Received May 21, 2012

# APPLICATION FOR APPEAL

*Department of Safety and Inspections*
*375 Jackson Street, Suite 220*
*Saint Paul, MN 55101-1806*
*651-266-9008*

**Zoning office use only**
File no. 12-061426
Fee 440.00
Tentative hearing date:
6/20/12

**APPLICANT**

Name David Cossetta, Bocce, LLC and Cossetta's, Inc.
Address 211 West 7th Street
City St. Paul St MN Zip 55102 Daytime phone 651-222-3476
Name of owner (if different)

**PROPERTY LOCATION**

Address 211 West 7th Street
Legal description: See attached Exhibit A
*(attach additional sheet if necessary)*

**TYPE OF APPEAL**: Application is hereby made for an appeal to the:

☐ Board of Zoning Appeals ☒ City Council

under the provisions of Chapter 61, Section _____, Paragraph _____ of the Zoning Code, to appeal a decision made by the Board of Zoning Appeals

on May 14, 2012, 200__. File number: 12-046263
*(date of decision)*

**GROUNDS FOR APPEAL**: Explain why you feel there has been an error in any requirement, permit, decision or refusal made by an administrative official, or an error in fact, procedure or finding made by the Board of Zoning Appeals or the Planning Commission.

See attached Statement of Grounds for Appeal

*(attach additional sheet if necessary)*

Applicant's signature [signature] Attorney Date 5.21.12 City agent _____

**STATEMENT OF GROUNDS FOR APPEAL**
**Appeal of May 14, 2012 Decision**
**of the**
**St. Paul Board of Zoning Appeals**
**File No. 12-046263**

Submitted on behalf of the Applicant, David R. Cossetta, Cossetta's Inc., and Bocce, LLC. The Applicant appeals the decision of the Board of Zoning Appeals, denying the requested variance from the requirements of Legislative Code Section 63.319.

**A. The Board should have found the Applicant met each of the six required findings for a variance as follows:**

**1. <u>The variance is in harmony with the general purposes and intent of the Zoning Code.</u>**

The Board adopted the findings of the May 9, 2012 Board of Zoning Appeals Staff Report (the "Staff Report"), which found that the Application did not meet the "general purposes and intent of the Zoning Code" because it did not meet the <u>specific</u> requirements of the one section from which the Applicant seeks a variance. If this was the appropriate standard, the Board would never grant a variance.

Section 60.103 lists twenty general purposes of the Zoning Code, one of which is "to protect water resources, improve water quality, and promote water conservation." The variance is in harmony with this <u>specific</u> purpose because, even with the variance, the Applicant will install a storm water filtration system that will ensure that sediments are removed from the parking lot runoff before it enters the storm sewer. The Applicant will also protect water resources, improve water quality, and promote water conservation quality by modestly reducing total impervious surfaces and by converting a significant portion of the site from surface parking lot to rooftop dining area.

The Zoning Code consists of ten chapters, sixty-three articles, and an appendix. The Applicant seeks a variance from one subparagraph of one of nineteen sections of one of the sixty-three articles. The project for which the Applicant seeks a variance is in conformance with every other policy and section of the Zoning Ordinance. The Applicant is not even asking for a variance from all of the requirements of Section 63.319(a).

The Applicant is seeking a variance solely from the rate control requirement of Section 63.319(a), which provides that stormwater drainage from the Applicant's off-street parking facility will enter the public sewers during the critical 100-year frequency at a rate that will not exceed 1.64 cubic feet per second per acre. The Applicant <u>will</u> comply with all other requirements of Section 63.319, including storm water filtration and the best management practices incorporated in Section 63.319 by reference.

Aside from the specific rate control requirement, Section 63.319(a) requires that

> 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.

Chapter 52 requires design in accordance with "best management practices" which require consideration of the practical implications of any specific solution:

> *Best management practices (BMPs) mean the erosion and sediment control and water quality management practices that are the most effective and practicable means of controlling, preventing, and minimizing degradation of surface water, including avoidance of impacts, construction phasing, minimizing the length of time soil areas are exposed, prohibitions, and other management practices published by state or designated area-wide planning agencies. Individual BMPs are described in the current version of "Protecting Water Quality in Urban Areas," Minnesota Pollution Control Agency 2000. BMPs must be adapted to the site and can be adopted from other sources. However, they must be similar in purpose and as effective and stringent as the MPCA's BMPs. Other sources include the current versions of "Minnesota Small Sites Urban BMP Manual", Metropolitan Council Environmental Services 2001, and "Erosion Control Design Manual", Minnesota Department of Transportation, 1993.*

The approved underground stormwater storage system is not consistent with best management practices. We discuss best management practices in detail in Section B.2 below. As a threshold matter, a system that requires breaking and hauling up to 10,000 cubic feet of rock, disturbing up to 30,000 cubic feet of potentially contaminated soils, and installing a 60,000 gallon cistern adjacent to and above the floor level of a commercial kitchen cannot possibly be "effective and practicable" under any standard.

In light of the fact that the project is consistent with the general purposes and intent of the Code as stated in Section 60.103, and with the specific purpose of Section 63.319, which is to protect water resources in a manner that it consistent with best practices, the City Council should find that the variance is in harmony with the general purposes and intent of the Zoning Code.

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

The Staff Report again recommends that the variance is not consistent with the whole comprehensive plan because the Applicant seeks a variance from a specific section of the Water Resources Management Plan section of the comprehensive plan. The variance is consistent with the general purposes of the comprehensive plan. Use of the Site as an Italian market and restaurant is permitted in the B-5 zoning district and meets all current planning goals for the area. The purpose of the variance is to allow development that is consistent with the Code and the comprehensive plan, the primary goals of which are to promote health, safety and welfare, including sound economic development within the City. The City has recognized the importance of the Project to the City, and the consistency of the Project with City's comprehensive plan and

economic goals, by providing economic assistance for the Project. The variance will serve the City's economic goals by reducing the cost of redevelopment and protecting the City's investment against the risk of future water damage.

The variance is also consistent with the specific purposes of the Water Resources Management Plan (the "Water Plan"), including Strategy 2, "Reduce Pollutant Loads to Water Bodies." The variance will allow the Applicant to avoid the rate control requirements, which reduce the speed at which storm water will enter the sewer system. This directly affects the capacity of the sewer system, not water quality. Rate control has an indirect effect on water quality by providing time for sediments to settle out of the storm water before entering the sewer system. The Applicant can and will address this concern by increasing the capacity of its filtration system to accommodate the faster rate.

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.**

Existing site conditions create practical difficulties in complying with the approved stormwater management plan for the Project, Section 63.319 and the standards of Chapter 52 of the Code that are incorporated in Section 63.319. The facts that (a) the Petitioner has used the property as a restaurant for decades, (b) the City has approved the project, and (c) the City has provided economic assistance for the project all demonstrate the use is reasonable. Failure to grant the proposed variance will result in undue hardship to the Petitioner and deprive the Petitioner of a reasonable use of the Site. Applicant seeks the variance because the only available means of satisfying the rate control requirements of Section 63.319 pose a substantial long term risk of water infiltration into the Applicant's basement level kitchen. Although economic considerations are not the only practical difficulty, the approved plan from which the Applicant seeks a variance will cost about $250,000 to implement. As one measure of the value state agencies place on storm water management, the Capitol Region Watershed District allows a developer that cannot satisfy its storm water treatment requirements on site to contribute $40,000 to a regional water quality improvement fund in lieu of on-site treatment. If the parking lots in this project were over an acre (a few hundred square feet bigger) the project would be under the jurisdiction of the Capitol Region Watershed District, and the payment-in-lieu option would be available to the Applicant.

The practical difficulties are inherent in the geography of the Cossetta's site. The natural slope of the parking lot from northeast to southwest and the separation of the Applicant's two parking lots by a public alley make it impossible for the Applicant to contour the parking lot to detain the stormwater on the surface of the parking lot while the water drains through catch basins that control the rate of flow, as is the usual cost-free means of controlling stormwater runoff from urban parking lots.

The Applicant also faces substantial practical difficulties in controlling the rate of stormwater runoff through underground detention facilities because of the subsurface site conditions. Specially, the Applicant cannot capture and store stormwater under the larger Smith Avenue parking lot because that parking lot slopes across the entire expanse of the parking lot to

the public alley. There is no opportunity, therefore, to collect the water in the first place. Water is directed across the alley to the smaller parking lot at Chestnut Street adjacent to the Applicant's restaurant building. The only available solution is to store the water underground. There are two basic ways to store storm water underground – let the water filter through a pervious surface -- through porous pavers as the Staff Report notes, for example – or direct the water underground through catch basins. EITHER WAY there has to be somewhere for the water to go and be held.

To meet the 1.64 cfs standard on this site, as the department of public works does its calculations, the underground storage has to be 60,000 gallons. In order to provide 60,000 gallons of underground water storage on the site, the Applicant will have to excavate 40,000 cubic feet of earth, including about 10,000 cubic feet of bedrock.

As the Staff Report notes, Cossetta's has resisted this solution from the beginning of its approval process over a year ago. Cossetta was nevertheless prepared to proceed with this plan until it started construction and confirmed that sub-surface conditions made this solution impractical and in fact potentially hazardous to health and safety. Specifically, excavation for the restaurant addition uncovered or confirmed the following:

- Excavation confirmed pre-construction soil borings: limestone bedrock is within three feet or less from grade over much of the site.

- In the course of excavating the basement of the addition, Petitioner encountered lead and petroleum contaminated soils, which required a $250,000 cleanup under the Minnesota Pollution Control Agency Voluntary Investigation and Cleanup Program.

- In order to install the proposed underground stormwater Storage System, consisting of 4-foot diameter pipes that will hold up to 7940 cubic feet (about 60,000 gallons) of water, Petitioner will have to excavate an area of at least 4,000 square feet to a depth of about 10.00 feet, requiring Petitioner to break up and haul away up to 10,000 cubic feet of bedrock (our civil engineer estimates between 8,500 and 10,000 cubic feet).

- The existing bedrock is fissured limestone. The approved storm water detention system would sit inside a 10 foot deep, 40 foot wide, 100 foot long trench. The trench itself will provide a place for ground water to collect <u>outside of the detention system</u> with no place to go except through fissures in the rock, through Applicant's 100 year-old limestone walls, into the Applicant's basement level kitchen.

The Staff Report asserts that the Applicant could have explored alternatives to the under ground storage, and then acknowledges that the Applicant did explore the possibility of porous pavers <u>with staff</u>. The Applicant's engineers determined, as they testified at the BZA hearing, that porous pavers are not a suitable alternative because (a) porous pavers do not work on a sloping site, (b) porous pavers do not work over shallow bedrock and (c) even if porous pavers could be installed, the result would be storing 60,000 gallons of water in the fissured limestone bedrock <u>outside</u> a storage tank would be even riskier than storing that volume inside the tank.

The Applicant also explored storing the storm water on the roof of the project. The Applicant rejected that alternative because that storage would defeat one of the primary purposes of the project, which was to provide rooftop dining and, more importantly, the roof top storage would have absolutely no beneficial affect on the parking lot run off, which is the only run off Section 63.319 regulates.

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

The practical difficulties are a product of the slope of the site, the condition of the existing soils and bedrock, and the condition of existing foundation walls. The Staff Report assertion that the hardship is self-imposed because the Applicant accepted the approved design as a condition of site plan approval is absurd. The plight is the substantial risk that the approved design will cause long term damage to the Applicant's property. This was true two years ago when the Applicant thought the underground storage was a bad idea and it is true now, when the Applicant knows the underground storage is a bad idea after the Applicant has seen subsurface conditions first hand and has experienced storm water infiltration through his limestone foundation wall.

At the BZA hearing, the Commissioners expressed concern that, if the BZA granted the variance to the Applicant, every future developer would seek a similar variance. When asked if others are being required to comply with Section 63.319 under similar circumstances, staff could not come up with a single example. Staff mentioned the Project for Pride in Living project on West Seventh, but also acknowledged that that project included open space, which provided an opportunity for natural infiltration. That project is a 44 unit residential rental project, on a substantially flat site, with a significant amount of landscaped open space. (See attached site plan). In order to grant a variance in the first place, the BZA has to find that the variance is appropriate due to "circumstances unique to the property." Others cannot claim entitlement to the same variance unless they can claim the same "unique" circumstances. The Cossetta's site is unique in its existing dense development, its sloping site, its bedrock subsurface, its existing porous limestone foundation walls, its need for a basement level kitchen. There is very little risk that the BZA or City Council will have difficulty distinguishing future projects from this one.

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

The Board of Zoning Appeals adopted the Staff Report finding that "this finding is met." The Site is currently zoned B-5 and all of the proposed land uses are permitted within the B-5 zoning district. The variance will, in fact, allow the Petitioner to proceed with a project that is allowed and is being encouraged by the City.

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

The variance itself will maintain or modestly reduce the existing flow rate. More importantly, the project will improve existing conditions, by directing surface water to catch basins with a filtration system that will remove sediments before the storm water enters the

sewer system. The proposed variance will have no effect at all on the essential character of the surrounding area – which is an urban commercial district that will be enhanced by the addition, which is consistent with the historical character of surrounding structures. The Staff Report assertion that the essential character of the surrounding area will be adversely affected by "polluted quantities of storm water flowing uncontrolled to the public storm sewer system and ultimately the Mississippi River" is patently false.

B. **Other issues raised at the Board of Adjustment Hearing and in the Staff Report.**

1. **The Development Agreement should have no bearing on the BZA decision.**

The Staff Report created significant confusion at the Board of Zoning Appeals hearing by introducing the Applicant's obligations under its Development Agreement with the St. Paul Housing and Redevelopment Authority ("HRA"). The Development Agreement was completely irrelevant to the discussion. As the Staff Report acknowledged, the Development Agreement is outside the scope of the BZA authority. Because of the confusion raised, and because the Development Agreement is not outside the authority of the City Council, we note the following about the Development Agreement:

a. The Staff Report states that "the BZA has no legal right to grant a variance on a request that is part of a Loan Agreement with another city agency." The Applicant agrees, but the Applicant did not ask the BZA, and is not asking the City Council, to grant a variance to the Development Agreement. The Applicant asked the BZA, and is now asking the City Council, for a variance from the zoning ordinance. The Applicant has a separate obligation under the Development Agreement "Sustainability Undertakings" to meet the 1.64 cubic feet per second per acre rate control standard "or such other rate as is approved in the site plan approval process." The HRA and the Applicant negotiated this point at length and ultimately added the underlined language with the intent of deferring to the zoning approval process, including the variance and appeals process, to determine what storm water management measures are appropriate for the project. The Applicant understands it will have to address this issue with the HRA, but the Applicant must first obtain the variance from zoning ordinance requirements.

b. The HRA required the Applicant, as it is requiring all recipients of assistance in excess of $200,000, to incorporate Sustainability Undertakings in its project. The Development Agreement includes 11 separate Sustainability Undertakings. The Applicant has incorporated 100% of 10 of those undertaking in the project. Rate control, the only item from which the Applicant seeks relief, is one of five subsections of item 7 on the list of undertakings. More importantly, again, this is a matter of contract between the HRA and the Applicant and the Applicant is asking for a variance from the zoning requirement.

c. Under the Development Agreement, the HRA is providing the Applicant with $2,000,000 in financial assistance, in the form of (1) a market rate loan, which Applicant will pay back with interest, (2) tax increment financing, which Applicant will pay back with interest through increased taxes, in addition to the increased taxes Applicant will pay that do not get applied to repay the TIF, and (3) a forgivable loan, which the City will forgive over time only if the Applicant completes the project and provides the City with the operating benefits the

Applicant promises to provide in the Development Agreement. The Applicant is grateful for the assistance and very respectful of the investment the City is making in the success of the project. As required by law, before providing the assistance to the Applicant, this City Council determined that the project provided the City with a significant public benefit and but for the assistance the Applicant could not proceed with the project. The Applicant willingly accepted 10 out of 11 Sustainability Undertakings and reserved the right to a hearing on the appropriateness of the rate control requirement. Applicant has demonstrated that the rate control requirement is not appropriate for the site and respectfully requests a variance of the zoning requirement so Applicant can address the contract requirement with the HRA.

2. **The approved underground stormwater storage system is not consistent with best management practices.**

Section 631.319 and Chapter 52 incorporate the following specific standards for parking lot design and storm water management, each of which requires a practical approach tailored to specific site conditions:

- **"Protecting Water Quality in Urban Areas," Minnesota Pollution Control Agency 2000** Section 2.10 adopts a "first do no harm" strategy by establishing the following priorities:

  **PRIORITIES**
  *Address the appropriate BMPs by priority:*
  *1. Avoid adverse impacts.*
  *2. Minimize unavoidable adverse impacts.*
  *3. Mitigate unavoidable adverse impacts.*

- **"Protecting Water Quality in Urban Areas," Minnesota Pollution Control Agency 2000** Section 2.10 requires implementation of BMP options that are suitable for the specific site and project:

  **Physical Site Suitability**
  *BMPs should only be used in areas where the physical site characteristics are suitable. Some of the important physical site characteristics are soil type, watershed area, water table, depth to bedrock, site size and topography. If these conditions are not suitable, a BMP can lose effectiveness, require excessive maintenance or stop working after a short while. . . . The physical site conditions must be examined for each practice.*

- **"Protecting Water Quality in Urban Areas," Minnesota Pollution Control Agency 2000** Section 2.10 requires implementation of BMP options that are cost effective:

  **Cost Effectiveness**
  *. . . . Economics is an important consideration in the selection of BMPs that will achieve the water-quality goal at the least cost. This should be considered when selecting BMPs and deciding how they will be implemented. To properly compare alternatives, all costs for the design life of a BMP should be included. These include expected maintenance costs as well as the initial costs for land, engineering and construction. To*

*create a true economic picture of a BMP, benefits other than water quality and flood prevention should also be considered.*

- **Capitol Region Watershed District Rules.** Although the Code does not expressly refer to the Capitol Region Watershed District Rules, the CRWD Rules are the most relevant set of standards because the CRWD Rules would apply if the Petitioner's project disturbed one acre or more. The CRWD Rules would not require Petitioner to install a costly, hazardous, and possibly ineffective underground stormwater storage system.

- **Capitol Region Watershed District Rules.** Rule C 3. Criteria, (b) RUNOFF RATE, would probably not require the Petitioner to do anything about runoff rates:

  *Runoff rates for the proposed activity shall not exceed existing runoff rates for the 2-year, 10-year, and 100 year critical storm events, and runoff rates may be restricted to less than the existing rates when the capacity of downstream conveyances systems is limited.*

- **Capitol Region Watershed District Rules.** Rule C 3. Criteria, (c) RUNOFF VOLUME, (1) recognizes that site conditions may not be suitable for any stormwater detention or retention, and therefore provide for Alternative Compliance:

  *(viii) Specific site conditions may make infiltration difficult, undesirable, or impossible. Some of these conditions are listed in Table 2 and may qualify the applicant for Alternative Compliance Sequencing. The applicant may also submit a request to the District for Alternative Compliance Sequencing for site conditions not listed below. All requests shall indicate the specific site conditions present and a grading plan, utility plan, and the submittal requirement listed in Table 2.*

- **Capitol Region Watershed District Rules.** Rule C 3. TABLE 2--Alternative Compliance Site Conditions specifically recognizes "bedrock within 3 vertical feet of bottom of infiltration area" as a physical condition warranting alternative compliance:

  According to the latest available Capitol Region Watershed District Volume Control Worksheet, "*The contribution amount is $40,000 per acre of impervious surfaces on a project site.*" The CRWD requires a developer to do what it reasonably can do on the development site, then on an alternative site, and only then will allow a developer to make a payment in lieu of providing the required volume reduction. Clearly, the CRWD would not make Petitioner spend $250,000 for an underground water storage system when the CRWD is willing to accept $40,000 as a payment in lieu. In light of the fact that Petitioner's site is too small to be subject to the CRWD Rules in the first place, it is absurd, unfair, and wasteful to require Petitioner to spend $250,000 on a solution the CRWD Rules would not require.

3. **The Applicant has not had an opportunity to discuss alternative standards with staff.**

The Applicant has asked for an opportunity to discuss alternative standards for compliance. Staff criticized Applicant in the Staff Report and at the BZA for failing to adopt alternative means of compliance with the 1.64 cfs rate control standard, such as installation of porous pavers or use of rooftop storage. The truth is, Applicant has looked at these alternatives and others and concluded that at best the alternatives would reduce the size of the underground storage modestly, but would not replace the underground storage. If the Applicant has to dig a trench of any size for underground storage, the water infiltration risk is created and the expense is incurred. There is no point in creating additional expense, and losing additional productive land, with small areas of pervious pavers. Roof top drainage makes no sense at all because it cannot satisfy the requirements for storm water drainage in the parking lot.

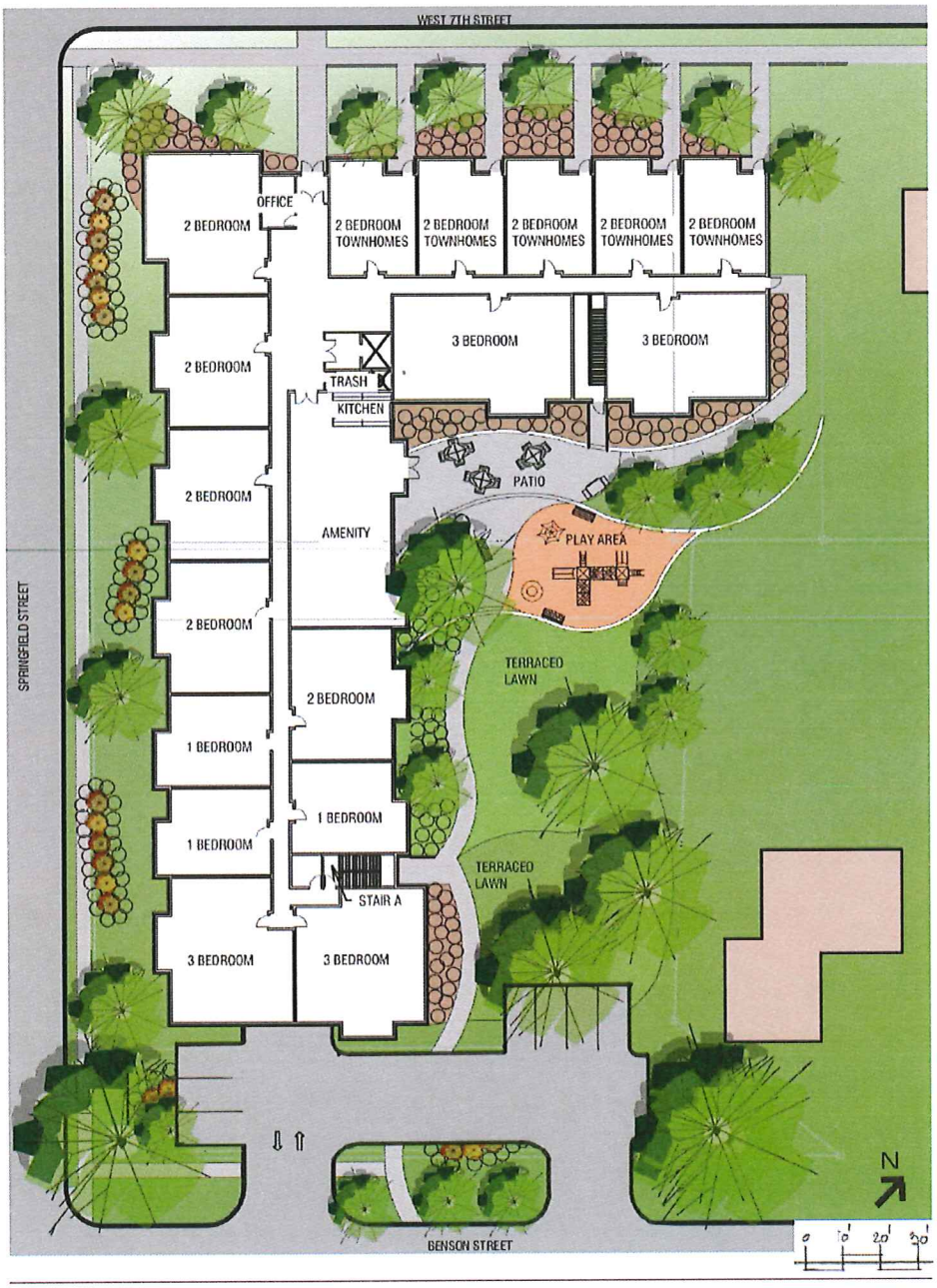
Staff has not discussed alternatives to the 1.64 cfs rate control standard. In its May 4, 2012 written submittal and at the BZA hearing, the Applicant stated that the Applicant is willing to construct a rain garden or implement another storm water management practice on another site. Specifically, Petitioner owns a site within a few blocks of the project site, downstream, at 226 Ryan Avenue. That property is a 50.00 feet x 100.0 feet vacant lot, adjacent to residential properties, that would be an ideal site for a rain garden. The Applicant is prepare to discuss other alternatives.

## CONCLUSION

**The Applicant respectfully asks the City Council to reverse the BZA denial and grant the variance from compliance with the strict requirements of Section 613.319. The proposed variance meets all 6 required findings. Specifically, with the variance, the project will be (1) in harmony with the purposes and intent of the zoning code and (2) consistent with the comprehensive plan, including provisions that require water quality improvements, (3) practical difficulties, and not just economic considerations, prevent the Applicant from complying with the strict requirements of the zoning code, (4) the Applicant's plight is due to unique characteristics of the site, relating to grading and subsurface conditions, not caused by the Applicant, (5) the variance will not allow a use that is not otherwise allowed, but will in fact support the continuance of an existing allowed use, and (6) the variance is consistent with the essential character of the surrounding neighborhood.**

### Incorporation of Submitted Documents

The original April 13, 2012 Variance Application, attached to that Application and our May 4, 2012 Supplemental submittal are incorporated by this reference in our Appeal.




PPL West 7th & Snelling Family Housing

St. Paul, MN 02.04.2009

Site & First Floor Plan