STATEMENT IN SUPPORT OF APPEAL OF THE
SUBDIVISION OF PREVIOUS LOT 4 IN SQUARE 763 INTO LOTS 26, 27 & 28
AND THE SUBSEQUENT ISSUANCE OF PERMITS FOR DEMOLITION,
CONSTRUCTION AND OCCUPANCY OF PUBLIC SPACE

This Statement of Reasons is submitted on behalf of the appellants, Larry & Louise Smith and Mary Ann Snow, the owners of properties adjoining the subject property.

The Property. The subject property is located at 206, 208 and 210 D street, S.E., Square 763, Lot 26, 27 and 28 (the "Properties"), previously known as 210 D Street, S.E., Lot 4 (assessment and taxation lots 800, 801 and 802) in Square 763. The Property is located in the Capital Hill Historic District. On February 20, 1948, Certificate of Occupancy No. 118519 (**Exhibit 10**) was issued for 210 D Street, S.E., Lots 800 and 802 (the "Pepco Properties") for use as a "public utility – electric power substation" (the "substation"). The substation occupied the Properties until its demolition in early July 2003. As outlined below, through a piecemeal process and without fully revealing his/its intent for and interest in the Properties, Chris Doefler ("Doefler") and/or Folger Park North, LLC ("Folger")(hereinafter collectively referred to as the "Owner") applied for and obtained: (a) a subdivision of the Pepco Property into three (3) substandard lots (**Exhibit 1**); (b) a demolition permit for the substation (**Exhibit 2**); (c) construction permits for the foundations, plumbing and construction of three (3) two-family, row house flats (**Exhibits 3 – 8**); and (d) public space permits for the use of the on-street parking spaces in front of the Properties (**Exhibit 9**.) Additionally, the Owner has illegally encroached upon the appellants' properties and, contrary to its building permits and plans, construction is not entirely on the Owners' Properties. (**Exhibit 9**.) Finally, the Owner has illegally closed the portion of the north-south alley adjacent to the Properties. (**Exhibit 9**.) The foundations have been laid and construction of the row houses is underway.

Exceptions to Administrative Decisions. By this application, the appellants appeal from the following decisions:

1. Approval by Department of Revenue and Finance (September 23, 2002), the Zoning Administrator of the Department of Consumer and Regulatory Affairs ("DCRA") (September 30, 2002) and the Historic Preservation Division (September 23, 2002) and the approval and issuance of S.O. 009755 by the D.C. Surveyor subdividing Lot 4 and part of Lot 6 in Square 763 into Lots 26, 27 & 28. Subdivision recorded at Book 196, Page 42 on September 30, 2002. (**Exhibit 1**.)

2. Issuance by DCRA, Building and Land Regulation Administration ("BLRA") of Permit No. 424724 on November 13, 2002, permitting the razing of the Pepco substation at 210 D Street, S.E., Lots 800, 801 and 802 in Square 763. (**Exhibit 2**.)

3. Issuance by BLRA of Permit No. B451616 on May 23, 2003, permitting the construction of a new foundation, with plumbing, for a two-family flat 206 D Street, S.E., Lot 26 in Square 763. (**Exhibit 3**.)

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EXHIBIT NO. 4

4. Issuance by BLRA of Permit No. B451615 on May 23, 2003, permitting the construction of a new foundation, with plumbing, for a two-family flat 208 D Street, S.E., Lot 27 in Square 763. (**Exhibit 4.**)

5. Issuance by BLRA of Permit No. B451617 on May 23, 2003, permitting the construction of a new foundation, with plumbing, for a two-family flat 210 D Street, S.E., Lot 28 in Square 763. (**Exhibit 5.**)

6. Issuance by BLRA of Permit No. B451260 on August 25, 2003, permitting the construction of a new two-family flat 206 D Street, S.E., Lot 26 in Square 763. (**Exhibit 6.**)

7. Issuance by BLRA of Permit No. B451262 on August 25, 2003, permitting the construction of a new two-family flat 208 D Street, S.E., Lot 27 in Square 763. (**Exhibit 7.**)

8. Issuance by BLRA of Permit No. B451261 on August 25, 2003, permitting the construction of a new two-family flat 210 D Street, S.E., Lot 28 in Square 763. (**Exhibit 8.**)

9. Failure of DCRA to take action to compel Owner to remove obstructions (fence closing and construction trailer on) from north-south alley to the immediate east of the Properties. July through August, 2003. The Owner has applied for, but was denied, an application to close the sidewalk in front of the Properties. Drawing attached to that application show fencing extending across the southern entrance to the alley along D Street, S.E. and across the alley adjacent to the northern boarder of the Properties. (**Exhibits 9.**) In the event that a public space permit has been granted for the closing of the alley, appellants appeal the issuance of such permit.

10. Issuance of Public Space Permit for dumpster. (*See* **Exhibit 9.**)[1]

Upon information and belief, the Owner claims that the subdivision and development of the Properties is as of right, based on the Owner's misrepresentations that the Properties were once improved with three (3) town homes and there previously existed three (3) lots. The appellants submit that the Owner's contentions and the decisions appealed from were erroneous for the following reasons:

1. Subdivision of the Properties. On or about September 30, 2002, the Properties were subdivided from one existing lot of record (Lot 4) into the three (3) current nonconforming lots. The required lot width and area in the R-4 zone district is eighteen feet (18') and 1,800 square feet, respectively. As illustrated below, each of the Properties is nonconforming by way of both lot width and area.

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[1] Attempts have been made to obtain a copy of this permit but one has not been secured as of the filing of this application.

Lot	Lot Width	Lot Area
26	16'	1,447 s.f.
27	16'	1,529 s.f.
28	16'	1,529 s.f.

None of the exceptions to the area requirements in the zoning regulations justify these nonconformities.

a. Inapplicability of Section 401.1 of the Zoning Regulations.

Section 401.1 of the zoning regulations provides that:

> Except as provided in chapters 20 through 25 of this title, in the case of a building *located, on May 12, 1958*, on a lot with a lot area or width of lot, or both, less than that prescribed in § 401.3 for the district in which it is located, the building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title.

11 D.C.M.R. § 401.1. In determining whether this section has any applicability, all one must look to is what existed at the property as of May 12, 1958. As of that date, the Pepco Property was improved with the Pepco substation (**Exhibit 10**), not three (3) townhouses, as alleged by the Owner.

b. Inapplicability of Sections 401.2 and 401.4 of the Zoning Regulations.

Section 401.2 of the zoning regulations provides:

> Except as provided in § 401.3, in the case of an unimproved lot in single ownership on November 1, 1957, that has a lot area or width of lot less than that specified in § 401.3 for the district in which it is located and that does not adjoin another unimproved lot in the same ownership, a structure may be erected on the lot if both the lot area and width of lot are at least eighty percent (80%) of the lot area and width of lot specified under § 401.3; provided, that the structure shall comply with all other provisions of this title.

As of November 1, 1957, only one record lot existed, that being record lot 4. (**Exhibit 11**.) There were three (3) assessment and taxation lots ("A&T lots") as of May 12, 1958; however, there is no authority that A&T lots give rise to a "grandfathered right" for record lots. Even assuming the previous individual A&T lots (i.e. A&T Lots 800, 801 & 802) provide a basis for the current subdivision (which we submit would be erroneous), section 401.2 is inapplicable in the instant matter, as these properties are adjoining and, at the time of the granting of the applications for building permits, were unimproved. 11 D.C.M.R. § 401.2.

Section 401.4 is likewise inapplicable. Section 401.4 provides the following exception to 401.3:

> In the case of an unimproved plot of ground in single ownership on November 1, 1957, that has a lot area or width of lot less than two hundred percent (200%) of that prescribed in § 401.3 or the district in which it is located and that does not adjoin another unimproved plot of ground in the same ownership, two structures may be erected on the lot; provided, that each structure shall be erected on a lot that complies with eighty percent (80%) of both the required lot area and width of lot specified in § 401.3; and provided further, that each structure shall comply with all other provisions of this title.

Given that Lot 4 was greater than 200% of the required lot width and lot area, this section does not apply.

c. As the Deviations are Greater Than Two Percent (2%), Relief is not Available Through Section 407.1.

Finally, Section 407.1 cannot apply, as the deviation on the lot area and lot width for each of the Properties is greater than two percent (2%). 11 D.C.M.R. § 407.1. Moreover, the deviation would not be "minor", as the end result – allowing three (3) new two-family flats, as opposed to the matter-of-right two (2) residences permitted in the CAP/R-4 zone district – would impair the purpose of the Zoning Regulations of controlling density in the CAP overlay. Given the negative impact on the surrounding neighborhood caused by the development of these *self-created* substandard lots, the community must be given a right to be heard on the matter, a right that was denied by the issuance of the permits.

2. Because the Properties do Not Meet the Requirements for Minimum Lot Area and Lot Width, Permits for the Properties Should Not Have Been Issued. Because the Properties do not meet the minimum lot area and width requirements, the permits for development of the Properties should not have been issued. As illustrated above, the Properties do not meet the tests for any of the exceptions to the lot area requirements. As such, the subdivision of the Properties resulted in the creation of unbuildable lots – a result stemming from the Owner's own actions.

The Owner has gone to great lengths to conceal the fact that the Properties do not meet the exceptions from the area requirements outlined above by applying for permits on a piece-meal basis and providing misleading and false statements on its applications. Additionally, construction has not been in accordance with the Owner's plans and, in addition to circumventing the zoning regulations, the Owner has consistently circumvented other applicable regulations, including the building code and public space permitting regulations. The culmination of these actions is a grand scheme to develop the Properties in violation of the zoning regulations in an expeditious manner, so as to avoid repercussions. The magnitude and

grievousness of the Owner's actions warrant mentioning, as provided in the following outline of false statements and misrepresentations:

(1) The address of the owner of the Properties is listed as 210 D Street, S.E. However, this is one of the subject Properties and is currently unimproved. On the building permits, the address of the Owner is listed as the subject Property. Finally, the "Owner", as listed on the permits and subdivision plat, is inconsistent (*see* **Exhibits 1-8**);[2]

(2) On the application for Permit No. B424724, the Owner (listed as Folger) misrepresented the building to be demolished as being an "Ancillary storage building. No Electric or Plumbing Utilities". (**Exhibit 2**, box 12.) Instead, the building to be demolished was a former public utility electric power substation. (*See* **Exhibit 10**.) Upon information and belief, this misrepresentation allowed the Owner to avoid environmental inspection and necessary soil testing of the site. The Owner also misrepresented the proposed use of the Properties as "vacant".

(3) a. On the applications for Permit Nos. B451616, B451615 and B451617 (Owner listed as Doefler), although the Owner indicated in Box 47 that there would be projections beyond the building line, the Owner failed to provide the information regarding such projections in Boxes 48 through 52. (**Exhibits 3, 4 & 5**.)

b. The Owner also misrepresented the need for sheeting and shoring.

c. As noted on the DCRA Batch information Sheets, the Owner failed to sign the permit applications.

d. On the Environmental Intake Forms, the Owner made the blatant misrepresentation that he does not own adjacent or abutting property and failed to complete boxes 5-11 of the forms.

e. A certificate of occupancy is attached to the applications, which certificate does not pertain to the Properties.

(4) On the application for Permit No. B451615 (**Exhibit 3**), the owner failed to complete boxes 22 and 23 regarding disturbing the earth, despite the fact that the permit application was for a foundation;

(5) On the application for Permit No. B454260 (Owner Listed as Folger), the Owner failed to disclose the fact that the foundation and/or footing of the

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[2] However, it is suspected that there is someone living in the construction trailer.

foundation encroached upon the adjoining properties that front 2nd Street, S.E., including the easement serving the appellants' properties. (**Exhibit 6.**)

(6) a. Contrary to representations on the previous permit applications, on the applications for Permit Nos. B454260, B454262 and 454261 (Owner Listed as Folger), the Owner, for the first time, revealed that the improvements will include an elevator. (**Exhibits 6, 7, and 8.**)

b. Although the plans depict a driveway, the Owner represented on the applications that there would be no construction of a driveway.

(7) Plans submitted with the permit applications (**Exhibit 12**) erroneously:

a. Depict the lot depths of 326 and 324 2nd Street, S.E. as 75'1/2". In fact, the depths of those properties are 81'9.5" (*Compare* **Exhibit 12** *with* **Exhibits 13 through 16**);

b Label a private easement to the west of Lot 28 as an "alley";

(8) Upon information and belief, the foundation and footings for Lot 28 encroaches upon the properties at 324 and 326 2nd Street, S.E. and a private right of way behind 318, 320 and 322 2nd Street, S.E. Encroachment is approximately one foot (**Exhibit 9**).

(9) The Owner, without availing itself of the alley-closing procedures, has closed off access to the north-south alley to the east of the Properties and regularly closes off more street frontage than permitted by its public space permit (**Exhibits 9 and 17**).

Section 3302.3 of the Building Code provides that:

> **Temporary encroachments:** Sidewalk sheds, underpinning and other temporary projective guards and devices shall not project beyond the interior and street lot lines except where required to ensure safety of the adjoining property and the public, *subject to approval.* Where necessary, *the written consent of the adjoining property owner shall be obtained.*

12A D.C.M.R. § 3302.3 (emphasis added).

Section 3310.2 provides:

> **Protection of Adjoining Property:** *If afforded the necessary* ***written*** *permission* to enter the adjoining lot, building or structure, the person causing demolition or excavation to be made *shall at all*

> *times and at his or her own expense* preserve and protect the lot, building or structure from damage or injury. If the necessary written permission is not afforded, it shall be the duty of the owner of the adjoining lot, building or structure to make safe his or her own property, for the prosecution of which said owner shall be granted the necessary written permission to enter premises for demolition or excavation. In the case of an existing adjoining or party walls which require underpinning, proper underpinning shall be provided in accordance with 3309.3 whether or not written permission to enter the adjoining lot is granted, provided adjoining owner has been given 30 days written notice by registered mail.

12A D.C.M.R. §3310.2 (emphasis added).

Finally, section 3310.7 provides that:

> **Sheeting and Shoring:** All excavations shall be protected by sheet piling or adequate shores of approved design in order to prevent excavation wall collapse and to protect adjoining building or property from damage.

By letter dated August 7, 2003, the appellants notified the owner of the encroachment onto their properties, as well as to their belief that the on-going construction was in violation of the zoning regulations. (**Exhibit 18.**) By letter dated August 8, 2003, the Owner, acknowledging its trespass, simply responded that it "hoped to restore the easement by October 30, 2003." (**Exhibit 19.**) With regard to the alleged zoning violations, erroneously claimed that the Historic Preservation Review Board ("HPRB") found that the development was as of right. To the contrary, HPRB does not have jurisdiction over zoning issues and, furthermore, at least one member of HPRB questioned how the Owner could be building on substandard lots. The Owner further asserted that:

> We are also compelled to inform you of our deep concerns for any unwarranted extra costs on this project in time or money as a result of your inaccurate and misleading presentation of the applicable zoning laws. It is hoped that you will see fit to advise all parties that received your letter so as to preclude any unfortunate scenarios where the aforementioned information may adversely affect the public perception of these fine new homes.

(**Exhibit 19.**) It is clear from this statement that the Owner (1) has no intention of complying with applicable regulations, including the zoning regulations, and (2) is solely motivated by profit, as evidenced by the quick turn around in construction (demolition occurring in early July, 2003 with construction to be completed by October 1, 2003). (**Exhibit 19.**) In addition to showing the Owner's true motivation, this statement is threatening in tone intended to discourage the appellants from pursuing their rights to see that the applicable regulations are followed and enforced.

The misrepresentations itemized above concealed the fact that the construction is not in accordance with the submitted applications, plans and permits or, most significantly, the zoning regulations. The misrepresentation regarding ownership of adjacent property allowed the Owner to proceed with construction as a matter of right, rather than filing for the necessary variances. Further illustrating the intent to deceive is the fact that the Owner has applied for applications for permits on a piecemeal basis, rather than contemporaneously, as well as the unprecedented expediency of the construction. *See* 11 D.C.M.R. § 3112.2(b)(1)(appeal cannot be filed ten (10) days after construction is under roof).

Because the Properties, created by the Owner's own actions, are substandard, the permits should not have been issued. In the alternative, once issued, the permits should have been revoked. However, DCRA has refused to take any action.

3. Given the Extraneous Circumstances Surrounding the Properties, the Actions of the Owner and the Inaction of and Misinformation Provided by DCRA, the Instant Application is Timely. The Zoning Commission recently amended section 3112.2 of the zoning regulations to set a limitation on the filing of an appeal. The amendments provide that:

> (a) An appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier.
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> (b) If the decision complained of involves the erection, construction, reconstruction, conversion, or alteration of a structure or part thereof, the following subparagraphs shall establish the latest date on which an appeal may be filed:
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> (1) No appeal shall be filed later than ten (10) days after the date on which the structure or part thereof in question is under roof. For purposes of this subparagraph, the phrase "under roof" means the state of completion of a structure or part thereof when the main roof of the structure or part thereof, and the roofs of any structures on the main roof or part thereof, are in place: and
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> (2) The provisions of paragraph (b) of this subsection shall not relieve an appellant of the jurisdictional requirement in paragraph (a) of this subsection of filing a timely appeal.
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> (c) Notwithstanding paragraphs (a) and (b) of this subsection, for purposes of establishing the timeliness of an appeal under this subsection, an appellant shall have a minimum of

sixty (60) days from the date of the administrative decision complained of in which to file an appeal. The Board may extend the sixty- (60) day deadline for the filing of an appeal only if the appellant demonstrates that:

(1) There are exceptional circumstances that are outside of the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board: and

(2) The extension of time will not prejudice the parties to the appeal, as identified in § 3199.1.

Appellants contend that, given that they have acted diligently, the appeal is timely. In the alternative, given the extraordinary circumstances of this matter, the sixty-day limitation should be extended pursuant to section 3112.2(c).

Since the demolition of the Pepco substation in early July of this year, the appellants, not experienced in zoning matters, have made frequent inquiries to DCRA, including BLRA and the Surveyor, as to how the Owner could be proceeding in light of the substandard lots. With regard to the subdivision, it was not until the appellant's reviewed the plans submitted to DCRA for permit review that they became fully aware of, and consequently extremely concerned about, the substandard lots. The Owner had previously represented that the lots were "grandfathered", as the Properties had previously been improved with row houses. However, research revealed that the certificate of occupancy attached to the foundation permit applications, purportedly backing up this claim, was not for the subject Properties. To the contrary, the application for the certificate of occupancy attached to the permit applications reveals that the certificate of occupancy was issued for ***610 D Street, Southwest, Square 465, Lot 839***. **(Exhibit 20.)** Attaching this certificate of occupancy to the permit applications was just another outrageous aspect of the Owner's plot to deceive both DCRA, as well as its surrounding neighbors.

When the neighbor's contacted DCRA with their concerns, they were informed that the proposed development would be reviewed for zoning compliance at the time of the filing of a building permit. Additionally, they were informed by DCRA that no applications for building permits had been filed. To the contrary, building permit applications were filed in April of 2003. DCRA's misrepresentation regarding the status of the permit applications continued into late August. When above-grade construction commenced, the appellants again inquired as to the status of permits. It was at this time that they learned that applications for building permits had been submitted and approved.

In late July, the appellants contacted DCRA regarding their concerns, including concerns about the alley closing and damage to their properties and the alleyway. Juan Scott of BLRA informed the appellants that the Owner had all the requisite permits – yet another incorrect statement on behalf of DCRA.

By letter dated August 27, 2003 (sent via email), the appellants, through counsel, again informed DCRA of the violations and requested a meeting to review the matter. **(Exhibit 21.)** On September 3, 2003, notice was sent to the appellants from DCRA acknowledging their inquiry (erroneously listing the date of inquiry as September 2, 2003) and informing the appellants that they would receive a response within seven (7) business days. **(Exhibit 22.)** Rather than wait for a response, the appellants immediately began to prepare the instant appeal and to continue their own investigation into the matter.

On September 11, 2003, it was discovered that the Owner had applied for, but had been denied, a public space permit to temporarily close the sidewalk adjacent to its property.[3] **(Exhibit 17.)** Much to the astonishment of the appellants, the drawings submitted with this application revealed that the fencing to close the side walk not only extended across the southern entrance of the alley on D Street, S.E., it depicted fencing for this "sidewalk closure" on the alley adjacent to northern portion boundary of the Properties. This fencing was installed despite the rejection of this permit and failure of the Owner to obtain an alley closing in accordance with Chapter 14 of Title 24 of the D.C. Municipal Regulations, extends the full width of the fifteen foot (15') alley and remains in place as of the date of the filing of this application. (*See* **Exhibit 9.**) Upon discovery of this egregious violation, the appellants sent notice to DCRA, by facsimile and email, requesting the matter be investigated that day and the Owner be compelled to remove the obstructions immediately. **(Exhibit 23.)** DCRA failed to respond. If there had been any doubt of the Owner's deliberate intention to violate the applicable regulations, the sidewalk closing application and the Owner's subsequent illegal closing of the alley erases any such doubt.

The appellants will prove their case relying on: (1) the plain language of the zoning regulations; (2) testimony of the appellants; (3) documents itemized in the Exhibit List and attached hereto; and (4) such additional evidence and testimony as deemed necessary.

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[3] In light of DCRA's early representation that the Owner had all the necessary permits, including a permit for the alley closing, the denial of the side walk closing permit (in addition to the application's contents) came as quite a surprise.

CONCLUSION

For the reasons stated herein and for the reasons provided at the hearing, the appellants respectfully submit that the subdivision plat and all permits for the Properties should be revoked and the Owner compelled to remove the improvements to the Properties.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI, LLP

By: _____
Richard B. Nettler
Jeannine Rustad Zigner

EXHIBIT LIST

1. Subdivision Plat for S.O. 009755.
2. Permit No. 424724, including application (dated November 5, 2002).
3. Permit No. B451616, including application (dated April 29, 2003).
4. Permit No. B451615, including application (dated April 29, 2003).
5. Permit No. B451617, including application (dated April 21, 2003).
6. Permit No. B451260, including application (dated April 2, 2003).
7. Permit No. B451262, including application (dated April 2, 2003).
8. Permit No. B451261, including application (dated April 2, 2003).
9. Photographs.
10. Certificate of Occupancy No. 118519 dated February 20, 1948, including application (dated September18, 1947).
11. Surveys of Properties and surrounding neighborhoods.
12. Building Plans.
13. Deed for Lot 804, Square 763.
14. Deed for Lot 803, Square 763.
15. Deed of easement adjacent to and benefiting, *inter alia*, the appellants properties.
16. Assessment and Taxation Plat for Lots 803 and 804, Square 763.
17. Application for Public Space Permit dated June 4, 2003.
18. Letter dated August 7, 2003 from appellants and other neighbors to the Owner.
19. Response letter dated August 8, 2003 from the Owner.
20. Application for certificate of Occupancy dated May 5, 1948, for Square 465, Lot 839.
21. Correspondence dated August 27, 2003, from counsel for the appellants to DCRA.
22. Response of DCRA dated September 3, 2003.
23. Correspondence dated September 11, 2003, from counsel for the appellants to DCRA.