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APPEAL NO. 18029
BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE
DISTRICT OF COLUMBIA

SUPPLEMENTAL PRE-HEARING STATEMENT OF APPELLANT,
FRIENDS OF FRANCIS FIELD

Appellant does not agree with Owner's statement, in its letter to the Board of April 13, 2010, that all conditions in 10b and 10c of ZC Order No. 06-35 have been met by Owner.

While the 10b conditions relating to Francis Field have been substantially completed, the 10c streetscape conditions have not been completed, and are not presently in accord with Exhibit 27, as the Order specifically requires; nor are they in accord with the landscape plan entitled "Interim Plan – Revised," submitted by Owner in its Pre-Hearing Statement as Owner's Exhibit G.

The case is therefore not moot; and additional live issues remain, as discussed below.

In light of the suggestions offered by Board Member Moldenhauer at the previous session (February 23, 2010), Appellant will narrow its oral presentation at the April 20, 2010, hearing to the most pertinent issues.

To that end, this supplemental pre-hearing statement addresses, as a pleading, the additional live issues which Appellant believes the Board must decide before disposing of this Appeal, as well as the Condition 10c deficiencies referred to above.

RELIEF SOUGHT

1. Appellant requests that the Board affirm that the Zoning Administrator has no statutory authority to change a Zoning Commission order in a PUD case.

Appellant emphasizes the importance of the Board's ruling on the major issue of the Appeal, which is that the Zoning Administrator of the Department of Consumer and Regulatory Affairs (ZA), had no authority to change a Zoning Commission (ZC) order, or the conditions of that order, in a Planned Unit Development (PUD) case.

This principle is not only important in the instant case, but in other pending PUD cases within the Appellant's immediate neighborhood and within the jurisdiction of Advisory Neighborhood Commission 2A (ANC-2A), which has joined Appellant as a party in this

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18029

EXHIBIT NO. 22

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Appeal. (Two additional PUD cases are pending within the jurisdiction of ANC-2A, and a third is expected to be filed later this year.)

In the instant case, ZC included conditions to “put teeth” in its order. If ZA is permitted to change a ZC order or its conditions when those conditions are inconvenient, few ZC orders will be meaningful or enforceable.

As Appellant argued in its original filing of this Appeal, the authority of ZA is strictly limited in PUD cases, and these limitations are stated clearly and unequivocally in 11 DCMR §2409.

Appellee DCRA, in its pre-hearing statement submitted by the Attorney General for the District of Columbia, cited no law or regulation that gives ZA the authority to change a ZC order or condition, nor could the Attorney General cite such a law or regulation, as none exists.

Similarly, counsel for Owner cited no law or regulation that gives ZA this authority, nor could he, as no such law or regulation exists.

Rather, 11 DCMR §2409 states that ZA’s authority in PUD cases is expressly limited to modifications of building plans within certain percentages of distances, measurements, and unit counts. All other changes in a PUD case must be submitted to ZC for changes pursuant to 11 DCMR §2409.9 or 11 DCMR §3030.

02. Appellant requests that the Board find that no case precedent exists that could be interpreted to give ZA authority to change a ZC order in a PUD case.

Appellee and Owner, who cannot cite any statutory authority for the action that ZA took in this case, have attempted to find a case precedent.

PUD cases have existed in the District of Columbia for 48 years. Yet Appellee and Owner have found only a single case to cite in any way in their favor, that case being BZA Appeal No. 16950.

That case, however, is not comparable and cannot be found to be an applicable precedent. In that case, the actual installation of physical amenities was not required in the ZC order, and delivery of the amenities was not a pre-condition to the issuance of the Certificate of Occupancy (CO).

What was required in the relevant part of BZA Appeal No. 16950 (a multiple-issue case involving George Washington University) was simply a cash contribution to a charitable organization *simultaneous* with the issuance of the CO. The Board found in that case that the cash contribution could not possibly be made because the charitable organization specified in the order was not yet in existence. An escrow was substituted. ZC and all parties were informed of the proceedings.

The Attorney General states in the Appellee's pre-hearing statement:

"In that case, the university was required by a Zoning Commission order to make a contribution to a feeding program; however, when the university was ready to apply for its CO, the feeding program had not yet been established."

Similarly, Owner states in its pre-hearing statement:

"In that case, the Board concluded that when the intended recipient of the amenity money had not yet been established ... it was reasonable for the University to place the amenity in an escrow account until the requirements of the condition could be met."

In BZA Appeal No. 16950, the university applicant was faced with an impossibility. There was no possible way for the university to comply with the condition of the order in full or in part; and there was no dispute about the truth of the university's statement that the feeding program was not in existence.

In the zoning case at issue in this Appeal, ZC 06-35, there was no absence of a recipient of the amenities. No impossibility presented itself. Francis Field and 25th Street NW were in existence at the time of the zoning order, and in fact, existed for decades before the order was issued.

The case is not comparable and not a precedent, particularly in light of the clear and unambiguous regulations stated in 11 DCMR §2409.

If a change in the conditions of the Order was required, Owner and DCRA were required to request the modification pursuant to DCMR §2409.9 and 11 DCMR §3030, and there was no bar or barrier to doing so.

03. Appellant requests that the Board find the ZA exceeded his limited authority when he accepted an escrow to satisfy conditions 10b and 10c of the ZC Order.

Such a ruling follows from the arguments made above in Sections 1 and 2 above. There was no statutory authority or case precedent; and there were clear and unambiguous regulations to the contrary.

Should the Board find otherwise—that ZA had the authority to accept the escrow—Appellant requests and reserves the right to submit a post-hearing statement challenging the legitimacy of the escrow on three additional grounds: 1) that it is inaccurate and insufficient in the dollar amount stated and deposited; 2) that it is fallacious and deceptive in the statements it makes regarding the need for the escrow; and, 3), that it was developed and executed *ex parte*, with no service to the parties, and no filing with ZC.

04. Appellant requests that the September 2009 CO, and all subsequent COs be revoked as issued without authority.

Such a request follows from the arguments made above in Sections 01 through 03.

At the time of the filing of this Appeal, on October 28, 2009, Appellant was aware of only one CO for the property, which was No. CO0903586, issued on September 25, 2009.

Subsequent to the filing of the Appeal, Appellee DCRA appears to have agreed with the Appellant that the September 25, 2009, CO was issued without authority or validity.

DCRA then issued what it terms a “conditional CO,” No. CO1000665, dated December 21, 2009. This CO has a shorter expiration date than the September 2009, CO, and states that it is “conditioned upon fulfillment of PUD Order 06-35 Condition 10(b).”

The Attorney General discusses this “conditional CO” in his pre-hearing statement for DCRA, stating:

“the current CO for the Property, the December 21 CO, is a conditional CO that expires on June 30, 2010. By issuing a conditional CO, DCRA has retained the ability to deny an application for a final, permanent CO if the conditions of ZC Order 06-35 are not fully met.”

The Attorney General, in this statement, affirms that the conditions of ZC Order 06-35 *have not yet been met*. This is also the position of the Appellant.

However, the “conditional CO” has no more validity than the September 25 CO. The ZC order in ZC 06-35 clearly states:

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

Appellant argues that “no certificate” means exactly what it says. There is no provision in the order for “conditional” or any other type of certificates. The dictionary meaning of “no” is statutorily affirmed in 11 DCMR §199.2g.

If Owner and/or DCRA felt that the conditions of the order required modification, they had the opportunity to seek such a modification pursuant to DCMR §2409.9 and 11 DCMR §3030.

05. Appellant requests that conditions 10b and 10c of ZC Order 06-35 be fully met before any CO is issued for the subject property.

At the time of the filing of this Appeal, on October 28, 2009, Owner had installed none of the required amenities on Francis Field as required under condition 10b of the order, nor had Owner made any streetscape improvements to the west side of 25th Street NW, as required under condition 10c of the order.

There were no approved construction plans to do this work, and no contract was drawn with any firm to complete the improvements.

Only after Appellant filed this appeal—and only after the Board accepted this appeal and scheduled a hearing date—did Owner begin a serious effort to deliver the required amenities.

Owner states in his pre-hearing statement that “Vornado has secured the required building permit to construct the improvements to Francis Field.” As shown in Owner’s Exhibit B, this permit is dated December 17, 2009, well after Appellant filed this Appeal with this Board.

As of the date of this submission (as stated above) Owner has installed most of the amenities required under condition 10b for Francis Field. However, Owner has not yet satisfied the conditions of 10c concerning the 25th Street streetscape.

Owner—in its escrow, and in its Pre-Hearing statement and its Supplemental Statement in the Appeal—obfuscates its proffer for the streetscape, and misstates the ZC’s order. Owner states, for example, in its Supplemental Statement of February 25, 2010:

“...Condition 10(c) did not set forth a specific dollar amount for the field improvements, nor did it require specific details other than the replacement ornamental fence. Rather, the condition simply directed the Applicant to improve the public space on both sides of 25th Street consistent with the approved PUD plans.”

That is not accurate. Owner filed his proffer of amenities in ZC 06-35 on March 6, 2007, stating in part:

“Streetscape improvements along both sides of 25th Street, including sidewalk paving, planting strips, and the creation of tree boxes, consistent with the existing streetscape in front of 1275 25th Street (Whitman Place). These improvements include the removal of the existing chain-link fence around the east and north sides of Francis Field and replacement with an ornamental metal fence. Estimated value: \$200,000.”

This filing, which was Exhibit D of Owner’s filing of that date, became Exhibit 27 in ZC 06-35, and is specifically referred to in the Order. It was accompanied by a landscape drawing, showing the concept of the improvements, specifically indicating “new street trees,” “ornamental planting strips,” and “new concrete” sidewalks. This became Exhibit 31 of the Zoning Order.

(See attached Exhibit FFF 01, which is Exhibit 27 of ZC 06-35, and Exhibits FFF 02 and 03, which are parts of Exhibit 31 of ZC 06-35.)

Because this proffer contained specific drawings and photographs of sample plantings, it was included as an exhibit in the final order, and not as a verbal description. However, there is no question that the exhibits are included as part of the ZC order.

In addition, on March 27, 2007, at the public hearing in the zoning case, Richard Smith, principal for Owner, verbally proffered a dollar value in his testimony:

“The second amenity is the agreement to fund \$200,000 in streetscape improvements for both sides of 25th Street including a new fence for Francis Field. These improvements will better tie our buildings into the existing fabric of the street and better tie them to the park.”

(The official transcript of this testimony is attached as Exhibit FFF 04.)

It is these streetscape improvements for the west side of 25th Street that Owner has been obfuscating, and about which he continues to dissemble.

Owner’s own Exhibit H, the escrow, shows that he attempted to settle this \$200,000 proffer with an escrow deposit of only \$36,000.

To date, Owner has installed no “tree boxes,” no “ornamental planting strips,” and no “new street trees,” on the streetscape area on the west side of 25th Street. Nor are the tree box areas on the west side of 25th Street comparable to those in front of Whitman Place or in front of Owner’s property. (See Exhibit FFF 05).

Owner has not replaced the entire sidewalk, but only partial sections. On November 18 and 19, 2009, the District Department of Transportation replaced considerable sections of the 25th Street west-side sidewalk. (See Exhibit FFF 06.)

Curb cuts or driveways into the field are shown to be eliminated on the approved plan reviewed by the Commission of Fine Arts, but they have not yet been eliminated in reality. Owner’s Exhibit G, which is titled “interim plan-revised” for Francis Field, shows this approved plan in color, clearly indicating that no curb cuts are to remain. (See Exhibit FFF 07, attached, which is a black-and-white version of this same plan.)

FFF Exhibit 08 is a photograph taken on April 13, 2010, showing these two remaining curb cuts and driveways, which lead nowhere, but will permit—and no doubt encourage—automobiles to enter the park illegally.

FFF Exhibit 09 is a ground-level photograph of the southern curb cut and driveway.

Owner's statement of costs filed with the Board on February 25, 2010, as a supplemental statement is an unaudited summary.

Owner states that he spent \$247,829 for improvements in front of his private property, and only \$73,004 on the other side of the street. This statement appears to indicate that Owner is claiming his building landscaping as part of the amenity funds, and Appellant questions the propriety of doing so.

At the March 26, 2007, ZC hearing, ANC commissioner Michael Thomas specifically stated in his testimony that "some part of the landscaping along 25th Street is so directly improving the owned property as to not justify full credit as an amenity" (ZC Hearing transcript of March 26, 2007, at Page 98.)

Appellant also disputes that the concrete paving costs that are listed were fully spent, as the Department of Transportation replaced much of pavement on the 25th Street in November, 2009, not being aware that Owner had a zoning obligation to replace that section.

06. Appellant does NOT request that any current tenants be removed from the building .

As stated in the Appellant's original filing in this case, Appellant has no desire to have existing tenants removed from the subject property, and is not requesting the Board to vacate the building.

However, Appellant requests that no new tenants be permitted to occupy the building until Owner fully satisfies the conditions of the ZC order.

Respectfully,



Gary Griffith, Secretary
Friends of Francis Field
2501 M Street NW #609
Washington, DC 20037
202 659-45

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Pre-Hearing Statement of Appellant, Friends of Francis Field was served by first-class mail, or hand delivery, this ____ day of April, 2010, to the following:

David Avitabile
Goulston & Storrs
2001 K Street NW, 11th Floor
Washington, DC 20006

Jay A. Surabian, Asst AG
DCRA: Office of General Counsel
1100 Fourth Street SW
Washington, DC 20024

Rebecca Coder
2501 M Street NW #721
Washington, DC 20037

Constance Miller
Manning and Sossamon
1120 20th Street NW #700
Washington, DC 20036

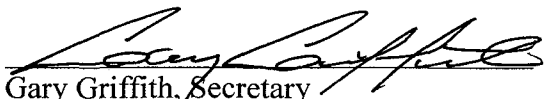

Gary Griffith, Secretary
Friends of Francis Field

EXHIBIT D

CHARLES E. SMITH COMMERCIAL REALTY: BNA BUILDINGS (Z.C. No. 06-35) PROJECT AMENITIES AND PUBLIC BENEFITS

Below please find a list of project amenities and public benefits for the proposed PUD. These amenities and benefits were selected based on input from and consultation with representatives of ANC 2A and the Office of Planning as well as interested stakeholders in the immediate neighborhood.

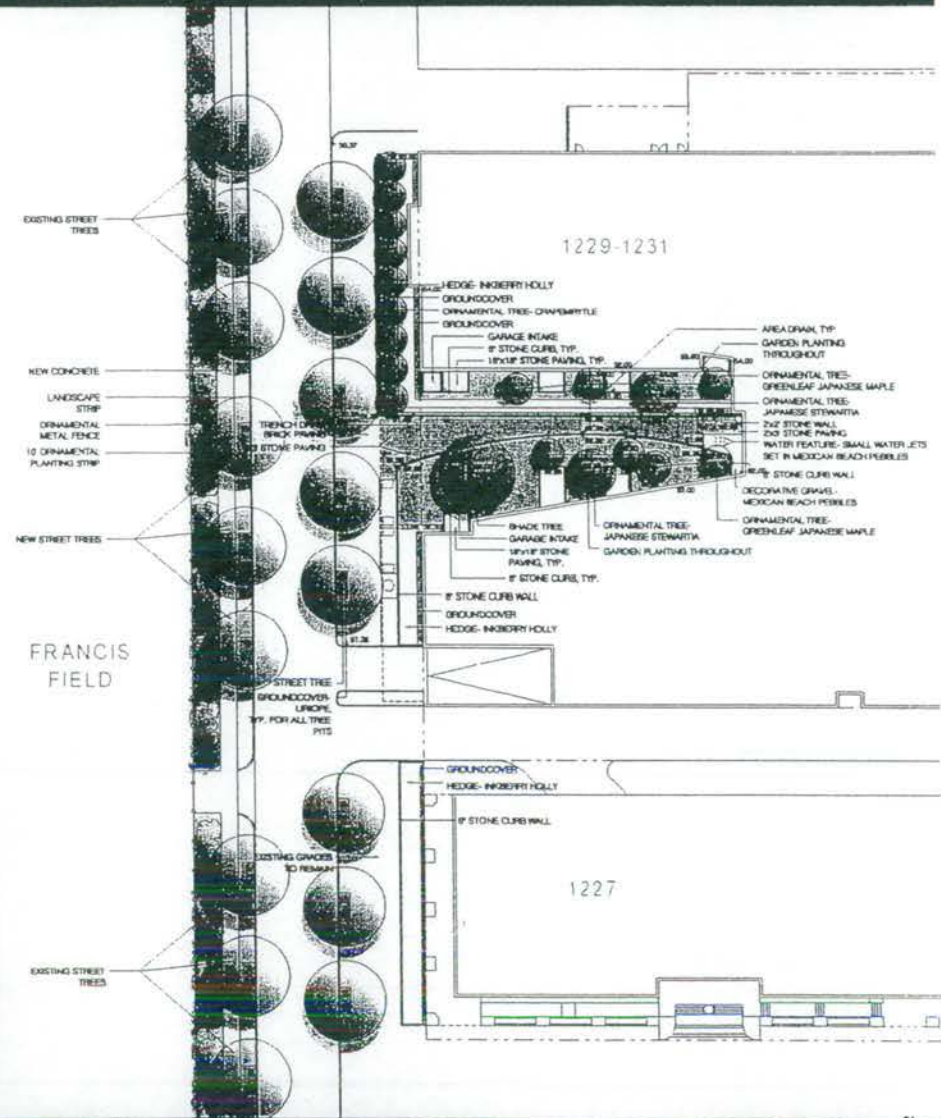
The Applicant believes that the following public benefits are superior features of the proposed PUD that benefit the surrounding neighborhood to a greater extent than would likely result from a matter-of-right development. The proffered amenities and benefits represent a significant contribution to the development of a strong residential community in West End, and vastly outweigh the development incentives and flexibility requested in this matter.

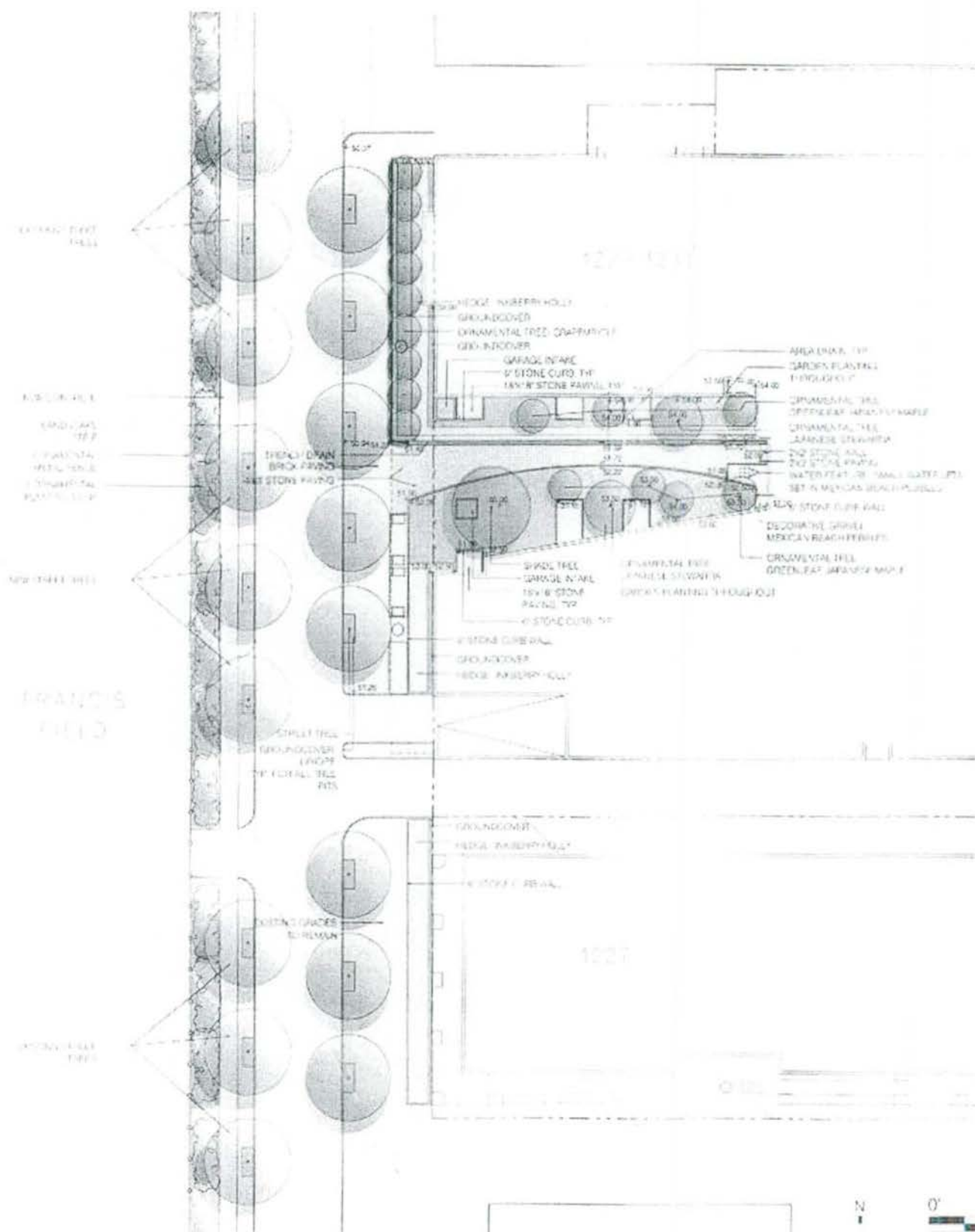
The Applicant is well aware that the Zoning Commission and Office of Planning both strongly prefer that contributions to institutions and organizations be targeted to a tangible item or project, and will continue to work with interested stakeholders in order to flesh out the commitments and finalize the amenities package.

1. Creation of housing units through the conversion of the existing office buildings at 1229 and 1231 buildings to residential use, and inclusion of affordable housing units consistent with the proposed inclusionary zoning regulations.
2. Streetscape improvements along both sides of 25th Street, including sidewalk paving, planting strips, and the creation of tree boxes, consistent with the existing streetscape in front of 1275 25th Street (Whitman Place). These improvements include the removal of the existing chain-link fence around the east and north sides of Francis Field and replacement with an ornamental metal fence. Estimated value: \$200,000.
3. Facilities improvements to Francis Field (e.g. trash receptacles, furniture, improved field conditions). A site visit with representatives of the Department of Parks and Recreation and Friends of Francis Field, as well as a representative of ANC 2A, to discuss specific improvements has been scheduled, and a detailed package will be presented at the public hearing. Estimated value: \$150,000.
4. Improvements to Francis Junior High School, including technological improvements and facilities improvements. The Applicant and a representative of ANC 2A are working with the school's principal to identify specific improvements and, again, a detailed package will be presented at the public hearing. Estimated value: \$150,000.
5. Commitment to sustainable design practices, including a commitment to achieve a minimum of 20 LEED-NC v2.2 points for the residential component and 16 LEED-NC v2.2 points for the office component.

March 6,
2006
Recomm
2x
27

Friends
of
Francis
Field
Exhibit
FFF 02





1 After lots of work, I believe we
2 have achieved a level of support from most if
3 not all of these neighbors. We have received
4 the endorsement of ANC-2A, the Friends of
5 Francis Field, and of the Francis Junior High
6 School. You'll hear more about that support
7 later.

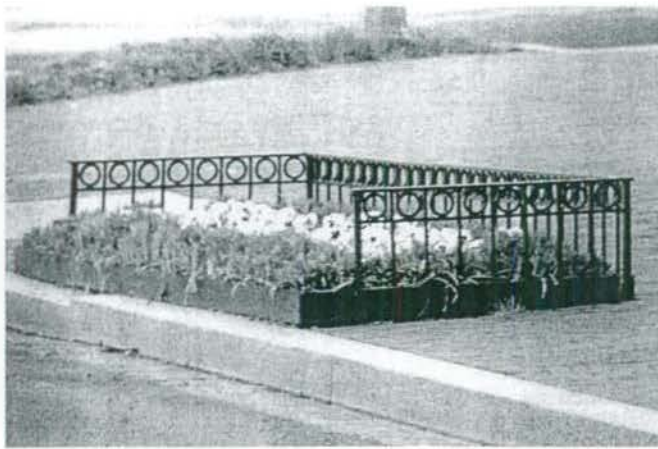
8 At this point, I'd like to just
9 briefly summarize the project and community
10 amenities and turn this over to Shalom Baranes
11 for a presentation on the architecture.

12 The first amenity is the simple
13 fact of the conversion from office to
14 residential. This will serve to further
15 enliven the neighborhood with more pedestrian
16 activity and more life outside the traditional
17 working hours of 9:00 to 5:00.

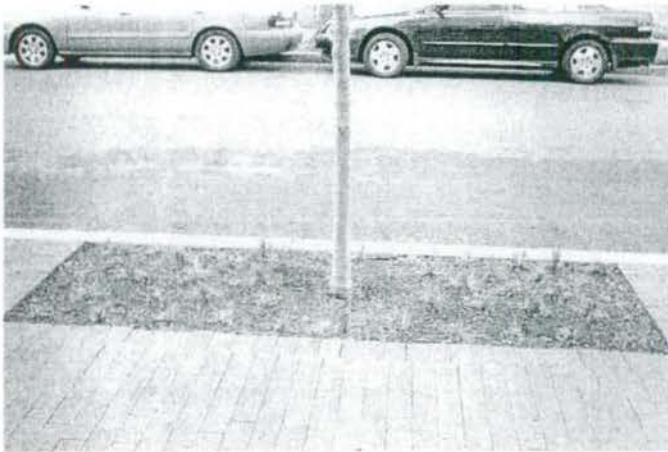
18 The second amenity is the
19 agreement to fund \$200,000 in streetscape
20 improvements for both sides of 25th Street,
21 including a new fence for Francis Field.
22 These improvements will better tie our

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701



Tree box with flowers. Whitman Place,
1275 25th Street (east side)



Tree box with ground cover.. WestEnd 25,
1255 25th Street (east side)

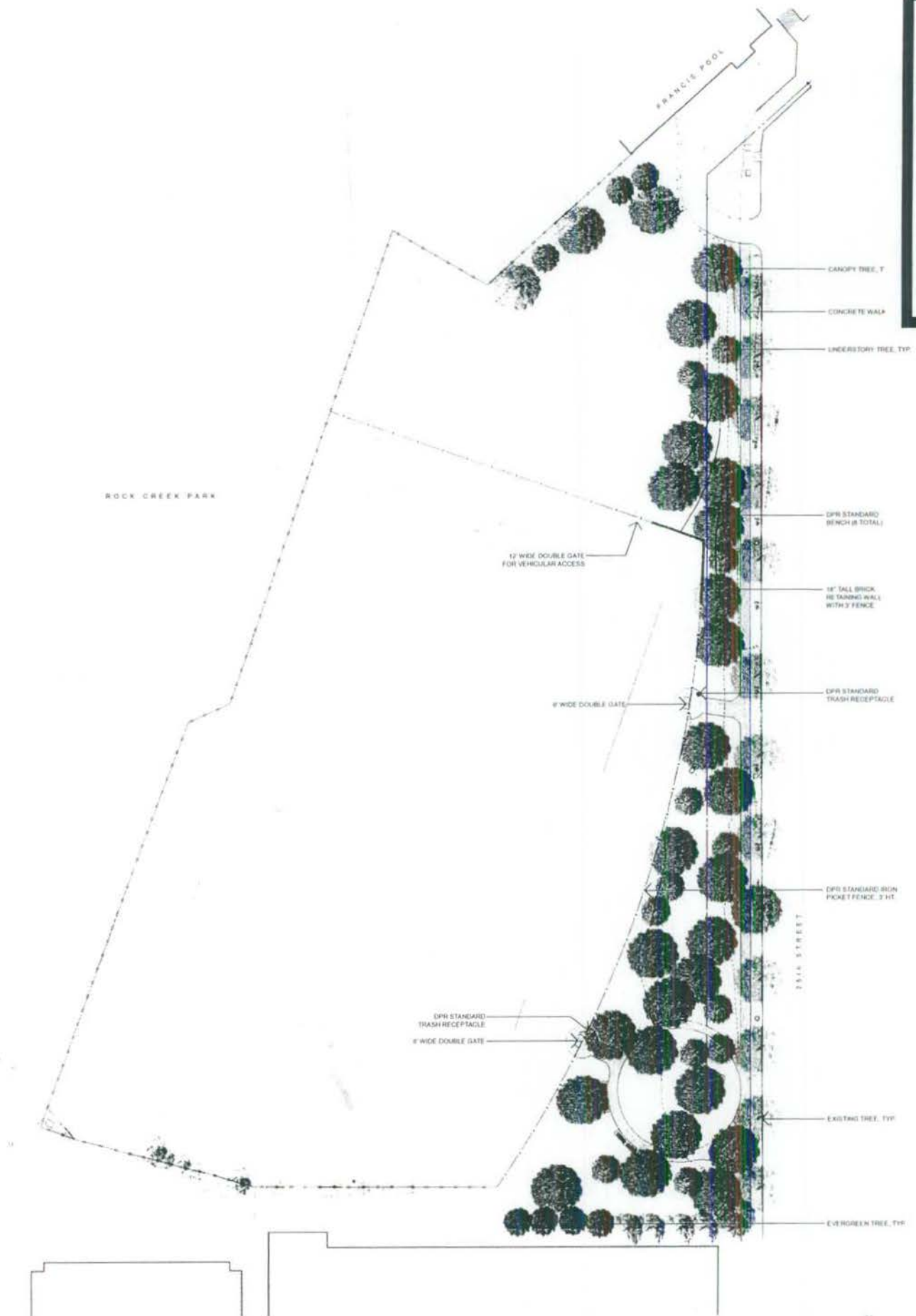


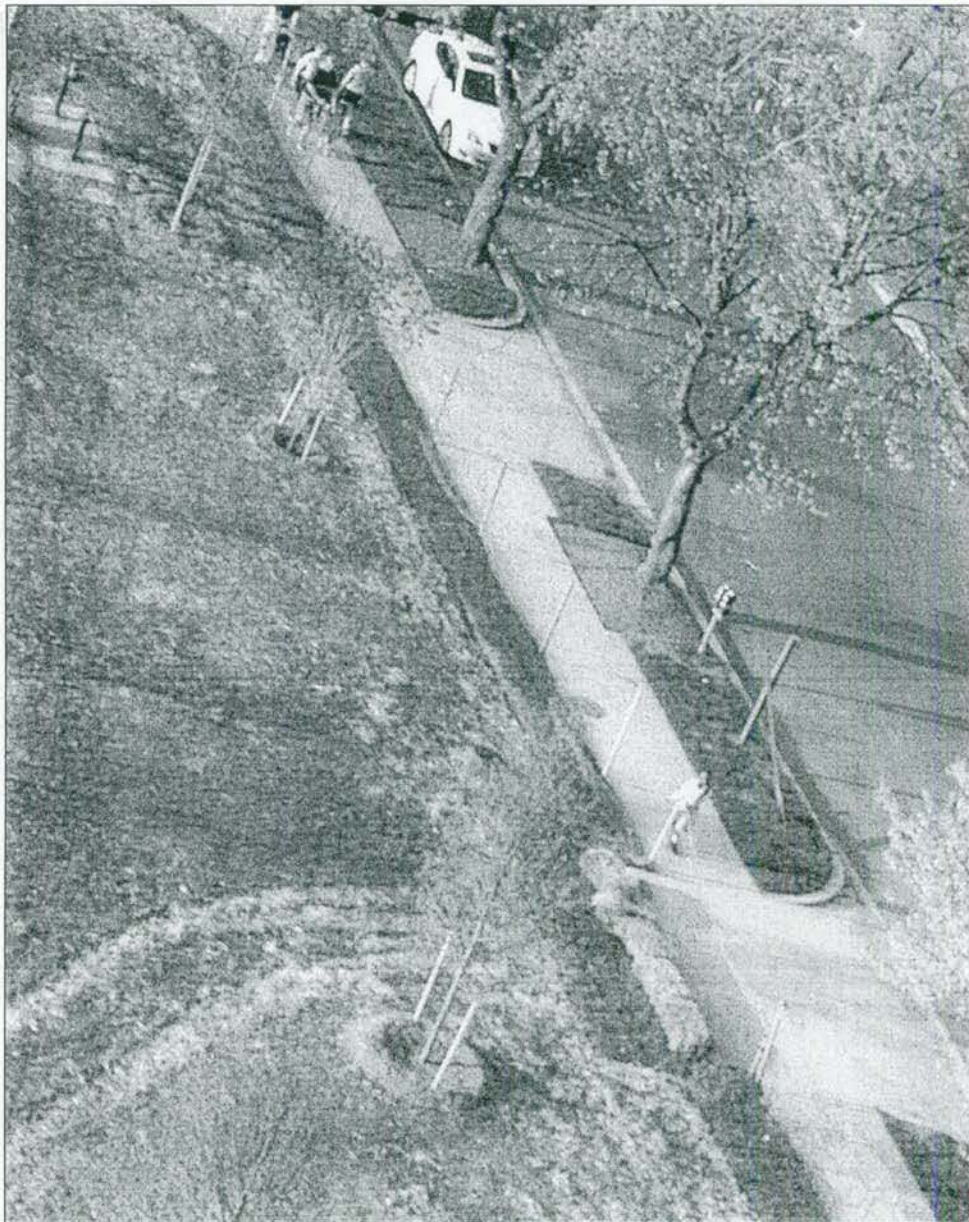
Tree area with bare soil and weeds.
Francis Field. (west side of 25th Street)



DDOT Sidewalk Repairs and Replacement

November 18 and 19, 2009





Curb cuts and driveways to nowhere.

April 13, 2010



Southern curb cut, close-up.

April 14, 2010