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November 8, 2024

VIA ELECTRONIC MAIL
Dover Board of Adjustment
C/O City of Dover Department of Planning and Inspections
P.O. Box 475
Dover, Delaware 19903

RE: 207 N. West Street, ED-05-076.08-02-01.00-000
Variance Request

Dear Chairperson Sheth and members of the Board of Adjustment,

I represent 4BL, LLC and Cameron Llewellyn. This correspondence is supplemental to the Board of Adjustment application filed on October 17, 2024. As noted in the materials filed with the application, we are seeking relief from the zoning code as follows:

> **Variance Request 1:** A variance from the required lot depth of 100 feet (Article 4, Section 4.2) for four townhome lots. The proposed configuration orients the new lots/homes with a lot depth of 84.5 feet. Accordingly, a lot depth variance of 15.5 feet is needed for each of the 4 townhome lots.
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> **Variance Request 2**: A variance from the required 3,000 square feet of lot area (Article 4, Section 4.2) to allow a minimum lot area of 2,366 square feet of lot area on the two center townhome lots. Accordingly, a lot area variance of 634 square feet is needed for each of the two center townhome lots.

The project is located at the corner of North West Street and Cecil Street and is in the RG-1 (General Residence Zone). The parcel is 12,168 square feet and previously contained a single-family home with a detached shed and a large concrete parking area. After the prior occupant passed away, the home fell into disrepair, and it was recently demolished by the City.

The proposed re-development of the site includes subdividing it into four lots, and constructing four two-story townhomes of approximately 1,750 +/- square feet with one car garages. The project perfectly aligns with the City's 2019 Comprehensive Plan and is a thoughtful effort to create homes that are within the financial reach of young families.

Indeed, the very first goal identified in the 2019 Comprehensive Plan in the area of Housing and Community Development is to "Encourage Balanced Housing Opportunities for all

Residents of the City."[1] The Comprehensive Plan's objectives in support of that goal include "[p]romot[ing] adequate, safe, and affordable housing for all residents in the City," "[c]ontinu[ing] to encourage compact and diverse residential development throughout the City," "[r]e-evaluat[ing] all residential zones development requirements and housing types in the City," and "[e]valuat[ing] and update[ing] Codes to encourage compact and diverse development throughout the City."[2] The proposed project is consistent with each of those objectives.

Moreover, the Comprehensive Plan encourages the development of affordable housing by "[w]ork[ing] with housing providers to provide affordable housing to low income residents."[3]

Finally, the Comprehensive Plan promotes residential development within the City by "[e]ncourag[ing] 'in-fill' residential development," and "[e]ncourag[ing] housing in the Downtown and other areas that are near transit and multi-modal routes, retail areas, employment and essential services."[4]

Although the proposed project satisfies many of the Comprehensive Plan's objectives and recommendations, it will not be possible without the variances requested. The economics of providing affordable homes to working class families drives the need to divide the parcel and obtain the requested relief from the zoning code. Anything less than four units will necessarily increase the individual unit cost to a price point that will not be reachable by most young families.

Critically, as the plan submitted with our Application notes, the average lot area is 3042 square feet for all four lots—which exceeds the minimum lot area of 3000 square feet. So, although we are requesting a lot area variance for the two interior lots, the overall parcel is larger than what is required in the RG-1 Zoning District to satisfy the lot area requirements for four individual lots.

I. Legal Standard

The Delaware Supreme Court has indicated that an area variance, like the ones requested in the current application, does not involve a prohibited use, and "concerns only the practical difficulty in using the particular property for a permitted use."[5] Unlike a use variance, an area variance is subjected to the relatively less burdensome 'exceptional practical difficulty' test."[6] *In Bd. of Adjustment of New Castle Cty v. Kwik-Check Realty, Inc.*, the Court concluded, "[s]uch [exceptional] practical difficulty is present where the requested dimensional change is minimal and the harm to the applicant if the variance is denied will be greater than the probable effect on the neighboring properties if the variance is granted."[7] When addressing an application for an

[1] *Dover 2019 Comprehensive Plan*, at 11-16.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Bd. of Adjustment of New Castle Cty v. Kwik-Check Realty, Inc.*, 389 A.2d 1289, 1291 (Del. 1978).
[6] *Id.*
[7] *Id.*

area variance, the *Kwik-Check* Court set forth four factors to be considered by a Board of Adjustment:

> [1][T]he nature of the zone in which the property lies[;] [2] the character of the immediate vicinity and the uses contained therein[;] [3] whether, if the restriction upon the applicant's property were removed, such removal would seriously affect such neighboring property and uses; [and] [4] whether, if the restriction is not removed, the restriction would create [hardship] for the owner in relation to his efforts to make normal improvements in the character of that use of the property which is a permitted use under the use provisions of the ordinance.[8]

Additionally, the applicant for an area variance must not have created the exceptional practical difficulty in order for it to be granted.[9]

One Delaware court described the *Kwik-Check* analysis as "…a determination as to whether the Appellants are experiencing exceptional practical difficulty in their efforts to make normal improvements to their property, which, in turn, is decided by weighing the interest of the applicants against the interest of the public. The balancing of competing interests is the essence of the Kwik-Check test."[10]

The current application satisfies each of the factors enumerated in *Kwik-Check* and the balancing of interests supports the granting of the relief requested.

Exceptional Practical Difficulty

Here, the exceptional practical difficulty arises from the condition that while the project seeks compliance with the 2019 Comprehensive Plan, the reality of economic concerns coupled with the requirements of the zoning code prohibit the type of project promoted by the 2019 Comprehensive Plan.

Further, while one could argue that the orientation of the lots and the desire to reduce lot size are self-imposed, the Delaware Supreme Court has explained that in Delaware, there is no *per se* bar against a variance for a self-imposed hardship. The question is whether the applicant has adequately demonstrated that the applicant's difficulty justifies the grant of a variance.[11] Although aesthetic concerns is not the reason for the requested variances, it is instructive to be aware that the Delaware Supreme Court has even affirmed the grant of an area variance driven

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[8] *Id.* (citation omitted), see also, *Wawa*, 929 A.2d at 831; *Holowka v. New Castle County Bd. of Adjustment*, 2003 WL 21001026, at *5 (Del. Super.).
[9] *See* 9 Del. C. §6917(3)(c); *Bd. of Adjustment of Sussex Cty v. Verleysen*, 36 A.3d 326, 330 (Del. 2012).
[10] *Conway & Conway v. Zoning Bd. of Adjustment*, 1998 Del. Super. LEXIS 113, at *10 (Del. Super. Ct. Feb. 20, 1998).
[11] *McLaughlin v. Board of Adjustment of New Castle County*, 984 A.2d 1190, 1193 (Del. 2009); *See also Markert v. Board of Adjustment of the City of Rehoboth Beach*, C.A. No. S22A-02-003 CAK, at *17 (Del. Super. Ct. Sept. 26, 2022).

by aesthetic concerns.[12] And in *Boyd v. Heffron*,[13] the Delaware Superior Court granted a variance were, like here, a project would not be viable due to certain fixed costs (e.g. land costs, building equipment costs, site improvement costs) without the grant of a variance.

Here, a balancing of the owner's interests against those of the public, in view of the 2019 Comprehensive Plan, favors the granting of the relief requested.

II. Application of the *Kwik-Check* Factors

In this instance, the "harm to the applicant if the variance is denied will be greater than the probable effect on the neighboring properties if the variance is granted."[14] Each of the *Kwik-Check* factors are addressed below.

(1) The nature of the zone in which the property lies

The parcel is in the RG-1 (General Residence Zone) Zoning District, where the proposed use of townhouses is permitted as a conditional use. Consequently, this first factor supports the granting of the variances requested.

(2) The character of the immediate vicinity and the uses contained therein

The project site is on the fringe of Residential (RG-1) Zoning District to the east of North West Street, and Industrial/Manufacturing (M) to the west. The Senator Bikeway passes North/South on West Street. Immediately to the south is Mt. Carmel Church of the Living God. To the southwest is the Rail Haus Beer Garden and the former recycling center (now parking for the Rail Haus). To the west is Teal Construction's warehouse and equipment yard. To the north and east are single family residences in varying states of repair, generally trending toward improvement. The proposed townhouse use, therefore, is an appropriate transition between the commercial uses and the single-family homes. Thus, this factor supports the granting of the variances requested.

(3) Whether, if the restriction upon the applicant's property were removed, such removal would seriously affect such neighboring property and uses

Allowing the two requested variances would not affect the use of neighboring properties. The new townhouses will be two story units, consistent with the height of the existing residences. Sixteen of the properties to the north and east do not meet bulk standards for lot width and/or lot area, as they pre-date the current zoning standards. The average lot area of the proposed lots exceeds the minimum lot area of the RG-1 District; therefore, a slightly "non-conforming" arrangement will not be out of character for the

[12] *Marriott Corp. v. Concord Hotel Management, a Div. of Concord Towers Inc.*, 578 A.2d 1097 (Del. 1990).
[13] 1987 WL 28314 (Del. Super. Dec. 11, 1987).
[14] *Kwik-Check Realty*, 389 A.2d at 1291.

neighborhood. Granting of the variance will allow for four tasteful, well-constructed, affordable homes in an area that was recently dominated by vacant properties. This factor supports the granting of the variances requested.

4) Whether, if the restriction is not removed, the restriction would create [hardship] for the owner in relation to his efforts to make normal improvements in the character of that use of the property which is a permitted use under the use provisions of the ordinance.

The existing lot is 12,168 square feet. A lot of this size is somewhat out of character in relation to the neighboring homes. To justify the cost of the parcel after the demolition and fines were absorbed, a very large single-family home would need to be constructed to make the project viable. And given the character of the neighborhood, a large single-family home would be very imposing, likely not marketable, and would defeat the objective of creating affordable housing. This factor supports the granting of the variances requested.

Noted above, "[t]he balancing of competing interests is the essence of the Kwik-Check test."[15] Balancing the interest of the applicants against the interest of the public demonstrates that an exceptional practical difficulty exists such that the applicant should be granted the relief requested.

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Given that my clients have an exceptional practical difficulty, as described above, we respectfully request that the Board grant the requested relief. Thank you for your consideration of this request.

Sincerely,

Glenn C. Mandalas, Esquire

cc:
Mr. Nicholas Rodriguez, Esq.
Mr. Cameron Llewellen (Tidemark Construction)
Mr. Doug Liberman (Larson Engineering)

[15] *Conway & Conway v. Zoning Bd. of Adjustment*, 1998 Del. Super. LEXIS 113, at *10 (Del. Super. Ct. Feb. 20, 1998).