NOTICE FOR SOLICITATION TO PROVIDE FACILITIES ENGINEERING AND MANAGEMENT SERVICES FOR

THE CESAR CHAVEZ PUBLIC CHARTER SCHOOLS FOR PUBLIC POLICY

Cesar Chavez Public Charter Schools for Public Policy hereby solicits contracted facilities engineering and management services. Call 202-547-3424 ext. 45 for more information/RFP. Proposal, credentials, and fee structure must be submitted by COB December 2, 2005 to 709 12th Street, SE, Washington, D.C. 20003, attn: David Durand.

NOTICE FOR SOLICITATION OF PROPOSALS TO PROVIDE FACILITIES ENGINEERING AND MANAGEMENT SERVICES FOR

THE CESAR CHAVEZ PUBLIC CHARTER SCHOOLS FOR PUBLIC POLICY

The Cesar Chavez Public Charter Schools for Public Policy, in accordance with section 2204 (c) (1) (A) of the DC School Reform Act of 1995 (Public Law 104-134), hereby solicits proposals to provide facilities engineering and management services for its two schools. One campus is approximately 40,000 square feet and is located at 709 12th Street, SE. The other is approximately 80,000 square feet and is located at 3701 Hayes Street, NE. Proposals should be separable by campus.

The Cesar Chavez Public Charter Schools will receive bids from November 18, 2005 to COB December 2, 2005 Attn: David Durand, Director of Operations, 709 12th Street, SE, Washington, D.C. 20003. Al necessary forms and a full RFP may be obtained by calling 202-547-3424 ext. 45.

DISTRICT OF COLUMBIA REGISTER NOV 1 8 2005

District of Columbia
BOARD OF ELECTIONS AND ETHICS

Monthly Report

of

Voter Registration Statistics

for the period ending

October 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

10200

D.C. BOARD OF ELECTIONS AND ETHICS

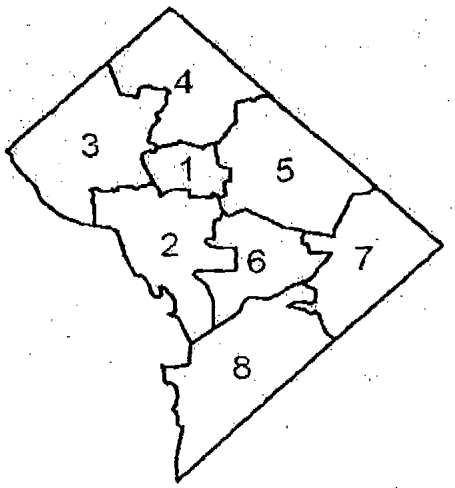
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

CITYWIDE SUMMARY

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

WARD	DEM	REP	STG	N-P	OTH	TOTALS
1	29,821	2,714	965	9,131	241	42,872
2	24,967	5,443	510	8,783	196	39,899
3	30,222	8,064	453	9,274	142	48,155
4	41,585	2,862	648	7,775	208	53,078
5	40,702	2,228	648	6,752	228	50,558
6	34,169	4,824	646	7,680	200	47,519
7	38,784	1,740	510	5,688	164	46,886
8	31,663	1,676	565	5,369	184	39,457
TOTALS	271,913	29,551	4,945	60,452	1,563	368,424
TOTAL Percentage (by party)	73.8%	8.0%	1.3%	16.4%	0.4%	100.0%

Wards



DISTRICT OF COLUMBIA REGISTER

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D.C. BOARD OF ELECTIONS AND ETHICS

MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 1 For the Period Ending: October 31, 2005

PRECINCT	DEM	REP	STG	N-P	OTH	TOTALS
20	1,319	48	17	382	28	1,794
22	1,904	211	54	489	19	2,677
23	1,427	90	60	471	12	2,060
24	1,740	209	39	551	13	2,552
25	3,076	464	95	914	12	4,561
35	2,672	234	101	852	20	3,879
36	2,742	222	83	816	22	3,885
37	2,219	141	49	593	16	3,018
38	1,875	136	54	547	15	2,627
39	2,578	229	119	838	19	3,783
40	2,527	222	121	844	18	3,732
41	2,076	175	80	843	12	3,186
42	1,213	64	37	376	14	1,704
43	1,196	80	30	270	8	1,584
136	678	155	14	223	7	1,077
137	579	34	12	122	6	753
TOTALS	29,821	2,714	965	9,131	241	42,872

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D.C. BOARD OF ELECTIONS AND ETHICS

MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 2 For the Period Ending: October 31, 2005

PRECINCT	DEM	REP	STG	N-P	OTH	TOTALS
2	408	132	7	260	7	814
3	1,085	446	12	520	8	2,071
4	931	327	18	465	9	1,750
5	1,939	726	35	713	10	3,423
6	2,306	1,202	54	1,419	21	5,002
13	1,079	295	15	394	6	1,789
14	2,326	451	41	754	17	3,589
15	2,507	348	37	788	22	3,702
16	2,194	342	43	605	11	3,195
17	3,068	533	78	1,058	33	4,770
18	2,868	215	66	688	14	3,851
21	1,089	68	35	244	6	1,442
129	1,184	139	23	365	14	1,725
141	1,983	219	46	510	18	2,776
TOTALS	24,967	5,443	510	8,783	196	39,899

D.C. BOARD OF ELECTIONS AND ETHICS

MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 3 **For the Period Ending: October 31, 2005**

PRECINCT	DEM	REP	STG	N-P	OTH	TOTALS
7	940	405	18	414	7	**1,784**
8	1,973	725	33	627	4	**3,362**
9	863	593	8	363	2	**1,829**
10	1,589	577	22	589	8	**2,785**
11	2,650	782	51	1,069	26	**4,578**
12	451	196	3	179	5	**834**
26	2,335	468	41	753	10	**3,607**
27	2,155	331	22	489	7	**3,004**
28	2,032	740	30	755	9	**3,566**
29	1,047	283	19	305	2	**1,656**
30	1,066	307	14	235	2	**1,624**
31	1,909	411	23	504	9	**2,856**
32	2,357	449	31	547	8	**3,392**
33	2,437	444	50	633	14	**3,578**
34	2,879	599	39	970	17	**4,504**
50	1,780	349	22	386	6	**2,543**
138	1,759	405	27	456	6	**2,653**
TOTALS	**30,222**	**8,064**	**453**	**9,274**	**142**	**48,155**

DISTRICT OF COLUMBIA REGISTER

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D.C. BOARD OF ELECTIONS AND ETHICS

MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 4 For the Period Ending: October 31, 2005

PRECINCT	DEM	REP	STG	N-P	OTH	TOTALS
45	1,835	103	33	314	14	2,299
46	2,514	106	38	457	11	3,126
47	2,157	166	43	596	16	2,978
48	2,376	160	40	448	8	3,032
49	627	36	16	150	4	833
51	2,912	620	43	588	9	4,172
52	1,162	281	7	240		1,690
53	958	94	21	233	4	1,310
54	1,886	136	35	413	16	2,486
55	2,305	118	29	371	18	2,841
56	2,740	105	40	600	16	3,501
57	2,232	107	34	394	16	2,783
58	2,069	64	34	349	7	2,523
59	2,396	96	30	357	11	2,890
60	1,551	100	27	569	13	2,260
61	1,488	76	21	260	3	1,848
62	3,006	188	40	355	7	3,596
63	2,747	133	72	485	15	3,452
64	2,172	86	18	295	9	2,580
65	2,452	87	27	301	11	2,878
TOTALS	41,585	2,862	648	7,775	208	53,078

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D.C. BOARD OF ELECTIONS AND ETHICS

MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 5 **For the Period Ending: October 31, 2005**

PRECINCT	DEM	REP	STG	N-P	OTH	TOTALS
19	2,854	188	81	622	19	3,764
44	2,246	247	33	515	20	3,061
66	4,065	131	34	447	19	4,696
67	2,793	142	25	365	14	3,339
68	1,715	162	31	336	8	2,252
69	1,982	104	16	212	12	2,326
70	1,295	78	23	221	5	1,622
71	2,288	92	37	356	11	2,784
72	3,360	137	43	537	18	4,095
73	1,640	102	31	303	8	2,084
74	3,206	208	59	633	16	4,122
75	2,389	124	51	486	22	3,072
76	616	46	15	139	7	823
77	2,370	112	38	388	12	2,920
78	2,116	89	31	352	8	2,596
79	1,672	72	31	273	7	2,055
135	2,365	145	55	426	17	3,008
139	1,730	49	14	141	5	1,939
TOTALS	40,702	2,228	648	6,752	228	50,558

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D.C. BOARD OF ELECTIONS AND ETHICS

MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 6 *For the Period* Ending: October 31, 2005

PRECINCT	DEM	REP	STG	N-P	OTH	TOTALS
1	2,695	223	52	621	16	3,607
81	3,774	303	67	656	15	4,815
82	2,063	196	30	423	14	2,726
83	2,414	186	48	495	17	3,160
84	1,720	373	32	394	12	2,531
85	2,166	493	36	531	15	3,241
86	1,898	244	34	387	9	2,572
87	2,271	174	45	423	14	2,927
88	1,722	262	32	364	4	2,384
89	2,083	665	43	603	10	3,404
90	1,215	240	23	327	7	1,812
91	2,933	292	69	646	18	3,958
127	3,068	302	71	642	15	4,098
128	1,433	151	21	406	6	2,017
130	1,288	526	30	452	17	2,313
131	389	22	4	54	3	472
142	1,037	172	9	256	8	1,482
TOTALS	34,169	4,824	646	7,680	200	47,519

DISTRICT OF COLUMBIA REGISTER

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D.C. BOARD OF ELECTIONS AND ETHICS

MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 7 For the Period Ending: October 31, 2005

PRECINCT	DEM	REP	STG	N-P	OTH	TOTALS
80	1,160	57	15	188	8	1,428
92	1,227	67	19	191	9	1,513
93	1,179	59	14	183	5	1,440
94	1,554	78	24	211	5	1,872
95	1,285	45	23	203	2	1,558
96	1,720	78	30	276	4	2,108
97	998	46	18	166	2	1,230
98	1,429	53	16	184	10	1,692
99	1,091	45	16	176	7	1,335
100	1,373	67	22	209	4	1,675
101	1,424	49	13	182	6	1,674
102	1,848	82	26	226	8	2,190
103	2,788	122	39	434	13	3,396
104	1,989	97	32	322	13	2,453
105	1,624	71	27	230	7	1,959
106	2,593	105	31	351	5	3,085
107	1,215	74	14	216	4	1,523
108	1,044	49	7	100	5	1,205
109	936	42	10	94	3	1,085
110	3,411	142	38	444	13	4,048
111	1,737	69	26	323	8	2,163
112	1,752	74	21	272	11	2,130
113	1,842	89	15	274	7	2,227
132	1,565	80	14	233	5	1,897
TOTALS	38,784	1,740	510	5,688	164	46,886

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D.C. BOARD OF ELECTIONS AND ETHICS

MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 8

For Period Ending: October 31, 2005

PRECINCT	DEM	REP	STG	N.P.	OTH	TOTALS
114	2,352	155	47	388	35	2,977
115	1,898	85	37	414	9	2,443
116	2,785	140	54	475	24	3,478
117	1,128	59	20	215	2	1,424
118	1,900	103	40	321	4	2,368
119	2,265	161	47	370	10	2,853
120	1,535	72	29	276	7	1,919
121	2,588	118	42	445	10	3,203
122	1,444	61	26	201	7	1,739
123	1,892	164	40	343	5	2,444
124	1,979	79	37	298	8	2,401
125	3,010	147	48	479	15	3,699
126	2,518	141	35	445	16	3,155
133	1,188	50	12	167	10	1,427
134	1,659	72	25	255	8	2,019
140	1,522	69	26	277	14	1,908
TOTALS	31,663	1,676	565	5,369	184	39,457

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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:

Mitchell Backfield
Single Member District 1D02

BOARD OF ELECTIONS AND ETHICS
CERTIFICATION OF ANC/SMD VACANCIES

The District of Columbia Board of Elections and Ethics hereby gives notice that there are vacancies in **eleven** (11) Advisory Neighborhood Commission offices, certified pursuant to D.C. Official Code § 1-309.06(d)(2); 2001 Ed.

VACANT: **3D07**
5C10
6B11
8B02, 8B03, 8C05, 8C06, 8E01, 8E06

Petition Circulation Period: **Tuesday, November 22, 2005 thru Monday, December 12, 2005**
Petition Challenge Period: **Thursday, December16, 2005 thru Wednesday, December21, 2005**

VACANT: **5B02**
6C07

Petition Circulation Period: **Tuesday, November 8, 2005 thru Monday, November 28, 2005**
Petition Challenge Period: **Tuesday, December 1, 2005 thru Wednesday, December 7, 2005**

Candidates seeking the Office of Advisory Neighborhood Commissioner, or their representatives, may pick up nominating petitions at the following location:

D.C. Board of Elections and Ethics
441 - 4th Street, NW, Room 250N

For more information, the public may call **727-2525**.

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METROPOLITAN POLICE DEPARTMENT

NOTICE OF DEPLOYMENT OF ADDITIONAL TEMPORARY CLOSED CIRCUIT TELEVISION CAMERAS

NOTICE OF CORRECTED GENERAL LOCATIONS FOR PERMANENT CLOSED CIRCUIT TELEVISION CAMERAS

The Chief of the Metropolitan Police Department, in accordance with the requirements established in 24 D.C. Municipal Regulations (DCMR) § 2502.1 *et seq.*, hereby gives notice that, pursuant to the Public Notice published in the September 23, 2005 *D.C. Register*, additional, temporary Closed Circuit Television (CCTV) cameras were deployed to support public safety operations during the International Monetary Fund and World Bank Group meetings and related anti-globalization and anti-war demonstrations from September 23 through September 26, 2005.

During this time, the temporary cameras were deployed generally in the area of the IMF and World Bank buildings at 19th Street NW and G Streets NW, and a temporary camera was deployed in the area of 17th Street, NW and D Street, NW. Temporary cameras were deployed on Saturday, September 24, from approximately 12:30 pm until 6:30 pm along the approved demonstration route which was as follows: The Ellipse to Constitution Avenue, east on Constitution Avenue, north on 15th Street, NW, east on Pennsylvania Avenue, north on 17th Street, NW, east on H Street, NW, south on 14th Street, NW, east on Pennsylvania Avenue, south on 9th Street, NW, west on Constitution Avenue, back to Ellipse.

While it was anticipated and announced in the Public Notice that a helicopter might be deployed with a temporary camera to monitor events on an as-needed basis between Friday, September 23 and Monday, September 26, no such camera was deployed.

No comments were received regarding the deployment of temporary cameras for this event.

In the September 23, 2005 *D.C. Register*, the Chief of Police also gave notice that the MPD's current CCTV system included twenty (20) cameras and provided the locations of those cameras. However, the notice incorrectly listed the viewable areas, and not the general locations of the cameras. In fact, MPD's current CCTV system only includes nineteen (19) cameras. The general locations of the nineteen (19) permanent CCTV cameras have not changed and are as follows:

Camera Location	Camera Location
1000 Block Jefferson Drive, SW	1100 Block Connecticut Avenue, NW
Pennsylvania Avenue & 15th Street, NW	1100 Block Pennsylvania Avenue, NW (2 cameras)
14th Street and Constitution Avenue, NW	800 Block Vermont Avenue, NW
700 Block 18th Street, NW	Wisconsin Avenue & M Street, NW

Camera Location	Camera Location
200 Block Constitution Avenue, NW	1000 Block Nineteenth Street, North (Rosslyn, VA)
700 Block 19th Street, NW	3600 Block M Street, NW
19th Street & Dupont Circle, NW	500 Block North Capitol Street, NW
100 Block Vermont Avenue, NW	1300 Block Wisconsin Avenue, NW
400 Block L'Enfant Plaza, SW	300 Block Independence Avenue, SW

No comments were received regarding the cameras comprising MPD's permanent CCTV system.

The public may submit comments in writing regarding a particular deployment, or the CCTV system in general, to the Chief of Police, Metropolitan Police Department, 300 Indiana Avenue, NW, Room 5080, Washington, DC, 20001, or via e-mail at mail.chief-of-police@dc.gov

The Metropolitan Police Department's CCTV system is a secure, wireless network of 19 cameras owned and operated by the MPD. These cameras are mounted on various buildings primarily in the downtown DC area. They focus on public spaces around the National Mall, the US Capitol, the White House, Union Station and other critical installations, as well as major arteries and highways that pass through downtown DC. Under DC regulations, additional cameras can be added to the network on a temporary or permanent basis following a period of public comment. During exigent circumstances, additional cameras can be deployed on a temporary basis without advance public notice, but with a post-deployment notification to the public.

The CCTV system is not a round-the-clock video monitoring operation. The system is activated only during major events in the District (such as large-scale demonstrations, the Fourth of July celebration, Presidential Inaugurations, etc.) or during periods of heightened alert for terrorism. CCTV camera feeds are displayed in the MPD's Joint Operations Command Center (JOCC), a secure facility located on the 5th Floor of police headquarters. The JOCC is operated by the MPD, but may include staff from other federal, regional, state and local public safety agencies participating in joint operations.

The MPD's use of CCTV is designed to ensure the protection of personal privacy rights. The CCTV network has no audio capability; it provides video images of public spaces only. The cameras can pan at 360 degrees and tilt at 180 degrees. The cameras do have the capability to zoom in on a particular location, but are used primarily to monitor wide areas of public space, not the individuals within that space. The CCTV system does not use face-recognition or any other biometric technology. Both DC regulations and internal MPD policy expressly prohibit the arbitrary monitoring of individuals or monitoring of individuals based on race, gender or other factors. Regulations and policies also prohibit the use of the CCTV system for the purpose of infringing on First Amendment rights.

Additional information about the CCTV network can be found on the MPD website at www.mpdc.dc.gov/cctv.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 17288 of Eastern Trans-Waste of Maryland, Inc. ("ETW"), pursuant to 11 DCMR 3100 and 3101, from the administrative decision of the Zoning Administrator of the Department of Consumer and Regulatory Affairs. Appellant alleges that the Zoning Administrator erred in denying the issuance of a building permit, and instead requiring variance relief from the Board of Zoning Adjustment, to make repairs and improvements to an existing solid waste transfer facility in the CG (Capital Gateway) CR District at premises 1315 1st Street, S.E. (Square 703, Lot 54).

HEARING DATE: March 15, 2005
DECISION DATE: May 10, 2005

ORDER

PRELIMINARY MATTERS

Appellant Eastern Trans-Waste of Maryland, Inc. ("Appellant" or "ETW") filed this appeal with the Board of Zoning Adjustment ("Board" or "BZA") on December 21, 2004. Appellant claimed that the Zoning Administrator ("ZA") of the Department of Consumer and Regulatory Affairs ("DCRA") erred in denying Appellant a building permit to allow it to perform repairs and improvements at its solid waste handling facility located at 1315 1st Street, S.E. The ZA denied the building permit and instead informed Appellant that it required two variances from the Board before it could proceed with the work on its facility.

The dispute herein arises out of a decision of the Zoning Commission in the Spring of 2001 to hold a further hearing with respect to Zoning Commission case no. 96-3/89-1. That case, begun in 1996, concerned the establishment of an overlay district that includes Appellant's property within its boundary. In connection with the establishment of the overlay, Appellant's property was to be rezoned from M to CR. By virtue of 11 DCMR § 3202.5, all building permit applications filed after the date of the Commission's decision to hold the hearing had to be processed in accordance with requirements of the rezoning being considered. Solid waste handling facilities are not permitted in CR Districts. Normally, when a property's zoning changes to a district in which its use is disallowed, it is treated as a nonconforming use. Such uses may continue, but may not expand, undergo significant structural alteration, or be rebuilt if substantially destroyed. The Zoning Commission, however, added language to the proposed overlay that deemed uses similar to Appellant's to be conforming, but precluded their expansion. The Zoning Administrator did not process this building permit application in accordance with that provision because he believed that it did not take precedence over the fact that solid

waste handling facilities were not permitted in CR zones. Because he believed that the Appellant's facility was a nonconforming use, he analyzed the proposed construction against what was permitted for such uses and concluded that it went beyond the type of structural alterations allowed.

Although Appellant's facility is within the area represented by Advisory Neighborhood Commission ("ANC") 6D, and although the ANC was automatically a party to this appeal, it did not submit any report to the Board either in favor of, or opposing, the appeal. The Capitol Hill Restoration Society filed a letter with the Board on February17, 2005, urging the Board to grant the appeal.

The Board heard the appeal on March 15, 2005, with both the Appellant and DCRA participating in the hearing.

At its May 10, 2005 decision meeting, the Board decided to grant the appeal by a vote of 5-0-0.

FINDINGS OF FACT

Background and History

1. The property that is the subject of this appeal ("subject property") is located at 1315 1st Street, S.E., at Square 703, Lot 54. The property is developed with the Appellant's solid waste handling facility.

2. The Appellant's facility was and is operating under a certificate of occupancy (No. B162503), issued on March 17, 1992, for a "Warehouse (Waste and Rec.[ycling])." Exhibit No. 4, Attachment 1. The C of O was issued at a time when the Zoning Regulations did not include provisions that directly regulated solid waste handling facilities. Subsequently, the Commission adopted 11 DCMR § 822.3, which permitted new solid waste handling facilities in M zones, but only by special exception.

3. The definition of nonconforming use in § 199 of the Zoning Regulations (11 DCMR) includes a provision stating that a "use lawfully in existence at the time of adoption or amendment of this title that would thereafter require special exception approval from the Board of Zoning Adjustment shall not be deemed a nonconforming use." However, an extension or enlargement of that use requires special exception review. 11 DCMR § 3104.2.

4. On June 1, 2001, the Zoning Commission published notice of its intent to hold a further public hearing with respect to Zoning Commission case 96-3/89-1, which would establish a new overlay, originally called Buzzard Point (BP), but later renamed the Capital Gateway (CG) Overlay District.

5. Subsection 1600.2 of the advertised text indicated that the new overlay was intended to "assure development of the area with a mixture of residential and commercial uses, and a suitable height, bulk and design of buildings" while also allowing "for continuation of existing industrial uses ...during the extended period projected for redevelopment."

6. The advertised text included several proposed zoning map amendments, including the following:

   4. Rezone from M to BP/CR:

   All of squares 605, 607, 609, 611, 660, 661, 662, E662, 664, 703, 705, 706 and the northern half of Square 665.

7. Appellant's property is located in square 703.

8. Neither the CR district, nor the advertised overlay provisions, permit solid waste handling facilities, either as a matter of right or by special exception. However, consistent with the stated purposes of the overlay, the Commission proposed a limited "grandfathering" provision, designated as § 1605.1, which, as advertised, read:

   > A commercial or industrial use that is first permitted in the CM or M districts and that is in existence with a valid Certificate of Occupancy as of (date), shall be deemed a conforming use and shall be entitled to expand on its current lot or lots as a matter of right up to the permitted commercial FAR and height limits of the underlying zone district; Provided, that the performance standards of §§ 804, 805, 825 and 826 applicable to the use shall apply to any expansion.

9. On August 2, 2002, the Zoning Commission published a notice of proposed rulemaking in the D.C. *Register* for case 96-3/89-1 *(49 D.C. REG. 7538)*. The notice included a revised version of proposed § 1605.1, which read as follows:

   > A commercial or industrial use that is first permitted in the CM or M districts and that is in existence with a valid Certificate of Occupancy as of (date), shall be deemed a conforming use, but shall not be entitled to expand.

10. Had the Zoning Commission not included this provision, the facilities it describes would have become nonconforming uses. While nonconforming uses may continue in operation until they are abandoned or destroyed, they

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cannot expand, 11 DCMR § 2002.3, nor undergo structural alterations other than those that would be considered "ordinary" or "required by other municipal law or regulation." 11 DCMR § 2002.4.

11. Section 3202.5 of the Zoning Regulations provides that if an application for a building permit is filed after the date that the Commission "has made a decision to hold a hearing" to rezone the property, "the application may be processed, and any work authorized by the permit may be carried to completion, 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."

12. Since the proposed CR rezoning is the most restrictive, any building permit filed by the Appellant between June 1, 2001 and August 1, 2002 would have been governed by the provisions advertised and after, August 2, 2002, by the revised text of the proposed rule.

13. In or around October, 2003 – after the Commission published the notice of proposed rulemaking but prior to the effective date of the final rule -- Appellant applied to DCRA for a building permit to perform renovation work, consisting of repairs and improvements, at its facility. Exhibit No. 21, Attachment 1.

14. Specifically, the Appellant sought to repair or replace portions of the facility's structural steel, roof and sub-structure, siding and floor, service doors, and bathrooms.

15. By memorandum to the Board dated November 3, 2004, DCRA indicated that it was denying the application based upon zoning grounds. DCRA characterized Appellant's proposed project as "an enlargement to an existing non-conforming use," and stated that Appellant needed variances from §§ 2002.4 and 3202.5(b) of the Zoning Regulations in order to proceed with its proposed repairs and improvements. Exhibit No. 4, Attachment 4.

16. The Appellant filed a timely appeal of that decision on December 21, 2004.

17. On January 7, 2005, the map and text amendments that established the CG Overlay and rezoned the Appellant's property became final. *D.C Register* at 52 D.C. Reg. 63 (2005). The text of § 1605.1 as published in the notice of proposed rulemaking was unchanged other than that the date upon which grandfathering would be determined was stated to be the date when the final rulemaking became effective.

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18. During the hearing on the appeal, the Zoning Administrator conceded that the proposed repairs and improvements did not constitute an "expansion" of the Appellants' use. He said, however, that he denied the permit on zoning grounds, with the November 3, 2004 memo, because he found that the use was a nonconforming use in the underlying CR zone and he interpreted some of the repairs to be the type of "structural alterations" not permitted by § 2002.4 to be undertaken to buildings housing nonconforming uses.

CONCLUSIONS OF LAW

Pursuant to the § 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(4) (2001), the Board may hear and decide appeals where it is alleged that there is error in any decision made by any administrative officer or body in the administration or enforcement of the Zoning Regulations. The decision being appealed in this case is the denial of the building permit based upon two findings: (1) the Appellant's facility was a nonconforming use, and (2) the proposed construction exceeded the extent permitted such uses. The Board concludes that both findings were in error.

As a result of the Zoning Commission's decision to hold a further hearing on what later became known as the Capital Gateway Overlay, the Zoning Administrator was required by 11 DCMR § 3202.5, to process the building permit application filed by the Appellant in accordance with the requirements of the CR zone district, as modified by the overlay text. Although the Zoning Administrator gave effect to the CR use requirements, he did not, pursuant to § 1605.1, "deem" Appellant's use to be conforming.

The Zoning Administrator did so, not because he thought that the Appellant's use failed to meet the two prerequisites of the provision, *i.e.* its use is first permitted in a CM or M District and it holds a valid certificate of occupancy[1], but because he did not "see any specific language in this overlay that addresses that as to which takes precedence." March 15, 2005 hearing transcript at 384, lines 24-25. However, § 1600.3, both as proposed and as finally adopted, provides that the text of the CG Overlay is to prevail over conflicting provisions of the underlying zone. Moreover, the very purpose of the grandfathering provision was to act as an exception to those sections of the Zoning Regulations that would have resulted in Appellant's use being treated as nonconforming.

The Board concludes that § 1605.1, as it appeared in the Notice of Proposed Rulemaking, required that the Zoning Administrator deem uses that met its prerequisites as conforming, even if those uses were not permitted in the underlying zone. Although the subsection prohibits the expansion of such uses, the government conceded that no expansion would result from the construction, and the Board concurs. The Appellant

[1] Although the Zoning Administrator indicated during the hearing that there was an issue as to the validity of the certificate of occupancy, it was not stated as a ground for permit denial and therefore is not before the Board.

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merely proposes to repair, replace, or modernize portions of its roof, siding, floor, doors, and bathrooms. Even had this been a nonconforming use, such activities are exactly the type of "ordinary repairs, alterations, or modernizations [that] may be made to a structure or portion of a structure devoted to a nonconforming use." 11 DCMR § 2002.4.

For the reasons stated above, the Board concludes that the Appellant has met its burden of proof in demonstrating that DCRA erred in denying it a building permit for repairs and improvements to its solid waste transfer facility. Therefore, it is hereby **ORDERED** that this appeal be **GRANTED.**

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

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

FINAL DATE OF ORDER: OCT 2 5 2005

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 17109 of Kalorama Citizens Association, pursuant to 11 DCMR § 3100 from the administrative decision of David Clarke, Director, Department of Consumer and Regulatory Affairs, from the issuance of Building Permit Nos. B455571 and B455876, dated October 6 and 16, 2003, respectively, to Montrose, LLC to adjust the building height to 70 feet and to revise penthouse roof structure plans to construct an apartment building in the R-5-D District at 1819 Belmont Road, N.W., Washington, D.C. and from the issuance of the original Building Permit No. B449218, dated March 11, 2003.

HEARING DATES: February 17, March 9 and 16, April 6 and 20, 2004
DECISION DATES: June 22, 2004, December 7, 2004 and February 1, 2005

ORDER

INTRODUCTION

The Kalorama Citizens Association ("KCA") filed this appeal with the Board of Zoning Adjustment ("Board") initially challenging the decision of the Director of the Department of Consumer and Regulatory Affairs ("DCRA") to issue Building Permit Nos. B455571 and B455876 ("Revised Permits"), dated October 6 and 16, 2003, respectively, to Montrose, LLC ("Montrose"). The permits authorized Montrose to adjust the building height to 70 feet and to revise penthouse roof structure plans for a five-story apartment building ("Project") in the R-5-D District at 1819 Belmont Road, N.W., Washington, D.C. Montrose sought the Revised Permits after DCRA issued a stop work order on the Building Permit No. 449218 ("Original Permit").

KCA alleged DCRA erred in issuing the Revised Permits because the Project exceeded the maximum height and set back requirements of the Act to Regulate Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452, D.C. Official Code §§ 6-601.01 to 6-601.09 (2001) ("the Height Act"), and the applicable FAR and roof structure set back requirements of the Zoning Regulations. Prior to the hearing on the appeal, the Board granted KCA's motion to amend the appeal to include appeal of the Zoning Administrator's decision to issue the original building permit.

For the reasons stated below, the Board concludes that the Zoning Administrator erred in approving the building permits in the following respect:

The height of the building, with the roof deck, exceeds the height limitations set forth in the Height Act.

The Board also concludes that the Zoning Administrator properly determined that the building's floor area ratio was within the matter of right limit and that the penthouse structure was properly set back according to the Height Act and 11 DCMR §§ 411 & 400.7(b).

PRELIMINARY AND PROCEDURAL MATTERS

Parties. The parties to the proceeding are the KCA, Advisory Neighborhood Commission 1C ("ANC"), and Montrose LLC. The ANC was an automatic party pursuant to 11 DCMR § 3199.1. Montrose LLC owns the property, also making it an automatic party pursuant to 11 DCMR § 3199.1.

Notice of Hearing. The Office of Zoning provided notice of the hearing on the appeal to the parties, including Montrose, and to the ANC. The Office of Zoning advertised the hearing notice in the *D.C. Register* at 50 D.C. Reg. 11060 (Dec. 26, 2003).

Motion to Dismiss. Montrose moved to dismiss the appeal on jurisdictional and equitable grounds. The Board denied the Motion for the reasons discussed below.

Motion to Amend. KCA moved to amend its appeal to include the decision to issue the Original Permit. The Board granted the motion for the reasons discussed below.

Further Proceedings: At its regularly scheduled meeting of June 8, 2004, the Board voted to grant the appeal with respect to Appellant's allegations regarding set back and height and denied the appeal with respect to the measurement of FAR. On December 7, 2004 the Board on its own motion reopened the record to reconsider and receive more evidence on the set back issue. After reviewing the materials submitted, the Board, at its regularly scheduled public meeting held February 1, 2005, denied the portion of the appeal that challenged the legality of the penthouse setback under the Height Act. The remainder of its earlier decision was left intact.

FINDINGS OF FACT

A. Description of the Property

1. The property that is the subject of this appeal ("Subject Property") is located at 1819 Belmont Road, N.W., Washington, D.C., in the R-5-D District.

2. The Subject Property is improved with a multiple story townhouse.

3. The width of the 1800 block of Belmont Road, N.W., measured from building line to building line, is 80 feet.

4. Montrose LLC owns the Subject Property.

B. Issuance of the Original and Revised Building Permits and KCA's Investigation

5. On December 12, 2002, Montrose applied for a building permit to alter and repair the existing building on the Subject Property, construct an addition at the rear of the building, and add two floors and an attic (the "Project").

6. The plans submitted with the building permit application showed the following:

- the height of the building as measured from the curb opposite the middle of the building would increase the existing building height to 71 feet, 3 inches;
- a penthouse would be constructed on top of the attic story at a height of 10 feet, 4 inches;
- the penthouse would be set back from the front and rear building walls a distance greater than 10 feet, 4 inches;
- the penthouse would be set back six feet on the west wall and flush with the wall along the east property line;
- the roof deck and railing were shown to be several feet above the roof line;
- without including the railing, the roof deck was less than four feet in height;
- the overall density of the Project was listed as 3.49 FAR;
- the building was to be connected to the adjacent buildings by a party wall that ended short of the building's height, leaving a portion of the building's side walls exposed.

7. On March 11, 2003, DCRA issued Building Permit No. B449218 authorizing construction of the Project (the "Original Permit").

8. The Original Permit stated it was for, "Alteration and repair of exist. Bldg. Addition in rear, add 2 floors plus attic; retaining wall & stair at rear." The Original Permit also had a notation indicating 5 stories plus basement.

9. In the late spring and summer of 2003, the existing row house was demolished except for the façade, and a new building constructed from the ground up.

10. On September 10, 2003, and again on September 15, 2003, KCA wrote to Denzil Noble, Administrator of the Building and Land Regulation Administration of DCRA, alleging that the Project exceeded the allowable height under the 1910 Height Act and might exceed the maximum allowable Floor Area Ratio.

11. DCRA issued a stop work order for the Project on September 12, 2003. DCRA determined that the third party inspector for zoning only analyzed the Project's compliance with building height under the R-5-D provisions, which permit a height of 90 feet, while the Height Act limits the Project's height to 70 feet.

12. Montrose began displaying the Original Permit in a location visible from the street after the stop work order was issued on September 12, 2003.

13. On September 22, 2003, KCA submitted a Freedom of Information Act request to DCRA seeking the plans associated with the Original Permit.

14. On September 29, 2003, DCRA wrote to KCA requesting assurance that KCA would pay the cost of providing the documents sought in its FOIA request, and stating that the statutory 10 day deadline for responding to the request was "suspended until all processing issues are resolved."

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15. On October 1, 2003, a Montrose representative appeared at an ANC meeting. After the meeting, KCA representative Ann Hargrove requested copies of the plans associated with the Original Permit. Montrose did not provide the plans to KCA.

16. On October 6, 2003, DCRA issued Building Permit No. B455571 (the "First Revision Permit") to Montrose to revise the Original Permit "to adjust the height of the building to 70'-0" [and] clarify FAR calculations, as per attached drawings." The drawings depicted:

- a section drawing through the east elevation showing the original height at the roof of the building;
- a section drawing through the east elevation showing the revised height at the roof of the building;
- a drawing showing the area of each level included in the FAR calculations; and
- the FAR calculations (the overall density remained 3.49 FAR).

17. The drawings did not depict the roof deck and railing, or the set back of the roof structure. Those details were provided only in the plans approved by the Original Permit.

18. The plans attached to the First Revision Permit show the Project's parapet 69 feet, 9 and 3/8ths inches from the top of the curb at the midpoint of the lot.

19. On October 16, 2003, DCRA issued Building Permit No. 445873 (the "Second Revision Permit") to "revise penthouse roof structure per DC request and per attached drawings." The drawing submitted with the Second Revision Permit showed the rear half of the roof structure gable removed. No other changes were made to the penthouse, the penthouse set backs along the interior lot lines remained as shown in the Original Permit, and no other changes were made to the Project.

20. On October 16, 2003, KCA representative Ann Hargrove met with ANC Commissioners Alan Roth and Bryan Weaver, and Councilmember Jim Graham in Mr. Graham's office. In the course of the meeting, in speakerphone conversation with DCRA officials, including Denzil Noble, Mr. Graham requested that DCRA provide the plans associated with the Original Permit to KCA.

21. On October 17, 2003, KCA received from DCRA copies of the plans, minus a certification of the actual height of the re-positioned roof, and initial FAR worksheets for the original and revised plans.

22. On November 10, 2003, KCA filed its appeal with the Board challenging the issuance of the First and Second Revision Permits.

23. On February 8, 2004, KCA filed a motion with the Board requesting that DCRA supply KCA with the documents listed in its FOIA request but not provided by DCRA.

24. On February 12, and 16, 2004, DCRA supplied the missing plan documents, minus the FAR worksheets.

25. On March 2, 2004, KCA moved to amend its appeal to include the Original Permit.

C. Height and Set Back of Roof Structures

26. The plans available to the Zoning Administrator depicted a penthouse on top of the attic story at a height of 10 feet, 4 inches from the roof.

27. If the height of the penthouse is added, the building's height, if measured in accordance with the Height Act, exceeds 70 feet.

28. The penthouse is set back from the front and rear building walls a distance greater than 10 feet, 4 inches.

29. The penthouse is set back six feet from the building's west wall, and flush with the wall along the building's east property line.

30. The roof deck and railing are several feet above the roofline, and are over 70 feet in height.

D. FAR Calculations

31. The plans depict an attic space less than 6 feet 6 inches in height from the floor level of the attic space to the underside of collar ties that form the ceiling of the attic.

32. The collar ties shown in the plans work to brace the building against racking in a north-south direction.

33. When calculating the Floor Area Ration ("FAR") attributable to partial basements, the Zoning Administrator uses either the "perimeter wall method" or the "grade plane method".

34. For this building, the Zoning Administrator used the perimeter wall method to calculate FAR.

35. Under the perimeter wall method, FAR is determined by establishing a ratio between the linear square footage of the portion perimeter wall with more than 4 feet out of grade and the total square footage of the lower level.

36. Under the "grade plane" method, a plane is established between the grade at the front of the building and the grade at the rear of the building. The point at which this plane intersects at a four foot level, any portion that exceeds that plane counts toward FAR and any portion that does not is considered a cellar.

37. Using the perimeter wall method, the amount of basement gross floor area assignable to FAR is 147.3 square feet, which results in a total FAR that is within the matter of right 3.5 limitation.

CONCLUSIONS OF LAW

1. Amendment to Include Original Permit

KCA initially appealed only the First and Second Revised Permits, and did not appeal the Original Permit. Prior to the Board's initial hearing in this matter, KCA moved to amend its appeal to include DCRA's decision to issue the Original Permit.

The Board has broad discretion to allow amendments to appeals, derived from its power to control its docket. The Board concludes that because the same errors alleged in the appeal (height of the roof deck and railing, set back of the penthouse, and bulk of the Project) are encompassed in the Original Permit and appeal of the original permit is timely pursuant to the Board's discussion below, it is appropriate to include the decision to issue the Original Permit in the appeal.

2. Timeliness of the Appeal

Montrose moved to dismiss the appeal as untimely. The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) require that all appeals be filed within 60 days of the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. 11 DCMR § 3112.2(a). This 60-day time limit may be extended only if the appellant shows that: (1) there are exceptional circumstances that are outside the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) the extension of time will not prejudice the parties to the appeal. 11 DCMR § 3112.2(d).

The "decision" at issue in this case with respect to timeliness is the Original Permit. The height, FAR, and penthouse set back were depicted on the original plans. Neither of the subsequent revisions changed these aspects of the building's designs. The Board must therefore first determine when the Appellant knew or should have known that the permit was issued.

Whether or not the permit was visible prior to September 2003 is irrelevant since construction was visible to the public by at least the summer of 2003, and KCA knew enough about the project on September 10th to write to DCRA concerning potential height and FAR violations. (Findings of Fact 10 and 11). It is unnecessary in these circumstances to pinpoint a precise date when the appellant knew or should have known that a permit had been issued. It is clear that whatever that date might have been, this appeal was filed more than 60 days from that time.

Nevertheless, the Board concludes that exceptional circumstances outside the KCA's control substantially impaired its ability to file a good faith appeal, and that in light of these circumstances, an extension should be granted. KCA could not file a good faith appeal until it had some reason to believe the Zoning Regulations were violated. Given these facts, KCA did

not have reason to believe the Project was problematic until the framing of the structure was completed in mid September 2003. Even then, it could not tell the precise height and bulk of the Project without access to the plans supporting the permit application. Although its September 10, 2003 letter indicates some level of concern, DCRA's resistance to providing the necessary information made the filing of a timely appeal impossible.

Beginning in mid-September, KCA demonstrated considerable diligence in its efforts to acquire information about Montrose's permit and construction plans from DCRA, but these efforts were thwarted. DCRA did not provide the plans attached to the Original Permit until October 17, 2003. Meanwhile, Montrose had changed the design of the Project, seeking the Revised Permits in October 2003. This meant that KCA needed to determine whether their concerns had been ameliorated.

The Board concludes the extension will not prejudice the parties to the appeal. Montrose was on notice that the appellant had serious concerns with the project and was seeking information concerning project details. As late as October 3, 2003, a Montrose representative refused KCA's request for such information. (Finding of Fact 16). Since Montrose contributed to KCA's inability to discern the true nature of the project, it cannot be heard to claim prejudice from a delay of its own making.

3. **Laches and Estoppel**

Montrose also moved to dismiss the appeal as barred by laches and estoppel. The defenses of laches and estoppel are disfavored in the zoning context because of the public interest in the enforcement of the zoning laws. *Sisson v. District of Columbia Board of Zoning Adjustment*, 805 A.2d 964, 972 (D.C. 2002) (quoting *Beins v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 122, 126 (D.C. 1990). Application of estoppel is limited to situations where the equities are strongly in favor of the party invoking the doctrine. *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7, 11 (D.C. 1978). To make a case of estoppel, Montrose must show that it: (1) acted in good faith; (2) on the affirmative acts of a municipal corporation; (3) made expensive and permanent improvements in reliance thereon; and (4) the equities strongly favor the party invoking the doctrine. *Sisson*, 805 A.2d at 971.

The Board notes that Montrose seeks to invoke the doctrine of estoppel against the Appellant, a private party, and not the government. The affirmative acts upon which Montrose is claiming reliance, namely the issuance of the building permits, were all taken by DCRA, not the appellant. The Board has previously taken the position that estoppel should not bar a neighboring property owner (as distinct from the District) from asserting rights under the Zoning Regulations. *See Appeal of Advisory Neighborhood Commission* 5B, BZA No. 16998 (August 26, 2004);, *see also Beins v. D.C. Board of Zoning Adjustment*, 572 A.2d 122, 125 (D.C. 1990). As noted by the Board in the *Appeal of Advisory Neighborhood Commission 5B*, "estoppel should not be used to preclude an innocent non-government appellant from seeking to eliminate a zoning violation."

Finally, laches is an equitable defense and may only be sought by a person with clean hands. The refusal of Montrose to provide KCA with project documentation contributed to the very delay it now complains of. Equity is not available under these circumstances.

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Laches is rarely applied in the zoning context except in the clearest and most convincing circumstances. *Sisson*, 805 A.2d at 971-972. To determine the validity of a laches defense, the Board must look at the entire course of events. Laches will not provide a valid defense, unless two tests are met: the defendant has been prejudiced by the delay and that delay was unreasonable. In the absence of an analogous statute of limitations, the party asserting the defense has the burden of establishing both elements. *Id.*

Montrose did not carry its burden of establishing that KCA unreasonably delayed in bringing its appeal. Montrose claims that KCA was on constructive notice of the original permit in March, 2003 when it was available to the ANC, was published in the D.C. Register, and when Montrose met with the ANC's transportation committee. However, one cannot conclude that an Advisory Neighborhood Commission's knowledge of a permit is timely communicated to every person or association that may be affected. Similarly, persons and associations cannot be expected to subscribe to the D.C. Register to learn of construction activities that may impact them. As part of its discussion of the timeliness issue, the Board concluded that KCA was chargeable with notice of DCRA's decision when the new construction became visible in the late spring and early summer of 2003. However, the Board, in that same discussion, also found that exceptional circumstances prevented KCA from filing this appeal within the 60-day period set forth in the Board's rules of procedure. The same factors that justified extension of the 60 day time period also warrant a finding that there was not unreasonable delay in bringing the appeal.

4. <u>Authority of the Board to hear appeals alleging errors in interpreting the Height Act</u>

The Board now turns to a jurisdictional question raised as to its authority to hear an appeal based on alleged errors made in decisions interpreting the Height Act. KCA asserts the Project's penthouse, roof deck and railing exceed the maximum height permitted by the Height Act. In addition, KCA alleges that the set back of the penthouse violates both the Zoning Regulations and the Height Act. Montrose argues to the contrary that the Board lacks jurisdiction to hear appeals of administrative decisions interpreting the Height Act. DCRA concurs with Appellant that the Board does have authority and jurisdiction to interpret the requirements of the Height Act as they are incorporated in the Zoning Regulations.

For the following reasons, the Board concludes that the Zoning Act and the authorize the Board to interpret the Height Act in consideration of an appeal regarding an alleged violation of the Height Act.

Section 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799)("Zoning Act"), delineates the scope of the Board's appellate jurisdiction. It authorizes the Board to hear and decide appeals based on errors made by District officials in enforcing the Zoning Regulations. Section 8 of the Zoning Act provides in relevant part that:

> Appeals to the Board of Adjustment may be taken by any person aggrieved ... by any decision ... based in whole or in part upon any zoning regulation or map adopted under this Act.

Section 8 of the Zoning Act further authorizes the BZA:

> To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by the Inspector of Buildings or the Commissioners of the District of Columbia or any other administrative officer or body in the carrying out or enforcement of any regulation adopted pursuant to this Act.

The Board concludes it has jurisdiction over all height and set back aspects of the appeal because the Height Act is incorporated throughout the Zoning Regulations that the Board is entrusted to interpret in hearing and deciding appeals. Of particular note is 11 DCMR § 2510. 1 which expressly provides that all buildings or other structures shall comply with the height limitations of the Height Act. It reads:

> In addition to any controls established in this title, all buildings or other structures shall comply with 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 (2001) (formerly codified at D.C. Code §§ 5-401 to 5-409 (1994 Repl. and 1999 Supp.))).

11 DCMR § 2510. 1.

In addition, 11 DCMR § 411.1 Roof Structures, requires that roof structures not be in conflict with the Height Act. See also § 400.1, which establishes height limits in Residence zone districts. That section provides that the heights set out in a table that follows apply, "except as specified ... in chapter[s] 20 thorough 25." Chapter 25 incorporates the Height Act's restrictions. Thus, the Zoning Regulation that establishes the maximum height permitted in Residence zone districts provides that the height limits in the zone district are circumscribed by the limitations of the Height Act.

Accordingly, the Board finds that it must interpret the Height Act in order to determine whether the Zoning Administrator erred with respect to his determinations regarding the height and set back issues. [1]
Montrose argues that the Height Act vests exclusive enforcement authority in the D.C. Attorney General's Office, and that the Board is therefore precluded from enforcing the Height Act's limits, citing the case *Techworld Development Corporation v. D.C. Preservation League*, 648 F. Supp. 106 (D.D.C. 1986). Montrose is correct that the Board has no enforcement responsibilities

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[1] This conclusion is consistent with the BZA's decision in *Howard University*, BZA Appeal No. 15568 (October 21, 1991). In the *Howard University* case, the Zoning Administrator denied a building permit on grounds that the height of a proposed dormitory building violated the height limitations of the Zoning Regulations and the Height Act. The BZA affirmed the Zoning Administrator's determination, concluding that, "[t]he height of buildings in the District of Columbia is governed by both the 11 DCMR Zoning Regulations and the Act to Regulate the Height of Buildings in D.C. June 10, 1910. When determining the allowable height of a structure, the more restrictive of the two laws must apply." *Howard* at 3.

with respect to the Height Act. But the same is true with respect to the Zoning Regulations. Section 11 of the Zoning Act gives that responsibility to the Mayor of the District of Columbia. D.C. Official Code § 6-641.01 (a) (2001). The Board is not an enforcement body. It is, in this context, an appellate body that hears and decides allegations of errors made in the carrying out or enforcement of any regulation adopted under the Zoning Act. The incorporation of the Height Act into the Zoning Regulations makes decisions made under that Act reviewable by this Board. The Board is therefore not persuaded by Montrose's argument.

5. Merits of the Appeal

A. Height of the Building with Roof Structures

The maximum height permitted in an R-5-D district is 90 feet. 11 DCMR § 400.1. However, as discussed in section 3 above, the Zoning Regulations incorporate the height limitations of the Height Act into the height restrictions in every zone district. The Height Act limits the height of a building on a residential street to the width of the street diminished by ten feet. Height Act § 5, D.C. Official Code § 6-601.05 (c). The width of the 1800 block of Belmont Road, N.W., is 80 feet, yielding a maximum permitted building height of 70 feet.

Building height for both Height Act and zoning purposes is measured from the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet. Height Act § 7, D.C. Official Code § 6-601.07; 11 DCMR § 199.1 (Feb. 2003) ("Building, height of"). The height of the building to the highest point of the roof is 69 feet 9 and 3/8 inches. The revised plans depict a roof deck and railing at the front of the building extending several feet above the roof. Although the plans do not indicate a precise height of these structures, the Zoning Administrator should have known that the additional height depicted, if measured from the opposite curb, would cause the building to exceed the two and five eighth inches remaining in lawful height. The Board therefore concludes that the roof deck exceeds the maximum height permitted by the Height Act.

Montrose argues that the roof deck's height should not be counted because it is less than four feet in height. This argument relies upon § 411.17, which provides that:

> Roof structures less than four feet (4 ft.) in height above a roof or parapet wall shall not be subject to the requirements of *this section*. (Emphasis added).

The flaw in Montrose's argument is that the 'section' being referred to in the italicized language is § 411, which governs the height and location of roof structures under DCMR 11, however no provision in this section, or any of the Zoning Regulations, can authorize a structure to exceed the height limitations imposed by the Height Act under any circumstances not authorized in the Act itself.

Section 5 of the Height Act permitted the Commissioners, now the Mayor, to waive its height restriction for certain types of structures. D.C. Official Code § 6-601.05 (h).[2] As documented in

[2] The record is silent with respect to whether a waiver was ever sought or granted in accordance with this provision for any roof structure in excess of the height limitations under the Act Appellants did not allege any error related

this appeal, the Board finds that this specific deck is a structure and that this roof deck is not among the enumerated structures exempted under § 5 of the Height Act, neither is it one that can be construed to be included in that provision. See n.4, *infra.*

Accordingly, the Board concludes that the Zoning Administrator erred in issuing the Original Permit, and the Revised Permits, based upon plans depicting a roof deck that would have exceeded the 70 foot height limit imposed by the Height Act. And thus, the Board concludes that this roof deck must comply with the height limitations of the Height Act.

Because the roof deck exceeds the limitations of the Height Act and the railings are attendant to the deck, the Board need not reach the issue of whether safety rails alone may be exempt under the Act if they are attendant to a compliant deck.

B. Penthouse Set back

Elevator penthouses are listed among the enumerated structures specifically exempt from the Height Act pursuant to D.C. Official Code § 6-601.05(h). While the Height Act permits such penthouses, to receive height waivers it also requires that they "be set back from exterior walls distances equal to their respective heights above the adjacent roof." D.C. Code § 6-601.05(h).[3]

The Zoning Regulations subject roof structures to conditions not in conflict with the Height Act, including the requirement that an elevator penthouse "be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located." 11 DCMR § 400.7(b). § 400. 1 and § 400.2. This requirement applies to all elevator penthouses, including those that are within matter of right zoning height, regardless of whether the penthouse is "located below, at the same roof level with, or above the top story of any building or structure." 11 DCMR § 411.2.

Accordingly, with respect to the set back requirement, the provisions of 11 DCMR § 400.7 (b) are similar, but not identical to § 5 of the Height Act, D.C. Official Code § 6-601.05 (h) (2001).

Appellants argue that the penthouse is not set back from all exterior walls in compliance with the Act or the Zoning Regulations because it is not set back the required distance from the two side walls. There is no dispute that the penthouse is properly set back from the front and back The side walls are partially exposed to the outside where they extend above the rooflines of the adjacent buildings,. Matter of right development on adjacent properties would allow the walls to be covered in the future.

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thereto. While such waiver is required under the Act, the Board need not resolve this factual issue in light of its finding that the Zoning Administrator erred in issuing the building permit on other grounds.

[3] The Board concurs with the 1953 Office of the Corporation Counsel Opinion that the phrase "penthouses over elevator shafts" set forth in D.C. Official Code § 6-601.05(h) may be construed to include penthouses over stairways. See opinion of Vernon E. West, Corporation Counsel, D.C., July 27, 1953, at 4, attached as Exhibit 1 to Appellant's Supplemental Memo on Historical Treatment by Corporation Counsel and Zoning Authorities of Roof Structure and Basement FAR issues.

A threshold issue is whether the Zoning Administrator, in applying the set back requirement for the stairway penthouse, looks to the current height of the roofs on adjacent lots to determine whether an exterior wall will result from the plans being reviewed, or to the potential height to which those rooflines may be brought as a matter of right. The Zoning Administrator's current practice when examining roof structure plans is to assume that adjacent structures are built to the maximum dimensions permitted by the Zoning Regulations

The Board finds that the Zoning Administrator must look at the potential height as a matter of right. To find otherwise, would be almost impossible for the Zoning Administrator to administer, would result in inconsistent application, and would regulate zoning based upon the whim of third parties. With respect to the subject property, since the connected buildings on the adjacent lots could reach the same maximum height of 70 feet and thereby cover the exposed portions of the walls, the Zoning Administrator did not err in considering the side walls to be interior.

This conclusion is in accord with the historical treatment of the term "exterior walls under the Zoning Regulations and the Height Act. While there have been differing opinions regarding the correct interpretation of exterior walls under the Height Act, the Zoning Commission has adopted the view that the Height Act requires set back only from a property line which abuts a street. See Zoning Commission Order No. 749–A, Case No.93-9C (1994) at 12, wherein the Zoning Commission concurred with the conclusion of the Zoning Administrator that the project did not violate the Height of Buildings Act. In that case the Zoning Administrator submitted a memorandum to the Zoning Commission stating that the setbacks of a roof structure under the provisions of the Height Act "have always been interpreted by the Zoning Division as being required to set back from the property line which adjoins a street." Memorandum to Madeleine H. Robinson, Acting Director, Office of Zoning from Joseph F. Bottner, Jr., Zoning Administrator, Subject: Commission Case No. 93-9C, (PUD and Map Amendment at 21st and H Streets, N.W. –GWU/WETA (hereinafter "Bottner Memorandum"). In accord, Note to George Oberlander, National Capital Planning Commission, from Sandra Shapiro, dated February 17, 1994; Report of the Zoning Advisory Council on Proposed Amendments to the Zoning Regulations, July 15, 1958. In that same memorandum, the Zoning Administrator advised that the Zoning Commission, under a Planned Unit Development Review, does have authority to "waive the setback of a roof structure from a property line that does not adjoin a street." Bottner Memorandum, supra, at 2.

The different interpretation under the Height Act and the Zoning Regulations of the term "exterior walls" may be explained by the fact that the term "exterior walls" is not defined in either the Act or the regulations, and the Act and the regulations governing the set back of penthouses serve different, if complementary, purposes. Under the regulations deviation from the set back provisions is allowed by special exception. Accordingly, the focus of analysis under the regulations is broader - whether the deviation will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property. In contrast, the Height Act is prohibitive, allowing no flexibility or exception, and the focus is on the protection of views from the street or alley.

While the term "exterior walls" has been interpreted more broadly under the Zoning Regulations to include a wall set back from the property line that abuts a yard or court, as opposed to a street or alley, it has not been interpreted to apply to a side wall constructed to the lot line of an abutting property. This type of wall has been considered a "party wall" or "common division wall", not subject to the set back requirements. See testimony of Faye Ogunneye, Chief Zoning Review Branch, DCRA (March 16, 2005 Transcript at 169 -71, 191-93; and 222). Accordingly, what distinguishes an exterior wall for zoning purposes is not whether it is exposed to the elements, but whether it is set back from a property line.

The Court of Appeals has stated that while the Board is not bound by past decisions, it must consider in its deliberations long-standing interpretations of the Zoning Regulations which have had precedential effect. *Smith v. District of Columbia Board of Zoning Adjustment,* 342 A.2d 356 (1975). In light of the fact that "exterior walls" is neither defined in the Height Act nor the regulations, but has a history of interpretation by the Zoning Commission, the Zoning Administrator, NCPC, and this Board, and that the historical interpretations referenced above support the stated purpose of the Act and the regulations, respectively, this Board concludes that these interpretations should apply.

Accordingly, in this case, the two walls from which the penthouse is not set back at a distance equal to its height are not exterior walls because they are built to the property line and abut the adjacent properties. For these reasons, the Board finds that pursuant to the Height Act and the Zoning Regulations the subject property has two exterior walls, at its front and back, and that the stairway penthouse was properly set back from both.

C. FAR Calculations

The Appellant asserts the Zoning Administrator committed two errors in calculating the FAR in the building permit. First, the area counted as attic space should have been included in the gross floor area of the Project. Second, the basement floor area was incorrectly calculated using the "perimeter wall method" instead of the "grade plane method."

All structures within the R-5-D Districts are limited to a maximum Floor Area Ratio ("FAR") of 3.5. 11 DCMR § 402.4. FAR is defined as "a figure that expresses the total gross floor area as a multiple of the area of the lot. This figure is determined by dividing the gross floor area of all buildings on a lot by the area of that lot." 11 DCMR § 199.1 ("Floor Area Ratio"). The term "Gross Floor Area" includes basements and attic space, whether or not a floor has actually been laid, providing structural headroom of six feet, six inches or more. 11 DCMR § 199.1 ("Gross Floor Area").

Turning first to the attic issue, the Appellant contended that the plans showed that the attic's ceiling was not "structural" and therefore should not have been used to limit the height of the attic space. If the ceiling is not counted as "structural headroom" then the height would exceed six feet six inches and the space would be included in the Gross Floor Area, and the building would exceed 3.5 FAR.

The term "structural" is not defined in the Zoning Regulations, accordingly the definition for zoning purposes is provided by Webster's Unabridged Dictionary pursuant to 11 DCMR § 199.

The dictionary defines "structural" as "of or relating to the load bearing members or scheme of a building, as opposed to the screening or ornamental elements."

The Board credits the testimony of the architect of record for the Project that because the building is framed from front to back, rather than relying on the adjacent walls of the abutting townhouses for support, the collar ties forming the attic ceiling were not ornamental, but served as structural members necessary to help brace the building against racking in a north-south direction. The Board therefore concludes that the collar ties created structural headroom of less than six feet, six inches, and thus the space was properly excluded from FAR calculations.

With respect to the basement issue, KCA argued that the Zoning Administrator failed to include more of its square footage to the building's FAR. Under the Zoning Regulations, a story that has a ceiling four feet or less out of grade is considered a cellar and does not count toward FAR. *See* 11 DCMR § 199.1 ("cellar"). Conversely, if a lower story has a ceiling height of more than four feet out of grade, it is considered a basement and the area must be included in the density calculations of the building. *See* 11 DCMR § 199.1 ("basement"). The difficulty arises when the lower level is partially above and partially below that four-foot plane, and when the adjacent grade cannot be determined. Such is the case here where the Project is bounded on either side by row dwellings and the finished grade is not apparent.

The Zoning Regulations provide no guidance on how to calculate the FAR of partial basements and partial cellars. The Zoning Administrator's office has employed at least two methods for calculating lower level FAR: the grade plane method and the perimeter wall method. In this instance, the Zoning Administrator utilized the latter. KCA asserted the "grade plane" method was the appropriate means to calculate partial basements/cellars.

Under the "perimeter wall" method, the FAR is determined by establishing a ratio between the linear footage of the portion perimeter wall with more than four feet out of grade and the total square footage of the lower level. Under the "grade plane" method, a plane is established between the grade at the front of the building and the grade at the rear of the building. The point at which this plane intersects at a four foot level, any portion that exceeds that plane counts toward FAR and any portion that does not is considered a cellar.

Both methods appear reasonable and the choice of which is most appropriate is within the Zoning Administrator's discretion.

The Board concludes the floor space in the basement was correctly calculated using the perimeter wall method in the plans submitted by Montrose. At most, only 147.3 square feet of space on the lower level is a basement, which counts toward FAR. The Project thus complies with the density limitation of 3.5 FAR for the R-5-D District.

6. **Great weight given to ANC issues and concerns**

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; D.C. Official Code Ann § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's written recommendation. In this case, the ANC joined with KCA in the above arguments that the Board has fully considered and addressed above.

Accordingly, it is therefore **ORDERED** that the appeal is **DENIED** in part and **GRANTED** in part. The Appeal is **DENIED** with respect to the penthouse set back requirements under the Height Act and the Zoning Regulations, and as to the FAR calculations. The Appeal is **GRANTED** on the grounds that the height of the building with the roof deck exceeded the height limitations of the Height Act.

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

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

FINAL DATE OF ORDER: NOV 0 8 2005

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17264 of Michael and Jill Murphy, pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy requirements of § 403, a variance from the rear yard requirements of § 404, and a variance from the nonconforming structure requirements of § 2001, to construct a deck at the rear of a single-family row dwelling in the CAP/R-4 District at premises 407 E Street, N.E. (Square 812, Lot 42).

HEARING DATE: March 15, 2005
DECISION DATE: March 15, 2005 (Bench Decision)

DECISION AND ORDER

This application was submitted on October 27, 2004, and again, with more specificity, but no substantive change, on December 28, 2004, by Michael and Jill Murphy ("Applicants"), owners of the property that is the subject of this application ("subject property"). The self-certified application requested two variances, from the lot occupancy requirements of 11 DCMR § 403, and the rear yard requirements of 11 DCMR § 404. The variances are necessary to allow the retention of a second-story rear deck, which was constructed during the summer of 2003. Although the Applicants built the deck without the proper permit, the Department of Consumer and Regulatory Affairs ("DCRA") later issued a building permit sanctioning its construction. Subsequently, however, DCRA issued a Stop Work Order, apparently for working without a permit, and at that time, the Applicants realized they needed variance relief to retain the deck.

The Board of Zoning Adjustment ("Board" or "BZA") held a hearing on the application on March 15, 2005, at which it voted 4-0-1 to approve the application, granting the variances, and permitting retention of the deck.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated January 4, 2005, the Office of Zoning ("OZ") gave notice of the filing of the application to the Office of Planning ("OP"), the District Department of Transportation, Advisory Neighborhood Commission ("ANC") 6C, the ANC within which the subject property is located, Single Member District/ANC 6C08, and the Councilmember for Ward 6. Pursuant to 11 DCMR § 3113.13, OZ published notice of the public hearing in the *District of Columbia Register* and on January 12, 2005, sent such notice to the Applicants, all property owners within 200 feet of the subject property, and ANC 6C.

Requests for Party Status. Mr. and Mrs. Nasser Nejad, the Applicants' immediate neighbors, were granted party status to oppose the application. The Nejads claimed that the Applicants' deck blocked their sunlight and negatively impacted their privacy and the drainage of water from their property, allegedly causing damaging moisture and dampness in their home.

NOV 1 8 2005

Government Reports. The Office of Planning filed a report with the Board dated March 8, 2005 recommending approval of the variances from the lot occupancy, rear yard, and nonconforming structure requirements. OP opined that the application met the variance tests, and that the deck would not be inconsistent with the Comprehensive Plan, but would be less intrusive than the old, two-level deck.

There were no other government reports filed in this case.

ANC Report. The ANC submitted a letter dated February 28, 2005, stating that, on February 9, 2005, during a properly-noticed meeting with a quorum present, it had considered the application, and voted 7-1 to support it.

Persons in Support. The Board received several letters in support of the application from neighbors, as well as a letter in support from the Capitol Hill Restoration Society which stated that the new deck "substantially reduces the interference with light, air, and privacy when compared with the previous two-story" deck.

FINDINGS OF FACT

1. The subject property is located at address 407 E Street, N.E, in Square 812, Lot 42. It is in an R-4 zone district and within both the Capitol Interest Overlay District and the Capitol Hill Historic District.

2. The property is developed with a three-story row dwelling, which is one in a series of nine row dwellings and is a contributing building to the Historic District.

3. When the Applicants purchased the property in 1997, the row dwelling had a two-level rear deck and was being used as a flat, with one unit consisting of the first floor and the other unit consisting of the two upper floors.

4. The lower level of the old two-level deck consisted of a 14' by 14' wooden platform, extending out from the second floor of the dwelling and topped by an open wooden fence. The upper level consisted of an 8' by 14' wooden platform, extending out from the third floor of the dwelling and enclosed with sight-tight wooden walls.

5. At some point after the Applicants purchased the property, they tore down the two-level rear deck, which had fallen into disrepair and was no longer structurally sound.

6. During June and July of 2003, the Applicants replaced the old two-level deck with a new one-level rear deck, the platform of which is 8' by 14' and extends out from the second floor of the dwelling. This new deck has an open-slatted wooden fence.

7. As the subject dwelling is a contributing building to the Capitol Hill Historic District, the Historic Preservation Office reviewed and approved the construction of the new deck.

8. Mr. Nejad, the Applicants' adjacent neighbor and the party opponent herein, first complained to the Applicant on April 18, 2004 about alleged impacts of the Applicants' construction. Specifically, Mr. Nejad claimed that rust on his dishwasher and stove and the loosening of bathroom floor tiles were due to the Applicants' remodeling, (which had not yet begun) and particularly to construction in the Applicants' rear yard.

9. In June/July of 2003, when the new deck was built, the Applicants did not have a permit for it, but they attempted to rectify this oversight. DCRA therefore included the deck as part of Building Permit No. B465450, issued on August 27, 2004, which permitted interior renovation work. *See,* Exhibit Number 9.

10. The Applicants extensively renovated the interior of the dwelling. The renovations retained the separate electrical and mechanical infrastructures necessary for a flat, but once the renovations were completed, the Applicants intended to occupy the entire dwelling for the foreseeable future.

11. On October 26, 2004, after the new deck was completed, but before the final completion of the remodeling, DCRA issued a Stop Work Order for the construction at the property, based on a complaint from Mr. Nejad. The nature of the complaint was not evident in the record.

12 It was at this time, *i.e.,* October of 2004, that the Applicants learned that the construction of the new rear deck, now completed for over a year, required zoning relief, and that such relief should have been applied for prior to the deck's construction.

13. The Applicants therefore applied to the Board for relief from the lot occupancy and rear yard requirements of the R-4 district. With the new deck, the lot occupancy of the row dwelling is approximately 78%, where only 60% is permitted in the R-4 district. The new deck decreases the rear yard to approximately 12 feet, where 20 feet is required. 11 DCMR §§ 403 and 404. [1]

14. Even without the new deck, the subject property is nonconforming as to lot width and lot area. Its width is approximately 15 feet, but 18 feet is required in the R-4 district. Its lot area pre-dates the Zoning Regulations, and at 753 square feet, is less than half the 1800 square feet required. *See,* 11 DCMR § 401. While 11 DCMR § 2001 permits additions to nonconforming structures, devoted to conforming uses, Applicants cannot meet the conditions pursuant to which such additions are permitted. *See,* 11 DCMR § 2001.3.

15. The new deck is modest in size and is identical in size to two other decks on the same block.

16. The new deck is significantly less intrusive than the old deck, which had two levels and solid walls around the upper level.

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[1]There were some discrepancies in the record as to the correct lot occupancy and rear yard calculations after the addition of the new deck, but all proffered calculations were such that variance relief was necessary.

17. The new deck projects out over the Applicants' rear yard, and so affords a view of the adjacent rear yards, but not to any significantly greater degree than is already afforded by the rear windows of the Applicants' dwelling.

18. The new deck does not cast any shadow on the adjacent rear yard. It does cast some shadow on the adjacent rear wall, but this abates before noon each day.

19. As the result of a complaint of water damage from the Applicants' immediate neighbor, Mr. Nejad, including the presence of potentially unhealthy mold in the first floor of his home, two inspectors from DCRA visited the Applicants' property. The neighbor claimed that the water damage was due to the blockage of sunlight allegedly caused by the construction of the new deck and due, generally, to the handling by the Applicants' contractor of the water drainage on the Applicants' property.

20. The report of the DCRA inspector, Mr. Myers, dated August 20, 2004, found no leaks, nothing improper, and that all work met all applicable codes and requirements. Moreover, the report emphasized that the neighbor himself could possibly prevent the claimed water damage by making some needed repairs to his own property.[2]

21. Mr. Nejad has not had any qualified professional assess the cause of the mold growth in the first floor of his home.

CONCLUSIONS OF LAW

The Board is authorized to grant variances from the strict application of the Zoning Regulations in order to relieve difficulties or hardship where "by reason or exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of any Zoning Regulation would "result in particular and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property...." D.C. Official Code § 6-641.07(g)(3), 11 DCMR § 3103.2. The "exceptional situation or condition" of a property can arise out of "events extraneous to the land," including the zoning history of the property. *See, e.g., De Azcarate v. Board of Zoning Adjustment,* 388 A.2d 1233, 1237 (D.C. 1978), *and see Monaco v. Board of Zoning Adjustment,* 407 A.2d 1091, 1097 and 1098 (D.C. 1979). Relief can be granted only "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map." *Id.* An applicant for an area variance must make the lesser showing of "practical difficulties," as opposed to the more difficult showing of "undue hardship," which applies in use variance cases. *Palmer v. D.C. Board of*

[2] The report states: "Mr. Gannon [the contractor] dug up the rear of 407 E St., N.E., so Mr. Gaines [the plumbing inspector] and myself to [sic] could see the storm drainage connection. The connection met all applicable codes and was not connected to Mr. Nasser['s] system, nor was it pitched that way. There was not leaks or evidence that the connection was causing a water problem." The report continued: "I emphasized my previous recommendation that Mr. Nasser seal up the connection between his down spout and storm water connection (he had used to [sic] tin to patch up the hole at this location) but he still needed a bead of caulk. He also need[s] to seal up the crevice between his patio and rear wall. A hard rain would trap rain water run off in this area." Exhibit No. 38, third appended document.

Zoning Adjustment, 287 A.2d 535, 541 (D.C. 1972). The Applicant in this case, therefore, had to make three showings: exceptional condition or situation of the property, that such exceptional condition or situation results in "practical difficulties" to the Applicant, and that the granting of the variance will not impair the public good or the intent or integrity of the Zone Plan and Regulations.

The subject property is smaller and narrower than required in the R-4 zone district. The lot area of the subject property is less than half that required. The property is therefore nonconforming as to both lot area and lot width. Accordingly, the property meets the first prong of the variance test in that the lot is exceptionally small. The property also presents an exceptional situation. The deck at issue in this case was built as a replacement for a previously existing deck that had fallen into disrepair. The new deck was permitted by DCRA approximately a year after the deck was built in DCRA's issuance of a building permit for interior renovation, Building Permit No. 465450. That interior renovation work was predicated in part on the existence of the deck.

The Board finds that this confluence of factors – replacement of an existing deck in disrepair, followed by DCRA sanctioning of the new deck as well as other construction predicated in part on the existence of the deck - constitutes an exceptional zoning history. Accordingly, the subject property is exceptional with respect to its small size and its zoning history.

The practical difficulty to the Applicants if the Zoning Regulations are strictly applied is manifest – Applicants would be required to remove the new deck. Removal of the deck would necessitate re-configuration of the interior of their dwelling. Further, if the dwelling were to be converted back to its previous use as a flat (a matter-of-right use in this R-4 zone), the resident of the upper floors would have no rear yard access.

As to the last prong of the variance test, the new deck does not impair the public good nor does it impair the intent or integrity of the Zone Plan or Regulations. The new deck is a small rear addition which cannot be seen from the street frontage of the dwelling and it has been approved by the historic preservation authorities. It is a significant improvement over the old, two-level deck, which had become an unsafe eyesore in the neighborhood. The new deck will not have a substantial negative impact on the light, air, or privacy of adjoining properties. The deck is open to the sky, with an open-slatted fence, which appears to be approximately 3 to 4 feet tall.

While the opposition party, Mr. Nejad, asserted that the new deck blocks sunlight to his property and thereby causes moisture to accumulate in his dwelling and unpleasant odors and health problems as a result therefrom, the evidence in the record does not support that conclusion. The report of the DCRA Inspector specifically found no connection between Mr. Nejad's problems and Applicants' deck. (Finding of Fact No. 20.) The Board also notes that there is no evidence in the record of complaints of moisture damage related to either the old two-level deck or the newly constructed deck from students who rented and resided in Mr. Nejad's home for approximately 7 years prior to Mr. Nejad's re-establishment of the dwelling as his personal residence. Finally, the Board does not agree that the new deck will impair the privacy of Mr. Nejad's rear yard to any greater extent than it may already be impaired by the rear windows on the adjacent dwellings. Mr. Nejad's row dwelling sits between two attached row dwellings, the

rear windows of which have a view into his rear yard. Also, the privacy of Mr. Nejad's rear yard is no more compromised with the new deck than it was with the old, two-level deck.

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

Based on the record before the Board and for the reasons stated above, the Board concludes that that Applicant has satisfied the burden of proof with respect to the application for variances from the lot occupancy requirements of § 403, the rear yard requirements of § 404, and the nonconforming structure requirements of § 2001. It is therefore **ORDERED** that the application be **GRANTED.**

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

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each voting member has approved issuance of this Order granting this application.

FINAL DATE OF ORDER: NOV 0 4 2005

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

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

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

APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE 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. 17276-A of Phillips Park, LLC, pursuant to 11 DCMR 3104.1, for a special exception from section 2516 of the Zoning Regulations to allow the construction of a theoretical lot subdivision for thirty-five single-family homes in the R-1-A zone district at 2101 Foxhall Road, NW, Square 1346, Lot 822.

HEARING DATES: February 15, 2005; February 22, 2005 and March 8, 2005
DECISION DATE: April 5, 2005
DATE OF DECISION OF MOTION FOR RECONSIDERATION: September 13, 2005

ORDER DENYING RECONSIDERATION

On August 5, 2005, Friends of Whitehaven (FOW)[1] moved for reconsideration of the Board of Zoning Adjustment's (Board) July 26, 2005 order granting a special exception for a theoretical lot subdivision to Phillips Park, LLC (the Applicant). FOW alleged specific errors in the Board's order pursuant to 11 DCMR § 3126.4 and requested that the administrative record be re-opened and supplemented. On August 12, 2005, the Applicant filed its opposition to the request for reconsideration. *See*, 11 DCMR § 3126.5. At a decision meeting on September 13, 2005, the Board voted to deny FOW's motion for reconsideration.

FOW sets forth two specific errors allegedly made by the Board: (1) the Board lacked a factual basis upon which to conclude that the property contained three acres of non-natural or "artificial" wetlands (para.5, Findings of Fact); and (2) the Board's decision to strike the "Declaration of Julie Moore" and "Addendum Clarification" after the record was closed was improper, and its decision not to strike "extra-record materials" within FOW's proposed findings of fact and conclusions of law was unclear. As a result, claims FOW, the record must be re-opened and supplemented. For reasons that will be explained below, the Board disagrees and denies the motion for reconsideration.

I. The Board had substantial evidence to find that artificial wetlands existed at the property.

The Court of Appeals has held that:

[1] FOW was a party in opposition to the special exception request.

> An agency such as the BZA must make "findings on 'each contested issue of fact.'" *Citizens Sass's. of Georgetown,* 402 A.2d at 41 (quoting D.C. Code § 1-1509(e) (1981))[2]. The Board need not provide its reasons for adopting one or another position on the "basic" or "underlying" facts which were themselves disputed by the parties. *Id.* at 44-46. Nevertheless, the Board must reach sufficiently detailed findings on basic factual issues to demonstrate that it has considered and ruled upon each of the party's contentions.

Draude, v. District of Columbia Board Of Zoning Adjustment, 527 A.2d 1242, 1251 (D.C. 1987).

FOW alleges that the Board's record contained "no factual basis" to find that "non-natural or artificial" wetlands existed at the property (*Motion for Reconsideration* at 1). This assertion is incorrect. The Board possessed ample evidence to make this finding.

As outlined in the opposition to this motion (Exhibit 72), the Board heard testimony to this effect from James Ingram, an expert in environmental science whose testimony was credited by the Board. And, contrary to FOW's statement, the Board also heard testimony to this effect from a representative of the DC Department of Health, Tim Karikari (Technical Review Chief for Erosion and Sediment Control).

In addition, the Board possessed persuasive documentary evidence delineating the "natural" and "artificial" wetland areas. The Applicant submitted a Phase I Environmental Site assessment for the property which identified both the natural wetlands in the southern portion of the site and the artificial wetlands "created. . . due to a water main leak" in the center of the site (Exhibit P appended to the special exception application). The Board also received a wetlands mapping prepared by the US Army Corps of Engineers. This document (appended as Exhibit Q to the special exception application) identified the natural wetlands area over which the Army Corps has jurisdiction. This "Jurisdictional Determination" identified the natural wetlands only in the "southern portion of the tract flowing from west to east", consistent with the Environmental Site Assessment submitted by the Applicant.

The Jurisdictional Determination made by the Army Corps, and Mr. Ingram's testimony regarding the process by which the Army Corps delineates jurisdictional wetlands, was not countered with the testimony of any qualified expert in environmental science. FOW did present testimony from two witnesses, Julie Moore and Kent Slowinski, both of whom disputed the existence and/or designation of the "artificial"

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[2] Now codified at D.C. Official Code § 2-509e) (2001).

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wetlands. However, neither Ms. Moore nor Mr. Slowinski was certified as an expert in the field of wetlands, environmental science, or any other field.

As set forth in *Draude, supra,* the Board need not explain why it adopted Applicant's position over FOW's. It is sufficient that the Board had a factual basis for its findings on the wetlands. In this case that factual basis is set forth in the testimony of applicant's witnesses and the documentary evidence described above.

II. The Board's decisions regarding the motions to strike were clear and proper.

FOW argues that the Board's oral decision to strike certain post-hearing submissions was incorrect. It also claims that the decision not to strike "extra-record materials" within FOW's proposed findings of fact and conclusions of law was unclear. The Board finds to the contrary.

The decision to strike the "Declaration of Julie Moore" (the Declaration) and an "Addendum Clarification" (the Addendum) was proper. The Board closed the record, with the exception of proposed findings of fact and conclusions of law (which were to have been submitted by all parties), at the conclusion of the public hearing on March 8, 2005. FOW submitted the Declaration and Addendum after the record had been closed. Accordingly, at its April 5, 2005 decision meeting, the Board granted the Applicant's motion to strike the Declaration and Addendum. It denied the request to strike "extra-record materials" within FOW's proposed findings of fact and conclusions of law, stating that it would disregard any statements that were not germane or went beyond the scope of the administrative record. FOW maintains that the latter decision was confusing because "[i]t was not clear from the BZA Order where the motion to strike being granted ended and where the motion to strike being denied began".

However, the Board's decision was straightforward: the motion to strike that was granted addressed the documents referenced above; *i.e.*, the Declaration and the Addendum. The motion to strike that was denied addressed matters that were interwoven through FOW's proposed findings of facts and conclusions of law that were not based on the evidence of record.

FOW claims that the decision to strike was incorrect because the record was incomplete regarding environmental issues. This claim lacks merit. The Board conducted three days of public hearing in which the Applicant and the three parties in opposition presented evidence and argument on all issues raised, including the environmental issues. Moreover, the Board deliberated on and made findings regarding the environmental issues on which FOW seeks a rehearing.

FOW has presented no basis for a rehearing on the wetlands issue.

FOW claims, finally, that the Board should "supplement the record for the limited purpose of obtaining accurate information on [the] wetlands in question". In effect, FOW requests a rehearing on the wetlands issue, and specifically requests that the Board consider records from the DC Department of Health. However, FOW has presented no basis for a rehearing on the wetlands issue. As stated previously, the Board did hear testimony from the Department of Health at the original hearing; and FOW states no reason why any new evidence it seeks to offer now could not have been presented at that time.

Section 3126.6 of the Zoning Regulations (11 DCMR) provides that "[n]o request for rehearing shall be considered by the Board unless new evidence is submitted that could not reasonably have been presented at the original hearing." FOW has offered no new evidence in its Motion for Reconsideration that could not reasonably have been presented during the original hearing.

For these reasons, it is hereby **ORDERED** that the Motion for Reconsideration is **DENIED.**

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

Vote taken on September 13, 2005

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: NOV 0 3 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 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17276-B of Phillips Park, LLC, pursuant to 11 DCMR 3104.1, for a special exception from section 2516 of the Zoning Regulations to allow the construction of a theoretical lot subdivision for thirty-five single-family homes in the R-1-A zone district at 2101 Foxhall Road, NW, Square 1346, Lot 822.

HEARING DATES: February 15, 2005, February 22, 2005, and March 8, 2005
DECISION DATE: April 5, 2005
MINOR CORRECTION DECISION DATE: September 13, 2005

CORRECTED DECISION AND ORDER

Note: This order corrects Order No. 17276, by reflecting clarifications approved by the Board that make it clear that the Applicant must meet the minimum standards contained section 2516.6 (b), which states that "each means of vehicular ingress and egress to any principal building shall be twenty-five (25 ft.) in width, but need not be paved for its entire width. These corrections are underlined and found below in Findings of Fact No. 12, and in the Conclusions of Law in Subsection 2516.6(b).

On November 18, 2004, Phillips Park, LLC (Phillips or the applicant), filed an application with the Board of Zoning Adjustment (Board) pursuant to 11 DCMR § 3104.1, for a special exception to permit the construction of thirty-three[1] single-family homes on a single subdivided lot. Following three sessions of public hearing, the Board voted to approve the application at a decision meeting held on April 5, 2005.

PRELIMINARY MATTERS

Self-Certification The zoning relief requested in this case was self-certified pursuant to 11 DCMR § 3113.2 (Exhibit 5).

Notice of Public Hearing Pursuant to 11 DCMR 3113.3, notice of the hearing was sent to the applicant, all entities owning property with 200 feet of the applicant's site, the Advisory Neighborhood Commission (ANC) 3D, and the Office of Planning (OP). The applicant posted placards at the property regarding the application and public hearing and submitted an affidavit to the Board to this effect (Exhibit 30).

ANC 3D The subject site is located within the area served by Advisory Neighborhood Commission 3D (the ANC), which is automatically a party to this application. The ANC filed a report indicating that at a public meeting on February 2, 2005, with a quorum present, the ANC voted to support the application subject to various conditions (Exhibit 26). However, the ANC later submitted a letter asking for an opportunity to reconsider the matter, stating that the application had been substantially altered from what it had originally considered and voted on.

[1]The original application sought approval for thirty-five theoretical lots. However, the applicant modified its proposal after discussions with neighboring property owners.

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The ANC also submitted a revised set of proposed conditions and provided testimony through its chairperson, Alma Gates. Among other things, Ms. Gates urged the Board to incorporate a construction management plan into any special exception approval.

Requests for Party Status

The Board granted three requests for party status: (a) Chandra Hardy, owner of 2001 Foxhall Road (the Hardy property) and the only adjacent residential property owner; (b) the Friends of Whitehaven (FOW), a District of Columbia non-profit association created for the protection of the Whitehaven National Parkland located to the south of the property, represented by William Snape; and (c) "Certain Residents of W Street" (Certain Residents), a group of nearby property owners located to the immediate north of the property on W Street and Foxboro Place, represented by Margaret Brady.

Although each of the entities was granted status as parties in opposition, they each indicated they were not necessarily opposed to the application, but had "concerns". Ms. Hardy's primary concerns pertained to construction activities and an alleged adverse impact on the mature trees at her property line. The concerns of the FOW pertained to alleged adverse impacts on the environment of the surrounding area as well as the property. The FOW also advocated for various measures to protect the wetlands located on and near the property. The concerns of the Certain Residents pertained to traffic safety and the character and density of the proposed development. However, the group also opposed the addition of a ninth matter-of-right house on W Street and advocated a different entrance point to the development.

Other Persons/Entities in Opposition/Support

The Colony Hill Neighborhood Association, comprised of 41 homeowners in a nearby neighborhood, submitted a letter into the record. The Association requested that the Board defer review of the application until such time as a "comprehensive traffic study" is done that takes into account future development of a nearby undeveloped parcel.

The National Park Service, through David Murphy, provided testimony regarding its concerns relating to storm water management, both on and off-site. Mr. Murphy also advocated use of a perimeter fence separating the property from adjacent federal parkland.

The District of Columbia Department of Health (Erosion and Sediment Control Section), through Tim Karikari, provided testimony that he agreed with the concept of the proposed storm water management plan.

Government Report Submissions

Office of Planning (OP) Report. OP filed an initial report stating that it generally supported the project, but needed additional information in order to make a final recommendation (Exhibit 29). After reviewing the applicant's revised site plan, OP filed a supplemental report supporting the application with conditions (Exhibit 64). OP's representative, Jennifer Steingasser, testified at the public hearing in support of the application.

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Department of Transportation The Department of Transportation (DDOT) reviewed the traffic study prepared by the applicant and submitted a report supporting the project and the creation of the entrance on Foxhall Road (Exhibit 24). DDOT concluded that the project would not affect the existing level of service of the surrounding street systems or adversely impact on the surrounding area from a transportation standpoint.

The Metropolitan Police Department The Metropolitan Police Department (MDP) submitted a letter into the record noting the heavy rush hour traffic and incidents of speeding near the proposed project on Foxhall Road.

Department of Housing and Community Development (DHCD) By memorandum dated January 6, 2005 to OP, DHCD indicated its support for the application.

Department of Parks and Recreation (DPR) Through its report to OP, DPR noted that it maintains a nearby neighborhood park with a playground, and also a recreation center with a multi-purpose room, soccer field, basketball court, tennis courts and a picnic area. DPR noted concerns regarding maintenance of the park space, maintenance of the interior boulevards and buffer spaces, access to interior spaces by the general public, and the use of native plants.

The Applicant's Case William Pryor, Managing Member of Phillips, LLC, testified for the applicant. The applicant also offered testimony from several expert witnesses during the public hearing: Anthony Barnes, Project Architect; Louis Slade, Traffic Operations Engineer; Stephen Petersen, Traffic Engineer; Keith Pitchford, Arborist; Cheng-Ho "Frank" Lin, Civil Engineer; Mary Sears, Civil Engineer and expert in storm water management; Roy Gauzza, Landscape Architect; and James Ingram, Environmental Scientist.

Disposition of Motions to Strike
Following the public hearing on March 8, 2005, the applicant moved to strike certain post-hearing submissions filed by FOW and by Ann Haas.

Motion to Strike Submissions of FOW (Exhibit 63) The applicant moved to strike an "Addendum Clarification" regarding the wetlands at the property (Exhibit 62), a "Declaration of Julie Moore" (Exhibit 57), a conservation biologist, and "references to extra-record materials" contained in FOW's proposed findings of fact and conclusions of law (Exhibit 59). The Board granted the motion to strike the "Addendum Clarification" and the "Declaration", finding that the hearing record had been closed except for the limited purpose of allowing proposed findings of fact and conclusions of law, and proposed conditions of approval. The Board denied the motion to strike "extra-record materials" contained within the proposed order, finding that it would disregard any statements that were not germane or went beyond the scope of the administrative record.

Motion to Strike Submissions of Ann Haas (Exhibit 66) Following the public hearing, Ann Haas, the single member district ANC commissioner for the property, submitted the same "Declaration of Julie Moore" that had been submitted by FOW, and the applicant again moved to strike. The Board struck the Declaration submitted by Ms. Haas, also on the ground that the hearing record had been closed.

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FINDINGS OF FACT

The Property

1. The subject property is located at 2101 Foxhall Road, NW (Square 1346, Lot 822) in an R-1-A zone in the Ward 3 neighborhood of Wesley Heights. It is bordered by W Street to the north, a portion of 44th Street to the east and a Federal park land, known as the Glover Archbold Park to the east, Whitehaven Park to the south, and Foxhall Road to the west.

2. The property is a large sloping site, containing 713,016 square feet, or just over 16 acres, with a mixture of open areas and some tree stands. It is irregularly shaped, with the Hardy property carved out of the southwest corner. There is 781.56 feet of frontage on W Street, 476.73 feet of frontage along Foxhall Road, and 566.09 feet along 44th Street. The portion of 44th Street to the east is a platted, dedicated street, which contains a District of Columbia Water and Sewer Authority maintained sanitary sewer main, but is unpaved.

3. The property has stood vacant[2] for some time and has grown fallow, overrun with many species of weed vegetation. Due to the overrun of non-native and weed-species, many of the native trees are either dead, dying, or in poor condition.

4. The property contains 36,541 square feet of natural wetland area (including a 25 foot buffer area), and is located in a natural stream system in the southern portion of the tract. These figures have been confirmed by a formal nontidal wetlands jurisdictional determination performed by the US Army Corps of Engineers (Exhibit 22, Tab 4).

5. The property also contains over three acres of non-natural or "artificial" wetlands that were formed as a result of a long-standing leaky municipal water line. These artificial wetlands are alleged to be entirely fed by the water main leaks.

The Surrounding Area

6. The area surrounding the property consists of residential and institutional uses, as well as the parkland described above. The nearby parkland provides a home for many species of wildlife, including the whitetail deer and several piebald deer.

7. Surrounding residential neighborhoods include approximately eleven houses to the immediate north of the property on the north side of W Street. To the northwest are the Foxhall Crescent, Wesley Heights and Spring Valley developments, on Foxboro Place.

8. Institutional uses surrounding the property include: the Mt. Vernon campus of George Washington University to the west of the property across Foxhall Road, the Belgium chancery just north of the intersection of Foxhall Road and W Street, St. Patrick's Episcopal Church and Day School to the south on Whitehaven Parkway, the Lab School of Washington to the west of St. Patrick's, the Field School to the north of the property, and the German Embassy further south along Foxhall Road. To the immediate south of the property across Whitehaven Park is

[2] There were various proposals to develop the property during the 1980s that were abandoned.

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the former "Casey" estate, recently purchased by the "Friends of St. Patrick's" for use as an expanded school.

The Proposed Project

9. The applicant is proposing a theoretical lot subdivision to divide those portions of the property that do not abut a street (the interior property) into thirty-three assessment and taxation lots. Additionally, though not subject to this application, the applicant will build thirteen matter-of-right homes along Foxhall Road and W Street. The matter-of-right homes will include nine homes along W Street and four homes along Foxhall Road. The development will consist of two-story single-family detached dwellings and will be named Dunmarlin at Phillips Park (Dunmarlin). [3]

10. **The Lots** In order to provide land set-asides for open space, parkland, and protected wetlands, and to ensure that the development is environmentally sensitive; the applicant has proposed larger lots with restricted development areas. The lots created will have an average lot size of 11,016 square feet, well above the 7,500 square feet required in the zone, and larger than the average lot in the surrounding residential neighborhoods.

11. **Access** There will be two roadway entrances onto the property, one onto W Street, and the second onto Foxhall Road. The entrance onto W Street will align with Foxboro Place to the north and will connect the development with the existing residential neighborhood to the north. The entrance onto Foxhall Road will be located towards the southern border of the property, with one of the matter-of-right lots to be located to the south of the road. This new road will have a left and right turn lane, and the applicant will pay for the cost to install a traffic light at the proposed entrance.

12. Each of the proposed thirty-three theoretical lots will have direct access from the proposed internal roads. Additionally, the matter-of-right lots will have driveway access onto the internal roads, rather than from Foxhall Road or W Street. The internal roads will follow the natural contours of the property, allowing the "stepping down" of the homes. The widths of the internal roads will be a minimum of twenty-five feet. All homes that do not front either W Street or Foxhall Road will front on the internal roads.

13. **Foxhall Road Improvements** The applicant also proposes to redesign and widen Foxhall Road. Using a portion of its own property, it proposes to create a merge lane for traffic turning out of the property north onto Foxhall Road, a left turn lane on Foxhall Road for traffic turning into the property from the north, and a right turn lane into the property for traffic entering from the south.

14. **Sidewalks** Sidewalks will be incorporated on at least one side of every street in the property. Additionally, the applicant will construct sidewalks along the perimeter of the property along W Street and Foxhall Road. Covenants will require that the roads within the property, as well as the

[3] The development plans evolved during the course of these proceedings, partly in response to concerns from the various agencies and parties and the ANC. The Board approval is based upon the plans and documents contained in the applicant's submissions of March 2, 2005, Exhibit 50.

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sidewalks, remain open to the general public. The sidewalks will be maintained by the homeowners association that will be created by the applicant.

15. **Green Space** The proposed development will also include 97,132 square feet of open public green space. The green space will consist of (a) a 3,819 square foot park at the corner of W Street and Foxhall Road, including a path leading from it into the interior portion of the property, (b) two tear drop islands along the interior road of 2,560 and 7,940 square feet, respectively, (c) 29,752 square feet of open space surrounding the wetland, (d) the natural wetland and wetland buffer, and (e) an additional 29,752 square feet of open space above the storm water management facility located to the immediate north of the wetland (See, Exhibit 50, Tab 13).

16. **Setbacks/Buffers/Tree Preservation** Each lot will have a minimum side yard of eight feet and a minimum front yard of twenty-five feet. The maximum lot occupancy will be forty percent. The proposed design will go beyond the twenty-five feet rear yard setbacks that are required in the zone. For those lots that abut parkland and/or 44th Street, the applicant has proposed thirty to forty feet non-disturbance buffer areas within which there can be no construction (See, Exhibit 50, Tabs 1, 5 and 13). These buffer areas may only be planted with trees and shrubs listed on an "approved species" plant list that will continue to be refined in consultations between Applicant's arborist and the National Park Service; and, weed, insect and disease infestation species within these areas must be controlled using specified environmentally "friendly" products. Approximately sixty-four of the 107 healthy trees at the property (60%) will be preserved, and 356 new trees of significant caliper will be planted, resulting in a total of 400 healthy indigenous trees on the property (See Exhibit 50, Tab 4). In addition, a certified arborist will be retained by the applicant to oversee the grading and the construction of the property to insure the health of the trees slated for preservation.

17. **Grading** Because the existing topography is fairly steep and rolling in nature, the proposed grading of the property is designed to preserve the existing "bowl" shape found on the site, but at gentler slopes than exist now. Grading at the property will be minimized and there will be no grading at all in the wetland area, wetland buffer, parkland buffer, or area adjacent to the Hardy property.

18. **Architectural Guidelines** The applicant submitted proposed architectural guidelines that govern, among other things, the maximum allowable floor area ration (FAR) for any improvements on individual lots, and the location and size of swimming pools and other accessory structures. Final guidelines will be filed with the land records prior to the sale of any individual lot.

19. **Storm water Management** The applicant submitted a comprehensive plan with the application that provides for on-site and off-site storm water management (See, Exhibit 50, Tabs 2, 3, 6-11). The on-site plan provides for water quantity control and water quality control, and includes the use of rain gardens where feasible. The off-site plan provides that storm water between W Street and the entrance into the development would be captured and diverted in underground pipes to the storm drain system at Whitehaven Parkway.

<u>The Impact of the Proposed Development</u>

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20. The Board credits the testimony and report presented by the applicant's traffic expert, Louis Slade, which was subject to peer review analysis and with which DDOT also concurs (See, Exhibit 22, Tabs 5, 6, and 9). In particular, the Board adopts the findings that (a) entranceways at W Street and Foxhall Road create the best traffic situation for the proposed development and for the neighborhood, and is preferable to by-right development which would allow direct driveway access from the conforming lots to existing streets; (b) the proposed development will have a negligible impact on traffic on Foxhall Road.; (c) the proposed development will create a new and safer means of access to and from Foxhall Road for the Certain Residents on or near W Street by adding a left turn lane for traffic traveling south on Foxhall Road turning into the development, and by adding a merge lane for vehicles turning from the development north onto Foxhall Road.

21. The Board credits the testimony and report presented by the applicant's expert arborist, Keith Pitchford (See, Exhibit 22, Tab 10). In particular, the Board adopts his findings that (a) based upon his tree survey, 64 trees at the property were suitable for preservation; and (b) lot lines along the eastern portion of the property had been shifted in order to preserve the maximum number of trees.

22. The Board credits the testimony and report presented by the applicant's expert landscape architect, Ray Gauzza. In particular, the Board adopts his finding that the proposed grading plan will not adversely impact on tree preservation at the property.

23. The Board credits the expert testimony presented by civil engineers Frank Lin and Mary Sears. In particular, the Board adopts Mr. Lin's testimony that the combined storm water management features will allow the applicant to manage both water quality and water quantity and that water would be captured at a fifteen year post development rate and released at the two year predevelopment rate and no greater flow than 2 cubic feet per second into the stream situated on parkland, thus assuring that the stream will not be subject to erosive degradation. This water capture rate is well above the requirements imposed by the District of Columbia Department of Health requirements.

24. The Board adopts Ms. Sears' testimony that water quality will be controlled through "best management practices" using: (a) a "filteras", a stand-alone filtering device located in streets and planted with small trees and shrubs, (b) bioretention systems, stand-alone filtering devices and surface treatments located in flat areas, and (c) a "Baysaver" system, a hydrodynamic separator that separates out coarse sediment, solid debris, fine sediment, and oil. The Board also credits Ms. Sears' testimony that only clean water at controlled flow rates will be returned to the natural wetland and it will be enhanced as a result of the proposed storm water management system.

25. The Board credits the testimony presented by the applicant's expert in environmental science, James Ingram. In particular, the Board adopts his findings that: (a) the artificial wetland at the property will be improved by the development due to the planned clean-up at its location, the removal of invasive species, and the removal of the chlorinated water being released

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into the wetlands area; and (b) the proposed 25 foot buffer is sufficient to protect the wetlands and the adjacent parklands.

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 § 2516 to allow the construction of a theoretical lot subdivision for thirty-three single family homes in the R-1-A zone at 2101 Foxhall Road, NW.

The Board can grant a special exception where, in its judgment, two general tests are met, and, the special conditions for the particular exception are met. First, the requested special exception must "be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps." 11 DCMR § 3104.1. Second, it must "not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Map" 11 DCMR § 3104.1. The Board concurs with OP that the proposed theoretical lot subdivision will not be contrary to the purpose or intent of the Zoning Regulations, as each of the lots being created will provide greater than the minimum lot area and width required in this zone, and the form of the private streets and housing development is in keeping with both the zoning and the character of the neighborhood. The Board also concurs with OP that the proposed form of subdivision layout will not adversely affect the surrounding neighborhood. From the outside, the development will be consistent in form with other developments in the area. Road improvements may benefit access to some existing homes in the area.

Under section 2516 of the Zoning Regulations, the Board may permit a theoretical lot subdivision and two or more principal buildings or structures on a single subdivided lot, subject to the following provisions:

2516.2 This section applies to construction on a lot that is located in, or within twenty-five feet (25 ft.) of, a Residence District. The subject property is within a residential district.

2516.3 In addition to other filing requirements, the applicant shall submit to the Board, with the new application, four (4) site plans for all new rights-of-way and easements, and existing and preliminary landscaping and grading plans with approximate building footprints; provided: (a) The applicant shall also submit, either with the original application or at a later time, final landscaping and grading plans and two (2) sets of typical floor plans and elevations; and (b) If the applicant elects to submit the plans referenced in § 2516.3(a) at a later date, the Board's original approval shall be conditional, subject to a later public hearing and final decision on the project as a whole. The applicant submitted preliminary and revised plans and documents as part of its application: site plans depicting existing conditions, site plans showing the proposed development, landscape plans, typical house plans, lot planting schematics, landscape design guidelines, grading plans, storm water management plans, water and sewer connections, street cross sections and traffic studies.

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2516.4 The number of principal buildings permitted by this section shall not be limited; provided, that the applicant for a permit to build submits satisfactory evidence that all the requirements of this chapter (such as use, height, bulk, open spaces around each building, and limitations on structures on alley lots pursuant to § 2507), and §§ 3202.2 and 3203.3 are met All of the theoretical lots provide the required site area and width, as well as a building envelope providing the required setbacks Thus, the development will easily meet the various area requirements. Because the proposed buildings are single-family dwellings, the proposed use is permitted in the zone and the proposed development meets the use requirements of the Zoning Regulations as well.

2516.5 If a principal building has no street frontage, as determined by dividing the subdivided lot into theoretical building sites for each principal building, the following provisions shall apply: The 33 internal theoretical lots do not have frontage on a public street. As such, the following provisions are applicable to those lots.

(a) The front of the building shall be the side upon which the principal entrance is located: All buildings on the theoretical lots front onto private streets, with pedestrian and vehicular entrance on that façade.

(b) Open space in front of the entrance shall be required that is equivalent either to the required rear yard in the zone district in which the building is located or to the distance between the building restriction line recorded on the records of the Surveyor of the District of Columbia for the subdivided lot and the public space upon which the subdivided lot fronts, whichever is greater; The required rear yard setback in the zone is a minimum of 25 feet. The front yards on all lots will be a minimum 25 feet and will comply with the requirement that they be "equivalent" to the required rear yard.

(c) (d) A rear yard shall be required; and [i]f any part of the boundary of a theoretical lot is located in common with the rear lot line of the subdivided lot of which it is a part, the rear yard of the theoretical lot shall be along the boundary of the subdivided lot. Each lot will have rear yards of at least 25 feet and will comply with this requirement (See site plan, Exhibit 50, Tab 5).

2516.6 In providing for net density pursuant to § 2516.11, the Board shall require at least the following:

(a) The area of land that forms a covenanted means of ingress or egress shall not be included in the area of any theoretical lot, or in any yard that is required by this title; As depicted on the site plan, roadways are not included in the theoretical lots.

(b) Notwithstanding any other provision of this title, each means of vehicular ingress or egress to any principal building shall be twenty-five feet (25 ft.) in width, but need not be paved for its entire width; As stated above, all internal roadways will be 25 feet in width (Finding of Fact 12).

(c) If there are not at least two (2) entrances or exits from the means of ingress or egress, a turning area shall be provided with a diameter of not less than sixty feet (60 ft.); Because there will be two entrances to the proposed development, this requirement is inapplicable.

(d) The requirements of paragraphs (a) and (c) of this subsection may be modified if the Board finds that a lesser width or diameter will be compatible with, and will not be

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likely to have an adverse effect on, the present character and future development of the neighborhood; provided, that the Board shall give specific consideration to the spacing of buildings and the availability of resident, guest, and service parking. The applicant has not requested any modifications of these requirements.

2516.7 Where not in conflict with 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 §§5-401 to 5-409 (1994 Repl. & 1999 Supp.)), the height of a building governed by the provisions of this section, in all zone districts, shall be measured from the finished grade at the middle of the front of the building. All homes within the proposed development will conform to the height limit of 40 feet, as measured from the finished grade at the middle of the front of the building

2516.8 The provisions of this section shall also apply to buildings erected under the terms and conditions of § 410, relating to a group of one-family dwellings, flats, or apartment houses, or a combination of such buildings. Because § 410 applies only to the R-4 and R-5 zones, and the subject property is within the R-1-A zone, this section is inapplicable.

2516.9 The proposed development shall comply with the substantive provisions of this title and shall not likely have an adverse effect on the present character and future development of the neighborhood. The Board finds that the proposed development complies with all of the applicable provisions of the Zoning Regulations and that the proposed project will not have an adverse effect on the present character or future development of the neighborhood. The present character of the neighborhood will be maintained by creating a subdivision of single-family homes located on large lots, a subdivision that follows the natural contours of the property so as to allow for the stepping down of homes, and a subdivision that maintains open green space and preserves trees. As to the effect on future development, the Board finds that the project will not create significant additional demand for government services. Storm water management will be handled entirely within the property. Internal roadways will be designed and constructed to DDOT specifications; and, although the roadways will be maintained by the homeowners' association, they will be open to the public. Also, by providing a new, safer access from Foxhall Road (with a traffic light and turning lanes), and allowing public access through the site, the project will likely result in improved access to existing homes on the north side of W Street. In addition, the Board concludes that the installation of storm water management and the "clean-up" at the property will enhance both the natural and artificial wetland areas. Finally, the Board believes that any potential adverse impacts to the neighborhood will be mitigated by the conditions imposed by this Order.

2516.10 Before taking final action on an application under this section, the Board shall refer the application to the D.C. Office of Planning for coordination, review, and report.

The application was forwarded to OP. In addition, various aspects of the application were reviewed by DDOT, the Metropolitan Police Department, the Department of Housing and

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Community Development, and the DC Department of Recreation. Issues and concerns raised by OP and other agencies are addressed in this Decision and Order.

Other than the special exception to permit multiple principle structures on a single subdivided lot, no other relief from the Zoning Regulations is required. The Board agrees with OP that the proposed development conforms to the overall purpose and intent of the Regulations, and the Comprehensive Plan.

The Board is persuaded that the project has been designed to be environmentally sensitive. Internal roads will follow the natural contours of the property, allowing the least amount of grading possible, as well as the preservation of a large number of trees. In addition to preserving approximately sixty percent of the specimen trees on the property, the applicant will be planting a large number of significant caliper trees, resulting in a net gain of healthy trees at the site. Furthermore, the proposed storm water management has been designed to include an innovative system that far exceeds the District's requirements for both water quality control and water quantity control. As explained in the Findings of Fact, the wetlands located on the site will actually be enhanced as a result of the removal of invasive plant species and abatement of the infiltration of chlorinated water and road run-off.

The Board concludes there will be no significant adverse environmental impacts, notwithstanding the assertions to the contrary by Ms. Hardy and the Friends of Whitehaven.

Ms. Hardy contends that the development will adversely affect the mature trees on the property line between her property and the development, and disputes the location of these trees as depicted on the applicant's tree survey. However, Ms. Hardy presented no empirical evidence that refuted either the tree survey or the evidence presented by the applicant's landscape architect and arborist. As stated previously, a significant number of trees will be preserved at the property – including those trees at the Hardy property line -- and a certified arborist will oversee the grading and construction at the property in order to insure the health of those trees slated for preservation.

The Friends of Whitehaven (FOW) contends, among other things, that the development will damage or destroy the wetlands and the nearby parklands. The Board does not agree. With respect to the wetlands, FOW proposes that approximately one-half of the subject property be protected with a "wetlands easement", a designation that is much larger than the formal designation that was made by the Federal government. First, the Board has no authority to impose such a restriction on private property; and, second, the Board does not agree that the wetlands will be adversely impacted by the proposed development. As stated in the Findings of Fact, the Board concludes that the natural wetlands and artificial wetlands areas will both be enhanced as a result of the proposed storm water management system. Likewise, the Board concludes that the adjacent parklands will be protected, provided this special exception is conditioned upon the creation of non-disturbance buffer areas next to the parklands.

The Board also concludes that the development will have a negligible impact on traffic. The Certain Residents group contends that the development will exacerbate dangerous traffic conditions at the nearby intersection of Foxhall Road and W Street, and that the entrance to the

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development should be relocated along Whitehaven Park. For reasons explained below, the Board does not agree.

The Board concurs with OP and DDOT that the proposed development will not adversely affect parking, loading or traffic conditions in the area, and that the proposed development has been designed to mitigate existing and potential traffic problems. The internal roads will be designed to District standards and will accommodate the low level of traffic anticipated for the relatively small number of homes. Deliveries will be minimal, and will be accommodated by the road and driveway system proposed. Although the Police Department noted the excess speed along Foxhall Road, the Board agrees with the applicant that this condition will not be exacerbated by the development. It appears, in fact, that the roadway improvements associated with the development, particularly the turning lanes at the proposed entrance, may result in improved traffic conditions to the surrounding area.

The Board concludes that the proposed development will be compatible with the surrounding area when considering factors relating to urban design and site planning. The Board concurs with OP that the form of development – detached dwellings on relatively large lots – is in character with the surrounding community. As also noted by OP, the development will contain considerable amounts of shared public space and on-site open space resulting from the generous setbacks. The density, at less than three units per acre, is low and in keeping with the neighborhood.

The Board also concludes that the proposed development is consistent with planning considerations relating to recreation. As mentioned earlier, the Department of Parks and Recreation maintains a park and recreation center near the site of the proposed development. In addition, the development will contain large amounts of open green space which will be open to the public and which will be maintained by the homeowners association.

The Board may impose conditions with respect to the size and location of driveways; net density; height, design, screening, and location of structures; and any other matter that the Board determines to be required to protect the overall purpose and intent of the Zoning Regulations. The Board has considered numerous conditions proposed by the applicant, the ANC, and the parties in opposition. The grant of this special exception is subject to the specifically enumerated conditions set forth in this Decision and Order.

The ANC Issues and Concerns

The Board is required under Section 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; now codified at D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's written recommendations.[4] 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

[4] Alma Gates, the ANC chair, expressed additional "concerns" during her testimony and proposed further conditions during subsequent submissions. However, Ms. Gates acknowledged that the ANC majority did not necessarily share her views, and had not voted to support the additional proposed conditions. Thus, the Board does not give "great weight" to those additional concerns.

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circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns.

The ANC report states that it supports the project, subject to various conditions. The following conditions were proposed: (1) that the applicant relinquish all right/claims to 44th Street that abuts the property and remove the concrete slabs and other remnants of the old road bed along the paper road, and work with the NPS to have 44th Street transferred to it; (2) that the applicant agrees to place covenants on the deeds of sale of properties that border on federal parkland that prohibit the placement of structures within the rear yard setback; (3) that the applicant will require that all swimming pools are constructed within the allowable lot footprint; (4) that the applicant agrees the homeowners association will prohibit the use of harmful chemicals/pesticides on properties within the development; (5) that the applicant will work with DDOT to maintain or improve the natural earthen berm fronting on 2001 Foxhall Road and ensure its minimal disturbance during improvements to Foxhall Road; (6) that the applicant agrees not to recommend to DDOT a right turn only policy from the east side of W Street; (7) that the applicant agrees not to request that DDOT fully signalize the traffic light on Foxhall Road at the Field School; and (8) that the applicant agrees to work closely with DDOT and to assume all costs related to the installation of a new "on demand" traffic light at the proposed new entrance on Foxhall Road. The ANC also requests that any Board approval be contingent upon a construction management agreement which it proffered with Ms. Hardy and a representative of the Certain Residents group.
With respect to the conditions proposed by the ANC, the Board finds that it has offered persuasive advice in some instances but not in others. The Board has addressed many of the ANC's concerns in the conditions of approval which are set forth below. For example, the applicant will work with the National Park Service regarding the closure of 44th Street. There will be non- disturbance buffer areas adjacent to the parklands. The buffer areas will be ensured by covenants that are recorded among the land records. Any swimming pools will be constructed within the setbacks. The applicant will assume the cost of the traffic light to be located at the proposed entrance of the development.

Other conditions requested by the ANC are beyond the Board's purview. For example, the ANC requests that the Board condition its approval on the applicant's working with DDOT to maintain the natural earthen berm at the Hardy property. However, the Hardy property is not the subject of this application and the Board cannot compel Ms. Hardy to comply with this condition. Nor can the Board compel DDOT to take specific actions regarding the planned improvements at Foxhall Road or direct a process whereby the applicant makes specific "recommendations" to DDOT. Finally, the Board has no authority to condition special exception approval on a construction management agreement. The Board is authorized by § 2516 to establish conditions "to protect the overall purpose and intent of the Zoning Regulations". Construction management plans do not control the impact of the operation of this development, but the impact of its construction, which is governed by the Construction Code. While the Board has encouraged the applicant and all parties to reach an agreement on construction related issues, it cannot require this.

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The Board is also 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 the advice received from the OP.

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 §2516 to allow the construction of thirty-three single-family homes on a single subdivided lot.

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 property shall be subdivided as shown on the plans and documents contained in Exhibit No. 50 of the record. Minor adjustments shall be permitted to accommodate tree preservation and/or grading.

2. Sidewalks shall be constructed on at least one side of the internal streets, as well as along the perimeter of the property along Foxhall Road and W Street, in accordance with the site plan contained in Exhibit 50, Tab 5 of the record.

3. A minimum of two off-street parking spaces for each home shall be maintained at all times.

4. The proposed dwellings shall be constructed behind the building setback lines shown on the Preliminary Grading Plan contained in Exhibit 50, Tab 1 of the record. Pools shall be constructed within building setback lines. With the exception of lots abutting parkland or the 44th Street right-of-way (lots A-10, A11, A29, A30, A12, A13, A34 and A35), patios at grade and decks at or below the main floor shall be permitted between the building setback line and the individual lot lines.

5. The applicant shall establish a tree preservation and screening area adjacent to the national parklands in accordance with Exhibit 50, Tabs 4 and 13 of the record. The following conditions shall apply:

    a. A six foot picket fence of black wrought iron or equivalent finish shall be installed on the eastern and southern borders of the property. This fence shall not cross the natural wetland area;

    b. As illustrated on the Preliminary Grading Plan in Exhibit 50, Tab 1, lots A-10, A11, A29 and A30 will have a thirty foot non-disturbance buffer area and lots A12, A13, A34 and A35 will have a forty foot non-disturbance buffer area. This buffer area may only be planted with trees and shrubs on the "approved species" plant list. Weeds or

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insects and disease infestations within these areas may only be controlled using environmentally "friendly" disease control products. Compliance with this provision will be monitored by the homeowners association on a bi-annual basis. The non-disturbance buffer areas will be protected by a covenant recorded in the land records. The approved species plant list is the list of plants that shall be consistent with similar plant lists developed for Rock Creek Park and Glover Archbold Parkway. The non-disturbance buffer area shall be maintained to present no visually identifiable or actual man-made objects or treatments, thus being a landscape indistinguishable from the majority of the original forested landscape conditions of Glover-Archbold Parkway.

c. In connection with the application of a building permit for any of the houses on the lots listed in 5 (b) above, the Applicant shall submit to the Zoning Administrator a plan showing the spacing of trees within the setback area of the lots, the buffer areas, and the open spaces in accordance with plans contained in Exhibit No. 50 in the record. The entire non-disturbance buffer shall be recorded with each lot identified and shall be recorded prior to the issuance of any clearing, construction, or other permits for any site on the property. The purpose, intent, and conditions of the non-disturbance buffer shall be clearly identified in all individual lot deeds as well as in the subdivision legal instruments.

6. Architectural Guidelines shall be established in accordance with the "Dunmarlin Architectural Standards Outline" dated February 14, 2005, appended to the Applicant's proposed Findings of Fact and Conclusions of Law contained in Exhibit No. 60, Tab B. The final Architectural Guidelines may be more, but not less restrictive than this Outline and shall be recorded in the land records prior to the subdivision of the property. The final Architectural Guidelines must require that a minimum of thirty percent of the front façade of every dwelling be on or within three feet of the front yard building restriction line. The Architectural Guidelines may not be amended so as to remove this or any other restriction approved by this Decision and Order. All construction shall be in accordance with the final Architectural Guidelines.

7. Landscape Guidelines consistent with the landscape guidelines submitted by the applicant as Exhibit 22, Tab 11 of the record shall be filed with the land records prior to the subdivision of the property. Final Landscape Guidelines may be more, but not less restrictive than the guidelines submitted in the record and may not be amended so as to remove restrictions approved by this Decision and Order.

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8. Covenants, conditions and restrictions consistent with this Decision and Order shall be recorded with the land records prior to the subdivision of the property. In addition to the required provisions set forth in these conditions, these documents shall require that the homeowners association maintain the storm water management facility and all open spaces, sidewalks and roads.

9. The construction entrance to the property shall be located on Foxhall Road at the proposed new entrance to the property. Construction will be done in five phases in accordance with Exhibit 60, Tab A in the record. The applicant shall retain the services of an ISA certified arborist to oversee all phases of grading and construction to ensure the protection of trees slated for preservation in accordance with the Tree Preservation Plan contained in Exhibit 50, Tab 4 of the record. The applicant shall share with adjacent neighbors any construction plans that may impact trees on their properties. In no case shall any construction fence extend past the tree preservation line.

10. Individual lot landscaping shall be as depicted on the typical plans and sections provided in Applicant's Pre-hearing Statement at Exhibit 22, Tab 3 of the record, and shall be in accordance with the Revised Landscape Guidelines set forth in Exhibit 22, Tab 11 of the record.

11. A storm water drainage system shall be constructed in accordance with Exhibit 50, Tabs 2, 3, 10, 11, and 12 of the record. Where possible, filteras and bioretention systems shall be installed as proposed, and water will be captured at the fifteen year post development rate and released at the two year predevelopment rate. The applicant shall enter into maintenance agreements for the annual maintenance and upkeep of all storm water management systems, including the filteras, bioretention and Baysaver with capacities of retention structures and surface water release rates onto park land being not greater than a flow rate of 2 cubic feet per second.

12. Storm water management along Foxhall Road for the property shall be constructed in accordance with Exhibit 50, Tabs 2, 3, 10, 11, and 12 of the record. The applicant shall coordinate these improvements with DDOT's planned improvements to Foxhall Road. Storm water collected on or from Foxhall Road shall be conveyed to the existing or modified storm sewers currently on Whitehaven Street.

13. The entry-ways (vehicular and pedestrian) to the property shall remain open to the public in perpetuity. The homeowners association documents shall provide that this provision may not be amended or deleted without prior approval of the Board with notice to all parties, their successors or assigns. If 44th Street right –of-way is closed, the applicant shall support the transfer of 44th Street Right of Way to NPS for park purposes, in particular, for inclusion of the unbuilt portions of 44th Street into Glover Archbold Parkway.

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14. The applicant shall assume all costs related to the installation of a new on demand traffic light at the proposed new entrance to the property.

15. Street lighting shall be fixtures selected and oriented so as not to cause direct illumination or glare on adjacent properties.
16. The applicant shall take measures to control soil erosion to protect the natural drainage channel and the adjacent parklands, subject to the approval of the District of Columbia Department of Health.

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

Vote taken on April 5, 2005

VOTE APPROVING MINOR CORRECTION TO ORDER NO. 17276:

5-0-0 (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller and John A. Mann, II, to approve, John G. Parsons to approve by absentee ballot)

Vote taken on September 13, 2005

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: NOV 0 3 2005

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

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

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

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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.

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.