

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**



Application No. 20390 of Potomac Venture Group LLC, pursuant to 11 DCMR Subtitle X, Chapter 10, for a use variance from Subtitle C § 204.1 to allow the expansion of an existing non-conforming apartment house (19 units) by adding one additional dwelling unit in the cellar of a building located in the R-1-B Zone at 11 Nicholson Street, NW (Square 3383, Lots 2, 23, 24).

HEARING DATES: March 3, March 31, and April 28, 2021

DECISION DATE: April 28, 2021

PROPOSED DECISION AND ORDER

This self-certified application was filed on October 9, 2020 on behalf of Potomac Venture Group LLC, the owner of the property that is the subject of the application (“Applicant”). Following public hearing, the Board voted to deny the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated December 28, 2020, the Office of Zoning provided notice of the application and of the public hearing to the Applicant, the Office of Planning (“OP”), the District Department of Transportation (“DDOT”), Advisory Neighborhood Commission (“ANC”) 4B, the ANC in which the subject property is located, Single Member District ANC 4B06, the Office of Advisory Neighborhood Commissions, the Councilmember for Ward 4 as well as the Chairman and three at-large members of the Council of the District of Columbia, the National Park Service, lessees of the subject property, and the owners of all property within 200 feet on the subject property. Notice was published in the *District of Columbia Register* on December 11, 2020 (67 DCR 14470).

Party Status. Pursuant to Subtitle Y § 403.5, the Applicant and ANC 4B were automatically parties in this proceeding. The Board received no requests for party status.

Applicant’s Case. The Applicant provided evidence and testimony in support of the application from Tenika Felder, the project architect and an expert in architecture, Kyle Tangney, a commercial real estate broker, and Ronald Bergman, representing the Applicant.

OP Report. By memorandum dated February 19, 2021, the Office of Planning recommended approval of the application. (Exhibit 32.)

DDOT Report. By memorandum dated February 18, 2021, the District Department of Transportation indicated no objection to approval of the application. (Exhibit 31.)

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ANC 4B. At a public meeting on November 23, 2020 with a quorum present, ANC 4B adopted a resolution in support of the application. (Exhibit 14.) The ANC reiterated its support by report dated February 13, 2021. (Exhibit 30.)

FINDINGS OF FACT

1. The property that is the subject of this application is a corner lot located at the northwest corner of the intersection of Blair Road and Nicholson Street, N.W., with the address 11 Nicholson Street, N.W. (Square 3383, Lots 2, 23, and 24).
2. The subject property is generally rectangular, with 160 feet of frontage on Nicholson Street and approximately 94 feet along Blair Road. The lot area is 13,185 square feet.
3. The subject property was improved with an apartment house that is two stories and 25 feet in height. The subject property lacks side and rear yards, and the existing lot occupancy is 50 percent. (Exhibit 4.)
4. The existing building was built as an apartment house in 1937. The building contains 19 dwelling units on the first and second floors. (Exhibit 32.)
5. The southeastern portion of the cellar level is devoted to commercial use, currently operating as a grocery store in accordance with a certificate of occupancy issued in 1947. The Applicant planned to convert the use of the commercial space from grocery store to a new retail use, which the Applicant indicated could be done as a matter of right in accordance with zoning provisions governing nonconforming uses (see Subtitle B § 200.2(bb) and Subtitle C § 201.2). (Exhibit 8.)
6. The Applicant indicated that a dwelling unit was created in the cellar when the building was originally built. The cellar unit was used by the building superintendent. (Transcript of April 28, 2021 at 78.)
7. The Applicant acquired the subject property in 2001. On November 15, 2001, the Department of Consumer and Regulatory Affairs issued a certificate of occupancy, No. CO 22915, to the Applicant. The certificate of occupancy reflected a change in ownership with the approved use stated as “apartment building (19) units” occupying 11,500 square feet. (Exhibit 8, Tab C.)
8. The cellar unit occupied an area of approximately 498 square feet, with an external window. The space was conditioned, contained a bathroom, and had framing to create a bedroom as well as kitchen facilities. The Applicant indicated that the space was sufficient to function as a dwelling unit in its current condition.
9. Since the Applicant acquired the subject property, the cellar unit “has been used from time to time as living space for on-site maintenance workers.” The unit was never leased to the

public but was used by persons affiliated with the building staff. (Exhibits 8, 29; Transcript of April 28, 2021 at 78.)

10. The Applicant proposed to create an additional dwelling unit in the building at the subject property to allow use of the cellar unit as an apartment for lease. The Applicant did not propose to enlarge the existing building.
11. The new dwelling would be located in the existing cellar unit, located at a corner of the building adjacent to Blair Road and bounded on two sides by a staircase and a corridor. The unit would include a kitchen and full bathroom as well as a bedroom and living space. (Exhibit 35.)
12. Other rooms in the cellar accessible from the corridor include two storage rooms (one of which contains a bathroom) that are used by building staff for equipment, supplies and maintenance, two utility rooms for gas and electrical equipment, a boiler room, a second staircase, and a room containing laundry facilities for use by building residents. (Exhibits 29, 35.)
13. The area surrounding the subject property is residential in character. Nearby properties are primarily improved with detached principal dwellings although another apartment house is located on the abutting property to the north of the subject property. Some commercial and industrial uses are located in a Production, Distribution, and Repair (PDR) zone across Oglethorpe Street to the north. The Fort Circle Park is located to the north of the subject property, and areas to the east, across Blair Road, contain community gardens.
14. The subject property is located approximately 0.8 miles from the Fort Totten Metrorail station, which serves three subway lines and has a Capital Bikeshare dock. A Metrobus stop is located on New Hampshire Avenue within three blocks of the subject property.
15. The subject property and surrounding properties are located in a Residential House (R) zone, R-1-B.
16. The Residential House zones are residential zones, designed to provide for stable, low- to moderate-density residential areas suitable for family life and supporting uses. (Subtitle D § 100.1.) The provisions of the R zones are intended to (a) provide for the orderly development and use of land and structures in areas predominantly characterized by low-to-moderate-density residential development; (b) recognize and reinforce the importance of neighborhood character, walkable neighborhoods, housing affordability, aging in place, preservation of housing stock, improvements to the overall environment, and low- and moderate-density housing to the overall housing mix and health of the city; (c) allow for limited compatible accessory and non-residential uses; (d) allow for the matter-of-right development of existing lots of record; (e) establish minimum lot area and dimensions for the subdivision and creation of new lots of record; and (f) discourage multiple dwelling unit development. (Subtitle D § 100.2.)

17. The purposes of the R-1-B zone are to (a) protect quiet residential areas now developed with detached dwellings and adjoining vacant areas likely to be developed for those purposes and (b) stabilize the residential areas and promote a suitable environment for family life. (Subtitle D § 300.1.) The R-1-B zone is intended to provide for areas predominantly developed with detached houses on moderately sized lots. (Subtitle D § 300.3.)

CONCLUSIONS OF LAW AND OPINION

The Applicant requested a use variance, pursuant to Subtitle X § 1002.1, from Subtitle C § 204.1 to allow an additional dwelling unit in an existing non-conforming apartment house in the R-1-B zone. The Board is authorized under § 8(g)(3) of the Zoning Act 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. *See also* Subtitle X § 1000.1. Based on the findings of fact, and having given great weight to the recommendation of the Office of Planning and to the report of ANC 4B, the Board concluded that the application failed to satisfy the burden of proof to warrant approval of the requested use variance.

The Applicant’s apartment house was built before the effective date of the 1958 Zoning Regulations and became a nonconforming use when the subject property was zoned R-1-B. A nonconforming use is defined as a use of a structure that was lawfully established but does not conform to the use provisions for the zone where the use is located. (Subtitle B § 100.2.) A nonconforming use may continue but “shall not be extended in land area, gross floor area, or use intensity; and shall not be extended to portions of a structure not devoted to that nonconforming use at the time of enactment” of the 2016 Zoning Regulations. (Subtitle C § 204.1.)

The Applicant contended that the subject property was affected by an exceptional situation or condition arising from the confluence of factors: (1) the subject property is a large lot improved with an existing apartment house and (2) the underutilized “20th unit” on the cellar level of the existing building, which already contained the facilities of a dwelling due to its use as a “long existing on-site superintendent unit.” The Applicant emphasized the existing features of the cellar space, including its external windows, framing for separate bedroom and bathroom spaces, and kitchen facilities, all of which were installed before the Applicant purchased the subject property, as well as the use “from time to time by on-site maintenance workers” although the unit was “never leased to the public” and had not been used by the Applicant “as a superintendent space for over three years.” (Exhibit 29; Transcript of April 28, 2021 at 83.) In recommending approval of the application, the Office of Planning asserted that the “subject property is exceptional in that it has

... space in the cellar currently configured as a residential unit – including demising walls, a kitchen and a bathroom – that was once used as a residential unit, but is not reflected on the Certificate of Occupancy.” (Exhibit 32.)

The Board concluded that the Applicant did not identify any feature of the subject property or of the existing building that exhibited any exceptional condition sufficient to warrant approval of the requested use variance. The existing apartment house at the subject property is unusual, although not unique, as an apartment house located in the R-1-B zone, where that use is not permitted as a matter of right under current zoning regulations. As a nonconforming use, the apartment house is permitted to continue as legally established. In this case, the existing building has a certificate of occupancy for 19 dwelling units. The Board was not persuaded that the lot area of the subject property, which is larger than nearby lots improved with principal dwellings, created any exceptional situation with respect to the requested use variance.

The existence of a space in the cellar of the existing apartment house that was suitable for use as an additional dwelling unit did not itself create an exceptional situation or provide a valid basis for approval of the requested use variance to allow the expansion of a nonconforming use. The space was outfitted as a dwelling by a prior owner but its use as a dwelling was not authorized by a certificate of occupancy. The creation of an unauthorized dwelling unit, even if accomplished by a prior owner, would constitute a violation of the zoning regulations and therefore would not provide a basis for approval of a use variance. Previous illegal use of a property is not relevant to the exceptional-condition inquiry for purposes of a request for a variance. *Capitol Hill Restoration Society v. District of Columbia Bd. of Zoning Adjustment*, 398 A.2d 13, 16 (D.C. 1979). The existence of a space configured as a dwelling unit did not create an exceptional condition because an applicant’s desire to utilize property for a certain use generally is not by itself sufficient to create an extraordinary or exceptional situation or condition under the zoning regulations, *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 540 (D.C. 1972).

With respect to undue hardship, the Applicant asserted that a variance to allow an additional dwelling unit was warranted because the space occupied by the cellar unit could not be used in any manner consistent with the zoning regulations that specified the uses that are permitted as a matter of right, by special exception, or as accessory uses in the R-1-B zone. (*See* Subtitle U §§ 201.1, 202.1, 203.1, and 250.) According to the Applicant, the space was not needed for storage or building maintenance because other rooms were already available for those purposes in the cellar, and “[t]here is no demand for common storage space,” which historically has not been offered to residents of the building in light of the building’s “larger units that offer residents enough space for in-unit storage.” (Exhibit 29.) The Applicant contended that the cellar space at issue was “uniquely suited for a dwelling” and “too small to function as an alternative type of accessory use for the apartment building, such as a common recreation room....” The Applicant argued that the uses permitted as a matter of right or by special exception in the R-1-B zone were “either not applicable due to the existing apartment building, not feasible due to the size of [the cellar unit] and its relatively low ceiling, or would create substantial operational difficulties,” especially considering that the cellar unit lacked an exterior exit and the building lacked an elevator. (Exhibit 29.) The Applicant noted that a variance would also be needed to combine the cellar space with

an existing unit, and asserted that the cost of demolishing the existing dwelling facilities in the cellar space would itself constitute an undue hardship. (Exhibits 8, 29.)

The Office of Planning testified that the Applicant would face an undue hardship if the Zoning Regulations were strictly applied and “reestablishment of the residential unit were not permitted,” citing the cost and inefficiency of reconfiguring the space. The Office of Planning agreed with the Applicant that “no other reasonable use would be suitable for this space, and denial of the variance would cause the space to remain un- or underutilized” because “other possible uses in the R-1 zone, such as educational, governmental or religious uses, would be incompatible with a residential building or would require more space than the 498 square feet available, and would likely require additional broader building reconfigurations for access and services.” (Exhibit 32.)

Based on the evidence in the record, the Board did not agree with the Applicant or the Office of Planning that the strict application of the Zoning Regulations would result in undue hardship to the Applicant as the owner of the subject property. The cellar unit was not unused space: the Applicant indicated that the cellar unit was used “from time to time” although “there’s not always a need for a maintenance person to be on-site.” (Transcript of March 3, 2021 at 142.) The Board was not persuaded by the Applicant’s conclusory testimony that undue hardship was created by the Applicant’s inability to offer the cellar space to the public as a dwelling unit, the underutilized nature of the space, or the alleged inability to devote the space to any other reasonable use consistent with zoning requirements.

The Board did not determine that any hardship faced by the Applicant was undue or was the result of the strict application of the Zoning Regulations. The Applicant acquired the building as a nonconforming apartment house and obtained a certificate of occupancy authorizing its configuration as 19 dwelling units; the nonconforming use may continue. Based on the testimony and evidence in the record, the Board was not persuaded by the testimony of the Applicant or the Office of Planning that the conversion of the “unused” or “underutilized” cellar space to an additional dwelling unit – which would require a use variance as an expansion of the permitted nonconforming use – was the only potential use to which the space could be devoted in compliance with zoning requirements. *Compare, Bernstein v. District of Columbia Bd. of Zoning Adjustment*, 376 A.2d 816, 819-820 (D.C. 1977) (Board was not required, through interpretation of the zoning regulations, to legalize a use that was not legally established where that use was not in harmony with the general purpose and intent of the zoning regulations; any hardship that resulted from converting unit from an illegal use back to a legal use was self-imposed). A “mere desire to use property in a given manner, or in a manner designed to return a greater profit, does not constitute a showing of an undue hardship that will support the granting of a use variance. *Bernstein*, 376 A.2d at 820, citing *Taylor v. District of Columbia Bd. of Zoning Adjustment*, 308 A.2d 230, 236 (D.C. 1973) and *Palmer*, 287 A.2d at 540. A “use variance cannot be granted unless a situation arises where reasonable use cannot be made of the property in a manner consistent with the Zoning Regulations.” *Palmer*, 287 A.2d at 542. “At some point economic harm becomes sufficient, at least when coupled with a significant limitation on the utility of the structure.” *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C. 1990). The Board was not persuaded in this case that the Applicant demonstrated sufficient economic harm or a significant

limitation on the utility of the structure, including the 498-square-foot area in the cellar proposed for use as an additional dwelling unit, to warrant approval of the requested use variance.

The Board did not conclude that approval of the application would result in substantial detriment to the public good. The addition of one relatively small dwelling unit in the 19-unit apartment house, without any expansion of the existing building, would not likely cause any adverse impacts on the use of nearby properties, including with respect to light, air, or privacy. The Board notes that the Office of Planning characterized the likely impacts of the creation of an additional dwelling unit in the building as “minimal” and DDOT concluded that approval of the application would “not have adverse impacts on the District’s transportation network.” (Exhibits 31, 32.)

However, the Board concluded that the requested use variance cannot be approved without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. The subject property is improved with an apartment house, with a certificate of occupancy authorizing 19 dwelling units. The existing apartment house use is a nonconforming use in the R-1-B zone that may continue but may not be extended in gross floor area or intensity of use or extended to portions of the structure not devoted to the nonconforming use at the time of enactment of the zoning regulations, pursuant to Subtitle C § 204.1. The Applicant’s proposal was not consistent with that prohibition or with the purpose and intent of the Residential House zones to provide for areas of low- to moderate-density residential development where multiple dwelling unit development is discouraged. Similarly, approval of the requested variance would not be consistent with the intent of the R-1-B zone to provide for areas predominantly developed with detached houses on moderately sized lots.

Great weight. The Board is required to give “great weight” to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04.) For the reasons discussed above, the Board did not agree with OP’s recommendation that the application should be approved.

The Board is also required to give “great weight” to the issues and concerns stated by an affected ANC. (D.C. Official Code § 1-309.10(d)(3)(A).) In this case, ANC 4B indicated its support for the application in two submissions that noted the Applicant’s request for a variance “to add one additional dwelling unit to an existing apartment complex.” (Exhibits 14, 30.) The ANC’s support was premised on the proposed location of the dwelling unit as “an underutilized cellar space within the existing apartment complex” and the ANC’s conclusion that “conversion of the underutilized cellar space into a dwelling unit will not cause detriment or disturbance to the current residents or community.” The Board credits the views presented by ANC 4B; however, the ANC’s submissions did not address the criteria for approval of the requested use variance. Accordingly, the Board did not find the ANC’s advice a persuasive reason to grant the application for a use variance from the zoning restrictions on the expansion of a nonconforming use.

Exceptions to the Proposed Order. Because a majority of the Board members participating in the issuance of this order did not personally hear the evidence in this application, a proposed order was provided to the parties to afford them an opportunity to present written exceptions, in accordance with D.C. Official Code § 2-509(d).

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Based on the findings of fact and conclusions of law, the Board concludes that the Applicant failed to satisfy the burden of proof with respect to the application for a use variance from Subtitle C § 204.1 to allow the expansion of an existing non-conforming apartment house (19 units) by adding one additional dwelling unit in the basement of a building located in the R-1-B zone at 11 Nicholson Street, N.W. (Square 3383 Lots 2, 23, 24). Accordingly, it is **ORDERED** that the application is **DENIED**.

VOTE: 3-2-0 (Carl H. Blake, Chrishaun S. Smith, and Anthony J. Hood voting to deny; Frederick L. Hill and Lorna L. John opposed)

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: _____

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.

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.