(E) FENCE (COMPLETE ITEMS 94 THRU 102)

The fence will not obstruct any accessible parking required by D.C. Zoning Regulations

94. Material and type:	95. Height: ft.	96. Color:	97. Location: ☐ Entirely on Owner's Land ☐ Party Line with Adjacent Neighboring Land *

* If party fence, the owner of the adjoining property must agree to the erection of the fence and this application.

98. Signature of Adjoining Owner:	99. Phone: Work Home	OFFICIAL USE ONLY: FEE	By	Date
100. Address of Adjoining Owner:	101. Lot:	102. Square:		

(F) SHED OR GARAGE (COMPLETE ITEMS 103 THRU 113)

103. Number:	104. Length: ft.	105. Width: ft.	106. Area: sq. ft.	107. Height: ft.	108. Volume: cu. ft.	109. Estimated Cost of Work: $	OFFICIAL USE ONLY: FEE	By	Date
110. Material of Roof:	111. Material of Sides:	112. Wall thickness:: ☐ External ( ) inches ☐ Party ( ) inches				113. Color:			

(G) AWNING (COMPLETE ITEMS 114 THRU 123)

114. Number:	115. Color:	116. Type: ☐ Folding ☐ Fixed	117. Projections: Beyond bldg. line _____ in. Beyond pt. of attachm. _____ in.	118. Height of lowest part of awning: (a) _____ ft above sidewalk (b) _____ ft above parking (c) _____ ft above grade	OFFICIAL USE ONLY: FEE	By	Date
119. Material of Frame:	120. Material of Covering:	121. Lettering on Awning? ☐ Yes ☐ No	122. Fixed posts? ☐ Yes ☐ No	123. Over sidewalk cafe? ☐ Yes ☐ No			

(H) SIGN (COMPLETE ITEMS 124 THRU 144)

124. Number:	125. Electric Signs? ☐ Yes, answer q. 126-132 ☐ No, SKIP q. 126-132	126. Type: ☐ Incandes. ☐ Fluoresc. ☐ Neon	127. Power _____ VA	128. Electrical Contractor: Lic. No.:

129. Address of Electrical Contractor *(include Zip)*	130. Signature of Licensed Electrician:	131. Phone:	132. License No.:

133. Height relative to building and ground: (a) _____ ft _____ in above sidewalk (b) _____ ft _____ in above roof (c) _____ ft _____ in is bldg height (d) _____ ft _____ in above projection or window (e) _____ ft _____ in from roof to sign's bottom	134. Material of Sign:	135. Type of Sign:	136. Color:
	137. Width: ft.	138. Length: ft.	139. Area of Sign: sq. ft.
			140. Width of Business Frontage: ft.

141. C of O Number for Building:	142. Sign Contractor Lic. No.:	OFFICIAL USE ONLY: Sign FEE	By	Date	Elect. FEE $	By	Date	Total FEE $	By	Date
143. Sign Contractor's Address:	144. Phone:									

(I) APPLICANT'S SIGNATURE:

A. **OWNER:** I hereby certify that I am the owner of the property; that the application and plans are complete and correct to the best of my knowledge; and that if a permit (or permits) is issued, the construction will conform to the D.C. Construction Codes, the Zoning Regulations, and other applicable laws and regulations of the District of Columbia.

Signature of Owner: _____ Address: _____ Date: _____

B. **AGENT:** I hereby certify that I have the authority of the owner to make this application. I declare that the application and plans are complete and correct to the best of my knowledge. The owner has assured me that if a permit (or permits) is issued, the construction will conform to the D.C. Construction Codes, the Zoning Regulations, and other applicable laws and regulations of the District of Columbia.

Signature of Agent: Mario Esposito Address: 8605 Cunningham Dr. Date: 7-10-00

Board of Zoning Adjustment
District of Columbia
CASE NO.16716
EXHIBIT NO.38A2

(J) APPROVALS (DO NOT WRITE ON THIS PAGE; OFFICIAL USE ONLY):

A. PERMIT CONTROL

- ☐ 1. Fine Arts by: _____ Date: _____
- ☐ 2. Historic by: _____ Date: _____
- ☐ 3. PADC by: _____ Date: _____
- ☐ 4. Cap. Gateway by: _____ Date: _____
- ☐ 5. W.H./ Obs. Precinct by: _____ Date: _____
- ☐ 6. Flood Control by: _____ Date: _____
- ☐ 7. WMATA by: _____ Date: _____
- ☐ 8. Condem. by: _____ Date: _____
- ☐ 9. RLA by: _____ Date: _____
- ☐ 10. Rental Accom. by: _____ Date: _____
- ☐ 11. Chinatown Distr. by: _____ Date: _____
- ☐ 12. Utility Clearance by: _____ Date: _____
- ☐ 13. General Liability Ins. Policy Clearance by: _____ Date: _____

B. CLEARANCE TO FILE PLANS

- ☐ 1. Zoning by: _____ Date: _____
- ☐ 2. DPW — Permit and Records Division
  Access to Parking Street ☐ Street ☐ Alley
  Cleared by: _____ Date: 7/10/00
- ☐ 3. DPW - Consumer Engineer
  Cleared by: _____ Date: 7/10/00
- ☐ 4. ERA - Erosion Control
  Cleared by: _____ Date: 7-10-00

Restrictions of the Permit:

C. PLANS AND APPLICATION APPROVAL

- ☐ 1. Information Counter by: _____ Date: 7/10/00
- ☐ 2. Information Center by: _____ Date: _____
  - ☐ (a) ABC Board by: _____ Date: _____
  - ☐ (b) Noise Control by: _____ Date: _____
  - ☐ (c) Industrial Safety by: _____ Date: _____
  - ☐ (d) Vector Control by: _____ Date: _____
  - ☐ (e) D.C. Animal by: _____ Date: _____
  - ☐ (f) Police Dept. by: _____ Date: _____
- ☐ 3. Zoning by: _____ Date: _____
  Zoning Update by: _____ Date: _____
- ☐ 4. DPW - Permit and Records Division/Deposit #
  Sidewalk Deposit $ _____ Driveway Deposit $ _____
  by: _____ Date: 7/10/00
- ☐ 5. Water/Sewer Design Branch
  Consumer Eng. by: _____ Date: _____
- ☐ 6. Environmental Regulation Administration
  - ☐ Environmental Policy Review
    Control No.: _____
    by: _____ Date: _____
  - ☐ Erosion Control by: _____ Date: _____
  - ☐ Storm Water Mgmt. by: _____ Date: _____
    Plan No. _____
- ☑ 7. Mechanical Eng. Review by: _____ Date: _____
- ☑ 8. Plumbing Eng. Review by: _____ Date: _____
- ☑ 9. Electrical Eng. Review by: _____ Date: _____
- ☐ 10. Health Plan Review
  - ☐ (a) Food Plan Review by: _____ Date: _____
  - ☐ (b) Medical X-ray Plan Rev.
    by: _____ Date: _____
- ☑ 11. D.C. Fire Dept. (Fire Prevention Plan Review Section)
  by: _____ Date: _____
- ☑ 12. Elevator Plan Rev. Sec. by: _____ Date: _____
- ☐ 13. Plumbing Insp. Rev. by: _____ Date: _____
- ☐ 14. Construction Insp. Branch (Field Check)
  by: _____ Date: _____
- ☐ 15. Historic Pres. Div. by: _____ Date: _____
- ☑ 16. Structural Eng. by: _____ Date: _____
- ☐ 17. Permit and Certificate Issuance Counter
  By: _____ Date: _____
- ☐ 18. Q.C. By: _____ Date: _____

TO REPORT WASTE, FRAUD, OR ABUSE BY ANY D.C. GOVERNMENT OFFICE OR OFFICIAL, CALL THE D.C. INSPECTOR GENERAL AT 1-800-521-1639

ZONING

C of O Number _____ Date _____
Existing Use(s) _____

- ☐ New bldg.
- ☐ P.O.D.
- ☐ File in room 329

Job No.:	BZA Case No.:	PUD Order No.:

DPW — PUBLIC SPACE

Street Name: _____
Street Width: _____
Road Width: _____
Sidewalk Width: _____
Parking: _____
Restrictions: _____



Chronology of BLRA Comments on Building Permit Application and Sunrise's Responses to

7/10/00	Sunrise files building permit application with BLRA
7/18/00	Structural Division of BLRA provides comments on building permit application, Sunrise follows-up on comments
7/31/00	Electrical Division of BLRA provides comments on building permit application, Sunrise follows-up on comments
8/1/00	Mechanical/Plumbing Section of BLRA provides comments on building permit application, Sunrise follows-up on comments
8/10/00	Fire Protection Division of BLRA provides comments on building permit application, Sunrise follows-up on comments
9/5/00	Health Division of BLRA provides comments on building permit application, Sunrise follows-up on comments
10/07/00	Department of Public Works, Solid Waste Management Administration issues memorandum that determines that the proposed project will have small to moderate impact on its services within the Department of Public Works
11/2/00	Sunrise sends a letter to Michael Johnson, Zoning Administrator, requesting information about the status of the building permit application review
11/17/00	Sunrise sends a letter to Michael Johnson, Zoning Administrator, requesting information about the status of the building permit application review
11/29/2000	Chief Operating Officer of the Department of Health (DOH) issues memorandum to the Acting Director of DCRA in response to the Environmental Impact Screening Form. The DOH memo determined that there is "no apparent significant adverse impact or likelihood of

substantial negative impact on the environment as a result of the proposed project".

11/30/00 Sunrise sends a letter to Theresa Lewis, Deputy Director of Operations, Department of Consumer and Regulatory Affairs (DCRA), requesting information about the status of the building permit application review

12/6/00 Denzil Noble, Acting Administrator, Building and Land Regulation Administration (BLRA), issues a memorandum to all BLRA reviewers stating that "No permits are to be issued for 5111 Connecticut Avenue, N.W., without my approval."

12/11/00 Sunrise meets with Denzil Noble to discuss the status of the building permit application review

12/11/00 Fire Protection Division of BLRA provides additional comments on building permit application, Sunrise follows-up on comments

12/20/00 ANC 3G files a letter with Denzil Noble demanding that the building permit not be issued for the project, alleging irregularities in the application and citing the proposed down-zoning application

2001

1/19/01 Sunrise receives a letter from Denzil Noble requesting that certain revisions be made to the building permit application

1/22/01 Sunrise makes the requested revisions to the building permit application

1/31/01 Sunrise representatives meet with Denzil Noble and various building permit reviewers to discuss pending building permit application

2/2/01 Building permit application approved by Mechanical/Plumbing Section of BLRA

2/7/01 Building permit application approved by Electrical, Health and Elevator Sections of BLRA

2/8/01	Sunrise submitted all additional materials requested by BLRA building permit reviewers at the 1/31/00 meeting
2/14/01	Sunrise representatives meet with Andrew Altman, Ellen McCarthy and Jennifer Steingasser of the Office of Planning to review the project
2/14/01	Building permit application approved by Zoning Section of BLRA
2/16/01	Sunrise provides requested information to the Office of Planning regarding shadow studies and a traffic analysis prepared by consultants to Sunrise
2/16/01	Building permit application approved by Fire Prevention Plan Review Section of BLRA
3/6/01	Building permit application approved by stormwater management and soil erosion control Sections of the Environmental Regulation Administration of BLRA
3/8/01	Building permit application approved by Department of Public Works, Permit and Records Division; DC Water and Sewer Authority, Water/Sewer Design Branch; Environmental Regulation Administration, Environmental Policy Review; and the Structural Engineering Section of BLRA
3/8/01	Building Permit No. B43564 authorizing the construction of a "seven story cast in place concrete structure containing assisted living residences (CRF, housing for the handicapped as the term is defined by the fair housing act) with undergrd parking." **THE BUILDING PERMIT PROCESS TOOK APPROXIMATELY 8 MONTHS**

H

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Form BLRA-15
(Rev. 9/30/91

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

BUILDING PERMIT **PERMIT NO.** B435464

Date 3/8/01 **(Type)** NEW BLDG.

Address of work 5111 CONN. AVE.N.W.

Permission is hereby granted to
SUNNY AND LOUIS REYES, ET AL
who is authorized to perform the work described herein at the address shown above in strict accordance with the conditions stated on BOTH sides of this permit.

Authorized work and conditions of performance thereof:

SEVEN STORY CAST IN PLACE CONCRETE STRUCTURE CONTAINING ASSISTED LIVING

RESIDENCES (CRF, HOUSING FOR THE HANDICAPPED AS THE TERM IS DEFINED BY THE FAIR HOUSING ACT) WITH UNDERGRD PARKING.

Builder **Valuation $** **No. of Bldgs.**
Width of Bldgs. **Length** **Height** **No. of Stories**
Zone **To be occupied as**
Height of terrace above grade **Projections**
Address of owner SAME ASABOVE
Deposit No. **Amount $**

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

NOTIFY DEPT. OF PUBLIC WORKS 48 HOURS PRIOR TO START OF CONST. DCWASA, WATER SVC AND SEWER SVC, RALPH JORDAN, MARTIN WALLACE. AREA CONST. ENGINEER 2/787-2393., 2/612-3460. SEPARATE ELECTRICAL, PLBG AND MECH INSTALLATION

Lot SITE PER 1989 Square

TOTAL PERMIT FEE $ 20.972.30
FILING FEE $ 2000.00
DATE
FEE PAYABLE $ 18,972.30

FOR INSPECTIONS CALL 727-7562

Chief, Permit Issuance Branch

D. MINOR

BY: Permit Clerk

(Owner) NO.

Store 001 DCR GOVERNMENT OF D.C.
Location: 1100 4TH ST. SW
Cashier DCR CASHIER OFFICE
Receipt 1037/0001 at 17:04 CLERK
EB2200215 145749 Amount $18,972.30 BUILDING STRUCTURES FEES

PERMIT



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
3737 Massachusetts Avenue, N.W.
Washington D.C. 20016

Mr. Gajinder Singh
The Sikh Cultural Society, Inc.
4452 Springdale Street, N.W.
Washington, D.C. 20016

Ruth Anne Miller
Advisory Neighborhood Commission 3C
2737 Devonshire Place, N.W.
Washington, DC 20008

Lyle Blanchard
Single Mender District 3C07
3124 38th Street N.W.
Washington, D.C. 20016

Councilmember Kathleen Patterson
441 4th Street N.W. Suite 709
Washington, D.C. 20005

Michael Johnson, Zoning Administrator
Building & Land Regulation Administration
941 North Capitol Street, N.E., Suite 200
Washington, DC 20009

ATTESTED BY:
Jerrily R. Kress, FAIA
Director

ل

Memorandum • Government of the District of Columbia

RECEIVED

'87 FEB -9 P3:32

OFFICE OF DIRECTOR

TO: Fred L. Greene
Director
Office of Planning

Office: Corporation Counsel
Prepared by: L&O:JEP:gbt
(86-410) LCD-2074

FROM: Margaret L. Hines
Deputy Corporation Counsel, D.C.
Legal Counsel Division

Date: February 5, 1987

SUBJECT: Applicability of Zoning Commission Order No. 503 and Large Tract Review Procedures to Proposed Development at 4620 Wisconsin Avenue, N.W.

This is in response to your memorandum dated December 9, 1986, asking two questions regarding a proposed development by Wisconsin Avenue Limited Partnership at 4620 Wisconsin Avenue, N.W. Specifically, you ask what impact Zoning Commission Order No. 503, regarding vesting of rights, has on the proposed development, and whether the Large Tract Review Procedures must be applied to that development. A third question, implicit in your memorandum, is whether the Large Tract Review Procedures, if applicable, must be completed before a permit application is accepted for filing. As explained more fully below, we have concluded under Zoning Commission Order No. 503 and previously existing regulations that the tender on September 22, 1986, of a permit application which was sufficiently complete to permit processing without substantial change, was sufficient to vest development rights as of that date. We further conclude that the Large Tract Review Procedures need not be applied to this development. Generally, the Large Tract Review Procedure should be initiated by the filing of a permit application; applicability of the procedure is not a valid reason for rejecting an application tendered for filing.

Zoning Commission Order No. 503, effective September 22, 1986, 33 D.C. Reg. 6225 (Oct. 10, 1986), amended the zoning regulations which govern the effect of the filing of a permit application on the vesting of the right to develop a property without regard to a subsequent change in the zoning of the property. See 11 D.C.M.R. §§ 3202.5 and 3202.6 (June 1986). Under the amendments effectuated by that order, if a permit application is filed on or before the date the Zoning Commission decides to hold a hearing on an amendment to the zone district classification of the site of the proposed development, the developer may proceed in accordance with the zoning classification in effect on the date the application was filed. If a permit application is filed after the day on which the Commission decides to hold a hearing on the zone district classification of the site,

the developer may proceed only in accordance with the final decision of the Commission on the zone district classification. Prior to the issuance of Commission Order No. 503 the regulations provided for vesting when the permit application is filed, without regard to the pendency of a proceeding before the Commission.

You raise the question of whether the permit application for 4620 Wisconsin Avenue, N.W., tendered for filing on September 22, 1986, but not accepted for filing until September 23, 1986, vested in the developer the right to develop the site in accordance with the zone district classification in effect on the date of filing. The right to proceed in accordance with the zoning in effect on September 22 vested with the tendering of the substantially complete application for filing; the Commission decided on September 22, to hold a hearing on the zone district classification of the site, and the completed application was tendered for filing on that date.

It is the view of the Zoning Division, Building and Land Use Regulation Administration, Department of Consumer and Regulatory Affairs, that a permit application is filed for purposes of the vesting rule when it is presented in substantially complete form to that office. Although the application is processed through various offices in the Department of Consumer and Regulatory Affairs before it is ultimately "accepted" for filing, that is, before a determination is made that a permit should be issued, the initial filing of an application by the developer is the act which determines the vesting of rights.

This interpretation is consistent with the Zoning Regulations. First, 12 D.C.M.R. § 199.8 provides that words which are not specifically defined in the Regulations "shall have the meaning given in Webster's Unabridged Dictionary." The relevant definitions of the word "file" are "to fill out and submit... to the appropriate office" or "to perform the first act of." More significantly, the vesting rule itself contemplates that the act of filing will be followed by processing, in stating among the requirements for vesting that "[t]he applications shall be accompanied by the plans and other information required by § 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation."

In this case, a permit application was filed on September 22, 1986, with accompanying data sufficient not only to permit processing, but to permit a determination to be made on that same date that the application should be accepted. The fact that the fee was not paid until the next day does not deprive the applicant of the benefit of having filed a sufficiently complete application on September 22; under 12 D.C.M.R. the applicant's rights vested

at that time."/

The context in which this problem is presented raises a more fundamental question, not articulated in your memorandum. The reason the permit application was not immediately accepted when tendered to the proper office for filing though the application was in no way defective is that your second question, whether the Large Tract Review Procedures apply to the development, was raised at that time. Apparently, if the procedures were judged to be applicable, the permit application would not have been accepted for filing. Refusing to accept the filing until after the Large Tract Review Procedures were completed would have been erroneous.

Section 1500.1(a) of the Large Tract Review Procedures, 10 D.C.M.R. § 1500.1(a), provides that the Office of Planning is to:

> "Review, prior to the filing of applications for building or construction permits, all large tract development projects comprising three (3) acres or more and any commercial or mixed-use commercial development of 50,000 square feet or more gross floor area (above grade) and cellar area (below grade)."

(Emphasis added). While the regulations purport to require a review prior to the filing of a permit application, it is beyond the authority of the Office of Planning to require review prior to filing, as "filing" is defined, supra. The Office of Planning derives its authority for implementing the Large Tract Review Procedures from Mayor's Order 86-121, effective July 28, 1986, 33 D.C. Reg. 5697 (Sept. 12, 1986). That order, among other things, directs the Director of the Department of Consumer and Regulatory Affairs to refer any application for specified commercial and mixed use commercial developments to the Office of Planning for review. Before the application is filed there is nothing for the Director of DCRA to refer to the Office of Planning and nothing for the Office of Planning to review. The review process itself, which is no more than a means of coordinating the views of various interested entities, can take place only after the filing of the application, concurrently with the application approval process, and has no effect whatsoever on the vesting of rights effectuated by the filing of an application by the developer under 11 D.C.M.R. § 3202.5.

We understand that some offices within the Department of Consumer and Regulatory Affairs refer to the acceptance of the application as "filing." Of course, in order to be effective the

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*/ Our conclusion is limited to the question of when rights to build in conformity with a particular zoning classification vest; if the application is not sufficiently complete or does not comply with applicable regulations the act of filing may vest no rights whatsoever.

Large Tract Review Procedures must take place prior to the completion of the processing of a permit application and ultimate acceptance of that application as complete and in conformity with District laws and regulations.

Finally, the proposed development does appear to fall within the language of both Mayor's Order 86-121 and the Large Tract Review Procedures promulgated pursuant to that order. With slight differences in wording, both the rules and Mayor's Order 86-121 indicate the procedures apply to development proposals of 50,000 square feet or more of gross floor area (above grade) and cellar area (below grade).**/ However, because the rules were intended to exclude parking from the gross floor area calculations, and that interpretation is reasonable, the Large Tract Review Procedures are inapplicable.

We understand that the Large Tract Review Procedures were intended to coordinate review of developments which are, by virtue of their size, likely to generate a lot of activity, significantly increase traffic, and otherwise affect the area surrounding the development site. Given this intent, it is reasonable to determine the applicability of the regulations by defining the size of the tract in terms of square footage of activity-generating space, e.g., office space or retail space, and to exclude square footage which supports that activity and does not itself generate additional activity e.g., parking. Because this interpretation is reasonable on its face, and is the view of the

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**/ You indicate that the intent of the rules was to exclude from the calculation of gross floor area below grade parking, based upon the definition of "gross floor area" in the Zoning Regulations, 11 D.C.M.R. § 199. While a reliance on the definitions in the Zoning Regulations in interpreting the Large Tract Review Procedures might be legitimate, in this case the Zoning Regulations' definition of gross floor area does not support an interpretation that parking should be excluded from consideration in determining whether a site is subject to the Large Tract Review Procedures. Below grade parking is generally not part of "gross floor area" under the Zoning Regulations because the definition of that phrase specifically excludes cellars; the term "cellar" denotes "that portion of a story, the ceiling of which is less than four feet (4') above the adjacent finished grade," and would include under ground parking. 11 D.C.M.R. § 199. The Large Tract Review Procedures, to the contrary, specifically include cellar area, not within the phrase "gross floor area", but within the calculation of square footage which determines the applicability of the rule.

office primarily responsible for administering the regulations, it is entitled to deference. We suggest, however, that in the future the regulations be amended to reflect this interpretation more clearly.

MLH



Government of the District of Columbia

Office of the
Director

Office of Planning
415 12th Street, N.W.,
Washington, D.C. 20004

July 23, 1998

'98 JUL 23 P5:06
OFFICE OF ZONING
DISTRICT OF COLUMBIA

MEMORANDUM

TO: D.C. Zoning Commission

FROM: Jill C. Dennis
Director

SUBJECT: Prehearing Submission: Text Amendments - Community Based Residential Facilities/Fair Housing Act (97-15I)

The Justice Department has determined that the District's Zoning Regulations do not provide equal housing opportunity for handicapped persons in multifamily zones. Whereas a multifamily (apartment) building of a size limited only by normal zoning height and bulk limits is permitted as a matter of right in a multifamily zone, many handicapped facilities are deemed community-based residential facilities (CBRFs) and are thus subject to special spacing and size limits, and developers and operators must seek approval through a special exception process complete with public hearings and conditional approval. The Justice Department threatened to sue the District government to bring about resolution of the issue.

On September 30, 1997 the District signed a "stipulated agreement" with the Justice Department (attached as Appendix A) agreeing to change the Zoning Regulations by December 24, 1998 to eliminate the existing unequal treatment. This was to be accomplished by adding two specific amendments which would 1) allow CBRFs for handicapped persons in the multifamily residential zones as a matter of right with no restrictions not equally applied to housing for non-handicapped persons and 2) to create a "reasonable accommodation" process applicable to housing for handicapped persons, so as to provide flexibility from the strict application of normal rules to accommodate the special needs of the handicapped in all zone districts.

Hearing sessions were held on March 5 and 23 and April 6, 1998, and the record closed May 6, 1998. The issues generally raised by citizens at the hearing sessions were that they strongly oppose the loss of notice and public input provided by the current special exception process, that these "institutional" uses would adversely impact neighbors and neighborhoods and that the brunt of the proposed changes would fall on the R-4 zone districts. (The R-1 through R-3 zones were made consistent with the Fair Housing Act in 1991-1992 when CBRFs with up to six persons (and two care-givers) were permitted as of right in those single-family zones.)

At the June 8 1998 meeting of the Zoning Commission, the Commission decided to rehear the case, essentially starting all over, and to broaden it by advertising in the alternative the

ZONING COMMISSION
CASE No. 97-15I
EXHIBIT No. 6

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Fair Housing component of the original 1996 petition by the Campaign for New Community and various churches (Case No. 96-8 was filed on 08-14-96 and withdrawn on 03-03-98 in order to file separate Religious Freedom and Fair Housing components). This action was taken by the Commission because of a concern that the community's potential input had not been fully reflected in the hearing to date (given the broad reach of the proposed amendments and the limited amount of community testimony) and the fact that the Commission's options and flexibility in the case had not been fully explored. In addition, the Commission was concerned that some vital information germane to a decision had not been presented, that the case might benefit from an expanded scope to include the CNC proposal to clarify and add definitions to relieve the Zoning Administrator of case by case decisions and, most importantly, because the Commission had lost one member and gained two others who had not participated in the case to that point.

COMMUNITY BASED RESIDENTIAL FACILITIES (CBRFs)

Comprehensive New Zoning Rules (1980-81)

In 1980-81, a comprehensive zoning text amendment case (78-12) established most of the current zoning rules governing CBRFs, following these principles:

- The facilities should be dispersed as equally as possible around the city. (A major dispersal and expansion of facilities has occurred since 1981.)

- The size and density of CBRFs should be generally consistent with the size and density permitted in the various zone districts.

- Smaller, family-size facilities should be encouraged, so as to lessen neighborhood impacts and provide a home-like environment for residents -- a true alternative to an institutional setting. (The single-family residential zones, R-1 to R-3, were opened up to CBRFs, as part of a general thrust to allow and encourage group homes in all zones, in matter-of-right and special exception size categories.)

- The needs and desires of the three affected segments of the community -- occupants, facility operators and neighbors -- should be balanced to the extent feasible.

The Zoning Commission adopted an overall definition of CBRFs with the key characteristic being a residential use "for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living." Seven specific facility types were defined and regulated (much more permissively than previously) following the more detailed licensing definitions of each type of facility. For zoning purposes, facilities were classified as Low Impact, Medium Impact and High Impact and regulated accordingly, as summarized below:

LOW IMPACT:

Community Residence Facility (for persons with disabilities)
Health Care Facility (Nursing Home, etc.)
Youth Residential Care Home (youth wards)

MEDIUM IMPACT:
Emergency Shelter (temporary housing for the homeless)

HIGH IMPACT:
Youth Rehabilitation Home (corrections)
Adult Rehabilitation Home (corrections)
Substance Abusers Home (residential drug rehabilitation facility)

Amended Zoning Rules Pursuant to the 1988 Fair Housing Amendments Act

In 1991-92, the D.C. Executive Branch and the Zoning Commission undertook a comprehensive updating of the rules regarding CBRFs pursuant to the Fair Housing Amendments Act (FHAA) of 1988 (aimed to eliminate any discriminatory provisions against handicapped persons, specifically as required by FHAA and the Americans with Disabilities Act (ADA)). That case, No. 91-15, was based on several months of staff work by a D.C. interagency task force in cooperation with the Institute for Mental Health Law. The following key amendments were adopted by the Commission:

- In the low-impact category of CBRFs, up to six individuals (plus two resident staff persons) were allowed in a dwelling, rather than the previous maximum of four. Six is the same number of unrelated persons, handicapped or not, allowed to share a dwelling, and was thus considered equal treatment. The actual maximum occupancy is eight persons, because up to two resident staff members and family are allowed.

- The spacing requirement for matter-of-right, family-size CBRFs was eliminated, i.e., for one to six persons, again, "equalizing" at six residents for handicapped and non-handicapped (with the exception of Substance Abusers Home, discussed later). Spacing requirements, and in some cases, special exceptions, were continued for facilities of seven or more occupants. This was not considered discriminatory treatment of the handicapped because group residences of seven or more non-handicapped persons in a dwelling are not allowed at all.

- In the multifamily zones (R-4 and less restrictive) the number of persons who could occupy a low-impact CBRF was increased beyond the size allowed in a dwelling in the single-family zones (R-1 to R-3).

A summary of the zoning regulations presently applicable to CBRFs is attached as Appendix B.

FAIR HOUSING - JUSTICE DEPARTMENT AGREEMENT

Definition of "Handicap" and Impact on CBRF Categories

In 1988 the FHAA defined "handicap" broadly, to include any physical or mental disability that "substantially limits" a person in performing one or more "major life activities." The latter, in turn, includes activities such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." Finally, the definition includes individuals

who are "regarded as having" such handicaps. The actual definition adopted in Section 802 of FHAA is as follows:

> *(h) "Handicap" means, with respect to a person –*
>
> *(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,*
>
> *(2) a record of having such an impairment, or being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).*

This definition clearly affects which of the seven defined types of CBRF are and are not handicapped facilities. Those that are handicapped facilities have special protection under FHAA. Thus, **Community Residence Facility** is clearly a residence for handicapped persons. **Youth** and **Adult Rehabilitation Homes** in the correctional system are clearly not housing for the handicapped.

The remaining four types of CBRFs can be either handicapped or non-handicapped, depending on the resident population. The Zoning Administrator, under the proposed rules, would make a case-by-case determination of whether a facility is handicapped, generally as discussed below.

An **Emergency Shelter** provides overnight housing for people in dire need, with few or no services provided. Typically, a shelter accommodates a significant percentage of people who are handicapped as defined in FHAA, but is not usually considered a handicapped facility because many of the residents are not handicapped. Specialized emergency shelters, however, such as those for abused women, might qualify as handicapped facilities on a case-by-case basis. Similarly, a **Youth Residential Care Home** is typically not a handicapped facility, although some handicapped individuals may be among the residents.

A **Substance Abusers Home** provides intense, short-term, residential treatment for persons attempting to overcome drug or alcohol addiction and is usually connected with a hospital. It is not a handicapped facility if it houses persons who are current users of drugs or alcohol or are receiving treatment to overcome addiction. However, persons who are "in recovery" from addiction are specifically deemed handicapped under FHAA, and thus a facility housing such persons would be considered a handicapped facility.

A **Health Care Facility** typically provides skilled or intermediate nursing care, so it would not be a handicapped facility even if some handicapped individuals were among the residents. To be considered a handicapped facility, it would have to house primarily handicapped patients/residents.

Multi-Family Zones - Equal Treatment

In multi-family zones (R-4 and less restrictive) there continues to be a maximum occupancy limit

(or other restriction such as a spacing requirement or a special exception process) for CBRFs in the current Zoning Regulations. The type of limitation varies according to the type and size of facility. The issue is that according to the stipulated agreement, any CBRF that is occupied by handicapped persons is entitled to equal treatment with housing for non-handicapped persons.

The text that the Corporation Counsel and the Justice Department agreed would be proposed to the Zoning Commission to rectify this problem is as follows:

330.5 The following uses shall be permitted as a matter of right in an R-4 district:

(i) Community-based residential facility; Provided, that notwithstanding any provision in this title to the contrary, the Zoning Administrator has determined that such community-based residential facility, which otherwise complies with the zoning requirements of this title that are of general and uniform applicability to all matter of right uses in an R-4 district, is intended and operated as housing for the handicapped as that term is defined under Section 3602 (h) of the Fair Housing Act, as amended, 42 U.S.C. Section 3601 et seq. (1955).

[An issue was whether 100% of the residents of a CBRF had to be handicapped in order for it to qualify as such. The 100% provision of a previously discussed version of the agreement has been dropped.]

The most straightforward effect of this rule is that a Community Residence Facility (which is specifically intended and operated for handicapped persons) and any other CBRF specifically for occupancy by handicapped persons would no longer be subject to any restrictions, such as special exception, numerical occupancy limit or spacing requirements. This liberalization of the rules would be applicable to CBRFs for handicapped persons in the R-4, R-5, SP, commercial and mixed use zones. The chart attached in Appendix B of this report summarizes the existing rules for all seven categories of CBRFs. A careful review of the chart indicates the potential ramifications by use category. As stated earlier in this report, case-by-case determinations of handicapped occupancy will need to be made to determine eligibility for matter-of-right status. The previously adopted restrictions would continue to apply to non-handicapped facilities.

The overall intent is that only the normal building standards of the applicable zone district (height, lot occupancy, FAR) would limit the size of a residential building for the handicapped, as is the case now with rooming and boarding houses, row dwellings, flats and apartment buildings in the affected zones. Thus, handicapped persons would have equal access with non-handicapped persons to these types of residential buildings.

The letter of January 13, 1997 from the Corporation Counsel to the Department of Justice provides additional background on the proposed zoning amendment:

> "As you know, our (the District's) original language was intended to address the risk that an applicant would misuse the CBRF process by establishing a residence with a primarily able-bodied population and only a minimal number of handicapped residents. We have

agreed to the changes you suggest with the understanding that, as you note, they are intended not to permit evasion of zoning rules but to permit able-bodied staff to live in what is otherwise a facility for the handicapped."

Reasonable Accommodation

The 1988 amendments to the Fair Housing Act require governments to make a "reasonable accommodation" of rules regarding housing for handicapped persons, as follows:

(3) For purposes of this subsection, discrimination (in housing) includes –

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises . . . if such modifications may be necessary to afford such person full enjoyment of the premises;

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; . . . (21 U.S.C. 804)

In Case 91-15, the task force and the Zoning Commission assumed that the special exception process was an acceptable mechanism to provide such a "reasonable accommodation." However, while some courts have upheld the validity of the special exception process for this purpose, many others have not, and the Department of Justice prefers a matter-of-right, interpretative process. The District of Columbia agreed to adopt the latter type of process, which applies to housing code and other regulations through the signed agreement in addition to zoning through this proposed amendment. The agreement with DOJ provides that the general reasonable accommodation rule will be proposed for adoption in DCMR 14 (Housing Regulations of the District of Columbia). A copy of the full text of the proposed "reasonable accommodation" regulations is found in Appendix C.

The key decision-maker on requests for "reasonable accommodation" is the Director of the Department of Consumer and Regulatory Affairs (DCRA). This indicates that a broad array of licensing, housing and building code rules could be modified by individual determinations, as well as zoning waivers. OP's recommendation, concurred in by the Office of Corporation Counsel, is that the Zoning Regulations not include the lengthy general rule, but rather make reference to it and indicate that the flexibility applies to zoning as well as to other codes. In order for the proposed rule to be applicable to all zones where residential uses are allowed, the amendment is to the permitted matter-of-right uses in the R-1 District, as follows:

201.1 (o) A community based residential facility for occupancy by handicapped persons shall be permitted as a matter of right; Provided, that the determination of handicapped facility shall be made according to the process and criteria set forth in 14 DCMR ____.

SUMMARY OF CAMPAIGN FOR NEW COMMUNITY HOUSING ALTERNATIVE

Summary of Proposed Changes to Current Zoning Law

The CNC housing proposals address three main issues: definition of family, community-based residential facilities, and reasonable accommodation for persons with disabilities. The following summarizes the substance of the proposals:

Redefine "Family" as "Household"

The term "family" is replaced by the more inclusive term, "household." Current law permits 6 unrelated persons to live together as a "family" in a single family dwelling (single housekeeping unit). The proposed regulation continues that provision, but permits persons who live together because of their disabilities to do so in numbers up to 15, the same number permitted in a religious community, and by the recent Oxford House consent decree for persons with disabilities.[1]

Eliminate Categories of Housing that are Based on Disability

The proposal removes the umbrella Community Based Residential Facility category, but leaves intact the subcategories (adult and youth rehabilitation homes, youth residential care homes, and health care facilities) that are not based on disabling conditions. Specifically,

- *It abolishes Community Residence Facility (CRF, which is designed just for persons with disabilities) as a zoning category, but does not affect licensing requirements for CRFs.* Zoning restrictions (radius and same square restrictions and requirement of seeking special permission) for disability housing are thereby removed wherever comparably-sized housing for non-disabled persons is permitted.

- *It retains all sub-categories of the former "CBRF" that do not relate to housing for persons with disabilities.* These housing types remain subject to all of the occupancy limits and radius restrictions that exist in current law. The proposal groups corrections facilities (Youth and Adult Rehabilitation Homes) together under the new heading, "Custodial Care Homes"; it leaves in place Health Care Facilities, whose primary focus is skilled or intermediate nursing care, as opposed to housing; and it leaves in place Youth Residential Care Homes, for unrelated children under the care of others.

- It *abolishes "Substance Abuser Home."* Persons in recovery have the same housing rights as non-disabled persons; detoxification facilities would be treated as health care facilities.

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[1] The definition of "disability" is taken from the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3602(h), and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213. Under those laws, persons in recovery from addictions are protected against housing discrimination, but active substance abusers are not.

- *It abolishes the "Emergency Shelter" category, to be replaced with a new category, "Temporary Congregate Housing," for transient housing (under 30 days) where residents do not live together as a "household."* This housing, which includes both emergency shelter and other highly transient housing, would be subject to the occupancy limits and radius restrictions in current law. Many residents of emergency shelters would qualify as "disabled" and therefore be protected under current law. Nevertheless, the CNC proposal would permit a limit on their numbers in residential zones when they are highly transient facilities, as opposed to more permanent housing.

The CNC proposal also clarifies that the provision of services (whether they be concierge or mental health services) to residents of any housing does not affect the zoning classification of that housing. The fact that services are provided for residents does not alter the character of the housing for zoning purposes; thus, services that enable persons to live independently are no more disfavored than services provided for convenience.

The proposal combines rooming and boarding house into one category, and adds a new sub-category, Single Room Occupancy Housing, as a type of rooming/boarding house. These categories of housing permit shared meals or group kitchens and shared or individual bathrooms. The proposal would eliminate "Tenement" and Tenement House" from the regulations as anachronistic.

Establish "Reasonable Accommodation" Procedure

The proposal establishes a new procedure for seeking "reasonable accommodation," i.e., a waiver of any rule, regulation, policy, or practice to permit persons with disabilities to occupy the dwelling of their choice. The procedure must be expeditious and final, and it must comport with the legal standards for equal housing opportunity.

Comparison of CNC and DOJ (DC) Proposals

The Department of Justice (DOJ) Agreement with the District of Columbia and the CNC proposals have much in common, but are not similar.

- Both would abolish the zoning (special exception and distance requirements) and regulatory burdens for the handicapped attached to multi-family dwellings in R-4 and R-5, the most dense, residential zones.

- Both would remove all zoning restrictions placed on disabled populations that do not also apply to non-disabled populations.

- Unlike the DOJ agreement, which would not directly affect single-family zone districts that allow more than 8 unrelated persons (6 residents and 2 caregivers) to reside together in a single-family residence only with Board of Zoning Adjustment approval, the CNC alternative would allow up to 15 unrelated persons to live together as a matter of right.

- Unlike the CNC proposal, the DOJ agreement does not eliminate the terms "CRF" and "CBRF," though the clear intention is to eliminate discrimination against these categories of housing as it relates to people with disabilities. (The CNC proposal removes the discriminatory categories, and leaves the rest virtually intact.)

In short, the CNC proposal is a more comprehensive and more aggressive vehicle for reform in that it addresses all categories of housing in which discrimination against persons with disabilities can occur and increases the matter of right limits.

Both the CNC and the DOJ approach also establish a procedure for granting reasonable accommodation, as required by federal law. The procedure in both would be simple and accessible for those who need it. It would be expeditious, final agency action to be granted unless it would fundamentally alter zoning and land use policy to do so.

PROPOSED ALTERNATIVE CNC AMENDMENTS TO ZONING REGULATIONS

The following are proposed CNC text amendments to the Zoning Regulations relating to fair housing in the District of Columbia, with goals for and comments on each revision also prepared by the CNC. New definitions and language added to current definitions appear in *italics*; deleted language is in ~~strikethrough~~):

I. Equal Housing Opportunity

A. "Family"

Goal of Revision

- Define "household" as persons living together as a single housekeeping unit as follows:
  - ~ any number of related persons
  - ~ 6 or fewer unrelated persons
  - ~ 15 persons in a religious community
  - ~ 15 persons with disabilities living together because of their disabilities

Proposed Definitions:

"Household — (i) any number of persons related by blood, marriage, or adoption who live together as a single housekeeping group in a dwelling unit; (ii) not more than six (6) persons who are not related by blood, marriage, or adoption, but who live together as a single housekeeping group in a dwelling unit; (iii) not more than fifteen (15) persons with disabilities as defined by this title and

who live together because of their disability as a single housekeeping group in a dwelling unit, or (iv) a religious community of not more than fifteen (15) persons who live together as a single housekeeping group in a dwelling unit."

*"**Disability** -- (i) a physical or mental impairment that substantially limits one or more of a person's major life activities; (ii) a record of having such an impairment, or (iii) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."*

Comments:

1. The term "family" is replaced by the more suitable term "household." Current law permits 6 unrelated persons to live together as a "family" in a single family dwelling. The proposed regulation continues that provision, but permits persons who live together because of their disabilities to do so in numbers up to 15, the same number permitted in a religious community, and by the recent Oxford House consent decree for persons with disabilities.

2. The definition of "disability" is taken from the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3602(h), and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213.

3. Persons in recovery from addictions are protected against housing discrimination, but active substance abusers are not.

B. "Community Based Residential Facility"

Goal of Revisions:

- Clarify that the provision of services (whether they be concierge or mental health services) to residents of any housing does not affect the zoning classification of that housing.

- Retain zoning restrictions on correctional halfway houses, youth residential care homes, and health care facilities.

- Remove zoning restrictions (radius and same square restrictions and requirement of seeking special permission for disability housing) on housing for persons with disabilities, to permit such housing wherever comparably-sized housing for non-disabled persons is permitted.

  ~ Abolish Community Based Residential Facility category.

  ~ Abolish Community Residence Facility (which is designed just for persons with disabilities) as a *zoning* category, but retain *licensing* requirements for CRFs.

~ Retain or add umbrella categories with certain zoning restrictions: Health Care Facilities, Custodial Care Home, and Community Care Home.

- Add new category of Single Room Occupancy Housing as a type of rooming/boarding house.

- Add category "Temporary Congregate Housing" for transient housing (under 30 days) where residents do not live together as a "household." This housing is subject to occupancy limits and, in some cases, radius restrictions. It includes both emergency shelter and other highly transient housing.

- Remove "Substance Abuser Home." Persons in recovery have the same housing rights as non-disabled persons; detoxification facilities should be treated as health care facilities.

Proposed Definitions:

*"**Associated Services** – services provided or available to the occupants of any dwelling, lodging, or sleeping accommodations, whether at the premises or off site, including but not limited to:*

- *building services such as air conditioning, elevator service, heat, hot and cold water, light, and security service;*

- *personal services such as child care, concierge services, counseling, financial planning, food and other household delivery services, home health care services, housekeeping, nutritional counseling, personal and health care services, porter, package, and door attendant services, secretarial service, telephone answering services, and transportation;*

- *maintenance services such as decorating, janitorial service, maintenance and repairs, removal of trash and refuse.*

The availability of such services shall not affect the zoning classification of the dwelling."

"**Apartment** — one (1) or more habitable rooms with *associated services,* kitchen and bathroom facilities exclusively for the use of and under the control of the occupants of those rooms."

"**Apartment house** — any building or part of a building in which there are three (3) or more apartments, or three (3) or more apartments and one (1) or more bachelor apartments providing accommodation *and associated services* on a monthly or longer basis."

*"**Rooming House/Boarding House** — a building or part of a building, without regard to its availability to the general public, that provides accommodations and*

associated services for three (3) or more persons for compensation or other consideration on a monthly or longer basis, and which accommodations are not under the exclusive control of the occupants. Meals or a group kitchen and group common areas may be provided; bathrooms may be part of individual units or may be shared. The term 'rooming house/boarding house' includes single room occupancy housing as defined in this title, but shall not be interpreted to include an establishment known as, or defined in this title as, a hotel, motel, inn, bed and breakfast, private club, tourist home, guest house, or other transient accommodation."

*"**Single Room Occupancy Housing** — A rooming house/boarding house that utilizes private, secured, single-occupancy bedroom unit(s), each of which is intended for occupancy and is occupied by a single adult either living alone or living with not more than one dependent child."**

"Health Care Facility — a facility that meets the definition for and is licensed as a skilled care facility or intermediate nursing care facility under the Health Care Facilities and Community Residence Regulations, 22 DCMR § 3099.1, as those definitions may be amended from time to time."

*"**Community Care Home** - one of the following:*

a. ***Temporary Congregate Housing** -- a building or part of a building, without regard to its availability to the general public, operated by a housing or program provider that provides accommodations and associated services on a less than 30-day basis for persons who possess a common need for shelter, or assisted congregate living, but who are not living together as a 'household,' as defined in this title; temporary congregate housing shall not be interpreted to include an establishment known as, or defined in this title as, rooming house/boarding house, single-room occupancy housing, adult rehabilitation home, youth rehabilitation home, or health care facility.*

b. **Youth Residential Care Home** -- a facility providing safe, hygienic, sheltered living arrangements for one (1) or more individuals less than eighteen (18) years of age, not related by blood, adoption, or marriage to the operator of the facility, who are ambulatory and able to perform the activities of daily living with minimal assistance."

*"**Custodial Care Home** - one of the following:*

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* *See,* D.C. Act 10-271 definition of SRO Housing.

a. Youth Rehabilitation Home -- a facility providing residential care *and associated services* for ~~one (1) or more~~ individuals less than twenty-one (21) years of age who have been detained or committed by a court pursuant to their involvement in the commission of an act designated as an offense under the law of the District of Columbia, or of a state if the act occurred in a state, or under federal law. The facility shall not house persons sixteen (16) years of age or older who are charged by the United States Attorney with a felony offense."

b. Adult Rehabilitation Home -- a facility providing residential care *and associated services* for ~~one (1) or more~~ individuals sixteen (16) years of age or older who are charged by the United States Attorney with a felony offense, or any individual 21 years of age or older, under pre-trial detention or sentenced court order."

Comments:

1. The principal goal is to clarify that many types of housing have associated services, and that the law does not permit persons who need services because of their disabilities to be treated differently in their housing opportunities from persons who use a multitude of other services.

2. The new category "Temporary Congregate Housing" will cover any kind of congregate living that is neither a household nor one of the other defined types of housing, e.g. rooming/boarding house. The term "congregate housing" is taken from HUD regulations, and is defined by its transient (less than 30 day) nature. It includes both emergency overnight shelter and transient housing that offers accommodations for less than 30 days. This housing has numerical limitations in certain zones, but the limits are somewhat higher than are now permitted for emergency shelters (*e.g.,* in residential zones, 4 are currently permitted as matter of right; we propose 8).

3. The umbrella category "Community Based Residential Facility" is eliminated. It currently has seven subcategories, the majority of which remain. The subcategories of adult rehabilitation home, youth rehabilitation home, health care facility, and youth residential care home remain, subject to all of the occupancy limits and radius restrictions that exist in current law. The corrections facilities adult rehabilitation home and youth rehabilitation home have been grouped under the new heading "Custodial Care Home"; youth residential care home and temporary congregate housing have been grouped under the new heading "Community Care Home." "Health Care Facility" has been retained as a separate category, because it does not fit into either the "Community Care Home" or "Custodial Care Home" categories.

4. The subcategory "Community Residence Facility" is eliminated from the *zoning* regulations, because it is a classification explicitly based on disability, with attendant zoning restrictions not applicable to non-disabled persons. A facility may still be classified as a Community Residence Facility for *licensing* purposes, but that will have no effect on the facility's zoning.

5. The category "Emergency Shelter" is eliminated; the new category "Temporary Congregate Housing" is intended to encompass shelters.

6. The category "Substance Abusers Home" is eliminated as an inappropriate category for housing for persons in recovery from addictions. Housing for such persons is protected from discrimination, and should be treated like any other comparably-sized housing. If the housing is a "detoxification" program, characterized by short-term, medically-oriented treatment, it is a type of health care facility. We see no need for another housing category for current substance abusers.

7. The terms "Tenement" and "Tenement House" are eliminated as anachronistic.

The following chart shows the restrictions by zone on CBRFs under current law, by comparison with apartment, rooming, and boarding houses.

Zoning District	Type of Facility	Number of Occupants	Permitted Under What Circumstances?[2]	Radius Restriction?
R-1	CRF, HCF, YRCH	up to 6	MOR	no
		7-8	MOR	1000'
		9-15[3]	SE	1000'
	ES	up to 4	MOR	no
		5-15	SE	1000'
	ARH, YRH, SAH	1-8	SE	1000'
R-2	CRF, HCF, YRCH	up to 6	MOR	no
		7-8	MOR	500'
		9-15	SE	500'
	ES	up to 4	MOR	no
		5-15	SE	500'
	ARH, YRH, SAH	1-8	SE	500'
R-3	same as R-2			
R-4	CRF, HCF, YRCH, ES same as R-2			
	ARH, YRH, SAH	1-15	SE	500'
	RM/BD	any	MOR	no
	APT	any	MOR[4]	no
R-5	CRF, HCF, YRCH	up to 6	MOR	no
		7-15	MOR	500'
		16-25	SE	500'
	ES	up to 4	MOR	
		5-25	SE	500'
	ARH, YRH, SAH	1-20	SE	500'
	RM/BD/APT	any	MOR	no
C-1	CRF, HCF, YRCH, ES - same as R-2			
	ARH, YRH, SAH	1-15	SE	500'
	RM/BD/APT	any	MOR	no
C-2	All CBRFs - same as R-5			
	RM/BD/APT	any	MOR	no
C-3	all	any	MOR	no
C-4	all	any	MOR	no

KEY: MOR = Matter of Right; SE = Special Exception; APT = Apartment Building; RM/BD = Rooming House/Boarding House

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2 Variances could always be sought to avoid any of the restrictions, but one who fails to obtain a special exception has virtually no chance to obtain the more difficult variance.

3 In all residential zones, a Health Care Facility may have up to 300 beds with a special exception (does not need a variance).

4 Apartment house is a matter of right in an R-4 zone if the building existed before May 12, 1958.

The following chart reflects the effect of the proposed changes:

Zoning District	Type of Facility	Number of Occupants	Permitted Under What Circumstances?	Radius Restrictions?
R-1	HCF, YRCH, TCH	up to 8	MOR	No
		9-15[5]	SE	
	ARH, YRH	up to 8	SE	1000'
R-2	HCF, YRCH, TCH same as R-1			
	ARH, YRH	up to 8	SE	500'
R-3	HCF, YRCH, TCH same as R-1			
	ARH, YRH	any	SE	500'
R-4	HCF, YRCH, TCH same as R-1			
	ARH, YRH	up to 15	SE	500'
	RM/BD, APT[6]	any	MOR	No
R-5	HCF, YRCH, TCH	up to 15	MOR	No
		16-25	SE	No
	ARH, YRH	up to 20	SE	500'
	RM/BD, APT	any	MOR	No
C-1	HCF, YRCH, TCH same as R-1			
	ARH, YRH	up to 15	SE	500'
	RM/BD, APT	any	MOR	No
C-2	same as R-5			
C-3	all	any	MOR	No
C-4	all	any	MOR	No

5 Health Care Facilities would continue to be permitted up to 300 beds with a Special Exception in all residential zones.

6 A building can be converted to an Apartment House in an R-4 district if it existed on or before May 12, 1958.

C. "Reasonable Accommodation"

Goal of Revision:

- Establish new procedure for seeking "reasonable accommodation," i.e., a waiver of any rule, regulation, policy, or practice to permit persons with disabilities to occupy the dwelling of their choice.

- Procedure must be expeditious and final, and it must comport with the legal standards for equal housing opportunity.

Proposed Regulation and Procedure:

*"**Reasonable Accommodation.** -- an adjustment to or waiver of a rule, policy, or practice that may be necessary to afford persons with disabilities equal opportunity to use and enjoy a dwelling. An accommodation is reasonable if (1) it would not require a fundamental alteration in legitimate land use policy and (2) it would not impose undue financial or administrative burdens on the government. Sections (1) and (2) above are the only factors that may be considered when determining whether a requested accommodation is reasonable."*

Comments:

Reasonable accommodation includes waiving all or part of a rule, policy or practice that prohibits persons with disabilities from occupying the dwelling of their choice. It is not a reasonable accommodation to subject persons with disabilities to special exception, variance, or other public hearings before deciding whether to grant a request for reasonable accommodation.

Proposed Procedure:

1. Persons who are disabled as defined in § _____ of this title are entitled to reasonable accommodation of the requirements of this title or of licensing and building code requirements where such accommodation may be necessary to allow them to use and enjoy the dwelling of their choice.

2. Reasonable accommodation is defined in § _____ of this title. Reasonable accommodation includes waiving all or part of any rule, policy, practice or service that prohibits disabled persons from occupying the dwelling of their choice. The accommodation may be in zoning rules or in licensing or building code rules. It is not a reasonable accommodation to subject disabled persons to special exception, variance, or other public proceedings before deciding whether to grant a request for reasonable accommodation.

3. Persons requesting a reasonable accommodation shall submit a written request to the Administrator specifically designated by the Director of the Department of Consumer and Regulatory Affairs to receive such requests -- or to the Director in the event that no other Administrator has been designated.

4. A request for reasonable accommodation must identify the applicant(s) as disabled as defined in § _____ of this title. The request must also specifically identify the accommodation requested, and explain why the accommodation may be necessary for the applicant(s) to use and enjoy a desired dwelling.

5. Upon receiving a written request for reasonable accommodation as described in paragraph 3, the Administrator must respond to the request in writing within 15 days of receipt. The Administrator must grant the request unless he or she determines that 1) granting the request would fundamentally alter legitimate land use policy, or 2) granting the request would impose undue financial or administrative burdens on the government. The response must explain in detail the basis for the decision.

6. If the Administrator fails to act within 15 days of receiving the written request, the request shall be deemed granted. The Administrator's action (or inaction within 15 days of receipt of the request) shall be a final agency action for purposes of the D.C. Administrative Procedure Act, D.C. Code § 1-1510, and shall become effective on the day it becomes final.

7. If the Administrator requires additional information in order to act on the request for reasonable accommodation, the Administrator must specify in detail the information required and must request such information within 5 business days of receiving the written request for reasonable accommodation. Once the Administrator requests additional information, the 15-day limit as set out in paragraph 6 is temporarily tolled until the applicant provides the requested information, or a statement that the applicant has no further information to provide.

RECOMMENDATION

For the reasons set forth in this memorandum, the Office of Planning recommends that the Zoning Commission provide public hearing notice for the two recommended text amendments flowing from the District's agreement with the Justice Department, one pertaining to a "reasonable accommodation" process and the other pertaining to matter-of-right uses in the multifamily zone districts. OP also recommends that the CNC proposal be advertised in the alternative.

Attachments

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HOVSONS, INC.; JOHN DOES v. TOWNSHIP OF BRICK, a MunicipalCorporation in Ocean County; ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF BRICKHovsons, Inc., Appellant No. 95-5648
Township of Brick, Appellant No. 95-5666
Nos. 95-5648, 95-5666

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

89 F.3d 1096; 1996 U.S. App. LEXIS 17610

June 3, 1996, Argued
July 18, 1996, Filed

SUBSEQUENT HISTORY: [**1] As Corrected July 22, 1996.

PRIOR HISTORY: On Appeal from the United States District Court for the District of New Jersey. (D.C. No. 94-cv-04265).

DISPOSITION: Reversed and remanded.

CORE TERMS: accommodation, nursing home, zone, dwelling, handicapped, nursing, zoning, township, variance, residential, Rehabilitation Act, build, reasonable accommodation, handicap, retirement, Fair Housing Amendments Act, Fair Housing Act, legislative history, legal standard, bungalows, disparate impact, disabilities, residents, acre, bed, municipalities, accommodate, incorrect, intend, zoning ordinance

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Thomas E. Monahan (argued), Charles W. Hutchinson, Gilmore & Monahan, Ten Allen Street, P.O. Box 1540, Toms River, New Jersey 08754, COUNSEL FOR APPELLEE/CROSS-APPELLANT, Township of Brick, a Municipal Corporation, in Ocean County.

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Andrew D. Levy, Brown, Goldstein & Levy, 520 West Fayette Street, Suite 300, Baltimore, Maryland 21201, The National Association of, Social Workers, Inc. Amicus-appellant, No. 95-5648, Amicus-appellee, No. 95-5666, American Seniors Housing, Amicus-appellant, No. 95-5648, Amicus-appellee, No. 95-5666, The National Citizens' Coalition, for Nursing Home Reform, Amicus-appellant, No. 95-5648, Amicus-appellee, No. 95-5666, The National Senior Citizens, Law Center, Amicus-appellant, [**2] No. 95-5648, Amicus-appellee, No. 95-5666.

JUDGES: BEFORE: COWEN, NYGAARD and LEWIS Circuit Judges.

OPINIONBY: COWEN

OPINION: [*1098] OPINION OF THE COURT

COWEN, Circuit Judge.

In this case we must decide whether the Township of Brick's refusal to grant a variance to Hovsons, Inc. ("Hovsons") to build a nursing home in the Township's R-R-2 zone, an area the district court found to be predominantly residential, violates the mandate of the Fair Housing Amendments Act of 1988 ("FHAA"), *42 U.S.C. § 3601* et seq., that all municipalities provide "reasonable accommodations" to handicapped persons. Id. § 3604(f)(3)(B). The district court rejected Hovsons' FHAA claims and denied its request for declaratory and injunctive relief.

We conclude that the accommodation Hovsons has put forward would not impose an undue financial or administrative burden upon Brick Township. Nor would building a nursing home in the R-R-2 zone fundamentally undermine the Township's zoning scheme. We therefore hold that the finding of the district court that the Township complied with the FHAA's "reasonable accommodations" provision cannot stand. Accordingly, we will reverse the August 16, 1995 order of the district [**3]court and remand with instructions to enjoin the Township of Brick from interfering with

Hovsons' plans to construct the nursing home facility that the State of New Jersey authorized it to build in Brick Township.

I.

A.

Hovsons is a developer of nursing homes and other forms of senior citizen housing, such as adult retirement communities. Hovcare of Brick, Inc., a corporation affiliated with Hovsons, owns a 32.73-acre parcel of land on the Brick Township-Lakewood Township border in New Jersey. Hovsons has proposed to build a nursing home facility on that parcel. Approximately twenty-two (21.96) of the acres are located in Brick Township; the remaining (10.77) acres are in Lakewood Township. n1 Hovsons' developmental plan calls for site construction only on the Brick Township portion of the property. Brick Township has steadfastly opposed the construction of such a development within the R-R-2 zone.

n1 The Township of Lakewood is not a party to this lawsuit.

The nursing home facility Hovsons has envisioned[**4] is intended for persons who will require some form of nursing care for the rest of their lives. Referred to as "Holiday Village," it would have the capacity to house 210 residents. The density, architecture and design features of the proposed development are comparable to that of the surrounding planned retirement communities in Brick Township. The structure and its associated [*1099] parking and access facilities would cover six to seven acres. The remaining land area would consist of open spaces, landscaped areas and preserved tree buffers.

Under New Jersey law, nursing homes may not be built unless the need for a home within the applicable health service area is established through a certificate of need process. See N.J. STAT. ANN. §§ 26:2H-7-:2H-8. On December 2, 1989, the New Jersey Department of Health approved Hovsons' application for a certificate of need which authorized construction of a 150-bed nursing home in Brick Township. Hovsons' certificate was amended on August 12, 1991 to increase the authorized number of beds from 150 to 210.

In its August 12, 1991, approval letter to Hovsons authorizing this sixty-bed increase, the New Jersey Department of Health cited the acute[**5] need for nursing home facilities in Brick Township. New Jersey Commissioner of Health Frances J. Dunston declared that building another nursing home in Brick Township would "help to maintain balance in the distribution of long-term care beds throughout Ocean County, thereby promoting geographical access to care for area residents. Brick Township has approximately 6.7 long-term care beds per 1,000 population, compared to the County average of 12 beds per 1,000 population." App. at 26. In addition, the State prioritized Hovsons' application on account of its agreement to have Medicaid-eligible patients comprise no less than fifty-five percent of its patient population.

Brick Township is divided into a total of twenty-three zoning districts comprised of fifteen residential zones, seven business/office zones and one hospital support zone. Nursing homes are excluded from all fifteen residential zones. Hovsons has proposed to construct Holiday Village in Brick Township's R-R-2 or "Rural Residential-Adult Community Zone." Id. at 242. The district court found that the R-R-2 zone is "primarily, although not exclusively, for residential use," and that this region was zoned by community[**6] planners with the intention of "minimizing traffic" and bringing about an environment that was both "quiet" and "secluded." Hovsons, Inc. v. Township of Brick, No. 94-4265, slip op. at 1, 5 (D.N.J. Aug. 16, 1995). In the R-R-2 zone, Brick Township permits the following land uses as of right and without conditions: (1) customary and conventional farming activities; (2) one-family dwellings; (3) public schools and accredited private schools; (4) municipal parks, playgrounds and other municipally owned facilities; and (5) planned residential retirement communities.

The Brick Township R-R-2 zone also allows for a number of conditional uses, including: (1) public utilities installations; (2) hospitals; (3) public and quasi-public philanthropic and charitable uses; (4) quasi-public buildings and recreation areas; (5) golf courses; (6) single-family residential dwellings with a maximum density of 1.5 dwelling units per acre; (7) single-family residential dwellings with open space; and (8) churches, parish houses, convents and cemeteries. The only area in Brick Township where nursing homes can be constructed is the hospital support zone. Other permitted uses in the hospital support zone[**7] are doctors' offices, clinics, emergency treatment facilities, pharmacies, retail establishments for the sale of medical and surgical supplies, motels and hospitals. The hospital support zone is commercial in nature. No single or multiple-family residences may be built in this area without first obtaining a variance.

Brick Township's hospital support zone has already been developed extensively. Less than thirty

undeveloped acres remain. The remaining vacant land consists of small, noncontiguous, separately owned parcels, the largest site being 8.6 acres. The record is unclear as to whether any of the undeveloped land in the hospital support zone is currently on the market or otherwise available for purchase.

B.

In 1990, Hovsons applied for a variance to the Brick Township Zoning Board of Adjustment ("Zoning Board"), to build a nursing home in the R-R-2 zone. Hovsons' application was debated extensively (a total of seventeen public hearings were conducted over [*1100] a two-year period) and was ultimately denied in April of 1992.

Hovsons challenged the denial of the variance by filing a lawsuit against the Zoning Board in the New Jersey Superior Court, Law Division. On February 5, [**8]1993, the Law Division reversed the denial of Hovsons' application and remanded the matter to the Zoning Board for reconsideration. Approximately two months later, the Zoning Board again denied Hovsons' application. Hovsons appealed the second denial to the New Jersey Law Division, which issued an order on April 16, 1993, directing that the use variance be issued. On March 30, 1994, the New Jersey Appellate Division reversed the Law Division and reinstated the Zoning Board's denial. Hovsons filed a petition for certification with the New Jersey Supreme Court, which was denied on July 15, 1994. *Hovsons, Inc. v. Zoning Bd. of Adjustment of Brick Township, 645 A.2d 142 (N.J. 1994).*

On September 6, 1994, Hovsons filed suit in the United States District Court for the District of New Jersey against the Township of Brick and the Zoning Board. Hovsons alleged, inter alia, that the defendants had violated the FHAA. Hovsons maintained that the Township and its Zoning Board had discriminated against handicapped persons by denying its application for a variance to construct a nursing home in the R-R-2 zone. Specifically, Hovsons contended that the defendants' actions amounted to intentional[**9] discrimination and that the Brick Township zoning ordinance had a disparate impact upon handicapped persons. Hovsons further asserted that the defendants had refused to comply with the FHAA's requirement that they provide "reasonable accommodations" to handicapped persons. n2

n2 In so doing, Hovsons was raising the claims of the "John Doe" plaintiffs who would reside in the nursing home facility that Hovsons plans to construct. The Fair Housing Act has been interpreted to permit such broad assertions of third-party standing. See *Havens Realty Corp. v. Coleman, 455 U.S. 363, 372, 102 S. Ct. 1114, 1121, 71 L. Ed. 2d 214 (1982)* ("The sole requirement for standing to sue under [the Fair Housing Act] is the Art. III minima of injury in fact[.]"); *Growth Horizons, Inc. v. Delaware County, Pennsylvania, 983 F.2d 1277, 1282 n.6 (3d Cir. 1993)* (Under the FHAA, "'an aggrieved person' does not necessarily have to be the person discriminated against.").

Hovsons sought both declaratory and injunctive relief to prevent the Township [**10] of Brick and its Zoning Board from interfering with its plans to build a nursing home in the R-R-2 zone. The defendants responded to Hovsons' allegations by filing motions for summary judgment. On June 27, 1995, the district court granted summary judgment in favor of the Zoning Board. The district court ruled that the federal claims Hovsons had brought against the Zoning Board could have been raised and litigated in previous state court proceedings and were therefore barred under the entire controversy doctrine. The district court also dismissed Hovsons' intentional discrimination claim against Brick Township, finding that its zoning ordinance was facially valid and rationally related to a legitimate governmental interest. Hovsons has not appealed the dismissal of these claims, nor was the entire controversy issue raised on appeal.

The district court did find, however, that there were material factual issues in dispute regarding Hovsons' disparate impact and reasonable accommodation claims against the Township of Brick. The district court further held that the nursing home Hovsons has proposed to build should be classified as a "dwelling" under the FHAA because it would be a home[**11] to its prospective residents. Accordingly, the Township's motion for summary judgment on these issues was denied and the case was set for trial.

A one-day bench trial was held on July 12, 1995. On August 16, 1995, the district court issued its findings of fact and conclusions of law. The court rejected Hovsons' disparate impact argument, reasoning that Hovsons had failed to establish that handicapped persons were more adversely impacted by the zoning ordinance than people without disabilities. Furthermore, the district court held that Brick Township was not in violation of the "reasonable accommodations" provision of the FHAA. The district court opined that § 3604(f)(3)(B) does not require municipalities "to disregard their own zoning requirements [*1101] in order to provide sufficient opportunities and accommodations for the disabled." Hovsons, No. 94-4265, slip op. at 6. In so holding, the

court relied upon the fact that Brick Township permitted the construction of nursing homes in another area of the Township. Moreover, the nursing home would, in the district court's view, be inconsistent with the residential character of the R-R-2 zone and would not adequately "service the immediate[**12] surrounding community." Id. at 5.

Hovsons now appeals the judgment of the district court rejecting its "reasonable accommodations" and disparate impact FHAA claims. The Township of Brick has cross-appealed the district court ruling that the proposed nursing home is a "dwelling" within the meaning of the FHAA.

II.

The district court had jurisdiction under *28 U.S.C. § 1331* and *42 U.S.C. § 3613*. We have jurisdiction pursuant to *28 U.S.C. § 1291*. We "exercise[] plenary review over questions of statutory construction." *United States v. Columbus Country Club, 915 F.2d 877, 880 (3d Cir. 1990)*, cert. denied, *501 U.S. 1205, 111 S. Ct. 2797, 115 L. Ed. 2d 971 (1991)*.

A number of our sister circuits have held "that in enacting the anti-discrimination provisions of the FHAA, Congress relied on the standard of reasonable accommodation developed under section 504 of the Rehabilitation Act of 1973, codified at *29 U.S.C. § 794*." *Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 334 (2d Cir. 1995)*. Accord *United States v. California Mobile Home Park Management Co., 29 F.3d 1413, 1416-17 (9th Cir. 1994)* (same); *Smith & Lee Assocs., Inc. v. City of Taylor, Michigan, 13 F.3d 920, 930[**13] (6th Cir. 1993)*. As it is supported by the legislative history of the FHAA, we also adopt this view. See H.R. Rep. No. 711, 100th Cong., 2d Sess. 25, reprinted in 1988 U.S.C.C.A.N. 2173, 2186 & n.66 ("The concept of 'reasonable accommodation' has a long history in regulations and case law dealing with discrimination on the basis of handicap.") (citing *Southeastern Community College v. Davis, 442 U.S. 397, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (1979)* (Rehabilitation Act case)); see also *Bryant Woods Inn, Inc. v. Howard County, Maryland, 911 F. Supp. 918, 940 (D. Md. 1996)* ("In light of the references to Davis in the legislative history of the Fair Housing Act, the courts have uniformly concluded that the standards for 'reasonable accommodations' developed under § 504 of the Rehabilitation Act also apply to § 3604(f)(3)(B).").

In *Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368 (3d Cir. 1991)*, a Rehabilitation Act case, we held that a district court's determination as to whether a proposed accommodation is "reasonable" is a question of fact. *Id. at 1386*. Therefore, we would ordinarily review the finding of the district court that the accommodation Hovsons proffered[**14] was unreasonable under the "clearly erroneous" standard. "A finding of fact is clearly erroneous when, after reviewing the evidence, the court of appeals is 'left with a definite and firm conviction that a mistake has been committed.'" *Oberti v. Board of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1220 (3d Cir. 1993)* (citation omitted). Our review of the factual findings of the district court is confined to "whether there is sufficient evidence in the record to support those findings." *Cooper v. Tard, 855 F.2d 125, 126 (3d Cir. 1988)*.

Hovsons argues that the district court applied the wrong legal standard when it placed the burden upon the plaintiff to establish that its requested modification was reasonable under the FHAA. We exercise plenary review over the question of whether the district court applied an incorrect legal standard. See *Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1511 n.11 (3d Cir. 1994)*, aff'd, *U.S. , 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)*.

III.

The Township of Brick contends that this case should not be considered under the FHAA because nursing homes are not "dwellings" as defined in the Act. Hovsons maintains that the district[**15] court erred in finding that Brick Township complied with the "reasonable accommodations" provision of the FHAA. We will address these issues in turn.

[*1102] A.

Section 3604 of the FHAA proscribes discrimination "in the sale or rental" of "a dwelling." *42 U.S.C. § 3604*(f)(1). The FHAA defines the term "dwelling" as

any building, structure, or portion thereof which is occupied as, or designated or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

42 U.S.C. § 3602(b) (emphasis added). We addressed the issue of what constitutes a "dwelling" under the FHAA in *United States v. Columbus Country Club, 915 F.2d 877 (3d Cir. 1990)*, cert. denied, *501 U.S. 1205, 111 S. Ct. 2797, 115 L. Ed. 2d 971 (1991)*.

One of the issues in Columbus Country Club was whether bungalows inhabited by club members during the summer months were "dwellings" within the meaning