

May 7, 2018

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

**RE: BZA Case No. 19629 – 1665 Harvard St. NW (rear) (the “Property”)
Applicant’s Response to Office of Planning Filing**

Chairperson Hill and Honorable Members of the Board:

On behalf of Applicant Tim and Charlotte Lawrence (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.

DCRA Permitting Division’s Processes and Procedures for Tax Lots Creates Practical Difficulty

To corroborate argument presented by Applicant’s counsel 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.¹ *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 in maintenance of an alley tax lot without subdivision.²

The affidavits of Mr. Gibson and Mr. Varga mirror the experience of Brian Wise, an Applicant in a separate BZA Case for whom having an alley tax lot was a barrier to obtaining a permit (BZA Case #19683). In that case, Mr. Wise testified that “when we went into DCRA, we

¹ 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 17th 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.

² Detrimental reliance on actions of city officials constitutes an exceptional situation that creates a practical difficulty. *See Oakland Condominium v. D.C. Bd. of Zoning Adjustment*, 22 A.3d 748 (2011).

were told that we would have to obtain relief for any use of the lot,” and “I could not get a certificate of 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.³

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).

³ 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 and limiting its use to a gravel parking area *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.

Adjacency to Two Public Alleys is a Unique Condition Creating Practical Difficulty

As noted in previous filings, the Property is situated along the corner of two alleys – one of which comprises the only public pedestrian alley in the neighborhood – which creates a challenge, especially given the lot's odd shape. Providing the setback requirement along the public pedestrian alley would eliminate the potential for developing along the widest two lot lines of the trapezoidal lot. Complying with zoning would result in a practically-difficult structure that would be too small for storage of a vehicle. Without the requested relief from the alley centerline setback requirements of Subtitle E § 5106.1, the reduction in the footprint of the proposed building would make the construction of a garage impractical and create a practical difficulty that results in unnecessary hardship to the Applicant.

Request to Bifurcate Relief

The Applicant submits that it has satisfied the relief for all request variance and special exceptions. However, out of an abundance of caution, in the event that the Board finds that the area variance standard is met for the lot area and alley width requirements of Subtitle C § 303.3, but is not met for the alley centerline setback requirements of Subtitle E § 5106.1, the Applicant respectfully asks the Board to bifurcate the relief so that a carport or garden shed may be constructed on the Property.

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 7th 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 Anne Fothergill, Development Review Specialist
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c/o Jon Stewart, Chairperson
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Meridith Moldenhauer

TAB A

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

AFFIDAVIT OF OWEN GIBSON

In re: BZA Case No. 19629, Timothy and Charlotte Lawrence

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 DCRA only issues permits for record lots. 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.

Owen Gibson
Owen Gibson

Executed: May 7, 2018

District of Columbia : SS

The foregoing affidavit was acknowledged before me
this 7th day of May, 2018

by Owen Gibson

Angela Henry
Notary Public, D.C.



TAB B

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

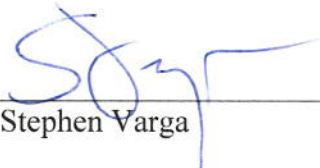
AFFIDAVIT OF STEPHEN VARGA

In re: BZA Case No. 19629, Timothy and Charlotte Lawrence

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 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

Executed: May 7th 2018

District of Columbia : SS

The foregoing affidavit was acknowledged before me
this 7th day of May, 2018

by Stephen Varga

Angela Henry

Notary Public, D.C.

