

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Application No. 13875, of ASTA Marketing Services, Inc., et al., as amended, pursuant to Paragraph 8207.11 of the Zoning Regulations for a variance from the floor area ratio requirements (Paragraph 5301.11) to use the third floor of the subject premises as offices in a C-1 District at the premises 4400 MacArthur Blvd., N.W., (Square 1356, Lot 29).

HEARING DATE: December 8, 1982  
DECISION DATES: January 5, 1983, March 2, 1983 and  
April 6, 1983.

FINDINGS OF FACT:

1. The Board at its Public Meeting of September 1, 1982, denied the applicant's request for an expedited public hearing.

2. The applicant at the Public Hearing amended the application to exclude the variance relief from the loading berth requirements of Sub-section 7302.1. An area of the site had been identified as suitable for a loading berth which was acceptable to the Department of Transportation and the Zoning Administrator to meet the requirements of a loading berth on the site.

3. The subject site is located on the south side of MacArthur Boulevard, N.W., approximately 107.67 feet from the southwest corner of the intersection of MacArthur Boulevard and Foxhall Road. It is known as premises 4400 MacArthur Boulevard, N.W. It is located in a C-1 District.

4. The subject property is improved by a newly constructed brick office structure, forty feet in height, with sixteen condominium office units. The office units are located on two full floors above grade and in a cellar level. The building also has a peaked cathedral-style attic space at the third floor level.

5. The subject property has a two-level parking garage beneath the cellar which contains sixty-nine parking spaces. There are eight additional parking spaces located to the rear of the building with access from a public alley. Access to and from the parking garage is provided from MacArthur Boulevard at a curb cut located at the northwest corner of the building. Thirty-one parking spaces are

required under the Zoning Regulations for the entire building.

6. The applicant is the owner of eight of the sixteen condominium office units, which comprise approximately sixty-four percent of the subject building. The subject variance application is for units 303/303L, 304/304L, 305/305L and 306/306L only. Specifically, the application is to allow the loft areas, the attic space at the third floor level of these units, to be used as offices. That space would contain 3,230.12 square feet of gross floor area. Each individual attic unit is accessible only by an interior staircase from the individual office unit that is below it. The attic areas are not connected at that level.

7. The office of the Zoning Administrator denied the application of the American Society of Travel Agents, Inc., hereinafter referred to as ASTA, to use the third floor of the subject structure as offices. In the letter dated August 26, 1982, the Zoning Administrator advised that the structure was approved for purposes of zoning on May 29, 1982, as a two story office building with an attic space less than six feet, six inches in height. The floor area of such a space is not charged against the gross floor area of the building. The building complied with the floor area ratio limitation of 1.0. Conversion of the attic space into a story will cause the structure to have a total of 21,152.64 square feet of gross floor area. That exceeds the 1.0 FAR by 3,230.12 square feet.

8. The plans originally approved for the building showed a ceiling in the attic space which reduced the finished height of that space to less than six feet, six inches. That ceiling was not constructed.

9. The ASTA now seeks variance relief from the FAR requirements.

10. The ASTA is the world's largest professional travel trade organization, comprised of over 19,000 travel agency members located in 128 countries. The ASTA relocated its headquarters to the subject property from New York City after a lengthy search for suitable office space in the District of Columbia. The ASTA purchased the eight units on the subject property including the loft areas of Units 303, 304, 305 and 306 with the clear understanding from the seller and its agents that this space could be utilized for office purposes. The ASTA took a prudent business course in the purchase by hiring appropriate professionals from the legal and architectural professions to review the subject property for its conformance with all District of Columbia laws. These professionals failed to note the deficiency of the loft space in that they failed to point out to ASTA that

it was technically attic space and unusable for office purposes.

11. The ASTA purchased the eight units in the subject building in May of 1982. Subsequently, ASTA spent \$250,000 in interior improvements and an additional \$1.3 million for various relocation expenses. The ASTA relocated eighteen employees from New York and San Diego to the District of Columbia and hired fifty new employees from the Washington metropolitan area. It was only upon completion of the relocation and the interior improvements that ASTA was informed that the District would not issue a certificate of occupancy for the loft areas. The ASTA did not occupy the lofts illegally and thus filed this application with the Board for a variance.

12. The variance is needed because ASTA now finds itself crowded into just the office space on the first and second levels. It had anticipated that it would be able to utilize the loft area for offices and it was only after relocation to the District that it discovered that it could not. Without the use of the loft space, ASTA indicated that it would be unable to properly deploy its executive and associated support staff and perform all of the functions which it must provide to its members and the traveling public.

13. The granting of this variance will not intensify the use of the building, but merely redistribute existing employees, who are crowded in that building, into the loft areas as originally planned. The legally occupiable office space, because of overcrowding, is unsuited to the functions which ASTA must perform to be effective. As a result of these conditions, ASTA is experiencing practical difficulties in attempting to fulfill its functions.

14. The Director of Government Affairs for ASTA submitted written testimony as one of the employees of the Society who is forced to operate from a subdivided conference room with inadequate communication facilities and inadequate space. She attested to the hardship created by the inefficient space in the performance of her job. She believed that it would be impossible for her department to continue to function efficiently and effectively in the overcrowded circumstances that exist in the building. She attested that many of her colleagues have expressed similar concerns that their work performance is not up to the professional standards expected by ASTA's members. She was of the opinion that the current work situation creates a distinct and unusual hardship on ASTA and the performance of its functions.

15. The ASTA's architect testified that he had examined the subject building including the loft space. The

building has been designed to fit into the neighborhood. He testified that the loft area in question had adequate clearance, light and air to be usable and desirable office space. The architect argued that the environmental impact of using the attic as office space will be negligible since there will be no addition to, or modification of, the existing structure. There would be no discernible change evident from the neighborhood or to existing occupants, if the building's attic space were occupied for offices. The Board so finds.

16. The ASTA's current situation is creating a hardship on its existing floor layouts by requiring employees to be located in hallways and on stair landing areas which create a deleterious effect on an efficient and effective working environment. Any additional available space elsewhere in the structure would not serve ASTA's needs. The available space is clearly separated from ASTA's existing space. The remaining space in the building is separated from the lobby and elevator core and entry to it is possible only by going outside the building.

17. It is a policy of the District of Columbia "to encourage the retention of existing businesses, the attraction of new businesses and appropriate business expansion," as set forth in Section 502(a) of the District of Columbia Comprehensive Plan Goals and Policies Act of 1978.

18. The Office of Planning and Development, by memorandum dated November 24, 1982, recommended that the application be denied on the grounds that no practical difficulty the basis for granting the requested relief, had been established. It was the opinion of the OPD that ASTA's misunderstanding as to the potential use of the loft space was a private business decision and such is not a basis to grant a variance. The Board, for reasons discussed below, does not concur in the OPD recommendation.

19. Advisory Neighborhood Commission 3B, by letter of November 19, 1983, reported that the ANC supported the application. The further reported that it had expressed reservations in approving such projects in the future for the following reasons:

- a. The ANC was hesitant to support other similar applications that might increase traffic congestion in the MacArthur Blvd. area. The applicant provided assurances that adequate parking exists underground to accommodate present staff needs and that the expansion entails no new staff increases that would further congest the area.
- b. The ANC expressed concern that new construction and utilization of office space are not being

properly monitored and documented to comply with Zoning Regulations. In the ASTA case, the ANC approved the application as a hardship case since ASTA was led to believe upon purchase of the building that the loft/attic space could be utilized as office space. The ANC urged the city to more carefully monitor zoning requirements of new construction projects.

The Board concurs with the ANC recommendation.

20. Seven letters were received in support of the application on the grounds that, since the time ASTA has operated from the subject premises, it has been a good neighbor and has taken an active part in the immediate neighborhood.

21. At its public meeting held on January 5, 1983, the Board discussed the subject application. A motion made by Lindsley Williams, seconded by William F. McIntosh to deny the application failed for a lack of a majority of the members of the Board by a vote of 2-1 (Lindsley Williams and William F. McIntosh to deny, Charles R. Norris opposed, Carrie L. Thornhill not voting and Douglas J. Patton not present, not voting). The Board deferred further consideration of the matter until its March meeting.

22. The applicant by Motion dated February 24, 1983, requested that the record be reopened for further submissions including a legal memorandum in support of the variance, a statement on the "equity role" of the BZA in variance cases and a statement on the message this application would send to the real estate community. The Board granted the Motion at the public meeting of March 2, 1983.

23. The ASTA, in its post-hearing submissions, argued that the purpose of granting variances, like the underlying purpose of other forms of administrative relief, is to mitigate the harsh consequences which result from a strict application of the Zoning Regulations. The ASTA argued that the BZA may grant an area variance if the applicant shows that the property possesses a uniqueness that creates an exceptional or extraordinary condition which creates a practical difficulty for the owner and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the zone plan.

24. The ASTA argued that exceptional and extraordinary conditions sufficient to meet the variance standard range from the size and configuration of the property to factors extraneous to the physical aspects of land. DeAzcarate v. BZA, 388 A.2d 1233, 1237 (D.C. App., 1978). An example of a factor extraneous to the property can be found in Clerics of

St. Viator Inc. v. BZA, 320 A.2d 291 (D.C. App., 1974). In that case, the extraordinary drop in enrollment of seminar-ians due solely to historical circumstances, not circumstances involving the property, was sufficient to satisfy the standard. In Monaco v. BZA, 407 A.2d 1091 (D.C. App., 1979), the court upheld the BZA's grant of a variance to the Republican National Committee based on conditions extraneous to the property. The court ruled that the BZA acted properly in deciding that the Committee's "close relationship to Congress" was an extraordinary condition sufficient to satisfy the variance standard even though it was extraneous to the property.

25. The ASTA argued that its "extraordinary" condition is less extraneous to the property than either of the applicant's condition in the Monaco or Clerics of St. Viator cases. The Society's problems are tied directly to the uniqueness of the building and property that already existed when it purchased its units. Its hardship is tied to its inability to occupy a portion of the property. In this case, ASTA is being forced to perform its functions, in an area which is far smaller than that which it, in good faith, thought it could utilize when it purchased the property. The Society's situation is due to the misrepresentation that the loft space in the condominium units could be used for office purposes. When the Society's property and situation are viewed together the exceptional or extraordinary condition it faces become evident.

26. The ASTA argued that the practical difficulties created by the exceptional condition the Society is experiencing are obvious. The difficulties are inextricably connected to the condition itself and are the reason for applying to the BZA for a variance. The Society is not permitted to utilize all the space it depended upon using, and needed to use, when it purchased the property. The result is that it is having a practical difficulty in performing its functions effectively. If the Society had an adequate alternative which would provide relief, the practical difficulty would not be as acute. However, the only relief that will solve the Society's difficulty is for it to be able to use the loft area and only the Board can grant this relief and help the Society.

27. The ASTA argued that a literal and strict view of the Board's role in the zoning process has serious and detrimental effect on the public good. The Board must evaluate the public interest in each and every case and balance that good with the intent and purpose of the Zoning Regulations. Where the public interest is served by the granting of a variance, as in this case, with the provision of employment opportunities and tax revenues to the District and the Board can justify the granting of the variance on legal grounds without creating an adverse effect on the

community, the Board, as an agency of the District of Columbia government, must act in the best interest of the District of Columbia. The Board must be cognizant of its role as a part of the overall entity that is the District of Columbia government.

28. The Board, at the public meetings of March 2, 1983, GRANTED the application by a vote of 3-2 (Carrie L. Thornhill, Douglas J. Patton and Charles R. Norris to grant; Lindsley Williams and William F. McIntosh opposed)

29. On March 14, 1983, Board member Williams filed a Motion for Reconsideration of the Board's decision. At the public meeting of April 6, 1983, the Chair ruled that the Motion was out of order in that it was not made by a member who voted with the prevailing side in the original decision on the application. On a motion made by Douglas J. Patton, seconded by Carrie L. Thornhill, the Board reconsidered its original decision to grant the application by a vote of 5-0 (Douglas J. Patton, Carrie L. Thornhill, William F. McIntosh, Charles R. Norris and Lindsley Williams to reconsider). Upon further consideration, the Board voted to grant the application.

CONCLUSIONS OF LAW AND OPINION:

Based on the record the Board concludes that the applicant seeks an area variance, the granting of which requires the showing of an exceptional or extraordinary situation or condition which causes a practical difficulty for the owner.

The Board notes that the building was originally approved for construction under plans which complied with all of the requirements of the C-1 District. Those plans provided for a ceiling to be installed in the loft/attic area, which ceiling resulted in a space having a height of less than six feet, six inches, not usable for office space and not charged against the gross floor area of the building. The subject building could be brought into compliance with the installation of that ceiling.

Such installation would however cause extreme difficulties for the applicant. It is clear on the record that the applicant purchased the subject premises with the understanding that it could use the loft areas for office space. The portion of the building owned by ASTA contains enough usable square footage to meet ASTA's needs only if the loft areas are included. Testimony on the record describes the difficulties that ASTA is now experiencing and will continue to experience if the organization is not allowed to use the loft areas. There are no other areas in the building where ASTA could expand that are adjacent to

the existing space and that could reasonably meet ASTA's needs.

It is also clear from the record that there will be no substantial adverse impact upon the area if the variance is approved. The use is permitted as a matter-of-right. Sufficient parking is provided. There will be no increase in the number of persons employed in the building as a result. There will be no change in the height, bulk or exterior appearance of the building.

It is further clear that there are policy objectives in support of approving the application. The District of Columbia has encouraged the location of new businesses in the District of Columbia, and particularly has sought associations and other trade groups. The subject organization relocated its offices to the District of Columbia from New York City, and has created employment opportunities for a substantial number of District of Columbia and metropolitan area residents.

The Board is greatly concerned however, that it is being asked to approve a variance to allow additional usable square footage in a building that with minimal changes could be brought into compliance with the Regulations. The Board is concerned that the inspection branches of the District of Columbia allowed the building to be completed and occupied without detecting that the building was not in accordance with the plans approved. The Board is greatly concerned that licensed professionals in the District of Columbia apparently clearly misrepresented to ASTA the conditions of the use of the loft area, and that other licensed professionals that ASTA retained did not detect the original errors and properly advise the applicant. These concerns will be addressed separately by the Board in resolutions.

The Board is further concerned that the integrity of the zoning process will be undermined by its actions in this matters. The Zoning Regulations are designed to set up minimum standards for the protection of the public health and welfare. Deviations from those standards in the form of variances are intended to be granted to relieve hardships and difficulties in the most unusual situations. The zoning process cannot effectively operate if the Board is viewed as a mechanism by which variances can be obtained to get around the application of the Regulations. The Board will not allow the process to be manipulated in that way.

On consideration of all the factors involved in this case, the Board concludes that the application should be granted. There are a unique set of factors affecting this property, including its ownership by an organization moving to the District of Columbia from some other area, the misrepresentation made about the status of the property to

the owner, the failure of the District of Columbia to determine that the building was not completed in accordance with the approved plans, the support for the variance from the Advisory Neighborhood Commission, owners of surrounding properties and neighborhood organizations, and the fact that approval of the application will not affect the exterior appearance or impact of the building.

The Board has accorded to the Advisory Neighborhood Commission the "great weight" to which it is entitled. The Board, however, emphasizes that this decision has no precedential value to applicants in other cases. Each application will be judged on its own merits and decisions be rendered in accordance with all applicable legal standards. Accordingly, it is ORDERED that the application is GRANTED.

VOTE: 3-2 (Carrie L. Thornhill, Douglas J. Patton and Charles R. Norris to grant; William F. McIntosh and Lindsley Williams opposed).

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

DISSENTING OPINION OF BOARD MEMBERS LINDSLEY WILLIAMS AND WILLIAM F. McINTOSH

We disagree with the Board's decision in this case. The disagreement relates not only to the majority's interpretation of the facts, but also to the longer term policy implications of this interpretation.

The Particulars of the ASTA case

The crux of the disagreement as to the facts specific to this case is whether ASTA has sustained a practical difficulty arising from the land. We believe it has not.

ASTA's difficulty flows from the apparent misrepresentation to it by the seller of the property that the loft portions, designated by L's, of office units 303/303L, 304/304L, 305/305L and 306/306L could be validly occupied and used for office purposes. (Finding of Fact No. 6).

The application before the Board relates only to a portion of the overall building. (Finding of Fact No. 6). At the time of the hearing, signs remained posted on the exterior of the subject address indicating the availability of additional units (See the Affidavit of Posting, Exhibit No. 28 of the record). When the Zoning Administrator denied ASTA a certificate of occupancy to use the attic or "loft" portion of each of the subject units, ASTA chose to file for a variance prior to and possibly in lieu of pursuing other remedies, including at least one seemingly more appropriate,

namely a remedy expressly set forth in the purchase contract (Section 11.3 of the Purchase Agreement, Part 13 of Exhibit No. 36 of the record: "Seller agrees to indemnify and hold Purchaser harmless from and against ... Any loss, liability or damage suffered or incurred by Purchaser because of the nonfulfillment of any representation, covenant or agreement on the part of Seller under this Agreement.")

Neither the builder, the seller nor agents of either appeared before the Board. This is a significant defect because, if there was any practical difficulty arising from the land in this case, which involved entirely new construction, they would have been in a better position to explain it. ASTA's remedy does not properly lie here. Clearly, ASTA should have sought equitable remedies from the builder, seller and their agents as a civil action in a court of law. ASTA could also have sought damages from those professional architects and attorneys advising it when ASTA was considering the purchase.

ASTA could, for example, have validly occupied the loft portions of the units in question if 3,230.12 square feet of office space located in other portions of the building not owned by ASTA were removed from the building's gross floor area by reconstruction and outright removal, or conceivably, by sealing off portions already constructed so that they would not be used for any purpose. The latter option might require approval from this Board.

To be sure, this would affect, among others, ASTA's ownership interest and responsibility in the overall office condominium project. Significantly, the purchase contract appears to have provided terms protecting ASTA should any of the representations made be inaccurate or be invalidated.

ASTA relies in part on the legal test under the Clerics of St. Viator, Inc. v. BZA, 320 A.2d 291 (D.C. App., 1974). That case involved a building that had been constructed some time prior for a purpose (monastery) which became obsolete and for which there was no longer a need. ASTA's case involves new construction and is thus entirely different.

A further reason for disagreement is that the Board did not limit the grant to ASTA, but rather made the grant in perpetuity. While we would disagree with any variance, we can see no reason to perpetuate the relief granted due to apparent misrepresentations. Moreover, a grant of a permanent nature may undercut any effort ASTA chooses to pursue against the sellers, their agent, or ASTA's own advisors. By the Board's approval, ASTA's damage is reduced to costs pursuing the variance and a period of inconvenience; ASTA may find it more cost effective to absorb these costs rather than pursue a direct challenge.

Implication for Long-Term Policy

Most fundamentally, we feel the Board is constituted to interpret the Zoning Regulations and map, established under the Zoning Act as amended.

We duly note that this application was not opposed; we further agree with the ANC's concern about precedent. While the facts here may seem unique, they may not seem so when raised by another party at a later time who pleads with the Board for relief on the basis of misrepresentation, apparent or real. The Board cannot rely on the fact that there may be opposition in a later case to distinguish what it acts on positively from what it acts on negatively. The Board's Rules explicitly require an ANC to convey its views relative to the tests the Board must consider when reaching its decision, not on factors extraneous to the Zoning Act, Regulations or Map. This same relevancy test is applicable to all other parties as well. This comment is particularly pertinent to this case because it is the applicant's burden, here ASTA, to prove its case relative to the applicable standards.

Nowhere in those standards do considerations appear as to whether the applicant has recently moved to the District of Columbia, failure to complete construction on the basis of approved plans, or difficulties arising because of real or apparent misrepresentations. The Board's action opens it up for providing relief in circumstances that represent a substantial departure from its historical mission and purpose. This is because the essential facts leading to the Board's decision, when stripped away from the difficulties facing the applicant, lead one to conclude that the Board is now willing to provide relief when builders and sellers do not meet their responsibilities to purchasers, the Government of the District of Columbia, or its residents.

ATTESTED BY:



STEVEN E. SHER

Executive Director

FINAL DATE OF ORDER:

NOV - 7 1983

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."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.