

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 19187 of 1212-1216 4th Street, LLC, pursuant to 11 DCMR § 3103.2¹, for variance relief from the lot area requirements under § 401.11, the lot occupancy requirements under § 403.2, and additions to nonconforming structures (§ 2001.3), and, pursuant to 11 DCMR § 3104.1, for special exception relief for a change to a nonconforming use under § 2003 to allow the conversion of an office use to a neighborhood retail or service establishment in the R-4 Zone District at premises 1212-1218 4th Street, N.W. (Square 513, Lots 155 and 156).

HEARING DATE: March 15, 2016
DECISION DATE: April 12, 2016²

DECISION AND ORDER

This self-certified application was submitted on November 9, 2015, by 1212-1216 4th Street, LLC (the “Applicant”), the owner of the property that is the subject of the application. As amended, the application requested special exception relief pursuant to § 3104.1 to change from one nonconforming use to another (§ 2003) to allow conversion of an office use to a neighborhood retail or service establishment (the “Neighborhood Establishment”), and variance relief under § 3103.2 for the requirements regarding lot area (§ 401.11), lot occupancy (§ 403.2), and additions to nonconforming structures (§ 2001.3), to allow the expansion of an existing apartment building (collectively, the “Project”)³ in the R-4 Zone District at premises 1212-1218 4th Street, N.W.

¹ All references to Title 11 DCMR within the body of this order are to provisions that were in effect on the date the case was decided by the Board of Zoning Adjustment (the 1958 Zoning Regulations), but which were repealed as of September 6, 2016 and replaced by new text (the 2016 Zoning Regulations). The repeal and adoption of the replacement text has no effect on the validity of the Board’s decision in this case or of this order.

² The application was postponed from the original hearing date of March 8, 2015, and the hearing was subsequently held on March 15, 2016. The application was originally set for decision on April 5, 2016, but was postponed until April 12, 2016.

³ To simplify the degree and areas of relief, the Applicant asked the Board to review the application under more restrictive standards applicable to expansions of existing apartment buildings, even though there are multiple uses at the Property and the Project is more complex than a straightforward expansion. Specifically, the premises at 1212-1214 4th Street, N.W. is an existing apartment house; 1216 4th Street is a mixed-use residential building with an office; and 1218 4th Street is a non-residential property with a history of use as a fuel and oil pump and liquor store. (Exhibits 8B and 8C, Original Building Permits for 1212-1216 4th Street, N.W.; Exhibit 26 at Ex. A, Certificates of Occupancy for 1216-1218 4th Street, N.W.).

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(Square 513, Lots 155 and 156) (the “Property”). At its public meeting on April 12, 2016, the Board of Zoning Adjustment (“Board” or “BZA”) voted to grant the application with respect to special exception relief and to deny the application with respect to variance relief.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated November 25, 2015, the Office of Zoning provided notice of the application to the Office of Planning (“OP”); the District Department of Transportation (“DDOT”); the Councilmember for Ward 6; Advisory Neighborhood Commission (“ANC”) 6E, the ANC for the area in which the Property is located; and the representative for ANC Single Member District 6E04. Pursuant to 11 DCMR § 3113.13, the Office of Zoning mailed letters on November 24, 2015, providing notice of the hearing to the Applicant, ANC 6E, and the owners of all property within 200 feet of the Property. Notice of the hearing was published in the *D.C. Register* on November 27, 2015 (62 DCR 15308).

Party Status. The Applicant and ANC 6E were automatically parties to this proceeding. On February 8, 2016, Sergei Mikhailov, a nearby resident, filed a request for party status. (Exhibit 23.) However, on March 14, 2016, prior to the hearing on the application, Mr. Mikhailov filed a rescission of his party status request, stating that the Applicant had resolved his concerns and that he now supported the application. (Exhibit 31.) Included in Mr. Mikhailov’s rescission letter were conditions related to the parking plan for the Project, which the Applicant agreed to proffer to the Board pursuant to the resolution it reached with Mr. Mikhailov. On March 14, 2016, the Applicant filed an addendum to its Prehearing Statement proffering several conditions. (Exhibit 34.) The conditions were as follows:

1. The Applicant shall provide a minimum of 27 parking spaces as part of the Project;
2. The Applicant shall limit the number of parking spaces available to the residents of the Project to one parking space per dwelling unit or not to exceed 22 parking spaces being utilized by those residents; and
3. The Applicant shall make the parking spaces available to all property owners within 200 feet (the “Nearby Property Owners”) as follows: Six months after the issuance of a Certificate of Occupancy for the Project or six months after 75% of the dwelling units for the Project have been sold or leased, whichever date is later, notice shall be given to the Nearby Property Owners stating that they shall have 30 days from the date of the notice to send a letter of intent to purchase or lease the remaining parking spaces available after parking spaces have been offered to the residents of the Project. The parking spaces shall be available to the Nearby Property Owners for purchase or lease on a first-come, first-serve basis, at a 15% discount of the current market rate sale or rent price for covered parking spaces in Mt. Vernon Square.

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In addition to these conditions, Mr. Mikhailov's rescission letter also referenced conditions that the Applicant agreed to proffer when it sought and received the support of ANC 6E.

No other persons requested party status.

Applicant's Case. The Applicant provided evidence and testimony describing the Project – to demolish the two existing garages on the Property and to preserve and add to the existing historic structure on the Property (the "Historic Structure"). The resulting structure will be a mixed-use building with 22 residential units and 760 square feet of space for the proposed Neighborhood Establishment. The Project will also include a below-grade level for parking and a total of 27 parking spaces.

OP Report. By memorandum dated March 8, 2016, OP recommended denial of the application. (Exhibit 29.) OP stated that granting the requested variance relief would permit expansion of an apartment building beyond the density and lot occupancy anticipated in the R-4 Zoning District. OP further stated that the Property does not exhibit any exceptional situation that would result in a practical difficulty in renovating the Property within the zoning restrictions. OP stated that the Project could result in undue impacts to other properties in the area and would present substantial and unjustified harm to the Zoning Regulations, specifically to the intent of the R-4 Zone District to be a predominantly rowhouse zone and not an apartment zone.⁴

With respect to the requested special exception relief under § 2003, OP stated that the commercial uses on the Property had lapsed for a three-year period, which, under § 2005.1, constitutes prima facie evidence of no intention to resume active operation as a nonconforming use. Once a nonconforming use has been abandoned, subsequent use of a property must conform to the regulations. OP stated that the Applicant had not submitted evidence indicating an intent to continue the nonconforming commercial uses and that a building permit had been issued to a previous owner for conversion from office space to a two-family flat. Accordingly, OP stated that it could not proceed with an analysis of the requested special exception because the use seems to have been converted to a conforming residential use.

DDOT Report. By memorandum dated March 8, 2016, DDOT indicated that it had no objection to the requested relief. (Exhibit 30.)

ANC Report. By letter dated March 6, 2016, ANC 6E indicated that, at a duly noticed meeting on March 1, 2016, the ANC voted, with a quorum present, 5-1-0 to support the application. The ANC further indicated that it voted 4-2-0 to support a Letter of Revisions and Proffers that the Applicant presented to the ANC, along with two additional conditions requested by the ANC. (Exhibit 28.) On March 1, 2016, the Applicant submitted an addendum to its Prehearing Statement confirming and attaching the Letter of Revisions and Proffers. (Exhibit 27.)

⁴ In its report, OP also stated that relief for the requirements regarding nonconforming structures (§ 2001.3) was also necessary. The Applicant subsequently amended its application to request a variance from this requirement as well.

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At the March 15, 2016 public hearing on the application, the Board heard testimony from Rachelle Nigro, the representative for Single Member District (“SMD”) 6E04, the SMD in which the Property is located. Commissioner Nigro reaffirmed the ANC’s support for the Project and reiterated that the community’s primary concerns were related to parking. (BZA Public Hearing Transcript (“Tr.”) of March 15, 2016 at 158-168.)⁵

Persons in support or opposition. No person appeared to testify in support of or opposition to the Application. Shawn Montgomery, a member of the Church of the Living God (the “Church”), located at 1206 4th Street N.W., provided testimony in neither support nor opposition. Mr. Montgomery testified that the Church’s primary concerns were related to parking, as well as the need to maintain the Property and ensure that there would be no structural effects on the Church as a result of the excavation needed to construct the Project’s underground parking level. (Tr. of March 15, 2016 at 168-170.)

Post-hearing submissions. On March 29, 2016, the Applicant submitted an informational draft order in response to the Board’s request at the public hearing. (Tr. of March 15, 2016 at 176-178.) The night before the scheduled decision date of April 5, 2016, Cheryl Stein, a nearby resident, and Commissioner Nigro requested to reopen the record to clarify the conditions proffered by the Applicant. To address the concerns raised by both Cheryl Stein and Commissioner Nigro, the Applicant submitted a clarification of proffers and conditions on April 7, 2016. (Exhibit 40.)

Motion for reconsideration and rehearing. On May 4, 2016, the Applicant submitted a motion for reconsideration and rehearing following the Board’s oral decision of April 12, 2016. Pursuant to § 3126.2, the motion was returned to the Applicant. (Exhibit 41.)

FINDINGS OF FACT

The Subject Property and Surrounding Area

1. The subject property is located at the intersection of 4th Street, N.W. and Ridge Street, N.W., which includes street addresses for 1212-1218 4th Street, N.W.
2. The subject property is comprised of Lots 155 and 156 in Square 513. Together, the lots have approximately 9,954 square feet of land area.
3. The subject property is within the R-4 Zone District, which is designed to include those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of the dwellings into dwellings for two or more families. (11 DCMR § 330.1.) The “primary purpose” of the R-4 Zone is the “stabilization of remaining one-family dwellings.” (11 DCMR § 330.2.)

⁵ Note that, while the ANC’s report requested a minimum of 29 parking spaces, Commissioner Nigro testified at the March 15, 2016 public hearing that she had reviewed the latest submission from the Applicant (which indicated that 27 spaces would be provided) and that this submission was acceptable. (Tr. of March 15, 2016 at 165).

4. The subject property is in the Mount Vernon Square Historic District.
5. The Property is currently improved with a two-story row structure that extends across 1212-12146 4th Street and is a contributing structure in the Mount Vernon Square Historic District. The Property is also currently improved with a garage to the rear of the Historic Structure, as well as a larger commercial garage at 1218 4th Street (the “Commercial Garage”).
6. The Historic Structure consists of a six-unit apartment building located at 1212-1214 4th Street (the “Apartment Building”) and a mixed-used building with an office on the first floor and two residential units above, located at 1216 4th Street (the “Mixed-Use Building”).
7. Both Lot 155 and Lot 156 have a long history of non-residential uses postdating 1958. In 1961, a Certificate of Occupancy was granted for the Commercial Garage for use as an oil and gas pump and storage facility for trucks and cars. In 1964, another Certificate of Occupancy was issued for the Commercial Garage to be used by Lucky Liquors, Inc. as a retail beverage store with food and tobacco products. In 1974, the Mixed-Use Building was granted a Certificate of Occupancy to operate a taxicab office. In 1978, another Certificate of Occupancy was issued for the Mixed-Use Building to operate a general cleaning office. These are the most recent Certificates of Occupancy available on public record for the Property.
8. Square 513 is in an R-4 Zone District that abuts several high-density zones. The square is bordered on the north and east by R-5-B Zone Districts, and is bordered to the south by an R-5-B/Downtown Development (“DD”) Overlay District. The Walter E. Washington Convention Center (the “Convention Center”) is approximately two blocks east of the square, and the highly-trafficked New York Avenue runs approximately one block south and east of the square.
9. There are several multi-family residential buildings in Square 513, including an apartment building on the adjacent property to the south at 1210 4th Street N.W. Across Ridge Street from the Property is a set of six flats at 1220-1230 4th Street N.W., which have a relatively large massing.

The Project and the Relief Requested

10. The Applicant proposes to combine Lot 155 and Lot 156, raze the existing garages on the Property, and renovate and construct an addition to the existing Historic Structure.
11. The result will be a three-story mixed-use building with 22 residential units and 760 square feet of space for a neighborhood servicing retail or service establishment on the ground

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floor. The Project will also include a below-grade level for parking and a total of 27 parking spaces.

12. The Applicant proposes to convert the existing office use in the Mixed-Use Building into the proposed Neighborhood Establishment. An office is a nonconforming use in the R-4 District, as are retail and service establishments.
13. Under § 2003, the Board may permit, by special exception, a change from one nonconforming use to any nonconforming use permitted as a matter of right in the most restrictive zone district in which the existing nonconforming use is permitted as a matter of right. The most restrictive district in which an office use is permitted as a matter of right is the C-1 Zone District. The Applicant proposes to convert the existing office to a retail or service establishment permitted as a matter of right in the C-1 Zone District, such as a coffee shop, bike repair shop, bakery, or dry cleaner.
14. The Property has not been used for any nonconforming use since before the Applicant purchased the Property in 2012.
15. In 2008, a previous owner of the Property was issued a building permit, Permit No. B115244 for 1216 4th Street, N.W. (Exhibit 29 at pg. 8.)
16. Dr. Sahr Bockai, the Applicant's authorized agent, testified at the March 15, 2016 hearing that, to his knowledge, there has never been an intent to abandon the commercial uses on the Property. (Tr. of March 15, 2016 at 121.)
17. Under § 401.11, an existing apartment building may not be expanded to increase the number of dwelling units unless there are 900 square feet of land area for each dwelling unit. The Project will have 22 units with a land area of 9,954 square feet, or approximately 453 square feet per dwelling unit. Accordingly, the Applicant requests variance relief from the minimum lot area requirements.
18. Under § 403.2, an expansion of an existing apartment building is limited to 40% lot occupancy. The Applicant requests variance relief to construct a building with a lot occupancy of 75%.
19. The Property currently has a lot occupancy of 41%. Accordingly, the Applicant requests a variance from § 2001.3 to permit an addition to a nonconforming structure.
20. After working with members and representatives of the surrounding community, the Applicant made the following changes to the Project:
 - A. Reduced the massing and removed an originally proposed penthouse;

- B. Revised the façade along Ridge Street, N.E. to resemble rowhomes;
 - C. Included neighborhood servicing retail space as part of the Project; and
 - D. Reduced the unit count to 22 units.
21. After working with members and representatives of the surrounding community, the Applicant agreed to the following conditions:
- A. Parking Spaces.
 - i. Provide a minimum of 27 parking spaces as part of the Project; and
 - ii. Limit the number of parking spaces available to the residents of the proposed Project to one (1) parking space per dwelling unit, or not to allow residents of the proposed Project to utilize more than twenty-two (22) parking spaces;
 - B. Parking for Nearby Property Owners. Make parking spaces available to the owners of all property within two hundred feet (200 ft.) (the “Nearby Property Owners”), as follows:
 - i. Six (6) months after the issuance of a Certificate of Occupancy for the project or six (6) months after seventy-five percent (75%) of the dwelling units for the Project have been sold or leased, whichever date is later, notice shall be given to the Nearby Property Owners stating that they shall have thirty (30) days from the date of the notice to send a letter of intent to purchase or lease the remaining parking spaces available after parking spaces have been offered to the residents of the Project; and
 - ii. On a first-come, first served-basis, offer excess parking spaces to Nearby Property Owners at a purchase price or rental rate at fifteen percent (15%) below the market rate for covered parking spaces in Mt. Vernon Square.
 - C. Residential Parking Permit Restrictions. Impose Residential Parking Permit (“RPP”) restrictions by including restrictions in the condominium documents recorded against the Property, as follows:
 - i. The Applicant/Condo Board shall include in its condominium documentation a provision that prohibits residents/owners from obtaining an RPP for the Property from the D.C. Department of Motor Vehicles (“DMV”), under penalty of fine(s) against the condominium unit owner;

- ii. The Applicant/Condo Board shall obtain written authorizations from each owner, either through a deed provision or another written document that allows the DMV to release the Applicant/Condo Board any and all records of that resident/owner requesting or receiving an RPP for the Property;
- iii. The Applicant/Condo Board shall monitor resident/owner compliance with the RPP lease restrictions by requesting from the DMV, every six (6) months, any and all records of residents/owners requesting or receiving RPPs for the Property, and shall provide annually the Condominium Board the results of its inquiries; and
- iv. The Applicant/Condo Board shall record a covenant against the Property among the Land Records of the District of Columbia prohibiting any owner of the Property from obtaining an RPP for the building approved as party of this application.

CONCLUSIONS OF LAW AND OPINION

The Applicant requests special exception and variance relief to construct the Project. The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2), to grant special exceptions, as provided in the Zoning Regulations, where it will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to adversely affect the use of the neighboring property, subject to specific conditions. (11 DCMR § 3104.1.)

The Board is also authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(3), to grant variance relief where, “by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property,” the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that relief can be granted 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. (11 DCMR § 3103.2.)

Special Exception Relief

The Applicant requests a special exception under § 2003 to convert the existing office use in the Mixed-Use Building into the proposed Neighborhood Establishment. Based on the findings of fact, the Board concludes that the Applicant has met its burden of proof for the requested relief.

An office is a nonconforming use in the R-4 District, as are retail and service establishments. Under § 2003, the Board may permit a change from one nonconforming use to any nonconforming use that is permitted as a matter of right in the most restrictive zone district in which the existing

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nonconforming use is permitted as a matter of right. The Neighborhood Establishment is likened to a retail or service establishment that is permitted as a matter of right in the C-1 Zone District, such as a coffee shop, bike repair shop, bakery, or dry cleaner.

The Board concurs with the Applicant that the Neighborhood Establishment will not adversely affect the present character or future development of the surrounding area, nor will it create any deleterious external effects, as required by §§ 2003.2 and 2003.3. To the contrary, the Neighborhood Establishment will provide much-needed retail or services in a neighborhood facility, as permitted under § 2003.5. Through extensive community outreach, the Applicant learned that such services were specifically requested and that the Project will benefit the surrounding community.⁶

The existing nonconforming office use has never been changed to a conforming or more restrictive use, as required by § 2003.4. Although OP's report indicated that a previous owner had been issued a building permit to convert the office in the Mixed-Use Building to a two-family flat, the documentation that OP attached to its report provided conflicting and ambiguous information as to whether the permit authorized the conversion of the office space or only the second story dwelling. (Exhibit 29). In any event, there is no evidence that work was ever begun under this permit.

Still, the Property has not been used for a nonconforming use since the Applicant purchased the Property in 2012. Section 2005.1 prohibits resumption of a nonconforming use once it has been abandoned, and states, in relevant part:

[d]iscontinuance for any reason of a nonconforming use of a structure or of land . . . for any period of more than three (3) years, shall be construed as prima facie evidence of no intention to resume active operation as a nonconforming use. Any subsequent use shall conform to the regulations of the district in which the use is located.

“The test [for abandonment] in the District of Columbia continues to be (1) the intent to abandon, and (2) some overt act or failure to act which carries the implication of abandonment.” *Application No. 17902 of Joseph Park* (2009) (quoting *George Wash. Univ. v. District of Columbia Bd. of Zoning Adjustment*, 429 A.2d 1342, 1345 (D.C. 1981)). As the Board explained in *Park*, § 2005.1 provides that discontinuance for three years or more creates a presumption of abandonment but this presumption may be rebutted “if the owner of the nonconforming use can make the appropriate showing that he did not intend” to abandon the use. *Id.*

Here, the Board credits the testimony of Dr. Bockai, the Applicant's authorized agent that, to his knowledge, there has never been an intent to abandon the commercial uses on the Property. *Supra* at 6. Accordingly, the Applicant is not prohibited from converting the office use to the proposed

⁶ See Tr. of March 15, 2016 at 140 (Applicant alluding to ANC's request for “local coffee shop or some sort of neighborhood servicing retail establishment closer by their homes[.]”).

Neighborhood Establishment under § 2003. Further, the Board finds that no modifications to the proposal are necessary under § 2003.7. Thus, the Applicant satisfies the requirements for special exception relief under § 2003.

Variance Relief

The Applicant seeks variance relief from the regulations regarding lot area under § 401.11, lot occupancy under § 403.2, and additions to nonconforming structures under § 2001.3. The Board voted to deny the Applicant each of the requested variances at its public meeting on April 12, 2016, for the reasons stated below.

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 zone plan. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). Based on the findings of fact, the Board concludes that the Applicant has not met its burden of proof for the requested area variances.

Exceptional Situation or Condition

The Board does not find that, based on a confluence of factors, an exceptional situation or condition is inherent in the Property. The Applicant claims that the Property is exceptionally large, and that the significant density surrounding the property is a factor creating an exceptional situation. The Board notes that the Property is located in a unique R-4 Zone District that abuts higher density R-5-B Zone Districts on three sides, and is near the Convention Center, Downtown, and New York Avenue. However, the Board does not concur with the Applicant that the Property's location creates an exceptional condition.

The Board may consider zoning history in determining whether variance relief is warranted. *See, e.g., DeAzcarate v. District of Columbia Bd. of Zoning Adjustment*, 388 A.2d 1233 (D.C. 1978) (extraordinary conditions may justify a finding of uniqueness based on events that are extraneous to the land, including the zoning history of a property). In this case, the Applicant supports its request for variance relief by alluding to the Property's prior designations for residential uses and various commercial uses that date back to at least 1961. The Property is currently improved with structures that were most recently used as an apartment house, a mixed-use building with a ground-floor office and residential units above, and a garage devoted to various commercial uses. The Applicant claims that such a variety of uses and structures is unusual and results in the Project being a unique, hybrid development that is partly a conversion of a non-residential structure and also partly an expansion of an existing apartment house.

Additionally, the Applicant contends that the interior layout of the existing Historic Structure on the Property is highly inefficient due to multiple interior renovations over the years. The Applicant points to electrical damage, water damage, and animal infestation as reasons for the “severely dilapidated condition” of the Property. (Exhibit 37.) The Board notes that the Historic Structure is a contributing structure in the Mount Vernon Square Historic District, and that the Applicant is committed to its preservation and restoration. Relatedly, the Board notes that the Property has been used as an oil and gas pump, which might require the Applicant to conduct environmental studies and subsequent remediation. However, the Board cannot grant variance relief given the uncertainty surrounding the true condition of the Historic Structure. As such, the Board is not persuaded that the combined result of the Property’s historical factors is an exceptional circumstance affecting the Property.

The Property has no encumbrances, such as grade changes, or any other exceptional situations that would create a practical difficulty for the Applicant. The Board concurs with OP’s analysis in that the Applicant could renovate the proposed combined structure within the requirements prescribed for the R-4 District, including both density (which, in this zone, is measured in number of units) and lot occupancy. Based on its factual findings and its analysis of the Applicant’s confluence of factors, the Board does not find that an exceptional circumstance exists at the Property.

Practical Difficulties

Having found the absence of exceptional circumstance, the issue of practical difficulties becomes moot. Nevertheless, the Board analyzed the issue and found that even if an exceptional circumstance were present, there was no practical difficulty in complying with matter of right standards.

In order to prove “practical difficulties,” an applicant must first demonstrate that compliance with the area restriction would be unnecessarily burdensome; and, second, that the practical difficulties are unique to the particular property. *Gilmartin*, 579 A.2d 1164, 1170; *see also Russell v. District of Columbia Bd. of Zoning Adjustment*, 402 A.2d 1231, 1235 (D.C. 1979) ([The] applicant for an area variance must demonstrate that the ‘practical difficulties’ of compliance are caused by the uniqueness of the property, not merely that his plight is unique.”). The Board concludes that the Applicant’s financial grievances do not create a practical difficulty that warrants relief from strict application of the Zoning Regulations.

The Applicant’s core argument is that the Project is not financially feasible if the Project involves fewer than 22 residential units. According to the Applicant, the Project, as proposed, is expected to provide a modest return-on-investment (“ROI”) of 5.03%. For sake of comparison, the Applicant claims that a Project with only 15 residential units would result in an ROI of 3.08%, and a project with only the 11 units permitted as a matter of right would provide an ROI of 0.68%. The Board recognizes the Applicant’s financial concerns, but finds it inappropriate to grant variance relief to safeguard the Applicant from the financial volatility of its investment. (Tr. of April 12, 2016 at 61-63.)

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The Applicant argues that the Board has found financial hardship might constitute a practical difficulty in variance cases. *See Application No. 17446 of Pauline S. Ney (2006)*; (finding practical difficulty based on economic burden); *Application No. 16573 of Martin E. Hardy (2000)* (“The Board may consider the economic hardship in evaluating the applicant’s practical difficulties . . .”). The D.C. Court of Appeals has also cited financial hardship as a consideration for variance relief. *See Tyler v. District of Columbia Bd. of Zoning Adjustment*, 606 A.2d 1362, 1367 (D.C. 1992) (“[E]conomic use of property may properly be considered as a factor in deciding the question of what constitutes an unnecessary burden or practical difficulty in area variances cases.”) (quotation and citation omitted); *Gilmartin* at 1171 (“Increased expense and inconvenience to applicants for a variance are among the proper factors for BZA’s consideration) (internal citation omitted). While the Board agrees that the factor of financial hardship can be significant, that does not mean its mere demonstration, or lack thereof, is sufficient to decide whether or not a practical difficulty exists.

In this case, however, the Board is not persuaded by the Applicant’s financial hardship argument. To satisfy its burden, the Applicant proffers a pro forma that the Board finds to be much too speculative and fungible. (Tr. of April 12, 2016 at 59). The pro forma is unconvincing because the Applicant’s cost estimates are based on various assumptions and incomplete information. Furthermore, the Applicant’s concern that the Project will be costly is not a justifiable basis to relieve the Applicant of strict compliance with the Zoning Regulations. Increased expense is but one factor to be considered. *See Barbour v. District of Columbia Bd. of Zoning Adjustment*, 358 A.2d 326, 327 (increased expenses involved with expansion of kitchen did not entitle area variance). The Applicant misconstrues a potential lower rate of return as financial distress, and the Board will not grant variance relief because the Applicant is concerned that it might not be able to maximize earnings. (Tr. of April 12, 2016 at 63.)

Generally, when evaluating financial feasibility, the Board cannot address or define which return rates are acceptable or unacceptable. As is the case here, the financial feasibility of any project is largely a “facts and circumstances” study. *See Palmer v. District of Columbia Bd. of Zoning Adjustment* 287 A.2d 535, 542 (D.C. 1972) (“The nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case.”). To clarify, the Board is not persuaded by the Applicant’s financial hardship claim, but not based on its finding that the project is either financially feasible or infeasible. Instead, the Board finds that the Applicant’s pro forma is too conjectural to substantiate a claim of financial distress.

Finally, as an experienced developer, the Applicant is, or should have been, aware that the Project poses challenges similar to those common for conversions of non-residential buildings – such as substantial internal reconfiguration and possible environmental study and remediation. Even if the Project is subject to the more stringent requirements applicable to expansions of existing apartment houses, such obstacles are easily discernable, and should have been factored into the Applicant’s purchase price when producing the pro forma. Based on these findings, the Board does not concur

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with the Applicant that there is a financial hardship that justifies a practical difficulty, and therefore cannot grant the requested variance relief.

No Detriment to the Public Good or Zone Plan

Although the Board found that the first two prongs of the variance test had not been met, it nevertheless analyzed whether granting the variance relief sought would result in substantial detriment to the public good, and concluded it would not. The Project will complement the surrounding neighborhood; it will rehabilitate a long-vacant property, the existing dilapidated Commercial Garage on Ridge Street, N.W. with a rowhome-type façade that extends the character of the other dwellings on Ridge Street to the end of the block and provides a continuous transition to 4th Street. Further, in response to requests from the surrounding community, the Project will include the proposed Neighborhood Establishment and will provide 27 parking spaces, well above the seven spaces required under the Zoning Regulations. The Project has the backing of ANC 6E and the surrounding community, and the Board credits this to support its conclusion that there will be no detriment to the public good. (Tr. of April 12, 2016 at 67.)

Nevertheless, the Board finds that variance relief cannot be granted without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. The intent of the R-4 rowhouse area, as described in the zoning and in the Comprehensive Plan, is for it to remain a predominantly rowhouse zone, and for it to not be an apartment zone. This intent to limit both conversions of rowhouses to apartment buildings and expansion of existing apartments was confirmed by the Zoning Commission in late 2015 as part of Z.C. Case No. 14-11.

As such, the explicit intent of the R-4 Regulations is to ensure that development, whether new or expansions to existing structures, maintains the row house character, which includes density. The R-4 District is explicitly not intended to be an apartment zone, or to encourage non-conforming expansions of existing apartment buildings. This proposed expansion would double the number of units anticipated by the zone, so it is well in excess of the prescribed limits and well beyond the intent or density of the zone. The proposed lot occupancy would be 87.5% more than the maximum permitted in the R-4 District and further facilitates the proposed increase in the density (number of units), so is also contrary to the wording and intent of the regulations.

Given the foregoing aspects and purpose of the R-4 District, the Board is not persuaded that the Applicant has satisfied its burden. The question of why the Project requires twice the number of units permitted as matter of right remains unanswered. (Tr. of April 12, 2016 at 67.) The Board concurs with OP's analysis on this matter, and concludes that the Project will result in substantial harm to the Zoning Regulations.

Office of Planning

The Board is required to give "great weight" to the recommendation of the Office of Planning.

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(D.C. Official Code § 6-623.04 (2001).) The Board must demonstrate in its finding that it considered OP's views and must provide a reasoned basis for any disagreement. *Glenbrook Rd. Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 605 A.2d 22, 34 (D.C. 1992) (internal citation omitted).

In this case, OP recommended denial of the Applicant's request for special exception relief under § 2003. The Board does not concur with OP's recommendation to deny the Applicant's special exception request. OP's report indicated that, because the commercial uses on the Property had lapsed for a three-year period, this constitutes prima facie evidence, under § 2005.1, of no intention to resume active operation as a nonconforming use, thus requiring that subsequent use of a property conform to the Zoning Regulations. OP stated that the Applicant had not submitted evidence indicating an intent to continue the nonconforming commercial uses and that a building permit was issued to a previous owner for conversion from office space to a two-family flat. Accordingly, OP stated that it could not proceed with an analysis of the requested special exception because the use seemed to have been converted to a conforming residential use.

For the reasons stated above, the Board finds that the Applicant has satisfied the requirements for special exception relief under § 2003. First, as discussed above, although OP stated in its report that a previous owner had been issued a building permit to convert the office in the Mixed-Use Building to a two-family flat, the reports attached to OP's report are inconclusive. In any event, there is no evidence that work was ever begun under this permit. Second, the Applicant provided sufficient evidence at the March 15, 2016 hearing to overcome the presumption of abandonment under § 2005.1. (Tr. of March 15, 2016 at 141-142.) Again, the Board credits the testimony of Dr. Bockai that, to his knowledge, there has never been an intent to abandon the commercial uses on the Property. Accordingly, the Board finds that the concerns raised by OP regarding a potential abandonment of the commercial use of the Property have been addressed.

Based on findings of fact and conclusions of law, and for the reasons stated above, the Board concurs with OP's recommendation to deny the Applicant's request for variance relief from the lot area requirements under § 401.11, the lot occupancy requirements under § 403.2, and additions to nonconforming structures under § 2001.3.

Advisory Neighborhood Commission

The Board must also give "great weight" to the issues and concerns that the affected ANC raises in its written report. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)).) In this case, ANC 6E submitted a letter in support of the Project, subject to conditions related to parking, as referenced above. (Exhibit 28.) These issues pertain the question whether the project would tend to adversely affect neighboring properties or substantially impair the public good, and as noted the Board concluded that the project would have neither effect. However, since the Applicant failed to meet the first two prongs of the variance test, the Board was required to deny that portion of the application.

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Therefore, for the reasons stated above, it is hereby:

ORDERED that the application is **GRANTED**, in part to allow a special exception for a change to a nonconforming use under § 2003 to allow the conversion of an office use to a neighborhood retail or service establishment, and

ORDERED that the application is **DENIED**, in part, for variance relief from the lot area requirements under § 401.11, the lot occupancy requirements under § 403.2, and additions to nonconforming structures (§ 2001.3),

Since the conditions of approval detailed in Finding of Fact No. 21 of this Order (pp. 7-8) were based upon plans that cannot go forward, they will not be repeated below. Any change to those plans would require the Applicant to seek a modification from the Board and, if that were to occur, the Board would consider the sufficiency of those conditions.

VOTE: 3-1-1 (Marnique Y. Heath, Anita Butani D'Souza, and Frederick L. Hill to APPROVE in part and DENY in part; Marcie I. Cohen to Approve by absentee ballot; Jeffrey L. Hinkle abstaining).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this order.

ATTESTED BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: February 21, 2019

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST

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FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.