BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPLICATION OF **BZA APPLICATION NO. 19452**
D.C. DEPARTMENT OF GENERAL SERVICES **DECISION DATE: APRIL 5, 2017**

APPLICANT'S CLOSING STATEMENT

As established during the approximately four-hour public hearing on March 1, 2017 (the "Hearing") and the ample, 208-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 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 Citizens for Responsible Options ("CFRO"), were speculative and anecdotal. Tellingly, a CFRO representative stated the proposed emergency shelter would be like "dropping" a "strange people bomb." (Hearing Tr. at 321, Lines: 18-19). This statement appears to provide insight into CFRO's intent in opposing this Project because the record establishes the homeless families that CFRO likens to "people bombs" are overwhelmingly young mothers with infant children. Furthermore, the record is exceedingly clear that CFRO'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 the site selection," (Hearing Tr. at 109), CFRO now challenges the zoning relief as a means of forcing this Board to say "no to the site." (Hearing Tr. at 149).[1]

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 1700 Rhode Island Avenue, NE (the "Property").[2]

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

CFRO's first statement to the Board was "[w]e are here today to object to the location of the Ward 5 homeless shelter site" and erroneously 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. 108 Lines: 7-8 and 24-25). *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. 109 Lines:15-17 and 110 Lines: 12-14)). While CFRO later tried to couch this statement to only apply to the Board's ability to grant the relief requested, CFRO's clear statements document otherwise: CFRO has asked the Board to reverse the Council

[1] The below exchange between the Applicant's counsel and CFRO's representative is particularly informative:
MS. MOLDENHAUER: But you've also indicated that your clients do not oppose the use of a special of an emergency shelter here. So then, you would be supporting the special exception relief, but then having questions regarding the variance and the size and the height.
MR. BROWN: Gee, if I said that, I misspoke. My clients are very much in favor of making sure that a homeless shelter in Ward 5 is anywhere but in the immediate vicinity of Rhode Island Avenue.
MS. MOLDENHAUER: So, just not near them.
MR. BROWN: Right. (Hearing Tr. at 149).

[2] The Applicant has requested variance relief from the requirements for height (Subtitle G § 403.1), floor-area-ratio ("FAR") (Subtitle G § 402.1), and off-street loading and delivery space requirement (Subtitle C § 901.1), as well as special exception relief to operate an Emergency Shelter in the MU-4 zone (Subtitle U § 513.1(b)) and from the requirements for lot occupancy (Subtitle G § 404.1), open court minimum width (Subtitle G § 202.1), rear yard (Subtitle G § 405.5(a)(1) and (2)), and parking (Subtitle C § 701.5)

of the District of Columbia'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 five 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 CFRO'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 the BZA could resolve whether this site is appropriate for an emergency shelter, but not that the BZA could second guess the D.C. Council's determination. 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 CFRO 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). (CFRO's counsel concedes this point stating "CFRO 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. 111 Lines: 12-15)).

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 close DC General by 2020, as well as the requirement 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. 185-187. 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. 185-187.

Moreover, the degree of relief requested by the Applicant aligns with other "public service" projects approved by the Board, as indicated 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 CFRO, 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 ARE NOT RELEVANT

CFRO also attempts to cobble together a confusing argument urging the Board to apply the "self-created hardship" standard here. Such an 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. The Applicant has established that any alleged "self-created hardship" is not relevant to the Board's deliberations on the requested relief because

the Applicant does not seek a use variance. CFRO 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 only *area* variances and special exceptions.

The apparent basis of CFRO's "self-created" hardship is that the Applicant was aware of the exceptional conditions on the Property, and accordingly, should have, in essence 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 CFRO's baseless claims, have any reasonable alternative sites in Ward 5 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 5. 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

A. Record supports granting height relief.

CFRO also argues that the Applicant does not satisfy the requirements for the requested height relief. This contention has no support in the record. Rather, the clear evidence of Record is that the Applicant meets the burden for area variance relief from the maximum permissible height in the MU-4 zone as set forth in Subtitle G § 403.1. Indeed, the evidence and testimony establish that there are exceptional conditions facing the Property that make it practically difficult for the Applicant to comply with the maximum height of 50', and that the Project will cause no substantial detriment to the surrounding properties or the zone plan.

As noted above, Director Zeilinger testified extensively on the programmatic needs for the Project, specifically that the Project must incorporate up to 50 units without significantly exceeding 10 units per floor. 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. (Hearing Tr. at 99). The Project architect, Ronnie McGhee of R. McGhee and Associates, testified as to additional exceptional conditions facing the Property, including the direction from the Historic Preservation Office ("HPO") to retain the existing police station (the "Existing Structure") without building over it despite its lack of landmark status, the atypical floor heights of the Existing Structure, the need to retain the antenna and equipment building and the significant public space along Rhode Island Avenue, NE and 17th Street, NE.

The evidence further demonstrates the practical difficulty for the Applicant in complying with Subtitle G § 403.1. Mr. McGhee testified that the Existing Structure pushes the building massing away from the station and increases the Project's height. Mr. McGhee's testimony further

establishes that the Project's floor plate must match the existing floor plate of the police station on floors one and two, which increases the corresponding height of the floors for the Project. The Applicant offered testimony that setting aside significant lot area for public space along Rhode Island Avenue and 17th Street necessitates an increase in the building height as well.

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 would not cause substantial detriment to the public good or to the zone plan. Mr. McGhee testified that the tallest portion of the Property would be on the eastern side adjacent to an alley and approximately 110 feet away from the nearby single-family homes. The Applicant is also providing landscaping and screening that separates the Project from the surrounding properties. Finally, the Applicant offered evidence, in the form of shadow studies, that the light and air of neighboring properties would be minimally impacted by the Project over what could be approved as a matter of right. The Project is in accord with the zone plan that encourages provision of homeless services through smaller shelters.

CFRO objects to the Project's height claiming substantial detriment to the public good. However, CFRO does not provide any substantive evidence in support of this claim. The Applicant, however, at the Board's request has submitted contextual renderings of the Project showing the existing conditions, the significant public space separating the Project from neighboring properties, and the surrounding context of four and five story buildings. (Ex. 204 C). These images, in conjunction with the ample expert testimony and shadow studies conclusively demonstrates that the Project will have no substantial detriment to the public good or the zone plan. Accordingly, CFRO's reliance on a vague claim that the degree of height relief is simply "too great" should carry limited weight.

To that end, CFRO'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. CFRO's counsel conceded that the CFA's recommendations are "advisory" in nature. *See* 3/1 Hearing Tr: p. 68 Lines 3-7). 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, CFA "wanted the massing to be pushed against the property line, against the apartment building, and they wanted it to have a single loaded corridor, like a typical apartment building" and that due to the Applicant's programmatic needs, CFA's "view of it is not one that we may be able to execute." 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.

B. Record supports granting FAR Relief.

CFRO has also argued that the requested FAR relief should not be granted. Similar to its claims on the requested height, CFRO provides no substantive basis for this claim. Rather, the Applicant meets its burden for variance relief to exceed a maximum permitted FAR of 2.5 for

residential uses in the MU-4 Zone District. As the Applicant testified, the need for relief arises from a confluence of factors creating an exceptional condition, including the District's programmatic requirements. Mr. McGhee testified as to the need to retain the main building of the Existing Structure, the Antenna and Equipment Building and the Property's status as a corner lot contributed to the need for the FAR relief. Mr. McGhee also testified that the size and massing of the Project is necessary to incorporate various programmatic elements, including space for wrap-around services and play space for children, which satisfy the shelter guidelines. Of particular relevance to the FAR issue, Mr. McGhee testified that the Project cannot provide a "double-loaded" corridor (with units on both sides of a corridor similar to other apartment houses) because "we have to have this interior series of elements and amenities on each floor… that allow the resident to feel a sense of community and sense of safety and get to know the other residents on the site." (Hearing Tr: p. 41 Lines 19-22, p. 42 Lines 1-2). The Applicant also established that the inefficiency of the Existing Structure and the non-utility of the Antenna/ Equipment Building together amount to approximately 1.0 FAR. Due to a confluence of these factors, the Applicant faces a practical difficulty if the Board does not grant zoning relief from the FAR requirement.

The Applicant has established in the record that relief from the FAR requirement will not be of substantial detriment to the public good or the zone plan. Specifically, the properties to the north, south and east of the Project are zoned MU-4 – like the Project – and with Inclusionary Zoning would have a permitted density of 3.0 FAR, similar to the Project's requested FAR (and above what is being requested not counting the Existing Structure and Antenna). The additional density will not impact the public good in terms of light and air, as evidenced by the Applicant's sun studies. *See* BZA Exhibit No. 94B2, as updated with matter of right sun studies at BZA Exhibit No. 204, Tab D.

For these reasons, the Applicant has satisfied the variance standard for relief from the FAR requirement in the MU-4 zone.

C. Record supports granting loading relief.

CFRO has also argued that the requested loading relief should not be granted, but their opposition is unsubstantiated. In contrast, the Applicant has presented clear testimony from Mr. McGhee concerning the need for relief from the loading requirements. The Property's location on the corner as well as many other factors create the exceptional condition (bounded by 15-foot alley to the rear, the street-side 20-foot sidewalk public space along Rhode Island Avenue as well as the 24-foot sidewalk along 17th Street, and the need to retain the majority of the Existing Structure and Antenna). The Antenna location along the alley limits access to the site and creates a challenge to satisfy the loading requirement. Additionally, the need to provide on-site wraparound services and outdoor recreational space for children as well as a trash area further limits the area on the Property that can be dedicated as a loading space. This confluence of factors results in a practical difficulty that inhibits the Applicant's ability to incorporate a loading berth and service/delivery space.

As established in the Applicant's Traffic Study, the lack of a full-size loading berth or service/delivery area will not be of substantial detriment to the public good or the zone plan. *See* BZA Exhibit No. 29. The number of expected loading deliveries is very low and, accordingly, the Traffic Study found that "this amount of loading can easily be accommodated." *See* BZA Exhibit No. 29. Further, loading activities can occur via the existing public alley on the eastern side of the Project. *See* BZA Exhibit No. 29. The Applicant has proposed a loading management plan that will circumscribe loading activities occurring on the Property. Mr. McGhee and the Applicant's traffic expert, Daniel Van Pelt,

testified that the Project will provide a 19-foot parking space for service deliveries that will be sufficient for those purposes, including meal delivery. Also, Mr. McGhee testified that the former police station had conducted its loading from the alley, so the proposed condition will not be substantially different from the prior condition. There is no evidence in the record that loading for the police station caused a detriment to the public good or zone plan in the past. Finally, as noted in the Traffic Study, the Applicant proposes to mark a portion of 17th Street as "no parking" to facilitate a pick-up and drop-off zone for residents along 17th Street. *See* BZA Exhibit No. 29. DDOT found this evidence sufficient to support the loading variance. *See* BZA Exhibit No. 47

VI. PROPOSED EMERGENCY SHELTER SATISFIES SPECIAL EXCEPTION REQUIREMENTS OF 11 DCMR SUBTITLE U § 513.1(b)[3]

The substantial evidence in the record, coupled with the Hearing testimony, undoubtedly support a conclusion that the Project satisfies the requirements of Subtitle U § 513.1(b) for the operation of an Emergency Shelter exceeding 25 persons[4] in the MU-4 zone. CFRO does not actively attempt to refute this, as CFRO failed to provide any experts in opposition. Rather, CFRO'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."

[3] Although not expressly challenged by CFRO, it is important to note that the Applicant satisfies the requirements of 11 DCMR § 513.1(b)(1, 3 and 5) because there is no Emergency Shelter within 500 feet or in the same square and the facility will meet all applicable codes and licensing requirements. *See* BZA Exhibit Nos. 7 & 36.

[4] While it appears that CFRO 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. 186 p. 5-6. Accordingly, special exception is the correct relief, and no use variance or "self-created hardship" is at issue in this case. *See* BZA Exhibit No. 94; *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).

These claims rely on conjecture, speculation and unfounded perceptions, as they lack basis in the record. For these reasons, CFRO's claims must be disregarded, and the Board should find that substantial evidence in the record strongly supports the Applicant's special exception request.

A. 11 DCMR § 513.1(b) does not establish a "per person" cap

The clear language of Subtitle U § 513.1(b) does not establish a maximum number of "persons" permissible in an Emergency Shelter. On the contrary, Subtitle U § 513.1(b)(6) thoughtfully requires the Board to 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 as finding is in Section "C" below. However, without any evidence in the record or basis in regulatory history, CFRO continues to claim that Subtitle U § 513.1(b) somehow places a cap on the number of Emergency Shelter residents.

Simply put, the clear language of Subtitle U § 513.1(b) establishes that such an allegation lacks merit. 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, CFRO's attempt to insert a cap or limit into the Zoning Regulations must fail. Based on the express language of Subtitle U § 513.1(b), 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 § 513.1(b)(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 4 site, which was zoned C-2-A, the precursor to the MU-4 zone. In that case, pursuant to 11 DCMR §358.8 of the 1958 Zoning Regulations, which has identical language to current 11 DCMR Subtitle U § 513.1(b)(6))[5], the Board approved relief from the 25-person size restriction for a 49-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 4 facility in particular, the Board has already concluded that an Emergency Shelter of this size is in "harmony" with the MU-4 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.[6] *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, CFRO's argument that the size of the Project "is beyond any plausible limit" must be rejected. Instead, the Board should follow its own precedent in the recent and historical emergency shelter cases and approve the Project, as proposed, provided the conditions of 11 DCMR § 513.1(b)(6) are met, as demonstrated below.

[5] 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."
[6] 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 in the area." *See* 11 DCMR § 513.1(b)(4).[7] In a blanket allegation, CFRO 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 at the hearing 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 Traffic Study, which included a parking analysis, and a supplemental transportation study. The Traffic Studies concluded that the Project will not have an adverse impact on the surrounding community. *See* BZA Exhibit Nos. 29 and 43. The Traffic Studies were prepared by Gorove Slade, a respected and experienced traffic consulting company. As noted above, Gorove Slade's principal, Mr. VanPelt, was accepted by the Board as an expert in traffic engineering at the Hearing. Furthermore, 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.

In this respect, CFRO's unsubstantiated claims of on-street parking difficulties and perceived traffic have no evidentiary backing. Indeed, CFRO's witnesses presented layman

[7] The Applicant notes that facility height, impact on neighboring light, air and privacy are not identified as "adverse impacts" under 11 DCMR § 513.1(b)(4). However, CFRO 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. 94A, and supplemented by the updated matter of right massing study at BZA Exhibit No. 204, Tab D, the projected shadow of the Project is not substantially different from the shadow that would be cast by a matter of right structure.

statements of traffic but no "tangible" evidence to counter the Applicant's traffic expert and/or DDOT's conclusions. CFRO alleged that there is existing congestion near the Property, but CFRO failed to provide any evidence that the Project will worsen the existing traffic conditions. Moreover, CFRO asked Mr. VanPelt 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 properties due to traffic.

- Noise

The Applicant's witnesses conclusively testified that the Project would not have an adverse impact as to noise. Mr. McGhee testified that the Project will be LEED Gold certified, which requires noise dampening materials and mechanical equipment. The Applicant's Landscape Architect, Ryan Moody, testified that the Project's proposed fencing and vegetated buffering would further reduce noise from residents using the on-site play areas. 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. CFRO offered no substantive evidence that the Project would generate an excessive amount of additional noise. The Property is located on, and loading would occur from, an alley off of the already heavily-trafficked Rhode Island Avenue. Moreover, the Property's prior use as a police station would have generated considerably more noise than the proposed use. 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. 185 and 186. 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. 186. 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. 186. Moreover, DDOT has determined that the operations of the Project will not have an adverse impact on the neighborhood. *See* BZA Exhibit No. 47.

Similar to noise and traffic, CFRO did not provide any specific evidence of adverse impacts due to the Project's operations other than non-zoning specific claims – all of which are hypothetical, unsubstantiated assertions having no correlation to the zoning relief requested. CFRO'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.

- Number of Similar Facilities

Finally, the Applicant has demonstrated that there are no other Emergency Shelters within 500 feet, the square or in the nearby area. As shown in the record at BZA Exhibit No. 204B, the "similar facilities" identified by CFRO at the Hearing are not "Emergency Shelters" because these facilities do not house homeless residents on an emergency or temporary basis. Rather, the programs mentioned by Tom Kirlin, a member of CFRO, run the gamut from the Veterans Affairs Community Resource and Referral Center, a service provider for veterans, to permanent affordable housing to senior housing. Additionally, as part of BZA Exhibit No. 204B, the Applicant provided a map of the programs identified by Mr. Kirlin, none of which are within 500 feet of the Project. Thus, the information presented by CFRO on this issue fails to establish the existence of "similar

facilities" that are located in such a manner that would have an adverse effect on neighboring properties.

D. The evidence in the record demonstrates that the Applicant satisfies both prongs of 11 DCMR Subtitle § 513.1(b)(6) because there can be no smaller project at the Property and there is no reasonable alternative site in Ward 5.

The clear evidence of record establishes that the Application satisfies both conditions for the Board to approve an Emergency Shelter of this size pursuant to 11 DCMR Subtitle U § 513.1(b)(6). Specifically, this section 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 CFRO focuses its efforts and statements on the second prong - "no reasonable alternative" - it is important to also set out the undisputed evidence in the record 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 DC 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. Director Zeilinger affirmed that the Project was already reduced to 46 dwelling units, after the initial Ward 5 site, which could house 50 units, was changed. Mr. McGhee 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 also establishes that there is no reasonable alternative to meet the program needs in Ward 5.

As made abundantly clear by CFRO's counsel's opening phrase, "We are here today to object to the location of the Ward 5 homeless shelter," (3/1 Hearing Tr: p. 108, Lines 7-8), CFRO's main purpose and goal in opposing the Project is to somehow force the D.C. Council to go back to the drawing board and to select a new Ward 5 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 5 site location at 2266 25th Place NE, CFRO did not form until July 2016, after the Property, near their homes, was selected by the Council. *See* BZA Exhibit No. 55. Indeed, in September 2016, CFRO 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. Now, CFRO has re-packaged this effort into the 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, provided in testimony from D.C. Council Chairman Phil Mendelson, City Administrator Young and Director Gillis, establishes with particularity the efforts taken to review alternative sites in Ward 5. Importantly, the evidence reflects the clear conclusion that no other reasonable site existed in Ward 5 that would meet the program's needs and the District's goals. *See* BZA Exhibit Nos. 184-186.

First, as stated above, Subtitle U § 513.1(b)(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 § 513.1(b)(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 CFRO'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 5 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 5. 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. 187. The District also hired a broker to help it identify sites in Ward 5. *See* BZA Exhibit No. 187. After evaluating the site qualifications, 2266 25th Place, 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 5. 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 testified to by D.C. Council Chairman Phil Mendelson, "the Council considered a number of suggested locations." *See* BZA Exhibit No. 183. 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. 183. 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 1700 Rhode Island Avenue." *See* BZA Exhibit No. 183.

While Subtitle U § 513.1(b)(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 5. Contrary to CFRO's assertions, the evidence establishes that there are no other reasonable sites in Ward 5 and the Applicant satisfies the requirements of Subtitle U § 513.1(b)(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. 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 § 513.1(b) have been met, and the Applicant is entitled to special exception relief for an Emergency Shelter use at the Property.

V. APPLICANT MEETS BURDEN OF PROOF FOR SPECIAL EXCEPTIONS FROM REQUIREMENTS FOR PARKING, LOT OCCUPANCY, OPEN COURT AND REAR YARD

Based on the record, the Applicant has met its burden to obtain special exception relief from the requirements for parking, lot occupancy, open court, and rear yard. In support of the special exception relief, the Applicant offered evidence and testimony from witnesses including Mr. McGhee and Daniel VanPelt of Gorove Slade, who was accepted by the Board as an expert in traffic engineering. CFRO presented no data, photos, or expert testimony in the record.

A. Applicant has met its burden of proof for a special exception as to the minimum parking requirement

Under the zoning regulations, the Project must provide 22 parking spaces, but the Project proposes three off-street parking spaces.[8] The Board should grant the requested reduction in required parking spaces because the Property complies with Subtitle C § 703.2. DDOT has determined that the "on-street parking supply has the capacity to meet parking demand" and that "DDOT has no objection to the requested variances and special exception." BZA Exhibit No. 47. Moreover, OP also reviewed the parking special exception request in depth and recommended approval. BZA Exhibit No. 49 pp. 6-7.

More specifically, we submit that this Board should approve parking relief because the Property meets multiple special exception conditions set forth in Subtitle C § 703.2. First, due to the Existing Structure and Antenna, which occupy a significant portion of the Property, the

[8] Initially, the Applicant had requested four parking spaces. However, at the request of DDOT, the Applicant has dedicated one parking space to loading.

required parking spaces cannot be provided on the Property. Similarly, additional parking spaces cannot be located on properties within 600 feet because those properties are all under separate ownership.

Further, the Applicant's Traffic Study confirms that the Property is well serviced by public transportation options, including Metrobus lines, the Rhode Island Avenue and Brookland Metro Stations, and Capital Bikeshare. BZA Exhibit No. 29. Notably, the number of residents who are anticipated to own vehicles is negligible (less than 1%), as stated in the Traffic Study and during the hearing. BZA Exhibit No. 29. Additionally, the Traffic Study concludes that there is ample capacity to absorb site-generated traffic without a negative impact on the immediate neighborhood. BZA Exhibit No. 29.

The evidence in the record and the testimony prove that there is ample on-street parking available during peak parking hours. Accordingly, the proposed parking relief meets the special exception conditions, is in harmony with the zone plan and will not tend to adversely affect the use of neighboring properties. Furthermore, the Applicant is providing a Transportation Demand Management Plan and the reduction in the required number of parking spaces is only for the amount that the Applicant is physically unable to provide on the site. Moreover, as OP noted, "proportionate to the need, as based on the experience of the current facility at DC General, less than one percent of the residents own a vehicle and many staff persons use public transportation. It is envisioned that the situation would be similar at this proposed facility." *See* BZA Exhibit No. 49. CFRO's claims that the requested parking relief will adversely affect the use of neighborhood properties amount to speculative anecdotal information, as CFRO has offered nothing in the record

indicating otherwise.[9] Thus, the evidence supports the Board approving the special exception for parking.

B. The Applicant satisfies the burden of proof for special exceptions as to the requirements for lot occupancy, open court and rear yard

As discussed at length in the record and at the Hearing, the substantial evidence supports a finding that the Applicant has satisfied the special exceptions standards for lot occupancy, open court and rear yard. OP also thoroughly reviewed these requests and recommended approval of the relief. BZA Exhibit No. 49. Again, CFRO's main contention was that the granting of this request was "unjustified" because the Property is "too small." As stated above, the size of the Property is part and parcel of the Applicant's request for special exception relief, and the Board reviews this factor pursuant to the special exception standard.

i. Lot Occupancy (Subtitle G § 404.1)

The maximum permitted lot occupancy in the MU-4 Zone District is 60%. The Proposed Project will reach 73% lot occupancy. As documented in the Record, if the Project was being constructed on an unimproved site, and the Existing Structure and Antenna were not being retained, the lot occupancy for the Proposed Project would not be as high. Notably, similar to the FAR discussion above, if the Project were eligible for an inclusionary zoning bonus, the permitted lot occupancy would be 75% and no relief would be required. Furthermore, as set out clearly in the record and stated by Mr. McGhee during the Hearing, the Project is separated from

[9] Indeed, one of the persons in opposition, Jeff Sheen, who testified to the difficulty in finding on-street parking should be discounted for the reasons below. Based on the witness cards at BZA Exhibit No. 211, Mr. Sheen owns the property at 1620 Hamlin Street NE, which is not within 200 feet of the property. The rear of that property abuts an alley. Importantly, an ariel view of that property on Bing, which is publicly available on the internet at 2https://www.bing.com/maps?q=1620+Hamlin+STreet+NE&mkt=en&FORM=HDRSC4, shows that Mr. Hamlin's property has a rear garage that is accessible via a paved area from the alley. Accordingly, Mr. Sheen could, if he wanted to, park his car in the garage, and he is selecting to park his car on the street. Therefore, his statements about the difficulty in finding on-street parking should not be accorded significant weight because he has off-street parking that he is choosing not to utilize.

the homes across 17th Street by a substantial distance - more than 100 feet. Specifically, due to the width of 17th Street, the bulk of the tallest portions of the Project will be separated from the single-family dwellings along 17th Street by approximately 150 feet. Accordingly, the light and air available to those properties will not be affected adversely.

The Applicant offered evidence in the form of sun studies affirming that the Project will not adversely affect neighboring properties' light and air. BZA Exhibit No. 94B2, as updated with matter of right sun studies at BZA Exhibit No. 204, Tab D. This Board has repeatedly held that the relevant analysis for sun studies is the difference between the shadows to be cast by the matter of right and proposed project,[10] not between the existing structure, if any, and the proposed project. Indeed, the evidence is clear that a matter of right building, *see* BZA Exhibit No. 204, Tab D, does not increase the number of properties in shade when compared to the proposed Project's sun study at BZA Exhibit No. 94B2. Accordingly, the Applicant has offered sufficient evidence that the Project will not adversely affect the light and air for the properties across 17th Street or the newly constructed condo building on the adjacent property.

ii. Open Court Width (Subtitle G § 202.1)

The evidence in the Record supports the Project's open court with a 17-foot diameter despite the minimum court requirement calling for a width of 23.33 feet. The testimony establishes that the Historic Preservation Office ("HPO") requested the Applicant leave open a viewshed of the Existing Structure from Rhode Island Avenue, N.E. by retracting the projecting wing of the new construction so that more of the historic police station could be viewed. As testified by Mr. McGhee, the effect of HPO's request was to reduce the court width, creating a practical difficulty for the Applicant.

[10] *See* BZA Case Nos. 16536, 18886, and 19230. *See also Draude v. Board of Zoning Adjustment*, 527 A.2d 1242, 1253 (1987).

This proposed relief will not adversely affect neighboring properties and is in harmony with the general purpose of the regulations and zoning maps. Courts are not required in the MU-4 zone, but when a court is provided the purpose of the court is to allow for light and air into a structure. The court at issue opens into Rhode Island Avenue's 25-foot "parking"/ sidewalk, ensuring access to light and air as shown in the landscape plans and discussed by the landscape architect, Ryan Moody, during the Hearing, the Applicant proposes substantial plantings and screenings for that area that will further limit any potential adverse effects on the use of neighboring properties. *See* BZA Exhibit No. 36A1. The net result of these factors is to minimize the Project's effect, if any, on neighboring properties.

iii. Rear Yard (Subtitle G § 405.5(a)(1) and (2))

The Board should support the requested relief from the rear yard requirement, which is 15 feet in the MU-4 zone. As established in the record and during the Hearing, the Project will provide a compliant rear yard along Rhode Island Avenue, but the eastern portion of the Project is constructed to the rear lot line, providing a 7.5-foot rear yard below the 25-foot plane and no rear yard setback above the 25-foot plane.[11] Notably, Mr. McGhee's testimony establishes that the Antenna's equipment building creates an existing non-conformity because that structure already intrudes upon the area that would have to be set aside for the rear yard. The Project will build over the ancillary, equipment building and south along the public alley with surface parking spaces.

Nonetheless, the Applicant has established that the request for rear yard relief is both in

[11] During the hearing, CFRO submitted testimony questioning whether the rear lot line could be identified in this location. However, that testimony is expressly undermined by CFRO's witnesses own admission that on a corner lot, a rear lot line can be identified in this manner, and the long-standing precedent of interpretations by the Zoning Administrator of both the Zoning Regulations and the 1910 Height Act supporting such a decision. For example see the Zoning Administrator's determination in 5333 Connecticut Avenue NW, an appeal of which was upheld by this Board in BZA Case No. 18615.

harmony with the general purpose of the regulations and will not tend to adversely affect the use of the neighboring properties. The evidence shows that the rear of the Property abuts a commercial auto-service/tire shop, limiting any impact on nearby residential uses. The use of the neighboring property will not be affected adversely because the Antenna equipment building will remain as is, and the rear yard area will not be impacted along Rhode Island Avenue.

Additionally, the record reflects that the requested rear yard relief satisfies the special conditions for rear yard relief under Subtitle G § 1201.1. The rear yard will face the public alley and all rear-facing windows will be more than 40 feet from another building. There will be no office windows on the Property and there are no habitable rooms that are within the site lines of the Project. Finally, as previously mentioned, the traffic study concluded that the services functions at the site will be well-managed with the proposed loading areas. BZA Exhibit No. 29.

In regard to the rear yard, CFRO challenges the location of the proposed rear yard, which has no basis in law or long-standing holdings of the Zoning Administrator and this Board. CFRO fails to offer any further evidence that the rear yard will adversely affect neighboring property or harm the zone plan. Accordingly, the Applicant has met its burden to obtain relief from the rear yard requirements.

VII. 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, as well as from the SMD Commissioner for the Project. 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

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