SULLIVAN & BARROS, LLP
Real Estate | Zoning | Business Law

Martin P. Sullivan, Partner
Direct: (202) 503-1704
Fax: (888) 318-2443
msullivan@sullivanbarros.com

November 30, 2015

Via IZIS

Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

Re: BZA Application No. 19068 – 727 Hobart Place, NW; Additional Submission

Dear Members of the Board:

I am writing on behalf of the Applicant in the above-referenced case to submit additional information to show the practical difficulty involved in developing the above-referenced subject property (the "Property") as a matter-of-right.

Review of the Practical Difficulty Standard in Area Variance Applications.

Before discussing the additional information provided below, it may be helpful to review the practical difficulty standard applied to area variances generally, and how it could be applied in this particular case. The practical difficulty standard applied by the Board over the years was originally established in the case of *Palmer v. BZA*, 287 A.2d 535, where the Court of Appeals ruled that to prove the existence of a practical difficulty, an applicant must show that compliance with the area restriction would be unnecessarily burdensome, and that an applicant is not required to make the stringent showing of undue hardship that is required in *use* variance cases.

It is instructive to review the *undue hardship* standard for *use* variances, in order to get a better sense of what could be considered "unnecessarily burdensome" in *area* variance cases. In Palmer, the Court of Appeals determined that a request for a use variance, as opposed to an area variance, required a showing that compliance with the zoning regulations would preclude a fair reasonable return arising out of ownership, and that an inability to put property to more profitable use is not sufficient to constitute a hardship sufficient to warrant granting a *use* variance. As noted above, an applicant for area variance relief, as opposed to use variance relief, is not required to make such a stringent showing as this.

Nevertheless, the Board has at times in recent years insisted upon seeing financial projections which show a financial loss, or a negative return, in order to justify *area* variance relief. The typical applicant presents financial information that shows a loss if relief is not granted, and a gain if the relief is granted. I would assert that such a practice – having to show that the matter of right option does not provide a fair and reasonable return – is meant for the consideration of a use variance; not an area variance. The showing required for an area variance is something less than this. The applicant should not have to show that proceeding with the matter-of-right option – which almost always exists as a possibility in every variance request – is impossible; only that it is unnecessarily burdensome, and that that burden be a result of the unique condition of the particular property.

In this case, the applicant actually does have the necessary financials, attached as Exhibit A, which do show that a matter-of-right scenario is economically not advisable, considering the costs involved in razing the church building and developing the property as only three separate lots. Another case in the Court of Appeals line of practical difficulty analysis, *Gilmartin v. BZA*, 579 A.2d 1164, provides that in considering whether or not a practical difficulty exists, the Board should consider the feasibility of the alternatives and whether or not those alternatives are themselves a practical difficulty. This is what we believe the Board asked of the applicant at the September 22nd hearing. We believe that several of the practical difficulties here are self-evident, although not fully articulated. This submission intends to more fully articulate these practical difficulties below.

It is also important to note the significance of the word "unnecessary" in the "unnecessarily burdensome" analysis. In this particular case, the burden imposed by the minimum lot area is particularly unnecessary, as the proposed 4-lot scenario best fits into the character of the surrounding neighborhood, is strongly supported by ANC 1B, is not opposed by neighbors, and still provides for lot widths well over the minimum requirement, and lot areas 50% higher than the large majority of lots on this block.

The "Matter-of-Right" Lot Configurations are Unnecessarily Burdensome

The three-lot alternative is unnecessarily burdensome, on its face. The dimensions of the lot are such that the applicant cannot divide the lot into three uniform side-by-side lots without then incurring a need for relief from the minimum lot width requirement of 18 feet. Such a configuration would present several burdens, including (i) providing unusually narrow (nonconforming) and long and large lots, requiring BZA relief, (ii) leaving a large open area of rear yard which would face a street, not an alley; and (iii) either the provision of extraordinarily large buildings relative to the neighborhood, or (iv) a portion of the development rights left idle or underdeveloped (a particular harm often mentioned in favor of area variance relief).[1]

The other alternative for a three-lot configuration would leave three lots over twice the size of the large majority of lots in this neighborhood, which the Applicant asserts is on its face unnecessarily burdensome as it requires a size and design of development completely out of character with the surrounding neighborhood, which either impacts the ability to market and sell the eventual property, or it requires that a portion of the property remain idle, as the Office of Planning has suggested without noting that such a scenario represents an unnecessary burden to the property owner. The Office of Planning also suggests that the third lot, which is at this point at least three times wider, and two times larger, than the typical lot on this block, could contain a semi-detached house with a side yard. But this scenario also cannot happen without area variance relief, as the existence of a semi-detached house would require that that lot have a minimum lot area of 4,000 square feet, not 1,800 square feet, as is the case for row structures in the R-4 zone.[2]

In addition to the elements of practical difficulty noted above, any scenario with less than four (4) lots requires either constructing homes drastically inconsistent with the surrounding neighborhood, or leaving a significant portion of the property undeveloped. The Court of Appeals has ruled that among the proper factors for the Board's consideration in the practical difficulty analysis is "[i]ncreased expense and inconvenience to applicants for a variance…" *Barbour v. BZA*, 358 A.2d 326.

<u>Small Degree of Relief Requested</u>

Another proper factor for consideration of practical difficulty is the *severity* of the variance requested (*Gilmartin v. BZA*, 579 A.2d 1164, 1171). In this case, the Applicant is proposing to develop four lots which will be well over the minimum lot width, and a few hundred feet under the minimum lot area. But generally, the degree of relief requested is very small when considering that granting relief will not change the overall maximum permitted development density on this plot of ground. The Applicant could construct two massive buildings on the property and attempt to rent it out as a rooming house or as (4) 6 bedroom group houses. The relief being requested does not lead to any additional allowable overall square footage, lot coverage, or height. It also does not lead to any nonconforming yards, and likely does not even increase the expected number of residents on the property.

1

2 We did not raise this issue at the hearing.

When considering that no additional density is being requested or provided, the degree of relief requested is *de minimus*; it amounts to a request to allocate the overall allowable density and lot coverage in a way that is consistent with the surrounding neighborhood, in line with the desires of the community and ANC 1B, and in a way that is not unnecessarily burdensome to the property owner (as in the case of the 2 and 3 lot scenarios discussed above).

The Office of Planning's Suggestion for a Semi-Detached Dwelling Causes a Practical Difficulty

In its report dated September 29, 2015, and at the BZA hearing, the Office of Planning suggested that the Applicant could easily develop the Property into three lots by developing one of the three lots as a semi-detached dwelling with a side yard, as in the case of the lot to the east. The Office of Planning failed to mention, however (and Applicant's counsel missed this as well), that if a lot is developed as a semi-detached dwelling, then it has a minimum lot area of either 3,000 square feet or 4,000 square feet, depending on whether or not there are one or two units proposed. The suggested scenario is shown in the drawing attached as Exhibit C hereto.

Financial Projections

Attached as Exhibit A is the Applicant's financial projection for development of the subject property under a 3-lot scenario and a 4-lot scenario. The projections show the difference between the 3-lot (6 units) and 4-lot (8 units) scenario, showing the practical difficulty in developing the property in strict compliance with the Zoning Regulations.

Parking Relief

The four proposed lots would be land-locked, and the local community and ANC 1B has made it known that it would vigorously oppose any request for a curb cut entering the subject property. DDOT has submitted a favorable report, with a request for more robust TDM measures, which the Applicant will be happy to agree to. In addition, the Applicant has submitted a parking study from Symmetra Design. That report concludes that there were 89 unoccupied parking spaces within the parking study area, and also notes the existence of substantial bus lines along nearby Georgia Avenue and Sherman Avenue.

Summary

The Applicant is requesting a small degree of relief, from the minimum lot area requirements and the 1-space parking requirement for each of the four (4) proposed lots. Granting relief would relieve the practical difficulty resulting from the unique conditions of this property, as detailed above, and would allow the property to be developed in the configuration and size that best fits with the character of the surrounding neighborhood and assures the removal of the unattractive church.

For the reasons provided herein, the Applicant asserts that the Application satisfies the area variance test and respectfully asks the Board to approve the requested relief.

Thank you for considering this Application.

Sincerely,

Martin P. Sullivan

cc: ANC 1B
Office of Planning

Scenario 1: 6 Units		
Purchase Price	$	610,000
Closing Costs	$	36,600
Hard Construction Costs	$	1,176,863
Soft Cost Estimate	$	176,529
Total Project Cost	$	1,999,992
Debt	$	1,499,994
Equity	$	499,998
Rental Scenario		
Gross Rent for 6 Units	$	163,800
Total Gross Potential Rent	$	163,800
Rent / unit / Month	$	2,275
Vacancy / Collection at 5%	$	8,190
Net Rent	**$**	**155,610**
Taxes	$	17,000
Insurance	$	7,500
Common Utilities	$	5,000
Trash	$	4,800
Management Fees at 7.5%	$	11,671
Repairs and Maintenance	$	4,500
Total Expenses	$	50,471
Operating Income	$	105,139
Debt Service	$	105,226
Cash Flow	**$**	**(86)**
Cash Return on Equity		**-0.02%**
Condo Scenario		
Sales Proceeds	$	2,625,000
Additional Soft Costs		$56,000
Additional HVAC		$48,000
Upgrades in Finishes		$60,000
Upgrades in Appliances		$30,000
Warranty Bond		$131,486
Sales Costs*		$393,750
Ongoing Warranty Costs		$18,000
Net Sales Proceeds		$1,887,764
Profit	**$**	**(112,228)**

*15%: Commisions, Taxes, Closing Help

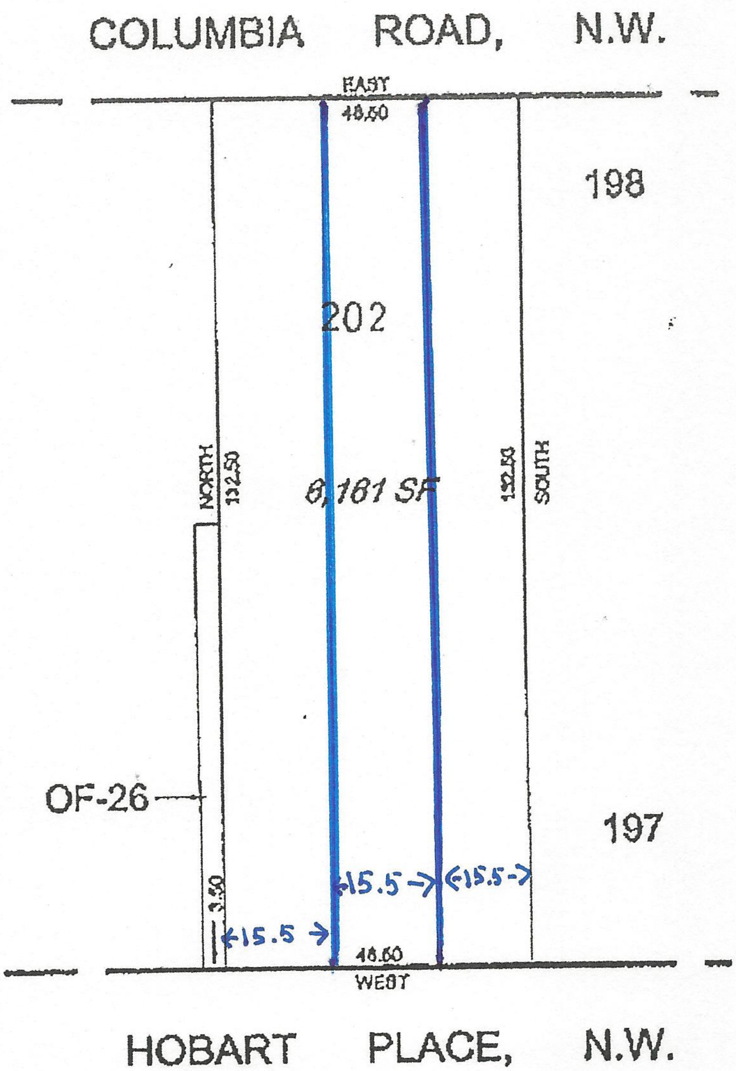
Scenario 2: 8 Units		
Purchase Price	$	795,000
Closing Costs	$	47,700
Hard Construction Costs	$	1,373,164
Soft Cost Estimate	$	205,975
Total Project Cost	$	2,421,839
Debt	$	1,816,379
Equity	$	605,460
Rental Scenario		
Gross Rent for 8 Units	$	218,400
Total Gross Potential Rent	$	218,400
Rent / unit / Month	$	2,275
Vacancy / Collection at 5%	$	10,920
Net Rent	**$**	**207,480**
Taxes	$	20,586
Insurance	$	9,500
Common Utilities	$	6,000
Trash	$	6,480
Management Fees at 7.5%	$	15,561
Repairs and Maintenance	$	6,000
Total Expenses	$	64,127
Operating Income	$	143,353
Debt Service	$	127,420
Cash Flow	**$**	**15,933**
Cash Return on Equity		**2.63%**
Condo Scenario		
Sales Proceeds	$	3,500,000
Additional Soft Costs		$61,000
Additional HVAC		$64,000
Upgrades in Finishes		$80,000
Upgrades in Appliances		$40,000
Warranty Bond		$155,716
Sales Costs*		$525,000
Ongoing Warranty Costs		$24,000
Net Sales Proceeds		$2,550,284
Profit	**$**	**128,445**

Scenario 3: 8 Units (1 Below Market)		
Purchase Price	$	795,000
Closing Costs	$	47,700
Hard Construction Costs	$	1,373,164
Soft Cost Estimate	$	205,975
Total Project Cost	$	2,421,839
Debt	$	1,816,379
Equity	$	605,460
Rental Scenario		
Gross Rent for 8 (1 < Market)	$	211,200
Total Gross Potential Rent	$	211,200
Rent / unit / Month	$	2,200
Vacancy / Collection at 5%	$	10,560
Net Rent	**$**	**200,640**
Taxes	$	20,586
Insurance	$	9,500
Common Utilities	$	7,000
Trash	$	6,480
Management Fees at 7.5%	$	15,048
Repairs, Maintenance & DHCD processing	$	21,000
Total Expenses	$	79,614
Operating Income	$	121,026
Debt Service	$	127,420
Cash Flow	**$**	**(6,394)**
Cash Return on Equity		**-1.06%**
Condo Scenario		
Sales Proceeds	$	3,338,400
Additional Soft Costs		$61,000
Additional HVAC		$64,000
Upgrades in Finishes		$80,000
Upgrades in Appliances		$40,000
Warranty Bond		$155,716
Sales Costs**		$515,760
Ongoing Warranty Costs		$24,000
Net Sales Proceeds		$2,397,924
Profit	**$**	**(23,915)**

Exhibit A

SUBDIVISION
SQUARE 2888

Three Lot Configuration #1
Requires relief for minimum lot width



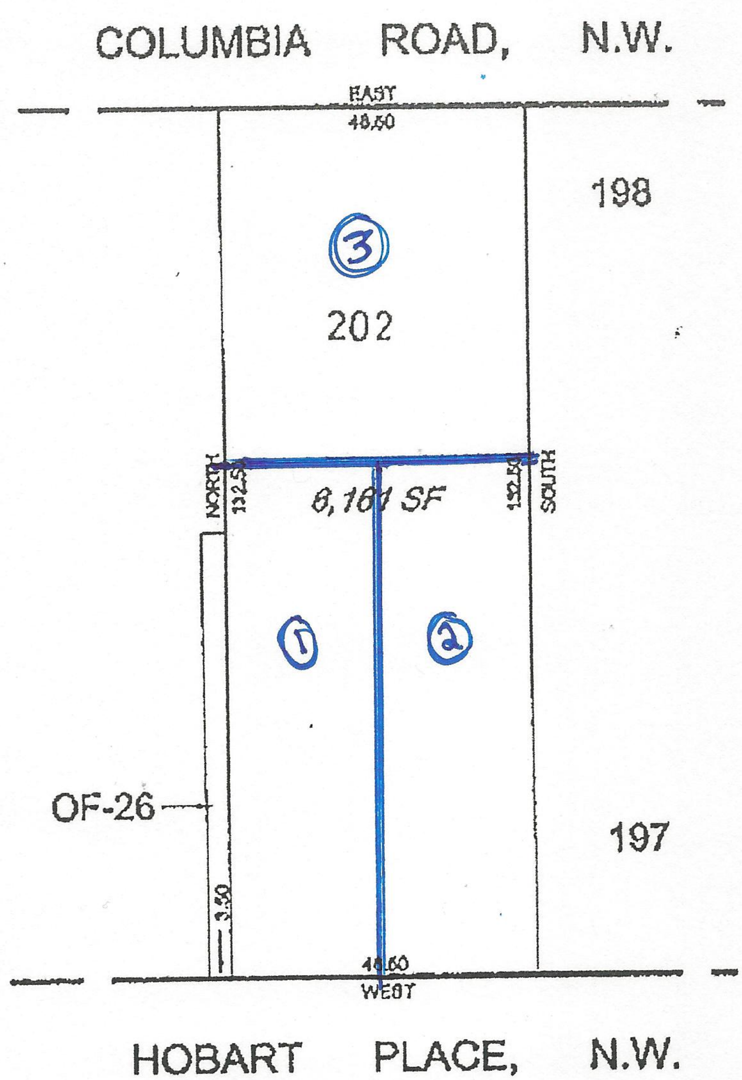
James L. [illegible]
Pastor/President
3/27/02

Exhibit B

SUBDIVISION
SQUARE 2888

Three lot configuration #2

Requires lot area relief for a semi-detached home.



Pastor, President
3/27/02

Exhibit C