

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 19386-A of IREI 22nd Street, LLC, as amended, pursuant to 11 DCMR Subtitle X, Chapter 10, for a variance from the lot width and area requirements of Subtitle D § 302.1, and a variance from the side yard requirements of Subtitle D § 307.1, to construct a new one-family dwelling in the R-1-B Zone at premises 3702 22nd Street, N.E. (Square 4226, Lot 42).

HEARING DATES: December 14, 2016, January 11, 2017, February 22, 2017¹
DECISION DATE: March 1, 2017

CORRECTED² DECISION AND ORDER

On October 5, 2016, IREI 22nd Street, LLC the property owner of the subject premises (the “Owner” or the “Applicant”) submitted an application for special exception relief to allow the construction of a new one-family dwelling located at premises 3702 22nd Street N.E. (Square 4226, Lot 42). (Exhibit 1.) However, the Applicant revised the application to request variances as noted in the caption above. (Exhibit 30.) For the reasons explained below, the Board of Zoning Adjustment (the “Board” or “BZA”) voted to approve the application on March 1, 2017, after the public hearing was completed on February 22, 2017 and based on additional materials submitted to the file on February 28, 2017.

PRELIMINARY MATTERS

Notice of Application and Notice of Public Hearing. By memoranda dated October 18, 2016, the Office of Zoning sent notice of the application to the Office of Planning (“OP”); the District Department of Transportation (“DDOT”); the Councilmember for Ward 5; Advisory Neighborhood Commission (“ANC”) 5C, the ANC for the area within which the subject property is located; and the single-member district ANC 5C-01. Pursuant to 11-Y DCMR § 402.1, on August 31, 2017, the Office of Zoning mailed notice of the hearings to the Applicant, ANC 5C,

¹ The application was originally scheduled for public hearing on December 14, 2016. The hearing was postponed to January 11, 2017 and continued to February 22, 2017.

² This order is issued to correct the exhibit number for the approved plans inadvertently cited as Exhibit 51 in BZA Order No. 19386 at p. 9, issued on April 18, 2018. The correct plans approved by the Board are at Exhibit **62**. In all other respects, this order remains the same as Order No. 19386.

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and the owners of all property within 200 feet of the subject property. Notice was published in the *D.C. Register* on October 21, 2016 (63 DCR 44).

ANC Report. ANC 5C, an automatic party to this proceeding, submitted three reports regarding the application. The first report was submitted on November 15, 2016, by the Single Member District Commissioner, requesting a postponement of the hearing. The second report was an official report from the ANC, submitted on January 4, 2016. The second report indicated that, at a regularly scheduled monthly meeting with a quorum present, the ANC voted 6-0-1 to recommend denial. The third report also indicated that, at a regularly scheduled monthly meeting with a quorum present, the ANC voted 6-0-1 to recommend denial.

OP Report. In its memoranda dated December 2, 2016, OP recommended approval of the requested relief. The OP report states that the subject property is impacted by exceptional conditions in that the lots in this square were created prior to the adoption of the current zoning regulations and that requiring eight-foot setbacks would result in a seven-foot wide³ house which would severely limit the available living space within the structure. The report also states that relief would not be a substantial detriment on the public good, nor would it be a substantial harm to the zoning regulations. At the hearing, OP testified that they would also support variance relief from the minimum lot width and lot area requirements.

DDOT Report. By memoranda dated December 2, 2016, DDOT indicated it had no objection to the approval of the application, noting that the proposal will have no adverse impacts on travel conditions of the District's transportation network.

Request for Party Status. There were no requests for party status.

Persons in Support/Opposition. The Board received a letter in opposition from Andrea Deadwyler, the adjacent neighbor at 3704 22nd Street, N.E. Ms. Deadwyler and her husband opposed the project because they did not believe that a side yard of three feet and five inches was enough space between the proposed dwelling and their dwelling. On December 20, 2016, the Board received a letter in opposition from Nicole Stevens, the adjacent neighbor at 3700 22nd Street, N.E. Both the Deadwylers and Ms. Stevens testified in opposition at the hearings on January 11, 2017 and February 22, 2017. The primary concerns of the adjacent neighbors were related to potential property damage from construction.

Robert Corletta and Councilmember Kenyan McDuffie submitted letters in opposition. At the hearing, Annette Scruggs, Valerie Boykin-Pair, and Enoch Thompson testified in opposition. The testimony in opposition focused primarily on concerns regarding the changing character of the neighborhood.

Sarah and Matthew Canzoneri and Jim Cronenburg submitted letters in support.

³ This was a typographical error in the OP report. Such a requirement would result in a nine-foot wide dwelling.

Applicant's Case. The Applicant provided evidence and testimony from Paul Deverger and Sam Cheng, Principals of IREI 22nd Street, LLC, the owner of the subject property. The Applicant also provided evidence and testimony from Charles Warren, a Principal of Teass/Warren Architects. The evidence and testimony described how the proposed project met the burden of proof for the requested variance relief.

FINDINGS OF FACT

The Subject Property and Nearby Properties

1. The subject property is located at 3702 22nd Street, N.E. (Square 4226, Lot 42).
2. The subject property is a rectangular parcel measuring 2,500 square feet in land area and 25 feet in width.
3. The subject property is located in the R-1-B Zone District.
4. The subject property is currently unimproved.
5. Abutting the subject property to the north and south are one-family dwellings.
6. Abutting the subject property to the east and west are 22nd Street, N.E. and a public alley, respectively.
7. The majority of the properties in the area have substandard side yard setbacks.
8. The subject property was created prior to the adoption of the 1958 Zoning Regulations.

The BZA Application and Proceedings

9. The BZA Application was submitted on October 5, 2016 under the 2016 Zoning Regulations as an application for special exception relief from the side yard setback requirements of 11-D DCMR § 307.1.
10. On November 14, 2016, the Application was revised to seek variance relief (in lieu of the special exception) and to include relief from the minimum lot dimensions of 11-D DCMR § 302.1. The Office of the Attorney General informed the Applicant that it would be required to request relief from 11-D DCMR § 302.1, so out of an abundance of caution, the Applicant requested relief from that requirement, as well. OP found that this relief was not necessary as it only applies to new lots, not existing lots.

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11. The original hearing was scheduled for December 14, 2016. Prior to the hearing, on November 15, 2016, the Single Member District Commissioner for ANC 5C-01, Gail Brevard, requested that the hearing be postponed.
12. On December 2, 2016, the Office of Planning submitted a report granting approval to the request of side yard setback relief.
13. On December 7, 2016, John and Andrea Deadwyler, the adjacent neighbors to the north at 3704 22nd Street, N.E., submitted a letter in opposition.
14. At the scheduled hearing on December 14, 2016, the Board postponed the hearing to January 11, 2017.
15. Nicole Stevens, the adjacent neighbor to the south at 3700 22nd Street, N.E., submitted a letter in opposition on December 20, 2016.
16. The ANC submitted its report on January 4, 2017.
17. The Applicant submitted photographs of the tree stumps on the property and the surrounding area on January 4, 2017.
18. The hearing took place on January 11, 2017. The Board continued the hearing to February 22, 2017 and requested that the Applicant provide additional materials to the record.
19. The Applicant submitted updated plans and elevations on January 12, 2017.
20. Bartlett Tree Experts submitted comments to the record on January 13, 2017.
21. On February 14, 2017, the Applicant submitted a draft Construction Management Agreement, a Tree Removal Permit, and a set of revised plans and elevations.
22. On February 16, 2017, Ms. Stevens and Mr. and Mrs. Deadwyler submitted a joint petition in opposition.
23. The ANC submitted a third report, recommending denial of the requested relief 6-0-1.
24. After the continued hearing on February 22, 2017 the Applicant submitted an updated Construction Management Agreement, Revised Architectural Plans, and a Revised Self-Certification. (Exhibits 61-64.) The revised plans reflected the Board's request that the Applicant provide four-foot side yards instead of the originally proposed three-and-a-half-foot side yards.

The Requested Zoning Relief

25. The proposed project will provide two, four-foot side yards.⁴ Pursuant to 11-D DCMR § 307.1, a detached structure in the R-1-B Zone is required to provide a side yard of eight feet.
26. Accordingly, the Applicant requested a variance from the minimum side yard requirements of 11-D DCMR § 307.1.
27. The subject property is impacted by an exceptional condition and situation because it is an existing lot measuring 25 feet in width and 2,500 square feet in land area, constructed prior to the adoption of the 1958 Zoning Regulations.
28. Because it is an existing lot, there is no opportunity to meet the zoning regulations pertaining to minimum lot area or lot width.
29. If the Zoning Regulations were strictly applied, the Applicant would face a practical difficulty, because it would be required to provide two, eight-foot side yards, which would result in a dwelling measuring nine feet in width.
30. A dwelling measuring nine feet in width is not feasible, as it would severely limit the available living space within the structure.
31. The building to the south, at 3700 22nd Street, N.E., is approximately six feet from the shared lot line.
32. The building to the north, at 3704 22nd Street, N.E. is approximately 12 feet from the shared lot line.
33. The new structure will not cause any undue shadow on the adjacent properties.
34. The new structure will not impact airflow to the adjacent properties.
35. The proposed project will be consistent with the District objectives to provide opportunities for infill housing where appropriate while maintaining neighborhood development patterns.
36. The Regulations are intended to make the city livable for households of various sizes, and the proposed project would allow a one-family dwelling similar to other dwellings in the neighborhood.

⁴ Originally requested relief for two, three and a half-foot side yards.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized to grant variances 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 a specific piece of 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.. .” D.C. Official Code 6-641.07(g)(3) (2008 Supp.); (11-X DCMR § 1002.)

A showing of “practical difficulties” must be made for an area variance, while the more difficult showing of “undue hardship” must be made for a use variance. *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535 (D.C. 1972). The Applicant in this case is requesting area variances; therefore, it had to demonstrate an exceptional situation or condition of the property and that such exceptional condition results in a practical difficulty in complying with the Zoning Regulations. Lastly, the Applicant had to show 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.” (11-X DCMR § 1002.)

The “exceptional situation or condition” of a property can arise out of “events extraneous to the land,” including the zoning history of the property. See, e.g. *De Azcarate v. Board of Zoning Adjustment*, 388 A.2d 1233, 1237 (D.C. 1978), and see *Monaco v. Board of Zoning Adjustment*, 407 A.2d 1091, 1097, and 1098 (D.C. 1979). See also *BZA Order No. 17264* (2005). The “exceptional situation or condition” can also arise out of the structures existing on the property itself. See, e.g., *Clerics of St. Viator v. D.C. Board of Zoning Adjustment*, 320 A.2d 291, 293-294 (D.C. 1974).

In order to prove "practical difficulties," an applicant must demonstrate first that compliance with the area restriction would be unnecessarily burdensome; and, second, that the practical difficulties are unique to the particular property. See *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 164, 170 (D.C. 1990).

Exceptional Situation Resulting in a Practical Difficulty

As detailed in the Findings of Fact, the Board finds that the property faces an exceptional condition and situation in that the lot is only 25 feet wide, has only 2,500 square feet of land area, and it was created prior to the adoption of the 1958 Zoning Regulations. Due to the width of the lot, it would be practically difficult to provide a matter-of-right project, as providing two eight-foot side yards would result in a dwelling that is nine feet in width. A dwelling of that width is not feasible. Further, there is no opportunity to meet the minimum lot width and lot area requirements, as the lot was constructed prior to the adoption of the 1958 Zoning Regulations. Commissioner Rob Miller requested that the Applicant provide information on the difficulty of providing a building less than 17 feet wide. The Applicant testified that a 16-foot-wide dwelling would be out of context

with the neighborhood, and a width of less than 17 feet would impact the layout of the dwelling, including the location of bathrooms and hallways. A width of less than 17 feet would force the building to extend back further than was originally proposed and would therefore impact the Applicant's ability to provide a compliant rear yard setback.

No Substantial Detriment to the Public Good

The Board concludes that the requested variance can be granted without substantial detriment to the public good. As detailed in the findings of fact, the new structure would not cause undue shadow on the adjacent properties or greatly impact airflow. The property to the south has a six-foot side yard and the property to the north is approximately 12 feet from the shared property line. Further, the proposed project is consistent with District objectives to provide opportunities for infill housing where appropriate while maintaining neighborhood development patterns. The Applicant also agreed to work with the adjacent neighbors regarding window location on the north and south façades of the proposed building to mitigate any concerns regarding privacy. The Applicant also made significant efforts to satisfy concerns over the impacts of construction in Construction Management Agreements submitted to the record.

No Substantial Impairment to the Zoning Regulations

The Board concludes that the requested variances can be granted without substantial impairment to the Zoning Regulations. As detailed in the findings of fact, the regulations are intended to make the city livable for households of various sizes. The requested relief would allow a single-family household similar to other houses in the neighborhood. The majority of the houses on this block do not meet the minimum side yard setback requirements of the R-1-B Zone.

ANC Great Weight

The Commission is required under § 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)) to give "great weight" to the issues and concerns raised in the written report of the affected ANC, which in this case is ANC 5C. To satisfy the great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. The District of Columbia Court of Appeals has interpreted the phrase "issues and concerns" to "encompass only legally relevant issues and concerns." *Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978) (citation omitted).

In submissions to the record and at the hearings, the ANC and the persons in opposition raised the following concerns: (1) the owner had not met its burden of proof; (2) the proposed project is not in character with the neighborhood; (3) the proposed relief infringes on the adjacent neighbor's property rights; (4) construction and excavation; (5) increased noise; and (6) tree removal.

1. Burden of Proof

As discussed below and in the findings of fact, the Applicant has met its burden of proof to show that, due to an exceptional situation or condition of the property, a strict application of the zoning regulations would result in a practical difficulty to the Applicant. Ms. Stevens alleged that the hardship was self-imposed. However, the Board disagrees with that assertion, as the lot existed prior to the adoption of the zoning regulations. Any purchaser of the property would be in the same position as the Applicant.

2. Character of the Neighborhood

In her submission in Exhibit 41, Ms. Stevens alleges that the proposed project is “incompatible with the surrounding properties and will detract from the livability and character of the surrounding properties.” The Board finds that the proposed project is in character with the neighborhood, which has a mixture of semi-detached and detached dwellings, few - if any - of which meet the minimum required side yard setback of eight feet.

3. Adjacent Neighbor’s Property Rights

Ms. Stevens also states that “the potential cost to the neighborhood is an infringement of property rights for all surrounding properties, specifically my property to the south and the property of my neighbors to the north. If this exemption is granted, neither my neighbors nor I will be able to build any additions without also getting an exemption for ourselves as we remain subject to the eight-foot side yard requirement.” The Board finds that granting a variance request for the subject property will not impact the adjacent neighbors’ abilities to construct additions. The adjacent properties are subject to the side yard setback requirements of the R-1-B Zone regardless of whether the relief is granted for the subject property.

4. Construction and Excavation

Both neighbors and the ANC raised concerns over potential damage caused by construction and excavation. The majority of the testimony at the hearing focused on the potential impacts of construction. While it is not within the Board’s jurisdiction to review potential construction issues, the Applicant drafted and submitted several Construction Management Agreements (“CMAs”) in a show of good faith. (Exhibit 63.)

5. Noise

The adjacent neighbors had concerns regarding noise from potential residents of the proposed project, finding that three and a half feet was not enough of a buffer. The Board requested that the Applicant provide an additional six inches of side yard on either side of the proposed project. A four-foot side yard would provide at least 10 feet of distance between the proposed structure and the structure to the south, and 16 feet of distance between the proposed structure and the structure

to the north. This distance is significantly more than the distances between other buildings in this area. The Board finds that the distance (four-foot side yards) was sufficient because this distance is significantly more than that distance between other buildings in this area.

6. Tree Removal

The parties in opposition also addressed concerns over tree removal, specifically, the fact that Applicant removed a large tree without a permit. The Applicant then received a permit after the fact, and paid an \$8,500 fine to the City Tree Fund to remedy the premature removal of the tree. In any event, the Applicant's compliance with the requirement to obtain a tree removal permit is not in and of itself relevant to the Board. Only if the removal of the tree would have an adverse impact on adjacent properties would its removal be relevant, and that would be true whether or not a permit was obtained. The record reflects no potential for such an impact.

CONCLUSION

Based on the case record, the testimony at the hearing, and the findings of fact and conclusions of law, the Board concludes that the Applicant has satisfied the burden of proof with respect to the request for variance relief from the minimum lot area and lot width requirements of 11-D DCMR § 307.1 and the minimum side yard requirements of 11-D DCMR § 307.1, to allow for the construction of a new one-family dwelling on the property located at 3702 22nd Street, N.E. Accordingly, it is **ORDERED** that this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 62 – REVISED ARCHITECTURAL PLANS AND ELEVATIONS.**

VOTE: 3-1-1 (Frederick L. Hill, Carlton E. Hart, and Lesylleé M. White to APPROVE; Robert E. Miller to deny; one Board seat vacant).

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: July 6, 2018

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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.