Before the Board of Zoning Adjustment, D. C.

Appeal No. 11448, of Edward A. Shay, pursuant to Section 8207.2 of the Zoning Regulations for a special exception as provided by Section 4101.42 and 4306 of the regulations.

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

Introduction and Summary

The applicant requests a special exception to construct an 8-story office building containing 52,729 square feet of space on Lots 58, 59, and 807 of Square 158, which are located on the north side in the middle of the 1700 block of N Street, Northwest. This block is zoned Special Purpose (R. 1-3). [1] Section 4101.1 of the Zoning Regulations defines the SP District as follows:

> "The Special Purpose District is designed to stablize those areas adjacent to the C-4 District which contain office, other Central Business District supporting uses, as well as desirable sites for residental buildings. Offices apartment houses, hotels, and controlled parking facilities are to be encouraged therein and the district will be generally restricted to the periphery of the C-4 District."

The subject site is presently occupied by three joined 19th century structures called The Tabard Inn which is presently used as a hotel (R. 1, 176, 213, 258-259). In order to merit the special exception he seeks, the applicant has the burden of demonstrating by a preponderance of reliable, probative, and substantial evidence that:

> "(a) The use is in harmony with existing uses on neighboring or adjacent property; (and)
> "(b) The use will not create dangerous or other objectionable traffic conditions." (Zoning Regulations, ss 4101.42; Stewart v. District of Columbia Board of Zoning Adjustment, D. C. App., 305 A. 2d 516, 518 (1973).)

[1] "R." refers to the administrative record as paginated and filed in the District of Columbia Court of Appeals in Shay v. District of Columbia Board of Zoning Adjustment, D. C. App. No. 8231.

Upon consideration of the testimony and documentary evidence submitted in behalf of the applicant and in behalf of those opposing the application, the Board concludes that the applicant has met his burden of proof with regard to the first standard, but has not met his burden of proof with regard to the second. Accordingly, the application for special exception must be denied.

FINDINGS OF FACT

1. The uses in the block are mixed - about 50% office use and 50% residential, including private townhouse residences, hotels, and apartment houses. A number of structures built for residential use have been converted to office use. (R. 188-189, 211-212, 244, 259, 292.)

2. The proposed building would have slightly less than 53,000 square feet of office space on seven floors of offices with an estimated maximum of six tenants per floor. The applicant could not forecast with any certainty what specific types of professionals would tenant the building or in what proportion. If these offices were occupied by engineering firms, employing draftsmen, it is possible that the building would have several hundred employees. (R. 175, 181-183.)

3. The applicant plans to have 29 parking spaces within the building, the minimum number required for a new office building in an SP District with a gross floor area of 52,729 square feet. (See "Commercial Buildings" category of ss 7202.1 of the Zoning Regulations and R. 177).

4. With regard to the projected visitor rate the proposed building would generate, Mr. Burton Sexton, an expert witness called by the applicant, testified that he estimated it would be approximately 20 to 30 visitors per day (R. 191). He stated that his estimate was based on his experience of approximately 150 office buildings (R. 197). Mr. Sexton admitted, however, that the number of visitors would vary according to the nature of the tenants (R. 191). The Board rejects the opinion of Mr. Sexton that the visitor rate will be 20 to 30 persons per day because such opinion is without a satisfactory underlying factual basis. See Taylor v. District of Columbia Board of Zoning Adjustment, D. C. App., 308 A. 2d 230, 236 (1973). There is no indication that Mr. Sexton's experience is based on a study of office buildings

in SP zones with the special limitations on the types of tenants which may occupy such buildings. Moreover, without knowledge of what types of professional persons will likely tenant the proposed building, he is in no position to predict the visitor rate with any reasonable degree of accuracy (see R. 185-186). Since the applicant plans to meet only the bare minimum parking space requirements, only 25% of the gross floor area of the building may be devoted to offices for doctors and dentists. See Zoning Regulations ss 7202.1, supra. Yet even with this limitation, the number of doctors and dentists tenanting the building could be ten or more. Common sense compels the conclusion that this group of professionals alone could generate visitor traffic substantially in excess of 30 per day.

5. As regards auto traffic likely to be generated by persons who would work in the proposed building, Mr. Sexton stated that he estimated that only 20 of such persons would make daily auto trips to and from the building each work day (R. 191). However, Mr. Sexton gave no estimate of the number of people who would be working in the building nor proffered any reasons why only 20 out of the total number of such persons could be expected to drive to work. In short, Mr. Sexton's estimate of auto traffic generated by those working in the proposed building is so totally lacking in underlying factual basis that it cannot be accepted as reliable.

6. The 1700 block of N Street, Northwest, is not a major traffic artery. At this location N Street is a relatively narrow in width (32 feet), one-way, eastbound street. There is metered parking on both sides of the street and parking is permitted during the morning and evening rush hours (R. 184-185, 196, 203, 206, 209, 244). A stop sign controls eastbound auto traffic exiting the east end of the block onto Seventeenth Street (R. 202-203). During the evening rush hours, motorists wishing to exit the block have considerable difficulty doing so because of the heavy two-way rush hour traffic on 17th Street. Traffic is regularly backed up the entire length of the block and motorists experiencd long waits before they are able to exit the block (R. 201-204, 244; Supp. R. 106-107, 126-127).[2] Frequently there is heavy traffic

[2]"Supp. R." refers to the supplemental record filed in the District of Columbia Court of Appeals in Shay v. District of Columbia Board of Zoning Adjustment, supra.

congestion in this block at other times of the day, especially during the morning rush hour (Supp. R. 77-78, 84-86, 106-107, 126). Delivery trucks double park in the block, making vehicular passage very difficult. Cars are routinely parked on the sidewalk interfering with pedestrian traffic; and fire trucks have difficulty negotiating the traffic congestion in the block (Supp. R. 108, 126-127).

7. Mr. Sexton testified that N. Street in this block has minor traffic volume (R. 190). His opinion was based on a District of Columbia Department of Highways and Traffic survey report made in 1969 and updated by application of a percentage formula to 1973. Mr. Sexton stated that he has never actually seen the report but received information contained in the report over the telephone (R. 194-195). He stated that he arrived at his current estimates of the amount of traffic by taking the 1969 figures and adding 3% per year, a factor supplied by someone in the District of Columbia Government (R. 199-200). We cannot accept as reliable and probative Mr. Sexton's opinion that the traffic volume in the 1700 block of N Street is minor for the following reasons:

1. The opinion is based on a report he never saw.

2. There is no indication that the 3% update factor is an accurate gauge of the actual increase in traffic in this block since 1969. In this regard, it should be noted that Mr. David Devine, a traffic engineer with the District of Columbia Department of Highways and Traffic, was not even sure that 3% was the proper increase factor (R. 250).

3. The day before the hearing, when Mr. Sexton was actually on the scene during the evening rush hour, he observed the heavily congested condition of the 1700 block of N Street and admitted that motorists wishing to exist the block have considerable difficulty doing so (R. 201-203).

8. Mr. David Devine, a traffic engineer from the District of Columbia Department of Highways and Traffic, testified that his department had no objection to the granting of the special exception (R. 243). He testified that the traffic study made in 1969, some four years previous to this application, indicated that traffic was quite light in the block (R. 245). He admitted, however, that he knew of no studies of rush hour conditions in the block during the preceding two or three years (R. 247).

Thus, Mr. Devine's testimony was not probative of the traffic conditions in the block as they existed at the time of the hearing.

OPINION

There can be no question that during the morning and evening rush hours, traffic is very congested in the 1700 block of N Street, Northwest. N Street at this location intersects two major rush hour arteries, namely, 17th and 18th Streets. It certainly does not appear that, from a traffic engineering standpoint, N Street at this location is designed to handle much traffic in view of the fact that parking is permitted on both sides of the street at all times and in view of the fact that all motorists wishing to exit the block must yield right-of way at all times tomotorists on the major artery that is 17th Street. In this regard, it is significant that the applicant offered no evidence at the hearing that the District of Columbia Department of Highways and Traffic intends to make changes in this block that would improve traffic flow.

The degree of existing traffic congestion is of course highly relevant to the amount of increase in traffic volume which may be said to be objectionable. If the traffic is already heavy and congested, as it is in this location, a relatively small increase in traffic volume, tolerable elsewhere, may be objectionable. The evidence presented by the applicant has not reliably demonstrated to us that the vehicular traffic which the proposed office building may possibly generate will not in a substantial way exacerbate the already difficult conditions in this block. Specifically, the applicant has failed to assure the Board by reliable, probative, and substantial evidence that the number of employees and visitors, suppliers, and others making daily trips to and from the proposed building by motor vehicle will be so insignificant as not to burden in a significant and measurable way the already strained traffic-bearing capacity of N Street in this block.[3] Before the Board can permit this proposed office building to be built, the Board must have such assurance, for once our approval is given and the building built, there is no retrieving the situation. Applicants for special exceptions frequently must bear the burden of establishing the lack of any significant traffic impact and have been able to do so when the requisite reliable evidentiary facts are at hand. See, e.g., Dietrich v. District of Columbia Board of Zoning Adjustment, D.C.App., 320 A. 2nd 282, 283-284 (1974). Here the requisite

3. The applicant presented no evidence as to amount of vehicular traffic generated by the Tabard Inn hotel which presently occupies the site.

evidentiary facts were lacking . The opinions of the experts called by the applicant did not have a sufficient underlying factual basis to render them reliable and probative. Without the requisite underlying factual bases, these opinions constituted little more than hopeful speculations.

The commencement of the operation of the subway system may result in such a decrease in motor vehicle congestion in this area of the city that an office building of this size and character at this location might not cause an objectionable increase in traffic. However, we are not in a position to accurately forecast the effect the operation of the subway system will have on downtown traffic. Moreover, if this application were granted, the building would likely be built and in full use several years before the subway system is in full operation.

The applicant has argued that because the Board has in former years granted applications of this nature for new office buildings along near Massachusetts Avenue, it should grant the instant application (see R. 33, 38-43). Unlike the 1700 block of N Street, Northwest, Massachusetts Avenue is a major traffic artery with a far greater traffic-bearing capacity. Thus, Board decisions relating to what traffic increases may be unobjectionable on Massachusetts Avenue cannot be said to control similar Board decisions regarding the 1700 block of N Street, Northwest.

Finally, it should be noted that some of those who opposed the granting of this application asserted that the granting of this application would have an adverse effect on the historical and architectural character of the 1700 block of N Street, Northwest. While this may be true the Board makes no findings and conclusions as to this issue because such issue is not one which the Board may properly consider under the applicable Zoning Regulations. Lest there be any doubt about the matter, the Board states that in deciding this case, it gave no consideration whatsoever to the architectural and historic preservation arguments advanced by the opponents of this application. (See R. 179-180; Supp. R. 49, 53, 71-73, 107-108.)

CONCLUSIONS OF LAW

Upon the foregoing, the Board makes the following conclusions of law:

1. The applicant has demonstrated that the proposed use is in harmony with existing uses on neighboring or adjacent property.

2. The applicant has not demonstrated that the proposed use will not create dangerous or other objectionable traffic conditions.

ORDERED: That the above application be DENIED.

The Board voted 3-1-0, to deny the application. Mr. Harps dissented and Mr. Klauber abstained because he was not a member of the Board at the time of the hearing. Because of the exigent nature of the case, the Board decided not to wait until its next formal executive excession, scheduled for April 22, 1975, to approve a redraft of the Fingings and Conclusions. A draft of the Findings and Conclusions was prepared and sent to each Board member. After reviewing the proposed Findings and Conclusions, Board members telephonically communicated their approval or disapproval to the Secretary to the Board

BY ORDER OF THE BOARD OF ZONING ADJUSTMENT, D. C.

ATTESTED By: James E. Miller
JAMES E. MILLER
Secretary to the Board

FINAL DATE OF ORDER: APR 09 1975

Before the Board of Zoning Adjustment, D. C.

Application No. 11448, of Edward A. Shay, pursuant to Section 8207.2 of the Zoning Regulations for a special exception to permit the construction of an eight (8) story office building in a SP District and approved of roof structures as provided by Section 4101.42 and 4306 of the regulations for the premises located at 1739 N Street, N. W., Lots 58, 59, 807, Square 158.

HEARING DATE: November 14, 1973

EXECUTIVE SESSION: November 20, 1973

FINDINGS OF FACT:

1. The applicant proposes to construct an eight (8) story office building to be used as an office building as provided by Section 4101.42 of the regulations for a Chancery, non-profit organization, labor union, architect, dentist, doctor, engineer, lawyer or similar professional persons. The improvements that currently exist on the property consist of a hotel with 48 units, with no off-street parking.

2. The 1700 block of N Street, N. W. is composed of row-dwellings used for residential, and commercial purposes. Across the street from the subject property is the Canterbury House, a relatively new apartment building complex. At the other end of the street, 18th and N Streets, N. W., are two office buildings and a commercial parking lot.

3. The 1700 block of N Street, N. W. is a one way street, 32 feet wide with parking permitted on both sides of the street.

4. The proposed building would contain approximately 48 offices and have a capacity for several hundred employees.

5. Opposition at public hearing was based upon the increase of traffic to the 1700 block of N Street, N. W. and alleged destruction of this old section of downtown Washington.

6. Mr. Burton Sexton, of Wilbur Smith and Company, expert witness for the applicant testified that the traffic volume in the 1700 block of N Street, N. W. is minor.

7. Mr. Burton further testified that (a) southbound traffic on 17th Street which is perpendicular to N Street on the east has roughly 2,000 trips during the A.M. rush hour. (b) that during the P.M. rush hour when traffic is two way, approximately 600 trips are made southbound, and 250 are northbound.

8. The Board finds that in order to travel east in the 1700 block of N Street, N. W., that all traffic must enter from 18th Street on Connecticut Ave., and all drivers using the Colonial Parking Lot at the corner of 18th Street and N Street must arrive and leave in an eastward direction.

9. The Board finds that the use of the proposed office building which may be used by doctors, dentists, architects, engineers, lawyers, and chanceries, would substantially increase traffic in the 1700 block of N Street, N. W.

CONCLUSIONS OF LAW:

Based upon the above Findings of Fact, the Board is of the opinion that the applicant's request for a special exception under Section 4101.42 of the regulations cannot be granted. In deciding the application, the Board must make findings on whether or not the proposed use is in harmony with existing uses in the neighborhood and whether or not, the use will create any dangerous or other objectionable traffic conditions.

The Board reasons, that because of the narrow width of N Street in the 1700 block, because of the existing commercial uses in the block, and the parking lot at corner of 18th and N Street, N. W., and because of objections registered at the public hearing by the opposition, that the proposed use, if allowed, would substantially increase the amount of traffic in the neighborhood thereby creating an objectionable traffic condition.

ORDERED: That the above application be DENIED.

VOTE: 4-1 (Mr. Harps dissenting)

BY ORDER OF THE D. C. BOARD OF ZONING ADJUSTMENT

ATTESTED By: James E. Miller
JAMES E. MILLER
Secretary to the Board

FINAL DATE OF ORDER: MAR 05 1974