

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, N.W, (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 building housing a principal dwelling into a three-unit apartment house. 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.

BZA APPLICATION NO. 19804
PAGE NO. 2

OP Report. The Office of Planning issued two reports. In its first report dated September 7, 2018, OP 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. (Exhibit 39.) 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 recommending approval of the proposed Concepts A and B. (Exhibit 60.)

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. Through an undated resolution, the ANC indicated that at its duly noticed public meeting held September 12, 2018, the ANC voted to oppose the application because the Commission and the applicant "have been unable to reach an agreement regarding the additional benefits that the Commission seeks to support this special exception and waiver from 11-U 320.2 (e)." The resolution was accepted by the Office of Zoning's Interactive Zoning Information System on November 13, 2018 and assigned Exhibit No. 68. Although there was testimony and written a submission concerning other votes that the ANC may have made, the only writing that qualifies to receive great weight is the resolution.

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 at 716 Upshur Street, N.W. (Square 3135, Lot 91).
2. The Subject Property is improved with a building housing a principal dwelling unit.
3. The Subject Property has a lot area of 2,726 square feet, and a lot width of 19.12 feet.
4. Abutting the Subject Property to the west is 718 Upshur Street, N.W., which is currently improved with an attached building.
5. Abutting the Subject Property to the east is 714 Upshur Street, N.W. which is also improved with an attached building.
6. Abutting the Subject Property to the north and south are Upshur Street, N.W. and a public alley, respectively.

BZA APPLICATION NO. 19804
PAGE NO. 3

7. The Subject Property is located in the RF-1 zone district.
8. The Applicant is proposing to convert the existing residential 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 26.17 feet 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, N.W.
11. In advance of the hearing on October 31, 2018, the Applicant provided revised plans showing three design options. (Exhibit 58.) Concept A depicted the originally proposed design. Concept B reduced the extent of rear addition and redesigned the rear façade, but would still extend at least ten feet beyond the wall of an adjacent property and require a waiver of 11-U DCMR § 320.2(e). Option C reduced the rear addition and would comply with the ten-foot rear extension requirement of 11-U DCMR § 320.2(e). The Applicant reduced the roof deck area in both Concepts B and C. (Exhibit 58.)
12. At the hearing on October 31, 2018, the Board requested that the Applicant revise Concept B so that it would have a smaller rear deck.
13. The Applicant submitted revised plans on November 2, 2018 that reflected the requested changes to the deck. (Exhibit 65.)
14. The Applicant now proposes 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 from the front façade and will not alter any architectural elements original to the Building. The addition will be 35 feet in height, which is permitted as a matter of right in the RF-1 zone.
15. The Applicant is not required to set aside units for Inclusionary Zoning, as the Applicant will increase the number of units from one unit to three units. The Inclusionary Zoning set-aside requirement of 11-U DCMR § 320.2(b) applies to residential conversions proposing four or more units.
16. There is an existing residential building, existing on the lot prior to May 12, 1958.

BZA APPLICATION NO. 19804

PAGE NO. 4

17. 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).
18. No adjacent property has a solar system installed on its roof.
19. The adjacent property at 718 Upshur has a chimney, but the adjacent property owner has signed a chimney agreement with the Applicant.
20. The rear addition extends 21.12 feet past the rear walls of the shorter of the adjoining properties at the cellar and ground floor. On the second and third floors, the proposed addition is set back 13.20 feet from the rear. The Applicant requested a waiver from 11-U DCMR § 320.2(e), which states that an addition may not extend further than ten feet past the furthest rear wall of any adjacent principal residential building.
21. The light and air available to neighboring properties will 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.
22. The proposed addition will 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 roof 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 7.92 feet past the primary mass of the building.
23. 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 Upshur Street or the alley. The proposed changes to the front façade are repairs. The third-floor addition will be set back three feet 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.
24. 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.
25. 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.”

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 X § 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 for a residential conversion of this type 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 residential building existing on the lot prior to May 12, 1958 to an apartment house 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 35 feet; (b) The fourth dwelling unit and every additional even numbered 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 900 square feet of land area per dwelling unit; (e) An addition shall not extend further than ten feet past the furthest rear wall of any principal residential building on an 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 rooftop 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.; and (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

BZA APPLICATION NO. 19804
PAGE NO. 6

subject street or alley. In demonstrating compliance with 11-U § 320.2(i), the applicant must 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. (11-U DCMR § 320.2(j).) The Board 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. (11-U DCMR § 320.2(k).) (Finally, the Board may modify or waive not more than three of the requirements specified in Subtitle U §§ 320.2(e) through § 320.2(h) provided, that any modification or waiver 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 35 feet in height (Finding of Fact 14.) The Inclusionary Zoning set-aside requirements do not apply, as the Applicant is not proposing more than three units. (Finding of Fact 15.) There is an existing residential Building on the Subject Property and it has over 2,700 square feet of land area (Findings of Fact 16-17.) 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 21.12 feet past the rear walls of the shorter of the adjoining properties at the cellar and ground floor. On the second and third floors, the proposed addition is set back 13.20 feet from the rear. In order to meet the waiver requirements, the project must not be in conflict with U § 320.2(i). No adjacent property has a solar energy system installed on its roof. (Finding of Fact 18.) 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. (Finding of Fact 19.) The Applicant requested a waiver from Subtitle U § 320.2(e); the Board finds that the waiver is not in conflict with U § 320.2(i), based on the Findings of Fact and for the reasons discussed below.

The light and air available to neighboring properties will not be unduly affected. The Applicant provided shadow studies 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. (Exhibit 58, pp. 26-28.)

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, such that the addition will not compromise the privacy or enjoyment of the adjacent properties. (Finding of Fact 22.)

BZA APPLICATION NO. 19804
PAGE NO. 7

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 from the front façade and will not be visible from the street. The proposed changes to the front façade are repairs. There are a number of rear additions in the subject alley and a variety of rear setbacks and, therefore, the addition will not intrude upon the view from the alley. (Finding of Fact 23.)

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).

As noted, the ANC submitted an undated resolution that indicated that at its duly noticed public meeting held September 12, 2018, the ANC voted to oppose the application because the Commission and the applicant “have been unable to reach an agreement regarding the additional benefits that the Commission seeks to support this special exception and waiver from 11-U 320.2 (e).” (Exhibit 68.) The ANC expressed no issues or concerns with respect to the requested relief, only its disappointment at being unable to obtain satisfactory terms for its support. This is not a legally relevant or legitimate concern in the context of the Board’s consideration of the special exception criteria.

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, N.W. 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 which reflected the requested changes to the deck. (Exhibit 65.)

Based on the case record, the testimony at the hearing, and the findings of fact and conclusions 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 this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 65 – APPLICANT’S SUPPLEMENTAL FILING - AND WITH 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, N.W. to raze 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 (Frederick L. Hill, Carlton E. Hart, Lesylleé M. White, Lorna L. John, and Michael G. Turnbull to APPROVE).

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: January 29, 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 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.

BZA APPLICATION NO. 19804
PAGE NO. 9

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.

PURSUANT TO 11 DCMR SUBTITLE A § 303, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITION IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITION IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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.