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September 28, 2010

Ms. Meredith Moldenhausner, Chairperson
D.C. Board of Zoning Adjustment
441 4th Street, N.W., Second Floor
Washington, D.C. 20001

2010 SEP 28 PM 3:33

OFFICE OF ZONING

Re: BZA Appeal No. 18108 of Advisory Neighborhood Commission 3C, Richard DeKaser and Rebecca Rhames, Margaret Ernst and Frederick Jenney, Sarosh Sattar, and the Woodley Park Community Association (collectively, the "Appellants") to the Board of Zoning Adjustment ("BZA") Relating to the Subdivision of 2854 and 2858 29th Place, NW (Lots 134 and 135, Square 2113) (formerly 2910 Garfield Street, NW (Lot 828, Square 2113)) (the "Property") – Statement of the Property Owner

Dear Chairperson Moldenhausner and Members of the Board of Zoning Adjustment:

On behalf of ZP 29th Place LLC ("ZP"), the owner of the above-referenced Property, the subject of Appeal No. 18108, we hereby submit ZP's pre-hearing statement relating to such Appeal.

If you have any questions, please do not hesitate to contact the undersigned at 202.721.1108 or 202.721.1132.

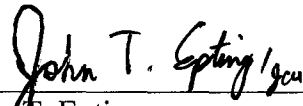
Thank you for your attention to this submission.

BOARD OF ZONING ADJUSTMENT
District of Columbia

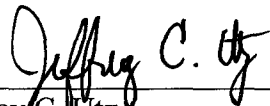
CASE NO. 18108

EXHIBIT NO. 19

Respectfully submitted,



John T. Epting

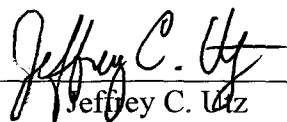


Jeffrey C. Utz

cc: ZP 29th Place LLC
Melinda Bolling

Certificate of Service

I certify that on September 28, 2010, I delivered a copy of the foregoing document via hand delivery or first class mail to the addresses listed below.



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BZA APPEAL NO. 18108

PRE-HEARING STATEMENT OF ZP 29TH PLACE, LLC

I. Introduction and Issue.

This Appeal by Advisory Neighborhood Commission 3C, Richard DeKaser and Rebecca Rhames, Margaret Ernst and Frederick Jenney, Sarosh Sattar, and the Woodley Park Community Association (collectively, the “**Appellants**”) filed on June 3, 2010 challenges the Zoning Administrator’s approval of the subdivision of Lot 828 in Square 2113, into two lots, Lots 134 and 135 (the “**Property**”) pursuant to Section 407.1 of the Zoning Regulations. ZP 29th Place LLC’s (“**ZP**”) is the owner of the Property.

This Appeal concerns only one narrow issue: whether the Zoning Administrator erred in approving the subdivision of the Property into two lots utilizing the two percent (2%) flexibility for minimum lot area permitted under Section 407.1 of the Zoning Regulations for one such lot. Appellants’ claims about the size of the proposed houses, permits, notice, and the Comprehensive Plan are not relevant to this Appeal.

It is clear that the Zoning Administrator did not err in his application of Section 407.1 and that the Zoning Administrator operated within his clearly delineated authority under that Section. The Appellants’ primary issue with ZP’s subdivision of the Property is the size of the two houses that the subdivision would allow to be built on a property where one house currently stands. This issue is unrelated to the validity of the Zoning Administrator’s approval of minor flexibility of the minimum lot area to allow two (2) lots in the R-1-B Zone District.

II. Statement of Facts.

The Zoning Administrator confirmed the potential for the subdivision of the Property in a letter ruling issued on November 19, 2009 (attached as Exhibit A) (“**Ruling**”). In the Ruling, the Zoning Administrator granted flexibility for the Property from the minimum lot dimensions of Section 401 to allow for the creation of two lots, one of which does not meet the minimum lot area of the R-1-B Zone District. Section 401 provides a minimum lot size of 5,000 square feet for lots in the R-1-B Zone. The subdivision of Lot 828 in Square 2113 was officially given effect by the Subdivision Plat recorded February 23, 2010 (attached as Exhibit B) (“**Plat**”). As a result, according to the Plat, Lot 134 has 4,908 square feet of lot area and is located at 2854 29th Place NW and Lot 135 has 5,039 square feet of lot area and is located at 2858 29th Place NW.¹ As discussed below, the Zoning Administrator did not err in his decision to subdivide Lot 828 of two (2) lots because such granting of flexibility is specifically permitted under Section 407.1 of the Zoning Regulations.

The District, including both the Director of the Department of Consumer and Regulatory Affairs (“**DCRA**”) (in the letter from Director Linda Argo to the community dated June 7, 2010 attached as Exhibit C) and the Office of the Attorney General (“**OAG**”) in D.C. Superior Court Case No. 2010 CA 005006 B, Ernst, et al. vs. Department of Consumer and Regulatory Affairs, et al. (in its Memo in Opposition to Plaintiff's Motion for Preliminary Injunction attached as Exhibit D), has indicated in writing that it stands by the Zoning Administrator's decision to allow the subdivision of the two lots. Building permits to allow the construction of the two (2) houses

¹ Note that the Ruling states that the lots will be 4,901 and 5,045 square feet, but the Plat recorded slightly different square footage amounts. Both 4,901 and 4,908 square feet are within the two percent (2%) deviation threshold. It is common for there to be a slight discrepancy between measured and recorded lot dimensions.

on the Property were issued on August 12, 2010 (attached as Exhibit E) (“**Permits**”). The Permits are not the subject of the Appeal.

On July 8, 2010, Appellants filed suit against the District of Columbia in the D.C. Superior Court in Ernst vs. Department of Consumer and Regulatory Affairs. ZP intervened in that case and was included as a defendant as a result. In that case, Appellants sought to enjoin issuance of the two Permits for the proposed houses on the Property, overturn the subdivision, and revoke the Special Tree Removal Permits and the Raze Permit issued for the Property.² Appellants alleged that ZP violated the Subdivision Regulations of the District (Title 10 Chapter 27 of the DC Municipal Regulations) by not applying for a variance under the Subdivisions Regulations. Appellants also alleged that the District and ZP violated D.C. Code Sections 1-207.38(d) and 1-309.10 by failing to provide ANC 3C notice of the proposed subdivision action. That case was dismissed by the D.C. Superior Court on August 20, 2010 by the Order attached hereto as Exhibit F (the “**Order**”). In the Order, the D.C. Superior Court ruled that the Subdivision Regulations do not supersede the Zoning Regulations; rather, they defer to the Zoning Regulations which allow for the Zoning Administrator’s lot area flexibility determination exercised under Section 407.1. The Court determined that the Zoning Regulations “expressly authorize the Zoning Administrator to permit a minor deviation” (emphasis added). Order, at p. 2. The Court further held that notice to the ANC was not required for the subdivision in this case. Id.

Furthermore, as discussed herein, the provisions of Section 407.1 were narrowly drawn by the D.C. Zoning Commission to allow discretion of the Zoning Administrator in cases such as

² Issuance of the Special Tree Removal Permits and Raze Permit are unrelated to the subdivision approval or the issuance of the two single family house construction permits and are not subject to BZA jurisdiction.

the case at hand. The Zoning Commission's intent behind the creation of Section 407.1 was to allow the Zoning Administrator a de minimis area of discretion to grant minor flexibility.

III. The Zoning Administrator Properly Applied Section 407.1 in Granting Flexibility from the Minimum Lot Dimensions

The subdivision of the Property was properly approved by the Zoning Administrator in the Ruling and on the Plat. In his Ruling, the Zoning Administrator granted flexibility from the minimum lot dimensions under Section 401 of the Zoning Regulations. Under Section 407.1, the Zoning Administrator is permitted to approve a deviation not to exceed two percent (2%) of the area requirement of Sections 401 (minimum lot dimensions) and 403 (lot occupancy); a deviation not to exceed ten percent (10%) of the linear requirements of Section 404 and 405 (minimum rear yard and side yard requirements); and a deviation from the requirements of Section 406 (minimum court dimensions) not to exceed either two percent (2%) of the area standard or ten percent (10%) of the width standard; provided that:

- (a) A building shall be allowed to deviate from the requirements of no more than two (2) of the sections identified in this subsection; and
- (b) The deviation or deviations shall be deemed by the Zoning Administrator not to impair the purpose of the otherwise applicable regulations. (emphasis added.)

In this case, ZP requested a deviation from only the lot area requirement identified in Section 401, so the Zoning Administrator properly complied with standard (a), above. In the R-1-B District, each lot is required to have 5,000 square feet of land area. Lots 134 and 135 contain 4,908 and 5,039 square feet, respectively. Such 4,908 square foot lot is within the two percent (2%) deviation of the required lot area (and the two lots combined are only 53 square feet short of 10,000 square feet of lot area required for both lots). In reality, this Appeal is about 53 square feet of land area, or one half percent (1/2%) of the total land area of the Property.

Regarding standard (b) above, the Zoning Administrator acted within the discretion provided to him under Section 407.1. This Regulation does not require him to provide a description of his conclusions, and it does not require him to use a specific analysis in making his determination. Section 407.1(b) requires the Zoning Administrator to deem that a deviation does not impair the purpose of the Zoning Regulations, which the Zoning Administrator did in this instance. On the first page of the Ruling, the Zoning Administrator wrote: “[Y]our request will not impair the purpose of the otherwise applicable Zoning Regulations.” In this case, the Zoning Administrator deemed the very minor deviation to be appropriate, creating two R-1-B lots rather than one R-1-B lot, and his issuance of the Ruling provided sufficient evidence for this conclusion. The Zoning Administrator also noted the flexibility on the Plat, which specifically acknowledges the lot deviation he was approving. In fact, the approved lots are otherwise in accordance with the R-1-B Zone requirements.

The very purpose of Section 407.1 is to give the Zoning Administrator discretion in cases where an applicant can demonstrate that a minor deviation from the Zoning Regulations is appropriate. ZC Order No. 840 (attached as Exhibit G) created the flexibility standard of Section 407.1 specifically to allow the Zoning Administrator the very de minimis discretion utilized in this case. As stated in Order No. 840, the purpose of Section 407.1 was to give the Zoning Administrator a specifically limited amount (2%) of flexibility over lot dimensions and other zoning, while maintaining a reasonable degree of control.³ The Zoning Administrator’s decision to grant the flexibility in this case falls squarely within the stated purpose of Section 407.1 because the flexibility is less than two percent (2%) for one element of the Zoning Regulations. Therefore, to overturn the Zoning Administrator’s decision would be to eviscerate the clear intention of the Zoning Regulations. In Order No. 840, the Zoning Commission addressed this

³ Note that the Zoning Administrator also has similar authority under Section 2522.1 of the Zoning Regulations.

issue specifically in response to concerns raised by several ANC's (including ANC 3C, the ANC for the Property). The ANC's stated that "[t]he proposed amendments provide a loophole to evade government reviews and effectively deny citizen participation in the decision making process." However, the Commission responded that the flexibility standard provided for the Zoning Administrator is so narrowly-defined that it would only allow for deviations that are extremely minor. Z.C. Order No. 840, at p. 6. Such is the case in the instant Appeal.

Appellants claim that the Zoning Administrator letter should have explained why the approved lot area flexibility does not impair the purpose of the otherwise applicable regulations. They claim further that the Zoning Administrator had not visited the property and that the Zoning Administrator's files contain no photographs or descriptions of the property or the surrounding area or any analysis of how the proposed substandard lot would affect neighboring properties. However, as discussed above, the Regulations do not require a site inspection or any of the materials that the Appellants request. It is sufficient that the Zoning Administrator considered the request for the minor lot area deviation and approved such request and included the additional note on the Plat indicating such review. The Zoning Administrator is presumed to have exercised his very minor discretion in an appropriate manner. The Appellants must prove that the Zoning Administrator erred in applying his sole discretion in his approval of such flexibility. Appellants do not prove such failure of discretion. Also, the BZA cannot read more documentation and procedural requirements into the Regulations than are stated. The very point of Section 407.1 is to provide the Zoning Administrator with minor, *de minimis* flexibility for the sake of government efficiency, while avoiding variance cases and the related process. Further, as mentioned below, it is patently false that the two new lots, which will contain R-1-B

Zone-compliant single family houses, would not “fit” within a neighborhood of other single family houses and row houses with the same zoning.

Appellants’ claim that the approved subdivision impairs the purpose of the Comprehensive Plan is not germane to the issue in this Appeal. The Home Rule Act specifies that the Zoning Commission has the sole authority to amend the Zoning Regulations and to ensure that they are not inconsistent with the Comprehensive Plan. Tenley and Cleveland Park Emergency Committee v. D.C. Bd. of Zoning Adjustment, 550 A.2d 331, 336 (D.C. 1988) (attached as Exhibit H). Contrary to the Appellants’ claim, the Comprehensive Plan is not self-executing and does not directly regulate specific aspects of development; rather, the Comprehensive Plan is a broad framework that the Zoning Commission interprets and effectuates through amendments to the Zoning Regulations. Id. at 337. Furthermore, the BZA does not have jurisdiction over the issue of consistency with the Comprehensive Plan. Id. at 341 n.22. Instead, the role of the BZA is to interpret the Zoning Regulations as adopted by the Zoning Commission. Likewise, it is improper for the Zoning Administrator to do more than interpret and apply the Zoning Regulations. BZA Appeal No. 16507 (attached as Exhibit I). The Zoning Administrator cannot read the Comprehensive Plan to require an action not provided for in the Zoning Regulations. Id. These holdings are well-settled.

By amending the Zoning Regulations to include Section 407.1, the Zoning Commission inherently concluded that the regulation was consistent with the Comprehensive Plan. Zoning Commission Order No. 840 stated that Section 407, as part of the language approved by that Order, “is consistent with the intent and purpose of the Zoning Regulations and the Zoning Act and is not inconsistent with the Comprehensive Plan for the National Capital”. Zoning Commission Order No. 840, at p. 9. Thus, in issuing Order No. 840, the Zoning Commission

concluded that the Zoning Administrator's limited flexibility to approve de minimis deviations is inherently not inconsistent with the Comprehensive Plan. Accordingly, the Zoning Administrator's subsequent application of Section 407.1 in this case was not and could not be inconsistent with the Comprehensive Plan. As noted in BZA Appeal No. 16507, it would have been improper for the Zoning Administrator to consider the Comprehensive Plan in the manner advocated by the Appellants. Therefore, the Zoning Administrator properly interpreted Section 407.1 as adopted by the Zoning Commission.

Permitting a minor deviation to allow one additional R-1-B zoned lot that otherwise complies with the Zoning Regulations was certainly consistent with the purposes of the Zoning Regulations. The purposes stated in Sections 101.2 (to "encourage the stability of districts and of land values in those districts") and Section 200 (to "protect quiet residential areas" and to "stabilize the residential areas and to promote a suitable environment for family life") were not undermined by permitting the two lots to be created at the Property. As stated before, the approved lots comply with the requirements of the R-1-B Zone in all other respects, and therefore further these purposes.

The approval of one lot with less than a two percent (2%) deviation in an R-1-B Zone also did not undermine the purposes of the Zoning Regulations that are set forth in the enabling statute, D.C. Code Section 6-641.1, nor the Regulations themselves. The enabling statute empowered the Zoning Commission with the ability to adopt the Zoning Regulations, which includes Section 407.1. The Zoning Commission found, in Zoning Commission Order No. 840, that the provisions of Section 407.1 were consistent with the Zoning Act. In this case, the Ruling allowed for development consistent with the R-1-B Zoning in the Woodley Park community and surrounding neighborhood. This area features many types of housing and density, including

townhouses directly across 29th Place and multi-family buildings one block east. Therefore, any type of development that complies with the R-1-B zoning does not undermine the purposes of the Zoning Regulations.

IV. The Property was Properly Subdivided under Section 101.6.

The approved subdivision did not violate any of the provisions of the Zoning Regulations, as stated in Section 101.6. Section 101.6 states:

Where a lot is divided, the division shall be effected in a manner that will not violate the provisions of this title for yards, courts, other open space, minimum lot width, minimum lot area, floor area ratio, percentage of lot occupancy, parking spaces, or loading berths applicable to that lot or any lot created.

As discussed above, the Zoning Administrator properly used his discretion in approving a lot that deviates from the minimum lot area by less than two percent (2%). After the grant of such flexibility, the lots comply with the Zoning Regulations and the R-1-B Zone District.

Appellants claim that the subdivision renders the existing house on Lot 134 nonconforming because the existing house violates the twenty-five (25) foot rear yard and percentage of lot occupancy requirements. However, as Appellants agree, once the structure on such lot is razed, there will be no nonconformance issues.⁴

In their original appeal statement, Appellants also claim that the lot width for Lot 135 was inappropriate for a lot of this shape and that the width of this lot was less than the requirement of fifty (50) feet in width. In the case of an irregular lot, as is the case for newly-created Lot 135, the Zoning Regulations define “lot width” as “the average distance between side lot lines....” In his Ruling, the Zoning Administrator confirmed that the preferred method for measuring lot width on an irregular lot is that the measurer “(a) draws lines perpendicular to and

⁴ Appellants have unsuccessfully sought to overturn the raze permit, as discussed above regarding the Superior Court case, Ernst.

intersecting the side property lines at ten (10) foot intervals, starting from and parallel to the front property line, (b) sums up the linear distance of drawn lines, and (c) divides the total linear distance by the total number of lines drawn to arrive at the average width of lot.” Such method has been utilized in numerous other cases, including as approved at 1705-1729 East Capitol Street, SE as shown on the attached Exhibit J. The BZA has also reviewed the various methods associated with calculating lot width in BZA Order No. 15129/15136 (attached as Exhibit K). BZA Order No. 15129/15136, at p. 6. In such BZA Order, the Board concluded that the Zoning Administrator has the discretion to utilize one of four methods to calculate lot width. Further, in that case, the Zoning Administrator testified that he decides on the method to use based on the Zoning Regulations and the particular proposal under review and that the “ten foot interval” method is typically utilized for irregularly shaped lots, such as the lot in this case. Id. Further, the Zoning Administrator “stated that the practice in the Zoning Administrator’s office is to use whatever lot lines are most advantageous to the applicant and apply whatever method will make the lot comply. He further stated that there is nothing in the Zoning Regulations to prohibit this practice.”⁵ Id. at 8. The BZA upheld the Zoning Administrator’s ruling in this Order.

By using the ten (10) foot interval method, ZP demonstrated, and the Zoning Administrator confirmed, that Lot 135’s width complies with the Zoning Regulations. As shown on page 3 of the Ruling, Lot 135 has the following width intervals using the ten (10) foot interval method: 54.69 feet, 54.69 feet, 54.69 feet, 54.69 feet, 54.69 feet, 54.69 feet, 54.69 feet, 53.56 feet, 45.14 feet, and 36.72 feet. The sum of such intervals is 518.25 feet, which divided by ten (10) interval lines equates to 51.8 feet. Therefore, the width of Lot 135 is 51.8 feet, which is in compliance with the minimum lot width of fifty (50) feet under the Zoning Regulations.

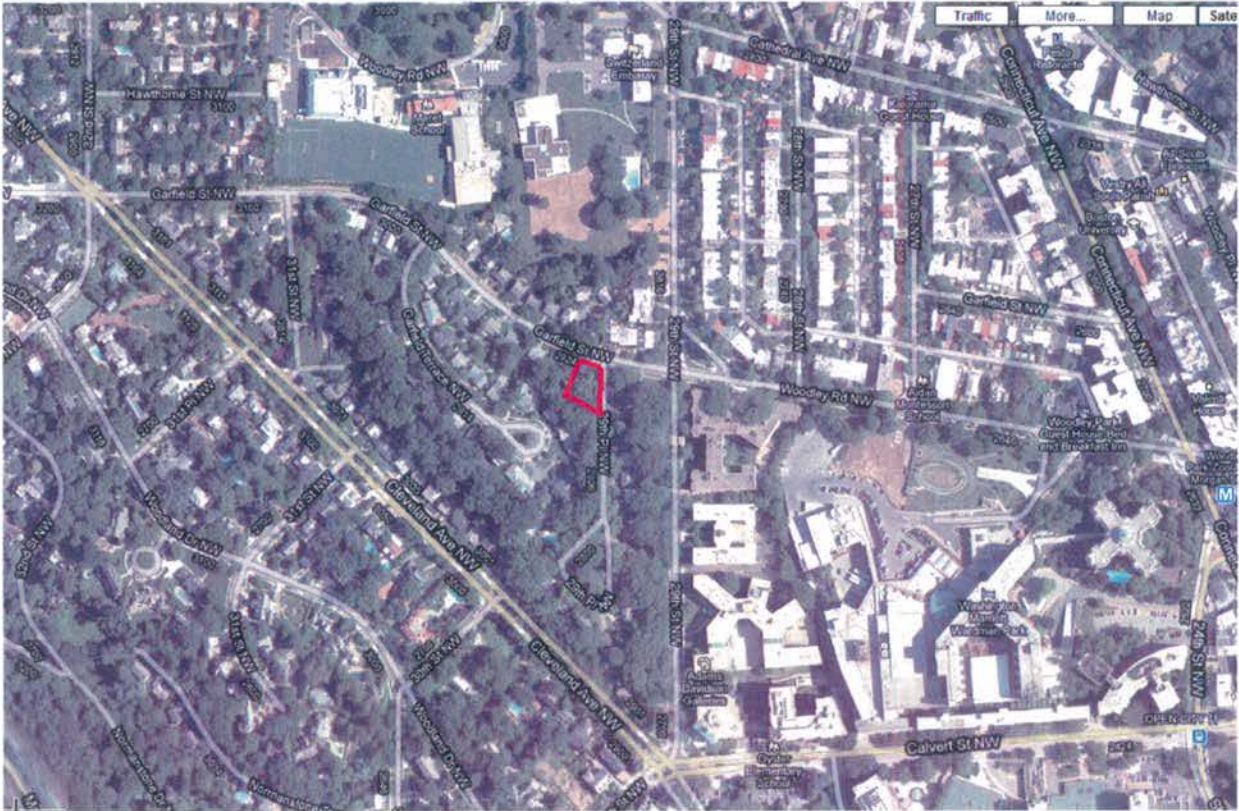
⁵ In BZA Order No. 15129/15136, at p. 6. The Board noted that the ten (10) foot interval method would not be appropriate for panhandle lots, as in the case of the lot in BZA Case No. 14649, but such situation is not what is the case for Lots 134 or 135 on the Property.

Appellants provided no support or evidence for its contention that this method is incorrect, nor have they offered an alternative for measuring lot width.

V. The Approved Subdivision does not Impair the Purpose of the Zoning Regulations

Appellants erroneously claim that the use of flexibility for the subdivision of the Property impairs the purpose of the Zoning Regulations. However, as described above in Section III, the purpose of the Zoning Regulations is not harmed by the instant subdivision.

Lacking an argument that the proposed lots are inconsistent with the Zoning Regulations for the R-1-B Zone and in order to demonstrate that the new lots do not “fit” within the adjacent carefully-defined area, Appellants created a convenient definition of the “surrounding community” that includes 73 lots (in the Appellants’ application statement) and 84 lots (in the Appellants’ Preliminary Statement) and contains only houses on larger lots (and inexplicably excluded properties within such arbitrary area that did not fit into the preconceived notion of the area). However, Woodley Park is characterized by a wide variety of lot sizes and densities on individual lots. More generally, the R-1-B Zone District allows many different types of houses, provided that all Zoning Regulations are met. Therefore, any house that is permitted by the R-1-B Zone District and complies with the requirements of that Zone, is permitted to be constructed as a matter-of-right in the R-1-B Zone District.



The Property (shown in red) and its vicinity are shown above. Densities beyond those described by Appellants are clearly shown.

The Woodley Park community is not characterized only by one certain size of house, nor does an R-1-B Zone mandate such constraint. The area contains single family homes on the smaller lots on the eastern side of 29th Place across the street from the Property and row houses directly across 29th Place in the R-3 Zone District. One block further, the area contains high-density residential buildings located in the R-5-A Zone District. The Appellants' definition of the "surrounding community" is an inaccurate description of what actually exists in the neighborhood and attempts to force all new lots to comply with such irrelevant standard for lot size. The only standard for lot size that matters in the instant case is 5,000 square feet in the R-1-B Zone District.

Appellants claim that the average lot size in the “surrounding community” is larger than the lot areas of the Property. However, there is nothing in the Zoning Regulations that requires properties to adopt the lot areas of the “surrounding community.” Instead, lot area minimums are dictated by the Zoning Regulations, and in this case, are set at 5,000 square feet (and smaller if approved by the Zoning Administrator’s minor flexibility, two percent (2%) less than such lot area) for the R-1-B Zone District. Creating two new lots within this minimum lot area conforms to the R-1-B Zone. Appellants try to read Section 407.1 out of the Zoning Regulations, but that argument must fail.

Appellants also invent several other metrics in an attempt to prove that the proposed houses on the Property do not comply with the Zoning Regulations or run afoul of the “character of the respective district” (under Section 101.2(a)). Appellants’ data is not relevant to the issue before the BZA: that the subdivision was permitted under the Zoning Administrator’s two percent (2%) flexibility in Section 407.1 of the Zoning Regulations. Three of the Appellants irrelevant metrics are: a) population density, which was determined by the ratio of house size to lot size; b) house/lot ratios for the proposed structures; and c) the mean house/lot ratio in the surrounding community. These manufactured metrics have no bearing on whether the subdivision of the lots complies with the Zoning Regulations. Such metrics are not part of the Zoning Regulations and thus cannot be considered by the BZA. Indeed, the BZA is limited to making determinations based on the Zoning Regulations under Section 3100.2.

Appellants also included images and description of the proposed houses in their Preliminary Statement. However, the appearance of the houses is not relevant to the Appeal since it is not related the subdivision of the Property. The houses must comply with the R-1-B Zone (height, lot occupancy percentage, rear yard, etc.) in order to obtain building permits.

Throughout their materials, Appellants imply that a greater amount of FAR or lot occupancy would be constructed on the Property as the result of the subdivision. Not only is this issue irrelevant to the issue on appeal, but this is a complete red herring. A single house constructed on the original lot would be able to have the exact amount of FAR and lot occupancy as two houses on the subdivided lots. The act of subdividing the lots does not double the amount of square footage or lot occupancy that could be built on the site. For instance, with or without a subdivision, a structure on the Property would be permitted to occupy 3,978.8 square feet, or 40%, of the lot area of 9,947 of the Property.

Appellants state that the subdivision would impair their privacy, light, landscaping, and neighborhood character. However, these are not issues within the BZA's jurisdiction for review of the subdivision. Trees are governed by the Urban Forestry Administration and are not subject to BZA review. Further, Appellants cannot compel adjacent private property to remain wooded because it maintains their privacy, light, landscaping, or neighborhood character.

Appellants also state that the excavation required for the construction of the proposed houses would adversely affect drainage conditions and result in extensive and irreparable damage to mature trees, shrubs, and other greenscape on their property. These issues are not issues within the BZA's jurisdiction here, since the only issue before the Board is whether the subdivision was valid. In BZA Order No. 14424, the BZA ruled that it lacked jurisdiction to address the validity of such underpinning and excavation permits affecting draining and site stability because they had not been issued by the Zoning Administrator or under the authority of the Zoning Regulations. The DC Court of Appeals stated that such ruling by the BZA was correct. Tenley, at 333, n.5. Regardless, ZP has developed a detailed civil engineering site plan, demonstrating that great care has been taken to ensure that excavation on and drainage from the

Property (which is at a lower elevation than the adjacent neighbors' properties) is properly performed and maintained. These issues have been reviewed by other agencies within the District government that have jurisdiction over these matters, and such agencies approved the proposed work, as evidenced by the issuance of the Permits.⁶ Similarly, the review of the Special Tree Removal Permits has taken place, and three of such permits have been validly issued by the District. Further, in addition to retaining the landscaping on the neighboring properties, ZP has offered to upgrade and enhance such landscaping. Appellants state that the subdivision would result in increased traffic and reduced parking availability. These issues are also not within the BZA's jurisdiction here, since the only relevant issue is the validity of the subdivision.

VI. Notice to the ANC for the Approved Subdivision Was Not Required

In their appeal statement, Appellants erroneously claim that ANC notice was required for the subdivision of the Property. It appears that Appellants have dropped this element of their Appeal based on their Preliminary Statement dated September 21, 2010. This issue has been decided and dismissed by the D.C. Superior Court pursuant to the Order. Order, at p. 2. Notice is not required in the instant case. Therefore, this issue is not before the Board.

VII. Conclusion

Only one issue is before the BZA in this case: whether the Zoning Administrator properly approved the subdivision using his flexibility under Section 407.1. The Zoning Regulations are clear. Under Section 407.1, the Zoning Administrator has the discretion to approve the subdivision of a lot into lots that are within two percent (2%) of the required minimum lot area.

⁶ The only District review remaining other than this Appeal is that DDOT's Public Space Committee approval is required for the curb cuts and one tree in public space. Such hearing should take place on October 28, 2010.

Lots in R-1-B Zones are required to be 5,000 square feet. After the subdivision, Lot 134 is 4,908 and Lot 135 is 5,039 square feet. Therefore, both lots are well within the two percent (2%) area of flexibility.

The Zoning Administrator validly determined that such flexibility is appropriate for the Property. Such determination allowed flexibility that was determined to be de minimis by the Zoning Commission when it adopted Section 407.1. The creation of one lot of 4,908 square feet is in accordance with the Zoning Regulations. Lots of this size are permitted in the R-1-B Zone District and are in accordance with the types of lots that are seen throughout the wider Woodley Park neighborhood (rather than the narrowly drawn “study area” selected by the Appellants).

Notice was not required for the Zoning Administrator’s determination to grant minor flexibility for lot area. The Superior Court of reached this decision as well, as described in the attached Order. Such notice issue is therefore not before the Board.

For all the reasons described herein, the Appeal should be denied.