ARNOLD & PORTER LLP

Nathan W. Gross
Zoning and Land Use Specialist
Nathan_Gross@aporter.com
Not Engaged in the Practice of Law

202.942.5956
202.942.5999 Fax

555 Twelfth Street, NW
Washington, DC 20004-1206

October 12, 2005

RECEIVED
D.C. OFFICE OF ZONING
2005 OCT 12 PM 3:19

Geoffrey Griffis, Chairman
D.C. Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210
Washington, D.C. 20001

RE: Application No. 17376
E.L. Haynes Charter School
Post-Hearing Submission

Dear Mr. Chairman and Members of the Board:

During the public hearing in the above-cited case, the Board asked the Applicant to respond in writing to several questions and issues. Those responses are provided below.

Precedents - Variances to Subsection 2500.1

One of the questions raised by the Board at the public hearing was whether the basis for the variance rested upon the CVS property accommodating the principal use rather than the subject lot, abutting to the east.

A search on the Office of Zoning web site for BZA orders under § 2500.1 (requirement that accessory use be located on the same lot as the principal use) yielded two cases: #14814 of the Providence Health Foundation and #15013 of Prospect Associates. Complete information on these cases is unfortunately not available for several reasons. Summary Orders were granted, and these cases are a few years too old (1988 and 1989) for the transcripts to be available on-line. Also, the case records are in off-site storage while the Office of Zoning's basement archives area is renovated.

Nonetheless, some relevant observations and tentative conclusions are possible, as follows.

- In the Providence Health Foundation case (#14814), the off-site building is a medical office building constructed in 1960 with an addition in 1965.[1] The construction is modern. The lot is very large and generally rectangular (138,360 square feet). Lot

[1] See the Summary Order attached as *Exhibit A*.

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17376
EXHIBIT NO. 29

Board of Zoning Adjustment
District of Columbia
CASE NO. 17376
EXHIBIT NO. 29

occupancy is low, and density is extremely low, at 0.26 FAR.[2] It is highly unlikely that this property could have been characterized as subject to exceptional conditions and practical difficulties to justify the location of an accessory use imported from another property. The basis for the variance was very likely found in the building accommodating the principal use rather than the subject lot in the case.

- In the Prospect Associates case (#15013), several forms of relief to enlarge a nonconforming (use) apartment house in an R-3 District were requested.[3] The subject buildings on Prospect Street in Georgetown are four contiguous apartment houses. One observation is simply that the accessory use is relocated to an existing building. For an existing building to simply accept the location of an accessory use does not appear likely to be a situation where this "receiving site" was subject to exceptional conditions or practical difficulties. More likely, in this general restructuring of these properties (as set forth in the hearing announcement), the accessory use did not fit well within the principal use building and the constraints were in the principal use property rather than the apartment house where the off-site accessory use was accommodated.

The above-cited cases are the only two cases that came up in a database search for variances related to § 2500.1. Both of them appear to be precedents for basing the approval on constraints on the principal use property rather than the accessory use property. By implication, the somewhat unusual situations that can arise under § 2500.1 was acknowledged by the Board, and the Board made pragmatic decisions to approve both applications.

Exceptional Condition and Practical Difficulty - Subject Lot

Notwithstanding the above-cited precedents, it should be noted that the subject lot (Square 2849, Lot 98) proposed for the accessory use/play area is constrained by several factors. The lot is small and narrow (20 feet X 100 feet) and is sandwiched between a row dwelling on one side and the new (2002) CVS property on the other. Its small size makes it inefficient and costly for mid-rise commercial or mixed-use development as allowed in the C-3-A District.[4] In such mid-rise development the elevator and other core factors would occupy a higher-than-normal proportion of each floor and present the owner-developer with economic feasibility constraints. In the case of a mixed use building, the core factor constraint is exacerbated by the need to provide separate access to residential and commercial uses. This lot has been vacant for many years.

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[2] See the Realquest property data sheet attached as part of *Exhibit A*. Note that the Square and Lot numbers coincide with the zoning order. The address of 817 Varnum Street, N.E. in the order appears to be incorrect (a single-family dwelling in the "wrong" location), and 801 is the correct address for Square 3810, Lot 822.

[3] See the Summary Order attached as *Exhibit B*.

[4] C-3-A is a medium-density commercial district allowing a maximum height of 65 feet and a maximum density of 4.0 FAR for residential or mixed uses, of which up to 2.5 FAR may be devoted to commercial or other nonresidential uses.

As stated in the Application and in Applicant's testimony at the public hearing, the CVS building within which the charter school operates and its concrete service driveway together occupy 100 percent of the lot. The driveway cannot be converted to play area use because it is needed for access to the trash dumpster and for evening deliveries to the CVS store. The exceptional condition/practical difficulty, therefore, is that there is no land area on the lot where the accessory use could be located. Thus, both the lot accommodating the principal use and the lot proposed to accommodate the accessory use are subject to exceptional conditions and practical difficulties.

The Consent of Both Owners

At the public hearing the question arose as to whether the owner of the subject property, the Shenandoah Corporation, was in fact the Applicant. Shenandoah Corporation provided a letter of authorization for the E.L. Haynes Charter School and Arnold & Porter LLP to file and prosecute the BZA application. The License Agreement, in which Shenandoah authorizes the E.L. Haynes Charter School to construct the play area on the subject property, was submitted to the record. It is common practice for lessees of property to be the active applicants in a case (together with the property owner who is also an applicant, but in a more passive role). For example, child development center cases are normally promulgated by the day care provider rather than the property owner.

The Board asked the Applicant to obtain a letter from the property owner of the CVS property. That letter is attached as *Exhibit C*. It indicates support for approval of the proposed play area on the adjacent lot. Accordingly, both property owners are in support of this variance application, thus making it more logical to consider the combined constraints of the properties as contributing to the basis for the variance.

Recreational/Open Space Use

At the public hearing the question arose as to whether the Shenandoah Corporation could simply have applied for a permit for open space/recreation use? The project team originally hoped that the Department of Consumer and Regulatory Affairs ("DCRA") would allow the use as a matter of right. However, as the Zoning Administrator and staff would not allow such an interpretation, as they were aware that the play area was to serve the E.L. Haynes Charter School rather than the general public. Accordingly, they ruled as indicated in the attached email from Faye Ogunneye, Zoning Administration, DCRA, to Nathan Gross, representing the Applicant. A copy of the email is attached as *Exhibit D* and states in part:

> *2. The playground cannot have a C of O as a public school without a building on the lot. If the work to be done is simply the erection of a fence, we can approve such an application, however to get a certificate of occupancy will be complicated as the proposed use will be difficult to qualify. Going to the BZA will result in seeking relief to provide an accessory use on a lot other than that of the principal use. Mr. Bello [Zoning Administrator] and I discussed this issue late yesterday.*

Accordingly, DCRA officials did not allow an open space/recreational use as an avenue to approval and instead referred the Applicant to the Board to allow the proposed accessory use to be located on a lot other than the lot accommodating the principal use.

Conclusion

The Applicant hopes that these responses fully answer the Board's questions and that the Board will approve this project which will be of significant benefit to the school and the immediate vicinity.

Respectfully submitted,
ARNOLD & PORTER LLP

Nathan W. Gross, AICP

Cynthia A. Giordano

Attachments

Cc: Advisory Neighborhood Commission 1A
Office of Planning

Exhibit A: **Order No. 14814 and Property Information**

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 14814 of Providence Health Foundation, pursuant to 11 DCMR 3107.2, for a variance to establish an accessory use within a building that is located on a lot other than the same lot on which the principal use is located (Sub-section 2500.1) for hospital administrative offices accessory to Providence Hospital in an R-5-A District at premises 817 Varnum Street, N.E., (Square 3810, Lot 822).

HEARING DATE: June 22, 1988
DECISION DATE: June 22, 1988 (Bench Decision)

SUMMARY ORDER

The Board duly provided timely notice of the public hearing on this application, by publication in the D.C. Register, and by mail to ANC 5A and to owners of property within 200 feet of the site.

The site of the application is located in Advisory Neighborhood Commission ("ANC") 5A. ANC 5A, which is automatically a party to the application, filed a written statement of issues and concerns in support of the application.

As directed by 11 DCMR 3324.2, the Board has required the applicant to satisfy the burden of proving the elements which are necessary to establish the case for a variance from the strict application of the requirements of 11 DCMR 2500.1. No person or entity appeared at the public hearing in opposition to the application or otherwise requested to participate as a party in opposition to this proceeding. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, the Board concludes that the applicant has met the burden of proof, pursuant to 11 DCMR 3107, and that the requested 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 maps. It is therefore ORDERED that the application is GRANTED.

Pursuant to 11 DCMR 3301.1, the Board has determined to waive the requirement of 11 DCMR 3331.3 that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is not prohibited by law.

VOTE: 4-0 (William F. McIntosh, Paula L. Jewell, Charles R. Norris, and Carrie L. Thornhill to grant; John G. Parsons abstaining).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

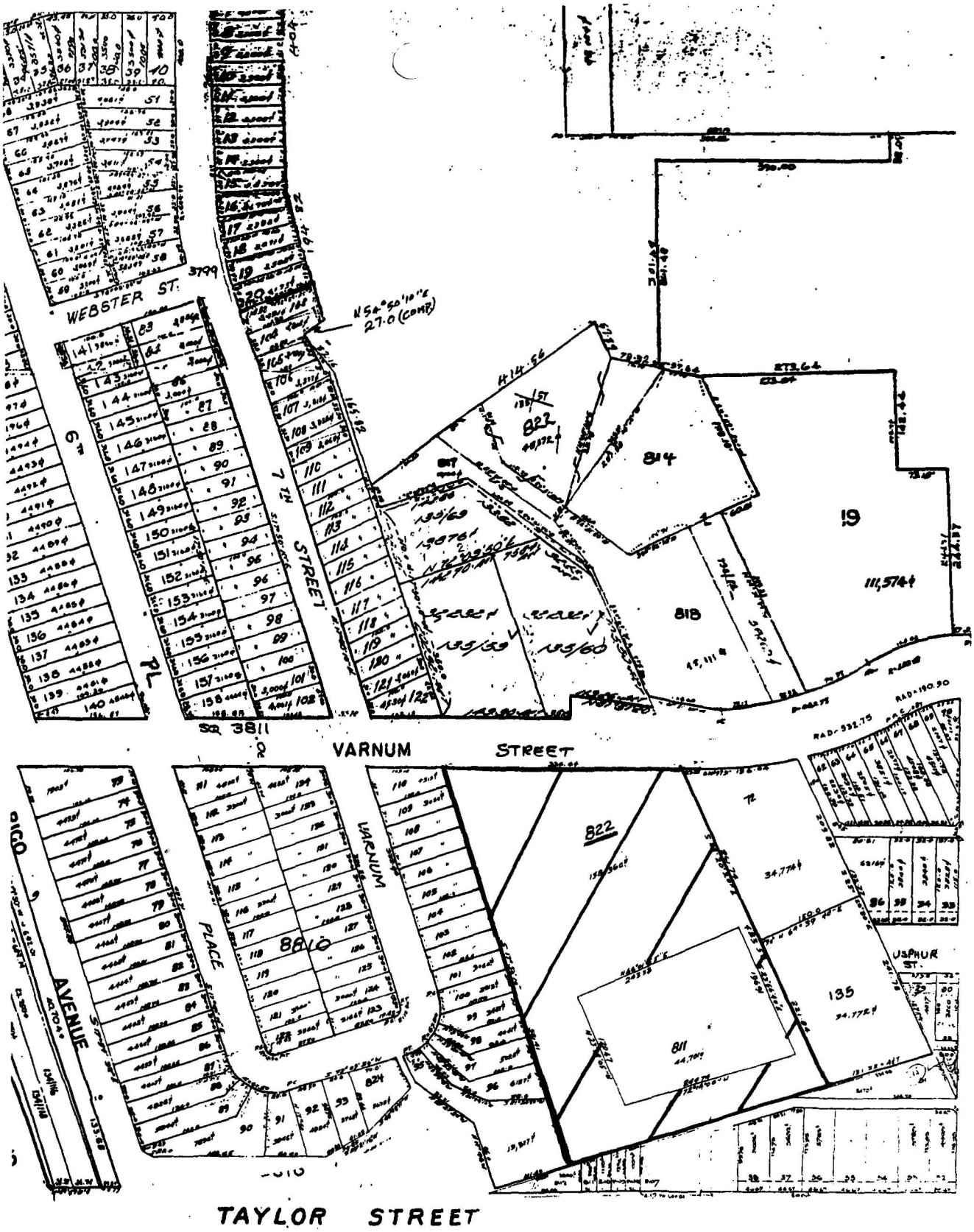
ATTESTED BY: Edward L. Curry CBT
EDWARD L. CURRY
Executive Director

FINAL DATE OF ORDER: AUG 18 1988

UNDER 11 DCMR 3103.1, "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 BEFORE THE BOARD OF ZONING ADJUSTMENT."

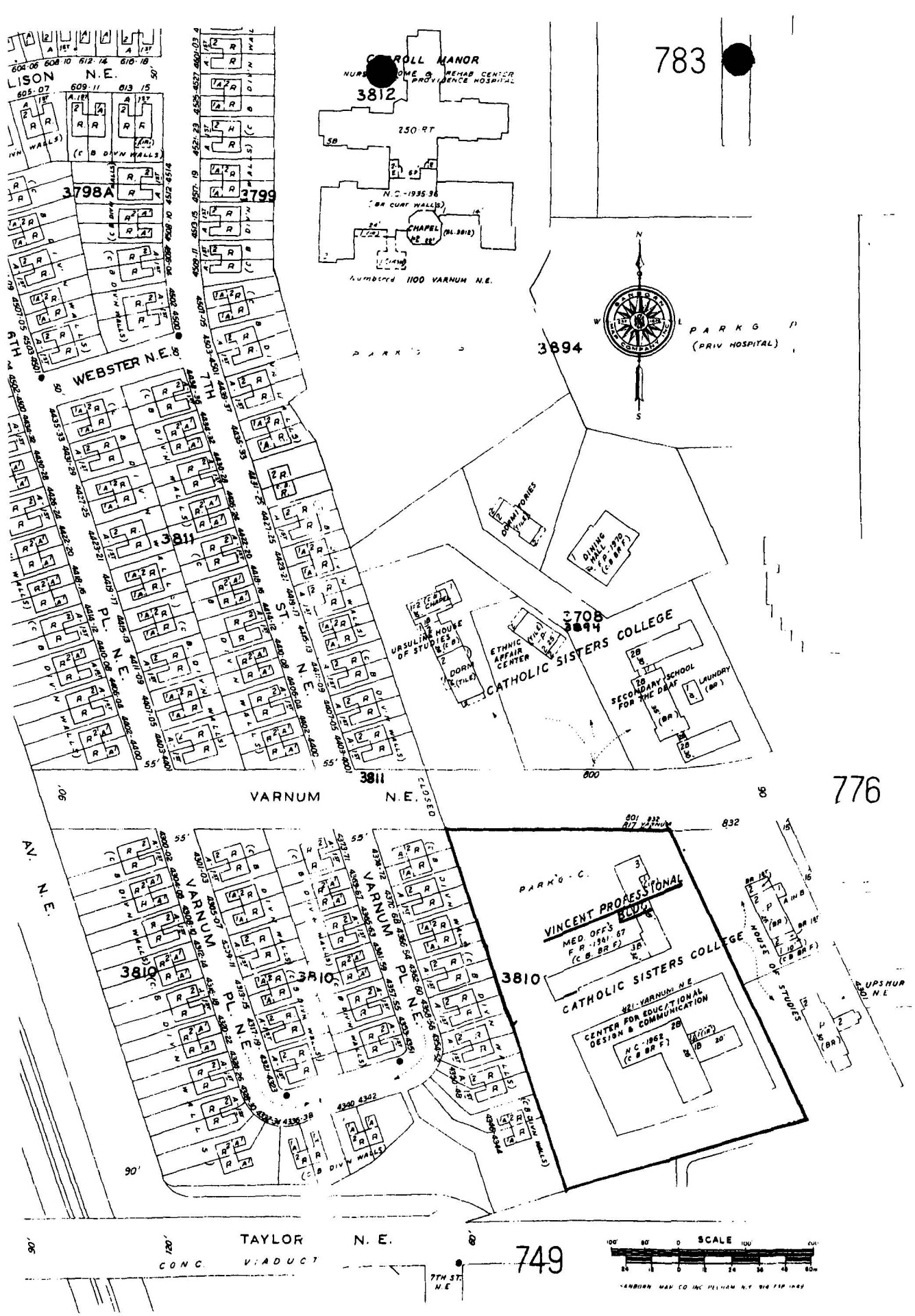
THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

14814order/SANDI



Square 3810, Lot 822

Source: *Sanborn Building and Property Atlas*



801 Varnum Street, N.E.

Source: ***Sanborn Building and Property Atlas***

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SEARCH BY TOPIC



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Prev

Property Detail

Address: 0801 VARNUM ST NE
SSL: 3810 0822

Record Details

Neighborhood:	BROOKLAND	**Sub-Neighborhood:**	C
Use Code:	36 -	**Class 3 Exception:**	No
Tax Type:	PP -	**Tax Class:**	002 -
Homestead Status:	** Not receiving the Homestead Deduction		
Assessor:	GREGORY GLOVER		
Gross Building Area:		**Ward:**	5
Land Area:	138,360	**Triennial Group:**	3

Owner and Sales Information

Owner Name:	PROVIDENCE HEALTH FND INC VINCENT MEDICAL BUILDING C/O JERRY BOLAND
Mailing Address:	1150 VARNUM ST NE; WASHINGTON DC20017-2149
Sale Price:	Not Available
Sale Date:	Not Available
Instrument No.:	

Tax Year 2006 Preliminary Assessment Roll

	Current Value	Proposed New Value (2006)
Land:	$2,335,520	$1,221,720
Improvements:	$1,415,080	$2,903,940
Total Value:	$3,750,600	$4,125,660
Taxable Assessment: *	$3,750,600	$4,125,660

* Taxable Assessment after Tax Assessment Credit and after $38,000 Homestead Credit, if applicable. (Click here for more information).

** If you believe you should be receiving tax relief through the Homestead deduction program and if you are domiciled in the District and this property is your principal place of residence, you can access the link below, complete the form, and return it per the instructions. For additional information regarding the Homestead program, call (202)727-4TAX. Click here to download the Homestead Deduction and Senior Citizen Tax Relief application *

View Tax Information | View Payments

Exhibit B: **Order No. 15013**

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 15013 of Prospect Associates, pursuant to 11 DCMR 3107.2, for a variance to allow an existing structure devoted to a nonconforming use to be enlarged (Sub-section 2002.5), a variance to establish an accessory use within a building that is located on a lot other than the same lot on which the principal use is located (Sub-section 2500.1) and a variance from the use provisions to allow the addition of an accessory parking garage, a storage area, a swimming pool, and an underground studio/recreation space (Sub-section 320.3) as accessory uses to an apartment house in an R-3 District at premises 3400 Prospect Street, N.W., (Square 1204, Lots 39 and 43-51).

HEARING DATE: May 24, 1989
DECISION DATE: May 24, 1989 (Bench Decision)

SUMMARY ORDER

The Board duly provided timely notice of the public hearing on this application, by publication in the D.C. Register, and by mail to ANC 2E and to owners of property within 200 feet of the site.

The site of the application is located in Advisory Neighborhood Commission ("ANC") 2E. ANC 2E, which is automatically a party to the application, by letter dated May 15, 1989, was unable to reach a concensus on the application.

As directed by 11 DCMR 3324.2, the Board has required the applicant to satisfy the burden of proving the elements which are necessary to establish the case for a variance from the strict application of the requirements of 11 DCMR 2002.5, 2500.1 and 320.3. No person or entity appeared at the public hearing in opposition to the application or otherwise requested to participate as a party in opposition to this proceeding. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, the Board concludes that the applicant has met the burden of proof, pursuant to 11 DCMR 3107, and that the requested 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 maps. It is therefore ORDERED that the application is GRANTED.

Pursuant to 11 DCMR 3301.1, the Board has determined to waive the requirement of 11 DCMR 3331.3 that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is not prohibited by law.

VOTE: 5-0 (Charles R. Norris, William F. McIntosh, Maybelle Taylor Bennett, Paula L. Jewell and Carrie L. Thornhill to grant).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____
EDWARD L. CURRY
Executive Director

FINAL DATE OF ORDER: _____

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3103.1, "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 BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

15013order/bhs4

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPLICATION No. 15013

As Executive Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that a copy of the Order of the Board in the above numbered case, said Order dated JUN 13 1989, has been mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

Norman M. Glasgow, Jr. Esq.
Allison M. Carney, Esq.
Wilkes, Artis, Hedrick & Lane
1666 K Street, N.W.
Suite 1100
Washington, D.C. 20006

Rory F. Quirk, Chairperson
ANC 2E
1041 Wisconsin Ave., N.W.
DC 20007

John Dryfuss
3400 Prospect St., N.W.
DC 20007

EDWARD L. CURRY
Executive Director

DATE: JUN 13 89

Exhibit C: **Letter from CVS Property Owner**

FOURTEENTH AND IRVING VENTURES, LLC

c/o Paragon Property Development, Inc.
4733 Bethesda Avenue, Suite 550
Bethesda, Maryland 20814
Phone: 301-913-0326
Fax: 301-913-5398

October 11, 2005

Mr. Geoffrey Griffis, Chairman
District of Columbia Board of Zoning Adjustment
441 4th Street N.W.
Suite 210
Washington, D.C. 20001

Re: Application No. 17376 - E.L. Haynes Charter School Play Area

Dear Mr. Griffis and Members of the Board:

Fourteenth and Irving Ventures, LLC ("Ventures") is the fee simple owner of the property located at 3029 & 3031 14th Street, N.W. ("CVS / School Building"), where E.L. Haynes Public Charter School occupies approximately 12,000 square feet of second-story space pursuant to a lease. Ventures is pleased to offer this letter of support for the construction and use of a play area for the School to be located on the currently vacant lot known as 1366 Irving Street, N.W. which is immediately adjacent to the CVS / School Building.

E. L. Haynes Public Charter School has an urgent need for a convenient and safe play area because currently children must be escorted to a neighborhood park, a process that presents very serious life safety issues. A play area immediately adjacent to the School would avoid such issues. Moreover, the School's plan constitutes a significant investment toward improving the appearance and use of an otherwise blighted lot. We applaud such thoughtful and appropriate investment in Columbia Heights.

The School has represented that the play area will be used during the hours of the School's operations, from 8:30 a.m. to 3:30 p.m., for health and fitness, dance, science classes and other activities during the Extended Day program that runs until 6 p.m. From the perspective of Ventures, neither the proposed use of the lot as a play area, nor the proposed schedule for use, conflicts with the rights of our tenants in the CVS / School Building.

We look forward to the construction and use of the play area as a positive addition to the School ensuring a well-rounded learning experience for the children, and as a great benefit to the general Columbia Heights community.

Fourteenth and Irving Ventures, LLC

By: _____

Gary Mullins,
Manager

Exhibit D: **Email Communication from Office of Zoning Administrator**



"Ogunneye, Faye (DCRA)" <Faye.Ogunneye@dc.gov>

To: Nathan Gross/Spec/DC/ArnoldAndPorter@APORTER
cc: "Bello, Toye (DCRA)" <Toye.Bello@dc.gov>
Subject: RE: Play Space @ 1366 Irving Street NW

05/03/2005 11:12 AM

Mr Gross,

1. Correct, a public school and a public charter school are allowed as a matter of right.
2. The playground cannot have a C of O as a public school without a building on the lot. If the work to be done is simply the erection of a fence, we can approve such an application, however to get a certificate of occupancy will be complicated as the proposed use will be difficult to qualify.

Going to the BZA will result in seeking relief to provide an accessory use on a lot other than that of the principle use.
Mr Bello and I discussed this issue late yesterday. I will have a word with him again, however I hope this response gives you some guidance as to what approach you might sort.

Faye Ogunneye

-----Original Message-----
From: Nathan_Gross@aporter.com [mailto:Nathan_Gross@aporter.com]
Sent: Friday, April 29, 2005 2:23 PM
To: Faye.Ogunneye@dc.gov
Cc: naddison@facilityplanners.com; Cynthia_Giordano@aporter.com
Subject: Play Space @ 1366 Irving Street NW

Ms. Ogunneye,

On behalf of Cynthia Giordano and myself at Arnold & Porter, I would like to add to the question. We would handle the BZA case, if there is one. Our questions:

1. Our understanding is that a charter school is allowed as a matter of right, the same as a public school. Please advise if that is incorrect.
2. Assuming that's true, why can't the playground lot simply get a matter-of-right C of O for charter school use. The recreational use of the lot is part of the educational program. I understand the accessory use interpretation, but is there not possibly some flexibility here when there is not even any construction involved other than a fence?
3. If we have to go to the BZA, what would be the requested use? If charter schools are public schools, how can there be an application for private school use? What other category, if any, might there be?

Please advise. Thank you.

Nate Gross
----- Forwarded by Nathan Gross/Spec/DC/ArnoldAndPorter on 04/29/2005 02:15 PM -----

"Natalie Addison"