GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17138 of James and Julie Edmonds, pursuant to 11 DCMR § 3103.2, for a variance from the lot area requirements under section 401.3, to allow a four story unit multi-family dwelling in the R-4 District at premises 1325 Fairmont Street, N.W. (Square 2860, Lot 819).

HEARING DATE: March 30, 2004
DECISION DATE: May 4, 2004

DECISION AND ORDER

This application was submitted by Mesfin Gebremichael, a real estate agent, on January 21, 2001, on behalf of James and Julie Edmonds, the owners of the property that is the subject of the application. In a memorandum dated August 14, 2003, the Zoning Review Branch of the Department of Consumer and Regulatory Affairs ("DCRA") advised the Applicants that they required a variance from the lot area provisions of section 401.3 of the Zoning Regulations to convert a two unit flat located at 1325 Fairmont Street, N.W. into a four unit apartment.

On March 30, 2004, the Board held a public hearing on the application. After the hearing, the Board left the record open to receive a statement from the Applicants setting forth how their application meets the variance test and to receive a response from the affected ANC to the Applicants' explanation. On May 4, 2004, the Board held a public decision meeting and denied the application by a vote of 4-0-1.

PRELIMINARY MATTERS:

Notice of Application Public Hearing Pursuant to 11 DCMR 3113.3, the Office of Zoning (OZ), by memoranda dated January 22, 2004, notified the Councilmember for Ward 1, Advisory Neighborhood Commission (ANC) 1B, Single Member District /ANC 1B-08, and the District of Columbia Office of Planning (OP) of the filing of the application. On January 29, 2004, OZ mailed notices of the public hearing to the ANC, the Applicants and all of the owners of property within 200 feet of the subject property, advising them of the date of hearing. The Applicants' affidavit of posting, filed in March 2004, indicates that on March 25, 2004, five days prior to the hearing, it posted a zoning poster at 1325 Fairmont Street, N.W., in plain view of the public. This was less than the 15 day notice that is required to be posted. On April 20, 2004, the Applicants again displayed a poster on the property. By the date of the decision meeting on May 4, 2004, the property had only been posted for 14 days. Consequently, the Board voted to waive the 15 day requirement.

Request for Party Status There were no requests for party status.

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Applicants' Case The Applicants' case was presented by Mesfin Gebremichael, the real estate agent who sold the property to the Applicants. The Applicants' case is based upon an assertion that their agent received erroneous information from a staff member at the Office of the Zoning Administrator at DCRA concerning the requirements for converting a flat into a four-unit dwelling. They maintain that they purchased the subject property, in reliance upon the oral information they received from DCRA and a statement in a listing service, which identified the property as being a four unit building. The Applicants claimed they will suffer an economic loss if they can not convert the building into a four unit apartment.

Government Reports In a report dated March 22, 2004, OP recommended that the Board deny the lot area variance because the Applicants failed to establish that the property is unique and did not demonstrate that there is a practical difficulty in complying with the Zoning Regulations. OP also stated that the intensified use would impair the intent of the zone plan and be detrimental to the public good.

ANC Report By letter dated March 6, 2004, ANC 1B indicated that at a regularly scheduled, properly noticed meeting on March 4, 2004, with a quorum of seven of its eleven members present, ANC 1B commissioners voted unanimously to support the application for variance relief. The ANC represented that the block in which the property is located is a mix of single family dwellings and apartment buildings, and that therefore, allowing four units, rather than three, would not greatly increase the density. The ANC also suggested that whatever increase in intensity of use and traffic would result from the conversion to a four-unit building would be counter-balanced by the rehabilitation of the property which is a vacant, nuisance property.

Parties and Persons in Opposition There were no parties in opposition to this application.

Hearing The public hearing on the application was held and completed on March 30, 2004. The Board left the record open so that the Applicants could provide a copy of the Metropolitan Regional Information System, Inc. listing for the subject property and a comprehensive, comparative, economic analysis demonstrating that there is a practical difficulty in complying with the zoning regulations. The Board also required the Applicant to post the property for 15 days and submit a new affidavit of posting showing that the property was posted for the requisite period of time.

FINDINGS OF FACT

1. The subject property is located in an R-4 Zone District, in Square 2860, lot 819, at the premises located at 1325 Fairmont Street, N.W.

2. The building, which was constructed as a row dwelling in 1910, is a three-story building with a basement. Currently, the building is a flat with the basement being one unit and the upper floors constituting the second unit.

3. The Applicants propose to convert the building into a four-unit apartment with each floor and the basement serving as a separate unit.

4. The subject property has a lot area of 2,853 square feet, which is 747 square feet less than the 3,600 square feet of land required for a four unit building.

5. The Applicants' building is located in the middle of the block with a 30 unit apartment building immediately adjacent to it on the east side and row dwellings on its west side.

6. When the Applicants purchased the subject property, the building was a vacant, nuisance property. There are several other vacant buildings on the same block as the subject property.

7. Prior to purchasing the subject property, the real estate agent for the Applicants informed the Applicants that the property could be converted into a four unit apartment based upon information he allegedly received during a telephone conversation with a zoning assistant in the Zoning Administrator's Office at DCRA. The zoning assistant purportedly said that the sole requirement for converting a flat into a four unit apartment house in an R-4 Zone District was that each unit must be 900 square feet.

8. The Applicants' real estate agent also caused the Applicants to believe that the building could be converted to four units based upon a statement in the Metropolitan Regional Information Systems, Inc. ("MRIS"), a real estate listing service, that described the building as containing four units.

9. The MIRS that the Applicants relied upon stated, in fine print, "[i]nformation is believed to be accurate, but should not be relied upon without verification."

10. The Applicants paid market price, $340,000, for the subject property, believing that they could convert the building into a four unit apartment. They claim they would not have purchased the subject property for that price had they known that they could not convert the building to a four unit apartment.

11. The Applicants represented that they would lose $29,274 if the property were converted to three units, but would make a profit of $215,716, if the building were converted to four units. Applicants did not submit documentation substantiating these projections despite the Board's invitation to do so.

12. The Applicants proffered that they would not be able to obtain financing for less than four units, but did not submit evidence in support of that assertion..

CONCLUSIONS OF LAW

The Applicants are seeking an area variance from the requirements of 11 DCMR § 401.3, which provides that the conversion of a flat into an apartment house requires a lot area of 900 square feet for each apartment unit. Because the Applicants are proposing to have four units in the apartment building, the minimum required lot area is 3,600 square feet. The Applicants' property is only 2,853 square feet, and requires a variance if the flat is to be converted into a four units apartment house.

The Board is authorized to grant a variance from the strict application of the zoning regulations in order to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property...." D.C. Official Code § 6-641.07(g) (3) (2001); 11 DCMR §3103.2. Relief can be granted only "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map." Id. An Applicant for an area variance must make the lesser showing of "practical difficulties," as opposed to the more difficult showing of "undue hardship," which applies in use variance cases. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). The Applicants in this case, must demonstrate the uniqueness of the property, that such uniqueness results in "practical difficulties" to the Applicant, and that the granting of the variance will not be detrimental to the public good or impair the intent and integrity of the zone plan and regulations.

There is nothing unique about the Applicants' property, and there is no exceptional situation or condition of the Applicants' property to warrant a variance from the lot area requirement. The property is rectangular shaped. The building is one in a row of similar buildings. There are several other vacant buildings on the block. Given no physical qualities of the property that render it unique, the Applicants tried to establish uniqueness by arguing that they received erroneous oral information from the Zoning Administrator's Office at DCRA, which led them to believe that they could convert the flat into a four unit apartment. Uniqueness may be established through zoning history where there is justifiable reliance on official actions by zoning officials. *De Azcarte v. Board of Zoning Adjustment,* 388 A.2d 1233 (D.C. 1978).

However, the Applicants' purchase of the subject property in reliance upon an oral conversation with someone in the Zoning Administrator's office was not justifiable reliance Nor was it reasonable for the Applicants to rely upon the MRSI, which is not an official District government zoning document and contains a disclaimer that cautions the user to verify the information. If the Applicants had reviewed the Zoning Regulations prior to purchasing the property, they would have been aware of the lot area requirement, and they would have known that the subject property did not comply with that requirement. [1]

Unlike the facts in *De Azcarte*, no building permit was issued or official approval given with respect to the subject property. The Applicants simply stated that they relied upon a single unsubstantiated conversation between their real estate agent and an unnamed DCRA employee. A self-serving representation of an oral conversation with an unidentified DCRA employee, without more, is insufficient to constitute a unique zoning history.

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[1] The Applicants also assert that the D.C. Surveyor had "conflicting" records concerning the subject property that "reflect two different widths and area of lot at different dates probably because of realignments to create a public alley and street widening." However, the relevance of the Applicants' argument of this point is unclear. Although the subject property was created by the subdivision of a larger lot and the Applicants can-not expand the lot area, the Applicants can use the subject property in a manner that is consistent with the Zoning Regulations.

The Applicants claim that they will suffer an economic loss totaling almost $30,000 if they are not permitted to convert the flat into a four unit apartment house. Economic harm may be considered in the practical difficulty test. *Gilmartin v. District of Columbia Board of Zoning Adjustment*, 579 A.2d 1164 (1990); and *Barbour v. District of Columbia*, 358 A.2d 326 (D.C. 1976). However, the Board has "no authority to grant a variance in order to assure ... a profit." *Taylor v. District of Columbia Board of Zoning Adjustment*, 308 A.2d 230, 236 (D.C. 1973), citing *Anderson's Law of Zoning 2* §14.23; 3 §14.48.

Although the Applicants maintain that rehabilitation of the property would not be financially feasible unless they are permitted to convert the building into four units, they have not provided information sufficient to sustain such a finding. The Applicants' economic analysis considers only the difference between the construction of three units and four units. The Applicants can renovate the property as a row dwelling or a flat, convert it into a three-unit building or sell the property without renovating it and recoup their money. They have presented scant evidence concerning the costs of restoring the build as a single family row dwelling or a flat which may prove to be profitable alternatives, if not immediately, in the future. Although no documents were submitted to support their estimates for the restoration of a single family dwelling, the Applicants' real estate agent did testify that a single family home comparable to the subject property had a market price of $340,000 and would require about $300,000 to renovate. According to the testimony of the Applicants' agent, such single-family property could be sold for approximately $500,000 to $640,000. The latter amount is sufficient to recoup their investment. There is also no evidence that lenders will not provide financing to a qualified borrower seeking to renovate the building with three or less units. Consequently, the Applicants have viable alternatives with respect to their disposition of the subject property. Since the Applicants can use the property in a manner that is consistent with the Zoning Regulations, they have failed to demonstrate that they will experience practical difficulties if denied a lot area variance.

The property is located in an R-4 District, which has as "its primary purpose the stabilization of remaining one-family dwellings" and which "shall not be an apartment house district as contemplated under the General Residence (R-5) Districts, since the conversion of existing structures shall be controlled by a minimum lot area per family requirement." 11 DCMR §§ 330.2 and 330.3. Consequently, an area variance should be granted in contravention of these zoning objectives only where the application clearly meets the requirements for the variance test. In the instant case, the Applicants cannot meet the uniqueness test and are unable to establish that they will encounter practical difficulties if they comply with the Zoning Regulations. Having found that the Applicants failed to satisfy two of the three tests for granting an area variance, the Board need not address the third prong of the area variance test.

The Board, as required, accorded "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. DC Official Code §§ 1-309.10(d) and 6-623.04 (2001). The Board concurs with OP's opinion that the Applicant failed to meet the test for the granting of a variance. ANC 1B voted to support the application because the property is currently a vacant, nuisance property, and in the ANC's view the proposed conversion was preferable to the current state of the property. Although the ANC's position may be significant in determining whether granting this application would be detrimental to the public

good, it is does not address the requirements that the property be unique, that Applicants would experience practical difficulties if the variance is not granted, and that the granting of the variance not impair the intent and integrity of the zoning plan. Accordingly, the Board may not grant variance relief based only on the ANC's argument regarding the public good.

Based upon the record before the Board and for the reasons stated above, the Board concludes that the Applicants have failed to satisfy the burden of proof with respect to its application for an area variance. Accordingly, it is therefore **ORDERED** that the application be **DENIED.**

VOTE: **4-0-1** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller, and John A. Mann, II to deny the request for a variance from the lot area requirements, the Zoning Commission member not present not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board Member approved the issuance of this order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: July 25, 2005

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL. rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
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As Director of the Office of Zoning, I hereby certify and attest that on JUL 2 5 2005 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:

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