GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4TH STREET N W., WASHINGTON, DC 20001

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In the Matter of:)
)
Application of Alleyoop, LLC)
Regarding 1018 (Rear) Irving Street NW)
Square 2851 Lot 837) **BZA No. 18511**
)

(PROPOSED) FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

The application of Alleyoop, LLC (the "Applicant") pursuant to 11 DCRM § 3103.2 is for a variance from the use provisions under subsection § 330 4, a variance from the nonconforming structure provisions under subsection § 2001 3, and a variance from the building on an alley lot provisions under section § 2507 The application would allow the use and alteration of an alley lot to construct an addition to an existing structure for a mixed-use (office and five residential apartments) in the R-4 District at the premises 1018 (Rear) Irving Street, N W. (the "Property").

The initial application was scheduled for a public hearing on March 5, 2013 The March 5th public hearing was continued to April 2, 2013 so the Applicant could provide supplemental evidence to support its undue hardship claim

ANC 1A was automatically a party to this proceeding At the April 2, 2013 public hearing, the Board granted a request for party status to Adetokunbo Ladejobi, a resident of the neighborhood (the "Opponent") who opposes the application The Opponent has more than 15 years experience as a real estate private equity investor and asset manager The rear of the Opponent's home faces the Property

Applicant's Case

The Applicant stated that the requested zoning relief was necessary to allow the Applicant to convert an existing automotive repair shop to a mixed-use office/residential building in the R-4 District on an alley lot. During the March 5th and April 2nd hearings, the Applicant was represented by Greg Gardner, the developer and a partner of Alleyoop, LLC Meridith Moldenhauer, an attorney with the Griffin, Murphy, Moldenhauer & Wiggins law firm, also represented the Applicant at the April 2nd hearing.

Government Reports

The Office of Planning ("OP"), through a report dated February 26, 2013, and testimony presented at the April 2nd public hearing, recommended the denial of the requested use variance pursuant to § 2507.1 (multi-family residential use of an alley building), and the denial of the requested area variance pursuant to § 2507 4 (height variance for an alley building). In addition, OP recommended that should the Board determine that the residential use and height is appropriate for this location, OP recommends approval of the requested use variance pursuant to § 330.4 (office use in an alley building), and the approval of the requested area variance pursuant to § 2001.3 (addition to a non-conforming structure) The Department of Transportation recommended approval of the Application with conditions in regards to parking and mitigation of the parking issue. No reports were received from the Fire and Emergency Medical Services Department.

ANC Report

ANC 1A, as reflected in a submission dated January 8, 2013, voted in support of the Application Kent Boese, an ANC Commissioner for Single Member District 1A-08, testified in support of the application at the April 2nd hearing

Persons in Support

The Applicant presented 10 letters in support of its application from separate residents in the square

Parties in Opposition

The Opponent filed a written objection to the application on February 19, 2013, along with 16 signatures from residents surrounding the Property who oppose the application The Opponent also filed supplemental information opposing the Application on April 2, 2013. The Opponent's wife, Veronica Ladejobi, a commercial real estate attorney with the Venable law firm, filed a Statement in Opposition of the Application on April 2, 2013. The Opponent has more than 15 years experience as a real estate private equity investor and asset manager

FINDINGS OF FACT

The Property

1. The Property was purchased all-cash in December 2012 by the Applicant for $556,093.00.

2 No appraisal, nor Phase I and II reports, were performed on the Property prior to purchase

3 The Property is located on Lot 837 in Square 2851 and is a large alley lot with approximately 5,901 square feet of land area and a width of roughly 52.7 ft The Property is bounded on three sides (east, west, and south) by public alleys. To the west, the alley network ranges from 10 feet to 15 feet wide, to the south the alley is 10 feet wide, and to the east the alley is 15 feet wide.

4. The existing structure has a footprint of roughly 4,072 square feet occupying 67% of the lot The remainder of the lot is an open yard The open yard allows for 24 8 feet of separation between the structure and the northern property line

5. The Property consists of a 1-story, 18.5 foot tall building Historically, the building has been used for automotive repair, a business which has been discontinued The automotive repair shop had been in use since at least 1928 and remained in use and operation until September 2012

6. Square 2851 is bounded by Irving Street NW to the north, Columbia Road NW to the south, 11th Street NW on the west, and Sherman Avenue NW on the east.

Surrounding Neighborhood Characteristics and Current Zoning

7 The Square is mostly characterized by 2- to 2.5-story row dwellings along with a few 3- story row dwellings. A 3-story multi-family apartment building fronts on Sherman Avenue NW on the square's east side More generally, the neighborhood is comprised of row dwellings, low density commercial uses, and some garden apartment buildings.

8 The Property is in the R-4 District The primary purpose of the R-4 zone district is the stabilization of remaining single-family dwellings. 11 DCMR § 330.2 The R-4 district is not to be an apartment house district 11 DCMR § 330 3 Section 330 3 provides that "[t]he R-4 District shall not be an apartment house district as contemplated under the General Residence (R-5) Districts, since the conversion of existing structures shall be controlled by a minimum lot area per family requirement."

9 Under the zoning regulations, multi-family use on an alley lot is not permitted in any zone.

10. The height of alley buildings is limited by the width of the alley in all zones

11. Section 2507 2 provides that "A one-family dwelling shall not be erected or constructed on an alley lot unless the alley lot abuts an alley thirty feet (30 ft.) or more in width and has from the alley access to a street through an alley or alleys not less than thirty feet (30 ft.) in width."

Proposed Development

12. The Applicant proposes to convert an existing 1-story automotive repair to a 3-story mixed-use office/residential building The first story will contain office use and four residential parking spaces Two additional spaces will be provided on the side yard. Five residential units, each containing 2 bedrooms, would be constructed on 2 new floors More specifically, the 2nd floor would house 3 units and the 3rd floor would contain 2 units. The building would rise to 39.5' in height. The current height of the building is 18 5'

Office of Planning Recommendation and Testimony

13. OP opposed the requested use variance for multi-family residential use of an alley building, and the area variance for height for an alley building

14 Paul Goldstein, from OP, testified that· (i) OP stands by its original report which said that OP is not able to support this project, (ii) the burden has not been met by the Applicant; (iii) it was not a reasonable expectation of the Applicant when purchasing the Property that it could get 2 additional floors up to 40 feet and 5 units on this property, (iv) the requested relief is far beyond what the alley lot regulations allow, and this application is running afoul of the restrictive intent of those regulations, and (v) OP supports reuse of the existing building for a different less intensive use, but does not support expanding or at least doubling the size of the building for a new nonconforming use

15. OP testified that height is a major issue with this Application.

<u>Application of 11 DCMR § 2003 to an Alley Lot</u>

16 OP testified that he reached out to the Zoning Administrator regarding the application of § 2003 to an alley lot but could not get a conclusive answer

17. With respect to the issue of whether § 2003, and thus the special exception standard, can be applied to an alley lot, OP testified that he had three reasons why it is not a reasonable interpretation of the zoning regulations to apply the special exception standard to this project The first reason is that the alley lots are pretty unique. They are their own subsection (Chapter 25, 2507 in particular). The regulations apply regardless of zone citywide On a sub 30-foot-wide alley you can't even have a one-family dwelling citywide regardless of the zone The second is that this application is for 2 new floors of residential use. It's not even discussing a conversion of an existing structure It's to build 2 new floors of this multi-family use. OP's third point was that he has not seen a case that's had this interpretation

18 OP also agreed with Chairperson Jordan's interpretation of his argument that even if the Applicant's use was allowable as a continued use, the Applicant's argument still fails under § 2507 because both single-family and multi-family use would not be allowed on an alley lot with these characteristics (15 feet alleys) in any zone in the city

19 Ms Glazer, from the DC Office of the Attorney General, testified that the OAG interpreted the auto repair use to be a discontinued use and had not looked at the question whether § 2003 would be applicable to alley lots

ANC Recommendation and Testimony

20 Mr Boese from ANC 1A-08 testified in support for the project because: (i) the ANC was very pleased with the communication it got from the Applicant; (ii) the ANC felt that the volume of traffic would be less than one could expect from its previous uses; (iii) anything that can add more residential units in the neighborhood in a tasteful manner is good as long as it's not overly dense because with the expanding city residents don't have the inventory for the demand, and it's putting a burden on the entire community.

21 During cross-examination by the Opponent, Mr. Boese admitted that although there are four squares (including this one) that have alley lots in them off of Sherman Avenue, that this is the first alley lot that has come before the ANC with a proposal for development None of the after mentioned alley lots have residential units in the middle of them or have any

development. One alley lot has been converted to a community garden, one still has a stable and a grassy area, and another one is entirely surrounded by private garages

Financial Feasibility

22. The Applicant gave testimony and presented supplemental evidence if the form of an Alternative Uses Income Analysis (attached as Exhibit I to the Supplemental Submission of the Applicant) that various other alternative uses, including continuation as an automotive repair, artist studio use, automotive storage use, and office use, were not financially feasible, and that each alternative use would result in a net monthly loss based on the Applicants assumptions in its financial analysis.

23. The Applicant's Supplemental Submission also states that reducing the height of the project to two stories, by removing the top floor from the proposed structure, is also not financially feasible

24. The Applicant testified that he had not done an analysis of the financial feasibility of the building being used a rental property

25 The Applicant states that a single-family home and/or multiple single-family homes do not allow the Applicant to recoup cost of renovation, but the Applicant did not provide an analysis to support this assertion

26 The Applicant has not presented evidence/cost analysis showing that razing the existing structuring and building anew would be more expensive

27 The Opponent testified that for current development, the Applicant would be prudent to have 55 to 60 percent debt on the Property If the Applicant uses a debt percentage of 55 to 60 percent, then the monthly interest payment by the Applicant on its loan would be significantly less The fact that the Applicant is using 80 percent leverage in its analyses inflates the amount of the monthly payment, and decreases the profitability of the projects that adhere to current zoning regulations Also, if the Applicant assumes that the mortgage is amortized over 30 years (rather than 25 years as presented in the financial feasibility analyses), the monthly debt service decreases, thereby increases the profitability of projects that adhere to current zoning regulations.

28. At the time of the April 2nd hearing, the Applicant had not submitted any letters of intent from a bank or financial institutions, or letters of commitment, supporting the financial assumptions made in its analysis.

Undue Hardship

29 The Applicant testified that prior to acquisition of the Property, he was aware of some damage to the concrete roof structure and that the damage was visible from the interior

30 The Applicant's Supplemental Submission stated that the building was used as an automotive repair shop since at least 1928 and remained in use and operation until

September 2012, and the Property is contaminated by oils, solvents and chemicals due to the extended use as an automotive repair shop.

31. The Applicant testified that no appraisal was performed on the Property prior to purchase Also, the record indicates that no Phase I and II reports were ordered prior to acquisition of the Property

32 The Opponent testified that the condition of the Property is apparent upon eyesight

Adverse Effects

33 The Opponent submitted written evidence stating that at present and when operated as an automotive shop, the Property facilitated the quiet and serenity which neighbors could enjoy in their backyards The automotive shop did not create the noise, traffic, and view impediment that the proposed project will cause. The traffic was very little and facilitated very well by the owner. The proposed project will have 10 bedrooms plus office space The traffic caused by this development will exceed that of the automotive shop which did not cause traffic throughout the entire day as residences will

34. The Opponent testified that as an automotive repair shop the majority of the traffic entered the north side of the alley lot The proposed development contemplates an entry/exit from the southwest corner of the alley lot. This is an entirely new source of traffic on the southwest end of the alley lot where the alley narrows to 10 feet.

35 The Opponent testified that he drives a '96 Camry and his car can barely fit down the entry and exit that the developer is suggesting for this Property His neighbor's house is already damaged because it is repeatedly hit by cars that are coming in and out of the alley (you can see bricks that are literally chipped off the side of his neighbor's home)

36 In the Statement in Opposition of the Application submitted by the Opponent's wife, Mrs. Ladejobi states that relief cannot be granted without substantial detriment to the public good, and such detriment includes: (i) increasing noise due to outdoor patois and increased traffic, (ii) increasing density beyond that which would allow comfortable living, (iii) loss of light, air and views (the set-backs are not enough), (iv) greatly diminishing the already limited number of parking spaces available to the neighborhood due to the increased demand caused by multiple-vehicle homes and guest parking; (v) hindering adjacent property owners' access to the rear of their properties for parking, loading/unloading, improvement to their properties, etc , (vi) adversely affecting the quality of life enjoyed by the adjacent property owners with respect to privacy, quiet, views, and open space, (vii) likely preventing the provision of public works and emergency services to the residents through the narrow alley (no Fire and Emergency testimony or report was submitted); (viii) adversely affecting neighboring properties through increased noise, loss of views and privacy, and the loss of light and air, (ix) incompatibility with the character of the majority of the surrounding homes; (x) resulting negative impact of vibrations, noise, and obstruction of alley during construction; (xi) adversely affecting traffic circulation and presenting further obstacles for the trash trucks which already have difficulty negotiating the alleys (the existing auto-shop had little

traffic); and (xii) the contemplated office tenant is not binding on the Applicant and a future tenant could potentially have a significant negative impact on traffic, noise and parking.

CONCLUSIONS OF LAW

37 The Applicant seeks variance relief from four sections of the zoning regulations. §§ 2507.4 and 2507.1, concerning restrictions on the use of an alley lot; § 2001.3, concerning an addition to a nonconforming structure; and § 3304, concerning office use in an alley building The Board is authorized to grant a variance from the strict application of the zoning regulations 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 any zoning regulation 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. D.C. Official Code § 6-641.07(g)(3); 11 DCMR § 3103 2.

Application of 11 DCMR § 2003 to an Alley Lot

38. Based on the testimony and evidence in the record, the Board is not persuaded that 11 DCMR § 2003 applies to alley lots, and, therefore will not consider the multi-family use under the special exemption standard. The Board agrees with OP's arguments as to why § 2003 does not apply in this case. Most importantly, the Board has not found a case that's had this interpretation

Use Variance Relief (§ 2507.1, multi-family residential use)

39. Based on the testimony and evidence in the record and the Findings of Fact, the Board concludes that the subject property exhibits an "extraordinary or exceptional situation or condition", however, the Property's uniqueness does not impose an undue hardship upon the owner of the Property related to the proposed multi-family residential use The alley lot regulations plainly prohibit multi-family dwellings on alley lots, and even a single residential unit would not be permitted on the Property due to the site's location along a less than 30' wide alley network.

40. The Board finds that any hardship on the Applicant does not arise from the strict application of the zoning regulations to the subject property but is self-created. Given the prolonged use of the property as an automotive repair shop (since 1928), the age of the building, the visible signs of damage to the concrete roof structure that the Applicant noted prior to purchase, and given the fact that a visual inspection of the building revealed the deterioration of the structure and fire damage, the Applicant should have foreseen these additional costs and taken into consideration the substantial structural repair costs and remediation costs into the purchase price. It would also have been prudent to have an appraisal and Phase I report completed prior to acquisition. Furthermore, with respect to

rehabilitation costs, the Applicant has not presented evidence/cost analysis showing that razing the existing structuring and building anew would be more expensive.

41 The self-created hardship rules applies to owners who purchase property with actual or constructive knowledge of zoning restrictions from which they intend to seek administrative relief. Foxhall, 524 A.2d at 761, citing 3 R Anderson, AMERICAN LAW OF ZONING § 20 44, -45 See also *Dwyer v. D.C Board of Zoning Adjustment*, 320 A.2d 306 (D.C. 1974), citing *Clouser v. David*, 114 U.S.App.D.C. 12, 13, 309 F.2d 233, 234 (1962) (hardship must result from location, situation, or condition of property, and not solely from owner's appropriation of it for commercial purposes without first having obtained necessary change in zoning) The Board has found that an inability to put property to more profitable use or loss of economic advantage is not sufficient to constitute hardship. *Draude v. D C. Board of Zoning Adjustment*, 527 A 2d 1242, 1255 (D.C. 1987), citing *Palmer v. D.C. Board of Zoning Adjustment*, 287 A 2d 535, 540 (D.C 1972). The Board has articulated that a mere desire to use property in a given manner, or in a manner designed to return a greater profit, does not constitute a showing of an undue hardship that will support the granting of a use variance. *Bernstein v. D.C. Board of Zoning Adjustment*, 376 A.2d 816, 820 (D.C. 1979). See also Ta*ylor v. D C Board of Zoning Adjustment*, 308 A.2d 230, 236; *Silverstone v. D.C. Board of Zoning Adjustment*, 396 A.2d 992 (D.C. 1979); and *Capitol Hill Restoration Society, Inc. v D C. Board of Zoning Adjustment*, 398 A 2d 13 (D.C 1979)

42. The Board is not persuaded by the Applicant's Supplemental Submission that the Property cannot be developed for a profit under the current zoning regulations The Board recognizes that a lower debt burden for the Property significantly improves the profitability of the project. The Board also recognizes that the Applicant has not presented evidence of the financial feasibility of the building being used as a rental property, or a single-family home and/or multiple single-family homes, or razing the existing structure and building anew.

43 The Board understands that the Applicant purchased the Property all-cash for $556,093 00. In its analyses in which the Applicant considers conforming uses, the Applicant assumes that cash in the projects that adhere to zoning regulations ranges from $183,400 to $233,400. Thus, the Applicant is assuming that cash is replaced with debt proceeds. This infusion of debt proceeds reduces the profitability of the projects that adhere to zoning regulations. However, if the Applicant does not withdraw cash (replacing cash with debt) in its analyses of conforming uses, then the profitability of such uses is materially increased

44 The Board finds that the relief cannot be granted without substantially impairing the intent, purpose and integrity of the zoning regulations and map. Multi-family use on an alley lot is not permitted in any zone, and the R-4 zone in particular is not generally intended for new apartment use In addition, the primary purpose of the R-4 zone district is the stabilization of remaining single-family dwellings, not the creation of new multi-family dwellings

Area Variance Relief (§ 2507.4, height)

45 The Board does not find that the unique situation imposes a practical difficulty related to the requested height. The application indicates that the site is currently non-conforming to height at 18.5' tall, which exceeds the 12.4' permitted on the lot The Applicant proposes to further expand the existing non-conformity by an additional 21' to accommodate a prohibited use, an amount which substantially exceeds the maximum permitted height for the Property.

46. The Board finds that requested height is substantial and would adversely affect the neighboring property owners by loss of views and privacy, and the loss of light and air. The Board also finds that the project is incompatible with the character of the majority of the surrounding homes in the area.

47 The Board finds that the relief cannot be granted without substantially impairing the intent, purpose and integrity of the zoning regulations and map. The height of an alley building is limited by the width of the alley in all zones, and the proposed height is more than triple the height permitted for the subject alley lot

Use Variance Relief (§ 330.4, commercial use)

48. The Board finds that although the Property is unique, the Property's uniqueness does not lead to a practical difficulty in using the existing building for a conforming use. Although the Applicant states the costs associated with the remediation and substantial structural repairs prevent it from being cost effective to convert the building to an arts use or other conforming uses, the Board recognizes that the remediation costs total $25,000 and therefore do not materially impact the profitability of the project. In addition, the Board finds that the projects debt burden can be significantly reduced, thereby improving the profitability of the project

49. Although the office use contemplated by the Applicant would likely be less impactful, in terms of noise or vehicle traffic, the use could potentially have substantial detriment to the public good if the office tenant changes The contemplated office tenant is not binding on the Applicant and a future tenant could potentially have a significant negative impact on traffic, noise and parking in the future

Area Variance Relief (§ 2001.3, expansion to a non-conforming structure)

The Board finds that the Property's uniqueness does not create a practical difficulty for adaptively reusing and expanding the existing structure

50. The relief could not be granted from § 2001.3 without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zoning regulations and map. Potentially adding 10 new residents and an office tenant to the alley lot with 10 to 15 feet alley widths would have numerous detrimental effects, which includes: (i) increasing noise due to outdoor patois and increased traffic; (ii) increasing density beyond that which would allow comfortable living, (iii) loss of light, air and views (the set-backs are not enough); (iv) greatly diminishing the already limited number of

parking spaces available to the neighborhood due to the increased demand caused by multiple-vehicle homes and guest parking; (v) hindering adjacent property owners' access to the rear of their properties for parking, loading/unloading, improvement to their properties, etc.; (vi) adversely affecting the quality of life enjoyed by the adjacent property owners with respect to privacy, quiet, views, and open space; (vii) likely preventing the provision of public works and emergency services to the residents through the narrow alley (no Fire and Emergency testimony or report was submitted); (viii) adversely affecting neighboring properties through increased noise, loss of views and privacy, and the loss of light and air; (ix) incompatibility with the character of the majority of the surrounding homes, (x) resulting negative impact of vibrations, noise, and obstruction of alley during construction, (xi) adversely affecting traffic circulation and presenting further obstacles for the trash trucks which already have difficulty negotiating the alleys (the existing auto-shop had little traffic); and (xii) the contemplated office tenant is not binding on the Applicant and a future tenant could potentially have a significant negative impact on traffic, noise and parking

BZA Case No. 16815

51 The Board agrees with the Opponent's arguments in his written submission stating that BZA Case No. 16815 is not a suitable comparison to this case. In BZA Case No 16815 the Board granted relief from § 2507, § 403, § 2001 3, and § 2101 to allow the conversion of a two-story warehouse to a four-story mixed-use structure It should be noted that the character of the surrounding area in BZA Case No 16815 is very different from the character of the surrounding area in this application. This proposed development is in an area in which there is a high concentration of row-houses, while the property in BZA Case No. 16815 is located in a block in which row houses are very few The subject property in BZA Case No. 16815 was surrounded predominately by apartment buildings and some two- and three-story row houses In addition, in BZA Case No 16815, OP supported the application, the project had numerous significant community benefits (such as space devoted to organizations serving the community), and the Board found that undue hardship was not created by the property owner but by the rezoning of the property from C-M-2 to RC/R-5-B Finally, the subject property in BZA Case No. 16815 was located in the Reed-Cooke RC/R-5-B zoning district The R-5 districts are designed to permit a flexibility of design by permitting all types of urban residential development The R-5-B zone permits a maximum height of 50 feet and the total building height for the proposed development was 31 feet, six inches.

Conclusion

52 Having considered the written submissions and the foregoing findings of fact, the Board concludes that the Applicant has not carried its burden of proof in this case The Board concurs with the recommendation of OP to deny the requested relief with respect to the use variance for multi-family residential use of an alley building, and the area variance for height variance for an alley building. The Board also denies the requested use variance pursuant to § 330.4 (office use in an alley building), and the requested area variance pursuant to § 2001.3 (addition to a non-conforming structure).

Nero, Richard (DCOZ)

From: Toks Ladejobi <toksjordan@msn com>
Sent: Tuesday, April 23, 2013 11 59 PM
To: DCOZ - BZA Submissions (DCOZ)
Subject: Case 18511
Attachments: Findings of Fact and Conclusions of Law BZA Case 18511 docx

Board Members,

Attached find the Findings of Fact and Conclusions of Law for Case Number 18511. I appreciate your attention in regards to this matter.

Toks E. Ladejobi
804-267-9427