GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: DEBORAH CHISHOLM, Complainant, v. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 20, Respondent.	PERB Case Nos. 99-U-32 and 99-U-33 Opinion No. 761 FOR PUBLICATION

DECISION AND ORDER

The matter before the Board is a Joint Request for Subpoena requested by the Complainant Deborah Chisholm[1] ("Complainant" or "Ms. Chisholm") and the American Federation of State, County and Municipal Employees, D.C. Council 20 ("AFSCME" or "Union"). The subpoenas are being requested in the remedy phase of an Unfair Labor Practice matter in which the Board previously issued a Decision and Order.[2] In that decision, Opinion No. 656[3], the Board found that the Union

[1]Ms. Chisholm was employed as a Social Service Representative for the D.C. Department of Human Services. Her job entailed processing applications for emergency assistance, including Temporary Assistance for Needy Families (TANF), food stamps, and Medicaid benefits for the Income Maintenance Administration of the D.C. Department of Human Services ("DHS").

[2]The Union also made an individual request for other documents on July 25, 2003. Those documents included, *inter alia,* files of complaints regarding Complainant, a Salazar Corrective Action Plan ("Salazar") dated September 8, 1997, and Memoranda regarding twenty six (26) clients for whom the Complainant failed to process benefits in violation of Salazar. (IR at page 4).

The Agency responded to that particular subpoena request by stating its willingness to produce the documents covered by the Union's July 25th request, to the extent that those documents do not contain information protected by District of Columbia and federal confidentiality provisions. (Hearing Examiner's Interim Report (IR) at pg. 5).

[3] Opinion No. 656 dealt with an unfair labor practice complaint filed by the Complainant,
(continued...)

committed an unfair labor practice by breaching its duty of fair representation in its handling of Ms. Chisholm's grievance arbitration concerning her termination.

In the remedy phase of this matter, the Complainant must prove by a preponderance of the evidence that she would have prevailed on the merits of her grievance in the arbitration proceeding concerning her termination.[4] To aid her in proving her case, she is seeking copies of the seventy-nine (79) client case files, for which she was terminated. The Union is seeking copies of the same files in order to prove that she would *not* have prevailed at arbitration.

The Agency is seeking to prevent the release of the files on the basis of privacy and confidentiality concerns raised by the TANF, Health Insurance Portability and Accountability Act of 1996 (HIPPA), and Medicaid privacy provisions. Specifically, the Agency asserts that it: (1) should not be directed to produce the files; and (2) can be required to do so only by Court Order, after its refusal to comply with the Board's subpoena. Finally, the Agency contends that "out of an abundance of caution and to avoid any violation of the privacy provisions," the client files should not be released to either party. (IR at pg. 6). Furthermore, the Agency claims that "the parties' objectives can be reached through other means, i.e., the testimony of Complainant's supervisor." (IR at pgs. 5-6).

The Board's Executive Director referred the parties' subpoena requests to a Hearing Examiner for a determination on the issue of whether the confidentiality requirements under TANF, Medicaid, and HIPPA prevent the release of the requested client files and whether a court Order was required. In addition, the Hearing Examiner was to decide what action, if any, the Board should take

---

[3](...continued)
Deborah Chisholm, against the District of Columbia Office of Labor Relations and Collective Bargaining (OLRCB), the American Federation of State, County and Municipal Employees (AFSCME), D.C. District Council 20 and the American Federation of State, County and Municipal Employees (AFSCME), Local 2401. Specifically, the Complainant alleged that OLRCB violated D.C. Code § 1-617.04 (a)(1), (3) and (5) (2001 ed.) by conspiring with AFSCME to have her arbitration canceled. In addition, the Complainant asserted that AFSCME, Local 2401 and AFSCME, D.C. District Council 20 (Council 20 or Union) violated D.C. Code §1-617.04(b)(1) (2001 ed.) by canceling the arbitration after the arbitration process had begun. The relief sought by the Complainant includes backpay with benefits, front pay with benefits, attorney fees and costs. The Complaint was dismissed against AFSCME, Local 2401 and the Office of Labor Relations and Collective Bargaining. However, the Board found that AFSCME, Council 20 committed an unfair labor practice, but did not make a finding on the appropriate remedy. Instead, the Board ordered a hearing in order to determine the appropriate remedy.

[4]Specifically, the Complainant is seeking to prove that she was *not terminated for just cause.*

to enforce subpoenas issued on July 11 and 25, 2003.[5] The Hearing Examiner issued an Interim Report and Recommendation (IR) in which she made the findings that follow in the paragraphs below.

The Hearing Examiner compared the language contained in each of the confidentiality provisions (TANF, Medicaid, and HIPPA) and determined that there was no bar to releasing the client files.[6] In addition, the Hearing Examiner found that the confidentiality provisions in all three Acts [7] provided exceptions for releasing the files. Specifically, the Hearing Examiner determined that the confidentiality provisions of TANF, Medicaid and HIPPA provided exceptions which allowed files to be released: (1) in connection with administration of the aid and (2) in *investigations* concerning the administration of the aid.[8] The Hearing Examiner concluded that a hearing as to whether there was *just cause* for dismissal of an employee responsible for the delivery of statutory benefits qualifies under both of the criteria for permissible disclosure. Furthermore, the Hearing Examiner found that the confidentiality of information provisions do not pose an obstacle to the Agency's compliance with the Board's subpoena. Finally, the Hearing Examiner found that due process requires that the Complainant have adequate access to case files which formed the basis of her termination.

In view of the above, the Hearing Examiner recommended that the Board order: (1) the subpoenaed files be redacted of all identifying information by DHS; (2) a code for identifying files used in this proceeding be developed by DHS personnel or by default by the Hearing Examiner; and

---

[5] These subpoena requests were made by the Complainant and AFSCME. The parties are seeking copies of documents and portions of case files under the maintenance and control of DHS.

[6]The Hearing Examiner's detailed analysis and interpretation of the confidentiality language in the TANF, Medicaid, and HIPPA provisions will not be outlined in detail in this Opinion. However, we note that a thorough discussion of the Hearing Examiner's findings may be found on pages 6-9 of the Hearing Examiner's Interim Report and Recommendation. Pages 6-9 of the Hearing Examiner's Report are attached to this Opinion.

[7]TANF, Medicaid, and HIPPA and their confidentiality/privacy provisions were analyzed and compared by the Hearing Examiner. See, D.C. Code §4-209.04 "Confidentiality of Information"; 42 CFR, Subchapter C, Part 431, Subpart F (42 CFR 431.301-302); 45 CFR Parts 160 and 164 (45 CFR §164.512(e)(1)(I), respectively.

[8] For example, the privacy provisions of TANF provide that the use or disclosure of information concerning applicants and recipients of TANF shall be limited to purposes directly relating to the administration of TANF, defined by the statute to include disclosure "*for purposes of providing services for applicants and recipients; [or]...any investigation...or civil proceeding conducted in connection with the administration of TANF.*"*(See, D.C. Code §4-209.04 and IR at pg. 6)*.

(3) that copies of the client files thereafter be made available to the parties by DHS. In addition, the Hearing Examiner recommended that the client files, in their redacted form, be: (1) marked and maintained as confidential and (2) returned to DHS at the completion of all proceedings. Finally, the Hearing Examiner recommended that DHS be directed to deliver to the parties, no later than twenty (20) days after the issuance of a Board order, any other subpoenaed materials. This would include, for example, Complainant's personnel file, or other documents not subject to client confidentiality concerns and which were not previously made available to the parties.

The Board has reviewed the findings and conclusions of the Hearing Examiner and find them to be reasonable, persuasive and consistent with the law. Furthermore, the Agency provided no support for its contention that a court order is required before it can produce the subpoenaed case files. Therefore, we adopt the recommendation of the Hearing Examiner in its entirety. Finally, in the event that the Agency refuses to produce the documents, we are prepared to take appropriate steps to enforce the subpoenas pursuant to D.C. Code §1-605.02(16)(2001 ed.).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Department of Human Services (DHS) comply with the Board's subpoenas issued on July 11, 2003 and July 25, 2003.

2. DHS shall redact the subpoenaed files of all individual identifying information, including names, addresses, social security numbers, and all other identifying information.

3. DHS shall make copies of the redacted client files and that they be made available to the parties within twenty (20) days after the issuance of the Board's Order. DHS should also deliver to the parties, no later than twenty (20) days after the issuance of this Board Order, any other subpoenaed materials, eg. Complainant's personnel file, not subject to client confidentiality concerns and not previously made available to the parties.

4. DHS mark the redacted files "confidential" and the American Federation of State, County, and Municipal Employees, District Council 20 and the Complainant's counsel (hereinafter "parties") maintain the confidentiality of the files .

5. The parties return the files to DHS after the completion of the proceeding concerning the appropriate remedy.

6. Within thirty (30) days of the issuance of this Decision and Order, DHS shall provide the Board with written notice concerning the steps that it has taken to comply with paragraphs 1-4 of this Order.

MAR 1 1 2005

7. Within thirty (30) days after the issuance of a Final Decision and Order in this matter, the parties shall provide the Board with written notice regarding the steps they have taken to comply with paragraph 5 of this Order.

8. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

November 24, 2004

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
American Federation of Government, Employees, Locals 631, 872 and 2553, American Federation of State, County and Municipal Employees, Local 2091, and National Association of Government Employees, Local R3-06,	)	
Complainants,	)	PERB Case No. 04-U-28 Opinion No. 767
v.	)	Motion for Preliminary Relief
District of Columbia Water and Sewer Authority,	)	**CORRECTED COPY**
Respondent.	)	**FOR PUBLICATION**

DECISION AND ORDER

I. Statement of the Case

The American Federation of Government Employees, Locals 631, 872 and 2553, American Federation of State, County and Municipal Employees, Local 2091, and National Association of Government Employees, Local R3-06 ("Complainants" or "Unions"), filed an Unfair Labor Practice Complaint and a Motion for Preliminary and Injunctive Relief, in the above-referenced case. The Complainants allege that the District of Columbia Water and Sewer Authority ("WASA" or "Respondent") violated D.C. Code § 1-617.04 (a)(1), (2), (3) and (5) (2001 ed.) by refusing to bargain "with the Complainants on compensation and non-compensation matters, until the conclusion of [WASA's] request for a unit modification in PERB Case No. 03-UM-03."[1] (Compl. at p. 3). The

[1]On October 17, 2003, Complainant AFGE, Local 631 filed an unfair labor practice complaint against WASA. That case was assigned docket number 04-U-02. In PERB Case No. 04-U-02, AFGE, Local 631 alleges that WASA has violated D.C. Code § 1-617.04 (a)(1), (2), (3) and (5) (2001 ed.) by refusing to bargain with Local 631 about non-compensation issues while [WASA's] petition for unit modification is pending. As a result, in the present case, AFGE Local 631 is only alleging that WASA violated the Comprehensive Merit Personnel Act by failing to

Complainants are asking the Board to grant their request for preliminary relief. In addition, the Complainants are requesting that the Board order WASA to: (1) bargain with the Complainants over compensation and non-compensation matters; (2) make the Complainants and their members whole for any and all loses; (3) pay costs; (4) pay attorney's fees; and (5) post a Notice indicating that they have violated the Comprehensive Merit Personnel Act. (See, Motion at p. 4 and Compl. at p. 7).

WASA filed an answer to the Unfair Labor Practice Complaint. In addition, WASA filed a response opposing the Complainants' Motion for Preliminary Relief. In its response to the Motion, WASA argues that the Complainants have not satisfied the criteria for granting preliminary relief. The "Motion for Preliminary and Injunctive Relief" is before the Board for disposition.

II. Discussion

In 1996 WASA and the Complainants executed a six year coalition agreement wherein they agreed, *inter alia,* to bargain for a single master labor contract covering both compensation terms and non-compensation working conditions. The Complainants allege that the master agreement would be effective from the date of execution and beyond, until any party provided the other signatories with written notice that the agreement would no longer be binding following the 180th day after such notice.

The Complainants claim that on June 9, 2003, WASA sent a letter to the Complainants requesting to bargain a successor collective bargaining agreement ("CBA") on compensation and non-compensation matters. Subsequently, on June 11, 2003, the Complainants contend that they informed WASA that they would negotiate a successor CBA. Furthermore, the Complainants assert that on July 10, 2003, they met with WASA to "begin face to face negotiations." (Compl. at p. 4) In addition, the Complainants allege that on July 10th they provided WASA with: (1) the ground rules for compensation negotiations; and. (2) letters stating that they wanted to negotiate separately regarding working conditions. See, Id. at pgs. 4-5. Thereafter, in a letter dated July 14, 2003, WASA informed the Complainants and George Johnson (Complainants' chief negotiator), that WASA was still working on providing the Complainants with an answer to both the Complainants' ground rules

and the Complainants' request to bargain separately regarding working conditions. See, Id. at p. 5. The Complainants claim that WASA "never gave the Complainants a response that specifically addressed the substance of [the Complainants'] request to negotiate working conditions separately. [In addition, the Complainants contend that WASA] never gave the Complainants a response that specifically addressed the substance of their proposed ground rules." Id.

---

bargain on compensation issues. The other four complainants are alleging that WASA failed to bargain on compensation and non-compensation issues. (See, Compl. at p. 3)

The Complainants claim that after receiving WASA's July 14th letter, they have made several requests to continue bargaining. However, WASA has not responded to any of the Complainants' request to continue bargaining. Instead, the Complainants claim that on August 15, 2003, WASA filed a "Petition for Unit Modification" (PERB Case No. 03-UM-03).

The Complainants assert that on September 9, 2003, Anne Wagner, Assistant General Counsel for AFGE, informed WASA that the Unions had agreed to "rescind their request to bargain working conditions separately and were willing to bargain together for one Master Agreement on compensation and working conditions." Id. at p. 5. However, in newsletters issued on October 2, 2003 and October 7, 2003, WASA's General Manager, Jerry Johnson "informed the Complainants and all of their members that [WASA was] not going to bargain over compensation and non-compensation [concerning a successor CBA] until after the conclusion of their effort to [consolidate] the five [existing] unions into one union." Id. at p. 6. In addition, the Complainants allege that at a July 1, 2004 hearing in PERB Case No. 04-U-02,[2] "WASA's Labor Relations Manager, [Stephen Cook,] testified that WASA was not going to bargain a successor CBA covering compensation and non-compensation matters, with the Complainants because [WASA] filed for a unit modification in PERB Case No. 03-UM-03." (Motion at p. 3)

The Complainants contend that despite WASA's "Petition for Unit Modification," the agency is required to bargain with the five existing unions. In addition, the Complainants assert that by refusing to bargain, WASA is attempting to discriminate, interfere with and "coerce the Complainants and . . . bargaining unit employees in the exercise of their rights as guaranteed by the [Comprehensive Merit Personnel Act] in violation of D.C. Code § 1-617.04 (a)(1), (2), (3) and (5) (2001 ed.)." (Compl. at p. 6) Furthermore, the Complainants claim that the "appeals process [regarding WASA's]. . . unit modification petition could take years . . .[As a result,] WASA's failure to bargain with the union[s] while they wait for the resolution of [the] unit modification petition to be resolved, seriously affects the public interest, labor relations, [and] employee morale." (Motion at p. 3) In view of the above, the Complainants filed an unfair labor practice complaint and a motion for preliminary relief.

The criteria the Board employs for granting preliminary relief in unfair labor practice cases is prescribed under Board Rule 520.15.

Board Rule 520.15 provides in pertinent part as follows:

> The Board may order preliminary relief ... where the Board finds

---

[2]See footnote number 1 for a description of the facts involved in PERB Case No. 04-U-02.

> that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, and the Board's ultimate remedy will be clearly inadequate.

The Board has held that its authority to grant preliminary relief is discretionary. See, AFSCME, D.C. Council 20, et al. v. D.C. Government, et al., 42 DCR 3430, Slip Op. No. 330, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise its discretion under Board Rule 520.15, the Board has adopted the standard stated in Automobile Workers v. NLRB, 449 F.2d 1046 (CA DC 1971). There, the Court of Appeals-addressing the standard for granting relief before judgement under Section 10(j) of the National Labor Relations Act-held that irreparable harm need not be shown. However, the supporting evidence must "establish that there is reasonable cause to believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by pendente lite relief." Id. at 1051. "In those instances where [PERB] has determined that the standard for exercising its discretion has been met, the basis for such relief [has been restricted to the existence of the prescribed circumstances in the provisions of Board Rule [520.15] set forth above." Clarence Mack, et al. v. FOP/DOC Labor Committee, et al., 45 DCR 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997).

In its response, WASA contends that the Motion for Preliminary Relief should be denied because: (1) the Complainants have failed to state a claim under the Comprehensive Merit Personnel Act and (2) there are disputes over material elements of the allegations asserted in the Motion and the Complaint. (See, WASA's Opposition at pgs. 4-6) For example, WASA claims that "the Unions have continually changed their mind about how they want to bargain, and therefore there is not currently a pending request to engage in bargaining on behalf of all of the Unions. [As a result, WASA argues that] this is plainly a material dispute that is most fundamental to the underlying action, and can only be resolved (absent an agreement by the parties) in the related unfair labor practice matter." (WASA's Opposition at p. 6).

In addition, WASA argues that the Motion should be denied "[b]ecause the Complainants have failed to produce sufficient evidence of widespread [violations], flagrant violations, [violations which] serious[ly] impact public interest, or irreversible harm in the absence of preliminary relief." (WASA's Opposition at pgs. 7-8).

Finally, WASA asserts that the Complaint is untimely because it does not comply with the 120 day requirement of Board Rule 520.4.. Specifically, WASA claims that "[n]o later than October 2, 2003, the Unions were fully aware of WASA's position that it could not bargain over a successor collective bargaining agreement until PERB Case. [No.] 03-UM-03 had been resolved. [However, WASA contends that since] this unfair labor practice charge was not filed until July 7, 2004, [it] must be dismissed." (Answer at p. 8). In view of the above, WASA is requesting that the Complaint be

dismissed because it was not timely filed.

Accepting the truth of the matters asserted in the pleadings and in the supporting exhibits accompanying the Complainants' request, we find that there is reasonable cause to believe that WASA's actions and conduct form the basis of an unfair labor practice as codified under D.C. Code § 1-617.04(a) (5) (2001 ed.).[3] Relying on Washington Teachers' Union, Local 6 and D.C. Public Schools, 34 DCR 3601, Slip Op. No. 151, PERB Case No. 85-U-18 (1987), WASA argues that it has no duty to bargain with the Complainants until the Board resolves its pending unit modification petition. We disagree.

In the WTU case, the complainant filed an unfair labor practice complaint alleging that the D.C. Public Schools violated the Comprehensive Merit Personnel Act by refusing to bargaining in good faith with the union concerning wages for teachers working in adult education and summer school programs. As a remedy, WTU requested that the Board compel the school system to bargain in good faith over the wages for teachers working in adult education and summer school programs. In that case, WTU was the certified bargaining agent for a unit composed of permanent full-time and part-time teachers. In addition, WTU claimed that it also represented adult education and summer school teachers and alleged that by refusing to bargain about wages for such persons, the D.C. Public Schools failed to bargain in good faith To prove its contention, WTU argued that every collective bargaining agreement since 1971 made reference to adult education and summer school teachers. The issue before the Board was whether the summer and adult education teachers were within the unit for which WTU was the exclusive representative. The Board found "that adult education and summer school teachers [were] not members of the bargaining unit represented by WTU, that DCPS [had] never recognized WTU as the bargaining agent for adult education and summer school teachers and [had] no legal obligation to do so. [As a result, the Board concluded] that DCPS' refusal to bargain [with WTU] over wages for these employees. . . [was] not an unfair labor practice." Slip Op. No. 151, at p. 2.

We believe that the facts in the WTU case bear no resemblance to those in the instant matter: Specifically, the WTU case concerned the legality of an employer's refusal to bargain with a single union over the wages of adult education and summer school teachers, who were never part of the bargaining unit. In the present case, the central issue focuses on the legitimacy of the Respondent's

---

[3]D.C. Code Sec. 1-617.04(a) (4) provides as follows:

(a) The District, its agents, and representatives are prohibited from:

* * *

(5) Refusing to bargain collectively in good faith with the exclusive representative

refusal to bargain with the Complainants, until the unit modification question is resolved. Also, in the present case, the Complainants are the certified representatives for all the unionized employees at WASA and there is no dispute that all of the employees involved are represented by one of the five Complainants. In view of the above, it is clear that the facts, the issue and the Board's decision in the WTU case do not support the Respondent's position that it has no duty to bargain with the Complainants.

Furthermore, the facts and principle discussed in International Brotherhood of Teamsters, Local 639 and 730 and D.C. Public Schools and AFSCME, District Council 20 and Local 2093.[4] 35 DCR 8155, Slip Op. No. 176, PERB Case Nos 86-U-14 86-U-17 (1988), are more applicable to the issue in the instant case. In that case, the Board addressed the question of whether an employer may refuse to bargain for a successor contract while a rival union's recognition petition is pending. In resolving that question, we relied on the rationale set forth in RCA Del Caribe, Inc. and IBEW, Local 2333, 262 NLRB No. 116, 1369 (1982), to decide that:

> [W]hile the filing of a valid petition may raise a doubt as to majority status, the filing, in and of itself, should not overcome the strong presumption in favor of the continuing majority status of the incumbent ... [T]he ... policy enunciated by the [NLRB] in RCA Del Caribe with respect to the requirements for employer neutrality when an incumbent union is challenged by an "outside union" is grounded in the rationale that "preservation of the status quo through an employer's continued bargaining with an incumbent is a better way [than cessation of such bargaining upon the filing of a representation petition] to approximate employer neutrality." Id. at 1371 So, here, preservation of the status quo "is a better way" to protect both stability and employee representational choice than shortening ... [the employer's] duty to continue dealing with the incumbent union prior to that union's legal replacement through an election and Board certification. (Slip Op. at pgs 7-8).

The reasoning in RCA Del Caribe case, which we adopted in the International Brotherhood of Teamsters case, is equally applicable in the present case. Although WASA's actions involve a unit modification petition rather than a recognition petition, we believe that the duty of the employer to preserve the status quo by bargaining with the incumbent unions, is the preferred way to promote stability and employee free choice.

Also, WASA argues that it "would commit an unfair labor practice if it engaged in bargaining

---

[4]Although distinctions clearly exist between this case and the present one, the principle it espouses is relevant here.

with the Unions and the PERB ultimately determined that some or all of them no longer represented appropriate bargaining units at the time." (WASA's Opposition at p. 5) To support this position, WASA relies on the National Labor Relations Board' s (NLRB) ruling in Point Blank Body Armor, Inc., 312 NLRB 197 (1993). In that case, the NLRB ruled that an employer may not lawfully bargain for a successor labor contract where there is objective evidence that the incumbent labor union has lost its majority status. In the Point Blank Body Armor case, the NLRB found that the employer and the incumbent union possessed a petition signed by a majority of unit employees that they no longer supported the incumbent union. However, in the present case, WASA has not produced any objective evidence which demonstrates that any of the Complainants has lost its majority status. As a result, we find that WASA must maintain the status quo by bargaining in good faith with the Complainants. In view of the above, we conclude that WASA's argument lacks merit.

For the reasons discussed above, we find no legal basis to support WASA's decision not to bargain over non-compensation and compensation matters regarding a successor agreement. As a result, we believe that WASA's actions constitute an unfair labor practice as codified under D.C. Code Sec. 1-617.04(a)(1) and (5) (2001 ed.). In addition, the Complainants have demonstrated that WASA's actions amount to a clear cut violation of the CMPA. Specifically, in two newsletters issued by the WASA's general manager, WASA makes it clear that it "will [only] return to the bargaining table after PERB [rules on the unit modification petition]." (WASA Newsletters dated October 2, 2003 and October 7, 2003, at p. 2).

Under the facts of this case, we conclude that the alleged violation and its impact satisfies two of the disjunctive criteria proscribed by Board Rule 520.15 for which preliminary relief may be accorded. Also, the remedial purposes of Board Rule 520.15 will be served by pendente lite relief for the Complainants, who (in the instant case) would otherwise not be able bargain on behalf of their members, pending the full extent of the Board's processes before relief is ordered.

In their answer to the complaint, WASA asserts that the complaint in this case is untimely because it does not comply with the 120 day requirement of Board Rule 520.4.[5] Specifically, WASA claims that "[n]o later than October 2, 2003, the Unions were fully aware of WASA's position that it could not bargain over a successor collective bargaining agreement until PERB Case. [No.] 03-UM-03 had been resolved. [However, WASA contends that since] this unfair labor practice charge was not filed until July 7, 2004, [it] must be dismissed." (Answer at p. 8). In view of the above, WASA is requesting that the Complaint be dismissed because it was not timely filed.

Although the complaint was filed on July 7, 2004, approximately nine (9) months after WASA refused to engage in bargaining for a successor agreement, we find that WASA's actions constitute

---

[5]WASA only raised this issue in its Complaint and did not raise it in its opposition to the motion for preliminary relief. However, since we are granting the Complainants' request for preliminary relief, it is necessary to rule on the timeliness issue.

a continuing refusal to bargain. Therefore, we conclude that WASA's continued refusal to bargain amounts to a continuing violation. In view of the above, we conclude that the complaint is timely.

Also, some of the issues raised in the instant case are identical to the issues raised and considered by the Hearing Examiner and the Board in PERB Case No. 04-U-02. However, the Board could not consider the Hearing Examiner's report and recommendation in PERB Case No.04-U-02 on the same date that we considered this motion for preliminary relief. In light of the above, we are reluctant to consider and rule on any other factual issues in the present case, that may be relevant and identical to issues which are pending in PERB Case No. 04-U-02.. Once we issue a decision and order in PERB Case No. 04-U-02, we will be in a position to determine whether there are any other outstanding issues in the present case that were not addressed in either this decision or in the decision involving PERB Case No, 04-U-02. As a result, we will retain jurisdiction in this matter in case it becomes necessary to consider any outstanding issue which was not addressed.

For the reasons discussed above, the Board grants the Complainants' request for preliminary relief.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The Complainants' Motion for Preliminary and Injunctive Relief is granted.

(2) The District of Columbia Water and Sewer Authority (WASA), its agents and representatives shall cease and desist from refusing to bargaining in good faith with Complainants (American Federation of Government Employees, Locals 872 and 2553; American Federation of State, County and Municipal Employees, Local 2091; and National Association of Government Employees, Local R3-06) over compensation and non-compensation matters regarding a successor agreement.

(3) The District of Columbia Water and Sewer Authority (WASA), its agents and representatives shall cease and desist from refusing to bargaining in good faith with Complainant, American Federation of Government Employees, Local 631 over compensation matters regarding a successor agreement.

(4) WASA, its agents and representatives shall cease and desist from interfering, restraining or coercing its employees by engaging in acts and conduct that abrogate employees' rights guaranteed by " Subchapter XVII Labor-Management Relations", of the Comprehensive Merit Personnel Act, to bargain collectively through representatives of their own choosing.

(5) WASA and the Complainants (American Federation of Government Employees, Locals 872

and 2553; American Federation of State, County and Municipal Employees, Local 2091; and National Association of Government Employees, Local R3-06) shall within seven (7) business days from the service of this Decision and Order agree on a date for the first bargaining session concerning compensation and non-compensation matters for a successor agreement. The first bargaining session shall be held no later than fourteen (14) business days from the service of this Decision and Order.

(6) WASA and the Complainant, American Federation of Government Employees, Local 631 shall within seven (7) business days from the service of this Decision and Order agree on a date for the first bargaining session concerning compensation matters for a successor agreement. The first bargaining session shall be held no later than fourteen (14) business days from the service of this Decision and Order.

(7) Within ten (10) business days from the issuance of this Decision and Order, WASA shall notify the Public Employee Relations Board, in writing, of the specific steps it has taken to comply with paragraphs 5 and 6 of this Order.

(8) Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC RELATIONS BOARD
Washington, D.C.

January 31, 2005

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: FRATERNAL ORDER OF POLICE/ METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE Petitioner, and DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, Respondent.	PERB Case No. 03-A-09 Opinion No. 770 FOR PUBLICATION

DECISION AND ORDER

On September 23, 2003, the Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP or Union) filed an Arbitration Review Request (Request). FOP seeks review of an arbitration award (Award) which determined that the Agency violated Article 4[1] of the parties' collective bargaining agreement (CBA) by failing to adhere to its procedures[2] for promoting employees to Detective Grade One positions. FOP took issue with the Award because the Arbitrator denied the remedy FOP had sought. FOP contends that the: (1) Award is contrary to public policy and (2) Arbitrator was without authority to grant the Award. (Request at p. 2). The Metropolitan Police Department (MPD or Department) opposes the Request.

[1]Article 4 of the parties' CBA provides that management has the right to, *inter alia*, "determine the qualifications of employees for ...promotion...as long as such rights are not exercised contrary to applicable laws, rules, and regulations." (Award at pg.3). The Arbitrator deemed the Department's requirements regarding the Detective Grade One promotions to be incorporated into Article 4.

[2]On August 28, 2001, MPD issued an Announcement of the 2001 Detective Grade One Selection Process (CIR-01-06). It required that applicants have current in-service training and firearms certification.

The issue before the Board is whether "the award on its face is contrary to law and public policy" or whether "the Arbitrator was without or exceeded his or her jurisdiction..." D.C. Code§1-605.2(6) (2001 ed.).

MPD promoted fifty-five (55) employees to Detective Grade One positions. In determining who would be selected, MPD qualified and eventually selected several applicants who had not completed the requisite in-service and firearms training. MPD's regulations which govern the Detective Grade One selection process required that eligible candidates have current in-service training and firearms certifications. FOP filed two separate group grievances based on the fact that some of the selected candidates did not have the required training and certifications. As a result, FOP contended that MPD violated Article 4 of the parties' CBA. As a remedy, the separate group of grievants requested two different forms of relief. One grievance requested that all detective candidates who applied be promoted to Detective Grade One positions. The other grievance requested that MPD promote the same number of candidates that were promoted without proper qualifications[3].

In a decision issued on August 29, 2003, the Arbitrator determined that MPD violated the parties' collective bargaining agreement by promoting candidates who had not met the requirements set forth in its own regulations. As a remedy, the Arbitrator found it appropriate to issue a cease and desist order prohibiting the Agency from promoting members who had not met the requirements of the Agency's promotion rules and regulations pursuant to Article 4. (Award at pg. 7). In awarding this relief, the Arbitrator found that the relief was consistent with Article 1[4] of the parties' CBA. Furthermore, the Arbitrator indicated that "subsequent similar violations by the Agency could warrant more serious action, depending on the circumstances involved." (Award at pg. 18).

In rejecting the Union's proposed remedies, the Arbitrator found that FOP had not established that additional promotions were warranted under the agreement. In addition, the Arbitrator found that ordering MPD to promote additional candidates would be contrary to management's right to determine the number of promotions it believes are necessary to carry out its operations. (Award at pg. 18).

FOP takes issue with the Arbitrator's Award. FOP asserts that the Arbitrator's Award is contrary to the public policy of promoting sound and effective labor-management relations pursuant

---

[3] Evidence in the record suggested that this was thirteen (13) candidates.

[4] In his Award, the Arbitrator noted that pursuant to Article 1 of the parties' CBA, the parties expressly agreed to honor their Agreement commitments and to "promote a sound and effective labor-management relationship in order to achieve mutual understanding of practices, procedures and matters affecting conditions of employment and to continue working toward this goal." (Award at pgs. 17-18).

to Article 1, §2 of the parties' agreement. Specifically, FOP contends that in refusing to award additional promotions based on the Department's undisputed, knowing and intentional violation of its own requirements, the Award detracts from the stated goal of Article 1. Instead of promoting sound labor-management relations, the Award effectively condones the Department's conduct and denies the Union any relief for the Department's flagrant violations. Moreover, FOP contends that the mere suggestion of more severe penalties in the future, depending on the circumstances, does nothing to cure the lack of an appropriate remedy in the present case. Instead, in FOP's view, the Arbitrator's Award damages the labor-management relationship between the parties. Therefore, such a result is "obviously contrary to the clear mandate of public policy set forth in the CBA." (Request at pg. 5).

MPD contends that FOP's public policy argument has no merit. Specifically, MPD asserts that Article 1 of the parties' CBA does not rise to the level of public policy, as defined by the Board's case law[5], that will allow the dismissal of an Arbitrator's Award. Therefore, MPD asserts that the Board has no basis to reverse the Arbitrator's decision on public policy grounds.

As a second basis for review, FOP contends that the Arbitrator exceeded his authority by merely issuing the cease and desist order and threatening more severe penalties in the future. FOP observed that "one of the tests to determine whether an Arbitrator has exceeded his jurisdiction and was without authority to render his award is whether the award draws its essence from the collective bargaining agreement." See, (Request at pg. 5) and Dobbs, Inc.v. Local No. 1614, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 813 F 2d 85 (6th Cir. 1987). FOP contends that this Award fails to draw its essence from the parties' contract. To support its argument, FOP relied on Cement Division, National Gypsum Co. V. United Steel Workers for America, AFL-CIO, Local 135 for the applicable standard. 793 F.2d 759, 765 (6th Cir. 1986). Applying the test set forth in Cement v. United Steel[6] , FOP contends that " the Arbitrator's Award effectively failed to

---

[5]MPD relies on D.C. Metropolitan Police Department and Fraternal Order of Police/ Metropolitan Labor Committee, 47 DCR, Slip Op. No. 633, PERB Case No. 00-A-04 (2000) in support of its argument that this Award should not be reversed on public policy grounds. In DCMPD v. FOP/MPDLC, the Board ruled that a reference to the domestic violence laws of the District of Columbia did not satisfy the "specific public policy that has been violated" standard. See, Opposition at pg. 2 and Id. at pg. 3. Consequently, MPD argues that in the present case, merely referring to a provision in a CBA cannot meet the standard of proving that a "specific public policy has been violated." Opposition at pg. 2. Furthermore, MPD argues that the Union has failed to identify a specific public policy. Therefore, there can be no violation of an unidentified policy.

[6] An arbitration award *fails* to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the

enforce the CBA between the parties in that it failed to effectively award the Union an actual remedy." (Request at pg. 6). Instead, it "merely provided for the possibility of an unspecified prospective remedy, despite the knowing and intentional violation by the Department." (Request at pg. 6). Finally, FOP argues that the Board has previously determined that awards concerning "future conduct" exceed an Arbitrator's authority. [7]
Therefore, in FOP's view, the Arbitrator's Award failed to draw its essence from the CBA as established by case precedent (Request at pg. 6).

In response to FOP's second basis for review, MPD contends that the Arbitrator did *not* exceed his authority by providing a cease and desist order as a remedy. Additionally, MPD contends that the D.C. WASA v. AFGE, Local 639 case is distinguishable from the one presently before the Board. 49 DCR 11123, Slip Op. No. 687, PERB Case No. 02-A-02 (2002). MPD asserts that the Arbitrator in WASA v. AFGE was attempting to impose *new* criteria that *were not found* in the parties' CBA[8]. In the present case, MPD contends, the opposite is true. The Arbitrator in the present case is directing MPD to follow its *existing* CBA in making future promotions. Therefore,

---

express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) award is based on general considerations of fairness and equity, instead of the precise terms of the agreement. Cement Division, National Gypsum Co.v. United Steel Workers for America, AFL-CIO, Local 135, 793 F.2d 759, 765(1986).

[7]FOP also relies on two Board cases to support its position that the Arbitrator exceeded his authority in this case. They are: D.C. Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Labor Committee and District of Columbia Water and Sewer Authority v. American Federation of Government Employees. 49 DCR 810, Slip Op. No. 669, PERB Case No. 01-A-02 (2002) and 49 DCR 11123 Slip Op. No. 687, PERB Case No. 02-A-02 (2002). In MPD v. FOP/MPDLC, the Board held that the Arbitrator exceeded his authority by ordering the Agency to reinstate a police officer to a civilian non-union position. Id. In WASA v. AFGE, Local 631, the Board held that an award which imposes additional requirements that are not expressly provided for in the parties' CBA exceed an Arbitrator's authority. 49 DCR 11123, Slip Op. No. 687, PERB Case No. 02-A-02(2002).

[8]In WASA v. AFGE, Local 631, as a remedy for an improper hiring decision which violated the parties' contract, the Arbitrator's Award ordered the Agency to establish hiring criteria based on objective factors in the future. 49 DCR 11123, Slip Op. No. 687, PERB Case No. 687 (2002).

MPD suggests that the Award does, in fact, draw its essence from the parties' CBA. In response to FOP's concern that the Arbitrator's cease and desist order is not effective because it does not establish binding precedent, MPD asserts that Arbitrators do, in fact, look at other Arbitrators' decisions and are influenced by them where they consider it appropriate.[9] Furthermore, MPD asserts that the Board will entertain injunctive relief in appropriate cases. See, Washington Teachers Union, Local 6, AFT/AFL-CIO and D.C. Public Schools, 46 DCR 6265, Slip Op. No. 478, PERB Case No. 96-U-18 (1996). Therefore, MPD argues that the "Union's claim that a cease and desist order is not an Award runs counter to PERB doctrine and practice." (Opposition at pg. 4). Based on the foregoing, MPD asserts that FOP's argument that the Award has no effect is without merit. MPD urges the Board to deny FOP's Arbitration Review Request.

Discussion and Analysis

As stated earlier, FOP requests that the Board grant its Petition to reverse the Arbitrator's Award on two grounds:(1) that his award is contrary to public policy and (2) that the Arbitrator exceeded his authority by merely issuing a cease and desist order concerning future conduct.

The Board has stated that "to set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000). We find that FOP has failed to cite any specific public policy or law that was violated by the Arbitrator's Award. Instead, FOP asserts that the Arbitrator's Award is contrary to the well established public policy embodied in Article 1, Section 2, of the parties' CBA. Therefore, FOP's claims only disagree with the Arbitrator's interpretation of Article 1, Section 2 of the parties' CBA. FOP has failed to point to any clear public policy or law which the Award contravenes. Finally, the Board has held that a disagreement with an arbitrator's choice of remedy does not render the Award contrary to law and public policy. D.C. Housing Authority v. Newell, 46 DCR 10375, Slip Op. No. 600, PERB Case No. 99-A-08). In this case, we find that FOP merely disagrees with its chosen Arbitrator's choice of remedy. In view of the above, we find that FOP's public policy argument is without merit. Therefore, we cannot reverse the Arbitrator's decision on this ground.

In response to FOP's second basis for review, we find that the Arbitrator did *not* exceed his authority in shaping the remedy. As a result, FOP's argument on this issue also lacks merit.

As an initial matter, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based." MPD

---

[9]To support its argument, MPD relies on the chapter entitled "Precedent Value of Awards" from How Arbitration Works. Elkouri & Elkouri, page 605 (5th Ed)(1997).

v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000). Moreover, the Board will not substitute its own interpretation for that of the duly designated Arbitrator. Id. Here, the Arbitrator determined that MPD violated the parties' CBA by failing to adhere to its promotion standards and issued a cease and desist order as the remedy. This remedy sought to prevent MPD from violating its own promotion procedures in the future. The Board has held that an Arbitrator has equitable power concerning remedies, unless restricted by contract. D.C. Metropolitan Police Department v. FOP/MPD on behalf of Vernon Gudger, 48 DCR 10989, Slip Op. No. 663, PERB Case No. 01-A-08 (2001). FOP has failed to cite any language in the parties' CBA which limits the Arbitrator's equitable powers. As a result, we have no basis to nullify or reverse the Arbitrator's Award.

One of the tests that the Board has used when determining whether an Arbitrator has exceeded his jurisdiction and was without authority to render an award is "whether the Award draws its essence from the collective bargaining agreement". D.C. Public Schools v. AFSCME, District Council 20, 34 DCR 3610 at p. 5, Slip Op. No. 156, PERB Case No. 86-A-05 (1987); Also see, Dobbs, Inc. v. Local No. 1614, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America 813 F. 2d 85 (6th Cir. 1987). In D.C. Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Labor Committee, the Board expounded on what is meant by "deriving its essence from the terms of the collective bargaining agreement." 49 DCR 810, Slip Op. No. 669 at pg.5, PERB Case No. 01-A-02 (2002) The Board relied on a statement from the Sixth Circuit Court in Cement Division, National Gypsum Co. v. United Steelworkers of America, AFL-CIO, Local 135, which explained the standard as follows:

> **An arbitration award *fails* to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) award is based on general considerations of fairness and equity, instead of the precise terms of the agreement. 793 F.2d 759, 765(1986).**

Contrary to FOP's argument, we believe that the Award derives its essence from the collective bargaining agreement and; therefore, meets the Cement Division standard. In our view, the *Award of a cease and desist order in this matter is consistent with the express terms of the parties' agreement.* For instance, Article 4 of the parties' CBA requires that management "determine the qualifications of employees for promotions, as long as such rights are not exercised contrary to applicable laws, rules, and regulations." (Request at pg. 3). In this case, the Agency promoted employees in a way that was contrary to its own regulations and procedures, as incorporated in Article 4 of the parties' agreement. To remedy this violation, the Arbitrator looked to the parties'

agreement and mandated that the Agency effect promotions consistent with Article 4 and its embodied regulations. We see no conflict with the express terms of the agreement. *The Award imposes no additional requirements that are not provided for in the agreement. The Award has support because it merely orders the Agency to do what it has already agreed to do through its CBA.* Furthermore, *the Award is based on the express terms of the agreement, and not on general considerations of fairness and equity.* The express terms of the agreement instruct management to follow its own rules and regulations when promoting employees. The Arbitrator's Award essentially mandates the same thing by prohibiting the Agency from implementing promotions in a way that is inconsistent with the party's collective bargaining agreement. Therefore, we find that the Award draws its essence from the parties' collective bargaining agreement. As a result, we find no statutory basis to reverse the Arbitrator's Award on this ground.

Finally, the Board has not previously decided the precise issue of whether "cease and desist" orders which enjoin future conduct are appropriate in circumstances such as this one. However, the Board has found two cases which establish that cease and desist orders are appropriate to prevent future misconduct in some circumstances. The Board relies on the decisions of other labor relations bodies and other states where it has no precedent on an issue. See, University of the District of Columbia v. University of the District of Columbia Faculty Association, 37 DCR 5666, Slip Op. No. 248, PERB Case No. 90-A-02 (1990). In one case, a court found appropriate and upheld several cease and desist orders that Arbitrators issued as an Award. See, New Orleans Steamship Association v. General Longshore Workers, ILA Local Union No. 1418 et.al, 486 F. Supp 409 (1980). These cease and desist orders sought to enjoin union members from striking pursuant to a non-strike clause in the parties' CBA . Id. The other case involved a cease and desist order concerning an Agency's implementation of disciplinary procedures. See Loretta Cornelius, Acting Director of Office of Personnel Management v. Allison E. Nutt, 472 U.S. 648, 664; 105 S.Ct. 2882 (1985). In Cornelius v. Nutt, the Supreme Court found, *inter alia,* that an Arbitrator may remedy a violation of disciplinary procedures outlined in the parties' contract by ordering the Agency to cease and desist from any further violation of those procedures. See, Id. Based on the foregoing, we find that a "cease and desist order" remedy is appropriate in limited circumstances such as the one presently before the Board. Finally, we note that cease and desist order remedies must be evaluated on a case by case basis. Therefore, we find that FOP has not established a statutory basis for our review and reversal of the Arbitrator's Award.

Pursuant to D.C. Code §1-605.2(6), the Arbitrator's Award did not violate law and public policy. Furthermore, the Board finds that the Arbitrator did *not* exceed his jurisdiction or authority by issuing the remedy noted above. Therefore, FOP's Arbitration Review Request is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Request for Review of the Arbitration Award is hereby denied.

2. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

December 7, 2004

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE DEPUTY MAYOR FOR PUBLIC SAFETY AND JUSTICE

PUBLIC NOTICE

REQUEST FOR COMMENT ON
THE DISTRICT OF COLUMBIA JUSTICE ASSISTANCE APPLICATION
FOR 2005

The District of Columbia Justice Grants Administration is requesting written comments on the District's 2005 Application for the Justice Assistance Grant (JAG) Program. The JAG Program was newly created through the merger of the Edward Byrne Memorial State and Local Law Enforcement Assistance Formula Grant (Byrne) Program, and the Local Law Enforcement Block Grant Program (LLEBG). The Byrne Program was commonly known as the Drug Control and System Improvement Grant Program, authorized by Title I of the Omnibus Crime Control and Safe Streets Act of 1968, as amended.

Copies of the FY 2005 JAG Application's projected use of funds are available Monday through Friday from 9:00 a.m. to 6:00 p.m. at the Office of The Deputy Mayor for Public Safety and Justice, Justice Grants Administration located at 1350 Pennsylvania Avenue, N.W., Washington, DC 20004 Suite 327.

Written comments must be submitted by March 25, 2005, close of business, and should be addressed to John Hallums, Director, Attention: Phyllis McKinney, JGA, 1350 Pennsylvania Avenue, N.W., Suite 327, Wash., D.C., 20004.

For further information, persons may contact Phyllis McKinney at 202 727-1700.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
1333 H STREET, N.W., SUITE 200, WEST TOWER
WASHINGTON, DC 20005

NOTICE OF EXTENSION OF COMMENT PERIOD

NOTICE OF PROPOSED RULEMAKING

FORMAL CASE NO. 1005, IN THE MATTER OF VERIZON WASHINGTON, DC INC.'S APPLICATION TO RECLASSIFY LOCAL DIRECTORY ASSISTANCE AND CONNECT REQUEST SERVICES AS COMPETITIVE UNDER PRICE CAP PLAN 2004

1. The Public Service Commission of the District of Columbia ("Commission") hereby gives notice of an extension of time in which to file initial and reply comments on the Application of Verizon Washington, DC Inc. ("Verizon") to reclassify Local Directory Assistance and Connect ReQuest services.[1] A Notice of Proposed Rulemaking ("NOPR") was published in the *D.C. Register* on January 21, 2005, at 52 *D.C. Register* pp. 574-5.[2] The Commission hereby gives notice, pursuant to District of Columbia Code Section 2-505,[3] of its intent to act upon Verizon's application in not less than 60 days from the date of this publication of this NOPR in the *D.C. Register*.

2. Verizon seeks the reclassification of Local Directory Assistance and Connect ReQuest services as competitive services pursuant to Price Cap Plan 2004.[4] Presently, Verizon's Local Directory Assistance for business and residential customers is classified as a basic service. Verizon's Connect ReQuest service enables a customer calling from touch-tone phones to have a telephone number that is provided by Verizon's Local Directory Assistance to be dialed automatically. Verizon's Connect ReQuest service for business and residential customers is currently classified as a discretionary service under the Price Cap Plan 2004. Under Price Cap Plan 2004, prices for basic and discretionary services are regulated but prices for competitive services are not regulated by the Commission.[5] Verizon's request would therefore remove existing price restrictions on these services.

---

1 *Formal Case No. 1005, In the Matter of Verizon Washington, D.C. Inc.'s Application to Reclassify Local Directory Assistance and Connect ReQuest Services as Competitive Under Price Cap Plan 2004,* filed December 27, 2004 (Verizon's Application).

2 52 *D.C. Register* 574 (January 21, 2005).

3 D. C. Code, 2001 Ed. § 2-505.

4 *Formal Case No. 1005, In the Matter of Verizon Washington, D.C. Inc.'s Price Cap Plan 2004 for the Provision of Local Telecommunications Services in the District of Columbia,* Order No. 13370, rel. September 9, 2004.

5 *See* Order No. 13370, ¶ 15.

3. Verizon's directory assistance service allows customers to receive directory information from its directory database in the Washington local service area. Residential customers, with the exception of certain exemptions, are allowed five (5) free directory assistance calls per month. After the customer has exhausted the five (5) free calls per month, the customer is billed forty-two cents ($0.42) per call. Call allowances are not applicable to business customers.

4. Connect ReQuest is a service provided to directory assistance customers calling from touch-tone telephones. After the requested number is located, the customer has the option to have the number automatically dialed. When the customer chooses to use this service, the numbers are automatically dialed at the cost of thirty-four cents ($0.34) per call.

5. Section 5(a) of Price Cap Plan 2004 requires the Commission to determine, no later than 60 days after the date of publication of the NOPR, that either the reclassification is approved, the reclassification is approved on an interim basis subject to the Commission completing its review, the reclassification is denied, or the reclassification request is held in abeyance because additional time is needed for the Commission to complete its review due to the complexity of the application.[6] The Commission finds it necessary to extend the deadline for issuing a decision on Verizon's reclassification application. Verizon's request presents complex issues that require additional Commission time to review. Therefore, the Commission holds this matter in abeyance to facilitate the Commission's review of the reclassification request.

6. Verizon's Application is on file with the Commission and can be reviewed at the Office of the Commission Secretary, 1333 H Street, N.W., Second Floor, West Tower, Washington, D.C. 20005, between the hours of 9:00 a.m. and 5:30 p.m., Monday through Friday. Copies of the application are available upon request, at a per-page reproduction cost.

7. Comments on Verizon's reclassification request must be made in writing to Christine D. Brooks, Commission Secretary, at the above address. All initial comments must be received within 10 days of the date of publication of this NOPR in the *D.C. Register*. Persons wishing to file reply comments may do so no later than 20 days of the date of publication of this NOPR. After the comments have been received, the Commission will take final action on Verizon's Application as prescribed by Section 5(a) of Price Cap Plan 2004.

---

[6] *See* Price Cap Plan 2004 § 5(a).

Office of the Secretary of the
District of Columbia

February 24, 2005

Notice is hereby given that the following named persons have been appointed as Notaries Public in and for the District of Columbia, effective on or after March 15, 2005.

Aqui, Antoinette M.	New	U S D H H S 901 D St,SW6thFlE 20447
Bang, Deborah S.	Rpt	Deloitte 555 12th St,NW 20004
Barnes, Joretha C.	Rpt	1520 Potomac Ave,SE 2003
Bekele, Beniam	New	Riggs Bank 2600 Va Ave,NW 20037
Beyene, Bersabeh	New	Wachovia Bank 4340 Conn Ave,NW 20008
Black, Phyllis D.	New	Wachovia Bank 801 Pa Ave,NW 20004
Blake, Deborah J.	Rpt	Thelen Reid & Priest 701 Pa Ave,NW#800 20004
Bland, William A.	New	Robert Ades & Associates 1140 Conn Ave,NW#1100 20036
Blundell, Marie A.	Rpt	Ft.Myer Construction Co. 2237 33rd St,NE 20018
Boileau, Lynne M.	Rpt	Capitol Title Insurance 1100 17th St,NW 20036

Bolton, Lucy G.	New	Markswright Company 4545 Conn Ave,NW 20008
Brown, Donna W.	Rpt	Manatt Phelps & Phillips 700 12th St,NW 20005
Brown, Gail L.	Rpt	O P I C 1100 N Y Ave,NW 20527
Campbell, Cindy	New	Ford & Harrison 1300 19th St,NW#700 20036
Campbell, Karen P.	Rpt	Way Back to Pentecost Ch 945 R St,NW 20001
Chryar, Karla L.	Rpt	People's Counsel 1133 15th St,NW#500 20005
Clairborne, Clara B.	Rpt	Alston & Bird 601 Pa Ave,NW10thFlNB 20004
Darrah, Jeffrey	New	Dupont Title & Settlement 1700 Q St,NW 20009
Dietrich, Aric	New	Dupont Title & Settlement 1700 Q St,NW 20009
Dosunmu, Priscilla McLain	New	S I P C 805 15th St,NW#800 20005
Dubendorf, Bonnie	New	Liquidity Services 2131 K St,NW4thFl 20037
Duncan, Yasmin M.	New	Venable 575 7th St,NW 20004
El-Amin, Ijnanya N.	New	Wachovia Bank 5005 N H Ave,NW 20011
Ford, Pamela M.	Rpt	N C T A 1724 Mass Ave,NW 20036

Fowler, Beth L.	Rpt	Robbins Russell Englert.. 1801 K St,NW 20006
Gaiser, Loretto E.	Rpt	Kirkpatrick & Lockhart 1800 Mass Ave,NW 20036
Gani, Lolita	New	Riggs Bank 1913 Mass Ave,NW 20036
Goldman, Judith R.	Rpt	Greenstein Delorme Luchs 1620 L St,NW#900 20036
Graham, James M.	Rpt	D.C. City Council 1350 Pa Ave,NW 20004
Hammond, Margaret E.	New	Patton Boggs 2550 M St,NW 20037
Harmon, Jewel	Rpt	Maginnis Law 1350 Conn Ave,NW#301 20036
Harris, Bethlehem	New	Riggs Bank 2600 Va Ave,NW 20037
Hart, Deborah A.	Rpt	923 46th St,NE 20019
Heath, Charmaine E.	New	Riggs Bank 3806 12th St,NE 20017
Hodges, Cristin	New	Wachovia Bank 4841 Mass Ave,NW 20016
Hoyle, Cheryl Y.	New	212 R St,NW#103 20001
Jackson, Tisha S.	New	Zuckerman Spaeder 1201Conn Ave,NW12thFl 20036
Johnson, Jane A.	New	Riggs Bank 650 Pa Ave, SE 20003

Jones, Eddie A.	New	SaiTex Engineering 1412 4th St,SW 20024
Keats, Debra	Rpt	Natl Cap Bank of Wash 316 Pa Ave,SE 20003
Khan, Faizul R.	Rpt	2122 Mass Ave,NW#503 20008
Kim, Ok Ja	New	Pascal & Weiss 1008 Pa Ave,SE 20003
Labbe, Claude R.	New	1214 Linden Pl,NE 20002
Lasso, Ricardo A.	Rpt	Lasso & Lasso 4530 Wis Ave,NW#220 20016
Leister, Barbara S.	New	Riggs Bank 1919 Pa Ave,NW 20006
Link, Tosha	New	Uptown Business Services 2851 Ga Ave,NW 20001
McGhee-Starke, Yivetta J.	Rpt	Reno & Cavanaugh 1250 I St,NW#900 20005
McKinney, Jenele	Rpt	Share Our Strenth 1730 M St,NW#700 20036
McMahon, Elizabeth T.	New	Shaw Pittman 2300 N St,NW 20037
Martin, Paula R.	Rpt	CadwaladerWickershamTaft 1201 F St,NW#1100 20004
Mohammed, Nargis	New	Riggs Bank 1913 Mass Ave,NW 20036
Moini, Mahshid	New	Riggs Bank 4249 Wis Ave,NW 20016

Mothershed, James F.	Rpt	U S D A/ R U S 14th & Indep Ave,SW 20250
Nestor, Marie S.	Rpt	Child & Family Services 400 6th St,SW 20024
~~Owendoff, Marilyn M.~~	~~Rpt~~	~~Steptoe & Johnson~~ ~~1330 Conn Ave,NW 20036~~
Pedroso, III, Manuel	New	Amer Immigration Lawyers 918 F St,NW 20004
Polyakova,Rose G.	New	Riggs Bank 5530 Conn Ave,NW 20015
Rankin, Arlene J.	New	Change Inc 1413 Park Rd,NW 20010
Real, Gregory J.	New	Riggs Bank 3806 12th St,NE 20017
Reyes-Yanes, Jakeline	New	Latin Amer Youth Center 1419 Columbia Rd,NW 20009
Rice, Carolyn E.	New	Riggs Bank 4249 Wis Ave,NW 20016
Robinson, Vickie L.	New	I R E X 2121 K St,NW#700 20037
Seyoum, Hagos A.	Rpt	907 T St,NW 20001
Shackett, Victoria Paxton	New	Premium Distributors 3500 FtLin Dr,NE 20018
Sharma, Umesh K.	New	Riggs Bank 5530 Conn Ave,NW 20015
Shem, Raymond	New	3 D G 1353 Parkwood Pl,NW 20010

Sinclair, Lois	Rpt	Home Realty 1111 10th St,SE 20002
Smith, Daisy M.	New	Dept of Mental Health 35 K St,NE 20002
Smith, Jean W.	New	Riggs Bank 1913 Mass Ave,NW 20036
Spelman, Barbara M.	Rpt	Amer Israel Pub Affairs 440 First St,NW#600 20001
Stein, Stacey L.	New	Wachovia Bank 1100 Conn Ave,NW 20036
Stewart, June M.	Rpt	H U D 451 7th St,SW#3248 20410
Sundstrom, Nancy A.	New	Dept of Labor F C U 200Const Ave,NW#S3220 20210
Tafalla, Evelyn D.	Rpt	H U D Fed Credit Union 451 7th St,SW#3241 20410
Taylor, Donna N.	Rpt	George Comfort & Sons 1401 H St,NW#250 20005
Thomas, Winifred L.	Rpt	West 901 15th St,NW 20005
Thompson, Leah	New	I R C 1730 M St,NW#807 20036
Thompson, Turkessa R.	New	Kirkland & Ellis 655 15th St,NW#1200 20005
Toldt, Pamela Jaye	New	W R A M C 6900 Ga Ave,NW 20307
Walder, Barbara J.	Rpt	Reno & Cavanaugh 1250 I St,NW#900 20005

Wardian, Mariele	New	BKA Logistics 1629 K St,NW#600 20006
Washington, Jean O.	Rpt	D.C. Housing & Com Dev 801 N Cap St,NE 20002
Williams, Christine M.	New	Brown Advisory Securities 1737 H St,NW5thFl 20006

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

PUBLIC NOTICE

DESIGNATION OF COMPETITIVE AREAS

The Board of Directors of the District of Columbia Water and Sewer Authority ("the Board"), pursuant to the authority set forth in the Water and Sewer Authority Establishment and Department of Public Works Reorganization Act of 1996, effective April 18, 1996 (D.C. Law 11-111; D.C. Code § 34-2201.01 et *seq.,*) and pursuant to Layoff and Recall regulations (Chapter 52, Section 5207, "LAYOFF AND RECALL", Subsection 5207.6 *et seq.* of the Water and Sanitation Regulations, (21 DCMR Section 5207) as amended and published in the January 18, 2002 edition of the District of Columbia Register (49 DCR 532) hereby publish the following designated departments as Lesser Competitive Areas for purposes of a reduction in force:

1. Customer Service
2. Engineering and Technical Services,
3. Facilities and Security
4. Finance and Budget,
5. Maintenance Services,
6. Procurement and Materiel Management,
7. Sewer Services,
8. Wastewater Treatment
9. Water Services

Publication of this notice fulfills the requirement of Section 5207.6(d) of the Layoff and Recall regulations (21 DCMR Section 5207.6 (2002); (49 DCR 537) which requires that the Board of Directors publish the competitive areas in which the reduction in force will be conducted. This action was authorized by the District of Columbia Water and Sewer Authority Board of Director's Resolution #05-19.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 17085 of Louise and Larry Smith and Mary Ann Snow and James Marsh, pursuant to 11 DCMR §§ 3100 and 3101, from various administrative decisions of the Department of Consumer and Regulatory Affairs (DCRA), involving construction of three flats located at 206, 208 and 210 D Street, S.E., Square 763, Lots 26, 27 and 28.

HEARING DATES: February 24, 2004, May 18, 2004, June 22, 2004
DECISION DATE: July 6, 2004

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on September 12, 2003 challenging several approvals by the Department of Consumer and Regulatory Affairs (DCRA) and one approval of the DC Office of the Surveyor. All approvals were connected with the construction of three flats at 206, 208 and 210 D Street, SE; i.e. approval of subdivision lots, recordation of a subdivision plat, issuance of a permit to raze an existing structure at the site, issuance of three foundation permits, issuance of three building permits, failure to compel the property owner to remove obstructions at the site, issuance of a public space permit for a dumpster, and a challenge to the lifting of a stop work order at the site. Appellants also alleged that two of the three building permits were issued in violation of applicable side yard requirements. Appellants later withdrew their challenges to the issuance of the razing permit and public space permit, and to DCRA's alleged failure to compel the property owner to remove obstructions. Following the May 18, 2004 public hearing, the Board voted to dismiss the remaining challenges as moot, except for the challenge regarding the alleged side yard violations. At a decision meeting on July 6, 2004, the Board voted to deny that portion of the appeal challenging the side yard violations.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning scheduled a hearing on the appeal for February 24, 2004. In accordance with 11 DCMR § 3113.4, the Office of Zoning mailed notice of the hearing to the Appellants, the ANC 6B (the ANC for the area concerning the subject property), the property owner, and DCRA.

Parties

The Appellants in this case are Larry and Louise Smith, and Mary Ann Snow and James Marsh (Appellants or the Neighbors), the owners of properties adjoining the subject property. Appellants were represented by Richard Nettler, Esq., and Jeannine Rustad, Esq., of Robins, Kaplan, Miller & Ciresi, LLP. The property owner, Folger Park North, LLC (Folger or the Owner), was represented by Richard Aguglia, Esq., of Hunton & Williams, LLP. As the

MAR 1 1 2005

property owner, Folger is automatically a party under 11 DCMR § 3106.2. DCRA was represented by Lisa Bell, Esq., Senior Counsel.

Preliminary Matters

Prior to the public hearing in this appeal, the Owner filed Application No.17108, an application for variances from the lot area and lot width requirements for the subject property. The Appellants (who also opposed the variance) moved to consolidate the variance application with this appeal, and requested that the cases be heard together on February 24, 2004. But on January 27, 2004, when the variance application was first scheduled, the Board denied the Appellant's motion to consolidate the two proceedings and determined that it would hear the variance application first, then the appeal. Since the Appellants and the property owner both requested additional time to prepare for the variance case, the Board continued the variance case and scheduled the two cases for February 24, 2004. The public hearing in the variance case concluded on that date, but the Board did not deliberate or vote on the application until April 6, 2004. On April 6, 2004, the Board voted to grant the variances for lot area and lot width requirements, and set the appeal to be heard on May 18, 2004.

Prior to the May 18 hearing date, the Appellants raised the additional challenge alleging that the building permits violated the side yard requirements of the Zoning Regulations. In response, the Owner moved to dismiss the appeal on all grounds -- including the newly raised side yard challenge -- as either moot or time-barred. The parties submitted extensive filings and argued the motion to dismiss before the Board on May 18, 2004. None of the parties disputed that, except for the side yard issue, the other issues on appeal had become moot as a result of the area variances granted by the Board in April. Thus, on June 22, 2004, the Board granted the motion to dismiss all portions of the appeal except for the side yard issue on grounds of mootness. It also determined that the side yard issue was not time-barred, and denied the Owner's motion to dismiss on that ground. The appeal was continued to July 6, 2004, for a decision on the merits of the side yard issue.

FINDINGS OF FACT

The Property and Surrounding Area

1. The subject property consists of three record lots, numbered 26, 27, and 28, in Square 763, located at 206 D Street, SE, 208 D Street, SE, and 210 D Street, SE, respectively.

2. Although created after the effective date of the applicable Zoning Regulations, the lot size and width of lots 26, 27 and 28 meet none of the minimum requirements under section 401 of the Zoning Regulations. Lots 27 and 28 (208 and 210 D Street, SE) are 271 square feet shy of the 1,800 square feet minimum lot size requirement, and Lot 26 (206 D Street, SE) is 353 square feet shy of the 1,800 square feet minimum lot size requirement. The width of all three lots is 16 feet -- 2 feet shy of the 18 feet minimum width that is required in the zone.

3. The property is zoned R-4 and is in the CAP (Capitol Interest Overlay District[1]). The R-4 zone permits one family dwellings, row houses and flats, such as those constructed by the applicant. Although the CAP Overlay provides for restrictions on use, height and bulk of buildings, the homes constructed by the applicant conform to the Overlay provisions.

4. Square 763 is bounded by D Street, SE to the south, 3rd Street, SE to the east, C Street, SE to the north, and 2nd Street, SE to the west. Folger Park is directly to the south of the square, and the Library of Congress Madison Building is to the northwest. The square is predominantly developed with 2 to 3 story row houses, but also includes a 6-story apartment building facing C Street, SE, and a sport club and an American Legion building along D Street.

5. Each of the three lots is improved with new homes that have been constructed by Folger. The homes are three level, two-family row houses with fully finished English basements and off-street parking. Because the property is located in the Capitol Hill Historic District, the Historic Preservation Review Board reviewed and approved the development plans for the row houses.

The Permits and Construction

6. On or about May 23, 2003, DCRA issued foundation permits for each of the three row houses.

7. On or about August 25, 2003, DCRA issued building permits for each of the three proposed row dwellings.

8. A previously existing PEPCO substation at the property was razed during June, 2003, and construction on the row house foundations began on or about July 1, 2003. Construction continued after the building permits were issued on August 25, 2003.

9. On or about September 2, 2003, DCRA issued a stop work order based upon an "invalid raze permit". The applicant met with DCRA officials to confirm the validity of the raze permit, and the stop work order was lifted on or about September 5, 2003.

10. DCRA issued a second stop work order on or about September 15, 2003,. Although the stop work order did not cite any code violation, DCRA later issued a letter stating that the proposed development did not comply with the minimum lot area and lot width requirements contained in § 401 of the Zoning Regulations.

11. On September 30, 2003, this appeal was timely filed. Among other things, Appellants challenged DCRA's August 25, 2003 issuance of the three building permits to construct

[1] The CAP Overlay was established "to promote and protect the public health, safety, and general welfare of the U.S. Capitol precinct and the area adjacent to this jurisdiction, in a manner consistent with the goals and mandates of the United States Congress. . ." § 1200.1 DCMR.

the three row dwellings.

12. On or about October 30, 2003, the Folger and DCRA entered into an agreement that provided for DCRA's lifting of the stop work order in return for the applicant's agreement to indemnify DCRA for any construction related damages, and to seek variances from this Board from the minimum lot area and width requirements.

13. After entering into the agreement, Folger applied to this Board for the variance relief and resumed construction of the row dwellings. By the end of January 2004, the row dwellings were "under roof"; *i.e.* the main roof was in place in each of the three units.

14. None of three units were constructed with side yards. The middle unit at Lot 27 is an interior lot with two common division walls, one adjoining Lot 28 and one adjoining Lot 26. Lot 28 has one common division wall with Lot 27 and abuts an alley which is 15 feet in width on the other side. Lot 26 has one common division wall with Lot 27 and abuts a four foot right of way on the other side.

15. By separate decision issued and served upon the parties, the Board granted the lot size and width variances.

Appeal of the Side Yard Issue

16. At the time it filed its appeal, the Appellants did not specifically raise the side yard issue However, the side yard issue was raised and discussed by Appellants and the Office of Planning (OP) during the variance case.

17. On or about May 6, 2004, Appellants filed a submission claiming that the two end units (Lots 26 and 28) required side yards under the Zoning Regulations. As a result, they argued, the building permits which approved the two structures were issued in error.

18. The Owner maintained that the side yard issue was untimely raised and that, in any event, this portion of the appeal lacked merit (See, Exhibits 49 and 51).

CONCLUSIONS OF LAW

An appeal to the Board may be taken by a person aggrieved or District agency affected by any decision of a District official in the administration and enforcement of the Zoning Regulations. D.C. Official Code § 6-641.07 (2001). Here, the Appellants allege and DCRA concedes that the three record lots were substandard and should not have been created. Appellants also claim that the two building at each end should have had a side yard.

The Challenges to the Building Permits based upon The Substandard Lots Is Moot.

"A case is moot when the legal issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome. *See Murphy v. Hunt*, 455 U.S. 478, 481, 71 L. Ed. 2d

353, 102 S. Ct. 1181 (1982) (citations omitted)", *Cropp v. Williams, 841 A.2d 328* (D.C. 2004) In the companion decision to this case, the property owner has been a granted variance from strict compliance with the lot size and width requirement of the Zoning Regulation. The variance relief converts these lots to a conforming status and thus negates any errors that had been made in creating them. Thus, the legal issue as to whether DCRA erred in issuing building permits that allowed construction on substandard lots is "no longer live".

The Motion to Dismiss the Side Yard Appeal

Folger and DCRA maintain that the portion of the appeal regarding the side yard violations was untimely filed and that the appeal must therefore be dismissed.[2] Appellants maintain that the side yard challenge should be treated as an amendment to the initial appeal, which was indisputably filed on a timely basis. The Board agrees with the Appellants because the facts and procedural posture of this case are so unusual. First, the side yard issue was raised early on in the variance case which was inextricably connected with this appeal. Although the cases were not consolidated, the granting of the variance relief caused most of the appeal to become moot. Second, because the side yard issue was raised during the variance case, Folger had ample notice of the challenge. Thus, there was no prejudice to Folger in permitting the Appellants the flexibility to amend their appeal to include the side yard challenge.

The Merits of the Side Yard Appeal

Appellants principally rely on section 405.3 of the Zoning Regulations and this Board's opinion in, *Appeal of David and Janet Pritchard,* BZA No. 16811, 49 DCR 9707 (2002) (the *Pritchard* case), which interpreted this section. Section 405.3 provides in part that, side yards are required at properties in the R-4 zone unless the dwelling at the property shares a common division wall with the adjacent property. Since, here, both end units have a common division wall at only one side – the sides abutting the middle unit – Appellants argue that side yards are required next to the free standing wall at both units.

Folger and DCRA argue that 405.3 is not apposite in this case and that the facts of the *Pritchard* case are distinguishable from the facts herein.

Folger claims that section 405.6 of the Regulations is applicable to this case, rather than section 405.3, and that section 405.6 squarely states that no side yard is required in the R-4 zone. As to *Pritchard*, Folger claims that decision is distinguishable for two reasons. First, unlike the property in *Pritchard*, the property in this case consists of two substandard lots that are unable to accommodate side yards on both sides. Second, the rationale underlying *Pritchard's* side yard requirement was to ensure adequate light and air. That rationale does not apply to this case where one end unit abuts an alley and the other end unit abuts a four foot right of way.

DCRA argues, in addition, that section 405.3 does not apply because this is a multiple dwelling "development" and that the logic of *Pritchard* cannot apply to such a development.

[2] See, 11 DCMR 3112.2, which requires generally that an appeal must be filed within 60 days of the administrative decision being complained of.

For the reasons stated below, the Board holds that the *Pritchard* decision does not prohibit the construction of new end-unit row dwellings, or any new row dwelling, regardless of whether the structure shares one or common division wall, or none at all.

Since thee issuance of the *Pritchard* decision, the Board has on two occasions emphasized the narrow scope of that decision. In *Appeal* of *Southeast Citizens for Smart Development,* BZA No. 16935, 50 DCR 8108 (2003), the Board rejected an interpretation that *Pritchard* barred the construction of single family semi-detached structures that sit on a lot line, and thus share no common division wall. The Board held that because the Zoning Regulations define semi-detached dwellings to include structures "the wall on one (1) side of which is ...a lot line wall, having one (1) side yard", *Pritchard* could not be interpreted as disallowing this matter of right structure.

Similarly, in *Application of Kathleen Peoples and Philip Sedlak,* BZA 17007, 51 DCR 9518 (2004), a case decided after this appeal, the Board made it clear the *Pritchard* does not preclude the construction of in-fill row dwellings.

> [T]he Board wishes to stress the narrowness of the Pritchard ruling. As noted in Appeal No. 16935 of Southeast Citizens for Smart Development, the Pritchard decision did not make single semi detached dwellings illegal if one side of the structure sat on a lot line (and was thus free standing on both sides). Nor did Pritchard require two side yards for new structures on lots with row dwellings on either side. Row dwellings, when permitted as a matter of right, may be constructed on all lots, except in the narrow circumstances that existed with respect to this subject property.
>
> The Pritchard decision is thus limited to its facts.

Id. at 9520.

The Board reaffirms this limitation. The *Pritchard* decision only addressed the narrow question of "whether the owner of a one-family semi-detached dwelling in an R-4 District *may convert* the dwelling to a row dwelling as a matter of right, where the dwelling will not share on both sides a common division wall with an adjacent building", *Pritchard*, 49 DCR at 9713 (emphasis added). The facts in this appeal are different. Here, Folger is not converting an existing semi-detached single family dwelling into a row dwelling, but building three entirely new row dwellings (*i.e.* a single family dwelling without side yards). And unlike the *Pritchard* scenario, Folger cannot avail itself of the special exception relief made available to additions to single family homes pursuant to 11 DCMR § 223[3], a factor that the *Pritchard* decision viewed as relevant in reaching it conclusions. *See Pritchard,,* 47 DCR at 9716-9717.

As newly constructed matter of right row houses, no side yards are required. To the extent it suggests otherwise, *Pritchard* is overruled.

---

[3] In fact, the owners of the property that was the subject of the *Pritchard* decision were granted special expection approval to build the addition in *Application of Kathleen Peoples and Philip Sedlak*, discussed *infra.*

Therefore, for the reasons stated above, it is hereby **ORDERED** that:

a. the motion to dismiss the side yard challenge is **DENIED**

Vote taken on June 22, 2004

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II, and Anthony J. Hood)

b. the motion to deny the appeal is **GRANTED** with respect to the side yard challenge

Vote taken on July 6, 2004

VOTE: **3-0-2** (Geoffrey H. Griffis, Ruthanne G. Miller, and Curtis L. Etherly, Jr., voting in favor of the motion, and John A. Mann II and Anthony J. Hood voting by absentee ballots against the motion)

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: FEB 2 8 2005

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."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17136 of Africare, pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy requirements under section 403, and a variance from the rear yard requirements under section 404, to allow an addition to an existing headquarters office of a charitable organization in the R-4 District at premises 440 R Street, N.W. (Square 509, Lot 805).

HEARING DATE: March 30, 2004
DECISION DATE(S): May 4, 2004

DECISION AND ORDER

Africare, the property owner ("Applicant") filed an application with the Board of Zoning Adjustment ("Board") on January 20, 2004, for a variance from the lot occupancy provisions of section 403.2, and a variance from the rear year requirements under section 404.1, to allow the construction of an addition to an existing headquarters office of a charitable organization.

Preliminary Matters

Self-Certification The Applicant's attorney, George R. Keys, Jr. filed a self-certification form on behalf of the Applicant for the zoning relief requested.

Notice of Application and Public Hearing Pursuant to 11 DCMR 3113.3, the Office of Zoning (OZ), by memoranda dated January 20, 2004 notified the Councilmember for Ward 6, Advisory Neighborhood Commission (ANC) 2C, the ANC member for Single Member District (SMD) 2C02 and the District of Columbia Office of Planning (OP) of the filing of the application. On January 29, 2004, OZ mailed notices of the public hearing to the Applicant, the ANC and all of the owners of property within 200 feet of the subject property, advising them of the date of hearing. Furthermore, the Applicant's affidavit of posting indicates that on February 20, 2004, it posted two zoning posters at 440 R Street, N.W. in plain view of the public.

Request for Party Status On March 16, 2004, Barry Krieiswith who resides at and is the owner of 427 Warner Street, N.W., filed an application for party status. Mr. Krieiswith's property is located across the alley, approximately 30 feet from the Applicant's property. The Board granted Mr. Kriesiwith's request for party status.

Applicant's Case The president of the Applicant testified with regard to the history of the property and how the property is being used. Joseph Handwerger, the applicant's architect, testified with regard to the construction design and building dimensions of the project. The Applicant was represented by George Keys, an attorney.

Government Reports The Office of Planning submitted a report to the Board dated March 5, 2004. OP recommended that the Board deny the requested variance relief because the Applicant failed to establish that it met the test for the requested relief. According to OP, the Applicant had not shown an exceptional situation or condition of its property, nor had it established that there was a practical difficulty arising from such condition. OP stated that an annex could be redesigned to comply with the lot occupancy and rear yard requirements of the Zoning Regulations. OP also was concerned about the intensity of use of the property and its potentially adverse impacts on the surrounding community because of the potential for an increased number of employees and visitors.

ANC Report The ANC did not file a report.

Parties and Persons in Opposition Mr. Kriesiwith, who resides across the alley adjacent to the rear of the Applicant's property, opposed the application. Mr. Kriesiwith's argued that the Applicant should be seeking a use variance rather than an area variance because the previously granted use variance only covers the existing building, not an annex. Mr. Kriesiwith further indicated that even if the Board determines that an area variance, rather than a use variance is appropriate in this instance, the Applicant has failed to meet the requirements for an area variance.

Hearing The public hearing on the application was held and completed on March 30, 2004. The Board left the record open to receive additional information from the Applicant and the ANC's report if one was submitted.

Decision Meetings The Board scheduled its decision meeting on the application for May 4, 2004. On that day, the Board granted the application on a vote of 4-0-1.

FINDINGS OF FACT

1. The Applicant is a non-profit organization whose mission is to provide humanitarian and development assistance to the people of Africa. Its services cover a broad array of areas including, food security, agriculture, health, education, credit and environmental issues. Since its establishment

MAR 1 1 2005

in 1970, the Applicant has given assistance to approximately 26 African countries

2. The subject property is located at 440 R Street, N.W. (Square 509, Lot 805) in the Shaw neighborhood of Ward 4. The site is improved with a two-story building with a basement that was built before the adoption of the 1958 Zoning Regulations. The building previously housed the Morse Public School.

3. The subject property is located in the R-4 District.

4. The lot is 18,318 square feet.

5. In its order of September 27, 1983, the Board granted the Applicant a use variance to use the former school as its headquarters' office.

6. In addition to serving as administrative space for Applicant's staff, each month, African diplomats use the site to hold monthly meetings and the annual meeting of the Diplomatic Core. The Applicant also makes meeting space available to the community and hosts visits by school children.

7. As a result of the expansion of its activities and staff, the Applicant has concluded that it needs additional space. Among the factors leading to this decision are the following:

    a. The growth of its headquarters staff has grown from 20 people to 58 employees;

    b. The inadequacy of the present office space and meeting rooms;

    c. The need to improve its financial management including the establishment of an auditing unit;

    d. The desire to establish an agricultural section on-site to compliment its agricultural staff in the field; and

    e. The efficiencies that would result from storing its records on-site instead of in off-site storage facilities, as is presently the case.

8. The needed expansion cannot be practically achieved through interior renovations of the former school building, which has large stairways and halls.

MAR 1 1 2005

9. In 1999, the Board issued a Summary Order which granted the Applicant an area variance to build an annex similar to the one Applicant proposes to build in this application, but that order expired without the annex being constructed.

10. Instead, the Applicant proposes erecting an annex, similar to one that the Board approved in 1999 through Summary Order No. 16506.

11. The proposed annex, which will be three stories high and include two below–grade levels for parking and storage, will be 12,633 square feet. It will occupy what is presently the parking lot for the existing building. The two buildings will be joined by a covered portico. There will be a below-grade connection of the two buildings where the garage level of the annex is connected to the basement level of the Morse School building.

12. A public school building may not occupy more than 60% of its lot in an R-4 zone district. For all other structures, the maximum amount of lot that may be occupied is 40%. The lot occupancy of the existing building is 31.56%. Because the Applicant proposes to expand the former school building in order to accommodate office uses, the 40% limitation applied. The proposed annex would increase the lot occupancy by 16.8% to 56.8%.

13. The rear yard in an R-4 District must be a minimum of 20 feet. The rear yard is currently 14 feet and the Applicant wishes to maintain it at that level.

14. The Applicant will have 22 on-site parking spaces, 18 in the underground parking garage and 4 spaces at the rear of the annex.

15. The Applicant will have two structures on the roof, a cooling tower, measuring 8 feet x 10 feet x by 3 feet high with a surrounding screen that will be approximately 11 feet, and an elevator shaft roof and roof access hatch that will be less than 2 feet above the roof. The screen wall for the cooling tower will be made of metal panels on a steel framework.

16. The proposed annex will maintain the back yard at 14 feet and establishes a large courtyard that prevents the property from appearing congested and renders the annex more complimentary to the residential dwellings in the neighborhood.

17. The annex will include a lecture conference room that can accommodate approximately 100 people. This will not only alleviate the severe overcrowding that occurs during diplomatic meetings, but will permit the

Applicant to host lectures on Africa, accommodate visitors from the African continent, and allow for larger school visits and community events.

18. The Applicant's proposed annex will not interfere with the light and air of the adjoining property owners nor will its cooling tower, described in finding of fact 15, produce noise that will interfere with the neighbors' use and enjoyment of their property.

CONCLUSIONS OF LAW

The Board is authorized to grant a variance from the strict application of the zoning regulations in order to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property...." D.C. Official Code § 6-641.07(g) (3) (2001); 11 DCMR §3103.2. Relief can be granted only "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." Id. An applicant for an area variance must establish that there are "practical difficulties," *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). The applicant in this case, therefore, had to make three showings: uniqueness of the property, that such uniqueness results in "practical difficulties" to the Applicant, and that the granting of the variance will not impair the public good or the intent and integrity of the zone plan and regulations.

The party in opposition, Mr. Barry Kreiswirth, argues that the Applicant should have sought a use variance. The Board disagrees. Once a use variance is granted, the use is considered conforming, and like any other conforming use, may be expanded so long as it complies with the area requirements of the Zoning Regulations. Industrial Lessors v. Garfield, 290 A. 2d 737 (NJ 1972); Rathkopf's The Law of Zoning and Planning § 73:29, at 73:123-126 (Ziegler, ed., 2002); and 1 Anderson's American Law of Zoning §6.01, 483 n.8 (K.H. Young, ed., 4th ed. 1996). Because the Applicant's plans diverge from the Zoning Regulations with respect to the lot occupancy requirements of § 403 and the rear yard requirements of § 404, area variances were properly sought.

Based on the record herein, the Board concludes that the Applicant has established the existence of an extraordinary or exceptional situation or condition of the subject property with respect to the granting of a variance for the lot occupancy and rear yard requirements.

The configuration of the existing building makes Applicant's property unique. That building, which was previously a public school, has large stairways and large halls. This design restricts the amount of space that is available for offices, meeting space, and storage. The Applicant's operation has outgrown its existing building. Presently, its offices are overcrowded by its current staff, and its meeting facilities are inadequate to accommodate the diplomatic meetings which it hosts monthly. Crucial functions such as having an auditing department, agricultural staff, and storage for records and art are not available in the existing building because there is insufficient room. The Applicant is a not-for-profit organization and has presented ample evidence that the proposed expansion is an institutional necessity. Such a showing constitutes a unique circumstance that is connected to the subject property. *Monaco v. District of Columbia Board of Zoning Adjustment*, 407 A.2d 1091 (D.C. 1979). "[T]he need to expand an existing building may constitute the kind of exceptional condition of the property that justifies a variance." *Draude v. D.C. Board of Zoning Adjustment*, 527 A.2d 1242, 1255 (D.C. 1987).

The Applicant has shown the requisite practical difficulties. The current building in which the Applicant maintains its headquarters is too small to accommodate the Applicant's growing operation. Core functions such as auditing and storage are non-existent because there is no room for them. Regularly held meetings are conducted in inadequate meeting space. The current structure can not be reconfigured to house more office and meeting space because having been a school, it has large staircases and hallways, the alteration of which would be prohibitively expensive and detrimental to the character of the existing building. Such a design might also yield a building which may be in excess of the height restrictions.

A variance can be granted only if this can be accomplished "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. The Applicant has clearly met this test. First, the annex is located so it is aligned with the existing building in the rear so as to avoid a congested looking lot which would be out of character with the surrounding residential area. Compliance with the 20 foot set back would make the Applicant's buildings appear more massive, and it would be thus less complimentary to the residential district in which it is located. Second, since the Applicant allows community groups to use its facility and makes it available for tours by school children, the Applicant may more readily accommodate these visitors. Finally, the Applicant's stature as an international organization providing assistance to African nations raises the stature of the community in which it is located. Authorizing the expansion will enable the

Applicant to remain in the neighborhood and fulfill its mission. Although Mr. Kreiswirth has concerns about the noise that is made by the Applicant's compressors for the Applicant's existing building, the cooling facilities for the annex will be screened by a metal wall on the roof and at least 90 feet from Mr. Kreiswirth's property. Under these circumstances, the cooling tower on the addition should not increase the noise level for Mr. Kreiswirth's property. The Applicant's annex will not affect the light and air of the surrounding properties. There will be adequate parking for the property since the Applicant will be providing 22 parking spaces on site. Based upon these circumstances, the Board concludes that the project would not have a negative affect on the public good.

The addition would not substantially impair the intent, purpose, and integrity of the zone plan as embodied in the regulations. Although the Applicant's property is in an R-4 District, the Board granted Applicant a use variance in 1983 so that it could establish its office headquarters in the existing building, and in 1999 it approved plans for an annex that is substantially the same as those presented in this application. The Board again finds that this annex will not substantially impair the intent, purpose and integrity of the zone plan and the Zoning Regulations.

ANC and OP Great Weight

The Board, as required, accorded "great weight" to issues and concerns raised by the affected ANC and to the written recommendations made by OP. DC Official Code §§ 1-309.10(d) and 6-623.04 (2001). The ANC did not submit a written report.

OP opposed the application because it believed that the Applicant has not established that it meets the requirements for an area variance. In its opinion, the Applicant can erect an annex that complies with the rear yard and lot occupancy requirements of the Zoning Regulations. OP further also felt that the intensity of use was not compatible with an R-4 District. For the reasons stated in the conclusions of law, the Board disagrees with this analysis.

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 the application for a variance from the lot occupancy requirements under section 403 and the rear yard requirements of 404 at the premises located at 440 R Street, N.W.

Therefore, it is **ORDERED** that the application be **GRANTED** with respect to the variance from the lot occupancy and rear yard requirements.

MAR 1 1 2005

VOTE: **4-0-1** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller, and John Mann II to grant the lot occupancy and rear yard variance request, the Zoning Commission member not participating, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board Member approved the issuance of this order.

FINAL DATE OF ORDER: FEB 2 8 2005

PURSUANT TO 11 DCMR § 3125.6, THIS 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.

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.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. 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, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF

MAR 1 1 2005

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. 17155, of Ray Hwang and Mathew Depue, pursuant to 11 DCMR 3103.2, for a variance from the requirements under section 330.5(c) of the Zoning Regulations to allow for the conversion of a single family residence to a 3 unit apartment house, at premises located at 3518 10th Street, NW (Square 2832, Lot 807) in the R-4 zone.

HEARING DATE: May 4, 2004
DECISION DATE: May 18, 2004

Preliminary Matters

Charles Ray, Esq., filed this application for variance relief with the Board of Zoning Adjustment (the Board) on February 24, 2004. Mr. Ray is the authorized agent for the owners of the subject premises, Ray Avery Hwang and Mathew Depue (the applicant or the owner). For the reasons stated below, the Board finds that the applicant failed to meet the elements for a variance. The application is therefore denied.

Notice of Public Hearing The Board scheduled a public hearing for May 4, 2004. Pursuant to 11 DCMR 3113.3, notice of the hearing was sent to the applicant, owners of all property within 200 feet of the subject premises, the Advisory Neighborhood Commission (ANC) 1A, and the District of Columbia 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
(Exhibit 23).

The Application The applicant initially sought a variance to convert a single family residence to four condominium apartment units under sections 330.5(c) and 401.3 of the Zoning Regulations.[1] (See, Exhibit 1, Application). At the public hearing, the applicant amended its application to convert the property to three apartment units instead of four.

OP Report OP reviewed the variance application and prepared a report recommending denial of the variance request (Exhibit 22). OP concluded that the property did not meet the test for a variance because (1) there is nothing unique or exceptional about the property; (2) there are no practical difficulties in using the property without variance relief; and (3) the intensified use is inconsistent with the zone plan. Although the written report was based upon the applicant's initial proposal for four apartments, OP's position

[1] Section 330.5(c) permits a conversion to an apartment building in the R-4 zone where the property was constructed prior to May 12, 1958, subject to certain other provisions, including section 401.3 of the Regulations. Section 401.3 requires that, when converting to an apartment house in the R-4 zone, each apartment must be a minimum size of 900 square feet. The proposed apartments do not meet the 900 square feet minimum.

remained the same after the application was amended to provide for only three apartments.

ANC Report In its report dated May 12, 2004, ANC 1A indicated that it had voted to support the project, citing the fact that the project would include one unit which is "affordable".

Requests for Party Status There were no requests for party status.

Persons in Support of the Application Two neighbors testified in support of the application, Beverly Wheeler and Charles Henkers. Ms. Wheeler and Mr. Henkers both testified that the project would benefit the neighborhood.

Closing of the Record After the public hearing on May 4, 2004, the Board left the record open for the submission of the ANC report, revised drawings, and a parking statement. The matter was set for a decision meeting on May 18, 2004.

Decision Meeting The Board voted to deny the variance application at the May 18, 2004 decision meeting.

FINDINGS OF FACT

The Property

1. The subject property is located at 3518 10th Street, NW, and is improved with a three-story single family detached dwelling that was built in the early 1900s.

2. The subject property is zoned R-4 and designated as "moderate density residential" on the Generalized Land Use Map. Except for one multifamily housing property located north of the subject property in the middle of the block, row dwellings and semi-detached dwellings are the predominant uses at the 3500 block of 10th Street, where the property is located.

3. Prior to acquisition by the applicants, the property was vacant and had been abandoned and vandalized for a period of time ranging anywhere from ten to twenty-five years. The property had been an eyesore and blight on the neighborhood. At various times over the years, it was occupied by trespassers and used for drug activity and/or prostitution. Because the property had not been cared for over an inordinately long period of time, the physical structure had deteriorated.

The Application

4. The applicant proposes to convert the existing three story dwelling into an apartment building with a unit on each floor. One of the three units would be "affordable" to a household with an income of less than $30,000 per year.

5. The R-4 district permits the conversion of existing structures built before 1958 to apartment buildings as long as there is 900 square feet of lot area per unit (See sections 330.5 and 401.3 of the Zoning Regulations). As the total area of the property is only 2,597 square feet, the per unit area would be less than the 900 square feet minimum that is required. As such, the applicant seeks an area variance from this requirement.

6. The applicant would not require variance relief if he were to renovate the property by converting the dwelling into two duplex apartment units.

The Project Costs

7. Due to the severely deteriorated condition of the property, it will be costly to renovate the dwelling.

8. The Board credits testimony from Mr. Hwang, a mechanical engineer and expert in construction costs, that the costs to renovate the structure would be greater than the costs to demolish the structure and re-build.

9. The Board also credits Mr. Hwang's testimony that the project would be economically viable if the property were renovated as two luxury duplex apartments instead of three apartments with one affordable unit.

Impact of the Project

10. The Board credits testimony from neighbors Beverly Wheeler and Charles Henkers ("the neighbors") that the proposed three unit project would eliminate a blight on the neighborhood.

11. The Board also credits OP's assessment that the proposed three unit project would have a detrimental impact on the zone plan in that it would result in an intensification of use beyond that permitted by the zoning regulations.

CONCLUSIONS OF LAW

The applicant here seeks variance relief from the requirement under § 401.3 that when converting a single family dwelling to an apartment house, each unit must be a minimum of 900 square feet.

MAR 1 1 2005

The Board is authorized to grant a variance from the strict application of the zoning regulations in order to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property...." D.C. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2. Relief can be granted only "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." *Id.*

The applicant initially applied for a use variance from section 330.5 (c) as well as an area variance from section 401.3. An applicant for a use variance must make the greater showing of "undue hardship," as opposed to the lesser showing of "practical difficulties," which applies in area variance cases. *Palmer v. Board of Zoning Adjustment,* 287 A.2d 535, 541 (D.C. 1972).
A use variance was sought because granting the area variance would have allowed an increase in the intensity of use not allowed in the zone in which the property is located

In analyzing the relief required as a use variance OP noted in its report that Section 330. 3 of the Zoning Regulations prevent the zone from becoming an apartment house district by controlling the lot area. Specifically, Section 330. 3 states, "*the R-4 District shall not be an apartment house district as contemplated under the General Residence (R-5) districts, since the conversion of existing structures shall be controlled by a minimum lot area per family requirement.*"

While acknowledging the rationale of OP's argument, the Board notes that in *Wolf v. D.C. Board of Zoning Adjustment,* 397 A.2d 936, 941 (D.C. 1979), which involved the very same variance requested here, the District of Columbia Court of Appeals upheld the Board's use of the practical difficulty standard.. The Court found that the conversion from two units to three did not constitute an "essential change" in the use of the property and that the fundamental change sought was related to the minimum lot restrictions. *Id.* at 941-942. Since the same may be said in this case, the Board will analyze the request as an area variance.

Under the three-prong test for area variances set out in 11 DCMR § 3103.2, an applicant must demonstrate that (1) the property is unique because of its size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter practical difficulty if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment,* 579 A.2d 1164, 1167 (D.C. 1990). In order to prove "practical difficulties," an applicant must demonstrate first, that compliance with the area restriction would be unnecessarily

burdensome; and, second, that the practical difficulties are unique to the particular property. *Id.* At 1170.

The applicant has failed to establish that it has met the three-prong test for a variance

Although the applicant has met the first prong of the variance test, the Board concludes that it has not met either the second or third prong of the test. As a result, the variance must be denied.

First prong – Uniqueness

The Applicant argues, and the ANC and the neighbors agree, that this property is unique because it is the only property on the block that has been abandoned for 10 years or more, is in gross disrepair and is used as a safe harbor for criminals. Although OP is correct that there is nothing unusual about a property being in a state of disrepair, the Board's uniqueness analysis may focus on an area comprising less than the entire territory of the District of Columbia. It is not required that a property be the only one of its kind. "[T]he rationale behind the uniqueness test is that difficulties that are common to or affect an entire neighborhood, or a substantial portion thereof, are properly addressed as an amendment of the regulations themselves from the Zoning Commission." *Gilmartin v. District of Columbia Board of Zoning Adjustment*, 579 A.2d 1164, 116 (DC 1990).

This case is almost identical to the situation that confronted the Board in *Application of Richard Nappi,* BZA No. 16983, 50 DCR 9131 (2003). There, as here, the applicant sought a variance from the minimum lot size requirements in order to create an apartment house in an R-4 District. The Board agreed with the applicant that the dilapidated nature of a structure could constitute an exceptional condition, citing *Capitol Hill Restoration Society v. Board of Zoning Adjustment,* 534 A.2d 939, 942 (D.C. 1987) ("condition inherent in the structures built upon the land, rather than in the land itself, may also serve to satisfy an applicant's burden of demonstrating uniqueness"). Nevertheless, the Board found in that case that the proximity of a nearby structure in similar condition refuted the contention of uniqueness. In addition, the Board concluded that the costs of rehabilitating the structure are "market forces [that] affect the entire neighborhood, not only the Applicant's lots, and therefore do not make those lots unique." *Id.* at 9136

Unlike, the row dwellings in Nappi, in this case there is no nearby structure in a similar condition. Indeed, it is undisputed that this is the only structure in such a state of disrepair for such a long period of time on this block. For this reason, the Board finds the poor condition of this structure to be an "exceptional situation or condition inherent in the property".

Second prong – Practical Difficulty

MAR 1 1 2005

In essence, Applicant claims a practical difficulty in not being able to recover a satisfactory return on his investment in the property if he renovates the property in accordance with the Zoning Regulations. The regulations permit a single family dwelling on this sized lot to be converted to two units, but not to the three units that Applicant is seeking. However, Applicant concedes that the building could be converted into two luxury duplex units instead of three apartments without the need for variance relief and that a two unit project would be economically viable.

As the Board decision in *Nappi* makes plain, economic harm may be considered in the practical difficulty test. *Accord, Gilmartin v. District of Columbia Bd. of Zoning Adjustment; Barbour v. District of Columbia,* 358 A.2d 326 (D.C. 1976). However, the Board has "no authority to grant a variance in order to assure ... a profit". *Taylor v. District of Columbia Board of Zoning Adjustment,* 308 A2d 230, 236 (D.C. 1973), *citing, Anderson's Law of Zoning* § 14.23; 3 § 14.48.

The facts in this case are even less favorable to a finding of practical difficulty than those in *Nappi,* in which the only economically feasible matter of right alternative was to raze the structure.

Here, the Applicant concedes that he can renovate the existing structure for the reasonable use contemplated by the regulations (2 units) and that such conversion would be economically viable. *Compare Wolf v. D.C. Board of Zoning Adjustment, supra, at 943,* in which the Court noted that the Board found the structure of the property – "specifically its large size, unique layout, and exceptional quality of workmanship-worked against its functioning as a two-unit apartment house." Accordingly, Applicant has not demonstrated the practical difficulty required for variance relief.

<u>Third prong</u> – Substantial Detriment to the Public Good or Zone Plan

An applicant for a variance must satisfy two separate sub-tests under the third prong. First, it must be shown that the requested variance will not result in substantial detriment to the public good; and second, that the requested variance will not impair the intent and purpose of the zone plan as embodied in the zoning regulations.

The Board agrees with the ANC and the neighbors that the proposed project would eliminate blight in the neighborhood that has served as a harborage for rats and criminals for over a decade. In addition, Applicant's allocation of one of the units for affordable housing would serve the public interest. Thus, granting the request would not result in a substantial detriment to the public good, but would benefit it.

With respect to the second test, however, the Board concurs with OP's conclusion that granting the variance would impair the intent and purpose of the zone plan as embodied in the zoning regulations and map because it would result in an intensified use in the R-4

MAR 1 1 2005

zone beyond that permitted by the zoning regulations where a viable matter of right alternative is available.

The Board is required under section 3 of the Comprehensive Advisory Neighborhood Commissions Reform Act of 2000, effective June 27, 2000 (D.C. Law 13-135, D.C. Official Code § 1-309(d) (2001) to give "great weight" to the issues and concerns raised in the written recommendations of the affected ANC. While the Board understands that the ANC wishes to see this nuisance property renovated, that factor alone does not permit the Board to grant a variance. In any event, the Board notes that this goal can still be achieved through the matter of right renovation of the structure.

The Board is also required under section 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990, (D.C. Law 8-163; D.C. Official Code § 6-623.04 to give "great weight" to OP's recommendations. For the reasons stated forth above, the Board disagrees with OP with respect to the question of the exceptional nature of the property, but concurs with OP's conclusion that the applicant has failed to show a practical difficulty in converting the structure in accordance with the zoning regulations and that permitting the renovation of the structure in the manner proposed would result in substantial detriment to the zone plan.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the application for variance is denied.

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

Vote taken on May 18, 2004

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: FEB 2 8 2005

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 DEMR § 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. 17275 of the Republic of Lithuania, pursuant to 11 DCMR § 1002, to permit the expansion of a chancery for the Embassy of Lithuania in the R-5-D and D/R-5-B Districts at premises 2622 16th Street, N.W. (Square 2575, Lot 32).

NOTICE OF FINAL RULEMAKING
and
DETERMINATION AND ORDER

The Board of Zoning Adjustment, in its capacity as the Foreign Missions Board of Zoning Adjustment for the District of Columbia, pursuant to the authority set forth in the Foreign Missions Act, approved August 24, 1982 (96 Stat. 283; D.C. Code, 2001 Ed. § 6-1306); Chapter 10 of the Zoning Regulations of the District of Columbia, 11 DCMR; and Section 6(c) of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206; D.C. Code, 2001 Ed. § 2-505(c)), hereby gives notice of the adoption of its determination not to disapprove the application of the Republic of Lithuania, for the expansion of the Embassy of Lithuania's chancery building at premises 2622 16th Street, N.W., (Square 2575, Lot 32).

Notice of the filing of the application was published in the D.C. Register on November 26, 2004, and notice of the proposed rulemaking was also published in the D.C. Register on November 26, 2004. At the January 25, 2005, public hearing, the Board took final action not to disapprove the application. This Board took final rulemaking action at the conclusion of its public hearing on January 25, 2005. This final rulemaking is effective ten days after publication in the D.C. Register.

The property that is the subject of the application is located at 2622 16th Street, N.W., and has been owned and occupied by the Embassy of Lithuania since 1924. The subject of this application is the Embassy's proposed addition to the rear of the building, which will include 9,112 square feet of new chancery office space and 2,937 square feet of residential space, an 802 square foot garage/carport at the rear of the property for 5 vehicles, and a surface parking lot for 11 vehicles. After completion of the project, the building will measure approximately 22,147 square feet of gross floor area, of which approximately 18,498 square feet will be chancery office and 3,649 square feet will be residential.

On November 18, 2004, the Applicant filed a chancery application with the Board. Pursuant to 11 DCMR § 3134.7, the application was accompanied by a letter from

the United States Department of State certifying that the Applicant had complied with Section 205 of the Foreign Missions Act (22 USC 4305) and that the application could be submitted to the Board.

The Office of Zoning, on November 19, 2004, provided notice of the filing of the application to the Department of State; the District of Columbia Office of Planning; the District of Columbia Department of Transportation; Advisory Neighborhood Commission (ANC) 1C, the ANC for the area within which the subject property is located; the ANC Commissioner for the affected Single Member District; and the Ward 1 Councilmember. The Office of Zoning subsequently scheduled a public hearing on the application for January 25, 2005, and provided notice of the hearing by mailing a copy to the Applicant, to ANC 1C, and to all property owners within 200 feet of the subject property. Notice of the hearing was also published in the D.C. Register on December 3, 2004, and posted in the Office of Zoning. In addition, on January 6, 2005, the Applicant posted notice on the property in plain view of the public in accordance with 11 DCMR § 3113.

The record closed on January 25, 2005. The Department of State submitted a favorable report on the application. The Office of Planning submitted a report recommending approval of the application in part and denial in part. However, after the conclusion of the Applicant's testimony, the Office of Planning modified its report to indicate full support for the application. The ANC 1C also voted to recommend approval of the application. The Board has not received any other comments on the application.

At its public hearing on January 25, 2005, the Board determined not to disapprove the application for the following reasons:

First, as recommended by the Secretary of State and the Office of Planning, favorable action on the application will fulfill the international obligation of the United States to facilitate the acquisition of adequate and secure premises by the Government of Lithuania for its diplomatic mission in the Nation's Capital.

Second, the Board concluded that it need not consider historic preservation issues in this case, since the property is neither an historic landmark nor is it located in an historic district.

Third, the Applicant provides parking spaces in the rear of the building for sixteen vehicles, and additional space for stacked parking for three more vehicles. The Office of Planning noted that the Zoning Regulations would require 17 parking spaces. The Office of Planning also noted the availability of public transportation and found the parking facilities to be more than adequate for the chancery

MAR 1 1 2005

building. In addition, the Secretary of State has determined that there are no special security requirements relating to parking in this case.

Fourth, after consultation with Federal agencies authorized to perform protective services, the Secretary of State has determined that the subject property and area are capable of being adequately protected.

Fifth, the Director of the Office of Planning, on behalf of the Mayor of the District of Columbia, has determined that favorable action on this application is in the municipal interest and is consistent with the Comprehensive Plan. The application requires a deviation from the strict requirements of the Zoning Regulations in three respects: (1) provision of sixteen parking spaces, rather than seventeen spaces in accordance with the schedule of parking in Chapter 21; (2) an extension of the use, height and bulk regulations of the R-5-D zone approximately seven and one-half (7-1/2) feet into the D/R-5-B zone, pursuant to Section 2514.2, to allow a part of the building in the D/R-5-B portion of the site to exceed 50 feet in height; and (3) a closed court which is approximately half of the minimum required area of a closed court in the R-5-D zone, based upon the height of the court in this particular case. The closed court is not for the provision of required light and ventilation, but instead is an amenity to provide daylight to the windows in the dining/reception room on the second floor and three offices on the third through fifth floors of the existing building. The Applicant provided testimony and evidence to indicate the practical difficulties that would be encountered if the closed court was required to be in strict compliance with the Zoning Regulations, as well as justification for the extension of the R-5-D height regulations and the provision of sixteen parking spaces.

Sixth, the Secretary of State has determined that a favorable decision on this application would serve the Federal interest. The U.S. Embassy in Vilnius is in the process of acquiring additional property adjacent to its chancery to enhance its security. The acquisition process in Vilnius is extensive and complicated, and the Board's favorable decision in this case will assist the State Department in completing these important purchases in a timely manner.

Accordingly, it is hereby **ORDERED** that this application is **NOT DISAPPROVED**.

Vote of the Foreign Missions Board of Zoning Adjustment taken at its public hearing on January 25, 2005, to **APPROVE** the proposed rulemaking: 5-0-0 (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller, John G. Parsons, and Patricia E. Gallagher)

FINAL DATE OF ORDER: February 2, 2005

PURSUANT TO 11 DCMR § 3125.6, THIS 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. 17283 of Julia Jones and Jason Pugh, pursuant to 11 DCMR § 3104.1, for a special exception to allow a rear addition to an existing flat (two-family) row dwelling under section 223, not meeting the lot occupancy requirements (section 403), in the CAP/R-4 District at premises 429 1st Street, S.E. (Square 694, Lot 831).

HEARING DATE: February 8, 2005
DECISION DATE: February 8, 2005 (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) submitted a report in conditional 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 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

MAR 1 1 2005

by findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED** subject to the following **CONDITION:**

1. The Applicant shall provide solid or semi-solid screening on the sides of the open deck to a minimum height of five (5) feet, subject to review, changes and approval by the Historic Preservation Review Board or its staff.

VOTE: **4-0-1** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller and John A. Mann II to approve, Carol J. Mitten 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: FEB 1 0 2005

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 § 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 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.

MAR 1 1 2009

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. RSN

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17284 of Miranda R. Brown, pursuant to 11 DCMR § 3103.2, for a modification of plans under subsection 3125.8, for a four story single-family detached dwelling, that was approved under BZA Application No. 16929, dated November 22, 2002. The requested modification will allow the construction of a three-story single-family detached dwelling with mezzanine, in the R-1-B District, at premises 3120 Pennsylvania Avenue, S.E. (Square 5545, Lot 3).

HEARING DATE: February 15, 2005
DECISION DATE: February 15, 2005 (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 public hearing on this application, by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 7B, the Office of Planning (OP) and to owners of property within 200 feet of the site. The site of the application is located within the jurisdiction of ANC 7B. The ANC submitted a report in support of the application. The OP submitted a report in support of the application

As directed by 11 DCMR § 3119.2, the Board required the applicant to satisfy the burden of proving the elements that are necessary to establish the case for a variance pursuant to 11 DCMR §§ 3103.2. No parties appeared at the public hearing in opposition to the 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 report filed in this case, the Board concludes that the applicant has met the burden of proving under 11 DCMR §§ 3103.2 and 3125.8, 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.

MAR 1 1 2005

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. The waiver will not prejudice the rights of any party, and is not prohibited by law. It is therefore **ORDERED** that this application be **GRANTED.**

VOTE: **4-0-1** (Curtis L. Etherly, Jr., Geoffrey H. Griffis, Ruthanne G. Miller and John A. Mann II to approve, Gregory Jeffries not hearing all of the case, not voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member has approved the issuance of this order.

FINAL DATE OF ORDER: February 16, 2005

PURSUANT TO 11 DCMR § 3125.6, THIS 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.

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.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. 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,

MAR 1 1 2005

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. RSN

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17286 of Grace Guggenheim, pursuant to 11 DCMR § 3104.1, for a special exception to allow additions to an existing single-family semi-detached dwelling under section 223, not meeting the lot occupancy (section 403), rear yard (section 404), and nonconforming structure provisions (subsection 2001.3) in the R-3 District at premises 2912 Cortland Place, N.W. (Square 2103, Lot 60).

HEARING DATE: February 15, 2005
DECISION DATE: February 15, 2005 (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) 3C and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 3C, which is automatically a party to this application. ANC 3C submitted a report 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 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

MAR 1 1 2005

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17287 of Robin Epstein, pursuant to 11 DCMR § 3104.1, for a special exception to construct a two-story rear addition to an existing single-family row dwelling under section 223, not meeting the lot occupancy (section 403) and rear yard (section 404) requirements in the R-4 District at premises 1542 1st Street, N.W. (Square 552, Lot 199).

HEARING DATE: February 15, 2005
DECISION DATE: February 15, 2005 (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) 5C and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 5C, which is automatically a party to this application. ANC 5C submitted a report 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 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

MAR 1 1 2005

by findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED.**

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

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: February 16, 2005

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.

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

MAR 1 1 2005

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

OFFICE OF DOCUMENTS AND ADMINISTRATIVE ISSUANCES
PUBLICATIONS PRICE LIST

DISTRICT OF COLUMBIA MUNICIPAL REGULATIONS (DCMR)

TITLE		SUBJECT	PRICE
1	DCMR	MAYOR AND EXECUTIVE AGENCIES (JUNE 2001)	$16.00
3	DCMR	ELECTIONS & ETHICS (JUNE 1998)	$20.00
4	DCMR	HUMAN RIGHTS (MARCH 1995)	$13.00
5	DCMR	BOARD OF EDUCATION (DECEMBER 2002)	$26.00
6A	DCMR	POLICE PERSONNEL (MAY 1988)	$8.00
7	DCMR	EMPLOYMENT BENEFITS (JANUARY 1986)	$8.00
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
11	DCMR	ZONING (FEBRUARY 2003)	$35.00
12	DCMR	CONSTRUCTION CODES SUPPLEMENT (2003)	$25.00
13B	DCMR	BOILER & PRESSURE VESSEL CODE (MAY 1984)	$7.00
14	DCMR	HOUSING (JULY 1991)	$20.00
15	DCMR	PUBLIC UTILITIES & CABLE TELEVISION (JUNE 1998)	$20.00
16	DCMR	CONSUMERS, COMMERCIAL PRACTICES & CIVIL INFRACTIONS (JULY 1998) W/DECEMBER 1998 SUPPLEMENT	$20.00
17	DCMR	BUSINESS, OCCUPATIONS & PROFESSIONS (MAY 1990)	$26.00
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
21	DCMR	WATER & SANITATION (FEBRUARY 1998)	$20.00
22	DCMR	PUBLIC HEALTH & MEDICINE (AUGUST 1986)	$26.00
22	DCMR	HEALTH CARE & COMMUNITY RESIDENCE FACILITIES SUPPLEMENT (AUGUST 1986 - FEBRUARY 1995)	$13.00
23	DCMR	ALCOHOLIC BEVERAGES (AUGUST 2004)	$10.00
24	DCMR	PUBLIC SPACE & SAFETY (DECEMBER 1996)	$20.00
25	DCMR	FOOD AND FOOD OPERATIONS (AUGUST 2003)	$20.00
26	DCMR	INSURANCE (FEBRUARY 1985)	$9.00
27	DCMR	CONTRACTS AND PROCUREMENT (JULY 1988)	$22.00
28	DCMR	CORRECTIONS, COURTS & CRIMINAL JUSTICE (AUGUST 2004)	$10.00
29	DCMR	PUBLIC WELFARE (MAY 1987)	$8.00
30	DCMR	LOTTERY AND CHARITABLE GAMES (MARCH 1997)	$20.00
31	DCMR	TAXICABS & PUBLIC VEHICLES FOR HIRE (JULY 2004)	$16.00

OTHER PUBLICATIONS

1994 - 1996 Indices	$52.00 + $5.50 postage
1997 - 1998 Indices	$52.00 + $5.50 postage
Complete Set of *D.C. Municipal Regulations*	$624.00
D.C. Register yearly subscription	$195.00
Rulemaking Handbook & Publications Style Manual (1983)	$5.00
*Supplements to D.C. Municipal Regulations	$4.00

MAIL ORDERS: Send exact amount in check or money order made payable to the D.C. Treasurer. Specify title and subject. Send to: D.C. Office of Documents and Administrative Issuances, Room 520, One Judiciary Square, 441 - 4th St., N.W., Washington, D.C. 20001. Phone: 727-5090

OVER THE COUNTER SALES: Come to Rm. 520, One Judiciary Sq., Bring check or money order.

All sales final. A charge of $65.00 will be added for any dishonored check (D.C. Law 4-16)