

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Application No. 13955, of Alan Baron and Gary Lipshutz, pursuant to Paragraph 8207.11 of the Zoning Regulations, for a variance from the minimum lot area requirements (Sub-section 3301.1) to use all floors and basement of the subject premises as a three unit apartment building in an R-4 District at premises 514 - 2nd Street, S. E., (Square 765, Lot 55).

HEARING DATES: April 27, 1983 and June 22, 1983  
DECISION DATE: September 7, 1983

FINDINGS OF FACT:

1. The application was first scheduled for the Public Hearing of April 27, 1983. The applicant requested a continuance due to illness in his family. The Chairman continued the case to the Public Hearing of June 22, 1983.

2. The subject site is located on the east side of 2nd Street, S.E., between E Street to the north and South Carolina Avenue to the south. It is in an R-4 District and is known as premises 514 2nd Street, S.E.

3. The lot is rectangular in shape, and is topographically level.

4. The site is presently improved with a two story brick row house, which has an English basement and a garage in the rear yard. Access to the property is from both 2nd Street at the front and an alley at the rear of the lot. The alley is fifteen feet wide and bisects the square at four points.

5. The property abuts similar row dwellings to the north and south. Both the lot and the structure are typical in size, shape and character for properties fronting on 2nd Street, S.E. in this square. The remainder of the square consists of row dwellings on lots of varying sizes, with Dent Public School occupying the northeast corner of the intersection of South Carolina Avenue and 2nd Street. Folger Park is located one block to the north. The surrounding area is known as Capitol Hill.

6. On May 23, 1956, Certificate of No. B1140 was issued to use premises 514 2nd Street, S.E. as a flat, first and second floors. The application for the Certificate of

Occupancy dated April 27, 1956, stated the proposed use as "Two family flat," "Applicant to reside on second floor."

7. On June 22, 1956, the Board of Zoning Adjustment, by Order No. 8256, E. F. Von Marbod, et al., applicants, granted a variance from the provisions of Sub-section 3301.1 requiring at least 900 square feet of lot area per unit, to permit the addition of one household unit each at 512 and 514 2nd Street, S.E. There is no evidence of record to indicate that a certificate of occupancy was issued under this order to use 514 2nd Street as a three unit apartment house.

8. In January of 1978, the subject property was purchased by the applicants. At the time of purchase, the property included two rental units, one each on the first and second floors, and an uncompleted English basement. Certificate of Occupancy No. B1140 for a flat was in effect at the time of purchase. One of the applicants, Alan Baron, testified that there were separate front and back doors to the English basement, and that the basement was dug out. Mr. Baron also testified that their real estate agent had advised the applicants that the property could be converted to three units based on other properties in the same block having been converted to three units.

9. On February 8, 1979, Certificate of Occupancy No. B108199 was issued to the applicants granting permission to use premises 514 2nd Street, S.E. as a flat. The Certificate of Occupancy stated that there would be "one unit in basement; one unit in 1st and 2nd floors." The application for the certificate of occupancy, dated April 21, 1978, stated the proposed use as "Flat-One unit in basement, One unit in 1st and 2nd floors." "Applicant to reside on the premises." Pursuant to this certificate of occupancy, the basement was renovated to provide an apartment unit in the premises.

10. In about April of 1979, the renovated basement unit was ready for occupancy and was rented to a tenant. The existing tenants on the first and second floors remained in place, thus creating an illegal use as three units under a certificate of occupancy for two units.

11. Mr. Baron testified that after purchasing the property in January of 1978, the applicants retained a contractor to finish the basement as a separate unit. The start of construction was delayed until the partners secured a loan, and renovations were completed in the Spring of 1979.

12. The subject premises are presently used as a three unit apartment house, with basement, first floor and second

floor each having a separate entrance, and each occupied by separate tenants.

13. In August of 1982, the owners applied for a certificate of occupancy for three units. The application was denied by the Zoning Administrator. The owners are now seeking the Board's approval of three units by applying for a variance from the minimum lot area requirements.

14. Sub-section 3301.1 of the D.C. Zoning Regulations requires a minimum lot area of 900 square feet per apartment unit, for the conversion of a building to an apartment house in an R-4 District. The subject property contains 1,900 square feet of lot area. To use the premises as a three unit apartment house thus requires an area variance of 800 square feet.

15. The applicants asserted that there are marketing difficulties in attempting to rent the first and second floors as one large unit. They further asserted that it is not economically feasible to use the structure as a flat. They also cited four properties in the same block of 2nd Street, S.E., which have been converted to three units, claiming this as a precedent for granting the requested variance.

16. The Office of Planning, in a report dated June 14, 1983, recommended that the application be denied. The Office of Planning was of the opinion that the test of uniqueness necessary in establishing a finding of practical difficulty pursuant to the criteria in the Zoning Regulations, Paragraph 8207.11, had not been met in this case. The property is not atypical in physical characteristics such as size, shape or depth compared to other properties in the square. The premises is located in a viable residential area, developed with a variety of dwelling types of varying sizes. The Office of Planning noted that a large portion of the row dwellings in the area, with or without English basements, could be redesigned to allow for three or more units given the profit incentive if it were not for the 900 square foot provision. In this case, the degree of variance is 800 square feet. The Office of Planning advised that the previous Board's order dated June 22, 1965, was no longer effective, pursuant to Paragraph 8205.11, there being no evidence that an application for a certificate of occupancy or building permit was ever filed. The Board concurs with these findings and recommendations of the Office of Planning.

17. The Capitol Hill Restoration Society, in a letter dated April 14, 1983, reported that the Society voted unanimously to oppose this application. The Society reported that the applicants have not met the burden of proof for granting the variance. The strict application and

enforcement of the existing R-4 Zoning would not be impractical and would not pose a hardship. The neighborhood has been adversely affected by the illegal use of the building and the resulting increase in density. The presence of an additional unit worsens an existing parking problem. The Board concurs with the findings of the Capitol Hill Restoration Society.

18. Advisory Neighborhood Commission 6B, by letter dated April 14, 1983, reported that the ANC voted to oppose this application and to recommend removal of the third unit in the building. The ANC based its action on its desire to prevent the "chopping up" of houses in an R-4 District, and on the complete failure of the applicants to show a hardship based on the nature of the property. The ANC further based its action, particularly as to the remedy proposed of ordering the removal of the third unit, on the history of this case, and the actions of the applicants. Construction on the third unit was begun in September, 1978. Complaints were made to the applicants by neighbors many times, and the illegal third unit was repeatedly reported by ANC 6B, the Capitol Hill Restoration Society, and the neighbors. The ANC was of the strong opinion that this blatant disregard for the zoning laws and a complete contempt of the stop work order should not be rewarded. Rather, the applicant should be ordered to remove the illegal third unit. The Board concurs with the findings and recommendation of the ANC.

19. A property owner from the 500 block of 2nd Street, S.E., testified in opposition to the application. He testified that the neighborhood had made a transition to single family occupancy of most of the row houses, except for the east side of 2nd Street where the three unit properties were established prior to 1958. He also testified that three units were constructed in the applicant's property, and operated illegally until the neighbors complained. In addition to his testimony he submitted letters from another neighbor indicating that from September, 1978, he had corresponded with the Zoning Administrator and other city agencies, requesting enforcement of the Zoning Regulations in this case.

20. The record was left open at the end of the public hearing for the applicants to submit a legal memorandum in support of the area variance relief. In the memorandum the applicants contended that they were entitled to the grant of the variance on the following basis:

- A. The variance granted in 1965 for the subject property was for the identical relief requested in the subject application. The applicants argued that, ordinarily, a second application for a variance which was previously granted and then expired must be granted, absent a showing of a

change in conditions. The applicants relied upon two Pennsylvania cases and the case of Monaco v. District of Columbia Board of Zoning Adjustment (407 A.2d, 1091, D.C. App., 1979).

- B. The variance granted in 1965 became a vested right after the owner made application for building permits and a certificate of occupancy. The applicants argued that a handwritten notation on a letter in the file of the prior BZA case evidenced that permit applications had been filed within six months of the variance approval, as required by the Regulations. Furthermore, renovations to the building were actually undertaken.
- C. The establishment of the three unit apartment house use was not terminated by the subsequent issuance of a certificate of occupancy for a flat. The applicants argued that they were unaware that someone acting as their agent had filed for and received such an occupancy permit. Further, the applicants argued that they had no intent to terminate the three unit use, and had never exhibited any indication that they intended to terminate the use.

21. In response to the issues raised by the applicants in their post-hearing brief, the Board finds as follows:

- A. The subject application can be distinguished from the prior application in several respects. The prior case involved two adjoining lots, the subject case only one lot. In the prior case there was no objection to the application. In the subject case, the Advisory Neighborhood Commission, the Office of Planning, the Capitol Hill Restoration Society and a neighboring property owner all opposed the application, for reasons set forth earlier in this order. The prior case had no evidence relating to the use history of the building, whereas in the subject case, the property has been used as an apartment house illegally for quite some time. In addition, the procedural context of the prior case was quite different from the subject case. There was no Administrative Procedure Act, no contested case, no requirement for findings of fact and conclusions of law and no record of evidence of any kind presented at the hearing. The present case was heard and decided on the benefit of an extensive record, as set forth in this order.
- B. The applicant has not established through substantial evidence that it vested its rights to the

three unit approval granted in 1965. The document referred to by the applicant is a stamp applied to a letter in the file of the Board. However, there is no evidence of a permit application in the records of the permit issuing office. Nor is there any evidence of a building permit or certificate of occupancy ever having been issued. Paragraph 8205.11 of the Regulations not only requires that an application for a permit be made, but that "Any permit approved hereunder shall be issued within a period of six months after the date of the filing of an application therefore." Any renovations to the building which were undertaken were unlawful in the sense that no permit authorizing such can be found.

- C. This Board has consistently held that it would look to the most recently issued certificate of occupancy in determining what was the most recent lawful use of a premise. In the subject case, Certificate of Occupancy No. B108199 authorizing the use of the premises as a flat is the most recent certificate of occupancy on record. Notwithstanding the applicants' assertion that they could not recall applying for a certificate of occupancy, there is nothing on the certificate itself or on the application for the certificate to indicate that it in any way was unusual. The last and continuing lawful occupancy of the premises must be considered to be a flat.

#### CONCLUSIONS OF LAW AND OPINION:

Based on the findings of fact and the evidence of record, the Board concludes that the applicants are seeking an area variance, the granting of which requires a showing through substantial evidence of a practical difficulty upon the owner arising out of some exceptional or extraordinary situation or condition of the property. The Board further must find that the relief will not cause substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan. The Board concludes that the applicants have not met their burden of proof in demonstrating a practical difficulty that is inherent in the property. The site is rectangular in shape and is topographically level. There is nothing physically unique about the site that precludes it from conforming with the R-4 Zoning Regulations. The structure has a long history of use as a flat. The Board is not persuaded by the testimony of the applicants that a flat is not a viable use. The marketing difficulties or a greater economic return on an investment as alleged by the applicants are not grounds for an area variance.

The Board cautions the applicants that it does not take lightly the continued illegal use of the subject premises. The owners have received more than sufficient warning from the neighborhood of the illegal use. The applicants acted less than prudently in their reliance on the statements of a real estate agent and a contractor that the structure could be put to a legal use of three units.

The Board further concludes that the requested relief cannot be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plans. Granting the relief would result in an increased density and an exacerbation of neighborhood parking problems. Accordingly it is ORDERED that the application is DENIED. The Zoning Regulations Division of the Department of Consumer Regulatory Affairs is hereby directed to take all necessary and appropriate actions to achieve compliance with the Zoning Regulations.

VOTE: 3-0 (Walter B. Lewis, Carrie L. Thornhill and Charles R. Norris to deny, William F. McIntosh not voting, not having heard the case, Douglas J. Patton not voting, having recused himself).

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

ATTESTED BY:



STEVEN E. SHER  
Executive Director

FINAL DATE OF ORDER: \_\_\_\_\_

JAN 24 1984

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."

13955order/BJW2