

MEMORANDUM

TO: District of Columbia Board of Zoning Adjustment
FROM: Jonathan Kirschenbaum, Case Manager
JL Joel Lawson, Associate Director Development Review
DATE: January 23, 2019

SUBJECT: Supplemental Report for BZA Case 19887 (1724 North Capitol Street, NW) to permit a restaurant use on the first floor and second floor of a row building.

I. BACKGROUND

At its December 19, 2018 public hearing, the Board considered this BZA application for a use variance, to permit a restaurant on the first and second floors of the subject row building. The OP report, Exhibit 32, recommended approval of the first floor to be used as a restaurant as the applicant had made a sufficient case that the use and configuration of that floor and its relationship to the street frontages of this corner lot presented a hardship in converting it to residential space as permitted in the zone; but could not recommend approval of the second floor to be used as a restaurant, as a similar case for the second floor had not been made.

At the public hearing for this case, the applicant stated that the second floor was historically used as a hair salon but did not submit materials to support this claim. OP stated on the record that it still could not recommend approval of the second-floor restaurant use without additional information being filed to support the applicant's claims. The Board closed the public hearing and set the application for decision, and the Board requested that the applicant work with OP to determine if there would be additional information that could be considered.

The test under the zoning regulations is not whether the space had or had not been used for non-residential purposes in the past; rather the test is whether there is a *hardship* to the owner in using the space for a permitted use. However, past use and more specifically past reconfiguration of the space by previous owners can be part of an applicant's justification for a use variance, as it may be a hardship to (re)configure commercial space to a residential use.

Since the hearing, OP has been contacted by neighbors and area residents who indicated that it is their recollection that the second floor of the building was not used for commercial purposes. Further, the applicant did not submit any materials to the record showing that permits or licenses had been issued by DCRA for the configuration or use of the second floor for commercial uses. OP would not typically accept even the occasional use of the space for commercial purposes as part of a home-based business as justification for a use variance request.

However, the applicant did submit a signed letter (Exhibit 53) from a general contractor, Michael Watson, affirming:

I was contracted by Ms. McCoy to do some work at 1724 North Capitol St. NW Washington DC. The conversion was minor as the property already appeared to be a commercial space. It had no kitchen and only a half bathroom.

Around 2006 I convert the second floor of the building into a working hair dresser. I was asked to removed (sic) a wall, which I did. I added two work stations and two shampoo bowls. I replaced the furnace and her roof also.

In spite of this additional information provided since the public hearing, and the applicant testifying on the record that when she bought the subject building the second floor was configured as a hair salon, OP continues to question whether the building presents a hardship in using the second floor as a residential use. A use variance is intended to be a very high burden to make, and proposing a use that is not consistent with, or which would potentially remove, residential space in a residential zone is an especially high burden of proof.

While it is now difficult to ascertain with any certainty the use of the second floor historically, or even the physical configuration of the second floor prior to improvements which appear to have been made recently, OP notes that the building has been configured with a separate exterior entrance to the second floor, and it is unclear if there has historically even been an internal connection between the two floors. Again, the test in the regulations is not specifically how the space has been used, but whether there is a hardship to the owner in using the space for a conforming use, even if that means some reasonable (re)configuration of the space for that by-right permitted use.

II. OFFICE OF PLANNING RECOMMENDATION

OP remains unable to recommend approval of the use variance to use the second floor as commercial restaurant space. However, OP also acknowledges the support for the variance relief from the ANC and some area residents, and should the BZA weigh all of the available evidence and determine that the applicant has made a sufficient hardship case, OP notes that the expanded non-residential use could have impacts on the neighborhood that could be mitigated and the Board may wish to consider conditions of approval. Some of the letters from neighbors included potential conditions of approval (Exhibits 34-37 and 38-42), and OP understands that the applicant has recently met with at least some neighbors and that conditions of an approval were further discussed.

Any conditions should be agreed to by the applicant, the ANC and the neighbors if possible, but could include ones consistent with suggested changes in the earlier letters from neighbors, and could include:

1. Restaurant use, in addition to any other use(s), shall be prohibited on the second floor “outdoor terrace” as labeled on the plans on sheet A-100 “As-Built First Floor” in Exhibit 29;
2. The hours of operation shall be limited to 11:00 am to 10:00 pm Monday through Thursday and 11:00 am to 11:00 pm Friday and Saturday. Sunday the restaurant shall not operate pursuant to the applicant’s statement that the restaurant would be closed on Sundays;
3. There shall be no more than 15 seats per floor for a total of no more than 30 seats, and no more than 7 bar stools per floor for a total of no more than 14 bar stools, as indicated on the plans in Exhibit 29;
4. Deliveries to the restaurant shall be limited to Monday and Saturday between 11:00 am and 1:00 pm;
5. Trash pickup shall occur on Monday, Wednesday, and Friday between 7:00 am and 10:00 am.

6. The applicant shall not store any trash receptacles outside, and trash shall be stored inside the restaurant;
7. The applicant shall make every best effort to ensure that there is not garbage associated with the restaurant in the outside area surrounding the restaurant on a daily basis; and
8. If a sidewalk café is approved by DDOT's public space committee, there shall be no music or other loud noise permitted outside of the building.

Some area residents also requested conditions related to parking, street signage and use of public space; OP would consider these outside the scope of this variance request, but the ANC and the applicant could work separately with DDOT to address these issues.