GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application No. 17088 of Willie D. Cook, Sr., pursuant to 11 DCMR § 3103.2, for a variance from the off-street parking space requirements under subsection 2101.1, to allow a public hall and summer garden in the C-2-A District at premises 1101 Kenyon Street, N.W. (Square 2844, Lot 819).

HEARING DATE: December 9, 2003
DECISION DATE: January 13, 2004

DECISION AND ORDER

This application was submitted on September 12, 2003 by the owner of the property that is the subject of the application, Willie D. Cook, Sr. ("Applicant"). The Applicant operates a nonconforming bar/restaurant on the subject property. He was informed that because he charges admission, his use is actually a "public hall" and that a public hall has parking requirements under the Zoning Regulations. As there is no room on the subject property to accommodate parking, he applied to the Board for a variance from the parking requirements for a public hall under 11 DCMR § 2101.1.

Following a public hearing on the application on December 9, 2003 and a public decision meeting on January 13, 2004, the Board voted 0-4-1 to deny the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memorandum dated September 17, 2003, the Office of Zoning ("OZ") gave notice of the application to the Office of Planning ("OP"), the District Department of Transportation ("DDOT"), the Councilmember for Ward One, Advisory Neighborhood Commission ("ANC") 1A and Single Member District/ANC 1A06. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing on the application in the District of Columbia Register and on September 26, 2003, mailed notices to the Applicant, ANC 1A, and all owners of property within 200 feet of the subject property providing notice of the hearing.

Requests for Party Status. ANC 1A was automatically a party in this proceeding. There were no other requests for party status.

Applicant's Case. The Applicant testified at the hearing that he has been operating his bar/restaurant establishment on the subject property for 13 years and that for 13 years he has been charging admission to defray the cost of entertainment. The Applicant said that

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he had only recently been informed that his charging of admission turned his use into a "public hall" triggering an off-street parking requirement under the Zoning Regulations. As the Applicant cannot provide parking for his establishment, he explained that a parking variance is needed.

Government Reports. The Office of Planning submitted a report dated December 2, 2003 recommending denial of the application, although it indicated in the report and again at the hearing that its recommendation was based on the fact that the Applicant had only a tacit, and not an official, agreement with a local elementary school permitting the use of its 26-space parking lot in the evening hours. OP's report discussed the uniqueness of the property, but did not address the question of practical difficulties/undue hardship. OP opined that a reduction of parking spaces to zero would cause adverse impacts to the neighborhood and a substantial impairment of the Zone Plan.

ANC Report. The ANC did not submit a report to the Board or attend the hearing in this case.

FINDINGS OF FACT

1. The subject property is located in Square 2844, lot 819, at address1101 Kenyon Street, N.W. It is at the corner of 11th Street, N.W. and is zoned C-2-A.

2. The property is a triangular-shaped lot that narrows to a point at the 10-foot wide alley abutting it on the north. The property has no, or restricted, access to the alley.

3. The property is improved with a 2-story brick building with basement that was constructed in 1927. The building occupies almost one hundred percent (100%) of the lot.

4. To the north of the property are commercial properties. To the west, south, and southeast are row houses, some of which have been converted to multiple dwellings. Recent and ongoing construction in the area is converting single-family dwellings to multiple dwellings with condominium units, resulting in an increase in density in the area.

5. A bar/restaurant has been operated on the subject property since approximately 1954, though the date of inception was not precisely established. The bar/restaurant use is a non-conforming use and has no parking requirement.

6. The Applicant has operated a bar/restaurant establishment on the subject property since approximately 1990. The establishment has a fenced-in area in the public

space adjacent to the building in which the Applicant occasionally holds cookouts as part of his bar/restaurant use.

7. The Applicant's hours of operation are from 8:00 p.m. to 1:00 a.m. on Sunday, Wednesday and Thursday, and from 8:00 p.m. to 2:00 a.m. on Friday and Saturday. The Applicant's establishment is closed on Monday and Tuesday.

8. Ever since 1990, the Applicant has been charging admission to his establishment to defray the cost of providing entertainment, but there is no evidence that an admission charge is necessary to keep the establishment running.

9. In 2001, the Applicant was advised by the Zoning Administrator that the charging of admission makes his establishment a "public hall." *See,* D.C. Official Code § 47-2820 (2001); 19 DCMR § 1699.1. He was also informed that public halls have parking requirements under the Zoning Regulations. *See,* 11 DCMR § 2101.1.

10. A public hall is a matter-of-right use in a C-2-A zone district.

11. The Applicant provides no off-street parking and there is no room on the subject property to accommodate any parking. The Applicant currently uses an area located on the adjacent public space to park his own vehicle.

12. Patrons of the Applicant's establishment have traditionally used on-street parking and a nearby 26-space public school parking lot to park their vehicles. The Applicant, however, does not have oral or written permission to use the lot, nor has he made any attempt to obtain such permission.

13. On September 12, 2003, the Applicant applied to the Board for a variance from the off-street parking requirements for a public hall use.

14. The parking requirement for a public hall is 1 parking space for each 10 seats of occupancy capacity (up to 10,000) and if such seats are not fixed, every 7 square feet usable for seating is considered 1 seat. 11 DCMR § 2101.1.

15. The Applicant's establishment does not have fixed seating, therefore, its parking requirement is based on the amount of square footage "usable for seating."

16. By letter dated January 22, 2001, the Zoning Administrator stated that the Applicant needed to provide 30 off-street parking spaces, but did not provide the amount of square footage "usable for seating" or show, in any other way, how the number 30 was derived.

17. In order to need 30 off-street parking spaces, the Applicant's establishment would have to have 2100 square feet of floor space "usable for seating."

18. OP was uncertain of the amount of square footage usable for seating and therefore of the number of off-street parking spaces required.

19. The Applicant submitted a rough estimate of approximately 1,022 square feet "usable for seating," which, if correct, would result in the need for 15 off-street parking spaces, pursuant to § 2101.1.

20. The Board finds that there is no reliable evidence in the record of the precise amount of floor space "usable for seating" pursuant to § 2101.1 and that it is therefore unclear how many off-street parking spaces are needed. For reasons stated in the conclusions of law, this lack of specificity does not impair the Board's ability to dispose of this application.

21. The Board further finds that the Applicant made no showing that he could not continue to operate his establishment successfully without providing entertainment, simultaneously eliminating the admission charge and the parking requirement.

CONCLUSIONS OF LAW

The Board is authorized to grant a variance from the strict application of the Zoning Regulations where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the 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 the property...." D.C. Official Code § 6-641.07(g)(3), 11 DCMR § 3103.2. Relief can only be granted without substantial detriment to the public good and with out substantially impairing the intent, purpose, and integrity of the Zone Plan. *Id.*

An applicant for an area variance must show that the exceptional situation or condition of his property has caused him "practical difficulties," whereas an applicant for a use variance must show "undue hardship." *Palmer v. Board of Zoning Adjustment for the District of Columbia,* 287 A.2d 535 (D.C. 1972). The Applicant herein is requesting a parking variance, which does not fall strictly under the category of area or use variance. *Id.* at 541. Thus, in *Palmer,* the court applied both the practical difficulties and undue hardship tests to a requested variance from the off-street parking requirements for a public hall use. *See also,* Board Order No. 16551.

The subject property is triangular-shaped and narrows to a point. The building on the property, which has been there since 1927, occupies approximately 100% of the lot, leaving no room to provide off-street parking. Further, the property appears to have no, or very restricted, access to the alley to its north. The property has been the site of continuous commercial operations since approximately 1954. These factors serve to create an extraordinary or exceptional situation or condition of the property for purposes of the first prong of the variance test.

There is, however, no evidence of any practical difficulties or undue hardship to the Applicant arising out of this exceptional situation. The Court in *Palmer* found no practical difficulties or undue hardship under facts strikingly similar to those here. In *Palmer*, the owner of a combination restaurant/record shop wished to expand its business in such a way that it would become a public hall, triggering the off-street parking requirement. The Board denied a special exception for off-street parking on a different lot because the lot was not within 800 feet of the principal use as required. The applicant then applied to the Board for a variance from the 800-foot requirement. The Court held that undue hardship consists of an inability to put the property to any purpose for which it is reasonably adapted. The Court further stated that there is no practical difficulty if a property conforming to the regulations will produce a reasonable income.

Under the standards set forth in *Palmer,* the Applicant has shown neither practical difficulties nor undue hardship. Even if the Applicant cannot expand his use to include a public hall, he is not denied the reasonable use of his property. He can still use it to operate a bar/restaurant establishment or, presumably, other uses permitted in a C-2-A zone. He did not show that he could not operate his bar/restaurant without entertainment, or that the bar/restaurant without entertainment would not produce a reasonable income. There was no evidence that he needed to charge admission in order to keep the establishment running. Admission is charged only to defray the cost of providing entertainment two nights a week. In order to continue to charge admission, he must provide parking. However, the Applicant can continue to operate his bar/restaurant without entertainment, no admission need be charged and no parking need be provided.

Granting the variance to permit the Applicant to run a public hall with no parking will be a substantial detriment to the public good and will impair the intent, purpose, and integrity of the Zone Plan. Patrons of the Applicant's establishment now park in available on-street parking spaces, but with the increasing residential density in the neighborhood, these may soon become unavailable. Patrons also park in the public school parking lot, but the Applicant has made no attempt to obtain permission to use the lot and it may also become unavailable at any time. Moreover, alternative means exist for the Applicant to meet his obligation to provide onsite parking, for example, he may request a special exception in order to provide accessory parking elsewhere. *See,* 11 DMCR § 2116.5.

Because the disposition of this application is not dependent upon ascertaining the precise number of parking spaces required, the Board will not resolve that factual issue.

The Board is required to give "great weight" to the recommendation of Op and to the issues and concerns of the ANC within which the subject property is located. D.C. Official Code §§ 6-623.04 and 1-309.10 (3)(A)(2001). The Board agrees with OP's recommendation of denial of the variance relief requested. The Board is unable to give great weight to the issues and concerns of ANC 1A because it did not participate in this case.

Based on the record before the Board and for the reasons stated above, the Board concludes that the Applicant has failed to satisfy the burden of proof with respect to the application for a variance from off-street parking requirements under subsection 2101.1, to allow a public hall and summer garden in the C-2-A District at premises 1101 Kenyon Street, N.W. Accordingly, the application is hereby **ORDERED DENIED.**

VOTE: **4-0-1** (Geoffrey H. Griffis, David A. Zaidain, Ruthanne G. Miller, and Peter G. May, to deny. The fifth member not present, not voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT.
Each concurring Board member approved the issuance of this order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: AUG 25 2004

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."LM/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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As Director of the Office of Zoning, I hereby certify and attest that on AUG 2 5 2004 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Willie D. Cook, Sr.
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rsn

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning