

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17793 of Ann-Lee Chen and Ray S. Chen, pursuant to 11 DCMR §3104, for a special exception to allow a change of a non-conforming use of the subject property from a rooming house to a two-family flat under § 2003.1 in the R-3 District at premises 1693 35th Street, N.W. in Georgetown (Square 1294, Lot 0218).

HEARING DATES: July 15, 2008, October 28, 2008, and November 5, 2008
DECISION DATE: November 5, 2008 (Bench Decision)

DECISION AND ORDER

This application was submitted on February 13, 2008, pursuant to a November 5, 2007 referral letter from the Zoning Administrator, by Ann-Lee Chen and her brother, Ray S. Chen (collectively “Applicant”), the owners of the property that is the subject of this application (“Property”). In September 2006, the Applicant purchased the Property, a two story row dwelling constructed in 1900. The first floor and basement were configured and used as a one-family dwelling by the previous owner dating back to the 1950’s. The second floor was configured and used as a rooming house. The two levels are connected by an interior staircase. Certificate of Occupancy (“C of O”) No. B6124 (August 12, 1957), authorized the use of Unit No. 2 as a “Rooming House (Less Than Five Roomers).” In September 2007, DCRA issued a change of ownership C of O, No. CO 151251, to the Applicant authorizing continued use of the second floor as a “Rooming House (5) Rooms.”

The Property is located in the R-3 zone district. Pursuant to the May 1958 version of the Zoning Regulations, a rooming house is first permitted in the R-4 zone. Because the rooming house use was lawfully established, but is no longer permitted in the zone district where it is located, it is considered a nonconforming use. 11 DCMR § 199.1 (definition of “Nonconforming use”). The Applicant desires to change the nonconforming rooming house use to a dwelling unit. The creation of a second dwelling unit would result in the entire building being considered a flat, which is also a use first permitted in the R-4 district. The Applicant therefore filed this application pursuant to § 2003, which permits the Board to grant requests of this type.

The Board held hearings on the application on July 15, 2008, October 28, 2008, and November 5, 2008. The July 15, 2008 hearing was continued at the request of the Applicant. The October 28, 2008 hearing was continued at the request of the Citizen’s Association of Georgetown and

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Advisory Neighborhood Commission (“ANC”) 2E. At the close of the November 5, 2008 hearing, the Board voted, 3-0-2, to approve the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated February 28, 2008, the Office of Zoning (“OZ”) provided notice of the filing of the application to the D.C. Office of Planning (“OP”), the D.C. Department of Transportation, ANC 2E, the ANC within which the Property is located, the Single Member District for 2E02, and the Councilmember for Ward 2. Pursuant to 11 DCMR § 3113.13, the Office of Zoning published notice of the hearing date in the *D.C. Register*, and mailed such notice to the Applicant, ANC 2E, and all owners of property within 200 feet of the Property.

Requests for Party Status. ANC 2E was automatically a party to the case and appeared in opposition to the application. The ANC was concerned that, with a flat, the density of the use of the Property would be too great and would erode the R-3 one-family zoning present throughout most of the Georgetown Historic District. At the July 15, 2008 public hearing, the Board granted opponent party status to the Citizen’s Association of Georgetown. The Association opposed approval of the requested special exception on the grounds that the proposed conversion to a flat would generate negative environmental impacts, including increased traffic, parking demand, and noise, and would double the intensity of use of the Property, thereby undermining the Zoning Regulations.

Applicant’s Case. The Applicant described the proposed two-family use of the Property and explained that no new construction is contemplated with the application. The Applicant also asserted that a flat will not cause objectionable conditions or adversely affect neighboring or nearby property, noting that the current use of the Property as a one-family dwelling on the first floor and lower level and rooming house on the second floor, is a use comparable to the proposed use as a two-family flat.

Government Reports. OP filed a report with the Board dated July 8, 2008 in which it thoroughly addressed each of the elements which had to be met by the application and determined that they were all met. Therefore, OP recommended approval of the Application. Exhibit No. 25.

ANC Report. ANC 2E filed a report with the Board dated July 3, 2008, stating that at a regularly scheduled and properly noticed meeting, with a quorum of five members present, the ANC had voted unanimously to oppose the application. The ANC opined that conversion to a two-family dwelling is contrary to the intent of this R-3 zone to retain one-family dwellings in the Georgetown Historic District, and would adversely affect the community by potentially doubling the number of occupants of the Property and increasing trash generation, parking demand, noise, and rodents.

Persons in Support or Opposition. The Board received four letters in opposition and a letter from the Ward 2 Council Member requesting that the Board consider the concerns of the

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neighborhood. Exhibit No. 33. The Applicant filed a petition in support of approval of the application signed by six nearby property owners.

FINDINGS OF FACT

1. The Property is located at 1693 35th Street, N.W., on Square 1294, Lot 218, in an R-3 zone district and within the Georgetown Historic District.
2. The neighborhood surrounding the Property is a mix of educational and residential uses, including multiple dwellings, flats, and one-family dwellings.
3. Immediately to the west of the Property, across 35th Street, is The Duke Ellington School for the Arts. The primary school for the Washington International School is located one block west of the Property. The Property is located approximately three blocks east of Georgetown University and two blocks west of Wisconsin Avenue, N.W. To the south and east of the Property are 2- and 3-story row dwellings. To the north of the Property are multi-family buildings located across R Street, N.W.
4. The Property has an area of 1,665 square feet and is improved with a 2-story row dwelling with English basement, constructed in 1900.
5. Approximately 10 row dwellings located, with the Property, along the east side of the 1600 block of 35th Street, N.W., or immediately around the corner, along the south side of R Street, N.W., are used as two-family flats.
6. Of the nine row dwellings in the line to which the Property belongs, one is used as a three-unit multiple dwelling and six are used as flats, including those located immediately on either side of the Property. *See*, Exhibit No. 37, Attachment 6.
7. Some time prior to May 12, 1958, the second floor of the row dwelling began operating as a rooming house, while the first floor and basement continued to be used as a one-family dwelling. A Certificate of Occupancy dated August 12, 1957 (“the 1957 C of O”) authorizes the use of the Property for “Rooming House (Less than 5 Roomers)” on the second floor. Exhibit No. 37, Attachment 3.
8. The individual to whom the 1957 C of O was issued owned the Property until her death in late 2005.
9. When the Applicant purchased the Property in September, 2006, the rooming house was occupied and configured with five rooming units.
10. In September 2007, the Applicant applied for and received from the Department of Consumer and Regulatory Affairs (“DCRA”) a change of ownership Certificate of

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Occupancy, No. CO 151251, dated September 13, 2007, for “Rooming House (5) Rooms” on the second floor (the “2007 C of O”). Exhibit No. 34, Attachment D.¹

11. Between the C of O for the rooming house use issued August 12, 1957, and the C of O issued to the Applicant for a rooming house on September 13, 2007, ten C of Os had been issued through the years allowing the use of the Property as a flat. Exhibit No. 8.²
12. There was no time when the Property was converted to a use conforming to the R-3 district or when the nonconforming use was otherwise discontinued within the meaning of 11 DCMR § 2005.
13. As authorized by the 2007 C of O, the Applicant currently rents out the rooming units to five individuals.
14. The Applicant and four other individuals, *i.e.*, six individuals, currently occupy the one-family dwelling on the first floor.
15. Currently, a total of eleven (11) individuals occupy the Property.
16. A maximum of six unrelated persons, or any number of persons “related by blood, marriage, or adoption ... living together in a single housekeeping unit” would constitute a “family” per the Zoning Regulations, and would be permitted in each one-family dwelling unit of a flat. *See*, 11 DCMR § 199.1, definition of “Family.”
17. The Applicant intends to convert the second floor of the Property to a one-family dwelling and to rent it in the immediate future to unrelated tenants living together as a single housekeeping unit.
18. The Applicant intends to continue to use the first floor as a dwelling unit.
19. As a result of the proposed conversion of second floor space to a second dwelling unit, the Property will become a two-family dwelling, and the maximum number of “unrelated” persons who could occupy the Property will increase from eleven (11) to twelve (12).

¹Although the Applicant has apparently received no official communication from DCRA, the Zoning Administrator believes the 2007 C of O was issued in error by DCRA and that a new Certificate of Occupancy should be issued unilaterally for a maximum of four (4) roomers. At the time of the hearing and Board decision, the 2007 C of O was the only certificate of occupancy issued and operative for the Property.

²One of these C of Os, issued December 12, 1997, authorizes an “apartment building,” but appears to, in reality, authorize a flat, as it permits two units, not more, and a flat is defined as “a two-family dwelling.” An apartment building must contain at least three units and each unit must include a kitchen. *See*, 11 DCMR § 199.1, definitions of “Flat,” “Apartment house,” and “Apartment.” In contrast, a rooming house consists of “rooming units” within which no food preparation may occur. *Id.*, definition of “Rooming unit.”

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20. The potential increase of one additional resident is *de minimis* and will not create any objectionable conditions.
21. Parking is permitted on both sides of 35th Street, as well as on R Street and Reservoir Road in the vicinity of the Property. On-street parking is readily available in the immediate vicinity of the Property.
22. Most of the current residents of the Property, many of whom are university students, do not own vehicles. Undergraduate university students living within the boundaries of ANC 2E, who are not residents of the District of Columbia, are precluded by statute from obtaining reciprocity stickers, effectively preventing them from parking on the street. D.C. Code § 50-1401.02 (e) (4).
23. The trash containers at the Property are adequate and are properly maintained. The rear yard of the Property is paved to reduce its attraction to, and harboring of, rodents.
24. There have been no problems with noise emanating from the Property and there are no known police reports with regard to noise complaints at the Property in the past three years.
25. No activities resulting from the conversion to a flat will result in noise, illumination, vibration, and/or odor effects.
26. No exterior changes to the Property are proposed and the Applicant will maintain the residential character and appearance of the dwelling and the lot.

CONCLUSIONS OF LAW

The Applicant seeks a special exception to convert a structure located in an R-3 zone district from a nonconforming rooming house use, to a flat, which is also not permitted in the R-3 district. Subsection 2003.1 provides in part that “[i]f approved by the Board of Zoning Adjustment ... a nonconforming use may be changed to a use that is permitted as a matter of right in the most restrictive district in which the existing nonconforming use is permitted as a matter of right.” Since both the existing rooming house use and the proposed flat use are first permitted as a matter-of-right in the R-4 zone district, (*see*, 11 DCMR § 330.5 (d)), the application meets this prerequisite. In addition, a flat is among the uses to which a nonconforming use in a residence zone may be changed. 11 DCMR 2003.5.

In addition to meeting these objective requirements, the Board finds that the proposed use will not adversely affect the present character or future development of the surrounding area, (§ 2003.2), or create any deleterious external effects, including, but not limited to, noise, traffic, parking and loading considerations, illumination, vibration, odor, and design and siting effects (§ 2003.3).

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As to the first requirement, the Board finds that the proposed use of the Property as a two-family flat will not cause objectionable conditions or adversely affect the present character or future development of the surrounding area. First, the current use of the Property as a one-family dwelling and rooming house does not substantially differ from the proposed use as a two-family flat. The only differences are that a one-family dwelling is comprised of a single dwelling unit, all the rooms of which are occupied and controlled by the family who rents or owns it, while a rooming house consists of separate rooming units, each of which is under the control of its particular occupant, who pays for the “accommodations” on a short-term basis. The difference therefore is in the nature of the occupancy, not in the number or type of occupants. Since the uses are essentially the same, so is the intensity of use and its potential impacts.

Second, as to the total number of occupants, under the current 2007 C of O, up to 11 “unrelated” individuals would be authorized to reside at the Property. With the approval of the use of the Property as a two-family flat, up to 12 “unrelated” individuals would be authorized to reside at the Property. The Board finds that the difference in the potential impact caused by 10 or 11 individuals and 12 individuals would be negligible.

Third, several row dwellings in the immediate vicinity of the Property (along both 35th and R Streets, N.W.) are also used as two-family flats, and at least four multi-family buildings are located just a block north of the Property within the 1700 block of 35th Street, N.W. In addition, a rooming house use is a commercial one that provides transient housing and is inappropriate for an R-3 zone. Use as a flat does no more than allow two dwelling units in the same structure. As such, the Board finds that the proposed use is not incompatible with the character of the neighborhood and is appropriate and compatible with the nature of the immediate area. Use as a flat will in fact terminate a less favored nonconforming use.

As to the second showing, required by § 2003.3, the Board concludes that the proposed use will not cause any new deleterious external effects. As noted, the current use and the proposed use are essentially the same in that they both provide living space and differ only with respect to the structural and legal arrangement under which the occupancies exist. Therefore, the change will not cause an increase in noise, illumination, or other such external effects. Furthermore, although there are currently students residing at the Property, there was no evidence of complaints or police reports regarding noise or other disturbances at the Property in the last three years. Testimony and photographic evidence showed that on-street parking is readily available and effectively serves the parking demands for the Property and the neighborhood. The street frontage of the Duke Ellington School, immediately across 35th Street, is available for parking, especially in evenings and on weekends. Moreover, non-resident students are unable to obtain reciprocity stickers, which means that their out-of-state vehicles are subject to towing if parked on the street. Finally, the trash containers for the residents, located in the rear of the Property, are sufficient to contain the trash generated by Property and the Property’s rear yard area was paved over to reduce the potential for rodent infestation.

The foregoing analysis of the specific requirements for granting this special exception also satisfies the Board that the Applicant has met the general standard for granting special exception

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relief, namely that doing so will be “in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property.” 11 DCMR § 3104.1.

The Board is required to give “great weight” to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive. In its report, OP carefully laid out all the provisions that needed to be met by the application, and determined that they were all satisfied. OP recommended approval of the application and did not recommend any conditions. OP noted its previous concern that the connection from the first floor to the lower level appeared to be blocked off, resulting in a “three unit” dwelling, but testified at the hearing that it was satisfied that the two levels were indeed connected and that the building was only divided into two separate uses.

ANC 2E opposed the application. The ANC’s letter states that, in the opinion of the ANC, a conversion to a two-family flat is incompatible with the one-family dwelling residential neighborhood.³

As to the ANC’s opinion respecting incompatibility, the Board disagrees. The evidence shows that two-family flats, as well as more dense residential uses, are a fixture in the neighborhood. The conversion to a one-family dwelling is actually a more conforming, stable, and compatible R-3 use than a rooming house and is therefore in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map, as per § 3104. A flat would generally be considered less of a transient use than a rooming house, thereby fostering the objective of ANC 2E and the Citizen’s Association of Georgetown to preserve and protect the lower-scale residential character of the neighborhood. The Applicant has met all the applicable requirements of the Zoning Regulations set forth in §§ 2003 and 3104 and therefore, the application must be granted. *See, First Baptist Church of Washington v. D.C. Board of Zoning Adjustment*, 432 A.2d 695, 698 (D.C. 1981). (“If the applicant meets its burden, the Board ordinarily must grant the application.”)

For all the reasons stated above, the Board concludes that the Applicant has satisfied the burden of proof with respect to an application for a special exception pursuant to §§ 3104 and 2003 of the Zoning Regulations. Accordingly, it is therefore **ORDERED** that the application, pursuant to Exhibit No. 10, Plans, is **GRANTED**.

³The ANC’s representative also expressed considerable concern regarding the renting of the second floor to students, as did the representative of the Citizen’s Association of Georgetown. The Board notes, however, that there is no restriction in the law regarding renting to students, the first floor is already partially occupied by students, and, most importantly, even without the change to a flat herein requested, the second floor could continue to be rented to students, as it is now. Therefore, the Board finds irrelevant to its special exception analysis whether the second floor may be rented to students.

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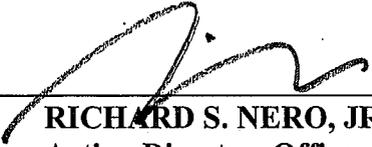
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VOTE: 3-0-2 (Ruthanne G. Miller, Mary Oates Walker and Shane Dettman to approve; fourth member and Zoning Commission member not present, not voting)

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

Each concurring Board member has approved the issuance of this order.

ATTESTED BY: _____


RICHARD S. NERO, JR.

Acting Director, Office of Zoning

FINAL DATE OF ORDER: JAN 26 2009

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE §§ 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS

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PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

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As Director of the Office of Zoning, I hereby certify and attest that on **JANUARY 26, 2009**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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