

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**



Application No. 21017 of Phillip H. Bishop, as amended, pursuant to 11 DCMR Subtitle X § 1000 for a use variance from Subtitle U § 600.1(f)(1) and an area variance from the height requirements of Subtitle D § 5100.1 and, pursuant to Subtitle X § 901, for a special exception under Subtitle D § 5201 from the side yard requirements of Subtitle D § 5100.1(d) to allow a new two-story detached building for use as a principal dwelling on an alley lot in the R-1B zone at 2229 Rear Bunker Hill Road, N.E. (Square 4239, Lot 64).¹

HEARING DATE: March 6, 2024

DECISION DATE: March 6, 2024

PROPOSED DECISION AND ORDER

This application was filed on August 4, 2023 by Phillip Bishop (the “Applicant”), the owner of the property that is the subject of the application. Following a public hearing, the Board voted to deny the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. In accordance with Subtitle Y §§ 400.4 and 402.1, the Office of Zoning provided notice of the application and of the public hearing by letters, dated September 14, 2023, to the Applicant, the Office of Planning (“OP”), the District Department of Transportation, Advisory Neighborhood Commission (“ANC”) 5B, the ANC in which the subject property is located, and Single Member District 5B01, the Office of Advisory Neighborhood Commissions, the Department of Buildings, the Councilmember for Ward 5 as well as the Chairman and the at-large members of the D.C. Council, and the owners of all property within 200 feet of the subject property. By letters dated September 19, 2023, the Office of Zoning provided notice of the application and of the public hearing to the Department of Public Works, DC Water, the Metropolitan Police Department, and the Fire and Emergency Medical Services Department. The Office of Zoning re-sent notices of the application and public hearing to all previous recipients

¹ The caption was revised to reflect that the application was amended. Consistent with referral memoranda from the Zoning Administrator, the Applicant originally requested special exceptions under Subtitle U §§ 600.1 and 601.1(f) to allow a principal dwelling on an alley lot, under Subtitle D § 5100.1(a) to allow building height greater than the maximum permitted, and under Subtitle D § 5001.1(d) to allow a building not meeting side yard requirements. (See Exhibits 4, 12.) The application was revised after the Zoning Administrator provided a revised referral memorandum (Exhibit 19). The Applicant’s project was not modified.

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by letters dated December 6, 2023, after the application was amended. Notices were published in the *District of Columbia Register* on September 29, 2023 (70 DCR 012991) and on December 15, 2023 (70 DCR 015782).²

Party Status. Pursuant to Subtitle Y § 403.5, the Applicant and ANC 5B were automatically parties in this proceeding. At a public meeting on December 20, 2023, the Board granted requests for party status in opposition to the application submitted by a group of residents living near the subject property in the 4000 block of 22nd Street N.E. or the 2200 block of Bunker Hill Road N.E. (Exhibits 20, 20A, 20B, 20C, 20D.) The parties in opposition were Bonita Beaty, Mildred Bell, Brian and Janella Ferguson, Francisco Javier Astudillo Del Pozo and Sara Arranz Ramiro, Anna Hartsfield, Taras Malta and Michelle Romo, and Stacey and Lalit Raina.

Applicant's Case. The Applicant presented evidence and testimony in support of the application, a request for the zoning relief needed to allow a new two-story detached building on an alley lot for use as a principal dwelling.

OP Report. By memorandum dated March 4, 2024, the Office of Planning recommended denial of the Applicant's request for a use variance from Subtitle U § 600.1(f)(1) to allow a residential use on an alley lot. The Office of Planning did not provide recommendations on the Applicant's requests for relief from side yard and height provisions because the Applicant's statements at Exhibits 21 and 31 indicated that the Applicant's architectural plans would be revised to eliminate the need for those areas of relief. (Exhibit 35.)

Parties in opposition. The parties in opposition argued that the application did not meet the requirements for the requested relief and that approval of the Applicant's proposal would adversely affect nearby properties. (Exhibits 34, 37.)

Persons in opposition. The Board received letters and heard testimony in opposition to the application from persons living near the subject property. The persons in opposition generally objected to the size of the Applicant's planned dwelling and contended that the application had not met the requirements for approval of the requested zoning relief.

FINDINGS OF FACT

1. The property that is the subject of this application is an alley record lot in the interior of the square bounded by Randolph Street N.E. to the south, 22nd Street N.E. to the west, Bunker Hill Road N.E. to the northeast, and Shepherd Street N.E. to the north, with the address 2229 Rear Bunker Hill Road, N.E. (Square 4239, Lot 64).
2. The subject property is irregularly shaped but generally rectangular. The alley lot is approximately 30 feet wide along the south lot line and 46.55 feet wide along the north lot

² The public hearing was originally scheduled for December 20, 2023 and rescheduled to March 6, 2024 after the application was amended.

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line. The west and east lot lines extend approximately 69 feet and 75.65 feet, respectively. The lot area is approximately 2,850 square feet. (Exhibits 2, 19, 35.)

3. The subject property is bounded by public alleys to the south and west, which are 15 and 16 feet wide, respectively. The north and east lot lines of the Applicant's lot abut the side or rear lot lines of three properties containing detached principal dwellings that front on Bunker Hill Road to the east.
4. The subject property is currently unimproved.
5. The Applicant purchased the subject property in 2008. Several years later, the Applicant decided to build a residence on the property. (Exhibit 3; Transcript of March 6, 2024 at 16-17.) Beginning in September 2020, the Applicant requested guidance from the Department of Consumer and Regulatory Affairs ("DCRA") regarding the construction of a dwelling at the subject property.³ (Exhibit 31.)
6. The Applicant proposed to construct a new two-story detached principal dwelling, with a cellar and roof deck, at the subject property. (Exhibit 9.)
7. As planned, the dwelling would be 22 feet and two stories in height. Its building area would be approximately 1,882 square feet, resulting in a lot occupancy of approximately 66 percent. (Exhibit 19.)
8. The principal entrance to the dwelling would be located along the west alley. (Exhibit 9.)
9. The proposed dwelling would result in a rear yard of approximately 5.65 feet on the east side of the lot. A side yard of approximately four feet would be provided on the north side. Two vehicle parking spaces would be provided in a garage on the first level of the dwelling, accessible from the south alley. (Exhibits 9, 19.)
10. The proposed dwelling would have windows on each side of the building, primarily on the east and west façades. The north façade would have one window on the first floor while the south façade would have a large window on the second floor. (Exhibit 9.)
11. The dwelling would have a roof deck surrounded by a guard rail, 3.5 feet in height, and accessible via a hatch. (Exhibit 9.)
12. The area surrounding the subject property is predominantly residential, characterized by detached principal dwellings.

³ As of October 1, 2022, the zoning functions formerly performed by the Department of Consumer and Regulatory Affairs were assumed by the new Department of Buildings. *See* D.C. Official Code § 10-561.01 *et seq.* (Department of Buildings Establishment Act, D.C. Law 23-269, 68 D.C. Reg. 4174 (April 5, 2021)).

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13. The subject property is located in a Residential House (R) zone, R-1B. The Residential House zones are residential zones, designed to provide for stable, low- to moderate-density residential areas suitable for family life and supporting uses. (Subtitle D § 101.1.)
14. The Residential House zones are intended to (a) provide for the orderly development and use of land and structures in areas predominantly characterized by low- to moderate-density residential development; (b) recognize and reinforce the importance of neighborhood character, walkable neighborhoods, housing affordability, aging in place, preservation of housing stock, improvements to the overall environment, and low- and moderate-density housing to the overall housing mix and health of the city; (c) allow for limited compatible accessory and non-residential uses; (d) allow for the matter-of-right development of existing lots of record; (e) establish minimum lot area and lot width for the subdivision and creation of new lots of record; and (f) discourage multiple dwelling unit development. (Subtitle D § 101.2.)
15. The purposes of the R-1B zone are to (a) protect quiet residential areas now developed with detached houses and adjoining vacant areas likely to be developed for those purposes; and (b) stabilize the residential areas and promote a suitable environment for family life. (Subtitle D § 101.3.)
16. The R-1B zone is intended to provide for areas predominantly developed with detached houses on moderately sized lots. (Subtitle D § 101.5.)

CONCLUSION OF LAW AND OPINION

The Applicant requested zoning relief, including a use variance and an area variance, needed to allow a principal dwelling in a new two-story detached building on an alley lot in the R-1B zone at 2229 Rear Bunker Hill Road, N.E. (Square 4239, Lot 64). The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(3), to grant a variance “[w]here, 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 the 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 also Subtitle X § 1000.1.)

Based on the findings of fact and having given great weight to the recommendation of the Office of Planning, the Board concluded that the Applicant has not satisfied the requirements for approval of the requested variances. The Board did not find that the subject property exhibited any extraordinary or exceptional situation or condition. The subject property is not significantly irregular in shape, exceptionally narrow or shallow, or affected by any exceptional topographical conditions.

The Applicant asserted that the subject property is larger than most in the area, is bounded by an alley, and that “the property is being utilized by neighbors as a parking lot and dumping ground.” According to the Applicant, the subject property could not feasibly be developed for a permitted use because of maintenance and security issues. (Transcript of March 6, 2024 at 19, Exhibit 21.) However, the Applicant did not identify any feature of the subject property that would preclude its use in a manner consistent with zoning requirements. The Board agreed with the Office of Planning that the record in this proceeding did not provide sufficient evidence to establish that the site was not suitable for any of the uses permitted as a matter of right or by special exception in the R-1B zone. The desire to use the alley lot for a principal dwelling did not create any exceptional condition to support approval of the requested variances, because generally an applicant’s desire to utilize the property for a certain use is not by itself sufficient to create an extraordinary or exceptional situation or condition under the zoning regulations. *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 540 (D.C. 1972).

The Board did not conclude that the strict application of the Zoning Regulations would result in undue hardship to the Applicant as the owner of the subject property. A “use variance cannot be granted unless a situation arises where a reasonable use cannot be made of the property in a manner consistent with the Zoning Regulations.” *Palmer*, 287 A.2d at 542. The Applicant noted that the R-1B zone permits several uses as a matter of right or by special exception (see Subtitle U §§ 600 and 601) but asserted that a dwelling would be a better use of the site. The Board was not persuaded by the Applicant’s claim that a use variance to permit a dwelling at the subject property was needed to avoid misuse or lack of maintenance at the site.

The Applicant also claimed an undue hardship based on mistaken advice from DCRA, which the Applicant relied on in expending significant financial capital through the permitting process, making any other use of the property infeasible. The Board disagreed, because the Applicant had actual or constructive knowledge of zoning restrictions that limited the use of the subject property as an alley lot and therefore any hardship accruing to the Applicant was self-created. *Salsbery v. District of Columbia Bd. of Zoning Adjustment*, 357 A.2d 402, 404–05 (D.C.1976) (hardship was self-inflicted where applicant contracted to purchase property for non-conforming use without conditioning contract on obtaining use variance.) The Applicant’s claimed hardship did not result from the location, situation, or condition of the subject property but solely from the Applicant’s intent to use the alley lot for a specific purpose, a new principal dwelling, without first having obtained the necessary change in zoning. Accordingly, the Board did not conclude that any undue hardship was caused to the Applicant as the owner of the subject property as a result of the strict application of the Zoning Regulations. *See, Dwyer v. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 306 (D.C. 1974). The Applicant’s claim of undue hardship was insufficient to warrant approval of the requested use variance because the Applicant was on notice of the zoning requirements that governed the permitted uses of the subject property as an alley lot and the Applicant could not reasonably have relied solely on informal guidance of DCRA to determine whether the planned use was permitted. The Applicant did not demonstrate any zoning history, such as the issuance of a building permit later determined to have been approved in error, in support

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of the variance request. *Contrast, Oakland Condo. v. District of Columbia Bd. of Zoning Adjustment*, 22 A.3d 748, 756 (D.C. 2011).

The Board agreed with the Office of Planning that the Applicant did not demonstrate that the subject property was incapable of any use permitted as a matter of right or by special exception under the zoning regulations governing alley record lots. To demonstrate undue hardship, an applicant must prove that the property cannot be ‘put to any conforming use with a fair and reasonable return arising out of the ownership thereof.’ *Downtown Cluster of Congregations v. District of Columbia Bd. of Zoning Adjustment*, 675 A.2d 484, 491–92 (D.C. 1996). “An inability to put a property to a more profitable use or loss of economic advantage is not sufficient to constitute hardship.” *Palmer*, 287 A.2d at 542.

Similarly, the Board did not conclude that the strict application of the Zoning Regulations would result in any peculiar and exceptional practical difficulties to the Applicant with respect to the planned height of the proposed principal dwelling at the subject property. The Applicant acknowledged that the building plans could be revised to lower the building height, consistent with zoning requirements, without impinging on the design or use of the planned dwelling.

The Board did not conclude that approval of the requested variances would result in substantial detriment to the public good. The subject property is a relatively large alley lot, and the Applicant proposed a residential use consistent with the low-density residential character of the surrounding area. The Board was not persuaded by the unsubstantiated claims made by the parties in opposition that the Applicant’s proposal would impair the use of surrounding properties with respect to the availability of light, air, or privacy, or due to impacts related to noise, traffic, parking, or infringement of nearby solar facilities.

The Board agreed with the Office of Planning that approval of the requested variances would substantially impair the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. The Zoning Regulations state specific limitations on the use of alley lots, and principal dwellings are not permitted on alley lots in the R-1B zone either as a matter of right or special exception. The Board concluded that the intent and purpose of the zoning regulations would be substantially impaired by the approval of the Applicant’s request for use and area variances because the application did not demonstrate any exceptional situation facing the subject property or any undue hardship or practical difficulty to the Applicant as the owner of the alley lot.

Special Exception. The Applicant requested a special exception under Subtitle D § 5201 from the side yard requirements of Subtitle D § 5100.1(d) to allow a new building on an alley lot that would not provide a side yard of at least five feet from a lot line abutting a non-alley lot. The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2), to grant special exceptions, as provided in the Zoning Regulations, when, in the judgment of the Board, the special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property in accordance

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with the Zoning Regulations and Zoning Maps, subject to specific requirements. (See Subtitle X § 901.2.)

Pursuant to Subtitle D § 5201.3, the Board may grant relief as a special exception from certain development standards, including yard requirements, to allow a new principal building on an alley record lot. (Subtitle D § 5201.3(a).) An applicant must demonstrate that the proposed new principal building will not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property; specifically (a) the light and air available to neighboring properties must not be unduly affected, (b) the privacy of use and enjoyment of neighboring properties must not be unduly compromised, and (c) the proposed addition, together with the original building, as viewed from the street, alley, and other public way, must not substantially visually intrude on the character, scale, and pattern of houses along the street and alley frontage. (Subtitle D § 5201.4.)

Based on the findings of fact, the Board concluded that the application did not satisfy the requirements for approval of the requested special exception. The Applicant proposed a new two-story detached principal dwelling on an alley lot with a side yard measuring four feet from a lot line abutting a non-alley lot. The Board was not persuaded, on the basis of information included in the application, that the Applicant's project would not unduly affect the light and air available to neighboring properties or unduly compromise the privacy of use and enjoyment of neighboring properties. For example, the application did not indicate the proximity of the planned dwelling to existing dwellings on nearby properties, provide a shadow study to illustrate the impacts on light that would be created by the proposed new dwelling, or address whether the new dwelling, as viewed from a street or the abutting alleys, would substantially visually intrude on the character, scale, and pattern of houses along the street or alley frontage.

Subtitle X, Chapter 9. The Board concluded that approval of the requested special exception would not satisfy the requirements of Subtitle X § 901.2. For the reasons already discussed, the Board did not find sufficient information to conclude that the application could be approved without adversely affecting the use of nearby properties in accordance with the Zoning Regulations and Zoning Map. The Board was also unable to conclude, based on the information in the record, that approval of the application would be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps. The application proposed a low-density residential use in the R-1B zone but did not demonstrate that the request for relief from the applicable side yard requirement would be in harmony with the Zoning Regulations and Map, including the provisions governing alley record lots.

Great weight. The Board is required to give "great weight" to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2018 Repl.)) For the reasons discussed above, the Board agreed with OP's recommendation that the Applicant's request for a use variance 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, effective March

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26, 1976.) (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)(3)(A).) The affected ANC in this case, ANC 5B, did not submit a report or otherwise participate in the proceeding.

Exceptions to the Proposed Order. Because a majority of the Board members participating in the issuance of this order did not personally hear the evidence in this application, a proposed order was provided to the parties to afford them an opportunity to present written exceptions, in accordance with D.C. Official Code § 2-509(d).

Based on the findings of fact and conclusion of law, the Board concludes that the Applicant has failed to satisfy the burden of proof with respect to the requests for a use variance from Subtitle U § 600.1(f)(1), an area variance from Subtitle D § 5100.1, and a special exception under Subtitle D § 5201 from the side yard requirements of Subtitle D § 5100.1(d) to allow a principal dwelling in a new two-story detached building on an alley lot in the R-1B zone at 2229 Rear Bunker Hill Road, N.E. (Square 4239, Lot 64). Accordingly, it is **ORDERED** that the application is **DENIED**.

VOTE: 5-0-0 (Frederick L. Hill, Lorna L. John, Carl H. Blake, Chrishaun S. Smith, and Joseph S. Imamura to DENY)

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: _____

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

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

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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.