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WASHINGTON, DC

CLINICAL PROGRAM

December 2, 2002

VIA HAND DELIVERY
Members of the Board of Zoning Adjustment
District of Columbia Office of Zoning
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

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2002 DEC -2 PM 4:33

Re: Board of Zoning Adjustment Case No. 16924
Jemal's Wheel/1701 Kalorama Road, N.W.

Dear Board Members:

Jemal's Wheel, LLC (the "Applicant") has argued that a special exception, and not a variance, is the proper form of relief necessary to exceed the height limits of the Reed-Cooke Overlay.[1] The Reed-Cooke Neighborhood Association ("RCNA") submits this letter in opposition to the Applicant's interpretation of the applicable regulations. In order to exceed the fifty-foot maximum height limit permitted in the Reed-Cooke Overlay District a variance is required.

The Applicant has asked for a special exception under 11 D.C.M.R. § 1403.1 to exceed the matter-of-right height limit imposed by section 1402.1 of the Reed-Cooke Overlay. When one reads Chapter 14 of the DCMR as a whole, the plain language indicates the purpose of section 1403.1 is to supplement rather than supplant section 1402.1. Section 1403.1 adds certain additional criteria that must be met in order to obtain a special exception from the requirements of Chapter 14. Thus, to be granted a special exception from the Board, an applicant must meet the conditions of section 1402.1 and 1403.1. A special exception to exceed fifty-feet is not even contemplated in this chapter. Moreover, even if section 1403.1 were interpreted to permit construction to the underlying zoning limit, section 1400.4 states that the more restrictive requirement shall apply.

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Under section 1402.1 the maximum height permitted in the Reed-Cooke Overlay District shall be forty-feet. However, the Board may permit a maximum height of fifty-feet by granting an Applicant a special exception, so long as the Board determines the project provides the required number of low and moderate income housing units. Thus, under section 1402.1 a developer may construct a building forty-feet in height as a matter-of-right, and to a maximum of fifty-feet with the approval of the Board under a special exception. Any construction above fifty-feet would require a variance. This is

[1] See October 15, 2002 letter from Mr. Glasgow to the members of the BZA.

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the same position articulated by the Zoning Commission member present at the October 8, 2002 hearing in this case.[2]

The Applicant has argued that section 1403.1 permits them to proceed outside the requirements of section 1402.1. They contend section 1403.1 permits the board to grant a special exception allowing non-compliance with any provision of Chapter 14 of the DCMR, including section 1402.1. A special exception granted under section 1402.1 would limit the maximum height of any development to fifty-feet. It would also require a set number of affordable housing units to be included in the project. Yet, according to the applicant's reading, a special exception granted under section 1403.1 would not only permit construction to sixty-five feet, it would eliminate any requirement to include affordable housing. If the section 1403.1 were to be interpreted this way, it would effectively render the height regulations articulated in section 1402.1 meaningless. Under such an interpretation there is hardly a scenario imaginable in which someone would seek a special exception under section 1402.1.

Furthermore, the Applicant has argued that a variance is not required because (1) a special exception under section 1403.1 would permit the height of the proposed project to be governed by the underlying zone district (C-2-B) rather than the regulations of the Reed-Cooke Overlay, and (2) the proposed height is in compliance with the underlying zoning.[3] This interpretation is contrary to the plain language of Chapter 14 of the DCMR. Section 1400.4 states, **"where there are conflicts between this chapter and the underlying zoning district, the more restrictive regulation shall govern."** For the purpose of regulating height, the Reed-Cooke Overlay is more restrictive than section 770.1, therefore it governs the present situation. In *Board of Zoning Adjustment Case No. 16869*,[4] King's Creek, LLC requested a special exception to exceed the forty-foot matter-of-right height limit in the Reed-Cooke Overlay in order to build a sixty-nine-foot structure. The board found that a variance rather than a special exception was the necessary form of relief. Although the reason a variance was required in that particular case was actually because the applicant's square was not subject to the Reed-Cooke Overlay, the Board took special care to note that a special exception to build higher than fifty-feet in the Reed-Cooke district is not provided for under the regulations:

> An applicant may apply for a special exception to exceed the requirements of the Reed-Cooke overlay...only up to the matter of right limits [fifty-feet.] To allow otherwise would allow the overlay to create a less stringent height requirement by offering a special exception where a variance is otherwise required, which was plainly not the Zoning Commission's intent when it established the overlay. See 11 D.C.M.R. §1400.4, (when there is a conflict between the overlay and the underlying

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[2] See p.10 of the October 8, 2002 Transcript, "CHAIRPERSON GRIFFIS: 'So your point, Ms. Mitten, would be that the Reed-Cooke outlines the special exception up to 50 feet and beyond that 50 feet would actually be a variance to the overlay.' MS. MITTEN: 'YES.'"

[3] The underlying zone permits a maximum height of sixty-five feet, 11 DCMR § 770.1, while the Reed-Cooke overlay limits the maximum height to forty-feet as a matter of right.

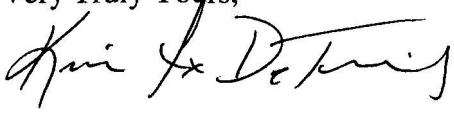
[4] 49 D.C. Reg. 9224 (Oct. 4, 2002).

zone, the more restrictive requirements apply.) *See Kings Creek, LLC, at 3.*

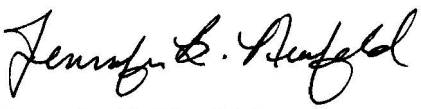
Finally, the Reed-Cooke Overlay was created in part to restrict the height and density of future development in the Reed-Cooke district.[5] If the overlay were to be interpreted as the Applicant has suggested, it would create a lower standard for developers wishing to exceed matter-of-right limits within the Reed-Cooke district, than would exist in the absence of the overlay. Where one of the stated purposes of the title is to limit heights and densities, it would be illogical to conclude that the same title would create a provision making it easier to exceed the very height limitations the title creates.

Based on the rational previously stated in this letter, we believe the Board should find that a variance, not a special exception, is the necessary form of relief needed to exceed the fifty-foot height limit of the Reed-Cooke Overlay. If you have any questions, or require any further information, please do not hesitate to contact us at (202) 274-4147.

Very Truly Yours,



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Cc: Maxine Brown Roberts, Office of Planning (via facsimile)
Alan Bergstein, Office of the Corporation Counsel (via facsimile)

[5] 11 D.C.M.R. § 1400.2 (b)