BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF D.C.
D.C. OFFICE OF ZONING
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In re:	:	
Appeal of Michael Sussman/ Georgetown Flea Market	:	BZA Appeal No. 16642

STATEMENT IN SUPPORT OF APPELLANT

This statement is filed by Michael Sussman (the "Appellant"), pursuant to 11 DMCR (Zoning) §3112.10, in support of his appeal of the decision of the Chief of the Zoning Review Branch, dated October 6, 1999, regarding the District of Columbia-owned property known as 1819 35th Street, N.W. (Square 1297, Lot 850), also known as the Hardy School. Since the fall of 1988, Appellant has had the permission of the District to use, without the requirement of a certificate of occupancy, a portion of the property for the purpose of operating a business known as the Georgetown Flea Market (the "Market"). (See attached Plat at Exhibit A.) In the October, 1999, decision, the Chief of the Zoning Review Branch denied Appellant's application for a certificate of occupancy to continue to use the subject property for "sale of antiques and collectibles - Sunday only 7:00 a.m. to 6:00 p.m.", claiming that a variance must be obtained from the Board of Zoning Adjustment ("BZA") in order to maintain such a use.

Appellant maintains that this decision is clearly erroneous for the following reasons: (1) the subject property is devoted to governmental use, which was in

BZA
Case No. 16642
Exhibit No. 55

Board of Zoning Adjustment
District of Columbia
CASE NO.16642
EXHIBIT NO.55

existence on May 23, 1990, and is therefore not subject to zoning pursuant to D.C. Code § 1-250(a)(2); (2) even if the school property is now deemed to be subject to zoning, no certificate of occupancy is needed for the Market to continue on this District-owned property since the use was a lawful use predating the requirement that District properties are subject to the Zoning Regulations and is entitled to continue under §2000.4 of the Zoning Regulations; (3) notwithstanding the fact that no certificate of occupancy is required to continue the use, Appellant holds a validly issued certificate of occupancy dated February 29, 2000, to operate at the subject premises; (4) under the equitable doctrine of laches, the District should be barred from applying the Zoning Regulations to require the Appellant to obtain a new certificate of occupancy; and (5) the use of a portion of the site for the sale of antiques and collectibles on Sundays only is a legally permitted accessory use of the school, pursuant to the definition of "School, Public" found in § 199 of the Zoning Regulations.

I.
STATEMENT OF FACTS

The property at issue in this appeal 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 Sundays only to the Appellant, who operates the Market. The Appellant has operated the Market continuously since that time. The Appellant was advised by Board of Education personnel at the inception of the lease that a certificate of occupancy for the Market use on public property was not required and,

consequently, the Appellant did not apply for one. See the testimony of Veronica Falwell, Deputy Director for Real Estate for the D.C. Public Schools, in BZA Application No. 16643, attached as Exhibit B. It is undisputed that, in 1988, when the Appellant's lease began, District properties were not subject to zoning and the District did not require a certificate of occupancy for the use of its property.

More recently, however, the Appellant was advised by the District government that he should apply for a certificate of occupancy. Although the Appellant has always maintained that such a certificate of occupancy was not required to operate the Market, he followed those instructions and so applied. On October 6, 1999, Edgar Nunley, then Chief of the Zoning Review Branch, denied the application and advised the Appellant that he could seek a variance from the BZA for the use.

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" D.C. Act 13-253. 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. That emergency legislation subsequently expired in April, 2000.

Although he continued to maintain that a certificate of occupancy was not required, out of an abundance of caution and under the terms of the emergency legislation, the Appellant applied for and was issued a certificate of occupancy, dated February 29, 2000, authorizing the use of the subject property for the Market. That certificate of occupancy has never been revoked.

By letter dated July 25, 2000, the Zoning Administrator informed a representative of D.C. Public Schools, the landlord of the subject property, that his office "had previously issued the applicant a certificate of occupancy in error." He further stated that "we encourage you to have GTFM [Georgetown Flea Market] appeal before the BZA immediately for a variance or special exception to continue operations at Hardy Elementary School, although the certificate of occupancy has not been revoked." That letter prompted Appellant to pursue the appeal of the decision now before the Board.[1]

II.
EXHIBITS IN SUPPORT OF APPEAL

Appellant submits the following exhibits in support of the appeal and this statement:

Exhibit A: Excerpt from the Baist Atlas showing the Property.

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[1] While the appeal was pending, the Appellant separately filed for a use variance for the property, again out of an abundance of caution and with the view of avoiding protracted conflict regarding the site. In an order entered on March 29, 2001, the BZA denied the use variance on the limited grounds that the Appellant had not demonstrated that the owner of the property, the D.C. Public Schools, would suffer a hardship by denial of the use variance. The Board did not address the question presented by this appeal, namely is a certificate of occupancy even required for the Market?

Exhibit B: Excerpt from the transcript of the public hearing before the BZA on January 30, 2001, containing the testimony of Veronica Falwell.

Exhibit C: Corporation Counsel Memorandum dated August 11, 2000, from John M. Miller to the Office of Planning and Economic Development.

Exhibit D: Certificate of Occupancy, dated February 29, 2000, authorizing the "Sales of Antiques and Collectibles" (Flea Market - Sundays Only).

Exhibit E: D.C. Act 13-253, the Comprehensive Plan Land Use Georgetown Flea Market Exemption Emergency Amendment Act of 1999.

Exhibit F: Letter of Support from Advisory Neighborhood Commission 2E.

Exhibit G: Letter of Support from Burleith Citizens Association.

Exhibit H: Letter of Support from Advisory Neighborhood Commission 3B.

III.
THE MARKET USE IS NOT SUBJECT TO ZONING PURSUANT TO D.C. CODE §1-250(A)(2)

The Appellant contends that the subject property in its entirety is exempt from zoning as a "governmental land use" of the property. D.C. Code §1-250(a)(2), provides that "governmental land uses that were either existent or substantially planned, documented and invested in, prior to May 23, 1990, shall not be subject to zoning". (emphasis added). The property was clearly being used as a school as of the effective date of the Comprehensive Plan Amendments Act ("CPAA") of 1989. The Market operates on a part of the property for only part of one day each week (and then only when weather conditions are favorable),. Accordingly, the property is not subject to zoning and its continued use for the purposes which were in existence at the time is authorized by §106.5(a) of the Zoning Regulations.

While the phrase "governmental land uses" is not defined in the statute or in District of Columbia case law, courts in other jurisdictions have found that state

land leased to private entities may constitute governmental or public use, thus exempting the property from local zoning restrictions. See e.g. Senders v. Town of Columbia Falls, 647 A.2d 93 (Me. 1994) (state land leased to private entity to operate salmon fry hatchery is not subject to local zoning); Baltimore v. State Dept. of Health & Mental Hygiene, 381 A.2d 1188 (Md. 1978); (lease of state property to private organization to be used for home for teenage girls in need constituted public use exempt from zoning ordinance; Portsmouth v. John T. Clark & Son. Inc., 378 A.2d 1383 (N.H. 1977)(storage of scrap metal by lessee of state-owned property could not be enjoined under local zoning ordinance prohibiting junkyards).

The present case is even more compelling since, for over ninety-three percent of the time, the property is solely devoted to public school uses. It is only during the eleven hours on fair Sundays that the parking lot is used by the Market. The property retains its predominant character as school property, unlike cases where the government has fully leased property to a private operator for the operator's exclusive or predominant use.

In support of his argument that D.C. Code §1-250(a)(2) applies to the present case, the Appellant submits that the Market use clearly predated May 23, 1990. Moreover, the Appellant notes that the lease of the subject property is authorized pursuant to D.C. Code §31-201(7), which permits the Board of Education to negotiate leases of school property for any use which it "may deem to be compatible with the normal use of the particular property and in the best interest of the local community." In addition, this lease arrangement has provided benefits for many

years to the D. C. government and to the community at large, including an annual revenue of approximately $170,000, inclusive of sales and franchise taxes.

As set forth in pages 1-2 of the Corporation Counsel Memorandum dated August 11, 2000 (attached as Exhibit C), the continuation of the Market use is compatible with the school use as it does not occur while school is in session and is in the best interest of the community. The Office of Planning made similar findings in its report to the Board in the application for a variance (BZA Application No. 16643) which was filed as an alternative to this appeal. There is also significant longstanding community support for the Market as evidenced through the ANCs, Burleith Citizen's Association and others. For all these reasons, the Appellant contends that no certificate of occupancy is required in the present case as the school property, including the part-time Market use, is not subject to zoning.

IV. THE MARKET IS PERMITTED TO CONTINUE AS A NON-CONFORMING USE

Even if the Board were to determine that the Market use, is somehow now subject to zoning, the Zoning Regulations cannot be read to deprive the Appellant of the right to continue to operate the Market where that use was lawful when it was established and the property has been continuously used for that purpose since before the property became subject to the Zoning Regulations. The Appellant submits on the basis of the facts and law pertaining to this case that a certificate of occupancy for the continued use of the school property for the "sale of antiques & collectibles" is not required and that the Market is permitted to continue its operations as a non-conforming use.

The Zoning Regulations define a nonconforming use as "any use of land ... lawfully in existence at the time this title or any amendment to this title become effective, which does not conform to the use provisions for the district in which the use is located." (11 DCMR §199) The Market use was sanctioned by the lease from the Public Schools, an agency of the District government, and was lawfully in existence at the time of its inception. Further, as testified to by Veronica Falwell, a knowledgeable and authorized representative of the Public School system, the District advised the appellant that no certificate of occupancy was required at the time the use was established in the variance case (BZA Application No. 16643, transcript at p.37),. The use was therefore lawful and consistent with the District's practices concerning its own property. It therefore meets the definition of a nonconforming use.

The Appellant refers the Board to the case of Speyer v. Barry, 588 A.2d 1147 (D.C. App. 1991), where the D.C. Court of Appeals addressed the situation of whether the Zoning Regulations applied to District-owned properties prior to and subsequent to May 23, 1990 (the effective date of the CPAA). The Speyer case involved a property known as the "Hurt Home for the Blind" that was purchased by the District in 1987 to convert to a residential treatment facility for emotionally disturbed children. Significantly, that treatment facility was and is not operated by D.C. government personnel, but instead is operated by private contract.

The Court found, among other things, that District-owned property first became subject to zoning on May 23, 1990. Id. at 1153. It also noted the general

rule that an existing non-conforming use will ordinarily be permitted to continue. Accordingly, an existing use in operation on District-owned property prior to May 23, 1990, was exempt from zoning, and consequently would continue to be exempt from zoning, subsequent to May 23, 1990, as a nonconforming use. It is undisputed that the Market was in operation on District-owned property prior to May 23, 1990, and has operated continuously on Sundays since that time. In its Order, dated March 29, 2001, in Application No. 16643, in Finding of Fact No. 3, the Board found that the use has been in operation at this site since 1988. Accordingly, the use is not subject to the current zoning requirements and is permitted to continue as a matter-of-right as a nonconforming use.

V.
NO VARIANCE APPROVAL IS NEEDED SINCE APPELLANT NOW HAS A CERTIFICATE OF OCCUPANCY TO OPERATE THE MARKET

Notwithstanding the fact that the Market does not require a certificate of occupancy to continue its operation, as explained above, the Appellant sought and obtained a valid certificate, dated February 29, 2000, pursuant to D.C. Act 13-253. That certificate authorizes the "Sales of Antiques and Collectibles (Flea Market - Sundays Only)" at the subject property. (See copy attached as Exhibit D.) The certificate remains valid since no written notification to revoke that certificate has been issued, as would be required by 12 DCMR l 18.4.3. Accordingly, no variance approval from the BZA is required in order for the Market to continue its operations. Thus, at this juncture, the BZA should find that the earlier decision by Mr. Nunley, then Chief of the Zoning Review Branch, is erroneous and should be reversed.

The Appellant maintains that the certificate of occupancy was validly issued and supported by D.C. Act 13-253, the Comprehensive Plan Land Use Georgetown Flea Market Exemption Emergency Amendment Act of 1999. Again, which 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." Even though the Act was enacted on an emergency basis and expired after ninety days, that Act clearly was in full force and effect when the certificate was obtained on February 29, 2000, and the District was obligated to apply the law and regulations in effect when the certificate was issued. The right to the certificate of occupancy vested at that time and there is no basis to force the termination of the use even if the applicable law subsequently reverted to the pre-emergency status.

VI.
THE DISTRICT SHOULD NOW BE BARRED FROM APPLYING CERTIFICATE OF OCCUPANCY REQUIREMENTS TO THE MARKET BASED UPON THE DOCTRINE OF LACHES

For the past twelve years the District of Columbia, through the Board of Education, has been well aware of the operation of the Market on District property. Indeed, the District authorized the use by virtue of its lease agreement with Appellant. It is inequitable, after twelve years of operation by the Appellant in an open and visible fashion, for the District to now claim that this use can no longer continue without BZA approval in the form of a variance.

The equitable doctrine of laches states that "equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the

defendant". Beins v. D.C. Board of Zoning Adjustment, 572 A.2d 122 (D.C. 1990)(quoting American University Park Citizens Ass'n v. Burka, 400 A.2d 737, 740 (D.C. 1979)). In order to invoke this doctrine, a two-prong test must be met: (1) the defendant has been prejudiced by the delay and (2) the delay was unreasonable. Beins at 126. As distinguished from the equitable doctrine of estoppel, which requires, among other things, that the claimant show expensive and permanent improvements made in good faith reliance on an affirmative act taken on the part of a municipal corporation, laches may attach where a party acting in reliance can prove inexcusable delay resulting in prejudice to the relying party. Wieck v. D.C. Board of Zoning Adjustment, 383 A.2d 7, 11 (D.C. 1978)(citing Amidon v. Amidon, 280 A.2d 82, 84 (D.C. 1971)). See also Rafferty v. District of Columbia Zoning Commission, 583 A.2d 169, 175 (D.C. 1990).

The District's twelve-year delay in trying to enforce the Zoning Regulations upon the operation of the Market severely harms the Appellant. If the Appellant had been advised to obtain a certificate of occupancy in 1988, he would have obtained one and there would be no issue before the Board today. Ironically, the Appellant was properly advised that no certificate of occupancy was required by the appropriate representatives of the D.C. Public School system and now, a separate branch of the District Government is applying a different standard years later to require a certificate of occupancy. In essence, the imposition of this new and contrary interpretation of the same issue years later could put the Market out of business, an operation that has become a staple in the community on Sundays.

Moreover, it is clear beyond peradventure that a twelve-year delay in seeking to enforce the Zoning Regulations on the Market is unreasonably long. Such an unreasonable delay is exactly the type of clear and compelling circumstances that require use of the doctrine of laches in the context of zoning regulations. Moore v. Bridgewater Township, 173 A.2d 430 (N.J. 1961).

If the District had consistently applied its regulations, then the Appellant would have (1) obtained a certificate of occupancy as a matter-of-right; or (2) leased other property years ago under far more favorable economic conditions than exist today relative to the Georgetown real estate market. Accordingly, the District should be barred under the doctrine of laches from requiring the Market to obtain a certificate of occupancy at this time..

VII.
THE USE OF A PORTION OF THE PUBLIC SCHOOL SITE FOR THE MARKET USE ON SUNDAYS IS AN "ACCESSORY USE" TO THE SCHOOL

Even if the Board were to find that the Market use was subject to the Zoning Regulations (including certificate of occupancy requirements), no variance approval from the BZA is required since the Market use is an accessory use to the principal use of the property, a public school. An accessory use is defined in the Zoning Regulations as a use "customarily incidental and subordinate to the principal use, and located on the same lot with the principal use." 11 DCMR §199.1. See also National Cathedral Neighborhood Ass'n v. D.C. Board of Zoning Adjustment, 753 A.2d 984, 986 (D.C. 2000). A public school, a matter-of-right use at the subject property, is defined as a building operated and maintained by the D.C. Board of Education for educational purposes and "such other community uses as deemed

necessary and desirable". (emphasis added). 11 DCMR §199.1. Moreover, the term includes, among other things, the school's parking lots. Id.

As previously mentioned, the Board of Education has already found the Market use in the school's parking lot on Sundays to be "compatible with the normal use of the particular [school] property and in the best interest of the local community" by virtue of its lease of the school property to the Appellant pursuant to D.C. Code §31-201(7). Moreover, it is indisputable that the Market use operates on the same lot (Lot 850) as the principal school use. The accessory use of the Market on school premises is analogous to a school's rental of athletic fields to independent softball, basketball or soccer leagues or provision of space for carnivals, bazaars or gatherings of social organizations. Both uses bring revenue to the D.C. public schools and provide benefits to the community at large.

The District of Columbia Court of Appeals has typically interpreted an accessory use to a school property in a broad manner. See e.g. Citizens Coalition v. D.C. Board of Zoning Adjustment, 619 A.2d 940 (DC 1993) (approving a cogeneration plant as an accessory use to a university where the cogeneration plant was constructed and operated by a private utility company and would obtain revenues from third party purchasers while being located on school property). Accordingly, even if the Board were to find that the Market use was subject to the Zoning Regulations, such use would be authorized as a matter-of-right as an accessory use within the definition of the public school use.

VIII.
CONCLUSION

In light of the foregoing analysis, the Appellant requests that the BZA find that: (1) the Zoning Review Branch's decision in this matter, dated October 6, 1999, is erroneous; and (2) no BZA approval in the form of a variance or special exception is required in order for the Market to continue its use at the subject property.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: _____
Norman M. Glasgow, Jr.

By: _____
Steven E. Sher
Director of Zoning and Land Use Services

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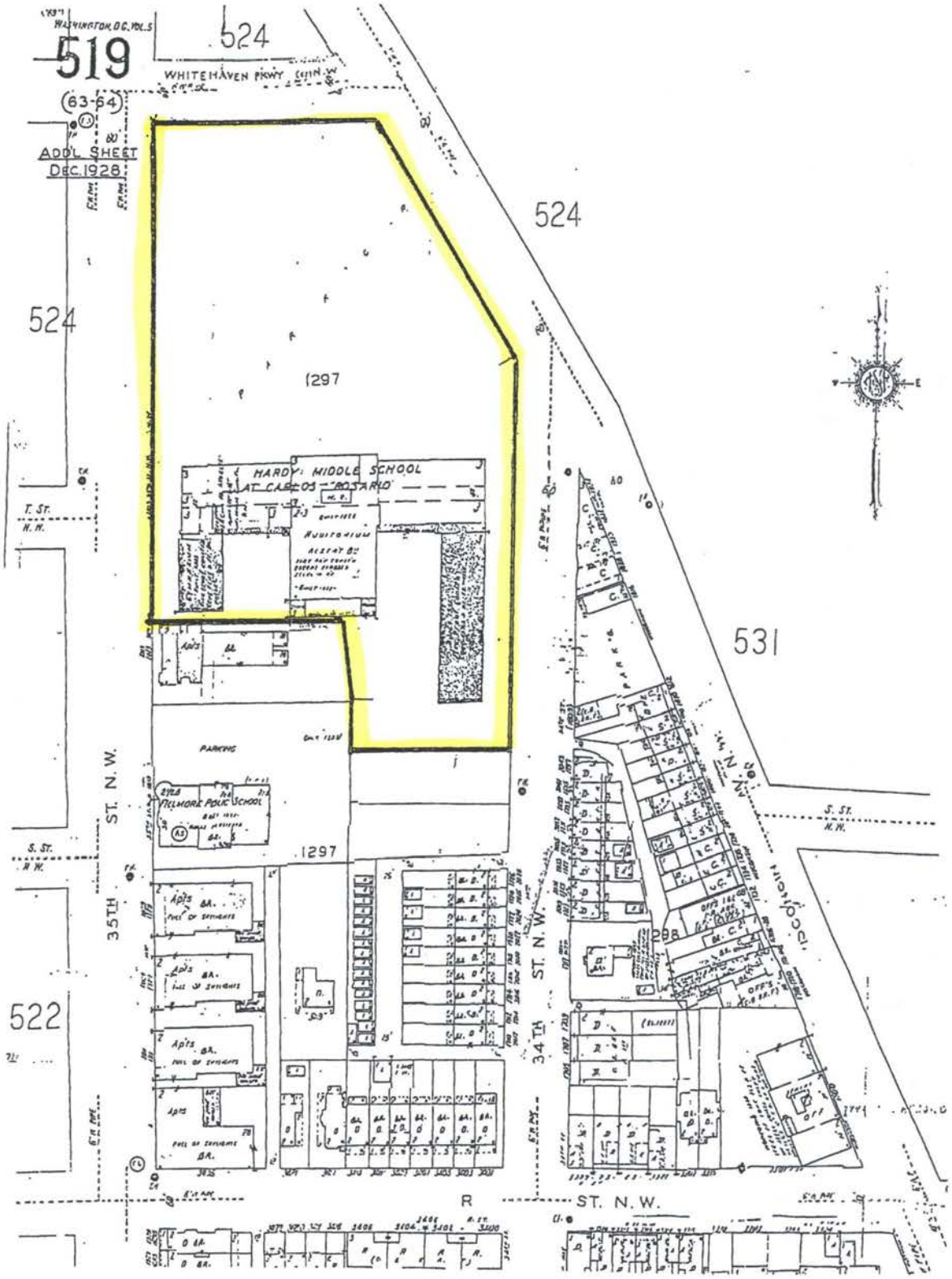
Attorneys for the Appellant

Dated: May 22, 2001

CC: D.C. Zoning Administrator
Office of Planning

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GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

JANUARY 30, 2001

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D.C. OFFICE OF ZONING
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The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Robert Sockwell, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

ROBERT N. SOCKWELL	Chairperson
SHEILA CROSS REID	Vice Chairperson
ANN RENSHAW	Board Member

ZONING COMMISSION MEMBERS PRESENT:

JOHN G. PARSONS	Commissioner

COMMISSION STAFF PRESENT:

Sheri Pruitt, Secretary, BZA
Beverly Bailey, Office of Zoning
Paul Hart, Office of Zoning
John Nyarku, Office of Zoning

OTHER AGENCY STAFF PRESENT:

Michael Johnson, Zoning Administrator
Maxine Brown-Roberts, Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:

Mary Nagelhout, Esq.

CHAIRPERSON SOCKWELL: Are you planning to call any other witnesses?

MR. GLASGOW: Yes, sir.

Veronica, please come forward.

MEMBER RENSHAW: Mr. Chairman, will we have a time to question Mr. Sussman?

CHAIRPERSON SOCKWELL: Yes. I was going to ask Board members if they wanted to hold questions until the completion of the presentation.

MEMBER RENSHAW: That's fine.

MR. GLASGOW: Would you please identify yourself for the record?

MS. FALWELL: My name is Veronica Falwell. I'm the Deputy Director for Real Estate for D.C. Public Schools.

MR. GLASGOW: Would you spell your last name, please?

MS. FALWELL: F like Frank, A L W E L L.

MR. GLASGOW: Thank you.

MS. FALWELL: You're welcome. Oh, I guess I should speak.

MR. GLASGOW: Yes.

MS. FALWELL: Anyway, I was asked to come here to verify the fact that Michael Sussman and the flea market in Georgetown was not required to have a

certificate of occupancy at the time that he began utilizing D.C. Public Schools surplus space at the Rosario Gordon which is now the Hardy Middle School.

We do have other outside -- we have various types of lessees that use our surplus space and parking lots and schools for day care centers, for a variety of church services, for a variety of different activities without the requirement of a certificate of occupancy.

This has been a new type of situation that our Board of Education rules don't identify and don't relate to at all. I just wanted to let everybody know that when he did start with us, Michael asked questions about everything and he's been a very good tenant. I was working there at the time and I did reiterate to him that there was not a need for a certificate of occupancy. That's it.

MR. GLASGOW: Just a question.

MS. FALWELL: Okay.

MR. GLASGOW: Ms. Falwell, you were in the present position at the time that Mr. Sussman first applied for a certificate of occupancy at that property?

MS. FALWELL: Right. I started in April of '88 so I met him then.

MR. GLASGOW: Thank you.

MS. FALWELL: You're welcome.

MR. GLASGOW: I have no questions of this witness.

CHAIRPERSON SOCKWELL: All right. You may wish to stay because there will be questions at the end of this. You will have to come back up.

MS. FALWELL: All right.

CHAIRPERSON SOCKWELL: Mr. Glasgow, do you wish to call --

MR. GLASGOW: Yes. I would like to call our last witness, Mr. Steven Sher, land planner. I previously submitted him as an expert witness and I understand the Board has accepted him as an expert.

CHAIRPERSON SOCKWELL: He does look somewhat familiar.

MR. GLASGOW: Mr. Sher, would you please identify yourself for the record and proceed with your testimony.

MR. SHER: For the record, my name is Steven E. Sher. I'm the Director of Zoning and Land Use Services with the law firm of Holland and Knight LLP. Staff is giving you an outline of what I'm about to say. I think what I would like to do is focus on the latter half of what's in that outline.



GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Corporation Counsel

File No. PL-00-219

MEMORANDUM

TO: Susan Linsky
Office of Planning and Economic Development

FROM: John M. Miller
Assistant Corporation Counsel

DATE: August 11, 2000

RE: Georgetown Flea Market

Pursuant to your request, I have prepared the following memorandum analyzing the legal issues raised by Norman Glasgow, Attorney for Michael Sussman, owner of the Georgetown Flea Market ("Market") in a letter dated August 1, 2000 ("Letter").

ISSUE

The principal issue raised in the above-referenced letter is whether Mr. Sussman has a right to the continued operation of the Market without the necessity of Board of Zoning Adjustment action. There are four principle legal theories raised by Mr. Sussman and Mr. Glasgow: 1) The "Hurt Home" case stands for the proposition that the Market is exempt from zoning regulations because of its existence prior to the Comprehensive Plan Amendments Act ("CPAA"); 2) The District is barred from applying zoning restrictions to the Market by the doctrine of estoppel; 3) The District is barred from applying zoning regulations to the Market by the doctrine of laches; 4) That the Market is entitled to rely on the Certificate of Occupancy issued on February 29, 2000.

I. The fact that the Market was in operation prior to the CPAA, may create an exemption from present zoning regulations.

Mr. Glasgow asserts that the Market is exempt from zoning regulations because it had an exemption prior to the CPAA and, in accordance with the "Hurt Home" case, the exemption is "grandfathered". (Letter, 1). The "Hurt Home" case stands for two propositions which are relevant to this issue. First, the "Hurt Home" case supports the rule that a "municipality exercising a governmental function is not bound by its own

zoning laws and regulations unless the legislature has manifested a contrary intent." Speyer v. Barry, 588 A.2d 1147, 1151 (D.C. 1991). Second, "Hurt Home" supports the general rule that an existing non-conforming use will ordinarily be permitted to continue until it can be eliminated without depriving the user of a vested right. Id. at 1154. Therefore, any existing use that was exempt prior to May 23, 1990 would be exempt after May 23, 1990.

As a result of "Hurt Home" case, the District enacted a law which states that any "governmental land uses that were either existent or substantially planned, documented, and invested in, prior to May 23, 1990, shall not be subject to zoning". D.C. Code §1-250(a)(2). The statute does not specifically require that the use be by the District itself.[1] The legislature made clear, however, that the use must be for a governmental purpose. The original language of the statute exempted "any use of government-owned property", and did not require that the use be for a government purpose. Report of the Committee of the Whole for Bill 10-689, p.8 (October 18, 1994). That language was stricken and replaced with the exemption for any "governmental land use". Id. This indicates an intent to only exempt uses of government owned land for a government purpose.

The benefits to the school and the community as a result of the Market, however, could serve a government purpose. This argument is bolstered by D.C. Code §31-201(7), which authorizes the Board of Education to negotiate leases of school property for any use which the Board "may deem to be compatible with the normal use of the particular property and in the best interest of the local community". While the Market may not serve as important an interest as the Hurt Home, it is reasonable to defer to the Board of Education as to what use of school property best serves the District.

II. The District is not barred from applying zoning restrictions to the Market by the doctrine of estoppel.

The claim of estoppel follows from the idea that where a party, acting in good faith on the affirmative acts of a city, makes expensive and permanent improvements to property, it would be unjust to destroy that party's property rights. Rafferty v. District of Columbia Zoning Comm., 583 A.2d 169, 174 (D.C. 1990). Estopping a municpality from applying zoning regulations is judicially disfavored because of the public interest in the integrity and enforcement of zoning regulations. Id. at 175. In order to establish an estoppel claim, the claimant must show: 1) expensive and permanent improvements, 2) made in good faith, 3) in justifiable and reasonable reliance upon, 4) affirmative acts of the District government, 5) without notice that the improvements might violate the zoning regulations, and 6) equities strongly favor the petitioners. Id.. The missing element in the Market's case is expensive and permanent improvements. The Market is a one day a week operation. All structures are temporary and are removed every week. For this reason, the Market's estoppel claim is not valid, particularly in a zoning case where estoppel claims are disfavored.

[1] It is likely that a Lessee could be construed to benefit from the exemption. The "Hurt Home" is not operated by the District, but the court implied that the exemption would have applied to Hurt Home if it had already been in operation prior to the CPAA. Speyer at 1153.

III. The District is not barred from applying zoning restrictions by the doctrine of laches.

A claim of laches arises when a plaintiff delays in bringing a claim and the defendant is unfairly prejudiced by that delay. Laches is based on the principal that "equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant." Beins v. District of Columbia Bd. of Zoning Adjustment, 572 A.2d 122, 126 (D.C. 1990)(quoting American Univ. Park Citizens Ass'n v. Burka, 400 A.2d 737, 740 (D.C. 1979)). In order to support a claim for laches, a defendant must show that 1) the delay was unreasonable 2) the defendant has been prejudiced by that delay. Like estoppel, laches claims are disfavored in the zoning context. Goto v. District of Columbia Bd. of Zoning Adjustment, 423 A.2d 917, 925 (D.C. 1980). The key element here is prejudice to the Market. *See* Id. Like estoppel, most succesful laches claims involve the defendant expending money on substantial, permanent improvements. *See* Id. at 926. As has already been noted, the Market has not made any expenditures on permanent improvements at all. Therefore, the Market's laches claim fails for the same reason as the estoppel claim.

IV. The Market is entitled to rely on the existing certificate of occupancy to continue operating.

While it is questionable whether the Market was operating lawfully when it began, the Market's existing valid certificate of occupancy carries a presumption that it is operating lawfully now. *See* Coombe v. United States, 3 F.2d 714 (D.C. 1925). A citizen is entitled to rely on the official acts of an administrative agency official, whose job it is to interpret its own regulations. Id.

I will not speculate on the issue raised by Mr. Glasgow regarding the possible plans to revoke the certificate of occupancy (Letter, 1) except to say that even if the certificate is revoked, the Market will be entitled to finish out the terms of its existing lease. A non-conforming use will ordinarily be permitted to continue until it can be eliminated without depriving the user of a vested right. Speyer at 1154. The Market's existing lease is a vested property interest. If the Zoning Administrator chooses to revoke the certificate of occupancy, the Market will be entitled to continue operation throughout the terms of the lease that exists at the time of revocation.



BLRA-17
(Rev 12/95)

District of Columbia Government
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration Zoning Division
P.O. BOX 37200 — Washington, D.C. 20013-7200

186657

CERTIFICATE OF OCCUPANCY

2/29/00
(date)

Permission is hereby granted to MICHAEL SUSSMAN
to use suite(s) _____ on the LOT floor(s)
of the building located on lot(s) 850 square 1297
known as premises 1819 35TH STREET., N.W. for the following
purpose(s) SALES OF ANTIQUES AND COLLECTIBLES-(FLEA MARKET -SUNDAYS ONLY)
NOT SEXUALLY ORIENTED . [su]

BZA # _____ EXPIRATION DATE: _____

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, ONLY for the premises or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

ZONE R-3 \ FEE $ 92.00
L. JORDAN

Director

By R. SMITH
Designee

98-0802PM5



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

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)).

Linda W. Cropp
Chairman
Council of the District of Columbia

Anthony A. Williams
Mayor
District of Columbia
APPROVED: January 10, 2000



GOVERNMENT OF THE DISTRICT OF COLUMBIA

Advisory Neighborhood Commission 2E

Representing the communities of Burleith, Foxhall-MacArthur, Georgetown and Hillandale

3265 S Street, NW • Washington, DC 20007

(202) 338-7427 • FAX (202) 338-0279 • anc2e@erols.com

January 10. 2001

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

Re: APPLICATION NO. 16642 and APPLICATION NO. 16643
GEORGETOWN FLEA MARKET

Dear Members of the Board:

At its regularly scheduled, duly noticed public meeting held on January 2, 2001, with all commissioners present, ANC 2E considered the above-referenced applications and passed the following motion by a 6–0 vote (with 2 commissioners abstaining):

> Whereas, the Georgetown Flea Market has been operating at its current location since 1988; and
>
> Whereas, during that time, the Flea Market management has been responsive to community concerns, including management of traffic, litter, noise, and congestion, so that the near neighbors are broadly supportive of the market; and
>
> Whereas, during that time there was no apparent negative impact on school programs that were conducted at its location; and
>
> Whereas, in fact, the Flea Market provides a public benefit greatly appreciated by residents throughout DC and around the world; and
>
> Whereas, the Flea Market has a substantial positive economic impact on the District of Columbia;
>
> Therefore, ANC 2E requests that the BZA grant any variance needed to continue operation of the Flea Market in its present form, on Sundays only in the public school parking lot. ANC 2E understands that any variance granted will not alter the existing zoning of the property.

Sincerely,

Peter Pulsifer (BCN)

Peter Pulsifer
Chair

COMMISSIONERS:

Scott Polk, District 1 Len Levine, District 2 Peter Pulsifer, District 3 Justin Kopa, District 4
Justin Wagner, District 5 Bill Starrels, District 6 Tom Birch, District 7 Mark Ryan, District 8



Burleith CITIZENS ASSOCIATION

3724 T Street, NW
Washington, DC 20007

Executive Board
Bonnie Hardy,
President
Guy Gwynne
Charles Mallett
Marilyn Reis
Diane Deland
Treasurer
Gwen Verhoff
Recording Secretary
Ann Gallagher
Corresponding Secretary
Peter Pulsifer
Past President & Newsletter Editor
Nan Bell
Janice Hopper
Vladka Landay
Margaret Meenahan
Irene Schaffner
Ed Solomon

TO WHOM IT MAY CONCERN

On May 19,1999 the Board of the Burleith Citizens Association voted in favor of the following Resolution:

We support the desire of the Georgetown Flea Market to be located on the Hardy School property after the construction of the school's new play area is over. This Flea Market would operate only on Sundays (as it does now) and would be located on the designated parking lot as is shown on the attached plan. The rest of the school property should be reserved for the school and neighborhood children.
The Georgetown Flea Market is very popular in our neighborhood and we have enjoyed their presence over the years.

Copies sent to:
Michael Sussman,Georgetown Flea Market
Patrick Pope, Pricnipal of Hardy School
Westy Byrd, Ward 2 School Borad Member

Bonnie Hardy

Bonnie Hardy
President



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

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.

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	