GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPLICATION NO. 16643

As Director of the Office of Zoning, I hereby certify and attest that on MAR 2 9 2001 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:
JERRILY R. KRESS, FAIA
Director

BZA
Case No. 16643
Exhibit No. 74

Board of Zoning Adjustment
District of Columbia
CASE NO.16643
EXHIBIT NO.74

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 16643 of D.C. Public Schools/Michael Sussman/Georgetown Flea Market, pursuant to 11 DCMR § 3103.2, for a use variance to continue to operate the "Sales of Antiques and Collectibles" on a public school parking lot – Sundays only in an R-3 District at premises 1819 35th Street, N.W. (Square 1297, Lot 850).

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

DECISION AND ORDER

PRELIMINARY MATTERS:

Advisory Neighborhood Commissions (ANC) 2E and 3B were parties in this proceeding. The Board granted a request for party status by Safeway, Inc., which operates a large grocery store near the subject property, but denied the party status request of Ronald Mlotek. The testimony indicates that Mr. Mlotek's property is not contiguous to the site; that his property is not separated from the site by an alley or other access; and that his property is located approximately 100 feet from the site, whereas other residentially zoned properties are located closer and would be more directly affected. The Board determined that Mr. Mlotek had not demonstrated that his interests would be more significantly or uniquely affected than other neighbors.

FINDINGS OF FACT:

1. The application was filed September 5, 2000 by Michael Sussman, with authority of D.C. Public Schools (DCPS), owner of the subject property. The application seeks a variance to continue the operation of the sale of antiques and collectibles at the Georgetown Flea Market.

2. The Georgetown Flea Market is operated by Mr. Sussman, pursuant to a lease with DCPS, on the parking lot of Rose L. Hardy Middle School. The parking lot, located at 1819 35th Street, N.W., is bounded by 35th Street on the west, Wisconsin Avenue on the east, Whitehaven Parkway on the north, and the school building on the south. Access to the property is from Wisconsin Avenue.

3. The Georgetown Flea Market operates every Sunday, weather permitting, between 9:00 a.m. and 5:00 p.m. Vendors arrive as early as 7:00 a.m. and depart by 6:00 p.m. The market has been in operation for almost 30 years and at its current site since 1988, but has

not obtained a certificate of occupancy. (An appeal of the Zoning Administrator's denial of the certificate of occupancy application is pending. BZA Appeal No. 16642.)

4. The subject property is zoned R-3, as is the property to the south and west of the site. Most nearby property fronting onto Wisconsin Avenue is zoned C-2-A, excluding Square 1299, which is split-zoned C-1 and NO/C-2-A and contains the Safeway grocery store and other commercial operations.

5. The Applicant testified that the subject property is affected by an exceptional situation or condition arising from its zoning history as District-owned public school property not subject to zoning before 1990, residentially zoned in a commercial area, and used continuously as a flea market since 1988.

6. The Applicant also testified that the strict application of the area regulations would impose an undue hardship for DCPS and for the operator of the Georgetown Flea Market. According to the Applicant, if not granted a variance, the market would have to cease operations at its present location and attempt to relocate elsewhere, losing its longstanding reputation and alienating both current dealers and customers. The Applicant stated further that DCPS would suffer undue hardship by losing "a significant and irreplaceable source of revenue for an otherwise fiscally unproductive site if the Market use is discontinued on the property." The Georgetown Flea Market pays DCPS approximately $20,000 annually for use of the school parking lot. Exhibit No. 29 at 5.

7. The Applicant asserted 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. According to the Applicant, the market has already occupied for more than a decade "with great public support and enthusiasm" and is not seeking to expand its operations but has scaled down the size of its operation on the site. In addition, the site abuts numerous commercial uses along Wisconsin Avenue, a major commercial artery. *Id.* at 6-7.

8. The Applicant testified that 25 parking spaces would be provided on-site in the rear parking lot, where vendors had previously been located, and that approximately free 39 parking spaces are available on Whitehaven Parkway. According to the Applicant, the 39 spaces are located within a three-minute walk from the flea market and are not otherwise used on Sundays. Transcript, January 30, 2001 at 23, 34.

9. The Office of Planning (OP) testified about the impact of the Georgetown Flea Market on school programs, parking concerns, and the benefit to the community. OP found no impact on school program, noting that the market has leased the same location for 14 years and has not been informed of another need for the parking lot. According to OP, the Georgetown Flea Market has caused some parking spillover onto nearby residential streets; however, the problem would be alleviated by the Applicant's plan to use the rear parking lot at the Hardy site for customer parking instead of additional vendors. OP also

testified that the Georgetown Flea Market provides an economic benefit both to the District of Columbia and to the school. Transcript, January 30, 2001 at 97-98.

10. By a vote of 6-0 (two abstaining), ANC 2E adopted a resolution in favor of the application at its public meeting held January 2, 2001 with all commissioners present. The ANC requested approval of the variance request because the Flea Market has a substantial positive impact on the District of Columbia and provides a greatly appreciated public benefit with no apparent negative impact on school programs, and because the Flea Market management has been responsive to community concerns pertaining to traffic, litter, noise, and congestion. Exhibit No. 28.

11. Safeway, Inc., owner of property adjacent to the Hardy Middle School, operates a large grocery store at 1855 Wisconsin Avenue, N.W. The Safeway property includes a 204-space parking lot in front of the store. The witnesses for Safeway testified that many people park their cars in the Safeway lot when they visit the Georgetown Flea Market, limiting the number of spaces available for grocery store customers and causing a "public relations nightmare" for Safeway, which has paid for a security firm to monitor its lot and for a towing company to remove cars whose owners are not shopping at Safeway. Transcript, January 30, 2001 at 124-125, 128.

12. By resolution dated January 17, 2001, the Burleith Citizens Association reaffirmed its support of the Flea Market at the Hardy School and requested that approval of a variance should be "solely for the operation of this Sunday Flea Market."

13. Numerous persons testified in support of the application, especially vendors and customers of the Georgetown Flea Market. They asserted generally that the market is a valued neighborhood institution that has a friendly atmosphere and provides opportunities for small businesses.

14. The Board also received several letters in support of the application. The letters generally described the flea market as a benefit to customers, vendors, and the neighborhood because of its vitality, friendly atmosphere, and opportunity for social interaction as well as the quality of merchandise sold there.

15. Three persons testified in opposition to the application. They objected to the presence of a commercial enterprise on school property in a residential zone and asserted that the market creates adverse impacts especially with respect to trash, parking, and traffic in the neighborhood.

CONCLUSIONS OF LAW AND OPINION:

The Board is authorized to grant a variance from the strict application of the Zoning Regulations in order to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property . . . or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the

property, the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property. . . ." D.C. Code § 5-424(g)(3), 11 DCMR § 3103.2. Relief can be granted only "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. *Id.*

The "undue hardship" criterion applies to applications for use variances, which warrant a more stringent showing in light of the more drastic relief inherent in a use variance. *Palmer v. Board of Zoning Adjustment for the District of Columbia*, 287 A.2d 535, 541 (D.C. 1971). A use variance cannot be granted unless a situation arises where reasonable use cannot be made of the property in a manner consistent with the Zoning Regulations. *Id.*

The Applicant does not own the property but seeks to use the site for the weekly Georgetown Flea Market. The Applicant and persons in support of the application provided substantial testimony about the benefits of the current site, their inability to locate an alternative site, and the many good qualities of the Georgetown Flea Market. However, the impact of the Zoning Regulations on a lessee, or other persons who merely use the property, is irrelevant. *Palmer*, 287 A.2d at 542. "The statute expresses in clear and unambiguous language that the showing, whether of "practical difficulties" or "undue hardship," must be upon the owner." *Id.*

The Applicant testified that, unless the requested variance is granted, the owner of the property, DCPS, would suffer undue hardship in the form of lost revenues, approximately $20,000 annually generated by the lease with the Georgetown Flea Market. However, the record contains no evidence that DCPS would in fact suffer undue hardship from the loss of the lease revenues. The Board concludes that the record fails to support a finding of "hardship to the owner" because the Applicant did not demonstrate through testimony of DCPS that the property could not be put to any reasonable use consistent with the Zoning Regulations, or that any undue hardship would result to the owner of the property because of strict application of the Zoning Regulations.

The Board accorded the issues and concerns of the Office of Planning and ANC 2E the great weight to which they are entitled. Both OP and ANC 2E recommended that the Georgetown Flea Market should be allowed to continue operating at its current location. However, neither OP nor the ANC asserted that undue hardship would result to the owner of the subject property as a result of the strict application of the Zoning Regulations. Because the record does not support a finding of undue hardship to the owner of the property, the Board need not consider whether the requested use variance could be granted without substantial detriment to the public good or substantial impairment of the zone plan, the issues addressed by OP and the ANC. *See Bakers Local Union No. 118 v. District of Columbia Bd. of Zoning Adjustment*, 437 A.2d 176 at 179 (Board must address only those concerns of the ANC that are "legally relevant").

The Board finds that the Applicant has failed to prove, by a preponderance of evidence, that the use variance can be granted consistent with applicable legal requirements. The Board hereby **ORDERS** that the application be **DENIED.**

VOTE: 3-1-1 (Robert N. Sockwell, Anne Mohnrern Renshaw, and Susan Morgan Hinton to deny; John G Parsons (by absentee vote) to grant; and Sheila Cross Reid abstaining.)

BY ORDER OF THE DC BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director

Final Date of Order: MAR 2 9 2001

PURSUANT TO 11 DCMR §3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR §3125.9, THIS ORDER WILL BECOME EFFECTIVE 10 DAYS AFTER IT BECOMES FINAL.

MN/3.27.01