



KIMBERLEY DRISCOLL
MAYOR

CITY OF SALEM, MASSACHUSETTS BOARD OF APPEALS

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Decision

City of Salem Board of Appeals

Petition of DIANE T. REDDY for variances per Section 4.1.1 *Table of Dimensional Requirements* of the Salem Zoning Ordinance from minimum lot frontage and minimum lot width to construct a two-story, single-family home at 39R CLARK STREET (Map 7, Lot 34) and 41 CLARK STREET (Map 7, Lot 36) (R1 Zoning District).

A public hearing on the above Petition was opened on May 20, 2020 pursuant to M.G.L Ch. 40A, § 11; continued to June 17, 2020; continued to July 15, 2020 and closed on July 15, 2020 with the following Salem Board of Appeals members present: Peter A. Copelas, Mike Duffy (Chair), Rosa Ordaz, Paul Viccica, Carly McClain (Alternate), and Steven Smalley (Alternate). Jimmy Tsitsinos was absent on July 15.

On May 20, Peter A. Copelas, Mike Duffy (Chair), Carly McClain (Alternate), Rosa Ordaz, Steven Smalley (Alternate), and Paul Viccica were present; Jimmy Tsitsinos was absent. On June 17, Peter A. Copelas, Mike Duffy (Chair), Carly McClain (Alternate), Rosa Ordaz, Steven Smalley (Alternate), and Paul Viccica were present; Jimmy Tsitsinos was absent.

The petitioner seeks variances per Section 4.1.1 *Table of Dimensional Requirements* of the Salem Zoning Ordinance from minimum lot frontage and minimum lot width to construct a two-story, single-family home at 39R and 41 Clark Street.

Statements of Fact:

1. In the petition date-stamped April 29, 2020, the petitioner requested a variance per Section 4.1.1 *Table of Dimensional Requirements* from minimum lot frontage and minimum lot width at 39R and 41 Clark Street to construct a two-story, single-family home. The home is proposed to be located on the 41 Clark Street lot.
2. The application was filed by petitioner and property owner Diane T. Reddy
3. 39R Clark Street and 41 Clark Street are adjacent lots located in the Residential One-Family (R1) zoning district. 39R Clark Street currently includes a single residential structure. 39R Clark Street is located largely behind the lot at 39 Clark Street, with only 10 feet of frontage along Clark Street. 41 Clark Street does not currently include a residential structure.
4. 39R and 41 Clark Street, as noted in the Statement of Hardship submitted to the Board, "...are two existing non-conforming registered land lots that merged due to previous common ownership." The Statement also noted that the two properties are assessed separately.
5. Both 39R and 41 Clark Street meet the required minimum lot area but fail to meet the required minimum lot width and minimum lot frontage in the R1 district. Because these lots have merged and

their unmerging would cause each to fall short of these dimensional requirements, variances from minimum lot width and minimum lot frontage for both these lots have been requested.

6. The proposal is to build a 28' by 44', two-story, single-family home on the lot at 41 Clark Street.
7. The requested relief, if granted, would allow the petitioner to build a two-story, single-family home at 41 Clark Street. The requested relief would also effectively unmerge 39R Clark Street and 41 Clark Street.
8. Due to the ongoing COVID-19 pandemic and related precautions and Governor Baker's March 12, 2020 Order Suspending Certain Provisions of the Open Meeting Law, G.L. c. 30A, §18, and the Governor's March 15, 2020 Order imposing strict limitations on the number of people that may gather in one place, the May 20, 2020 meeting of the Board of Appeals was held remotely, via the online platform Zoom.
9. At the May 20, 2020 public hearing, Attorney Scott Grover, representing the petitioner, Diane T. Reddy, discussed the petition. Also in virtual attendance was Dave Potter, whom Attorney Grover indicated has agreed to purchase 41 Clark Street from Ms. Reddy contingent upon the requested relief being granted. Attorney Grover presented the plot plan, easement plan, and elevations. Attorney Grover described the history of the lots at 39, 39R, and 41 Clark Street. He explained that property was initially subdivided in 1936 into 39 and 41 Clark Street, each lot with 50 feet of frontage. In 1950, the property identified as 39 Clark Street was subdivided into two lots, 39 Clark Street with 40 feet of frontage and 39R Clark Street with 10 feet of frontage but expanding past the back of 39 Clark Street. Up until 1953, the two lots had separate ownership. In 1953, Frank and Lois Nobili jointly purchased 39R Clark Street and purchased 41 Clark Street in Ms. Nobili's name only. After Frank passed away leaving the jointly held property in Lois' name, the two lots were merged from a zoning standpoint. Attorney Grover noted that the current owner, Ms. Reddy, purchased the two lots from Ms. Nobili in 2006, purchasing 39R Clark Street in her own name and 41 Clark Street in the name of a realty trust, not knowing the lots had already merged. Attorney Grover noted that in 2006, the City separately assessed 41 Clark Street as a buildable lot, and Ms. Reddy has paid taxes on that lot at the assessed value.
10. At the May 20, 2020 public hearing, Attorney Grover explained the relief requested and noted Mr. Potter's plan to purchase 41 Clark Street and build a home on that lot. He stated that the relief is to restore the lots to their legal status. He noted that this home would not require any relief other than the instant request. Attorney Grover discussed the grounds for the variance. He noted that the two lots meet the minimum lot area but lack the required frontage and width. He noted that the hardship is financial, arguing that literal enforcement would render 41 Clark Street an unusable lot with no value. Attorney Grover also noted that the owner of 39 Clark Street had concerns as they currently use the 10-foot driveway (part of 39R Clark Street) under limited circumstances. He noted that the purchase of the property would be willing to grant an easement if relief was granted, which could be a condition of approval. Attorney Grover added that a neighbor across the street expressed concerns regarding drainage and runoff if 41 Clark Street were developed; Attorney Grover offered a condition that drainage systems will be installed so runoff is not increased.
11. At the May 20, 2020 public hearing, the Board, Building Commissioner Tom St. Pierre, and Attorney Grover discussed the question of merger. Attorney Grover stated that they were merged from a zoning standpoint but titled separately. Mr. Copelas expressed his concern that the Board is being asked to override the law and principle of merger. He noted the purpose of the merger provision is if you have two nonconforming lots in common ownership, they merge. He noted that it was not clear that the project would not result in detriment or derogation (from the ordinance). Attorney Grover noted that actions were taken to prevent merger, but the lots merged at Mr. Nobili's passing. Chair

Duffy asked about the legal efficacy of the Board granting a variance if there is a question about whether a lot is actually two lots. Mr. St. Pierre and Chair Duffy agreed to confer with the City Solicitor and suggested a continuance. Mr. Copelas noted that even if the legal question is resolved, he is uncomfortable approving a “pork chop lot” with a ten-foot driveway.

12. At the May 20, 2020 public hearing, two (2) members of the public spoke in opposition to the petition. No (0) members of the public spoke in favor of the petition. Two others, Dennis Colbert and Frank LoConte, expressed concerns about runoff. Frank LoConte of 39 Clark Street indicated that he was initially fine with the petition as long as the access easement was granted, but was not aware of the runoff issue and is now on the fence.
13. At the May 20, 2020 public hearing, the Board voted five (5) in favor (Peter A. Copelas, Mike Duffy (Chair), Rosa Ordaz, Paul Viccica, and Carly McClain) and none (0) opposed to continue the petition to the next regularly scheduled meeting on June 17, 2020.
14. The June 17, 2020 meeting of the Board of Appeals was also held remotely, via Zoom. At this meeting, Attorney Grover noted that Ms. Reddy met with neighbors to address their concerns following last month’s meeting and indicated that there is a letter from neighbors indicating support with certain conditions. Attorney Grover explained that the issue is the merger of the two lots, and that there is no question that the lots have merged. He noted that the relief being sought is to reverse the merger so the vacant lot at 41 Clark Street can be built on. Attorney Grover argued that the hardship in this case is one of fairness, as Ms. Reddy purchased the two lots believing they were separate and has paid taxes on 41 Clark Street as if it were a buildable lot, as assessed by the City. He argued that if the variances are not granted, 41 Clark Street would become worthless. Attorney Grover discussed the issues raised by neighbors and expressed that the applicant is prepared to agree to the discussed conditions to address those concerns.
15. At the June 17, 2020 public hearing, Attorney Grover noted that the City Solicitor is speaking with outside counsel about whether Planning Board approval would be needed to subdivide the property. Attorney Grover noted that the Solicitor’s suggestion was that if the Board wished to grant the variance, they could do so with the condition that Planning Board approval will be obtained if required. Ms. Reddy discussed her history with the properties, noting the plan was to build on 41 Clark Street with the properties to be for her children. She noted that she has been paying taxes for almost twenty years on a lot she thought was buildable but is not.
16. At the June 17, 2020 public hearing, the Board discussed the petition. Mr. Copelas expressed that he still was uncomfortable with the Board voiding the legal concept of merger. He noted that the original parcels of land here were intended to hold two homes, and that is what is currently there. He stated that the Board is being asked to build a third home on what was originally two lots. He noted that the merger had already occurred by 2006. He added that he was unmoved by the arguments and that nothing so far indicated that the concept of merger should be voided. Ms. McClain noted that it did not seem to her that the land does not have value just because it cannot be sold and used to build a home; it can be used in other ways. As such, she stated she did not see it as a hardship that the land (at 41 Clark Street) cannot be sold for a third lot.
17. At the June 17, 2020 public hearing, no (0) members of the public spoke in opposition to the petition; no (0) members of the public spoke strongly in favor. One individual, Dennis Colbert, noted that Ms. Reddy presented a list of things they were willing to do to appease the neighbors, and they addressed the concerns he was aware of.
18. At the June 17, 2020 public hearing, there was more discussion about the petition. Attorney Grover noted that the fact that the lots do not comply with the current zoning arose because of the doctrine

of merger, but that the Board regularly addresses situations that do not comply. He stated that the reason for the situation should not matter as much as the justification for the variance being sought, which is a question of whether there is a legitimate hardship. Attorney Grover argued that both lots are already large, so to say that 41 Clark Street could be useful and would add value to add to 39R Clark Street is not the case. He argued that without the variance, 41 Clark Street is largely worthless, overgrown, and undeveloped.

19. At the June 17, 2020 public hearing, Chair Duffy confirmed with Attorney Grover that the benefit of the requested relief is really for 41 Clark Street as 39R Clark Street already has a house. Attorney Grover confirmed and noted that by taking away what merged into 39R Clark Street, you create a need for the variance to go both ways so you do not create a new violation for 39R by subtracting land that had merged. (This explains why the relief was requested for both.) Chair Duffy asked whether 41 Clark Street would still be too narrow even if there was not a merger, because it would have had 40 feet of frontage. Attorney Grover noted that it would have had 50 feet [which is also short of the requirement], but it would have been [pre-existing nonconforming] because it predated the zoning ordinance. Attorney Grover noted the property lost its protected status when it merged with 39R Clark Street. Mike Becker, who was involved with the application, noted that 39R Clark Street is over 15,000 square feet and 41 Clark Street is 20,000 square feet. He argued that the additional square footage from 41 Clark Street would not be of large consequence in terms of resale value (combined with 39R Clark Street) compared to value if the lot (41 Clark Street) is buildable.
20. At the June 17, 2020 public hearing, the Board again discussed procedure. Mr. Viccica asked if there is an alternate way to separate the lots if the Board does not approve the request. There was agreement that there is not an alternate path. Mr. St. Pierre noted that outside legal counsel is still being sought, so continuing the petition until the Board has all the facts would be helpful. Chair Duffy, Mr. Copelas, and Attorney Grover indicated agreement. Mr. Copelas noted he is open to hearing a different interpretation if the City Solicitor believes otherwise; he noted that he keeps coming back to the fact that it was originally designed as two lots and there are two houses there. Attorney Grover noted that he did not think the Solicitor would weigh in on that issue, as he has acknowledged they have merged; the question is whether Planning Board would need to re-subdivide the property if the variances were granted. He noted that the next step if the variances are granted is an important piece of information. Chair Duffy asked the applicant and the Board if they wanted the Board to act or to wait for input from the City Solicitor. Attorney Grover noted that they would be happy to continue (to the next meeting) so the Board has a full picture of what is involved. Chair Duffy acknowledged that it may not move the needle, but he is more than happy to hear another view on this from the Solicitor's office in case it does have some impact. The Board voted five (5) in favor (Peter Copelas, Carly McClain, Paul Viccica, Mike Duffy (Chair), and Rosa Ordaz) and none (0) opposed to continue the hearing to the next regularly scheduled meeting on July 15, 2020.
21. Before the July 15, 2020 meeting, the Board received comments from City Solicitor Beth Rennard via email to Planner Brennan Corrison. The email noted, in part,

“All, I have been asked to provide guidance regarding relief, if any, that may be required from the Planning Board in order for the real property located at 39R and 41 Clark Street to be used as separate lots.

It is my understand that the lots are shown as separate lots on subdivision plans filed with the registered land department of the Essex South District Registry of Deeds (See Plans 7159B, sheet 2 and 7159J) but have been held in common ownership and thus, under the doctrine of merger, are considered one lot for purposes of zoning. It is also my understanding that the

owner of the lots has applied to the Zoning Board for all variances necessary for each lot, as depicted on said plans, to be treated as a buildable under the City's Zoning Ordinance.

In my opinion, if the Zoning Board grants the necessary variances, where the lots are already depicted as separate lots on subdivision plans of record, nothing further is required from the Planning Board in order for the lots to be treated as separate buildable lots.”

22. The July 15, 2020 meeting of the Board of Appeals was held remotely, via Zoom.
23. At the July 15, 2020 meeting of the Board of Appeals, Attorney Grover and Diane Reddy were in attendance along with Mike Becker representing the potential purchaser of the lots. Attorney Grover reviewed the situation. He noted that the City Solicitor has confirmed that no further subdivision of the lots would be required from the Planning Board if the Board of Appeals grants the requested variances. Attorney Grover referenced Mr. Copelas' concern about reversing merger and discussed the history of merger as a means of combining nonconforming lots. Attorney Grover stated that he looked at the state statute that the doctrine of merger grew out of: the state statute is Chapter 40A, Section 6's "grandfathering provision," which was intended as a provision to protect legal lots from changes in [zoning] provided they were not held in common ownership. The language – not held in common ownership – is the basis for the merger doctrine, which tells us that lots that are held that way no longer have that protected status. Attorney Grover noted that the grandfathering clause is rooted in the idea of fairness to landowners – protecting them from losing what once were buildable lots. He argued that this was the case with these lots: they were buildable when they were originally subdivided in the 1950s. He argued that it is an unfair result to Ms. Reddy for these lots to be rendered unusable. He noted that Ms. Reddy and the prior owners, the Nobilis, did the right things to protect the lots from merging (holding the lots separately), but when Mr. Nobili passed away, the lots merged. When Ms. Reddy took title, she did so in two separate entities, but merger had already occurred. Attorney Grover that the City treated the lots as separate, buildable lots since 2006. He reiterated that the result is an unfair result and that the doctrine of merger grew out of the grandfathering provision that was based on the idea of fairness to landowners.
24. At the July 15, 2020 public hearing, Attorney Grover added that if the Board granted the relief, they would ask for conditions based on discussions they had with neighbors: to grant an easement to the owner of 39 Clark Street to access the back of his property, and to require that improvements to 41 Clark Street be constructed to not increase water flow across the street to the neighboring property. He stated with those conditions, he believes they generally have the support of the neighborhood. Attorney Grover reiterated that the hardship is financial: if the relief is not granted, 41 Clark Street essentially becomes a worthless piece of property.
25. At the July 15, 2020 public hearing, Diane Reddy again discussed the history of these two lots, in which she and her late husband purchased the lots under separate ownership, with the intention of using the property for their kids. She noted that they understood 41 Clark Street to be buildable at the time. Ms. Reddy noted that the previous owner's death caused the merger. She noted that this is a complicated process and that she is not a developer. She added that they paid taxes on the land as if it was buildable. She noted that her husband passed unexpectedly.
26. At the July 15, 2020 public hearing, Mr. Viccica asked about the wording of the application; he asked whether, if the Board voted in favor, they would grant variances to both lots. Attorney Grover noted that he did not file the petition, but he thinks that the relief would be for both lots because if they had merged from a zoning standpoint, if separated, 39R Clark would lose land that had merged into it for zoning purposes. The variances are to make sure you would not create a zoning problem for 39R Clark Street as well, even though no changes to the building are proposed for 39R Clark Street. There was some more discussion about the phrasing. Attorney Grover noted that the only construction that

would occur is on 41 Clark Street. Chair Duffy asked if future construction on 39R Clark Street would require further relief from this Board. Attorney Grover noted that if the variances are granted now and the new construction complied with all other requirements, he would think it would not need to come back to the Board.

27. At the July 15, 2020 public hearing, Paul Viccica asked why reversing merger is not best done in court rather than the Board of Appeals. Attorney Grover noted that the only thing you could argue to a court is that merger did not occur, but they acknowledge that merger did occur, so he does not think there is a case to reverse it (in court). Attorney Grover noted that granting the variances is the appropriate solution; he has referred to it as reversing merger, but it is just granting variances for lot frontage and lot width. He added that the lots meet all other requirements and the proposed new house at 41 Clark Street would meet the setback requirements. He stated that calling this reversing merger is probably a bit of a mislabel.
28. At the July 15, 2020 public hearing, Peter Copelas expressed sympathy for the personal concerns and appreciation for Attorney Grover's research but noted that the Board would effectively override the merger (by granting the relief), and that he thinks there is a good public policy reason that the doctrine exists, and he has not personally been convinced that there is a reason to override it. Mr. Copelas noted that the lots were designed to have two homes on them, and they do have two homes (although the lots are not configured as originally intended). He added that 39 Clark Street is not party to this action, but granting this relief would allow three homes on what was intended to be two lots. Attorney Grover noted that Mr. Copelas' understanding of the history was correct, but that all happened prior to the Nobili's ownership of the property. He added that in 1950, the two lots were legal building lots; he reiterated the "grandfathering" principle and the lots' merger history.
29. At the July 15, 2020 public hearing, no (0) members of the public spoke in favor of or in opposition to the petition.
30. At the July 15, 2020 public hearing, Chair Duffy noted that he thinks it is a valid point that at a previous point, the lots – 39, 39R, and 41 Clark Street – were subdivided to put them in a position that they would all be legal, buildable lots, which occurred after the first two lots were subdivided. He added that he was not sure that the Board needs to pay so much fealty to what happened with the original subdivision, as some action occurred later. He expressed sympathy to the applicant in the sense that they believed they had a legal status that protected their ability to build on both lots, and the legal status was not altered by an intentional transfer of property but by the death of a family member. He noted that this is a tricky case because for a normal variance, the Board looks to conditions of the land, lot, or building, because the hardship is based on those indicators. Here, the lots were intended to be somewhat unusually shaped, so these owners came to that condition, but when they did so, they did not have the problem of the zoning effect of the merger that exists now. He stated that he sees this as a different type of case. Chair Duffy noted that he thinks there is a valid hardship in the general sense that impacts these owners that changed the conditions in a way that they did not expect and would have been difficult to plan for the owners themselves to plan for.
31. At the July 15, 2020 public hearing, Paul Viccica noted that Mr. Copelas' argument was an interesting and compelling one. Mr. Viccica asked, if the Board were to deny the application, is there an avenue other than the Zoning Board for the applicant to rectify the situation. He asked in other ways, if the Zoning Board chooses not to do this because this is not the place to separate these lots and reverse merger, is there a more proper place for this issue to be adjudicated. Attorney Grover noted that the other possibility is to contest the idea that merger occurred in the first place through legal action, but he did not think that the facts were there; it seemed to him that clearly, these lots merged from a zoning standpoint. He added that the City Solicitor alluded to the same thing: that merger has

occurred. He reiterated that he did not think that court action would not be fruitful. Mr. Viccica asked Attorney Grover to reiterate the “grandfathering” clause that he previously cited. Attorney Grover reiterated this history and the idea of protecting buildable lots from losing their buildable status as a result of zoning changes. He noted that they carved out lots held in common ownership, because of the idea of moving towards greater conformity: those lots held in common ownership would merge and would not get the benefit of “grandfathering.”

32. At the July 15, 2020 public hearing, Mr. Viccica asked if the petitioner could try to subdivide these lots anew. Attorney Grover noted that between the two lots, there is only 50 feet of frontage, so if subdivided, they would be well short of the zoning requirement and would thus need the same two variances. Mr. Corriston and Chair Duffy expressed agreement with this interpretation. Chair Duffy noted the Solicitor’s reference that the plans on record indicate that they have been subdivided into separate lots. Mr. Corriston noted that he commends and respects the Board for having a tendency to be cautious about setting improper precedents. He stated that this case is so specific to the legal history of the ownership of the two lots that it seems unlikely that there would be another similarly situated set of properties that would seek relief under the same grounds.
33. At the July 15, 2020 public hearing, Mr. Viccica asked if there is a more compelling argument of hardship if the applicant came back to the Zoning Board with a subdivision plan rather than asking for variances for what is a merged lot, as even a court would not have been friendly to that kind of argument. Mr. Viccica noted that he understands the issues here, but that he wants to make sure the Board does the right thing and does not do something that is properly done in a different place. Attorney Grover noted that referring to this as reversing merger may have been a disservice. Mr. Viccica asked if Ms. Reddy is selling the property to someone else to develop it; Attorney Grover confirmed. Attorney Grover reiterated that no matter what, there is only 50 feet of shared frontage, so relief is required from the Board.
34. At the July 15, 2020 public hearing, Mike Becker noted that there is precedent for this. He owns 27-29 and 31-33 Cedar Street which had merged and were granted a variance around 1994. He stated that there were similar circumstances with separate properties; the owner who owned them both in common at the time was able to obtain variances for lot size and frontage because the lots had merged.

The Salem Board of Appeals, after careful consideration of the evidence presented at the public hearing, and after thorough review of the petition, including the application narrative and plans, makes the following **findings** that the proposed project **does not** meet the provisions of the City of Salem Zoning Ordinance:

Variance Findings:

1. It is not clear that special conditions and circumstances especially affect the land, building, or structure involved, generally not affecting other lands, buildings, and structures in the same district.
2. It has not been demonstrated that literal enforcement of the provisions of the Ordinance would involve substantial hardship to the applicant. The property at 41 Clark Street still holds value even if it is not a separate buildable lot.
3. Desirable relief may not be granted without substantial detriment to the public good, and without nullifying or substantially derogating from the intent of the district or the purpose of the ordinance. Separating these two lots would override the zoning principle of merger.

On the basis of the above statements of fact and findings, the Salem Board of Appeals voted two (2) in favor (Carly McClain, Mike Duffy (Chair)) and three (3) opposed (Paul Viccica, Peter A. Copelas, and Rosa Ordaz) to grant the requested Variances per Section 4.1.1 *Table of Dimensional Requirements* of the Salem Zoning Ordinance from minimum lot frontage and minimum lot width to construct a two-story, single-family home at **39R Clark Street and 41 Clark Street**.

Failing to receive four votes in favor, the petition for variances is denied.

 BJC

Mike Duffy, Chair
Board of Appeals

A COPY OF THIS DECISION HAS BEEN FILED WITH THE PLANNING BOARD AND THE CITY CLERK.

Appeal from this decision, if any, shall be made pursuant to Section 17 of the Massachusetts General Laws Chapter 40A, and shall be filed within 20 days of filing of this decision in the office of the City Clerk. Pursuant to the Massachusetts General Laws Chapter 40A, Section 11, the Variance or Special Permit granted herein shall not take effect until a copy of the decision bearing the certificate of the City Clerk has been filed with the Essex South Registry of Deeds.