

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17789-A on behalf of Walgreen Eastern Co., pursuant to 11 DCMR 3103.2, for a variance from the off-street parking requirements under sections 2101 and 2115 to permit the redevelopment of the site, to demolish an existing gas station/auto repair facility, and to construct a pharmacy and drug store with underground parking at 4225 Connecticut Avenue, N.W. (Square 2051, Lot 7).

HEARING DATES: July 1, 2008, October 28, 2008,
February 24, 2009, and March 3, 2009

DECISION DATE: April 7, 2009

ORDER ISSUANCE DATE: March 17, 2010

**DATE OF DECISION ON
MOTION FOR RECONSIDERATION
AND MOTION TO STRIKE:** May 4, 2010

**ORDER DENYING RECONSIDERATION
AND GRANTING APPLICANT'S MOTION TO STRIKE**

On March 29, 2010, Concerned Citizens of Van Ness¹ (the "Opposition Party") submitted a motion for reconsideration of the Board of Zoning Adjustment's ("Board") March 17, 2010 Order ("Order"), which granted parking variances to Walgreen Eastern Co., Inc. ("Walgreens" or the "Applicant"). (Exhibit 55.) The variances allowed the Applicant to redevelop the site with a "Walgreens" pharmacy and drug store pursuant to plans which did not meet the parking requirements under the Zoning Regulations. The Opposition Party claimed that the Board's Order was erroneous as a matter of law, alleging specific errors in the Board's Order pursuant to 11 DCMR § 3126.4, and requested that the Board reconsider its Decision and Order. (Exhibit 57.) On April 5, 2010, the Applicant filed a timely response to the motion (the "Response") pursuant to 11 DCMR § 3126. (Exhibit 58.)

¹ Concerned Citizens of Van Ness is comprised of the owners of cooperative apartments located at 3001 Veazey Terrace, N.W., a building nearby to the subject property. The group was granted party status in opposition to the application and participated fully during the Board's proceedings.

Thereafter, on April 15, 2010, the Opposition Party submitted a document in response to the Applicant's Response (hereafter, the "Reply"). (Exhibit 60.) On April 22, 2010, the Applicant filed a Motion to Strike the Opposition's Reply (Exhibit 61), asserting that the filing of a Reply was not authorized under the Zoning Regulations. On April 28, 2010, the Opposition Party filed a document asking the Board to deny the Applicant's Motion to Strike. (Exhibit 62.) At a decision meeting on May 4, 2010², the Board granted the Applicant's Motion to Strike the Opposition Party's Reply, and denied the Opposition Party's Motion for Reconsideration. The Board's reasoning is set forth below.

The Motion to Strike

The Board concludes that the Reply filed by the Opposition Party should not be allowed into the record and therefore grants the Applicant's Motion to Strike.

Chapter 31 of Title 11 of the District of Columbia Municipal Regulations includes all of the Board's rules of practice and procedure. It contains no section devoted to describing the procedures for filing or opposing written motions. The chapter does contain a specific section that governs motions for reconsideration, which is § 3126. Subsection 3126.5 allows for a response to such a motion, either in support or in opposition, within seven days of the date after the motion for reconsideration has been filed. There is no provision that allows for a "reply" to a response. Clearly no reply is permitted without leave of the Board, and no such request was made here.

In addition, the "Reply" that was filed by the Opposition Party raises matters, including newly cited case law, for the first time and goes beyond the scope of the Applicant's "Response." There is no reason that these matters could not have been raised by the Opposition Party in its initial Motion for Reconsideration. As such, the Board believes it would be fundamentally unfair to allow the "Reply" document into the record. Accordingly, the Board grants the Applicant's Motion to Strike the Reply and hereby strikes Exhibit 60 from the record.

The Motion for Reconsideration

The Board has reviewed the alleged errors raised by the Opposition Party. For reasons that will be explained below, the Board finds that no errors were committed, and therefore denies the motion for reconsideration.

The Alleged Errors

There was no "conditional" grant of relief under § 2115, as claimed.

² Board members Moldenhauer, Sorg, and May reviewed the record and transcript of these proceedings, as they had not participated in or voted on the original decision. (See, 11 DCMR § 3126.8.)

The Opposition Party contends, in essence, that the Board approved a variance that was not requested. (Exhibit 57, p. 2.) In fact, just the opposite occurred. The Applicant's plans did not show compliance with 11 DCMR § 2115.4, which requires that compact car parking spaces be placed in groups of at least five contiguous spaces with access from the same aisle. The Board rejected the Applicant's contention that it had amended its application to request a variance from the provision and therefore refused to consider granting the relief. Because the Board's approval of an application normally carries with it approval of the plans submitted, 11 DCMR § 3125.7, the Board's Order specified that no building permit would be issued for the project unless the parking plans conformed to the requirements of § 2115.4. (Order, p. 12-13.) Hence, the Board never considered the relief the Opposition Party claims to have been granted, but mandated compliance with § 2115.4 as a pre-requisite to construction.

The Board did not err in its analysis of the parking reduction variance.

The Opposition Party makes two arguments: (1) the Board decided the case based upon an incorrect parking requirement; and (2) no evidence was presented regarding the correct parking requirement. These statements are not accurate. Although the Board believed the parking requirement was more stringent than it actually was, the number of spaces proposed by the Applicant never changed and the Board only considered evidence as to whether the 31 spaces proposed would be sufficient at the site.

The Board's Order made clear that it decided the parking reduction variance based upon a more stringent standard than was actually required. At the time of the Board's deliberations, in April 2009, the Board believed the Applicant was required to provide 57 parking spaces, but that only 31 spaces were proposed. (Order, p. 9.) Although the property met the requirements for the 25% parking space reduction authorized in 11 DCMR § 2104.1, the provision indicated that special exception approval was required. The Applicant did not choose to request special exception relief to reduce its requirement to 43 spaces and then a variance for the remaining 12 spaces it could not accommodate, but requested a variance for the entire amount. Approximately a month after the Board's deliberations, but prior to the Board's issuance of its written Order, the Zoning Commission made a technical correction to § 2104.1 which clarified that the 25% reduction was a matter-of-right reduction and was not subject to Board review.

Thus, at the time the Board voted to grant the variance it believed that 57 parking spaces were required and that a reduction to 31 spaces was before it. In fact, the Board needed only to have considered a reduction from 43 spaces to the 31 spaces proposed. The issue is relevant to the magnitude of the relief requested, but since the Board believed that more relief was needed than was actually the case, the only person potentially prejudiced by this would have been the Applicant. But since the Board approved the application notwithstanding its use of the higher parking number, no harm occurred.

As to the evidence presented of what the parking requirement was, that evidence is the parking schedule contained in the Zoning Regulations and the reduction permitted by 11 DCMR

§ 2104.1.

The Board did not err in granting a parking reduction in excess of 25%.

Although this application is for a variance, which is authorized by statute, the Opposition Party maintains that the Board is not authorized to grant more than a 25% reduction based upon a Zoning Regulation that authorizes a special exception. Specifically, the Opposition party claims that because 11 DCMR § 2108 authorized a maximum 25% reduction in parking by special exception, that limitation applies to variances as well. This is incorrect for the reasons explained in the Board's Order:

[I]f the stricter test is met, [the Applicant] may seek a parking reduction as a variance from the parking requirements. While section 2108 sets a 25% cap on the special exception relief, section 3103 allows a variance from *any* zoning regulation, including the parking requirements set forth in the parking schedule of section 2101. So long as the strict variance test is met, an applicant may seek a partial reduction – either less than or more than 25% of the requirement – or even a full parking reduction.”

(Order, p. 11.)

The Board only made conclusive findings regarding parking, not building height or signage.

The Opposition Party claims the Board erred by concluding that the Walgreens building design (particularly the building height and signage) was “well within” the parameters of the C-3-A zone district. This argument is based upon Finding of Fact No. 9 (“Finding of Fact 9”) of the Board's Order. However, this language was cited out of context and misconstrued.

Finding of Fact 9 is contained under a heading in the Order titled “The Proposed Project.” As such, it means only that the project, as proposed, complies with all requirements of the zone other than the parking requirements. Because the Applicant only sought relief from the parking requirements, and because the application was self-certified, the Board reviewed only the question of compliance with the parking requirements. The Board did not even review the issue of building height, let alone approve it. Nothing in the Order, other than the grant of the parking variance, is binding upon the Zoning Administrator (“ZA”). The ZA will need to determine whether all other aspects of the proposed building that are controlled by Title 11 are within matter-of-right limits. And the Applicant or the Opposition Party may file a timely appeal if either disagrees with the ZA's determinations. Similarly, the Board did not review the signage at the site. Nor could it have. The Applicant correctly points out that the Board has no jurisdiction over interpretation of the Sign Regulations, which are set forth in § 3107A of the Construction Codes, 12A DCMR.

The Board correctly applied the “practical difficulty” standard rather than the “undue hardship” standard, and found that the strict application of the Zoning Regulations will result in “practical difficulty” for the owner.

The Opposition Party claims that the Board erred because it lacked proof that the owner, Mid-Atlantic Commercial Properties, Inc., would suffer “undue hardship.” The Board disagrees in two respects. First, the correct standard to be applied in an area variance is “practical difficulty,” not “undue hardship.” Second, the Board considered the “practical difficulty” to the “Applicant,” who was the owner.

Regarding the correct legal standard, the District of Columbia Court of Appeals has held that that the undue hardship standard is only utilized when a use variance is sought.

Viewing the difference between ‘practical difficulties’ and ‘undue hardship’ as a matter of degree, we follow those decisions which construe the statute in the disjunctive, applying the former criterion to area variances and that latter to use variances.

(Palmer v. Board of Zoning Adjustment, 287 A.2d 535, 541 (D.C. 1972)).

Turning to the next question, the Board found that “practical difficulty” would be suffered by the owner, Mid-Atlantic Commercial Properties, Inc. The Board did not specifically reference Mid-Atlantic Commercial Properties, Inc. by name. However, the Conclusions of Law section in the Order specifically states that the Applicant would suffer from practical difficulty, (Order, p. 9 and 10), and, as noted, the Applicant is the owner. To be sure, the issue is confusing because the case is captioned in the name of Walgreens. However, the Order clearly states on the very first page that Mid-Atlantic Commercial Properties, LLC is the Applicant and Walgreens is the contract-purchaser at the property. Also, it is important to note that the practical difficulties found by the Board would apply to almost any commercial use of the property, regardless of who the property owner was. The shape and size of the property were exceptional conditions that were found to result in practical difficulty to the Owner\Applicant. However, these factors would result in practical difficulty regardless of who the owner was.

In conclusion, the Opposition Party has not identified any legal or factual errors, or any other basis upon which the Board should reconsider its decision in this case. For these reasons, it is hereby **ORDERED** that the Motion for Reconsideration is **DENIED**.

VOTE: 4-0-1 (Meridith H. Moldenhauer, Shane L. Dettman, Nicole C. Sorg, and Peter G. May to Deny; No other Board members (vacant) participating)

Vote taken on May 4, 2010

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BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A Majority of the Board members approved the issuance of this order.

ATTESTED BY: 
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: DEC 03 2010

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
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DEC 03 2010

As Director of the Office of Zoning, I hereby certify and attest that on _____, 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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AGE NO. 2

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