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October 1, 2002

MARY CAROLYN BROWN
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VIA HAND DELIVERY

Board of Zoning Adjustment
for the District of Columbia
Office of Zoning
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: BZA Application No. 16911
Motion for Reconsideration of Three-Year Time Limit

Dear Members of the Board:

On behalf of Brandywine Street Association ("Brandywine"), the applicant in the above-referenced case, we hereby request the Board of Zoning Adjustment ("Board" or "BZA") to reconsider its decision to limit the special exception approval for the child development and community center at 700 Brandywine Street, S.E., to three years. The three-year time limit will effectively preclude Brandywine from financing and proceeding with the project, as described in greater detail below.

1. Background

On September 17, 2002, the Board considered the above-referenced case and voted 4-0-1 to approve the special exception and variance relief requested without any time limitation. Early that same evening, the Office of Zoning notified the applicant that, after it had heard its last case for the day, the Board reopened the record in Application No. 16911 and voted 4-0-1 to limit the approval period for the special exceptions to three years. Recognizing that the applicant was not present for this discussion, the Board indicated that the

BZA
Case No. 16911
Exhibit No. 37

Board of Zoning Adjustment
District of Columbia
CASE NO.16911
EXHIBIT NO.37

applicant could submit a motion for reconsideration if there were additional information that could have a bearing on the Board's decision. In response to this suggestion, the applicant is submitting this motion for reconsideration.

2. Financing for Project Is Jeopardized by Time Limitation

Unlike most other child development and community centers, which have limited renovation or build-out needs, Brandywine must raise $1.3 million to undertake the substantial renovation and rehabilitation of the dilapidated building at 700 Brandywine Street, S.E., in order to make it useable for its proposed facility. *See* testimony of Mr. Henry Bowden, Project Manager, September 17, 2002 BZA hearing; *see also* Photographs of Building Condition in Applicant's Pre-Hearing Statement, BZA Exhibit No. 26. As a not-for-profit community organization, Brandywine has no revenue-generating functions to support itself at this time. It relies solely on volunteers, donations and grant money.

In order to proceed with this ambitious project, Brandywine is seeking funds from a variety of sources, none of which are willing to make such a substantial investment if there is a limitation on the return. The Community Development Block Grant ("CDBG") program of the Department of Housing and Urban Development, the principle targeted source of funds for Brandywine, has established a sustainability timeframe of forty years. Additionally, each CDBG applicant is competing with several other applicants for the same limited funds. Thus, it is critical for an applicant to demonstrate not only the merits of its project, but also that it can complete the project and that the CDBG investment will have more than a short-term effect. As stated at the hearing, the zoning approval received September 17th was a critical step for Brandywine in earning "points" for its application. However, the three-year time limit imposed by the Board will have a devastating, preclusive effect on Brandywine's rating. Other applicants without this handicap will be in a much better position to receive the limited funds available. As a result, it is highly unlikely that Brandywine would be awarded funds from this or any other source. Accordingly, Brandywine requests that the Board remove the three-year time limit on the special exception approval.

2. No Harm Will Result from Elimination of Time Limitation

Elimination of the three-year time limit on the special exception approvals will not harm the purpose or intent of the Zoning Regulations or create any objectionable conditions on adjacent and nearby properties. The evidence of record in this case demonstrated that there are no objectionable conditions created by the child development and community center.

Additionally, there was absolutely no opposition to these uses by residents in the immediate vicinity or anywhere else; rather, there was overwhelming support for the facilities in the community.

Moreover, there is ample precedent for the Board to approve child development centers and community centers without time limits. The following centers were all approved without restriction on the number of years the facility may operate.

BZA Application No.	Applicant/Address	Order Date
14641	Resurrection Baptist Church 3501 Martin Luther King Jr Ave SE	9/17/87
14679	James Cobb 2025 Park Rd., NW	3/21/88
14713	Church of the Redeemer 1423 Girard St., NE	2/11/88
14721	Georgetown Presbyterian Church 3115 P St., NW	6/24/88
14736	1436-38 Meridian Place Gen Ptnshp 1436 Meridian Pl., NW	4/7/88
14776	Lorraine Brannon 4527 Georgia Ave., NW	6/24/88
14917	Harvey Memorial Baptist Church 3204 Brothers Pl., SE	11/19/88
14942	DC Dept of Public and Assisted Hsg 5725 East Capitol St., SE	12/16/88
14943	Edgewood Associates Ltd Ptnshp 601 Edgewood St., NE	2/24/89
14944	DC Dept of Public and Assisted Hsg 1625 Montana Ave., NE	12/16/88
14945	DC Dept of Public and Assisted Hsg 400 50th St., NE	12/16/88
14946	DC Dept of Public and Assisted Hsg 1000 12th St., SE	12/16/88
15048	Pinkie Malone 1027 51st St., NE	7/14/89
15056	SG Limited Ptnshp 1210 Southern Ave., SE	7/28/89
15117	Phyllis Wheatley YWCA 1719-12 13th St., NW	7/19/89
15724	Dor-Kee Inc. 1321 Emerson St., NW	12/22/92
15747	John Redmond 1636 Kenyon St., NW	10/21/92
15758	Winn Development & MUSCLE 4309 3rd St., SE	4/30/93
15820	Little Workers of the Sacred Heart 3520 15th St., NE	6/4/93

BZA Application No.	Applicant/Address	Order Date
15985	St. Luke's Methodist Church 3655 Calvert St., NW	9/14/94
15990	Jonathan Woodner Co. 3636 16th St., NW	10/28/94
16044	National Children's Center, Inc. 200 Rittenhouse St., NW	6/29/95
16068	Cleveland Park Cong. United Church 3400 Lowell St., NW	2/5/96
16131	DC Hsg Auth & Ellen Wilson Redev LLC 704-10 6th St., SE	9/23/96
16334	DC Dept of Hsg & Community Dev. 128 M St., NW	5/1/98
16339	Jerome Lindsey for Kaleb LLC 801 Rittenhouse St., NW	6/16/98
16354	Mt. Calvary Holy Church of Deliverance 5900 Chillum Pl., NE	7/2/98
16357	Parkland 2011 Savannah St.,SE	8/7/98
16375	Peoples Involvement Corp 1855 7th St., NW	9/28/98
16398	New Mount Olive Baptist Church 710 58th St, NE	1/22/99
16413	National Child Day Care Assn 2229 M St., NE	1/14/99
16630	DC Office on Age (elderly day care) 3500 Martin Luther King Jr Ave SE	12/11/00

In instances where the Board has limited the approval to a certain number of years, it has generally done so when there had been opposition to the facility based on intensity of use, noise, adverse traffic impacts, or other objectionable conditions. *See,* for example, orders in BZA Application Nos. 14593, 14646, 14651, 14688, 14690, 14832, 14883, 14932, 14941, 15755, 15799, 15838, 15986, 16183, 16200, 16242, 16502, and 16657.

On certain occasions, the Board has placed time limits on the approval for child development or community centers even when there was no opposition of record. Because these applications were approved by summary order, however, there is no indication of what information the Board relied on to support the time limit. The restrictions range anywhere from two to three, five, seven, ten, or fifteen years. Without examining the evidence of record or the transcript for the proceedings, it is impossible to glean the reasons for such a wide range in time limits.

Here, there is ample basis for not imposing any time limitations. Like the approvals listed in the chart above, there was no person or party in opposition to the Brandywine child development and community center. Rather, there was overwhelming support for the facility. Second, there were no potentially adverse conditions identified during the hearing process that might warrant a time limitation. A concern raised by the Office of Planning over possible objectionable noise to an abutting homeowner was addressed when that owner testified in support of the application and stated she had no concerns about noise from the child development center. Further, there were no objectionable traffic conditions to be generated by the facility. Rather, the presence of the police outreach office at the community center is anticipated to reduce the number of speeding automobiles and other objectionable traffic conditions generated by drug dealers in the neighborhood. Consequently, no time limits are necessary to cure or mitigate any adverse effects at the Brandywine facility.

The Office of Corporation Counsel ("OCC") has previously addressed the issue of the Board's authority to impose conditions on granting special exception relief. In a Memorandum to the Board of Zoning Adjustment dated July 6, 1976, OCC advised the Board that while it may impose conditions to ensure that the special exception will be in harmony with the Zoning Regulations and will not tend to adversely affect the use of neighboring property, that power has limitations. *See* 1 Op.C.C., D.C. 176 (1976) ("OCC Memorandum") (copy attached) *citing Nathanson v. District of Columbia Bd. of Zon. Adjust.,* 289 A.2d 881, 884 (D.C. 1972); 2 Rathopf, *The Law of Zoning and Planning*, 49-1, ff (1972 ed.). Any condition must be directly related to and incidental to the proposed use of the property. Moreover, the record in the BZA case must support imposition of the proposed conditions to warrant the conclusion that it is necessary to protect adjoining and nearby property from "objectionable conditions." *See* 1 Op.C.C. at 180. Because there were no objectionable conditions identified in the Brandywine case, there is no need for a time limitation on the approval period.

4. Conclusion

The three-year time limit imposed on the approval of the child development and community center is unduly burdensome on the Brandywine Street Association. It will not only undermine the association's ability to secure the $1.3 million funding for the project but will likely ensure the facility's demise. Eliminating the time limitation will not harm the purpose or intent of the Zoning Regulations or create any objectionable conditions on adjacent and nearby properties. There is ample precedent for granting special exception relief for child development and community centers without time limits, particularly

when there is no opposition from the adjacent and nearby neighbors. Consequently, Brandywine Street Association respectfully requests the Board to reconsider its decision and remove the time limitation from the special exception approval.

Respectfully submitted,

Carolyn Brown

Attachments

cc: Brandywine Street Association
Henry Bowden
Ann Congdon
Whayne S. Quin
Steven E. Sher

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OPINIONS OF THE CORPORATION COUNSEL

Volume 1

April 1, 1976 to March 31, 1977

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JOHN R. RISHER, JR.
Corporation Counsel, D.C.

JUL 8 1975

SA:IOM:cls

MEMORANDUM TO: Stephen E. Sher, Acting Secretary
Board of Zoning Adjustment

FROM: John R. Risher, Jr.
Corporation Counsel

SUBJECT: Authority of the Board of Zoning Adjustment to limit access to parking lots to car pools and non-commuters as a condition of a grant of special exception (CCO No. 1432)

On behalf of the Board of Zoning Adjustment (hereinafter, the "Board") you have submitted to this Office the following questions:

> "1. Whether, under applicable statutes and regulations, the Board has the authority to impose conditions reserving spaces for car pools or short term non-commuter use.
>
> "2. If the authority exists, what kind of conditions could be imposed and how these conditions could be enforced."

These questions have arisen from two applications before the Board for special exceptions to operate parking lots. These applications were forwarded, as required by the Zoning Regulations, to the Director of the Department of Transportation, for review and report. According to your memorandum, the Department of Transportation has recommended that the Board impose conditions

regarding the use of parking lots which would serve to discourage commuter parking and would encourage the reduction of vehicle miles of travel. In his memorandum to the Board, the Director of the Department of Transportation stated that the objectives to be achieved by the imposition of these conditions would be the reduction of air pollution and energy consumption and the control of the growth of congestion.

I am also in receipt of a letter from Whayne S. Quin, Esquire, who represents one of the applicants, in which he has requested that the Board forward several additional questions to this Office. Because I find that the Board, for the reasons stated herein, cannot impose the conditions suggested by the Department of Transportation, it will not be necessary to directly address the issues raised by Mr. Quin.

It is fundamental that the discretion of the Board to grant special exceptions is limited to a determination of whether the exception sought meets the requirements of the Zoning Regulations. Stewart v. District of Columbia Bd. of Zon. Adjust., 305 A.2d 516, 518 (D.C. App. 1973); Rose Lees Hardy Home & S. Ass'n v. D.C. Bd. of Zon. Adj., 324 A.2d 701, 706 (D.C. App. 1974). Once an applicant has made the requisite showing the Board ordinarily must grant his application. Stewart, supra at 518.

The standards which control the granting of special exceptions are the adjudicatory standards set forth in the Zoning Regulations. Rose Lees Hardy H. & Sch. Ass'n v. D.C. Bd. of Zon. Adj., 343 A.2d 564, 566 (D.C. App. 1975). The Zoning Regulations do not permit the Board to go beyond its delegated function in special exception cases. Id.

Likewise it is settled that the Board may apply reasonable conditions to insure that the grant of a special exception will be in harmony with the Zoning Regulations and will not tend to adversely affect the use of neighboring property. Nathanson v. District of Columbia Bd. of Zon. Adjust., 289 A.2d 881, 884 (D.C. App. 1972); Section 8207.2, Zoning Regulations. See also 2 Rathkopf, The Law of Zoning and Planning, 49-1, ff. (1972 ed.) and 2 Yokley, Zoning Law and Practice, §15-16 (3rd ed. 1965). According to Rathkopf the power of a Board of Zoning Adjustment to tailor a grant of special exception by appropriate conditions and safeguards is an inherent one. 2 Rathkopf, supra at 49-1.

A limitation upon the power to attach conditions to grants of special exceptions is that conditions cannot be imposed which go beyond the provisions of the zoning ordinance or are more severe than the ordinance itself. Teglund v. Dodge, 316 Mich. 185, 25 N.W. 2d 161 (1946); Belle-Haven Citizens Ass'n, Inc. v. Schumann, 201 Va. 36, 109 S.E. 2d 139 (1959); Bernstein v. Board of App. Matinecock 60 Misc. 2d 470, 302 N.Y.S. 2d 141, 146 (Spec. Term 1969). Moreover, the conditions imposed must be directly related to and incidental to the proposed use of the property. Bernstein, supra, 302 N.Y.S. 2d at 146. With respect to commercial uses of property, conditions which bear on the operation of the business rather than the use of the land have been held to be invalid. Vlahos v. Little Boar's Head District, 146 A.2d 257 (Sup. Ct. N.H. 1958); Town of Huntington v. Sudano, 42 A.D. 2d 791, 346 N.Y.S. 2d 382 (1973).

It is my opinion that the conditions which the Director of the Dept. of Transportation has proposed be attached to the grants of special exception herein would require the Board to exceed its delegated functions in special exception cases and would, in effect, require a policy decision which the Board has no authority to make. See Sheridan-Kalorama Neighborhood Council, et al. v. D.C. Board of Zoning Adjustment, No. 6934, D.C. Court of Appeals (decided July 3, 1975). The Zoning Regulations contain no provisions or standards for the reduction of air pollution and energy consumption and the control of the growth of traffic congestion. I am also of the opinion that the effect of the proposed conditions in limiting access to the parking lots bears more on the operation of the business than the use of the land.

Both parcels of land which are the subjects of the applications for special exception parking lot use are located in the SP zone District (Limited Office, Apartment and Office Use). The Zoning Regulations provide that in the SP District, offices, apartment houses, hotels, and controlled parking facilities are to be encouraged therein. Section 4101.1, Zoning Regulations. In my opinion, the term "controlled parking facilities," as used in section 4101.1, means, as applied to parking lots in the SP District, control in accordance with the standards provided in section 4101.41 for the grant of special exceptions. Parking lots are permitted as a special exception in the SP District if approved by the Board of Zoning Adjustment subject to the conditions specified in section 8207 of the Zoning Regulations and the following standards:

"4101.41 Parking lot, parking garage on lot other than alley lot, public storage garage, or mechanical parking garage, subject to the provisions of Article 74 and to the following standards:

(a) Such use is so located and all facilities thereof are so designed that they are not likely to become objectionable to adjoining and nearby property because of noise, traffic, or other objectionable conditions;

(b) The present character and future development of the neighborhood will not be affected adversely by the use;

(c) Before taking final action on an application for such use, the Board shall submit the application to the Director, Department of Vehicles and Traffic for review and report; and,

(d) Before asking final action on an application for a parking garage, public storage garage, or mechanical parking garage the Board shall submit the application to the National Capital Planning Commission for review and report."

The relevant provisions of Article 74 are as follows:

"Section 7404--Parking Lots

7404.1 A parking lot in any district shall conform to the following special provisions:

7404.11 All areas devoted to driveways, access lanes, and parking areas shall be paved with materials which form an all-weather impervious surface;

7404.12 The parking lot shall be so designed that no vehicle or any part thereof shall project over any lot line or building line;

7404.13 No other use shall be conducted from or upon the premises and no structure other than an attendant's shelter shall be erected or used upon the premises unless such use or structure is otherwise permitted in the district in which the parking lot is located;

7404.14 No vehicular entrance or exit shall be within 25 feet of a street intersection as measured from the intersection of the curb lines extended; and,

7404.15 Any lighting used to illuminate a parking lot or its accessory buildings shall be so arranged that all direct rays of such lighting are confined to the surface of the parking lot."

As indicated, the standards provided in section 410.141 require inter alia, that the Board find that the location and design of a parking use be such that it is "not likely to become objectionable to adjoining and nearby property because of noise, traffic, or other objectionable conditions." (Emphasis supplied). On this score, I am not in a position to state an opinion as to whether the record in these cases supports imposition of the proposed conditions to warrant the conclusion that it is necessary to protect adjoining and nearby property from "other objectionable conditions." *

The objectives referred to by the Director of the Department of Transportation in his memorandum have been presented to the Board in the form of undefined long range policy goals of general city-wide applicability. Because such broad policy goals are general and future in effect, they are legislative in nature and therefore must be adopted by either the Congress, the City Council, and/or the Zoning Commission. See Capitol Hill

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* The Board has previously ruled, and the D.C. Court of Appeals has affirmed, that the phrase "objectionable conditions" must be interpreted by a "reasonable person" standard. Rose Lees Hardy H. & Sch. Ass'n, 343 A.2d at 566, 567.

Restoration Soc. v. Zoning Commission, 287 A.2d 101 (D.C. App. 1972). In the absence of specific provision in the Zoning Regulations, the Board does not have the authority to adapt the existing regulations to meet long range goals for the reduction of air pollution and energy consumption and for control of the growth of congestion. §5-420, D.C. Code, 1973 ed.; Citizens Ass'n of Georgetown, Inc. v. District of Columbia Bd. of Zon. Adj., 337 A.2d 495, 497 (D.C. App. 1975); Belle-Haven Citizens Association, Inc. v. Schumann, 201 Va. 36, 109 S.E. 2d 139, 143 (1959).

In addition to my objections to the proposed conditions on legal grounds, I have been advised by the Zoning Administrator that enforcement of those conditions by his staff is impractical and, perhaps, impossible. He feels that he does not have sufficient staff available for the detailed inspection and monitoring which would be required if such conditions are to be effective.

In conclusion, I am in agreement with the long-range goals of reducing air pollution and energy consumption, and controlling the growth of traffic congestion. However, the appropriate means of achieving these goals is through the legislative process.

JRR, JR.

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