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March 1, 2001

VIA HAND DELIVERY

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

D.C. BOARD OF ZONING
RECEIVED
2001 MAR -1 PM 5:20

Re: BZA Application No. 16643
Georgetown Flea Market
Applicant's Proposed Findings of Fact and Conclusions of Law

Dear Members of the Board:

The applicant hereby submits its proposed findings of fact and conclusions of law in the above-referenced application for a variance to allow the Georgetown Flea Market to continue to operate on the grounds of the Hardy Middle School on Sunday. The proposed order contains a condition regarding the provision of on-site parking for the Flea Market use. The applicant believes that it has met the burden of proof and respectfully requests that the Board grant the application in accordance with the condition stated.

The applicant respectfully objects to the filing made by Safeway on February 27, 2001. The record was left open for parties to respond to filings made by other parties which were due no later than February 13, 2001. Safeway's filing goes far beyond a response to the material filed by the Flea Market and attempts to reargue the case in chief. In particular, the applicant objects to the attachments to the letter, which introduce new evidence not part of the record which the applicant did not have the opportunity to address. The position of the principal of the School, as expressed in a letter over one year old, should further be given no weight. The school system as the applicant, through a representative at the public hearing and a letter from the elected representative of District 1 on the Board of Education, presents the official position of the Public Schools in support of granting the application.

BZA
Case No. 16643
Exhibit No. 73

Board of Zoning Adjustment
District of Columbia
CASE NO.16643
EXHIBIT NO.73

In any event, the applicant specifically notes that the plat submitted of the parking lot does not accurately represent the actual conditions in the field. Approximately twenty-five spaces are faintly striped today, with an access aisle sufficient for their use. The applicant is fully comfortable that it can supply the twenty-five spaces referenced in the condition it has specified in the enclosed draft order as a condition to the Board's approval.

Sincerely,

Norman M. Glasgow, Jr.

Steven E. Sher
Director of Zoning and Land Use Services

Enclosure

cc: ANC 2E
Jerry A. Moore, III, Arter & Hadden

WAS1 #921039 v1

BOARD OF ZONING ADJUSTMENT APPLICATION NO. 16643

HEARING DATES: **January 30, 2001**
DECISION DATE: **March 6, 2001**

DRAFT FINDINGS OF FACT AND CONCLUSIONS OF LAW AND OPINION

Application No. 16643 of D.C. Public Schools/Michael Sussman/ Georgetown Flea Market, pursuant to 11 DCMR §3013.2 for a use variance to continue to operate the "Sale of Antiques and Collectibles" on a public school parking lot – Sundays only in an R-3 District at premises 1819 35th Street, NW. (Square 1297, Lot 850).

HEARING DATE: **January 30, 2001**
DECISION DATE: **March 6, 2001**

DECISION AND ORDER

PRELIMINARY MATTERS:

1. The Board, pursuant to its rules, provided proper and timely notice of the public hearing on this Application by publication in the D.C. Register, and by mail to ANC 2E and to owners of property within 200 feet of the site.

2. The site of this Application is located within the jurisdiction of ANC 2E, which is automatically a party to this Application, and which submitted a letter in support of the Application.

3. As directed by 11 DCMR §3119.2, the Board has required the Applicant to

satisfy the burden of proving the elements which are necessary to establish the case for variance pursuant to §3103.2. The only parties to the proceeding were the Applicant, ANC 2E and Safeway, Inc. The Board admitted Safeway as a party in opposition pursuant to 11 DCMR §3106.3. No other person or entity was granted party status in this proceeding. The Board refused to admit Ronald Mlotek as a party on the basis that he failed to demonstrate that his interests would likely be more significantly, distinctively, or uniquely affected in character or kind by the requested zoning relief than would others in the general public.

4. The Board received letters and petitions and heard testimony from many persons in support of the Application, including local residents and owners of surrounding property, patrons and vendors of the market, and neighboring businesspeople. Two persons testified in opposition to the Application.

5. The Office of Planning ("OP") submitted a report and testified in support of the Application.

FINDINGS OF FACT:

1. The property that is the subject of this Application is owned by the District of Columbia through the Board of Education and is currently operated as the Hardy Middle School. Since the fall of 1988, the Board of Education has leased the exterior portion of the premises/parking lot on Sundays only to Michael Sussman, who there operates a business known as the Georgetown Flea Market ("GFM") on Sundays between 9:00 AM and 5:00 PM, with set-up and take-down occurring before and after these hours.

2. The property is located at 1819 35th Street, NW, in the northern half of Square 1297. Square 1297 is currently zoned R-3, as are the squares located immediately to its south and west. The R-3 District is designed essentially for row dwellings, as well as detached and semi-detached single family dwellings. Public schools and churches are permitted uses within the R-3 District.

3. Square 1298, located directly east of the subject square, is split-zoned R-3 and C-2-A, with the latter zone abutting that portion of the subject square that is used by the Hardy School for its parking lot and on Sundays as a market.

4. Diagonally opposite the northeast corner of the subject square, across Wisconsin Avenue, is Square 1299, an unusually-shaped square, split-zoned C-1 and NO/C-2-A, that contains a Safeway Grocery and other commercial operations. The area located immediately to the north of the subject square, across Whitehaven Parkway, NW, is Federal Property and unclassified for zoning purposes, followed by a church and cemetery, zoned R-3.

5. GFM has operated at the subject property for approximately 13 years. GFM uses the parking lot area north of the existing school building, which is bounded to the south by the school building, to the west by 35th Street, NW, to the north by Whitehaven Parkway, NW, and to the east by Wisconsin Avenue and 34th Street, NW. Access is provided from Wisconsin Avenue, NW. GFM accommodates approximately 60 vendors, operating on Sundays only. The Application involves no change to the existing school building or parking lot.

6. When GFM entered into a lease with the Board of Education in 1988 for the use of the property on Sundays, the property was exempt from the Zoning Regulations as a result of its public ownership. District-owned properties became subject to the provisions of the Zoning Regulations on May 23, 1990, the effective date of the Comprehensive Plan Amendments Act. (Speyer v. Barry, 588 A.2d 1147 (D.C. 1991)).

7. At the time it entered into the lease, GFM relied upon the advice of Board of Education personnel that a certificate of occupancy for the proposed use on public property was not required. More recently, in late 1999, GFM was advised by District Officials that it should obtain a certificate of occupancy. GFM's application for a certificate of occupancy was denied by the Chief of the Zoning Review Branch on October 6, 1999 and GFM was advised to seek a use variance from the Board.

8. Through its expert in land use and urban planning, the Applicant testified that the Application complies with the variance standards of §3103.2 regarding exceptional situation or condition on the basis of the zoning history of the subject property. The market use was established in 1988 when District-owned buildings were not subject to zoning. As a result, no certificate of occupancy was required for the market use when it was initiated. District-owned buildings were made subject to zoning by the Council through the Comprehensive Plan Amendments Act of 1989, with an effective date of May 23, 1990. The Zoning Commission subsequently amended the Zoning Regulations in 1998 to make District-owned buildings subject to zoning. The Board has found no other similar uses on District public school grounds anywhere in this area or elsewhere in the

District. The Board so finds.

9. Through its expert in land use and urban planning, the Applicant testified that the Application complies with the variance standards of §3103.2 regarding exceptional situation or condition on the basis of the zoning pattern impacting the subject property and vicinity. While the subject square is currently zoned R-3, the subject property fronts on Wisconsin Avenue in the North Georgetown/Burleith area, a busy commercial corridor with a variety of building types and heights. The predominant zoning along Wisconsin Avenue between M Street and Calvert Street is C-2-A. Other than the church and cemetery to the north, there is no other residential zoning along Wisconsin Avenue in this vicinity. The Board so finds.

10. Through its expert in land use and urban planning, the Applicant testified that the Application complies with the variance standards of §3103.2 regarding exceptional situation or condition on the basis of the nature of the use of the subject property. GFM has become an institution both within its immediate vicinity as well as the metropolitan area. At the same time, it is not the principal use of the property, instead operating only one weekend day per week. Uniquely, it is a use that utilizes no permanent structures. The Board so finds.

11. Through its expert in land use and urban planning, the Applicant testified that the Application complies with the variance standards of §3103.2 regarding potential undue hardship in that the market faces closure without the requested variance relief. GFM would have to cease operations at the Hardy School and attempt to relocate its operations to another location, perhaps outside the District. Denial of the variance request would also serve to effectively erase the longstanding reputation that GFM has developed as a product of its investment in the Georgetown community. Such a move would have the likely impact of alienating numerous existing merchants and customers, especially owing to the pedestrian focus of the market. GFM cannot secure a suitable alternative location to transfer its operations, because other parking lots now serve commercial uses open on Sundays. The Board so finds.

12. Through its expert in land use and urban planning, the Applicant testified that the Application complies with the variance standards of §3103.2 in that the District of Columbia Public Schools also will suffer undue hardship as a result of denial of the requested variance in this matter. The schools system and the District government stand to lose a significant source of revenue for an otherwise fiscally unproductive site if the market use is discontinued on the property. Currently, the District of

Columbia Public Schools receives more than $20,000 annually from GFM vendors for the rental of the Hardy School parking lot on Sundays between roughly March and December from the hours of 7:00 a.m. to 6:00 p.m. In addition, the overall annual benefit provided to the District government and the community at large by the lease of the property totals nearly $170,000, including sales and franchise taxes. A strict application of the Zoning Regulations in this matter would frustrate the Public Schools' ability to rent the use of the property on the weekend to the GFM and thus render an exceptional and undue hardship upon the Public Schools. The Board so finds.

13. Through its expert in land use and urban planning, the Applicant testified that variance relief in the present case will not cause substantial detriment to the public good in that it will only be sanctioning a secondary use that has already occupied the property for more than a decade with great public support and enthusiasm. The Board so finds.

14. GFM is not seeking to expand its operations in any way. In fact, in order to accommodate the new playground sited on a portion of the grounds, GFM scaled down the size of its operation and at the same time is proposing to make 25 parking spaces available on-site for use by patrons of the market, to be provided in the parking area behind the Hardy School building, thus alleviating any potential parking congestion.

15. The Office of Planning, by memorandum dated January 23, 2001 (as revised on January 29, 2001 to correct a citation error) recommended that the Application be approved, with the condition that at least 25 parking spaces be provided. Noting that GFM has become a fixture in the Georgetown community and a source of economic benefit to the District that has existed at the subject property for over 14 years, OP endorses the market use as compatible with the operation of the school, having minimal impact on the school or vicinity, and enjoying widespread public support.

16. In its memorandum, OP establishes that the Application satisfies the criteria for use variance pursuant to 11 DCMR §3103.2. As to the exceptional condition or situation of the Application, OP notes that the subject property is located in the R-3 District, but the market and parking are accessed from Wisconsin Avenue, similar to neighboring commercial uses. Furthermore, the market is a unique neighborhood activity that has operated at this location for many years. It is not the principal use of the property, has no permanent structures and is limited to a single weekend day per week.

17. With regard to the potential hardship precipitated by a strict application of the Zoning Regulations for the Application, OP states that GFM would have to be closed or moved to a new location and acknowledges the difficulty of locating a suitable alternate space in Georgetown as well as the potential economic and cultural losses to neighboring businesses, residents and the District.

18. OP finds that the variance request will not cause substantial detriment to the public good nor impair the intent, purpose and integrity of the zone plan, noting especially the market's historical role at the subject property and the widespread community support GFM enjoys. OP notes the concerns of certain neighboring property owners as to parking and conditioned its recommendation of approval accordingly.

19. GFM also has the support of ANC 2E and neighboring ANC 3B. ANC 2E offered its support for the Application by resolution on January 7, 2000, and reaffirmed by letter dated January 22, 2001. According to §3115.2 of the Zoning Regulations, the Board is to give "great weight" to the written report of the ANC.

20. Likewise, in its letter to the Board dated January 20, 2000, ANC 3B stated unanimously 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.

21. By letter dated January 24, 2001, Ward 2 Council member Jack Evans offered his enthusiastic support for GFM and the Application, noting "what an important public asset the flea market is to the community, the residents of Georgetown and the District of Columbia as a whole. The Georgetown Flea Market has brought life and vitality to the area and has distinguished itself as a good public citizen utilizing a public facility.

22. Ward 1 Council member Jim Graham also offered his support for the Application by letter dated January 25, 2001.

23. Julie Mikuta, D.C. Board of Education member representing the district that includes the subject property, offered her support for the Application by letter dated January 29, 2001. Noting "that the Flea Market does not appear to have any negative impact on the School's operations," Ms. Mikuta states, "[t]he Flea Market contributes to the vibrancy of the area in which it is located, and to the city at-large."

24. By letter dated January 22, 2001, the Burleith Citizens Association reaffirmed its support for the market, asking the Board to restrict

variance approval to the operation of "this Sunday Flea Market."

25. The Application was opposed by Safeway, which owns and operates a store across Wisconsin Avenue to the east. Notwithstanding its arguments about whether the Applicant had successfully proved its case for a variance, Safeway's primary arguments rested on its concern that the applicant was not providing sufficient parking to serve GFM. Safeway made several arguments with respect to the parking issue:

    A. Patrons of GFM utilize the Safeway parking lot and deprive Safeway's customers of the ability to park on the lot.

    B. GFM does not provide parking to meet the requirements of the Zoning Regulations.

    C. The area proffered by GFM for parking, south of the existing School building, does not contain enough space for twenty-five cars without substantial adjustment, including paving additional areas now in grass.

26. Two owners of property in the vicinity of the site appeared in opposition to the Application, arguing that the School property should not be used for commercial use and that the market caused congestion and other adverse impacts in the neighborhood.

27. As to the issues raised by the opposition, the Board finds as follows:

    A. The property is affected by an exceptional situation, due to the zoning history of the site. The use was established at a time when District of Columbia properties were not subject to zoning. The operator of GFM did not obtain a certificate of occupancy for the use at the time that it was instituted because he was advised by the owner, a government entity, that no such certificate was necessary. The operator demonstrated to the Board that he had obtained certificates of occupancy for other locations on private property.

    B. But for not having obtained a certificate of occupancy at the time, the subject use would not require a variance.

    C. Hardship will occur to the operator and the owner. One will be deprived of the opportunity to continue the use, the other will lose the income stream from the use and the city will lose a

unique institution which benefits not only the immediate community but also has city-wide benefits.

D. The great majority of testimony and the weight of the evidence of the entire record indicates that GFM does not cause or create objectionable conditions. The Board credits the weight of the evidence on that issue.

E. As to the impact on parking, the Board finds that Safeway's own studies indicates that there are always parking spaces available on Safeway's own lot. Testimony also indicated that patrons who use the Safeway lot and shop in the store also patronize GFM and other retail uses in the vicinity.

F. No vendors park on the street, since each vendor pulls his or her vehicle onto the north lot adjacent to the assigned selling space.

G. The Applicant's proffer to reduce the number of vendors by using the south lot for parking and not for sales space, increases the available parking for GFM and will make more spaces available on neighborhood streets and the Safeway lot. The applicant also submitted evidence that there are twenty-five metered and fourteen unmetered parking spaces, for a total of thirty-nine, available and unused on Whitehaven Street during the hours that GFM is open.

H. There are no spaces required under the Regulations for the Flea Market use. Retail spaces are generally required on the basis of gross floor area and/or cellar floor area. GFM is an open area involving no building and thus does no generate any required parking.

I. The photograph in the record and the plats provided indicate that there is sufficient space to park approximately twenty-five cars on the paved surface. Those spaces are not required spaces and therefore do not have to meet all of the dimensions applicable under Chapter 21. In any event, the Board will condition approval on that number of spaces to be provided.

CONCLUSIONS OF LAW AND OPINION:

Based upon the foregoing findings of fact, the Board concludes that the Applicant is seeking a use variance under §3103.2 of the Zoning Regulations. The granting of such variance relief requires proof of an undue hardship upon the applicant arising out of some unique or exceptional condition of the property. The Board further must find that the relief requested can be granted without substantial detriment to the public good and that it will substantially impair the intent of the zone plan.

The Board concludes and agrees with the Applicant, the Office of Planning and ANCs 2E and 3B that the Applicant has met the respective burden of proof. The Board further concludes that the site is subject to extraordinary or exceptional conditions by virtue of the exceptional zoning history, zoning pattern and use of the subject property, which create an undue hardship upon the Applicant in complying with the uses allowable pursuant to the current R-3 zoning for the subject property.

Finally, the Board concludes that the relief requested will not cause substantial detriment to the public good. The Georgetown Flea Market will continue to serve as a positive community institution in the North Georgetown/ Burleith neighborhood as well as the larger metropolitan area, and to act as a responsible secondary user of District-owned property at the Hardy School.

The Board concludes that the parking proposed by the applicant is a reasonable measure to reduce the impact of the Flea Market use. There will be at least twenty-five spaces on the same lot as the use and another thirty-nine spaces on a public street which are free, open and available on Sunday. The Board concludes that this parking is a reasonable solution to reduce any potential adverse impact from the use.

It is therefore ORDERED that this application be **GRANTED** subject to the condition that the Applicant no longer use the south lot of the School Property for vending purposes but instead use that lot for parking to accommodate no less than twenty-five cars, with the spaces meeting the size requirements of the Regulations allowing an access aisle in excess of eighteen feet wide.

VOTE:

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:

_____

Jerrily R. Kress, FAIA
Director

FINAL DATE OF ORDER: _____

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.