7/10/2020

Frederick L. Hill
Chairperson
Board of Zoning Adjustment
441 4th Street NW
Suite 210 South
Washington DC 20001

SUPPLEMENT TO HEARING STATEMENT

Re: Application of Bridges 2 Psychological Services & Consultation, LLC

639 Atlantic Street SE BZA No. 20121

In continuing the related case of reference at its December 11, 2019 hearing, the applicant requested and the Board granted leave for a brief on the subject of the doctrine of reasonable return on investment as a basis for the granting of a use variance, as set forth in relevant case law of reference, to wit:

1. Gilmartin v. District of Columbia Board of Zoning Adjustment, 579 A..2d 1164 ("Palmer")

2. Palmer v. Board of Zoning Adjustment, 287 A.2d 535 ("Gilmartin")

Applicant notes that although the subject of appeal in both of the cited case law differ in material facts given that the relief of application were area variance from the off-street parking provisions of the Zoning Regulation – Palmer deeming the relief a hybrid – the focus in this submission is the expansive interpretation of the variance law therein, particularly in pertinent part as it affects and is relevant to the instant application.

Interpretation of the Variance Law in "Palmer"

Below are pertinent excerpts from Palmer and Gilmartin, and attendant context to the condition of the property of application as represented in the applicant's hearing statement (see Exhibit # 42)

"To support a variance, it is fundamental that the difficulties or hardships be due to unique circumstances peculiar to the applicant's property and not to general conditions in the neighborhood"

Applicant submits that the confluence of factors resulting in exceptional and undue hardship upon the owner are unique circumstances peculiar to the applicant's property and not to general conditions in the neighborhood.

The confluence of factors is:

- The fact of the subject property's uniqueness as the only single-family detached dwelling in its neighborhood of location which predominantly comprise semi-detached dwellings on smaller lots and apartment houses

- The fact of the physical shape and size of the subject property for its zone district of location, comprising over eight thousand square feet where lot sizes are predominantly less than three thousand square feet

- The unique features of the interior of the existing building, which include five-foot wide corridors, commercial grade fire alarm and sprinkler systems, self-closing doors, commercial exit signs and other accessibility features, given that the building was constructed for from inception for purposes of a Community Residence Facility for the handicapped (CRF).

- The fact of the history of use of subject premises as a CRF and never having being occupied for purposes of a private residence

- The fact of the commercial tax classification (see Exhibit # 48)

- The fact of applicant's good faith reliance upon DCRA's direction in incurring expenses for repairs to make premises compliant with construction codes for commercial use

"A Delaware court defined the term "extraordinary and exceptional situation or condition" in reference "to an economic, geographic or topographic situation or condition, connected with or affecting the lot for which the variance is sought"

Palmer cites the foregoing because Delaware and New Jersey are two States with substantially identical provisions to the District of Columbia's Zoning Laws or Regulations.

Applicant contends that the extraordinary and exceptional situation or condition connected with or affecting the subject property is both economic and geographic in that the confluence of factors adduced above conspire the foreclose the use of premises for a conforming use which permits a fair and reasonable return arising out of the ownership.

The applicant references Exhibit #s 49 and 52, the rental comparison report and mortgage statement respectively, including the owner's testimony at the December 11, 2019 public hearing to the effect that the highest possible rental income for subject property is three thousand dollars, whereas at minimum four thousand six hundred monthly income is the minimum threshold required to service mortgage debt, including utilities, maintenance costs and property taxes.

The geographic is the fact of the anomaly of its location, given that the subject property is disproportionately large and an oasis amongst the predominant lot area and type of structure in its neighborhood of location, which is directly related to an economic disadvantage

The applicant contends that there is a nexus between the anomaly of the geographic location of the subject property and its inability to attract a conforming use which will produce a positive cash flow, let alone a reasonable income, and the fact of holding the property out for lease going on two years without restriction as to use should serve as sufficient evidence to that effect

"In several states where the applicable standard is phrased in the disjunctive -- "practical difficulties or undue hardship" -- area variances have been allowed on proof of practical difficulty only while use variances require proof of hardship, a somewhat greater burden. The apparent reason for this difference is that an area variance, relating to restrictions such as side yard, rear yard, frontage, setback or minimum lot requirements, does not alter the character of the zoned district, whereas a use variance seeks a use ordinarily prohibited in the particular district. On the other hand, it has been said that the term "practical difficulties" has no significance in itself but the phrase "practical difficulties or unnecessary hardship" should be construed as a whole. Similarly, the New Jersey Supreme Court, under a statute identical to ours, expressed the view that there is no practical difference between the two phrases and that where "peculiar and exceptional practical difficulties" exist so does "undue hardship"

Applicant concedes that notwithstanding the foregoing, the burden of proof is greater for a use variance than an area variance, and that a showing of practical difficulties is applicable to an area variance whereas the more stringent undue hardship is applicable to a use variance. It is still worthy of note that the property of application's inability to attract a conforming use which will yield a reasonable income after close to two years of holding out the subject property for rent or lease in itself constitutes practical difficulties upon the owner, and that to the extent that the applicant has not been able to attract a conforming use which yields a fair and reasonable return or reasonable income, imposes exceptional and undue hardship upon the owner

"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. An inability to put property to a more profitable use or loss of economic advantage is not sufficient to constitute hardship. It must be shown that the regulations "preclude the use of the property in question for any purpose for which it is reasonably adapted, i.e., can the premises be put to any conforming use with a fair and reasonable return arising out of the ownership thereof"

The applicant submits that in light of the foregoing, both "Palmer" and "Gilmartin" which borrows heavily from Palmer, cannot be interpreted to suggest that the mere fact that a subject property can be put to a conforming use in and of itself forecloses the granting of a use variance. Such conforming use must produce a fair and reasonable return or reasonable income to obviate the granting of a use variance.

Applicant contends that holding the property out for lease over an extended period to include for any use which is conforming in the underlying zone district without success is not an

unreasonable yardstick or benchmark for concluding that market forces relating to the extraordinary situation or condition of property – that is the confluence of factors aforementioned – conspire to preclude the establishment of a conforming use which produces a fair and reasonable return or reasonable income, thereby constituting exceptional and undue hardship upon the owner of the property or the applicant in the instance.

In the course of the public hearing on December 11, 2019, there was testimony that because the owner had the option of either selling the property or redeveloping the site by subdividing the property into two separate lots, which would necessitate the complete demolition of the existing structure, that that option is evidence that a conforming use may be established, hence no undue hardship results upon the owner, if the use variance is not granted.

Applicant contends that the Board is constrained to review the application before it on its merits or its compliance with the three-prong burden of proof. The applicant seeks to use the subject property as it exists currently

Further that the reasonable use standards go to the use of the property as it exists at the time of application, not its speculative potential today or in the future and neither of "Palmer or "Gilmartin" can overtly be interpreted or construed to view reasonable use which yields fair and reasonable return or production of reasonable income in that context.

Applicant seeks to use the subject property she owns as it exists today. The subject property has undergone a downzoning in the past (see ZC-08-12) and there is no telling that the same could not happen in the future, if prevailing conditions of the neighborhood warrant an amendment to the Comprehensive Plan of the District, a living document subject to change and amendments.

In any event, applicant has provided to the record neighborhood comparable showing the sale price range for comparable semi-detached single-family dwelling to range between a low $399,500.00 to a high $547,000.00

Public tax record put the current value of the subject property at approximately $400.000.00 and when an rough construction cost of approximately $600,000.00, excluding carry costs, other soft costs and marketing cost, applicant contends that the suggested conforming use is not a viable project, nor is it one that yields a fair and reasonable return or reasonable income

"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. But it is certain that a variance cannot be granted where property conforming to the regulations will produce a reasonable income but, if put to another use, will yield a greater return"

The distinction between the use of a property for conforming use which produces a reasonable income, but if put to another use, will yield a greater return and a conforming use which results in negative cash flow is worthy of note here.

The contention in the instant application is that having held the subject property out for lease for going on two years for any conforming use, including a CRF, which could possibly attract a fair

and reasonable return, that is a return on investment or reasonable income, to no avail, is not an unreasonable basis to conclude that the adduced confluence of factors, result in an exceptional and undue hardship upon the owner; that hardship being the inability to expect a positive cash flow.

Hence the situation of the subject property is not one in which a conforming use could produce a fair and reasonable return or produce a reasonable income and the owner desires a greater yield in return, but one in which a fair and reasonable return or reasonable income is expected, the absence of which constitutes an exceptional and undue hardship upon the owner and which constitutes grounds for the granting of the use variance sought in the instant application.

An excerpt from Gilmartin states verbatim as follows:

"The statute does not preclude the approval of a variance where the uniqueness arises from a confluence of factors"

As aforementioned, applicant reiterates the confluence of factors which result in exceptional and undue hardship upon the owner

SUBSTANTIAL DETRIMENT TO PUBLIC GOOD AND SUBSTANTIAL IMPAIRMENT OF INTENT, PURPOSE AND INTEGRITY OF THE ZONE PLAN

The subject property was constructed in the early 1990s for purposes of an Intermediate Care Facility for the mentally challenged and housed six residents and two rotating staff.

Hence the floor plan and accessible features previously enumerated are akin to those common in an institution and not the typical for a single-family dwelling intended for the purpose of a private residence. In fact, the subject property has never been occupied as a single-family dwelling.

In both of its reports dated 10/18/2019 and the supplemental dated 11/27/2019 (Exhibits # 37 and 54) respectively the Office of Planning (OP) states that the proposed medical office use "should not cause substantial detriment to the public good" and that OP is "supportive of neighborhood serving medical offices" notwithstanding its recommendation of denial.

OP's rationale for concluding that granting of the use variance will result in substantial harm appears solely based on the fact that the proposed use is not allowed in the underlying R-2 zone district.

The foregoing fact in and of itself cannot be deemed to constitute substantial harm or impairment of the intent and purpose of the Zoning Regulations or no use variance can ever be granted, consequently undermining the authority of the Board to evaluate each application on its unique circumstances or merit.

Applicant contends that if approved the medical office use will not result is substantial detriment to public good and substantial harm or impairment of the intent and purpose of the zone plan for the following reasons:

- Medical office use or the home offices of a medical practitioner or dentist is permitted in the R-2 zone district under the Home Occupation provisions see U, §251.1 (h), provided that not more than 2 persons not resident on the subject premises shall be permitted as employees.

- The proposed medical office use will have only one employee

- The medical office use will operate between the hours of 9:30 AM - 5:30 PM Wednesdays and Fridays, and 1:30 PM – 5:30 PM Thursdays. Mondays and Tuesdays are off-site client counselling visits days

- In the three days of office operation, not more than 5 – 7 clients will be present on premises on any given day

- The proposed office will serve neighborhood clients in close proximity to the subject property, hence will not result in increase in traffic impact or affect street parking.

- The subject property has capacity for an on-premise parking area which will accommodate four to five automobiles.

- The objective of the owner is to bring mental health services to an underserved area so designated by the National Health Service Corps (NHSC), as a Health Professional Shortage Area (HPSA); hence there is inherent public good served by the location of the use at subject premises

Finally, OP expressed concern about the loss of a residential dwelling unit in a residential zone. To the extent that this fact is considered a substantial harm to the intent and purpose of the zone plan, applicant contends that approval of the relief sought does not result in permanent harm since the use variance if granted, does not foreclose the future of subject property for a residential purpose when market forces are conducive to permit reasonable return or reasonable income for a future owner.

For all the foregoing reasons, the applicant contends that the instant application complies with the three-prong use variance test, is consistent with the core argument or interpretation in relevant case law, and respectfully requests that the Board grant the use variance