



January 29, 2010

Hand Delivered

Marc Loud, Chairperson
D.C. Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, DC 20001

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D.C. OFFICE OF ZONING
2010 JAN 29 PM 2:53

**Re: BZA Appeal No. 18029
Pre-Hearing Statement of Owner Vornado/Charles E. Smith**

Dear Chairperson Loud and Members of the Board:

On behalf of Vornado, the owner of the property that is the subject of the above-referenced appeal, attached please find our pre-hearing statement. As discussed herein, the Zoning Administrator did not err in approving the issuance of the certificate of occupancy for the Planned Unit Development ("PUD") constructed at 1255 25th Street NW (the "Property"). The Zoning Administrator's determination and issuance of the certificate of occupancy should be upheld for the following reasons:

1. After over two years of extraordinary efforts to secure the approvals required to construct the Francis Field improvements, as detailed on the Timeline attached as Exhibit A of the Statement, Vornado has secured the approval and building permit required to begin construction, construction is contracted to start on February 2, 2010 and completed by May 30, 2010. Even if the Board were to read Condition 10 consistent with FFF's interpretation, the underlying issue on appeal is, or will shortly be, moot.
2. The Zoning Administrator's determination that Vornado had completed a timely delivery of the amenities called for in Condition 10 was reasonable given the language of the Condition as well as intent expressed in the record before the Zoning Commission.
3. It was reasonable for the Zoning Administrator to broadly construe the language of Condition 10 to permit the use of an escrow agreement based on the particular obstacles that arose, which were out of Vornado's control and prohibited final approval and actual construction of the amenities. Prior decisions of this Board have authorized the use of escrow agreements to satisfy PUD conditions when delivery of a public benefit was otherwise delayed.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18029

EXHIBIT NO. 14

Board of Zoning Adjustment
District of Columbia
CASE NO. 18029
EXHIBIT NO. 14

4. The record demonstrated that the Zoning Administrator took extraordinary and exceptional measures to ensure and affirm compliance with the PUD.

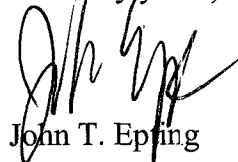
In its pre-hearing filing, the Friends of Francis Field ("FFF") reference multiple issues that are either irrelevant or beyond the jurisdiction of the Board. **This appeal is narrowly focused on whether Vornado completed a timely delivery of the amenities required by Conditions 10(b) and 10(c) of Z.C. Order No. 06-35 (the "Order").** These conditions are repeated below for the Board's convenience:

10. No certificate of occupancy for any building approved by this Order shall be issued until the following amenities have been provided:

- b. Francis Field: contribution of design, materials, and labor for improvements to Francis Field to (1) prepare a landscape plan for Francis Field that includes the addition of trees, park lighting, furniture, trash receptacles, and a drinking fountain and (2) following approval by DPR, install the improvements, consistent with the Memorandum of Understanding included with Exhibit 40 of the record, valued at \$150,000.*
- c. The landscape and streetscape improvements to 25th Street, N.W., in accordance with the plans marked as Exhibits 27, 31, and 40 of the record. These improvements shall include, subject to approval by the appropriate District agency or agencies, the removal of the existing chain-link fence along the west side of 25th Street N.W. and replacement with an ornamental metal fence.*

As discussed herein, Vornado has satisfied all of the conditions of the Order, including the conditions tied to the improvements to Francis Field and 25th Street. Furthermore, the improvements to Francis Field and 25th Street have been permitted and are under construction. The decision of the Zoning Administrator should therefore be affirmed or the appeal dismissed as moot.

Sincerely yours,



John T. Epling



David Avitabile

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2010 a copy of the attached letter, statement, and exhibits was served by hand, U.S. Mail, and/or electronic mail on the following:

Gary Griffith
Secretary, Friends of Francis Field
2501 M Street NW #609
Washington, DC 20037

Jay Surabian
Assistant Attorney General
Office of the Attorney General of the District
of Columbia
Office of the General Counsel for the
Department of Consumer and Regulatory
Affairs
941 North Capitol Street, NE, Suite 9400
Washington, DC 20002

Rebecca Coder
Chair, ANC 2A
2501 M Street, NW #721
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A handwritten signature in black ink, reading "David Avitabile", is written over a horizontal line.

David Avitabile

BZA APPEAL NO. 18029

2010 JAN 29 PM 3:05

PRE-HEARING STATEMENT OF THE OWNER

At issue in this appeal is whether the Zoning Administrator erred in approving the issuance of a certificate of occupancy to Vornado/Charles E. Smith (“**Vornado**”) for a planned unit development (“**PUD**”) located at 1255 25th Street (the “**Property**”) because Vornado had not yet physically constructed proposed improvements to Francis Field as well as related streetscape improvements to 25th Street. Francis Field is a public park that is operated by the District Department of Parks and Recreation (“**DPR**”) and located across the street from the PUD.

Prior to the issuance of the CO, Vornado had completed the design of the improvements to Francis Field and had deposited the remaining amenity funds into an escrow account that specifically reserved the funds for the construction of improvements to Francis Field. Thus, as discussed below, the Zoning Administrator did not err in his decision to issue the CO because Vornado had, in fact, completed delivery of the proposed improvements.

Furthermore, as discussed herein, the terms of the escrow agreement were narrowly drawn to allow use of the escrowed funds only for improvements to Francis Field. The escrow agreement also permitted Vornado to actually construct the improvements once the design was approved by the relevant District and federal agencies. That approval has finally been granted, and construction is contracted to begin on February 2, 2010 and scheduled for completion in May 2010. Therefore, construction of all of the improvements called for under the conditions of the PUD Order will soon be completed.

I. The Appeal is Moot.

Here, even if the Board were to find the Zoning Administrator had erred in concluding that delivery of the money to construct the improvements to Francis Field into the escrow account was insufficient to permit issuance of the certificate of occupancy, the appeal is essentially moot since:

- Vornado has already completed the design of the improvements to Francis Field called for in Condition 10(b)(1), at a cost of \$38,230.
- Vornado has secured the required building permit to construct the improvements to Francis Field. A copy of the permit is attached as Exhibit B and a copy of the approved permit plans are attached as Exhibit C. The permit authorizes construction of the elements called for under Condition 10(b) as well as the fence called for under Condition 10(c).

- Vornado has contracted for the delivery of the materials and labor to construct the improvements; and
- Under the terms of the contract, construction will commence on February 2, 2010, and will likely be completed by May 30, 2010.

Through the contract, Vornado will expend more than \$111,770 on materials and labor for improvements to Francis Field that include all of the elements outlined in Condition 10(b). This, when added to the \$38,230 already expended on the design of those improvements, will fully provide the \$150,000 amenity set forth in Condition 10(b). In addition, the contract provides for the completion of the streetscape improvements, including the new fence, called for under Condition 10(c).

As this Board is aware, pursuant to 11 DCMR § 3100.7, the Board may not consider moot questions. The Board has previously concluded that a case is moot when “the legal issues presented are no longer ‘live’ or when the parties lack a legally cognizable interest in the outcome.” See BZA Appeal No. 17085 (2005) at 4-5 (citing Cropp v. Williams, 841 A.2d 328 (D.C. 2004)). For example, in BZA Appeal No. 17085, the Board determined that its subsequent grant of variance relief in a companion case eliminated the zoning irregularities at issue in the appeal and therefore “negated any errors that had been made in creating them.” Id. at 5. The Board concluded that the legal issue as to whether DCRA had erred was no longer “live” and was therefore moot. Id. This decision is attached as Exhibit D.

Here, based on the foregoing, the issue on appeal is or will shortly be moot. First, at a minimum, Vornado has completed the design work contemplated in Condition 10(b), and has actually delivered \$38,230 of the value of the amenity called for in that condition. Second, Vornado has entered into a binding contract for the materials and labor required to install the park improvements, and has received a valid building permit that authorizes the construction work to proceed. Since the contract covers the “materials and labor” for the Francis Field and 25th Street streetscape improvements called for in Condition 10, and the permit authorizes actual construction of the improvements, Vornado has demonstrated significant and substantial compliance with the requirements of Condition 10 and has effectively ensured actual delivery of the “materials and labor” required to install the improvements. Third, construction is expected to be completed by May 30, 2010, at which point the members of Friends of Francis Field and ANC 2A as well as the residents of Vornado’s PUD will be able to use and enjoy the proffered amenity.

Since the amenities called for under Condition 10(b) and 10(c) are under contract to be constructed and will soon be available, Friends of Francis Field’s interest in ensuring delivery of the amenity will soon be met. The issue is no longer “live”, and no further action of the Board is necessary to ensure the actual construction of the PUD amenities. Therefore, the narrow issue on appeal, which is whether the Zoning Administrator erred in issuing the CO based on the use of the escrow account rather than actual construction to complete delivery of the amenities, is moot.

II. The Owner Satisfied All Conditions of PUD Approval, Including Condition 10, Prior to the Issuance of the Certificate of Occupancy.

As discussed in detail below, Vornado fully satisfied the requirements of Condition 10(b), which required, prior to the issuance of the certificate of occupancy for the PUD, a contribution of \$150,000 towards the “design, materials, and labor” for improvements to Francis Field. Vornado also satisfied the requirements of Condition 10(c), which required, prior to the issuance of the CO, the construction of streetscape improvements to both sides of 25th Street, including a new ornamental metal fence along the Francis Field perimeter. In both cases, delivery was satisfied in part through the deposit of funding for park and streetscape improvements into an escrow account that limited the use of such funding to improvements to Francis Field.

A. Condition 10(b) included the design as well as construction of the improvements to Francis Field as a part of the amenity, and the contribution of the design work was completed prior to the issuance of the CO.

FFF alleges that the amenity consists of a landscape design for Francis Field in addition to \$150,000 for improvements for the field. This claim is flatly inconsistent with the plain language of the PUD condition as well as the original memorandum of understanding between DPR and Vornado dated April 5, 2007 regarding the amenity (the “MOU”). Furthermore, the record in the underlying case is clear that the proffered amenity included the cost of the design of improvements as part of the \$150,000 promise, and that FFF was well aware of the terms of this promise.

- The MOU, attached as Exhibit E, specifically acknowledges Vornado’s proffer to provide “design, materials, and labor necessary to provide improvements to Francis Field” (emphasis added) as well as DPR’s “willingness to accept this work.” A plain reading of this sentence clearly demonstrates that “work” included the design as well as the materials and labor. The MOU then details the specific tasks that Vornado will provide, which include both the “preparation of a landscape plan” and installation of the improvements. The MOU concludes that the “proposed work is valued at \$150,000” – again, work clearly including the design as well as materials and improvements.
- Representatives of FFF were copied, by e-mail, on the draft MOU that was sent by Vornado’s counsel to DPR. This e-mail, dated March 15, 2007, was explicit that “the proposed work, including the design, materials, and installation, is valued at \$150,000.” See Exhibit F.
- The language of Condition 10(b) of the Commission’s Order parallels the MOU between Vornado and DPR. Again, its plain language states that the amenity for Francis Field consists of “contribution of design, materials, and labor for improvements to Francis Field to (1) prepare a landscape plan [and] (2) . . . install the improvements” (emphasis added). The condition explicitly states that the proffered amenity should be “consistent with the MOU” and that the amenity is “valued at

\$150,000". The Commission's decision is clear that the proffered contribution consisted of design work as well as materials and labor. It is also clear that the value of the entire contribution is \$150,000.

Consistent with the language of the MOU and Condition 10(b) of its Order, Vornado directed its landscape architect to prepare a landscape plan for Francis Field (the "Master Plan"). The Master Plan, which was prepared over a year-long period through consultation with DPR, the Friends of Francis Field, ANC 2A, and other community representatives, contained the specific features promised in Condition 10(b), which were intended to be constructed as "Phase I" of the improvements to the field. The Master Plan as well as the design for the Phase I improvements were presented to the U.S. Commission of Fine Arts ("CFA") in January 2009 and both were approved by the CFA in September 2009. In total, Vornado expended at least \$38,230 on the design of the Field, which contained all of the features detailed in Condition 10(b). The final approved Master Plan, as well as the Interim "Phase I" Plan containing all of the features called for under Condition 10(b), are attached as Exhibit G.

Therefore, based on the foregoing, the Zoning Administrator reasonably concluded that (i) the design of improvements to Francis Field, as well as the actual improvements, were part of the amenity set forth in Condition 10(b) of the Order, and (ii) Vornado had satisfied a minimum of \$38,230 of its total obligation under Condition 10(b) through actual performance.

B. The contribution of the materials and labor for improvements to Francis Field was completed prior to the issuance of the CO through an escrow agreement, which the Zoning Administrator reasonably determined satisfied the terms of Condition 10(b).

Vornado worked extensively with DPR to secure approval for a park design and to actually move forward with construction of the improvements while the PUD was also under construction. However, a series of events beyond Vornado's control (discussed in Section III and on the timeline attached as Exhibit A) prevented Vornado from satisfying the condition through actual construction of the improvements prior to the issuance of the CO. Therefore, beginning in March 2009, Vornado worked with representatives of DPR and the Zoning Administrator to develop an alternative solution that would satisfy the PUD Condition, ensure the provision of the amenity, and yet permit the occupancy of the PUD while obstacles to construction of the amenity were resolved.

Here, the language in the PUD Order emphasized provision of a "contribution" towards the improvements to Francis Field by the issuance of a CO. The term "contribution" simply requires that the amount promised by Vornado be provided prior to the issuance of the CO; it does not mandate that the actual outcome promised by the amenity be provided prior to issuance of the CO. As a result, the completion of the financial contribution for these amenities, rather than the actual completion of the work contemplated by Condition 10, is all that is required to satisfy the Commission's condition of approval.

A review of the Zoning Commission transcript from the public hearing provides additional support for the Zoning Administrator's interpretation of the condition. At the public hearing on Case No. 06-35, Vornado's representative testified that Vornado promised to "fund the design and implementation of \$150,000 in improvements for Francis Field," fund \$200,000 in streetscape improvements," and commit \$150,000 to Francis Junior High school. See Z.C. Tr. Mar. 26, 2007 at 24-25 (emphasis added). The ANC representative similarly described the amenities package as "essentially . . . cash." Id. at 95. The OP Report also referenced a "\$150,000 contribution towards facilities improvements at Francis Field", a "\$150,000 contribution toward technological and facilities improvements to Francis Junior High School", and "\$200,000 towards streetscape improvements" (including the fence) as amenities of the project. See OP Final Report at 7 (emphasis added). In its report, OP did request further definition on how the contributions would be used, which ultimately led to the detailed explanations for the use of each amenity in the final Zoning Commission order. Notwithstanding that request for "exact expenditures" of each promise, OP continued to regard the proffers as "contributions" and "amenity money," and found that the Applicant's proffered contributions and their targeted recipients were acceptable. Id.

Based on this understanding of the amenity as a "contribution," DPR agreed to permit Vornado to contribute the remaining funds for the improvements into an escrow account as satisfaction of its promise. Importantly, the escrow agreement was narrowly drafted in order to limit the use of the contribution to improvements to Francis Field. As importantly, Vornado retained the ability to actually undertake construction of the improvements and draw the escrowed funds once the issues impeding construction were resolved, which provided additional assurance that the improvements would actually be constructed. The escrow agreement, which is attached as Exhibit H, was executed on June 18, 2009, and Vornado completed its delivery of the amenity through a deposit into the escrow account on July 8, 2009.

Therefore, based on the foregoing, the Zoning Administrator reasonably concluded that (i) the escrow agreement constituted a valid "contribution" under Condition 10(b) and (ii) Vornado satisfied the remaining balance of its required contribution (\$111,770) through the deposit into the escrow account. Combined with the \$38,230 spent on design of the field improvements, Vornado thus completed its contribution of \$150,000 toward improvements at Francis Field.

C. Vornado satisfied the provisions of Condition 10(c) through a combination of actual performance and contribution to the escrow account.

Condition 10(c), which required landscape and streetscape improvements to both sides of 25th Street, was satisfied by Vornado prior to issuance of the CO. Streetscape improvements along the east side of 25th Street have been constructed and are completed. The replacement of the fence called for in Condition 10(c) will be constructed concurrently with the construction of the improvements to Francis Field itself. As shown on the design approved by DPR and CFA that is attached as Exhibit G, the design of the Francis Field improvements includes the public space along the west side of 25th Street

and integrates it into the “linear park” that is created at the entrance to the Field, so it makes sense from a construction standpoint to construct the fence at the same time as the other improvements.

As part of the streetscape improvements required under Condition 10(c) on the west side of 25th Street, Vornado agreed, subject to the approval of the appropriate District agency or agencies, to replace the existing chain-link fence along 25th Street with an ornamental metal fence. Therefore, Vornado’s landscape architect included the new fence in the design of the Francis Field improvements. Vornado could not, however, proceed with the actual removal of the existing fence or construction of the new fence until such work was authorized by DPR. To ensure the provision of this fence, Vornado contributed an additional \$36,000 to the escrow account to provide for the replacement fence. This is consistent with the language of Condition 10(c), which explicitly noted that the installation of the fence would be subject to the “approval of the appropriate District agency or agencies.”

Based on the foregoing, Vornado has fully satisfied the requirements of Condition 10(c) through actual completion of streetscape improvements as well as contribution to the escrow account for the cost of the fence.

III. A Broad Reading of Condition 10 was Reasonable in Light of the Circumstances Surrounding Vornado’s Efforts to Deliver the Improvements to Francis Field and 25th Street.

The Commission issued Order No. 06-35 in October 2007. Beginning in late 2007, Vornado began to work extensively with DPR to attempt to secure approval for a park design and to move forward with improvements. However, a series of events that were wholly outside of Vornado’s control arose during the planning and construction process. These events added substantial and unexpected complexity to the design approval process, and frustrated Vornado’s efforts to actually construct the improvements prior to the issuance of a CO for the PUD. These issues included: (i) review of the Master Plan and Phase I Improvements by the U.S. Commission of Fine Arts; (ii) discussions with the National Park Service regarding jurisdiction over Francis Field; and (iii) work under Francis Field by the DC Water and Sewer Authority. Discussions with community organizations (including the Friends of Francis Field and ANC 2A) regarding the programming, use, and lighting of the athletic fields at Francis Field further complicated the approval process for the park design. These events are detailed on the Timeline attached as Exhibit A and are briefly summarized below.

Vornado and DPR spent nearly a year consulting with representatives of the community, including Friends of Francis Field and ANC 2A, on the design of the Field and by December 2008 had secured ANC 2A approval for a Master Plan and the Phase I improvements. DPR and Vornado presented the Master Plan and Phase I improvements to CFA in January 2009, who approved the concept plan but requested further changes. DPR and Vornado intended to present these revisions at the February 2009 CFA meeting.

However, shortly after the January CFA meeting, further progress was put on hold pending the resolution of jurisdictional and related use issues raised by the National Park Service¹, as well as other issues related to WASA inspection work and DPR's own internal decisions regarding the programming and use of the field. These issues were not resolved until July 2009, when NPS agreed to issue a special use permit to DPR to permit use of the NPS-owned side. With the Park Service and other issues resolved, DPR and Vornado returned to CFA in September 2009, and CFA approved the design.

Vornado made extensive efforts and exhausted all reasonable efforts to actually construct the improvements in spite of these obstacles. Indeed, Vornado had a vested interest in completing the improvements prior to the occupancy of its new apartment building, since Francis Field serves as the "front yard" for its new residences. However, by February 2009 it became apparent that red tape and conflicting priorities among government entities would hinder any hope of completing the field improvements by the PUD's anticipated completion in September 2009. Therefore, Vornado, DPR and the Zoning Administrator discussed the escrow agreement as an alternative solution that would ensure the delivery of the amenity prior to the issuance of the CO for the PUD yet still permit Vornado to occupy the new building upon its targeted completion date.

The Zoning Administrator's approval of an escrow agreement as satisfaction of the PUD condition was reasonable given the extenuating circumstances that made actual performance otherwise impossible as well as Vornado's demonstrated commitment to the delivery of the amenities. This Board has ratified the use of an escrow agreement to satisfy PUD conditions in past circumstances. In BZA Appeal No. 16950 (2003), the Board approved a contribution by The George Washington University to an escrow account as a "reasonable attempt" to comply with a condition of approval when strict compliance with the condition of approval itself was not possible. *Id.* at 9. In that case, the Board concluded that when the intended recipient of the amenity money had not yet been established, and an alternate recipient had not been designated pursuant to the process outlined in the condition, it was reasonable for the University to place the amenity in an escrow account until the requirements of the condition could be met. The Board observed that, "not only was this not a violation of [the condition], but it was actually the University's [] attempt to comply with the Condition." *Id.* BZA Appeal No. 16950 is attached as Exhibit I.

Here, it was also reasonable for the Zoning Administrator to determine that an escrow agreement satisfied the intent of the PUD condition. As in Appeal No. 16950, the Zoning Administrator could reasonably determine that strict compliance with the PUD condition would not be possible given the multiple issues facing the applicant that were

¹ Pursuant to a transfer of jurisdiction, the District of Columbia controls the eastern half of the Field, along 25th Street. The National Park Service retains authority over the western half of the Field, which is adjacent to Rock Creek Park.

out of its control. In addition, Vornado had clearly demonstrated deliberate efforts to move the amenity forward. Therefore, given the language of the PUD condition, which required only a “contribution”, and the existence of an escrow agreement that would in fact ensure that the delivered funds be set aside for improvements to Francis Field, it was reasonable for the Zoning Administrator to approve the escrow agreement as a valid satisfaction of the PUD condition.²

IV. The Zoning Administrator’s Decision Was a Careful and Reasoned Determination Intended to Ensure Compliance with the PUD.

The Zoning Administrator’s decision regarding Vornado’s compliance with the conditions of PUD approval was a careful, reasoned decision that considered input from the Friends of Francis Field and involved extra steps to ensure and confirm compliance with the PUD.

- First, beginning in March 2009 and leading up to the issuance of the September 25 certificate of occupancy that is under appeal, representatives of Vornado met with the Zoning Administrator to discuss the issues regarding PUD compliance. During that time period, representatives of Friends of Francis Field also reached out to the Zoning Administrator on multiple occasions to share their views regarding the PUD conditions.
- Second, as referenced in FFF’s initial statement, the Zoning Administrator also took additional measures in September 2009, when it reconsidered its approval of previously issued COs and subsequently issued the CO that is under appeal.³ During the week-long period in between DCRA’s notice of revocation and the issuance of the new CO, Vornado responded to detailed Zoning Administrator inquiries regarding the provision of the amenities, many of which directly addressed the issues and concerns of Friends of Francis Field.

² Indeed, even after the issuance of the CO, Vornado has continued to encounter bureaucratic issues that have slowed Vornado’s actual construction work. Processing of the construction permit was delayed for over a month as DCRA and DPR negotiated over the proper street address for the permit. The permit application was finally accepted for processing in mid-December and was issued on December 17, 2009.

³ Notwithstanding FFF’s inferences, Vornado followed DCRA policy and direction when it changed the address of the Property. The building’s change in address was approved pursuant to proper DCRA procedure on May 1, 2009. Furthermore, pursuant to instructions in the letter approving the address change, notification of the address change was provided by electronic mail to the Office of the Zoning Administrator, as well as multiple other District agencies. The notification did not reach the current Zoning Administrator because the DCRA instructions still contained the electronic address of the former Zoning Administrator. Furthermore, the applications for the certificates of occupancy themselves directly cited the Zoning Commission case number linked to approval of the PUD.

- Third, the Zoning Administrator has continued to retain control in order to ensure compliance through the particular manner in which certificates of occupancy have been issued for the PUD. The September 25 CO that is under appeal was a temporary CO limited to partial floors within the PUD, and was followed by a series of other floor-by-floor COs that were issued as construction on each floor was completed. That CO, as well as the subsequent floor by floor COs, have since been cancelled and replaced by a building-wide certificate of occupancy, which was issued on December 21, 2009 and is attached as Exhibit J. Prior to the issuance of the December CO, Vornado again provided the Zoning Administrator with additional detail regarding PUD compliance as well as a progress update on the Francis Field amenities.

Indeed, the Zoning Administrator continues to retain oversight of the PUD. The full building CO issued in December is itself temporary and will expire in June 2010. At that time Vornado will need to reapply for a final, full, and unconditional CO for the PUD. Vornado fully expects that, by the time this CO is issued, all of the improvements contemplated in the PUD Condition will be actually constructed. While the PUD's conditions were already satisfied through the contribution to the escrow account, the Zoning Administrator's continued oversight constitutes an extra step intended to ensure the PUD's proffers are actually provided.

Conclusion

The facts are clear. Prior to the issuance of a certificate of occupancy, Vornado was required to make a contribution of \$150,000 for design, labor, and improvements to Francis Field under the PUD Order. Vornado satisfied this requirement, prior to the issuance of the CO for the PUD, through a combination of actual completion of the design work and delivery of the balance of the proffered amenities into an escrow account.

Vornado did not choose to pursue the escrow agreement as an effort to shirk its promises regarding the improvements. Rather, Vornado would have preferred to complete the actual construction of the improvements prior to the completion of its own PUD. As noted above, the Francis Field improvements are as important to Vornado as they are to the Friends of Francis Field, since the field serves as the "front yard" for its new residential building. Furthermore, the escrow agreement has resulted in additional expenses above and beyond what was originally contemplated in the PUD. Indeed, Vornado—perhaps more so than any of the other parties to this appeal—would have greatly preferred to satisfy the PUD requirement through direct construction of the amenities, rather than inserting an intermediate step that incurred additional time and expense.

Finally, notwithstanding its literal satisfaction of the PUD and receipt of the CO, Vornado has continued to work with DPR to resolve the remaining roadblocks to

construction. It has secured the required building permit and construction is slated to begin on February 2, 2010.

Based on the foregoing reasons set forth above, the Zoning Administrator did not err in issuing the CO and reasonably determined that the PUD was in full compliance with the conditions of Zoning Commission Order No. 06-35, including the conditions regarding the PUD amenities. Furthermore, the improvements to Francis Field and 25th Street have been permitted and are underway. The decision of the Zoning Administrator should therefore be affirmed or dismissed as moot.

A

EXHIBIT A

TIMELINE OF EVENTS

Below is a brief summary of Vornado's efforts to construct the FFF improvements, from the issuance of the PUD Order to date, as well as the various issues encountered during those efforts.

Fall 2007 – Spring 2008

The final Zoning Order for the PUD was issued in October 2007. Vornado and its landscape architect, Oculus, reached out to DPR starting in December 2007 – over two years ago – to start the design process for a landscape plan. Vornado and Oculus met regularly with DPR over the first half of 2008 to lay out the basic design and process for the Francis Field improvements.

Summer 2008 – Fall 2008

Starting in May 2008, DPR began to reach out to stakeholders, including FFF and other interested organizations. DPR held monthly meetings between July 2008 and November 2008 to provide FFF an opportunity to comment on Oculus's concept designs for Francis Field. Oculus originally presented four plans, then revised two plans selected by the stakeholders, and then prepared an additional plan based on further input.

Throughout this process, DPR received conflicting feedback from multiple stakeholders on the programming of Francis Field, including the continued use of field lighting. By Fall 2008, disputes between FFF and DPR over field lighting threatened to stop all forward progress on the design of the field improvements.

Winter 2008 – 2009

At the end of 2008, the issues regarding field lighting temporarily subsided, and DPR continued to move forward with the approvals for the improvements. Three plans were presented to ANC 2A at its December 17, 2008 meeting, and the ANC voted to select the final plan prepared by Oculus, provided that it had no field lights and included a potential dog park.

The selected plan was then presented to CFA in January 2009. CFA approved the master plan, including the concept design for the PUD-related improvements, but requested further changes to the design. DPR and Vornado intended to present these revisions at the February 2009 CFA meeting. Following the January CFA meeting, however, the process encountered additional obstacles that were entirely outside Vornado's control to resolve.

- First, in late January, DPR was notified that DC WASA intended to perform inspection work on a major water main that would impact the northern half of the Field through summer 2009.

- Then, in early February, CFA received correspondence from the National Park Service asserting jurisdiction over a portion of Francis Field and objecting to the DPR Master Plan. As a result, DPR and Vornado could not proceed with the presentation of the revised design to CFA until NPS issues regarding jurisdiction and the plan were resolved.
- Finally, DPR had not resolved issues regarding the future use of Francis Field, nor had it resolved the issue over whether existing lights on the field should be removed, replaced, or kept in place.
 - Some neighbors petitioned DPR to include a dog park as a part of the new field design, but DPR determined that a dog park could not be included because of the underlying ownership of portions of the field by NPS.
 - While FFF and ANC 2A continued to press for the removal of lights, other organizations and entities such as ANC 2B (the adjacent ANC) and the principal of the adjacent Francis-Stevens public school, argued that some lighting should be maintained, albeit with improved technology and use restrictions that would limit impacts.

As a result of these issues, DPR put all progress on hold and could not authorize Vornado to go ahead with the Phase I work until DPR was able to address the above issues.

Spring 2009

Given the above issues that were out of its control, Vornado determined that it was no longer likely that the construction of the improvements would be completed prior to the completion of the PUD. In March 2009, Vornado met with the Zoning Administrator, Matt LeGrant, to discuss alternative approaches that would satisfy the conditions of approval, including the potential use of an escrow account to fulfill its contribution. The Zoning Administrator indicated general agreement with the escrow approach. Based on the guidance from the Zoning Administrator, Vornado negotiated the terms of the escrow agreement with DPR, and the final version was executed in June 2009.

Notwithstanding the escrow agreement, Vornado continued to work with DPR to resolve the roadblocks to approval and construction of the improvements. DPR met with staff at NPS in March 2009 to discuss the proposed design and resolve NPS's issues and concerns. However, DPR experienced a series of staffing changes within the agency in April 2009, including the departure of then-Director Clark Ray, who was actively involved in the Francis Field planning process. Further forward progress remained on hold.

Vornado met with FFF and an ANC 2A representative in May 2009. The neighbors expressed frustration with the delays and with the process. They also expressed continuing concern over the issue of the lights and the programming of the field for use after dark by sports teams from outside the neighborhood. FFF was advised that an escrow agreement was a possible solution at this time.

Following the meeting with FFF, Vornado next met with DPR in June 2009 to express its desire to get the plan back to CFA on the July calendar. Vornado also expressed and communicated the concerns voiced by FFF and the ANC representative regarding the lights. DPR indicated that it could not go back to CFA until the NPS issue was resolved.

Summer 2009

In July 2009, DPR and NPS fully resolved their jurisdictional differences. NPS agreed to issue DPR a special use permit for the federally-owned portions of the Field. NPS also sent a letter to CFA indicating that, since the issues had been resolved, CFA could proceed with its further review of the Master Plan.

Vornado worked with DPR to get Francis Field on the agenda for the next available CFA meeting, which was scheduled for September 17, 2009. DPR presented the revised Master Plan to CFA at its September meeting, and CFA approved the revised design.

Fall 2009

Following CFA approval, DPR also gave Vornado the green light to move forward with the construction of the PUD-related improvements. Vornado directed its design team to prepare construction drawings for the PUD-related improvements, and the base plans were prepared within a month.

On November 3, 2009, Vornado attempted to file for its construction permit to begin construction of the improvements. Processing of this permit was delayed for over a month, however, as DPR and DCRA officials struggled to determine the proper address for Francis Field, which was required as a necessary prerequisite to filing of the permit. Vornado actively worked to help DPR and DCRA resolve these issues. The permit was finally accepted for filing in mid-December 2009 and on December 17, 2009 DCRA issued the building permit.

Winter 2010

In January 2010 Vornado engaged W.H. Boyer as the general contractor to construct the improvements. Under the contract, construction work is scheduled to commence on February 2, 2010.

B

Department of Consumer and Regulatory Affairs

Permit Operations Division

941 North Capitol Street NE Room 2100

Washington DC 20002

Tel: (202) 442-4589

Fax: (202) 442-4862

TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557

RW

RETAINING WALL PERMIT

THIS PERMIT MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS OF WORK UNTIL WORK IS COMPLETED AND APPROVED

PERMIT NO. RW1000028

Date: 12/17/2009

Address of Project:		Zone:	Ward:	Square:	Suffix:	Lot:
2435 N ST NW			7	5389		0148
Description of Work:						
INSTALL NEW 3' STEEL PICKET FENCE WITHIN FRANCIS FIELD PROPERTY, INSTALL NEW 3' BELOW GRADE CONCRETE WALL, REMOVAL OF SURFACE DIRT FROM BALLFIELD, RETURN NEW TOP SOIL TO AREA, INSTALL NEW CONCRETE WALKWAY WITH BENCHES AND TRASH RECEPTACLES AS SHOWN ON THE ATTACHED PLANS.						
Type of Work:	Retaining Wall Height:	Length in linear feet:	Material:	Color:		
		FT				
Permission is Hereby Granted To:		Owner Address:		PERMIT FEE		
DC Government		810 RIDGE ROAD SE WASHINGTON, DC 20019		\$66.00		
Engineer/Architect Name:		License Number:	Engineer/Architect Address:			
Conditions/Restrictions:						
This permit is associated with the building permit number This permit expires if no construction is started within 1 year or if the last inspection is over 1 year. All construction done according to the current construction codes and zoning regulations; As a condition precedent to the issuance of this permit, the owner agrees to conform with all conditions set forth herein, and to perform the work authorized hereby in accordance with the approved application and plans on file with the District Government and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property and to inspect all work authorized by this permit and to require any change in construction which may be necessary to ensure compliance with the permit and with all the applicable regulations of the District of Columbia. Work authorized under this Permit must start within one (1) year of the date appearing on this permit or the permit is automatically void. If work is started, any application for partial refund must be made within six months of the date appearing on this permit.						
Director:		Permit Clerk:	Expiration Date:			
Linda K. Argo		Lucretia Hackney	12/17/2010			
TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL, CALL THE DC INSPECTOR GENERAL AT 1-800-521-1639 FOR CONSTRUCTION INSPECTION INQUIRIES CALL (202) 442-9557 TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557						

C

FRANCIS FIELD PARK RENOVATIONS

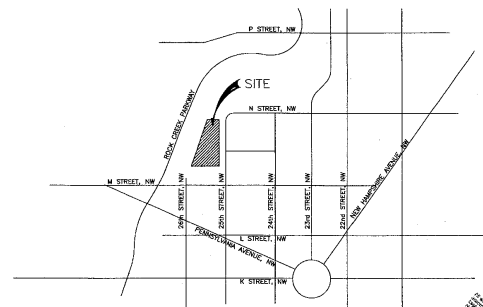
THE DISTRICT OF COLUMBIA DEPARTMENT OF PARKS AND RECREATION

25th STREET NW AND N STREET NW, WASHINGTON, DC 20037

DRAWING LIST

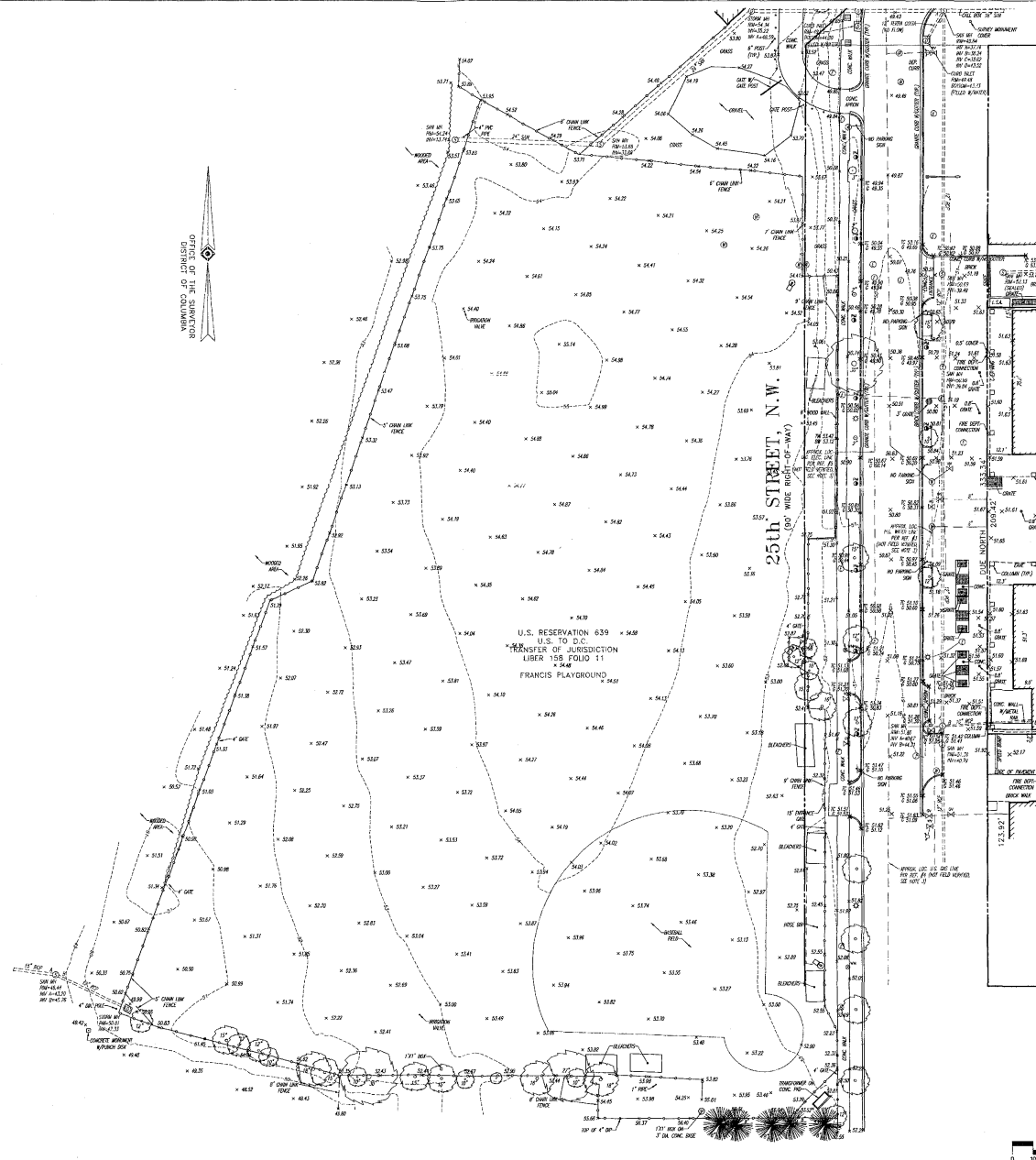
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L1.0	EXISTING CONDITIONS PLAN
L1.1	DEMOLITION PLAN
L2.0	GRADING PLAN
L3.0	HARDSCAPE PLAN
L4.0	PLANTING PLAN
L5.0	HARDSCAPE DETAILS
L5.1	PLANTING DETAILS

VICINITY MAP



LANDSCAPE ARCHITECT	
OCULUS	
2410 17th STREET NW WASHINGTON DC 20037 P: 202-785-1000 F: 202-785-1001 E: OCULUS@OCULUSDC.COM	
OWNER DISTRICT OF COLUMBIA DEPARTMENT OF PARKS AND RECREATION 3145 18th STREET NW Washington, DC 20037 (202) 675-3517	
CLIENT VORNADO CHARLES E. SMITH CHARLES E. SMITH COMMERCIAL REALTY ARLINGTON, VA 2500 CRYSTAL DRIVE, SUITE 1000 ARLINGTON, VA 22202 TEL: (703) 700-6200 / FAX: (703) 700-6201	
CIVIL BOHLER ENGINEERING 2500 DAVIS DRIVE, SUITE 200 STEVENS, MD 20784 TEL: (703) 700-6200 / FAX: (703) 700-6201	
	
FRANCIS FIELD PARK RENOVATIONS 25th STREET NW AND N STREET NW WASHINGTON DC 20037	
DRAWING NO. 1001 10/05/09 100% CONSTRUCTION DOCUMENTS	
DATE: OCTOBER 5, 2009 PROJECT NUMBER: W801 SCALE: COVER SHEET AND DRAWING TITLE: DRAWING LIST SHEET NUMBER: L0.0	

- LEGEND**
- EXISTING CONTOUR
 - x 123.45 EXISTING SPOT ELEVATION
 - x 123.45 EXIST. TOP OF CURB ELEVATION
 - x 123.45 EXIST. GUTTER ELEVATION
 - x 123.45 EXIST. TOP OF WALL ELEVATION
 - x 123.45 EXIST. BOTTOM OF WALL ELEVATION
 - HYDRANT
 - WATER VALVE
 - GAS VALVE
 - APPROX. LOC. UNDERGROUND SANITARY SEWER LINE
 - APPROX. LOC. UNDERGROUND GAS LINE
 - APPROX. LOC. UNDERGROUND WATER LINE
 - APPROX. LOC. UNDERGROUND ELEC. LINE
 - STORM DRAIN MANHOLE
 - SANITARY MANHOLE
 - TELEPHONE MANHOLE
 - ELECTRIC MANHOLE
 - WATER MANHOLE
 - WATER METER
 - SIGN
 - HOLLAND
 - AREA LIGHT
 - COLUMN
 - DENOTES PARKING SPACE COUNT
 - TREE
 - PARKING METER
 - FENCELINE
 - LANDSCAPED AREA
 - TREE LINE
 - LIGHT POLE



LANDSCAPE ARCHITECT

OCULUS

3410 17th Street NW Washington DC 20005
P: 202 555 1000 F: 202 555 1001 E: OCULUS@OCULUSDC.COM

OWNER
**DISTRICT OF COLUMBIA
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AND RECREATION**

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202 555 1000

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BOHLER ENGINEERING
33700 Fairfax Avenue, Suite 300
Beverly Hills, CA 90212
TEL: (310) 759-6500 FAX: (310) 759-6501



**FRANCIS FIELD
PARK RENOVATIONS**

25th STREET NW and N STREET NW
WASHINGTON DC 20007

DATE	REVISION
10/20/09	PERMIT SET

8/10/09
DATE: **OCTOBER 21, 2009**

PROJECT NUMBER: **WB01**

SCALE: **1" = 20'**

TYPE: **EXISTING CONDITIONS**

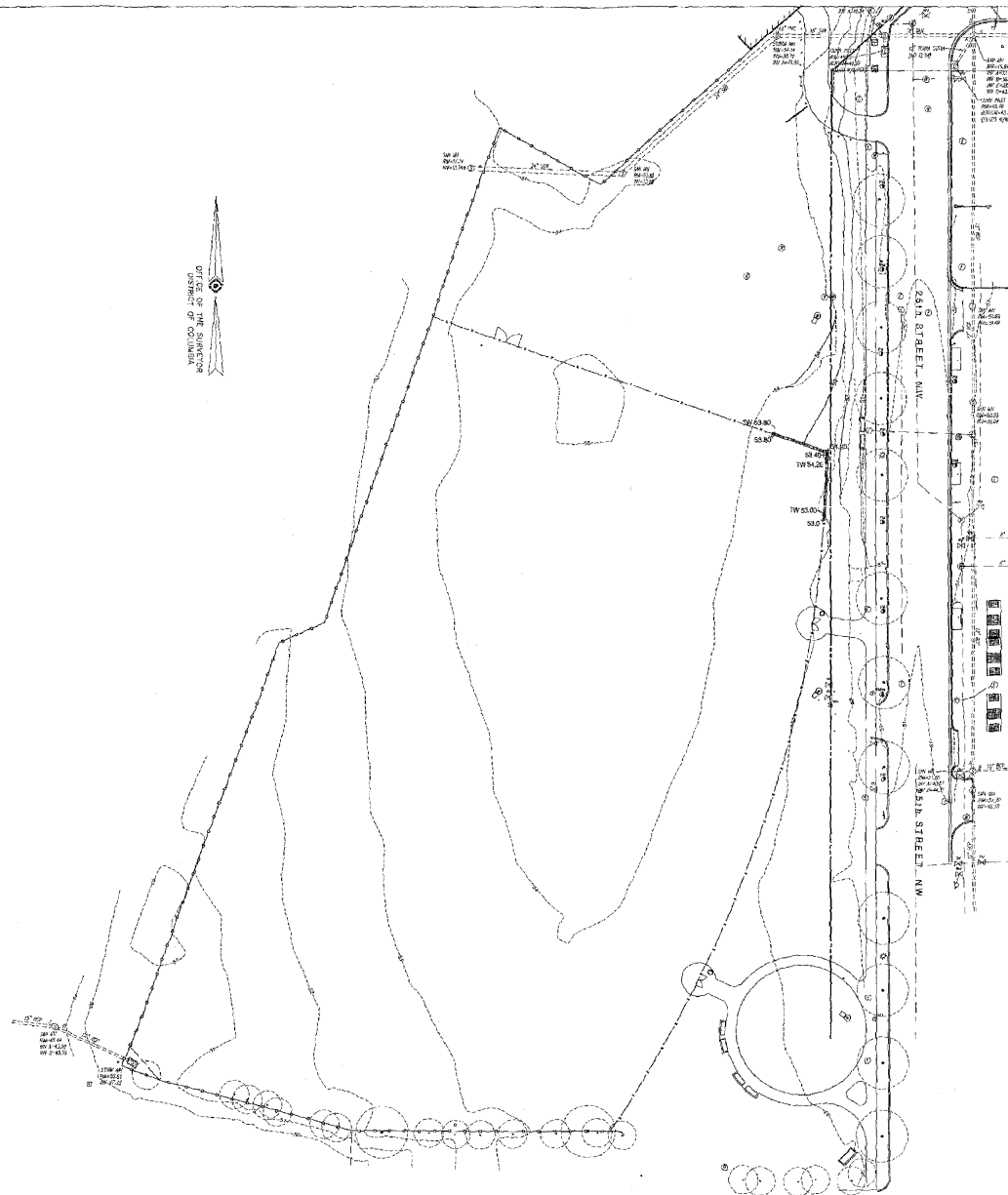
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SHEET NUMBER: **L1.0**

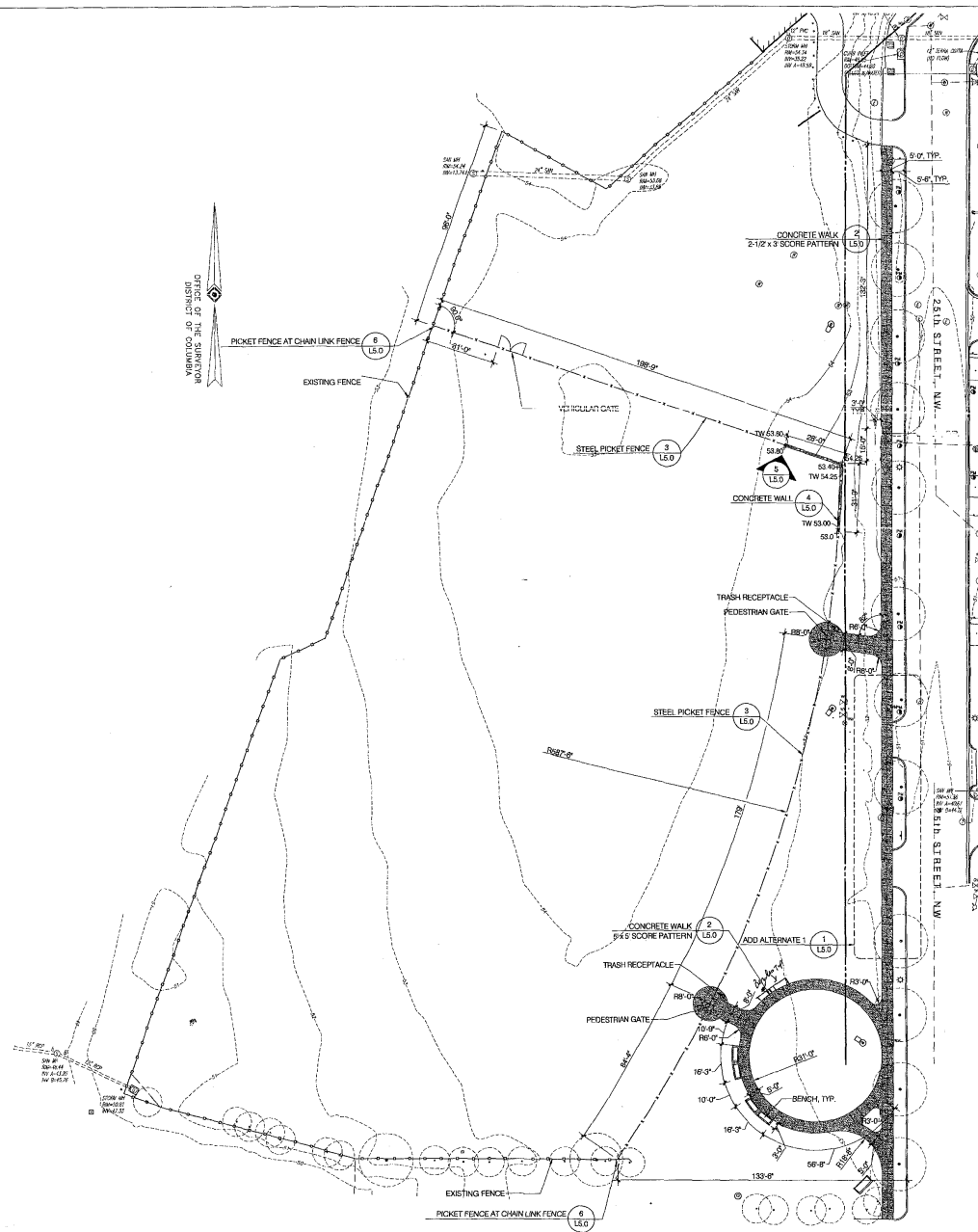


L1.1

100



L2.0



OFFICE OF DISTRICT
 OF THE DISTRICT OF COLUMBIA
 DEPARTMENT OF PARKS
 AND RECREATION
 1410 17th Street NW
 Washington, DC 20035
 TEL: 202-695-1500 FAX: 202-695-1501

LANDSCAPE ARCHITECT
O C U L U S
 1410 17th Street NW Washington, DC 20035
 P: 202-695-1500 F: 202-695-1501 E: OCS@OCULUSDC.COM

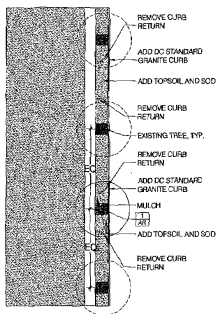
OWNER
 DISTRICT OF COLUMBIA
 DEPARTMENT OF PARKS
 AND RECREATION
 1410 17th Street NW
 Washington, DC 20035
 202-695-1500

CLIENT
VORNADO
 CHARLES E. SMITH
 CHARLES E. SMITH
 COMMERCIAL REALTY
 ARLINGTON, VA
 2345 CRYSTAL DRIVE, SUITE 1000
 ARLINGTON, VA 22202
 TEL: 703-708-1125 / FAX: 703-466-7025

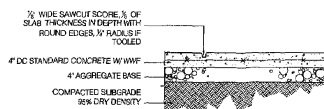
CIVIL
BOHLER ENGINEERING
 2700 SOUTH LEE ROAD, SUITE 200
 STERLING, VA 20154
 TEL: 703-708-6000 / FAX: 703-708-6001

**FRANCIS FIELD
 PARK RENOVATIONS**
 25th STREET NW and N STREET NW
 WASHINGTON DC 20035

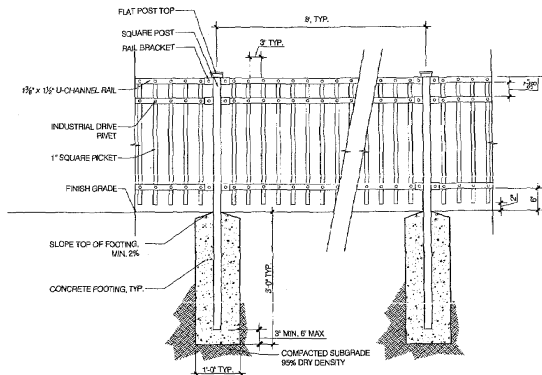
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 DATE: OCTOBER 21, 2009
 PROJECT NO. W801
 SCALE: 1" = 20'
 SHEET NO. 1021.06
 HARDSCAPE PLAN
 L3.0



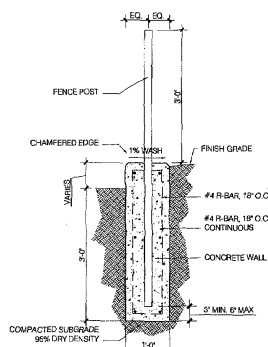
1 ADD ALTERNATE 1
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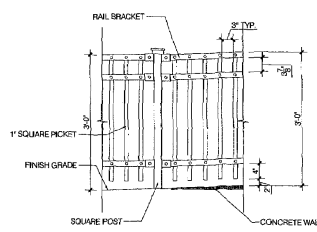
2 CONCRETE WALK
SCALE: 1" = 12"



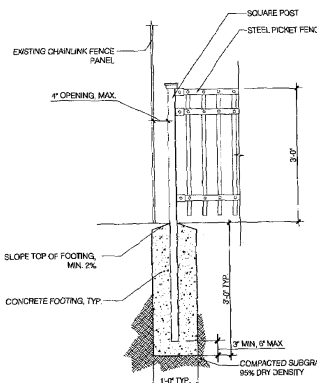
3 STEEL PICKET FENCE
SCALE: 1" = 10'



4 CONCRETE WALL
SCALE: 1" = 10'



5 PICKET FENCE AT WALL
SCALE: 1" = 10'



6 PICKET FENCE AT CHAIN LINK FENCE
SCALE: 1" = 10'

LANDSCAPE ARCHITECT

OCULUS

3410 11th STREET NW WASHINGTON DC 20009
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OWNER
**DISTRICT OF COLUMBIA
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AND RECREATION**
3140 15th Street NW
Washington, DC 20004
202.724.5600

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CHARLES E. SMITH
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CIVIL
BOHLER ENGINEERING
22430 DAVIS DRIVE, SUITE 203
FARMINGDALE, VA 22034
TEL: (703) 769-8200 / FAX: (703) 769-8201

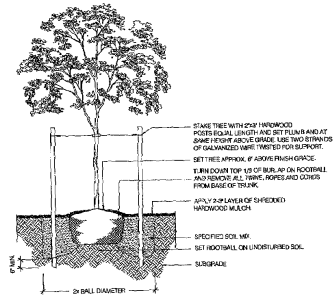
FRANCIS FIELD
PARK RENOVATIONS
20th STREET NW AND M STREET NW
WASHINGTON DC 20007

REVISIONS

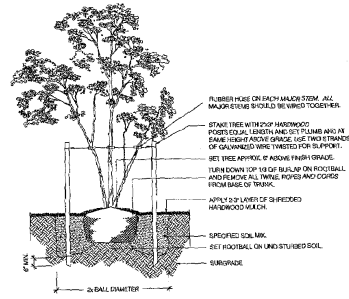
NO.	DATE	DESCRIPTION
1	10/21/09	PERMIT SET

DATE: OCTOBER 21, 2009
PROJECT NUMBER: W801
SCALE: VARIES
HARDSCAPE DETAILS

L5.0



1 DECIDUOUS TREE
SCALE: NTS



2 MULTISTEM TREE
SCALE: NTS

NO.	STANDARD NAME	COMMON NAME	SIZE	SPACING	NUMBER	QTY
LANDSCAPE TREES						
AN	Aster multiflorus October Glory	October Glory Red Maple	3-3 1/2 in. cal.	As shown	100	1
CA	Chamaecyparis arborescens	Yellowwood	2 1/2 in. cal.	As shown	100	2
GO	Gymnocladia dioica	Honeylocust	3 1/2 in. cal.	As shown	100	3
OP	Quercus prinus	Pin Oak	3 1/2 in. cal.	As shown	100	5
OW	Quercus laevis	White Oak	3 1/2 in. cal.	As shown	100	2
TC	Tilia cordata Greenstar	Greenstar Littleleaf Linden	2 1/2 in. cal.	As shown	100	4
SMALL ORNAMENTAL TREES						
AD	Amelanchier x grandifolia Autumn Brilliance	Autumn Brilliance Serviceberry	2 1/2 in. cal.	As shown	100	4
AL	Amelanchier alnifolia	Albiflora Serviceberry	2 1/2 in. cal.	As shown	100	3
CC	Cercis canadensis	Redbud	1 1/2 in. cal.	As shown	100	2
OP	Opuntia capitata Poinc/Plena	Forest Pansy Redbud	1 1/2 in. cal.	As shown	100	3
OV	Chamaecyparis virginiana	Parrotia	3 1/2 in. cal.	As shown	100	2
AND ALTERNATE						
AN	Aster multiflorus October Glory	October Glory Red Maple	3-3 1/2 in. cal.	As shown	100	1

LANDSCAPE ARCHITECT

OCULUS

1418 17TH STREET NW WASHINGTON DC 20036
P: 202.462.8888 F: 202.462.8889 E: info@oculusdc.com

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DISTRICT OF COLUMBIA
DEPARTMENT OF PARKS
AND RECREATION

3145 16TH STREET NW
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CLIENT
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ARLINGTON, VA 22204
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BOHLER ENGINEERING
2820 CAMPBELL DRIVE, SUITE 100
STERLING, VA 20154
TEL: 703.576.7800 / FAX: 703.576.8001



FRANCIS FIELD
PARK RENOVATIONS

25th STREET NW and N STREET NW
WASHINGTON DC 20007

DATE	10/21/09
PROJECT	PERMANENT
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DATE	10/21/09
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REPORT
DATE
OCTOBER 21, 2009
PROJECT
WS01
SCALE
NTS
PLANTING DETAILS
PROJECT NO.

L5.1

[illegible]

DETAIL 4 - SILT FENCE

PLAN VIEW: Shows a rectangular silt fence with dimensions: 30" MINIMUM CENTER TO CENTER DISTANCE, 30" MINIMUM LENGTH, 15" MINIMUM HEIGHT, 15" MINIMUM WIDTH, and 15" MINIMUM DEPTH IN GROUND.

PERSPECTIVE VIEW: Shows the silt fence with dimensions: 30" MINIMUM CENTER TO CENTER DISTANCE, 30" MINIMUM LENGTH, 15" MINIMUM HEIGHT, 15" MINIMUM WIDTH, and 15" MINIMUM DEPTH IN GROUND.

TOP VIEW: Shows the silt fence with dimensions: 30" MINIMUM CENTER TO CENTER DISTANCE, 30" MINIMUM LENGTH, 15" MINIMUM HEIGHT, 15" MINIMUM WIDTH, and 15" MINIMUM DEPTH IN GROUND.

CROSS SECTION: Shows the silt fence with dimensions: 30" MINIMUM CENTER TO CENTER DISTANCE, 30" MINIMUM LENGTH, 15" MINIMUM HEIGHT, 15" MINIMUM WIDTH, and 15" MINIMUM DEPTH IN GROUND.

CONSTRUCTION SPECIFICATIONS:

1. Fence posts shall be a minimum of 30" long driven 16" minimum into the ground and spaced at a maximum of 30" on center, or 15" if the material contained round shall be of square quality hardwood. Stem tips will be rounded or a section reinforced with steel mesh 1.00 pound per linear foot.
2. Geotextile will be fastened securely to each fence post with wire ties or staples at top and intersection and shall meet the following requirements for Geotextile:

Factor	Minimum	Test Method
Tensile Strength	50 lb/in (min)	ASTM D-4869
Impact Resistance	750 ft-lb (min)	ASTM D-4869
Filtering Efficiency	95% (min)	ASTM D-4869
3. Where ends of geotextile fabric come together, they shall be overlapped, folded and stapled to prevent sediment bypass.

NOTES:

1. Silt Fence shall be installed after all rainfall events and maintained when higher erosion than when sediment accumulation reaches 50% of the fabric height.

USE OF MATERIALS: MATERIAL: 30" MINIMUM CENTER TO CENTER DISTANCE, 30" MINIMUM LENGTH, 15" MINIMUM HEIGHT, 15" MINIMUM WIDTH, 15" MINIMUM DEPTH IN GROUND.

DETAIL 6B - AT GRADE INLET PROTECTION

3/4" - 1 1/2" TUBE

GEOTEXTILE CLASS E

PLAN/CUT AWAY VIEW

6' x 6'

6' x 6'

3/4" - 1 1/2" TUBE

INLET GRATE

GEOTEXTILE CLASS E

WIRE TIES

6" DICK-UP

CROSS SECTION

STANDARD SYMBOL

□ HELP

WHL. SHADING AREA = 3/4" DICK-UP

Construction Specifications

1. Lift grate and wrap with Geotextile Class E to completely cover all openings. Then set grate back in place.

2. Place 3/4" to 1 1/2" tube, 6" thick on the grate to secure the fabric and provide additional filtration.

USE DEPARTMENT OF HIGHWAY NATURAL RESOURCE CONSERVATION SERVICE	PAGE 3 - 2 - 6	UNIMPROVED PROTECTION SHEET DISTRICT OF COLUMBIA DEPARTMENT OF HIGHWAY
--	-------------------	---

[illegible]

TREE PROTECTION

The top diagram illustrates a circular fence system around a tree. Labels include: Drip Line, Snow Fence, Board Fence, Plastic Fence, and Wind Fence. Below this diagram is the caption: **CORRECT METHODS OF TREE FENCING**.

The bottom left diagram shows a **TRIANGULAR BOARD FENCE** around a tree trunk.

The bottom right diagram shows a tree trunk with vertical armor strips, labeled **CORRECT TRUNK ARMORING**.

[illegible]

GENERAL NOTE:
It is the responsibility of the contractor to review all of the drawings and specifications associated with this project with scope prior to the initiation of construction. Should the contractor find a conflict with the documents relative to the specifications or applicable codes, it is the contractor's responsibility to notify the project engineer of record in writing prior to the start of construction. Absence of the contractor to notify the project engineer shall constitute acceptance of full responsibility by the contractor to complete the scope of the work as indicated on the drawings and specifications. CONTRACTOR: WFLA LOCAL MEDIA GROUP, INC./2002

BOHLER
ENGINEERING



OFFICES:

- ◆ ATLANTA, GA
- ◆ BOSTON, MA
- ◆ CHICAGO, IL
- ◆ DALLAS, TX
- ◆ DENVER, CO
- ◆ HOUSTON, TX
- ◆ LOS ANGELES, CA
- ◆ MIAMI, FL
- ◆ NEW YORK, NY
- ◆ PHOENIX, AZ
- ◆ SAN ANTONIO, TX
- ◆ TAMPA, FL
- ◆ WASHINGTON, DC

FUNCTIONS:

- ◆ PROJECT MANAGERS
- ◆ ENVIRONMENTAL ENGINEERS
- ◆ LANDSCAPE ARCHITECTS

Civil & Consulting Engineers

NOT APPROVED FOR
CONSTRUCTION

PROJECT No.:	3072029
DRAWN BY:	AS
CHECKED BY:	GS
DATE:	10/01/20
SCALE:	NOT TO SCALE
CAD L.S.:	SS

FRANCIS FIELD

VORNADO/
CHARLES E. SMIT

PART OF U.S. RESERVATION 6
DISTRICT OF COLUMBIA

PROJECT NARRATIVE

THE AREA OF PROPOSED MAINTENANCE BY VORNADO/CHARLES E. SMITH IS LOCATED ON THE WEST SIDE OF 25TH STREET NORTHWEST, BETWEEN M AND N STREETS IN WASHINGTON, DISTRICT OF COLUMBIA. THE SUBJECT PROPERTY IS CURRENTLY IN USE AS A PUBLIC PARK. EXISTING SITE IMPROVEMENTS INCLUDE ATHLETIC FIELDS, BLEACHERS, LANDSCAPING, AND LIGHTING.

THE PROPOSED MAINTENANCE HAS BEEN APPROVED BY THE DISTRICT UNDER A PUD APPROVAL FOR DEVELOPMENT LOCATED AT 1229 & 1231 25TH STREET NORTHWEST. MAINTENANCE WILL INCLUDE INSTALLATION OF LANDSCAPING, FENCING, TRASH RECEPTACLES, BENCHES, AND OTHER RELATED SITE AMENITIES. AN EXISTING CONCRETE SIDEWALK ALONG 25TH STREET SHALL BE REPLACED IN LIKE AND KIND. WINCH GRADING WILL BE REQUIRED TO REDUCE SLOPES IN THE NORTHEAST CORNER OF THE PROPERTY.

MISS UTILITY



SHEET TITLE:
EROSION & SEDIMENT
CONTROL DETAILS

SHEET NUMBER: _____

BEFORE YOU SAY NO,
811 IN VA
or 1-800-552-7801
PROTECT YOURSELF, GIVE
WORKING SITES MORE
THE COORDINATOR TO CALL WHEN IT
HAS ALL COUNTRY UTILITIES MARK
WAYS AHEAD TO THE CONSTRUCTION

3

D

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 17085 of Louise and Larry Smith and Mary Ann Snow and James Marsh, pursuant to 11 DCMR §§ 3100 and 3101, from various administrative decisions of the Department of Consumer and Regulatory Affairs (DCRA), involving construction of three flats located at 206, 208 and 210 D Street, S.E., Square 763, Lots 26, 27 and 28.

HEARING DATES: February 24, 2004, May 18, 2004, June 22, 2004

DECISION DATE: July 6, 2004

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on September 12, 2003 challenging several approvals by the Department of Consumer and Regulatory Affairs (DCRA) and one approval of the DC Office of the Surveyor. All approvals were connected with the construction of three flats at 206, 208 and 210 D Street, SE; i.e. approval of subdivision lots, recordation of a subdivision plat, issuance of a permit to raze an existing structure at the site, issuance of three foundation permits, issuance of three building permits, failure to compel the property owner to remove obstructions at the site, issuance of a public space permit for a dumpster, and a challenge to the lifting of a stop work order at the site. Appellants also alleged that two of the three building permits were issued in violation of applicable side yard requirements. Appellants later withdrew their challenges to the issuance of the razing permit and public space permit, and to DCRA's alleged failure to compel the property owner to remove obstructions. Following the May 18, 2004 public hearing, the Board voted to dismiss the remaining challenges as moot, except for the challenge regarding the alleged side yard violations. At a decision meeting on July 6, 2004, the Board voted to deny that portion of the appeal challenging the side yard violations.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning scheduled a hearing on the appeal for February 24, 2004. In accordance with 11 DCMR § 3113.4, the Office of Zoning mailed notice of the hearing to the Appellants, the ANC 6B (the ANC for the area concerning the subject property), the property owner, and DCRA.

Parties

The Appellants in this case are Larry and Louise Smith, and Mary Ann Snow and James Marsh (Appellants or the Neighbors), the owners of properties adjoining the subject property. Appellants were represented by Richard Nettler, Esq., and Jeannine Rustad, Esq., of Robins, Kaplan, Miller & Ciresi, LLP. The property owner, Folger Park North, LLC (Folger or the

Owner), was represented by Richard Aguglia, Esq., of Hunton & Williams, LLP. As the property owner, Folger is automatically a party under 11 DCMR § 3106.2. DCRA was represented by Lisa Bell, Esq., Senior Counsel.

Preliminary Matters

Prior to the public hearing in this appeal, the Owner filed Application No.17108, an application for variances from the lot area and lot width requirements for the subject property. The Appellants (who also opposed the variance) moved to consolidate the variance application with this appeal, and requested that the cases be heard together on February 24, 2004. But on January 27, 2004, when the variance application was first scheduled, the Board denied the Appellant's motion to consolidate the two proceedings and determined that it would hear the variance application first, then the appeal. Since the Appellants and the property owner both requested additional time to prepare for the variance case, the Board continued the variance case and scheduled the two cases for February 24, 2004. The public hearing in the variance case concluded on that date, but the Board did not deliberate or vote on the application until April 6, 2004. On April 6, 2004, the Board voted to grant the variances for lot area and lot width requirements, and set the appeal to be heard on May 18, 2004.

Prior to the May 18 hearing date, the Appellants raised the additional challenge alleging that the building permits violated the side yard requirements of the Zoning Regulations. In response, the Owner moved to dismiss the appeal on all grounds -- including the newly raised side yard challenge -- as either moot or time-barred. The parties submitted extensive filings and argued the motion to dismiss before the Board on May 18, 2004. None of the parties disputed that, except for the side yard issue, the other issues on appeal had become moot as a result of the area variances granted by the Board in April. Thus, on June 22, 2004, the Board granted the motion to dismiss all portions of the appeal except for the side yard issue on grounds of mootness. It also determined that the side yard issue was not time-barred, and denied the Owner's motion to dismiss on that ground. The appeal was continued to July 6, 2004, for a decision on the merits of the side yard issue.

FINDINGS OF FACT

The Property and Surrounding Area

1. The subject property consists of three record lots, numbered 26, 27, and 28, in Square 763, located at 206 D Street, SE, 208 D Street, SE, and 210 D Street, SE, respectively.
2. Although created after the effective date of the applicable Zoning Regulations, the lot size and width of lots 26, 27 and 28 meet none of the minimum requirements under section 401 of the Zoning Regulations. Lots 27 and 28 (208 and 210 D Street, SE) are 271 square feet shy of the 1,800 square feet minimum lot size requirement, and Lot 26 (206 D Street, SE) is 353 square feet shy of the 1,800 square feet minimum lot size requirement. The width of all three lots is 16 feet -- 2 feet shy of the 18 feet minimum width that is required in the zone.

3. The property is zoned R-4 and is in the CAP (Capitol Interest Overlay District¹). The R-4 zone permits one family dwellings, row houses and flats, such as those constructed by the applicant. Although the CAP Overlay provides for restrictions on use, height and bulk of buildings, the homes constructed by the applicant conform to the Overlay provisions.
4. Square 763 is bounded by D Street, SE to the south, 3rd Street, SE to the east, C Street, SE to the north, and 2nd Street, SE to the west. Folger Park is directly to the south of the square, and the Library of Congress Madison Building is to the northwest. The square is predominantly developed with 2 to 3 story row houses, but also includes a 6-story apartment building facing C Street, SE, and a sport club and an American Legion building along D Street.
5. Each of the three lots is improved with new homes that have been constructed by Folger. The homes are three level, two-family row houses with fully finished English basements and off-street parking. Because the property is located in the Capitol Hill Historic District, the Historic Preservation Review Board reviewed and approved the development plans for the row houses.

The Permits and Construction

6. On or about May 23, 2003, DCRA issued foundation permits for each of the three row houses.
7. On or about August 25, 2003, DCRA issued building permits for each of the three proposed row dwellings.
8. A previously existing PEPCO substation at the property was razed during June, 2003, and construction on the row house foundations began on or about July 1, 2003. Construction continued after the building permits were issued on August 25, 2003.
9. On or about September 2, 2003, DCRA issued a stop work order based upon an "invalid raze permit". The applicant met with DCRA officials to confirm the validity of the raze permit, and the stop work order was lifted on or about September 5, 2003.
10. DCRA issued a second stop work order on or about September 15, 2003,. Although the stop work order did not cite any code violation, DCRA later issued a letter stating that the proposed development did not comply with the minimum lot area and lot width requirements contained in § 401 of the Zoning Regulations.
11. On September 30, 2003, this appeal was timely filed. Among other things, Appellants challenged DCRA's August 25, 2003 issuance of the three building permits to construct

¹ The CAP Overlay was established "to promote and protect the public health, safety, and general welfare of the U.S. Capitol precinct and the area adjacent to this jurisdiction, in a manner consistent with the goals and mandates of the United States Congress. . ." § 1200.1 DCMR.

the three row dwellings.

12. On or about October 30, 2003, the Folger and DCRA entered into an agreement that provided for DCRA's lifting of the stop work order in return for the applicant's agreement to indemnify DCRA for any construction related damages, and to seek variances from this Board from the minimum lot area and width requirements.
13. After entering into the agreement, Folger applied to this Board for the variance relief and resumed construction of the row dwellings. By the end of January 2004, the row dwellings were "under roof"; *i.e.* the main roof was in place in each of the three units.
14. None of three units were constructed with side yards. The middle unit at Lot 27 is an interior lot with two common division walls, one adjoining Lot 28 and one adjoining Lot 26. Lot 28 has one common division wall with Lot 27 and abuts an alley which is 15 feet in width on the other side. Lot 26 has one common division wall with Lot 27 and abuts a four foot right of way on the other side.
15. By separate decision issued and served upon the parties, the Board granted the lot size and width variances.

Appeal of the Side Yard Issue

16. At the time it filed its appeal, the Appellants did not specifically raise the side yard issue. However, the side yard issue was raised and discussed by Appellants and the Office of Planning (OP) during the variance case.
17. On or about May 6, 2004, Appellants filed a submission claiming that the two end units (Lots 26 and 28) required side yards under the Zoning Regulations. As a result, they argued, the building permits which approved the two structures were issued in error.
18. The Owner maintained that the side yard issue was untimely raised and that, in any event, this portion of the appeal lacked merit (See, Exhibits 49 and 51).

CONCLUSIONS OF LAW

An appeal to the Board may be taken by a person aggrieved or District agency affected by any decision of a District official in the administration and enforcement of the Zoning Regulations. D.C. Official Code § 6-641.07 (2001). Here, the Appellants allege and DCRA concedes that the three record lots were substandard and should not have been created. Appellants also claim that the two building at each end should have had a side yard.

The Challenges to the Building Permits based upon The Substandard Lots Is Moot.

"A case is moot when the legal issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome. *See Murphy v. Hunt*, 455 U.S. 478, 481, 71 L. Ed. 2d

353, 102 S. Ct. 1181 (1982) (citations omitted)”, *Cropp v. Williams*, 841 A.2d 328 (D.C. 2004) In the companion decision to this case, the property owner has been a granted variance from strict compliance with the lot size and width requirement of the Zoning Regulation. The variance relief converts these lots to a conforming status and thus negates any errors that had been made in creating them. Thus, the legal issue as to whether DCRA erred in issuing building permits that allowed construction on substandard lots is “no longer live”.

The Motion to Dismiss the Side Yard Appeal

Folger and DCRA maintain that the portion of the appeal regarding the side yard violations was untimely filed and that the appeal must therefore be dismissed.² Appellants maintain that the side yard challenge should be treated as an amendment to the initial appeal, which was indisputably filed on a timely basis. The Board agrees with the Appellants because the facts and procedural posture of this case are so unusual. First, the side yard issue was raised early on in the variance case which was inextricably connected with this appeal. Although the cases were not consolidated, the granting of the variance relief caused most of the appeal to become moot. Second, because the side yard issue was raised during the variance case, Folger had ample notice of the challenge. Thus, there was no prejudice to Folger in permitting the Appellants the flexibility to amend their appeal to include the side yard challenge.

The Merits of the Side Yard Appeal

Appellants principally rely on section 405.3 of the Zoning Regulations and this Board’s opinion in, *Appeal of David and Janet Pritchard*, BZA No. 16811, 49 DCR 9707 (2002) (the *Pritchard* case), which interpreted this section. Section 405.3 provides in part that, side yards are required at properties in the R-4 zone unless the dwelling at the property shares a common division wall with the adjacent property. Since, here, both end units have a common division wall at only one side – the sides abutting the middle unit – Appellants argue that side yards are required next to the free standing wall at both units.

Folger and DCRA argue that 405.3 is not apposite in this case and that the facts of the *Pritchard* case are distinguishable from the facts herein.

Folger claims that section 405.6 of the Regulations is applicable to this case, rather than section 405.3, and that section 405.6 squarely states that no side yard is required in the R-4 zone. As to *Pritchard*, Folger claims that decision is distinguishable for two reasons. First, unlike the property in *Pritchard*, the property in this case consists of two substandard lots that are unable to accommodate side yards on both sides. Second, the rationale underlying *Pritchard*’s side yard requirement was to ensure adequate light and air. That rationale does not apply to this case where one end unit abuts an alley and the other end unit abuts a four foot right of way.

DCRA argues, in addition, that section 405.3 does not apply because this is a multiple dwelling “development” and that the logic of *Pritchard* cannot apply to such a development.

² Sec. 11 DCMR 3112.2, which requires generally that an appeal must be filed within 60 days of the administrative decision being complained of.

For the reasons stated below, the Board holds that the *Pritchard* decision does not prohibit the construction of new end-unit row dwellings, or any new row dwelling, regardless of whether the structure shares one or common division wall, or none at all.

Since the issuance of the *Pritchard* decision, the Board has on two occasions emphasized the narrow scope of that decision. In *Appeal of Southeast Citizens for Smart Development*, BZA No. 16935, 50 DCR 8108 (2003), the Board rejected an interpretation that *Pritchard* barred the construction of single family semi-detached structures that sit on a lot line, and thus share no common division wall. The Board held that because the Zoning Regulations define semi-detached dwellings to include structures “the wall on one (1) side of which is ...a lot line wall, having one (1) side yard”, *Pritchard* could not be interpreted as disallowing this matter of right structure.

Similarly, in *Application of Kathleen Peoples and Philip Sedlak*, BZA 17007, 51 DCR 9518 (2004), a case decided after this appeal, the Board made it clear the *Pritchard* does not preclude the construction of in-fill row dwellings.

[T]he Board wishes to stress the narrowness of the *Pritchard* ruling. As noted in Appeal No. 16935 of *Southeast Citizens for Smart Development*, the *Pritchard* decision did not make single semi detached dwellings illegal if one side of the structure sat on a lot line (and was thus free standing on both sides). Nor did *Pritchard* require two side yards for new structures on lots with row dwellings on either side. Row dwellings, when permitted as a matter of right, may be constructed on all lots, except in the narrow circumstances that existed with respect to this subject property.

The *Pritchard* decision is thus limited to its facts.

Id. at 9520.

The Board reaffirms this limitation. The *Pritchard* decision only addressed the narrow question of “whether the owner of a one-family semi-detached dwelling in an R-4 District *may convert* the dwelling to a row dwelling as a matter of right, where the dwelling will not share on both sides a common division wall with an adjacent building”, *Pritchard*, 49 DCR at 9713 (emphasis added). The facts in this appeal are different. Here, Folger is not converting an existing semi-detached single family dwelling into a row dwelling, but building three entirely new row dwellings (*i.e.* a single family dwelling without side yards). And unlike the *Pritchard* scenario, Folger cannot avail itself of the special exception relief made available to additions to single family homes pursuant to 11 DCMR § 223³, a factor that the *Pritchard* decision viewed as relevant in reaching its conclusions. See *Pritchard*, 47 DCR at 9716-9717.

As newly constructed matter of right row houses, no side yards are required. To the extent it suggests otherwise, *Pritchard* is overruled.

³ In fact, the owners of the property that was the subject of the *Pritchard* decision were granted special exception approval to build the addition in *Application of Kathleen Peoples and Philip Sedlak*, discussed *infra*.

Therefore, for the reasons stated above, it is hereby **ORDERED** that:

- a. the motion to dismiss the side yard challenge is **DENIED**

Vote taken on June 22, 2004

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr.,
John A. Mann II, and Anthony J. Hood)

- b. the motion to deny the appeal is **GRANTED** with respect to the side yard challenge

Vote taken on July 6, 2004

VOTE: **3-0-2** (Geoffrey H. Griffis, Ruthanne G. Miller, and Curtis L. Etherly, Jr., voting in favor of the motion, and John A. Mann II and Anthony J. Hood voting by absentee ballots against the motion)

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

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: 
JERRILY R. KRESS, FAIA
Director, Office of Zoning 

FINAL DATE OF ORDER: FEB 28 2005

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 17085

As Director of the Office of Zoning, I hereby certify and attest that on FEB 23 2005 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Richard B. Nettler, Esq., Counsel to the following Appellants:
Robins, Kaplan, Miller & Ciresi LLP
1801 K Street, N.W., Suite 1200
Washington, D.C. 20006

James Marsh
Mary Ann Snow
320 2nd Street, S.E.
Washington, D.C. 20003

Louise and Larry Smith
322 2nd Street, S.E.
Washington, D.C. 20003

Richard L. Aguglia, Esq., Counsel to Folger Park North LLC
Hunton & Williams LLP
1900 K Street, N.W.
Washington, D.C. 20006

Chairperson
Advisory Neighborhood Commission 6B
921 Pennsylvania Avenue, S.E.
Washington, D.C. 20003

Commissioner 6B01
Advisory Neighborhood Commission 6B
921 Pennsylvania Avenue, S.E.
Washington, D.C. 20003

BZA APPLICATION NO. 17085

PAGE NO. 2

Sharon Ambrose, City Councilmember
Ward Six
1350 Pennsylvania Avenue, N.W., Suite 102
Washington, D.C. 20004

Toye Bello, Zoning Administrator
Building and Land Regulation Administration
Department of Consumer and Regulatory Affairs
941 N. Capitol Street, N.E.
Washington, D.C. 20002

Ellen McCarthy, Deputy Director
Office of Planning
801 North Capitol Street, N.E.
4th Floor
Washington, D.C. 20002

Alan Bergstein, Esq.
Office of Attorney the General
441 4th Street, N.W., 6th Floor
Washington, D.C. 20001

rsn

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning 

E



GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Parks and Recreation

April 5, 2007

Mr. Richard Smith
VORNADO/Charles E. Smith
Suite 1000
2345 Crystal Drive
Arlington, VA 22202

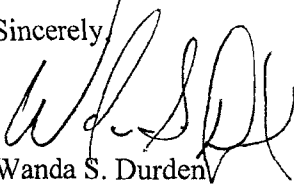
Re: BNA Buildings PUD, Zoning Commission Case No. 06-35
Memorandum of Understanding – Francis Field

Dear Mr. Smith:

We write this letter to acknowledge VORNADO/Charles E. Smith's offer to provide the design, materials, and labor necessary to provide improvements to Francis Field and to express our willingness to accept this work. Per our understanding, you will arrange for the preparation of a landscape plan for Francis Field that will include the addition of trees, park lighting, furniture, trash receptacles, and a drinking fountain. Following review and approval by the D.C. Department of Parks and Recreation, you will then install the improvements, which will provide a public benefit to the proposed PUD. We note that the specific features of the improvement were arrived at through discussion and consultation with representatives of ANC 2A and the Friends of Francis Field. The proposed work is valued at \$150,000.

DPR understands that this commitment to provide the work is conditioned on the approval of the PUD. We also understand that the work will be performed only if a building permit is granted for the PUD, and the project commences construction.

Sincerely,



Wanda S. Durden
Interim Director

cc: Carol Mitten, Chairperson, D.C. Zoning Commission
Michael Thomas, Chairperson, ANC 2A
Friends of Francis Field

Join in the Fun!

F

Avitabile, David

From: Avitabile, David
Sent: Thursday, March 15, 2007 5:56 PM
To: Sharon.Dendy@dc.gov
Cc: Prince, Allison C.; Smith, Richard; mthomas.anc2A02@earthlink.net; jw@janewilner.com; gary@smart.net
Subject: Francis Field
Attachments: Draft DPR Amenity Letter.doc

Sharon,

Thank you for meeting with us on Wednesday, March 7, 2007, regarding improvements to Francis Field that will be included as a public benefit and project amenity of the proposed planned unit development (PUD) to redevelop the existing BNA Buildings, which is currently scheduled for a public hearing before the D.C. Zoning Commission on Monday, March 26, 2007.

As we discussed last week, VORNADO/Charles E. Smith (the Applicant) will engage its landscape architect to prepare a design for Francis Field that includes the addition of mature trees and landscape plantings, park lighting fixtures, benches and park furniture, trash receptacles, and a drinking fountain. Following D.C. Department of Parks and Recreation's review and approval of the design, and provided that the PUD is approved, the Applicant will then install the improvements, which will provide a public benefit of the proposed PUD. The proposed work, including the design, materials, and installation, is valued at \$150,000.

As also discussed, the Applicant also intends to provide substantial streetscape improvements to both sides of 25th Street as part of the PUD. These improvements, which were also designed by the Applicant's landscape architect, include the installation of an ornamental metal fence along the field's perimeter to replace the present fence.

We note that the commitment to provide this work is conditioned on the approval and construction of the PUD. As such, the work will be performed only if the Applicant secures a building permit and commences construction of the project.

The Zoning Commission requires the Applicant provide the Commission with a Memorandum of Understanding by the date of the hearing—typically in letter form—that confirms the agency will accept the proffered amenity. We have prepared a draft/sample letter for your convenience that incorporates the above; once you have secured appropriate DPR approval, we would appreciate if you could return a final signed copy to us at your earliest convenience. Additionally, as discussed at our meeting last week, we invite you or another representative of DPR to testify at the public hearing in support of the application. We anticipate the hearing will commence around 7:00 PM on Monday, March 26.

Please feel free to contact me with any questions.

Best,

Dave

David Avitabile | Associate
Pillsbury Winthrop Shaw Pittman LLP

Tel: 202.663.9113 | Fax: 202.663.8007
2300 N Street, NW | Washington, DC 20037-1122

Email: david.avitabile@pillsburylaw.com

1/22/2010

Mr. Richard Smith
VORNADO/Charles E. Smith
Suite 1000
2345 Crystal Drive
Arlington, VA 22202

Re: BNA Buildings PUD, Zoning Commission Case No. 06-35
Memorandum of Understanding – Francis Field

Dear Mr. Smith:

We write this letter to acknowledge VORNADO/Charles E. Smith's offer to provide the design, materials, and labor necessary to provide improvements to Francis Field and to express our willingness to accept this work. Per our understanding, you will arrange for the preparation of a landscape plan for Francis Field that will include the addition of trees, park lighting, furniture, trash receptacles, and a drinking fountain. Following review and approval by the D.C. Department of Parks and Recreation, you will then install the improvements, which will provide a public benefit to the proposed PUD. We note that the specific features of the improvement were arrived at through discussion and consultation with representatives of ANC 2A and the Friends of Francis Field. The proposed work is valued at \$150,000.

We fully support the Applicant's proposed PUD for the former BNA Buildings. The conversion of the existing office buildings to residential use will enhance the mixed-use nature of this block of 25th Street, which is currently dominated by office uses. The project's high quality design and streetscape improvements will improve the pedestrian experience on both sides of 25th Street. Additionally, the low-impact development features of the PUD will enhance the surrounding environmental conditions.

We understand that this commitment to provide the work is conditioned on the approval of the PUD. We also understand that the work will be performed only if a building permit is granted for the PUD, and the project commences construction.

This PUD will improve the quality of life for nearby residents. We believe that the Zoning Commission should approve this project, and we applaud VORNADO/Charles E. Smith in its effort to adaptively reuse the existing buildings.

Sincerely yours,

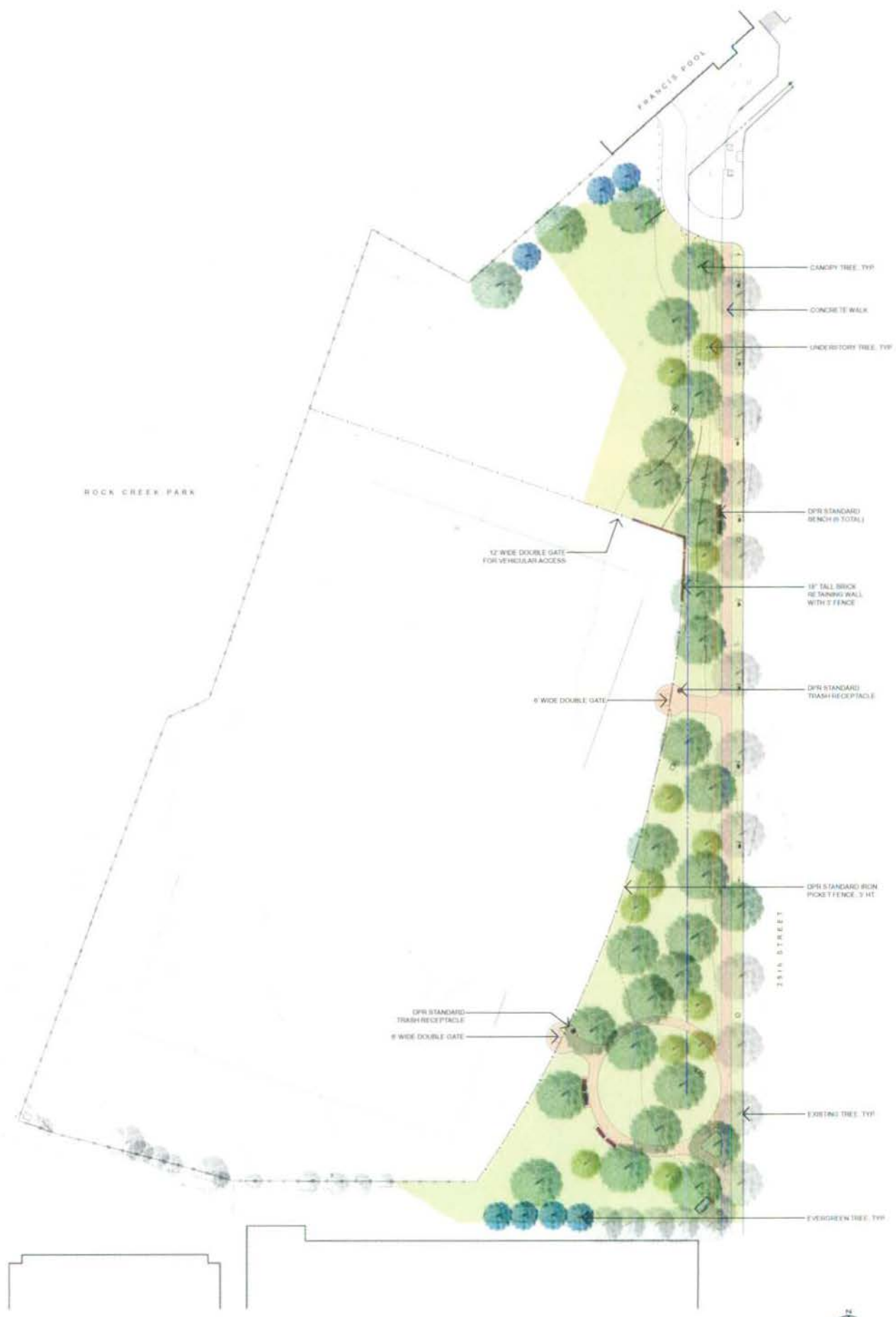
[name]

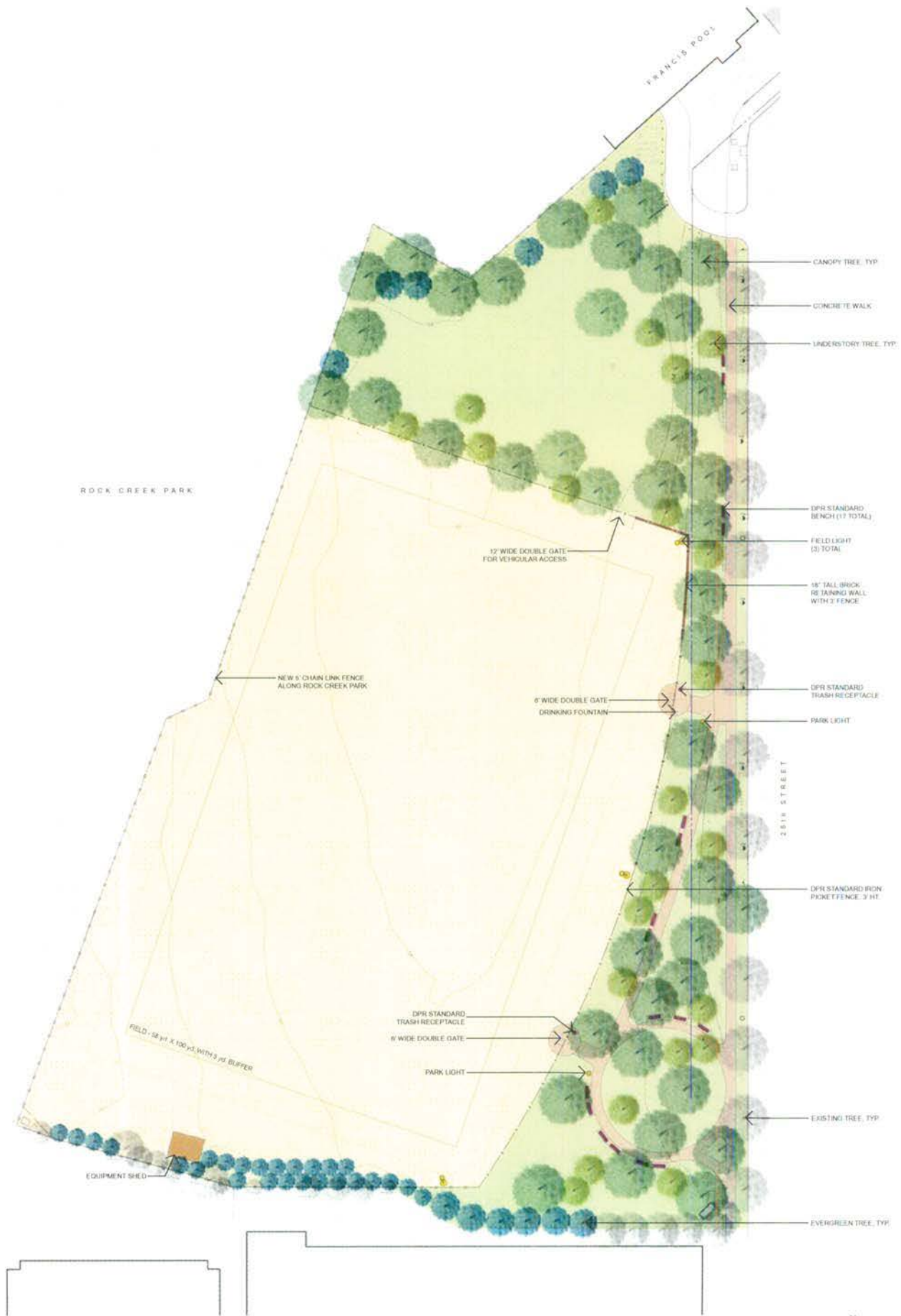
[title]

D.C. Department of Parks and Recreation

cc: Carol Mitten, Chairperson, D.C. Zoning Commission
Michael Thomas, Chairperson, ANC 2A
Friends of Francis Field

G





H

ESCROW AGREEMENT

This ESCROW AGREEMENT ("Agreement") is made as of JUNE 18, 2009 (the "Effective Date"), by and among (i) VNO 1229-1231 25TH STREET LLC, a Delaware limited liability company, and its successors and assigns ("Owner"), (ii) the D.C. DEPARTMENT OF PARKS AND RECREATION ("DPR"), and (iii) COMMONWEALTH LAND TITLE INSURANCE CO. ("Escrow Agent")

RECITALS:

A. In Z.C. Order No. 06-35 (the "PUD Order"), the Zoning Commission approved a Planned Unit Development ("PUD") for property owned by Owner and located at 1229-1231 25th Street (Square 24, Lot 885) (the "Property"). Pursuant to this approval, Owner commenced construction of the PUD on the Property. Owner intends to seek a certificate of occupancy for the PUD by late summer 2009.

B. Francis Field is a public park operated by DPR and located directly across 25th Street NW from the Property.

C. Owner and DPR are parties to that certain Memorandum of Understanding dated April 5, 2007 ("MOU"). Pursuant to that MOU, Owner agreed to provide design, materials, and labor, valued at \$150,000, necessary to provide improvements to Francis Field (the "Contribution").

D. During the course of the PUD proceedings before the Commission, Owner proffered the Contribution as a project amenity and public benefit of the PUD.

E. Owner has, through its consultants, prepared a master landscape plan for Francis Field (the "Master Plan"). The Master Plan includes, inter alia, the specific features promised by Owner in its Contribution (i.e. trees, park lighting, furniture, and trash receptacles referred to in the MOU), and these features are planned as the first phase of the Master Plan (the "Phase I Improvements"). The total value of the preparation of the Master Plan, which constitutes the "design" portion of the contribution required by the PUD Order, is \$38,230.

F. Owner desires to purchase the materials, prepare the construction drawings, and install the Phase I Improvements, which DPR agrees shall satisfy Owner's commitment to complete the Contribution, so that Owner may secure a Certificate of Occupancy for the PUD. The total value of the materials, construction drawings, and installation of the Phase I Improvements, which constitute the "materials and labor" portion of the contribution required by the PUD Order, is \$111,770.

G. During the course of the PUD proceedings, Owner also proffered the replacement of the existing chain-link fence along a portion of the west side of 25th Street N.W. with an ornamental metal fence (the "Fence") as a project amenity and public benefit of the PUD. In conjunction with its approval of the PUD, the Commission incorporated the Fence into its PUD Order as a part of a condition of approval, and

required that, subject to the approval of the appropriate District agency or agencies, Owner provide the Fence prior to the issuance of a Certificate of Occupancy for any portion of the PUD. The total value of the Fence is approximately \$36,000.

H. DPR has approved the design of the Phase I Improvements and the Fence. Notwithstanding DPR's approval, DPR cannot authorize Owner's construction of the Phase I Improvements or the Fence until certain issues regarding the overall Master Plan are resolved. These issues are entirely outside the control of Owner, and include (i) discussions with the National Park Service regarding jurisdiction over Francis Field; (ii) approval of the Master Plan by the U.S. Commission of Fine Arts; and (iii) completion of improvements under Francis Field by the DC Water and Sewer Authority.

I. Owner agrees to deposit funds in the aggregate amount of \$147,770 (the "Escrow Amount") to be held by the Escrow Agent in an escrow account established pursuant to the terms of this Agreement (the "Escrow Account").

J. Following the deposit of the Escrow Amount into the Escrow Account, Owner shall have satisfied its Contribution under the MOU.

K. Owner, DPR, and Escrow Agent desire to set forth their respective rights and obligations with respect to the Escrowed Funds.

NOW, THEREFORE, in consideration of the recitals and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

1. **Appointment; Agreement to Serve as Escrow Agent.** Owner and DPR hereby collectively appoint and engage the Escrow Agent to serve as escrow agent pursuant to the terms of this Agreement. The Escrow Agent hereby agrees to hold the Escrowed Funds (as defined below) in accordance with the terms of this Agreement.

2. **Escrowed Funds.**

a. Not more than ten days after the Effective Date, Owner shall cause to be delivered to the Escrow Agent funds in an amount equal to the Escrow Amount (the "Escrowed Funds"). The Escrowed Funds are permitted to be delivered in the form of cash or an unconditional, irrevocable commercial letter of credit ("Letter of Credit") naming the Escrow Agent as the beneficiary thereof. All interest earned on the Escrowed Funds (if in the form of cash or at any time converted to cash) shall be the property of Owner, shall be payable to Owner on a quarterly basis, and shall not in any event be deemed a part of the Escrowed Funds.

b. The Letter of Credit, if any, shall be (i) in form and substance reasonably satisfactory to DPR (DPR hereby approving the form of letter of credit attached hereto as Exhibit A); (ii) in the Escrow Amount; (iii) issued by a federally-insured commercial bank accepting presentation of sight drafts in the Washington, D.C. metropolitan area; (iv) include an "evergreen" provision which provides that the Letter of Credit shall be automatically renewed on an annual basis unless the issuer delivers thirty

(30) days prior written notice of cancellation to Escrow Agent and DPR; and (v) providing for presentation of sight drafts for payment based solely on a certification from the beneficiary that the beneficiary is entitled to draw thereon.

c. Escrow Agent shall draw upon the Letter of Credit in any of the following circumstances, without any further notice of any kind except as expressly specified in this Section 2(c): (i) if Owner fails to deliver to Escrow Agent a replacement Letter of Credit (from a financial institution other than the issuer, or successor thereto, of the then-current Letter of Credit) reasonably approved in writing by DPR within ten (10) days after written demand by DPR (it being agreed that DPR shall not deliver such demand unless the issuing bank's (or its successor's) credit rating is reduced below P-2 (or equivalent) by Moody's Investors Service, Inc., or below A-2 (or equivalent) by Standard & Poor's Corporation); or (ii) if Owner fails to provide Escrow Agent with any renewal or replacement Letter of Credit reasonably approved in writing by DPR at least fifteen (15) days prior to the expiration of the then-current Letter of Credit (taking into account any automatic renewal, provided notice of non-renewal has not been given).

4. **Certificate and Acknowledgment; Effect of Delivery.** Within five (5) business days after Owner's delivery of the Escrowed Funds, the Escrow Agent shall notify Owner and DPR in writing of Escrow Agent's holding of the Escrowed Funds by signing three (3) counterparts of the Certificate and Acknowledgement attached to this Agreement as Exhibit B (the "**Certificate and Acknowledgement**") and delivering one (1) original counterpart to each of Owner and DPR. DPR acknowledges and agrees that the delivery of the Escrowed Funds to Escrow Agent satisfies Owner's obligation to make the Contribution under the MOU.

5. **Investment of Escrowed Funds.** At any time that the Escrowed Funds are being held in the form of cash, the Escrow Agent shall invest the Escrowed Funds in investment grade securities.

6. **Release of Escrowed Funds.**

a. Within five (5) business days after Owner delivers a copy of an invoice for materials, construction drawings, and/or services related to the Phase I Improvements and/or Fence to DPR, DPR shall notify Escrow Agent in writing to disburse a portion of the Escrowed Funds to Owner. Within three (3) business days after DPR delivers said notice to Escrow Agent (which notice shall specify the amount of such disbursement as the amount due on said invoice), Escrow Agent shall disburse the specified portion of the Escrowed Funds to Owner. Within five (5) business days after Owner delivers a certification signed by Owner's landscape architect ("**Architect's Certification**") that construction of the Phase I Improvements is completed to DPR, DPR shall notify Escrow Agent in writing to release the balance of the Escrowed Funds to Owner. Within three (3)-business days after DPR delivers said notice to Escrow Agent, Escrow Agent shall promptly release the balance of the Escrowed Funds from escrow and shall deliver the same to Owner.

b. Notwithstanding the foregoing, if any portion of the Escrowed Funds has not been disbursed to Owner on or before the date that is five (5) years after the Effective Date of this Agreement, then the Escrow Agent shall release the Escrowed Funds from escrow and deliver the same to DPR. Upon receipt, DPR shall take all reasonable and appropriate actions to designate and reserve the Escrowed Funds exclusively for the funding of improvements to Francis Field.

7. **Termination.** This Agreement shall terminate, and the parties shall have no further rights, liabilities or obligations to each other under this Agreement, upon the disbursement of the Escrowed Funds by the Escrow Agent in accordance with the terms of Section 6 above.

8. **Disputes.** In the event of any dispute between Owner or DPR regarding the release and disbursement of the Escrowed Funds, or if the Escrow Agent receives conflicting demands or instructions with respect to the release and disbursement thereof (but not with respect to drawing on the Letter of Credit, which Escrow Agent shall do notwithstanding any conflicting demands or instructions), the Escrow Agent shall withhold such disbursement and continue to hold the Escrowed Funds in accordance with the terms hereof pending (a) the joint written instructions of Owner and DPR or (b) receipt of an order of a court of competent jurisdiction or the binding award of an arbitrator resolving the dispute or directing the release and disbursement of the Escrowed Funds.

9. **Actions Taken in Good Faith.** The Escrow Agent may act upon any instrument or writing believed by the Escrow Agent in good faith to be genuine and executed by the proper person. The Escrow Agent shall not be liable for any losses, liabilities, claims, actions, damages and expenses arising out of or in connection with this Agreement, except for those arising out of the Escrow Agent's own negligence or willful misconduct. Owner and DPR hereby agree to indemnify and hold the Escrow Agent harmless from and against all losses, liabilities, claims, actions, damages and expenses (including, without limitation, reasonable attorneys' fees and court costs) arising out of this Agreement, except for those arising out of the Escrow Agent's negligence or willful misconduct.

10. **Notices.** Any notice or communication required or permitted hereunder shall be given in writing, sent by (a) personal delivery, or (b) expedited delivery service with proof of delivery, or (c) United States mail, postage prepaid, registered or certified mail, addressed to the parties at the following addresses, and shall be effective upon actual receipt or refusal of receipt:

If to Owner:

c/o Vornado/Charles E. Smith
Attn: Richard Smith
Senior Vice President, Development
2345 Crystal Drive, Suite 1000
Arlington, VA 22202

with a copy to:

John T. Epting, Esq.
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street NW
Washington, DC 20037

If to DPR:

Bridget Stesney
Planning Officer
1480 Girard Street, NW, 4th Floor
Washington, DC 20009

with a copy to:

Marie-Claire Brown
General Counsel
3149 16th Street, NW
Washington, DC 20010

If to the Escrow Agent:

David P. Nelson
Vice President, Commonwealth Land Title Co.
1015 15th Street, N.W., Suite 300
Washington, DC 20005

12. **Fees.** The Escrow Agent has previously been paid a fee for serving under this Agreement with respect to the period expiring on the day before the first anniversary of the date first above written. Fees payable to Escrow Agent for serving hereunder with respect to subsequent periods shall be borne by Owner.

13. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the District of Columbia without regard to conflicts of laws principles.

14. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which when so executed and delivered shall be deemed an original, and all of which taken together shall constitute one and the same instrument.

15. **Binding Effect.** The agreements, terms, covenants and conditions herein shall bind and inure to the benefit of Owner, DPR and the Escrow Agent, and their respective heirs, personal representatives, successors and assigns.

16. **Modifications.** The terms of this Agreement may not be modified, amended or altered in any way except by a writing (which may be in counterpart copies)

that is (a) signed by Owner and DPR, and (b) acknowledged by the Escrow Agent. DPR hereby acknowledges that Owner may seek to modify the PUD Order, including the requirement imposed by Condition 10(b) and Condition 10(c), which may require modification of this Agreement. DPR agrees to cooperate reasonably and in good faith with any request by Owner to modify the PUD and related request to modify this Agreement pursuant to said PUD modification.

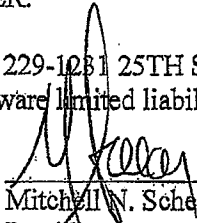
17. **Substitution of Escrow Agent.** Owner and DPR reserve the right, at any time and from time to time, to substitute a new escrow agent in place of the Escrow Agent.

18. **Time of the Essence.** Time shall be of the essence as to performance of any party's obligations hereunder.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

OWNER:

VNO 1229-1231 25TH STREET LLC,
a Delaware limited liability company

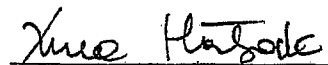
By: 

Name: Mitchell N. Schear

Its: President

DPR:

D.C. DEPARTMENT OF PARKS AND
RECREATION

By: 

Name: Ximena Hartsock

Its: Acting Director

ESCROW AGENT:

that is (a) signed by Owner and DPR, and (b) acknowledged by the Escrow Agent. DPR hereby acknowledges that Owner may seek to modify the PUD Order, including the requirement imposed by Condition 10(b) and Condition 10(c), which may require modification of this Agreement. DPR agrees to cooperate reasonably and in good faith with any request by Owner to modify the PUD and related request to modify this Agreement pursuant to said PUD modification.

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OWNER:

VNO 1229-1231 25TH STREET LLC,
a Delaware limited liability company

By: _____
Name: Mitchell N. Schear
Its: President

DPR:

D.C. DEPARTMENT OF PARKS AND
RECREATION

By: _____
Name: Ximena Hartsock
Its: Acting Director

ESCROW AGENT:

COMMONWEALTH LAND TITLE INSURANCE CO.

By:  _____
Name: Michael A. Segal
Its: Assistant Vice President

EXHIBIT A

(Acceptable Form of Letter of Credit)

Irrevocable Letter of Credit No. _____
_____, _____

[ESCROW AGENT INFO]

Account Party: _____

Beneficiary: _____

Amount: \$_____ U.S. Dollars

Expiration Date: _____, _____

Ladies and Gentlemen:

We hereby issue this irrevocable, unconditional letter of credit number _____ (the "Credit") in your favor, payable in immediately available funds in one or more draws of any sum or sums not exceeding in the aggregate _____, by your draft(s) at sight presented at _____, together with the following statement:

"The undersigned, an authorized representative of Beneficiary, hereby certifies that Beneficiary is entitled to the amount drawn hereunder pursuant to the terms of that certain Escrow Agreement dated _____, by and among _____."

This Credit shall automatically be renewed from year to year commencing on the first anniversary of the date hereof unless we shall give thirty (30) days prior written notice to Beneficiary by certified mail, return receipt requested, at the address set forth above (with copies sent in an identical manner to (a) _____ or such other address as _____, may direct us in writing from time to time, and (b) any one (1) other entity as _____, may have notified us of in writing from time to time), of our intent not to renew this Credit at the expiration of such thirty (30) day period. During such thirty (30) day period, this Letter of Credit shall remain in full force and effect and Beneficiary may draw up to the full amount hereof when accompanied by the statement described in this Credit.

We will accept any and all such representatives as authorized and any and all statements delivered hereunder as conclusive, binding, and correct without having to investigate or having to be responsible for the accuracy, truthfulness, correctness, or validity thereof, and notwithstanding the claim of any person to the contrary.

Drafts presented under this Credit shall specify the number of this Credit as set forth above and shall be presented on or before the Expiration Date hereof.

This Credit is assignable and transferable and may be transferred one or more times, without charge, upon our receipt of your written notice that an agreement has been executed to transfer or assign this Credit.

We hereby engage with you that drafts drawn under and in compliance with the terms of this Credit will be duly honored upon presentation to us.

This Credit sets forth in full the terms of our undertaking and such undertaking shall not in any way be modified, amended, amplified, or limited by reference to any document, instrument or agreement referred to herein, or by any document, instrument, or agreement in which this Credit is referred to, or to which this Credit relates, and any such reference shall not be deemed to incorporate herein by reference any such document, instrument, or agreement.

Except as otherwise expressly stated herein, this Credit is subject to the International Standby Practices (ISP98), International Chamber of Commerce Publication No. 590, and to the extent not inconsistent therewith, the laws of the District of Columbia, including without limitation, the Uniform Commercial Code in effect therein.

[BANK]

By:

Authorized Officer

EXHIBIT B
(Certification and Acknowledgement by Escrow Agent)

This is to certify that the undersigned, as _____ of _____, which is the "Escrow Agent" pursuant to an Escrow Agreement dated as of _____ ("Escrow Agreement") by and among _____, hereby (i) acknowledges receipt of funds in the amount of _____ ("Escrowed Funds") pursuant to the Escrow Agreement, and (ii) agrees that the Escrowed Funds will be disbursed only pursuant to and strictly in accordance with the terms of the Escrow Agreement.

By: _____
Name:
Title:

Dated: _____

I

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 16950 of the West End Citizens Association, pursuant to 11 DCMR §§ 3100 and 3101, of the administrative decisions of David Clark, Director, and Robert Kelly, Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Certificate of Occupancy No. 39477 on August 16, 2002 to The George Washington University, permitting the occupancy of the subject property for residential (apartment) and parking use, pursuant to a Planned Unit Development in a C-3-C zone district at premise 1957 E Street, N.W. (Square 122, Lot 835).

HEARING DATES: December 17, 2002 and January 14, 2003
DECISION DATE: March 4, 2003

DECISION AND ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

This appeal was brought by the West End Citizens Association (WECA), a nonprofit association involved with civic matters within the "Foggy Bottom/West End" community. On September 23, 2002, WECA filed an appeal with the Office of Zoning (OZ) of the decision of then-Zoning Administrator (ZA), Robert Kelly, to approve the issuance of Certificate of Occupancy (C of O) No. 39477 to The George Washington University (University). The C of O enabled the University to occupy part of a multi-story building for apartment and parking uses pursuant to an approved Planned Unit Development (PUD) at premise 1957 E Street, N.W. (subject property). In its appeal document, WECA contended that the C of O should not have been issued because the University was not in compliance with Zoning Commission Order No. 746-C, the order that granted the University authority to build the PUD. WECA also contended that the ZA tried to improperly add conditions to a Zoning Commission Order, failed to timely respond to a Freedom of Information Act (FOIA) request and erred in not issuing daily fines for alleged non-compliance.

WECA alleged that the University had failed to comply with two conditions and one provision of Zoning Order No. 746-C. Specifically, WECA alleged that the University had not complied with Condition No. 9(a), which states that, on the day the C of O for the subject property is issued, the University shall make the first of five \$100,000 contributions to the Foggy Bottom Feeding Program. WECA also alleged non-compliance with Condition No. 12, which states that the University shall comply with the D.C. Environmental Policy Act (D.C. Official Code § 6-981 *et seq.* (2001)) on all future campus construction projects. Lastly, WECA contended that the University had failed to

comply with finding of fact No. 32, which notes an agreement between WECA and the University to manage student parking in the Foggy Bottom/West End area and reiterates certain intentions of the parties concerning the implementation of this agreement.

By letter dated September 25, 2002, OZ notified the University, the Director of the Department of Consumer and Regulatory Affairs (DCRA), under whom the ZA operates, Advisory Neighborhood Commission (ANC) 2A, the ANC member for Single Member District 2A05, the Councilmember for Ward 2 and the District of Columbia Office of Planning (OP), of the filing of the appeal. Pursuant to § 3112.14 of Title 11 of the District of Columbia Municipal Regulations (DCMR), OZ, by letter dated October 25, 2002, notified the ZA, WECA, ANC 2A and the University of the hearing date of December 17, 2002. The University was notified of the filing of the appeal and the hearing date because, as owner of the subject property, it is a party to the appeal pursuant to 11 DCMR § 3199.

The Board held a public hearing on the appeal on December 17, 2002, which was continued to January 14, 2003. During the December 17th hearing, Ms. Barbara Kahlow and Ms. Sara Maddux argued the appeal for WECA. Ms. Kahlow presented WECA's arguments on the University's alleged non-compliance in three areas: the Condition 9(a) feeding program contribution, the D.C. Environmental Protection Act (DCEPA) and the parking agreement with WECA. Ms. Maddux testified further concerning parking in the Foggy Bottom/West End area. She also testified as to two new alleged grounds for appeal which did not appear on the appellant's September 23, 2002 appeal document. Ms. Maddux brought up the University's alleged failure to provide required retail at the subject property (Condition No. 9(b) of Order 746-C) and its alleged failure to implement an approved landscape plan (Condition No. 7 of Order 746-C).

At the December 17, 2002 hearing, the ZA testified, explaining and defending his actions. WECA questioned him regarding, among other things, his alleged improper addition of conditions to a Zoning Commission Order, his alleged failure to respond timely to a FOIA request, and his alleged failure to impose fines. He denied any irregular or improper acts or wrongdoing.

The University, through its counsel, and the testimony of the University's Senior Counsel, Mr. Charles Barber, asserted that the University was in compliance with Condition 9(a), that Condition 12 (DCEPA) applied prospectively only, and therefore did not apply here, that the parking issue arose out of a private agreement between the University and WECA, and that it was therefore not properly before the Board, and that the other two issues, concerning the required retail and the landscape plan, were not yet ripe for review.

By virtue of 11 DCMR § 3199.1, ANC 2A is a party to this appeal. The ANC did not present any testimony on December 17th, but on December 29, 2002, the ANC held a special meeting and designated Ms. Dorothy Miller and Ms. Elizabeth Elliott to represent

it at the continued hearing scheduled for January 14, 2003. At this continued hearing, Ms. Kahlow and Ms. Maddux again appeared on behalf of the appellant. The two ANC representatives, Ms. Miller and Ms. Elliott, testified that the ANC was not taking a position with regard to this appeal, but was remaining neutral.

After the January 14th hearing, the Board requested the submission of additional information, after the receipt of which the Board held a public decision meeting on March 4, 2003. At the decision meeting, the Board decided, by a vote of 5-0-0, to deny the appeal on all grounds.

FINDINGS OF FACT

1. The subject property, acquired by the University in 1999, is located at 1957 E. Street, N.W. On the property, the University is building a multi-story building for residential (apartment) and parking use.
2. The subject property is zoned C-3-C and is located in the Foggy Bottom/West End Neighborhood of the District of Columbia.
3. Pursuant to Zoning Commission Order No. 746, dated December 10, 1993, a Planned Unit Development requested by the Associated General Contractors of America was approved for the subject property and the property was rezoned from an SP-2 zone district to the current C-3-C zone district. The 1993 Order approved the site for the construction of a mixed-use building, with both residential and commercial uses. The PUD approved a floor area ratio (FAR) of 5.79 for commercial space and a FAR of at least 2.17 for residential space.
4. Zoning Commission Order No. 746 was extended for two years, until December 10, 1997, by Order No. 746-A, with construction to begin not later than December 10, 1998. Order No. 746-B extended Order No. 746 for another two years, requiring the acquisition of a building permit by December 10, 1999, and the commencement of construction not later than December 10, 2000.
5. After purchasing the subject property in 1999, the University obtained approval from the ZA for several non-major changes to the approved PUD plans, as well as a building permit approving construction of the project, under the original PUD order, *i.e.*, Order No. 746. WECA and Advisory Neighborhood Commission 2A appealed the ZA's actions. On appeal, the Board of Zoning Adjustment overturned the issuance of the building permit and held that the ZA had exceeded his discretion in that the proposed changes should have been presented to the Zoning Commission as a PUD modification.
6. The University, therefore, applied to the Zoning Commission for modifications to the approved PUD plans. After appropriate application and public hearing on the matter, the Zoning Commission approved modifications to the PUD in Order No. 746-C, which granted the University permission to proceed with the construction of the building on the subject property, but modified the PUD with additional

terms and conditions which the University is obligated to perform. (Exhibit A to Exhibit No. 29).

7. The Department of Consumer and Regulatory Affairs, through the Zoning Administrator, issued Certificate of Occupancy No. CO39477 for the building on August 16, 2002. WECA now alleges that the University failed to abide by certain conditions of Order No. 746-C and that therefore issuance of the C of O was error on the part of the ZA.

Condition No. 9(a) of Zoning Commission Order No. 746-C

8. Condition No. 9(a) of Order 746-C states, in relevant part, as follows:

The University shall contribute \$500,000 over five (5) years for the purpose of operating a program of providing meals at reduced rates for the needy, elderly, and other low-income residents of Foggy Bottom (the "Feeding Program") at one or more food service venues in Foggy Bottom, such as venues in University-owned or leased facilities. The \$500,000 contribution will be \$100,000 a year for five (5) years to the Foggy Bottom Feeding Program Foundation, Inc. (the "Foundation"), an established District of Columbia nonprofit corporation organized by the representatives of the University and WECA. ... **The first \$100,000 contribution shall be made on the date of the Certificate of Occupancy for the Subject Property.** ... The contribution shall be conditioned so that no portion of the \$500,000 contribution ... may be used for salaries, expenses and other costs relating to the administering the Feeding Program. The entirety of the \$500,000 contribution paid by the University shall be conditioned upon its exclusive use to provide food and meals to needy, elderly, and other low-income residents. **If, for any reason, the Feeding Program cannot operate as described above or the Feeding Program fails to comply with the above-stated funding condition, then the University shall pay \$100,000 a year to an existing, nonprofit food service Program selected by the Foundation until (a) the Feeding Program begins or resumes operation; (b) the Feeding Program achieves compliance with the funding condition; or (c) the \$500,000 is fully expended, whichever comes first.** (Emphasis added.)

9. Zoning Commission Order No. 746-C (Order 746-C) became effective on August 16, 2002.

10. On August 12, 2002, the University wrote to Mr. Batham, a representative of the Foggy Bottom Feeding Program Foundation (Foundation) and informed him that the University was about to apply for a C of O for the residential wing of the building on the subject property. (Exhibit No. 30). The letter pointed out that the Foundation did not yet have a feeding program in operation and therefore requested that, pursuant to Condition 9(a), the Foundation designate an alternative, existing feeding program to receive the University's first \$100,000 contribution.
11. DCRA issued the first Certificate of Occupancy for the building on the subject property on August 16, 2002. (Exhibit No. 23).
12. By August 16, 2002, the Foundation had not designated an alternative feeding program, but instead, members of WECA requested more time to establish the Foundation's own feeding program.
13. On August 16, 2002, the University sent Mr. Batham and the ZA a letter explaining that, because the Foundation's feeding program was not yet operating and an alternative had not been designated, the University had, on August 16th, deposited the first \$100,000 contribution in an interest-bearing escrow account at Riggs Bank under the name of "George Washington University Elliott School Escrow Account." (Exhibit D to Exhibit No. 29).
14. The term of the escrow account was three months, with its expiration on November 16, 2002, although the money could be removed from the account earlier. (See, Exhibit No. 28, fn. #1). The University designated the ZA as escrow agent for the account.
15. In the August 16th letter referenced in Finding of Fact No. 12, the University proposed the following solutions to the situation: If the Foundation's feeding program were operating prior to November 16, 2002, the money from the escrow would be paid to it at that time. If the Foundation's program were still not operating at that time, the money would be paid to an alternative feeding program selected by the Foundation. If, however, the Foundation's program did not yet exist and the Foundation had not yet selected an alternative program by November 16th, the University would request the Zoning Commission to determine how the money should be applied.
16. The Foundation, to which Condition 9(a) directs the first \$100,000 contribution, was operating as a nonprofit organization on August 16, 2002. However, Condition 9(a) also places two conditions on the contribution: (1) "no portion of the \$500,000 contribution ... may be used for salaries, expenses and other costs relating to administering the program," and (2) "its exclusive use to provide food and meals to needy, elderly, or other low-income residents." On August 16, 2002, the Foundation's feeding program was not operating.
17. It appears, from a series of e-mails between the ZA and the DCRA staff, sent between August 19, 2002 and August 29, 2002, that the ZA did not desire to be escrow agent for the University and that DCRA was concerned about the University's unilateral decision to set up the escrow account without WECA's prior agreement. (See, Attachments B & C to Exhibit No. 27).

18. On August 28, 2002, the ZA sent an e-mail to the University stating "it would appear that GWU (the University) is now in violation of Condition 9(a) of Order 746-C." (See, Attachment B to Exhibit No. 27).
19. On September 6, 2002, however, the ZA sent a letter to the Foundation, Mr. Batham, in his capacity as president of WECA, and the University. (Exhibit No. 28). The letter finally concludes that the University did not violate Condition 9(a) and requests that the Foundation either certify that its own feeding program has been established or that it designate an alternative feeding program. The letter goes on to state that, as soon as the Foundation takes one of these actions, the ZA will direct the proper disposition of the escrow funds.
20. In his September 6, 2002, letter, the ZA specifically requested one of two things from the Foundation:
 - 1) A resolution by the Board of Directors, duly adopted in accordance with D.C. law and the bylaws of the Foundation, certifying that a feeding program has been established and that the Foundation is prepared to operate the feeding program in conformance with the requirements of the Zoning Commission Order; or
 - 2) A resolution by the Board of Directors, duly adopted in accordance with D.C. law and the bylaws of the Foundation, designating an existing non profit food service program to receive the first \$100,000, in lieu of the Foundation.
21. In Zoning Commission Order 746-D, effective February 7, 2003, of which the Board took judicial notice at the March 4, 2003 decision meeting, the Zoning Commission added the following language to Condition 9(a), clarifying its meaning:

If the Foundation neither establishes the Feeding Program in compliance with this condition, nor identifies an alternative existing food service program within 30 days after receipt of a written request from the University to the Foundation, the University shall select a non-profit food service and/or homeless program operating within the Foggy Bottom area and not affiliated with the University to be the donee of the contribution, and said contribution shall be delivered within 10 business days after the expiration of the above-referenced 30-day period.
22. At a Board of Directors' meeting on February 27, 2003, the Foundation approved the existing food service program of St. Mary's Court Housing Development Corporation to be the recipient of the first \$100,000 contribution. The money was to be placed in the Foundation's account and then transferred to the use of St. Mary's Court.

23. Condition No. 12 of Order No. 746-C states: "[t]he University shall comply with the D.C. Environmental Policy Act (D.C. Code § 6-981 *et seq.*), subject to any applicable amendments, regulations or judicial interpretation, **on all future campus projects.**" (Emphasis added.)
24. The Board finds that the Condition applies only prospectively and therefore does not apply to the building on the subject property.

Parking Restrictions

25. Findings of Fact No's. 6(h) and 32 of Order 746-C note that the University had a private agreement with WECA to restrict freshmen and sophomores living in the Foggy Bottom/West End area from bringing cars to the University (with certain exceptions) and that the University would publish this restriction in its printed materials. These two findings of fact merely re-state the facts as they existed at the time. They do not require the University to do anything, nor do they amount to a condition of Zoning Commission Order No. 746-C.
26. This agreement between the University and WECA amounts to a private contract, which was not incorporated into Zoning Commission Order No. 746-C.

Condition No. 9(b) -- Provision of Required Retail

27. Condition 9(b) of Order 746-C states:
The University shall use its best efforts to fill the retail space called for in this Order ... with appropriate retail tenants. In the event that the University, despite its best efforts, is unable to rent the space within one (1) year of the issuance of the certificate of occupancy for the subject property, the University shall commence operation of the retail operation in the space under its own authority within that time frame. ... The University shall provide status reports on such retail operations on an annual basis to the Zoning Administrator, WECA and ANC 2A.
28. Condition No. 9(b) does not create a duty on the part of the ZA to contact the University to determine what the University is doing in order to implement and/or comply with this condition.
29. Condition 9(b) clearly allows the University one year from August 16, 2002 within which to provide the retail tenants required by Order 746-C. This appeal was brought on September 23, 2002, and therefore this issue was not ripe for the Board's consideration.

Condition No. 7 -- Implementation of Landscape Plan

31. Condition No. 7 in Order 746-C states that the University shall implement the same landscaping plan for this project as that approved in the original PUD. This landscaping plan, however, is not in the record.
32. At the time this appeal was brought, only a portion of the building on the subject property was completed. The Board finds that there was not yet any way to determine whether the University would properly implement the landscape plan and that, therefore, this issue was not ripe for the Board's review.

Alleged Failure to Issue Daily Fines for Non-Compliance

33. DCRA did not issue any fines to the University for non-compliance with any aspect of Zoning Commission Order No. 746-C.

CONCLUSIONS OF LAW AND OPINION

An appeal to the Board may be taken by any person aggrieved by any decision of any District official in the administration and/or enforcement of the zoning regulations, including the issuance of a certificate of occupancy. 11 DCMR §§ 3100.2 and 3200.2. The Board's regulations arise out of the authority and jurisdiction conferred upon it by D.C. Official Code § 6-641.07(f) (2001), in accordance with §8 of the Zoning Act of 1938 (52 Stat. 797, 799, as amended). D.C. Official Code § 6-641.07(g) limits the Board's jurisdiction to the decisions/actions "in the carrying out or enforcement of any regulation adopted pursuant to this subchapter and subchapter V of this chapter," *i.e.*, Subchapter IV. Zoning Regulations and Subchapter V. Chanceries. The Board therefore has no subject matter jurisdiction over WECA's claims as to non-compliance with the DCEPA or with FOIA. Nor does the Board have jurisdiction to rule upon alleged non-compliance with any aspect of any private agreement between WECA and the University, whether relating to parking or another subject.

The Board, however, does have jurisdiction over WECA's remaining claims, *to wit*: whether the University complied with Conditions 9(a), 9(b) and/or 7 of Order 746-C, whether the ZA improperly added conditions to Order 746-C, and whether the ZA erred in not issuing daily fines for alleged non-compliance. The Board will discuss each claim briefly, in turn.

Condition 9(a)

After a careful analysis of the whole of Condition 9(a), the Board concludes that the clear intent of the Zoning Commission was to provide money only for the Foundation's feeding program and not merely to provide money to the Foundation, to be used as it saw fit. The money is to be used by the Foundation only to feed the "needy, elderly, and other low-income" residents, and not for "salaries, expenses and other costs relating to administering the Feeding Program." Condition 9(a) seems to pre-suppose the operation

of the Foundation's feeding program prior to the first contribution and does not say that the University will provide the money to enable the Foundation to start a feeding program.

Although the Board finds that the Commission's intent was clear in Order No. 746-C, it was further clarified in Order No. 746-D, wherein the Commission specifies that, if neither the Foundation's feeding program is established nor an alternative program been selected by the Foundation within a prescribed period of time, the University shall choose a food service or homeless program to receive the contribution. Order No. 746-D does not say that if the Foundation's feeding program is not yet established, the contribution should go directly to the Foundation to be used to establish such a program. The Commission was concerned that the money go to feed the poor and homeless, not that the money go to the Foundation.

Acting on the Zoning Commission's intent, in its August 12th letter, the University asked the Foundation to designate an alternative feeding program, as its feeding program was not yet operational. As of the date of the issuance of the C of O, August 16, 2002, the Foundation's program was still not established and the Foundation had not yet designated an alternative program. The University decided to open the escrow account to hold the first \$100,000 contribution until one of these things occurred, otherwise it would have to return to the Commission for guidance. The ZA determined that the University's actions did not violate Condition 9(a).

The Board finds that the creation of the escrow account was a reasonable attempt by the University to comply with Condition 9(a). The University reasonably read Condition 9(a) to require the money to be paid to the Foundation's feeding program or a designated alternate, and not to the Foundation itself. With the Foundation's feeding program not established and no alternate designated on August 16th, when the C of O was issued, the University was in danger of not complying with Condition 9(a) if it did not do something. The escrow account set aside the \$100,000 until such time as all the requirements of Condition 9(a) were met, or the Zoning Commission gave further guidance. Not only was this not a violation of Condition 9(a), but it was actually the University's attempt to comply with the Condition. Therefore, the Board concludes that the ZA did not err in finding that the University was not violating Condition 9(a).

Condition 9(a) could be interpreted to condition the issuance of the first C of O for the subject property on the payment of the first \$100,000 contribution. The Board, however, does not find this interpretation persuasive because the language of Condition 9(a) does not support it. The language shows no clear intent on the part of the Zoning Commission to make the payment a prerequisite to the issuance of the C of O. Instead, the language merely says that the first \$100,000 contribution shall be made "on the date of the Certificate of Occupancy." This language could as easily be read to require the issuance of the C of O first, before the contribution was made. The Board therefore finds that

Condition 9(a) did not make payment of the first \$100,000 contribution a condition precedent to the issuance of the C of O. It merely mandated that the contribution had to be made on the same day that the C of O was issued. Therefore, the Board concludes that the ZA did not err in issuing the C of O on August 16, 2002.

Addition of Conditions to Order

Finding of Fact No. 19 sets forth the two requests by the ZA which the appellants call improper conditions added to Order No. 746-C. These requests were made in order to obtain proof that the Foundation's feeding program was operational or to obtain a designation of an alternative feeding program, to which to direct the first \$100,000 contribution. This appears to the Board to be a reasonable way for the ZA to attempt to acquire the information necessary to avoid any non-compliance with Condition 9(a). The Board concludes that these requests by the ZA were made in an attempt to implement Condition 9(a) and were not improper additions of new conditions to Order 746-C.

Condition 9(b)

Finding of Fact No. 28 sets forth Condition 9(b)'s requirement that the University provide retail operations in the building on the subject property. Condition 9(b) states that this retail must be provided within one year of the issuance of the C of O. Because the first C of O was issued on August 16, 2002, the University has/had until August 16, 2003, to provide the required retail operations. Therefore, when this appeal was filed on September 23, 2002, this issue was not yet ripe for the Board's review.

Condition No. 7

Condition No. 7 of Order 746-C states that the University must implement the same landscape plan for the subject property as that approved in the original PUD. At the time this appeal was brought, however, only one section of the building was complete. In fact, the C of O issued on August 16, 2002 applied only to the residential part of the building. The rest of the building was still under construction. Under these circumstances, the Board finds that it was too early to know whether or not the University would comply with Condition 7 and therefore concludes that this issue was not ripe for the Board's review.

Non-Issuance of Daily Fines

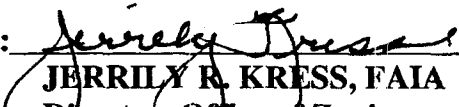
DCRA did not issue any daily fines to the University for non-compliance with Order 746-C. Because the Board finds that the University did not violate any of the complained-of provisions or conditions of Order 746-C, the Board concludes that the ZA did not err in not issuing such daily fines. Moreover, the Board doubts whether such a refusal could serve as grounds for an appeal in view of the absolute discretion normally afforded enforcement decisions. *Heckler v. Chaney*, 470 U.S. 821 (1985).

For the reasons stated above, the Board concludes that the appellant, WECA, has not met its burden of demonstrating that the ZA erred in any of the ways alleged by appellant herein, over which the Board has jurisdiction. It is hereby **ORDERED** that this appeal is **DENIED**.

VOTE: **5-0-0** (Geoffrey H. Griffis, Anne G. Renshaw, Curtis L. Etherly, Jr.,
David A. Zaidain and Peter G. May, to deny).

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

Each concurring member has approved the issuance of this Decision and Order and Authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY: 
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: APR 01 2004

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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BZA APPEAL NO. 16950

As Director of the Office of Zoning, I hereby certify and attest that on APR 01 2004 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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Commissioner 2A05
Advisory Neighborhood Commission 2A
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BZA APPEAL NO. 16950

PAGE 2

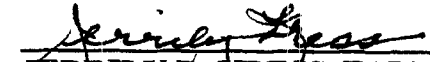
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rsn

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

J

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Permit Operations Division

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TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557



CERTIFICATE OF OCCUPANCY

THIS CERTIFICATE MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS MAIN ENTRANCE

PERMIT NO. CO1000665

Date: 12/21/2009

Address of Use: 1255 25th ST NW		Zone: 2	Ward: 2	Square: C-0024	Suffix: 0865	Lot: 0865
Description of Occupancy: CONDITIONAL CERTIFICATE OF OCCUPANCY FOR MULTI-FAMILY RESIDENTIAL BUILDING - 283 UNITS, 2 LEVEL PARKING GARAGE WITH 233 SPACES AND 19 VALET PARKING SPACES, CONDITIONED UPON FULFILLMENT OF PUD ORDER 08-35 CONDITION 10(b); EXPIRES 6/30/2010.						
Permission is Hereby Granted To: Mitchell Shear	Trading As: WEST END 25	Floor(s) Occupied: HRU 10TH, PENTH	PERMIT FEE: \$794.39			
Property Owner: 1229-1231 25th Street LLC	Previous Use(s): Office - B	Occupant Load: 283	BZA Number:			
Type of Occupancy: New Building	Occupied Sq. Footage: 323380	Approved Use(1): Apartment Houses - R-2				
Conditions/Restrictions: As a condition precedent to the issuance of this Certificate, the owner agrees to conform with all conditions set forth herein, and to maintain the use authorized hereby in accordance with the approved application and plans on file with the District Government and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property and to inspect all spaces whose use is authorized by this Certificate and to require any changes which may be necessary to ensure compliance with all the applicable regulations of the District of Columbia.						
Director: Linda K. Argo	Permit Clerk: Stacie Williams	Expiration Date: 06/30/2010				
TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL CALL THE DC INSPECTOR GENERAL AT 1-800-521-1639. FOR CONSTRUCTION INSPECTION INQUIRIES CALL (202) 442-9557 TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557.						