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Monday, June 26, 2016

The Honorable Marnique Y. Heath
Board of Zoning Adjustment
441 4th Street, N.W., Suite 210 South
District of Columbia 20001

Re: **BZA Application No. 19288 for 4200 6th Street, S.E.
(Square 6207, Lots 53-56)**

Dear Chairperson Heath:

I am a member of Advisory Neighborhood Commission 8D ("ANC-8D"). Four days ago, the District of Columbia Department of General Services ("DGS") persuaded ANC-8D to support the agency's **Application No. 19288** for a variance from the requirements of **11 DCMR 360.1, 400.1, 2116.4, 2201.1, and 3104.1** for the purpose of constructing an "emergency shelter" on the 4200 block of 6th Street, S.E., in Lots 53 through 56 of Square 6207, in a R-5-A Zone District. The commissioners of ANC-8D voted three for the variance application and two against. As one of the two commissioners who opposed the agency's application, I want to record a written dissent from the majority decision of ANC-8D. Also, I want to record the dissent of my fellow commissioner, Ms. Theresa Jones, who joined me in opposing the agency's application for a variance.

For purposes of this dissent, I adopt the description of DGS' property as stated in the June 14, 2016 Prehearing Statement of the Applicant. In its variance application, DGS explained that it planned to construct an emergency shelter for up to fifty families who in the aggregate would number about 178 residents. In a neighborhood zoned under **11 DCMR 105.1(a) (5) (A)** as "R-5-A low density" or under **10 DCMR 225.4** as "moderate density residential", DGS proposes to build a six-story emergency shelter that would be sixty-seven feet high, but seventy-six feet high at its penthouse roof. Although the shelter would house about 178 residents while employing thirty-eight or more staff, DGS proposes to set aside merely eleven off-street parking spaces. Yet, DGS' proposed shelter would be closely surrounded by twelve

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single-family row houses and two independent day care centers¹ to the east and southeast, a public elementary school² to the north, and multi-family garden apartments³ to the west. Moreover, a veterans' shelter⁴ operates at 4134 6th Street, S.E., or about 435 feet away from the DGS property.

DGS, or rather its principal, the District of Columbia government, owns a number of Ward 8 properties, including St. Elizabeth's East Campus District ("St. Elizabeth's East" and "St. Elizabeth's"), where a well-managed emergency shelter for fifty families would be better accommodated than would be the case at 4200 6th Street, S.E. Although DGS boasted that it considered nine sites in Ward 8 besides the proposed 6th Street location, DGS noticeably ignored the potential for a perfectly workable shelter on the vast and as yet undeveloped parcels at St. Elizabeth's East. Since the District hopes to construct at St. Elizabeth's East a mixed-use development with multi-family residences, an entertainment and sports arena, a hospital, retail shops, and offices, the addition at St. Elizabeth's of a 178-bed shelter could be amply accommodated without danger to the public good. Quite frankly, DGS' decision to ignore the feasibility of a shelter at the more capacious St. Elizabeth's undermines the credibility of DGS' variance application.

REGULATORY SCHEME GOVERNING DGS APPLICATION NO. 19288

According to **11 DCMR 199.1**, the emergency shelter described in **Application No. 19288** must be regarded as a "community-based residential facility ... for persons who

¹ Southeast Children's Fund CDC 1 operates a day care center in what used to be single-family homes at 4233 6th Street, S.E. Southeast Children's Fund CDC 1 maintains its day care center on lots directly adjoining the property where DGS would construct its emergency shelter for fifty homeless families. Across the street from the Southeast Children's Fund CDC 1 day care center, Sunshine Early Learning Center, Inc., located at 4224 6th Street, S.E., also offers day care services for local residents.

² Henley Elementary School, located at 425 Chesapeake Street, S.E., enrolls about 339 children in grades pre-kindergarten to fifth grade. At present, about 283 of the estimated 339 students at Henley participate in the government-funded free lunch program, while the student-teacher ratio at Henley is 15.8 students for each teacher.

³ Atlantic Gardens Apartments, with a rental office at 4216 4th Street, S.E., provides one-bedroom, two-bedroom, and three-bedroom apartments to low-income residents in three-story high multi-family residential buildings. Atlantic Gardens' tenants benefit from federally funded rent subsidies that the U.S. Department of Housing and Urban Development pays to WinnCompanies (probably through Winn Managed Properties, L.L.C.), the proprietor of Atlantic Gardens Apartments.

⁴ DCVets Transitional Housing provides transitional housing for homeless veterans.

have a common need for treatment, rehabilitation, assistance, or supervision in their daily living". **11 DCMR 199.1**. In addition, **section 199.1** defined an "emergency shelter" as "a facility providing temporary housing for one or more individuals who are otherwise homeless". **11 DCMR 199.1**. However, the local regulations at **11 DCMR 353.1 et seq.** outlawed the construction of a new emergency shelter at the 4200 block of 6th Street, S.E., unless the Board of Zoning Adjustments ("BZA") grants a **section 3103** area or use variance or a **section 3104** special exception. **11 DCMR 353.1** (prohibiting new residential developments in the R-5-A Zone District); **11 DCMR 358.1** (prohibiting community-based residential facilities for sixteen to twenty-five persons in an "R-5 District"); **11 DCMR 360.1** (prohibiting emergency shelters for five to twenty-five persons in an "R-5 District"); and **11 DCMR 3103.2** (general rule on variances) and **3103.7** (standards for obtaining variances).

Regarding area or use variances, the **D.C. Code, section 6-641.07(g) (3)**, legislated that, "where, by reason of exceptional ... shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional ... condition of a specific piece of property, the strict application of any regulation ... would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, [the BZA shall have the power] to authorize ... a variance from such strict application so as to relieve such difficulties or hardships, provided such relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the [District of Columbia] zoning regulations and map". **D.C. Code, section 6-641.07(g) (3)**; see **11 DCMR 3103.2**; see also **Roumel v. D.C. Board of Zoning Adjustment**, 417 A.2d 405, 408 (D.C. 1980).

**VARIANCE ALLOWING CONSTRUCTION OF DGS SHELTER WOULD
SUBSTANTIALLY IMPAIR INTENT, PURPOSE AND INTEGRITY OF ZONE
PLAN AND D.C. ZONING REGULATIONS**

DCVets Transitional Housing ("DCVets") provides shelter for homeless veterans at 4134 6th Street, S.E., or about 435 feet away from the site of DGS' proposed emergency shelter. According to **11 DCMR 358.3**, "there shall be no other property containing a community-based residential facility [including an emergency shelter] for

seven or more persons within a radius of five hundred feet from any portion of the subject property". **11 DCMR 358.3**. The dissenting commissioners reasonably believe that DCVets houses seven or more homeless veterans at 4134 6th Street, S.E.

Therefore, **11 DCMR 358.3** prohibits construction of DGS' proposed shelter unless BZA grants a variance for the project. However, DGS never applied for variance relief from **11 DCMR 358.3**. In fact, the DGS application never demonstrated that, because of "the attributes of" Lots 53 through 56 in Square 6207, the strict application of **section 358.3** would "result in peculiar and exceptional practical difficulties" or "exceptional and undue hardship" to DGS. See **11 DCMR 3103.7(a)-(b)**. Therefore, because DGS inexcusably overlooked the prohibition in **11 DCMR 358.3**, it should not receive variance relief from that particular regulation.

Similarly, **11 DCMR 358.7** prohibited DGS from constructing a massive 178-bed shelter within 500 feet of the DCVets shelter unless BZA, first of all, "finds that the cumulative effect of the [two] facilities will not have an adverse impact on the neighborhood because of traffic, noise, or operations". **11 DCMR 358.7**. To date, DGS' application never addressed the "adverse impact on the neighborhood because of traffic, noise, or operations" from the DGS and DCVets shelters. As a result, **11 DCMR 358.7** forbids construction of DGS' 178-bed shelter, that is, unless BZA grants a variance from the rule in **11 DCMR 358.7**.

However, as with the previous issue, DGS never applied for variance relief from **11 DCMR 358.7**. In fact, the DGS application never demonstrated that, because of "the attributes of" DGS' property, the strict application of **section 358.7** would "result in peculiar and exceptional practical difficulties" or "exceptional and undue hardship" to DGS. See **11 DCMR 3103.7(a)-(b)**. Therefore, DGS has no basis for receiving variance relief from **11 DCMR 358.7**, and, therefore, DGS should be barred from constructing a shelter at 4200 6th Street, S.E.

**DGS VARIANCE FOR OFF-STREET PARKING SPACES WOULD
SUBSTANTIALLY HARM PUBLIC GOOD AND
INTEGRITY OF D.C. ZONING REGULATIONS**

According to **11 DCMR 2101.1** and the accompanying Display Table, the R-5-A Zone District where DGS would construct an emergency shelter for fifty families must be supported with "one [off-street parking space] for each dwelling unit". **11 DCMR 2101.1, Display Table** (Residential Uses). In other words, the public policy calls for DGS to set aside fifty off-street parking spaces or one parking space for each family, if DGS would construct the 178-person shelter described in **Application No. 19288**. As an alternative, DGS requested variance relief that would allow it to build a six-story shelter for fifty families, while providing merely eleven off-street parking spaces.

If granted, the variance would allow DGS to provide far fewer off-street parking spaces per residential unit than other properties in the area. After all, each of the row houses near the proposed shelter includes one off-street parking space for each dwelling. Similarly, the multi-family Atlantic Gardens Apartments⁵ set aside one off-street parking space for each of its residences. In fact, Atlantic Gardens rests on hilly terrain much like the proposed DGS shelter. However, the developers who constructed Atlantic Gardens obtained sufficient land, whether on hilly or flat terrain, so that the landlord could provide the appropriate amount of off-street parking for both tenants and employees as required by **11 DCMR 2101.1**.

As provided for in the **D.C. Code, section 6-641.07(g) (3)**, BZA may "authorize ... a variance" from the "one parking space for each dwelling unit" rule. However, BZA lacks authority to grant the variance if it would result in "substantial detriment to the public good" or in "substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations". **D.C. Code, section 6-641.07(g) (3); 11 DCMR 3103.2**. With these standards in mind, BZA should deny the variance. The variance, if granted, would be a substantial detriment to the public good, and indeed it would substantially impair

⁵ Atlantic Gardens' residents often benefit from federally subsidized rental payments for low-income families. Despite their need for a rent subsidy, many Atlantic Gardens residents own automobiles. Likewise, low-income shelter residents may own an automobile.

the intent, purpose, and integrity of the zone plan as documented in local zoning regulations.

As stated earlier, DGS argued that the proposed 178-person shelter needed merely eleven off-street parking spaces. Noticeably, the DGS application never drew lessons from the parking problems for staff and residents at the shelter managed at 2nd and D Streets, N.W., by Concerned Citizens for Creative Nonviolence. In addition, the DGS application never examined the impact of busing children, especially those requiring special education, from the proposed 6th Street shelter to school or to health care providers. As an additional worry, the DGS proposal ignored the plight of homeless families who live in their cars. Shall these desperate souls abandon their automobiles in order to find temporary shelter at 4200 6th Street?

In essence, the DGS application asks BZA to ordain a deliberate effort at violating the "one parking space for each dwelling unit" rule in **11 DCMR 2101.1**. The variance, if granted, would substantially impair the regulatory intent of ensuring that "all [District of Columbia zoning] regulations shall be uniform for each class or kind of building throughout each district". **D.C. Code, section 6-641.01**. In this case, a variance from the off-street parking space rule would rest on a shoddy DGS analysis of parking patterns at 4200 6th Street, S.E. With these considerations in mind, BZA should deny DGS' request for variance relief from **11 DCMR 2101.1**.

**DGS VARIANCE FROM BUILDING HEIGHT RESTRICTION WOULD
SUBSTANTIALLY HARM PUBLIC GOOD
AND INTEGRITY OF D.C. ZONING REGULATIONS**

According to **11 DCMR 400.1** and the accompanying Display Table, DGS may construct a building at 4200 6th Street, but, in the R-5-A Zone District for the proposed project, DGS cannot lawfully erect a building that would be more than three stories high and taller than forty feet. **11 DCMR 400.1, Display Table** (Residential Uses). As a matter of fact, the zoning regulations at **11 DCMR 350.2** firmly ruled that, "in R-5-A [Zone] Districts, only a low height and density shall be permitted". **11 DCMR 350.2**. Therefore, in order to construct a six-story emergency homeless shelter that would be seventy-six feet high at the roof of its penthouse, DGS needs variance relief from **11**

DCMR 350.2 and **400.1**. In this case, DGS requested an area variance, but only from the prohibition in **11 DCMR 400.1**. The failure to seek a variance relief from **11 DCMR 350.2** should in and of itself be enough to result in a denial of DGS' variance application.

In any case, the variance from **11 DCMR 400.1**, if granted, would drastically distinguish DGS' proposed shelter from the other residences in the neighborhood of this R-5-A Zone District. None of the neighboring residences, whether single-family row houses or multi-family garden apartments, stands higher than three stories or forty feet. Therefore, the proposed DGS emergency shelter would substantially impair the regulatory intent of ensuring that "all [District of Columbia zoning] regulations shall be uniform for each class or kind of building throughout each district". **D.C. Code, section 6-641.01**.

In the meantime, the "peculiar" and exceptionally "practical difficulties" that DGS anticipates if denied a variance from the **11 DCMR 400.1** height restriction arises not from difficulties because of DGS' hilly, L-shaped property, but rather from DGS' blind determination to build a massive 178-bed shelter instead of a much smaller five-bed to twenty-five-bed shelter under an **11 DCMR 360.1** special exception. Hence, the hilly, L-shaped terrain on Lots 53 through 56 never mandated the construction of a six-story shelter. Rather, as DGS readily admitted, the self-imposed goal of closing D.C. General inspired the request for a variance from the height restrictions in **11 DCMR 400.1**. **Meredith Moldenhauer, PreHearing Statement of the Applicant** (Applicant No. 19288) (June 14, 2016), pp. 3-4.

In essence, DGS petitioned for the right to violate the height restrictions for buildings on the 4200 block of 6th Street, and to do so by constructing a massive six-story structure rather than several smaller shelters throughout Ward 8. However, the variance would substantially impair the regulatory intent that, "in R-5-A [Zone] Districts, only a low height and density shall be permitted". **11 DCMR 350.2**. In a word, the variance, if granted, would be a substantial detriment to the public good, and it would substantially impair the intent, purpose, and integrity of the zoning regulations. For these reasons, BZA should deny the application for variance relief from **11 DCMR 400.1**.

**DGS VARIANCE WOULD OVERCROWD
NEIGHBORS AND BLOCK OUT LIGHT AND AIR**

As an additional concern, **11 DCMR 358.8** established that BZA "may approve [an emergency homeless] facility for more than twenty-five persons ... only if [BZA] finds that the program goals and objectives of the District of Columbia cannot be achieved by a facility of a smaller size at the subject location and if there is no other reasonable alternative to meet the program needs of that area of the District". **11 DCMR 358.8**. Despite being required to do so, DGS never identified any "program needs" of the residents and businesses neighboring 4200 6th Street, S.E. Nor did DGS prove that any relevant "program needs" for the residents and businesses near 4200 6th Street mandated the construction of a 178-bed shelter on Lots 53 through 56.

In addition, the District of Columbia never explored whether its "program goals and objectives" that inspired the planned construction of a 178-bed shelter at 4200 6th Street could be achieved by establishing throughout Ward 8 seven or more smaller emergency shelters, all of which could comply with local height and off-street parking regulations. These seven or more shelters, if constructed with **11 DCMR 3104** special exceptions, could be evenly dispersed throughout Ward 8, and the buildings could be designed to avoid overcrowding and interference with neighbors' light and air interests. In this fashion, a carefully crafted plan would be more protective of the public good than the hastily drafted **Application No. 19288**.

However, when DGS failed to craft a plan that balanced DGS' "program goals and objectives" against the burdens that would be imposed on residents near 4200 6th Street, DGS overlooked the overcrowding and the interference with light and air issues arising from **Application No. 19288**. In other words, the construction of a massive six-story shelter directly across the alley from the Southeast Children's Day Care Center would situate the six-story shelter very close to Atlantic Gardens Apartments. In the morning, the DGS shelter would block sunlight and warm air that would otherwise comfort residents at Atlantic Gardens. In the afternoon and early evening, the shelter would block sunlight and warm air that would otherwise comfort residents in the 6th Street row houses. At all times, the proposed shelter would block the easterly vista of many

Atlantic Gardens residents. At all times, the shelter would block the westerly vista of 6th Street row house residents and of the children inside the Southeast Children's Day Care Center. Indeed, the structure would block the southerly vista of students and teachers at Henley Elementary School.

Simply put, the DGS-proposed emergency shelter would overcrowd its neighbors in Lots 30, 31, 44, 45, 60, 812, 813, and 809 of Square 6207. As a result, the residents' interest in light and air, as well as in their interest in their vistas, would be "unduly affected" or "compromised" by the construction of the shelter. See **11 DCMR 400.23(a)(1)-(2)**. This intrusion would harm the well-being of affected residents while potentially impairing the land values of properties near the proposed project. This circumstance, which **Application No. 19288** never addressed, threatens to be a problem under the Zoning Regulations of the District of Columbia.

After all, in **11 DCMR 400.23(a)(1)-(2)** and **(5)**, the zoning regulations established that DGS "shall demonstrate that the overall building ... height ... will not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property, in particular: (1) The light and air available to neighboring properties shall not be unduly affected; (2) The privacy of use and enjoyment of neighboring properties shall not be unduly compromised; ... and (5) The resulting building ... height, as viewed from the street, alley, and other public way, shall not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage". **11 DCMR 400.23(a)(1)-(2)** and **(5)**. Moreover, in **11 DCMR 350.2**, the zoning regulations established that, "in R-5-A Districts [such as the neighborhood of 4200 6th Street], only a low height and density shall be permitted". **11 DCMR 350.2**.

Unfortunately, the DGS application ignored this mandate. In **Roumel v. D.C. Board of Zoning Adjustment**, 417 A.2d 405 (D.C. 1980), the District of Columbia Court of Appeals expressed concern about similar problems when it affirmed a BZA judgment that a proposed home construction "create[d] an overcrowded situation in the area". **Roumel**, 417 A.2d at 407. According to the court in **Roumel**, BZA concluded "that the granting of the application would be of substantial detriment to the public good and would impair

the intent of the Zoning Regulations". **Roumel**, 417 A.2d at 407. As noted by the court, BZA determined that "the proposed dwelling would interfere with the light and air of the abutting property owners" and "would result in ... undue crowding of the land". **Roumel**, 417 A.2d at 407. In the end, BZA decided "that ... the application could not be granted because of the adverse effect on adjoining property which construction of the proposed dwelling would cause". **Roumel**, 417 A.2d at 407.

In **Roumel**, the District of Columbia Court of Appeals acknowledged that BZA may grant an area variance when

it finds three conditions: (1) the property is unique because, *inter alia*, of its size, shape or topography; (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.

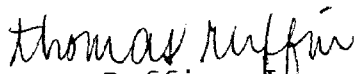
Roumel, 417 A.2d at 408. After stating this rule, the court in **Roumel** explained that the term "overcrowding" refers, among other things, to the density of structures ... on different lots in a given area". **Roumel**, 417 A.2d at 408. The court then determined that "an overcrowded situation is supported ... by ... findings of adverse impact on adjoining property owners and the substantial size of the variance requested". **Roumel**, 417 A.2d at 408.

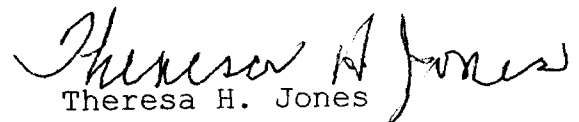
Based on the **Roumel** precedent, the DGS application for variance relief should be firmly rejected. Whereas in **Roumel** the applicant wanted to erect a tiny house that would closely abut two neighboring homes at the corner of Garfield and Hurst Streets, N.W., the DGS **Application No. 19288** asks BZA to grant an area variance so that DGS can construct a massive six-story shelter for 178 residents, with the shelter abutting scores of garden apartments, several row houses, a day care center, and a public elementary school. In the case of DGS' **Application No. 19288**, an overcrowded situation will impose an "adverse impact on adjoining property owners", and that impact will largely result from the "substantial size of the variance requested" for the 178-bed emergency shelter. **Roumel**, 417 A.2d at 408.

CONCLUSION

For the reasons stated in this letter, my colleague and I dissent from the ANC-8D resolution on Thursday, June 23, 2016, with regard to DGS' **Application No. 19288**. In fact, Ms. Theresa Jones and I, as members of ANC-8D, ask the Board of Zoning Adjustments to deny the variance relief that DGS requested.

Sincerely,


Thomas Ruffin, Jr.
ANC 8D-05


Theresa H. Jones
ANC 8D-07

c: Anita Butani D'Souza, Vice-Chairperson
Frederick L. Hill
Jeffrey L. Hinkle