BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPLICATION OF **BZA APPLICATION NO. 19450**
D.C. DEPARTMENT OF GENERAL SERVICES **DECISION DATE: APRIL 5, 2017**

APPLICANT'S CLOSING STATEMENT

As established during the approximately seven-hour public hearing on March 1, 2017 (the "Hearing") and the voluminous, 241-exhibit record (the "Record"), the District's Department of General Services (the "Applicant") has provided extensive expert and witness testimony that fully satisfies its burden of proof in this case. At the Board's request, the Applicant now provides a Closing Statement that summarizes the evidence in support of the application and incorporates the applicable legal precedent on the following matters:

- The Board's authority is focused only on evaluating zoning relief requests;
- The reduced standard of review for the Project, a public service use;
- Claims of self-created hardship are not a factor because relief is area variance;
- Applicant satisfies burden of proof for the requested variance relief;
- Applicant satisfies burden of proof for special exception relief for proposed Emergency Shelter use; and
- Applicant satisfies burden of proof for other requested special exceptions relief.

The arguments and statements set forth by the party in opposition, the Neighbors for Responsive Government ("NRG"), were speculative and anecdotal. The Record is exceedingly clear that NRG's main, and indeed, driving desire is to force the selection of another project site. Having failed before the D.C. Superior Court as to their requested "do-over on site selection," (Hearing Tr. at 161), NRG now challenges the zoning relief as a means of forcing this Board to say "no to the selection of the police station site." (Hearing Tr. at 161).

After addressing those arguments directly and expressly documenting how the substantive evidence in the Record, supports the Applicant's case, the Applicant respectfully requests that the

Board grant the requested relief necessary to construct an Emergency Shelter (the "Project") at 3320 Idaho Avenue, NW (the "Property").[1]

I. THE BOARD'S AUTHORITY EXTENDS TO APPROVAL OR DENIAL OF APPLICANT'S REQUESTED ZONING RELIEF

NRG's counsel erroneously argued that the "Board has the full power to say no to the selection of the Rhode Island Avenue site." (3/1 Hearing Tr. at p. 161 Lines: 5-6). *See also* (CFRO's other statements: the "Board was fully empowered to remedy our concerns about site selection"; and "This Board should reject this claim and fully embrace its power to say "No" to this site…" (3/1 Hearing Tr. at pp. 161 Lines: 21-22 and 162 Lines: 15-17). These statements clearly establish that NRG is asking the Board to reverse the Council's decision and require that the Project be located elsewhere. That task is outside the Board's purview.

In review of an application for zoning relief, "[t]he powers of the BZA are those defined by statute and regulation." *See President & Dirs. of Georgetown College v. Board of Zoning Adjustment*, 837 A.2d 58, 68 (2003). In this matter, the Board's statutory authority – derived from D.C. Code § 6-641.07(g)(2-3) – is focused solely on whether the Applicant may be granted the specific zoning relief requested, three area variances and two special exceptions. It is instructive that the variance standard calls for the Board to consider the extraordinary condition of "a specific piece of property." *See* D.C. Code § 6-641.07(g)(3); *see* Subtitle U § 1000.1. Contrary to NRG's assertion, this statutory authority does not include the power to dictate the Applicant's selection of a property for the Project, nor does it call for the Board to determine the existence of other properties for which the Applicant may not require zoning relief. The Court may have meant that

[1] The Applicant has requested variance relief from the requirements for height and number of stories (Subtitle F § 303.1), loading (Subtitle C § 901.1), and number of primary structures on one lot (Subtitle C §302.2), as well as special exception relief to operate an Emergency Shelter in the RA-1 zone (Subtitle U § 420.1(f)) and for a temporary, accessory parking use (Subtitle U § 203.1(j)).

the BZA could resolve whether this site is appropriate for an emergency shelter, but not that the BZA could second guess the Council's determination. Counsel for NRG asks for "a do-over on site selection," but that is not the purview of the Board. (3/1 Hearing Trans. at p. 161). The selection of the Property, or the D.C. Council's authorization process for the Property to be used as an Emergency Shelter, is not under review.

II. AS A PUBLIC SERVICE, THE PROJECT IS ENTITLED TO REDUCED STANDARD OF REVIEW

As the evidence and testimony establish, and NRG acknowledges, the Project is a "public service" and the Board may apply a reduced standard of review for the Applicant's case. *See Monaco v. Board of Zoning Adjustment*, 407 A.2d 1091, 1099 (1978); *see also National Black Child Development Institute, Inc. v. Board of Zoning Adjustment*, 483 A.2d 687, 690 (1984). (NRG's counsel concedes this point stating "NRG does not dispute that DGS is entitled to a little more leeway than the private sector in seeking variance relief for this public service project." (3/1 Hearing Tr. at p. 166 Lines: 5-7).

In regard to the "public service" standard, the D.C. Court of Appeals sets forth that "public need is an important factor in granting or denying a variance," and the Board "does not err in considering the needs of the organization" as an exceptional condition in the area variance test." *See id.* The Court of Appeals has also recognized that an applicant whose project promotes the "public welfare" may be entitled to the reduced "public service" standard as well. *See National Black Child Development Institute, Inc. v. Board of Zoning Adjustment* at 690. Indeed, this Board has applied the "public service" standard on numerous occasions, including BZA cases 18240, 18272 and 17973.

At the Hearing, the Applicant offered extensive testimony outlining the nature of the Project as a public service. Through the testimony of City Administrator Young, Director

Zeilinger, Director Gillis, and Chairman Mendelson, the Applicant highlighted the acute public need to resolve the District's homelessness crisis, the programmatic needs for the Project and how those needs drive the Applicant's request for zoning relief at this Property. *See* BZA Exhibit Nos. 226-228. Indeed, the Project is a key facet of the District's "Homeward D.C." plan to make homelessness rare, brief and non-recurring. *See* BZA Exhibit Nos. 226-228.

The evidence reflects that over 8,300 persons were experiencing homeless in the District at a given point in time in January 2016. *See* BZA Exhibit 235, Tab C. At the hearing, Director Zeilinger testified that there are currently 941 families in emergency shelters in the District. Rabbi Aaron Alexander, speaking in support of the application, called the Project "a clear and unequivocal moral imperative." The public need could not be more acutely stated than from Latia Barnette, a current resident of D.C. General. Ms. Barnette testified that D.C. General is "not fit for living at all," that she and her children were always sick there (she once woke up and her "whole face was swollen"). The Board has the ability to approve "better quality family shelters where families can live in a decent manner and get case management so they can get back on their feet into permanent housing." The evidence and testimony is clear, the Project is a public service that will promote the public welfare by providing a safe and dignified emergency shelter in Ward 3 for District families experiencing homelessness. (3/1 Hearing Tr. at p. 147-49).

Moreover, the degree of relief requested by the Applicant aligns with other "public service" projects approved by the Board, as indicated in the chart below:

- BZA Case 18240
    - Rear yard – required: 15'; provided: 0' (**100% increase**)
- BZA Case 18272
    - Height – maximum: 70'; provided: 90' (**29% increase**)
    - Uniform roof enclosure – maximum: 13'; provided: 18' (**39% increase**)
- BZA Case 17973
    - Parking – required: 21 spaces; provided: 7 spaces (**67% increase**)
- BZA Case 19287

        - Height – maximum: 40’; provided : 49.5’(**24% increase**)
        - Stories – maximum: 3; provided: 4 (**33% increase**)
        - Lot occupancy – maximum: 40%; provided: 58-64% (**up to 60% increase**)
        - FAR – maximum: . 9; provided: 2.38 (**164% increase**)
        - Side yard – minimum: 12.38’; provided: 5’ (**60% increase**)
        - Rear yard – minimum: 20’; provided: 14.25’ (**29% increase**)
    - BZA Case 19288
        - Height – maximum: 40’; provided: 67’ (**68% increase**)
        - Stories – maximum: 3; provided: 6 (**100% increase**)
        - Loading/Service-Delivery – required: 1 of each; provided : 0 (**100% increase**)
    - BZA Case 19289
        - Height – maximum: 50’; provided: 59’ (**18% increase**)
        - FAR – maximum: 2.5; provided: 2.83 (**13% increase**)
    - BZA Case 19451
        - Height – maximum: 35’; provided: 88.5’ (**153% increase**)
        - Stories – maximum: 3; provided: 7 (**133% increase**)
        - Parking – required: 26 spaces; provided: 12 spaces (**54% increase**)

Clearly, contrary to the assertion of NRG, the degree of zoning relief requested for the Project is very much in-line with similar “public service” projects in the District, including the relief granted for the four other Emergency Shelter cases. (BZA Case Nos. 19287, 19288, 19289 and 19451).

III. SELF-CREATED HARDSHIP CLAIMS NOT RELEVANT

NRG also attempts to cobble together a confusing argument urging the Board to apply the “self-created hardship” standard here. Such effort should fail because it is a misstatement of the law and prior Board precedent. Rather, it is well-recognized precedent that a self-created hardship is not a factor to be considered by the Board in an application for an area variance. *See Ass’n for Pres. Of 1700 Block of N St., NW & Vicinity v. Board of Zoning Adjustment*, 384 A.2d 674, 678 (1978)*; see also* BZA Case No. 18651. NRG offered no factual, expert or legal basis to support its claim that the Applicant is seeking a use variance for the Project. To the contrary, the record reflects that the Applicant has requested three area variances and two special exceptions, as agreed and documented by the Zoning Administrator at BZA Exhibit 202A, Tab A.

The apparent basis of NRG's "self-created" hardship argument is two-fold. First, NRG attempts to argue that relief from the Subtitle C § 302.2 limitation of one structure per Property should be treated as a "use" variance- or even more confusingly a "hybrid area/use variance." This argument fails because this relief has nothing remotely to do with *uses* and that the RA-1 Zone has no express limitations on the number of *uses* on a property. Rather it has a limitation on the number of structures on a lot, irrespective of the proposed uses. Indeed, if the Project structure *could* be connected to the MPD Station structure through a meaningful connection, this relief would not be necessary. That is not possible here, so the area variance relief is requested.

Second, NRG attempts to argue that "self-created" hardship applies here because the Applicant was aware of the exceptional conditions on the Property, and accordingly, should have walked away from the site or chosen another site. Again, this contention lacks legal support. In *Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1169 (D.C. 1990), the Court found that "[p]rior knowledge or constructive knowledge or that the difficulty or hardship is self-imposed is not a bar to an area variance." Moreover, other "self-created hardship" cases based on prior knowledge considered by the Board and the Court of Appeals concern market-rate projects or commercial entities where financial windfall was to be gained. *See DeAzcarate v. Board of Zoning* Adjustment, 388 A.2d 1233 (1978); *see also Oakland Condo Ass'n v. Board of Zoning Adjustment*, 22 A.3d 748 (2011); *see also A.L.W. v. Board of Zoning Adjustment*, 338 A.2d 428 (1975). Here, the evidence illustrates that the Applicant is a District agency and the Project is part of a District policy initiative addressing homelessness, not a for-profit commercial entity.

The Applicant does not, despite NRG's baseless claims, have an y reasonable alternative sites in Ward 3 that would meet the specific needs of this program. The Project supports the all-8 Ward strategy, thus acknowledging the limit to finding appropriate sites in Ward 3. Any alleged

"self-created hardship" by the Applicant is in good faith and does not result in a financial benefit to the Applicant. Thus, previous cases concerning a "self-created hardship" are not instructive for the Project.

IV. THE APPLICANT SATISFIED ITS BURDEN FOR AREA VARIANCE RELIEF FOR TWO PRIMARY STRUCTURES ON ONE LOT

NRG's specious argument against the requested relief from Subtitle C § 302.2, is based on the faulty premise that this request is a use variance, which fails for the reasons stated above,[2] and a convoluted argument on the Comprehensive Plan that in actuality opposes the site selection. These arguments fail.

Instead, the Record is clear that the Applicant has met the burden for an area variance from Subtitle C § 302.2, which calls for each new primary structure to be erected on a separate lot of record in the RA-1 Zone District. For this area of relief, the Applicant presented testimony from both Chairman Mendelson and City Administrator Young as to the D.C. Council's selection of the Property as the authorized Ward 3 location for the Project. *See* BZA Exhibit Nos. 224 and 228. Given the limited District-owned inventory in Ward 3, Director Gillis testified that once the D.C. Council encouraged district-owned land for the Project, this necessitated that the Project would be co-located on a single lot with another city use. *See* BZA Exhibit No. 226. Here, the Property is home to the Metropolitan Police Department's second district station, an impound lot, refueling station, community garden and tennis courts. Accordingly, existing configuration, layout, topography and condition of the Property is an exceptional condition.

The Project architect, Joseph McNamara of Ayers Saint Gross, testified that absent relief from Subtitle C § 302.2, the Applicant would face a practical difficulty in complying with the

[2] NRG's counsel also urges the Board to disregard the Zoning Administrator's proper conclusion relief from Subtitle C § 302.2 is an area variance, not a use variance. 3/1 Hearing Tr. 164 Lines: 4-6. Such effort should fail because it is well accepted that the Zoning Administrator's role is to administer and interpret the Zoning Regulations.

Zoning Regulations. Mr. McNamara testified that connecting two structures - the Project and the MPD station - was not viable, as creating a meaningful connection for a compliant single primary structure would not be recommended. Accordingly, complying with Subtitle C § 302.2 would create a practical difficulty for the programmatic needs of DHS and the needs of MPD.

As to the third prong of the variance test, the Applicant put forth evidence, including letters from MPD, HSEMA and FEMS, that this area variance relief would not be of substantial detriment to these agencies' use of the Property or the public good. Additionally, the Project does not impair the District's zone plan, as the District's Comprehensive Plan encourages co-location of public community service buildings.

V. THE APPLICANT SATISFIED ITS BURDEN FOR AREA VARIANCE RELIEF FROM MAXIMUM HEIGHT AND STORIES

The Applicant meets the burden for an area variance from the maximum permissible height and stories in the RA-1 zone as set forth in Subtitle F § 303.1. Director Zeilinger and Director Gillis' testimony establish that there are exceptional conditions facing the Property. *See* BZA Exhibit Nos. 226-227. As noted above, Director Zeilinger testified extensively on the programmatic needs for the Project, specifically that the Project must incorporate 50 units, with no more than 10 units per floor, as well as wrap-around services. *See* BZA Exhibit No. 226. The programmatic need for close to 10 units per floor was not plucked from the sky. Rather, this need is the product of an extensive study of the best possible circumstance for families experiencing homelessness, conducted by experts and consultants in providing homeless services that were selected for the ICH. Moreover, the disappearance of a young girl, Relisha Rudd, from the DC General emergency shelter was also an important catalyst for this programmatic requirement. Director Gillis also confirmed that preservation of the existing MPD station, MPD refueling station, and the Newark Street Community Garden was a main objective for the Project's site plan.

See BZA Exhibit No. 227. Both Director Zeilinger and Director Gillis' testimony establish that there are exceptional conditions facing the Property.

The evidence further demonstrates the practical difficulty for the Applicant in complying with Subtitle F § 303.1. Mr. McNamara testified as to the need to preserve the existing structures and the community garden, and how those elements affect the overall building height and number of stories. Mr. McNamara established that:

- Building two shorter structures would not meet programmatic needs.
- Building a shorter structure with two wings would not meet programmatic needs.
- Lowering the Project by a story and adding units to each floor creates design challenges and would not meet programmatic needs.
- Any further reduction in the overall building height would be in increments of 8 inches due to the building's masonry. Such a reduction for each floor, as designed, would create a floor-to-ceiling height of 7'8", which is below industry standard for residential dwelling units.

The Applicant demonstrated compliance with the final prong of the area variance test as well. The Applicant offered evidence and testimony that the Project's height and stories would not cause substantial detriment to the public good or to the zone plan. Notably, the southern side yard will be 63 feet – almost a 1:1 ratio with the building's height – providing a buffer for the neighboring residences. As demonstrated by the Applicant's shadow study, the Project will not cast a single shadow on neighboring properties and, therefore, any impact to neighboring properties as to light and air would not be substantial or adverse. *See* BZA Exhibit No. 202B. The Project is in accord with the zone plan that encourages provision of homeless services through smaller shelters.

NRG objects to the Project's height and stories claiming substantial detriment to the public good. However, in support of this claim, NRG produced only one architectural image illustrating that the Project will be next to a two-story single family house, which is an undisputed fact. The Applicant, however, submitted expert testimony and renderings showing the existing conditions, the dense tree cover in the area, the side yard separating the Project from neighboring properties, and the surrounding context of five, six and nine story buildings. Accordingly, NRG's reliance on a vague claim that the degree of height relief is simply "too great" should carry limited weight.

Similarly, NRG's reference to a report of the U.S. Commission of Fine Arts ("CFA") is misguided. The CFA "comments and advises on the plans and on the merits of the designs," but cannot require design changes, including to the Project's height. *See* 45 CFR 2101.1. Importantly, the CFA's report was limited to a review of "concept designs" and reflects no consideration of the District's zoning regulations or the Board's obligation to review the public service needs of the city. Therefore, the CFA's review of the Project vastly differs from how the Board reviews the height relief. Indeed, the Board is expressly charged with reviewing the extensive evidence of exceptional conditions; programmatic requirements; and no substantial impact on the neighborhood, that are beyond the scope of the CFA's review.

However, even if the CFA's recommendations were given great weight by the Board, there is substantial evidence in the Record that the Applicant could not satisfy the District's programmatic needs with a massing that is more consistent with the CFA's recommendation. To that end, the Applicant's architectural expert stated that CFA's "feelings are entirely their own and valid on their own, but they don't understand the needs that DHS has for these emergency shelters . . . [CFA's]view of it is not one that we may be able to execute." (3/1 Hearing Tr. at p. 74). The

Board should therefore find that the Applicant meets the standard for height relief, given the ample evidence presented by the Applicant concerning the constraints on the site.

VI. THE APPLICANT SATISFIED ITS BURDEN FOR AREA VARIANCE RELIEF FROM LOADING AND SERVICE/DELIVERY REQUIREMENTS

The Project does not provide a loading berth or a service/delivery area, as required by Subtitle C § 901.1, and the Applicant requests relief from this requirement. As set forth in the record, the need for relief arises from a confluence of factors creating an exceptional condition. The layout of the lot with the existing MPD building and community garden, as well as the existing paved area, limit the reasonable amount of area the Project may occupy on the lot. Mr. McNamara testified that the Project's design must take into account street access for the MPD building and the parking deck; therefore, the Project cannot expand its footprint toward the MPD station. Mr. McNamara also testified that the Project cannot expand toward the rear of the Property because the outdoor recreational space is located in that area and the pre-existing 10-foot brick wall further minimizes space to the rear of the Property. In response to community feedback, the Applicant modified the Project to include a large, southern-facing side yard to buffer the Project from neighboring properties, which further restricts the available building area. Due to a confluence of these factors, the Applicant faces a practical difficulty incorporating the required loading berth and service/delivery area on the Property.

The record and testimony further establish that there will be no detriment to the public good or the zone plan due to an absence of a loading berth and service/delivery area. To that end, the Applicant's Traffic Study, *see* BZA Exhibit No. 37, establishes the following:

-The Project design provides adequate loading access, particularly given the Emergency Shelter use.

-The Project will be fully furnished, decreasing the need for a full-size loading berth.

-Delivery of meals twice per day can be accomplished at the delivery zone on the northern side of the Project.

At the Hearing, Nicole White of Symmetra Design, who was accepted by the Board as an expert in traffic engineering, affirmed these findings. Notably, the District's Department of Transportation ("DDOT"), the District's technical experts on transportation, conducted a detailed review of the application, and determined that it had "No Objection" to the Project, including the absence of a formal loading berth and service/delivery area. *See* BZA Exhibit No. 125. As a result, the evidence and testimony indicate that the Applicant has met its burden to obtain variance relief from these zoning requirements.

VII. THE PROPOSED EMERGENCY SHELTER SATISFIES SPECIAL EXCEPTION REQUIREMENTS OF SUBTITLE U § 420.1(f)

The substantial evidence in the record, coupled with the Hearing testimony, undoubtedly support a conclusion that the Project satisfies the requirements of Subtitle U § 420.1(f) for the operation of an Emergency Shelter exceeding 25 persons[3] in the RA-1 zone. NRG does not actively attempt to refute the clear evidence in the record, as NRG failed to provide any experts in opposition. Rather, NRG's arguments are limited to the following baseless objections: (1) The proposed size of the Project is "beyond any plausible limit"; (2) The Project would cause "adverse impacts in the neighborhood"; and (3) The record lacks "evidence of a search for reasonable alternative sites." Yet, NRG relies on conjecture, speculation and unfounded perceptions, as these claims lack any basis in the record. For these reasons, NRG's claims must be disregarded, and the

[3] While it appears that NRG all but dropped its prior, baseless claim, that the Project did not satisfy the requirement of an "Emergency Shelter" use, it is helpful to remind the Board that the Director of DHS, who was also qualified by the Board as the Applicant's expert in homeless services, expressly testified that the Project fit the zoning definition of an "Emergency Shelter" as set out in Subtitle B, §100.2. *See* BZA Exhibit No. 227. Accordingly, special exception is the correct relief, and no use variance or "self-created hardship" is at issue in this case. *See Ass'n for Pres. Of 1700 Block of N St., NW & Vicinity v. Board of Zoning Adjustment, 384 A.2d 674, 678 (1978)*(establishing that a self-created hardship is not a factor to be considered by the Board in an application for an area variance).

Board should find that substantial evidence in the record strongly supports the Applicant's special exception request for an Emergency Shelter in the RA-1 zone.

A. Subtitle U § 420.1(f) does not establish a "per person" cap

The clear language of Subtitle U § 420.1(f) does not establish a maximum number of "persons" permissible in an Emergency Shelter. On the contrary, Subtitle U § 420.1(f)(6) thoughtfully requires that the Board make two findings prior to approval of a special exception for an Emergency Shelter exceeding 25 persons. A detailed discussion of the evidence in the record that supports such a finding is in Section "C" below. However, without any evidence in the record or basis in regulatory history, NRG continues to claim that Subtitle U § 420.1(f) places a cap on the number of Emergency Shelter residents.

Simply put, the clear language of Subtitle U § 420.1(f) establishes that there is no cap on the number of residents in the Project. Indeed, it is a well-settled rule of statutory and regulatory interpretation that "the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them." *See Davis v. United States*, 397 A.2d 951, 956 (1979). Thus, NRG's attempt to insert a cap or limit into the Zoning Regulations must fail. Based on the clear language of Subtitle U § 420.1(f), there is no maximum number of persons at an Emergency Shelter, and the Board may approve a shelter the size of the Project (or any number more than 25) provided the conditions of Subtitle U § 420.1(f)(6) are satisfied – which they are in this case.

B. The Board approved special exceptions for similarly-sized Emergency Shelters in Wards 4, 6, 7 and 8.

It is important to remind the Board that Emergency Shelters ranging in size from 35 to 50 units (with an average resident capacity of 105 to 150 persons) have been approved in Wards 4, 6, 7 and 8. *See* BZA Case Nos. 19287, 19288, 19289 and 19451. All four of these projects required

special exception relief from the 25-person limitation in the Emergency Shelter special exception regulations.

Of particular relevance to the subject case is the Ward 8 site, which was zoned R-5-A, the precursor to the RA-1 zone. In that case, pursuant to 11 DCMR § 358.8 of the 1958 Zoning Regulations, which has identical language to the current 11 DCMR Subtitle U § 420.1(f)(6) [4], the Board approved relief from the 25-person Emergency Shelter restriction for a 50-unit building that was anticipated to house a similar number of persons to the Project. While such decisions are property-specific on their face, it is important to highlight that, in approving the previous emergency shelter cases, and the Ward 8 facility in particular, the Board has already concluded that an Emergency Shelter similar to the Project is in "harmony" with the RA-1 Zone. The legal requirement of "*stare decisis*" directs the Board to make the same finding here, and approve the proposed 50-unit facility, which would average 150 residents.[5] *See Hensley v. D.C. Dep't of Empl. Servs*., 49 A.3d 1195, 1203 (D.C. 2012) (internal citations omitted).

It is also instructive to highlight that in 1991, the Board approved a 138-person Emergency Shelter in a portion of Ward 6 zoned R-4. *See* BZA Case No. 15412. Accordingly, the Board has approved emergency shelters of this size in the past. For these reasons, NRG's argument that the size of the Project "is beyond any plausible limit" must be rejected. The Board should follow its own precedent established in recent and historical emergency shelter cases and approve the Project, as proposed, provided that the conditions of 11 DCMR § 420.1(f)(6) are met, as demonstrated below.

[4] 11 DCMR §358.8 of the 1958 Zoning Regulations reads: "The Board may approve a facility for more than twenty-five (25) persons, not including resident supervisors or staff and their families, only if the Board 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."
[5] Notably, approximately 60% of the residents will be babies, toddlers, and children.

C. The evidence in the record establishes that the Project will not have an adverse impact on the neighborhood.

The Emergency Shelter special exception can be granted if substantial evidence in the record demonstrates that "[t]he facility shall not have an adverse impact on the neighborhood because of traffic, noise, operations, or the number of similar facilities[6] in the area." *See* 11 DCMR § U-420.1(f)(4).[7] In a blanket allegation, NRG contends that the Project should not be approved due to "adverse impacts in the neighborhood." Such claims must fail because the record and the testimony establish that the Project will not create an adverse impact due to traffic, noise, operations, or the number of similar facilities in the area.

- Traffic

The Applicant submitted a detailed Transportation Study, which included a parking analysis. The Transportation Study concluded that the Project will not have an adverse impact on the surrounding community. *See* BZA Exhibit No. 40. The Transportation Study was prepared by Symmetra Design, a respected and experienced traffic consulting company. As noted above, Symmetra Design's principal, Nicole White, was accepted by the Board as an expert in traffic engineering at the Hearing. Furthermore, DDOT determined that it had "No Objection" to the Project.

In this respect, NRG's unsubstantiated claims of on-street parking difficulties and perceived traffic have no evidentiary backing. Indeed, NRG's witnesses presented layman statements of traffic but no "tangible" evidence to counter the Applicant's traffic expert and/or

[6] The Record reflects that there are no Emergency Shelters within 500 feet of the Property or within Square 1818. NRG does not argue, or offer any evidence, to the contrary.

[7] The Applicant notes that facility height, impact on neighboring light, air and privacy are not identified as "adverse impacts" under 11 DCMR § 420.1(f)(4). However, NRG and others have continued to allege adverse impacts due to the Project's height. Such claims lack substantial evidence in the record. Rather, as demonstrated in the sun studies at BZA Exhibit No. 202B, the Project will not have an adverse impact on light and air.

DDOT's conclusions. NRG alleged that there is existing congestion near the Property, but NRG failed to provide any evidence that the Project will worsen the existing traffic conditions. Moreover, NRG asked Ms. White very few questions and did not take other actions at the Hearing to substantiate their claims. In sum, the evidence in the record supports a finding that the Project will not have an adverse impact on neighboring property due to traffic.

- Noise

The Applicant's witnesses conclusively testified that the Project would not have an adverse impact as to noise. Mr. McNamara testified that the Project will be LEED Gold certified, which requires noise dampening materials and mechanical equipment. Director Zeilinger, an accepted expert in homeless services, testified that residents would enter and exit the building at different times, further limiting the noise impact.

NRG offered no substantive evidence that the Project would generate an excessive amount of additional noise. In this respect, NRG failed to distinguish any excessive noise from the Project with existing conditions in the neighborhood, including trash pick-up from the MPD station, police sirens and other noise from police operations, the tennis courts and playground in the community garden, and the loading area for Cathedral Commons. An NRG witness claims that homeless children playing outside and making noise is "not an appropriate place to be in a residential neighborhood." (3/1 Hearing Tr. at p. 194 lines 16-19). Director Zeilinger's testimony refutes these shameless claims with documentation and reference to the ICH that residential communities are what these families need and where these families should be located. Accordingly, the evidence in the record is clear that the Project will not have an adverse impact on the neighborhood because of noise.

- Operations

On the topic of operations, both the City Administrator and Director Zeilinger testified that the Project's operator would be bound by a "Good Neighbor Agreement" with the adjacent neighbors, which will establish operational frameworks limiting any adverse impacts on the neighborhood. *See* BZA Exhibit Nos. 227 and 228. The Good Neighbor Agreement will address expectations and commitments regarding exterior facility and landscape maintenance, safety and security, and mutual codes of conduct and respect. *See* BZA Exhibit No. 227. Director Zeilinger testified that "I've also met many people who don't even realize that a homeless program is operating just down the street or right around the corner from their homes or offices." *See* BZA Exhibit No. 227. Moreover, DDOT has determined that the operations of the Project will not have an adverse impact on the neighborhood. *See* BZA Exhibit No. 125.

Similar to noise and traffic, NRG did not provide any specific evidence of adverse impacts due to the Project's operations other than non-zoning specific claims of rat infestation, light pollution, crime and safety – all of which are hypothetical, unsubstantiated assertions having no correlation to the zoning relief requested. NRG's claims are amorphous and do not withstand the Board's level of scrutiny. Thus, the evidence in the record establishes that the Project will not have an adverse impact on the neighborhood due to operations.

D. The evidence in the record demonstrates that the Applicant satisfies both prongs of 11 DCMR Subtitle U § 420.1(f)(6) because there can be no smaller project at the Property and there is no reasonable alternative site in Ward 3.

The clear evidence in the record establishes that the Applicant satisfies both conditions for the Board to approve an Emergency Shelter of this size pursuant to Subtitle U § 420.1(f)(6), which reads:

> The Board of Zoning Adjustment may approve an emergency shelter for more than twenty-five (25) persons, not including resident

> supervisors or staff and their families, only if the Board of Zoning Adjustment 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.

While NRG focuses its efforts and statements on the second prong - "no reasonable alternative" - it must be noted that the undisputed evidence in the record reflects that the Applicant also satisfies the first prong of this condition. Accordingly, the Board should find that the Homeward DC's program goals and objectives cannot be achieved by a smaller project at the Property.

i. The record establishes that the District's program goals and objectives – closing D.C. General by 2020 and creating smaller, dignified emergency shelters for families – cannot be achieved by a smaller building at the Property.

In light of the number of families at D.C. General and the number of replacement units dictated by the D.C. Council's legislation, Director Zeilinger testified that a smaller building at the Property would not meet the District's goal of closing D.C. General. *See* BZA Exhibit No. 227. From a design perspective, Director Gillis testified that creating multiple, smaller facilities in Ward 3 would require starting the project development process from scratch, impacting the District's ability to achieve its goal of closing D.C. General by 2020. As stated above, Mr. McNamara also confirmed that a smaller building on the Property would not meet the programmatic goals and objectives of DHS, the city, and the D.C. Council.

ii. The record establishes that there is no reasonable alternative to meet the program needs in Ward 3.

To be blunt, NRG's main purpose and goal in opposing the Project is to somehow force the D.C. Council to go back to the proverbial drawing board and authorize a new Ward 3 emergency shelter site that is further from their homes. It is telling that despite significant public outreach by the District, and a public hearing on March 17, 2016 concerning the initial Ward 3 site location at 2619 Wisconsin Avenue, NW, NRG did not form until June 2016, a few months after

the Property, near their homes, was selected by the Council. *See* BZA Exhibit No. 164A1. Indeed, in August 2016, NRG filed suit in the D.C. Superior Court asking that body to reject the Council's selection of the Property; yet, that attempt failed, as the lawsuit was dismissed by the D.C. Superior Court in February 2017. *See id.* Now, NRG has re-packaged this effort into its current form – allegations that the Applicant has failed to produce evidence of a "search for reasonable sites."

However, this claim fails on both the law and the facts. The well-developed record, including testimony from Chairman Phil Mendelson, the City Administrator Rashad Young and Director Gillis, establishes with particularity the efforts taken to review alternative sites in Ward 3. Importantly, the evidence reflects the clear conclusion that no other reasonable site existed in Ward 3 that would meet the program's needs and the District's goals.

First, as stated above, Subtitle U § 420.1(f)(6) directs that the Board find "there is no other reasonable alternative to meet the program needs of that area of the District." Notably, the term "search" is not included in the text of Subtitle U § 420.1(f)(6). As stated above, it is a well-settled legal precedent that "the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them." *See Davis v. United States*, 397 A.2d 951, 956 (1979). Indeed, the clear statutory construction of this section does not require that the Board find there to be evidence of a "search" for reasonable alternatives, just that no reasonable alternatives exist. Despite NRG's attempt to read words into the statute, the requirement here is straight forward: The Board need only conclude that substantial evidence supports a finding that "no reasonable alternatives" exist in Ward 3 to meet the District's program needs in that area.

Notwithstanding, the clear evidence in the record establishes that a search was, in fact, conducted – in that alternative sites were evaluated and discussed – and that it was determined by the District that there was "no reasonable alternative" in Ward 3. As discussed at length by

Director Gillis, DGS began the search for appropriate sites in 2014, looking first at District-owned properties, and then releasing a Solicitation of Offers ("SFO") for leasing and acquiring property based on certain metrics – a site ranging in size from 12,000 to 30,000 s.f., close to public transportation, economically feasible and developed within a 24-30 month timeline. *See* BZA Exhibit No. 226. The District also hired a broker to help identify sites in Ward 3. *See* BZA Exhibit No. 226. After evaluating the site qualifications, 2619 Wisconsin Avenue, NW, a privately-owned site, was determined to fit the criteria. Accordingly, the evidence in the record is clear that DGS conducted a multi-year search of both District and privately-owned properties that included numerous properties in Ward 3. Despite the extensive public record filed in this case, on the website, and available upon request, CFRO presented no contrary evidence but only baseless claims.

The subject Property was ultimately selected by the D.C. Council and legislatively adopted through D.C. Act 21-412. As Council Chairman Phil Mendelson testified, "the Council considered a number of suggested locations." *See* BZA Exhibit No. 224. On May 17, 2016, the Council voted to change the "economic structure of the plan so that all of the sites would be owned, not leased by the City". *See* BZA Exhibit No. 224. Chairman Mendelson concluded that "when all of the factors, including the ones just mentioned, are taken together, all of the suggested locations, including the Mayor's proposal, were less reasonable than 3320 Idaho Avenue." *See* BZA Exhibit No. 224.

While Subtitle U § 420.1(f)(6) does not require the Applicant to conduct a "search" for alternative sites in order to obtain special exception relief, the clear, substantive evidence in the record establishes that the Applicant did, in fact, "search" for reasonable alternative sites in Ward

3. Contrary to NRG's assertions, the evidence establishes that there are no other reasonable sites in Ward 3 and the Applicant satisfies the requirements of Subtitle U § 420.1(f)(6).

Importantly, in 1991, the Board found that the District had satisfied the "no reasonable alternatives" standard to permit an emergency shelter that exceeded the "person limit" in the R-1-B zone. *See* BZA Case No. 15558. Notably, BZA Case 15558 also concerned a proposed emergency shelter located in Ward 3. In that case, the Board credited the District's testimony that the site selection process was sufficient to satisfy the "no reasonable alternative" standard because "efforts were initiated over two years [before that hearing] to identify an appropriate site" and that numerous sites were reviewed and assessed by the District agencies. In that case, the specific site was selected based on its suitability as well as proximity to public transit and because it was "owned by the District of Columbia government, selecting it was fiscally sound."

These facts are strikingly similar to those presented in the subject case, where, as in Case No. 15558, the site selection process began more than two years before the hearing, numerous sites were reviewed, and the Property was selected because it was owned by the District, proximate to transit and found to be suitable. Accordingly, the Applicant would urge the Board to follow its prior precedent and determine, as it did in Case No. 15558, "no reasonable alternative" exists.

In summation, the Applicant has established, in the record and during the Hearing, that all conditions under Subtitle U § 420.1(f) have been met, and the Applicant is entitled to special exception relief for an Emergency Shelter use at the Property.

VIII. CONCLUSION

The extensive record in this case reflects that all parties have fully been able to present their arguments, evidence, and support for their position. Chairman Mendelson stated that there has been "considerable anxiety" that new shelters would meet stiff opposition from neighborhoods.

While you have heard opposition to the Project, you have also heard support from the community, John Eaton parents, local synagogues, and partially from the ANC. The Applicant urges members of the Board to avoid letting unfounded concerns and negative stigmatization of homeless families color the facts of this Application. Based on record, we feel the Board has more than sufficient evidence to approve all areas of relief and support the Project and the Application.

Sincerely,

GRIFFIN, MURPHY, MOLDENHAUER & WIGGINS, LLP

Meridith H. Moldenhauer