Law Offices
Griffin, Murphy, Moldenhauer & Wiggins, LLP

Mark G. Griffin (DC, MD)
Brian P. Murphy (DC, MD)
Ashley E. Wiggins (DC, MD, VA)
Meridith H. Moldenhauer (DC, MD, VA)
Kinley R. Bray (DC, MD)
Eric M. Daniel (MD, DC)
Iris E. Postelnicu (VA, DC*)
*Pending

May 26, 2015

Lloyd Jordan, Chair
DC Board of Zoning Adjustment
441 Fourth Street, NW Suite 210 S
Washington DC 20001

Re: Application of Jonathan & Jessica Leonard
BZA Case No. 19007
Applicant's Prehearing Statement

Dear Chairman Jordan and Members of the Board:

Attached for filing is the Applicant's Prehearing Statement in Support of the above-referenced Application. Two color copies of the attached will be delivered by hand to the Office of Zoning on May 27.

We look forward to the Board's consideration of this case at its June 9, 2015 public hearing.

Sincerely,

GRIFFIN, MURPHY,
MOLDENHAUER & WIGGINS, LLP

By: ______________________
Kinley R. Bray

Cc: Advisory Neighborhood Commission 5E
DC Office of Planning
Jonathan & Jessica Leonard

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ASHLEY E. WIGGINS (DC, MD, VA)
MERIDITH H. MOLDENHAUER (DC, MD, VA)
KINLEY R. BRAY (DC, MD)
ERIC M. DANIEL (MD, DC) 202-530-7158
IRIS E. POSTELNICU (VA, DC*) kbray@washlaw.com
*PENDING

Executive Summary

Case No. 19007

Site Description

Address: 18 T Street, NE

Square/Lot: Sq. 3509S, Lot 43

Zoning: R-4

Existing: 2-unit flat does not conform to Zoning Regulations

Historic District: None

Nearby Properties:

- Indigo Apartments
- Langley Junior High School
- McKinley Tech. High School

Public Transportation:

- Metro: Rhode Island & Shaw
- Metrobus routes: 80, G8.
- Capital Bikeshare Docks:
  - 1st St & Rhode Island Ave
  - Florida Ave & R St.
  - Eckington Place and Q St.
- Car Sharing: Zipcar; Car2Go

Cases:

- *Gilmartin* 579 A.2d 1164 (1990)
- *26 T Street, N.E.* (BZA Case No. 18484
- *1131 5th Street, N.E.* (BZA Case No. 18406)

Project Description

Applicant	Jonathan & Jessica Leonard
Proposal	Flats
Relief Sought	• 400.1: Height and Story Requirement • 403.2: Maximum Lot Occupancy • 2001.3: Nonconforming Structures
Variance Standard	1. **Exceptional Circumstance**: • Existing Condition • Good faith, detrimental reliance on DCRA's prior issuance, in error, of building permits and Certificate of Occupancy for the Property. 2. **Strict Application Results in Practical Difficulty**: • Compliance with height and story requirement requires tearing down top floor of building or backfill lower level of the Property with dirt. Both options are financially infeasible. • Applicant has clean hands – illegal construction performed by developer on behalf of owner with limited involvement in project 3. **No Detriment to Public Good or Zone Plan**: • Utilized exclusively for residential purposes. • No change to existing aesthetic in neighborhood; landscaping to be added • Provides needed addition to housing supply. • Immediate neighbors in support

Comments of District Agencies and Community:

- ANC 5E Meeting on May 19
- 5 Letters of Support from Neighbors
- DDOT: No objection to approval of requested variances

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPLICATION OF	**BZA CASE NO. 19007**
JONATHAN & JESSICA LEONARD	**HEARING DATE: JUNE 9, 2015**

PREHEARING STATEMENT OF THE APPLICANT

This Prehearing Statement is submitted on behalf of Jonathan and Jessica Leonard (collectively, the "Applicants"), the contract purchaser of the property known as 18 T Street N.E., Unit 2, Lot 43 in Square 3509S (the "Property") in support of their application for area variance relief, pursuant to 11 DCMR § 3103.2, to allow the occupation of the Property, an existing four-story, two-unit flat in the R-4 Zone District that does not comply with the Zoning Regulations. This Prehearing Statement supplements and amends the initial application filed in this matter.

I. JURISDICTION OF THE BOARD

The Board of Zoning Adjustment (the "Board" or "BZA") has jurisdiction to grant the area variance relief requested herein pursuant to 11 DCMR § 3103.2.

II. NATURE OF RELIEF REQUESTED

The Applicant initially requested area variance relief from the maximum height and story limitation (11 DCMR § 400.1), the minimum lot area (11 DCMR § 401.3), and the maximum percentage of lot occupancy (11 DCMR § 403.2). However, upon further review and research, and discussion with the District Department of Consumer and Regulatory Affairs ("DCRA") and the Office of Planning, the Applicant has determined that a variance from the minimum lot area is not required, but that a variance from the nonconforming structure provisions of 11 DCMR § 2001.3 is required. Accordingly, the Applicants hereby request that the Board approve an amendment to the Application, and has submitted a new Self-Certification (Form 135). *See* **Exhibit A**. The facts leading to the need for such an amendment will be discussed further herein.

III. EXHIBITS IN SUPPORT OF THE APPLICATION

EXHIBIT A	Revised Form 135
EXHIBIT B	Building Permit I
EXHIBIT C	Building Permit II
EXHIBIT D	Interior Photographs of 18 T Street, Unit 2 (Subject Property)
EXHIBIT E	MRIS Listing of 18 T Street, Unit 1 (lower level unit)
EXHIBIT F	Neighbor Letters in Support

IV. BACKGROUND

The Property contains approximately 1,751 square feet of land area and is located in Square 3509S, which is bounded by Todd Place NE to the north, Lincoln Road to the east, T Street to the south, and North Capitol Street to the west. The Property is located in the R-4 Zone District, in a neighborhood characterized by multi-story attached row dwellings, flats, and apartment buildings. The Property is presently improved with a four-story, two-unit flat that does not conform to the Zoning Regulations. The Property is not located within any historic district, and the existing building on the Property is not listed on the District of Columbia Inventory of Historic Sites. Prior to May 2013, the Property was nonconforming as to minimum lot area (approximately 49 square feet less than the required minimum area of 1,800 square feet in the R-4 District) and maximum percentage of lot occupancy (currently 79%, whereas the maximum permitted is 60%). These existing conditions should have limited the ability of the Property owner to make additions or alterations, pursuant to 11 DCMR 2001.3.

The Property was purchased by Edward and Donna Naybor on May 29, 2012. Between May 2012 and December 2014, the Naybors (via their agent, Insun Hofgard, and a contractor) obtained a building permit ("Building Permit I" – Exhibit B) and gutted the then two-story (plus attic) structure. Pursuant to Building Permit I, the Naybors also replaced an existing deck and constructed a new deck and roof covering above in the existing building footprint. Building Permit I was marked "interior work only" and therefore the DCRA did not route the application through zoning.

Following substantial completion of the work authorized by Building Permit I, the Naybors' contractor sought a second building permit ("Building Permit II" – attached as Exhibit C), which was issued by DCRA on June 6, 2013. Building Permit II authorized the following work:

1. Demolition of existing floor slab at cellar level;
2. Removal of 8 inches of top floor to provide new concrete slab;
3. Removal of 4 inches of top floor and retaining wall to make room for a 9'x19' parking space;
4. New entry door at basement level (as noted by Zoning Reviewer).

Building Permit II was reviewed and approved by the Zoning Review Division at DCRA[1]. The "new concrete slab" authorized converted an existing attic level to a third story by altering the existing roof line of the building to raise the finished ceiling height of the attic level from approximately six feet, six inches to approximately ten feet at the front, sloping to approximately 8.5' clear ceiling height in the rear of the third floor. The excavation of the cellar level berm and installation of a "new entry door at basement level" converted the lowest level of the structure,

[1] The initial application stated, incorrectly, that both permits were reviewed by the Zoning Review Division at DCRA. Rather, only Building Permit II was reviewed by that discipline.

which had previously been a cellar, to a basement, thus creating a fourth story in violation of the Zoning Regulations.

In addition to the work authorized by Building Permit II, the Naybors' contractor added a 6' diameter spiral staircase in the rear, further expanding the existing nonconforming lot occupancy in violation of 11 DCMR § 2001.3. Thus, in addition to a variance from lot occupancy under 403.2, the Applicant also requires area variance relief from Section 2001.3, and is thereby requesting to amend the Application as stated above.

The Applicants entered into a contract to purchase the property from Mr. and Mrs. Naybor in November 2014, with closing scheduled for December 11, 2014. The Applicant was under the impression that the Naybors would have the certificate of occupancy in time to close on December 11th. When the Applicant viewed the Property, construction appeared complete except for minimal "punch list" items.[2] In reliance upon the issued building permits, the continuing work to complete the punch list, and the projected closing date of December 11, 2014, the Applicants sold their home; that contract required them to vacate their previous home on or before December 15, 2014.

On or about the first week of December, 2014, the Naybors informed the Applicants that there was a problem obtaining a certificate of final inspection and requested to delay closing. The Applicants were told that resolution was possible within a week or two of the original closing date, and entered into a pre-settlement occupancy agreement with the Naybors allowing the Leonards to move their furniture into the Property for storage beginning on December 10 and continuing until closing, with closing to occur on such date as a final Certificate of Occupancy was issued by the District of Columbia or January 15, 2015, whichever occurred first.[3] The Applicants moved into a hotel pending closing.

Unbeknownst to the Applicants at the time, an inspection by the DCRA Illegal Construction Unit revealed that the Property was deemed to have an illegal fourth story and a Stop Work Order was issued. Also unbeknownst to the Applicants, the inspection by the Illegal Construction Unit had been prompted by an investigation into the Naybors' developer, Insun Hofgard. Ms. Hofgard has recently been sued by the District of Columbia for illegal construction and violation of the District's consumer protection law and featured in numerous media articles.

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[2] See MRIS Listing, Unit 1 (Lower Level unit), attached hereto as Exhibit E. Unit 2, the Subject Property, was never listed for sale, as the Leonards and Naybors entered into a contract of sale for the property as soon as the condominium regime was approved by DCRA in November 2014, however, the Property was in substantially similar stages of completion as shown in the photographs of the lower unit when the Leonards and Naybors signed the contract of sale.

[3] See Photographs of the Interior of the Subject Property, attached hereto as Exhibit D. The Leonards moved their furniture from their previous home into the Subject Property in anticipation of closing, but have been unable to physically occupy the unit.

The Naybors and their contractor assert that, except for the spiral staircase, all work was done in conformance with the two issued building permits.[4]

The Applicants had no control over the preparation of the permit plans, the issuance of the building permits, or the work performed. In fact, they appear to be the only parties in this scenario with clean hands. Upon learning of the violations, the Applicants caused their representatives to meet with the Zoning Administrator, who initially agreed to issue a temporary certificate of occupancy to allow the Applicants to occupy the Property upon filing of this Application. Upon filing of the Application, however, the Zoning Administrator advised that the DCRA's Office of the General Counsel would not authorize the issuance of a temporary certificate of occupancy. The Applicants have since learned that the Property is tied up in the broader investigation of Ms. Hofgard. After several meetings with DCRA's General Counsel and inspectors, the Applicants now understand that DCRA was preparing to file suit against Ms. Hofgard, and that no action will be taken prior to the BZA's decision on this Application.

Since December 15, 2014, the Applicants have been residing in a combination of hotels and short term housing, and have moved four times. They are not in a financial position to cancel the contract (which would result in the loss of their earnest money deposit) or to enter into a long-term lease or purchase contract, due to the fact that they remain (at least at this time) contractually obligated to purchase the Property. Despite the massive inconvenience and uncertainty created due to the allegedly fraudulent and/or negligent actions of the seller, developer, and/or contractor in this case, the fact is that the Applicants have contracted to buy the finished unit as they saw it in December 2014, with additional punch list corrections, at a specific contract price. Nothing short of legal occupancy will make them whole.

The work that was completed pursuant to the permits obtained by the developer as agent for the Naybors was not done under the Naybors direct control. As the owners of the Property, without the zoning relief requested, the Naybors will be unable to complete the transaction with Mr. and Mrs. Leonard, and will be unable to sell the Property to another purchaser, as they cannot obtain a legal certificate of occupancy from DCRA until the relief requested is granted. The hardship they are experiencing, while distinct from that of the Leonards, nonetheless also rises to the level of practical difficulty.

V. APPLICANT MEETS THE BURDEN OF PROOF FOR VARIANCE RELIEF

The Board is authorized to grant an area variance where it finds: (1) The property is affected by exceptional size, shape or topography or other extraordinary or exceptional situation or condition; (2) The owner would encounter practical difficulties if the zoning regulations were strictly applied; and (3) The variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zone plan as embodied in the Zoning Regulations and Map. *See French v. District of Columbia Board of Zoning Adjustment*,

[4] While Building Permit I was not reviewed by the Zoning Review Division at DCRA, the plans associated with that permit clearly depict a full third (top) floor.

65S A.Zd 1023,1035 (D.C. 1995) (quoting *Roumel v. District of Columbia Board of ZoningAdjustment*, 417 A. 2d 405, 408 (D.C. 1980)); *see also Capitol Hill Restoration Society, Inc. v. District of Columbia Board of Zoning Adjustment*, 534 A.2d 939 (D.C. 19S7). As discussed below, and as will be further explained at the public hearing, all three prongs of the area variance test are met in this Application.

A. The Property is Unusual Because of its Size, Shape or Topography and is Affected by an Exceptional Situation or Condition.

The phrase "exceptional situation or condition" in the above-quoted variance test applies not only to the land, but also to the existence and history behind the configuration of a building and other subsequent events extraneous to the land itself. *See Oakland Condominium v. District of Columbia Bd. Of Zoning Adjustment*, 22 A.3d 748 (D.C. 2011) (Holding that an exceptional situation existed because an applicant before the Board of Zoning Adjustment seeking a variance from the zoning code demonstrated good faith, detrimental reliance on actions the actions of city officials, namely the issuance of a building permit by the Department of Consumer and Regulatory Affairs ("DCRA"), in believing that they were acting in accordance with the zoning regulations); *See also Clerics of St. Viator, Inc. v. D.C. Board of Zoning Adjustment*, 320 A.2d 291, 294 (D.C. 1974)(Holding that an exceptional situation existed because of the failure of a seminary to remain a viable institution). In this case, the exceptional situation stems from a confluence of factors, none of which were caused by the Applicant.

The Property is exceptional due to the unique history and confluence of facts which lead to the Applicant's seeking this variance. First, the flat is a structure that already exists. After obtaining permits which the Applicant thought were validly-issued, the developer converted an attic to a third floor. Although the permit plans showed the top floor conversion, the plans were apparently never reviewed by Zoning, therefore no one reviewing the permit plans at DCRA was aware that the Property was already non-conforming with respect to minimum lot area and maximum percentage of lot occupancy.

Second, pursuant to another permit (which neither the Applicants nor the Naybors again had reason to know was not a validly-issued permit) the structure was excavated in a manner that increased the number of stories from three to four and increased the height to greater than 40 feet.

On information and belief of the Applicants, it appears that the Naybors were minimally involved in the renovation process, and that Ms. Hofgard and/or her contractors took the lead in designing all proposed improvements, obtaining permits, and undertaking construction.

Finally,at the time the Property was placed under contract in November 2014, there was no reasonable basis for the Applicant to know that the structure was constructed illegally. When the Applicant viewed the Property and signed the contract, construction appeared virtually complete.[5] The illegal conversion of the cellar level to a basement, making it noncompliant with respect to lot area and height requirements, was not the result of any actions taken by the Applicant. The Applicant was not involved in the renovation or unlawful conversion of the structure. The Applicant believed, in good faith, that the building, as constructed, marketed and contracted to be

[5] See Exhibits D and E, which show the finished condition of the interior.

sold, was in compliance with all regulations and requirements. The Applicants are not real estate professionals. Rather, the Applicants contracted to purchase the Property to make it their principal residence, and were devastated when they discovered the extent of the violations and realized that their dream home was tied up in an extensive investigation of alleged illegal construction and consumer fraud by a developer with whom the Applicants have no privity.

B. Strict Application of the Zoning Regulations would Result in Practical Difficulty

Converting the Property back into a structure that complies with the Zoning Regulations would result in significant financial hardship on the Applicant. As contract purchaser filing with the authorization and as agent of the owner of the Property, the Applicants have standing to seek a variance. *Russell* v. *D.C. Board of Zoning Adjustment*, 402 A.2d 1231, 1233 fn2 (D.C. 1979). Moreover, the Applicants are contractually obligated to purchase the real estate or forfeit their earnest money deposit as liquidated damages. The Seller is obligated to specifically perform under the contract, delivering this particular piece of property in occupiable condition to the Applicants. Performance under the contract is legally impossible at this moment, because the construction undertaken by the developer a) should not have been permitted by DCRA as it violated 11 DCMR § 2001.3 and 11 DCMR § 400.1, and b) the developer's installation of a spiral staircase extended the violation of maximum percentage of lot occupancy and was not authorized by any permit (validly issued or not).

Requiring the sellers or Applicants to bring the Property into strict compliance with the Zoning Regulations would cause significant practical difficulties, First, the restoration of the berm along the lowest level of the Property would be extraordinarily expensive – approximately $40,000. Second, such work would not have a direct impact on the Property the Applicants have contracted to Purchase – the upper of two units in the building. Thus, restoring the grade to the condition prior to construction would be impractical, costly, and would potentially diminish the value of the lower unit, potentially endangering the Applicants' ability to recover monetary damages against the seller of the Property and/or the developer. Moreover, requiring the seller to undertake such restoration could result in the inability to sell the lowest unit and/or an increase in the maintenance fees included in the condominium dues for both units, further burdening the Applicants for work that they did not authorize or undertake and that does not directly impact the upper unit. Additionally, the Applicants and the sellers have experienced the practical difficulty of extended monetary expenses for alternative housing, which could extend for an (as now) undetermined period of time until closing could occur.

Second, compliance with the nonconforming structure requirements could require removal of the third floor, which was previously an attic. Had Building Permit I been reviewed by Zoning, it would appear that the work proposed would have required a variance because the property was already exceeding the maximum percentage of lot occupancy. Although 11 DCMR § 2001.3 permits the alteration or expansion of nonconforming structures devoted to conforming uses, such alteration or expansion is only permitted where a property does not exceed maximum lot occupancy and the addition or alteration does not extend the existing nonconformity nor create any new nonconformity. In this case, the alteration authorized by Building Permit I did not extend an existing nonconformity, but because the property was not conforming with respect to maximum percentage of lot occupancy, arguably the conversion of the existing attic to a third floor should not have been permitted at all. Removal of the third floor to comply with this section would result in the removal of half of the square footage and the majority of the livable space[6] within the unit the Applicants have contracted to purchase.

Further, with respect to the variance from maximum lot occupancy, removal of the spiral staircase extending the existing nonconformity as to lot occupancy would result in a condominium unit that is less valuable than the Property as it exists today. These costs would be in addition to the extensive obligations and expenses that the Applicant has already incurred in connection with the Property, including the purchase price of the structure, the inconvenience of not being able to move into a home or enter into a long-term or permanent alternative housing arrangement, and the significant expense of short term housing while they wait for this matter to be resolved. The Applicant would have no reasonable expectation of a financial return if required to convert the Property back into a structure that complies with the Zoning Regulations.

In BZA Case No. 18406, pursuant to an Order issued October 17, 2012, the Board approved an application for a variance from the building on alley lot provisions to allow the continued use of three residential apartments in a three-unit apartment building located on alley lots in the DD/R-S-B District (attached hereto as Exhibit D). Except for use as a one-family dwelling, a structure is not to be constructed or altered for human habitation on an alley lot. In 2008, the structure was converted to residential use without the necessary zoning approval and building permits. The application was submitted by the present owners, all of whom purchased their units subsequent to the conversion to residential use, after DCRA issued letters indicating the zoning and permitting violations. The Board granted the variance application, by summary order, based on the unique history of the property and good faith purchase without knowledge of any wrongdoing on the part of the Applicants.

Additionally, the Board granted similar relief to that requested in the instant Application in Case No. 18484 for a property at 26 T Street, N.E., just four doors down from the Subject Property. In that case, a developer had illegally converted a flat to a three-unit apartment building and popped up the roof creating an illegal fourth floor. In addition, the lowest level was excavated (similar to what has occurred on the instant Property), further increasing the violation of the maximum height and stories limitations in the R-4 Zone. In granting variance relief for the as-built condition, the Board recognized that the alteration had taken place through no fault of the purchaser (then already an owner of the Property), and as it did in Case No. 18406, the Board was careful to make clear that each case is to be assessed on a case-by-case basis and that the precedential value of the decision was limited to the unique facts of the case before it.

We contend that the Applicant in this case faces a unique circumstance and that the precedential value of approval of this application would be equally limited to the individual facts of this case. In this instance, the facts are highly unique due to (1) the good faith, detrimental reliance of the Applicant, (2) the broader investigation of the developer the property owner hired to renovate the Property, (3) the quick and timely effort to correct any violations on the part of the Applicant by filing this Application, and (4) the significant costs associated with remedying the

[6] The upper floor contains two bedrooms and two full bathrooms. Removal of the upper floor would result in a one-bedroom, one-bathroom condominium.

noncompliance. As stated, the Applicant had no knowledge of the noncompliance and was in no way responsible for the noncompliance that took place.

Furthermore, this is not a case in which an owner has held onto a property for a long period of time before resolving zoning issues. Compliance with the height and story requirement would require demolishing the top level (estimated to cost $35,000 to $40,000) or backfilling the lower level (estimated to $30,000 to $35,000) in addition to removal of the spiral staircase providing direct access to the parking area, which would decrease the value of the structure.

C. No Detriment to Public Good or Inconsistency with Zone Plan

The continued use of the existing structure will not cause detriment to the public good or be inconsistent with the Zoning Regulations. The current residential use and structure is consistent and compatible with the residential uses and structures immediately surrounding the Property. The existing residential use does not generate excessive traffic, noise, or other nuisance.

On May 19, 2015, the Applicant presented the Application to Advisory Neighborhood Commission ("ANC") 5D. At the meeting, ANC 5C voted unanimously to recommend denial of the application to the BZA, based entirely on the notion that the Applicants have recourse against the sellers of the Property and the developer and they did have to move into the Property. However, the Applicants have minimal recourse against the developer who appears to be responsible for the violations, due to the fact that their contractor is with the property owner, Donna and Edward Naybor, who may or may not have been involved in the actions of Ms. Hofgard. Moreover, due to the nature of real estate, nothing short of the unit Mr. and Mrs. Leonard contracted to purchase in November 2014 can make them whole. At this time, delivery of that unit by the seller is impossible without the requested zoning relief.

The Applicant has been in contact with the Office of Planning, who has requested that the Applicants consider landscaping the concrete area at the lowest level. The Applicants are willing to do so, and accordingly are in the process of preparing a preliminary landscape plan showing permeable pavers and plantings adjacent to the public space, which will be ready by the date of the hearing.

The Applicant reached out to the Eckington Civic Association to request the opportunity to present their case and seek the input of the ECA in this matter. Unfortunately, the ECA could not accommodate that request prior to the date of the scheduled hearing due to a full June 1 agenda. Nonetheless, there is support for the requested relief in the neighborhood. The Applicant reached out to all surrounding neighbors along the block, and has obtained several letters from immediate neighbors who support the project. See Exhibit F attached.

VI. WITNESSES

The following witnesses will appear on behalf of the Applicants:

Jonathan Leonard, Applicant
Andrew Riguzzi, Applicant's Realtor

The Applicant reserves the right to call additional witnesses at the public hearing to support its case.

VII. REQUEST FOR BIFURCATED DECISION

Notwithstanding the fact that the Applicants believe firmly that they have demonstrated they meet the test for all relief requested in this matter, because potential remediation of the existing zoning violations has a disparate impact on each of the two units in the building, the Applicants ask the Board to consider each variance requested separately and to vote on each in deciding the case.

VIII. CONCLUSION

For the reasons stated herein and in the Applicants' prior filings in this case, we hereby submit that the application meets the requirements for area variance relief. We look forward to presenting our case at the hearing on June 9, 2015.

Sincerely,

GRIFFIN, MURPHY,
MOLDENHAUER & WIGGINS, LLP

By:______________________

Kinley R. Bray
1912 Sunderland Place NW
Washington DC 20036
(202) 429-9000
kbray@washlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of May, 2015, a copy of the foregoing was sent via electronic mail to the following:

Advisory Neighborhood Commission 5E
Teri Janine Quinn, Chair
5E06@anc.dc.gov

Sylvia Pinkney, Single Member District Commissioner 5E 04
5E04@anc.dc.gov

DC Office of Planning
Joel Lawson & Brandice Elliott
Joel.lawson@dc.gov
Brandice.elliott@dc.gov

Kinley R. Bray