BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

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Application of BP Amoco Corporation
and Steuart Investment Company

BZA Application No. 16648
Public Hearings: December 19, 2000
March 20, 2001
ANC 6A

APPLICANT'S MOTION TO EXCLUDE
OFFICE OF PLANNING STAFF REPORTS AND
LIMIT ALL EVIDENCE AND TESTIMONY TO
THE ENUMERATED REQUIREMENTS FOR A
SPECIAL EXCEPTION AND 11 DCMR SECTION § 726.1

The Applicant, BP Amoco Corporation, by and through undersigned counsel, respectfully submits this Motion to:

1. Exclude the Office of Planning Staff Reports which improperly rely on the Comprehensive Plan, and are irrelevant and prejudicial; and

2. Limit all evidence and testimony to the enumerated requirements for a special exception under 11 DCMR § 726.1 without reference to the Comprehensive Plan.

In support of this Motion, the Applicant sets forth the following undisputed facts and law which are binding on the Board in these proceedings. The Office of Planning has submitted an original Staff Report, dated December 11, 2000 and a Supplemental Staff Report dated March 9, 2001 (the "O.P. Reports"). However well-intentioned, the O.P. Reports are misleading and prejudicial to BP Amoco and the Board because of the far-reaching and improper reliance on the Comprehensive Plan. In attempting to impose standards which clearly do not exist in the current Zoning Regulations, the O.P. Reports have obscured the Board's limited special exception review and created wholly unrealistic expectations in the community for the nature and scope of these proceedings.

BZA
Case No. 16648
Exhibit No. 121

Board of Zoning Adjustment
District of Columbia
CASE NO.16648
EXHIBIT NO.121

1. The Board's Special Exception Review is Limited

This Application, as dramatically scaled back by the BP Amoco, involves only a "special exception under Subsection 726.1 for the development and the expansion of an existing gasoline service station…." As such, the Board's inquiry is limited as set forth to the specific and enumerated requirements in the Zoning Regulations. The Court of Appeals has carefully defined and limited the Board's jurisdiction and responsibility in special exception cases.

> **The BZA's discretion in reviewing applications for special exceptions is limited to determining whether the proposed exception satisfies the relevant zoning regulations**. *Stewart* v. *Board of Zoning Adjustment*, D.C. App., 305 A.2d 516, 518 (1973)..... **If the prerequisites set out in the particular regulations are met, the BZA ordinarily must grant the application**. The narrow issue, then, which the BZA was faced with deciding was whether [the enumerated Zoning Regulations] had been satisfied.

Bakers Local Union No. 118 v. District of Columbia Board of Zoning Adjustment, 437 A.2d 176, 178 (D.C. 1981) (Emphasis added).

The applicable requirements and the extent of the Board's inquiry is limited to the enumerated requirements established under the existing Zoning Regulations. In the C-2-A zone, a special exception under § 726 for a gasoline service station is subject to the requirements set forth in § 706, including:

706.1 A gasoline service station established or enlarged after the adoption of these regulations shall be permitted in a C-1 district if approved by the Board of Zoning Adjustment in accordance with the conditions specified in § 3108 chapter 31 of this title, subject to the provisions of chapter 23 and the provisions of this section.

706.2 Each application submitted under this section shall be referred to the Office of Planning in accordance with the provisions of § 705.

706.3 The stations shall not be located within twenty-five (25 ft.) of a Residence district unless separated from the Residence district by a street or alley.

706.4 The operation of the use shall not create dangerous or other objectionable traffic conditions.

706.5 The Board may impose requirements pertaining to design, appearance, screening, lighting, or other requirements as it deems necessary to protect adjacent or nearby property.

706.6 Required parking spaces may be arranged so that all spaces are not accessible at all times. All parking spaces provided under this subsection shall be designed and operated so that sufficient access and maneuvering space is available to permit the parking and removal of any vehicles without moving any other vehicle onto public space.

Additionally, Section 2302 imposes the following requirements for a gasoline service station, including:

2302.2 No portion of the structure or premises to be used for any of the uses listed in 2302.1 [gasoline service station] shall be located within twenty-five feet (25ft.) of a Residence district unless separated from the Residence district by a street or alley.

2302.3 No use listed in 2302.1 shall have a vehicular entrance or exit connected with a street at a point closer than twenty-five (25ft.) To any Resident district existing at the time the use is established, unless separated from the Residence district by a street or alley.

2302.4 No driveway of any entrance or exit to any use listed in 2302.1 shall be closer than forty feet (40ft.) to a street or intersection as measured from the intersection of the curb lines extended.

2. The Comprehensive Plan Is Not Relevant To The Board's Inquiry

While the Court of Appeals has provided clear guidance on what the Board must consider in a special exception application, it has been equally unequivocal in what the Board must not take into consideration. Specifically, the Comprehensive Plan has no role whatsoever in the special exception process administered by the Board. Tenley and Cleveland Park Emergency

Committee v. District of Columbia Board of Zoning Adjustment, 550 A.2d 331, (D.C. 1988); cert denied, 489 U.S. 1082 (1989); Levy v. District of Columbia Board of Zoning Adjustment, 570 A.2d 739, (D.C. 1990).

More recently, the Court of Appeals has provided further explicit guidance to the Board and the Office of Planning.

> This court has held, however, that "the Zoning Commission is the exclusive agency vested with the responsibility for assuring that the Zoning Regulations are not inconsistent with the Comprehensive Plan." *Tenley & Cleveland Park Emergency Committee v. District of Columbia Board of Zoning Adjustment,* 550 A.2d 331, 341 (D.C. 1988), *cert. denied*, 489 U.S. 1082, 109 S.Ct. 1539, 103 L.Ed.2d 843 (1989.) Given this holding, we must decline to consider petitioner's arguments based on the Comprehensive Plan, since the Zoning Commission has not been heard in this case (nor, as far as we know, have its views been sought). **The Board's limited function is to assure that the regulations adopted by the Zoning Commission are followed; it has "no authority to implement the Comprehensive Plan**."

French v. District of Columbia Board of Zoning Adjustment, 658 A.2d 1023, 1034 (D.C. 1995) (Emphasis added).

The Board has had no reluctance or difficulty in implementing the well-established and binding legal standard in this area. In a November 22, 2000 decision, the Board without hesitation, excluded testimony and arguments related to the Zoning Administrator's enforcement of the Zoning Regulations in issuing a building permit which was allegedly inconsistent with the Comprehensive Plan. Appeal No. 16604 of Fairview Heights Neighborhood Association (Order attached). Under the circumstances and its past practices, the Board is obligated to exclude any documents and testimony related to the Comprehensive Plan.

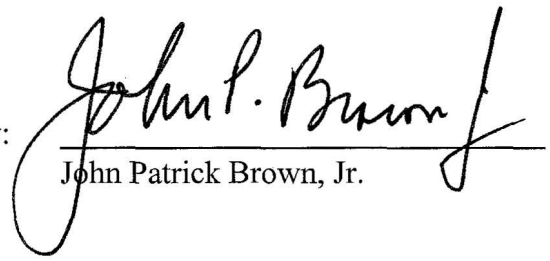
Conclusion

For the reasons set forth above, the requested Motion must be granted in order to ensure these proceedings are conducted in accordance with the clearly defined legal standards, longstanding Board practices and without prejudice to the Applicant.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

March 20, 2001

By: 
John Patrick Brown, Jr.

LAW OFFICES OF ANTHONY M. RACHAL, III

By: /s/
Anthony M. Rachal, III

Co-Counsel for Applicant

154573

CERTIFICATE OF SERVICE

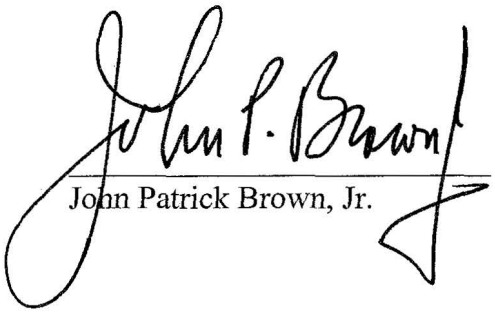
I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Exclude Office of Planning Staff Reports and Limit All Evidence and Testimony to the Enumerated Requirements for a Special Exception and 11 DCMR Section § 726.1 was served by hand-delivery and/or facsimile, this 20th day of March, 2001, upon:

Mr. Daniel M. Pernell
Mr. Marvin F. Fields, Jr.
Mr. G. Keith Jarrell
Advisory Neighborhood Commission 6A
624 H Street, N.E.
Washington, D.C. 20002

Ms. Sarah L. Robinson
816 4th Street, N.E.
Washington, D.C. 20002

Mr. Mackie J. McCrea, Jr.
814 4th Street, N.E.
Washington, D.C. 20002

Mr. David McGettigan
Office of Planning
801 N. Capitol Street, N.E.
Fourth Floor
Washington, D.C. 20002



John Patrick Brown, Jr.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

★ ★ ★

Appeal No. 16604 of Fairview Heights Neighborhood Association, pursuant to 11 DCMR §§ 3105 and 3106, from the administrative decision of the Zoning Administrator, on July 16, 1999, to issue Building Permit No. B425220 to the Sikh Cultural Society to permit the construction of a temple in an R-1-B District at premises 3801 Massachusetts Avenue, N.W., Square 1816, Lot 45.

Hearing Date: September 13, 2000
Decision Date: October 3, 2000

PROCEDURAL HISTORY

The Sikh Cultural Society of Washington, D.C., an intervener in this matter, applied November 8, 1996 for a building permit to construct a temple at 3801 Massachusetts Avenue, N.W. The Department of Consumer and Regulatory Affairs ("DCRA") approved the building plans and issued Building Permit No. B425220 on July 16, 1999. On May 26, 2000, DCRA issued a stop work order for the project as preventive measure to ensure that the Intervener had complied with applicable regulations. The stop work order was subsequently rescinded.

Fairview Heights Neighborhood Association ("Appellant"), a group of residents who live in the immediate area of the proposed temple, filed the instant appeal on June 12, 2000. The appeal alleges, among other things, that issuance of the building permit resulted from an erroneous interpretation of the zoning regulations governing building height, side yard and rear setbacks, and parking. The appeal also alleges that issuance of the building permit violated provisions of the Comprehensive Plan and that certain zoning regulations are invalid under the First Amendment because they directly favor churches over all other private entities. In addition, the Appellant advances a contention made by Advisory Neighborhood Commission ("ANC") 3C that DCRA failed to give the ANC notice of the issuance of the building permit, contrary to the legal requirement under D.C. Code § 1-261(c)(3) and (d). The ANC contended that the lack of proper notice prevented the community from raising the issues now before the Board, and that, as a result, the permit was improperly issued.

A public hearing was held before the Board on September 13, 2000. Testimony was received from the Fairview Heights Neighborhood Association, the Sikh Cultural Society, DCRA, and ANC 3C.

FINDING OF FACT

1. The subject property is located at 3801 Massachusetts Avenue, N.W. in an R-1-B zone district at Square 1816, Lot 45.

2. The site is an irregular corner lot bounded on the east by 38th Street and on the south by Massachusetts Avenue.

3. The property is owned by the Sikh Cultural Society, which proposes to build a temple on the site. A church or other place of worship is permitted as a matter of right in an R-1-B district. 11 DCMR § 201.1(b).

4. The proposed temple would be 30 feet high, with a 10-foot side yard on the west side of the property but no setback from the property line on the east side (along 38th Street), and a 26-foot back yard. The temple would occupy approximately 48 percent of the lot.

5. The proposed temple would include as an architectural embellishment a spire extending approximately 40 feet above the building's roof.

6. Six parking spaces would be provided in the alley, with 21 additional spaces located underground.

7. The proposed temple would have a seating capacity of 270.

8. At its public meeting of August 28, 2000, ANC 3C unanimously approved a resolution expressing its concern that the issuance of the building permit for the Sikh temple "resulted from an erroneous interpretation of the zoning regulations governing height and setback limitations in an R-1 District." The resolution also stated that:

> the Zoning Administrator's application of the . . . zoning regulations will result in the construction of a building that is out of scale and character with the rest of the neighborhood immediately surrounding it, to the serious detriment of fundamental objectives of zoning policy in the District of Columbia and the Ward 3 Plan in the Comprehensive Plan (i.e. preventing the overcrowding of land and preserving light and air).

Resolution of ANC 3C, August 28, 2000. The ANC testified at the public hearing that the Zoning Regulations should not be interpreted inconsistently with the Comprehensive Plan.

CONCLUSION OF LAW AND OPINION

The Board of Zoning Adjustment has jurisdiction to hear this appeal and render a decision and order pursuant to D.C. Code § 5-424(f). The Appellant, as the proponent in this matter, has the burden of proof pursuant to 11 DCMR § 3119.2. To reverse the Zoning Administrator's decision approving the issuance of the building permit, the Appellant must show by a preponderance of

the evidence that the building permit was issued in error because the proposed building would violate the Zoning Regulations. The Appellant contends that the proposed building would violate (1) the setback requirements and height restrictions specified in 11 DCMR §§ 400.1, 400.5, 400.6 and 400.9 and (2) the number and width of parking spaces required under 11 DCMR §§ 2101 and 2115. The Board is not persuaded by the Appellant's arguments, and concludes that the Zoning Administrator properly issued Building Permit No. B425220, because the proposed temple does not exceed the applicable height or setback requirements, or otherwise violate the Zoning Regulations.

Building height. In an R-1-B district, building height is generally limited to 40 feet or three stories. 11 DCMR § 400.1. That height may be exceeded in specific instances. 11 DCMR § 400.2. A "spire . . . serving as an architectural embellishment . . . may be erected to a height in excess of that" otherwise authorized. 11 DCMR § 400.3. A church or other place of worship "may be erected to a height of sixty feet (60 ft.). . . ." 11 DCMR § 400.6.

The proposed Sikh temple would be built to a height of approximately 30 feet, with a spire extending approximately 40 above the roof line. The spire constitutes an architectural embellishment, whose height is not limited by the Zoning Regulations. The Zoning Regulations specify that "[i]n those districts in which the height of building is limited to forty feet (40 ft.), the height of the building may be measured from the finished grade level at the middle of the front of the building *to the ceiling of the top story*." 11 DCMR § 199 (emphasis added).

The Board concludes that the 30-foot height of the proposed temple complies with the applicable zoning requirements. Building heights of up to 40 feet are generally permitted in an R-1-B zone, and places of worship in particular may be built to a height of 60 feet. The proposed spire constitutes an architectural embellishment that does not increase building height for zoning purposes.

Setbacks. The Appellant argues that the proposed temple violates the setback requirements of 11 DCMR §§ 400.5 and 400.9. Those provisions allow construction of a building up to 90 feet in height, rather than the 40-foot limit that would otherwise apply, provided that the building is sufficiently set back from the property's lot lines. However, this provision is not applicable to this building, which as previously noted, is only 30 feet high. The setback provisions cited by the Appellant apply for buildings that exceed the otherwise applicable height limits, which is not the case here.

The rear and side yard requirements applicable to the Sikh temple project are found in 11 DCMR §§ 404 and 405, respectively. In this case, the Zoning Regulations require a rear yard of at least 25 feet and a side yard of at least eight feet on the west side of the property. 11 DCMR §§ 404.1, 405.9. No minimum side yard is required on the east (38th Street) side of the property, consistent with 11 DCMR § 405.5 (no side yard is required along a side street abutting a corner lot in a Residence district). Because the proposed temple would have a side yard of 10 feet on the west and a rear yard of 26 feet, the Board concludes that the proposed development complies with minimum rear and side yard requirements of the Zoning Regulations.

The Appellant asserts that the front steps of the proposed temple should be set back because they are within a few feet of the lot line. The setback requirements of 11 DCMR §§ 400.5 and 400.9 govern rear and side yards, and do not apply to the steps at the front of the building. As proposed, the front steps of the temple building do not violate any provision of the Zoning Regulations.

Parking. The Appellant contends that the six underground parking spaces do not meet minimum size requirements, which specify that parking spaces must be at least nine feet wide. 11DCMR § 2115.1. However, the Appellant did not offer sufficient evidence to prove this assertion, while DCRA testified at the hearing that there were no issues of non-compliance with respect to parking. Tr. at 77-78.

The proposed temple is required to provide one parking space for every 10 seats of occupancy capacity. 11 DCMR § 2101.1. As proposed, the temple would have a capacity of 270 people and a total of 27 parking spaces. The Board concludes that the off-street parking provided by the proposed temple satisfies the relevant requirements of the Zoning Regulations.

Other issues. At the public hearing, the Board ruled as a preliminary matter that it would not hear testimony on issues raised by the Appellant concerning the constitutionality of the Zoning Regulations with respect to religious uses or the effect of DCRA's alleged failure to give the ANC proper notice of the building permit, because those issues are outside the scope of the Board's jurisdiction. Noting that the sole authority for any amendment of the Zoning Regulations is in the Zoning Commission, the Board concluded that it must give effect to the Zoning Regulations that are currently in place, and this was not the proper forum to consider arguments concerning whether the regulations are unconstitutional.

With respect to the issue of ANC notice, the Board held that a delay or failure by DCRA to notify an affected ANC of a building permit was not a decision made in the administration of the Zoning Regulations such that the notice issue should be considered by the Board pursuant to its appellate jurisdiction. *See* D.C. Code § 5-424(f); 11 DCMR § 3112.2 (an appeal may be brought to the Board by any person aggrieved by any order or decision made in the administration or enforcement of the Zoning Regulations).

The Board also declined to hear the Appellant's argument that the Zoning Administrator's decision to issue the building permit was not consistent with certain provisions of the Comprehensive Plan. The Board concurs with DCRA that, when issuing a building permit, the Zoning Administrator is required to comply only with existing Zoning Regulations. The Comprehensive Plan is a statement of general policy governing planning and development in the District of Columbia. *See, e.g., Levy v. District of Columbia Board of Zoning Adjustment*, 570 A.2d 739, 744 (D.C. 1990). The Plan "is a broad framework intended to guide the future land use planning decisions for the District." *Tenley and Cleveland Park Emergency Committee et al. v. District of Columbia Board of Zoning Adjustment*, 550 A.2d 331, 337 (D.C. 1988); *cert. denied*, 489 U.S. 1082 (1989). The Plan is not self-executing but is implemented by various agencies charged with regulatory authority. *Id.* One such agency is the Zoning Commission, which is the exclusive agency vested by Congress, through the District Charter, with power to

enact zoning regulations for the District of Columbia. Home Rule Act § 492(e), D.C. Code § 5-413.

The Charter requires that "[z]oning maps and regulations, and amendments thereto, shall not be inconsistent with the comprehensive plan for the National Capital . . . ." Home Rule Act, § 492(b)(1); D.C. Code § 5-414. However, the Court of Appeals has recognized that, while "the existing zoning regulations may be inconsistent in some instances with the policies outlined in the Comprehensive Plan, . . . an examination of existing zoning regulations for conformance with the Comprehensive Plan is necessarily a time-consuming process . . . ." *Tenley and Cleveland Park Emergency Committee*, 550 A.2d 331, 337 (D.C. 1988). Zoning regulations and maps already in place continue to have the full force and effect of law until such time as the Zoning Commission amends them. *Id.*, 550 A.2d 331, 336 (D.C. 1988).

The Board accorded ANC 3C the "great weight" to which it is entitled. However, the Board concludes that the ANC has not offered persuasive advice that would cause the Board to find that the building permit was issued in error or that the proposed temple would be constructed in violation of the Zoning Regulations. Specifically, the Board does not agree with the ANC's assertion that issuance of the building permit resulted from an erroneous interpretation of the Zoning Regulations governing building height and setback requirements. The Board finds that the ANC's assessment of building height improperly included an architectural embellishment, and that the proposed temple in fact does not exceed the 60-foot building height allowed as a matter of right for places of worship in an R-1 zone. As previously discussed, the Board is not persuaded by the ANC's argument regarding zoning decisions that are allegedly inconsistent with the Comprehensive Plan, but concurs with DCRA that the Zoning Administrator is bound to apply the existing zoning regulations.

CONCLUSION

This appeal concerns the proposed construction of a temple on property zoned R-1-B, where a place of worship is permitted as matter of right up to a height of 60 feet. The temple design includes a spire extending above the roofline. The spire, as an architectural embellishment, does not increase the calculation of building height for zoning purposes. The height of the proposed temple building, at approximately 30 feet, is well within the 60-foot allowable height limit for a place of worship in an R-1-B district. Moreover, the siting of the proposed temple on the subject property satisfies all applicable zoning provisions with respect to lot occupancy and to rear and side yard setbacks, and the development will provide off-street parking consistent with the requirements of the Zoning Regulation. The Board finds that the Appellant has failed to prove, by a preponderance of evidence, that the building permit for the proposed temple was issued in error, and therefore the appeal of the Fairview Heights Neighborhood Association is denied.

VOTE: **3-1-1** (Kwasi Holman, Rodney Moulden and Sheila Cross Reid to deny the appeal, Robert Sockwell abstaining and Anne Renshaw in opposition).

ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____
Jerrily R. Kress, FAIA
Director

FINAL DATE OF ORDER: NOV 22 2000

UNDER 10 DCMR § 3125.9, "NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBSECTION 3125.6" OF THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES.

Ord 16604 NM/SMP

BZA APPEAL NO. 16604

As Director of the Office of Zoning, I hereby certify and attest that on NOV 22 2000 a copy of the order entered on that date in this matter was mailed first class, postage prepaid, to each party who appeared and participated in the public hearing concerning the matter, and who is listed below:

Richard H. Boote
Fairview Heights Neighborhood Association
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Washington, DC 20009

ATTESTED BY: _____
Jerrily R. Kress, FAIA
Director