GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING

Office of the Director

MEMORANDUM

TO: D.C. Board of Zoning Adjustment

FROM: Andrew Altman, Director

DATE: September 11, 2002

SUBJECT: Waiver of Rules for Late Submission of Office of Planning Report
BZA Application No. 16911
700 Brandywine Street, Square 6163, Lot 125

The attached Office of Planning report on Application No. 16911 is being submitted less than 7 days prior to the Board of Zoning Adjustment's consideration of the application at the scheduled public hearing. The application is a request for a two Special Exceptions and four variances at 700 Brandywine Street, SE.

OP requests that the Board waive its rules to receive the report into the record.

Attachment

aa/sc

BZA
Case No. 16911
Exhibit No. 29

Board of Zoning Adjustment
District of Columbia
CASE NO.16911
EXHIBIT NO.29

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING

Office of the Director

MEMORANDUM

TO: Board of Zoning Adjustment

FROM: Andrew Altman, Director

DATE: September 10, 2002

SUBJECT: BZA Application No.16911
Application of Brandywine Street Association
700 Brandywine Street, S.E.
Square 6163, Lot 125

I. APPLICATION SUMMARY

The applicant, Brandywine Street Association (BSA), is a non-profit community-based group in far Southeast Washington, D.C. It wishes to gut a vacant and abandoned apartment building in its Ward 8 neighborhood and convert it into a child development center and community service center. The BSA purchased the apartment building from the District's Department of Housing and Community Development Homestead Program for this express purpose. It is now asking the Board of Zoning Adjustment (BZA) for 2 special exceptions and 4 area variances to help enable the conversion.

Specifically, the applicant is requesting:

- A Special Exception to establish a child development center pursuant to 11DCMR §2051;
- A Special Exception to establish a community service center pursuant to §334;
- A FAR variance from §402.4;
- A lot occupancy variance from §403.2;
- A parking variance from §2101;
- A court width variance from §406.1.

II. OFFICE OF PLANNING SUMMARY RECOMMENDATION

The Office of Planning (OP) cannot recommend the Board approve this application as of September 11, 2002. If the applicant and the District Department of Transportation are able to submit additional material, OP will attempt to review it, and to update our report and recommendation., if appropriate.

III. SITE AND AREA DESCRIPTION *(See Attachments 1 and 2)*

Square 6163 in southeast Washington is bounded by:

- North: Atlantic Street, SE
- East: Barnaby Road, SE
- South: Brandywine Street, SE
- West: 6th Street, SE

The Square is orthogonal on three sides and angled on the east. There is a public alley bisecting the entire square from east to west. It is a relatively long block from east to west.

Lot 125 is orthogonal on three sides and is sharply angled on its western edge. It is bordered by Brandywine Street on the south, the public alley on the north, a single-family house on the west and an apartment building on the east.

The angle on the western edge dictates a narrowing of the lot's 76.5-foot frontage on Brandywine Street to a 25.5-foot rear lot line at the alley. There is also a 16-foot grade difference (within a 109-foot distance) between the lower front and the higher back of the site.

The site is occupied by a 3½ story apartment building typical of post-World War II construction in many parts of the R-5-A zone district. The building has been vacant for many years and has deteriorated to the extent that over the 1½ year period the Department of Housing and Community Development (DHCD) marketed it for homestead purposes, there were no takers. Only the foundation and the exterior walls remain sound enough for re-use.

The site is bordered on the east and southeast by similar, but maintained and occupied, apartment buildings. There are single-family houses to the west, north and southwest. Oxon Run Park and Recreation Center is five blocks to the north. The Prince George's County, Maryland line is four blocks to the south.

IV. AREA ZONING AND HISTORIC DISTRICTS *(See Attachment 2)*

The site is zoned R-5-A, as is most of surrounding neighborhood. There are two small, isolated pockets of C-1 zoning 1½ blocks southeast and 4 blocks northeast of the site.

There are no nearby historic districts or designated structures.

V. PROJECT DESCRIPTION

The Brandywine Street Association (BSA) is a registered non-profit association of groups and individuals organized in 1995 solely for the improvement of Brandywine Street and the immediately

surrounding neighborhood. The group's credentials are included in the applicant's pre-hearing statement.

BSA purchased 700 Brandywine Street from DHCD in mid-2001 with the express purpose of turning the abandoned property into a *de facto* community center. This center is intended to include:

- A child development center for 46 children generally under 5 years of age, with 9 – 10 staff. This will be open from 6 a.m. to 7 p.m.;
- A program for 15 youths over 5 years of age, with 1 – 2 staff;
- A community services center open during unspecified day and evening hours; This will include:
  - A computer skills center;
  - A counseling center;
  - A police community outreach post;
  - A community meeting room;
  - An accessory laundry facility[1] ;
- BSA's office.

The proposed location of these facilities is labeled in the architectural plans submitted by the applicant. The applicant proposes to accommodate the facilities in a structure that would gut the existing apartment building, due to deterioration and the consequently high cost of renovation. The foundation and the exterior walls would remain. There would be additions for building-code related stairs and an elevator, as well as an entrance porch for the accessibility ramp, and an office for the BSA. Portions of the site would be re-graded, and retaining walls constructed, to enable the play spaces to meet code-mandated 1st floor access requirements. An ADA compliant ramp would be constructed, extending into the public space and to the curb. There would be two parking spaces in the back, off the alley. The overall size of the building would increase from approximately 5,000 square feet to approximately 7,000 square feet.

VI. RELATIONSHIP OF THE APPLICATION TO THE COMPREHENSIVE PLAN (*See Attachment 3)*

The Comprehensive Plan's Generalized Land Use Map designates the area as suitable for low and moderate density residential use. It is not atypical for child development centers and community service centers to be requested for such areas as special exceptions.

The project appears to be consistent with several of the written elements of the Comprehensive Plan.

> 10 DCMR Section 1927.1(b)(2)(1) and (2) note the scarcity of child care centers and encourage the identification of potential sites for additional child care facilities.

[1] Referred to as a laundromat in the text, but since clarified as a non-commercial facility, intended to serve only the uses of the child development center and community center, and not for commercial operation.

§ 1927.1(c) (1) and (2) emphasize the need to secure vacant and abandoned buildings as, among other reasons, a deterrent to the drug activity that the Ward and its neighborhoods are working hard to eliminate.

§1906.1(g) includes the important objective: "Develop attractive training and employment alternatives to drug-related criminal activity for Ward 8's underused labor force, particularly its youths." The Brandywine Street Association is seeking to do this at the proposed facility through its community center, and its employment training programs, especially those emphasizing computer training

Throughout the Ward 8 section of the Comprehensive Plan there is awareness of the social needs of the Ward 8 community.

VII. DOES THE APPLICATION MEET THE TESTS FOR THE REQUESTED ZONING RELIEF?

A. Special Exceptions Tests

Pursuant to 11 DCMR § 3401.1 the applicant is requesting two special exceptions.

1. Section 205, Child Development Center Tests

This would be for 8 infants less than two years old, up to 38 children between two and one half and five years old, and up to 15 children over the age of 5. There would be ten staff and two aides.

- §205.2: The Center Shall Be Capable of Meeting All Applicable Code and Licensing Requirements

  Most of the variances the applicant is requesting are due to the applicant's having to meet building code requirements. The District's Child and Residential Care Division of the Department of Health is overseeing the applicants compliance with all licensing requirements and has recommended adoption of the applicant's requested zoning relief. (See case file).

- §205.3: The Center Shall be Located and Designed to Create No Objectionable Traffic Condition and No Unsafe Condition for Picking Up and Dropping Off Children or Elderly Persons.

  The applicant repeatedly states that almost all of the center's children, parents and staff live close-by and will walk to the center. The pre-hearing statement notes that Brandywine Street is a little-known street with little if any through-traffic. It also cites an informal BSA survey indicating the daytime-availability

of 28 on-street parking spaces. The applicant argues that the combination of these conditions will ensure that the center will create no unsafe traffic conditions, and that, despite there being no drop-off/pick-up area (due to a combination of topography and ADA accessibility requirements), drop-off and pick-up conditions will be safe.

However, no traffic studies have been provided. The District Department of Transportation (D-DOT) is reviewing the application, and anticipates submitting a report before the hearing.

- §205.4: The Center Shall Provide Sufficient Off-Street Parking Spaces to Meet the Reasonable Needs of Teachers, Other Employees, and Visitors

  There will be twelve staff at the center. 11 DCMR §2101 thus requires 3 parking spaces. The applicant states that the staff will be drawn primarily from the community and that, therefore, two parking spaces will be sufficient. This has not been documented. The applicant does state that a survey of available street parking spaces between the hours of 8 a.m. and 6 p.m. indicates that 28 street spaces are available. In discussions with OP, D-DOT staff has said it believes sufficient street parking is available. OP believes the availability of on-street parking should meet the reasonable needs of the center.

- §205.5: The Center, Including Outdoor Play Space Provided, Shall be Located and Designed So That There Will Be No Objectionable Impacts on Adjacent or Nearby Properties Due to Noise or Activity, or Visual or Other Objectionable Conditions

  The proposed facility is to be located in an abandoned building that has been a blight on the community and that is alleged by the applicant to be have been a physical danger to the community. None of the neighbors have registered written objections to the application, nor is OP aware of any oral objections. There would undoubtedly be noise from the play areas. These play areas are located at the west and north sides of the property, below the grade of adjacent properties. Noise would, to some extent, be mitigated by the retaining walls acting as sound-reflecting devices. The single-family house to the west is located at the western side of that property, at least twenty feet away from the play areas. The retaining walls will also serve to keep children from running onto adjacent properties. The renovated building will be no taller than the existing structure. It is OP's opinion that there will be minimal, if any, objectionable impacts on neighboring properties. However, see below for OP's recommendation for a fence on the western property line

- §205.6: The Board May Require Special Treatment in the Way of Design, Screening of Buildings, Planting and Parking Areas, Signs, or Other

Requirements as It Shall Deem Necessary to Protect Adjacent and Nearby Properties

The building is generally well designed. The addition of the porch-like entrance would establish a presence on the street that would mitigate the impact of the ramp and retaining wall.

OP believes the Board should require the construction of a privacy fence along the western property line, in order to further screen the play areas and to keep people from the neighboring property out of the play space. This would address concerns under both §205.6 and §205.6.

- §205.7: Any Off-Site Play Area Shall be Located So as Not to Result in Endangerment to the Individuals in Attendance at the Center in Traveling Between the Play Area and the Center Itself
  There would be no off-site play areas. All play-space requirements would be met on-site, in the side yard, to the west, and in the back yard, to the north.

- §205.8: The Board May Approve More than One (1) Child/Elderly Development Center Only When the Board Finds That the Cumulative Effect of These Facilities Will Not Have an Adverse Impact on the Neighborhood Due to Traffic, Noise, Operations, or Other Similar Factors.

  Because there is a 3-child development center located at 706 Brandywine Street, which is immediately to the east of the proposed facility and the 180-child South East Child Development Center just under 1,000 feet away on 6th Street, SE, the Board must determine whether the cumulative effect of the existing facilities and the proposed facilities will not have adverse impacts on the neighborhood due to traffic, noise, operations, etc. The larger facility is located in a church building, which, with its adjacent parking lot, appears on OP's visual inspection to be adequate to contain the "operational facilities" (presumably pick-up and drop-off, stacking, parking) within the site. Given this, the small size of the 706 Brandywine facility, and the lack of impact from the proposed 700 Brandywine facility, the applicant states there would be no cumulative negative effects on the immediate neighborhood these facilities are intended to serve.

  The child development center at 706 Brandywine Street serves only three children. Because of its small size the *cumulative* nature of the impact of centers at 700 Brandywine and 706 Brandywine would be difficult to measure. The center on 6th Street is over 900 feet away. OP is awaiting the report from D-DOT to assess possible cumulative traffic impacts from the center on 6th Street and the proposed center at 700 Brandywine Street will be acceptable.

- §§205.9 and 205.10: Before Taking Final Action on an Application for Use as a Child Development Center and/or Elderly Day Care Center, the Board Shall Submit the Application to the D.C. Departments of Public Works and Health, the D.C. Office on Aging and the D.C. Office of Planning, for Review and Written Reports. The Referral to the D.C. Department of Human Services Shall Request Advice As to Whether the Proposed Center Can Meet All Licensing Requirements Set Forth in the Applicable Laws of the District.

  The Office of Zoning referred the application to the Department of Health, which has filed its support of the project and has stated it will oversee licensing requirements; to D-DOT, which is currently reviewing the project; and to OP.

2. Section 334, Community Service Center

The non-child development center uses of the proposed facility qualify as a community service center.

- §334.2: A Community Service Center Shall Be Located So That It is Not Likely To Become Objectionable to Neighboring Properties Because of Noise or Other Objectionable Conditions

  The center's objectives are to help rectify the objectionable conditions that currently exist in the neighborhood through community services such as job training, skills enhancement, and providing a safe place to congregate and play. However, the applicant has not given an indication of what type of meetings might be held at night, nor how large they would be. The applicant has stated that, given the service radius intended by the proposed facility, it is likely that the majority of users will walk to the center. OP has requested additional information on the type, size and number of evening events anticipated for the center. OP has also asked D-DOT to review the applicant's discussion of parking requirements for the Center.

- §334.4: The Use Shall be Reasonably Necessary or Convenient to the Neighborhood in Which It is Proposed to be Located.

  Both the applicant's pre-hearing statement, and Census 2000 profiles of this area of Ward 8 make the need for such services abundantly clear. The proposed center is located in the heart of the community and is not separated from the residential area by any major streets or divides.

- §334.5: A Community Service Center Shall Not be Organized for Profit, and No Part of Its Net Income Inures to the Benefit of Any Private Shareholder or Individual

The applicant has provided documentation of its IRS tax-exempt status.

3. § 3102.4: Harmony With the General Purpose and Intent of the Zoning Regulations and Maps and Lack of Adverse Effect on Neighboring Properties.

   Among the purposes and intents of the Zoning Regulations and Maps are to help stabilize neighborhoods, give them a reasonable sense of certainty about their futures, and to protect them from noxious and inappropriate uses and physical impacts. The objectives of the proposed child development center and community services center are consistent with these purposes and intents.

B. **Variance Tests**

The applicant is requesting four area variances on a 5,583 square foot lot: FAR, Lot Occupancy, Court Width and Parking. These relief requests are summarized in the following table.

Type of Relief	Permitted or Required as Matter of Right	Existing Structure	Proposed	Degree of Relief Requested
FAR	.9 (5,025 sf)	.91 (3,064 sf)	1.24 (6,940 sf)	+37%
Lot Occupancy	40% (2,233 sf)	30% (1,687 sf)	46% (2,576 sf)	+6% (15%)
Court	4"/1'of court ht. (10'11")	None existing	8'7" @ entry level 18'11" provided @ 2nd story & above	- 1'4" approx. 10%
Parking Spaces	At least 10 spaces [Child center: 1 per staff (3 spaces); Public Assembly Area: 1 per 10 seats for the computer learning center where applicant assigns 487sf to use @ 7sf/seat (7	No spaces provided, although 7 would have been required under current zoning for the previous 7-unit apartment building	2 spaces	1 space[4]

[2] Parking requirements for public meeting purposes are based on square footages, since there will be no fixed seating. According to the applicant, 10 seats would be required. However, again according to the applicant, the "grandfathering" of the relief from 7 parking spaces by virtue of the building being a pre-1959 structure with 7 units means that the applicant would be required to provide only 3 spaces. By this reasoning, since the applicant would be providing 2 spaces, the applicant is asking for relief from 1 parking space. OP has asked D-DOT to review this.

	spaces); Other Uses: unclear from application			

i. <u>Uniqueness</u>: *Is the property exceptionally narrow, shallow, of a shape or with topography, or possessing of other extraordinary or exceptional situations or conditions of the specific piece of property that make it unique?*

The property does have exceptional conditions.

The lot is irregularly shaped, narrowing from 76.5 feet in the front to 25.5 feet in the back. Almost all of the other lots on the block are rectangular, about 67' wide and 109'6" deep.

The site slopes steeply at the rear, being 16' higher at the rear of the property than at the front sidewalk.

The blighted condition of the building is also exceptional, requiring total reconstruction of the interior, and additional construction to enable the building to meet current building code requirements.

The applicant contends that its small size in relation to its neighboring lots makes it unique. OP notes that a 5,583 square foot lot is not particularly small for an R-5-A zone district, even if it is 1800 sf smaller than some of the other lots on the block.

ii. <u>Practical Difficulties or Hardship</u>: *Would there be "practical difficulties" that would be "unnecessarily burdensome" and impose "undue hardship to the Applicant" should the variance not be approved?*

There would be practical difficulties.

The applicant's request results from two major circumstances. First the applicant is reusing an existing building. Second, the lot is too small and irregular to meet the building code, licensing, and ADA requirements and still serve the intended purposes unless the applicant receives relief from the Zoning Regulations. The applicant has attempted to maximize the square footage of the areas for child development center and community center programs by externalizing construction required to meet newer building code and ADA-related requirements. Such construction includes the stair towers, the elevator and the landing area for the access ramp. All of this affects FAR and lot occupancy significantly. The applicant estimates that internalizing the stair

towers and elevators would reduce the usable square footage of the existing building shell by 25%, and reduce the number of children that could be served from 61 to 45.

The applicant has chosen to meet its requirements for an office and reception area by also externalizing them, which would lead to the creation of a sub-standard open court at the first floor level of the side of the building.

It would be practically difficult and burdensome to provide the required parking. The rear of the lot, off of the alley, is about 25'6" deep. The three required 9'wide parking spaces would require 27' of width. To stack the spaces down the length of the side would:

- require building a platform, due to the steep slope of the rear yard, and;
- eliminate much of the required play area.

OP has asked the applicant to address whether the center would be unworkable if its size were reduced so that all of the variances currently being requested, with the exception of the parking variance, would not have to be requested.

OP also notes the applicant indicates the argument in the applicant's pre-hearing statement, that when the applicant is a non-profit group, the Board may take that status into consideration as well as the proposed use of the building for the public interest. (*See Attachment 5 for case decision*).

VIII. COMMUNITY COMMENTS

The applicant had been unable to contact the ANC. OP was able to reach ANC 8E's chair at home on September 5, 2002 and has put the applicant in touch with him. The chair hopes that a letter from him, and possibly from the single member district Commissioner will be forthcoming. However, the chair did not anticipate there being a formal ANC position on the application.

X. OTHER AGENCY COMMENTS

The Department of Health has recommended the BZA approve the requested zoning relief.

D-DOT is currently reviewing the parking and traffic considerations, but had not submitted a report as of the time the OP report was complete on September 11, 2002.

Other than D-DOT's no other agency comments are anticipated.

XI. OP RECOMMENDATION

OP feels that as a matter of comprehensive plan policy, the location of a child development center and community center at 700 Brandywine Street would likely have a beneficial impact on the surrounding community. OP recommends approval of the special exception for a child care

center contingent upon D-DOT's determining there is no adverse impact from traffic or the reduction in parking spaces from 3 to 2.

OP recommends approval of the special exception for the community service center subject to and contingent upon the following conditions:

1. The applicant work with D-DOT to determine that there is no adverse impact from traffic in combination with the child care center (§§ 205.3, 205.4 and 205.8) and;
2. The applicant work with D-DOT to determine that there are no unacceptable impacts from evening meetings at the center (§334.2).

OP has insufficient information to make a recommendation on the following area variance requests at this time:

- FAR (§402.4)
- Lot occupancy (403.2)
- Court Width (§406.1)

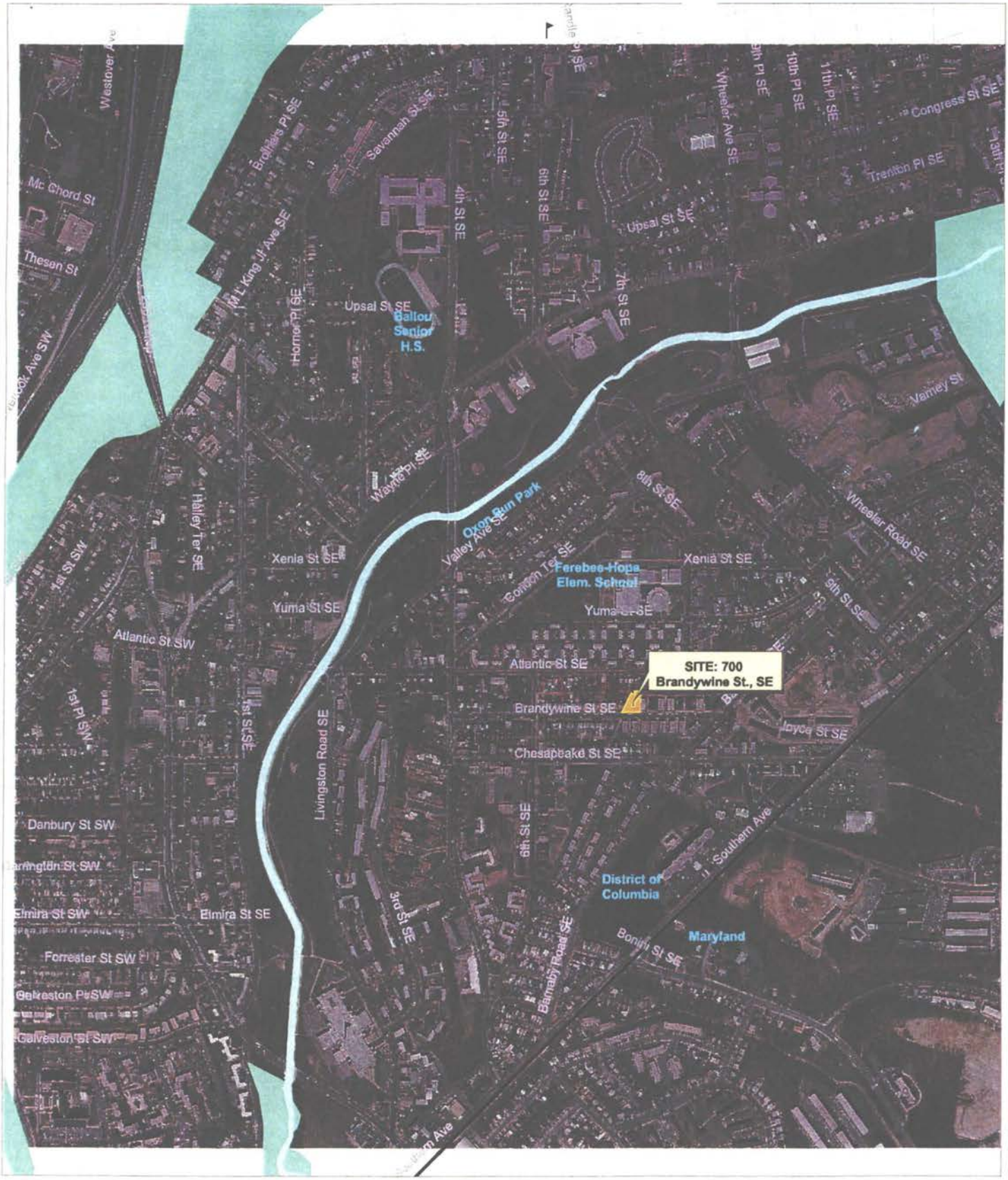
OP has asked the applicant to provide additional information to establish why the building cannot be built to current zoning requirements.

Should the Board decide to approve the application, OP recommends that the Board require the construction of a privacy fence along the western property line, in order to further screen the play areas and to keep people from the neighboring property out of the play space. This would address concerns under both §205.5 and §205.6.

AA/slc

Attachments

1: Location Map
2: Zoning Map and Location of Nearby Child Development Facilities
3: Comprehensive Plan Land Use Map
4: Letter from DHCD regarding sale of property
5: Monaco v. BZA



Feature Key

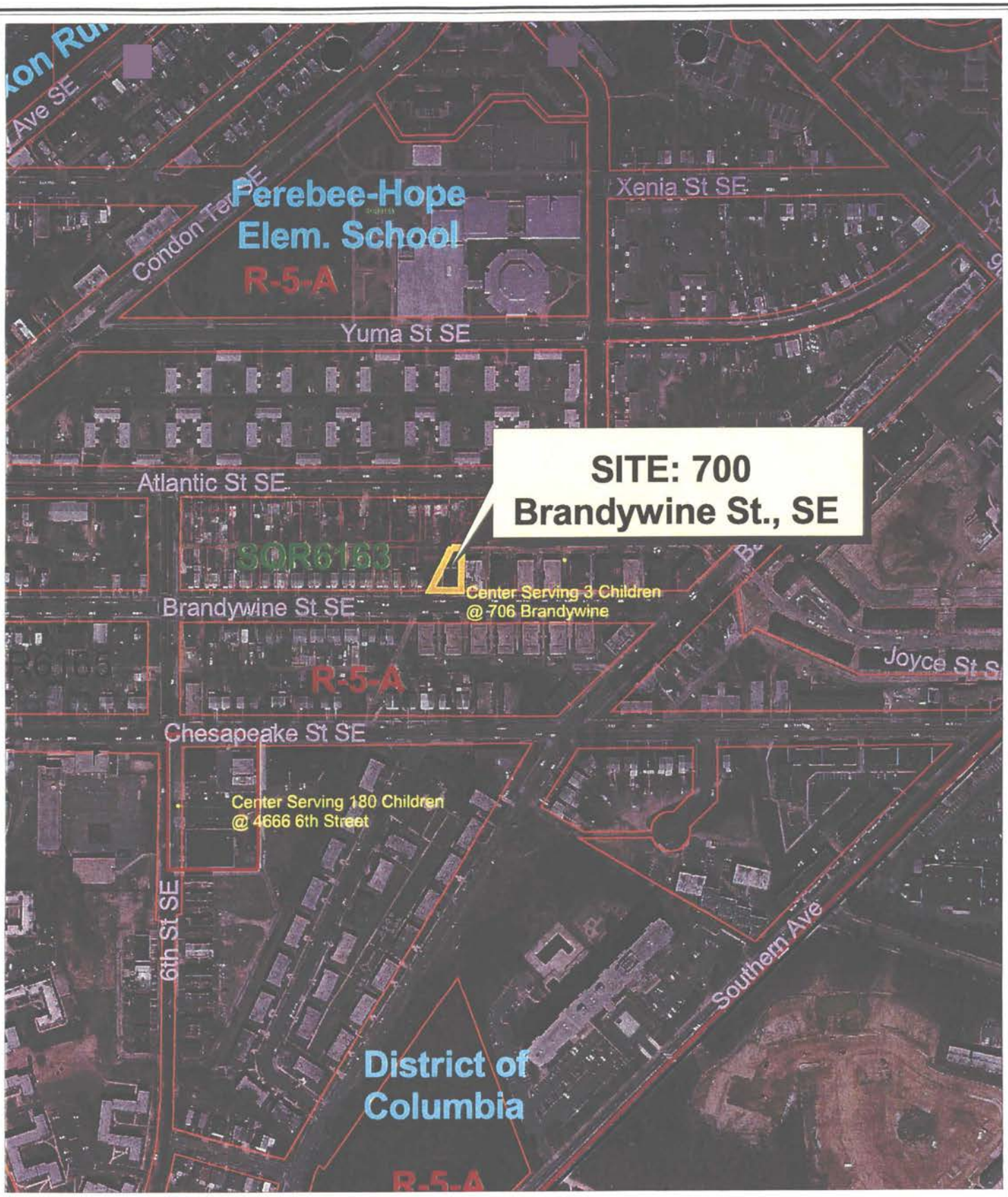
- Zoning Boundaries
- Square Index

Board of Zoning Adjustment
Application No. 16911
700 Brandywine St., SE

DC Office of Planning
August 1, 2002

Scale 1:11271

Attachment 1



Feature Key

Zoning Boundaries

Square Index

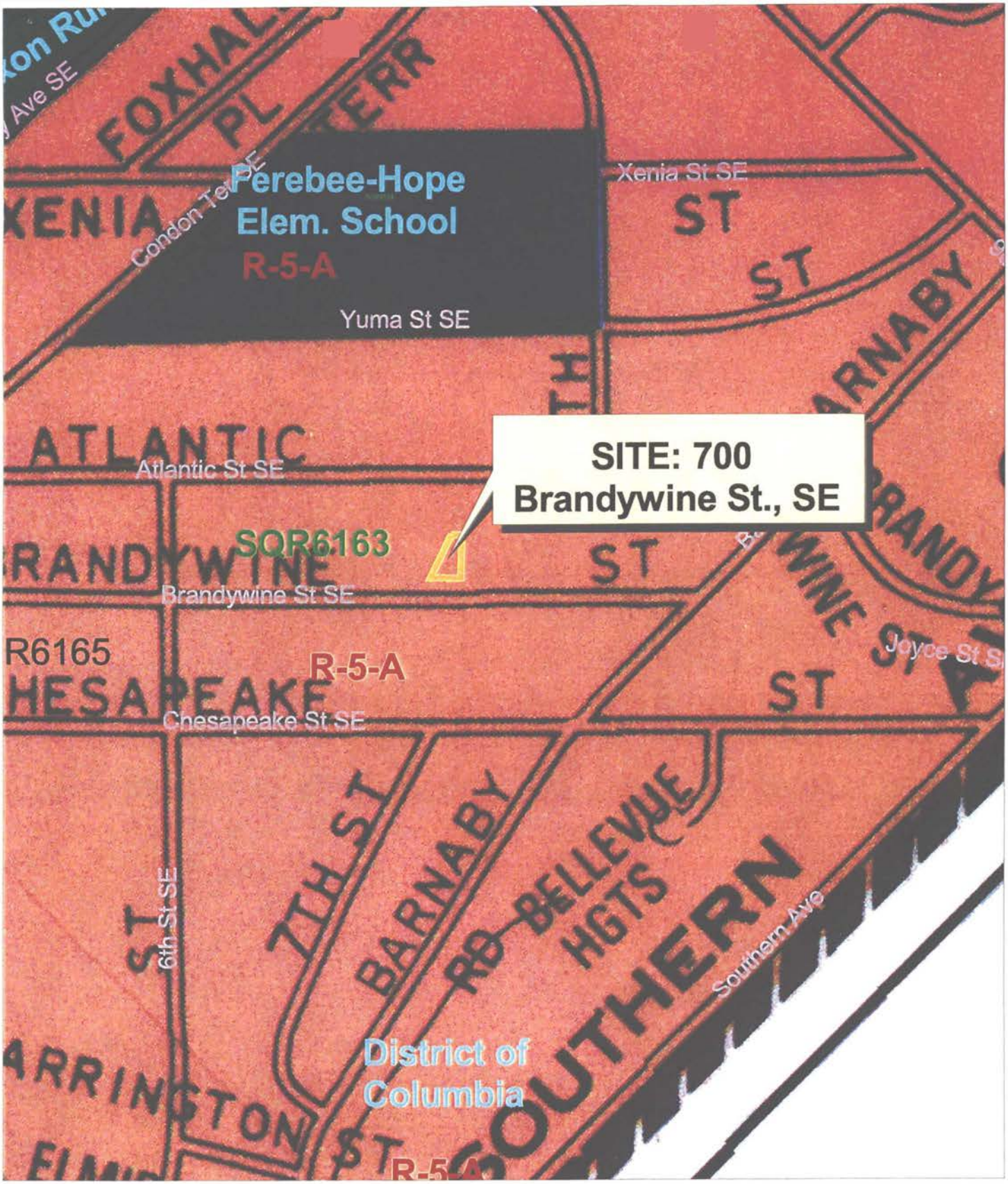
Board of Zoning Adjustment
Application No. 16911
700 Brandywine St., SE

DC Office of Planning
August 1, 2002

Scale 1:4021

N

Attachment 2



Feature Key

- Zoning Boundaries
- Square Index

Board of Zoning Adjustment
Application No. 16911
700 Brandywine St., SE

DC Office of Planning
August 1, 2002

Scale 1:4021

Attachment 3

ATTACHMENT 4
3

District of Columbia Government
Department of Housing and Community Development

Postit Fax Note #7673 | Date 9/10/02 | # of pages 3
To M.C. Brown
Fax# 202.955.5564
From A. Congdon
Phone# 301.261.1664

HOMESTEAD PROGRAM ADMINISTRATION
801 North Capitol Street, #6100
Washington, DC 20002
July 10, 2000

Mr. Harry Darnell Hooker
President
Brandywine Street Association
717 Brandywine Street, SE
Washington, DC 20032

Dear Mr. Hooker:

Congratulations! The Brandywine Street Association has been selected to develop the District's Homestead property located at 700 Brandywine Street, S.E.

The purchase price for the property is $3,000. If you wish to accept this offer, a $250 deposit must be paid by cashier's or certified check, payable to the District of Columbia Treasurer, no later than Friday, July 21, 2000, at 4:00 p.m., at the Homestead Program Administration, D.C. Department of Housing and Community Development, 801 North Capitol Street, Room 6100. You also must submit the enclosed affidavit -- signed and notarized -- at that same time.

As developer of the property, you would be required to:

1. Rehabilitate the property as a community center that meets the appropriate code standard;
2. Secure the property prior to and during rehabilitation; and
3. Submit all architectural plans to the Architectural Research Institute for approval.

Closing must take place no later than August 31, 2000. The Homestead Program Administration will lend Building Bridges Across the River $100,000 for construction and closing costs. It must be understood, however, that this would be a deferred second mortgage to be repaid at 3% interest should either the ownership or property use change. ?

Please contact Ms. Jean Washington on 442-7155, as soon as possible, and advise her as to which company will handle your settlement. This will enable her to submit the requisite paperwork to ensure our having a check for you at the settlement table.

Contact Stanley Fields on 442-7196 should you wish to enter the property prior to settlement.

The University of the District of Columbia's Architectural Research Institute (UDC/ARI) is available to provide technical assistance and assistance with building permits. We would require ARI's approval of your plans.

It is my genuine hope that you will be able to transform this property into a community center that will serve the surrounding community for years to come.

Sincerely,

Lynn C. French
Homestead Program Administrator

Encl.

LEXSEE 407 A.2d 1091

LAWRENCE A. MONACO, JR., PETITIONER, v. DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT; WILLIAM BROCK & WILLIAM McMANUS, INTERVENORS

No. 13321

District of Columbia Court of Appeals

407 A.2d 1091; 1979 D.C. App. LEXIS 473

December 5, 1978, Argued

November 5, 1979, Decided

PRIOR HISTORY:
[1]**

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

DISPOSITION:
Affirmed.

COUNSEL:
Lawrence A. Monaco, Jr., pro se.

Richard W. Barton, Deputy Corporation Counsel, and Leo N. Gorman, Assistant Corporation Counsel, entered appearances for respondent and adopted the brief of the intervenors.

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

JUDGES:
Kern and Gallagher, Associate Judges, and Yeagley, Associate Judge, Retired.

OPINIONBY:
GALLAGHER

OPINION:

[*1094] Petitioner appeals the Board of Zoning Adjustment's (BZA's) grant of a variance to Capitol Hill Associates, intervenors below, n1 under Section 8207.11 n2 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.

n1 Messrs. Brock and McManus are trustees for the Republican National Committee, beneficial owners of the property. Capitol Hill Associates, the applicant before the BZA, was under contract to convey the property to the Republican National Committee. **[**2]**

n2 District of Columbia Zoning Regulation § 8207.11, adopted pursuant to D.C. Code 1973, § 5-420, provides as follows:

8207.11. Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under this Act would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance from such strict application so as to relieve such difficulties or hardship, provided such relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map.

Intervenors maintain that historical factors, the relationship with Congress, and **[*1095]** past actions **[**3]** of the BZA and Zoning Commission create an "extraordinary or exceptional situation or condition" so as to fulfill the statutory variance requirement. n3 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.

n3 D.C. Code 1973, § 5-420, is substantially identical to Zoning Reg. § 8207.11, *supra* note 2.

The BZA ruled with intervenors and granted a variance. Petitioner Monaco n4 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 **[**4]** 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. n5

n4 Mr. Monaco resides at 123 C Street, S.E., in the same block as the subject site.

n5 D.C. Code 1973, § § 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 **[**5]** 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 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 **[**6]** 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. n6 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.

n6 *See* Zoning Regs. § § 8205.11, 8205.12.

[7]**

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. n7 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.

n7 *See* D.C. Code 1973, § 5-420; Zoning Regs. § 8207.11, *supra* note 2; *Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851, 853 (1939).* In *Palmer v. Bd. of Zoning Adjustment, D.C.App., 287 A.2d 535, 541 (1972),* this court held that an applicant for a use variance, as in this case, must meet the higher standard of "undue hardship" rather than the "practical difficulties" required to justify an area variance.

[8]**

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 **[**9]** of fact is also relevant to the question of uniqueness:

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

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 **[**10]** 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 **[**11]** 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

[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 [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.]*

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 **[**12]** 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, 239 N.E.2d 713, 717, 293 N.Y.S.2d 75, 81 (1968)* (difficulty which sets a property apart from its neighbors need not be physical but can stem from the zoning history of the case).

Petitioner reasons that the **[**13]** 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 § 38.06[2] (4th ed. 1979) (variance rights should not be lost through delay in exercise if conditions remain the same). *See also Madden v. Zoning Board of Review, 89 R.I. 131, 151 A.2d 681 (1959); Nuckles v. Allen, 250 S.C. 123, 156 S.E.2d 633 (1967)* (board without authority to revoke a variance on which a subsequent owner has relied).

When the BZA reassessed the neighborhood and the project after the 12-year interval, it found circumstances **[**14]** 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.

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 **[**15]** *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).

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 **[**16]** did mention economic conditions, *id. at 539,* and character of surrounding uses, *id. at 540,* as possible criteria for determining uniqueness along with topography and geographic factors. The Republican National Committee's wish to move to the subject site does not make the site unique. Nevertheless, the site is uniquely suitable for their headquarters because of the surrounding use, the Capitol. While a commercial user before the BZA might not be able to establish uniqueness in a particular site's exceptional profit-making potential, we consider that the BZA may be more flexible when it assesses a non-profit organization which is a well established element of our governmental system. As Professor Anderson has observed, public need for the use is an important factor in granting or denying a variance and "the apparently objective standards of the enabling acts are applied differently to the several kinds of uses ...." 3 R. ANDERSON, AMERICAN LAW OF ZONING § 14.78 (1968).

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 **[**17]** 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.

The fact that a building has already been constructed on the adjoining property is another factor which may be considered in finding uniqueness. In *Clerics of Saint Viator, Inc. v. District of Columbia Board of Zoning Adjustment, D.C.App., 320 A.2d 291 (1974),* we stated that existing structures are as important as topography in creating "other extraordinary or exceptional situation or condition of a specific piece of property." *Id. at 294.* Petitioner argues that the existing building is not on the subject site, and thus cannot be taken into account. Only occasionally are cases found in which a variance is granted on one parcel to remedy the deficiencies of another. *See Kenmore Joint Venture* **[**18]** *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. Commw. Ct. 341, 383 A.2d 1286 (1978)* (grant of variance for expansion of townhouses based on dictates of business). *Cf.* 2 R. ANDERSON, *supra,* § 14.29.

The characterization of the use as a public service will again be significant. For example, "A commercial nonconforming user who needs parking facilities cannot satisfy the requirement for a use variance ... without proving that the proposed site will not yield a reasonable return for a conforming use, that the difficulty is caused by unique circumstances, that the use will not materially alter the neighborhood. No such burden is usually imposed on a hospital." 2 R. ANDERSON, *supra,* § 1478. See also *Lincoln Central Association v. Zoning Board of Appeals, 30 Ill. App. 3d 258, 332 N.E.2d 510, 517 (1975),* in which the court accepted a different type of uniqueness for a hospital than for an ordinary commercial user. The hospital, as a single purpose structure, argued that an addition was necessary to its **[**19]** 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.

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. Commw. Ct. 139, 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 **[**20]** and Board of Zoning Adjustment.

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.

Applicants' good faith, detrimental reliance on previous zoning **[**21]** actions can also be relevant to determine undue hardships, the second branch of the variance test. The BZA property found undue hardship when

> [the] 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].

It is true that normally an owner suffers no undue hardship when his property can produce a reasonable profit in a permitted use. *Palmer, supra at 542; Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851 (1939).* Petitioner contends that the subject site could profitably be used for townhouses, and that the Republican National Committee's need for more office space is irrelevant. In support of this contention, petitioner cites a number of cases where an owner sought to expand an existing use, but a variance to expand was denied because the limited profitability of the **[**22]** 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 **[**23]** 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 unprofitabilty 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). n8

> n8 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, 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.

[24]**

[*1101] 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 **[**25]** 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).

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 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.

Our inquiry is limited to whether findings are **[**26]** 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.

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 **[**27]** 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. n9

n9 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 § 4.71 provides that "[parties] to **[**28]** 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, "We are unable to find anything in Title 20 of the D.C. Rules and Regulations requiring the proposed findings to be served upon other parties." *Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment, D.C.App., 355 A.2d 550, 555 (1976).* Nor does the submission of proposed findings after the record is closed violate the District of Columbia Administrative Procedure Act. D.C. Code 1973, § 1-1509(b), requires that every party be given the right to be present, submit rebuttal evidence, and cross-examine at contested case proceedings. Petitioner took advantage of this right during the hearing itself.

In support of his position petitioner **[**29]** 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, 99 L. Ed. 467, 75 S. Ct. 409 (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, 89 L. Ed. 1171, 65 S. Ct. 770 (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 **[**30]** has no opportunity to challenge its worth. Here, the material submitted to the Board was not evidence, but rather conclusions which might be drawn from the evidence already included in the record.

Due process considerations differ with respect to evidence in the record and proposed findings of fact and conclusions of law, as is shown by a number of challenges under Federal Rule of Civil Procedure 52(a) (in non-jury 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.

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 **[**31]** 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, 12 L. Ed. 2d 12, 84 S. Ct. 1044* **[*1103]** *(1964); United States v. Crescent Amusement Co., 323 U.S. 173, 184-85, 89 L. Ed. 160, 65 S. Ct. 254 (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.

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 **[**32]** 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.

d.

District Division of Transportation

FAX TRANSMITTAL

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BZA Case No. 16915	(202) 671-2238

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NOTES/COMMENTS:

See attachments

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