Government of the District of Columbia
Public Employee Relations Board

In the Matter of: American Federation of Government Employees, Local 872 (on behalf of Christopher Hawthorne), Petitioner, and District of Columbia Water and Sewer Authority, Respondent.	PERB Case No. 03-A-05 Opinion No. 727 **FOR PUBLICATION**

DECISION AND ORDER

On August 20, 2003, the American Federation of Government Employees, Local 872 ("AFGE"), filed an Arbitration Review Request ("Request"). AFGE seeks review of an arbitration award ("Award") which "allowed the [District of Columbia Water and Sewer Authority] to impose a 15 day suspension on the Union President, Mr. Hawthorne." (Request at p. 2). AFGE contends that the: (1) the arbitrator was without authority to grant the Award and (2) Award on its face is contrary to law and public policy. (Request at pgs. 2-3). The District of Columbia Water and Sewer Authority ("WASA") opposes the Request.

The issue before the Board is whether "the award on its face is contrary to law and public policy" or whether "the arbitrator was without or exceeded his or her jurisdiction . . . ." D.C. Code § 1-605.02(6). Upon consideration of the Request, we find that AFGE has not established a statutory basis for our review. Therefore, pursuant to Board Rule 538.4, AFGE's request for review is denied.

WASA imposed a thirty (30) day suspension on the Grievant (Christopher Hawthorne, President of Local 872) for insubordination. AFGE filed for arbitration on behalf of Mr. Hawthorne. In a decision issued on August 1, 2003, the Arbitrator determined that WASA had sufficient cause to take adverse action against the Grievant. However, the Arbitrator found that WASA violated Article 57, Section D of the parties' master agreement when it failed to initiate the "Notice of Proposed Disciplinary Action" within the 45-workday limit. (Award at p. 9). As a result, the Arbitrator determined that the thirty (30) day suspension was inappropriate. Therefore, the Arbitrator

reduced the suspension to fifteen (15) days. (Award at p. 9).

AFGE takes issue with the Arbitrator's Award. AFGE asserts that the Arbitrator exceeded his authority by allowing the agency to impose a fifteen (15) day suspension. Specifically, AFGE claims that the Arbitrator rendered an award that: (1) conflicts with the express terms of the parties' master agreement and (2) fails to derive its essence from the agreement.

In support of its argument, AFGE cites Article 57, Section D,[1] of the parties' master agreement which provides in pertinent part as follows:

> **No corrective or adverse action shall be commenced more than 45 workdays** (not including Saturdays, Sundays or legal holidays) after the date that the Authority knew or should have known the act or occurrence allegedly constituting cause. (Emphasis added.).

AFGE asserts that the plain language of the above-referenced provision of the parties' master agreement, makes it clear that no disciplinary action can be commenced after 45 workdays. Also, AFGE argues that in the present case, the Arbitrator found that the "Notice of Proposed Disciplinary Action" was untimely. Nevertheless, Arbitrator Applewhaite concluded that WASA had cause to take adverse action against the Grievant. As a result, the Arbitrator still allowed WASA to impose a 15 day suspension on the Union President, Mr. Hawthorne. AFGE contends that "such an award flies in the face of the collective bargaining agreement under Article 58."[2] (Request at p. 2). In view of the above, AFGE asserts that the Arbitrator "acted outside the scope of his power by modifying the penalties and time frame that were bargained for under the collective bargaining agreement." (Request at p. 2). In addition, AFGE claims that the award fails to derive its essence from the agreement.

In the present case, the Arbitrator reasoned that the grievance before him involved the interpretation of Article 57, Section D of the parties' master agreement. (See, Award at p. 8). As a result, we believe that one of AFGE's grounds for review only involves a disagreement with the Arbitrator's interpretation of Article 57, Section D of the parties' master agreement. Moreover, AFGE merely requests that we adopt its interpretation of the above-referenced provision of the

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[1]In its Arbitration Review Request, AFGE cites Article 58 of the parties' master agreement. However, Article 58 only contains general information concerning the grievance and arbitration procedures. The language that AFGE refers to concerning the time frame for proposing disciplinary action is actually contained in Article 57, Section D of the master agreement. In view of the above, we assume that AFGE's reference to Article 58 is a typographical error and that they intended to refer to Article 57, Section D.

[2]See footnote 1.

master agreement.

Based on the above and the Board's statutory basis for reviewing arbitration awards, AFGE contends that the Arbitrator exceeded his authority by modifying "the time frame for meeting out discipline under the collective bargaining agreement." (Request at p. 3). We disagree.

We have held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's, that the parties have bargained for." University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 37 DCR 5666, Slip Op. No. 248 at pgs. 3-4, PERB Case No. 90-A-02 (1990). Moreover, "[t]he Board will not substitute its own interpretation or that of the [petitioner] for that of the duly designated Arbitrator." District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union No. 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987).

In addition, we have held that an Arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provisions." D.C. Dept. of Public Works and AFSCME, Local 2091, 35 DCR 8186, Slip Op. No. 194 at p. 2, PERB Case No. 87-A-08 (1988). Furthermore, we have determined that an Arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement.[3] See, D.C. Metropolitan Police Department and FOP/MPD Labor Committee, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). In the present case, AFGE does not cite any provision of the parties' master agreement which limits the Arbitrator's equitable power. Therefore, once the Arbitrator determined that WASA had cause for taking disciplinary action against the Grievant, he also had authority to reduce the suspension due to WASA's failure to comply with procedural rights guaranteed to the Grievant by the master agreement. [4]

As a second basis for review, AFGE asserts that the Arbitrator's Award is contrary to law and public policy. AFGE points to D.C. Code § 1-617.04 (a)(1) (2001 ed.) and contends that the award is contrary to this code provision. Specifically, AFGE claims that "since Mr. Hawthorne was acting in his capacity as the Union steward and engaging in protected activity, he [could not] be disciplined for insubordination. [As a result, AFGE asserts that] an award that allows discipline against a Union steward for exercising his right to engage in concerted activity is contrary to law." (Request at p. 3). The Arbitrator considered AFGE's argument and noted that it is common for union grievance representatives to be given special privileges and immunities in the performance of their duties. However, he observed that this immunity is not unlimited. For example, he opined that both sides have a duty to maintain the integrity of the agreement at all times. In addition, he noted that Article 5-B of the parties' master agreement states that "all parties shall conduct such meetings with appropriate professional courtesy and decorum." In the present case, he concluded that "clearly,

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[3]We note, that if the parties' collective bargaining agreement limits the Arbitrator's equitable power, that limitation would be enforced.

[4]The Arbitrator concluded that the "Notice of Proposed Disciplinary Action" was not delivered to the Grievant until 48 days after the incident. (Award at p. 9).

things got out of hand and there is also no doubt that the Grievant knew of the consequences of his behavior." (Award at p.8). Specifically, he noted that the Grievant's prior disciplinary action for the same offense, insubordination, would indicate his familiarity with the issue. Furthermore, the Arbitrator found that, as Union President, the Grievant was all the more responsible for knowing the consequences involved and setting an example. The Arbitrator concluded that in a case where there was no immediate threat to the safety of persons or property, the rule of thumb to "obey now and grieve later" applies. (Award at p. 8). In view of the above, the Arbitrator found that WASA: (1) did not retaliate against the Grievant and (2) had cause for taking adverse action against the Grievant.

In the present case, the Arbitrator considered AFGE's argument. However, he concluded that WASA's action did not amount to retaliation. In light of the above, we believe that AFGE's second claim involves only a disagreement with the Arbitrator's findings and conclusions. We have held that a "disagreement with the Arbitrator's interpretation . . . does not render the award contrary to law and public policy." AFGE, Local 1975 and Dept. of Public Works, 48 DCR 10955, Slip Op. No 413 at p. 3, PERB Case No. 95-A-02 (2001). To set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the Arbitrator arrive at a different result. See, AFGE, Local 631 and Dept. of Public Works, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1998). Also, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties agreement and related rules and regulations as well as his evidentiary findings and conclusions upon which the decision is based." University of the District of Columbia and University of the District of Columbia Faculty Association, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992).

As noted above, we find that AFGE's second claim involves only a disagreement with the Arbitrator's findings and conclusions. This is not a sufficient basis for concluding that the: (1) Arbitrator has exceeded his authority or (2) Award is contrary to law or public policy.

We find that the Arbitrator's conclusion is based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. For the reasons discussed, no statutory basis exist for setting aside the Award; the Request is therefore, denied.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The Arbitration Review Request is denied.

(2) Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

November 18, 2003

Government of the District of Columbia
Public Employee Relations Board

In the Matter of: District of Columbia Water and Sewer Authority, Petitioner, and American Federation of Government Employees, Local 631, Respondent.	PERB Case No. 03-A-07 Opinion No. 733 **FOR PUBLICATION**

DECISION AND ORDER

I. Statement of Case:

On September 15, 2003, the District of Columbia Water and Sewer Authority ("WASA"), filed an Arbitration Review Request ("Request"). WASA seeks review of an arbitration award ("Award") which rescinded the termination of seven Grievants. Specifically, the Arbitrator concluded that the collective bargaining agreement does not provide for an absolute guarantee of employment for those Waste Water Treatment Operators who did not obtain the necessary certification. However, he found that WASA should within 180 days of the Award attempt to transfer the Grievants to vacant positions. In addition, he determined that if an employee does not qualify for a vacant position during the 180-day period, then that employee can be terminated. Finally, the Arbitrator concluded that the date for determining when to apply the 20-year exemption should be October 4, 2001. (Award at p. 19). WASA contends that the Arbitrator was without authority to grant the Award. (Request at pgs. 2-3). In addition, WASA asserts that the award is contrary to law and public policy. The American Federation of Government Employees, Local 631 ("AFGE") opposes the Request.

The issue before the Board is whether "the award on its face is contrary to law and public policy" or whether "the arbitrator was without or exceeded his or her jurisdiction . . . ." D.C. Code Sec. 1-605.02(6).

II. **Discussion:**

On June 4, 1998, WASA and AFGE, Local 631 entered into a collective bargaining agreement (CBA). Article 27 of the CBA provided that "... [all] employees holding certain job positions should be certified or licensed." (Award at p. 5). Exemptions to this licensing requirement were provided for employees who had a: (1) current license or certification; (2) minimum of 20 years in a related job at WASA or its predecessor and who have a satisfactory work performance; and (3) minimum of 20 years of service and who have a prior license or certification. The above-noted exempted employees could retain their position without obtaining an additional license or certification.

In addition, the CBA provided that any employee who had a minimum of 20 years of service and a certificate in environmental science or other job related studies from the University of the District of Columbia or its equivalent, was deemed licensed and/or certified, and therefore exempt from the provisions of Article 27. (Award at p. 5).

Pursuant to Article 27, WASA agreed to assure that all individuals who were employed in these positions at the time this agreement became effective, would be trained and otherwise assisted in satisfying the licensing requirement. In order to accomplish this, WASA agreed to supply and pay for the training of employees for whom such licensing or certification was required as part of their job requirements. Furthermore, it was agreed that this training would be available for at least twelve (12) months before any certification or licensing test would be required. Also, any employee subject to this provision would be allowed to take the test at least twice before being deemed unable to continue in the affected position. Finally, if an employee failed the test, WASA agreed to train the employee for a minimum of six (6) months, prior to the second and third test, in those skill areas in which the employee was deemed deficient. Employees who wish to take the test again would only be required to be re-tested in the areas in which they were deemed deficient.

Finally, Article 27 of the 1998 agreement provided that in the event an employee could not obtain the required certification or license after being trained and tested at least three times, that employee would be transferred to any vacant position for which he/she is qualified or can perform with minimum training, regardless of seniority.[1] Transferred employees would be allowed to take a re-test for a license or certification (in their original position) whenever the test is scheduled.

The parties negotiated a new CBA which was signed on October 4, 2001. Article 34 of the 2001 agreement contained the same basic provisions that were in Article 27 of the 1998 Agreement. For example, Article 34 states that employees who have performed waste water treatment duties for 20 years, shall be exempt from the certification requirements. However, this provision does not state the time when the 20 year exemption begins to run. Also, Article 34, Section C, provides that employees who are unable to obtain their certification "shall be transferred to any vacant position for

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[1]If the employee is transferred to a position of a lesser grade, that employee would retain the salary that was in effect at the time of the third test, for a period of one (1) year after being transferred to a lesser grade position.

which he/she is qualified or can perform with minimal training." As with the 1998 agreement, the parties did not address what would happen if employees could not be placed in vacant positions.

In the present case, the seven Grievants are all Waste Water Treatment Operators (WWT) with varying degrees of experience. On January 21, 2001, WASA issued a Waste Water Treatment Operator Certification Policy. Pursuant to that policy, WWT Operators were required to be certified. "The policy language promulgated by [WASA] contains language that tracks much of the wording found in Article 27 of the . . .contract provision. Like that language, WWT Operators who do not obtain a certification, 'will be transferred to a vacant position for which he or she is qualified.' The policy also promises that [WASA] will provide minimal training, if needed." (Award at p. 12). The Arbitrator noted that WASA's certification "policy does not address how employees would be transferred or what they needed to do in order to obtain another position. [In addition, the Arbitrator found] that the policy does state. . . that employees shall have a year to attain their certification. [Also, the Arbitrator observed that pursuant to the certification policy,] if [employees] fail to [obtain the required certification] and an eligible vacancy does not become available within 180 days thereafter then the employees can be terminated." (Award at p.12). The Arbitrator determined that the latter language was not contained in the CBA.

On January 22, 2001, each of the Grievants was notified that they had one year to obtain the necessary certification. To assist in meeting that requirement, WASA indicated that it would provide certification training and sponsor the certification examination at no cost.

Approximately two years later, on January 14, 2003, WASA notified the Grievants that they had not obtained the required certification. In addition, the notice indicated that effective January 26, 2003, the Grievants would be temporarily assigned to positions that did not require them to perform duties as certified WWT Operators. Specifically, the Grievants would be assigned work that would include performing housekeeping tasks at WASA.

On July 22, 2003, the seven Grievants received a "Notice of Proposed Disciplinary Action." The July 22nd Notice informed the Grievants that pursuant to Article 57 (disciplinary provision) of the CBA, they would be terminated because they failed to obtain the required certification.

AFGE filed for arbitration concerning the planned terminations. In an Award issued on August 29, 2003, the Arbitrator upheld AFGE's grievance. (Award at p. 19). Specifically, the Arbitrator concluded that the CBA does not provide for an absolute guarantee of employment for those WWT Operators who did not obtain the necessary certification. However, the Arbitrator found that WASA should within 180 days of the date of the Award, attempt to transfer the Grievants to vacant positions. The Arbitrator noted that at the beginning of this 180-day period, management should evaluate each of the Grievants to determine what their range of skills and ability are. "This can include reviewing their applications and also interviewing them." (Award at p. 18). In addition, he indicated that AFGE should participate, as appropriate, in trying to aid in finding appropriate jobs for these individuals. Furthermore, the Arbitrator ruled that if after 180 days these efforts do not result in the placement of some or all of the Grievants, then WASA has the right to terminate the individuals who could not be placed. Finally, the Arbitrator determined that the date for determining when to apply the 20-year exemption would be October 4, 2001.

WASA takes issue with the Arbitrator's Award. WASA claims that the award is contrary to law and public policy. In addition, WASA asserts that the Arbitrator was without authority when he: (a) modified the WWT certification policy by asserting that the actual effective date of the exemption status was October 4, 2001;[2] and (b) dictated to WASA the manner in which it should proceed to fill its vacant positions. (Request at p. 5). Specifically, WASA claims that the Arbitrator rendered an Award that: (1) was not supported by any contractual language and (2) fails to derive its essence from the parties' contract. (Request at pgs. 2 and 5).

As noted above, WASA claims that the award is contrary to law and public policy. In the present case, the Arbitrator reasoned that the issue before him was "whether WASA's conduct [was] consistent with the terms of the parties' collective bargaining agreement." (Award at p. 16). As a result, we believe that one of WASA's grounds for review only involves a disagreement with the Arbitrator's interpretation of Article 34 and Article 58 of the parties' CBA. Moreover, WASA merely requests that we adopt its: (1) interpretation of Article 34 and Article 58 of the parties' CBA and (2) evidentiary findings and conclusions. We have determined that a "disagreement with the Arbitrator's interpretation of the parties' contract does not make the Award contrary to law and public policy." AFGE, Local 1975 and Dept. of Public Works, 48 DCR 10955, Slip Op. No. 413 at p. 3, PERB Case No. 95-A-02 (1995). Moreover, the Board has held that "to set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). See also, AFGE, Local 631 and Dept. of Public Works, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993 and W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983). After reviewing WASA's public policy argument, we find that WASA fails to cite any specific public policy or law that was violated by the Arbitrator's Award. Instead, WASA asserts that Article 34 does not state the date which should be used when computing the 20-year exemption. As a result, WASA claims that "the date for determining the 20-year exemption should be January 21, 2001, the date WASA issued its certification policy." (Request at p. 7). Also, WASA argues that pursuant to Article 58 of the CBA, AFGE should have raised the question of WASA's interpretation of the 20-year exemption at the time it (WASA) made the policy decision in January 2001 and not wait until July 2003. As a result, WASA asserts that the Arbitrator ignored the plain language of Article 58 when he considered the issue of the 20-year exemption. In view of the above, WASA's claims involve only a disagreement with the Arbitrator's interpretation of Article 34 and Article 58 of the parties' CBA. Furthermore, WASA's public policy argument does not rely on a well-defined policy or legal precedent. Thus, WASA has failed to point to any clear public policy or law which the Award contravenes.

In view of the above, we find no merit to WASA's public policy argument. Specifically, WASA disagrees with the Arbitrator's interpretation of Article 34 and Article 58 of the parties' CBA. This is not a sufficient basis for concluding that the Arbitrator's Award is contrary to law and public policy. Also, we believe that the Arbitrator's conclusion is based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. For the reasons discussed, no statutory basis exist for setting aside the Award. Therefore, we cannot reverse the Arbitrator's Award on this ground.

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[2]WASA claims that the October 2001 date is ten months after it implemented the WWT certification policy.

As a second basis for review, WASA asserts that the Arbitrator acted outside the scope of his authority when he: (1) allowed the union to raise the issue concerning the effective date of the 20-year exemption; (2) created a date of October 4, 2001, as the date for determining when to apply the 20-year exemption and (3) dictated to WASA the manner in which it should fill its vacant positions.

In support of its argument WASA cites Articles 21, 34 and 58 of the parties' collective bargaining agreement which provide in pertinent part as follows:

> **Article 21 - Job Placement and Changes**
> The Authority agrees that vacancy announcements shall be posted on official bulletin boards for a period of at least ten (10) workdays prior to the vacancy announcement closing date. Such announcements shall provide a synopsis of duties to be performed, qualifications required, any special knowledge, skills or ability that shall be given consideration.
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> **Article 34, Section A - License and Certification**
> It is determined by the Authority that employees holding certain positions should be certified or licensed, the Authority agrees that all employees with a minimum of twenty (20) years in the position and/or related position at the Authority or its predecessor and an annual satisfactory work performance shall be exempt from the licensing and certification requirement and may retain their present position.
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> **Article 58, Section G - General Grievance and Arbitration Procedures**
> The aggrieved employee. . . and/or the Local Union shall orally or in writing present and discuss. . . the grievance . . . within ten (10) workdays of the occurrence of the event giving rise to the grievance becomes known to the . . . Local Union.

WASA asserts that Article 34 is silent on the issue of the effective date of the 20-year exemption and that the Arbitrator acknowledged this fact. In addition, WASA claims that pursuant to Article 58, the union should have raised the question of the interpretation of the 20-year exemption at the time WASA implemented the certification policy in January 2001 rather than waiting until July 2003. In view of the above, WASA contends that the Arbitrator acted outside the scope of his authority when he: (1) allowed the union to raise the issue concerning the effective date of the 20-year exemption and (2) concluded that the date for determining when to apply the 20-year exemption should be October 4, 2001. (Request at p.6).

Finally, WASA notes that the Arbitrator concluded that the collective bargaining agreement does not provide for an absolute guarantee of employment for those Waste Water Treatment Operators who did not obtain the necessary certification. (Award at p. 19). Nevertheless, the Arbitrator found that WASA should within 180 days of the Award attempt to transfer the Grievants to vacant positions. In addition, he determined that if an employee has not qualified for a vacant position during the 180-day period, then that employee can be terminated. WASA contends that the Arbitrator was without authority when he dictated to the agency the manner in which it should proceed to fill its vacant positions. (Request at p. 5). Specifically, WASA claims that when the

Arbitrator provided detailed language concerning the procedure that WASA should follow, he violated Article 4 and Article 21 of the parties' CBA. (Request at pgs. 5-6).

The Arbitrator acknowledged that Article 58(G)(1) of the CBA indicates that the union shall raise claims within ten working days of the occurrence. However, he noted that one of the Grievants (Mr. Parker) was terminated because management believed that he was not entitled to the 20-year exemption. Furthermore, the Arbitrator determined that this Grievant appealed his termination in a timely manner. As a result, the Arbitrator stated that the issue before him was whether there was just cause to terminate this Grievant. Therefore, in order to determine whether this Grievant should have been terminated, it was necessary to resolve the issue of whether this Grievant was eligible for the 20-year exemption. In view of the above, the Arbitrator concluded that it was appropriate (during the arbitration) to consider the question concerning how to compute the 20-year exemption.

In the present case, the Arbitrator notes that Article 34, Section A of the parties' CBA does not state when the time for the 20-year exemption should run. Also, the Arbitrator reasoned that the parties could have adopted a start date or incorporated the deadlines noted in WASA's Wastewater Treatment Operator Certification Policy (WWT Policy), but did not do so. In view of the above, the Arbitrator indicated that "[t]ypically, in instances where a contract term provides for a particular action or benefit but does not state when it comes into effect, the most logical approach is to use the date in which the contract became effective." (Award at p.17). Using this approach, the Arbitrator concluded that "the 20-year exemption would run backwards from October 4, 2001" (the date the parties signed the new CBA). (Award at p. 17). The Arbitrator noted that this interpretation of Article 34 places it in conflict with WASA's WWT certification policy statement that made January 21, 2001, the date for determining certification. However, he concluded that WASA's certification policy was not a mutually agreed upon document. Furthermore, he determined that Article 2 of the CBA states that in such situations the contract language should prevail over a WASA policy. (Award at p.18). As a result, he found that the correct date should be October 4, 2001 (the date the new CBA was signed). WASA contends that consistent with the "logical approach" reasoning employed by the Arbitrator, the 20-year exemption should run backwards from June 4, 1998 and not October 4, 2001. WASA's claim is based on the fact that June 4, 1998 is the effective date of the collective bargaining agreement which first introduced the 20-year exemption. (Request at p. 5). However, the Arbitrator was not persuaded by WASA's argument.

Based on the above and the Board's statutory basis for reviewing arbitration awards, WASA contends that the Arbitrator exceeded his authority by: (1) ignoring the contractual language in Article 58 and extending the time frame for raising a grievance and (2) unilaterally changing the effective date of the 20-year exemption that was established by WASA's certification policy which was issued on January 22, 2001. (Request at p. 5). We disagree.

We have held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's, that the parties have bargained for." University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 37 DCR 5666, Slip Op. No. 248 at pgs. 3-4, PERB Case No 90-A-02 (1990). Moreover, "[t]he Board will not substitute its own interpretation or that of the [petitioner] for that of the duly designated Arbitrator." District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union No. 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). Also, we have found that by submitting a matter to arbitration, "the parties agree to be

bound by the Arbitrator's interpretation of the parties agreement and related rules and regulations as well as his evidentiary findings and conclusions upon which the decision is based." University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992).

In addition, we have held that an Arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provisions." D.C. Dept. of Public Works and AFSCME, Local 2091, 35 DCR 8186, Slip Op. No. 194 at p. 2, PERB Case No. 87-A-08 (1988). Furthermore, we have determined that an Arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement.[3] See, D.C. Metropolitan Police Department and FOP/MPD Labor Committee, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). In the present case, WASA does not cite any provision of the parties' collective bargaining agreement which limits the Arbitrator's equitable power. Therefore, once the Arbitrator determined that Article 34 requires that an employee who does not obtain the necessary certification shall be transferred to a vacant position, he also had authority to direct that WASA should within 180 days of the award attempt to transfer the Grievants to any vacant position. Furthermore, since the CBA does not limit the Arbitrator's equitable power, he could also outline the procedures for placing these individuals into vacant positions within the 180 day period.

In view of the above, we believe that WASA's second claim only involves a disagreement with the Arbitrator's findings and conclusions. This is not a sufficient basis for concluding that the Arbitrator acted outside the scope of his authority.

As a third basis for review, WASA asserts that the Arbitrator was without authority when he dictated to the agency the manner in which it should proceed to fill its vacant positions. For example, WASA claims that the Arbitrator gave "detailed language of the procedure that the [agency] should follow which was not supported by any contractual language nor [agency] policy." One of the tests that the Board has used when determining whether an Arbitrator has exceeded his jurisdiction and was without authority to render an award is "whether the Award draws its essence from the collective bargaining agreement." D.C. Public Schools v. AFSCME, District Council 20, 34 DCR 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987). See also, Dobbs, Inc. v. Local No. 1614, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 813 F. 2d 85 (6th Cir. 1987). The Board has expounded on what is meant by "deriving its essence from the terms of the collective bargaining agreement." See, MPD and FOP/MPD Labor Committee, 49 DCR 810, Slip Op. No. 669, PERB Case No. 01-A-02 (2001). In addition, the U.S. Court of Appeals for the Sixth Circuit in Cement Division, National Gypsum Co. v. United Steelworkers of America, AFL-CIO, Local 135, has also explained the standard by stating the following:

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

[3]We note, that if the parties' collective bargaining agreement limits the Arbitrator's equitable power, that limitation would be enforced.

> fairness and equity, instead of the precise terms of the agreement. 793 F.2d 759,765 (6th Cir. 1986).

We find that the portion of the Award which prescribes the procedure that should be used when attempting to transfer the Grievants to vacant positions, derives its essence from the parties' collective bargaining agreement and, therefore, meets the standard noted in the MPD and Cement Division cases. Specifically, Article 34, Section C, of the CBA provides that an employee who cannot achieve the required certification or license shall be transferred to any vacant position for which he or she qualifies. The Arbitrator reasoned that "the plain meaning of [Article 34] is that the Grievants' credentials have to be examined to see whether or not they could be placed in a vacant position with or without some training assistance. [Furthermore, the Arbitrator observed that] such analysis ordinarily would be performed by individuals who have experience evaluating not only an employee's qualifications but also whether, with some minimal training, the employee could be qualified to perform the job. [Finally, the Arbitrator concluded that management,] has both the expertise and the responsibility for evaluating employees to determine whether or not they are qualified." (Award at p. 16). In view of the above, the Arbitrator decided that it was necessary to indicate how to proceed when attempting to transfer the Grievants to a vacant position. We believe that the procedures established by the Arbitrator were an attempt to comply with the transfer requirements of Article 34. As a result, we believe that the noted procedures are rational. Therefore, we conclude that this portion of the Award is rationally derived from the terms of the parties' CBA.

For the above noted reasons, we find that WASA's third claim lacks merit. Specifically, WASA's third claim involves only a disagreement with the Arbitrator's interpretation of Article 34 of the parties' CBA and his findings and conclusions. This is not a sufficient basis for concluding that the Award fails to derive its essence from the collective bargaining agreement.

We find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. For the reasons discussed, no statutory basis exist for setting aside the Award; the Request is therefore, denied.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The Arbitration Review Request is denied.

(2) Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

February 6, 2004

Government of the District of Columbia
Public Employee Relations Board

In the Matter of: American Federation of Government Employees, Local 2978, AFL-CIO, Labor Organization, and District of Columbia Department of Health, HIV/AIDS Administration, Agency.	PERB Case No. 03-RC-01 Opinion No. 735 **FOR PUBLICATION**

DECISION ON UNIT DETERMINATION AND DIRECTION OF ELECTION

The American Federation of Government Employees, Local 2978 ("AFGE" or "Petitioner"), filed a Recognition Petition in the above-captioned proceeding. AFGE seeks to represent for purposes of collective bargaining, a consolidated unit of unrepresented professional and non-professional employees of the District of Columbia Department of Health, HIV/AIDS Administration. The Petition was accompanied by a showing of interest meeting the requirement of Board Rule 502.2, a roster of Petitioner's officers and a copy of the Petitioner's constitution as required by the Board Rule 502.1(d).

Notices concerning the Petition were issued on May 5, 2003, for conspicuous posting where Notices to employees are normally located at the District of Columbia Department of Health, HIV/AIDS Administration ("Department of Health"). The Notices indicated that requests to intervene and/or comments should be filed in the Board's Office no later than May 20, 2003. The Department of Health confirmed in writing that the Notices were posted. In addition, the Office of Labor Relations and Collective Bargaining (OLRCB) submitted comments on behalf of the Department of Health. In their comments OLRCB indicated that the agency did not oppose the Petition. However, they claimed that the professional employees may already be represented by District 1199E-DC National Union of Hospital and Health Care Employees ("NUHHCE"), Service Employees International Union. As a result, this matter was referred to a Hearing Examiner in order to determine if the professional employees were represented by NUHHCE. There were no other comments received.

Prior to the hearing, the Hearing Examiner was notified by the parties that NUHHCE was

not challenging the Petition.[1] As a result, the parties entered into a stipulated agreement which settled the issue. In view of the above, the Hearing Examiner recommended that the Board: (1) accept the parties' stipulated agreement and (2) find that the proposed unit is an appropriate unit. There were no exceptions filed concerning the Hearing Examiner's Report.

AFGE seeks to represent the following proposed unit:

> All professional and non-professional employees of the District of Columbia Department of Health, HIV/AIDS Administration; except management officials, supervisors, confidential employees, employees engaged in personnel work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.

D.C. Code § 1-617.09(a) (2001 ed.), requires that a community of interest exist among employees in order for a unit to be found appropriate by the Board for collective bargaining over terms and conditions of employment. An appropriate unit must also promote effective labor relations and efficiency of agency operations.

Our review of the Petition, the Hearing Examiner's Report and attached exhibits reveal the following concerning the proposed consolidated unit. The proposed unit consists of the following employee positions: public health analyst, program assistant, staff assistant, public health advisor, program analyst, medical technician, trainer coordinator, public health service specialist, supply technician and clerical assistant. All of these employees share a common organizational structure and mission within the District of Columbia Department of Health, HIV/AIDS Administration. No other labor organization represents these employees. Also, there is no collective bargaining agreement in effect covering any of these employees.

In view of the above, we adopt the Hearing Examiner's recommendation. Furthermore, we believe that sufficient factors exist for the Board to find that these employees share a community of interest. Such a unit of all professional and non-professional employees at the District of Columbia Department of Health, HIV/AIDS Administration that share a common purpose and mission, would in our view, promote effective labor relations and efficiency of agency operations and thereby constitute an appropriate unit under the Comprehensive Merit Personnel Act.

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[1]As noted above, OLRCB indicated that the agency did not oppose the Petition. However, OLRCB asserted that the professional employees were already represented by District 1199E-DC, National Union of Hospital and Health Care Employees, Service Employee International Union. District 1199E-DC was notified of the hearing and provided with an opportunity to demonstrate that the professional employees were represented by them. However, District 1199E-DC did not attend the hearing and their representative indicated that they would not challenge AFGE's Petition.

Regarding the question of representation, the Board orders that an election be held to determine the will of the eligible employees (in the unit described above), regarding their desire to be represented by AFGE, Local 2978 for purposes of collective bargaining with the District of Columbia Department of Health, HIV/AIDS Administration. Also, in order to conform with the requirements of D.C. Code § 1-617.09(b) (2001 ed.) and Board Rule 510.5 (concerning the inclusion of professional employees and non-professional employees in the same unit), eligible professional employees shall indicate their choice on separate ballots as to: (1) whether they desire to be represented for bargaining on terms and conditions of employment by AFGE, Local 2978; and (2) whether they wish to be included in a consolidated unit with non-professional employees. Eligible non-professional employees, in the same election, shall indicate their choice only as to the former question. Finally, we believe that a mail ballot election is appropriate in this case.

ORDER

IT IS HEREBY ORDERED THAT:

1. The following unit is an appropriate unit for collective bargaining over terms and conditions of employment:

   > All Professional and non-professional employees of the District of Columbia Department of Health, HIV/AIDS Administration; except management officials, supervisors, confidential employees, employees engaged in personnel work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.

2. A mail ballot election shall be held in accordance with the provisions of D.C. Code § 1-617.10 (2001 ed.) and Board Rules 510-515, in order to determine whether or not: (1) all eligible employees desire to be represented for bargaining on terms and conditions of employment by either the American Federation of Government Employees, Local 2978 or No Union; and (2) all eligible professional employees wish to be included in a consolidated unit with non-professional employees. Eligible non-professional employees, in the same election, shall indicate their choice only as to the former question.

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

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

February 5, 2004

Office of the Secretary of the
District of Columbia

March 17, 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 April 15, 2004.

Alsobrooks, Betty Brown	Rpt	Ulico Casualty 111 Mass Ave,NW 20001
Archer, Darlene R.	Rpt	Renee Fox/Attorney at Law 1725 K St,NW#1202 20006
Awolaja, Adeyiuka	New	Wash Hosp Ctr/RmNA1006 110 Irving St,NW 20010
Baker, Kathy	Rpt	Howrey Simon et al 1299 Pa Ave,NW 20004
Brinkman, Kimberley S.	Rpt	U S Senate/Disbursing H S O B #SH127 20510
Burness, Margaret R.	Rpt	Natl Capital Bank of Wash 316 Pa Ave,SE 20003
Caspari, Amy Marie	New	514 11th St,SE 20003
Charles,III, Albert L.	New	Wash Hosp Ctr/RmNA1006 110 Irving St,NW 20010
Chouinard, Christopher M.	New	WRAMC/C J A 6900 Ga Ave,NW 20307
Cunningham, Andra E.	Rpt	F C C 445 12th St,SW 20554
Darbo, Momodou L.	New	Wash Hosp Ctr/RmNA1006 110 Irving St,NW 20010

Davis, Gloria Y.	New	Wash Hosp Ctr/RmNA1006 110 Irving St,NW 20010
Davis, Kimberly	New	NASA Fed Credit Union 300 E St,SW 20456
Davis, LaKeasha A.	New	AFRAM Group 1101 17th St,NW#500 20036
Davis, Simone	New	Stewart Title Group 11 DuptCircle,NW#750 20036
Debelie, Chernet W.	New	1201 U St,NW#202 20009
Diggs, Leah H.	New	Amer Pub Trans Assoc 1666 K St,NW#1100 20006
Douglas, Rodney S.	Rpt	Redbox Group 1612 U St,NW#405 20009
Emberley, Daniel	New	Zahn Design Architects 1327 14th St,NW 20005
Fedor, Thelma L.	Rpt	Nixon Peabody 401 9th St,NW#900 20004
Feuer, Michael	New	Nicholas Gilman & Assoc 600 Pa Ave,SE #410 20003
Frazier, Jenifer B.	Rpt	Sonosky Chambers et al 1425 K St,NW#600 20005
Galiano, Susan L.	Rpt	Paralegal Assoc of Wash 1001 Conn Ave,NW#1137 20036
Gaskins, Collesta Y.	Rpt	Chronicle of Higher Ed 1255 23d St,NW 20037
Gaskins, Gloria A.	Rpt	Kleinfled Kaplan & Becker 1140 19th St,NW#900 20036

Gilmore, Cheryl	Rpt	Union Labor Life Insur 111 Mass Ave,NW 20001
Gittens, James P.	New	Session Title Service 1150 Conn Ave,NW#900 20036
Grant, Richard R.	New	Hurwitz & Abramson 1735 20th St,NW 20009
Halivis, Albert E.	New	1610 16th St,NW#B1 20009
Hargrove, Beverly L.	New	B B & T 1909 K St,NW 20006
Hereford, Carolyn	Rpt	734 Hobart Pl,NW 20001
Higginbotham, Deborah T.	New	WMATA 600 5th St,NW 20001
Holt, Matthew G.	Rpt	U S Senate/Disbursing H S O B #SH127 20510
Jeffcoast, Mary A.	Rpt	Natl Endowment/Humanities 1100 Pa Ave,NW 20506
Johnson, Mary E.	Rpt	Life Stride 3005 BladensburgRd,NE20018
Jones, Latisha L.	New	K P M G 2001 M St,NW 20036
Kaufmann, Roy L.	Rpt	Jackson & Campbell 1120 20th St,NE#300 20036
Kiedrowski, Sandra	Rpt	Sutherland Asbill et al 1275 Pa Ave,NW 20004
Kobiec, Stephen M.	Rpt	Mercer Human Resource Con 1255 23rd St,NW#500 20037

Lamborn, William C.	Rpt	Smithsonian/Gen Counsel 1000 JeffersonDr,SW 20560
Lasher, Julia	New	Jewish War Vets/USA 1811 R St,NW 20009
Laughlin, Ellen D.	Rpt	Boards & Commissions 441 4th St,NW#530S 20001
McFadden, Angela B.	Rpt	Finnegan Henderson et al 1300 I St,NW 20005
Marrow, Gwendolyn E.	Rpt	Holland & Knight 2099 Pa Ave,NW#100 20006
Murphy, Kimberly A.	Rpt	Weber's Volvo Trucks 1331 Half St,SE 20003
Navarro, Ramon P.	New	Elizabeth Glaser Ped AIDS 1140 Conn Ave,NW#200 20036
Odom, William L.	Rpt	U S House of Reps 1718 Longworth Bldg 20515
Orzatty, Jeniffer	New	Union Multi-Care Med Ctr 6323 Ga Ave,NW#106 20011
Overton, Jonathan	New	Elizabeth Glaser Ped AIDS 1140 Conn Ave,NW#200 20036
Pacuska, Alison	New	Westerman Hattori et al 1250 Conn Ave,NW#700 20036
Parker, Joyce C.	Rpt	N E A 1201 16th St,NW 20036
Phillips, Michael L.	Rpt	The U P S Store 611 Pa Ave,SE 20003
Pierce, Linda C.	New	Sidley Austin Brown Wood 1501 K St,NW 20005

Plummer, Ida H.	New	Amer Pub Health Assoc 800 I St,NW 20001
Reinhardt, Christopher	New	AmeriTitle 5100 Wis Ave,NW#520 20016
Roberson, David W.	Rpt	U S Senate/Disbursing Hart SOB #SH127 20510
Sass, Paige A.	New	Elizabeth Glaser Ped AIDS 1140 Conn Ave,NW#200 20036
Saunders, Janell R.	New	Bracewell & Patterson 2000 K St,NW#500 20006
Scott, Karen J.	Rpt	Martin & Associates 1827Jefferson Pl,NW 20036
Sommer, Gerald Ira	Rpt	S E I U 1313 L St,NW 20005
Surratt, Rick	Rpt	Disabled Amer Vets 807 Maine Ave,SW 20024
Swanson, Diane E.	Rpt	Akin Gump et al 1333 N H Ave,NW 20036
Taggart, Cheyenne Yasmin	New	B E T Holdings 1235 W St,NE 20018
Taylor, Alysia Y.	Rpt	Dimensions Entertainment 6829 4th St,NW 20012
Taylor, Ewing Bevard	Rpt	F D I C 550 17th St,NW 20429
Thrasher, Gerald M.	Rpt	U S Senate/Disbursing H S O B #SH127 20510
Tiller, Ethyl L.	Rpt	Natl Public Radio 635 Mass Ave,NW 20001

Villodas, Mary L.	Rpt	Winston & Strawn 1400 L St,NW 20005
Walker, William H.	Rpt	WesleyTheologicalSeminary 4500 Mass Ave,NW 20016
Waller, Charlotte R.	New	Haynes & Boone 555 11th St,NW#650 20004
Warthen, Cassandra N.	New	Gore Reporting 1050 17th St,NW 20036
Washington, Joan M.	Rpt	Sonnenschein Nath et al 1301 K St,NW#600ET 20005
Whitley, Katherine	New	Wilmer Cutler Pickering 2445 M St,NW 20037
Whitson, Paul B.	Rpt	Bank Fund Staff F C U 1818 H St,NW 20433
Williams, Daisy	Rpt	D H S 2700 MLK Ave,SE#801E 20032
Williams, Marlaine D.	New	Wilmer Cutler Pickering 2445 M St,NW 20037
Winters, Jean M.	Rpt	Wannen & Company 1666 K St,NW#400 20006
Worthy, Dorothy H.	Rpt	Nineteenth Street Bapt Ch 4606 16th St,NW 20011
Zabel, Eric J.	Rpt	U S Senate/Disbursing H S O B #SH127 20510

SECRETARY OF THE
DISTRICT OF COLUMBIA

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

Memorandum Opinion

Appeal of: Dan Keating, Database Editor
The Washington Post Company

Matter No: 390592

Date: March 25, 2004

OPINION

A. Brief Procedural and Factual Background

Pursuant to section 207(a) of the District of Columbia Freedom of Information Act ("D.C.-FOIA"), D.C. Official Code § 2-537(a)(2001), the appellant, Dan Keating ("Keating"), Database Editor, *The Washington Post Company*, filed the present appeal with Mayor Anthony A. Williams[1] from a written determination from the Office of the Chief Financial Officer ("OFCO") which "relates to the denial of

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

Zip Code and date of birth information." Keating Appeal letter dated 5 May 2003.[2]

According to Keating's appeal letter, his D.C.-FOIA request, which acknowledged that the "home street address of DC and DCPS employees is considered private information not subject to release," sought the following information:

> An electronic copy/extract of the entire existing District of Columbia payroll database including all payments recorded in the existing systems (CAPPS and UPPS) since Jan. 1, 2000. . . . [T]he request includes the zip code on the check, since the zip code is general geographic information that does not reveal invasive personal information. The request includes the employee information fields such as date of birth, hire date, pay rate and classifications. . . .

Keating Appeal letter ¶ 2

OCFO partially denied the subject request in a letter to Keating which informed him that "the information contained on the computer disks does not include the date of birth or zip code information." Letter dated April 29, 2003 from R. James, Disclosure Counsel, OCFO to D. Keating.

The exclusion of birth date and zip code information from the database records disclosed in response to Keating's D.C.-FOIA request prompted him to exercise his

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

statutory right to challenge the propriety of OFCO's determination to withhold responsive information per the instructions in OFCO's partial denial letter which advised, in part, that "[i]n the event you should desire to appeal this partial denial, you may petition the Mayor to review the public record in accordance with § 2-537 of the District of Columbia Code." Id.

B. Applicable Law, Analysis, and Disposition

Applicable Law

Section 204(b) of the D.C.-FOIA provides as follows:

> Any reasonably segregable portion of a public record shall be provided to any person requesting the record after deletion of those portions which may be withheld from disclosure pursuant to subsection (a) of this section. *In each case, the justification for the deletion shall be explained fully in writing, and the extent of the deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (a) of this section under which the deletion was made.* If technically feasible, the extent of the deletion and the specific exemptions shall be indicated at the place in the record where the deletion was made.

See D.C. Official Code § 2-534(b)(emphasis added).

Analysis

OCFO's response in support of its partial denial of Keating's D.C.-FOIA request briefly stated that "[t]he information contained on the computer disks does not include the date of birth or zip code information requested because this information is exempt under DC Code § 2-

534(2)[sic]." Letter dated April 29, 2003 from R. James to D. Keating.[3]

The threshold issue that is raised on appeal is whether the birth date and zip code data constitutes personal information.

In a supplemental letter in support of his appeal, Keating points out that a federal statute, the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725 (2000), does not treat zip code information as personal information:[4]

> There is clear federal precedent for the question that zip code information is not personal private information. The clearest example is the Driver Privacy Protection Act 18 U.S.C. § 2721 (et. seq.). This law was created entirely for the protection of private information. Yet in its definitions, Sec. 2725(3) it explicitly states that the zip code is not

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[3] D.C. Official Code § 2-534**(a)**(2)("D.C.-FOIA Exemption 2") protects from disclosure "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]" (emphasis added in bold).

[4] Subject to certain exceptions, the Driver's Privacy Protection Act makes it unlawful for any officer, employee, or contractor of a state Department of Motor Vehicles to "knowingly disclose or otherwise make available to any person or entity *personal information* about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721 (emphasis added).

As defined in the Driver's Privacy Protection Act, "'personal information' means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, *address, (but not the 5-digit zip code)*, telephone number . . . ." 18 U.S.C. § 2725 (emphasis added).

> private information. That statement was a summary of longstanding federal position that the zip code is not private information.

Letter dated 8 January 2004 from D. Keating to Mayor Anthony A. Williams.

The likelihood that the release of birth date and zip code information for a large class of individuals, by itself, could be used to identify a particular individual or class of individuals appears to be remote. However, this office is mindful that OCFO has already provided a significant amount of information from its payroll database to Keating pursuant to his D.C.-FOIA request.

In the present matter, OCFO did not provide any justification whatsoever as to why the segregation of the information in the payroll database provided to Keating from the birth date and zip code data withheld from him was necessary to prevent a finite risk of disclosing personally identifying information. Therefore, it is necessary to remand this matter to OCFO to address, via affidavit(s), whether the withheld birth date and zip code information, standing alone, or in combination with the disclosed payroll database information, could potentially reveal "personal information" which implicates a personal privacy interest that may be protected from disclosure under D.C.-FOIA Exemption 2.

Assuming, arguendo, that the disclosure of personal information is at stake by the release of birth date and zip code information, it is necessary for OCFO to provide an explanation to support its nondisclosure determination in accordance with the standards applicable to D.C.-FOIA Exemption 2. In this regard, OCFO must sustain its burden of showing that the privacy interests triggered by the release of the birth date and zip code information outweighs the public interest in disclosure, the net result of which would constitute a clearly unwarranted invasion of personal privacy.[5]

Disposition

Based on the record evidence, this office is unable to determine whether the disclosure of the birth date and zip code information, in combination with the information from the OCFO's payroll database already made available to Keating, could pose a substantial risk of disclosing information that could likely lead to the identification of the particular individuals to whom it pertains and, consequently, create a clearly unwarranted invasion of personal privacy.

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[5] For a detailed analysis of the legal standards applicable to D.C.-FOIA Exemption 2, see *Appeal of The Washington Post Company*, Matter No. 01-170008 (September 7, 2001), 48 D.C. Reg. 8629 (September 14, 2001).

Accordingly, this matter is remanded to OCFO for further amplification of the record.

C. Conclusion

For all the foregoing reasons, this is appeal is required to be, and hereby is, remanded to OCFO for further information to supplement the record in accordance with the instructions below.

On remand, OCFO, in accordance with the requirements of D.C. Official Code § 234(b), and consistent with the balancing test applicable to D.C.-FOIA Exemption 2, shall prepare a written justification which explains fully the reason(s) for the exclusion of the birth date and zip code information and, if it has not already done so with respect to the payroll database information already disclosed, shall also indicate the extent of the deletions on the portion of the records released.

OCFO is further directed to provide its written justification to the Office of the Secretary of the District of Columbia, with a courtesy copy to appellant Keating, within five (5) working days of its receipt of this opinion.

OCFO shall also provide a written certification to the Mayor (via the General Counsel to the Mayor), with a courtesy copy to the Office of the Secretary, stating its

compliance, or reasons for noncompliance, with the instructions herein.

SHERRYL HOBBS NEWMAN
SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16144 of Trust for Public Land, pursuant to 11 DCMR § 3103.2 and 3104.1, for special exceptions under section 335 to allow a new residential development, a special exception under section 410 to allow a group of one-family dwellings to be erected and deemed a single building and under section 209 to establish a community center building, and a variance from subsection 410.8, a variance from the floor area ratio requirements under section 402, a variance from the rear yard requirements under section 404, a variance from the off-street parking requirements under subsection 2101.1, for the subdivision and construction of 88 row dwellings, 44 semi-detached dwellings and a community center building in an R-5-A District in the area of Anacostia Avenue, Foote Street, Hayes Street, Kenilworth Avenue, Barnes Street, and Parkside Place, N.E. (Square 5041, Lots 806-808, 811, 814, 815, 817, 818, 820, 821 and 823, and in Square 5056, Lots 806, 808-816, 818, 820, 821and 823).

HEARING DATE: June 5, 1996
DECISION DATE: July 10, 1996, March 2, 2004

DISMISSAL ORDER

On July 10, 1996, the Board of Zoning Adjustment (Board) approved special exceptions for the development of Phase II of the above-referenced application. At that time, the applicant requested a deferment payment of the $52,800 filing fee. Over the last seven years, this office has contacted the applicant on numerous occasions concerning the status of the filing fee. In a letter to the Board dated March 28, 2000, the applicant requested an additional extension of time to pay the fee, due to pending litigation involving the property. The Board at its April 5, 2000, public hearing granted the request for an additional extension. On February 22, 2001, OZ office wrote the applicant a letter requesting an update on the court's determination within 90 days. OZ never received a reply. On August 6, 2002, the OZ again wrote the applicant, this time noting that the OZ intends to recommend to the Board that this application be dismissed for failure to comply with the procedural requirements of Title 11 DCMR Zoning Regulations. No follow-up correspondence has been received from the applicant in over a year relevant to the foregoing. Given the foregoing, including the considerable time period that has transpired and the fact that the Board members who heard the case are no longer sitting, the OZ recommended that the Board dismiss the above-cited application.

At the Board's monthly meeting on March 2, 2004, the OZ reported the aforementioned status of the application and recommended that the Board dismiss

the application for failure of the Applicant to comply with the procedural requirements of Chapter 31 of the Zoning Regulations.

In light of the foregoing, the Board hereby **ORDERS** that the application be **DISMISSED**.

VOTE: **4-0-1** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr. and David A. Zaidain to dismiss the application, the Zoning Commission member not present not voting).

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

FINAL DATE OF ORDER: MAR 0 5 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. rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16486 of Tosha Walker, pursuant to 11 DCMR § 3103.2, for a variance from the lot area requirements under section 401, a variance from the rear yard requirements under section 404, and a variance from the nonconforming structure provisions under subsection 2001.3, for an addition and conversion of an existing private garage to a single-family dwelling in the R-4 District at premises 439 15th Street, S.E. (Square 1062, Lot 804).

HEARING DATE: September 29, 1999
DECISION DATE: March 2, 2004

DISMISSAL ORDER

This application was filed with the Office of Zoning (OZ) on May 21, 1999. The public hearing on the application was held on September 29, 1999. The Board of Zoning Adjustment (Board) members who heard the case are no longer sitting. The application was opposed at the hearing. During the course of the hearing, the Board determined that the applicant, who resides in North Carolina, needed more time to prepare to address the burden of proof for the relief being requested. The Board continued the hearing to an unspecified date and asked the OZ to provide the applicant with a list of items that are needed before the case can be re-scheduled for a hearing. The OZ provided the applicant with this information. Not hearing back from the applicant for a considerable time, the OZ by letter dated January 14, 2000, advised the applicant that it would recommend that the case be dismissed unless she responded by January 31, 2000. The OZ sent another letter to the applicant on April 8, 2002, inquiring of her intentions to proceed with the application. The OZ received a letter on April 29, 2002, from the applicant stating her intentions to proceed with the application, noting that she is looking for representation to act on her behalf. Not hearing back from the applicant for six months the OZ sent a letter dated October 25, 2002 to the applicant advising that if the outstanding information is not received by December 1, 2002, that OZ will recommend that the Board dismiss the application. No follow-up correspondence has been received from the applicant in over a year relevant to the foregoing. Given the substantial time that has passed, and the applicant's failure to provide the additional information requested after due notice and expiration of a reasonable time, the OZ recommended that the Board dismiss this application for failure to comply with the provisions of the Zoning Regulations under subsection 3100.6.

At the Board's monthly meeting on March 2, 2004, the OZ reported the aforementioned status of the application and recommended that the Board dismiss

the application for failure of the Applicant to comply with the procedural requirements of the Zoning Regulations.

In light of the foregoing, the Board hereby **ORDERS** that the application be **DISMISSED**.

VOTE: **4-0-1** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr. and David A. Zaidain to dismiss the application, the Zoning Commission member not present not voting).

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

FINAL DATE OF ORDER: MAR 05 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. rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16875 of All Souls Memorial Episcopal Church, pursuant to 11 DCMR § 3104.1 for a special exception to allow the use of an existing accessory parking lot for weekday parking under section 213 in the R-4 District at premises 2300 Cathedral Avenue, N.W. (Square 2208, Lots 23 & 24).

HEARING DATE: May 29, 2002
DECISION DATES: July 2, 2002; January 21, 2003, February 10, 2004

DECISION AND ORDER

The Applicant in this case is All Souls Memorial Episcopal Church, the owner of the property that is the subject of the application. The Zoning Administrator informed the Applicant by memorandum dated February 25, 2002 that its request for a certificate of occupancy to use the subject property as a parking lot for weekday parking required approval as a special exception under 11 DCMR § 213. By letter dated March 8, 2002, the Applicant authorized Brigitte L. Adams to seek the special exception on its behalf. The application for a special exception pursuant to section 213 was filed March 11, 2002.

Following a hearing on May 29, 2002 and a public meeting on July 2, 2002, the Board voted 3-0-2 to grant the application subject to conditions. On December 10, 2002, prior to the filing of a final decision, the Board voted pursuant to 11 DCMR § 3124.2 to re-open the record in this proceeding to receive additional information from the parties with respect to the Applicant's burden of proof under sections 213 and 3104.1. After receiving a supplemental filing from the Applicant and a response from the party in opposition, the Board denied the application on January 21, 2003 by a vote of 3-0-2.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated March 15, 2002, the Office of Zoning mailed notice of the application to the Councilmember for Ward 3, the Office of Planning, Advisory Neighborhood Commission ("ANC") 3C, Single Member District/ANC 3C01, and the Department of Public Works. Pursuant to 11 DCMR § 3113.13, the Office of Zoning mailed letters or memoranda dated March 25, 2002 to the Applicant, ANC 3C, and all owners of property within 200 feet of the subject property, providing notice of the hearing.[1]

[1] The Board later learned that the subject property was affected by the recent redistricting of ward boundaries and is now located in Ward 1, although still within the boundaries of ANC 3C.

Requests for Party Status. ANC 3C was automatically a party in this proceeding. The Board granted party status to Peter Choharis, the owner of a residence in the 2700 block of Woodley Place directly opposite the main entrance to the subject parking lot.

Applicant's Case. The Applicant requested a special exception to allow the weekday use of up to 17 parking spaces by contract arrangement on the Applicant's existing parking lot, which provides accessory parking for the adjacent church. The Applicant asserted that the proposed expanded parking lot use would be in harmony with the intent of the Zoning Regulations and would not adversely affect the use of neighboring property, but would enhance the neighborhood by providing additional weekday parking in an area that has a serious parking shortage.

Government Reports. By memorandum submitted May 24, 2002, the Office of Planning recommended approval of the application. By report dated May 24, 2002, the District Department of Transportation indicated its support for the proposed parking arrangement between the Applicant and business owners, employees, and residents of the Woodley Park community.

ANC Report. By resolution dated April 22, 2002, adopted by unanimous vote at its regular public meeting with a quorum present, ANC 3C indicated its full support for the Applicant's request for a special exception to allow weekday use of its parking lot by neighborhood businesses.

Party in Opposition. The party in opposition, Peter Choharis, testified that the weekday use of the subject parking lot would have adverse noise and safety impacts on the residential community, and that the business community could find long-term parking in other lots throughout the neighborhood.

Hearing. A public hearing on the application was held March 29, 2002. Testimony and evidence was provided by the Applicant, the Office of Planning, and Peter Choharis. While the Applicant originally requested a special exception under section 213, the Board determined that the Applicant required variance relief because the subject parking lot did not satisfy two conditions for special exception approval pursuant to section 213; specifically, subsections 213.2 and 213.3, relating to the location of the parking lot relative to the closest Commercial or Industrial district.

FINDINGS OF FACT

1. The subject property is a parking lot adjacent to a church building located at 2300 Cathedral Avenue, N.W. (Square 2208, Lots 23 and 24). The Applicant has owned the property since 1913. The church building was constructed in 1923 as an enlargement of a smaller building built in 1914, and the accessory parking lot has been in use since about 1930.

2. The site is bounded on the north and east by local streets (Cathedral Avenue and Woodley Place, respectively), on the south by residential property, and on the west by a 15-foot public alley that runs parallel to Connecticut Avenue. The rowhouse abutting the parking lot at its southern edge is also owned by the Applicant.

3. The parking lot has an area of approximately 10,000 square feet and contains 21 spaces, only four of which are used regularly during weekdays for church business. The parking lot has entrances on Woodley Place and on the alley; the alley entrance is presently chained closed.

4. The subject property is zoned R-4 and is located in the Woodley Park section of Ward 1. The surrounding land use is predominantly residential, primarily rowhouses and large apartment buildings.

5. The Applicant proposes to allow weekday parking in its parking lot on a contract basis to residents, businesses, and business employees in the community. The Applicant plans to enter into contracts with the intent to maintain control over the use of its spaces and to charge a reasonable monthly or annual fee to each contract holder. Contract holders would be permitted to park in the subject parking lot between midnight Sunday and midnight Friday, excluding Christmas. Spaces would not be rented for periods of less than one month.

6. The Office of Planning ("OP") recommended approval of the Applicant's request even though the Applicant "has not fully met all of the criteria" for special exception relief under section 213. OP's recommendation was based on its conclusion that "the addition of 17 parking spaces in the area where parking is at a premium would serve a greater need in the community."

7. According to OP, the Commercial districts closest to the subject site are: (a) an area within the Woodley Park Neighborhood Commercial Overlay district whose underlying zone is C-2-B, located approximately 750 feet, or one block, from the southern edge of the subject parking lot; and (b) an area on the west side of Connecticut Avenue north of Cathedral Avenue, zoned C-2-A and located approximately 900 feet, or two blocks, from the Applicant's church building. OP did not indicate that any Industrial district is the vicinity of the subject property.

8. The District Department of Transportation ("DDOT") had no objection to the requested special exception, which DDOT concluded would not have an adverse traffic or parking impact on the neighboring residential area. Citing "a serious overflow of vehicular traffic in the Woodley Park community generated by customers of retail establishments in search of curb parking spaces" and "overflow

traffic . . . forced into residential areas," DDOT concluded that the proposed parking arrangement would help to alleviate some of the parking shortages in the community.

9. ANC 3C unanimously voted to support the Applicant's request for a special exception on grounds that (a) "the extremely limited street parking in Woodley Park is frequently further stressed by events at local businesses, [so that] residents are often forced to search for street parking and to park far from their residences;" (b) the additional parking proposed by the Applicant would help alleviate the neighborhood parking shortage; and (c) the Applicant's request has the full support of the Woodley Park Community Association.

10. The Woodley Park Community Association passed a resolution by unanimous consent at its meeting on April 19, 2001 expressing its support for the Applicant's efforts "to rent parking spaces in its adjacent parking lot to local business owners and residents."

CONCLUSIONS OF LAW

The Applicant seeks a special exception under section 213, pursuant to 11 DCMR § 3104.1, to allow weekday use of an existing parking lot accessory to a church use. Pursuant to section 213, use as a parking lot is permitted in a Residence district if approved by the Board as a special exception, subject to the provisions enumerated in that section. The provisions include that a parking lot in a Residence zone (a) must "be located in its entirety within two hundred feet (200 ft.) of an existing Commercial or Industrial District," 11 DCMR § 213.2, and (b) must "be contiguous to or separated only by an alley from a Commercial or Industrial District." 11 DCMR § 213.3.

The Board credits OP's testimony that the subject parking lot is located approximately 750 and 900 feet from the two closest Commercial zones in the vicinity of the site, and finds further that there is no Industrial zone within 200 feet of the subject property. Accordingly, the Board concludes that the subject property fails to satisfy two provisions of section 213; specifically subsection 213.2, which requires location of a parking lot entirely within 200 feet of a Commercial or Industrial zone, and subsection 213.3, which requires location of the parking lot contiguous to or separated only by an alley from a Commercial or Industrial District. Because the subject property cannot satisfy two provisions listed in section 213 as requirements for special exception approval of use as a parking lot in an R-4 district, the Applicant's request for a special exception under section 213 must be denied unless the Applicant can satisfy the burden of proof for a variance from the two provisions at issue.

Recognizing the subject property's noncompliance with subsections 213.2 and 213.3, the Applicant asserts that a variance is warranted under the circumstances. The Board is

authorized to grant a variance from the strict application of the zoning regulations where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of the property, the strict application of any zoning regulation would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that 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. D.C. Official Code § 6-641.07(g)(3) (2001); 11 DCMR § 3103.2.

An applicant for a use variance must make the greater showing of "undue hardship," as opposed to the lesser showing of "practical difficulties," which applies in area variance cases. *Palmer v. Board of Zoning Adjustment,* 287 A.2d 535, 541 (D.C. 1972). The variance relief sought here does not fall neatly into either of the traditional variance categories. The Applicant does not seek greater height, setback, density, lot occupancy, or other similar types of zoning relief associated with area variance. Indeed, the relief sought does not even relate to its property as such, but the distance between its property and the zone boundary. However, it cannot be said that the relief sought would introduce a use that is not allowed in the zone district under any circumstances, and thus does not comport with the traditional view of a use variance.

However, determining which variance test should be applied to a particular application does not necessarily depend upon whether the relief seems to concern area or use limitations. In *Taylor v. D.C. Board of Zoning Adjustment,* 308 A.2d 230 (D.C. 1973), the Court of Appeals found that the various types of area relief sought by that applicant would, if granted, "drastically alter the character of the zoned district" and therefore was subject to the undue hardship burden. *Id.* at 233. This approach is consistent with what one commentator has described as a "common thread" running through court decisions that have grappled with non-traditional variance requests. "If the variance will permit a use of the land that changes the character of the neighborhood, then it is more likely that the variance will be held to be a use variance." 1 E. Ziegler, Rathkopf's The Law of Zoning and Planning § 58:4, p. 58-17 (4th ed. 2001).

This application involves a proposal to introduce a use – a parking lot in a Residence zone – under conditions other than those required for special exception approval under section 213. The subject property currently serves as accessory parking for a church, and the Applicant proposes to expand the existing use to allow the weekday parking by business and residential users not accessory to the church use. The Applicant seeks a variance from two conditions for special exception approval: location of a parking lot entirely within 200 feet of a Commercial or Industrial zone, and location of the parking lot contiguous to or separated only by an alley from a Commercial or Industrial District.

The requested variance, while not "a use variance in its purest form,", *Taylor, supra.*, would significantly alter the character of the Residence zone district of the subject property by permitting a public parking lot use on property where parking lot use is not permitted except by special exception subject to several provisions, including two that the Applicant is unable to meet. Both the Applicant and the party in opposition made arguments regarding undue hardship, the standard applicable to a request for a use variance. *Palmer*, 287 A.2d 535, 541 (D.C. 1972). Because the Board finds that the location of the proposed accessory parking lot could potentially change the character of this neighborhood, it is appropriate to analyze the application using the undue hardship standard.

The Applicant contends that a use variance would be appropriate because the parking lot has been in continual use for 70 years, the land surrounding the subject site has been completely developed, and the Applicant is unable to relocate its parking lot closer or adjacent to a commercial district to meet the technical criteria of subsections 213.2 and 213.3. According to the Applicant, the undue hardship resulting from its inability to relocate the parking lot supports the approval of a use variance. The Applicant also argues that approval of a variance is warranted because the expanded use of the otherwise largely vacant facility to long-term weekday use by residents and neighborhood businesses would promote the greater good of the community, reduce circling traffic on residential streets, and advance the Comprehensive Plan, without affecting the use of neighboring properties.

Peter Choharis, the party in opposition to the application, asserts that the subject property is not unique, and that its use as a parking lot for more than 70 years demonstrates that the Zoning Regulations do not preclude the use of the property. He also contends that the Applicant's proposed expanded use of the parking lot would not satisfy parking needs in the area but would create adverse noise and safety impacts on neighboring residential properties.

Even accepting *arguendo* the Applicant's assertion that the subject property is unique, the Board concludes that the Applicant has failed to demonstrate that the strict application of the Zoning Regulations would result in undue hardship upon the Applicant as owner of the property. The primary use of the Applicant's property is as a church, and the subject parking lot has been used for more than 70 years as an accessory parking lot serving the principal church use. The accessory use is consistent with the Zoning Regulations and is expected to continue in the future. Accordingly, the Board cannot conclude that the Applicant is unable to use the subject property consistent with the Zoning Regulations, or that the strict application of the Zoning Regulations creates undue hardship on the Applicant as the owner of the subject property.

The Board is not persuaded by the Applicant's argument that undue hardship results from its inability to relocate the parking lot closer to a commercial district to meet the requirements of subsections 213.2 and 213.3. The parking lot exists to provide accessory parking for the church; if the Applicant wished to provide parking at another location, at a greater distance from the church, it could seek to do so subject to the requirements of section 213 or other applicable provision. The Applicant has not demonstrated that any hardship results to the Applicant by limiting the use of the accessory parking spaces to their intended purpose of providing parking accessory to the principal church use of the property. *See, e.g. Palmer*, 287 A.2d 535, 542 (D.C. 1972) (a use variance cannot be granted unless a situation arises where reasonable use cannot be made of the property in a manner consistent with the Zoning Regulations).

The Board has accorded ANC 3C the "great weight" to which it is entitled. The record reflects that the affected ANC voted unanimously to support the application for a special exception to allow weekday use of the subject accessory parking lot. The Board credited the unique vantage point held by the ANC with respect to the effect of the requested special exception on its constituents. However, the Board concludes that the ANC report did not offer persuasive advice that would cause the Board to find that the application to allow use as a parking lot in an R-4 zone would be consistent with the requirements for a special exception under section 213 or with the statutory requirements for a variance.

For the reasons stated above, the Board concludes that the Applicant has not satisfied the burden of proof with respect to the application for a special exception or variance allowing use as a parking lot in an R-4 zone. Accordingly, it is therefore **ORDERED** that the application is **DENIED.**

VOTE: **3-0-2** (Geoffrey H. Griffis, Anne M. Renshaw, and Carol J. Mitten to deny the application; Curtis L. Etherly, Jr. not present, not having heard the case; and David A. Zaidain not present, not voting)

Because the term of Board member Anne M. Renshaw expired before issuance of this order, the Board conducted a second decision meeting on February 10, 2004 and voted to **ADOPT** this **ORDER** as the decision of the Board as follows:

VOTE (February 10, 2004) **3-0-2**: (Geoffrey H. Griffis, Carol J. Mitten and David A. Zaidain to approve the issuance of this order; Curtis L. Etherly, Jr. not voting, not having heard the case; Ruthanne G. Miller not voting, not having heard the case)

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

FINAL DATE OF ORDER: MAR - 1 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. MN/rsn

GOVERNMENTOF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17080 of Asian American LEAD pursuant to 11 DCMR § 3104.1 for a special exception to allow the establishment of a community center under section 209 in the R-4 District at premises 1323 Girard Street, N.W. (Square 2855, Lot 828).

HEARING DATE: December 2 and December 9, 2003
DECISION DATE: January 20, 2004

DECISION AND ORDER

This application was submitted on September 9, 2003 by Asian American LEAD ("Applicant"), the owner of the property that is the subject of the application. The self-certified application requested a special exception to establish a community center at 1323 Girard Street, N.W. (Square 2855, Lot 828). Following a hearing conducted on December 2 and 9, 2003 and a public meeting on January 20, 2004, the Board granted the special exception for a term of five years by a vote of 3-0-2.

PRELIMINARY MATTERS:

Notice of Application and Hearing. By memoranda dated September 10, 2003, the Office of Zoning mailed notice of the application to the Office of Planning ("OP"), the Department of Transportation ("DDOT"), the Councilmember for Ward One, Advisory Neighborhood Commission ("ANC") 1B, and Single Member District/ANC 1B08. Pursuant to 11 DCMR § 3113.13, the Office of Zoning mailed letters or memoranda dated September 25, 2003 to the Applicant, ANC 1B, and all owners of property within 200 feet of the subject property, providing notice of the hearing. Notice of the hearing was also published in the *D.C. Register* on October 3, 2003 (50 DCR 8174).

Requests for Party Status. ANC 1B was automatically a party in this proceeding. The Board granted requests for party status in opposition to the application from Gary Imhoff and Dorothy Brizill, residents of the property abutting the subject property.

Applicant's Case. The Applicant presented testimony from witnesses including the executive director and co-chair of the board of directors of Asian-American LEAD, who described the proposed community center use, and an architect, who described proposed modifications to the building and parking area to accommodate the community center use.

Government Reports. By report dated November 13, 2003 and through testimony at the public hearing, the Office of Planning recommended approval of the requested special

exception for a period of five years. According to OP, DDOT expressed no objection to the Applicant's proposed use of the subject property.

ANC Report. By letter dated November 9, 2003, ANC 1B indicated that, at a public meeting with a quorum present, the ANC voted unanimous support for the application.

Parties in Opposition. The parties in opposition to the application did not request denial of the application, but did express concerns about the concentration of community-based facilities and social service institutions already located in the residential neighborhood in the vicinity of the subject property, adequate parking for the Applicant's proposed community center, adequate adult supervision of its clients, and an adequate fire escape and modifications of the exterior building that might adversely affect the residential character of the neighborhood. The parties in opposition also requested that the BZA review after 2 years any exception or variance that might be granted.

Persons in support or opposition. The Board received several letters in support of the application and heard testimony in support from Bill Shortinghouse, a resident of a dwelling directly across the street from the subject property. No persons testified in opposition to the application.

FINDINGS OF FACT

1. The subject property is located at 1323 Girard Street, N.W. (Square 2855, Lot 828) in the Columbia Heights neighborhood of Ward One. The site is improved with a brick three-story detached building built as a single-family residence in 1895. A driveway is located on the east side of the lot.

2. The subject property is an interior lot on the north side of Girard Street. The square is bounded by 13th Street to the east, 14th Street to the west, Harvard Street to the north, and Girard Street to the south. A public alley parallel to Girard and Harvard Streets abuts the subject property at the rear of the lot. The rear yards of rowhouses fronting on Harvard Street are located across the alley from the subject property. A parking lot abuts the subject property to the east, while a single-family detached dwelling is located on the property abutting the site to the west.

3. The subject property is zoned R-4. Nearby properties are zoned R-4, R-5-D, and C-2-B.

4. The Applicant proposes to renovate the existing building on the subject property for use as a community center. An exterior egress will be constructed at the rear of the building, with a staircase connecting the basement and three above-grade floors and a handicap lift providing access to the first floor.

5. The subject property was previously owned by Sojourners, a nonprofit Christian ministry, which operated a neighborhood center that provided child care and after-school programs, parenting support groups, and summer programs and recreational activities.

6. Certificate of Occupancy No. B138348, issued April 13, 1984 to Sojourners, authorizes use of the first, second, and third floors of the building on the subject property as a church. After purchasing the subject property from Sojourners, the Applicant filed a change of ownership request and on November 15, 2002 was issued Certificate of Occupancy No. CO 44577 authorizing church use.

7. The Applicant is a 501(c)(3) nonprofit organization organized for charitable, educational, and social service purposes "to nurture Asian American youth and families, to develop leadership, and to strengthen community building through a partnership between youth and adults."

8. The proposed community center will serve the needs of Asian-American youth and families, particularly in the Columbia Heights and Mount Pleasant communities, through three core programs: (i) an after-school academic enrichment/tutoring program for students ages 6 to 19; (ii) a family-strengthening program that will provide educational, social, and parenting support services; and (iii) a mentoring program. Activities at the community center will be provided with adult supervision.

9. The Applicant previously operated similar programs in leased space at 3045 15th Street, N.W.

10. The hours of operation of the community center are expected to be 10:00 a.m. to 7:00 p.m., Monday through Friday. The Applicant will occasionally host meetings (such as meetings of the community center staff or board of directors) and special events (such as parent nights, volunteer receptions, holiday parties, and art or other exhibits or performances) in the evening or on weekends.

11. No articles of commerce will be offered for sale or sold at the subject property.

12. The community center will have a staff of 11 employees. The Applicant's current programs cater to approximately 160 people, with 50 to 60 people on site at any given time. Participants in the mentoring program typically arrange meetings at locations other than the community center.

13. Because the community center is intended to serve the neighboring community, most participants in the programs are expected to walk to the subject property or arrive by public transportation. The subject property is located near a well-served bus route and within walking distance of the Columbia Heights Metrorail station.

14. The rear portion of the subject property will be graded and paved so as to provide four parking spaces accessible from the alley. A fifth space, reserved for handicapped use, will be located in the driveway and accessed from Girard Street.

15. The parking lot abutting the subject property is owned by Easter Seals Child Development Center, located at 1325 Girard Street, N.W. By letter dated December 4, 2003, Easter Seals indicated its willingness to extend its agreement with the Applicant for the lease of two parking spaces in the lot "for as long as [the Applicant] needs them." The letter stated that the two spaces are solely for the Applicant's use and are not also rented to any other organization.

16. Under chapter 21 of the Zoning Regulations, the parking requirement applicable to a community center use is the same as the parking requirement for a church, the use for which a certificate of occupancy was issued to the prior owner of the subject property. Therefore, a change in use of the subject property to community center does not generate a requirement to provide additional spaces under 11 DCMR § 2100.4

17. The Board credits the Office of Planning's conclusion that the community center's activities will not likely become objectionable to neighboring property because the center's programs will cater to a small population residing in the immediate neighborhood.

18. The Board credits the testimony of ANC 1B that the Applicant is a nonprofit organization formed to promote the well-being of a targeted community within Columbia Heights, that a community center located at the subject property would be convenient to the targeted population, and that, based on its design and expected activities, the proposed community center would not become objectionable to neighboring properties.

CONCLUSIONS OF LAW

The Applicant seeks a special exception pursuant to 11 DCMR § 3104.1 to establish a community center in an R-4 zone under § 209. 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. 11 DCMR § 3104.

The Board concludes that the Applicant has met its burden of proof with respect to the application for a special exception to establish a community center in accordance with the provisions of § 209. The Applicant is not organized for profit and will not offer articles of commerce for sale in the community center, but will promote the social welfare of its neighborhood, particularly with respect to Asian-American youth and families. The Board is persuaded by the Applicant's testimony that the community center is both reasonably necessary and convenient to the neighborhood where it will be located, since the activities offered at the community center will provide needed services primarily to a targeted population in the surrounding neighborhood.

The Applicant's community center is not likely to become objectionable because of noise or traffic. The center's activities will be supervised and will take place indoors, primarily during the day and early evening hours. The community center is not likely to generate substantial traffic, given its location convenient to public transportation and the likelihood that many participants will arrive on foot. The center will provide parking for seven vehicles, with five spaces on the subject property and two more rented on an abutting parking lot.

The requested special exception is 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. The building on the subject property was originally constructed as a residence but has been used for church or community center purposes for several decades. The modifications to the building proposed by the Applicant will not greatly alter its residential appearance.

The Board has accorded ANC 1B the "great weight" to which it is entitled. The record reflects that the affected ANC voted unanimously to support the Applicant's request for a special exception to establish a community center at the subject property. The Board credits the unique vantage point held by the ANC with respect to the effect of the requested special exception on its constituents. The Board has also accorded great weight to the recommendation of the Office of Planning. The Board credits OP's conclusion that a five-year term is appropriate for the requested special exception.

For the reasons stated above, the Board concludes that the Applicant has satisfied the burden of proof with respect to the application for a special exception to establish a community center in an R-4 zone pursuant to 11 DCMR §§ 209 and 3104. Accordingly, it is therefore **ORDERED** that the application is **GRANTED** for a term of five years from the effective date of this order.

VOTE: **3-0-2** (Geoffrey H. Griffis, Ruthanne G. Miller, and David A. Zaidain to grant the application; Curtis L. Etherly, Jr., not voting, having recused himself; Anthony J. Hood, not present, 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: MAR 05 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 SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

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

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17111 of 2412 Limited Partnership, pursuant to 11 DCMR § 3103.2, for a variance from the floor area ratio requirements under section 402, a variance from the lot occupancy requirements under section 403, and a variance from the nonconforming structure provisions under subsection 2001.3, to allow a two story addition to an apartment house in the R-5-B District at premises 2412 17th Street, N.W. (Square 2566, Lot 819).

HEARING DATE: February 10, 2004
DECISION DATE: March 2, 2004

SUMMARY ORDER

SELF-CERTIFIED

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

The Board provided proper and timely notice of public hearing on this application, by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 1C, the Office of Planning (OP) and to owners of property within 200 feet of the site. The site of the application is located within the jurisdiction of ANC 1C. ANC 1C submitted a letter in conditional support of the application. The OP submitted a report recommending approval 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 ANC and OP reports filed in this case, the Board concludes that the applicant has met the burden of proving under 11 DCMR §§ 3103.2, 402, 403 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**.

VOTE: **4-0-1** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., and David A. Zaidain to approve, the Zoning Commission member not present, not voting).

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

FINAL DATE OF ORDER: MAR 0 5 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. 17114 of Ingleside at Rock Creek, pursuant to 11 DCMR § 3104.1 for a special exception under section 218 to increase an existing community residence facility and section 219 to increase a healthcare facility by the addition of thirteen independent living units and storage space by the conversion of underutilized space in an R-1-A District at premises 3050 Military Road, N.W. (Square 2287, Lot 809).

HEARING DATE: February 17, 2004
DECISION DATE: February 17, 2004 (Bench Decision)

SUMMARY ORDER

The Board provided proper and timely notice of public hearing on this application, by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 3/4G and to owners of property within 200 feet of the site. The application was also referred to the Office of Planning for review and report.

The site of the application is located within the jurisdiction of ANC 3/4G. ANC 3/4G, which is automatically a party to the application, filed a written statement expressing its unanimous support for the application. Anne M. Renshaw appeared as the representative of ANC 3/4G. The Office of Planning 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 which are necessary to establish the case for a special exceptions, as set forth in 11 DCMR §§3104.1, 218 and 219. No person or entity appeared at the public hearing in opposition to this application or otherwise requested to participate as a party in this proceeding. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, the Board concludes that the applicant has met its burden of proof, pursuant to 11 DCMR §3104.1, for a special exception under sections 218 and 219, which will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps. It is therefore **ORDERED** that this application be **GRANTED** subject to the following **CONDITIONS:**

1. The proposed construction is to be built in accordance with the plans entered into the record of the application. The plans include the addition of thirteen independent living units in space presently used as crawl space, an office and an exercise room and the construction of storage space over the ramp to the parking garage. Eight parking spaces are to be eliminated through the construction.

2. The approval of the construction plans includes the approval of phasing the construction of the additional independent living units. Ten units will be constructed initially and the final three units will be added within five years after the effective date of this order.

3. All conditions included in BZA Order No. 16138 governing the use and operation of Ingleside at Rock Creek are incorporated into this Order except for those conditions specifically relating to the construction phase of the completed project which was the subject of Order No. 16138, specifically Condition VII's provisions regarding photographic surveys and Condition VIII's provisions regarding Advisory Committee review and comment on portions of the building exterior unaffected by Application No. 17114.

Pursuant to 11 DCMR §3100.5, 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.

VOTE: **4-0-1** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller, David A. Zaidain to approve, the Zoning Commission member not present, not voting).

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

FINAL DATE OF ORDER: MAR 0 5 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 OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

PURSUANT TO 11 DCMR §3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE

REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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

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. 17117 of Carver Terrace Residential Association, pursuant to 11 DCMR § 3104.1, for a special exception to allow a community service center under section 334, pursuant to 11 DCMR § 3103.2, a variance from the use provisions under subsection 350.4, to allow a convenience store in the R-5-B District at premises 2026 Maryland Avenue, N.E. (Square 4469, Lot 95).

HEARING DATE: March 2, 2004
DECISION DATE: March 2, 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 public hearing on this application by publication in the D.C. Register and by mail to the Applicant, Advisory Neighborhood Commission (ANC) 5B, and to owners of all property within 200 feet of the property that is the subject of this application. The application was also referred to the Office of Planning (OP). The OP submitted a report in support of the application. The subject property is located within the jurisdiction of ANC 5B. The ANC 5B11 single member representative testified in support of the application. The full ANC letter was not available to the Board at the time of the public hearing.

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 special exceptions pursuant to 11 DCMR §§ 3104.1 and 334, and a variance under 11 DCMR § 3103.2 from the strict application of the requirements of § 350.4. No party appeared at the public hearing in opposition to this application or otherwise requested to participate as a party in this proceeding. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

The Board closed the record at the conclusion of the hearing. Based upon the record before the Board, and having given great weight to the Office of Planning report filed in this case, the Board concludes that the applicant has met the burden of proof pursuant to 11 DCMR §§ 3104.1, for a special exception under section 334, that the requested relief can be granted as in harmony with the general purpose and intent of the Zoning Regulations and Map and will not tend to affect

adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

The Board also concludes that the applicant has met its burden of proof under 11 DCMR §§ 3103.2 and 350.4, 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 requested 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. It is therefore **ORDERED** that the application is **GRANTED** with the following **CONDITION**:

The size of the convenience store shall not exceed 1,500 square feet.

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 appropriate in this case.

VOTE (Community Service Center): **5-0-0** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller, David A. Zaidain and Kevin L. Hildebrand to approve).

VOTE (Convenience Store): **5-0-0** (Curtis L. Etherly, Jr., Geoffrey H. Griffis, Ruthanne G. Miller, David A. Zaidain and Kevin L. Hildebrand to approve).

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

FINAL DATE OF ORDER: MAR 0 5 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 § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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

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. 17118 of Martin Hahn and Colleen Martin, pursuant to 11 DCMR § 3104.1, for a special exception to allow the construction of a rear addition to a single-family dwelling under section 223, not meeting the side yard requirements (section 405) in the R-1-B District at premises 3770 McKinley Street, N.W. (Square 1867, Lot 33).

Note: The Board, as preliminary matter at the public hearing, waived the requirement that the applicant post a hearing notice on the subject property at least fifteen (15) days in advance of the public hearing.

HEARING DATE: March 2, 2004
DECISION DATE: March 2, 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) 3G and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 3G, which is automatically a party to this application. ANC 3G 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 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, David A. Zaidain, Ruthanne G. Miller, Curtis L. Etherly, Jr. and Kevin L. Hildebrand 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: MAR 0 5 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.

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. 17119 of John and Linda Whitney, pursuant to 11 DCMR § 3104.1, for a special exception to allow the construction of a second story rear deck addition to an existing single-family row dwelling under section 223, not meeting the lot occupancy requirements (section 403) in the R-5-B District at premises 1743 S Street, N.W. (Square 152, Lot 29).

HEARING DATE: March 2, 2004
DECISION DATE: March 2, 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) 2B and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 2B, which is automatically a party to this application. ANC 2B 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 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: **4-1-0** (Geoffrey H. Griffis, David A. Zaidain, Ruthanne G. Miller, Curtis L. Etherly, Jr. to approve, Kevin L. Hildebrand opposed to the motion).

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

FINAL DATE OF ORDER: MAR 0 5 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.

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

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
and
Z.C. ORDER NO. 02-42
Z.C. Case No. 02-42
(Text Amendment – 11 DCMR)
(W-0 Waterfront Open Space Recreation Zone)

The full text of this Zoning Commission order is published in the "Final Rulemaking" section of this edition of the *D.C. Register*.

OFFICE OF DOCUMENTS AND ADMINISTRATIVE ISSUANCES
PUBLICATIONS PRICE LIST

DISTRICT OF COLUMBIA MUNICIPAL REGULATIONS (DCMR)

TITLE		SUBJECT	PRICE
1	DCMR	MAYOR AND EXECUTIVE AGENCIES (JUNE 2001)	$16.00
3	DCMR	ELECTIONS & ETHICS (JUNE 1998)	$20.00
4	DCMR	HUMAN RIGHTS (MARCH 1995)	$13.00
5	DCMR	BOARD OF EDUCATION (JUNE 1997)	$26.00
6A	DCMR	POLICE PERSONNEL (MAY 1988)	$8.00
7	DCMR	EMPLOYMENT BENEFITS (JANUARY 1986)	$8.00
8	DCMR	UNIVERSITY OF THE DISTRICT OF COLUMBIA (JUNE 1988)	$8.00
9	DCMR	TAXATION & ASSESSMENTS (APRIL 1998)	$20.00
10	DCMR	DISTRICT'S COMPREHENSIVE PLAN (PART 1, FEBRUARY 1999)	$33.00
10	DCMR	PLANNING & DEVELOPMENT (PART 2, MARCH 1994) w/1996 SUPPLEMENT*	$26.00
11	DCMR	ZONING (FEBRUARY 2003)	$35.00
12	DCMR	CONSTRUCTION CODES SUPPLEMENT (2003)	$25.00
13	DCMR	ELECTRICAL & MECHANICAL CODE (MARCH 1987)	$10.00
13B	DCMR	BOILER & PRESSURE VESSEL CODE (MAY 1984)	$7.00
14	DCMR	HOUSING (JULY 1991)	$20.00
15	DCMR	PUBLIC UTILITIES & CABLE TELEVISION (JUNE 1998)	$20.00
16	DCMR	CONSUMERS, COMMERCIAL PRACTICES & CIVIL INFRACTIONS (JULY 1998) W/DECEMBER 1998 SUPPLEMENT	$20.00
17	DCMR	BUSINESS, OCCUPATIONS & PROFESSIONS (MAY 1990)	$26.00
18	DCMR	VEHICLES & TRAFFIC (APRIL 1995) w/1997 SUPPLEMENT*	$26.00
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