DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

RLA Revitalization Corp.
applicant

v. BZA Application #17232

Kelsey Temple Church of God in Christ, *et al.*
intervenors

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SUMMARY BRIEF OF KELSEY TEMPLE CHURCH OF GOD IN CHRIST AND TEMPLE CHURCH BUILDING & ECONOMIC DEVELOPMENT CORP.

Introduction

The intervenors, Kelsey Temple Church of God in Christ ("Kelsey Temple") and the Temple Church Building & Economic Development Corporation ("TCBEDC"), oppose the RLA Revitalization Corporation ("RLA") request for a parking variance. Kelsey Temple and TCBEDC oppose RLA's application because the grant of a parking variance in this case would result in substantial detriment to the public good, would substantially impair the intent, the purpose, and the integrity of the local zoning plan, and would result from reasonably anticipated circumstances and conditions that do not uniquely distinguish the RLA property from other properties in Columbia Heights or elsewhere in the District of Columbia. To be sure, RLA proposes to construct its DC USA Mall as a 535,524 square-

BZA
Case No. 17232
Exhibit No. 38

Board of Zoning Adjustment
District of Columbia
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EXHIBIT NO. 38

foot "big box"[1] featuring a Target discount department store which would occupy about 172,290 square feet.[2]

RLA plans to construct the mall in the Park Road and Hiatt Place region of Columbia Heights, within square 2,674, inside an area zoned C-3-A, which local regulations describe as a "district" permitting "medium density development, with a density incentive for residential development within a general pattern of mixed-use development".[3] However, if the Board grants RLA's application for a parking variance, the construction of the proposed "big box" mall in the middle of the Park Road region on Columbia Heights would impose on the neighborhood a business community with immense parking requirements, and this would so terribly displace local residential parking and, as well, local residents that the C-3-A district where the DC USA Mall would be constructed would become in essence either a C-3-B or a C-3-C district for "medium density development" or "medium-high density development" for "office-retail, housing, and mixed uses … where the

[1] This sum results from adding together the 402,317 square feet for retail space, the 37,968 square feet for a proposed health club, the 70,651 square feet for service businesses, and the 24,588 square feet set aside for a "closed court", all as described on page Z102A of the architectural drawings presented to the Board of Zoning Adjustment on about November 2, 2004.
[2] **Statement of Applicant**, BZA Application #17232 (Nov. 2, 2004), p. 3.
[3] **11 DCMR 740.4**.

largest component of development will be office-retail and other nonresidential uses".[4]

ANALYSIS

Under local law, the proposed construction site for RLA's proposed mall could never properly be regarded under the **D.C. Code, section 6-641.07(g)**, or under **11 DCMR 3103.2** as being "of exceptional narrowness, shallowness, or shape … or … of exceptional topographical conditions or other extraordinary or exceptional situation or condition" so as to qualify for the parking variance sought by RLA.[5] Also, while Kelsey Temple Church and TCBEDC openly dispute whether the property in question has unique features for purposes of **section 6-641.07(g)**, the two opponents add that, even if the property had some such unique condition, that unique condition in and of itself would not serve as an impracticable obstacle to RLA's "strict" compliance with **11 DCMR 2101.1**, which requires that RLA set aside 1,775 parking spaces for the DC USA Mall which would house 535,524 square feet of "gross floor area". In other words, RLA cannot establish a *prima facie* case for the parking "variance" that it seeks.

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[4] *See* **11 DCMR 740.6 and 740.8.**
[5] *See* **D.C. Code, section 6-641.07(g)**; *see also* **11 DCMR 3103.2.**

For example, RLA complains that the proposed site has an L shape and occupies about 215,871 square feet of land.[6] However, as for the shape of the proposed structure, it would be nearly identical to the sharp-angled L shape of the nearly completed Tivoli office and retail center filling up the entire block surrounded by Monroe and 14th Streets and Park Road and Holmead Place. In fact, the L shape resembles the layout of the buildings of the commercial and residential properties on the northwest corner of the same block as that where RLA would construct the DC USA Mall; that is to say, the buildings extending from the middle of the 1400 block of Park Road to Hiatt Place, and then up to Bell Multicultural Education Center on Hiatt Place. In addition, the Samuel Kelsey Apartments complex at 3300 14th Street has an L shape or a truly unusual horseshoe shape, but provides parking for its tenants.

Similarly, the campuses for Lincoln Middle School on Hiatt Place and Irving Street, for Harriet Tubman Elementary School at 13th and Kenyon Streets, for Cardozo High School at 13th and Clifton Streets, and even the Tivoli office-retail development all occupy entire city blocks and clearly appear to be comparable in size to that of the

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[6] **Glasgow & Freeman**, *Supplemental Statement of the Applicant*, p. 6.

proposed mall development for which RLA seeks its variance. Clearly, then, the size and the shape of the property is not so unique so as to warrant a variance under **section 6-641.07(g)**.[7] After all, RLA must prove that extraordinary or exceptional circumstances unique to this property will create "peculiar and exceptional practical difficulties" or an "exceptional and undue hardship" that would make impractical the construction of 1,775 parking spaces at its proposed mall. However, this property has no unique features, whether in terms of size, shape, or other features. Moreover, even if the site had unique features, those features do not create or serve as "exceptional practical difficulties" or an impracticable or "undue hardship" in the way of providing 1,775 parking spaces. Hence, the size and the shape of the RLA property do not constitute features warranting relief from the parking space requirements set out in **11 DCMR 2101.1.**

Similar arguments apply to RLA's claim that groundwater deep within the soil of the property, as well as the location of the property next to underground Metro tracks, make out unique circumstances such that, if RLA had to comply with the parking space requirements of **11 DCMR 2101.1**, it would face "exceptional practical difficulties"

[7] **Barbour v. Board of Zoning Adjustment**, 358 A.2d 326, 327, n.4 (D.C. 1976)(*per curiam*).

or "exceptional and undue hardship". In this case, RLA's geological engineer made the following remarks on behalf of RLA about groundwater problems at the DC USA Mall site and at other nearby locations:

> Groundwater within the Washington, DC area typically exhibits relatively high iron content, which in a wet aerobic environment gives rise to the growth of iron-loving bacteria which can clog drainage lines and pumps. Previous experience in Washington projects indicates that frequent purging of the underdrainage system should be performed to minimize clogging by these bacteria.[8]

Mr. Lacy, the geological engineer, added that

> Tunneling for Metro Sections E2, E3 and E4 which run from U Street NW along 14th Street, Park Road, and New Hampshire Avenue involved intense efforts at predrainage of groundwater. Installation and operation of deep wells encountered exceptional difficulties, particularly along Park Road. These involved the pervasive influence of iron-loving bacteria in clogging well filter packs and screens. No efficient remedy other than frequent purging was devised.[9]

These observations establish rather clearly that the groundwater at the proposed DC USA Mall site seems to be practically identical to, rather than different from, groundwater problems at other locations near the site and

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[8] **Hugh S. Lacy**, *Subsurface Investigation DC USA* (April 13, 2004), p. 6.
[9] **Lacy** at 9.

throughout the District of Columbia. Also, the location of the Metro near the DC USA Mall site along 14th Street appears to be no different from the location of the Metro along 14th Street but alongside the Tivoli project, alongside the construction of a new Giants Food Store at 14th Street, between Park Road and Kenyon Street, and at other construction projects near the proposed DC USA Mall site and elsewhere in the city.

Therefore, while the location of the Metro and groundwater at the DC USA Mall could make the construction of underground parking more expensive for RLA, this does not appear to be a unique condition as required by **section 6-641.07(g)(3)**. In fact, as the court in **Carliner v. D.C. Board of Zoning Adjustment**, 412 A.2d 52 (D.C. 1980), explained, RLA "would suffer no *exceptional* practical difficulty from the strict application" of the parking space requirements for C-3-A districts as mandated by **11 DCMR 2101.1**. *See* **Carliner**, 412 A.2d at 54 (emphasis mine).

In fact, this DC USA Mall case resembles the facts in **Palmer v. Board of Zoning Adjustment**, 287 A.2d 535 (D.C. 1972), where proprietors wanted a parking variance for a Georgetown store which, under the regulations, needed off-street parking no more than 800-feet away from the establishment. Since neighboring shops, like the one in

question, operated in Georgetown more than 800 feet away from off-street parking and otherwise faced circumstances identical to that confronting the applicant, the **Palmer** court observed that "the lack of off-street parking is a problem faced by many establishments in Georgetown", and, "consequently, there is no 'extraordinary or exceptional situation or condition' with respect to the" property in question. **Palmer**, 287 A.2d at 540. The court in **Palmer** explained that

> To support a variance it is fundamental that the difficulties or hardships be due to unique circumstances peculiar to the applicant's property and not to general conditions in the neighborhood. If the circumstances affect the whole area the reasonableness of the regulations are challenged and the proper remedy is to seek an amendment of the regulation rather than a variance.[10]

On these facts, the court ruled that the proprietor could not be regarded as uniquely situated and hence could not obtain a parking variance.

In fact, what distinguishes this project and makes impracticable the requirement of providing 1,775 parking spaces appears to be the failure of the District of Columbia and its development partners to set aside the money for constructing more than 1,000 underground parking

[10] **Palmer**, 287 A.2d at 539.

spaces. In the *Statement of the Applicant,* RLA admitted to the following:

> The feasibility of the entire project has always been, and continues to be, based upon financial assistance from the District Government. The legislation passed by the Council this year … capped the public financing for the project at approximately $42 million but the net available to the developer for construction is approximately $35 million. *The number of parking spaces proposed was based on the project budget assuming the maximum amount of public funding ….* Additional parking spaces [beyond 1,000] cannot be supported for the project.[11]

Moreover, the record before the Board in BZA Application #16858-A indicates that RLA earlier modified its proposed design for this project. That is to say, RLA modified its project design and made the floor space smaller than originally planned in order to decrease the number of parking spaces needed for the project. This proves that the big box proposal presently before the Board does not constitute an immutable condition peculiar to the site on which RLA would construct the DC USA Mall. In fact, the grounds currently include a number of smaller stores and buildings which could generate rent. Two stores, that is, the Quality Wash Laundromat and the Waffle Shop, currently provide rent. Moreover, as history readily

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[11] **Glasgow & Freeman,** *Statement of the Applicant,* 9-10.

proves, this site formerly included a collection of retail operations, including a now demolished post office on Irving Street, a now demolished Mary Ann's department store on the corner of 14th and Irving Streets, a now demolished Gracy's department store, and a now demolished General Motors automobile dealership on the corner of Irving Street and Hiatt Place, which never required the variance sought by RLA.

On the other hand, in order to construct the DC USA Mall, RLA would demolish the former Woolworth's department store at 3214 14th Street, the currently operating Quality Wash Laundromat at 3216 14th Street, the former Value Express store at 3218 14th Street, the former Payless Shoe Store at 3220 14th Street, the currently operating Waffle Shop at 1402 Park Road, a former restaurant at 1404 Park Road, and the currently operating parking lot managed by Kelsey Temple Church. As presently associated with each other, these establishments comply with **11 DCMR 2101.1** and do not require a parking space variance. In fact, as the opponents witnesses shall likely explain under oath, the parking lot at the center of the proposed development has historically provided ground level parking for nearly all the businesses and residences on 14th Street, from Irving Street to Monroe Street, and on the 1400 block of Park Road

and on Hiatt Place, including the Riggs Bank, Kelsey Temple Church, and the restaurants, the beauty shops, the grocery stores, and the other shops in the neighborhood.

Hence, RLA's proposed destruction of the properties on its site would change current conditions which make use of above-ground parking spaces. In addition, if RLA constructed its big box DC USA Mall with underground parking, these changes eliminate the parking required by **11 DCMR 2101.1** for the apartment building at 1448 Park Road, for the apartment building at the corner of Park Road and Hiatt Place, for Riggs Bank, for the TCBEDC properties at 1430-1432 Park Road, and for the R-5-A zoned Kelsey Temple Church, which, according to the law, has to provide about 120 parking spaces for its main sanctuary which holds about 1,200 people.

In **Carliner**, the court ruled that "the affirmative action of the applicant in making his property non-conforming" would and should be the basis for the Board's denial of a requested variance.[12] In a related context, in **Barbour**, the District of Columbia Court of Appeals explained "that, in the commercial context, a variance cannot be granted where property conforming to the regulations will produce a reasonable income but, if put to

[12] **Carliner**, 412 A.2d at 55.

another use, will yield a greater return".[13] This rule points to a fundamental problem with the proposed variance application: it proposes to set aside underground parking for proprietors and patrons of the DC USA Mall, but that would certainly exclude from these premises the businesses, the churches, the residential families, the neighborhood business customers, and so many others from this parking facility, unless they have business at the mall.

Moreover, RLA has to destroy shops and a parking lot already in place and serving profitably in the community in order to bring about this "substantial detriment to the public good" and this drastic change of a mixed commercial-residential neighborhood into what in essence would be a C-3-C "medium-high density" fit for the location of a predominantly office-retail district.[14] This result would "substantially impair the intent, purpose, and integrity" of the zone plan that made a C-3-A district on the south side of the 1400 block of Park Road, but made this area a R-5-B district on the northwest portion of this same street.[15] Since the Board has no authority under **section 6-641.07(g)** to grant a variance if it would bring about "substantial detriment to the public good" or if it would

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[13] **Barbour**, 358 A.2d at 327.
[14] *Compare* **11 DCMR 740.4 and 11 DCMR 740.6**; *see* **D.C. Code, section 6-641.07(g) and 11 DCMR 3103.2.**
[15] *See* **D.C. Code, section 6-641.07(g) and 11 DCMR 3103.2.**

substantially impair "the intent, purpose, and integrity of the zoning plan as embodied in the Zoning Regulations" outlined in **section 2101.1**, then the variance sought by RLA cannot be justified under the statute and should not be granted.

WHEREFORE, Kelsey Temple Church and TCBEDC ask this Board to deny the applicant's request for a parking variance.

Respectfully submitted,

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Certificate of Service

I, Thomas Ruffin, Jr., certify that, at the hearing of this matter on December 21, 2004, I delivered a copy of this summary brief to Norman Glasgow, Esquire.

Thomas Ruffin, Jr.

WITNESSES FOR OPPONENTS:

1. Mr. Michael Berger
2. Ms. Christin Miles
3. Delores Ruffin, Chairperson, Kelsey Temple Trustees Board
4. Fred D. Morris, Pastor, Kelsey Temple Church
5. Min. Raymond Holmes
6. Gennell Anderson, Architect