BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

In Re Application Of:	:	
	:	**BZA Case Number 19450**
D.C. Department of General Services	:	**Presiding Officer: Frederick L. Hill**
Ward 3 Homeless Shelter Project	:	**Chairperson**
3320 Idaho Avenue, NW	:	

CLOSING ARGUMENT FOR NEIGHBORS FOR RESPONSIVE GOVERNMENT

Neighbors for Responsive Government ("NRG") respectfully submits this Closing Argument in compliance with the Board's Order of March 1, 2017. NRG is also filing herewith extensive Proposed Findings of Fact and Conclusions of Law, which elaborate on the issues addressed in this Argument and provide detailed record support.

SUMMARY

The District Department of General Services ("DGS") is seeking drastic zoning relief to shoehorn a six-story, densely-populated homeless shelter onto a piece of property that is zoned RA-1 for low-rise, low-density residential housing. The proposed shelter is wildly out of scale with the neighborhood, and will be feet from, and loom over, single-family homes in an R-1-B zone. DGS seeks this relief despite the fact that the chosen property is already fully developed with incompatible uses, and the site was selected without the required systematic search for reasonable alternative sites. The affected ANC and the U.S. Commission on Fine Arts objected to at least some of the requested zoning relief. Moreover, granting the requested relief would be contrary to the Zoning Regulations in a plethora of ways.

The evidence in the record demonstrates that each of Applicant's requests for zoning relief must be denied for numerous reasons:

- Applicant has repeatedly failed to meet the deadlines established by the Board's regulations, interfering with the ability of the ANC to assess the District's plans and the ability of NRG to oppose the application. Moreover, the application remains fatally incomplete with respect to both Applicant's late-proposed three-level parking garage and Applicant's very late-filed request for a special exception for temporary parking. The failure to submit requisite documentation and to meet BZA filing requirements denies all affected residents and the affected ANC fair notice and thus the opportunity for due process in response to Applicant's requested substantial zoning relief;

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- Applicant's failure to provide plans and detailed drawings supporting its 3-level parking garage, and its admission that the garage has not even been designed yet, means that Applicant has failed to demonstrate that the proposed garage complies with zoning requirements. In fact, the evidence that is in the record indicates that it does not. As a result, Applicant has not met its burden of proving that the homeless shelter that it proposes to build complies with the parking requirements of Subtitle C, § 701.5, or with the mandatory parking condition in U, § 420.1(f)(2);

- The Application is inconsistent with the Comprehensive Plan and, therefore, must be denied;

- There is no "exceptional situation or condition" giving rise to a cognizable hardship or practical difficulty on the Property. The only hardship or difficulty related to the Property arises from other uses being made by the Applicant (and other DC agencies). Allowing the existence of a use on a property to constitute either a hardship or a practical difficulty would gut variance law – an owner would be free to engage in one use, and then claim that the existence of that use constituted a hardship or practical difficulty entitling the owner to make a further use that otherwise would not be allowed. There would be no meaningful limit. Moreover, the rationale for variances is to ensure that otherwise unusable properties can be used at all; it is generally inappropriate to grant variances to properties that are already being productively used;

- Applicant itself created the conditions requiring relief by deciding to place its shelter on the property with knowledge of the existing conditions and zoning requirements. As a matter of law, this self-imposed hardship precludes the grant of a use or hybrid use-area variance. Moreover, the fact that any practical difficulty is self-imposed should bar area variance relief where, as here, the property is already being productively used;

- Applicant's request for a variance to place two principal structures on one lot is a use variance (or at minimum, a hybrid use-area variance). The need arises from the fact that Applicant seeks to place fundamentally incompatible uses on the same lot – as testified by Applicant's own architect. Thus, the doctrine of self-inflicted hardship precludes the grant of the requested use variance;

- The requested variance to double the number of stories allowed in zone RA-1 and to nearly double the permitted height stems directly from the existence of other uses by the Applicant of the same property. Their presence is not a cognizable practical difficulty. Even with those other uses, there is adequate land on the property to build a building that complies with the height requirement, but Applicant has chosen not to do so. Applicant's preferred (but not mandatory) design is not a practical difficulty. Further, the requested height variance would result in a building that is entirely out of scale with the neighborhood: it is too tall, too dense, and would have material adverse impacts on the neighborhood.

- ANC 3C objected to the requested height variance, and its objection must be given great weight. The U.S. Commission on Fine Arts objected to the proposed design because of its height, and its independent expert recommendation in this regard deserves substantial deference;

- The requested variance to not include a loading berth stems directly from the existence of other uses by the Applicant of the same property, which is not a cognizable practical difficulty. Even with those other uses, there is adequate land on the property to build a building that complies with the loading berth requirement, but Applicant has chosen not to do so. Applicant's preferred design is not a practical difficulty. Further, the requested loading berth variance would have material adverse impacts on the neighborhood;

- Applicant's request for a special exception to build a shelter for 46 times as many residents than is permitted as of right under U § 420.1(f), and 7 times more residents than is ordinarily permitted even by special exception, is beyond any reasonable construction of the approval authority granted in U § 420(f)(6). Moreover, in light of the parameters defined in U § 420.1(f), a shelter for 185 residents is, by definition, not in harmony with the general purpose and intent of the RA-1 zone;

- Applicant's request for a special exception under U § 420.1(f) also fails to satisfy a critical mandatory conditions in U § 420.1(f)(6). Applicant has not met its burden of proving that there is no reasonable alternative site or that a smaller shelter will not satisfy its needs;

- Applicant's request for a special exception under U § 420.1(f) also fails to satisfy U § 420.1(f)(4). Notably, the record makes clear (and Applicant has not proven to the contrary) that proposed shelter will have substantial adverse impacts on the neighborhood from noise, traffic and the operation of the shelter;

- Applicant's request for a special exception under U § 420.1(f) also fails to satisfy the mandatory parking condition in U § 420.1(f)(2). Applicant proposes to satisfy the parking requirements with spaces located in its proposed, but undefined, three-level parking garage. Because Applicant has not demonstrated that it has the right to build the proposed garage, it has not satisfied this condition;

Applicant's request for a special exception for temporary parking under U § 203.1(j) was made long after the deadline, and Applicant still has submitted none of the documentation needed to support that special exception or to meet the conditions imposed in the regulations for that special exception;

- Applicant's arguments to the contrary are without merit:

  - The Board has the full power to deny requested relief in the wake of Applicant's selection of this fully developed property for additional uses. Applicant's new-found argument that it is required by law to locate a shelter

on the Property and that the Board must permit the use of this site is erroneous. Itis directly belied by the language of the Homeless Shelter Replacement Act and by the District's own arguments to the D.C. Superior Court, which the Court adopted. The Act mandates nothing – it merely authorizes the use of the site. Similarly, the Council made clear to the Court that the Board has the full authority to review the Council's site selection and apply ordinary zoning principles, just as it would for any other applicant;

- Applicant cannot prove that it satisfies the "more flexible" standard of *Monaco* and *National Black Child Development Institute*, because neither the choice of the property nor the specific design desired by Applicant are "institutional necessities." Moreover, Applicant is not entitled to the more flexible standard applied in those cases because the standard only applies when a public service organization is seeking to expand an existing building or to continue an ongoing, previously approved use. That is not the case here.

- The Board may not grant the requested relief because Applicant claims that it must have the requested relief so it can close D.C. General on the schedule it desires. Applicant's claims are unsupported and over-stated. The largest delay comes from Applicant's selection of a site on which it needs to take an extra year to build a parking garage, and, in any event, the Board should not be rushed into a destructive decision that will have adverse consequences on a neighborhood for decades.

ARGUMENT

1. Neighbors for Responsive Government

NRG was created in the summer of 2016 to present in an organized manner the concerns of the neighbors in the immediate vicinity of the proposed Idaho Avenue shelter. NRG is composed of neighbors whose properties abut Lot 849, others who live within 200 feet of the proposed shelter, including those who live directly across the street, and those residing in close proximity to the proposed shelter in the adjacent blocks. Ex. 164A1, Pre-Hearing Statement at 2. These are the District residents most directly impacted by the proposal, who were never consulted about the selection of the Idaho Avenue site, and whose Advisory Neighborhood Commission (ANC 3C) to this day has been kept in the dark about material aspects of the plan.

2. The Application Is Fatally Incomplete and Untimely and Must Be Denied Under the Board's Own Rules

Although Applicant asserts that its application must proceed on a rapid timetable, Applicant has itself repeatedly failed to meet the deadlines established by the Board's

regulations. This failure has interfered with the ability of the directly affected ANC to assess and respond to the District's plans. See Oral Test. Of ANC3C Chair Nancy MacWood, Tr. 121:12-124:4. It has also hindered interested parties, including NRG, in mounting an opposition and even in identifying exactly what they need to oppose and what is no longer relevant. The Board, ANC and opponents are left attempting to respond to a continuously moving target and incomplete information.

For example, Applicant's plan to build a three-level above-ground parking garage, a necessary accessory for Applicant to satisfy applicable zoning requirements for parking for its proposed shelter, has never been fully explained or documented. The record contains absolutely no architectural plans, scale drawings, or other detailed drawings showing the design of the garage and how it relates to the other structures planned for lot 849. Indeed, Applicant's Prehearing Statement conceded that the garage has not even been designed yet. DGS Prehearing Statement, Ex. 75 at 2, n.1 (Feb. 8, 2017) ("[t]he architecture team is in the process of designing the two story deck, and upon completion will provide updated plans. . . .").

Applicant asserts that it is not seeking zoning relief related to the garage. That is immaterial and, as discussed in Point 3 below, wrong. Regardless of how zoning issues related to the garage might be resolved, the addition of the garage is a material change in the construction intended to take place on the property, and it is being built as an accessory to both the shelter and the police station. Subtitle Y, sections 300.8(b) & (c) require a scaled drawing showing the boundaries and dimensions of any proposed accessory buildings on the property, detailed architectural plans and elevations, and a detailed explanation of how the parking garage is to be used. They have never been submitted. This material failure to adhere to the Board's rules with respect to a key component of the shelter project is fatal to the application in its entirety.

Eight days after the February 8 deadline for supplements to Applicant's application, Applicant presented a request for a wholly new special exception, under U § 203.1(j), to create a temporary parking lot and driveway on the tennis courts and the Newark Street Community Garden ("Community Garden"). The new request affected both the original Lot 849 and a new lot not affected by the original plan submitted by Applicant, Square 1818, Lot 848. This request was not timely. Similarly, Applicant did not send out notices, as required by Y § 300.8(g), to all of the neighbors located within 200 feet of the newly affected lot, Lot 848, which is significantly to the west of Lot 849. Ex. 180.

Moreover, the request for this special exception was, and remains, wholly unsupported. Applicant has never provided drawings or plans related to this temporary parking exception and has never demonstrated that it will not cause adverse effects in the neighborhood. Nor has applicant provided the required information for review and recommendation by the DDOT or the Transportation Assessment consultant. Oral Test. of Evelyn Israel, Tr. 111:4-10; Oral Test. of Nicole White, Tr. At 64:8-20. Likewise, the Office of Planning was not furnished information

concerning temporary parking and therefore did not address that issue in their report. Oral Test. of Maxine Brown, Tr. 110:10-14. In short, Applicant has wholly failed to comply with the Board's procedural and substantive requirements with respect to its request for a special exception under U § 203.1(j).

The requirements that an application be completed in a timely manner – and moreover, that it be complete – is at the heart of due process. Applicant's failures deny NRG and the affected neighborhood due process under applicable zoning law to comment as necessary upon the content of plans that materially impact the enjoyment of their property and neighborhood. Applicant's failure to adhere to the requirements of the Zoning Regulations is, in itself, ample reason to deny the Application in its entirety.

3. Applicant's Failure To Demonstrate that its Proposed Parking Garage Meets Zoning Requirements Is Fatal to its Request for Zoning Relief

As discussed in Part 2, above, Applicant has never provided the architectural plans or scale drawings for its proposed 3-level parking garage that are required by Y § 300.8. As a result, it is not possible to determine whether, and how, the proposed garage complies, as it must, with the development standards applicable to accessory buildings in Zone RA-1, as set forth in Subtitle F, §§ 5000.1, 5000.2, 5002.1, 5005.1, and 5201.2. Nor does the revised self-certification of zoning compliance submitted by DGS counsel on February 16, 2017 (Ex. 108) address the parking garage or its compliance with the applicable standards.

The evidence that is in the record indicates that the proposed garage fails to comply with Subtitle F, Chapter 50. First, under F § 5000.2, the parking garage must be "secondary in size compared to the principal building" and its footprint is to be included in the RA-1 zone lot occupancy requirement of 40% for the entire property. It is apparent from the "concept" drawings submitted by Applicant in Applicant's post-hearing "updated plans" that the parking garage is not secondary size to either the police station building or the homeless shelter building; its footprint is significantly larger than either building. Ex. 237 at 5, 17, 18 ("Applicant's Updated Plans"). Further, Applicant has done nothing to demonstrate that the lot occupancy limit is met with this new building.

Under F § 5002.1, the parking garage is limited to two stories and a height of 20 feet. The garage will have three levels in violation of this requirement. Moreover, Applicant has not submitted any evidence to demonstrate that the garage complies with the height requirement. With no scaled drawings to rely upon, there is basis to conclude that the parking garage meets the applicable requirements.

Moreover, under F § 5000.4.2, the parking garage must be taken into account not only on the lot occupancy requirement, but also on the green area ratio requirement for the property (40%) and the FAR maximum for the property (.9).

Again, Applicant has made no demonstration of compliance and provided no scale drawings from which compliance could be determined.

Applicant has not sought a special exception for the garage. Nor could it. Specifically, F § 5005.1 provides that relief from the development standards of Chapter 50 is to be special exception relief "subject to the provisions and limitations of Subtitle F § 5201." That section provides, in turn, that a special exception would be available only when the parking garage is accessory to an existing residential structure. Here, the parking structure is, in large part, accessory to a police station, which is not a residential structure. Moreover, it is unlikely that a homeless shelter would meet the definition of a "residential structure," as that term is intended in zone RA-1, and, in any event, there is no question that the shelter is not an "existing" structure.

The failure to provide the required information concerning this necessary accessory parking garage is fatal to Applicant's requested special exceptions and variances to build the shelter. Having failed to meet its burden of demonstrating that it can build the garage, Applicant cannot satisfy the minimum parking requirements for the shelter of 23 spaces, which are set forth in C § 701.5. Without the garage, Applicant cannot satisfy the condition set forth in U § 420.1(f)(2) for a special exception to build a shelter to house more than 4 residents. Without the garage, the proposed shelter will create harm to the neighborhood due to critical parking shortages, which undermines all of the zoning relief sought by Applicant. In short, because Applicant has not demonstrated that it is permitted to build the proposed garage, its request for zoning relief to build the shelter must also fail.

4. The Application Is Inconsistent with the Comprehensive Plan and Must Be Denied

The zoning laws set forth in the D.C. Code serve vital public interests; namely, the stability, comfort and enjoyment of our neighborhoods. Residential zoning requirements, including limits on height and density, are at the core of the District of Columbia Comprehensive Plan. They are what make D.C. livable. As detailed in the written testimony of abutting property owner Pat Wittie, Ex. 211, and as set forth in NRG's Proposed Findings of Fact, the requested relief would violate the Comprehensive Plan and associated zoning requirements, including requirements that variances and special exceptions be consistent with the Zone Plan and Zoning Maps.

Among other provisions, Ms. Wittie cited LU-3.4.1, which states that accommodations for group homes should not diminish the character or fundamental qualities of their residential neighborhoods; and RCW-1.2.10, which encourages **small-scale** community-based residential facilities in the Rock Creek West Planning Area, "**provided that such facilities are consistent with the area's low-density character.**" Ex. 211. As discussed below, the proposed shelter is flatly inconsistent with that low-density character.

Also pertinent, but ignored by Applicant, is the Comprehensive Plans Policy on how best to integrate homeless services into residential and other neighborhoods. Policy H-4.2.8 encourages a "smaller service model" over "institution like facilities and large-scale emergency shelters, "as the better way to "improve community acceptance," and to support the reintegration of homeless individuals back into the community." The building proposed for the location is plainly inconsistent with the Policy.

Applicant's claim that the Comprehensive Plan supports co-locating multiple community services in the same facility (Ex. 202A at 11-12), is ironic at best. The provision cited by Applicant includes a condition that the uses be functionally compatible and be compatible with the surrounding properties. Policy CSF-1.1.8. The required compatibility with surrounding properties is woefully absent here for the myriad reasons stated in testimony by adjacent and nearby neighbors. *See, also, e.g.*, Oral Test. of Nancy MacWood, Tr. 118:20-25; 119: 1-16; Oral Test. of Angela Bradbery, Tr. 231:5-10. The policy also envisions joint planning and collaboration among affected agencies, whereas the rushed process leading to selection of this site reflects no such collaborative effort.

Moreover, the required functional compatibility between uses is negated on the record by Applicant's own architect. He testified that the police station and homeless shelter are not being located in the "same facility" precisely because they are not functionally compatible. As he testified at the hearing: "They operate separately for obvious reasons. They don't want to be crossing paths." Oral Test. of Joe McNamara, Tr. 268: 8-13.

5. There Is No "Exceptional Situation or Condition" Giving Rise to a <u>Cognizable Hardship or Practical Difficulty on the Property</u>

Applicant is not entitled to variance relief in connection with the Property for the simple reason that the record demonstrates that there is no "exceptional situation or condition" giving rise to a hardship or practical difficulty.

All of the variances requested by the Applicant can be traced directly to the existence of multiple other uses already being made by Applicant (or other DC agencies) on the Property. But for the police station, refueling station, impound lot, Community Garden, and tennis court, the Property is more than amply sized to build a shelter that is three stories high and contains the required loading berth, using a design with two wings and a common area on each floor, as suggested by CFA. Ex. 206 at 2. But for the police station, there would be no need for a variance to build a second primary structure.

The existence of these other uses by the Applicant cannot justify a variance. There would be nothing left of variance law if an owner could make one use on a property, occupying part of the useful space, and then assert that his or her own use

constituted an exceptional circumstances leading to a hardship or practical difficulty, permitting an entirely different and unrelated second use of the remainder of the lot in violation of either area or use requirements. There would be no meaningful limit to such a doctrine.

Indeed, such a doctrine would be inconsistent with the requirement that an exceptional circumstance relate uniquely to a particular property. *Gilmartin v. District of Columbia Board of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990) ("[t]he critical point is that the extraordinary or exceptional condition **must affect a single property").** Any property could be subjected to an owner desiring to make a second use on a non-conforming part of already used property.

Moreover, such a rule would make no sense in light of the reason that variances are granted in the first place. As the Court of Appeals has reasoned, area variances have a lower bar than use variances in order to prevent "the prospect of a lot remaining permanently vacant in a street devoted to residential use[, which] is scarcely calculated to enhance the neighborhood, as abandoned lots tend to become overgrown with weeds or dumping grounds for trash and garbage." *A.L.W., Inc. v. BZA*, 338 A.2d 428, 432 (1975). This reasoning is wholly inapplicable when an owner is already making extensive use of a lot. There is no risk of the Police Station property going vacant or being abandoned; it is already fully used, and will continue to be fully used if the requested variances are denied.

Nor does Applicant's preferred shelter design add to Applicant's claim for variance relief. That design is not an exceptional circumstance affecting only this property, it applies wherever Applicant might choose to build a shelter. And it is not a hardship or practical difficulty – it is a desire to build a shelter a certain way, nothing more. But a variance cannot be based on a preferred design. *See, e.g., Barbour v. District of Columbia Bd. of Zoning Adjustment*, 358 A.2d 326, 327 (D.C.1976) (denying area variance where alternative but more costly designs that complied with zoning requirements were available).

Even with the Police Station present, the lot at 3320 Idaho Avenue, N.W., is more than adequate for a three-story homeless shelter for 50 families, with two wings and a common area on each floor, as suggested by the CFA. Ex. 206 at 2. In either configuration, there would also be plenty of room for the required loading dock.

Further, even if Applicant's preferred design deserved some weight in the variance calculus, which it does not, the other uses of the Property exacerbate the requested variances. But for those other uses, even Applicant's preferred six-story design could be implemented in a way that had a less significant impact on the neighborhood, with ample parking, a loading berth, and much enlarged setbacks and additional landscaping to minimize impacts on neighboring residences.

In short, the only exceptional circumstance is that the Property is already fully used. That cannot justify a variance.

6. **Applicant's Request for Variance Relief Should Be Denied Because Applicant's Selection of the Property for its Shelter Is the Direct Cause of any Asserted Hardship or Practical Difficulty**

It is well settled that a use or a hybrid use-area variance may not be based on a claimed hardship that is self-imposed. *See, e.g., Foxhall Community Citizen's Ass'n v. District of Columbia Board of Zoning Adjustment*, 524 A.2d 759, 761 (1987) (use variance); *Oakland Condo. Ass'n v District of Columbia Board of Zoning Adjustment*, 22 A.3d 748, 755 (D.C. 2011); *Taylor v. District of Columbia Board of Zoning Adjustment*, 308 A.2d 230, 235 (1973) (hybrid use-area variance). The selection of a site with knowledge that zoning relief is needed is a quintessential self-imposed hardship that precludes use variance relief. *E.g., Foxhall*, 524 A.2d at 762; *Taylor*, 308 A.2d at 236.

Moreover, the fact that a practical difficulty is self-imposed as a result of site selection can be considered in considering an area variance. *Gilmartin, supra*, 579 A.2d at 1171; *A.L.W., Inc.*, supra, 338 A.2d at 431-32 (knowledge of a site's zoning noncompliance when the property is acquired is one factor that may be taken into account in exercising discretion to grant or deny an area variance);.

That factor should be given particular significance here, because the rationale for not fully applying the self-inflicted harm rule to area variances is wholly absent from this case. As explained in *A.L.W., Inc.*:

> The reason for this distinction [in the applicability of the self-inflicted harm doctrine between a use variance and an area variance] is not hard to fathom. Unless the applicant himself as a result perhaps of some prior conveyance is responsible for the irregular shape of the property, he cannot as a practical matter improve the lot in any way that would enable him to realize income or sell it to a purchaser for value. The prospect of a lot remaining permanently vacant in a street devoted to residential use is scarcely calculated to enhance the neighborhood, as abandoned lots tend to become overgrown with weeds or dumping grounds for trash and garbage.

338 A.2d at 432.

That is not this case. As discussed in Point 5, above, there is no risk that the Property will not be used. It is already being subjected to multiple valuable and productive uses. Viewed another way – it is Applicant who is responsible for the need for an area variance, because of Applicant's other uses of the property.

7. **Putting Two Primary Structures for Different Uses on the Same Lot Is a Use Variance or a Hybrid Use-Area Variance that Should Be Denied. It is a Self-Inflicted Hardship and Applicant Has Otherwise Failed To Justify the Requested Variance**

Applicant's request for a variance to place two primary structures with incompatible uses on one lot is a request for a use variance. See NRG Prehearing Statement at 12-13.

Variance types are as specified in X §1001. An area variance is a request to vary from an area requirement. X §1001.2. Under the specific examples in X §1001.3 (a) and (b), the loading variance being sought is an area variance, but a variance from the one-primary-structure-per-lot requirement is not among the other examples of area variances.

In contrast, a use variance is a variance for a use that is not permitted as of right or as a special exception in the zone, X § 1004.1(a), or is for a use expressly prohibited in the zone. X § 1004.1(b). Here a second primary structure on the same lot is not permitted as of right, and DGS has not claimed it would be permitted as a special exception. So by definition from the Regulations, the request is for a use variance.

This conclusion is bolstered by the fact that Applicant admits that the two uses proposed for the site are wholly incompatible. Applicant contends that the two-structure variance would not have been needed if the two structures had been architecturally connected. But, asked why the two structures were not connected, Applicant's architect made clear that it was because the two uses were entirely incompatible: "they operate separately for obvious reasons." Oral Test. Of Joe McNamara Tr. 268:5-13. Thus the need for the variance relates directly to the incompatible nature of the proposed uses.

Applicant responds that neither the existing use nor the proposed new use is prohibited on the Property. But that misses the point – the essence of the variance that Applicant seeks is the need for two primary structures in order to place two incompatible uses on the same property, a variance tied directly to the nature of the uses. It is also nonsensical to argue, as DGS counsel has done, that a restriction on primary structures for incompatible uses on the same lot is an area variance because it is a "numeric" restriction. Ex. 202A, at 10 n.4. An area variance is a request to vary from an area requirement. X § 1001.2. Placing two uses on the same lot is not varying from an area or even a numeric requirement; it is varying from a use constraint. DGS points to a conclusory statement in the Zoning Administrator's letter of February 13, 2017, which does not analyze the issue. Ex. 202A, ex. A at 2. Thus, there is no basis to defer to the Zoning Administrator.

If the variance sought by Applicant is not a use variance, it is at minimum a hybrid use-area variance. The Court of Appeals in *Taylor* found that a variance that did not fit neatly into either the use or area category was a hybrid use-area variance. There, the Court reasoned that the decision to read the zoning statute to create a different standard for use and area variances was predicated on the theory that "area variances involve minor alterations to the character of the zoned district while use variances tend to drastically

change the district's nature." 308 A.2d at 233. The Court found that a request for a variance to build town-house residences in an area zoned for single-family homes was such a drastic change that constituted, at minimum, a hybrid use-area variance. The request to co-locate a homeless shelter that is dramatically out of scale with both the RA-1 zone and the neighboring R-1-B zone cannot be deemed a "minor alteration to the character" of the zoned district; it is no less drastic than placing town homes in a single family zone.

Similarly, in *Palmer v. District of Columbia Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972), the Court of Appeals found that a request for a variance to allow parking that was more than 800 feet from a property to qualify as off-street parking for the property was found not to fall strictly into either the category of use or area variance. Thus, the Court found it to be a hybrid use-area variance. The requested variance here is no less dramatic than the request to allow off street parking to be more than 800 feet from a property.

As discussed above, if the two principal structure variance is either a use variance or a hybrid use-area variance, it must be denied, because Applicant selected the site for its shelter with actual or constructive knowledge of the existing use and the need for the requested variance. Moreover, Applicant has not even attempted to satisfy the requirements of a use variance or a hybrid variance – it has only made an argument for an area variance. Ex. 202A at 9-10.

But even if Applicant is correct that it is seeking an area variance, Applicant has not justified the relief it seeks. Applicant's sole argument in support of its requested variance relief is that the Shelter Act requires the use of this Site and Applicant cannot use this site without the requested variance. Applicant's First Statement, Ex.2 at 12 (the "Applicant is required to construct the shelter on the Property"); Applicant's Revised Statement, Ex. 75 at 11 under D.C. Law, 21-141 (the Shelter Act), "the short-term facility <u>must</u> be located at the Property"). As discussed below, that argument is wrong. The law is clear that it does not require the use of this site – rather it authorizes DGS to proceed, **subject to the need to obtain zoning relief under applicable zoning standards**. In short, Applicant has failed to show that it needs or is entitled to the variance to place two principal structures on Lot 849.

Moreover, the Applicant successfully argued to the Superior Court that the Shelter Act did not mandate construction at this site, and that the Council's selection of the site was only preliminary. It would be manifestly unjust to allow Applicant to take the opposite position before this Board or for this Board to credit that contradictory position. Applicant made its case before the Superior Court, and its position before that Court was vindicated by the Court. Accordingly, Applicant has not justified its need for the requested variance.

Indeed, Applicant's argument is entirely circular and would gut the concept of zoning. Applicant is arguing that it needs zoning relief to place a shelter on Lot 849 – land selected knowing that the lot already contained a working police station -- because it cannot build the shelter without zoning relief, due to the station's presence on the property.. In essence, Applicant says it is entitled to zoning relief because it selected a site that requires

it to obtain zoning relief. That theory would mean that zoning rules are meaninglessat least for the District.

8. Applicant's Request for a Height and Story Variance Should Be Denied

Testimony and a multitude of letters from the most neighbors that are most proximate to the proposed shelter are clear and stark: the proposed six-story, 69-foot shelter building would tower over the immediately adjacent homes, located in low-density zone R-1-B, a zone that is designed to protect quiet residential neighborhoods of primarily single family homes and moderate-sized lots. The extent to which the proposed shelter is out of scale with the immediately surrounding neighborhood is demonstrated in Exhibit 5 to NRG's Prehearing Statement, Exs. 164A1, 164A2.

The proposed building will be located just a few yards from an existing two-story single-family residence. It will loom over not just that residence, but all of the nearby single-family homes, depriving them of their privacy, and cutting off their sunlight, air and open sight-lines. See Parts V.D and VI.C&D of NRG's Proposed Findings. These are factors that zoning laws exist to protect. *See, e.g., Draude, supra*, 527 A.2d at 1252 (quoting the predecessor regulation to Subtitle A § 101.1).

The Property itself is zoned RA-1, which in this circumstance is a surrounding neighborhood that consists primarily of single family homes, low rise garden apartments, and row homes that are no more than 40 feet and three stories high. Indeed, the maximum height permitted in the zone is 40 feet and 3 stories. The proposed building is almost twice the permitted height, and is twice the permitted number of stories. It would also be far denser than contemplated in zone RA-1, creating additional adverse effects, which are discussed below.

In these circumstances, the requested height variance cannot be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan. X § 1000.1.

ANC 3C expressly recognized these problems and objected to the requested height variance, and its objection must be given great weight. Ex. 170 (ANC 3C Resolution); Ex. 229 (Written Testimony of Nancy Macwood, Chair ANC 3C); Ex. 232 (Written Testimony of Angela Bradbury, ANC 3C06 SMD Commissioner); Oral Test. of Nancy MacWood, Tr. at 119; 11-16.

Moreover, the U.S. Commission of Fine Arts, long a respected and expert source of input about what is appropriate for construction in the District, considered Applicant's plan and concluded that the proposed shelter was "too tall for its immediate context of single-family houses and a low-rise police station." Ex. 206.

Applicant implicitly recognizes the degree to which the proposed shelter is inconsistent with the existing properties to the south of the proposed shelter. Applicant has steadfastly refused to provide drawings showing the view of the shelter from the **south**,

despite a specific request from the Board to provide such a drawing. Tr. 289-90. In response, Applicant's Supplemental Submission, Ex. 235, included additional drawings from the **north**, which appear to be out of scale, but no drawing showing the view from the south. To address this deficiency, NRG re-engaged the architectural firm whose direct, street view of shelter is in the record. Ex. 164A2, ex. 5. The firm prepared views from the south as requested by the Board. NRG hereby seeks leave to include these drawings, attached as Exhibit A hereto, in the final record that the Board will consider. These drawings establish what Applicant sought to conceal: that the height and scale of the proposed shelter is grossly out of character with the rest of the immediate neighborhood.

Applicant's attempt to justify its requested variance simply ignores these properties to the south -- the ones most directly and seriously affected by the proposed shelter, and instead argues that the new shelter is not out of scale with Vaughan Place (including WTOP). Ex. 75 at 4, 13. But those buildings are across Newark Street, to the north of Lot 849 – well away from the south end of the lot where the shelter is being built, and shielded by distance and topography from the R-1-B zoned single-family homes that will sit immediately next to and directly below the shelter. See Tr. at 183:6-8 (Wittie Testimony); and Part VI.C of NRG's Proposed Findings.

Even the Cathedral Commons building across Idaho Avenue, which is prominently marked on the Applicant's drawings, is in better scale to the neighborhood than the proposed shelter. The Giant, CVS buildings and loading dock, along with the apartments above the CVS and the townhouses fronting Idaho Avenue, are all in proper proportion to the height of the other residential properties near the shelter – essentially three floors from above the street, not six as proposed for the shelter. Id.

Moreover, the buildings cited by DGS were the result of PUD processes, which included significant community input, intensive regulatory oversight, and compromise to minimize community impact. Ex. 211 (Testimony of Brian Powers). There has been nothing of the sort here. The buildings that came out of that PUD process were carefully limited in their location, and should not be allowed to serve as precedent for further overly large development. *Id.* That would lead to a domino effect of over-development in violation of the Zone Plan and would allow the exception to become the rule.

Here, double the height/stories is simply a bridge too far, and none of the cases cited by DGS, including prior Board decisions, comes close to the sort of extravagant relief proposed in the requested height variance. The record is clear that the proposed shelter, at this location, is contrary to the public good. And even if the record were unclear, the burden of proof lies with Applicant. The Applicant has not come close to meeting that burden.

9. Applicant's Request for a Loading Berth Variance Should Be Denied

For the reasons discussed in Points 4, 5 and 6, Applicant's request for a loading berth variance should also be denied.

In addition, the requested loading dock variance cannot be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan. X §1000.1.

Common sense dictates that a loading and service delivery dock is an absolute necessity for a facility proposing to house 185 residents who will be regularly coming and going with their possessions. Moreover, since residents will be eating in common dining facilities with meals provided by the shelter, food trucks and other service vehicles will arrive twice daily for deliveries. It must be anticipated that a facility this large will also experience emergency vehicles arriving to assist residents in distress. They, too, will need such a dock.

A loading berth is also necessary for trash management. The proposed approach to trash is manifestly inadequate and threatens the public good. As shown on "Applicant's Updated Plans," Exhibit 237, pdf at 7, Applicant now proposes to provide two modest sized bins, located on a dead end driveway to the north of the shelter, directly adjacent to the play area. The two dumpsters in the drawing appear to occupy less room than the single parking spot shown on the drawing. It is not credible to suggest that such limited trash facilities would be adequate for a shelter with 185 residents, including babies in diapers and children, a staff of ten or more, visitors, twice daily food services, and other necessary trash considerations. Applicant has utterly failed to provide any analysis of (a) how trash will be safely stored on the premises, without hazard to children in the adjacent play area and the neighbors in immediate proximity to the garbage location; (b) how trash collection vehicles can safely access the dumpsters, particularly when cars are parked in the spaces along the back of the shelter; and (c) how rats, deer, raccoons, other animals and vermin will not infest the garbage site. Additionally, with the proposed location of the dumpsters at the rear of the premises, there is no traffic plan that assures that District garbage trucks can actually reach the containers and load their contents into their trucks. In light of the risks to the neighborhood of improper handling of trash, a detailed plan should have been provided. The failure of the Applicant to present such a plan is an added failure to prove that the proposed development is consistent with the public good and reason for denial of the application.

The Applicant's Revised Prehearing Statement, Ex. 75 at 10-11, relies on its Transportation Assessment ("TA," Ex. 37) to support its claim that no loading berth is necessary. But the discussion in the TA is entirely conclusory and has no supporting evidence or analysis. Therefore Applicant has failed to meet its burden of proof. The TA's discussion about the lack of need for a loading dock ignores the many needs that a loading dock serves, including repair and maintenance of large systems (e.g., boilers and HVAC systems), furniture replacements when new furniture is needed, and, notably, trash pick-up. The TA similarly provides no analysis of whether the proposed trash bins will be sufficient, or how a trash pickup truck will be able to access the bins. This omission was not cured at the hearing. Tr. 62:3-25; 64:1-20. In short, Applicant has failed to meet its burden of proof to justify the requested loading variance.

10. Applicant's Request for a Special Exception To Build a Shelter for 185 Residents Should Be Denied

The maximum size emergency shelter permitted as of right in zone RA-1, is a shelter for 4 residents. U §401.1(a); U §301.1; U §202.1(h). The regulations allow a special exception for a shelter designed to house 5 to 25 residents if certain defined conditions are met. U §420.1(f). A special exception to exceed 25 residents requires compliance with additional conditions set forth in U, § 420.1(f)(6).

The conditions set forth in U §420.1(f) are **mandatory** and are not, in turn, subject to exception. The Regulations make clear that, to be granted, the special exception "will meet such special conditions as may be specified in this title." X § 901.2. The conditions are written as absolute requirements; the regulations do not provide for a test of degree, a sliding scale, or exceptions to the condition.

The proposed shelter is so large for the RA-1 Zone that it is beyond the authority of section 420.1(f)(6). Moreover, Applicant has failed to meet its burden of demonstrating that it meets the mandatory conditions required by U § 420.1(f). Accordingly, the special exception under U § 420.1(f) must be denied.

A. The Proposed Shelter Is Too Large for Zone RA-1.

Section 420.1(f) does not contemplate that an emergency shelter for 185 residents may be placed in zone RA-1. The requested shelter is 46 times the size of a shelter permitted as of right in the zone, and more than 7 times the size of the contemplated special exception. A shelter that large would render meaningless the RA-1 zoning restrictions on occupancy and density. Oral Test. of Angela Bradbery, Tr. at 231:13-16. Such a shelter stretches the authority provided in U §420.1(f)(6) beyond the breaking point and is far beyond any reasonable outer limit for approving such a special exception in the RA-1 Zone under U § 420.1(f).

Applicant claims that the special exceptions granted by the Board in 2016 for shelters in Wards 4, 7 and 8 provide valid precedent. Those cases were uncontested, and the issue of the maximum size for an emergency shelter in the applicable zone was not raised. Tr. At 277:9-21 (Test. Of DGS Director Gillis).

Moreover, the Board can and should take account of the extreme nature of the deviation sought by DGS by simply ruling under X § 901.2 that a shelter with this many occupants in this zone is not in harmony with the general purpose and intent of the RA-1 zone. The correctness of that conclusion is confirmed by the specific facts of record in this case. See, NRG Proposed Findings, Part V.

Further, even if a 185-resident shelter conceivably could comply with U § 420.1(f) (which it does not), the massive deviation of the proposed shelter from the ordinary maximum contemplated by that section means that the conditions set forth

in that section must be strictly met by detailed, clear and convincing evidence. Conclusory assertions should not be sufficient.

B. The Proposed Shelter Will Have an Adverse Impact on the Neighborhood Because of Traffic, Noise, and Operations.

Under U § 420.1(f)(4), DGS must prove the shelter will not have adverse impact on the neighborhood because of traffic, noise or operations." Applicant has failed to make this showing. To the contrary, compliance with this requirement is contradicted in myriad ways by the testimony and letters of abutting and nearby neighbors. See NRG Proposed Findings, Part V.D.

The record demonstrates that the operation of the proposed shelter is likely to have the following adverse impacts on the neighborhood, among others: (i) increased traffic with accompanying risk to pedestrian safety; (ii) increased noise; (iii) increased population density and congestion; (iv) exacerbation of scarce parking; (v) problems with trash and vermin; (vi) loss of privacy; (vii) increased overcrowding at John Eaton Elementary School; and (viii) further disruption due to the lack of a master site plan for the shelter and the police station. Id.

These adverse effects should not be imposed on a neighborhood that very recently underwent, with City approval, major changes on Wisconsin Avenue and Idaho Avenue as a result of the Cathedral Commons project. Oral Test. of Christopher Sweeney, Tr. at 187:20-188:10 and 215:8-10; Ex. 211, Test. of Yvonne Thayer at 1.

C. Applicant Has Failed To Meet its Burden of Proving that the District's Program Goals and Objectives Cannot Be Met by a Facility of Smaller Size, as Required by U § 420.1(f)(6).

Under U §420.1(f)(6), in order to obtain a special exception for a shelter intended to house more than 25 residents, Applicant must prove that "[t]he program goals and objectives of the District of Columbia cannot be achieved by a **facility of a smaller size** at the subject location. . . ." U § 420.1(f)(6)(emphasis added). Not only has the Applicant failed to make this required showing, but also, the record shows the contrary to be true.

The only programmatic requirement identified by Applicant is the need to close DC General. In fact, a shelter substantially smaller than 50 units at the Site would enable the Applicant to close DC General.

Applicant has created a numbers shell game – insisting that 50 families must occupy the building, which is intended to substitute for a prior choice that targeted 38 families – one-third less. Even more, if the District is to find rooms for the families currently in D.C. General (variously and inconsistently cited as 270 families at one point and 280 families at another), plans for other wards reduce the real burden to be met at a Ward 3 shelter to between 21 and 31, far fewer than the 50 insisted on by

Applicant. *Compare*, Ex. 224 at 1 (270 units at DC General) with Ex, 227 at 2 (approximately 280 units at DC General).

Aside from Ward 3, the Homeless Shelter Replacement Act, D.C. Act 21-412, authorizes shelters of 29 units in Ward 1, 49 units in Ward 4, and 50 units in each of Wards 5, 6, 7, and 8. Ex. 225 at 26. That is a total of 278 units even with no units in Ward 3. The Council Committee Report asserts that the 29 unit shelter in Ward 1 is not part of the plan to replace D.C. General, but rather is a replacement for another existing shelter. Id. Even excluding the Ward 1 shelter from the list of replacement shelters, there are 249 D.C. General replacement units anticipated for Wards 4 through 8. Thus, even crediting the programmatic needs claimed by the District they could be met with a shelter of 21 units in Ward 3 to reach 270, or 31 units to reach 280.

Moreover, Applicant has not demonstrated that it would be cost-prohibitive to build more than one shelter in Ward 3. The Applicant provided only conclusory testimony that operating expenses would be higher to operate two shelters. It did not provide even a ballpark estimate of the expenses to operate the proposed shelter, let alone evidence to demonstrate the cost increase of operating two shelters in Ward 3, to allow the Board to evaluate those costs in the context of other costs of the project or the entire budget. Given that the projected cost of the 3-story garage alone is $10 million, there is little doubt that a more cost-effective solution should have been considered.

D. Applicant Has Failed To Meet its Burden of Proving that there Is No Reasonable Alternative Site for a Ward 3 Shelter, as Required by Subtitle U, Section 420.1(f)(6).

Under U §420.1(f)(6), in order to obtain a special exception for a shelter intended to house more than 25 residents, Applicant must prove that "**there is no other reasonable alternative to meet the program needs of that area of the District.**" U § 420.1(f)(6)(emphasis added). Applicant has failed to make this showing.

Given the enormous size of this facility in relation to the standard range of special exception approval in the RA-1 zone (5 -25 individual occupants), compliance with U § 420.1(f)(6) is a critical requirement that must be demonstrated by a showing, not just an assertion, that a reasonable and systematic effort was conducted to locate an alternative site.

What is clear from the record are two salient facts: first, although there are conclusory statements from various government officials, there is nothing *in the record* to support the assertion that a search for reasonable alternative sites for the District to purchase was made. The chosensite was identified by the Council based on *ad hoc* suggestions from opponents of another site. Second, the Idaho Avenue site was designated despite the fact that Applicant itself, acting in a neutral advisory

capacity before it was directed to follow orders and support the selection of this site, had declared that due to the other uses already on the site, the site was "unsuitable for our purposes." Ex. 164A2, ex. 11 at 1. Applicant has never explained this 180-degree reversal.

Once the City Council rejected the Mayor's choice of leasing a privately constructed shelter at 2619 Wisconsin Avenue, N.W., there was no Request for Proposals or a Solicitation of Offers for an alternative site. And despite the fact that the shelters for Wards 1 & 4 are to be on land acquired by the District for that purpose, there is no showing that there was any systematic outreach for Ward 3 land acquisition for a homeless shelter. In the end, apart from conclusory assertions by District witnesses, the record does not permit the Board to conclude, one way or the other, (a) whether any other District-owned land in Ward 3 lacking any need for zoning relief (or lesser relief) could have been selected instead, or (b) whether such a site could have been acquired.

The importance of the absence of this evidence is heighted by the history of the Shelter Act and recent events. Initially, the Shelter Act, when introduced, proposed leasing private property valued at $2.5 million in Ward 3. When this idea was scrapped by the Council due to cost considerations, the Police Station Site was its replacement. The costs at this site now far exceed the market value of acquiring the initial site. The costs at this Site have now ballooned to $25-30 million, due in large part to the need to construct a parking structure for nearly $10 million, a cost that would not have been necessary but for the co-location of the shelter and the Police Station. The prospect of these great, unanticipated costs, bears directly on the statutory criteria of examining reasonable alternatives to the chosen site. Had Applicant reasonably considered the drawbacks and added costs needed at this site, many other sites would have come within a reasonable range for purchase and construction, without the zoning and other problems caused by co-location.

DGS's position appears to be that it is under no obligation to demonstrate that a search for a site needing no (or at least less drastic) zoning relief was conducted. As the NRG Prehearing Statement details, however, the District, in other homeless shelter cases, has recognized that this "reasonable alternative" requirement is about other locations—Ex. 164A1 at 20-21; Ex. 164A2, ex. 6 -- presumably ones that would do the job with lesser or no special exception/variance relief. The absence of such a "reasonable alternative" can only be demonstrated by showing, not telling, that a respectable effort was made by the District to find a "reasonable alternative" site, and that the effort was unavailing. This evidentiary failing alone warrants denial of the special exception

11. Applicant's Request for a Special Exception for Accessory Parking <u>Should Be Denied</u>

Applicant has failed completely to meet its burden to justify its request for a special exception to permit accessory parking on an adjacent lot, Square 1818, Lot 848, during the construction of the parking structure. It must be denied.

First, as discussed in Point 1, above, Applicant's request was not filed in a timely manner, and Applicant has never demonstrated that it notified all property owners located within 200 feet of Lot 848. Thus, the application for this special exception violates Y §§ 300.15 & 401.2(d).

Second, Applicant has never provided any plans or drawings to support this requested special exception. Its submission is devoid of information concerning this requested exception – no plans, and no drawings of either the parking area or the proposed access road. Thus, Applicant has violated Y §300.8(c).

Third, Applicant has not even attempted to demonstrate that it meets the conditions of U § 203.1(j)(6), i.e., that its proposed parking lot is "not likely to become objectionable to adjoining or nearby property because of noise, traffic, or other objectionable conditions have." Among other things, Applicant has presented no evidence to show that the requested special exception will have no adverse effect on the neighborhood due to noise; runoff; safety risks related to the use of a road for high-volume, high-speed police activity next to a children's playground; nuisance caused by headlights shining on neighboring houses at all hours; or nuisance from accumulated exhaust fumes from about 70 police vehicles.

Fourth, Applicant has failed to meet the requirements of U §203.1(j)(11), which provides that an application for a special exception under U § 203.1(j) must be "referred to the District Department of Transportation for review and report." Applicant has provided no evidence for the record that it has done this, and the record is devoid of any report from DDOT concerning this requested special exception.

12. The Board Has the Full Power To Deny All of Applicant's Requests for <u>Zoning Relief</u>

Much of Applicant's argument for zoning relief hinges on its claim that it must locate a shelter on the Property. That claim is contrary to law and to the District's own position in Court.

NRG sued the Council and the Executive in D.C. Superior Court challenging their failure to provide the affected ANC, ANC 3C, with notice and an opportunity to make recommendations concerning the selection of the Police Station as the site for a proposed shelter before the Council chose it. As detailed in NRG's Prehearing Statement, Ex. 164A, in that case, the City Council and the Mayor argued – successfully – that the Homeless Shelter Replacement Act did not mandate the Idaho Avenue site selection or mandate the size of any shelter to be placed on the Site. Rather, the Mayor and the Council told the Court that the Act was merely a "preliminary proposal," and that NRG could not articulate actual harm because the proposal would have to satisfy

all zoning requirements, and this Board would have full authority to conclude that the site selection was not appropriate. Id. at 5-8.

The Court agreed and dismissed the case largely on those grounds. Indeed, the Homeless Shelter Replacement Act contains nothing mandating that DGS build a shelter on the site or mandating the size of the shelter.

Applicant now speaks out of the other side of its mouth. Despite the position advanced in court, Applicant now states that the BZA's hands are tied, that this site has been mandated by D.C. law, and that Applicant must build a shelter on this location, six stories high, accommodating 50 families and up to 185 people, no more, no less. Applicant cannot have it both ways. It cannot preclude community and ANC review of the site selection by arguing that the site was not really required, and that the community's remedy lies with this Board, while at the same time, telling this Board that there is no remedy before this Board because the Council has spoken.

In one forum or another, citizens have a right to due process, and to voice their concerns about whether this site, out of all possibilities for government owned or acquired land in Ward 3, is appropriate for a homeless shelter. In this forum, citizens are constrained to couch their concerns in the language of compliance with the Zoning Regulations, but DGS is now trying to deprive the adjacent neighbors of even that right by arguing, in essence, that this Board has no choice but to accept the City's choice of this site and provide whatever number of approvals of zoning relief are necessary to legitimate the use.

The Board should reject this claim and fully embrace its power to deny zoning relief for this project, just as it would have for dealing with any other applicant. In simplest terms, there must be a full remedy before this Board, as the Executive and the Council told Superior Court Judge Di Toro and as Judge Di Toro concluded and ordered.

13. Applicant Has Failed To Meet Even a "Flexible" Standard for Proof of Hardship or Practical Difficulty, and, in Any Event, Is Not Entitled to a Reduced Variance Standard in this Case

Applicant argues that, because it is "a public service," it is entitled to a "more flexible" standard for the grant of variances. Ex. 75 at 4-5; Ex. 216 at 5-7 (Reply Statement). It relies on *Monaco v. BZA*, 407 A.2d 1091 (D.C. 1979), *National Black Child Development Institute v. BZA*, 483 A.2d 687 (D.C. 1984) (hereinafter "*NBCDI*"), and *Draude v. BZA*, 527 A.2d 1242 (1986), for this proposition. Ex. 75 at 4-5.

But even assuming, arguendo, that a more flexible standard applied to this case, it would not justify giving the Applicant a free pass to ignore zoning requirements. As the Court of Appeals has held, "[t]he need to expand does not, however, automatically exempt a public service organization from all zoning requirements." *Draude*, 527 A.2d at 1256.

Rather, that Court has held that where a public service organization invokes the *Monaco* rule to seek to expand its facilities, it must show: "(1) that the specific design it wants to build constitutes an institutional necessity, not merely the most desired of various options, and (2) precisely how the needed design features require the specific variance sought." *Draude*, 527 A.2d at 1256.

In adopting that rule, the Court of Appeals made clear that the institution seeking a variance must prove "institutional necessity," not merely convenience. A showing of institutional necessity encompasses proof, as in *NBCDI*, that "the great expense of operating offices at another site would cause serious detriment to the Institute," which the Court found would "cause undue hardship." *NBCDI*, 483 A.2d at 690.

Thus, any relaxation of variance requirements for the District government must have, as a precondition to relief, a convincing demonstration, absent here, that the District is, in the particular instances, limited and constrained in its design choice, <u>and</u> in its selection of property, so as to necessitate the relief requested. The District is quite unlike other non-profit entities who have been afforded limited variance flexibility in the accommodation of their institutional needs on the single parcel of property they own, and where there was no true possibility of achieving institutional needs at another location.

Moreover, NRG submits that the more flexible standard does not apply in this case. Applicant significantly overstates the reach of *Monaco*, *NCBDI* and *Draude*. In *Monaco* and *NBCDI*, a non-profit institution sought to expand or continue **an existing previously authorized use** on land that it owned. *Monaco*, 407 A.2d at 1095-96; *NBCDI*, 483 A.2d at 689. As the Court of Appeals explained in *Monaco*, when a public service has inadequate facilities and applies for a variance "to expand into an adjacent area in common ownership which has long been regarded as part of the same site," then the Board of Zoning Adjustment does not err in considering the needs of the organization as possible "other extra-ordinary and exceptional situation or condition of a particular piece of property." 407 A.2d at 1099.

In *Draude*, the Court of Appeals reiterated this narrow formulation of the more "flexible" standard: "we have held that **the need to expand an existing building** may constitute the kind of exceptional condition of the property that justifies a variance." *Draude*, 527 A.2d at 1255 (emphasis added).

Here, there is no need to expand an existing use into an adjacent area of common ownership. Nor is there any claim that Applicant needs zoning relief to continue an existing use that was previously allowed. Applicant's attempt to shoe-horn a new use onto an existing site that is fully used is not a comparable situation.

14. Applicant's Plea that the Board Must Quickly Ratify its Requests for Extraordinary Zoning Relief in Order To Permit the City To Close D.C. General Deserves No Weight

Applicant seeks to be held to less than ordinary zoning scrutiny because the District must move quickly to close D.C. General. Oral Argument of Meredith Moldenhauer, Tr. at 65:19-25, 66: 1-18 That argument is meritless for numerous reasons. The Board should not be railroaded into a bad zoning decision that will have adverse effects on a neighborhood for decades to come. It is worth the time to get this right.

First, the desire to move quickly is not a condition of the property, so it does not create either a hardship or a practical difficulty that would support a variance or a special exception.

Second, DGS has selected a site that requires up to a year to construct a new parking garage before the shelter can be constructed. This is not a way to move quickly. If the City really meant to move quickly, it would have selected a site that did not have the immense complications of this site. As the affected ANC Single Member District Commissioner, Angela Bradbery testified, "Surely the Council didn't intend for the shelter [to] lead to the construction of a massive aboveground parking garage adjacent to single family and garden apartments." Ex. 232 at 4.

Third, for similar reasons, any delay occasioned by Applicant's selection of this site is self-inflicted. Applicant was well aware of community concerns as early as June, 2016, but chose to ignore them and try to force its misguided agenda through the Board. That is not a reason to give Applicant lax scrutiny on zoning compliance.

Fourth, Applicant has not shown why it could not close D.C. General and make alternative arrangements for the families it wants to house in the proposed Ward 3 shelter for the limited time it will take to comply with the law with respect placing a shelter in Ward 3.

CONCLUSION

The record simply does not support the many requests for zoning relief sought by DGS in this case. This Board has the authority, unimpaired by the identity of the Applicant, to reject any and all zoning relief sought by the District in this case.

The record is incomplete in presentation and justification for the parking garage and the temporary parking special exception. There is no exceptional situation or condition that can support any of the requested zoning relief – a different existing use of the property by the same owner is not an exceptional situation. Moreover, the District has only itself to blame for all the zoning relief that is required to approve the construction of a homeless shelter on the same property as a police station, and it is a self-imposed hardship precluding the contemplated co-location of uses, and weighing strongly against the other zoning relief that is sought.

Granting the height variance would be especially inimical to surrounding properties, and should be denied, as recommended by the affected ANC and the CFA.The size and operational needs of the proposed shelter portend substantial adverse impacts in the surrounding neighborhood, warranting denial of all the requested variances and special exceptions. Further, a shelter for 185 residents is simply too large to be placed in zone RA-1. Finally, the Board should take seriously, as the District did not, the statutory requirement to demonstrate that a homeless shelter anywhere near the size of the one proposed here simply cannot be placed in the RA-1 zone unless and until it is clear that reasonable alternatives have been explored and found wanting. The Board should therefore deny the application in its entirety.

Respectfully submitted,

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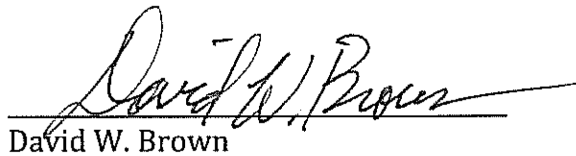
March 31, 2017

CERTIFICATE OF SERVICE

The Neighbors for Responsive Government, by and through the undersigned counsel, on March 31, 2017, served the foregoing Closing Argument by email on the attorney for the applicant, Meridith Moldenhauer, Esq., Griffin, Murphy, Moldenhauer & Wiggins, LLP, 1912 Sunderland Place, NW, Washington, DC 20036 MMoldenhauer@washlaw.com and ABigley@washlaw.com; DC Office of Planning, Maxine.brownroberts@dc.gov; D.C. Dept. of Transportation, evelyn.israel@dc.gov; the local ANC, Advisory Neighborhood Commission 3C, Nancy MacWood, Planning and Zoning Committee Chairperson, nmacwood@gmail.com and 3c@anc.dc.gov; and Angela Bradbery, Single Member District 3C06, 3C06@anc.dc.gov.

Respectfully submitted,



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