GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16843 of 800 8th Street, N.W. LLC, pursuant to 11 DCMR § 3103.2, for a variance for modification of approved plans pursuant to BZA Order No. 16498, to allow for a reduction in the approved number of parking spaces under subsections 2101.1 (parking schedule) and 2117.4 (parking space access)[1] in an under-construction office building in the DD/C-3-C District at premises 800 8th Street, N.W. (Square 404, Lot 31).

HEARING DATE: March 12, 2002
DECISION DATE: March 26, 2002

DECISION AND ORDER

On January 9, 2002, the corporation 800 8th Street, N.W. LLC, filed an application with the Board of Zoning Adjustment for modification of approved plans, for additional variance relief pursuant to 11 DCMR § 3103.2 from the requirements of §§ 2101.1 and 2117, relating respectively to the number of required parking spaces and parking space access, for an office building with ground floor retail under construction at 800 – 8th Street, N.W. (Square 404, Lot 31), zoned DD/3-C-3. In 1999, in BZA Application No. 16498, the Board had approved plans for the development of the property, including variance relief from the parking space and access requirements. After the Board's approval, the Hillel Foundation for Jewish Campus Life (Hillel) entered into a contract to purchase the property. Since Hillel believed that it would not need the number of parking spaces provided in the Board-approved plans, it requested 800 – 8th Street, N.W. LLC, to apply for additional variance relief. Prior to the public hearing on the application, Hillel purchased the property. The term "applicant" in this Decision and Order refers to Hillel. Hillel is represented in these proceedings by the law firm Holland and Knight LLP.

After a public hearing, the Board denied the application, determining that the applicant failed to demonstrate practical difficulties in complying with the Zoning Regulations, as required for variance relief to permit the proposed modification of the previously approved plans.

BZA
Case No. 16843
Exhibit No. 39

[1] The applicant requested relief generally from the access, maintenance, and operation requirements of 11 DCMR § 2117 for purposes of providing stacked parking. The aisle width requirements in § 2117.5 are particularly relevant.

Board of Zoning Adjustment
District of Columbia
CASE NO.16843
EXHIBIT NO.39

PRELIMINARY AND PROCEDURAL MATTERS

Notice of Application and Notice of Public Hearing. By memoranda dated January 14, 2002, the Office of Zoning advised Advisory Neighborhood Commission (ANC) 2C, the ANC for the area within which the property that is the subject of this application is located; the ANC Commissioner for the affected Single-Member District; the affected Ward Councilmember; the D.C. Office of Planning; and the D.C. Department of Public Works[2] of the filing of the application.

The Board scheduled a public hearing on the application for March 12, 2002. Pursuant to 11 DCMR § 3113.13, the Office of Zoning on January 18, 2002, mailed the applicant, the owners of all property within 200 feet of the subject property, and ANC 2C notice of hearing. Notice of hearing was also published in the *D.C. Register* on January 25, 2002, at 49 DCR 745. The applicant's affidavit of posting indicates that on February 25, zoning posters were placed on both the 8th Street and H Street frontages of the property, in plain view of the public.

Applicant's Case. The applicant presented testimony from Aryeh Furst, Hillel's Chief Operating Officer and Chief Financial Officer; Susan Turnbull, project manager; and Steven Sher, who was offered and qualified as an expert witness in land use planning. Mr. Furst discussed the applicant's proposed use of the property, and its variance request. Ms. Turnbull had conducted a transportation survey of Hillel's employees, and also created and participated in its parking survey. Mr. Sher described the surrounding area, the proposed parking arrangement, and the variance criteria.

D.C. Office of Planning (OP) Report. In its report dated March 5, 2002, OP recommended that the Board deny the application. OP questioned whether the applicant had met its burden of proving that it would encounter practical difficulties as a result of strict compliance with the Zoning Regulations. OP also emphasized as a matter of public policy the importance of retaining in the Downtown area existing parking spaces available to the public. OP stated that the requested parking variance could not be granted without substantially impairing the intent, purpose, and integrity of the zone plan, since the variance would result in increased pressure on the parking spaces otherwise available to the public. OP also stated that maintaining access aisle width is important, given the anticipated difficulty of maneuvering in the close quarters provided by the garage. OP submitted a supplemental report on March 19, 2002, relating to parking facilities and planned construction in the surrounding area. Arthur Jackson presented OP's report at the hearing.

District Department of Transportation (DDOT) Report. In its report dated March 1, 2002, DDOT noted that the parking requirement could be reduced under 11 DCMR § 2104 by 25 percent (or four spaces) given the proximity of the Gallery Place Metrorail Station. DDOT stated that from a transportation standpoint, the building would generate little or no parking impact. DDOT also observed that the reduction of parking requirements in the Downtown area,

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[2] The relevant division in the Department of Public Works has since been reorganized and renamed the District Department of Transportation.

coupled with high transit availability, would likely enhance transit use and discourage single-occupant vehicles. DDOT therefore had no objection to the requested modification.

D.C. Department of Fire and Emergency Medical Services. According to the OP report, the Department had no objections to the application.

ANC Report. In its report dated February 11, 2002, ANC 2C indicated that at a regularly scheduled meeting with a quorum present, ANC 2C voted to support the application. According to the ANC, the narrow width and small size of the lot preclude any traditional type of garage arrangement. The ANC stated that a practical difficulty would result in requiring the applicant to use the second below-grade level for parking, when one level would suffice for the applicant's needs. The ANC felt that the requested variance, which it characterized as minor, would be consistent with the Board's prior action in granting variance relief from the parking space requirements for this property.

Persons in Support of the Application. The Board received letters in support of the application from Ward 2 Councilmember Jack Evans, as well as the American Public Health Association, Family Research Council, Greater New Hope Baptist Church, and SXL Real Estate, Inc., nearby property owners. In general, these letters stated that the requested variances would not adversely affect the nearby property nor public parking in and around the area.

Persons in Opposition to the Application. The Board did not receive any comments in opposition to the application.

Closing of the Record. The record closed at the conclusion of the public hearing on March 12, 2002, with the exception of a post-hearing submission from the applicant providing further analysis of the variance test and proposed findings of fact and conclusions of law.

Decision Meeting. At a special public meeting on March 26, 2002, the Board, voting 3 – 2 – 0, denied the application.

FINDINGS OF FACT

The Subject Property and Surrounding Area

1. The property that is the subject of this application is located at 800 – 8th Street, N.W. (Square 404, Lot 31), at the northwest corner of 8th Street and H Street, N.W.

2. It is a 4,023 square-foot corner lot, with 85 linear feet of frontage on 8th Street and approximately 47 linear feet of frontage on H Street.

3. The property is located in the Gallery Place area of Downtown, one block west of the Gallery Place Metrorail Station and one block north of the National Portrait Gallery/Museum of American Art.

4. The subject property and nearby lots north of H Street are located in the C-3-C (Major Business and Employment Center) Zone District, and subject to the requirements of the Downtown Development (DD) Overlay District. Properties across H Street to the south are zoned DD/C-4 (Central Business District).

5. The surrounding development consists of the Greater New Hope Baptist Church and a three-story youth center to the north; a three-story commercial building and a vacant ten-story office building across H Street to the south; a four-story restaurant and a two to four-story vacant commercial building across 8th Street to the east; and a ten-story office building to the west occupied by the United States Department of the Treasury (U.S. Mint).

6. The subject property has been developed as an office building with ground floor retail in accordance with the plans approved on November 3, 1999, in BZA Application No. 16498. In that proceeding, the Board granted the property owner a special exception under 11 DCMR § 411.11 to permit a roof structure that does not meet setback requirements; a special exception under § 774.2 to waive minimum rear yard requirements; a variance from the required number of parking spaces under § 2101.1; a variance from § 2117.4 to provide parking access by car elevator rather than an improved driveway; and a variance from § 2205.3, from the requirement of providing at least one loading berth.

7. Construction of the 120-foot, nine-story masonry and stone building was substantially complete at the time of the hearing. The building permit plans indicate that the building has a total gross floor area above grade of 34,285 square feet, with a floor area ratio of 8.52, including 2.0 FAR from the transfer of development rights under § 1702.8. The development as originally proposed included a restaurant on the first two floors of the building, with leasable office space above.

8. The building has a two-level parking garage below grade. A car elevator provides access to the garage.

9. Both garage levels continue east into a vault in public space under the adjacent 8th Street sidewalk. The applicant will rent the vault space from the District of Columbia.

10. There are a total of 20 parking spaces in the garage. On each garage level, six parking spaces are located on private property, while four spaces are located in vault space.

Parking Space and Access Requirements

11. The Board credits OP's testimony that based on a gross floor area of 34,285 square feet as stated in the building permit plans, the Schedule of Requirements for Parking Spaces in § 2101.1 requires the provision of 18 parking spaces.[3]

12. Under §§ 2100.1 and 2101.1, all required parking spaces must be located on the subject property.

13. In BZA Application No. 16498, the Board approved a reduction in the required number of on-site parking from 18 spaces to 12 spaces. Counting the spaces in the vault, 20 parking spaces are available for use.

14. To provide for accessibility and maneuvering space between rows of parking spaces, § 2117.5 requires a minimum access aisle width of 20 feet for 90 degree parking and not less than 17 feet for angle parking.

The Requested Variances

15. The applicant will occupy the majority of the building. On the first floor, the applicant will provide a museum, with conference/meeting rooms available for outside use. The applicant will occupy the fourth through eighth floors with its offices, and provide conference/meeting facilities on the top floor. The applicant will lease office space on the second and third floors to four affiliated organizations until such time as the space is needed for the expansion of the applicant's own operations.

16. The focus of the first floor will be as an arts pavilion. The applicant anticipates that the museum will host a wide variety of events and rotating exhibits, including sculpture, paintings, multi-media exhibits, literary events, poetry recitals, musical performances, Judaic crafts, and Hillel receptions.

17. The applicant anticipates that the visitors to the arts pavilion/museum will primarily consist of individuals already visiting the organizations in the building for other purposes.

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[3] In the C-3-C District, general office use requires the provision of one parking space for each 1,800 square feet of gross floor area above 2,000 square feet. *See* 11 DCMR § 2101.1 (Commercial Buildings, Office – General). The applicant's architect, Eric Colbert, previously testified in BZA Application No. 16498 that the building requires 18 parking spaces. Tr. at 248, 251 (Oct. 13, 1999). The applicant's attorney also stated at the public hearing on the instant application that the requirement is 18 spaces. Tr. at 121 (Mar. 12, 2002). OP likewise concluded that 18 spaces are required. Tr. at 173 (Mar. 12, 2002). The applicant's prehearing statement, however, indicates that the requirement is 17 spaces. At the hearing, the applicant's land use planning expert testified that given the proposed first floor arts use, the requirement is 17 spaces. Tr. at 143, 149, 150. (Mar. 12, 2002). The applicant, however, did not provide any parking calculations to support this conclusion. The Board therefore finds that the applicant is required under § 2101.1 to provide 18 spaces on-site. The order in BZA Application No. 16498 reduced this requirement to 12 spaces.

18. The applicant proposes to eliminate the upper garage level, due to its security concerns and internal space needs.

19. The applicant would convert the upper garage level into space for a kosher kitchen, an employee lounge and eating area, a fitness center for building occupants, a separate ventilation system for the building's mail room, and information technology storage space.

20. The applicant proposes to provide on the lower garage level, eight parking spaces on private property and six additional spaces in public space. The parking spaces would be in a stacked configuration, with vehicles parked in the access aisles.

21. The applicant has approximately 68 employees, all of whom will move to the new building. The applicant's survey of the transportation patterns of its employees showed that most employees will use public transportation to commute, and that no more than six to ten employees will drive to work on an average daily basis. Due to the proximity of the metrorail station to the subject property, the applicant does not expect that the number of employees who drive to work will increase.

22. The applicant testified that due to the nature of the building as an international organization, visitors to the building will likely be from out-of-town and arrive by public transportation.

23. The applicant stated that its future tenants on the second and third floor currently do not have any parking spaces allocated to them at their existing location, and would not have parking privileges at the new building.

24. Due to security concerns, the applicant will not make the garage available for parking by the general public.

Uniqueness and Practical Difficulties

25. In BZA Application No. 16498, the property owner testified that providing the required amount of parking and a ramped driveway to those spaces was not possible given the exceptionally small size and narrowness of the lot. Without the car elevator, the driveway system alone would occupy virtually the entire floorprint of both garage levels.

26. Hillel likewise cites the size and shape of the property as unique and exceptional characteristics.

27. The Board finds that since twelve parking spaces already exist on the subject property and an additional eight spaces already exist in the public vault space, strict compliance with the Zoning Regulations, as modified by the Board's order in BZA Application No. 16498, would not be unduly burdensome.

28. The Board also finds that the practical difficulties asserted by the applicant (namely the applicant's desire to refrain from using the upper garage level for security reasons and to use it instead for other organizational purposes), do not arise from unique or exceptional conditions of the property, but rather from circumstances personal to the applicant. The applicant has not demonstrated that its security concerns cannot be adequately address through reasonable security measures, including limiting access to the garage, requiring employees to present identification and other evidence of parking privileges, and inspecting vehicles upon entry to the garage.

29. Because the applicant has failed to prove that it would confront practical difficulties in complying with the parking requirements of the Zoning Regulations as modified by BZA Application No. 16498, the Board also finds that the applicant has failed to prove that the access aisles must be used to provide parking.

30. The applicant purchased the subject property with full knowledge of the size of the building, the zoning classification of the property, the parking space requirements of the Zoning Regulations as modified by the order in BZA Application No. 16498, and its own expansion plans. The Board finds therefore that the applicant's desire to restrict access to the garage and to instead use the upper garage level for purposes other than parking represents a self-created hardship.

31. Finally, the applicant's desire to lease the second and third floor also gives rise to a self-created hardship in that those floors would otherwise be available to accommodate the uses that the applicant proposes for the upper garage level.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799, as amended; D.C. Official Code § 6-641.07(g)(3) (2001)), to grant variances from the strict application of the Zoning Regulations. Hillel is seeking to modify the building plans approved in BZA Application No. 16498, which would require additional variance relief from the schedule of required parking spaces in 11 DCMR § 2101.1 and from the requirements in § 2117 relating to access to required parking spaces. The notice requirements of § 3113 for the public hearing on the application have been met.

In reviewing a variance application, the Board is required under D.C. Official Code § 6-623.04 (2001) to give "great weight" to OP recommendations. For the reasons stated in this Decision and Order, the Board agrees with OP's recommendation that both variance requests be denied.

The Board is also required under D.C. Official Code § 1-309(d) (2001) to give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. The Board has carefully considered the issues and concerns raised in the ANC's report, which mirror those of the applicant. However, for the reasons stated in this Decision and Order, the Board does not accept the ANC's recommendation that the Board grant the application.

Under the three-prong test for area variances set out in 11 DCMR § 3103.2, an applicant must demonstrate that (1) the property is unique because of its size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter practical difficulty if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). In order to prove "practical difficulties," an applicant must demonstrate first, that compliance with the area restriction would be unnecessarily burdensome; and, second, that the practical difficulties are unique to the particular property. *Id.* at 1170.

The Board previously found the property to be unique due to its narrowness and small size, and approved a reduction in the required number of parking spaces from 18 to 12 spaces, with an additional 8 spaces to be provided in public vault space. The building has been constructed to provide these spaces. Since the parking spaces have already been provided, the Board concludes that compliance with the parking space requirements would not be unduly burdensome.

Moreover, § 2117.5 provides in pertinent part that:

> Required parking spaces shall not be reduced in total extent after their provision except upon approval of the Board of Zoning Adjustment and then only after proof that the parking spaces provided are no longer needed by reason of a reduction of employees, seats, gross floor area, dwelling units, or any other standard applicable to the use set forth in the regulations . . . .

The standard for general office use, as set forth in § 2101.1, is gross floor area. In this case, the applicant is seeking contrary to § 2117.5 to increase the gross floor area of usable office space while at the same time decreasing the number of parking spaces. While one of the applicant's witnesses stated that given the applicant's proposed arts use on the first floor, the parking

requirement would be reduced by one space, the applicant failed to provide any calculations to support this assertion.

More importantly, the practical difficulties asserted by the applicant are not unique to this property, but rather stem from the applicant's desire to restrict parking in its building for security purposes and to use the upper garage level for activities in support of its programs. As explained in *Monaco v. District of Columbia Bd. of Zoning Adjustment*, 1091, 1098 (D.C. 1979), the desire to utilize property for a certain use is not by itself enough to create an "extraordinary or exceptional situation or condition." Similarly, in *Draude v. District of Columbia Board of Zoning Adjustment*, 527 A.2d 1242 (D.C. 1986), the Court stated that:

> The concept of an "exceptional condition" in the variance context refers to unusual conditions *of the property*, not merely to unusual circumstances personal to the owner and related to the property only in the sense that the owner's personal situation makes it difficult to develop the land consistently with the zoning regulations. Furthermore, the BZA generally cannot grant a variance just because the property makes it difficult for the owner to construct a particular building or to pursue a particular use without a variance if the owner could use or improve the land in other ways compatible with zoning restrictions.

Id. at 1255 (citations omitted) (emphasis in original). Without diminishing the seriousness of the applicant's security concerns, there is no indication that these concerns cannot be addressed through reasonable security measures, including restricted access, requiring employee and vehicle identification, and vehicle inspection. If the Board were to recognize the applicant's desire to use its parking facilities for purposes other than providing required parking as an unusual circumstance of the property, the Board would be required to grant variances to other property owners who similarly wished to put their parking facilities to other uses. Not only would such a result seriously undermine the parking space requirements of the zoning regulations, but the Board lacks the authority to grant a variance where the need for the variance does not arise out of an extraordinary or exceptional condition of the property.

Further, the applicant purchased the property with full knowledge of the size of the building, the zoning classification and zoning history of the property, the parking space requirements, and its own expansion plans. Citing *A.W.L., Inc. v. District of Columbia Board of Zoning Adjustment*, 338 A.2d 428 (D.C. 1975), and *DeAzcarte v. District of Columbia Board of Zoning Adjustment*, 388 A.2d 1233 (D.C. 1978), the applicant points out that a self-created hardship is not a bar to the granting of an area variance. However, in considering whether an applicant for an area variance would confront practical difficulties in complying with the Zoning Regulations, prior knowledge or self-imposition of the difficulty is "but one of the many factors that the BZA might consider

in reaching its decision." *Gilmartin*, 579 A.2d at 1171. Here, the applicant purchased a building that is apparently too small to accommodate its long-range expansion plans. Also, the applicant intends to lease space on the second and third floors to other organizations, when that space would otherwise be available to accommodate the facilities the applicant proposes to locate on the upper garage level. In light of the facts of this case, application of the self-created hardship doctrine also leads to the conclusion that the variance request should be denied.

Finally, the applicant urges the Board in applying the variance test to consider the applicant's status as a nonprofit organization providing a public service. The Court of Appeals has recognized 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 or condition of a particular piece of property."

Monaco, 407 A.2d at 1099; *see also Draude v. District of Columbia Bd. of Zoning Adjustment*, 582 A.2d 949, 956 (D.C. 1990). In both cases, however, the public service organizations had long occupied one lot and sought to expand onto an adjacent lot that had long been regarded as part of the same site. In the instant case, the applicant recently acquired the subject property, with full knowledge of its limitations. It does not seek to expand onto an adjacent lot, but rather onto a level of the building that under Board-approved plans is to be dedicated to parking. The applicant's expansion needs therefore are not properly considered as an extraordinary or exceptional condition of the property.

Because the Board has concluded that the applicant failed to demonstrate practical difficulties in complying with the strict requirements of the Zoning Regulations as modified by the Board's order in BZA Application No. 16843, it is not necessary to address whether the application can be granted without substantial detriment to the public good or the zone plan.

For the reasons stated above, it is hereby **ORDERED** that the application is **DENIED.**

VOTE: 3 – 2 – 0 (David W. Levy, Anne M. Renshaw, and Anthony J. Hood (by absentee vote), to deny; Geoffrey H. Griffis, opposed and Curtis L. Etherly, Jr. opposed (by absentee vote)).

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

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED: _____

JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: OCT 15 2002

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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BZA APPLICATION NO. 16843

As Director of the Office of Zoning, I hereby certify and attest that on OCT 15 2002 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY: Jerrily Kress
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