

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 16071 of the Washington International School, as amended, pursuant to 11 DCMR 3107.2, for a variance from the use provisions (Subsection 320.3) to allow the alteration and conversion of a school building into a 14-unit apartment house in an R-3 District at premises 2735 Olive Street, N.W. (Square 1215, Lot 806).

HEARING DATE: September 20, 1995
DECISION DATE: December 6, 1995

DISPOSITION: The Board GRANTED the application by a vote of 5-0 (Susan Morgan Hinton, Maybelle Taylor Bennett, Angel F. Clarens and Laura M. Richards to grant; Craig Ellis to grant by absentee vote).

FINAL DATE OF ORDER: March 26, 1997

RECONSIDERATION ORDER

By its order dated March 26, 1997, the Board granted the application to allow the conversion of the school building into a 14-unit apartment house. At the hearing of September 20, 1995, the Board granted party status to Keshet Israel Congregation ("Keshet") and five neighboring residents in opposition to the application ("opponents").

On April 4, 1997, Keshet filed a timely motion for reconsideration of the decision to grant the application. Keshet argued that the Board erred in determining the property's fair market value using the tax assessed value as a guide. Keshet offered into evidence "Excerpts from the Report by the School Closing Task Force of the District of Columbia Public Schools" for school year 1996-1997 and dated March 17, 1997. The report lists schools, their assessed values and fair market values. Keshet used the report to demonstrate that the assessed value can be up to seven times more than the fair market value. Therefore, Keshet maintains that the assessment is not a reliable guide and should not have been relied upon by the Board in finding that the applicant would not receive a fair and reasonable return if Keshet was allowed to acquire the property. Keshet believes that the Board should have sought an actual appraisal of the site.

Keshet argued that the portion of the Board's order dealing with the property's fair market value is not well-supported by the record. Keshet stated that the only record support for equating the tax assessment with its fair market value is the post-hearing argument of counsel for the applicant to the effect that statutory law requiring a property's tax assessment to reflect its fair

market value means that ". . . the District of Columbia considers the assessed value of the land for a use or uses permitted under the Zoning Regulations . . .," Keshner maintains that this legal argument is not evidence and it is implausible, considering that tax assessments can be erroneous, particularly in the case of tax-exempt properties where there is no incentive for anyone to challenge the assessment, and therefore no incentive for the assessor to make sure that the assessment is correct. Keshner stated that the report submitted shows, moreover, that not even the members of the D.C. Government charged with selecting school properties for sale considered the tax assessments of such properties as evidence of their fair market values.

Keshner stated that the applicant did not offer into evidence neither the property's appraisal which the realtor had examined, nor any other competent evidence of the fair market value. Keshner argued that the School Closing Report critically undermines the Board's determination that the applicant would suffer an "undue hardship" if it accepted Keshner's \$350,000 offer for the school building because the offer represented only 25 percent of the subdivision's fair market value. Therefore, Keshner maintains that the Board's decision is in error.

The applicant (respondent herein) filed a response to the motion stating that Keshner failed to meet the requirements for granting a reconsideration motion. The applicant stated that in reviewing a motion for reconsideration, the Board is to consider the following factors as set forth in 11 DCMR 3332:

1. Whether the motion raises any materially different issues or provides any evidence of a substantive nature that the Board has not previously considered and addressed in its final order.
2. Whether the motion states any specific erroneous findings made by the Board relevant to its final decision.
3. Whether any new evidence has been proffered which could not reasonably have been raised at the public hearing.
4. Whether the motion states how the Board erred in its decision, and whether it states the grounds for any error by the Board.

The respondent stated that the motion must be based upon the record before the Board. Facts, circumstances and allegations which are beyond the scope of the record considered and acted upon

by the Board are not a proper subject of a motion for reconsideration.

The respondent stated that Keshet Israel's motion fails each of the tests outlined above, and therefore should be denied.

New Evidence

The respondent stated that while the March 18, 1997 report offered into evidence by Keshet Israel was not available at the time of the hearing, September 20, 1995, the assessed value of all real property in the District of Columbia is publicly available. This information was obtainable at the time of the hearing. However, Keshet Israel did not submit assessed value information, nor did it engage an appraiser or broker to obtain estimates of fair market value of public school buildings, either prior to the hearing, or prior to its posthearing submission. Having failed to secure this information in a timely fashion, Keshet Israel cannot now use a report published 18 months later, which purportedly contains current market information, to support its motion for reconsideration. Should the Board accept this document as "new evidence . . . which could not reasonably have been presented at the original hearing", it would allow any party in any case in the future to submit a post hoc written report prepared months (or years) after the oral decision has been rendered in a case, as a basis for reconsideration. This would unfairly prejudice prevailing parties, and render the Board's final decisions meaningless.

Evidence of the Fair Market Value

In response to Keshet Israel's argument that the Board should consider the fair market value of a property, as opposed to its assessed value, to determine the property's true value, the respondent argued that this was done by the Board in the subject case.

The respondent pointed out that D.C. Code Section 47-820 states that:

The assessed value for all real property shall be the estimated market value of such property as of January 1 of the year preceding the tax year [taking] into account any factor which might have a bearing on the market value of the real property, including, but not limited to, sales information on similar types of real property, mortgage or other financial considerations, reproduction costs less accrued depreciation because of age, condition, and other factors, income earning potential (if any), zoning, and government imposed restriction . . ."
(Emphasis supplied by respondent.)

D.C. Code Section 47-802(4) further defines "estimated market value" as:

100 percentum of the most probable price at which a particular piece of real property, if exposed for sale in the open market . . . would be expected to transfer under prevailing market conditions between parties who have knowledge of the uses to which the property may be put, both seeking to maximize their gains and neither being in a position to take advantage of the exigencies of the other.

The respondent indicated that other sources of information can be relied on in determining the fair value of the property. These sources are the Lusk Directory, the purchase contract for the site and the sale price for other property in the same square. The respondent stated that the record reflects an assessed value of the entire site, as listed in the 1995 Lusk Real Estate Directory, of \$3,553,100.00. The portion of the lot which was the subject of this application had an assessed value of approximately \$1.71 million. The total assessed value of the property which Keshet Israel offered to purchase was \$1,538,555.00.

The respondent stated that the best indication of the fair market value of the property is the \$3.6 million contract for purchase of the property. The record reflects that the property was marketed, a potential purchaser was identified, and a contract was entered for \$3.6 million. That market value favorably compares to the assessed value, as well as to the sale price, on a pro rata basis, for another property in the same square. In 1992, there was a sale price of \$319,000 for a property with one-sixteenth the size of the land area, and one-fourteenth the size of the building, that Keshet Israel has proposed to buy for \$350,000.

The respondent stated that these factors taken together, clearly rebut Keshet's position.

The Report and Keshet's Position

The respondent argued that the report does not support Keshet's argument that a public school building's tax assessment is not necessarily a reliable guide to its fair market value.

First, the Washington International School is not a public school. The subject building has been operated as a private school for approximately 30 years.

It is uncertain how the structural integrity, maintenance record and overall condition of the school building and property compares with some or all of the surplus public schools listed in the report.

Secondly, Keshar Israel refers to the Report as "a private realty firm's preliminary estimates of the fair market value" of those surplus properties. The respondent was uncertain as to why Keshar Israel neglected to include the attached disclaimer language which accompanied the report. This disclaimer language indicates that the report only "provides a rough estimate of the market value of eighteen school properties in the District of Columbia . . . based upon limited knowledge of the properties . . ." The firm stated that it viewed the properties from the exterior only. The respondent argued that this disclaimer language should be compared with the testimony of the applicant's expert in real estate marketing and brokerage in the District of Columbia. Her services, which ultimately resulted in the identification of a purchaser and the negotiation and execution of a purchase contract for \$3.6 million for the property, included extensive study of the general market conditions, the location, the current use, the physical condition and the zoning of the property.

Third, although offered for the purpose of demonstrating that the market of public school buildings is less than the assessed value, the Report indicates at least one school, the Hearst Elementary School, where the market value is greater than its assessed value.

Finally, the respondent stated that an analysis of the figures for each of the schools listed in the attachments to the Report indicates that the "market value" of the following six schools was simply derived by multiplying \$30 times the square footage of the building:

- o Keene Elementary School - Fort Totten Drive & Riggs Road, N.E.
- o Patterson - South Capitol & Elmira Streets, S.W.
- o Petworth - 8th & Shepherd Streets, N.W.
- o Harrison Elementary School - 13th & V Streets, N.W.
- o Lewis Elementary School - 300 Bryant Street, N.W.
- o Evans Junior High School - 5600 East Capitol Street, N.E.

This market value of the properties, based upon an across-the-board factor of \$30 per square foot of building area, was fixed on the above properties regardless of size of the land area, which ranged from 31,720 square feet or 0.72 acres (Harrison) to 364,000 square

feet or 8.35 acres (Evans Junior High School). Moreover, there is no indication that other factors which would typically affect fair market value (location, zoning, environmental, other government-imposed or privately-imposed restrictions, etc.) were reviewed either.

The respondent noted that in the Report, three other schools were assigned significantly higher values per square foot of building area. Stevens School, at 21st Street between K and L Streets in downtown, was assigned a value of \$100 per square foot of building area. Hearst Elementary School at 37th & Tilden Streets, N.W., in Cleveland Park, is given a value of \$180 per square foot of building area. Finally, Peabody Elementary School at 5th & C Streets, N.E., in Stanton Park on Capitol Hill, lists a per square foot value of \$125.

In comparing these figures to the instant case, the respondent stated that the subject building, located in Georgetown, contains 21,200 square feet of gross floor area, and approximately 22,000 square feet of total building area (gross and cellar). Using the formula in the report, Keshner Israel's offer of \$350,000, divided by 22,000 square feet of building area, yields a per square foot value of \$15. This is merely one-half of the lowest per square foot value assigned to any of the schools across the city listed in the Report.

The respondent stated that, as reflected in the record, the contract price for the property was \$3.6 million. When that number is divided by the square footage of the building, the per square foot value is \$163. This is less than the per square foot value of the Hearst Elementary School in Cleveland Park. If the assessed value of \$1.71 million for the building and land which are the subject of this application are applied to the building area, the value per square foot is just under \$78. Both figures are within the range of figures contained in the report.

The respondent stated that the report does not provide market value, but only "a rough estimate" of market value. There is no indication in the Report of actual value, i.e., a contract price between a willing buyer and a willing seller, for any of those schools. The studies were by admission, very preliminary and cursory, and were not tested in the marketplace.

In conclusion, the respondent stated that Keshner is simply attempting to justify its offer of purchase based upon information that could have been obtained during the public hearing process. The report contains incomplete, preliminary estimated information and fails to support Keshner's position. The respondent stated that because Keshner failed to satisfy any of the bases for reconsideration, the motion should be denied.

On April 7, 1997, the opposition parties also filed a motion for reconsideration of the Board's decision. The opposition parties (movants herein) maintained that the Board erred in granting the application.

The movants stated that they have evidence to undermine the Board's conclusion that the subject building was obsolete for use by private schools. They argued that the applicant did not attempt to market the building to other schools but rather determined it to be obsolete for the Washington International School's purposes and marketed it privately. The movants introduced affidavits and a news article to support the position that the D.C. School Board received numerous inquiries from private schools about leasing or buying other public schools similar in size and location to the subject school.

The movants argued that the Board should not have relied solely on the opinions of the applicant's officials and real estate broker because their opinions were not tested in the marketplace.

In response to the movants' motion the respondent, stated that the opposing parties failed to meet the tests for the granting of a motion for reconsideration. The respondent stated that the movants did not present new evidence that could not have been introduced at the hearing. The respondent noted the movants' contention that the "new evidence", a newspaper article, indicated that other schools could occupy the subject property. The respondent argued that while the closing of the two public schools cited in the article is a current event, the closing of public schools and conversion of those buildings to other adaptive reuses is not new information which could not reasonably have been presented at the original hearing. The respondent stated that this very issue was the subject of testimony by both the applicant and opponents during the public hearing. The respondent noted that during the hearing, the Washington International School presented substantial evidence and testimony to support its position on the issue, while the opponents failed to present substantial evidence or testimony on this issue.

The respondent addressed the movants' argument that the Board erroneously relied on the testimony of Washington International School officials and the real estate broker in deciding that the building was obsolete for educational purposes in general, and therefore of no interest to other private schools. The respondent maintained that the Board did not err because of the evidence presented by the school's witnesses, including the head of the Washington International School, who summarized the applicant's position as follows: "As a professional educator, I can state without equivocation that this 19th Century building is totally unsuited for educating students in the 21st Century." She testified that the subject building was designed and built for an

educational system which no longer exists, and cited the tremendous change in the science of education which has occurred over the past 100 years. She testified to the building's serious shortcomings and inadequacies, resulting in a compromised education program with costly inherent inefficiencies.

The respondent also noted that their expert witness in real estate marketing and brokerage in the District of Columbia testified that the cost for interior renovation of the building would be more expensive than new construction, and that such cost is "above the market for current users of 21,000 [square foot] size buildings, particularly in the educational, nonprofit category." She testified that, based upon her extensive experience in the field, if other schools were actively in the market for this type of building, she would have known about it.

The applicant's expert witness in architecture, planning and adaptive reuse of historic structures testified as to his experience with designing educational facilities. In response to a question from the Board as to whether another school might be able to use the subject building, he testified that the "critical aspect of every educational facility I have been familiar with is the issue of flexibility." He testified that a structure used as a modern educational facility must be able to accommodate changing programs over time. He also testified that the subject building is not flexible in that regard, due to the system of interior and exterior load bearing walls, dual entrances and large interior stairways.

He further testified that most of the older public school buildings in the District are being abandoned, and many of those buildings have been converted to either office or residential use. Finally, he testified that the costs for upgrading the building would be very expensive, and would be better accommodated by a for-profit venture than a nonprofit organization.

The respondent pointed out that the only witness offered by the opponents at the hearing on this issue was the architect who testified that, in his opinion, the subject building could be put to a variety of uses. However, he testified that while buildings of this type "worked in the 19th Century for [schools and] a large number of other kinds of purposes, [those] purposes may have diminished by the passage of time and the relative complexity of our systems." He cited only one example, the Maret School in Arlington, Virginia which was converted to an arts center. But he was unfamiliar with whether an arts center would be a permitted R-3 use in the District of Columbia.

The respondent stated that the opponents architect witness did not offer any testimony in rebuttal to demonstrate that the continued use of the subject building for any matter-of-right

purposes would be financially feasible. He was also not familiar with the market for other types of uses for a building of this nature.

The respondent argued that, clearly the issue of reuse of the subject building as a school was extensively discussed at the public hearing. Opponents were on notice of the use variance issue and familiar with the use variance standard. They were represented by counsel, and had ample opportunity to discuss the issue of further school use of the building at the public hearing. Their architect witness did not effectively do that, nor did he effectively rebut the evidence and testimony presented by the applicant's witnesses. Moreover, to the extent that the article attached to the motion qualifies as "new evidence," the issue of continued educational use of the subject building has already been effectively addressed by the applicant.

It is the respondent's view that the Board correctly relied upon the school's experts in deciding the issue of adaptive reuse of the building for school purposes.

While the movants maintained that the property was marketed privately and directly to ten residential developers but not to any private schools, the respondent pointed out that the Chairman of the Facilities Committee of the Washington International School testified that the school underwent a very public land use review process for 2-1/2 years, during which time news articles about the school's efforts appeared in the Georgetown newspapers, as well as in city-wide newspapers. He also testified that, although the school was aware of other private schools in the market, the applicant found itself in competition with these other schools for other larger sites, because private schools are growing as enrollment in public schools decreases.

The opposition party movants stated that they join in Keshner Israel's motion and incorporate the contents of its submission by reference. This statement was made by the opposition parties with reference to the issue that the Board erroneously relied upon the realty tax assessment as the measure of fair market value. The movants maintained that the D.C. Code provisions related to assessments provide direction to assessors but are not statutory mandates that their conclusions are always to be deemed correct. The movants noted that taxpayers have the right to challenge assessments. They stated that the Board has assumed that the assessment of the applicant's property was accurate and has failed to give the opponents the opportunity to contest it. The opponents are of the view that they have the right to contest the valuation, particularly where the taxpayers has been exempt from taxes and has thus had no incentive to challenge the accuracy of the assessment itself. They maintained that the Board erred in depriving them of that right without notice.

Finally, the movants argued that they first received notice that the market value of the property was an issue in this proceeding 45 days after the hearing when the applicant filed a report on its negotiations with Keshet Israel, as directed by the Chairman of the Board at the end of the hearing. The opposition parties were expressly directed by the Chairman not to become involved in the filing of the reports. Then, in its report on the negotiations, the applicant made the contention adopted by the Board that the market value was the assessed value. The opposition parties stated that they did not know that the Board had adopted the applicant's contention until it recently received the final order.

Based on the above arguments, the movants requested that the Board reconsider its decision and deny the variance.

Responding to the movants, the respondent stated that the assessed value of the subject property, and its relation to the contract price, was the subject of discussion during testimony by the applicant's witness. The opponents claim as a basis for their motion for reconsideration that they "first received notice that the market value of the property was an issue in this proceeding" after the posthearing submissions were filed. This contention is without basis.

The respondent stated that the opponents participated throughout the course of the public hearing, but did not offer evidence or rebut the applicant's statements on this issue during the course of the hearing. They cannot now be heard to raise this issue as a new matter, through new counsel, after the decision has been rendered. Finally, the respondent maintained that the movants' argument that they were improperly excluded from the post-hearing negotiations between the applicant and Keshet Israel is unfounded for several reasons. The respondent stated that the Board expressly directed the applicant and Keshet Israel to engage in discussions after the close of the public hearing, in an effort to explore whether there was common ground for purposes of contract negotiations between the parties for matter-of-right synagogue use of the subject property. Those discussions resulted in an offer by Keshet Israel to purchase the property for \$350,000. In its November 6, 1995 posthearing submission, the applicant demonstrated to the Board that this figure was unreasonably low, in light of (1) the existing negotiated contracted price of \$3.6 million for the entire property (which is the best indication of fair market value), (2) the assessed value of the subject property, and (3) a recent sale price for other property in the same square, compared on a pro rata basis. The respondent stated that the opponents had no place in those negotiations, and were properly excluded from those negotiations by the Chairman.

Moreover, the respondent maintains that when the Chairman reviewed with counsel for the parties the subjects of the requested post-hearing submissions, and the due dates for those submissions, he specifically advised counsel for opponents that they would not be involved in the posthearing negotiations and reports to the Board on the matter regarding the contract negotiations. Counsel for the opponents raised no objection at that time. Opponents, through new counsel, cannot now be heard to object to that ruling.

In conclusion the respondent stated that the opponents raise no "new evidence," but simply seek to reargue, or argue for the first time, issues that were previously considered by the Board and that opponents could have addressed at the public hearing. The motion seeks merely to take issue with the rulings of the Board. The motion fails to satisfy any of the bases for a motion for reconsideration. Therefore, the respondent requests that the motion be denied.

CONCLUSIONS OF LAW AND OPINION:

Upon consideration of the motions, the responses and the record in the application, the Board concludes that the movants did not submit any new evidence that could not have reasonably been submitted at the hearing. The Board indicated that even if the evidence had been new, for a number of reasons it failed to demonstrate that the Board erred in making a determination about the fair market value of the property.

As discussed by the movants, the Board relied in part on the assessed value of the property to determine its fair market value. The Board noted that an assessment is done on every property and that this assessment is not the exact fair market value but an indication of what the market value is expected to be in the District of Columbia. This assessment is done by the city government and no evidence was submitted to prove that the assessment was wrong.

The Board concluded that the movants would have to show that there is no relationship in general between assessed values and fair market values, and they would have to show that there is no such relationship for this site in particular. This was not shown. The Board pointed out that the reports and other evidence submitted relate to other schools, not the subject site. The Board noted that there are schools listed in the report where the assessed value is equal to or less than the market value. This negates the movants' opinion that the assessed value would be higher than the fair market value of this site. The Board noted that appraisals could have provided reliable evidence of the true fair market value but no appraisals were submitted by either party. Finally, the

Board noted that the issue of fair market value was challenged at the time of the hearing by Keshet Israel Congregation. Therefore, the issue is not proper for reconsideration.

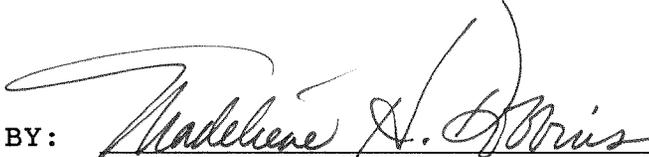
With regard to obsolescence, the Board concludes that the evidence related to other schools failed to show that the property is not obsolete for educational purposes. The Board remains of the opinion that the use variance test has been met.

The Board concludes that the movants failed to meet the burden of proof for reconsideration of its final decision. The Board is of the opinion that it did not err in granting the application. Therefore, the Board hereby **ORDERS** that the **MOTIONS** for **RECONSIDERATION** are **DENIED**.

VOTE: 4-0 (Angel F. Clarens and Susan Morgan Hinton to deny; Laura M. Richards and Maybelle Taylor Bennett to deny by absentee vote; Sheila Cross Reid not voting, not having the case).

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

ATTESTED BY:


MADELIENE H. DOBBINS
Director

FINAL DATE OF ORDER:

AUG 15 1997

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3103.1, "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."

BZA APPLICATION NO. 16071
PAGE NO. 13

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

ord16071/TWR/LJP

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 16071

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on AUG 15 1997 a copy of the order entered on that date in this matter was mailed first class, postage prepaid to each person who appeared and participated in the public hearing concerning this matter, and who is listed below:

Christopher H. Collins, Esquire
Allison C. Prince, Esquire
Wilkes, Artis, Hedrick and Lane
1666 K Street, N.W., Suite 1100
Washington, D.C. 20006

Anne-Marie Pierce
Washington International School
3100 Macomb Street, N.W.
Washington, D.C. 20008

Charles R. Braun, Esquire
3816 Windom Place, N.W.
Washington, D.C. 20016

Robin B. Hayes, Esquire
Stohlman, Beuchert, Egan and Smith
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Fran Goldstein, Chairperson
Advisory Neighborhood Commission 2E
3265 S Street, N.W.
Washington, D.C. 20007

A handwritten signature in black ink, appearing to read "Madeliene H. Dobbins".

MADELIENE H. DOBBINS
Director

DATE: AUG 15 1997