

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:

IRA J. BELL
Employee,

v.

D.C. DEPARTMENT OF
HUMAN SERVICES
Agency

OEA Matter No. 1601-0020-03R06

Rohulamin Quander, Esq.
Senior Administrative Judge

Date of Issuance: January 12, 2007

John Anderson, Esq., Employee representative
Kevin J. Turner, Esq., and Robert Warren, Esq., Agency representatives

ADDENDUM DECISION ON REMAND

INTRODUCTION AND BACKGROUND

Ira J. Bell (the "Employee") worked as a Youth Corrections Officer (a "YCO") at the Oak Hill Youth Center ("Oak Hill" or the "facility") with the Youth Services Administration of the D.C. Department of Human Services (the "Agency"). On May 14, 2002, Employee was working his scheduled shift at Oak Hill. During his shift, Employee retrieved a video play station game from his automobile, and returned to the facility with the video game. As he was walking to his duty station, he was approached by George Perkins ("Perkins"), Deputy Administrator for Secure Programs, and informed that he had been randomly selected for a more thorough search. Employee was directed to proceed to the Central Administration Building. (the "CAB")¹

During the search, which included a pat down, the play station video game that Employee was carrying in his hand was confiscated. According to Agency's regulations and assertions, the game constituted contraband, in direct violation of Agency's

¹ The Hearing Transcript, Pp. 19-20 (November 12, 2003), indicated that Perkins had ordered that the correctional officers stationed at the entrance conduct a random pat down search of every fourth or fifth person entering the facility at that location.

previously established prohibition about bringing such items into the facility. Although video games were not specifically listed as a forbidden item, Agency relied upon a generic reference, or “catch all” phrase, which defined “contraband” as, “any item, article or thing not issued or purchased from the facility/institutional canteen, or not specifically authorized for use by residents or staff by the Superintendent or Program Manager.”² (Agency Exhib. #5)

During the pat down search, Agency officials detected a metal object in Employee’s groin area, which Employee advised was a component of his back brace he continued to wear, due to a previously sustained injury. When directed to remove the item and surrender it for inspection, Employee refused, asserting that in order to remove the brace, he would likewise have to remove both his uniform pants and his underpants. After the dispute arose regarding the removal of the brace and exposure of his groin area, Employee then requested that a union representative be summoned to the site before the search progressed any further. However, Employee elected to leave both the room and the facility prior to the union representative’s arrival.

As a result of this incident, and after Employee had been accorded an opportunity to respond to allegations of insubordination, possession of contraband, and unauthorized absences, on December 3, 2002, Agency issued a letter of removal to Employee, based upon an adverse action charge of insubordination for refusing to be subjected to the search. The two allegations related to contraband and unauthorized absences were dismissed at the Agency level. Employee filed a timely Petition for Appeal with the Office of Employee Appeals (the “Office”), alleging that he had been subjected to Agency’s random, unauthorized search, without probable cause, and in violation of the collective bargaining agreement. I conducted an Evidentiary Hearing in this matter on November 12, and 13, and December 11, 2003, and issued an *Initial Decision* on May 7, 2004.

In my prior decision, I reasoned that the play station video game that Employee brought into the facility was a *de minimus* violation of Agency’s contraband policy, the effect of which behavior rendered Employee only mildly insubordinate. I further reasoned that that incident, standing alone, was not a sufficient basis to sustain Employee’s removal. I then held that Agency lacked probable cause to believe that Employee was harboring contraband, and that the pat-down search, which escalated into a potential strip search that would have left Employee naked from the waist down, was not justified by the circumstances. I concluded that Employee was well within his legal rights to decline to be subjected to what amounted to a strip search, and that his refusal to be further searched, including his electing to leave the premises, was not an insubordinate action. Viewing the situation as a whole, including relying upon the credible testimony of witnesses called by Employee, who testified that this type of search was previously unknown to have been conducted against their fellow correctional officer employees, I further found that Employee had been singled out for disparate treatment.

² See Agency Memorandum of February 23, 1995, on Subject, “Contraband Items.”

During the conducting of the Evidentiary Hearing, and likewise reflected in the *Initial Decision*, I found that the applicable legal standard was “probable cause”. Using that legal standard, I then found that Agency had not met its burden of proof. Agency filed a Petition for Review on June 16, 2004, and for the first time, raised the issue of what standard of proof governed this case. Agency maintained, and the Board likewise agreed, that the applicable legal standard in this matter was the “reasonableness” of Agency’s actions, rather than a question of whether Agency had “probable cause” to conduct the search.

In its appeal, Agency cited federal and District of Columbia cases in which this issue had been raised and decided. In *O’Connor v. Ortega*, 480 U.S. 709 (1987), the U.S. Supreme Court held that the Fourth Amendment protects the right of people to be secure in their person against unreasonable searches and seizures. As a result, individuals do not lose their Fourth Amendment rights merely because they work for the government. More specifically related to the matter at hand, the Court held, at 718-719, that, “the constitutionally protected privacy interests of government employees for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all circumstances.” Further, reasonableness is determined by a balance of the invasion of the employee’s legitimate expectation of privacy against the government’s need for supervision, control, and the efficiency of the workplace. The Court explained at 725-726, that under the referenced standard, the search must be justified at its inception and reasonably related to the circumstances which justified the intrusion.

Citing *O’Connor* for its pronouncement on the application of the reasonableness standard, the Court in *Wiley v. Department of Justice*, 328 F.3d 1346 (2003), distinguished between searches based on work-related misconduct from a search seeking evidence of criminal misconduct. Drawing the matter even closer to the present fact pattern, the Court held in *Profitt v. District of Columbia*, 790 F.Supp. 304 (1991), that reasonableness is the standard for searches of government employees, and that strip searches of correction officers within correctional facilities are not *per se* violations of an employees Fourth Amendment rights. In *Profitt* the Court added that correctional officers fall within the exception for the warrant requirement because there is a legitimate governmental purpose of maintaining correctional facilities, and the governmental purpose outweighs a correction officer’s diminished expectation of privacy.³

³ In *Profitt*, the Court listed factors that must be considered to determine if a search is reasonable. Those factors include: a) the scope of the intrusion; b) the manner in which the search is conducted; c) the justification for initiating the search; and d) the place in which the search is conducted.

JURISDICTION

The Office had jurisdiction in this matter pursuant to *D.C. Official Code* § 1-606.03 (2001).

ISSUES

The issues to be decided are:

- a) Whether Agency's action to terminate Employee was taken for "cause", as that term is defined by the D.C. Office of Personnel (DCOP) Rule 1603.3, 47 D.C. Reg. 7094, 7096 (2000);
- b) If Agency's action was taken for cause, whether Employee's violation of the cause standard was *de minimus*;
- c) Does the record support a finding that Employee was subjected to disparate treatment by Agency; and
- d) Whether the decision was in accordance with law or applicable regulations.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

A. Undisputed facts

1. On May 14, 2002, the date of the incident, Employee was employed as a YCO with Agency's Youth Services Administration ("YSA"), and was assigned to work at Oak Hill, located in Laurel, Maryland. At the time that he was terminated from employment, he had served as a YCO since 1989, and was a model employee.⁴ He had consistently earned and received an annual performance rating of "Excellent", was YCO of the Year in 1993, and had never been subjected to any prior disciplinary action.
2. While on duty on May 14, 2002, Employee visited his automobile, which was parked just outside of the facility's perimeter. Upon reentering the secured areas of the Center, he was initially subjected to and completed the usual search by gatehouse personnel. He was then directed by Perkins to proceed to the CAB, where he was subjected to a more thorough pat down search.
3. Employee was told that he had been randomly selected for a more thorough search, consistent with Perkins's directive to gatehouse staff to conduct random searches of every fourth to fifth person coming through the gate, and to assure compliance with Agency's policy which forbade bringing non allowed items into the Center.

⁴ Prior to working as a YCO at Oak Hill, Employee served in that same capacity at Cedar Knoll, another YSA center, which is now closed.

4. During the search, Employee was observed carrying "Virtual Fighter", a video game. Agency maintained that the item was "contraband", and in violation of Agency's memorandum, issued February 23, 1995, which expressly forbade the bringing of such items onto the Oak Hill campus. In addition to 25 enumerated items which were expressly forbidden, contraband was defined to also include, "... any item, article, or thing that is not issued or purchased from the facility/institution canteen or not specifically authorized for use by residents or staff by the Superintendent or Program Manager." (*Agency Exhib. #5*)
5. The searching official felt an unusual object in the Employee's lower abdomen/upper groin area. Employee explained that he still wore a device to brace his back and apply necessary medication, both incidental to a 2001 on-the-job injury.
6. Employee was directed to remove the device from his groin area and to likewise remove his outer uniform pants, underpants, and athletic supporter. He refused, saying, "This search is over!"
7. Pursuant to his rights under the union contract, Article 6, *Employee Rights*, § 8, paragraph 1, it provides that, "A labor representative of the appropriate bargaining unit will be given the opportunity to be present at any examination of an Employee by a management official in connection with an investigation (1) if disciplinary action could result, and (2) the Employee requests representation." Employee then requested that a union representative be present before any further search was conducted. While efforts were made to locate and then summon a union representative, Employee grew increasingly agitated, stating that he did not wish to continue with the search and that he was preparing to leave the room and the Center.
8. Perkins informed Employee that if he left the area at this crucial point in the search process, he would be considered insubordinate and likewise would be subject to immediate termination.
9. Employee elected to leave the premises, and was escorted from the facility by Perkins, who directed the staff that Employee should not be allowed back into the Center until further notice.
10. During the administrative review component of this appeal, the proposed adverse action was investigated by James C. Parks ("Parks"), Deputy Director of Administration at Agency. Assigned to serve as the hearing officer in the matter, he gathered extensive evidence and other information from both Agency and Employee, through John Anderson, Employee's counsel.
11. After evaluating the evidence and all supporting documents, Parks found, *inter alia*, that:
 - a) On the date of the search, Employee appeared to have been intimidated by the action and under duress when he failed to obey an order from the Deputy Administrator, which latter person was entitled to give orders and have them be obeyed. Employee's refusal actions under this set of circumstances constituted insubordination.

- b) Although the video game CD that Employee brought into the facility was not one of the 25 items specifically enumerated as prohibited by the memorandum of February 23, 1995, the CD was still included as a forbidden item covered under the Agency's broad definition of "contraband", that included any item that was not authorized by the Superintendent or Program Manager. However, Agency had not presented sufficient evidence to establish that Employee had been trained on the expectations and requirements of the 1995 memo. Parks recommended that Employee could not be removed from his YCO position for failure to comply with the memo's directive.
- c) The evidence presented by both parties concerning the issue of Employee's unauthorized absence on May 16, 18, and 22, 2002, was both conflicting and unclear. The evidence presented did not support the removal of Employee for the charges of unauthorized absence on the dates claimed.
12. Based upon his review of the evidence presented, the record as a whole, and the legal standards set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), Parks concluded that the charges of possession of contraband and unauthorized absence should not be sustained by refusing to submit to the more extensive bodily search, but that the separate charge of insubordination should be sustained.
13. Parks then recommended in his comprehensive report, dated November 27, 2002, that Employee's termination should be sustained.
14. In my *Initial Decision*, I found that the allegations which Agency re-raised during the evidentiary hearing held before me, i.e., a) bringing contraband into the Center; and b) Employee's alleged unauthorized absences, were no longer properly before me, having been initially disposed of at the Agency level. However, the subject of the video game CD being brought into the Center was itself an act of misconduct, as the object was not specifically approved by the facility's superiors. Employee's action was insubordination, and will be addressed separately from the allegation of insubordination related to the random search of Employee by Agency.

B. Additional Findings of Fact

Hearing Examiner Parks conducted a full fact finding proceeding at Agency level and found and concluded that the evidence Agency presented did not support a finding that the play station video game that Employee admitted bringing onto the Oak Hill site was contraband, especially in light of the alleged confusing and inconsistent application of the policy and the question of whether the band was against video movies and video games, or just a restriction on movies. Parks dismissed the AWOL charge, noting confusion in Employee's work assignment, in part due to the prior approved leave status and absence of the supervisor that Employee was directed to report to.

However, Parks found Employee liable on the charge of insubordination related to his refusal to submit to the more comprehensive search, and recommended to Agency

that a Final Decision be made to terminate Employee, based upon the following language:

The Recommendation of the Hearing Officer, including the findings of fact, analysis and conclusion of law, is adopted in full and is hereby entered as the decision of the Department of Human Services, District of Columbia Government.

This Recommendation, including the dismissing of the charges related to contraband and AWOL, were adopted in full as presented, by Carolyn W. Colvin, Director, Department of Human Services.

Agency's contraband policy as relates to insubordination

Agency's mission as a correctional institution can best be carried out when there is full cooperation and understanding by all components of the Oak Hill community. Otherwise, chaos and a complete breakdown would occur, which would be greatly detrimental to the health, welfare, and safety of everyone at the facility, including the administration, corrections and other staff, and residents, the latter group comprising youth who are incarcerated either while awaiting trial or as part of the committed population.

In furtherance of Agency's mission of providing service and counseling to its youthful residents, Agency legitimately can exercise the option of carefully monitoring what is brought into the Center. The Center must assure that the youth are not corrupted by negative and unwarranted outside influences, which might only potentially increase the residents' involvement in crime and violence, while currently incarcerated inside the Center, and continuing later in life after they have been released back to the community. It was into this arena that both video games and video play stations were introduced.

The 1995-issued contraband memo provided that, "The staff or individuals entering the facility or institution will not be permitted to bring these items into the confines of any Youth Services Administration facility or institution." The memo also states that contraband will be confiscated, and that, ". . . an Incident Report will be prepared and submitted to the Officer-of-the-Day so that appropriate disciplinary action can be taken." "Contraband" is defined as, ". . . any item, article or thing that is not issued or purchased from the facility/institutional canteen, or not specifically authorized for use by residents or staff by the Superintendent or Program Manager."

On June 13, 2001, Perkins issued another memorandum, addressing the use of video taped material at Oak Hill. The memo directed that all videos shown to the youth must first be authorized by either Rev. Edward Cole or Perkins, warning that unapproved videos would be confiscated as contraband, and that non-compliance with this directive may result in disciplinary action.⁵ (*Agency Exhib. #6*) Agency asserted that both the 1995 and 2001 memos were circulated, including serving a copy upon staff and posting in prominent places on the grounds.

Despite Agency's assertion that a clear policy prohibiting video games had been established, which Employee elected to ignore, several witnesses, including Agency's

⁵ See Agency Memorandum of June 13, 2001 on Subject, "The use of video taped material at Oak Hill Youth Center."

own rebuttal witness, Barbara Hardy, testified that while they were aware of the existence of the 1995 memo addressing contraband, they were either not fully aware of the second memo addressing video taped material, or had a general understanding that the 2001 memo applied to video movies, but did not apply to video games.

Further, and despite the existence of the two memos, the longstanding custom and practice, which apparently predated even the 1995 memo, was that staff routinely, and almost daily, brought in video games (as opposed to video movies) for the residents' enjoyment, without the video games being confiscated by gatehouse personnel. Further still, because the Center only provided televisions and VHS video recorders, staff also purchased video play stations with their own personal funds, so that residents would have a more diversified recreation during their non-school hours. More than one witness referred to this practice as "recreational therapy". Based upon the credible testimony on the issue, I find, therefore, that the longstanding custom, practice and usage concerning bringing video games into the Center was the norm, despite Agency's attempt to demonstrate otherwise during this proceeding. I find that Agency acted arbitrarily when it attempted to enforce its 1995 memo, and the 2001 follow-up memo, by suddenly and randomly seeking to make Employee an example for disciplinary enforcement.

Conversely and despite Agency's clumsy handling of the implementation of the already existing policy, I further find that Agency's policy prohibiting video games and equipment was clearly reasonable, given Agency's mission and function. Agency sought to implement the established policy, despite its apparent prior ineffectiveness. However, the manner and timeliness of when Agency attempted to draw the line on enforcement left much to be desired. The established law on the subject supports Agency's contention that it was entitled to enforce the policy, based upon the reasonableness of the policy, viewed in the context of Agency's long stated mission and how Agency deemed it necessary to function, in pursuit of its mission.

Based upon the forgoing, I find that Employee's conduct of bringing a video game into the Center was "contraband", within the context of the generic statement that anything not issued or authorized by Agency or Oak Hill was considered to be contraband. However, I further find that video games and video movies are different items, and the specific prohibition against unapproved video movies cannot automatically be assumed to likewise be applicable to video games. I conclude, then, that Employee's action of bringing an unapproved item into the Center was a *de minimus* violation and only mildly insubordinate. Standing alone, this act was not a sufficient basis for termination from employment. But there is more.

Agency's Search Policy as Relates to Insubordination

Agency emphasized its authority to search anyone who comes into the Center. Even before arriving at the Center, all approaching parties, staff and visitors included, are advised by posted notice that anyone who proceeds beyond a certain point is subject to being searched. This is a standard custom and practice, universally enforced in virtually all penal systems in this country. As such, everyone entering this type of facility is fully aware that a search of both their person and their property might be conducted prior to gaining access to the Center. Employee, a trusted staff member since 1989, with a stellar work history at both Cedar Knoll and Oak Hill, plus many years of law enforcement experience for the state of Virginia, approached his worksite on notice of the regulations,

and anticipating that he would be at least subjected to a search at Control Seven before being admitted into the Center.

However, while the record reflects that not everyone who arrived at Control Seven during this shift was comprehensively searched, testimony reflects that every fourth to fifth person was more carefully searched, pursuant to Perkins's directive. The record does reflect that, after the complications incurred incidental to the confrontation in which Employee's refused to submit to a strip search, there were no other known strip searches conducted on that date. Further, none of the testifying witnesses was aware of other strip searches having occurred, but believed that had such transpired, they certainly would have been aware of it.

Although Terrance Wright, Youth Correction Supervisor, testified that, in addition to the standard search at the Control Seven gatehouse, random searches were conducted as a part of Agency's ongoing policy, both before and after the date of Employee's incident, both Employee's witnesses and Barbara Hardy, Agency's own rebuttal witness, testified credibly that at the time of the incidental which resulted in Employee's termination, there was no policy addressing the issue of random searches. As well, if there was a search policy which applied to staff, other than the routine search of everyone who comes into the Center, Agency, which had the burden of going forward with the relevant evidence, never presented it for my consideration. Taking the entire situation and circumstance into consideration, I find, therefore, that there was no established policy of record which addressed the issue of Agency's right to conduct more comprehensive searches of its employees, other than the generic "policy" which advised everyone that he or she was subject to being searched by reason of coming onto the Center's premises.

When the pat down searched revealed "something hard" in the lower abdomen/upper groin area, Employee showed Perkins, Wright, and other administration staff, both his athletic supporter, with its wide straps and metal components, and the Lidoderm patch that he wore pasted on his back, held in place by the wide strap of the supporter, which was inside his underpants, directly against his skin. Although Agency knew about Employee's 1994 injury and his additional on-the-job injury in May 2001, and the subsequent long term workers compensation absence between May 2001 and February 2002, Agency still ordered Employee to remove his pants, underpants, and the supporter. At that point, what began as a random search devolved into a strip search.

Despite Agency's deficient behavior in terms of failing to advise its employees regarding a more comprehensive search policy, the local courts have long ago addressed the issue, and set the tone which governs the ultimate outcome in this matter. One particular incident comes to mind. Based upon an anonymous drug-related telephone tip that the D.C. Department of Corrections received, Gloria Profitt, a Corrections Officer with that D.C. government agency, was subjected to both a strip search and visual body cavity search upon entering the workplace. Although she initially vehemently protested the justification for conducting the search, administrators determined that the tip was credible enough to at least justify conducting the search. Although no drugs were found, Profitt had a small glass bottle of perfume in her purse. Agency determined that the glass bottle was contraband, since bringing it onto the premises was forbidden and she did not have approval from the Superintendent.

Profitt sued Agency and lost. In *Gloria Profitt v. District of Columbia, et al*, 790 F.Supp. 304, (1991), the court discussed the “Reasonableness of the Search”, as the standard that governs the appropriateness of the search. Citing *Security and Law Enforcement v. Carey*, 737 F.2d 187 (2d Cir. 1984), the New York Court of Appeals held that, “warrantless strip searches of correction officers within correctional facilities are not *per se* violations of the fourth and fourteenth amendments of the Constitution.” *Id* at 203. The Court further determined that these searches fell within an exception to the warrant requirements since the legitimate governmental purpose of maintaining correctional facility security outweighs the correction officers’ diminished expectations of privacy under certain circumstances. The dissent in *Carey*, at 213, urged that the government should, “place no greater limitation on strip searches [of prison guards] than that they not be conducted arbitrarily, capriciously, or in bad faith.”

Other circuits have followed *Carey’s* reasonable suspicion standard for strip searches of correctional employees. See *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (reasonable suspicion standard governs strip searches of correctional officers); *Adrow v. Johnson*, 623 F. Supp. 1085 (N.D. Ill. 1985) (reasonable suspicion standard applies); *Gettleman v. Werner*, 377 F. Supp. 445, 451 (W.D. Pa. 1974) (upholding the constitutionality of a strip search of a prison employee and indicating that “a wide latitude for judgment and discretion must be extended to state officials”); and *United States v. Kelly*, 393 F. Supp. 775, 756-757 (W.D. Okla. 1975) (determining that the strip search of a prison guard was constitutional and that the guard “could have no reasonable expectation of privacy while on prison ... grounds.”)

Based upon the above discussion, I find that it was entirely reasonable for Agency to continue with the search of Employee, and that the scope of the search was legitimately expanded, once it was determined that “something hard” was discovered on Employee’s person. It was not the search and the discovery of a contraband item, i.e., the video game that resulted in Employee’s termination. Rather, Employee was terminated because he refused to allow Agency to conduct a level of search which the courts in this jurisdiction have determined to be reasonable and appropriate under the circumstances. The court in *Profitt*, citing *McDonell* at 1307, noted that, “the undisputed facts of [each] case [must] constitute reasonable suspicion. [Agency] must be able to point to ‘specific, articulate facts and rational inferences they are entitled to draw from those facts in light of their experience’ to justify the search.”

Employee, who was a stellar member of the officer corps, made a very bad instant decision. When he declared that the search was over and that he was leaving, he subjected himself to being charged with insubordination, which is exactly what occurred. He was escorted off the premises, an investigation of the incident was conducted, and he was ultimately dismissed for his insubordinate behavior of refusing to obey a legitimately established right and directive from Agency. He knew that, pursuant to the collective bargaining agreement, he was entitled to union representation under these circumstances. His options, then, were to either waive the representation or hold off the search until the union representative arrived. Initially waiving representation, he changed his mind and requested that a union representative be immediately summoned, once he more fully realized that the search was anything but routine.

Regretfully, while the arrival of the representative was briefly delayed, in part due to the short notice, Employee elected not to wait until the representative arrived. Instead, he totally withdrew his initially reluctant cooperation, declared the search to be over, refused to cooperate further, and then vacated the premises. Prior to his departure, he was warned by Perkins that his action would lead to termination, which warning was also a reasonable opportunity for Employee to calm down, readjust his sights, and await the delayed arrival of the union representative.

I find that Employee's conduct of abruptly leaving the room, and refusing to allow the search to continue, was insubordinate. Had he remained there and allowed the search to be completed, based upon the information in the record, he most probably would have been cited only for bringing the video play game into the Center, and despite it being a contraband item, it is doubtful that the ultimate outcome, i.e., termination, would have been the same.

Pursuant to DPM § 1603.3, "cause" is defined as:

[A]ny on duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious. This definition includes, without limitation, . . . *insubordination*. (emphasis added)

Black's Law Dictionary Fifth Edition (1979), defines "insubordination" as:

Refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a willful or intentional disregard of the lawful and reasonable instructions of the employer.

The definition of "cause" as recited by the DPM makes it clear that before cause can be established, a determination must be first made that the act or omission that an employee committed must interfere with the efficiency and integrity of government operations, and that the reason(s) for attempting corrective or adverse action must not be taken arbitrarily or capriciously. Similarly, *Black's* definition of "insubordination" underscores that the order that an employee refused to obey or disregard must have been lawfully given and reasonable.

Therefore, any order given by a superior to a line employee must not be arbitrary, capricious, and unreasonable, and should be within what the superior can reasonably expect to be obeyed. There is no question that the video play station was contraband under the generic definition of "anything not specifically authorized or approved is deemed to be contraband." The commission of that relatively innocuous act by Employee, standing alone, may not have justified a random search nor a strip search. However, the courts have imposed a standard of "reasonableness", and determined that the governing governmental agency must determine what is reasonable under the circumstances. At present, and in this jurisdiction, there does not appear to be any violation of the affected individual's (Employee herein) fourth and fourteenth amendment rights of the Constitution.

I find that Agency's action of directing Employee to surrender to a comprehensive search of his body, which devolved into a strip search, was appropriate and reasonable under the circumstances. I further find that Employee's election to abruptly terminate the

search, despite being warned that his action would lead to immediate termination, was insubordinate, unreasonable, and contrary to the law in this jurisdiction. I conclude that Agency's action of terminating Employee, after an investigation into this matter concluded that termination was the appropriate action, should be upheld.

Disparate treatment

Employee's assertion that Agency's actions subjected him to disparate treatment also places the burden of proving such on Employee to present a *prima facie* showing. If Employee can do so, the burden shifts to Agency to demonstrate a legitimate reason for imposing a penalty upon Employee, while others were not penalized for similar conduct. If Agency cannot meet its burden, the penalty must be reduced, or might fail entirely. See *Butler v. Department of the Navy*, 23 MSPR 99 (1984), and *Martin v. D.C. Department of Public Works*, OEA Matter No. 1601-0010-87, __ D.C. Reg. __ (). While Employee has established that it was a longstanding practice and common usage for video games to be brought into the Center by YCOs and other YSA staff, and although Agency did have a 1995 anti-contraband policy, buttressed by a 2001 policy for monitoring and approval of video movies before they could be shown to the residents, I have found, noted above, that Agency's actions related to how it treated Employee were reasonable and justified by the circumstances.

This Office's scope of review as to the appropriateness of a penalty is limited to a determination of whether the penalty is within the range allowed by law, regulation, or applicable table of penalties, as it is not my role as the deciding AJ, to substitute my judgment for that of Agency. Rather, I must ensure that "managerial discretion has been legitimately invoked and properly exercised", whether the penalty is based on a consideration of relevant factors, and whether there has been a clear error of judgment. See *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (DC 1985), and *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915 (1985). Employee argues that he was treated very differently from other employees at Agency who engaged in the identical conduct as he, sometimes almost on a daily basis. However, while none of them was apparently disciplined by being subjected to a strip search, the courts have declared that these searches are perfectly legal and permissible. Further, the question before me is not the legality of the strip search but rather Employee's personal reaction and conduct, when he was subjected to the search.

It was not the search that was impermissible, but rather Employee's electing to abruptly terminate the search and to vacate the premises, despite being warned of the dire consequences of doing so. Agency did not treat him any differently from how it might have treated another employee who reacted in the same manner. That Employee was the only person who was subjected to a possible strip search, if in fact that was the case, does not mean that he was subjected to disparate treatment, in light of established court decisions, provided the "reasonable under the circumstances" test was met.

Based upon the record taken as a whole, I conclude that Employee was not randomly singled out and improperly disciplined by Agency. I further conclude that Employee was not subjected to disparate treatment by Agency.

I conclude that, given the legally established guideline for matters of this nature which relate to misconduct committed by D.C. correctional officers during the course of

their employment, the initial application of the Probable Cause Standard to the facts and circumstances of this case was erroneous. It is well established in the law that the application of a legal standard governed by "Reasonableness" was more accurate and controlling, and should have been initially incorporated into the Findings of Fact and Conclusions of Law generated as a result of the Evidentiary Hearing.

ORDER

It is hereby ORDERED that Agency's action of terminating Employee from Agency, effective December 13, 2002, is UPHeld; and

FOR THE OFFICE

ROHULAMIN QUANDER, ESQ.
Senior Administrative Judge

EXECUTIVE OFFICE OF THE MAYOR

**SERVE DC
DC COMMISSION ON NATIONAL AND
COMMUNITY SERVICE**

PUBLIC MEETING

The mission of the DC Commission on National and Community Service (Serve DC) is to promote the District of Columbia's spirit of service through national service, partnerships and volunteerism.

The DC Commission on National and Community Service (Serve DC) is pleased to announce its next Commission meeting on:

Wednesday, September 5, 2007, 11:30 A.M.
Conference Room 1117
One Judiciary Square
441 Fourth Street, NW
Washington, D.C.

All meetings are open to the public. Meeting minutes can be obtained from 441 4th Street NW, Suite 1140N, Washington, DC 20001.

For additional information or to request a copy of the minutes, please call 202-727-7925.

KIPP DC**REQUEST FOR PROPOSALS**

KIPP DC, 910 17th Street, NW, Washington, DC 20006, will receive bids until **Friday, August 24th, 2007 at 5:00 p.m.** for the following services: (1) Financial Advisor services, and (2) Borrower's Counsel services.

All proposals must meet minimum requirements as outlined in the RFP.

Requirements and all necessary forms may be obtained from:

Kristen Keenan
KIPP DC:
910 17th Street, NW – Suite 1050
Washington, DC 20006
Ph: 202-223-4505
Fax: 202-223-4505
Email: kkeenan@kipfdc.org

DEPARTMENT OF HEALTH**NOTICE OF CERTIFICATION**

The Director of the Department of Health, pursuant to the authority set forth in Reorganization Plan No. 4 of 1996, hereby gives notice of certification of three drugs for inclusion in the formulary of the District of Columbia Acquired Immunodeficiency Syndrome Drug Assistance Program (ADAP). The drugs that have been approved by the Food and Drug Administration (FDA) and certified for inclusion in the ADAP program are pravastatin sodium ("Pravachol"), approved by the FDA on October 31, 1991, fenofibrate ("Tricor"), approved by the FDA on November 6, 2004, and ezetimibe ("Zetia"), approved by the FDA on October 25, 2002.

The drugs listed above have been certified on the recommendation of the HIV/AIDS Drugs Advisory Committee at a meeting held on July 18, 2007.

ADAP is designed to assist low income individuals with Acquired Immunodeficiency Syndrome (AIDS) or related illnesses to purchase certain physician-prescribed, life-sustaining drugs that have been approved by the U.S. FDA for the treatment of AIDS and related illnesses. Rules for this Program may be found at 29 DCMR § 2000 *et seq.*

For further information, please contact Gerry Rebach, Public Health Analyst AIDS Drug Assistance Program, HIV/AIDS Administration on (202) 671-4949.

DEPARTMENT OF HEALTH**NOTICE REGARDING THE ACCEPTING OF APPLICATIONS FOR THE
ASSISTED LIVING RESIDENCE LICENSURE PROGRAM**

The Department of Health, Health Regulation Administration, Child and Residential Care Facilities Division (DOH/HRA/C&RCFD), hereby gives notice of its intent to begin accepting applications for the licensing of Assisted Living Residences beginning September 1, 2007. The DOH/HRA/C&RCFD, wishes to further advise the public that after April 1, 2008, any organization, individual, or corporation providing services that require an Assisted Living Residence license will be considered as providing those services without a license, and therefore subject to enforcement actions by the Department.

Those who wish to obtain information regarding the licensure program or obtain application information and materials should contact:

Valerie A. Ware
Program Manager
Child & Residential Care Facilities Division
Health Regulation Administration
825 North Capitol Street, NE Second Floor
Washington, DC 20002
Phone Number 202-442-5888 or 202-442-5929

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Application No. 17309 of Dorchester Associates, LLC, pursuant to 11 DCMR 3104.1, for a special exception under § 2516 of the Zoning Regulations to allow the construction of a theoretical lot subdivision for thirteen detached one-family dwellings, including a modification of the requirement for twenty-five foot wide roadways under § 2516 (d), in the CB/UT/R-1-A zone district in the 2800 block of Chain Bridge Road, N.W. (Square 1425, Lot 827, Parcels 12/63, 12/293, and 12/294)

HEARING DATES: April 26, 2005, July 19, 2005, January 10, 2006, April 11, 2006, July 18, 2006, September 19, 2006, October 31, 2006

DECISION DATE: January 9, 2007

DECISION AND ORDER

On or about February 18, 2005, Dorchester Associates, LLC (Dorchester or the applicant), filed an application with the Board of Zoning Adjustment (Board) pursuant to 11 DCMR § 3104.1, for a special exception to permit the construction of 13 detached one-family homes on a single subdivided lot. Following several days of public hearing, the Board voted to deny the application at a decision meeting held on January 9, 2007.

PRELIMINARY MATTERS

Applicant The Applicant was initially represented by Norman Glasgow, Jr., Holland & Knight, LLP. (See, Exhibit 2, Authorization pursuant to § 3106.1 of the Zoning Regulations). Holland & Knight withdrew as counsel, and Jordan & Keys, George Keys, Esq., noted its appearance on or about September 19, 2006 (Exhibit 157).

Self-Certification The zoning relief requested in this case was self-certified pursuant to 11 DCMR § 3113.2 (Exhibit 3).

Notice of Public Hearing Pursuant to 11 DCMR 3113.3, notice of the hearing was sent to the Applicant, all entities owning property with 200 feet of the applicant's site, the Advisory Neighborhood Commission (ANC) 3D, and the Office of Planning (OP). The Applicant posted placards at the property regarding the application and public hearing and submitted an affidavit to the Board to this effect.

ANC The subject site is located within the area served by Advisory Neighborhood Commission 3D (the ANC), which is automatically a party to this application. The ANC filed a report indicating that at a public meeting on April 6, 2005, with a quorum present, the ANC voted to

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oppose the application (Exhibit 52). The Applicant filed additional submissions during the course of the proceedings, and the ANC filed a second report in which it re-affirmed its opposition to the project (Exhibit 82). Alma Gates, the ANC's representative, testified during the proceedings, and also submitted her testimony in writing.

Requests for Party Status

At the public hearing on April 26, 2005, the Board considered requests for party status from the Chain Bridge Road/University Terrace Preservation Committee (Exhibit 48), Rudy Djabbarazadeh (Exhibit 49), Arthur Watson (Exhibit 45), and Richard England (Exhibit 43), each in opposition to the application. The Board also considered a request from the Chain Bridge Road Citizens for Responsible Growth/Lewis Mulitz, who sought party status as a proponent of the application (Exhibit 47).

Chain Bridge Road/University Terrace Preservation Committee (the Committee or the Opposition) The Committee is a 501(c) (3) not for profit corporation dedicated to protecting the unique park-like character of the Chain Bridge Road/University Terrace neighborhood, and was represented by Greenstein DeLorme & Luchs, PC, John Patrick Brown, Jr., Esq. The Committee's request for party status was granted, with no objection from the Applicant.

Rudy Djabbarazadeh Mr. Djabbarzadeh owns nearby property at 2730, 2738, and 2740 Chain Bridge Road, NW and was also represented by Mr. Brown. Mr. Djabbarzadeh agreed to join with the Committee in his case presentation.

Arthur Watson and Richard England Mr. Watson resides at 2828 Chain Bridge Road, NW, and Mr. England resides at 2832 Chain Bridge Road, NW. The Board denied their individual applications, but allowed them to participate in the proceedings through the Committee.

Eric Hovde Mr. Hovde resides at 2911 University Terrace, NW. However, Mr. Hovde did not appear at the first day of public hearing on April 26, 2005, and his request for party status was denied.

Chain Bridge Road Citizens for Responsible Growth/Lewis Mulitz (Citizens for Responsible Growth) The Citizens for Responsible Growth comprises a group of property owners in the area, and was represented by Mark Brodsky, Esq. Mr. Brodsky indicated that he would call witnesses during the proceedings, including Lewis Mulitz. Mr. Mulitz is the owner and occupant of 2895 University Terrace, NW. The Citizens for Responsible Growth was granted party status as a proponent of the application.

Other Persons/Entities in Opposition/Support

The Board received numerous submissions in opposition, including several letters from area residents, letters from the Palisades Citizens Association, a letter from the Chain Bridge Road Corporation, and a "petition" in opposition from the Chain Bridge Road Corporation. The Board also received a letter in support from Bernard Gewirz, a resident of the 2600 block of Chain Bridge Road, NW. In addition, the Board heard testimony in opposition from several area residents; for example: Richard England (2832 Chain Bridge Road), Michael Edwards (2822

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University Terrace) and Andrea Mitchell (2710 Chain Bridge Road). There was no testimony from residents who were in support of the project.

Government Report Submissions**Office of Planning (OP) Report**

OP filed an initial report dated April 19, 2005, stating that it was unable to make a recommendation without review and comments from the Department of Transportation (DDOT), the Department of Health (DOH) and the National Park Service (NPS) (Exhibit 54). In its report, OP expressed concern regarding the viability of trees that were "close to construction areas". In a supplemental report dated January 3, 2006, OP expressed "general" support for the application (Exhibit 79). However, OP stated that its support for the project was subject to several conditions, including a reduction in the number of homes from 13 to 12.¹ In particular, OP noted that the dwelling proposed on Lot F would be sited too close to the adjacent property. OP's representative, Maxine Brown Roberts, testified at the public hearing and explained that most of the special exception requirements would be met by the proposal. However, Ms. Roberts also explained that she had specific concerns regarding the dwellings proposed at Lot F and Lot 3. In particular, she stated that the dwelling proposed at Lot F, which would be only 11 feet from the neighboring residence, would be too close to the existing neighbor. In addition, she stated that the home proposed at Lot 3 would give the appearance of "towering" over Chain Bridge Road.

Department of Transportation

The Department of Transportation (DDOT) reviewed the traffic study prepared by the Applicant and submitted an initial report and supplemental report (Exhibits 55 and 68). DDOT concluded that the proposed project would have a minor impact in terms of capacity and level of service on the adjacent street system (Exhibit 55). Because the internal roadway servicing nine lots would accommodate only one-way traffic, DDOT first suggested widening it from 16 feet to 20 feet (Exhibit 55). DDOT later commented that a 16 foot roadway would suffice, so long as the Applicant provided two shoulder areas to allow cars to wait while other cars passed in the opposite direction (Exhibit 68).

Urban Forestry Administration (UFA)

The District's UFA, within DDOT, also reported to OP and/or the Board, through written reports and testimony on two separate hearing dates. Earl Eustler, a certified arborist, presented the UFA's position, and was cross-examined by the Applicant's attorney. The UFA reviewed the tree inventory that was submitted by the Applicant that assessed the condition of trees having a circumference of more than 38 inches (See, Exhibit 54, Attachment 4). Through its report to OP, the UFA accepted the Applicant's tree assessment, noting that the assessment had been prepared by a certified arborist (Exhibit 54, Attachment 5). However, the UFA maintained throughout the proceedings that the Applicant's tree and slope protection plan was inadequate. Early in the proceedings, the UFA stated that more details were required from the Applicant (Exhibit 54, p. 3). Once details were provided, the UFA concluded that the trees were at risk, stating, among

¹ At the time report was prepared, OP also requested additional information regarding tree remediation and soil and sediment control. This information was provided during the public hearing.

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other things that: the proposed stormwater drains posed a threat to the tree roots, and the proposed entranceway posed a threat to the Beech trees (See, Exhibit 140, Supplemental OP report dated July 21, 2006, transmitting UFA report, and Exhibit 168). Mr. Eustler also claimed that the tree protection plan violated the Overlay provision prohibiting the removal of more than three trees on a single lot (See, § 1568.1(b).)

The Fire and Emergency Medical Services Department (Fire and EMS)

After reviewing the site plans and conducting an on-site visit, the Acting Fire Marshal informed OP that the fire hydrants were too far from the proposed development (Exhibit 54, Attachment 7).

Department of Health (DOH) (Watershed Protection Division)

Through its report to OP, DOH noted that the proposed stormwater management plan would meet the District's requirements. DOH noted that there is no existing storm sewer system at Chain Bridge Road. Consequently, it is imperative that a "comprehensive on-site storm water management system" be put in place to control anticipated additional runoff from the proposed development in order to prevent "adverse impact[s] [to] the receiving creek" (Exhibit 79, Attachment 1). DOH also noted that infiltration/exfiltration systems should be placed away from slopes, and that post development peak discharge should not exceed the two-year pre-development discharge. At the time of OP's supplemental report, DOH had not received erosion and sediment control plans; therefore, DOH did not provide comments regarding the impact with respect to erosion and/or sediment control.

National Park Service (NPS)

David Murphy, of the NPS, testified at the public hearing on July 18, 2006. He expressed concerns about the "massive, billboard presentation" of the proposed homes and potential adverse impacts on Battery Kemble Park. He also noted the risk of adverse impact on the Park and neighboring streams if the stormwater management system were not carefully maintained (T., p. 234-237).

The Applicant's Case

The Applicant filed numerous submissions, including the initial application with plans, a pre-hearing statement, a revised pre-hearing statement and supplement, a tree inventory report prepared by a consulting arborist, landscaping plans, a tree and slope protection plan (including revisions and supplemental materials), stormwater management plans, and a traffic measurement report.

Morton Bender, managing partner of Dorchester Associates, testified for the Applicant, as well as several expert witnesses: Stan Andrulis, Project Architect; Steven Sher, Land Use Planning and Zoning; Osborne George, Transportation Engineer; James Afful, Civil Engineer and Stormwater Management; Howard Rosenberg, Structural Engineer; and Thomas Bonifant, Tree Care Expert.

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The Opposition's Case

The Opposition filed numerous submissions, including Pre-Hearing Statements and supplements, reports prepared by a certified arborist and a traffic consultant, photographs, charts reflecting density comparisons, and an overview of the proposed tree removal. The Opposition also presented testimony from several expert witnesses: Mary Sears, Greenehorne & O'Mara, expert in Civil Engineering and Stormwater Management; Edward Milhous, Certified Arborist; Allen Neymann, Architect licensed in District of Columbia, Maryland and Virginia; and Stephen Peterson, Traffic Engineer.

The Proceedings

The Board held public hearings on seven dates over a course of more than 18 months, including:

April 25, 2005 – After establishing the parties to the proceeding, the Board continued the hearing until July 19, 2005 at the Applicant's request. The Applicant stated that it wanted more time to meet with members of the community regarding their concerns (Exhibit 59), and the Opposition did not object to the request (Exhibit 63).

July 19, 2005 – The Board again continued the hearing until January 10, 2006 at the Applicant's request (Exhibit 69) over the Opposition's objection (Exhibit 71).

January 10, 2006 – The Board continued the hearing until April 11, 2006, at the request of the Opposition (Exhibit 80).

April 11, 2006 – The Applicant completed its case presentation. At the conclusion of the proceedings, the Board asked the Applicant to submit an updated landscaping plan and stormwater management plan, and also submit grading plans.

July 18, 2006 – The Applicant presented its updated plans that had been submitted, and reports were given by Maxine Brown Roberts, the Office of Planning (OP), Earl Eustler, the Urban Forestry Administration (UFA). Afterwards, the Opposition completed its case presentation, and all parties were allowed to cross-examine the witnesses. Due to the lateness of the hour, the case was continued to September 19, 2006, to allow for rebuttal by the Applicant, and closing statements by all parties. The record was left open to allow the applicant to submit a list of rebuttal witnesses by September 8, 2006.

September 19, 2006 – The Applicant filed a binder with documents and presented rebuttal testimony over the objection of the Opposition. The Opposition contended that it was disadvantaged because it only received the binder on the hearing date. The Applicant contended that the testimony and evidence addressed points made by the Opposition at the last hearing. The Board allowed the Applicant's rebuttal presentation, but also continued the case to October 31, 2006, so that the Opposition could review the submissions and testimony. The Board also stated that it would entertain a Motion to Strike by the Opposition.

October 31, 2006 – Prior to the hearing, the UFA submitted a supplemental report (Exhibit 168). In addition, the Opposition filed a Motion to Strike, claiming that the Applicant's filings and presentations exceeded the scope of rebuttal (Exhibit 167), and the Applicant filed a Response to the Motion (Exhibit 169). At the hearing, the Board considered the filings and heard argument by the parties. After fully exploring the issues, the Board denied the Motion to Strike, but allowed cross-examination of the rebuttal witnesses. The Opposition conducted

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cross-examination. The Board also admitted the UFA report, questioned Mr. Eustler regarding the report, and allowed Applicant to cross-examine Mr. Eustler. In addition, the Opposition's witnesses were allowed to respond, and the Applicant was allowed to cross-examine them following a short break during the proceedings. At the conclusion of the hearing, the Board closed the record, except to allow proposed Findings of Fact and Conclusions of Law by December 19, 2006.

Post-Hearing Submissions

Both the Applicant and the Opposition filed proposed Findings of Fact and Conclusions of Law (Exhibits 173 and 174).

FINDINGS OF FACT**The Property**

1. The subject property is located along Chain Bridge Road, NW, and is currently undeveloped. A small portion of the site was formerly developed with a one-family detached home that was demolished a few years ago.
2. The site is approximately 3.28 acres in size, with approximately 574 feet of frontage on Chain Bridge Road, a narrow, winding, wooded country lane which dates back to Colonial times. The upper portion is flat but fairly steep around the eastern and southern perimeter, and slopes down towards the lower portion of the site. The lower portion of the site is very steep and slopes towards adjacent properties.
3. The underlying zone district on the property is R-1-A, a zone which permits one-family detached residential dwellings. However, the site is also governed by the Chain Bridge/University Terrace Overlay District (CBUT Overlay). The Overlay was created in 1999 by Zoning Commission Order No. 863 "to preserve and enhance the park-like setting of the Chain Bridge Road University Terrace area by regulating alteration or disturbance of terrain, destruction of trees, and ground coverage of permitted buildings and other impervious surfaces, and by providing for widely spaced residences". See, 11 DCMR §§ 1565 through 1569 (the Overlay provisions).
4. The Overlay provisions establish a maximum lot occupancy limitation of 30% for lots of 9,000 square feet or more. See, § 1567.1
5. The Overlay provisions limit maximum impervious surface coverage to 50% of a lot. See, 1567.2

The Neighborhood

6. The neighborhood surrounding the property consists of predominantly one-family detached homes along Chain Bridge Road. Chain Bridge Road between MacArthur Boulevard and Loughboro Road is a heavily wooded area with a sloping topography occupied by one-family detached dwellings. The dwellings range in size from 1,776 square feet to more than 14,000 square feet at the north end of Chain Bridge Road.

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7. To the east of the site is Battery Kimble Park, a 57 acre park maintained by the National Park Service.
8. To the north of the site is the Chain Bridge Road School, a designated historic building that is now used as a residence. The School is served by an existing driveway that runs from Chain Bridge Road, around and in front of the building.
9. Access to the site from Chain Bridge Road is currently provided by a long-standing paved driveway that is slightly wider than 12 feet at its entrance and maintains the same width for most of the driveway's 200 foot length. The existing driveway is flanked on either side by a one-of-a-kind alee of mature, specimen-quality American Beech trees which are sensitive and uniquely vulnerable to disturbance.

The Proposed Project**The Lots**

10. The applicant proposes to subdivide the property into 13 record lots, Lots 1 through 4 and Lots A through I (Exhibit 54, Attachments 2 and 3). The new lots would vary in size from approximately 9,500 square feet to almost 12,200 square feet, and each lot would be developed with a home that is tailored to that lot.
11. The lot occupancy proposed for each home is identified in a chart attached to OP's report, and ranges from a low of 22% (Lot 2) to a high of 32% (Lot 3). (Exhibit 54, Attachment 2).
12. The proposed impervious surface coverage ranges from a low of 34%, to a high of 49% coverage on three of the proposed lots (Exhibit 54, Chart at Attachment 2).
13. The project would permit a variety of house sizes, architecture, form, materials, and landscaping. However, the proposed lot and house size represents a departure from the existing development on Chain Bridge Road. The average size of each single owner site on Chain Bridge Road in the existing neighborhood is 22,778 square feet, approximately half an acre, as compared to the average lot size of 9,938 square feet at the proposed project. Also, the average house size in the existing neighborhood is substantially smaller than the average house size at the proposed project.
14. In general, the homes on Chain Bridge Road between MacArthur Boulevard and the subject property are spaced far apart. There are 13 homes along the first half of the road or an average of one per 203 feet.

Access

15. The applicant proposes to create two roadways by repaving two existing driveways off Chain Bridge Road. One roadway would be created from the curvilinear driveway serving the historic School to the north. The other roadway would be created from the driveway which formerly served a single home.

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16. As proposed, the roadway located at the northern end of the property, running around and in front of the School, would serve three homes (Lots 1, 2, and 3), and would be widened to a width of 20 feet and a radius of 30 feet at the cul-de-sac. The Historic Preservation Review Board (HPRB) reviewed the proposed extension and repaving of the roadway at its April 28, 2005 meeting, and stated that the roadway extension will not impact the historic building.

17. As proposed, the central roadway bisecting the site, would serve nine homes, would be 16 feet wide and would also terminate in a cul-de-sac with a 60 feet diameter.

18. As proposed, the 13th home, located at the southern end of the property, would have its own driveway off Chain Bridge Road.

Stormwater Management

19. Because of the impervious lot coverage proposed, the large roofs of the 13 homes proposed, the steep topography at the property, and a history of flooding in the area, the proposed development requires the construction of an extensive stormwater management system.

20. In response to the Board's request, the Applicant submitted a revised stormwater management plan prior to the public hearing on April 11, 2006. The proposed stormwater plan provides that runoff would be collected at the southern edge of the property and then discharged through an existing 18 inch terra cotta pipe owned by neighboring landowners. The runoff would travel underground for a short distance and empty into a stream bed which passes through several downstream properties before crossing MacArthur Boulevard and flowing into the Potomac River.

Landscaping and Grading

21. The Applicant initially stated that a grading plan was not necessary because he proposed to build onto the natural topography. However, the Applicant submitted a Landscape Master Plan at the Board's request. The Applicant stated that the plans purported to be more "naturalistic" and consistent with the Overlay (Exhibit 136).

Tree Preservation

22. The applicant submitted a tree inventory prepared by Lew Bloch, a certified arborist (Exhibit 54, Attachment 4). This inventory assessed the health and structural stability of trees at the site that were larger than 38 inches in circumference.

23. The Applicant's initial filing identified general measures to protect the trees and slope (Exhibit 54, Attachment 6, dated September 1, 2004). Among other things, the plan stated that: "As required, additional protection measures will be instituted on an individual basis for those trees that will have work done within their drip line".

24. The Applicant proposes to remove a total of nine trees which are between 38 and 75 inches in circumference. Although thirteen lots are proposed after development, the property currently consists of four parcels or two taxation and assessment lots. Three of the trees are located within proposed Lot G, two of the trees are located within proposed Lot D, two of the trees are located

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within proposed Lot 4, and one tree is located in the middle of the central roadway (Exhibit 136, Project Drawings, Tab: "All Trees").

25. The Applicant submitted a tree preservation plan dated August 16, 2005, which outlined methods of protection for trees during construction and identified those trees that could be impacted by construction (Exhibit 76). The plan was prepared by Tom Bonifant, of Bonifant Tree Service, Inc.

26. The Applicant maintains that the disturbance of critical root zones will not threaten the trees' survival (Exhibit 163).

The Impact of the Proposed Development

27. The Board finds that the substantially smaller lot and larger dwelling sizes are out of character with the existing neighborhood. Also, the siting of the proposed dwellings, particularly the dwelling on Lot F which is only 11 feet from the neighboring residence, is out of character with the existing neighborhood and inconsistent with the purpose of the Overlay.

28. The Board also agrees with the testimony presented by the representative from the National Park Service: the development would have a "billboard effect", particularly the proposed dwelling at Lot 3 which would tower over Chain Bridge Road.

29. The Board credits the testimony and report presented by Mary Sears, Civil Engineer and stormwater management expert; in particular, findings that: (a) the Applicant did not provide sufficient calculations to determine whether stormwater retention and discharge facilities are sufficient to handle the stormwater on the property, (b) the proposed stormwater management methods are untested, (c) the proposed stormwater management methods are not typically used in residential developments, (d) the capacity and constructability of the stormwater management system is unknown, and (e) the extensive grading and excavation required for the installation of the system will threaten the survival of protected trees.

30. Because the effectiveness of the proposed stormwater system has not been demonstrated, neighboring property owners would not be protected from runoff damage.

31. Because the effectiveness of the proposed stormwater system has not been demonstrated, adjacent parkland and parkland downstream would not be protected from additional stormwater runoff or lower quality of water.

32. The Board credits the testimony and reports presented by the UFA, and the testimony presented by Earl Eustler. In particular, the Board adopts his findings that: (a) the density and number of houses proposed, and the required infrastructure would fatally damage an overwhelming number of protected trees; (b) although the proposed stormwater management is in close proximity to, and in many cases, conflicts with the trees' critical root zones, the tree preservation plan does not adequately detail the necessary construction safeguards; (c) the scope of pre-construction tree pruning is understated, especially the pruning of the sixteen American Beech trees.

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CONCLUSIONS OF LAW

The Motion to Strike and Exclude

As set forth in the Preliminary Matters, the Opposition filed a "Motion to Exclude and Strike the Unauthorized 'Rebuttal' Submission and Testimony. This motion is denied. Under the Board's Rules of Procedures, an applicant may present "rebuttal" evidence. § 3117.11(b)(7). After closely examining the evidence presented, the Board concludes that the filings and testimony did address various points that were raised by the Opposition. Therefore, the Board considered these filings and this testimony when deciding this application.

The § 1568.1(b) Claim

The Board also considered the Opposition's claim that the Applicant's tree protection plan violated this section of the Overlay on its face. Section 1568.1(b) limits tree removal to no more than three trees per lot. The Opposition claims that the proposed tree protection plan violates § 1568.1(b) because it allows for the removal of more than three trees on a single "lot". This claim (submitted through the UFA report and testimony from the Opposition) rests upon an assumption that compliance with this provision should be based on the lots as now exist, rather than the lots as will exist following subdivision that is being requested in this proceeding. The Board agrees with the Applicant that it is the latter circumstance that controls. All zoning compliance in a § 2516 proceeding must be based upon the lots to be created, otherwise any findings by the Board would be irrelevant to the project before it and made moot instantly when the subdivision occurs. Thus, the Board believes that the tree removal restrictions, apply to the 13 lots that would be created after subdivision and concludes that the tree removals contemplated for each of these lots are consistent with § 1568.1(b).

The Special Exception

The Board is authorized under the Zoning Act of June 20, 1938 (52 Stat. 797, as amended, D.C. Code § 6-641.07(g)(2) (2001), to grant special exceptions as provided in the Zoning Regulations. The applicant applied under 11 DCMR § 3104.1 for a special exception pursuant to 11 DCMR § 2516 to allow the construction of a theoretical lot subdivision for thirteen one-family homes, including approval of two sixteen foot wide roadways, instead of the required twenty-five foot wide roadways under § 2516 (d), in the CBUT/R-1-A zone in the 2800 block of Chain Bridge Road, NW.

The Board can grant a special exception where, in its judgment, two general tests are met, and, the special conditions for the particular exception are met. First, the requested special exception must "be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps." 11 DCMR § 3104.1. Second, it must "not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Map" 11 DCMR § 3104.1.

The Board concludes that the proposed theoretical lot subdivision would adversely affect the use of neighboring property in the area for several reasons: the density of the project would be out of character with the area and inconsistent with the purposes of the Overlay, the proposed home on Lot 3 would tower over Chain Bridge Road creating a "billboard effect", the proposed home on

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Lot F would be much too close to the neighboring property owner, the proposed stormwater management sewers are untested and dependent upon a high level of maintenance which is not guaranteed, the system creates a risk to downstream property owners and neighboring parkland, and the system poses a risk to the critical root zones of the protected trees.

Because this application fails under the general test for a special exception, it is not necessary to evaluate each of the special exception criteria. However, as will be set forth below, the applicant has not met the criteria in subsection 2516.9, for the same reasons that it does not meet the general test for a special exception. Sub-section 2516.9 requires that the applicant must comply with "substantive provisions of this title" and that the proposed development shall not likely have an adverse effect on the present character and future development of the neighborhood.

For this same reason, the Board cannot find compliance with the specific requirement of § 2516.9, which provides, in part, that the proposed development ... shall not likely have an adverse effect on the present character and future development of the neighborhood. Indeed, the Board is persuaded that the proposed project will be inconsistent with the present character of the neighborhood.

The ANC Issues and Concerns

The Board is required under Section 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; now codified at D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's written recommendations. To give great weight, the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns.

The ANC's primary concerns were: (1) the proposed project seeks to maximize the allowable density, lot occupancy, number of homes, and impervious surface coverage, and is therefore inconsistent with the CB/UT Overlay; (2) the proposed project is not in keeping with the character of the neighborhood; (3) the proposed project will result in the release of additional stormwater onto neighboring terrain, and will exacerbate measures taken by neighbors to alleviate flooding; and (4) the proposed project will adversely effect tree protection, slope protection, and the protection of nearby parkland.

As set forth above, the Board found these ANC concerns persuasive.

The Board is also required under D.C. Official Code § 6-623.04 (2001) to give "great weight" to OP recommendations. OP expressed concerns regarding the viability of trees as well as concerns that the proposed dwelling at Lot F is too close to the neighboring property and that the proposed dwelling at Lot 3 would "tower" over Chain Bridge Road.

For the reasons discussed above, the Board also finds OP's concerns persuasive.

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Accordingly, the Board concludes that the proposed project would have an adverse impact upon the use of neighboring property and that the special exception would not be in harmony with the general purpose and intent of the Zoning Regulations. The applicant has, therefore, not satisfied its burden of proof for a special exception under §2516 to allow the construction of thirteen one-family dwellings.

It is therefore **ORDERED** that the application for special exception relief is **DENIED**.

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and John G. Parsons to deny)

Vote taken on January 9, 2007

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

Each concurring member has approved the issuance of this Decision and Order.

FINAL DATE OF ORDER: **AUG 07 2007**

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Application No. 17537 of Victor Tabbs, pursuant to 11 DCMR § 3104.1, for a special exception under Section 223, to construct an addition that would convert a row dwelling into a flat not meeting the percentage of lot occupancy at premises 740 13th Street, S.E. (Square 1045, Lot 97) in the R-4 District.

Hearing Dates: November 21, 2006 and December 12, 2006
Decision Date: January 23, 2007

DECISION AND ORDER

Victor Tabbs (“the Applicant”) filed an application with the Board of Zoning Adjustment (the “Board”) pursuant to 11 DCMR §§ 223 and 3104.1 for a special exception to construct a three-story-plus-cellar addition to a single family dwelling at premises 740 13th Street, S.E. (Square 1045, Lot 97) (“the subject property”). Mr. Tabbs is the owner of the subject property. The public hearing was conducted on December 12, 2006. On January 23, 2007, the Board granted the application by a vote of 4-1-0. An explanation of the facts and law that justify the Board’s determination follow.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. The application was filed on July 11, 2006. By memoranda dated July 17, 2007, the Office of Zoning notified the following agencies that the application had been filed: the D.C. Office of Planning (“OP”); Advisory Neighborhood Commission (“ANC”) 6B, the ANC for the area within which the subject property is located; the ANC Commissioner for the affected single-member district, ANC 6B-07; the District Department of Transportation; and the Ward 6 Councilmember.

The Board scheduled a public hearing on the application for November 21, 2006. Pursuant to 11 DCMR § 3113.13, the Office of Zoning on September 6, 2006, mailed the applicant, owners of all property within 200 feet of the subject property, and ANC 6B notice of the hearing. On September 13, 2006, a corrected notice of hearing was sent to those same persons correcting the address for the premises. On October 2, 2006, another corrected notice of hearing was mailed indicating that the case involved a request for a special exception pursuant to section 223 for lot occupancy and a request for a variance

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for the limitation on the number of floors under section 400.1. The Applicant subsequently amended the application to remove the request for variance relief.¹

On November 21, 2006, the Board postponed the hearing until December 12, 2006, because the Applicant had not posted a notice of the hearing on the property as required by 11 DCMR § 3113.14.

On November 27, 2006, the Applicant submitted an affidavit of posting, with attached photographs showing that two zoning posters were posted on the site.

The public hearing was conducted December 12, 2006. The record remained open for the submission of additional material into the record by the Applicant and the opposition.

The Office of Planning Report. The Office of Planning submitted its report dated November 14, 2006, recommending approval of the application on the condition that the Applicant permanently seal the side windows it had already installed and permanently fill or seal the non-conforming side courts, which OP viewed as being a fire hazard. The Applicant submitted revised plans that were consistent with this recommendation (Finding of Fact No. 5). OP addressed the special exception criteria in § 223, concluding that the proposed addition complied with the criteria.

Advisory Neighborhood Commission Report. By letter dated December 13, 2006, ANC 6B advised the Board that it had voted 7-0 to oppose the application as recommended in its Executive Committee's letter to the Board dated December 11, 2006. Its opposition was based on light, air, and privacy concerns. The ANC also believed that the addition created a four-story building, which requires a variance in the R-4 zone district. The ANC claimed that the bottom floor did not meet the definition of a cellar (which does not count as a story), because its ceiling was higher than four feet above the adjacent finished grade. The ANC further stated that it opposed the granting of a variance, because there was no exceptional condition affecting the property.

Request for Party Status. Bryan Cassidy, who resides at 748 13th Street, S.E., filed a request for party status to represent himself and other neighbors in opposition on November 6, 2006. Since he could not be available for the new hearing date, he agreed to submit his opposition and that of the other neighbors in writing and withdrew his request for party status. ANC 6B was automatically a party in the case.

Persons in Support. Four neighbors signed a petition in support of the construction, including one who subsequently signed a petition and submitted a letter in opposition to

¹ The case caption has been modified to reflect this change.

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the construction.

Persons in Opposition. Bryan Cassidy along with 11 other residents of 13th Street S.E., Patrick and Wendy O'Meara of 736 13th Street, Clarence J. Jackson, Sr., who resides at 738 13th Street, which is next door to the applicant, and the Capitol Hill Restoration Society ("Society") are the persons opposing the application. The Applicant did not appear before the Society to discuss his addition, and the Society voted to oppose the application. The other persons in opposition were variously concerned about the adverse impact on light and air to neighboring properties due to the proposed height, the privacy issues raised by the side window, the potentially negative effect a large addition would have on neighboring property values, the failure of the Applicant to comply with building plans, and the negative effect on the character of the neighborhood that would be created by the erection of a four story addition in an R-4 zone.

FINDINGS OF FACTThe Subject Property

1. The subject property is located at 740 13th Street, S.E. (Square 1045, Lot 97) on the east side of 13th Street between Pennsylvania Avenue, S.E. and Potomac Avenue, S.E. The subject lot is improved with a row dwelling.
2. Lot 97 is 18.8 feet wide and 92.5 feet deep, with a land area of 1,743 square feet (rounded).
3. The subject property is zoned R-4.

The Proposed Addition

4. The Applicant proposes to construct a three-story addition and cellar to the rear of the existing row dwelling and cellar and to add an additional dwelling unit, thereby converting the structure to a flat.
5. In response to the concerns raised by the Office of Planning as to the existence of side windows and non-conforming courts, the Applicant submitted plans on January 18, 2007 ("the revised plans") that showed no side windows, the side courts infilled with concrete, and the new addition exterior walls with stucco on six inch concrete masonry units to line up with the face of the existing building.

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6. With the proposed addition, the structure would have a lot occupancy of 63.8 percent.
7. A flat may not occupy more than 60 percent of its lot in an R-4 zone district, 11 DCMR § 403.2. The BZA is authorized to grant a special exception from that limitation, so long as the proposed lot occupancy does not exceed 70 percent, 11 DCMR § 223.3.
8. On July 13, 2006, the Applicant filed an application with the Board for a special exception pursuant to section 3104.1 of the Zoning Regulations under section 223.

The Withdrawal of the Variance Request

9. The maximum height of any building in an R-4 District may not exceed 40 feet or three stories, 11 DCMR § 400.1.
10. Based upon a memorandum from the Zoning Administrator indicating that the addition would increase the building stories to four (Exh. 3), the Applicant also sought a variance from this provision.
11. Subsequently, the Zoning Administrator filed a second and third memorandum indicating that variance relief was not necessary (Exhs. 30 and 35).
12. Subsection 199.1 of the Zoning Regulations defines a story as the space between the surfaces of two successive floors in a building. The number of stories is counted at the point from which the height of the building is measured. The definition provides that a cellar is not counted as a story.
13. Subsection 199.1 defines a cellar as that portion of a story, the ceiling of which is less than four feet above the adjacent finished grade, which would be the center and the adjacent grade at the front of the subject property.
14. The Applicant initially claimed that the height of the bottom-most ceiling of the building was 3'8" above the adjacent finished grade, but did not offer drawings showing the location of the existing ceiling.
15. The ANC contended that the Applicant used the ceiling of the crawl space beneath the porch, but if the porch were removed, the actual basement ceiling would be over 6 feet above the finished grade.

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16. The Applicant's revised plans showed the actual location of the ceiling in the existing portion of the building. The drawing shows that the ceiling for the lowest portion of the building remains level from the front to the back of the structure and that this ceiling's height is 3'8" above the adjacent finished grade. (Exh. 45)

Findings Relevant to the Special Exception

17. The properties on the subject block consist of two-story row dwellings. The other properties in the subject block have rear yards and detached garages in the rear. These homes extend into the yards at varying lengths.
18. On the east side of the north-south alley at the rear of the subject property, a planned unit development, consisting of five-story condominium buildings called Jenkins Row, is being constructed. The alley is approximately 20 feet wide, and there is no rear yard to Jenkins Row.
19. The revised plans showed the line of sight for the property that illustrates that the addition would not be visible from the sidewalk directly across 13th Street in front of the subject property, but can only be seen if viewed from a position north or south on 13th Street. (Exh. 45)
20. The subject property is oriented east and west so the addition will cast minor shadows on the property immediately to the north of it for a portion of the day.
21. The addition will have no side windows, and therefore will not reduce the level of privacy currently enjoyed by the adjacent properties.

CONCLUSIONS OF LAW

The Applicant seeks a special exception under Section 223 pursuant to 11 DCMR § 3104.1 to allow construction of a three-story-plus-cellar addition on the rear of a row dwelling in the R-4 District. The Board is authorized to grant special exceptions where, in the Board's judgment, a special exception would be in harmony with the general purpose and intent of the Zoning Regulations and Map and would not tend to adversely affect the use of neighboring property. Pursuant to § 223, the Board may permit an addition to a one-family dwelling or a flat that does not comply with normal requirements pertaining to minimum lot dimensions, lot occupancy, rear and side yards, courts and nonconforming structures, subject to the conditions enumerated in Section 223. In this case, Applicant seeks to construct an addition that would exceed the maximum lot

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occupancy permitted for a flat, but which would be less than the 70% lot occupancy limitation set forth in § 223.3.

The Board finds that the application meets the general requirements of § 3104.1 and the specific criteria of § 223.

In accordance with § 223.2, the addition will not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property. The neighboring building that will be most affected in terms of its light and air is the abutting row dwelling on the immediate north at 738 13th Street S.E. Although there will be shadows from the subject property during the morning, there will be ample sunlight available to the property during most of the day. Additionally, the elimination of the side windows will assure that the addition will not reduce the present privacy level of the adjacent properties.

The addition also meets the requirement of § 223.2 (c) in that it will not create a visual intrusion on the character, scale and pattern of houses along the east frontage of 13th Street, S.E. in this vicinity, as viewed from the street, alley, and other public way. The addition will not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage. It can not be viewed easily from 13th Street and to the extent it is visible, it will have little visual impact. Although the addition is visible from the alley in the rear, it will not be out of context with other intrusions into neighboring back yards and will have no greater impact than the construction of the five story condominiums Jenkins Row.

The Board concludes that the project is in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to adversely affect the use of neighboring property in accordance with the Zoning Regulations and Maps.

Great Weight to Office of Planning and ANC 6B

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04. Great weight means an acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive.

The Office of Planning recommended approval of the application, and the Board agrees with OP's analysis and recommendation.

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ANC 6B voted unanimously to oppose the addition. The ANC's opposition was based upon its belief that the addition would adversely affect the light, air, and privacy of neighboring property owners and that the addition would "create an enclosed court yard effect" in light of another residential development under construction to the rear of the property. The Office of Planning, to which the Board also gives great weight, determined that the addition would not unduly affect the light and air of neighboring properties. Based on the evidence in the record, including photos submitted by the Applicant showing the property in the context of its neighboring properties, including the property under construction, the Board is persuaded, as set forth above, that this particular addition will not have a substantial adverse impact on the light and air of any adjacent dwelling or property.

The ANC also contended that the Board should have heard the case as a request for a variance. The District of Columbia Court of Appeals has held that "the 'great weight' requirement extends only to 'issues and concerns that are 'legally relevant.' *Bakers Local 118, supra, 437 A.2d at 179* (citation omitted)", *Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment*, 634 A.2d 1234, 1241(DC 1993). The question of whether an applicant should be requesting variance relief is not germane to the question of whether a special exception should be granted. As the Board previously stated in *Application No 16974 of Tudor Place Foundation, Inc*, 51 DCR 8885 (2004),

Assuming that the opposition is correct ... the most that can be said is that the applicant will need variance relief. That fact alone does not require the Board to deny a special exception. ... Our inquiry is limited to the narrow question of whether the Applicant met its burden under the general and specific special exception criteria that apply to the requested use. Having concluded that it has done so, the Board must grant the application.

While not required to address this concern, the Board notes that the ANC's argument that a variance is required is not supported by the facts in this case. The ANC contended that the ceiling height should be measured from the top of the porch over the crawl space nearest the front door with 8 inches allowed for joists to determine the ceiling height. The Applicant's revised plans show the actual location of the cellar ceiling, which turns out to be level throughout and shows its height is 3' 8" measured in accordance with the regulations. Since this ceiling was less than 4 feet in height above the adjacent finished grade to the underside of the cellar ceiling, that portion of the building was a cellar, and therefore not counted as a story (11 DCMR § 199.1 (definitions of "cellar" and "story")).

Based on the above record before the Board and for the reasons stated above, the Board concludes that the Applicant has satisfied the burden of proof with respect to the

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application for approval of an addition as a special exception under Section 223 in the R-4 District.

It is therefore **ORDERED** that the Application is **GRANTED**.

VOTE: **4-1-0** (Ruthanne G. Miller, John A. Mann II, Curtis L. Etherly, Jr. and Gregory N. Jeffries to grant the application; Geoffrey H. Griffis to deny)

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

Each concurring Board member approved the issuance of this order.

FINAL DATE OF ORDER: JULY 27, 2007

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

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE §§ 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR

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PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Application No. 17571 of 1124 9th Street, L.L.C., pursuant to 11 DCMR § 3103.2, for a variance from the floor area ratio requirements of § 771, a variance from the lot occupancy requirements of § 772, a variance from the residential open space requirements of § 773,¹ and a variance from the rear yard requirements of § 774, to allow a three-story residential addition to an existing building in the DD/C-2-A District at premise 1124 9th Street, N.W. (Square 369, Lot 36).

HEARING DATE: February 27, 2006
DECISION DATE: February 27, 2006

DECISION AND ORDER

This application was submitted on October 9, 2006 by 1124 9th Street, LLC (“Applicant”), the owner of the property that is the subject of this application (“subject property”). The self-certified application requested several area variances necessary to permit the Applicant to restore and enlarge a one-story vacant building located at 1124 9th Street, N.W., in a DD/C-2-A zone district.

The Board held a hearing on the application on February 27, 2006, and at the conclusion of the hearing, voted 4-0-1 to approve the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated October 25, 2006, the Office of Zoning (“OZ”) sent notice of the filing of the application to the D.C. Office of Planning (“OP”), the D.C. Department of Transportation (“DDOT”), Advisory Neighborhood Commission (“ANC”) 2C, the ANC within which the subject property is located, the Single Member District member for 2C03, and the Council Member for Ward 2. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing in the *D.C. Register* and mailed such notice to the Applicant, ANC 2C, and all owners of property within 200 feet of the subject property.

Requests for Party Status. ANC 2C was automatically a party to this case. There were

¹On April 6, 2007, the Zoning Commission repealed all the residential recreation space provisions in the Zoning Regulations; therefore, such variance relief is neither necessary nor addressed in this Order.

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originally three party status requests in this case, two of which were withdrawn at the hearing, after an agreement was reached with the Applicant. The third, of Mr. Kwok Tom, a nearby neighbor, was granted by the Board. Mr. Tom was particularly concerned about the parking issues related to the proposed project, both during construction and after occupancy of the building.

Applicant's Case. The Applicant's representative testified in support of the project. The project architect explained how the 56-foot setback came about and what effect it had on the project and the relief requested. The Applicant's land use and zoning expert testified as to how the variance tests are met.

Government Reports. The Office of Planning filed a report with the Board dated February 13, 2007, recommending approval of all the variance relief sought. OP stated that the variances are minimal, will not have detrimental impact on nearby buildings or on the neighborhood, and will meet the intent of the Zoning Regulations.

The Historic Preservation Office ("HPO") prepared two reports on the Applicant's project. In the first report, no approval was recommended by staff because the Applicant was directed to either eliminate the third floor of the proposed addition or set the addition significantly further back on the roof of the existing building. After the Applicant revised its plans and considerably increased the setback of the addition, the HPO staff recommended concept approval to the Historic Preservation Review Board ("HPRB").

ANC Report. By a letter filed with OZ on November 13, 2006, ANC 2C stated that, at a regularly-scheduled and properly-noticed meeting, it had voted unanimously to support the application. The ANC opined that the application met the three prongs of the variance test and that "the relief is necessary due to the size and configuration of the existing building on the site."

FINDINGS OF FACT

The Subject Property and the Surrounding Neighborhood

1. The subject property is located at 1124 9th Street, N.W. (Square 369, Lot 36), in a DD/C-2-A zone district, and encompasses approximately 3,469 square feet of land area.
2. The subject property is 25 feet wide, and is bounded at the rear by a 30-foot wide public alley.
3. Square 369 is bounded by M Street, N.W. on the north, L St., N.W., on the south, 10th St., N.W. on the west and 9th St., N.W. on the east. The Square

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includes a number of vacant structures along 9th Street, a new residential development on M St., and other residential uses along M, L, and 10th Streets.

4. The subject property is in the Shaw Historic District and is improved with a vacant, one-story building built in 1920 which has been found to be a contributing building to the Historic District, effectively preventing its razing.
5. The existing building has a unique crenellated roofline, or "stepped parapet," as the HPO staff referred to it, which signals its current one-story nature.
6. The adjacent building attached to the north side of the subject building is two stories, and the adjacent building attached to the south side is three stories.
7. Prior to being vacated approximately 15 years ago, the building on the subject property was used for commercial purposes.
8. The building on the property occupies 100% of the lot, which is permitted in the C-2-A zone for a building devoted to commercial uses.
9. There is a loading zone on 9th Street, in front of the property, from the prior commercial use, which the Applicant will retain.

The Proposed Project

10. The Applicant proposes to rehabilitate the existing building for commercial use, and add a three-story addition on top of it, containing one residential unit on each floor.
11. There will be no residential unit(s) on the ground floor, but the entrance to the upper-floor residential units will be on the ground floor, as will two parking spaces serving those units.
12. Because the existing building is a contributing structure in the Shaw Historic District, the ability to remove portions of the existing building or locate new structures on the property is limited and subject to HPRB review and recommendation to the Mayor to assure that alterations of existing structures and new construction are compatible with the character of the historic district.
13. The Applicant's original plans called for a three-story addition set back 10 feet from the building face along 9th Street, with two parking spaces open to the

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sky, and a building height of 43 feet, 7 feet less than the 50 feet permitted in the zone. *See*, 11 DCMR § 770.1.

14. The HPO staff did not recommend approval of the original plans to the HPRB, but recommended that the Applicant either remove one floor of the addition or set it much further back, in order to respect the historic nature of the existing building, particularly its “stepped parapet,” and to minimize the visual connection between the existing façade and the addition.
15. In order to obtain HPRB’s recommendation of approval, the Applicant changed the setback of the addition to approximately 56 feet from the building face along 9th Street, resulting in the addition being above, and therefore, completely enclosing, the two parking spaces which were previously open to the sky. The building height was also increased to 49 feet.

The Requested Relief

16. Although not required to do so because the existing building has been certified as contributing to the historic district, the Applicant has chosen to provide the two parking spaces that would otherwise be required. *See*, 11 DCMR §§ 2100.5 & 2101.1.
17. Because the two parking spaces are covered by the addition, the area in which they are located is within the rear portion of the existing building, and so counts toward the floor area ratio (“FAR”) of the project, putting the FAR of the project .18 over the maximum permitted FAR of 2.5, and resulting in the request for the FAR variance. *See*, 11 DCMR §771.2.
18. If the two parking spaces were not enclosed, and therefore not counted toward FAR, no FAR relief would be needed.
19. The small size of the lot and the location of the historic building make below-grade parking infeasible, if not impossible.
20. In a C-2-A zone, a building or portion thereof which is devoted to residential use is limited to a maximum lot occupancy of 60%. *See*, 11 DCMR § 772.1.
21. Each of the stories of the addition will have a lot occupancy of only 57%, but the large setback of the addition results in the floor area of the two parking spaces being located within the building, and the two spaces are attributable to residential use. Although there are no residential units on the ground floor, if the parking spaces are considered to make the residential use begin at the

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- ground floor, then the residential lot occupancy becomes 100%, over the permitted 60%, resulting in the need for the lot occupancy variance.
22. The minimum required rear yard in the C-2-A district is 15 feet, but for a building abutting an alley, the rear yard for the portion of the building below a horizontal plane 20 feet above the mean finished grade is measured from *the center line of the alley* to the rear wall of the building. For the portion of the building above a horizontal plane 20 feet above grade, the rear yard is instead measured from the *rear lot line* to the rear wall of the building immediately above the horizontal plane. *See*, 11 DCMR §§ 774.1 & 774.7.
 23. There is a rear yard of 15 feet from the center line of the rear alley to the rear wall of the existing building; therefore no rear yard variance is required for the first floor.
 24. Because of the deep setback of the addition, there is a rear yard of only one foot provided above a horizontal plane 20 feet above grade, necessitating the requested rear yard variance for the second, third, and fourth floors.
 25. But for the deep setback approved by HPRB, no rear yard relief would be needed.
 26. Compliance with the 60% lot occupancy maximum would require elimination of the two parking spaces or a significant reduction in the size of the addition, and therefore, in the number of residential units provided, thereby harming the feasibility of the project.
 27. Similarly, compliance with the rear yard requirement above the 20-foot threshold would result in a significant reduction in the size of the addition, and therefore, in the number of residential units provided, thereby harming the feasibility of the project.
 28. Even with the rear yard variance, there is still a 30-foot alley, twice as wide as the required 15-foot rear yard depth, providing open space and allowing air and light to reach the building behind the subject property.

CONCLUSIONS OF LAW

The Board is authorized to grant variances from the strict application of the Zoning Regulations 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

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situation or condition” of the property, the strict application of the Zoning Regulations would “result in particular and exceptional practical difficulties to or exceptional or undue hardship upon the owner of such property.” D.C. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2. The “exceptional situation or condition” of a property can arise out of structures existing on the property itself. *See, e.g., Clerics of St. Viator v. D.C. Board of Zoning Adjustment*, 320 A.2d 291, 293-294 (D.C. 1974). Relief can only 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. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2.

An applicant for area variances must make the lesser showing of “practical difficulties,” as opposed to the more difficult showing of “undue hardship,” which applies in use variance cases. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). Because area variances are being sought in this case, the Applicant had to make three showings: exceptional condition of the property, that such exceptional condition results in “practical difficulties” to the Applicant, and that the granting of the variances will not impair the public good or the intent or integrity of the Zone Plan and Regulations.

The subject property is affected by an exceptional situation due to the confluence of its narrowness, the 100% lot occupancy and historic nature of the existing structure, and the deep setback necessary to gain HPRB approval. *See, Gilmartin v. D.C. Board of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990). The width of the subject property is actually 5 feet less than the alley abutting it at the rear. This is an unusual condition of the property. The existing building has a unique crenellated parapet along its roofline facing 9th Street. The HPRB was concerned that this architectural embellishment not be overshadowed by the addition.

Meeting the strict letter of the applicable Zoning Regulations relating to FAR, residential lot occupancy, and rear yard would cause the Applicant exceptional practical difficulties. The HPRB-recommended setback, coupled with a 25-foot lot width circumscribed on either side by attached buildings, considerably reduces the building envelope available to the Applicant. The reduced building envelope forces the rear wall of the addition to within one foot of the rear wall of the existing building, resulting in the enclosure of the area containing the two parking spaces. The Applicant’s original plans called for only a 10-foot setback from the building face along 9th Street, with two open-air parking spaces. If these plans had been implemented, the project would likely not require any relief.

The 46-foot increase in front setback, to 56 feet, creates the need for the relief requested. The enclosure of the area where the two parking spaces are located makes it count toward the building’s FAR, raising the FAR .18 above the 2.5 FAR permitted by §771.2. With their enclosure, the parking spaces also arguably create a 100% lot occupancy for a

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“portion of the building devoted to a residential use,” contrary to § 772.1, which permits a lot occupancy of 60% for such a building portion. The language of § 772.1 is not crystal clear, but the Applicant reads it as meaning that variance relief is needed if the portion of the building, *i.e.*, the floor, that includes the residential use, occupies more than 60% of the lot, rather than that the area actually devoted to the residential use must occupy more than 60% of the lot. Therefore, the Applicant requests lot occupancy relief because the first floor of the building, which houses part of the residential use (the parking spaces), occupies 100% of the lot. If the parking spaces had remained unenclosed or been eliminated, this relief would not be necessary.

The last variance, for rear yard relief, is also necessitated, at least in large part, by the extensive 56-foot setback. There is no rear yard relief needed for the building’s first floor, and without the sizable setback, the addition was designed to meet the requirement of a 15-foot rear yard measured from the rear lot line to the rear wall of the building immediately above a horizontal plane 20 feet above grade. *See*, §§ 774.1 & 774.7(b). With the setback, however, the second, third, and fourth floors end up being just one foot short of the rear wall of the existing building, creating a one-foot rear yard and the need for rear yard relief.

While it is true that HPRB is an advisory body and its guidance comes in the form of “recommendations,” it is also true that without HPRB’s sign-off indicating that historic preservation requirements have been met, the Applicant cannot obtain a building permit to alter its building without a potentially costly and time-consuming procedure before the Mayor’s Agent. To prevail before the Mayor’s Agent, an applicant must meet the heavy burden of showing that the issuance of its permit “is necessary in the public interest, or that failure to issue [its] permit will result in unreasonable economic hardship to the owner.” *See*, D.C. Official Code § 6-1105 (2001). It therefore behooves Applicants to work with, and comply with, HPRB’s recommendations, and this can result in the need for zoning relief.

Merely being located in a historic district does not rise to the level of an “exceptional situation” in the context of the variance test. *See, Capitol Hill Restoration Society v. D.C. Board of Zoning Adjustment*, 534 A.2d 939, 942 (D.C. 1987). When a building is subject to HPRB review, however, the specific design constraints imposed by HPRB as a condition to its approval can create practical difficulties in constructing a building within the parameters of the Zoning Regulations. Such is the case here. The practical difficulties in meeting the Zoning Regulations engendered by the effect of the much-greater-than-originally-contemplated setback results in the need for the variance relief.

The requested variance relief can be granted without substantial detriment to the public good or substantial impairment of the Zone Plan. The uses proposed, first-floor retail, and upper-floor residential, are matter-of-right uses in this C-2-A zone. The project will

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cause no impairment of the Zone Plan. The FAR variance is minimal and results in a minimally more dense building than permitted. Such a *de minimus* variance request requires a lesser showing of practical difficulties than a more substantial variance request. See, *Gilmartin, supra*, at 1171, fn. 6. (The "BZA may consider whether the variance is *de minimus* in nature and whether for that reason a correspondingly lesser burden of proof rests on the" applicant.) The residential lot occupancy variance has no real external effect because the existing building is already at 100% lot occupancy, and any effect of the rear yard variance is ameliorated by the 30-foot alley abutting the rear of the property.

Great Weight

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive. Both OP and ANC 2C recommended approval of the application and the Board agrees.

Based on the record before the Board and for the reasons stated above, the Board concludes that the Applicant has satisfied the burden of proof with respect to variance relief from the FAR requirement of § 771, the residential lot occupancy requirement of § 772, and the rear yard requirement of § 774. It is therefore **ORDERED** that the application be **GRANTED**.

VOTE: **4-0-1** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr. and John A. Mann II, to approve. No Zoning Commission member participating or voting.)

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

Each voting Board member has approved the issuance of this Order granting the application.

FINAL DATE OF ORDER: AUG 03 2007

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

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PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE §§ 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

LM

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Application No. 17602-A of The National Presbyterian Church, pursuant to 11 DCMR Section 3104.1, for a special exception to establish a child development center under Section 205 (16 children, ages infant to 4 years, and 5 staff), in the R-1-B District, on the first floor of the multi-purpose building, at premises 4101 Nebraska Avenue, N.W. (Square 1724, Lot 805).

HEARING DATE: May 8, 2007

DECISION DATE: May 8, 2007 (Bench Decision)

DECISION DATE ON CLARIFICATION: July 31, 2007

CORRECTED SUMMARY ORDER¹

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR Section 3113.2.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 3E and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 3E, which is automatically a party to this application. ANC 3E submitted a report in support of the application. The Office of Planning (OP) also submitted a report in the application.

As directed by 11 DCMR Section 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to Section 3104.1, for special exception under section 205. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

As indicated above, this is an application for a child development center in an existing building at The National Presbyterian Church. The Applicant represented that priority enrollment will be offered at the child development center based on a three-tiered system. The first tier will consist of children of faculty and staff of the school; the second tier will consist of children of families of the church and school; and the third tier will consist of children from the general public, with preference given to children of families residing within the boundaries of ANC 3E. In addition, two parking spaces will be designated for the staff of the child development center (Exhibit No. 33). Finally, the play area for the children will be located behind the building.

¹ This order amends the order issued on May 17, 2007, to clarify that the third tier of enrollment will consist of children from the general public with preference given to children of families residing within the boundaries of ANC 3E.

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Based upon the record before the Board and having given great weight to the OP and ANC reports, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR Sections 3104.1 and 205, that the requested relief can be granted being in harmony with the general purpose and intent of the Zoning Regulations and Map. The board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR Section 3101.6, the Board has determined to waive the requirement of 11 DCMR Section 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED, SUBJECT** to the following **CONDITIONS**:

1. The maximum number of children shall not exceed 16, ages infant to four years old.
2. The hours and days of operation shall be 7:30 a.m. to 6:00 p.m., Monday through Friday.
3. The total number of staff shall not exceed 5.

VOTE: **5-0-0** (Ruthanne G. Miller, Marc D. Loud, Curtis L. Etherly, Jr. and John A. Mann II (by absentee ballot) to approve, the Zoning Commission member not present, not voting)

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

Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: May 17, 2007

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

PURSUANT TO 11 DCMR 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION

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FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Application No. 17582 of 656 Pennsylvania Avenue LLC, 666 Pennsylvania Avenue Associates and 327 7th ST SE LLC, pursuant to 11 DCMR § 3103.2, for a variance from the building height requirements under section 770, a variance from the floor area ratio requirements under subsection 1572.3, and a variance from the off-street parking requirements under subsection 2101.1, to construct an office addition to several contiguous buildings in the CHC/C-2-A District at premises 656 Pennsylvania Avenue, S.E., 666 Pennsylvania Avenue, S.E., 325 7th Street, S.E., and 327 7th Street, S.E. (Square 873, Lots 115, 116 and 117).

HEARING DATE: March 20 and July 24, 2007
DECISION DATE: July 24, 2007 (Bench Decision)

SUMMARY ORDER

REVIEW BY THE ZONING ADMINISTRATOR

The application was accompanied by a memorandum from the Zoning Administrator certifying the required relief.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register and by mail to Advisory Neighborhood Commission (ANC) 6B and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6B, which is automatically a party to this application. ANC 6B submitted a report in support of the application. The Office of Planning (OP) also submitted a report in support of the application. Finally, the D.C. Department of Transportation (DDOT) filed its report stating no objections to the application. DDOT noted the Applicant's implementation of mitigation measures or conditions that are outlined in the Applicant's mitigation and transportation demand management plan (in Exhibit No. 32).

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case for a variance pursuant to § 3103.2, for variances from §770, 1572.3, and 2101.1. No parties appeared at the public hearing in opposition to this application. Accordingly a decision by the Board to grant this application would not be adverse to any party.

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Based upon the record before the Board and having given great weight to the ANC and the Office of Planning reports filed in this case, the Board concludes that the applicant has met the burden of proving under 11 DCMR §§ 3103.2, 770, 1572.3 and 2101.1. that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the 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.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application (pursuant to Exhibit 10 - Plans) be **GRANTED**.

VOTE: 4-0-1 (John G. Parsons, Ruthanne G. Miller, John A. Mann II, and Marc D. Loud to grant; Curtis L. Etherly not present, not voting)

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

Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: JUL 26 2007

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

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION

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THERE TO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE §§ 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

TWR

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Application No. 17629 of Robin A. Pressman, pursuant to 11 DCMR § 3104.1, a special exception to allow a two-story addition to an existing single-family detached dwelling under section 223, not meeting the rear yard requirements (section 404), in the R-1-B District at premises 1501 Roxanna Road, N.W. (Square 2766N, Lot 1).

HEARING DATE: July 31, 2007
DECISION DATE: July 31, 2007 (Bench Decision)

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 4A and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 4A, which is automatically a party to this application. ANC 4A submitted a letter in support of the application. The Office of Planning (OP) submitted a report in support of the application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for special exception under section 223. No parties appeared at the public hearing in opposition to this application. Accordingly a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1 and 223, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by

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findings of fact and conclusions of law. It is therefore **ORDERED** that this application (pursuant to the architectural plans – Exhibit 10 in the record) be **GRANTED**.

VOTE: 3-0-2 (Ruthanne G. Miller, Marc D. Loud and Curtis L. Etherly, Jr. to Approve, the National Capitol Planning Commission Member and the Zoning Commission Member not present, not voting).

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

Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: August 1, 2007

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

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

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DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

rsn

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FILING
Z.C. Case No. 84-19A
(Modification to a Previously-Approved PUD – Square 24, Lot 112)
August 9, 2007**

THIS CASE IS OF INTEREST TO ANC 2A

On August 7, 2007, the Office of Zoning received an application from World Wildlife Fund, Inc. (the “applicant”) for approval of a modification to a previously-approved PUD for the above-referenced property.

The property that is the subject of this application consists of Square 24, Lot 112 in Northwest Washington, D.C. (Ward 2) with an address of 1250 24th Street, N.W. The property is currently zoned CR.

The applicant proposes to modify Condition No. 4 of Z.C. Order No. 453 which requires 17,000 s.f. of the gross floor area of the approved PUD be devoted to retail sales or services, restaurants, or public or private theaters.

For additional information, please contact Sharon S. Schellin, Secretary to the Zoning Commission at (202) 727-6311.

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FILING
Z.C. Case No. 05-03A
(Time Extension for a previously approved PUD – Anacostia Gateway
Government Center – Parcel 224/31; Square 5600, Lot 17; and Square 5601,
Lots 54, 858, 859, 860, and part of 857.)
August 1, 2007**

THIS CASE IS OF INTEREST TO ANC 8A

On July 27, 2007, the Office of Zoning received an application from the D.C. Office of Property Management (the “applicant”) for approval of a two-year extension of time for a previously approved PUD for the above-referenced property.

The property that is the subject of this application consists of Parcel 224/31; Square 5600, Lot 17; and Square 5601, Lots 54, 858, 859, 860, and part of 857 in southeast Washington, D.C. (Ward 8) and is located at the 1800 block of Martin Luther King, Jr. Avenue, S.E..

For additional information, please contact Sharon S. Schellin, Secretary to the Zoning Commission at (202) 727-6311.

**OFFICE OF DOCUMENTS AND ADMINISTRATIVE ISSUANCES
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DISTRICT OF COLUMBIA MUNICIPAL REGULATIONS (DCMR)

TITLE	SUBJECT	PRICE
1	DCMR MAYOR AND EXECUTIVE AGENCIES (JUNE 2001)	\$16.00
3	DCMR ELECTIONS & ETHICS (MARCH 2007)	\$20.00
4	DCMR HUMAN RIGHTS (MARCH 1995)	\$13.00
5	DCMR BOARD OF EDUCATION (DECEMBER 2002).....	\$26.00
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8	DCMR UNIVERSITY OF THE DISTRICT OF COLUMBIA (JUNE 1988).....	\$8.00
9	DCMR TAXATION & ASSESSMENTS (APRIL 1998).....	\$20.00
10	DCMR DISTRICT'S COMPREHENSIVE PLAN (PART 1, FEBRUARY 1999)	\$33.00
10	DCMR PLANNING & DEVELOPMENT (PART 2, MARCH 1994) w/1996 SUPPLEMENT*	\$26.00
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18	DCMR VEHICLES & TRAFFIC (APRIL 1995) w/1997 SUPPLEMENT*.....	\$26.00
19	DCMR AMUSEMENTS, PARKS & RECREATION (JUNE 2001)	\$26.00
20	DCMR ENVIRONMENT - CHAPTERS 1-39 (FEBRUARY 1997).....	\$20.00
20	DCMR ENVIRONMENT - CHAPTERS 40-70 (FEBRUARY 1997).....	\$26.00
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