

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 17270 of Thomas and Kathryn Toggas, pursuant to 11 DCMR § 3104.1, for a special exception to allow an addition to an existing single-family detached dwelling under § 223 not meeting the side yard (§ 405) requirements in the R-1-B district at premises 3112 Legation Street, N.W. (Square 2293, Lot 835).

HEARING DATES: January 18, 2005

DECISION DATE: February 1, 2005, February 15, 2005

DECISION AND ORDER

Thomas and Kathryn Toggas ("Applicants"), owners of the property that is the subject of this application ("subject property"), filed an application with the Board of Zoning Adjustment (the "Board" or "BZA") on November 5, 2004. The Applicants sought a special exception under section 223 of the Zoning Regulations to construct an addition to their dwelling where the addition would not conform to the minimum side yard requirements of 11 DCMR § 405.

Following a hearing on January 18, 2005, the Board held a public decision meeting on February 1, 2005, at which it determined that more information was needed before a decision could be made. The decision meeting was postponed until February 15, 2005, when the Board voted 4-1-0 to approve the application.

Preliminary Matters

Notice of Application and Notice of Public Hearing. By memoranda dated November 9, 2004, the Office of Zoning ("OZ") gave notice of the filing of the application to the Office of Planning ("OP"), the District Department of Transportation ("DDOT"), Advisory Neighborhood Commission ("ANC") 3/4G, Single Member District/ANC 3G03, and the Council Member for Ward 3. Pursuant to 11 DCMR 3113.13, OZ published notice of the public hearing in the *District of Columbia Register* and on November 18, 2005, sent notice to the Applicant, all property owners within 200 feet of the subject property, ANC 3/4G, and OP. The Applicant posted the property 15 days prior to the hearing, thereby informing the public of the pending application and the January 18, 2005 hearing date. The Applicant filed a notarized Affidavit of Posting with the Board verifying that the property was posted in a timely manner.

Request for Party Status. ANC 3/4G was automatically a party to this proceeding. The Board granted requests for opposition party status to Mrs. Cecile B. Kelly, owner of 5442 31st Street, N.W., which is northeast of the subject property, and Joseph and Cynthia

Dempsey, owners of 3114 Legation Street, N.W., which is immediately adjacent to the southwest side of the subject property. The Board denied requests for opposition party status from Scott and Gayle Moseley and Reginald A. White and Brenda Scott-White, residents of the 3100 block of Legation Street, N.W., finding that they were not more uniquely affected by the application than the general public.

Government Reports. The Office of Planning, by report dated January 11, 2005, recommended approval of the special exception request, concluding that the addition would be in harmony with the general purpose and intent of the Zoning Regulations and Map, and that the proposed changes would not tend to adversely affect the use of neighboring properties. OP's recommendation was subject to two conditions: (1) that a 7-foot high sight-tight fence be provided around the rear and southwest side yards of the property, and (2) that the proposed third floor window on the southwest side of the addition be eliminated.

ANC Report. At a regularly scheduled meeting on December 13, 2004, with a quorum present, ANC 3/4G passed a resolution, by a vote of 6-0-1, recommending denial of the application. Included in the ANC's reasons for opposing the special exception application were (i) the size of the addition, (ii) the concern that Applicants might have been building without required permits, (iii) possible loss of privacy, and (iv) the property line erosion issue with the adjoining neighbor to the southwest. The ANC also recommended that the Applicants and their neighbors agree to a construction management plan and a landscape buffer plan.

Parties in Opposition. Mrs. Kelly stated that the addition would create a less pleasant view from the rear of her property and would limit the feeling of space that is currently enjoyed. She further indicated that without sufficient side yard space along the alley side of the addition, there was no possibility of landscaping which would soften the claimed impact of the addition. She expressed concern that, due to its length and massing, the addition would diminish the real estate value of her property.

Joseph and Cynthia Dempsey were represented at the public hearing by their counsel, George R. Keys, Jr., Esq. The Dempseys were concerned that the addition would be located too close to their property. They indicated that the addition would diminish their privacy, further obscure their view of the street from their northeast side and rear yards, and significantly reduce the amount of sunlight to their rear yard and their northeast side yard.

Persons in support or opposition. The Board heard testimony in support of the application from Mr. Martin Fuchs, a resident of the dwelling at 3101 Legation Street, N.W. The Board heard testimony in opposition from Mr. Moseley and Mr. White. The Applicants submitted a petition signed by 28 neighbors in support of the application.

FINDINGS OF FACT

The Subject Property and the Surrounding Area

1. The subject property is located in an R-1-B zone in the Chevy Chase neighborhood of Ward 3 at 3112 Legation Street N.W. (Square 2293, Lot 835). The property is improved with a three-story one-family detached dwelling constructed in 1932. A one-story den addition was added on the west side of the dwelling shortly after its construction and before 1958. Also on the property is a one-story accessory building located within the rear yard.
2. The surrounding area is zoned R-1-B and is developed with single-family detached dwellings, some of which have three-story additions.
3. The subject property fronts on Legation Street and abuts a 15-foot public alley at its rear. Immediately to the northeast of the property is a 15-foot wide public alley and immediately to its southwest is the Dempsey property. The 15-foot wide public alley to the northeast abuts approximately the front half of the subject property, then the property line turns to the south and no longer abuts the alley. A 15-foot wide public alley also abuts approximately the rear half of the property on the southwestern side.
4. The Applicants propose to construct a rear addition which will wrap around the southwestern corner of the dwelling and continue along the southwestern side of the dwelling. They also propose to construct a front porch addition along the Legation Street frontage.¹
5. The subject property is comprised of one large lot with a depth of approximately 195 feet and a lot area of 7,205 square feet, well above the 5,000 square-foot lot area required. *See*, 11 DCMR § 401.3.
6. The subject property has a lot width of 40 feet at the front and 36 feet at the rear.² The narrowest part of the property is in the center, at the point where it turns southward away from the alley bounding it to the northeast.
7. Section 223 permits a maximum lot occupancy of 50 percent in an R-1 zone. With the construction of the proposed additions to the subject property, the lot occupancy will be 34 percent.

¹There was some dispute whether this porch would cross the building restriction line, but as this is a public space issue, and not a zoning issue, the Board declined to address it.

²The R-1-B zone requires a minimum lot width of 50 feet for all structures. The Applicants' lot width is therefore substandard. Although this was not separately mentioned in the advertisement of the application, the relief required is subsumed within the relief requested pursuant to § 223. *See*, 11 DCMR § 223.1.

8. Eight foot side yards are required in the R-1-B zone district. 11 DCMR § 405.9. The currently existing side yard to the northeast of the subject dwelling measures 1.77 feet. The northeastern wall of the rear addition will continue the line of the northeastern side of the dwelling, extending this nonconforming side yard along the northeastern side of the addition.³
9. On the southwest side of the property, the depth of the existing side yard, between the den addition and the lot line, measures at least 5.01 feet. The Board finds that because the subject dwelling existed before May 12, 1958 and has a side yard of less than 8 feet, but more than 5 feet, which is not being decreased, an extension or addition may be made to the southwestern side of the dwelling with no zoning relief. *See*, 11 DCMR § 405.8.
10. Due to severe water and structural damage caused by Hurricane Isabel in September 2003, the den was deemed unsafe. As a result, the Applicants removed the den during the winter of 2003-04, with the intention of building a new structure on the same footprint as a part of the construction proposed here.
11. Section 2001.6 of the Zoning Regulations allows a nonconforming structure which is destroyed by an act of God to an extent of less than 75% of the cost of reconstructing the entire structure, to be restored or reconstructed to its previous condition, provided that the reconstruction or restoration shall be started within twenty-four months of the date of the destruction and continued diligently to completion. *See*, 11 DCMR § 2001.6.
12. On August 6, 2004, within the 24-month period stipulated in § 2001.6, the Department of Consumer and Regulatory Affairs ("DCRA") issued Permit No. B465160 to the Applicants for the subject property to "excavate and build foundation." Applicants began the excavation on the subject property and construction of the foundation. Therefore, the Board finds that the exception to the side yard requirement granted by § 405.8 for the southwestern non-conforming side yard was not lost with the emergency removal of the den as a result of the damage from Hurricane Isabel, which constitutes a casualty or an Act of God.
13. On September 16, 2004, the Applicants were notified by DCRA that they required a special exception pursuant to § 223 in order to permit the construction of the addition.

Section 223 Provisions re: Light, Air, and Privacy

14. The dwelling owned by opposition party Mrs. Kelly fronts on 31st Street, N.W. Its rear yard abuts the opposite side of the alley which abuts the northeast side of the

³This requires relief from § 2001.3, which prohibits extension of a nonconformity. This relief was not specifically advertised, but is again subsumed within the relief requested pursuant to § 223. *See*, 11 DCMR § 223.2.

subject property. Between the rear wall of the Kelly home and the alley is a distance of 56 feet, 9 inches. This, plus the 15-foot width of the alley and the 1.77-foot width of the Applicants' northeast side yard, creates a distance of approximately 72 feet from the dwelling of Mrs. Kelly to the subject addition.

15. In Mrs. Kelly's rear yard is a 22-foot wide 2-car garage and a continuous line of evergreen trees growing along the rear property line, both of which minimize the visibility of the Applicants' dwelling and the subject addition.
16. The three windows on the northeast side of the proposed addition are approximately 20 feet from Mrs. Kelly's garage. One is 7 feet from the floor, one is 6 1/2 feet from the floor, and the third is a basement window which will be obscured by plantings.
17. The proposed addition on the southwest side of the property will not be less than 5.01 feet from the lot line with the Dempsey property, the same depth that existed prior to the demolition of the den.
18. The Applicant plans to erect a 7-foot sight-tight privacy fence or wall along the entire 150-foot southwestern lot line, effectively shielding the first floor of the addition from the first floor of the Dempsey home, maintaining the privacy of the Dempsey property.
19. On the southwest side, the rear portion of the proposed addition immediately adjacent to the existing dwelling is three stories, but the top two stories are actually a sloped roof with skylights, not a vertical wall. The addition then continues further into the rear yard, but at a height of only one story and this one-story part of the addition is set back approximately 17 feet from the southwestern lot line with the Dempsey property.
20. The Board credits the Applicants' sun path study prepared by a licensed architect. Because the subject property is located northeast, and not due east, from the neighboring Dempsey property, potential impact or reduction of light is minimized. According to the sun path study, the worst case scenario is that on the shortest day of the year, the proposed addition will cast only minimal shade on the northeastern side of the Dempsey dwelling, equal to less than 10% of the square footage of the side of the dwelling, at maximum shade exposure at 8:00 a.m., and decreasing each minute thereafter. On all other days of the year, the shade cast will be less.
21. Three of the five windows on the southwest side of the addition are located in areas where the Applicants will not spend significant amounts of time – two of them are skylights on the sloped roof, two are staircase windows, and one is in a

spare room. The other two windows (on the first floor) will be shielded by the 7-foot privacy fence.

22. The design of the addition complements the existing dwelling and is not out of character with the other dwellings, or the other additions, in the neighborhood.

CONCLUSIONS OF LAW

The Board is authorized to grant special exceptions where, in its judgment, the special exception would be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and would not tend to affect adversely the use of neighboring properties. 11 DCMR § 3104. Pursuant to § 223, the Board may permit, by special exception approval, an addition to a one-family dwelling that does not comply with requirements pertaining to minimum lot dimension, lot occupancy, rear and side yards, courts, and nonconforming structures, subject to the provisions enumerated in § 223. The provisions of § 223 relevant here are: that the proposed addition must not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property, and in particular (a) the light and air available to neighboring properties must not be unduly affected; (b) the privacy of use and enjoyment of neighboring properties must not be unduly compromised; and (c) the addition, together with the original building, as viewed from the street, alley, and other public way, must not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage. 11 DCMR § 223.2.

The Board concludes that the Applicants' proposed addition will not unduly affect the light and air available to neighboring properties. There was no evidence that the front of the Kelly home, indeed that any part of the home, would experience a reduction of light or air due to the proposed addition. The home itself fronts on 31st Street, N.W., and its 56-foot rear yard stretches toward the 15-foot public alley and the subject property. There is a substantial distance of approximately 72 feet between the rear of the Kelly home and the northeast side of the proposed addition. This distance is enough to maintain sufficient light and air to the Kelly home.

On the southwest side of the subject property, the addition will minimally, but not unduly, increase the shade to the Dempsey property. *See*, Finding of Fact No. 20. The part of the proposed addition immediately adjacent to the rear of the existing dwelling will be three stories, but not an unrelenting three-story vertical wall. The two top stories are not vertical to the ground, but actually present as a sloped roof, sloping gradually away from the southwestern side of the property. Due to the slope, any impact on light and air is mitigated. Moreover, although the addition will rise to three stories, the existing house is already three stories tall.

The Board also concludes that the privacy of use and enjoyment of neighboring properties will not be unduly compromised. The windows on both sides of the addition have been placed so as not to impact the privacy of the neighbors' properties. Because of the substantial distance from the rear of the Kelly home to the addition, the Board fails to see how the addition will have any compromising effect on the privacy of use and enjoyment of the Kelly property to the northeast. The view from the Dempsey property to Legation Street may be slightly impacted by the addition, but it was already impeded by the prior den addition, and any slight further impact is not undue. Nor will the addition compromise the Dempseys' privacy in their rear yard because of the sensitive placement of the windows on the addition and the construction of a 7-foot sight-tight fence running the length of the western lot line.

With the addition, the subject dwelling will be similar in height to other dwellings within the surrounding area, many of which have been added to and expanded. The side yards will continue their existing depth and are similar in character and depth to other side yards in the neighborhood. The addition has been designed to complement the dwelling and the neighborhood and its rooflines have been varied in order to break up its massing. The Board concludes that the addition, together with the existing dwelling, will not substantially visually intrude on the character, scale, and pattern of houses along Legation Street. There are always some impacts from a change such as the addition that the Applicant is proposing, but after considering the opposition to the application, the Board concludes that granting the special exception will be in harmony with the Zoning Regulations and Zoning Maps.

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations 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 not did not find their views persuasive. OP recommended approval of the application and the Board agrees with this recommendation. The ANC recommended denial of the application, citing objections concerning the size of the addition, possible loss of privacy, building without proper permits, and erosion issues. The latter two issues are not within the Board's jurisdiction under the Zoning Regulations. The first two issues are properly before the Board, but the Board does not find the ANC's views persuasive for the reasons set forth above.

For the reasons stated above, the Board concludes that the Applicants satisfied the burden of proof with respect to the application for a special exception under § 223 to allow the construction of an addition that does not comply with the side yard requirement in the R-1-B zone.

Accordingly, it is **ORDERED** that the application is **GRANTED**, subject to the following **CONDITION**:

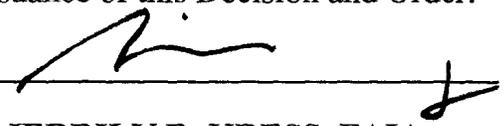
1. Applicant will construct a 7-foot high sight-tight fence, barrier, wall or other enclosure around the rear yard and southwest side yard of the subject property.

VOTE: **4-1-0** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., John A. Mann II and Gregory Jeffries to approve, Ruthanne G. Miller to deny)

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

Each concurring Board member approved the issuance of this Decision and Order.

ATTESTED BY: _____


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JUL 20 2005

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

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 PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3205, 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.

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, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. 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, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IS VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT OF 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. rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 17270

As Director of the Office of Zoning, I hereby certify and attest that on July 20, 2005, 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:

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