

SUMMARY OF PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW. AND ORDER

Board of Zoning Adjustment Case #20266
Pursuant to 11-C DCMR §703.2
for a Special Exception to the Minimum Parking Requirements under 11-C DCMR §701.5

HEARING DATES: July 29, 2020; August 5, 2020
SUBMISSION DATE: September 8, 2020
DECISION DATE: September 30, 2020

SUMMARY OF CONTESTED ISSUES IN BZA CASE #20266

Applicable Regulations

1. 11-X DCMR §901.2 provides that the special exception “(a) Will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps; (b) Will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps...” 11-X DCMR §901.3 requires that “The applicant for a special exception shall have the full burden to prove no undue adverse impact and shall demonstrate such through evidence in the public record.” Further, 11-C DCMR §703.2 requires that the applicant must demonstrate that at least one of the enumerated conditions has been met to qualify for a special exception (*Findings of Fact at ¶20*).
2. In accordance with 11-C DCMR §701.5, a project of this size is required to provide sixteen (16) parking spaces for residents and seventeen (17) spaces for the retail component, for a total of thirty-three (33) spaces (*Findings of Fact at ¶21*).
3. Pursuant to 11-C DCMR §702.1(a), the proposed project received a 50 percent reduction in the required number of parking spaces based on its proximity to a Metro station. Accordingly, the Applicant is required to provide eight (8) parking spaces for residents and nine (9) spaces for the retail component, for a total of 17 spaces (*Findings of Fact at ¶22*).
4. Beyond the 50 percent reduction of 11-C DCMR §702.1(a), the Applicant requests a special exception and asks that the parking requirement be waived in its entirety under §703.2 so that the existing 14 space surface retail parking lot can be removed and replaced partly with structure and partly with an open plaza (*Findings of Fact at ¶23*).

Contested Issues of Fact

1. Existing demand for public parking in Cleveland Park already exceeds supply, and the parking situation will get worse with fewer spaces and more demand from development.

The Party in Opposition submitted written and oral testimony that documents businesses’ long-standing concern that lack of parking frustrates their prosperity and even existence. None of

these facts were presented by the Applicant, who did not mention the relationship of parking to the health of local businesses. Among the facts ignored were:

- A.** DMPED's 2016 Commercial Market Analysis and Enhancement Strategy for Cleveland Park, which found that lack of parking is the #1 challenge faced by local businesses (*Findings of Fact at ¶25*).
- B.** The Firehook Bakery owner's quote, upon closing his Cleveland Park business in the summer of 2020, that local businesses need parking now more than ever (*Findings of Fact at ¶26*).
- C.** The fact that the Applicant advertised four on-site parking spaces when leasing existing commercial space on the subject property (*Findings of Fact at ¶27*).

2. Parking supply is decreasing when it needs to be increasing.

The Party in Opposition submitted written and oral testimony that there are approved plans to remove three or four spaces from the inadequate parking supply on Connecticut Avenue, and 28 spaces are indefinitely removed from the service lane. Among the pending reductions in parking availability that were not addressed by the Applicant:

- A.** DDOT has approved a Streetscape Improvement Project that is scheduled to begin later this year; it will include re-orienting the service road exit, which will result in the removal of three or four retail parking spaces on Connecticut Avenue. DDOT and OP did not mention this in its report, which not only endorsed an incorrect parking supply number but also omitted any independent analysis of reports and initiatives by other government agencies regarding the subject area (*Findings of Fact at ¶¶29, 45, 56, 57*).
- B.** The Applicant will remove 14 extant retail spaces in the surface parking lot while increasing retail space on-site by about 15 percent or 2,700 square feet without providing any of the additional parking spaces required by Zoning Regulation (*Findings of Fact at ¶¶23, 32*).
- C.** Applicant is requesting the special exception in order to remove existing parking on-site, which would nearly satisfy the minimum parking requirement (*Findings of Fact at ¶32*). Neither DDOT nor OP mentioned that a 50% exemption had already been applied because of the project's proximity to a Metro station and that they were using the minimum parking requirement that resulted (*Findings of Fact at ¶44, 56*).
- D.** The Applicant's traffic consultant refuted the DDOT and OP conclusions that parking is available for the increased demand that will result from the subject project, which were based on the Gorove Slade study. When correct parking supply numbers are used, the study's results change, and there is no availability based on the methodology used; this is why he stated at a public ANC3C meeting in the summer of 2020, that there is, in fact, no parking available in Cleveland Park (*Findings of Fact at ¶¶28, 30*).

3. Metro rail and bus lines are inadequate to meet the needs of the increased number of residents and the increased patrons of new businesses.

The Party in Opposition asserts that Metro primarily serves commuter travel, not commercial business activity, and that the bus lines primarily duplicate Metro routing and do not expand access to local businesses. Among the arguments in support of this assertion:

A. The Cleveland Park Metro station serves only the Red Line, which travels along a north-south route; the only connection to other routes to other parts of the city are from downtown. Almost all of the available bus service follows the same route, which is redundant (*Findings of Fact at ¶24*).

B. DDOT did not describe the bus lines or the Metrorail line serving Connecticut Avenue; it only asserts that Cleveland Park is well served by both. Without more explanation, this is an unsupportable assertion (*Findings of Fact at ¶61*).

C. DDOT and OP mention in their memoranda that the property is well served by transportation, but does not mention that public transit service, all north-south, is redundant and – with the exception of a bus line which travels between Cleveland Park and Columbia Heights – do not expand connectivity to other parts of the city. Thus, it is hyperbole to describe transportation in the subject area as “well served” or “very well served” as OP and DDOT do, respectively (*Findings of Fact at ¶¶24, 51*).

D. The Applicant has benefitted from the existence of a Metro station in the subject area to the extent of the elimination of half the minimum parking requirement. To grant them more, as this Special Exception application requests, should require at least the demonstration of a more robust and comprehensive transportation system alternative to driving (*Findings of Fact at ¶22*).

E. Metrorail has served Cleveland Park for more than three decades, and local business complaints about lack of parking has been consistent for at least the past 20 years. Thus, the existence of the Red Line has not positively affected business prosperity and removing existing parking by granting a special expectation to waive this project’s parking requirement will only worsen the situation (*Findings of Fact at ¶24*).

4. There are feasible ways to provide the minimum parking required on-site.

A. Although the Applicant claims that retaining the existing parking, and the associated curb cut on Connecticut Ave., would not be permitted, the Party in Opposition asserts that the Applicant is creating the dilemma that it faces by eliminating the existing parking (*Findings of Fact at ¶¶29, 32*). When the existing parking was created it was legal; and it is only recent regulations that state if a property is redeveloped the site should comply with all subsequent regulations. (*Findings of Fact at ¶¶35, 48, 50*). The majority of the development project the 31-unit apartment building on Lot 821 – does not affect physically the existing parking, since the parking is on Lot 817 (*Findings of Fact at ¶35*). The construction of four townhouses and an additional 2,700 square feet of retail is proposed

on part of the surface lot, but could be designed in a way that would not require the removal of all of the existing lot or the closing of the existing curb cut (*Findings of Fact at ¶¶34, 35*). Furthermore, there has not been a thorough examination of alternatives on-site (*Findings of Fact at ¶48*).

B. If Lot 817 is to be developed, the creation of the non-compliance with zoning regulations is not fatal and can be addressed with another Special Exception, the same process that is being used here to waive the parking requirement (*Findings of Fact at ¶35*). The specific regulations that the Applicant submits need to be waived are 11-C DCMR §710.2(b)(2) and §714. The former prohibits parking lots in front yards. In 11-B §101.2 a front yard is defined as the area between the front façade of a building and the lot line, and its stated that front yards don't apply to all zones. In fact, in the NC-3 zone there is no front yard requirement and buildings are permitted to occupy 100% of the lot (*Findings of Fact at ¶50*). It is a stretch for the Applicant and OP to contend that 11-C §710.2(b)(2) applies in this case. The latter regulation requires screening around surface parking lots, but §714.2(b) states that "gaps in the screening are allowed only to provide driveways and pedestrian exits or entrances that open directly onto a street, a sidewalk, or an alley." The only open area for the existing surface parking lot would be the portion facing the Connecticut Avenue sidewalk and the curb cut driveway (*Findings of Fact at ¶50*). If the Zoning Administrator, who has not offered an opinion since the Applicant self-certified zoning compliance, determines that the regulations apply, the Applicant has the same remedy it is using today, that is to seek a Special Exception (*Findings of Fact at ¶36*). The NC zone designation at 11-H §204.1 restricts driveways to required parking spaces from designated roadways. The designated roadway for the NC-3 zone is Connecticut Avenue. There is a special exception option for waiving this restriction and permitting the existing driveway to be retained (*Findings of Fact at ¶35*).

D. Applicant presented and dismissed several alternatives to providing the required minimum number of parking spaces (*Findings of Fact at ¶35*). No engineering exhibits were submitted to show how an option would be designed and why it would or would not work. The Applicant only described the access point and the general elements of each design and then dismissed each as unworkable (*Findings of Fact at ¶¶33-35*). OP and DDOT accepted this cursory exposition, which was apparently intended to persuade the BZA that the only option is a complete waiver. In testimony the Applicant admitted that alternatives are feasible, but they might be expensive or eliminate some housing units from the project, so he does not want to pursue them (*Findings of Fact at ¶33*). The Zoning Regulations do not offer expense or project bottom line goals as review standards. The BZA should reject the Applicant's proforma dismissal of his obligation to comply with the minimum parking requirement, which is actually only half of what is required for the size of the development proposed (*Findings of Fact at ¶21*).

CONCLUSIONS OF LAW

1. The Board is authorized to grant variances from the strict application of the Zoning Regulations to relieve difficulties or hardship, providing the project will: 1) be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps, and 2) not tend to affect adversely the use of neighboring property . . . (11-X DCMR §901.2).
2. Since the project is in the Cleveland Park Neighborhood Mixed-Use(NC-3) Zone, the Applicant must also comply with 11-H DCMR §500.1(c), which provides that the purpose of the zoning is, in part, to “enhance pedestrian activity, safety, and consumer support for businesses in the commercial area.”
3. The Applicant for a special exception bears the full burden to prove no undue adverse impact (11-H DCMR §901.3).
4. The Board may grant a full or partial reduction in number of required parking spaces, subject to the above standards and the Applicant’s demonstration of at least one of the enumerated requirements in 11-C DCMR §703.2(a)-(j).
5. For the reasons stated below, the Applicant has not met his burden to prove that the project is in harmony with the Zoning Regulations and that there is no undue adverse impact.
6. In addition, the Applicant has not met his burden to demonstrate that he qualifies for one of the exceptions listed in 11-C DCMR §703.2(a)-(j).

The requested special exception is not in harmony with the general purpose and intent of the Zoning Regulations.

7. For a project this size, Applicant is required to provide a total of 33 parking spaces. Pursuant to 11-C DCMR §702.1(a), the proposed project received a 50 percent reduction in the required number of parking spaces based on its proximity to a Metro station. Accordingly, the Applicant is required to provide only eight parking spaces for residents and nine spaces for the retail component, for a total of 17 spaces. So, the Applicant has received a significant benefit already because of its proximity to public transportation.
8. Despite its proximity to a Metro station and bus lines, Cleveland Park already has a significant parking problem. Notably, the Cleveland Park Metro Red Line has been open since 1981 and the parking problems associated with the neighborhood have not dissipated. DDOT itself previously recognized the need to retain as many parking spaces as possible in redesigning the service road pursuant to the Connecticut Avenue Streetscape Project. A 2016 report for the Deputy Mayor for Planning and Development identified the lack of parking as a significant problem for local businesses.
9. The Applicant’s traffic study does not convince this Board otherwise, as it finds the study flawed. First, the study fails to consider the elimination of 14 parking spaces on site. Second, even improperly considering those spaces, the study found there were no RPP spaces available

during rush hour. Third, if you eliminate those 14 spaces, the observed demand for the on-street parking spaces would exceed the available supply during any of the hours analyzed. Fourth, the Applicant's own expert candidly acknowledged that there is no parking in the neighborhood. Fifth, the expert did not update the study to consider the more recent loss of 28 service road spaces, 3 to 4 spaces on Connecticut Avenue due to the Streetscape Project, and the general change in driving behavior due to the pandemic.

10. The public transit available in Cleveland Park, both bus and rail, is redundant, since it all (with the exception of a bus line to Columbia Heights) travels along a north-south route, with all connections to other parts of the city only from downtown. Thus, there is little or no basis for the Office of Planning or the Department of Transportation to claim, as they do, respectively, that the project is "well served" or "very well served" by public transit.
11. The Board, therefore, does not, as Applicant suggests, consider the proximity to public transportation as justification to reduce the parking requirement even further to zero.
12. Moreover, the ample evidence of a parking supply/parking demand imbalance that directly affects "consumer support for the businesses in the area," as required by NC-3 zoning, leads to the conclusion that the requested waiver conflicts with the intent and purpose of the Zoning Regulations.

The requested special exception is not required by the Applicant's alleged inability to physically provide any spaces on-site.

13. At the heart of the Applicant's request for a special exception is his argument that it is not feasible to provide the required parking spaces. Indeed, it is on that basis that the OP supports his request. However, the property currently has 14 retail parking spaces, which the Applicant could retain in order to provide almost all the required parking. Since this parking is on a separate lot, he would not be subject to the regulations concerning screening and removal of the curb cut. Even if he were subject to those regulations, nothing precludes him from seeking a special exception, as he is doing in this case.
14. Instead, Applicant asks this Board to grant a special exception to the minimum parking requirements of the Zoning Regulations so that he can use the parking lot primarily for additional income-producing structures -- retail space and four townhouses -- at the expense of neighbors and local retailers. The question is: Can the Applicant develop his property in such a way to remove parking spaces and then use that very removal to justify his request for a special exception. We find that he cannot. The regulations envision a situation where parking is not feasible; they do not envision a situation where parking is removed, thereby allowing an applicant to argue parking is no longer feasible.
15. Moreover, 11-C §703.2(a) provides for an exception [d]ue to the physical constraints of the property, if "the required parking spaces cannot be provided either on the lot or within six hundred feet (600 ft.) of the lot..." The Applicant has not demonstrated that he cannot provide parking at another lot 600 ft. away. Notably, OP did not address this issue in its report.

16. As discussed above, the Board does not consider the proximity to public transportation as justification to reduce the parking requirement even further to zero. Accordingly, Applicant does not meet the requirements of 11-C DCMR§703.2(b) and (c).
17. The addition of 35 additional dwelling units would significantly increase traffic congestion. Accordingly, Applicant does not meet the requirements of 11-C DCMR§703.2(d).
18. OP concluded that 11-C DCMR§703.2(e), (f), and (g) are not applicable.
19. Similarly, 11-C DCMR§703.2(h) does not apply because it is premised on the project not having access to an open public alley and this project does have access. Applicant's curb cut is grandfathered in as the curb cut predates any regulation. Moreover, even if the regulation applies, Applicant has not demonstrated that he cannot obtain a waiver of the regulation.
20. Since OP supported a waiver because it found on-site parking was not feasible, we give their report no deference.
21. We conclude that the Applicant has not met his burden to show that the requested special exception is required by the number of spaces the Applicant cannot physically provide on-site. Accordingly, such a use conflicts with the intent and purpose of the Zoning Regulations.

The requested special exception will affect adversely the use of neighboring property.

22. The project would remove 14 extant retail spaces in the parking lot while increasing retail space on-site by about 15 percent or 2,700 SF without providing any of the additional parking spaces required by their customers and staff.
23. The proposed project adds increases by more than 70 percent the number of Newark Street residences between Connecticut Avenue and Highland Place. Along with such a number comes increased traffic, including delivery and ride share drivers, and visitors.
24. The Board gives weight to the fact that 54 neighbors – a preponderance of the owners of neighboring properties – supported Party Status and asserted that the proposed project would affect them adversely. Neighbors on the three nearby streets who wrote to the ANC were more than 90 percent in opposition, citing problems in parking (37), traffic (17) and safety (13).
25. Sight levels on the street are poor because the Macklin sits right below a curve in the street. The record provides evidence that pedestrians, especially children in strollers and seniors, and cars would face serious safety hazards on Newark and Ordway Streets, both of which are narrow. Part of Newark Street has a sidewalk on only one side of the road, and utility pole obstructions often force pedestrians to walk in the street.
26. The only evidence the Applicant presented to the contrary is the OP report, which concluded that the project would not have an adverse impact on the neighborhood, which also conflicts with the finding of ANC 3C The OP's conclusion is flawed. OP asserts that the addition of 35 dwelling

units “would not be expected to significantly increase traffic congestion” without any analysis of the impact of moving trucks, visitors, guests, and delivery services, or of expected new retail customers and staff, all searching for non-existent parking spaces. In fact, the OP representative testified that she did not take any of those things into account when she wrote her report. Her failure to do so severely undermines her conclusion. Accordingly, the Board gives it no weight.

27. Similarly, the Board does not give deference to DDOT’s report. DDOT did not factor into its report the loss of 14 retail spaces in the extant parking lot nor did it take note of the DMPED study documenting businesses identification of scarce parking as their overwhelming principal concern. It did not mention the loss of 3-4 parking spaces from the DDOT Streetscape Improvement Project, or the indefinite suspension of 28 parking spaces on the service road that, like other temporary changes resulting from Mayor Bowser’s declaration of a State of Emergency, could be made permanent. In effect, DDOT did not mention anything the Applicant did not mention, which the Board finds telling.
28. The Board considered the ANC 3C recommendation and gave it great weight. The ANC found that there would be adverse impacts on neighboring property and the Board concurs. The Board is not considering the conditions the ANC offered because the Board finds that the applicant has not met his burden to satisfy the requirements for a Special Exception from the minimum parking requirements
29. There is a documented problem, which has existed since long before this project, with the lack of adequate parking for local businesses. Providing no parking for residents and removing 14 parking spaces, currently earmarked for commercial tenants, will only exacerbate the problem and serve to undermine those businesses further.
30. The Applicant has not met his burden to demonstrate that the requested special exception will not tend to affect adversely the use of neighboring property. To the contrary, the Board concludes that the waiver would adversely affect the use of neighboring property.
31. The Board concludes that there is overwhelming evidence that granting the Applicant’s request will create parking demand, is counter to the zone intent and purpose, will both create and exacerbate existing pedestrian and traffic safety issues, and will undermine support for local businesses.

In consideration of the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that the request for a special exception to the minimum parking requirements under 11-C DCMR §701.5 is **DENIED**.