

REQUEST FOR PROPOSAL

Project Manager
(Owner's Representative)
Arts & Technology Academy Renovation and Addition

Issued: April 7, 2005

I. INTRODUCTION

The Arts & Technology Academy ("ATA" or the "Owner") is a District of Columbia public charter school located at 5300 Blaine Street NE, Washington, DC. It serves 615 students in preschool through 6th grade. ATA received its charter in the fall of 1999. The Academy was founded on the basis that children are interested in and entitled to an education. Learning is fun, yet challenging, and becoming an educated person is a goal that is not easily attained, but eagerly sought, while simultaneously building character and strength of mind. The school is dedicated to the incorporation of arts and technology in the learning process. The website is: www.artsandtechnologyacademy.org.

ATA is soliciting Proposals for a Project Manager to act as its agent through the successful design and construction of a new addition for 7th and 8th grades and a renovation of the existing building (the "Project").

II. PROJECT DESCRIPTION

The Arts & Technology Academy is currently housed in 50,000 square feet of building at 5300 Blaine Street NE, Washington DC. The Academy is considering expanding its successful program through 8th grade and therefore its enrollment to approximately 1000. Additional space as well as renovated space is needed to accommodate the facility needs of the future operation. The Project is expected to include various classrooms, a science lab, a computer lab, an art studio, a library, and general administrative space. The amount of new construction is currently estimated in the range of 30,000 to 40,000 square feet.

Design is expected to begin within the next few months, aiming toward occupancy of the addition in January 2007 and of the entire Project by August 2007.

III. SCOPE OF WORK

The contractor is expected to serve as the Owner's Representative and Project Manager for the entire construction-from initial planning through completion and successful occupancy. The following list includes some of the expected services to be provided by the Project Manager, with appropriate Owner involvement and approval:

- reconcile the program, schedule, and budget into a final concept for implementation;
- develop a cash flow schedule;
- assist with the financing strategy and confirmation;
- create a program document detailing the architectural requirement of the Project;
- determine the appropriate construction delivery method;
- manage the RFP process for A / E services and negotiate the contract;
- manage the RFP process for Construction services and negotiate the contract;
- issue schematic design (SD) and design development (DD) reviews for reconciliation with the program's spaces, efficiency, functionality, and FF&E, and overall compliance with the Owner's intentions;
- report to the Board of Directors of the school and/or the Building Committee;
- ensure a reasonable meeting schedule, agendas, minutes, action items, and approvals strategy;
- manage SD and DD independent cost estimates, the value engineering process, the contractual Cost of Work, and subsequent cost items;
- continually track and report on the budget against commitments and against actual expenditures;
- coordinate and obtain all necessary permits for the renovation and new construction;
- coordinate the Academy's relationship within its own community and with its neighbors for effective communication of information;
- maintain Owner satisfaction providing various regular updates and preparing participants in their roles and their decisions.

IV. PRE-QUALIFICATION

The Bidder must have prior experience in overseeing renovation/rehabilitation/construction projects of schools in accordance with applicable codes, standards, rules, and regulations.

The Bidder must not be on the "Unacceptable Risk Determination" list of the United States Department of Housing and Urban Development.

V. FORM OF PROPOSAL

Proposals must consist of the following information in the order indicated below:

- Cover letter with the following:
 - Statement of interest in the Project
 - Identification of the point of contact for this RFP process with telephone number and email address
 - Name, address, telephone, email, website for the prime and any sub consultant firms
 - Signature of a duly authorized principal;
- Resumes of personnel for the ATA Project , their proposed roles, and availability;
- Fee structure and range proposed for the ATA Project;
- Descriptions of similar project management projects within the last four years with the following details:
 - Project name, school name, location
 - Bidder personnel involved
 - Target and actual opening date
 - Ability to manage to project budget
 - Optional comment on quality or issues of interest
 - Optional comment on the general DBE involvement on the Project;
- List of three Professional / Owner References;
- Financial references.

VI. SUBMISSION OF PROPOSAL

Submission packages shall:

- Be addressed to Arts & Technology Academy, 5300 Blaine St. N.E., Washington, D.C. 20019 ; **ATTN: Jonathan B. Hill, Treasurer;**
- Be identified as containing a Proposal for Project Manager;
- Have the Bidder's name and address;
- Contain four bound copies of the Proposal
- Contain one loose original or one electronic version of the Proposal

Proposals are due on or before 4:30pm on April 18, 2005. Proposals received after this deadline will not be accepted.

The selection will be based on the completeness and on the quality of the content of the Proposal. No modifications to Proposals once submitted will be considered unless requested in writing.

The Owner reserves the right to waive irregularities and the right to reject any Proposals at any point during the selection process. The Owner also reserves the right to approve all sub consultants and team members.

The Owner anticipates inviting some Bidders to interview and notifying the preferred Bidder on or before 30 days from the submission deadline. Note that the contract will not be effective until reviewed and approved by the District of Columbia Public Charter School Board.

VII. QUESTIONS

Please address your questions concerning this RFP to the Academy's single point of contact:

Jonathan B. Hill
202-776-2725-Office
202-776-4725-Fax
jhill@dowdohnes.com

APR 1 2009

DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

Certification of Filling a Vacancy
In Advisory Neighborhood Commission

Pursuant to D.C. Code section §1-309.06 (d)(6)(G) and the resolution transmitted to the District of Columbia Board of Elections and Ethics ("Board") from the affected Advisory Neighborhood Commission, the Board hereby certifies that a vacancy has been filled in the following single member district by the individual listed below:

Angelia D. Scott
Single Member District 1D06

DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

Certification of Filling a Vacancy
In Advisory Neighborhood Commission

Pursuant to D.C. Code section §1-309.06 (d)(6)(G) and the resolution transmitted to the District of Columbia Board of Elections and Ethics ("Board") from the affected Advisory Neighborhood Commission, the Board hereby certifies that a vacancy has been filled in the following single member district by the individual listed below:

Jarni Pina
Single Member District 7E07

District of Columbia
BOARD OF ELECTIONS AND ETHICS

Monthly Report
of
Voter Registration Statistics
for the period ending
March 31, 2005

Covering Citywide Totals by:

WARD, PRECINCT, and PARTY

One Judiciary Square
441 - 4th Street, NW, Suite 250N
Washington, DC 20001
(202) 727-2525
<http://www.dcboee.org>

D.C. BOARD OF ELECTIONS AND ETHICS
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

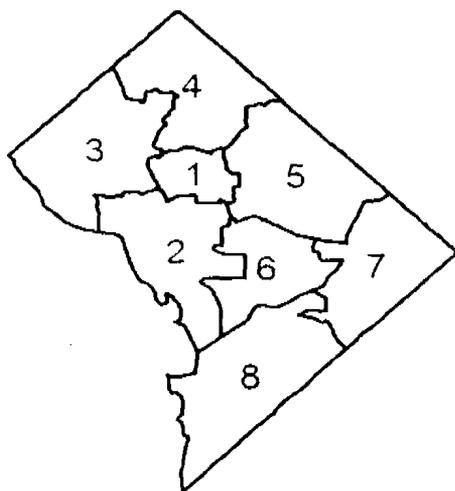
CITYWIDE SUMMARY

Party Totals and Percentages by Ward for the period ending March 31, 2005

*The decrease in voter registration reported for the month of March 2005 is due to the conduct of the 2005 Biennial Residency Canvass.

WARD	DEM	REP	STG	N-P	OTH	TOTALS
1	30,815	2,702	1,007	9,130	255	43,909
2	25,808	5,624	524	9,191	196	41,343
3	30,843	8,264	468	9,548	140	49,263
4	42,505	2,873	650	7,495	212	53,735
5	41,225	2,228	654	6,705	224	51,036
6	35,211	4,737	656	7,650	197	48,451
7	39,354	1,696	520	5,599	165	47,334
8	32,585	1,697	576	5,356	163	40,377
TOTALS	278,346	29,821	5,055	60,674	1,552	375,448*
TOTAL Percentage (by party)	74.1%	7.9%	1.3%	16.2%	0.4%	100.0%

Wards



D.C. BOARD OF ELECTIONS AND ETHICS
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 4

For the Period Ending: March 31, 2005

PRECINCT	DEM	REP	STG	N-P	OTH	TOTALS
45	2,592	104	41	457	14	3,208
46	2,197	160	44	535	14	2,950
47	2,440	157	42	434	11	3,084
48	621	35	15	147	4	822
49	2,932	642	40	607	7	4,228
51	1,172	287	8	233	1	1,701
52	1,007	101	23	232	6	1,369
53	1,917	128	35	394	17	2,491
54	2,341	113	29	360	19	2,862
55	2,805	104	39	547	16	3,511
56	2,286	102	32	389	15	2,824
57	2,123	67	37	332	6	2,565
58	2,471	95	31	349	12	2,958
59	1,618	100	32	539	12	2,301
60	1,510	79	21	237	4	1,851
61	3,038	192	39	344	7	3,620
62	2,788	135	67	457	16	3,463
63	2,246	83	18	288	7	2,642
64	2,514	88	26	292	12	2,932
65						
TOTALS	42,505	2,873	650	7,495	212	53,735

D.C. BOARD OF ELECTIONS AND ETHICS
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 7

For the Period Ending: March 31, 2005

PRECINCT	DEM	REP	STG	N-P	OTH	TOTALS
80	1,194	50	18	182	8	1,452
92	1,236	62	19	182	8	1,507
93	1,204	64	14	190	5	1,477
94	1,579	74	20	200	5	1,878
95	1,292	42	24	203	3	1,564
96	1,676	73	27	264	4	2,044
97	1,035	41	19	169	2	1,266
98	1,458	55	18	189	9	1,729
99	1,084	47	19	184	5	1,339
100	1,391	62	24	208	6	1,691
101	1,470	47	15	175	7	1,714
102	1,873	85	25	231	9	2,223
103	2,825	126	36	426	13	3,426
104	2,022	97	32	302	13	2,466
105	1,673	72	28	235	5	2,013
106	2,598	101	30	336	6	3,071
107	1,239	64	16	217	3	1,539
108	1,058	49	7	99	5	1,218
109	961	45	11	103	2	1,122
110	3,482	130	38	443	15	4,108
111	1,753	70	28	311	6	2,168
112	1,783	74	20	255	13	2,145
113	1,851	85	16	268	8	2,228
132	1,617	81	16	227	5	1,946
TOTALS	39,354	1,696	520	5,599	165	47,334

Announcement Notice for the Funding Alert
Office of Justice Grants Administration
Government of the District of Columbia

Public Notice of Funding Availability

District Opportunities

Byrne Formula Block Grant Program. *The DC Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration* announces the availability of Federal grant funds under the 2004 Byrne Formula Block Grant program, which includes program areas that address drug control, violent and serious crime, all aspects of criminal justice processing (including incarceration and treatment of offenders), and general improvements in Justice Operations. Eligible applicants include nonprofit agencies. Approximately \$721,000 is available for up to six approved programs. The Request for Applications (RFA) will be available at 9:00 a.m. on Monday, April 18, 2005, and may be picked up at the front desk of the Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration, 1350 Pennsylvania Avenue, NW, Suite 327, Washington, DC 20004. The deadline for applications is 5:00 p.m. on Friday, May 27, 2005. For more information, contact Phyllis McKinney, Program Manager, Office of the Deputy Mayor for Public Safety and Justice/ Justice Grants Administration at (202) 727-1700 or phyllis.mckinney@dc.gov.

Announcement Notice for the Funding Alert
Office of Justice Grants Administration
Government of the District of Columbia

Public Notice of Funding Availability

District Opportunities

Edward Byrne Memorial Justice Assistance Grant (JAG) Program. *The DC Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration* announces the availability of Federal grant funds under the 2005 JAG Block Grant program. JAG combines the Byrne and Local Law Enforcement Block Grant (LLEBG) programs to support a range of activities to prevent and control crime and to improve the criminal justice system: Applications should include program areas that address the following: Citizens partnerships and empowerment; information sharing, family substance abuse intervention and treatment, drug-gang mediation and interdiction, prevention and education programs, corrections and community corrections programs, drug treatment programs, planning, evaluation, and technology improvement programs, and Youth/Family Delinquency Intervention. Eligible applicants include neighborhood or community-based organizations that are private and non-profit. Approximately \$1,094,209 is available for up to six approved programs. The Request for Applications (RFA) will be available at 9:00 a.m. on Monday, April 18, 2005, and may be picked up at the front desk of the Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration, 1350 Pennsylvania Avenue, NW, Suite 327, Washington, DC 20004. The deadline for applications is 5:00 p.m. on Friday, May 27, 2005. For more information, contact Phyllis McKinney, Program Manager, Office of the Deputy Mayor for Public Safety and Justice/ Justice Grants Administration at (202) 727-1700 or phyllis.mckinney@dc.gov.

**Announcement Notice for the Funding Alert
Office of Justice Grants Administration
Government of the District of Columbia**

Public Notice of Funding Availability

District Opportunities

Local Law Enforcement Block Grant Program.

The DC Office of the Deputy Mayor for Public Safety and Justice (ODMPSJ)/Justice Grants Administration (JGA) announces the availability of federal grant funds under the 2004 Local Law Enforcement Block Grant (LLEBG) for programs under the following purpose area: (1) Establish Crime Prevention Programs. Eligible applicants include non-profit organizations located in the District of Columbia. The deadline for applications is May 27, 2005 at 5:00 PM. The Request for Applications (RFA) will be available April 18, 2005 and may be picked up at the front desk of ODMPSJ/JGA, 1350 Pennsylvania Avenue, NW, Suite 327, Washington, DC 20004. For further information, contact Iris Crenshaw, Grants Program Manager, ODMPSJ/JGA, at (202) 724-7009 or iris.crenshaw@dc.gov.

Announcement Notice for the Funding Alert
Office of Justice Grants Administration
Government of the District of Columbia

Public Notice of Funding Availability

District Opportunities

Title II Juvenile Justice Grants. *The Justice Grants Administration in the Office of the Deputy Mayor for Public Safety and Justice* announces the availability of federal grant funds under the FY 2006 Title II Juvenile Justice Grants Program. This program supports delinquency prevention and intervention efforts as well as juvenile justice system improvements. Priorities include delinquency prevention; aftercare/re-entry/probation; youth, parent, community and victim education and outreach and addressing disproportionate minority contact. Eligible applicants include units of local government and community-based organizations located in the District of Columbia. The Request for Applications (RFA) will be available at 9:00 a.m. on Monday, April 17, 2005, and may be picked up at the front desk of the Justice Grants Administration in the Office of the Deputy Mayor for Public Safety and Justice, 1350 Pennsylvania Avenue, NW, Suite 327, Washington, DC 20004. The deadline for applications is 5:00 p.m. on Friday, May 27, 2005. For more information, contact Nakeisha Neal, Juvenile Justice Specialist, Justice Grants Administration, Office of the Deputy Mayor for Public Safety and Justice at (202) 727-9541 or nakeisha.neal@dc.gov

Announcement Notice for the Funding Alert
Office of Victim Services
Government of the District of Columbia

Public Notice of Funding Availability

District Opportunities

Crime Victims Assistance Grant (VOCA). *The DC Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration/ Office of Victim Services* announces the availability of federal grant funds under the Crime Victim Assistance Program for 2005, to improve the treatment of victims of crime by providing victims with the assistance and services necessary to speed their restoration after a criminal act, and to support and aid them as they move through the criminal justice process. Eligible applicants are nonprofit and public organizations in the District of Columbia that provide direct services to crime victims. The Request for Applications (RFA) will be available at 9:00 a.m. on Monday, April 18, 2004, and may be obtained at the Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration/ Office of Victim Services, 1350 Pennsylvania Avenue, NW, Suite 327, Washington, DC 20004. The deadline for applications is 5:00 p.m. on Friday, May 27, 2005. For more information, contact Christine Brooks-Cropper, Program Manager, Office of the Deputy Mayor for Public Safety and Justice/ Justice Grants Administration/ Office of Victim Services at (202) 727-0941 or christine.cropper@dc.gov.

Announcement Notice for the Funding Alert
Office of Victim Services
Government of the District of Columbia

Public Notice of Funding Availability

District Opportunities

The Services*Training*Officers*Prosecution (STOP) Violence Against Women Formula Grant. *The DC Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration/Office of Victim Services* announces the availability of federal grant funds under the 2005 STOP VAWA Formula Grant program, which is designed to promote a coordinated, multi-disciplinary community response to combating violence against women. The goal of the STOP Program is to encourage collaborative efforts between members of the law enforcement, prosecution, judiciary, and private, non-profit victim services agencies to address the issues of domestic violence, stalking, and sexual assault. Eligible applicants are District agencies and offices; public or private nonprofit organization; units of local government; Indian tribal governments; nonprofit, nongovernmental victim services programs; and legal services programs that provide services to violence against women or provide a function/service to law enforcement, prosecution and/or court agency to promote a coordinated, multi-disciplinary community response to combating violence against women. Grants under this Program shall provide personnel, training, technical assistance, evaluation, data collection and equipment for the more widespread apprehension, prosecution, and adjudication of persons committing violent crimes against women. The Request for Applications (RFA) will be available at 9:00 a.m. on Monday, April 18, 2005, and may be obtained at the Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration/ Office of Victim Services, 1350 Pennsylvania Avenue, NW, Suite 327, Washington, DC 20004. The deadline for applications is 5:00 p.m. on Friday, May 27, 2005. For more information, contact Christine Brooks-Cropper, Program Manager, Office of the Deputy Mayor for Public Safety and Justice/ Justice Grants Administration/ Office of Victim Services at (202) 727-0941 or christine.cropper@dc.gov

Announcement Notice for the Funding Alert
Office of Victim Services
Government of the District of Columbia

Public Notice of Funding Availability

District Opportunities

Victim Assistance Fund. *The DC Office of the Deputy Mayor for Public Safety and Justice/ Office of Victim Services* announces the availability of grant funds under the fiscal year 2006 Victim Assistance Fund to create and/or expand education and outreach on issues faced by victims of violent crime. Eligible applicants are non-profit, community-based organizations and/or District government agencies that provide direct services to crime victims located in the District of Columbia. The Request for Applications (RFA) will be available at 9:00 a.m. on Monday, April 18, 2005, and may be obtained from the Office of the Deputy Mayor for Public Safety and Justice/Office of Victim Services, 1350 Pennsylvania Avenue, NW, Suite 327, Washington, DC 20004. The deadline for applications is 5:00 p.m. on Friday, May 27, 2005. For more information, contact Bryan Criswell, Program Manager, Office of the Deputy Mayor for Public Safety and Justice/ Office of Victim Services at (202) 727-0957 or bryan.criswell@dc.gov.

Announcement Notice for the Funding Alert
Office of Victim Services
Government of the District of Columbia

Public Notice of Funding Availability

District Opportunities

Victim Assistance Fund. *The DC Office of the Deputy Mayor for Public Safety and Justice/ Office of Victim Services* announces the availability of grant funds under the fiscal year 2006 Victim Assistance Fund to sustain and/or expand the provision of direct services to victims of violent crime. Eligible applicants are non-profit, community-based organizations and/or District government agencies that provide direct services to crime victims located in the District of Columbia. The Request for Applications (RFA) will be available at 9:00 a.m. on Monday, April 18, 2005, and may be obtained from the Office of the Deputy Mayor for Public Safety and Justice/Office of Victim Services, 1350 Pennsylvania Avenue, NW, Suite 327, Washington, DC 20004. The deadline for applications is 5:00 p.m. on Friday, May 27, 2005. For more information, contact Bryan Criswell, Program Manager, Office of the Deputy Mayor for Public Safety and Justice/ Office of Victim Services at (202) 727-0957 or bryan.criswell@dc.gov.

Request for Proposal
Paul Public Charter School
5800 8th Street NW
Washington, DC 20011

Paul Public Charter School (www.paulcharter.org) will be soliciting proposals from qualified contractors for the following goods and services for the 2005-2006 school year:

- English Textbooks, Grades 6-9, McDougal Series
- Psychological Services (SPED Related Service)
- Speech- Language Services (SPED Related Service)
- Janitorial Services
- Facilities Management
- Audit and Tax Services (to include A-133 Audit)
- Catering- National School Lunch Program
- Portable Classrooms (4)

Complete RFP submission requirements may be obtained by contacting Denise Taylor in the Business Office at 202-378-2251 beginning Monday, April 18, 2005. All proposals are due on Friday, April 29, 2005 at 4:00 PM.

Office of the Secretary of the
District of Columbia

March 24, 20005

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 April 15, 2005.

Arechiga-Holt, Cathy	New	Chevy Chase Bank 1800 M St, NW 20036
Atkins, Doris A.	Rpt	Industrial Bank 125 45 th St, NE 20019
Avery, Erin	New	Ace Federal Reporters 1120 G St, NW#500 20005
Beggs, Colleen T.	New	Metropolis Development 1327 14 th St, NW#300 20005
Benjamin, Angelo F.	New	Classic Concierge 1010 Vt Ave, NW#600 20006
Berry, Janice J.	New	D C Public Schools/H R 825 N Cap St, NE 20002
Biles, Ora L.	Rpt	John Fedders, Esq 1914 Sunderland Pl, NW 20036
Botchway, Jr., Ebenezer A.	New	Kriegsfeld Corporation 4301 Conn Ave, NW#132 20008
Boykin, Clarence	New	Wachovia Bank 801 Pa Ave, NW 20004
Brantley, Regina	Rpt	C L I N I C 415 Michigan Ave, NE 20017

Brezina, Kathy J.	Rpt	U S Secret Service 950 H St,NW 20223
Butler, Pamela	New	5821 4 TH St,NW 20011
Cabbiness, Jennie B.	Rpt	Wilkie Farr Gallagher 1875 K St,NW 20006
Carnahan, Terri L.	Rpt	Ross Dixon & Bell 2001 K St,NW 20001
Chance, Jenette M.	New	107 Q St,NW#302 20001
Chestnut, Kelvin	New	Classic Concierge 1010 Vt Ave,NW#210 20005
Coan, Caithin E.	New	Potts-Dupre Difede et al 900 7 th St,NW#1020 20001
Cole, Stella O.	New	Ropes & Gray 700 12 th St,NW#900 20005
Cole, Tykisha	New	Riggs Bank 1920 L St,NW 20036
Davis, Mabel E.	New	D C Public Schools/H R 825 N Cap St,NE 20002
Desormeaux, Shirl L.	New	Dept of Commerce F C U 14 th &Const Ave,NW#B818 20044
Espanza, Alvan L.	New	IDB IIC Federal C U 1300 N Y Ave,NW 20577
Evans, Yvette R.	Rpt	Amalgamated Transit Union 5025 Wis Ave,NW 20016
Fitzpatrick, Amy	New	P A Consulting Group 1750 Pa Ave,NW#1000 20006

Frazier, Barbara	New	Banner & Witcoff 1001 G St, NW 11th Fl 20001
Fribush, Susan	Rpt	O P I C 1100 N Y Ave, NW 20527
Goodman, Donald L.	New	G L M Associates 2410 18 th St, NW 20009
Gray, Jean B.	New	Office/Thrift Supervision 1700 G St, NW 20552
Grimes, Olivia A.	New	P E P C O Holdings 701 9 th St, NW 20068
Gurily, Gwendolyn Florence	New	Dept of Labor/Chief Acct 122 C St, NW #400 20001
Hall, Josephine	Rpt	Winston & Strawn 1400 L St, NW 20005
Hampton, Joanne	New	Holland & Knight 2099 Pa Ave, NW 20037
Hayes-Igbozuruike, Ina	Rpt	Quality Investment 1817 12 th St, NW 20009
Jackson, Zenobia	New	Riggs Bank 3300 14 th St, NW 20020
Jefferson, Mary L.	Rpt	222 24 th St, NE 20019
Jones, Carolyn J.	New	Office/Thrift Supervision 1700 G St, NW 20552
Kerley, Patrick J.	New	Skadden Arps et al 1440 N Y Ave, NW 20005
Lawrence, Nayo L.	New	Fannie Mae 3900 Wis Ave, NW 20016

Lehner, Sharon	New	Davis & Harman 1455 Pa Ave, NW#1200 20004
Lopez, Juan A.	New	Beta Court Reporting 910 17 th St, NW#200 20006
McCann, Brenda J.	New	Ballard Spahr et al 601 13 th St, NW#1000So 20005
Meyer, Jana	New	Foundry United Methodist 1500 16 th St, NW 20036
Michaelsen, Carol L.	Rpt	Preston Gates et al 1735 N Y Ave, NW#500 20006
Mingione, Elizabeth	Rpt	Henderson Legal Services 1120 G St, NW#1010 20005
Mobley, Rotunda D.	Rpt	Benjamin Saulter, Esq 1710 R I Ave, NW#700 20036
Moore, Stephanie L.	New	Children's Natl Med Ctr 111 Michigan Ave, NW 20010
Moringello, Sally-Anne	New	Gilbert Heintz Randolph 1100 N Y Ave, NW#700 20005
Muench, Joyce	Rpt	Reynolds Tobacco Company 1201 F St, NW#1000 20004
Murphy, Gale	New	Riggs Bank 3300 14 th St, NW 20010
Navai, Arzhang	New	Wachovia Bank 1850 M St, NW 20036
Notarangelo, David	New	T Rowe Price Associates 900 17 th St, NW 20006
O'Neill, Loria A.	Rpt	Wilkie Farr & Gallagher 1875 K St, NW 20006

Ortiz, Judy	New	Arent Fox 1050 Conn Ave, NW 20036
Paylor, Edward J.	New	Watkins Security Agency 5325B East Cap St, SE 20019
Petzing, Ursula C.	New	Long & Foster Real Estate 2601 Conn Ave, NW 20008
Pratt, Yvonne	New	Riggs Bank 2000 M K L Ave, SE 20020
Proctor, Sandra Marie	Rpt	Library of Congress/EEOC 101 Indep Ave, SE 20540
Rai, Sandhya	New	Charles Schwab & Company 1845 K St, NW 20006
Reynolds, Cora J.	New	Edmund J. Flynn Company 5100 Wis Ave, NW#514 20016
Richards, Rosie W.	Rpt	CitiBank 5700 Conn Ave, NW 20015
Ridley, Mary L.	Rpt	Metroplex Corporation 512 G St, SW 20024
Ross, Jenise S.	New	Quality Trust 5335 Wis Ave, NW#825 20015
Runyan, Stephanie T.	New	Williams & Connolly 725 12 th St, NW 20005
Sabir-Peacher, Gwendolyn	Rpt	322 Emerson St, NW 20011
Samuels, Elizabeth I.	New	Banner & Witcoff 1001 G St, NW 11th Fl 20001
Scalley, Wendy Jo	New	Piper Rudnick 1200 19 th St, NW 20036

Scott, Sheilah D.	Rpt	Wash D C Assoc/Realtors 1818 N St,NW#T50 20036
Sebo, Cindy L.	New	Beta Court Reporters 910 17 th St,NW#200 20006
Smith, Josette C. Bailey	New	H U H/Faculty Practice 2041 Ga Ave,NW#4C02 20060
Snyder, Mary Jane S.	Rpt	London & Mead 1225 19 th St,NW#320 20036
Swann, Leah A.	New	Skipco Waterfront Prop 1614 20 th St,NW 20009
Sydnor, Mary L.	New	Riggs Bank 1348 4 th St,NE 20002
Terrell, Drucilla V.	Rpt	Treasury Dept F C U 701 Madison Pl,NW 20220
Thompson, Angela	Rpt	SIGAL Construction 3299 K St,NW#100 20007
Tompkins, Gail S.	New	D C Public Schools/H R 825 N Cap St,NE 20002
Troutman, Diane L.	Rpt	E O P Group 819 7 th St,NW 20001
Walcott, Donna	Rpt	Scott & Yallery-Arthur 7306 Ga Ave,NW 20012
Williams, Rosetta G.	New	Americans United... 518 C St,NE 20002
Winchester, Zelma	New	D C Public Schools/H R 825 N Cap St,NE 20002
Wyse, Philip G.	Rpt	Adams National Bank 50 Mass Ave,NE 20002

SECRETARY OF THE
DISTRICT OF COLUMBIAGOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE
OFFICE OF THE SECRETARY
OF THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20001

Memorandum Opinion

Petition of: Mary Horne

Matter No: MCU No. 434430

Date: February 22, 2005

Arnold R. Finlayson, Esq., Director, Office of Documents and Administrative Issuances, participated in the preparation of this decision.

MEMORANDUM OPINION

The above-captioned matter, brought under the District of Columbia Freedom of Information Act ("D.C.-FOIA"), D.C. Official Code §§ 2-531 et seq. (2001 and 2004 Supp.), is before the Secretary of the District of Columbia for administrative review in connection with a formal appeal to the Honorable Anthony A. Williams filed by Ms. Mary Horne (hereinafter the "appellant").

This appeal arises from the alleged failure of the Public Employee Relations Board ("PERB") to respond to a letter from the appellant which, citing the "Freedom of

Information Act of 1974,"¹ sought the disclosure of certain information regarding the dismissal of a petition for decertification of the labor union representing her collective bargaining unit.

The record on appeal indicates that, on or about May 28, 2004, the appellant filed a "Decertification Petition" with the PERB in a case captioned Mary Horne, et al. and AFSCME, 1199, DC Metropolitan District, DC, NUHHCE, Local 2095 and AFGE, Local 383 and D.C. Department of Mental Health, PERB Case No. 04-RD-01

By letter dated September 27, 2004, the Executive Director of PERB notified the appellant that her petition was being administratively dismissed because it did "not meet the thirty percent (30%) showing of interest required by Board Rule 505.3." Letter dated September 27, 2004 from J. A. Castillo to M. Horne.

Subsequently, by letter dated December 10, 2004, addressed to the attention of Julio Castillo, Director, the appellant submitted a "request that a copy of the documents

¹ The D.C.-FOIA, like the federal FOIA upon which it was modeled, was enacted in 1976 to divest government officials of broad discretion in determining what, if any, government records should be made available to the public upon the receipt of a request for information. See Subcommittee on Administrative Practice & Procedure of the Senate Committee on Judiciary, 95th Cong., 2d. Sess., *Freedom of Information: A Compilation of State Laws* (Comm.Print 1978).

or information which followed the decision that you, as Director of PERB, cited in your July 1, 2004 letter informing me that the Petition for Decertification which I submitted to PERB to decertify as exclusive representative of American Federal of State, County and Municipal Employees, AFL-CIO, AFSCME, Local 2095 by National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO . . . was deficient be provided me:" [sic]. Letter dated December 10, 2004 from M. Horne to PERB, Public Relations Employee Board, ATTN: Julio Castillo, Director.

The alleged failure of the PERB to respond to the appellant's December 10, 2004 request for information within the time limits prescribed in section 202 of the D.C.-FOIA resulted in the filing of the instant appeal pursuant to D.C. Official Code § 2-537(a) which provides that "[a]ny person denied the right to inspect a public record of a body may petition the Mayor to review the public record to determine whether it may be withheld from public inspection."²

² By Mayor's Order 97-177, dated October 9, 1997, the Secretary of the District of Columbia was delegated the authority vested in the Mayor to render final decisions on administrative appeals and petitions for review under the D.C.-FOIA.

Section 202 of the D.C.-FOIA, in pertinent part, provides:

(c) A public body, upon request reasonably describing any public record, shall within 10 days . . . of the receipt of any such request either make the requested public record accessible or notify the person making such request of its determination not to make the requested public record or any part thereof accessible and the reasons therefor.

D.C. Official Code § 2-532(c), as amended (emphasis added).

If a public body does not "comply with a request . . . within the time provisions [of the D.C.-FOIA]," the failure to timely respond on the part of the public body "shall be deemed a denial of the request, and the person making such request shall be deemed to have exhausted his [or her] administrative remedies with respect to such request, unless such person chooses to petition the Mayor . . . to review the deemed denial of the request." D.C. Official Code § 2-532(e) (emphasis added).³

³ In "unusual circumstances," a one-time, ten-day extension of the original ten-day time period for a response to an initial request may be taken by a public body upon written notice to the person who made the request which sets forth the reasons for such an extension and the anticipated date for a determination. D.C. Official Code § 2-532(d). For the purposes of the D.C.-FOIA, the term "unusual circumstances" is limited to the following situations:

- (1) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

In the present matter, the appellant elected to file a formal petition for review directly with the Mayor, instead of exercising her right to seek immediate judicial relief by initiating a civil action in the Superior Court of the District of Columbia.

The record before the Office of the Secretary indicates that the PERB has not responded to the appellant's December 10 2004 D.C.-FOIA request for records related to the dismissal of the appellants' Decertification Petition. Therefore, under section 202(e) of the D.C.-FOIA, the PERB has constructively denied the appellant's request for records. Accordingly, the appellant is entitled to an administrative order compelling the PERB to promptly respond to her D.C.-FOIA request.

DISPOSITION

For all the foregoing reasons, the appellant's appeal to the Mayor is sustained and this matter is remanded to the PERB for appropriate action in accordance with the

-
- (2) The need for consultation, which shall be conducted with all practicable speed, with another public body having a substantial interest in the determination of the request or among 2 or more components of the public body having a substantial subject matter interest therein.

Id.

requirements of 1 DCMR § 407 (June 2001), entitled "RESPONSES TO REQUESTS" and the specific instructions set forth below.

On remand, the PERB is directed to provide a written response to the appellant, with a courtesy copy to the Office of the Secretary of the District of Columbia and the Mayor's office (via the General Counsel to the Mayor), within seven (7) working days of the date of the receipt of this opinion. In preparing its response, the PERB shall fully comply with the specific instructions that follow:

1. If any requested records have been located and are available, the PERB shall notify the appellant as to where and when: (1) such records are available for inspection; or (2) copies will be provided or made available for copying. The notification shall advise the appellant of any fees for processing its D.C.-FOIA request, if applicable.
2. A response denying a written request for any record(s) shall be in writing and shall include the following information:
 - (a) The identity of each person responsible for the denial;
 - (b) A reference to the specific exemption or exemptions authorizing the withholding of the record(s) with (i) a brief explanation of how each exemption applies to the record(s) withheld and (ii) a statement of the public interest considerations which establish the need for withholding the record(s). Where more than one record has been requested and is being withheld, the foregoing information shall be provided for each record withheld;

- (c) After deletion of any reasonably segregable portion of a public record which may be withheld from disclosure, justification shall be explained fully in writing and the extent of the deletion shall be indicated on the record which is made available, unless that indication would harm an interest protected by any exemption under the D.C.-FOIA. If technically feasible, the extent of the deletion and the specific exemption(s) shall be indicated at the place in the record where the deletion was made;
- (d) If a requested record cannot be located from the information supplied or is known to have been destroyed or otherwise disposed of, the appellant shall be so notified; and
- (e) A statement of the appellant's appeal rights provided by the D.C.-FOIA, if applicable.

The PERB is further directed to provide a written certification to the Mayor within ten (10) working days indicating its compliance with this opinion or the reason(s) for noncompliance with any of the directives herein.

This Memorandum Opinion constitutes the formal disposition of the Secretary of the District of Columbia upon administrative review of this matter.

/s/

SHERRYL HOBBS NEWMAN
SECRETARY OF THE DISTRICT OF COLUMBIA

SECRETARY OF THE
DISTRICT OF COLUMBIAGOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE
OFFICE OF THE SECRETARY
OF THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20001

Final Decision

Appeal of: Yianni Pantis, Esq.

Matter No: MCU No. 417405

Date: April 6, 2005

Arnold R. Finlayson, Esq., Director, Office of Documents and Administrative Issuances, participated in the preparation of this decision.

INTRODUCTION

The above-captioned matter, commenced pursuant to section 207(a) of the District of Columbia Freedom of Information Act ("D.C.-FOIA"), D.C. Official Code § 2-537(a) (2001 and 2004 Supp.),¹ is before the Secretary of the District of Columbia for a final decision on the merits of the formal administrative appeal to Mayor Anthony A.

¹ Pursuant to section 207(a) of the D.C.-FOIA, "[a]ny person denied the right to inspect a public record of a public body *may petition the Mayor* to review the public record to determine whether it may be withheld from public inspection." D.C. Official Code § 2-537(a) (emphasis added).

Williams filed by Yianni Pantis, Esq. of the Law Office of Yianni Pantis ("Pantis").²

Pantis is appealing the alleged "denial by the Office of Tax and Revenue of [his] DC FOIA request dated April 15, 2004[.]" Appeal Letter page 1 ¶ 1.

BACKGROUND

Pantis is an attorney in private practice and a licensed real estate broker in the state of California.

The Real Property Tax Administration ("RPTA"), Office of Tax and Revenue ("OTR"), Office of the Chief Financial Officer, prepares, and makes available for sale to the public, real estate property tax maps of the District of Columbia.

RPTA claims a copyright in all of its real estate property maps and, upon the execution of a license agreement, grants licenses to, and collects royalties from, entities and individuals which authorizes them to market sell, publish or distribute the tax maps.³

² Pursuant to Mayor's Order 97-177, dated October 9, 1997, the Secretary of the District of Columbia was delegated the authority vested in the Mayor to render final decisions on appeals and petitions for review under the D.C.-FOIA.

³ Compilations of real estate property tax maps of parcels of land are often purchased from state and local governments for commercial purposes.

By letter dated April 15, 2004, Pantis made "a formal request under the District of Columbia Freedom of Information Act . . . for copies of all District of Columbia real estate tax maps and indices from the year 2000 until the present held or maintained by the Office of Tax and Revenue and/or its subdivisions, including, but not limited to, Real Property Tax Administration (the 'Tax Maps')." Letter dated April 15, 2004 from Y. Pantis, Esq. to A. Washington, Freedom of Information Officer, Office of Tax and Revenue.

Pantis, citing section 2-532(a-1) of the D.C.-FOIA,⁴ "specifically request[ed] that the Tax Maps be provided in electronic format maintained by the District of Columbia, on CD or DVD media." Id. (emphasis in original). Pantis further stated that "pursuant to Section 2-532(a-1) of the D.C. FOIA, [he was] prepared to pay the applicable costs of reproduction therefor." Id.

Apparently anticipating that OTR's response to his D.C.-FOIA request would be that it required the advance payment of prescribed fees for the reproduction of such maps, and claimed a valid copyright in its Tax Maps, the

⁴ D.C. Official Code § 2-532(a-1) provides that "[i]n making any record available to a person . . . a public body shall provide the record in any form or format requested by the person, provided that the person shall pay the costs of reproducing the record in that form or format."

commercial resale and distribution of which needed formal authorization by RPTA via a duly executed license agreement, Pantis' letter also contained the following caveat:

Please note that I will not agree to pay fees in excess of the applicable costs of reproduction or sign any license or similar agreement as a condition of disclosure.

Id. Pantis letter, preemptively, goes on to elaborate, in some detail, as follows:

Should the Office of Tax and Revenue and/or Real Property Tax Administration claim any copyright on the Tax Maps and require fees in excess of the applicable cost of reproduction and/or any sort of license or similar agreement in connection with the disclosure of the Tax Maps, I respond as follows:

- i. The Tax Maps are in the public domain and thus any claim of copyright is invalid.
- ii. Ignoring the validity of any claim of copyright, the Tax Maps are clearly "public records" under the DC FOIA and no exemption for copyrighted materials exists.
- iii. Apart from any claim of copyright, no other exemption exists for the Tax Maps. The exemption in Section 2-534(a)(1) of the DC FOIA is clearly inapplicable, as that applies to "Trade secrets and commercial or financial information obtained from outside the government. . . ."
- iv. Section 2-532(a-1) of the DC FOIA provides that "a public body shall provide the record in any form or format requested by the person, provided that the person shall pay the costs of reproducing the record in that form or format." Pursuant to the foregoing, a public body shall provide a public record upon payment of the applicable cost of reproduction. There is no

discretion or authority for a public body to require a requester (a) to pay any fees in excess of the costs of reproducing the record in the form or format requested or (b) to sign any license or similar agreement in connection with the public body's disclosure of the public record.

Id.

OTR's initial response to Pantis' D.C.-FOIA request came in an electronic mail ("e-mail") message from its FOIA Officer which, inter alia, informed him that "there is a \$15.00 charge for (each) tax map(s), etc., total count is between 4,500 to 5000 - the cost would be \$67,500." E-mail message dated April 29, 2004 from A. Washington, Federal State Coordinator/Paralegal/FOIA Officer, Office of the General Counsel, OTR, to yianni@pantislaw.com. The FOIA Officer's e-mail response further advised Pantis as follows:

Please see D.C. Code § 47-876 (2004).

§ 47-876. Cost for records and data; miscellaneous charges:

Provides in part - The Mayor may establish and collect costs related to the compilation and production of records, data, and maps in electronic media or tangible formats. The Mayor may also establish and collect charges, including royalties, pursuant to a contract, for goods and services and the licensing of intellectual property rights. Costs and charges under this section shall be deposited into the Recorder of Deeds Automation and Infrastructure Improvement Fund under § 42-1214.

Id. In a subsequent e-mail on the same day, OTR's FOIA Officer apprised Pantis that "you will not be getting a

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license to resell or distribute these materials unless you sign a license agreement with OTR." E-mail dated April 29, 2004 from A. Washington to Y. Pantis.

Dissatisfied with OTR's response to his D.C.-FOIA request, Pantis filed the present 10-page appeal to Mayor Anthony A. Williams.

On appeal, Pantis asserts that OTR's "response to [his] DC FOIA request is objectionable on two bases[:]

First, the quoted reproduction costs for the records well-exceed what OTR/RPTA may impose. . . . Second, the requirement that a license agreement be signed as a condition to receiving these records, along with its royalty provisions and various restrictions, is invalid as these records cannot be copyrighted, and such requirement is contrary to the DC FOIA."

Appeal Letter p. 2.⁵

Following a general overview of the legal principles underlying the D.C.-FOIA, this decision considers the propriety of the merits of Pantis' appeal to the Mayor.

DISCUSSION

⁵ Pantis' second objection raises copyright issues that are beyond the jurisdictional reach of this office under the D.C.-FOIA administrative appeals process. However, as discussed below, this office notes that in County of Suffolk, New York v. Experian Information Solutions, Inc., 261 F.3d 179, 183 (2nd Cir. 2001), the United States Court of Appeals for the Second Circuit held that the New York Freedom of Information Law "does not abrogate Suffolk County's copyrights" in its Real Property Tax Service Agency's original tax maps "and found that it [was] possible for Suffolk County to comply with its obligations under FOIL while preserving its rights under the Copyright Act."

General Overview of the D.C.-FOIA

The D.C.-FOIA, like the federal FOIA upon which it was modeled, was enacted in 1976 to divest government officials of broad discretion in determining what, if any, government records should be made available to the public upon the receipt of a request for information. See Subcommittee on Administrative Practice & Procedure of the Senate Committee on Judiciary, 95th Cong., 2d. Sess., *Freedom of Information: A Compilation of State Laws* (Comm. Print 1978); see also Washington Post v. Minority Business Opportunity Commission, 560 A.2d 517, 521 (D.C. 1989). In this regard, the D.C.-FOIA was "designed to promote the disclosure of information, not inhibit it." Id.

The D.C.-FOIA embodies "[t]he public policy of the District of Columbia . . . that all persons are entitled to full and complete disclosure of information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C. Official Code § 2-531; see Donahue v. Thomas, 618 A.2d 601, 602 n.2 (D.C. 1992); Newspapers, Inc. v. Metropolitan Police Department, 546 A.2d 990, 993 (D.C. 1988); Barry v. Washington Post Company, 529 A.2d 319, 321 (D.C. 1987).

In order to accord full force and effect to the spirit and intent of the D.C.-FOIA, officials of District of

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Columbia public bodies are required to construe its provisions "with the view toward expansion of public access and the minimization of costs and time delays to persons requesting information." D.C. Official Code § 2-531; see Washington Post, 560 A.2d at 521; Newspapers, Inc., 546 A.2d at 993. Thus, the policy underlying the D.C.-FOIA favors the broad disclosure of official records in the possession, custody or control of public bodies of the government of the District of Columbia, unless such records (or portions thereof) fall squarely within the purview of one or more of the eleven (11) categories of information which are expressly exempted from the disclosure mandate. See Washington Post, supra; Newspapers, Inc., supra. The statutory exemptions enumerated in the D.C.-FOIA, which protect certain types of confidential and/or privileged information from disclosure, "are to be construed narrowly, with ambiguities resolved in favor of disclosure." Washington Post, supra.

D.C.-FOIA's Broad Disclosure Mandate and Exemption Scheme

Keeping the above-enunciated principles in the general overview of the D.C.-FOIA in mind, section 202(a) of the D.C.-FOIA provides that "[a]ny person has [the] right to inspect, and at his or her discretion, to copy any public record of a public body, except as otherwise expressly

provided by § 2-534." D.C. Official Code § 2-532(a) (emphasis added).

Section § 2-534 of the D.C. Official Code, conspicuously entitled "**Exemptions from disclosure**," in turn, enumerates the eleven (11) categories of information which "may⁶ be exempt from disclosure under the provisions of [the D.C.-FOIA]." D.C. Official Code § 2-534(a)(1)-(11) (emphasis added).⁷ Furthermore, and particularly important, the delimiting language of section 534 makes it clear that the exemptions from disclosure enumerated in the D.C.-FOIA are exclusive in nature by explicitly stating "[t]his section does not authorize withholding of information or limit the availability of records to the

⁶ In the legal sense, the "use of the word 'may' in a statute ordinarily denotes discretion." In re Langon, 663 A.2d 1248 (D.C. 1995). Indeed, the federal FOIA has been interpreted by federal courts to permit agencies to make discretionary disclosures of records otherwise exempt under at least four of the exemptions to the federal FOIA. See Bartholdi Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997) ("FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information").

⁷ Taken together, sections 2-532(a) and 2-534 of the D.C. Official Code clearly mandate full disclosure of all public records maintained by District public bodies, to the extent that such records (or any reasonably segregable portions thereof), do not fall within the ambit of any of the statutory exemptions. See Barry v. Washington Post Co., 529 A.2d 319, 321 (D.C. 1987) ("The [D.C.-FOIA] provides for full disclosure unless the information requested is exempted under a specific statutory provision").

public, except as specifically stated in this section."

D.C. Official Code § 2-534(c) (emphasis added).⁸

As a threshold matter, the D.C.-FOIA requires the mandatory disclosure of "public records" not otherwise exempted from disclosure under D.C. Official Code § 2-534. The D.C.-FOIA is a part of the District of Columbia Administrative Procedure Act ("D.C.-APA") and the term "public record" has exactly the same meaning as defined in section 3 of the D.C.-APA. See D.C. Official Code § 2-539 (incorporating by reference the D.C.-APA's definition of public record).

According to section 3 of the D.C.-APA, "[t]he term 'public record' includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. *Public records include information stored in an electronic format.*" D.C. Official Code § 2-502(18)

⁸ This office has previously opined that, like the federal FOIA, the D.C.-FOIA's "statutory exemptions are intended to be exclusive" and, as such, they "cannot [be] enlarge[d] or extend[ed] . . . beyond the limits set by the [D.C.-FOIA]." *Appeal of Dan Keating, Database Editor, The Washington Post*, Matter No. FY0412, dated February 23, 2004, 51 DCR 2540, 2548 n. 4 (March 5, 2004) (quoting *FAA Administrator v. Robertson*, 422 U.S. 255, 262 (1975) (U.S. Supreme Court held that the federal FOIA's exemptions were "explicitly exclusive"))).

(emphasis added).

Based on the broad definition of "public record" contained in the D.C.-APA (and expressly incorporated into the D.C.-FOIA), it is patent that the Tax Maps sought by Pantis are "public records" and, as such, they are subject to the disclosure requirements of the D.C.-FOIA.

Having determined that the Tax Maps prepared by OTR were public records within the meaning of the D.C.-FOIA, the only relevant issue that remains for this office to address is whether OTR "has (1) 'improperly' (2) 'withheld' (3) '[public] records.'" United States Department of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989) (quoting Kissinger v. Reporters Committee for Freedom of Press, 445 U.S. 136, 150 (1980)).⁹ A public record is improperly withheld from disclosure by a public body if it does not fall within one or

⁹ There is a dearth of case authority from the District of Columbia Court of Appeals interpreting the provisions of the D.C.-FOIA and, in the few discoverable published opinions located during this office's research, none of them are relevant to the outcome of the present appeal. However, under circumstances where, as here, a "statute is borrowed extensively from a federal statute, as the D.C.-FOIA was from the federal Freedom of Information Act . . . the decisions of the (federal) court of last resort are normally adopted with the statute." Donahue v. Thomas, 618 A.2d 601, 602 n. 3 (D.C. 1992) (quoting Lenaetts v. District of Columbia Dep't of Employment Services, 545 A.2d 1234, 1238 n.9 (D.C. 1988)). Therefore, "except where the two acts differ . . . case law interpreting the federal FOIA [is] instructive authority with respect to our own Act." Washington Post, supra, 560 A.2d at 521 n.5.

more of the specific exemptions enumerated in the D.C.-FOIA. See Tax Analysts v. United States Department of Justice, 845 F.2d 1060, 1064 (D.C. Cir. 1988) (the "'refusal to release documents that are in [an] agency's 'custody' or 'control' for any reason other than those set forth in the Act's enumerated exceptions would constitute 'withholding.'"). In this regard, "[n]either an agency nor a court may impose its own additional criteria as to when disclosure is proper; the settled policy of the FOIA is one of 'full agency disclosure unless information is exempted under clearly delineated statutory language.'" Id. (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)).

In the instant matter, Pantis alleges that OTR improperly withheld copies of RPTA's Tax Maps based on the two (2) e-mails that he received from OTR's FOIA Officer which he has construed as the formal written denials of his D.C.-FOIA request.

With respect to the first e-mail, which Pantis has construed as a denial of his D.C.-FOIA request, he alleges that the fee of \$15.00 per Tax Map charged by OTR was excessive because "the quoted reproduction costs for the records requested *well-exceed* what OTR/RPTA may impose." Appeal Letter p. 2.

As regards the second e-mail, which informed Pantis

that he would not be granted a license to sell or distribute copies of RPTA's Tax Maps unless he executed a license agreement, Pantis alleges that the "requirement that a license agreement be signed as a condition to receiving these records, along with its royalty provisions and various restrictions, is invalid as these records cannot be copyrighted, and such requirement is contrary to the D.C.-FOIA." Id.

A review of the record on appeal before the Office of the Secretary reveals that OTR's FOIA Officer, in her e-mails to Pantis, neither invoked any of the D.C.-FOIA's exemptions from disclosure to withhold copies of the Tax Maps from disclosure to him, nor explicitly denied the subject D.C.-FOIA request, in whole or in part, for any reasons. Rather, the e-mails collectively inform Pantis that (1) based on OTR's fee schedule, payment guidelines and procedures, the estimated cost for the production of the Tax Maps would be \$67,500.00 (4,500 - 5,000 Maps @ \$15.00 each), and (2) Pantis would be required to execute a license agreement with RPTA *prior to being granted authorization to resale or distribute copies of the Tax Maps* he received from OTR for commercial purposes.

As to the latter of the aforesaid requirements, the Second Circuit's decision in County of Suffolk, New York,

supra, is instructive and compels this office to deny the portion of Pantis' appeal relating to the license agreement requirement.

In County of Suffolk, New York, a copyright infringement case, at issue was whether a subdivision of the New York government (i.e., Suffolk County), could protect its copyright interest in its official tax maps while complying with its information disclosure obligations under the New York Freedom of Information Law ("FOIL").

Suffolk County alleged that defendant First American Real Estate Solutions infringed upon its protected copyright in its official tax maps by publishing and marketing copies of them without obtaining authorization from the County via an executed license agreement.

During the course of reaching its decision, the Second Circuit made a couple of key observations which have some bearing on the legal implications arising from the post-disclosure requirement that Pantis obtain a license from OTR to use its official tax maps for commercial purposes.

First, the court recognized that the "FOIL does not explicitly address what a recipient may or may not do once it receives the agency records; it provides only that the state agency must make the records available for public inspection and copying." 261 F.3d at 192.

Second, the court observed that the "FOIL also does not prohibit a state agency from placing restrictions on how a record, if it were copyrighted, could be distributed." Id. (citing, as analogous, and quoting Weisberg v. United States Dep't of Justice, 631 F.2d 824, 828 (D.C. Cir. 1980) ("Deciding that copyrighted materials are subject to [the federal Freedom of Information Act ("FOIA")] however, does not resolve whether any particular FOIA request should be granted, and if so, under what terms"))).

The court then noted that "Suffolk County is not attempting to restrict *initial access* but is attempting to restrict only the *subsequent redistribution* of its copyrighted works."

Id.

In concluding that Suffolk County could preserve and enjoy copyright protection in its official tax maps while complying with its information disclosure obligations under FOIA, the Second Circuit rationalized that:

There is nothing inconsistent between fulfilling FOIL's goal of access and permitting a state agency to place reasonable restrictions on the redistribution of its copyrighted works. For an example, an agency's choice to notify the recipient that a portion of the record is protected by copyright law or an agency's requirement that the recipient enter into a licensing agreement if it wishes to distribute the record

commercially does not restrict initial access but only what the recipient may do once it acquires access.

Id.

The decision in County of Suffolk, New York is particularly relevant here because, like Suffolk County, OTR's responses to Pantis do not indicate that the *initial disclosure* of its Tax Maps to Pantis was being denied. Rather, the relevant e-mail, OTR's second one, on its face, may be reasonably construed as placing Pantis on explicit notice that if he intended to market, sell, or further distribute copies of the official tax maps for any commercial purposes after they are disclosed to him pursuant to his D.C.-FOIA request, he would need to enter into a license agreement with OTR.

Accordingly, the Secretary of the District of Columbia denies Pantis' appeal to the extent that it relates to OTR's notice to him of the post-disclosure conditions or restrictions on the commercial resale or distribution of the official tax maps of the District of Columbia.

Turning next to allegation regarding the amount of the estimated costs OTR has assessed for copies of the Tax Maps in the electronic format requested, Pantis proffers on appeal that "[a] cost of \$15.00 per map perhaps may have some relation to the actual cost of reproducing a map in paper

format, but has *absolutely no relation* to the actual cost of duplication of the requested records in electronic format." Appeal Letter p. 8 ¶ 1. According to Pantis, "it is much more time consuming and expensive to produce 5,000 paper copies of tax maps as opposed to the relatively simple and inexpensive process of copying computer disks (e.g., a CD or DVD) or moving the applicable files onto a computer disk." Id. Therefore, this office must consider whether the fees assessed by OTR were in excess of allowable charges prescribed by law, thereby resulting in a constructive denial of Pantis' D.C.-FOIA request. See Detroit Free Press v. Michigan Department of State (unpublished opinion), No. 188313, 1997 Mich. App. LEXIS 1652 (May 16, 1997) (state appellate court upheld trial judge's determination that an "exorbitant fee" an agency charged for copies of records resulted in the constructive denial of a FOIA request).

Two separate provisions appear to be relevant to the disposition of the quantum of fees issue, one of which is contained in the D.C.-FOIA, and the other is contained in regulations duly promulgated by OTR pursuant to its rulemaking authority.

According to the relevant D.C.-FOIA fee provision, which Pantis relies upon, "[in] making any record available to a person pursuant to this section, a public body shall

provide the record in any form or format requested by the person, provided that the person shall pay the costs of reproducing the record in that form or format." D.C. Official Code § 2-532(a-1) (emphasis added).

The D.C.-FOIA does not define the phrase "cost of reproducing" or any substantially similar term or phrase. However, the fee provisions of the regulations which implement the D.C.-FOIA appear to fill the gap. The D.C.-FOIA regulations, in pertinent part, provide:

When a response to a request requires services or materials for which no fee has been established, the direct cost of the services or materials to the government may be charged, but only if the requester has been notified of the cost before it is incurred.

1 DCMR § 408.2 (June 2001) (emphasis added).¹⁰

The aforesaid fee provision arguably applies in calculating the amount to be charged for reproducing copies of the subject Tax Maps requested by Pantis unless OTR has established fees for its rendering of services or materials incident thereto.

OTR, in fact, has prescribed a listing of fees for services or materials it provides which, inter alia, "cover

¹⁰ Neither the D.C.-FOIA or its implementing regulations define "direct cost." According to Black's Law Dictionary, a "direct cost" is "[t]he amount of money for material, labor, and overhead to produce a product." BLACK'S LAW DICTIONARY 349 (7th ed. 1999).

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all mailings associated with service functions for which a user charge is assessed." 9 DCMR § 336.1. In relevant part, OTR's regulations provide for the collection of the following fees:

<u>DESCRIPTION OF SERVICE</u>	<u>FEE</u>
Mailing/User Charge	
Certificate of Good Tax Standing	\$15.00
Computer photocopying of Real or Personal Property Data	*
Computer [Printout] of Real or Personal Property	*
Computer Tape of Real or Personal Property Data	*
Lot and Square Map	\$2.00 each
Mailing	\$1.00/mailing
Transcript of Property [Tax] Bill	\$3.50

- * Estimates will be provided prior to service delivery on a request by request basis and will be based on the personnel cost of individual(s) to be assigned the job and other than personnel service cost, i.e., computer and supply usage.

Notice of Final Rulemaking published at 48 DCR 10040, 10041 (November 2, 2001). OTR's regulations establishing certain prescribed "Fees" for services and materials were promulgated pursuant to the Notice and Comment requirements of the District of Columbia Administrative Procedure Act and have the full force and effect of law. See Davis v. Moore, 772 A.2d 204, 216 (D.C. 2001) ("administrative regulations that are validly promulgated pursuant to statutory authority have the force and effect of statutes[.]").

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Based on the record evidence, the undersigned is unable to render an informed decision on the merits of Pantis' allegation that OTR's estimation of the cost for producing 4,500 to 5,000 Tax Maps in electronic format was in excess of what the law requires because it is unclear as to whether OTR determined its fee of \$15.00 per Tax Map pursuant to its regulations at 9 DCMR § 336.1 or by calculating the cost of reproduction (including direct costs) mandated by the D.C.-FOIA.

Because it appears from the record that Pantis did not raise the issue regarding the amount of the estimated cost for electronic copies of the Tax Maps with OTR in the first instance, it is necessary to remand this matter to OTR for further consideration regarding the propriety of an assessment of \$15.00 per Tax Map.

CONCLUSION

For all of the foregoing reasons, the present appeal is denied or dismissed, in part, with respect to Pantis' objection to OTR's conditions or restrictions on the subsequent distribution of its Tax Maps following initial disclosure, and remanded to OTR with instructions for it to determine whether grounds for reconsideration exists in connection with the fees assessed for copies of its official Tax Maps.

OTR shall within seven (7) working days of this decision, provide a written response to the Office of the Secretary with a copy to Pantis.

OTR is further directed to submit a written certification to the Mayor (with a courtesy copy to the undersigned's office, that indicates whether it has complied with the requirements of this final decision or any reason(s) as to why it has not complied with the directives herein.

This constitutes the final decision of the Secretary of the District of Columbia upon administrative review of this matter.

/s/

SHERRYL HOBBS NEWMAN
SECRETARY OF THE DISTRICT OF COLUMBIA

WASHINGTON CONVENTION CENTER AUTHORITY
ADVISORY COMMITTEE

MEETING NOTICE

Chairperson Carmencita R. Kinsey, Chairman of the Washington Convention Center Authority Advisory Committee (WCCAAC), hereby amends the time of the regularly scheduled monthly meeting on Thursday, April 21, 2005, as follows:

EXECUTIVE SESSION	5:00 PM — 5:45 PM
PUBLIC SESSION	5:50 PM — Adjournment

The WCCAAC Public Session will retain its usual format to include the Citizens Participation portion of the meeting. Individuals wishing to make comments, but unable to attend the Public Session, may call the Washington Convention Center Authority 24-hour Community Hotline at (202) 249-3200.

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

Appeal No. 16982 of J. Brendan Herron Jr. and ANC 3F, pursuant to §§ 3100 and 3101 of the Zoning Regulations, from the administrative decision of the Department of Consumer and Regulatory Affairs ("DCRA" or "Appellee") in the issuance of building permit Nos. B446312, and B446316, issued on June 13, 2002, to Zuckerman Brothers, Inc. ("Property Owner"), allowing the construction of two single family dwellings at 2900 and 2902 Albemarle Street, N.W. ("Property"), and from the administrative decision to allow the subdivision of the Property on April 17, 2002.

HEARING DATE: March 4, 2003
DECISION DATE: March 11, 2003

DECISION AND ORDER

J. Brendan Herron Jr. filed an appeal with the Board of Zoning Adjustment ("Board" or "BZA") on December 14, 2002. ANC 3F later joined in the appeal. Mr. Herron and ANC 3F will be collectively referred to as the "Appellants." They appeal an October 23, 2002 decision of David Clark, the then Director of DCRA, as that decision relates to the building permits¹ issued on June 13, 2002, for the Property, as well as the subdivision of the Property.

Appellants allege that DCRA erred because it did not process the building permits in accordance with the Forest Hills Tree and Slope Protection Overlay ("FHTSP" or "Overlay"). Because the building permit applications were filed before the Zoning Commission decided to "set down" the Overlay for hearing, 11 DCMR §3202.5 (a) ("set down rule") would ordinarily allow the permits to be processed in accordance with the zoning in place as of the date of application. However, Appellants' claim that the building permit applications were incomplete and therefore, under the same rule, must be processed under the more restrictive zoning designation proposed to be set down. Appellants contend that the development on each newly subdivided lot was noncompliant with the FHTSP provisions.

Appellants also assert that the subdivision of the Property created lots that were not in conformance with the side yard requirements of 11 DCMR § 405.9, and therefore was in violation of 11 DCMR § 410.6(c). The Appellants allege that the error occurred as a

¹ The Board must first clear up an inconsistency resulting from the information filed by Appellants. Appellant Herron listed permits "B446310", "B446312" and "B44316" in his initial filing for this appeal. Appellant Herron incorrectly identified permit B446316 as "B44316" in this filing, omitting the first number 6. In Appellants' statement filed on December 19, 2002, Appellants referenced only permits B446312 and B446316. At the hearing, Appellants withdrew their appeal of the raze permit B446310 (Hearing Transcript at 152). In light of the above, the Board has determined that this appeal concerns building permits B446312 and B446316.

result of DCRA's failure to consider the existing house on the Property at the time of the subdivision.

Lastly, Appellants allege that a statutorily required 30-days notice to the ANC of a pending permit application was not given to ANC 3F for the permits at issue. Section 8 of the Zoning Act of 1938 limits the Board's jurisdiction alleged errors that are made "in the administration or enforcement of the Zoning Regulations." D.C. Official Code § 6-601.07 (2001). A failure to provide ANC notice in this context stems from § 13(b) of the Advisory Neighborhood Commissions Act of 1975, effective October 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-309.10(b) (2001)), not the Zoning Regulations. Therefore, only the first two grounds are considered to be properly before the Board and the portion of the appeal regarding notice to the ANC is dismissed.

Representing ANC 3F in this appeal were David J. Bardin and Cathy Wiss. Appellant Herron represented himself. Appellee was represented by Laura Gisolfi Gilbert, DCRA, and Brenda Walls, Office of the Corporation Counsel (now the Office of the Attorney General for the District of Columbia). The Property Owner, Zuckerman Brothers Inc., was represented by John Epting, from the law firm of Shaw Pittman.

The Property Owner filed a Motion for Leave to Intervene and Dismiss for lack of jurisdiction based on timeliness on January 9, 2003. He was granted leave to intervene as a preliminary matter on the day in which the hearing was scheduled.

The Property Owner also filed a Motion to Schedule Hearing on Motion to Dismiss and Postpone Public Hearing on Merits. On the day of the scheduled hearing for this case, this motion was withdrawn.

Appellants' Opposition to the Property Owner's Motion for Leave to Intervene and Dismiss was received on February 20, 2003.

On February 24, 2003, the Property Owner also submitted a Motion to Dismiss for Failure to Comply with the Requirements of 11 DCMR § 3110 *et seq.* In that Motion, Property Owner argued that Appellants failed to adhere to the filing requirements of § 3112.10 when filing their pre-hearing statement and Opposition to Motion for Leave to Intervene and Dismiss. The pre-hearing statement was filed on February 12, 2003, only twelve days before the scheduled hearing, two days beyond the limited established in § 3112.10. However, Appellants did send a letter on the date that the filing was due stating their delay and explaining that a snowstorm prevented easy communication between the two Appellants, and that Appellants therefore had difficulty submitting the pre-hearing statement on time. The Board therefore determined that Appellants met their burden of proof to establish good cause, pursuant to 11 DCMR § 3110.4, and the pre-hearing statement was accepted into the record. As to the Appellants' Opposition to Motion for Leave to Intervene and Dismiss, there is no provision establishing the timeliness of such

a submission. Subsection 3112.10 does not apply to motions or oppositions thereto. Therefore, the Property Owner's motion was considered on this point and denied.

After hearing from all parties on the Property Owner's Motion to Dismiss for lack of jurisdiction, the Board granted the motion and dismissed the remainder of the appeal at its March 11, 2003, public meeting. The Board therefore does not address the Appellants' arguments regarding the merits of the case.

Notice of Appeal and Notice of Public Hearing. By memoranda dated January 6, 2003, the Office of Zoning advised the Zoning Administrator, the Office of the Corporation Counsel, the Property Owner, ANC 3F, the ANC for the area within which the property is located, the ANC Commissioner for the affected Single-Member District, the affected Ward Councilmember, and the D.C. Office of Planning, of the appeal.

Pursuant to 11 DCMR § 3113.14, the Office of Zoning, on January 9, 2003, mailed to the Appellant, the Zoning Administrator, ANC 3F, and the Property Owner's counsel, notice of hearing. Notice of Public Hearing was also published in the *D.C. Register* on January 17, 2003, at 50 DCR 547.

ANC Report. The ANC, being a party to this appeal, did not submit a report to the BZA. A report to the Board of Appeals and Review ("BAR")² was submitted, but, because it only addressed the proceeding before the BAR, it was not given great weight.

Hearing and Decision. On March 11, 2003, the Board voted to grant the Property Owner's motion to dismiss the appeal based upon timeliness, by a vote of 3 to 1.

FINDINGS OF FACT

1. The Property is Lot 9 in Square 2043, with an address of 2900 and 2902 Albemarle Street, N.W.
2. Appellant J. Brendan Herron Jr. lives across the street from the Property.
3. ANC 3F is the ANC in which the Property is located.
4. On April 5, 2002, the Property Owner applied to DCRA to subdivide the Property into two lots.
5. The Property Owner applied for raze permit B446310 on March 1, 2002, and for building permits B446312 and B446316 on April 4, 2002.

²The BAR's responsibilities have since been transferred to the Office of Administrative Hearings, but at all times relevant to this case the BAR was in existence. Therefore, the term "BAR" is used herein.

6. On April 17, 2002, DCRA granted the Property Owner's application to subdivide the Property.
7. Appellants knew of the subdivision on or around the time it was approved by DCRA.
8. The subdivision bisected an existing house on the Property.
9. On April 19, 2002, the Zoning Commission set down for a hearing the Forest Hills Tree and Slope Protection Overlay. Pursuant to 11 DCMR § 3202.5, applications for building permits filed prior to a Commission decision to hear a zoning map change are processed under existing zoning controls provided that the application is "sufficiently complete to permit processing without substantial change or deviation". Incomplete applications and applications filed after a "set down" decision is made are processed "only in accordance with the zone district classification of the site pursuant to the final decision of the Zoning Commission in the proceeding, or in accordance with the most restrictive zone district classification being considered for the site".
10. Appellants allege that the proposed Overlay's geographic area includes the Property that the building permit application was incomplete, and that, therefore, the application should have been processed as if the provisions of the proposed Overlay were in effect. This, presumably, would have made the proposed buildings or lots noncompliant.³
11. Appellant Herron requested copies of the subdivision application from DCRA on April 22, 2002.
12. During April and May of 2002, Appellants submitted letters and emails to DCRA expressing their concerns regarding the building permit applications for the Property.
13. The ANC 3F resolution dated April 29, 2002, indicated that several neighbors had reviewed building plans for the Property and had objections to those plans.
14. By email dated May 9, 2002, Theresa Lewis, Deputy Director for Operations, DCRA, informed Phil Cogan, from ANC 3F, that DCRA would "withhold issuance of the building permits until June 3, 2002, to allow [the ANC] time to fully review the information submitted."

³ Section 3202.5 does not by its terms apply to the processing of subdivision applications.

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15. On May 28, 2002, Theresa Lewis met with Appellant Herron and representatives of Appellant ANC 3F to discuss Appellants' concerns regarding the building permits for the Property.
16. On June 11, 2002, Theresa Lewis sent Appellants a letter (Property Owner's Exhibit L) informing them that the subject permits would be issued on June 12, 2002. The letter also discussed the subdivision plan for the Property.
17. Permit B446310, for the razing of an existing structure, and permits B446312 and B446316, for construction of two single-family dwellings, were issued on June 13, 2002.
18. On June 20, 2002, Steven Sher of the law firm of Holland and Knight, on behalf of the Property Owner, mailed a letter to Appellants and neighboring property owners, informing them that the subject permits had been issued. (Property Owner's exhibit N).
19. By email dated July 2, 2002, Appellant Herron asked DCRA whether he was correct in his understanding that Building Code issues may be appealed to the BAR and issues related to the "zoning code" may be appealed to the BZA.
20. By email dated July 19, DCRA's Customer Services Advocate, stated, in response to Appellant Herron's July 2, 2002 email, that the procedures for appealing building permits were in DCMR Title 12A, Section 122, (Appellants' exhibit A-5). A copy of that section was attached to the email. Nothing was stated in the email regarding zoning issues.
21. Title 12A, D.C. Building Code Supplement, Section 122, Subsection 122.2 reads as follows:

Appeal to Board of Appeals and Review: The owner of a building or structure or any other person may appeal to the D.C. Board of Appeals and Review for a final decision of the code official. The appeal shall specify that the true intent of the Construction Codes or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of the Construction Codes do not fully apply, or an equally good or better form of construction can be used.

Section 122 does not discuss appeals related to the Zoning Regulations nor does it mention the Board of Zoning Adjustment.

22. On July 3, 2002, Appellant Herron appealed the issuance of the building permits to the BAR, pursuant to § 122.2 of the Building Code Supplement. In his

submission to the BAR, Appellant Herron included, in addition to building code issues, a brief discussion of the § 3202.5 zoning issue.

23. On July 3, 2002, Appellant Herron sent a letter to David A. Clark, then the DCRA Director, asking that the issues outlined in the BAR complaint be reviewed.
24. On July 9 and October 18, 2002, David A. Clark sent Appellant Herron letters that indicated that DCRA would respond to his request to overturn the building permits. (Appellants' exhibits A-6 and A-7). These letters, however, did not indicate that DCRA would review the merits of Appellant Herron's request.
25. Appellant Herron sent a copy of the BAR appeal to DCRA, on or around the time of filing, asking that they "reconsider and/or follow their own appeal process regarding the issuance of these permits" and requesting that they issue a stop work order. (Property Owner's exhibit P).
26. Appellant Herron's brief to the BAR referenced the May 9, 2002, email exchange between Appellant Herron and Theresa Lewis, DCRA. Appellant Herron informed the BAR that he disagreed with Ms. Lewis' contention therein that the FHTSP did not apply to the permit applications.
27. On July 18, 2002, the Property Owner filed a motion with the BAR to dismiss the zoning issues from the BAR appeal on the grounds that the BZA, and not the BAR, had jurisdiction to hear an appeal involving such subject matter. (Property Owner's exhibit Q). Appellant Herron received this motion by first class mail.
28. In response to the July 18, 2002, motion to the BAR, Appellant Herron, on August 1, 2002, countered that his appeal was of building code issues and was therefore properly before the BAR. (Property Owner's exhibit R at 3).
29. On July 18, 2003, Appellant Herron received the following documents: copies of the subject permits, the subdivision record from the Office of Tax and Revenue, copies of the corresponding amended permit applications, and other supporting documents and plans (other than the storm water management plans). (Appellants' Opposition to Motion to Dismiss).
30. On or around July 18, 2002, Appellant Herron received a copy of the subdivision application, which included the proposed lot lines drawn on the application but did not depict the existing house, which the Property Owner intended to raze. (Transcript at 186).
31. Appellant Herron mailed a letter dated October 11, 2002, to Gregory Love, then the Administrator of the Building and Land Regulation Administration, and David

A Clark, DCRA Director, asking for a stay, a stop work order, or to vacate the permits for the Property. Appellant Herron's letter alleges various building code violations related to the subject permits and that the Zoning Regulations were improperly applied because the FHTSP should have been given effect pursuant to the requirements of § 3202.5. In that letter, Appellant Herron does not go so far as to allege a violation of the FHTSP in the issuance of the building permits, but merely states that the permit applications should not have been allowed to proceed.

32. DCRA Director Clark stated on October 23, 2002, in a letter to Appellant Herron, that, after considering all the correspondence submitted, including the July 3 and October 11 letters, the permits in question "were correctly issued and [DCRA] stands by its decision issuing the [permits]. Therefore, your request for a stay of the permits, stop work order or order to revoke permits B446310, B44[6]316 and B446312 is hereby formally denied by DCRA."
33. A decision by the BAR on the Property Owner's motion to dismiss was mailed to Appellant Herron on October 29, 2002. The BAR's Order stated that the BAR did not have jurisdiction over the zoning issues raised in the appeal.
34. By letter dated November 20, 2002, DCRA's General Counsel's Office stated that 11 DCMR § 3202.5 was not violated by accepting the subject building permit applications.
35. On November 25, 2002, the Property Owner began razing the existing structure.
36. Appellants filed this appeal with the Board of Zoning Adjustment on December 14, 2002.

CONCLUSIONS OF LAW

The Property Owner, in its Motion to Dismiss, argued that the Board lacks jurisdiction to hear this appeal because it was not timely filed by Appellant.

At the time the events giving rise to this appeal transpired, the Zoning Regulations did not specify a particular number of days within which a decision had to be appealed to the Board. The Board and the courts had long applied a standard of reasonableness, which required appeals to be brought within a "reasonable" period of time in order to invoke the appellate jurisdiction of the Board. The "reasonableness" of the timing of an appeal had historically been judged on a case-by-case basis depending on the circumstances and factors that caused the delay.

In *Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117, 1122 (D.C. 2001), the Court of Appeals re-affirmed that the Board lacks jurisdiction to consider an appeal which is not timely filed and articulated a test for timeliness:

[e]xperience teaches that in the ordinary scheme of things, two months is ample time in which to decide whether to seek appellate review and act accordingly. At least in the absence of *exceptional circumstances substantially impairing the ability of an aggrieved party to appeal—circumstances outside the party's control*—we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness.⁴

(Emphasis added.) If actual notice was not given, “the time for filing the appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of.” *Id.*

As a threshold matter, the Board must determine what is the “decision complained of”. Appellant asserts that it is the October 23, 2002 letter from the Director of DCRA. That position is supported by recent Board precedent.

Thus in *Appeal No. 16764 of Darryl J. Grinstead*, 49 DCR 5227 (2002), the Board determined that it had jurisdiction to hear an appeal from a DCRA letter affirming a previous decision, made seven months earlier, to issue a building permit. There, DCRA had clearly stated in the letter that it had re-reviewed the zoning issue and the errors alleged, and after this more thorough review, found no violation. The Board found that this letter represented another decision from which an appeal could be taken, the first being the decision to issue the building permit.

In *Appeal of Robert Lehrman*, BZA No. 16849, 50 DCR 4055, (2003), the Board sought to narrow the *Grinstead* precedent. In *Lehrman* the appellant received a letter from DCRA rejecting assertions that DCRA had violated the Zoning Regulations. This letter represented the first decisions on the issues raised. Then, after continued attempts to resolve the dispute, an additional DCRA letter was sent. Because the second letter merely reaffirmed the first decision, and did not actually represent a more thorough review of the issues raised, the Board held that only the first letter gave rise to an appeal

⁴This standard was later codified in Zoning Commission Order No. 02-01, published together with a notice of final rulemaking in the *D.C. Register* on February 9, 200, at 50 DCR 1200. The Order amends subsection 3112.2 of the Zoning Regulations.

In the instant case, the October 23, 2003 letter from DCRA stated that, after considering all the correspondence submitted, the permits in question “were correctly issued and [DCRA] stands by its decision issuing the [permits].” The October 23 letter was therefore akin to the letter in *Grinstead* in that it reconsidered the initial decision, and represented that action was taken beyond that which was represented to have been taken in the second letters in *Lehrman*.

This appeal was filed less than sixty days after the October 23 letter. Therefore, if the Board followed *Grinstead* in this case, it would have no choice but to allow this appeal of a second determination (contained in the October 23, 2003, letter) regarding the same underlying zoning issue, but purporting to contain a more thorough review of that issue.

The Board is convinced that it must go beyond limiting the *Grinstead* precedent, and overrule it. The Board does not find it in the interests of judicial economy or fairness to allow an appeal of a second or subsequent determination on the same basic issue, which can come months or years after the initial determination, at a point where the permittee has progressed beyond mere preparation. Such a subsequent determination should not “re-start” the 60-day time period. If such “re-starting” were allowed, there would be no certainty for a permittee, whose project could be halted at any point by an appeal of a subsequent affirmation of the initial permit issuance decision. The permittee might have such affirmative defenses as laches and estoppel available to it,⁵ but the Board cannot countenance creating such uncertainty and forcing the parties to come before it at such a late date. Nor can it be said that the permit holder proceeds at its own risk, since it may not even know that a potential appellant has written to DCRA. And because there are no DCRA rules establishing a timeframe for this process, a permit holder may never know when it is safe to proceed.

The *Lehrman* decision only compounded the uncertainty. The distinction between a “mere affirmation” and a “more thorough review” letter puts a potential appellant in an untenable position, since a potential appellant cannot know which type of letter will issue, or even if a letter will be issued at all. Indeed, in this case, Appellant Herron’s July 2002 letter was not responded to until after he wrote a second letter in October. A potential appellant who lets the 60-day appeal period expire in the hopes of receiving a DCRA response to a letter, may end up getting non-appealable “mere affirmation,” or no letter at all. In either case their right to appeal would be lost.

In *Grinstead*, the Board stated that it needed to recognize the right of appeal of a second determination in order to allow DCRA “the opportunity to correct its errors internally

⁵An estoppel defenses, however, does not lie against a party other than the municipality which issued the permit. See, e.g., *Rafferty v. District of Columbia Zoning Commission*, 583 A.2d 169, 176 (D.C. 1990). (“[I]t is not clear that estoppel will bar a case brought by a neighboring landowner; arguably that defense may be asserted only against the municipality which rendered the decision on which a party relied.”)

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before the appeal process begins – an opportunity that promotes administrative efficiency, the prompt correction of errors, and the resolution of disputes.” *Grinstead*, 49 DCR at 5237. The Board still recognizes that DCRA should have an opportunity to correct alleged errors, but notes that there is nothing preventing a potential appellant from filing a timely appeal before the BZA while continuing to try to resolve any issues with DCRA. The fact that a potential appellant is working with DCRA to resolve issues does not “substantially impair” the ability of that potential appellant to appeal to the BZA.

For the rules to be applied fairly the timeframe for the appeal must be clear to all concerned and the starting point for this timeframe must be definite. The facts in this appeal demonstrate that the *Grinstead* and *Lehrman* precedents accomplished the very opposite and are therefore overruled.

The Board thus holds that when an appeal challenges the grant or denial of a building permit or subdivision, no subsequent communication from DCRA may be appealed, including, but not limited to, a refusal to issue a stop work order or take other enforcement actions. Obviously a DCRA decision to reverse its position (*i.e.* the revocation of a building permit) may be appealed. Although this holding specifically addressed whether the 60-day appeal timeframe established in *Waste Management* may be re-started by a subsequent DCRA communication, its analysis is equally applicable to appeals governed by the codification of the *Waste Management* ruling that is now found in section 3112.2 of the Board’s Rules of Practice and Procedure.

The *Grinstead* appeal was decided by the Board in December 2001, but not published in the *D.C. Register* until June 7, 2002; almost two months after the subdivision was granted and four days after the building permits were issued. Therefore, for most of the period between the decisions complained of and the filing of this appeal, *Grinstead* was good law.

In *Smith v. District of Columbia Bd. of Zoning Adjustment*, 342 A.2d 356, 359 (D.C. 1975), the Court of Appeals, though noting that the Board is “not bound for all time by its prior positions”, remanded the appeal back to the Board because it failed to explain why its reversal of its past rulings and Zoning Administrator interpretation should be applied retroactively.

In *Appeal of Southeast Citizens for Smart Development, Inc., and ANC 6B*, BZA No. 16791, 49 DCR 6607 (2002), also involving a retroactive application of a holding, the Board noted that:

The Court of Appeals has outlined a number of factors to be considered in determining whether to apply a new rule of law retroactively in a pending case or prospectively only, including:

- (1) The extent of reliance by the parties on the previous rule;
- (2) The need to avoid any alteration of property or contract rights;
- (3) The policy of rewarding plaintiffs who seek to initiate just changes in the law; and
- (4) The desire to avoid unduly burdening the administration of justice with retroactive changes in the law.

French v. District of Columbia Bd. of Zoning Adjustment, 658 A.2d 1023, 1031 (D.C. 1995). Any reliance must be reasonable to avoid retroactive application of the new interpretation. *Id.*

Id. at 6632.

Unlike the permit holders in *Smith*, there is nothing in the record to suggest that the Appellants either knew of or relied upon this particular Board precedent. Indeed, Appellant Herron contended throughout the BAR proceeding that the BZA appeals process, including its timeliness rule and precedent, were irrelevant. The Board will therefore analyze the timeliness of the appeal starting from the dates that the Appellants' knew or should have known of the decisions to grant the subdivision and issue the building permits.

As to that issue there is no real dispute. Appellants concede that they knew of the grant of the subdivision on or about April 17, 2002, the day on which it was approved. (FF 6 and 7) The Appellants were informed by DCRA that the building permits would issue after June 12, 2002 (FF 16) and were advised of their June 13th issuance in a letter sent June 20, 2002. (FF 18). Assuming three days for mailing, the Board finds that the Appellants had notice of the issuance of the building permits on or about June 23, 2002. The Appeal was not filed until December 14, 2002, more than sixty days after Appellants were chargeable with notice of the decisions complained of. Therefore, under the *Waste Management* test, the Board must now consider whether Appellants have demonstrated "exceptional circumstances substantially impairing the ability ... to appeal—circumstances outside the party's control." Since the subdivision decision was made at a different time than the building permits decision, two distinct timeframes for appeal exist, each of which must be separately examined to determine whether exceptional circumstances arose within the sixty day period following notice.

As to the building permits, Appellant Herron claims that DCRA failure to furnish documentation hindered his ability to file a timely BZA appeal. Yet, even without such information, he was able to appeal these same permits, on the same zoning grounds, to the BAR on July 3, 2002, well within the 60-day period. Mr. Herron's BAR appeal thus

disproves his claim that DCRA's unresponsiveness constituted an exceptional circumstance.

Mr. Herron also claims that he filed the BAR appeal in reliance upon a DCRA communication, which delayed his appeal to the Board. To prove this, Mr. Herron points to an email from a DCRA Customer Services Advocate that responded to his request for verification that zoning issues are appealed to the BZA and building code issues to the BAR. This email merely provided Appellant Herron with the provision governing appeals of the "Construction Code," which directed a person to appeal building code issues to the BAR. Nothing in that provision covered appeals of administrative decisions of the Zoning Regulations. If anything, the omitted reference should have convinced Mr. Herron that his understanding of the BZA's role was correct. At worst, the response was ambiguous and could not have reasonably been relied upon one way or the other.

The Court of Appeals decision in *Felicity's Inc. v DCRA*, 817 A.2d 825 (D.C. 2003), cited by Appellants, is easily distinguished. In *Felicity's*, the Court of Appeals allowed an appeal to the BZA after the appellant was directed to the BAR in an Administrative Law Judge's final written order. The direction was unequivocal and contained in the very document that would be the subject of the appeal. Here, the communication neither instructed Mr. Herron to appeal erroneous zoning interpretations to the BAR nor constituted a document of any legal standing. Whereas *Felicity's* reliance was understandable, Mr. Herron's claimed reliance was not.

Even if the DCRA communication could be viewed as an exceptional circumstance, its relevance vanished on July 18, 2002, when the Property Owner filed a motion with the BAR stating that the BAR had no jurisdiction over zoning issues. Appellant Herron was served with this motion and could have timely appealed his zoning issues to the BZA thereafter. Instead, he responded on August 1, 2002, still within the 60-day time period for filing an appeal with the BZA, and asserted that all aspects of the appeal were properly before the BAR. From this point on, Mr. Herron was relying upon nothing other than his own misinterpretation of the law.

The appeal with regard to the issuance of Building Permits B446312, and B446316 should have been filed within 60-days of their June 13, 2002 issuance date. Because this aspect of the appeal was not filed until December 14, 2002, it is untimely.

With respect to the subdivision decision, Appellant Herron requested copies of the subdivision plans on April 22, 2002, but did not receive subdivision plans until July 18th of that year. However, it would not require plans or any other documents to determine the particular violation alleged. Appellant Herron lives across the street from the property. He undoubtedly noticed that a house still stood on it when he learned that the lot was subdivided and that therefore the line separating the new lots almost certainly would pass through the building. In any event, the Appellants clearly should have known

of the alleged violation when they received the building plans for the Property on July 18, 2002 and a copy of the subdivision application on or around that time, both of which delineated the new lot lines. While what Appellants received did not depict the still-standing house, it would have been relatively easy to determine where the house generally stood in relation to those lines. At most this would permit the extension of the time for filing the subdivision appeal to the end of July, but not to mid-December.

Therefore, the appeal regarding the decision to grant the application to subdivide the Property should have been filed within 60-days of the April 17, 2002, subdivision issuance date. Because the appeal was not filed until December 14, 2002, it is also untimely as to the subdivision.

It is therefore **ORDERED** that the **MOTION TO DISMISS** be **GRANTED**, and this appeal be **DISMISSED** for lack of jurisdiction.

VOTE: 4-0-1 (Geoffrey H. Griffis, Curtis L. Etherly, Jr., David A. Zaidain and James Hannaham, by proxy, to grant Owner's Motion and dismiss the appeal, Anne M. Renshaw opposed to the motion)

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

Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: APR - 7 2005

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT.

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

Application No. 16601-A of NJA Development Partners, L.P./Daniel and Mary Loughran Foundation, Inc., pursuant to 11 DCMR §§3104.1 and 3103.2, for a special exception, under §411.11 of the Zoning Regulations, to allow multiple roof structures not meeting the normal setback requirements, for a variance from the requirement of §1709 to use Transferable Development Rights (TDRs), and for a variance from the residential recreation space requirements of §773.3. The requested relief is necessary to permit the construction of a 14-story apartment house and hotel in the C-3-C District in Square 741, located at the intersections of New Jersey Avenue, K Street, L Street and 2nd Street, S.E. (Square 741, lot 37, formerly known as Lots 7, 8, 13, 14, 16-18, 20-36, 801, 803, 804, 807-809, and a public alley to be closed)

HEARING DATE:	September 19, 2000
DECISION DATE:	September 26, 2000
FINAL DATE OF ORDER:	December 13, 2000
MODIFICATION ORDER DECISION DATE:	April 5, 2005

**ORDER ON MOTION TO MODIFY APPLICATION
AND DELETE CONDITION NO. 5**

By Order dated December 13, 2000, this Board approved Application No. 16601 to allow the construction of a fourteen story apartment house and hotel in the C-3-C District which is in the Capitol South Receiving Zone. The property that is the subject of the Application is in Square 741, bounded by New Jersey Avenue and 2nd, K and L Streets, S.E. At the time of the approval, the property was known as Lots 7, 8, 13, 14, 16-18, 20-36, 801, 803, 804, 807-809, and a public alley to be closed. The property is now a single record lot, Lot 37. The relief approved by the Board was a special exception under §411.11 to allow multiple roof structures not meeting the normal setback requirements, a variance from the requirements of §1709 to use transferable development rights (TDRs) and a variance from the residential recreation space requirements of §773.3.

The Board's approval included ten conditions. The conditions were based on the recommendations of the Office of Planning (OP) and the Advisory Neighborhood Commission. Condition No. 5, derived from the OP recommendation, requires the Applicant to "reserve at least 20% for the total number of apartment units for affordable housing for a minimum of 20 years subject to the terms and conditions of an agreement with DCHFA and its bond financing."

The current owners of the subject property, NJA Development Housing LLC and NJA Hotel LLC, the successors in interest to the original applicants, filed a Motion on March 22, 2005, requesting the Board to modify the relief granted in the application and to eliminate Condition No. 5. The relief would be modified to eliminate the request for a variance from §1709 and to delete the requirement that twenty percent of the residential units be for affordable housing. The Motion argued that Condition No. 5 was a quid pro quo for the TDR variance and since the TDR variance was not pursued, the condition is no longer relevant.

The current owners requested that, if necessary, the Board waive the requirements of §3129 of the rules, which requires that a motion for modification of plans be filed within six months of the date of the Board's order. In this case, the developer sought clarification from the Zoning Administrator that, since the development had not availed itself of the relief granted from §1709 and the wording of Condition No. 5 was keyed to the financing obtained from the DCHFA, Condition No. 5 no longer applied. The Zoning Administrator determined that the developer should seek an Order from the Board addressing the situation and the subject Motion was filed thereafter. The Board finds that the facts set forth above constitute good cause for waiving the rules to allow consideration of the Motion.

The Board received no comment on the Motion from Advisory Neighborhood Commission 6D, the ANC within which the property is presently located.

Based upon the Motion and the facts recited therein, the Board concludes that the Applicant has met its burden for modifying the Application and requesting deletion of Condition No. 5. Conditions imposed by the Board must be reasonably related to the relief sought. Given that the application as amended no longer requires a variance from §1709, the condition related to the approval of that relief is no longer relevant or appropriate. It is therefore **ORDERED** that the application be **AMENDED** to delete the variance granted from §1709 and that Condition No. 5 of BZA Order No. 16601, dated December 13, 2000, be **DELETED**. All the other conditions of BZA Order No. 16601 shall remain in effect.

VOTE: **4-0-1** (Geoffrey H. Griffis, John A. Mann, II, Ruthanne G. Miller and Curtis L. Etherly, Jr., having read the record and in favor of the motion; the Zoning Commission member not participating, not voting)

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

Each concurring member has approved the issuance of this Order.

FINAL DATE OF ORDER: April 7, 2005

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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 § 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.

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 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. 17134-A of V. Jerome Walker, pursuant to 11 DCMR § 3104.1, for a special exception to allow the construction of a two story rear enclosed porch addition to a single-family row dwelling under section 223, not meeting the lot occupancy requirements (section 403), rear yard (section 404) and open court requirements (section 406) in the R-4 District at premises 163 Adams Street, N.W. (Square 3125, Lot 15).

HEARING DATE: March 23, 2004
DECISION DATE: March 23, 2004 (Bench Decision)
**MODIFICATION
DECISION DATE:** April 5, 2005

DISPOSITION: By Order No. 17134, dated March 24, 2004, the Board granted Application No. 17134 by a vote of 4-0-1 (Geoffrey H. Griffis, Ruthanne G. Miller, Anthony J. Hood and John A. Mann II, Curtis L. Etherly, Jr. not present not voting).

MODIFICATION ORDER

By Motion Form 150, received by the Office of Zoning on March 28, 2005, the Applicant submitted a request that the Board approve a minor modification to the approved plans in the subject application. The motion was served by the Applicant on the Office of Planning and Advisory Neighborhood Commission 5C, the parties involved in the application. The Applicant requested that the Board grant an approximately 30 inch reduction in the approved plan's rear yard depth. The modification will allow a change in the size of the rear porch from 7 ft.- 4 inches by 14 ft. to 10 ft. by 16 ft. (See Scope of Work – Exhibit 33).

THE WAIVER REQUEST

As part of its filing, the Applicant requested a waiver from the six month limitation for filing requests for modification of plans with the Board, as set forth in §3129.3 of the Zoning Regulations. The six month period for seeking a modification is out of consonance with the two year period provided in §3130 for filing an application for a building permit. The Board granted the waiver of the six month filing requirement to consider the requested modification, finding good cause and no prejudice to any party.

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THE MODIFICATION

In Order No. 17134, the Board of Zoning Adjustment (Board) granted a special exception allowing the construction of a two story rear enclosed porch addition to a single-family row dwelling under section 223, not meeting the lot occupancy requirements (section 403), rear yard (section 404) and open court requirements (section 406). Based on this approval the Applicant applied for and was subsequently issued a building permit from the Department of Consumer and Regulatory Affairs. Construction of the porch addition commenced. Well into the construction it was discovered that the actual rear yard depth is approximately 30 inches less than approved by the Board.

DECISION

The Board concludes that the requested modification is minor and is within the requirements of §3129, as "minor modifications] that do not change the material facts the Board relied upon in approving the application." After reviewing the request for modification and the supporting materials, the Board determined that the request should be granted.

Accordingly, it is therefore hereby **ORDERED** that the motion for waiver of the rules to consider the request is granted and that the motion for modification of plans in Exhibit 33 (noted in the scope of work) of the record is **GRANTED**.

DATE OF DECISION: April 5, 2005

VOTE: 3-0-2 (Geoffrey H. Griffis, John A. Mann II, and Ruthanne G. Miller to approve, Curtis L. Etherly, Jr. and the Zoning Commission member not present, not voting)

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

Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: APR 07 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

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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 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. 17211 of the National Broadcasting Corporation, pursuant to 11 DCMR 3104.1, for a special exception under section 211 to permit the continued operation of a commercial broadcasting tower in an R-1-B District at premises 4001 Nebraska Avenue, N.W. (Square 1722, Lot 1).

HEARING DATE: October 26, 2004
DECISION DATE: December 7, 2004

DECISION AND ORDER

On June 29, 2004, the National Broadcasting Company (NBC or the applicant), filed an application with the Board of Zoning Adjustment (Board) pursuant to 11 DCMR § 3104.1, for a special exception to permit the continued operation of a broadcasting tower pursuant to Section 211 of the Zoning Regulations at 4001 Nebraska Avenue, NW. (Lot 1, Square 1722). Following a public hearing on October 26, 2004, the Board voted to approve the application at a decision meeting held on December 7, 2004.

PRELIMINARY MATTERS

Self-Certification The zoning relief requested in this case was self-certified pursuant to 11 DCMR § 3113.2 (Exhibit 6).

Notice of Public Hearing Pursuant to 11 DCMR 3113.3, notice of the hearing was sent to the applicant, all entities owning property with 200 feet of the applicant's site, the Advisory Neighborhood Commission (ANC) 3E, and the Office of Planning (OP). The applicant posted placards at the property regarding the application and public hearing and submitted an affidavit to the Board to this effect (Exhibit 23).

ANC 3E The subject site is located within the area served by Advisory Neighborhood Commission 3E (3E or the ANC), which is automatically a party to this application. The ANC filed a report indicating that at a public meeting on October 14, 2004, with a quorum present, the ANC unanimously voted "not to oppose" the application (Exhibit 20).

Request for Party Status The Board received a request for party status (Exhibit 26) from ANC 3C, (3C or ANC 3C), a neighboring ANC whose area covers the McLean Gardens complex and borders the subject site to the east. The Board granted party status to ANC 3C as an affected ANC due to its proximity to the site. The Board also noted in its consideration that ANC3C had participated as a party in the original special application and that the abutting ANC 3C residential property may possibly be uniquely impacted by the change in slope between the ANC's coverage area and the site.

ANC 3C in its Resolution No. 2004-027 stated that "ANC 3C does not support the special exception application because it finds that the existence of the two towers is a more visible presence than is the presence of one tower; that the height of the old tower is greater than what is necessary given that the old tower is not used for NBC transmissions, and what is provided on the old tower for NBC use could be moved to the new tower, and thus, there is no necessity as described in 11 DCMR 211 for the continued use of the tower."

Government Report Submissions

Office of Planning (OP) Report. OP filed a report supporting the continued use of the 1955 tower, subject to specific conditions: (1) that the applicant maintain the muted gray color of the tower; and (2) that the applicant continue to meet with representatives from ANC 3E and 3C (Exhibit 25). OP also recommended that the special exception approval be limited to two years. However, OP's representative withdrew this last recommendation during testimony at the public hearing.

National Park Service Report The National Park Service recommended approval of the application, subject to two conditions: (1) that the applicant maintain the 1955 tower in a muted gray color, and (2) that the applicant convey a scenic easement to the Park Service.

FINDINGS OF FACT

Background

1. Beginning in 1955, the Board of Zoning Adjustment (the Board) granted permission to the National Broadcasting Corporation (NBC) to operate a broadcast studio office building with an antenna tower and parking. (Appeal No. 4159, Public Hearing June 1, 1955)
2. After the initial 1955 approval, NBC filed a series of applications with the Board and was granted permission to make various changes at the site, including permission to replace the original 1955 tower with a newer larger tower. (See, BZA Appeal No. 5494, Public Hearing May 20, 1959, BZA Appeal No. 8234, Public Hearing June 16, 1965, Appeal No. 10120, dated November 16, 1969, BZA Order 12539, dated March 7, 1978, BZA Order 13222, dated July 28, 1980, and BZA Order 13554, dated November 25, 1981)
3. NBC constructed a new tower in 1988 but also continued to use the original 1955 tower. Because the 1955 tower was to have been replaced under the terms of the 1981 Board order, NBC applied to the Board in 1992 for permission to continue the use of the 1955 tower.
4. The Board held public hearings on the application and voted in February 1993 to allow the 1955 tower to continue. However, the Board did not issue its written decision until December 1994, by which time three of the four-member majority had been out of

office for over a year because their terms had expired. An appeal was brought to the District of Columbia Court of Appeals based in part on this procedural defect. The Board then requested the Court to remand the case so its current Board members could consider NBC's application on the merits. The Court granted the Board's motion and issued an order remanding the application to the Board for further proceedings.

5. The Board conducted further proceedings on remand from the Court. Based upon its review of the record, the Board adopted the substance of the previous decision and order, approving the continued use of the 1955 tower until December 1, 2004 (BZA Order 15708-A of the National Broadcasting Company, dated January 21, 2004, 51 DC REG 1285).

6. This application was filed in June, 2004 to permit the continued use of the 1955 tower upon the expiration of the Board's 2004 order.

The Property and Surrounding Area

7. The property is located on the east side of Nebraska Avenue between Massachusetts Avenue to the south and Upton Street to the north, and is known as premises 4001 Nebraska Avenue, N.W. It is zoned R-1-B.

8. The site consists of 315,810 square feet or 7.25 acres in land area. It has 60 feet of street frontage on Nebraska Avenue. It is shaped somewhat like a baseball diamond. Vehicular access for the site is from a 310-foot long driveway from Nebraska Avenue. The site is improved with a three-story commercial broadcasting facility, two broadcasting towers – the 1955 tower and the tower constructed in 1988 -- and 172 on-site parking spaces.

9. The site is surrounded by a number of institutional uses. The U.S. Department of Homeland Security offices are located to the south of the site. The National Presbyterian Church headquarters and school facilities are located to the immediate north of the site. To the east of the site is Glover-Archbold Park followed by property in the C-3-A district and the McLean Gardens residential development in the R-5-A district fronting on Wisconsin Avenue.

The Special Exception Application

10. The two antenna towers are set back from the lot lines to conform to the Zoning Regulations, and are set back a distance of approximately 600 feet from Nebraska Avenue and approximately 200 feet from Glover-Archbold Park.

11. The 1955 tower is approximately 30 feet from the 1988 tower at the closest point. Each part of the ground mounted antenna tower is set back a minimum of 10 feet from each lot line or a distance of at least 1/6 of the antenna height. The 1955 tower – approximately 700 feet from the nearest residence -- is not within close proximity to the neighboring residential properties.

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12. Visibility of the 1955 tower is minimized as a result of the generous setbacks, landscaping and existing vegetation on the site, and the fact that the site abuts Glover-Archibold Park. The muted grey painting of the tower, endorsed by the National Park Service, helps the tower blend with the skyline.

13. The 1955 tower has an approximate height of 459 feet, a height which is 200 feet lower than the 1988 antenna tower. This height was approved by the District government during the 1955 permit process under the Act to Regulate the Height of Buildings in the District of Columbia (36 Stat. 452, as amended; D.C. Official Code §§ 6-601.01 through 6-601.09). The height has had no impact on the use of neighboring properties.

14. Antenna space on the 1955 tower is leased by several tenants who use the tower along with NBC. These tenants currently include the DC Police Department, the Fairfax County Police Department, the DC Friendship Fire Association, the Federal Radio Service Corporation, and Univision, a Spanish language television broadcaster (See, Exhibit 10). Each of the tenants needs the tower space to provide its own broadcasting or communication service. (See, Exhibit 37, also tabs E, F, G and H appended thereto.)

15. The Board finds that the leasing of tower space is a key economic consideration in the construction, maintenance and continued use of broadcast towers. The leasing of broadcast towers in the DC region is a common practice, marked by a few towers with a number of tenants transmitting and broadcasting from each tower (See Regional Tower Inventory, appended as tab A to Exhibit 37).

16. The Board credits statements by the applicant and OP that the District of Columbia has a policy favoring the co-location of antennas.

17. The Board also credits the applicant's testimony that a continuation the 1955 tower, with tenants, is needed for NBC's operational and economic viability.

18. The Board accepts OP's finding that the larger 1988 tower would require a substantial height increase to support the tenant users who are currently located at the 1955 tower.

19. During prior proceedings the Board found the height of the 1955 tower to be reasonably necessary to render satisfactory service. The Board finds that this is still the case; NBC and the tenant users need the existing tower space to render satisfactory service.

20. Continuation of the 1955 tower will not result in adverse impacts to the community with respect to increased density or traffic. The commercialization of the site will not be increased by a continuation of the 1955 tower and will not result in an increase in office space, number of employees, vehicular and pedestrian traffic or the establishment of other commercial uses on the site.

21. Continuation of the 1955 tower will not result in adverse impacts on the neighborhood stemming from the electromagnetic effects of the tower. Antennas located on the tower are licensed by the Federal Communications Commission (FCC), and the applicant has certified to the FCC that the site complies with the maximum permissible radiofrequency electromagnetic exposure limits under applicable federal law.

22. Robert Denny, Jr., the applicant's radio frequency engineer, submitted a report indicating that the radiofrequency radiation exposure limits are within the maximum permissible exposure limits allowed under federal law and industry standards (Exhibit 28). The Board accepts the findings and conclusions contained in Mr. Denny's expert report.

CONCLUSIONS OF LAW

The Board is authorized under the Zoning Act of June 20, 1938 (52 Stat. 797, as amended, D.C. Code § 6-641.07(g)(2) (2001), to grant special exceptions as provided in the Zoning Regulations. The applicant applied under 11 DCMR § 3104.1 for a special exception pursuant to 11 DCMR § 211 to permit the continued use of the 1955 tower at its broadcast studio facility.

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

The applicant has established that the continuation of the 1955 antenna tower is in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps. The broadcast facility and tower has been operating at the site since 1955 and has been subject to periodic special exception reviews since that time. During this time period the tower has been compatible with the surrounding neighborhood, and there is no evidence to suggest that it would be incompatible with the neighborhood in the future.

Likewise, the tower has not adversely affected the use of neighboring properties in the past; and, there is no evidence to suggest that its continued use would adversely affect the neighborhood in the future.

The applicant claims that the Board is preempted under federal law from considering the potential effects of radio frequency emissions. Because this issue is not disputed by any of the parties, the Board need not reach this question. Based upon the record, however, the Board notes that the emissions standards under federal law have been met and there is no reason to believe that there will be any adverse effects on surrounding properties or the public as a result of the radio frequency emissions.

BZA APPLICATION NO. 17211
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Under Section 211.1 of the Zoning Regulations, the Board may permit the use of commercial broadcast antenna subject to the following provisions:

211.2 The proposed location, height, and other characteristics of the antenna shall not adversely affect the use of neighboring property. Because the 1955 tower is set back from lot lines substantially more than required under the Zoning Regulations and is also set back from neighboring residential properties, its location does not adversely affect the use of neighboring properties. The height of the 1955 tower, only 459 feet, is 200 feet less than the 1988 tower and less than the tower that was never built but was previously approved. The comparatively low height of the existing tower has had no impact on the use of neighboring properties (See, Finding of Fact 13).

211.3 The antenna shall be mounted in a location that minimizes to the greatest practical degree its visibility from neighboring property and from adjacent public space, or that is appropriately screened by landscaping or other techniques so as to soften or minimize the visibility of the antenna. Because of its muted gray color, the generous setbacks, and the landscaping at the site, visibility of the tower is minimized (See, Finding of Fact 12).

211.4 Each part of a ground-mounted commercial broadcast antenna, including support system and guy wires, shall be removed a minimum of ten feet (10 ft.) from each lot line or at a distance of at least one-sixth of the mounted height of the antenna, whichever is greater. This condition is met (See, Finding of Fact 11).

211.5 The proposed height of the tower shall not exceed that which is reasonably necessary to render satisfactory service to all parts of its service area. The height of the tower is necessary to support the required coverage area for the communication services supported by the tower. As explained in the Findings of Fact, several tenants occupy and use the tower as well as NBC. In addition to providing revenue to NBC, each of the tenants requires antenna space in order to meet its own broadcast needs. Thus, not only is the height required to sustain NBC's continued economic viability, the height is required to support the coverage needs for other broadcast users.

211.6 No transmission equipment shall be located in a Residence District, unless location in the district is necessary for technically satisfactory and reasonably economical transmission. The 1955 tower is not only necessary for technically satisfactory and economic transmission; it is needed for NBC's operational and economic viability (See, Finding of Fact 17). In addition, as explained above, the 1955 tower is critical to the broadcast needs of several other tenant users (Findings of Fact 14 - 19).

211.7 If review by the Historic Preservation Review Board or Commission of Fine Arts is required, concept review and approval shall occur before review by the Board of Zoning Adjustment. This review is not required. Therefore, this condition is inapplicable.

211.8 No height of an antenna tower in excess of that permitted by the Act to Regulate the Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452,

as amended; D.C. Official code §§ 6-601.01 to 6-601.09 (formerly codified at D.C. Code §§ 5-401 through 5-409 (1994 Repl. & 1999 Supp.)), shall be permitted, unless the height is approved by the Mayor. The height of the 1955 tower was approved by the District government¹ during the 1955 permit process (See, Finding of Fact 13).

211.9 Before taking final action on an application for use as an antenna tower, the Board shall submit the application to the D.C. Office of Planning for review and report. The Office of Planning (OP) reviewed the application and submitted a report recommending approval.

211.10 The applicant shall have the burden of demonstrating the need for the proposed height, and that full compliance with matter-of-right standards would be unduly restrictive, prohibitively costly, or unreasonable. Matter of right standards would permit only one ground mounted antenna not to exceed a height of 12 feet at its highest point (See, Sections 201.2—201.5 of the Zoning Regulations). Since 1955, when the subject tower was first approved and built, the Board has recognized that compliance with the matter-of-right standard would be unduly restrictive and unreasonable. The applicant has not only demonstrated the need for the existing 459 feet tower, it has previously demonstrated the need for a tower with greater height, i.e., the 659 feet 1988 tower. The Board is persuaded that the applicant has satisfied its burden of demonstrating the continued need for the existing 459 feet tower.

For the reasons stated above, the Board concludes that the applicant has satisfied the burden of proof with respect to the application for a special exception under § 211 to allow the continued use of the 1955 tower in a residential zone.

The ANC Issues and Concerns

The Board is required under Section 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; now codified at D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. To give great weight the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns."The "great weight" requirement pertains "only to the written recommendations of the ANC" and not to its oral testimony." *Neighbors United for a Safer Community v. District of Columbia Board of Zoning Adjustment*, 647 A2d. 793, [insert page #], 1994, citing *Friendship Neighborhood Coalition v. District of Columbia Board of Zoning Adjustment*, 403 A.2d 291, 295 (D.C. 1979). Further, the "written recommendations" to which great weight is afforded are those described in § 1-309.10(d)(1)- i.e. those considered at a duly noticed public meeting in accordance with the requirements set forth in § 1-309.10. These requirements are incorporated and specifically set forth in the zoning regulations at 11 DCMR 3115.1

¹ The District of Columbia did not have a mayor at that time. Height approval was obtained from the Commissioners of the District of Columbia instead.

In this case, there are two affected ANCs, ANC 3E and ANC 3C. The Board has carefully considered the reports made by each ANC. ANC 3E submitted a written recommendation that met the requirements for great weight indicating that at a duly noted public meeting the ANC voted 3-0 not to oppose the application for special exception. The report raises no issues or concerns for the Board to address. ANC 3C also submitted a written resolution that met the requirements for great weight. ANC 3C's written report raises issues and concerns in its resolution not to support the application for special exception, which the Board addresses herein:

The Tower's Visibility

The ANC claims that § 211.3, which requires, in relevant part, that the antenna be mounted in a location that minimizes its visibility from neighboring property, is not satisfied because the 1955 and 1988 towers together constitute a more visible presence together than would the 1988 tower alone. While the 1955 tower, by necessity, is visible, the Board finds that its visibility has been minimized. The tower is more than 700 feet from the nearest residence, is not readily visible from the public space at grade, is adequately screened by landscaping and vegetation, and blends in with the skyline due to its muted grey color. In addition, the Board specifically explored this issue at the hearing in light of ANC 3C's concerns. The Office of Planning, to which this Board is also required to give great weight, definitively stated that the alternative to these two towers would have been one taller tower which would have been more visually egregious. OP also stated in its written report that the proposed 1988 tower that would have replaced the 1955 tower would have been taller and "would have had a negative impact on the visual aesthetic and character of the neighborhood" and that the two towers together have less impact on the skyline than the one tower alone would have. (OP Report at 8)

The Board agrees with the Office of Planning that one tower in place of the two towers would more negatively impact the skyline as well as the character of the neighborhood, and accordingly, does not find the argument of ANC 3C persuasive.

Necessity of Height The ANC asserts that NBC does not need the full height of the 1955 tower to meet its service needs under § 211.5. It claims that the language of this subsection does not encompass the service needs of tenant users and limits Board review to the service needs of the applicant. The ANC further asserts that the tenant users could meet their service needs by locating at the 1988 tower.

First, the Board does not agree that the plain meaning of § 211.5 supports the ANC's interpretation. Section 211.5 of the Regulations states: "The proposed height of the tower shall not exceed that which is reasonably necessary to render satisfactory service to all parts of its service area (emphasis supplied)." The ANC contends that the word "its" refers to the applicant's service area. However, the Board finds otherwise. The words "applicant" and "owner" are conspicuously absent from the regulatory language. The Board concludes that the word "its" refers to the service area of all of tenants of the tower. Although this particular tower happens to be owned by one of its users, that may not always be the case. See, e.g. *Appeal of American Towers*, BZA No. 16990, 50 D.C. REG. 5421 (2003). For the Board to accept the ANC's interpretation

would be to establish a *de facto* prohibition against non-broadcasters owning transmission facilities intended to serve the needs of area radio and television stations. The Board finds no reason to believe that the Zoning Regulation intend such a restriction, particularly in view of the preemption and commerce clause consideration implicated.

Second, such a narrow reading of this provision would be a departure from Board precedent. In a previous case the Board construed this criterion to include the coverage needs of a tower user that was neither the owner nor the applicant. In Application No. 13524, the DC Police Department sought to increase the height of its tower to allow Channel 50 to broadcast from it (See, Tab C, appended to Exhibit 37). Rather than limiting its review to the service needs of the applicant, the Board evaluated the coverage needs of Channel 50 when it determined that the proposed height was reasonably necessary to render satisfactory service.

Third the ANC's interpretation is inconsistent with the District's policy in favor of co-location. Following the ANC's approach would result in no co-location at all because only the applicant's service needs could be taken into account.

Consistency with the Comprehensive Plan

Councilmember Phil Mendelson appeared as a person in opposition to the application.² In addition to sharing the same arguments as the ANC, addressed above, Councilmember Mendelson and ANC 3C argued that granting the application would be inconsistent with the Comprehensive Plan. In particular, they argued that granting the application would violate the public policy to limit the intrusion of antenna towers into the skyline and that the Board should exercise "prudent avoidance" in its decision in accordance with Sections 411 and 1403.13 (e) of the Comprehensive Plan.

The District Elements of the Comprehensive Plan provide guidance for executive and legislative decisions affecting the District and its residents. D.C. Code Section 1-301. 62. (a) (3)(b)(2). Pursuant to Section 112.6 (a) and (b) the Board shall look to the elements for general policy guidance, and to the extent they are relevant, consider the objectives and policies, in its consideration of a special exception or variance.

As set forth above, the Board specifically evaluated the question of the intrusion of the antenna tower on the skyline and the neighborhood and agreed with the Office of Planning that the two towers have less negative impact than would the alternative one tower. In addition, the Board considered this issue with respect to the regulatory findings it must make to grant this application, particularly Section 211.3 regarding the location and screening of the antenna tower.

Section 411 of the Environmental Element and Section 1403.13(e) of the Ward 3 Plan state that District officials must incorporate "prudent avoidance" in their decision making

² Councilmember Mendelson stated that he was testifying as a resident of McLean Gardens, and therefore as someone who lives near the antenna towers, as a former ANC 3C commissioner who was active in the case ten (10) years ago, and as an at-large councilmember.

with respect to "the approval, location, and routing , and the intensity of electromagnetic field (EMF) generating facilities such as generators, power lines , and antennas; and, that facilities should be located only when and where necessary based on the local service needs of property owners, and facilities should be designed using methods to mitigate, to the greatest extent practicable, involuntary exposures to the public and adverse effects on park land, public space and private property.

In evaluating this application under Section 211 of the Zoning Regulations, this Board has considered these factors and agrees with the Office of Planning that the continuation of the antenna tower that has been in the location since 1955 is consistent with the District's policy of encouraging co-location of antennas on structures to diminish the adverse impact of antennas at various locations and is beneficial to the public good.³

The Board further concludes that, as hereinafter conditioned, the special exception can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map and that the granting of the requested relief will not tend to adversely affect the use of neighboring property in accordance with the regulations and map. It is therefore **ORDERED** that the application is **GRANTED, SUBJECT** to the following **CONDITIONS**:

1. The applicant shall continue to maintain a Community Liaison/Advisory Council which shall meet with neighborhood representatives upon the request of Advisory Neighborhood Commissions 3E and 3C. The applicant's General Manager or his/her designee(s) shall provide any relevant information about their operations upon request, including but not limited to information regarding use of the broadcast towers, real property improvements, parking and traffic issues, or community outreach efforts. The applicant shall also provide upon request information regarding its intentions to seek any licenses or approvals required by any agencies of the Federal or District or Columbia governments regarding station operations.
2. The applicant shall maintain the 1955 tower in a muted gray color to help minimize its visibility.
3. The applicant shall record the deed of easement granted to the National Park Service within 6 months of the final date of this Decision and Order.

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and John G. Parsons, in favor of the motion, none opposed.)

³ ZC Order 01-02: Text Amendment -Regulation of Antennas, Antenna Towers and Monopoles February 24, 2003. 3118 DCR March 19, 2004.

FINAL DATE OF ORDER: April 7, 2005

BZA APPLICATION NO. 17211

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

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

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 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.

17211 NBC ORDER

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

Application No. 17241 of Thomas and Dana McLarty III, pursuant to 11 DCMR § 3103.2, for a variance from the maximum height and number of stories requirements under § 404, a variance from the side yard requirements under § 405, and a variance from the nonconforming structure provisions under § 2001.3, to allow a rear addition to a single-family dwelling in the R-1-B zone at premises 1824 24th Street, N.W. (Square 2506, Lot 45).

HEARING DATE: November 23, 2004
DECISION DATE: November 23, 2004 (Bench Decision)

DECISION AND ORDER

Thomas and Dana McClarty, the owner of the subject premises (the owner or the applicant), filed this application for variance relief with the Board of Zoning Adjustment (the Board) on July 18, 2004. 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 November 23, 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) 2D, and the District of Columbia Office of Planning (OP). The applicant posted placards at the property¹ regarding the application and public hearing and submitted an affidavit to the Board to this effect (Exhibit 27).

Self-Certification The zoning relief requested was self-certified, pursuant to 11 DCMR § 3113.2 (Exhibit 2).

Applicant's Case The Applicant is seeking to construct a fourth floor above a portion of the existing third floor. The new addition would be used as a study. Gladys Hicks, zoning consultant, presented the case with testimony from applicant's architect. Applicant seeks a variance to provide more work space in the home.

OP Report OP reviewed the variance application and prepared a written report recommending that the Board deny the variance relief (Exhibit 28). OP found that there was no unique condition of the property which necessitated the variance, nor any practical difficulty which would result from denial of the variance. While OP found that

¹ The property was not posted for the 15 days required under 11 DCMR 3113.14. However, the Board waived this requirement upon finding that actual notice had been provided.

granting the variance would have no significant impact on the public good, it also concluded that granting the variance would impair the intent of the zone plan.

ANC Report In its report dated November 11, 2004, ANC 2D indicated that it voted to support the variance relief requested (Exhibit 26). The report did not indicate that proper notice was given, what the exact vote was, or whether a quorum was present. Nor did it identify any specific issues or concerns that relate to the standards within the Zoning Regulations.

Request for Party Status The Board received a request for party status (Exhibit 25) from neighboring property owner, Murray Drabkin, whose request was granted over the objection of the applicant. Mr. Drabkin maintained that allowing the proposed addition would destroy the unity of a row of historic townhouses and obstruct the skyline.

Persons in Support of the Application. The Board received letters in support from other nearby property owners.

FINDINGS OF FACT

The Property

1. The subject property is located at 1824 24th Street, NW in the R-1-B zone. It is improved with a four story single-family semi-detached townhouse that was built prior to May 12, 1958, the effective date of the Zoning Regulations.
2. The dwelling is part of a row of town homes that share roof heights with others in a row.
3. Nearly every building on the street frontage of the subject property is of similar bulk and height with a four-story front half and a three-story rear half.
4. The immediate area consists mainly of three and four story single-family and diplomatic uses. Many of the buildings in the area are "overbuilt" for the R-1-B zone that was applied after construction.

The Requested Relief

5. The applicant proposes to construct a one story addition to the rear of the dwelling by extending the fourth story by approximately 350 square feet. The addition would be built on the back of the house over the existing three-story portion. The applicant also proposes a 74 square foot deck over the remainder of the third story.

BZA APPLICATION NO. 17241

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6. The maximum height allowed under the Zoning Regulations is three stories and forty feet. Although a portion of the existing dwelling is four stories and more than forty-four feet in height, the proposed addition and deck would extend this non-conformity.
7. The minimum side yard requirement under the Zoning Regulations is 8 feet. Although the existing dwelling has no side yard setback on the north or south walls, the proposed addition and deck would also extend this non-conformity.

CONCLUSIONS OF LAW

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799, as amended; D.C. Official Code § 6-641.07(g)(3) (2001), to grant variances from the strict application of the Zoning Regulations. The applicant here seeks relief from these requirements.

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).

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

1. Uniqueness The applicant has not demonstrated that there are any conditions that are unique to the property that necessitate the variance. The applicant alleges that the property is unique because: (1) it is a semi-detached dwelling in what is now a detached dwelling zone, and (2) it is four stories tall in a zone that has a three story maximum. However, neither of these characteristics is unique to this property. As stated in the Findings of Fact, the subject dwelling is one of a row of semi-detached townhomes, and many of the dwellings along the street are overbuilt with four stories in front and three stories in the rear.

The applicant argues that all of the buildings in the area are unique because they are all overbuilt. By definition, applicant's building cannot be unique if it is like all of the buildings in the area. A finding of uniqueness is justified where the extraordinary or exceptional condition uniquely affects a piece of property. See *Capitol Hill Restoration Society v. BZA*, 534 A.2d 939 (1987). Moreover, the fact that this property is overbuilt can only be characterized as a benefit of the property, not a unique feature that necessitates a variance. While the applicant's desire to expand and avoid "waste" is understandable, it is not a legal basis for granting a variance.

2. Practical Difficulty. 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. *Gilmartin v. District of Columbia Bd. of Zoning Adjustment supra* at 1170. While the applicant demonstrated a practical difficulty in conducting its work in the home due to insufficient space, that practical difficulty is not unique to the particular property. Insufficient space for a property owner's needs could apply to any property.

Further, the practical difficulty must arise from the uniqueness or exceptional condition of the property. D.C. Official Code § 6-641.07(g)(3) (2001) states in relevant part,

Where by reason of ... extraordinary or exceptional situation or condition of a specific property, the strict application of any regulation.... would result in peculiar and exceptional practical difficulties to or undue hardship upon the owner of the property.....

Accordingly, applicant cannot meet the second prong of the variance test having failed to meet the first prong.

3. Substantial Detriment. The Board also finds that the Applicant has failed to demonstrate that the addition would not result in substantial detriment to the public good or the zone plan. The Board agrees with Mr. Drabkin that the proposed addition would alter the roof line on the street and destroy the unity of the row of townhomes. The Board also agrees with the Office of Planning that granting this application would impair the intent and integrity of the zoning regulations because it so clearly fails the variance test, particularly with respect to the uniqueness element..

In reviewing a variance application, the Board is required under D.C. Official Code § 6-623.04 (2001) to give "great weight" to OP recommendations. For the reasons stated in this Decision and Order, the Board agrees with OP's recommendation that the variance relief be denied.

The Board is also required under D.C. Official Code § 1-309(d) (2001) to give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. However, in this case no issues or concerns were articulated. It merely stated that it voted to "support" the application. Moreover, the ANC report did not contain the information which is required in order to receive great weight. The report contained no information regarding proper notice, the numbers voting, whether there was a quorum, etc. *See*, 11 DCMR 3115.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the motion to **DENY** the variance relief is granted.

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

Vote taken on November 23, 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: APR - 7 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. 17271 of JBG/Louisiana Avenue, L.L.C., pursuant to 11 D.C.M.R. 3103.2 for a variance from the height limitation of 11 DCMR § 770.1, to allow an addition to an existing office building in the C-3 District at premises 51 Louisiana Avenue, N.W. (Square 631, Lot 17).

HEARING DATE: January 18, 2005

DECISION DATE: January 18, 2005 (Bench Decision)

DECISION AND ORDER

This application was submitted on November 5, 2004 by the owner of the property that is the subject of the application, JBG/Louisiana Avenue, LLC. ("Applicant"). The self-certified application requested a height variance to allow a 130-foot building height in a C-3-C zoning district.

Following a hearing on January 18, 2005, the Board voted 3-0-2 to approve the height variance.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memorandum dated November 9, 2004, the Office of Zoning gave notice of the application to the District of Columbia Office of Planning ("OP"), the D.C. Department of Transportation, Advisory Neighborhood Commission ("ANC") 6A, the ANC within which the property is located, the Councilmember for Ward 6, and Single Member District/ANC 6C09. Pursuant to 11 DCMR § 3113.13, the Office of Zoning published notice of the application in the *D.C. Register* and on November 18, 2004, provided notice of the hearing to the Applicant, ANC 6C, and all owners of property within 200 feet of the property. Further, the Applicant's Affidavit of Posting shows that, on January 3, 2005, 5 zoning placards were placed on the 5 street frontages of the Acacia Building, located on the Property.

Requests for Party Status. ANC 6A was automatically a party to this proceeding. There were no requests for party status.

Applicant's Case. The Applicant presented testimony from several witnesses concerning the design of the proposed new building and new atrium space, and concerning the need for the height variance. Mr. Cinkala, a principal with the Applicant, testified with regard to the uniqueness of the property. Mr. Dove and Mr. Harbour, both members of the architectural team working on the project, discussed the difficulties of designing the new building and atrium due to the unique features of the Property. Mr. Orr, a development management consultant, and Mr. Slade, a traffic consultant, testified as to the cost of the project, and as to the lack of adverse traffic and parking impacts, respectively. Mr. Santry spoke on behalf of the tenant of the proposed new building. Lastly, both Mr.

Cinkala and Mr. Dove testified as to security issues, relying to some extent on the report of the security consultant hired by the Applicant.

Government Reports. The Office of Planning, by a report filed January 11, 2005, and by testimony at the hearing, recommended approval of the application. OP opined that the property is unique because of its shape and historic nature and the shape of the existing buildings, which leave inadequate space to capitalize on the remaining matter-of-right floor area ratio ("FAR") available. OP noted that the Tiber Creek combined storm sewer and the Metro tunnel limit underground development on the property. OP also noted that there are other 12-story buildings in the extended neighborhood and that the proposed variance will likely not have a substantial detriment on the surrounding neighborhood.

The Commission of Fine Arts submitted a letter into the record stating that at its meeting of November 18, 2004, the Commission reviewed and approved the proposed concept for a new 12-story office building to replace the existing 4-level parking garage. The Commission also stated that it encouraged the strong statement of contemporary design with the inclusion of environmentally-conscious features.

The Architect of the Capitol, after consulting with the Senate Sergeant at Arms, submitted a letter in opposition to the variance, citing a possible security risk to the Capitol Building. The United States Senator for the District of Columbia (Shadow) submitted a letter countering the letter from the Architect of the Capitol and asserting that there is no evidence that the height variance, if granted, would create any greater security risk than already exists, and further, that even if a security risk exists, there is no evidence that it would be mitigated by the denial of the variance.

ANC Report. Advisory Neighborhood Commission 6A timely filed a letter in support of the application on December 16, 2004. The letter stated that at a properly-noticed meeting on December 8, 2004, with a quorum present, ANC 6A unanimously agreed to support the variance request provided that the applicant seeks LEED certification for the building.

FINDINGS OF FACT

The Property and the Surrounding Area

1. The subject site is known as 51 Louisiana Avenue, N.W., Square 631, Lot 17 (the "Property").
2. The Property is located in the C-3-C zoning district, within the Downtown East Receiving District, and within the Central Employment Area.
3. The Property is an irregularly-shaped, 5-sided parcel containing 91,021 square feet of land. It is located directly across from the U.S. Capitol grounds, and near, although not adjacent to, Union Station and federal courts and offices.

4. The Property is situated on a full city block and is bordered by D Street, N.W. to the north, New Jersey Avenue, N.W. to the east, Louisiana Avenue, N.W. to the southeast, C Street, N.W. to the south (the property along C Street curves slightly to the northwest), and 1st Street, N.W. to the west.
5. The Generalized Land Use Map of the Comprehensive Plan designates the Property and the surrounding area in the highest density commercial designation.
6. The surrounding area is dominated by hotel, commercial and institutional uses, although the areas immediately adjacent to three sides of the Property are green spaces.
7. The Property is improved with an above-ground six-level parking garage built in the 1970's and two separate but connected buildings (known as the "Acacia Building" and "Annex Building") that are configured in a V shape around a modest interior courtyard.
8. The Acacia and Annex Buildings contain approximately 208,747 square feet of gross floor area or 2.29 FAR.
9. The total current FAR for the Property, including the above-grade parking garage, is 3.30, with a total gross floor area of 300,997 square feet.
10. The six-level above-grade parking garage accommodates 463 vehicles and is located on the northern portion of the Square fronting on 1st Street, New Jersey Avenue and D Street, N.W.
11. The 1935 Acacia Building is historically important. It was designed by the New York firm of Shreve, Lamb and Harmon, the architects for the Empire State Building, and has a limestone façade set with solar glass panel windows with anodized aluminum window frames on all sides.
12. The Acacia Building includes large cut stone blocks and limestone accents and soffits at the upper floor levels. It has fifteen-foot (15') floor-to-floor ceiling heights and a two-story main lobby with marble floors and walls.
13. A rooftop terrace occupies forty-five percent (45%) of the roof on the existing buildings, and features concrete pavers and raised, professionally maintained planters.

The Project

14. The Applicant proposes to raze the existing above-grade parking garage and replace it with a 12-story office building with 6 levels of below-grade

- parking. The proposed new building will be used, for the foreseeable future, solely, or primarily by, a single tenant, the law firm of Jones, Day.
15. The Applicant also proposes to construct a triangularly-shaped glass-covered atrium in a portion of the courtyard which will be open at its sides and will cover a series of ramped walkways connecting various floors of the new building to various floors of the existing buildings.
 16. Together with the proposed new building, the Property will contain approximately 544,583 square feet of gross floor area or a 5.98 FAR. 6.5 FAR is allowed as a matter of right.
 17. The Applicant's request for a height variance to 130 feet, the maximum height permitted by the 1910 Height of Buildings Act, gains the project approximately an additional 50,000 square feet.
 18. Below-grade, the Tiber Creek combined storm sewer tunnel runs through the Property, and the Metro tunnel runs along its northern edge. Both of these tunnels are currently in use and it would be prohibitively costly to divert the Tiber Creek tunnel.
 19. Construction of the 6 levels of below-grade parking, to provide required parking and to replace the existing parking garage, adds significantly to the cost of the project. The presence of the two subterranean tunnels mandates smaller-than-normal garage floor plates and greater-than-normal underpinning, sheeting and shoring, as well as construction of a complex and expensive slurry wall to support the Creek. Also, due to the location of the Creek, the southeast corner of the proposed building is truncated and requires a special structure. As a result of the presence of the two tunnels, there is an estimated additional cost of \$2 million for the garage construction.
 20. There exists a stand-still agreement with the District of Columbia Preservation League ("DCPL") entered into by the prior owner in exchange for DCPL agreeing not to pursue an application for designation as a historic landmark so long as the Acacia and Annex Buildings were not altered.
 21. The proposed new building and new atrium must be designed in such a way as to take into account the historic nature of the existing buildings on the Property. Design elements and solutions to accommodate the concerns of the Commission of Fine Arts, OP, DCPL, and the ANC amount to additional costs of \$13 - \$15 million.
 22. Without the variance, the estimated economic loss, at \$150/FAR square foot, would be \$7.5 million.

23. Pursuant to § 2101 of the Zoning Regulations, the proposed new building is required to provide 301 parking spaces. The Applicant proposes to provide parking spaces for 443 vehicles, approximately 40 of which will be in tandem.
24. The level of trip generation resulting from the Building's increased height and added commercial FAR on the Property, based on the Applicant's proposal, would not adversely impact access to neighboring properties.
25. The traffic impact of the garage on roadways leading to it equates to one car every 3 minutes during the hour of peak traffic, which the Board finds to be insignificant.
26. The Applicant proposes to implement elements of "green building" design and to seek LEED Certification for the Building.

Security Issues

27. The Architect of the Capitol, after consulting with the Senate Sergeant at Arms, opposed the grant of the variance on security grounds because it would offer sight lines from the roof and penthouse of the new building to the Senate wing of the Capitol.
28. The distance from the roof of the proposed new building to the Capitol is significant – approximately one-third of a mile, or 1695 feet.
29. There exist 5 buildings with essentially equivalent lines of sight and ranges to the Capitol.
30. At least 2 of these 5 existing buildings have shorter ranges to the Capitol, one of approximately 1280 to 1320 feet, and one of approximately 1600 feet.
31. The proposed new building will eliminate the sight line to the Capitol from some formerly exposed rooftop areas, such as that from the Hyatt Hotel just to the north of the proposed building.
32. The proposed new building will be used solely, or primarily, by a single tenant, as opposed to many other buildings in the neighborhood that are open to the public and/or have transient and anonymous occupants and visitors.
33. Security measures can be taken to mitigate any security risks, including perimeter security, control of building and roof access, rooftop security precautions, and obscurement of the Capitol Building and its interior.

CONCLUSIONS OF LAW AND OPINION

The Applicant is seeking variance relief, pursuant to § 3103 of the Zoning Regulations, from the maximum height allowed in the C-3-C District. The C-3-C zoning district is designed to permit medium-high density development, including office, retail, housing and mixed use; it permits a maximum height of ninety feet (90') The Applicant seeks a forty foot height variance to 130 feet.

The requested relief is for an area variance, the granting of which requires proof of a practical difficulty arising out of some extraordinary or exceptional situation or condition of the Property. The Applicant must therefore demonstrate that compliance with the Zoning Regulations results in practical difficulties due to such extraordinary or exceptional situation or condition. The Board must also find that the relief requested can be granted without substantial detriment to the public good or substantial impairment to the zone plan.

Uniqueness of the Property

The first criterion for the granting of an area variance is that the property is affected by an extraordinary or exceptional situation or condition. This is often termed the "uniqueness" test. The District of Columbia Court of Appeals has stated that the

threshold requirement to show that the property is unique with respect to the hardship or difficulty asserted as grounds for the variance means the property owner must present proof that "the circumstances which create the hardship *uniquely* affect the *petitioner's property* * * * ." (emphasis in original).

Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. Of Zoning Adjustment, 534 A.2d 939, 941-942 (D.C. 1987), quoting *Taylor v. District of Columbia Bd. of Zoning Adjustment*, 308 A.2d 230, 234 (D.C. 1973). The uniqueness requirement "insures relief for problems peculiarly related to the * * * land or structure, and not shared by other property in the neighborhood, thus avoiding a de facto amendment of zoning laws." *Russell v. Board of Zoning Adjustment*, 402 A.2d 1231, 1235 (D.C. 1979). The Property is unique in several respects. It is an oddly-shaped, 5-sided parcel with an unusually deep area of public space adjacent to its New Jersey and Louisiana Avenue frontages. Adding to the uniqueness of the Property is the V-shaped configuration of the existing improvements, as well as the historic status of the Acacia building and the stand-still agreement with DCPL.

Any construction on the Property must be sensitive to the historic nature of its current improvements and must be designed not to overwhelm them. Further, the Acacia Building is not merely historic, but it has floor-to-floor heights of 15 feet, 4 to 5 feet higher than the typical floor-to-floor heights in new construction. *See, e.g., Capitol Hill Restoration Society, Inc. v. Board of Zoning Adjustment, supra*, at 942. (A condition inherent in the structures built upon the land may serve to satisfy an applicant's burden of demonstrating uniqueness).

There are also two below-grade factors contributing to the uniqueness of the Property. The Property lies over the Tiber Creek combined storm sewer, which is still in use today and would be prohibitively costly to relocate. Also, running along the northern edge of the Property, and therefore directly under and adjacent to the northern side of the proposed building, is a Metro tunnel. These unusual subterranean features, as well as the above-grade conditions discussed above, combine to create the extraordinary or exceptional situation or condition necessary to satisfy the first prong of the variance test.

Practical Difficulties Arising Out of Uniqueness

The exceptional and unique conditions presented by the shape of the Property, the location of the improvements on the Property, the historic nature of the Property, and the location of the Tiber Creek and Metro tunnels result in practical difficulties in designing an efficient building which fully complies with the Zoning Regulations. Moreover, full compliance with the regulations would render development of the Property economically infeasible, particularly given the increased cost associated with designing around the historically sensitive structures and designing the parking garage around the limitations imposed by the Tiber Creek and Metro tunnels. Consideration of the economic viability of the proposed project is relevant to the Board's analysis of the practical difficulty aspect of the area variance requested. *See, e.g., Tyler v. District of Columbia Board of Zoning Adjustment*, 606 A.2d 1362, 1366 (D.C. 1992). (The court states that "evidence of economic justification ... may indeed be considered in deciding whether area variances should be granted.")

The Acacia and Annex Buildings currently use only 3.5 FAR of the 6.5 to 9.0 FAR available on the Property. They form a V-shape, however, leaving only an oddly-shaped area for any additional improvements on the Property. Two options for additional improvements would be adding additional floors to these buildings (i.e., increasing the height of one or both to a height of 110 feet through TDRs (assuming this could be done) and/or constructing an addition in the location of the existing parking garage. The historic nature of the Acacia Building precludes adding additional floors, indeed, the idea was rejected by the Commission of Fine Arts when proposed by the former owners of the Property. This leaves only the possibility of a new building in the place of the existing parking garage and adding underground parking. This solution, however, is not simple and is fraught with practical difficulties due to the conditions underneath the Property, the historic nature and extremely high floor plates of the existing buildings, and constraints on the use of matter-of-right density.

The Tiber Creek storm sewer tunnel runs through the middle of the property, making it difficult to design an efficient below-grade garage. Not only must the Applicant construct a below grade design that does not encroach into the Creek, but it must also construct a complex and expensive slurry wall to support the Creek. This narrows the area of construction and pushes density vertically rather than horizontally.

Also, because of the location of the Creek, the southeast corner of the proposed new building is truncated and requires a special structure. The presence of the Metro tunnel also affects the design of the below grade parking garage in that the garage cannot encroach into the zone of influence of the tunnel. Consequently, the deeper the garage to provide the required parking, the further from the tunnel it needs to be.

As a result of these factors, the six levels of the garage below result in smaller and smaller, and therefore less efficient, garage plates. This factor further limits the flexibility and increases the cost of construction of the below-grade garage. Due to all the above-named factors, the garage configuration will be less efficient than the typical efficiency rate of 375 square feet of space per parking space.

The proposed garage will require 450 square feet per parking space. This will result in a premium construction cost of over \$2.5 million. Further, the sheeting, shoring, underpinning, and construction of slurry walls necessitated by the presence of the two below-grade tunnels will increase the garage cost by approximately \$2 million.

The height variance, allowing above-grade development to the greatest extent possible, is requested to help offset these increased costs associated with the Property's unique aspects.

The historic nature of the existing improvements and the stand-still agreement with DCPL strictly limit the room and flexibility available for any additional development of the Property. In addition to being precluded from adding additional floors to the existing buildings, any addition must be stepped back and situated so as to defer to the historic buildings.

Ideally, a new building or addition would match the 15' floor plates of the existing buildings, but in reality, this would result in a significant loss of gross floor area and potential failure to meet the needs of the existing (or any potential) tenant. Therefore, in order to maximize the gross floor area to the extent possible within the limited envelope, the proposed new building will be connected to the existing buildings via a seven (7) story triangular atrium addition to be constructed in a portion of the current courtyard. The floor plates of this atrium will be aligned with the 15' slab-to-slab floor heights in the Acacia Building. The proposed new office building's 11'2" slab-to-slab floor heights will not align with either the floors in the atrium addition or in the existing Acacia Building. Instead, there will be a series of ramped skywalks connecting various floors of the atrium addition to various floors of the new office building. The area between the new office building and the existing Acacia Building and Annex will be covered with a glass atrium roof.

Given the above-and underground constraints on the footprint of the proposed new building, the height variance is necessary to gain approximately an additional 50,000 square feet of gross floor area. Without the variance, this additional 50,000 square feet would be lost, at an economic loss of approximately \$7.5 million.

The Board concludes that the extraordinary or exceptional situation or condition of the Property results in practical difficulties for the Applicant. The unique conditions of the Property render full compliance with the Zoning Regulations unduly burdensome and economically infeasible.

No Substantial Detriment to Public Good or Impairment of Zone Plan

The property is located in the Downtown East Receiving Zone, where the Zoning Regulations authorize a matter of right height of 110 feet in conjunction with the purchase of development rights. It may therefore be presumed that the Commission found that buildings that reached that height would not impair the zone district. Thus, when addressing this prong, a height of 110 may be viewed as presumptive compatible with the zone district.

There are several buildings in the immediate vicinity of the Property that are higher than 110 feet, for example, the Hyatt Hotel, just across the street to the north of the Property, has a roof elevation of 135 feet. Partially surrounding the Property is the Hotel-Residential Overlay District, which permits a matter-of-right height of 130 feet. *See*, 11 DCMR § 1101.6(a). Thus, the requested height of 130 feet will not dwarf nearby buildings, and is commensurate with building heights in the neighborhood. The Acacia Building itself is 113.5 feet high. Therefore, the proposed relief is consistent with the zone plan and map.

There is limited development immediately around the Property as it is surrounded on three sides by green space. Beyond this green space, the neighborhood hosts high density office and commercial uses. The proposed new building will improve the street experience of pedestrians walking by the project by providing a more animated streetscape experience. Furthermore, the addition has been designed to be sensitive to the historic nature of the Acacia Building. As designed, the construction of the atrium addition and new building in place of the existing above-grade parking garage will be an enhancement to the surrounding neighborhood.

The proposed project replaces an above ground parking structure with a new office building while continuing to provide sufficient parking underground, thereby not causing any adverse impact on local traffic or parking. The project is also a mere two blocks from Union Station, with its metro and bus access. The Applicant also intends to incorporate "green building" aspects into the project and to seek LEEDs certification, thereby enhancing, rather than impairing, the public good.

The primary concern with the project is the potential for a security risk to the Capitol Building. The Architect of the Capitol submitted a letter in opposition to the requested height variance stating that he had consulted with the Senate Sergeant at Arms, and that, in their opinion, the lines of sight from the roof and penthouse would present a security risk to the Senate wing of the Capitol. The letter, did not, however, expound on what type of security risk is posed, or whether there were any possible mitigating measures to be taken. The Architect of the Capitol did not request party status nor participate in the hearing. It is therefore difficult for the Board to specifically address the concerns raised.

It can be inferred from the letter that the Sergeant at Arms and the Architect of the Capitol are concerned with the possibility that a sniper could perch himself on the roof of the proposed new building and fire into the Capitol Building. In anticipation of this concern, the Applicant hired a well-known security consulting firm to analyze the situation and the potential for security risks if the height variance were to be granted. *See, generally*, Exhibit No. 29. While the consulting firm acknowledged that a sniper threat is "legitimately credible," it pointed out that such a threat is similarly credible, indeed perhaps more credible, from other nearby buildings. The security consultant considers the range from the proposed new building to the Capitol to be "significant," as it is approximately a third of a mile, or approximately 1695 feet long. The consultant's analysis points out that there are five other office buildings and a hotel which would provide "essentially equivalent line[s] of sight and firing range[s]" to the Capitol as would be available from the proposed new building. In fact, two of these buildings have shorter ranges to the Capitol Building. The more southerly section of the existing building at 101 Constitution Avenue has a roof elevation of 130 feet and a range of approximately 1280 feet to the Capitol, while its northern section has a roof elevation of 110 feet and a range of approximately 1320 feet. The building just north of 101 Constitution Avenue has a roof elevation of 122 feet and a range of approximately 1600 feet to the Capitol. The Acacia Building itself, while lower in height than the proposed building, has a shorter range to the Capitol.

The consultant's analysis further points out that the greater height requested for the proposed new building will act as a screen between the Hyatt Hotel and the Capitol Building, by reducing the sight lines from the hotel to the Capitol. In this way, the granting of the height variance may actually enhance security near the Capitol, for the security analysis opines that "[t]he hotel is a far more attractive location to initiate a sniper assault, as the anonymity of its occupants and their activities are indigenous to the hotel's operation."

It appears that the potential for a sniper to make use of the roof of the proposed new building is a possibility. It appears, however, to be a remote possibility, which can readily be mitigated in three ways: rooftop design precautions, control of access to the building and to the roof, and obscurement of the target building. Intelligent and security-minded rooftop design can prevent a sniper from accessing the roof and from having sufficient time to set up the necessary equipment. The consultant's analysis provides concrete suggestions as to these design modes:

[t]his is readily accomplished through the specification of ballistic and forced entry rated doors, frames, and hardware that access the roof. The use of commercial motion detection and video surveillance equipment routinely provide detection and assessment of these secure access protocols and should be part of such a design to ensure its effective operation. ... The use of a competently designed surveillance system can assure that such [sniper] activities do not go undetected. Furthermore, a conscientious physical security design of the roof should preclude areas of undetectable refuge. Also, it is likely that the architects can develop a scrim and/or other form of obscuring fencing on the roof at some distance inboard from the parapet, which would add another layer of significant delay by preventing the sniper from having a clear of sight and convenient setup point for target acquisition.

Exhibit No. 29, at 3.

Any potential security threat can be further mitigated by a careful control of persons entering the building and/or accessing the roof. In this regard, the consultant's report recommends "the issuance of ID credentials, the use of access control systems, security and concierge staffing, video surveillance, door monitoring systems, and other physical and electronic security measures." Exhibit No. 29, at 4. All of these measures are reasonable, particularly in light of the fact that the proposed building will be housing, at least for the foreseeable future, only one tenant, the law firm of Jones Day. Although the building will be, in a sense, "open" to the public, it appears reasonable that it can be managed so as to control the inflow of pedestrian traffic.

Lastly, the consultant recommends obscuring the target individuals within the Capitol Building. This can be done with implementation of landscaping to preclude a line of sight from any of the nearby buildings to the Capitol. The Capitol Building itself can put effective screening elements into place.

In light of the above, the Board agrees with the security consultant and the Applicant that the remote risk to one building, even a building as singularly important as the Capitol, cannot be allowed to dictate the zoning and design mandates for an entire neighborhood.

The Board does not wish to appear dismissive of the Architect of the Capitol's concerns. But the Board is limited to what is in the record, which consists of a letter expressing the Architect of the Capitol's concerns against which the Board must consider a substantial and persuasive presentation from the Applicant's security consultant. Nevertheless, the Board expects the applicant to continue working with the Senate Sergeant at Arms on security issues of concern to that office and implement reasonable security measures such as those mentioned in this order.

For all the foregoing reasons, the Board concludes that the relief requested also meets the third prong of the variance test. It can be granted without substantial detriment to the public and without substantially impairing the intent, purpose and integrity of the Zone

BZA APPLICATION NO. 17271

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Plan as embodied in the Zoning Regulations and Map.

The Commission is 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 (2001)) to give great weight to OP recommendations. The Commission carefully considered the OP report and, as explained in this decision, finds its recommendation to grant the applications persuasive.

Under § 3 of the Comprehensive Advisory Neighborhood Commissions Reform Act of 2000, effective June 27, 2000 (D.C. Law 13-135, D.C. Code § 1-309.10(d)(3)(a)), the Commission must give great weight to the issues and concerns raised in the written report of the affected Commission. While the ANC indicated its support for the Application, it did so contingent upon the applicant seeking LEED certification for the building. Although the Board favors such action, and the Applicant has agreed to do so, the Board has no authority to condition its order upon a requirement, such as LEED certification, that is not directed to mitigating a potential adverse impact of the use.

In light of the foregoing, the Board **ORDERS** that the application be and the same is hereby **GRANTED**.

VOTE: 3-0-2 (Geoffrey H. Griffis, Ruthanne G. Miller, and John A. Mann II, to approve. Curtis L. Etherly, Jr. and the Zoning Commission member not voting, not having participated.)

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

Each concurring member has approved the issuance of this Order.

FINAL DATE OF ORDER: April 6, 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

APR 15 2005

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

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

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

Application No. 17298 of Tashir Lee, pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy requirements under section 403, a variance from the minimum lot area requirements under section 401.1, and a variance from the off-street parking requirements under subsection 2101.1, to allow the conversion of an existing apartment house from 4 units to 6 units in the R-4 District at premises 1507 4th Street, N.W. (Square 521, Lot 835).

Note: The originally requested side yard variance was eliminated. The Board approved the lot occupancy increase from 54.8 to 59 percent.

HEARING DATE: April 5, 2005
DECISION DATE: April 5, 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 public hearing on this application, by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 5C, 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 5C. The ANC submitted a report in support of the application. The OP submitted a report in partial 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 and ANC reports filed in this case, the Board concludes that the applicant has met the burden of proving under 11 DCMR §§ 3103.2, 401.1, 403 and 2101.1, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent,

purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. 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 denying party status to Carl and Doris Sensabaugh

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

Vote approving the application

Vote: 4-1-0 (Geoffrey H. Griffis, John A. Mann II, Ruthanne G. Miller and Curtis L. Etherly, Jr. to approve; Kevin Hildebrand opposed to the motion).

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: April 7, 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 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

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