GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17155, of Ray Hwang and Mathew Depue, pursuant to 11 DCMR 3103.2, for a variance from the requirements under section 330.5(c) of the Zoning Regulations to allow for the conversion of a single family residence to a 3 unit apartment house, at premises located at 3518 10th Street, NW (Square 2832, Lot 807) in the R-4 zone.

HEARING DATE: May 4, 2004
DECISION DATE: May 18, 2004

Preliminary Matters

Charles Ray, Esq., filed this application for variance relief with the Board of Zoning Adjustment (the Board) on February 24, 2004. Mr. Ray is the authorized agent for the owners of the subject premises, Ray Avery Hwang and Mathew Depue (the applicant or the owner). For the reasons stated below, the Board finds that the applicant failed to meet the elements for a variance. The application is therefore denied.

Notice of Public Hearing The Board scheduled a public hearing for May 4, 2004. Pursuant to 11 DCMR 3113.3, notice of the hearing was sent to the applicant, owners of all property within 200 feet of the subject premises, the Advisory Neighborhood Commission (ANC) 1A, and the District of Columbia Office of Planning (OP). The applicant posted placards at the property regarding the application and public hearing and submitted an affidavit to the Board to this effect
(Exhibit 23).

The Application The applicant initially sought a variance to convert a single family residence to four condominium apartment units under sections 330.5(c) and 401.3 of the Zoning Regulations.[1] (See, Exhibit 1, Application). At the public hearing, the applicant amended its application to convert the property to three apartment units instead of four.

OP Report OP reviewed the variance application and prepared a report recommending denial of the variance request (Exhibit 22). OP concluded that the property did not meet the test for a variance because (1) there is nothing unique or exceptional about the property; (2) there are no practical difficulties in using the property without variance

[1] Section 330.5(c) permits a conversion to an apartment building in the R-4 zone where the property was constructed prior to May 12, 1958, subject to certain other provisions, including section 401.3 of the Regulations. Section 401.3 requires that, when converting to an apartment house in the R-4 zone, each apartment must be a minimum size of 900 square feet. The proposed apartments do not meet the 900 square feet minimum.

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relief; and (3) the intensified use is inconsistent with the zone plan. Although the written report was based upon the applicant's initial proposal for four apartments, OP's position remained the same after the application was amended to provide for only three apartments.

ANC Report In its report dated May 12, 2004, ANC 1A indicated that it had voted to support the project, citing the fact that the project would include one unit which is "affordable".

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

Persons in Support of the Application Two neighbors testified in support of the application, Beverly Wheeler and Charles Henkers. Ms. Wheeler and Mr. Henkers both testified that the project would benefit the neighborhood.

Closing of the Record After the public hearing on May 4, 2004, the Board left the record open for the submission of the ANC report, revised drawings, and a parking statement. The matter was set for a decision meeting on May 18, 2004.

Decision Meeting The Board voted to deny the variance application at the May 18, 2004 decision meeting.

FINDINGS OF FACT

The Property

1. The subject property is located at 3518 10th Street, NW, and is improved with a three-story single family detached dwelling that was built in the early 1900s.

2. The subject property is zoned R-4 and designated as "moderate density residential" on the Generalized Land Use Map. Except for one multifamily housing property located north of the subject property in the middle of the block, row dwellings and semi-detached dwellings are the predominant uses at the 3500 block of 10th Street, where the property is located.

3. Prior to acquisition by the applicants, the property was vacant and had been abandoned and vandalized for a period of time ranging anywhere from ten to twenty-five years. The property had been an eyesore and blight on the neighborhood. At various times over the years, it was occupied by trespassers and used for drug activity and/or prostitution. Because the property had not been cared for over an inordinately long period of time, the physical structure had deteriorated.

The Application

4. The applicant proposes to convert the existing three story dwelling into an apartment building with a unit on each floor. One of the three units would be "affordable" to a household with an income of less than $30,000 per year.

5. The R-4 district permits the conversion of existing structures built before 1958 to apartment buildings as long as there is 900 square feet of lot area per unit (See sections 330.5 and 401.3 of the Zoning Regulations). As the total area of the property is only 2,597 square feet, the per unit area would be less than the 900 square feet minimum that is required. As such, the applicant seeks an area variance from this requirement.

6. The applicant would not require variance relief if he were to renovate the property by converting the dwelling into two duplex apartment units.

The Project Costs

7. Due to the severely deteriorated condition of the property, it will be costly to renovate the dwelling.

8. The Board credits testimony from Mr. Hwang, a mechanical engineer and expert in construction costs, that the costs to renovate the structure would be greater than the costs to demolish the structure and re-build.

9. The Board also credits Mr. Hwang's testimony that the project would be economically viable if the property were renovated as two luxury duplex apartments instead of three apartments with one affordable unit.

Impact of the Project

10. The Board credits testimony from neighbors Beverly Wheeler and Charles Henkers ("the neighbors") that the proposed three unit project would eliminate a blight on the neighborhood.

11. The Board also credits OP's assessment that the proposed three unit project would have a detrimental impact on the zone plan in that it would result in an intensification of use beyond that permitted by the zoning regulations.

CONCLUSIONS OF LAW

The applicant here seeks variance relief from the requirement under § 401.3 that when converting a single family dwelling to an apartment house, each unit must be a minimum of 900 square feet.

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.*

The applicant initially applied for a use variance from section 330.5 (c) as well as an area variance from section 401.3. An applicant for a use variance must make the greater showing of "undue hardship," as opposed to the lesser showing of "practical difficulties," which applies in area variance cases. *Palmer v. Board of Zoning Adjustment,* 287 A.2d 535, 541 (D.C. 1972).
A use variance was sought because granting the area variance would have allowed an increase in the intensity of use not allowed in the zone in which the property is located

In analyzing the relief required as a use variance OP noted in its report that Section 330. 3 of the Zoning Regulations prevent the zone from becoming an apartment house district by controlling the lot area. Specifically, Section 330. 3 states, "*the R-4 District 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.*"

While acknowledging the rationale of OP's argument, the Board notes that in *Wolf v. D.C. Board of Zoning Adjustment,* 397 A.2d 936, 941 (D.C. 1979), which involved the very same variance requested here, the District of Columbia Court of Appeals upheld the Board's use of the practical difficulty standard.. The Court found that the conversion from two units to three did not constitute an "essential change" in the use of the property and that the fundamental change sought was related to the minimum lot restrictions. *Id.* at 941-942. Since the same may be said in this case, the Board will analyze the request as an area variance.

Under the three-prong test for area variances set out in 11 DCMR § 3103.2, an applicant must demonstrate that (1) the property is unique because of its size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter practical difficulty if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). In order to prove "practical difficulties," an applicant must

demonstrate first, that compliance with the area restriction would be unnecessarily burdensome; and, second, that the practical difficulties are unique to the particular property. *Id.* At 1170.

The applicant has failed to establish that it has met the three-prong test for a variance

Although the applicant has met the first prong of the variance test, the Board concludes that it has not met either the second or third prong of the test. As a result, the variance must be denied.

First prong – Uniqueness

The Applicant argues, and the ANC and the neighbors agree, that this property is unique because it is the only property on the block that has been abandoned for 10 years or more, is in gross disrepair and is used as a safe harbor for criminals. Although OP is correct that there is nothing unusual about a property being in a state of disrepair, the Board's uniqueness analysis may focus on an area comprising less than the entire territory of the District of Columbia. It is not required that a property be the only one of its kind. "[T]he rationale behind the uniqueness test is that difficulties that are common to or affect an entire neighborhood, or a substantial portion thereof, are properly addressed as an amendment of the regulations themselves from the Zoning Commission." *Gilmartin v. District of Columbia Board of Zoning Adjustment*, 579 A.2d 1164, 116 (DC 1990).

This case is almost identical to the situation that confronted the Board in *Application of Richard Nappi,* BZA No. 16983, 50 DCR 9131 (2003). There, as here, the applicant sought a variance from the minimum lot size requirements in order to create an apartment house in an R-4 District. The Board agreed with the applicant that the dilapidated nature of a structure could constitute an exceptional condition, citing *Capitol Hill Restoration Society v. Board of Zoning Adjustment,* 534 A.2d 939, 942 (D.C. 1987) ("condition inherent in the structures built upon the land, rather than in the land itself, may also serve to satisfy an applicant's burden of demonstrating uniqueness"). Nevertheless, the Board found in that case that the proximity of a nearby structure in similar condition refuted the contention of uniqueness. In addition, the Board concluded that the costs of rehabilitating the structure are "market forces [that] affect the entire neighborhood, not only the Applicant's lots, and therefore do not make those lots unique." *Id.* at 9136

Unlike, the row dwellings in Nappi, in this case there is no nearby structure in a similar condition. Indeed, it is undisputed that this is the only structure in such a state of disrepair for such a long period of time on this block. For this reason, the Board finds the poor condition of this structure to be an "exceptional situation or condition inherent in the property".

Second prong – Practical Difficulty

In essence, Applicant claims a practical difficulty in not being able to recover a satisfactory return on his investment in the property if he renovates the property in accordance with the Zoning Regulations. The regulations permit a single family dwelling on this sized lot to be converted to two units, but not to the three units that Applicant is seeking. However, Applicant concedes that the building could be converted into two luxury duplex units instead of three apartments without the need for variance relief and that a two unit project would be economically viable.

As the Board decision in *Nappi* makes plain, economic harm may be considered in the practical difficulty test. *Accord, Gilmartin v. District of Columbia Bd. of Zoning Adjustment; 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 A2d 230, 236 (D.C. 1973), *citing, Anderson's Law of Zoning* § 14.23; 3 § 14.48.

The facts in this case are even less favorable to a finding of practical difficulty than those in *Nappi,* in which the only economically feasible matter of right alternative was to raze the structure.

Here, the Applicant concedes that he can renovate the existing structure for the reasonable use contemplated by the regulations (2 units) and that such conversion would be economically viable. *Compare Wolf v. D.C. Board of Zoning Adjustment, supra, at 943,* in which the Court noted that the Board found the structure of the property – "specifically its large size, unique layout, and exceptional quality of workmanship-worked against its functioning as a two-unit apartment house." Accordingly, Applicant has not demonstrated the practical difficulty required for variance relief.

Third prong – Substantial Detriment to the Public Good or Zone Plan

An applicant for a variance must satisfy two separate sub-tests under the third prong. First, it must be shown that the requested variance will not result in substantial detriment to the public good; and second, that the requested variance will not impair the intent and purpose of the zone plan as embodied in the zoning regulations.

The Board agrees with the ANC and the neighbors that the proposed project would eliminate blight in the neighborhood that has served as a harborage for rats and criminals for over a decade. In addition, Applicant's allocation of one of the units for affordable housing would serve the public interest. Thus, granting the request would not result in a substantial detriment to the public good, but would benefit it.

With respect to the second test, however, the Board concurs with OP's conclusion that granting the variance would impair the intent and purpose of the zone plan as embodied

in the zoning regulations and map because it would result in an intensified use in the R-4 zone beyond that permitted by the zoning regulations where a viable matter of right alternative is available.

The Board is required under section 3 of the Comprehensive Advisory Neighborhood Commissions Reform Act of 2000, effective June 27, 2000 (D.C. Law 13-135, D.C. Official Code § 1-309(d) (2001) to give "great weight" to the issues and concerns raised in the written recommendations of the affected ANC. While the Board understands that the ANC wishes to see this nuisance property renovated, that factor alone does not permit the Board to grant a variance. In any event, the Board notes that this goal can still be achieved through the matter of right renovation of the structure.

The Board is also required under section 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990, (D.C. Law 8-163; D.C. Official Code § 6-623.04 to give "great weight" to OP's recommendations. For the reasons stated forth above, the Board disagrees with OP with respect to the question of the exceptional nature of the property, but concurs with OP's conclusion that the applicant has failed to show a practical difficulty in converting the structure in accordance with the zoning regulations and that permitting the renovation of the structure in the manner proposed would result in substantial detriment to the zone plan.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the application for variance is denied.

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II, and Kevin L. Hildebrandt, to deny the variance application)

Vote taken on May 18, 2004

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

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

FINAL DATE OF ORDER: FEB 2 8 2005

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 17155

As Director of the Office of Zoning, I hereby certify and attest that on FEB 28 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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