BZA CASE NO. 20594

CLOSING ARGUMENT OF JACK BARINGER

Jack Baringer, a party to this case, submits this closing argument through his undersigned counsel, in accordance with the July 21, 2022 Memo issued by Board Secretary Moy in this case.

SUMMARY: The theoretical lot subdivision application should be denied. One of the two proposed theoretical lots does not comply with the minimum lot width requirement for the zone, and zoning relief excusing compliance with that requirement is not warranted. For the reasons set forth below, this is fatal to the application.

1. **Proposed Lot 2 Does Not Comply with the R-8 Zone Minimum Lot Width Requirement.**

There is no dispute on this record that Lot 2, the smaller of the two proposed theoretical lots, does not comply with the minimum lot width requirement for the R-8 zone, which is the zoning classification for the property. C § 304.1 and D§ 502.1 are read together to require the lot width measurement to take place 30 feet back of the street line. In this case, that measurement is along the pipestem portion of the lot, fronting on Albemarle. The pipestem's width at that point is 16.3 feet, well below the minimum lot width of 75 feet. OP Report at 1 (Exhibit 99). The rule requiring lot width to be measured 30 feet back of the street line is intended to discourage the creation of pipestem lots with minimal street frontage. Lot 2 would, quite plainly, be exactly that – a substandard, pipestem lot.[1]

[1] The existing A&T Lot 818 proposed for subdivision is not a substandard pipestem lot, even though in actual practice, the lot is accessed through the same pipestem that proposed Lot 2 would use. Lot 818, with ample frontage on Appleton Street, does not violate the minimum lot width requirement. DDOT would not allow two curb cuts for access to Lot 818, but would allow the single curb cut for Lot 818 to switch from the pipestem curb cut on Albemarle to non-pipestem access from Appleton. Hence, subdivision approval in this case would create a substandard lot where none currently exists.

2. **The Office of Planning Rejected Variance Approval for Noncompliance with the Minimun Lot Width Requirement for Inconsistency with the Purpose and Intent of the Zoning Regulations.**

Our Exhibit 107 explains in detail the analysis by OP leading to the conclusion that no variance should be granted from the minimum lot width requirement. I refer the Board to that analysis rather than repeat it here. But it is important to note that among the several reasons OP provided the Board for rejecting the variance was that it found that variance approval would allow for the creation of a substandard lot, and this "**would not be consistent with the purpose and intent of the Zoning Regulations.**" OP Report, Exhibit 99 at 7 (emphasis added). At the hearing, OP staff reiterated OP's rationale for variance denial. This testimony was in no way disputed or contested by any party.

3. **The Special Exception for a Theoretical Lot Subdivision Does Not Relieve the Applicant of Demonstrating Entitlement to the Minimum Lot Width Variance.**

Our Exhibit 107 discusses in detail the error in OP's conclusion, Ex 99 at 7, that the application for and approval of a variance excusing violation of the minimum lot width requirement could be dispensed with by applying for a theoretical lot subdivision special exception. To summarize, by its explicit terms, the only special exception sought in this case is under C § 305.1, and it is for only one type of zoning relief: "to allow multiple primary buildings on a single record lot." Certain requirements have to be met for this type of relief to be granted, as spelled out in C § 305. But those conditions of affirmative special exception approval do not amount to a sort of papal dispensation from compliance with standards and conditions otherwise applicable that are not changed or deleted by the express terms set forth in C § 305. No such conflict, where one provision obviates another, should be inferred unless the Regulations so provide, and they do not.

This explains why it has been a consistent position in the past for OP to advise that theoretical lot subdivision applications must include appropriate variance requests when one or more of the proposed new theoretical lots present issues of noncompliance with development standards not mentioned in C § 305. We showed in Exhibit 107, footnote 3, many such examples of variances sought and approved in conjunction with theoretical subdivision requests. Later, counsel for party Deborah Hernandez, Ms. Giordano, submitted a complementary report: mine

dealt with theoretical lot subdivisions under the 2016 Zoning Regulations; Ms. Giordano showed that the OP practice in this respect was the same under the predecessor § 2516 of the 1958 Regulations. Exhibit 132 at 1-3.

In this case, however, OP has taken the position that the special exception for the theoretical lot subdivision makes it unnecessary to seek approval of variances when theoretical lots do not comply with development standards. OP Report at 7 (Exhibit 99). OP did not attempt to explain its sudden change until Ms. Vitale was asked about it on cross-examination by the undersigned. Her explanation was that those other cases merely involved seeking approval for noncompliance with the setback requirements set forth in § 305.3(a). This is factually incorrect and does not explain the inconsistency between past and present practice. We showed examples of variances sought and obtained for violation of lot occupancy and height requirements. Exhibit 107 at 3 n. 3.

We also pointed out that maintaining the need for variance review and approval, as appropriate, was a continuation of the rules set forth under the 1958 Zoning Regulations when they were amended in 1989 to require special exception approval by this Board of theoretical lot subdivisions. Under the express terms of the amended 1958 Regulations, the applicant had to ensure that, apart from the limited scope of special exception approval for multiple primary buildings on a single record lot, "all the requirements of this chapter . . .are met." Exhibit 107 at 3; reiterated in Exhibit 157 at 2 (*quoting from former* § 2516.4). Neither the applicant nor OP produced any evidence to suggest that enactment of the 2016 Zoning Regulations was intended to work a radical change in the intended scope of special exception approval under C § 305. The inescapable conclusion, therefore, is that a minimum lot width variance needs to be reviewed and approved in order for this project to move forward with the theoretical lot subdivision. But OP has already correctly concluded that such a variance should not be approved in this case, a conclusion the applicant has not disputed. The inescapable conclusion is that there is a fatal defect in the application.

4. The Zoning Administrator's Last-Minute Email to the Applicant is Wrong.

Exhibit 157 explains our strong objection to Exhibit 153, the applicant's last-minute attempt to refute the analysis presented on behalf of Mr. Baringer more than two months before in Exhibit 107. Such a last-minute maneuver by the applicant, who was provided Mr. Baringer's analysis when filed, is exceedingly unfair. We had just 18 hours to respond before the hearing

day started. Even so, our response, Exhibit 157, thoroughly refutes the strained notion advanced by Mr. LeGrant that granting theoretical lot subdivision approval carries with it approval of every other circumstance in the application where zoning relief would otherwise be required. His analysis is contrary to both the wording of C § 305 and the long-established practice with OP and the Board, going back to when these applications began to come before the Board after the special exception was legislatively established in 1989. See Exhibit 107 at 7-8. Mr. LeGrant did not discuss or try to reconcile the past practice by OP and the Board with his latest, non-binding advice to the applicant. The advice was procured in a 2 –hour turnaround response to the applicant, who provided Mr. LeGrant none of the analysis provided to the Board by Ms. Giordano and undersigned counsel, delving deeply into the actual practice and history of this provision over the years.

In this rushed, 11th hour process, Mr. LeGrant, like Ms. Vitale, ignored the most fundamental problem of all: if variance approval in this case was, as OP established without dissent from anyone, not consistent with the intent, purpose and integrity of the Zoning Regulations, X §1000.1, how could OP turn around and justify having this Board make the substantively equivalent required special exception finding that approval will "be in harmony with the general purpose and intent of the Zoning Regulations . . .?" X § 901.2 (a). There is no answer to this question on this record. Neither the applicant nor OP attempted to offer any explanation of a material difference between these standards that would justify saying "no" to a variance but "yes" to a special exception effectively contradicting the "no" on the variance.[2]

5. Mr. Baringer Supports the Legal Objections Raised by Other Parties.

In the interests of all involved in this case, including Board members, Mr. Baringer will not extend this closing with discussion of the other legal arguments advanced by counsel for other

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[2] While it is far from clear in Mr. LeGrant's cryptic response to the applicant, which merely parroted the applicant's own words back to him, there is buried in his response some notion that development standards seemingly needing zoning relief in conjunction with a theoretical lot special exception can simply be "waived," as if they were nonexistent or meaningless in the wake of a theoretical lot subdivision request. But C § 305 states no such extraordinary notion, and it would be squarely at odds with basic rules of statutory construction to in effect read all relevant development standards out of the Regulations with the expedient of a waiver, when no such prospect is provided for in the express terms of C § 305.

opposing parties, Ms. Giordano and Ms. Ferster, for rejecting this application as a matter of law. Suffice it to say that he supports those claims, even as he places principal reliance on the arguments he advanced before the Board and has reiterated in this closing statement.

6. The Board Should Not Ignore the Application's Fatal Flaw on the Ground that the Application is Self-Certified.

The Board should resist the temptation to avoid addressing Mr. Baringer's claim of a fatal flaw in the application on the grounds that the applicant bears the risk of error because the application is self-certified for the necessary zoning relief. This bear-the-risk approach is best suited to situations where the claim of noncompliance is a judgment call on some ancillary requirement where a modest change in the proposed structure would obviate the problem. For example, imagine a special exception application where there are competing claims about the allowed building height, stemming from differing interpretations of what is the correct Building Height Measuring Point, and the amount of building height at issue on account of the measuring point choice is six feet. In this hypothetical, the Board could determine that plus or minus six feet the building height is an ancillary point, i.e., not something pivotal to the grant or denial of the special exception. In such a case, if the Board believes the special exception has merit, it would be perfectly reasonable to tell the applicant that the six feet of the building height shown in the approved special exception is still at risk and could be contested before the Board by the opposition party in a permit appeal should DCRA agree with the applicant's position on height. One ensuing possibility is that the Zoning Administrator could agree with the applicant and the opposition party may concede the lawfulness of the six feet at that time. Another is that the Zoning Administrator could agree with the opposition and the applicant might concede the illegality of the six feet. In both cases, the DCRA process would obviate further action before the Board. Only if the parties continue to maintain opposing claims about the six-foot height difference after permit approval would there be need for a time and resource consuming permit appeal for the Board to adjudicate.

In this case, by contrast, there is no ancillary dispute about a somewhat inconsequential matter that might get resolved in the permit review process. If the Board does not address and resolve the issue presented by Mr. Baringer, there is no reason to believe that it will get resolved in the permit review process. Rather, the Board would just be postponing to a permit appeal the

inevitable need to address and resolve it. All parties would be better served if the Board resisted postponing judgment on self-certification grounds.

7. Conclusion

Mr. Baringer appreciates the opportunity to present this written closing argument and the Board's careful consideration of the reasons he has presented that should lead the Board to the conclusion that the application must be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 25, 2022, a copy of the attached Closing Argument of Jack Baringer was served on the following by email:

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