

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18651 of Peter J. Fitzgerald, pursuant to 11 DCMR § 3103.2, for variances from lot area (§ 401), lot occupancy (§ 403), rear yard (§ 404), off-street parking (§ 2101.1), and alley width (§ 2507.2) requirements for a subdivision allowing an existing apartment building and construction of a new one-family dwelling on an alley lot in the CAP/R-4 District at premises 319 A Street, N.E. and rear of 319 and 321 A Street, N.E. (Square 786, Lot 827, part of Lot 827 and Lot 22).¹

HEARING DATES: November 5, 2013 and January 29, 2014
DECISION DATE: March 11, 2014

DECISION AND ORDER

This application was submitted on August 25, 2013 by Peter J. Fitzgerald (the “Applicant”), the owner of the property that is the subject of the application. The application requested use and area variances to allow the subdivision of two adjoining parcels so as to permit an existing apartment house on one lot and a new one-family dwelling on an adjoining alley lot, in the CAP/R-4 District at 319 A Street, N.E. and rear of 319 and 321 A Street, N.E. (Square 786, Lot 827, Lot 22 and part of Lot 827). Following a public hearing, the Board of Zoning Adjustment (the “Board” or “BZA”) voted to deny the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated August 20, 2013, the Office of Zoning provided notice of the application to the Office of Planning (“OP”); the District Department of Transportation; the Councilmember for Ward 6; Advisory Neighborhood Commission (“ANC”) 6C, the ANC in which the subject property is located; and Single Member District/ANC 6C01. Pursuant to 11 DCMR § 3112.14, on August 29, 2013, the Office of Zoning mailed letters providing notice of the hearing to the Applicant, ANC 6C, and the owners of all property within 200 feet of the subject property. Notice was also published in the *D.C. Register* on August 30, 2013 (60 DCR 12378) and on November 15, 2013 (60 DCR 15854).

¹ The caption was amended slightly to eliminate the unneeded duplicate recitation of the square of the property.

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Party Status. The Applicant and ANC 6C were automatically parties in this proceeding. The Board received an application for party status in support of the application from Elliot Eisenberg, a resident of the 300 block of A Street, who was deemed a person in support instead. The Board granted requests for party status in opposition to the application from a group of residents living on A or 4th Street near the subject property: Janet Schmidt, John and Sheila Hollis, and Brian Stansberry.²

Motion to dismiss. The party in opposition made a preliminary motion to dismiss or, in the alternative, to stay the proceeding because the application was not signed by the owner of record of the subject property. The party in opposition alleged that Peter J. Fitzgerald, who signed the authorization letter (Exhibit 6), was not the titled owner of the property. According to the party in opposition, the actual owner was a testamentary trust created under the will of Joseph Fitzgerald. The Applicant asserted that Peter J. Fitzgerald, the son of Joseph Fitzgerald, had ownership and control of the subject property in his personal and trustee capacity, and that Peter J. Fitzgerald, in turn, authorized his son John H. Fitzgerald to act on his behalf with respect to the request for zoning relief.

Applicant's Case. The Applicant provided evidence and testimony describing a plan to subdivide the lots comprising the subject property by combining the area now occupied by the accessory garage behind the apartment house on Lot 827 with the area designated Lot 22 to create a new lot, where the Applicant proposed to construct a new one-family dwelling. According to the Applicant, the costs of renovating the garage structures for use either as garages or as artist studios – that is, uses that would be permitted as a matter of right on an alley lot – made those uses financially infeasible for development on new Lot 22, and use as a one-family dwelling was required to obtain a sufficient return on investment. The Applicant proposed certain requirements, concerning especially the construction process, as conditions of approval of the requested zoning relief.

OP Report. By memorandum dated October 22, 2013, the Office of Planning recommended denial of the requested variances, stating that the application had not satisfied any part of the test for variance relief. (Exhibit 35.)

DDOT. By memorandum dated October 23, 2013, the District Department of Transportation (“DDOT”) indicated no objection to approval of the application. (Exhibit 33.)

ANC Report. By letter dated September 16, 2013, ANC 6C indicated that, at a properly noticed public meeting, held September 12, 2013 with a quorum present, the ANC voted 6-0-0 to support the application. The letter noted that “[n]eighbors have expressed support for this project, conditioned on the applicant limiting construction to the hours of 9 am to 5 pm on weekdays,” and that the Applicant had agreed to that restriction. (Exhibit 27.)

² The request for party status in opposition to the application submitted by Brian Stansberry was subsequently withdrawn. (Exhibit 47.)

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Party in opposition. The party in opposition argued that the zoning requirements, such as minimum lot area and maximum lot occupancy, should not be disregarded and that approval of the requested variance relief would have a detrimental effect on nearby properties due to the increased density of buildings in the alley, increased demand for parking, and impeded vehicular access in the alleys, especially for emergency vehicles. (Exhibits 30, 31, 54, 55, 56, and 63.)

Persons in support. The Board received letters in support of the application from the zoning committee of the Capitol Hill Restoration Society (Exhibit 38) and from Elliot Eisenberg (Exhibit 28), who lives near the subject property.

Persons in opposition. The Board received letters in opposition to the application from persons living in the vicinity of the subject property. The letters cited concerns related to the density and lot occupancy of the planned one-family dwelling, increased traffic in the alley and the demand for parking, adverse impacts on light and air, the lack of undue hardship to the Applicant, and safety concerns pertaining to the alley.³ (Exhibits 34, 42, 43, and 45.)

FINDINGS OF FACT

The Subject Property

1. The subject property is currently designated Lot 827 and Lot 22 in Square 786. Lot 827 is a long, rectangular lot approximately 17 feet wide and 128 feet deep. Lot 827 fronts onto A Street and is bounded by public alleys on the west and to the south. Lot 22 abuts Lot 827 to the east at the rear of Lot 827, so that Lot 22 is bounded by Lot 827 on the west and public alleys to the south and on a portion of its eastern property line. Lot 22 is slightly irregular but generally rectangular, 20 feet wide along the southern alley and 26 feet deep.
2. Lot 827 is improved with a three-story apartment house, built in 1890, which contains three apartments. A one-story accessory garage is located at the rear of the lot. Lot 22 is improved with a one-story garage, which adjoins the accessory garage on Lot 827.
3. The subject property was purchased in the early 1960s by Joseph Fitzgerald from a plumbing contractor, who used the garages to store plumbing supplies. The Applicant's property management company has used the garages for storage since the 1970s. The Applicant described the garages as "dilapidated" and in poor condition due to their age and the effects of attempted break-ins and vandalism. Structural concerns include leaks in the

³ The Board also received an "emergency motion to stay" the application, submitted by Dr. Michael Kim and Grubbs' Care Pharmacy, which is located within 200 feet of the subject property. (Exhibit 44.) The motion argued that the Applicant's proposal would require the relocation of a telecommunications and utility pole serving Square 786, thereby resulting in "significant interruption of utility and telecommunications services" to the pharmacy. The motion was denied on grounds that it was not submitted by a party in this proceeding and did not address the criteria for a stay or matters within the Board's purview.

roofs, cracks in the concrete floor of one garage, one garage door is inoperable, and the buildings lack electricity and other utilities.

4. The alley to the west of Lot 827 is 15 feet wide and provides access to both A Street (to the north) and South Capitol Street (to the south). The alley to the south of both Lots 827 and Lot 22 is 30 feet wide. The southern alley connects to other portions of the alley system, ranging from 10 to 24 feet wide, to provide access to 4th Street (to the east).
5. The subject property and surrounding properties are located in the R-4 zone within the Capitol Interest overlay (CAP/R-4). Properties in the vicinity of the subject property contain primarily row dwellings and small apartment houses, with some institutional uses. A six-story apartment building is located on the eastern side of the square. The widest portion of the alley system in Square 786, designated Millers Court, contains several alley dwellings.

The Applicant's Project

6. The Applicant proposes to subdivide the subject property by allocating the rear portion of Lot 827, currently the location of the accessory garage, to Lot 22. The planned subdivision would reduce the depth of Lot 827, and consequently reduce its lot area from 2,204 square feet to 1,722 square feet and its lot occupancy from 78% to 72%. New Lot 22 would increase in size from 489 square feet to 971 square feet.
7. The Applicant proposes to maintain the existing apartment house on Lot 827, and to construct a new one-family dwelling on Lot 22. The planned dwelling would occupy 100% of the alley lot and would provide approximately 1,900 square feet of gross floor area on two floors. The building would be approximately 22 feet in height. One parking space would be provided in an enclosed garage.
8. For Lot 827, the Applicant's proposal requires: (a) an area variance from § 401.3 to allow a lot subdivision that would further noncompliance with the required minimum lot area, since the lot would provide less than 900 square feet per apartment unit; (b) an area variance from § 403.2 to allow a lot subdivision that would further noncompliance with maximum allowable lot occupancy; and (c) a parking variance from § 2101.1 to allow a lot subdivision that would create noncompliance with required parking spaces.
9. By reducing the lot area on Lot 827, the planned subdivision would increase its noncompliance with the minimum lot area required by the Zoning Regulations by allowing less than 900 square feet of lot area per apartment unit. A minimum of 2,700 square feet would be required under § 401.3 for a three-unit apartment house, but the Applicant's proposal would reduce the lot area to 1,722 square feet, a variance of 978 square feet.

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10. The Applicant's proposal would also increase the noncompliance of Lot 827 with the maximum lot occupancy permitted under the Zoning Regulations. After the proposed subdivision, the lot occupancy would be 72.3%, where the maximum permitted as a matter of right is 60%, requiring a variance of 12.3%.
11. The Applicant's proposal would also create noncompliance on Lot 827 with the minimum number of off-street parking spaces required in the R-4 zone. While the lot currently contains an accessory parking garage at the rear of the lot, the proposed subdivision would remove the one existing space from Lot 827 and eliminate the ability to provide any off-street parking on-site. At least one space is required under the Zoning Regulations for the apartment house use.
12. The proposed subdivision and one-family dwelling on new Lot 22 also requires variance relief.
 - a) An area variance from § 401.3 to allow a new one-family dwelling on a lot that does not comply with the required minimum lot area: New Lot 22 would provide 971 square feet where a minimum of 1,800 square feet is required for a one-family dwelling, a variance of 829 square feet.
 - b) An area variance from § 403.2 to allow a one-family dwelling that would exceed the maximum allowable lot occupancy: The proposed building on new Lot 22 would occupy 100% of the lot where a maximum of 60% is permitted as a matter of right, a variance of 40% (388 square feet).
 - c) An area variance from § 404.1 to allow a one-family dwelling that would not comply with required minimum rear yard: The proposed building on new Lot 22 would not provide a rear yard where a minimum of 20 feet is required, a variance of 100%.
 - d) A use variance from § 2507.2 to allow a new one-family dwelling on an alley lot that does not comply with minimum alley width: New Lot 22 would face an alley 30 feet wide, but the alleys providing access to the street are 15 feet wide, half of the required minimum of 30 feet.
13. The subject property is located in the Capitol Hill historic district. A staff report prepared for the Historic Preservation Review Board ("HPRB") described Millers Court as an "important historic alley, as it features inhabited alley dwellings and several early carriage houses." (Exhibit 9, p. 1) The staff report concluded that HPRB could reasonably grant approval for the demolition of the garage structures for the Applicant's project, and stated that the Applicant's "proposal to join together the parcels formerly occupied by the garages is consistent with the pattern of development" in the square. (Exhibit 9, p. 2.) The report also stated that the project would be "compatible with the character of Millers Court and with the Capitol Hill Historic District as a whole." (Exhibit 9, p. 3.) On November 29, 2012,

HPRB found the proposed demolition, new construction, and subdivision to be consistent with the purposes of the historic preservation act and delegated final approval to the staff.

Harmony with Zoning

14. 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.)

CONCLUSIONS OF LAW AND OPINION

The Applicant seeks area and use variances to allow the subdivision of two adjoining parcels so as to permit an existing apartment house on a new smaller lot and a new one-family dwelling on an adjoining alley lot, in the CAP/R-4 District at 319 A Street, N.E. and rear of 319 and 321 A Street, N.E. (Square 786, Lot 827, part of Lot 827 and Lot 22). The Board is authorized under § 8 of the Zoning Act 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.) 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. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). The use variance inquiry focuses on whether “the property can be put into any conforming use with a fair and reasonable return to the owner.” *Id.* at 542.

In this case the Applicant is requesting area variances from the lot area (§ 401), lot occupancy (§ 403), rear yard (§ 404), and off-street parking (§ 2101.1) requirements. The Applicant also seeks a use variance from § 2507.2 of the Zoning Regulations to permit the construction of five one-family dwellings on alley lots in the R-4 District where the alleys are less than 30 feet in width.

As a preliminary matter, the Board denies the motion by the party in opposition to dismiss the application on the ground that the application was not signed by the owner of record of the subject property. The Applicant adequately demonstrated that the application was submitted by the person with ownership and control of the subject property, who was represented before the Board by a duly authorized representative.

Based on the findings of fact, the Board finds that the application does not satisfy the requirements for the requested variance relief. The Board concurs with the Office of Planning that the subject property is not faced with any exceptional situation or condition. Lot 827 is a

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typical lot for its neighborhood, exceptional only in that the parcel abuts another property also owned by the Applicant, which the Applicant seeks to redevelop. Similarly, Lot 22 is not unusual for an alley lot. The Applicant argued that the subject property faced an exceptional situation due to a confluence of factors, especially that both garages are no longer suitable or usable for garage or other permitted purposes, and have received approval for demolition but could not be replaced “given existing zoning limits.” The Board does not agree that the garages could not be replaced⁴ or that the garages could not be devoted to a use permitted under the Zoning Regulations. Despite their poor condition, the garages have remained in use for storage by the Applicant’s property management company; they are not vacant. Nor does the Board find an exceptional situation in the dilapidated conditions of the two garages, which are relatively old structures that have been owned by the Applicant for decades; the owner’s lack of maintenance does not provide a justification for variance relief. *See, e.g., Foxhall Community Citizens Ass’n v. District of Columbia Bd. of Zoning Adjustment*, 524 A.2d 759 at 763 (D.C. 1987) (court vacated a Board finding that property faced an exceptional situation due in part to “problems with the heating, cooling and bathroom facilities,” stating that “[t]hese observations beg the question because they ignore that [the property owner] itself is responsible for the ‘extraordinary or exceptional situation or condition’ the BZA described.” *Id.* at 753. Other factors cited by the Applicant as indicative of an exceptional situation – e.g. the nonconforming aspects of each lot, the lack of street frontage for Lot 22, the absence of an alley 30 feet wide, location in a historic district – are similarly unpersuasive as grounds for the grant of a variance. Many properties, especially within the Capitol Hill historic district, face similar circumstances.

Even if these were exceptional conditions, the Board does not find that as a result of such conditions the Applicant faces any practical difficulty or undue hardship arising from the strict application of the Zoning Regulations. The properties are currently in use as storage and could also, consistent with the Zoning Regulations, be devoted to use as an artist studio or used as parking. The Board agrees with the party in opposition that the lots would be useful as storage or for parking by nearby residents, citing the demand for parking in the densely developed square. Contrary to the Applicant’s claims, existing Lot 22 is not “too small to be useful on its own,” as the lot, which is at least 20 feet wide, could accommodate two parking spaces.

The Board was not persuaded by the Applicant’s claims that a result of the strict application of the Zoning Regulations would be elimination of any reasonable use of a substantial portion of the property absent a grant of variance relief due to the numerous unique conditions and circumstances for Lot 22 and its physical relationship to Lot 827 and the existing garages. Especially with respect to new Lot 22, where a use variance is required to allow its development with a new one-family dwelling, the Applicant’s claim of deterioration describes a self-created hardship. Although “self-created hardship is not a factor to be considered in an application for an area variance,” *Ass'n For Pres. of 1700 Block of N St., N.W., & Vicinity v. D.C. Bd. of Zoning Adjustment*, 384 A.2d 674, 678 (D.C. 1978), it “will not support the grant of a use variance.” *Salsbery v. D.C. Bd. of Zoning Adjustment*, 357 A.2d 402, 404 (D.C. 1976) *See, e.g., Foxhall*

⁴ The Office of Planning indicated that the Zoning Administrator permits the replacement of existing dilapidated accessory structures even if they contribute to a nonconformity such as lot occupancy.

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Community Citizens Ass'n, 524 A.2d at 761 (hardship related to configuration of existing structure was not grounds for use variance where the configuration was created by the owner of the property), quoting 3 A. Rathkopf and D. Rathkopf, *THE LAW OF ZONING AND PLANNING*, § 39-01 (4th ed. 1986); *accord*, 3 R. Anderson, *AMERICAN LAW OF ZONING*, § 20.44, -.45, -.46 (3d ed. 1986) (If the peculiar circumstances which render the property incapable of being used in accordance with the restrictions contained in the ordinance have themselves been caused or created by the property owner, ... the essential basis of a variance – that is, that the hardship be caused solely through the manner of operation of the ordinance upon the particular property – is lacking. In such a case, a variance may not be granted.)

The Board does not agree with the Applicant's assertion that approval of the requested zoning relief would not cause substantial detriment to the public good on the grounds that development of a new one-family dwelling would be consistent with the residential purposes of the R-4 zone and in keeping with the character of the historic district and specifically with Millers Court. New Lot 22 would be little more than half the minimum size required under the Zoning Regulations for a one-family dwelling, and the proposed design of the dwelling does not include any yard setbacks as the dwelling would occupy the entire substandard lot. As noted by the party in opposition, Square 786 is already densely developed, and construction of a new dwelling on an alley lot would further increase the density and contribute to parking and traffic congestion issues within the alley system. In addition, as noted by the Office of Planning, the lack of rear yard or other setbacks could affect the availability of light and air to adjacent properties, including the apartment house on Lot 827 and other nearby residences.

The Board concurs with the Office of Planning that granting the requested zoning relief would substantially impair the intent, purpose, and integrity of the Zoning Regulations and Map. The application requests a use variance, a parking variance, and five area variances. Each of the variances would continue or increase an existing nonconforming aspect of the subject property, or create a new nonconforming aspect that does not now exist (e.g. the elimination of an area suitable for parking on Lot 827). Two of the variances would entail 100% variance relief (to eliminate the rear yard requirement on new Lot 22 and parking for Lot 827). Moreover, approval of a use variance to allow a new dwelling on an alley lot would be inappropriate where the property could be devoted to other viable uses consistent with the Zoning Regulations. The substantial degree of variance relief requested was not supported by any exceptional situation, practical difficulty, or undue hardship to the owner. *Cf. Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164 (D.C. 1990) (where a requested variance is *de minimis* in nature, a correspondingly lesser burden of proof might rest on the property owner).

The Board is required to give "great weight" to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2001).) In this case, as discussed above, the Board concurs with OP's recommendation that the application should be denied.

The Board is also 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,

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effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001)).) In this case, ANC 6C voted to support the application. However, the ANC's report noted only that neighbors had expressed support for the project, subject to the Applicant's agreement to restrict the hours of construction. The ANC's report did not offer persuasive advice with respect to the criteria for granting variance relief that the Board must consider.

Based on the findings of fact and conclusion of law, the Board concludes that the Applicant has not satisfied the burden of proof with respect to the request for use and area variance relief necessary to allow the subdivision of Lot 827 and Lot 22 and the location of a three-unit apartment house, without off-street parking, on Lot 827, or a one-family dwelling on Lot 22, an alley lot not served by an alley 30 feet wide to the street in the CAP/R-4 zone at 319 A Street, N.E. and rear of 319 and 321 A Street, N.E. (Square 786, Lot 827, part of 827, and Lot 22). Accordingly, it is **ORDERED** that the application is **DENIED**.

VOTE: 3-0-2 (Lloyd J. Jordan, S. Kathryn Allen, and Robert E. Miller (by absentee ballot) voting to Deny the application; Jeffrey Hinkle and Marnique Y. Heath not participating.)

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: April 30, 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.