

May 7, 2018

## Meridith H. Moldenhauer

Direct Phone 202-747-0763 Direct Fax 202-683-9389 mmoldenhauer@cozen.com

Frederick L. Hill, Chairperson Board of Zoning Adjustment 441 4th Street, NW, Suite 200S Washington, DC 20010

RE: BZA Case No. 19683 – 260 Lincoln Court SE (the "Property") Applicant's Response to Office of Planning

Chairperson Hill and Honorable Members of the Board:

On behalf of Applicant Brian and Carolyn Wise (the "Applicant"), please consider the following a response to the Office of Planning ("OP") supplement filed on May 1, 2018. The Applicant submits that they have met the area variance standard for relief from the lot area and alley width requirements of Subtitle C § 303.3 for the reasons set forth in the record, during the hearings, and as affirmed in the OP supplement and herein.

## <u>DCRA Permitting Division's Processes and Procedures for Tax Lots Creates Practical</u> Difficulty

To corroborate Mr. Wise's testimony that DCRA would not issue a paving permit for an alley tax lot, we enter into the case record affidavits from two individuals who have had similar experiences requesting a building permit from DCRA for an alley tax lot. An affidavit from Owen Gibson is attached at Tab A and an affidavit from Stephen Varga is attached at Tab B. Both Mr. Gibson and Mr. Varga separately visited DCRA and were told by representatives at DCRA's Permitting Division that a record lot and a street address is required for a permit and they could not obtain a permit for an alley tax lot. See Tab A and Tab B. We submit that the OP supplement addresses zoning regulations alone, and not the Applicant's position that DCRA's process, procedures or system create the practical difficulty to maintain an alley tax lot without subdivision.

The affidavits of Mr. Gibson and Mr. Varga mirror the Applicant's experience with DCRA's Permitting Division. The Applicant testified that "when we went into DCRA, we were told that we would have to obtain relief for any use of the lot," and "I could not get a certificate of

<sup>&</sup>lt;sup>1</sup> As discussed throughout the case record, OP found this exact circumstance to be a practical difficulty in BZA Case 19479 for 1 Library Court SE, saying a nonconforming alley tax lot created "a practical difficulty in attaining a building permit for any home renovations." During the April 17<sup>th</sup> hearing, OP acknowledged that the owner of the property at 1 Library Court SE could not get a permit because the property was a tax lot. *See* 4/17/18 Hearing Transcript, pg. 113:5-9.

<sup>&</sup>lt;sup>2</sup> Detrimental reliance on actions of city officials constitutes an exceptional situation that creates a practical original properties of Columbia CASE NO.19683

occupancy until the lot becomes a record lot." *See* 2/21/18 Hearing Transcript, pg. 341:5-6; *see also* 4/17/18 Hearing Transcript, pg. 90:24-91:2.

The Applicant faces a practical difficulty because DCRA's Permitting Division will not issue a permit until the property becomes a record lot. This practical difficulty rises not necessarily due to DCRA's interpretation of the zoning regulations but because of DCRA's processes and procedures regarding permit issuance for tax lots. If the Board strictly applies the lot area and alley width requirements of Subtitle C §303.3, the Applicant will not be able to subdivide the property into a record lot and will not be able to have a permit processed by DCRA.

## The Inability to Improve the Property for a Beneficial Use is a Practical Difficulty

Notwithstanding the inconsistencies in the DCRA permitting process, the Applicant faces a practical difficulty if the requirements of Subtitle C §303.3 are strictly applied because the Applicant cannot build *any* structure on the property without zoning relief. Indeed, this was confirmed by the Zoning Administrator, who stated to OP that a record lot is required for "any principal structure." *See* Ex. No. 74, pg. 1. Here, *any* structure at the Property would be deemed a "principal structure" because the lot is unimproved and an accessory structure is not applicable. Therefore, absent zoning relief, the Applicant would face a practical difficulty because the property could not be improved with a structure of any kind even if that structure is fully zoning compliant.<sup>3</sup>

Importantly, the inability to improve a lot has been deemed a practical difficulty by both the D.C. Court of Appeals and the Supreme Court of the United States. In *Russell v. BZA*, the Court of Appeals reviewed the Board's decision to grant variance relief from the lot area requirements for an unimproved lot in the R-1-B zone. *See Russell v. D.C. Bd. of Zoning Adjustment*, 402 A.2d 1231, 1233 (1979). Under ZR-58, a private garage was a by-right use in the R-1-B zone and a parking pad was permitted by special exception. *See* 11 DCMR §§ 201.1(n) and 213.1. Yet, in *Russell*, the Court of Appeals affirmed the Board's finding of practical difficulty, stating:

Where a property owner is deprived of all **beneficial use** of his property he is entitled to a variance. [citation omitted]. Without this escape hatch, the application of the statute would be **unconstitutionally confiscatory**. (emphasis added) *See id.* at 1236.

The *Russell* Court also noted that "deprivation of all beneficial use is an extreme example of practical difficulty; area variances may issue, however, on less harsh facts." *See id.* The Court found that the lot area restriction was "more than" unduly burdensome because "the owner could never sell the unimproved lot for a residential use absent a variance," which would "effectively prevent **development** of the lot." *See id.* The Supreme Court of the United States has adopted this precedent, stating that "it seems unlikely that common-law principles would have prevented the erection of any habitable or **productive improvements** on petitioner's land; they rarely support prohibition of the 'essential use' of land." *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992) (quoting *Curtin v. Benson*, 222 US 78, 86 (1911) (emphasis added).

<sup>&</sup>lt;sup>3</sup> A matter-of-right shed or carport would be deemed a principal structure because no other structures are located on the Property; thus, a "separate lot of record" would be required before a zoning compliant permit could be issued.

The substantial case law is clear that the Applicant's inability to improve the Property with any structure *is* a practical difficulty in and of itself. Even if the Applicant is able to maintain a parking use, which is still uncertain, the DCRA process is clearly a practical difficulty. Moreover, a parking use alone does not change the conclusion that the Applicant faces a practical difficulty with strict application of the lot area and alley width requirements of Subtitle C § 303.3 as confirmed by case law. Therefore, the Applicant has met the burden for variance relief to subdivide the Property into a record lot, which would allow the Applicant to obtain a permit for a structure at the Property.

## **Use of Property for Parking Creates Financial Hardship Constituting Practical Difficulty**

Use of the Property for parking would not be a benefit because as shown here, such a minimal use would create financial hardship. The Court of Appeals has clearly determined that financial hardship can constitute a practical difficulty. See Klugman v. D.C. Bd. of Zoning Adjust., 107 A.2d 1117 (D.C. 2014) (upholding a BZA's granting of an area variance where the matter of right use was not found to be an economically viable option). Further, in the 1996 case of the Downtown Cluster of Congregations v. D.C. Bd. of Zoning Adjust., 675 A.2d 484, the Court of Appeals affirmed the approval of variance relief based on the Board's findings that a 6% yield as a return on investment for a project without zoning relief created a financial hardship that constituted a practical difficulty. This Board has also approved numerous cases with documented financial hardships. See BZA Case No. 19315; BZA Case No. 19055; BZA Case No. 18511.

In this case, the Applicant will be faced with a practical difficulty that will negate any beneficial use of the Property without the variance relief for the subdivision. Indeed, even if a paving permit could be issued, which is still uncertain, the associated parking use would not generate any profits. Rather, it would result in substantial, year-over-year losses, based upon the property taxes associated with the Property and the rent the Applicant could hope to obtain for its use. *See* property tax information and Capitol Hill-area parking spaces currently for rent at <u>Tab</u> <u>C</u>. Such a *negative* return clearly constitutes a financial hardship that makes it nearly impossible to conclude that the applicant will have a "beneficial" use of their property if the variance relief is denied.

Thank you for your attention and consideration of this matter.

Sincerely,
COZEN O'CONNOR

By: Meridith Moldenhauer

## **Certificate of Service**

I hereby certify that on this 7<sup>th</sup> day of May, 2018, a copy of the foregoing Letter with Attachments was served, via electronic mail, on the following:

District of Columbia Office of Planning c/o Matt Jesick, Development Review Specialist 1100 4th Street SW, Suite E650 Washington, DC 20024 matthew.jesick@dc.gov

Advisory Neighborhood Commission 6B c/o Daniel Ridge, Chairperson 1504 Potomac Avenue SE Washington, DC 20003 6B09@anc.dc.gov

Advisory Neighborhood Commission 6B01 c/o Jennifer E. Samolyk, SMD Commissioner 407 2<sup>nd</sup> Street SE Washington, DC 20003 6B01@anc.dc.gov

Meridith Moldenhauer

## TAB A

## BEFORE THE BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA

## AFFIDAVIT OF OWEN GIBSON

## In re: BZA Case No. 19683, Brian and Carolyn Wise

I, Owen Gibson, first being duly sworn under oath and competent to testify as to all matters set forth herein, depose and say that I am over the age of 18 years old and hereby state the following:

- 1. I make this affidavit based on my personal knowledge.
- 2. I am a paralegal at Cozen O'Connor.
- 3. On Tuesday, May 1, 2018, I went to the Department of Consumer and Regulatory Affairs' ("DCRA") Permitting Center in an attempt to obtain permits to pave on two alley tax lot properties: Lot 828 in Square 762, (260 Lincoln Court SE) and Square 2588, Lot 827 (the "Properties").
- 4. When I arrived at the Permitting Center, the in-take person told me that, for the paving work I described, I would need to obtain an excavation permit as well as an alteration and repair permit.
- 5. As directed by the in-take person, I then went to one of the "public computer terminals" on the side of the Permitting Center and attempted to complete electronic applications for the necessary excavation permits and alteration and repair permits for both of the Properties. To start the permitting application process, I attempted to input both of the Properties into DCRA's computer system. I was unable to do so because the electronic system did not recognize the addresses or the Square and Lot numbers for either Property. I waved over the in-take person for assistance, and she recommended that I could input another address (for example DCRA's address) to get the process started so I could sit down with a member of the permitting division.
- 6. When my "number was called", and I sat down at Counter #5 with a DCRA permitting representative. Eventually, we were joined by a DCRA permitting supervisor as well.
- 7. During our conversations, which lasted approximately ten minutes, I was told Properties' owners would need to convert the lots from tax lots to record lots for the necessary excavation and/or alteration and repair permits to be issued. The DCRA representatives also clarified that the Office of Tax and Revenue handles tax lots, but <u>DCRA only issues permits for record lots</u>. The DCRA representatives were clear that a permit could not be issued for a tax lot.
- 8. I was also told that a property owner cannot obtain an excavation permit or any other type of permit without a street address, but that a tax lot must be converted into a record lot before DCRA will issue a street address.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: May \_\_\_\_\_, 2018

District of Columbia: SS

## TAB B

## BEFORE THE BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA

## AFFIDAVIT OF STEPHEN VARGA

## In re: BZA Case No. 19683, Brian and Carolyn Wise

I, Stephen Varga, first being duly sworn under oath and competent to testify as to all matters set forth herein, depose and say that I am over the age of 18 years old and hereby state the following:

- 1. I make this affidavit based on my personal knowledge.
- 2. I am the Director of Planning Services at Cozen O'Connor.
- 3. On Thursday, May 3, 2018, I went to the Department of Consumer and Regulatory Affairs' ("DCRA") Permitting Center to inquire about the steps necessary to obtain permits necessary to excavate, pave and fix broken bollards for an unimproved alley tax lot with no street address.
- 4. After a short discussion with the in-take person, I was directed to sit at a counter with a DCRA permitting representative. That individual told me that a property owner cannot apply for, or obtain, the necessary permits to do this work for a property that does not have a street address or other property information that is recognized by DCRA's computer system.
- 5. With the understanding that the necessary permit applications could not be started (because there was no property information that could be recognized by DCRA's system), in an effort to assist, the DCRA permitting representative did suggest that I could start filling out fill out a permit application online using the address of the nearest building.
- 6. Since such a permit application would not apply directly to the subject property (which lacked both a street address and lot and square number recognizable in DCRA's system), it was suggested that I could identify the actual location of the work to be performed in the 'description of work' box on the permit application (so that an inspector would be able to find it).

I declare under penalty of perjury that the foregoing is true and correct.

Stephen Varga

District of Columbia: SS

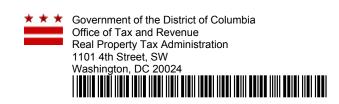
The foregoing affidavit was acknowledged before me this 70 day of reacy 2018

by Stephen Varga

Notary Public, D.C.

# TAB C

Income/mo.  Rent expected - total (average of seven examples found) \$159.57  Total income \$159.57  Costs/mo.  Tax \$332.25  Insurance cost of add'l liability \$15.00		
Rent expected - total (average of seven examples found) \$159.57  Total income \$159.57  Costs/mo.  Tax \$332.25  Insurance cost of add'l liability \$15.00		260 Lincoln Ct. SE
seven examples found) \$159.57  Total income \$159.57  Costs/mo.  Tax \$332.25  Insurance cost of add'l liability \$15.00	Income/mo.	
Total income \$159.57  Costs/mo.  Tax \$332.25  Insurance cost of add'l liability \$15.00	Rent expected - total (average of	
Costs/mo.  Tax \$332.25  Insurance cost of add'l liability \$15.00	seven examples found)	\$159.57
Tax \$332.25  Insurance cost of add'l liability \$15.00	Total income	\$159.57
Insurance cost of add'l liability \$15.00	Costs/mo.	
	Tax	\$332.25
Maintenance \$80.00		
Total costs \$427.25		
Profit/loss -\$267.68	Profit/loss	-\$267.68



%%KEYLINE BRIAN WISE CAROLYN WISE 205 3RD ST SE WASHINGTON DC 20003-1904

Below are instructions for individuals with limited English proficiency who need assistance.

All others please turn to the next page for important information from the Office of Tax and Revenue.



Si necesita ayuda en Español, por favor llame al **(202) 727-4829** para proporcionarle un intérprete <u>de manera gratuita</u>.

Nếu quý vị cần giúp đỡ về tiếng Việt, xin gọi (202) 727-4829 để chúng tôi thu xếp có thông dịch viên đến giúp quý vị miễn phí.

Si vous avez besoin d'aide en Français appelez-le <u>(202) 727-4829</u> et l'assistance d'un interprète vous sera <u>fournie gratuitement</u>.

በአማርኛ አርዳታ ከፌለት በ <u>(202) 727-4829</u> ይደውሉ። የ<u>ነፃ</u> አስተር<del>ን</del>ሚ ይመደብልዎታል።

한국어로 언어 지원이 필요하신 경우 (202) 727-4829 로 연락을 주시면 **무료로** 통역이 제공됩니다.

如果您需要用(中文)接受幫助,請電洽 (202) 727-4829 將免費 向您提供口譯員服務。

Office of the Chief Financial Officer
Office of Tax & Revenue
Customer Service Administration
1101 4th Street, SW Suite W270
Washington, DC 20024

1101 4th Street, SW Washington, D.C. 20024

Notice Number: 9192147180301

Tax Year 2018 is October 1, 2017 thru September 30, 2018 Class 002

## **REAL PROPERTY TAX BILL**

Square	Suffix	Lot	Pro	perty Address		Mrtg. I	No.	Assessment	Tax Rate/\$100	Annual Tax
0762		0828		3RD ST SE				\$241,640	1.65	\$3,987.06
	DE	SCRIP.	TION	TAX	PENAL	_TY	11	NTEREST	PAYMENT	TOTAL
2018 Fir	st Half			\$1,993.53						\$1,993.53
Total										\$1,993.53

## **Additional Information**

Taxpayer's Record

See reverse side for important information

- Pay online; it's easy! See reverse for instructions on payment or visit www.taxpayerservicecenter.com.
- 14% of your Tax Year 2018 Real Property Tax is used to pay the General Obligation Bonds debt service requirement.

If paid by:	Mar 31, 2018	Amount due:	\$1,993.53
If paid by:	Apr 30, 2018	Amount due:	\$2,222.78
If paid by:	May 30, 2018	Amount due:	\$2,252.69

If paid by:	Jun 29, 2018	Amount due:	\$2,282.59
If paid by:	Jul 29, 2018	Amount due:	\$2,312.49
If paid by:	Aug 28, 2018	Amount due:	\$2,342.39

-----PLEASE DETACH HERE AND RETURN THIS PORTION WITH YOUR PAYMENT------

Square	Suffix	Lot	Property Address	Mrtg No.	Assessment	Tax Rate/\$100	Annual Tax	
0762		0828	3RD ST SE		\$241,640	1.65	\$3,987.06	
BRIAN WISE CAROLYN WISE								

Notice Number: 9192147180301 Notice Date: March 1, 2018

DCN#

1	8	1	1	0	0	6	1	5

Amount Enclosed: \$ For Official Use Only:

OFFICE OF TAX AND REVENUE REAL PROPERTY TAX ADMINISTRATION P.O. BOX 98095 WASHINGTON, DC 20090-8095

PAYMENT DUE BY:	Mar 31, 2018
AMOUNT DUE:	\$1,993.53

## TAX BILL INFORMATION

### **PAYMENTS:**

You must pay your real property tax bill by March 31 for the first half tax payment and by September 15 for the second half tax payment. If the due date is on a weekend or holiday, it is due the next business day.

Payments may be made in the following manner:

- 1. Pay online using our eCheck system at www.taxpayerservicecenter.com:
  - · Click on the Real Property Tab and then click Online Bill Payment;
  - · You will need information from the front of this bill to make your payment.
- 2. Pay by check payable to the "DC Treasurer":
  - To ensure your payment is recorded accurately, you must write your Square, Suffix, and Lot number on your check or money order;
  - Mail your check with the coupon at the bottom of this notice to Office of Tax and Revenue, P.O. Box 98095, Washington, DC 20090-8095;
  - If paying for more than one property, you must include separate checks for each payment voucher.
- 3. Pay in person at any DC branch of the Wells Fargo Bank:
  - Be sure to include the coupon at the bottom of this notice to ensure timely credit for your payment.

## PENALTY, INTEREST, AND FEES:

The law provides that if your real property tax is not paid in full by the due date on the tax bill, the Office of Tax and Revenue must charge a penalty equal to 10 percent of the delinquent tax and interest on the delinquent tax at the rate of 1.5 percent per month (or part thereof) until paid. Furthermore, a \$65 fee will be assessed for each dishonored payment.

### TAX SALE:

Properties delinquent in the payment of real property tax, BID tax, special or nuisance assessment, water bill or public space rental charge for one year may be subject to being sold at the tax sale in July of the year following the date of this bill. If your property becomes subject to tax sale, in addition to being advertised in the newspapers, you will be notified of the possibility of tax sale in a special notice. The notice will give you instructions on procedures to prevent the sale of your property.

## PROPERTY CREDITS, DEDUCTIONS, AND TAX RATES:

The Homestead Deduction, Senior/Disabled Property Owner Tax Relief and the Assessment Cap Credit are automatically deducted (if applicable) to calculate the tax amount due on this tax bill. The Homestead Deduction and Assessment Cap Credit are deducted from the current Assessed Value to arrive at the current Estimated Taxable Assessment; these amounts were indicated on your annual assessment notice mailed to you by March 1st. The current "Total Value" annual assessment and current "Taxable Assessment" are also viewable on our website, www.taxpayerservicecenter.com, by clicking on Real Property and then Real Property Tax Database Search. The Senior/Disabled Property Owner Tax Relief reduces the tax bill by 50% of the tax on the Taxable Assessment. To learn more about the Assessment Cap Credit in reference to real property tax liability please visit www.taxpayerservicecenter.com, click on Real Property, and then click on Real Property Other Credits and Deductions.

Class	Tax Rate per \$100	Description
1	\$0.85	Residential real property, including multifamily
2		Commercial and industrial real property, including hotels and motels, for the first \$3 million of assessed value
2		Commercial and industrial real property, including hotels and motels, for assessed value more than \$3 million
3	\$5.00	Vacant real property
4	\$10.00	Blighted real property

## APPLY FOR OR REPORT CHANGE IN HOMESTEAD, SENIOR/DISABLED TAX RELIEF:

If you are not currently receiving but believe you are eligible for Homestead, Senior/Disabled tax relief, you may apply online following the instructions below. If you are currently receiving the Homestead and/or Senior/Disabled tax relief but you are no longer domiciled in the District, if the property is no longer your principal place of residence, or if the property is receiving the Senior/Disabled tax relief and the total of your household's Federal adjusted gross income exceeds \$130,550, you must notify us within 30 days of the change to cancel your tax relief. You can apply or report a change in the following manner:

- Visit our website at www.taxpayerservicecenter.com;
- Click on the Real Property tab, click on the Homestead Deduction to select the applicable form.

## **ADDRESS CHANGE:**

Obtain a change of address form online at www.taxpayerservicecenter.com:

- · Click on the Forms tab, click on Real Property Tax Forms and Publications, and click on Change of Address;
- · Complete the form and mail to the address on the form or fax to the number indicated on the form.

While we do take steps to find better addresses if mail is returned, it is your responsibility to be sure we have your correct mailing address.

## **BILL QUESTIONS:**

Please contact our Customer Service Center at 202-727-4TAX (4829). Or, please send a detailed explanation to the Office of Tax and Revenue, Real Property Tax Administration, Attention: ASD Chief, 1101 4th St, SW, Suite 550, Washington, DC 20024. Assistance with property classifications III (3) and IV (4), please contact the Department of Consumer and Regulatory Affairs, Vacant Building Enforcement Unit at 202-442-4223 or e-mail *vacantbuilding@dc.gov*.

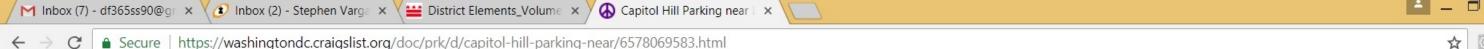
REAL PROPERTY SERVICES Property Tax Bills Property Tax Rates and Calculation Property Assessment Process Property Assessment Appeals Tax Relief Credits Search Real Property Sales Database O'TR Real Property Web Map

Address: 3RD ST SE SSL:

SSL: 0762 0828					
	Record	Details			
Neighborhood:	CAPITOL HILL	Sub-Neighborhood:	A		
Use Code:	64 - Parking Lot-Special Purpose	Class 3 Exception:	No		
Tax Type:	TX - Taxable	Tax Class:	002 - Commercial		
Homestead Status:	** Not receiving the Homestea	d Deduction			
Assessor:	FOLU ADDEY				
Gross Building Area:		Ward:	6		
Land Area:	1,120	Triennial Group:	2		
	Owner and Sal	es Information			
Owner Name:	BRIAN WISE				
Mailing Address:	205 3RD ST SE; WASHINGTON DC20003-1904				
Sale Price:	\$225,000				
Recordation Date:	03/03/2015				
Instrument No.:	19176				
Sales Code:	MARKET				
Sales Type:	I - IMPROVED				
	Tax Year 2019 Prelimi	nary Assessment Roll			
		Current Value (2018)	Proposed New Value (2019)		
Land:		\$262,080			
Improvements:		\$840	\$840		
Total Value:		\$241,640	\$262,920		
Taxable Assessment: *		\$241,640	\$262,920		
* Taxable Assessment after Tax Assessme	ent Credit and after \$73,350	Homestead Credit, if applicable. (Click here	for more information).		

<sup>\*\*</sup> If you believe you should be receiving tax relief through the Homestead deduction program and if you are domiciled in the District and this property is your principal place of residence, you can access the link below, complete the form, and return it per the instructions. For additional information regarding the Homestead program, call (202)727-4TAX. Click here to download the Homestead Deduction and Senior Citizen Tax Relief application \*





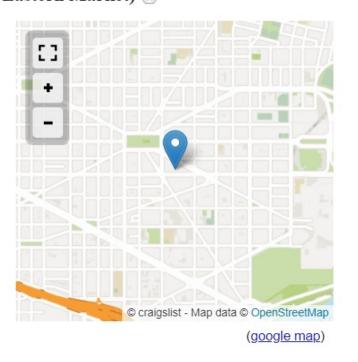
★ \$90 Capitol Hill Parking near Lincoln Park (Capitol Hill/Lincoln Park/Eastern Market) 🗟



Posted 2 days ago

prohibited [2]

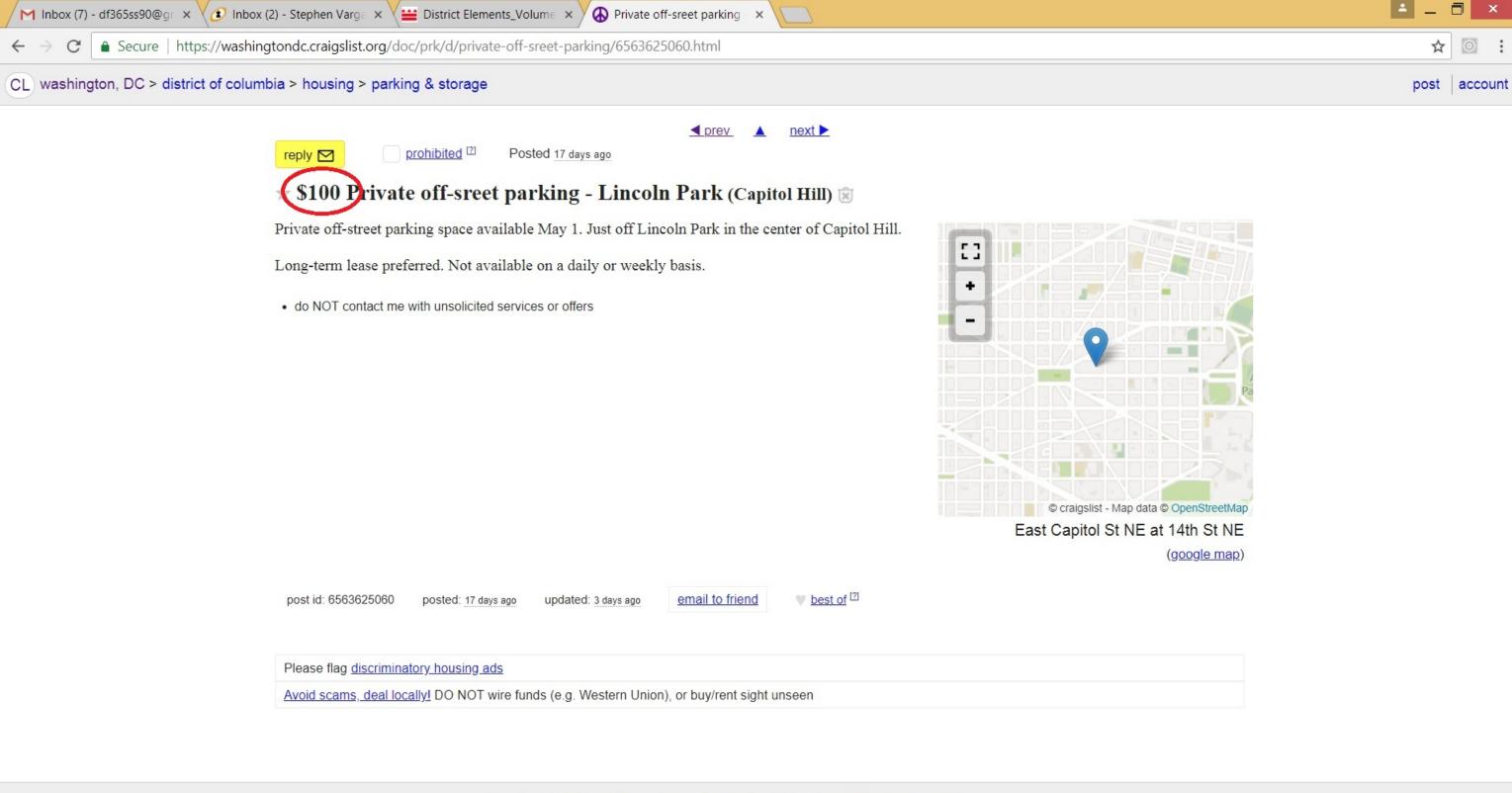
reply M



I have one parking spot available for rent in the alley behind my house. It is in the alley north of Independence Ave, about halfway between 13th and 14 St SE. It is in Capitol Hill, near Lincoln Park and not far from Eastern Market. Available immediately.

As you can see, it is not a huge spot so it only works for a compact car. An SUV or long station wagon will not fit. The space has gotten tighter since my neighbor put a planter on the edge. However, I have put a tire stop at the back so when you back in to parallel park you will know when to stop. It is only 17 feet long. Because the neighbor made it tighter I have lowered the price and seek someone who will park carefully and not hit the planter.

Please feel free to go look at the spot. It on the south side of the alley and mine is the last spot before you get fenced-in yards (see pics for help locating



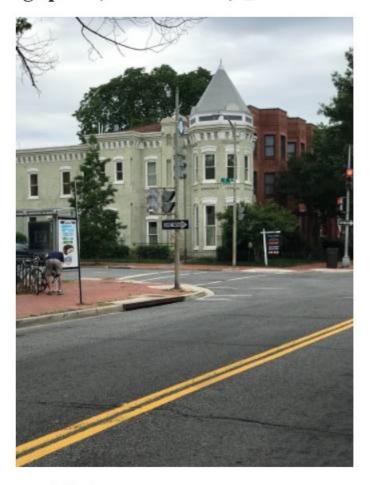






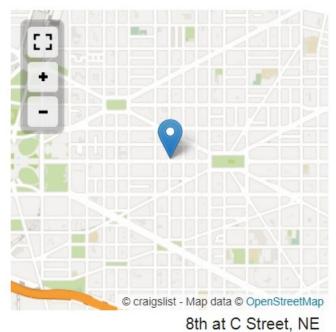






Private parking space available for rent \$150 per month Between 8 and 9 Streets on C Street, NE Call Nasser for more details show contact info

· do NOT contact me with unsolicited services or offers



(google map)

