BOARD OF ELECTIONS AND ETHICS
CERTIFICATION OF ANC/SMD VACANCIES

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

VACANT: **3D07, 3D08**
5C10, 5C11
6B11
7C01
8B03, 8C05, 8C06

Petition Circulation Period: **Tuesday May 6, 2003 thru Monday, May 26, 2003**
Petition Challenge Period: **Thursday, May 29, 2003 thru Wednesday, June 4, 2003**

VACANT: **4A05**
8E01

Petition Circulation Period: **Tuesday, May 13, 2003 thru Monday, June 2, 2003**
Petition Challenge Period: **Thursday, June 5, 2003 thru Wednesday, June 11, 2003**

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

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

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

DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

Certification of Filling a Vacancy
In Advisory Neighborhood Commission

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

Chapman Todd
Single Member District 3E03

Government of the District of Columbia

Department of Insurance and Securities Regulation

IN THE MATTER OF:	)	
THE LONDON PACIFIC	)	**Order Number SO-03-01**
LIFE AND ANNUITY COMPANY	)	

ORDER

OF SUSPENSION

The London Pacific Life and Annuity Company is a foreign insurer holding a Certificate of Authority in the District of Columbia. On August 6, 2002 the Superior Court of the Wake County of North Carolina, issued an Order of Receivership for The London Pacific Life and Annuity Company, based upon the finding that the continuation of its business will be hazardous to the policyholders, creditors and the public.

It is the finding of the Commissioner, Department of Insurance and Securities Regulation pursuant to D.C. Official Code, §*31-2502.03(a)(2001* ed.), that the Certificate of Authority authorizing The London Pacific Life and Annuity Company, a corporation of the State of North Carolina, to transact the business of insurance in the District of Columbia is hereby suspended, and further it is hereby ordered that all appointments of agents with The London Pacific Life and Annuity Company are suspended, and in the event said Certificate of Authority and appointments have not been reinstated within one (1) year from the date of this Order, same shall be automatically revoked without further action by the Department.

810 First Street NE, #701 • Washington DC 20002 e (202) 727-8000 • Fax (202) 535-1207

GOVERNMENT OF THE DISTRICT OF COLUMBIA

DEPARTMENT OF INSURANCE AND SECURITIES REGULATIONS

IN THE MATTER OF:	)	
THE HOME	)	**Order Number S0-03-3**
INSURANCE COMPANY	)	

ORDER

OF SUSPENSION

The Home Insurance Company is a foreign insurer holding a Certificate of Authority in the District of Columbia. On March 5, 2003 the Superior Court of the State of New Hampshire, issued an Order of Rehabilitation for The Home Insurance Company, based upon the finding that the continuation of its business will be hazardous to the policyholders, creditors and the public.

It is the finding of the Commissioner, Department of Insurance and Securities Regulation pursuant to D.C. Official Code, §*31-2502.03(a)(2001* ed.), that the Certificate of Authority authorizing The Home Insurance Company, a corporation of the State of New Hampshire, to transact the business of insurance in the District of Columbia is hereby suspended, and further it is hereby ordered that all appointments of agents with The Home Insurance Company are suspended, and in the event said Certificate of Authority and appointments have not been reinstated within one (1) year from the date of this Order, same shall be automatically revoked without further action by the Department.

810 First Street NE, #701 · Washington DC 20002 · (202) 727-8000 · Fax (202) 535-1207

RLA REVITALIZATION CORPORATION

NOTICE OF PROPOSED REQUEST FOR PROPOSALS

The RLA Revitalization Corporation ("RLARC") hereby provides notice of its intent to issue a Request for Proposals ("RFP") sometime on or about June 18, 2003, subject to approval by the District of Columbia Council. The RFP will seek proposals for the disposition and development of RLARC Parcel 1 in the District of Columbia.

1. Parcel 1 is located in the Downtown Urban Renewal Area at the northeast corner of the intersection of 5th and K Streets, N.W. It is also known as the former Wax Museum site which is 3.18 acres or approximately 138,000 square feet of vacant land area currently used as a surface parking lot.

2. RLARC contemplates offering the site by long-term ground lease, or, under special circumstances, by sale by special warranty deed.

3. The proposed RFP contemplates development of the site into a mixed-use development consisting of 400 mixed-income housing units, neighborhood retail, and open public space that will make the project the centerpiece of a new, vibrant residential neighborhood. The RFP will require that a minimum of 20% of all units will be available to households earning 30% to 80% of the Washington, D.C. metropolitan area median income. Additionally, the proposed RFP will require a grocery store of at least 25,000 square feet.

4. Public comment regarding the proposed RFP must be received by the RLARC by 5:00 p.m. on Wednesday, May 28, 2003.

5. The Notice of RFP will be published in the Washington Post and Washington Times on or about June 18, 2003.

6. For good cause related to the urgency in getting the project underway without undue delay, this Notice of Proposed Request for Proposals is being published less than thirty (30) business days prior to the proposed date to issue the RFP.

7. Additional information regarding the proposed RFP may be obtained from RLARC's website: http://www.ncrcdc.com/main/rlarc/.

8. RLARC's address and point of contact information regarding this matter is:

RLA Revitalization Corporation
1801 K Street, N.W., Suite 1210
Washington, D.C. 20006
Attn: Greg Jeffries, Senior Development Director
Tel: (202) 530-5750

RLA REVITALIZATION CORPORATION

NOTICE OF PROPOSED REQUEST FOR PROPOSALS

The RLA Revitalization Corporation ("RLARC") hereby provides notice of its intent to issue a Request for Proposals ("RFP") sometime on or about July 15, 2003, subject to approval by the District of Columbia Council. The RFP will seek proposals for the disposition and development of RLARC Parcel 34 in the District of Columbia.

1. Parcel 34 is located in the Columbia Heights neighborhood of the District on the west side of 14th Street NW between Florida Avenue and Belmont Street (Square 2667, Lot 227). The parcel is approximately 16,370 square feet and is currently vacant. The parcel is zoned C2B – allowing for commercial uses no larger than approximately 24,500 square feet (1.5 floor to area ratio) and residential uses no larger than approximately 57,200 square feet (3.5 floor to area ratio). The zoning requires a height limit of 65 feet.

2. RLARC contemplates offering the site by sale or long-term ground lease and reserves the right to enter into a joint venture partnership with the selected development team and/or receive equity participation in the profits of the proposed development.

3. The proposed RFP contemplates development of the site into either a mixed-income residential development consisting of rental or for sale housing units or a mixed-use, mixed-income development consisting of rental or for sale housing units and retail. The RFP is expected to require that a minimum of 20% of the housing units developed be available to households earning less than 80% of the Washington, D.C. metropolitan area median income. Alternatively, the RLARC reserves the right to evaluate potential development for a solely commercial use if RLARC deems that such use will be beneficial to the Columbia Heights community and the District.

4. Final public comment regarding the proposed RFP must be received by the RLARC by 12:00 p.m. on Friday, June 27, 2003.

5. The Notice of RFP will be published in the Washington Post, Washington Times, and El Pregonero on or about July 15, 2003.

6. Additional information regarding the proposed RFP may be obtained from RLARC's website: http://www.ncrcdc.com/main/rlarc/.

7. RLARC's address and point of contact information regarding this matter is:

RLA Revitalization Corporation
1801 K Street, N.W., Suite 1210
Washington, D.C. 20006
Attn: Simone Goring, Senior Development Director
Tel: (202) 530-5750

SECRETARY OF THE
DISTRICT OF COLUMBIA

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

Final Decision

Appeal of: Marcia D. Cole

Matter No: MCU 342945

Date: May 10, 2003

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

INTRODUCTION

This matter is before the Office of the Secretary of the District of Columbia for a final decision on Marcia Cole's formal administrative appeal to the Mayor of the District of Columbia[1] from a denial of her request for the disclosure of certain records pursuant to section 207(a) of the District of Columbia Freedom of Information Act ("D.C.-FOIA" or the "Act"), D.C. Official Code § 2-537(a)(2001).[2]

---

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

[2] Pursuant to section 207(a) of the D.C.-FOIA, "[a]ny person denied the right to inspect a public record of a

The narrow issue on appeal is whether, under the provisions of the D.C.-FOIA, a public body has a duty to obtain, and make publicly available, records in the possession, custody or control of a private contractor that are generated during the performance of a contract awarded by the District government.

BACKGROUND

Marcia Cole (hereinafter the "appellant") is a fourth grade teacher at Eugene A. Clark Elementary School in the District of Columbia. MVM, Inc. ("MVM") is a contractor which provides security guard services for District of Columbia Public Schools ("DCPS").

The written letter of appeal to the Mayor states, in relevant part, that "[o]n January 24th, 2003, [the appellant] submitted a written request to Dr. William Ritchie[3] . . . in receipt of the District of Columbia Public Schools School Security handbook [sic] detailing the agency's employees [sic] responsibilities and their governing policies." Appeal letter dated February 24, 2003 from M. D. Cole to Mayor Anthony A. Williams.

(footnote 2 continued)

public body *may petition the Mayor* to review the public record to determine whether it may be withheld from public inspection." D.C. Official Code § 2-537(a)(emphasis added).

[3] The record indicates that Dr. Ritchie is employed by MVM.

The full text of the appellant's January 24, 2003 letter to Dr. Ritchie is as follows:

> January 24, 2003
>
> Dear Dr. Richey:
>
> Per Ms. Joyner's permission, I am requesting a copy of your security handbook which details the employee duties and responsibilities of your security staff. You may mail the handbook to my home address at: 710 Roeder Road, #203, Silver Spring, MD 20910 or forward a clean copy to Clark Elementary School for pick up. Thank you for your cooperation.
>
> Sincerely
>
> /s/
>
> Marcia Cole
> Fourth Grade Teacher
> Eugene Clark Elementary School

Letter dated January 24, 2003 from M. Cole to Dr. Richey [sic].

Dr. Ritchie's response to the appellant's January 24, 2003 letter[4] came approximately three (3) days later in the form of a handwritten notation that was made directly on the January 24, 2003 letter which stated as follows:

> Disapproved, no justification cited for
> the release of the requested material.
> Call me at 202-576-5030
> if you have Questions.
> WR
> 1/27/03

[4] Noticeably absent from the body of the appellant's letter to Dr. Ritchie was a citation or reference to the D.C.-FOIA or its implementing regulations.

The appellant's letter of appeal also describes the efforts that she made to obtain a copy of the MVM's security handbook between January 24, 2003 and January 29, 2003 from various individuals, all of which were ultimately unavailing.[5]

The instant appeal, however, arises solely from Dr. Ritchie's decision to disapprove her request for a copy of the security handbook. See Appeal Letter p.2, ¶ 3 ("In

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[5] In the appeal letter, the appellant provided the following account of the events that took place in her unsuccessful pursuit of a copy of MVM's security handbook:

- January 24th, 2003- I contacted Donald Harper, MVM Security, to request a copy of the security handbook and he referred me to Michelle Lalahudlin, Supervisor, MVM Security, stating he could not issue me a copy of the handbook.
- January 24th, 2003 - I contacted Michelle Lalahudlin, Supervisor, MVM Security, and she too said that she could not release the handbook.
- January 24th, 2003 - I received a phone call from the principal of Clark Elementary, Ms. Patricia Joyner, stating she received a call from Michelle Lalahudlin suggesting that I contact Dr. William Ritchie, Project Manager, MVM in writing. Ms. Lalahudlin informed Ms. Joyner that my request should come through the principal.
- January 24th - Request faxed to Dr. Ritchie regarding security handbook.
- January 27th - Dr. Ritchie faxed a response to Clark Elementary denying me access to security handbook.
- January 29th - Spoke with Mr. Theodore Tuckson, Interim Director of DCPS Security. Made a verbal request and he openly denied my request stating I could seek the "Freedom of Information Act" from the Office of the General Counsel. [sic]

Appeal letter p. 1.

closing, I am appealing Dr. William Ritchie's decision to receive a copy [sic] of the security handbook issued by MVM and DCPS Security to its employees.")

Following a general overview of the legal principles underlying the D.C.-FOIA, this decision addresses the merits of the present appeal.

GENERAL OVERVIEW OF THE D.C.-FOIA

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

The D.C.-FOIA embodies "[t]he public policy of the District of Columbia . . . that all persons are entitled to full and complete disclosure of information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C.

Official Code § 2-531; see Donahue v. Thomas, 618 A.2d 601, 602 n.2 (D.C. 1992); Newspapers, Inc. v. Metropolitan Police Department, 546 A.2d 990, 993 (D.C. 1988); Barry v. Washington Post Company, 529 A.2d 319, 321 (D.C. 1987).

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

DISCUSSION

As a preliminary matter, the D.C.-FOIA applies to each *public body* of the District of Columbia and requires the disclosure of any *public record[s]* not otherwise exempted from disclosure under D.C. Official Code § 2-534. See D.C. Official Code § 2-532(a).

The D.C.-FOIA is part of the District of Columbia Administrative Procedure Act ("D.C.-APA") and the terms "public body"[6] and "public record"[7] have the same meaning as ascribed in section 3 of the D.C.-APA. See D.C. Official Code § 2-529. Accordingly, the D.C.-FOIA applies to the Mayor, the Council of the District of Columbia, and both "subordinate"[8] and "independent"[9] agencies of the government of the District of Columbia.[10]

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[6] According to the D.C. APA, "[t]he term 'public body' means the Mayor, an agency, or the Council of the District of Columbia." D.C. Official Code § 2-502(18A).

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

[8] The D.C. APA defines "subordinate agency" to mean "any officer, employee, office, department, division, board, commission, or other agency of the government of the District, other than an independent agency or the Mayor or the Council, required by law or by the Mayor or the Council

On appeal, it is patent that MVM is not a "public body" as defined in the D.C.-FOIA. The determination that MVM is not a public body, however, is not dispositive on the question as to whether its security handbook is a "public record" that is subject to release under the information disclosure requirements of the D.C.-FOIA.

With the enactment of the Freedom of Information Amendment Act of 2000, the scope and reach of the D.C.-FOIA was legislatively enlarged to bring within the purview of its broad disclosure mandate records "produced or collected" by government contractors in the performance of contracts awarded by public bodies of the District of Columbia.

In this regard, the D.C.-FOIA, as amended, in pertinent part, provides:

> (a-3) *A public body shall make available* for inspection and copying *any record produced or*

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to administer any law or any rule adopted under the authority of a law." D.C. Official Code § 2-502(4).

[9] The D.C. APA defines "independent agency" to mean "any agency of the government of the District with respect to which the Mayor and the Council are not authorized by law, other than this subchapter, to establish administrative procedures, *but does not include the several courts of the District* and the Tax Division of the Superior Court." D.C. Official Code § 2-502(5)(emphasis added).

[10] "The term 'agency' includes both subordinate agency and independent agency." D.C. Official Code § 2-502(3).

> *collected pursuant to a contract with a private contractor to perform a public function*, and the public body with programmatic responsibility for the contractor shall be responsible for making such records available to the same extent as if the record were maintained by a public body.

D.C. Law 13-283, effective April 27, 2001, published at 48 DCR 4064 (May 11, 2001), incorporating by reference D.C. Act 13-581 published at 48 DCR 1917 (March 2, 2001)(to be codified at D.C. Official Code § 2-532(a-3)(emphasis added).

Thus, the crucial inquiry on appeal is whether MVM's security handbook constitutes a record that was "produced or collected" during the performance of a "public function."

There can be no doubt that MVM is performing a "public function" while it is engaged as a contractor for the provision of DCPS's security services. The remaining question is whether the security handbook sought by the appellant was a record that was "produced or collected" pursuant to MVM's contract with DCPS.

There is a dearth of case law interpreting the D.C.-FOIA and there are no published opinions which have construed any of the provisions added by the FOIA Amendments of 2000. Notwithstanding, in interpreting the D.C.-FOIA, this office is mindful that it must construe its

provisions "with the view toward expansion of public access" to information. D.C. Official Code § 2-531.

By adding the provision at issue to the D.C.-FOIA, this office is of the opinion that the Council of the District of Columbia ("Council") evinced its intent to give the public the right to have access to a contractor's records insofar as they relate to the performance of a government contract and involve the expenditure of public funds. In doing so, the Council carved out an exception to the general rule that the D.C.-FOIA requires only the disclosure of records in the physical custody, possession or control of public bodies.

The Council's intent to subject the records of private contractors doing business with the government to the disclosure mandate of the D.C.-FOIA can also be deduced from the language of the original version of the bill introduced by Councilmember Kathy Patterson before the Committee on Government Operations. When the bill was introduced, it provided, in pertinent part, that:

> (18) **** Public records include:
>
> ***
>
> (B) Records received or maintained by a private person, firm, corporation, or other private entity in the performance of a service or function for or on behalf of a public body shall

> be subject to disclosure to the same extent that such records would be subject to disclosure if received or maintained by such public body.

The above-quoted language demonstrates that the D.C.-FOIA was amended to, inter alia, bring the records of government contractors within the coverage of the Act.

Turning to the merits of the instant appeal, if, as the appellant asserts in her appeal letter, the security handbook that she is requesting was provided to security guards to provide guidance or instructions to them in the performance of security services at Eugene A. Clark Elementary School, it seems clear that it was "produced" pursuant to the contract between DCPS and MVM.

Accordingly, DCPS has a statutory responsibility to ensure that the security handbook (or non-exempt portions thereof) is made publicly available "to the same extent as if the record was maintained by [the agency]" upon its receipt of a request for a copy of the subject document.

The record on appeal is not clear as to whether the appellant made a proper D.C.-FOIA request to DCPS, rather than to MVM. Therefore, it is necessary to refer this matter to DCPS for processing as an initial request for records pursuant to the D.C.-FOIA.

CONCLUSION

For the reasons set forth above, this matter is referred to DCPS for processing in accordance with the provisions of the D.C.-FOIA and its own implementing regulations published at chapter 34 of Title 5 of the District of Columbia Municipal Regulations (December 2002).

This constitutes the final decision of the Secretary of the District of Columbia in this matter.

SHERRYL HOBBS NEWMAN, ACTING
SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16849 of Robert Lehrman, pursuant to §§ 3100 and 3101 of the Zoning Regulations from the administrative determination of Michael Johnson, Zoning Administrator, dated October 10, 2001 stating that the holder of permit Nos B439404 and B435446 did not effect the illegal removal of trees in violation of the Tree and Slope Protection Overlay District (§1511) in the TSP/R-1-A District, at premises 2221 30th Street, NW (Square 2198, Lot 6) and the reaffirmation of that determination made by the BLRA Administrator, dated December 10, 2001.

HEARING DATE: September 24, 2002
DECISION DATE: September 24, 2002

DECISION AND DISMISSAL ORDER

Robert Lehrman ("Appellant") filed an appeal with the Board of Zoning Adjustment on January 17, 2002, challenging the determination of the Zoning Administrator and the BLRA Administrator that the holder of permit Nos B439404 and B435446 did not violate the Tree and Slope Protection Overlay District, § 1511 of the Zoning Regulations. Mr. Lehrman was originally represented by counsel, but represented himself at the hearing. Mr. Estrin, the owner of the premises ("Owner") at 2221 30th Street, NW (the "Property"), was represented by Whayne S. Quin, Esquire, from the law firm of Holland & Knight LLP. As a preliminary matter, before the scheduled public hearing for this case, the Board granted the Owner's Motion to Dismiss on the ground that the appeal was not filed in a timely manner.

Notice of Appeal and Notice of Public Hearing. By memoranda dated April 9, 2002, the Office of Zoning advised the Zoning Administrator, the Office of the Corporation Counsel, the Owner, Advisory Neighborhood Commission ANC 3C, the ANC for the area within which the property is located, the ANC Commissioner for the affected Single-Member District, the affected Ward Councilmember, and the D.C. Office of Planning.

The Board originally scheduled a public hearing on the appeal for April 9, 2002. Pursuant to 11 DCMR § 3113.14, the Office of Zoning, on February 25, 2002, mailed to the Appellant, the Zoning Administrator, ANC 3C, and Owner's counsel, notice of hearing. Notice of public hearing was also published in the *D.C Register* on July 19, 2002, at 49 DCR 6792. The hearing was rescheduled for September 24, 2002.

In its Motion to the Board dated March 20, 2002, the Owner alleged that that the appellant lacked standing, the appeal was filed untimely, and was barred by laches and mootness.

ANC Report. In its report dated March 25, 2002, ANC 3C states that, at its regularly scheduled public hearing, with a quorum present, the ANC voted to support the appeal on the grounds that a violation of the Tree and Slope Overlay occurred on the subject property. The report did not address any jurisdictional issues.

On March 26, 2002, Appellant filed a prehearing statement and a request to the Board to stay the building permit for the Property. On April 4, 2002, Appellant filed a motion in opposition to Owner's motion for dismissal of the appeal. Owner filed, on April 5, 2002, an opposition to Appellant's stay request, and on April 8, 2002 a reply to Appellant's motion in opposition. The appeal was rescheduled for a hearing date on September 24, 2002.

Prior to the scheduled hearing date, the Board, through the Office of Zoning, asked Appellant for additional copies of materials, including: copies of all relevant building permit applications, permits, stop work orders, site plans, a chronology of all permitting and construction activities on site and any other fact relevant to the timeliness of the appeal and whether laches applies to the appeal, and any other materials that could assist the Board in its decision-making.

On the day of the scheduled hearing, Owner requested that the Board dismiss the appeal for lack of jurisdiction and requested a preliminary hearing on its motion. The Board did not address the Appellant's request for a stay, having disposed of the case by granting the Owner's motion to dismiss as a preliminary matter.

Hearing and Decision. On September 24, 2002, the Board voted to grant the property Owner's motion to dismiss the appeal based upon timeliness.

FINDINGS OF FACT

1. Appellant resides at 2900 Benton Place, NW., adjacent to the Property.

2. The trees at issue in this case are visible from Appellant's property.

3. It is undisputed that Appellant's property and Owner's property are subject to the provisions of the Woodland Normanstone Tree and Slope Protection overlay ("WNTSP").

4. The WNTSP, 11 DCMR § 1511 *et seq.*, is designed to protect the park-like setting of designated neighborhoods and includes limitations on the removal of healthy trees, depending upon their sizes. The penalty for any such removal is a prohibition on the issuance of a building permit for a seven-year period, unless the Board of Zoning Adjustment grants a special exception.

5. Owner received Building Permit No. B435446, dated March 7, 2001, from the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), Building and Land Regulation Administration ("BLRA"), to expand certain portions of the residential premises on the Property and to undertake various interior and exterior remodeling of the same. The construction began at the Property on or around June or July of 2001.

6. On or around July 19, 2001, a tulip poplar tree on the Property was removed.

7. At or around July 19, 2001, a second tree, located at the center of the Property, was damaged, allegedly as a result of construction activity.

8. Because the Board did not reach the merits of the appeal, the Owner's proffered explanation for these events are not relevant to this order.

9. On or around July 26, 2001, Appellant, through his counsel, sent a letter to Zoning Administrator Michael D. Johnson (the "Zoning Administrator") requesting that a stop work order be issued for the construction under the March 7, 2001 building permit, alleging that the construction was in violation of the WNTSP provisions of the Zoning Regulations.

10. As explained by letter to Appellant from J. Gregory Love, BLRA Administrator(the "BLRA Administrator"), dated September 14, 2001, a stop work order was issued at the Property by the BLRA Construction Inspection Branch because demolition of the existing building was beyond the scope of the plans approved for Building Permit No. B435446. By the same letter, the BLRA Administrator stated that the Zoning Administrator was "reviewing the other zoning issues related to construction not in accordance with approved plans, including the one related to the removal of trees in violation of the Zoning Regulations, DCMR 11, Section 1514. A review of our records confirms that no prior request for tree removal was made as required by the Tree and Slope Protection Form that was attached to the construction permit application. Therefore, I have instructed the Zoning Administrator to make an expeditious determination on this matter."

11. By letter to Owner dated October 10, 2001, with copy to Appellant, the Zoning Administrator concluded, in response to the issues raised in Appellant's July 26, 2001 letter, that "while there may be a question as to whether the Tree and Slope Protection Overlay Zone is even applicable to an area outside the zone of construction, I find, based upon the information that I received and the investigation conducted, that there was an unsafe condition which warranted the removal of the tree under Section 1514.1(b) of the Zoning Regulations. Further, based upon my review, site inspection and understanding of the issues raised, I conclude that there is no violation of the Zoning Regulations and no further enforcement action is required regarding this matter." The Board finds that this letter addressed both alleged violations, one involving the tree already cut down, and one involving the injured but still standing tree, where the Zoning Administrator specifically addressed the tree already cut down and conducted a site inspection to determine whether there were any other violations of the Overlay.

12. In response to the earlier stop work order, Owner obtained Building Permit No. B439404, dated October 16, 2001, which revised Permit No. B435446 and granted permission to replace masonry cinder block walls as per plan.

13. In the three months subsequent to the Zoning Administrator's ruling of October 10, 2001, Appellant did not file an appeal. Rather, Appellant communicated with various representatives of the BLRA to seek reversal of the Zoning Administrator's determination.

14. By letter to counsel for Appellant dated November 5, 2001, the BLRA Administrator noted that "[a]t the behest of your client, Robert Lehrman, I am in the process of re-

evaluating the Zoning Administrator's determination. If a different interpretation is made, you will be so advised."

15. As a result of conversations between Appellant and David A. Clark, DCRA Director, a second stop work order was issued by BLRA at the Property on November 21, 2001.

16. By letter dated December 7, 2001, Acting Zoning Administrator Toye Bello notified counsel for Owner that the second stop work order was lifted and that no further enforcement action is necessary. In the same letter, the Acting Zoning Administrator noted that "[t]he Department stands by the resolution of the previous complaint of illegal tree removal as encapsulated inn(sic) the Zoning Administrator Opinion dated October 10, 2001, in which the [Zoning] Administrator found no cause for further enforcement action."

17. By letter dated December 10, 2001, the BLRA Administrator issued a letter to Appellant once again confirming the Zoning Administrator's proper application of the Zoning Regulations as well as addressing a variety of zoning and building code issues related to the Property. The BLRA Administrator noted that "the second stop work order was issued solely to address [the Appellant's] concern that construction activity continued to willfully cause fatal damage to protected trees. This stop work order has also been lifted as there was no evidence upon which [the BLRA Administrator] could justify the continuance of said order.

18 Appellant filed the present appeal on January 17, 2002 -- 99 days after the date of the Zoning Administrator's October 10, 2001, ruling, and 39 days after the date of the BLRA administrator correspondence confirming the Zoning Administrator's ruling.

19. The Board finds that the Appellant knew or should have known of the adverse decision of DCRA as of October 10, 2001, the date of the Zoning Administrator's full and final determination with respect to the issues presented on this appeal

20. The December 10, 2001, letter from the BLRA Administrator merely reaffirmed the October 10, 2001 decision.

21. Because no exceptional circumstances existed that could have impaired the Appellant's ability to file this appeal within two months after October 10, 2001, *the* Board finds that the appeal is untimely.

CONCLUSIONS OF LAW

The Owner argued that the Board lacks jurisdiction to hear this appeal because: (1) Appellant was not aggrieved as required by the Zoning Act and §3112.2 of the Zoning Regulations and therefore lacked standing; (2) because the appeal was not timely filed by Appellant; (3) because the appeal was barred by the equitable doctrine of laches; and (4) because the appeal was moot. Because the arguments raised by Owner involve the authority of the Board to exercise jurisdiction over the appeal, the Board addressed Owner's Motion to Dismiss prior to entertaining Appellant's Motion for Stay or the parties' arguments on the merits.

Standing

In support of its argument that Appellant lacks standing, Owner contended, at the hearing and through his pre-hearing submissions, that the instant appeal is not proper because Appellant is not an "aggrieved" person within the meaning of §3112.2. Owner submitted that in order for Appellant to qualify as an "aggrieved" person within the meaning of the Zoning Regulations, Appellant must demonstrate that he has an interest that will be more significantly, distinctively, or uniquely affected in character or kind than those of other persons in the general public.

The Owner further claimed that Appellant has not suffered any injury as a result of the Zoning Administrator's ruling and that, even if such injury could be said to have been suffered, it was no different than that suffered by the general public, given the distance of Appellant's property from the subject Property.

The Board concludes, however, that the Appellant qualifies as an "aggrieved" person within the meaning of §3112.2 because of the proximity between Appellant's property and the Property and Appellant's testimony that the tree canopy from the Property can be seen from Appellant's property. Therefore, the Board concludes that Appellant does have standing to bring the instant appeal.

Timeliness

As of the date that this appeal was filed, the Zoning Regulations did not specify a particular number of days within which a decision must be appealed. The Board and the courts have long applied a standard of reasonableness, which requires appeals to be brought within a "reasonable" period of time in order to invoke the appellate jurisdiction of the Board. The "reasonableness" of the timing of an appeal has historically been judged on a case-by-case basis depending on the circumstances and factors that caused the delay.

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

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

(Emphasis added.)

In support of its argument that dismissal is required because the instant appeal was not timely filed, the Owner contended that Appellant waited more than three months from the date of the

Zoning Administrator's October 10, 2001 determination to file the instant appeal with the Board, more than a month beyond what the Court of Appeals, in *Waste Management,* has determined is the reasonable limit of timeliness. Appellant, in turn, argued that its appeal was timely because it was filed within 60 days after Mr. Love's December 10, 2001 letter. Therefore, the Board must decide which of the two communications start the two-month time period for the Appellant to file its appeal.

The Board's decision in *Appeal of Robert E. Love*, BZA Appeal No. 14054 (1984) is dispositive of this issue. The appellant in *Love* received a letter on December 6, 1982, from DCRA, advising him that plans approved by the disputed building permits were in compliance with the Zoning Regulations. The appellant in *Love* "chose not to file an appeal before the Board of Zoning Adjustment at that time," but rather "attempted to resolve the problem through letters to and meetings with staff and members of the City Council, other D.C. Departments and the Mayor." *Love*, Findings of Fact No. 13. As a result of these efforts, an additional DCRA letter, dated August 12, 1983, was sent. However, because the letter was only a "reaffirmation of the facts" stated in the December, 1982 correspondence, the Board held that the December letter began the time for filing the appeal. The Board dismissed the appeal as untimely.

Like the August 12th letter in *Love*, the December 10, 2001 letter from the BLRA Administrator in this case merely reaffirmed the conclusion reached earlier by the Zoning Administrator on October, 10, 2001. Therefore, the time for filing this appeal began on October 10, 2001.

Appellant waited more than three months from the October 10, 2001, to file his appeal with the BZA, an additional month beyond what the Court of Appeals has defined as the limit of timeliness, absent exceptional circumstances.

The Board finds no evidence in the record upon which the Board could base a conclusion that there existed any "exceptional circumstances . . . outside [Appellant's] control," that "impaired" the ability of Appellant to appeal or to warrant extending the two-month deadline to nearly 100 days. Appellant does not deny receiving the October 10, 2001 determination by the Zoning Administrator. The Board finds that there is no reason that Appellant could not have filed an appeal to this Board shortly after October 10, 2001. Appellant became involved in the proceedings as early as June, 2001 when he corresponded with Owner regarding the removal of the tree. Likewise, Appellant maintained close contact with the Zoning Administrator and the BLRA Administrator throughout the period in question prior to October 10, 2001.

After October 10, Appellant did not choose to appeal to the BZA but rather sought reversal of the ruling by asking the BLRA to further review the determination. There is no basis in the record to indicate that the Zoning Administrator would reverse his ruling. The Board concludes that these efforts do not rise to the level of an exceptional circumstance outside Appellant's control that "impaired" the ability to appeal earlier.

With regard to the issuance of the second stop work order, issued on November 21, 2001, by BLRA under the Building Code, which was issued subsequent to the Zoning Administrator's October 10, 2001, determination, the majority of this Board finds that such an order also does not create an exceptional circumstance. As discussed at the hearing (Transcript at 288-89), the December 10, 2001 letter from DCRA made it clear that the order was issued to ensure that

existing activity was not jeopardizing the remaining trees in violation of the Overlay. It was not issued in direct response to the allegations of past violations, allegations that form the basis of this appeal. While it is not clear that the Appellant knew the reason for the issuance of the stop work order prior to the December 10, 2001, letter, neither was it clear that the stop work order was in response to his concerns of past violations.

In reaching this decision, the Board was divided, with two members indicating during the decision meeting that dismissing this case would be inconsistent with the Board's prior decision in *Appeal of Darrel J. Grinstead,* BZA Appeal No. 16764 (2001).

Grinstead involved an appeal filed seven months after the issuance of a building permit, but less than two months after Mr. Grinstead received his first and only letter from DCRA upholding the disputed building permit. The minority equate the following to Grinstead: 1) the October 10th letter in this appeal to the permit challenged in Grinstead; 2) the November 21, 2001 stop work order, the December 7, 2001 letter from the Acting Zoning Administrator, and numerous telephone exchanges in between to the period of internal DCRA resolution in Grinstead (i.e., the time during which the Appellant's letters to DCRA went unanswered), and 3) the December 10th letter in this appeal to the subsequent letter of final decision in the Grinstead case. The second stop work order is found by the minority to indicate that serious reconsideration of the Zoning Administrator's October 10th decision was underway and that a final decision had not, in fact, been made.

Based upon this ruling, the two members felt that the October 10, 2001 letter could not be a final decision where DCRA continued to review the allegations made by the Appellants. The minority thus appears to equate the October 10th letter in this appeal to the permit challenged in *Grinstead,* and to equate the December 10th letter in this appeal to the subsequent letter in the *Grinstead* case.

The majority does not find it appropriate to treat the October 10th letter as if it were no more than a bare bones permit. That letter, like the letter in *Grinstead* and the first letter in *Love,* fully addressed the issues raised. No purpose, other than delay, is served by permitting an appeal based upon follow-on correspondence.

To hold that the appeal period continues so long as a reevaluation is occurring would place holders of building permits in a state of chronic uncertainty and allow disgruntled individuals to endlessly extend the appeal period through repeated requests for DCRA to reevaluate its last stated position. While *Grinstead* recognized value in allowing DCRA to reevaluate its positions on zoning matters, the need for finality and the prompt resolution of zoning disputes dictates that such an internal process should be permitted only once, if at all.[1]

Thus, the December 10, 2001 letter from the BLRA Administrator did not begin the time for filing this appeal because it was simply a reaffirmation of the earlier decision and because, even if it constituted more than a reaffirmation, the earlier October 10th letter fully addressed all issues raised and therefore was the only writing that could properly furnish the basis for this appeal.

Because of the disposition of this appeal on the grounds that it was not timely, the Board need not address the Owner's further assertions that the appeal is barred by the equitable doctrine of laches and is moot.

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

VOTE: 3-2-0 (Geoffrey H. Griffis, Curtis L. Etherly, Jr., and David A. Zaidain to grant Owner's Motion and dismiss the appeal, Carol J. Mitten and Anne M. Renshaw opposed)

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

FINAL DATE OF ORDER: MAY 0 8 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. crb/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No 16880 of Endale Terefa, pursuant to 11 DCMR § 3104.1, for a special exception to allow a change of nonconforming use from retail grocery to retail grocery and deli (no seats) under section 2003, in an R-4 District at premise 434 Shepherd Street, N.W. (Square 3237, Lot 79)

HEARING DATES: June 11, 2002, October 1, 2002
DECISION DATES: November 5, 2002, January 7, 2003

DECISION AND ORDER

The applicant in this case is Mr. Endale Terefa ("Applicant"), who is seeking to add a delicatessen component to his existing non-conforming grocery store, thereby expanding his non-conforming use. The Applicant's corner grocery store in an R-4 zone district at the corner of Shepherd and 5th Streets, N.W., in the Petworth Neighborhood of Ward Four. He is seeking a special exception to be permitted to add a delicatessen use to the grocery store in order to provide customers with items such as coffee, doughnuts and pre-packaged sandwiches

In 2001, the Applicant applied to the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") for a Certificate of Occupancy to use his store as a "Retail Grocery/Deli." On October 31, 2001, the Applicant was notified by the Office of the Zoning Administrator in the Building and Land Use Regulation Administration of DCRA, that his application was disapproved because his store is a nonconforming use, a change or expansion of which requires zoning relief from the Board of Zoning Adjustment ("Board").

On March 20, 2002, the Applicant filed an application with the Board requesting a special exception under § 2003.1 of Title 11 of the District of Columbia Code of Municipal Regulations ("DCMR"), pursuant to § 3104.1. A public hearing on the application was scheduled for June 11, 2002, but was continued, without any action being taken, until October 1, 2002, at the request of the Applicant.

On September 30, 2002, the Applicant's attorney, who was retained on September 26, 2002, in anticipation of the October 1, 2002 hearing, requested another continuance, which was denied. Therefore, the public hearing proceeded on October 1, 2002. After the hearing, the Board determined that additional information was needed from the parties and the Office of Planning ("OP") prior to making its decision. After receipt of such information, the Board held a public decision meeting on November 5, 2002. At this meeting, the Board deferred making a decision on the application in order to afford the applicant more time to work with the community, Advisory Neighborhood

Commission (ANC) 4C and the appropriate Councilmember's office. The Board also sought a management and landscape plan from the applicant, outlining mitigating conditions to be imposed on the operation of his store, and input from the District of Columbia Department of Public Works. Final decision on the application was set for January 7, 2003. As of that date, however, the Board had not received any plan or list of conditions from the Applicant. For that reason and the reasons stated below, the Board, on January 7, 2003, voted 0-4-1 to deny the special exception application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated April 1, 2002, the Office of Zoning (OZ) notified OP, ANC 4C, the ANC Commissioner for the affected Single-Member District and the Ward 4 Councilmember 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 on April 16, 2002, mailed notices to the Applicant, ANC 4C and all owners of property within 200 feet of the subject property, advising them of the date of the hearing. Further, the Applicant's affidavit of posting indicates that on June 1, 2002, he placed a zoning poster on the premise at 434 Shepherd Street, N.W., in plain view of the public.

Requests for Party Status. There were no requests for party status in this case. ANC 4C is automatically a party.

Applicant's Case. The Applicant testified in support of his application. He described his grocery store operation and his attempts to mitigate negative impacts on the surrounding neighborhood, including litter and loitering individuals. The Applicant did not call any witnesses to testify on his behalf.

Government Reports. The Office of Planning submitted a report dated June 11, 2002 to the Board recommending approval of the application. OP opined that the addition of a deli component to the grocery store would not require any significant change to the external or internal configuration of the store, nor would it create any deleterious external effects. OP testified at the October 1, 2002 hearing that, at the time it drafted its report, it was unaware that the Applicant planned to sell hot dogs cooked on the premise as part of his deli operation, but further testified that this would not change its recommendation. OP did not include any conditions in its June 11th report. Subsequent to the hearing, however, it provided the Board with a requested Supplemental Report dated October 30, 2002, in which it suggested several conditions to be imposed on the operation of the grocery/deli in order to mitigate potential negative impacts on the neighborhood.

ANC Report. In two separate letters dated May 22, 2002, ANC 4C indicated that it voted at a regularly scheduled public meeting on May 14, 2002 to oppose the application. The ANC stated that a deli in an area zoned R-4 is undesirable and will further challenge an

already challenged neighborhood. Further reasons cited for opposition were: fostering of criminal activity, litter, loitering, excessive vehicular and pedestrian traffic and noise to abutting properties.

Parties and Persons in Support. No persons testified in support of the application. During the hearing, two letters and a petition in support were entered into the record. After the hearing, the Applicant proffered 4 more letters of support, which the Board accepted into the record.

Parties and Persons in Opposition. ANC 4C Chairman Timothy Allen Jones testified as a party in opposition to the application. Mr. Ron Austin, representing Councilmember Fenty's office, testified as to the Councilmember's opposition. Metropolitan Police Officer Marcus Jones, of the 4th District, testified in opposition and two local residents, Ms. Shirley Washington, and Ms. Kiesha Miller, testified as persons in opposition. The record also contains several letters in opposition, including letters signed by Councilmembers Fenty and Mendelson, and two petitions against the operation and expansion of the grocery store, signed by neighborhood residents.

Hearing. The public hearing on the application was postponed from June 11, 2002 until October 1, 2002, when it was concluded.

Decision Meetings. The Board held a public decision meeting on November 5, 2002, but deferred a final decision on the application until January 7, 2003, on which date the Board voted 0-4-1 to deny the application.

FINDINGS OF FACT

1. The Applicant's grocery store is on the ground floor of the building located at the corner of Shepherd and 5th Streets, N.W., in the Petworth Neighborhood of Ward Four. It is located in an R-4 zone district.

2. The building housing the grocery store was built in 1915 and has a long history of having a "miscellaneous grocery store" on the first floor. There is a residential unit above the grocery store.

3. The grocery store use, though not permitted as a matter-of-right use today in an R-4 zone, pre-dates the zoning regulations, and so, is a non-conforming use within the zone, which is permitted to continue, subject to certain specific provisions of the zoning regulations.

4. The grocery store is named "Bless 7 to 9 Store" and sells pre-packaged grocery items, including beer and wine, which are not intended for "take-out" use or to be eaten on the premise.

5. The hours of the store are from 8:30 a.m. to 9:00 p.m. The Applicant works in the store part-time, and when he is not present, his wife or his other employee is present. The store receives two commercial deliveries per week.

6. Applicant would like to expand his grocery store non-conforming use to include a deli
component, and to sell therein hot dogs cooked on the premise, hot coffee, doughnuts and pre-packaged sandwiches.

7. There is often debris from the store, such as food wrappers, littering the area immediately exterior to the Applicant's store, although he cleans this area twice a day.

8. The Applicant's building has been cited at least once by the District of Columbia Department of Public Works for a litter violation for "[o]vergrowth of bushes, weeds, branches, etc. extending into public space!!" and "[i]mproper storage of bottle holders." (Notice of Violation No. 332496-1) The violation incurred a $75.00 fine and required abatement within 14 days.

9. A commercial trash collector removes trash from the Applicant's premise twice a week.

10. Applicant provided trash cans outside his store for the use of his customers, but they were repeatedly stolen during the night, when the store was closed. The Applicant did not take the trash receptacles into the store at night, not did he attempt to install a fixed receptacle. Instead, he began using a milk crate or a cardboard box for trash collection.

11. There was, for a long period of time, in front of Applicant's store, a large, unsightly empty ice machine, covered with graffiti, in which the Applicant stored newspapers between the time of their early morning delivery and his opening of the store, in order to prevent them from being stolen.

12. There was a pay phone in front of the Applicant's store. He removed the phone itself, leaving the empty metal housing.

13. The Applicant has placed two small lights on the exterior of his store, on either side of the door, and there is a city street light approximately 10 meters away from the entrance to the store, on the street corner.

14. The Applicant's store has a surveillance camera, but it does not have a recording capability.

15. The Applicant often has to call the police because of people congregating and loitering in front of his store.

16. The Board credits the testimony of Police Officer Jones. He testified that the individuals loitering in front of the store are engaging in criminal activity, such as selling drugs, and that the store provides them with a "cover," in that, if they see a police squad car approaching, they immediately duck into the store under the pretense of being customers and "stash" the drugs out of sight.

17. The Board credits Officer Jones' testimony that the lighting in front of Applicant's store is inadequate, and that, in combination with a large, untrimmed tree in front of the store, it creates shadows, which the criminal loiterers use to their advantage in hiding from, and running from, the police. These loiterers also cause undue noise when yelling about the approach of the police.

18. The Board credits the testimony of Officer Jones and Mr. Austin and finds that an expansion of the store to include a deli component would worsen an already poor situation and would increasingly attract criminals by providing them with further comforts, such as hot food and coffee.

CONCLUSIONS OF LAW

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, however, must also meet all the conditions enumerated in the particular section pertaining to it. In this case, the Applicant has to fulfill not only the requirements of § 3104.1, but also the conditions listed in § 2003 of the zoning regulations. Section 2003 pertains to changes made to a non-conforming use, such as the applicant's grocery store. Although the Board concludes that the Applicant's grocery store is a "neighborhood facility," as required by § 2003.5, the Board further concludes that the application falls short of fulfilling the requirements necessary for the granting of the special exception.

The application fulfills neither of § 3104.1's requirements. Granting of the requested special exception is not in harmony with the Zoning Regulations and Zoning Maps. Although Applicant's nonconforming use is permitted, expansion of such uses is not encouraged, as demonstrated by the stringent restrictions placed upon them by Chapter 20 of the zoning regulations. Further, granting the special exception would tend to affect adversely the uses of neighboring property, contrary to § 3104.1. Moreover, coupled

with § 3104.1's requirement of no adverse affects on neighboring property, are the requirements of §§ 2003.2 and 2003.3, *to wit*:

> The proposed use shall not adversely affect the present character or future development of the surrounding area in accordance with this title. The surrounding area shall be deemed to encompass the existing uses and structures within at least three hundred feet (300 ft.) in all directions from the non-conforming use.
>
> The proposed use shall not create any deleterious external effects, including but not limited to noise, traffic, parking and loading considerations, illumination, vibration, odor, and design and siting effects.

11 DCMR §§ 2003.2 and 2003.3, respectively. There is ample evidence in the record showing that the Applicant's proposed expansion of his grocery store to include a deli component would adversely affect the present character and future development of the surrounding area. In fact, the record is replete with allusions to the adverse impacts on the neighborhood created by, and exacerbated by, the Applicant's store as it currently exists. There was much testimony concerning the congregating and loitering of unsavory characters in front of Applicant's store. The Board concludes that this problem, which includes criminal activity, would be further exacerbated by an expansion of services offered by the store.

Although it appears that the Applicant has attempted to address some of the other deleterious external effects created by his store, such as litter and trash, his efforts have been insufficient. If such efforts are insufficient to contain the deleterious effects of the store as it is presently constituted, the Board is constrained to find that an expansion of the store's offerings would only make the attempts at containment more inadequate, thereby worsening the deleterious effects.
The Applicant has not provided the Board with any evidence that he would have, in the future, any greater ability to contain such deleterious effects than he does now. The Board therefore concludes that an expansion of the Applicant's store to include a deli component would lead to an increase in those deleterious external effects already caused by, and exacerbated by, the store, in direct contravention of § 2003.3.

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 for a special exception, pursuant to § 3104, to allow a change of nonconforming use from a retail grocery to a retail grocery and deli, under § 2003. It is therefore **ORDERED** that the application be **DENIED.**

VOTE: **0-4-1** (Geoffrey H. Griffis, Anne M. Renshaw, Curtis L. Etherly and David Zaidain, to deny. Zoning Commission member 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: MAY 1 2 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. LM/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17005 of The Studio Theatre, Inc., pursuant to 11 DCMR § 3104.1, for a special exception from the rear yard requirements under section 774, a special exception to allow more than one roof structure, one of which provides screening walls that would not be of equal height and another that would have an opening other than a louver along one screening wall, both of these under section 771 (and section 411), and a special exception to allow less than 50% of the surface area of the street wall along 14th Street at the ground level to be used for display windows and entrances under sections 1903 and 1906, to allow additions to existing buildings (to be consolidated into a single building on a single record lot) for use as a legitimate theater in the Arts/C-3-A District at premises 1501, 1507 and 1509 14th Street, N.W. (Square 241, Lots 830, 834, and 835).

Note: The Board amended the application at the public hearing to consider relief from the rear yard requirements under section 774 as a special exception instead of the area variances originally sought.

HEARING DATE: April 22, 2003
DECISION DATE: April 22, 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 public hearing on this application, by publication in the ***D.C. Register***, and by mail to the Applicant, Advisory Neighborhood Commission (ANC) 2F, the Office of Planning (OP), the only tenant located within one of the subject properties (at 1507 14th Street, N.W.), and owners of property within 200 feet of the site.

The site of the application is located within the jurisdiction of ANC 2F. ANC 2F submitted a letter in support of the application adopted by the ANC at a duly constituted meeting with a quorum of its Commissioners present. The OP submitted a report in support of the application.

As directed by 11 DCMR § 3119.2, the Board required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case for special

exceptions pursuant to 11 DCMR §§ 3104.1, 411, 771, 774, 1903 and 1906 having determined that neither the variance originally sought from the requirement to provide a rear yard of a specified minimum depth nor the variance from expansion of a non-conforming aspect of a non-conforming building was required in the case. No party appeared at the public hearing in opposition to this application or otherwise requested to participate as a party in this proceeding. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

The record before the Board included a letter of support from the Logan Circle Community Association. No other persons appeared at the hearing or within the record in support of or opposition to the application.

The Board closed the record at the conclusion of the hearing. Based upon the record before the Board, and having given great weight to the ANC's report and the Office of Planning's report filed in this case, the Board concludes that the Applicant has met the burden of proof pursuant to 11 DCMR §§ 3104.1 for special exceptions under sections 411, 771, 774, 1903 and 1906 that the requested relief can be granted as in harmony with the general purpose and intent of the Zoning Regulations and Map and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

It is therefore **ORDERED** that the application as amended is **GRANTED**, noting that the relief approved is associated with the plans dated April 22, 2003, that the Board received from the Applicant at the hearing that specifically depict each area of relief sought, all of which are hereby granted (Exhibit 33 of the Record).

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3 that the Order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is appropriate in this case.

VOTE: 4-0-1 (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Anthony J. Hood and David A. Zaidain to approve, the third mayoral appointee not present, not voting).

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

FINAL DATE OF ORDER: APR 2 5 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.

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

RSN

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 910-B
Case No. 01-31TE/98-17F/95-16P
(Florida Rock Properties PUD Extension)
March 10, 2003

By Zoning Commission Order No. 850, dated June 8, 1998, the Zoning Commission for the District of Columbia (the "Commission") granted to Florida Rock Properties, Inc. (the "Applicant") first-stage approval of a planned unit development ("PUD") and related map amendment from M to C-3-C for Lots 800, 801, and 802 in Square 707; Lot 809 in Square 708; Lots 807 and 808 in Square 708E; and Lot 806 in Square 708S (the "PUD Site"), having a street address of 100 Potomac Avenue, S.E. The PUD Site is bounded by Potomac Avenue on the north, 1st Street on the east, the Anacostia River on the south, and the right-of-way of the Frederick Douglass Bridge (the "Bridge") on the west. The PUD Site contains approximately 253,502 square feet of land area, with more than 800 linear feet of frontage along the Anacostia River.

By Order No. 910, dated November 8, 1999, the Commission granted second-stage approval of the PUD. The approval allowed approximately 1.5 million square feet of commercial development in two buildings constructed above a single below-grade, off-street parking facility (the "approved PUD"). The buildings were to be of varying heights: the highest building at 130 feet located closest to the Bridge and with buildings of 110 feet in height oriented toward 1st Street. The approved PUD contained ground level retail and service commercial in those portions of the project fronting on Potomac Avenue and on the Anacostia River. The approved PUD included a waterfront esplanade that was to be no less than fifty-five (55) feet in width extending along the Anacostia River. Two independent waterfront food pavilions and a public, outdoor performance space located within the waterfront esplanade were to be provided. The approved PUD, seeking to maximize open space, was planned to occupy only fifty-eight percent (58%) of the PUD Site. Landscaped gateways for public access to the waterfront from Potomac Avenue were provided at Half and 1st Streets, S.E.

The Applicant also committed to a development program for a nearby square (Square 664E), west of the Bridge at the terminus of South Capitol Street. That square, containing approximately 90,000 square feet of land area, was programmed to be developed with approximately 253,000 square feet of residential development, a park of approximately 40,000 square feet at the foot of South Capitol Street, and facilities for a non-profit organization, the Earth Conservation Corps. Additionally a waterfront esplanade for the square's full frontage along the Anacostia River was to be provided.

On November 9, 2001, the Applicant timely filed a request for extension of the second-stage PUD approval. This request was the first time extension request made by the Applicant. If not made, the second-stage approval granted by Order No. 910 would otherwise have expired on November 26, 2001.

At the Commission's regular monthly meeting on May 13, 2002, the Commission reviewed the Applicant's request for time extension, as well as a report dated April 19, 2002, filed by the District of Columbia Office of Planning ("OP") related to the Applicant's request. The OP report noted numerous changes in the environs of the PUD Site as well as changes in District of Columbia planning policy that had occurred since the initial approval of the PUD. In OP's opinion, those changes necessitated that modifications to the program of the approved PUD be made if the project were to be developed. Notwithstanding the changes, however, OP recommended approval of the Applicant's extension request, having reached an understanding with the Applicant that the Applicant would work with OP to adjust the project's program to address those changes.

The Commission took note of the changes highlighted in the OP report, including the recently adopted text and related map amendment for the Capitol Gateway Overlay District. The Commission expressed concern that if a time extension to the second-stage approval were granted, the Applicant would then have the opportunity to construct the approved PUD in the face of what the Commission perceived as conflicts with the direction of the District's planning efforts since the second-stage approval had been granted. In light of those factors, the Commission voted to deny the Applicant's request for a time extension of the approval of the PUD.

The Applicant, by various communications to the Commission during subsequent months, sought to have the Commission give further consideration to the Applicant's request for time extension, offering to refrain from seeking permits to construct the approved PUD for one year while agreeing to work with OP to identify acceptable modifications to the program of the approved PUD. The Commission declined to give further consideration to the Applicant's extension request and on November 22, 2002, Order No. 910-A was issued denying the Applicant's time extension request.

On December 2, 2002, the Applicant filed with the Commission a motion for reconsideration of the Commission's action to deny the time extension as contained in Order No. 910-A. The motion for reconsideration was timely filed under 11 DCMR, § 3029.

In its motion, the Applicant asserted that the Commission had erred in denying the time extension, but also put forth a set of design guidelines, developed in consultation with OP, which would constrain any modifications to the approved PUD for submission to the Commission for its consideration. The design guidelines materially changed the proposed program for the project, reducing the maximum heights of buildings, reducing the permitted density, increasing the width of the waterfront esplanade along the riverfront, and introducing additional access to the waterfront from Potomac Avenue, thus, effectively reducing the perceived massing of the approved PUD. Additionally, the Applicant proposed to change the project from one containing retail and office uses only to one of a mix of residential, hotel, office, and retail/commercial uses.

The OP filed a report with the Commission, dated December 3, 2002, supporting the Applicant's request for reconsideration. The OP recommended that the Commission reverse its decision and afford a limited time extension to the Applicant to file modified plans for the PUD with the Commission, based upon the design guidelines that had been produced in cooperation with OP and that were included in the Applicant's motion for reconsideration.

At its January 13, 2003, regular monthly meeting, and after giving due consideration to the Applicant's motion, including the proffered design guidelines and the recommendation of OP, the Commission voted not to reconsider its previous denial of the time extension for the second-stage approval of the PUD, but agreed to reconsider its previous denial of a time extension related to the first-stage approval of the PUD. During the Commission's consideration of the motion for reconsideration, the Commission noted its continued discomfort with the height permitted under the proposed design guidelines offered by the Applicant; the Commission indicated that lesser heights of buildings were preferable. On February 14, 2003, the Applicant submitted to the Commission, a revision to the proposed design guidelines, having a revision date of February 13, 2003, which proposed lesser heights of buildings and attendant changes in gross floor area calculations.

At its re-scheduled regular monthly meeting held on February 24, 2003, the Commission voted to grant a time extension of the first-stage approval of the PUD for a period of one year, subject to and as modified by the OP endorsed revised design guidelines submitted by the Applicant, as contained in the Applicant's February 14, 2003 submission to the Commission.

A PUD may be extended if the Commission determines that "[t]here is no substantial change in any of the material facts upon which the Commission based its original PUD approval that would undermine the Commission's justification for approving the original PUD" (*See* 11 DCMR § 2408.10). Conversely, the Commission may deny a time extension request where there are such changes. In the case of the request for extension for the second-stage approval, the Commission has determined that the changes identified by OP were so material as to make extension of the second-stage approval, allowing the Applicant to proceed directly to construction of the approved PUD, not justified.

Whereas the Commission finds that there have been substantial physical and policy changes affecting the PUD Site and its environs sufficient in substance to warrant denial of an extension for the second-stage approval of the PUD, the changes in circumstances do not preclude extension of the first-stage approval of the PUD. The Applicant has agreed to accept a set of design guidelines, developed with OP, which mitigate any aspects of the first-stage approval of the PUD that might be adverse to or in contravention with the current circumstances in the vicinity of the PUD Site. The process to consider the second-stage PUD application will allow the Commission to take into account all relevant factors, including proffered amenities and benefits, before construction can proceed, including proffered amenities and public benefits.

The Commission takes note that pursuant to 11 DCMR § 2407.10, the Commission is authorized to extend the validity of a first-stage PUD in its discretion.

Preserving the first-stage of a PUD, while denying the second-stage, is supported by case law. Even though the approval of the second-stage PUD incorporates that which was approved in the

first-stage, approval of the first-stage of a PUD has been found by the District of Columbia Court of Appeals to remain reviewable under the District of Columbia Administrative Procedures Act even after approval of the second-stage. (*See Friendship Neighborhood Coalition v. District of Columbia Zoning Commission,* 516 A.2d 532 (D.C. 1986), (petition for review of first-stage of a PUD held in abeyance pending conclusion of Commission's review of second-stage of the PUD), citing *Dupont Circle Citizens Association v. District of Columbia Zoning Commission,* 426 A.2d 327,331 (D.C. 1981), (Commission's decision to approve or deny a first-stage PUD application is appealable under the D.C. Administrative Procedures Act)). Therefore, approval of a first-stage PUD can be seen to stand alone as an independent final action by the Commission.

Furthermore, this bifurcated approach is akin to the practice outlined in 11 DCMR § 2407.12. That section, applicable to a consolidated PUD review, allows for the Commission to simultaneously approve the first-stage of a PUD, but deny the second-stage PUD approval.

In consideration of the reasons set forth in this order, the Zoning Commission for the District of Columbia hereby **ORDERS** that the validity of Zoning Commission Order No. 850 be extended for a period of **one (1) year** from the effective date of this Order for the Applicant to file a second-stage PUD application consistent with the "Design Guidelines for Modification of Planned Unit Development," revised as of February 13, 2003, which are attached hereto and incorporated herein by reference.

The Commission, on January 13, 2003, voted to **DENY** in part and to **APPROVE** in part the Applicant's motion for reconsideration of the Commission's denial of a time extension of the Applicant's second-stage PUD approval, on a vote of 3-0-2 (Carol J. Mitten, John G. Parsons, and Anthony J. Hood to deny extension of the second-stage PUD approval and to reconsider its previous denial of the first-stage PUD approval; James H. Hannaham and Peter G. May, not present and not voting).

The Commission on February 24, 2003, voted to **APPROVE** an extension of the Applicant's first-stage PUD approval, subject to the referenced revised design guidelines, for a period of **one (1) year**, from the effective date of this Order, by a vote of 5-0-0 (Carol J. Mitten, John G. Parsons, Anthony J. Hood, James H. Hannaham, and Peter G. May).

The Order was **ADOPTED** by the Zoning Commission at its public meeting on March 10, 2003, by a vote of 5-0-0 (Carol J. Mitten, John G. Parsons, Anthony J. Hood, James H. Hannaham, and Peter G. May).

Attachment to Z.C. Order No 910-B

Design Guidelines for Modification of Planned Unit Development

Florida Rock Properties, Inc. ("FRP")

Zoning Commission Case No.: 01-31TE/98-17F

I. 100 Potomac Avenue

1. Site Plan Organization

   a. The site plan for the PUD Site shall be modified to reflect the proposed development of a minimum of three (3) independent buildings, creating a minimum of two (2) publicly-accessible, primarily pedestrian-oriented passages through the PUD Site for access from Potomac Avenue to the Anacostia River waterfront (the "Waterfront").

2. Site Perimeter Setback and Build-to Requirements

   a. Potomac Avenue, SE – Buildings fronting along Potomac Avenue, SE shall be designed to face on the Potomac Avenue, SE right-of-way line with no setback from that right-of-way, except for façade articulation and fenestration and breaks for pedestrian access to the Waterfront.

   b. First Street, SE – No building, fronting on what would be a theoretical extension of the right-of-way of First Street, SE through the PUD Site to the Waterfront, shall extend into area of the PUD Site covered by this theoretical extension of the First Street, SE. right-of-way.

   c. Anacostia River – To provide space for a broad esplanade for the full length of the PUD Site along the Waterfront, buildings would be set back at least seventy-five (75) feet from the exterior face of the Anacostia River bulkhead along the PUD Site. This setback line shall be perpendicular to the Anacostia River bulkhead. The design of the façades of buildings fronting on the Waterfront shall be further modulated behind this setback line to achieve a variety of setback dimensions for the buildings fronting on the Waterfront.

   d. Frederick Douglass Bridge – All buildings on the PUD Site shall be set back from eastern edge of the structure of the Bridge. Buildings shall not be located closer to the structure of the Bridge than the eastern boundary of the established right-of-way fixed in the official records of the District of Columbia, within which the Bridge structure is located. Actual building site locations fronting on the Bridge shall be coordinated with and may be adjusted based upon the findings of the DC DOT Corridor Study for the South Capitol Street and Bridge relocation being

undertaken as of the date of these Design Guidelines ("DC DOT Corridor Study").

3. Mid-block Points of Public Access to the Waterfront

   a. Half Street, SE - The development plan for the PUD Site shall include the theoretical extension of Half Street, SE to the Waterfront as a pedestrian-focused, open-to-the sky, publicly-accessible passageway, with a width of no less than sixty (60) feet at any point along the passageway; a limited number of motorized vehicles may be permitted to use the passageway to permit vehicular access to the proposed residential development, including a possible hotel fronting on the Waterfront.

   b. Additional Access Through the PUD Site – The development plan for the PUD Site shall include a minimum of one additional pedestrian-oriented, open-to-the sky, publicly-accessible passageway, with a width of no less than forty (40) feet at any point along the passageway; the passageway shall be located east of Half Street, SE, and west of First Street, SE, with this passageway having the intended purpose of providing an additional pedestrian-oriented passageway from Potomac Avenue, SE to the Waterfront.

4. Building Height, Bulk Restrictions, and Design Objectives

   a. General – Height of buildings on the PUD Site shall create a varied silhouette of building heights, as seen from across the Anacostia River. With that in mind, any building(s) located in the area of the PUD Site west of the theoretical extension of Half Street, SE (as described in Item 3 above), the height of building may not exceed 110 feet; for the area east of the theoretical extension of Half Street, SE and west of the additional access through the PUD Site (as described in Item 3.b. above), the height of any building shall not exceed 100 feet, provided that OP and FRP may explore an increase in the height of any building proposed to be located in this area if the same would increase the amount of non-transient residential housing in the PUD; and for the area east of the additional pedestrian passageway described above and First Street, SE, the height of building may not exceed ninety (90) feet.

   b. Potomac Avenue, SE – The building(s) fronting on Potomac Avenue, SE shall rise to allowable heights with no setback in the massing. Building facades shall be developed so as to create a street-wall condition, which engages the historic L'Enfant grid, provided that façade articulation, fenestration, and possible setbacks of the building façades at upper elevations of the buildings shall be permitted.

   c. First Street, SE – At a minimum, the buildings fronting on First Street, SE (including the theoretical extension thereof) shall setback a minimum of ten (10)

feet above the height of sixty-five (65) feet. Primary building material may be glass.

d. Anacostia River Waterfront - The buildings fronting on the Waterfront shall be articulated with varying setbacks of different widths and dimensions at various elevations along the Waterfront facing façades to avoid a monolithic appearance for the buildings along the Waterfront, the intent being to create a multifaceted and interesting project appearance along the Anacostia River, coordinated with the design of various vistas, views, passageways, and open spaces on the PUD Site to be developed with any application for modification of the PUD as approved.

e. Frederick Douglass Bridge Façade – The façade of buildings fronting the Bridge and its right-of-way will reflect this area as a major gateway to the monumental core of Washington, D.C. at the foot of South Capitol Street; façade development will also be evaluated within the recommendations of the DC DOT Corridor Study.

f. Façade Materials of PUD Buildings - Building materials shall be primarily masonry and glass in character. Variation in materials colors shall distinguish the buildings on the PUD Site from one another so as to create an ensemble of buildings rather than the appearance of a single large structure.

5. Development Program Requirements

a. General – The intention of the development program is to create a mixed-use, waterfront environment of residential, office, and commercial uses.

b. The ground levels of all buildings shall maximize uses, which open to and are intended to activate the adjacent streets and planned open spaces. A minimum of fifty percent (50%) of the net useable area of the aggregate of all ground levels in the PUD shall be designated to retail, cultural, or community uses, which uses it is believed will serve to promote and encourage visitation of the Waterfront. All ground level areas shall be designed to allow a twelve (12) foot floor-to-ceiling height and shall be designed so as to anticipate future changes in program use. Ground level areas fronting on the Waterfront should be designed to give the appearance from the esplanade that those ground level spaces are multi-storied, spacious, and open.

Understanding that there is an elevation change in the PUD Site from Potomac Avenue, SE down to the Anacostia River, net useable areas of the various ground levels of the buildings shall be deemed to be those areas of the ground levels that directly front on Potomac Avenue, SE, First Street, SE, the passageway described in Item 3 above, and the Waterfront, and which would be reasonably accessible from those areas and useable for the purposes described above; the term "useable area" shall specifically exclude areas on those levels designated or used for

building entrances and lobbies and related facilities, elevator banks, staircases and corridors related thereto, mechanical, electrical and fire control rooms, parking garage entrances and other related facilities, off-street loading facilities and other related facilities, and service corridors related to any of the above.

c. Those portions of the ground levels fronting on the Bridge in buildings will be evaluated in light of the recommendations of the DC DOT Corridor Study to determine if a more animated ground level area in that location would be appropriate to ensure that these areas can appropriately address possible pedestrian presence in those locations.

d. All legally required, on-site parking shall be located below grade; other parking provided may be located above grade, but shall be located so as not to impede pedestrian uses of the open spaces, vistas and views on the PUD Site, or prevent the dedication of ground level spaces to preferred uses as specified in paragraph 5.b. above.

e. The remaining development program above ground levels shall include commercial and residential uses (including potential hotel uses) with a maximum allowable commercial development potential of 625,000 gross square feet; and a minimum residential development of 440,000 square feet of gross floor area of hotel and residential uses, provided that no less than 160 units of residential, non-transient housing, based upon an average gross floor area of 1,200 square feet per unit, would be provided for.

f. The maximum permitted building area on the PUD Site shall be 1,115,400 gross square feet for a total of 4.4 FAR.

6. Project Amenities of PUD

a. General – The general approach to the PUD amenities shall consist of public space improvements in and about the vicinity of the PUD Site, including areas to the north and east of the PUD Site.

b. Public Access to the Waterfront – Access through the PUD Site to the Waterfront, including plaza connections from Potomac Avenue, SE, shall be maintained as privately-owned, publicly-accessible, and appropriately landscaped open spaces.

c. Anacostia Esplanade and Riverwalk – The PUD shall provide for continuous publicly-accessible esplanade of no less than seventy-five (75) feet in width, on the PUD Site, including designated walkways and bicycle lanes. In addition to development of the esplanade on the PUD Site, FRP would design and develop a riverwalk/pathway of no less than twelve (12) feet in width stretching eastward from the PUD Site to the site known as the Southeast Federal Center ("SEFC"), over sites owned by the District of Columbia and the DC Water and Sewer Authority. The riverwalk/pathway would be intended to afford a pedestrian and

bicycle connection between the esplanade on the PUD Site and the proposed SEFC riverside facilities. Waterfront redevelopment is not contemplated as being part of this amenity. FRP would maintain the riverwalk/pathway for a period of no less than five (5) years after its development.

d. Parks and Plazas – In addition to the esplanade and open spaces on the PUD Site and the riverwalk/pathway described above, FRP shall design and develop public open spaces at two locations adjacent to the PUD Site as urban parks. The first space would be the triangle park reservation to the north of the FRP site on Potomac Avenue ("Reservation 247"), containing approximately 16,000 square feet of land area more or less; the second space would be an area at the terminus of First Street, SE immediately adjacent to the PUD Site and fronting on the ECC pumphouse. FRP shall maintain each of these public spaces for a period of no less than five (5) years after its development.

e. Sustainable Design – All buildings on the PUD Site shall be designed to achieve USGBC LEED certification, including state-of-the-art best practices for all open spaces and amenity areas.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
Order No. 970
Z.C. CASE NO. 01-22MA
(Map Amendment – New York and Florida Avenues, N.E.
Square 3584, Lots 23 and 809)

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

ZONING COMMISSION ORDER NO. 02-27
Case No. 02-27
(Consolidated PUD and Related Zoning Map Amendment
– Jefferson at Logan Circle, L.P.)
October 28, 2002

On July 15, 2002, an application was submitted to the Zoning Commission for the District of Columbia by Jefferson at Logan Circle, L.P. ("Applicant") for consolidated review and approval of a planned unit development ("PUD") and related amendment to the Zoning Map of the District of Columbia pursuant to chapter 24 of the District of Columbia Municipal Regulations (DCMR, Title 11, Zoning). The Applicant requested the Commission to set the project down for public hearing. At its public meeting on October 28, 2002, the Commission voted 4-0-1 to dismiss the application without prejudice pursuant to 11 DCMR § 3011.

The Applicant, Jefferson at Logan Circle, L.P., is an affiliate of JPI Apartment Development and the contract purchaser of the subject property, located at 13th and M Streets, N.W. The proposed PUD, as revised by the Applicant after the initial filing, would be a 10-story apartment building with an underground garage. By preliminary report dated October 17, 2002, and supplemental report dated October 28, 2002, the Office of Planning ("OP") recommended setting down the application for public hearing despite expressing reservations about the requested zoning map amendment, among other aspects of the proposed development.

Findings of Fact

1. The proposed PUD site is located at the northwest corner of the intersection of 13th and M Streets, N.W. in the Logan Circle neighborhood of Ward 2 (Square 245, Lots 28, 804-806, 821, 825, 827, 834, and 841-842). The subject property has an area of approximately 35,128 square feet.

2. The proposed PUD would be a 10-story building containing 252 apartments and 107 parking spaces in an underground garage. The total floor area would be 275,000 square feet above grade, with eighty percent (80%) lot occupancy and a floor area ratio ("FAR") of 8.0.

3. The subject property is zoned R-5-E and designated "high-density residential" on the Generalized Land Use Map.

4. The R-5-E district permits a maximum height of 90 feet, a maximum FAR of 6.0 for apartment buildings, and maximum lot occupancy of seventy-five percent (75%). *See* 11 DCMR §§ 400.1, 402.4, and 403.2.

5. The Applicant requested a PUD-related map amendment of the subject property to DD/C-2-C, agreeing to forgo any DD-related development incentives, such as the generation of transferable development rights or bonus density, created as a result of the zoning change.

6. The DD/C-2-C zone permits a maximum height of 130 feet and maximum lot occupancy of eighty percent (80%). *See* 11 DCMR §§ 770.1, 771.2, 772.1, 1700.4, and 1706.4.

7. The Office of Planning noted in its report that the current boundaries of the DD overlay do not extend north of M Street, and that the closest DD/C-2-C district is a block away from the subject property along Massachusetts Avenue, N.W.

8. Alternatively, a PUD-related map amendment to Mixed-Use (CR) was proposed for the subject property. A PUD in the CR zone may have a maximum height of 110 feet, a residential FAR of 8.0, and maximum lot occupancy of seventy-five percent (75%). *See* 11 DCMR §§ 630.1, 631.1, 634.1, 2405.1, and 2405.2.

9. The Office of Planning expressed reservations about introducing a CR zone for a single project, even through a PUD. According to OP, no other property in the immediate area surrounding the subject property is currently zoned CR.

Conclusions of Law

1. The PUD process is designed to encourage high-quality developments that provide public benefits.

2. While providing for greater flexibility in planning and design than may be possible under conventional zoning procedures, the PUD process shall not be used to circumvent the intent and purposes of the Zoning Regulations, nor to result in action that is inconsistent with the Comprehensive Plan.

3. The development of this PUD project would not be consistent with chapter 24 of the Zoning Regulations because of the disproportionately large size of the proposed apartment building relative to the matter-of-right limitations applicable under the existing R-5-E zoning of the subject property. The size and bulk of the proposed PUD – a 10-story building with 8.0 FAR and eighty percent (80%) lot occupancy – would substantially exceed the density contemplated in areas designated for high-density residential land use, which generally allows a maximum height of 90 feet, a

maximum FAR of 6.0, and a maximum lot occupancy of seventy-five percent (75%).

4. The application is dismissed without prejudice. An appropriate modification of the application would reduce the size and bulk of the proposed PUD project consistent with levels permitted in the R-5-E zone district with the additional increments permitted as part of the PUD process pursuant to chapter 24 of the Zoning Regulations.

Decision

In consideration of the Findings of Fact and Conclusions of Law contained in this order, the Zoning Commission for the District of Columbia orders DISMISSAL, without prejudice, of the application for consolidated review of a planned unit development and related Zoning Map amendment for Square 245, Lots 28, 804-806, 821, 825, 827, 834, and 841-842.

Vote of the Zoning Commission was taken at its public meeting of October 28, 2002, to **DISMISS WITHOUT PREJUDICE** by a vote of 4-0-1 (Carol J. Mitten, Anthony J. Hood, John G. Parsons to deny; Peter G. May to deny by absentee ballot; and James H. Hannaham not present, not voting).

Zoning Commission Order No. 02-37
Case No. 02-37/16869
(*Sua Sponte* Review of Board of Zoning Adjustment
Application No. 16869 of King's Creek, LLC,)
December 9, 2002

This decision and order arises from the *sua sponte* review by the Zoning Commission for the District of Columbia ("Commission") of an order dated September 23, 2002, of the Board of Zoning Adjustment ("Board") which granted Application No. 16869, filed by Applicant King's Creek, LLC, ("Applicant") requesting variance relief from four provisions of the Zoning Regulations of the District of Columbia, Title 11 of the District of Columbia Municipal Regulations ("DCMR"). The Zoning Commission timely decided at a Special Meeting held on September 30, 2002, to invoke its *sua sponte* review authority, pursuant to DCMR § 3128. As a result of its review of the record and the submission of the Applicant, the Commission reverses in its entirety the Board's order in the case of Application No. 16869.

PRELIMINARY MATTERS

The Board's Decision

The September 23, 2002, decision of the Board granted the Applicant variance relief from (1) § 402, to increase the allowable floor area ratio ("FAR"); (2) § 403, to increase the allowable lot occupancy; (3) § 2001.3, to expand a non-conforming structure; and (4) § 400, to allow a height greater than fifty (50) feet in an R-5-B zone district.[1] The Applicant claimed that its property was unique by virtue of its "irregular" shape and its having been zoned differently in the past. The Applicant centered its uniqueness argument, however, on the architectural significance of the existing building, which it desired to retain. The Applicant was not required to save the structure due to historic preservation constraints. Rather, as the Board opines, the Applicant desired to save it because of its "aesthetic appeal," and because it "adds architectural variety to the area." September 23, 2002 Order of the Board of Zoning Adjustment in Case No. 16869, at

[1]The original application requested three (3) variances and one (1) special exception as to height under § 1403, because it was believed that the subject property was located in the Reed-Cooke Overlay District ("R-C Overlay"). Based on this belief, the Board granted the three (3) requested variances and a special exception pursuant to § 1403. However, it was later determined that the property was not in the R-C Overlay, but only in an R-5-B zone district, the case was re-opened and the Board amended its decision to grant the three (3) originally-requested variances, plus a fourth variance from the height requirements of § 400.

7. (hereinafter referred to as "Board Order") The Board's Order then found that this claimed exceptional situation of the property "would result in peculiar and exceptional practical difficulties upon the owner of the property." Board Order at 8. Based upon this finding, the Board granted an FAR variance of more than double what would be otherwise allowed and height relief that amounted to almost half the height allowed in an R-5-B zone.

Sua Sponte Review

At a Special Meeting held on September 30, 2002, the Commission decided to conduct a *sua sponte* review of the Board's decision in Application No. 16869. The *sua sponte* review concerned all four (4) variances requested by the Applicant.

The Commission sent a letter, dated October 8, 2002, notifying all parties that it would accept into the record their recommendations and arguments regarding its *sua sponte* review. Such recommendations or arguments were due no later than noon on November 29, 2002.

On November 26, 2002, the Applicant, represented by the law firm of Griffin, Farmer & Murphy, LLP, submitted a document entitled "Statement of King's Creek, LLC," arguing in favor of upholding the decision of the Board ("Statement"). The Statement argues that the Applicant's practical difficulties arise out of the retention of the architecturally significant structure on the property, which is non-conforming as to lot occupancy. It further argues that there is no specific limitation on the magnitude of variance relief and suggests that the matter-of-right limitations in the zoning regulations are merely "thresholds for consideration of the appropriateness of a particular project in a particular context." Statement at 7.

No submission was received by Advisory Neighborhood Commission ("ANC") 1C, the only other party to the case before the Board.

DECISION

The Commission conducted this *sua sponte* review pursuant to 11 DCMR § 3128.7. Sections 3128.7(a) and (b) authorize the Commission to engage in *sua sponte* review of a Board order "where it appears to the Commission that the Board has exceeded its prerogatives and has thus in effect changed the zoning" and/or "where it appears that a basic policy of the Commission, as expressed in the Zoning Regulations, has been violated as a result of" Board action. The Commission has considered the record before the Board and all properly submitted recommendations and arguments. After such consideration, the Commission hereby reverses the Board's decision to grant the Applicant all four (4) requested variances.

The Board is empowered to grant variances pursuant to § 8 of the Zoning Act of 1938, 52 Stat. 797, 799 (1938), repeated verbatim in 11 DCMR § 3103, when the Board finds that:

> [w]here, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of

> 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 such property.

11 DCMR § 3103.2.

Therefore, in order to have even one (1) variance granted, let alone four (4), the Applicant had to make three (3) showings before the Board: 1) that its property was affected by an "extraordinary or exceptional situation or condition"; 2) that such situation or condition resulted in "practical difficulties" to the Applicant[2]; and 3) that variance relief may 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." 11 DCMR § 3103.2. Therefore, any relief granted must not harm the public good and must be consistent with the zone plan as expressed in the regulations.

In the case before the Board, the Applicant claimed that it was necessary to retain the structure existing on the property because of its architectural significance to the neighborhood. According to the Applicant, retaining this structure created an exceptional situation resulting in practical difficulties to the Applicant. The Applicant also claimed an exceptional situation existed because the property was originally developed under the requirements of the then-existing commercial and industrial zones. Therefore, only as a result of the re-zoning of the property to an R-5-B zone district has the building become non-conforming as to lot occupancy and FAR. Lastly, the Applicant claimed the lot's "irregular shape" constituted an exceptional situation.

The structure existing on the property has never been designated a landmark or a contributing building in a historic district. Therefore, the Applicant is not compelled to save the structure. It has chosen to do so. Even assuming that the Applicant needed to retain the structure, it made no showing of how it could use the structure as it is, without zoning relief. In fact, the building was occupied at the time of the application. The Applicant's alleged practical difficulties, which it claims justify variance relief, arise out of the design of the addition to the structure, not out of the existence of the structure itself. There is no nexus between the claimed exceptional situation, caused by the retention of the existing structure and the claimed practical difficulties, caused by the design of the addition to that structure. The Applicant has not shown that it must put an addition on the structure in order to make reasonable use of it, even under its current residential zoning. *See, e.g.,* Board Order No. 16815 of Adams Alley, LLC (November 8, 2002) (The existing building was properly shown to be unsuitable for residential use without the proposed addition.) The Applicant simply chose to design an addition in such a way as to create the need for excessive zoning relief.

Further, the Commission finds that the mere re-zoning of the property does not amount to an exceptional situation or condition, making this property unique. Lastly, although the Applicant claimed that the lot was irregularly shaped, there was no credible evidence of irregularity. The

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[2]The Applicant had to make a showing of "practical difficulties" and not "undue hardship" because all four (4) variances requested were area variances, (as opposed to use variances.) *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972).

lot is essentially a square, encompassing 9,652 square feet and with an 83.2 foot width. It is not particularly narrow, shallow, or irregular in any way. It fronts on a street and backs onto a public alley. Therefore, the Commission concludes that the Applicant has first failed to make a convincing showing of the existence of an extraordinary or exceptional situation or condition of its property. Second, even if the existing structure constitutes an exceptional situation or condition, the Applicant has failed to show that its claimed practical difficulties result from such situation or condition.

An applicant's claimed practical difficulties must not only result from the exceptional situation or condition of its property, but their proof must also bear some reasonable relationship to the magnitude of relief granted. The quantum of proof for the practical difficulties claimed varies with the magnitude of the variance sought. *See, e.g., In the Matter of National Merritt v. Weist,* 41 N.Y.2d 438, 443, 361 N.E.2d 1028, 393 N.Y.S.2d 279 (1977). *De minimus* relief requires lesser proof of practical difficulties. *See, e.g., Gilmartin v. District of Columbia Board of Zoning Adjustment,* 579 A.2d 1164, 1171 (D.C. 1990). Drastic relief such as requested here, however, requires a showing of practical difficulties great enough to merit such relief. After reviewing the record before the Board, the Commission finds that the Applicant failed to make such a showing, leaving the Board without power to grant the relief requested.

The Commission also finds that with regard to the height and FAR variances, the Board failed to take into account the magnitude of the relief it was granting. It therefore exceeded its prerogative and, in effect, re-zoned the subject property. A variance must not be granted lightly and never on the basis that a project is popular or has exceptional merit. Before granting a variance, the Board must seriously consider only the legally relevant aspects of the request, including the magnitude of the relief requested. *See, e.g., In the Matter of National Merritt v. Weist, supra,* at 441. ("[T]he magnitude of the desired area variance ... is significant since the greater the variance in area restrictions the more severe the likely impact upon the community.") *See also, Sasso v. Osgood,* 86 N.Y. 2d 374, 633 N.Y.S.2d 259, 657 N.E.2d 254 (NY 1995). (Discussing recent New York law establishing new area variance test, one factor of which is "whether the requested variance is substantial.") If the relief granted is too great and out of all proportion to the practical difficulties claimed, it can amount to a de facto amendment of the zoning regulations or map and a re-zoning of the property. The Board is without power to amend the zoning regulations or map to change a property's zoning. *See,* D.C. Official Code § 6-641.07(e).

In the instant case, the FAR and height relief granted by the Board was extraordinary, resulting in a de facto re-zoning of the property. In an R-5-B District, the matter-of-right permitted density is 1.8 FAR. 11 DCMR § 402.4. The density of the building extant on the site is 1.9 FAR. The Board granted the Applicant's variance to permit it to construct a building with a density of 3.9 FAR--more than double the matter-of-right FAR of 1.8. The matter-of-right FAR permitted in the next two less restrictive zone districts, R-5-C and R-5-D, would only be 3.0 and 3.5, respectively. The Board permitted the Applicant an FAR of 3.9, which would not be permitted as a matter-of-right until an R-5-E district. The matter-of-right height in an R-5-B District is fifty (50) feet (with no limit on the number of stories). 11 DCMR § 400.1. The Board granted the Applicant variance relief to a height of 69.7 feet. The matter-of-right height in the next less restrictive zone district, R-5-C, is only sixty (60) feet. A matter-of-right height of 69.7

feet would not be available until an R-5-D District. These leaps are just too great to be countenanced in the absence of truly exceptional circumstances, none of which exist here. The Commission finds that the Board's FAR and height relief is tantamount to a de facto re-zoning of the property.

The Commission thus concludes that all the variance relief granted by the Board "substantially impair[s] the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map." 11 DCMR § 3103.2. Variance relief must be consistent with the intent and purpose of the zone plan as expressed in the regulations. Matter-of-right lot occupancy, FAR and height maximums are just that--maximums. Variance relief is provided to avoid unfair situations, (*See, Goreib v. Fox,* 274 U.S. 603, 607 (1927)), but it must be exercised reasonably, keeping in mind that the matter-of-right standards set forth in the regulations are considered the maximum optimal conditions in the particular zone. *See, e.g., Abel v. Zoning Bd. of Appeals of City of Norwalk,* 172 Conn. 286, 374 A.2d 227, 229 (Conn. 1977). (It must be recognized that area requirements are the "embodiment of the legitimate expectations of the community and surrounding property owners.") Variance relief is available, when the required proofs are made, but variance relief of the magnitude granted here, wholly unconnected to the claimed exceptional situation or condition, and out of all proportion to the dubious practical difficulties claimed, does violence to the zone plan as embodied in the zoning regulations and map. Accordingly, the Commission finds that the Board, by granting the Applicant's requested variance relief, violated a basic policy of the Commission, as expressed in the regulations.
Based upon the foregoing, the Commission reverses in its entirety the Board's Order in Case No. 02-37/16869.

No motions to reconsider this decision may be submitted. The Zoning Commission is only authorized to decide motions to reconsider filed by parties to contested cases heard under § 3022 of its rules of practice and procedure. 11 DCMR § 3029.5. *Sua sponte* reviews concern contested cases that were heard by the Board pursuant to Chapter 31. Any motion to reconsider this decision will be rejected for filing by the Office of Zoning or, if inadvertently filed, will be returned to the person submitting the motion. Any person receiving such a motion should disregard it.

So ordered.

The Commission, on December 9, 2002, voted to **REVERSE** in its entirety the Board's decision and to **ADOPT** this order on a vote of 5-0-0 (Peter G. May, Carol J. Mitten, James H. Hannaham, Anthony J. Hood, and John G. Parsons in favor.)

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