

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 15333 of the Board of Directors of the Woodley Park Towers on behalf of Ann Novel, pursuant to 11 DCMR 3107.2, for a variance from the use provisions (Sub-section 350.4) to allow a real estate office on the first floor of an apartment house in an R-5-B District at premises 2737 Devonshire Place, N.W., [Square 2106, Lots 811 (820)].

HEARING DATE: October 10, 1990
DECISION DATE: November 7, 1990

ORDER

1. The property which is the subject of this application is located on the first floor of the Woodley Park Towers Condominium at 2737 Devonshire Place, N.W. It is located in an R-5-B District. The subject site is known as Suite 5, one of the five rooms or suites in Unit F. Unit F is owned by the applicant, Ann Novel.

2. Suite 5 consists of approximately 200 square feet in floor area. It is located near the lobby entrance of the building. It is across the hall from an import-export business and across from the building's gas meter room.

3. Of the remaining rooms in Unit F, two are used for a beauty salon, one is used for a dressmaking shop and one is a grocery shop. There are a total of seven commercial uses on the first floor of the condominium building.

4. The applicant testified that she purchased Unit F in 1980 and was granted permission by the Board of Directors to operate her real estate office out of the subject site. She was under the impression that the building was zoned for commercial and residential uses. She stated that she was not aware that it would be necessary to obtain an occupancy permit for the real estate office given that she already has a permit for the beauty salon in Suites 1 and 2.

5. The applicant proposes to continue the operation of the small real estate office at the subject site. Currently, the room contains two small desks and two chairs. The applicant stated that she and her daughter, who also sells real estate, use the office to meet with clients, prepare paperwork and provide information on real estate. They are in the office about twice a week. The applicant stated that 99 percent of her business involves Woodley Park Towers residents and properties. She testified that usually, she holds an open house in the unit that is for sale. Prospective buyers come from the outside and from

within the building to see the unit. During open house, those who are interested in the property do not have to come to the office. At other times people come to the office for real estate information. The applicant stated that clients come from the outside only once or twice a month.

6. The applicant testified that her hardship lies in the fact that the property is too small to be used for residential purposes. She attempted to sell it prior to establishing her office but she was unsuccessful. The applicant maintained that she also suffers a hardship because this is her livelihood and she cannot afford to pay rent, high taxes and condominium fees for a commercial area in Unit F.

7. The applicant testified that the proposed use would not have an adverse effect on the residents or the character of the building. She also stated that the proposed use would not adversely impact the local parking supply, because she has two parking spaces that can be used by clients. Also visitors can secure a temporary permit to park in the semi-circular driveway at the front of the building. The applicant testified that she has received no complaints from any of the building's residents.

8. The applicant is seeking a variance from the use provisions of 11 DCMR 350.4 which provides as follows:

350 R-5 DISTRICTS: GENERAL PROVISIONS

350.4 The following uses shall be permitted as a matter-of-right in an R-5 district:

- (a) Any use permitted in the R-4 District subject to the requirements of Section 410 of chapter 4 and Section 303 of chapter 3 of this title;
- (b) Greenhouse or horticultural nursery;
- (c) Multiple dwellings subject to the requirements of Section 410 of chapter 4 and Section 303 of chapter 3 of this title;
- (d) Hotel, only in R-5-B, R-5-C, or R-5-D districts, in existence as of May 16, 1980, with a valid Certificate of Occupancy or a valid application for a building permit; Provided, that the gross floor area of the hotel may not be increased and the total area within the hotel devoted to function rooms, exhibit space, and commercial adjuncts may not be increased. An existing hotel may be repaired, renovated, remodeled, or structurally altered;

- (e) Residence for teachers or staff of private schools;
- (f) Youth residential care home, community residence facility, or health care facility for five (5) to fifteen (15) persons, not including resident supervisors and their families; Provided, that there is no property containing an existing community-based residential facility for five (5) or more persons in the same square and that there is no property containing an existing community-based residence facility for five (5) or more persons within a radius of five hundred feet (500') from any portion of the subject property; and
- (g) Child development center in R-5-C and R-5-D districts; Provided, that the center shall be limited to no more than twenty-five (25) individuals.

9. Also relevant to the subject application is Sub-section 351.1 which provides as follows:

351 ACCESSORY USES AND BUILDINGS (5-5)

351.1 The following accessory uses or accessory buildings incidental to the uses listed in Section 350 shall be permitted in an R-5 district:

- (a) Any accessory use or accessory building permitted in R-4 districts under Section 331 of this title;
- (b) Temporary exhibits, fund raising functions, and benefit sales for nonprofit organizations not to exceed ten (10) days in a hotel with more than one hundred (100) rooms or suites; and
- (c) Any other accessory uses or accessory buildings customarily incidental to the uses permitted in R-5 districts under the provisions of this chapter, including mechanical amusement machines that are accessory to uses specified in subsection 350.4(d), subject to the provisions of Section 2501.

10. The Office of Planning (OP), by report dated October 3, 1990 and through testimony at the hearing, recommended denial of the application.

OP stated that the apartment building is located on the north side of Devonshire Place, N.W. near Connecticut Avenue and Cortland Place. The building is surrounded on the north, east and west by Rock Creek Park. It is located in the vicinity of the National Zoological Park.

OP stated that the R-5-B District in which the building is located, permits matter-of-right development of general residential uses including single-family dwellings, flats, and apartments to a maximum lot occupancy of 60 percent, a maximum floor area ratio (FAR) of 1.8, and a maximum height of 60 feet. Adjuncts to apartment buildings are allowed with approval from the Board.

OP stated that Suite 5 is similar in size to the other four suites in Unit F. OP believes that the size of Suite 5 is inadequate for use as an apartment. However, OP stated that the applicant has failed to demonstrate why the subject space cannot be used for the sale of commodities and services adjunct to the apartment building. The proposed real estate office use would not cater to the daily needs of the residents of the building.

OP is of the opinion that the applicant has failed to show an under hardship, or that reasonable use cannot be made of the space if the application is denied. Therefore, OP recommends denial.

11. By memorandum dated May 15, 1990, to the Office of the Corporation Counsel (OCC), the Executive Director of the Zoning Secretariat requested advice on whether the Zoning Regulations may reasonably be understood to provide for approval of a use variance to allow a portion of a large residential building to be used as a commercial office, given that the building as a whole is being used in conformity with the Zoning Regulations.

12. After reviewing the request, the applicant's statement and the case law on the matter, OCC submitted a memorandum dated June 22, 1990 responding to the inquiry. In the memorandum, OCC set forth the provisions of 11 DCMR 350.4. OCC also set forth Sub-section 354.1 which provides as follows:

354 CONVENIENCE STORES IN APARTMENTS (R-5)

354.1 Sales of the following convenience commodities and services, as necessary uses and appropriate adjuncts to an apartment house which are designed to service the tenants daily living needs shall be permitted in an R-5 district if approved by the Board of Zoning Adjustment in accordance with the conditions specified in Section 3108 of chapter 31 of this title, subject to the provisions of this section:

- (a) Foods, drugs, and sundries; and
- (b) Personal services.

OCC stated that a personal service business is ordinarily interpreted to mean businesses such as barber shops, beauty parlors

OCC stated that a personal service business is ordinarily interpreted to mean businesses such as barber shops, beauty parlors and tailors. A real estate office is not a personal service in the same sense as a barber or beauty salon, in that real estate brokerage services cannot be considered necessary to serve the tenants "daily living needs." Since no provision is made in the Zoning Regulations for the type of use proposed by this applicant in a residential neighborhood, it is necessary to ascertain whether the applicant meets the criteria established for a zoning variance.

OCC concluded that the applicant could not meet the undue hardship test. OCC stated a hardship, not resulting from the location, situation or condition of the property, but solely from the owner's appropriation of it for commercial purposes without first having obtained the necessary zoning change, is not such a "hardship" as to justify a variance. Clouser v. David, 309 F. 2d 233, 234 (D.C. Cir. 1962).

OCC that stated a self-created hardship is one arising from the conduct, acts or omission of the owner of property, and not directly the consequence of the Zoning Regulations. Salisbury Board of Zoning Appeals v. Bounds, 240 Md. 547, 214 A.2d 814, 815. Further, a zoning variance is inappropriate where the circumstances rendering the property incapable of use in accordance with the land use restrictions are caused or created by the owner. Foxhall Citizens Association v. District of Columbia Board of Zoning Adjustment, 524 A.2d 761 (D.C. 1987). Where property is acquired with knowledge of the economic hardship, a property owner cannot later complain of that hardship. Where the owner knows that a municipality has zoning regulations, as in this case, but does not make an investigation to determine if the property can be used as contemplated under the applicable zoning laws, then the hardship is self-inflicted, and the court will not grant redress in the form of a variance. McLean v. Zoning Board of Adjustment of Borough of Crafton, 185 2. 2d 533, 537 (Sup. Ct. Pa. 1962).

Following these principles, OCC concluded that the applicant's only hardship is economic and self-created, and is not, therefore considered to constitute a hardship sufficient to justify a use variance. The applicant's only relief rests with the Zoning Commission.

13. Advisory Neighborhood Commission (ANC) 3C, by letter dated October 3, 1990, and through testimony at the hearing, expressed no opposition to the application. However, the ANC commented that the Board should not deny the application on the basis of self-created hardship if that hardship was created when the building was converted to condominium (an interpretation suggested more by the Executive Director's memorandum seeking advice than by the Corporation Counsel's opinion). Such a finding would have significant ramifications for the hundreds of

appropriately be reached by the Zoning Commission after a public hearing. The ANC encouraged the Board to focus on the use, rather than subdivision of the units into condominiums, when determining hardship.

14. A neighbor residing at 2901 Cortland Place, N.W., testified in opposition to the application. The opposing neighbor testified that he also owns the property at 2704 Cortland Place, located directly across the street from the subject property. He testified that the problem he has with the application is that it would allow a whole class of uses to potentially come into place, and the standards by which the neighborhood would be governed would be altogether different once the certificate of occupancy is issued in the form that is being sought. He was more concerned with the precedent than with the scale of the operation.

The opposing neighbor also testified that the applicant has not explored the alternative uses which might be viable at the site. He testified that prior to condominium conversion the subject space was used by the developers for a sales office, for construction headquarters, and for other uses that were arguably incidental to the principal use at the time. He pointed out that the developers did not seek permission to use the property for anything other than for accessory uses that were permitted under the original occupancy.

15. No one testified as a neighbor in support of the application.

16. One letter dated June 19, 1990, was received from the President of the Board of Directors of Woodley Park Towers stating that he does not object to the proposed use. He stated, however, that the Board of Directors would insist on the installation of an automatic door closer in the real estate office.

FINDINGS OF FACT:

1. The size and configuration of the property is inadequate for residential purposes.
2. The applicant did not examine the Zoning Regulations for permitted uses prior to purchasing the property.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and evidence of record, the Board concludes that the applicant is seeking a use variance to maintain a real estate office in a condominium unit located in an R-5-B District. The granting of such a variance requires a showing of substantial evidence of an undue hardship upon the owner arising out of some extraordinary or exceptional

requires a showing of substantial evidence of an undue hardship upon the owner arising out of some extraordinary or exceptional condition of the property such as exceptional narrowness, shallowness, shape or topographical condition. The applicant must further show that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the zone plan. Finally, the applicant must show that the property cannot be used for any purpose for which it was zoned.

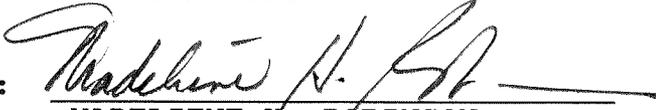
The Board concludes that the small size of the property makes it unusable for residential purposes. The Board concludes that the applicants suffer a hardship which was created when the applicant purchased the property without examining the Zoning Regulations to determine whether contemplated uses would be allowed. The Board concludes, however, that the hardship is self-created and inadequate to substantiate the granting of a use variance.

Having reached the conclusion that the undue hardship test has not been met, the Board concludes that it is unnecessary to address the remaining use variance standards.

The Board concludes that it has accorded ANC-3C the "great weight" to which it is entitled. In light of the foregoing, it is hereby ORDERED that the application is DENIED.

VOTE: 3-1 (Paula L. Jewell and Carrie L. Thornhill to deny; Lloyd D. Smith to deny by proxy; Charles R. Norris opposed to the motion; Sheri M. Pruitt not voting, not having heard the case).

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

ATTESTED BY: 
MADELIENE H. ROBINSON
Acting Director

FINAL DATE OF ORDER: APR 27 1992

UNDER 11 DCMR 3103.1, "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."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



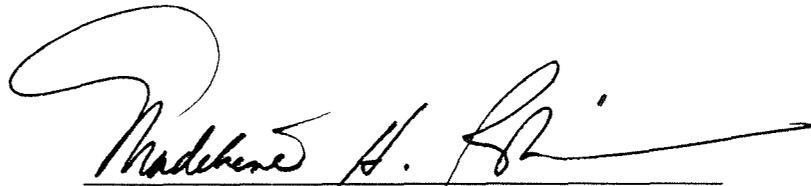
BZA APPLICATION NO. 15333

As Acting Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on APR 27 1992 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

Ann Novel
5611 Belmont Avenue
Chevy Chase, MD 20815

Patricia Wamsley, Chairperson
Advisory Neighborhood Commission 3-C
2737 Devonshire Place, N.W.
Washington, D.C. 20008

Lindsley Williams
2901 Cortland Place, N.W.
Wash, D.C. 20008


MADELIENE H. ROBINSON
Acting Director

DATE: APR 27 1992