imposed to prevent circumvention of the Double Jeopardy proscription, which would occur, for example, if a convicted individual were held indefinitely in the cell block, subject to imposition of a more severe sentence.

[2] Neither *Green* nor *Rowley* offers a standard for determining whether resentencing has been imposed with promptness sufficient to comply with the Double Jeopardy Clause. Indeed, in *Rowley*, the court stated that it "need not determine the exact point in time which fixes the ultimate limit to the court's power to make the correction." *Rowley v. Welch, supra* at 356, 114 F.2d at 504. *The Rowley* court was satisfied that a one-half hour delay was within the limit; in *Green*, we were satisfied that an hour was sufficiently prompt. Although the case at bar presents a period of greater duration between sentencing and resentencing, we find, by reference to the purpose of the promptness requirement, that the seven-hour delay is constitutionally sustainable.

The record in this case is barren of any indication that the seven hours appellant was held following imposition of his first, inadvertent sentence represented an attempt by the government to circumvent the protection of the Double Jeopardy Clause. Appellant was detained in the cell block for a legitimate administrative purpose. He had been transported that morning from the District of Columbia Jail, where he had been committed pending sentence, and was held here awaiting return to that facility. We judicially notice that prisoners are brought to court from that and other local prison facilities in regularly scheduled trips at the beginning and end of the court day. As such, appellant's presence in the courthouse, and the concomitant failure to have transferred custody of him to executive authorities, was fortuitous insofar as resentencing was concerned. We are not here presented with a situation in which transfer of custody was delayed to facilitate imposition of a more severe sentence, or in which such delay was occasioned by neglect or indifference. Nor do we have in this case a trial court changing its mind with respect to the first sentence imposed. Rather, we review correction of a sentence never intended. Accordingly, the trial court's action is

Affirmed.



Luis DE AZCARATE et al., Petitioners,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent,

Marvin Pitkin and Walter J. Schafer, Intervenors.

No. 12650.

District of Columbia Court of Appeals.

Argued May 11, 1978.

Decided July 14, 1978.

Judicial review was sought of final order of the Board of Zoning Adjustment which granted landowner a variance from minimum lot-width requirement, thus permitting landowners to construct single-family residence. The District of Columbia Court of Appeals, Kern, J., held that: (1) Board was authorized to grant variance due to extraordinary situation concerning lot where original parcel out of which lot was subdivided was susceptible subdivision into three conforming parcels, zoning office personnel on three occasions implicitly found lot conformed to width requirements, lot owner and predecessor proceeded in good faith and dispute over lot width was due to actions of zoning officials which were later found to be in error, and (2) failure of lot to meet width requirement could not accurately be described as a direct consequence of sole and affirmative acts of owner and predecessor in title where zoning department employees played significant part by

BZA
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Exhibit No. 31

Board of Zoning Adjustment
District of Columbia
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EXHIBIT NO.31

approving three separate applications concerning subdivision of parcel creating lot, and thus self-created hardship rule did not preclude variance.

Affirmed.

1. Zoning ⇐489

Statutory language allowing the Board of Zoning Adjustment to issue variance from zoning regulations for "other extraordinary or exceptional situation or condition of a specific property" served as a grant of authority to Board empowering it to provide variance relief, in appropriate cases, to extraordinary or exceptional conditions brought about after the original adoption of the zoning regulations. D.C.C.E. § 5–420(3).

2. Zoning ⇐489, 536

Once an extraordinary and exceptional situation or condition has arisen with respect to property, the owner must show peculiar and exceptional practical difficulties or exceptional and undue hardship in order to obtain variance from zoning regulations; furthermore, Board of Zoning Adjustment may grant variance relief only where there is no substantial detriment to the public and no impairment of the intent, purpose and integrity of the zone plan. D.C.C.E. § 5–420(3).

3. Zoning ⇐536

Application for use variance from zoning regulations requires a greater burden of proof than an application for an area variance.

4. Zoning ⇐496

The extraordinary or exceptional condition which is the basis for use variance need not be inherent in the land, it can be caused by subsequent event extraneous to the land itself. D.C.C.E. § 5–420.

5. Zoning ⇐496

The term "extraordinary or exceptional situation or condition" in statute providing for variances from zoning regulations was designed to serve as an additional source of authority enabling the Board of Zoning Adjustment to temper the strict application of the zoning regulations in appropriate cases, subject to limitations set forth in the statute. D.C.C.E. § 5–420.

6. Zoning ⇐503

Board of Zoning Adjustment was authorized to grant variance from minimum-width requirement of lot for single-family residential use where original parcel had been susceptible to subdivision into three conforming parcels, zoning office personnel on three occasions implicitly found that lot in question conformed to width requirements, lot owner and predecessor proceeded in good faith following subdivision of original parcel, homes were constructed on two out of three newly created lots and present dispute was due to actions of zoning officials which were later found to be in error. D.C.C.E. § 5–420(3).

7. Zoning ⇐497

The self-created hardship rule applicable to requests for variances from zoning regulations is a manifestation of equitable principle of estoppel; if an applicant for an area variance or his predecessor in title committed an affirmative act which directly resulted in the hardship complained of, the variance relief will be withheld.

8. Zoning ⇐497

Failure of configuration of lot to meet width requirements could not accurately be described as a direct consequence of the sole and affirmative acts by lot owner and predecessor in title where zoning department employees played a significant part by approving three separate applications during original subdivision creating lots, and thus self-created hardship rule did not apply to preclude variance from lot width requirements. D.C.C.E. § 5–420.

James L. Montgomery, Washington, D. C., for petitioners. Nelson Deckelbaum, Washington, D. C., was on the brief for petitioners.

Leo N. Gorman, Asst. Corp. Counsel, Washington, D. C., for respondent. Richard W. Barton, Deputy Corp. Counsel, Wash-

ington, D. C., also entered an appearance for respondent. Respondent adopted the brief of the intervenors.

Whayne S. Quin, Washington, D. C., with whom Norman M. Glasgow and Iverson O. Mitchell III, Washington, D. C., were on the brief, for intervenors.

Before KELLY, KERN and YEAGLEY, Associate Judges.

KERN, Associate Judge:

Petitioners seek review of a final order of the District of Columbia Board of Zoning Adjustment (Board) which granted intervenors a variance from the R-1-A district's minimum lot-width requirement of 75 feet, thereby permitting them to construct a single-family residence on the lot in question.

The history of the present dispute can be briefly summarized. Lot 17, for which the Board granted the area variance was originally part of a considerably larger lot designated Lot 13. Lot 13 was a triangular-shaped parcel of approximately 26,000 square feet, located in the R-1-A zone.[1] During July 1975, Lot 13 was subdivided into three lots and this subdivision was duly recorded at the Office of the Surveyor of the District of Columbia. Subsequently, Lot 17 was enlarged slightly to include an additional strip of land and this subdivision was also recorded. Following the approval of the second subdivision, intervenor-Pitkin applied for and received a building permit for the construction of a single-family dwelling on Lot 17.[2]

As approved, Lot 17 was an irregular configuration. The main body of the property was connected to the street by a strip of land 30 feet wide and 70 feet long. A single-family home was to be constructed on the main portion of the lot, which contained approximately 8,500 square feet. Intervenor-Pitkin did not proceed with construction of the dwelling and, during December 1976, he sold Lot 17 to intervenor-Schafer on condition that the property was suitable for the erection of a single-family residence. During this same time-frame, single-family homes were constructed upon each of the other two lots carved from the original Lot 13.[3]

When intervenor-Schafer applied for another building permit in February 1977, his application was rejected on the ground that Lot 17 failed to conform with the width requirements of the R-1-A zone; specifically, the Zoning Regulations Division concluded that Lot 17 was substandard since its width measured approximately 62 feet although the R-1-A zone requires a 75-foot width.[4]

1. The minimum lot-area requirement for this particular type of zone is 7,500 square feet. D.C. Zoning Regs. § 3301.1. No one disputes that intervenors meet this requirement.

2. Prior to recording a proposed subdivision, the Office of the Zoning Regulations Division reviews the subdivision to determine whether or not it is in accordance with the applicable zoning regulations. Also, D.C. Zoning Reg. 8103.1 provides: ". . . a building permit shall *not* be issued . . . *unless* such structure complies with the provisions of these regulations." (Emphasis added.) Presumably, such reviews occurred on three occasions: first, when Lot 17 was recorded; second, when the addition to Lot 17 was added and recorded; and third, when the first building permit was issued.

3. Petitioners do not allege that the other two lots upon which the houses were built are substandard in any respect.

4. The record does not clearly indicate the basis for the zoning authorities inconsistent decisions—viz., the grant of a building permit followed by the rejection of an application concerning the very same lot. One of the Board's findings of fact indicates that ". . . after [a] *reinterpretation* and application of the definition of width of lot for lot 17, by the Zoning Regulations Division, the applicant was told the lot no longer complied with such definition and that all previous approvals had been in error." (Emphasis added.) Counsel for intervenors, during the hearing before the Board, described the different techniques of computation which purportedly produced the inconsistent results. Regardless of the methodology employed, the record indicates that on April 13, 1976, the Zoning Regulations Division concluded that the average width of Lot 17 was 76 feet. A later computation made when intervenor-Pitkin's application for a building permit was submitted, produced an average lot width figure of 50 feet. This figure was later withdrawn when the Zoning Regulations Division concluded that Lot 17 had an average width of 62 feet. Intervenors raise no specific challenge to the propri-

Following the denial of his application for a building permit, intervenor-Schafer sought to obtain a variance from the 75-foot width requirements of the R–1–A zone.[5] After a public hearing, the Board, by unanimous vote, granted the area variance on the ground intervenors had established a practical difficulty in utilizing the lot. The Board concluded ". . . that [without a variance] the unusual shape of the lot renders it unusable for any purpose." The Board further concluded that relief, by way of a variance, could be granted without ". . . substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the zone plan."

D.C.Code 1973, § 5–420(3) provides in pertinent part:

> Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions *or other extraordinary or exceptional situation or condition of a specific piece of 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 such property, [a variance may be granted]. [Emphasis added.]

Petitioners' first contention is the Board lacked the statutory authority to grant a variance on the ground of any alleged difficulty in the application of the lot-width zoning regulation to Lot 17 since:

> "exceptional situation or condition of a specific piece of the property" refers to a situation or condition connected to the property. It does not include the circumstances here where invalid subdivisions and an invalid permit were issued because those circumstances are not conditions of a specific piece of property. [Petitioner's brief at 5.]

[1] Intervenors respond, *inter alia*, that the grant of authority contained in the statutory phrase "or other extraordinary or exceptional situation or condition of a specific property" permits the Board to grant a variance in this case. We agree with the intervenors that this statutory language serves as a grant of authority to the Board empowering it to provide variance relief, in appropriate cases, to extraordinary or exceptional conditions brought about after the original adoption of the zoning regulations.[6]

This court has recognized the purposes served by a procedure through which a variance can be obtained:

> It is designed to provide relief from the strict letter of the regulations, protect zoning legislation from constitutional attack . . . and prevent usable land from remaining idle. [*Palmer v. Board of Zoning Adjustment*, D.C.App., 287 A.2d 535, 541 (1972). *See Daniel v. Board of Zoning Adjustment*, D.C.App., 329 A.2d 773, 775 (1974); *Salsbery v. Board of Zoning Adjustment*, D.C.App., 318 A.2d 894, 896 (1974).]

[2] *Palmer v. Board of Zoning Adjustment*, *supra* at 539, did observe that "few cases . . . [have construed] the term 'extraordinary or exceptional situation . . . of a specific piece of property'." Moreover, the legislative history of § 5–420

ety of any alleged changes by the Zoning Regulations Division in their interpretation of the term "lot width."

5. A variance of approximately 16% was needed to permit utilization of Lot 17. Intervenors contend, without contradiction, that the property satisfied every other requirement of the R–1–A zone. The record indicates that the complaints of the petitioners to the proposed construction of a single-family home were entirely esthetic.

6. Consideration of all of petitioners' contentions is unnecessary in light of our resolution of this case. The thrust of petitioners' argument is that the Board lacked authority to grant a variance. Assuming the Board possessed statutory authority to act, petitioners cannot contend persuasively that its factual findings are not supported by and in accordance with reliable, probative and substantial evidence in the whole administrative record or that the Board's conclusions do not flow rationally from these findings. *Ass'n for Preservation of 1700 Block of N Street, N.W. and Vicinity v. BZA*, D.C.App., 384 A.2d 674, 677 (1978).

offers no explanation of the standard. *Id.* In that case, this court did not attempt to define comprehensively the content of the term "extraordinary or exceptional situation or condition"; instead, decisions from other jurisdictions are cited which defined the term to include economic, geographic or topographic conditions or *a condition created by the zoning authority's zoning of a lot* "partly for residence and partly for business." *Id.*[7]

[3, 4] A second decision of this court suggests that petitioner's claim is not well taken; *viz.*, that a variance can be granted only where the extraordinary or exceptional situation or condition inheres in the land itself at the time of the passage of the statute. In *Clerics of St. Viator, Inc. v. Board of Zoning Adjustment*, D.C.App., 320 A.2d 291, 293–4 (1974), this court rejected the contention that "only a hardship which is inherent in the 'land' can be the basis of a variance." In that case, a *use* variance was sought in order to permit the conversion of an existing religious seminary into a nursing home.[8] *Id.* at 292. After concluding that an exceptional situation had been shown by the applicant, *viz.*, a serious and continuing decline in the seminary's enrollment, the court stated:

> We think that the statute is clear. It provides that "other extraordinary or exceptional situation or condition of a specific piece of property" may be grounds upon which a variance may be granted. The Board is in error when it takes the position that a variance may only be issued when the required hardship inheres in "land" as opposed to "property." [*Id.* at 294.]

In effect, the extraordinary or exceptional condition which is the basis for a use variance need not be inherent in the land, but can be caused by subsequent events extraneous to the land itself, such as the failure of the seminary to remain a viable institution in *Clerics of St. Viator, Inc., supra.*[9]

[5] We also need not in this case precisely define the contours of the term "extraordinary or exceptional situation or condition." In our view, that term was designed to serve as an additional source of authority enabling the Board to temper the strict application of the zoning regulations in appropriate cases, subject to the limitations found in Section 5–420. It is sufficient for the present to conclude that the facts of this case fall within the ambit of that term. *See Palmer v. Board of Zoning Adjustment, supra* at 542 (the nature and extent of the burden justifying an area variance is best left to the facts and circumstances of each case).

[6] Consequently, we hold that the Board was authorized to grant an area variance in the instant case due to the extraordinary situation concerning Lot 17 which created "peculiar and exceptional practical difficulties" for the intervenors. However, because it is not necessary to define comprehensively the statutory term at issue here, we will recite those factors which we found significant to the outcome in the instant case. First, the record suggests and it was asserted during oral argument by intervenors, without contravention by peti-

7. During oral argument, counsel for petitioners contended that a broad interpretation of the phrase "extraordinary or exceptional situation or condition of a specific piece of property" would vest the Board with unbridled authority. We disagree. D.C.Code 1973, § 5–420(3) itself imposes restraints upon the Board's discretion. Once an extraordinary and exceptional situation or condition has arisen, the owner of the property must show "peculiar and exceptional practical difficulties" or "exceptional and undue hardship." Furthermore, the Board may grant variance relief pursuant to the statute only where there is no "substantial detriment to the public good" and no "[impairment of] the intent, purpose, and integrity of the zone plan."

8. That an application for a use variance requires a greater burden of proof than for an area variance is well-established in this jurisdiction. *Ass'n for Preservation of 1700 Block of N St., N.W. and Vicinity v. BZA, supra* at 677; *Palmer v. BZA, supra* at 541.

9. This is not to say that *any* subsequent event will invariably result in unusual conditions supporting the grant of a variance, particularly if an affirmative act of the applicant is the direct and sole cause of the hardship complained of.

tioners, that the original Lot 13, although of irregular shape, was susceptible to subdivision into three conforming parcels. Second, zoning office personnel, on three occasions, implicitly found that Lot 17 conformed to the lot width requirements of the R–1–A zone. Third, intervenors proceeded in good faith, following the subdivision of the original parcel and, eventually, two homes were constructed on two of the three newly-created lots. Finally, during oral argument before this court, counsel for the Board conceded that the present dispute was due to the actions of the zoning officials which were later found to be in error.

Petitioner's second contention is that the "self-created hardship rule" bars variance relief where the affirmative act of the applicant, or his predecessor in title, is the sole cause of the hardship complained of.[10] At the outset, petitioner is confronted by *A.L.W., Inc. v. Board of Zoning Adjustment*, D.C.App., 338 A.2d 428, 431–32 (1975), where it is said:

> In New York, for instance, the rule seems to be "that the 'self created hardship' concept does not apply to area variance cases, *i. e.*, the fact that the condition complained of was self created is not dispositive of the matter but only one factor to be considered by the zoning board in determining whether to exercise its discretion and grant an area variance." [*Id.* at 431–32.]

Petitioner seeks to avoid the import of this decision by arguing:

> The type of affirmative action creating the [zoning] difficulty as here has to be distinguished from the type of self-created difficulty which arises when the applicant has purchased the lot subject to the zoning ordinance. The latter, the purchase type of self-created difficulty, does not bar relief for an area variance. . . . The distinction from the facts before the court in this petition was recognized in *A.L.W., Inc. [v. Board of Zoning Adjustment, supra]*, at 432 when the court said:
>
> > Unless the applicant himself—as a result perhaps of some prior conveyance—is responsible for the irregular shape of the property, he cannot as a practical matter improve the lot in any way that would enable him to realize income or sell it to a purchaser for value. . . .
>
> The act of the applicant or a former owner in the chain of title creating the condition does bar relief. [Petitioner's brief at 11.]

However, a recent decision of this court, *Association for Preservation of 1700 Block of N Street, N.W. and Vicinity v. Board of Zoning Adjustment*, D.C.App., 384 A.2d 674, 678 (1978), undermines petitioners' argument. In that case, the Board granted a parking variance.[11] After concluding that the Board properly treated the application as an area variance rather than as a use variance, the court rejected the petitioners' contention that the rule of self-created hardship applied.[12]

10. Petitioner cites 2 A. Rathkopf, Law of Zoning § 48–1 (3rd ed. 1972), for the proposition that:

> if the peculiar circumstances . . . have been themselves caused or created by the property owner or his predecessor in title, the essential basis of a variance, *i. e.*, that the hardship be caused *solely* through the manner of operation of the ordinance upon the particular property is lacking. In such a case, a variance will not be granted. [Emphasis in original.]

11. *The opinion notes that*

> Provision of the required off-street parking with the proposed building on the subject property is impossible due to its irregular shape; furthermore, even if the lot were rectangular in shape, only thirty parking spaces—rather than the required forty—could be provided with the building. There would be further hardship to the YMCA if the required parking were to be placed below the proposed swimming pool. Each such parking space would cost over $20,000 to provide, whereas the normal cost of each off-street parking space located within the garage structure is between $6,000 and $8,000. [*Id.* at 676.]

12. The problem faced by the applicant (YMCA) in that case was "self created" in the narrow sense that the configuration of the lot, the design of the building, and the zoning regulations in force combined to create the hardship. Although it is clear that given these variables the YMCA could not readily comply with the zoning code on the lot in question, it is equally

Petitioners state that whatever hardship faced the YMCA "was self-created to the extent of Metro YMCA having *full knowledge* of all problems with the alleged shape of the land, the type of zoning, and costs of putting in the parking *prior* to the purchase of the property in March 1974." The YMCA's self-created hardship in not a factor to be considered in an application for an area variance, however, as that factor applies only to a use variance. [*Id.* at 678. *See Salsbery v. Board of Zoning Adjustment*, D.C. App., 357 A.2d 402, 404 (1976); *A.L.W., Inc. v. Board of Zoning Adjustment, supra* at 431 (emphasis in original).] [13]

[7, 8] Regardless of the impact of *A.L.W., Inc. supra*, and *Association for Preservation of 1700 Block of N Street, N.W., supra*, on the applicability of the self-created hardship rule in area variance cases, we think petitioners' argument founders for yet another reason; *viz.*, the particular facts of this case. The self-created hardship rule is, in fact, a manifestation of the equitable principle of estoppel; that is, where an applicant for an area variance, or his predecessor in title, has committed an *affirmative act* which directly results in the hardship complained of, variance relief will be withheld. 2 A. Rathkopt, Law of Zoning, § 48–6 (3rd ed. 1972). However, the hardship at issue here—the failure of the configuration of Lot 17 to meet the lot-width requirement—cannot be accurately described as the direct consequence of the intervenors' sole and affirmative acts; here, the zoning department employees played a significant part by approving three separate applications during the original subdivision of Lot 13. Having concluded that Section 5–420(3) authorized the Board to grant an area variance in this case and that the doctrine of self-created hardship, whatever its validity in this jurisdiction to area variances, is inapplicable on the facts of the present dispute, we are unwilling to disturb the decision of the Board.

Affirmed.



Joseph and Mary EDISON, Appellants,

v.

Michael and Joyce SCOTT, Appellees.

No. 12021.

District of Columbia Court of Appeals.

Submitted Jan. 10, 1978.

Decided July 14, 1978.

Plaintiff brought action to recover for property damages sustained when car allegedly stolen from defendant allegedly sideswiped his car. The Superior Court, District of Columbia, George H. Goodrich, J., entered judgment in favor of plaintiff,

clear that the YMCA's difficulties stemmed directly from its decision to erect the facility on a small, irregularly shaped parcel of land.

13. In *Salsbery v. BZA, supra* at 404, and *A.L.W., Inc. v. BZA, supra*, it appears that the self-created hardship rule was found inapplicable to variances where the purchaser-applicant bought the property with knowledge of its nonconformity with the zoning regulations. In *A.L.W., supra* at 431–2, it is stated:

> the fact that the owner knew or should have known of the area restrictions *before he purchased the property* does not alter the lesser standard [used in area variances as opposed to use variances]. In New York, for instance, the rule seems to be "that the 'self created hardship' concept does not apply to area variance cases." [Emphasis added.]

In *Salsbery, supra* at 403–04, the applicant for a use variance purchased the commercial property without conditioning the contract upon the grant of a variance for a different nonconforming use. In that case, the economic hardship stemmed from the fact that the applicant made no efforts to protect his rights. In that context, the court's statement is entirely appropriate:

> If there is hardship present, it stems from the fact that petitioner contracted to purchase the existing property . . . without conditioning the contract upon the securing of a use variance. A self-inflicted hardship, such as this, will not support the grant of a use variance. [*Id.* at 404.]

court failed to determine whether the statement was made freely and voluntarily before it was admitted into evidence as required by *Jackson v. Denno*. Thus the court erred in attempting to defer his consideration of the voluntariness issue to a post-trial hearing. The trial court's failure to make any determination on the voluntariness issue whatsoever, standing alone, would require us to remand the matter to the trial court for this hearing. However, in this case, there is more. The trial court's promise to look into the allegation of coercion after trial has created an unusual posture in this case. At trial appellant did not take the stand to testify, and he did not introduce any other evidence touching upon the question whether appellant's statement was the product of coercion. From the record before us we are unable to discern if this was a tactical decision or, instead, if appellant was lulled by the trial court's assurance that the court would (and could) deal with the matter of coercion after trial. Consequently, because of the importance of the rights involved, we would require a clear indication that appellant's failure to submit this evidence was the result of a deliberate tactical choice.

It is difficult, on this record, to conceive of a legitimate tactical basis for foregoing the presentation of appellant's allegations of brutality to the jury on the issue of what weight they should give the confession. The government's case was strong, the charges were grave, and no defense was presented. Under these circumstances, the normal tactical concern that the jury may disbelieve the defendant or that he might be impeached by prior convictions, would appear simply inapposite. Given our inability to discern a legitimate tactical choice counsel could have been making (and we note that the government suggested none in the brief or oral argument), we would normally be inclined to reverse. However, given the necessity for a remand on the *Jackson-Denno* issue, we chose to remand on this issue as well. Upon such remand, the trial court should conduct such hearings as appropriate (including the appointment of counsel for appellant) to determine the reason for prior counsel's failure to present evidence to the jury on this issue. The trial court shall make appropriate findings of facts and conclusions of law.[5]

Remanded for further proceedings consistent with this opinion.

5. We note in passing that the instruction given on voluntariness was not No. 2.46 of the Criminal Jury Instructions for the District of Columbia, but one which was rendered improper by *Hawkins v. United States*, supra at 282. *See* note 3 *supra*. *Compare* note 4 *supra with* note 2 *supra*. This was harmless to appellant for it gave him *more* than he was entitled to under *Jackson v. Denno*, *supra*.

#1

Lawrence A. MONACO, Jr., Petitioner,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent,

William Brock and William McManus, Intervenors.

No. 13321.

District of Columbia Court of Appeals.

Argued Dec. 5, 1978.

Decided Nov. 5, 1979.

Rehearing En Banc Denied Jan. 8, 1980.

Neighborhood resident appealed Board of Zoning Adjustment's grant of a variance to intervenors below to permit Republican National Committee, to extend its offices located in an R–4 district bordering the Capitol grounds. The Court of Appeals, Gallagher, J., held that: (1) the uniqueness factor of the use variance test is not limited to physical aspects but, rather, includes extraordinary circumstances such as past zoning history; (2) applicants' good faith, detrimental reliance on prior zoning actions, pursuant to which part of the complex was

constructed, were also relevant to determining undue hardship, the second branch of the variance test; (3) neither due process, Board's own rules or District of Columbia Administrative Procedure Act was violated by Board's receiving intervenors' proposed order after record was closed and issuing findings of fact and conclusions of law almost identical to those submitted by intervenor, without serving the proposed order on petitioner; and (4) finding that variance would not harm the public or undermine the zoning plan was supported by probative and substantial evidence.

Affirmed.

1. Zoning and Planning ⇐489

A landowner must meet there requirements for a use variance: (1) unique physical aspects 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. D.C.C.E. § 5–420.

2. Zoning and Planning ⇐496

"Extraordinary circumstances" justifying a use variance are not limited to physical aspects of the land. D.C.C.E. § 5–420.

See publication Words and Phrases for other judicial constructions and definitions.

3. Zoning and Planning ⇐513

Where Zoning Commission and House Office Building Commission implicitly approved site to which public service organization sought to relocate following condemnation of prior site and indicated that organization proceed by way of variances rather than a zone change and variances were granted for greatest part of the project and organization proceeded in good faith to construct proposed club and stage one of office building and secured a variance for second stage, which variance had lapsed, the actions by the zoning authorities provided implicit assurance that the project could be completed, for purpose of a second variance for the stage two office building. D.C.C.E. § 5–420.

4. Zoning and Planning ⇐533

Issuance of a variance, which had lapsed, to construct second stage of office project could be considered in application for another variance where reliance on eventual approval of the entire project was in good faith. D.C.C.E. § 5–420.

5. Zoning and Planning ⇐496

Past zoning history can be taken into account in the uniqueness facet of the variance test. D.C.C.E. § 5–420.

6. Zoning and Planning ⇐496

Public service organization's desire to move to site for which it sought a use variance did not make the site unique; however, although a commercial user might not be able to establish uniqueness in a particular site's exceptional profit-making potential, the Board of Zoning Appeals could be more flexible when it assessed a nonprofit organization which was a well-established element of our governmental system and fact that the site was uniquely suitable for the organization's headquarters because of the surrounding use, the Capitol. D.C.C.E. § 5–420.

7. Zoning and Planning ⇐490

Public need for the use is an important factor in granting or denying a variance.

8. Zoning and Planning ⇐496

Restrictive covenant between House Office Building Commission and public service organization involving height limitations on new building along with design restrictions as well as United States' right of first refusal to purchase the property at lesser of cost or fair market value, which covenant was incorporated in prior variances, could be considered as an extraordinary condition for purposes of additional use variance as it effectively restricted design, height and use to that which Board of Zoning Adjustment considered compatible with surrounding residential and governmental properties and provided evidence of organization's unique relationship with Congress. D.C.C.E. § 5–420.

9. Zoning and Planning ⇐496

Fact that public service organization had already constructed a building on adjoining property was a factor which could be considered in finding uniqueness for purpose of granting use variance to enable the organization to complete its building plans by constructing the "second stage" on immediately adjacent parcel. D.C.C.E. § 5–420.

10. Zoning and Planning ⇐496

A significant factor in determining if inadequate buildings on one parcel may constitute extraordinary situation for another parcel is whether the two parcels are contiguous and under common ownership. D.C.C.E. § 5–420.

11. Zoning and Planning ⇐496

When a public service has inadequate facilities and applies for a variance to expand into an adjacent area in common ownership which has long been regarded as part of the same site, the Board of Zoning Adjustment does not err in considering the needs of the organization as possible other extraordinary and exceptional situation or condition of a particular piece of property. D.C.C.E. § 5–420.

12. Zoning and Planning ⇐496

Since site's proximity to the Capitol made it uniquely valuable to public service organization, the fact of prior construction and the contiguous subject site could be considered together in applying the uniqueness aspects of the area variance test, especially because past acts of zoning authorities in granting variances to construct portion of project led the organization to rely in good faith on their eventual consent to the final stage of the building. D.C.C.E. § 5–420.

13. Zoning and Planning ⇐493

A use variance applicant's good faith, detrimental reliance on previous zoning actions can be relevant to determine undue hardship, the second branch of the variance test. D.C.C.E. § 5–420.

14. Zoning and Planning ⇐495

Normally a property owner, seeking a use variance, suffers no undue hardship when his property can produce a reasonable profit in a permitted use. D.C.C.E. § 5–420.

15. Zoning and Planning ⇐495

Good faith, detrimental reliance on zoning authorities' informal assurances that variances would be granted to complete office project for nonprofit public service organization could be considered in assessing undue hardship for purpose of granting use variance to complete second and final stage of the project, especially since organization relied on actions of zoning authorities in forming a covenant with House Office Building Commission, which covenant would greatly reduce value of present investment if organization were required to move, with the hardship due to reliance that accommodation would be made to allow expansion of present site, and not to poor bargaining. D.C.C.E. § 5–420.

16. Zoning and Planning ⇐536

Even if an applicant for use variance has demonstrated uniqueness and undue hardship, the applicant must still show the third element of the variance test, namely, that the variance will not harm the public or undermine the zone plan. D.C.C.E. § 5–420.

17. Zoning and Planning ⇐703

Review of Board of Zoning Adjustment's finding that proposed building addition, for which use variance was sought, did not have a detrimental impact on neighborhood or zone plan was limited to whether the findings were supported by reliable, probative and substantial evidence in the record as a whole and whether the Board's conclusion flowed rationally from such findings. D.C.C.E. § 5–420.

18. Zoning and Planning ⇐646

Finding that proposed addition to public service organization's office building, which addition would require grant of use variance, would not have detrimental impact on neighborhood or zone plan was amply supported by the record, as no new employees would be brought into the neighborhood, the metro across the street would

alleviat[redacted]ngestion and structure would be compatible with design and height of surrounding buildings. D.C.C.E. § 5–420.

19. Zoning and Planning ⇐534

Board of Zoning Adjustment violated neither its own rules nor Administrative Procedure Act by receiving variance applicant's proposed order after the record was closed and issuing findings of fact and conclusions of law almost identical to those submitted by the applicants, without serving a copy of the proposed order on petitioner, as petitioner took advantage of his right to be present and submit rebuttal evidence and to cross-examine witnesses at contested case proceedings and matter submitted was not evidence but conclusions which might be drawn from the evidence. D.C.C.E. §§ 1–1509(b), 5–420; U.S.C.A. Const. Amends. 5, 14.

20. Zoning and Planning ⇐359

Better practice is for Board of Zoning Adjustment to serve all filed papers on each party to the adjudication, including proposed findings filed by a party to a contested case proceeding. D.C.C.E. § 5–420.

21. Constitutional Law ⇐278.2(2)

Since ample evidence in the record supported Board of Zoning Adjustment's grant of a use variance, due process was not violated even though the Board incorporated findings and conclusions prepared by applicant and not served on objector. D.C.C.E. § 5–420; U.S.C.A.Const. Amends. 5, 14.

22. Zoning and Planning ⇐762

Variance law is broad enough to relieve, in some instances, the strict application of t[redacted]oning regulations where an applicant's unique situation and undue hardship are caused by good-faith reliance on prior assurances of zoning authorities; while authorities' actions may not suffice to warrant application of estoppel, their actions may be considered under variance law, which is designed to avoid harsh and unjust results in extraordinary situations. D.C. C.E. § 5–420.

Lawrence A. Monaco, Jr., pro se.

Richard W. Barton, Deputy Corp. Counsel, and Leo N. Gorman, Asst. Corp. Counsel, Washington, D. C., entered appearances for respondent and adopted the brief of the intervenors.

Norman M. Glasgow, Washington, D. C., with whom Whayne S. Quin and Norman M. Glasgow, Jr., Washington, D. C., were on the brief, for intervenors.

Before KERN and GALLAGHER, Associate Judges, and YEAGLEY, Associate Judge, Retired.

GALLAGHER, Associate Judge:

Petitioner appeals the Board of Zoning Adjustment's (BZA's) grant of a variance to Capitol Hill Associates, intervenors below,[1] under Section 8207.11[2] of the Zoning Regulations. Intervenors sought a use and area variance in order to extend Republican National Committee offices located in an R–4 district bordering the Capitol grounds.

Intervenors maintain that historical factors, the relationship with Congress, and

1. Messrs. Brock and McManus are trustees for the Republican National Committee, beneficial owners of the property. Capitol Hill Associates, the applicant before the BZA, was under contract to convey the property to the Republican National Committee.

2. District of Columbia Zoning Regulation § 8207.11, adopted pursuant to D.C.Code 1973, § 5–420, provides as follows:

> 8207.11. Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under this Act would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance from such strict application so as to relieve such difficulties or hardship, provided such relief can be granted 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.

past actions of the BZA and Zoning Commission create an "extraordinary or exceptional situation or condition" so as to fulfill the statutory variance requirement.[3] Intervenors reason further that due to the same historical circumstances, they will suffer "undue hardship" if not allowed to expand according to plans of 20 years' duration formed with the ostensible consent of the zoning authorities. Finally, intervenors maintain that the proposed building extension will not undermine the zone plan, but rather will provide a harmonious transition between the Capitol buildings and the surrounding residential neighborhood.

The BZA ruled with intervenors and granted a variance. Petitioner Monaco[4] argues primarily that the Board misapplied the variance law in finding unique circumstances and undue hardship in historical factors personal to intervenors and unrelated to the property in question. A secondary issue is whether the BZA's finding of no detriment to the neighborhood is supported by substantial evidence. Petitioner also contends that the BZA admitted into the record intervenors' proposed findings of fact and conclusions of law after the public hearing was concluded, violating its own rules and the District of Columbia Administrative Procedure Act.[5]

The historical circumstances on which intervenors base their claim of exceptional situation and undue hardship began in 1960 when the United States government condemned Republican National Committee property in order to construct the Madison Library. Because of intervenors' close relationship with Congress, they wished to relocate on the perimeter of the Capitol. They found and acquired other suitable property in an R–4 district one block to the south on First Street, S.E., running from "C" Street almost to "D" Street. The site of the present dispute includes roughly the southernmost third of that property, with the addition of lot # 81[redacted] the corner of 1st and "D" Streets, acquired more recently.

In 1961, intervenors filed an application to the Zoning Commission to change the classification of the northern portion of their new site from an R–4 to an SP zone. An office building would have been permitted as of right in an SP zone, and would not have been subject to the R–4 height restrictions. The House Office Building Commission approved the relocation of Republican National Committee headquarters, but was concerned that height restrictions be maintained. After negotiations with intervenors, the Zoning Commission, and the Architect of the Capitol, it was agreed that the Zoning Commission would defer decision of the zone change, and intervenors would proceed by means of a series of variances, which, unlike a zone change, could be conditioned on low building height.

A height limitation of 40 feet at the corner of 1st and "C" Streets, along with design restrictions, were embodied in a covenant between the House Office Building Commission and intervenors. This covenant was incorporated by reference in the grant of several variances to intervenors. The same covenant provided that the United States had a right of first refusal to purchase the land and improvements at the lesser of cost or fair market value.

Intervenors proceeded with their building plans in three parts: the Capitol Hill Club, and a two-stage office building. The BZA granted variances for the Capitol Hill Club in appeal # 6348 (June 21, 1961) and # 8288 (July 14, 1965); for the first stage of the office building in # 8183 (December 22, 1965); and for the second stage of the office building in # 8834 (November 8, 1966). Although the Capitol Hill Club and the first stage of the office building were completed, construction of the second stage was postponed for lack of funds. The vari-

3. D.C.Code 1973, § 5–420, is substantially identical to Zoning Reg. § 8207.11, *supra* note 2.

4. Mr. Monaco resides at 123 C Street, S.E., in the same block as the subject site.

5. D.C.Code 1973, §§ 1–1501—1–1510.

an[illegible]psed after six months.[6] This case is an appeal of the BZA's grant of another variance for the stage two office building. The proposed office addition is designed to join the existing building and use the same engineering systems. It is slightly modified from the plan approved in the mid-1960's in order to cover newly acquired lot # 816 and extend all the way to "D" Street.

[1] A landowner must meet three requirements for 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.[7] Petitioner claims that intervenors met none of the three requirements, and that the BZA applied an incorrect standard for determining uniqueness and undue hardship. Firstly, he contends that the *physical* aspect of the property must be unique. Here the subject site would equal four perfectly ordinary lots, suitable for permitted townhouses. Furthermore, because the land could be used for townhouses, says petitioner, intervenors would suffer no undue hardship by conforming to the R–4 zoning. Lastly, he claims that the expansion of an office building in a block developed primarily with row houses would deter the public good and undermine the integrity of the zone plan.

The BZA made a conclusion of law in respect to the first variance requirement, unique physical aspect or "other extraordinary or exceptional situation or condition of a specific piece of property."

> 1. The subject site is affected by an exceptional situation as a result of the history of the creation of this property as the site upon which the Republican National Committee Office building would be located through previously granted variance relief. The property is also uniquely affected by an agreement between the House Office Building Commi[illegible] and Capitol Hill Associates, Inc., which limits the use of the subject property to offices for the Republican National Committee and its affiliates, provides that all plans for exterior facades should be subject to the approval of the Architect of the Capitol and that the United States Government shall have the right of first refusal to purchase the property in the event of a sale of that premises to any person other than the Republican National Committee. The applicant has made major expenditures on the building and land on the basis of prior actions of the Zoning Commission and the Board of Zoning Adjustment.

A finding of fact is also relevant to the question of uniqueness:

> 11. [W]hen the Republican National Committee first embarked on the Eisenhower Center project it was the understanding of the Committee that an accommodation to provide space for it would be provided as the United States Government acquired its former site at First and Carroll Streets, S.E. by condemnation, that the applicant found it necessary to obtain another location in the Capitol Hill area because of its unique relationship with members of Congress and other personnel located on Capitol Hill and that this unique situation is evidenced by the existence of an agreement dated July 19, 1965, between the House Office Building Commission and Capitol Hill Associates, Inc.

[2] In sum, the BZA considered four factors in applying the uniqueness or other *extraordinary circumstances* test:

> A. The Republican National Committee's close relationship to Congress and location of property near Congress;
>
> B. existence of stage I of the office building;

6. *See* Zoning Regs. §§ 8205.11, 8205.12.

7. *See* D.C.Code 1973, § 5–420; Zoning Regs. § 8207.11, *supra* note 2; *Otto v. Steinhilber*, 282 N.Y. 71, 24 N.E.2d 851, 853 (1939). In *Palmer v. Bd. of Zoning Adjustment*, D.C.App., 287 A.2d 535, 541 (1972), this court held that an applicant for a use variance, as in this case, must meet the higher standard of "undue hardship" rather than the "practical difficulties" required to justify an area variance.

C. past actions of the Zoning Commission and BZA which led them to begin construction in that location;

D. the right of first refusal and restrictive covenant held by the House Office Building Commission which limits the use and design of the building.

Petitioner maintains that none of these factors may be used to justify a variance. Rather, he contends the extraordinary circumstances must be limited to physical aspects of the land. We disagree with petitioner's narrow interpretation of the phrase "other extraordinary or exceptional situation or condition of a specific piece of property." Though we recently rejected the possibility that unique circumstances could refer to the personal misfortunes of the applicant or to the previous use of the property. *Capitol Hill Restoration Society, Inc. v. Board of Zoning Adjustment*, D.C.App., 398 A.2d 13 (1979), in that case the subject site was a row house of design, size, and acreage similar to others in the neighborhood. There were no unusual circumstances, as there are in this case, involving the presence of an office building, or the influence and proximity of the Capitol affecting the neighborhood. Furthermore, the history we referred to in *Capitol Hill Restoration Society, Inc., supra*, was merely the previous illegal use made of the property by the owner, whereas the history material to this case consists of past actions of the zoning authorities.

Those past actions are the critical factors which have caused the Republican National Committee's present predicament. In *DeAzcarate v. District of Columbia Board of Zoning Adjustment*, D.C.App., 388 A.2d 1233 (1978), an area variance case, we found that a similar past history of zoning approvals gave rise to uniqueness. We said in *DeAzcarate* that

> [i]n effect, the extraordinary or exceptional condition which is the basis for a use variance need not be inherent in the land, but can be caused by subsequent events extraneous to the land itself, such as the failure of [a] seminary to remain a viable institution . . . . In our view, that term was designed to serve as an additional source of authority enabling the Board to temper the strict application of the zoning regulations in appropriate cases . . . . [*Id.* at 1237.]

[3] The four factors which the court found significant in upholding the grant of a variance in *DeAzcarate* were (1) the original property owned by the variance applicant could have been divided into three conforming lots; (2) zoning office personnel, on three occasions, implicitly found that the lot in question conformed to area requirements; (3) applicant proceeded in good faith to rely on said division, and built houses on the other two newly created lots; and (4) the present dispute was caused by zoning officials' erroneous action. *Id.* at 1238. Here, intervenors could originally have located elsewhere or possibly secured a zone change for the site. However, the Zoning Commission and House Office Building Commission implicitly approved the site and indicated that intervenors should proceed by means of variance. Moreover, the BZA granted variances for the greatest part of the project. Intervenors proceeded in good faith to construct the Capitol Hill Club and stage one of the office building and secured a variance for the second stage of the office as well. These actions by the zoning authorities provided implicit assurance that the project could be completed. *See Jayne Estates, Inc. v. Raynor*, 22 N.Y.2d 417, 425, 293 N.Y.S.2d 75, 81, 239 N.E.2d 713, 717 (1968) (difficulty which sets a property apart from its neighbors need not be physical but can stem from the zoning history of the case).

[4] Petitioner reasons that the grant of a variance in 1966 cannot be considered because it lapsed after six months and thus has no res judicata effect. Even though the variance for the final stage lapsed, intervenors' reliance on eventual approval was nevertheless in good faith. As a New York court explained, the reason for having a time limitation on a variance "is to insure that in the event conditions have changed at the expiration of the period prescribed the board will have the opportunity to reap-

praise the proposal by the applicant in the light of the then existing facts and circumstances if the latter still desires to proceed." *In re Goodwin*, Sup.Ct.N.Y., N.Y.L.J., July 5, 1962, as quoted in 3 A. Rathkopf, The Law of Zoning and Planning § 38.06[2] (4th ed. 1979) (variance rights should not be lost through delay in exercise if conditions remain the same). *See also Madden v. Zoning Board of Review*, 89 R.I. 131, 151 A.2d 681 (1959); *Nuckles v. Allen*, 250 S.C. 123, 156 S.E.2d 633 (1967) (board without authority to revoke a variance on which a subsequent owner has relied).

When the BZA reassessed the neighborhood and the project after the 12-year interval, it found circumstances were still favorable to the project. The intervenors rationally could have expected a favorable evaluation when the major change in the neighborhood was installation of the Metro across the street which would reduce the vehicular traffic effects on the surrounding neighborhood. Thus, we find that intervenors showed the same type of good faith detrimental reliance on zoning actions as was shown in *DeAzcarate*, where such zoning actions were found to contribute to uniqueness.

[5] Given that the past zoning history can be taken into account in the uniqueness facet of the variance test, we now turn to an examination of the resulting situation as it exists today to assess whether the BZA erred in considering the needs of the Republican National Committee, the proximity of the site to the Capitol, the restrictive covenant, and existence of the first two buildings as contributing to uniqueness.

Petitioner relies upon this court's decisions in *Taylor v. Board of Zoning Adjustment*, D.C.App., 308 A.2d 230 (1973) and *Palmer v. Board of Zoning Adjustment*, D.C.App., 287 A.2d 535 (1972), to support his contention that "uniqueness" is limited to physical characteristics of the land. In *Taylor*, however, we merely interpreted the uniqueness test to mean that petitioner's property must be subject to some difficulty not shared by the entire neighborhood, and did not say the difficulty must be a physical condition. Here, the subject site is distinguished from the rest of the R–4 district because it is closer to Capitol grounds. While it might be argued that the entire residentially zoned neighborhood around the Capitol is subject to the same condition, immediate proximity has sometimes been used to distinguish a property from its neighbors in general proximity to a particular building. *See, e. g., Peirce v. Zoning Board of Adjustment*, 410 Pa. 262, 189 A.2d 138 (1963) (property immediately adjacent to a sewage pumping station and to an industrial park entrance considered unique from other property in same general neighborhood).

[6, 7] In *Palmer, supra* at 540, we held that the attempt or desire to utilize property for a certain use was not by itself enough to create an "extraordinary or exceptional situation or condition" under the zoning regulations, but we did not define precise limits to the phrase. Referring to decisions from other jurisdictions, the court did mention economic conditions, *id.* at 539, and character of surrounding uses, *id.* at 540, as possible criteria for determining uniqueness along with topography and geographic factors. The Republican National Committee's wish to move to the subject site does not make the site unique. Nevertheless, the site is uniquely suitable for their headquarters because of the surrounding use, the Capitol. While a commercial user before the BZA might not be able to establish uniqueness in a particular site's exceptional profit-making potential, we consider that the BZA may be more flexible when it assesses a non-profit organization which is a well established element of our governmental system. As Professor Anderson has observed, public need for the use is an important factor in granting or denying a variance and "the apparently objective standards of the enabling acts are applied differently to the several kinds of uses . . . ." 3 R. Anderson, American Law of Zoning § 14.78 (1968).

[8] The restrictive covenant between intervenors and the House Office Building Commission provides evidence of the unique

relationship with Congress. The restrictions contained there also may be considered in their own right as an extraordinary condition of a particular piece of property, since they effectively restrict design, height, and use to that which the BZA considered compatible with surrounding residential and governmental properties. In *Capitol Hill Restoration Society v. Zoning Commission*, D.C.App., 380 A.2d 174, 184–85 (1977), a case involving a petition for rezoning, we held that private restrictive covenants properly may be considered in zoning decisions.

[9] The fact that a building has already been constructed on the adjoining property is another factor which may be considered in finding uniqueness. In *Clerics of Saint Viator, Inc. v. District of Columbia Board of Zoning Adjustment*, D.C.App., 320 A.2d 291 (1974), we stated that existing structures are as important as topography in creating "other extraordinary or exceptional situation or condition of a specific piece of property." *Id.* at 294. Petitioner argues that the existing building is not on the subject site, and thus cannot be taken into account. Only occasionally are cases found in which a variance is granted on one parcel to remedy the deficiencies of another. *See Kenmore Joint Venture v. District of Columbia Board of Zoning Adjustment*, D.C. App., 391 A.2d 269 (1978) (apartment previously granted special exception to use adjoining R–1–B lots for parking); *In re Freid-el Corporation*, 34 Pa.Cmwlth. 341, 383 A.2d 1286 (1978) (grant of variance for expansion of townhouses based on dictates of business). *Cf.* 2 R. Anderson, *supra*, § 14.29.

The characterization of the use as a public service will again be significant. For example, "A commercial nonconforming user who needs parking facilities cannot satisfy the requirement for a use variance . . . without proving that the proposed site will not yield a reasonable return for a conforming use, that the difficulty is caused by unique circumstances, that the use will not materially alter the neighborhood. No such burden is usually imposed on a hospital." 2 R. Anderson, *supra*, § 1478. See also *Lincoln Central Association v. Zoning Board of Appeals*, 30 Ill.App.3d 258, 332 N.E.2d 510, 517 (1975), in which the court accepted a different type of uniqueness for a hospital than for an ordinary commercial user. The hospital, as a single purpose structure, argued that an addition was necessary to its continued viability, and so it needed a variance to expand into a contiguous parcel of land. The court adopted the hospital's proposed uniqueness test, but held that the hospital had not properly documented its need to expand in the proceedings below.

[10] Another significant factor in determining if inadequate buildings on one parcel may constitute extraordinary situation for another parcel is whether the two parcels are contiguous and under common ownership. Pennsylvania courts allow variances to be granted for the normal expansion of a non-conforming use. "But nowhere in the law is there any support for a proposition that any supposed hardship to one noncontiguous piece of property owned by a separate entity can be shown to support an application for a variance to expand a nonconforming use to a completely separate property." *Snyder v. Zoning Hearing Board*, 20 Pa.Cmwlth. 139, 142, 341 A.2d 546, 548 (1975). In this case, not only is the subject site contiguous and in common ownership with intervenors' existing office building, but also the entire area between "C" and "D" Streets has been regarded as one site, subject to one plan, both by intervenors and by the Zoning Commission and Board of Zoning Adjustment.

[11, 12] Consequently, we conclude that when a public service has inadequate facilities and applies for a variance to expand into an adjacent area in common ownership which has long been regarded as part of the same site, then the Board of Zoning Adjustment does not err in considering the needs of the organization as possible "other extraordinary and exceptional situation or condition of a particular piece of property." Overall, the BZA considered permissible factors in applying the first branch of the

variance test. The site's proximity to the Capitol made it uniquely valuable to the Republican National Committee, a public service organization. The previously constructed buildings and the contiguous subject site can be considered together in applying the test especially because the past acts of the zoning authorities led intervenors to rely in good faith on their eventual consent to the final stage of the building. This case, like *DeAzcarate*, illustrates that extraordinary circumstances can encompass the past zoning history, as well as the physical features, of the property.

[13] Applicants' good faith, detrimental reliance on previous zoning actions can also be relevant to determine undue hardships, the second branch of the variance test. The BZA property found undue hardship when

> [t]he site located to the immediate south was acceptable to all parties involved at that time [1960's] and it was planned that eventually an office structure to house the Committee would occupy the entire site . . .. To deny the present application would thwart that plan and force the Committee to relocate on a less favorable site after a substantial investment in the present area and after reliance upon prior understandings. [Conclusion of Law No. 3.]

[14] It is true that normally an owner suffers no undue hardship when his property can produce a reasonable profit in a permitted use. *Palmer*, *supra* at 542; *Otto v. Steinhilber*, 282 N.Y. 71, 24 N.E.2d 851 (1939). Petitioner contends that the subject site could profitably be used for townhouses, and that the Republican National Committee's need for more office space is irrelevant. In support of this contention, petitioner cites a number of cases where an owner sought to expand an existing use, but a variance to expand was denied because the limited profitability of the existing use did not establish undue hardship. *Hamilton v. Board of Supervisors*, 269 Cal. App.2d 64, 75 Cal.Rptr. 106, 110 (1969) (fact that cottage hotel would be more profitable if expanded does not justify variance when property can be put to effective use under existing zoning); *Hyatt v. Zoning Board of Appeals*, 163 Conn. 379, 311 A.2d 77, 79 (1972) (maximum enrichment of owner and highest and best use are irrelevant to establish unusual hardship peculiar to a parcel of land); *Scaduto v. Town of Bloomfield*, 127 N.J.L. 1, 20 A.2d 649, 650 (1941) (finding that land is not solely suitable for permitted residences, but might also be suitable for stores, is not sufficient to establish undue hardship); *North Shore Steak House, Inc. v. Board of Appeals*, 30 N.Y.2d 238, 282 N.E.2d 606, 608, 331 N.Y.S.2d 645, 648 (1972) (that property would be more valuable as parking for restaurant owner applicant is insufficient to warrant a hardship variance when the property could reasonably be used for conforming housing); *Griffin v. Zoning Board of Review*, 98 R.I. 233, 200 A.2d 700 (1964) (slight profitability of existing nonconforming diner did not warrant variance for expansion to size contemplated by original owner before R–2 zoning was adopted); *Hall v. Zoning Board of Review*, 93 R.I. 65, 170 A.2d 912, 913 (1961) (nursing home's present unprofitability because of small size will not support a claim of unnecessary hardships for a variance to expand). Petitioner also cites *Palmer*, *supra* at 542 (tenant's desire to use the building as public hall does not signify that owner could not profitably rent to others for a permitted use); *Clerics of Saint Viator*, *supra* at 296 (must show that old seminary building cannot be put to any conforming use).[8]

8. Two other cases relied upon by petitioner illustrate the difficulty in applying the undue hardship test to nonprofit organizations. In *Lincoln Central Association v. Zoning Board of Appeals*, *supra*, 30 Ill.App.3d at 267, 332 N.E.2d at 517, the test of undue hardship for a hospital was whether the variance was needed for the reasonable performance of hospital functions. In *Appeal of the Catholic Cemeteries Association*, 379 Pa. 516, 109 A.2d 537, 540 (1954), the majority of the Supreme Court of Pennsylvania evaluated a religious association's undue hardship in regard to its request for a variance to locate a cemetery in a residential zone in light of the association's ability to find a suitable cemetery tract outside of a residential zone. But we need not reach the issue of whether a nonprofit owner experiences undue hardship if it cannot expand as necessary to perform its public service function.

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[15] In this case, however, intervenors' hardship stems from an additional factor not present in any of the cases cited by petitioner, namely, their reliance on actions of the zoning authorities in locating at their present site, in partially completing their facilities, and in forming a covenant with the House Office Building Commission which will greatly reduce the value of their present investment if intervenors should move to another site. If they were forced to move due to overcrowding, they could not realize a reasonable return on their substantial investment in the previously constructed building. They would have to offer their buildings to the House Office Building Commission at cost, not because of their own poor bargaining power, but because of their reliance that accommodation would be made to allow expansion at the present site. Thus, we conclude that good faith, detrimental reliance on the zoning authorities' informal assurances may be taken into account in assessing intervenors' undue hardship under variance law. *See Jayne Estates, Inc., supra; Iacobelli v. City of Rye*, 64 App.Div.2d 888, 407 N.Y.S.2d 895 (1978) (while equities not such as to justify estoppel, detrimental reliance on zoning actions may be used to show unnecessary hardship); *Reichenbach v. Windward at Southampton*, 80 Misc.2d 1031, 364 N.Y.S.2d 283 (1975) (building inspector's successive grants of illegal use variances did not constitute basis for estoppel, but expenditures in reliance thereon could be considered as unnecessary hardship).

[16] Even after an applicant has demonstrated uniqueness and undue hardship, applicant must still show the third element of the variance test, namely, that the variance will not harm the public or undermine the zone plan. *Jayne Estates, Inc., supra*, 22 N.Y.2d at 422, 239 N.E.2d at 715, 293 N.Y.S.2d at 79 (possible damage to zone plan if owner is allowed to proceed under vested rights based on a mistake of zoning authorities; whereas, in seeking a variance, owner must show both that he cannot recover his investment *plus* that his proposed use will not be inconsistent with the zoning scheme). Here, the BZA found that the proposed addition would not have a detrimental impact on the neighborhood or the zone plan. Petitioner asks this court to find that the Board's conclusion was faulty.

[17, 18] Our inquiry is limited to whether findings are supported by reliable, probative and substantial evidence in the record as a whole, and whether the Board's conclusions flow rationally from these findings. *Citizens Association of Georgetown, Inc. v. District of Columbia Zoning Commission*, D.C.App., 403 A.2d 737 (1979); *Stewart v. Board of Zoning Adjustment*, D.C.App., 305 A.2d 516 (1973). The Board's conclusion was amply supported by the record. It flows logically from several findings of fact, for instance, that the hours and functions of the building would remain the same, that no new employees would be brought into the neighborhood, that the Metro across the street would alleviate congestion, and that the structure would be compatible with the design and height of surrounding buildings. Consequently, we conclude that the Board's decision is supported by substantial evidence and was neither arbitrary nor capricious.

[19, 20] Petitioner's final claim is that the Board violated its own rules and the District of Columbia Administrative Procedure Act by receiving intervenors' proposed order after the record was closed and issuing findings of fact and conclusions of law almost identical to those intervenors submitted. Moreover, the proposed order was never served on petitioner. Petitioner maintains that this violation amounted to a denial of due process in that he had no opportunity to submit rebuttal evidence or his own proposed order. Even though we strongly support the fundamental judicial principle "that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert," *Mazza v. Cavicchia*, 15 N.J. 498, 516, 105 A.2d 545, 555 (1954), quoted

with approval in *Citizens Association of Georgetown v. D.C. Alcoholic Beverage Control Board*, D.C.App., 288 A.2d 666, 669 (1972), we must nevertheless rule against petitioner on this point.[9]

BZA Supplemental Rules of Practice & Procedure § 4.71 provides that "[p]arties to the [BZA] proceeding may submit proposed findings of fact and conclusions of law for the consideration of the Board within such time as the presiding officer may direct." Intervenors were proceeding in accordance with this rule. Petitioner was free to submit his own proposed findings of fact and order under the same rule. The rule implies that the proposed findings are for the consideration of the Board, not the other parties. As this court said about a substantially identical portion of the zoning regulations, "[W]e are unable to find anything in Title 20 of the D.C.Rules and Regulations requiring the proposed findings to be served upon other parties." *Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment*, D.C.App., 355 A.2d 550, 555 (1976). Nor does the submission of proposed findings after the record is closed violate the District of Columbia Administrative Procedure Act. D.C.Code 1973, § 1–1509(b), requires that every party be given the right to be present, submit rebuttal evidence, and cross-examine at contested case proceedings. Petitioner took advantage of this right during the hearing itself.

In support of his position petitioner cites three cases that stand for the proposition that an administrative tribunal violates due process when it considers matters which a party had no opportunity to rebut. *Gonzales v. United States*, 348 U.S. 407, 75 S.Ct. 409, 99 L.Ed. 467 (1955) (Justice Department's recommendation to Appeal Board to deny conscientious objector status violated due process because registrant had no opportunity to rebut the adverse evidence contained in Justice Department's report); *Market Street Railway v. Railroad Commission of California*, 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171 (1945) (due process was observed when the company had notice its rates were under attack, there was evidence in the record to support the Commission's conclusions, and the additional matters outside the record which the Commission noticed were merely cumulative); *Quick v. Department of Motor Vehicles*, D.C.App., 331 A.2d 319 (1975) (error for examiner to consult petitioner's traffic record without notice so as to allow petitioner no opportunity to rebut inaccuracies). All three cases refer to a situation where the Board considers *evidence* which is not properly admitted into the record so that a party has no opportunity to challenge its worth. Here, the material submitted to the Board was not evidence, but rather conclusions which might be drawn from the evidence already included in the record.

Due process considerations differ with respect to evidence in the record and proposed findings of fact and conclusions of law, as is shown by a number of challenges under Federal Rule of Civil Procedure 52(a) (in nonjury cases, court shall prepare findings of fact and conclusions of law). Courts have often decided who will win the suit, directed that party to submit findings of fact and conclusions of law, and then adopted those findings as its own. *See* J. Skelly Wright, *The Nonjury Trial—Preparing Findings of Fact and Conclusions of Law, Seminars for Newly Appointed U.S. District Judges*, 159, 166 (West 1963). In effect, one counsel loses the opportunity for comment on the other party's proposed findings, even if they are served on him according to Federal Rule of Civil Procedure 5.

[21] Although reviewing courts have frowned on this procedure, they have nevertheless held that the findings cannot be rejected out of hand on due process grounds. Such findings will be examined narrowly to see if they are supported by evidence in the record, but if supported, they will stand. *See United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 84 S.Ct.

9. No reason appears why the Board of Zoning Adjustment should not follow the invariable practice of serving all filed papers upon each party to the adjudication, and we suggest that the Board do so in future.

1044, 12 L. [redacted]d 12 (1964); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 184–85, 65 S.Ct. 254, 89 L.Ed. 160 (1944); *Shlensky v. Dorsey*, 574 F.2d 131, 148–49 (3d Cir. 1978); *George W. Bennett Bryson & Co. v. Norton Lilly & Co.*, 502 F.2d 1045, 1049 (5th Cir. 1974). *But see Roberts v. Ross*, 344 F.2d 747 (3d Cir. 1965) (court strongly disapproves the practice); *United States v. Forness*, 125 F.2d 928, 942–43 (2d Cir. 1942) (facts and conclusions prepared by one counsel were inconsistent with the opinion, thus creating clear error). We have already noted the ample evidence in this record which supports the BZA's grant of a variance to intervenors and therefore we hold that due process was observed even though the Board incorporated findings and conclusions prepared by intervenors and not served on petitioner.

[22] In conclusion, variance law is broad enough to relieve in some instances the strict application of the zoning regulations in cases where the applicant's unique situation and undue hardship have been caused by good fait[redacted]liance on previous assurances of the zoning authorities. While the authorities' actions may not be sufficient to warrant application of estoppel, their actions may be considered under variance law which is designed to avoid harsh and unjust results in extraordinary situations like the present one. Under variance law, the neighborhood will be protected despite former laxity of zoning officials, because the third variance test must still be met, namely, the zone plan must not be undermined and the public must not be harmed. There was ample evidence in the record of this case to support the BZA's conclusion that the variance does not harm the public interest. Accordingly we affirm.

Affirmed.



Accordingly, if the payment of child support is to be made a condition of probation, the procedural requirements should be similar to those required where restitution is ordered. As the court stated in *Morgan v. Wofford*, 472 F.2d 822, 827 (5th Cir.1973):

> prior notice and an opportunity to be heard are prerequisite where $7,000 restitution is ordered by a court of law to be paid out of appellant's weekly salary and the penalty for failure to pay is imprisonment. Especially when criminal sanctions may be involved, we have always been careful to surround the procedures through which the state may deprive a defendant of freedom with safeguards against possible miscarriages of justice.

See Sloan v. United States, 527 A.2d 1277, 1289–90 (D.C.1986) (restitution). Moreover, to enable appellate courts to review a child support order, the order must indicate the manner in which the amount has been determined. *See Murville v. Murville*, *supra*, 433 A.2d at 1109; *People v. Pettit*, 88 Mich.App. 203, 205, 276 N.W.2d 878, 880 (1979). *See also United States v. Lemire*, 232 U.S.App.D.C. 100, 127, 720 F.2d 1327, 1354 (1983), *cert. denied*, 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 874 (1984).

In sum, the trial judge had a constructive idea which properly focused on appellant's rehabilitation. In the rush of events, however, the implementation of the idea was flawed. Dealing with child support issues is difficult in any event. When attempted at a sentencing hearing in a criminal case, it cannot be accomplished summarily, but requires reasonable procedural protections for the defendant. It may be that the amount determined could be permissible since two children are involved and appellant may be able to pay that amount when he is employed. On the other hand, the children may have other sources of support or appellant may have other obligations which would affect his obligation to pay once he is employed. In any event, the Guidelines provide for some flexibility in setting the amount of child support based on the circumstances of the affected parties, *see* Guidelines, *supra*, 37 D.C.Reg. at 3725–27, which, on remand, the judge may wish to apply.[12]

Accordingly, we hold that the trial judge abused her discretion in setting the amount of the child support payment, and we reverse that part of the judgment and remand the case for further proceedings consistent with this opinion.

Affirmed in part; reversed in part.



William GILMARTIN, et al., Petitioners,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent.

David C. Barnes, Intervenor.

No. 87–1253.

District of Columbia Court of Appeals.

Argued May 22, 1989.

Decided Aug. 29, 1990.

Adjoining landowners petition for review of order of board of zoning adjust-

2071; *Freeman v. Freeman*, 397 A.2d 554, 556 (D.C.1979). These considerations may make a probationer's compliance with such a condition difficult to evaluate, especially where, as here, the probationer was unemployed at the time the terms of probation were imposed.

12. Under the Guidelines, a non-custodial parent of two children who earns more than $7500 and less than $15,000 annually would, absent unusual circumstances, be required to pay 26 percent of his or her gross income for child support. There is no percentage for gross income under $7501, although the minimum amount of child support required is $50 a month. If appellant earns under $7501 annually, requiring him to pay $50 a week could result in his paying as much as 32 percent of his gross income. Here the judge imposed an amount in excess of what the Guidelines would appear to permit since, as a non-custodial parent (so far as the record indicates) of two children under the age of six who earned less than $7501, appellant could not be ordered, except in unusual circumstances, to pay $50 a week in child support. 37 D.C.Reg. at 3731. Setting appellant's child support obligation above the amount typically required under the Guidelines may be permissible, but we cannot tell from the record. *Cf.* footnote 10, *supra*.

ment, granting landowner's application for area variance for proposed parking space and permitting parking in front of landowner's property. The Court of Appeals, Belson, J., held that: (1) property for which owners sought variance from minimum parking space size requirements satisfied uniqueness requirements; (2) board's authority to grant variance relief for exception or extraordinary conditions was not limited to conditions brought about after adoption of zoning regulations; but (3) board was required to determine whether locating parking space within structure of carriage house was feasible and whether such alternative was, under circumstances, itself a practical difficulty.

Remanded.

1. **Zoning and Planning ⇐509**

Property for which owner sought variance from minimum parking space size requirements satisfied uniqueness requirements; unique confluence of location of carriage house on property in relation to property boundaries on north and easements on south made it necessary for owners to seek variance. D.C.Code 1981, § 5–424(g)(3).

2. **Zoning and Planning ⇐496**

Zoning statute does not preclude approval of variance where uniqueness arises from confluence of factors; extraordinary or exceptional condition must affect single property. D.C.Code 1981, § 5–424(g)(3).

3. **Zoning and Planning ⇐489**

Board of Zoning Adjustment's authority to grant variance relief for exceptional or extraordinary conditions was not limited to conditions brought about after adoption of zoning regulations. D.C.Code 1981, § 5–424(g)(3).

4. **Zoning and Planning ⇐489**

"Other extraordinary or exceptional situation or condition of specific piece of property," as required by statute to warrant variance, need not have preceded promulgation of zoning regulation. D.C.Code 1981, § 5–424(g)(3).

5. **Zoning and Planning ⇐509**

In determining whether "practical difficulties" precluded grant of zoning variance permitting parking space that did not comply with minimum length requirement next to carriage house that owner wished to convert to single family residence, board of zoning adjustment was required to determine whether locating parking space within structure of carriage house was feasible and whether such alternative was, under circumstances, itself a practical difficulty. D.C.Code 1981, § 5–424(g)(3).

6. **Zoning and Planning ⇐540**

Substantial evidence supported board of zoning adjustment's determination that there would be no harm to public good if owners of carriage house were allowed to have variance from minimum parking space requirements, despite claim that occupant of carriage house would not park in such space and exacerbate serious parking problem in the neighborhood by parking on the street.

Richard Halberstein, for petitioners.

Frederick D. Cooke, Jr., Corp. Counsel at the time the brief was filed, Charles L. Reischel, Deputy Corp. Counsel, Washington, D.C., and Martin B. White, Asst. Corp. Counsel, Chevy Chase, Md., were on the Memorandum in Lieu of Brief, for respondent.

Aurelius K. Wilson, with whom Leonard L. McCants, Silver Spring, Md. was on the brief, for intervenor.

Before ROGERS, Chief Judge, and BELSON, Associate Judge, and MACK, Senior Judge.*

BELSON, Associate Judge:

* Judge MACK was an Associate Judge of the court at the time of argument. She became a Senior Judge December 1, 1989.

Petitioners[1] challenge an order of the respondent District of Columbia Board of Zoning Adjustment ("BZA" or the "Board") granting an application for an area variance to David C. Barnes and Janet B. Barnes to permit a decrease in length by one foot in a proposed parking space and to permit parking in the front rather than in the rear of the Barnes' property. These variances would enable Mr. and Mrs. Barnes to convert their two-story brick carriage house into a single-family residence while complying with the requirement that a parking space accompany each single-family residence.[2] Although we are unpersuaded by petitioners' challenges to BZA's order on the issues of uniqueness and lack of harm to the public good, we conclude that BZA's findings are insufficient to support its conclusion that the applicants would suffer practical difficulties if made to comply with the zoning regulations pertaining to parking for single-family dwellings. We therefore remand this case to BZA for further proceedings.

Intervenor, David C. Barnes ("Barnes" or "intervenor"), with his wife Janet B. Barnes, owns the subject property located just to the rear of 303 12th St., S.E., lot 814 within square 991 located within an R–4 district.[3] The subject lot is bounded on the east by petitioners Gilmartin and McCarthy's property and on the west by a public alley. It is improved with a two-story brick carriage house currently used for storage. Square 991 is bounded to the north by South Carolina Avenue to the south by D Street, to the east by 12th Street and to the west by 11th Street. The only direct means of access to the lot is via the public alleys, as there is no frontage on any public street. Both Gilmartin's and McCarthy's lots are beneficiaries of easements across the subject lot to the south (or rear) of the carriage house so as to provide access to the alley.

Barnes is seeking variances from the zoning ordinances in order to convert the carriage house into a single-family residence. In his initial application to BZA, Barnes sought a variance from the prohibitions against converting an existing garage into a residence when located on an alley less than thirty feet wide. Barnes' initial application provided for two parking spaces on the lot, one to the north of the carriage house and one to the south, so as not to exacerbate local parking congestion. While the proposed parking space on the south of the carriage house was regulation-size, the proposed north parking space was smaller, measuring nine feet by eighteen feet. A regulation-size parking space is nine feet by nineteen feet. 11 DCMR § 2115.1 (1987). The Board approved Barnes' initial application despite petitioners' contentions that the south parking space would interfere with their easements. In order to avoid impeding the use of easements on the south side of the carriage house, Barnes sought to delete the south parking space from his application for a variance. BZA ruled, however, that a new application was required. This second application, the subject of this appeal, sought two specific variances: (1) from ordinance § 2115.1 requiring parking spaces to be a minimum of nine feet wide and nineteen feet long; and (2) from ordinance § 2116.2 providing that parking spaces may only be located in "rear" or "side" yards of residential lots (the Zoning Administrator ruled that the area to the north of the carriage house is the front).

After a hearing at which petitioners and other neighbors opposed the requested variance, BZA granted Barnes' variance appli-

1. Petitioners are William Gilmartin, Donald S. Good and John McCarthy. Petitioners own property fronting on 12th Street, S.E. in the 300 block.

2. 11 DCMR § 2101.1 (1987) requires the provision of a parking space with each dwelling unit for one-family dwellings.

3. An R–4 district consists of "those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of the dwellings into dwellings for two (2) or more families." 11 DCMR § 330.1 (1987).

cation on October 7, 1987.[4] Petitioners then sought review of BZA's order in this court.

This court's standard for reviewing orders of BZA is well-settled: "we must determine: (1) whether the agency has made a finding of fact on each material contested issue of fact; (2) whether substantial evidence of record supports each finding; and (3) whether conclusions legally sufficient to support the decision flow rationally from the findings." *Levy v. District of Columbia Bd. of Zoning Adjustment*, 570 A.2d 739, 746 (D.C.1990) (citing cases). *See also* D.C.Code § 1–1509(e) (1987 Repl.). "Generalized, conclusory or incomplete findings are insufficient; subsidiary findings of basic fact on all material issues must support the end result in a discernible manner." *Levy, supra*, 570 A.2d at 746. "If the agency makes no finding of fact on a material contested issue, this court on review may not 'fill in the gap by making its own determinations from the record,' but must remand the case." *Id.* (citations omitted). This court will defer to the Board's interpretation of its own regulations so long as its interpretation is consistent with the regulations and not "plainly erroneous." *Id.* We apply these standards of review to the issues before the court in this case.

Intervenor sought variances pursuant to D.C.Code § 5–424(g)(3) (1988 Repl.).[5] This court has enunciated the following three-part test, each part of which the applicant for the variance has the burden of satisfying before BZA may grant a variance:

> An applicant must show, first, that the property is unique because of some physical aspect or "other extraordinary or exceptional situation or condition" inherent in the property; second, that strict application of the zoning regulations will cause undue hardship or practical difficulty to the applicant; and third, that granting the variance will do no harm to the public good or to the zone plan.

Capitol Hill Restoration Society v. District of Columbia Bd. of Zoning Adjustment, 534 A.2d 939, 941 (D.C.1987) (*Capitol Hill II*).

Petitioners contend that Barnes has failed to satisfy any of these three criteria and that BZA erred in concluding that he had met them. We will address, in turn, each of the three prongs of the test set forth in *Capitol Hill II, supra*, as they were applied by BZA.

[1] Petitioners contend that private encumbrances such as an easement or covenant, especially those in existence before adoption of the zone plan, may not satisfy the uniqueness test because such encumbrances are "commonly found to exist with regard to all types of properties, and in all different zoning districts." Petitioners misapprehend the uniqueness criteria. As explained in *Capitol Hill II, supra*, the

4. BZA concluded in part as follows:

> Sub-section 2115.1 of the Zoning Regulations requires that a parking space be a minimum of nine feet in width and 19 feet in length. The parking space proposed will be measured only 9 by 18 feet. Sub-section 2116.2 provides that parking may not be located in front yards of residential lots. The proposed parking will be located in the space determined by the Zoning Administrator to be the front yard of the lot.
>
> The Board concludes that the applicant has met the burden of proof. The site is affected by an extraordinary condition in that development and use of the site is restricted by an easement. If the easement did not exist, the subject variance would not have been requested. The required parking space cannot be located in the rear yard as originally proposed because of the location of the easement in that area.

5. D.C.Code § 5–424(g)(3) provides:

> Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under §§ 5–413 to 5–432 would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance from such strict application so as to relieve such difficulties or hardship, provided such relief can be granted 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....

See also 11 DCMR § 3107.2 (1987).

rationale behind the uniqueness test is that difficulties that are common to or affect an entire neighborhood, or a substantial portion thereof, are properly addressed by seeking amendment of the regulations themselves from the Zoning Commission. *Id.* at 942 (citing *Taylor v. District of Columbia Bd. of Zoning Adjustment*, 308 A.2d 230, 234 (D.C.1973)); *Myrick v. District of Columbia Bd. of Zoning Adjustment*, 577 A.2d 757, 760 (D.C.1990). If such problems were addressed through individual variances, the effect would be a *de facto* amendment of the zoning regulations by BZA because requests by other owners similarly situated would have to be granted as a matter of equal protection under the due process clause. *Capitol Hill II*, *supra*, 534 A.2d at 942. It is the Zoning Commission, however, not BZA that is empowered to make such amendments to the overall zone plan.

[2] The test follows from its rationale. To support a variance it is fundamental "that the difficulties or hardships [be] due to unique circumstances peculiar to the applicant's property and not to the general conditions in the neighborhood." *Palmer v. Bd. of Zoning Adjustment*, 287 A.2d 535, 539 (D.C.1972), *quoted in Myrick*, *supra*, 577 A.2d at 760. There is no requirement that the uniqueness "inheres in the land at issue ..." *Capitol Hill II*, *supra*, 534 A.2d at 942. *See also Monaco v. District of Columbia Bd. of Zoning Adjustment*, 407 A.2d 1091 (D.C.1979); *Clerics of St. Viator, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 291 (D.C.1974). The statute does not preclude the approval of a variance where the uniqueness arises from a confluence of factors. The critical point is that the extraordinary or exceptional condition must affect a single property. *Capitol Hill II*, *supra*, 534 A.2d at 942. In this case the petitioners maintain that the exceptional condition is the general existence of easements. It is not, however, simply the existence of some unspecified easement that makes this property unique. What makes this property different from others is the fact that two specific easements cross the subject property in a particular fashion in relation to the improvement on the property so as to preclude the use of that portion of the property for a parking space. Thus, it is the unique confluence of the particular location of the carriage house in relation to the property boundaries on the north and the easements on the south that makes it necessary for the intervenors to seek the variances, as BZA found. This, in effect, makes the topography of the property unique. *Cf. Peterson v. Washington Court Athletic Club*, 28 Ohio App.3d 90, 92, 502 N.E.2d 252, 254 (Ohio Ct.App.1986) (unique topography of the land prevented construction of the pool in any place other than the side yard). While encumbrances by easement are likely to be common on a large number of properties in the neighborhood as well as in other neighborhoods, it seems unlikely that many properties would be affected in this particular way, so that these particular types of variances would be required for a large number of properties and, if granted, constitute a *de facto* amendment of the zone plan.

This court has decided a closely-related issue in a manner adverse to petitioners' position in *Monaco v. District of Columbia Board of Zoning Adjustment*, *supra*, 407 A.2d 1091. There we held that private restrictive covenants "may be considered in their own right as an extraordinary condition of a particular piece of property...." *Id.* at 1099 (citing *Capitol Hill Restoration Society v. Zoning Commission*, 380 A.2d 174, 184–185 (D.C.1977) (*Capitol Hill I*)). We see no reason to distinguish between the covenants at issue in *Monaco* and the easements at issue in the case at bar. Consequently, we conclude that the Board's finding of uniqueness based on the existence of the easements across Barnes' "rear" yard is supported by substantial evidence in the record and is neither arbitrary nor capricious.

[3] Petitioners also contend that BZA's authority to grant variance relief for exceptional or extraordinary conditions is limited to conditions brought about after adoption of the zoning regulations on March 12, 1958. The lot and carriage house were created prior to 1900 whereas the ease-

ments providing adjacent property owners "free and uninterrupted use, liberty and privilege of and passage in, over and along" the rear of the property were in place before 1920. Petitioners cite *De Azcarate v. District of Columbia Board of Zoning Adjustment*, 388 A.2d 1233, 1236 (D.C.1978), in support of their position. *De Azcarate*, however, does not purport to limit BZA's authority to grant variances to situations in which the exceptional conditions resulted from actions taken after adoption of the zoning regulations. Rather, the particular conditions in that case occurred after adoption of the zoning regulations. Our language in *De Azcarate*, *supra*, 388 A.2d at 1236, reveals that the court was simply addressing itself to the facts posed in the case before it. The court did not affirmatively hold that conditions existing before adoption of the regulations would not suffice as the basis for a variance.

In addition, the express wording of the statute does not limit the circumstances or conditions that can provide a basis for a variance to those that came about subsequent to adoption of the zoning regulations. The statute merely refers to "other extraordinary or exceptional situation [sic] or condition of a specific piece of property...." D.C.Code § 5–424(g)(3) (1988 Repl.). This is especially significant in view of the statute's specificity as to physical aspects of the property requiring that they exist "at the time of the original adoption of the regulations...." *Id.* Moreover, this court has held that prior knowledge or constructive knowledge or that the difficulty or hardship is self-imposed is not a bar to an area variance, the type of variance with which we are concerned in the instant case. *See A.L.W. v. District of Columbia Board of Zoning Adjustment*, 338 A.2d 428, 431 (D.C.1975). In *Taylor v. District of Columbia Board of Zoning Adjustment*, 308 A.2d 230 (D.C.1973), it was held that such knowledge or self-imposition of the hardship would ordinarily bar a use variance. *Taylor*, however, has been limited to requests for use variances, and has not been applied to applications for area variances. *See A.L.W.*, *supra*, 338 A.2d at 431.

To the contrary, consideration of *Capitol Hill II*, *supra*, in conjunction with *Clerics of St. Viator, Inc. v. District of Columbia Board of Zoning Adjustment*, *supra*, *Taylor*, *supra*, and *De Azcarate*, *supra*, indicates that circumstances occurring before adoption of the zoning regulations may satisfy the statute. In *Capitol Hill II* we stated, "the extraordinary or exceptional conditions which justify a finding of uniqueness can be caused by subsequent events...." *Capitol Hill II*, *supra*, 534 A.2d at 942, citing *De Azcarate*, *supra*, 388 A.2d at 1237. The use of the word "can" implies that we viewed *De Azcarate* as extending the circumstances in which BZA could grant a variance from only those conditions that predated the promulgation of the 1958 zoning regulations to conditions that came into being after their promulgation. Indeed, this is the most reasonable reading of the statute.

[4] Today we make explicit what was implicit in our previous opinions that certain "other extraordinary or exceptional stituation [sic] or condition of a specific piece of property" as stated in § 5–424(g)(3) need not have preceded the promulgation of the zoning regulation. This is the interpretation adopted by BZA, it seems explicit in the statute, and we can discern no reason to reject this interpretation in the instant case. Consequently, BZA's decision to consider these easements merits our approval.

[5] Turning to "practical difficulties," petitioners argue that the only such difficulties suffered by intervenor in complying with the applicable zoning regulations for parking for single-family residences would be the economic cost of having to park within the interior of the residence rather than in a non-conforming space outside in the yard. Upon review of the record we conclude that the findings of BZA are insufficient to support the conclusion that intervenor would suffer "practical difficulties" in complying with the requisite zoning regulations pertaining to parking, and that BZA failed to make findings on all material contested issues of fact.

The seminal case in this jurisdiction on this issue is *Palmer v. Board of Zoning Adjustment, supra.* In *Palmer* this court held that because of the nature of the 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. *Id.* at 540–41. *Palmer* did not establish a precise definition of what constitutes "practical difficulties." *Id.* at 542. The court merely set forth a general standard that the applicant must show that strict compliance would be "unnecessarily burdensome," leaving specific questions regarding the nature and extent of burden to a case-by-case analysis. *Id.* The court did state, however, that "it is certain that a variance cannot be granted where property conforming to the regulations will produce a reasonable income but, if not put to another use, will yield a greater return." *Id.* (footnote omitted). Although this statement was within the section of the opinion discussing area variances, it appears that it refers to the particular use of a property and thus the economic discussion is more appropriately confined to use variances. The *Palmer* test for determining "practical difficulties" for area variances has been further refined by our subsequent case law. In order to prove that an applicant suffers from "practical difficulties" two elements must be proven:

> The applicant must demonstrate that (1) "compliance with the area restriction would be unnecessarily burdensome ...", *A.L.W. Inc. v. District of Columbia Board of Zoning Adjustment*, D.C. App., 338 A.2d 428, 431 (1975); and (2) the practical difficulties are unique to the particular property. *Barbour v. District of Columbia Bd. of Zoning Adjustment*, 358 A.2d 326, 327 (D.C.1976).

Association for Preservation of 1700 Block of N Street, N.W., and Vicinity v. District of Columbia Bd. of Zoning Adjustment, 384 A.2d 674, 678 (D.C.1978) ("*1700 Block*").

Economic use of property has been considered as a factor in deciding the question of what constitutes an unnecessary burden or practical difficulty in variance cases that have used the *Palmer* analysis. In *Barbour v. District of Columbia Board of Zoning Adjustment, supra*, the court affirmed BZA's denial of an area variance application from certain side yard requirements in order to expand the size of the applicant's kitchen. The fact that alternative methods of expansion without necessitating the variance would cost fifty to ninety percent more, or that the other methods would reduce the interior living space or backyard space, was held insufficient to meet the burden imposed by the *Palmer* standard. *Id.* at 327. In *1700 Block, supra*, however, this court upheld BZA's grant of an area variance from off-street parking requirements to the YMCA. The difficulties in compliance were that recreational facilities would have to be reduced, including cutting the size of the swimming pool in half. Even if that were done, the cost of the parking spaces would still have been prohibitive. If the normal number of parking spaces were included, the YMCA would not have been able to provide all of its programs. In both *Barbour* and *1700 Block* the practical difficulties were ones of increased costs and reduced enjoyment of the property. Yet it was clear that in the latter the costs were far larger and the restrictions upon use were far greater. In *1700 Block*, moreover, there was no feasible alternative that would have complied with the regulations whereas in *Barbour*, there were different designs that would have been in compliance with the regulations, albeit with a consequent loss in back yard size or interior space in the rest of the house. *1700 Block, supra*, 384 A.2d at 678 n. 13.

Thus, *Barbour* suggests that a substantial increase in the cost of an intended improvement coupled with some loss in the overall utility of the property was not a practical difficulty that merited an area variance. *See also Myrick, supra*, 577 A.2d at 761–62 (cost of renovation of interior space insufficient to justify area variance where expansion of living space could be achieved in accordance with regulations). On the other hand, *1700 Block* indi-

sue of material fact. *See Draude v. District of Columbia Bd. of Zoning Adjustment*, 527 A.2d 1242, 1251 (D.C.1987). BZA failed to address the feasibility of locating the parking space (or part of it) within the structure of the carriage house in order to comply with zoning regulations, or whether such an alternative was in the circumstances of the instant case itself a practical difficulty.[7] Accordingly, we remand this case to BZA for more thorough findings on "practical difficulties" consistent with the views expressed in this opinion.

[6] Turning to the matter of the public good, we note that the basic harm asserted by petitioners is that conversion of the carriage house to a residence with two bedrooms and two full baths is likely to result in the addition of more than one car to the neighborhood. Petitioners contend that this will exacerbate an already serious parking problem in the neighborhood. Petitioners argue that if the only space is on the north side of the carriage house, the difficulty of getting into that space will cause the resident to park on the street or, if not, to congest the alley area unduly and impede the provision of municipal services such as trash collection. Intervenor, on the other hand, contends that it is unlikely that someone with a space right next to the house would park out on the congested street where parking is scarce, especially at night when walking through the alley might be dangerous.

This issue presents a particularly fact-based question more appropriately resolved by BZA. The Board explicitly found that an "occupant of the carriage house is most likely to park in the front yard of the site." There is evidence in the record on both sides of the issue, and the evidence in Barnes' favor is more than just his testimony. Petitioners themselves provided substantial evidence in Barnes' favor during cross-examination. Given the deference that we owe BZA, particularly on factual issues, we are satisfied that substantial evidence supports BZA's conclusion that there is no harm to the public good or the zone plan. The Board's conclusion is amply supported by the record. It flows rationally from its findings of fact. Consequently, we conclude that BZA's order finding that no public harm would result from granting the variances is supported by substantial evidence in the record and is neither arbitrary nor capricious.[8]

In view of the foregoing, this case will be remanded to BZA for further consideration, and the entry of appropriate findings on the issue of practical difficulties.

It is so ordered.



Claude Steve DAVID, Jr., Appellant,

v.

UNITED STATES, Appellee.

No. 89-676.

District of Columbia Court of Appeals.

Argued May 30, 1990.

Decided Aug. 31, 1990.

Defendant was convicted on guilty plea to single count of second-degree mur-

7. Barnes made only broad conclusory statements to the Board during the hearing to the effect that "the whole reason that I don't want to park inside" is because the property is more valuable to him with outside parking. Barnes provided no documentation to BZA as to what the economic or other loss to him would be if he parked inside rather than out. This court cannot consider for the first time on appeal figures listed in intervenor's brief at 15 n. 4 as to the extent of possible losses due to interior parking in the carriage house. In remanding this case to BZA for further proceedings, BZA may seek additional evidence on this issue to support any findings on practical difficulty.

8. As to petitioners' contention that BZA's ruling in this case conflicts with their prior ruling in Barnes' initial application, case 14491, that the easements are not relevant, the record in that prior case is not before the court and thus we do not consider it here.

testified concerning a YMCA submission which similarly indicated a very low percentage of income derivable from nonmembers. On this record, we cannot say that the BZA's finding was without substantial support, nor can we say its conclusion that the Metro YMCA satisfied this part of the definition of private club is unreasonable or clearly erroneous.[9]

[7] We consider the BZA's conclusion that the YMCA is a private club, as defined, is neither unreasonable nor clearly erroneous.

The decision of the BZA is

Affirmed.



ASSOCIATION FOR PRESERVATION OF 1700 BLOCK OF N STREET, N. W., AND VICINITY, et al., Petitioners,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent,

Young Men's Christian Association of Metropolitan Washington, D. C., Intervenor.

No. 10903.

District of Columbia Court of Appeals.

Argued Feb. 18, 1977.

Decided March 29, 1978.

Petition was filed for review of an order of the Board of Zoning Adjustment granting a private club's application for a variance from the parking requirements of the zoning regulation. The District of Columbia Court of Appeals, Gallagher, J., held that: (1) the application was properly characterized as one for an area variance rather than use variance; (2) the club satisfied its burden of showing a practical difficulty sufficient to support the grant of the variance.

Affirmed.

1. Zoning ⇐703

On review of decision of Board of Zoning Adjustment, court must determine whether findings made are supported by and in accordance with reliable, probative and substantial evidence in whole administrative record, and whether conclusions of board flow rationally from such findings.

2. Zoning ⇐509

Private club's application for variance from parking requirements of zoning regulation on grounds that irregular shape of site of proposed building made provision of required off-street parking on property impossible was properly characterized by Board of Zoning Adjustment as application for area variance rather than use variance since use of property as private club would be compatible use and club was seeking to erect its proposed structure in manner other than that prescribed by ordinance, i. e., without providing required number of qualified off-street parking spaces.

3. Zoning ⇐481

Distinction between use variance and area variance is that former permits use other than that prescribed by zoning ordinance whereas area variance has no relation to change of use but is primarily grant to erect, alter or use structure for permitted use in manner other than that prescribed by ordinance.

9. Petitioners also argue that the Metro YMCA failed to satisfy the requirement that the office space and activities are not "limited to that necessary and customarily incidental to maintaining the membership and financial records of the organization." Zoning Reg., art. 12, § 1202. They argue that any records pertaining to nonmember activities kept at the Metro YMCA would violate that requirement. As we have indicated, some incidental, accessory uses by nonmembers are permissible. Keeping records of those nonmember activities is a reasonable, necessary, and incidental use accessory to the keeping of records on membership activities.

4. Zoning ⇐536

Private club seeking grant of area variance from zoning regulation requirement relating to off-street parking had burden of proof before Board of Zoning Adjustment to show that it was entitled to requested area variance.

5. Zoning ⇐536

Where area variances are involved, applicant must demonstrate that compliance with area restriction would be unnecessarily burdensome and that practical difficulties are unique to particular property.

6. Zoning ⇐497

Private club's self-created hardship was not factor to be considered in club's application for area variance to erect proposed structure without providing required number of off-street parking spaces, since rule of self-created hardship applies only to use variance.

7. Zoning ⇐540

Evidence, in proceedings on private club's application for area variance to construct its proposed building without providing required number of off-street parking spaces, supported finding that club satisfied its burden of showing practical difficulty entitling it to variance.

Nicholas A. Addams, Washington, D. C., for petitioners.

Richard W. Barton, Deputy Corp. Counsel, Washington, D. C., for respondent. John R. Risher, Jr., Corp. Counsel, and Louis P. Robbins, Principal Deputy Corp. Counsel, Washington, D. C., also entered appearances for respondent. Respondent adopted the brief of the intervenor.

Norman M. Glasgow, Washington, D. C., with whom Whayne S. Quin, John F. McCabe, Jr., and Iverson O. Mitchell, III, Washington, D. C., were on the brief, for intervenor.

Before GALLAGHER, YEAGLEY and MACK, Associate Judges.

GALLAGHER, Associate Judge:

This is a petition for review of an order of the District of Columbia Board of Zoning Adjustment (BZA). The BZA order granted an application submitted by the Young Men's Christian Association of Metropolitan Washington, D. C. (YMCA), for: (1) a special exception for roof structures under Zoning Regulation, art. 43, § 4306.2; and (2) a variance from the parking requirements of Zoning Regulation, art. 72, § 7202.1.[1] These relate to the construction of a new YMCA facility at 1701 Rhode Island Avenue, N.W.

Petitioners also contend the new YMCA facility is not a private club within the meaning of Zoning Regulation, art. 12, § 1202. The BZA declined to rule specifically on that question, concluding that the issue "should only be considered as an appeal of the decision of the Zoning Administrator, such appeal to be properly filed and advertised with the Board."[2] This was later accomplished and the issue is squarely presented to us in a subsequently filed proceeding, which we decided this date.[3] Consequently, the only question for review here[4] is whether the BZA erred in granting the parking variance to an organization (YMCA) which in the companion proceed-

1. At a subsequent oral argument in associated case No. 12202, petitioners confirmed there is no issue left on appeal regarding roof structures. We are left with only one issue, viz., the parking variance.

2. We point out, however, that by admitting some evidence relating to the issue and discussing that evidence, the BZA confused the record. We decided not to compound the confusion, but, instead, to await the subsequent proceeding then on its way to us to decide the issue, as it was there properly presented.

3. *Ass'n for Preservation of 1700 Block of N Street, N.W. v. District of Columbia Board of Zoning Adjustment*, D.C.App., 384 A.2d 668 (No. 12202, decided this date).

4. Petitioners also raised an issue concerning the form of the notice in this case. Since petitioners had actual notice and showed no prejudice, we conclude there is no merit to that issue. *Dupont Circle Citizens Ass'n v. District of Columbia Board of Zoning Adjustment*, D.C. App., 364 A.2d 610, 612–13 (1976).

ing, we have now determined to be a private club within the meaning of Zoning Regulation, art. 12, § 1202.

The Central Branch of the YMCA was located at 18th & G Streets, N.W., and had been at this location since the turn of the century with additions made over the years. Those facilities became obsolete and future improvements and modernizations were found to be not economically feasible. The new location was selected for its more central location and for its proximity to the new subway system. The Executive Director of the Metro YMCA testified that the proposed facility would fulfill four general functions: (1) headquarters for the YMCA of Metropolitan Washington—which includes sixteen operating units; (2) training center for YMCA staff; (3) an international program; and (4) health and fitness. He also testified that the facility would be open, at a maximum, from 6 a. m. until 10 p. m. on Monday through Saturday—with peak hours from 11 a. m. until 2 p. m. and from 4:30 p. m. until 7 p. m. He further stated that the projected membership at the new facility would be 5,600 with a projected daily usage of 1,000.

The following is a summary of findings of fact by the BZA pertinent to the parking issue:[5] The proposed site is vacant, unimproved, and irregularly shaped—with 57.5 feet on 17th Street, 175.61 feet on Rhode Island Avenue, 119.25 feet on the west property line, and 155.55 feet along the north property line. Provision of the required off-street parking with the proposed building on the subject property is impossible due to its irregular shape; furthermore, even if the lot were rectangular in shape, only thirty parking spaces—rather than the required forty—could be provided with the building. There would be further hardship to the YMCA if the required parking were to be placed below the proposed swimming pool. Each such parking space would cost over $20,000 to provide, whereas the normal cost of each off-street parking space located within a garage structure is between $6,000 and $8,000. Additionally, providing such $20,000 parking spaces would require the YMCA to reduce its proposed recreational facilities. Without drastic reduction in the proposed size of the pool, the number of parking spaces capable of being built would not be materially affected.

A large number of persons using the new YMCA would be walk-in patrons, particularly local workers. Those patrons of the YMCA who would be driving would have available ample off-street parking in the area.[6] There is also public transportation available—with twenty-two existing bus routes serving that vicinity, as well as a Metro subway stop within two blocks.

Significantly, the BZA also found that it had granted a variance as to the location of off-street parking in a prior case (BZA No. 9362) involving part of the proposed YMCA site because of the property's irregular shape. Furthermore, the Municipal Planning Office supported the granting of this parking variance.[7]

In pertinent part the BZA concluded that the parking variance requested is an area variance, the granting of which requires the showing of a practical difficulty sufficient to satisfy that burden. The Board concludes that the applicant has carried the burden of not needing park-

5. Petitioners do not specifically challenge any of the findings of fact relevant to the parking issue as being unsupported by substantial evidence in the record.

6. For example, statistics on the average number of available parking spaces in facilities within a two-block radius of the new YMCA revealed the following: (1) daytime—448; (2) evening until 9 p. m.—1,449; and (3) weekend —1,279. The same study disclosed that the maximum parking demand at any one time for staff, members, and guests would be 92 spaces.

7. The testimony of the staff planner for this office was:

> Recognizing the character, surrounding land uses, and irregular shape of the lot, the activities that the applicant [YMCA] seeks to provide, and the estimated transportation patterns of the applicant's clientele, it does not appear that the proposed use will adversely affect the public good, or impair the integrity of the zoning plan.

ing spaces on site, as demonstrated by the large number of spaces located in the immediate vicinity. The Board also concludes that there will be a large number of walk-in patrons particularly from the working population in the area.

Petitioners argue that the BZA "abused its discretion and was plainly erroneous in waiving all parking spaces contrary to overwhelming evidence and controlling case law." (Brief for Petitioners at 26.) We disagree.

[1] Our duty on review is narrowly prescribed. See D.C.Code 1973, § 1–1510; *Dietrich v. District of Columbia Board of Zoning Adjustment*, D.C.App., 320 A.2d 282 (1974). We must "determine whether findings made 'are supported by and in accordance with reliable, probative, and substantial evidence in the whole administrative record, *Schiffmann v. ABC Board*, D.C. App., 302 A.2d 235 (1973), and whether the conclusions of the Board flow rationally from these findings, *Stewart v. BZA*, D.C. App., 305 A.2d 516 (1973).' *Marjorie Webster Junior College, Inc. v. BZA*, D.C.App., 309 A.2d 314, 319 (1973)." *Dietrich v. District of Columbia Board of Zoning Adjustment, supra* at 285.

[2] To determine whether the BZA applied the correct legal standard to the YMCA's application, we must first decide whether the BZA erred in treating the application as one for an area variance, rather than a use variance. "The burden of proof is greater for a use variance than an area variance." *Palmer v. Board of Zoning Adjustment*, D.C.App., 287 A.2d 535, 541 (1972). In *Taylor v. District of Columbia Board of Zoning Adjustment*, D.C.App., 308 A.2d 230, 233 (1973), when this court found the requested variance (*not* from the off-street parking regulation) to be a hybrid, "use-area variance," we applied the stricter burden of proof—*i. e.*, undue hardship. We view the BZA's characterization of the application as correct.

[3] The distinction between a use variance and an area variance is that the former " 'permits a use other than that prescribed by the zoning ordinance' whereas an 'area variance has no relation to change of use. It is primarily a grant to erect, alter or use a structure for a permitted use in a manner other than that prescribed by the ordinance.' "[8] Since we have previously decided that the YMCA is a private club within the meaning of the applicable zoning regulation,[9] Zoning Regulation, art. 12, § 1202, and given that a private club is a permitted use in the relevant area here,[10] it is apparent that the YMCA is seeking to erect its proposed structure in a manner other than that prescribed by ordinance—*i. e.*, without providing the required number of off-street parking spaces. The principal rationale for the different standards applicable to the two variances is that an area variance does not affect the *use* of the land and does not threaten the neighborhood or adjacent landowners with the maintenance of an incompatible use of the subject property. 3 Anderson, American Law of Zoning § 14.45, at 3–4 (1968). The use of the property by the YMCA as a private club will be a compatible use.[11]

[4, 5] The YMCA had the burden of proof before the BZA to show that it was entitled to the requested area variance. *Taylor v. District of Columbia Board of Zoning Adjustment, supra* at 234. Where area variances are involved, we have construed the applicable statute[12] as requiring proof that compliance with the applicable zoning regulation would cause "peculiar

8. 2 Anderson, American Law of Zoning § 14.07 (1968), *quoting in part, Alumni Control Board v. Lincoln*, 179 Neb. 194, 137 N.W.2d 800, 802 (1965).

9. That issue was decided today by this court in another proceeding, see note 3 *supra*, and accompanying text.

10. No party to these proceedings has ever challenged that fact, nor could they, as this site is located in a Special Purpose district. See Zoning Regs., art. 41, §§ 4101.3, 4101.31; art. 31, §§ 3105.3–.31, 3104.3, 3104.39.

11. See notes 9 and 10 *supra*, and accompanying text.

12. D.C.Code 1973, § 5–420(3).

and exceptional practical difficulties" for the owner of the subject property. *Barbour v. District of Columbia Board of Zoning Adjustment*, D.C.App., 358 A.2d 326, 327 (1976). This standard of proof consists of two elements. The applicant must demonstrate that (1) "compliance with the area restriction would be unnecessarily burdensome . . .", *A.L.W. Inc. v. District of Columbia Board of Zoning Adjustment*, D.C.App., 338 A.2d 428, 431 (1975); and (2) the practical difficulties are unique to the particular property. *Barbour, supra* at 327.

Two factors are responsible for the peculiar practical difficulties of the YMCA at its proposed site. First, as the BZA found, the subject site is irregularly shaped. Second, the construction of the YMCA's proposed indoor pool as part of its private club facilities presents certain structural design problems.

[6] Before turning to the evidence supporting the YMCA's peculiar practical difficulties, we examine petitioners' contention that the rule of self-created hardship applies here and should have been considered by the BZA. Petitioners state that whatever hardship faced the YMCA "was self-created to the extent of Metro YMCA having *full knowledge* of all problems with the alleged shape of the land, the type of zoning, and costs of putting in the parking; *prior* to the purchase of the property in March 1974." The YMCA's self-created hardship is not a factor to be considered in an application for an area variance, however, as that factor applies only to a use variance. *See Salsbery v. District of Columbia Board of Zoning Adjustment*, D.C.App., 357 A.2d 402, 404 (1976); *A.L.W., Inc. v. District of Columbia Board of Zoning Adjustment, supra* at 431.

[7] There is no dispute that the lot is irregularly shaped. The BZA concluded on the basis of the lot's irregular shape that the YMCA had satisfied its burden of showing a practical difficulty, sufficient to support the grant of an area variance. We cannot say that the Board erred in so doing.[13]

The YMCA showed by expert testimony, supported by exhibits, that due to the irregular shape of the lot, which appears to be unique, the cost to provide the required off-street parking would be extraordinary. One approach to the problem would require cutting the swimming pool tank in half; even so, the cost of providing parking spaces under the tank would be prohibitive. Additionally, construction with parking would cause an inability to provide all of the YMCA's programs.

The YMCA also introduced evidence to demonstrate that there is available a combination of area parking spaces, bus and subway service; and that consequently off-street parking was not necessary in order to avoid frustrating the parking regulation. The Board credited this evidence.

We conclude the BZA findings are supported by substantial evidence; and that its conclusion that the YMCA be granted a parking variance flows rationally from those findings.

The order of the BZA is

Affirmed.

WEST KEY NUMBER SYSTEM

13. We are aware that our decision in *Barbour v. District of Columbia Board of Zoning Adjustment, supra*, affirmed the denial of an area variance where the primary evidence of practical difficulty was the financial burden of construction conforming with the zoning regulation. That case is, however, distinguishable. There the owner of the property had two alternative methods of construction which would have *fully* complied with the zoning regulation, whereas here the YMCA had no feasible alternative method which would have provided both the pool and *all* of the required parking spaces.

District of Columbia Court of Appeals.

Gardner E. PALMER et al., Petitioners,
v.
BOARD OF ZONING ADJUSTMENT for the District of Columbia, Respondent, Emergency, Inc., Intervenor.

No. 5884.

Argued Oct. 26, 1971.
Decided Feb. 17, 1972.

Proceeding for review of order of Board of Zoning Adjustment granting variance from off-street parking regulations. The Court of Appeals, Hood, C. J., held that, in absence of showing that owner could not reasonably adapt premises or find tenant to produce a reasonable income from use in conformance with off-street parking regulations, there was no hardship upon owner such as would justify use variance and that, in absence of any showing of difficulties of owner, financial or otherwise, granting of area variance to permit tenants to use another lot for parking in connection with owner's land was improper.

Reversed.

West Headnotes

[1] Zoning and Planning ⚿496
414k496

To support a variance, difficulties or hardships must be due to unique circumstances peculiar to applicant's property and not to general conditions in the neighborhood. D.C.C.E. § 5-420.

[2] Zoning and Planning ⚿489
414k489

If circumstances affect whole area, proper remedy is to seek an amendment of zoning regulation rather than a variance as to particular parcel in area. D.C.C.E. § 5-420.

[3] Zoning and Planning ⚿355
414k355

Zoning Commission has task of making basic legislative judgments in drafting regulations.

[4] Zoning and Planning ⚿509
414k509

Where variance was sought from zoning regulation requiring parking spaces to be no farther than 800 feet from lot line of structure spaces were intended to serve, but lack of off-street parking was problem faced by many establishments in area and only unique aspect about location was owner's desire to utilize it as a public hall for which parking spaces were required, there was no "extraordinary or exceptional situation or condition" with respect to the property such as would justify a use variance. D.C.C.E. § 5-420.

[5] Zoning and Planning ⚿537.1
414k537.1
(Formerly 414k537)

More stringent showing is required for use variance than for area variance. D.C.C.E. § 5-420.

[6] Zoning and Planning ⚿493
414k493

Within zoning code providing for Board of Adjustment to grant variance if strict application of zoning regulation would result in practical difficulties or undue hardship on owner, criterion of practical difficulties applies to area variances and criterion of undue hardship applies to use variances. D.C.C.E. § 5-420.

[7] Zoning and Planning ⚿607
414k607

In evaluating order denying zoning variance, court would look only to evidence of hardship or difficulty befalling owner and not that befalling tenant.

[8] Zoning and Planning ⚿481
414k481

Variance procedure is designed to provide relief from strict letter of zoning regulations, protect zoning legislation from constitutional attack, alleviate an otherwise unjust invasion of property rights and prevent usable land from remaining idle. D.C.C.E. § 5-420.

[9] Zoning and Planning ⚿489
414k489

Use variance cannot be granted unless a situation

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arises where reasonable use cannot be made of property in manner consistent with zoning regulations. D.C.C.E. § 5-420.

[10] Zoning and Planning ⚿495
414k495

Inability to put property to more profitable use or loss of economic advantage is not sufficient to constitute "hardship" such as will warrant granting use variance. D.C.C.E. § 5-420.

[11] Zoning and Planning ⚿536
414k536

To grant use variance, it must be shown that zoning regulations preclude use of property in question for any purpose for which it is reasonably adapted, that is, any use with fair reasonable return arising out of ownership. D.C.C.E. § 5-420.

[12] Zoning and Planning ⚿509
414k509

Inability of tenant or owner to use building as public hall under existing zoning as long as parking conditions continued in area would not constitute "hardship" upon the owner sufficient to warrant granting use variance to permit use of another lot for parking, where there was no evidence that owner could not reasonably adapt premises or find tenant to produce a reasonable income for use in conformance with the off-street parking regulations. D.C.C.E. § 5-420.

[13] Zoning and Planning ⚿537.1
414k537.1
(Formerly 414k537)

Owner is not required to make stringent showing of undue hardship with respect to area variance. D.C.C.E. § 5-420.

[14] Zoning and Planning ⚿536
414k536

Generally, to warrant granting area variance, it must be shown that compliance with area restriction would be unnecessarily burdensome. D.C.C.E. § 5-420.

[15] Zoning and Planning ⚿503
414k503

Nature and extent of burden which will warrant an area variance is best left to facts and circumstances of each particular case. D.C.C.E. § 5-420.

[16] Zoning and Planning ⚿503
414k503

Area variance cannot be granted on ground that property, which produces reasonable income when conforming to regulations, will, if put to another use, yield a greater return. D.C.C.E. § 5-420.

[17] Zoning and Planning ⚿509
414k509

Tenant's financial problems were immaterial in determining whether area variance should be granted to permit tenants to use another lot for parking. D.C.C.E. § 5-420.

[18] Zoning and Planning ⚿509
414k509

In absence of showing of difficulties of owner, financial or otherwise, granting of area variance to permit tenants to use another lot for parking in connection with owner's land was improper. D.C.C.E. § 5-420.

***536** Milton M. Gottesman, Washington. D. C., with whom William H. Greer, Jr., Washington, D. C., was on brief, for petitioners.

C. Francis Murphy, Corp. Counsel, Richard W. Barton and Earl A. Gershenow, Asst. Corp. Counsels, entered appearances for respondent but filed no brief.

Frank J. Costello, Washington, D. C., for intervenor. Warren C. Nighswander, Washington, D. C., entered appearance for intervenor.

Before HOOD, Chief Judge, and KELLY and FICKLING, Associate Judges.

***537** HOOD, Chief Judge:

Petitioners [FN1] seek review of an order of the Board of Zoning Adjustment [FN2] (hereinafter the Board) granting a variance of the off- street parking regulations to intervenor, Emergency, Inc. (hereinafter Emergency).

FN1. Petitioners are The Citizens Association of Georgetown, organized for 'the purpose of preserving the historic character and developing the aesthetic values of Georgetown,' and individual property

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owners in proximity to Emergency, Inc.

FN2. D.C.Code 1967, s 11-722 (Supp. IV, 1971).

Emergency is a District of Columbia corporation. As tenant of the Georgetown premises at 2813 M Street, N.W., located in a C-2-A district (community business center of medium density), Emergency has been authorized under a certificate of occupancy to operate as a combination restaurant-record shop. The business is staffed and managed by young people. Its purpose is to provide contemporary enter tainment in a nonalcoholic surrounding through educational and musical offerings. Appeal to the Community's youth is sought as an alternative to the streets. Aside from selling records Emergency Provides live music on weekends. Patrons are admitted to the premises upon payment of an admission fee entitling them to a sandwich and soft drink. The record shop comprises the front area of the premises. In the rear there is an entertainment stage upon which bands play and a bar where food and drinks are prepared. Although random seats are available there are no waiters or tables to facilitate the consumption of food. Patrons may gather in any part of the shop and dancing is permitted in the entertainment area. The bulk of Emergency's revenues is used to furnish live rock music. [FN3]

FN3. The nature of Emergency's operation has been the subject of prolonged litigation before the Board and the United States District Court. Petitioners have taken the position that Emergency has been operating as a public hall in violation of its limited authorization as a restaurant-record shop. On remand to the Board after a hearing in the District Court, it was concluded that 'the public hall use is the primary use of the premises' thereby requiring Emergency to obtain a certificate of occupancy as such. Subsequently on April 22, 1971 the District Court suit was dismissed without prejudice by agreement of all parties.

Emergency desires to raise additional revenues by expanding its operation to include such activities as film workshops, repertory theater events, benefits and private party rentals. These activities would presumably require a public hall certificate, the issuance of which is conditioned upon compliance with the off-street parking regulations. [FN4] Section 7205 of the Zoning Regulations requires that the parking spaces be located on the same lot with the structures they are intended to serve or elsewhere provided '(s)uch spaces are so located as to furnish reasonable and convenient parking facilities . . . but in no case shall they be farther than 800 feet from any lot line of the lot upon which the structure is located.' Zoning Regs. s 7205.33. (Definitional italics omitted.)

FN4. Emergency has indicated that under the pertinent schedule in s 7202.1 of the Zoning Regulations it must provide approximately 26 parking spaces as a public hall whereas a restaurant-record shop calls for minimal or no spaces.

Sincd no space for on-site parking is available at 2813 M Street, Emergency applied to the Board for a special exception pursuant to Zoning Regs. s 7205.3 to provide off-street parking within 800 feet of the premises. After a hearing the Board issued an order denying the application on the ground that the proposed parking lot was more than 800 feet from the M Street property. [FN5] Thereafter, Emergency applied to the Board for a variance from the '800-foot' requirement. Following a brief hearing at which the record of previous litigation was incorporated therein, the ***538** Board issued an order granting a variance to Emergency. The petition for review in this court ensued.

FN5. It was determined that the proposed lot, located at 1034-29th Street, N.W., was 851.34 feet (walking distance) from Emergency.

Petitioners contend that the Board's action was arbitrary, capricious, procedurally defective and a misconstruction of the statutory prerequisites governing variances. Agreeing with the assertion that the Board's application of the statutory criteria was erroneous, we reverse. In addition we point out certain deficiencies in the Board's order that make intelligent judicial review a difficult task. For instance, the findings merely state undisputed facts, see D.C.Code 1967, s 1-1509(e) (Supp. IV, 1971), and the opinion merely echoes in large part the statutory language authorizing the grant of a variance. In short, the Board Failed to set forth findings of fact of a basic or underlying nature necessary to a determination of the ultimate facts, usually stated in terms of the statutory criteria. [FN6] Whithout such findings there is no guarantee that 'cases (will) be decided according to the evidence and the law, rather than arbitrarily or from extra-legal considerations'. [FN7] Moreover, scrupulous fact-fincing facilitates compliance with s 8202.64 of the Zoning Regulations requiring that 'full reasons' be entered in the minutes book for all decisions of the Board-a regulation having more than just record-keeping value. [FN8]

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FN6. See Saginaw Broadcasting Co. v. ,FCC, 68 U.S.App.D.C. 282, 287-289, 96 F.2d 554, 559-561, cert. denied, Gross v. Saginaw Broadcasting Co., 305 U.S. 613, 59 S.Ct. 72, 83 L.Ed. 391 (1938).

FN7. Id. at 287, 96 F.2d at 559.

FN8. See International Institute of Interior Design, Inc. v. Scrivener, 124 U.S.App.D.C. 102, 361 F.2d 556 (1966); Robey v. Schwab, 113 U.S.App.D.C. 241, 307 F.2d 198 (1962).

We turn now to interpretation of the variance law. D.C.Code 1967, s 5-420 provides for a Board of Adjustment to grant variances pursuant to the following:

(3) Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece or property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under sections 5-413 to 5-428 would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance from such strict application so as to relieve such difficulties or hardship, provided such relief can be granted 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. (Emphasis supplied.)

The Board's opinion states:

The only factor preventing Emergency from obtaining the public hall certificate of occupancy which it now desires is the requirement of . . . off-site parking within 800 feet (sidewalk measurement) . . . which cannot technically be met because of the condition of the property and the immediate area adjacent thereto . . . consequently, an 'extraordinary and exceptional situation or condition of a specific piece of property' exists such that the strict application of Section 7205.33 of the Zoning Regulations 'would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the owner of such property' and upon Emergency.

Petitioners' argument is essentially two-fold: (1) There is no 'extraordinary or exceptional situation or condition' of the M Street property within the meaning of the statute. Rather petitioners note the widespread lack of off- street parking in the Georgetown area and the ordinary dimensions of the lot in question. (2) There *539 has been no showing of 'exceptional and undue hardship upon the owner' resulting from the strict application of the '800- foot' requirement. Petitioners maintain that the 'hardship' contemplated by the statute requires a showing of the owner's inability to make any reasonable use of his property in a manner authorized by the Zoning Regulations. [FN9]

FN9. In their reply brief petitioners also contend that the variance would impair the intent, purpose, and integrity of the zoning plan. Finding noncompliance with basic elements of Section 5-420, we need not reach this contention concerning the proviso.

I.

We have found few cases construing the term 'extraordinary or exceptional situation or condition of a specific piece of property' because most states have literally adopted or largely fashioned their Zoning legislation on the Standard State Zoning Enabling Act, recommended by the United States Department of Commerce in the 1920's, which differs in part from Section 5-420. [FN10] It appears that the Standard Act embodies more liberal provisions than Section 5-420. The niceties between the two statutes do not concern us, however, because developing case law and commentary analysis have provided adequate principles to guide the application of our statute. [FN11]

FN10. See Puritan-Greenfield Improvement Ass'n v. Leo. 7 Mich.App. 659, 153 N.W.2d 162, 166 n. 11 (1967). The Standard Act authorizes variances, 'where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship'.

FN11. An examination of the legislative history reveals no particular significance in the distinctive wording of Section 5-420, enacted several years after the promulgation of the Standard Act.

[1][2][3] To support a variance it is fundamental that the difficulties or hardships be due to unique circumstances peculiar to the applicant's property and not to general conditions in the neighborhood. [FN12] If the circumstances affect the whole area the reasonableness of the regulations are challenged and the proper remedy is to seek an amendment of the regulation rather than a variance. [FN13] To grant a variance when the conditions are not unique would result in similar demands from neighboring property

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owners. Approval of such requests would in effect be amending the Zoning Regulations thereby undermining the function of the Zoning Commission whose task it is to make the basic legislative judgments in drafting regulations. [FN14]

FN12. See, e. g., Puritan-Greenfield Improvement Ass'n v. Leo, supra note 10, at 168-169; Brown v. Beuc, 384 S.W.2d 845, 852-853 (Mo.Ct.App.1964); Alumni Control Bd. etc. v. City of Lincoln, 179 Neb. 194, 137 N.W.2d 800, 802 (1965); Otto v. Steinhilber, 282 N.Y. 71, 24 N.W.2d 851, 853 (1939).

FN13. 8 E. McQuillin, The Law of Municipal Corporations s 25.167, at 542-45 (3d ed. rev. vol. 1965).

FN14. 74 Harv.L.Rev. 1396, 1403 (1961).

Our research has disclosed two states with provisions substantially identical to ours-Delaware and New Jersey. A Delaware court defined the term 'extraordinary and exceptional situation or condition' in reference 'to an economic, geographic or topographic situation or condition, connected with or affecting the lot for which they variance is sought . . ..' [FN15] The New Jersey Supreme Court found an 'extraordinary and exceptional situation or condition' in unusual circumstances where an owner sought to erect to commercial use (gasoline station) on a lot, zoned partly for residence and partly for business, located in a predominantly business community, split by a zone boundary and surrounded by commercial properties. [FN16]

FN15. Application of Julian, 53 Del. 175, 167 A.2d 21, 27 (Del.Super.Ct.1960).

FN16. 165 Augusta Street v. Collins, 9 N.J. 259, 87 A.2d 889, 891 (1952).

Here the Board concluded that the '800-foot' requirement could not be met because of 'the condition of the property ***540** and the immediate area adjacent thereto'. The findings fail to disclose what was unique about the condition of the property or its adjacent area. Emergency argues that the location of the lot 'can supply the unique hardship required to support a variance', citing in support thereof a statement from a treatise. [FN17] The assertion is made that if Emergency was located 'but a short distance from 2813 M Street in the direction of the (proposed) parking lot,' the '800-foot' requirement could be complied with. We have examined the cases cited by McQuillin and find them ill-adapted to intervenor's argument. In some cases the uniqueness of the location was supplied by the character of the uses surrounding the applicant's land which made it singularly unsuitable for a permitted use. [FN18] Several cases involved unique conditions of a topographical nature giving rise to hardship. [FN19] The irregular shape of a plot provided the requisite showing in another case. [FN20]

FN17. 8 E. McQuillin, supra note 13, s 25.167, at 547-548.

FN18. City of Loves Park v. Woodward Governor Co., 14 Ill.2d 623, 153 N.E.2d 560 (1958); Frankel v. City of Baltimore, 223 Md. 97, 162 A.2d 447 (1960).

FN19. North American Holding Corp. v. Murdock, 9 Misc.2d 632, 167 N.Y.S.2d 120 (Sup.Ct.1957); Bonitati Bros., Inc. v. Zoning Bd. of Review, 99 R.I. 49, 205 A.2d 363 (1964); Lincourt v. Zoning Bd. of Review, 98 R.I. 305, 201 A.2d 482 (1964); Bergson Co. v. Zoning Bd. of Review, 92 R.I. 226, 167 A.2d 844 (1961).

FN20. Fiorilla v. Zoning Bd. of Appeals, 144 Conn. 275, 129 A.2d 619 (1957).

[4] In the instant case the surrounding uses were compatible with any number of permitted uses in a C-2-A district including a public hall use and the dimensions and topography of the plot were in no way irregular. The Lack of off-street parking is a problem faced by many establishments in Georgetown. Moreover, in support of a showing of uniqueness, Emergency has not shown that the shops located a short distance from 2813 M Street in a direction away from the proposed parking lot could satisfy the '800-foot' requirement. The only aspect about the location in question that is unique is Emergency's desire to utilize it is a public hall. Such a consideration cannot support a variance. Consequently, there is no 'extraordinary or exceptional situation or condition' with respect to the M Street property.

II.

The second argument petitioners raise concerns another stautory requisite which must be satisfied to support a variance. The claim is that Emergency has failed to show 'hardship upon the owner'. Specifically, it is contended that 'exceptional and undue hardship' should be construed to require a showing of a situation where in the absence of a

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variance the property cannot be reasonably used in a manner consistent with the Zoning Regulations; that the hardship must be shown to fall upon the owner and that, at the most, the evidence here relates to the tenant's predicament rather than the owner's hardship.

Emergency contends that the variance requested is an area variance as distinguished from a use variance; that, consequently, the Board merely had to have evidence before it that, in the absence of a variance, 'practical difficulties' would result; that the applicants were acting as agents for the owner and that, in any event, there was sufficient evidence to support a showing of hardship upon the owner as well as the tenant.

In several states where the applicable standard is phrased in the disjunctive- 'practical difficulties or undue hardship'-area variances have been allowed on proof of practical difficulty only while use variances require proof of hardship, a somewhat greater burden. [FN21] The apparent ***541** reason for this difference is that an area variance, relating to restrictions such as side yard, rear yard, frontage, setback or minimum lot requirements, does not alter the character of the zoned district, [FN22] whereas a use variance seeks a use ordinarily prohibited in the particular district. On the other hand, it has been said that the term 'practical difficulties' has no significance in itself but the phrase 'practical difficulties or unnecessary hardship' should be construed as a whole. [FN23] Similarly, the New Jersey Supreme Court, under a statute identical to ours, expressed the view that there is no practical difference between the two phrases and that where 'peculiar and exceptional practical difficulties' exist so does 'undue hardship'. [FN24]

FN21. Puritan-Greenfield Improvement Ass'n v. Leo, supra note 10, 153 N.W.2d at 166; Alumni Control Bd. v. City of Lincoln, supra note 12, 137 N.W.2d at 802; Village of Bronxville v. Francis, 1 A.D.2d 236, 150 N.Y.S.2d 906, 909 (Sup.Ct.), aff'd 1 N.Y.2d 839, 153 N.Y.S.2d 220, 135 N.E.2d 724 (1956). See 2 A. Rathkopf, The Law of Zoning and Planning 45-1 (3d ed. 1962).

FN22. See Village of Bronxville v. Francis, supra note 21.

FN23. Brown v. Beuc, supra note 12, 384 S.W.2d at 852.

FN24. 165 Augusta Street v. Collins, supra note 16, 87 A.2d at 891. See Clouser v. David, 114 U.S.App.D.C. 12, 309 F.2d 233 (1962), turning on another phrase of s 5-420.

[5][6] As the New Jersey court recognized, situations involving practical difficulty will also involve hardship to some extent, but it is clear that whichever construction of the statute is taken the burden of proof is greater for a use variance than an area variance. We agree that a more stringent showing is warranted with respect to the more drastic relief inherent in a use variance. Viewing the difference between 'practical difficulties' and 'undue hardship' as a matter of degree, we follow those decisions which construe the statute in the disjunctive, [FN25] applying the former criterion to area variances and that latter to use variances.

FN25. See note 21, supra.

Variance of the off-street parking regulation here concerned does not strictly fall into either category. Suffice it to say that it is a hybrid with aspects of both. [FN26] It is unnecessary to elaborate on this distinction for the record reveals that Emergency fails to meet either standard.

FN26. See Alumni Control Bd. v. City of Lincoln, supra note 12, 137 N.W.2d at 803.

[7] The statute expresses in clear and unambiguous language that the showing, whether of 'practical difficulties' or 'undue hardship', must be upon the owner. The legislative history is also instructive on this point:

> The duty of this board is to grant variances from the strict application of the zoning regulations in cases where otherwise a hardship would be worked upon the owner. (Emphasis supplied.)

H.R.Rep. No. 2418, 75th Cong., 2d Sess. 2 (1938). The cases cited here and those researched are concerned with the plight of the owner or one with an incident of ownership. [FN27] Statements by taxt writers ownership. [FN28] Statements by text writers the Board's order we look only to evidence of hardship or difficulty befalling the owner.

FN27. Richman v. Philadelphia Zoning Bd. of Adjustment, 391 Pa. 254, 137 A.2d 280 (1958) cited by McQuillin to the contrary appears to be decided under a statute materially different from Section 5-420.

FN28. 2 A. Rathkopf, supra note 21, at 45-6, 45-28, 29; 8 E. McQuillin, supra note 13, at 525-526.

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Exceptional and Undue Hardship

[8][9][10][11] The variance procedure has many purposes. It is designed to provide relief from the strict letter of the regulations, protect zoning legislation from constitutional attack, alleviate an otherwise unjust invasion of property rights and prevent usable land from remaining idle. [FN29] These purposes infuse meaning into the ***542** phrase 'exceptional and undue hardship'. The authorities widely recognize, as petitioners contend, that the hardship envisioned by the statute must be great. 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. [FN30] An inability to put property to a more profitable use or loss of economic advantage is not sufficient to constitute hardship. [FN31] It must be shown that the regulations 'preclude the use of the property in question for any purpose for which it is reasonably adapted, i. e., can the premises be put to any conforming use with a fair and reasonable return arising out of the ownership thereof?' [FN32] (Emphasis in original.)

FN29. See 8 E. McQuillin, supra note 13, at 512-513; 74 Harv.L.Rev. 1396 (1961).

FN30. For a comprehensive and instructive analysis of the 'hardship' standard see Puritan-Greenfield Improvement Ass'n v. Leo, supra note 10. A checklist of factors to consider in passing upon an application for a variance is succinctly set forth at 2 A. Rathkopf, supra note 21, at 45- 5, 6.

FN31. Searles v. Darling, 46 Del. 263, 83 A.2d 96, 100 (Del.1951); 8 E. McQuillin, supra note 13, at 552-53.

FN32. 2 A. Rathkopf, supra note 21, at 45-5.

[12] In substance Emergency's 'hardship' argument is that 2813 M Street cannot be used as a public hall by the tenant or the owner under the present zoning plan as long as current parking conditions continue in Georgetown. There is no evidence in the record that the owner cannot reasonably adapt the premises or find a tenant to produce a reasonable income for a use in conformance with the off-street parking regulations. Accordingly, the record before us fails to support a finding of 'hardship upon the owner'.

Peculiar and Exceptional Practical Difficulties

[13][14][15][16][17][18] A clear definition of what constitutes 'practical difficulties' has not been found. [FN33] Where substandard lots (those having a smaller size or lesser frontage than the minimum) are involved the practical difficulty is perforce of an extreme nature-an inability to put the lot to any conforming use. In these instances the concepts of 'practical difficulty' and 'undue hardship' overlap so that the courts often tend to speak of them synonymously. The statute, however, does not require the owner to make such a stringent showing with respect to area variance. Generally it must be shown that compliance with the area restriction would be unnecessarily burdensome. [FN34] The nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case. But it is certain that a variance cannot be granted where property conforming to the regulations will produce a reasonable income but, if put to another use, will yield a greater return. [FN35] The tenant's financial problems in operating a restaurant-record shop are immaterial. At issue are the difficulties of the owner. The record is manifestly devoid of evidence bearing on the difficulties of the owner, financial or otherwise. It cannot be said that the tenant's financial distress has caused the owner any difficulties whatsoever.

FN33. See Wachsberger v. Michalis, 19 Misc.2d 909, 191 N.Y.S.2d 621, 624 (Sup.Ct.1959); 2 A. Rathkopf, supra note 21, at 45-26.

FN34. 2 A. Rathkopf, supra note 21, at 45-28.

FN35. Markovich v. Feriola, 41 Misc.2d 1051, 247 N.Y.S.2d 29, 33 (Sup.Ct.1963).

We wish to stress that the discretion of the Board is not challenged by our decision herein. The objectives and aspirations of the youthful members who founded Emergency go unquestioned and the grant of a variance perhaps would not result in appreciable harm to the community. However, the issue here is not the reasonableness or feasibility of the Board's decision but rather compliance with the statutory requisites. On the basis of the foregoing the decision of the Board is

Reversed.

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