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Citation: **384 A.2d 674**

*384 A.2d 674, *; 1978 D.C. App. LEXIS 459, ***

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

384 A.2d 674; 1978 D.C. App. LEXIS 459

February 18, 1977, Argued
March 29, 1978, Decided

PRIOR HISTORY: [1]**

Petition for Review of an Order of the District of Columbia Board of Zoning Adjustment

DISPOSITION: Affirmed.

CORE TERMS: parking, space, variance, area variance, zoning regulation, off-street, private club, irregular, practical difficulties, use variance, prescribed, hardship, site, feet, burden of proof, self-created, peculiar, practical difficulty, substantial evidence, subject property, large number, irregularly, shaped, patrons, staff, pool, rationally, accompanying text, property line, swimming pool

COUNSEL: Nicholas A. Addams, for petitioners.

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

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

JUDGES: Gallagher, Yeagley and Mack, Associate Judges.

OPINIONBY: GALLAGHER

OPINION: [*675] 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. n1 These relate to the construction of a new YMCA facility at 1701 Rhode Island Avenue, N.W.

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n1 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.

Board of Zoning Adjustment
District of Columbia
CASE NO.16827
EXHIBIT NO.39A2

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[**2]**

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." n2 This was later accomplished and the issue is squarely presented to us in a subsequently filed proceeding, which we decided this date. n3 Consequently, the only question for review here n4 is whether the BZA erred in granting the parking variance to an organization (YMCA) which in the companion proceeding, **[*676]** we have now determined to be a private club within the meaning of Zoning Regulation, art. 12, § 1202.

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n2 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.

n3 *Ass'n for Preservation of 1700 Block of N Street, N.W. v. District of Columbia Board of Zoning Adjustment*, D.C.App., 364 A.2d 668 (1978). **[**3]**

n4 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).

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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 **[**4]** 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: n5 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 **[**5]** 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.

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n5 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.

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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. n6 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.

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n6 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.

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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. n7

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n7 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.

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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 parking **[*677]** **[**7]** 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.

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.

To determine whether the BZA applied the correct legal **[**8]** 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.

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.'" n8 Since we have previously decided that the YMCA is a private club within the meaning of the applicable zoning regulation, n9 Zoning Regulation, art. 12, § 1202, and **[**9]** given that a private club is a permitted use in the relevant area here, n10 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. n11

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n8 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).

n9 That issue was decided today by this court in another proceeding, see note 3 *supra*, and accompanying text.

n10 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. **[**10]**

n11 See notes 9 and 10 *supra*, and accompanying text.

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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 n12 as requiring proof that compliance with the applicable zoning regulation would cause "peculiar **[*678]** 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.

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n12 D.C. Code 1973, § 5-420(3).

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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.

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.

There is no dispute **[**12]** 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. n13

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n13 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.

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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 **[**13]** 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.

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Service: **Get by LEXSEE®**
Citation: **579 A.2d 1164,AT 1171**

*579 A.2d 1164, *; 1990 D.C. App. LEXIS 214, **

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

579 A.2d 1164; 1990 D.C. App. LEXIS 214

May 22, 1989, Argued
August 29, 1990, Decided

PRIOR HISTORY:

[1]**

Petition for Review of an Order of the District of Columbia Board of Zoning Adjustment.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner landowners sought review of an order of the District of Columbia Board of Zoning Adjustment (board), which granted intervenor applicants' application for an area variance, under D.C. Code Ann. § 5-424(g)(3) (1988 Repl.), D.C. Mun. Regs. tit. 11, §§ 2115.1, 2116.2 (1987), and allowed the applicants to create a non-conforming parking space in an area the board determined to be the front yard of the applicants' lot.

OVERVIEW: The applicants, whose lot was surrounded by the landowners' lots and an alley, applied for a variance, which would have allowed them to create a parking space at the front of their lot. The proposed parking space was also one foot shorter than that required by D.C. Mun. Regs. tit. 11, § 2115.1 (1987). The board granted the variance, making specific finding as to the facts that the property was subject to easements favoring the landowners that prevented creation of a conforming parking spot, which presented an exceptional or extraordinary condition, and that granting the variance would not have harmed the public, concluding that its failure to grant the variance would have resulted in practical difficulties to the applicants. On appeal, the court reversed and remanded, holding that the board had not made factual findings as to what practical difficulties the applicants would have encountered without the variance, directing the board to enter appropriate findings on that issue. The court noted that the applicants had made only broad conclusory statements as to the diminution in value of the lot absent the variance during the proceedings below.

OUTCOME: The court reversed and remanded the order of the board, which granted the applicants' application for an area variance to create a non conforming parking space over the landowners' objections.

CORE TERMS: variance, regulation, parking, easement, carriage house, zoning, practical difficulties, parking space, exceptional, space, intervenor, yard, zone, area variance, feet, uniqueness, rear, practical difficulty, alley, neighborhood, street, front, substantial evidence, piece of property, public good, interior, dwelling, block, park, hardship

CORE CONCEPTS - ◆ Hide Concepts

Real & Personal Property Law : Zoning & Land Use : Zoning Generally

D.C. Mun. Regs. tit. 11, § 2101.1 (1987) requires the provision of a parking space with each dwelling unit for one-family dwellings.

Real & Personal Property Law : Zoning & Land Use : Land Use Planning

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 or more families. 11 D.C. Mun. Regs. tit. 11, § 330.1 (1987).

Real & Personal Property Law : Zoning & Land Use : Land Use Planning

A regulation-size parking space is nine feet by nineteen feet. D.C. Mun. Regs. tit. 11, § 2115.1 (1987).

Real & Personal Property Law : Zoning & Land Use : Land Use Planning

D.C. Mun. Regs. tit. 11, § 2116.2 providing that parking spaces may only be located in "rear" or "side" yards of residential lots.

Real & Personal Property Law : Zoning & Land Use : Zoning Generally

This court's standard for reviewing orders of District of Columbia Board of Zoning Adjustment requires determinations as to (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. D.C. Code Ann. § 1-509 (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. 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. The 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."

Real & Personal Property Law : Zoning & Land Use : Conditional Use Permits & Variances

Administrative Law : Agency Adjudication : Hearings

There is a three-part test, each part of which the applicant for a variance has the burden of satisfying before District of Columbia Board of Zoning Adjustments 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.

Real & Personal Property Law : Zoning & Land Use : Conditional Use Permits & Variances

D.C. Code Ann. § 5-424 (g)(3) provides that 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 D.C. Code Ann. §§ 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.

Real & Personal Property Law : Zoning & Land Use : Conditional Use Permits & Variances
To support a variance it is fundamental that the difficulties or hardships are due to unique circumstances peculiar to the applicant's property and not to the general conditions in the neighborhood.

Real & Personal Property Law : Zoning & Land Use : Conditional Use Permits & Variances
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 and (2) the practical difficulties are unique to the particular property.

COUNSEL: Richard Halberstein for petitioners.

Frederick D. Cooke, Jr., Corporation Counsel at the time the brief was filed, Charles L. Reischel, Deputy Corporation Counsel, and Martin B. White, Assistant Corporation Counsel, were on the Memorandum in Lieu of Brief, for respondent.

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

JUDGES: Rogers, Chief Judge, and Belson, Associate Judge, and Mack, Senior Judge. *

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

OPINIONBY: BELSON

OPINION: [*1166] Petitioners n1 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 **[**2]** that a parking space accompany each single family residence. n2 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.

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n1 Petitioners are William Gilmartin, Donald S. Good and John McCarthy. Petitioners own property fronting on 12th Street, S.E. in the 300 block.

n2 ↑11 DCMR § 2101.1 (1987) requires the provision of a parking space with each dwelling unit for one-family dwellings.

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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. n3 The subject lot is bounded on the east by petitioners **[**3]** 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.

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n3 ↑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).

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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 **[**4]** 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 **[**5]** 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 application **[*1167]** on October 7, 1987. n4 Petitioners then sought review of BZA's order in this court.

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n4 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 he located in front yards of residential lots. The proposed parking will he 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.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[**6]**

↑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 § 1-509 (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 **[**7]** variances pursuant to D.C. Code § 5-424 (g)(3) (1988 Repl.). n5 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).*

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n5 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).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[**8]**

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.

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 **[*1168]** 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, **[**9]** 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.

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, slip op. at 6. 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 (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 **[**10]** 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 **[**11]** 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.

Petitioners also contend that BZA's authority to grant variance relief for exceptional **[**12]** 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 easements **[*1169]** 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 **[**13]** 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. **[**14]**

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.

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 **[**15]** 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.

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.

[*1170] The seminal case in this jurisdiction on this issue is *Palmer v. District of Columbia 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 **[**16]** 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 **[**17]** 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 **[**18]** 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 **[**19]** 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, slip op. at 10-11 (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* indicates **[*1171]** that at some point economic harm becomes sufficient, at least when coupled with a significant limitation On the utility of the structure. It is for BZA, in the first instance, to weigh carefully the claims of potential difficulty advanced here in light of Barbour, *1700 Block,* and other applicable precedents.

We repeat the observation we made in Palmer, supra, 287 A.2d at 542, that 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." *See* Wolf v. District of Columbia Bd. of Zoning Adjustment, 397 A.2d 936, 942 (D.C. 1979) (this court defers to BZA's determination of the practical difficulties so long as the requisite findings of fact are made).

BZA considers many factors in reaching a decision to grant or deny a variant **[**20]** In A.L.W., Inc. v. District of Columbia Board of Zoning Adjustment, supra, the court considered the issue of whether an owner who knew or should have known of area restrictions should be granted an area variance. The court essentially held that prior knowledge or self-imposition of the difficulty did not bar granting an area variance. Rather, that fact was but one of many

factors that BZA might consider in reaching its decision. *Id.* at 431-32 (citing *Ozolins v. Horn*, 26 A.D.2d 555, 270 N.Y.S.2d 1001, 1002-03 (1966)). As in *A.L.W.*, BZA may also consider a wide range of factors in determining whether there is an "unnecessary burden" or "practical difficulty." *See Monaco, supra*, 407 A.2d at 1097; *Clerics of St. Viator, supra*, 320 A.2d at 294. Increased expense and inconvenience to applicants for a variance are among the proper factors for BZA's consideration. *Barbour, supra*, 358 A.2d at 327.

It is possible that a factor underlying BZA's decision in the instant case was that the requested variances were de minimis in nature. n6 The one foot difference in the size of the parking space is almost negligible, especially where, as here, the Board determined that the grant of the **[**21]** variance would not harm the public. The prohibition on parking in "front yards" seems more likely to have been aimed at lots such as petitioners' that front directly onto public streets than at lots along an alley, like intervenor's. In this case, because the lot is completely enclosed within other lots and a public area, the distinction between the "front" and "rear" yards appears at least negligible, if not irrelevant.

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n6 This court may not substitute its reasoning for BZA's when that reasoning appears to be lacking in its order. *See, e.g., Levy v. District of Columbia Bd. of Zoning Adjustment, supra*, 570 A.2d at 753 ("A court may not supply a rationale for the agency decision by conjecture from what it did."). "[O]ur function is to 'assure that the agency has given full and reasoned consideration to all material facts and issues. The court can only perform that function when the agency discloses the basis of its order by an articulation with reasonable clarity of its reasons for the decision.'" *Id.* (quoting *Dietrich v. District of Columbia Bd. of Zoning Adjustment*, 293 A.2d 470, 473 (D.C. 1972), *aff'd on remand*, 320 A.2d 282 (D.C. 1974)). On remand BZA may consider whether the variance sought is de minimis in nature and whether for that reason a correspondingly lesser burden of proof rests on the intervenor. See 3 R. M. Anderson, American Law of Zoning, § 2051 at 534 (1986 ed.); *Stewart v. Zoning Hearing Bd. of Radnor Township* 110 Pa. Commw. 111, 531 A.2d 1180, 1182 (Pa. Commw. 1987) ("infinitesimal deviation [lot a few feet short of one acre] from complete compliance is clearly within the de minimis exception for granting dimensional variances.").

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In order for BZA to deal with circumstances such as those presented in the application for variances in this case, BZA has the flexibility to consider a number of factors including, but not limited to: 1) the weight of the burden of strict compliance; 2) the severity of the variance(s) requested; and 3) the effect the proposed variance(s) would have on the overall zone plan. Although BZA's consideration of such factors seems to flow implicitly from its conclusion that a failure to grant the variances would result in "practical difficulties" for the intervenor, and it is likely that BZA considered it significant that the specific variances requested were slight and would not harm the overall zone plan, we must require more specific findings as to what practical difficulties BZA identified.

The Board also failed to make the requisite findings concerning each contested issue **[*1172]** 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 **[**23]** was in the circumstances of the instant case itself a practical difficulty. n7 Accordingly, we remand this case to BZA for more thorough findings on "practical difficulties" consistent with the views expressed in this opinion.

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n7 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.

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Turning to the matter of the public good, we note that the basic harm asserted by petitioners is that conversion of **[**24]** 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 **[**25]** 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. n8

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n8 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.

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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.

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We believe that this report accurately reflects the discussions held. Please make any additions, deletions or corrections as soon as possible.

cc: All Present
Candy Hall
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