

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18787 of 143 Rear W Street LLC, pursuant to 11 DCMR § 3103.2, for a use variance from § 2507.2 to allow construction of five single-family row dwellings on alley lots where the alleys are less than 30 feet in width in the R-4 District at premises 143 Rear W Street, N.W. (Square 3121, Lots 73 and 74).

HEARING DATE: July 29, 2014
LIMITED HEARING DATE: September 9, 2014
DECISION DATE: October 7, 2014

DECISION AND ORDER

The owner of the subject property, 143 Rear W Street LLC (“Applicant”), submitted a self-certified application on April 17, 2014, seeking use variances from §§ 2507.1 and 2507.2 of the Zoning Regulations to allow the construction of four flats on alley lots in the R-4 District at 143 Rear W Street, N.W. (Square 3121, Lots 73 and 74) (the “Site”). On June 11, 2014, the Applicant submitted an amended application that reduced the number of proposed units from four flats (eight dwellings) to five single family row dwellings, and withdrew its request for a variance from § 2507.1. Following a public hearing, the Board of Zoning Adjustment (“Board” or “BZA”) granted the Applicant’s remaining request for a variance from § 2507.2 of the Zoning Regulations.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing: By memoranda dated April 18, 2014, the Office of Zoning provided notice of the original application to the Office of Planning (“OP”); the District Department of Transportation (“DDOT”); the Councilmember for Ward 5; Advisory Neighborhood Commission (“ANC”) 5E, the ANC in which the subject property is located; and Single Member District/ANC 5E08. Pursuant to 11 DCMR § 3112.14, on April 23, 2014, the Office of Zoning mailed letters providing notice of the hearing to the Applicant, ANC 5E, and the owners of all property within 200 feet of the subject property. Notice was published in the *D.C. Register* on May 2, 2014 (61 DCR 004387).

Request for Party Status. In addition to the Applicant, ANC 5E was automatically a party in this proceeding. The Board granted requests for party status in opposition to the application

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submitted by Alicia Hunt and Joe Gersen (Exhibit 25), Victoria Leonard (Exhibit 27), Pia Brown (Exhibit 28), and Jonathan Carron (Exhibit 29). The Board combined the individual requests into a single party (the “Party in Opposition”). Each of the persons within the Party in Opposition owns property on the 2200 block of Flagler Place, N.W., and three of those four properties are located directly across the alley from the Site.

Board of Zoning Adjustment Hearing. The Board convened a hearing on the application on July 29, 2014. At the close of the hearing the Board asked the Applicant to submit additional information, with a response by the Party in Opposition, to be reviewed at a limited further hearing. The Applicant filed its post-hearing submission on August 12, 2014 (Exhibits 71-74) and the Party in Opposition submitted a response thereto on August 25, 2014. (Exhibit 76.) The limited further hearing was held on September 9, 2014. The Board scheduled the application for deliberation on October 7, 2014, and voted 3-1-1 to approve the application.

Applicant's Case. Christopher Collins of Holland & Knight LLP represented the Applicant. The Applicant presented four witnesses in support of the application at the July 29, 2014 hearing: Robert Miller of 143 Rear W Street LLC; Ralph Cunningham of Cunningham Quill Architects, recognized as an expert in architecture; Eric Smart of Bolan Smart Associates, recognized as an expert in real estate economics; and Steven E. Sher of Holland & Knight LLP, recognized as an expert in land use and zoning. The witnesses described the plans to construct the five row-dwellings at the Site and presented evidence and testimony to demonstrate that the application met all requirements for approval under the Zoning Regulations.

In further support of its application, on August 12, 2014, the Applicant submitted supplemental information requested by the Board (Exhibits 71-74). This submission presented (i) empirical data on the construction costs and financing for the proposed project, and alternative uses permitted on the Site, and (ii) a response to the ANC’s position on part three of the variance test (“no substantial detriment”). This submission included a more detailed study prepared by Bolan Smart Associates, which demonstrated that none of the alternative matter-of-right and special exception uses of the Site were economically viable, nor was a four-unit residential development economically viable. (Exhibit 72.)

The Applicant submitted corresponding architectural drawings that illustrate the various proposed alternative development scenarios (Exhibit 74). In addition, the Applicant submitted a letter from Jones Lang LaSalle, which provided information on debt and equity financing possibilities in the marketplace applicable to the various proposed alternative development scenarios. (Exhibit 73.)

At the limited further hearing on September 9, 2014, the Applicant presented testimony of Robert Miller, Eric Smart, and Daniel Karchem of Karchem Properties, Inc., recognized as an expert in real estate economics and development. Robert Miller explained the Applicant’s process of re-reviewing the alternate development scenarios after the first hearing, developing detailed architectural drawings for each scenario, and determining the overall construction costs and project revenues for each scenario. Eric Smart summarized his financial feasibility analysis,

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concluding that there is a lack of market demand at the Site sufficient to cover development and operating costs of any use permitted as a matter of right or special exception, and that none of these alternatives generate sufficient economic return to be viable in the real estate development marketplace. Daniel Karchem's testimony summarized his expert opinion that none of the alternative matter-of-right or special exception uses for the Site were economically viable, nor was a four-unit residential development economically viable.

Government Reports. By memorandum dated July 22, 2014, OP recommended approval of the application. (Exhibit 49.) OP set forth the requirements of §§ 2507.2 and 3103.2 and opined that the application met the standards for use variance relief. OP found that the Site is exceptional because it is the only large, vacant alley lot in the vicinity. OP found that the exceptional situation created an undue hardship for the Applicant because the "property is not economically feasible to own in the long term in its present condition, or even with the permitted potential uses." (Exhibit 49, pg. 3.) Finally, OP found that relief could be granted without substantial detriment to the public good or zone plan because the buildings would be adequately set back so as to not unduly impact light available to nearby properties. OP concluded that shadow studies submitted by the Applicant (Exhibit 46) "show that the new construction would not unduly impact light available to nearby properties." In addition, the Applicant would provide lighting and landscaping to increase safety and visual appeal, and because the Applicant would provide all the necessary water, sewer, and parking facilities for the Site.

By memorandum dated July 3, 2014, DDOT also filed a report with the Board, stating that it had no objection to the requested relief (Exhibit 40). The District Fire and Emergency Medical Services ("FEMS") Fire Prevention Division sent a letter dated July 15, 2014, to the Applicant indicating that it had no concerns with the project as proposed and explained that 2nd Street, W Street, and Adams Street met the fire apparatus access road requirement for the project. (Exhibit 48.)

ANC Report. ANC 5E submitted a report to the Board dated July 21, 2014, stating its opinion that the originally-proposed four flat (eight unit) development did not meet the three-pronged test to obtain a variance and recommending that the Board deny the Applicant's request (Exhibit 50).

Party in Opposition. The Party in Opposition asserted that the project would negatively increase population density in the neighborhood, reduce available on-street parking, negatively impact light, air, open space, and views from the surrounding properties on the 2200 block of Flagler Place, and impede access to the rear of the Flagler Place properties.

The Party in Opposition argued that the application does not meet the three-prong test for a use variance for the following reasons:

1. The Site is not affected by an exceptional situation or condition. They asserted that "other blocks in Bloomingdale include alley lots of similar size and shape" and "are adjacent to narrow alleys," including a large alley lot in Square 3117 that is owned by the non-profit Crispus Attucks Development Corporation that is used as a public park; an

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alley lot in Square 3119 that is improved with several buildings that appear to be used for parking and storage; and an alley lot in Square 3116 that is improved with several two-story buildings;

2. The Applicant would not encounter practical difficulties or undue hardship if the Zoning Regulations were strictly applied. They asserted that there are viable uses for the Site other than single family row dwellings, such as operating the Site as a parking lot, or using it for car-sharing or bike-sharing services, or offering the lot for valet parking by restaurants located several blocks to the south. The Party in Opposition claimed that the Applicant could “make a reasonable return on investment by leasing [the Site] to ... neighborhood residents interested in leasing off-street parking,” or building four dwelling units with two-stories and 1,500 square feet instead of the proposed five-dwelling plan; and
3. The project will cause substantial detriment to the public good. They asserted that the project will “block sunlight and existing views” and is “too large and will seriously detract from the openness of [the] block, and it will create spaces that are too small given the large size of the development.” (Exhibit 66.)

At the public hearing and in its written testimony, the Party in Opposition also requested that the Board require the Applicant to make the following modifications to its application:

1. Set back the row dwellings ten feet from the alley along the 2200 block of Flagler Place and do not expand the row houses farther east beyond the existing building line at 143 W Street;
2. Limit the row dwellings to two stories;
3. Construct four row dwellings instead of five; and
4. Limit the size of the row dwellings to 1,500 square feet. (Exhibits 66 and 76.)

FINDINGS OF FACT

The Subject Property and the Surrounding Neighborhood

1. The Site is located at 143 Rear W Street, N.W. (Square 3121, Lots 73 and 74) and is zoned R-4.
2. The Site is unimproved and currently used for surface parking.
3. Square 3121 is bounded by Adams Street to the north, Flagler Place to the east, W Street to the south, and 2nd Street to the west. The entirety of Square 3121 is zoned R-4, and the predominant use is one-family and two-family dwellings (flats). Along the south side of

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the square, fronting on W Street, are three four-story apartment buildings, also zoned R-4.

4. A convenience store is located at the southeast corner of the square. The R-4 District extends one block to the north of Square 3121 to Bryant Street; two blocks to the east; and seven to eight blocks to the south, with an R-5-B enclave two blocks south of the Site. The north side of Bryant Street and the west side of 2nd Street, from V Street to the McMillan Reservoir, are zoned R-5-B.
5. This area includes maintenance and storage facilities for the District Department of Public Works and the pumping station building for the McMillan Reservoir. The McMillan Reservoir property is located farther to the north.

The Applicant's Project

6. The Applicant seeks to construct five one-family row dwellings at the Site. Each dwelling has a 20-foot rear yard and a 16.1-foot front yard and will be made of wood and/or steel framing with masonry exteriors. Each dwelling includes a parking garage for one vehicle and entrances on the north and south sides of each dwelling. The main pedestrian entrance to the development will be from the south via a 26-foot wide landscaped and lighted perpetual easement from W Street. The pedestrian path will lead directly into the entrance courtyard for the units.

The Need for Zoning Relief

7. Subsection 2507.2 of the Zoning Regulations allows the construction of a one-family dwelling on an alley lot if the lot abuts an alley 30 feet or more in width and has access to a street through an alley not less than 30 feet in width. Square 3121 does not have any alleys that are 30 feet in width, which precludes any residential use of the Site without relief from this Board. It is not possible to widen any of the alleys leading from the surrounding streets to the Site in order to achieve the 30-foot width requirement because each of the alleys is bordered on both sides by buildings or open space that is part of adjacent lots.

Facts Relevant to the Variance Test

8. The Site is an unusually large unimproved alley lot, measuring 90 feet by 101.3 feet and containing approximately 9118.5 square feet of land area. The Site is located in the center of Square 3121 and surrounded on all sides by public alleys, which measure 15 feet in width on the north, east, and west sides, and ten feet in width on the south side.
9. The Site is accessed through the following right-of-ways: (i) 15 foot wide public alleys from W Street to the south and from 2nd Street to the west; (ii) a ten foot wide public

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alley from Adams Street to the north; (iii) a ten foot wide alley easement for pedestrian and vehicular access, extending from 2nd Street and across the rearmost ten feet of the apartment building property at 2201 2nd Street, N.W.; and (iv) a 26-foot wide perpetual pedestrian and utility easement leading from W Street, between the two apartment buildings at 143 and 149 W Street, N.W. that was specifically created to facilitate the development of this alley parcel.

10. None of the squares within several blocks of the Site have other large unimproved alley lots that are surrounded on all four sides by alleys and directly connected to a street through a perpetual pedestrian easement.
11. The large alley lot in Square 3117 that is owned by Crispus Attucks Development Corporation is specifically devoted to use as a public park.
12. The alley lots in Squares 3119 and 3116 are both improved: the center of Square 3116 is improved with several two-story buildings and the center of Square 3119 is improved with several buildings that appear to be used for parking or storage, surrounding an open courtyard.
13. None of these alley lots is accessed by, or abuts, alleys of 30 feet in width, and none has a dedicated 26-foot wide easement leading to a street for pedestrian access.
14. The only uses permitted as a matter of right on an alley lot in the R-4 District where the alleys are less than 30 feet wide are an artist studio (11 DCMR § 2507.5) and a private garage (11 DCMR § 201.1(o)).
15. For an artist studio, the minimum lot area is 4,000 square feet and the minimum lot width is 40 feet. Thus, the Applicant could provide two equally-sized record lots on the 9,118 square foot Site for development of two matter-of-right, three-story, 40-foot tall artist studio buildings. Each artist studio could accommodate up to four artists and apprentices per floor, or 12 occupants per building (total of 24 occupants for both buildings).
16. For a private garage on an alley lot under § 201.1(o), the garage structure is limited to a maximum of 900 square feet in size and can only be located on an alley lot that was recorded prior to November 1, 1957 (11 DCMR § 2300.5). Current Lots 73 and 74 existed as of November 1, 1957.
17. Storage of wares and goods, parking lot, parking garage, and public storage garage uses are permitted by special exception in the R-4 District where surrounding alleys are less than 30 feet wide and the alley lots were recorded prior to November 1, 1957. (11 DCMR § 333). Therefore, only two such buildings could theoretically be constructed on the Site.
18. Accessory Parking Spaces could also be provided on the Site pursuant to § 214, so long

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as they are located on a lot with a minimum area of 4,000 square feet and a minimum width of 40 feet. Accessory Parking Spaces must also be within 200 feet of the area to which they are accessory, in this case limiting the use of the spaces only to the residents within Square 3121.

19. Based upon the testimony and financial analysis offered by the Applicant's expert witnesses, the Board finds that none of the available matter-of-right or special exception uses would be economically viable. Even assuming that there would be a market for any of these alternative uses, there would be a financial loss on the development of the Site with an artist studio, private garage, parking garage, storage facility, or surface parking facility.
20. Although the site is currently used for surface parking, there is insufficient demand in the area to reasonably continue the parking use in the long-term.
21. Based upon the financial analysis and the expert testimony presented, the Board finds that the proposed five-unit development contains the minimum number of residential uses that would permit an economically viable project. Neither of the four unit alternatives analyzed by Mr. Smart, including the development suggested by the Party in Opposition, would be financially viable.
22. The Site is zoned R-4. 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. Very little vacant land is included within the R-4 District, since its primary purpose is the stabilization of remaining one-family dwellings. The row dwellings each satisfy all of the applicable height, bulk, set back, and other area requirements and limitations for row dwellings in the R-4 District.
23. The proposed one-family dwellings are similar to the row dwellings in the neighborhood in terms of massing and size, and the project creates a condition seen throughout the District where row dwellings back up to the backs and sides of other row dwellings.
24. The dwellings will be set back more than 30 feet from the opposite side of the alleys bordering the Site to the north and south. To the north is the 15-foot wide existing alley plus a setback (front yard) of 16.1 feet. To the south is the 10-foot alley plus a setback (rear yard) of 20 feet.
25. The lots to the east of the Site have a depth of 80 feet and the footprint of the houses on those lots extends 40 feet. Even assuming a ten foot differential, there is a 30-foot distance between the rear of the homes and the rear property line. Adding the 15 feet of open space provided by the alley results in a total separation of 45 feet in a zone that requires a 20 foot rear yard.

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26. There will be a 26 foot wide landscaped and lighted perpetual easement for pedestrian use leading directly to W Street.
27. Neither the Metropolitan Police Department, nor D.C. Water expressed any opposition or concern about the proposed development.
28. D.C. FEMS also indicated that it had no concerns about the project. (Exhibit 48.) Ordinarily fire apparatus access roads must be within 150 feet of the project and all such roads must have a minimum width of 20 feet. The public alleys located within the 150-foot limit are less than the required width. However the DC FEMS indicated that the fire code official in this case could expand the 150-foot limit because fire sprinklers would be installed in each residence. This expansion permitted 2nd Street, W Street, and Adams Street to be considered the fire apparatus access roads for this project. DC FEMS concluded that each street met the fire apparatus access roads requirements.
29. The DDOT report also indicated it had no objections to the requested variance, noting that pedestrians “would have safe access to the Site through an easement created for pedestrian and utility access.” (Exhibit 40.)
30. The OP report concluded that “relief would not impair the integrity of the Regulations” and noted that there will be adequate water and sewer to the Site, to be installed by the Applicant. Further the report concluded that the public interest would not be impaired a grant of the variance and specifically noted that that the shadow studies submitted by the Applicant show that the project would not unduly impact light available to nearby properties.

CONCLUSIONS OF LAW

The Board is authorized under § 8 of the Zoning Act to grant variances from the strict application of the Zoning Regulations to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property . . . or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of the Zoning Regulations would "result in particular and exceptional practical difficulties to or exceptional or undue hardship upon the owner of the property" D.C. Official Code § 6-641.07(g)(3) (2012 Repl.), 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 Applicant in this case requests a use variance from § 2507.2 of the Zoning Regulations to permit the construction of five one-family row dwellings on alley lots in the R-4 District where the alleys are less than 30 feet in width.

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Therefore, the Applicant must demonstrate an exceptional situation or condition of the property and that such exceptional condition results in an “undue hardship” to the Applicant.

The purpose of the variance procedure is to “prevent usable land from remaining idle.” *Palmer v. Dist. of Columbia Bd. 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. The court has also recognized in a use variance application that approval is justified when the relief requested is minor relative to the nature of the surrounding community. *The Oakland Condominium v. Dist. of Columbia Bd. of Zoning*, 22 A.3d 748, 750 (D.C. 2011).

Lastly, the Applicant had to show that the granting of the variance will not impair the public good or the intent or integrity of the Zone Plan and Regulations.

Based on the above findings of fact, the Board finds that the Applicant has satisfied the burden of proof and that the application should be granted.

Exceptional Condition

The Board concludes that the subject property is affected by an exceptional situation or condition. The Site is an unusually large vacant alley lot, containing almost a quarter acre of land area, and is surrounded by public alleys on all four sides. The Site is also directly connected to W Street via a 26-foot wide perpetual easement created specifically for pedestrian and utility access from W Street to the Site.

None of the squares within several blocks of the Site have other large unimproved alley lots that are surrounded on all four sides by alleys and directly connected to a street through a perpetual pedestrian easement. The large alley lot in Square 3117 that is owned by Crispus Attucks Development Corporation is specifically devoted to use as a public park. The alley lots in Squares 3119 and 3116 are both improved: the center of Square 3116 is improved with several two-story buildings and the center of Square 3119 is improved with several buildings that appear to be used for parking or storage, surrounding an open courtyard.

Undue Hardship

The Board concludes that the property cannot be put into any conforming use with a fair and reasonable return to the owner and therefore the strict application of the Zoning Regulations would result in undue hardship to the Applicant as the owner of the Site. Uses permitted as a matter of right on an alley lot in an R-4 District where the alleys are less than 30 feet wide are artist studio and private garage, and uses permitted as a special exception are storage of wares and goods, parking lot, parking garage, and public storage garage. Based upon the expert testimony presented by the Applicant, the Board finds that none of these uses would be economically viable. The Board further concludes that although the site is currently used for

surface parking, there is insufficient demand in the area to reasonably continue the parking use in the long-term.

Further, the five residential units proposed by the Applicant represent the minimum number of units required for an economically viable residential project on this site. The financial analysis prepared by the Applicant's expert witness (Exhibits 71 and 72) indicates that under conservative conditions, neither of the four-unit alternatives considered, including one proposed by the Party in Opposition, would generate sufficient economic return to be viable in the real estate development marketplace. The alternative with four dwellings at the same size and dimension as the dwellings proposed by the Applicant results in a post-financing loss, as does the Party in Opposition's proposal with four two-story dwellings at 1,500 square feet each.

The Party in Opposition claimed that the Applicant's estimated costs, both to construct the row dwellings as proposed and to construct and operate a surface parking lot in the alternative, are too high, and that the Applicant's estimated revenues for the same are too low. In support of its position, the Party in Opposition submitted construction estimates from several websites for a three-story luxury dwelling, an asphalt driveway, and a block retaining wall. The Party in Opposition also submitted financial feasibility analyses, based upon the construction estimates contained in the websites (Exhibit 76). They also claimed that the Applicant's revenues were underestimated when compared to other new or renovated dwellings in the surrounding area.

The Board was not persuaded by the non-expert economic analysis proffered by the Party in Opposition. The website construction estimates were based upon assumptions, generalizations, and industry norms that are not specific to the D.C. market. Further, the Party in Opposition's comparison of the projected sales prices for the project as proposed was based upon recent sales of condominium units in the neighborhood. The Project's row dwellings will be sold to buyers in fee simple. The Board agrees with the Applicant that sales prices for condominium units cannot realistically be equated to sales price for fee-simple row dwellings.

The Public Good and Integrity of the Zone Plan and Regulations

The Board concludes that the requested variance can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan.

As to the zone plan, the Board finds that the project fits well within the character of the neighborhood and the square. The proposed one-family dwellings are similar to the row dwellings in the neighborhood in terms of massing and size, and the project creates a condition seen throughout the District where row dwellings back up to the backs and sides of other row dwellings. The Board further concludes that the proposed development plan substantially complies with the 30-foot alley requirement in § 2507.2, because the setbacks on the north and south sides of the dwellings create a 30-foot open space consisting of a public alley and private

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property, and there is a 26-foot wide perpetual pedestrian easement leading directly from W Street to the Site.

The project is consistent with the District of Columbia's Comprehensive Plan, which encourages infill development of vacant land within the city, particularly in areas where there are unimproved lots that create gaps in the urban fabric. The proposed development compliments the established character of the area while turning an eyesore into a productive housing use, which is desperately needed in the city.

The project will not impair the public good. The Site has direct access to a public street via a perpetual 26-foot wide pedestrian easement. The Site has public alleys on all sides and setbacks that create more than 30 feet of open space to the north and south. The Board concludes that the public good will be well-served by the proposed high-quality, infill residential development in this area of the city, which the District is seeking to revitalize through public and private investment.

The Board finds that the project will not impermissibly impact the homes at 2216, 2218, and 2220 Flagler Place by blocking sunlight and existing views. The Board notes that there will be a 45 foot separation between the rear of these dwellings and the Site. In addition, the Office of Planning concluded, and this Board agrees, that the shadow studies submitted by the Applicant show that the project would not unduly impact light available to nearby properties.

In any event, this Board has found on a number of occasions that "it is well settled in the District of Columbia that a property owner is not entitled to a view across another person's property without an express easement. *See* BZA Order No 18330 (*quoting Hefazi v. Stiglitz*, 862 A.2d 901, 911 (D.C. 2004)); *see also* Z.C. Order No. 12-02 (stating that "a property owner is not entitled to a view, light, or air across another person's property without an express easement, and a property owner has no right to a view across another person's property... The Commission finds that the view sheds and property values of [the opponents] are not protected by any restrictive covenants or by the Zoning Regulations").

The Applicant requested and received feedback from D.C. FEMS Fire Prevention Division, the Department of Public Works, the Metropolitan Police Department, and D.C. Water, none of which expressed any opposition or concern about the proposed development. The Board notes specifically that the letter from D.C. FEMS (Exhibit 48) stated that 2nd Street, W Street, and Adams Street all meet the fire apparatus access road requirements for this project. Furthermore, the OP report concluded that "relief would not impair the integrity of the Regulations" (Exhibit 49) and the DDOT report indicated no objections and noted that pedestrians "would have safe access to the Site through an easement created for pedestrian and utility access" (Exhibit 40).

Great Weight

The Board is required under § 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)) to give “great weight” to the issues and concerns raised in the written report of the affected ANC, which in this case is ANC 5E. 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. Similarly, 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.

In this case, the Board concurs with OP's conclusion that the application met the three elements of the test for a use variance and therefore agrees with its recommendation that the application should be approved.

As to ANC 5E, that Commission submitted a report indicating that it voted not to support the application for four flats (eight units) based on its opinion that the development did not meet the three-pronged test to obtain a variance. Although the project was later revised to reduce the number of units to five, the Board will respond to the ANC's concern that the project has not satisfied the test for a use variance.¹

The ANC believed the site was not exceptional, pointing to other properties of a similar size. As explained, it was not just the exceptional size of the site that created the exceptional condition, but that it was also unimproved, bounded by public alleys, and subject to a perpetual easement. With respect to undue hardship, the ANC based its conclusion upon the ability of the owner to continue to offer parking on the site. As noted, the Board has concluded that surface parking is not a viable long term use for the site.

As to impairment of the zone plan and the public good, the ANC asserted that other property owners might seek the same relief, the that there was insufficient access for emergency vehicles, and that the homes at 2216, 2218, and 2220 Flagler Place would be negatively affected as a result of blocked sunlight and the loss of existing views. With respect to the potential for future application, the ANC's concern is speculative at best. In any event, even if the grant of this application might invite others, such a possibility would not impair the zone plan. The Board decides variances on the merits of each case and each property must be shown to have an exceptional condition. Finally, as explained above, the project will not tend to adversely impact the homes at 2216, 2218, and 2220 Flagler Place by blocking sunlight and existing views, which, as the referenced case law indicate, are not guaranteed.

¹ On October 6, 2014, the day before the Board's deliberations and well after the record in this case was closed; the Office of Zoning received an email from Mr. Mark Mueller who identified himself as a former ANC Commissioner. Subsection 3121.9 of the Board's Rules of Practice and Procedure provides that any material received after the close of the record that bears upon the substance of the application shall not be received into the files of the Board unless accompanied by a request to re-open the record. No such request was made and therefore the email was not entered into the record of this case.

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For these reasons and the other substantive findings and conclusions made in this order, the Board finds the ANC's recommendation of denial unpersuasive.

Based on the findings of fact and conclusions of law, the Board concludes that the Applicant has satisfied the burden of proof with respect to the request for a use variance to permit the construction of five single family row dwellings on alley lots in the R-4 District where the alleys are less than 30 feet in width at 143 Rear W Street, N.W. (Square 3121, Lots 73 and 74). Accordingly, it is therefore **ORDERED** that the application is hereby **GRANTED, SUBJECT TO EXHIBIT 47C – UPDATED PLANS, DRAWINGS AND RENDERINGS, AND THE FOLLOWING CONDITIONS:**

1. Landscaping shall be substantially in accordance with that shown on Exhibit 47C.
2. Lighting for the project shall be designed to minimize spillover light onto nearby properties.

VOTE: 3-1-1 (Jeffrey L. Hinkle, Robert E. Miller, and Marnique Y. Heath to approve; Lloyd J. Jordan opposed to the motion; 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: April 14, 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

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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.