GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 13444, of Murray Levine, et al., pursuant to Sub-section 8207.2 of the Zoning Regulations, for a special exception under Paragraph 3104.44 to operate a parking lot in an R-5-B District at the premises 1520 O Street, N.W., (Square 195, Lots 818, 819, 817, 816, 68 and 69).

HEARING DATE: March 18, 1981
DECISION DATE: April 1, 1981

FINDINGS OF FACT:

1. The subject parking lot is located on the south side of P Street between 15th and 16th Streets, N.W., and is known as premises 1520 O Street, N.W. It is in an R-5-B District.

2. The subject site has been used as a parking lot for at least fifteen years. The subject lots were last approved by the BZA in BZA Order No. 12225, dated May 23, 1977, for a period of three years.

3. The subject application was filed January 6, 1981, more than six months after the last approval of the Board had expired, even though the applicant was advised by letter of the Zoning Inspection Branch dated May 23, 1980, that the parking lot was being operated without a valid Certificate of Occupancy.

4. No proper Certificate of Occupancy has existed for the lot since permit No. B-87372 expired on August 27, 1975. This parking lot has thus been operated illegally since that time, in violation of Sub-section 8104.1 of the Zoning Regulations.

5. The subject property consists of six lots. There is an individual owner for each of five lots, with one person owning two lots. Section 3.5 of the Supplemental Rules of Practice and Procedure before the Board states that, in parking lot applications, the owner and the operator of the parking lot shall appear before the Board. None of the owners was present. Their surrogates did not posses any knowledge as to what the future plans of the owners were for the subject lots. Most of the surrogates read prepared statements of the owners. The statements reflected that it was the owners' intentions that the lots would remain as is, or, when it is opportune, the lots would be developed.

6. The operator of the parking lot testified that he visits Washington three times a week to supervise fourteen parking lots. According to his testimony, the lot is operated from 7 a.m. to 6 p.m. Monday through Friday. There is one attendant. The lot is open at night and weekends for the use of the neighboring residents and the nearby churches. The lot is policed once a day. There is a weekly clean-up on Saturday evening. The operator testified that he has received no complaints and that if complaints were received, they would be directed to his attention. The operator testified that it was not his impression that he was responsible for the lot once it closed at night or on weekends.

7. The parking lot accommodates seventy cars. The parking plat of record evidences fifty-seven marked-off spaces. The operator testified that the lot was relined to accommodate smaller cars. Approximately thirty-three spaces are reserved for all day commuter parkers. There is no charge for the use of the lot after it closes at 7:00 p.m.

8. Entrance to and exit from the lot are from O Street and the alley to the rear of the lot. In the operator's opinion, the lot created no adverse traffic impact.

9. In prior application No. 12225, the Board approved continued use of the property as a parking lot for a period of three years. In order to protect surrounding properties, the Board imposed a series of conditions on the approval. Condition "f" reads in part "All parts of the lot shall be kept free of refuse and debris..."

10. A property owner residing at 1528 O Street objected to the application. She testified at the public hearing and submitted photographs with dates thereon of the subject parking lot, reflecting the lot as an eyesore because of accummulated trash and litter on the parking lot. She complained of trash cans overflowing with litter, noise from the lot on the part of the attendant and his company who were partying, of finding used condoms and hypodermic needles on the lot. She testified as to asking the police to keep watch on the property. She also testified that she did not personally report to the police any particular crime. The Board finds that the pictures submitted evidence that the lot was not properly cleaned and policed and that the schedule of cleaning as testified to by the operator of the lot is less than adequate.

11. The Dupont Circle Citizens Association objected to the application on several grounds. The applicant had not met the burden of proof in establishing that the subject use did not create dangerous or otherwise objectionable traffic conditions. All the applicant testified to were the hours of operation of the lot, the status of the users of the lot, the number of spaces and the clean-up policy. As to the adverse affect on the present character and future development of the neighborhood, the applicants could present no future plans for the lots since they were absent at the public hearing. The DCCA testified that housing has been developed in that neighborhood on sites which were previously parking lots, and that most of the subject owners were satisfied to keep the site as a parking lot rather than put it to

residential use. The DCCA representative also testified that she personally visited the lot and corroborated that it was an eyesore with its accumulated trash and debris and in such a condition that the lot is a blight on the neighborhood. As to the lot being reasonably necessary and convenient to other uses in the neighborhood, the DCCA testified that the subject site is reachable by the 14th Street bus line, the P Street bus, the 16th Street bus and that two Metro stations are approximately five blocks away at McPherson Square and Dupont Circle. There is also a subway stop at Farragut North. All in all the area is well served by public transportation. The DCCA also testified that there are other parking lots in the neighborhood where users of the subject lot could be accommodated. The DCCA also suggested that since the Certificate of Occupancy had expired on this lot, it was no longer a continuation of a parking lot but rather an application to establish a parking lot. The Board concurs in all the objections of the DCCA except the issue of putting the lots to residential use. The applicant is seeking his relief through a special exception. The applicant does not have the burden of proof to establish that the site cannot be used for residential purposes.

12. The record reflects that at least one letter from a resident of the subject block was sent to the operator of the lot, complaining of various adverse conditions resulting from the activities on the parking lot. No reply to that complaint was ever sent to the resident.

13. Advisory Neighborhood Commission - 2B testified that by unanimous vote the ANC opposed the application. The ANC reported that the fundamental reason for the ANC's opposition was that this lot is located in an R-5-B zone. Because the character of this area is intended to be residential, the ANC opposed continuance of a use that so conflicts with and disrupts this residential character. The purpose of an R-5-B zone is housing. This parking lot has occupied the subject property for many years despite a housing shortage in the District of Columbia. The ANC was also concerned that the lot has been used in ways which jeopardize the neighborhood. Residents have complained that the lot has not been kept free of trash, that loud noise and music have emanated from the lot, and that the lot has been the base of certain illegal activities. Complaints by the residents to the lot owners or operators have not brought about any change in these conditions. The ANC is further concerned that the owners were notified by the Chief of the Zoning Inspection Branch, on May 23, that their use of the lot was without a valid certificate of occupancy and was illegal. However, the ANC viewed the lapse of time in filing an application before the Board as representing a cavalier attitude by the lot's owners and operators toward the Zoning Regulations. The ANC argued that the Board's granting of an extension would only encourage and reward the applicant and other illegal users to ignore the Regulations with impunity.

14. The Board is required by statute to give great weight to the issues and concerns of the ANC. In addressing these concerns, the Board concurs as to the litter and trash issues and that the applicant was operating without a Certificate of Occupancy. The applicant through his long history of operating the parking lot knew or should have known of his duty to comply with the laws of the District of Columbia. As to the issue of the use of the site for residential uses, the Board reaffirms that the applicant is seeking relief through a special exception and that the relief can be granted if there is compliance with the requirements of Paragraph 3104.44 and Sub-section 8207.2 of the Zoning Regulations. The applicant does not have the burden of proof to establish that the site cannot be used for residences.

15. The application was referred to the Department of Transportation on January 9, 1981, as required by Sub-paragraph 3104.444.The DOT report was not received at the time of the public hearing, whereafter the record was closed. Section 7608 provides that a forty day period is provided where the Regulations provide for the referral of an application to another public agency. The hearing was held sixty-eight days after the referral to DOT was made.

16. The record was left open for the ANC to submit the minutes of the ANC meeting at which its recommendations were made. The record was left open to receive authorization from owners not present at the public hearing for their surrogates to represent them and a statement of the future use of their lots. The record was left open for the opposition to submit photos of the condition of the lot.

17. The minutes of the ANC meeting were received and marked as Exhibit No. 27. The opposition's photographs of the condition of the lot and the accumulation of trash and debris were received and marked as Exhibit No. 24 of the record. A power of attorney given by Della Mae Shimmel to her son James Shimmel, was received and marked as Exhibit No. 30 of the record.

18. Counsel for the applicant requested additional time in which to secure affidavits from certain of the owners of the property regarding their planned use and development of the site. The Chairman ruled to deny the applicants' request for extension of time, on the grounds that the Board had enough information in the record to decide the application, and that any additional information to be supplied would not effect the basis for the Board's decision.

CONCLUSIONS OF LAW AND OPINION:

Based on the record, the Board concludes that the applicant is seeking a special exception, the granting of which requires proof that the applicant has complied with the requirements of Paragraph 3104.44 of the Zoning Regulations. In addition pursuant to Sub-section 8207.2 of the Zoning Regulations, the applicant must demonstrate that the requested relief can be granted as in harmony with the general purpose and intent of the Zoning Regulations and that it will not tend to affect adversely the use of neighboring property.

The Board concludes that the burden of proof has not been met, particularly as to the affect on neighboring properties. The Board concludes that the provisions of Condition "f" of the prior Order have not been met, since all parts of the lot are not kept free of refuse or debris. There is adequate testimony from a resident of the block, the ANC and the Dupont Circle Citizens Association, that the lot as now operated is virtually a nuisance to the area.

The Board concludes that there was no probative evidence, merely unverified conclusions, that no dangerous or otherwise objectionable traffic conditions result from the use of the property as a parking lot and that the parking lot is "reasonably necessary" for other uses in the vicinity. There is no evidence in the record that the lot is necessary to any other uses in the vicinity. To the contrary, there was ample probative evidence that the subject site is well served by public transportation, and that the parking lot is not necessary.

Also, the Board concludes that the accumulation of trash and debris does affect the present character and future development of the neighborhood and does affect adversely the use of neighboring property. The Board has further accorded to the ANC the "great weight" to which it is entitled.

The Board concludes that this case can be distinguished from Application No. 13096. In that application, the Board denied a request to continue a parking lot across O Street from the subject site. The D.C. Court of Appeals reversed the Board, concluding that the "Findings of Fact and Conclusions of Law reached by the Board are deficient." In that case, the Court cited one finding where it concluded the Board erred. The Court further cited a Connecticut case and ruled that "before the Board can decline to reissue an expiration permit, the opponents should introduce evidence of "(1) a change of conditions...and (2) other considerations materially affecting the merits of the subject matter."

In this case, testimony and evidence highlight the poor conditions of the lot, the adverse effect on adjoining property, the operation of the lot without a Certificate of Occupancy for almost six years, and the lack of diligence of the applicant in filing an application before the Board even after it was notified of the violation. All of these conditions were changed from the previous applications before the Board in Cases 12080 and 12225. Furthermore, in the subject case, the Board has found probative evidence of availability of mass transit to serve commuter traffic. The record further contains no evidence that the parking is necessary to serve any other uses in the vicinity.

As to the report from the Department of Transportation, the Board concludes that it met its obligations under Sub-paragraph 3104.444 when it referred the application to DOT. The Board has no subpoena power, and cannot compel the preparation and production of a DOT report. The Board allowed more than the required time period to elapse, and was then forced to decide the application based on the exclusive record before it.

For all these reasons, the Board concludes that the requested relief cannot be GRANTED. Accordingly, it is ORDERED that the application is DENIED.

VOTE: 4-0 (Charles R. Norris, William F. McIntosh and Connie Fortune to DENY; Douglas J. Patton to DENY by PROXY).

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

ATTESTED BY: Steven E. Sher
STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: 20 JUL 1981

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."