

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Board of Zoning Adjustment**



**Application No. 17989 of Stephen A. W. McKinney**, pursuant to 11 DCMR § 3103.2, for a variance from the alley width requirements under §§ 2507.2 and 2507.3, and a variance from the lot area requirements under § 401, to convert an existing non-residential structure on an alley lot to a one-family dwelling in the R-2 zone district, at premises 4615 Rear 42nd Street, N.W. (Square 1732, Lot 816).

**HEARING DATES:** November 3, 2009 and February 2, 2010  
**DECISION DATE:** March 2, 2010

**DECISION AND ORDER**

Stephen A. W. McKinney, the owner of the subject property, (the “Applicant”) filed this application for variance relief on July 2, 2009. Following a public hearing on February 2, 2010 and a Decision Meeting on March 2, 2010, the Board of Zoning Adjustment (the “Board”) voted to approve the requested relief.

**PRELIMINARY MATTERS**

**Applicant Representation**

The Applicant authorized Martin P. Sullivan, Esq., to represent him during the Board proceedings. (Exhibit 7).

**Self-Certification**

The zoning relief requested in this case was self-certified pursuant to 11 DCMR § 3113.2. (Exhibit 6).

**Notice of Public Hearing**

Pursuant to 11 DCMR 3113.13, notice of the hearing was sent by the Office of Zoning to the Applicant, all owners of property within 200 feet of the subject site, Advisory Neighborhood

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Commission (“ANC”) 3E, and the District of Columbia Office of Planning (“OP”).

**Posting**

The Applicant posted placards at the property regarding the application and public hearing in accordance with 11 DCMR § 3113.14 through § 3113.20. He also submitted an affidavit to this effect in accordance with 11 DCMR §§ 3113.19 and 3113.20. (Exhibit 23).

**ANC 3E**

The subject site is located within the jurisdiction of ANC 3E, which is automatically a party to this application. In this case, the ANC filed two reports. In a report submitted October 26, 2009, ANC 3E indicated that, at a regularly scheduled monthly meeting with a quorum present, it voted to oppose the application. The report also indicated that the ANC would reconsider the application should the applicant postpone its November 3, 2009 hearing before the Board and commence discussions with the neighbors in opposition to the project. (Exhibit 25). The Board hearing was postponed, discussions with the neighbors took place, and the ANC reconsidered the application. In its second report submitted January 21, 2010, the ANC indicated that, at a regularly scheduled monthly meeting with a quorum present, the ANC voted to support the application, provided that the converted residential property was owner-occupied<sup>1</sup>. (Exhibit 27).

**Requests for Party Status**

ANC 3E was automatically a party to this proceeding. The Board also received two requests for party status from nearby property owners, one from Bruce Lowrey, residing at 4117 Brandywine Street, N.W. (Exhibit 21), and one from Rosalinda Liendo, residing at 4615 42<sup>nd</sup> Street, N.W. (Exhibit 29). Although Mr. Lowrey’s request was timely filed, Ms. Liendo’s request was not filed a minimum of 14 days before the Board hearing, as required by § 3106.2. The Board waived this requirement and allowed Ms. Liendo’s late filing after finding that Ms. Liendo had also emailed her request to the Office of Zoning on an earlier date. The Board granted both requests for party status and, with no objection from the Applicant or either neighbor, the Board directed Mr. Lowrey and Ms. Liendo (the “Neighbors”) to consolidate their presentations and proceed as a combined party.

The Neighbors each detailed their opposition to the application in their requests for party status.<sup>2</sup> In addition, Mr. Lowry filed a comprehensive pre-hearing statement in opposition to the application. (Exhibit 30). Among other things, the Neighbors contend that the conversion of the

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<sup>1</sup> The ANC resolution compelled the property owner to record a covenant in the land records requiring that, if used as a residence, the property would be owner-occupied unless future changes to the zoning code allowed residential use as a matter of right.

<sup>2</sup> The Neighbors object to the variance to convert the property to residential use. However, they took no position with respect to the area variance from the minimum lot dimension requirements.

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existing structure into a one-family residence would increase the residential density around their homes, and result in problems with traffic and parking near their properties. They also contend that the property could be used as a residence for college students and a site for “frat parties” that would disturb neighboring property owners. Ms. Liendo also testified that she wished to purchase the subject property to provide parking for her own residence next door. (Hearing Transcript of February 2, 2010, (“T.”), p. 210; *See also*, Exhibit 30).

**Persons in Opposition**

No persons appeared at the hearing to testify in opposition. Nor were any letters submitted into the record from persons in opposition to the application.

**Persons in Support**

There were no written submissions by persons in support of the application. However, the Board received testimony in support from Mr. John LeMon, a neighboring property owner who has resided at 4619 42<sup>nd</sup> Street, N.W. for 32 years. Mr. LeMon testified that he did not believe that residential use of the subject property would significantly increase the amount of traffic in and around the alley. He also stated that Mr. McKinney’s residence at the property would be an “improvement” to the security of the alley and the integrity of the neighborhood. (T., p. 199-200).

**Government Reports**

**OP Report**

OP reviewed the application and prepared a report recommending denial of a variance from the alley width requirements and disallowance of the conversion to residential use. (Exhibit 28). The report stated that, should the Board allow the conversion to residential use, OP would support the variance from the lot area requirements in order to facilitate conversion of a tax lot to a record lot. (Exhibit 28).<sup>3</sup> The report further stated that the Applicant had not shown that denial of the variance would cause undue hardship, or that granting the variance would not harm the intent of the zone plan. In particular, the report asserted that the carriage house had been renovated for artist studio use, a permitted use in the zone, and the Applicant had not shown that this use could not “reasonably operate”. (Exhibit 28). OP’s representative, Paul Goldstein, also testified to this effect at the public hearing.

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<sup>3</sup> The Applicant asserts that DCRA requires this variance in order to obtain a record lot. It is not clear to the Board that this is so. However, as this is a self-certified application, and there is no opposition to the variance from the minimum dimension requirements, the Board will not second-guess the Applicant’s request. As the Applicant notes, the adjacent lots are not owned by the Applicant and he is, therefore, unable to make the property conform to the minimum lot dimensions without area relief.

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District of Columbia Fire and Emergency Medical Services (“FEMS”)

OP noted in its report that FEMS had reviewed the proposal and had no objection to the application, so long as construction was in compliance with the Fire Code and all relevant laws. (Exhibit 28).

**Closing of the Record**

At a public hearing on February 2, 2010, Mr. McKinney and the Neighbors each presented their case and, except for allowing specific documents from each of the parties, the Board closed the record.

**Post-Hearing Submissions**

In response to the Board’s directive, Mr. McKinney submitted filings which detailed (a) his investment in the subject property, (b) the fair market value (on a per square foot basis) of an artist studio which is comparable in size to the subject property; and (c) information regarding classification of the property for tax assessment purposes. (Exhibit 33). The Neighbors submitted a timely response to Mr. McKinney’s filings. (Exhibits 34 and 35).

**FINDINGS OF FACT**

The Site

1. The property is located at Lot 816 in Square 1732 in the R-2 zone district.
2. Lot 816 is a 2,700 square-foot rectangular-shaped lot located in the American University Park neighborhood. The lot was created in approximately 1948 and is located behind several lots under separate ownership.
3. The lot has no street frontage. It abuts an improved 20-foot wide alley. The property is, thus, an “alley lot” which, under the Zoning Regulations, is “a lot facing or abutting an alley and at no point facing or abutting a street.” 11 DCMR § 199.
4. It is the only alley lot within the Square.
5. The lot is improved with a stone structure that was built as a carriage house during the early 1900s. It was built by the Louis Perna Stone Company to house the carts and mules used to bring stone into the District from a quarry in Maryland.
6. The carriage house is approximately 1,300 square feet in size, contains two stories plus a cellar, and has a footprint of approximately 700 square feet.

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7. The property slopes sharply from the front (on the alley) to the rear of the carriage house. To accommodate this slope, a full walk-out exists in the rear (approximately 10-12 feet high), even though the depth of the building is only 23 feet.
8. A gated concrete driveway is along the side of the carriage house and leads to the rear, where there is space to park several cars.

The Surrounding Area

9. Square 1732, which includes the property, is bordered by Chesapeake Street to the north, Wisconsin Avenue to the east, Brandywine Street and River Road to the south, and 42nd Street to the west.
10. The rear alley is located directly behind Wisconsin Avenue, bordering several commercial structures in the C-2-A zone district. However, the property is surrounded on its three remaining sides by residential structures and uses, mostly one-family dwellings.

Use of the Property

11. In 2001, the Applicant purchased the carriage house, which was then in a deteriorated condition.
12. The Applicant renovated the carriage house in 2003 under a building permit that was approved as an artist studio. He spent approximately \$175,000.00 to renovate the property. After the renovation, the Applicant attempted to rent the property as an artist's studio. While the Applicant received a few inquiries from potential tenants, the interested persons desired to use the artist studio as a residence as well as a working artist studio.
13. Since the Applicant purchased the property, it has been vacant or used intermittently for storage.
14. The carriage house was vacant at the time of the public hearing.

The Project

15. The Applicant proposes to use the existing carriage house as a residence.
16. The Applicant is not proposing any expansion to the building and the existing parking would remain at the property.

The Zoning Relief

17. Although one-family dwellings are permitted in the R-2 zone district, they are not permitted

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on an alley lot unless the lot abuts an alley which is 30 feet or more in width. 11 DCMR § 2507.2. Since the abutting alley is only 20 feet wide, a variance is required from § 2507.2 of the Regulations. A variance is also required from § 2507.3, which expressly prohibits the conversion of non-residential structures on alley lots to residential structures.

18. In contrast, artist studios are permitted as a matter of right on alley lots; and a storage facility, parking lot, parking garage or public storage garage is permitted by special exception, and is not subject to the minimum alley width requirement. See, 11 DCMR § 2507.5 and § 2507.6.
19. The minimum lot size in the R-2 zone district is 3,000 square feet. 11 DCMR § 401. As the lot is only about 2,700 square feet in size, the Applicant also seeks a variance from this section of the Regulations.<sup>4</sup>

The Exceptional Condition

20. The property is located on a substandard alley lot which pre-dates the current version of the Zoning Regulations adopted on May 12, 1958 and is the only alley lot in the square.
21. The structure on the lot – the carriage house – is a very unusual structure which has existed for approximately 100 years.
22. Even if redevelopment were permitted under the Zoning Regulations, it would not be feasible due to the severe slope of the property.

Undue Hardship

23. The only matter of right use at the property is use as an artist studio and the only uses permitted by special exception are uses for storage and parking. 11 DCMR § 2507.5 and § 2507.6.
24. The Applicant was unable to rent the property as an artist's studio despite attempts to do so for approximately two years.
25. No permitted use would provide the Applicant with a fair and reasonable return on his investment. The Applicant needs to charge approximately \$2,800.00 per month (or \$3.30 per square foot) in rent to receive a reasonable return on his investment. (See, Exhibit 33, positing a six percent return on the Applicant's investment in the property.) The Applicant would receive only about \$750 per month if the property were rented as an artist studio and \$400.00 per month if rented for storage. (See, Exhibit 33, Tab B, p.1 analysis based on rents for artist studios in comparable spaces).

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<sup>4</sup> As noted in the discussion of "Preliminary Matters", this portion of the application is unopposed.

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26. It is not feasible to use the property for parking which would use only the private garage in the basement floor, and would necessitate the hiring of a parking attendant.
27. Because there is no viable use for the property, other than residential use, the property is at risk for becoming classified as a vacant structure for tax purposes. If taxed at the rate for vacant properties, the value in the property would be rapidly extinguished. (See, Exhibit 33).

Impact of the Residential Use

28. Residential use of the carriage house will have a negligible impact on neighboring property owners. The carriage house includes just two rooms and would not reasonably accommodate more than two residents. Therefore, it will not significantly increase density or traffic in the area. Any additional traffic will likely be unnoticed when compared with the existing traffic generated by the nearby Friendship Animal Hospital.
29. Residential use will not adversely impact the privacy of neighboring property owners. The carriage house has only one small window and is screened by at least three very full trees and other greenery. Mr. Lowry's lot is more than 80 feet away from the subject property. Therefore, his privacy will not be significantly affected by the residential use of the carriage house. The Applicant has installed a fence at the property, which will protect the privacy of neighboring property owners such as Ms. Liendo, as well as the privacy of the Applicant.
30. There is no evidence that the level of privacy associated with residential use at the property will differ greatly from the level of privacy associated with use as an artist studio.
31. There is no evidence that residential use will be detrimental to the zone plan. The two-story carriage house with garage lends itself to residential use and will be compatible with neighboring residential properties in an R-2 zone district.

CONCLUSIONS OF LAW

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797; D.C. Official Code § 6-641.07(g)(3) (2001)), to grant variances from the strict application of the Zoning Regulations. As stated above, the Applicant here seeks relief from the alley width requirements under §§ 2507.2 and 2507.3, and relief from the lot area requirements under § 401.<sup>5</sup>

Under the three-prong test for variances set out in the Zoning Act and re-stated at 11 DCMR § 3103.2, a property owner must demonstrate that (1) its property has an exceptional size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property;

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<sup>5</sup> As stated previously, the variance from the lot area requirements is unopposed. Therefore, the following analysis under the variance test will focus on the variance to convert the property from non-residential use to residential use.

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(2) the applicant will encounter practical difficulties or undue hardship if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan.

The threshold question for the Board in this case is whether relief from the alley width requirements and the conversion to residential use is an area variance or a use variance. As the Applicant seems to concede,<sup>6</sup> the Board concludes that a use variance is required in this case. The Board has previously held that conversion of an existing building on an alley lot to a residential use requires a use variance, since what is at issue is the use of the premises for human habitation. See, *Application of Alley Cat Mews, L.C.C.*, BZA Case No. 17656 (December 15, 2008); *Application of Stephen B. Naylor and Barbara A. Levi*, BZA Case No. 12982 (November 5, 1979); and *Application of Dayton Investments, Inc.*, BZA Case No. 12934, (August 7, 1979). This case, like the cases above, involves an expressly prohibited use.

Thus, the Applicant in this case must meet the “undue hardship” test for a use variance. (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. Bd. of Zoning Adjustment*, 287 A.2d 535 (D.C. 1972). Accordingly, when considering the second prong of the variance test, the Board will consider the “undue hardship” standard rather than the “practical difficulties” standard.

Turning to the first prong of the variance test, the Board finds that the property is exceptional in several respects. The structure – a carriage house with a footprint of only 700 square feet, and the lot – a substandard alley lot which predates the current version of the Zoning Regulations – are both very unusual.

As to undue hardship, the Applicant has established that strict application of the Zoning Regulations in this case will result in undue hardship. Only three uses are permitted for the carriage house under a strict application of the Zoning Regulations, an artist studio as a matter of right, and storage and parking uses by special exception. Neither the artist studio use nor the parking or storage use will result in a fair and reasonable return of the Applicant’s investment. (Findings of Fact 24-26). Use as an artist studio is not financially viable. (Findings of Fact 24-25). Nor is use for storage or parking. (Finding of Fact 26). The Applicant testified that he would receive no more than \$400 per month in rent for storage, and he would need a valet attendant to rent out the four parking spaces. (T., p. 151 and 225-226).

The OP report disputes that undue hardship was established. However, Mr. Goldstein conceded that when he wrote the OP report, he was not aware of the Applicant’s failed attempts to market the property over a two-year period or the fact that prospective tenants desired to live at the property as well as work at the property. (T., p. 191-192).

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<sup>6</sup> During closing remarks, counsel for the Applicant stated that he accepted previous Board rulings on this point. (T., p. 224).

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Turning to the third prong of the variance test, the Board concludes that the conversion to residential use as a one-family dwelling will not be a detriment to the public good or to the zone plan. As explained, there is no evidence that use of the carriage house as a one-family dwelling will adversely impact neighboring property owners in any way. (Findings of Fact 28-30). Nor is there any evidence that the residential use at the property will substantially impair the intent, purpose, and integrity of the zone plan. (Finding of Fact 31).

The Board also grants the variance for relief from the minimum lot area requirements, which is an area variance and, thus, held to the less difficult “practical difficulties” standard. This standard has been met. Because the adjacent lots are not owned by the Applicant, the Applicant cannot annex any of these parcels. Therefore, he is unable to make the property conform to the minimum lot dimensions without area relief. The Applicant has been advised that he cannot use the property as a principal building for residential use without such area relief. Given that no matter-of-right use is available for the property under the stricter undue hardship test, it follows that any related area variances should be granted.

Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10 (d)(3)(B)) requires that the Board’s written orders give “great weight” to the issues and concerns raised in the recommendations of the affected ANC. Specifically:

The written rationale of the decision shall articulate with particularity and precision the reasons why the Commission does or does not offer persuasive advice under the circumstances. In so doing, the government entity must articulate specific findings and conclusions with respect to each issue and concern raised by the Commission. Further, the government entity is required to support its position on the record.

As noted, the ANC supported the application, so long as the property was owner-occupied and so long as the Applicant agreed to encumber the property with a covenant effectuating this condition. The Applicant represents that the residence will be owner-occupied, and has proffered that a covenant to this effect will be recorded in the land records. However, the Board will not impose a condition which restricts the property to an owner-occupied use because the Board has no basis upon which to do so. The Board cannot impose a condition unless it is needed to mitigate a potential adverse impact and the record points to no adverse impact from renting the property. Nevertheless, while the Board does not impose a condition that the residence be owner-occupied, the Board notes that the residence will be owner-occupied as the result of an agreement between the Applicant and the ANC.

The Board is also required under D.C. Official Code § 6-623.04 (2001) to give “great weight” to OP recommendations. The OP report had two major concerns: (a) OP opined that the Applicant had not established the “undue hardship” under the second prong of the variance test; and (b) OP

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opined that the granting of the application would result in harm to the zone plan. For the reasons stated in this Decision and Order, the Board does not find OP's advice to be persuasive.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the application is hereby **GRANTED** to allow zoning relief from the requirements under § 2507.2, § 2507.3, and § 401, allowing a variance from the alley width requirements and conversion from a non-residential structure to a one-family dwelling on an alley lot which does not meet the minimum area and width requirements.

**VOTE:**        **4-0-1**        (Marc D. Loud, Meridith H. Moldenhauer, Nicole C. Sorg, and Konrad W. Schlater to Approve; Shane L. Dettman not present, not voting)

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

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

ATTESTED BY:   
JAMISON L. WEINBAUM  
Director, Office of Zoning

SEP 13 2010

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

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 SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

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, STATUS AS A VICTIM OF AN INTRAFAMILY OFFENSE, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS

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ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Board of Zoning Adjustment**



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As Director of the Office of Zoning, I hereby certify and attest that on September 13, 2010, 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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Ms. Rosalinda Liendo  
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**ATTESTED BY:**



**JAMISON L. WEINBAUM**

**Director, Office of Zoning**