

BZA Case # 18154

December 20, 2010

Appeal of the Capitol Hill Restoration Society

Pursuant to 11 DCMR 3100 and 3101, from an October 13, 2010, decision by the Department of Consumer and Regulatory Affairs to grant a building permit (B1008586), under the Fair Housing Act, allowing an addition to a row dwelling in the R-4 District at 1363 Massachusetts Avenue, S.E.

Introduction

This case was ignited by the issuance and posting of Building Permit No. B1008586 (a copy of the permit is attached as Exhibit A).¹ On Friday, October 15, 2010, the permit was posted and construction began. The Permit and plans show a rear porch extension that, when constructed, will give the property virtually 100% lot occupancy. The property is in the Capitol Hill Historic District and is zoned R-4. The R-4 zones allows 60% lot occupancy as a matter of right, 70% lot occupancy upon receiving a special exception, and over 70% lot occupancy with a variance.² Ordinarily, expanding the lot coverage, such as this, requires a variance and a public hearing by the BZA.³ Instead of requiring a variance, DCRA, citing the Fair Housing Act 42 USC 3601-3619, waived the requirement because of the disability of the applicant's husband. The Capitol Hill Restoration Society (CHRS) filed this appeal on October 25, 2010. Mr. Mark O'Donnell will testify to these and other facts, a summary of his testimony is attached as Exhibit B.

CHRS agrees that the Fair Housing Act (FHA) prohibits discrimination against persons with disabilities. CHRS also agrees that the FHA applies to the Zoning Laws of the District of Columbia if they are administered in a discriminatory way. CHRS does not agree that DCRA has the power to waive the requirements for a variance and that the property owner (Mary Donovan, hereafter "Donovan") must apply to the BZA for a variance.

Argument

When Congress enacted the Home Rule Act, it delegated its power to zone to the Zoning Commission.⁴ This means that the Mayor and the City Council cannot exercise the power of zoning. In the exercise of its power, the Zoning Commission has adopted

¹ Soon after construction started a stop work order was issued because the construction did not follow the plans. After a delay, a new building permit was issued, No. B1101413. Believing there to be no new zoning issues, the permit was not reviewed until later by the Zoning Administrator, at which time he concurred in its issuance. We believe that this appeal includes this permit as well and it raises no issues not raised by the first permit.

² The Capitol Hill Restoration Society (CHRS) routinely supports increasing the lot occupancy to 70% and seldom supports expanding beyond 70%.

³ There may be other variances required such as rear yard, etc. We have not attempted to invoke them all.

⁴ DC Code 6-621.01) "(e) The Zoning Commission shall exercise all the powers and perform all the duties with respect to zoning in the District as provided by law."

Zoning Regulations and these regulations are the only protection a landowner has for adequate light and air.⁵ Further, only the Zoning Regulations govern the use or enlargement of a building.⁶ In this case, Donovan's construction of a one story addition to her building eradicates the rear yard, increasing the lot occupancy to virtually 100%, and acutely impinges upon the light and air of her neighbors.⁷

The Zoning Commission has not given DCRA or the Zoning Administrator the power to waive the requirements for a variance under any circumstances. The Commission has given the Zoning administrator limited flexibility to permit a minor deviation from the maximum percentage of lot occupancy.⁸ This shows that the Zoning Commission realizes that it can grant waiver powers to the Zoning Administrator but has chosen not to except as it regards de minimus deviations. In this case the deviation from the maximum allowable lot coverage is much more than de minimus.

The Commission is also well aware of the requirements of the FHA. As a result of the case *United States of America v. District of Columbia*, the Zoning Commission amended 11 DCMR 201.1(o) and 330.5(i). This case involved an allegation that the District unlawfully prevented Father Flanagan's Girls & Boys Town, a charitable organization, from operating four group homes by imposing unreasonable and unlawful conditions on their building permit applications. The United States claimed (1) that the District violated the FHA by denying and delaying decisions on Boys Town's reasonable accommodation and related requests for building permits based on the disabilities of the prospective residents; and (2) that the District's municipal regulations include zoning classifications on the basis of disability that violate the FHA.

Sections 201.1(o) and 330.5(i) recognize the need to comply with the FHA as it pertains to community based residential facilities (CBRF) for the disabled. Section 201.1(o) says the criteria of 14 DCMR 111 applies. The section states "...that the determination of handicapped facility shall be made according to the reasonable accommodation criteria in 14 DCMR 111."

Section 330.5(i) in its pertinent part states:

"...the Zoning Administrator has determined that such community-based residential facility, that otherwise complies with the zoning requirements of this title that are of general and uniform applicability to all matter-of-right uses in an R-4 District, is intended to be operated as housing for the persons with handicaps."

This section allows CBRFs in R-4 so long as they meet other requirements that apply to other matter of right uses. One of these requirements is percentage of lot occupancy and the need to apply for a special exception or variance.

⁵ 11 DCMR 101.1.

⁶ 11 DCMR 101.5.

⁷ Attached as Exhibit C is a petition opposing the addition signed by the neighbors.

⁸ 11 DCMR 407.1 and 11 DCMR 2522.

It is clear from the settlement that the Zoning Commission was aware of the requirements of the FHA and that they approved sections 201.1(o) and 330.5(i) with the FHA in mind. These sections apply to CBRFs only. The Zoning Commission could have made regulations pertaining to single family use or residential flats, but chose not to. The Zoning Commission also allowed, in 330.5(i), the Zoning Administrator to determine if the CBRF is a house for the disabled. It did not allow him to waive any other requirements such as percentage of lot occupancy or the need for a variance.

The Zoning Commission unmistakably had an opportunity to address the situation involved in this appeal and chose not to amend the regulations as it has done for CBRFs. They could have chosen to give wide latitude to the Zoning Administrator in the situation here and did not. DCRA and the Zoning Administrator have invaded the territory the Zoning Commission has reserved for itself.

The Civil Rights Division of the US Department of Justice is charged with enforcing the FHA. The Division in conjunction with the Department of Housing and Urban Development (HUD) has issued a joint statement stating their opinions on the FHA as it applies to group homes and local land use.⁹ On point, the statement, in the second paragraph states:

The Fair Housing Act prohibits a broad range of practices that discriminate against individuals on the basis of race, color, religion, sex, national origin, familial status, and disability. (footnote omitted) The Act does not pre-empt local zoning laws. However, the Act applies to municipalities and other local government entities and prohibits them from making zoning or land use decisions or implementing land use policies that exclude or otherwise discriminate against protected persons, including individuals with disabilities. (emphasis added)

The statement also notes that “Not all requested modifications of rules or policies are reasonable. If a requested modification imposes an undue financial or administrative burden on a local government, or if a modification creates a fundamental alteration in a local government’s land use and zoning scheme, it is not a ‘reasonable’ accommodation.”

It is clear that the Civil Rights Division and HUD believe that the Zoning Commission can enforce the application of regulations about percentage of lot occupancy and the need for variances. The Commission cannot discriminate in the application. There is no mandate by the FHA to waive requirement regarding percentage of lot occupancy or the requirement to obtain special exceptions or variances.

Montgomery County, Maryland also has to deal with FHA provisions and zoning. In Montgomery County the Montgomery County Board of Appeals hears cases for zoning variances. The Board follows a strict analysis concerning variances and the FHA. The board first considers whether the variance qualifies under the applicable standards. If it

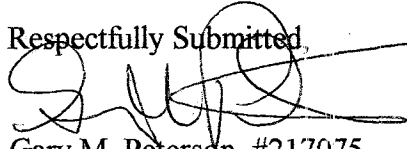
⁹The statement, updated to July 25, 2008, can be found at http://www.justice.gov/crt/housing/final8_1.php. A copy is attached as Exhibit D.

does, it need go not further, it can grant the variance. If not, the Board goes through a FHA driven analysis of the request looking at the disability, insures that there is not discrimination based upon disability and looks for reasonable accommodation through modification of local zoning ordinances. Interestingly the order requires the addition to be removed when it is not longer required by the disability or the person moves.¹⁰

Conclusion

This appeal calls rejects the right of DCRA and the Zoning Administrator to ignore the property right of light and air, that is only protected by the Zoning Regulations, and without notice or a public hearing waive the requirements of the Zoning Regulations. Unmistakably, only the Zoning Commission can grant this waiver power and it has not done so. DCRA and the Zoning Administrator have usurped the rights of the Zoning Commission asserting that the FHA as authority. It is clear that the FHA does not preempt the Zoning Regulations and does not give the authority to DCRA or the Zoning Administrator to interfere in zoning. For these reasons, this appeal ought to be granted

Respectfully Submitted,



Gary M. Peterson #217075
Chair, Capitol Hill Restoration Society
Zoning Committee
810 Massachusetts Avenue, NE
Washington, DC 20002-6016
202-547-7969
202-547-7689 (fax)

¹⁰ Attached as Exhibit E is a copy of a recent Montgomery County Board of Appeals. This appeal and two others may be found at:

<http://www.montgomerycountymd.gov/content/council/boa/pdf/opinions/2007/a-6211.pdf>

<http://www.montgomerycountymd.gov/content/council/boa/pdf/opinions/2002/A-5809.pdf>

<http://www.montgomerycountymd.gov/content/council/boa/pdf/opinions/2005/A-6066.pdf>

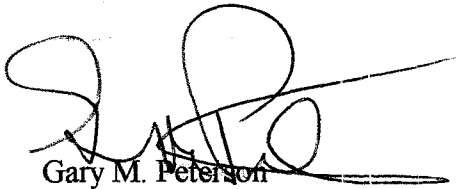
Certificate of Service

I hereby certify that a copy of the foregoing brief was served in person, this 20th day of December 2010, to the following:

ANC 6B
% David F. Garrison
703 D Street., SE
Washington, DC 20003

Jay A. Surabian, Esquire
Assistant Attorney General
Department of Consumer and Regulatory Affairs
Office of the General Counsel
1100 4th Street, SW, 5th Floor
Washington, DC 20004
Phone: 202-442-8403

Jacques B. DePuy, Esquire
Greenstein DeLorme & Luchs, P.C.
1620 L Street, N.W.
Suite 900
Washington, D.C. 20036
Phone: 202-452-1400 x 5400



Gary M. Peterson

EXHIBIT A

Department of Consumer and Regulatory Affairs

Permit Operations Division

1100 4th Street SW

Washington DC 20024

Tel. (202) 442 - 4589

Fax (202) 442 - 4862

TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442 9557

B

BUILDING PERMIT

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

Issue Date: 10/13/2010

ERMIT NO. B1008586

Expiration Date: 10/13/2011

Address of Project:

63 MASSACHUSETTS AVE SE

Zone:

R-4

Ward:

6

Square:

1037

Suffix:

Lot:

0073

Description Of Work:

rear porch addition.

Permission Is Hereby Granted To:

Donovan Mary M

Owner Address:

1363 MASSACHUSETTS AVE SE
WASHINGTON, DC 20003-1540

PERMIT FEE:

\$266.00

Permit Type:

Addition Alteration Repair

Existing Use:

Two-Family Flat - R-3

Proposed Use:

Two-Family Flat - R-3

Plans:

Yes

Agent Name:

Agent Address:

Existing Dwell
Units:

2

Proposed Dwell
Units:

2

No. of Stories:

2

Floor(s)
Involved:

Conditions/ Restrictions:

This Permit Expires if no Construction is Started Within 1 Year or if the Inspection is Over 1 Year.

All Construction Done According To The Current Building 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.

Lead Paint Abatement

Whenever work related to this Permit could result in the disturbance of lead based paint, the respondent shall abide by all applicable provisions of the 'Lead-Hazard Prevention and Elimination Act of 2008' and the EPA 'Lead Renovation, Repair and Painting rule' regarding lead-based paint activities including adherence to lead-safe work practices. For more information, go to <http://dcdoe.dc.gov>, Lead and Healthy Housing.

Director:

Linda K. Argo

Permit Clerk

Virender Bhogal

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.

S.E.

73

EXISTING HOUSE
AND PORCH

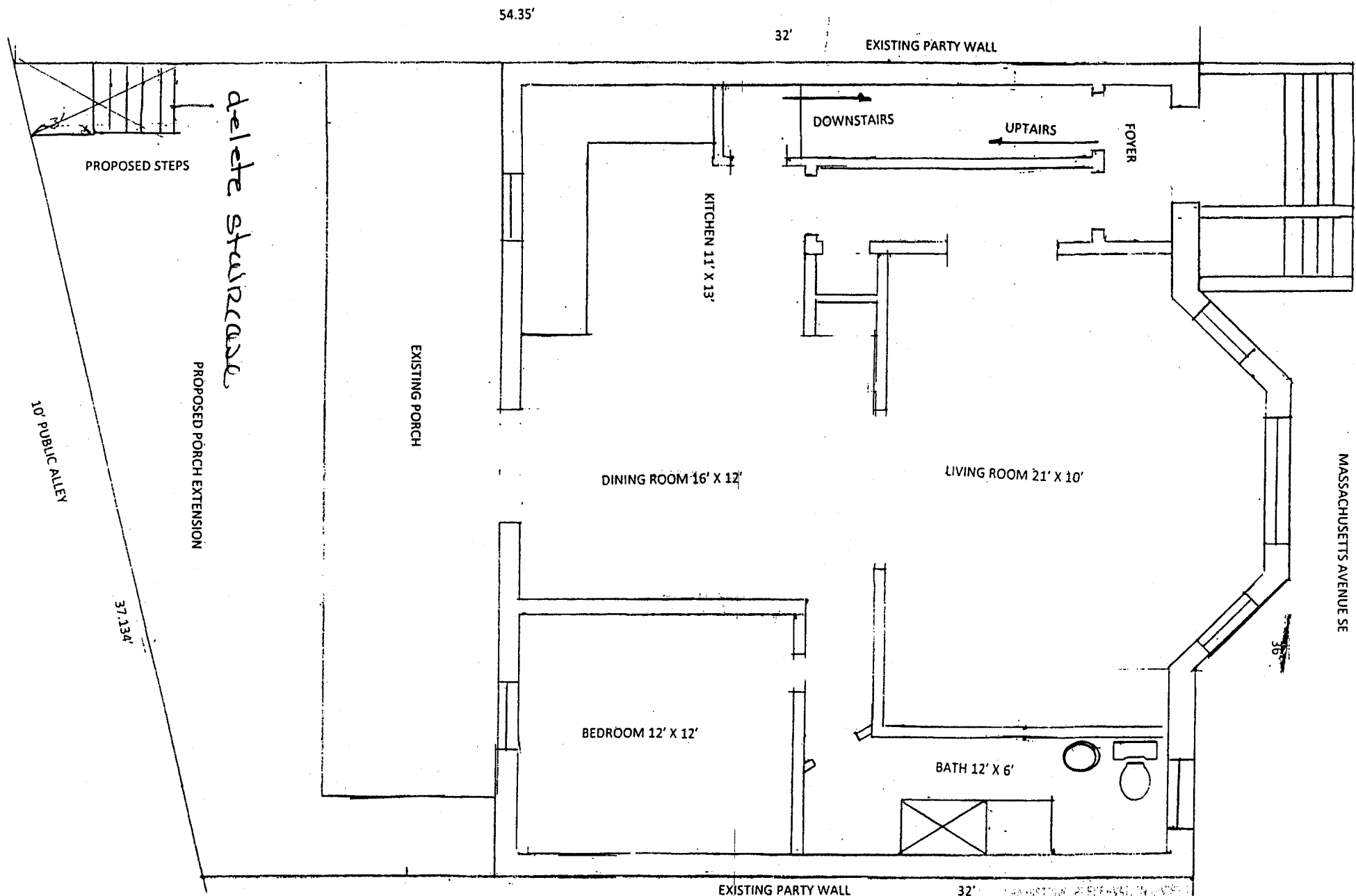
PROPOSED PORCH
EXTENSION

PUBLIC
ALLEY

DCRA/OFFICE OF THE ZONING
ADMINISTRATOR/COMPLIES
WITH REQUIREMENTS OF
DC ZONING REGULATIONS (11DCMR)

m22 10/8/10

use all pressure treated lumber

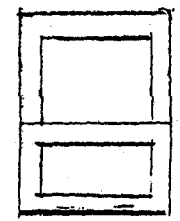
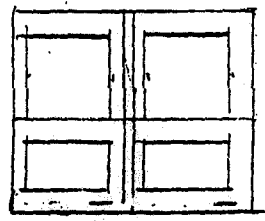
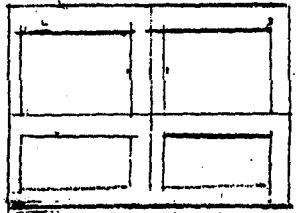
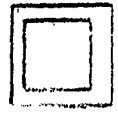


32' TRANSITION PRESERVATION CLEARANCE
PRESERVATION CLEARANCE
WITH MAINTENANCE
12' X 11'

Am 8/27/10
(SIGNATURE/DATE)

Use All
pressure
treated
Lumber

EAVES

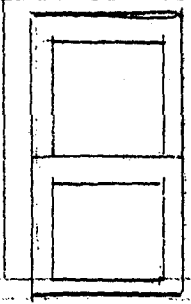
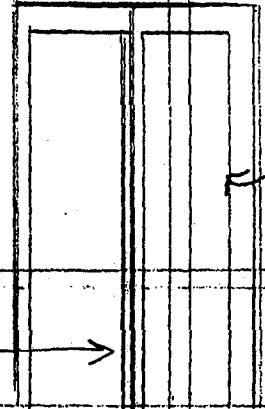
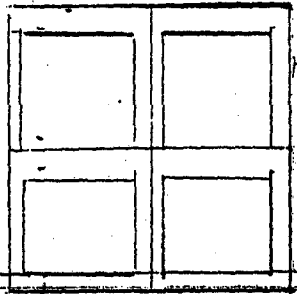


PERMANENT FILE

PERMANENT FILE

360

Roof



SCREEN

SOLID PANEL - WOOD

1ST FLOOR PORCH

10'0"
2x4 Top
nailing
2x4 Framing
16" OC
COVERED
with
5/8 T-11

4" Diameter 3/8th inch thick steel pipe support
Roof Support See Detail

DCRA/OFFICE OF THE ZONING
ADMINISTRATOR/COMPLIES
WITH REQUIREMENTS OF
DC ZONING REGULATIONS (HDCMR)

m22 10/6/10

REAR ELEVATION

1363 MASSACHUSETTS AVE, SE-

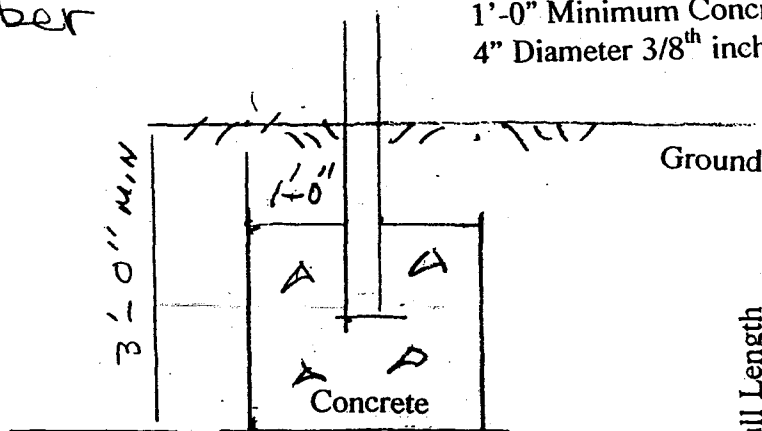
DCRA HISTORIC PRESERVATION DIVISION
HISTORIC PRESERVATION CLEARANCE: COVERED
BASEMENT FLOOR
LAW 2-144

BY: AW 8/27/10
(SIGNATURE DATE)

SCALE 1/4" = 1' - 0"

GROU

1'-0" Minimum Concrete Cover Steel Pipe
4" Diameter 3/8th inch thick steel pipe support

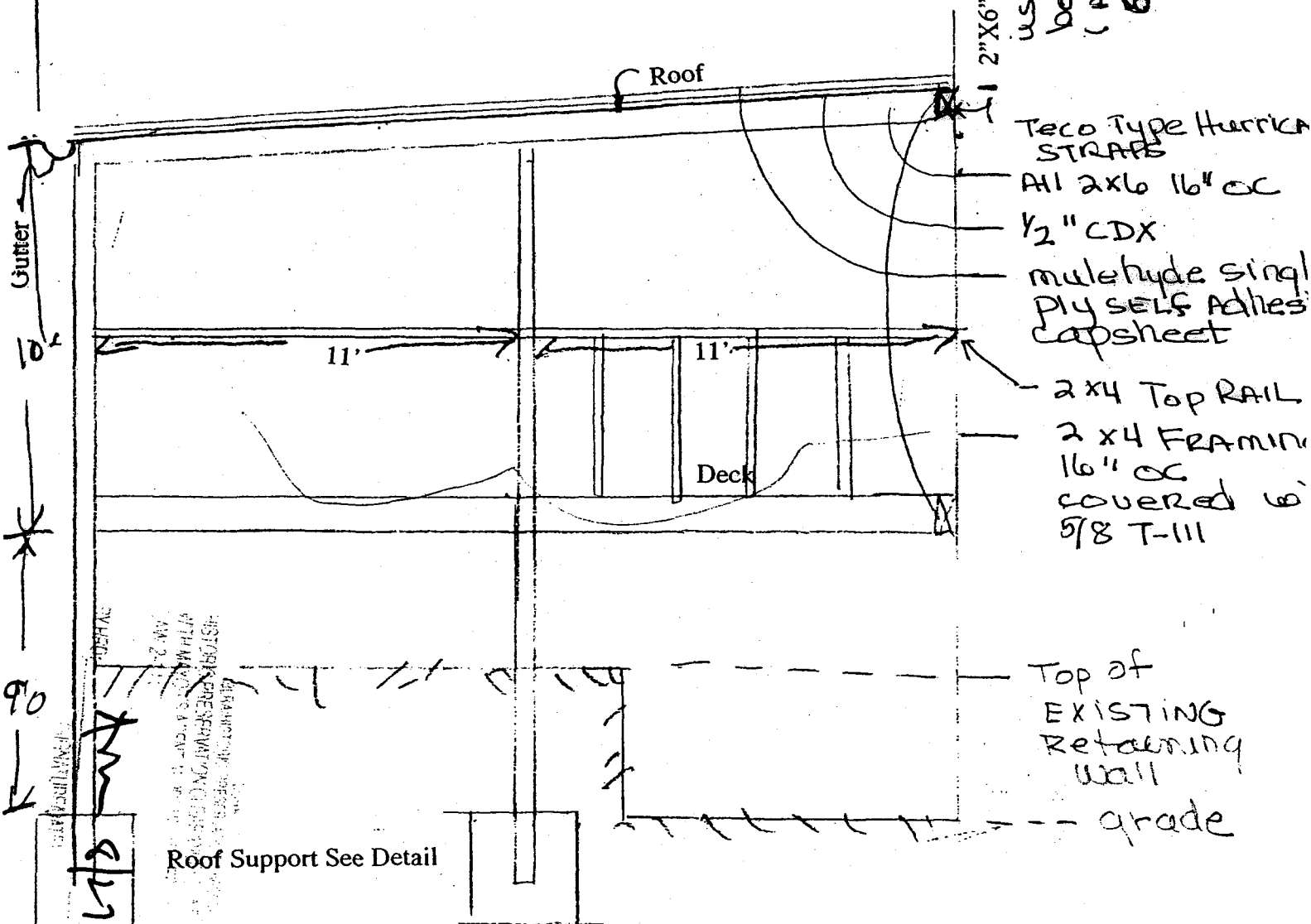


Scale 1/2" = 1'-0"

Proposed Porch

2"X6" Ledger Board Full Length

use multi epoxy expansion bolts in staggered pattern (All bolts $\frac{1}{2}$ " dia) by 6" x 12" OC



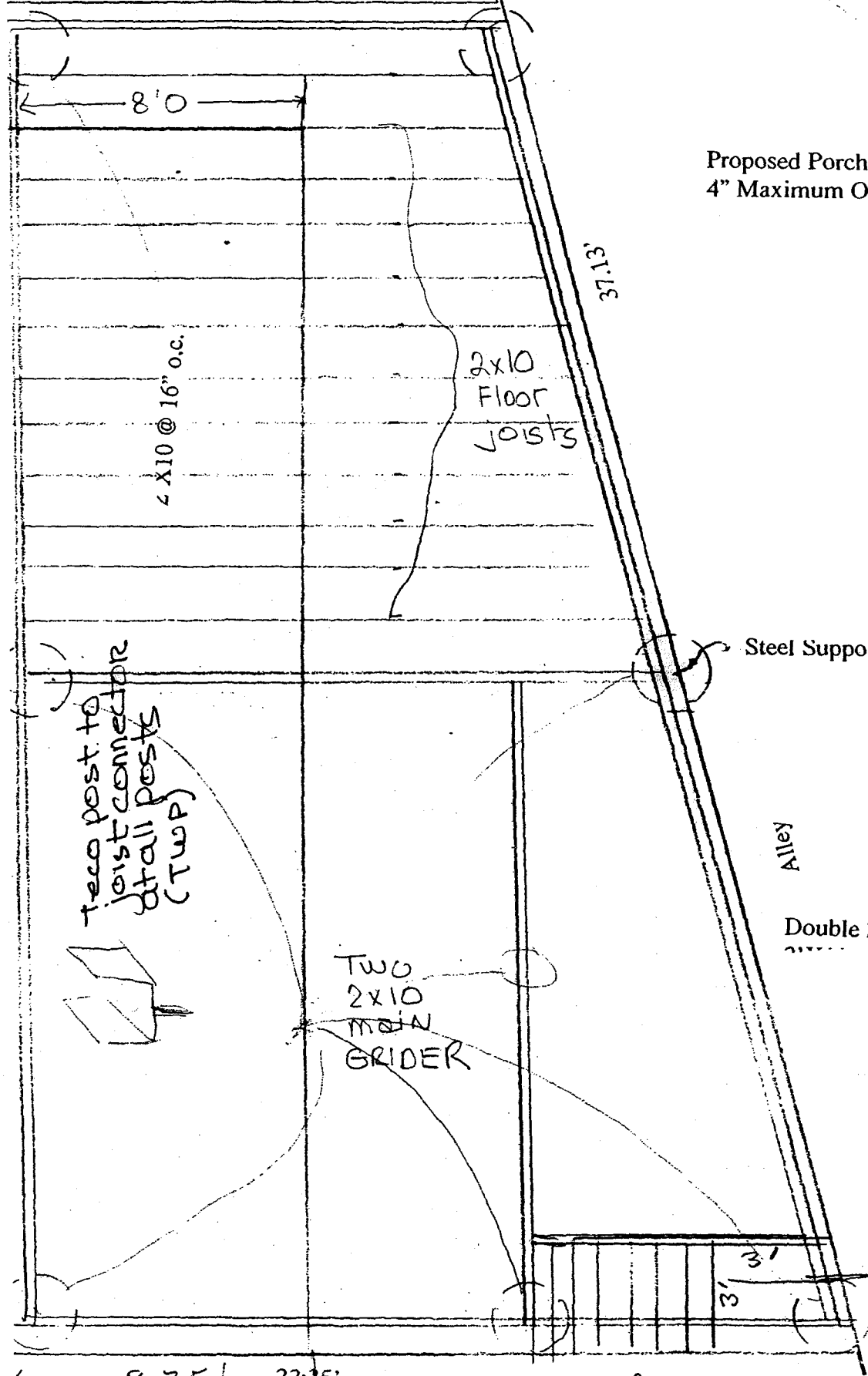
Roof Support See Detail

Cross Section Rear Porch
Scale 1/4" = 1'-0"

all pressure treated Lumber

Framing Plan Proposed Porch

13.24'



Proposed Porch Steps Cross Section
4" Maximum Opening Between Spindles

Proposed Steps

Handwritten signature and date: 2/27/12

STANDARD DRAWING
ARCHITECTURAL
FLOOR PLAN
1/2" = 1'-0"

Alley

Double 2"x10"

Scale 1/4" = 1'-0"

Department of Consumer and Regulatory Affairs

Permit Operations Division

1100 4th Street SW

Washington DC 20024

Tel. (202) 442 - 4589 Fax (202) 442 - 4862

TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442 9557

Received:

Plans: Application

Date: 7/30/2010

☐
☐

Applicant/Agent: DONOVAN MARY M

Engineering Coordinator: Virender Bhogal

Job Classification:

Job No:

Address of Project:

363 MASSACHUSETTS AVE SE

B1008586

Required Reviews: (Checked boxes only)	Reviewer:	Completion Time:	Review Status:
☐ Fine Arts:		☐ AM ☐ PM	☐ Approved ☐ HFC ☐ Conf. w/Applicant
☒ Historic:	<i>Am</i>	☐ AM ☒ PM	☒ Approved ☐ HFC ☐ Conf. w/Applicant
☐ Public Space/DDOT:		☐ AM ☐ PM	☐ Approved ☐ HFC ☐ Ref. to DPW ☐ Conf. w/Applicant
☒ Zoning:	<i>JA</i>	☐ AM ☐ PM 7/30/10	☐ Approved ☒ HFC ☒ Ref. to BZA ☐ Ref. to Zoning Administrator ☐ Conf. w/Applicant
☒ Soil Erosion/DDOE:	<i>GA</i>	☐ AM ☒ PM	☐ Approved ☐ HFC ☐ Conf. w/Applicant
☐ Storm Water Mgmt:			☐ Ref. to DOH ☐ DDoe Deposit
☐ Air Quality:		☐ AM ☐ PM	☐ Approved ☐ HFC ☐ Conf. w/Applicant
☐ EIS:			
☐ Water & Sewer/WASA:		☐ AM ☐ PM	☐ Approved ☐ HFC ☐ Conf. w/Applicant
☐ Mechanical/Plumbing:		☐ AM ☐ PM	☐ Approved ☐ HFC ☐ Conf. w/Applicant
☐ Health/DOH:		☐ AM ☐ PM	☐ Approved ☐ HFC ☐ Conf. w/Applicant
☐ Electrical:		☐ AM ☐ PM	☐ Approved ☐ HFC ☐ Conf. w/Applicant
☐ Elevator:		☐ AM ☐ PM	☐ Approved ☐ HFC ☐ Conf. w/Applicant
☐ Fire Protection:		☐ AM ☐ PM	☐ Approved ☐ HFC ☐ Conf. w/Applicant
☒ Structural:	<i>7</i>	☐ AM ☐ PM	☒ Approved ☐ HFC ☐ Conf. w/Applicant
☐ Other:		☐ AM ☐ PM	☐ Approved ☐ HFC ☐ Conf. w/Applicant

Remarks:

Zoning: Existing structure (House + Porch) exceeds the lot occupancy of sixty (60) percent.

10/14/10 Granted Approval as reasonable Accomodate - m22 ZA
10/8/10

Department of Consumer and Regulatory Affairs

Permit Operations Division

1100 4th Street SW

Washington DC 20024

Tel. (202) 442 - 4589 Fax (202) 442 - 4862

TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442 9557

Remittance Source Document

Date: October 13, 2010

INVOICE

Invoice Number: 565099

Customer: DONOVAN MARY M

Mailing Address: 1363 MASSACHUSETTS AVE SE
WASHINGTON, DC 20003-1540

Address of Work: 1363 MASSACHUSETTS AVE SE
WASHINGTON, DC 20003

Permit: B1008586

Type of Permit: Addition Alteration Repair

Acct Code:

Fees:

Description:

3012-3012-1000

\$23.00

Enhanced Services Fee - Addition/Alteration/Repair

\$115.00

Addition / Alteration & Repair Fee

\$115.00

Filing Fee

\$13.00

Green Building Fee

\$-

Enhanced Service Fee - Green Building

\$266.00

Office of Finance
and Treasury

10/13/2010 2:46 PM

DCRA Term:OFT-4HPOLB1

91 Batch Date:10/13/10

OFT17

#78

Rcpt: 00703598

Document: B1008586

Payment Total: \$266.00

Document Distribution:

2 CRO (0402) 10mb1-ops90 \$266.00

DEPARTMENT OF HEALTH I

Rcpt: 00703599

Document:

Payment Total: \$98.00

Document Distribution:

5 KGO (6111) s0634-2080a \$98.00

MC Tendered: \$364.00

Thank you for your payment.
Have a nice day!

EXHIBIT B

Statement of Facts

Mark O'Donnell

Friday, October 15, 2010--Without public process or posted permit, my next-door neighbor of 29 years, Mary Donovan, at 1363 Massachusetts Ave SE, began construction on an addition designed to cover her entire back yard to the alley. Her rowhouse currently exceeds the lot occupancy requirements, so I asked her for her zoning variance. I recalled her earlier attempts to enlarge this same rear porch without permits. Mary Donovan explained that she obtained a special variance based on the disability of her husband, and she gave me a copy of a "Fair Housing Act Request for Reasonable Accommodation" sheet. I asked Mary Donovan if any personnel from DCRA had been out to the site to evaluate whether the disability justified the addition and she said that no one from DCRA had come out to the site. Mary Donovan asserted to me that she intended to build the same type of addition she had recently completed down the block at 1375 Massachusetts Ave SE (her son's home).

I called the DCRA ADA Coordinator, Jeff Mason, and the DC Office of Disability Rights. They told me there was nothing they could share with me as the application involved sealed medical records. I asked for the procedures and standards for determining disability and for evaluating that the disability required a particular "reasonable accommodation" and they told me that there were none. I called the DCRA Illegal Construction number and they sent out an inspector, Ruben Legaspi, who confirmed that the owner had a valid permit. My wife, Susan Oehler, contacted Gary Peterson of the Capitol Hill Restoration Society and he came and viewed the site. At 5:00 p.m., (after work had already begun clearing the site and moving an unpermitted hot tub) we received a certified letter, back dated to October 1st.

October 17, 2010—I sent an email to Tommy Wells, DCRA, ANC 6B and others setting out our serious concerns about this outrageous addition.

October 18, 2010—I received an email from Jill Byrd, Staff Assistant, on behalf of Linda Argo, Director of DCRA. The email contained assertions that an inspector would indeed be out to ensure that the construction was being conducted "within the scope of the plans."

October 20, 2010—Gary Peterson called and told me that the Capitol Hill Restoration Society had decided to appeal the building permit to the Board of Zoning Adjustment (BZA).

October 22, 2010—My wife, Susan Oehler, witnessed the contractor, Sheldon Roseman, at the work site with someone who appeared to be the DCRA inspector. The inspection appeared short and "chummy" with a sympathetic conversation about how the owner was just a grandmother. On this date, it was obvious that the footers did not conform with the substructure specified in the approved site plans. No Stop-Work Order was issued at that time.

October 25, 2010—I filed the Capitol Hill Restoration Society's BZA appeal, Forms 125 and 126 with attachments. I received an acknowledgement letter noting that the BZA gives "great weight" to the comments of ANC 6B. I served Mary Donovan with a complete copy of the BZA appeal by hand delivering it to 1363 Massachusetts Ave, SE. I witnessed Mary Donovan entering 1363 Massachusetts Ave SE. I took a photo of the site to document the progress of construction at the point that Mary Donovan received notice of the BZA appeal.

October 26, 2010—I sent an email to Matthew LeGrant, asking him to reconsider the special zoning variance and to issue a Stop-Work Order on the project. I received his response stating that he building permit application was approved pursuant to a reasonable accommodation request.

October 27, 2010—I served Mary Donovan a copy of the BZA appeal by certified mail.

November 1, 2010—I sent an email to Tommy Wells, DCRA, ANC 6B and others pointing out that Mary Donovan and contractor Sheldon Roseman (DC Lic. #6563) were not building in accordance with their "reasonable accommodation" site plans. I pointed to Mary Donovan's and Sheldon Roseman's history of "unclean hands" and asked that a Stop-Work Order be issued on the construction.

November 3, 2010—Gary Peterson and I met with the Planning and Zoning Committee of Advisory Neighborhood Commission 6B to explain our serious concerns about this project and DCRA's secret process (or total lack of process) for handling "reasonable accommodation" cases.

November 9, 2010—I presented our concerns at the ANC 6B monthly meeting. The ANC voted unanimously (10 to 0) to support the BZA appeal and requested an immediate Stop-Work Order "to allow this case to be properly re-evaluated before the project is completed."

November 10, 2010—My wife, Susan Oehler, called Amanda Molson at the DC Historic Preservation office. Amanda Molson said that Mary Donovan had shown up at her office without an appointment, carrying some plans and a sample piece of siding. Mary Donovan asked Amanda Molson for approval to use the siding on her addition, as if to get a "back door" approval of her modified design. Amanda Molson pointed out that the construction at 1363 Massachusetts Ave SE did not match the approved site plans.

Mary Donovan's work crew at 1363 Massachusetts Ave SE removed some of the plywood beside the window openings on the addition.

I received an email from Bill Hackett, a neighbor 10 feet across the alley from 1363 Massachusetts Ave SE expressing concern about this massive addition and about added water volume and flooding.

A Stop-Work Order for “Work beyond scope of permits” under DCMR 12 section 1051 was posted on this addition and on the front of 1363 Massachusetts Ave SE. This came after a week-long string of unanswered emails and phone calls to DCRA about illegal construction at 1363 Massachusetts Ave SE. Most unconscionable was Jill Byrd’s tepid response to our frantic efforts to halt the illegal construction: “As all new construction must comply with the approved plans, DCRA inspectors will determine on their next scheduled site visit [no date given] whether the construction is permitted. Therefore, no matter when the inspection occurs. . .” What we now know is that Sheldon Roseman’s reputation for shoddy and illegal work is quite well known to DCRA and in fact DCRA Director, Linda Argo, is quoted in an October 2009 City Paper article about his business license.

The article describes Sheldon Roseman’s deplorable work on a rowhouse on Florida Avenue NE, his troubling financial relationship with certain DCRA inspectors or former inspectors, and Linda Argo’s statement about DCRA’s scrutiny of his license. Comment 15 at the end of the article is by Mary Donovan noting her 25-year relationship with Sheldon Roseman and the enormous amount of work (permitted or unpermitted?) she had him do on her many Capitol Hill Historic District properties.

For a large part of the summer of 2010, a Life Long Construction sign was posted at Mary Donovan’s adjacent rental property, 1367 Massachusetts Ave SE, and Sheldon Roseman’s work crew was present. No permits were posted and an internet search of the DCRA permit web page showed no permits approved. I witnessed a new living space complete with bedroom and bathroom built in the attic. This is the kind of fire trap that the permit process is designed to prevent. An internet search on Sheldon Roseman confirms his dismal treatment of District homeowners.

November 11, 2010—I sent an email to Don Masoero, the Reviewing Official noted on the Stop-Work Order, outlining some of the ways in which the construction at 1363 Massachusetts Ave SE does not match the approved site plans, and asking that he keep the Stop-Work Order in place until the BZA can hear the case in accordance with ANC 6B’s request. Don Masoero responded (11/12/10) describing the limits on the scope of his authority.

I spoke with a tenant at 1354 Independence Ave SE, 10 feet across the alley from 1363 Massachusetts Ave SE who expressed concern over the significant reduction in light and air from this growing, outsized addition. He relayed the owner’s dismay about this extreme encroachment next to his home’s back deck area.

November 12, 2010—I sent Matthew LeGrant, the DC Zoning Administrator, an email asking that he honor ANC 6B’s request that he issue a Stop-Work Order until the BZA can hear this case. Matthew Le Grant declined.

I sent Don Masoero an email with background information and asked that he require that Mary Donovan’s construction comply with the approved site plans, and that he not allow a modification to her “reasonable accommodation” addition. Any change to her

approved “reasonable accommodation,” certainly anything so fundamental as changing an open screened-in porch to interior space, constitutes a new “reasonable accommodation” request needing another approval of the Zoning Administrator. Given that this case is under appeal, I asked that Don Masoero not remove the Stop-Work Order on 1363 Massachusetts Ave SE until the BZA has a chance to fully and fairly consider the case. I also pointed to Mary Donovan’s history of not following approved plans.

November 14, 2010—I sent Don Masoero an email asking that he require that Mary Donovan’s construction comply with the approved site plans, and that he not allow any modification to her specific “reasonable accommodation” addition. Sent background email (11/16/2010)

November 18, 2010—I sent Don Masoero an email describing an addition at 1375 Massachusetts Ave SE inhabited by Mary Donovan’s son. Don Masoero responded and said he will assign it to his staff for inspection.

November 19, 2010—A Stop-Work Order was placed on an addition to a rowhouse inhabited by Mary Donovan’s son at 1375 Massachusetts Ave SE. This addition appears to be totally completed, and one can assume that there was no DCRA inspection of the project since the approved plans for the permit do not at all match the work done.

November 22, 2010—I sent Don Masoero and Matthew LeGrant an email asking that they not to lift the Stop-Work Order or allow any modification to the approved “reasonable accommodation” until the BZA can consider this case.

November 23, 2010—I witnessed Mary Donovan at the worksite with a man who appeared to be her engineer taking measurements and making notes.

November 24, 2010—I received Don Masoero’s response describing Mary Donovan’s appeal of the Stop-Work Order. This email includes Don Masoero’s assertion “. . . if the property owner now wants to amend the approved plans, then, the Zoning Administrator would review the amended plans anew.” Our response agreed that the Zoning Administrator would have to review the fundamentally new design and function reflected in the new plans.

November 28, 2010—I sent Don Masoero an email setting out 11 violations at 1363 Massachusetts Ave SE.

November 29, 2010—I sent Linda Argo an email setting out the need for the Zoning Administrator to review the new fundamentally different plans and reasons why he should reject them. (

November 30, 2010—Linda Argo responded “. . . Mr. LeGrant [the Zoning Administrator] and his staff would review any new submissions to determine compliance with the Zoning Regulations.” Bill Hackett, a neighbor directly across the 10-foot alley from the new addition responded with a statement of the unfairness of this process.

December 1, 2010—I sent the DCRA FOIA Officer, Hamilton Kuralt, a request for a status update on my requests for background information on the Zoning Administrators approval. Hamilton Kuralt responded apologizing for the delay.

December 2, 2010—I sent Linda Argo an email pointing out that standards and procedures are needed to assure the reasonableness of “reasonable accommodation.” determinations.

December 7, 2010—Amanda Molson from the DC Historic Preservation office sent an email stating that her office had approved new plans that consisted of a minor change in materials and maintained the screening (not windows) on the new addition.

December 8, 2010—I sent Don Masoero an email pointing to the important protections in the process followed in Montgomery County, MD, for “reasonable accommodation” requests. I learned that DCRA issued a new Building Permit (#B1101413) without the review and approval of the Zoning Administrator.

December 9, 2010—I sent an email to the DCRA Zoning Administrator, Matthew LeGrant, pointing out that his office should have reviewed the new plans. I received an email from our ANC 6B Commissioner, Neil Glick, stating that DCRA should stop all construction until the BZA hearing.

December 10, 2010—I sent Don Masoero and Matthew LeGrant an email why the Zoning Administrator had not reviewed and approved the new plans given their prior assurances and the fundamental changes in design and function. I received a response from Don Masoero that there was no zoning review because there was no change in the “footprint.”

December 13, 2010—I sent an email to Don Masoero and Matthew LeGrant disputing the “footprint” theory and pointing up additional defects in the construction at 1363 Massachusetts Ave SE.

I sent an email to the DCRA FOIA officer, Hamilton Kuralt, asking for the information I had requested under FOIA. He responded with an apology and a promise to complete the request by December 14th.

December 14, 2010—I sent an email to Don Masoero with additional violations at 1363 Massachusetts Ave SE. I sent an email to Matthew LeGrant and Rabbiah Sabbakhan asking why there was no zoning review. Matthew LeGrant responded that the original zoning approval covered this new set of plans.

Bill Hackett, a neighbor directly across the alley from the addition, sent an email expressing his deep concerns.

December 15, 2010—I sent Don Masoero an email listing additional defects at 1363 Massachusetts Ave SE. Dave Garrison, chair of ANC 6B, sent an email about ANC 6B support for the BZA appeal. Bill Hackett, a neighbor across the alley from the addition, sent an email with photos of the addition. Don Masoero telephoned me and said that new plans were “junk” and would need a one-hour rated fire wall and other corrections. This raises the question of why DCRA would approve “junk” plans.

EXHIBIT C

Petition in Support of Appeal #18154 to the Board of Zoning
Adjustment that the Building Permit to Build a Rear Addition at 1363
Massachusetts Ave SE Beyond Lot Occupancy Limitations be
Revoked

I support Appeal #18154 to the Board of Zoning Adjustment that Building Permit
#B1008586 to build a rear addition at 1363 Massachusetts Ave SE beyond lot
occupancy limitations be revoked because the DC Department of Consumer and
Regulatory Affairs issued the permit:

- Without public process,
- Without evaluating existing space and less burdensome alternatives, and
- Without evaluating that the "Reasonable Accommodation" is necessary for
the owner to use and enjoy the dwelling.

Name	Address
<u>Mark J. O'Donnell</u>	<u>1359 Massachusetts Ave SE</u>
<u>Susan W.</u>	<u>1359 Mass. Ave. SE</u>
<u>EVI DEHLER</u>	<u>503 15th ST SE WASH DC</u>
<u>Frank Pietrucha</u>	<u>1354 Indep. Ave SE</u>
<u>John McGraw</u>	<u>1354 Independence Ave SE</u>
<u>Robert P. ...</u>	<u>122 13th ST, SE</u>
<u>Adam</u>	<u>1326 Mass. Ave. SE</u>
<u>Richard A. Smith</u>	<u>1345 Massachusetts Ave SE</u>
<u>Jan</u>	<u>1359 Massachusetts Ave SE</u>
<u>W.S.</u>	<u>1359 MASSACHUSETTS AVE SE</u>
<u>William J. ...</u>	<u>1339 Mass. Ave SE.</u>
<u>John O'Donnell</u>	<u>1359 Massachusetts Ave SE</u>
<u>W. J. O'Donnell</u>	<u>1359 Mass. Ave SE</u>

Petition in Support of Appeal #18154 to the Board of Zoning
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occupancy limitations be revoked because the DC Department of Consumer and
Regulatory Affairs issued the permit:

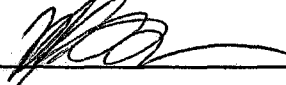
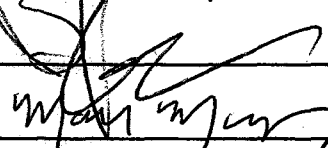
- Without public process,
- Without evaluating existing space and less burdensome alternatives, and
- Without evaluating that the "Reasonable Accommodation" is necessary for
the owner to use and enjoy the dwelling.

Name	Address
Frances Sundt	1345 mass. Ave, SE WDC 20003
Elisabeth Morgan	1349 Mass Ave SE WDC 20003
MORVIN J. SPALLO	1323 MASS. AVE. SE. 20003
Jim Newell	1328 Mass Ave. SE 20003
Tom King	124 13th St. SE, 20003
Paul Reilly	134 13th St SE 20003
Dr Campbell	142 13th St SE
Ulrike Reichen	152 13th St., SE
Carole Nischmann	154 13th St SE
Braquel	1331 Mass Ave SE
Zettie Flood	12013 St SE
Roxanne Walker	1346 Mass Ave SE
John B. O'Donnell	1359 Mass. Ave SE

Petition in Support of Appeal #18154 to the Board of Zoning
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- Without public process,
- Without evaluating existing space and less burdensome alternatives, and
- Without evaluating that the "Reasonable Accommodation" is necessary for
the owner to use and enjoy the dwelling.

Name	Address
STEPHAN AHADI	1362 Independence Ave, SE
MARIA NÚÑEZ	1362 Independence Ave, SE
Gillian Sterick	1360 Independence Ave SE
Zeb Schon	1356 Indep. Ave. SE
 (M. Cohrs)	1354 Independence Ave SE
PATRICIA Mc HUGH	1352 INDEPENDENCE AVE. SE
	1332 Indp Ave SE
Robert Capecechi	1326 Independence Ave SE
Naoke Aoki	1322 Independence Ave. SE
KANISHKA GANGOPADHYAY	1312 Independence Ave SE
Kerni Pemberton	1354 Independence Ave SE
IAN LeVallier	116 14 th St SE
	116 14 th St SE

Petition in Support of Appeal #18154 to the Board of Zoning
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- Without evaluating that the "Reasonable Accommodation" is necessary for
the owner to use and enjoy the dwelling.

Name

Address

Barbara C. Culp

148 13th Street S.E.

Janet V. V. V. V.

1318 Independence Ave. SE

Cathy V. V. V.

144 13th St SE

Regina Chlothe

123 Kentucky Ave. SE

Georgine Reed

161 Kentucky Ave SE

MARIE SPIRO

161 Kentucky Ave SE

Allen O'Brien

151 Kentucky Ave SE

Edward J. V. V.

148 13th St SE

Kramer Schmitt

1343 Independence Ave SE

Madeleine

246-15th 15th St SE

Spencer

1346 Massachusetts Ave SE

Gregory

1350 Mass. Ave SE

EXHIBIT D



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JOINT STATEMENT OF THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

GROUP HOMES, LOCAL LAND USE, AND THE FAIR HOUSING ACT

Since the federal Fair Housing Act ("the Act") was amended by Congress in 1988 to add protections for persons with disabilities and families with children, there has been a great deal of litigation concerning the Act's effect on the ability of local governments to exercise control over group living arrangements, particularly for persons with disabilities. The Department of Justice has taken an active part in much of this litigation, often following referral of a matter by the Department of Housing and Urban Development ("HUD"). This joint statement provides an overview of the Fair Housing Act's requirements in this area. Specific topics are addressed in more depth in the attached Questions and Answers.

The Fair Housing Act prohibits a broad range of practices that discriminate against individuals on the basis of race, color, religion, sex, national origin, familial status, and disability.⁽¹⁾ The Act does not pre-empt local zoning laws. However, the Act applies to municipalities and other local government entities and prohibits them from making zoning or land use decisions or implementing land use policies that exclude or otherwise discriminate against protected persons, including individuals with disabilities.

The Fair Housing Act makes it unlawful --

- To utilize land use policies or actions that treat groups of persons with disabilities less favorably than groups of non-disabled persons. An example would be an ordinance prohibiting housing for persons with disabilities or a specific type of disability, such as mental illness, from locating in a particular area, while allowing other groups of unrelated individuals to live together in that area.
- To take action against, or deny a permit, for a home because of the disability of individuals who live or would live there. An example would be denying a building permit for a home because it was intended to provide housing for persons with mental retardation.
- To refuse to make reasonable accommodations in land use and zoning policies and procedures where such accommodations may be necessary to afford persons or groups of persons with disabilities an equal opportunity to use and enjoy housing.
- What constitutes a reasonable accommodation is a case-by-case determination.
- Not all requested modifications of rules or policies are reasonable. If a requested modification imposes an undue financial or administrative burden on a local government, or if a modification creates a fundamental alteration in a local government's land use and zoning scheme, it is not a "reasonable" accommodation.

The disability discrimination provisions of the Fair Housing Act do not extend to persons who claim to be disabled solely on the basis of having been adjudicated a juvenile delinquent, having a criminal record, or being a sex offender. Furthermore, the Fair Housing Act does not protect persons who currently use illegal drugs, persons who have been convicted of the manufacture or sale of illegal drugs, or persons with or without disabilities who present a direct threat to the persons or property of others.

HUD and the Department of Justice encourage parties to group home disputes to explore all reasonable dispute resolution procedures, like mediation, as alternatives to litigation.

DATE: AUGUST 18, 1999

Questions and Answers

on the Fair Housing Act and Zoning

Q. Does the Fair Housing Act pre-empt local zoning laws?

THE COMMON LAW IS THE WILL OF *Man* *God* ISSUING FROM THE *Life* OF THE *People*

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No. "Pre-emption" is a legal term meaning that one level of government has taken over a field and left no room for government at any other level to pass laws or exercise authority in that area. The Fair Housing Act is not a land use or zoning statute; it does not pre-empt local land use and zoning laws. This is an area where state law typically gives local governments primary power. However, if that power is exercised in a specific instance in a way that is inconsistent with a federal law such as the Fair Housing Act, the federal law will control. Long before the 1988 amendments, the courts had held that the Fair Housing Act prohibited local governments from exercising their land use and zoning powers in a discriminatory way.

Q. What is a group home within the meaning of the Fair Housing Act?

The term "group home" does not have a specific legal meaning. In this statement, the term "group home" refers to housing occupied by groups of unrelated individuals with disabilities.⁽²⁾ Sometimes, but not always, housing is provided by organizations that also offer various services for individuals with disabilities living in the group homes. Sometimes it is this group home operator, rather than the individuals who live in the home, that interacts with local government in seeking permits and making requests for reasonable accommodations on behalf of those individuals.

The term "group home" is also sometimes applied to any group of unrelated persons who live together in a dwelling -- such as a group of students who voluntarily agree to share the rent on a house. The Act does not generally affect the ability of local governments to regulate housing of this kind, as long as they do not discriminate against the residents on the basis of race, color, national origin, religion, sex, handicap (disability) or familial status (families with minor children).

Q. Who are persons with disabilities within the meaning of the Fair Housing Act?

The Fair Housing Act prohibits discrimination on the basis of handicap. "Handicap" has the same legal meaning as the term "disability" which is used in other federal civil rights laws. Persons with disabilities (handicaps) are individuals with mental or physical impairments which substantially limit one or more major life activities. The term mental or physical impairment may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, and mental illness. The term major life activity may include seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, speaking, or working. The Fair Housing Act also protects persons who have a record of such an impairment, or are regarded as having such an impairment.

Current users of illegal controlled substances, persons convicted for illegal manufacture or distribution of a controlled substance, sex offenders, and juvenile offenders, are not considered disabled under the Fair Housing Act, by virtue of that status.

The Fair Housing Act affords no protections to individuals with or without disabilities who present a direct threat to the persons or property of others. Determining whether someone poses such a direct threat must be made on an individualized basis, however, and cannot be based on general assumptions or speculation about the nature of a disability.

Q. What kinds of local zoning and land use laws relating to group homes violate the Fair Housing Act?

Local zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities violate the Fair Housing Act. For example, suppose a city's zoning ordinance defines a "family" to include up to six unrelated persons living together as a household unit, and gives such a group of unrelated persons the right to live in any zoning district without special permission. If that ordinance also disallows a group home for six or fewer people with disabilities in a certain district or requires this home to seek a use permit, such requirements would conflict with the Fair Housing Act. The ordinance treats persons with disabilities worse than persons without disabilities.

A local government may generally restrict the ability of groups of unrelated persons to live together as long as the restrictions are imposed on all such groups. Thus, in the case where a family is defined to include up to six unrelated people, an ordinance would not, on its face, violate the Act if a group home for seven people with disabilities was not allowed to locate in a single family zoned neighborhood, because a group of seven unrelated people without disabilities would also be disallowed. However, as discussed below, because persons with disabilities are also entitled to request reasonable accommodations in rules and policies, the group home for seven persons with disabilities would have to be given the opportunity to seek an exception or waiver. If the criteria for reasonable accommodation are met, the permit would have to be given in that instance, but the ordinance would not be invalid in all circumstances.

Q. What is a reasonable accommodation under the Fair Housing Act?

As a general rule, the Fair Housing Act makes it unlawful to refuse to make "reasonable accommodations" (modifications or exceptions) to rules, policies, practices, or services, when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use or enjoy a dwelling.

Even though a zoning ordinance imposes on group homes the same restrictions it imposes on other groups of unrelated people, a local government may be required, in individual cases and when requested to do so, to grant a reasonable accommodation to a group home for persons with disabilities. For example, it may be a reasonable accommodation to waive a setback requirement so that a paved path of travel can be provided to residents who have mobility impairments. A similar waiver might not be required for a different type of group home where residents do not have difficulty negotiating steps and do not need a setback in order to have an equal opportunity to use and enjoy a dwelling.

Not all requested modifications of rules or policies are reasonable. Whether a particular accommodation is reasonable depends on the facts, and must be decided on a case-by-case basis. The determination of what is reasonable depends on the answers to two questions: First, does the request impose an undue burden or expense on the local government? Second, does the proposed use create a fundamental alteration in the zoning scheme? If the answer to either question is "yes," the requested accommodation is unreasonable.

What is "reasonable" in one circumstance may not be "reasonable" in another. For example, suppose a local government does not allow groups of four or more unrelated people to live together in a single-family neighborhood. A group home for four adults with mental retardation would very likely be able to show that it will have no more impact on parking, traffic, noise, utility use, and other typical concerns of zoning than an "ordinary family." In this circumstance, there would be no undue burden or expense for the local government nor would the single-family character of the neighborhood be fundamentally altered. Granting an exception or waiver to the group home in this circumstance does not invalidate the ordinance. The local government would still be able to keep groups of unrelated persons without disabilities from living in single-family neighborhoods.

By contrast, a fifty-bed nursing home would not ordinarily be considered an appropriate use in a single-family neighborhood, for obvious reasons having nothing to do with the disabilities of its residents. Such a facility might or might not impose significant burdens and expense on the community, but it would likely create a fundamental change in the single-family character of the neighborhood. On the other hand, a nursing home might not create a "fundamental change" in a neighborhood zoned for multi-family housing. The scope and magnitude of the modification requested, and the features of the surrounding neighborhood are among the factors that will be taken into account in determining whether a requested accommodation is reasonable.

Q. What is the procedure for requesting a reasonable accommodation?

Where a local zoning scheme specifies procedures for seeking a departure from the general rule, courts have decided, and the Department of Justice and HUD agree, that these procedures must ordinarily be followed. If no procedure is specified, persons with disabilities may, nevertheless, request a reasonable accommodation in some other way, and a local government is obligated to grant it if it meets the criteria discussed above. A local government's failure to respond to a request for reasonable accommodation or an inordinate delay in responding could also violate the Act.

Whether a procedure for requesting accommodations is provided or not, if local government officials have previously made statements or otherwise indicated that an application would not receive fair consideration, or if the procedure itself is discriminatory, then individuals with disabilities living in a group home (and/or its operator) might be able to go directly into court to request an order for an accommodation.

Local governments are encouraged to provide mechanisms for requesting reasonable accommodations that operate promptly and efficiently, without imposing significant costs or delays. The local government should also make efforts to insure that the availability of such mechanisms is well known within the community.

Q. When, if ever, can a local government limit the number of group homes that can locate in a certain area?

A concern expressed by some local government officials and neighborhood residents is that certain jurisdictions, governments, or particular neighborhoods within a jurisdiction, may come to have more than their "fair share" of group homes. There are legal ways to address this concern. The Fair Housing Act does not prohibit most governmental programs designed to encourage people of a particular race to move to neighborhoods occupied predominantly by people of another race. A local government that believes a particular area within its boundaries has its "fair share" of group homes, could offer incentives to providers to locate future homes in other neighborhoods.

However, some state and local governments have tried to address this concern by enacting laws requiring that group homes be at a certain minimum distance from

one another. The Department of Justice and HUD take the position, and most courts that have addressed the issue agree, that density restrictions are generally inconsistent with the Fair Housing Act. We also believe, however, that if a neighborhood came to be composed largely of group homes, that could adversely affect individuals with disabilities and would be inconsistent with the objective of integrating persons with disabilities into the community. Especially in the licensing and regulatory process, it is appropriate to be concerned about the setting for a group home. A consideration of over-concentration could be considered in this context. This objective does not, however, justify requiring separations which have the effect of foreclosing group homes from locating in entire neighborhoods.

Q. What kinds of health and safety regulations can be imposed upon group homes?

The great majority of group homes for persons with disabilities are subject to state regulations intended to protect the health and safety of their residents. The Department of Justice and HUD believe, as do responsible group home operators, that such licensing schemes are necessary and legitimate. Neighbors who have concerns that a particular group home is being operated inappropriately should be able to bring their concerns to the attention of the responsible licensing agency. We encourage the states

to commit the resources needed to make these systems responsive to resident and community needs and concerns.

Regulation and licensing requirements for group homes are themselves subject to scrutiny under the Fair Housing Act. Such requirements based on health and safety concerns can be discriminatory themselves or may be cited sometimes to disguise discriminatory motives behind attempts to exclude group homes from a community. Regulators must also recognize that not all individuals with disabilities living in group home settings desire or need the same level of services or protection. For example, it may be appropriate to require heightened fire safety measures in a group home for people who are unable to move about without assistance. But for another group of persons with disabilities who do not desire or need such assistance, it would not be appropriate to require fire safety measures beyond those normally imposed on the size and type of residential building involved.

Q. Can a local government consider the feelings of neighbors in making a decision about granting a permit to a group home to locate in a residential neighborhood?

In the same way a local government would break the law if it rejected low-income housing in a community because of neighbors' fears that such housing would be occupied by racial minorities, a local government can violate the Fair Housing Act if it blocks a group home or denies a requested reasonable accommodation in response to neighbors' stereotypical fears or prejudices about persons with disabilities. This is so even if the individual government decision-makers are not themselves personally prejudiced against persons with disabilities. If the evidence shows that the decision-makers were responding to the wishes of their constituents, and that the constituents were motivated in substantial part by discriminatory concerns, that could be enough to prove a violation.

Of course, a city council or zoning board is not bound by everything that is said by every person who speaks out at a public hearing. It is the record as a whole that will be determinative. If the record shows that there were valid reasons for denying an application that were not related to the disability of the prospective residents, the courts will give little weight to isolated discriminatory statements. If, however, the purportedly legitimate reasons advanced to support the action are not objectively valid, the courts are likely to treat them as pretextual, and to find that there has been discrimination.

For example, neighbors and local government officials may be legitimately concerned that a group home for adults in certain circumstances may create more demand for on-street parking than would a typical family. It is not a violation of the Fair Housing Act for neighbors or officials to raise this concern and to ask the provider to respond. A valid unaddressed concern about inadequate parking facilities could justify denying the application, if another type of facility would ordinarily be denied a permit for such parking problems. However, if a group of individuals with disabilities or a group home operator shows by credible and un rebutted evidence that the home will not create a need for more parking spaces, or submits a plan to provide whatever off-street parking may be needed, then parking concerns would not support a decision to deny the home a permit.

Q. What is the status of group living arrangements for children under the Fair Housing Act?

In the course of litigation addressing group homes for persons with disabilities, the issue has arisen whether the Fair Housing Act also provides protections for group living arrangements for children. Such living arrangements are covered by the Fair Housing Act's provisions prohibiting discrimination against families with children. For example, a local government may not enforce a zoning ordinance which treats group living arrangements for children less favorably than it treats a similar group living arrangement for unrelated adults. Thus, an ordinance that defined a group of up to six unrelated adult persons as a family, but specifically

disallowed a group living arrangement for six or fewer children, would, on its face, discriminate on the basis of familial status. Likewise, a local government might violate the Act if it denied a permit to such a home because neighbors did not want to have a group facility for children next to them.

The law generally recognizes that children require adult supervision. Imposing a reasonable requirement for adequate supervision in group living facilities for children would not violate the familial status provisions of the Fair Housing Act.

Q. How are zoning and land use matters handled by HUD and the Department of Justice?

The Fair Housing Act gives the Department of Housing and Urban Development the power to receive and investigate complaints of discrimination, including complaints that a local government has discriminated in exercising its land use and zoning powers. HUD is also obligated by statute to attempt to conciliate the complaints that it receives, even before it completes an investigation.

In matters involving zoning and land use, HUD does not issue a charge of discrimination. Instead, HUD refers matters it believes may be meritorious to the Department of Justice which, in its discretion, may decide to bring suit against the respondent in such a case. The Department of Justice may also bring suit in a case that has not been the subject of a HUD complaint by exercising its power to initiate litigation alleging a "pattern or practice" of discrimination or a denial of rights to a group of persons which raises an issue of general public importance.

The Department of Justice's principal objective in a suit of this kind is to remove significant barriers to the housing opportunities available for persons with disabilities. The Department ordinarily will not participate in litigation to challenge discriminatory ordinances which are not being enforced, unless there is evidence that the mere existence of the provisions are preventing or discouraging the development of needed housing.

If HUD determines that there is no reasonable basis to believe that there may be a violation, it will close an investigation without referring the matter to the Department of Justice. Although the Department of Justice would still have independent "pattern or practice" authority to take enforcement action in the matter that was the subject of the closed HUD investigation, that would be an unlikely event. A HUD or Department of Justice decision not to proceed with a zoning or land use matter does not foreclose private plaintiffs from pursuing a claim.

Litigation can be an expensive, time-consuming, and uncertain process for all parties. HUD and the Department of Justice encourage parties to group home disputes to explore all reasonable alternatives to litigation, including alternative dispute resolution procedures, like mediation. HUD attempts to conciliate all Fair Housing Act complaints that it receives. In addition, it is the Department of Justice's policy to offer prospective defendants the opportunity to engage in pre-suit settlement negotiations, except in the most unusual circumstances.

1. The Fair Housing Act uses the term "handicap." This document uses the term "disability" which has exactly the same legal meaning.
2. There are groups of unrelated persons with disabilities who choose to live together who do not consider their living arrangements "group homes," and it is inappropriate to consider them "group homes" as that concept is discussed in this statement.

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EXHIBIT E

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

**Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600**

Case No. A-6211

**PETITION OF DORIS VALIS
(Hearing held May 30, 2007)**

**OPINION OF THE BOARD
(Effective date of Opinion, July 18, 2007)**

This proceeding is a petition pursuant to Section 59-A-4.11(b) of the Zoning Ordinance (Chap. 59, Mont. Co. Code 1994, as amended) for a variance from Section 59-C-1.323(b)(2). The petitioner proposes the construction of a one-story addition that requires a variance of 9.95 feet as it is within 15.05 feet of the rear lot line. The required rear lot line setback is twenty-five (25) feet.

Angelos Valis, the petitioner's husband, and Ellis Theodorakos, an architect, appeared with the petitioner at the public hearing.

The subject property is Lot 35, Block D, Inverness Forest Subdivision, located at 8208 Inverness Hollow Terrace, Potomac, Maryland, 20854, in the R-90 Zone (Tax Account No. 00903082).

Decision of the Board: Requested variance **granted**.

EVIDENCE PRESENTED TO THE BOARD

1. The petitioner proposes that construction of a one-story addition in the rear yard.
2. The petitioner testified that her family has resided in the home for 36 years. The petitioner testified that the proposed construction would replace an existing deck and that the addition will be the same size as the deck. See Exhibit No. 7(a) [photograph].
3. Mr. Theodorakos testified that the residence is sited deep into the lot and that this precludes new construction elsewhere on the lot. Mr. Theodorakos testified that the addition, as proposed, will not exceed the footprint of the existing deck. In response to questions from the Board, Mr. Theodorakos testified that the subject property is consistent in shape and size with the adjoining and neighboring properties. The

subject property is 9,212 square feet. See Exhibit Nos. 4(a) [site plan] and 10 [zoning vicinity map].

4. Mr. Theodorakos testified that the addition will be for the petitioner's husband, Angelos Valis, and that the record contains a letter from Mr. Valis' physician. The letter from Dr. Schoenberg states "Mr. Valis is under my care for chronic heart and lung disease. His exercise capacity is severely limited as a result. Due to his activity limitation, I have recommended that he add an addition to his home so that he can have access to a bathroom on the main floor." See Exhibit No. 8 [letter from Carl I. Schoenberge, M.D.].

STANDARDS FOR EVALUATION

Based upon the petitioner's binding testimony and the evidence of record, the Board finds as follows:

The requested variance does not comply with the applicable standards and requirements of the Montgomery County Zoning Ordinance set forth in Section 59-G-3.1. However, the Board finds that the variance can be granted as a reasonable accommodation of the petitioner's husband's disability under Title II of the Americans With Disabilities Act (ADA) and the Fair Housing Amendments Act of 1988 (FHAA) provisions.

Determination of Disability

The ADA and FHAA define a person's disability, or handicap, in pertinent part, as "a physical or mental impairment that substantially limits one or more of the major life activities of (an) individual." 42 U.S.C.A. §12102(2)(A); 42 U.S.C. §3602(h).

Whether an individual has an impairment and whether the impairment substantially limits a major life activity is to be determined on a case-by-case basis. *Dadian v. Village of Wilmette*, 269 F.3d 831, 837 (7th Cir. 2001) (citations omitted).

Prohibition on Housing Discrimination Based on Disability

The FHAA and Title II of the ADA prohibit housing discrimination based on an individual's handicap or disability.

The FHAA prohibits discrimination against "any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling" on the basis of that person's handicap. 42 U.S.C.A. § 3604(f)(2). The FHAA definition of discrimination includes a refusal to make reasonable accommodations in "rules, policies, practices or services when such accommodation may be necessary to afford" a person with a handicap "equal opportunity to use and enjoy a dwelling." 42 U.S.C.A. § 3604(f)(3)(B). A "necessary accommodation" to afford "equal opportunity" under FHAA will be shown where, but for the accommodation, the disabled person seeking the accommodation "will be denied an equal opportunity to enjoy the housing of their choice." [See *Trovato v. City of Manchester, N.H.*, 992 F.Supp. 493, 497 (D.N.H. 1997) (citing *Smith & Lee Assocs. v. City of Taylor*, 102 F3d 781, 795 (6th Cir. 1996).] A failure to make a reasonable

accommodation need not be supported by a showing of discriminatory intent. [See *Trovato*, 992 F. Supp. at 497 (citing *Smith*, 102 F.3d at 794-96).]

Reasonable Accommodation by Local Government of an Individual's Disability

The "reasonable accommodation" provision of the FHAA has been interpreted to require municipalities to "change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities." [See *Trovato*, 992 F. Supp. at 497 (citing *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996)).] Similarly, Title II of the ADA (42 U.S.C.A. §12132) has been held to apply to zoning decisions, which constitute an "activity" of a public entity within the meaning of the ADA. [See *Mastandrea v. North*, 361 Md. 107, 126, 760 A.2d 677, 687, at n. 16 (citing *Trovato*, 992 F. Supp. at 497).]

Under the ADA, a local jurisdiction is required to reasonably modify its policies when necessary to avoid discrimination on the basis of disability, unless it is shown that the modifications "would fundamentally alter the nature of the service, program or activity." 28 C.F.R. §35.130(b)(7) (2006). Therefore, unless the proposed accommodation would "fundamentally alter or subvert the purposes" of the zoning ordinance, the variance must be granted under Title II of the ADA. [See *Trovato*, 992 F. Supp. at 499.]

Findings of the Board

Based on the above, the Board must make the following findings:

1. Determination of disability: An evaluation of whether a disability exists under the ADA or FHAA requires a three-step analysis. The applicant's medical condition must first be found to constitute a physical impairment. Next, the life activity upon which the applicant relies must be identified (i.e. walking, independent mobility) and the Board must determine whether it constitutes a major life activity under the ADA and FHAA. Third, the analysis demands an examination of whether the impairment substantially limits the major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).
2. Non-discrimination in housing: The Board must find that the proposed variance constitutes a reasonable accommodation of existing rules or policies necessary to afford a disabled individual equal opportunity to use and enjoy a dwelling.
3. Reasonable modification of local government policies: Because zoning ordinances are among the varieties of local government rules subject to Title II of the ADA and the FHAA, the Board must find that the proposed variance must be granted in order to avoid discrimination on the basis of disability unless the proposed accommodation would fundamentally disrupt the aims of the zoning ordinance.

Applying the above analysis to the requested variance, the Board finds as follows:

1. The Board finds that the due to the petitioner's husband's activity limitation due to chronic heart and lung disease demonstrates that several major life activities are restricted. Because of the direct impact these impairments have on the petitioner's husband's major life activities, the Board finds that a disability exists pursuant to the definitions in the ADA and FHAA. The Board finds that the proposed construction of a one-story addition would permit the petitioner's husband a reasonable accommodation to essential life activities.

2. The Board finds that the proposed one-story addition will not undermine the intent of the zoning ordinance and is consistent with the intent of the zoning ordinance to promote a residential scale and streetscape in residential zones.

The Board further finds that although the proposed construction of a one-story addition requires a variance pursuant to the requirements of Section 59-C-1.323(b)(2), the proposed construction will not impair the intent, purpose, and integrity of the general plan affecting the subject property.

Therefore, based upon the petitioner's binding testimony, the evidence of record, the Board finds that the grant of the requested variance is a reasonable accommodation to the petitioner's husband's disability because (1) it will not fundamentally alter or subvert the purposes of the zoning ordinance; and (2) the proposed construction is necessary to permit the petitioner's husband equal access in the use of his home.

Accordingly, the requested variance of 9.95 feet from the required twenty-five (25) foot rear lot line setback for the construction of a one-story addition is **granted** subject to the following conditions:

1. The petitioner shall be bound by her testimony and exhibits of record, and the testimony of her witness, to the extent that such evidence and representations are identified in the Board's Opinion granting the variance.
2. Construction must be completed according to plans entered in the record as Exhibit Nos. 4(a) and 4(b) and 5.
3. The variance is granted to the petitioner only, the one-story addition shall be removed at such time as it is no longer required to address the petitioner's husband's medical condition or the petitioner's husband no longer resides in the property.

The Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the Opinion stated above is adopted as the Resolution required by law as its decision on the above entitled petition.

Board member Wendell M. Holloway was necessarily absent and did not participate in this Resolution. On a motion by Catherine G. Titus, seconded by Donna L. Barron, with Caryn L. Hines and Allison Ishihara Fultz, Chair, in agreement, the Board adopted the foregoing Resolution.

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

I do hereby certify that the foregoing Opinion was officially entered in the Opinion Book of the County Board of Appeals this 18th day of July, 2007.

Katherine Freeman
Executive Secretary to the Board

NOTE:

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve-month period within which the variance granted by the Board must be exercised.

The Board shall cause a copy of this Opinion to be recorded among the Land Records of Montgomery County.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.