

## DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

NOTICE OF PUBLIC INTEREST

The following is a listing of raze permit applications filed with the Permit Operations Division of the Department of Consumer and Regulatory Affairs:

<b>Application Date</b>	<b>Address</b>	<b>Lot</b>	<b>Square</b>	<b>Use</b>
March 20, 2009	5901 East Capitol Street, NW	817	5279	12 story apartment
March 20, 2009	5929 East Capitol Street, NW	52	5279	14 story apartment
March 24, 2009	6029 16 <sup>th</sup> Street, NW	824	2726	1 story single family development
April 3, 2009	2358 Champlain Street, NW	888	2560	3 story single family development (emergency)
April 6, 2009	2620 Martin Luther King, Jr. Avenue, SE	1033	5868	4 story single family development

For further information, please contact Mr. Joseph Bembry at the Permit Operations Division via email at [Joseph.Bembry@dcra.gov](mailto:Joseph.Bembry@dcra.gov) or Ms. Cheryl Randall Thomas, Manager of the Permit Center, at (202) 442-4534.

**DISTRICT OF COLUMBIA**

**BOARD OF ELECTIONS AND ETHICS**

**Certification of Filling Vacancies**

In Advisory Neighborhood Commissions

Pursuant to D.C. Official Code §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 the vacancy has been filled in the following single-member district by the individual listed below:

Von Pariss  
Single-Member District 8B07

**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 five (5) Advisory Neighborhood Commission offices, certified pursuant to D.C. Official Code § 1-309.06(d)(2); 2001 Ed; 2006 Repl. Vol.

**VACANT: 6B11, 8C05, 8C06, 8E01**

Petition Circulation Period: **Monday, April 13, 2009 thru Monday, May 4, 2009**

Petition Challenge Period: **Thursday, May 7, 2009 thru Wednesday, May 13, 2009**

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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 - 4<sup>th</sup> Street, NW, Room 250N  
Washington, DC 20001**

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

**IMAGINE SOUTHEAST PUBLIC CHARTER SCHOOL****REQUEST FOR PROPOSALS****Food Service Agreement**

The Imagine Southeast Public Charter School, in compliance with Section 2204 (C) of the District of Columbia School Reform Act of 1995, hereby solicits requests for proposals for the delivery of breakfast, lunch and snack to children enrolled at the school for the 2009-2010 school year with a possible extension of (4) one year renewals. All meals must meet, but are not restricted to, minimum National School Breakfast, Lunch, and Snack meal pattern requirements. Meal pattern requirements and all necessary forms may be obtained from:

Mrs. Tuanshanita Brown  
Imagine Southeast Public Charter School  
421 Alabama Ave. S.E.  
Washington, DC 20032

Email questions to [tuanshanita.brown@imageschools.com](mailto:tuanshanita.brown@imageschools.com) with the subject line as "Food Service Provider". Appointments for Food Tastings can be arranged by calling the school office 202-561-1622.

**Deadline for submissions is April 20, 2009 by 4:00 p.m.**

Please mail proposals and supporting documents to the recipient address listed above.

**IMAGINE SOUTHEAST PUBLIC CHARTER SCHOOL****REQUEST FOR PROPOSALS****Janitorial Services**

The Imagine Southeast Public Charter School, in compliance with Section 2204 (C) of the District of Columbia School Reform Act of 1995 hereby solicits Requests for proposals for cleaning services.

Email questions to [tuanshanita.brown@imageschools.com](mailto:tuanshanita.brown@imageschools.com) with the subject line as “Janitorial Services”. For further information you may contact the school at 202-561-1622.

**Deadline for submissions is April 20, 2009 at 4:00 p.m.**

Please mail proposals and supporting documents to the following address:

Imagine Southeast Public Charter School  
Tuanshanita Brown  
421 Alabama Ave. SE  
Washington, DC 20032

## JUSTICE GRANTS ADMINISTRATION

## FY 2010 NOTICES OF FUNDING AVAILABILITY

**FY 2010 Title II Juvenile Justice Formula Funding: Evidence Based Services for Juvenile Offenders Program:** The District of Columbia Justice Grants Administration announces funds to support a capacity building and implementation initiative to provide Functional Family Therapy services to adjudicated youth in the juvenile justice and PINS systems. Funds must be used to support the development of Functional Family Therapy teams that work in partnership with juvenile justice system agencies, stakeholders, and an intermediary—Evidence Based Associates—to build organizational capacity to provide these evidence-based services, and subsequently, to implement these services for approximately 100 youth and families per year per program. Grantees will be required to participate in and abide by all initiative organizational readiness activities, training, protocol development, clinical model adherence protocols, and funding sustainability planning as outlined in the RFA.

**Eligibility:** Community-based organizations that have the demonstrated abilities to meet the funding priorities, outputs, outcomes, and required activities identified in the Request for Applications (RFA), and who are able to commit to complying with all JGA financial, administrative, and programmatic regulations and expectations.

**Deadline:** 5:00 p.m. on Friday, **May 15, 2009.**

**Funds:** \$800,000 is available to fund two (2) awards.

**Information:** To review the RFA, go to <http://opgd.dc.gov/opgd/site/default.asp> and select the *District Grants Clearinghouse* or go to [jga.oca.dc.gov](http://jga.oca.dc.gov) and select the *Notice of Funding Availability/Requests for Application*.

**FY 2010 Title V Community Prevention/Justice Assistance Grant: PINS Services**

**Improvement Program:** The District of Columbia Justice Grants Administration announces funds to support a capacity-building and funding partnership with Fair Chance to strengthen the internal operations, sustainability and accountability of organizations that serve PINS (Persons in Need of Supervision) youth so that they can measure and achieve improved youth development outcomes for at-risk adolescents and their families. Participants are required to and will receive intensive technical assistance and capacity building services from Fair Chance for 12 months in the areas of Strategic Planning; Fundraising; Fiscal Management; Board Development; Leadership Development; Program Evaluation; Human Resources; and Communications & Outreach. JGA funds must be used to support related evaluation capacity building and service program improvements.

**Eligibility:** Community-based organizations that have the demonstrated abilities to meet the funding priorities, outputs, outcomes, and required activities identified in the Request for Applications (RFA), and who are able to commit to complying with all JGA financial, administrative, and programmatic regulations and expectations.

**Deadline:** 5:00 p.m. on Friday, **May 15, 2009.**

**Funds:** \$432,000 is available to fund up to six (6) awards.

**Information:** To review the RFA, go to <http://opgd.dc.gov/opgd/site/default.asp> and select the *District Grants Clearinghouse* or go to [jga.oca.dc.gov](http://jga.oca.dc.gov) and select the *Notice of Funding Availability/Requests for Application*.

**FY 2010 Justice Assistance Grant Recovery Act: Detention and Incarceration Diversion**

**Service Program:** The District of Columbia Justice Grants Administration announces funds to support service programs and system improvements that expand and strengthen alternatives to detention, prosecution, and residential placement/prison, with a particular emphasis on reducing the number of youth and adults offenders served by institutions outside of the District of Columbia. Applicants will need to identify concrete numerical benchmarks for reducing the number of youth and/or adults involved with such systems; identify detailed eligibility criteria and a referral process for achieving such reductions; and are strongly encouraged to include letters of support from the Office of the Attorney General, US Attorney General, Metropolitan Police Department, DC Superior Court, and/or other agencies as appropriate to ensure institutional buy-in for the proposed diversion activities. Applicants are also encouraged to propose evidence-based service strategies for these diversion activities, and to include a formal evaluation component in their funding proposal.

**Eligibility:** Community-based organizations, District and Federal agencies that have the demonstrated abilities to meet the funding priorities, outputs, outcomes, and required activities identified in the Request for Applications (RFA), and who are able to commit to complying with all JGA financial, administrative, and programmatic regulations and expectations.

**Deadline:** 5:00 p.m. on Friday, **May 15, 2009**.

**Funds:** \$2,000,000 is available to support up to six (6) awards

**Information:** To review the RFA, go to <http://opgd.dc.gov/opgd/site/default.asp> and select the *District Grants Clearinghouse* or go to [jga.oca.dc.gov](http://jga.oca.dc.gov) and select the *Notice of Funding Availability/Requests for Application*.

**FY 2010 Justice Assistance Grant Recovery Act: Evidence-Based Residential Service, Discharge and Re-entry Service Demonstration Projects:**

The District of Columbia Justice Grants Administration announces funds to support demonstration projects that pilot new, evidence-based strategies and services for reducing recidivism rates and achieving pro-social outcomes for youth and adult offenders returning to the District of Columbia after a period of incarceration. Demonstration projects can focus on residential services, discharge planning, supervision, and/or re-entry services, with a preference for projects that focus on high-risk offenders and that link multiple phases of an offender's re-entry. Applicants are strongly encouraged to submit proposals collaboratively that include at least two of the following partners: a residential facility/custody entity; service provider(s); supervision entity if appropriate; and a technical assistance provider that can offer training and support around the implementation of evidence based practices and can assist with required evaluation activities.

**Eligibility:** Community-based organizations, District and Federal agencies that have the demonstrated abilities to meet the funding priorities, outputs, outcomes, and required activities identified in the Request for Applications (RFA), and who are able to commit to complying with all JGA financial, administrative, and programmatic regulations and expectations.

**Deadline:** 5:00 p.m. on Friday, **May 15, 2009**.

**Funds:** \$2,000,000 is available to support up to six (6) awards

**Information:** To review the RFA, go to <http://opgd.dc.gov/opgd/site/default.asp> and select the *District Grants Clearinghouse* or go to [jga.oca.dc.gov](http://jga.oca.dc.gov) and select the *Notice of Funding Availability/Requests for Application*.

**FY 2010 Justice Assistance Grant Recovery Act: District of Columbia Juvenile and Criminal Justice Research and Policy Institute:** The District of Columbia Justice Grants Administration announces funds to support the creation of a new Juvenile and Criminal Justice Research and Policy Institute. The Institute's mission will be to conduct practical, nonpartisan research and evaluation activities—at the direction of the Executive Office of the Mayor—on juvenile and criminal justice issues of importance to the District. Funds will be used to support the strategic planning, development and founding of the Institute, as well as staffing and resources to carry out three initial research and evaluation projects identified in collaboration with the Executive Office of the Mayor.

**Eligibility:** Community-based organizations that have the demonstrated abilities to meet the funding priorities, outputs, outcomes, and required activities identified in the Request for Applications (RFA), and who are able to commit to complying with all JGA financial, administrative, and programmatic regulations and expectations.

**Deadline:** 5:00 p.m. on Friday, **May 22, 2009**.

**Funds:** \$800,000 is available to fund one award.

**Information:** To review the RFA, go to <http://opgd.dc.gov/opgd/site/default.asp> and select the *District Grants Clearinghouse* or go to [jga.oca.dc.gov](http://jga.oca.dc.gov) and select the *Notice of Funding Availability/Requests for Application*.

**FY 2010 Justice Assistance Grant Recovery Act: Juvenile and Criminal Justice System Data Indicators Program:** The District of Columbia Justice Grants Administration announces funds to support the development and implementation of monthly aggregate juvenile and criminal justice data indicator reports. Funds must be used to work with District and Federal agencies and other stakeholders as needed to identify and define a set of aggregate monthly data indicators that fully describe the District's juvenile and criminal justice systems from arrest through disposition; identify how this data can be captured best, and if needed, what capacity building improvements within District or Federal agencies are required so the data can be accurately collected; develop and implement a data communication process; and begin implementation of the monthly reports, which must be made publically available.

**Eligibility:** Community-based organizations and District and Federal agencies that have the demonstrated abilities to meet the funding priorities, outputs, outcomes, and required activities identified in the Request for Applications (RFA), and who are able to commit to complying with all JGA financial, administrative, and programmatic regulations and expectations.

**Deadline:** 5:00 p.m. on Friday, **May 22, 2009**.

**Funds:** \$500,000 is available to fund one award to a lead developer and manager of the data indicators project, with the flexibility for this lead entity to sub-grant resources as needed to support District and federal agency data collection capacity building.

**Information:** To review the RFA, go to <http://opgd.dc.gov/opgd/site/default.asp> and select the *District Grants Clearinghouse* or go to [jga.oca.dc.gov](http://jga.oca.dc.gov) and select the *Notice of Funding Availability/Requests for Application*.

**FY 2010 Justice Assistance Grant Recovery Act: Technology, Electronic Information**

**Sharing, and Evaluation Capacity Improvement Program:** The District of Columbia Justice Grants Administration announces funds to build organizational capacity to employ cutting-edge technology and/or capture, store and share electronic information and/or conduct evaluations that will help the District to better prevent crime; improve case processing; improve systems coordination and information sharing; and provide outcome data on program operations and performance that can help the District to better determine how to invest criminal justice resources. Applications that identify peer learning and/or technical assistance partners around the implementation of data/technological improvements, and applications submitted collaboratively on behalf of multiple agencies around information sharing, are strongly encouraged.

**Eligibility:** Community-based organizations, District and Federal agencies that have the demonstrated abilities to meet the funding priorities, outputs, outcomes, and required activities identified in the Request for Applications (RFA), and who are able to commit to complying with all JGA financial, administrative, and programmatic regulations and expectations.

**Deadline:** 5:00 p.m. on Friday, **May 8, 2009**.

**Funds:** \$1,000,000 is available to fund up to five (5) awards

**Information:** To review the RFA, go to <http://opgd.dc.gov/opgd/site/default.asp> and select the *District Grants Clearinghouse* or go to [jga.oca.dc.gov](http://jga.oca.dc.gov) and select the *Notice of Funding Availability/Requests for Application*.

**FY 2010 Juvenile Accountability Block Grant: Juvenile Justice Data Improvements**

**Program:** The District of Columbia Justice Grants Administration announces funds to support improving the capacity of agencies in or that serve youth involved in the District's juvenile justice system to collect, analyze, share and publically report data on core operations and program outputs and outcomes. Funds must be used to support technological, systems, or staffing improvements that allow organizations to sustainably improve their ability to track, measure and share data on their core operations and performance, and must result in publically shared information that helps the District to better understand the functioning of and know how to improve the juvenile justice system.

**Eligibility:** Community-based organizations, District, or Federal agencies that have the demonstrated abilities to meet the funding priorities, outputs, outcomes, and required activities identified in the Request for Applications (RFA), and who are able to commit to complying with all JGA financial, administrative, and programmatic regulations and expectations.

**Deadline:** 5:00 p.m. on Friday, **May 8, 2009**.

**Funds:** \$466,000 is available to fund up to four (4) awards.

**Information:** To review the RFA, go to <http://opgd.dc.gov/opgd/site/default.asp> and select the *District Grants Clearinghouse* or go to [jga.oca.dc.gov](http://jga.oca.dc.gov) and select the *Notice of Funding Availability/Requests for Application*.

**LIGHTHOUSE FACILITIES MANAGEMENT, LLC.****REQUEST FOR PROPOSALS 2009-2010**

Lighthouse Facilities Management, L.L.C. on behalf of Lighthouse Academies, Inc. is seeking competitive proposals to provide start-up and year-round classroom, office, janitorial, physical education and nursing supplies to Lighthouse charter schools in Bronx, NY; Chicago, Illinois; Cleveland, Ohio; East Chicago, Indiana; Gary, Indiana; Indianapolis, Indiana; Washington, District of Columbia; and Jacksonville, Arkansas.

All sealed proposals shall be forwarded to the address listed below:

Attn: Tom Stewart  
Lighthouse Facilities Management, Inc.  
1661 Worcester Road, Suite 207  
Framingham, MA 01701  
Phone: 508-626-0904 ext 102  
Fax: 508-626-0905  
tstewart@lighthouse-academies.org

Sealed proposals shall be received no later than May 15, 2009, by 1:00 PM EST

Sealed proposals shall be submitted according to the specifications in the Request for Proposal. In addition all sealed proposals shall be submitted in a sealed envelope marked as:

“School Supply Proposal 2009-2010.” Indicate the firm name on the envelope. Included with the hard-copy proposals shall be an electronic copy of the proposal.

Late and/or faxed proposals will not be accepted.

Lighthouse Facilities Management, LLC and Lighthouse Academies, Inc. reserve the right to reject any and all proposals without limitation. Lighthouse Facilities Management, LLC and Lighthouse Academies, Inc. reserve the right to award a contract as it determines to be in the best interest of the school. To acquire a copy of the proposal specification, please contact Tom Stewart at the above phone number or e-mail address.

**LIGHTHOUSE FACILITIES MANAGEMENT, LLC****REQUEST FOR PROPOSALS**

Lighthouse Facilities Management, LLC., on behalf of Lighthouse Academies, Inc. and its charter school, the Potomac Lighthouse Public Charter School, are seeking competitive proposals to provide special education services, including psychological/social work, occupational and physical therapy, and speech therapy, for the 2009-2010 school year.

All sealed proposals shall be forwarded to the address listed below:

Attn: Tom Stewart  
Lighthouse Facilities Management, LLC.  
1661 Worcester Road, Suite 207  
Framingham, MA 01701  
Phone: 508-626-0904 ext. 102  
Fax: 508-626-0905  
tstewart@lighthouse-facilities.org

Sealed proposals shall be received no later than May 15, 2009, by 1:00 PM ET

Sealed proposals shall be submitted according to the specifications enclosed herein. In addition all sealed proposals shall be submitted in a sealed envelope marked as:  
PLPCS Special Education Proposal 2009-2010. Indicate the firm name on the envelope.  
Included with the hard-copy proposals shall be an electronic copy of the proposal.

Late and/ or faxed proposals will not be accepted

Lighthouse Facilities Management, LLC. reserves the right to reject any and all proposals without limitation. Lighthouse Facilities Management, LLC. reserves the right to award a contract as it determines to be in the best interest of Lighthouse Academies, Inc. and its public charter school. To acquire a copy of the proposal specification, please contact Tom Stewart at the above phone number or e-mail address.

**BOARD OF REAL PROPERTY ASSESSMENTS AND APPEALS****NOTICE OF ADMINISTRATIVE MEETING**

Friday, May 15, 2009 at 2:00 p.m.  
Room 220 (Office of Zoning Hearing Room)  
441 4<sup>th</sup> Street NW  
Washington, D.C. 20001

The District of Columbia Board of Real Property Assessments and Appeals will hold an administrative meeting on Friday, May 15, 2009 at 2:00 p.m.

**Individual who wish to submit their comments** as part of the official record should send copies of the written statements no later than 4:00 p.m., Wednesday, May 13, 2009 to:

Renee McPhatter, Administrative Officer  
Board of Real Property Assessments and Appeals  
441 4<sup>th</sup> Street NW, Suite 430S  
Washington, D.C. 20001

**D.C. WORKFORCE INVESTMENT COUNCIL****NOTICE OF PUBLIC MEETINGS**

The District of Columbia Workforce Investment Council (DC WIC) is the state and local workforce investment board charged with developing consumer-driven systems and programs to support career development and self-sufficiency and to enhance the productivity and competitiveness of the District of Columbia's workforce. The DC WIC will hold quarterly meetings in April, June, September and December of 2009. All quarterly meetings are open to the public. Employers, stakeholders, and residents are welcome to attend and provide comments. The meetings dates are as follows:

Monday, April 20, 2009

**(Cancelled due to conflict with DC Council's Budget Hearing  
with the Department of Employment Services.)**

Wednesday, June 10, 2009

Wednesday, September 2, 2009

Wednesday, December 2, 2009

**Executive Committee meetings are only for the Executive Committee members unless otherwise invited.**

**Quarterly meetings are open to the public. Please contact Ms. Amelia Lofton for more detailed information and the meeting location at 202.698.5826 or [Amelia.Lofton@dc.gov](mailto:Amelia.Lofton@dc.gov). The WIC Chair has the discretion to reschedule or postpone these meetings.**

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

**Application No. 17521-A of 601-645 H Street Ventures LLC**, pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy requirements under section 772 and a variance from the residential recreation space requirements under section 773, and pursuant to 11 DCMR §§ 3104.1 and 1325.1, a special exception from the lot occupancy requirements of § 1324.4, a special exception from § 1303.2 to permit a driveway on H Street, a special exception pursuant to § 2514.2 for a thirty-five foot extension of a less restrictive district into a more restrictive district, and a special exception under § 1320.4 to allow an addition that increases the gross floor area of an existing building by more than fifty percent on a lot that has 6,000 square feet or more of land area, in the H Street Northeast Neighborhood Commercial Overlay District in the HS/C-2-A and HS/C-2-C Districts at premises 601-645 H Street, N.E. (Square 859, Lot 177).

**Hearing Dates:** November 21, 2006 and December 5, 2006

**Decision Dates:** December 5, 2006 and February 6, 2007

**Final Date of Order:** August 21, 2007

**Decision on Motion to Extend Order:** April 7, 2009

**ORDER ON MOTION TO EXTEND  
THE VALIDITY OF BZA ORDER NO. 17521**

The Underlying BZA Order

On December 5, 2006, the Board approved the Applicant's request for variances (SS 772 and 773) and a special exception to extend the zone boundary line (§ 2514.2) and a special exception from lot occupancy (§1324.4). On February 6, 2007, the Board approved the Applicant's request for a special exception for the relocated curb cut (§ 1303.2) and a special exception to permit an addition of more than 50% on a lot with more than 6,000 square feet (§ 1320.4). The Board issued an order to that effect on August 21, 2007.

Under the Order, and pursuant to § 3130.1 of the Zoning Regulations, the Order was valid for two years from the time it was issued – until August 21, 2009.

Section 3130.1 states:

No order [of the Board] authorizing the erection or alteration of a structure shall be valid for a period longer than two (2) years, or one (1) year for an Electronic Equipment Facility(EEF), unless within such period, the plans for the erection or alteration are filed for the purposes of securing a building permit.

(11 DCMR § 3130.1)

## Motion to Extend

On March 19, 2009, the Board received a letter from the Applicant, which noted that:

"the District of Columbia and the United States are in the most significant economic downturn since the Great Depression of the 1930's. Despite the applicant's efforts, there is no financing for a residential project of this type at this time. The applicant has, over the past two years, sought financing from any number of sources and it has not been able to obtain commitments to allow the project to proceed.

Accordingly, the Applicant requested that, pursuant to § 3100.5 of the Regulations, the Board waive the provisions of § 3130.1, which limits the validity of the underlying Order to two years from the date of its issuance, and extend the validity of its prior order for an additional two years, thereby allowing the Applicant additional time to apply for a building permit.

## Criteria for Evaluating Motion to Extend

Section 3100.5 of the Regulations states in full:

Except for §§ 3100 through 3105, 3121.5 and 3125.4, the Board may, for good cause shown, waive any of the provisions of this chapter if, in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

(11 DCMR § 3100.5)

The Board finds that the Applicant has met the criteria set forth in this provision. The Applicant's inability to secure financing and the poor economic conditions in the District constitutes the "good cause" required under § 3100.5. The Board also finds that a waiver in this case would not prejudice the rights of any party and is not otherwise prohibited by law.

In requesting this extension of the Order, the applicant's plans for development of the site would be unchanged from those approved by the Board in its Order dated August 21, 2007 (Exhibit Nos. 96 and 105 in the record). There have been no changes to the zone district classification applicable to the property or to the Comprehensive Plan affecting this site since the issuance of the Board's Order. The only change to the requirements of the Regulations from which relief was sought is that the provisions requiring residential recreation space have been deleted and relief from §773 is no longer required. Neither the ANC nor any party to the application objected to an extension of the Order. The Board concludes that the extension of that relief is appropriate under the current circumstances.

Accordingly, the Board hereby waives the limitation in § 3130.1 of the Regulations and extends the validity of the underlying Order for a period not to exceed two years from the current expiration date, thereby establishing a new expiration date of August 21, 2011.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions

of law. It is therefore **ORDERED** that this request for extension of time be **GRANTED** until August 21, 2011.

**VOTE: 3-0-2** (Marc D. Loud, Shane L. Dettman and Michael G. Turnbull to approve; Mary Oates Walker and the third (vacant) mayoral appointee not participating, not voting)

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

Each concurring member approved the issuance of this order.

**FINAL DATE OF ORDER:** \_\_\_\_\_

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

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

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, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

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

**Application No. 17583-A of 1634 Associates LLC**, pursuant to 11 DCMR § 3103.2, for a variance from the residential recreation space requirements under section 773, a variance from the retail use provisions under subsection 1901.1, and a variance from the off-street parking requirements under subsection 2101.1, to construct a thirty-two (32) unit residential building with ground floor retail in the ARTS/C-3-A District at premises southwest corner of the intersection of 14<sup>th</sup> & R Streets, N.W. (Square 208,. Lots 806, 807 and 808)

**Hearing Date:** April 3, 2007  
**Decision Date:** April 3, 2007  
**Final Date of Order:** April 4, 2007  
**Decision on Motion to Extend Order:** April 7, 2009

**ORDER ON MOTION TO EXTEND  
THE VALIDITY OF BZA ORDER NO. 17583**

The Underlying BZA Order

On April 3, 2007, the Board approved the Applicant's request for a variance from the residential recreation space requirements under section 773, a variance from the retail use provisions under subsection 1901.1, and a variance from the off-street parking requirements under subsection 2101.1 of the Zoning Regulations. Given that there were no opposing parties, the Board authorized a bench decision and summary order, which was issued on April 4, 2007 (BZA Order 17583).

Under the Summary Order, and pursuant to § 3130.1 of the Zoning Regulations, the Order was valid for two years from the time it was issued – until April 4, 2009.

Section 3130.1 states:

No order [of the Board] authorizing the erection or alteration of a structure shall be valid for a period longer than two (2) years, or one (1) year for an Electronic Equipment Facility(EEF), unless within such period, the plans for the erection or alteration are filed for the purposes of securing a building permit.

(11 DCMR § 3130.1)

Motion to Extend

On March 20, 2009, the Board received a letter from the Applicant, which noted that:

"the District of Columbia and the United States are in the most significant economic downturn since the Great Depression of the 1930's. Despite the applicant's efforts, there is no financing for a residential project of this type at this time. The applicant has, over

BZA APPLICATION NO. 17583-A

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the past two years, sought financing from any number of sources and it has not been able to obtain commitments to allow the project to proceed."

Accordingly, the Applicant requested that, pursuant to § 3100.5 of the Regulations, the Board waive the provisions of § 3130.1, which limits the validity of the underlying Order to two years from the date of its issuance, and extend the validity of its prior order for an additional two years, thereby allowing the Applicant additional time to apply for a building permit.

#### Criteria for Evaluating Motion to Extend

Section 3100.5 of the Regulations states in full:

Except for §§ 3100 through 3105, 3121.5 and 3125.4, the Board may, for good cause shown, waive any of the provisions of this chapter if, in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

(11 DCMR § 3100.5)

The Board finds that the Applicant has met the criteria set forth in this provision. The filing of the motion on March 20, 2009, prior to the expiration date, tolled the effect of the order. The Applicant's inability to secure financing and the poor economic conditions in the District constitutes the "good cause" required under § 3100.5. The Board also finds that a waiver in this case would not prejudice the rights of any party and is not otherwise prohibited by law.

In requesting this extension of the Order, the applicant's plans for development of the site would be unchanged from those approved by the Board in its Order dated April 4, 2007 (Exhibit No. 22 in the record). There have been no changes to the zone district classification applicable to the property or to the Comprehensive Plan affecting this site since the issuance of the Board's Order.

Neither the ANC nor any party to the application objected to an extension of the Order. The Board concludes that the extension of that relief is appropriate under the current circumstances.

Accordingly, the Board hereby waives the limitation in § 3130.1 of the Regulations and extends the validity of the underlying Order for a period not to exceed two years from the current expiration date, thereby establishing a new expiration date of April 4, 2011.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this request for extension of time be **GRANTED** until April 4, 2011.

**VOTE: 3-0-2** (Marc D. Loud, Michael G. Turnbull and Shane L. Dettman to approve; Mary Oates Walker and the third (vacant) mayoral appointee not participating, not voting)

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

BZA APPLICATION NO. 17583-A

PAGE NO. 3

Each concurring member approved the issuance of this order.

**FINAL DATE OF ORDER:** April 8, 2009

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

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

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, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

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

**Application No. 17606-B of Dakota Points LLC**, pursuant to 11 DCMR § 3104.1, for a special exception from the roof structure uniform height provisions under section 411, to construct a four-story residential building in the C-2-A District at premises 5545-5549 South Dakota Avenue, N.E. (Square 3760, Lot 10) and 5553-5575 South Dakota Avenue, N.E. (Parcel 137/86).

<b>Hearing Date:</b>	May 8, 2007
<b>Decision Date:</b>	May 8, 2007
<b>Final Date of Order:</b>	May 9, 2007
<b>Decision on Motion to Extend Order:</b>	March 24, 2009

**ORDER ON MOTION TO EXTEND  
THE VALIDITY OF BZA ORDER 17606-A**

**The Underlying BZA Order**

On May 8, 2007, the Board approved the Applicant's request for a special exception from the roof structure requirements of § 411 of the Zoning Regulations. Given that there were no opposing parties, the Board authorized a bench decision and summary order, which was issued on May 9, 2007 (BZA Order 17606). Because of a minor error in the caption of this Order, the Board issued a Corrected Summary Order (17606-A), to accurately reflect that the proposal was for a 4-*story* residential building, and not a four *unit* residential building. The Corrected Summary Order was also dated May 9, 2007.

Under the Corrected Summary Order, and pursuant to § 3130.1 of the Zoning Regulations, the Order was valid for two years from the time it was issued – until May 9, 2009.

Section 3130.1 states:

No order [of the Board] authorizing the erection or alteration of a structure shall be valid for a period longer than two (2) years, or one (1) year for an Electronic Equipment Facility (EEF), unless within such period, the plans for the erection or alteration are filed for the purposes of securing a building permit.

(11 DCMR § 3130.1)

**Motion to Extend**

On March 6, 2009, the Board received a letter from the Applicant indicating that it had not yet applied for a building permit, and that it would not be able to do so prior to May 9, 2009 when the Order was set to expire. According to the Applicant, despite strong efforts, "the Property Owners ha[d] not been able to a[quire] financing which would allow the preparation of

**BZA APPLICATION NO. 17606-B**  
**PAGE NO. 2**

construction plans and the filing of their building permit applications.” The Applicant asserted that this was due to the unprecedented negative economic circumstances impacting development in the District of Columbia in general.

Accordingly, the Applicant requested that:

- A. Pursuant to § 3100.5 of the Regulations, the Board waive the provisions of § 3130.1, which limits the validity of the underlying Order to two years from the date of its issuance, thereby allowing the Applicant additional time to apply for a building permit; **or**,
- B. The Board extend the underlying Order for a period of two years from May 9, 2009.
- C. The Board toll the expiration date for the underlying Order from the date the motion to extend was filed.

**Criteria for Evaluating Motion to Extend**

Section 3100.5 of the Regulations states in full:

Except for §§ 3100 through 3105, 3121.5 and 3125.4, the Board may, for good cause shown, waive any of the provisions of this chapter if, in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

(11 DCMR § 3100.5)

The Board finds that the Applicant has met the criteria set forth in this provision. The Applicant’s inability to secure financing and the poor economic conditions in the District constitutes the “good cause” required under § 3100.5. The Board also finds that a waiver in this case would not prejudice the rights of any party and is not otherwise prohibited by law. Neither the ANC nor any nearby property owners objected to an extension of the Order; and as noted above, there were no opposing parties at the time the underlying Order was decided. Since granting the initial request for relief did not prejudice the rights of any party, the Board concludes that the extension of that relief, likewise, will not be prejudicial.

Regarding the Applicant’s request to toll the expiration of the underlying Order, the Board finds that the expiration was tolled at the time the Applicant’s motion was filed.

Accordingly, the Board hereby waives the limitation in § 3130.1 of the Regulations and extends the validity of the underlying Order for a period not to exceed two years from the current expiration date, thereby establishing a new expiration date of May 9, 2011.

**BZA APPLICATION NO. 17606-B  
PAGE NO. 3**

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this request for extension of time be **GRANTED** until May 9, 2011.

**VOTE:**       **3-0-2** (Ruthanne G. Miller, Marc D. Loud, and Shane L. Dettman to approve; Mary Oates Walker not participating, not voting; and no member of the Zoning Commission participating or voting)

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

Each concurring member approved the issuance of this order.

**FINAL DATE OF ORDER: APRIL 7, 2009**

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

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

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SG/TWR

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

**Appeal No. 17657 of 1231 Morse Street**, pursuant to 11 DCMR 3100.2, from the administrative decision of the Department of Consumer and Regulatory Affairs (DCRA) on March 6, 2007 to deny an application for the revision of Building Permit B477039, allowing for the “reconstruction of collapsed walls for an existing single-family dwelling and conversion to an 11-unit apartment building”; and the decisions on July 20, 2007 to revoke Building Permit B477039 and Emergency Demolition Permit Number B478240, all pertaining to premises 1233 Morse Street, NE (Square 4069, Lot 130), in the R-4 zone district.

**HEARING DATES:** October 2, 2007, October 16, 2007, and October 30, 2007  
**DECISION DATES:** December 4, 2007, and January 8, 2008

**DECISION AND ORDER**

This appeal concerns a project to convert an existing one-family dwelling to an apartment house in an R-4 zone district. New apartment houses are not permitted in an R-4 zone, but structures existing before May 12, 1958 may be converted to that use. A building permit authorizing such a conversion was issued to the Appellant in September 2005 and construction commenced. In February 2006, structural deficiencies in the one-family dwelling prompted DCRA to issue an emergency demolition permit. Although the permit did not authorize the complete razing of the structure, by the conclusion of President’s Day weekend, whether by accident or design, the one-family dwelling was no more. Construction activity ceased after the first of several stop work orders was issued.

In January 2007, the Appellant filed an application to amend its building permit in order to resume construction. The Zoning Administrator denied the application on March 6<sup>th</sup>, reasoning that the destruction of the one-family dwelling rendered any further construction non-compliant with the zoning regulations. The Appellant challenges that denial. Four months later, DCRA revoked the initial building permit and the already executed emergency demolition permit. The revocation notice claimed that the Appellant misrepresented its intentions when obtaining both. The Appellant also challenges these revocations.

For the reasons stated below, the Board sustains the denial of the amended permit and dismisses the remainder of the appeal as moot.

**PRELIMINARY AND PROCEDURAL MATTERS**

**Notice of Appeal and Notice of Public Hearing**

The appeal challenging denial of the revised permit was filed with the Board on April 20, 2007.

**BZA APPEAL NO. 17657**  
**PAGE NO. 2**

In accordance with 11 DCMR § 3113.4, the Office of Zoning mailed notice of the hearing to the Appellant, ANC 5B, (the ANC within whose Commission the boundaries of the subject property is located), the property owner and DCRA. The Office of Zoning advertised the hearing notice in the D.C. Register at *54 D.C. Reg. 6662* (July 6, 2007).

**Parties**

**Appellant**

The Appellant, 1231 Morse Street, Inc. (Morse Street) is a corporation organized under the laws of the District of Columbia, and is the owner and developer of the premises at 1231 Morse Street, N.E. (the property). Taiwo Demurren, the President of Morse Street, appeared on the corporation's behalf. Morse Street was represented by Greenstein DeLorme & Luchs, PC, Patrick Brown, Esq.

**DCRA**

The Appellee, DCRA, is the agency of the government of the District that is authorized, among other things, to issue building permits. DCRA was represented by Assistant Attorney Generals Matthew Green, Jr., Esq., Melinda Bolling, Esq., and Doris Parker-Woolridge, Esq. The Office of the Zoning Administrator of DCRA is headed by a Zoning Administrator (ZA). That office is separate from the entity within DCRA that issues building permits, which, at the time of the events relevant to this appeal, was called the Building and Land Regulation Administration (BLRA). The ZA is charged with administering and enforcing the Zoning Regulations. At the time of the public hearing, Matthew LeGrant was the Acting ZA. Mr. William Crews was the ZA when most of the events which are relevant to this appeal took place. Mr. Olutoye Bello was the ZA when the subject property was subdivided. He is no longer an employee of the District of Columbia and testified as an expert in zoning on behalf of Morse Street.

**The Affected ANC**

ANC 5B, as the affected ANC, was automatically a party to the appeal by virtue of 11 DCMR § 3199.1(a). However, the ANC did not file a report or participate in the proceedings and therefore no great weight could be given to it.

**Notice to Amend Appeal**

On August 9, 2007, Morse Street filed a "Notice of Related Appeal" and "Motion to Amend Pending Appeal to Incorporate Directly Related Revocation of Permits by DCRA". The Motion was argued on October 2, 2007. After argument, the Board granted the motion allowing the amendment, determining that DCRA's later decisions to revoke the initial permit and the emergency demolition permit were directly related to the pending appeal.

**Motion for Summary Judgment**

Morse Street also filed a Motion for Summary Judgment prior to the public hearing on October

**BZA APPEAL NO. 17657****PAGE NO. 3**

2, 2007. (Exhibit 17) That motion was opposed by DCRA and extensively argued by the parties. The Board held the motion in abeyance pending a full hearing of the appeal. However, as the Board found there were material facts in dispute, the motion was ultimately denied.

**Motion to Dismiss**

On October 1, 2007, the first day of public hearing, DCRA filed a Motion to Dismiss Morse Street's Appeal, claiming that the Appeal, as amended, fails to state a claim. (Exhibit 19). Morse Street was given time to respond and filed a statement in opposition on October 12, 2007 (Exhibit 28). This motion was argued with the Motion for Summary Judgment, and also held in abeyance. It too was ultimately denied, as the Board found that Morse Street had indeed stated a claim, albeit a non-meritorious one.

**Motion to Disqualify Expert Witness and Strike Testimony**

On or about October 26, 2007, before the public hearing had concluded, DCRA moved to disqualify Mr. Bello as an expert, and strike his October 2, 2007 testimony from the record. (Exhibit 31). DCRA argued that because Mr. Bello approved the subdivision for Morse Street's project as the former ZA, he could not later advocate a position that was contrary to the District. (Exhibit 31)<sup>1</sup> Morse Street opposed the motion to disqualify and strike. (Exhibit 32) The Board held this motion in abeyance pending completion of the hearing. However, ultimately the Board agreed with Morse Street and denied the motion, finding that Mr. Bello's testimony was not colored by his participation in the subdivision for several reasons: (a) the 2005 subdivision approval was not substantially related to the matters now on appeal, (b) Mr. Bello received no confidential information regarding the property when the subdivision was approved, and (c) Mr. Bello had no connection with any of the permit applications, all of which were processed after Mr. Bello left his position with the District.

**FINDINGS OF FACT***The Property*

1. The subject property is located at 1233 Morse Street, NW, Square 4069, Lot 130, (formerly Lots 810, 812, and 816).
2. Morse Street acquired Lots 810, 812, and 816 in April and November of 2004.
3. At the time of purchase, the property was improved with a vacant one-family dwelling (OFD) that had been constructed in 1940.
4. The property is zoned R-4 and has a lot area of 10,443 square feet. In the R-4 zone, the

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<sup>1</sup> DCRA argued that Mr. Bello's actions violated the Ethics in Government Act of 1978 (18 U.S.C. § 207) placing restrictions on former government employees, and the D.C. Employee Code of Conduct (6 DCMR § 1814), relating to post 2/27/09-employment conflicts of interest.

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Zoning Regulations allow the “conversion of a building . . . existing before May 12, 1958, to an apartment house as limited by § 350.4 (c) and the area requirements of § 401.3. 11 DCMR § 330.5(c)).

5. Section 350.4 (c) disallows residencies of less than a month and is of no relevance to this appeal.
6. The proposed project would have complied with § 401.3, which requires converted buildings to provide 900 square feet of lot area for each apartment or, in this case, a minimum lot area of 9,900 square feet for eleven units.

*The initial permit*

7. On April 12, 2005, Morse Street applied for a building permit under § 330.5(c) to build an addition to the OFD, and convert the structure to an eleven unit apartment building. A copy of the application is attached to the Statement on Appeal, Exhibit 4, Tab B. The plans submitted with the application depict the existing OFD that was to be converted.
8. The proposed use stated on the application is for “Apartment 11 Units”.
9. On September 2, 2005, DCRA issued Building Permit Number B477039 (the initial permit), authorizing Morse Street to “BUILD ADDITION TO SFD/CONVERT SFD<sup>2</sup> TO 11-UNIT APT. AS PER PLAT/PLANS.” (emphasis supplied). A copy of the initial permit is attached to the Statement on Appeal, Exhibit 4, Tab C.
10. On or about September 7, 2005, Morse Street began construction of the addition to the OFD.

*The demolition permit*

11. On or about February 7, 2006, during the construction of the addition, Morse Street became concerned about the structural integrity of the OFD, notified DCRA and requested an inspection of the property.
12. DCRA inspectors agreed that the structure was unsafe, and instructed Morse Street to obtain an emergency demolition permit. Under the direction of Mr. Lennox Douglass (Deputy Director for Licensing and Permitting at DCRA), an emergency demolition permit (the demolition permit) was issued on February 14, 2006. A copy of the demolition permit is attached to the Statement on Appeal, Exhibit 4, Tab D.
13. Morse Street began the demolition work on or about February 15, 2006. It ceased demolition activities on Saturday, February 18, 2006 (during President’s Day weekend).
14. At some point during President’s Day weekend, any remaining wall[s] of the OFD collapsed

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<sup>2</sup> The acronym refers to a “single family dwelling”. That term does not exist in the zoning regulations, which instead uses the term “one-family dwelling” (OFD) when referring to structures/uses of this kind.

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into a hole, resulting in the complete destruction of the OFD.

15. Morse Street contends that the ultimate destruction of the structure was a result of adverse weather conditions; DCRA contends that the actions of Morse Street constituted an intentional razing of the structure.
16. At the time of the collapse, the rear addition was about 75% framed, construction was about 30% completed, and Morse had spent approximately \$300,000 in direct construction costs, plus financing costs. (T. October 2, 2007, p. 159).

*The stop work orders and expended costs*

17. Shortly after the collapse of the OFD, on or about February 22, 2006, DCRA issued a written notice of a Stop Work Order (SWO), alleging that the OFD had been razed without a raze permit and that Morse Street was unlawfully constructing a new apartment house.<sup>3</sup> DCRA post-dated the SWO to allow Morse Street to back fill and brace the ground in order to stabilize the property and prevent damage to the adjacent property.
18. Construction was halted when the SWO became effective on or about February 28, 2006.
19. The project has been substantially shut down since then. (T. October 2, 2007, p. 159).
20. The only costs Morse Street claims to have expended from February 2006 until it filed its post-hearing submissions (on or about December, 2007), was approximately \$225,000.00 in high interest carrying charges. (Exhibit 40, Demuren Affidavit, p. 2)
21. Morse Street appealed the SWO to the Code Reviewing Official, the DCRA Director, and finally, on October 17, 2007, to the Office of Administrative Hearings (OAH).
22. In an order dated March 27, 2007, Administrative Law Judge Claudia Barber granted the appeal, finding that DCRA's failure to cite the applicable Building Code sections was a fatal defect.
23. Morse Street resumed construction for a brief period after that decision, until a second SWO was issued on or about April 9, 2007.
24. During the succeeding months, DCRA issued a third SWO to cure technical problems with the second SWO, and then a fourth SWO to cure similar problems with the third SWO.
25. All three stop work orders made the same substantive allegations as were stated in the first SWO.
26. The second, third, and fourth SWOs were each separately appealed to the OAH by Morse

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<sup>3</sup> DCRA relied on provisions of the Building Code that require a "raze" permit to remove a building or structure down to the ground. See, 12A DCMR §§ 105.1.7 and 105.1.7.1

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Street, consolidated by OAH into a single appeal, and stayed pending the outcome of this proceeding.

*The denial of the application to amend the building permit.*

27. In mid-December of 2006, approximately two months after the OAH appeal was filed, Morse Street and DCRA entered into settlement discussions.
28. Morse Street contends that a settlement was reached by which DCRA agreed to let Morse Street resume construction if it filed an amended building permit application. DCRA denied reaching such an agreement and no document memorializing the alleged understanding was produced by the Appellant.
29. On January 16, 2007, Morse Street filed an application to revise the original permit to “reconstruct collapsed walls of an existing structure. Per Plans.” (Exhibit 4, Tab A)
30. On March 5, 2007, Mr. William Crews (the ZA at the time) issued a denial letter for the application. (Exhibit 4, Tab A)
31. According to the March 5th letter, a District inspection determined that the one-family dwelling had been ‘razed.’ The ZA then opined that “once an existing structure has been razed, it may no longer be considered a reconstructed building. ... Furthermore, without an existing structure there can be no conversion to an apartment building in the R-4 ... district.” In addition, the ZA found that the submitted plans “misrepresent the existing structure” because the plans did “not reflect the original structure and collapsed walls”.
32. This appeal was filed on April 20, 2007, challenging only the denial of the revised permit.

*The revocations of the building and demolition permits*

33. On or about July 20, 2007, DCRA issued a notice revoking the initial permit and the demolition permit. (Exhibit 16, Tab B, Notice of Revocation).
34. The notice cited 12A DCMR § 105.6 (1) for DCRA’s authority to revoke a permit “[w]here there is a false statement or misrepresentation of fact or other significant inaccuracy, in the application or on the plans on which a permit or approval was based’ and 12A DCMR § 105.6 (6) which authorizes the Director to revoke a permit that was ‘issued in error’”.
35. Specifically, DCRA concluded that Morse Street had always intended to raze the existing OFD and misrepresented that fact in stating on its building permit application that it intended to convert the structure instead. According to the notice, if Morse Street had indicated that it “planned to raze the existing structure and construct a new one, the District would have denied [the] Application.”
36. DCRA also asserted in the notice that Morse Street’s statement in its application for a

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demolition permit that it intended to demolish only one wall of the OFD did not accurately represent its plans.

37. DCRA did not allege therein any violation of the Zoning Regulations.
38. Shortly thereafter, on August 9, 2007, Morse Street filed an amended appeal challenging the revocations.

**CONCLUSIONS OF LAW**

For the reasons explained below, the Board concludes that (1) DCRA did not err when it denied the revised permit; and (2) the legal issues arising from the revocations of the initial building permit and emergency demolition permit have become moot.

**Denial of the revised permit application**

The building permit that is the subject of this appeal authorized Morse Street to “BUILD ADDITION TO SFD/CONVERT SFD TO 11-UNIT APT. AS PER PLAT/PLANS.” The insertion of the phrase “CONVERT SFD” was not surplusage. New apartment houses are not permitted as a matter of right in the R-4 zone. However, 11 DCMR § 330.5 (c) does permit “the conversion of a building or other structure existing before May 12, 1958, to an apartment house”, subject to other requirements not relevant here. Because the plans showed a pre-1958 one-family dwelling being converted to an apartment house, the building permit was properly issued.

In February of 2006, the one-family dwelling was destroyed. In January 2007, while its appeal of a stop work order remained pending, Morse Street filed an application to revise the original permit. By letter dated March 5, 2007, the then Zoning Administrator denied the application, on the grounds that an inspection by the District on February 27, 2006 revealed that the OFD had been razed. Because an OFD no longer existed, there could be no **conversion** of an OFD pursuant to 11 DCMR § 330.5 (c). The letter stated that “without an existing structure there can be no conversion to an apartment building in the R-4 ... district”. (Exhibit 4, Tab A).<sup>4</sup>

Morse Street argues that in fact conversion of the one-family dwelling had occurred long before the events of President’s Day weekend 2006, going so far as to claim that the OFD “ceased to exist independently and was replaced by the 11 unit apartment dwelling” once the building permit was issued. (Exhibit 28, page 3). In the alternative, it argues that § 3202.4 vested its construction rights for all purposes and that § 3203.11 similarly vested its occupancy rights, so

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<sup>4</sup> The letter also stated that the revised plans misrepresent the existing structure and violate Title 11, Chapter 3 of the Zoning Regulations. The Board need not and does not reach this question because it upholds the decision of the Zoning Administrator on other grounds.

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that the destruction of the one-family dwelling had no more effect on its ability to proceed than would have a change in the Zoning Regulations.

The Board does not agree that the one-family dwelling was converted to an apartment house at the split second that the building permit was issued. To the contrary, the Board is of the view that conversion is a process that is not accomplished until the construction is complete and the certificate of occupancy for an apartment house is issued. Accordingly, the Board determined that because not one speck of the one family dwelling remained as of February 27, 2006, conversion could not be continued under a revised permit pursuant to 11 DCMR § 330.5 (c).

The Appellant's rationale to the contrary would undermine the intent and purpose of the zoning regulations governing the R-4 zone. The R-4 zone was not intended to "be an apartment house district," 11 DCMR § 330.3, but was established to ensure "the stabilization of remaining one-family dwellings", 11 DCMR 330.2. Adopting the Appellant's view would have the exact opposite effect, since it would permit the immediate razing of structures, such as this one-family dwelling, upon building permit issuance. This would amount to the matter of right replacement (rather than conversion) of existing structures with new apartment houses, which is not permitted until the R-5-A zone, and then only by special exception.

As to the question of vesting, § 3202.4, § 3203.11 and similar provisions found in other jurisdictions, do no more than vest "the right to initiate or continue the establishment of a use or construction of a structure which, when completed, *will be contrary to the restrictions or regulations of a recently enacted zoning ordinance.*" 4 *Rathkopf's The Law of Zoning and Planning* § 70:2 (4<sup>th</sup> ed.) (emphasis added).

Section 3202.4 of the Regulations states in its entirety:

Any construction authorized by a building permit may be carried to completion pursuant to the provisions of this title in effect on the date that the permit is issued, subject to the following conditions:

- (a) The permit holder shall begin construction work within two (2) years of the date on which the permit is issued; and
- (b) Any amendment of the permit shall comply with the provisions of this title in effect on the date the permit is amended<sup>5</sup>**

There is no issue in this case involving a change in a zoning ordinance or regulation.

Instead, this case involves a change in facts - facts that are key to the Applicant's authority to proceed under the same regulation. Applicant's original permit allowed the applicant to build an addition to a one family dwelling /convert a one family dwelling in existence prior to May 12,

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<sup>5</sup> § 3203.11 provides in pertinent part that "[a] building permit shall be issued in compliance with § 3202"

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1958, to an 11-unit apartment building.

On February 27, 2006, Applicant could have proceeded under a revised permit to continue the addition to the one family dwelling/conversion of the one family dwelling to an 11-unit apartment as a matter of right pursuant to 11 DCMR 330.5(c) had there been even a part of the pre-May 12, 1958 one family dwelling still in existence. It was undisputed that there was none. Without the existence of the one family dwelling built in 1958, there could be no conversion to an apartment building pursuant to 11 DCMR 330.5(c), the regulation in effect at the time of the original permit and at the time of the application for the revised permit.

**The revocations of the initial permit and the emergency demolition permit.**

Morse Street also challenges DCRA's July 2007 revocation of the initial permit and the demolition permit. At the time of the revocation, the one family dwelling had already been demolished and the Zoning Administrator had already denied on March 5, 2007, applicant's application for the revised permit; in addition, a stop work order was in place preventing further work on the project.<sup>6</sup> The revocation was essentially based on grounds that the building and demolition permit applications each contained a "false statement or other misrepresentation, or other significant inaccuracy ... that substantively affected the approval of the application(s)" 12A DCMR § 105.6 (1) and that based on the applicant's violation of the zoning regulations, the initial permit was issued in error. 12A DCMR § 105.6 (6).<sup>7</sup>

With the stop work order in place and the revised permit denied, this project cannot go forward. That being the case, the question as to whether Morse Street submitted a building permit application to convert a structure it really intended to raze has become purely academic, and therefore moot. The same is true with respect to the revocation of the demolition permit as it was issued after the structure had already been destroyed. *See N. St. Follies, Ltd. Pushup v. D.C. Bd. of Zoning Adjustment, 949 A.2d 584, 589 (D.C. 2008)* ("If a tribunal is asked to decide only abstract or academic issues, a case is also moot because there is no justifiable controversy.") (internal quotation marks omitted).

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<sup>6</sup> Morse Street has appealed that and two other stop work orders to the Office of Administrative Hearing, which has stayed that proceeding pending the Board's decision in this case. The Board notes that DCRA's decisions to deny the amended permit and to issue the stop work orders were both based in part upon the same interpretation of the Zoning Regulations; namely that further work on the project would be tantamount to the construction of a new apartment house.

<sup>7</sup> The Board notes that the grounds for the revocations are based on the Building Code, not the Zoning Regulations. The question of what constitutes misrepresentation in the context of a building permit requires an interpretation of § 105 of the Building Code and not any provision of the Zoning Regulations.

**BZA APPEAL NO. 17657****PAGE NO. 10****Estoppel and laches**

Morse Street claims that the District is estopped from preventing it from building a new apartment house. Estoppel is generally invoked in the zoning context to permit the continuation of construction initially approved by the government, but which the government later seeks to halt as unlawful. *See generally Saah v. District of Columbia Bd. of Zoning Adjustment*, 433 A.2d 1114 (D.C. 1981) (Board estopped from denying variance when DCRA had miscalculated FAR).

In this case Morse's initial construction was initially approved by DCRA when it was lawful under 11 DCMR 330.5(c). DCRA denied the resumption of construction when it was no longer lawful under that same regulation as a result of a change in facts, not as a result of the District's change in its application of the law.

In order to establish the affirmative defense of estoppel, Morse Street must show the existence of "(1) expensive and permanent improvements, (2) made in good faith, (3) in justifiable and reasonable reliance upon, (4) affirmative acts of the District government, (5) without notice that the improvements might violate the zoning regulations; and (6) equities that strongly favor the petitioner." *Bannum, Inc. v. District of Columbia BZA*, 894 A.2d 423 (D.C. 2006).

The Appellant claims it relied upon (1) DCRA's action in issuing of the building permit and (2) DCRA's purported statements made around the time that the emergency demolition permit was issued and during subsequent settlement discussion suggesting that Morse Street could continue construction of the multi-family dwelling without the one-family dwelling in place.

As to the building permit, there is no doubt that the Appellant made expensive improvements between September 2005, when the permit was issued, and February 2006, when the first stop order was posted. The Applicant represents that when DCRA halted work the Applicant had expended over \$300,000 in construction costs and the addition was 75% framed. *Compare Saah, supra*, 433 A.2d at 1116 (expensive improvements found based upon \$225,000 of construction work). However, except for the amount spent to secure the work site after notice of an impending stop work order was received, all this money was spent while the one family dwelling still existed.

The building permit on its face authorizes the conversion of the one-family dwelling. There is no evidence in the record that DCRA represented that the Applicant could construct an 11-unit apartment building without the existence of the one family dwelling.

As to the alleged subsequent conduct or statements by DCRA suggesting or promising that construction could proceed in the absence of the one-family dwelling, the Board concludes that the Appellant failed to establish that anything of the kind occurred. It produced no writing memorializing the claimed representations, and DCRA has denied making any. Since the Appellant bears the burden on the issue, its unproven and contradicted assertions do not suffice.

Even if the Appellant had shown that such actions occurred, it made no expensive and permanent improvements in reliance thereon. As just noted, all of the permanent improvements were made

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prior to the time that the statements allegedly were made. The Appellant was notified on February 22, 2006 that a stop work order was to be posted a few days later, and the only action it took prior to the cessation of construction a week later was to safeguard the project site. Since then, the Appellant has undertaken little or no construction work because of the stop work orders that barred it from doing so. Although it claims to have expended large sums in debt carrying costs, it presented no authority that these could be considered akin to permanent improvements.

Finally, the equities do not favor the Appellant. The R-4 District “is designed to include those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of the dwellings into dwellings for two (2) or more families”, 11 DCMR § 330.1. Its “primary purpose [is] the stabilization of remaining one-family dwellings”, 11 DCMR § 330.2, and for that reason the “R-4 District shall not be an apartment house district,” 11 DCMR § 3303. 3. To permit the construction of a new multi-family dwelling, instead of a matter of right use, would contravene these purposes. Therefore, the Board cannot conclude that the equities strongly favor the Appellant.

Morse Street also fails to show the applicability of the doctrine of laches. “Laches is a species of estoppel, being defined as the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches”. *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7, 13 (D.C. 1978), quoting, RATHKOPF, LAW OF ZONING AND PLANNING, at 67-1 (3d ed. 1972). Laches is rarely applied in zoning matters “except in the clearest and most compelling circumstances.” *Id.* at 11. To establish a claim of laches, Morse Street must show it has been prejudiced by delay, and the delay was unreasonable.

The delay claimed by Morse is between February 2006, when DCRA concluded that the project no longer complied with the Zoning Regulations, until either March, 2007, when DCRA denied the application to amend the permit or until July, 2007, when it revoked the initial permit. The prejudice claimed is the debt carrying costs mentioned in its estoppel argument.

The claim of laches fails in this case because there was no delay on DCRA’s part in asserting any right that resulted in prejudice to the Applicant. On February 20, 2006, what was left of the pre-1958 building collapsed. On February 28, 2006, DCRA issued the first stop work order. Since that date, DCRA continued to take the position that the Applicant could no longer build pursuant to the original permit as a matter of right. It was not until mid-January, 2007, that the Applicant submitted a revised application to DCRA, 11 months after the issuance of the first stop work order. The Zoning Administrator’s denial of the revised permit on March 5, 2007, less than two months later, did not unreasonably delay or prejudice the Applicant. The notice of revocation of the original permit in July, 2007, was basically redundant of the March 5, 2007 denial of the application for the revised permit.

Accordingly, the Applicant was on notice within one week of the collapse of the remaining wall of the pre-1958 building that it could not build in accordance with the original permit. The prompt issuance of a stop work order and others to follow suspended the project during the time

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leading up to the denial of the revised permit and the subsequent revocation of the original permit. Although the Applicant claims prejudice in the form of its payment of debt carrying costs, such debt was retained with full knowledge of DCRA's view that further construction was illegal. As such, any prejudice was a result of applicant's own actions.

For all of these reasons, the doctrine of Laches is not available to the Appellant.

For the reasons explained above, the Board concludes that DCRA did not err when it denied the revised permit and that DCRA's revocation of the initial permit and the demolition permit are both moot.

For the reasons discussed above, it is hereby **ORDERED** that the appeal is **DENIED**.

**VOTE:**           **3-1-1** (Ruthanne G. Miller, Shane L. Dettman, and Michael G. Turnbull to deny; Marc D. Loud opposed to the motion to deny; No fifth Board member participating or voting)

Vote taken on January 8, 2008

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

Three Board members have approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

**FINAL DATE OF ORDER: MARCH 31, 2009**

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

SG

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

**Application No. 17850 of JBG/14<sup>th</sup> & S LLC**, pursuant to 11 DCMR §§ 3104.1 and 3103.2, for a variance from the lot occupancy requirements under § 772, a special exception under § 411.11 for roof structures with unequal heights, special exception relief under § 1906.1 from provisions of the ARTS overlay district restricting eating and drinking establishments under § 1901.6 and height under § 1902.1, and a special exception under § 2120.6 from the parking requirement for an addition to a contributing structure to allow construction of a mixed-use residential and retail development in the ARTS/C-3-A district at premises 1407 S Street, N.W. and 1802, 1804, 1810, 1816, and 1818 14<sup>th</sup> Street, N.W. (Square 206, Lots 1, 210, 230, 819, 820, and 821).

**HEARING DATE:** December 2, 2008  
**DECISION DATES:** January 6, 2009 and February 3, 2009

**DECISION AND ORDER**

This application was submitted July 3, 2008 by JBG/14<sup>th</sup> & S, LLC, the owner of the property that is the subject of the application (“Applicant”). Following a public hearing, the Board voted 5-0-0 on February 3, 2009 to grant the application subject to conditions.

**Preliminary Matters**

Application. The application was filed pursuant to 11 DCMR § 3103 for a variance from the maximum lot occupancy requirement under § 772.1 and pursuant to 11 DCMR § 3104 for a special exception under § 411.11 for roof structures with unequal heights as well as special exceptions under § 1906 from provisions of the Uptown Arts-Mixed Use (ARTS) overlay district pertaining to restrictions on eating and drinking establishments (§ 1901.6) and height (§ 1902.1), and under § 2120.6 for relief from the parking requirement for an addition to a historic structure, so as to develop a mixed-use residential and retail development on a site zoned ARTS/C-3-A in Square 206, Lots 1, 210, 230, 819, 820, and 821. The zoning relief requested in this application was self-certified pursuant to 11 DCMR § 3113.2.

Notice of Application and Notice of Public Hearing. By memoranda dated July 7, 2008, the Office of Zoning sent notice of the application to the Office of Planning; the State Historic Preservation Officer; the District Department of Transportation (“DDOT”); the Councilmember for Ward 2; Advisory Neighborhood Commission (“ANC”) 2B, the ANC for the area within which the subject property is located; and the single-member district ANC 2B09.

A public hearing was scheduled for December 2, 2008. Pursuant to 11 DCMR § 3113.13, the Office of Zoning on September 18, 2008 mailed notice of the hearing to the Applicant, the

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owners of property within 200 feet of the subject property, and ANC 2B. Notice was published in the D.C. Register on September 26, 2008 (55 DCR 9986).

Requests for Party Status. In addition to the Applicant, ANC 2B was automatically a party in this proceeding. The Board granted requests for party status in opposition to the application from Tom Coumaris, Peter Knapp, Joseph Freeman, and James Bogden and Charles Taylor, who all reside near the subject property. By letters dated December 22, 2008, Peter Knapp and Joseph Freeman withdrew their opposition to the application, citing discussions with the Applicant that addressed concerns regarding construction and other impacts of the project as well as the location of the parking garage and loading dock in the alley

Applicant's Case. The Applicant provided testimony and evidence from Andrew McIntyre and Brooks Blake of JBG Companies; Shalom Baranes, an expert in architecture; and Martin Wells, an expert in traffic issues. The Applicant and its witnesses described its project, explained the need for the various forms of zoning relief requested, and addressed issues of potential adverse impact.

Government Reports. By report dated November 25, 2008 and through testimony at the public hearing, the Office of Planning ("OP") recommended approval of the application subject to certain conditions. The conditions initially proposed by OP would require the Applicant to limit eating and drinking establishments to no more than 50 percent of the project's 14<sup>th</sup> Street frontage, and to implement recommendations by DDOT with respect to the allocation of parking spaces between the residential and commercial uses consistent with the objectives of the ARTS overlay district.

In a supplemental report dated February 2, 2009, OP reiterated its recommendation that the Board should grant the Applicant's request for special exception relief from the restriction that eating and drinking establishments occupy no more than 25% of the linear frontage within the Arts Overlay, but changed its condition to limit eating and drinking establishments to no more than 40 percent of the project's linear footage along 14<sup>th</sup> Street in light of the fact that applicant agreed to the greater restriction. OP noted estimates that, not including the Applicant's proposal, eating and drinking establishments now occupied between 23.8 and 25.2 percent of the linear footage along 14<sup>th</sup> and U Streets within the ARTS overlay. OP also noted the lack of an established procedure to measure eating and drinking establishments, and the resulting difficulty of determining when a violation of the restriction has occurred.

By memorandum dated November 21, 2008, the District Department of Transportation indicated its support for the Applicant's proposal to provide approximately 90 parking spaces at the subject property. Noting that "the proposed project does not appear to have a projected demand that may place a significant burden on the local network of neighborhood streets," DDOT recommended that the Board require the Applicant to implement a transportation demand management strategy to ensure that the project would "not effectuate undue congestion." DDOT made several suggestions, including that the Applicant should provide Metro SmarTrip cards to residents and business owners at the new development; install ample bicycle parking – at least

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four racks on 14<sup>th</sup> Street – for residents and retail customers, and furnish lockers and showers to encourage bicycle commuting by the retail staff; evaluate the provision of a parking space for a car-sharing service in the garage; and pay the residents' application fee and annual fee for one year for the car-sharing service to encourage its use as well as paying their membership fee for the SmartBikes bicycle-sharing service for one year. DDOT testified that the transportation demand management strategies were suggested to decrease the number of trips generated at the subject property and to reduce any unmet demand for parking.

ANC Report. At a regularly noticed and scheduled public meeting held November 12, 2008 with a quorum present, ANC 2B voted 9-0 to approve a motion stating that the ANC did not support the application. The motion did not indicate the ANC's issues or concerns.

By letter dated December 22, 2008, ANC 2B indicated its support for the use of alternative transportation modes by residents of the project, but objected to the lack of a parking plan to support the retail and service businesses planned for the site, including a proposed restaurant occupying up to 40 percent of the frontage along 14<sup>th</sup> Street.

By letter dated January 23, 2009, ANC 2B indicated that, at a duly noticed regular meeting on January 14, 2009 with a quorum present, the ANC approved two motions by a vote of 8 to 0. The motions (i) rejected the Applicant's revised plan for the placement of the garage and asked "the developer to work with neighbors to relocate the garage so that it is responsive to neighborhood concerns for safety and access"; and (ii) asked the Board "to withhold its rulings on the requests for a variance and special exceptions until the [Historic Preservation Review Board] approves the concept plans for the proposed development." ANC 2B contended that "no flexibility condition should be granted to the developer until specific drawings have been approved by the HPRB."

Persons in support. The Board heard testimony and received letters from persons in support of the application who commented favorably on the Applicant's project, including the proposed reduction in the number of parking spaces at the project as a means to discourage vehicular traffic. By letter dated November 25, 2008, the Cardozo Shaw Neighborhood Association ("CSNA") indicated that, at its regularly scheduled monthly membership meeting held November 13, 2008, CSNA voted 13-2-2 in general support of the application. The letter stated CSNA's support for the zoning relief requested by the Applicant but also expressed concern about whether the proposed 90 parking spaces would adequately serve the needs of the property and would not contribute to any further demands on limited on-street parking.<sup>1</sup>

Parties in opposition. The parties in opposition stated objections to the Applicant's proposal especially with respect to the construction of a large building in close proximity to nearby residences, the location of the entrance to the garage and loading dock on the alley, and concerns

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<sup>1</sup> At the public hearing, the CSNA representative stated that the letter in support did not encompass the Applicant's request for special exception relief from the restriction on eating and drinking establishments, because, at the time of the CSNA meeting, the Applicant had not yet decided whether to seek that relief.

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pertaining to noise, trash, parking, and traffic. A party in opposition also contended that the application was erroneously advertised as a request for special exception when variances were needed from height and setback requirements applicable in the ARTS overlay district, and that placards giving notice of the hearing were not properly maintained at the subject property.<sup>2</sup>

Persons in opposition. By letter dated December 2, 2008, the MidCity Beautification & Education Association indicated its opposition to the Applicant's request for relief from the restriction on eating and drinking establishments. According to MidCity, the requested special exception would allow a large eating or drinking establishment – 100 feet of frontage along 14<sup>th</sup> Street – and would have “extremely heavy impacts on the surrounding area in terms of parking congestion, traffic congestion (from patrons, daily food delivery trucks, and trash trucks), and in terms of potential noise disturbance.” MidCity also contended that a “significant increase in eating and drinking establishments also has indirect adverse effects on the neighborhood by driving up rent levels for street frontage, which leads to other uses being priced out of this market and over time to a loss of business diversity in the Arts District.”

**FINDINGS OF FACT****The Subject Property and Surrounding Area**

1. The subject property is a rectangular parcel located on the west side of 14<sup>th</sup> Street, N.W., bounded by S Street on the south and Swann Street on the north (Square 206, Lots 1, 210, 230, 819, 820, and 821). The site has 110 feet of frontage on S and Swann Streets and 200 feet of frontage on 14<sup>th</sup> Street, and is bounded on the west side by a public alley, 20 feet wide, that extends from Swann Street to S Street. Another public alley, 10 feet wide, runs east-west through the middle of the square and intersects with the larger alley at approximately the midpoint of the western boundary of the subject property.
2. The subject property currently comprises six lots at 1407 St Street, N.W. and 1802, 1804, 1810, 1816, and 1818 14<sup>th</sup> Street, N.W. The area of the subject property is approximately 24,000 square feet.
3. The site is located within the Greater U Street Historic District. Only the building at 1407 S Street – a four-story building originally constructed as the Hudson apartment building and more recently occupied by the Whitman-Walker Clinic – has been determined to be a contributing building. The other lots are improved with non-contributing buildings or surface parking lots.

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<sup>2</sup> The Board was not persuaded by the party in opposition that the application was erroneously advertised. Pursuant to 11 DCMR § 1906.1, the Board may permit exceptions from any requirement of the ARTS overlay district – including the height and setback requirements imposed in the overlay zone – if granted under § 3104, the section of the Zoning Regulations that sets forth the Board's authority to grant special exceptions pursuant to § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g) (2) (2001 ed.). Nor was the Board persuaded that notice of the hearing was deficient even if the placards were not properly maintained at the subject property. (The Applicant submitted affidavits asserting that the posting had been maintained as required.) Notice of the hearing was mailed directly to owners of property within 200 feet of the subject property, and was published in the *D.C. Register*.

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4. Fourteenth Street has a right of way of 110 feet and accommodates two-way traffic. S Street is also two-way, with a 90-foot right of way. Swann Street is one-way eastbound and has a right of way of 50 feet.
5. The subject property is zoned ARTS/C-3-A, which is generally mapped along 14<sup>th</sup> Street in the vicinity of the site. Properties to the west of the 20-foot public alley are located in the R-5-B zone district; another area of R-5-B is located to the southeast of the subject property. Areas to the east are located in the R-4 zone.
6. The subject property is located in the vicinity of several Metrobus routes as well as the U Street/African-American Civil War Memorial/Cardozo Metrorail station.
7. The subject property is designated for moderate-density residential and commercial uses on the Future Land Use Map of the Comprehensive Plan. The Plan's Generalized Policy Map designates 14<sup>th</sup> Street as a "Main Street/Mixed Use Corridor," and calls for enhancement of corridors to foster economic and housing opportunities serving neighborhood needs.

**The Applicant's Project**

8. The Applicant proposed to construct a mixed-use development on the subject property that will incorporate the contributing building on the southern portion and new construction on the remainder of the parcel; the existing noncontributing buildings will be demolished. The project will contain approximately 17,837 square feet of ground-floor retail space; residential space on the second through seventh floors containing approximately 130 dwelling units; and two levels of below-grade parking that will provide at least 90 parking spaces. The Applicant indicated that the precise number of dwelling units and parking spaces had not yet been determined but will depend on the final layouts of the building and the garage.
9. The building will contain approximately 119,825 square feet of gross floor area, and will be 75 feet tall. Its floor area ratio ("FAR") will be 4.99, including approximately 0.74 FAR of retail space. While the C-3-A zone generally permits a maximum building height of 65 feet, with no limit on the number of stories, within the ARTS overlay district a building may be constructed to a maximum height of 75 feet. *See* 11 DCMR §§ 770.1, 1902.1.
10. Access to the residential portion of the project will be provided on S Street, while the retail areas will be accessible from S, 14<sup>th</sup>, and Swann Streets.
11. Vehicular access to the garage and loading area will be provided through the alley off S Street. No curb cuts are planned on any of the streets bordering the subject property, and one existing curb cut on 14<sup>th</sup> Street will be eliminated.

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12. The Applicant will provide bicycle parking in the project for both the retail and residential components, and will work with DDOT to install bicycle racks in public spaces along the project's 14<sup>th</sup> Street and S Street frontages.
13. The Applicant will work with appropriate District agencies to locate a parking space for a car-sharing service on a street abutting the subject property. Absent a car-sharing space on an abutting street, the Applicant will reserve at least one space in the retail portion of the parking garage for use by a car-sharing service.
14. The Applicant will offer one-year memberships in a car- or bicycle-sharing service to initial residents of the project who do not have a parking space.
15. In response to concerns expressed by the Historic Preservation Review Board concerning visual impacts of the garage doors, the Applicant proposed a modification to the parking and loading garage doors that will move the doors approximately three or four feet to the north of the originally proposed location and recess the doors approximately five to seven feet from the property line at the alley. Ornamental gates will be installed for both garage doors, along with sound attenuation technology, to reduce the visual and noise impacts of the garage doors.

**Zoning Relief**

16. The C-3-A zone district permits a maximum lot occupancy of 75 percent for residential use (§ 772.1) and 100 percent for nonresidential uses. The Applicant's project will have varied percentages of lot occupancy, depending on the floor: 99 percent on the ground floor; 79 percent on the second and third floors; 67 to 70 percent on the fourth floor; and 64 or 65 percent on the fifth through seventh floors. The project requires zoning relief so as to permit lot occupancy greater than 75 percent on the second and third floors due to the incorporation of the contributing building on the site into the new project.
17. Pursuant to § 1901.1, the Applicant's proposed building, which will front on 14<sup>th</sup> Street, is required to devote not less than 50 percent of the ground level of the building to retail, service, arts, and arts-related uses listed in §§ 1907 and 1908. Pursuant to § 1901.6, eating and drinking establishments may not occupy more than 25 percent of the linear footage within the ARTS overlay district, as measured along the lots fronting on 14<sup>th</sup> Street and U Street, N.W.
18. The Applicant's project will devote at least 50 percent of the ground floor to retail and service uses, consistent with § 1901.1. The Applicant requested special exception relief from the restriction on eating and drinking establishments because the Applicant cannot determine whether the limitation will apply to the project until seeking a certificate of occupancy for the space.
19. The Zoning Administrator has no current measurement of the percent of the linear foot frontage occupied by eating and drinking establishments along 14<sup>th</sup> or U Streets within

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the ARTS overlay district, nor are there any regulations identify which uses would be counted towards that threshold. An “eating and drinking establishment analysis” submitted by the Applicant demonstrated that eating and drinking establishments presently occupy approximately 24 percent of the linear foot frontage along 14<sup>th</sup> and U Streets within the ARTS overlay district. Eating and drinking establishments now occupy more than 30 percent of the frontage along U Street, and almost 20 percent of the frontage along 14<sup>th</sup> Street. A survey undertaken by the MidCity Association estimated that 25.2 percent of the total frontage of 14<sup>th</sup> and U Streets within the ARTS overlay district is now occupied by eating and drinking establishments.

20. Pursuant to § 1902.1, a building located in the ARTS/C-3-A zone may be constructed to a maximum height of 75 feet so long as no roof structure exceeds a height of 83.5 feet and, if the lot abuts a Residence district or an alley that serves as the zone district boundary line of an adjacent Residence district (as is the case with the subject property), no part of the building may project above a plane drawn at a 45-degree angle from a line located 50 feet directly above the property line that abuts the Residence district or the alley.
21. While the height of the Applicant’s proposed building will be 75 feet, the Applicant requested special exception relief to allow a roof structure in excess of the 83.5-foot limit to accommodate elevator access to the roof, and from the 45-degree setback requirement, because the shape of the lot dictated the placement of structural columns in certain locations and the column placement resulted in a building design that will encroach into the 45-degree setback on the top story. The area encroaching into the 45-degree setback is a square approximately five feet on each side. Elimination of that area, so as not to require special exception relief from the setback requirement, would, for structural reasons, cause the elimination of the top floor of the planned building.
22. The shadow studies submitted by the Applicant demonstrate that the planned massing of the building will not create adverse light or air impacts on abutting properties. The new construction will be set back approximately 18 feet from the property line; with the 20-foot alley, the Applicant’s building will be located 38 feet from the closest residential building.
23. The Applicant requested special exception relief, pursuant to § 411.11, from the requirement set forth in § 411.5 stating that the enclosing walls of a roof structure must be of equal height. The Applicant planned two roof structures on the proposed building: the primary roof structure will not exceed the 83.5-foot limit required by the ARTS overlay district, but the other roof structure will have a height of 18 feet, six inches, to accommodate an elevator core needed in part to provide access to recreational space on the roof. The footprint of the elevator core will be less than 500 square feet, and the taller roof structure will not create adverse light impacts on nearby properties. The separate roof structures will allow use of a larger portion of the roof as recreational space.

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24. Pursuant to § 2101.1, the minimum parking requirement for the Applicant's project is 108 spaces, including 43 parking spaces to serve the planned retail uses and 65 to serve the residential units. The Applicant proposed to provide at least 90 parking spaces in the below-grade garage, and to allocate at least 65 spaces to the residential use and at least 15 spaces to the commercial uses; the remaining 10 parking spaces could be allocated to serve the residential or retail use, depending on demand.
25. The Board agrees with the conclusion reached by the Applicant's traffic expert that the proposed 90 parking spaces will likely suffice for the project's 130 dwelling units and retail space in part because (a) the required and proposed ratio of parking spaces per dwelling unit – 0.5 spaces per dwelling – is close to the average automobile availability in the neighborhood according to the U.S. Census; that is, 0.57 vehicles per dwelling; and (b) one-quarter of residents living in owner-occupied households and nearly two-thirds of residents living in renter-occupied households in the neighborhood do not own vehicles, according to the U.S. Census.
26. After a party in opposition expressed concern about trash collection in the alley, the Applicant obtained a letter from the Department of Public Works ("DPW"), dated February 2, 2009. The letter stated that representatives of DPW and the Applicant conducted a field test in the alley abutting the subject property to determine how far the Applicant's building should be set back so that trash-collection trucks could safely maneuver in the alley. According to DPW, the field analysis demonstrated that "a five-foot setback from the edge of the alley and a length of nine feet to allow for turning and backing" would be required so that the trucks could turn into the alley safely to collect trash and recycling from the residents of S and Swann Streets. The Board agrees with this conclusion.

**Harmony with Zoning**

27. The C-3 district is designed to accommodate major business and employment centers supplementary to the Central Business (C-4) district, providing substantial amounts of employment, housing, and mixed uses. The C-3-A zone permits medium-density development, with a density incentive for residential development within a general pattern of mixed-use development, located on arterial streets, in uptown centers, and at rapid transit stops. *See* 11 DCMR § 740.
28. The purposes of the Uptown Arts-Mixed Use (ARTS) overlay district include to require uses that encourage pedestrian activity, especially retail, entertainment, and residential uses; to expand the area's housing supply in a variety of rent and price ranges, as well as business and job opportunities; and to encourage the development of residential and commercial buildings, including the adaptive reuse of older buildings in the area and an attractive combination of new and old buildings. 11 DCMR § 1900.2.
29. The Applicant's project will conform to the applicable zoning requirements with respect to building height, bulk, and use (after special exception relief from the ARTS overlay

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provision that could otherwise preclude use of the ground floor by eating and drinking establishments).

30. The project will comply with street frontage design requirements set forth in § 1903, including the provision calling for construction of the majority of the streetwall to the property line (§ 1903.3) and the prohibition against driveways that provide access from a pedestrian street to parking spaces or loading berths (§ 1903.2). Vehicular access and egress to the project will be located in the alley, thereby minimizing pedestrian impacts.

### CONCLUSIONS OF LAW AND OPINION

The Applicant seeks an area variance from the 75-percent maximum lot occupancy permitted under § 722.1 for residential use in the C-3-A zone to allow construction of residential space occupying 79 percent of the underlying lot on the second and third floors of the planned mixed-use project.

The Board is authorized under § 8 of the Zoning Act to grant variance relief where, “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 the Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. *See* 11 DCMR § 3103.2.

The Board finds that the subject property is affected by an exceptional situation or condition due to a confluence of factors, including the need to preserve and integrate the contributing building on the site, the inability to build new floor area above the existing historic structure, and requirements of the ARTS overlay district that affect building design.

The retention of the contributing portions of the building is required by Historic Landmark and Historic Protection Act of 1978 (“the Preservation Act”), which disallows the issuance of a permit to demolish a building that contributes to a historic district “unless the Mayor finds that issuance of the permit is necessary in the public interest, or that failure to issue a permit will result in unreasonable economic hardship to the owner”. D.C. Official Code § 6-1104 (e). Since the retention of the contributing portion of the building places significant development constraints on the Applicant, the Board assumes that the Applicant’s decision to retain the structure resulted from its conclusion that the Mayor would not be able to make one of the findings required by the Preservation Act.

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In addition, the Mayor may not approve a permit to alter the exterior of contributing portions of the building unless the same standards for issuing a demolition permit are met. D.C. Official Code § 6-1105 (f). In order to obtain a favorable recommendation of the Historic Preservation Review Board, which advises the Mayor on such matters, the Applicant has agreed to not construct new building area above the four-story contributing building.

Additional limits on development result from the street design requirement of § 1903.3, which applies to this and other new buildings that front certain streets in the overlay. This provision requires that such buildings “be designed and built so that not less than seventy-five percent (75%) of the streetwall(s) to a height of not less than fifteen feet (15 ft.) shall be constructed to the property line between the subject lot and the abutting street right-of-way,” thus further squeezing the development potential of this project.

Although this street design requirement is not unique as to this development, the confluence of its impact together with the loss of development resulting from the preservation of the contributing portions of the existing structure and the limitations on development above that structure combine to make absolute compliance with lot occupancy limits a practical difficulty. Compliance with the 75-percent lot occupancy maximum on the second and third floors would require a decrease of approximately 500 square feet of floor area per floor on the second through seventh floors of the building (or 3,000 square feet), resulting in a decrease of approximately four dwelling units and jeopardizing the financial feasibility of the project. Strict compliance with the Zoning Regulations would require the Applicant to construct a smaller addition that would jeopardize the Applicant’s ability to pursue the redevelopment project.

The requested variance can be granted without causing substantial detriment to the public good and without impairing the intent, purpose, and integrity of the zone plan. The purposes of the ARTS overlay district include to “encourage adaptive reuse of older buildings in the area and an attractive combination of new and old buildings.” 11 DCMR § 1900.2(g). The requested variance is relatively small, allowing a maximum lot occupancy of 79 percent instead of 75 percent on two of the seven floors of the project.

The Applicant also requests a special exception under § 411.11 for roof structures with unequal heights, special exception relief under § 1906.1 from provisions of the ARTS overlay district restricting eating and drinking establishments under § 1901.6 and height under § 1902.1, and a special exception under § 2120.6 from the parking requirement for an addition to a historic structure. The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2001) to grant special exceptions, as provided in the Zoning Regulations, where, in the judgment of the Board, 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 in accordance with the Zoning Regulations and Zoning Map, subject to specific conditions. *See* 11 DCMR § 3104.1.

Pursuant to § 411.11, the Board may approve, as a special exception, the design, number, and other aspects of roof structures where full compliance would be unduly restrictive, prohibitively

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costly, or unreasonable due to operating difficulties, size of building lot, or other conditions relating to the building or surrounding area, provided that the intent and purpose of the Zoning Regulations will not be materially impaired by the structure, and the light and air of adjacent buildings will not be affected adversely. In this case, the Applicant proposes to construct a principal roof structure whose height will comply with the limit applicable in the ARTS overlay zone and a smaller roof structure, with a height of 18.5 feet, needed to accommodate the elevator core of the building. The Board concludes that special exception relief from roof structure requirements is appropriate to allow the two planned roof structures of unequal heights. Full compliance would require either elimination of elevator access to the roof, part of which will be available for use as recreation space, or building both roof structures to a height of 18.5 feet. As designed by the Applicant, the roof structures will not adversely affect the light and air of adjacent properties.

Pursuant to § 1906.1, the Board may grant exceptions from the requirements of the ARTS overlay district based on the following criteria: (a) the uses, buildings, or features at the size, intensity, and locations proposed will substantially advance the purposes of the ARTS Overlay District and will not adversely affect neighboring property or be detrimental to the health, safety, convenience, or general welfare of persons living, working, or visiting in the area; (b) exceptional circumstances affecting the property make compliance with the ARTS overlay requirements difficult or impossible, or the development will provide alternative public benefits in lieu of the excepted uses or features that are of comparable value to the public in achieving the purposes of the ARTS overlay and of the Comprehensive Plan; (c) the architectural design concept of the project will enhance the urban design features of the immediate vicinity in which it is located; and (d) vehicular access and egress will be located and designed so as to minimize conflict with principal pedestrian ways, to function efficiently, and to create no dangerous or otherwise objectionable traffic conditions. The Board may impose requirements pertaining to design, appearance, signs, size, landscaping, and other requirements as necessary to protect neighboring property and to achieve the purposes of the ARTS overlay district.

The Board concludes that the Applicant's requests for special exception relief from two provisions of the ARTS overlay district – so as to allow use of up to 40 percent of the ground floor of the project by eating and drinking establishments and to allow a portion of the top floor of the building to encroach into the 45-degree setback area – are consistent with the requirements for relief under § 1901.6. The ARTS overlay district encourages eating and drinking establishments – restaurants and “drinking places, including bar, nightclub, or cocktail lounge” are among the “preferred arts uses and arts-related uses” listed in § 1908.1 – even as the overlay also imposes a restriction on the amount of space that can be devoted to eating and drinking establishments on lots fronting on 14<sup>th</sup> Street or U Street.

Exceptional circumstances affecting the subject property make compliance with the ARTS overlay requirements difficult or impossible. The Zoning Administrator has not yet measured the percentage of the linear street frontage of 14<sup>th</sup> Street that is occupied by eating and drinking establishments nor has the Zoning Commission adopted regulations specifying which uses

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should be counted towards that threshold.<sup>3</sup> According to the study submitted by the Applicant, the lots fronting on 14<sup>th</sup> Street have not yet exceeded this threshold, while the lots fronting U Street have. Although the restaurant uses envisioned by the Applicant are still permitted as a matter of right, this may change by the time the Applicant seeks certificates of occupancy for these uses. The developer cannot be expected to make the expenditures required to build out restaurant space for a development of this size without the certainty that certificates of occupancy will issue once occupants are found. The Applicant is not attempting to circumvent the special exception process that may or may not be required in the future, but is subjecting itself to adverse impact scrutiny at this time.

In this regard, the requested special exception concerning eating and drinking establishments will not create dangerous or otherwise objectionable traffic conditions, and the condition adopted in this order, limiting space devoted to eating and drinking establishments to no more than 40 percent of the project's linear foot frontage along 14<sup>th</sup> Street, will protect neighboring property and achieve the purposes of the ARTS overlay district.

With regard to the special exception requested to allow encroachment into the 45-degree setback area, the Board concludes that the relatively small encroachment is necessary to achieve a mixed-use building at the size, intensity, and location that will substantially advance the purposes of the ARTS overlay district and will not adversely affect neighboring property or be detrimental to the health, safety, convenience, or general welfare of persons living, working, or visiting in the area. Exceptional circumstances affecting the subject property, especially the retention of the contributing building on the site and compliance with other requirements of the ARTS overlay affecting building design, make compliance with the setback requirement difficult, if not impossible. The architectural design concept of the project, which will come before HPRB for its review and recommendation to the Mayor, will enhance the urban design features of the immediate vicinity, and no dangerous or otherwise objectionable traffic conditions will be created.

Pursuant to § 2120.6, the Board may grant relief from parking requirements if the owner of the property demonstrates that, as a result of the nature or location of the historic resource, providing the required parking will result in significant architectural or structural difficulty in maintaining the historic integrity and appearance of the historic resource. The retention of the contributing building on the subject property will limit the ability to construct parking under that portion of the site, and that additional parking spaces are not needed to accommodate the proposed mix of uses based on the location of the site, in an area likely to attract pedestrians and well served by public transportation. The Applicant will devote at least 65 of the 90 parking spaces in the

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<sup>3</sup> The Zoning Commission has proposed the following text for a similar restriction in the Neighborhood Commercial Overlay in a Notice of Proposed Rulemaking published in the D.C Register at 53 DCR 1202:

An establishment that is required to obtain either a Basic Business License with a Public Health Food Establishment Restaurant Endorsement or a CR or DR Restaurant, CT or DT Tavern, or CN or DN Nightclub Alcohol Beverage License shall be subject to the following limitations (and shall hereinafter be referred to as an "eating or drinking establishment")....

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garage to the residential use in the building, the minimum number required by the Zoning Regulations for the planned residential use. At least 15 parking spaces will be reserved for the retail uses, while the remaining 10 parking spaces may be allocated either to the residential or the retail uses, depending on demand. In addition, the Applicant will implement measures designed to encourage use of alternative forms of transportation, including bicycles and a car-sharing service.

Lastly, the Board agrees with the Department of Public Works that a five-foot setback from the edge of the alley and a length of nine feet to allow for turning and backing should be required so that the trucks could turn into the alley safely to collect trash and recycling from the residents of S and Swann Streets. This requirement is stated in condition number two below.

Based on the findings of fact and for the reasons discussed above, the Board concludes that the requested special exceptions 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.

The Board has accorded the issues and concerns raised by ANC 2B the “great weight” to which they are entitled. In doing so, the Board fully credited the unique vantage point that ANC 2B holds with respect to the impact of the requested zoning relief on the ANC’s constituents. However, the Board concludes that the ANC did not offer persuasive advice that would cause the Board to find that the requested zoning relief should not be approved. ANC 2B initially expressed its opposition to the project without stating any specific issues or concerns. The ANC later objected to the lack of parking plan to support commercial uses planned for the site, the Applicant’s revised plan for the location of the entrance to the garage, and the Applicant’s request for approval of zoning relief before the project was approved by the HPRB. Based on the findings of fact and for the reasons discussed above, the Board concludes that the parking plan for the project, with the transportation demand management measures that the Applicant will implement to decrease the number of trips generated at the subject property, will support the commercial and residential uses located at the proposed development and will not create adverse impacts on neighboring property. With respect to the ANC’s objection to the location of the garage entrance, the Board notes that the Applicant’s garage proposal is consistent with the requirements of the ARTS overlay. Further, the Applicant has proposed moving the doors and recessing them in response to HPRB concerns about their visual impact. (See Finding of Fact No. 15.) The Board declines the ANC’s recommendation that it withhold its rulings pending HPRB review. HPRB review does not impact the zoning relief at issue in this case. If any new zoning relief is triggered in response to HPRB recommendations, then the Applicant may seek modification of its plans in this forum at that time. (See Condition No.1.)

Based on the findings of fact, and having given great weight to the recommendations of the Office of Planning and to the issues and concerns of ANC 2B, the Board concludes that the requested zoning relief, as conditioned by the Board, can be approved so that the Applicant’s project is not likely to become objectionable to adjoining and nearby property. For the reasons stated above, the Board concludes that the Applicant has satisfied the requirements for a variance

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from the lot occupancy requirements under § 772, a special exception under § 411.11 for roof structures with unequal heights, special exception relief under § 1906.1 from provisions of the ARTS overlay district restricting eating and drinking establishments under § 1901.6 and height under § 1902.1, and a special exception under § 2120.6 from the parking requirement for an addition to a historic resource to allow construction of a mixed-use residential and retail development in the ARTS/C-3-A district at 1407 S Street, N.W. and 1802, 1804, 1810, 1816, and 1818 14<sup>th</sup> Street, N.W. (Square 206, Lots 1, 210, 230, 819, 820, and 821). Accordingly, it is hereby **ORDERED** that the application is **GRANTED** subject to the following **CONDITIONS**:

1. The Applicant shall have flexibility to modify design features to comply with the recommendations of the Historic Preservation Review Board or its staff so long as the modification does not result in any new areas of zoning relief.
2. In conjunction with this approval, the Applicant shall modify the alley elevation to include the ground-level setback detailed in the letter from the Department of Public Works dated February 2, 2009 (Exhibit 55).
3. The Applicant shall have flexibility to modify the amount and allocation of vehicle parking provided in the project, so long as the project includes an overall minimum of 90 parking spaces, with a minimum of 15 spaces set aside for the retail component of the project and a minimum of 65 spaces set aside for the residential component of the project.
4. The Applicant shall provide bicycle parking in the parking garage for both the residential and retail components as shown on the approved plans, and shall offer to pay for the installation of up to four bicycle racks in public space abutting the subject property on both 14<sup>th</sup> Street and S Street.
5. The Applicant shall work with the appropriate District authorities to reserve a parking space for a car-sharing service on a street abutting the subject property. If no car-sharing space is located on a public street abutting the project by the date upon which the first certificate of occupancy is issued for the project, the Applicant shall set aside at least one space in the retail portion of the parking garage for use by a car-sharing service no later than one year thereafter.
6. The Applicant shall provide, on request, a one-year membership in a car-sharing or bicycle-sharing service per unit to initial residents of the project who have not leased or purchased an automobile space.
7. Eating and drinking establishments shall occupy no more than 40 percent of the project's linear foot frontage along 14<sup>th</sup> Street.

**VOTE: 5-0-0** (Ruthanne G. Miller, Marc D. Loud, Mary Oates Walker, Shane L. Dettman, and Gregory N. Jeffries voting to approve with conditions)

**BZA APPLICATION NO. 17850****PAGE NO. 15****BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT**

Each concurring member has approved the issuance of this Order.

**FINAL DATE OF ORDER: APRIL 1, 2009**

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

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

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

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, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

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

**Application No. 17864 of Kuumba Learning Center, Inc.**, pursuant to 11 DCMR § 3104.1, for a special exception for a private school under section 206 and a special exception for a child development center under section 205, for a total of 60 children and 12 staff in three adjacent buildings in the R-4 District at premises 3328, 3330, and 3332 Martin Luther King, Jr. Avenue, S.E. (Square 5978, Lots 884, 1037, and 1036).<sup>1</sup>

**HEARING DATES:** February 17, 2009 and March 17, 2009  
**DECISION DATE:** March 24, 2009

**SUMMARY ORDER**

**REVIEW BY THE ZONING ADMINISTRATOR**

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

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register and by mail to Advisory Neighborhood Commission (ANC) 8C and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 8C, which is automatically a party to this application. ANC 8C filed a report, dated February 25, 2009, indicating that, at a meeting with a quorum present, it voted to approve the Applicant's request to operate a private school and a child development center at the premises. (Exhibit 24, attachment). The Office of Planning (OP) submitted two reports, one dated June 3, 2008 recommending approval of the application subject to certain conditions (Exhibit 22), and a second report, dated March 10, 2009, indicating that it "[was] favorably inclined toward the application" but needed the Applicant to clarify or address several issues. (Exhibit 26). At the public hearing on March 17, 2009, OP indicated that, since its report had been filed, the Applicant had addressed the referenced issues, and that OP was in support of the application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for a special exception under section 205 and a special

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<sup>1</sup> The Applicant has been operating at the property with 40 students pursuant to BZA Order No. 17428. With this application, the Applicant seeks approval to add 20 new students at the building located at 3332 Martin Luther King, Jr. Avenue.

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exception under section 206. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1, 205, and 206, and that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED**, that this Order supersedes all previous Orders relating to this property, and that this approval is **SUBJECT** to the **FOLLOWING CONDITIONS**:

1. Approval shall be for **TEN (10) Years**.
2. The number of children for the private school and child development center at the three buildings shall not exceed 60, and the number of staff shall not exceed 12, with 5 staff assigned to the private school and 7 staff assigned to the child development center.
3. Pick-up and drop off for the 20 additional children at the 3332 Martin Luther King, Jr. Avenue location shall take place as provided in the Applicant's submission dated March 23, 2009 (Exhibit 28). Specifically, a shuttle van will transport children to the Kuumba Learning Center from a the Applicant's related facility located at 1320-B Good Hope Road, S.E.

**VOTE:** **4-0-1** (Marc D. Loud, Ruthanne G. Miller, Shane L. Dettman, Anthony J. Hood, to APPROVE as conditioned. Mary Oates Walker, not participating, not voting.)

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

Each concurring member approved the issuance of this order.

**FINAL DATE OF ORDER:** April 3, 2009

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME

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FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

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

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

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

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, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, STATUS AS A VICTIM OF AN INTRAFAMILY OFFENSE, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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

**Application No. 17905-A of James Iker and Hayes Nuss**, pursuant to 11 DCMR § 3104.1, for a special exception to allow an addition to an existing single family dwelling under section 223, not meeting the lot occupancy requirements (section 403), the court requirements (section 406), and the nonconforming structure requirements (subsection 2001.3(b)(2)) and a special exception from the roof structure requirements under 411, in the R-4 District at premises 1329 R Street, N.W. (Square 239, Lot 802).

**HEARING DATE:** March 24, 2009  
**DECISION DATE:** March 24, 2009 (Bench Decision)

**CORRECTED SUMMARY ORDER**

This order amends Order No. 17905, by correcting the reference to the approved plans. The correct exhibit reference for the plans is Exhibit No. 23 (the plans filed with the Applicant's prehearing statement), not Exhibit 10 (the plans filed with the original application).

**SELF CERTIFIED**

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

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register and by mail to Advisory Neighborhood Commission (ANC) 2F and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 2F, which is automatically a party to this application. ANC 2F did not file a report on the application, but the Office of Planning's report dated March 17, 2009, indicated that, as of that date, the Zoning Committee of ANC 2F had voted unanimously to approve the addition and that it had been forwarded to the full ANC for consideration. The Office of Planning (OP) submitted a report in support of the relief pursuant to section 223 and expressed its opinion that relief under subsection 411.11 was not required (Exhibit 25).<sup>1</sup> Four letters of support from neighbors were submitted for the record (Exhibits 22, 26, 27, and 28).

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

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<sup>1</sup> The subject property is in a Historic District. According to the OP report, the Historic Preservation staff reviewed the concept application and concluded there were no issues with the proposal. (Exhibit 24)

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3104.1, for special exception under section 223 (403, 406, and 2001.3(b)(3)) and for a special exception under section 411. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP report, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1, 223 (403, 406, and 2001.3(b)(3)), and 411, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application (pursuant to **Exhibit 23** – Plans) be **GRANTED**.

**VOTE:**       **4-0-1** (Marc D. Loud, Gregory N. Jeffries, Shane L. Dettman, Ruthanne G. Miller, to APPROVE. Mary Oates Walker, not participating, not voting.)

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

Each concurring member approved the issuance of this order.

**FINAL DATE OF ORDER:** April 7, 2009

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

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

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

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FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

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, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, STATUS AS A VICTIM OF AN INTRAFAMILY OFFENSE, 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.

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA**  
**ZONING COMMISSION ORDER NO. 08-19**  
**Z.C. Case No. 08-19**  
**(The HSC Foundation – Map Amendment at Square 101, Lot 874)**  
**March 9, 2009**

The Zoning Commission for the District of Columbia (the “Commission”), pursuant to its authority under § 1 of the Zoning Act of 1938, approved Jun 20, 1938 (52 Stat. 787, *et seq.*; D.C. Official Code § 6-641.01), having held a public hearing to consider the application from The HSC Foundation (the “Applicant”), and referred the proposed amendments to the National Capital Planning Commission for a 30-day review pursuant to § 492 of the District Charter, hereby gives notice of its adoption of an amendment to the Zoning Map of the District of Columbia that rezones Lot 874 in Square 101 (the “Property”) from the R-5-D to the C-3-C Zone District.

**FINDINGS OF FACT**

**Procedural Background**

1. On June 6, 2008, the Office of Zoning received an application from the Applicant requesting the Commission to rezone the Property, with premises address of 2013 H Street, N.W., from R-5-D to C-3-C.
2. Notice of the public hearing was given in accordance with the provisions of 11 DCMR §§ 3014 and 3015.
3. The Office of Planning (“OP”) reviewed the Applicant's proposal to rezone Lot 874 in Square 101 to the C-3-C Zone District (“Application”) and, in its August 28, 2008 report, recommended that the Application be set down for public hearing. OP also recommended approval of the Application through a written report dated December 8, 2008 and through testimony at the Commission's December 18, 2008, public hearing.
4. By letter dated November 4, 2008, and received by the Office of Zoning on November 6, 2008, the West End Citizens Association (“WECA”) requested to participate as a party in this proceeding.
5. By memorandum dated December 17, 2008, the District of Columbia Department of Transportation (“DDOT”) stated that it supports the Application.
6. On December 18, 2008, the Commission held a public hearing on the Application. As a preliminary matter, the Commission considered the party status application of WECA. The Applicant had no objection to the grant of party status to WECA. WECA was granted party status by the Commission. Mr. Steven E. Sher was

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- accepted as an expert in land use and zoning and testified on behalf of the Applicant. Mr. Asher Corson, chairman of ANC 2A, testified on behalf of Advisory Neighborhood Commission (“ANC”) 2A. Ms. Barbara Kahlow testified on behalf of WECA. The Commission acknowledged receipt of correspondence, dated December 17, 2008, from George Washington University, owner of properties to the immediate north, east, and west of the Property, indicating no objection to the Application.
7. At the December 18, 2008, public hearing, the chairman of ANC 2A indicated that the ANC voted unanimously to oppose the Application. The ANC chairman also submitted a resolution of ANC 2A in opposition to the Application. The Commission determined that the ANC submission did not meet the regulatory requirements necessary for the Commission to give great weight to the ANC's written statement of its issues and concerns position and left the record open following the hearing for the ANC to submit a conforming letter or resolution.
  8. The ANC submitted a subsequent correspondence on December 22, 2008, indicating that the ANC unanimously passed a resolution in opposition to the Application at the ANC's December 17, 2008, public meeting. The resolution stated in relevant part that, “the site is located in a huge R-5-D area with the only all-commercial zoning either along Pennsylvania Avenue or in approved Planned Unit Developments (PUDs) in which some amenities are required as quid-pro-quo for the adverse impacts on our community;” and that the ANC was concerned that the change in zoning would “set a dangerous precedent which could adversely change the residential and mixed-use character of both Foggy Bottom ... and of the West End...” The resolution also included statements regarding the development proposal submitted by the Applicant to the District of Columbia Historic Preservation Review Board (“HPRB”), and a variance that the ANC asserts the Applicant will seek in the future.
  9. At its public meeting on January 12, 2009, the Commission voted to reopen the official record to accept a letter dated November 25, 2008, and received by the Office of Zoning on December 22, 2008, from the Bureau of Catholic Indian Missions, owner of property at 2021 H Street, N.W., in support of the Application. The Commission confirmed receipt of the conforming correspondence from ANC 2A in order to give great weight to the comments received from the ANC. The Commission took proposed action to approve the map amendment.
  10. The proposed action of the Commission was referred to the National Capital Planning Commission (“NCPC”) under the terms of the District of Columbia Home Rule Act. NCPC, by action dated February 5, 2009, found that the proposed PUD would not affect the federal establishment or other federal interests

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in the National Capital, nor be inconsistent with the Comprehensive Plan for the National Capital.

11. The Commission took final action to approve the map amendment at its regularly scheduled meeting held on March 9, 2009.

### **The Merits of the Request**

12. The Property is located in Square 101, which is bounded by I Street, N.W. on the north, 20<sup>th</sup> Street, N.W. on the east, H Street, N.W. on the south, and 21<sup>st</sup> Street, N.W. on the west. The Property fronts on the north side of H Street, mid-block between 20<sup>th</sup> and 21<sup>st</sup> Streets, with approximately 36 feet of frontage along H Street and 5,373 square feet of land area. The Property does not meet the 15,000 square foot minimum area requirement for consideration as a planned unit development, as established pursuant to 11 DCMR § 2401.1(c).
13. Along with the bulk of property in Square 101, given its location within the boundaries of the George Washington University (the "University") campus, the Property is designated for Institutional uses on the District of Columbia Comprehensive Plan Future Land Use Map and Generalized Policy Map. The portion of Square 101 that fronts on I Street to the north is designated for High Density Commercial uses. Square 101 is split-zoned C-3-C and R-5-D, with C-3-C zoning covering roughly the northern half of the square as well as the square's southeast corner pursuant to prior map amendments and planned unit development approvals by the Commission.
14. The immediately adjacent area to the Property is comprised of the following:
  - C-3-C zoned property to the immediate north of the Property, improved with an eleven-story (approximately 110 feet tall) office/retail building with premises address of 2000 Pennsylvania Avenue owned by the University.
  - Immediately east of the Property is a surface parking lot, also owned by the University, which has been rezoned to C-3-C as part of the University's Campus Plan/PUD (Zoning Commission cases # 06-11/-6-12), with the rezoning to take effect upon approval of the second stage PUD. According to its application materials, the University intends to construct a 90-foot building with a density of 7.5 FAR on the site, to be devoted to academic/administrative/medical building use and/or residential/campus life/athletic uses.
  - Immediately south of the Property, across H Street, is University Yard, a landscaped open space occupying the core of Square 102. Pursuant to the

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Campus Plan/PUD approval, the University intends to reduce the footprint of University Yard by enclosing it through construction of at least two new buildings in Square 102. One of those buildings will be constructed over what is now open space immediately across from the Property and will measure approximately 65 feet in height and 80,000 square feet of gross floor area devoted to the University's academic, administrative and/or medical uses.

- To the immediate west of the Property is vacant land owned by the University, which is landscaped and paved for pedestrian passage to and from the adjacent 2000 Pennsylvania Avenue office building. Further west is a three-story building utilized for office purposes by the Bureau of Catholic Indian Missions.
  - At the southwest corner of Square 101 is a six-story building utilized by the University for non-residential purposes. This building was constructed pursuant to a Campus Plan processing (BZA Order No. 16379), which permitted construction of an 80-foot mixed-use (faculty office, classroom, auditorium) building.
15. The Property is improved with a three-story-plus-cellar masonry townhouse building with an accessory two-story masonry carriage house/garage at its rear, both of which appear to have been constructed in the late nineteenth century. The existing improvements abut the eastern property line of the Property, leaving roughly the western half of the Property vacant and unimproved.
  16. The Property is one of a number of properties located within the proposed boundaries of a contemplated "Foggy Bottom/George Washington University Campus Historic District", which district is the result of a proffer made by the University as part of the public benefits package it submitted in its application for first-stage PUD approval in Zoning Commission Case No. 06-12. Specifically, the University agreed to file an application with HPRB to: (1) achieve the designations of University-owned individual landmarks identified in the University's Historic Preservation Plan; and (2) work with the District's Historic Preservation Office ("HPO") in the preparation of documentation to be filed with said office supporting designation of a proposed historic district, again as identified in the University's Historic Preservation Plan submitted as part of its applications to the Commission. The proffer was made a condition of the first-stage PUD approval granted.
  17. The Property is located in the R-5-D Zone District. This zone classification permits multiple dwelling residential buildings and other compatible uses to a maximum building height of 90 feet and a maximum building density of 3.5 FAR. Lot occupancy in the R-5-D Zone District is restricted to 75%. Office use is not

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- included within the generally permitted uses in the R-5-D Zone District. The improvements on the Property have been occupied for non-residential purposes by a non-profit association for several years.
18. The Applicant requests rezoning of the Property to the C-3-C Zone District, consistent with properties to the immediate north and as designated for rezoning east of the Property. The C-3-C Zone District is a commercial district that permits medium-high density development, including office, retail, housing, and mixed-use development. Buildings in the C-3-C Zone District may be constructed to a maximum height of 90 feet and maximum density of 6.5 FAR as a matter-of-right. Buildings in the C-3-C Zone District may also occupy up to 100% of the lot on which they are situated.
  19. The proposed Map Amendment to the C-3-C Zone District will facilitate use of the Property for office purposes and increased density compatible with the surrounding office and University institutional buildings in Squares 101 and 102. The Commission finds that less than 10% of the land area in Square 101 and in the six surrounding squares south of Pennsylvania Avenue is utilized for residential purposes, and the bulk of that residential use is for dormitory use by the University.
  20. The Commission finds that the proposed map amendment is not inconsistent with the District Elements of the Comprehensive Plan for the National Capital ("Comprehensive Plan") and is fully consistent with the following components of the Comprehensive Plan:
    - a. Land Use Element: The Comprehensive Plan specifies general policies to "ensure the efficient use of land resources to meet long-term neighborhood, citywide, and regional needs; ...to sustain, restore or improve the character and stability of neighborhoods in all parts of the city; and to effectively balance the competing demands for land to support the many activities that take place within District boundaries." (§ 302.1) Further, the proposal is reflective of the policy of concentrating redevelopment efforts near Metrorail station areas which offer the greatest opportunities for infill development and growth. (§ 306.11)
    - b. Economic Development Element: The Comprehensive Plan states an office sector should be planned for that will continue to accommodate growth in service-sector office industries and that the primary location of this growth should be in Central Washington. (§ 707.6) The proposal will establish a long-term office use just outside the boundaries of the Central Employment Area. This space will potentially accommodate growth in a

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diverse array of office industries, including institutional and/or non-profit uses.

- c. Historic Preservation Element: The Comprehensive Plan encourages the appropriate preservation of historic buildings through an effective design review process. (§ 1011.6) As mentioned above, although the HPRB has not yet designated the proposed Foggy Bottom/George Washington University Campus Historic District, the subject property is one of a number of properties identified as within the proposed boundaries. The applicant has therefore worked closely with HPO staff even though the property is not currently designated.
- d. Comprehensive Plan Future Land Use Map: The Comprehensive Plan 2006 Future Land Use Map designates the property for Institutional Uses because of its location within the George Washington University Campus Plan boundaries, even though the property is not owned by the University. The Comprehensive Plan states that the areas identified as Institutional on will not necessarily remain static and that change and infill can be expected. Given that most such Institutional designations are the result of university campuses, such change and infill is expected to occur on each such campus consistent with campus plans (§ 223.22). Given that the site is not part of the University's holdings, such change must occur other than through the campus plan process, dictated by compatibility of the proposed use with the surrounding neighborhood.

The Comprehensive Plan states that if a change in use occurs, the new designations should be compatible in density or intensity to those in the vicinity, unless otherwise stated in the Area Elements or an approved Campus Plan (§ 226.1). The proposal is compatible with the existing or approved development in the surrounding vicinity.

### CONCLUSIONS OF LAW

The Commission's authority to amend the Zoning Map derives from the Zoning Act of 1938, effective June 20, 1938 (52 Stat. 797, D.C. Official Code § 6-641.01) ("Zoning Act"). Section 1 of the Zoning Act authorizes the Commission to regulate the uses of property in order to "promote the health, safety, morals, convenience, order, prosperity, or general welfare of the District of Columbia and its planning and orderly development as the national capital." D.C. Official Code § 6-641.01. Section 2 of the Zoning Act provides that the "zoning regulations shall be designed to lessen congestion on the street, to secure safety from fire, panic, and other dangers to promote health and the general welfare, to provide adequate light and air, to prevent the undue concentration and the overcrowding of land, and to promote such distribution of population and of the uses of

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land as would tend to create conditions favorable to health, safety, transportation, prosperity, protection of property, civic activity, and recreational, educational, and cultural opportunities, and as would tend to further economy and efficiency in the supply of public services. Such regulations shall be made with reasonable consideration, among other things, of the character of the respective districts and their suitability for the uses provided in the regulations, and with a view to encouraging stability for the uses provided in the regulations, and with a view to encouraging stability of districts and of land values therein.” D.C. Official Code § 6-641.02. Section 3 of the Zoning Act, among other things, authorizes the Commission to amend the zoning regulations and maps. D.C. Official Code § 6-641.03.

The Commission finds that the proposed C-3-C zoning of the Property is consistent with the surrounding uses, intensity of uses, and heights of surrounding properties and that approval of the Application will result in no adverse effect on neighboring properties.

The Commission acknowledges the issues and concerns raised by ANC 2A and WECA, and fully credits the unique vantage point that ANC 2A holds with respect to the impact of the requested map amendment on the ANC’s constituents. However, for the reasons stated below, the Commission does not find WECA’s position and the written recommendation of ANC 2A to be persuasive.

The Commission does not agree that its grant of the Application will result in construction on the Property that will overwhelm the existing improvements on the Property and neighboring properties. Instead, the Commission finds that: (1) the Applicant has worked extensively with the HPRB and HPO regarding its renovation plans for the Property even though the Property is not currently designated historic; (2) the Application is supported by the Bureau of Catholic Indian Missions and the University, which are the owners of all the properties in the immediate vicinity of the Property; (3) and that, with respect to impacts on light and air of adjacent properties, permitted building height in the existing R-5-D Zone District is the same as in the proposed C-3-C Zone District. The Commission acknowledges that the Application is supported by the owners of all the surrounding properties to the Property.

Nor does the Commission agree with ANC 2A and WECA regarding the potential impact that the approval of the Application may have upon the delicate balance of residential, institutional, and commercial uses in the Foggy Bottom neighborhood in the event other owners of residentially-zoned properties should pursue rezoning of their properties. Rather, the Commission concludes that approval of the map amendment will not have any impact on the balance of uses in the area, since there are now no residential uses in the building on the Property. Further, the Commission recognizes the exceptional circumstances involved in the Application and finds that its approval of the Application will have no precedential effect upon other properties. In the present Application, the Commission is presented with a property that is: (1) zoned for high-density, albeit

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residential, uses; (2) is too small to qualify for review as a planned unit development; (3) is immediately adjacent to existing and proposed construction measuring between 90 and 110 feet or more in height; (4) is located immediately adjacent to medium-density commercial, C-3-C, zoned properties, allowing for an extension of the existing zoning boundary line; (5) is designated for Institutional use by the Comprehensive Plan; (6) has a history of non-residential use of the existing improvements on the Property; (7) has virtually no residential use within its square or any tangent squares; and (8) has the support of the owners of all immediately abutting properties, the Office of Planning and the Department of Transportation.

Although the Applicant has proffered the sensitivity of its proposed design to the Commission, the issue is entirely irrelevant to this decision. Once this amendment becomes effective; the Applicant may build any structure consistent with the matter of right standards under the rezoning, subject to other constraints, such as historic preservation review, as may apply. The Commission approval makes no assumption as to whether the design favored by the Applicant will ever be built.

By virtue of the preceding discussion, the Commission has accorded the issues and concerns raised by ANC 2A the "great weight" to which they are entitled pursuant to D.C. Official Code § 1-309.10. The Commission fully credited the unique vantage point that ANC 2A holds with respect to the impact of the requested map amendments on the ANC's constituents. However, for the reasons stated above the Commission concludes that the ANC did not offer persuasive advice that would cause the Commission to deny the map amendment requested.

In amending the Zoning Map, the Commission is constrained by the limitation in the District Charter that the Zoning Map be "not inconsistent" with the Comprehensive Plan. §492(b)(1) of the District of Columbia Home Rule Act, effective December 24, 1973 (Pub.L.No. 93-198; 87 Stat. 774; D.C. Official Code §6-641.02).

The Commission concludes that approval of the requested map amendment from the R-5-D to the C-3-C Zone District is not inconsistent with the purposes of the Comprehensive Plan and is consistent with the other requirements of the Zoning Act. The Commission concludes that the requested map amendment is not inconsistent with the Comprehensive Plan, including the District's general policy in support of general strengthening of the established urban core through new infill development, and the more specific policy of avoiding sharp contrasts in height and bulk between the George Washington University campus and the surrounding community, and will promote orderly development in conformity with the District of Columbia Zone Plan as embodied in the Zoning Regulations and Map. The present request is not inconsistent with the designation of Square 101 for Institutional Uses on the Future Land Use Map.

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The map amendment is not spot-zoning because it is not inconsistent with the Comprehensive Plan. To constitute illegal spot-zoning, the Commission's action must (1) pertain to a single parcel or limited area; and (2) must be inconsistent with the Comprehensive Plan, or if there is none, with the character and zoning of the surrounding area, or the purposes of the zoning regulation, i.e., the public health, safety, and general welfare. *Daro Realty, Inc. v. D.C. Zoning Comm'n*, 581 A.2d 295, 299 (D.C. 1990). The proposed map amendment does not constitute spot-zoning under this test. The proposed C-3-C zoning is not inconsistent with the Comprehensive Plan, as set forth in this Order.

The Commission also concludes that the requested map amendment is in the best interests of the District of Columbia and will benefit the community in which the Property is located.

The Commission is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163, D.C. Official Code §6-623.04) to give great weight to OP recommendations. The Commission concurs with OP's recommendation for approval, and has given its recommendation the great weight to which it is entitled.

### **DECISION**

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia hereby **ORDERS APPROVAL** of the Application for an amendment of the Zoning Map to change the zoning of Lot 874 in Square 101 from R-5-D to C-3-C.

The Applicant is required to comply fully with the provisions of the D.C. Human Rights Act of 1977, D.C. Law 2038, as amended, D.C. Official Code § 2-1401.01 *et seq.* ("Act"). This Order is conditioned upon full compliance with those provisions. In accordance with the 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, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, or place of residence or business. Sexual harassment is a form of sex discrimination that is prohibited by the Act. In addition, harassment based on any of the above protected categories is 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 denial or, if issued, revocation of any building permits or certificates of occupancy issued pursuant to this Order.

On January 12, 2009, upon the motion of Commissioner May, as seconded by Commissioner Turnbull, the Zoning Commission **APPROVED** the Application by a vote

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of **3-0-2** (Peter G. May and Michael G. Turnbull to approve; Gregory N. Jeffries to approve by absentee ballot; Anthony J. Hood, not having participated, not voting; third Mayoral appointee position vacant, not voting).

On March 9, 2009, upon the motion of Commissioner May, as seconded by Chairman Hood, the Order was **ADOPTED** by the Zoning Commission at its public meeting by a vote of 3-0-2 (Peter G. May to adopt; Gregory N. Jeffries and Michael G. Turnbull to adopt by absentee ballot; Anthony J. Hood and William W. Keating, III, not having participated, not voting).

In accordance with the provisions of 11 DCMR § 3028, this Order shall become final and effective upon publication in the *D.C. Register* on \_\_\_\_\_.

DISTRICT OF COLUMBIA GOVERNMENT  
OFFICE OF THE SURVEYOR

Washington, D.C., December 24, 2007

Plat for Building Permit of: SQUARE 101 LOT 874

Scale: 1 inch = 20 feet      Recorded in Book A&T Page 3710-L

Receipt No.      01805

Furnished to:      HOLLAND & KNIGHT

I hereby certify that all existing Improvements shown hereon, are completely dimensioned, and are correctly platted; that all proposed buildings or construction, or parts thereof, including covered porches, are correctly dimensioned and platted and agree with plans accompanying the application; that the foundation plans as shown hereon is drawn, and dimensioned accurately to the same scale as the property lines shown on this plat; and that by reason of the proposed Improvements to be erected as shown hereon the size of any adjoining lot or premises is not decreased to an area less than is required by the Zoning Regulations for light and ventilation; and it is further certified and agreed that accessible parking area where required by the Zoning Regulations will be reserved in accordance with the Zoning Regulations, and that this area has been correctly drawn and dimensioned hereon. It is further agreed that the elevation of the accessible parking area with respect to the Highway Department approved curb and alley grade will not result in a rate of grade along centerline of driveway at any point on private property in excess of 20% for single-family dwellings or flats, or in excess of 12% at any point for other buildings. (The policy of the Highway Department permits a maximum driveway grade of 12% across the public parking and the private restricted property.)

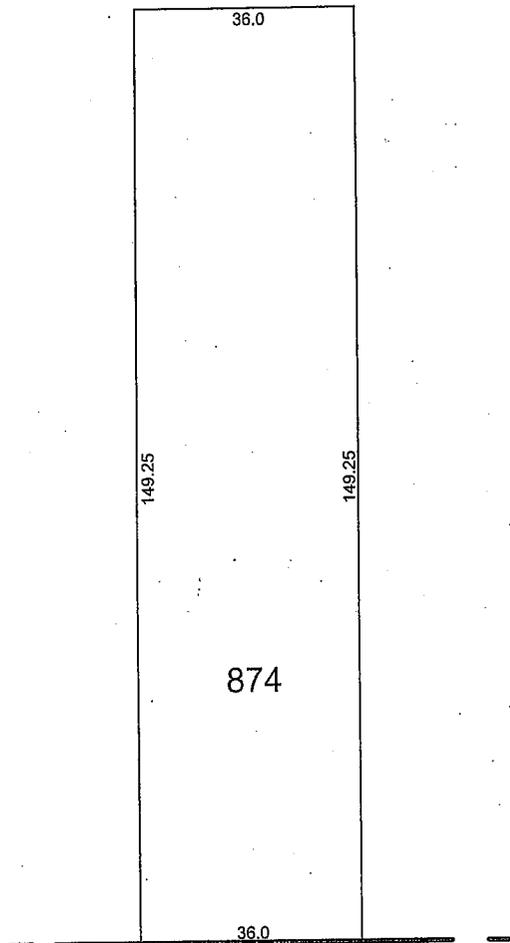
*Bob Meyer*  
For Surveyor, D.C.

Date: \_\_\_\_\_

By: L.M.A.

\_\_\_\_\_  
(Signature of owner or his authorized agent)

NOTE: Data shown for Assessment and Taxation Lots or Parcels are in accordance with the records of the Department of Finance and Revenue, Assessment Administration, and do not necessarily agree with deed description.



H STREET, N.W.

002805

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**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA  
ZONING COMMISSION ORDER NO. 08-30**

**Z.C. Case No. 08-30**

**West Half 1 LLC, West Half 2 LLC, and West Half 3 LLC  
(Capitol Gateway Overlay Review)**

**February 23, 2009**

Pursuant to notice, the Zoning Commission for the District of Columbia (the "Commission") held a public hearing on January 29, 2009, to consider an application for property owned by West Half 1 LLC, West Half 2 LLC, and West Half 3 LLC (collectively, the "Applicant") for review and approval of a new development pursuant to the Capitol Gateway (CG) Overlay District provisions ("CG Overlay District Review") set forth in §1610 of the D.C. Zoning Regulations (the "Zoning Regulations"), Title 11 of the District of Columbia Municipal Regulations ("DCMR"). The property that is the subject of this application consists of Lots 33, 802, 840, 841, 850, 857, 864, 865, 868, 871, and 872 in Square 700.

In addition to the special exception relief requested pursuant to § 1610, the Applicant also requested the following relief: special exception relief from §§ 639 and 411 regarding the rooftop structures; variance relief from the loading requirements of § 2201.1; variance relief from the step-back requirements of § 1607.2; variance relief from the ground floor retail requirements of § 1607.3; variance relief from the M Street setback requirements of §1604.3; and variance relief from the lot occupancy requirements of § 634.1.

The Commission considered the application pursuant to Chapter 30 of the Zoning Regulations. The public hearing was conducted in accordance with the provisions of 11 DCMR § 3022. For the reasons stated below, the Commission hereby approves the application.

**FINDINGS OF FACT**

**PROCEDURAL HISTORY**

1. On November 12, 2008, the Applicant submitted an application for Zoning Commission design review and special exception and variance relief for property located on Lots 33, 802, 840, 841, 850, 857, 864, 865, 868, 871, and 872 in Square 700 (the "Property"). The Property is comprised of approximately 87,989 square feet of land area and is located in the CG/CR Zone District. In addition to the CG Overlay District special exception review pursuant to § 1610 of the Zoning Regulations, the Applicant requested; special exception relief from §§ 639 and 411 regarding the rooftop structures, variance relief from the loading requirements of § 2201.1, variance relief from the step-back requirements of §1607.2, variance relief from the ground floor retail requirements of § 1607.3, variance relief from the M Street setback requirements of § 1604.3, and variance relief from the lot occupancy requirements of § 634.1.

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2. The purposes and objectives of the CG Overlay District, as enumerated in §1600.2, that are relevant to the proposed development include:
  - Assuring development of the area with a mixture of residential and commercial uses, and a suitable height, bulk, and design of buildings, as generally indicated in the Comprehensive Plan and recommended by planning studies of the area;
  - Encouraging a variety of support and visitor-related uses, such as retail, service, entertainment, cultural and hotel or inn uses;
  - Requiring suitable ground-level retail and service uses and adequate sidewalk width along M Street, SE, near the Navy Yard Metrorail station; and
  - Provide for the development of Half Street, SE as an active pedestrian oriented street with active ground floor uses and appropriate setbacks from the street façade to ensure adequate light and air, and a pedestrian scale.
3. After proper notice was provided, the Commission held a hearing on the application on January 29, 2009. Parties to the case included the Applicant and Advisory Neighborhood Commission (“ANC”) 6D, the ANC within which the Property is located.
4. Expert witnesses appearing on behalf of the Applicant included: Jon Eisen of Street Sense, William Hellmuth of HOK, Phil Esocoff of Esocoff & Associates, and Erwin Andres of Gorove/Slade Associates, Inc.
5. The Deputy Mayor for Planning and Economic Development (“DMPED”) submitted a letter in support of the project noting that the proposed design of the project, “appears to successfully accomplish the goals of the Capitol Gateway Overlay District in creating an active, pedestrian-oriented Half Street with vibrant ground floor uses.” (Exhibit 16.) The Capitol Riverfront Business Improvement District (“BID”) also submitted a letter in support of the project. The BID supported the vision and design aesthetic that the Applicant and its architects have pursued and noted that the project’s plans for a vibrant pedestrian environment with retailers planned on all sides of the project will be a welcome addition to the neighborhood and will act as an exciting gateway to Nationals Park while serving basic retail needs. (Exhibit 17.)
6. At the conclusion of the hearing, the Commission requested that the Applicant submit the following: (i) a roof section with all roof structures clearly dimensioned; and (ii) a copy of an updated rendering of the Half and M Street facades of the project that was presented at the January 29, 2009 public hearing. The Applicant submitted these materials to the Commission on February 9, 2009. (Exhibit 31.)
7. At the public meeting on February 23, 2009, the Commission took final action to approve the plans submitted into the record and the requests for area variance relief. When it took final action, the Commission expressed concern that the plans depicted a roof structure that could possibly violate An Act to Regulate the Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452, as amended; D.C. Official Code

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§§ 601.01 to 601.09) ("Height Act") depending on how the statute is interpreted. The Commission noted that it was up to the Zoning Administrator, not the Commission, to interpret the Height Act. While the Commission would be reluctant to approve plans that clearly violated the Height Act, no such clear cut infraction was present. Rather, the question of whether the roof structure is ineligible for a waiver is best left to the judgment of the Zoning Administrator. Nevertheless, the Zoning Administrator should not view the Commission's approval of this application as obviating the need for a careful review of these plans for compliance with the Height Act and the Zoning Regulations. The Commission further requested that the Office of Zoning write to the Zoning Administrator to highlight this issue, and request that he report his conclusion back to the Commission. The Commission wishes to stress that its approval of this application does not extend to any portion of the structure that is depicted on the plans as exceeding the maximum height permitted under the Zoning Regulations and therefore establishes no precedent in that regard.

#### **DESCRIPTION OF PROPERTY AND SURROUNDING AREA**

8. The Property is located east of South Capitol Street in Southeast Washington. It is bound by Van Street, S.E. to the west, Half Street, S.E. to the east, N Street, S.E. to the south, and M Street, S.E. to the north. It is located one block north of the Washington Nationals' Ballpark ("Ballpark") and west of Monument Realty's development in Square 701 (which was approved by the Zoning Commission in Z.C. Case Nos. 06-46 and 06-46A). An entrance to the Navy Yard Metrorail Station is located just to the east of the Property, across Half Street.

#### **PROJECT OVERVIEW**

9. The Applicant proposes to develop the Property with a mixed-use development that includes approximately 260-300 market-rate residential units, approximately 370,019 square feet of office space, and approximately 53,840 square feet of retail uses located predominantly on the ground floor (the "Project"). The Project will have a density of approximately 8.01 floor area ratio ("FAR") (3.2 residential, 4.2 office and 0.6 retail) and a maximum building height of 110 feet. Retail and restaurant uses are proposed for all of the ground floor space in the Project (other than lobbies for the residential and office components and service uses) with retail possible on the second or concourse (P1) levels of the Project in select locations. The Project will include 567-607 parking spaces and 157 bicycle parking spaces. The parking spaces for the residential units will be provided at a ratio of .75 spaces per residential unit. The Project will provide approximately 304 parking spaces for the office use and approximately 90 parking spaces for the retail uses. The Applicant requested the flexibility to replace up to 40 parking spaces on the first parking level with retail uses. The Project will include six shared loading docks. Access to the loading docks and the parking garages will occur solely from Van Street. (Exhibit 11, pp. 4-5; Exhibit 13, p. Z2.)

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10. The Project will introduce an east-west 30-foot-wide pedestrian oriented street or via (“Via”) that bisects the Property into two appropriately sized development parcels. The Via allows for a natural break in the development pattern of the Property and aligns with the private street (Monument Place) on the east side of Half Street to create a central retail and pedestrian node on Half Street (the location of Monument Place was approved in Z.C. Order Nos. 06-46 and 06-46A). The Via has been designed to be a dedicated pedestrian street that will provide retail opportunities for local tenants and shop owners. (Exhibit 11, pp. 4, 6.)
11. The residential component of the Project will be located at the southern end of the Property, closest to the Ballpark on the corner of Half Street and N Street. The office component will be located along M Street and will also include a portion of the structure that is located south of the Via. The office components will be connected across the Via by two enclosed corridors at the third and sixth levels and outdoor terraces on the fourth and seventh levels. (Exhibit 11, pp. 4-5, Exhibit 21.)
12. The ground floor retail spaces will have ceiling heights ranging from 14 feet to 18 feet (clear height to structure of up to 20 feet), making them marketable to a wide range of urban retailers. Mr. Eisen, the architect for the retail portion of the Project, testified that individual retailers will be encouraged to make their own mark on the streetscape with inboard and outboard tables, chairs, benches, and planters that both reflect and complement their storefronts. The Applicant requested that the Commission grant flexibility to, “vary the exterior design and materials of the ground floor retail space based on the preferences of the individual retailer.” The Applicant proposed that Half Street will become the next great retail, dining and entertainment district in Washington, D.C., with the flexibility to function as a plaza on game days while still accommodating vehicular traffic for the majority of the time. Half Street will become an animated “Main Street” that will include restaurants (which could be entertainment driven, themed, casual, fine dining, quick bite), specialty stores, sports related stores or neighborhood service stores. The retail character of the Via will be marked by high ceilings, elegant and animated store fronts, and smaller store footprints. The Applicant anticipates open-air produce, flower, or beverage markets to be an integral component of the experience along the Via. (Exhibit 11, pp. 5-6; Exhibit 13, Exhibit 21.)
13. The residential component of the Project is configured in two wings flanking an interior courtyard garden at the second floor. The courtyard opens to the south to catch natural light and the windows in the courtyard are angled and recessed to allow good views as well as privacy for residents. A second floor lounge and club room will be provided adjacent to the garden terrace. The residential units are shaped to capture and frame sweeping views of the Ballpark and other urban and monumental views. Large and dramatic units at the south end of the building have uninterrupted views into the playing field and are provided with large expanses of glass to accentuate these views. The roof

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features a lap pool, several well-defined outdoor gathering spaces and three private terraces directly accessed from residential units below. The proposed building materials include glazed ceramics, metal screens, brick, spandrel glass and stone. Mr. Esocoff, the architect for the residential portion of the Project, testified that the use of dramatic forms and striking materials is intended to create an iconic image and create a true architectural landmark at the Property. (Exhibit 11, pp. 7-9; Exhibit 13, Exhibit 21.)

14. The design intent of the office component is three-fold:

- To create a beacon or visual marker at the neighborhood level for the entire Half Street retail and entertainment zone;
- To create an exciting visual and three-dimensional response to the M Street Metro Station entrance, Monument Realty's project across Half Street, and the Ballpark; and
- To create and contribute to a sense of richness and urbanity at the pedestrian level.

In the written statement, and through the testimony of Mr. Hellmuth (the architect for the office component of the Project), the Applicant noted that the expression of the office exterior skin is seen as a background with a series of "events". The background is an elegant, modern version of the classic industrial brick warehouse. Tall glass windows punctuate a horizontally expressed brick, with either masonry or metal spandrel panels. The brick color is either a terra-cotta or soft red depending on location. The "events" consist of several large scale geometric shifts in the massing. The largest of these is the angled aged patina green metal clad box that seems to skewer the larger office piece – it forms the middle of the façade on M Street to mark the office entry and then pokes through on Half Street, greeting Metro riders on their way to the Ballpark. It terminates at the Via, cantilevering out over the sidewalk, with a multi-story framed view toward the Ballpark. This patina green metal box is topped by a covered roof terrace which extends the form above the roof. The southern office component has a similar, smaller patina green metal piece. The corner of M and Half Streets is identified by a sleek glass and metal wall, with a stainless steel lighted mesh screen element reaching above the building roof, marking the entry to the Half Street retail and entertainment neighborhood. Van Street is treated in a quieter manner, as bay projections are used to punctuate and add articulation and relief to the façade and offer views up and down Van Street. (Exhibit 11, pp. 9-10; Exhibit 13, Exhibit 21.)

15. The Applicant noted that it intends to pursue legislation with the District of Columbia City Council to create special electronic signage legislation to help make this Project, and Half Street in particular, a completely unique destination in the District of Columbia. The Applicant provided plans with examples of the signage the Applicant envisions for this Project and possible locations for such signage, while acknowledging to the Commission that such signage is not presently permitted in the District of Columbia. The

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electronic signage will provide advertising and live broadcast opportunities throughout Half Street and the Via, adding to the liveliness of the pedestrian experience. (Exhibit 11, pp. 9-10; Exhibit 13, Exhibit 21.)

### **REQUESTED AREAS OF RELIEF**

#### **Special Exception Relief - Satisfaction of CH Overlay**

16. The Applicant is required to prove that the Project is consistent with the requirements of § 1610, § 1604 (since the Property has frontage along M Street), and § 1607 (since the Property has frontage along Half Street, south of M Street). The following paragraphs address the Applicant's satisfaction of these special exception standards.
17. Pursuant to § 1610.3(a), the Applicant is required to prove that the Project will achieve the objectives of the CG Overlay District as set forth in § 1600.2. The Applicant, in its written statement and testimony at the public hearing, noted that the Project will achieve the objectives of the CG Overlay District as it is a mixed-use development that will include a significant residential component, commercial office space, and a variety of preferred retail uses. The height and density of the building are within the parameters for the CG/CR Zone District and are consistent with its high-density residential and high-density commercial designation under the Comprehensive Plan. The Project is designed to highlight Half Street as an active, pedestrian-oriented street with a mix of retail uses that will support and sustain the revitalization of Half Street. The retail will serve both the residents of the community as well as attract individuals who are discovering the neighborhood for the first time while attending a game at the Ballpark. The Applicant proposes brick sidewalks along Half Street and Belgian Block pavers for the street. The retail uses at the ground plane will include projections of up to four feet into the public space to add variety and texture to the retail uses. (Exhibit 11, p.12; Exhibit 13.)
18. In accordance with § 1610.3(b), the proposed building will help achieve the desired mix of uses in the CG Overlay District as set forth §§ 1600.2(a) and (b). The Project will incorporate residential, retail, and service uses. The 260-300 residential units will include a mix of unit types that will attract a diverse resident base, while the retail base will be designed to accommodate entertainment and retail uses. (Exhibit 11, p.13.)
19. Pursuant to § 1610.3(c), the proposed building must be in context with the surrounding neighborhood and street patterns. The Applicant noted that the Project is consistent with the higher density development encouraged around the Navy Yard Metro Station. The Property is surrounded by existing and proposed office, hotel and residential buildings, making the Project's mixed use program complementary to adjacent land uses. The Applicant's representative testified that the proposed development will encourage pedestrian activity along Half Street through the inclusion of ground floor retail, a curbside streetscape environment, and by prohibiting curb cuts along all surrounding streets except Van Street. In testimony at the public hearing, Mr. Hellmuth, noted that

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the design of the Project is intended to be different, yet entirely complementary to the surrounding neighborhood. The contemporary design of the office component of the Project, with the numerous projections and recesses along the building's façade, is contrasted with the relatively flat façade of the buildings on the east side of Half Street. This contrast will add interest and liveliness to the streetscape experience along Half Street as pedestrians enter and exit the Ballpark. The proposed building design respects the existing street grid and is in context with the surrounding neighborhood and street patterns. (Exhibit 11, p.13, Exhibit 21.)

20. Satisfaction of § 1610.3(d) requires that the proposed building minimize conflict between vehicles and pedestrians. The Applicant and its representatives stated that the proposed design promotes a safe and efficient pedestrian experience, especially along Half Street and M Street which are two primary pedestrian corridors within the CG Overlay. Per the CG Overlay regulations, no new curb cuts will be established along Half or M Streets. The proposed building will eliminate seven existing curb cuts along Half and M Streets. Access to parking and loading for the entire development will be from Van Street. Eliminating curb cuts along the main pedestrian corridors will reduce the possibility of vehicular and pedestrian conflicts. (Exhibit 11, p.14.)
21. In accordance with § 1610.3(e), the proposed building needs to minimize unarticulated blank walls adjacent to public spaces through façade articulation. In their testimony at the public hearing, all three of the Project's architects noted that all of the building facades are highly articulated and defined on each elevation, thus minimizing unarticulated blank walls adjacent to public spaces. The façade articulation is accomplished through use of bays, building materials, and display windows along the ground floor. The projections proposed in this Project truly maximize what is special about this area, the Ballpark. The proposed projections of the office component provide direct views into the stadium for multiple office tenants. (Exhibit 11, p.14; Exhibit 13, Exhibit 21.)
22. Section 1610.3(f) requires that the proposed building will minimize impact on the environment, as demonstrated through the provision of an evaluation of the proposal against LEED certification standards. The Project has been designed to qualify for at least LEED Silver certification for both the residential and office building components of the Project. The Applicant submitted preliminary LEED checklists for both the office and residential components of the Project. (Exhibit 11, Exhibit D; Exhibit 22.)
23. In accordance with § 1610.5(a), the building or structure shall provide for safe and active streetscapes through building articulation, landscaping, and the provision of active ground level uses including retail, entertainment, cultural, and pedestrian concourse space. The proposed building design encourages pedestrian activity along its Half Street, Via and M Street façades and provides safe and active streetscapes. The Project architects testified that this is achieved through building articulation; thoughtfully

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- landscaped spaces; the provision of ground floor retail; variable height retail expressions along Half Street, the Via, M Street and N Streets; and variable depth retail bay projections. In keeping with the pedestrian activity along those facades, the Applicant provides access to its garage and its loading area from Van Street in order to minimize vehicular and pedestrian conflicts. (Exhibit 11, p.15; Exhibit 13, Exhibit 21.)
24. Pursuant to § 1610.5(b), the building or structure shall provide for safe and convenient movement to and through the site, including to public transit, the Ballpark, and to the Anacostia Riverfront. The primary pedestrian pathway will be along Half Street which is an important link between the Navy Yard Metrorail Station and the Ballpark. The ground floor retail provided along Half Street will make for an interactive and exciting pedestrian experience. Additionally, the landscaping, lighting, the transparent display glass of the ground floor retail, and overall increased activity will enhance pedestrian safety. (Exhibit 11, pp.15-16; Exhibit 13, Exhibit 21.)
25. Section 1610.5(c) requires that the application include a view analysis that assesses openness of views and vistas around, including views toward the Capitol Dome, other federal monumental buildings, the Ballpark, and the waterfront. The Applicant provided numerous view analyses which showed that the Project will not detract from area views, but will enhance them. Importantly, the Project does not block the view of the Capitol, other federal monumental buildings, the waterfront, or the Ballpark. Rather, the superior design of the Project will provide a favorable view for tenants and residents of neighboring buildings, and visitors to the Ballpark. (Exhibit 11, p.16; Exhibit 13, Exhibit 21.)
26. The Applicant is required to show that the Project complies with the design review standards for new developments that have frontage along M Street, pursuant to § 1604. One of those requirements is that no driveway may be constructed or used from M Street to required parking spaces or loading berths in or adjacent to a new building (§ 1604.2). The Project satisfies this requirement as it does not include any curb cuts along M Street. All of the parking and loading for the project will be accessed from Van Street. (Exhibit 11, p.16; Exhibit 13.)
27. In accordance with § 1604.3, the streetwall of each new building shall be set back for its entire height and frontage along M Street not less than 15 feet measured from the face of the adjacent curb along M Street, S.E. The streetwall of the office building is set back 15 feet for the entirety of the first floor. The Applicant requested variance relief to allow the portion of the façade that continues up from the M Street office lobby entrance, to extend into the 15-foot setback above the second floor. The proposed design punctuates the streetscape along M Street and varies the uniformity of the streetwall with calculated articulation. The proposed lighted metal mesh embellishment at the corner of M and Half Streets also extends into this required setback area, above the second floor. The Applicant and Mr. Hellmuth, in the written statement and testimony at the public hearing,

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stated that this element is important as it claims this important corner, creating an identity and excitement that is critical to making Half Street a memorable place and a success. (Exhibit 11, pp. 9, 16; Exhibit 13.)

28. Section 1604.4 requires that each new building shall devote not less than 35% of the gross floor area of the ground floor to retail, service, entertainment, or arts uses (“preferred uses”)...such preferred uses shall occupy 100% of the building’s street frontage along M Street, except for space devoted to building entrances or required to be devoted to fire control. Sixty-nine percent of the gross floor area of the ground floor is dedicated to preferred uses. The preferred uses occupy 100% of the building’s street frontage along M Street with the exception of the space devoted to the office building lobby. (Exhibit 11, p.17, Exhibit 13.)
29. Section 1604.5 allows the Commission, for good cause shown, to authorize interim occupancy of the preferred use space required by § 1604.4 by non-preferred uses for up to a five-year period; provided, that the ground floor space is suitably designed for future occupancy by the preferred uses. This section is not applicable, as the Applicant is not seeking relief to place a non-preferred use in the space dedicated to preferred uses. (Exhibit 11, p.17.)
30. In accordance with § 1604.6, not less than 50% of the surface area of the streetwall of any new building along M Street shall be devoted to display windows having clear or low-emissivity glass except for decorative accent, and to entrances to commercial uses of the building. At least 50% of the streetwall along M Street will be devoted to display windows having clear or low emissivity glass. (Exhibit 11, p. 17.)
31. Pursuant to § 1604.7, the minimum floor to ceiling clear height for portions of the ground floor level devoted to preferred uses shall be 14 feet. Throughout the Project, the ceiling height of the ground floor space dedicated to preferred uses varies between 14 feet and 18 feet, but in no instance is it below 14 feet. (Exhibit 11, p. 17; Exhibit 13.)
32. Section 1604.5 allows a building that qualifies as a Capitol South Receiving Zone site under § 1709.18 and for which a building permit has been applied for prior to August 31, 2001, shall not be subject to the requirements of this section. This section is not applicable to the Project. (Exhibit 11, pp. 17-18.)
33. Pursuant to § 1604.9, where a preferred use retail space is required under this section and provided, the requirement of 11 DCMR § 633 to provide public space at ground level shall not apply. The Applicant is providing the requisite amount of preferred use retail space; thus, the public space requirement does not otherwise apply to this project. (Exhibit 11, p. 18.)

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34. The Applicant is required to show that the Project complies with the design review standards for new developments that have frontage along Half Street, south of M Street, pursuant to § 1607. In accordance with § 1607.2, any portion of a building or structure that exceeds 65 feet in height shall provide a minimum step-back at 20 feet in depth from the building line along Half Street S.E. Pursuant to § 3104, the Zoning Commission may grant relief from this requirement, to a maximum of 15 feet in height and eight feet in depth, for the provision of reasonable development footprints. The Applicant sought variance relief from this section. (Exhibit 11, p. 18.)
35. Pursuant to § 1607.3, each new building shall devote not less than 75% of the gross floor area of the ground floor to retail, service, entertainment, or arts uses (“preferred uses”). The Applicant requested variance relief from this section as it is dedicating 69% of the gross floor area of the ground floor to preferred uses, excluding the loading and service space dedicated to retail uses. The remainder of the floor is dedicated to office and residential lobby space, making it impractical to provide additional retail space. (Exhibit 11, p. 19, Exhibit 13.)
36. In accordance with § 1607.4, preferred uses shall occupy 100% of the building’s street frontage along Half Street, S.E., except for space devoted to building entrances or required to be devoted to fire control. The Applicant and the architect of the retail portion of the Project noted that preferred uses occupy 100% of the buildings street frontage along Half Street with the exception of the space dedicated to the office and residential lobbies as well as the fire control rooms. (Exhibit 11, p. 19, Exhibit 13.)
37. Pursuant to § 1607.5, the minimum floor-to-ceiling clear height for portions of the ground floor level devoted to preferred uses shall be 14 feet. Throughout the Project, the ceiling height of the ground floor space dedicated to preferred uses varies between 14 feet and 18 feet, but in no instance is it below 14 feet. (Exhibit 11, p. 19; Exhibit 13.)
38. Section 1607.6 allows the Commission, for good cause shown, to authorize interim occupancy of the preferred use space required by § 1607.2 by non-preferred uses for up to a five-year period; provided, that the ground floor space is suitably designed for future occupancy by the preferred uses. This section is not applicable, as the Applicant is not seeking relief to place a non-preferred use in the space dedicated to preferred uses. (Exhibit 11, p.19.)
39. In accordance with § 1607.7, no private driveway may be constructed or used from Half Street S.E. to any parking or loading berth areas in or adjacent to a building or structure constructed after February 16, 2007. The Applicant is proposing only one curb cut along Half Street and that is to create the Via. The Via is a pedestrian walkway and will not be used to access parking or loading; thus, it is consistent with this section. (Exhibit 11, pp.19-20; Exhibit 13, Exhibit 21.)

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40. Pursuant to § 1607.8, where preferred use retail space is required under this section and provided, the provisions of DCMR 11 § 633 shall not apply. The Applicant notes that it is maximizing the amount of preferred use retail space it can provide; thus, the public space requirement does not otherwise apply to this project. (Exhibit 11, p. 20.)
41. The Applicant is also required to show that the proposed development will not affect adversely the use of neighboring property. The property to the east of the proposed building has been approved for a mixed-use development of a similar density and height. It will include residential, retail, office, and hotel uses. The property to the north of the site is an office building with ground floor retail. The Applicant's architects testified that the Project is in keeping with the scale of density and height of the surrounding buildings and fits appropriately into that context. The building has been designed to respect and in the case of the Ballpark, serve, the surrounding buildings. The Project will not affect adversely these neighboring properties, but will work in concert with them to create a more dynamic community surrounding the Ballpark. The property to the west of the proposed building is zoned for a mixed-use development of increased height and density. The proposed Via will provide and promote pedestrian access from the adjacent property to Half Street. The Van Street façade will include retail storefronts and articulated façades that will enhance the views and experience from the neighboring property. (Exhibit 11, p. 20; Exhibit 13, Exhibit 21.)

#### Special Exception Relief – Roof Structures

42. The Applicant is seeking special exception relief pursuant to §§ 3104 and 639 from 11 DCMR §§ 411.3, and 411.5 for multiple roof top structures on the roof of the proposed building, some of which are of varying heights<sup>1</sup>. Section 411.3 requires that, "all penthouses and mechanical equipment shall be placed in one (1) enclosure, and shall harmonize with the main structure in architectural character, material and color." Section 411.5 requires penthouse walls from roof level to be of equal height, and to rise vertically to a roof. Section 411.11 of the Zoning Regulations provides, however, that "[w]here impracticable because of operating difficulties, size of building lot, or other conditions relating to the building or surrounding area that would tend to make full compliance unduly restrictive, prohibitively costly, or unreasonable, the Board of Zoning Adjustment shall be empowered to approve, as a special exception under § 3104, the ... location, design, number, and all other aspects of such structure; . . . provided, that the intent and purpose of this chapter and this title shall not be materially impaired by the structure, and the light and air of adjacent buildings shall not be affected adversely." (Exhibit 11, pp. 21-22.)

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<sup>1</sup> The Applicant submitted revised roof plans in a post-hearing submission that removed the need for roof structure set-back relief.

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43. The Project will provide five rooftop structures: two for stair enclosures and three for elevator overruns. The rooftop enclosures provided for the elevator overruns are permitted pursuant to § 411.4 of the Zoning Regulations; however, the stair enclosures are in excess of those permitted by the Zoning Regulations. The stair enclosures, however, are required by the Building Code. As noted in the written statement and in the testimony of Mr. Esocoff, the stairways are located on each arm of the residential building to provide a means of egress in the event of an emergency. Further, the stairways are required under the Code to provide access for the individuals using the rooftop amenities. The stairways and the elevator overruns cannot be located in a single enclosure because the Building Code requirements necessitate that the stairways be located in specific locations, which do not coincide with the location of the elevator core. To create a single penthouse for both the elevators and stairways would result in unnecessarily large penthouses and would greatly reduce the amenity space on the roof. It would also reduce the quality of the amenity space provided because it would provide an imposing view for the residents using the rooftop space, as well as the second floor courtyard. (Exhibit 11, p. 23.)
44. Mr. Esocoff testified that the penthouses will vary in height because they serve different purposes. The penthouses for the elevator overruns will be 18 feet, 6 inches in height, while those housing mechanical equipment or stairways will be 12 feet, 6 inches tall. Mr. Esocoff noted that the design goal was to diminish the impact of the penthouses by decreasing their height where possible. (Exhibit 11, pp. 23-24, Exhibit 13, Exhibit 21, Exhibit 31).
45. The project architects testified that the additional penthouses and their varying height will not adversely affect the use of neighboring property. To the contrary, the Applicant is reducing the possibility of adversely affecting neighboring property owners by providing separate penthouse structures and a structure of varying heights rather than creating a single, overly large structure. The Applicant also noted that the properties immediately adjacent to the building are predominantly commercial uses of a similar density and height, thus minimizing the possibility of affecting residential units with the proposed rooftop structures. (Exhibit 11, p. 24.)

#### Variance Relief

46. In order to satisfy the standards for area variance relief, the Applicant must satisfy a three-part test: (1) the property must be subject to an extraordinary or exceptional situation or condition; (2) a practical difficulty will result if the applicant is required to satisfy the strict application of the Zoning Regulations; and (3) no harm to the public or to the zone plan will occur as a result of the approval of the variance application.
47. The Applicant noted that there are a number of unique conditions affecting the Property. The Property is extraordinarily large in size at almost 90,000 square feet and is also very

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deep (or wide), with an east/west dimension of approximately 150 feet. The project site is located at a very prominent location in the CG Overlay (the intersection of Half and M Streets), which requires a mixture of uses and dictates design features with which the Applicant must comply simply as a result of its presence on both M Street and Half Street (such as a prohibition on curb cuts on two sides of the project, elevated ground floor ceiling heights, and the requirement to provide a “pedestrian scale” building on relatively narrow streets). The Applicant is also proposing to include three different types of land uses on the Property, which is encouraged by the CG Overlay regulations but raises construction feasibility considerations. Finally, the Property is located directly north of the Ballpark which requires a building design that is cognizant of the building’s context and respectful of the District of Columbia’s objectives for development in and around the Ballpark. (Exhibit 11, pp. 25-26.)

#### Variance Relief – Loading

48. The Zoning Regulations require the Project to provide a total of six loading berths and three service and delivery spaces. The office use generates a need for three loading berths at 30 feet deep, the retail component generates a need for two loading berths – one at 30 feet deep and the other at 55 feet deep, and the residential component generates a requirement for one loading berth at 55 feet deep. The Applicant is proposing a total of six berths at 30 feet and one service and delivery space at 20 feet. Though the Applicant is providing a sufficient number of berths, it is not providing any berths at 55 feet deep and it is only providing one service and delivery space instead of the requisite three. (Exhibit 11, p. 27.)
49. In its written statement and as testified to by its expert witnesses, the Applicant stated that it was unnecessarily burdensome for the Applicant to satisfy the strict application of the Zoning Regulations’ loading requirements for the Project. The Applicant noted that this is a unique project where there are three distinct uses, each of which generates a loading requirement. The residential, retail, and office components each require a separate service and delivery space under the Zoning Regulations for a total of three spaces. Each of the loading berths the Applicant will provide will be 30 feet deep even though this project generates a need for two berths at 55 feet deep. Providing a 55-foot deep berth, however, is impractical since all loading is required to be accessed from Van Street, which is only 50 feet wide. It would be extremely difficult, if not impossible, for a truck that would require a 55-foot loading berth to access a loading berth from the narrow Van Street. (Exhibit 11, p. 28, Exhibit 13, Exhibit 21.)
50. The Applicant’s traffic engineering expert prepared a traffic impact assessment that addressed the sufficiency of the loading spaces provided in the project. The traffic engineering expert opined that the loading facilities proposed can accommodate the projected amount of truck activity and that the amount of truck activity is not significant enough to negatively impact through traffic on Van Street. The reduction in service and

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delivery spaces and the depth of the loading berths will not burden the neighboring road network. The Applicant and its traffic engineering concluded that there will be no adverse impact on neighboring properties from a back-up of trucks or from trucks loading from the streets. Similarly, there will be no adverse impact from not providing two berths at 55 feet deep. Given the limitations of Van Street with regard to accessing loading, vendors will be forced to use smaller trucks. Because vendors will use smaller trucks, berths with a 55-foot depth will not be necessary. (Exhibit 11, pp. 27-28, Exhibit 11 - Exhibit A.)

#### Variance Relief – Ground Floor Retail

51. Section 1607.3 requires that each new building devote at least 75% of the gross floor area of the ground floor to retail service, entertainment or art uses. The Applicant provided testimony at the public hearing and presented arguments in its written statement that it is unnecessarily burdensome to satisfy the strict application of the Zoning Regulations' ground floor retail requirements on the Project. The Applicant is dedicating approximately 69% of the ground floor to preferred uses. The Applicant stated that it is precluded from achieving the full 75%, because a portion of the ground floor must also serve as lobbies for the office use and a separate lobby for the residential use. To require the full 75% would necessitate elimination of either the office lobby or the residential lobby, which would detract from the appeal of the building. The Applicant also noted that the severity of the variance requested (6%) is minimal and does not adversely impact the planning goals for the area, as the Project still provides a great variety of retail uses that animate Half Street, and the introduction of the Via provides for an additional 300 linear feet of retail storefront within the project. (Exhibit 11, pp. 28-29, Exhibit 13.)
52. The Applicant's request for relief from the ground floor retail requirements will not be substantially detrimental to the public good or impair the intent, purpose, and integrity of the Zone Plan. The Applicant is providing as much retail on the ground floor as possible. Sixty-nine percent, or approximately 53,800 square feet of retail uses will be provided. This affords plenty of flexibility in securing tenants for the building and provides a significant amount of ground floor retail and restaurant space. In testimony at the public hearing, the Applicant and its architects noted that the community will still have the benefit of retail uses lining Half, M, Van, and N Streets, as well as the new Via (which provides an additional 300 linear feet of retail storefront), which is consistent with the CG Overlay. (Exhibit 11, pp. 31-32, Exhibit 13.)

#### Variance Relief – Step-Backs on Half Street

53. Section 1607.2 requires a building to step-back a minimum of 20 feet along Half Street above a height of 65 feet. The Applicant's architects noted that the purpose of this step-back requirement is to encourage buildings with articulated facades rather than a uniform streetwall and to help ensure a pedestrian scale environment. The Applicant presented

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significant testimony, in writing and at the public hearing, that it would be unnecessarily burdensome to satisfy the strict application of the step-back requirements along Half Street. Both Mr. Hellmuth and Mr. Esocoff noted that the Project creates an articulated façade that respects the intent of this section, as the façade is set back at varying heights and steps out at varying heights. The result is a building with a highly articulated façade that creates an interesting aesthetic for Half Street. The Project's design includes projections and recessions throughout the building wall, starting at ground level to enhance the pedestrian experience and to create interesting focal points along Half Street. These focal points accentuate the retail plane and have the effect of visually shortening the block. The Applicant also presented substantial evidence that is not garnering additional square footage with its design compared to a project that would satisfy the strict application of § 1706.2. The Applicant also noted that the severity of the variance relief that is requested is not significant. (Exhibit 11, pp. 29-30; Exhibit 13, Exhibit 21.)

54. The relief the Applicant is seeking from the step-back requirements along Half Street will not be detrimental to the public good. The information included in the Applicant's written statement and plans confirms that the proposed design does not secure a windfall of additional density for the Applicant. The projections will not diminish views of surrounding landmarks and will not have a negative affect on the light and air for neighboring uses. View analyses submitted to the Commission also confirm that the building will not affect views of federal buildings or public spaces. Instead, the building will create a more exciting and interactive experience for pedestrians along Half and M Streets. The proposed design engages pedestrians and emphasizes the retail experience. The instant proposal allows for an elegant building design that doesn't sacrifice the views for neighboring properties. (Exhibit 11, p. 32; Exhibit 13, Exhibit 21.)

#### Variance Relief – Setback Along M Street

55. Section 1604.3 requires the streetwall of each new building shall be set back for its entire height and frontage along M Street not less than 15 feet measured from the face of the adjacent curb along M Street. The Applicant is proposing a 15-foot setback for the first floor of the building along M Street, but it is proposing projections into the required set back above the ground floor for the portion of the façade above the office lobby entrance and for the architectural embellishment at the corner of M and Half Streets. Mr. Hellmuth testified that the building is intended to act as a marker and a placemaker, announcing to pedestrians that it is the entrance to Half Street, the retail and entertainment destination in the neighborhood. Mr. Hellmuth also noted that requiring a uniform 15-foot setback for the entire height of the building along M Street would be burdensome in that it would undermine the Applicant's efforts to create an iconic building providing a sense of place in a developing neighborhood of the District. Similar to its proposal for Half Street, the projection the Applicant is proposing for M Street will create a dynamic façade that will help activate the streetscape. (Exhibit 11, pp. 30-31, Exhibit 13, Exhibit 21.)

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56. The requested relief from the set back requirements along M Street will not have an adverse impact on the streetscape. The required set back is provided at the ground floor to allow for wide sidewalks to promote the pedestrian experience. Pedestrians will be able to patronize the retail spaces with ease but will also be able to experience the punctuations the proposed projection creates along the streetscape. In response to a question from the Commission, a representative of the Office of Planning (“OP”) noted that the purpose of this section of the CG overlay regulations was to provide an appropriate amount of ground floor space for pedestrian movement along M Street. The projection occurs above twenty feet and helps create the dynamic streetscape that the CG Overlay regulations intended to create. (Exhibit 11, pp. 32-33, Exhibit 13, Exhibit 21.)

Variance Relief – Lot Occupancy

57. Section 634.1 limits the lot occupancy of the residential portion of the building to 75%. The Applicant, through its written statement and testimony at the public hearing, argued that the strict application of the lot occupancy requirements will result in a practical difficulty for the Applicant in that it will unnecessarily restrict the development envelope for the office building and it will detrimentally affect the design of the residential building. Because this building is considered one building for zoning purposes, the 75% lot occupancy restriction applies to the entire building (starting at the second floor -- the horizontal plane where residential uses begin). However, the Applicant also noted that if the building were considered two separate buildings – one residential and one commercial – the office portion would be permitted a 100% lot occupancy and the residential portion would be limited to a 75% lot occupancy. The Applicant noted that providing a uniform 75% lot occupancy across the Project would reduce the square footage of the office portion by nearly 93,000 square feet. Whereas a lesser lot occupancy is required for residential use to protect the light and air of the building’s residents, the same concerns do not apply to the office portion. The office portion would be required to reduce its footprint simply by virtue of its connection to the residential portion. Thus, the significant reduction in the size of the office building would serve absolutely no purpose. (Exhibit 13, Exhibit 21.)
58. Mr. Esocoff, in testimony at the public hearing, noted that the residential portion of the building has a lot occupancy of 79.8%, which exceeds the permitted 75% lot occupancy. The excess lot occupancy is created in part by the larger balconies the Applicant is proposing. Eliminating the balconies, however, would reduce the attractiveness and functionality of the residential units. Mr. Esocoff noted that the residential building is designed around a courtyard that is meant to serve the residents and to provide an oasis amid the hustle of Half Street and the nearby ballpark. The balconies maximize the effect of the courtyard and are a means to provide residents a private, outdoor recreation space with plenty of access to light and air. The Applicant testified that eliminating the

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balconies will undermine the effectiveness of the courtyard as well as reduce the attractiveness of the building as a place to live. (Exhibit 13.)

59. The flexibility the Applicant is seeking is for the lot occupancy variance, with regard to the residential portion of the building is within five percent of the matter-of-right standards. The Applicant argued that the requested relief is minimal given the size of the structure. The Applicant testified that the Project satisfies the zoning requirements for courtyard size, thus the courtyard provides adequate light and air to the interior building units. In addition to the courtyard, the building takes advantage of its extensive street frontage on N, Half, and Van Streets – all of which contribute to the light and air available to the exterior residential units. The Applicant argued that in light of these conditions, it is clear the residential units are not adversely affected by the increased lot occupancy. (Exhibit 13, Exhibit 21.)

### **GOVERNMENT REPORTS**

60. In its January 16, 2009, report, OP noted that it generally supported the application and felt that it would provide an attractive gateway to the baseball stadium, provide for pedestrian movement to and from the Navy Yard Metro station and help achieve an active, mixed use neighborhood, all in keeping with the objectives of the CG Overlay. However, OP noted that more information was required from the Applicant about the architecture and building operations in order for OP to complete its evaluation of the project. (Exhibit 14.)
61. In testimony at the January 29, 2009 public hearing, representatives of OP testified that OP had concluded that the materials included in the Applicant's January 15, 2009 submission had addressed all of the concerns raised in the initial OP report and that OP fully supported the applications for special exception and variance relief.
62. At the request of the Commission, OP filed a supplemental report on February 13, 2009, that addressed the issues that were unresolved at the time of the hearing. OP's supplemental report concluded that all the issues were resolved.
63. The District Department of Transportation ("DDOT") submitted a report into the record of this case on January 22, 2009. DDOT supported the Applicant's request for variance and special exception relief if the Applicant agreed to provide the following steps for increased multi-modal transportation uses:
- reduction in vehicle parking spaces by 100 parking spaces;
  - a total of 6 carsharing spaces in the underground parking facility;
  - provision of SmartTrip memberships and SmartBike memberships; and
  - a delivery management coordinator for the entire premises.

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DDOT requested that the Commission put a special focus on deliveries to the Project and stressed that the Applicant must develop and enforce a tenant truck delivery management program to ensure that deliveries occur during off peak hours, to minimize disruption to the surrounding roadways. DDOT requested that the Commission require that the Applicant prepare an annual report on actual vehicular traffic generation, truck deliveries and transit and bicycle use, and submit the report to DDOT, Transportation Policy Planning Administration and ANC 6D. (Exhibit 15, pp. 4-5.)

64. DDOT noted that the Project provides 210 parking spaces for the residential units, 304 parking spaces for the office uses and 90 parking spaces for the proposed retail uses. DDOT believed that the Applicant is providing too much parking in the Project given the proximity and frequency of both Metrorail and Metrobus transit service. DDOT suggested that the Applicant lessen the parking supply for the site as a way to create a more integrated transportation system and noted that “if the Applicants [sic.] lessen the parking quantity, it will send a clear message to visitors that driving personal vehicles will not be rewarded.” DDOT also requested that the Applicant: (i) provide SmartTrip cards, with \$60 fare media, to all residents and business owners upon move-in to the new property; (ii) pay for the initial car sharing application fee (\$25) and annual fee (\$50) for one year for all residents, proprietors and office staff in the Project; and provide SmartBike memberships for one year (\$40) for residents and proprietors upon move-in. (Exhibit 15, pp. 3-4.)
65. At the January 29, 2009 public hearing, the Applicant noted that it had agreed to DDOT’s recommendations that the number of parking spaces in the Project reserved for carsharing services be increased from three to six. The Applicant also noted that it agreed to create the position of a delivery management coordinator to address the operation of the shared loading docks. The Applicant noted that it did not agree with DDOT’s recommendations regarding the large financial commitment to fund Carsharing memberships and Bikesharing memberships for residents, tenants and employees of the Project. The Applicant noted that it believed such a condition is outside the scope of this special exception and variance relief application and that such a condition is more appropriate in a planned unit development application.
66. At the January 29, 2009 public hearing, the representative of the Applicant and the Applicant’s traffic engineer provided testimony that the amount of parking spaces proposed was appropriate for this type of mixed-use project that will ultimately draw people from the entire DC Metropolitan region. The Applicant also noted that given the existing state of development in the surrounding area, it was necessary to provide this amount of parking spaces to attract high-quality retailers and office tenants.

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### ADVISORY NEIGHBORHOOD COMMISSION REPORT

67. On January 12, 2009, ANC 6D voted 6-0-1 to support the modification application. The ANC noted that the design of the project will include neighborhood oriented retail and will provide a lively and amenable destination for local residents as well as visitors to the area. The ANC expressed concern about the height of the architectural embellishment, noting that it, "will tower over the entire area, including the ballpark directly to its south." The ANC requested that the Community Benefits Agreement that it negotiated with the Applicant become a condition of the Commission's approval of this case. The ANC noted that the implementation of the Community Benefits Agreement will make the Applicant a full partner in the ANC 6D community, particularly in the critical area of workforce development and employment. (Exhibit 18.)

### PERSONS IN OPPOSITION

68. Ms. Brenda Sayles, on behalf of the D.C. Combined Vendors Association, testified at the public hearing and noted her concern about the Project's impact on street vendors.
69. A letter in opposition from Mr. Martin Greenbaum was received in the record of the case. Mr. Greenbaum stated that the project does not appear to address the concerns of sidewalk vendors. Mr. Greenbaum requested that further review of the application be conducted before a decision is made. (Exhibit 19.)

### CONCLUSIONS OF LAW

1. The Commission finds that, pursuant to 11 DCMR § 1610.3, the Applicant is required to satisfy the burden of proving the elements that are necessary to approve the overall project under § 3104, as well as the specifically delineated requirements of the CG Overlay (§ 1604 for buildings that have frontage on M Street and § 1607 for buildings that have frontage on Half Street south of M Street). In addition, the Applicant must establish the case for special exception relief from the roof structure requirements of §§ 639.1 and 411.11; and must establish the case for variance relief from: (i) the loading requirements of § 2201.1; (ii) the step-back requirements of § 1607.2; (iii) the ground floor retail requirements of § 1607.3; (iv) the M Street setback requirements of § 1604.3; and (v) the lot occupancy requirements of § 634.1.
2. The Commission is authorized to grant area variance relief pursuant to § 1610.7. In order to satisfy the standards for area variance relief, the Applicant must satisfy a three-part test: (1) the property must be subject to an extraordinary or exceptional situation or condition; (2) a practical difficulty will result if the applicant is required to satisfy the strict application of the Zoning Regulations; and (3) no harm to the public or to the zone plan will occur as a result of the approval of the variance application. (*See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990).)

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The D.C. Court of Appeals held in Clerics of St. Viator v. D.C. Board of Zoning Adjustment, 320 A.2d 291 (D.C. 1974) that the exceptional situation or condition standard goes to the “property”, not just the “land”; and that “...property generally includes the permanent structures existing on the land [footnote omitted].” *Id.* at 293-294. The Court held that the exceptional situation standard of the variance test may be met where the required hardship inheres in the land, or the property (i.e., the building on the land).

The DC Court of Appeals defined “practical difficulty” in Palmer v. D.C. Bd. of Zoning Adjustment, 287 A. 2d 535, 542 (D.C. 1972) as the following: “[g]enerally it must be shown that compliance with the area restriction would be unnecessarily burdensome. [Footnote omitted.] The nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case.” In area variances, applicants are not required to show “undue hardship” but must satisfy only “the lower ‘practical difficulty’ standards.” Tyler v. D.C. Bd. of Zoning Adjustment, 606 A.2d 1362, 1365 (D.C. 1992), citing Gilmartin v. D.C. Bd. of Zoning Adjustment, 579 A.2d 1164, 1170 (D.C. 1990). Finally, it is well settled that the BZA may consider “... a wide range of factors in determining whether there is an ‘unnecessary burden’ or ‘practical difficulty’ ....”. Gilmartin, 579 A.2d at 1171, citing Barbour v. D.C. Bd. of Zoning Adjustment, 358 A. 2d 326, 327 (D.C. 1976). See also, Tyler v. D.C. Bd. of Zoning Adjustment, 606 A.2d 1362, 1367 (D.C. 1992). The Gilmartin case also notes three factors that can be used to determine whether the unnecessarily burdensome/ practical difficulty standard has been satisfied. These include: (i) the weight of noncompliance; (ii) the severity of the variance requested; and (iii) the effect the proposed variances would have on the overall zone plan. Thus, to demonstrate practical difficulty, the Applicant must show that strict compliance with the regulations is burdensome, not impossible.

3. The Commission provided proper and timely notice of the public hearing on this application, by publication in the *D.C. Register*, and by mail to ANC 6D, OP, and to owners of property within 200 feet of the site.
4. The proposed development is within the applicable height, bulk, and density standards of the Zoning Regulations, and the height and density will not cause a significant adverse effect on any nearby properties. The Commission notes that the Applicant will enter into a combined lot development agreement, pursuant to § 1602.1(a) and (e), to achieve this density and mix of uses. The Commission approves the additional density in excess of 8.0 FAR as the Applicant has provided sufficient evidence that the project satisfies the objectives and guidelines of § 1601 and §§ 1604 and 1607. The residential, office and retail uses are appropriate for the site, which is located in the CG/CR Zone District. The impact of the project on the surrounding area is not unacceptable. The proposed

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development has been appropriately designed to complement existing and proposed buildings adjacent to the site, with respect to height and mass.

5. No parties appeared at the public hearing in opposition to the application. Accordingly, a decision by the Commission to grant this application would not be adverse to any party.
6. Approval of the proposed development is not inconsistent with the Comprehensive Plan.
7. The Commission is required under D.C. Official Code § 1-309.10(d) to give “great weight” to the issues and concerns raised in the written report of the affected ANC. As is reflected in the Findings of Fact, at its duly noticed meeting held on January 12, 2009, ANC 6D, the ANC within which the Subject Property is located, voted 6-0-1 in support of the application for CG Overlay District Review. The ANC noted its concern with the height of the lit architectural embellishment at the corner of M and Half Streets, S.E. The Commission believes that the Applicant has provided sufficient evidence in the record of this case to determine that the proposed height and bulk of the architectural embellishment is appropriate and will not adversely impact neighboring properties. The Commission also finds that the proposed lighting of the architectural embellishment will not adversely impact neighboring properties. At the public hearing, the Applicant provided testimony that the proposed architectural embellishment is not the tallest structure in the area, noting that the lights at the Ballpark are taller. Acting upon the advice of the Office of the Attorney General, the Commission did not include the condition requested by the ANC requiring the Applicant to comply with the Community Benefits Agreement. The Commission did so because its review of the application is limited to the standards established in § 1610 of the Zoning Regulations, which do not include consideration of the benefits and amenities provided by the Applicant to the community. The Commission believed that conditioning the approval of the application on such benefits and amenities was therefore inappropriate.
8. Based upon the record before the Commission, having given great weight to the views of the ANC and having considered the report and testimony OP provided in this case, the Commission concludes that the Applicant has met the burden of satisfying the applicable standards under 11 DCMR §§ 1610 and 3104, the independent burden for each special exception, and all of the variances requested. The Commission finds that the Project fully satisfies the goals and objectives of the CG Overlay District. The Commission finds that the Property is subject to an exceptional situation or condition as outlined in the Applicant’s pre-hearing statement and as presented at the public hearing. The Commission agrees that the Applicant is faced with practical difficulties with satisfying the strict application of the Zoning Regulations with regard to: the loading requirements of § 2201.1; the Half Street step-back requirements of § 1607.2; the ground floor retail requirements of § 1607.3; the M Street setback requirements of § 1604.3; and the lot occupancy requirements of § 634.1. The Commission agrees with the Applicant’s written

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statement and testimony at the public hearing that it would be unnecessarily burdensome for the Applicant to satisfy these requirements. The Commission also finds that granting this variance relief will not cause substantial detriment to the public good and the variances can be granted without impairing the intent, purpose, and integrity of the Zone Plan. The Commission finds that granting the requested special exception and variance relief will create a building of significant architectural quality that will further the goals of the CG Overlay District and will create a new entertainment, retail, office and residential destination in the District of Columbia.

9. The Commission notes that the Applicant agreed with two of DDOT's conditions; the provision of six parking spaces for a carsharing service in the Project and the creation of a delivery management coordinator position. The Commission agrees that it is proper to include these recommendations as conditions of approval of this case. However, the Commission does not believe that it is necessary for the Applicant to prepare an annual report on actual vehicular traffic generation, truck deliveries, and transit and bicycle use and to submit that report to DDOT and ANC 6D. The Commission believes that the establishment of the delivery management coordinator position is sufficient to help assure that deliveries to the uses in the Project, and the use of the loading docks on Van Street, will not create adverse impacts on the neighboring properties or on the residents and tenants of the Project. The Commission finds that the additional reporting requirements proposed by DDOT are not necessary to address issues related to the use and operation of the loading docks and are outside the scope of this special exception and variance relief application.
10. The Commission agrees with the testimony of the Applicant and its traffic engineering expert that the number of proposed parking spaces is appropriate. The Commission finds that DDOT's report did not include any evidence to support the need for the reduction of 100 parking spaces, other than a general goal to "send a clear message to visitors that driving personal vehicles will not be rewarded". Therefore, the Commission approves the amount of parking spaces proposed by the Applicant. In addition, the Commission agrees with the Applicant that DDOT's recommendation that the Applicant provide SmartTrip memberships and SmartBike memberships to tenants, residents, and employees in the Project is not appropriate for a special exception and variance relief application. The Commission concludes that the requests for financial contributions for Carsharing and BikeSharing memberships are outside the scope of this case and more suitable for a planned unit development application.
11. The Commission also notes the testimony of Ms. Sayles and the letters in the record from street vendors regarding the potential impact that the Project would have on their businesses. The Commission recognizes that it, along with the Applicant, does not have any control over the use of public space, and that street vendor operations and licenses are administered by other agencies of the District government.

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12. The application for CG Overlay District Review will promote the orderly development of the site in conformity within the entirety of the District of Columbia zone plan as embodied in the Zoning Regulations and the Map of the District of Columbia.

### 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 APPROVAL**, consistent with this Order, of the application for CG Overlay District Review, special exception, and variance relief. This approval is subject to the following guidelines, conditions, and standards:

1. The project shall be built in accordance with the architectural plans, elevations and materials submitted in the record of Zoning Commission Case No. 08-30 as Exhibits 13, 21, and 31, as modified by the guidelines, conditions, and standards below.
2. The overall maximum permitted density shall be 8.01 FAR. In order to achieve the maximum permitted density, the Applicant shall transfer non-residential density from other lots within the CG Overlay District and shall transfer residential density to those same lots by the process set forth in accordance with the limitations of §§ 1602.1(a) and 1602.1(e).
3. Except for the roof structures and architectural embellishments for which a waiver has been granted under the Height Act, the maximum permitted height of the building shall be 110 feet. The project in its entirety shall include approximately 280,952 square feet of residential use (260-300 market-rate residential units), 370,019 square feet of office use and 53,840 square feet of retail use.
4. A minimum of 69% of gross floor area of the ground floor shall be devoted to preferred uses.
5. The Applicant shall dedicate at least 52% of the building roof to a vegetated roof, as depicted in the plans. The Applicant shall provide sustainable building design features such that both the residential and office components of the project will qualify for certification for at least a LEED Silver building.
6. The Applicant shall have flexibility with the design of the project in the following areas:
  - To vary the location and design of all interior components, including but not limited to partitions, structural slabs, doors, hallways, columns, stairways and mechanical rooms, provided that the variations do not materially change the exterior configuration of the buildings;

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- To vary the final selection of the exterior materials within the color ranges and material types (maintaining the same general level of quality) as proposed, based on availability at the time of construction;
  - To make refinements to exterior materials, details and dimensions, including belt courses, sills, bases, cornices, railings, and trim, or any other changes to comply with the District of Columbia Building Code or that are otherwise necessary to obtain a final building permit or any other applicable approvals; and
  - To vary the exterior design and materials of the ground floor retail space based on the preferences of the individual retailer. The Applicant will not permit the individual retailer to modify the building footprint, except for bay projections not to exceed four feet from the property line, or reduce the quality of the materials used on the exterior of the ground floor of the Project, as shown in the plans submitted with this application. The Applicant and all tenants of the project will comply with the requirements of Chapter 16, except as otherwise approved by this Order.
7. The Zoning Administrator shall have the flexibility to make minor modifications to the final plans as approved by the Commission. These modifications shall be limited to the following:
- A change not to exceed two percent (2%) in the percentage of lot occupancy or gross floor area of the building; and
  - A change not to exceed two percent (2%) in the number of residential units or gross floor area to be used for commercial uses.
8. The project shall include a maximum of 607 parking spaces. The Applicant shall have the flexibility to reduce the number of parking spaces per market conditions and demand for parking spaces. The lower limit of this reduction is 367 parking spaces, the matter of right requirement for the project.
9. The Applicant shall reserve six parking spaces in the below-grade garage for a local car-sharing vehicle service.
10. The Applicant shall designate a delivery management coordinator to coordinate loading for the residential, office, and retail uses on the Property.
11. The project shall be valid for a period of three (3) years from the effective date of Zoning Commission Order No. 08-30. Within such time, an application must be filed for a building permit for the construction of either the office or residential component of the project; the filing of such a building permit application will vest the Zoning Commission Order. An application for the final building permit completing the development of the project must be filed within five (5) years of the issuance of the final certificate of occupancy for the first component of the project.

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For the reasons stated above, the Commission concludes that the Applicant has met the burden, it is hereby **ORDERED** that the application be **GRANTED**.

On February 23, 2009, upon the motion Chairman Hood, as seconded by Vice Chairman Jeffries, the Zoning Commission **ADOPTED** the Order at its public meeting by a vote of 5-0-0 (Anthony J. Hood, Gregory N. Jeffries, William W. Keating, III, Peter G. May, and Michael G. Turnbull to adopt).

In accordance with the provisions of 11 DCMR 3028, this Order shall become final and effective upon publication in the *D.C. Register* on \_\_\_\_\_.

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