GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 18448 of 3579 Warder Street LLC, pursuant to 11 DCMR § 3103.2, for variances from the lot area requirement under § 401.3, lot occupancy requirement under § 403.2, and nonconforming structure requirements under § 2001.3 to allow the conversion of a rooming house into a four-unit apartment building in the R-4 District at premises 1221 Otis Place, N.W. (Square 2829, Lot 57).[1]

HEARING DATE: November 27, 2012
DECISION DATE: January 15, 2013

DECISION AND ORDER

This self-certified application was submitted on June 12, 2012 by 3579 Warder Street LLC (the "Applicant"), the owner of the property that is the subject of the application. The application, as amended, requests area variances from requirements pertaining to maximum lot occupancy under § 403.2, the enlargement of a nonconforming structure under § 2001.3, and minimum lot area under § 401.3 to allow the enlargement and conversion of a two-story, 11-bedroom rooming house to a three-story, four-unit apartment house in the R-4 District at 1221 Otis Place, N.W. (Square 2829, Lot 57). Following a public hearing, the Board of Zoning Adjustment ("Board") voted to approve the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated August 1, 2012, the Office of Zoning provided notice of the application to the Office of Planning ("OP"); the District Department of Transportation ("DDOT"); the Councilmember for Ward 1; Advisory Neighborhood Commission ("ANC") 1A, the ANC in which the subject property is located; and

[1] This self-certified application was amended at the public hearing to request variance relief from requirements pertaining to lot occupancy and the enlargement of a nonconforming structure, in addition to the variance from the lot area requirement initially requested. The Applicant requested the amendment after becoming aware of a mistaken calculation of lot occupancy in the initial application. The caption has been revised accordingly.

Single Member District/ANC 1A07. Pursuant to 11 DCMR § 3112.14, on September 17, 2012 the Office of Zoning mailed letters providing notice of the hearing to the Applicant, ANC 1A, and the owners of all property within 200 feet of the subject property. Notice was also published in the *D.C. Register* on September 21, 2012 (59 DCR 10996).
Party Status. The Applicant and ANC 1A were automatically parties in this proceeding. The Board granted a request for party status in opposition to the application from Elias Wolfberg, the owner and resident of a property abutting the Applicant's property to the west.

Applicant's Case. The Applicant provided evidence and testimony from Mohammed Pishvaeian, representing 3579 Warder Street LLC, and from the project architect, James Killette. The witnesses described the proposed project and asserted that the application satisfied all requirements for approval of the requested zoning relief. The Applicant submitted a "profit and loss analysis" in support of its contention that conversion to a three-unit apartment house, as suggested by OP, would not be financially feasible, in part due to the costs of renovating the property from its prior use as a rooming house.

Party in opposition. The party in opposition objected to the Applicant's proposal "to convert a single-family dwelling house, protected by and classified under R-4, into a three-story, four-unit condominium complex." (Exhibit 34.) The party in opposition asserted that the building at the subject property was no longer an 11-room rooming house, as the Applicant lacked both a certificate of occupancy and a business license to operate a rooming house. According to the party in opposition, the application did not satisfy the requirements for variance relief but was an attempt by the Applicant to maximize return on investment, and would create an apartment building, containing four units in three stories, that would be out of character with the surrounding neighborhood of predominantly two-story one- or two-family dwellings. The party in opposition also objected that the planned third story at the subject property would compromise the view from his property, and that approval of the requested zoning relief would encourage other property owners in the neighborhood to seek approval of additional units in their buildings, which would alter the current lower-density character of the neighborhood.

OP Report. By memorandum dated November 20, 2012, OP indicated its lack of support for variance relief that would allow the conversion of the Applicant's building, after enlargement, to a four-unit apartment house, although OP could potentially support conversion of the existing building into three apartments. According to OP, conversion to three units would be economically feasible and would require a smaller degree of variance relief and thus would be more consistent with the intent of the Zoning Regulations. The report further concluded that approval of the requested zoning relief "would be contrary and detrimental to the intent and integrity of the Zoning Regulations." The report noted that the Zoning Commission had recently adopted amendments to the R-4 zone to "clarify and reinforce" that this zone district was not intended to be an apartment zone. (Exhibit No. 30.) By supplemental report dated January 7, 2012, OP reiterated its lack of support for the variances requested by the Applicant from the requirements pertaining to lot area and lot occupancy. (Exhibit 37.)

DDOT. By memorandum dated November 19, 2012, the DDOT indicated no objection to approval of the requested variance. (Exhibit 31.)

ANC Report. At a public meeting on November 14, 2012, with a quorum present, ANC 1A voted 6-1-1 in support of the application and recommended that the Board grant the requested relief. ANC 1A indicated no concerns with the Applicant's proposal, as finally revised. (Exhibit 33.)

Persons in support or in opposition. The Board received several letters in support of the application from residents living in the vicinity of the subject property. The letters stated that the Applicant's project would not have a substantially adverse effect on the use or enjoyment of the residents' nearby homes, or affect their light, air, or privacy, but would be comparable to other projects in the immediate vicinity and would not visually intrude on the character, scale, or pattern of houses in the neighborhood.

The Board also received a letter in opposition to the application from a neighbor of the subject property, who asserted that the application had not satisfied the requirements for variance relief and cited concerns that the density of the Applicant's proposal would cause substantial detriment to the public infrastructure, the availability of parking, and the cohesion of the row of two-story dwellings that comprise the street's architecture.

FINDINGS OF FACT

The Subject Property

1. The subject property is an interior lot located on the north side of Otis Place, N.W. near its intersection with 13th Street (Square 2829, Lot 57). The parcel is rectangular, 18 feet wide and 100 feet deep, and has an area of 1,800 square feet. A public alley, 10 feet wide, abuts the rear lot line.

2. The subject property is improved with a row building, built around 1909, that is two stories in height and has a cellar. The building at the subject property occupies approximately 65.5% of the lot.[2] The property has a rear yard of 34 feet. Two parking spaces are located at the rear of the lot, accessible from the public alley.

3. The building on the subject property is attached to a similar building, one of a series of row buildings, on the east. The western side of the building, which contains several windows on both floors, abuts the rear yards of five residential row buildings that front

[2] The Applicant originally stated that the existing lot occupancy at the subject property was 54%. However, the Applicant subsequently realized that an error had been made in that calculation and corrected the application to state that existing lot occupancy was 65.5%. The party in opposition asserted that existing lot occupancy was 68%. Even if true, that higher figure would not alter the Board's analysis of the Applicant's request for variance relief.

on 13th Street, separated by a walkway between the Applicant's building and the rear yards.

4. The building on the subject property was formerly used as a rooming house with as many as 11 bedrooms. Exterior stairs were installed to provide access from both floors of the building to the rear yard. The building is presently in a deteriorated condition, has an inefficient layout due to the numerous bedrooms, and lacks a kitchen.

5. The subject property is located in an R-4 District mapped between C-2-A Districts along 11th and 14th Streets and a C-3-A District along Georgia Avenue.

6. The majority of lots in the immediate vicinity of the subject property are developed with row or semi-detached dwellings, generally two or three stories in height. A number of apartment houses, as well as a shopping area, are located within a half-mile of the subject property.

The Applicant's Project

7. The Applicant proposes to construct a third-story addition to the existing building, and to convert its use to a four-unit apartment house. The addition will be constructed of brick and will occupy substantially the same building footprint; the existing rear yard will not decrease in size. Building height will increase from two stories and approximately 20 feet to three stories and 39 feet where a maximum of three stories and 40 feet are permitted. (11 DCMR § 400.1.)

8. The planned renovation of the subject property will decrease lot occupancy slightly, from 65.5% to 64.75%, due to changes in the building's rear deck. The depth of the new deck will be less than the depth of the existing deck, and its width will also decrease due to the presence of a new spiral staircase at the rear of the building.

9. The enlarged building will provide one apartment per floor, including the cellar. The apartments, each with two bedrooms, will range in size from approximately 836 square feet to 1,145 square feet.

Harmony with Zoning

10. The R-4 District is designed to include those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of the dwellings into dwellings for two or more families. (11 DCMR § 330.1.) The primary purpose of the R-4 zone is the stabilization of remaining one-family dwellings. (11 DCMR § 330.2.) The R-4 District is not intended to become an apartment house district as contemplated under the General Residence (R-5) districts, since the conversion of existing structures is controlled by a minimum lot area per family requirement. (11 DCMR § 330.3.)

11. A rooming or boarding house is permitted as a matter of right in an R-4 District, subject to certain requirements, including that accommodations may not be provided to transient guests who stay 90 days or less at the premises, cooking facilities may not be provided in any individual unit, and no central dining or food preparation area may be provided for guests. 11 DCMR § 330.6.

12. In the R-4 District, a building that was existing before May 12, 1958, such as the Applicant's building, may be converted to an apartment house as a matter of right, as limited by the lot area requirement set forth in §§ 401.3 and 403.2. 11 DCMR § 330.5. Pursuant to § 401.3, conversion of a building to an apartment house requires 900 square feet of lot area per apartment. Pursuant to § 403.2, the other limit on matter-of-right conversion of a building to an apartment house, the maximum permitted lot occupancy for conversion of a building to an apartment house is the greater of 60% or the lot occupancy as of the date of conversion.

CONCLUSIONS OF LAW AND OPINION

The Applicant requests area variances from requirements pertaining to maximum lot occupancy under § 403.2,[3] the enlargement of a nonconforming structure under § 2001.3, and minimum lot area under § 401.3 to allow the enlargement and conversion of a two-story, 11-bedroom rooming house to a three-story, four-unit apartment house in the R-4 District at 1221 Otis Place, N.W. (Square 2829, Lot 57). The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(3) (2008), to grant variance relief where, "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property," the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that relief can be granted 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. (*See* 11 DCMR § 3103.2.)

Based on the findings of fact, the Board finds that the application satisfies the requirements for approval of the requested area variance relief. The Board credits the testimony of the Applicant that the subject property is faced with an exceptional situation or condition due to a confluence

[3] The Applicant's request for relief was self-certified and, apparently assuming that the maximum permitted lot occupancy at the subject property is 60%, "in an abundance of caution" also sought variance relief from the requirements relating to lot occupancy and enlargement of a nonconforming structure. The Board notes that, pursuant to § 403.2, the R-4 District permits a maximum lot occupancy of 60% for a row dwelling or flat, and 40% for "all other structures" (other than certain uses not relevant here), while the maximum permitted lot occupancy for the conversion of a building or structure to an apartment house is the greater of 60% or "the lot occupancy as of the date of conversion." Consistent with the Applicant's submission, the Board considers the application a request for area variance relief to permit lot occupancy of 64.75% rather than 60%.

of factors related to the deteriorated condition of the existing structure and its prior use as an 11-room boarding house. Due to the past deterioration of the building and deferred maintenance by prior owners, the Applicant must expend considerable funds to ensure the building's compliance with the Construction Code and to construct marketable dwelling units. Because of its past use as a rooming house with 11 bedrooms, the building presently has a number of unnecessary interior walls and an unconventional layout, increasing the cost of renovation of the building.[4]

The party in opposition asserted that the facts presented by the Applicant "are not sufficient to establish the 'uniqueness' of the property, and thus the Applicant cannot meet its legal burden to prove that there is an extraordinary or exceptional condition affecting the property." (Exhibit 34.) The Board finds no merit in the party in opposition's assertion that the building at the subject property was no longer an 11-room rooming house because of its alleged use more recently as a one-family dwelling. While the Applicant may not have obtained the necessary certificate of occupancy or license to continue the prior rooming house use, the Board credits the Applicant's testimony that the building, when acquired by the Applicant, was configured as a rooming house with 11 bedrooms, and its multiple interior walls and inefficient layout hindered the renovation of the building to another use.

The Board also concludes that the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to the Applicant by precluding the renovation of the building into a viable residential use. The Board credits the testimony and evidence provided by the Applicant, including the financial analysis showing the expected return on the renovation of the building, in finding that conversion to four dwelling units is necessary for the viable reuse of the building.

The party in opposition argues that "the extraordinary expense of renovating a property [is] not sufficient to satisfy the 'practical difficulty' prong," citing *Myrick v. District of Columbia Bd. of Zoning Adjustment*, 577 A.2d 757 (D.C. 1990). As noted by the Applicant, the District of Columbia Court of Appeals has held that "economic use of property may be properly considered as a factor in deciding the question of what constitutes an unnecessary burden or practical difficulty in area variance cases." *Tyler v. District of Columbia Bd. of Zoning Adjustment*, 606 A.2d 1362, 1366 (D.C. 1992); *see also, Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990) (economic use of property has been considered as a factor in deciding the question of what constitutes an unnecessary burden or practical difficulty in variance cases; at some point economic harm becomes sufficient, at least when coupled with a significant limitation on the utility of the structure); *Wolf v. District of Columbia Bd. of Zoning Adjustment*, 397 A.2d 936 (D.C. 1979) (lot area variance for conversion of two-family flat into

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[4] As noted by OP, the Board has previously approved applications for zoning relief necessary to allow the conversion of a rooming house into an apartment house in the R-4 District, including an application concerning a property abutting the subject property in this case. *See* BZA orders issued in BZA Case Nos. 18115 (November 18, 2010) (variances from requirements pertaining to minimum lot area, maximum lot occupancy, courts, enlargement of a nonconforming structure, and parking to allow conversion of a 12-unit rooming house into a three-unit apartment house, with a new third-story addition at 3603 13th Street, N.W.) and 18297 (February 13, 2012) (variance from lot area requirement under § 401.3 to allow conversion of rooming house into a three-unit apartment house).

three-unit apartment house was appropriate where two-family dwelling was not marketable and would operate at a loss, but three units would allow a return). In light of the evidence presented by the Applicant, the Board concludes that the Applicant demonstrated a need for variance relief to allow four apartment units at the subject property, and did not agree with OP's contention that conversion to a three-unit apartment house would be economically feasible under the circumstances.

The Board was not persuaded by the party in opposition's contention that the Applicant's financial argument is without merit. The opposition contends that the financial challenge was self-created. He argued that financial feasibility depends principally on the fact that the Applicant paid too much for the building that was vacant and had been on the market for a long period of time. The "self-created hardship" is a factor generally applicable to a request for a use variance, not an area variance. *See, 1700 Block of N Street, NW v. District of Columbia Bd. of Zoning Adjustment*, 384 A.2d 674, 678 (D.C. 1978); *Wolf*, 397 A.2d at 945; *Gilmartin*, 579 A.2d at 1169 (D.C. 1990) (prior or constructive knowledge or a difficulty or hardship that is self-imposed is not a bar to an area variance), *citing A.L.W. v. District of Columbia Bd. of Zoning Adjustment*, 338 A.2d 428, 431 (D.C. 1975).

For similar reasons, the Board concludes that the Applicant has also satisfied the requirements for variance relief from requirements related to lot occupancy and enlargement of a nonconforming structure. The Applicant does not propose to increase lot occupancy over the existing situation, and thus the planned enlargement of the building – a new third floor that will not alter the building's footprint substantially, but in fact will reduce lot occupancy slightly – will not increase the existing nonconforming lot occupancy or create any new nonconformity of the structure and addition combined.

The Board credits the testimony of the Applicant in concluding that approval of the requested variances will not cause any substantial detriment to the public good. After the conversion, the building will be restored to residential use, at a lower density than its prior 11-room boarding house use. OP testified that its recommendation of conversion of the existing building into three apartments would not negatively impact the surrounding neighborhood, in part because on-site parking would be adequate and the overall building envelope would remain the same. The Board does not find that the addition of the planned third floor, utilizing the footprint of the existing building and constructed to a height permitted under the Zoning Regulations, will result in any adverse impacts on the use of neighboring properties.

The Board credits the testimony from persons in support of the application who stated that the Applicant's project would be comparable to other projects in the immediate vicinity and would not visually intrude on the character, scale, or pattern of houses in the neighborhood. The Board does not find that the conversion to apartment house use or the addition of the planned third floor will cause substantial detriment to the neighborhood due to its density, effect on parking, or surrounding architecture. The neighborhood is characterized by a variety of building types and contains several apartment houses in the vicinity of the subject property, and the Applicant's

project will satisfy the zoning requirements for parking and thus will not significantly alter existing parking conditions in the neighborhood.

Similarly, the Board does not find that approval of the requested variance relief would substantially impair the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. Conversion of the building into a four-unit apartment house will cause the property to remain in residential use in a manner consistent with the relatively lower density residential use of the surrounding neighborhood. The size of the Applicant's building, as enlarged, will remain consistent with the generally two- and three-story buildings in the vicinity of the subject property.

The Board is required to give "great weight" to the issues and concerns raised by the affected ANC. 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) (2001)). In this case, ANC 1A adopted a resolution indicating its support for the application. The ANC recommended approval of the requested zoning relief and did not express any issues or concerns about the application, including the amendment by the Applicant seeking additional variance relief.

The Board is also required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163, D.C. Official Code § 6-623.04) to give weight to the recommendations of the Office of Planning. The Board interprets OP's statement that it cannot support the application as its recommendation of denial. For the reasons stated above, the Board disagrees with OP's contention that the conversion of the rooming house to a three-unit building was economically feasible or that approval would be contrary and detrimental to the intent and integrity of the Zoning Regulations. Therefore, the Board does not find OP's recommendation to be persuasive.

Based on the findings of fact and conclusion of law, the Board concludes that the Applicant has satisfied the burden of proof with respect to the request for area variances from requirements pertaining to lot occupancy under § 403.2, enlargement of a nonconforming structure under § 2001.3, and minimum lot area under § 401.3 to allow the enlargement and conversion of a two-story, 11-bedroom rooming house to a three-story, four-unit apartment house in the R-4 District at 1221 Otis Place, N.W. (Square 2829, Lot 57). Accordingly, it is **ORDERED** that the application is **GRANTED,** subject to Exhibit 29A, Revised Plans.

VOTE: **4-0-1** (Lloyd J. Jordan, Marcie I. Cohen, Jeffrey L. Hinkle, and Nicole C. Sorg (by absentee ballot), voting to approve; one Board seat vacant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of Board members approved the issuance of this order.

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: June 13, 2013

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 PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

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. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

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