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February 25, 2000

'00 FEB 25 P1:04

BY HAND

D.C. Board of Zoning Adjustment
Room 210
441 4th Street, N.W.
Washington, D.C. 20001

Re: BZA Application No. 16542
Georgetown Flea Market

Dear Members of the Board:

This letter is to supplement and further explain the applicant's request for postponement filed on January 26, 2000, in the above-referenced application. The Board considered the request at the public hearing on February 9, 2000, and, while not granting the postponement, did determine not to proceed with the hearing. At the same hearing, Ron Mlotek appeared and asked the Board to dismiss the application. The applicant also hereby responds to that request.

Background

The property at issue in the subject matter is owned by the District of Columbia through the Board of Education and is currently operated as the Hardy Middle School. Since the late 1980s, the Board of Education has leased the exterior portion of the premises on Sunday only to Michael Sussman, who operates a business known as the Georgetown Flea Market. Mr. Sussman was advised by Board of Education personnel at that time that a certificate of occupancy for that use on public property was not required, and consequently, did not apply for one.

More recently, Mr. Sussman was advised by the District government that he should apply for a certificate of occupancy, and he did so. On October 6, 1999, Edgar Nunley, the Chief of the Zoning Review Branch denied the application and advised Mr. Sussman that he could seek a variance from the BZA for the use.

BZA
Case No. 16542
Exhibit No. 30

Board of Zoning Adjustment
District of Columbia
CASE NO.16542
EXHIBIT NO.30

At Mr. Sussman's direction, we began to assemble the information necessary to file such an application. We further suggested to Mr. Sussman that the decision to require a certificate of occupancy might be in error and, after further discussion, on November 5, 1999, we filed an appeal of Mr. Nunley's ruling. That appeal was assigned BZA No. 16535. After completing the material necessary to file an application with the BZA, we also followed Mr. Nunley's direction and, on November 24, 1999, filed the subject application for a variance, which was assigned BZA No. 16542.

On December 21, 1999, the Council of the District of Columbia passed on an emergency basis the "Comprehensive Plan Land Use Georgetown Flea Market Exemption Emergency Amendment Act of 1999." A copy of that Act, assigned Act No. 12-253, is attached as Exhibit A. That Act provides in pertinent part: "The use of parking areas of the public school on Lot 850 in Square 1297, which is located at 1819 35th Street, N.W., as a flea market on Sundays shall not be subject to zoning."

The legislation passed by the Council was signed by the Mayor on January 10, 2000, and was approved by the Control Board on January 27, 2000. Emergency acts are not subject to Congressional review, and accordingly, the legislation became effective on January 27, 2000. The legislation was properly considered by the Council and, having gone through the remainder of the applicable legislative process, must be assumed to have been validly adopted.

The appellant requested and the Board granted a postponement of the hearing on the appeal on January 19, 2000. Having already been granted the postponement in the appeal, and having filed the variance case as a protective matter assuming that the appeal did not dispose of the issues, on January 26, 2000, we filed a request for postponement of the application. Consistent with past practices in applications before the Board, we did not file a pre-hearing statement, nor did we post the notice on the property.

District of Columbia Government Compliance with Zoning

The D.C. Court of Appeals has ruled that the District Government was not subject to zoning prior to May 23, 1990, in the case involving the Hurt Home property at 3050 R Street, N.W. In its decision in *Speyer v. Barry*, 588 A.2d 1147 (D.C.App. 1991), the Court noted "the general rule that a municipality exercising a governmental function is not bound by its own zoning laws unless the legislature

has manifested a contrary intent." *Id.* at 1151. Noting that the Council had adopted the Comprehensive Plan Amendments Act of 1989 after the lower court's ruling in the Hurt Home matter, the Court of Appeals went on to hold that "although the District government was previously exempt from zoning laws applicable to private parties, it is exempt no longer." *Id.* at 1153. The Council clearly has within its legislative authority the ability to control whether and how the municipality must comply with zoning.

Status of the Subject Application

The application was properly filed with the Board prior to any action by the Council. As noted in our background discussion, above, the legislation had been passed by the Council and signed by the Mayor prior to the time we filed our request for postponement, and the legislation has since become effective. As we noted in our requests for postponement of both the appeal and the application, we believe that the legislation may ultimately make it unnecessary for the Board to hear and decide either case. For that reason, we requested a postponement.

We continue to believe that deferring the hearing is proper. Since the Board in fact did not go forward with the February 9, 2000, hearing, we believe that the Board should reschedule the case, with the only issue being one of timing. We further believe that, if a hearing before the Board is necessary, the most appropriate course of action is to hear and decide the appeal first, and then consider the variance application if the appeal does not resolve all the issues. Accordingly, we request that a hearing be scheduled after June 7, 2000.

As to the request that the case be dismissed, the Rules of the Board provide that "No application or appeal shall be dismissed on the grounds that the applicant failed to comply with the provisions of this Chapter unless, after due notice of the deficiency and expiration of a reasonable time as fixed by the Board, the deficiency has not been corrected." (11 DCMR §3101.7) In light of the facts set forth above, there is no basis to dismiss the application.

We note that if the Board were to grant the dismissal without prejudice, the only practical effect of that action would be to exact an additional $800 from the applicant to refile the application. The Board would further lose control over when the case would be heard, since the timing of filing a new application would remain solely with the applicant. Dismissal would therefore not be productive.

We further note for the Board's information that the two Advisory Neighborhood Commissions affected by the Flea Market, 2E and 3B, have both written to the Board in support of continuation of the use. Copies of those letters are attached as Exhibit B. The letter from ANC 2E cites the wrong case number. It was therefore not available to the Board or the applicant at the hearing on February 9, 2000.

For all of the above reasons, the applicant respectfully requests that the Board reschedule a public hearing on the subject application after the appeal is to be heard on June 7, 2000. The applicant will advise the Board prior to the scheduled notice date as to whether the hearing should go forward or whether the issues have been resolved and no hearing is necessary.

Sincerely,

Norman M. Glasgow, Jr.

Steven E. Sher
Director of Zoning Services

Attachments

ENROLLED ORIGINAL

Codification District of Columbia Code 2000 Supp.

AN ACT

D.C. ACT 13-253

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend, on an emergency basis, the District of Columbia Comprehensive Plan Act of 1984 Land Use Element Amendment Act of 1984 to exempt from zoning the use of the parking areas of the public school at 1819 35th Street, N.W., as a flea market on Sundays.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Comprehensive Plan Land Use Georgetown Flea Market Exemption Emergency Amendment Act of 1999".

Sec. 2. Section 7(a) of the District of Columbia Comprehensive Plan Act of 1984 Land Use Element Amendment Act of 1984, effective May 23, 1990 (D.C. Law 8-129; D.C. Code § 1-250(a)), is amended as follows: Note, § 1-250

(a) Paragraph (1) is amended by striking the phrase "and (4)" and inserting the phrase "(4), and (5)" in its place.

(b) A new paragraph (5) is added to read as follows:

"The use of parking areas of the public school on Lot 850 in Square 1297, which is located at 1819 35th Street, N.W., as a flea market on Sundays shall not be subject to zoning.".

Sec. 3. Fiscal impact statement.

This legislation will have a positive fiscal impact. The legislation limits the zoning exemption to only the parking areas on Sundays and does not include the school building or field. Currently, the flea market vendors pay more than $21,000 per year in lease payments to the District of Columbia Public Schools. Sales tax revenue averages between $20,000 to $30,000 per year. These revenues would be lost if the flea market were closed. In addition, 1/3 of the vendors live in the District and pay tax on income generated by sales at the flea market.

Sec. 4. This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto) and approval by the Financial Responsibility and Management Assistance Authority as provided in section 203(a) of the District of Columbia Financial Responsibility and Management Assistance Act of 1995, approved April 17, 1995 (109 Stat. 116; D.C. Code §47-392.3(a)), and shall remain in effect for no longer

EXHIBIT A

than 90 days, as provided for in emergency acts of the Council of the District of Columbia in section 412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Code §1-233(c)(1)).

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED: January 10, 2000

COUNCIL OF THE DISTRICT OF COLUMBIA

COUNCIL PERIOD THIRTEEN

RECORD OF OFFICIAL COUNCIL VOTE

Docket No. B13-537

[ ] ITEM ON CONSENT CALENDAR

[X] ACTION & DATE ADOPTED FINAL READING, 12-21-99

[X] VOICE VOTE APPROVED

RECORDED VOTE ON REQUEST ORANGE

ABSENT

[ ] ROLL CALL VOTE - Result ( )

Councilmember	Aye	Nay	NV	AB	Councilmember	Aye	Nay	NV	AB	Councilmember	Aye	Nay	NV	AB
Chmn. Cropp					Chavous					Orange				
Allen					Evans					Patterson				
Ambrose					Graham					Schwartz				
Brazil					Jarvis									
Catania					Mendelson									

X - Indicates Vote AB - Absent NV - Present not Voting

CERTIFICATION RECORD

Secretary to the Council

December 22, 1999
Date

[ ] ITEM ON CONSENT CALENDAR

[ ] ACTION & DATE

[ ] VOICE VOTE

RECORDED VOTE ON REQUEST

ABSENT

[ ] ROLL CALL VOTE - Result ( )

Councilmember	Aye	Nay	NV	AB	Councilmember	Aye	Nay	NV	AB	Councilmember	Aye	Nay	NV	AB
Chmn. Cropp					Chavous					Orange				
Allen					Evans					Patterson				
Ambrose					Graham					Schwartz				
Brazil					Jarvis									
Catania					Mendelson									

X-indicates no AB-Absent NV-Present not voting

CERTIFICATION RECORD

Secretary to the Council

Date

[ ] ITEM ON CONSENT CALENDAR

[ ] ACTION & DATE

[ ] VOICE VOTE

RECORDED VOTE ON REQUEST

ABSENT

[ ] ROLL CALL VOTE - Result ( )

Councilmember	Aye	Nay	NV	AB	Councilmember	Aye	Nay	NV	AB	Councilmember	Aye	Nay	NV	AB
Chmn. Cropp					Chavous					Orange				
Allen					Evans					Patterson				
Ambrose					Graham					Schwartz				
Brazil					Jarvis									
Catania					Mendelson									

X - Indicates Vote AB - Absent NV - Present not Voting

CERTIFICATION RECORD

Secretary to the Council

Date

DISTRICT OF COLUMBIA
ADVISORY NEIGHBORHOOD COMMISSION 3B
GLOVER PARK AND CATHEDRAL HEIGHTS
P.O. BOX 32312
WASHINGTON, DC 20007
TELEPHONE: 202.338.2969
FACSIMILE: 202.333.8654
E-MAIL: ANC3B@ATT.NET

'00 JAN 27 A10:55

20 January 2000

Jerrily R. Kress, FAIA
Director, Board of Zoning Adjustment
Government of the District of Columbia
441 4th Street, NW, Suite 210
Washington, DC 20001

Dear Jerrily R. Kress:

Thank you for your memorandum of 24 November 1999 informing ANC3B of Norman M. Glasgow, Jr.'s appeal, filed on behalf of Michael Sussman, of the Building and Land Regulation Administration's decision to deny a certificate of occupancy to continue operation of the Georgetown Flea Market in the parking lot of the DC public school located at 1819 35th Street, NW.

As you noted, this site is not within ANC3B's boundaries, but it is in the Commission area immediately bordering ours, and many Glover Park and Cathedral Heights residents have an interest in the matter.

Accordingly, at our regular public meeting on 9 December 1999 we discussed Mr. Sussman's appeal and request for a zoning variance. All residents in attendance and all Commissioners agreed that the banishment of the Georgetown Flea Market from its long-time site of operation would be a detriment to our neighborhood and indeed to the city as a whole. The Flea Market is a major attraction, bringing a large number of shoppers from around the city and the surrounding areas, from many other states, and indeed, in some cases, from foreign countries to our neighborhood, where they patronize not only Mr. Sussman and his vendors, but also our neighborhood stores and restaurants. Just as important, the flea market is a favorite recreational and commercial destination of many Glover Park and Cathedral Heights residents. Furthermore, we have observed, in our own frequent travels to and by the site, no negative implications of the Flea Market's presence there.

In short, we fully support Mr. Sussman's request for a zoning variance that would allow him to secure a certificate of occupancy for the site. And we look forward to his continued operation of the Flea Market there, and consequently to the preservation of an asset important to the neighborhood and to the city. We appreciate your consideration of this opinion.

BZA
Case No. 16542
Exhibit No. 26

Sincerely,

A.L.B.

Ann Lloyd Breeden
Vice Chair

cc: The Hon. Jack Evans, Councilmember, Ward 2
Norman M. Glasgow, Esq.
Peter Pulsifer, Chair, ANC2E

3B01	3B02	3B03	3B04	3B05
N. GLOVER PARK	E. GLOVER PARK	W. GLOVER PARK	CATHEDRAL HEIGHTS	S. GLOVER PARK
RICHARD PROCIDA	MONICA MIZEREK	ANN LLOYD BREEDEN	TONI RITZENBERG	JAMES LIVELY
TREASURER	CHAIR	VICE CHAIR	SECRETARY	

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Advisory Neighborhood Commission 2E
3265 S Street, NW - Washington, DC 20007
Phone: 202-338-7427 FAX: 202-338-0279

'00 JAN 13 P5:59
OFFICE OF ZONING
DISTRICT OF COLUMBIA

January 7, 2000

Board of Zoning Adjustment
441 Fourth Street, NW
Suite 210
Washington, DC 20001

Appeal of Michael Sussman/Georgetown Flea Market. Appeal No. 16535

Dear Members of the Board;

At its regularly scheduled, duly noticed public meeting on January 4, 2000, with a quorum present, the ANC 2E voted to pass the following motion:

> ANC 2-E supports the granting of a variance for the operation of a flea market on a portion of the parking lot of the Hardy Middle School should such a variance be necessary.

Sincerely,

Peter Pulsifer
BLH
Peter Pulsifer
Chair

#14