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August 24, 2001

VIA HAND DELIVERY

Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210
Washington, D.C. 20001

Re: BZA Application No. 16729 (Wayne Place Senior Living LP) Post-Hearing Correspondence

Dear Members of the Board:

This letter is being filed on behalf of Wayne Place Senior Living Limited Partnership (the "Applicant") in response to the correspondence to the Board from Virginia L. Major dated July 26, 2001 and August 5, 2001. In the referenced letters, Ms. Major questions the validity of the final order issued by the Board in the above-referenced matter due to the alleged failure of ANC-8C to follow the meeting notice procedures prescribed in the District of Columbia Code. Although it is difficult to determine the exact nature of the request, it appears that Ms. Major is requesting that the Board reconsider its decision in this case.

To the extent that Ms. Major's request is considered a motion for reconsideration, the Board should deny it for several reasons. First, as is discussed in further detail herein, Ms. Major has no standing to file a motion for reconsideration because she is not a party to the case even though she was given an opportunity to request party status by the Board at the public hearing. Second, she has not stated any basis on which the Board could find that its decision was

BZA
Case No. 16729
Exhibit No. 46

Board of Zoning Adjustment
District of Columbia
CASE NO.16729
EXHIBIT NO.46

erroneous. Third, the granting of a motion for reconsideration made by Ms. Major would be prejudicial to the Applicant because Ms. Major was present at the Board's hearing on this case and did not raise an issue with respect to the validity of the ANC decision despite having had ample opportunity to do so. We discuss each of these issues in turn.

I. ***Ms. Major is not a Party in this Case Despite Having the Opportunity to Request Party Status Before and at the Public Hearing.***

Section 3126.2 of Title 11 of the District of Columbia Municipal Regulations ("the Regulations") allows any *party* to file a motion for reconsideration or rehearing of any decision of the Board within a specified timeframe after issuance of an order. Even though she participated at the public hearing, Ms. Major never requested and was not accorded party status and therefore is not legally entitled to file for reconsideration. Section 3106.2 provides that:

> Except for the applicant, appellant or the ANC, to participate as a party in a proceeding before the Board, any affected person shall file with the Board, not less than fourteen (14) days prior to the date set for the hearing, the following information:
>
> (a) the person's name and address;
>
> (b) A request to appear and participate as a party;
>
> (c) Whether the person will appear as a proponent or opponent of the application of appeal;
>
> (d) Whether the person will appear through legal counsel, and, if so, the name and address of such legal counsel; and
>
> (e) A written statement setting forth why the person should be granted party status, including reference to the following:
>
> (1) The property owned or occupied by such person, or in which such person has an interest, that will be affected by the action requested of the Board;

(2) The legal interest such person has in such property, such as owner, tenant, trustee or mortgagee;

(3) The distance between such person's property and the property that is the subject of the application or appeal before the Board;

(4) The environmental, economic or social impacts that are likely to affect such person and/or such person's property if the action requested of the Board is approved or denied; and

(5) Any other relevant matters that demonstrate how such person likely will be affected or aggrieved if the action requested of the Board is approved or denied.

Section 3106.3 further provides that:

> In considering any request for party status pursuant to Section 3106.2, the Board shall grant party status only if the person has clearly demonstrated that his or her interests will be more significantly, distinctly or uniquely affected in character or kind by the proposed zoning action than those of other person in the general public.

The only parties in this case were the Applicant and the ANC. Ms. Major never followed the procedures required under Section 3106.2 to request party status nor did she request party status at the hearing. Ms. Major apparently did file a letter dated July 9, 2001 with the Board. However, the letter was filed fewer than the required 14 days before the hearing and Ms. Major clearly did not request party status in accordance with the Regulations. (*See* Exhibit A.) Ms. Major merely requested to testify as a witness at the hearing on behalf of herself and the residents of Single Member District 8C-07. Consequently, the Board did not make the determination that would have been required under Section 3106.3 to confer party status upon her. As a non-party in this case, Ms. Major clearly has no standing to file a Motion for Reconsideration.

II. *The Motion for Reconsideration Does Not Comply With the Regulations.*

Even if the Board were to consider the Motion for Reconsideration despite the legal deficiency of the lack of has party status by filer of the motion, the Motion for Reconsideration still could not be granted because Ms. Major does not state a basis upon which the Board could find that its decision was erroneous. Section 3126.4 of the Regulations provides that:

> A motion for reconsideration shall state specifically all respects in which the final decision is claimed to be erroneous, the grounds of the motion and the relief sought.

Representatives of the Applicant attended both the June 6, 2001 and June 27, 2001 meetings of ANC 8C. From the observations of the Applicant's representatives, the ANC 8C properly voted on June 6th, with a quorum present, to hold a meeting on June 27, 2001 and to vote on the project at that meeting. The Commissioners appeared to have taken into account the concerns of all of those present and notice seemed to have been properly given. (*See* Exhibit B, Affidavit of Brandon Bellamy, Representative of Applicant.)

However, even if the notice procedures employed by the ANC 8C Commissioners were not in accordance with the District of Columbia Code, the Board has no authority to invalidate its order on the basis of a technical violation of the meeting notice procedures.

Although the Board is obliged under Section 3115.2 of the Regulations to give the written report of the ANC "great weight," the invalidity of an ANC report considered by the Board does not affect the validity of the Board's final order. Advisory Neighborhood Commissions are separate legal entities authorized and operated pursuant to the provisions of Section 1-261 et. seq. of the D.C. Code. The Board has no jurisdiction with regard to ANC procedures and is merely required to give great weight to any ANC written report submitted to it. In a case involving similar allegations of technical violations of the ANC statute relating to a hearing before the Historic Preservation Review Board, *Dwyer et al. V. District of Columbia, et al.*, 120 Washington Law Reporter, 2609, a court found that there was "no authority for the Board to vacate an order where there was a technical violation of the ANC statute, not by the Board but exclusively by the ANC itself. In that case, the Court held that:

> The plaintiffs have utterly failed to provide any legal authority which would empower the Superior Court to vacate the Board's decision where there was a technical violation of the ANC statute—not by the Board ***but exclusively by the ANC itself***. For all the reasons noted above, the issue of procedural error by the ANC lacks merit (emphasis in original). (*See* Exhibit C.)

The Applicant submits that, likewise, where in this case the Board clearly complied with the requirement of Section 3115.2 by giving great weight to the ANC report before it, the validity of that report does not affect the validity of the Board's order in this case.

III. *The Granting of a Motion for Reconsideration Would be Unfairly Prejudicial to the Applicant.*

The granting a motion for reconsideration would be unfairly prejudicial to the Applicant where the issue being asserted by Ms. Major was or should have been known to her prior to and during the meeting and she declined to raise it at the appropriate time. Ms. Major asserts in her letter dated July 26, 2001 that she was not aware that a "special public meeting" of the ANC was held until she retrieved the ANC letter in support of the project after the BZA public hearing on July 17, 2001. Ms Major attended and testified at the BZA hearing as a witness on behalf of herself and purportedly her single member district ANC 8C-07. At the hearing, the Chair of the ANC 8C, Mary Cuthbert, testified in great detail regarding the hearing notice procedures followed by ANC 8C with regard to the Wayne Place project. (*See* Exhibit D.) Ms. Alethea Campbell, Ward 8 representative on the Mini-Commission on Aging, also testified as a witness in support of the project on behalf of the Mini-Commission on Aging. Ms. Cuthbert and Ms. Alethea Campbell, as well as two other ANC 8C Commissioners all testified prior to Ms. Major, who testified neither in favor nor in opposition to the project but presented a number of issues for the Board's consideration. (*See* Exhibit E.) Improper ANC meeting notice procedures were not among the issues Ms. Major raised despite the ample opportunity she had to do so, having just heard Ms. Cuthbert's recitation of the procedures followed for the ANC June 27th meeting.

It is a well-settled principle in the law that the failure to raise a known issue at the time of the hearing on a matter results in the waiver of that issue. *See generally Rose Lees Hardy Home & School Association v. District of Columbia Board of Zoning Adjustment,* 343 A.2d 564 (1975). The failure by Ms. Major to raise the

issue regarding the propriety of ANC meeting notice procedures during the hearing clearly constitutes a waiver. It would be extremely prejudicial to the Applicant for the Board to reconsider this case on that basis.

IV. *Conclusion*

As stated above, Ms. Major is not a party to this case and therefore is not authorized to file a Motion for Reconsideration. The ANC meeting notice procedures appear to have been consistent with the D.C. Code and, even if they were not, a technical violation of the procedures would not affect the validity of the Board's order. Finally, even if Ms. Major's motion were to be considered by the Board, she has waived her right to raise the propriety of ANC meeting notice procedures by failing to raise that issue at the time of the hearing. Since the Board's order is valid and further proceedings would unreasonably and unfairly prejudice the Applicant, we respectfully request that the Board return the motion as being improperly filed or, in the alternative, deny the motion for reconsideration.

Sincerely,

Norman M. Glasgow, Jr.

Lisa L. Jackson

Enclosures

CERTIFICATE OF SERVICE

I hereby certify that on this, the 24h day of August, 2001, a true and correct copy of the foregoing was furnished by U.S. Mail to:

Mary Cuthbert
Chairperson
Advisory Neighborhood Commission 8C
3125 Martin Luther King Avenue, SE
Washington, DC 20020

Virginia L. Major
3301 – 5th Street, SE
Washington, DC 20032

Lisa L. Jackson

Exhibit A

Commissioner Virginia Major
Advisory Neighborhood Commission 8C-07
3301 5th Street, SE
Washington, DC 20032
(202) 561-2837 * (202) 561-8204

RECEIVED
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July 9, 2001

Re: BZA Case # 16729
Wayne Place Senior LP Co.

Board of Zoning Adjustment
441 4th Street, NW
Washington, DC 2001

Dear Ms. Kress:
This is a request to provide testimony at the July 17th Public Hearing on behalf of myself and the residents of Single Member District 8C-07 where the proposed property will be located. While no vote was taken in favor or in opposition to the proposed project at our May 24, 2001 Single Member District Meeting, and we recognize the need and desire for change to the existing property, there are some concerns about the following:

Proposed limited use of the new complex, that is, low-income residents only, as it relates to the current social-economic conditions of the area.
The existing buildings in the area, their conditions and use.
The steep topography of the land and its effect on the current building and possible effect on future buildings.
The proposed height of the building and its distance from the street and whether, given the lay of the land, the lot occupancy requirement should be exceeded.

I will be appearing on behalf of myself and the residents of SMD 8C-07.

Respectfully yours,

Virginia Major

Virginia Major

BZA
Case No. 16729
Exhibit No. 28

Exhibit B

Saint Paul Community Development Corporation

5817 Allentown Way, Temple Hills, MD 20748
(301) 449-1290 ext. 17, (301) 449-1453 FAX
e-mail: lexxanent@aol.com

Brandon C. Bellamy
Deputy Director

August 24, 2001

Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210
Washington, District of Columbia 20001

RE: St. Paul Senior Living at Wayne Place

Dear Members of the Board:

This letter is to serve as my official affidavit regarding the ANC Commission meeting held June 6, 2001. The ANC Commission invited our organization to their June 6, 2001 meeting to present our proposal to develop senior housing to the community in Ward 8.

I was present at the June 6 meeting and participated in the presentation of our project, the St. Paul Senior Living at Wayne Place. There were 6 ANC Commissioners present for the meeting and our presentation. In light of some questions the citizens had with respect to the quality and design of our developments, the ANC suggested that we host a tour of our closest senior project for the community. Their was an announcement made by the Chairperson of the ANC at the end of the meeting that we would provide transportation to take any and all seniors who wished to participate on a tour of our closest project and provide those seniors with lunch at the end of the tour. The ANC and the Community agreed that the date of the tour would be June 21, 2001. The Chair also announced that a special meeting would be held on June 27th, 2001 specifically to discuss any further concerns the community may have about the proposed project and vote on whether or not to support the project moving forward at that meeting. The ANC decided that the meeting would be held at the Petey Greene Center, 7 p.m. at the aforementioned date.

It should be noted that ANC 8C Commissioner Virginia Majors was one of the 6 Commissioners present at the June 6 meeting. On June 21 we conducted a tour of our facilities for approximately 20 seniors. Mrs. Majors also attended the tour of our facilities with the Ward 8 seniors, many of who also attended the June 6 meeting and she joined the group for lunch.

After receiving positive feedback from the seniors who attended the tour, the special meeting was held at the Petey Greene Center on June 27th, 2001, where 4 ANC Commissioners voted in support of the development of the St. Paul Senior Living at Wayne Place. In my observation all events took place in accordance with the mandates announced at the June 6th meeting and all procedures appeared as though they were followed directly.

Sincerely,

Brandon C. Bellamy
Deputy Director

Daily Washington Law Reporter

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Exhibit C

D.C. Superior Court

HISTORIC PRESERVATION

ANC

In designating Kalorama Triangle as Historic Place, D.C. Historic Preservation Review Board failed to give "great weight" to ANC recommendation requiring remand.

DWYER, ET AL. v. DISTRICT OF COLUMBIA, ET AL., D.C.Super.Ct. No. CA 91-10849, August 14, 1992. *Opinion* per Long, J. *Nancy G. Dunn* for Defendant. *Elaine Mittleman* for Plaintiff.

PART 1 OF 2 PARTS

LONG, J.: Plaintiffs herein have filed an action that essentially seeks judicial review of a decision by the District of Columbia Historic Preservation Review Board (hereinafter "the Board") in which the Board nominated a certain neighborhood in the District of Columbia for inclusion in the National Register of Historic Places. The neighborhood that is affected is known as "Kalorama Triangle." Plaintiffs ask the Court to vacate this decision.

The plaintiffs herein have brought suit to reverse the Board's decision principally because of the impact of the decision upon their economic situation in the community. All but two plaintiffs are property owners along the commercial portion of Columbia Road, N.W. (primarily an area of restaurants and other businesses near 18th Street). Plaintiff J. George Frain is the secretary of the 18th & Columbia Road Business Association. Plaintiff Herbert W. White is Vice President of the 18th & Columbia Road Business Association.

Defendants in this action are: the District of Columbia, the Historic Preservation Review Board, Advisory Neighborhood Commission 1C, James T. Speight, Jr. (Chairperson of the Board), as well as two public officials who are no longer in office, but who were sued in their official capacities (Mayor Marion Barry, Jr. and Carol B. Thompson, the State Historic Preservation Review Officer at the time of the proceedings prior to suit).

The crux of this civil action is the following group of accusations: (1) that the Board and the local Advisory Neighborhood Commission (hereinafter the "ANC") failed to follow certain statutory procedures in considering the application for historic district designation, (2) that the Board's decision violates the due process that is owed to the plaintiffs, who opposed certain aspects of the boundary selection, and (3) that the decision was fatally tainted by an *ex parte* communication and the alleged, resultant bias of the Board.

In assessing the cross motions for summary judgment, the Court has reviewed the entire court record as well as the administrative record provided by the parties. The basic background facts are not in dispute and the matter of summary judgment can be resolved by a legal analysis of the significance of what was or was not actually considered by the Board.

The Superior Court's role in judicial review is not to second-guess the Board or to engage in *de novo* decisionmaking. Rather, the Court's role is limited to determining whether the Board's decision is legally defective, according to an analysis of relevant case law and statutory mandates.

Herein, the Court addresses the contentions of the parties and evaluates the points and authorities cited by counsel on each issue.

I. PERTINENT BACKGROUND FACTS

The parties filed on February 4, 1991 a praecipe accompanied by a set of stipulated facts. The following facts, then, are not in dispute.

The decision that is the subject of this civil action was made on December 22, 1986 by the Historic Preservation Review Board at one of its meetings. In written form, this unanimous decision is embraced in a formal, seven page document signed on December 22, 1986 by James T. Speight, Jr., Chairman of the Historic Preservation Review Board. It is reproduced in the court record as Exhibit N, attached to Plaintiffs' Motion for Summary Judgment. This report contains all of the conclusions of the Board and its justification for the boundary selection that defines "Kalorama Triangle."

Following the issuance of the Board's decision, the District's "State Historic Preservation Review Officer" forwarded Kalorama's nomination to the National Trust for Historic Preservation. On May 4, 1987, Kalorama Triangle was indeed formally placed on the National Register of Historic Places.

The whole process through which Kalorama Triangle was nominated was commenced on October 25, 1984 through an application for historic district designation. This application was made by the Kalorama Citizens Association and the Adams-Morgan Community Development Company. The filing was given case number 84-9.

To paraphrase their arguments, the plaintiffs allege that they are harmed by the selection of the eastern side of Columbia Road as the eastern boundary of this historic district. They contend that the architecture and facades of their businesses are utterly unrelated to the genuine architectural styles and features of the Kalorama Triangle district. For this reason, they argue that Columbia Road should not have been picked as a geographical boundary of the District. More precisely, plaintiffs decry the selection of Columbia Road itself rather than, perhaps, the rear property lines of the structures on the western side of Columbia Road, or some other option.

At oral argument on the cross motions, plaintiffs asserted through counsel that the ultimate harm from the boundary decision is that there will be, in the future, ongoing negative, collateral consequences, such as requirements of

(Cont'd. on p. 2612 - ANC)

[Editor's Note: Due to its length, this opinion will be published in two consecutive issues, Thursday, December 10, 1992 and Friday, December 11, 1992.]

D.C. Court of Appeals

DISCOVERY

SANCTIONS

Trial court did not err in imposing sanctions against third-party defendant for failing to supplement discovery answers where it received information after court ordered separate trial of its portion of case.

MARYLAND DRYWALL COMPANY, INC. v. ROBERTSON, D.C.App. No. 91-CV-1206, November 17, 1992. *Affirmed* per Terry, J. (Ferren and Steadman, JJ. concur). *Kelly A. Saunders* for appellant. *Lutz R.S. Simmons* for appellee. Trial Court—Huhn, J.

TERRY, J.: This appeal arises from a trial court order imposing sanctions on appellant, Maryland Drywall Company, in June 1991. According to appellant's brief:

> The court ordered sanctions because Maryland Drywall did not supplement its answers to the plaintiff's interrogatories served upon and answered by Maryland Drywall in November 1990. The court ruled that Maryland Drywall should have supplemented its answers with information Maryland [Drywall] received in April 1991. Maryland Drywall appeals the order of sanctions on the ground that it was not required to supplement its interrogatory answers since it had been severed from the plaintiff's case in February 1991—two months before it received the additional information.

We conclude, after examining the record, that the claim against Maryland Drywall was not "severed" within the meaning of Super.Ct. Civ.R. 21, but that the court merely ordered a separate trial of its portion of the case under Super.Ct.Civ.R. 42(b). Consequently, Maryland Drywall remained a party and was under a duty to provide further discovery under Super.Ct.Civ.R. 26(f). We therefore hold that the trial court did not err in imposing sanctions for failure to perform that duty, and accordingly affirm the order under review.

I

Andre Robertson, an employee of Maryland Drywall, was injured when he fell from a third-story window in a building owned by the District of Columbia which was undergoing renovation and remodeling. He sued the District, the W.M. Schlosser Company ("Schlosser"), which was the general contractor, and others who were later dismissed from the case. Schlosser in turn filed a third-party

(Cont'd. on p. 2611 - Sanctions)

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D.C. Superior Court

Dwyer, et al. v. District of Columbia, et al.....2609

case, and I have decided to have separate trials . . . ." Given these and similar remarks throughout the hearing, we can draw no conclusion from the judge's use of any particular word. We will not impose on a busy trial judge the burden of choosing every single word with absolute precision, on pain of reversal, especially when the difference between a severance and a separation was not the focus of anyone's attention at the time.

More relevant, we think, are Robertson's motion and Maryland Drywall's written response to it. Robertson had asked the court "pursuant to [Rule] 20(b) . . . to sever third party defendant Maryland Drywall from this action and order a separate trial on defendant's third party Complaint," arguing that such an order was necessary "to prevent delay or prejudice." Maryland Drywall responded:

> Superior Court Rules of Civil Procedure 20(b) and 42(b) provide for separate trials in order to prevent delay and/or avoid prejudice. In the case at bar, the plaintiff is in no way prejudiced, nor will the case be delayed . . . .
>
> Additional considerations for ordering severance/separate trials under Rules 20(b) and 42(b) concern judicial economy. In this instance, it would be a waste of judicial resources to sever the Third-Party Complaint against Maryland Drywall from this case.

From the references to Rules 20(b) and 42(b) in both the motion and Maryland Drywall's opposition, and from the fact that neither the motion nor the opposition ever mentioned Rule 21, it is evident to us that what the parties contemplated was a mere separation of the third-party portion of the case from the claim against the District. The June 27 order, *quoted supra*, plainly shows that this was the court's understanding of its own February 28 ruling. Analyzing that ruling in light of the whole record, we conclude that there was no severance, and hence that Maryland Drywall was under a continuing duty to provide discovery. Accordingly, we find no error in the order imposing sanctions.

Affirmed.

ANC

(Cont'd. from p. 2609)

obtaining special approval for alterations or demolition of their facades or properties, potential expenses for associated legal fees, possible negative impact on zoning issues, etc.

In essence, plaintiffs are irate that their street (the commercial strip) simply does not match the classic appearance of the so-called Kalorama Triangle residential neighborhood. They regard the appearance of the Columbia Road commercial strip to be a visual non-sequitur that is irrelevant to the preservation of the actual historic buildings and sites that are still recognizable as such.

The court record discloses references to other kinds of concerns as well. For example, one of the items included within Exhibit M attached to Plaintiff's Motion for Summary Judgment is a copy of a letter to the *Washington Post*, written by plaintiff Patrick Dwyer and apparently published on November 18, 1986. In his letter, plaintiff Dwyer reiterates the problems faced by business people who were opposed to the inclusion of the Columbia Road business strip as the boundary of the proposed historic district. Dwyer closed his letter, saying

> The inclusion of the business strip in the historic district will lead to higher rents and neo-Victorian, WASP-ish aesthetic values being imposed on the multinational storefronts, the displacement of low-income families living in the business-strip [*sic*] apartment buildings, and the worst gentrification.

These subjects, thus, are added to the plaintiffs' concerns about the lack of architectural congruity of the structures on Columbia Road itself with the residential components of Kalorama. Overall, plaintiffs have articulated a plethora of objections to the boundary selection.

The ANC participated in the Board's hearing process, not only by appearing through witnesses at a public hearing, but by submitting a formal resolution embracing the ANC's specific position on the designation of Kalorama Triangle as an historic district. In pertinent part, this resolution stated,

> RESOLVED: that ANC 1C endorses the application for creation of a Kalorama Triangle Historic District, as submitted by the Kalorama Citizens Association and the Adams-Morgan Community Development Corporation on 25 October, 1984, ***providing that all rights under the present C-2-B zoning along Columbia and Adams Mill Roads can be fully exercised, including alterations and expansions as well as replacement with design review when a building does not merit historic preservation.***

Minutes of the ANC-1C, included as an enclosure to the item marked as Exhibit E to Plaintiffs' Motion for Summary Judgment [emphasis supplied]. This resolution is a key subject of the instant litigation. The relevant text of the Board's decision concerning the eastern boundary is quoted *infra*, herein.

II. CONTENTIONS OF THE PARTIES

It is helpful to recapitulate the specific issues raised in the cross motions by comparing the allegations of the plaintiffs and corresponding responses of the defendants. The plaintiffs' arguments initially can be summarized into three categories: procedural errors, lack of due process in the Board's procedure for recognizing the interests of the plaintiffs, and the alleged bias.

The Asserted Procedural Errors. First, the plaintiffs argue that the Board's decision should be vacated because of procedural errors that were committed by the local Advisory Neighborhood Commission that participated in the Board's hearing process. The plaintiffs state that the ANC failed to hold a public hearing after receiving notification of the Board's proposed hearing on this issue and that the ANC failed to send to the Mayor and his designated agent a copy of its resolution that was being transmitted to the Board.

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JOHN B. GOOCH, P.E., CSP (703) 356-1045
C.V. upon request

The District responds to this allegation, stating that the ANC got early warning of the Board's impending hearing and proceeded to hold its hearing prior to the Board's formal hearing. This, the defendants argue, was not a genuine failure to afford the opportunity for community debate within the ANC system. The ANC merely acted earlier than what the relevant statute otherwise requires. The defendants also argue that the failure to send a timely copy of the ANC's resolution to the Mayor is not a substantive defect and, although this was a mistake, it does not affect the actual decision of the Board.

Second, the plaintiffs contend that the Board's decision violates the District of Columbia Administrative Procedures Act, 1 D.C. §1501 *et seq.* in that no "substantial evidence" in the administrative record supports the Board's decision. In asserting this violation the plaintiffs argue, *sub silentio*, that the nature of the Board's duties and decision making function as to historic districts is analogous to an adjudicatory function that is subject to the so-called substantial evidence rule and the requirement of specific fact-finding in the Board's opinion. Plaintiffs specifically seek a ruling by this Court that the Board is subject to these requirements.

Defendants argue that the characteristics of the proceedings before the Board and the type of issue involved are all indicative of a proceeding that is analogous to a rulemaking proceeding in which the substantial evidence rule does not apply. Defendants argue that the proper standard of review is that the Superior Court need only find in the administrative record a "rational basis" that would support the Board's ultimate decision.

Third, plaintiffs claim that the Board's written decision does not comply with a specific statutory mandate requiring the Board to give "great weight" to the opinion or position of the ANC. 1 D.C. §261(d). Plaintiffs assert that the Board's decision is devoid of any reference to the ANC resolution and that it does not explain why it rejected the ANC's specific views on the selection of the eastern boundary of the historic district.

Defendants deny that the Board's decision does not address the position stated by the ANC. Defendants address this issue by stating,

> Essentially the ANC presented the Board with a resolution that both supported and opposed the designation. Construing the ANC's resolution as a boundary issue, whether to include Columbia Road in the historic district, the Board in its deliberations and decision clearly gave great weight to the ANC's conflicting resolution as evidence by the its [sic] site visit, discussions of the boundaries at meetings, and its designation decision document which is replete with boundary justifications.

Defendants' Cross Motion for Summary Judgment at page 19.

The Due Process Claim. Essentially, the plaintiffs argue that they were denied due process of law by the Board's procedural scheme through which its decision was made. More specifically, the plaintiffs complain that the hearing process does not sufficiently afford individual property owners an opportunity to plead their individual cases and to argue that their personal circumstances should affect the nomination of a neighborhood for historic district designation. Plaintiffs assert that the Board employed an impermissible presumption of including all buildings within a historic district, with the burden upon property owners to persuade the Board to create individualized exceptions or exemptions.

The defendants basically respond that the fundamental procedures of the Board already have been found to meet due process standards and that any change in the procedural scheme for the Board can be obtained only through a legislative change by the District of Columbia Council.

The Allegation of Bias and Improper Ex Parte Communication. Plaintiffs claim that the Board was biased against their interests because of an incident in which the Board, subsequent to the public hearing, permitted a witness to read into the record a letter from then Mayor Barry supporting the establishment of the historic district. Plaintiffs argue that the presentation of this letter by the Kalorama Citizens Association was improper because its presentation did not occur with any notice to the plaintiffs.

The District of Columbia and other defendants urge the Court to deny any relief to the plaintiffs because of this incident. The defendants argue that the mere reading of such a letter does not establish that the Board therefore had pre-judged the issue that is the subject of the plaintiffs' attack (selection of boundaries), nor does anything in the record reflect that the Board was actually biased against the plaintiffs. The defendants assert that, at worst, this episode was harmless error, if it was error at all.

III. DISCUSSION OF ISSUES

To arrive at the ultimate disposition of the cross motions for summary judgment, it is necessary to determine whether any issue raised by the plaintiffs is a sufficient basis upon which to reverse the decision of the Board. The Court therefore addresses separately the specific issues noted above. Only one of plaintiffs' arguments is sufficient to compel a remand of this case to the Board.

1. The ANC's Technical Violations. Upon the following analysis, this Court finds as a matter of law that the technical violations by the ANC do not provide a basis upon which to vacate the decision of the Board, an entirely separate entity.

First, it is significant to note that neither of the two items alleged as technical violations have any genuine connection to the ability of the plaintiffs to voice their opinions before the ANC or the Board. For example, the fact that no copy of the ANC resolution was forwarded to the Mayor in a timely fashion is a problem that has never been raised by the real party in interest—the Mayor. The lack of such a timely communication to the Mayor had no genuine impact upon the plaintiffs.

Second, the plaintiffs complain that the ANC's public meeting to discuss the proposed historic district nomination did not occur in the precise time sequence that is prescribed by statute. Plaintiffs assert that the ANC failed "to hold a public meeting after receiving notice from the Review Board." Plaintiff's Motion for Summary Judgment at page 4.

The record reflects that the 30-day notice was received by the ANC on June 30, 1986. The public meeting at which the ANC voted on its resolution occurred on June 4, 1986. See Stipulated Facts at pages 3, 4.

The statute governing Advisory Neighborhood Commissions states that any board, commission, or agency that is considering a final policy, adoption of a rule, or other proposed final action must provide written notice to the affected ANC at least 30 days prior to taking the action. 1 D.C. §261(b). Each Commission so notified "shall consider each such action or actions in a meeting with notice given in accordance with §1-262(c) which is open to the public in accordance with §1-262(g)." 1 D.C. §261(d).

Certainly, on its face the statute contemplates that the ANC will receive notice and thereafter hold its own meeting to consider the particular proposal that is pending before the executive branch agency. However, this statutory language clearly presupposes that the ANC has no other prior knowledge of the proposal and the requirement of 30 days' advance notice to the ANC is only meant to insure minimal notification.

There is no statutory prohibition against public ANC meetings that address the proposal prior to the issuance of the formal 30-day notice. Thus, there is no harm or legal defect to be found in the mere fact that the ANC acted more quickly to address the historic district issue at one of its regularly scheduled meetings that preceded its receipt of the formal 30-day notice from the Board.

Regarding the communication to the Mayor, the statute does require that when an ANC is responding to a 30-day notice of proposed agency action that the particular ANC "shall forward its written recommendations with respect to the proposed actions to the Council of the District of Columbia, the Mayor and the appropriate agency, board or commission within 30 days of the mailing of the notification required by subsection (b) of this section. 1 D.C. §261(d). The Court agrees with defendants' view that, in the context of the facts of this case, the "ANC's failure to send the Council and Mayor its written recommendations is of no importance." Defendants' Cross Motion for Summary Judgment, at page 17.

Quite apart from any discussion of the statutory requirements is another issue that is

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not addressed by any of the parties to this lawsuit. The plaintiffs have argued that the so-called technical violations by the ANC should be considered grounds for vacating the Board's decision to nominate Kalorama Triangle to the National Register of Historic Districts. The plaintiffs have utterly failed to provide any legal authority which would empower the Superior Court to vacate the Board's decision where there was a technical violation of the ANC statute—not by the Board ***but exclusively by the ANC itself.*** There is no such authority. The ANC is the real party in interest, with the standing to complain about lack of adequate notice from the Review Board, etc. Likewise, the Mayor would be the real party in interest to complain about the untimely receipt of the ANC's resolution. But neither the ANC nor the Mayor (or his successor) is a complainant in any fashion before this Court.

Moreover, even if this Court were to find that the ANC by its own internal actions substantially violated its own statute in some material or pivotal regard, any resolution that was borne of such illegal action could not be regarded as a valid resolution that was properly before the Board. In other words, if the ANC's resolution had no legal validity, surely the Board was not bound to give it any weight or priority. In retrospect, it is not in the plaintiffs' interests to attack the validity of the ANC's actions that led to its adoption of the resolution sent to the Board. For all of the reasons noted above, the issue of procedural error by the ANC lacks merit.

2. The Due Process Claim. As a practical matter, the plaintiffs ask the Superior Court

> to require the Review Board to set out specific criteria for the inclusion and exclusion of properties from historic districts. At a minimum, there should not be a presumption of inclusion, with the burden on property owners to show why their property should not fall within some other parties' definitions of what should be an historic district.

Plaintiffs' Motion for Summary Judgment at page 8-9.

The concerns cited by plaintiffs are that the Board should have included in its hearing process an

> analysis of the financial and other effects on [property owners] from the designation itself. . . . The procedural aspects, particularly those affecting individual property owners, should differ when designating an historic *district* as compared to an historic *building*. In a district, property owners can be affected because some other buildings in the vicinity may have historic value and should be preserved. Plaintiffs submit that the Review Board failed totally to consider their own positions, and they were therefore denied due process.

Plaintiffs' Motion for Summary Judgment at page 8 [emphasis in original]. The plaintiffs ask this Court to "set out more detailed and appropriate guidelines to be utilized in the determination of historic districts." Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at page 3-4.

While the plight of the plaintiffs is a serious matter, this Court is convinced that it simply does not have the authority to legislate a new and different system by which the executive branch nominates historic districts. The arguments of the defendants are persuasive that the changes sought by the plaintiffs are only properly directed to the legislative branch for relief.

Defendants point to certain existing provisions of the Historic Preservation Review Act that assertedly provide an avenue of relief to any property owner who faces a demolition or renovation issue that may collide with the historic status of the area in which the property is located.

The Mayor is vested with the authority to grant permits for demolitions, new construction and alterations of properties that are found within historic districts. For example, defendants note that if an owner wishes to demolish a property, the owner may do so if the Historic Preservation Review Board advises the Mayor that the particular property does not contribute to the historic district or landmark. 5 D.C. §1004(c).

Demolition proceedings are to be conducted under District of Columbia Administrative Procedure Act and findings must be supported by substantial evidence. *See Citizens Committee to Save Historic Rhodes Tavern* v. *District of Columbia Dept. of Housing and Community Development*, 432 A.2d 710, 717 n.15 (D.C. 1981), *cert. denied*, 454 U.S. 1054 (1981). The statute mandating applicability of the APA to demolition cases has been renumbered in recent years and the statute is now published at 5 D.C. §1012.

Also, the Mayor can permit the demolition if the failure to grant such a permit would result in an unreasonable economic hardship. 5 D.C. §1005(4). The statute provides a right to a public hearing after the Mayor has submitted the owner's permit application to the Review Board for the Board's consideration and recommendation. 5 D.C. §1004(c).

In addition, the defendants point out that if a property owner in an historic district desires to make an alteration to the property or to erect "new construction," that property owner may obtain a permit to do so if there will be economic hardship in the refusal to issue such a permit. 5 D.C. §1005.

The plaintiffs herein, however, ask this Court to ignore these statutory provisions and to impose upon the Review Board a whole new set of procedures and standards by which individual properties can be exempted from inclusion within an historic district. Presumably, such exemptions would be granted without regard to demolitions, new construction, or renovations *in futuro*, and would be exemptions granted at the outset of defining the boundaries of the proposed historic district. This type of change is squarely a matter for action by the local legislature.

The judicial branch is not empowered to create its own version of an administrative review system that is perhaps a hybrid between a rulemaking and an adjudicatory process. The plaintiffs have cited no legal authorities to support the Court's intervention in the legislative function that clearly applies to the instant situation. Instead, the plaintiffs simply ask the Court to do it because they believe that their underlying problems deserve a more elaborate type of hearing and review process. It is not appropriate for the Court to engage in an analysis of their preferred review system because plaintiffs' real task is to convince the Council of the District of Columbia.

The Court notes parenthetically that the plaintiffs themselves seem to be well aware that statutory amendments are the useful and appropriate mode of obtaining what they want. Plaintiff J. George Frain, in a letter of September 11, 1986 wrote to the Chairman of the Review Board and expounded at length on the subject of fairness for "the low-income

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residents" and [illegible] districts. This letter [illegible] M. attached to plaintiff's Judgment. The [illegible] statute is discussed [illegible]

Within this letter [illegible] separate letter written [illegible] Mittleman, Esq.) [illegible] various "statutory [illegible] implemented to address [illegible] sion of the notice requirements [illegible] affected persons in support [illegible] the application. Exhibit [illegible] the lawyer is quoted by Mr. [illegible] "statutory amendment" [illegible] an historic district shall [illegible] *alia*, a finding that [illegible] result to owners, merchants [illegible] the proposed historic district [illegible] page 4.

It is not clear from anything [illegible] record whether the plaintiffs have [illegible] the option of lobbying the Council [illegible] they simply view court litigation [illegible] alternative to be exhausted before [illegible] letter to Mr. Speight was indicative of the hope that someone on the Board itself would initiate or support a change in the statute.

Nonetheless, the legislative process is the sole forum for obtaining the type of relief that is now sought by the plaintiffs, as far as the Board's procedures concern notice to affected citizens and the institutionalized consideration of individual properties within the proposed historic district.

It is significant that when the Council enacted the Review Board's organic statute, this law specifically established the Board's jurisdiction to deal with both "historic landmarks" and "historic districts." Thus, the Court must respect the legislature's choice to enact a statutory framework applying identically to issues regarding single landmarks and whole historic districts—and treating them identically as far as procedural matters are concerned. If the Council had intended to treat them differently, it could have done so. But that did not happen.

Without doubt, then, the matter of institutionalizing the mandatory consideration of certain segments of the community in the process of nominating an historic district is a clear choice to be made by the legislative branch of government, not by the judiciary.

3. Nature of the Board's Proceedings and the Substantial Evidence Requirement. In the above recapitulation of the allegations of "procedural errors," the Court summarized the plaintiffs' view that the Board's decision was legally defective because it was not based upon "substantial evidence" reflected in specific findings of fact and corresponding rulings.

Hearings that are not adjudicatory in nature but which are equivalent to rulemakings are not subject to the substantial evidence rule. Rather, those administrative actions need only be justified by some "rational basis" that may be found in the administrative record. The following case law and authority is instructive on these principles.

The District of Columbia Code provides that in any "contested case," the agency's

> decision and order adverse to a party to the case . . . shall be in writing and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusion upon each contested issue of fact. Findings of fact and conclusions of law shall be supported by and in accordance with the reliable, probative, and substantial evidence.

MR. SPIEGEL: Depending on the amount of benches placed there. That I don't think has been determined yet.

VICE CHAIRPERSON RENSHAW: Okay. Thank you.

CHAIRPERSON CROSS REID: All right. Cross examination of the Office of Planning. Mr. Glasgow? Okay. Thank you very much.

Any other government reports? I know it has been referred to several other government entities.

So now we move to ANC. Is the ANC representative here? Please come forward.

Okay. Thank you.

MS. CUTHBERT: Good afternoon, Madame Chair and members of the Board. I'm Mary Cuthbert. I am the Chair for Advisory Neighborhood Commission 8C.

MR. LOCKBRIDGE: I'm R. Calvin Lockbridge, Vice Chairman of Ward 8C.

MS. KEMP: Good afternoon. I'm Barbara Kemp, Commissioner of 8C-05. I'm the Secretary.

MS. CAMPBELL: Good afternoon. My name is Alethea --

CHAIRPERSON CROSS REID: Turn your mic on,

please, ma'am.

MS. CAMPBELL: Good afternoon. My name is Alethea Campbell. I am not an ANC Commissioner. I'm a member of the D.C. Commission on Aging.

CHAIRPERSON CROSS REID: Okay. This is just for the ANC report, but are you having her as a witness for your report?

MS. CUTHBERT: Right.

CHAIRPERSON CROSS REID: Okay. Now, are you giving the report for the ANC?

MS. CUTHBERT: Yes, I am.

CHAIRPERSON CROSS REID: All right, and you have -- as I ma understanding it, you have witnesses that you want to speak as well?

MS. CUTHBERT: Only one witness.

CHAIRPERSON CROSS REID: Okay.

MS. CUTHBERT: The mini Commission on Aging from Ward 8.

CHAIRPERSON CROSS REID: All right. Thank you.

MS. CUTHBERT: Okay. I'm just going to go an overview rather than read my statement.

Advisory Neighborhood Commission 8C met on June 6th of year 2000. At that meeting we recommended that a group of citizens go see the facility in

Maryland. About 17 seniors signed up, and they went to visit the site on the 21st of June.

By the ANC going on summer recess and we knew the hearing was coming up July, at that meeting we voted to have a meeting to vote on this project on June 27th, and we held the meeting after the seniors visited the site in Maryland to see if it would be conducive for our community.

At our meeting on the 27th, well, the seniors returned, and it was from our community, gave us the result, which a couple of ANC Commissioners went afterward. Myself and Commissioner Lucas then went to see the facility after work hours because both of us work during the day.

And we came to the conclusion from the observance of the community and with the variance, that we felt that this would be beneficial to our community as we are maturing very quickly, and that location, they felt that that facility was unique. It wasn't the traditional senior citizen facilities that we do have in Ward 8, with the straight, direct, long, dark hallways. It had some unique points to it that we really wished that we could have in Ward 8.

Like Commissioner Renshaw asked about a seating area. Well, unfortunately, that's not

conducive for our area right now at this time, but the building structure, the apartment size which I was very concerned about, being a young senior, and the doors to each room was extremely wide in case you become handicapped with a wheelchair.

So we were very pleased with the facility, and when we looked at the zoning issue, we felt that it wouldn't distract the architecture of our community.

CHAIRPERSON CROSS REID: Okay, and did you have a vote taken?

MS. CUTHBERT: We had a vote. We had a quorum. A quorum in Advisory Commission Neighborhood 8C is four Commissioners, and that is stated on the front page of our report, what Commissioners were at that meeting.

CHAIRPERSON CROSS REID: Your report, the July 9th letter?

VICE CHAIRPERSON RENSHAW: Your June 2nd letter?

MS. CUTHBERT: Oh, that was the wrong date. I'm sorry. It was supposed to be -- it should have been July.

VICE CHAIRPERSON RENSHAW: July. July 2nd?

MS. CUTHBERT: Yes. No, it wasn't -- it should have been July, not June, because our meeting -- our vote took place, if you read the letter; our vote took place June 27th. So that's where the error came out on the top part.

CHAIRPERSON CROSS REID: Oh, okay.

MS. CUTHBERT: Our vote took place on the 27th.

VICE CHAIRPERSON RENSHAW: Thank you for clarifying that.

CHAIRPERSON CROSS REID: Okay. Thank you very much.

And you had someone else that you wanted to speak?

MS. CAMPBELL: As I said, I'm Alethea Campbell, a member of the Ward 8 Mini Commission.

I understand that you do have a copy of the letter on file already. So I don't really need to read it, but I do want to say that I was one of those seniors, around 17 of us, that took the trip out to see the St. Paul's building.

We were surrounded by beauty. That's all you could hear, "oh, ah," as we entered because we expected a drab, colorless kind of thing that we are accustomed to seeing and especially in Ward 8.

The Ward 8 Mini Commission fully supports this and we welcome it to the community.

I would like to add though, and it's not on the letter, that in regards to the transportation, this site is unique because even though it is on a slope, there's transportation from each end. If I was going to live there, and one day maybe I will if I'm fortunate, I would go down the hill when I'm leaving on one bus line, and I would come back on another bus line. I'd still be going down the hill, which makes it quite unique.

(Laughter.)

VICE CHAIRPERSON RENSHAW: You have this all worked out.

CHAIRPERSON CROSS REID: Thank you very much.

Ms. Glasgow, any cross examination?

MR. GLASGOW: No, no cross examination.

CHAIRPERSON CROSS REID: All right. Thank you.

Now we go to person in support of the application.

(No response.)

CHAIRPERSON CROSS REID: persons in opposition to the application? Sorry?

MS. MAJOR: I would like to testify. I'm not in favor of or opposed to.

CHAIRPERSON CROSS REID: All right. Come on. Okay.

MS. MAJOR: Good afternoon. My name is Virginia Major. I'm the Commissioner for the single member District 8C-07. 114-124 Wayne place is within my single member district.

Thus, I'm here today to provide information on concerns expressed by residents that live in 8C-07.

On May 24th, 2001, a single member district meeting was held after residents in the senior member district were notified by a flyer which included information on this project. A special effort was made to provide notices to apartment owners and residents on Wayne Place and on First Street, S.E.

The project representative was invited, as well as other Commissioners. A project representative, however, was not able to attend.

The meeting was held at the Oxon Run Manor on Wayne Place and Mississippi Avenue, S.E. Twenty-two residents were in attendance. While no vote was taken in favor of or in opposition to this project, the following is presented for consideration by the

Board of Zoning Adjustment.

First, I'd like to mention that the D.C. Department of Housing and Community Development provided pre-development funds for acquisition and demolition of the property, and to construct residential units to offer as rental housing for low and moderate income elderly persons who are capable of independent living.

Second, my understanding is that funding is being requested from the Housing Finance Agency to construct residential units for low income residents. Sine tax dollars will be used in constructing this facility, I feel very effort should be made to insure that it serves present and future needs to the community and is following the current trend in building tax subsidized facilities. The training in our community, I believe, is to replace low income housing with mixed use property.

And I might mention there are senior complexes also included in these mixed use properties for residents. Many of the low income housing have been torn down, and they're being replaced with mixed use properties, which includes housing for seniors.

Now, the concerns expressed by residents were as follows: low income housing. Building units

strict limited to low income sen rs would probably provide an isolated community due to the topography of the street, the surrounding properties, the current activities in the surrounding area, and the needs of many low income seniors.

Public transportation would not be readily available without walking up Wayne Place and over to Martin Luther King Avenue or down Wayne Place to Mississippi Avenue.

There are few, if any, amenities in the nearby neighborhood.

Topography and possible effects. The project is located at the top of a hill with elevation of about 140 to 160 feet, and that's above mean sea level. I didn't put that in.

Some of the buildings on both sides of the street have problems with cracks in the foundation and along outside walls. The building on the lowest part of the subject property has cracks in the foundation in as high as the third floor outside wall.

While topography may not be the reason for these cracks, we know that Southeast has many buildings with problems due to the way they were placed on hilly areas.

Surrounding buildings. All buildings on

Wayne [redacted]ace are apartment buildi[redacted] owned by various owners.

CHAIRPERSON CROSS REID: Okay. Now, Ms. Major.

MS. MAJOR: Yes.

CHAIRPERSON CROSS REID: We have -- not that we don't appreciate your testimony, but what we have to be concerned about with at this particular hearing is the subject property before us. So make your comments in your testimony germane to this specific property itself.

I read ahead.

MS. MAJOR: Okay. That's fine.

CHAIRPERSON CROSS REID: In this particular paragraph, I think that you kind of get a little bit off mark with it in going into other buildings and also in discussion -- discussing the community.

And it is true. These things are not within our purview. So if you could pick back up in your last paragraph, I think that would be more appropriate.

MS. MAJOR: Okay. I will do that.

CHAIRPERSON CROSS REID: Thank you.

MS. MAJOR: But my thought was you were

respo[redacted]ble for reviewing all bui[redacted]ings that were not single family units, and as to the --

CHAIRPERSON CROSS REID: No.

MS. MAJOR: That' snot within the purview of the -- okay.

CHAIRPERSON CROSS REID: Only the buildings that come before this Board are the ones that we have any kind of authority to have any decision making capacity. That is not within our authority.

MS. MAJOR: So residential facilities -- and I just want to ask to clarify my own, maybe my misunderstanding -- any buildings that are non-single family buildings would not come before the zoning. Is that the Board of Zoning or the BZA?

CHAIRPERSON CROSS REID: Well, I'm not sure. The question that you're referring to -- what is your question?

MS. MAJOR: The question is apartment buildings.

CHAIRPERSON CROSS REID: Yeah, but what about them?

MS. MAJOR: Apartment buildings that are being built. Do you routine review that?

CHAIRPERSON CROSS REID: No. That would

be DCR. You mean for building permits?

MS. MAJOR: No.

CHAIRPERSON CROSS REID: Things of that nature?

MS. MAJOR: No, simply whether or not multi-family units can be built. I thought some board, and I thought it was this Board, would review those buildings, whether or not they should be built.

CHAIRPERSON CROSS REID: No, no. Let's get clear. If there is a case specifically regarding a building or a site that is brought before this Board, yes, but not --

MS. MAJOR: For a variance, I think, or --

CHAIRPERSON CROSS REID: For a variance or special exception, yes, definitely, but not generally. We don't review multi-family or single family properties in general.

MR. COCHRAN: Madame Chair.

CHAIRPERSON CROSS REID: Only if they pertain to whether there is a special exception or variance.

Yes?

MR. COCHRAN: Could I suggest that perhaps Ms. Major is very familiar with her part of town, where there is a considerable amount of R-5-A zoning,

where [redacted]view is required for stru[redacted]ures that are not single family unattached or semi-detached houses. Multi-family review is required as a special exception in an R-5-A zone. So that may be what she's alluding to.

CHAIRPERSON CROSS REID: Oh, okay.

MS. MAJOR: That's what I am asking, I thought, but to clarify --

CHAIRPERSON CROSS REID: Okay. Maybe I didn't understand your question. You're asking if there is a special exception involved does it come before this Board?

MS. MAJOR: Some board. I thought it was, and I may be misinformed.

CHAIRPERSON CROSS REID: If, in fact, the point I was making, that if there is a special exception or variance involved, they would come to this Board to ask for relief for that particular property only. If, in fact, there's any change made in the zoning other than if it's a -- not a change made, but if there is some exception or there is some difference or something -- someone wants to do something that differs from what the current zoning regulations specify. Then they would come before this Board for that particular property.

MS. MAJOR: I thoug[redacted] that applied to multi-family units in our area.

CHAIRPERSON CROSS REID: If they want to do something that is a departure from what the zoning regulations will allow, then, yes, it would come before this Board, if there is something that is a departure from what the zoning regulations would allow.

MS. BAILEY: Madame Chair, I think the confusion is in most projects in the R-5-A district some type of design review is involved, and so it would come before the Board if it's not a single family or a townhouse type of building. But most multi-family apartments in the Southeast area, the new ones, more than likely they would be at some point coming before the Board for review because there would be design issues involved.

Does that help you at all?

MS. MAJOR: Yes and no. I'm assuming then, you know, that the review would include the buildings surrounding, whether or not -- but anyway --

CHAIRPERSON CROSS REID: No, wait, wait, wait, wait. When you say "review," maybe I -- Ms. Sansone, can you weigh in on this, please? Because I think that there is some confusion. I think there's

further confusion with what Ms. [redacted]ley said.

MS. MAJOR: Yes, it is.

CHAIRPERSON CROSS REID: And we need to get it clarified. Do you understand the question, and can you assist with the response? Because I'm not familiar with the review process before this Board.

MS. SANSONE: Madame Chair, I think you were on the right track when you were saying that the Board would only review the specific building or project that's in front of the Board at any given time. So in this case, you're only reviewing the specific proposal here for the St. Paul --

CHAIRPERSON CROSS REID: If there is a request for some type of -- something that would be a departure from the existing zoning regulations?

MS. SANSONE: Yes. However, as Ms. Bailey was trying to allude to and as was involved in this case, a special exception is required for this multi-family dwelling, but the case only concerns this particular building, not other buildings that might ultimately be constructed in the area.

I don't know if that is --

MS. MAJOR: I'm only talking about this building as it relates to what's already there, but nevertheless, I'm still not clear on this, and I think

I'll seek further clarification on whether we're talking about reviewing. I'm talking about this building, and I would think that review would relate to how may other multi-family units would be in the area, would be a part of whether or not this --

CHAIRPERSON CROSS REID: It would depend on what the zoning is.

MR. COCHRAN: Madame Chair, again, when the regulations were developed, as I understand it, for the R-5-A zone, there was considerable vacant land east of the Anacostia River. There was some concern that with the numbers of multi-family housing units proposed, there might not be the infrastructure, be that the usual utilities, sewer lines, et cetera, or the public infrastructure, such as school system, et cetera.

So this zoning was put into place to insure that the area did not become overly dense and could not support both the physical and the social needs of the new residents.

To that extent, Ms. Major, I believe, is correct in saying that the building is reviewed within the context of the larger area and whether a building would overly burden the school system, the streets, parks, and other services or the general site and the

environment.

Given that Anacostia is now built out, this is, in the view of Office of Planning, somewhat of an anachronistic regulation. Nevertheless, it remains within the regulations. So we review it for special exceptions, knowing that the water, the sewer capacity is there and will likely remain fixed, knowing that as the population decreases, we will have to some extent excess capacity in the school system, a situation which did not exist in the late 1950s, et cetera, et cetera.

So within that context, it does get reviewed, but I'm hard pressed to think of a recent review for a special exception in an R-5-A zone where we have found that the social and physical infrastructure would be overly burdened by the construction of multi-family housing in an R-5-A zone.

CHAIRPERSON CROSS REID: I see. I understand now. I think, Ms. Major, what you were saying and also that was further explained by Mr. Cochran, is that your understanding was because of these issues that multi-family houses that would be coming on line or any type of new construction or any changes would have to come to this Board to be reviewed to see whether or not, and I guess it would

go to adverse impact, whether it be infrastructure, what have you, what kind of effect it would have on that community. Is that what you're saying?

MS. MAJOR: Well, I'm really not asking this Board to make a decision on that. What I'm saying is this entire area -- and I'm in my last statement in the paragraph preceding the last one, which states that the area would benefit for a comprehensive review of the use of the land, the type of buildings, and the need of the community.

As I say, this may not be in the purview of the Office of Zoning Adjustment.

CHAIRPERSON CROSS REID: Right.

MS. MAJOR: However, it is within the purview of the Office of Planning, and I'm suggesting that perhaps prior to the start of construction that the Office of Planning, along with the city funding sources for this project, would review the entire area and perhaps consider the needs of the community and the use of the land.

I'm not opposed to this project. We are certainly looking forward to a lot of changes, but we would like to see more changes on Wayne Place so that this project will not suffer because of what's already around it.

That's my point, and maybe I'm not making it clear.

CHAIRPERSON CROSS REID: Okay. So basically you're using this as a forum to be able to request this comprehensive review from the Office of Planning?

MS. MAJOR: Well, the Office of Planning is here. So I mean --

CHAIRPERSON CROSS REID: Yeah, yeah. That's what I'm saying.

MS. MAJOR: But you're right.

CHAIRPERSON CROSS REID: And I think that the Office of Planning and their participation in this case was charged with a review of this particular site as it pertained to the whole area and the comprehensive plan, you know, et cetera, et cetera, et cetera. I think this is what they did.

Is that not correct?

MR. COCHRAN: That's correct, Madame Chair.

MS. MAJOR: But not for change.

CHAIRPERSON CROSS REID: That's a whole other issue.

MS. MAJOR: Okay.

CHAIRPERSON CROSS REID: That you may

perha[redacted] want to take up with the[redacted]as to what would be the best route to take as far as implementing changes, but as far as this particular site is concerned and the review process, to make recommendations to this Board as to the effect impact and the analysis as to the overall effect it will have if, in fact, a special exception would be -- the relief would be granted is what they were charged to do, and they have already done that.

MS. MAJOR: Well, I appreciate that, and my concern is that I wanted to make it a part of the record because there are city tax dollars being used in this project, and hopefully they, too, will be reading the record of this hearing.

CHAIRPERSON CROSS REID: Thank you.

MS. MAJOR: So that, you know, one or some of us in the community are really concerned about the overall effect so that this project is not affected adversely because of what's already there.

CHAIRPERSON CROSS REID: Okay.

MS. MAJOR: In considering the various requests, however, I do hope that if the height, stories variance is approved, that you will be sure that it is adequately placed back from the street, and I'm not sure what that amount of space should be, if

there is any that's required, but anyway, I hope that it's considered.

And also, the fact that the topography of Wayne Place and the fact that many hilly areas in Southeast have soil problems will be factors into the decision about lot occupancy and the other variances requested.

Thank you very much for your patience, and that's basically what I wanted to share with the Board in terms of my perspective, as well as the members of the residents of HCL-7, but we did have a meeting, as I said, with 22 people present.

CHAIRPERSON CROSS REID: Okay. Thank you. Thank you very much.

VICE CHAIRPERSON RENSHAW: Yes, I want to say to Ms. Major thank you very much for a very thoughtful paper.

I take it that in your last paragraph where you address the fact that you hope the building will be placed an adequate distance from the street, that is from Wayne Place?

MS. MAJOR: Wayne Place.

VICE CHAIRPERSON RENSHAW: And you feel and your single member district members feel that that is as depicted too close to the street?

MS. MAJOR: Well, you know, we're not able to judge whether that is too close or not, and we're leaving it up to the experts, but we know that a building that is very high that overshadows the street -- and I think Wayne Place suffers with some of those buildings now where you walk out of the building and you have these three story buildings right at the street.

I'm not sure if that's a problem or not, but I would think if you put it on both sides of the street and it's not that way on this side where this project is because they have courtyards, then you know I'm not sure what the appearance would be, and of course, I can't judge it until I see it. Unfortunately the paper doesn't help me, but I hope that you can.

CHAIRPERSON CROSS REID: Well, it has to be in compliance with the regulations with regard to setbacks, lot occupancy, side yard and the like, whatever, they're not requesting a variance from. So it would be -- have to be in compliance, and that is what the regulations are for, to make sure that those type of concerns are addressed.

MS. MAJOR: But if you ask for a height above, outside of the regulations or a story outside

of th[redacted]regulation, does that spa[redacted]e from the --

CHAIRPERSON CROSS REID: Yeah, that's departure, and that's one of the variances, and you will remember when the case was -- when the Applicant was making his case, explaining that because the topography, that they asked a variance from the stories because of the fact that they wanted to keep the height consistent.

If you looked, I don't think you could see here how it slopes down and on the back, but there was another story added, and there was a variance requested for that.

MS. MAJOR: I understand that, but when you give a variance, are you also asked to do something with moving it back from the street? I'm just asking that question?

CHAIRPERSON CROSS REID: It has to be consistent with all the other regulations as well, and one of which is setback. If there's not a variance requested, then all the other regulations would be applicable.

MS. MAJOR: I'm sorry. If there's not a variance?

CHAIRPERSON CROSS REID: If they're not asking a variance from a specific regulations or

section of the regulation, then they have to comply with all of the other aspects of the regulations that pertain to that case.

MEMBER LEVY: Madame Chair.

CHAIRPERSON CROSS REID: So everything else, everything else would be applicable. All the other regulations would apply.

MEMBER LEVY: Given that Ms. Major has raised the question, and the OP report, I believe, states that the building height does not require a variance, would it be appropriate just to have a quick explanation of how the building height was calculated and --

CHAIRPERSON CROSS REID: Sure. Sure, if you like.

MEMBER LEVY: And maybe Office of Planning can confirm that it does not require a variance in this case.

MR. COCHRAN: It does not require a variance.

I would hope that the Board would ask that question of the Applicant on the calculation of the height.

CHAIRPERSON CROSS REID: All right.

MEMBER LEVY: And that was my intention.

CHAIRPERSON CROSS REID: Okay. Would the architect like to speak to that?

Well, you might -- can you see this board? Could you put that one back and then bring that one forward so that it's not --

VICE CHAIRPERSON RENSHAW: Oops, there it goes.

MR. SPIEGEL: For the record, Jay Spiegel.

The height was calculated at a midpoint at the front of the building facade 40 feet to a point measured from the inside ceiling height, as stated in the code.

MEMBER GRIFFIS: For clarification on your elevations, actually I'm not looking at them right now, but dimensioned right off of the site below the port-cochere, it actually would be about 42 feet. So common sense would tell you you're coming up the slope to the middle of that front elevation probably more than two feet, and so you'd be below 40 feet to the ceiling height on the interior, correct?

MR. SPIEGEL: We made absolutely sure that we wouldn't be in violation at the midpoint.

CHAIRPERSON CROSS REID: Ms. Major, did you follow that?

MS. MAJOR: Yes. So what you're saying

then [redacted] that you can certainly p[redacted] it right up on the street without any --

CHAIRPERSON CROSS REID: The height is okay.

MS. MAJOR: Is that what I'm hearing?

MEMBER GRIFFIS: No, i think we just established the height of the building is in compliance.

MR. SPIEGEL: I can discuss the front BRL if you --

CHAIRPERSON CROSS REID: Discuss what?

MR. SPIEGEL: The front building restriction line.

CHAIRPERSON CROSS REID: Would you like him to explain to you how that was done?

MS. MAJOR: No, that's not necessarily. I just wanted to raise the issue. If you're satisfied with that, I certainly will be, too.

CHAIRPERSON CROSS REID: Okay.

MS. MAJOR: Thank you.

CHAIRPERSON CROSS REID: Thank you.

No cross examination? All right.

Then we move to closing remarks.

MR. GLASGOW: Madame Chair, members of the Board, just so that you're aware, the building is set