**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**Board of Zoning Adjustment**

**Application No. 19521-A of David Hunter Smith,** pursuant to 11 DCMR Subtitle Y § 704, for a modification of significance to the relief approved by BZA Order No. 19521 to include a variance from the accessory building requirements of Subtitle D § 1209.4, to construct a second story accessory apartment above an existing garage in the R-20 Zone at premises 3520 S Street, N.W. (Square 1303, Lot 29).

**HEARING DATE:** July 25, 2018
**DECISION DATE:** July 25, 2018

## DECISION AND ORDER

This self-certified application was submitted on May 1, 2018, by David Hunter Smith, the owner of the property that is the subject of the application (the "Applicant"). The application requested a modification of significance to the relief approved by BZA Order No. 19521 to include a variance from the accessory building requirements of Subtitle D § 1209.4, to construct a second story accessory apartment above an existing garage in the R-20 Zone at premises 3520 S Street, N.W. (Square 1303, Lot 29). Following a public hearing, the Board of Zoning Adjustment ("Board" or "BZA") voted to grant the application.

## PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated June 4, 2018, the Office of Zoning provided notice of the application to the Office of Planning ("OP"); the District Department of Transportation ("DDOT"); the Councilmember for Ward 2 as well as the Chairman and the four at-large members of the D.C. Council; Advisory Neighborhood Commission 2E (the "ANC"), the ANC in which the subject property is located; and Single Member District/ANC 2E01. Pursuant to 11 DCMR Subtitle Y § 402.1, on June 4, 2018 the Office of Zoning mailed letters providing notice of the hearing to the Applicant, the Councilmember for Ward 2, ANC 2E, and the owners of all property within 200 feet of the subject property. Notice was published in the *District of Columbia Register* on June 7, 2018 (65 DCR 23).

Party Status. The Applicant and ANC 2E were automatically parties in this proceeding. No additional requests for party status were filed.

Applicant's Case. The Applicant provided evidence and testimony about the proposed two-story accessory building. The witnesses presenting testimony for the Applicant consisted of the Applicant and the Applicant's architect, Catarina Ferreira, AIA, NCARB.

OP Report. By memorandum dated July 12, 2018, the Office of Planning recommended approval of the zoning relief requested by the Applicant. (Exhibit 46.) At the public hearing, OP also recommended approval of the zoning relief requested by the Applicant. (Hearing Transcript ("Tr.") of July 25, 2018 at 90.)

ANC Report. By a report dated July 17, 2018, ANC 2E indicated that, at a properly noticed public meeting on July 2, 2018 with a quorum present, the ANC adopted a resolution in opposition to the application. The ANC also provided testimony at the public hearing.

In its resolution, ANC 2E expressed the views that the condition affecting the Applicant's property is not unique because the R-20 Zone contains other alley-facing garages, that granting the variance would result in a substantial detriment to the public good by opening the door to second-story living units adjacent to alleys throughout the R-20 zone, and that the Burleith neighborhood, in which the Applicant's property is located, faces impacts from the parking demands caused by area schools and hospitals. (Exhibit 50.)

At the hearing, ANC 2E was represented by Commissioner Rick Murphy.

Persons in support. The Board received letters from persons in support of the application. The persons in support generally cited the need for additional rental housing in the Burleith neighborhood, the desirability of having people living directly on alleys to increase the perception of safety of the alleys, and the lack of negative impact from the zoning relief sought.

Persons in opposition. The Board also received letters from persons in opposition to the application. In addition, the Board heard testimony from one person in opposition to the application. The persons in opposition expressed concerns about the quality-of-life impact that may occur as a result of increased density and the aesthetics of the proposed accessory building. Letters in opposition also expressed the view that the height of the proposed accessory building exceeds the maximum height allowed by the zoning regulations.

## FINDINGS OF FACT

### Subject Property

1. The subject property is located on the south side of S Street, N.W., in between 35th and 36th Streets, N.W. (Square 1303, Lot 29).

2. The subject property is located in the R-20 Zone. Though the R-20 Zone is a Georgetown Residential House Zone (see 11 DCMR Subtitle D § 1200), the subject property is not located within the Georgetown Historical District. Instead, it is located within the Burleith neighborhood, which is not subject to any official designation as historical.

3. The subject property is rectangular, with frontage on S Street and on the alley running between R and S Streets, N.W. The lot area is 2,281 square feet.

4. The subject property is improved with a two-story principal building and a one-story detached accessory building. The principal building is an attached building typical of the Burleith neighborhood and is the Applicant's primary residence. The accessory building was built as a garage but is not currently in usable condition; the accessory building is located on the rear of the lot, adjacent to the alley.

5. The immediately adjacent properties (Square 1303, Lots 28 and 30) are also rowhouses with detached accessory garages fronting on the alley. Lot 28 has a two-story detached accessory garage.

### Procedural History

6. The Applicant had considered replacing the existing one-story garage with a one-story building containing an accessory apartment. As the Applicant testified, no one in his household owns a car and building a one-story accessory building containing an accessory apartment would have reduced design and construction costs.

7. On May 5, 2017, the Applicant applied for a special exception under the accessory apartment requirements of Subtitle U § 253.4, to construct an accessory apartment above an existing garage in the R-20 Zone at premises 3520 S Street, N.W (Square 1303, Lot 29).

8. The Application was granted through BZA Order No, 19521, which stated:

> The zoning relief requested in this case was self-certified, pursuant to 11 DCMR Subtitle Y § 300.6. (Exhibit 10.) In granting the certified relief, the Board of Zoning Adjustment ("Board" or "BZA") made no finding that the relief is either necessary or sufficient. Instead, the Board expects the Zoning Administrator to

undertake a thorough and independent review of the building permit and certificate of occupancy applications filed for this project and to deny any application for which additional or different zoning relief is needed.

9. The Applicant applied for a building permit on August 14, 2017. (Exhibit 12 at p. 2.) On September 25, 2017 DCRA completed its review of the zoning discipline, approving the project as having obtained all the zoning relief required. (Exhibit 12 at p. 2; Exhibit 61.)

10. Shortly thereafter, DCRA completed review of all outstanding disciplines aside from structural review. The structural reviewer had extensive comments, but the Applicant believed they were addressable and that a building permit would issue imminently. (Tr. at pp. 70-71.)

11. In reliance on DCRA zoning approval, the Applicant began to incur costs in anticipation of the permit approval and the beginning of construction. The Applicant had recently had a second child and had intended to complete the accessory apartment as soon as possible so that it could be used as a lodging for a nanny or other childcare worker. The costs that the Applicant incurred in reliance on DCRA's zoning approval include: (1) signing a contract with an over $30,000 deposit with a general contractor; (2) ordering kitchen cabinets costing $7,845.59 for the accessory apartment; and (3) signing a $20,900.90 contract to install solar panels on the proposed accessory building and the existing principal dwelling. (Exhibit 12 at p. 5.) In addition, the Applicant obtained a raze permit for the existing garage and incurred further design costs as the Applicant responded to permit comments, including DCRA's request for soil testing as part of its structural review. (Tr. at pp. 70-71; Exhibit 12 at p. 5.)

12. On December 4, 2017, DCRA notified the Applicant that the permit was ready to be issued, upon payment of the applicable fees. The Applicant was ready to begin construction as soon as the permit was issued. (Tr. at p. 71.)

13. In the meantime, DCRA's Zoning Administrator, Matthew LeGrant, had requested a meeting with the Applicant's architect. The meeting was scheduled for December 4, 2017. Mr. LeGrant did not inform the Applicant or his architect of the subject of the meeting in advance. (Tr. at p. 71.)

14. At the meeting, Mr. LeGrant expressed concern that the project did not conform with the 15-foot limitation on the height of detached accessory buildings in the R-20 Zone provided for in Subtitle D § 1209.4. Mr. LeGrant stated there was tension between this height requirement and the requirement that an accessory apartment in the R-20 Zone "shall only be permitted on the second story of a detached accessory building." (Subtitle U § 253.9.) It is generally difficult to construct a two-story building that does not exceed 15 feet in height and Mr. LeGrant stated he was not sure of the proper zoning analysis, given the

apparent tension between Subtitle D § 1209.4 and Subtitle U § 253.9. (Tr. at pp. 71-72.)

15. Mr. LeGrant requested that the Applicant submit a written explanation of his position as to whether Subtitle D § 1209.4's height limitation applied to the project. The Applicant submitted that explanation on December 11, 2017. (Tr. at p. 72.)

16. The Applicant did not receive a response from DCRA. On December 26, 2017, the Applicant sent an email to Mr. LeGrant asking if he had any objection to the Applicant picking up the permit from DCRA. The Applicant did not receive a response to that inquiry, so on January 3, 2018, the Applicant paid the permit fees and picked up the permit. (Tr. at p. 72.)

17. DCRA determined that the permit had not been properly issued. On January 9, 2018, DCRA issued a "notice of cancellation of permit." (Exhibit 8.) The notice stated that DCRA was cancelling the permit because "the Permit authorized the construction of an accessory building that exceeds the allowable height in violation of Section D-1209.4 of the Zoning Regulations." (Exhibit 8.)

18. On January 17, 2018, the Applicant submitted revised plans to the Zoning Administrator that reflected a decreased building height. The Zoning Administrator replied on March 9, 2018, stating that the revised plans now complied with the 15-foot height limitation in Subtitle D § 1209.4. The Zoning Administrator, however, stated that further zoning relief is required because Subtitle D § 1209.4 also limits accessory buildings in the R-20 Zone to one story. (Exhibit 9, Tr. at p. 73.)

19. On May 1, 2018, the Applicant filed the present application for a modification of significance to add a variance from the one-story limitation in Subtitle D § 1209.4.

**The proposed detached accessory building**

20. The Applicant's revised architectural plans and elevations (Exhibit 7) are unchanged from the plans submitted as part of Case No. 19521 (Case No. 19521, Exhibit 6), except that the proposed detached accessory building's height has been reduced to comply with the 15-foot height restriction in Subtitle D § 1209.4.

21. The proposed detached accessory building would face the alley between S and R Streets, N.W. It would not be visible from either S or R Streets.

22. The proposed detached accessory is designed with a mansard roof that extends from the top of the structure to below the second story. The mansard roof obscures the existence of the second story from the exterior.

23. The proposed detached accessory building is the only economically feasible location on Applicant's property to construct an accessory apartment. While accessory apartments are permitted in the principal building (Subtitle U § 253.4), such an accessory apartment would require the construction of a separate entrance at below ground level (see Subtitle U § 253.7(d)) and expensive underpinning. (Exhibit 12 at 6.)

**Applicant's good faith**

24. The Applicant acted in a good faith belief that, as DCRA initially found, the only zoning relief required for the proposed project was the special exception under Subtitle U § 253.4. (Exhibit 12 at pp. 1, 3; Tr. at pp. 69-70.)

25. While the Applicant's and DCRA's initial reading of the Zoning Regulations of 2016 ("ZR 16") as requiring only a special exception under Subtitle U § 253.4 for the proposed project to proceed was mistaken, the mistake was reasonable. ZR 16 became effective on September 6, 2016 and therefore had been in place for only seven months when the Applicant filed for the special exception. As of the date of the instant application, no application or appeal that would have required the Board to address the interaction of Subtitle U § 253.9 and Subtitle D § 1209.4 has been filed. Furthermore, two-story accessory apartments are allowed in all R-zones except the R-20 zone and nothing on the face of the Zoning Code provision concerning accessory buildings in R Zones indicates that it does not apply in the R-20 Zone. See Subtitle D § 5002.1 ("The maximum height of an accessory building in an R zone shall be two (2) stories and twenty feet (20 ft.)").[1] In addition, the lot immediately adjacent to the Applicant's contains a two-story detached accessory building, making his belief that erecting a similar structure on his property reasonable. (Exhibits 37 & 51.)

**Persons in support and in opposition**

26. Several letters in support of the proposed project were submitted into the record. The letters in support primarily came from individuals living on the same block of S Street as the proposed project. (Exhibits 28 & 40, 37, 39, 47, 48, and 53.) A resident of R Street whose property is adjacent to the alley on which the proposed project would be constructed also submitted a letter in support. (Exhibit 45.)

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[1] What is more, the fact that a variance - as opposed to a special exception - is required to construct a two-story accessory building in the R-20 Zone becomes apparent only after examining three different and distant provisions of the Code. See Subtitle D § 1209.4 (accessory building limited to one story in the R-20 Zone); Subtitle D § 1210.10 (special exceptions permitted to these development standards, except as limited by Subtitle D §§ 5201 and 5205); Subtitle D § 5201.6 ("This section shall not be used to permit the introduction or expansion of nonconforming height or number of stories as a special exception"). The Applicant was mistaken, but understandably so, to focus on Subtitle U § 253.9's specific and clear requirement that accessory apartments be located in a two-story detached accessory building, and without noticing these three provisions of Subtitle D, which appear to prohibit two-story detached accessory buildings in the R-20 Zone.

27. Several letters in opposition were submitted into the record. No letters in opposition, however, were received from any property owners within 200 feet of the subject property, nor from any residents of S or R Streets. At the public hearing, Ms. Gail Juppenlatz testified in opposition to the proposed project, expressing concerns about increased density and the aesthetics of the proposed detached accessory building. Ms. Juppenlatz lives "a couple of blocks away" from the proposed building. (Tr. at p. 103.)

28. The immediately adjacent neighbor to the West (3522 S Street N.W.) submitted a letter in support of the project. (Exhibit 37.) The immediately adjacent neighbor to the East (3518 S Street, N.W.) did not submit a letter concerning the project.

29. On July 2, 2018, ANC 2E adopted the following resolution in opposition to the application:

> WHEREAS, the condition affecting the applicant's property is not unique because there are numerous alley-facing garages already in existence throughout the R-20 zone, including accessory buildings with respect to which homeowners have sought zoning relief to permit the addition of a second story containing an accessory apartment,
>
> WHEREAS, issuance of the variance requested by the applicant would result in a substantial detriment to the public good and the integrity of the R-20 zone plan because it would open the door to the construction of second story living units adjacent to alleys throughout the R-20 zone in derogation of the explicit and unambiguous prohibition on two story accessory buildings in the R-20 zone contained in the 2016 Zoning Regulations,
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> WHEREAS, Subtitle 253.8 (f) (1) of the 2016 Zoning Regulations states that "the accessory building shall be located such that it is not likely to become objectionable to neighboring properties because of noise, traffic parking, or other objectionable conditions," and
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> WHEREAS, the Burleith Community is impacted by daytime and evening on-street parking from three schools, including the Duke Ellington School of the Arts, which includes a state of the art 800-seat auditorium, Hardy Middle School, the Washington International School, nearby Georgetown University, and MedStar Georgetown University Hospital.
>
> THEREFORE, BE IT RESOLVED that ANC 2E opposes the issuance of a variance from the accessory building requirements to permit the construction of a two story accessory building at 3520 S Street NW.

(Exhibit 50.)

30. The Applicant submitted a rebuttal to the ANC's report, in which, among other things, he contended that the ANC's concerns about parking impacts are not germane to the zoning relief requested and that, in any event, a recent community survey found that only eight percent of respondents found it difficult to find parking near their homes. (Exhibit 51.) The survey was entered into the record by a member of the public. (Exhibit 40.)

**CONCLUSIONS OF LAW AND OPINION**

The Applicant seeks a modification of a significance to the relief approved by BZA Order No. 19521. A public hearing on a modification of significance "shall be limited to impact of the modification on the subject of the original application, and shall not permit the Board to revisit its original decision." (Subtitle Y § 704.7.) Accordingly, the subject of the public hearing - and of the Board's decision - is limited to Applicant's request for a variance from the one-story limitation in Subtitle D § 1209.4. The Board will not revisit its decision to grant a special exception pursuant to Subtitle U § 253.

The Board is authorized under § 8 of the Zoning Act to grant variance relief where, "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property," the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. (*See* 11 DCMR Subtitle X § 1000.1.)

Based on the findings of fact, the Board concludes that the Applicant has met the requirements for a variance from the accessory building requirements of Subtitle D § 1209.4. [2]

Extraordinary or exceptional situation. For purposes of variance relief, the "extraordinary or exceptional situation" need not inhere in the land itself. *Clerics of St. Viator, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 291, 294 (D.C. 1974). Rather, the extraordinary or exceptional conditions that justify a finding of uniqueness can be caused by subsequent events extraneous to the land at issue, provided that the condition uniquely affects a single property. *Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d

[2] The Applicant also requested that the Board approve the revisions to the drawings and elevations upon which the special exception was premised. That revision, as reflected in Exhibit 7, consists solely of decreasing the proposed accessory building's height to 15 feet and may have been processed as a minor modification under Subtitle Y § 703.3. There was no objection to this revision and the Board approves it.

939, 942 (D.C. 1987); *De Azcarate v. District of Columbia Bd. of Zoning Adjustment*, 388 A.2d 1233, 1237 (D.C. 1978) (the extraordinary or exceptional condition that is the basis for a variance need not be inherent in the land but can be caused by subsequent events extraneous to the land itself…. [The] term was designed to serve as an additional source of authority enabling the Board to temper the strict application of the zoning regulations in appropriate cases….); *Monaco v. District of Columbia Bd. of Zoning Adjustment*, 407 A.2d 1091, 1097 (D.C. 1979) (for purposes of approval of variance relief, "extraordinary circumstances" need not be limited to physical aspects of the land). The extraordinary or exceptional conditions affecting a property can arise from a confluence of factors; the critical requirement is that the extraordinary condition must affect a single property. *Metropole Condominium Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 141 A.3d 1079, 1082-1083 (D.C. 2016), citing *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990).

"Good faith detrimental reliance on zoning actions" can be "taken into account in the uniqueness facet of the variance test." *Monaco*, 407 A.2d at 1098. For example, *De Azcarate* involved a "dispute [that] was due to the actions of the zoning officials which were later found to be in error." 388 A.2d at 1238. Zoning officials had "implicitly found" that a proposed project complied with the zoning code. *Id.* The property owners proceed "in good faith" on reliance on these approvals, only for the error to be detected later. *Id.* The Board found that these circumstances met the uniqueness test for a variance to allow the project to be completed, and the Court of Appeals affirmed. *Id.* In *Monaco*, the Board again found -- and the Court of Appeals affirmed -- that property owners had satisfied the uniqueness test through "the same type of good faith detrimental reliance on zoning actions" as in *De Azcarate*. *Monaco*, 407 A.2d at 1098; *see also Oakland Condo. v. D.C. Bd. of Zoning Adjustment*, 22 A.3d 748, 754 (D.C. 2011) (good faith reliance on issuance on "actions of city officials," including issuance of building permit, satisfied first branch of variance test).

The Board finds that an exceptional situation exists as a result of the property's unique zoning history. First, the Board has found (see findings of fact above) that the Applicant relied in good faith on the erroneous actions of DCRA in clearing the building permit for zoning.

Second, this case is unique because it is apparently the first involving these provisions: the Board is unaware of any case involving the interaction of Subtitle U § 253.9 and Subtitle D § 1209.4. The Applicant – and, in addition, DCRA - made a reasonable mistake in concluding that a special exception was sufficient zoning relief to construct the proposed project. DCRA is unlikely to repeat that mistake, in part because of the experience it has gained through this case. Future property owners will have the benefit of DCRA's experience and this opinion when they analyze

the zoning regulations to determine whether they can construct an accessory apartment in the R-20 zone.[3] These considerations affect only a single property, which is the "critical requirement" in the first prong of the variance test. *Metropole Condominium Ass'n*, 141 A.3d at 1083.

Practical difficulties. An applicant for area variance relief is required to show that the strict application of the zoning regulations would result in "practical difficulties." *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995), quoting *Roumel v. District of Columbia Bd. of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980). A showing of practical difficulty requires "'[t]he applicant [to] demonstrate that ... compliance with the area restriction would be unnecessarily burdensome….'" *Metropole Condominium Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 141 A.3d 1079, 1084 (D.C. 2016), quoting *Fleishman v. District of Columbia Bd. of Zoning Adjustment*, 27 A.3d 554, 561-62 (D.C. 2011). The Board "'may ... consider a wide range of factors in determining whether there is an 'unnecessary burden' or 'practical difficulty.'" *St. Mary's Episcopal Church v. D.C. Zoning Comm'n*, 174 A.3d 260, 271 (D.C. 2017) (quoting *Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C. 1990)). These factors include "'[i]ncreased expense and inconvenience to applicants for a variance,' and 'the severity of the variance(s) requested.'" *St. Mary's Episcopal Church v. D.C. Zoning Comm'n*, 174 A.3d 260, 271 (D.C. 2017) (quoting *Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C. 1990)).

The showing of "practical difficulties" required for an area variance is a "lower" standard than the undue hardships required for a use variance. *See, e.g.*, *Fleischman v. D.C. Bd. of Zoning Adjustment*, 27 A.3d 554, 562 (D.C. 2011); *Palmer v. Bd. of Zoning Adjustment*, 287 A.2d 535, 541–42 (D.C.1972). In the context of the more demanding showing for use variances, "[g]ood faith, detrimental reliance on the zoning authorities informal assurances may be taken into account in assessing . . . undue hardship." *Monaco v. D.C. Bd. of Zoning Adjustment*, 407 A.2d 1091, 1101 (D.C. 1979). It therefore stands to reason that such good faith detrimental reliance may be taken into account in assessing the less demanding practical difficulties test for an area variance as well.

The Board concludes that the strict application of the Zoning Regulations would result in practical difficulties for the Applicant. The Applicant has incurred expenses in reliance on the DCRA clearance of the building permit application for zoning, including (1) signing a contract with an

[3] The Applicant has argued that the mere fact a special exception was granted under Subtitle § U 253.4 also constitutes an exceptional condition concerning the property and that this reading is one way of reconciling the apparent tension between Subtitle § U 253.9 and Subtitle D § 1209.4. (Exhibit 51 at p. 2, Tr. at p. 108.) The Applicant has also argued that his need to provide housing for his sister-in-law, who has been diagnosed with cancer and has recently moved to the Burleith neighborhood constitutes a unique hardship. (Exhibit 51 at p. 2.) The Board does not reach these arguments.

over $30,000 deposit with a general contractor; (2) ordering kitchen cabinets costing $7,845.59 for the accessory apartment; and (3) signing a $20,900.90 contract to install solar panels on the proposed accessory building and the existing principal dwelling.

These expenditures would have been for nothing if the Board were to deny the variance, because doing so would effectively prohibit the construction of an accessory apartment on the premises. The detached accessory building is the only economically feasible location for the accessory apartment on the Applicant's property and Subtitle U § 253.9 requires accessory apartments to be located on the second story of such detached accessory buildings in the R-20 Zone. While it may theoretically have been possible to seek a special exception from Subtitle U § 253.9's second-story requirement and to have constructed the accessory apartment on the first story of where the garage is now located, that would have eliminated the lot's only parking space and may have necessitated further zoning relief and exacerbated the ANC's concerns about the availability of parking in the neighborhood. Therefore, the Board concludes that the substantial expenditures made by the Applicant would have been for naught if this variance was denied, and this loss would be unnecessarily burdensome.

The Board will weigh these practical difficulties against "'the severity of the variance(s) requested.'" *St. Mary's Episcopal Church v. D.C. Zoning Comm'n*, 174 A.3d 260, 271 (D.C. 2017) (quoting *Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C. 1990)); *Fleischman v. D.C. Bd. of Zoning Adjustment*, 27 A.3d 554, 562–63 (D.C. 2011). The zoning relief requested by Applicant is far from severe. Indeed, it pertains only to whether the interior of the proposed detached accessory building may be divided into two stories or one: the building otherwise complies with the "by right" height limitation set forth in Subtitle D § 1209.4. The accessory building will not be visible from S or R Streets. Further, the existence of a second story will be disguised, in part, by the use of a mansard roof. The R-20 Zone does allow accessory apartments and, in fact, expresses a preference for such units to be constructed on the second story of the detached accessory building. (*See* Subtitle U § 253.9.) For all these reasons, it is hard to imagine a less "severe" form of variance than the one Applicant seeks here. The Board concludes that the practical difficulties that the Applicant would face from denial of the variance outweigh the severity of the variance sought.

No substantial detriment or impairment. The Board finds that approval of the requested variance relief would not result in substantial detriment to the public good or cause any impairment of the zone plan.

As discussed above, the variance sought is far from severe and pertains only to the number of stories in the interior of the detached accessory building. Thus, as the Office of Planning noted in

its report, "the accessory structure would be no taller or larger than what is permitted, while still maintaining the first floor for automobile parking." (Exhibit 46 at p. 3.) For that reason, as the Office of Planning concluded, the proposed accessory structure "would not increase the appearance of bulk." (Exhibit 46 at p. 3.) Moreover, the use of a mansard roof helps disguise the existence of the second floor.

The very reason that the Applicant is seeking this relief from Subtitle D § 1209.4 is his attempt to comply with another provision of the Zoning Code, namely, Subtitle U § 253.9. In the past, this Board and the Court of Appeals have considered the fact that a "requested variance[] [was] born from [the Applicant's] considerations of 'the zone plan'" as a factor supporting the grant of the variance. *Fleischman v. D.C. Bd. of Zoning Adjustment*, 27 A.3d 554, 563 (D.C. 2011). The Board does so here as well. The Board also considers it a relevant factor that no immediately adjacent neighbors objected to the zoning relief sought.

**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 (2012 Repl.).) For the reasons discussed above, the Board concurs with OP's recommendation that the application should be approved in this case.

The Board is also required to give "great weight" to the written issues and concerns raised by the affected ANC. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)(3)(A) (2012 Repl.).) In this case ANC 2E, the affected ANC, submitted a resolution in opposition to the Applicant's request for an area variance and a representative of the ANC also testified in opposition to the variance at the public hearing. The Board has considered the ANC's concerns, and was not persuaded that they warrant disapproval of the zoning relief requested in this application.

The ANC expressed concern that granting the variance would "open the door" to the construction of second-story living units adjacent to alleys throughout the R-20 Zone. (Exhibit 50.) But for the reasons discussed above, the Board has considered whether the Applicant has satisfied the extraordinary or exceptional circumstances prong of the variance test and has concluded that he does. In other words, the Board has concluded that the Applicant's case is unique and will not result in the widespread granting of similar zoning relief throughout the R-20 Zone.[4]

[4] The ANC's resolution also stated that the R-20 Zone contains other "accessory buildings with respect to which homeowners have sought zoning relief to permit the addition of a second story containing an accessory apartment." (Exhibit 50.) The ANC, however, did not identify any specific examples of such accessory buildings, much less cases concerning the interaction of Subtitle D § 1209.4 and Subtitle U § 253.9 under the ZR 16. As such, the ANC's resolution provides no reason to doubt the Board's finding that Applicant's case is unique in being the first to proceed under the new code.

The ANC's resolution also expressed concern about the parking impacts that the Burleith neighborhood faces from the presence of nearby schools and hospitals. Strictly speaking, however, parking impacts do not pertain to the zoning relief requested - i.e., whether the proposed detached accessory building may have one or two stories - and instead were properly addressed as part of the special exception proceeding. (*See* Subtitle Y § 704.7.) In any event, the Board is not persuaded that the parking impacts of allowing a second-story living unit are a reason to disapprove the project. The Board concurs with the District Department of Transportation's report in the special exception proceeding that there will be "no adverse impacts on the travel conditions of the District's transportation network" and that any increase in parking utilization from the addition of one dwelling unit would constitute at most a "minor potential impact." (Case No. 19521, Exhibit 48.)

Finally, the ANC has expressed the view that zoning relief should be denied because the prohibition on two-story accessory buildings is "explicit and unambiguous" and the Applicant faces hardship only as a result of his own mistake. (Exhibit 50; Tr. at p. 111.) For the reasons described and in the findings of facts, however, we find the Applicant's mistake to have been reasonable and thus should not bar him from relief. In any event, the ANC's argument may be understood as an invocation of the self-created hardship doctrine. While courts have held that "[a] self-inflicted hardship . . . will not support the grant of a *use variance," Salsbery v. District of Columbia Bd. of Zoning Adjustment*, 357 A.2d 402, 404 (D.C.1976) (emphasis added), Applicant is seeking an area variance and "the rule of self-created hardship does not apply to the grant of area variances…." *Washington Canoe Club v. D.C. Zoning Comm'n*, 889 A.2d 995, 1001 (D.C. 2005). *See, e.g., Ass'n for the Preservation of 1700 Block of N Street v. District of Columbia Bd. of Zoning Adjustment*, 384 A.2d 674 (D.C. 1978) (grant of a parking variance was upheld even though the property owner, a YMCA, had "full knowledge" of all problems with the shape of the land, zoning, and costs of putting in parking before buying the property; the YMCA had no feasible alternative method to provide both a pool and all required parking spaces, and its self-created hardship was not a factor to be considered in an application for an area variance, as that factor applies only to a use variance.); *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1169 (D.C. 1990) (Prior knowledge or constructive knowledge or that the difficulty is self-imposed is not a bar to an area variance.); *A.L.W. v. District of Columbia Bd. of Zoning Adjustment*, 338 A.2d 428, 431 (D.C. 1975) (prior knowledge of area restrictions or self-imposition of a practical difficulty did not bar the grant of an area variance). Furthermore, we have also concluded that unique hardships that Applicant faces are not solely of his own creation, but also arise from his "reliance on actions of the zoning authorities." *Monaco v. D.C. Bd. of Zoning*

*Adjustment*, 407 A.2d 1091, 1101 (D.C. 1979). In such circumstances, the self-created hardship rule is inapplicable. *See id.*

**Conclusion**

Good-faith reliance on erroneous actions of the DCRA will not always entitle a property owner to variance relief. Factors such as the reasonableness of the mistake, the degree of the hardship, and the severity of the variance relief requested are all relevant factors that, in addition to others will need to be considered in a future case. Here, for the reasons expressed above, the Board concludes that the Applicant has met his burden of proof.

Based on the findings and fact and the conclusions of law, the Board concludes that the Applicant has satisfied the burden of proof with respect to the modification of significance to the relief approved by BZA Order No. 19521 to include a variance from the accessory building requirements of Subtitle D § 1209.4, to construct a second story accessory apartment above an existing garage in the R-20 Zone at premises 3520 S Street N.W. (Square 1303, Lot 29). Accordingly, it is **ORDERED** that the application is **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 7 – APPLICANT'S ARCHITECTURAL PLANS AND ELEVATIONS.**

**VOTE:** **4-1-0** (Frederick L. Hill, Robert E. Miller, Lesylleé M. White, and Lorna L. John to APPROVE; Carlton E. Hart opposed.)

**BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT**
A majority of Board members approved the issuance of this order.

**ATTESTED BY:** _____
**SARA A. BARDIN**
**Director, Office of Zoning**

**FINAL DATE OF ORDER:** October 23, 2018

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.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, 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 SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, 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.

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.