ARTER & HADDEN LLP
ATTORNEYS AT LAW

founded 1843

Austin
Cleveland
Columbus
Dallas
Dayton
Irvine
Los Angeles
Sacramento

1801 K Street, N.W., Suite 400K
Washington, D.C. 20006-1301
telephone 202.775.7100
facsimile 202.857.0172

San Antonio
San Diego
San Francisco
Washington, D.C.
Woodland Hills
Affiliated Offices
Brussels, Belgium
Geneva, Switzerland

Direct Dial: (202) 775-7101
Internet Address: jmoore@arterhadden.com

January 26, 2001

RECEIVED
D.C. OFFICE OF ZONING
2001 JAN 26 PM 2:52

BY HAND DELIVERY

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

Re: Application of District of Columbia Public Schools/Georgetown Flea Market; BZA Application No. 16643

Dear Mr. Sockwell and Members of the Board:

Our client, Safeway, Inc., respectfully opposes the applicant's request for a use variance pursuant to 11 DCMR § 3103.2 to continue to operate the "Sales of Antiques and Collectibles" on a public school parking lot. The applicant in interest seeks to operate the "Georgetown Flea Market" ("GFM") on D.C. Public School property on Sundays in a residential district at premises 1819 35th Street, NW (Square 1297, Lot 850), also known as the playground/parking area of the Hardy Middle School. For the reasons that follow, the proposed use does not meet the standards that would entitle it to the extraordinary relief that is requested. Accordingly the application must be denied as a matter of D.C. law.

BZA
Case No. 16643
Exhibit No. 40

Board of Zoning Adjustment
District of Columbia
CASE NO.16643
EXHIBIT NO.40

The law is quite clear that a landowner must meet three requirements in order to be granted a use variance: (1) unique physical aspect or "other extraordinary or exceptional situation or condition of a specific piece of property," (2) undue hardship, and (3) no harm to the public or to the zone plan. *See Capitol Hill Restoration Society v. District of Columbia Board of Zoning Adjustment*, 534 A.2d 939, 941 (D.C. 1987); 11 DCMR § 3103.2. An applicant has the burden to meet these three criteria before a variance can be granted. Id. Furthermore, the applicant must meet a particularly high standard to be granted a use variance. *See Gilmartin v. District of Columbia Board of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990) (holding because of the nature of respective types of variances and their effects on the zone plan, the higher "undue hardship" standard applies to requests for use variances while the lower "practical difficulty" standard applies to area variances).

1. The Hardy Middle School Parking Lot is Not Affected by an Exceptional Situation or Condition

In order to receive a use variance, an extraordinary or exceptional condition must uniquely affect a single piece of property. *Capitol Hill Restoration Society*, 534 A.2d at 941-42 (D.C. 1987). Applicant does not meet this threshold because the exceptional conditions that the GFM alleges are not unique to the property. Applicant argues that the property is "exceptional" because it was not subject to zoning before May 23, 1990.[1] *Statement of the Applicant*, at 3. However, the fact is that there is nothing exceptional or unusual about that. This just puts this property is the same category as every other D.C.

[1] The effective date of the Comprehensive Plan Amendments Act subjecting D.C. government land and their uses to the zoning requirements.

government owned property that was made subject to zoning by the Act. Being one of many runs contrary to the definition of extraordinary or exceptional.

Notwithstanding its effort to do so, GFM gains no advantage in its reliance on *Monaco v. District of Columbia Board of Zoning Adjustment*, 407 A.2d 1091 (1979) to substantiate its allegation that the zoning history of a site may constitute an exceptional condition in a variance application. Such a reliance admittedly points the application in a direction favorable to the GFM, but it falls far short of getting where it needs to be. The *Monaco* case was decided by the D.C. Court of Appeals based solely on the facts that were before it. That case concerned a variance request to extend the Republican National Committee ("RNC") offices located in a portion of an R-4 zoned lot near the U.S. Capitol building.

In 1960, the United States condemned the former RNC property in order to construct the Madison Library. *Id.* at 1095. Because of the RNC's unique and close relationship with Congress, it sought to find a site close to the Capitol. The RNC was faced with the problem that the area surrounding the Capitol was zoned R-4 which contains certain height restrictions. Instead of seeking to rezone the neighborhood, the RNC negotiated a zoning solution with the Zoning Commission that would allow the RNC to proceed with the construction through a series of variances. *Id.*

The RNC proceeded with their building plans in three parts: the Capitol Hill Club and a two-stage office building. *Id.* Between 1961 and 1966, BZA granted two variances for the Capitol Hill Club, one variance for the first stage of the office building, and one variance for the second stage. *Id.* The first stage of the office building was completed, but for financial reasons, the RNC was unable to complete the second stage and the

variance expired after six months. The RNC then reapplied for the variance to extend an existing use to the portion of the property on which the variance had lapsed. A neighbor appealed when the BZA, in effect, regranted this variance.

The court upheld the BZA's decision based on: (1) the RNC's close relationship to Congress and location of property near Congress; (2) the existence of the first stage of the office building; (3) past actions of the Zoning Commission and BZA which led the RNC to begin construction in that location; and (4) the right of first refusal and restrictive covenant held by the House Office Building Commission which limited the use and design of the building. *Id.* at 1097.

The twelve year history of a private business of running a flea market, by renewable leaseholds, without the benefit of a certificate of occupancy,[2] in the parking lot of a public school hardly rises to the level of the unique and remarkable eighteen year history of the Republican National Committee and the necessity that it be proximate to the U.S. Capitol building. At no point did the GFM have any similar history with the zoning authority – in fact, the GFM had been operating for ten years before it had any documented contact with D.C. zoning officials. The *Monaco* decision was largely based on the zoning history of the case and the appropriateness that the RNC be located near the Capitol. The GFM has no such tie to Wisconsin Avenue. Clearly, the *Monaco* court affirmed the BZA's decision to authorize the relief necessary to permit the RNC to locate next to the Capitol because those facts were sufficiently unique to justify the requested relief. There is no factual similarity here.

2. The Strict Application of the Regulations Would Not Impose an Undue Hardship

The GFM argues that (1) but for the use variance that it requests, the GFM will have to close; (2) (incongruously) the expense of relocating the market to another location; (3) the alienation of existing merchants and customers; and (4) the loss of the annual income the GFM generates to the city will effect an undue hardship sufficient to support a use variance. *Statement of the Applicant*, at 5-6. Well, no. In the context of use variances, the District of Columbia courts have held that the inability to put property to a more profitable use or loss of economic advantage is not sufficient to constitute hardship. *Tyler v. District of Columbia Board of Zoning Adjustment*, 606 A.2d 1362, 1367 (D.C. 1992). Zoning Regulations accord the Board no authority to grant a use variance in order to assure the economic viability of the use of a particular property in a particular manner. Id. The possibility that it may cost the GFM money not to continue a commercial use in a residential zone, one that has been illegally operating for the past nine plus years, cannot and should not be found to rise to the exceptional level of undue hardship.[3] *Id.; Russel v. District of Columbia Board of Zoning Adjustment*, 402 A.2d 1231, 1236 n.8 (D.C. 1979). Undue hardship means a lot more than financial inconvenience.[4] *See Gilmartin v. District of Columbia Board of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990) (holding economic use of property has been considered as "a" factor in deciding the question of what constitutes an unnecessary burden).

---

[2] The GFM did obtain a certificate of occupancy on February 29, 2000. This issuance was based solely on the "Comprehensive Plan Land Use Georgetown Flea Market Exemption Emergency Amendment Act of 1999" D.C. Act 13-253, which has since expired.

[3] Applicant's argument concerning the "burden" of finding a new location is undermined by the existence of the "Georgetown Flea Market at U Street" that Safeway believes is owned and run by this same applicant at 1345 U Street, NW. *See* Annie Groer, *Flea Politics*, WASHINGTON POST, Aug. 12, 1999, at T05.

[4] Applicant has submitted no evidence that another site is not available.

3. Relief Cannot Be Granted Without Substantial Detriment to the Public Good

To satisfy the third prong required for the grant of a variance, the applicant must prove that relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose or integrity of the zone plan. A variance may not be granted, even to alleviate a bona fide serious hardship to the owner, if the granting thereof would adversely affect the surrounding neighborhood. *Roumel v. District of Columbia Board of Zoning Adjustment*, 417 A.2d 405 (D.C. 1980). To meet this burden, the GFM claims that the requested variance from the zoning regulations will not cause a substantial detriment because it will "only be sanctioning a use for the property that has already occupied the property for more than a decade with great public support and enthusiasm." *Statement of the Applicant*, at 6.

As an initial matter, popularity alone cannot and does not substantiate what is in the public good. That is the role of elections. More substantive to the issue of public good is that the proposed use not be inconsistent with the zone plan and not have an adverse effect on the use and enjoyment of neighboring property. For its part, Safeway states categorically that the use of the Hardy Middle School property by the Georgetown Flea Market now has a direct and adverse impact on its use and enjoyment of its nearby property.

Safeway has been a familiar site on Wisconsin Avenue for more than four decades, contributing substantially to the business economy in the District of Columbia. Over the years, Safeway has set a high standard of providing quality products, as well as quality service. An integral part of that service is providing Safeway customers with sufficient parking to access the store, as well as an uncongested parking lot with easy

ingress and egress. The GFM jeopardizes Safeway's ability to deliver this service to its customers. Because the GFM does not provide adequate parking for its customers, flea market patrons often park illegally in the Safeway parking lot while they shop across the street at the GFM. Pickup trucks and SUV's loaded up with wares that are obviously from or for the GFM are common sights on Safeway's parking lot on Sundays.

Safeway provides an adequate number of off-street parking spaces to fulfill the needs of its customers. But each of those spaces is precious to Safeway's ability to run its business and to the convenience of its customers – two related concepts. When patrons of the Flea Market use these spots, Safeway suffers because Safeway customers either cannot use its parking lot, or they choose to shop elsewhere where it is more convenient. The posting of signs prohibiting GFM customers from using Safeway's lot has not been successful – many are still willing to "take the risk." Assigning Safeway personnel to monitor the lot is unnecessarily expensive and an unattractive public relations gesture. In recent months, the GFM parking situation has become so serious that Safeway has taken to towing GFM vehicles from its lot to make room for Safeway customers. It cannot be to the public good to impose these hardships on Safeway's use and enjoyment of its property as a direct result of GFM's use of the Hardy Middle School property.

4. Non-conforming Use

Applicant suggests that the variance that it requests may not be required because the GFM is 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. *See* 11 DCMR § 2000.4. However, 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). To this end, 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.

5. Conclusion

In the end, the GFM is a popular, but clearly commercial use of the property. Our client's use and most others uses in this neighborhood – and in the city – are popular too. But popularity doesn't accord the GFM or other property users the right to use residentially zoned property for commercial purposes or to except itself from the zoning laws. That it has successfully done so over the past ten years is more a commentary on zoning enforcement than a justification for future relief.

Safeway makes clear that it is not opposed to either the GFM or its being located on the Hardy Middle School property. What it does object to, in the strongest terms, is the GFM's failure to provide off-street parking at a level sufficient to reasonably prevent the resulting adverse impact to Safeway's use and enjoyment of its property.

For these reasons Safeway submits that the GFM has not met the burden of proof sufficient to substantiate the extraordinary relief that is requested. Alternatively, Safeway respectfully requests that any relief that the Board may grant be expressly conditioned on

a satisfactory showing and a conditional order that demonstrates and requires a sufficient number and accessibility of off-street parking for the requested use.

Respectfully submitted,

Jerry A. Moore III
Attorney for Safeway, Inc.
Arter & Hadden,LLP
1801 K Street, NW Suite 400K
Washington, DC 20006-1301
202-775-7101

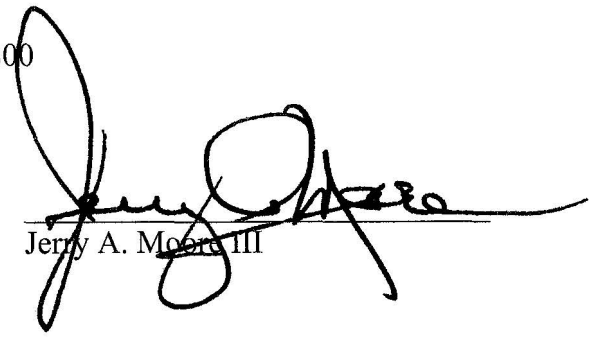
cc: Norman M. Glasgow, Jr.
Avis E. Black, Esq.

288839

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2001, a copy of the foregoing Motion to Dismiss for Lack of Jurisdiction was served upon the following by hand delivery.

Norman M. Glasgow, Jr.
Wilkes, Artis, Hedrick & Lane
1666 K Street, NW
Suite 1100
Washington, D.C. 20006-7800



Jerry A. Moore III

289037