

BOARD OF ZONING APPEALS STAFF REPORT
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TYPE OF APPLICATION: Major Variance **FILE #**12-046263

APPLICANT: DAVID COSSETTA

HEARING DATE: May 14, 2012

LOCATION: 211 7TH STREET WEST

LEGAL DESCRIPTION: Riceirvines Add B26 4146 53 Ex Alley Nely 4o Ft Of Lot 10 Blk 53

PLANNING DISTRICT: 9

PRESENT ZONING: B5 **ZONING CODE REFERENCE:** 63.319

REPORT DATE: May 9, 2012 **BY:** Wes Saunders-Pearce

DEADLINE FOR ACTION: June 12, 2012 **DATE RECEIVED:** April 13, 2012

A. **PURPOSE:** A variance from the requirement of Section 63.319 (a) that specifies stormwater runoff from off-street parking lots shall be released into the City sewer system at a controlled rate.

B. **SITE AND AREA CONDITIONS:** The development site in question involves property at 211 West 7th Street as well as 212 Smith Avenue North. The site in question is generally referred to as Cossetta’s Italian Market and Pizzeria which is a three-story restaurant building utilizing two surface parking lots. One surface parking lot (the “South Lot”) is on-site adjacent to the restaurant building operations. An additional surface parking lot is situated nearby to the northwest at 212 Smith Avenue North (the “North Lot”). The two surface parking lots are separated by a public alley.

Surrounding Land Use: Residential use to the west and the remaining of the surrounding area is mainly commercial.

C. **OVERVIEW:**

- Applicant is undertaking substantial property development aided in part with roughly \$2 million in city financial assistance.
- The city expects the property development to meet conventional and enhanced standards for building and site development. This includes stormwater management.
- City review and approval for stormwater management within the development has been protracted due to several factors, including:

- Applicant's original site plan application did not include required stormwater management calculations; and,
- A Development Agreement was negotiated which included enhanced stormwater management standards that also cross-referenced city code and site plan review; and,
- Applicant withdrew original site plan application and resubmitted as two separate site plan applications.
- Applicant's resubmitted site plans met stormwater requirements for the Development Agreement and received city approval.
- Current variance application seeks full relief from Development Agreement's stormwater management requirements, however, application was preceded by several meetings with City staff where applicant was seeking relief from increased site costs attributed to stormwater management.

D. DETAILED HISTORY:

While operating at 211 West 7th Street, the applicant purchased the property at 212 Smith Avenue North in 2005 and subsequently demolished the building at that site. In 2006, the applicant proposed site development to create a paved bituminous surface parking lot with 64 spaces (North Lot). The site plan application illustrated a future expansion of the Pizzeria operation but noted the future expansion would be part of a later phase of development.

City staff approved the site plan for the North Lot in November, 2006. Ultimately the applicant did not proceed with the approved site development (North Lot paving) and the city's approval expired.

Between the time of the previous site development plans and the current development plans, the City adopted a Sustainable Building policy. The policy has specific requirements to create development which minimizes impact upon the environment. In general, the policy applies to certain projects for which schematic design was initiated after July 1, 2010.

The applicant approached the City in early 2011 regarding a comprehensive development plan, the "Alimentari," for the parcels at 212 Smith Avenue North and 211 7th Street West. The plan proposed an expansion of the Pizzeria, paving improvements to the North Lot, and reconstruction of the existing on-site South Lot.

The City Housing and Redevelopment Authority (HRA) committed roughly \$2 million in tax increment financing, a low interest loan, and a forgivable loan to assist the applicant in achieving the development plans. Financial contributions greater than \$200,000 by the City to private projects is a trigger for the Sustainable Building policy to apply. Although the applicant claimed schematic design was initiated prior to July 1, 2010, the City and applicant mutually agreed to apply the Sustainable Building policy requirements.

On April 8, 2011, the applicant submitted a letter requesting the city to vary the Sustainable Building policy for the Alimentari. The letter observed concerns about the overall green certification requirements and process. However, the letter noted a minimal goal for stormwater design and quantity control: “design and construction teams will implement stormwater best management practices.”

The applicant applied for site plan approval for the entire Alimentari. A site plan review meeting was held May 3, 2011. The applicant did not include stormwater calculations or show site design elements for stormwater management. Requirements for stormwater were discussed at the meeting including city code matters (i.e. Section 69.319(a)) as well as items within the Sustainable Building policy. There was additional discussion between staff and the applicant’s agents.

In to June, 2011, the applicant was finalizing terms and arrangements for the Alimentari “Development and Loan Agreement.” Site plan review and sustainability items for stormwater management were still unresolved. Despite several informal discussions with applicant’s agents, no substantive plan or engineering was developed to address stormwater requirements. In order to advance the development and memorialize the applicant’s commitments to enhanced site improvements, the Development and Loan Agreement included the attachment “Exhibit J, Sustainability Undertakings for the Cossetta’s Alimentari Project,” which incorporated stormwater management standards for the Alimentari development. (Refer to Section F of this report for further details.) The Agreement and supporting exhibits were executed June 22, 2011 between the HRA and the applicant.

In July, 2011, the Alimentari site plan application was withdrawn and two separate site plan applications were submitted in its place:

- Application for building and South Lot (file 11-253817); and,
- Application for North Lot (file 11-253823).

Discussion continued between staff and the applicant’s agents. A memorandum from the applicant’s civil engineer dated August 1, 2011 acknowledges that the rate control calculations do not meet the City’s standards and the narrative references “physical and financial constraints” for stormwater treatment.

A site plan review meeting was held August 2, 2011 for both applications. The applicant provided drainage plans and stormwater calculations only for the South Lot. The applicant did not include plans and calculations demonstrating required controls for the North Lot. The stormwater requirements, including city code matters as well as items within the Sustainable Building policy, were discussed and evaluated comprehensively. This is particularly relevant in that stormwater from the North Lot naturally flows south towards the South Lot.

Further discussion took place between city staff and applicant’s agents during the month

of August 2011 to address the still unresolved stormwater management items. During that time the applicant provided sufficient documentation to demonstrate that the numeric standards for stormwater rate control and enhanced controls for stormwater quality were met for both areas in question of the Alimentari development: the North Lot as well as building and South Lot. Plans also demonstrated an emergency overflow location and elevation for any stormwater runoff which may exceed system capacity.

Site plan review approval for the building and South Lot (file 11-253817) was provided in a letter by Tom Beach dated October 6, 2011. The approval letter states: "The stormwater system shown in the plan is designed to handle stormwater from this project and also stormwater from the parking lot at 212 Smith that you will be paving/improving. You have submitted an Operation and Maintenance Plan for the system."

Site plan review approval for the North Lot (file 11-253823) was provided in a letter by Tom Beach dated December 6, 2011. The approval noted a variance was approved for internal landscaping for the North Lot.

In mid-January, 2012, a letter was sent from McGough Construction to Bocce, LLC (the applicant) regarding increased site cost. A meeting was requested by the applicant with Council Member Dave Thune, Director of Planning and Economic Development Cecile Bedor, and staff Martin Schiekkel, Kurt Schultz, and Wes Saunders-Pearce. The meeting reviewed the financial concerns of the applicant and potential avenues of recourse.

Near late February and early March, 2012, the applicant explored discussions with the Department of Public Works to determine if the property could be assessed the cost for stormwater work required for the Alimentari project. In concept, this approach would allow the development to install the required controls as part of the construction. The capital cost of constructing the stormwater controls would then be paid by the applicant as part of property taxes over a period of years.

In late March, 2012, the applicant submitted a variance request that would relieve him from all the requirements to install a stormwater retention system required under Legislative Code Chapter 52. Since Chapter 52 is not part of the zoning code, the BZA has no authority to grant the variance requested. Staff returned the application as incomplete pursuant to Minn. Stat. 15.99.

On April 13, 2012, the applicant submitted the current variance request under Section 63.319 of the zoning code pertaining to the rate control of 1.64 cubic feet per second (cfs) per acre disturbed.

E. CODE CITATION: Stormwater runoff

Stormwater drainage from off-street parking facilities of greater than one-quarter ($\frac{1}{4}$) of an acre of total disturbed area into public sewers shall be controlled so that peak stormwater discharge rates from the site for all storms up to and including the critical 100-year frequency will not exceed:

$$Q = 1.64 \times A$$

where Q = the maximum acceptable discharge rate in cubic feet per second and A = the site area in acres.

Parking facilities shall be designed in accordance with best management practices to comply with required local and regional water quality, volume, and rate control standards. These standards include but are not limited to chapter 52, stormwater runoff. Parking lots shall also abide by operation and maintenance regulation as specified by local and regional authorities.

F. ADDITIONAL STORMWATER REQUIREMENTS

The applicant is also bound to a Development and Loan Agreement which requires installation of devices and features in order to meet "Sustainability Undertakings." The agreement includes requirements for stormwater within Exhibit J as follows:

Storm Water Management Requirements:

- (a) Site Eligibility: Sites with one quarter ($\frac{1}{4}$) acre or more of total land disturbance;
- (b) Rate Control: 1.64 cubic feet per second (cfs)/ acres disturbed, or such other rate as is approved in the site plan approval process;
- (c) Water Quality Management: For a two year, 24-hour rainfall event, Building Owner will use good faith efforts to achieve a goal to provide treatment systems designed to remove 80% of the average annual post development Total Suspended Solids (TSS) and remove 60% of the average annual post development Total Phosphorus (TP), or such other percentage as is approved in the site plan approval process, by implementing Best Management Practices (BMPs) outlined in "Urban Small Sites Best Management Practices" handbook (Metropolitan Council), "Protecting Water Quality in Urban Areas" handbook (Minnesota Pollution Control Agency), and "Minnesota Storm Water Manual" (Minnesota Pollution Control Agency). All BMP treatment systems for subject site need to include safety factors, maintenance and a back-up plan in case of failure. All manufactured devices require independent laboratory testing to confirm product claims.

(d) Volume Control/Infiltration: The Project will maintain or increase infiltration rates from pre-project site conditions;

(e) Operation and Maintenance: All practices must have a O and M plan.

The BZA has no legal right to grant a variance on a request that is part of a Loan Agreement with another city agency.

G. FINDINGS:

1. *The variance is in harmony with the general purposes and intent of the zoning code.*

This finding is not met. The applicant states that this site is zoned B5 and all proposed land uses are permitted within this zoning district. The applicant acknowledges that the purpose of the stormwater runoff regulation for which he is seeking a variance to control stormwater pollution along with soil erosion and sedimentation in the city.

With respect to stormwater, the zoning code establishes consistency across any and all land uses so that access and demands upon the public storm sewer system for drainage capacity are fairly apportioned. Thus, the overall drainage benefits provided by the public storm sewer system are equally shared. The public storm sewer system is municipal infrastructure which is owned, operated and maintained by the City in the public interest. Particularly, the public storm sewer system was separated from the public sanitary system decades ago and constructed new. The separated storm sewer system was designed on a foundation of projected runoff contributions by any property citywide, regardless of land use, which the zoning code supports in uniformity.

Therefore, the applicant's request to deviate entirely from the stormwater management plan by not providing any of the approved stormwater retention system is not in keeping with the purpose and intent of the code in promoting and protecting the public health, safety, aesthetics and general welfare of the community.

2. *The variance is consistent with the comprehensive plan.*

This finding is not met. The applicant states that the requested variance is reasonable because this business is permitted in this zoning district. The applicant further states that the city has recognized the importance of the project and its consistency with the comprehensive plan and economic goals by providing financial assistance for the project.

The comprehensive plan includes a chapter known as the Water Resources Management Plan (the Water Plan). The second strategy of the Water Plan is “reduce pollutant load to water bodies.” More specifically, item 2.9 of the Water Plan targets reducing “the negative impacts that parking lots in the city have on water quality and water resources.” Section 63.319 is directly related to addressing stormwater impacts from parking lots in the city. Additionally, the City’s Sustainable Building Policy is a significant tool to address the negative impacts targeted in the comprehensive plan.

3. *The applicant has established that there are practical difficulties in complying with the provision, that the property owner proposes to use the property in a reasonable manner not permitted by the provision. Economic considerations alone do not constitute practical difficulties.*

This finding is not met. The applicant states that this site is part of an old historic neighborhood built long before the current zoning regulations and the building codes were in place. The site is urban, tight and condensed, which makes the construction and development of the project more difficult than new construction and that the City recognized those constraints by providing economic assistance for the project. The applicant states that the practical difficulties related to the configuration of the site, depth of bedrock, and the existing use of the below grade improvements are all factors that cannot be addressed by the City’s economic assistance.

The applicant states that he intended to construct the stormwater retention required by the City until his engineers and consultants notified him that the location of the system would be above and adjacent to the planned food processing area. He states that the runoff from the adjoining lots, west and north of the site, could result in a flow exceeding the capacity of their retention system and would back-up in the food processing area.

The applicant’s claim that water flow exceeding the retention system capacity would back-up into his food processing area has not been substantiated by any technical hydraulic analysis or engineering evaluation of grades, elevations, etc.

Further, the retention system in question is not an infiltration system which functions to soak water into the ground. Rather the retention system was designed as a self-contained temporary holding device that usually stores water for a relatively short period of time as it is gradually released in to the municipal storm sewer system. The Alimentari system includes an identified surface emergency overflow that allows a controlled escape to the street for excess runoff.

The applicant listed some constraints and concerns associated with providing the retention system at this site. While the alleged difficulties may have some merit, other alternatives could have been explored by the applicant. For example, the applicant could have considered using porous pavers instead of asphalt at the newly

paved North Lot or South Lot. In fact, a design option from the applicant's agents showed a detail of a porous paver system proposed at a total depth of less than three feet. However, the total amount of porous paver proposed was roughly only 20 square feet within approximately 12,000 square feet of impervious space within the South Lot. The applicant could have considered guidance provided by staff regarding stormwater landscaping in parking lot systems. Alternatively, a higher capacity retention system could be designed.

Indications suggest that due diligence to explore reasonable alternatives thus avoiding practical difficulty constraints was minimized. Additionally, financial concerns have been presented several times. (Refer to Item D for a detailed history.) The applicant's request does not demonstrate that there are practical difficulties which are real and legitimate.

4. *The plight of the landowner is due to circumstances unique to the property not created by the landowner.*

This finding is not met. The applicant had ample interaction with City staff to understand the variety of options available to address the site design to meet stormwater management requirements. Many of the available options would require the applicant compromising a small portion of revenue-generating real estate such as parking lot stalls or rooftop dining for stormwater control. Other options such as porous pavers were contemplated but at such a small scale as to be ineffective. The pavers showed technical merit; it is unclear why that was not explored further.

The stormwater management plan which includes the water retention system was designed by the applicant and accepted as noted in the city's October 6, 2011 site plan review approval letter. The request to be exempt from providing the stormwater retention system designed by the applicant himself after a professional evaluation of the site and potential alternatives is a self-imposed hardship. It is a circumstance created by the applicant.

5. *The variance will not permit any use that is not allowed in the zoning district where the affected land is located.*

This finding is met. The requested variance will not permit any use that is not allowed in this zoning district.

6. *The variance will not alter the essential character of the surrounding area.*

This finding is not met. The applicant is proposing to be exempt from providing any stormwater management plan. The City, through its comprehensive plan and related policies and zoning code, views the essential character of the surrounding area as one which is more benign upon the environment. Without a stormwater treatment

mechanism, the requested variance will result in polluted quantities of storm water flowing uncontrolled to the public storm sewer system and ultimately the Mississippi River. While this would maintain the status quo regarding drainage patterns, it is not consistent with the desired essential character of the surrounding area.

- H. **DISTRICT COUNCIL RECOMMENDATION:** Staff has not received a recommendation from District 9.
- I. **CORRESPONDENCE:** Other than material submitted by the applicant, staff has not received additional correspondence.
- J. **STAFF RECOMMENDATION:** Based on findings 1 through 4, and 6, staff recommends denial of the variance.