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April 4, 2003

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HAND-DELIVERED

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

Re: Board of Zoning Adjustment Application No. 16836
The Washington Home

Dear Mr. Griffis:

Enclosed for filing please find ANC 3F's Motion to Reopen the Record and for Leave to Allow Parties to Respond in Writing and at a Further Hearing on Designated Issues Concerning New Submissions Requested of the Applicant by the Board.

Submission of this Motion was approved by ANC 3F by a vote of 6-0-0 at a duly noticed public meeting on March 17, 2003, with a quorum present (a quorum being 4).

Sincerely,

Cathy Wiss

Cathy Wiss
Chair, ANC 3F

BZA
Case No. 16836
Exhibit No. 128
127

Board of Zoning Adjustment
District of Columbia
CASE NO.16836
EXHIBIT NO.127

Doc 03-02

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

In Re: The Washington Home Lot 818, Square 1825 3720 Upton Street, N.W. Washington, D.C. 20016	)))))	BZA Case No. 16836

MOTION TO REOPEN THE RECORD AND FOR LEAVE TO ALLOW PARTIES TO RESPOND IN WRITING AND AT A FURTHER HEARING ON DESIGNATED ISSUES CONCERNING NEW SUBMISSIONS REQUESTED OF THE APPLICANT BY THE BOARD

ANC 3F moves that the Board of Zoning Adjustment (Board) reopen the record and afford ANC 3F and other parties the opportunity to comment on and cross-examine the applicant's witnesses and to present rebuttal evidence and testimony to new submissions the Board has requested from the applicant. ANC 3F believes that approval of its motion is required by § 2-509 of the D.C. Administrative Procedure Act, D.C. Code 2001 Ed. § 2-501 et seq., and that a further hearing is warranted under 11 DCMR § 3124.2.

The Washington Home filed BZA Case No. 16836 to request special exceptions to construct a four-bed addition to its hospice facility and to enlarge its parking lot from 75 to 173 parking spaces in an R-1B Zone. Hearings were held on April 2, June 25, July 9, and October 15, 2002.

At a special public meeting on December 17, 2002, the Board voted to approve both special exceptions, but limited the increase in parking to 130 spaces, as a condition

of its approval. This was a significant reduction from the 173 parking spaces requested in the application. Approval of this special exception was also conditioned on the applicant's submission of a revised site plan along with a new landscaping plan and a parking and transportation management plan to reduce the demand for parking and to provide better control over the use of the lot.

In arriving at its decision, the Board discussed whether it was reopening the record to receive these submissions and whether it should serve the other parties and receive a response from them. Board members called these new submissions conditions of its order. They indicated they planned to evaluate the impact of the new plans on the site before granting final approval, but noted the record already contained a large amount of evidence and testimony. (Dec. 17 Tr. 51-56) After finding a "fairly good consensus" not to reopen the record for response from the other parties (although Board Member Zaidain would have allowed it), the Board voted to "hav[e] a submission of a new site plan to the Board *only for its own deliberation and approval of the plan*". (Dec. 17 Tr. 61, emphasis added)

In so doing, the Board erred by disregarding the D.C. Administrative Procedure Act , D.C. Code 2001 Ed. § 2-501 et seq., and its own rules of evidence and post-hearing procedure. Section 2-509 of the D.C. Administrative Procedure Act provides in pertinent part:

> (a) In any contested case, all parties thereto shall be given reasonable notice of the afforded hearing by the Mayor or the agency, as the case may be. . . . [I]f subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto. . . .
>
> (b) Every party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to

conduct such cross-examination as may be required for a full and true disclosure of the facts.

A party's fundamental right to present its point of view and to respond to evidence presented by other parties is recognized in the Board's rules of evidence, 11 DCMR § 3119.4, and in its rules of post-hearing procedure. Section 3121.6 mandates that the Board "allow all parties to a case an opportunity to file written responses to any exhibits, information, or briefs submitted after the close of the hearing." The Board is not limited to only written responses in such a situation: "Prior to the filing of a final decision, the Board may, on its own motion, reopen the record and require further hearing on designated issues." 11 DCMR § 3124.2.

As all Board members present at the special meeting indicated, they expect the new site plan, with a much-reduced parking lot and new landscaping plan to screen it, to be substantially changed in design, as well as in the amount and location of paved surface and green space. (*See* Dec. 17 Tr. 20, 23, 26-27, 30-31, 41, 52) The transportation management plan, recommended by DDOT, ANC 3F, and CCHE at the hearing, would be entirely new, as no such plan had ever been drawn up.

These new submissions are in effect amendments to the application, not merely conditions to a final order that need no further deliberation by the Board. The Board must find that these plans are in harmony with the Zoning Regulations and Act. Furthermore, the layout of the parking lot on the site, the landscaping to screen it, and the plan to manage parking and encourage use of public transportation are major contested issues pertaining to the special exception requested for increased parking.

It is clear from the Board's discussion that it does intend to review and evaluate these new submissions before granting final approval. (Dec.17 Tr. 52-57) But to do so, the Board would have to base its decision on the record developed for the rejected site plan, not on the new plans or any new considerations that may arise from them, because its decision precludes the parties' response to these submissions or any guidance from experts or appropriate government agencies.

Although the Board might try to infer from the existing record what the response of the parties might be to the new submissions it has requested from the applicant, it would have no lawful basis for doing so without providing the parties the opportunity to respond, as required by the D.C. Administrative Procedure Act and 11 DCMR § 3124.2. "It is fundamental that the mind of the decider should not be swayed by evidence which is not communicated to both parties and which they are not given an opportunity to controvert." *Quick v. Department of Motor Vehicles,* 331 A.2d 319, 323 (D.C. 1973) (remanded to afford petitioner an opportunity to rebut his driving record, which the hearing examiner had consulted before announcing his decision). "[T]he fundamental purpose of the on-the-record requirement [is] to assure the parties an adequate opportunity, at the administrative proceeding, to challenge and respond to the evidence which forms the basis of the agency's decision." *M.B.E., Inc., v. Minority Business Opportunity Commission of the District of Columbia*, 485 A.2d 152, 159 (D.C. 1984) (remanded for further proceedings because the Commission had received and considered two sets of materials relevant to its decision without making them available to the petitioner). This rule applies not only to evidence reviewed and considered by an agency before its final decision, but also to evidence that later leads an agency to modify that

decision. In *Citizens' Association of Georgetown v. D.C. Board of Zoning Adjustment,* a memorandum interpreting an order granting a special exception, written in response to an inquiry from the applicant, was deemed a "substantial modification of the original order". In the absence of notice to the parties and an opportunity for them to be heard, its issuance violated the D.C. Administrative Procedure Act. 365 A.2d 372, 377 (D.C. 1976).

The Board recognized the need to allow all parties an opportunity to respond to a new site plan when the applicant proffered a "new revised parking plan" at the October 15, 2002, hearing. This plan differed from that of the original application in that the number of parking spaces was reduced to 155; the spaces were perpendicular rather than angled; a central island was added; and the dimensions of the lot were altered slightly. Chairperson Griffis called this "a modified plan . . . that would amend the application" (Oct. 15 Tr. 144), and observed that "the Office of Planning would need to address this. Perhaps DDOT would need to take a look at it." (Oct. 15 Tr. 153) Board Member Etherly added: "I believe in the issue of fairness, that there needs to be an opportunity for parties in opposition to respond to what is a substantial change, a material change." (Oct. 15 Tr. 155) Board Member May suggested "an amendment to the application that comes at some later date with appropriate time for parties to react and continue from there." (Oct. 15 Tr. 158) A Commissioner from ANC 3F responded that "fil[ing] written comments . . . is not the same as hearing testimony live, hearing from experts. . . . [and] hav[ing] the opportunity to cross-examine them." (Oct. 15 Tr. 159) The Applicant subsequently withdrew the amendment (Oct. 15 Tr. 166), and the hearing continued on the original application.

For the foregoing reasons, ANC 3F respectfully requests that the record be reopened and that the Board allow it and the other parties to this case the opportunity to testify at a public hearing on any new submissions provided by the applicant pursuant to the special meeting on December 17, 2002, as specified in 11 DCMR § 3124.2. At a minimum, ANC 3F requests that it and other parties to the case be given the opportunity to comment in writing on any new submissions made by the applicant, in accordance with 11 DCMR § 3121.6.

Submission of this Motion was approved by ANC 3F by a vote of 6-0-0 at a duly noticed public meeting with a quorum present on March 17, 2003.

Respectfully submitted,

Cathy Wiss

Cathy Wiss, Chair
ANC 3F
4401A Connecticut Avenue, N.W., Box 244
Washington, D.C. 20008-2322
202-362-6120

CERTIFICATE OF SERVICE

I hereby certify that, on April 4, 2003, a copy of the foregoing Motion was served by first class mail on the following parties:

The Washington Home
c/o George R. Keys, Jr., Esq.
Jordan, Keys & Jessamy, LLP
1400 - 16th Street, N.W.
Suite 700
Washington, D.C. 20036-2217

Citizens Concerned about the Home's Expansion
c/o Jonathan P. Graham, Esq.
Williams & Connolly LLP
725 12th Street, N.W.
Washington, D.C. 20005-5901

Cathy Wiss

Cathy Wiss