

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17852 of Ok Y. Cho, pursuant to 11 DCMR § 3103.2, for a use variance from 11 DCMR § 350.4, to allow the establishment of a nail salon business in the R-5-B District at premises 3413 Wisconsin Avenue, N.W. (Square 1914, Lot 40).¹

HEARING DATE: December 9, 2008

DECISION DATE: December 9, 2008

DECISION AND ORDER

This application was submitted on July 16, 2008 by Ok Y. Cho (“Applicant”), the operator of the business located at the property for which the use variance is sought, 3413 Wisconsin Avenue, N.W. (“subject property”). With the authorization of the owner of the subject property, the Applicant requested that the Board of Zoning Adjustment (“Board” or “BZA”) grant a use variance to allow the use of the basement level of the subject property as a commercial establishment.

The Board held a public hearing on the application on December 9, 2008, and at the close of the hearing, voted, 4-0-1 to deny the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated July 18, 2008, the Office of Zoning (“OZ”) sent notice of the filing of the application to the D.C. Office of Planning, the D.C. Department of Transportation, Advisory Neighborhood Commission (“ANC”) 3C, the ANC in which the subject property is located, the member for Single Member District 3C06, and the Council Member for Ward 6. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing in the *D.C. Register* and on September 18, 2008, mailed such notice to the Applicant, ANC 3C, and all owners of property within 200 feet of the subject property.

Requests for Party Status. ANC 3C was automatically a party to this application. There were no requests for party status.

¹This application was originally advertised in the alternative for either special exception relief pursuant to §§ 3104 and 2003.1 or for a use variance pursuant to §§ 3103 and 350.4. Since the latter is the correct relief, the caption has been changed to reflect only the variance request.

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Applicant's Case. The Applicant did not appear at the hearing, but was represented by the owner of the subject property and the owner's personal representative. The owner's representative presented the case and tried to explain how the application met the use variance test.

Government Reports. The Office of Planning ("OP") filed a report with the Board on December 2, 2008 recommending denial of the use variance, based on its determination that the application failed to meet any of the three prongs of the variance test.

ANC Report. ANC 3C did not file a report with the Board.

FINDINGS OF FACT

The subject property

1. The subject property is located at address 3413 Wisconsin Avenue, N.W., in an R-5-B zone district.
2. The subject property is improved with a 3-story row dwelling constructed in 1925, which is a contributing building to the Cleveland Park Historic District.
3. The subject row dwelling has a basement level accessible at grade at the front of the building, which is where the commercial use for which relief is being requested would be located.
4. The row dwelling is located in the center of the block and in the center of a line of dwellings, sharing a party wall with the adjacent dwelling on either side.
5. At the rear of the row dwelling is a 15-foot wide public alley.

The proposed use

6. The Applicant proposes to operate a commercial nail salon in the basement of the subject row dwelling.
7. The Applicant is not proposing any exterior modifications to the subject building, but commercial uses are not permitted in R-5-B districts, necessitating the use variance requested herein. See, 11 DCMR § 350.4.
8. The subject basement has been used as a commercial space for approximately 10 years under the auspices of various home occupation permits, at least some of which were issued for a nail salon business.
9. At least some of the home occupation permits appear to have been issued erroneously because the property was not the principal residence of the operator of the business to whom they were issued. See, 11 DCMR § 203.2.

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10. The Applicant operated a nail salon at the subject property from approximately December, 2005 to May, 2007, when it was shut down for violations of the Zoning Regulations.
11. The Applicant was issued a temporary Certificate of Occupancy (“C of O”) for a nail salon in order to allow her to continue operating while her application for a use variance was pending before the Board.
12. Prior to the issuance of the Applicant’s temporary C of O, no C of O for a nail salon use had ever been issued for the subject property.

The Variance Test

There is no exceptional condition of the property

13. The subject property is essentially the same size and shape as the other properties in the same line of row dwellings, as is the subject dwelling itself.
14. Other row dwellings in the line with the subject dwelling share the same attribute of a basement accessible at grade.
15. There is no undue hardship in using the property in compliance with the Zoning Regulations
16. There is no restriction in the Zoning Regulations on the number of residential units permissible within a dwelling in an R-5-B zone district.
17. The basement is 18 feet wide by 36 feet long, with an area of approximately 650 square feet, and includes a kitchen, a full bathroom, and adequate heating facilities.
18. There is no off-street parking requirement for the subject dwelling, but it does provide two parking spaces in its rear, accessed from the rear alley. See, 11 DCMR § 2100.5.

There would be a substantial detriment to the zone plan

19. The R-5-B district within which the subject property is situated is flanked to the north by an R-5-A district, to the south by an R-5-D district, and to the east by an R-1-B district, the latter of which is a much more restrictive district than the other three.
20. There is a C-1 district directly across Wisconsin Avenue from the subject property, which allows commercial uses such as the nail salon proposed by the Applicant. See, 11 DCMR § 701.1(c).

CONCLUSIONS OF LAW

The Board is authorized to grant variances from the strict application of the Zoning Regulations to relieve difficulties or hardship where “by reason of exceptional narrowness, shallowness, or

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shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition” of the property, the strict application of the Zoning Regulations would “result in particular and exceptional practical difficulties to or exceptional or undue hardship upon the owner of the property...” D.C. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2. The “exceptional situation or condition” of a property can arise out of the structures existing on the property itself. See, e.g., *Clerics of St. Viator v. D.C. Board of Zoning Adjustment*, 320 A.2d 291, 293-294 (D.C. 1974). Relief can be granted only “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.” D.C. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2.

A showing of “practical difficulties” must be made for an area variance, while the more difficult showing of “undue hardship,” must be made for a use variance. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). The Applicant in this case is requesting a use variance, therefore, she had to demonstrate an exceptional situation or condition of the property and that such exceptional condition results in an “undue hardship” to the Applicant. Lastly, the Applicant had to show that the granting of the variance will not impair the public good or the intent or integrity of the Zone Plan and Regulations.

The District of Columbia Court of Appeals (“DCCA”) has interpreted “undue hardship” to mean that a property cannot be put to any use for which it can be reasonably adapted. See, *Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972). (“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.”) See also, *Bernstein v. D.C. Bd. of Zoning Adjustment*, 376 A.2d 816, 819-820 (D.C. 1977) (“[I]t must be shown that strict application of the Zoning Regulations would preclude the use of the property for any purpose to which it may be reasonably adapted.”)

Although there is a history of commercial use in the subject basement space, it appears that such use has been permitted through home occupation permits. The subject property is not the principal residence of the Applicant, making the Applicant ineligible to receive such a permit. See, 11 DCMR § 203.2. The proposed use is therefore disallowed on the property and a use variance is necessary. This application, however, fails to satisfy any of the prongs of the use variance test.

Neither the property nor the row dwelling on the property is beset with any exceptional conditions or unusual circumstances. They are essentially the same as all the other properties and dwellings in the row. Nor is there any undue hardship to the property owner demonstrated here. The basement level of the subject property could reasonably be adapted to the residential use permitted in the zone. The Applicant could incorporate the basement into the rest of the dwelling. The Applicant could alternatively choose to treat it as a separate unit since multiple dwellings are permitted in this R-5-B district. The basement is large enough to be a separate dwelling unit, and it is fitted out with a kitchen, full bath, and heating equipment. The basement level lends itself to residential use as it has an on-grade entrance in the front of the building.

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As Director of the Office of Zoning, I hereby certify and attest that on MAR 20 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 and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Eddie Moy
Lisa Y. Lai
3413 Wisconsin Avenue, N.W.
Washington, D. C. 20016

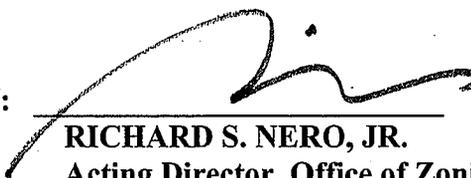
Chairperson
Advisory Neighborhood Commission 3C
2737 Devonshire Place, N.W.
Washington, D.C. 20008

Single Member District Commissioner 3C06
Advisory Neighborhood Commission 3C
2737 Devonshire Place, N.W.
Washington, D.C. 20008

Mary H. Cheh, Councilmember
Ward Three
1350 Pennsylvania Avenue, N.W., Suite 108
Washington, D.C. 20004

Bennett Rushkoff, Esquire
Acting General Counsel
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E., Suite 9400
Washington, D.C. 20002

ATTESTED BY:


RICHARD S. NERO, JR.
Acting Director, Office of Zoning

TWR

441 4th Street, N.W., Suite 200/210-S, Washington, D.C. 20001

Telephone: (202) 727-6311

Facsimile: (202) 727-6072

E-Mail: dcoz@dc.gov

Web Site: www.dcoz.dc.gov