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January 29, 2001

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Mr. Robert Sockwell, Chair
D.C. Board of Zoning Adjustment
441 4th Street, NW
Suite 220
Washington, DC 20001

Re: Appeal of Michael Sussman/Georgetown Flea Market
BZA Appeal No. 16642

Dear Mr. Sockwell and Members of the Board:

Our client, Safeway, Inc, respectfully submits that the Board should uphold the decision of the Chief of the Zoning Review Branch, dated October 6, 1999, regarding the Georgetown Flea Market ("GFM") which is operated on District of Columbia-owned property at 1819 35th Street, NW (Square 1297, Lot 850), also known as the parking lot/playground of the Hardy Middle School. In his October 1999 decision, the Chief of the Zoning Review Branch denied the GFM's application for a certificate of occupancy to continue to use the subject property for the "sale of antiques and collectibles – Sunday only 7:00 a.m. to 6:00 p.m.," stating that a variance must be obtained from the Board of Zoning Adjustment ("BZA") in order to maintain such a use.

BZA
Case No. 16642
Exhibit No. 36

Board of Zoning Adjustment
District of Columbia
CASE NO.16642
EXHIBIT NO.36

1. Background

The Chief of the Zoning Review Branch denied Appellant's request for a certificate of occupancy on October 6, 1999. Appellant filed an appeal of that ruling and a request for a variance on November 5, 1999. On December 21, 1999, the Council of the District of Columbia passed the "Comprehensive Plan Land Use Georgetown Flea Market Exemption Emergency Amendment Act of 1999."[1] This legislation was signed by the Mayor on January 10, 2000 and approved by the Control Board on January 27, 2000.

With the emergency legislation in place, the GFM requested the Board to grant a postponement of the public hearing which was then scheduled for January 19, 2000. The Board granted this request and rescheduled the hearing for June 7, 2000. The GFM then applied for, and was granted, a certificate of occupancy, dated February 29, 2000. The emergency legislation expired in April 2000. Nonetheless, the GFM withdrew its appeal and variance request and, as a consequence, the June hearing was cancelled.

By letter dated July 25, 2000, the Zoning Administrator informed the D.C. Public Schools, the landlord of the subject property, that the applicant had been issued the certificate of occupancy in error. It was at this point that the GFM re-filed its appeal and now, after twelve years without a certificate of occupancy and several months of procedural "strategies" to avoid the obvious, appears before the Board requesting that it be understanding of its plight.

[1] *See* D.C. Act 13-253 (1999). The Act provides, "The use of parking areas of the public school on lot 850 in Square 1297, which is located at 1819 35th Street, NW, as a flea market on Sundays shall not be subject to zoning." *Id.*

2. The Market is Not a Non-Conforming Use

Appellant argues that the GFM should be permitted to continue its operations as a non-conforming use. An existing non-conforming use will ordinarily be permitted to continue if it is lawfully in existence at the time of its inception.[2] *See* 11 DCMR § 2000.4. Appellant relies on *Speyer v. Barry*, 588 A.2d 1147 (D.C. 1991) for its position that District owned property that was not subject to zoning prior to the Comprehensive Plan Amendments Act of 1989 ("CPAA") should not be subject to zoning now because it is a non-conforming use. *Statement in Support of Appellant*, at 4. Applicant's reliance on *Speyer* is misplaced.

In *Speyer*, neighborhood residents brought an action against the District of Columbia to prevent the conversion of the former "Hurt Home for the Blind" ("Hurt Home") to a facility housing emotionally disturbed youngsters. The District of Columbia bought the Hurt Home pursuant to legislation supporting the growth of mental health services and facilities. *Id.* at 1149. The facility was located in a residential district, and under existing zoning regulations, a "community-based residential facility" for more than eight persons was not permitted without the approval of the BZA. *Id.* at 1151. The *Speyer* court held that the government was subject to zoning as a result of the Comprehensive Plan Amendments Act of 1989.[3]

The GFM alleges significance to the fact that the treatment facility was and is not operated by D.C. government personnel, but instead a private contractor. *Statement in Support of Appellant*, at 4. That does not help the GFM here. Though a private contractor may be operating the Hurt House, the primary purpose of the establishment is to comply with the Saint Elizabeths Hospital and District of Columbia Mental Health Services Act ("MHSA") which

[2] There is a clear policy bias to terminate the non-conforming use of property. *See Interdonato v. District of Columbia Board of Zoning Adjustment*, 429 A.2d 1000, 1002 (D.C. 1981) (discussing the Zoning Commission's broader zoning policy of discouraging and eventually eliminating non-conforming uses).

required the Mayor to establish "a comprehensive District mental health system to provide mental health services and programs through community mental health facilities to individuals in the District of Columbia." *Id.* at 1149, *citing* D.C. Code § 32-623 (a)(2) (1988).[4] Thus, the central function of the Hurt House is to carry out a government function. That it was a private party providing that service is inconsequential to the fact that it was a government created and funded facility. Furthermore, the D.C. Court of Appeals held that the District was required to apply for and receive the statutorily required certificate of occupancy before it could operate the proposed center. *Id.* at 1153. This adds support to Safeway's position that the GFM must do the same.

The circumstances surrounding the Georgetown Flea Market are clearly distinguishable from the facts in *Speyer*. The GFM in no way carries out a government function any more than an Arts and Crafts store would. The District did not seek out the Hardy Middle School and purposely lease the grounds to further a government goal or objective. The GFM is simply a business agreement between the District and the GFM, with no policy or legislative force behind its creation or its operation.

GFM also contends that it has been using the District-owned property continuously since the late 1980's. *Statement in Support of Appellant*, at 4. While the GFM may have been present at the same site since this time, it is by Safeway's information and belief that the relationship between the GFM and the District is a series of renewable leaseholds and that the GFM currently

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[3] The CPAA states that as of May 23, 1990, "the [D.C.] government shall be subject to Zoning." *See* D.C. Code § 1-250.

[4] A secondary issue in this case was whether the MHSA had implicitly superseded the District of Columbia Certificate of Need Act (CONA) which governs the establishment of any new institutional health service by any person, including the District government, with which the District did not comply. *Id.* at 1148.

leases the property on a month-to-month basis. Safeway believes that GFM's agreement with the D.C. Public Schools has expired numerous times since the District adopted the CPAA.[5]

3. The Georgetown Flea Market is Subject to Zoning Pursuant to D.C. Code § 1-250(a)(2)

The GFM argues that while the phrase "governmental land use" is not defined in the statute or in the District of Columbia case law, other jurisdictions have found that state land leased to private entities may constitute governmental or public use, thus exempting it from local zoning restrictions. *Statement in Support of Appellant*, at 5.

The private business of running a flea market in the parking lot of a public school simply does not rise to being a "governmental land use." There is no legitimate government interest in renting out space to different vendors for a profit. The interests are solely those of the owners and vendors of the GFM. Furthermore, Appellant argues that significant community support would qualify the GFM as "governmental land use." If that is true then every popular commercial use in the city could operate on a residentially zoned public school property as a "governmental land use."

4. The GFM Does Not Have A Certificate of Occupancy That Will Allow It To Operate the Market Indefinitely

The GFM then argues that the certificate of occupancy it obtained on February 29, 2000 is still valid. However, it is obvious that the only reason the GFM was granted a certificate of occupancy was because it had applied in the "window of opportunity" created by the emergency

[5] It should also be noted that a non-conforming use cannot be expanded or enlarged. *See* 11 DCMR § 2002.5. Thus, assuming, *arguendo*, that applicant does establish itself as a non-conforming use, the level of that non-conformity may only extend to the degree of use when the non-conformity arose.

legislation. A certificate of occupancy that is created by emergency legislation must die with the expiration of that emergency legislation, especially when the "unique" circumstances of the issuance are clearly known to the holder. Emergency legislation is usually passed with the goal that permanent legislation will follow. It is clear that the decision by the Zoning Administrator, stating that the certificate of occupancy was issued in error, illustrates that the Act, and any actions resulting from the Act, would not be permanent.[6]

5. The Doctrine of Laches Does Not Apply

Appellant argues that under the doctrine of laches, the District should be barred from denying that a valid certificate of occupancy exists. A claim of latches arises when a plaintiff delays in bringing a claim and the defendant is unfairly prejudiced by that delay. The doctrine of latches is based upon the principle that "equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant." *See Beins v. District of Columbia Board of Zoning Adjustment*, 572 A.2d 122, 126 (D.C. 1990) *citing American Univ. Park Citizens Ass'n v. Burka*, 400 A.2d 737, 740 (D.C. 1979). In order to support a claim of laches, a defendant must show that (1) the delay was unreasonable and (2) the defendant has been prejudiced by that delay. *Id.* It is well-established in the District of Columbia that the defense of laches is "judicially disfavored in the zoning context because of the public interest in enforcement of the zoning laws." *Id.*; *Goto v. District of Columbia*, 423 A.2d 917, 925 (D.C. 1980).

[6] The GFM also argues that the certificate remains valid since no written notification to revoke that certificate has been issued, as would be required by 12 DCMR § 118.4.3. Safeway believes that this section was cited to in error. While there is no 12 DCMR § 118.4.3, 12A DCMR § 118.4.3 states: "Any certificate of occupancy previously issued or issued pursuant to Section 118.0 shall be revoked by the Director, after notice, if due to any material circumstance, it is found to have been issued in error." Section 118.4.6 sets forth the requirement that notice of revocation should be given in writing.

Most successful laches claims involve the defendant's expenditure of money on substantial, permanent improvements. *See Goto*, 423 A.2d at 926. The defendant will argue that it invested money on a particular piece of property believing it had the right to do so, and it will be prejudiced by having those rights taken away as a result of a lawsuit, thereby losing its economic investment. There is no offering of either permanent improvements or substantial invested money based unreliably on a representation of the government. In fact, the GFM claims that it closes its proposed use every Sunday. Any structures are temporary, and are erected and removed on the day of the market. Since Appellant has offered no evidence of expenditures on permanent improvements to the property, the laches claim must fail.[7]

6. Georgetown Flea Market is Not an Accessory Use to the Hardy Middle School.

An "accessory use" is defined as a use (1) customarily incidental and subordinate to the principal use and (2) located on the same lot with the principal use. *See* 11 DCMR § 199 (1999). The Georgetown Flea Market is not incidental to the principal use of Hardy Middle School. The middle school is an educational facility and the flea market does not contribute to the education of any students who may attend the middle school. It is clearly a business enterprise with the primary goal of making a profit for the lessee of the lot, and for the vendors who rent space from the lessee.

7. Conclusion

The GFM must comply with the same zoning requirements that apply to private business establishments that occupy District of Columbia property for private purposes. To find

[7] It should also be noted that this is the position espoused by the Assistant Corporation Counsel of the Government of the District of Columbia. *See Statement in Support of Appellant*, at Exhibit B.

otherwise would create a zoning exception that no other D.C. business enjoys. That the D.C. Council created a legislative exception for the GFM is conclusive evidence that but for the legislation, the GFM is, indeed, subject to the zoning laws. That the Council let this legislation expire strongly evidences the Council's intention not to permit this exemption to continue.

Thus, for the foregoing reasons, Safeway respectfully requests that the Board affirm the decision of the Chief of the Zoning Review Branch, denying Appellant's application for a certificate of occupancy. In doing so, the Board must require that GFM comply with the zoning regulations and to obtain a variance from the regulations.

Respectfully submitted,

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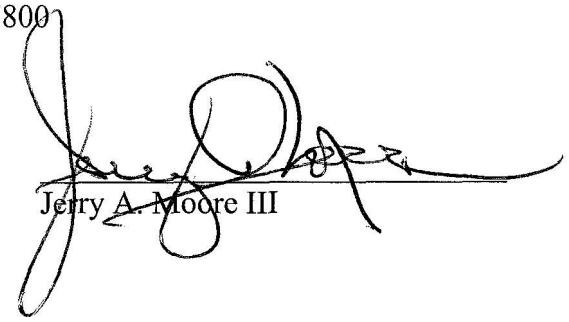
cc: Norman M. Glasgow, Jr.
Avis E. Black, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2001, a copy of the foregoing Opposition to Appeal was served upon the following by hand delivery.

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