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October 19, 2012

VIA EMAIL & HAND DELIVERY

Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210S
Washington, DC 20001

Re: Application No. 18395 - Applicant's Response to Report Filed By Advisory
Neighborhood Commission 5A

Honorable Members of the Board:

On behalf of CWC WDC LLC, the Applicant in the above-referenced case, enclosed please find one original and twenty copies of the Applicant's response to the report filed by Advisory Neighborhood Commission 5A on October 12, 2012.

Thank you for your attention to this application.

Sincerely,



Kyrus L. Freeman

Enclosure

cc: Arthur Jackson, Office of Planning (Via Hand, with enclosure)
ANC 5A (Via U.S. Mail, with enclosure)

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18395
EXHIBIT NO. 49

Board of Zoning Adjustment
District of Columbia
CASE NO.18395
EXHIBIT NO.49

**BEFORE THE DISTRICT OF COLUMBIA
BOARD ZONING ADJUSTMENT**

**APPLICATION OF
CWC WDC LLC**

)
) **BZA Application No. 18395**
) **Hearing Date: September 11, 2012**
) **ANC 5A**
)

**THE APPLICANT'S RESPONSE TO
ADVISORY NEIGHBORHOOD COMMISSION 5A'S LETTER**

Applicant CWC WDC LLC (the "Applicant"), the owner of the property located at 2431 Market Street, N.E. (Square 4327, Lot 5) (the "Site"), by its undersigned counsel, hereby responds to the Advisory Neighborhood Commission ("ANC") 5A's report, filed on October 12, 2012, in support of the Applicant's request for a special exception (the "ANC Report"). The ANC Report should be given "great weight" by the Board of Zoning Adjustment (the "Board") because it decisively satisfies the nine criteria in 11 DCMR § 3115.1.

The Independent Gas Station Operators Alliance (the "Alliance") is likely to attack the ANC Report as deficient by claiming that it is inexcusably late, the product of a defective meeting notice, and compromised by an alleged conflict of interest.¹ Each of these arguments is wrong both legally and factually. Accordingly, the Board should accept the ANC Report into the record and accord it great weight in its deliberations.

A. The ANC's Report Should Be Given "Great Weight" in the Board's Decision.

The ANC Report is entitled to be given great weight during the Board's deliberations because the ANC Report satisfies the requirements set forth in 11 DCMR § 3115.1(a)-(i). *See* 11

¹ In Applicant's response to the Alliance's proposed findings of fact and conclusions of law ("Proposed Findings"), filed with the Board on October 16, 2012, the Applicant noted that none of the Alliance's allegations regarding the ANC Report are supported in the record before the Board. Based on this alone, the Alliance's arguments in opposition to the ANC Report should be summarily rejected. *See generally Fleischman v. District of Columbia Bd. of Zoning Adjustment*, 27 A.3d 554, 557 (D.C. 2011) (explaining that BZA decision must be supported by substantial evidence in the record).

DCMR § 3115.2 (requiring that the Board shall give "great weight" to the ANC's written report if it includes the requisite information in Section 3115.1). First, the ANC Report correctly identifies the application—BZA Application No. 18395—on which it is based. (ANC Rep. at 1.)¹¹ DCMR § 3115.1(a). Second, the ANC Report states that a regularly scheduled public meeting of the ANC 5A to consider the application was held on September 26, 2012 at the Potomac Lighthouse Public Charter School. *Id.* § 3115.1(b). Third, the ANC Report states that proper notice of the public meeting was given by the ANC. *Id.* § 3115.1(c). Specifically, the ANC Report states that notice of the meeting was provided on the ANC 5A's website, by individual Commissioners to their single member districts, and by various Ward 5 list serves. (ANC Rep. at 1.) These methods of notice comply with the requirements of D.C. Code § 1-309.11(c)(1)-(4). Fourth, the ANC Report states that six members of the ANC 5A must be present at the meeting to constitute a quorum and that ten members were actually present and cast votes.² *Id.* § 3115.1(d).

Fifth, the ANC Report addresses the ANC 5A's issues and concerns about the application as related to the standards of the Zoning Regulations against which the application must be judged. *Id.* § 3115.1(e). Specifically, the ANC Report explains that the ANC 5A considered the traffic impacts of the proposed gas station, potential environmental and safety concerns on the gas station site, and safety concerns in and around the Fort Lincoln community. (ANC Rep. at 1.) The ANC Report also states that the proposed gas station will be approximately 965 feet away from the nearest residence and approximately 2,310 to 2,850 feet away from the nearest elementary school, community pool, and daycare/recreation center. *Id.* at 2. The ANC also found that the Applicant was committed to working with DDOT to install turn lane pavement

² ANC 5A includes 12 member districts, with one vacancy, thereby reducing the quorum requirement to six members. (ANC Rep. at 1.)

markings at 33rd Place. Finally, the ANC Report states that the ANC 5A considered the arguments raised by the Alliance and concluded that the proposed gas station "will not drive out existing gas stations since membership is needed, but rather will make them be more competitive and offer cheaper gas, which will in turn benefit members of the community." *Id.*

Sixth, the ANC included its recommendation that the ANC grant the application for the proposed gas station. *Id.* § 3115.1(f). Specifically, the ANC Report states, that "[b]ased on the information presented, including the numerous presentations and written documents from the Applicant, the ANC believes that the Applicant meets the special exception standards as set forth in the Zoning Regulations. *Id.* at 2. Further, the ANC Report specifically requests that "great weight" be given to the ANC 5A's support for the proposed gas station. *Id.* at 3. Seventh, the ANC Report states that the vote was 6-3-1 in favor of the application. *Id.*; 11 DCMR § 3115.1(g).³ Finally, the ANC report contains the signature of ANC 5A Chairperson Janae Grant. (ANC Rep. at 3.)

In sum, the ANC Report decisively satisfies the requirements set forth in the Zoning Regulations and therefore should be given "great weight" by the Board in its deliberations. 11 DCMR § 3115.2.

B. The Alliance's Likely Arguments in Opposition to the ANC Report Are Without Merit.

1. Good cause exists to accept the ANC Report into the record.

Under Section 3115.1 of the Zoning Regulations, the ANC 5A was required to submit its report to the Board at least seven days prior to the September 11, 2012 hearing (the "Hearing"). 11 DCMR § 3115. The Board, however, is entitled to waive Section 3115.1 and keep the record

³ Regarding 11 DCMR § 3115.1(h), there was no need to designate someone authorized by the ANC 5A to present the ANC Report because the submission occurred after the Hearing.

open after the conclusion of a hearing "for the receipt of specific exhibits, information or legal briefs, as may be directed by the presiding officer." 11 DCMR § 3121.5. In fact, the Board kept the record open in this case so that it could receive a report from the ANC 5A following its meeting on September 26, 2012. Ex. 40 (BZA Notice of Closed Record in Advance of Decision (stating that "[t]he record for this case has been closed in advance of the decision meeting, except for the following information: (1) All parties—Draft findings of fact & conclusions of law; (2) All parties—Responses to above; (3) ANC 5A—letter")). Moreover, the Board has in many instances waived the seven-day filing requirement for ANCs. *E.g.*, *Application No. 17875 of BB&H Joint Venture* at 1 n.1 (Mar. 3, 2009) ("Although the ANC report was untimely filed, the Board waived its rules to accept the report into the record."); *Application No. 17604 of NJA Assocs. LLC* at 1 n.1 (May 8, 2007) (same); *Tr. of Hrg. on Application No. 16316 of Catholic Univ. of America* at 19:5-9 (Feb. 18, 1998) (same).

Here, good cause exists to waive the seven-day filing requirement and accept the ANC Report into the record because the ANC 5A does not schedule meetings during August and therefore was unable to vote on the application before the Hearing. (ANC Cover Ltr. at 1.) The ANC timely brought this issue to the Board's attention. In a letter dated August 31, 2012, which was 12 days before the Hearing, ANC 5A Commissioner Robert L. King identified the issue and requested that the Board keep the record open until after the ANC held its next meeting on September 26, 2012.⁴ Ex. 28 (Ltr. from Robert King to Richard S. Nero Jr., Aug. 31, 2012).

⁴ To ensure the input of the Fort Lincoln community was registered at the Hearing, Commissioner King conducted a Single Member District ("SMD") 5A-12 meeting on September 10, 2012. The SMD voted to support the application, and this fact was reported by Commissioner King at the Hearing. Tr. 279:8-280:7. Separately, the Alliance previously argued in its Proposed Findings that the SMD vote is tainted because an attorney for the Applicant assisted in counting "the votes." (Proposed Findings at 6.) Contrary to the Alliance's insinuation, the SMD votes were not registered on handwritten ballots and then somehow privately tallied by Applicant's counsel. The vote was taken by a "show of hands." To confirm that a majority had voted to support the application, Applicant's counsel

During his individual testimony at the Hearing, Commissioner King again requested the Board waive the seven-day filing requirement and keep the record open. Tr. 275:3-8 ("Mr. Chairman, I was very hopeful that you would keep your record open because we just returned from recess and will not have our first public meeting until September the 26th.") The ANC 5A should not be denied the opportunity to provide meaningful input on the application, particularly given that the Zoning Regulations expressly provide the Board with flexibility to hold open the record in exactly these kinds of situations. 11 DCMR § 3121.5.

The Alliance cannot credibly complain that it will be prejudiced if the ANC Report is included in the record. The ANC Report was submitted on October 5, 2012, which is well in advance of the Board's decision date of November 7, 2012. Tr. 388:15-17. Pursuant to 11 DCMR § 3121.6, the Board has given all parties an opportunity to file written responses to the ANC Report that will then be considered as part of the Board's deliberations. Additionally, given that the Alliance's counsel attended the ANC 5A meeting on September 26, 2012, the Alliance cannot argue that it is unable to substantively respond.

Accordingly, because the good cause exists to waive the seven-day filing requirement and because no party to the proceeding will be prejudiced if the ANC Report is included in the record, the Board should waive the filing requirements under Section 3115.1 and accept the ANC Report.

2. The ANC 5A's meeting notice and procedures were fair and transparent.

a. The public notice of the ANC 5A meeting was proper.

In its Proposed Finding, the Alliance argued that the Board should refuse to accept the ANC Report or otherwise treat it "with a grain of salt" because the public notice for the

assisted in the open, transparent process of counting the raised hands. Moreover, it is the full ANC's vote of 6-3-1 in support of the application that is entitled great weight.

September 26, 2012 meeting did not mention that a vote would be taken on the application. (Proposed Findings at 6-7.) This argument is without merit. The ANC 5A's public notice, which properly listed the date, time, and location of the meeting, conforms to the applicable rules.

The ANC statute, D.C. Code § 1-309.01 *et seq.*, is silent as to whether an ANC meeting notice must specify that a vote will be taken. But the ANC statute provides that "[w]here not otherwise provided, the procedures of the Commission shall be governed by Robert's Rules of Order." D.C. Code § 1-309.11(e)(3). Accordingly, Robert's Rules of Order ("Robert's Rules") control on the issue of whether the contents of the ANC 5A notice were adequate. On this issue, Robert's Rules states that the only items that must be included in a notice are the date, time, and place of the meeting. *Robert's Rules of Order Newly Revised* § 1 at 5, § 53 at 527 (10th ed. 2000).

This rule has been adopted by the Office of Corporation Counsel (the "OCC") in its advisory opinions. Specifically, in response to an inquiry from an ANC 2A Commissioner on the scope of information to be included in a public notice, the OCC advised that an ANC meeting notice must state "the date, time, and place of the meeting." Letter from Office of Corp. Counsel to Dorothy Miller, Comm'r, ANC 2A at 2 (Sept. 17, 1996), *available at* <http://anc.dc.gov/page/about-anc> (*citing Robert's Rules of Order Newly Revised* § 40, at 369-70 (9th ed. 1990)). The OCC clarified, however, that there is no legal requirement that the principal agenda items to be taken up at the meeting, including, for example, a vote, be included in the ANC meeting notice. *Id.*; *see also* Letter from Office of Corp. Counsel to Dorothy Miller, Comm'r, ANC 2A at 2 (Sept. 24, 1996), *available at* <http://anc.dc.gov/page/about-anc>.

Here, the ANC 5A's public notice properly included the date, time, and location of its September meeting and therefore appropriately apprised the community that a meeting would

occur. As such, it was legally sufficient. The failure to include the vote on the application does not render the notice invalid—a fact supported by Robert's Rules and the OCC advisory opinions. Additionally, the Alliance's counsel attended the Hearing and was on notice that the ANC 5A would consider the application at its September 26, 2012 meeting. Based on that notice, the Alliance's counsel submitted a legal brief to the ANC 5A before the September 26, 2012 meeting, which raised the same arguments that the Alliance made at the Hearing, and the Alliance's counsel attended the September 26, 2012 meeting. Accordingly, because proper notice of the ANC 5A's meeting was given, the ANC Report that resulted from that meeting is entitled to be given "great weight" during the Board's deliberations on the application. *See* 11 DCMR §§ 3115.1(c), 3115.2.

b. The Fort Lincoln community was given ample opportunity to comment on the application.

In a weak bid to discredit the ANC Report, the Alliance will likely claim that the ANC 5A has not allowed "the community any substantive discussion on [CWC's] request for a special exception." (*E.g.*, Proposed Findings at 6.) This argument is belied by the record. First, as set forth more fully in the ANC Report, Commissioner King held numerous community meetings on the application, which were attended by between 150 and 350 members of the community. (ANC Rep. at 3.) These meetings were extremely well publicized, with several hundred flyers being distributed through the community and the Ward. *Id.* Second, the Applicant presented its proposal at meetings on June 9 and June 16, 2012, a SMD meeting on June 23, 2012, and the emergency SMD meeting on September 11, 2012. *Id.* at 2-3. At each of these meetings, the Applicant answered community questions about the impact of the proposal on the neighborhood, the requested zoning relief, and the justifications for the requested relief. *Id.* Third, the ANC 5A commissioners and leaders of the various Fort Lincoln housing clusters met on June 9, July 16,

July 25, and September 8, 2012, to discuss the potential environmental, safety, and traffic issues relating to the Applicant's proposed gas station. Fourth, counsel for the Alliance submitted a legal brief in opposition to the application to the ANC 5A before the September 26, 2012 meeting, which raised the same arguments made at the Hearing. Given that there were more than 10 community meetings, which were well publicized and well attended, and given that the Alliance itself submitted a written opposition brief to ANC 5A, the Alliance cannot credibly argue that the Fort Lincoln community was not given a sufficient opportunity to comment on the application. Through these meetings, presentations, and legal submissions, the views of the community became well known to the ANC 5A.

Moreover, any claim by the Alliance that the ANC 5A did not permit substantive discussion on the application at the September 26, 2012 meeting is without merit. As set forth more fully in the ANC Report, the community was permitted to ask many questions at the September 26, 2012 meeting about the application before the vote was taken. (ANC Rep. at 3.) The community input at the September 26, 2012 meeting was in addition to the multiple community meetings that were held on the application and retail development prior to vote, which, as indicated in the ANC Report, totaled more than "25 hours of discussion." *Id.*

3. Allegations of conflicts of interest with non-parties to this matter are irrelevant.

Finally, any contention by the Alliance that the ANC Report should not be accepted into the record because ANC Commissioner King has an alleged "conflict of interest" in this matter is without merit. In its Proposed Findings, the Alliance claimed that a conflict exists because Mr. King, in his individual capacity, filed a civil case in Delaware State court seeking to inspect the books and records of DAG SPE Managing Member, Inc. ("DAG SPE"). (Proposed Findings at 6.) But DAG SPE has never been mentioned as an interested party in any of the Alliance's

filings with the Board. Importantly, DAG SPE has never sought party status in this matter or even mentioned in the Alliance's own request for party status. Ex. 24 (Alliance's Request for Party Status). As such, DAG SPE has never established that it is more significantly, distinctively or uniquely affected by the relief requested in the application than the general public. Accordingly, any purported conflict between Mr. King and DAG SPE should be deemed immaterial to the Board's decision on the application.

Additionally, it is well established that the "great weight" given to ANC recommendations "apply only to those recommendations which come formally from the ANC, and not to recommendations of individual commissioners not authorized to speak on behalf of the ANC." *See* Office of Corp. Counsel Memo. to all District Agencies, Bds., and Comm'ns at 2 (Feb. 22, 1999). Contrary to what the Alliance would have the Board believe, the ANC Report is not exclusively the recommendations of Commissioner King. Rather, the ANC Report supporting the application is the product of extensive community meetings in which ANC 5A commissioners heard presentations in support of and in opposition to the application, which culminated in a final vote of 6-3-1. Because the ANC Report comes formally from the ANC 5A and because it meets the requirements of 11 DCMR § 3115.1(a)-(i), the ANC Report is entitled to be given great weight in the Board's decision.

C. CONCLUSION

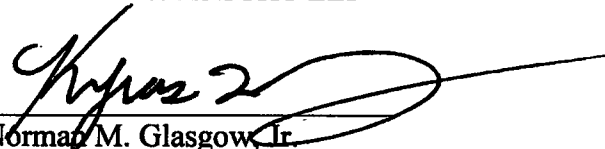
For all the foregoing reasons, the Board should accept the ANC Report into the record and give the findings in that report great weight pursuant to 11 DCMR § 3115.2.

Dated: October 19, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 19th day of October, 2012, I served a true and correct copy of the foregoing by email and hand delivery on the following:

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