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By electronic mail submission to

Clifford W. Moy, Secretary
Board of Zoning Adjustment
Office of Zoning
441 4th Street, NW
Suite 200/210-S
Washington, DC 20001

February 20, 2018

Re: Application of Brian and Carolyn Wise, BZA Case No. 19683

Dear Mr. Moy:

I am a neighbor of Brian and Carolyn Wise, the applicants in the above-referenced case. I am writing to oppose their application for six variances and exceptions. The requested variances and exceptions would present unreasonable burdens on abutting properties in terms of fire safety, physical safety, and sanitation. As these burdens will impair the use and enjoyment of abutting properties such as mine, I request that requested relief be denied.

I. Background

On December 27, 2017, the applicants filed the instant BZA application for exceptions and variances to construct a new two-story dwelling on the alley lot at Square 762, Lot 828. Alley lot 828 was a tax lot that the applicants purchased in 2015.

On February 9, 2018, the Office of Planning recommended that the BZA deny three of the four requested variances. The OP's reasoning was that alley lot 828 is an unimproved tax lot and not an existing alley record lot; therefore, development of alley lot 828 would have to conform to existing zoning law. In response to the OP's recommendation, the applicants on February 16, 2018 filed a supplemental application seeking two additional variances.

For the reasons stated herein, I oppose all six of the requested variances and exceptions.

II. The Requested Relief Creates Unreasonable Safety Hazards for Abutting Property Owners That Would Be Too Burdensome to Remediate.

I have resided at the abutting property at 213 Third Street, SE for 18 years and have some knowledge of the history of alley lot 828's zoning and use. Based on that knowledge, I believe that the proposed construction of a two-story residential building on alley lot 828 with the six

requested variances and exceptions will present unreasonable safety risks to abutting homeowners like me. These risks justify denying the requested variances and exceptions.

As the applicants acknowledge, the width of the public alleyway is only 14' on the south side of the alley lot. The alleyway does not run in a straight line from one end to the other. Rather, it takes a sharp 90-degree turn at the southwest corner of alley lot 828 and wraps around the perimeter of alley lot 804 before exiting the private alleyway on C Street. See Tab A. If the requested relief is granted, the alleyway will become too narrow for emergency vehicles and trash trucks to access the alley. This is a real concern for me, and it is also a concern for the Office of Planning.

About 8 to 10 years ago, the two-story garage in the alleyway at 207 Third Street, SE (record lot 26) caught on fire. The garage was only 30 feet and 2 houses away from my house. I watched as the flames burned the interior of the garage for 45 minutes before a fire truck was able to access the alleyway. When the flames were finally extinguished, the interior was completely destroyed and the exterior brick façade was badly charred. Living in proximity to structures such as the garage at 207 Third Street, SE has made me keenly aware of the extraordinary risks that a fire in the alley can present.

Such safety risks to abutting properties and owners will be exacerbated if the applicants are allowed to build a substantially oversized two-story dwelling on an undersized alley lot. Should their dwelling catch on fire, it will be very difficult for emergency vehicles and fire engines to access the already narrow public alleyway. This, in turn, will substantially increase the risks of bodily injury and property damage to abutting properties because of their close proximity to alley lot 828.

The applicants claim, rather disingenuously, that the rear yards of abutting properties provide a natural "buffer" against fire and other safety hazards, but this argument only underscores the unreasonableness of their request for relief. The elimination of a rear yard setback on the north side combined with a 15-foot high garden wall on the east side lot line will present a real threat to physical safety. In the event of an alley fire, the garden wall would impede access to interior, non-detached rowhouses like mine. The construction on lot lines also will block out light and air from abutting properties and create a dark passageway that invites transients and trespassers. Anyone traversing that dark 3-foot wide walkway would be able to access the rear yards of abutting properties, undetected.¹

For these reasons, the requested variances and exceptions should be denied. The RF-3 zone is intended to "promote and protect the public health, safety, and general welfare of the U.S. Capitol Precinct and the area adjacent to this jurisdiction." Title 11, Section 500.2(a)-(d). This "well-recognized general public interest" requires that by-right development of alley lots

¹ If the applicants were to proceed with their amended plan to erect a wooden fence no higher than 7-feet tall along the east side lot line, I would have no objection to that plan, provided that they comply with the 5-foot side yard setback requirement.

conform to existing permitted use restrictions, “to reduce the possibility of harming the U.S. Capitol precinct and the adjacent area.”

III. The Requested Relief Would Substantially Impair the Use and Enjoyment of Abutting Properties, Resulting in a Regulatory Taking.²

A. Prior Uses of Alley Lot 828 Do Not Justify the Requested Relief.

According to prior owners and residents,³ my house was part of a larger residence constructed sometime in 1840. The larger residence which faced Third Street, SE had an outdoor area in the rear that was used for parking of horse-drawn carriages. Sometime before 1890, the larger residence was subdivided into three separate and distinct lots. The three lots facing Third Street, SE were assigned lot numbers 826, 827, and 824, while the alley lot in the rear was assigned lot number 828.

After the subdivision, three rowhouses were built on lots 826, 827, and 824. The three rowhouses were assigned street addresses of 211, 213, and 215 Third Street, SE, respectively. The rowhouses facing Third Street, SE provided housing for shipyard workers who worked at the Navy Yard in the latter half of the nineteenth century and the first half of the twentieth century. Sometime before 1890, as the neighborhood continued to grow, the City installed a combined sewer system along Second and Pennsylvania Avenue, SE, at the northwest corner of Square 762. The antiquated combined sewer system is still in use today, and it services the houses in Square 762, including my house.

According to a prior resident of 213 Third Street, SE (lot 827), the City owned alley lot 828 during the time that he lived on Capitol Hill, from 1938 to 1966. He recalled that the City used the rear portion of 215 Third Street, SE (lot 59/formerly lot 824) as a neighborhood coal shed.⁴ When the City conveyed the coal shed to 215 Third Street, SE, to be used for construction of an accessory structure, it deeded to my property at 213 Third Street, SE an easement in the 3-foot walkway that is located in the rear of 211, 213, and 215 Third Street, SE, to use for ingress and egress. To this day, I routinely use that walkway to enter and leave my house.

²² Murr v. Wisconsin, 582 U.S. ___ (2017) (Under the doctrine of regulatory takings, government regulation that goes too far in burdening property rights counts as a taking under the Fifth Amendment, entitling the owner to just compensation).

³ Due to the 1890 fire at City Hall, historical records are not available. Former neighbors and residents with whom I have spoken included Mary and Rick Weirich; Bob Forcey; James Ryan; John and Kristine Beling; and the National Alliance of Black Secondary Educators which owned alley lot 828 for approximately 40 years.

⁴ In the 1960's, due to a gas explosion occurring during an excavation, the rowhouse at 215 Third Street, SE was destroyed and had to be rebuilt. It was probably during that process that the lot number for 215 Third Street, SE changed from 824 to 59.

In the early 1970's, the non-profit National Alliance of Black Secondary Educators moved into its offices at 310 Pennsylvania Ave., SE. NABSE purchased alley lot 828 and used it for off-street parking. NABSE's office building was not contiguous to alley lot 828. At various times, NABSE rented out available parking space to nearby businesses that needed extra parking space. In 2015, NABSE sold alley lot 828 to the applicants as an unimproved tax lot.

The applicants do not dispute that alley lot 828 remained undeveloped in the 130 years after subdivision, and that for over 100 years it was only used for surface parking. Nevertheless, they claim that a two-story dwelling may be built by right because alley lot 828 was grandfathered into the RF-3 zone by virtue of the 1905 subdivision of an existing record lot. While I support development of alley lot 828, I object to the proposed non-conforming use.

First, when the immediate prior owner, NABSE, sold the alley lot to the applicants in 2015, the sale was for an unimproved tax lot, rather than as an existing alley record lot. The applicants purchased alley lot 828 from NABSE for \$160,000. This amount was far less than the value of an existing record lot of comparable size, which was approximately \$400,000. Therefore, the applicants knew or should have known that alley lot 828 was not suitable for residential development even though it was in zone RF-3, and that the conditions placed on its use effectively precluded residential development.

Second, in August 2017 after they unsuccessfully applied for 8 variances and exceptions to build a two-story building on alley lot 828, the applicants tried to sell alley lot 828 as an existing record lot with potential for residential development. They used the abutting property owners' address of 205 Third Street, SE to put the alley lot on the market. But even then, they were unable to sell alley lot 828 for the asking price of \$425,000. Since alley lot 828 did not sell in 2017 as an existing record lot, the applicants cannot claim that they had a reasonable expectation of developing the lot for residential use when they purchased it as an unimproved tax lot in 2015.⁵

Third, the applicants argue that construction of a two-story dwelling would prevent "usable land from remaining idle." Given the alley lot's proximity to public transportation, they argue that the best use of alley lot 828 is no longer surface parking. This argument, however, overlooks the fact that construction of a new two-story dwelling on alley lot 828 must still include on-premise parking such as a garage. Moreover, as the applicants have acknowledged

⁵ In filing the instant BZA application, the applicants misused another abutting property address (mine) to obtain approval as an existing record lot. I did not give the applicants permission to use my street address of 213 Third Street, SE for any purpose. After I discovered the misuse of my address, I brought the matter to the applicants' attention and demanded that they issue a correction. On February 1, 2018, they filed an amended Form-120 in which they listed the tax lot's newly assigned street address of 260 Lincoln Court, SE. As 260 Lincoln Court, SE is an unimproved tax lot, the applicants must still request the variances and exceptions from the BZA for the proposed alley lot development.

and as the OP has determined, the historical and current use of alley lot 828 was “surface parking, subject to certain conditions.”

Given the historical use of alley lot 828 as surface parking, there is a countervailing argument that the City’s past ownership of alley lot 828 has resulted in it being dedicated to public use. During the period of City ownership, the City maintained a combined sewer system underneath the alleyway and alley lot 828. At one point, all waste water from the street-facing lots 826, 827, and 824 drained into that sewer system. Evidence of this historical use can be found in the plumbing lines and downspouts in the rear of my house which drain into the sewer underneath the alleyway and alley lot 828.

Even after the City conveyed alley lot 828 to private purchasers, it has continued to place conditions on the lot’s use as surface parking. The City itself has maintained the abutting alleyway, repaving it no less than three times in the past 12 years. The lot’s current use serves the public interest of maintaining sanitary streets and sewers that do not overflow when the antiquated combined sewer system in Square 762 is overwhelmed. For this reason, the applicants’ proposed development of alley lot 828 would be non-conforming.

B. The Applicants Have Not Shown Exceptional Circumstances Justifying the Requested Relief.

If the applicants are permitted to build a two-story dwelling on alley lot 828, the City should place similar zoning restrictions on that development as it did on the development of contiguous street-facing lots (826, 827, and 59/formerly 824). Otherwise, development of the alley lot would place unreasonable burdens on abutting properties and would substantially impair their use and enjoyment.

Residents in the historic Capitol precinct have a right to public health, safety, and general welfare that must take precedence over by-right development in the densely populated area. The requirements pertaining to lot size and occupancy, rear and side yard setbacks, and alley width and centerline setbacks are meant to put safe distances between alley dwellings and public streets. Exempting the applicants from those requirements would substantially increase the risks of fire and other hazards for the residents of Square 762.

Additionally, the hazard posed by construction on lot lines must be weighed against the desire for consistency in the pattern of alley development. Such a hazard cannot be mitigated by abutting properties because they are subject to the same use and zoning restrictions. For example, the HPRB has advised that it would not approve the construction of a 10-to-15-foot high brick wall, because historic preservation rules only allow rear-yard wooden fences that are no higher than 7 feet. Therefore, the fact that lot 828 is an alley lot does not negate the requirements of setbacks and alley width, which promote public safety.

The applicants seek relief based on a showing of six factors, but those factors are not exceptional circumstances justifying a grant of relief.

- The fact that lot 828 is an alley lot is not an exceptional circumstance, since historically the lot was unimproved, was used solely for surface parking, and the 2016 Alley Lot Development Act had not yet been enacted into law when the applicants purchased the alley lot in 2015. As the OP observed in its February 9, 2018 letter, the application does not demonstrate how adherence to the regulations would present a practical difficulty to the applicants, since the current use of the alley lot as surface parking could continue.
- The fact that alley lot 828 cannot be expanded in any direction is also not an exceptional circumstance. The applicants purchased that lot in 2015 knowing then that the lot size was only 1120 square feet and the lot occupancy was 60 percent.
- The fact that Square 762 is a mixed-zone square does not justify the conversion of the parking lot into an oversize 3,000-square foot “McMansion.” It is important to note that abutting single-family dwellings are also located in the mixed-zone square, but they have much less square footage of living area than what the applicants propose for their alley dwelling. For example, the rowhouses built on lots 826, 827, and 824 -- which are contiguous to alley lot 828 and are similar in lot size – have living areas between 1,200 and 1,350 square feet. Allowing the applicants to build twice as large a house on the alley lot would unfairly penalize abutting property owners, like me, who have played by the rules and built more modest dwellings in Square 762. It also would encourage overbuilding in an already densely populated neighborhood with an overburdened infrastructure.

In this regard, the public interest in protecting zoning legislation from constitutional attack clearly outweighs the private interest in developing the alley lot. During the February 13, 2018 ANC-6 hearing, four ANC-6 commissioners proposed to write a letter recommending that the Zoning Commission suspend the requirement to convert alley tax lots to alley record lots, so as to facilitate by-right development of alley lot 828. The four ANC-6 commissioners also voted to send the Office of Planning a recommendation to interpret the zoning regulations in a light most favorable to the applicants, giving more weight to the 2016 Alley Lot Development Act than the OP’s interpretation of existing use and zoning regulations. The four ANC-6 commissioners also voted against requiring the applicants to obtain FEMS certification that emergency vehicles and first responders could still service the alleyway if the requested variances and exceptions were granted.

In voting to recommend approval of all relief, the ANC-6 commissioners overlooked serious flaws in the applicants’ architectural renderings and certain misrepresentations of fact. The applicants erroneously claim that their proposed construction plan has received the consent or approval of HPRB, DDOT, and FEMS. But any consent or approval that they received was based on an earlier set of architectural renderings that another architect prepared and submitted in support of an earlier BZA application that the applicants ultimately withdrew. Thus, the

alleged consent and approval the applicants received all pre-date the submission of the architectural renderings that support the instant BZA application.⁶

For the above reasons, the instant BZA application should be denied. The proposed construction would create unreasonable safety risks for abutting properties that cannot be adequately mitigated, would unreasonably burden the neighborhood's infrastructure such as the antiquated sewer system, and would deprive abutting homeowners of reasonable use and enjoyment of their properties.

Thank you for your consideration.

Respectfully submitted,

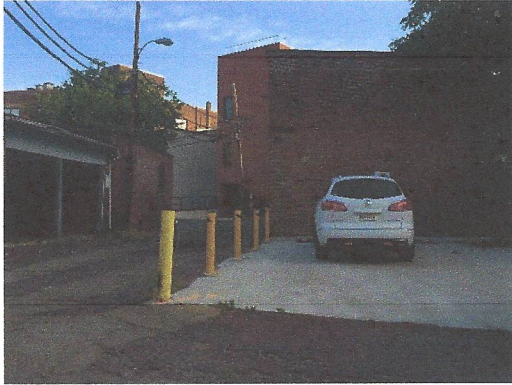


Quynh Vu Bain
Abutting property owner
213 Third Street, SE

Enc.: Tabs A and B

⁶ In fact, both OP and HPRB did not know that the applicants repaved alley lot with concrete – an impervious material -- in 2016, without obtaining a permit. The OP and HPRB also did not know that there are above-ground utility poles placed along the public alleyway or an underground combined sewer system that runs underneath the alleyway and alley lot 828.

Tab A – Alley lot 828 abuts a public alleyway at 90-degree angles on the west and south sides. The alleyway is too narrow to permit emergency vehicles to access the alleyway and maneuver around the sharp turn.



View of alley lot 828 from south and west sides.



View of the narrowest point of the public alleyway, at a width of 14 feet, looking out to Third Street, SE.



View of public alleyway from Third Street, SE. Capitol Hill Suites parking lot abuts the alleyway on the south side. The white van on the right side of the photos illustrates how the public alleyway would be narrowed to 14 feet wide if the requested variances were granted.



Small vehicle navigating 90-degree turn on public alleyway, on the southwest corner of alley lot 828.

TAB B – Photographs show combined sewer system underneath alley lot 828 and the 3-foot walkway that abuts the east side of alley lot 828. Underneath the walkway are plumbing pipes that drain sewer and storm water from the abutting properties. A broken sewer pipe jutting out from alley lot 828 has resulted in standing water collecting under the walkway.

