

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18794 of Newton St Development 3 LLC, pursuant to 11 DCMR § 3103.2, for variance relief from the requirements regarding lot area (§ 401.3), nonconforming structures (§ 2001.3), and parking (§ 2101.1) to allow the Applicant to renovate and convert a vacant nonconforming corner building to a multiunit dwelling in an R-4 District at premises 1740 New Jersey Avenue, N.W. (Lot 9, Square 508N).¹

HEARING DATES: September 16, 2014 and October 28, 2014
DECISION DATE: October 28, 2014

DECISION AND ORDER

On April 30, 2014, Newton St Development 3 LLC (the "Applicant"), the owner of 1740 New Jersey Avenue, N.W. (Lot 9, Square 508N), filed a self-certified application with the Board of Zoning Adjustment (the "Board") for zoning relief. The Board held public hearings on the application on September 16, 2014 and October 28, 2014.

PRELIMINARY MATTERS

Self-Certification. The zoning relief requested in this case was self-certified pursuant to 11 DCMR § 3114.2.

Notice of Public Hearing. Pursuant to 11 DCMR § 3113.1, notice of the hearing was sent to the Applicant, all individuals and entities owning property within 200 feet of the Property, Advisory Neighborhood Commission ("ANC") 6E, and the Office of Planning ("OP"). The Applicant posted placards at the subject property regarding the application and public hearing and timely submitted an affidavit to the Board to this effect.

The Applicant's Case. The Applicant was represented by Meridith H. Moldenhauer, Esq., of Griffin, Murphy, Moldenhauer & Wiggins, LLP. Jimmy Edgerton, Nick Hodges, and David Bloom testified on behalf of the Applicant.

¹ The Initial Application requested eight residential units but the Applicant subsequently modified the application and architectural plans. While the degree of relief was decreased, the areas of relief identified remained the same.

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ANC 6E. The Property is located within the area served by ANC 6E, which is automatically a party to this application. ANC 6E filed a letter and resolution, dated September 12, 2014 indicating that ANC 6E, at its regularly scheduled meeting on September 2, 2014, which was properly advertised and where a quorum was present, voted 5-2-0, in support of the application. (See ANC Report at Exhibit 32.)

Office of Planning (OP) Report. OP submitted a report dated August 29, 2014, recommending denial of the Application. OP stated that although it supports renovation of the building, the renovation and the addition proposed go “well beyond the development intensity anticipated in an R-4 zone” particularly on a small lot. Although OP concluded that the lack of alley access made it practically difficult to locate parking on the property, it found no other exceptional conditions existed. However, the OP report did not consider the dilapidated nature of the property due to significant water damage nor the fact that it had been vacant for at least five years. OP also did not analyze whether a matter of right project was economically feasible. As to the third prong of the variance test, OP concluded that a variance from the lot area requirement would impair the zone plan and the public good. OP noted that granting relief from the requirement that there be 900 square feet of land area for each unit would result in 210 square feet of land area per unit. According to OP this “would intensify the density of the lot beyond that anticipated by the R-4 provisions for conversions of existing structures to apartment buildings.” (See OP Report at Exhibit 28.)

District Department of Transportation (“DDOT”) Report. By memorandum dated July 8, 2014, DDOT indicated no objection to the application emphasizing that the project will have no adverse impact on the travel conditions of the District’s transportation network.

Party in Opposition. There were no Parties in opposition.

Persons in Opposition. There were no persons in opposition.

Persons in Support. No persons in support testified but the Applicant submitted 20 letters in support of the Application.

FINDINGS OF FACT

The Subject Property and Surrounding Area

1. The Property is located at 1740 New Jersey Avenue, N.W., at the intersection of Rhode Island Avenue, New Jersey Avenue, and S Street, N.W.
2. Square 508N is located in the northwest quadrant of the District and is bounded on the north by S Street, N.W., on the east by New Jersey Avenue, N.W., on the south by Rhode Island Avenue, N.W., and on the west by 5th Street, N.W.

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3. The Property contains approximately 1,685 square feet of land area and is located in Northwest Washington, DC.
4. The Property has approximately 32 feet of frontage along S Street, N.W., 43 feet of frontage along New Jersey Avenue, N.W., and 31 feet of frontage along Rhode Island Avenue, N.W.
5. The Property is in the R-4 District.
6. 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 (2) or more families.” (11 DCMR § 330.1.)
7. The Property is presently improved with a vacant two-story corner building.
8. The Property is not located within any historic District, and the existing building on the Property is not listed on the D.C. Inventory of Historic Sites.
9. The Property is located approximately three blocks from the Shaw Metro Station.

The Applicant’s Project

10. The Applicant proposes to convert the Property from a vacant, two-story residence to a three-story plus cellar residential structure with six residential units. The current footprint of the structure will be left unchanged.
11. The development will also include covered and secure bicycle parking spaces.
12. The Applicant has provided a Parking Demand Mitigation Plan.

Zoning Relief Requested

Lot area (§ 401.3)

13. The conversion of a building or structure to an apartment house in the R-4 District is permitted, but requires a minimum of 900 square feet of lot area per apartment unit. (11 DCMR § 401.3.)
14. The lot area is 1,685 square feet.
15. Conversion of the structure to a six-unit apartment therefore requires relief from the lot area requirement.

Nonconforming Structures (§ 2001.3) as to Lot Occupancy (§ 403.1)

16. The Property currently has a lot occupancy of 100%.

17. While the footprint of the structure, and lot occupancy on the first and second story, will remain unchanged, the addition to the third story with a lot occupancy of 100% requires relief from the nonconforming structure requirements (§ 2001.3) as to lot occupancy (§ 401.3). (11 DCMR § 2001.3.)

Parking (§ 2101.1)

18. Apartment use in the R-4 District requires one parking space for every three dwelling units.
19. The project, at six units, requires two parking spaces.

Exceptional Circumstance

20. The Property is a multi-sided lot with street frontage on three streets. The Property fronts on a complex intersection made up of three large arterial streets including Rhode Island Avenue, N.W., New Jersey Avenue, N.W., and S Street, N.W.
21. The Property is zoned R-4 but is within close proximity to large commercial zones along Rhode Island Avenue and Florida Avenue, N.W.
22. The existing structure has three entryways, one on each of the three sides with street frontage, and a large internal stairway.
23. The existing structure has several nonconforming aspects, including lot area less than 1,800 square feet, 100% lot occupancy, and a nonconforming court.
24. The existing structure has been vacant for at least five years and has suffered from substantial water damage. The dilapidation of the existing structure is also due, in part, to the extended vacancy and deferred maintenance at the Property.
25. The exceptional history of the Property and extended vacancy is due, in part, to a conflict among heirs and complicated title issues that delayed closing.

Practical Difficulty

26. The Applicant has provided evidence into the record demonstrating that the proposed number of units are required to allow for renovation of the structure while remaining economically feasible.
27. The Applicant is working around an existing stairwell location, which naturally divides the structure into the manner proposed by the Applicant. The creation of fewer units would result in awkward layouts as well as inefficient ingress and egress into the units due to the preexisting three entrances. Larger units would be less appropriate at the location considering the proximity to a complex, commercial intersection.

28. The Property, at 100% lot occupancy, cannot accommodate off-street parking without demolition of a substantial portion of the existing structure. Furthermore, there are no curb cuts on the lot to allow access for vehicles onto the Property.

CONCLUSIONS OF LAW

Standard of Review

The Board is authorized under § 8 of the Zoning Act of 1938, D.C. Official Code § 6-631.07(g)(3), 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.)

The District of Columbia Court of Appeals has held that "an exceptional or extraordinary situation or condition" may encompass the buildings on a property, not merely the land itself, and may arise due to a "confluence of factors." *See Clerics of St. Viator v. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 291 (D.C. 1974); *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990). The Court of Appeals has repeatedly 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, et. al. v. District of Columbia Bd. of Zoning Adjustment*, 606 A.2d 1362 (D.C. 1992)(internal citations removed)(*Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C. 1990)(Reiterating in the context of an area variance that "increased expense and inconvenience to applicants for a variance are among the proper factors for BZA's consideration.").

The Applicant is seeking a variance from the zoning regulations regarding lot area (§ 401.3), nonconforming structures (§ 2001.3), and parking (§ 2101.1). As discussed below, the Board concludes that the Applicant has met its burden of proof for the requested area variances in this case.

Exceptional Circumstance

The Board concludes that based on a confluence of factors an exceptional circumstance exists at the Property. The Property is affected by an exceptional situation and condition as a result of a confluence of several factors. The Property is a multi-sided lot with street frontage on three streets. The Property fronts on a complex intersection made up of three large arterial streets

including Rhode Island Avenue, N.W., New Jersey Avenue, N.W., and S Street, N.W. The Property is zoned R-4 but is within close proximity to large commercial zones along Rhode Island Avenue and Florida Avenue, N.W. The existing structure has three entryways, one on each of the three sides with street frontage, and a large internal stairway. The existing structure has several nonconforming aspects, including lot area less than 1,800 square feet, 100% lot occupancy, and a nonconforming court. The existing structure, exposed on three sides, has suffered from substantial water damage. The dilapidation of the existing structure is also due, in part, to the extended vacancy and deferred maintenance at the Property. The history of the Property, including an extended period of vacancy and complicated title issues delaying closing, is also exceptional.

Practical Difficulty

The Board concludes that the confluence of these exceptional and extraordinary conditions creates practical difficulties for the Applicant in complying with the requirements regarding lot area, nonconforming structure requirements with respect to lot occupancy, and parking.

Lot area (§ 401.3)

The lot area requirement cannot be met as a result of the exceptional circumstances at the Property. The creation of fewer units would result in awkward layouts as well as inefficient ingress and egress into the units due to the preexisting three entrances. Furthermore, significant renovation is required to resolve issues such as water damage, excessive property damage, and roof repair. There are also additional costs, no matter the number of units, as a result of the required closing of two existing curb cuts in public spaces unknown to the Applicant until meeting with DDOT. In addition to the location of the Property on a complex and pedestrian-unfriendly corner, the substantial renovations required would make it impractical to either rehabilitate the home to a single-family home or provide fewer units. As a result of the extensive renovations required, a six-unit structure is required for the project to be financially feasible, which the Applicant demonstrated by providing detailed financial information on the proposed project as well as various alternatives. In light of the evidence presented by the Applicant, the Board concludes that the Applicant has demonstrated the need for variance relief to allow six apartment units at the Property.

Nonconforming Structures (§ 2001.3) as to Lot Occupancy (§ 403.1)

The 100% lot occupancy on a third story is necessary to allow a financially feasible project with street frontage on three sides of the Property. The Applicant has demonstrated that a third story is necessary and that a third story, at 60% lot occupancy, would be structurally inefficient and aesthetically awkward as a result of the frontage along three streets.

Parking (§ 2101.1)

The Board concludes that compliance with the parking requirement would result in a practical difficulty. As a result of the 100% lot occupancy, there is no space to put the required parking spaces on the Property without demolishing a significant portion of the structure. Furthermore, there is no curb cut and DDOT indicated in their report that it is unlikely that a curb cut would be permitted. (See DDOT Report at Exhibit 27.)

No Detriment to the Public Good or Zone Plan

The Board concludes that there will be no substantial detriment to the public good and no substantial impairment to the intent, purpose, and integrity of the zone plan by approving the project as proposed.

The proposed project renovates a vacant, single-family home, a portion of which was previously used as a doctor's office, as a residential structure. Furthermore, the footprint of the existing structure will be left unchanged. In addition, the proposed project adequately balances the zoning regulations' goals of ensuring adequate space for residents, providing a diverse and adequate housing stock, and permitting property owners to create marketable units. The Property is located on a prominent corner and serves as a gateway into the Shaw neighborhood. The height and massing of the proposed project are compatible with the location of the Property at the intersection of three wide avenues including Florida Avenue, New Jersey Avenue, and Rhode Island Avenue. The proposed project, though not in a historic district, uses high quality materials and thoughtful design to both match the defining architectural features of the existing building and compliment the character of the surrounding properties.

The Board further concludes that parking relief can be granted without detriment to the public good. Due to the accessibility of the Property, including an extremely high walkscore as well as access to two metro stations, several bus routes, carsharing and bikesharing options, variance relief for three spaces will not have a substantial impact. The Applicant will implement the Parking Demand Mitigation ("PDM") measures to promote the use of non-automotive transportation. Furthermore, the availability of a variety of transportation options, particularly carsharing and proximity to the Metro, as well as demographic changes in Shaw, reduces the need for residents to own a vehicle.

The Board is required under § 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)) to give "great weight" to the issues and concerns raised in the written report of the affected ANC, which in this case is ANC 6E. To satisfy the great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. In this case, ANC 6E stated its support for the application and for the reasons stated above the Board concurs with the ANC's advice.

The Board is 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 great weight to

OP recommendations. OP found exceptional conditions and practical difficulty to support the parking variance and found no harm to the zone plan or public good would result. The Board finds this advice to be persuasive.

However, contrary to OP's view, the Board is persuaded that the Applicant has demonstrated that exceptional conditions on the property result in a practical difficulty in complying with the restrictions on lot occupancy and the expansion of a nonconforming structure. Unfortunately, OP did not consider the dilapidated nature of the building or its unusual internal configuration in concluding that no exceptional conditions existed. Further, OP did not analyze whether the confluence of exceptional conditions made matter of right construction economically infeasible, as proven by the Applicant.

As to OP's concern that the lot area relief will substantially impair the zone plan and the public good, the Board is not persuaded that the additional intensity of use resulting from this grant will have this effect. First, the Board notes that the property is at the very edge of an R-4 zone and in essence juts into an adjacent C-2-A district where greater density is permitted. The property is bounded on the east by New Jersey Avenue, N.W. and on the south by Rhode Island Avenue, N.W. both of which are major commercial thoroughfares. The Board must judge the impact of a variance in the context in which the property is located and it is in this context that the Board is confident that no impairment to the zone plan will result. As to the public good, because OP did not consider the economic feasibility of matter of right development, it did not consider the stark choice presented, which is to either have the project proceed as proposed by the Applicant or have the property remain vacant for the foreseeable future. The Board concludes that permitting the development of the property will have a positive impact on the public good and therefore finds OP's conclusion to the contrary unpersuasive.

CONCLUSION

Based upon the record before the Board, and having given great weight to the ANC, OP, and DDOT reports filed in this case, the Board concludes that the Applicant has met the burden of proof for variance relief pursuant to 11 DCMR § 3103.2 from the zoning regulations regarding lot area (§ 401.3), nonconforming structures (§ 2001.3), and parking (§ 2101.1) to allow the Applicant to renovate and convert a vacant nonconforming corner building to a multiunit dwelling in the R-4 District at premises 1740 New Jersey Avenue, N.W. (Lot 9, Square 508N).

Accordingly, it is therefore **ORDERED** that the application is hereby **GRANTED, SUBJECT TO THE REVISED PLANS AT EXHIBIT 34 Tabs A, B, D, and E, and SUBJECT** to the following **CONDITIONS**:

1. The Applicant shall include in its residential leases a provision that prohibits tenants from obtaining a Residential Parking Permit ("RPP") or Visitor Parking Pass ("VPP") at the building approved by this BZA Order from the D.C Department of Motor Vehicles for the life of the project.

2. The Applicant shall record a covenant against the Property among the Land Records of the District of Columbia prohibiting any lessee or owner of the Property from obtaining an RPP or VPP at the building approved by this BZA Order for the life of the project.
3. If rented as an apartment, the Applicant shall, for a period of five years, provide the first occupant of each residential unit a \$100 car sharing membership, or a \$150 Capital Bikeshare membership, or a \$200 *Smart Trip* card. If sold as condominium units, the Applicant shall provide the first owners with the incentives mentioned herein and the Condominium Declaration and Bylaws shall contain, in their operating budget, a pro rata allocation to offer all new purchasers the incentives mentioned herein for five years from transfer of control of the Condominium from the declarant to the Condominium Board.
4. The Applicant shall provide seven covered and secure bicycle spaces in the building.
5. The Applicant shall use reasonable efforts to lease four parking spaces from a nearby parking garage and make them available to residents at the Property.
6. The Applicant shall work with DDOT to close existing curbcuts, which provides additional public street parking space on Rhode Island Ave as well as additional space for parking on S Street, N.W.
7. The Applicant shall work with DDOT to provide space for a Capital Bikeshare Dock if and when a Capital Bikeshare Dock can be installed.

VOTE: **4-0-1** (Marnique Y. Heath, Lloyd J. Jordan, Jeffrey L. Hinkle, and Peter G. May to Approve; S. Kathryn Allen not present, not voting.)

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

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

ATTESTED BY: _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: May 18, 2015

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.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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.