

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17638 of Safeway, Inc., pursuant to 11 DCMR 3104.1, for a special exception under § 214 of the Zoning Regulations to continue the present accessory parking use at premises 3725-3729 Morrison Street, NW (Square 1867, Lot 93) in the R-1-B zone district.

HEARING DATE: July 17, 2007
DECISION DATE: July 17, 2007 (Bench Decision)

DECISION AND ORDER

On March 7, 2007, Safeway, Inc. (Safeway or the applicant), filed an application with the Board of Zoning Adjustment (Board) pursuant to 11 DCMR § 3104.1, for special exception relief to continue the accessory parking use at 3725-3729 Morrison Street, NW. Following a public hearing on July 17, 2007, the Board voted to approve the application.

PRELIMINARY MATTERS

Self-Certification The zoning relief requested in this case was self-certified pursuant to 11 DCMR § 3113.2 (Exhibit 5).

Notice of Application and Notice of Hearing The application was filed on March 7, 2007. By memoranda dated March 7, 2007, the Office of Zoning notified the following agencies that the application had been filed: the D.C. Office of Planning (OP), Advisory Neighborhood Commission (“ANC”) 3/4G, the ANC for the area within which the subject property is located, and the D.C. Department of Transportation (DDOT). Pursuant to 11 DCMR 3113.3, notice of the hearing was sent to the applicant, all entities owning property within 200 feet of the applicant’s site, the ANC, OP and DDOT. The applicant posted placards at the property regarding the application and public hearing and submitted an affidavit to the Board to this effect (Exhibit 28).

ANC 3/4G The subject site is located within the area served by the Advisory Neighborhood Commission 3/4G, which is automatically a party to this application. The

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ANC filed a report indicating that at a public meeting on June 25, 2007, with a quorum present, the ANC voted to support the special exception subject to certain conditions, including a condition that the special exception approval would be for a term of five (5) years, and not be “unlimited in duration”, as proposed by the applicant. (Exhibit 26). The ANC did not participate in the public hearing.

Requests for Party Status There were no requests for party status.

Other Persons/Entities in Opposition/Support No persons appeared in opposition or in support at the public hearing.

Government Reports

Office of Planning OP filed a report indicating that it recommended approval of the special exception. However, it recommended that the Board incorporate conditions imposed by a previous Board order (BZA Order No. 16240), and conditions memorialized in a 1976 agreement between Safeway and the “Upper Connecticut Betterment Association”, a now defunct community organization. (Exhibit 27). OP also recommended that the Board impose a term of 10 years from the effective date of the order. OP’s representative, Arthur Jackson, participated in the public hearing, stating that he would “stand on the record” rather than present direct testimony regarding the application. Mr. Jackson answered questions posed by the Board and discussed the conditions that were proposed for approval.

DDOT Report DDOT filed a report recommending approval of the application, stating that the parking area is “cleaned and well maintained, and serves the parking needs of the Safeway patrons who might otherwise occupy parking spaces on the surrounding residential streets”. (Exhibit 29).

The Public Hearing The applicant submitted his case “on the record”, without direct testimony. However, Safeway’s District Manager, Craig Hanning, was sworn in and responded to Board questions. The hearing was focused on the proposed conditions for special exception approval, and the Board considered the conditions proposed by the applicant, the ANC and OP. In particular, the Board considered the applicant’s request that approval not be limited to a specific term, OP’s request for a term of 10 years, and the ANC’s request for a term of 5 years.

FINDINGS OF FACT

The Site and Surrounding Area

1. The property that is the subject of the application is located at 3725-3729 Morrison Street, NW. Lot 93 in Square 1867 (the Subject Property) and is zoned R-1-B. (Exhibit 8).
2. A Safeway store with parking is located on Lot 92, with a street address of 5545 Connecticut Avenue, NW (the Store). An additional 25 parking spaces that serve that building are located on the Subject Property (accessory parking spaces). (Tab 1 appended to OP Report, Exhibit 27).
3. The accessory parking spaces are contiguous to the Safeway lot and within 200 feet of the Safeway store. The parking spaces are bounded on the west by the portion of the Safeway site devoted to customer parking, is buffered on the north by a 15-foot public alley, is bounded on the east by a 25-foot strip of land, and is bounded on the south by Morrison Street.
4. An R-1-B district surrounds the parking area to the north and east. There are three-story single-family dwellings across the alley and on both sides of Morrison Street.

Prior Zoning Approvals

5. Safeway first sought permission in 1967 to establish accessory parking spaces on the Subject Property.
6. It was (and is still) economically unpractical to locate all the Safeway parking on Lot 92, where the Store is located, because of the shallow depth of the commercial district mapped along Connecticut Avenue. (Exhibit 4).
7. As a result, Safeway sought to locate accessory parking off-site. Lots 74 and 76 were located adjacent to the east of the Store. Safeway intended to purchase the properties if BZA granted permission to allow accessory parking spaces at that location.
8. The Board conditionally approved the accessory parking use in 1967 in BZA Order No. 9217, and Lots 74 and 76 became present Lot 93.
9. Later, the Board approved similar special exceptions in 1979, 1981, 1992 and 1997 (Exhibit 4). The Board's last approval for continuance of the accessory parking was

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in BZA Order No. 16240, dated August 8, 1997 (the 1997 Order). The 1997 Order was entered into the record as Exhibit 10.

10. The Board found in each application that the parking area was designed so that it was not likely to become objectionable to adjoining and nearby properties because of noise, traffic, or other objectionable conditions. (Exhibit 4).
11. The special exceptions in 1979, 1981 and 1992 were for periods of two to five years, while the 1997 special exception was approved for a period of ten years.
12. All of the special exception approvals were conditioned with various design and operational guidelines, which Safeway has incorporated and implemented. Safeway has met each of the conditions imposed by the Board in its previous orders and there have been no substantive changes in the use or operation of the parking area since the special exception was first approved in 1967. (Exhibit 4).
13. Additionally, all approvals were conditioned upon Safeway's compliance with an agreement dated June 16, 1976 (hereafter the 1976 Agreement) between Safeway and the Upper Connecticut Avenue Betterment Association, a community organization that is now defunct. Safeway has complied with all provisions of the 1976 Agreement, including the construction of an additional driveway on Connecticut Avenue and the construction of a pedestrian access on Morrison Street. (OP Report, Tab 5 appended to Exhibit 27.)

The Off-Site Accessory Parking Spaces

Design and Operation

14. The points of ingress and egress for the parking area and the entire Safeway site are on Connecticut Avenue, where there are two curb cuts. There is no vehicular access from Morrison Street. (Exhibits 4 and 27).
15. The accessory parking spaces are in an open area which is at the same level as the adjacent parking area and Safeway store (Exhibit 4).
16. The parking area is paved with an all-weather, impervious surface, and is striped for 25 vehicles. (Exhibits 4 and 27).
17. The layout of the parking area was designed to buffer the lot from residential surroundings. A retaining wall, partially concrete and partially masonry, encloses the parking area on three sides. There is a wooden stockade fence on top of the retaining wall along the northern lot line, which separates the parking area from the

public alley. There is a 30 to 40 foot landscape buffer zone between the eastern edge of the parking area and the property line which borders the abutting residences. This buffer area contains evergreens and a masonry wall which blocks the view of the parking area from adjacent homes. Finally, south of the wall and north of the Morrison Street sidewalk are parallel rows of mulch beds, which are planted with rows of evergreen bushes. (Exhibits 4 and 27).

18. The public streets and walkways are protected from encroachment by vehicles in the parking spaces by wheel bumpers guards, curbs and the retaining wall. These improvements prevent any part of a vehicle from projecting over any lot line or building line. (Exhibit 4)
19. A paved pedestrian walkway extends from the parking area to the Morrison Street sidewalk through an opening in the retaining wall. A metal trash receptacle is next to the walkway. (Exhibit 27).
20. The parking area is cleaned and well maintained. (Exhibit 29). In addition to the trash receptacles next to the walkway, there are two other receptacles placed at strategic locations around the property. Moreover, every morning Safeway employees patrol the parking area, the adjacent public alley, and the sidewalk along Morrison Street, and clean where appropriate. (Exhibit 4).
21. The landscaping is maintained by a professional landscaping service. Representatives from this service are at the property on a weekly schedule during the spring and summer and periodically, as needed, during the fall and winter. (Exhibit 4).
22. Safeway prohibits all day parking by commuters. It is Safeway's practice to notify the police when this occurs. To the same end, Safeway enforces a two hour parking limit to discourage the use of Safeway's parking lot for customers of nearby stores. (Exhibit 4).
23. Although on site parking is provided for a few employees, Safeway employees are encouraged to take mass transit to and from work, and are strongly discouraged from parking on the adjacent residential street. (Exhibit 4).

Compliance with Chapter 23 Requirements

24. The accessory parking use complies with all relevant provisions in Chapter 23 pertaining to parking lots.

25. The parking area is paved (§ 2303.1).
26. The parking spaces are striped so parked vehicles do not extend beyond the parking lot boundaries (§ 2303.1(b)).
27. No other use is conducted within the boundaries of the lot on which it is located (§ 2303.1(c)).
28. There is no direct vehicular access from the parking area in Lot 93 to Morrison Street, the adjacent public right-of-way (§2303.1(d)).
29. Onsite lighting is directed down and away from nearby residences (§2303.1(e)).
30. The parking area is generally free of refuse and the landscaping is in good condition (§2303.1(f)).
31. The parking area is screened from all contiguous residential property by brick and concrete walls and a 30 to 40 foot landscape buffer zone at the eastern edge of the property (§ 2303.2).

CONCLUSIONS OF LAW

The Board is authorized under the Zoning Act of June 20, 1938 (52 Stat. 797 D.C. Code § 6-641.07(g)(2) (2001), to grant special exceptions as provided in the Zoning Regulations. The applicant applied under 11 DCMR § 3104.1 for a special exception pursuant to 11 DCMR § 214 to establish accessory parking spaces elsewhere than on the same lot as the building they serve.

The Board may grant a special exception where, in its judgment, two general tests are met, and, the special conditions for the particular exception are met. First, the requested special exception must “be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps.” 11 DCMR § 3104.1. Second, it must “not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map.” 11 DCMR § 3104.1.

Subsection 214.1 of the Zoning Regulations permits “accessory passenger automobile parking spaces elsewhere than on the same lot or part of a lot on which any principal R-1 use is permitted, except for a one-family dwelling, ... as a special exception in an R-1 District if approved by the Board of Zoning Adjustment under § 3104, subject to the provisions of [that] section”.

The Board concludes that the accessory parking spaces – which have existed at the site for over 40 years -- are in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps. Further, the Board finds that the accessory parking spaces, as conditioned, will not tend to adversely affect the use of neighboring property in accordance with the Zoning Regulations and Maps.

As to the specific requirements of § 214, the parking spaces are in an open area that is at the level of the adjacent parking area (§ 214.2; Finding of Fact 15), are all located within 200 feet of the Safeway store and are contiguous thereto (§§ 214.3 and 214.4; Finding of Fact 3), and the parking use complies with all relevant provisions in Chapter 23 (§ 214.5; Finding of Fact 24).

The accessory parking spaces are also located, and facilities in relation to the parking lot are designed, so that they are not likely to become objectionable to adjoining or nearby property owners because of noise, traffic, or other objectionable conditions as is required by § 214.7. As noted above, the Board has reviewed this use on five separate occasions, and found each time that it was not likely to become objectionable to adjoining or nearby property owners. (Finding of Fact 10). Similarly, during the instant proceedings, the Board received no evidence that the use will result in any adverse impacts. Furthermore, the design and operational features of the parking area militate against this result. The layout of the parking area was designed to buffer the lot from its residential surroundings. (Finding of Fact 17). In addition, the site has been well maintained by a professional landscaping service (Finding of Fact 21), and kept free from debris. (Finding of Fact 30). To stem potential traffic impacts, Safeway has taken measures to ensure that its patrons and employees do not burden Morrison Street or other nearby residential streets. (Finding of Fact 28). Finally, this approval with conditions will require Safeway to maintain the same level of care that has been maintained at the site since 1967. As a result, the Board finds that the parking area will not become objectionable to adjoining or nearby property owners, and this condition has been satisfied.

Lastly, § 214.6 lists six circumstances when “it shall be deemed economically impracticable or unsafe to locate accessory parking spaces within the principal building or on the same lot on which the building or use is permitted.” One such factor is “Strip zoning or shallow zoning depth,” 11 DCMR § 214.6 (a). As noted above, the Board concludes that Safeway is unable to locate sufficient parking at Lot 92 because of the shallow depth of the commercial district that is mapped along Connecticut Avenue. (Finding of Fact No. 6).

The ANC Issues and Concerns

The Board is required under Section 3 of the Comprehensive Advisory Neighborhood Commissions Reform Act of 2000, effective June 27, 2000 (D.C. Law 13-135, D.C. Official Code § 1-309.10(d)(3)(A)), to give “great weight” to the issues and concerns raised by the affected ANC. To give great weight the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances, and make specific findings and conclusions with respect to each of the ANC’s issues and concerns. As will be explained below, the Board finds most, but not all, of the ANC’s recommendations to be persuasive.

The ANC recommended that this approval be subject to the same conditions that were required in the 1997 Order and the 1976 Agreement with a now defunct community organization. It also urged the Board to limit relief by setting a term of 5 years. The Board is adopting most of the conditions from the 1997 Order. However, the Board will not set a term limitation, and will not adopt the provisions of the 1976 Agreement on a wholesale basis.

Regarding the conditions from the 1997 Order, the Board is adopting the conditions regarding paving, landscaping, trash removal, and parking by patrons and employees. However, the Board will not adopt condition number 8, which requires Safeway to vigorously enforce a policy regarding commuter parking. While the Board believes this may be a good policy for Safeway, it does not believe this condition will mitigate any adverse impacts related to the relief being granted in this Order.

As to the 1976 Agreement, the Board finds that it would be of no value to incorporate its provisions in this Order. Many of the provisions impose requirements that have already been accomplished. The chart prepared by OP indicates, for example, that Safeway was to construct a second driveway on Connecticut Avenue and construct a pedestrian access on Morrison Street. Safeway has already complied with both of these provisions. (Finding of Fact 13 and OP Report, Tab 5 appended to Exhibit 27). The Board also notes that a now defunct community organization was a party to the 1976 Agreement. Therefore, the Agreement itself is no longer enforceable and should not be incorporated into this Order.

The Board has carefully considered whether to impose a term as a condition of approval, and examined the positions taken by OP and the ANC. However, the Board concludes that a term limitation is not necessary at this point in time. This parking area has existed for over 40 years without any significant problems, and this was noted by both DDOT and OP. Furthermore, the Board believes that no party will be adversely affected by the

absence of a term. Any individual who may become aggrieved in the future may seek redress through the zoning enforcement process.

The OP Recommendations

The Board is also required under D.C. Official Code §6-623.04 (2001) to give “great weight” to OP recommendations. While OP recommends approval of the application, it advised that the Board should limit the approval to a term of 10 years. OP also advised the Board to incorporate all conditions of approval from its prior order, and certain specified conditions contained in the agreement between Safeway and the Upper Connecticut Betterment Association. (Exhibit 13). OP provided a cogent rationale with respect to several of the proposed conditions. However, for the reasons set forth above, the Board was not persuaded it should incorporate all of the proposed conditions, or to limit approval to a term of 10 years.

The Board concludes that the applicant has satisfied the burden of proof with respect to the application for a special exception under § 214 to allow the continuation of the accessory parking spaces. The Board further concludes that, as hereinafter conditioned, the special exception can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map and that granting of the requested relief will not tend to adversely affect the use of neighboring property in accordance with the regulations and map.

It is therefore **ORDERED** that the Application is **GRANTED**, subject to the following **CONDITIONS**:

1. The pedestrian walkway located at the west end of the parking lot shall be maintained, and parking lot ingress/egress shall be limited to the two (2) driveway entrances along Connecticut Avenue, NW.
2. No vehicle or any part shall be permitted to project over any lot or building line or over the public space.
3. All parts of the lot shall be kept free of refuse or debris and shall be paved or landscaped.
4. The applicant shall maintain a hedge of eye-level evergreen trees, Canadian hemlocks or another similar low maintenance evergreen growing no taller than 15 feet along the south side of the lot bordering Morrison Street to provide screening for residents.

5. The landscaping shall be maintained by a professional landscaping service, which will maintain the property on a weekly schedule during the spring and summer, and periodically, as needed, during the fall and winter.
6. The applicant shall provide parking for its employees and shall discourage employee parking on Morrison Street at all times.
7. Truck loading on the Safeway site shall occur between the hours of 6 A.M. and 10 P.M.
8. The applicant shall pick up daily all debris on the property, in the alley that adjoins the property on the north side, and the area between the brick wall of the parking lot and the curb along Morrison Street.

VOTE: 5-0-0 (Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II,
Marc D. Loud and Michael G. Turnbull, all in favor of the motion)

Vote taken on July 17, 2007

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

Each concurring Board member has approved the issuance of this Decision and Order.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

Final Date of Order: MAY 9 2008

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND

REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., 9 (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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As Director of the Office of Zoning, I hereby certify and attest that on **MAY 9, 2008**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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