District of Columbia Court of Appeals.

Luis DE AZCARATE et al., Petitioners,
v.
DISTRICT OF COLUMBIA BOARD OF **ZONING** ADJUSTMENT, Respondent,
Marvin Pitkin and Walter J. Schafer, Intervenors.

No. 12650.

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

Affirmed.

West Headnotes

[1] Zoning and Planning 489
414k489

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 and Planning 489
414k489

[2] Zoning and Planning 536
414k536

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 and Planning 536
414k536

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

[4] Zoning and Planning 496
414k496

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 and Planning 496
414k496

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 and Planning 503
414k503

Board of **Zoning** Adjustment was authorized to grant variance from minimum-width requirement of lot for single-family residential use where original parcel

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Board of Zoning Adjustment
District of Columbia
CASE NO.16896
EXHIBIT NO.22A2

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 and Planning ⚿497
414k497

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 and Planning ⚿497
414k497

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.

***1234** 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, Washington, ***1235** 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.[FN1] 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. [FN2]

FN1. The minimum lot-area requirement for this particular type of zone is 7,500 square feet. D.C. **Zoning** Regs. s 3301.1. No one disputes that intervenors meet this requirement.

FN2. 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.

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-

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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. [FN3]

> FN3. Petitioners do not allege that the other two lots upon which the houses were built are substandard in any respect.

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.[FN4]

> FN4. 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 propriety of any alleged changes by the **Zoning** Regulations Division in their interpretation of the term "lot width."

***1236** 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.[FN5] 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."

> FN5. 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.

D.C.Code 1973, s 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.[FN6]

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FN6. 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).

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 s 5-420 ***1237** 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.[FN7]

FN7. 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, s 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."

[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. [FN8] 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:

FN8. 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.

> 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. [FN9]

FN9. 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.

[5] We also need not in this case precisely define the contours of the term "extraordinary or exceptional situation or condition." In our view,

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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 petitioners, ***1238** 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. [FN10] 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:

> FN10. Petitioner cites 2 A. Rathkopt, Law of **Zoning** s 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.)

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.[FN11] 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.[FN12]

> FN11. 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

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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.)

FN12. 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 clear that the YMCA's difficulties stemmed directly from its decision to erect the facility on a small, irregularly shaped parcel of land.

***1239** 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).) ([FN13])

FN13. 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.)

[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**, s 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.

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ZONING VARIANCES

District of Columbia Court of Appeals.

CLERICS OF SAINT VIATOR, INC., Petitioner,
v.
DISTRICT OF COLUMBIA BOARD OF **ZONING** ADJUSTMENT, Respondent.

No. 7308.

Argued Oct. 18, 1973.
Decided May 30, 1974.

Zoning applicant filed petition for review of decision of Board of **Zoning** Adjustment decision which denied variance, on claim of undue hardship, to convert existing religious seminary located in R-1-B **zoning** classification to a convalescent or nursing home. The Court of Appeals, Yeagley, J., held that under **zoning** statute, grant of variance on basis of hardship was not restricted to case where required hardship inheres in 'land' as opposed to 'property'; that owner of seminary was not precluded on application for variance from claiming hardship on theory that any hardship was self-imposed; and that any increase in density from conversion of seminary to nursing home was not necessarily incompatible with residential neighborhood.

Reversed and remanded for further proceedings.

West Headnotes

[1] Zoning and Planning 481
414k481

Purpose of a variance provision is to prevent a **zoning** statute from operating to deprive a property owner of all beneficial use of his property. D.C.C.E. § 5-420(3).

[2] Zoning and Planning 40
414k40
(Formerly 414k110)

A **zoning** statute which operates to deprive property owner of all beneficial use of his property would be unconstitutionally confiscatory. D.C.C.E. § 5-420(3).

[3] Zoning and Planning 493
414k493

Under **zoning** statute, grant of variance on basis of hardship was not restricted to case where required hardship inheres in "land" as opposed to "property." D.C.C.E. § 5-420(3).

[4] Zoning and Planning 497
414k497

Owner of seminary was not precluded on application for variance from claiming hardship on theory that any hardship was self-imposed, where it was not building of structure which gave rise to complained-of hardship but hardship was caused by extraordinary drop in enrollment of seminarians due solely to historical circumstances and beyond control of seminary administration. D.C.C.E. § 5-420(3).

[5] Zoning and Planning 489
414k489

Variance may not be granted, even to alleviate a bona fide serious hardship to owner, if granting thereof would adversely affect surrounding neighborhood. D.C.C.E. § 5-420(3).

[6] Zoning and Planning 508
414k508

Any increase in density from conversion of seminary to nursing home was not necessarily incompatible with residential neighborhood. D.C.C.E. § 5-420(3).

[7] Zoning and Planning 536
414k536

Applicant for **zoning** variance has burden to show that it is entitled to a variance.

[8] Zoning and Planning 534
414k534

[8] Zoning and Planning 536
414k536

On application for variance to convert seminary to nursing home, it would be proper for **zoning** board to require applicant to present evidence to show that his proposed use would not create traffic flow and parking problems inconsistent with R-1-B residential neighborhood, and board must give applicant

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sufficient notice of issues on which it seeks proof. D.C.C.E. §§ 1-1501 et seq., 1-1509(a, b).

[9] Zoning and Planning ⚿496
414k496

A variance may only be granted where the strict application of any regulation would result in peculiar and exceptional practical difficulties or exceptional and undue hardship. D.C.C.E. § 5-420(3).

[10] Zoning and Planning ⚿539
414k539

On application for variance to convert seminary to nursing home on claim of hardship, necessary element of proof of hardship was evidence showing inability of applicant to make a reasonable disposition of property for a permitted use. D.C.C.E. § 5-420(3).

***292** J. Robert Walsh, Washington, D.C., for petitioner.

Leo N. Gorman, Assistant Corp. Counsel, Washington, D.C., with whom C. Francis Murphy, Corp. Counsel, and Richard W. Barton, Asst. Corp. Counsel, Washington, D.C., were on the brief, for respondent.

Before KERN, NEBEKER and YEAGLEY, Associate Judges.

YEAGLEY, Associate Judge:

On October 27, 1971, the petitioner, Clerics of Saint Viator, Inc., filed with the respondent, District of Columbia Board of **Zoning** Adjustment (hereinafter referred to as the Board), an appeal for a variance from D.C. **Zoning** Regulations based on undue hardship. The appeal sought permission to convert an existing religious seminary located at 1212 Otis Street, N.E., in the R-1-B **zoning** classification to a convalescent or nursing home, as defined in the D.C. **Zoning** Regulations.

Following the first public hearing the variance was denied by the Board, but after further argument on reconsideration it was approved on January 18, 1972. However, on May 16, 1972, the Board vacated all previous action on its part and held a new hearing on November 29, 1972. By a vote of three to one the variance was denied on March 28, 1973, and this appeal followed. The cause was then remanded to the Board at its request to permit it 'to make additional findings' and a new order issued July 13, 1973. The new order states that the earlier order 'is hereby amended'. We note, however, that it not only enlarges on the first but in some respects is inconsistent with it;[FN1] as to such inconsistencies we accept the latter order as controlling.

> FN1. The Board's original opinion stated that 'the entire record does not indicate with any degree of assurance' that the proposed use will not cause traffic congestion which would threaten the residential neighborhood. The Board's second opinion is phrased differently, stating that permitting the proposed use 'would create the added threat of more cars (and) in turn add measurably to pollution and congestion.' In the former the Board is finding that petitioner has failed to show that the proposed use will not create traffic congestion while in the latter the Board affirmatively finds that there would be an 'added threat of more cars'.

The findings of the Board are summarized in pertinent part as follows:

> The property consists of approximately 93,241 square feet of land, improved by a twelve year old modern religious seminary of approximately 29,000 square feet containing approximately 80 rooms and chapel on three floors and basement.
>
> The seminary was built in 1961, pursuant to a special exception granted by the Board, consisting of thirty-eight (38) small sleeping rooms, each with clothes closet and wash basin and served by common facilities. It also contains eight two-room suites, each with a connecting bath, recreation and study rooms, and classrooms.
>
> It is zoned R-1-B, is surrounded by single family detached residences, except that its westerly line abuts a strip commercial zone running along Twelfth Street, N.E.
>
> The number of seminarians residing at the Viatorian Seminary has steadily declined in the last several years from a high of over thirty, which increased to ***293** over forty during the summer months, to a present enrollment of two.
>
> The decrease in enrollment is due solely to the historical circumstances of decline in religious vocations and departure from the traditional seminary concept of theological education to a more dispersed format of education.
>
> The subject property has a current assessed value of $448,258.00 and a current appraised value of

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> $600,000.00 based upon a reproduction of improvement costs of $483,500.00 There is no ascertainable value based upon the market value.
> The applicant has been unable to transfer the facility to other religious or educational institutions, and further supports his request for a variance on the ground that development of the property for R-1-B use would result in undue financial hardship.
> A substantial loss of several hundred thousand dollars would be suffered if applicant attempted to utilize the property for permitted residential purposes due to the necessity of demolition, removal, and compacting back of the building foundation plus the construction of access roads to serve subdivided lots.
> The proposed use, convalescent and nursing home, will tend to increase density.

The Board first contends that the variance was properly denied on the basis that the hardship, which petitioner claims, does not inhere in the land itself but, rather, is caused by the nature of the structure on the land. The Board argues that only a hardship which is inherent in the 'land' can be the basis of a variance.

The applicable statute, D.C.Code 1973, s 5-420(3), which is incorporated into D.C. **Zoning** Regulation No. 8207.11, 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 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, (the Board is empowered) 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 added.)

Petitioner claims that its situation falls within that section of the statute which provides for a variance where there is an 'other extraordinary or exceptional situation or condition of a specific piece of property . . ..'

We note at the outset that the applicable statute (above) uses the word 'property' rather than 'land' and that property generally includes permanent structures existing on the land.[FN2] The Board, in support of its position that the hardship must inhere in the land itself, refers us to Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851 (1939). We do not see that this case lends any support to the Board's position on the land-property issue since that particular question was not under consideration. The Board's citation of 2A Rathkopf, The Law of **Zoning** 45-5 (1962) suffers from the same disability. [FN3]

> FN2. See Black's Law Dictionary 1383 (4th ed. 1951); D.C.Code 1973, s 5-702(m); see also D.C.Code 1973, ss 5-702(e), 5-902(f)(1).

> FN3. In fact on the page facing the one from which the Board quotes, (45-4) Rathkopf quotes approvingly from Elwyn v. City of Miami, 113 So.2d 849 (Fla.App.1959), which uses the term 'property' in the same context that Rathkopf uses 'land'. See also Palmer v. Board of **Zoning** Adjustment, D.C.App., 287 A.2d 535, 539-540 (1972), where the word 'property' is used in discussing requirements necessary for granting of a variance.

***294** A detailed discussion of the subject is found in 2 Anderson, American Law of **Zoning** ss 14.28 14.34 (1968) (hereinafter cited as Anderson), where it is stated that a variance may be granted 'where the land is incapable of yielding a fair return because of obsolete or dilapidated improvements.' See also Banister v. Board of Appeals, 65 N.Y.S.2d 15 (Sup.Ct.1946), where the existence of an obsolete structure on a parcel of land constituted the hardship basis for the granting of a variance.

[1][2] The purpose of a variance provision is to prevent a **zoning** statute from operating to deprive a property owner of all beneficial use of his property. A statute which so operated would be unconstitutionally confiscatory.[FN4] It makes no practical difference whether the inability to use property in accordance with **zoning** regulations stems from topographical conditions of the land itself or from the existence of a structure on the land.

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FN4. Anderson, supra at s 14.02.

[3] 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'.

The Board next argues that petitioner is not entitled to a variance because the hardship it complains of (the non-utility of the structure as a seminary) is of its own creation since it built the structure with knowledge of the **zoning** restrictions applicable to the land. It is for this proposition, presumably, that the Board cites Taylor v. District of Columbia Board of **Zoning** Adjustment, D.C.App., 308 A.2d 230 (1973).

One of the expressed reasons for upholding the Board's denial of a variance in Taylor was the court's finding that the hardship of the petitioner was 'self-imposed', in that he himself, in developing a tract of land, created an elongated lot which he then claimed was unsuited for any allowable use.

[4] The Board takes the position that since petitioner built the structure, it may not now be heard to complain of its existence as constituting a hardship, that any hardship is like that in Taylor, 'self-imposed'. We disagree. In Taylor the direct result of the petitioner's actions was the creation of the hardship complained of, and the court quite correctly deemed it to be 'self-imposed'. In the instant case it was not the building of the structure in 1961 which gave rise to the complained of hardship, the building was utilized for its intended purpose as a seminary for a number of years. The hardship was caused by an extraordinary drop in enrollment of seminarians, found by the Board to be 'due solely to the historical circumstances of decline in religious vocations and departure from the traditional seminary concept of theological education' and 'beyond the control of the seminary administration.' We conclude that the Board is in error when it contends that the hardship complained of by petitioner is 'self-imposed'.[FN5]

FN5. See also and compare Clouser v. David, 114 U.S.App.D.C. 12, 309 F.2d 233 (1962), where a nonconforming use was created in direct violation of the **zoning** provisions and the cost of creating it then claimed as a hardship in a request for a variance.

[5] The Board also contends that granting of a variance to allow operation of a nursing home would adversely alter the residential character of the neighborhood. It is well established that a variance may not be granted, even to alleviate ***295** a bona fide serious hardship to the owner, if the granting thereof would adversely affect the surrounding neighborhood. 2 Anderson, supra at s 14.40. By statute the Board may grant a variance

> 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. (D.C.Code 1973, s 5-420(3).)

The Board, in its 'Conclusions of Law', asserts that the proposed nursing home facility would 'necessarily result in increased traffic over that generated' by the former use of the property. It further states that '(t)he quiet, stable, residential character of the neighborhood will be altered by a transient influence generated by the influx of commercial vehicles from establishments servicing the facilities and private vehicles of persons employed at or visiting the home.'[FN6] Except for a finding that the proposed use will tend to increase density, none of the Board's findings of fact is addressed to the above conclusions.

FN6. There can be no claim that the proposed use, by its appearance will adversely affect the neighborhood, since the new use will not require exterior structural changes. The situation is therefore different from that in Taylor, supra, where the proposed use would have been architecturally out of character with the neighborhood.

[6] The Board did not find that the increase in density would adversely affect the neighborhood and it does not necessarily follow from the findings that the increase in density in this case is necessarily incompatible with a residential neighborhood. It is by no means clear that increasing the population of an area, by permitting a building to be occupied by a larger number of bed patients than the number of students who previously used it, will bring about an increase in traffic of persons or commercial vehicles to or from the premises; neither does it, in and of itself, indicate a significant change in the level of

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noise.[FN7] Consequently we are at a loss to know on what basis the Board arrived at these conclusions. The Board, in its brief, does not refer us to any evidence in the record on which these conclusions could be based.[FN8]

FN7. We address ourselves to the question of burden of proof, infra. Also see note 11.

FN8. In its brief the Board refers to the testimony of Maurice A. Davis, president of the Brookland Neighborhood Civic Association, to the effect that the essential character of the neighborhood would be altered by the proposed use. This testimony was given at a hearing of the Board on December 8, 1971. At the November 29, 1972, hearing of the Board, however, Mr. Davis testified that his organization, pursuant to an agreement with petitioner, no longer opposed the proposed use. The reference to Mr. Davis' earlier testimony is inappropriate and provides no evidentiary support for the Board's legal conclusions.

The Board does not dispute petitioner's assertion, on appeal, that the proposed use 'has the joinder and approval of all neighboring property owners; and (that) the owner has resolved all tentative opposition which developed to the application.' (Petitioner's brief at 5.) Indeed the Board, in its order of July 13, 1973, eliminated all references which had been made in its original order to opposition to the proposed use.[FN9]

FN9. The record does not show conclusively whether all opposition to the proposed use has actually been eliminated.

We have thus far concluded that the Board erred in finding that the petitioner was not entitled to a variance on the grounds that the hardship complained of did not inhere in the 'land' and on the grounds that the hardship was 'self- created'. We have also found that the Board's Conclusion of Law No. 6 (regarding alteration of the residential character of the neighborhood by increased traffic and influx of commercial vehicles) is not supported by findings of fact and is therefore deficient. Salsbery v. District of Columbia Board of **Zoning** Adjustment, D.C.App., 318 A.2d 894 (1974). These errors require ***296** reversal of the Board's denial of the petition and a remand to the Board for further action.[FN10]

FN10. Note nature of remand in Salsbery v. District of Columbia Bd. of **Zoning** Adjust., supra.

[7][8] We recognize, of course, that it is petitioner's burden to show that it is entitled to a variance. Palmer v. Board of **Zoning** Adjustment, D.C.App., 287 A.2d 535 (1972); D.C.Code 1973, s 1-1509(b). It would therefore be proper for the Board to require petitioner to present evidence to show that its proposed use will not create traffic flow and parking problems inconsistent with an R-1-B residential neighborhood,[FN11] unless the matter can be resolved by stipulation. The Board must, of course, give the petitioner sufficient notice of the issues on which it seeks proof as required by D.C.Code 1973, s 1-1509(a).[FN12] See also Palace Restaurant, Inc. v. Alcoholic Beverage Control Board, D.C.App., 271 A.2d 561 (1970).

FN11. In the Board's original opinion (March 28, 1973) it is stated that '(c) areful examination of the entire record does not indicate with any degree of assurance that traffic congestion, i. e., parking and other vehicular ingress and egress would not eventually pose a threat to this residential neighborhood.' (Emphasis added.) A decision cannot be made based on petitioner's failure to meet its burden of proof on an issue, unless petitioner is on notice that the issue will be determinative of the decision. Palace Restaurant v. Alcoholic Bev. Con. Bd., D.C.App., 271 A.2d 561 (1970).

FN12. A proceeding before the Board of **Zoning** Adjustment is a contested case and therefore subject to the requirements of D.C.Code 1973, s 1-1501 et seq. Dietrich v. District of Columbia Bd. of **Zoning** Adjust., D.C.App., 293 A.2d 470 (1972).

We would also suggest to the Board that it take evidence on petitioner's efforts to dispose of the property. The Board found, as a matter of fact, that '(t)he applicant has been unable to transfer the facility to other religious or educational institutions.' There is no evidence or stipulation in the record to support such a finding. Petitioner proffered testimony on its efforts to dispose of the property but such evidence was thought to be unnecessary by Chairman Scrivener, based on his view that appellant's claimed hardship was not suitable for alleviation by variance, because it did not inhere in the 'land'. (Tr. 64-65, Board hearing December 8, 1971.)

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[9][10] A variance may only be granted 'where the strict application of any regulation . . . would result in peculiar and exceptional practical difficulties . . . or exceptional and undue hardship . . ..' D.C.Code 1973, s 5-420(3); see Palmer v. Board of **Zoning** Adjustment, supra, 287 A.2d at 541. In this case, a necessary element of proof of such hardship is evidence showing the inability of the applicant to make a reasonable disposition of the property for a permitted use. See 2 Anderson, supra at s 14.21.

Reversed and remanded for further proceedings.

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ZONING VARIANCES

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

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414k489

Use variance cannot be granted unless a situation 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

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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 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

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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]

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

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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 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

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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 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.

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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.

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

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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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ZONING VARIANCES

BARBOUR

District of Columbia Court of Appeals.

Edward L. and Jean R. BARBOUR, Petitioners,
v.
DISTRICT OF COLUMBIA BOARD OF **ZONING** ADJUSTMENT, Respondent.

No. 10078.

Argued April 27, 1976.
Decided June 7, 1976.
Rehearing and Rehearing en Banc Denied July 27, 1976.

Homeowners sought review of order of District of Columbia board of **zoning** adjustment which denied application for variance from side yard requirement. The Court of Appeals held that neither fact that methods of expansion of kitchen other than one requiring the variance would cost 50 to 90% more, nor fact that other methods would require elimination of interior living space or backyard space, relocation of existing utilities, and diminishment of the enjoyment of the home entitled the homeowners to the variance.

Affirmed.

West Headnotes

[1] Zoning and Planning ⚿496
414k496

Showing of uniqueness is required in order to obtain area variance in the District of Columbia. D.C.C.E. § 5-420(3).

[2] Zoning and Planning ⚿496
414k496

Fact that expansion requiring a variance is personally preferable to other methods not requiring **variances** does not constitute a unique property situation entitling owner to variance. D.C.C.E. § 5-420(3).

[3] Zoning and Planning ⚿503
414k503

Fact that homeowners might incur expenses of 50% to 90% more in pursuing methods of expansion of their kitchen other than one which would require variance and that other methods would require elimination of either interior living space or backyard space, relocation of existing utilities, and diminishment of their enjoyment of their home did not entitle them to variance from side yard requirements of **zoning** regulations. D.C.C.E. § 5-420(3).

***326** John F. McCabe, Jr., Washington, D. C., with whom Norman M. Glasgow and Whayne S. Quin, Washington, D. C., were on the brief, for petitioners.

Leo N. Gorman, Asst. Corp. Counsel, Washington, D. C., with whom Louis P. Robbins, Acting Corp. Counsel, Washington, D. C., at the time the brief was filed, and Richard W. Barton, Asst. Corp. Counsel, Washington, D. C., were on the brief, for respondent.

Before KELLY, FICKLING and KERN, Associate Judges.

PER CURIAM:

Petitioners seek review of an order of the District of Columbia Board of **Zoning** Adjustment (Board) on September 25, 1975, denying petitioners' application for an area variance under D.C.Code 1973, s 5-420(3), from the side yard requirements of section 3305.1 of the **Zoning** Regulations.[FN1] The variance was requested in order to permit petitioners to build a one-story addition to their home in Northwest Washington, located in an R-1-B district. Petitioners maintain that the Board incorrectly applied the standards set forth in Palmer v. District of Columbia Board of **Zoning** Adjustment, D.C.App., 287 A.2d 535 (1972) in reviewing their request. We disagree and affirm.

> FN1. Petitioners' first application for a variance in Application No. 11177 was finally rejected on August 27, 1973. That decision was not appealed.

In Palmer, this court discussed the standards applicable in reviewing petitions for ***327** area **variances.** We said there that (at 539):

> 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. . . . (Footnote omitted.)

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The hardship petitioners raise in this case is the relatively small size of their kitchen, owing to the construction of the house in 1941.[FN2] The practical difficulties they have encountered in considering enlargement of the kitchen in ways not requiring a variance include increased costs,[FN3] elimination of either interior living space or back yard space, relocation of existing utilities, and diminishment of the enjoyment of their home.

FN2. The kitchen measures eight feet by ten feet, and has an average width of three feet with appliances installed. Finding of Fact 2.

FN3. Expansion of the kitchen inside the house would cost approximately $18,000; expansion into the back yard would cost approximately $14,700; and neither alternative would require a variance. In comparison, expansion into the side yard if the variance were granted would cost approximately $9,500. See Findings of Fact 6, 7.

[1][2][3] Petitioners have not shown, however, that these difficulties are unique to their property in particular,[FN4] or that the added expense and inconvenience inherent in the alternative methods of expansion are unnecessarily burdensome or rise to the level of 'peculiar and exceptional practical difficulties.' See Palmer v. District of Columbia Board of **Zoning** Adjustment, supra at 539, 542; D.C.Code 1973, s 5-420(3). While petitioners may incur expenses of 50% to 90% more in pursuing these alternative methods of expansion, we have cautioned that, in the commercial context, '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.' Palmer v. District of Columbia Board of **Zoning** Adjustment, supra at 542. Increased expense is only one factor to be considered, then, and here that factor was considered, along with the inconvenience to petitioners. Notwithstanding these factors, the very fact that petitioners have at least two alternative ways of enlarging their kitchen, neither of which would require a variance, distinguishes this case from A.L.W., Inc. v. District of Columbia Board of **Zoning** Adjustment, D.C.App., 338 A.2d 428 (1975), relied on by petitioners, and supports the Board's conclusion that this situation does not present 'exceptional practical difficulties.'

FN4. Petitioners argue that a showing of uniqueness is not required in area variance applications, citing several New York cases, since unlike use **variances,** in area **variances** there is no danger of a change in character of the zoned district which should instead be accomplished by the legislature. However, if the requisite hardship in area variance requests need not be shown to be unique, then all petitioners would be entitled to expand into their side lots and the effect would be a de facto amendment of the **zoning** regulations, though concededly not a change in the character of the neighborhood. Although this court has followed New York law in some areas, see A.L.W., Inc., v. District of Columbia Board of **Zoning** Adjustment, D.C.App., 338 A.2d 428 (1975), we decline to follow those New York cases cited by petitioners that dispense with a uniqueness requirement. We believe a showing of uniqueness is required by existing case law and statute in the District of Columbia. See Palmer v. District of Columbia Board of **Zoning** Adjustment, supra; D.C.Code 1973, s 5-420(3). Nor are we persuaded, as petitioners assert, that they have established the existence of unique difficulties in complying with the existing regulation. The fact that an expansion requiring a variance is personally preferable to other methods not requiring **variances** does not constitute a unique property situation. Further, this case does not present a situation where no use could be made of the property absent a variance, as in A.L.W., Inc. v. District of Columbia Board of **Zoning** Adjustment, supra.

At this court noted in Palmer v. District of Columbia Board of **Zoning** Adjustment, supra at 542, '(t)he nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances ***328** of each particular case.' In this case, the Board's conclusion that a variance was not warranted flows rationally from its findings of fact, and those findings have support in the evidence of record. See A.L.W., Inc. v. District of Columbia Board of **Zoning** Adjustment, supra at 430; Dietrich v. District of Columbia Board of **Zoning** Adjustment, D.C.App., 320 A.2d 282, 285 (1974); Stewart v. District of Columbia Board of **Zoning** Adjustment, D.C.App., 305 A.2d 516, 518 (1973). Since the Board applied appropriate legal standards to the particular facts at hand, its order must be affirmed.

So ordered.

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ZONING VARIANCES

District of Columbia Court of Appeals.

Lawrence A. MONACO, Jr., Petitioner,
v.
DISTRICT OF COLUMBIA BOARD OF **ZONING** ADJUSTMENT, Respondent,
William Brock and William McManus, Intervenors.

No. 13321.

Argued Dec. 5, 1978.
Decided Nov. 5, 1979.

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.

West Headnotes

[1] Zoning and Planning ⚿489
414k489

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
414k496

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

[3] Zoning and Planning ⚿513
414k513

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
414k533

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
414k496

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
414k496

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

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for the organization's headquarters because of the surrounding use, the Capitol. D.C.C.E. § 5-420.

[7] Zoning and Planning ⚿490
414k490
Impairment

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

[8] Zoning and Planning ⚿496
414k496

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
414k496

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
414k496

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
414k496

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
414k496

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
414k493

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
414k495

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
414k495

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

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expansion of present site, and not to poor bargaining. D.C.C.E. § 5- 420.

[16] Zoning and Planning ⚷536
414k536

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
414k703

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
414k646

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 alleviate congestion and structure would be compatible with design and height of surrounding buildings. D.C.C.E. § 5-420.

[19] Zoning and Planning ⚷534
414k534

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
414k359

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)
92k278.2(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
414k762

Variance law is broad enough to relieve, in some instances, the strict application of the **zoning** 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.

***1094** 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**

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Adjustment's (BZA's) grant of a variance to Capitol Hill Associates, intervenors below,[FN1] under Section 8207.11 [FN2] 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.

FN1. 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.

FN2. District of Columbia **Zoning** Regulation s 8207.11, adopted pursuant to D.C.Code 1973, s 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.

Intervenors maintain that historical factors, the relationship with Congress, and ***1095** past actions of the BZA and **Zoning** Commission create an "extraordinary or exceptional situation or condition" so as to fulfill the statutory variance requirement. [FN3] 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.

FN3. D.C.Code 1973, s 5-420, is substantially identical to **Zoning** Reg. s 8207.11, Supra note 2.

The BZA ruled with intervenors and granted a variance. Petitioner Monaco [FN4] 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.[FN5]

FN4. Mr. Monaco resides at 123 C Street, S.E., in the same block as the subject site.

FN5. D.C.Code 1973, ss 1-1501 1-1510.

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 # 816 on 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

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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 variance ***1096** lapsed after six months.[FN6] 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.

FN6. See **Zoning** Regs. ss 8205.11, 8205.12.

[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. [FN7] 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.

FN7. See D.C.Code 1973, s 5-420; **Zoning** Regs. s 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.

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 Commission 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

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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;
>
> ***1097** 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 reappraise***1098** 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 s 38.06(2) (4th ed. 1979) (variance rights should not be lost through delay in exercise if conditions remain

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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** s 14.78 (1968).

[8] The restrictive covenant between intervenors and the House Office Building Commission provides evidence of the unique ***1099** 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

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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, s 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, s 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 ***1100** 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

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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).[FN8]

FN8. 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.

***1101** [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.

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[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 ***1102** 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.[FN9]

> FN9. 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.

BZA Supplemental Rules of Practice & Procedure s 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, s 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

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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. ***1103** 1044, 12 L.Ed.2d 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 faith reliance 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.

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Client Identifier: **75067/05119**
Date of Request: 06/04/2002
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