

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 15978 of Square 743 Investors, L.P. and the Resnick Family Real Estate Partnership, pursuant to 11 DCMR 3107.2, for a variance to allow paving materials other than four inches of an all-weather impervious material (Subsection 2117.10) for construction of an open commercial parking lot in a C-M-3 District at premises 1115-1131 New Jersey Avenue, S.E. (Square N-743, Lots 23, 44-47 and 816-818).

HEARING DATE: November 16, 1994
DECISION DATE: January 4, 1995

ORDER

SUMMARY OF EVIDENCE:

1. The subject site is located close to the entrance of the Navy Yard Metrorail station at the northwest corner of the intersection of M Street and New Jersey Avenue, S.E.

2. The site is primarily rectangular in shape and consists of approximately 16,410 square feet of land area with a street frontage of approximately 157 feet and a depth of 93 feet. The southernmost 14-foot wide portion of the site, however, has a depth of 76 feet.

3. The site is currently developed with six boarded-up rowhouses which are in need of extensive repairs. According to the applicants, the property was acquired approximately five years ago at the time the rowhouses were occupied. However, due to the numerous difficult tenancy problems encountered by the applicants during this period, the tenants were evicted and the rowhouses were boarded-up. The site is currently vandalized and lacks proper maintenance. The D.C. Board of Condemnation has requested the applicant to take action to improve the current status of the property. Consequently, the applicant is proposing to raze the existing rowhouses and develop the site with a parking lot.

4. The area surrounding the site is developed primarily with commercial and light industrial uses such as automotive repair shops and warehouses. Nightclub facilities known as Tracks and the Mirage are also located in this vicinity. St. Matthew's Baptist Church is located immediately to the north of the site. The Navy Yard is located across M Street to the south.

5. The applicants are requesting an area variance from Subsection 2117.10 of 11 DCMR pertaining to the required paving materials for parking lots.

6. The applicants are proposing to construct a commercial parking lot in a C-M-3 District using paving materials other than four inches of an all-weather impervious material as required by the Zoning Regulations. The applicants are proposing to raze the six existing rowhouses on the site to construct a 62-space public parking lot. The proposed parking lot is a matter of right use in a C-M-3 District.

7. The applicants testified that they decided to put a parking lot on the subject property because of the repeated public safety problems. They hope the proposed "park and ride" lot, which would sit on top of a Metro station, would be attractive to motorists who use the Metro system.

8. The applicants proposed to have low-cost parking by putting down a two-inch thick milled asphalt surface instead of the four-inch thick asphalt surface required by the Zoning Regulations.

9. The applicants testified that the primary reason for doing the less expensive surfacing was because they had no real assurance that the lot would be successful.

10. The applicants further testified that if the more expensive four-inch thick asphalt is required instead of the less expensive two-inch thick asphalt, it would be cheaper for them to re-board the rowhouses on the site.

11. The applicants indicated that the cost of paving as the Zoning Regulations require would be \$15,000 - \$20,000 as opposed to about \$2000 or \$3000 to put the retread down.

12. By memorandum dated November 8, 1996, the Office of Planning (OP) recommended denial of the application. OP stated that the proposal is based primarily on the desire of the applicant to establish the parking lot at minimum cost. The proposed parking lot would not meet the standards required by the Zoning Regulations in terms of layout, lighting, landscaping, maintenance and upkeep.

13. OP believes that the proposed parking lot would not meet the required surfacing standards, and would consequently have a blighting influence on the surrounding area owing to unsightly appearance and unsafe conditions.

14. By a memorandum dated July 18, 1994, the Metropolitan Police Department (MPD) did not have any objection to the applicant's proposal. The MPD indicated that it did not appear that the change proposed in the application would affect the public safety in the immediate area or generate an increase in the level of police services provided.

15. By memorandum dated July 18, 1994, the Fire and Emergency Medical Services Department (FEMD) did not voice any objection to the application.

16. The Department of Public Works (DPW), by its memorandum dated October 18, 1994, opposed the application. The DPW indicated that the application had not provided justification for deviating from DPW standards that require parking lots to be paved with an all-weather impervious material.

17. The Advisory Neighborhood Commission (ANC) 6B, by its letter dated September 21, 1994, unanimously voted to oppose the application. ANC 6B based its opposition on its finding that the requirement of "practical difficulty" had not been met.

18. The Office of the Corporation Counsel (OCC), by memorandum dated December 21, 1994, advised the Board as follows:

- a. The BZA has jurisdiction over the above variance since it arised under the legal authority of the BZA to authorize variances from the zoning regulations pursuant to D.C. Code Sec. 5-424(g)(3) (1981).
- b. The BZA may not grant a variance from the requirement that any paving materials other than bituminous, concrete or brick are to be "approved by the District of Columbia Department of Public Works (DPW) as structurally equivalent or better" when such other paving materials have not been approved by DPW. DPW approval is a legal requirement of Sec. 2117.10 whose waiver would constitute an amendment of Sec. 2117.10. The BZA is not empowered to amend this zoning regulation since the Zoning Commission has exclusive legal authority to amend all zoning regulations. See D.C. Code Secs. 5-413, 5-415 and 5-424(e) (1981). Moreover, negating public agency approval is neither a land use nor a land area variance as required and authorized under the law. See D.C. Code Sec. 5-424(g) (3).
- c. Unlike the DPW approval requirement, it appears that the BZA may grant variance relief from the thickness and surface requirements under Sec. 2117.10 since such requirements may arguably arise under an area variance request. However, BZA review does not in any way whatsoever serve as a waiver of or substitute for

other agency review, like DPW's. Moreover, if the thickness and surface requirements are also contained in DPW or other agency regulations or codes (e.g., building or construction), those other agencies have the sole and exclusive authority to waive compliance with their regulations. If there is a conflict between public agency actions on these requirements, the BZA would be well advised to defer to the other agencies, especially DPW, since these requirements are largely unrelated to land use and zoning and are typically within the jurisdiction and expertise of agencies with specialized knowledge, like DPW.

- d. We do not advise the BZA to condition approval of this or other variances for a limited period of time since BZA imposition of such limitation may be regarded as beyond its explicit statutory and regulatory authority. Moreover, other courts have regarded such time limit conditions as illegal contract zoning since they amount to an automatic reverter provision. See Konkel v. Common Council, City of Delafield, 229 N.W.2d 606 (Wis. 1975); Scrutton v. County of Sacramento, 79 Cal Rptr. 872 (Cal. App. 1969); Hausman & Johnson, Inc. v. Berea Board of Zoning Code Appeals, 320 N.E.2d 685 (Ohio App. 1974).

19. The Capitol Hill Restoration Society opposed the application on the grounds that "the applicant has not demonstrated any practical difficulties or undue hardship."

FINDINGS OF FACT:

Based on the evidence of record, the Board finds as follows:

1. The applicant is proposing to establish a parking lot on the site in response to the request by the D.C. Board of Condemnation to improve the existing unsightly and unsafe conditions.
2. There is no uniqueness in the subject property in terms of its physical characteristics or any characteristics extraneous to the property and relative to other properties in the area.
3. The Board agrees with the recommendations of the Office of Planning and the Department of Public Works.

4. The Board has the legal authority to grant a variance to Section 2117.10 of the Zoning Regulations. The Board finds DPW's knowledge and expertise in these matters to be compelling.

CONCLUSIONS OF LAW AND OPINION:

Based on the evidence of record and findings of fact, the Board concludes that the applicants are seeking an area variance to construct a commercial parking lot in a C-M-3 District that would be paved with materials other than four inches of an all-weather impervious material as required by the Zoning Regulations. Granting such variance requires a showing through substantial evidence of a practical difficulty upon the owner arising out of some unique or exceptional condition of the property such as exceptional narrowness, shallowness, shape or topographical conditions. Further, the Board must find that granting the application will not be of substantial detriment to the public good, and will not substantially impair the intent, purpose and integrity of the zone plan.

The Board concludes that the applicants have not met this burden of proof, and that the property is not unique. The Board concludes that there is nothing about the site that contributes an exceptional condition that creates a practical difficulty for the owners of the property. The Board further concludes that the applicants seek to construct the parking lot as a matter of convenience to get rid of the boarded houses on the site.

It is the opinion of the Board that to grant the variance under the circumstances above, where the tests for granting an area variance have not been met and other agency expertise is compelling and contrary to the application, would substantially impair the intent and integrity of the Zoning Regulations.

The Board concludes that it has accorded ANC 6B the "great weight" to which it is entitled.

In the light of the foregoing, the Board **ORDERS** that the application is hereby **DENIED**.

VOTE: 5-0 (Craig Ellis, Susan Morgan Hinton, Angel F. Clarens, Laura M. Richards and William L. Ensign to deny).

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 15978

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on OCT 1 1996 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

Daniel M. Melrod, General Partner
1990 M Street, N.W., Suite 650
Washington, D.C. 20036

Peter J. Waldron, Chairperson
Advisory Neighborhood Commission 6B
921 Pennsylvania Avenue, S.E., #108
Washington, D.C. 20003

A handwritten signature in cursive script, reading "Madeliene H. Dobbins". The signature is written in black ink and is positioned above the printed name and title.

MADELIENE H. DOBBINS
Director

DATE: OCT 1 1996