

[DRAFT]

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Board of Zoning Adjustment



**Application No. 19804 of 716 Upshur LLC**, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under the residential conversion provisions of Subtitle U § 320.2, to construct a three-story rear addition and convert the existing principal dwelling unit to a three-unit apartment house in the RF-1 Zone at premises 716 Upshur Street N.W. (Square 3135, Lot 91).

**HEARING DATE:** September 19, 2018; October 31, 2018  
**DECISION DATE:** November 28, 2018

**DECISION AND ORDER**

This self-certified application (the “Application”) was submitted on May 17, 2018 by 716 Upshur LLC, (the “Applicant”) the owner of the property located at 716 Upshur Street, NW, (the “Subject Property”) that is the subject of the Application. The Applicant requests special exception approval pursuant to 11-U DCMR § 320.2 of the Zoning Regulations to convert a single-family dwelling into a three-unit residential building. Following a public hearing, the Board voted to approve the Application.

**PRELIMINARY MATTERS**

Notice of Application and Notice of Public Hearing. By memoranda dated July 16, 2018, the Office of Zoning sent notice of the Application to the Office of Planning (“OP”); the District Department of Transportation (“DDOT”); the Councilmember for Ward 4; Advisory Neighborhood Commission (“ANC”) 4C, the ANC for the area within which the Subject Property is located; and the single-member district ANC 4C-08. Pursuant to 11-Y DCMR § 402.1, on July 16, 2018, the Office of Zoning mailed notice of the hearings to the Applicant, ANC 4C and the owners of all property within 200 feet of the Subject Property. Notice was published in the *D.C. Register* on August 3, 2018 (65 DCR 31).

Party Status. The Applicant and ANC 4C were automatically parties in this proceeding. There were no additional requests for party status.

Applicant’s Case. The Applicant provided evidence and testimony to show that the Application satisfied all requirements for approval of the requested zoning relief.

OP Report. The Office of Planning (“OP”) issued two reports. In its first report (Exhibit 39) dated September 7, 2018, the Office of Planning recommended approval of the Applicant’s initial design for the conversion and waiver from the U § 320.2(e) in order to extend 26.17 feet past the farthest

rear wall of the adjoining buildings. Following the initial hearing on September 19, 2018, the Applicant revised the Application and presented Concepts B and C for the Office of Planning to review. (Exhibit 58). OP submitted a supplemental report (Exhibit 60) recommending approval of the proposed Concepts A and B.

DDOT Report. By memoranda August 27, 2018, DDOT indicated it had no objection to the approval of the Application, noting that the proposal will have no adverse impacts on travel conditions of the District's transportation network. (Exhibit 36).

ANC Report. The ANC did not submit a report in time for the first hearing on September 19, 2018; however, the SMD submitted a report (Exhibit 52) alleging that the ANC Chairperson proposed a vote in support of the Application, but the motion did not pass. The Board requested the Applicant attend the October ANC meeting and present the plans. There was testimony presented that the ANC meeting in October 2018, the ANC proposed a resolution to oppose the Application, but the resolution did not pass and therefore no action was taken by the ANC. The only official ANC correspondence to be uploaded to the record were the ANC Resolution from the September 12, 2018 meeting, and two clarification letters (Exhibits 67 and 71) clarifying that the original vote in support did not pass and received a vote of 3-4-1; subsequent to that, there was a vote for the ANC resolution to oppose which "passed" 3-2-2. The resolution also noted that any other submissions that were alleged on behalf of the ANC were solely the views of the Single Member District Commissioner (Exhibit 71). The ANC did not allege specific concerns regarding the project and noted that they did not take a stance on the project.

Persons in Opposition. Thirteen letters and a petition in opposition were submitted to the record.

Persons in Support. Seven letters in support were submitted to the record.

## **FINDINGS OF FACT**

1. The Subject Property is located 716 Upshur Street, NW (Square 3135, Lot 91).
2. The Subject Property is improved with a principal dwelling unit.
3. The Subject Property has a lot area of 2,726 square feet, and a lot width of nineteen point twelve feet (19.12 ft.).
4. Abutting the Subject Property to the west is 718 Upshur Street, NW, which is currently improved with a row dwelling.
5. Abutting the Subject Property to the east is 714 Street, NW which is improved with a row dwelling.
6. Abutting the Subject Property to the north and south are Upshur Street, NW and a public alley, respectively.

7. The Subject Property is located in the RF-1 zone district.
8. The Applicant is proposing to convert the existing building (the “Building”) from one housing a principal dwelling unit to a three-unit apartment house.
9. Accordingly, the Applicant requested special exception relief pursuant to 11-U DCMR § 320.2.
10. The Applicant’s original plans showed an addition that extended twenty-six point seventeen feet (26.17 ft.) past the rear walls of the adjoining principal buildings. The Board requested the Applicant revise the original plans in order to mitigate concerns over light, air, and privacy raised by the adjacent neighbors at 714 Upshur Street, NW.
11. At the hearing on October 31, 2018, the Board again requested that the Applicant revise Concept B so that it would have a smaller rear deck.
12. The Applicant submitted revised plans on November 2, 2018 (Exhibit 65) which reflected the requested changes to the deck.
13. The Applicant is proposing to construct a third-story addition to the Building and a three-story addition at the rear of the Building. The third-story addition will be setback three feet (3 ft.) from the front façade and will not alter any architectural elements original to the Building. The addition will be thirty-five feet (35 ft.) in height, which is permitted as a matter-of-right in the RF-1 Zone.
14. The Applicant is not required to set-aside units for Inclusionary Zoning, as the Applicant will increase the number of units from one (1) unit to three (3) units. Inclusionary Zoning applies to residential conversions proposing four or more units.
15. There is an existing residential building existing on the lot prior to May 12, 1958.
16. At 2,726 square feet, the lot area of the Subject Property exceeds the minimum lot area requirement of 2,700 square feet (i.e. 900 square feet per dwelling unit) as required pursuant to 11-U DCMR § 320.2(d).
17. No adjacent property has a solar system installed on its roof.
18. The adjacent property at 718 Upshur has a chimney but the adjacent property owner has signed a chimney agreement with the Applicant.
19. The rear addition extends twenty-one point twelve feet (21.12 ft.) past the rear walls of the shorter of the adjoining properties. On the second and third floor, the proposed addition is setback thirteen feet point twenty feet (13.20 ft.) past at the rear. The Applicant requested a waiver from this provision.

20. The light and air available to neighboring properties shall not be unduly affected by the addition, as any additional impact would primarily be on the roof of the adjacent buildings and at most for a few hours in the winter.
21. The proposed addition shall not unduly compromise the privacy and use of enjoyment of neighboring properties. The Applicant made significant changes to the plans after the first hearing and reduced the size of the roof deck in order to mitigate any privacy concerns. The proposed deck will not extend further than the rear wall of the existing building. The Applicant also revised the plans to show a shorter rear deck limited to seven point nine two (7.92 ft.) past the primary mass of the building.
22. The conversion and associated addition, as viewed from the street, alley and other public ways, will not substantially visually intrude upon the character, scale, and pattern of houses along the Upshur Street or the alley. The proposed changes to the front façade are repairs. The third-floor addition will be setback three feet (3 ft.) from the front façade and will not be visible from the street. There are a number of rear additions in the subject alley and a variety of rear setbacks and the addition will not intrude upon the view from the alley. The Applicant also revised the plans to show a shorter rear deck limited to seven point nine two feet (7.92 ft.) past the primary mass of the building.
23. The Applicant provided plans, photographs, sections and elevations, as well as rendered views of the proposed conversion to sufficiently represent the relationship of the conversion to the buildings and views from Upshur Street and the adjacent alley.
24. The Applicant requested a waiver from U § 320.2(e) which states “an addition shall not extend further than ten feet (10 ft.) past the furthest rear wall of any adjoining principal residential building on an adjacent property.” After a number of revisions, the final plans show the Addition extending twenty-one point twelve feet (21.12 ft.) past the rear walls of the shorter of the adjoining properties. On the second and third floor, the proposed addition is setback thirteen feet point twenty feet (13.20 ft.) past at the rear.. In order to meet the waiver requirements, the project must not be in conflict with U § 320.2(i). As discussed above in Facts 20-22 the project is not in conflict with the light, air, privacy, and character requirements of U § 320.2(i).

## **CONCLUSIONS OF LAW AND OPINION**

The Applicant requests special exception relief pursuant to 11-U DCMR § 320.2 of the Zoning Regulations in order to construct a third-story addition and a rear addition to the existing building, and to convert the building from one housing a principal dwelling unit to a three-unit apartment house. The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2008) to grant special exceptions, as provided in the Zoning Regulations. Subtitle Z, § 901.2 authorizes the grant of a special exception when, in the judgment of the Board, the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and

Zoning Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map, subject to specific conditions.

The Board's discretion in reviewing an application for a special exception is limited to a determination of whether an applicant has complied with the requirements of 11-U DCMR § 320.2, and 11-X DCMR § 901.2 of the Zoning Regulations. If an applicant meets its burden, the Board ordinarily must grant the application. *See, e.g. Stewart v. District of Columbia Board of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973); *Washington Ethical Society v. District of Columbia Bd. of Zoning Adjustment*, 421 A.2d 14, 18-19 (D.C. 1980); *First Baptist Church of Washington v. District of Columbia Bd. of Zoning Adjustment*, 432 A.2d 695, 698 (D.C. 1981); *Gladden v. District of Columbia Bd. of Zoning Adjustment*, 659 A.2d 249, 255 (D.C. 1995).

Pursuant to 11-U DCMR § 320.2, a conversion of a single-family dwelling to a multi-unit dwelling may be permitted as a special exception, subject to the enumerated conditions. These conditions include: (a) The maximum height of the residential building and any additions thereto shall not exceed thirty-five feet (35 ft.); (b) The fourth (4th) dwelling unit and every additional even number dwelling unit thereafter shall be subject to the inclusionary zoning set-aside requirements; (c) There must be an existing residential building on the property at the time of filing an application for a building permit; (d) There shall be a minimum of nine hundred square feet (900 sq. ft.) of land area per dwelling unit; (e) An addition shall not extend further than ten feet (10 ft.) past the furthest rear wall of any adjoining principal residential building on the adjacent property; (f) Any addition, including a roof structure or penthouse, shall not block or impede the functioning of an operative chimney or other external vent on an adjacent property required by any municipal code; (g) Any addition, including a roof structure or penthouse, shall not significantly interfere with the operation of an existing or permitted solar energy system (of at least 2kW) on an adjacent property; (h) A roof top architectural element original to the house such as cornices, porch roofs, a turret, tower, or dormers shall not be removed or significantly altered, including shifting its location, changing its shape or increasing its height, elevation, or size.; (i) Any addition shall not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property, in particular: (1) The light and air available to neighboring properties shall not be unduly affected; (2) the privacy of use and enjoyment of neighboring properties shall not be unduly compromised; and (3) the conversion and any associated additions, as viewed from the street, alley, and other public way, shall not substantially visually intrude upon the character, scale, and pattern of houses along the subject street or alley; (j) In demonstrating compliance with 11-U § 320.2(i) the applicant shall use graphical representations such as plans, photographs, or elevation and section drawings sufficient to represent the relationship of the conversion and any associated addition to adjacent buildings and views from public ways; (k) The Board of Zoning Adjustment may require special treatment in the way of design, screening, exterior or interior lighting, building materials, or other features for the protection of adjacent or nearby properties, or to maintain the general character of a block; (l) The Board of Zoning Adjustment may modify or waive not more than three (3) of the requirements specified in Subtitle U §§ 320.2(e) through § 320.2(h) provided, that any modification or waiver granted pursuant to this section shall not be in conflict with 11-U DCMR § 320.2(i).

Based on the findings of fact, the Board concludes that the request for special exception relief, as represented by the submitted plans, testimony, and evidence, satisfies the requirements of 11-U DCMR § 320.2. The Board credits the testimony of the Applicant and the Office of Planning and finds that the proposed addition and conversion meet the enumerated conditions. As evidenced by the plans and testimony, the proposed addition will not exceed thirty-five feet (35 ft.) in height (Fact 13). The Inclusionary Zoning set-aside requirements do not apply, as the Applicant is not proposing more than three (3) units. Inclusionary Zoning applies to residential conversions proposing four or more units. (Fact 14). There is an existing residential Building on the Subject Property and it has over 2,700 square feet of land area (Facts 15-16). The Applicant requested a waiver from U § 320.2(e) which states “an addition shall not extend further than ten feet (10 ft.) past the furthest rear wall of any adjoining principal residential building on an adjacent property.” After a number of revisions, the final plans show the Addition extending twenty-one point twelve feet (21.12 ft.) past the rear walls of the shorter of the adjoining properties. On the second and third floor, the proposed addition is setback thirteen feet point twenty feet (13.20 ft.) past at the rear.. In order to meet the waiver requirements, the project must not be in conflict with U § 320.2(i). (Facts 20-22). No adjacent property has a solar energy system installed on its roof (Fact 17). The adjacent property to the west has a chimney, but the adjacent property owner has signed an agreement with the Applicant to allow the Applicant to raise the chimney if required by building code (Fact 18). The Applicant requested a waiver from Subtitle U § 320.2(e); the waiver is not in conflict with U § 320.2(i) (Facts 19-22).

The light and air available to neighboring properties will not be unduly affected. The Applicant provided shadow studies (Exhibit 58, pp. 26-28) demonstrating that the light and air available to neighboring properties shall not be unduly affected by the addition, as any additional impact would primarily be on the roof of the adjacent buildings and at most for a few hours in the winter. (Fact 20).

The proposed addition will not compromise the privacy or enjoyment of the adjacent properties. The Applicant made significant changes to the plans after the first hearing and reduced the roof deck in order to mitigate any privacy concerns. The proposed roof deck will not extend further than the rear wall of the existing building. At the hearing on October 31, 2018, the Office of Planning testified that the reduction of the roof deck should mitigate concerns with privacy and make it so the addition will not compromise the privacy or enjoyment of the adjacent properties. (Fact 21).

The Board finds also that the proposed addition, along with the original structure, will not visually intrude on the character, scale, or pattern of houses along the street frontage. The third-floor addition will be setback three feet (3 ft.) from the front façade and will not be visible from the street. The proposed changes to the front façade are repairs. The third-floor addition will be setback three feet (3 ft.) from the front façade and will not be visible from the street. There are a number of rear additions in the subject alley and a variety of rear setbacks and the addition will not intrude upon the view from the alley. (Fact 22).

For these same reasons, the Board finds that the proposed addition will not adversely affect the use of neighboring properties as required by 11-X DCMR § 901.2. Further, the Board finds that

the addition will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps.

The Board is required to give “great weight” to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2001).) In this case, as discussed above, the Board concurs with OP’s recommendation that the Application should be approved.

The Board is also required to give “great weight” to the issues and concerns raised by the affected ANC. (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) (2001).) The District of Columbia Court of Appeals has interpreted the phrase “issues and concerns” to “encompass only legally relevant issues and concerns.” *Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978) (citation omitted).

The ANC did not submit a report in time for the first hearing on September 19, 2018; however, the SMD submitted a report (Exhibit 52) alleging that the ANC Chairperson proposed a vote in support of the Application, but the motion did not pass. The Board requested the Applicant attend the October ANC meeting and present the plans. There was testimony presented that at the ANC meeting in October 2018, the ANC proposed a resolution to oppose the Application, but the resolution did not pass and therefore no action was taken by the ANC. The only official ANC correspondence to be uploaded to the record were the ANC Resolution from the September 12, 2018 meeting, and two clarification letters (Exhibits 67 and 71) clarifying that the original vote in support did not pass and received a vote of 3-4-1; subsequent to that, there was a vote for the ANC resolution to oppose a previous design option which “passed” 3-2-2. The resolution also noted that any other submissions that were alleged on behalf of the ANC were solely the views of the Single Member District Commissioner (Exhibit 71). The ANC did not allege specific concerns regarding the project and noted that they did not take a stance on the project.

The majority of letters in opposition voiced concerns over a third unit and the loss of single-family homes in the area. The Single Member District Commissioner echoed these concerns in his various letters (Exhibits 52, 61 and 69). The letters argued that the project would disrupt the single-family character of the area. The Board addressed these concerns, noting that the regulations permitted conversions to three units so long as the special exception criteria were met.

While the majority of concerns from the persons in opposition are not legally relevant, the Board requested the Applicant revise the original plans in order to mitigate concerns over light, air, and privacy raised by the adjacent neighbors who lived at 714 Upshur Street, NW. At the hearing on October 31, 2018, the Board again requested that the Applicant revise Concept B so that it would have a smaller rear deck. The Applicant submitted revised plans on November 2, 2018 (Exhibit 65) which reflected the requested changes to the deck.

Based on the case record, the testimony at the hearing, and the findings of fact and conclusion of law, the Board concludes that the Applicant has satisfied the burden of proof with respect to the request for special exceptions under 11-U DCMR § 320.2, to allow for an addition to and conversion of the subject property from a principal dwelling unit to a three-unit residential

building. Accordingly, it is **ORDERED** that the Application is **GRANTED** subject to the plans in Exhibit 65 and the following condition:

1. Prior to the issuance of any building permit authorized by this order, the applicant shall obtain the issuance of a building permit for 718 Upshur Street NW to raise the chimney or otherwise ensure the compliance of the project approved by this order with the requirements of Subtitle U § 320.2(f).

**VOTE: 5-0-0** (Chairman Fred Hill, Carlton Hart, Lesyleé M. White, Lorna John and Michael Turnbull to approve.)