

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17908 of Mark Merlino, pursuant to 11 DCMR § 3103.2, for a variance from the alley width requirements of subsections 2507.2 and 2507.3, to allow a one-family dwelling in the R-4 District at premises 318 7th Street, N.E.¹

HEARING DATE: 4/21/09

DECISION DATE: 5/19/09

DISMISSAL ORDER

PRELIMINARY MATTERS

This application was submitted on November 1, 2008, by Mark Merlino (“Applicant”), the owner of the property that is the subject of this application (“subject property”). The self-certified application requested a variance from § 2507.3 of the Zoning Regulations, which prohibits the conversion, for human habitation, of a nonresidential structure on an alley less than 30 feet wide.

A variance under § 2507.3 is a use variance, and the Board held a hearing on the use variance request on April 21, 2009. At the hearing, the Board set a decision date of May 19, 2009. During the hearing, facts came out which led the Board to determine that no variance relief was needed by the Applicant. Therefore, at the decision meeting on May 19th, the Board voted 3-0-2 to dismiss the application.

FINDINGS OF FACT

1. The subject property is located at address 318 7th Street, N.E., on Square 864, Lots 818 and 816, in an R-4 zone district.
2. The two lots that comprise the property make a trapezoid containing a total of approximately 1,477 square feet of land area.
3. The property is improved with a two-story brick carriage house built circa 1932, which is a contributing building in the Capitol Hill Historic District.

¹The originally-advertised address – 645 Maryland Avenue, N.E., rear – was formally changed to 318 7th Street, N.E., in 2008.

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4. The carriage house is on Lot 818, but is physically behind a building fronting on Maryland Avenue, at address 645 Maryland Avenue, N.E.
5. The footprint of the carriage house is approximately 875 square feet, and it has a lot occupancy of approximately 58%.
6. Since approximately 1950, the carriage house has housed an auto repair business, and the latest Certificate of Occupancy (“C of O”) was issued on July 8, 1997 for “auto repair and office space.” Exhibit No. 9.
7. Two parking spaces are located on Lot 816, which will remain to service the Applicant’s use of the carriage house.
8. The subject property is located at the intersection of two public alleys and has no street frontage.
9. Running along the south of the property is a 9.35-foot wide public alley, which, at the southeastern corner of the property, dead-ends into a 12-foot public alley. This 12-foot alley runs north-south along the eastern edge of the property, turns east at the northeastern corner of the property, narrows to 10 feet, and runs east to 7th Street.
10. There is a distance of approximately 110 to 125 feet from the nearest edge of the subject property to 7th Street, N.E.
11. Trash trucks use the alley system once a week to empty the trash dumpster located on the subject property, and it appears that the alley structures can be served by the fire department by running hoses down the alleys.
12. Subsection 2507.3 states that nonresidential structures located on alleys less than 30 feet in width “shall not be converted, altered, remodeled, restored, or repaired for human habitation, regardless of cost.” 11 DCMR § 2507.3.
13. In approximately 2004, the Applicant purchased the subject property, originally intending to continue to use it for a commercial purpose, such as the previous auto repair use.
14. At some point, the Applicant, who paints, decided to convert the carriage house to an artist studio with artist housing. See, 11 DCMR § 199.1, definitions of “Artist studio,” and “Artist housing.”
15. An artist studio is a matter-of-right use in this location. 11 DCMR § 2507.5.
16. Because of § 2507.3’s prohibition on human habitation in converted structures on alleys less than 30 feet wide, a one-family dwelling, i.e., a human habitation, including artist housing, is not permitted on the property, therefore, the Applicant required use variance relief from this Board in order to obtain a building permit from DCRA.

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17. Nevertheless, on November 5, 2008, DCRA issued the Applicant Permit No. B0801358 to renovate and improve the interior of the carriage house in order to make it habitable. Exhibit No. 25.
18. Permit No. B0801358 specifically permitted the Applicant to perform “alteration/repair” for a “use change from auto repair shop to artist studio/single family house, interior only.” Exhibit No. 25.
19. Permit No. B0801358 was only issued after DCRA had performed all necessary building, plumbing, and electrical inspections and final approval had been granted by its inspectors. Exhibit No. 32, first three Attachments. See also, Exhibit No. 30 (stamped plans).
20. No enlargement or addition to the carriage house is proposed by the Applicant, but at some point, he made changes to its exterior, such as installing new windows and doors and putting on a new roof.
21. The Applicant also worked with the Historic Preservation Office in doing the restoration of, and improvements to, the carriage house.
22. The Applicant spent at least \$10,000 to renovate and improve the carriage house so it could serve as an artist studio and artist housing.
23. Because no C of O is needed for a one-family dwelling in the District of Columbia, after receiving DCRA’s “final approvals” and Building Permit No. B0801358, no further permission was needed from the D.C. government before the Applicant could begin to use the carriage house as a one-family dwelling.
24. In October, 2008, in reliance on the “final approvals” and the assurance that the “permit was ready to pick up,” the Applicant set a settlement date for the sale of the house he was living in at 423 3rd Street, N.E., which he had been living in for approximately 20 years. Transcript of April 21, 2009 hearing (“Trans.”), at 96-97.
25. In reliance on the “final approvals” and Building Permit No. B0801358, the Applicant sold the house on 3rd Street and proceeded to move into the carriage house with his wife.

CONCLUSIONS OF LAW

Subsection 2507.3 stipulates that no nonresidential structure on an alley less than 30 feet wide may be converted for human habitation. It is clear from the record that, before issuing Building Permit No. B0801358, DCRA was aware that the Applicant intended to live in the carriage house and that the carriage house did not face an alley at least 30 feet wide. In the normal course of events, the Applicant should have been referred to this Board for zoning relief before a permit was issued to him allowing him to occupy the carriage house. Instead, for reasons unknown to the Board, and apparently unclear to the Applicant, DCRA first allowed, then inspected and

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approved, the work done on the carriage house, and then went even further and issued a building permit, which, without more, permitted the Applicant to inhabit the carriage house as a one-family dwelling.

Once the building permit issued, the Applicant's right to complete the *construction* authorized by that permit was "vested" pursuant to 11 DCMR § 3202.4. Because the use specified on the building permit was "artist studio/single family house" and because no C of O is needed for a "single-family house," the *use* was also vested with the issuance of the building permit. *See, Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356, 364 (D.C. 2008). ("Ordinarily, the building permit is the document that reflects a zoning decision about whether a proposed structure, *and its intended use as described in the permit application*, conform to the zoning regulations." (Emphasis added.))

At this point, the Applicant does not need a use variance to secure the issuance of a building permit, because the necessary permit has already been issued to him by DCRA. Although the one-family dwelling use is not permitted on the subject property, per 11 DCMR §§ 2507.3 and 2507.2, it has been established there with DCRA's permission. The Board cannot, through the granting of a use variance, accord the Applicant any greater magnitude of permission than he has already been accorded by DCRA.

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendation 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. ANC 6C voted unanimously to support the application. The Office of Planning recommended denial of the application. Because, however, the Board is neither granting nor denying the application, but dismissing it, it need not address these recommendations at any length.

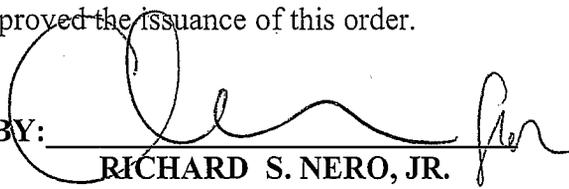
For all the reasons stated above, the Board has determined that no zoning relief is necessary to enable the Applicant to occupy the subject carriage house. Accordingly, it is hereby **ORDERED** that Application No. 17908 be **DISMISSED**.

VOTE: 3-0-2 (Marc D. Loud, Michael G. Turnbull, and Shane L. Dettman, to dismiss.
Two Mayoral appointees (vacant) not participating, not voting.)

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

A majority of Board members has approved the issuance of this order.

ATTESTED BY: _____


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

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FINAL DATE OF ORDER: AUGUST 6, 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.

LM

GOVERNMENT OF THE DISTRICT OF COLUMBIA
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As Director of the Office of Zoning, I hereby certify and attest that on AUG 06 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:

Mark Merlino
423 3rd Street, N.E.
Washington, D.C. 20002

Chairperson
Advisory Neighborhood Commission 6C
P.O. Box 77876
Washington, D.C. 20013

Single Member District Commissioner 6C06
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Bennett Rushkoff, Esquire
Acting General Counsel
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ATTESTED BY:

A handwritten signature in black ink, appearing to read "Richard S. Nero, Jr.", is written over a horizontal line.

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

TWR