

THE DISTRICT OF COLUMBIA  
ALCOHOLIC BEVERAGE CONTROL BOARD

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In the Matter of:	)	
	)	
Watson Delicatessen, Inc.	)	
t/a S & J Liquors	)	
Renewal Application for a Retailer's	)	Case No.: 181-01/036P
License Class "A" at premises	)	Order No.: 2004-63
1500 Massachusetts Ave., S.E.	)	
Washington, D.C.	)	
	)	
Applicant	)	
_____	)	

BEFORE: Charles A. Burger, Chairperson<sup>1</sup>  
Vera M. Abbott, Member  
Audrey E. Thompson, Member  
Judy A. Moy, Member  
Peter B. Feather, Member<sup>2</sup>

ALSO PRESENT: Fred P. Moosally, III, Esquire, General Counsel  
Alcoholic Beverage Regulation Administration

Simon Osnos, Esquire, on behalf of the Applicant

Leslie Miles, Esquire, on behalf of the Protestants

**FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER**

The application, filed by Watson Delicatessen, Inc., ("Applicant"), t/a S & J Liquors, for a renewal of its Retailer's License Class "A" at premises 1500 Massachusetts Avenue, S.E., Washington, D.C., initially came before the Alcoholic Beverage Control Board ("Board") for a roll call hearing on May 16, 2001. It was determined that timely protests were filed pursuant to D.C. Official Code § 25-601 (2001) by Kenan Jarboe, Chairperson, Advisory Neighborhood

<sup>1</sup> Former ABC Board member Ellen Opper-Weiner, Esq., served as Acting Chairperson -- in the place of then ABC Board Chairman Roderic L. Woodson, Esq. -- for the majority of the June 26, 2002 proceeding. Both Mr. Woodson and Ms. Opperweiner are no longer members of the ABC Board. Current Chairperson Charles A. Burger participated as a member of the ABC Board during the June 26, 2002 proceeding, and served as Interim Chairperson during the May 14, 2003 proceeding.

<sup>2</sup> ABC Board member Peter B. Feather was not a member when these proceedings were initiated and did not participate or vote on this matter.

Commission ("ANC") 6B, on behalf of ANC 6B; and various nearby District of Columbia residents who were represented by Lisa Schwartz with the 15<sup>th</sup> Street Citizens Association. The filed protest issue, pursuant to D.C. Official Code § 25-602(a) (2001), is whether the establishment adversely affects the peace, order, and quiet of the neighborhood.

The case came before the Board for public protest hearings on June 26, 2002 and May 14, 2003. At the conclusion of the May 14, 2003 protest hearing, the Board took its decision in this matter under advisement. The Board gave the parties until July 15, 2003 to file proposed findings of fact and conclusions of law pursuant to D.C. Official Code § 25-433(b) (2001). The Protestants timely filed proposed findings of fact and conclusions of law. The Applicant's request to extend the deadline to file proposed findings of fact and conclusions of law until August 15, 2003 was denied on July 30, 2003. The Board having considered the evidence, the testimony of the witnesses, the arguments of counsel, and the documents comprising the Board's official file, makes the following:

### FINDINGS OF FACT

1. The Applicant's establishment is located at 1500 Massachusetts Avenue, S.E., on the Northeast corner of 15<sup>th</sup> Street, S.E., and Massachusetts Avenue, S.E. (Tr. 6/26/02 at 3; ABRA Exhibit No. 1 at 1<sup>3</sup>; Alcoholic Beverage Regulation Administration ("ABRA") Application File #000181.) The premises is zoned C-2-A, which is designed to provide facilities for shopping and business needs, housing, and mixed uses for large segments of the city outside of the central core areas. (ABRA Application File #000181; ABRA Exhibit No. 1 at 1.) The establishment is located in the same block as a dry cleaners which is located at the corner of 15<sup>th</sup> Street, S.E., and Independence Avenue, S.E. (Tr. 6/26/02 at 14, 18, 38; ABRA Exhibit No. 1 at 1.) Another Alcoholic Beverage Control ("ABC") establishment, Southeast Market, holder of a Retailer's License Class "B", is located on the Northeast corner of 15<sup>th</sup> Street, S.E., and Independence Avenue, S.E. (Tr. 6/26/02 at 14, 18-19, 48; ABRA Exhibit No. 1 at 1.) There are also residential homes and two (2) bus stops located in the area of the establishment. (Tr. 6/26/02 at 12, 18.)
2. The establishment is currently open and operating on the first floor of a one-story building. (ABRA Application File #000181; ABRA Exhibit No. 1 at 1.) The establishment's approved hours of operation are 9:00 a.m. to 9:00 p.m., Monday through Thursday; 9:00 a.m. to 10:00 p.m., Friday and Saturday; and, is closed on Sunday. (ABRA Exhibit No. 1 at 1.) The establishment has a voluntary agreement, dated February 12, 1998 with ANC 6B, which contains conditions on the Applicant's license that have been approved by the Board. (ABRA Application File #000181.)
3. Kenan P. Jarboe, ANC 6B Chairperson, on behalf of ANC 6B, filed a timely written protest letter, dated April 24, 2001, opposing the renewal of the Applicant's Class "A" Retailer's License on the grounds that the establishment has a negative impact on the peace, order, and quiet of the neighborhood. The April 24, 2001 letter from ANC 6B authorizes ANC 6B Commissioner Neil Glick to represent ANC 6B and also indicates that the establishment is not in

<sup>3</sup> A copy of ABRA Investigator Samuel Carpenter's April 1, 2002 Investigative Report was provided to both parties at the June 26, 2002 hearing and is being designated as ABRA Exhibit No. 1. (Tr. 6/26/02 at 6-7.)

compliance with its February 12, 1998 voluntary agreement with ANC 6B. (ABRA Protest File #181-01/036P.) The Protestants subsequently represented to the Board that they were seeking creative solutions to address problems they believed to be related to the establishment and were not asking the Board to deny the Applicant's renewal application. (Tr. 6/26/02 at 66.)

4. ABRA Investigator Samuel Carpenter visited the establishment a total of five (5) times for two (2) hours during each visit. (Tr. 6/26/02 at 8, 35; ABRA Exhibit No. 1 at 2.) Specifically, Investigator Carpenter visited the establishment on Monday, March 18, 2002 from 5:00 p.m. to 7:00 p.m.; Tuesday, March 19, 2002 from 6:00 p.m. to 8:00 p.m.; Wednesday, March 20, 2002 from 4:00 p.m. to 6:00 p.m.; Saturday, March 23, 2002 from 8:00 p.m. to 10:00 p.m.; and Wednesday, March 27, 2002 from 12:00 p.m. to 2:00 p.m. (Tr. 6/26/02 at 8-9, 15; ABRA Exhibit No. 1 at 2.) Investigator Carpenter stated that in speaking with the Protestants, the main peace, order, and quiet issues they were concerned with were trash and loitering. (Tr. 6/26/02 at 8-9.)

5. With respect to loitering, Investigator Carpenter observed separate groups of individuals loitering around the establishment, throughout the 1500 block of 15<sup>th</sup> Street, S.E., at all times of the day. (Tr. 6/26/02 at 9-10, 12, 35-36.) Investigator Carpenter also witnessed panhandlers approaching customers exiting in and out of the establishment. (Tr. 6/26/02 at 10.) Investigator Carpenter observed loiterers standing in the small park located across the street from the establishment as well as in front of the dry cleaners adjacent to the establishment. (Tr. 6/26/02 at 37-39.) Investigator Carpenter observed small groups of two (2) and three (3) individuals loitering in the public alley behind the establishment. (Tr. 6/26/02 at 45.) Investigator Carpenter stated that he could identify some of the loiterers as customers of the establishment. (Tr. 6/26/02 at 39-40.) Investigator Carpenter indicated that he spoke with Dol Ko, the owner the establishment, about the loitering issue. (Tr. 6/26/02 at 10.) Mr. Ko explained to Investigator Carpenter that he calls the Metropolitan Police Department ("MPD") when he observes the loitering problem and that MPD will then respond and disperse the crowd; however, the loiterers still come back. (Tr. 6/26/02 at 10.) Investigator Carpenter testified that Mr. Ko showed him a log book in which Mr. Ko recorded all calls made to MPD. (Tr. 6/26/02 at 20.) Investigator Carpenter spoke with an MPD officer in the First District substation who confirmed that he had received calls for loitering in the area of the establishment. (Tr. 6/26/02 at 20.) Investigator Carpenter noted that the establishment did have a "No Loitering" sign posted outside of the establishment. (Tr. 6/26/02 at 14.) Investigator Carpenter observed Mr. Ko come outside to view the front of the establishment on more than one occasion. (Tr. 6/26/02 at 25-26.) Investigator Carpenter observed the loiterers making loud noises that could be heard throughout the block and he occasionally observed some of the loiterers carrying and consuming beverages, including in front of the establishment, contained in brown paper bags. (Tr. 6/26/02 at 11, 13, 27, 41-42.) The establishment sells beverages in brown bags. (Tr. 6/26/02 at 26-27.) Investigator Carpenter testified that the loiterers tended to be twenty-five (25) years of age and older, and that he did not know where the loiterers resided. (Tr. 6/26/02 at 16-17, 58.) Investigator Carpenter stated that some of the loiterers were overly loud but that he did not witness any fights or any rowdy behavior occur between any of the loiterers. (Tr. 6/26/02 at 41-42.)

6. With respect to litter, Investigator Carpenter stated that he did not see a lot of trash in front of the establishment, but that he did see small amounts of trash in the alley behind the establishment. (Tr. 6/26/02 at 10, 43-44.) Investigator Carpenter noted that there is a trash can on the corner in the front of the establishment and that there is a dumpster in the rear of the establishment which did not appear to be overflowing. (Tr. 6/26/02 at 21.) Investigator Carpenter explained that there were small amounts of trash scattered throughout the public alley behind the establishment, including cigarette packages, candy wrappings, brown paper bags, and spirit bottles. (Tr. 6/26/02 at 22-23, 44.) Investigator Carpenter could not discern whether the trash in the public alley came from the neighboring houses that border on the alley or the establishment. (Tr. 6/26/02 at 45, 47.)

7. With regards to criminal activity, Investigator Carpenter did not observe any criminal activity in the surrounding areas of the Applicant's establishment. (Tr. 6/26/02 at 11, 47.) Investigator Carpenter did not observe intoxicated patrons entering the establishment, nor did he observe any incidents of public intoxication. (Tr. 6/26/02 at 28, 42, 46-47.)

8. With regard to residential parking and vehicular and pedestrian safety, Investigator Carpenter observed customers driving up to the establishment, but he never observed illegal parking, such as double parking or cars parked on the sidewalk next to the establishment. (Tr. 6/26/02 at 27-28, 60.) Investigator Carpenter observed that the Applicant does not provide parking facilities; however, parking is available on the 200 block of 15<sup>th</sup> Street, S.E., which has one-hour restriction parking from 7:00 a.m. to 6:30 p.m., with Zone 6 permit holders excepted. (Tr. 6/26/02 at 28; ABRA Exhibit No. 1.)

9. Investigator Carpenter found all of the establishment's licenses to be current. (Tr. 6/26/02 at 24-25.) Investigator Carpenter indicated that he did not verify whether or not Mr. Ko was in compliance with the terms of the existing Voluntary Agreement. (Tr. 6/26/02 at 57.)

10. Fred Rosario is a Master Patrol Officer with MPD and is assigned to the Fifth District, Patrol Service Area ("PSA") 512. (Tr. 5/14/03 at 12-13.) Officer Rosario has worked in MPD's Fifth District since 1988. (Tr. 5/14/03 at 12.) Officer Rosario's tour of duty is from 3:00 p.m. to 11:00 p.m. (Tr. 5/14/03 at 32.) Officer Rosario noted that the establishment is located within his PSA and that he patrols the establishment about twice a day, on a daily basis. (Tr. 5/14/03 at 13-14.) Officer Rosario has known Mr. Ko for approximately two (2) years. (Tr. 5/14/03 at 12.) Officer Rosario stated that Mr. Ko is very cooperative with him. (Tr. 5/14/03 at 15.) Officer Rosario is present at the establishment everyday during closing to ensure that the establishment does not get robbed. (Tr. 5/14/03 at 13.) Officer Rosario indicated that he also makes his presence known at several other ABC establishments within his PSA during their closing times for similar safety-related reasons. (Tr. 5/14/03 at 26-27.) Officer Rosario noted that the establishment is bordering two (2) PSAs. (Tr. 5/14/03 at 29.)

11. Officer Rosario indicated that there are two (2) alleyways within the establishment's immediate vicinity and noted that: 1) the first alleyway runs perpendicular to Massachusetts Avenue, S.E., and Independence Avenue, S.E.; and, 2) the second alleyway is perpendicular to the first alleyway, and runs parallel to Massachusetts Avenue, S.E., and Independence Avenue, S.E. (Tr. 5/14/03 at 25; Applicant's Exhibit No. 1.)

12. With regard to loitering, Officer Rosario noted that the loiterers standing on the corner in the front of the establishment will generally disperse when they see his patrol car approaching. (Tr. 5/14/03 at 15-16, 19, 32-33.) Officer Rosario stated that the regular groups of loiterers consist of between five (5) and seven (7) individuals congregating together and talking in conversational tones. (Tr. 5/14/03 at 33-34.) Officer Rosario has observed Mr. Ko and his employees go outside to ask loiterers to move on. (Tr. 5/14/03 at 16.) Officer Rosario has not observed individual littering by the loiterers. (Tr. 5/14/03 at 34-35.) Officer Rosario did not remember ever responding directly to a call from Mr. Ko, but he did recall responding to radio runs usually during the summer months. (Tr. 5/14/03 at 19-20.) Officer Rosario indicated that he has never seen the establishment's logbook of calls made to MPD. (Tr. 5/14/03 at 28.) Officer Rosario stated that the establishment does have a "No Loitering" sign posted. (Tr. 5/14/03 at 45-46.) Officer Rosario considers Mr. Ko to be one of the more responsible owners, specifically with regards to controlling loitering and public drinking, including in front of the establishment. (Tr. 5/14/03 at 18.)

13. With respect to criminal activity, Officer Rosario has never observed criminal activity take place inside of the establishment. (Tr. 5/14/03 at 16.) Officer Rosario did not recall seeing any narcotics activity occur in front of the establishment. (Tr. 5/14/03 at 29.) Officer Rosario testified that narcotics sales and other criminal activity routinely take place in the alley which separates the establishment from the row houses along Massachusetts Avenue, S.E., and Independence Avenue, S.E.; however, Officer Rosario noted that the criminal activity is not connected to the establishment, but rather to a private residence located on Independence Avenue, S.E. (Tr. 5/14/03 at 20-21, 26; Applicant's Exhibit No. 1.) Officer Rosario stated that the establishment does not sell drug paraphernalia. (Tr. 5/14/03 at 30-31.) Officer Rosario has observed Mr. Ko refuse to sell alcoholic beverages to intoxicated individuals. (Tr. 5/14/03 at 16.) Officer Rosario testified that the establishment did not present community problems of the same magnitude as many other ABC establishments in the District of Columbia. (Tr. 5/14/03 at 15-17.) With regard to public intoxication, Officer Rosario has never arrested individuals for publicly drinking alcoholic beverages in front of the establishment; however, he has arrested individuals for public drinking in the park across the street from the establishment. (Tr. 5/14/03 at 31; Applicant's Exhibit No. 2.) Officer Rosario recalled making one (1) or two (2) arrests in the last year for public drinking within the establishment's vicinity. (Tr. 5/14/03 at 37.) Officer Rosario testified that throughout PSA 512 there are many instances of public drinking. (Tr. 5/14/03 at 37-38.) Officer Rosario has witnessed Mr. Ko ask his customers for identification and refuse to sell alcoholic beverages to intoxicated individuals. (Tr. 5/14/03 at 16.) Officer Rosario has never observed instances of public urination. (Tr. 5/14/03 at 35.)

14. With regard to litter, Officer Rosario testified that the garbage containers in the general vicinity of the establishment overflow with garbage that ends up on the ground. (Tr. 5/14/03 at 35, 38.) Officer Rosario testified that the garbage containers are filled with single empty beer containers and that empty beer containers also line the ground surrounding the garbage cans and the park area across the street from the establishment. (Tr. 5/14/03 at 38.) Officer Rosario has observed both Mr. Ko and his employees cleaning the outside of the establishment. (Tr. 5/14/03 at 16, 34, 44.) Officer Rosario indicated that the dumpster located in the alley behind the establishment had been removed. (Tr. 5/14/03 at 21.)

15. Joshua Strassman is a Police Officer with MPD, Fifth District, PSA 512. (Tr. 5/14/03 at 48.) Officer Strassman has worked in PSA 512 for a little over five (5) years. (Tr. 5/14/03 at 48.) Officer Strassman's normal tour of duty is from 3:00 p.m. to 11:00 p.m.; however, when Officer Strassman is on mountain bike patrol, his tour of duty is from 12:00 p.m. to 8:00 p.m. or 8:30 p.m. (Tr. 5/14/03 at 63.) Officer Strassman patrols the establishment approximately once during his tour of duty. (Tr. 5/14/03 at 62, 77.) Officer Strassman has known Mr. Ko for a little over five (5) years. (Tr. 5/14/03 at 51.) Officer Strassman explained that the Applicant's establishment is located within PSA 512, but that the establishment also borders on PSA 109. (Tr. 5/14/03 at 61.) Officer Strassman testified that the closest ABC establishment with a Retailer's License Class "A" is located approximately five (5) to six (6) blocks away from the Applicant's establishment, around the 400 block of 15<sup>th</sup> Street, N.E. (Tr. 5/14/03 at 80-81.)

16. With respect to criminal activity, Officer Strassman stated that the corner of 15<sup>th</sup> Street, S.E., and Massachusetts Avenue, S.E., is ridden with criminal activity, including public drinking, narcotics use, and narcotics sales. (Tr. 5/14/03 at 52-53.) Officer Strassman indicated that he has never observed any direct connection between the outside narcotics activity and the establishment. (Tr. 5/14/03 at 52-53.) Instead, Officer Strassman attributed much of the narcotics activity to a specific house located within the immediate vicinity of the establishment. (Tr. 5/14/03 at 53.) Officer Strassman did not recall observing any criminal activity inside of the establishment, nor did he recall ever making any arrests regarding narcotics activity in front of the establishment. (Tr. 5/14/03 at 56-57, 67.) Officer Strassman has made several arrests and observed criminal activity in the alleyway that runs parallel to both Massachusetts Avenue, S.E., and Independence Avenue, S.E. (Tr. 5/14/03 at 66-67.)

17. Officer Strassman has received neighborhood complaints and radio runs to respond to the establishment for problems such as loitering and public drinking, but did not know if any of the calls were made by Mr. Ko himself. (Tr. 5/14/03 at 52, 76-77.) Officer Strassman did not observe any public drinking immediately in front of the establishment but did observe public drinking in the park across the street from the establishment, as well as in the abandoned building on the Southwest corner of the intersection of 15<sup>th</sup> Street, S.E., and Massachusetts Avenue, S.E., located diagonally across from the establishment. (Tr. 5/14/03 at 54; Applicant's Exhibit No. 6.) Officer Strassman stated that the individuals he observes drinking in public across the street in the park or at the bus stop, drink out of brown paper bags, black plastic bags, or cups, and that he has arrested these same individuals. (Tr. 5/14/03 at 57-58, 68.) Officer Strassman could not ascertain whether the disorderly individuals he has arrested purchased liquor products from the Applicant's establishment. (Tr. 5/14/03 at 53.) Officer Strassman has never observed Mr. Ko sell to intoxicated customers. (Tr. 5/14/03 at 56.) Officer Strassman noted that the Applicant has a "No Drinking" sign posted on the building of the establishment. (Tr. 5/14/03 at 55.)

18. With regard to litter, Officer Strassman has observed empty liquor and beer bottles in the vicinity of the park across the street from the establishment, and in the vicinity of the abandoned building on the Southeast corner of the intersection of 15<sup>th</sup> Street, S.E., and Massachusetts Avenue, S.E. (Tr. 5/14/03 at 79-80.) Officer Strassman has observed Mr. Ko, as well as his

employees, sweeping both the inside and outside of the establishment, picking up trash, and disposing of it. (Tr. 5/14/03 at 59.)

19. With respect to loitering, Officer Strassman has observed loitering in front of Southeast Market, holder of a Retailer's License Class "B", which is located on the Northeast corner of 15<sup>th</sup> Street, S.E., and Independence Avenue, S.E. (Tr. 5/14/03 at 65-66, 73; ABRA Exhibit No. 1 at 1.) Officer Strassman has also observed loitering on the south side of Independence Avenue, S.E., by the sidewall of the dry cleaners adjacent to the establishment. (Tr. 5/14/03 at 66.) Officer Strassman indicated that in the past couple of years loitering has decreased in the area. (Tr. 5/14/03 at 69-71.) Officer Strassman noted that Mr. Ko does have a "No Loitering" sign posted. (Tr. 5/14/03 at 55.) Officer Strassman has in the past advised Mr. Ko to call MPD if he has problems with loitering, and he believes that the Applicant has placed calls to MPD regarding loiterers. (Tr. 5/14/03 at 70-71.)

20. Officer Strassman could not make a determination as to whether a restriction on the sale of singles at the establishment would improve the quality of life in the neighborhood by reducing the instances of littering and loitering. (Tr. 5/14/03 at 77-78.)

21. Ronald Harvey resides at 1826 Massachusetts Avenue, S.E., where his family moved to in 1954. (Tr. 5/14/03 at 89.) Mr. Harvey's residence is approximately three (3) blocks away from the establishment. (Tr. 5/14/03 at 93.) Mr. Harvey moved out of this residence in 1978 and then returned in 1985. (Tr. 5/14/03 at 89.) Mr. Harvey has been familiar with the area of the establishment since approximately 1955. (Tr. 5/14/03 at 89.) Mr. Harvey indicated that he patronizes the establishment on a daily basis so he observes Mr. Ko's actions regularly. (Tr. 5/14/03 at 90, 96-97.)

22. With respect to litter, Mr. Harvey never witnessed any of the previous owners of the establishment clean up the outside of the establishment. (Tr. 5/14/03 at 89-90.) Mr. Harvey stated that since becoming the owner of the establishment, Mr. Ko has regularly cleaned the inside and outside of the establishment, as well as picked up trash in the park across the street. (Tr. 5/14/03 at 90, 92.)

23. With regard to loitering, Mr. Harvey has seen loiterers in front of the establishment, but has never seen anyone drinking out of brown paper bags in front of the establishment. (Tr. 5/14/03 at 94-95.) Mr. Harvey has witnessed individuals drinking in the park. (Tr. 5/14/03 at 96.) Mr. Harvey indicated that there is a blind spot, in between the Applicant's establishment and the adjacent dry cleaners, where individuals can stand and not be seen from either the establishment or the dry cleaners. (Tr. 5/14/03 at 96.) Mr. Harvey noted that Mr. Ko will routinely ask customers who make too much noise inside of the establishment to leave and that Mr. Ko will also ask loiterers outside of the establishment to move on from the premises. (Tr. 5/14/03 at 90.) Mr. Harvey emphasized that Mr. Ko is the only owner he has ever witnessed perform such actions with loiterers. (Tr. 5/14/03 at 90.) Mr. Harvey testified that he has seen Mr. Ko get cursed out after Mr. Ko has asked groups of loiterers in the park across the street to move on. (Tr. 5/14/03 at 91.) Mr. Harvey has also witnessed Mr. Ko get cursed out for refusing to sell alcoholic beverages to customers that appeared to be high. (Tr. 5/14/03 at 92.)

24. Mr. Harvey did not believe that restricting the sale of singles at the establishment would have a long term effect in deterring loiterers. (Tr. 5/14/03 at 97.)

25. Eleanor Cox has resided at 1421 A Street, S.E., for twenty-four (24) years. (Tr. 5/14/03 at 105, 108.) Ms. Cox has been a patron of the establishment for approximately twenty (20) years. (Tr. 5/14/03 at 105.) Ms. Cox patronizes the establishment twice per day. (Tr. 5/14/03 at 106.) Ms. Cox testified that Mr. Ko is very well respected in the neighborhood. (Tr. 5/14/03 at 105.)

26. Ms. Cox has seen Mr. Ko ask loiterers to move away from the establishment. (Tr. 5/14/03 at 105.) Ms. Cox noted that Mr. Ko refuses to sell alcoholic beverages to intoxicated individuals and that Mr. Ko will ask intoxicated individuals to leave the establishment. (Tr. 5/14/03 at 106.) Ms. Cox stated that she has never observed patrons of the establishment drinking in public or acting in a disorderly manner. (Tr. 5/14/03 at 108.)

27. Michael Glynn Lyles has resided at 1812 Burke Street, S.E., for forty (40) years. (Tr. 5/14/03 at 111,114.) Mr. Lyles has been a customer of the establishment for approximately twenty-six (26) years. (Tr. 5/14/03 at 111.) Mr. Lyles noted that Mr. Ko refuses to sell to intoxicated individuals and that Mr. Ko will ask loiterers outside in front of the establishment to move on. (Tr. 5/14/03 at 112.) Mr. Lyles testified that loiterers who have been asked to leave the premises by Mr. Ko, will usually move across the street or down the street, and within fifteen (15) minutes they return to the establishment and Mr. Ko once again must ask them to leave. (Tr. 5/14/03 at 112.)

28. With regard to litter, Mr. Lyles has observed Mr. Ko sweep the front of the establishment on a daily basis and has also observed Mr. Ko sweep the sidewalk and the curbs along the park across the street from the establishment. (Tr. 5/14/03 at 114.) Mr. Lyles buys alcoholic beverages at the establishment, including single beers on occasion, but takes his alcoholic beverages home. (Tr. 5/14/03 at 119.)

29. Dol Ko is President of Watson Delicatessen, Inc., which owns and operates the establishment. (Tr. 5/14/03 at 121; ABRA Application File #000181.) Mr. Ko has served as President of Watson Delicatessen, Inc., since 1993. (Tr. 5/14/03 at 137; ABRA Application File #000181.) Mr. Ko has worked at the establishment for almost twenty (20) years. (Tr. 5/14/03 at 121.) Mr. Ko works in the establishment Monday through Thursday, from 9:00 a.m. to 9:00 p.m., and on Friday and Saturday, from 9:00 a.m. to 10:00 p.m. (Tr. 5/14/03 at 126-127.)

30. With respect to litter, Mr. Ko spends about twenty (20) to thirty (30) minutes, two (2) to three (3) times per day, picking up trash outside of the establishment. (Tr. 5/14/03 at 121-123.) Mr. Ko stated that he cleans up trash along Massachusetts Avenue, S.E., between 14<sup>th</sup> Street, S.E., and 16<sup>th</sup> Street, S.E. (Tr. 5/14/03 at 123.)

31. With regard to drinking in public, Mr. Ko testified that he does not know whether his customers are the same individuals who drink in the park across the street from the establishment. (Tr. 5/14/03 at 124.) Mr. Ko testified that he does not see individuals drinking alcoholic beverages outside in front of the establishment or in the park across the street from the establishment. (Tr. 5/14/03 at 126-127, 134.) Mr. Ko indicated that he tries to ensure that his

customers don't drink alcoholic beverages or loiter on the street outside of the establishment by asking his customers to move on and then by calling MPD. (Tr. 5/14/03 at 124.) Mr. Ko stated that about seventy (70) to eighty (80) percent of his customers are regular customers who do not cause problems outside of the establishment. (Tr. 5/14/03 at 124.)

32. With respect to loitering, Mr. Ko stated that throughout the day he will go outside to the front of the establishment whenever he senses that people are loitering to ask them to move. (Tr. 5/14/03 at 124, 127, 132.) Mr. Ko typically goes outside of the establishment an average of six (6) to seven (7) times per day to disperse loiterers. (Tr. 5/14/03 at 127.) Mr. Ko refuses to sell alcoholic beverages to the people that loiter in front of the establishment and he also does not allow those same individuals inside of the establishment. (Tr. 5/14/03 at 129.) Mr. Ko noted that the loitering problem on the corner of 15<sup>th</sup> Street, S.E., and Massachusetts Avenue, S.E., has improved greatly in the last twenty (20) years. (Tr. 5/14/03 at 129.) Mr. Ko has kept a log book of calls made to MPD as required by his voluntary agreement. (Tr. 5/14/03 at 131-132; Protestants' Exhibit No. 1.) Mr. Ko acknowledged that there have been no entries made in the log book since June 14, 2002, and that he has been going outside and asking the loiterers directly to leave. (Tr. 5/14/03 at 132.)

33. Mr. Ko acknowledged that his signature is on the bottom of the February 12, 1998 voluntary agreement entered into between the Applicant and ANC 6B, but that he does not understand what the voluntary agreement actually is. (Tr. 5/14/03 at 138-139, 141; ABRA Application File #000181.) Mr. Ko testified that he does not speak and understand the English language well and that he does not remember signing the voluntary agreement. (Tr. 5/14/03 at 141.) Mr. Ko stated that he was not aware that the signed voluntary agreement would become part of his ABC license. (Tr. 5/14/03 at 143.) Mr. Ko was represented by counsel, Leonard Birdsong, Esq., at the time he signed the voluntary agreement. (Tr. 5/14/03 at 143.) Mr. Ko does not remember if he had ever attended a Board-approved alcohol server training program, but he did remember taking some kind of course. (Tr. 5/14/03 at 142.)

34. Mr. Ko noted that he did not make a verbal agreement with the community over one (1) year ago to either: 1) use clear plastic bags, or 2) clean the alley behind the establishment with bleach, which are not part of his voluntary agreement. (Tr. 5/14/03 at 135-136, 147.) Mr. Ko stated that he cleans the premises because he wants to clean up around the neighborhood, not because he signed any agreement stating that he would clean. (Tr. 5/14/03 at 137.) Mr. Ko informed the community at an ANC meeting on May 13, 2004 that he began using clear plastic bags. (Tr. 5/14/03 at 134-135.) Mr. Ko began using clear plastic bags three days prior to the May 14, 2003 protest hearing. (Tr. 5/14/03 at 135.) Mr. Ko could not remember the exact date he last cleaned the alley behind the establishment with bleach. (Tr. 5/14/03 at 135.)

35. Mr. Ko stated that single cans of beer and malt liquor make up between thirty (30) and forty (40) percent of the establishment's gross sales. (Tr. 5/14/03 at 129-130, 146.) Mr. Ko testified that he sells ten (10) cases of Miller 24 ounce beer per week. (Tr. 5/14/03 at 146.) Mr. Ko stated that he would have to close the establishment if he could no longer sell single containers of alcoholic beverages. (Tr. 5/14/03 at 130-131.)

36. Barbara Jean Jackson has resided at 1816 Potomac Avenue, S.E., for thirty-four (34) years. (Tr. 5/14/03 at 154.) Ms. Jackson has been a customer of the Applicant's establishment for at least twenty (20) years and patronizes the establishment daily. (Tr. 5/14/03 at 155-156.) Ms. Jackson testified that Mr. Ko has made a difference at the establishment because he tries to get rid of the loiterers in front of the premises, so that his customers can go in and out of the establishment without being harassed. (Tr. 5/14/03 at 156.) Ms. Jackson indicated that the amount of people loitering in front of the establishment has decreased. (Tr. 5/14/03 at 156.)

37. Neil Glick has resided at 1515 Massachusetts Avenue, S.E., for three and a half (3½) years. (Tr. 5/14/03 at 162.) Mr. Glick lives approximately seventy (70) feet away from the establishment. (Tr. 5/14/03 at 225.) Mr. Glick is the Chairperson of ANC 6B's Alcoholic Beverage Committee. (Tr. 5/14/03 at 162.) Mr. Glick stated that he purchased his house with the understanding that the surrounding neighborhood was changing and with the false belief that the Applicant's establishment would be closing at any time. (Tr. 5/14/03 at 165.) Mr. Glick's frustration with the state of his neighborhood was what led him to run for the ANC. (Tr. 5/14/03 at 166.) Mr. Glick testified that when he first moved into the neighborhood he patronized the establishment, including to buy alcoholic beverages; however, he has patronized the establishment only once -- to buy a bottle of tequila -- since ANC 6B filed a protest against the Applicant. (Tr. 5/14/03 at 163, 227-228.)

38. With respect to criminal activity, Mr. Glick testified that his neighborhood has a serious problem with heroin sales. (Tr. 5/14/03 at 163.) Mr. Glick testified that there is a needle exchange van that parks at the 1500 block of Independence Avenue, S.E., every Thursday outside of the dry cleaners from 10:45 a.m. to 11:30 a.m. (Tr. 5/14/03 at 163-164.) Mr. Glick testified that the neighborhood is victim to a prescription drug ring that harbors in the front of the Applicant's establishment and attracts individuals coming from the methadone clinic and the women's treatment and rehab clinic at D.C. General Hospital. (Tr. 5/14/03 at 164, 212-213, 223-24.) Mr. Glick did not believe that the establishment encouraged the prescription drug ring. (Tr. 5/14/03 at 213.) Mr. Glick testified that the neighborhood also has a problem with public defecation. (Tr. 5/14/03 at 164.)

39. Mr. Glick stated that since 1998 or 1999, ANC 6B has been in opposition to the sale of singles in ANC 6B; furthermore, ANC 6B believes that if singles are sold in ANC 6B, customers should be provided with clear or translucent bags to assist MPD in identifying individuals who are consuming alcoholic beverages in public. (Tr. 5/14/03 at 166-167.) Mr. Glick stated that ANC 6B's position on the sale of singles and the use of clear or translucent bags has been incorporated into many voluntary agreements. (Tr. 5/14/03 at 167.) Mr. Glick testified that in 2001, ANC 6B voted unanimously to again support its position on the sale of singles and the use of clear or translucent bags. (Tr. 5/14/03 at 167.) Mr. Glick stated that ANC 6B has a voluntary agreement with Southeast Market, holder of a Retailer's License Class "B", and that as part of the voluntary agreement, Southeast Market has agreed to not sell singles if the ABC establishments within five (5) blocks of them do not sell singles. (Tr. 5/14/03 at 167-168, 175, 208; ABRA Exhibit No. 1 at 1.) Mr. Glick stated that at the urging of ANC 6B, Southeast Market also uses clear and translucent plastic bags. (Tr. 5/14/03 at 215.) Mr. Glick testified that within the vicinity there are two (2) other establishments with Retailer's License Class "A". (Tr. 5/14/03 at 168.) Mr. Glick testified that Albert's Liquors, holder of a Retailer's License Class

"A", sells singles but uses clear and translucent bags. (Tr. 5/14/03 at 168.) Mr. Glick testified that Safeway is also a holder of a Retailer's License Class "A", however, Safeway, as part of their voluntary agreement, does not sell singles. (Tr. 5/14/03 at 168, 229.)

40. With regard to drinking in public, Mr. Glick stated that he constantly observes individuals in the neighborhood near the establishment who: 1) sit in public, drinking and passing bottles around; 2) stagger drunk down the street; 3) urinate in public; and, 4) pass out on the street because they are intoxicated. (Tr. 5/14/03 at 168-171.) Mr. Glick noted that recently while leaving his house around 6:15 p.m. to attend an ANC 6B meeting, he observed two (2) individuals sitting at a bus stop along Massachusetts Avenue, S.E., who were completely inebriated, and then after walking further along, he witnessed three (3) more individuals sitting outside drinking from a bottle in a paper bag. (Tr. 5/14/03 at 168-169.) Mr. Glick recalled an instance where an intoxicated individual, who had passed out at a bus stop and bloodied his head because he was drunk, told Mr. Glick that he had purchased his liquor from the Applicant's establishment. (Tr. 5/14/03 at 170-171, 196; Applicant's Exhibit No. 8.) Mr. Glick believed that individuals in his neighborhood who drink out of brown paper bags likely purchase their alcoholic beverages from the Applicant's establishment, which uses brown paper bags. (Tr. 5/14/03 at 171-172.) Mr. Glick testified that he believes Mr. Ko sells alcoholic beverages to chronic alcoholics in the neighborhood. (Tr. 5/14/03 at 225.) Mr. Glick testified that the establishment sells single rolls of toilet paper. (Tr. 5/14/03 at 232.) Mr. Glick stated that he sees people drinking bottles of beer and flasks of Mad Dog outside the area of the establishment in brown paper bags and that he also sees these bottles broken all over the neighborhood. (Tr. 5/14/03 at 171-172.) Mr. Glick stated that he has seen individuals enter the Applicant's establishment and then drink their alcoholic beverages on the street, and that he has also observed intoxicated individuals drinking on the street as well. (Tr. 5/14/03 at 173.)

41. Mr. Glick indicated that two (2) years ago Mr. Ko attended an ANC 6B meeting with a translator and that at the meeting, ANC 6B requested that the Applicant's establishment and other establishments use clear or translucent bags. (Tr. 5/14/03 at 174.) Mr. Glick noted that ANC 6B's protest issues are loitering, litter, and the public consumption of alcohol. (Tr. 5/14/ at 203.)

42. With regard to loitering, Mr. Glick has found individuals passed out in front of his house on numerous occasions. (Tr. 5/14/03 at 164.) Mr. Glick indicated that the neighborhood is noisy on Saturdays when the Applicant's establishment is open and pretty quiet on Sundays when the Applicant's establishment is closed. (Tr. 5/14/03 at 176.) Mr. Glick testified that loitering is not a serious problem in the winter months, but once it gets warmer people begin to loiter and drink in public. (Tr. 5/14/03 at 164.) Mr. Glick indicated that when his front windows are open on Saturdays he hears yelling and screaming coming from the intersection of 15<sup>th</sup> Street, S.E., and Massachusetts Avenue, S.E., which he attributes to the public drinking and the selling of singles. (Tr. 5/14/03 at 176-177, 204-205.) Mr. Glick noted that Mr. Ko posted a "No Loitering" sign outside on the front of the establishment. (Tr. 5/14/03 at 192.) Mr. Glick stated that he has never seen Mr. Ko ask loiterers to move on when they stand in front of the establishment. (Tr. 5/14/03 at 192.) Mr. Glick testified that he believes Mr. Ko is capable of controlling the loitering problem in front of the establishment. (Tr. 5/14/03 at 226.) Mr. Glick stated that he has seen the written record of the dates and times Mr. Ko has called MPD for assistance. (Tr. 5/14/03 at 193.)

Mr. Glick indicated that there is no pay phone outside of the establishment. (Tr. 5/14/03 at 193.) Mr. Glick did not believe that the Applicant had taken the course required by the voluntary agreement. (Tr. 5/14/03 at 194.)

43. With regard to litter, Mr. Glick noted that at least ninety (90) percent of the time the front of the establishment is kept very clean. (Tr. 5/14/03 at 177.) Mr. Glick has observed Mr. Ko sweep the outside of the establishment regularly, as well as pick up trash in front of the establishment on a few occasions, but he has never seen Mr. Ko clean the alley. (Tr. 5/14/03 at 193-194.) Mr. Glick testified that he has never seen Mr. Ko clean along the south side of Massachusetts Avenue, S.E., or in the park across the street from the establishment. (Tr. 5/14/03 at 219.) Mr. Glick testified has picked up loads of bottles and beer cans in paper sacks littered throughout the neighborhood. (Tr. 5/14/03 at 164.) Mr. Glick testified that the alley behind the establishment smells of urine and is littered with lottery tickets and other garbage. (Tr. 5/14/03 at 177, 200.) Mr. Glick stated that ANC 6B asked for the dumpster in the alley behind the establishment that runs perpendicular to Independence Avenue, S.E., and Massachusetts Avenue, S.E., to be removed so that emergency vehicles could pass through. (Tr. 5/14/03 at 198-99.) Mr. Glick stated that the dumpster was removed. (Tr. 5/14/03 at 200.) Mr. Glick testified that his front lawn and the front lawn of other homes on Massachusetts Avenue, S.E., are littered with empty bottles, brown paper bags, and lottery tickets. (Tr. 5/14/03 at 178.) Mr. Glick testified that for two (2) years he has worked on the trash and litter issue with Leo Pinson, the Ward 6 Area Coordinator from the Mayor's Office and had a giant trash can placed on the corner of 15<sup>th</sup> Street, S.E., and Massachusetts Avenue, S.E., outside of the establishment. (Tr. 5/14/03 at 210.)

44. Mr. Glick believed Mr. Ko understood the voluntary agreement he signed with ANC 6B. (Tr. 5/14/03 at 206-207.) Mr. Glick confirmed there is no language in the existing voluntary agreement between the Applicant and ANC 6B that requires Mr. Ko to clean the alley behind the establishment with bleach, to use clear or translucent plastic bags, or to refrain from selling singles. (Tr. 5/14/03 at 216-218.) Mr. Glick stated that Mr. Ko was abstinent about not wanting to sign a new voluntary agreement or an amended voluntary agreement. (Tr. 5/14/03 at 222.) Mr. Glick indicated that Mr. Ko planted flowers in the front area of the establishment. (Tr. 5/14/03 at 219.) Mr. Glick stated that Mr. Ko has never attended any of the meetings of PSA 512 or PSA 109, and that Mr. Ko only attends the ANC meetings when the establishment's license is up for renewal. (Tr. 5/14/03 at 228.)

45. Mr. Glick stated that he wants the establishment to stop selling single containers of beer and fortified wines, and flask bottles of hard spirits. (Tr. 5/14/03 at 214, 228.) Mr. Glick wants the establishment to use clear or translucent bags to inhibit the public consumption of alcohol. (Tr. 5/14/03 at 228.)

46. Gracie P. Glymph has resided at 1534 Massachusetts Avenue, S.E., for fifty (50) years. (Tr. 5/14/03 at 237, 247.) Ms. Glymph's house is half (1/2) a block away from the Applicant's establishment. (Tr. 5/14/03 at 238, 247.) Gracie Glymph stated that she has not patronized the Applicant's establishment recently because she is fearful of the loiterers and panhandlers that linger outside of the establishment. (Tr. 5/14/03 at 240-241, 244.)

47. Gracie Glymph testified that customers of the Applicant's establishment often purchase beer, liquor, and snacks from the establishment, and that these same customers loiter on the block and in front of her house, then dispose of empty bottles, brown bags, and other trash in her front yard and at the bus stop that is within ten (10) feet of her house. (Tr. 5/14/03 at 238-242, 245-246, 248-249.) Ms. Glymph testified that she has been cleaning up the litter left by these same customers of the establishment for the last fifteen (15) to twenty (20) years and that she has never seen anyone else clean her block. (Tr. 5/14/03 at 239-240, 242-243.) Ms. Glymph has recently had litter, including beer bottles and cans, as well as brown bags left in her yard. (Tr. 5/14/03 at 241-242.) Ms. Glymph indicated that customers of the establishment loiter on the steps of her house where they eat and drink what they have bought from the establishment. (Tr. 5/14/03 at 245-246.) Ms. Glymph testified that the problems with littering and loitering will persist as long as the Applicant's establishment is there and customers can buy single cans of beer and wine, sodas, and other items. (Tr. 5/14/03 at 240.) Ms. Glymph believed that the establishment should be in a shopping mall and not in a residential neighborhood because the neighborhood problems will continue to exist. (Tr. 5/14/03 at 240-241.)

48. Queen Glymph has resided at 1534 Massachusetts Avenue, S.E., which is half (1/2) a block away from the Applicant's establishment, for approximately thirty (30) to forty (40) years, on and off. (Tr. 5/14/03 at 254-255.) She lives at this address with her mother, Gracie Glymph. (Tr. 5/14/03 at 261.)

49. Queen Glymph does not patronize the Applicant's establishment because her family has always been opposed to the establishment and she finds the establishment to be a nuisance. (Tr. 5/14/03 at 255.) She wants the establishment closed. (Tr. 5/14/03 at 258.) Queen Glymph testified that by selling singles, the establishment is actively contributing to the drug addiction of the addicts in the neighborhood. (Tr. 5/14/03 at 256.)

50. With regard to loitering, Queen Glymph testified that she cannot walk in the direction of the establishment because the loiterers on the corner block her way. (Tr. 5/14/03 at 256-257, 261.) Ms. Glymph noted that in the past she has been unable to sit on the bench by the bus stop because of the loiterers sitting on the bench and the brown bags littered on the bench. (Tr. 5/14/03 at 257.)

51. With respect to littering, Queen Glymph testified that she has observed individuals littering bottles and brown bags throughout the day, from the time the establishment opens to the time the establishment closes. (Tr. 5/14/03 at 260-261.)

52. With regard to public drinking, Queen Glymph stated that she has witnessed customers come out of the establishment and open their drinks on the street. (Tr. 5/14/03 at 262.) She has never witnessed MPD arrest individuals for having an open container or drinking alcoholic beverages in public. (Tr. 5/14/03 at 266.) She has never observed customers of Southeast Market purchase singles and open their drinks on the street. (Tr. 5/14/03 at 263.) Ms. Glymph has observed individuals urinating in the alley behind the establishment and in the space between the establishment and the dry cleaners. (Tr. 5/14/03 at 263-264.)

53. Lisa Schwartz has resided at 1522 Massachusetts Avenue, S.E., for seventeen (17) years. (Tr. 5/14/03 at 268.) She lives within half (1/2) a block away from the establishment. (Tr. 5/14/03 at 268.) Ms. Schwartz is: (1) on the board of the Capitol Hill Community Garden Land Trust; (2) founder of the King's Court Community Garden; (3) one of the original founders of Capitol Hill Cat Rescue; and (4) a tutor at Payne Elementary School. (Tr. 5/14/03 at 270-271.)
54. Ms. Schwartz has kept a diary since mid-April 2003 that she believed has documented a pattern of problems associated with the establishment. (Tr. 5/14/03 at 269.) Ms. Schwartz stated that the community's relationship with Mr. Ko has been contentious and that Mr. Ko has demonstrated an unwillingness to work with the community. (Tr. 5/14/03 at 272-273.) Ms. Schwartz testified that the owners of Southeast Market have always demonstrated a sense of community-mindedness, which Mr. Ko and his staff have never demonstrated. (Tr. 5/14/03 at 275-276.) Ms. Schwartz stated that Mr. Ko has not offered, as a gesture of good faith, to clean the alley behind the establishment with bleach. (Tr. 5/14/03 at 272-273.) Ms. Schwartz testified that it took Mr. Ko two (2) years to switch to using clear bags. (Tr. 5/14/03 at 273.) Ms. Schwartz personally planted the tree box in front of the Applicant's establishment after asking Mr. Ko for money for the tree box. (Tr. 5/14/03 at 271.)
55. Ms. Schwartz indicated that Mr. Ko sells alcoholic beverages to intoxicated individuals and that she has witnessed visibly intoxicated individuals go into the establishment and exit with brown paper bags that appear to contain alcoholic beverages, such as hard liquor bottles or forty (40) ounce containers of beer. (Tr. 5/14/03 at 274, 279, 282.) Ms. Schwartz testified that she personally accompanied a frequently intoxicated individual to ABRA and witnessed him file a complaint charging the Applicant with feeding his addiction by knowingly serving him alcohol over a period of ten (10) years. (Tr. 5/14/03 at 279-280.) Ms. Schwartz believed that the establishment's sale of singles has a detrimental impact on the neighborhood. (Tr. 5/14/03 at 268-269.)
56. With regard to litter, Ms. Schwartz has observed patrons of the establishment disposing of alcoholic beverage bottles in the yards of her neighbors and has also observed patrons of the establishment publicly defecate and urinate throughout the neighborhood. (Tr. 5/14/03 at 280-281.) Ms. Schwartz indicated that the Department of Public Works has been called several times to clear the trash littered in the alley behind the establishment. (Tr. 5/14/03 at 275.)
57. With respect to loitering, Ms. Schwartz stated that she is approached at least twice a week by panhandlers loitering in front of the Applicant's establishment. (Tr. 5/14/03 at 276.) Ms. Schwartz testified that on April 24, 2003 and May 12, 2003, after giving panhandlers money, she witnessed both panhandlers go into the establishment and purchase and exit with beverages contained in brown bags. (Tr. 5/14/03 at 277.) Ms. Schwartz testified that on April 24, 2003, the individual's bag appeared to contain a 40-ounce beer. (Tr. 5/14/03 at 277.) Ms. Schwartz was physically assaulted by a panhandler in her driveway after refusing to give the individual money. (Tr. 5/14/03 at 278.)
58. Ms. Schwartz would like the establishment to be prohibited from selling singles of forty (40) ounces or less, as well as small bottles of Mad Dog, Wild Irish Rose, and any other alcoholic beverage that is sold in a single consumption size. (Tr. 5/14/03 at 281-282.)

59. Taylor Brown resides at 106 15<sup>th</sup> Street, S.E. (Tr. 5/14/03 at 291.) His house is about half (1/2) a block away from and within direct view of the establishment. (Tr. 5/14/03 at 291.) Mr. Brown testified that throughout the day, he observes loitering and public drinking by the customers of the establishment. (Tr. 5/14/03 at 292-293, 297.) He has observed customers of the establishment loitering in front of the boarded-up building on the corner, in the park across the street from the establishment, and in front of the establishment itself. (Tr. 5/14/03 at 295-296.) Mr. Brown has also observed individuals drinking alcoholic beverages in the park. (Tr. 5/14/03 at 296.) He has called MPD when he encounters individuals leaning against his car vomiting, or when he observes individuals breaking glass in the street in front of his house, or when he observes loiterers sitting on his wall who don't move when asked. (Tr. 5/14/03 at 294.) Mr. Brown stated that as soon as MPD patrol cars approach the block, the loiterers will disperse, but once MPD is gone the loiterers return. (Tr. 5/14/03 at 294-295.)

### CONCLUSIONS OF LAW

60. Pursuant to D.C. Official Code § 25-313(a) (2001), an Applicant must demonstrate to the satisfaction of the Board that the establishment for which a liquor license is sought is appropriate for the neighborhood in which it is located. Having considered the evidence upon which this determination must be made and the findings of fact adduced at the protest hearings, the Board concludes that the Applicant has demonstrated that the renewal of its Retailer's License Class "A" -- with the conditions imposed by the Board as listed below -- would be appropriate for the delineated area in which the establishment is located.

61. The Board recognizes that pursuant to D.C. Official Code § 1-309.10(d) (2001) and D.C. Official Code § 25-609 (2001), an ANC's properly adopted written recommendations are entitled to great weight from the Board. See Foggy Bottom Ass'n v. District of Columbia ABC Bd., 445 A.2d 643, 646 (D.C. 1982). In this instance, Kenan P. Jarboe, ANC 6B Chairperson, on behalf of ANC 6B, filed a timely written protest letter, dated April 24, 2001, opposing the renewal of the Applicant's Class "A" Retailer's License on the grounds that the establishment has a negative impact on the peace, order, and quiet of the neighborhood. The April 24, 2001 letter from ANC 6B also indicates that the establishment is not in compliance with its February 12, 1998 voluntary agreement with ANC 6B. The ANC 6B letter mentions that ANC 6B opposes the renewal of the Applicant's liquor license due to its purported adverse impact on the peace, order, and quiet of the neighborhood without any specific examples. However, there was oral testimony provided by ANC 6B Commissioner Neil Glick, who was designated in the April 24, 2001 letter to represent ANC 6B that its peace, order, and quiet concerns include: loitering, litter, and criminal activity -- specifically the public consumption of alcoholic beverages -- in the area. The Board also notes that the Protestants, including ANC 6B, represented to the Board at the June 26, 2002 hearing that they were seeking creative solutions to address problems they believed to be related to the establishment and were not asking the Board to deny the Applicant's renewal application. The recommendation of ANC 6B is entitled to great weight.

62. Pursuant to D.C. Official Code § 25-313(b)(2) (2001) and Title 23 of the District of Columbia Municipal Regulations ("DCMR") § 400.1(a) (2004), the Board must determine

whether renewing the Applicant's license will have an adverse effect on the peace, order, and quiet of the neighborhood.

63. With regard to loitering, the Board finds based upon the testimony of Investigator Carpenter, Officer Rosario, Officer Strassman, Mr. Harvey, Queen Glymph, Gracie Glymph, Mr. Glick, Ms. Schwartz, and Mr. Brown that loitering, including by customers of the establishment, does occur in the area of the establishment, including: (1) in front of the establishment at the corner of 15<sup>th</sup> Street, S.E., and Massachusetts Avenue, S.E.; (2) in the alley adjacent to the establishment; and (3) in the park across the street from the establishment. However, the testimony of Officer Rosario, Mr. Harvey, Ms. Cox, Mr. Ko, Mr. Lyles, and Ms. Jackson also revealed that the Applicant has been proactive in attempting to disperse and discourage loiterers and panhandlers from lingering outside of the premises. Specifically, the testimony of Officer Rosario, Mr. Harvey, Ms. Jackson, and Mr. Ko revealed that on a daily basis, Mr. Ko and his employees confront loiterers and ask that they move away from the establishment. The testimony of Mr. Ko also revealed that he further discourages loitering by refusing to sell to loiterers and by not allowing loiterers inside of the establishment. Additionally, the testimony of Investigator Carpenter, Officer Rosario, Officer Strassman, Mr. Ko, and Mr. Glick all confirmed that a "No Loitering" sign remains posted on the outside of the establishment as required by the Applicant's voluntary agreement. The testimony of Investigator Carpenter, Officer Rosario, Officer Strassman, Mr. Henry, and Mr. Brown also revealed that the loitering problem is not specifically attributed to the operations of the establishment as loitering exists beyond the immediate vicinity of the Applicant's establishment. The testimony revealed that loitering is prominent throughout the area, including, in front of the dry cleaners adjacent to the establishment, and in front of Southeast Market on the Northeast corner of 15<sup>th</sup> Street, S.E., and Independence Avenue, S.E.

64. Additionally, the Board finds that the amount of loitering that occurs in the area of the establishment, including in front of the establishment and in the alley in back of the establishment, can be reduced by requiring the establishment to install outdoor lighting to illuminate the perimeter of the establishment's premises from sundown to sunup, which should discourage individuals from desiring to loiter or engage in criminal activity in the area of the establishment. The Board notes that it has authority to place this condition on the Applicant's license pursuant to D.C. Official Code § 25-104(e) (2001). Additionally, the Board is continuing the following license conditions contained in the Applicant's February 12, 1998 voluntary agreement: (1) prohibiting the Applicant from installing an outdoor payphone on or adjacent to the establishment; (2) requiring the Applicant to keep posted a "No Loitering/No Panhandling sign; (3) calling MPD when necessary regarding disturbances of loitering; and (4) maintain a logbook detailing the time and date of calls made to MPD. The Board is also requiring the Applicant to call MPD when necessary to report other criminal activity and maintain a logbook with the time and date of calls made to MPD regarding such criminal activity.

65. With respect to litter, the Board finds based upon the testimony of Investigator Carpenter, Officer Strassman, Officer Rosario, Mr. Glick, Gracie Glymph, and Ms. Schwartz, that litter is a problem in the neighborhood where the Applicant's establishment is located. Specifically, the testimony of Officer Strassman, Mr. Glick, Gracie Glymph, and Ms. Schwartz indicated that liquor and beer bottles and other trash are littered in the park across the street from the

establishment, in the alley behind the Applicant's establishment, around the public bus stop, and in the yards of the surrounding residences. However, the testimony of Investigator Carpenter, Officer Rosario, Officer Strassman, Mr. Lyles, and Mr. Glick, also revealed that the Applicant has made an effort to reduce the amount of litter in the immediate area of the establishment. Specifically, the testimony revealed that the area inside and in front of the Applicant's establishment generally remains free of litter because Mr. Ko and his employees sweep and pick-up trash. For example, Mr. Ko's testimony revealed that he spends between twenty (20) to thirty (30) minutes, two (2) to three (3) times per day picking up trash outside of the establishment along Massachusetts Avenue, S.E. The Board finds that requiring the Applicant to pick-up trash on a daily basis in the immediate environs of the establishment, including the adjacent alley and sidewalks, pursuant to D.C. Official Code § 25-726 (2001), will continue to help curtail the amount of litter found around the Applicant's establishment. The Board notes that it has authority to place this condition on the Applicant's license pursuant to D.C. Official Code § 25-104(e) (2001).

66. With regard to criminal activity, the testimony of Officer Rosario, Officer Strassman, Mr. Glick, Ms. Glymph, Ms. Schwartz, and Mr. Brown revealed that criminal activity, including drug activity, drinking in public, and urinating and defecating in public, does occur in the area of the Applicant's establishment. However, the Board finds based upon the testimony of Officer Rosario, Officer Strassman, and Mr. Glick that the criminal activity, particularly the narcotics sales and usage that takes place in the alleyways behind the establishment, is not connected to the operations of the Applicant's establishment, but rather to a private residence and a known prescription drug ring in the neighborhood. The installation of outdoor lighting, as described above, should also help to discourage individuals from engaging in criminal activity around the premises of the establishment. Additionally, as suggested by ANC 6B, the Board finds that requiring the Applicant to place purchases of single containers of beer or malt liquor in sizes of forty (40) or fewer ounces ("singles") only in clear or translucent plastic bags rather than brown paper bags will deter patrons of the establishment from drinking in public and assist MPD in identifying individuals who are consuming alcoholic beverages in public. Additionally, not permitting the applicant to sell or give away: (1) disposable cups in quantities of three or less --in light of testimony that or two or three individuals were sometimes observed outside sharing an alcoholic beverage -- or (2) loose or unbagged ice can only help to reduce public drinking in the neighborhood. The Board also finds that requiring the Applicant and all employees who sell alcoholic beverages to complete a Board-approved alcohol training and education certification program should help to assist the establishment in identifying intoxicated patrons who alcoholic beverages should not be sold. Furthermore, the Board finds that requiring the Applicant to call MPD -- in addition to loitering -- to report other criminal activity when necessary and maintain a logbook with the time and date of calls made to MPD can help to decrease crime and public drinking in the neighborhood. Finally, the Board finds that requiring the Applicant to post and maintain a "No Public Drinking/Please Respect Our Community" sign -- in addition to the No Loitering/No Panhandling sign should also help to deter criminal activity, as well as loitering and loud noise, in front of the Applicant's establishment. The Board notes that it has authority to place these conditions on the Applicant's license pursuant to D.C. Official Code § 25-104(e) (2001).

67. With regard to noise, the Board finds based upon the testimony of Investigator Carpenter and Mr. Glick that some problems exist with regard to noise emanating from groups of individuals standing outside of the establishment on the corner of 15<sup>th</sup> Street, S.E., and Massachusetts Avenue, S.E. The Board finds that the conditions set forth above will also help to reduce the amount of noise emanating from this area by making the area of the establishment less inviting for loitering and criminal activity.

68. With respect to rowdiness, the Board found based upon the testimony of Investigator Carpenter and Ms. Cox that while patrons of the establishment are sometimes noisy they are not acting in a rowdy manner.

69. Based upon the above factors, and the conditions imposed by the Board above, the Board finds that the concerns of ANC 6B have been addressed and that renewing the Applicant's Class "A" license renewal application will not adversely affect the peace, order, and quiet of the neighborhood. The Board notes that it is requiring the Applicant or his or her designee to attend two or more meetings of the ANC where the establishment is located each calendar year to assist the Applicant in working with the ANC regarding future peace, order, and quiet issues.

70. Pursuant to D.C. Official Code § 25-313(b)(3) (2001), the Board finds based upon the testimony of Investigator Carpenter and the record as a whole that there is sufficient parking for the patrons of the establishment. Pursuant to D.C. Official Code § 25-313(b)(3) (2001), the Board finds based upon the testimony of Investigator Carpenter and the record as a whole that the establishment will not have an adverse affect on vehicular or pedestrian safety. The Board notes that the Protestants did not raise this as a protest issue.

71. Pursuant to D.C. Official Code § 25-313(b)(1) (2001), the Board finds no evidence from the record as a whole that the establishment will have an adverse affect on real property values. The Board notes that the Protestants did not raise this as a protest issue.

72. With regard to the Applicant's compliance with the ABC laws and regulations, as set forth in D.C. Official Code § 25-315(b)(1) (2001), the testimony of Investigator Carpenter revealed that the establishment is currently in compliance with existing ABC laws and regulations. Additionally, the testimony of Mr. Ko and Mr. Glick and the testimony as a whole indicated that the Applicant is in substantial compliance with its February 12, 1998 voluntary agreement with ANC 6B. Specifically, the testimony revealed that the Applicant: (1) has made an effort to ask loiterers to move on; (2) has posted signage at the establishment required by the voluntary agreement; (3) has not installed a payphone on or adjacent to the establishment; (4) has picked up trash and swept outside on a daily basis; and (5) did keep a written record of the times he had called MPD for assistance. However, the Board notes that the testimony of Mr. Ko and Mr. Glick did raise concerns regarding whether Mr. Ko had ever attended a Board-approved alcohol server training program as required by the voluntary agreement. As a result, the Board is requiring Mr. Ko and all employees of the establishment to: (1) complete an alcohol training and education certification program conducted by a Board-approved provider pursuant to D.C. Official Code § 25-120 (2001); and, (2) submit certification of such training to the Board within ninety (90) days. This was a factor the Board considered in making its decision.

**ORDER**

Therefore, it is hereby **ORDERED** on this 22nd day of September 2004, that the renewal application for a Retailer's Class "A" license filed by Watson Delicatessen, Inc., t/a S & J Liquors, 1500 Massachusetts Avenue, S.E., be and the same is hereby, **GRANTED**.

It is **FURTHER ORDERED** that the following conditions are hereby imposed on the Applicant and shall become a term of the license:

1. The Applicant shall post and maintain a "No Loitering/No Panhandling" sign on the front of the establishment. The Applicant shall also post a "No Public Drinking of Alcoholic Beverages Permitted/Please Respect our Community" sign on both the interior and exterior of the premises;
2. The Applicant shall call MPD when necessary to report disturbances, including loitering and criminal activity, and maintain a logbook detailing the time and date of calls made to MPD;
3. The Applicant or his or her designee shall attend two or more meetings of the ANC where it is located each calendar year;
4. The Applicant shall on a daily basis or more frequently if needed pick-up trash, including beverage bottles and cans, in the immediate environs of the establishment, including the adjacent alley and sidewalks, pursuant to D.C. Official Code § 25-726 (2001). The Applicant shall also sweep the outside of the establishment on a daily basis, or more frequently if needed;
5. The Applicant shall place purchases of single containers of beer or malt liquor in sizes of forty (40) or fewer ounces ("singles") only in clear or translucent plastic bags;
6. The Applicant and all employees who sell alcoholic beverages shall complete a Board-approved alcohol training and education certification program and submit certification of such training to the Board within ninety (90) days;
7. The Applicant shall install outdoor lighting to illuminate the perimeter of the establishment's premises, including the back alley, from sundown to sunup;
8. The Applicant shall not give away disposable cups in quantities of three (3) or less or sell or give away loose bags of ice; and

9. The Applicant shall not install an outdoor payphone on or adjacent to the establishment.

Watson Delicatessen, Inc.  
t/a S& J Liquors  
September 22, 2004

District of Columbia  
Alcoholic Beverage Control Board

Charles A. Burger, Chair  
Charles A. Burger, Chairperson

Vera M. Abbott  
Vera M. Abbott, Member

Audrey E. Thompson  
Audrey E. Thompson, Member

Judy A. Moy  
Judy A. Moy, Member

Not voting  
Peter B. Feather, Member

Pursuant to 23 DCMR § 1719.1 (April 2004), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, 941 North Capitol Street, N.E., Suite 7200, Washington, D.C. 20002. Also, pursuant to section 11 of this decision within ten (10) days of service of this Order with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (April 2004) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b).

THE DISTRICT OF COLUMBIA  
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of	)	
	)	
Chang Sung Kuang and Cheng Che	)	
t/a Tai Jaing Carry-Out	)	
Holder of a Retailer's License	)	
Class "B" - at premises	)	Case No.: 22536-04/070S
1023 Bladensburg Road, N.E.	)	Order No.: 2004-87
	)	
Respondent	)	
	)	

BEFORE: Charles A. Burger, Chairperson  
Vera M. Abbott, Member  
Audrey E. Thompson, Member <sup>1</sup>  
Judy A. Moy, Member  
Peter B. Feather, Member

ALSO PRESENT: Jayme Kantor, Assistant General Counsel, on behalf of the  
Office of the General Counsel of the District of Columbia

Fred P. Moosally, III, Esquire, General Counsel  
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER

On May 13, 2004, the Alcoholic Beverage Control Board ("Board"), pursuant to D.C. Official Code §§ 25-823(1) (2001) and 25-826(a) (2001), ordered the suspension of the Retailer's License Class "B" held by Chang Sung Kuang and Cheng Che, t/a Tai Jaing Carry-Out ("Respondent"), located at 1023 Bladensburg Road, N.E., based upon a written investigation conducted by Alcoholic Beverage Regulation Administration ("ABRA") Investigator Jeff Jackson, dated May 11, 2004, as the result of a PD-251 incident report received from the Violent Crimes Branch of the District of Columbia Metropolitan Police Department ("MPD"), pursuant to D.C. Official Code § 25-804(b) (2001). The grounds for the suspension were set forth in the Notice of Summary Suspension dated May 13, 2004<sup>2</sup>, which was served on the Respondent on May 14, 2004.

<sup>1</sup> ABC Board member Audrey E. Thompson was not present for either the Summary Suspension hearing scheduled for May 19, 2004 or the Show Cause Hearing held on July 14, 2004 and did not participate or vote on this matter.

<sup>2</sup> The Board notes that the Notice of Summary Suspension incorrectly states that it was signed on May 13, 2003 instead of May 13, 2004.

The Board cleared May 19, 2004 at 1 p.m. on its calendar in the event that the Respondent requested a summary suspension hearing within 72 hours after service by the Board of the Notice of Summary Suspension on May 14, 2004, pursuant to D.C. Official Code § 25-826(c) (2001). A hearing was never requested of the Board by the Respondent under D.C. Official Code § 25-826(c) (2001). An ABC manager for the establishment did appear before the Board on May 19, 2004; however, neither the owner of the Class "B" Retailers License or a designated representative were present. As a result, the Board kept the Respondent's license in suspension and scheduled a show cause hearing to revoke the Respondent's Class "B" Retailer's License for July 7, 2004, which was rescheduled to July 14, 2004, pursuant to D.C. Official Code § 25-447(c)(2001) and Title 23 of the District of Columbia Municipal Regulations ("DCMR") § 1604.1 (2004).

The Board held the show cause hearing to revoke the Respondent's license based upon the three charges set forth in the Notice to Show Cause, dated June 9, 2004, as described below. Due to the licensee's failure to appear for either the summary suspension hearing on May 19, 2004, or the show cause hearing on July 14, 2004, the Board proceeded ex parte at the July 14, 2004 show cause hearing pursuant to D.C. Official Code § 25-447(e) (2001) and 23 DCMR § 1604.3 (2004). At the conclusion of the July 14, 2004 show cause hearing, the Board took its decision in this matter under advisement.

The Board considered in making its decision the evidence addressed at the hearings, the testimony of the witnesses, the arguments of counsel, exhibits admitted in the hearings, and the documents comprising the Board's official file in making the following:

#### FINDINGS OF FACT

1. The establishment is owned by Chang Sung Kuang and Cheng Che. (ABRA Application File No. 22536; Tr. 5/19/04 at 14.) The establishment holds a Retailer's License Class "B", which expires on September 30, 2005. (ABRA Application File No. 22536.)
2. The Notice to Show Cause dated June 9, 2004 charges the Respondent with: (1) allowing the licensed establishment to be used for an unlawful or disorderly purpose in violation of D.C. Official Code § 25-823(2) (2001) for which the Board may take action pursuant to D.C. Official Code § 25-823 (2001); (2) selling alcoholic beverages after 10 p.m. in violation of D.C. Official Code § 25-722(a) (2001) for which the Board may take action pursuant to D.C. Official Code § 25-823 (2001); and (3) failing to take steps reasonably necessary to ascertain whether a person to whom you sold, delivered, or served an alcoholic beverage is of legal drinking age in violation of D.C. Official Code § 25-783(b) (2001) for which the Board may take action pursuant to D.C. Official Code § 25-823 (2001).
3. The Respondent's license has been suspended since May 14, 2004, when the Board, pursuant to D.C. Official Code § 25-826(a)(2001), served the Notice of Summary Suspension, dated May 13, 2004, on the Respondent, based upon a written investigation

conducted by ABRA Investigator Jeff Jackson, dated May 11, 2004, as the result of a PD-251 incident report received from the Violent Crimes Branch of MPD, pursuant to D.C. Official Code § 25-804(b) (2001). (See ABRA Show Cause File No. 22526-04/03.)

4. Ms. Man Kwock, the ABC licensed manager of the establishment, appeared before the Board on May 19, 2004 and informed the Board that the owner of the establishment did not request a summary suspension hearing, but that she was the one at the establishment on the day of the incident -- not the owner. (Tr. 5/19/04 at 3-4, 6-8.) The Board cleared time on its May 19, 2004 calendar in the event that a hearing was requested, but did not proceed with a summary suspension hearing on May 19, 2004 due to the licensee not being present either in person or through a representative designated in writing, pursuant to 23 DCMR §§ 1706 and 1707 (2004). (Tr. 5/19/04 at 4-9.) Ms. Kwock stated that the Respondent is aware that the Board issued a Notice of Summary Suspension and that the establishment's license has been suspended by the Board. (Tr. 5/19/04 at 4-5, 14-15.) Ms. Kwock testified that while Mr. Chang Sung -- an owner of the license -- received the Notice of Summary Suspension issued by the Board, he did not understand it. (Tr. 5/19/04 at 15.) Laura Byrd, Program Manager, Adjudication and Licensing Divisions, ABRA, stated that she did not receive a written request for a hearing from the licensee. (Tr. 5/19/04 at 20-22.) The Board scheduled a show cause hearing, to revoke the Respondent's license, for July 7, 2004, which was subsequently rescheduled to July 14, 2004. (Tr. 5/19/04 at 25-26.) The Respondent was notified in writing but failed to attend the July 14, 2004 show cause hearing. (Tr. 7/14/04 at 3-4.) The Board proceeded ex parte, pursuant to D.C. Official Code § 25-447(e) (2001) and 23 DCMR § 1604.3 (2004), at the July 14, 2004 show cause hearing. (Tr. 7/14/04 at 8.)

5. Detective Jacqueline S. Middleton, Detective, MPD, Homicide Unit, responded to the establishment's address at 1023 Bladensburg Road, N.E., the morning of May 1, 2004 to investigate a reported shooting. (Tr. 7/14/04 at 10-11; Government's Exhibit No. 5.) Detective Middleton stated that MPD received five (5) calls regarding the shooting from citizens who live in the area of the establishment, who heard gunshots. (Tr. 7/14/04 at 11, 35.) Detective Middleton noted that MPD did not receive a call from the establishment at any time regarding the incident. (Tr. 7/14/04 at 11-12; 18.) Detective Middleton arrived at 1023 Bladensburg Road, N.E., at approximately 12:30 a.m., and found that the street had been cordoned off with "police crime scene tape." (Tr. 7/14/04 at 12.) Detective Middleton observed a bloody pathway leading to a parking lot located next to the establishment, where the decedent was shot. (Tr. 7/14/04 at 12, 20.) On the inside of the establishment, Detective Middleton observed blood on the floor, a bloody tee shirt, and blood splattered on the wall. (Tr. 7/14/04 at 13-14; Government Exhibit Nos. 1 and 2.) Detective Middleton stated that the decedent was sixteen (16) years old. (Tr. 7/14/04 at 33-35.)

6. Detective Middleton determined, based upon her interview of a witness, that there was a "bumping" incident that occurred outside of the establishment prior to the decedent entering the establishment. (Tr. 7/14/04 at 17.) Specifically, Detective Middleton stated that "the aggressor" that bumped into the decedent outside of the establishment, subsequently entered the establishment, initiated a verbal confrontation with the

decedent, resulting in an argument, which led to the aggressor trying to punch the decedent, and ultimately, leading to a physical fight inside of the establishment. (Tr. 7/14/04 at 16-17.) Detective Middleton stated that while friends of the aggressor held the decedent, the aggressor pulled out a knife and stabbed the decedent approximately five (5) times. (Tr. 7/14/04 at 17.) Detective Middleton stated that the decedent subsequently made it outside of the establishment where three individuals standing around him produced handguns and shot the decedent five (5) times. (Tr. 7/14/04 at 17-18; ABRA Show Cause File No. 22526-04-03.) Detective Middleton noted that the witness, from whom she obtained the account of the incident, was an eighteen (18) year old friend of the decedent who was with the decedent at the time of the incident. (Tr. 7/14/04 at 18, 34-35.) Detective Middleton explained that the friend of the decedent was shot at, fled the scene, and returned to the scene after the incident was over. (Tr. 7/14/04 at 35.) The friend of the decedent informed Detective Middleton that he and the decedent were at the establishment to purchase beer. (Tr. 7/14/04 at 18, 34.) The establishment is where the friend of the decedent and the decedent normally purchase their beer. (Tr. 7/14/04 at 18-19.) The friend of the decedent observed two females at the counter of the establishment. (Tr. 7/14/04 at 42.) Detective Middleton noted that she also interviewed another witness to the shooting who purchased beer from the establishment with two (2) other individuals shortly before the shooting, but after the 10:00 p.m. limit for selling alcoholic beverages. (Tr. 7/14/04 at 24-25, 53.)

7. Detective Middleton stated that when MPD went to the establishment and interviewed Ms. Kwock -- an ABC manager for the establishment -- she stated that she was in the back of the establishment at the time of the incident and did not see or hear anything. (Tr. 7/14/04 at 23.) Detective Middleton noted that the police were nearby when the incident occurred, heard the gunshots, and arrived on the scene in approximately four (4) minutes. (Tr. 7/14/04 at 32.) Detective Middleton stated that there is a plexiglass window inside of the establishment between the establishment's employees and people in the well lit waiting area, so anyone should be able to see what is going on from either side of the plexiglass window. (Tr. 7/14/04 at 39-41.) Detective Middleton estimated that the victims and the assailants were inside of the establishment for four (4) or five (5) minutes, and she believes that employees of the establishment should have heard and seen the incident. (Tr. 7/14/04 at 40-41.) Detective Middleton indicated that the shooting incident occurred at the entranceway of the parking lot located next to the establishment, and that from standing inside of the establishment, one would be able to see "everything that's out there." (Tr. 7/14/04 at 20; Government Exhibit Nos. 3 and 4.) Detective Middleton stated that the shooting incident occurred approximately thirty (30) to thirty-five (35) feet away from the entranceway of the establishment. (Tr. 7/14/04 at 21-22.)

8. Detective Middleton returned to the establishment on May 6, 2004 to interview Ms. Kwock and other employees of the establishment about the May 1, 2004 incident. (Tr. 7/14/04 at 27-28, 59.) Detective Middleton stated that Ms. Kwock was not cooperative, claiming that she could not understand the English language, and she said that nothing occurred inside of the establishment, except an argument. (Tr. 7/14/04 at 28-29.) Detective Middleton had someone from the "Asian Liaison Unit" to interview Ms.

Kwock, and he reported to Detective Middleton that he sensed a lot of deception, the interview seemed rehearsed, and that Ms. Kwock did understand English. (Tr. 7/14/04 at 30-31.) Detective Middleton escorted Ms. Kwock to the scene inside of the establishment where there was still evidence of bloodshed to demonstrate that an incident had occurred at the establishment; Ms. Kwock then became combative and refused to talk. (Tr. 7/14/04 at 29.) Ms. Kwock informed Detective Middleton and ABRA Investigator Jeffrey Jackson that she did not call MPD because they came pretty quickly after the individuals left the establishment. (Tr. 7/14/04 at 31, 48.)

9. Detective Middleton stated that with the assistance of ABRA Investigator Kevin Lee who facilitated communication, Ms. Kwock admitted that she did hear an argument and put the individuals involved out of the store, but she claimed that *nothing more occurred* inside of the establishment. (Tr. 7/14/04 at 28-29, 54.) Detective Middleton did not believe that the employees inside of the establishment, from where they were working, could have seen when the decedent fell outside, but believes that the employees could have heard the gunshots. (Tr. 7/14/04 at 43.)

10. Detective Middleton believes that the failure of the employees inside of the establishment to: (1) call MPD to prevent the incident from occurring, or (2) cooperate with MPD regarding the incident endangered the health and safety of the community surrounding the establishment. (Tr. 7/14/04 at 32-33.) Detective Middleton stated that it is clear that Ms. Kwock has a relationship with the people involved in the murder because when she interviewed one of the suspects, he told her to ask "Princess" for verification that he was not inside of the establishment. (Tr. 7/14/04 at 33.) Detective Middleton stated that Ms. Kwock is referred to in the neighborhood as "Princess". (Tr. 7/14/04 at 33.) Detective Middleton stated the establishment is not experiencing problems because the drug dealers, with whom "Princess" and the operators of the store have a relationship, protect the establishment. (Tr. 7/14/04 at 36.)

11. ABRA Investigator Jeffrey Jackson stated that on May 6, 2004, he was tasked with assisting Detective Middleton in a homicide investigation at the establishment, by interviewing one of the witnesses. (Tr. 7/14/04 at 45-46.) Specifically, Investigator Jackson interviewed the establishment's ABC Manager, Ms. Kwock, who he found to be very combative, defensive, and uncooperative. (Tr. 7/14/04 at 46, 54, 59.) Investigator Jackson stated that initially, Ms. Kwock told him that she did not witness anything; however, when she was reminded by Detective Middleton that a witness had stated that she did see the incident, she responded that she did see the incident, but did not see the stabbing or the shooting. (Tr. 7/14/04 at 46.) Investigator Jackson stated that while he was at the establishment, Ms. Kwock called Chang Sung Kuang, the owner of the establishment, on the telephone at Investigator Jackson's request. (Tr. 7/14/04 at 47; ABRA Application File No. 22536.) Investigator Jackson stated that when he spoke with Chang Sung Kuang on the telephone and asked him to encourage Ms. Kwock's cooperation, he responded that he was too busy and hung up the telephone. (Tr. 7/14/04 at 47, 54, 58-59; ABRA Application File No. 22536.) Investigator Jackson stated that Ms. Kwock refused to give him Chang Sung Kuang's telephone number and he was unable to call him back. (Tr. 7/14/04 at 47.) Investigator Jackson stated that subsequent

messages left for Ms. Kwok to have the owner call him were not returned. (Tr. 7/14/04 at 48.) Investigator Jackson found Ms. Kwok to speak English very well. (Tr. 7/14/04 at 54.)

12. Investigator Jackson stated that his investigation of the establishment also revealed sale to minor violations on May 21, 1993; June 23, 1993; November 17, 1993; February 4, 1994; November 4, 1994; and May 30, 1997. (Tr. 7/14/04 at 49; Government's Exhibit No. 7a.) Investigator Jackson stated that an Investigative Report prepared by ABRA Investigator Kevin Lee revealed that Ms. Kwok sold an alcoholic beverage to a minor in 2002. (Tr. 7/14/04 at 49-50; Government's Exhibit No. 7b.) He stated that a memorandum to ABRA Director Maria Delaney reflected that the licensee was fined one thousand five hundred dollars (\$1,500) for a sale to minor violation. (Tr. 7/14/04 at 51-52; Government's Exhibit No. 8.) Investigator Jackson believes that the ongoing operation of this establishment is a threat to public safety. (Tr. 7/14/04 at 64.)

### CONCLUSIONS OF LAW

13. The Board has the authority to suspend or revoke the license of a licensee who violates any provision(s) of Title 25 of the D.C. Official Code pursuant to D.C. Official Code § 25-823(1) (2001). Additionally, the Board has the authority to suspend or revoke the license of a licensee who allows the licensed establishment to be used for any unlawful or disorderly purpose, pursuant to D.C. Official Code § 25-823(2) (2001). In this instance, the Board finds that the Respondent's violation of both D.C. Official Code §§ 25-823(2) and 25-722(a) (2001) warrant the revocation of the Respondent's Class "B" Retailer's License.

14. With regard to Charge I, the Board must determine whether the licensee allowed the licensed establishment to be used for an unlawful or disorderly purpose as prohibited by D.C. Official Code § 25-823(2) (2001). In this case, the testimony of Detective Middleton revealed that the licensee did in fact allow the establishment to be used for an unlawful or disorderly purpose. Specifically, the testimony of Detective Middleton showed that on May 1, 2004, the decedent was stabbed approximately five (5) times inside of the establishment, which ultimately resulted in the decedent being shot approximately five (5) times outside of the establishment. The testimony of Detective Middleton also established that the verbal confrontation that ultimately led to the physical fight, also commenced inside of the establishment. More importantly, the testimony of Detective Middleton revealed that the establishment did nothing to prevent the May 1, 2004 incident from occurring, including not calling MPD. This was despite the fact that the testimony of Detective Middleton revealed that the incident occurred inside of the establishment for four (4) or five (5) minutes and that nearby MPD officers and citizens were able to hear gunshots outside of the establishment. Additionally, the testimony of Detective Middleton and ABRA Investigator Jackson revealed that the Respondent, and the establishment's ABC manager, Ms. Kwok, were uncooperative with MPD and ABRA regarding the investigation and what took place inside of the establishment. The Board notes that based upon: (1) the Respondent's lack of cooperation with MPD and ABRA and its unwillingness to call MPD to report the May 1, 2004 incident; (2) the

Respondent's failure to attend the July 14, 2004 show cause hearing; and (3) the testimony of Detective Middleton that the sixteen (16) year old decedent and his eighteen (18) year old friend were at the establishment to purchase beer -- the place where these two individuals normally purchased their beer -- the Board has concerns about the licensee's ability to prevent unlawful or disorderly conduct from occurring at the licensed premises in the future. The Board notes that this was one factor the Board considered in deciding to revoke the Respondent's license and notes that a violation of this charge may constitute grounds for revocation pursuant to D.C. Official Code § 25-823(2) (2001).

15. With regard to Charge II, the Board must determine whether the establishment sold alcoholic beverages after 10:00 p.m., in violation of D.C. Official Code § 25-722(a) (2001). In this case, the Board found the testimony of Detective Middleton to reveal that the establishment did sell alcoholic beverages after 10 p.m. Specifically, the testimony of Detective Middleton revealed that a witness and two other individuals purchased beer from the establishment after 10:00 p.m., prior to the decedent getting shot thirty (30) to thirty five (35) feet outside of the front of the establishment. The Board notes that this was one factor the Board considered in deciding to revoke the Respondent's license and notes that a violation of this charge may constitute grounds for revocation pursuant to D.C. Official Code § 25-823(1) (2001).

16. With regard to Charge III, the Board must determine whether the licensee failed to take steps reasonably necessary to ascertain whether a person to whom alcoholic beverages were sold, delivered, or served was of legal drinking age pursuant to D.C. Official Code § 25-783(b) (2001). In this case, the testimony of Detective Middleton revealed that the decedent, who was sixteen (16) years old, and the eighteen (18) year old friend of the decedent were at the establishment to purchase beer. However, there was no evidence that the decedent or the eighteen (18) year old friend of the decedent were actually ever sold, delivered, or served alcoholic beverages by the establishment just prior to the May 1, 2004 incident. As a result, the Board did not find the establishment to have violated D.C. Official Code § 25-783(b) (2001).

17. The Board finds pursuant to D.C. Official Code §§ 25-822(1) and 25-822(2) (2001) that the above-mentioned violations warrant the revocation of the Respondent's Class "B" Retailers License.

Chang Sung Kuang and Cheng Che  
t/a Tai Jaing Carry-Out  
September 29, 2004

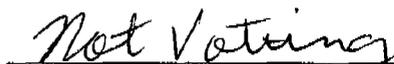
**ORDER**

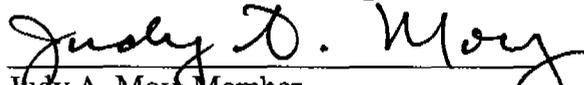
THEREFORE, it is hereby **ORDERED** on this 29th day of September 2004, that the Retailer's License Class "B", issued to Chang Sung Kuang and Cheng Che, t/a Tai Jaing Carry-Out, be and is hereby **REVOKED**.

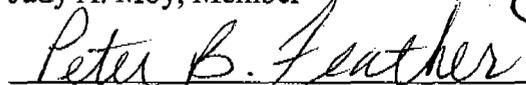
District of Columbia  
Alcoholic Beverage Control Board

  
Charles A. Burger, Chairperson

  
Vera M. Abbott, Member

  
Audrey E. Thompson, Member

  
Judy A. Moy, Member

  
Peter B. Feather, Member

Pursuant to 23 DCMR § 1719.1 (April 2004), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, 941 North Capitol Street, N.E., Suite 7200, Washington, D.C. 20002.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (April 2004) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b).

**Capital City Public Charter School**

3047 15th Street, N.W.

Washington, DC 20009

**NOTICE OF A REQUEST FOR PROPOSALS:  
EQUIPMENT, FURNISHINGS & SERVICES**

Capital City Public Charter School, a public elementary school for approximately 245 children in grades pre-K through eighth, seeks requests for proposals, in accordance with D.C. Code section 38-1802.04(c)(1)(A), to provide one or more of the following types of equipment, furnishings and services for its newly renovated permanent facility:

Equipment and Furnishings

1. Computers and related equipment
2. Furniture and other classroom equipment
3. Office equipment and furnishings
4. Library furnishings, library books and related materials
5. Cabinetry and related millwork
6. Custom display boards

Services

1. Occupational therapy
2. Academic and psycho-educational testing
3. Facilities management and operations services

Interested individuals and companies may obtain additional information regarding Capital City's needs for equipment, furnishings and services by contacting Susan Sabella, at (202) 387-0309; (fax: 202-387-7074). Final bids will be due by noon on October 18, 2004.

## OFFICE OF THE CHIEF FINANCIAL OFFICER

**NOTICE of GENERAL REAL PROPERTY TAX RATES AND  
SPECIAL REAL PROPERTY TAX RATES: TAX YEAR 2005****I. Sum of Real Property Tax Rates**

The recommended Tax Year 2005 real property tax rates are the following:

<b>2005 Proposed Real Property Tax Rates</b>	
<u>Real Property Tax Class</u>	<u>Calculated Indexed Rate Per \$100 of Assessed Value</u>
Class One (owner and renter-occupied residential)	\$0.96
Class Two (commercial)	\$1.85
Class Three (vacant and abandoned)	\$5.00

**II. Special Real Property Tax Rates**

**BOND ACT REQUIREMENTS**  
**Certification of Debt Service Requirement**

In Tax Year 2005, forty-five percent of total real property tax collections, by class, shall be dedicated the repayment of General Obligations Bonds. The recommended special real property tax rates by class for Tax Year 2005 are as follows:

<b>2005 Recommended Real Property Special Tax Rates</b>	
<u>Property Class</u>	<u>Real Property Special Tax Rate Per \$100 of Assessed Value</u>
Class One (owner and renter-occupied residential)	\$0.38
Class Two (commercial)	\$0.74
Class Three (vacant and abandoned)	\$2.00

**Paul Public Charter School  
5800 8th Street NW  
Washington, DC 20011**

**Request for Proposal**

Paul Public Charter School ([www.paulcharter.org](http://www.paulcharter.org)) will be soliciting proposals for a comprehensive school facility assessment from qualified facilities management/engineering firms. Complete RFP submission requirements may be obtained by contacting Denise Taylor in the Business Office at 202-378-2255. All proposals are due on Friday, October 22, 2004 at 4:00 PM.

**District of Columbia Public Schools  
Office of Federal Grants Programs, State Education Agency**

**NOTICE OF FUNDS AVAILABILITY**

**FY 2005 Comprehensive School Reform Demonstration (CSRSD) Program**

The District of Columbia Public Schools, Office of Office of Federal Grants Programs is soliciting competitive applications under the Comprehensive School Reform Demonstration (CSRSD) Program. The CSRSD Program provides financial incentives for local educational agencies to support schools that need to substantially improve student achievement, specifically focusing on Title I schools identified as in need of improvement, to implement comprehensive school reform programs that are based on scientifically based research and effective practices, and include an emphasis on basic academics and parental involvement. The CSRSD programs are intended to stimulate school-wide change covering all aspects of the applicant school's operations.

Applicants must submit a comprehensive plan for each school included in the application and must address the following eleven (11) program components, and for each one, indicate how it relates back to the overall school-wide reform.

1. Proven methods and strategies based on scientifically-based research;
2. Comprehensive design;
3. Professional development;
4. Measurable goals and benchmarks;
5. Support within the school;
6. Support for teachers and principals;
7. Parental and community involvement;
8. External technical support and assistance;
9. Annual evaluation;
10. Coordination of resources; and
11. Strategies that improve the academic achievement.

LEA's serving schools identified as *in need of improvement under Title I, Part A*, including charter schools, are eligible to apply for funds under this RFA.

The Request for Application (RFA) will be released on September 30, 2004 and the deadline for submission is December 2, 2004, at 4:00 p.m. For additional information, please contact Ms. Deidre M. Hunt at CDH Management and Consulting on (202) 641-5766. The RFA will also be available on the Mayor's Office of Partnership and Grants Development (OPGD) website, <http://www.opdg.dc.gov> (District Grants Clearinghouse) and the District of Columbia Public School (DCPS) website, [www.k12.dc.us](http://www.k12.dc.us) no later than, October 6, 2004.

Applicants to the program must attend the Pre-Application Conference on October 14, 2004 from 10:00 a.m.-12:00 p.m. at DCPS Board Room, Fifth Floor, 825 North Capitol Street, NW, Washington, DC 20002.

Office of the Secretary of the  
District of Columbia

September 29, 2004

Notice is hereby given that the following named persons have been appointed as Notaries Public in and for the District of Columbia, effective on or after November 1, 2004.

Belton, Ernestine	Rpt	H U D/D C F O 820 1 <sup>st</sup> St,NE#300 20002
Bird, Kathy E.	New	PricewaterhouseCoopers 1301 K St,NW#800W 20005
Black, Sheba S.	New	5505 13 <sup>th</sup> St,NW 20011
Buford, Dana	New	Bd of Govs/Fed Res System 20 <sup>th</sup> & C Sts,NW 20551
Bunn, Michelle V.	New	SunTrust Bank 1275 K St,NW 20005
Burke, Roy A.	Rpt	Ft. Myer Construction 2237 33 <sup>rd</sup> St,NE 20018
Campbell, Cynthia	Rpt	Classic Conciege 1010 Vt Ave,NW 20005
Carlos, Sharon S.	Rpt	Marzouk & Parry 1120 19 <sup>TH</sup> St,NW#750 20036
Carroll, Dawn C.	New	200 21 <sup>st</sup> St,NE#1 20002
Chen, Cong Jie	New	1601 18 <sup>th</sup> St,NW#1 20009

Coltrane, Verdette	New	Dow Lohnes Albertson 1200 N H Ave,NW#800 20036
Dallas, Sandra A.	New	Dow Lohnes Albertson 1200 N H Ave,NW#800 20036
Dennis,Jr., H. Alexander	New	Wachovia 1510 K St,NW 20005
Diggs, Ernestine M.	Rpt	Hogan & Hartson 555 13 <sup>th</sup> St,NW 20004
Dixon, Joanne M.	Rpt	WUSA-TV 9 4100 Wis Ave,NW 20016
Elbaz, Daniel	New	Wachovia Bank 801 Pa Ave,NW 20004
Elias, Mariana J.	New	Housing Counseling Serv 2430 Ontario Rd,NW 20009
Fenwick, Gaynell D.	New	O'Donoghue & O'Donoghue 4748 Wis Ave,NW 20016
Foster, Sharyum J.	New	201 I St,SW#612 20024
Friend, Carolyn E.	Rpt	Misty Klapper & Assoc 1150 Conn Ave,NW#900 20036
Gibbs, Tasha	New	Quagliano & Seeger 2620 P St,NW 20007
Glover, Sherry L.	New	Jones Lang et al 2001 M St,NW 20036
Gordon, Kisha C.P.	New	Court Services 633 Indiana Ave,NW 20004
Habib, Sylvia A.	New	CitiGroup Private Bank 2099 Pa Ave,NW10thFl 20006

Holland, Deborah A.	Rpt	Office/Thrift Supervisor 1700 G St,NW 20552
Holmes, James D.	Rpt	WMATA/Metro Trans Police 600 5 <sup>th</sup> St,NW 20001
Hornbeck, Kirk A.	Rpt	Wash Pre-Trial Services 2000 Mass Ave,NW 20036
Jabir, Darlene L.	New	Cohen Milstein et al 1100 N Y Ave,NW#500WT 20005
Jones, Rudolp R.	Rpt	7705 Ga Ave,NW#203 20012
Jordan, Kathleen A.	Rpt	Skadden Arps et al 1440 N Y Ave,NW 20005
Jordan, Roy	New	Lincoln Property Company 1920 L St,NW 20036
Lee, Z. Lynn	New	Avenue Settlement Corp 2401 Pa Ave,NW#H 20037
Lockhart, Eva A.	New	Transportation F C U 800 Indep Ave,NW#128 20591
McDonald, Constance M.	Rpt	Kirkpatrick & Lockhart 1800 Mass Ave,NW 20036
Mena, Guadalupe G.	New	Housing Counseling Serv 2430 Ontario Rd,NW 20009
Miller, Chandra M.	New	1842 2 <sup>ND</sup> St,NW 20001
Morgan, Brent	New	U.S. Green Bldg Council 1015 18 <sup>th</sup> St,NW#508 20036
Morgan, Carolyn E.	New	Academy/RealEstateStudies 1717 K St,NW#600 20036

Newsome, Kamina	New	Smislova Kehnemui & Assoc 1709 N St,NW 20036
Olson, Cheryl L.	New	Jenner & Block 601 13 <sup>th</sup> St,NW#1200S 20005
Pearson, Vanessa	New	Johns Hopkins University 1740 Mass Ave,NW 20026
Powell, Patricia A.	New	Sheppard's Academy 3921 So Cap St,SW 20032
Robin, Janet R.	Rpt	Arnold & Porter 555 12 <sup>th</sup> St,NW 20004
Robinson, Fannie Marie	Rpt	Justice Fed Credit Union 935 Pa Ave,NW#8676 20535
Rowland, Nancy Bond	Rpt	L A D Reporting 1100 Conn Ave,NW#850 20036
Simpson, La'Yunda K.	New	Blackhawk Security 810 Vt Ave,NW 20420
Smith, Keisha Paxton	New	Dept of Health/APRA 825 N Cap St,NE#3126 20002
Smith, Michelle D.	New	433 Kennedy St,NW#2 20011
Stokes, Janice P.	Rpt	Office/Attorney General 441 4 <sup>th</sup> St,NW#800 20001
Svendsen, Kelly A.	New	WRAMC Office/CJA 20307
Thomas, Willard N.	New	Woodrow Wilson Center 1300 Pa Ave,NW 20004
Torres, Carilyn	New	Bates White 2001 K St,NW7thF1 20006

Wallace, Sandra L.	New	C A P C S 1300 Allison St,NW 20011
Wills, Gwendolyn	New	107 56 <sup>th</sup> Pl,SE 20019
Young, David	New	Skadden Arps 1440 N Y Ave,NW 20005
Young, Renee G.	New	Housing Counseling Serv 2420 Ontario Rd,NW 20009

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

**Appeal No. 17043 of the Stanton Park Neighborhood Association**, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator in the issuance of Certificate of Occupancy Permit Nos. CO51298 and CO51290, to Capitol Hill Healthcare Group, dated March 26, 2003, for a community residence facility and hospital (60 beds and 60 parking spaces) respectively. The R-5-D zoned subject premise is located at 700 Constitution Avenue, N.E. (Square 875, Lot 76).

**HEARING DATES:** July 29, 2003, November 4, 2003, November 18, 2003, November 25, 2003

**DECISION DATE:** January 6, 2004

**DATE OF DECISION ON RECONSIDERATION:** February 24, 2004

**ORDER**

**PRELIMINARY MATTERS**

On May 23, 2003, appellant Stanton Park Neighborhood Association ("Appellant") filed this appeal with the Board of Zoning Adjustment ("Board") alleging error in the Zoning Administrator's ("ZA") March 26, 2003 issuance of two Certificates of Occupancy, Nos. 51289 and 51290. Certificate of Occupancy No. 51289 was issued to Capitol Hill Healthcare Group for a "Community Based Residential Facility-Health Care Facility That Provides Housing For The Handicapped. 25 Parking Spaces & 117 Beds." Certificate of Occupancy No. 51289 described the use as a "Health Care Facility," which is a specific type of community-based residential facility ("CBRF") under the Zoning Regulations, but then, in the same C of O, also characterized the use as a "Community Residence Facility," which is a different type of CBRF. Certificate of Occupancy No. 51290 was issued to Capitol Hill Community Hospital for a "Hospital 60 Beds & 60 Parking Spaces."

There were two earlier Board Orders with respect to the property that is the subject of the two Certificates of Occupancy. In 1991, Board Order No. 15542 granted a special exception pursuant to § 359 of the Zoning Regulations to Capitol Hill Hospital to operate a health care facility with 130 beds, 250 employees, and 176 off-street parking spaces. This Order was modified by Order No. 16407, issued to the Capitol Hill Group, and dated February 3, 1999, which permitted an expansion of the CBRF use to 162 beds and 340 employees with 276 off-street parking spaces. Order No. 16407 was never implemented and so lapsed after two years from its effective date.

On April 30, 1999, the Zoning Regulations were amended to make CBRFs housing handicapped individuals a matter-of-right use in all residential zones. Based on this regulatory amendment, the ZA issued Certificates of Occupancy Nos. 51289 and 51290 as matter-of-right uses. The Zoning Regulations specify a parking ratio of one off-street parking space per bed for a hospital.

Therefore the ZA required the hospital, with 60 beds, to provide 60 spaces. There was, however, no parking schedule in the Zoning Regulations for the health care facility, covered by the 1999 zoning amendments. Therefore, the ZA looked to the parking schedule in the Zoning Regulations and applied the ratio applicable to what he determined was the most comparable facility set forth therein - a rooming house. Accordingly, he reduced the required off-street parking to 25 spaces for the health care facility.

In this appeal, Appellant claims that the ZA disregarded the two previous Board Orders in issuing the matter-of-right certificates of occupancy and that he was without authority to do so. In the alternative, the Appellant claims that, even if the certificates of occupancy were properly issued, the ZA was without authority to determine parking requirements under them, as that authority is expressly given to the Board by the Zoning Regulations.

The Board did not hear this appeal on the originally scheduled hearing dates of July 29, 2003, and November 4, 2003. A public hearing was held on November 18, 2003, and continued and concluded on November 25, 2003. At the hearing, ANC 6C was automatically a party. The Board granted party status to ANC 6A, which is located across the street from the subject property, and to Father Richard Downing, pastor of St. James Parish, which is located in the same square as the subject property.

At its January 6, 2004 public decision meeting, the Board denied the appeal by a vote of 3-2-0. On February 10, 2004, however, the Board, on its own motion, voted 5-0-0 to reconsider part of the denial. On February 24, 2004, the Board voted 5-0-0 to partially deny and partially grant the appeal.

## FINDINGS OF FACT

### The Subject Property and its Use

1. The subject property is located in an R-5-D zone district at 708 Massachusetts Avenue, N.E. (a.k.a. 708 Constitution Avenue, N.E.) and 700 Constitution Avenue, N.E., in Square 895, Lot 76.<sup>1</sup>
2. The subject property is owned by the Capitol Hill Group ("CHG"), which leases portions of the property for use as a hospital and a health care facility.
3. Certificate of Occupancy No. 51289 refers to the nursing center<sup>2</sup> as both a "health care facility that provides housing for the handicapped" and a "community residence facility."

<sup>1</sup>The advertisement for this appeal refers to Square 875, Lot 76, however, when the case was announced at the November 18, 2003 hearing, it was announced as Square 895, Lot 76. The first pair of certificates of occupancy (Nos. 51289 and 51290) issued on March 26, 2003 refer to Square 865, Lot 862, while the second pair, issued under the same numbers and on the same date, refer to Square 895, Lot 76. The Board need not resolve this discrepancy, since the material facts of this case are not altered and there is no prejudice as there is no question as to what facility or what issues are involved in this appeal.

<sup>2</sup> In the record, the hospital and health care facility are sometimes collectively referred to as "MedLink" and the latter is sometimes referred to as the "nursing center."

4. These two types of facilities are not interchangeable, but are two distinct types of CBRF uses. The Zoning Regulations definitions (11 DCMR § 199.1) for both these types of CBRFs refer to their respective (and now superseded) definitions in the public health regulations at 22 DCMR § 3099.1. Based upon the definitions at 22 DCMR § 3099.1, all the evidence in the record, and the two prior Orders that treat the same use at the same facility as a health care facility under § 359 of the Zoning Regulations, the Board finds that the nursing facility is a health care facility.
6. The health care facility is operated by the Capitol Hill Healthcare Group and is located at address 708 Massachusetts Avenue, N.E. The hospital is operated by Capitol Hill Community Hospital and is located at address 700 Constitution Avenue, N.E. The hospital occupies the basement, part of the first floor, and the second and third floors of the building on the subject property. The health care facility occupies part of the first floor, and the fourth, fifth, and sixth floors of the building. The hospital is permitted as a matter-of-right in the R-5-D district. 11 DCMR §§ 350.4(a) and 330.5(f).

#### History

7. Prior to April 30, 1999, the date of enactment of 11 DCMR § 330.5(i), all health care facilities for 16 or more residents in an R-5 zone, whether providing housing for the handicapped or not, required special exception approval under § 359 and required that the number of parking spaces be determined by the Board of Zoning Adjustment. 11 DCMR § 2101.1.
8. Board Order No. 15542, dated August 16, 1991, granted a special exception under § 359 to Capitol Hill Hospital, for the establishment of a health care facility with 130 beds and 250 full-time staff at 708 Massachusetts Avenue, N.E. (Square 895, Lot 76). Exhibit No. 76, Attachment B.
9. Order No. 15442 mandated that the health care facility provide 176 on-site screened parking spaces for employees, residents and visitors. *Id.*
10. Board Order No. 16407, dated October 21, 1999, granted a special exception under § 359 to the Capitol Hill Group "for opening an additional 32 beds in an existing nursing facility at 700 Constitution Avenue, N.E." Order No. 16407 conditioned the special exception with a 10-year term and further required that the health care facility have a maximum of 340 staff, no more than 162 beds, and 276 off-street parking spaces. Exhibit No. 76, Attachment C.
11. CHG never added the 32 beds or 100 more parking spaces authorized by Order No. 16407. Because the Order was not implemented within the necessary 2-year period from its effective date, it lapsed. *See*, November 25, 2003 hearing transcript at 145, lines 4-12 and at 154, lines 2-15.

12. In Order No. 869, the Zoning Commission amended the Zoning Regulations to add a new section 330.5(i), effective April 30, 1999, which states:

The following uses shall be permitted as a matter of right in an R-4 District:

- (i) Community-based residential facility; provided that, notwithstanding any provision in this title to the contrary, the Zoning Administrator has determined that such community-based residential facility, that otherwise complies with the zoning requirements of this title that are of general and uniform applicability to all matter-of-right uses in an R-4 District, is intended to be operated as housing for persons with handicaps. For purposes of this subsection, a "handicap" means, with respect to a person, a physical or mental impairment which substantially limits one or more of such person's major life activities, or a record of having, or being regarded as having, such an impairment, but such item does not include current, illegal use of, or addiction to, a controlled substance.
13. A health care facility is a type of CBRF. 11 DCMR § 199.1 (definition of Community-based residential facility).
14. The definition of "handicap" in § 330.5(i) contains the same language as that found in the definition of "handicap" in the Fair Housing Act, as amended, 42 U.S.C. § 3602(h).
15. Subsection 330.5(i) applies in R-5-D zone districts by virtue of § 350.4(a), which states: "[t]he following uses shall be permitted as a matter of right in an R-5 District: ... (a) Any use permitted in the R-4 District" subject to certain requirements not relevant here.
16. On November 5, 2002, Denzil Noble, Acting Administrator of the Building and Land Regulation Administration ("BLRA") of DCRA, and therefore, the supervisor of the ZA, sent a letter to CHG pointing out that there were several certificates of occupancy for the subject property. Mr. Noble requested that CHG consolidate the multiple certificates of occupancy into one for the entire building to ensure compliance with the two previous Board Orders and to reflect the requirements of Board Order No. 16407.
17. In response, CHG requested new matter-of-right certificates of occupancy for the health care facility and the hospital, pursuant to the change in the regulations brought about by § 330.5(i). *See*, November 25, 2003 hearing transcript at 157, lines 19-24.
18. On March 18, 2003, then-ZA Robert Kelly sent a letter to CHG's attorney indicating that CHG had not submitted any information to verify that it was providing housing for handicapped persons, and he requested this information. Exhibit No. 91, Attachment B.
19. CHG submitted to DCRA the appropriate information verifying its provision of housing for the handicapped at the health care facility. *See*, Exhibit No. 91; *see also*, hearing transcript of November 18, 2003, at 310-311, lines 21-25 & 1-12. Specifically, CHG

- submitted to DCRA a copy of its application for a license for a health care facility, its certificate of licensure, its long term facility application for Medicare and Medicaid, and an affidavit of its Chief Financial Officer. See, Exhibit No. 91, Attachment C, and Exhibit No. 76, Attachment F.
20. Based on its review of this information, DCRA found that the health care facility provides housing for the handicapped.
  21. DCRA also found that the health care facility complies with the zoning requirements of general and uniform applicability to all matter-of-right uses in an R-5-D zone district.
  22. Therefore, on March 26, 2003, DCRA issued Certificate of Occupancy No. 51289 for a matter-of-right "Community-Based Residential Facility-Health Care Facility That Provides Housing For The Handicapped. 25 Parking Spaces & 117 Beds."
  23. Also on March 26, 2003, DCRA issued Certificate of Occupancy No. 51290 for a "Hospital 60 Beds & 60 Parking Spaces," pursuant to § 2101.1 of the Zoning Regulations, which requires a hospital in an R-5-D district to provide one off-street parking space per hospital bed.
  24. The Zoning Regulations state that the number of parking spaces required by a CBRF with more than 16 residents in all zones other than C-3, C-4, and C-5, is to be determined by the Board. 11 DCMR § 2101.1.
  25. When the Zoning Commission amended the Zoning Regulations to permit a health care facility housing the handicapped as a matter of right, it did not amend the parking schedule set forth at 2101.1 that provides for the BZA to determine the number of parking spaces for CBRF's with 16 or more residents, nor did the Commission establish a separate parking ratio for a matter-of-right health care facility with 16 or more residents in zones other than C-3, C-4, and C-5.
  26. Because the Zoning Administrator determined that the health care facility was matter-of-right and there was no established parking ratio for that specific matter-of-right use, he chose the parking schedule for what he determined to be the most analogous matter-of-right use in the same (R-5) zone.
  27. The Zoning Administrator limited his review of comparable facilities to residential uses.
  28. The ZA deemed the use in § 2101.1 entitled "rooming or boarding house: All districts" to be the most analogous residential use. He therefore applied its parking schedule of "1 plus 1 for each 5 rooming units" to the health care facility. This resulted in the ZA requiring the health care facility to provide 25 off-street parking spaces.

#### CONCLUSIONS OF LAW

An appeal may be taken by a person aggrieved by, or District agency affected by, any decision of a District official in the administration and enforcement of the Zoning Regulations, including the issuance of a certificate of occupancy. D.C. Official Code § 6-641.07(f) (2001). Appellant timely appealed DCRA's March 26, 2003 issuance of two certificates of occupancy, numbers 51289 and 51290. Appellant sets forth two issues on appeal: (1) the ZA was without authority to issue a matter-of-right certificate of occupancy for the health care facility use so long as the Board Order granting a special exception was in place,<sup>3</sup> and (2) alternatively, even if the certificates of occupancy were properly issued, the ZA was without authority to set the parking requirement for the health care facility as only the Board has the authority to do so.<sup>4</sup> Although the Board finds both arguments unpersuasive, the Board nevertheless grants the appeal because the Zoning Administrator erred by limiting himself to residential uses when determining the parking requirement. Rather than remand the appeal to the Zoning Administrator, the Board finds that the most analogous matter-of-right use would be that of a hospital, and therefore reforms the certificate of occupancy to reflect a parking requirement of one off-street parking space for each bed. 11 DCMR § 2101.1 (parking requirement for hospital).

Appellant's two issues actually subsume the following questions within them. First, after the enactment of § 330.5(i), was the health care facility still subject to the special exception order previously issued by the Board, and, in particular, the parking requirements set forth therein? Second, if the health care facility were no longer subject to the special exception order, would the Board still have jurisdiction to determine the parking requirement pursuant to § 2101.1? Lastly, if the Board was without jurisdiction to determine the parking requirements, then did the ZA properly determine them? Each of these questions will be answered in turn.

1. The Zoning Commission's enactment of 330.5(i) on April 30, 1999 changed the status of health care facilities housing the handicapped from special exception to matter-of-right use and thereby removed them from the jurisdiction of the Board.

Prior to April 30, 1999, the health care facility was subject to special exception approval pursuant to § 359 of the Zoning Regulations. A special exception for the health care facility was first approved in 1991 by Board Order No. 15542. Order No. 15442 imposed no temporal condition on the use, but required the provision of 176 off-street parking spaces.

Effective April 30, 1999, the Zoning Commission, in Order No. 869, made CBRFs located in R-4 and the less restrictive residential and commercial zones, that provided housing for the handicapped, matter-of-right uses, provided they comply with the "zoning requirements of ... general and uniform applicability to matter-of-right uses" in the district in which the CBRF is

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<sup>3</sup>Only Order No. 15542 is actually in question. See, Finding of Fact No. 11.

<sup>4</sup>Although the Appellant appealed the issuance of the certificates of occupancy for both the health care facility and the hospital, the certificate of occupancy for the hospital was never seriously challenged and was properly issued as a matter-of-right use with 60 beds and 60 off-street parking spaces. See, 11 DCMR §§ 350.4(a) and 330.5(f), and § 2101.1. During the hearing, the Appellant stated that it was not disputing "the hospital portion" of the parking required by the ZA. See, November 18, 2003 hearing transcript at 344, lines 2-3. Therefore, only the certificate of occupancy and the parking requirement for the health care facility are actually in question here.

located.<sup>5</sup> "Zoning requirements of general and uniform applicability" mean basic area requirements for matter-of-right development in that zone, such as maximum height or lot occupancy. Under § 330.5(i), therefore, a CBRF in an R-5 zone district which provides housing for the handicapped and meets the generally and uniformly applicable Zoning Regulations for that zone district is a matter-of-right use and not a special exception.

Section 330.5(i) defines "handicap" as "a physical or mental impairment which substantially limits one or more of such person's major life activities...." The Affidavit of the health care facility's Chief Financial Officer, which was submitted to the ZA, states that "[a]ll of the ... residents require assistance in performing one or more of their major life activities, including, but not limited to, eating, bathing, dressing, getting out of bed, taking medication, etc." Exhibit No. 76, Attachment F. These residents suffer mental and/or physical disabilities caused by strokes, respiratory problems, Alzheimer's disease, or the like. *Id.* The health care facility provides residential and 24-hour medical care to its residents. *Id.* Based on these facts, the ZA found, and the Board concurs, that the health care facility provides housing for the handicapped as "handicapped" is defined in § 330.5(i).

The Appellant does not contest the ZA's determination that the health care facility complies with the requirements of general and uniform applicability to matter-of-right uses in an R-5-D zone. Accordingly, the Board finds that the ZA correctly determined that the health care facility housed the handicapped and complied with the applicable general and uniform zoning requirements. It therefore falls squarely within § 330.5(i) and is no longer a special exception use. The enactment of § 330.5(i) removed this use from the category of special exceptions and placed it in the category of matter-of-right uses.

Because the health care facility is a matter-of-right use, it is no longer subject to the earlier Board Order. It is axiomatic that matter-of-right uses are not subject to Board approval. Pursuant to § 330.5(i), CBRFs housing handicapped persons are a matter-of-right use in an R-5-D zone. They are not subject to a greater level of regulation than that applicable to a row dwelling or a multiple dwelling and so, cannot be made to come before the Board for a special exception or be subject to Board conditions. This is borne out by Zoning Commission Order No. 869, which enacted § 330.5(i). Part of the impetus for the enactment of § 330.5(i) was the determination by the Department of Justice that the Zoning Regulations did not provide equal housing opportunity for handicapped persons in multifamily zones. One of the inequities cited was that CBRFs housing handicapped persons required Board approval, while multifamily housing not specifically designated to serve handicapped persons did not. *See*, Exhibit No. 96, Zoning Commission Order No. 869 (1999), at 1. Section 330.5(i) was enacted to remove the requirement of Board approval for multifamily handicapped housing, thus making it no more regulated than other matter-of-right multifamily housing.

Section 330.5(i) must be construed to cause the least restriction necessary on the use of the land. *See*, Rathkopf's *The Law of Zoning and Planning*, 4<sup>th</sup> ed., § 5:13 (2001). The enactment of § 330.5(i) changed the status of this health care facility from a special exception to a matter-of-

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<sup>5</sup>Although § 330.5(i) only refers to the R-4 District, § 350.4 provides that the same uses permitted as a matter of right in the R-4 District shall be permitted as a matter of right in an R-5 District subject to conditions not relevant here.

right use and terminated the special exception just as if the Order had had a termination date. Given the fact that the Commission understood that subjecting these uses to special exception review was discriminatory, it is unlikely that the Commission intended to maintain in place orders that would continue such disparate treatment. Therefore, the health care facility is no longer subject to Order No. 15542.

2. Because the health care facility is no longer a special exception, the Board does not determine its parking requirement.

The Appellant argues that because the health care facility houses more than 16 persons, its parking requirement must be determined by the Board, whether or not it is still treated as a special exception, pursuant to the specified parking requirement set forth in § 2101.1. Although § 2101.1 provides that the number of parking spaces required for a CBRF housing 16 or more persons shall be determined by the BZA, the Board concludes that the Appellant's argument runs counter to the general scheme of the Zoning Regulations and the language of § 330.5(i).

Section 2101.1 sets forth the parking schedule for all uses and includes a provision setting forth parking requirements for CBRFs. This provision specifies a parking requirement for CBRFs in C-3, C-4, and C-5 districts, all of which are a matter-of-right. It also specifies a parking requirement for all CBRFs in all other zones which house between 1 and 8 residents. These, too, are all matter-of-right uses in their respective zones. It also specifies a parking ratio for all CBRFs with up to 15 residents, some of which are matter-of-right. *See, e.g.*, 11 DCMR § 350.4(f). Therefore, all matter-of-right CBRFs have parking requirements set out in the Zoning Regulations. No matter-of-right CBRFs have their parking requirement left to the determination of the Board.

The only CBRFs whose parking requirement is left to the Board are those in zones other than C-3, C-4, and C-5, which house 16 or more persons. These CBRF's are all special exceptions, not matter-of-right uses. A careful reading of § 2101.1 then shows that only CBRF's which are special exceptions have their parking determined by the Board.

Prior to § 330.5(i), all CBRFs in residential zones for 16 or more persons, whether handicapped or not, were special exceptions, so it made sense for the Board to determine their parking. That changed with the enactment of § 330.5(i), but no new parking ratio for an over-16-person matter-of-right CBRF housing handicapped persons was added to the Zoning Regulations. Until this lack of a parking ratio is rectified, there is a gap in the regulations, but the general scheme of the regulations is clear – special exception CBRFs go to the Board for parking, while matter-of-right CBRF's do not.

The wording of § 330.5(i) also undermines the Appellant's position. It states that a CBRF housing the handicapped is a matter-of-right use "notwithstanding any provision in this title to the contrary." (Emphasis added). To the extent that 2101.1's provision that CBRFs for more than 16 persons shall have their parking determined by the Board conflicts with the matter-of-right status conferred by § 330.5(i), § 2101.1 must fail. Section 2101.1's provision would apply to a CBRF in an R-5-D district with more than 16 residents, none of whom are handicapped, because

this would not be a matter-of-right use. However, § 2101.1's provision does not apply to the same CBRF with handicapped residents, as here, because it is a matter-of-right use.

Finally, this Board concludes that the Zoning Commission intended to eliminate all discrimination between CBRFs housing the handicapped and in compliance with the applicable general and uniform zoning requirements and other multi-family dwellings. This would include a requirement for these CBRFs to come to the BZA to determine their parking, when there is no such requirement for all other matter-of-right uses.

3. Because the Zoning Regulations do not specify a parking ratio for this matter-of-right use and § 2101.1's requirement of parking determination by the Board applies only to special exceptions, the ZA had the authority to determine parking for the health care facility. The issue then before the Board is whether the ZA properly determined the parking requirement for health care facilities where no specific ratio is designated in the regulations.

Since the enactment of § 330.5(i), the ZA has properly interpreted § 2101.1's provision regarding parking for CBRFs housing 16 or more persons as applying only where Board approval is required for a special exception, not where the CBRF is established as a matter-of-right. When, as here, the ZA is presented with a matter-of-right use for which no parking ratio is set forth in the Zoning Regulations, he applies the parking ratio for the most analogous use for which such a ratio is specified. The ZA's action falls within his authority to administer the Zoning Regulations and was recently upheld by the Board in Order No. 16716A. *See*, Reorganization Plan No. 1, 1982, Subchapter V, Part II (e) and Reorganization Plan No. 1, 1983, Subchapter VI, Part III (B)(1).

Case No. 16716A, *Appeal of Nebraska Avenue Neighborhood Association*, (the *Sunrise* Case), is, in this respect, analogous to the instant situation. In Case No. 16716A, the applicant was constructing a CBRF/community residence facility, not a CBRF/health care facility, but the *Sunrise* facility was determined to be a matter-of-right facility under § 330.5(i). The ZA in that case was presented with the same lack of a specific parking ratio for the matter-of-right facility, and so, looking to the most analogous use, he applied the parking ratio for a rooming and boarding house. The Board upheld the ZA's action, concluding that, "a ruling from the Zoning Administrator was *necessary* because the regulations do not set forth specific parking ... ratios for a community residence facility in the R-5-D zone." (Emphasis added.) *See*, Exhibit No. 76, Attachment E, Order No. 16716A, at 15. Similarly, the regulations do not set forth a parking ratio for a matter-of-right health care facility in an R-5-D zone. Therefore the Board concludes that a parking determination from the ZA was also necessary here.

Although the Board concludes that the ZA had to determine parking for the health care facility, the Board further concludes that he erred in the determination he made. The ZA erred in limiting his parking determination to just residential uses and therefore did not choose the proper most analogous use. Because he chose the incorrect most analogous use, he applied the incorrect parking ratio.

The ZA chose a "rooming or boarding house" as the use most similar to the health care facility for which a parking ratio is set forth in § 2101.1. The parking ratio for a rooming or boarding

house in all zone districts is "1 plus 1 for each 5 rooming units." Thus the ZA concluded that the health care facility required 25 parking spaces. 11 DCMR § 2101.1. The Chief of BLRA's Zoning Review Branch testified that, in making this choice, the BLRA looked only at residential uses because it considered the health care facility a residential use. *See*, November 18, 2003 transcript, at 354-355, lines 6-25 & 1-5. She also testified that BLRA relied on the decision in the *Sunrise* Case, because the choice of rooming or boarding house was upheld there. *See, Id.*, at 318, lines 18-24.

Neither the Chief of the Zoning Review Branch nor counsel for DCRA could point to any authority for the proposition that the ZA was constrained to look only at residential uses. This may have been DCRA's past practice, but the Board is not persuaded that it is a sound one, particularly here, where the health care facility is operated as a commercial enterprise. *Accord.*, 11 DCMR § 801.2.

The fact that a CBRF is listed as a residential use in the parking table set forth in 2101.1 does not necessarily mean that the parking requirement for a health care facility should be compared only to other residential uses. A large health care facility such as this has different parking needs from the average residential use. It must provide parking not only for visitors and possibly residents, but also for a large staff coming and going in shifts, 24 hours a day. It has 117 beds, 29 of which are deemed for "skilled care," the highest level of care under the definition of health care facility at 22 DCMR § 3099.1. On the other hand, a rooming or boarding house provides accommodations and possibly housekeeping services, but it does not provide any specialized supervision, therapeutic services, or medical care. It would likely have no staff other than perhaps a manager and/or a housekeeper/janitor. *See, e.g., Hooker v. Edes Home*, 579 A.2d 608 (D.C. 1990). Its parking needs would therefore be significantly less than the health care facility here.

The ZA's reliance on the *Sunrise* decision (Order No. 16716A) was also misplaced here. The use at issue in *Sunrise* was a community residence facility, not a health care facility. Both the Zoning Regulations and the Department of Health regulations at 22 DCMR § 3099.1 make a clear distinction between the two types of uses. CHG's health care facility provides 24-hour medical care and continuous nursing coverage under the supervision of physicians to residents with physical or mental impairments which substantially limit one or more of their major life activities. By contrast, a community residence facility, such as the one in *Sunrise*, provides a much lower level of care. It provides a safe, hygienic, sheltered living arrangement for residents who "are ambulatory and able to perform the activities of daily living with minimal assistance." 22 DCMR § 3099.1 (definition of community residence facility). During the hearing, DCRA conceded that the facility in *Sunrise* does not provide the level of medical care that CHG's health care facility does. *See*, November 18, 2003 transcript, at 341, lines 14-19.

There are significant differences in resident population, level of care provided, and size of staff between a community residence facility and a health care facility. These differences dictate a difference in parking requirements. Therefore, the *Sunrise* case is not helpful in determining the use in the Zoning Regulations most analogous to a health care facility in order to determine the correct parking ratio for such a facility.

The services provided by the health care facility and the staffing necessary to provide them are most analogous to a hospital. A hospital is a "place where sick or injured persons are given medical or surgical care." *Webster's Third New International Dictionary* (Unabridged), 1986. Analogously, a health care facility is a place where sick or disabled persons are given medical and residential care. A hospital is listed as an "institutional" use in the § 2101.1 parking schedule, but may also be considered a residential use. *See, e.g.*, 11 DCMR §§ 634.3, 636.6, 638.3 and discussion in *Wallick v. Board of Zoning Adjustment*, 468 A.2d 1183, 1186 (D.C. 1985). This hybrid nature is similar to the commercial/residential nature of the health care facility. The Board therefore concludes that the ZA should have looked beyond uses categorized as "residential" in § 2101.1 and should have applied the parking ratio for a hospital -- 1 space for each bed. The ZA erred in requiring the health care facility to provide 25 off-street parking spaces. Instead, the health care facility must provide 1 off-street parking space for each bed in the facility.

For the reasons stated above, the Board **denies the appeal in part** with respect to Appellant's claims that the ZA lacked authority to issue Certificates of Occupancy No's. 51289 and 51290 and to determine the parking requirements for the uses in those Certificates of Occupancy. The Board **grants the appeal in part in** concluding that the ZA imposed the incorrect parking requirement on the health care facility use for which Certificate of Occupancy No. 51289 was issued. Therefore, it is hereby **ORDERED** that this appeal be **DENIED IN PART AND GRANTED IN PART**. It is further **ORDERED** that Certificate of Occupancy No. 51289 be reformed to reflect a parking requirement of one off-street parking space for each bed.

**VOTE: 5-0-0**

(Geoffrey H. Griffis, Ruthanne G. Miller,  
Curtis L. Etherly, Jr., David A. Zaidain, and  
Anthony J. Hood, to deny in part and grant  
in part.)

**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: September 9, 2004**

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.LM/rsn

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

**Application No. 17007 of Application of Kathleen Peoples and Philip Sedlak**, pursuant to 11 DCMR § 3104.1 for a special exception to allow an existing rear yard addition to a semi-detached single-family dwelling under 11 DCMR § 223, not meeting the side yard requirements of section 405 and the lot occupancy requirements of section 403 in the R-4 District at premises 1018 Constitution Ave, N.E. (Square 964, Lot 46).

**HEARING DATE:** May 20, 2003

**DECISION DATE:** June 3, 2003

**DECISION AND ORDER**

This application was submitted on February 28, 2003 by the owners of the property, Kathleen Peoples and Philip Sedlak (collectively, "Applicants").

Following a hearing on May 20, 2003, and public meeting on June 3, 2003, the District of Columbia Board of Zoning Adjustment ("BZA") voted 4-0-1 to approve the application.

**PRELIMINARY MATTERS**

Notice of Application and Notice of Hearing. The District of Columbia Office of Zoning mailed memoranda dated March 13, 2003 providing notice of the application to: the Councilmember for Ward 6, Advisory Neighborhood Commission 6A, Single Member District /ANC 6A03, the Department of Transportation, and the District of Columbia Office of Planning ("OP"). Pursuant to 11 DCMR § 3113.13, the Office of Zoning mailed letters of notice of the hearing dated March 25, 2003 to the Applicants, ANC 6A, and all owners of property within 200 feet of the subject property. On April 30, 2003, the Applicants posted notice of the hearing at the subject property.

Request for Party Status. ANC 6A was automatically a party in this proceeding. The Board granted a request for party status from David and Janet Pritchard, the owners of a property abutting the subject property.

Applicants' Case. The Applicants stated that the special exception was needed to allow the existing two-story addition to the rear of a single-family dwelling they constructed to increase the living space in the house. The Applicants sought and received a building permit to construct the addition. The permit was later found invalid by an order of this Board. *Appeal No. 16811 of David and Janet Pritchard* (2002) The Applicants submitted photographs of the addition, building plans and elevations.

Government Reports. By memorandum dated May 13, 2003, the OP recommended approval of the special exception. According to OP, the special exception relief will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps, and would not tend to affect the use of neighboring property adversely.

ANC Report. None.

Persons in Opposition to the Application. The party in opposition, David and Janet Pritchard ("Party in Opposition"), contended that the proposed addition would block light to their property and obstruct the view from the rear of their property.

Hearing. The Board held a public hearing on the application on May 20, 2003. Testimony and evidence was provided by the Office of Planning, the Applicants, the Applicants' architect, and the Party in Opposition.

### **FINDINGS OF FACT**

1. The subject property is located at 1018 Constitution Ave., N.E. (Square 964. Lot 46) in the Capitol Hill neighborhood of Ward 6. The lot is on the north side of Constitution Ave., N.E.
2. The subject lot is rectangular in shape, 26 feet wide and approximately 90.5 feet deep, and has a north-south orientation.
3. The site is improved with a two-story, single family semi-detached house built in 1889.
4. The house is at the end of a line of row houses. It shares a common party wall with the neighboring row house to the west. To the east, an alley runs along the property line. The original dwelling has a seven-foot wide side yard.
5. The eastern side of the lot line of the subject property coincides with the rear lot lines of five lots developed with row dwellings, fronting on 11<sup>th</sup> St., N.E., including the Party in Opposition's property, 204 11<sup>th</sup> St., N.E.
6. A fence extends along the east-side of the property line.
7. The Applicants constructed a two-story addition to the rear of the original dwelling. The addition extends the full width of the lot.
8. The addition did not add any new windows facing neighboring properties from the second level.
9. The deck in the rear of the second level of the addition is angled so as to minimize intrusion to neighboring properties.
10. The lot area of the subject property is 2,357 square feet. The original dwelling and the addition occupy 1226 square feet of the lot. The original dwelling plus the addition occupy 52% of the lot.

11. The lot is zoned R-4. The predominant land use in the vicinity of the subject property is row houses.

### CONCLUSIONS OF LAW

The Applicants seek a special exception under 11 DCMR § 223 to allow an existing two-story addition to the rear of a single-family semi-detached dwelling in the R-4 zone. This application was required as a consequence of this Board's decision in **Appeal No. 16811 of David and Janet Pritchard** (BZA 2002), which held that an addition may not "convert a semi-detached dwelling to a row dwelling under circumstances where it is not possible to construct a common division wall". Because one side of the subject property abutted an alley, there was no adjacent structure to share a common division wall, and therefore a side yard was required.

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

The Pritchard decision is thus limited to its facts.

As to this application, the Board is authorized to grant special exceptions where, in the Board's judgment, a special exception would be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and would not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps. See D.C. Official Code § 6-641.07(g)(2) (2001); 11 DCMR § 3104.

Pursuant to § 223, the Board may permit, by special exception approval, an addition to a one-family dwelling that does not comply with requirements pertaining to minimum lot dimension, lot occupancy, rear and side yards, courts, and nonconforming structures, subject to the conditions enumerated in § 223.

The Applicants' property does not comply with requirements pertaining to lot occupancy and side yards.

Lot occupancy. The maximum permitted lot occupancy for a semi-detached dwelling in an R-4 district is 40 percent. 11 DCMR § 403.2. Pursuant to 11 DCMR § 223.3, the lot occupancy of the dwelling, together with the addition, may be as high as 70 percent in the R-4 zone, if approved by the Board consistent with the requirements of section 223. The lot occupancy of the subject property, including the addition, is 52 percent.

Side yard. A one-family dwelling in an R-4 zone that does not share a common division wall with an existing building or a building constructed together with the new building must have a side yard on each resulting free-standing side. See 11 DCMR § 405.3. Because this structure did

not share a common division wall on its eastern side, the addition cannot intrude into the required side yard.

11 DCMR § 223 provisions. The Applicants seek approval of the already completed addition to the dwelling that does not comply with requirements pertaining to lot occupancy and side yards. The Board may grant such approval as a special exception subject to the provisions enumerated in section 223. The provisions include that the proposed addition must not have substantially adverse effect on the use and enjoyment of any abutting or adjacent dwelling or property, and in particular (a) the light and air available to neighboring properties must not be unduly affected; (b) the privacy of use and enjoyment of neighboring properties must not be unduly compromised; and (c) the addition, together with the original building, as viewed from the street, alley, and other public way, must not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage. 11 DCMR § 223.2.

The Board concludes that the addition does not unduly affect the light and air available to affect neighboring properties, including the property owned by the party in opposition. In forming this conclusion, the Board reviewed the photographs and other graphical evidence submitted by the applicants and by the Party in Opposition, and considered their testimony. The Applicants testified that the addition did not unduly affect the light and air available to neighboring properties, did not compromise the privacy of neighboring properties, change the character of the property when viewed from the street. The Party in Opposition offered testimony that the addition blocked light and air available to the rear yard and back window of their house. The Party in Opposition submitted testimony that the addition blocked thirteen percent of the light available to the rear of their property. The Party in Opposition was unsure, however, how much of that thirteen percent was blocked by the portion of the addition that the Applicants could have built as of right, and without resort to a special exception. The Board is of the opinion that the addition does not unduly affect the light and air available to the Party in Opposition, nor to other neighboring properties.

The Board further concludes that the addition does not unduly compromise the privacy of use and enjoyment of neighboring properties, including the Party in Opposition's property. A fence provides privacy at ground level. The addition did not add any new windows facing neighboring properties from the second level. The deck in the rear of the second level of the addition is angled so as to minimize intrusion to neighboring properties.

The Board further concludes that as viewed from the street, the addition does not substantially intrude upon the character, scale and pattern of houses along the subject street frontage. The Board notes that the predominant use on the subject street frontage is row houses. The addition is consistent with the predominant use, and in fact, the addition renders the applicant's property more consistent with character, scale, and pattern of houses along the subject street frontage than it was previously.

The Board concludes that a special exception is in harmony with the general purpose and intent of the Zoning Regulations and Maps. The neighborhood is comprised mainly of row houses and it is only because of some unusual features of the Applicants' property that a special exception is

required. We do not believe that our granting this special exception will adversely affect neighboring properties.

For the reasons stated above, the Board concludes that the Applicants have satisfied their burden of proof

Finally, the Board observes that the surface of the addition that faces the Party in Opposition's property is finished with an unappealing cement material. 11 DCMR § 223.4 authorizes the Board to require special treatment in design, building materials or other features for the protection of adjacent or nearby properties. The Board finds that the application of a new finish to the addition will protect the Party in Opposition from visual intrusion on the character of the rear of their property.

Accordingly, it is therefore **ORDERED** that the application is **GRANTED**.

It is further **ORDERED** that the Applicants shall apply a final finish to the side of the addition facing the opposing party's property of a smooth parch or stucco finish that would be painted in a light color, and that will allow for the attachment for an additional veneer for a trellis type system.

**VOTE:**           4-0-1           (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr. to approve; Anthony J. Hood to approve by proxy; David A. Zaidain not hearing the case, not voting).

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

Each concurring Board member approved the issuance of this order.

**FINAL DATE OF ORDER:** SEP - 7 2004

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

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

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

THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

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

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT

**Application No. 17154 of Bruno B. Freschi**, pursuant to 11 DCMR § 3103.2 for a variance from the lot width and lot area requirements under section 401, a variance from the lot occupancy requirements under section 403, a variance from the rear yard requirements under section 404, and a variance from section 401.6 from the street frontage requirements to allow the construction of a single-family row dwelling in the FBOD/R-3 District at premises rear of 935 26<sup>th</sup> Street, N.W. (Lot 95, Square 16).

**HEARING DATE:** May 4, 2004

**DECISION DATE:** June 8, 2004

**DECISION AND ORDER**

The Applicant in this case is Bruno B. Freschi, the owner of the property located at rear of 935 26<sup>th</sup> Street, N.W. (Lot 95, Square 16) (the "Property"). Mr. Freschi filed an application with the Board of Zoning Adjustment on February 20, 2004 for area variances under 11 DCMR § 3103.2, to allow the construction of a single-family row dwelling on the Property, which is located in the FBOD/R-3 District. Except for the relief under section 401.6<sup>1</sup>, the zoning relief requested in this application is self-certified pursuant to 11 DCMR § 3113.2. Following a public hearing, the Board voted 4-1-0 on June 8, 2004 to approve the application.

**PRELIMINARY MATTERS**

Application. The application requests area variances under 11 DCMR § 3103.2, to allow the construction of a single-family row dwelling on an alley lot in the FBOD/R-3 District. The original application proposed by Bruno Freschi (the "Applicant") requested variances from the lot area, lot width, lot occupancy, height, and rear yard requirements of the zoning regulations. Prior to submitting the current application, Mr. Freschi obtained concept approval of the proposed project from the Historic Preservation Review Board. As a result of the HPRB design review process, Mr. Freschi lowered the height to meet matter-of-right guidelines. Accordingly, the Applicant withdrew his request for the height variance during the public hearing.

Notice of Application and Notice of Hearing. By memoranda dated February 25, 2004, the Office of Zoning advised the D.C. Office of Planning, the Zoning Administrator, the Department of Transportation, the Councilmember for Ward 2, and the Advisory Neighborhood Commission (ANC) 2A, the ANC for the area within which the subject property is located, of the application. The Board scheduled a public hearing on the application for May 4, 2004. Pursuant to 11 DCMR § 3113.13, the Office of Zoning, on February 26, 2004, mailed the applicant, the owners of all property within 200 feet of the subject property, and ANC 2A notice of the May 4<sup>th</sup> hearing. Notice was also published in the D.C. Register. The Applicant's affidavit of posting and maintenance indicates that two zoning posters were posted beginning on April 19, 2004, in plain view of the public.

<sup>1</sup> The Board voted to amend the application to include relief under this section on its own motion.

Requests for Party Status. ANC 2A was automatically a party in this proceeding. The Board granted party status in opposition to the application to the Foggy Bottom Historic District Conservancy ("FBHDC"), members of which reside in the immediate area of the subject property. The Board granted this request, over the objection of the Applicant, based upon the FBHDC's unique interest in the proposal's impact on the zone plan. The Board also granted party status in opposition to Lisa Farrell, who resides at 2523 Queen Anne's Lane, N.W., adjacent to the subject property. The Board denied party status to Dr. Nam Pham, who filed a request but did not appear at the public hearing.

Applicant's Case. The Applicant presented testimony and evidence from Bruno B. Freschi, an architect recognized by the Board as an expert in architecture, regarding the Property, the proposed project, and the HPRB review process. The Applicant also presented testimony from Gladys Hicks, recognized by the Board as an expert in zoning, about the zoning implications of the proposed project.

Office of Planning ("OP") Report. OP submitted a report and testified that it had reviewed the application for compliance with the standards for granting an area variance. In its report dated April 27, 2004, the OP recommended that the application be approved with respect to variances relating to lot area and lot width and that the application be denied with respect to the requested lot occupancy and rear yard setback. OP observed that a side yard setback may be required and that a special exception may be required for the roof structure setback. During the public hearing, OP testified that the application was referred to the National Park Service and Water and Sewer Authority. The National Park Service noted no concern with the proposed project. The Water and Sewer Authority also noted no concern, provided neither water nor sewer pipes are installed to the garage.

Department of Housing and Community Development ("DHCD") Report. DHCD reviewed the application and recommended against approval, finding Square 16 is already densely developed. DHCD expressed concern that the size and scale of the proposed house is too large for the existing lot. It also expressed concern that the proposed house will affect the light, air, and views of the adjacent apartment buildings and alley dwellings.

ANC Report. ANC 2A, at its regularly scheduled meeting held on April 21, 2004, voted 3-0 to support the application for all requested variances. The ANC report noted with approval that Mr. Freschi had modified the project to accommodate changes suggested by HPRB and the Commission of Fine Arts.

Party and Persons in Opposition to the Application. Lisa Farrell, the owner of a row dwelling located at 2523 Queen Anne's Lane, testified in opposition to the application. She expressed concern that the project would adversely affect the light and air, privacy, and the property value of her home. FBHDC also testified in opposition to the application, arguing that the lot was too small for a dwelling, that the proposed project does not qualify as a row house, and that the applicant failed to demonstrate undue hardship. The Board received letters in opposition to the application from members of the surrounding neighborhood. Generally, these letters argued that the application should be denied because it requests too many variances.

Closing of the Record. The record was closed at the end of the hearing, except for specific documents requested by the Board. The Board requested that the Applicant provide information demonstrating the date of subdivision of Lots 94 and 95. The Applicant submitted a copy of the subdivision plat, which demonstrated that the subdivision occurred on January 6, 1969.

## FINDINGS OF FACT

### A. The Property and the Surrounding Area.

1. The property that is the subject of this application is Lot 95 in Square 16, located at the premises known as rear of 935 26<sup>th</sup> Street, N.W. The Property is an alley lot located behind and to the east of 935 26<sup>th</sup> Street, N.W. (Lot 94 in Square 16). Lot 94 is improved with a four-story, 1970s, single-family row dwelling, which also is owned and occupied by the Applicant. Immediately to the south of the Property, are two of the 1960s three story, brick, row dwellings that front on Queen Anne's Lane. Immediately to the north is a four-story apartment building. The Property abuts Hughes Mews, a thirty foot wide alley, to the east. Across the alley to the east is an eight-story apartment building.

2. The Property is 18.17 feet wide, 51 feet deep and has a square footage of only 926.67 square feet. It presently is paved with asphalt. In the past, it has been used for parking by the previous owner of Lot 94, the adjacent lot, and other residents of Hughes Mews.

3. Lot 94 is improved with a four-story, 1970s, single-family row dwelling, which also is owned and occupied by the Applicant. Immediately to the south of the Property are two of the three-story brick row dwellings that were constructed in the 1960s as part of the Hughes Mews development that fronts on Queen Anne's Lane. Immediately to the north is a four-story apartment building. The Property abuts Hughes Mews, a thirty-foot wide alley, to the east. Across the alley to the east is an eight-story apartment building.

4. The area is essentially residential with a mix of densities, including major, ten-story condominiums and smaller, single-family row dwellings.

5. Pursuant to Zoning Commission Order No. 714, effective April 17, 1992, the Property is included within the Foggy Bottom Overlay District (FBOD) with an underlying R-3 zone designation. Prior to that Order, the Property was located in the R-5-B Zone District. The Property also is located in an historic district.

6. The subject property was created in 1969 as a result of a subdivision. Lots 94 and 95 at one time comprised a single lot. The lot was subdivided per a subdivision plat dated January 6, 1969. Because the lot was created after 1966, it is subject to the street frontage requirements of section 401.6 if it is "to be used and occupied by a row dwelling".

7. Most of the row dwellings that constitute the Hughes Mews development are located on lots that are now nonconforming with respect to the requirements of the current R-3 zoning.

### B. The Proposed Project

9. The proposed project will consist of a three-story, thirty-foot tall single-family row dwelling with a roof deck and a bay window. The dwelling will feature two bedrooms, a den, three bathrooms, and a garage.
10. The total square footage of the proposed row dwelling is between 1,700 and 1730 square feet.
11. The proposed project will be constructed from lot line to lot line and will provide no side yards and this meets the definition of a row dwelling.

#### **B. The HPRB Process**

12. The HPRB initially expressed concern about the proposed height of the house and the penthouse located on the roof. In response, the applicant lowered the height by 1.6 feet, which allows the proposed project to be constructed within the matter-of-right height requirements. The applicant also removed the equipment initially proposed to be housed on the roof and limited the use of the roof structure so as to provide only roof access. The applicant also relocated the roof access structure to the north side of the Property to reduce any impact on the row dwellings to the south.

13. The HPRB staff report and recommendation, which was adopted by HPRB, noted that Mr. Freschi had reduced the footprint and height of the proposed rooftop penthouse in response to HPRB's concerns. The report found that the Property's distance from any of the lower, historic buildings in the area, and the proximity of three and four-story non-contributing structures suggests that the height of the proposed building is not incompatible with the character of the historic district. The report recommended that HPRB approve the scale and general massing of the concept.

#### **C. Zoning Relief Required**

14. Under § 401.3, the minimum lot area for a row dwelling in the R-3 Zone is 2,000 square feet. The lot area of the Property is 926.67 square feet, which is 1073.33 square feet less than the 2000 square foot minimum lot area required under § 401.3.

15. The additional variance relief the applicant requests are minor. The applicant proposes a rear yard of 18 feet, which is only 2 feet less than the 20 feet required by § 404.1. The proposed project will have a lot occupancy of 63.3%, which is only 3.3% greater than the maximum lot occupancy of 60% permitted under § 403.2. The width of lot for the Property is 18.17 feet, only 1.83 feet less than the 20 foot requirement set forth in § 401.3.

16. Section 401.6 requires that each lot created after February 15, 1966, to be used and occupied as a row dwelling, shall have street frontage measured along the street a distance equal to at least 40% of the required width of lot and in no case less than fourteen feet. "Street" is defined in § 199.1 as "a public highway designated as a street, avenue, or road on the records of the Surveyor of the District of Columbia." The proposed project provides frontage only on an alley, which is not a "street" under the above definition.

17. Section 2507 expressly permits the construction of a one-family dwelling on an alley lot that abuts an alley thirty feet or more in width and which provides access to a street through an alley or alleys not less than thirty feet in width. Hughes Mews, on which the Property fronts, is thirty feet wide and provides access to 26<sup>th</sup> Street, N.W. through Queen Anne's Lane, which also is thirty feet wide.

**D. Exceptional Condition**

18. The Board finds that the Property is affected by an exceptional and extraordinary situation in that it is exceptionally narrow and shallow, and it is extremely undersized. The lot is 18.17 feet wide and 51 feet deep and is less than 1,000 square feet in area. Although none of the nearby lots are large, this lot is small even by the standards in the area.

**E. Practical Difficulty**

19. Because of the exceptional and extraordinary narrowness and shallowness of the lot, it would be difficult for an architect to design a habitable, livable home that would provide adequate living space and adequate light and air without the additional rear yard and lot occupancy variances.

**F. Lack of Substantial Impact**

20. The Board finds that the granting of the requested variances would not create a detrimental effect on the zone plan or the neighborhood, because the proposed project represents a contextual design that reflects the height, massing, and window fenestration predominant in the area. Nor will it deprive Ms. Farrell of light and air. The proposed project will complement both the row dwellings located in the Hughes Mews development to the south and the existing modern, high-rise condominium and apartment buildings located to the north and east of the Property. Accordingly, the proposed project will provide an appropriate buffer between the row dwelling and high-rise uses. The three similar unattached row dwellings located on Hughes Mews demonstrate that the proposed row dwelling will not be out of context with the surrounding area simply because it is not attached on either side. The proposed bay window will not cause a substantial detrimental impact on neighboring properties because it does not exist at the ground level, has a footprint of only two feet, and is located to the north side of the Property, the side opposite the row dwellings to the south.

**G. Consistency with Zone Plan**

21. The Board finds the proposed project will be consistent with the zone plan as the dwelling falls within the design plan for an R-3 District. Section 320.1 provides that the R-3 District is designed essential for row dwellings, but also includes areas within which row dwellings are mingled with one-family detached dwellings, one-family semi-detached dwellings, and groups of three (3). Thus, the proposed row dwelling is consistent with the underlying R-3 Zone. The proposed project also is consistent with the goals of the FBOD, which include preserving the low-scale residential character of the area (§ 1521.1), providing a scale of development consistent with the low scale harmony of rhythmic residential townhouses (§ 1521.3(a)(2)), and enhancing the residential character of the area (§ 1521.3(c)). Based on the testimony of Mr. Freschi, Ms. Hicks, and ANC 2A, the Board finds that OP's concerns that the

proposed project will increase the density in the area beyond what is contemplated in the Zoning Regulations are unfounded. The addition of a modest single-family dwelling in a residential Zone District will not adversely affect the density of the area.

### CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799), as amended; D.C. Official Code § 6-641.07(g)(3) (2001), to grant variances from the strict application of the Zoning Regulations. As stated above, the applicant here seeks relief from the certain area requirements to allow construction of a new single-family dwelling.

Under the three-prong test for area variances set out in 11 DCMR § 3103.2, an applicant must demonstrate that (1) the property is unique because of its size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter practical difficulty if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). In order to prove "practical difficulties," an applicant must demonstrate first, that compliance with the area restriction would be unnecessarily burdensome; and, second, that the practical difficulties are unique to the particular property. *Id.* At 1170

The Board concludes that the applicant has met the test for the granting of the requested area variance relief. It finds the subject property is affected by an exceptional or extraordinary situation or condition, that the strict application of the Zoning Regulations will result in practical difficulties to the applicant, and that the intent, purpose, and integrity of the Zone Plan will not be impaired by granting the requested variances.

The Board concludes that the Property is affected by an extraordinary and exceptional situation in that the Property is exceptionally shallow, narrow and small. The Board also concludes that a strict application of the Zoning Regulations will result in practical difficulty to the applicant because no dwelling can be constructed on the Property without variance relief. In addition, the applicant faces practical difficulties in designing a project that will provide adequate light and air to the interior living space. As to the street frontage requirement, the Board finds that the unique zoning history of the property justifies the grant of this relief.

Finally, the Board finds that granting the requested variance relief will not cause substantial detriment to the public good and will not impair the intent, purpose, and integrity of the Zone Plan. Pursuant to 11 DCMR § 320, the R-3 Zone District is designed essentially for row dwellings. The proposed project also furthers several goals of the Foggy Bottom Overlay District. The proposed project will maintain and enhance the low scale residential character of the neighborhood as described in 11 DCMR § 1521.2. It also will enhance the low scale harmony of rhythmic townhouses prevalent in the area. 11 DCMR § 1521.3(a). Moreover, the applicant has accommodated the concerns expressed by Ms. Farrell and FBHDC by lowering the

height of the building and the roof structure and by relocating the bay window and roof structure away from the dwellings abutting the Property to the south.

Votes on Motions:

**VOTE: 3-0-2:** Board Motion to DENY Applicant's Motion to Strike Party Opponent's Exhibit 42 post-hearing document. (Ruthanne G. Miller, John A. Mann II, and Curtis L. Etherly, Jr. to Deny; Geoffrey H. Griffis and Kevin L. Hildebrand, not present, not voting).

**VOTE: 3-0-2:** Board Motion to GRANT Applicant's Motion to Allow Applicant to Respond to Opponent's Exhibit 42 (Ruthanne G. Miller, John A. Mann II, and Curtis L. Etherly, Jr. to support; Geoffrey H. Griffis and Kevin L. Hildebrand, not present, not voting).

**VOTE: 3-0-2:** Board Motion to amend application to provide relief from Section 401.6. (Ruthanne G. Miller, Curtis L. Etherly, and John A. Mann II to support; Geoffrey H. Griffis and Hildebrand, not present, not voting).

It is therefore **ORDERED** that this application be **GRANTED**.

**VOTE: 4-1-0:** (Ruthanne G. Miller, John A. Mann II, Curtis L. Etherly, Jr., and Geoffrey H. Griffis (by absentee vote) to approve, as amended; Kevin L. Hildebrand (by absentee vote) to oppose.

**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:** SEP 09 2004

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

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

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

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

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

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.SG/RSN

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

**Application No. 17185 of James Firkser**, pursuant to 11 DCMR § 3103.2, for a variance from the rear yard requirements under section 401, a variance from the lot occupancy requirements under section 403, a variance from the rear yard requirements under section 404, a variance from the open court requirements under section 406, and a variance from the nonconforming structure provisions under subsection 2001.3, to construct a rear deck addition (with room for parking below) to an existing single-family row dwelling in the R-3 District at premises 2130 Leroy Place, N.W. (Square 2531, Lot 41).

**HEARING DATES:** July 6, 2004, September 21, 2004

**DECISION DATE:** September 21, 2004 (Bench Decision)

**SUMMARY ORDER**

**REVIEW BY THE ZONING ADMINISTRATOR**

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

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 2D and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 2D, which is automatically a party to this application. ANC 2D submitted a letter in support of the application. The Office of Planning (OP) submitted a report in support of the application.

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

Based upon the record before the Board and having given great weight to the OP and ANC reports filed in this case, the Board concludes that the applicant has met the burden of proving under 11 DCMR §§ 3103.2, 401, 403, 406 and 2001.3, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent,

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

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is not prohibited by law. It is therefore **ORDERED** that this application be **GRANTED** subject to the following **CONDITION**:

1. The area beneath the deck shall not be enclosed along the rear lot line facing the alley.

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

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

Each concurring Board member has approved the issuance of this order.

**FINAL DATE OF ORDER:** SEP 23 2004

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

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

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

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

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

**Application No. 17201 of Janet Mann**, pursuant to § 3104.1, for a special exception to allow the construction of a two-story rear addition to a single-family row dwelling under section 223, not meeting the lot occupancy requirements (section 403), side yard requirements (section 405), and nonconforming structure provisions (subsection 2001.3), in the R-1-B District at premises 1523 Elliott Place, N.W. (Square 1358, Lot 807).

Note: The Applicant, at the hearing, presented an alternative construction plan referred to as Alternative No. 2 (Exhibit 29) in the record. The Board approved this plan.

**HEARING DATE:** September 14, 2004

**DECISION DATE:** September 14, 2004 (Bench Decision)

**SUMMARY ORDER**

**SELF-CERTIFIED**

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

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

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

Based upon the record before the Board and having given great weight to the ANC and OP reports the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1 and 223, that the requested relief can be

BZA APPLICATION NO. 17201

PAGE NO. 2

granted, subject to the conditions set forth below, as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

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

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

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

Each concurring member approved the issuance of this order.

**FINAL DATE OF ORDER:**    SEP 17 2004

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.

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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,

BZA APPLICATION NO. 17201

PAGE NO. 3

COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN