GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 14134, of Jay Vee Partnership, pursuant to Paragraph 8207.11 of the Zoning Regulations, for a variance from the use provisions (Sub-section 3104.3) to operate a grocery store on the first and second floors in an R-4 District at the premises 400 K Street, N.E., (Square 806, Lot 804).

HEARING DATE: May 16, 1984
DECISION DATE: June 6, 1984

FINDINGS OF FACT:

1. The subject site is located on the northeast corner of the intersection of 4th and K Streets, N.E. The site is in an R-4 District and is known as premises 400 K Street, N.E.

2. The subject lot is rectangular in shape and flat in topography. Its dimensions are 20.08 feet on the north and south sides and 95.0 on the east and west sides. The lot area is 1,907.6 square feet.

3. The subject site is improved with a two-story brick structure. There is a garage located at the rear of the lot. The combined lot occupancy of the two structures is more than sixty percent.

4. There is access to and from the subject site through K Street on the south and through 4th Street on the west. There is access to the rear of the site through a public alley on the north. K Street is a heavily traveled street and provides the main access to the site at its front.

5. The subject square and the surrounding neighborhood are developed primarily with medium density residential uses. There is a real estate office located on the southwest corner of the subject intersection and a church located on the southeast corner of the intersection. Most of the remaining uses in the vicinity are residential and most of the surrounding structures are single family row dwellings. Several corner locations in the area are developed with commercial and other non-residential uses. Half a block south on 4th Street there are a sandwich shop and a repair garage.

6. The area is zoned R-4 on all four sides of the subject site. There is a C-2-A District approximately 700 feet to the south and a C-M-1 District approximately 350 feet to the west.

7. The subject structure was constructed in 1890. The first floor was used as a retail grocery store from approximately 1968 to approximately 1979. The premises have been vacant for at least five years. The equipment and shelves relating to the grocery use have been removed. The doors and windows have been boarded-up but there is easy access to the site through a door on which the padlock holder has been unfastened from the frame. The premises are extremely deteriorated and an extensive renovation will be required to make the premises habitable. This renovation would require at least a new roof, new plumbing, electrical conduits, a heating and cooling system, replacement of some sections of the floors, new walls and new toilet facilities.

8. The applicant, J. V. Partnership, is a real estate company which purchased the subject property in approximately 1979. The real estate company has attempted to sell the property as a residence and has advertised it in the newspaper as such. No serious buyers have responded to the residential offering. The only serious offers that the applicant has received have come from potential commercial users such as a dance studio operator who wanted to use the first floor as a dance studio and use the second floor as a residence. These offers failed for lack of adequate financing for the purchasers.

9. The applicant proposes to sell the subject premises as a neighborhood grocery store, which was its former use. The contract purchasers for the property are a Mr. and Mrs. Fogleman, who would operate a grocery store on the first floor of the premises and would reside on the second floor. The Foglemans currently operate a grocery store at the corner of 9th and I Streets, N.E., where they live above the store. The proposed use of the premises would be exactly the same as the previous use in which the former owners lived on the second floor and operated a grocery store on the first floor. This use was authorized by Certificate of Occupancy No. B66899, dated August 22, 1968.

10. The proposed grocery store would operate from 7:00 A.M. to 10:00 P.M., seven days a week. There would be three full-time employees. The use would be a small convenience-store for the neighborhood and would provide bread, packaged foods and other convenience items. No carryout, hot food preparations or sandwiches would be provided. There would be no parking on the premises. Deliveries would be made two or three times a week at approximately 7:00 A.M. The applicant would pick-up the products to be delivered, using his station wagon. For purposes of unloading, the station wagon would be temporarily parked in a loading zone on K

Street or in a driveway at the rear portion of the site, adjacent to the garage.

11. A grocery store is first permitted as a matter-of-right use in the C-1 District. In order to use the premises as a grocery store in an R-4 District, the owner has applied for a variance from the use provisions of Sub-section 3104.3 of the D.C. Zoning Regulations.

12. The application was advertised for both use of the first and second floors as a grocery store. The applicant mistakenly applied at the office of the Zoning Administrator for a variance to use both the first floor and the second floor as a grocery store. This error was based on the applicant's misreading of the prior Certificate of Occupancy, with which the applicant attempted to conform. The discrepancy was clarified at the public hearing of May 16, 1984. The Board found the discrepancy to be minor, and proceeded with the case on its merits.

13. The Board of Zoning Adjustment has the power to grant a use variance pursuant to Paragraph 8207.11 of the Zoning Regulations. The granting of a use variance requires that there be an undue hardship upon the owner arising from a unique or exceptional condition of the property which precludes the property from being used for the purpose for which it is zoned. The granting of the use variance must not cause a substantial detriment to the public good nor impair the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Maps.

14. The applicant argued that the existing structure at the subject site is commercial in design and would be difficult and expensive to convert to a residence. The first floor of the premises has large storefront windows on both K Street and 4th Street. The interior of the first floor has one large main room with a vestibule, a staircase and a storage room at one side. There is no operational plumbing on the first floor. The second floor is designed for residential use and has been so used.

15. The applicant further argued that the structure does not lend itself to R-4 uses, including the matter-of-right uses and the special exception uses. In addition to arguing that the first floor of the premises is unusable for residential uses, the applicant argued that it is not large enough for an art gallery or museum. He has never been involved with an are gallery or museum but could not imagine that the space at the subject site would be adequate. The applicant further argued that a club or fraternity would require parking facilities that the site does not have. A clinic, hospital or sanitarium would require parking and would probably need more space then the site provides. A child development center would need a play area that does

not exist on the site or nearby. A rooming house would require more space and more facilities.

16. The applicant presented no figures to define the space needs of the R-4 uses he discussed. The applicant further testified that the area of the first floor space was not known to him. The original use of the first floor was also unknown to the applicant. He asserted that if the site was not originally used as a grocery store that it appears to have been substantially altered for the grocery store use.

17. The applicant further argued that the proposed use would be compatible with the existing mixture of uses in the subject neighborhood. There are commercial uses coexisting with the residential uses in the area, especially on K Street. The applicant named one or two commercial uses in each nearby block. He further testified that besides the subject vacant property, the other three corners of the subject intersection are occupied by a real estate office, a church, and a priests residence. The Board finds that the only use in the subject intersection that is not an R-4 permitted use is the real estate office.

18. The applicant further argued that the proposed use would be a neighborhood facility. There is not much on-street parking available in the subject area and the residents need grocery stores within walking distance of their homes. Several neighborhood grocery stores have recently closed and the proposed use would provide retail grocery services within a reasonable walking district for the neighbors. The contract purchaser intends to operate a store that is clean and has no loiterers. The Board notes that the requirement that a use be a neighborhood facility pertains to a change of nonconforming use and not to a use variance as sought by the applicant.

19. The applicant argued that the proposed use would be good for the city because it would increase the tax base and provide jobs. The Board finds that although commendable, benefit to the city is not part of the test for a use variance. Tax income is not a zoning issue.

20. The applicant also argued that the continuing vacancy of the property creates a hardship for the owner. The property has been listed for sale for five years and there have been no offers to buy it for residential use. The applicant argued that there are many residential properties standing vacant in the area and that potential buyers can purchase a vacant residential property and rehabilitate it for substantially less than the cost of purchasing, renovation and converting the subject structure. The applicant asserted that these market conditions leave the owners of the subject property with the choice of selling

the site for a commercial use such as a grocery store or allowing it to continue to stand vacant.

21. The applicant testified that the vacant property has become a safety hazard for people in the neighborhood. However securely the structure is boarded-up, vandals can still get into the premises. The site is an attractive haven for junkies and others.

22. The applicant further testified, in answer to questions from the Board, that no contracts for renovation or remodeling have been pursued to the point of obtaining a cost estimate. One architect has surveyed the property and said that it would be difficult to renovate. The applicant, a real estate agent, has informally estimated the cost as in excess of $75,000 for the renovation work. The applicant is attempting to sell the property as-is for $50,000. The sale of the property is being done through an exclusive listing, but the applicant is aware of an obligation to share the commission with any other broker who found a buyer for the property.

23. The Board finds that the applicant's problems in marketing the subject property for a permitted use do not constitute a hardship in the sense defined by the Zoning Regulations. Neither does the cost of renovating and converting the structure constitute such a hardship. In order to justify a use variance, the hardship must be inherent in the physical nature of the site so that it cannot be used for a permitted purpose, even with alterations.

24. The Office of Planning, by report dated May 9, 1984, recommended that the application be denied. The Office of Planning noted that the subject property is a flat rectangular piece of land improved with a two story rowhouse and a garage. The properties adjacent to the subject site seem to be similar in characteristics and are used as single family residences. The first floor of the subject site was used as a grocery store after 1968, but the use has been discontinued for at least five years. The equipment and shelves relating to grocery use have been removed. The intent of the nonconforming use regulations is to bring these uses into conformity with the zone district in which the premises are located. In the Office of Planning's opinion, there did not seem to be anything unique or inherent in the property that would not allow the applicant to renovate property and use it in accordance with the R-4 District. The Office of Planning further noted that the intent of the R-4 District is the stabilization of the remaining one-family dwellings. The reintroduction of a commercial use seems to have an adverse impact on the residential character of the area and the intent, purpose and integrity of the zone plan for the city. The Office of

Planning was of the opinion that the property did not qualify under Paragraph 8207.11 for a use variance. The Board concurs with the Office of Planning's findings and recommendations.

25. Advisory Neighborhood Commission 2C filed no recommendation on the application.

26. A neighbor who resides in the dwelling adjacent to the subject site on its east side, testified in support of the application. The neighbor's support was based on the fact that the property is an eyesore. The supporter described the neighborhood as transitional and partly renovated. The supporter moved into the neighborhood in 1980, and paid $75,000 for his renovated house. When this price is compared to the combined cost of purchasing and renovating the subject site, it seemed unlikely to the witness that a residential occupant would purchase the subject property. The neighbor in support further testified that a Safeway at 6th and H Streets had recently closed, causing a problem for the many elderly, retired people in the neighborhood and neighbors without automobiles. A neighborhood grocery store would be a convenience for everyone in the area.

27. The neighborhood in support had, furthermore, no objection to a well-managed commercial establishment being located next door to his residence. He was of the opinion that the proposed use of the premises would act as a deterrent to crime. The supporter's dwelling was burglarized twice in 1981, and the burglar gained access through the vacant subject property. The neighbor testified that a hole was hacked through the common wall between the subject site and the neighbor's dwelling, thus enabling the burglars to enter his home undetected. The neighbor has heard people inside the vacant property and has noticed that boards have been torn away from points of access to the subject property.

28. The neighborhood in support testified that he was pleased that a grocery with a residence above it was proposed. Conversations with the applicant had convinced the supporter that the proposed retail use would be a commodious establishment. In the supporter's opinion, it would be a contribution to the neighborhood to use the subject site as a store and provide the services planned by the applicant.

29. A petition in support of the application was submitted to the record. The petition bore the signatures of twenty-seven neighbors of the subject site. The signatures were collected by Jason Vogel, an agent representing the sellers of the property. With an almost unanimous voice, the neighbors seem very anxious for something to be done with the building. The vast majority of people that Mr. Vogel talked to did not object to the building being used as a grocery store, and many were quite excited about the idea.

The petition indicated that the neighbors of 400 K Street, N.E. understand that the applicant wished to put a grocery and gourmet shop in the building at 400 K Street, N.E., which is presently vacant. To do this, the applicant must obtain a zoning variance from the Board of Zoning Adjustment. The neighbors supported the concept of a grocery and gourmet store at this location, and required the BZA to support the applicant's petition.

30. The Board appreciates the concerns of the proponent neighbors. The Board finds however that there concerns are not grounds that would support a use variance. These concerns are personal and should be addressed through other avenues. Security is a police matter. Maintenance of real property is the responsibility of the owner. The applicant is not an ingenue. Its business is real estate. The purchase of the subject property did not materialize to the applicant's expectations and the applicant must thus proceed with other plans.

CONCLUSIONS OF LAW AND OPINION:

Based on the findings of fact and the evidence of record, the Board concludes that the applicant is seeking a use variance, the granting of which requires a showing through substantial evidence of a hardship upon the owner arising out of some unique or exceptional condition in the property so that the property cannot reasonably be used for the purpose for which it is zoned. The Board must further find that the relief requested can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Maps.

The Board concludes that the applicant has not met this burden of proof in showing an undue inherent in the property. There is nothing in the size, shape hardship or topography of the subject property that would preclude it from being used for an R-4 purpose. The Board concludes that the applicant has not exhausted the list of uses permitted to him for the subject property. The property could be converted to an R-4 use including matter-of-right and special exception uses. In addition to the possible residential uses, whether single family or multi-family, there are non-residential uses permitted which the applicant has not investigated. Either renovation of the existing structure or new construction would be possible to provide for a permitted use.

The Board further concludes that the applicant's marketing problems in selling the subject property for a permitted use and the economic problems involved in renovating and converting the property for a permitted use do not constitute a hardship in the sense defined by the

Zoning Regulations. Such hardship should be inherent in the physical characteristics of the site, so that it cannot be used for a permitted purpose, even with alterations. As to the applicant,s contention that the proposed use would remove an eyesore and a safety hazard from the neighborhood and replace it with a neighborhood facility, the Board concludes that this issue is not dispositive of the application. The issue of indue hardship is dispositive of the application.

The Board concludes that granting this use variance to operate a grocery and convenience store in an R-4 District cannot be done without substantial detriment to the public good and substantial impairment to the intent and purpose of the zone plan. The granting of this use variance would postpone the conversion of an R-4 property to an R-4 use and would be completely contrary to the intent of the Zoning Commission when it adopted the new amendments the nonconforming uses. Accordingly, it is hereby ORDERED that the application is DENIED.

VOTE: 3-0 (Maybelle T. Bennett, William F. McIntosh and Charles R. Norris to deny; Douglas J. Patton and Carrie L. Thornhill not voting, not having heard the case).

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

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

FINAL DATE OF ORDER: 14 SEP 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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