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February 10, 2004

BY HAND

Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
441 4th Street, NW,
Room 210
Washington, DC 20001

Re: **BZA Appeal No. 17085** of Louise and Larry Smith and Mary Ann Snow and James Marsh Regarding 206, 208 and 210 D Street, S.E.
Square 763, Lots 26, 27 and 28
Our File No. 092314.0000

Dear Mr. Griffis:

Attached for filing you will find the original and twenty (20) copies of the Prehearing Statement of Appellants in Support of their Appeal and Response to Property Owner's Motion to Strike the Appeal.

Thank you for your attention to this matter.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Richard B. Nettler
Jeannine Rustad

cc: Mary Ann Snow (by hand; w/encl.)
Larry & Louise Smith (by hand; w/encl.)
Joel Lawson, Office of Planning (by hand; w/encl.)
Zoning Administrator (by hand; w/encl.)
Advisory Neighborhood Commission 6B (w/encl.)

Word 45654335.1

BZA
Case No. 17085
Exhibit No. 43

Board of Zoning Adjustment
District of Columbia
CASE NO. 17085
EXHIBIT NO. 43

Gary Peterson, Capitol Hill Restoration Society (w/encl.)
Karen Edwards, Office of General Counsel, DCRA (by hand; w/encl.)
Richard Aguglia (by hand; w/encl.)

BEFORE THE BOARD OF ZONING ADJUSTMENT

OF THE DISTRICT OF COLUMBIA

Appeal of Larry & Louise Smith and
Mary Ann Snow and James Marsh — BZA Appeal No. 17085

PREHEARING STATEMENT OF APPELLANTS IN SUPPORT OF APPEAL

AND

RESPONSE TO PROPERTY OWNER'S MOTION TO STRIKE APPEAL[1]

This Prehearing Statement is submitted on behalf of the appellants, Larry & Louise Smith and Mary Ann Snow and James Marsh (the "Neighbors"), the owners of properties adjoining the subject property, which is located at 206, 208 and 210 D street, S.E., Square 763, Lot 26, 27 and 28 (the "Properties").

I. WITHDRAWAL OF CERTAIN CLAIMS.

By this statement, the Neighbors hereby withdraw the following items from their appeal (numbers refer to the list included with the appeal form and statement of reasons in support of the appeal):

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.

9. Failure of DCRA to take action to compel the Developer 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 Developer 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. 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.

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[1] The Developer's Motion to Strike was filed in BZA Application No. 17108.

II. RESPONSE TO MOTION TO STRIKE

A. The Appeal Was Timely Filed.

Both in its Motion to Strike, and in a separate letter dated September 16, 2003 (which letter was not served on any of the parties to this appeal, including the Neighbors or the ANC), previous counsel for the Developer argues that the instant appeal was untimely filed. In support of this argument, but without explanation, the Developer relies on the recently amended section 3112.2 of the zoning regulations, which sets a time limitation on the filing of an appeal. Section 3112.2 provides 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.
>
> (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:
>
> (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
>
> (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.
>
> (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.

1. The Appeal of the Building Permits, Issued on August 25, 2003, as Well as the Lifting of the Stop Work Order on or About October 1, 2003, Were Timely Filed.

Clearly, with regard to the building permits that were issued on August 25, 2003, as well as the Zoning Administrator's decision to lift the September 16, 2003 stop work order, the appeal is timely filed. It is unfathomable how the Developer can argue that the appeal as to these matters, which occurred well within sixty (60) days of the date of filing the appeal and supplemental appeal, respectively, are untimely.

With regard to the issuance of the building permits, the deadline for appealing these decisions was October 25, 2003. The appeal deadline for the lifting of the stop work order was, at the earliest, December 1, 2003, as construction recommenced at the Properties on or about October 1, 2003. Thus the earliest date that the Neighbors had notice or knowledge (or should have had notice or knowledge) that some decision had been made as to the validity of the stop work order was October 1, 2003. Although not able to ascertain the nature of that decision, in an abundance of caution, on October 31, 2003, the Neighbors supplemented their appeal to include an appeal of the lifting of the stop work order. It was not until approximately November 4, 2003, that Neighbors learned from the Office of Planning that, in exchange for indemnifying the Department of Consumer and Regulatory Affairs ("DCRA"), the Developer was allowed to continue with construction.

The appeal of the issuance of the building permits was filed within thirty (30) days of the issuance of the same. The appeal of the lifting of the stop work order was likewise filed within thirty (30) days of the Neighbors having notice of that action. Thus, the filing of the appeal on September 12, 2003 and the supplemental appeal on October 31, 2003, was timely.

As to the issuance of the foundation and plumbing permits, as well as the issuance of the subdivision, The Neighbors 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), as there would be no prejudice to the parties or the Developer. Each of these arguments is addressed in turn below.

2. The Neighbors Have Acted Diligently in Filing the Instant Appeal, Which Was Filed Within Sixty (60) Days of When They Had Knowledge of the Subdivision Plat, Foundation and Plumbing Permits.

a. Facts.

In determining the trigger date of the time in which to file an appeal, the Board must determine when the Neighbors had knowledge of the decisions appealed from. As set forth in the attached timeline, it was not until the Pepco substation had been razed and the Properties, along with a right of way belonging to the Neighbors, were excavated that the Neighbors had knowledge that something was not right. The Pepco substation was demolished sometime between June 30 and July 8, 2003. On or about July 7, 2003, the Developer boarded up the Neighbors gates at the rear of their properties and excavated the private walkway running along their rear property lines (hereinafter referred to as the "walkway"). Prior to this action, the Developer had repeatedly represented that the proposed development was as a matter of right. Nothing in the plans that the Developer had shared at previous meetings indicated that the proposed development could not be constructed within the boundaries of the Properties and without damaging and trespassing onto the Neighbor's properties.

After the events of the first week in July, alarmed at the Developer's action and then alerted to the fact that the development may not be consistent with the zoning regulations, the Neighbors began to investigate the nature of the proposed construction, as well as the approvals and permitting granted by DCRA. As the Developer had failed to post a raze permit at the Properties, the Neighbors first attempted to ascertain whether a demolition permit had, in fact been issued by DCRA. Upon inquiry, DCRA was unable to find any records of a raze permit and, therefore, DCRA issued a stop work order sometime during end July early August, 2003. However, DCRA later located the raze permit documents and lifted the stop work order. The Neighbors were left to continue their efforts to determine what permits had been issued and whether zoning review would be required.

On August 4, 2003, Mary Ann Snow made several calls inquiring about the Properties. The first call was to the DCRA permit branch, where Ms. Snow spoke with Ms. Epps. Ms. Epps informed Ms. Snow that the only type of applications on file for construction at the Properties was for a new foundation - "family flat," and, upon information and belief, for plumbing. Ms. Epps stated that there were no building permits on file. Ms. Epps then provided Mary Ann Snow with the application numbers for the foundation permits.

Unsure how foundation permits could be issued without zoning review, Ms. Snow next spoke with Mr. Lenny Douglas in the permit issuance branch of DCRA. Mr. Douglas explained to Ms. Snow that a building permit is not needed until construction goes above ground; since the foundation is underground, no building permit is needed at this time.

Ms. Snow's next call was to Mr. Frank Moody with the permit intake branch. Mr. Moody informed Ms. Snow that there were no building permit applications on file for the Properties. Ms. Snow also spoke with Rochelle Joseph at DCRA, who advised Ms. Snow that

when the developers applied for a building permit, they would be told they had to file for a variance because the lots did not conform with R-4 width and area zoning requirements.

At no point during any of these various conversations did any of the representatives of DCRA inform Ms. Snow that building permit applications had been filed on April 2, 2003, and that zoning review had been completed and approval issued on July 22, 2003.

With regard to the subdivision, it was not until the Neighbor's reviewed the plans submitted to DCRA for permit review that they became fully aware of the impact of, and consequently extremely concerned about, the substandard lots. Despite diligent efforts, these plans were not obtained until on or about August 14, 2003. As mentioned above, the Developer 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 revealed that the certificate of occupancy was issued for *610 D Street, Southwest, Square 465, Lot 839*. One can only assume that the Developer did not have good intentions in providing this false and misleading information to the District.

Significantly in relation to the filing of the instant appeal, during July and August, 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, the Neighbors were informed by DCRA that no applications for building permits had been filed. Contrary to these representations and assurances from DCRA, 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 Neighbors 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.

On August 27, 2003, the undersigned counsel, having been retained by the Neighbors, sent DCRA correspondence expressing the Neighbors' concerns regarding the proposed development of the Properties and the lack of response from DCRA to date. Counsel requests a meeting with DCRA to discuss the Properties. On September 3, 2003, counsel receives a letter from Joseph McClarley of DCRA (customer service) acknowledging receipt of counsel's "September 2, 2003" letter regarding the Properties and indicating a response would be sent within seven (7) business days. The request for a meeting went unanswered.

On September 12, 2003, despite almost two (2) months of diligent and persistent efforts to obtain answers from DCRA, the instant appeal is filed on behalf of the Neighbors.

b. Argument.

On the issue of notice to the Neighbors of the zoning violations, this matter bears striking similarity to the facts in BZA Appeal No. 16405 of Mildred Crary of the granting of five (5) permits to her neighbor, Charles Sisson (the "Sisson Case"). In the Sisson Case, the property owner, Mr. Sisson, applied for and received five (5) building permits between January and October 1998 for construction at the subject property, whose main elements were a covered front porch, a rear two-story addition, and a new garage. Sisson Order Findings of Fact ¶ 6. In her appeal, Ms. Crary alleged, and the Board found, that Mr. Sisson had: (1) applied for the permits in a piecemeal fashion; (2) provided erroneous information on various permit applications, including incorrect zoning; (3) commenced work prior to the issuance of a permit; and (4) failed to reveal the full extent of his work on plans submitted with the various permit applications. *Sisson v. D.C. Board of Zoning Adjustment*, 805 A.2d 964, 967 (D.C. 2002). On appeal, the court upheld the Board's conclusion that the appeal was timely field with respect to all five permits on the basis that:

> Because of the cumulative, piecemeal nature of the applications, the full extent of [Mr. Sisson's] construction project could not be discerned as each individual permit was issued and therefore they must be considered as a whole. . . . The Board is not persuaded that the first permit put [Ms. Crary] on notice of all the work to be done on [Mr. Sisson's] property or, therefore, that the work allegedly violated the zoning regulations.
>
> Other factors also support our conclusion that [Ms. Crary] was not "chargeable with notice" as soon as the first permit was issued. [Mr. Sisson's] various permit applications contained errors of omission or were otherwise misleading in that they did not reflect all existing and planned improvements accurately and consistently . . . Because of these errors, zoning violations arising from the failure to comply with lot occupancy and setback requirements of the Wesley Heights overlay, in particular, were not apparent until the work was substantially completed on [Mr. Sisson's] property. Moreover, some work was performed beyond the scope of the permit, as with the demolition of the existing garage and the construction of a new garage larger than the dimensions specified on the permit, and two of the (the third and fifth) were issued for work that was undertaken prior to receiving the permits. Therefore, the Board concludes that [Ms. Crary] was not chargeable with notice of the entire scope of the work performed at [Mr. Sisson's] property until all of the permits were issued.

Id. at 967-968.

Although section 3112.2 of the zoning regulations did not apply, the court held that the Board had implicitly determined that the case fell "under the principle of 'exceptional circumstances' substantially impairing the *ability* of an aggrieved party to appeal – circumstances outside the party's control." *Id.* at 969.

In the instant case, the permit applications and subdivision application were filed in a piecemeal fashion. The subdivision plat was recorded on September 30, 2002, after having been signed by the Developer on September 18, 2002. On or about November 11, 2002, the Developer applied for a raze permit. On this application, the developer misrepresents the nature of the building to be razed as a "ancillary storage building" with "no electric or plumbing utilities." Contrary to these representations, the building being demolished was a former Pepco substation. On November 13, 2002, the demolition permit was issued.

On April 2, 2003, building permit applications for each of the newly created record lots were filed. On each of these permit applications, the Developer misrepresented the Properties as being "vacant", even though the Pepco substation still occupied the lot.[2] Additionally, the Developer checked that no sheeting or shoring was necessary, a fact that proved to be incorrect at best, intentionally misleading at worst. Each of these permits listed the owner of the Properties as "Folger Park North, LLC". However, the addresses for the owner was listed as the individual property, despite the Developers claims that the Properties were vacant. Zoning sign-offs on these permit applications were not obtained until July 22, 2003.

On April 29, 2003, applications for foundation permits were filed for 206 and 208 D Street (Lots 26 and 27, respectively). These permits listed the Owner as Chris Doefler and the owner address as 210 D Street. In addition to failing to check that sheeting and shoring would be required, on the Environmental Intake Forms attached with these applications, the Developer checked that it was not the owner of a site adjacent or abutting the property and that the Developer did not plan any additional activity for the subject site or any site within the same square during the next three years. By failing to correctly acknowledge yes to either or both of these questions, the Developer circumvented the requirements of submitting a site plan to the EIS Coordinator of CRA or, in the alternative, a written explanation to the EIS Coordinator.

The plans filed with the various permit applications contained three (3) serious misrepresentations:

(1) They depicted the lot depths of 326 and 324 2nd Street, S.E. as 75'1/2". In fact, the depth of those properties are 81'9.5"; [3]

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[2] The Developer has attempted to justify this misrepresentation in BZA Application 17108 by relying on the assessments for the Properties, which listed the value of the improvements as "zero". However, just because the improvements on the Properties had no value – or even negative value given the fact that the demolition costs were probably greater than the value of the improvements – does not detract from the fact that the Properties were still occupied by the Pepco substation.

[3] When the Neighbors pointed this out to the Developer about this, they were informed that the plans were preliminary.

(2) They labeled the private walk way to the west of Lot 28 as an "alley";

(3) Attached a certificate of occupancy for 210 D Street, S.W. (Square 495, Lot 839)

Presumably, it was as a result of the first two (2) misrepresentations that the District allowed the Developer to dig up the Neighbor's property and place its footings and drainage pipe in this area.[4] The third misrepresentation served to satisfy the District that the Properties were excepted from the area requirements of section 401.3 of the zoning regulations.

On May 23, 2003, permits were issued for the foundation for each of the Properties (Permit Nos. B451615, B4561616 & B451617). Some time near the end of June 2003, the Properties were fenced in. Included in the fenced area was the private walkway behind the Neighbors' properties. This spurred the Neighbors into investigating their deeds to see if the Developer was blocking off their properties.

During the first week in July, the Pepco substation was demolished. That same week, on or about July 7, 2003, the Developer blocked off the Neighbors' gates at the rear of their properties by placing plywood against the gates and using large screws to secure the plywood to the historic fences. Subsequently, the Developer excavated the private right of way of the Neighbors without advance notice, warning or permission. This action alerted the Neighbors of potential problems to come and, as a result, they diligently started inquiries so as to ascertain the status of the various permits for the Properties However, their efforts were hindered by continued misinformation provided by DCRA including, but not limited to, the repeated assurances that, (1) as these lots were substandard, before a building permit would be issued, the matter would have to go before the Board for a variance; (2) foundation permits could be issued, even if zoning relief would be required for the above-grade portion of the structure; and (3) no building permit applications were on file.

While the Neighbors were attempting to work through the maze of DCRA, on July 25, 2003, the Developer applied for and received plumbing permits for each of the Properties.

Becoming increasingly frustrated with the lack of or mis-information provided by DCRA, the Neighbors, while still continuing their own investigation, sought out zoning counsel to assist them in determining: (a) if the proposed construction was in compliance with the zoning regulations; and, if not (b) what remedies were available.

Meanwhile, the Neighbors corresponded with the Developer about the encroachment and trespass on the property, as well as to their belief that the on-going construction was in violation of the zoning regulations. By letter dated August 8, 2003, the Developer, acknowledged its

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[4] The exact nature and purpose of the drainage pipe has been a moving target. According, the Neighbors have asked the Developer to provide proof of the City's approval for this work or, as the Developer claims, proof that the District mandated that the Developer perform work under private property that does not belong to the Developer.

trespass but dismissed it claiming that it "hoped to restore the easement by October 30, 2003." With regard to the alleged zoning violations, the Developer 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.

Shortly after sending its August 8, 2003 letter to the Neighbors, Mr. Stoneburner and Mr. Doefler visited Ms. Smith at her home. During this visit, both gentlemen acknowledged that they had initially been informed by DCRA that they could only build two (2) home on the Properties as a matter of right and that it took them six (6) months to figure out how to build three (3). It is clear from these statements that the Developer (1) had no intention of complying with applicable regulations, including the zoning regulations, and (2) was solely motivated by profit, no matter how gained, as evidenced by the quick turn around in construction and insistence of continuing with construction despite notice that it development may be at risk of having to be torn down. In addition to showing the Developer's true motivation, this statement was threatening in tone and intended to discourage the Neighbors from pursuing their rights to see that the applicable regulations were followed and enforced.

Clearly, the Developer went about obtaining its approvals in a piecemeal fashion and with the intention of misleading the government. Given the material nature of the misstatements contained in its permit applications, not only were the Neighbor's kept in the dark about the noncompliance of the development with the zoning regulations, DCRA was likewise fooled. In fact, it was not until the undersigned counsel sent DCRA a letter clearly outlining the misrepresentations of the Developer that DCRA grasped the fact that the construction was not as a matter of right. Namely, that DCRA had been misled into authorizing the subdivision application and the subsequent issuance of permits. Accordingly, on or about September 16, 2003, four (4) days after the Neighbors filed the instant appeal, DCRA issued a stop work order.

Should the true intentions of the Developer still be at issue, the subsequent actions of the Developer dispel any doubts. First, despite full knowledge that continued construction was at its own risk, the Developer opted to proceed with construction. At the time the stop work order was imposed, the improvements were barely above-grade. Second, despite being allowed to move forward with construction, the Developer requested, and was granted, an expedited hearing based on the fear that exposure would result in damage to the Properties "due to the quick onset of winter and potential for adverse weather effects on the partial construction, the applicant and DCRA are anxious to resolve the issue."

As in the Sisson case, the Neighbors had no control over the piecemeal application process taken by the Developer or the material misinformation provided in that process by the Developer. Additionally, the Neighbors had no control over the inability of DCRA to provide accurate information to the Neighbors. Thus, to the extent that the Board finds that any of the points appealed by the Neighbors were untimely filed, despite their diligent efforts, an extension of time is warranted under subsection 3112.2(c). Given that any delay was caused by the Developers subversive actions, there is no prejudice to any party or property owner.

B. Response to Additional Comments in the Developers Submission.

The Developer claims that the Neighbors have made various misstatements in their pleadings. However, to the extent that any of their claims, upon continued research and investigation, proved to be without merit, such claims have been withdrawn by the Neighbors.[5]

For example, as to the alleged trespass onto the Neighbors' properties, the mere fact that the Developer has put the property back does not mitigate this damage, as the trespass is ongoing. The Developer, despite comments in its filing, does not deny that there is a drainage pipe under the Neighbor's right of way or that there is "spillage" from the foundation of the new construction under the right of way. Rather, the Developer dismisses the import of these trespasses, as they are subsurface. To the extent the Developer relies on the wall check to refute its own admissions to the subsurface trespasses, the wall check merely verified what was above-grade.

However, the true issue at hand is the zoning violations.

As to the reviews by DCRA of the project, as explained above, approvals were, presumably, granted based on the Developers misrepresentations. This is supported by the fact that, shortly after the August 27, 2003 letter to DCRA on behalf of the Neighbors outlining the history of the representations of the Developer and the resulting zoning violations, DCRA issued a stop work order finding that the subdivision plat was erroneously issued and requiring the Developer to apply for the necessary variances. The documents filed by the Developer speak for themselves and support the instant appeal.

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[5] These claims were made in good faith and upon investigations with the District, which failed to result in evidence that the Developer had correct authorizations. However, upon further investigation after filing the appeal so as to preserve the Neighbor's rights, contrary evidence was provided by the District.

III. THERE IS NO BASIS FOR EXEMPTION OF THE PROPERTIES FROM THE AREA REQUIREMENTS OF SECTION 401.3 OF THE ZONING REGULATIONS.

A. 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 of record – Lots 26, 27 and 28. The required lot width and area in the R-4 zone district is eighteen feet (18') and 1,800 square feet, respectively. 11 DCMR § 401.3. As illustrated below, each of the Properties is nonconforming by way of both lot width and area.

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.

1. 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. *See, e.g.* BZA Application No. 17034, December 2, 2003 Transcript at 34 – 46. As of that date, the Pepco Property was improved with the Pepco substation, not three (3) townhouses, as alleged by the Developer.

With regard to the Developer's argument that the Pepco substation somehow grandfathers the use of the Property as substandard lots, this is simply not the case. Although it is unknown why the 1942 through 1948 documents regarding the substation show the assessment and taxation ("A&T") lots (lots 800-802), the structure was actually constructed on record lot 4. Moreover, the applicant's argument ignores the plain language of this provision which states that "***the building may not be enlarged or replaced by a new building*** *unless it complies with all other provisions of this title.*" These buildings, which replace the Pepco substation (which, in turn, replaced the previous row houses on the Property) do not comply, as they are constructed on substandard lots.

Finally, section 3202.3 prohibits the construction on anything but a record lot.[6] Thus, the mere fact that prior to 1958, improvements had been constructed on A&T lots on the Property does not serve as justification to violate section 3202.3, or the conversion of A&T lots into record lots.

2. 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. 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 were improved as of November 1, 1957. 11 D.C.M.R. § 401.2; *see* BZA Application No. 17034, December 2, 2003 Transcript at 34 – 46 (finding that November 1, 1957 is the date to look to in determining whether the property is unimproved for the purpose of this section).

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[6] Section 3202.3 provides that:

> Except as provided in § 2516 and § 5 of An Act To amend an Act of Congress approved March 2, 1893, entitled "An Act To provide a permanent system of highways in that part of the District of Columbia lying outside of cities, and for other purposes, approved June 28, 1898 (30 Stat. 519, 520, as amended; D.C. Official Code § 9-101.05(2001)(formerly codified at D.C. Code § 7-1 14 (1995 Rep].))", a building permit shall not be issued for the proposed erection, construction, or conversion of any principal structure, or for any addition to any principal structure, *unless the land for the proposed erection, construction, or conversion has been divided so that each structure will be on a separate lot of record*; except buildings and structures related to a fixed right-of-way mass transit system approved by the Council of the District of Columbia. Any combination of commercial occupancies separated in their entirety, erected, or maintained in a single ownership shall be considered as one (1) structure.

(Emphasis added.) Thus, contrary to the applicant's assertions during community meetings, it could not have constructed the row houses on the previously existing A&T lots as a matter of right. Rather, the applicant would have been required to file for a special exception pursuant to section 2516 of the zoning regulations, or for a variance from section 3202.3, to allow three principal structures on a single lot of record.

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. Furthermore, Lot 4 was improved as of November 1, 1957.

3. 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 in 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.

B. 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 Developer's own actions.

The Developer 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. Construction has not been in accordance with the Developer's plans in that they excavated the adjoining property in order to construct their retaining walls and lay drainage piping. 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 misrepresentations of the Developer concealed the fact, from both the Neighbors, as well as the District, 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 Developer 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 Developer applied for applications for permits on a piecemeal basis, rather than contemporaneously, as well as the unprecedented expediency of the construction even after learning that such construction may be required to be torn down.

Because the Properties, created by the Developer'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 refused to take any action. When DCRA finally did issue a stop work order, despite requiring the Developer to apply for a variance, it allowed the illegal construction to continue.

CONCLUSION

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

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI, LLP

By: _____
Richard B. Nettler
Jeannine Rustad Zigner

210 D Street, S.E. - Chronology

February 20, 1948 Certificate of Occupancy No. 118519 issued for Pepco substation.

November 1, 1957 Trigger date for sections 401.2 and 401.3 of the Zoning Regulations (lot must be unimproved and in single ownership as of this date).

May 12, 1958 Trigger date for section 401.1 of the Zoning Regulations (building must be existing as of this date).

June 14, 2002 Developer closes on purchase of the Properties

End June 2002 Sign erected announcing the coming of three luxury town homes (no mention of size/lot dimensions)

July 1, 2002 Date of plans for proposed new row houses – these plans were submitted with the permit applications

- Page C2 – private right of way to west of the Property listed as an "alley"
- Plans 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"

September 30, 2002 Subdivision Plat recorded subdividing Lot 4 in to Lots 26, 27 and 28

Nov. 5 or 11, 2002 Applicant applies for raze permit for 210 D Street, S.E., (lots 800,801 & 802 in square 763). Application is dated Nov. 5, 2002 but wasn't signed until Nov. 11, 2002.

- Owner of Property listed as Folger Park North, LLC
- Address of Owner: 5000 Gardner Drive, Alexandria, VA 22304
- W.J. Maiden signing for owner.
- Per application & DC sign-offs, no environmental review.
- Description: ***Raze Ancillary STORAGE Building. No Electric or Plumbing Utilities***

November 13, 2002 Demolition Permit No. B424724 issued. Building listed as "Ancillary storage building, no electric or plumbing utilities".

February 11, 2003 James Marsh and Mary Ann Snow attend ANC 6B meeting on HBRB design review and obtain copy of plans from Alger Stoneburner; Stoneburner mentions existence of deed of right-of-way behind Neighbors' properties and Property.

February 27, 2003 Louise Smith and Mary Ann Snow attend Historic Preservation Review Board Meeting re: architectural renderings submitted by the developers; architect on HPRB (Amy Weinstein) comments that she does not understand how developers were able to get a variance.

Nancy Metzger, Capitol Hill Restoration Society tells Mary Ann and Louise that Stoneburner told CHRS that they were building as a matter-of-right because there previously had been three town homes on the site.

April 2, 2003[1]

Application for building permit for 206 D Street, S.E. filed (Lot 26)

- Owner: Folger Park North, LLC
- Filed by Elizabeth Johnson
- Address of owner listed as 206 D Street (210 crossed out)
- Box 13 – existing use listed as vacant
- Box 43 – greenery listed as 20%
- Box 54 – no driveway
- Box 55 – no sheeting/shoring necessary
- Zoning sign off dated **July 22, 2003**

Application for building permit for 208 D Street, S.E. filed (Lot 27)

- Owner: Folger Park North, LLC
- Filed by W.J. Maiden
- Address of owner listed as 208 D Street (210 crossed out)
- Box 13 – existing use listed as vacant
- Box 43 – greenery listed as 20%
- Box 54 – no driveway
- Box 55 – no sheeting/shoring necessary
- Zoning sign off dated **July 22, 2003**

Application for building permit for 210 D Street, S.E. filed (Lot 28)

- Owner: Folger Park North, LLC
- Filed by W.J. Maiden
- Address of owner listed as 210 D Street
- Box 13 – existing use listed as vacant
- Box 43 – greenery listed as 20%
- Box 54 – no driveway
- Box 55 – no sheeting/shoring necessary (yes checked and then scratched out)
- Zoning sign off dated **July 22, 2003**

April 21, 2003

Application for foundation permit filed for 210 D Street, S.E. (Lot 28)

- application signed and dated 4/21
- Owner: Chris Doefler
- Filed by W.J. Maiden
- Address of owner listed as 210 D Street, S.E.
- Box 47 – answers "yes" to projection beyond building line; does not answer 48-52, as required.
- Box 55: No sheeting/shoring necessary
- Attach Certificate of Occupancy for 610 D Street, S.W. (Square 495, Lot 839)

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[1] Developer, in its application to the BZA, claims that building permit applications were filed on August 8, 2002.

- Notation on section J "Restrictions of the Permit" was "Approved for foundation only[2]

April 29, 2003

Application for foundation permit filed for 206 D Street, S.E. (Lot 26)

- application dated 4/29; signed on 4/30
- Owner: Chris Doefler
- Filed by Elizabeth Johnson
- Address of owner listed as 210 D Street, S.E.
- Box 42 – total lot area not provided
- Box 47 – answers "yes" to projection beyond building line; does not answer 48-52, as required.
- Box 55 - No sheeting/shoring necessary
- Attach Certificate of Occupancy for 610 D Street, S.W. (Square 495, Lot 839)
- Notation on section J "Restrictions of the Permit" was "Approved for foundation only (same on Building permit control batch sheet)
- Environmental Intake Form: Applicant checks "no" on questions 1-3. Question 1 asks "Does the owner of this site own adjacent or abutting property?" Question 3 asks "Is additional activity planned by the applicant for this site or any site within the same square during the next three years that requires a permit?" Yes answers to either of these questions require the submission of a site plan to the EIS Coordinator of DCRA. If no plan exists, the applicant is required to submit a written explanation to the EIS Coordinator.

Application for foundation permit for 208 D Street filed (Lot 27)

- Application unsigned
- Owner listed as Chris Doefler
- Filed by Elizabeth Johnson
- Address of owner listed as 210 D Street, S.E.
- Box 47 – answers "yes" to projection beyond building line; does not answer 48-52, as required.
- No sheeting/shoring necessary
- Attach Certificate of Occupancy for 610 D Street, S.W. (Square 495, Lot 839)
- Notation on section J "Restrictions of the Permit" was "Approved for foundation only (same on Building permit control batch sheet)
- Environmental Intake Form: Applicant checks "no" on questions 1-3. Question 1 asks "Does the owner of this site own adjacent or abutting property?" Question 3 asks "Is additional activity planned by the applicant for this site or any site within the same square during the next three years that requires a permit?" Yes answers to either of these questions require the submission of a site plan to the EIS Coordinator of DCRA. If no plan exists, the applicant is required to submit a written explanation to the EIS Coordinator.

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[2] Neither the Control Batch nor the Environmental Intake Form not provided to Appellants by DCRA sheet not provided to the Neighbors by DCRA

May 23, 2003	Permit No. B451616 issued (foundation Lot 26) Permit No. B 451615 issued (foundation Lot 27) Permit No. B451617 issued (foundation Lot 28)
In or about June 2003	Property is fenced in, including the property behind Neighbors' fences, and the trailer is placed on the public alley; Jim measures lot line depth of our house and compares it with measurements on builder's plans.
June 30, 2003	Mary Ann Snow obtains from the Register of Deeds certified copy of 1928 deed providing a perpetual right of way over area behind fences of 318, 320, 322, 324 and 326 Second Street, S.E.; same day, Mary Ann Snow calls Maiden & Associates, speaks with Phil Maiden, and tells him their plans contain an inaccurate measurement; Maiden says plans are only "preliminary."
Between approx. June 30 & July 8, 2003	Former Pepco substation is razed.
Week of July 7, 2003,	Neighbors' fences are boarded up and their property/right-of-way is excavated. This conduct alarms Neighbors, and raises the fear that the developers may try to build on their right-of-way. Neighbors' research on zoning regulations begins, as well as calls to ANC 6B, Capitol Hill Restoration Society, and the Department of Consumer and Regulatory Affairs for information and assistance. SMD member of ANC recommends that the Neighbors hire an attorney.
July 22, 2003	Zoning sign off on applications for building permits
July 25, 2003	**Application for plumbing permit for 206 D Street filed (Lot 26).** - Owner – Chris Doefler - Owner address – 210 D Street Plumbing Permit PLBG59014 issued **Application for plumbing permit for 208 D Street filed (Lot 27).** - Owner – Chris Doefler - Owner address – 210 D Street Plumbing Permit PLBG59013 issued. **Application for plumbing permit for 210 D Street filed (Lot 28).** - Owner – Chris Doefler - Owner address – 210 D Street

Plumbing Permit PLBG59011 issued

July 2003 Mary Ann Snow visits DCRA and leaves a note for Juan Scott, building inspector, regarding the razing of the building without a permit.

Approx. end July/ Early August 2003 Neighbors ask developers' site superintendent to see permits - Stan shows Mary Ann Snow permits for foundation; no building permit; Louise Smith is told the permits are "all downtown;" Mary Ann Snow calls DCRA repeatedly during July and August to discuss the zoning and building permit issues; is told repeatedly that the lots must be a minimum 18' feet wide & 1800 square feet, and that anything less will require a variance; DCRA also says no building permits had been issued for the property; could not find a permit to raze the building.

End July/early Aug. FIRST STOP WORK ORDER posted on basis of no raze permit.

Mr. Scott later found raze permit, and withdrew first stop work order.

August 4, 2003 Mary Ann Snow calls the Office of Zoning and speaks with Richard Nero, who says the procedure is that the Zoning Administrator would examine the building permit applications to make sure they were in compliance with zoning regulations, and would be rejected if only 16 feet wide in an R4 district and referred to the BZA for a variance. Mr. Nero checked their records, and stated that no applications for a variance were on file with respect to this property; he stated, further, that if permits were to be issued, we would have to appeal the issuance of the permits under which they are proceeding with construction.

Mary Ann Snow calls the DCRA permit branch and was told that the only type of applications on file for construction at this location were for a new foundation - "family flat," and, upon information and belief, for plumbing; there were no building permits on file. Ms. Epps provided Mary Ann Snow with the application numbers for the foundation permits (B451616 - 206 D Street, S.E.; B451615 - 208 D Street, S.E.; and B451617 - 210 D Street, S.E.).

Mary Ann Snow also spoke with Mr. Lenny Douglas with the permit issuance branch of DCRA. Mr. Douglas said that a building permit is not needed until construction goes above ground; since the foundation is underground, no building permit is needed at this time.

Mary Ann calls Mr. Frank Moody with the permit intake branch - no building permit applications on file. Mary Ann also speaks with Rochelle Joseph at DCRA, who advised that when the developers apply for a building permit, they would be told they have to file for a variance because the lots do not conform with R4 width and area zoning requirements.

August 5, 2003 Mary Ann calls OSHA to see if that agency had any jurisdiction over possible PCB contamination and potential worker exposure to it; told the report had to come from an on-site employee.

Mary Ann Snow also sends an email to David Sheldon, ANC 6B, informing him that she learned that the developers only permits for a foundation and for plumbing only, that they did not have building permits and had not applied for building permits, and that they dug into our right-of-way, and asked for his help.

August 7, 2003 Letter sent by neighbors to developers regarding the developers' destruction of neighbors' land and the substandard width and area construction of the lots.

August 8, 2003 Developers write letter to neighbors in response.

August 9, 2003 Larry Smith visits "Stan" (the superintendent of the Properties). Stan informed Larry that he had made a phone call overseas to talk about the problem of erecting a wall on the west side of the Properties without excavating the walkway and was informed by the Developer just to take out the walkway.

Week of August 11, 2003 Developers visit Louise Smith at her home and ask if she like their letter. They explain that they were initially told by DCRA that they could only build two town homes, but they wanted to build three, and that it took them about six months to figure out how they could build three.

(on or about), Larry and Louise Smith, Jim Marsh and Mary Ann Snow meet and decide to hire an attorney; Larry Smith initiates contact with Piper and Rudnick law firm to see if they will represent the Neighbors.

Repeated calls to DCRA are not returned, or representative say to call someone else; numerous voice mail messages are left.

August 12, 2003 Mary Ann Snow sends summary of information obtained to date to Piper and Rudnick

August 13, 2003 Mary Ann Snow speaks with representative of DCRA (name not recorded) and is told to formally request a ruling on whether a variance is required, and request that no further permits be issued until a ruling on the variance issue is provided.

Conference call with attorney at Piper and Rudnick is scheduled for 8/15/03.

Around this time period, foundation floor is erected, extending about ten to twelve inches into our property/right-of-way. Black pipe is laid in same area. Photographs are taken.

August 14, 2003 Mary Ann Snow visits DCRA, requests copies of all applications pertaining to 210 D Street, S.E.; picks up copies of applications for each of the lots; speaks with Ms. Yavocka Young, who takes Mary Ann Snow to surveyor's office; representative in Surveyor's Office says that the Pepco lot was always only one record lot; the three lot lines were tax and assessment lots - never lots of record; Mary Ann Snow orders copy of subdivision plan, but leaves it with Ms. Young, who said she would speak with one of her supervisors about it, and try to schedule a meeting.

Mary Ann Snow sends copy of 8/7/03 letter to David Sheldon, ANC 6B representative.

Mary Ann Snow speaks by phone with attorney from Piper and Rudnick; the law firm states they could handle the encroachment issues, but not the zoning issues. Neighbors decide to search for zoning counsel.

August 15, 2003 Mary Ann Snow has conversation with Ms. Young at DCRA, who said she spoke with Mr. Noble, who stated that she should meet with Ms. Ogunneye, the chief zoning technician; Ms. Ogunneye is out until 8/22/03, so Ms. Young advised that Ms. Snow call Ed Reeves or Yvonne Epps to schedule a meeting with Ms. Ogunneye. Neither one could be reached; either their voice mail was full or they did not return the call. Ms. Young then recommended that Ms. Snow schedule a meeting with Ms. Ogunneye for 8/25/03 by sending her an email requesting a meeting on that date. Ms. Young provided email address of Faye.Ogunneye@dc.gov. Ms. Young said she will sit in on the meeting. Email sent by Ms. Snow to Ms. Ogunneye.

August 16, 2003 Neighbors begin communications with Robins, Kaplan, Miller & Ciresi L.L.P. for legal representation.

August 19, 2003 Counsel for Neighbors meeting with DCRA, including Denzil Nobel on another matter, brings up potential problems with the Property.

August 20, 2003 (on or about) Mary Ann Snows picks up copy of subdivision plan from Ms. Young at DCRA; Ms. Young says she will direct the Neighbor's questions to Mr. Noble.

August 25, 2003 Building permits are issued for construction of row houses (permit nos. B454260 for Lot 26, B454262 for Lot 27, and B454261 for Lot 28)

- Ms. Ogunneye had not responded to request for a meeting; apparently had not returned to the office.

August 26, 2003 Mary Ann faxes FOIA letter to Thomas Collier, Esquire, U.S. Department of Health, Office of General Counsel, per his direction, requesting information on environmental impact studies on the Pepco property (To date, no response received).

August 27, 2003 Counsel for Neighbors writes DCRA (Theresa Lewis and Denzil Nobel) regarding Property, outlining concerns and requesting meeting within the next few days.

August 30, 2003 Neighbor's write Councilmember Ambrose re: Property.

September 3, 2003 Letter received by counsel for Neighbors from Joseph McClarley of DCRA (customer service) acknowledging receipt of counsel's "September 2, 2003" letter regarding the Property & indicating a response will be sent within 7 business days.

Mary Ann Snow speaks with Toye Bello of the Office of Zoning. Mr. Bello surprised that construction is new construction and that none of the lots (*ie.*, Lots 26, 27 & 28) met the minimum 1800 sf zoning requirement

September 9, 2003 Mary Ann Snow speaks with building inspector at DCRA regarding the demolition of our right-of-way and the subsidence from the excavation; says inspector will be sent out, and is told to call public space.

Mary Ann speaks with Connie Wheeler at public space, who states that since the foundation wall had been erected next to the alley, the subsidence cannot be seen; it's our word against theirs, photographs are not sufficient, and they can do nothing.

September 11, 2003 Counsel for Neighbors writes DCRA (Denzil Noble and Theresa Lewis) attaching Aug. 27 letter and notifying DCRA of the denial of a public space permit to the developer. Request inspection of work at the Property.

September 12, 2003 Neighbors' appeal is filed with the Board of Zoning Adjustment; about the same time, the private right-of-way is replaced, prior to the hurricane Isabel's occurrence beginning on Thursday, September 18, 2003.

September 16, 2003 Denzil Noble writes the developers stating that the subdivision is flawed and should not have been approved, and that the developers need to seek a variance through the Board of Zoning Adjustment.

SECOND STOP WORK ORDER ISSUED. The construction consists solely of foundation and foundation walls.

September 22, 2003 (in or about week of 9/22/03) - construction RESUMES.

September 25, 2003 Counsel for Neighbors receives letter from Mr. Noble (dated September 16, 2003) that stop-work has been imposed.

October 1, 2003 Construction resumes

October 1-3, 2003 Counsel for Neighbors attempts to reach Denzil Noble at DCRA to discuss (and/or meet) whether (and) why stop work order was lifted. No response received

October 6, 2003 The following response is received from DCRA:

> Ms. Zigner
>
> This is matter is pending an appeal before the BZA in which you represent the appellant. The appellant appealed my decision to issue the building permits. The General Counsel has advised me that any matters pending before BZA or any courts in the District of Columbia, the parties must contact the Office of the General Counsel for a meetings relating to the case. The General Counsel can be reached at (202) 442-8475.
>
> Denzil L. Noble
>
> Administrator
> 941 North Capitol Street, N.E. - Suite 2000
> Washington, D.C. 20002
> (202) 442-4542

October 6 – end Oct. 2003 Attempts made by counsel for Neighbors to contact DCRA Counsel to set up meeting between parties and to ascertain why stop work order was lifted.

October 23, 2003 Office of Planning ("OP") recommends expedited hearing. Reason for expedited hearing "due to the quick onset of winter and potential for adverse weather effects on the partial construction, the applicant and DCRA are anxious to resolve the issue." (This, despite construction ongoing)

October 31, 2003 Appeal supplemented to include the lifting of the stop work order, referenced in Mr. Noble's letter dated September 16, 2003, which was received by Robins, Kaplan, Miller & Ciresi on September 25, 2003.

November 4, 2003 Meeting with Office of Planning.

- Informed that developer granted DCRA an indemnity in exchange of being allowed to proceed with construction

Developer writes Tracy Gruis, owner of adjoining properties, and states that:

> The building has been constructed under city approved and permitted set of drawings and built in accordance with standard construction practices. You specifically mentioned concrete and black

plastic drainage pipe. The concrete could only refer to miscellaneous overflow or spillage, and would be 8 feet or more underground, and provides no conflict with any future use of your site.

The black plastic pipe was shown on the approved plans and provides hydrostatic pressure relief to both sides of the site.

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY

DECEMBER 2, 2003

+ + + + +

The Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS,	Chairperson
CURTIS H. ETHERLY, JR.,	Vice Chairperson
DAVID A. ZAIDAIN,	Board Member (NCPC)
RUTHANNE G. MILLER,	Board Member

ZONING COMMISSION MEMBER PRESENT:

ANTHONY J. HOOD	Zoning Commission Member

Office of Zoning STAFF PRESENT:

Clifford Moy
Beverly Bailey
John K.A. Nyarku

conditions on the motion of Zaidain, seconded by Ms. Miller. Also in favor of the motion the chairman, Mr. Etherly, and Mr. Hood. Would you like staff to go over the changes in the conditions?

CHAIRPERSON GRIFFIS: Love to but we have no time.

MR. MOY: Okay, conditions as recorded.

CHAIRPERSON GRIFFIS: Fabulous, thank you.

MR. MOY: The next case, application, is the appeal Application No. 17034 of Advisory Neighborhood Commission 2E pursuant to 11 DCMR ? 3100 and 3101 from the administrative decision of the Zoning Administrator in the issuance of a final and bidding ruling letter dated July 12, 2001 to the law firm of Shaw Pittman confirming the ability to develop three lots on the east side of the 1500 block of 32nd Street, N.W. with three rural dwellings.

The appellant alleges that the Zoning Administrator's decision is flawed and contains factual and legal errors. The R3 zoned subject premises are located in the 1500 block of 32nd Street, N.W. That's on the east side in Square 1270, Lots 19, 20 and 21.

This case was convened by the board at its special public meeting on November 25th, 2003. After

CHAIRPERSON GRIFFIS: Others?

VICE CHAIRPERSON ETHERLY: I agree with Ms. Miller's interpretation.

CHAIRPERSON GRIFFIS: Thank you.

MS. MILLER: I think that if we conclude that the ZA erred with respect to its determination whether the property was unimproved as of that date then that decides that the property owners could not come in as a matter of right by means of 401.2 and we could just grant the appeal on that basis.

And, therefore, I would move that we grant the appeal of the ANC 2E that the Zoning Administrator erred in his July 12, 2001 letter granting the ability to the property owners to develop the lots in question as a matter of right.

VICE CHAIRPERSON ETHERLY: Seconded, Mr. Chair.

MR. ZAIDAIN: As a course of deliberation on that issue, I want to make sure that we're clear on what we're determining here. You're not saying that it's based on the C of O that was proffered? It was based on the evidence of some sort of construction on the property in that time frame, correct?

MS. MILLER: The evidence that the property was unimproved in 1957.

motion encompasses an error of the Zoning Administrator to just make a determination that the property is improved as of the date that its being looked at. I think it has to go back to November 1, 1957.

CHAIRPERSON GRIFFIS: Okay, anything else?

MR. HOOD: I would just ask we have a motion on the table. I think it was seconded, right?

CHAIRPERSON GRIFFIS: Yes.

MR. HOOD: I would just ask Ms. Miller to restate the motion if you don't mind or if you can come close.

MS. MILLER: Oh, no.

VICE CHAIRPERSON ETHERLY: If I could Ms. Miller perhaps just to assist in that regard, of course not to suggest that you need any but, once again, I would.

As a seconder of the motion I would understand to grant the appeal on the grounds that the Zoning Administrator's decision embodied in the July 12, 2001 letter was flawed and did contain factual and legal errors one of which from a factual standpoint would be the fact that the lot was indeed improved as of November 1, 1957.

And the flip side of that in terms of the

dictionary. We were talking about this last and unimproved was defined as not built on so I think --

CHAIRPERSON GRIFFIS: Well, it goes to the same point that you brought up in terms of how you would, if you relied on the certificate of occupancy, Ms. Miller, as a single family residence wouldn't be issued a certificate of occupancy which means if a house is built there it would never be improved.

MR. HOOD: I'm clear, Mr. Chair. We can proceed with the vote.

CHAIRPERSON GRIFFIS: Very well. The motion is before us and seconded. I would ask for all those in favor of the motion signify by saying aye.

BOARD: Aye.

CHAIRPERSON GRIFFIS: And opposed? Abstaining? Mr. Hood, abstaining?

MR. HOOD: No, I'm not abstaining, I'm supporting.

CHAIRPERSON GRIFFIS: Oh, I'm sorry I didn't hear your vote. Okay, very well. Mr. Moy would you mind recording the vote?

MR. MOY: Yes, sir. The staff would record the vote as 5-0-0 to grant the appeal of ANC 2E on the motion of Ms. Miller, seconded by Mr. Etherly, also in favor of granting the appeal the chairman, Mr.

Zaidain and Mr. Hood.

CHAIRPERSON GRIFFIS: Anything else for us to do?

MR. MOY: We have the next case.

CHAIRPERSON GRIFFIS: Well then let's call it.

MR. MOY: That is Application No. 17022 of Edmund Burke School pursuant to 11 DCMR 3104.1 for a special exception to allow an addition to an existing private school and to increase the enrollment from 270 to 320 students and faculty and staff to 70 under Section 206 in the R2 and R5D districts at premises 4101 Connecticut Avenue, N.W. and 2955 Upton Street, N.W. That's in Square 2243, Lot 67 and 68.

On October 28, 2003 the board completed testimony on the application and scheduled its decision for on December 2, 2003. The board requested the following post hearing documents.

First from the applicant testimony provided by Martin Wells, specifically in references to pages 54, 57 and 91 of the final report of the Connecticut Avenue Transportation Study and that was submitted on November 18, 2003 by the applicant and that's in your case folders as Exhibit 191.

The board also requested any responses to