

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Application No. 13864, of Stewart Marshall Bloch, pursuant to Paragraph 8207.11 of the Zoning Regulations, for variances from the use provisions (Sub-section 4101.3) to operate a parking lot and from the prohibition against all-day commuter parking (Sub-paragraph 4101.413) in an SP-2 District at the premises 1304-1312 N Street, N.W., (Square 245, Lots 9 and 811).

HEARING DATES: December 8, 1982 and April 18, 1984  
DECISION DATES: January 5, 1983 and June 6, 1984

FINDINGS OF FACT:

1. The subject property is located on the south side of N Street, N.W. between Vermont Avenue and 13th Street, N.W. It is known as 1304-1312 N Street, N.W. and is in an SP-2 District. The southern portion of the subject square is bounded by M Street and Massachusetts Avenue.

2. The Board in BZA Order No. 13864, dated July 28, 1983, DENIED the same applicant the same relief for the same property. The Board concluded that the applicant had failed to meet his burden of proof in that the applicant had failed to submit probative evidence that would support the granting of two use variances. The applicant had the burden of establishing that the subject site could not be put to any of the uses established under the Zoning Regulations for SP-2 Districts. The Board in its Conclusions of Law noted that the Board took judicial notice that other sites that were previously used as commercial parking lots had been developed during the period that the subject lot has been on the market.

3. The applicant appealed the Board's Order to the District of Columbia Court of Appeals. The Board, the respondent in the case, moved the Court to remand the case for further proceedings. The grounds for this motion were that the petitioner, the applicant herein, contended in his brief that the Board erred in taking judicial notice of development of other lots which were formerly used as parking lots without giving petitioner notice and an opportunity to rebut this fact. After consideration of the Court's decision in Carey v. District Unemployment Compensation Board, 304 A.2d 18, 20 (D.C. App., 1973), the Board agreed that the petitioner should be given an opportunity to rebut this fact. The Board requested the Court to remand

this case so that it could provide petitioner with notice and an opportunity to rebut the fact that other parking lots have been developed during the period that the petitioner had owned the lot in question, and for such further administrative proceedings as would be appropriate. The Court granted the motion and the case was remanded to the Board for further proceedings.

4. The Board held a further hearing on the application on April 18, 1984. The further hearing was limited to the following issues:

- A. The applicant's response to the Board's taking judicial notice that other lots that were previously used as commercial parking lots were developed since the time that the subject lot had last received a certificate of occupancy.
- B. Additional evidence from the applicant to meet the test for the granting of a use variance; i.e., that the applicant cannot make reasonable use of the property for a purpose permitted in the SP-2 District.

5. The aforementioned initial BZA Order No. 13864, dated July 28, 1983, is incorporated herein and made part of the subject Order.

6. At the further hearing on April 18, 1984, in response to the first issue, the applicant argued that the Board should put the applicant on greater notice as to which parking lots in particular have been developed to allow the applicant to make an economic comparison. It was the applicant's further contention that any parking lots which have been so developed have not been located in SP Districts and that said lots were not located in the immediate vicinity of the subject parking lot.

7. The applicant argued that the immediate neighborhood is considered a two block radius around the subject lots. The applicant argued that to extend the concept of immediate neighborhood beyond the two blocks would bring a person into an entirely different neighborhood, one that was more attractive, developed and productive. The subject neighborhood is visited by pimps, prostitutes and drug pushers twenty-four hours a day.

8. The applicant cited the order of the BZA in Cases No. 13921 and 13922, dated June 14, 1983, for property located at 13th & N Streets, directly across from the subject lots, to continue to be used as parking lots for all day commuter parking.

9. As to the second issue, the applicant argued that no new development is occurring in the immediate area. The Logan Park building, built as a condominium, has resorted to the rental of units and only thirty percent of the residential units in the building had been leased at the time of the initial public hearing. As of the date of the second public hearing, none of the commercial space in the building had been leased, and the asking price for commercial space was only \$10.00 per square foot. The Galt Mansion, an historic mansion, the former Hysong Funeral Home, located immediately adjacent to the subject parking lot, was on the market for leasing as SP office space for over three years until the owner decided to move his property management company into the premises, following which one small tenant agreed to rent a portion of the space. In light of the economy and use history of the area, the applicant argued that development of the lots for a permitted SP use is not practical at the present time, and undue hardship would result to the owner if the application was denied.

10. The applicant argued that the price for developing the subject lots would be from \$200.00 to \$250.00 per square foot. It would have to rent at \$15.00 per square foot. Office space in the immediate area was renting from \$6.35 to \$9.50 per square foot.

11. In a post hearing submission, the applicant attempted to distinguish his site from other sites that are being developed. The applicant argued that there are three main differences between the building being built at 1313 L Street, N.W., and a building which the applicant could build on the subject parking lot, as follows:

- A. The building at 1313 L Street is being built by the Service Employees International Union (SEIU), a non-profit organization, as its headquarters. In its application to the BZA, the SEIU stated that it projected that its staff will immediately occupy fifty percent of the entire building upon completion, and would eventually occupy 100 percent of the entire building. Accordingly, the organization which is building the building intends to occupy immediately a sufficiently large amount of space to make the building "profitable" to build. The applicant argued that the property which the applicant owns would very likely remain totally vacant for several years. The applicant's witness, Meda Nalley, testified that she was unable to rent out office space in the Galt Mansion for several years, despite having three separate companies attempt to locate tenants. Finally, after the owner itself moved into the property, some space was rented out to a third party at the low rate of \$6.35 a square foot.

Such a low rate of occupancy and rental value can not support the construction of a new office building.

- B. The socio-economic conditions of the area differ drastically. The property located at 1304-12 N Street, N.W., is located in an area in transition. The applicant's witness testified that the property is visited by pimps, prostitutes and drug pushers twenty-four hours a day. The property located at 1313 L Street, N.W. also has these undesirable characters present during the evening hours, but not during the daylight hours. The property located at 1313 L Street, N.W., is surrounded by other office buildings which are occupied during the day, whereas the property located at 1304-12 N Street, N.W., is surrounded by properties which are mostly vacant during the day, and few of which contain office and commercial tenants.
- C. Financing for the SEIU was not a problem since the SEIU intended to occupy a substantial portion of the building for its own use. By contrast, the applicant argued that it would have great difficulty in securing financing for a building that would very likely be totally vacant for several years and would be competing with the Galt Mansion for tenants at \$6.35 a square foot and the Logan Park Building at \$10.00 a square foot.

12. The applicant further argued that the Iowa House located one block north on 13th Street is located within the Shaw School Urban Renewal Area and as such, it enjoys a special status not afforded to the subject parking lot. This status included a federal subsidy.

13. The applicant contended that the facts and the conclusions for the one variance as to commuter parking granted in BZA Order No. 12968 for the subject lots still prevail. The hours of operation would remain the same. There would be an attendant. The schedule for the cleaning of the lot would remain intact. The lot would cater to all day commuter parking. The neighborhood has not changed, in that there are not sufficient facilities in the area to generate enough demand for short-term parking. The applicant argued that the Board's conclusions that the subject site has no other reasonable use than the continuation of the existing parking facility and that restriction of the lot to other than commuter parking would create a hardship for the owner are as valid today as they were on September 5, 1979.

14. The applicant argued that his lot is almost identical in size to those of the Electrical Workers Benefit Association (BZA Cases No. 13921 and 13922), and the

Association was given the use variance that the applicant herein was denied. Thus, the two nearly identical applications, both requesting the same two use variances for properties on the west side of 13th Street, N.W. at its intersection with N Street, met with two opposite results at nearly the identical time. The applicant contended that the granting of a use variance for 1303-11 N Street, N.W. mandates the granting of the subject application for the same use variances. The applicant further noted that the Association argued successfully to the Board that it needed the variance because one of its lots was small in size. The applicant argued that the the two lots owned by the Association were nearly identical to the two lots of the applicant.

15. The lot will be operated on an in-and-out commercial basis with some monthly lease contracts for use of both commuters and area residents. The lot will be available for use of area residents as storage space for their cars.

16. The applicant argued that because of its nature and operation, the lot will not adversely affect the present character and future development of the neighborhood. The lot will be maintained daily, supervised by an attendant at all times the lot is in operation, and periodically policed during the day. In response to neighborhood concerns, the lot will be secured during evening and weekend hours. The lot will be available for short-term parking to serve the limited retail uses in the neighborhood, and will also provide commuter parking as well as storage space for the cars of neighborhood residents.

17. The applicant contended that a copy of a traffic and transportation consultant's report, which was provided to the Board in Cases No. 13921 and 13922, and a copy of which was given to the Board as part of the record herein, evidences that the use of the lots for parking cars will not result in an appreciable increase in traffic or noise above that generated by the existing traffic on 13th Street, which is a major roadway for commuters. In addition, there is a substantial need for commuter parking at this site due the recent closing of several parking lots in the area which reduced the number of available parking spaces by approximately 305 spaces.

18. The Board finds that the applicant did not demonstrate factually, by dollars and cents proof, an inability to realize a reasonable return from the property if put to office or residential uses. There is no evidence in the record that the subject property could not be sold to a single non-profit organization or other qualifying SP type office user and be developed.

19. The applicant's evidence focused only on office and residential uses. The applicant offered no evidence that

the site could not be put to any other uses permitted under the Zoning Regulations as a matter-of-right or as a special exception in the SP-2 District.

20. The applicant's reliance on the condition of the neighborhood to distinguish the subject site from the L Street property is misplaced. Such indicators as the presence of drug pushers and prostitutes are transitory in nature and not related to the physical condition of the property. This Board will not make long-term land use decisions based on conditions which are general to an area and which are easily subject to change.

21. In seeking relief, the applicant cites BZA Orders No. 12968, dated September 5, 1979 and No. 13921 and 13922, dated June 14, 1983, in which the Board granted the use of the sites as parking lots with all-day commuter parking. All sites were also in SP-2 Districts.

22. The Board finds that the subject application is distinguishable from the above cited orders, as follows:

- A. BZA Order No. 12968 of Hysong Realty Co., Inc., the former owner, concerned itself with the identical site as the subject application. The applicant sought a special exception to continue a parking lot and a use variance to permit all-day commuter parking. At the time the application was heard and decided by the Board, the Zoning Regulations provided that the continued operation of a parking lot in an SP District that had been in existence on October 5, 1978, could be approved by the Board for a period not to exceed four years. The subject lot was in operation on October 5, 1978, with a certificate of occupancy that expired on March 25, 1979. Consequently, by way of special exception under Paragraph 4101.41, the lot could be approved only until March 25, 1983.
- B. In the subject application, the certificate of occupancy had expired on March 25, 1981. The lot was being operated without a valid certificate of occupancy. Accordingly, the relief could not be brought for a continuance of a lot with a valid certificate of occupancy through a special exception. Since the purpose was to establish, not continue, a parking lot the relief had to be sought through a use variance.
- C. The threshold question is the burden of proof required for the establishment of a parking lot versus the continuation of a parking lot. In the former, the proof is compliance with the requirements of Paragraph 4101.41 of the Zoning

Regulations. In the latter, the burden of proof is the establishment that the site could not reasonably be put to a use for which it was zoned.

- D. Paragraph 4101.41 of the Zoning Regulations specifically prohibits the BZA from granting permission to establish any new parking lot in an SP District.

For the reasons discussed below, the Board finds that the applicant has failed to meet the burden of proof to warrant the Board's permission to establish a parking lot. It thus follows that the Board need not determine if the burden of proof has been met to grant a use variance to permit all day commuter parking.

23. In BZA Cases No. 13921 and 13922, of the Electrical Workers Benefit Association, both applications were consolidated for the purposes of the Order since both parking lots were owned by the applicant, they shared a common boundary and many of the facts regarding both applications were the same. Both lots had been approved for parking by the BZA for over twenty years. In the most recent Orders of the Board lot 822 had inadvertently been excluded. Thus, in Application No. 13921 the applicant had to seek a use variance to institute a parking lot to correct the inadvertency. The Board noted that lot 822 was a small lot with a capacity for ten attendant parking cars. Lot 822 alone could not provide ten parking spaces because it was too small to provided an access aisle. Lot 822 had been continuously operated as a parking lot in conjunction with Lot 826. Accordingly, the Board granted the use variance for a single small lot and the special exception for the larger Lot 826. Also in the Electrical Workers Benefit Associated applications the parking lot had formerly been owned by the District of Columbia Government. The property was sold at public auction to the applicants. At the public auction, the property was advertised for sale as a parking lot and was represented as a lot available for use as commuter parking in accordance with previous Board approvals. The applicant relied upon the representations made by the District of Columbia Government in purchasing the property. In granting the relief the Board decided that the parking lot operation would be limited to the expiration date of March 31, 1984.

24. The Board further finds that there is a significant difference in size between Lot 822 in Case No. 13921 and Lot 9 in the subject case. Lot 822 contains only 2,270 square feet. Lot 9, 3,425 square feet, is more than fifty percent larger. The other distinguishing features of Lot 822 are described above.

25. The Board finds that the owner in the subject application is not in the same position as the owners in Cases No. 12968, 13921 and 13922. While the conditions may not have changed, the issue of relief through a special exception or a use variance is completely different. The subject applicant is not seeking his relief through a special exception wherein his burden is less than and different from that required for a use variance. Under a special exception the burden is to comply with the requirements of the Zoning Regulations under which the relief is sought. The burden under a use variance is to establish by probative evidence that the site cannot be put to any of the uses established under the Zoning Regulations for SP-2 Districts.

26. The Board finds that the occupancy of the Galt Mansion by the applicant's property manager without a certificate of occupancy is an illegal occupancy.

27. The Board finds that the use of the subject parking lot by employees of the owner is an illegal use. The lot has no valid certificate of occupancy for any type of parking.

28. Advisory Neighborhood Commission 2C made no recommendation on the further hearing issues.

29. No one appeared at the further hearing in favor of or in opposition to the application.

CONCLUSIONS OF LAW AND OPINION:

Based on the record the Board concludes that the applicant is seeking two use variances. In order to grant a use variance, the Board must find through persuasive and probative evidence that there is some exceptional or extraordinary situation or condition inherent in the site such that the strict application of the Regulations causes an undue hardship on the owner. The Board must determine that there is no reasonable use for the property for a purpose for which it is zoned.

The Board concludes that no such condition or hardship exists. The site through special exception relief had been used as a parking lot for some twenty-seven years. A parking lot in an SP-2 District would be an interim use of land. In BZA Order No. 12968, in Finding of Fact No. 9, the applicant testified that the subject property had been on the market for years and that it was the intent of the owner that the parking lot would be an interim use until a purchaser is found. Some three and one half years have expired since the last valid certificate of occupancy was issued, and still the subject site has not been developed for a

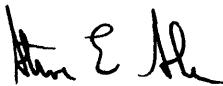
permitted SP-2 use. The Board concludes that the applicant's argument, that in light of the economy and use history of the subject area, development of the lots for a permitted SP use is not practical at the present time, is not grounds for a use variance. An inability to put the subject lot to a more profitable use does not entitle the applicant to a use variance.

The Board concludes that the applicant has not met his burden of proof, as set out in the first paragraph of these Conclusions. Accordingly, it is therefore hereby ordered that the application is DENIED. The Board cautions the applicant that the use of the parking lot for parking any automobiles and the use of the Galt Mansion by a property management firm without a certificate of occupancy are illegal uses.

VOTE: 4-0 (Walter B. Lewis, Charles R. Norris, William F. McIntosh, and Douglas J. Patton to deny, Carrie L. Thornhill not voting, having recused herself)

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

ATTESTED BY:

  
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STEVEN E. SHER  
Executive Director

FINAL DATE OF ORDER: 6 DEC 1984

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."

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