

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 13728, of Clara Lee, pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decision of James J. Fahey, Zoning Administrator, made on January 18, 1982, that the use of the basement where the caretaker of the owner lives does not constitute a permissible accessory use in an R-3 District at the premises 2791 28th Street, N.W., (Square 2109, Lot 801).

Application No. 13661, of Clara Lee, as amended, pursuant to Paragraph 8207.11 of the Zoning Regulations, for a variance from the use provisions (Section 3103) to use the basement, first and second floors of the subject premises as a flat in an R-3 District at the premises 2791 28th Street, N.W., (Square 2109, Lot 801).

HEARING DATES: January 27 and April 21, 1982
DECISION DATES: April 21, and May 5, 1982

FINDINGS OF FACT:

1. Application No. 13661 was first scheduled for the public hearing of January 27, 1982. The application was advertised for a variance from the use provisions to use the basement, first and second floors of the subject premises as an apartment house. By motion dated January 22, 1982 and at the public hearing of January 27, 1982, counsel for the applicant requested a continuance. Counsel advised the Board that on January 22, 1982, the applicant had filed appeal No. 13728 from the decision of the Zoning Administrator that the use of the basement where a caretaker resides does not constitute a permissible accessory use. The applicant also requested permission to amend application No. 13661 to permit the applicant to seek a use variance to use the subject premises as a flat rather than an apartment house as first advertised. The Board granted the continuance. The application, as amended, was readvertised. The appeal was advertised for the same public hearing date as the amended application. The appeal and the application are consolidated for the purpose of this Final Order.

2. The subject property is located on the east side of 28th Street between Woodley Road and Cathedral Avenue, N.W., approximately 150 feet north of the intersection of Woodley Road and 28th Street, N.W. The property is known as premises 2791 28th Street, N.W. It is in an R-3 District.

3. The subject property is trapezoidal in shape and contains approximately 2,650 square feet of land area with twenty feet of frontage on 28th Street. It is improved with a two story with basement brick semi-detached dwelling measuring approximately twenty by forty feet. The building was constructed in 1962.

4. The site is surrounded on all four sides by property zoned R-3 developed with rowhouses and semi-detached dwellings. Immediately adjoining the subject structure to the north are row dwellings. To the south is a fifteen foot public alley. To the east is a vacant lot, followed by a fifteen foot public alley. To the west across 28th Street are single-family dwellings. Connecticut Avenue is located two blocks east of the site, is zoned R-5-C and is developed with apartment houses at this location.

5. The basement of the subject structure contains a living room/dining room combination, a bedroom, a full bath and a full kitchen. It is presently rented for \$325 per month.

6. Mrs. Clara Lee, the applicant/appellant, refers to the occupant of the basement as a caretaker. The caretaker is responsible for the maintenance and operation of the entire structure and grounds. The caretaker also provides many personal services for Mrs. Lee, a woman of eighty-four years, including shopping, cooking, washing, and cleaning of her apartment.

7. The first floor is occupied by Mrs. Lee and contains a living room, dining room, bedroom, bath and kitchen.

8. The second floor contains two units, each of which has a living room/bedroom area, bathroom and a kitchenette. The kitchenette consists of one unit containing stove, sink and refrigerator. The front unit rents for \$250 dollars per month. The rear unit rents for \$300 dollars per month. Mrs. Lee refers to these occupants as roomers.

9. The subject structure was constructed in 1962 as a single family dwelling. The appellant produced no copy of any building permit or plans to suggest to the contrary. The tax assessor's records indicate that the building was built as a single family dwelling. Such a dwelling is the only use permitted without a certificate of occupancy.

10. The owner applied in 1980 for a certificate of occupancy to use the subject building as a three unit apartment house. Such a use is not permitted in an R-3 District. By letter of September 19, 1980, the application for the certificate of occupancy was denied. An inspection of the subject premises disclosed that the structure

contained four residential units, as described in Findings 5, 7 and 8. Each of the units constitutes an apartment, as that term is defined in Section 1202 of the Zoning Regulations.

11. On January 13, 1982, representatives of the owner advised the Zoning Administrator that they would remove the two electric burners in the kitchenettes on the second floor. In their opinion, the second floor units would then be rooming units and not apartments. The representatives also argued that the basement unit was occupied by a caretaker and that the first floor and basement should be considered one unit. The representatives of the owner argued that the building would then constitute a single family dwelling.

11. The Zoning Administrator advised on January 19, 1982, that the kitchenettes must be completely removed from the second floor, the basement unit must be removed and made part of the house and that the maximum number of people living on the premises, other than the owner and her family, be reduced to two, to comply with the definition of a family, the definition of accessory use and the permitted number of roomers as an accessory use.

13. On January 22, 1982, the owner appealed from the decision of the Zoning Administrator that the caretaker of the owner does not constitute a permissible accessory use.

14. The property is located in an R-3 District and as such, is basically limited to use as a one family dwelling.

15. Under Section 1202, a one family dwelling is defined as "a dwelling used exclusively as the residence for one family".

16. "Family" is defined under Section 1202 as "one or more persons related by blood, marriage or adoption or not more than six persons who are not so related, including foster children, living together as a single housekeeping unit, using certain rooms and housekeeping facilities in common, provided that the term family shall include a religious community having not more than fifteen members."

17. The four people living at the subject premises do not qualify as a family. They are not related by blood, marriage or adoption. They are not living as a single housekeeping unit, using certain rooms and household facilities in common. They are not foster children. They are not a religious community.

18. The residents on the second floor at present are not roomers. The units they occupy clearly fall within the definition of an apartment as set forth in the Zoning

Regulations, "one or more habitable rooms with kitchen and bathroom facilities exclusively for the use of and under the control of the occupants thereof."

19. As to the specific issue of the subject appeal, the Zoning Administrator argued that the occupancy of the subject basement does not qualify as an accessory use. Section 1202 defines an accessory use as a "use customarily incidental and subordinate to the principal use and located on the same lot therewith." The Zoning Administrator testified that a caretaker could be an incidental use. In the subject case, where the caretaker pays a monthly rental of \$325 dollars per month, the Zoning Administrator argued that the basement tenant is not customarily incidental and certainly not subordinate to the principal use, which is an apartment house. The caretaker's payment of rent of this amount, together with the contribution of the occupants of the second floor, constitutes the principal use. The Zoning Administrator summarized that the subject structure constitutes a four unit apartment house which is a prohibited use in the R-3 District.

20. The appellant argued that the caretaker pays a low rent for the facilities provided and this favors the concept of a caretaker.

21. The Board finds that as to a building otherwise used as a single family residence, a legitimate caretaker situation would exist:

- A. Where the rent is so unreasonably low that a reasonable person would agree that a relationship other than landlord and tenant existed.
- B. Where the caretaker has an employer/employee relationship with the principal occupant of the house.
- C. Where the caretaker has no other full-time occupation.
- D. Where there is no separate, distinct individual apartment unit not under the control of the principal occupant of the dwelling.

As the previous Findings of Fact demonstrated, such is not the case in the subject application.

22. As to the application for a use variance to use the subject premises as a flat, the applicant testified that the subject structure was built in 1962 with valid building permits. The applicant testified that she relied upon advice from a zoning officer who explained to her that her intended use as a flat was not in violation of the Zoning

Regulations at that time. She testified that she was further advised that she could provide the electric burners in the second floor units and that they would not be deemed apartments. Accordingly, her building plans provided a front and rear entrance to the basement and interior stairs from the basement to the first floor unit which she occupied as a residence. The owner had anticipated that a daughter might occupy the basement unit.

23. Entrance to the first and second floors is from an exterior stairway which opens on a first floor landing. From that landing, one can proceed directly into the first floor unit or can proceed to the second floor up on interior stairway not part of the residential unit on the first floor. The house is thus constructed so as to provide separate units on the basement and first floor level and two renters on the second floor.

24. The applicant, from the foregoing testimony, argued that the BZA is now estopped from disallowing the use of the premises as a flat.

25. The applicant produced no building plans from 1962 in evidence. She was also unable to recall the name of the person who drew the plans at a zoning office. She further testified that the architect was dead, but could not establish this fact. There was also no corroborating evidence that the architect was in fact employed by the Government of the District of Columbia and that he had authority to act in the manner which the applicant attributed to him.

26. The applicant submitted conflicting evidence from the tax assessor's records. That information reflected that the subject structure was listed as a single family residence when constructed, but that subsequently the tax assessor's bill referred to the structure as a flat. The Board finds that from the evidence it cannot be clearly established whether the house was designed originally as a flat or a single family residence with roomers.

27. The applicant further argued in the alternative, that she is entitled to a variance because the hardship test is related to the physical character of the structure. If the application for a flat is denied, the applicant will be unable to use the structure for its intended purpose. The applicant intends to live in the structure until her death. She cannot afford the two mortgage and interest payment on the structure unless she can rent the basement unit. She would be forced to sell the house. Income from the two roomers alone would not meet the monthly expenses on the mortgages and the maintenance and operation expenses. The only other source of income to the applicant is her Social Security check.

28. The applicant presented no other evidence or testimony that the subject property was affected by an extraordinary or exceptional situation or condition.

29. Other than the economic hardship set forth in Finding No. 27, the applicant alleged no undue hardship arising from the strict application of the Zoning Regulations.

30. The Office of Planning and Development, by report dated April 16, 1982 recommended denial of the application. The OPD reported that the subject property could be used as a single-family dwelling in accordance with the R-3 District and as such no undue hardship would be imposed on the applicant. The OPD concluded that there is no physical condition which is unique to the subject property regarding size, shape or topography. The improvements, including the interior design and plumbing, does not constitute uniqueness. The proposed flat would be inconsistent with the surrounding R-3 zoned neighborhood whose predominant use is single-family row dwellings. The proposal would impair the intent, purpose and integrity of the Zoning Regulations. The Board agrees with the findings and recommendation of the OPD.

31. Advisory Neighborhood Commission 3C, by letter dated January 26, 1982 opposed the application for the following reasons:

- A. Apartment houses are not a permitted use in an R-3 District which is "designated essentially for row dwellings."
- B. Section 3103.2 expressly prohibits the use of any building or permits, or the erection or alteration of any building "arranged, intended, or designed to be used" for a use other than those permitted in R-3 Districts either as a matter of right under Sub-section 3103.3 as a special exception under Sub-section 3103.4, or as an accessory use under Sub-section 3103.5. Apartment houses are not included among the permissible uses listed in those sections.
- C. The rowhouse area where the project is located has an important role in the neighborhood. It creates a buffer zone between the R-5 high rise apartments on Connecticut Avenue and the R-1 single family detached residential area west of 29th Street. There is extensive pressure from the hotels and other institutional users, to reduce the already small family type of residential use to transient type of apartments and tourist homes. Therefore any additional apartment conversion is contrary to

the desired and planned characteristic of the neighborhood.

- D. The applicant is not entitled to a variance under Paragraph 8207.11 of the Zoning Regulations because there is no extraordinary or exceptional situation or condition of her specific piece of property which would support a claim that the strict application of the Zoning Regulations would result in exceptional and undue hardship upon the owner. The applicant for some time has been maintaining apartments illegally in this one-family row dwelling without having obtained a certificate of occupancy as required by Sub-section 8104.1 of the Zoning Regulations. The applicant now claims that substantial and expensive renovation would be required to restore her rowhouse to a one-family dwelling. According to the information available to the ANC, substantial and expensive renovations would be required to convert this house to an apartment house which would meet the requirements of the building code and fire regulations and thus form the basis for issuance of a valid occupancy permit. On the other hand, if the permitted use of the structure remains that of a one-family dwelling, the applicant can continue to reside in the house herself and as a matter of right provide accommodations to two roomers or boarders and the only renovation required would be the removal of the additional kitchens and other facilities which bring the accommodations within the definition of an "apartment."
- E. Even if the applicant could sustain her burden of showing that exceptional and undue hardship would result from strict application of the Zoning Regulations, she would not be entitled to the variance sought here because a variance to permit use of a one-family row dwelling in an R-3 District could not be granted without substantially impairing the intent, purpose and integrity of the zone plan as embodied in the Zoning Regulations and Map.
- F. What the applicant seeks, in effect, is not a variance but "spot" zoning of her property to a less restricted zoning classification in which apartment houses are permitted.

32. Advisory Neighborhood Commission 3C filed into the record a petition signed by approximately fifty-two residents in the community who are in opposition to the application. All of the signers have addresses in the 2700

and 2800 blocks of 28th Street and the 2700 block of Woodley Road, N.W.

33. The Board is required by statute to give great weight to the issues and concerns of the ANC that are reduced to writing in the form of a recommendation. The Board concurs in the ANC recommendation. The Board notes that the application, as amended, is not seeking relief to use the structure as an apartment house but as a flat. The Board realizes that the ANC addressed itself to the application as first advertised, not as amended. The Board finds that the issue raised by the ANC apply to a flat as well as an apartment house. As to the last issue raised by the ANC, the Board has no authority to "spot zone" property. The Zoning Commission is the proper forum for requests to change zoning. What is before the Board is a use variance. The R-3 zoning of the property would remain intact.

CONCLUSIONS OF LAW AND OPINION:

The owner seeks her relief through Appeal No. 13728 or through Application No. 13661. The Board as to the appeal, concludes that the use of the basement of the subject premises where the tenant of the owner lives does not constitute a permissible accessory use. The Board found that the resident of the basement unit has taken over the responsibilities of the operation and maintenance of the subject structure and also performs personal services for the owner. The said resident also pays a rental of \$325 a month for the use of his premises. While this rental may be low for the facilities this lessee has in the subject neighborhood, it is not so unreasonably low that, as mentioned herefore, a reasonable person would agree that a relationship other than landlord and tenant existed. Further, as set forth in Finding No. 20, the use of the basement as described herein goes far beyond what an ordinary interpretation of what an acceptable accessory use for a caretaker or live-in domestic help would be. The Board believes that the standards it has set forth in Finding No. 20 are reasonable in assessing what is "customarily incidental and subordinate to" the main use. The Board concludes that said tenant is not a caretaker and that the use of the basement at issue herein does not constitute an accessory use.

The Board notes that the appeal as filed does not relate to the Zoning Administrator's determination that the kitchen facilities be removed from the second floor. Consequently, that ruling stands and is not disturbed by the Board.

The alternative relief sought is through a use variance, the granting of which requires a showing of an

exceptional or extraordinary condition inherent in the property which creates an undue hardship on the owner of the property. The Board concludes that the nature of the improvements presently on the site and the size and configuration of the lot do not create a hardship on the owner. There is no probative evidence that the subject property can not be used as a single family dwelling in accordance with the requirements of the R-3 District. The Board concludes that since the subject structure was built after the adoption of the 1958 Zoning Regulations, the structure should have been constructed and occupied in accordance with the R-3 District requirements. The hardship argued by the owner is a personal one. It is based on an economic return. Such a hardship is no basis on which to grant a variance.

The owner also argued that the Board is now estopped from disallowing the use of the premises as a flat. The D.C. Court of Appeals has clearly stated on several occasions that the doctrine of equitable estoppel is not favored when sought to be applied against enforcement of zoning ordinances. The Court has stated that the elements that must be shown in order to raise an estoppel against enforcement of a zoning regulation are: (1) that a party, acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party seeking to invoke the doctrine.

In the subject case, the applicant has not met her burden of proof in establishing the estoppel argument. To meet the burden, the applicant must establish all four elements cited above. If the applicant fails to establish any one of the elements, there is no need for the Board to address the others. In the subject case, there is no clear evidence demonstrating that the District of Columbia acted affirmatively to approve flat use of the premises. Rather, the zoning computation sheet and the original assessment notes indicate the building was approved as a single family dwelling. There is further no evidence that the applicant relied on District approval. The applicant was unable to identify who helped her draw the plans. There was no probative evidence or testimony that such person was even connected with the District Government. The applicant clearly has not met the burden to successfully invoke the estoppel doctrine.

The Board further concludes that the requested relief can not 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. The R-3 District in which the subject site is located is a buffer area between the R-5 and C Districts along Connecticut Avenue to the east and the R-1 District to the west.

The Board concludes that it has accorded to the ANC the "great weight" to which it is entitled. In consideration of all of the preceding findings and conclusions, it is therefore hereby ORDERED that both Appeal No. 13728 and Application No. 13661 are DENIED.

VOTE as to the appeal: 5-0 (Walter B. Lewis, William F. McIntosh, Connie Fortune, Charles R. Norris and Douglas J. Patton to deny)

VOTE as to the application: 4-1 (Walter B. Lewis, Connie Fortune, William F. McIntosh and Charles R. Norris to DENY; Douglas J. Patton OPPOSED to Motion).

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

ATTESTED BY: Steven E. Sher
STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: MAR 11 1983

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

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