

Before the Board of Zoning Adjustment, D.C.

Application No. 11200 - Lee Salsbery

ORDERED:

That the application of Mr. Lee Salsbery for a variance to change the use of the premises 14-16 7th Street, N.E., in the District of Columbia from a C-1 non-conforming use (grocery store) to a C-2 non-conforming use (commercial photography studio) be and hereby is, DENIED.

INTRODUCTION

The applicant, Mr. Lee Salsbery, a commercial photographer, seeks a variance to use a vacant building, formerly used as a Safeway grocery store, for a commercial photography studio. A grocery store use is a C-1 use. Zoning Regulations, § 5101.33(1). Such use with regard to the property in this case became a non-conforming use in 1958 when the area in which the building is located was rezoned R-4. The R-4 District is designed to include residential row dwellings and conversions of such dwellings into dwellings for two or more families. Commercial uses, such as the use sought here, are not permitted in the R-4 District. Zoning Regulations, § 3104. The use sought by Mr. Salsbery is a C-2 use. Zoning Regulations, § 5102.32(n). Because the proposed use involves a change from a C-1 non-conforming use to a C-2 non-conforming use, a use variance is required. See Zoning Regulations, § 7104 and R. 148-149.

FINDINGS OF FACT

1. The application for a variance was filed on July 21, 1972. The original owner/applicant was Charles E. Merrill, Jr., of Boston Massachusetts. In late 1972, or early 1973, while Mr. Merrill's application was pending before the Board, the present applicant, Mr. Lee Salsbery, signed a contract unconditionally obligating himself to purchase the subject property from Mr. Merrill for \$66,000 (R. 60, 92, 178).^{1/}

2. The subject property is located in an R-4 District and comprises Lots 45, 46, and 832 in Square 868, known as 14-16 Seventh Street, Northeast, in the Capitol Hill area of the District of Columbia. The other buildings in the unit block of Seventh

^{1/}"R" refers to the record filed in Salsbery v. Board of Zoning Adjustment, D.C. Appeal No. 7267.

Street, Northeast, are two and three story buildings built for residential use. With two exceptions, the buildings in this block are used as residences. Thus, the neighborhood has a predominantly residential character in both appearance and use. (R. 4-6, 27, 45, 93, 153, 162.)

3. Lots 45, 46 and 832 in Square 868 are improved by a one-story, red brick building designed and built in 1943 for use as a grocery store (R. 94). At the time the building was built, a grocery store operation was a permitted use in this area of the city under the then applicable Zoning Regulations. Because the neighborhood remained primarily residential, the Zoning Commission, in 1958, rezoned the neighborhood R-4 (R. 153). This rezoning rendered the grocery store use a non-conforming use and rendered the building itself a non-conforming structure since it occupies 100% of lots 45, 46 and 832. See R. 150 and Zoning Regulations, § § 3303.1 and 3304.1.

4. Safeway Stores, Inc., leased and used the building as a grocery store from 1943 until 1969 (R. 148). In that year, Safeway's lease expired. Because of the difficulty of obtaining proper insurance coverage, Safeway did not renew its lease and vacated the building (R. 41-42). Between 1969 and July 1972, when the application for a variance was filed, Mr. Merrill first offered the property for sale at \$125,000 and later offered it at \$90,000. No one expressed any interest in the property at either of these prices. Moreover the real estate agents handling the property received practically no offers for the property even at substantially lower prices. (R. 94).

5. While the property was owned by Mr. Merrill it produced rental income from 1943 until 1969. When the property was sold to Mr. Salsbery, the building had been depreciated to 10% of its original cost (R. 59).

6. It is not economically feasible to convert the existing building into a residential structure conforming to the requirements of the R-4 District (R. 99). The cost of razing the existing building is approximately \$2500 (R. 158).

7. There was no probative evidence presented at the hearing that the building, vacant since 1969, 30 years old, and encumbered as it is by its non-conforming status, has, together with the land, a fair market value of \$66,000. The evidence indicated that the property (i.e., land and building) is worth \$66,000 only if the variance sought is granted. (See R. 163, 177-178).

A letter from counsel for Mr. Salsbery to the Board (see R. 59-60) stating what counsel believed to be the assessed value of the property for tax purposes is not probative evidence of current fair market value. Such letter does not reveal when the alleged assessment was made or whether such assessment took into account the fact that the building has been vacant since 1969, cannot be feasibly converted to conforming residential use, and cannot be converted to another commercial use without either a use variance or special approval of the Board under § § 7104.2 and 7109 of the Zoning Regulations.

The fact that Mr. Salsbery paid \$66,000 for the property is not probative evidence of its fair market value as encumbered by its non-conforming status. While the building and the land may be worth \$66,000 to Mr. Salsbery if he could get a variance to use the building as a commercial photography studio (see R. 163) nevertheless, when considering whether there exists a hardship entitling Mr. Salsbery to a use variance, the Board must consider what the land and building are fairly worth in the absence of a variance.

8. Because of the age of the building, because of the restrictions placed on the building's use by virtue of its non-conforming status, and finally because it cannot be economically converted to residential use, the Board finds that in the absence of a use variance, the building's value is negligible.

9. In conformance with the requirements of the R-4 District, the land on which the building is situated can be improved with three row-type townhouses each of which would have a market value in the range of \$50,000 to \$60,000. Such structures would support a land value of approximately \$15,000 per townhouse lot, making the land worth approximately \$45,000. (See R. 43, 157-158.)

10. In view of the foregoing it is apparent that the proper use of this land is to raze the present 31-year old, red brick building and construct three row houses conforming to the requirements of this residential R-4 District. (See R. 158, 174, 177-178.)

OPINION

We are of the opinion that Mr. Salsbery has not demonstrated the kind of hardship which, under general principles of zoning law, warrants the use variance he seeks. Mr. Salsbery's attorney candidly admitted at the hearing that Mr. Salsbery's hardship really lies in the fact that he has unconditionally obligated himself to pay \$66,000 for the property and that if the variance is not granted he would lose money (R. 178). Thus, Mr. Salsbery bought the property fully knowing the zoning restrictions and then has asked this Board to grant him a variance to insure that his \$66,000 will have been well invested. This the Board cannot do. See and compare Taylor v. District of Columbia Board of Zoning Adjustment, D.C. App., 308 A. 2d 230, 236 (1973).

When Mr. Salsbery signed the contract he speculated on his ability to obtain administrative relief. In entering into a contract obligating himself to pay \$66,000, he expended money in anticipation of being granted a variance and took on a self-created hardship which did not relate to the property itself, but rather to the amount of money he obligated himself to pay for it. Such self-inflicted economic hardship is not grounds for a variance. See Clouser v. David, 114 U.S. App. D.C. 12, 309 F.2d 233 (1962); Bruzzese v. Board of Appeals of Hingham, 179 N. E. 2d 269, 271 (Supreme Jud. Ct., Ply., Mass., 1962); Appeal of Patti, 440 Pa. 101, 270 A.2d 400 (1970); and Campbell v. Zoning Hearing Board of Plymouth Tp., 10 Pa. Cmwlth 251, 310 A. 2d 444, 447 (1973). See also 2 Anderson, American Law of Zoning, § § 14.22, 14.41 and 14.42 (1968). It is fundamental to variance law that the hardship must inhere in the property itself. See D.C. Code, 1973, § 5-420(3).

Stated in other language, under the circumstances of this case and on this record, would the original applicant, Mr. Merrill, have had a hardship entitling him to a use variance if the most he could get for his property was \$45,000, i.e., the approximate value of the land? Plainly not. Thus, it is clear that a mere

change in ownership cannot create the necessary basis for the kind of hardship that is necessary to merit a use variance.

Moreover, the fact that petitioner may lose some \$20,000 or more on his investment cannot automatically entitle Mr. Salsbery to a use variance. The evidence presented to the Board, especially the testimony of John Donohue (at R. 177-178), inescapably leads to the conclusion that the building itself, situated where it is and without a use variance, has no substantial value. Since there was evidence that the land, if developed in conformance with R-4 zoning, was worth \$45,000, it follows that in paying \$66,000 for the property, Mr. Salsbery paid too high a price. If the property with a variance was worth \$66,000 to him (see R. 163), he should have made his \$66,000 contractual obligation contingent upon the obtaining of a variance. In not doing so, he made at best a risky and at worst a poor business judgment. Use variances cannot properly be granted to save an individual from the consequences of a risky or poor business judgment. See and compare North Huntington Township Board of Adjustment v. Drop, 6 Pa. Cmwlth. 64, 293 A. 2d 144, 146 (1972). See also 2 Anderson, supra, § 14.29, p. 663.

The main purpose of variances is to prevent land from being rendered useless. See Comment, Zoning Variances, 74 Harvard Law Review 1396, 1401 (1961). The denial of this application will not render this land useless. Far from it. Mr. Salsbery may, without a use variance or special approval from the Board under § § 7104.2 and 7109 of the Zoning Regulations, use the building for the purpose for which it was intended, i.e., a grocery store, merely by complying with the registration requirements of § 7110 of the Zoning Regulations.

In any event, the land upon which the building is situated has substantial value (approximately \$45,000) and is well suited to the kind of development permitted in the R-4 District. Mr. Salsbery's own witnesses testified that R-4 development of the property would provide a reasonable return on a reasonable investment in the property. Indeed, one of Mr. Salsbery's witnesses, Mr. Barrett M. Linde, a builder, testified that R-4 development of the property is the best course of action (R. 158).

In Palmer v. Board of Zoning Adjustment, D.C. App. 287 A. 2d 535, 542 (1972), the Court stated: "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." (Emphasis supplied.) Here, Mr. Salsbery's own witnesses established that a reasonable R-4 use of the property in question is possible. Accordingly, it follows that no hardship has been shown. See 2 Anderson, supra, § § 14.17, 14.18, 14.21 and 14.22.

Finally, the Zoning Regulations of the District of Columbia, like most zoning regulations applicable in other jurisdictions, express a policy that non-conforming uses should eventually be eliminated. This policy is embodied in the regulations restricting the right of the property owner to enlarge or extend the non-conforming use or structure, or to substitute a different non-conforming use without either special Board approval or a use variance. See Zoning Regulations, § § 7104 through 7110.

As Arden H. Rathkopf states in Volume 2 of his treatise, "The Law of Zoning and Planning, " 62-1 (1972):

"Non-conforming uses and structures are, by definition, alien to the homogeneity of a district created under a zoning ordinance enacted in accordance with a comprehensive plan. They were originally tolerated and protected to the extent of their scope and existence at the time of passage of the zoning ordinance because it was considered necessary so to preserve them in order to render the ordinance constitutional, the powers of the municipality in relation to zoning then being only partially realized. Moreover, from the beginning of zoning it was assumed that:

'the ultimate ends of zoning would be accomplished as the non-conforming uses terminated in time,'

by obsolescence, destruction or similar factors and that thereby the objectives of the zoning ordinance classification would be achieved.

"Because non-conforming uses and structures, so long as they exist, prevent the full realization of the zoning plan, the spirit of zoning is, and has been, to restrict, rather than increase, such non-conformities and to eliminate such uses as speedily as possible." (Footnotes omitted.)

In line with this "spirit of zoning," it would be especially inappropriate for the Board to permit a C-1 non-conforming use to be changed to a C-2 non-conforming use unless the clearest necessity for such a change is demonstrated, i.e., unless it is shown that both great and unnecessary hardship will result if the requested variance is withheld. The applicant in this case has not borne that heavy burden.

CONCLUSION

Mr. Salsbery has not demonstrated exceptional and undue hardship which relates to lots 45, 46 and 832 in Square 868, known as 14-16 Seventh Street, Northeast, in the District of Columbia. Accordingly, his application for a use variance must be denied.

BY ORDER OF THE D. C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: James E. Miller
JAMES E. MILLER
Secretary to the Board

FINAL DATE OF ORDER: JUN 28 1974

Before the Board of Zoning Adjustment, D. C.

PUBLIC HEARING -- January 17, 1973

Application No. 11200 Charles Merrith, Jr, appellant

THE ZONING ADMINISTRATOR OF THE DISTRICT OF COLUMBIA, appellee

On motion duly made, seconded and carried by a vote of 3-1, with Mr. Authur B. Hatton abstaining, the following Order of the Board was entered at the meeting of January 23, 1973.

ORDERED:

That the application for permission to change a non-conforming use from retail grocery store to a gallery and artist studio at 14 and 16 7th Street, N.E., Lots 45, 46 and 832, Square 868, be DENIED.

FINDINGS OF FACT:

1. Subject property is located in a C-1 District which is defined by the Zoning Regulations as an area of neighborhood shopping services and retail outlets.
2. The subject building was erected in 1943 as a safeway grocery store and has continued for that use until 1969 when the store was vacated.
3. It is applicant's contention that since 1969 substantial efforts to obtain a C-1 use for the property have been unsuccessful and the store has remained vacant.
4. It is applicant's contention that it suffers a hardship by reason of the subject premises being originally designed and constructed as a one story retail commercial grocery store and at the cost and expense and use of space would preclude the conversion of the building to residential purposes.
5. It is the applicant's contention that the case herein is for a variance for the Board to permit change of a retail grocery store to a C-1 non-conforming use i.e., photographic studio.

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6. It is the testimony of the real estate broker that the proposed new use lends itself to a front facade treatment that is highly compatible with the surrounding residential area. It will be a quiet dignified type of use completely in harmony with neighboring uses.

7. Pursuant to the Zoning Regulations this Board must find that the cost of converting this property into residential purpose in conformity with the existing zoning would be excessive and the income to be derived from residential occupancy would not justify the expense of conversion.

8. The file contains letters both in support and in opposition to the application herein.

OPINION:

The Board has heard lengthy testimony in this case and has reviewed a very complete file which the applicant submitted and is of the opinion that this request for change of non-conforming use will not be GRANTED.

The interpretation of the variance law which the Courts have so skillfully set forth for us in Palmer v. Board of Zoning Adjustment (Slip opinion No. 5884, D.C. App.) authorizes this Board to grant use variances only upon a showing of "Undue hardship". The use variance seeks a use ordinarily prohibited in this particular district, in this case a C-1 District. A great burden of proof is required of the applicant and it is our determination that applicant has not carried his burden.

Further, it is the policy of this Board to tolerate and protect a non-conforming use only to the extent of their scope and existence at the time of passage of the Zoning Ordinance because it was considered necessary so to preserve them in order to render the ordinance constitutional.

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Non-conforming uses, so long as they exist, prevent the full realization of the zoning plan, the spirit of zoning thus continues to foster restriction, rather than increase of such uses, and eventually have them eliminated.

Here we do not agree that the substitution of a photographic studio for a retail grocery store will not be more detrimental to the neighborhood than the prior use. The Board appreciates that the owner has been unable to secure a legitimate non-conforming use but to give weight to this factor alone against the possible detriment to the neighborhood which might result from the granting of said use, as we view it, is unwarranted in the present application.

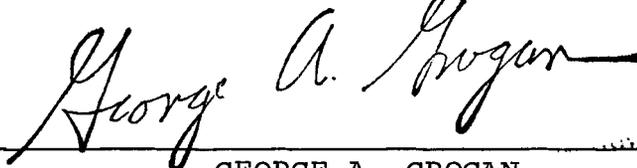
Under the principles of the law of zoning and as they are presently interpreted, we exercise our delegated discretion and deny the application.

We are of the opinion that this use will have an adverse effect upon the present character and future development of the neighborhood and will substantially impair the purpose, intent or integrity of the Zoning Regulations and Maps.

BY ORDER OF THE D. C. BOARD OF ZONING ADJUSTMENT

ATTESTED:

By: _____



GEORGE A. GROGAN
Secretary of the Board

March 15, 1973