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Concerning BZA Case 18240, 3160 16th St NW (The Mount Pleasant Library)

ANC 1D resolves to advise the Board of Zoning Adjustment that the attached appendices of fact and opinion make points demonstrating that the Public Library (DCPL) has not met its burden of proof in BZA Case 18240. These appendices are incorporated as an integral part of this resolution.

Passed by 3 to 0 to 1 vote at the legally noticed, public meeting of ANC1D on August 30, 2011, with a quorum present. A quorum consists of four commissioners; four were present for this meeting. Voting "yes": Commissioners Edwards, McKay, Romero-Castillo. Abstaining: Commissioner Wilson Phelan.



Jack McKay
Secretary, ANC1D

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18240

EXHIBIT NO. 55

Board of Zoning Adjustment
District of Columbia
CASE NO.18240
EXHIBIT NO.55

Appendix A – Institutional Requirements & rationale

BZA Questions

"Is there a reason ... you couldn't push this forward towards the front of the building and pull it away from the rear line?"

Page 443, lines 14-22.

CHAIRPERSON MOLDENHAUER:

14 Is there a reason why design-wise you couldn't
15 push this forward towards the front of the
16 building and pull it away from the rear line?
17 I am looking at the design layout. I
18 don't understand why you couldn't push some of
19 the density towards the rear of the existing
20 facade and pull it away from the rear line of the
21 building, and that's my question for -- for
22 whoever wants to take it at this point.

Is there another design rather than asking for 100-percent relief on the rear yard?"

Page 445, lines 14-19.

CHAIRPERSON MOLDENHAUER:

14 ...Is there a reason why you couldn't
15 reconfigure this layout, even with the
16 mechanical, move the mechanical up?
17 I'm just trying to understand if there's
18 not another design rather than asking for
19 100-percent relief on the rear yard.

"see where you're getting this programmatic or ... institutional requirements from"

Page 442, lines 1-16.

CHAIRPERSON MOLDENHAUER:

2 I think that what would be great at the
3 end -- I think we've already identified some
4 additional, supplemental information we'd like to
5 see. If we could actually see that in writing or
6 see where you're getting this programmatic or

7 this institutional requirements from -- there was
8 a reference, I think, to some sort of database
9 that you have that kind of created some of the
10 specs. Just the information as to where you got
11 this from, you identified there was a board of
12 librarians and experts that kind of put together
13 these issues, kind of laying out how you got
14 here, how you got to these different
15 requirements, and what expertise and what
16 methodology brought you to those needs.

"see if you can kind of quantify the additional program elements or space that you get in this addition,"

Page 436, Lines 7-15.

7 MS. SORG: Thank you, Madam Chair.

8 Actually, as a follow-up to Mr.

9 Turnbull's last question, I wanted to see if you
10 can kind of quantify the additional program
11 elements or space that you get in this addition,
12 if there's some sort of general way you can do
13 that, you know, say X number of square feet,
more

14 work rooms, or X number of square feet, more
15 bookshelves, storage. Can you quantify that?

"what's the institutional necessity"

Page 437, Lines 5-10.

5 MR. JORDAN: If I may, Madam Chair,

6 following up on that same type of question,
7 because I think it's important to meet the second
8 leg of your test, and that is, the services that
9 is going to be allowed in this new building,
10 what's the institutional necessity for that?

[Is] there a standard?

Page 437, Lines 11-19.

MR. JORDAN

11 [is] there a standard that says we need to have X
12 amount of meeting space to meet, let's say, a

13 national standard or that there was a local
14 demand? Is there some type of other services
15 that are going on that you have to meet, that
16 it's required to be in a library, and that you
17 had to make these changes, and that this
18 configuration for this building is required, so
19 that you can meet that standard?

***[I]s it a necessity based upon
some standard that meets ... basic
criteria"***

Page 438, lines 15-22. Page 439, Lines 1-5.
15 MR. JORDAN: Maybe I wasn't clear.
16 That's the desire of the library to do that, and
17 that's kind of an optional choice. It's not a
18 necessity that you expand to 150 people or 250.
19 It's a selection that you made, so there's no
20 standard. Is there a standard that says that a
21 library situated in this type of community with
22 this amount of people around requires this much
1 meeting space, and that it should have maybe
2 automated bookshelves or something?
3 I can understand what you may want to do,
4 but is it a necessity based upon some standard
5 that it meets these basic criteria?

***"you can have some other
configurations at the option of the
library"***

Page 439, lines 16-21.

LPH

In this the term LPH stands for DCPL's counsel's Post-Hearing submission on 2011-0802 of supplementary materials in answer to questions raised by BZA members.

"The Board requested that the Applicant submit greater detail regarding its required building program..."

LPH points

- the Library Building Program for the Mt. Pleasant Library is a result of the 21 St Century Capital Projects Program 1, which was created in 2006 when the Mayor and City Council approved capital funds for rebuilding nearly all of DC's neighborhood libraries.

Since there were no references given to fulfill the applicants duty of the burden of proof, Robin Diener searched year by year to find evidence.

"The Applicant, in its Submission, implies some form of mandate for the addition from the Mayor and Council as a result of their approval of capital funds for the rebuilding of D.C. libraries in general. But the Applicant provides no further information as to how an approval of a capital budget for the library system means that the

16 MR. JORDAN: So, without a standard or
17 I'm not hearing you recite the standard. So it
18 could have less meeting room space at the
19 selection or option of the library, and you can
20 have some other configurations at the option of
21 the library?

***"was there a standard ... you are
required to meet"***

Page 440, line 22. Page 441, lines 1-14.
22 MR. JORDAN: Well, as I determine and
1 look at the cases, I'm trying to get to where
2 your necessity is for your programmatic layout of
3 this building and thus the design of the
4 building, so that's why I asked the question.
5 I used 100 because that's been kind of
6 floating around. Whether it was a 50-seat room,
7 I wanted to know what necessitated it being 50.
8 That's what I'm asking. It could be 50-seated or
9 whatever. I just needed to know was there a
10 standard somewhere that you're required to meet,
11 such as hospitals now basically have to have
12 semi-private rooms. You can't have wards
anymore
13 because that's a standard somewhere. That's kind
14 of what I was asking.

Mayor and Council have specifically required a specific square footage amount for the Mt. Pleasant or any other library.

... the Applicant provides no further information as to how an approval of a capital budget for the library system means that the Mayor and Council have specifically required a specific square footage amount for the Mt. Pleasant or any other library. "

"...the Applicant never cites from where its mandate comes, even as it repeats, over and over, that "the Library Building Program is a mandate for..." a massive addition that requires 100% relief from the rear yard requirement. The "mandate" term is hollow, since this is not a mandate or requirement in any sense of the word."

DCPL did not give references to verify its assertions of a mandate from the various funding legislation. Robin Diener searched year by year to find any such reference, and found none – her memo is attached as Appendix C.

She "upon searching could find no documentation, in the records of the DC City Council or its Committee on Libraries recognizing or approving a so-called 21st Century Capital Projects Program in 2006. We also examined legislation, committee records, and budgets for 2007 and 2008, and likewise found no plan so-named." Actually, weakening DCPL's case for a mandate, there was legislation duly passed into law which was ignored by DCPL:

'in January 2006, the Library Enhancement, Assessment and Development Act (LEAD Act of 2006) was passed by the DC Council and approved by the Mayor calling for:

"a Library Enhancement Task Force to serve as a collaborative body to assess, support, and implement strategies to fund the enhancement and development of the District of Columbia Public Library (DCPL) system," and to develop a "strategic plan".

The Task Force has never been seated; no meetings have ever been convened; no strategic plan has ever been developed for presentation to or approval by the Mayor and DC Council.

DCPL also claimed that Institutional Requirements forcing a variance had been included in various funding legislation passed into law by the Mayor and Council. A year by year search found no such statements, and, indeed, descriptions of a different kind of projects.

"Summary:

There is no record of the "21st Century Capital Projects" program referenced by Library counsel ever being delineated or presented to DC Council for approval.

However, there is record of legislation being enacted by the DC Council – the LEAD Act 2006 – mandating the creation of a strategic plan for libraries. No such plan, nor indeed any other comprehensive plan for the Library, has ever been presented to the public or its representatives, the DC Council.

Mayor and Council have approved budgets every year, but the per library spending first outlined in Capital Budget library budget 2007-2012 has changed every year, and its specifications are not part of any plan that has ever been publicly viewed, vetted or approved."

Notes

DCPL did not answer the questions posed by BZA.

Since case law requires there to be a causal link from facts, law, or observables, this burden of proof has not been met.

DCPL did not provide references to support its claims of Mayor and Council legislation supporting this program.

Appendix B – Claim for case law relief

LPH argues 'that it is entitled to "somewhat reduced scrutiny" from the Board in considering its variance request, as a result of language in BZA Order No. 17973. In that case, the Board did rule that the library was subject to a somewhat reduced scrutiny in the area variance analysis. But ... Neither the National Black Child case, nor the Monaco case, ever said anything about "reduced scrutiny" for public service uses. What Monaco said was that in determining whether an application meets the variance test, for certain public service uses (and it based its analysis on a previous case involving a hospital), the Board could consider the specific use, and the need for space, by the applicant to determine whether or not there was a unique condition resulting in a practical difficulty. The language, or even the concept, of a "reduced scrutiny" is nowhere to be found in the Applicant's, or Order No. 17973's, cited cases, and it's not clear how such language came to be in Order No. 17973."

DCPL "it now claims it is entitled to 100% relief from the rear yard restriction because of an ADA requirement to have a single entrance. It even claims this requirement is a mandate from the Council – without any supporting citation or reference. But even if this were a mandated requirement, such a requirement has no nexus at all to the construction of a 3-story addition requiring 100% rear yard relief."

The Degree of Variance (100%) is a Critical Factor for the Board's Consideration.

In the Gilmartin case, the D.C. Court of Appeals noted that, in considering a variance application, the severity of the variance requested was one of the factors that the Board could consider. (*Gilmartin vs. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1171. The Applicant, in its Submission, cites BZA Case No. 17973 as supportive of its argument in the present case. But, besides the fact that that application was a completely different situation, the degree of the variance approved in that case was miniscule in relation to the present request.

Application No. 17973 requested a variance of 14 parking spaces in an area with plenty of other available parking. In comparison, the present request is for 100% relief from the rear yard requirement, in order to construct a 45-foot high, 3-story addition all the way to the rear property line; a rear property line that directly abuts a residential property – with no alley between the addition and that residential property.

The Applicant has argued that it is entitled to "somewhat reduced scrutiny" from the Board in considering its variance request, as a result of language in BZA Order No. 17973. In that case, the Board did rule that the library was subject to a somewhat reduced scrutiny in the area variance analysis. But the Board apparently did not apply ratios (rationality is grounded in ratios) on the degree of reduction. Aside from a mention by DCPL, neither Board members nor the final order of this case dwelled on DCPL's assertion.

BZA did not approve necessary program requirements

The statement in the DCPL 2011-02 Supplement States that BZA had "previously determined " that the arguments were sufficient to establish necessary program requirements

This ignores the record that no Board member saw it that way. Instead, Board members specifically depreciated the "institutional requirement" argument to focus on other arguments. This is seen in the record where they described the building design as the "chosen envelope" (p. 50) and debated whether the "self-created" (p. 51) and

even "self-inflicted" (p. 62) programmatic goals were the proximate cause of the practical difficulty claimed, rather than the uniqueness of the site.

No Board member argued that the so-called Capital Project Program "requirements" were a basis for granting the variance. Instead, three members found sufficient causality flowing from the topography of the land to the difficulty in meeting parking requirements to grant the variance, while one did not.

Monaco

Neither the National Black Child case, nor the Monaco case, ever said anything about "reduced scrutiny" for public service uses. What Monaco said was that in determining whether an application meets the variance test, for certain public service uses (and it based its analysis on a previous case involving a hospital), the Board could consider the specific use, and the need for space, by the applicant to determine whether or not there was a unique condition resulting in a practical difficulty. The language, or even the concept, of a "reduced scrutiny" is nowhere to be found in the Applicant's, or Order No. 17973's, cited cases, and it's not clear how such language came to be in Order No. 17973.

Even if the Board had validated DCPL's argument in case 17973, the situation in the Mt Pleasant case is so different that it cannot be rationally applied.

Shift in degree of a useful facility vs wipeout of a fundamental zoning component.

- In case 17983 of Washington Highlands, the variance sought was to cut back the number of parking spaced, not to dispense with them all.
- In this case of Mt Pleasant, the variance sought is more radical: completely wiping out the rear-yard setback and thereby blocking a long-standing corridor of air, light, and access.

Mt Pleasant the zoning relief requested is more radical — complete relief from the rear yard setback. Unlike Washington Highlands, where there was doubt about the number of parking spaces that were actually needed at the library, Mount Pleasant raises the more fundamental question of the spacing between buildings.

In other words, the Zoning Commission has recently considered the circumstances under which it would be appropriate to provide the kind of relief that DCPL seeks in the present case and did not authorize elimination of the rear yard under the circumstances of the Mount Pleasant library — where the rear lot line abuts or adjoins the lot line of multi-family dwellings. As a result, the burden of proof on the applicant in this case to justify the relief sought must be raised accordingly.

Appendix C – Air & Light

Questions Posed by BZA

Turnbull

Page 431, lines 4-6

4 wondering. Did you ever do any shadow studies as

5 to the impact of the library on the spaces around

6 it?

Page 431, line 10.

10 MR. STEWART: We could do that.

Page 431, lines 11-22, Page 432, lines 1-13.

11 MR. TURNBULL: Could model some of that.

12 Okay.

13 I'm just curious as to how -- with that

14 20-foot yard, does that 20-foot yard get light?

15 Some sunlight is going to get in there, but is it

16 now going to be totally dark?

17 Some of it is from their own building.

18 You are going to get shade from their own

19 building, too.

21 MR. TURNBULL: But I'm just curious what

22 the overall impact now is with this structure in

1 that area for the residents, mainly because

2 you've got bedrooms back there, and I'm just

3 curious as to what that space would finally

4 evolve. What is the quality of life in that

5 space for those people looking out? Is it
6 constantly in the shade? Is there some sunlight?
7 MR. STEWART: No, there is some sunlight,

8 because as the sun comes around – ...
12 totally, but there is some, and I'd be interested
13 in just seeing how that modeling plays out.

LPH Response

Narrative

2. Sun Studies.

Sun Studies showing the Mt. Pleasant Library and Proposed Addition and the surrounding buildings are included as Exhibit B hereto. One sheet for each season (July, October, January, and April) is included, and each season's study includes views from early morning, noon, and late afternoon.

The Sun Studies show that the impact of the Proposed Addition on the surrounding neighborhood is negligible at best, given the positioning of the Mt. Pleasant Library to the north and east of neighboring apartment buildings. In fact, the Mt. Pleasant Library receives a significant amount of shading from the buildings to the south.

Tab B

Asserts, without any demonstration

"With the exception of a period of time in the morning, the addition to the Mt. Pleasant Library Branch has minimal, if any, effect on light to the neighboring buildings."

"Period of time in the morning" where there is "effect on light to the neighboring buildings" is not quantified, nor is the change with and without the 15 foot extension.

Comparison to Questions

Does not show shadows on neighboring buildings.

Does not estimate "overall impact ... for the residents".

Does not estimate quality of life "for those people looking out".

Does not provide "how modeling plays out".

Only shows shadows on Proposed Library structure.

Observation

Thus, there is no rational linkage between the facts and impacts on neighbors and on "air and light".

The burden of proof is not really addressed.

That modeling could be done is attested Page 431, lines 11 by MR. STEWART.

The applicant chose to not substantially address the issue.

Appendix D – Diener Memo

Lack of Evidence for a “21st Century Capital Projects Program”

According to DCPL counsel Arent Fox in a letter of August 2, 2011, section number 4 “Library Building Program Details,”

“The 21st Century Capital Projects Program was created in 2006 when the Mayor and City Council approved capital funds for rebuilding nearly all of DC’s neighborhood libraries.”

Library Renaissance Project¹ knows of no documentation, and upon searching could find no documentation, in the records of the DC City Council or its Committee on Libraries recognizing or approving a so-called

¹ Established in 2002 to protect and promote the public interest in the library,

21st Century Capital Projects Program in 2006. We also examined legislation, committee records, and budgets for 2007 and 2008, and likewise found no plan so-named.

However, in January 2006, the **Library Enhancement, Assessment and Development Act (LEAD Act of 2006)** was passed by the DC Council and approved by the Mayor calling for:

“a Library Enhancement Task Force to serve as a collaborative body to assess, support, and implement strategies to fund the enhancement and development of the District of Columbia Public Library (DCPL) system,” and to develop a “strategic plan”.

The Task Force has never been seated; no meetings have ever been convened; no strategic plan has ever been developed for presentation to or approval by the Mayor and DC Council.

Funding for Mt. Pleasant

FY 2006: \$2.75M was budgeted for the exterior restoration of Mt. Pleasant Library.² This was characterized as a restoration only. No addition was mentioned.

FY 2007: Request for \$1.5M in 2009, characterized as “renovations,” no addition mentioned.³
Shows total over six years (2007-12) of \$4,250,000 for Mt. Pleasant, as “renovations.”

FY 2008: Request for \$1.5M in 2009 reiterated. Six year total budget (2008-13) for Mt. Pleasant now shows prior funding of \$6.25M. Project still characterized as renovation. No addition.

Capital Funds Approved for Libraries Not Expended as Budgeted

Funding for library buildings has been authorized by Mayor and City Council on an ever changing basis, seemingly adaptable to whatever the Library deems necessary at the moment. Commissioner Turnbull commented in June that, from the community’s perspective, plans for the Mt. Pleasant Library have been “a moving target.” Indeed, this has been the case for many of the libraries “planned” per budget documents from 2007.

The FY 2007 Capital Budget, document Appendix B- FY 2007- FY 2012 *Planned Expenditures from New Allotments*⁴ is striking for the inconsistency of what is “planned to be expended” versus subsequent “actual expenditures,” calling into question the idea that there was a comprehensive plan. For instance:

- **Capitol View** was to have \$8M in new construction, slated to be finished in 2012, but is no longer planned nor under construction currently.
- **Chevy Chase** was to have \$8M in new construction, slated to be finished in 2012, but is no longer planned nor under construction currently.
- **Cleveland Park** was to have an \$11M renovation completed in 2011 but to date nothing has been planned or built.

² Appendix A- FY 2006 Planned Expenditures from New and Existing Allotments, Government of the District of Columbia
http://cfo.dc.gov/cfo/frames.asp?doc=/cfo/lib/cfo/budget/2006/pdf/capital_appendices/ca06_a.pdf&open=|33210|

³ Appendix A – FY 2007 Appropriated Budget Authority Request, Government of the District of Columbia
http://cfo.dc.gov/cfo/frames.asp?doc=/cfo/lib/cfo/budget/2007/DC_Budget-Volume_5d.pdf&open=|33210|

⁴ Appendix B – FY 2007—FY 2012 *Planned Expenditures from New Allotments*
http://cfo.dc.gov/cfo/frames.asp?doc=/cfo/lib/cfo/budget/2007/DC_Budget-Volume_5d.pdf&open=|33210|

- **Francis Gregory** was to have \$3.4M expended in 2009 but instead has been torn down and is being completely rebuilt at a cost of over \$12M, and is scheduled to open in 2012.
- **Lamond Riggs** was to receive \$11.8M over 2010-11 for completion this year but has been neither planned nor is under construction.
- New construction of \$8M for **Palisades**, to have been completed this year, is not planned or under construction.
- New construction of \$11.4M for **Southwest**, which was to have been completed this year, is not planned or under construction.
- **Washington Highlands** was to have \$1.4M expended in '07 and \$3.3M in '08 for "substantial renovation," but instead has been torn down and is being rebuilt currently for \$15M.

Eight libraries out of 25 (nine including the failed central library), would be a significant portion of the "nearly all" referred to in Library Counsel's statement to have been "planned" in 2006 for completion by 2012, but in fact were neither built nor are any longer reflected in the FY2012 budget.

This is not accounted for by lack of revenue, since the bonds were issued and total monies allocated and spent by DCPL. They simply were not used as planned. Excessively high fees to architects have been criticized⁵ and grandiose designs with special materials may account for some of the price overruns.

Capital "Planning" for Libraries as Shown by the DC Budget

FY 2007 contains the following statement under "New Central Library:" The District proposes a new central library be built on the site of the Old Convention Center. Proposed Borrowing Table CA-6 shows line item New Central Library (debt service backed by funds from lease or sale) as TBD. In December 2006, after the start of FY2007, the new central library was defeated.

FY 2008 Budget, Section CEO DC Public Library (CEO-1) contains the following statement:

The Public Library is continuing to assess the condition of its physical plant with a long-range goal of automating its operations, and renovating its facilities to meet the needs of the twenty-first century.

Even by 2008, there is no plan for the library system. DCPL is still "assessing." However, for the first time, this section is accompanied by pages for each individual library. The page devoted to Mt. Pleasant Library, features a picture of the apartment building next to the library, not the Mt. Pleasant Library itself -- a strange mistake for a planning document.

A section called Description says, "Renovate and update the historic library." That is all, no addition is mentioned. A section labeled "Project Status" states, "Exterior improvements to windows, doors, security lighting and signage design has been completed. Construction contract awarded to Garcete Construction in August 2006. Work expected to be completed by August 2007." The work described is exterior renovation only, and again nowhere is there any reference to an addition.

DC Council Mandate to Library for Collaboration

The LEAD Act of 2006 specifically called for formation of a "collaborative" body -- to be designated the Library Enhancement Task Force. The use of the word collaborative seems to indicate that the DC Council sought to mandate community inclusion in decision-making around public libraries. As stated earlier, this Task Force has never met nor developed the strategic plan it was charged with creating. Many in the library-interested community at Mt. Pleasant feel they were never offered real or meaningful collaboration in DCPL's planning for their library. Had the Task Force been convened and done its job, perhaps community dissatisfaction would have been avoided.

⁵ Examiner article to be cited attached

DCPL maintaining it has an authorized plan, when it does not, is consistent with DCPL's less than straightforward portrayal of the facts in general and specific. An example of this on-going mischaracterization of things is footnote 1 of Library Counsel's August 2 letter, wherein the planned new West End Library is described as "developer-funded." It is not. The District of Columbia is selling the land to a developer, who will construct the new library as part of a private project. The city is deducting the cost of a new library from the sale price. The result is that the District is paying for the new library by selling the land and air rights. The city and DCPL are not getting a deal, but simply fair market value for the land.

Summary:

There is no record of the "21st Century Capital Projects" program referenced by Library counsel ever being delineated or presented to DC Council for approval. However, there is record of legislation being enacted by the DC Council – the LEAD Act 2006 – mandating the creation of a strategic plan for libraries. No such plan, nor indeed any other comprehensive plan for the Library, has ever been presented to the public or its representatives, the DC Council. Mayor and Council have approved budgets every year, but the per library spending first outlined in Capital Budget library budget 2007-2012 has changed every year, and its specifications are not part of any plan that has ever been publicly viewed, vetted or approved.