LEXSEE 320 a2d 291

CLERICS OF SAINT VIATOR, INC., PETITIONER, v. DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT

No. 7308

District of Columbia Court of Appeals

320 A.2d 291; 1974 D.C. App. LEXIS 222

October 18, 1973, Argued

May 30, 1974, Decided

PRIOR HISTORY:
[1]**

Petition for Review of a Decision of the District of Columbia Board of Zoning Adjustment

DISPOSITION:
Reversed and remanded for further proceedings.

COUNSEL:
J. Robert Walsh for petitioner.

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

JUDGES:
Kern, Nebeker and Yeagley, Associate Judges.

OPINIONBY:
YEAGLEY

OPINION:

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

Following the first public hearing the variance was denied by the Board, but after further argument on reconsideration it was approved on January 18, 1972. However, on May 16, 1972, the Board vacated all previous action on its part and held a new hearing on November **[**2]** 29, 1972. By a vote of three to one the variance was denied on March 28, 1973, and this appeal followed. The cause was then remanded to the Board at its request to permit it "to make additional findings" and a new order issued July 13, 1973. The new order states that the earlier order "is hereby amended". We note, however, that it not only enlarges on the first but in some respects is inconsistent with it; n1 as to such inconsistencies we accept the latter order as controlling.

n1 The Board's original opinion stated that "the entire record does not indicate with any degree of assurance" that the proposed use will not cause traffic congestion which would threaten the residential neighborhood. The Board's second opinion is phrased differently, stating that permitting the proposed use "would create the added threat of more cars [and] in turn add measurably to pollution and congestion." In the former the Board is finding that petitioner has failed to show that the proposed use will *not* create traffic congestion while in the latter the Board affirmatively finds that there would be an "added threat of more cars".

[3]**

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

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The property consists of approximately 93,241 square feet of land, improved by a twelve year old modern religious seminary of approximately 29,000 square feet containing approximately 80 rooms and chapel on three floors and basement.

The seminary was built in 1961, pursuant to a special exception granted by the Board, consisting of thirty-eight (38) small sleeping rooms, each with clothes closet and wash basin and served by common facilities. It also contains eight two-room suites, each with a connecting bath, recreation and study rooms, and classrooms.

It is zoned R-1-B, is surrounded by single family detached residences, except that its westerly line abuts a strip commercial zone running along Twelfth Street, N.E.

The number of seminarians residing at the Viatorian Seminary has steadily declined in the last several years from a high of over thirty, which increased to **[*293]** over forty during the summer months, to a present enrollment of two.

The decrease in enrollment is due solely to the historical circumstances of decline in religious vocations and departure from the traditional seminary concept **[**4]** of theological education to a more dispersed format of education.

The subject property has a current assessed value of $448,258.00 and a current appraised value of $600,000.00 based upon a reproduction of improvement costs of $483,500.00. There is no ascertainable value based upon the market value.

The applicant has been unable to transfer the facility to other religious or educational institutions, and further supports his request for a variance on the ground that development of the property for R-1-B use would result in undue financial hardship.

A substantial loss of several hundred thousand dollars would be suffered if applicant attempted to utilize the property for permitted residential purposes due to the necessity of demolition, removal, and compacting back of the building foundation plus the construction of access roads to serve subdivided lots.

The proposed use, convalescent and nursing home, will tend to increase density.

The Board first contends that the variance was properly denied on the basis that the hardship, which petitioner claims, does not inhere in the land itself but, rather, is caused by the nature of the structure on the land. The Board argues that only **[**5]** a hardship which is inherent in the "land" can be the basis of a variance.

The applicable statute, D.C. Code 1973, § 5-420(3), which is incorporated into D.C. Zoning Regulation No. 8207.11, provides:

Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions *or other extraordinary or exceptional situation or condition of a specific piece of property*, the strict application of any regulation adopted under sections 5-413 to 5-428 would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, [the Board is empowered] to authorize, upon an appeal relating to such property, a variance from such strict application so as to relieve such difficulties or hardship, provided such relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map.

Petitioner claims that its situation falls within that section of the statute which **[**6]** provides for a variance where there is an "other extraordinary or exceptional situation or condition of a specific piece of property ...."

We note at the outset that the applicable statute (above) uses the word "property" rather than "land" and that property generally includes permanent structures existing on the land. n2 The Board, in support of its position that the hardship must inhere in the land itself, refers us to *Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851 (1939)*. We do not see that this case lends any support to the Board's position on the land-property issue since that particular question was not under consideration. The Board's citation of 2A RATHKOPF, THE LAW OF ZONING 45-5 (1962) suffers from the same disability. n3

n2 *See* BLACK'S LAW DICTIONARY 1383 (4th ed. 1951); D.C. Code 1973, § 5-702(m); *see also* D.C. Code 1973, § § 5-702(e), 5-902(f)(1).

n3 In fact on the page facing the one from which the Board quotes, (45-4) Rathkopf quotes approvingly from *Elwyn v. City of Miami, 113 So.2d 849 (Fla.App. 1959)*, which uses the term "property" in the same context that Rathkopf uses "land". *See also Palmer v. Board of Zoning Adjustment, D.C.App., 287 A.2d 535, 539-540 (1972)*, where the word "property" is used in discussing requirements necessary for granting of a variance.

[**7]

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

The purpose of a variance provision is to prevent a zoning statute from operating to deprive a property owner of all beneficial use of his property. A statute which so operated would be unconstitutionally confiscatory. n4 It makes no practical difference whether the inability to use property in accordance with zoning regulations stems from topographical conditions of the land itself or from the existence of a structure on the land.

n4 ANDERSON, *supra* at § 14.02.

We think that the statute is clear. It [**8] provides that "other extraordinary or exceptional situation or condition of a specific piece of property" may be grounds upon which a variance may be granted. The Board is in error when it takes the position that a variance may only be issued when the required hardship inheres in "land" as opposed to "property".

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

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

The Board takes the position that since petitioner built the structure, it may not now be heard to complain of its existence as constituting a hardship, that [**9] any hardship is like that in *Taylor*, "self-imposed". We disagree. In *Taylor* the direct result of the petitioner's actions was the creation of the hardship complained of, and the court quite correctly deemed it to be "self-imposed". In the instant case it was not the building of the structure in 1961 which gave rise to the complained of hardship, the building was utilized for its intended purpose as a seminary for a number of years. The hardship was caused by an extraordinary drop in enrollment of seminarians, found by the Board to be "due solely to the historical circumstances of decline in religious vocations and departure from the traditional seminary concept of theological education" and "beyond the control of the seminary administration." We conclude that the Board is in error when it contends that the hardship complained of by petitioner is "self-imposed". n5

n5 *See also and compare Clouser v. David, 114 U.S.App.D.C. 12, 309 F.2d 233 (1962),* where a nonconforming use was created in direct violation of the zoning provisions and the cost of creating it then claimed as a hardship in a request for a variance.

[**10]

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

provided such relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map. [D.C. Code 1973, § 5-420(3).]

The Board, in its "Conclusions of Law", asserts that the proposed nursing home facility would "necessarily result in increased traffic over that generated" by the former use of the property. It further states that "[the] quiet, stable, residential character of the neighborhood will be altered by a transient influence generated by the influx of commercial vehicles from establishments servicing the facility and private vehicles of persons employed at or visiting the home." n6 Except [**11] for a finding that the proposed use will tend to increase density, none of the Board's findings of fact is addressed to the above conclusions.

n6 There can be no claim that the proposed use, by its appearance, will adversely affect the neighborhood, since the new use will not require exterior structural changes. The situation is therefore different from that in *Taylor, supra,* where the proposed use would have been architecturally out of character with the neighborhood.

The Board did not find that the increase in density would adversely affect the neighborhood and it does not necessarily follow from the findings that the increase in density in this case is necessarily incompatible with a residential neighborhood. It is by no means clear that increasing the population of an area, by permitting a building to be occupied by a larger number of bed patients than the number of students who previously used it, will bring about an increase in traffic of persons or commercial vehicles to or from the premises; neither **[**12]** does it, in and of itself, indicate a significant change in the level of noise. n7 Consequently we are at a loss to know on what basis the Board arrived at these conclusions. The Board, in its brief, does not refer us to any evidence in the record on which these conclusions could be based. n8

n7 We address ourselves to the question of burden of proof, *infra. Also see* note 11.

n8 In its brief the Board refers to the testimony of Maurice A. Davis, president of the Brookland Neighborhood Civic Association, to the effect that the essential character of the neighborhood would be altered by the proposed use. This testimony was given at a hearing of the Board on December 8, 1971. At the November 29, 1972, hearing of the Board, however, Mr. Davis testified that his organization, pursuant to an agreement with petitioner, no longer opposed the proposed use. The reference to Mr. Davis' earlier testimony is inappropriate and provides no evidentiary support for the Board's legal conclusions.

The Board does not **[**13]** dispute petitioner's assertion, on appeal, that the proposed use "has the joinder and approval of all neighboring property owners; and [that] the owner has resolved all tentative opposition which developed to the application." (Petitioner's brief at 5.) Indeed the Board, in its order of July 13, 1973, eliminated all references which had been made in its original order to opposition to the proposed use. n9

n9 The record does not show conclusively whether all opposition to the proposed use has actually been eliminated.

We have thus far concluded that the Board erred in finding that the petitioner was not entitled to a variance on the grounds that the hardship complained of did not inhere in the "land" and on the grounds that the hardship was "self-created". We have also found that the Board's Conclusion of Law No. 6 (regarding alteration of the residential character of the neighborhood by increased traffic and influx of commercial vehicles) is not supported by findings of fact and is therefore deficient. *Salsbery* **[**14]** *v. District of Columbia Board of Zoning Adjustment, D.C.App., 318 A.2d 894 (1974).* These errors require **[*296]** reversal of the Board's denial of the petition and a remand to the Board for further action. n10

n10 Note nature of remand in *Salsbery v. District of Columbia Bd. of Zoning Adjust., supra.*

We recognize, of course, that it is petitioner's burden to show that it is entitled to a variance. *Palmer v. Board of Zoning Adjustment, D.C.App., 287 A.2d 535 (1972);* D.C. Code 1973, § 1-1509(b). It would therefore be proper for the Board to require petitioner to present evidence to show that its proposed use will not create traffic flow and parking problems inconsistent with an R-1-B residential neighborhood, n11 unless the matter can be resolved by stipulation. The Board must, of course, give the petitioner sufficient notice of the issues on which it seeks proof as required by D.C. Code 1973, § 1-1509(a). n12 *See also Palace Restaurant, Inc. v. Alcoholic Beverage Control Board, D.C.App., 271 A.2d* **[**15]** *561 (1970).*

n11 In the Board's original opinion (March 28, 1973) it is stated that "[careful] examination of the entire record does not indicate with any degree of assurance that traffic congestion, *i.e.*, parking and other vehicular ingress and egress would *not* eventually pose a threat to this residential neighborhood." A decision cannot be made based on petitioner's failure to meet its burden of proof on an issue, unless petitioner is on notice that the issue will be determinative of the decision. *Palace Restaurant v. Alcoholic Bev. Con. Bd., D.C.App., 271 A.2d 561 (1970).*

n12 A proceeding before the Board of Zoning Adjustment is a contested case and therefore subject to the requirements of D.C. Code 1973, § 1-1501 et seq. *Dietrich v. District of Columbia Bd. of Zoning Adjust., D.C.App., 293 A.2d 470 (1972).*

We would also suggest to the Board that it take evidence on petitioner's efforts to dispose of the property. The Board found, as a matter of fact, that "[the] applicant has been unable **[**16]** to transfer the facility to other religious or educational institutions." There is no evidence or stipulation in the record to support such a finding. Petitioner proffered testimony on its efforts to dispose of the property but such evidence was thought to be unnecessary by Chairman Scrivener, based on his view that appellant's claimed hardship was not suitable for alleviation by variance, because it did not inhere in the "land ". (Tr. 64-65, Board hearing December 8, 1971.)

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

Reversed and remanded for further proceedings.

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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.

Capitol Hill Restoration Society, Inc., et al., Petitioners, v. District Of Columbia Board Of Zoning Adjustment, Respondent, and Historic D.C. Property Group Limited Partnership, et al., Intervenors

No. 86-426

District of Columbia Court of Appeals

534 A.2d 939; 1987 D.C. App. LEXIS 508

October 15, 1987, Argued
December 22, 1987, Decided

PRIOR HISTORY: [1]**

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

DISPOSITION:

Accordingly, the order of the BZA is Reversed.

LexisNexis(R) Headnotes

COUNSEL:

Lawrence A. Monaco, Jr., for petitioners.

Karen S. Dworkin, Assistant Corporation Counsel, Frederick D. Cooke, Jr., Acting Corporation Counsel, and Charles L. Reischel, Deputy Corporation Counsel, filed a statement in lieu of brief for respondent.

Anne G. Collins, with whom Jacques B. Depuy was on the brief, for intervenors.

JUDGES:

Mack, Rogers, and Steadman, Associate Judges.

OPINIONBY:

ROGERS

OPINION:

[*940] The Capitol Hill Restoration Society, Stanton Park Neighborhood Association, John Ray, and Richard Snell (Petitioners), seek reversal of an order of the District of Columbia Board of Zoning Adjustment (BZA) which granted the application of Historic D.C. Property Group (intervenor) for an area variance on property located at 642 East Capitol Street, N.E. Petitioners contend that intervenor failed to present sufficient evidence of an exceptional or extraordinary condition inherent in the property which would satisfy the showing of uniqueness needed to justify a variance. We agree and conclude that the BZA's findings of fact on uniqueness **[**2]** do not support its conclusion that the property meets this threshold requirement. Accordingly, we reverse. n1

n1 In view of our disposition we do not reach petitioner's other contentions that (1) the BZA mischaracterized intervenor's application as an area variance, rather than a hybrid use-area variance, and therefore applied the incorrect standard in granting the requested relief; (2) assuming the property was unique and that the BZA applied the correct standard, intervenor failed to meet its burden of demonstrating practical difficulty and the BZA therefore acted arbitrarily and capriciously in granting the application; and (3) the BZA abused its discretion in granting the variance because in so doing the BZA acted in a manner inconsistent with its prior decisions.

I

Intervenor Historic D.C. Property Group filed an application with the BZA for a variance for property located at 642 East Capitol Street, N.E. (lot 800 in Square 868). The property is located on the north side of East Capitol Street in an R-4 **[**3]** district n2 and is twenty-one feet wide and 128 feet deep, encompassing approximately 2,688 square feet. The lot is improved by a three-story brick townhouse, a two-story carriage house, and a small shed. The principal building is situated on the southern end of the lot. Intervenor intends to renovate and subdivide six units in the principal building into four two-bedroom apartment units.

n2 The zoning regulations define an R-4 district as "those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of the dwellings into dwellings for two (2) or more families." 11 D.C.M.R. § 330.1 (1987).

The carriage house is located on the northern or rear part of the lot and is **[*941]** approximately 1,380 square feet in area. It abuts a thirty foot wide public alley on which there are thirteen other carriage houses, four of which are identical in square footage to the one at issue. Intervenor wishes to convert the carriage house into a one-bedroom dwelling **[**4]** unit containing an interior garage.

Intervenor proposed to divide lot 800 into two separate lots pursuant to 11 D.C.M.R. § 2516 (1987), n3 which allows the erection of two or more principal structures on a single subdivided lot. The application for the carriage house would require a 903.93 square foot (50.21 percent) lot area variance, 11 D.C.M.R. § 401.3, a 176.43 square foot (32.82 percent) lot occupancy variance, 11 D.C.M.R. § 403.2, and one hundred percent variances from the front and rear yard requirements. 11 D.C.M.R. § 404.1. The subdivision of the lot would necessitate substantial variances for the principal building as well. n4

n3 Since the BZA issued its order, the zoning regulations have been renumbered. For the sake of clarity, we will cite the regulations as presently codified.

n4 The principal building would require a 2,206.39 square foot (55.16 percent) lot area variance; a nineteen-foot (47.5 percent) lot width variance; and a 351.49 square foot (48.99 percent) lot occupancy variance.

[5]**

The majority of the neighboring property owners n5 opposed the requested variance, but a number of letters were received in support. The Advisory Neighborhood Commission 6A supported the application with certain reservations concerning exacerbation of the problem of illegal parking in the abutting alley. The D.C. Office of Planning opposed the application because of the large size of the variances involved. Following a hearing, the BZA granted the application.

n5 Notice of the proposed variance was sent to all property owners within a 200 foot radius of the subject property.

II

D.C. Code § 5-424 (g)(3) (1981), authorizes the BZA to grant variance relief where

> 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 . . . would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, . . . provided such **[**6]** relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the zone plan . . . .

Id.; see also 11 D.C.M.R. § 3107.2 (1987).

Under this statute an applicant has the burden n6 to meet three criteria before a variance can be granted. An applicant must show, first, that the property is unique because of some physical aspect or "other extraordinary or exceptional situation or condition" inherent in the property; second, that strict application of the zoning regulations will cause undue hardship or practical difficulty to the applicant; and third, that granting the variance will do no harm to the public good or to the zone plan. *National Black Child Development Institute, Inc. v. District of Columbia Board of Zoning Adjustment, 483 A.2d 687, 690 (D.C. 1984); Roumel v. District of Columbia Board of Zoning Adjustment, 417 A.2d 405, 408 (D.C. 1980); Monaco v. District of Columbia Board of Zoning Adjustment, 407 A.2d 1091, 1096 (D.C. 1979).* We must determine whether the decision of the BZA follows as a matter of law from the facts stated as its basis and whether the facts are supported **[**7]** by substantial evidence in the record. *Capitol Hill*

Restoration Society v. District of Columbia Board of Zoning Adjustment, 398 A.2d 13, 15 (D.C. 1979).

n6 *See Ass'n for Preservation of 1700 Block of N Street v. District of Columbia Board of Zoning Adjustment, 384 A.2d 674, 677 (D.C. 1978); Taylor v. District of Columbia Board of Zoning Adjustment, 308 A.2d 230, 234 (D.C. 1973).*

The threshold requirement to show that the property is unique with respect to the hardship or difficulty asserted as grounds for the variance means the property owner must present proof that "the circumstances **[*942]** which create the hardship *uniquely* affect the *petitioner's property. . . ." Taylor, supra* note 6, *308 A.2d at 234* (emphasis in original). Where the circumstances which create the hardship or difficulty affect the entire neighborhood rather than merely a specific piece of property, the problem is properly addressed by seeking amendment of the regulations from the Zoning Commission. *Id.* If the BZA **[**8]** were to grant variances where the hardship or difficulty is not peculiar to a particular piece of property, similar requests could follow from property owners similarly situated, "which, as a matter of due process, would have to be granted." *Id.* The effect of such decisions by the BZA would be an amendment of the zoning regulations by that body, an action which the BZA is not empowered to take. *Id.* Upon review of the record, we conclude that the BZA erroneously found that intervenor's property is affected by a unique circumstance.

The BZA relied chiefly on two factors in concluding that the property was unique: the effect of its location in an historic district and its size. The BZA appears to have concluded that because the property's location in the Capitol Hill Historic District imposes certain limitations upon the manner in which intervenor can modify the structures on the lot, intervenor had met its burden of showing uniqueness.

A showing of a hardship or difficulty which inheres in the land at issue is not necessary to prove uniqueness. *See Clerics of Saint Viator, Inc. v. District of Columbia Board of Zoning Adjustment, 320 A.2d 291, 294 (D.C. 1974).* A condition **[**9]** inherent in the structures built upon the land, rather than in the land itself, may also serve to satisfy an applicant's burden of demonstrating uniqueness. *Id.* In addition, the extraordinary or exceptional conditions which justify a finding of uniqueness can be caused by subsequent events extraneous to the land at issue. *DeAzcarate v. District of Columbia Board of Zoning Adjustment, 388 A.2d 1233, 1237 (D.C. 1978); see also Monaco, supra, 407 A.2d at 1097.* However, the extraordinary or exceptional condition must uniquely affect a single piece of property. That is not the situation here. The inclusion of intervenor's property in the Capitol Hill Historic District is not a condition which uniquely affects the lot at issue. If this fact were sufficient to justify a finding of uniqueness, then each and every parcel of land within the Capitol Hill Historic District would be entitled to a variance on this basis.

The BZA also concluded, after finding that both the carriage house and the lot upon which it is located are unusually large, that the size of the property further supported the conclusion that the property was unique. The latter conclusion does not follow, however, **[**10]** from the evidence presented to the BZA.

Intervenor relies heavily on the testimony of Ruth Ann Overbeck, an expert in historic preservation, as support for the BZA's finding of uniqueness. Ms. Overbeck did testify that lot 800 was "wider than average" for the Capitol Hill area. But in the very same sentence she stated that lots 801 and 802 were similarly large. She further noted that because East Capitol Street had been planned as an extremely wide street in L'Enfant's original plan of the city of Washington, "East Capitol Street contains one of [the] *largest clusters* of wide lots on Capitol Hill." (emphasis added). The clear import of her testimony is that wide lots, such as lot 800, occur with some frequency on East Capitol Street in the Capitol Hill area. Ms. Overbeck also testified in general terms about the architectural characteristics typical of buildings located on "oversized lots." She stated that "[a] building which is 20 feet wide, or wider, generally, on Capitol Hill is going to be in excess of . . . three stories . . . and have an English basement rising above grade level." Her testimony is phrased in terms which reflect that she was speaking of characteristics **[**11]** common to all large lots on Capitol Hill. This indicates that the condition of lot 800 is not peculiar to that piece of property. Rather, her testimony suggests that similar conditions exist on many other lots in the Capitol Hill area. As noted, if the condition which is claimed **[*943]** as the basis for a showing of hardship or difficulty affects the entire neighborhood and not merely the applicant's property, the proper recourse for the applicant is to challenge the reasonableness of the zoning regulations before the Zoning Commission. *Taylor, supra* note 6, *308 A.2d at 234.*

The other testimony before the BZA likewise does not provide support for a finding of uniqueness. Robert Hummer, a partner in intervenor Historic D.C. Property Group, admitted on cross-examination that lot 800 was no different in size or shape from the immediately adjacent lot. When questioned about lot 804, another lot in the vicinity, Hummer admitted that the sole difference

between that lot and intervenor's property was a one-foot disparity in width. Indeed, when showed a map of the entire square, Hummer remarked with respect to the dimensions of the lots that "it appears that those on the East Capitol **[**12]** side, give or take a foot, are the same width." With respect to the carriage house, Hummer testified that there were four other carriage houses in the Square 868 with an area similar to the one at 642 East Capitol Street.

The BZA appears to have recognized the property's similarity to other properties in the area. In its order the BZA states that the carriage house abutted an alley containing fourteen carriage houses, four of which contained as much floor space as the subject premises. The transcript of the meeting at which the BZA voted to grant the variance reveals that both Board Member Norris and Chairperson Thornhill realized that the subject property was similar to other properties in the area. n7

n7 A significant factor in the BZA's decision was the lack of available rental housing in the District of Columbia. Members of the BZA believed that the proposed conversion would help alleviate the housing shortage in the District of Columbia. As one commentator has pointed out, however, benefit resulting to the public from the grant of a requested variance, or a showing that if the variance is denied the public will be deprived of some advantage, cannot substitute for a finding that the particular property requires a variance because of the existence of an extraordinary or exceptional situation peculiar to that property. 3 A. RATHKOPF & D. RATHKOPF, THE LAW OF ZONING AND PLANNING § 38.04 (1987). A variance must be granted or denied on the basis of factors related to the specific property at issue and not out of a generalized concern for increasing the District's available stock of rental housing. In any event, no evidence was presented to the BZA regarding the housing shortage and its finding that intervenor proposed to reduce the number of apartments on the lot from six to five appears contrary to the beliefs of the members of the BZA.

[13]**

Since neither the property's situation in an historic district nor the evidence justified a finding that the property was unique, intervenor failed to meet its burden of showing some extraordinary or exceptional situation related to this particular property. In the absence of a showing of unique circumstances, intervenor did not meet the first requirement for a variance and the BZA should have denied its application.

Accordingly, the order of the BZA is *Reversed.*