

BEFORE THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

IN RE: APPLICATION NO. 18651 of Peter J Fitzgerald, personally

BRIEF IN OPPOSITION REGARDING OWNERSHIP

On order of the BZA, this brief on the question of ownership of the two properties that are the subject of the above referenced Application is being submitted by Janet L. Schmidt personally and as a designated spokesperson on behalf of certain neighbors opposed to the Application

OWNERSHIP OF THE PROPERTIES THAT ARE THE SUBJECT OF THE ABOVE BZA APPLICATION REMAINS CLOUDED BY A 1982 FAIRFAX COUNTY PROBATE THAT HAS STILL NOT BEEN CLOSED BY THE APPLICANT

The two properties that are the subject of the above referenced BZA application are Square 786 Lot 827, and Square 786 Lot 22 (hereinafter referred to as "The Properties") The Properties were owned by Joseph Fitzgerald, Jr., personally (hereinafter referred to as "Property Owner"), at the time of his death in Fairfax County, Virginia on March 13, 1982 The Property Owner died with a will and was a Fairfax County resident at the time of his death.

The Property Owner's will was filed in The Fairfax County Circuit Court on or about April 6, 1982 and an estate was opened for the Property Owner Pursuant to the Property Owner's will, his son, the applicant in this BZA matter, Peter Jerry Fitzgerald (hereinafter referred to as "Applicant") was named as executor of the Property Owner's estate. The Ninth provision of the will also designated Applicant as the Trustee of a testamentary income trust for the benefit of Applicant during his life (See attached Exhibit 1).

At the time of his death, the Property Owner personally owned a valuable residence in McLean, VA, various bank and investment accounts, and a substantial portfolio of income properties located in the District of Columbia.

Applicant was named executor of the Property Owner's estate and was appointed Executor by the Fairfax County Circuit Court. A year later, On April 11, 1983, Applicant filed under oath an initial Estate Inventory of the assets of Property Owner's estate. That Inventory listed "Real Property in Washington, D.C." with an estimated aggregate value of \$1,231,500 Applicant's sworn estate Inventory also stated that "Ancillary proceedings have been instituted" in the District of Columbia with respect to the above referenced D C real estate holdings. The two Properties involved in this application were included in the above referenced inventory (See attached Exhibit 2).

BOARD OF ZONING ADJUSTMENT
District of Columbia

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EXHIBIT NO. 62

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A recent review of the Fairfax County probate file indicates that Applicant's administration of Property Owner's Virginia estate, which owned the Properties that are the subject of this BZA application, has still not been completed some 30 years later. Applicant has never filed a Final Accounting of the estate or a tax certification, which are prerequisites to closing the estate.

As a result of Applicant's failure to file the required Final Accounting, the Fairfax County Commissioner of Accounts mailed a notice to Applicant to do so in 2005. When Applicant did not respond to such notice after a certain period of time, the Fairfax County Commissioner of Accounts put the file of the Property Owner's estate in suspense, leaving it incomplete unless or until the court received a response from Applicant or further information regarding Applicant's whereabouts. (See attached Exhibit 3). The administration of Property Owner's estate has been left in limbo since then and Applicant has not yet discharged his obligations as executor of the Property Owner's estate.

Even more important is the fact that there is nothing in Property Owner's probate file to indicate that Applicant ever applied for appointment as Trustee of the Trust that was to be established for his benefit that now purportedly exists and holds title to the Properties. The trust provided income only for life to Applicant Peter Jerry Fitzgerald with a remainder interest to the Property Owner's grandchildren.

"As an appointment as trustee of a testamentary trust can only come from the probate court Standing in as it were for the Decedent. The testamentary trustee must in turn decide whether to accept the trust on the terms contained in the will and in the background default of the law of trusts." Langbein, John H, "The Contractarian Basis of the Law of Trusts" (1995) *Faculty Scholarship Series* Paper 502

Here, the Applicant once appointed by the Fairfax Circuit Court would have had to either decline the appointment or consent to it. Such acceptance by Applicant as nominative trustee does not appear to exist in the Fairfax County Probate Record of the Property Owner's estate.

In that regard, there is no evidence in the Property Owner's Virginia Probate records that Applicant ever received and formally accepted a Trustee appointment of the Fairfax Circuit Court and agreed to act as Trustee for the testamentary trust created under the 9th provision of Property Owner's will.

In addition, Applicant apparently never filed a proper inventory or accounting of the assets of the testamentary trust that was to be created for his benefit and was to hold title to the Properties. These failures on the part of Applicant as the nominal trustee of Property Owner's testamentary trust created under the 9th paragraph of the will resulted in the Fairfax County Circuit Court's Commissioner of Accounts notified Applicant to do so some time in 2005. When such notification was not responded to by Applicant, the Commissioner of Accounts likewise put the file on the Property Owner's testamentary trust in suspense, leaving it incomplete unless or until it received a response from Applicant or further information regarding Applicant's whereabouts. (See attached Exhibit 4).

In the absence of Applicant concluding the administration of Property Owner's Virginia estate and implementing Property Owner's testamentary trust that was to hold the Properties, there is no documentation that Applicant has ever obtained authorization from Fairfax County Circuit Court to act as Trustee of the testamentary trust that was supposed to be created to hold the Properties. Despite that fact, on August 5, 1992, Applicant, in his apparent capacity as Executor of an ancillary D.C. probate of the Property Owner's D.C. real estate assets, deeded the Property known as Square 786 Lot 22 to himself as the purported Trustee of a testamentary trust that then supposedly existed for the purpose of owning that Property. (See attached Exhibit 5)

Some years later on June 19, 1995, Applicant, in his apparent capacity as Executor of an ancillary probate of the Property Owner's real estate assets located in the District of Columbia, also deeded the Property known as Square 786 Lot 827 to himself as purported Trustee of the same testamentary trust referenced above that then supposedly existed for the purpose of owning that Property (See attached Exhibit 6) These are the two parcels that comprise the Property that is the subject of this BZA application.

In the absence of documentation to the contrary, Applicant either has never received the necessary authorization from Fairfax County Circuit Court to allow him to act as Trustee of the Property Owner's trust created to hold the Properties involved in this application, or he took title as Trustee of the Properties in the name of a trust that was never established by order of the Fairfax County Circuit Court, or both.

Before considering further the request of Applicant that is pending before the BZA, the BZA should require Applicant to provide independent documentation that he has obtained the necessary authorization from the Fairfax County Circuit Court to act as Trustee of a testamentary trust that has in fact been created pursuant to Property Owner's will to hold the Properties that are the subject of his application. Such documentation should include 1) Applicant's petition for appointment as Trustee of the trust that was to be established for his benefit under the ninth provision of property Owner's will, 2) A Fairfax County Court appointment of Applicant as Trustee of the trust that was to be established for his benefit under the ninth provision of Property Owner's will, 3) A final accounting of a Virginia trust established for Applicant's benefit pursuant to the ninth provision of Property Owner's will, 4) A copy of the certification by Applicant to the Fairfax county Circuit Court that all taxes pertaining to Property Owner's estate were paid, 5) A redacted 2012 Federal tax return filed by Applicant for the above testamentary trust

Such evidence should be furnished to the BZA by Applicant personally, since it is not appropriate for an agent to testify on Applicant's behalf on such matters, and a trustee cannot legally name an agent to act in his stead as trustee.

In light of the unfinished probate of Property Owner's estate, and absent the above documentation, the above referenced deeds created by Applicant to transfer the Properties to himself as Trustee are without adequate legal foundation to confirm that there is a clear chain of legal title to the Properties that now rests with Applicant as Trustee of a trust that owns the Properties. Without such documentation, Applicant is not entitled to request relief from the BZA

with respect to the Properties he does not own personally or legally control as a Trustee.

In addition, Applicant should be required to provide documentation as to whether any estate taxes have ever been paid to the District of Columbia on the Properties that the Property Owner owned in D C. when he died. Those Properties had a 1982 valuation of over \$1,230,000, and the estate taxes due to the District of Columbia on such amount at that time would have been in excess of \$100,000

APPLICANT HAS MADE HIS REQUEST TO THE BZA IN HIS PERSONAL CAPACITY BUT THE PROPERTIES INVOLVED ARE CURRENTLY TITLED IN THE DC LAND RECORDS TO THE TRUSTEE OF A TRUST.

Even if the BZA obtains the above documentation confirming that the Properties that are the subject of this Application are owned by an ongoing testamentary trust controlled by Applicant as Trustee, the BZA still should not give the application further consideration. This is because the Applicant, Peter Jerry Fitzgerald brought forth the above referenced BZA request in his personal capacity. Applicant, in his individual capacity (not as a trustee) further purportedly designated his son, John Fitzgerald, as his authorized agent to pursue such application on Applicant's personal behalf.

The BZA rules governing applications make clear that an applicant must be the owner of record of the properties involved in the application. Even if an agent is designated by an applicant as has occurred in this case, the Applicant himself, the person of Peter Jerry Fitzgerald, is required to demonstrate that he is the owner of record of the Properties. That is an impossibility in this instance. The only way the Properties can be currently owned is by a purported trust which Applicant claims to be trustee of, or by the as yet unfinished Virginia estate of the Property Owner pending the finalization of Applicant's probate of that estate.

The law presumes that, without designation to the contrary when you name yourself in a legal document or application, that you are doing so as an individual and not as some undisclosed agent, attorney in fact, trustee or other fiduciary. The application should be denied because it has been filed by a person who is not the demonstrated legal owner of the Property involved.

Even if Applicant can document that he is the properly authorized trustee of a trust holding the properties, he has not applied for BZA approval in his fiduciary capacity as Trustee of the Joseph Fitzgerald, Jr Testamentary Trust, but rather as Peter Jerry Fitzgerald. Respectfully, the BZA is without the ability to grant variances to individual applicants who do not own the property in question.

Applicant Peter Jerry Fitzgerald has no demonstrated personal title to the Properties that are the subject of this Application. Applicant's son has represented under oath to the BZA that the Applicant has "a life estate" in the Properties, implying that he therefore has the individual right, to demolish structures on the Properties, to subdivide them and to subsequently build a new structure on the Properties and then personally own or sell them. It is black letter law that a life

estate or life tenancy, if such can be documented to exist, provides the grantee with the use and enjoyment of a piece of real estate but does not convey any ownership right in such real estate

A reading of the ninth provision of Property Owner's will establishing a trust for the benefit of Applicant Peter Jerry Fitzgerald during his life makes clear that it is an "income only" trust. As such, the trust corpus, that is, the Properties that are the subject of this application cannot be converted to Applicant's personal benefit as he seeks to do with the help of the BZA.

The undersigned respectfully requests that she be given a right to reply to Applicant's response to this Brief in the event that Applicant's response contains demonstrable errors or omission or misstatements of fact.

Respectfully Submitted,

/s/ Janet L. Schmidt

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CERTIFICATE OF SERVICE

I hereby certify that this 25th day of February, 2014, a copy of the foregoing brief and accompanying exhibits were served by email on John Patrick Brown, Esq. counsel for Applicant Peter J. Fitzgerald at his email address: JPB@GDLLAW.com

A hard copy was also sent by mail to

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/s/ Janet L. Schmidt