

REORGANIZATION PLAN NO. 1 OF 2003 (Sec. B)**FOR THE****OFFICE OF RISK MANAGEMENT****Section 1. Purpose for the Reorganization Plan**

Pursuant to the Governmental Reorganization Procedures Act of 1981 this represents the Reorganization Plan for the Office of Risk Management (Plan). The Plan would establish the Office of Risk Management (Office), state the purpose of the Office, state the duties of the Chief Risk Officer and state the authority and functions of the Office.

The Plan would transfer responsibility for the District of Columbia's public sector disability compensation program, public sector safety and health management program, claims for unliquidated damages filed against the District government and the risk management aspects affecting the safety and physical security of District government facilities to the newly established Office.

The Plan would also provide for the Office to purchase insurance for the benefit of the District, place administration of the Settlements and Judgments Fund within the Office subject to the financial management of the District's Chief Financial Officer and repeal the authority of the Office of the Corporation Counsel to settle claims against the District of Columbia under Part III, A, subsections 1 and 2 of Reorganization Order 50, as amended (June 26, 1953). In addition, the Plan would establish a Risk Management Council and effectively repeal all reorganization plans and executive orders in conflict with the Plan.

Section 2. Definitions.

For the purpose of the Plan, unless otherwise required by the context the term:

(1) "Agency risk management representative" means the individual in each agency whose duties include exposure identification and assessment and risk control strategy coordination at the agency level on behalf of the agency director. Where this individual obtains the necessary professional training as specified by the Chief Risk Officer they may be referred to as the "Agency Risk Manager".

(2) "Chief Risk Officer" means the head of the Office of Risk Management.

(3) "Claims management" means the process used to administer and gather data concerning any notice to the District government of any alleged wrongful acts, whether tortious, contractual, or equitable in nature, for which the District, its officers, agents, or employees are allegedly responsible, including, but not limited to, claims arising from unresolved civil, administrative, or judicial litigation.

(4) "Cost of risk" means the cost of actual losses sustained, administrative costs of the risk

management program, costs of funding losses, costs of risk control efforts and other outside service costs.

(5) "District government facility" means a building either owned, controlled, occupied, or leased by the District government.

(6) "Office of Risk Management" means the office (Office) established by the Plan.

(7) "Risk assessment" means the process for conducting reviews and investigations of District operations, activities and facilities to identify and measure risk exposures.

(8) "Risk control" means the effective minimization of the probability, frequency, and severity of accidental losses on a pre-loss and post-loss basis through the selection and implementation of mitigation strategies, a proactive compliance monitoring program for safety and security, and contingency planning for District government operational interruptions or emergencies.

(9) "Risk exposure" means exposure to issues or matters which have potential to create financial, reputational, efficiency and organizational losses, including losses from any alleged wrongful acts, whether tortuous, contractual, or equitable in nature, for which the District, its officers, agents, or employees are allegedly responsible, including, but not limited to, claims arising from unresolved civil, administrative, or judicial litigation.

(10) "Risk financing" means claims management and the professional anticipation and planned funding of loss payments resulting from adjudication or settlement of claims.

(11) "Risk funding" means the selection and application of specific techniques to meet the financial obligation caused by unexpected losses including retention such as self-insurance, or transfer such as purchasing insurance or other contractual transfer, and the oversight of those techniques.

(12) "Risk identification and analysis" means the systematic identification, measurement, analysis, and documentation of the District government's exposure to risk.

(13) "Risk management" means the continuous process of risk identification and analysis, employing effective risk assessment, risk control, risk financing, and risk funding strategies to minimize and control risk exposure and actual and potential losses.

(14) "Risk map" means a schematic drawing that illustrates the prioritization of risk exposures in terms of anticipated frequency and severity of occurrence suggesting organizational hierarchy and priority of strategies for risk management.

Section 3. Creation of the Office of Risk Management.

(a) There is created within the executive branch of the government of the District of Columbia the Office of Risk Management (Office) with direct oversight by the City

Administrator.

(b) The head of the Office shall be the Chief Risk Officer, who shall be appointed by the Mayor with the advice and consent of the Council pursuant to section 422 (1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 790; D.C. Official Code § 1-204.22 (1)). To be eligible for appointment as the Chief Risk Officer a person shall have demonstrated, through his or her knowledge and experience, the ability to administer a public risk management office of the size and complexity of the Office established by the Plan.

(c) The Chief Risk Officer shall be paid at an annual rate, determined by the Mayor. To the extent that the annual salary rate exceeds that set forth in the District of Columbia Comprehensive Merit Personnel Act of 1978 (CMPA), the proposed salary shall be forwarded to the Council and set forth in a pay resolution approved by the Council as required by the CMPA.

(d) Notwithstanding any delegation of the authority to settle claims that the Mayor may delegate to the Chief Risk Officer, the Chief Risk Officer may redelegate any or all of such settlement authority to the Corporation Counsel.

Section 4. Purpose of the Office of Risk Management.

(a) The purpose of the Office is to provide risk management direction, guidance and support to District government agencies so that they can minimize the total cost of risk, resulting in improved government operations and enhanced service delivery. This will be accomplished by integrating agency programs of systematic risk identification and analysis, selecting and implementing appropriate risk control strategies, and prudently financing anticipated and incurred losses, into a District government integrated risk management program. The result will be to minimize the probability, occurrence and impact of accidental losses in the District government and to support the effective and efficient achievement of the District government's strategic risk management objectives.

(b) The strategic objectives of the Office shall include the:

- (1) Institutionalization of risk management as a regular District-wide and agency-specific function;
- (2) Systematization of the identification and analysis of District-wide and agency-specific exposures to risk;
- (3) Minimization of the likelihood and severity of losses through effective safety and security risk control strategies; and
- (4) Formalization of the philosophy, policies and procedures for financing identified risks and incurred losses.

Section 5. Duties of the Chief Risk Officer.

- (a) The Chief Risk Officer shall be the central risk management official for the District government.
- (b) The Chief Risk Officer shall exercise full direction and supervision over the Office its functions and personnel, including the authority to organize the Office and to redelegate to employees authority as, in the judgment of the Chief Risk Officer, is warranted in the interests of efficiency and sound administration.

Section 6. Functions of the Office.

The Office, through the Chief Risk Officer, shall:

- (a) Identify gaps, omissions, or inconsistencies in risk management practices and policies, and recommend and oversee the implementation of appropriate responsive laws, regulations, rules, or procedures for adoption pursuant to the Plan;
- (b) Organize and operate the Office to ensure the accomplishment of the Office's purpose;
- (c) Prepare reports as necessary and as required by the Mayor or the Council;
- (d) Create and maintain a District government prioritization risk map based on the frequency and severity of projections of anticipated loss;
- (e) Minimize the probability, frequency, and severity of accidental losses to the District government on a pre-loss and post-loss basis through a pro-active and compliance monitoring program for safety, security and contingency planning for District government operational interruptions or emergencies;
- (f) Conduct and oversee on-site risk management assessments of all District government facilities and operations;
- (g) Maintain a risk management resource library for the assistance of agency risk management and Office personnel;
- (h) Provide risk management training to District employees and agency risk management representatives;
- (i) Appropriately utilize technology to maximize the Office's efforts in accomplishing its purposes under the Plan;
- (j) Administer, organize, and exercise all of the powers, duties, and functions concerning the District of Columbia Government Employees' Disability Compensation Program;

(k) (1) Administer, organize, and exercise all of the powers, duties, and functions concerning the District of Columbia Public Sector Occupational Safety and Health Management Program authorized and required by the Occupational Safety and Health Act of 1970, as amended (84 Stat. 1590), Title XX of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-620.01 *et seq.*), and applicable codes, rules, and regulations including, but not limited to:

(A) the D.C. Occupational Safety and Health Board, Occupational Safety and Health Standards (29 DCMR, Chapters 30-32);

(B) the Building Code approved pursuant to the Construction Codes Approval and Amendments Act of 1986;

(C) the Electrical Code approved pursuant to the Construction Code Approval and Amendments Act of 1986;

(D) the Fire Prevention Code approved pursuant to the Construction Codes Approval Amendments Act of 1986; and

(E) the Plumbing Code approved pursuant to the Construction Code Approval and Amendments Act of 1986.

(2) The Office's authority under this subsection shall not supersede any statutory authority of other District agencies, including but not limited to the Fire and Emergency Medical Services Department, the Department of Consumer and Regulatory Affairs, the Department of Health, or the Department of Housing and Community Development, with primary enforcement jurisdiction for any of the codes or regulations referenced in this section;

(l) Ensure that safety, physical security, liability, and other risk management concerns of District owned, controlled, leased, or occupied facilities are appropriately addressed. In performing its functions, the Office shall not duplicate the functions of the Office of Property Management as set forth in section 1804 of the Office of Property Management Establishment Act of 1998, effective March 26, 1999 (D.C. Law 12-175; D.C. Official Code § 10-1003);

(m) Create a culture of risk awareness and management, within the District government, concerning District government facilities, employees, volunteers, and visitors;

(n) By delegation from the Mayor, pursuant to section 422 (b) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 790; D.C. Official Code § 1-204.22 (6)), procure insurance and utilize alternative risk financing strategies, as necessary and pursuant to an authorized appropriation, for the benefit of the District government to compensate for large liabilities and catastrophic exposure to risk including, but not limited to, tort settlements and judgments, contractual settlements and

judgments, and property losses;

(o) Implement and maintain a system for managing the resolution of outstanding recommendations/findings from various sources including the Inspector General, the D.C. Auditor, external District-wide audits with management letter recommendations, court orders, retained consultants and others; and

(p) Procure goods and services and contract for the Office.

Section 7. Disability Compensation Program.

(a) All of the powers, duties and functions transferred to the Office of Personnel under section 1202 of the District of Columbia Government Employees Disability Compensation Reorganization and Amendment Act of 2001, effective October 3, 2001 (D.C. Law 14-28; 48 DCR 6891), are hereby transferred to the Office.

(b) All property, records, personnel, and unexpended balances of appropriations, allocations, and other funds available or to be made available to the Office of Personnel under section 1202 of the District of Columbia Government Employees Disability Compensation Reorganization and Amendment Act of 2001, effective October 3, 2001 (D.C. Law 14-28; 48 DCR 6891), are hereby transferred to the Office.

Sec. 8. Transfer of Public Sector Occupational Safety and Health Management Program.

(a) All of the powers, duties, and functions concerning the District of Columbia public sector Occupational Safety and Health Management Program authorized and required by the Occupational Safety and Health Act of 1970, as amended (84 Stat. 1590), Title XX of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-620.01 *et seq.*) and applicable codes, rules, and regulations, including those set forth in section 6 (m) of this act, currently performed by the Department of Employment Services, are hereby transferred to the Office.

(b) All of the property, records, personnel, and unexpended appropriations, allocations, and other funds available or to be made available to the Department of Employment Services for the program described in this section are hereby transferred to the Office.

Section 9. Transfer of the OCC Claims Unit Operations.

(a) The administration and control of the unit set aside for the receipt and processing of claims filed against the District of Columbia government pursuant to D.C. Official Code § 12-309, presently vested in the Office of the Corporation Counsel, is hereby transferred to the Office.

(b) All of the property, records, personnel and unexpended balances of appropriations, allocations, claim recoveries and other funds available or to be made available to the

Office of the Corporation Counsel for the Claims Unit are hereby transferred to the Office.

Section 10. Risk Management Council.

(a) The Chief Risk Officer shall create and manage a Risk Management Council constituted of agency risk management representatives and professional leaders from the Office.

(b) Through the Risk Management Council, the Chief Risk Officer shall:

- (1) Meet with, receive reports from, and generally oversee the functions of agency risk management representatives;
- (2) Coordinate, integrate, and guide the work of agency risk management representatives to identify, measure, analyze, and document agency and District government risk exposure;
- (3) Facilitate topical interaction among agency risk management representatives and Office leaders to foster the development and effective implementation of a comprehensive, integrated risk management program for the District;
- (4) Cultivate awareness, understanding and support for risk, safety and security management initiatives as part of the District's strategic, integrated risk management program; and
- (5) Monitor the effectiveness of agency Risk Assessment and Control Committees (RACCs)

(c) The Risk Management Council shall:

- (1) Exchange risk management ideas and best practices;
- (2) Identify and share available risk management resources;
- (3) Provide input to the development of District-wide risk management practice standards and risk and safety administrative regulation review;
- (4) Establish the risk management culture of the District in support of institutionalizing and systematizing the risk management program of the District;
- (5) Identify opportunities for economies of scale in the implementation of risk management strategies;
- (6) Participate in loss trend analysis and related exposure awareness communication;

- (7) Participate in the evolution of the District risk management information system;
- (8) Provide primary coordination to the performance requirements for risk management in agency director's contracts;
- (9) Participate in the cost of risk allocation methodology, communication and monitoring; and
- (10) Coordinate internal agency emergency response plan development and maintenance including plans for continuity of operations in the event of any emergency, and definition of interaction points with the external District Emergency Response Plan coordinated by the Emergency Management Agency.

Section 11. Repealers.

Any provision of a Reorganization Plan or Executive Order in conflict with any provision of this reorganization is hereby repealed, except that any regulations adopted or promulgated by virtue of the authority granted by such conflicting provision shall remain in force until properly revised.

Section 12. Effective Date.

The Plan shall take effect immediately after the statutorily required sixty (60) day Council review period.

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

Application No. 16370-A of Gerald Cassidy on behalf of Jack Milton Fields, pursuant to 11 DCMR § 3104.1 for a special exception under subsection 203.10 to allow an additional two employees in a home occupation at 434 New Jersey, S.E. (Square 694, Lot 811).

HEARING DATE: July 22, 1998

DECISION DATES: September 2, 1998, July 1, 2003, August 5, 2003

DECISION AND ORDER

Gerald Cassidy, (hereinafter "Applicant"), the applicant in this case, was the owner of the subject property at the time of the filing of the application. He filed this application on behalf of Jack Milton Fields, (hereinafter "Fields"), the then contract purchaser of the property.¹ On February 5, 1998, the Acting Zoning Administrator, of the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), granted Fields a home occupation permit for a consulting business on the subject property, with only one employee in addition to the resident. An application for a home occupation permit for two additional employees was rejected by the Zoning Administrator, with instructions that the request would have to be considered by the Board of Zoning Adjustment ("Board") as a special exception. Therefore, the Applicant filed this application with the Board on May 21, 1998, to allow for use of the property by two employees of Fields, who are not residents of the property, in addition to the one non-resident employee already permitted in the home occupation at 434 New Jersey Avenue, S.E.

On July 22, 1998, the Board held a public hearing on the application. The date for a public decision meeting was set for September 2, 1998, at which meeting the Board voted 3-0-2 to grant the special exception application.

Issuance of this order was stayed, however, because on September 14, 1998, the Capitol Hill Restoration Society ("CHRS") filed a motion to stay and an appeal of the decision of the Acting Zoning Administrator to issue Mr. Fields a home occupation permit for 434 New Jersey Avenue, S.E. The appellant claimed that 434 New Jersey Avenue, S.E. was not Mr. Fields' principal residence at the time the permit was issued and that therefore it was improperly issued. The issuance of this order was stayed pending the outcome of Board of Zoning Adjustment Appeal No. 16404, which was denied by the Board on June 2, 1999.

Following the denial of the appeal, the Applicant/Mr. Fields moved that the stay be lifted. On May 21, 2003, the Office of Zoning ("OZ") served copies of the motion, by first class mail, on the parties to the proceeding. No objections were received. At its regularly scheduled public meeting held on July 1, 2003, the Board voted 5-0-0 to lift the stay previously on the issuance of this order. However, since a majority of the current Board did not personally hear and vote on this case, this order was sent out for exceptions prior to issuance, pursuant to D.C. Official Code § 2-509(d) (2001). Under this procedure, on July 1, 2003, this order was sent to all parties, who

¹At the time of the filing of this application, Mr. Fields was the contract-purchaser of the subject property. At the date of this order, however, Mr. Fields is the owner of the property.

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were afforded until July 14, 2003, to file exceptions to it with OZ. No exceptions were received and therefore, on August 5, 2003, at a regularly scheduled public meeting, the Board voted 5-0-0 to approve this order for issuance.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. The District of Columbia Office of Zoning ("OZ") properly notified the District of Columbia Office of Planning ("OP"), Advisory Neighborhood Commission ("ANC") 6B, as well as the ANC member for the appropriate Single Member District, of the filing of the application. Pursuant to 11 DCMR § 3113.13, the OZ published notice of the hearing on the application in the District of Columbia Register and mailed notices to the ANC, the Applicant, and to all owners of property within 200 feet of the subject property, advising them of the date of the hearing. Further, pursuant to 11 DCMR § 3113.15, the Applicant posted notice of the application on the subject property in plain view of the public.

Applicant's Case. At the hearing, Mr. Fields testified on behalf of the application. He testified that he has lived in the Capitol Hill area for 17 years. He further testified that he intends to reside on the subject property and operate from it a consulting business focusing primarily on telecommunications issues. He indicated that no external or internal structural modifications will be made to the property to accommodate this office use, and that no sign will be affixed to the property, but since the property was largely vacant for the last 3 years, necessary repairs would be done. Such repairs will include fixing water damage, repainting the exterior, removing dead trees and cleaning the nearby alley. Lastly, Mr. Fields spoke to some of the neighbors' concerns. He stated that he and his current employee have leased off-street parking spaces and that he has already leased off-street parking spaces for the two new employees. He testified that ninety percent of client meetings will not be held on the property and that most of the time his employees, except for one receptionist, will be either on Capitol Hill or at client's offices. He also testified that he will hold occasional afternoon coffees for 3 or 4 people, but no larger events.

Government Reports. There were no government reports submitted to the Board.

ANC Report. ANC 6B, automatically a party to this proceeding, voted to oppose the granting of the special exception application. The ANC listed three main objections. It opined that allowing an expanded consulting operation would produce traffic problems. The ANC Planning and Zoning Committee report cited increased Fedex and messenger deliveries, trucks, and what it felt was the likelihood that the property would be used as a lobbying and fund-raising venue, leading to more traffic and double parking. The ANC also indicated that there was little or no way of ensuring that the 25% floor area limitation mandated by § 203.4(b) would be adhered to.

Parties and Persons in Support. There were no parties in support of the application, but seven neighbors either submitted letters or signed a petition supporting the application.

Parties and Persons in Opposition. The Capitol Hill Restoration Society ("CHRS") appeared as a party in opposition to the application. The CHRS opposed the application on two grounds: (1) that Mr. Fields was not entitled to a home occupation permit because this is not his principal

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residence and thus the office use is not secondary to a residential use; and (2) Mr. Fields needs a variance for the relief requested. The CHRS has abandoned this second argument, as reflected in its proposed findings of fact.

Two neighbors appeared in opposition to the application, and other neighbors submitted letters in opposition. The major concern was that an office use was inappropriate to the residential character of the neighborhood. A specific concern was also broached regarding a desire to avoid excess foot traffic in the alley, leading from the off-street parking spaces. The most serious concern expressed by the neighborhood was the use of the subject property as a venue for frequent large fundraisers which would bring a great deal of traffic, parking demand and noise into the neighborhood in the early evening hours.

Hearing. The public hearing on the application was held and completed on July 22, 1998.

Decision Meeting. At the decision meeting on the application on September 2, 1998, the Board voted 3-0-2 to grant the application, subject to the conditions enumerated below. After the denial of Appeal No. 16404, the lifting of the stay on the issuance of this order, and the running of the period in which exceptions to it could be filed, during which no exceptions were received, the Board voted 5-0-0 at the decision meeting on July 1, 2003, to issue this order.

FINDINGS OF FACT

1. The subject property is located at 434 New Jersey Avenue, S.E. (Square 694, Lot 811). It is located between D and E Streets, S.E. The property is located in a CAP/R-4 zone district.
2. The property is developed with a four-story residential semi-detached townhouse structure. The townhouse is attached on the south side only, with a driveway belonging to the townhouse to the north on the other side.
3. The property is now owned by former Congressman Jack Milton Fields, who, at the time the application was filed, was the contract-purchaser of the property.
4. The property is in a neighborhood of mixed residential, commercial and institutional uses, with the Capitol Building and two office buildings for the House of Representatives immediately north of the site. The Capitol Power Plant and a Congressional Annex lie immediately to the south, with a block of office and retail buildings to the east along First Street. The 400 block of New Jersey Avenue, where the property is located, however, is residential in character, except for a three-story office building at the corner of New Jersey and E Streets, which is grandfathered from a previous commercial use.
5. On February 5, 1998, DCRA granted Mr. Fields a home occupation permit to run a consulting business from the site. The permit allowed one non-resident employee in addition to the resident, Mr. Fields.
6. Mr. Fields has another residence in Texas, but his consulting business is located here, the subject property is his place of residence a majority of the year and he has no other local

residence. Therefore, the subject property is Mr. Fields' principal residence and will be used primarily as such, and secondarily for consulting office use.

7. Under § 203.10 of the Zoning Regulations, Mr. Fields is seeking special exception permission from the Board to add two non-resident employees to his home occupation. These two employees are true employees, not co-practitioners.
8. There will be no external or internal structural modifications made to the subject property to accommodate the office use. Necessary repairs, however, resulting from the fact that the property has been largely vacant for the last three years, will be done, including fixing water damage, repainting the exterior, removing dead trees and cleaning the nearby alley.
9. No sign will be affixed to the exterior of the premise and further, Mr. Fields will maintain the residential character and appearance of the premise and lot.
10. The home occupation use will not occupy more than 25% of the floor area of the townhouse. It will occupy one floor of the dwelling, on the third level, making the office use not visible from the street.
11. Other than a receptionist, hired to perform secretarial and receptionist duties, Mr. Fields and his employees will be off-site a majority of the time, possibly on Capitol Hill or at clients' offices. No more than one employee will be employed to perform such secretarial and receptionist duties.
12. Mr. Fields may host occasional afternoon coffees for three or four people, but no large events.
13. The home occupation use will receive express mail deliveries two to three times a week.
14. Mr. Fields and his current employee have off-site leased off-street parking spaces. Two off-site, off-street parking spaces to accommodate the proposed two new employees, have already been leased.
15. The proposed two new employees will not cause any significant traffic problems or congestion.
16. No finished products will be produced as a result of the proposed home occupation. Any files or other related materials will remain in the area designated for the home occupation.
17. Neither Mr. Fields nor any other person will use any equipment or process which will create visual or audible electrical interference in television or radio receivers outside the subject property, or which will cause fluctuations in line voltage outside the subject property.

18. The proposed home occupation will not produce any noxious odors, vibrations, glare, or fumes which are detectable to normal sensory perception outside the subject premise. Additionally, the proposed use will not produce a level of noise which exceeds the level normally associated with the category of dwelling or with the immediate neighborhood.
19. The proposed home occupation use will not be a retail service or other use as specified in §§ 701.1, 701.4, 721.2, 721.3, 741.2, 741.3, 751.2(b), 801.7, or 902.1, nor will it be a use prohibited in § 902.1, and thus it is not disallowed by § 203.9 of the Zoning Regulations.

CONCLUSIONS OF LAW

Generally, the Board is authorized to grant a special exception where, in its judgment, the special exception 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." 11 DCMR § 3104.1, D.C. Official Code § 6-641.07(g)(2) (2001). Each special exception permitted must also meet the conditions enumerated in the particular section pertaining to it. In this case, the Applicant/Mr. Fields must meet not only the requirements of § 3104.2 (codified as § 3108.1 at the time of the filing of the application), but also the requirements of § 203.10, which in turn requires substantial compliance with §§203.4 through 203.8. Further, they must demonstrate that the proposed home occupation and related conditions shall be consistent with the purposes set forth in § 203.1.

Under § 203.10(b) of the Zoning Regulations, the Board may approve a special exception for a home occupation which modifies no more than two of the requirements for a home occupation set forth in §§ 203.4 through 203.8. Section 203.4(d) requires that no more than one person who is not a resident of the dwelling unit may be employed in the home occupation, though it places no restriction on the number of residents who may be so employed. The Board concludes that the proposed use, a strategic planning and consulting firm, is consistent with the purposes set forth in § 203.1. The Board further concludes that the use meets all the zoning requirements set forth in § 203.10, except the restriction on the number of non-resident employees established in § 203.4(d).

Based on the record, the Board concludes that the proposed home occupation use is compatible with the residential neighborhood in which it is located and that, as conditioned by this order, it will not have an adverse impact on traffic or parking in the area. Indeed, the Board has recognized the use of residences for a consulting business in a residential district with less density than that of the subject site. *See Application No. 15925* (March 23, 1994). The Board also concludes, however, that, pursuant to § 203.10(b), one modification is necessary (of subsection 203.4(d)), to permit Mr. Fields to employ two additional non-residents, even though it is expected that the two additional employees will not be working on the premise the majority of the time. Such a modification will not be inconsistent with the general purposes or intent of § 203.10.

With regard to the contention that the subject property is not the principal residence of Mr. Fields, the Board, based on the record and Finding of Fact No. 6, concludes that the subject property is Mr. Fields' principal residence. The Zoning Regulations do not require that the

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residence be the place in which the applicant is domiciled, which is the location in which an individual pays income taxes. Rather, the regulations look to which location is the principal residence, namely, where the individual resides most of the time. Here, the residence is the only one utilized by Mr. Fields in this area, and it is utilized a majority of the week of every month of every year.

The Board concludes that, pursuant to § 3104.1, the special exception for the proposed home occupation use can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map, and that, as conditioned by this order, it will not tend to affect adversely the use of neighboring properties in accordance with the Zoning Regulations and Map.

The Board has accorded ANC 6B the great weight to which it is entitled, pursuant to D.C. Official Code § 1-309.10(d) (2001). The Board has considered the ANC's objections, specifically parking and traffic impacts, potential use of the premise for large gatherings or events, and concern that the 25% floor area limitation be adhered to. All of these concerns have been adequately addressed in the record. Moreover, the ANC failed to specify how much of a traffic problem would be caused by the addition of two employees. The Board therefore finds the ANC's recommendation unpersuasive when weighed against the evidence in the record and the applicable legal principles.

Based on the record before the Board and for the reasons stated above, the Board concludes that the Applicant/Mr. Fields has satisfied the burden of proof with respect to the application for a special exception under subsection 203.10 to allow two additional employees in a home occupation at 434 New Jersey Avenue, S.E. It is therefore **ORDERED** that the application be **GRANTED**, subject to the following conditions:

1. At least two off-street parking spaces shall be provided for employees of the home occupation use.
2. The residential character and appearance of the residence and lot shall be maintained.
3. No interior structural alterations shall be permitted if it would make it difficult to return the premise to use which is exclusively residential.
4. No operations outside the structure shall be conducted or allowed, and no storage or other unsightly condition shall be maintained or allowed outside the structure.
5. No equipment or process shall be used which creates visual or audible electrical interference in television or radio receivers outside the subject residence, or which causes fluctuations in line voltage outside the subject residence.
6. The use shall produce no noxious odors, vibrations, glare, or fumes which are detectable to normal sensory perception outside the subject residence.
7. The use shall not produce a level of noise which exceeds the level which is normally associated with the category of dwelling or the immediate neighborhood.

8. Vehicular trips to the premise by visitors, customers, and delivery persons, if any, shall not exceed eight (8) trips daily on a regular and continuing basis.
9. There shall be no more than eight (8) clients or customers on the premise in any one (1) hour period.
10. No additional employees shall be employed without first obtaining relief from the Board of Zoning Adjustment.

VOTE (September 2, 1998): **3-0-2** (Sheila Cross Reid, Betty King and John G. Parsons to grant; the third mayoral appointee and National Capitol Planning Commission designee not present, not voting.)

VOTE (August 5, 2003): **5-0-0** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller, David A. Zaidain approving the issuance of the order, John G. Parsons approving same by proxy).

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: AUG 15 2003

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.

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

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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. 16927 of the Public Welfare Foundation and Manna, Inc., pursuant to 11 DCMR § 3103.2, for a variance from the lot area and lot width requirements under § 401, a variance from the lot occupancy requirements under § 403, a variance from the rear yard requirements under § 405, a variance from the parking space location requirements under subsection 2116.1, and a variance from the building on alley lots provisions under subsection 2507.2, to allow the construction of 10 single-family row dwellings in the R-4 District at premises rear 1300 block of Temperance Court, N.W. (Square 274, Lots 57-61, and 804 through 820 (1 through 12 per sub.)).

HEARING DATE: October 22, 2002

DECISION DATES: December 10, 2002, January 14, 2003, February 4, 2003, April 1, 2003

DECISION AND ORDER

There are two applicants in this case. One is the Public Welfare Foundation ("Foundation"), owner of the property which is the subject of this application. The other is Manna, Inc. ("Manna"), holder of an option to purchase the property in order to develop housing thereon. The Applicants hoped to construct affordable housing on the subject property. Because they believed that lots greater than a certain size would not allow them to offer affordable housing, they proposed to subdivide the subject property into lots smaller than the minimum lot size mandated by the Zoning Regulations for an R-4 zone district. The lot sizes chosen also made compliance with other area requirements impossible. The applicants now seek variances, not because there is anything unique about the subject property itself, but because they claim that strict compliance with the Zoning Regulations makes the provision of single family affordable housing projects impossible in an R-4 zone, where this property happens to be located. Thus, the applicants' difficulty does not arise from the property itself, but from an alleged conflict between the economics of affordable housing and the area requirements of the zoning regulations. For this and other reasons stated below, the Board must deny the application. The appropriate forum to resolve the applicants' dilemma is the Zoning Commission, which could fundamentally change the area requirements allegedly impeding the provision of affordable housing, or permit this Board, by special exception, to do so in particular cases. But that type of broad regulatory relief is not within the Board's jurisdiction to give.

PROCEDURAL HISTORY

In a memorandum dated June 17, 2002, the Office of the Zoning Administrator of the District of Columbia notified the Board that zoning relief would be necessary for the

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Applicants' proposed construction. On June 27, 2002, the Applicants filed the appropriate application with the Board, requesting the zoning relief necessary to bring their project to fruition.

On October 22, 2002, the Board held a public hearing on the application. After the hearing, the Board determined that, prior to making its decision, additional information was needed from the Applicants, the District of Columbia Office of Planning ("OP") and the District of Columbia Department of Transportation ("DDOT"). Between the hearing and the scheduled date of the public decision meeting, December 10, 2002, the Board received a report from DDOT, a supplemental report from OP and two further submissions from the Applicants. The two reports, filed late, were accepted by the Board, but their lateness hampered the Board's review of them. Moreover, in their two submissions, the Applicants indicated that they were considering changing their design, thereby changing their application and the type of relief they needed. The Board, therefore, put off its decision on the application and requested further clarification from the Applicants, including information as to any changes in the application and how they affected the relief necessary. The Board also requested a report from the District of Columbia Department of Fire and Emergency Medical Services ("Fire Department") concerning the accessibility to emergency vehicles of the proposed row house development. The decision meeting was re-scheduled for January 14, 2003.

At the request of the Applicants, the January 14, 2003 public meeting was re-scheduled to February 4, 2003. During the February 4, 2003 decision meeting, OP put into the record a report it had received from the Fire Department which requested a prohibition on parking in the alley bounding the subject property to the east. After extensive discussion on February 4, 2003, the Board, on its own motion, continued the case until April 1, 2003. The Board was particularly concerned with issues of density, parking, accessibility for emergency vehicles, and vehicular and pedestrian safety. The Board indicated that the Applicants needed to make further changes in the project to address these issues. The Applicants did so and re-submitted the project to the Board. Even with these further changes, however, the Board could not overcome serious reservations about the application and voted 3-0-1 to deny it. (The seat of the fifth Board member, a mayoral appointee, was vacant at the time the vote was taken.)

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated July 16, 2002, the District of Columbia Office of Zoning ("OZ") notified the Council Member for Ward 1, Advisory Neighborhood Commission ("ANC") 1B, the ANC member for Single Member District 1B02, OP and the District of Columbia Department of Public Works (actually DDOT), of the filing of the application. Pursuant to DCMR § 3113.13, OZ published notice of the hearing on the application in the District of Columbia Register and on

August 27, 2002, mailed notices to ANC 1B, the Applicants, and to all owners of property within 200 feet of the subject property, advising them of the date of the hearing. Several of the hearing notices to nearby property owners were returned to OZ, but the Applicants' affidavit of posting indicates that on October 7, 2002, they placed, in plain view of the public, one zoning poster at 13th St., near U St., N.W., and 2 zoning posters in the 1900 block of Temperance Alley, a.k.a. Temperance Court.

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

Applicants' Case. Mr. Larry Kressley, Executive Director of the Foundation, testified as to the Foundation's community development activities. Mr. George Rothman, president of Manna, testified generally as to the need for affordable housing and in some detail about the Temperance Row project, including discussing the community meetings at which the project was presented. The project's architect, Mr. Carl Skooglund, testified concerning the proposed site plan, the building elevations and the floor plans. Mr. Nate Gross, the Applicants' city planning consultant, testified as to the lot sizes chosen by the Applicants and the difficulties of building within the constraints of 4 perimeter alleys, all less than 20 wide. Mr. Skooglund, and particularly Mr. Gross, attempted to address the need for the multiple variances requested. A Ms. Martha Davis, with Manna, also testified in response to a question asked by a Board member.

Government Reports. The District of Columbia Department of Housing and Community Development provided a memorandum dated October 9, 2002, supporting the Applicants' project. In a February 28, 2002 report, the staff of the Historic Preservation Review Board approved the Applicants' design in concept, with a direction that the Applicant work with staff on the final design. On October 15, 2002, OP submitted its first report on the Applicants' project, which recommended approval of the relief requested, subject to minor design revisions to satisfy the Historic Preservation Review Board. On December 3, 2002, DDOT submitted a report to the Board which supported the variance from the required off-street parking, but did not support the planned access to three of the row houses from the 10-foot wide rear alley which forms the eastern perimeter of the property.

OP then filed a Supplemental Report with the Board on December 3, 2003, which listed questions referred to DDOT and the Fire Department as a result of the Board's October 22 hearing. OP's Supplemental Report further conditioned OP's approval of the project on the answers to these questions and on a redesign of the three eastern row houses to provide vehicular access from the frontal 25-foot alley rather than from the rear 10-foot alley, as highlighted by DDOT.

On February 4, 2003, the Board received a report from the Fire Department, which stated that the Department had no objections to the project, as long as each unit had sprinklers

installed in it. The report, however, went on to express concern about the functioning of emergency response apparatus if vehicles were parked in the "east alley," *i.e.*, the rear 10-foot alley which also concerned OP and DDOT. The Fire Department requested that no parking be permitted in this alley.

After vehicular access to the three (later revised to two) eastern row houses was changed to the central 25-foot alley, DDOT filed a Supplemental Report with the Board on March 25, 2003, supporting the application as revised. This Supplemental Report noted that the Applicants were considering working with the residents and DDOT to make the alley a one-way circulation system and to install appropriate signage, as the alleys are too narrow for two-way circulation.

ANC Report. By letter dated October 1, 2002, ANC 1B indicated that it voted at a June 10, 2002 meeting, with a quorum present, to support the application. The letter, however, also addressed "several issues of concern" with the application. The size of the row houses, pedestrian and emergency access and the proposed setback from the alley and existing row houses along 13th Street were all areas of concern. In the ANC letter and at the ANC meeting, the view was also expressed that "the project would more appropriately have been developed along 12th Street, the current location of the Public Welfare Foundation's parking lot (with the parking lot moving to the proposed location for these row houses)"

Parties and Persons in Support. There were no parties or persons in support of the application.

Parties and Persons in Opposition. Mr. Philip Spalding, a resident of 13th Street, N.W., who lives approximately one block from the proposed project, testified in opposition to the location of the project. Mr. Spalding testified as to concerns about access for both emergency vehicles and trash trucks. Mr. Spalding's biggest concern, however, was the alley-locked location of the project. He stated several times that the project should have been proposed for the 12th Street location of the Foundation's current parking lot, which is approximately one block east of the proposed development site and fronts on 12th Street.

Hearing. The public hearing on the application was held, and completed, on October 22, 2002.

Decision Meetings. The Board held its first decision meeting on the application on December 10, 2002. The Applicants, however, informed the Board of possible design changes in the project which could affect the relief required. Therefore, the Board put off its decision and scheduled a new decision meeting for January 14, 2003. The January 14th decision meeting was re-scheduled to February 4th at the request of the Applicants. On February 4, 2003, the Board, on its own motion, continued the meeting until April 1,

2003, asking the Applicants, in the mean time, to address certain critical issues. After reviewing Applicants' new information, the Board, on April 1, 2003, finally decided to deny the application by a 3-0-1 vote. (The seat of the fifth Board member, a mayoral appointee, was vacant at the time the vote was taken.)

FINDINGS OF FACT

1. The subject property is unimproved land located in the center of Square 274 in the Shaw Neighborhood of Ward 1, in the Northwestern Quadrant of the District of Columbia.
2. The property is actually comprised of two separate pieces of land, separated by a 25.25-foot wide public alley, called Temperance Court. To the west of Temperance Court is a long, rectangular parcel, 47.50 feet east to west by 200 feet north to south. To the east of Temperance Court is a shorter, wider, square parcel, 57.50 feet east to west by 57.14 feet north to south. Together, the two parcels include 12,785.55 square feet.
3. Square 274 is bounded by U Street, N.W. to the north, T Street, N.W. to the south, 12th Street, N.W. to the east, and 13th Street, N.W. to the west. The two subject parcels, however, are located within the center of the square, and are bounded by 15.25-foot wide public alleys to the north and south, a 10-foot wide through public alley to the west,¹ and a 10-foot wide dead-end public alley to the east. Neither parcel has any street frontage, and they are therefore "alley lots" as defined in 11 DCMR § 199.1.
4. The two parcels have access to public streets through the central 25.25-foot wide alley and the east-west-running 15.25-foot wide alleys bounding them on the north and south.
5. The subject property is zoned R-4.
6. To the west and south of the site, respectively, are the rear yards of a continuous row of three-story row houses that front on 13th Street and two-story row houses that front on T Street. To the north, just across the northern 15.25-foot wide alley, is the western entrance of the U Street/Cardozo Metrorail Station, with its plaza and surplus land, proposed to be improved with an office building. Due east of this land is a low-rise commercial building and then the True Reformer Building. Just south of the northern 15.25-foot wide alley, and abutting the northern edge of the smaller eastern parcel of the subject property, is a one-story, brick utility

¹The Applicants have set back their fence row along the western perimeter alley by two feet, creating a de facto 12-foot wide alley, but the legal measurement of the alley width is 10 feet.

building owned by the Washington Metropolitan Area Transit Authority. To the east of this utility building is the Foundation's parking lot along 12th Street.

7. The owner of the property is the Public Welfare Foundation, which acquired it, and other nearby property, sometime before spring, 2001. By that time, the Foundation had renovated the True Reformer Building as its headquarters. The True Reformer Building is located diagonally across the northern 15.25-foot wide alley from the subject property.
8. At least as early as 1960, part of the subject property had been used as a parking lot. (*See*, Board Order No. 5908, dated May 25, 1960.) In 1987, the Duron Paint Store then located in the True Reformer Building, was granted approval in Board of Zoning Adjustment Case No. 14574, to use the subject property as accessory parking. The paint store parking lot, however, was never constructed or officially established. By order dated April 1, 1998, the Board next granted a special exception to the former owner of the True Reformer Building, Temperance Market, LLC, to use the subject property (in its entirety) as a parking lot. Again, no official parking lot was established, and although the property is currently used to park cars on, it is, for all intents and purposes, vacant land.
9. For the use of its employees, the Foundation maintains its own surface parking lot located just to the northeast of the subject smaller eastern parcel. (This parking lot is currently in use and does not include any of the property which is the subject of this application.) The parking lot abuts the southern edge of the northern 15.25-foot wide alley and is directly across the alley from the True Reformer Building. The parking lot has approximately 85 feet of street frontage on 12th Street, N.W.
10. The Foundation did not need to use the subject property as a parking lot and therefore consulted the community to determine what was the best use for the property. After this consultation, the Foundation decided to build affordable housing on the site.
11. The Foundation solicited proposals for the development of the site and selected that of Manna, Inc., its partner in this project.
12. The Foundation plans to convey the site to Manna free of charge and has committed a grant of additional funds to support the project.

The Applicants' Original Design

13. There currently exist on the site 22 lots, each measuring 11 feet wide by 47.5 or 57.5 feet long.² The Applicants intended to subdivide these into 12 new lots, most measuring 18 or 20 feet in width. The center lot on the eastern side of Temperance Court would measure 17.14 feet in width. The north lot on the western side would measure 39 feet in width, with 20 feet taken up by the footprint of the row house and the southern lot on the western side would measure 29 feet, with, again, 20 feet taken up by the footprint of the row house situated on that lot.
14. The Applicants planned 9 lots to the west of Temperance Court, each 47.50 feet long and 3 lots to the east of Temperance Court, each 57.50 feet long.
15. On each of the 9 lots to the west of Temperance Court, the Applicants originally proposed building 1 small row house fronting on the western side of Temperance Court. On each of the 3 lots to the east of Temperance Court, the Applicants originally proposed building 1 small row house fronting on the eastern side of Temperance Court.
16. Each row house would be two stories high, at 33 feet, 3 inches in height, and would have a 6.5-foot front-yard setback.
17. The Applicants proposed making Temperance Court a one-way alley, making parallel parking in the alley a possibility.

Relief Necessary for Applicants' Original Design

Rear Yard

18. The minimum required depth of a rear yard in an R-4 zone district is 20 feet. (*See*, 11 DCMR § 404).
19. Each of the 9 row houses situated to the west of Temperance Court had 10.5-foot deep rear yards, and each required variance relief from rear yard provisions. The eastern row houses, situated on lots 10, 11 and 12, each had a rear yard of over 20 feet, therefore no rear yard relief was required for these three lots.

Lot Occupancy

20. The maximum lot occupancy for a row dwelling in an R-4 zone district is 60%. (*See*, 11 DCMR § 403).

²In discussing the measurement of lots, the measurement of "width" is the applicable north-south measurement, and the measurement of "length" is the applicable east-west measurement.

21. Units numbers 2, 3 and 5, on lots 2, 3 and 5 each had a lot occupancy of 66.66%, thereby requiring variance relief from lot occupancy requirements.
22. Units numbers 1 and 9 were one-family, semi-detached dwellings because each of them had one side yard. (*See*, definition of "Dwelling, one-family, semi-detached," in 11 DCMR § 199.1).
23. The maximum lot occupancy for a semi-detached dwelling in an R-4 zone district is 40%. (*See*, 11 DCMR § 403). According to the record, both Units 1 and 9, on lots 1 and 9, complied with this maximum lot occupancy requirement, and so did not require variance relief.

Lot Width

24. The minimum lot width for a row dwelling in an R-4 zone district is 18 feet. (*See*, 11 DCMR § 401).
25. Unit number 11, on lot 11, had a lot width of 17.14 feet. Lot 11, therefore, required variance relief from minimum lot width provisions.

Lot Area

26. The minimum lot area for a row dwelling in an R-4 zone district is 1,800 square feet. (*See*, 11 DCMR § 401).
27. Unit number 9, on lot 9, had a lot area of 1377.5 square feet, triggering the need for variance relief from minimum lot area requirements.
28. Units numbers 2, 5 and 8, on lots 2, 5 and 8, each had a lot area of 855 square feet. They each needed relief from minimum lot area requirements.
29. Units numbers 3, 4, 6 and 7, on lots 3, 4, 6 and 7, each had a lot area of 950 square feet, and so needed variance relief from minimum lot area requirements.
30. Units numbers 10 and 12, on lots 10 and 12, each had a lot area of 1150 square feet, triggering the need for variance relief from minimum lot area requirements.
31. Unit 11, on lot 11, had a lot area of 985.55 square feet, and therefore needed variance relief from minimum lot area requirements.

Building on Alley Lots

32. Single-family dwellings may not be constructed on lots which abut alleys less than thirty feet in width or on lots which do not have alley access to a street through alleys at least thirty feet in width. (*See*, 11 DCMR § 2507.2).
33. Neither Temperance Court, nor any of the 4 perimeter alleys bounding the subject property are thirty feet or more in width, therefore variance relief from the building on alley lots provisions was required.

Parking³

34. Sections 2101.1 and 2116.1 of the zoning regulations require, respectively, in an R-4 district, one off-street parking space for each new residential unit and that the parking space be located on the same lot as the residence it is intended to serve.
35. Applicants originally proposed 10 off-street parking spaces for the 12 units of the project. The project as a whole therefore needed variance relief from the one-space-per-unit requirement of § 2101.1
36. Five of the parking spaces to be provided were to be located immediately to the north of lot 1, and two were to be located immediately to the south of lot 9. Lots 1 through 9, therefore, did not provide a parking space on the lot itself, triggering the need for variance relief from the requirements of § 2116.1. Lots 10, 11 and 12 did not require relief from § 2116.1 as they were each to have one parking space in the rear yard.

The Applicants' First Revision of the Original Design

37. The Applicants revised their original design by proposing two and one-half additional feet of paved alley width behind the three eastern row houses and by moving the location of the parking space for the southernmost of these three row houses from the southern boundary of the lot (lot 12) to its northern boundary. This made lot 12's parking space adjacent to the parking space on the next lot to the north, lot 11, thus improving vehicle maneuverability.
38. The Applicants further revised their original design by removing the near-alley portions of fences between each of the three eastern row house lots. (lots 10, 11 and 12)

³The Applicants first requested a special exception under § 2116.5, which referred them to § 2117.9. Subsections 2117.9(a) and (b) apply only to row dwellings with street frontage. Subsection 2117.9(c) does not specify whether it, too, applies only to row dwellings with street frontage, but it must be read in the context of the rest of § 2117.9. In this context, the Board reads § 2117.9(c) as applying to row dwellings with street frontage, making it inapplicable here. Instead, it was determined that the Applicants most appropriately needed variance relief from § 2116.1, which states that a required parking space be located on the same lot with the building it is intended to serve.

The Applicants' Second Revision of the Original Design

39. The Applicant reduced the number of row houses proposed from 12 to 10, by eliminating one row house from the western row and one from the eastern row. After the second revision, the final configuration of the project is: 9 lots with 8 row houses on the western parcel of land, each fronting on the western side of Temperance Court, and 2 lots with 2 row houses on the eastern parcel, each fronting on the eastern side of Temperance Court. The western lots and units are numbered 1 through 8, north to south, and the eastern lots and units are numbered 9 and 10, north to south.
40. The group of five parking spaces situated at the northern end of the western row was eliminated. Instead, 10 parking spaces are now located at the southern end of the western row, in a new parking lot area, which is 45 feet wide and 47.5 feet long. The Applicants will implement a sticker system to denote authorized vehicles and will post "no parking" signs to attempt to prohibit use of this area by the public.
41. The eastern row of row houses now consists of two units, numbers 9 and 10. Unit 9 has one parking space on it, at the northern end of its lot, which is accessible only from Temperance Court. Unit 10 (old unit 12) no longer has a parking space in its rear yard, therefore all parking spaces proposed for the project are accessible from Temperance Court.
42. Pedestrian access along the northern 15.25-foot wide alley will be denoted by a striped, three-foot-wide marked area on the surface of the alley, an approach with which DDOT concurs.

Revised Relief Necessary for Applicants' Second Revision of the Original Design

Rear Yard

43. The minimum rear yard depth in an R-4 zone district is 20 feet. (*See*, 11 DCMR § 404).
44. All the western row houses, (now numbered 1 through 8, north to south), have rear yards of 10.5 feet, and all require variance relief from rear yard requirements. The two eastern row houses, (now numbered 9 and 10, north to south), with rear yards of more than 20 feet, do not require such relief.

Lot Occupancy

45. Units numbers 1 and 9 each have 1 side yard and each is, therefore, a one-family, semi-detached dwelling. (*See*, definition of "Dwelling, one-family, semi-detached," in 11 DCMR § 199.1).
46. The maximum lot occupancy for a semi-detached dwelling in an R-4 zone district is 40%. (*See*, 11 DCMR § 403).
47. Unit 1, on new lot 1, has a lot occupancy of greater than 40%, triggering the need for variance relief from maximum lot occupancy provisions.
48. The lot occupancy of unit 9, on new lot 9, was not provided by the Applicant, therefore it is uncertain whether it needs variance relief from maximum lot occupancy provisions for one-family, semi-detached dwellings.⁴
49. The lot occupancy of Unit 8, on new lot 8, is also unknown, but from the site plan provided by the Applicants, it does not appear to need variance relief from lot occupancy requirements.

Lot Width

50. The minimum lot width for a one-family, semi-detached dwelling in an R-4 zone district is 30 feet. (*See*, 11 DCMR § 401).
51. Unit 1, on new lot 1, a semi-detached dwelling, has a lot width of 21.5 feet, and therefore needs variance relief from minimum lot width requirements. Unit 9, on new lot 9, is also a semi-detached dwelling, but has a lot width of 33 feet and 1 and 3/4 inches, and therefore does not need variance relief from lot width requirements. Unit 8, on new lot 8, is also a semi-detached dwelling, but has a lot width of 66.5 feet, and so does not require variance relief from lot width requirements.
52. All the other Units, 2 through 7 and 10, are row dwellings, and as such have a minimum lot width requirement of 18 feet, which they meet.⁵

⁴The Applicant, in its Post-Hearing Submission No. 4, states that "[l]ots 1 and 10 now require a variance from lot occupancy requirements ... [t]hese variances derive from the fact that semi-detached dwellings are limited to 40 percent lot occupancy rather than the 60 percent allowed for row dwellings." It appears from the site plan attached to this submittal, however, that it is actually Units numbers 1 and 9, and not Units 1 and 10, that are semi-detached dwellings. Unit 10 appears from this plan to be a row dwelling, subject to the greater 60% lot occupancy maximum. The Applicant did not supply the Board with the lot occupancy of Unit 10, therefore the Board cannot determine whether Unit 10 needs lot occupancy relief, even from this more lenient requirement.

⁵Again, Applicant, in its Post-Hearing Submission No.4, states that Unit 10 is a semi-detached dwelling. Looking at the site plan attached to this submittal, this does not appear to be the case. Unit 10 is a row dwelling and Unit 9 is a semi-detached dwelling.

Lot Area

53. The minimum lot area for a row dwelling in an R-4 zone district is 1,800 square feet. (*See*, 11 DCMR § 401).
54. Units numbers 3 and 6, on new lots 3 and 6, each have a lot area of 950 square feet. They each need variance relief from lot occupancy requirements.
55. Units numbers 2, 4, 5 and 7 on new lots 2, 4, 5 and 7 each have a lot area of 855 square feet, thereby requiring variance relief from lot occupancy requirements.
56. Unit 10, on new lot 10, has a lot area of 1,380 square feet, also requiring variance relief from lot area requirements.
57. The minimum lot area for a semi-detached dwelling in an R-4 zone district is 3,000 square feet. (*See*, 11 DCMR §401).
58. Unit 1, on new lot 1, a semi-detached dwelling, has a lot area of 1021.25 square feet, and so requires variance relief from the minimum lot area requirements.
59. Unit 9, on new lot 9, a semi-detached dwelling, has a lot area of approximately 1897.5 square feet, and so needs variance relief from minimum lot area requirements.
60. Unit 8, on new lot 8, a semi-detached dwelling, has a lot area of 3,055 square feet, and so does not require variance relief from lot area requirements.

Side Yard⁶

61. A semi-detached dwelling in an R-4 zone district must have a side yard of at least 8 feet. (*See*, 11 DCMR subsection 405.2)
62. Unit 1, on new lot 1, a semi-detached dwelling, has a side yard of 1 and 1/2 feet, thereby requiring variance relief from side yard requirements.
63. Units 8 and 9, on new lots 8 and 9, both semi-detached dwellings, both have side yards of more than 8 feet, and so do not need relief from side-yard requirements.

⁶Side yard relief was not requested by the Applicant, but the Board has determined that it would be required.

64. The other Units, 2 through 7, and 10, are row dwellings, which by definition, do not require side yards. (*See*, definition of "Dwelling, row," in 11 DCMR § 199.1)

Building on Alley Lots

65. The relief required remains unchanged. *See*, Findings of Fact numbers 32 and 33.

Parking

66. The project, as re-revised, provides 11 parking spaces for 10 units, thus the need for variance relief from § 2101.1 has been removed.
67. Section 2116.1 requires that one parking space per unit be located on the same lot with the unit. Unit 9, on new lot 9, now complies with this requirement, and so does not need variance relief from this section. All of the parking spaces for the other 9 new units, however, will be located on part of new lot 8, at the southern end of the western row of row houses. Therefore, these units, *i.e.*, new units 1 through 8 and new unit 10, still need variance relief from § 2116.1.

Public Detriment and Impairment of the Zone Plan

68. Due to the narrowness of the alleys involved here, fire trucks and other large vehicles, including trash and recycling trucks, may have difficulty accessing the proposed row dwellings. This difficulty would present a public health and safety hazard, not only to the occupants of the proposed row dwellings, but also to adjacent property owners.
69. The introduction of 10 new row dwellings would add pedestrian and vehicle traffic and parked cars to the alleys, adversely affecting alley access, causing traffic and parking congestion and potentially causing unsafe conditions.
70. The density of development proposed by the Applicants is too great for the limited amount of land involved and the alley-locked location of the building site, resulting in potential overcrowding and potentially unhealthy conditions.
71. Section 2507 restricts the use of alley lots and disfavors high-density construction thereon by permitting (other than non-residential uses) only one-family dwellings and only when the 30-foot alley width requirements are met.

CONCLUSIONS OF LAW

The Board is authorized to grant variances from the strict application of the zoning regulations in order to relieve difficulties or hardship where "by reason of exceptional

narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property... ." D.C. Official Code § 6-641.07(g)(3) (2001); 11 DCMR § 3103.2. Relief can be granted only "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map." *Id.* An applicant for an area variance⁷ must make the lesser showing of "practical difficulties," as opposed to the more difficult showing of "undue hardship," which applies in use variance cases. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). The Applicants in this case, therefore, had to make three showings: uniqueness of the property, that such uniqueness results in "practical difficulties" to the Applicants, and that the granting of the variances would not impair the public good or the intent and integrity of the zone plan and regulations.

The First Test -- Extraordinary or Exceptional Situation or Condition ("Uniqueness")

Based on the record herein, the Board is constrained to conclude that the Applicants failed to show any extraordinary or exceptional situation or condition of the subject property. When determining whether a property is unique for variance purposes, "[t]he critical point is that the extraordinary or exceptional condition must affect a single property." *Gilmartin v. District of Columbia Board of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990). This point is "critical" in order to avoid demands from similarly-situated property owners, "approval of [whose] requests would in effect be amending the Zoning Regulations, thereby undermining the function of the Zoning Commission whose task it is to make the basic legislative judgments in drafting regulations." *Palmer, supra*, 287 A.2d at 539. Such a multiplicity of similar demands would frustrate the whole point of a variance as a "safety valve" to avoid possible unfair and/or unconstitutional consequences which may arise in certain individual instances when the use of private property is regulated by zoning. *See, e.g., Goreib v. Fox*, 274 U.S. 603, 607 (1927). A variance, therefore, as an exception to the rule, must not be granted lightly and must arise out of an exceptional condition affecting a particular property, and not all or most similarly-situated properties.

The Applicants' representative states that the exceptional condition of the property "is created by a combination of factors, including the H-shaped alley system, the small size

⁷The Applicants argued their variance requests as if all the relief sought went to area requirements. However, the prohibition against single family dwellings on these types of alley lots is better analyzed as a use variance, because it results in the complete prohibition of a use in these circumstances. However, since the Applicants have not succeeded in meeting the "practical difficulty" test, there is no need to undertake the stricter analysis required for a use variance.

of the existing alley lots, and the limitations imposed by the Historic Preservation Regulations." (Transcript of October 22, 2002 Public Hearing, (hereinafter referred to as Oct. 22 Trans.), at 258; *See also*, Applicants' Pre-Hearing Statement at 7, Exhibit No. 9). None of these factors, however, even if considered in the aggregate, make the subject property unique.

The alley system certainly is not unique in Washington, D.C., a city with many similar alley systems. The Applicants themselves make this clear in their Exhibit C, attached to Exhibit No. 42. Exhibit C presents copies of 9 maps of squares in the Shaw neighborhood. All of these maps depict alley systems with 10- and 15-foot wide alleys. The Applicants state that these alley systems are "typical" and that "[t]he 10-foot wide alley is the most common, followed by a few 10-foot and 15-foot alleys and an occasional 20-foot or wider alley." It is difficult, if not impossible, to claim that the alley system in question here is simultaneously "unique" and "typical."

Applicants' third factor fails for the same reason. The Historic Preservation Regulations apply equally to all properties within historic districts. *See*, D.C. Official Code § 6-1101, *et seq.* (2001). The application of those regulations here is no different from their application to any other site within any historic district in Washington, D.C. As the Court of Appeals said in *Capitol Hill Restoration Society v. District of Columbia Board of Zoning Adjustment*, 534 A.2d 939, 940 (D.C. 1987) the inclusion of a property in a historic district:

is not a condition which uniquely affects the lot at issue.
If this fact were sufficient to justify a finding of uniqueness,
then each and every parcel of land within the ... Historic
District would be entitled to a variance on this basis.

Applicants' second stated reason for uniqueness, the small size of the existing alley lots, is irrelevant here, as the Applicants are free to re-subdivide the existing lots into larger lots. The property is vacant and the Applicants are not constrained in their creation of larger lots by any existing improvements or by any legal impediments, such as easements on the land.

Because the Applicants' representative stated that the property's uniqueness "included" the three above-discussed factors, the Board looks for further factors creating an extraordinary or exceptional situation or condition. One such factor presented by the Applicants is the narrow width of the perimeter alleys involved here, which creates the need for variance relief from § 2507.2. Section 2507.2 mandates that a single-family dwelling shall not be constructed on an alley lot which abuts a less-than-30-foot-wide alley or which does not have access to a street through alleys at least 30 feet wide. First, as stated earlier, the width of the perimeter alleys is common throughout the Shaw

neighborhood. It is not unique to this property. Second, this property is not unique *because* the alleys do not conform to the 30-foot width requirement. The mere proximity of this property to an alley less than 30-feet in width proves nothing more than that a variance is needed to undertake the use desired.

The subject property is comprised of a long rectangular parcel to the west of Temperance Court and a square parcel to its east. Together, the two parcels encompass 12,785.55 square feet. Neither parcel is particularly angular or oddly-shaped in any way. Neither parcel is affected by a gradient change or other unusual topographical feature. Both parcels are unexceptional, unimproved lots. It is true that the parcels do not have street frontage, but, as explained above, this is not unique, and as explained below, this actually works against the granting of the variances requested, as lack of street frontage impairs the intent, purpose and integrity of the zone plan. The Board therefore concludes that the Applicant has failed to make a convincing showing of an extraordinary or exceptional situation or condition of its property.

The Second Test -- Practical Difficulties

Nor have the Applicants made a convincing showing of any practical difficulties arising out of the property itself -- unique or not. The only real practical difficulty encountered by the Applicants is their desire to fit 10 units on a land area that is, under the zoning regulations, too small to sustain that many units. There has been no credible showing that a matter-of-right use, or even a less dense use, cannot be made of the property. At the hearing, the Board questioned why the Applicants did not subdivide the land into conforming, or more conforming, lots. In answer, the Applicants' representatives stated that larger lots with, presumably, more open space, would be more expensive to build (for example, because of the increased number of exterior walls), and would be out of character with the surrounding neighborhood. (Oct. 22 Trans. at 259 and 273). Although the Board is permitted to consider economic factors in a variance analysis (*See, Tyler v. District of Columbia Board of Zoning Adjustment*, 606 A.2d 1362, 1366-1367 (D.C. 1992)), the Board also "has no authority to grant a variance in order to assure the economic viability of the use of a particular property in a particular manner." *Silverstone v. District of Columbia Board of Zoning Adjustment*, 396 A.2d 992, 994 (D.C. 1979). In the instant case, the Board is unconvinced that a less dense development would be economically infeasible or that the economic burden rises to the level of practical difficulties required for the granting of a variance.

Nor is the Board persuaded by the Applicants' second reason for choosing small lots -- that larger lots would be out of character with the neighborhood⁸. The Applicants' representative stated that widening the lots to be conforming "would make them out of

⁸Although made in the context of a practical difficulty analysis, the Applicants' desire to create small lots to blend in with adjacent similarly sized lots belies their uniqueness contention.

character with the greater U Street historic district and probably not approvable by HPRB. That's not a definite, but in our opinion it would be out of character...." (Oct. 22 Trans. at 258). The Applicants have not brought a larger-lot design to the HPRB and therefore are only speculating that it would not be approved. The fact that these are alley-bound lots dictates that larger lots may work better to maintain a higher quality of life. The alleys, particularly the perimeter alleys, are narrow, restricting the flow of light and air and potentially giving the appearance of overcrowding. Larger lots with more open space would benefit the inhabitants and avoid such an appearance. Further, larger lots would help overcome the problem of parking space location. With fewer units on larger lots and a parking space on each lot, the need for variance relief from § 2116.1 would be obviated. (*See*, Finding of Fact No. 68).

The Applicants' representative stated that if they were to build on conforming lots they could build 5 units to the west of Temperance Place and 1 unit to the east. (Oct. Trans. at 236). Nowhere do the Applicants explain satisfactorily, however, why such a conforming development could not be built so as to be "in character" with the surrounding neighborhood. The Applicants' assertion of the existence of practical difficulties is not enough; there must be proof of their existence in the record. There is nothing in the record pointing to any real practical difficulty in abiding by the zoning regulations.

Finally, it is the Zoning Regulations, and not the design preferences of a particular applicant, that determines what lot size is appropriate for properties within the R-4 zone district. The fact that the applicant would prefer smaller lots than allowed in order to achieve aesthetic conformity does not rise to the level of practical difficulty.

Therefore, based on the facts before it, the Board concludes that there is no practical difficulty arising out of the strict application of the zoning regulations.

The Third Test -- Effect on Public Good and Intent, Purpose and Integrity of Zone Plan

A variance can only 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. Although the Board feels that the provision of "affordable housing" is certainly a meritorious undertaking and that the Applicants are attempting to benefit their community, it concludes that the project, as proposed, could negatively affect the public good and would substantially impair the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations.

The alleys surrounding the proposed project are too narrow to sustain the increased pedestrian and vehicular traffic which would be associated with the project. While the provision of one parking space for each row dwelling meets the requirements of the

zoning regulations, multiple-vehicle homes and guest parking would generate additional traffic and parking congestion in these narrow alleys and in the neighborhood. The Board is also concerned with the safety of pedestrians in these narrow alleys and the ability of trash trucks and emergency vehicles to access structures abutting these alleys. The Board is not unmindful that DDOT supported the application as revised and that the Fire Department had no objection to the project, except to request that parking not be allowed in the eastern 10-foot dead-end alley. The Board, however, concludes that, even if fire trucks can access these dwellings, the negative impacts on the public good which will likely arise from the presence of these row dwellings crowded into two interior lots cannot be avoided.

Section 2507 rather severely restricts construction on alley lots, particularly the construction of dwellings. No structures for "human habitation" shall be constructed on alley lots except a single-family dwelling on a lot which abuts, and has access to a street through, alleys at least 30 feet wide. Subsection 2507.3 goes on to say that nonresidential structures on less than 30-foot wide alleys shall not be converted to residences and further, that single-family dwellings already existing on less than 30-foot wide alleys may not be altered if the cost of such alteration exceeds one-half the value of the structure. Subsection 2507.4 limits the height of a structure on an alley lot in an attempt to retain the flow of air and light to and around alley structures. The restrictions articulated in § 2507 are unchanged since § 7507 of the 1958 Zoning Regulations first enunciated them. The 1958 regulations sought to address problems with alley dwellings, many of which lacked sufficient air and light and had become slums.⁹ The construction of "affordable housing" on alley-bound, interior lots may lead to the same conditions originally targeted by § 7507 in 1958. Relegating "affordable housing," to alley-bound, interior lots does not properly integrate it or its inhabitants into the community. Clearly, the construction of dwellings on alley lots, and any significant density of construction of such dwellings, is disfavored by the zoning regulations. The Board therefore concludes that the Applicants' proposed project would substantially impair the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations.

ANC and OP Great Weight

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). The Board has seriously considered the report of

⁹See, the HPRB Report on the Applicants' project: "[a]lleys have provided a location for affordable housing in Washington since the city's inception. However, by the early 20th century, their often cramped, substandard and unsanitary conditions made them a target of progressive reformers who worked successfully to abolish alley dwellings -- and often the alleys themselves -- in many areas of the city." HPRB Staff Recommendation and Report, at 1.

ANC 1B. Although the ANC voted to support Applicants' project, its letter also highlighted several important concerns, such as access to the property, alley setbacks and the size of the row dwellings. The alley-bound siting of the project, when a more suitable site with street frontage (also belonging to the Foundation) was available, was also mentioned as a concern. Taking into consideration not only the ANC's final recommendation, but also the issues its letter raises, as well as the findings of fact and conclusions of law set forth above, particularly the Board's determination that the Applicants have failed to meet the three variance tests, the Board is not persuaded by the ANC's recommendation. Similarly, the Board has carefully considered OP's report and recommendations, but cannot agree that this project meets the variance tests or that it will not substantially impair the intent, purpose and integrity of the zone plan. In fact, the OP report seems to base its approval recommendation largely on the facts that the lots here are "small," "shallow" and abutting "narrow" alleys. The Board finds that these facts militate against granting the many variances requested for this project. The Board finds it difficult to believe that the zone plan, as embodied in the regulations, sanctions this density of development on such "small," "shallow" lots on "narrow" alleys.

CONCLUSION

The Board regrets that its decision may delay this project. It appreciates the good motives behind the endeavor and general community sentiment in favor of its going forward. But the zoning regulations exist first and foremost to protect the public health and safety. The prohibition against residential uses on these types of alley lots, the requirement for on-site parking, and the other minimum area requirements that this project fails to meet cannot be waived simply because a project seeks to achieve important social goals. As the Zoning Commission has stated: "A variance must not be granted lightly and never on the basis that a project is popular or has exceptional merit." *Sua Sponte Review of Board of Zoning Adjustment Application No. 16869 of King's Creek, LLC, Z.C. Case No. 02-37/16869 (2003).*

At the beginning of this order, the Board noted that the problems identified by the applicant go beyond the confines of a particular lot, but relate to an apparent conflict between what the zoning regulations require and the flexibility that this affordable housing provider claims to need. The evaluation and resolution of this claimed conflict requires the type of zoning policy analysis that can only be undertaken through rulemaking by the Zoning Commission. This Board is without jurisdiction to do so.

Based on the record before the Board and for the reasons stated above, the Board concludes that the Applicant has failed to satisfy the burden of proof with respect to the application, pursuant to 11 DCMR § 3101.2, for a variance from the lot area and lot width requirements under § 401, a variance from the lot occupancy requirements under § 403, a variance from the rear yard requirements under § 405, a variance from the parking space location requirements under subsection 2116.1, and a variance from the building on

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alley lots provisions under subsection 2507.2, to allow the construction of 10 single-family row dwellings in the R-4 District at premises rear 1300 block of Temperance Court, N.W. (Square 274, Lots 57-61, and 804 through 820 (1 through 12 per sub.)).

It is therefore **ORDERED** that the application be **DENIED**.

VOTE: **3-1-1** (Geoffrey H. Griffis, David A. Zaidain and Anthony J. Hood, to deny; Curtis L. Etherly, to grant, with the fifth member, a mayoral appointee, not present, not voting.)

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

Each voting Board member has approved the issuance of this Order denying the application.

FINAL DATE OF ORDER: AUG 15 2003

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

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

Application No. 16973 of Bundy Development Corporation, pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy requirements under § 403, a variance from the rear yard requirements under § 404, a variance from the Downtown Development ("DD") District's Chinatown provisions under § 1705, and variances from floor area ratio (FAR) requirements under §§ 402 and 1701 and Chapter 17, or in the alternative to a portion of the FAR variances sought, pursuant to 11 DCMR § 3104.1, a special exception from the roof structure set back provisions under § 411, to construct an apartment building in the DD/R-5-E District at premises 809 -- 813 6th Street, N.W. (Square 485, Lot 46).

HEARING DATE: February 11, 2003

DECISION DATE: February 11, 2003

DECISION AND ORDER DENYING REINSTATEMENT OF WITHDRAWN CASE

The applicant in this case is Bundy Development Corporation, and Ms. Pamela Bundy, its president ("Applicant"). On November 26, 2002, Ms. Bundy's authorized representative, Mr. Lindsley Williams, filed an application with the Board of Zoning Adjustment ("Board") for the zoning relief described above. Mr. Williams signed the application form as the "Applicant," which is defined on the form itself as "[t]he Owner of the Property for which the application is made or his/her authorized agent." Under this definition, only the owner of the subject property or his or her authorized agent may file an application for zoning relief with the Board.

On December 2, 2002, the Office of Zoning ("OZ"), pursuant to its normal procedures, notified the City Council Member for Ward 6, Advisory Neighborhood Commission ("ANC") 2C, the ANC members for Single Member Districts 2C04 and 6C09 (a re-districting was to take effect on January 1, 2003), the District of Columbia Office of Planning ("OP"), and the District of Columbia Department of Transportation ("DDOT") of the filing of the application. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing on the application in the District of Columbia Register and on December 10, 2002, mailed notices to the Applicant, ANC 2C and all property owners within 200 feet of the subject property, advising them of the date of the hearing.

On January 2, 2003, the Office of Zoning received a letter dated December 31, 2002, from Ms. Bundy explaining that, at the time Mr. Williams filed the application with the Board, she was not the owner of the subject property, but the contract-purchaser. Ms. Bundy stated that she assumed she had implicit authority to file the application. The

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actual owner of the property, however, upon receiving notice of the filing of the application, requested that Ms. Bundy withdraw the application because the purchase contract for the property lacked explicit authority for the contract-purchaser, *i.e.*, Ms. Bundy, to file for zoning relief. As of December 31, 2002, Ms. Bundy appeared loath to withdraw her application as she felt it might be possible to cure any deficiencies in it in a timely manner. She did, however, formally request that it be withdrawn in a separate letter, also dated December 31, 2002.

OZ was informed that settlement on the subject property and its transfer to Ms. Bundy as owner, was to occur on January 28, 2003. Based on this, OZ held off on officially withdrawing Ms. Bundy's application. Unfortunately, unforeseen circumstances prevented the occurrence of the settlement and transfer on January 28th, and on that day, OZ sent a letter to Ms. Bundy formally acknowledging her withdrawal request and officially withdrawing her application.

Two days later, on January 30, 2003, the settlement occurred and Ms. Bundy's entity, Chinatown East, LLC, became the fee simple owner of the subject property. The Applicant's Affidavit of Posting indicated that on January 31, 2003, it posted two zoning posters on the 6th Street frontage of the subject property. On February 3, 2003, Ms. Bundy corresponded with OZ again, and requested that her application be reinstated. She requested that the Board consider the question of reinstatement on February 4, 2003 and that if such reinstatement were granted, that the hearing on the case commence on February 11, 2003.

The Board addressed the motion for reinstatement at its February 11, 2003 decision meeting. The Board, by consensus, decided that the case could not be reinstated, but that the Applicant would have to file a new application, which would be heard on an expedited schedule.

FINDINGS OF FACT

1. 11 DCMR § 3113.3 states that the **owner** of property may file an application with the Board. Section 3113.4 states that an authorized agent may file an application on behalf of the **owner**. (Emphasis added.)
2. When, on November 26, 2003, Ms. Bundy's authorized agent, Mr. Williams, filed the application with the Board, Ms. Bundy was not the owner of the subject property, but was the contract-purchaser.
3. Upon learning of the filing of the application, the then-owner of the subject property protested to the Applicant and asked that the application be withdrawn.

4. The application was advertised under the name of "Bundy Development Corporation."
5. On January 30, 2003, Chinatown East, LLC, and not Bundy Development Corporation, became the fee simple owner of the subject property.
6. Section 3113.14 states that the applicant shall post the property with notice of the hearing at least 15 days in advance of the hearing.
7. The applicant posted the property on January 31, 2003, only 11 days before the hearing/decision date of February 11, 2003.
8. Section 3113.8 states that no later than 14 days before the hearing date, the applicant shall file with the Board information, reports, plans, etc. that it wishes to offer into evidence at the hearing.
9. The Applicant filed the report of its Land Use and Zoning Consultant and its architectural plans on February 3, 2003, only 8 days before the hearing date of February 11, 2003.
10. Section 3113.10 states that an applicant may withdraw an application at any time, but that the application fee shall not be refunded upon withdrawal. It also states that, without leave of the Board, a withdrawn application may not be accepted for filing again for at least 90 days after its withdrawal.
11. Section 3100.5 states that with certain exceptions, not relevant here, the Board may waive its procedural rules if the waiver will not prejudice the rights of any party and is not prohibited by law.

CONCLUSIONS OF LAW

Based on the record and the Findings of Fact laid out above, the Board concludes that the Applicant's motion for reinstatement must be denied. Even without its subsequent withdrawal, the application fails because it was not filed by the individual who owned the subject property at the time of filing. Moreover, upon learning of the filing, the then-owner protested and requested that the Applicant withdraw the application. In a sense, because the application was not properly filed in the first place, there was no application to withdraw, or to reinstate.

Even assuming that deficiencies in the application itself could be cured, the project would still have had to be re-advertised under the new owner's name, that of Chinatown East, LLC. Further, later deficiencies of too-late posting and too-late submittals to the Board could not be cured. The 14-day rule of § 3113.8 exists to allow OZ enough time to

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prepare materials for the Board and to allow the Board members sufficient time to review such materials. Applicant's late submittals negated both these purposes. Even more significantly, posting is an important part of notifying the community of the proposed project. The 15-day rule of § 3113.15 allows a sufficient time to permit the public to learn of, and possibly inquire about, or object to, the project.

The Board, pursuant to § 3100.5, may waive its procedural rules, but only if there is no prejudice to any party. This application was filed by a non-owner, advertised under the wrong name, and not posted for the required 15-day period. The Board finds that proceeding with the application on February 11 would have prejudiced the public in that, if a member of the public had inquired about the application between the time of its official withdrawal on January 28, 2003 and the February 11th hearing date, he/she would have been told that it had been withdrawn. If that person had intended to express opposition to the application, he/she would have been misled into believing that such opposition was no longer necessary, or indeed even possible. The Board finds that reinstating the application would prejudice the interests of members of the general public who are potential parties and therefore declines to waive any of its procedural rules herein.

The Board concludes that the Applicant must file a new application and start anew, with re-advertising and re-posting of the property. The Board will allow the Applicant to include the submittals already presented to be included in the new case file, to avoid costly and time-consuming duplication of effort. Pursuant to § 3113.10, the Applicant's fee will not be refunded, but also pursuant to that section, the Board grants the Applicant leave to re-file before the expiration of the 90-day period after the withdrawal of the first application. It is therefore **ORDERED** that the motion to reinstate the application is **DENIED**.

VOTE:**5-0-0**

(Geoffrey H. Griffis, David A. Zaidain,
Anne M. Renshaw, Curtis L. Etherly, Jr.,
and Peter G. May, to deny.)

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

Each voting Board member has approved the issuance of this Order denying the application.

FINAL DATE OF ORDER: AUG 14 2003

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. 17015 of Evangel Missionary Baptist Church, pursuant to 11 DCMR § 3103.2, for a variance from the off-street parking requirements under subsection 2116.3, to allow the construction of a new church (replacing a previous church on the site that was destroyed by fire) in the R-1-B District at premises 2122 Jackson Street, N.E. (Square 4220, Lot 802).

Note: The Applicant amended the application as originally filed to eliminate the need for variance relief from the rear yard requirements (section 404) and off-street parking requirements (section 2101), to only seek variance relief under subsection 2116.3.

HEARING DATE: June 3, 2003
DECISION DATE: July 1, 2003 and August 5, 2003

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) 5A, 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 5A. ANC 5A submitted a letter in 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 and 2116.3, 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

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public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. The applicant proffered to the Board an agreement with the owner(s) of an off-street parking lot located elsewhere to satisfy the requirements under subsection 2116.3.

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: 3-1-1 (David A. Zaidain, Curtis L. Etherly, Jr. and Geoffrey H. Griffis to approve, Ruthanne G. Miller opposed to the motion, the Zoning Commission Member not voting, not having participated in the hearing).

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: AUG 15 2003

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

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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. 17046 of Robert Holland, et. al., pursuant to 11 DCMR § 3104.1, for a special exception to allow an accessory parking lot under section 214 (last approved by BZA Order No. 16329) in the R-2/C-1 District at premises 3820-26 McKinley Street, N.W. (Square 1859, Lots 49, 50, 51, and part of 92).

HEARING DATE: July 29, 2003
DECISION DATE: July 29, 2003 (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 report in support of the application. The Office of Planning (OP) submitted a report in support of the application. The Department of Transportation submitted a report stating no objection to 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 § 214. 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 214, 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.

BZA APPLICATION NO. 17046

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and the Zoning Commission member not present, not voting).

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

Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: ~~AUG - 1~~ 2003

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.

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

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