Form 125 – Exhibit 1
(Revised 03/15/02)

Case No. 17034

BEFORE THE BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA

APPEAL

Notice: See other side of appeal form for instructions

Pursuant to Section (s) §3100 and §3101 of the Zoning Regulations of the District of Columbia, an appeal is hereby taken

from the administrative decision of: Zoning Administrator (Name of administrative officer and title) Michael D. Johnson

made on July 12, 2001 (Date of decision) **, to the effect that** the decision was based on reversible legal and factual error and erroneously granted the ability to develop the lots in question "as a matter-of-right"

Address(es) of Affected Premises	Square(s)	Lot(s)	Zoning Districts
1500 block of 32nd Street, N.W.	1270	19, 20, 21	R-3

Present use of Property: unimproved lots

Proposed use of Property: rowhouses

Owner of Property: see attached **Telephone No.:** see attached

Address of Owner: see attached

Name, address and telephone number of lessee: N/A

Name, address and telephone number of appellant, if other than owner: Advisory Neighborhood Commission 2E
3265 S Street, N.W. Washington, DC 20007 tel: (202) 338-7427

State specifically manner in which appellant is aggrieved by the administrative decision, the allegations of error in the administrative decision, and the relevant sections of the Zoning Regulations (see reverse for more detailed explanation).

Please use a separate piece of 8 ½? x 11? to respond and attach it to the Form 125 Appeal.

Date: May 9, 2003 **Signature:** Thomas L. Birch, Chair ANC 2E (Appellant*)

* *If appeal is filed by agent of the Appellant, Form 125 Appeal shall be accompanied by a letter signed by the appellant authorizing the agent to act on his behalf in this appeal.*

To be notified of hearing and decision:

(Appellant or Authorized Agent)*

Name:	Advisory Neighborhood Commission 2E				
Address:	3265 S Street, N.W. Washington, D.C. 20007				
Phone No.:	(202) 338-7427	**Fax No.:**	(202) 338-0279	**E-Mail:**	anc2e@erols.com

ANY APPLICATION THAT IS NOT COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS ON THE BACK OF THIS FORM WILL NOT BE ACCEPTED.

BZA
Case No. 17034
Exhibit No. 1

Board of Zoning Adjustment
District of Columbia
CASE NO. 17034
EXHIBIT NO. 1

Owner of Property

Square 1270, Lot 19
Strategic Georgetown, LLC
c/o ResAgent, Inc.
1025 Connecticut Avenue, N.W., Suite 400
Washington, DC 20036
No telephone number provided on Certificate of Registration

Square 1270, Lot 20
G'town 32nd Street, LLC
c/o ResAgent, Inc.
1025 Connecticut Avenue, N.W., Suite 400
Washington, DC 20036
No telephone number provided on Certificate of Registration

Square 1270, Lot 21
Herbert S. Miller and Patrice R. Miller
3124 Q Street, N.W.
Washington, DC 20007
(202) 338-1588

D.C. Zoning Administrator Michael Johnson's July 12, 2001 letter ruling to Mr. John T. Epting of Shaw Pittman applies 11 DCMR § 401.2 and § 401.7 to provide for the construction of rowhouses on square 1270, lots 19, 20, and 21 (the "Subject Lots"). A copy of Mr. Johnson's letter is attached hereto as Attachment 1. Plans for the construction of townhouses on the Subject Lots have been proposed and submitted to ANC 2E. The ANC 2E has unanimously opposed those plans three times pursuant to three separate reviews for a variety of reasons (including but not limited to the detrimental effect of the proposed plans on the historic integrity of the block, serious design concerns, the number of houses proposed, and the disruption to the neighborhood which already has endured over four years of constant construction noise, filth, and other interference with the quiet enjoyment of neighboring properties) which are enumerated in the relevant ANC 2E resolutions, attached hereto as Attachment 2.

The ANC 2E appeals to the Board of Zoning Adjustment to review the July 12, 2001 ruling of the D.C. Zoning Administrator granting the ability to develop the three center lots (lots 19, 20, and 21) on the property located on the east side of the 1500 block of 32nd Street N.W., "as a matter of right," on the grounds that the Zoning Administrator's decision is flawed and contains legal and factual errors.

DETAILS OF EXCEPTIONS

1. With lot areas of 1,573 square feet, the lots are too small for the construction of rowhouses under the minimum dimensions set forth in § 401.3. Therefore, in order to be eligible for the matter-of-right construction of rowhouses, the lots would have to satisfy one of the exceptions contained in the Zoning Regulations. The letter ruling sought to employ the exception provided by § 401.2. The letter ruling claims that the "lots *are* unimproved, and *were* in single ownership on November 1, 1957." (Emphasis supplied.) The exceptions contained in § 401.2 apply "in the case of an unimproved lot in single ownership on November 1, 1957." Both conditions must relate to the date of November 1, 1957. By the wording of § 401.2, the lot must have been unimproved on November 1, 1957 and it must have been in single ownership on November 1, 1957 to qualify for the exceptions that follow. The letter ruling relates to the "unimproved" condition to the *present* day, but relates the "single ownership" condition to November 1, 1957. However, as a matter of legal construction (and simple grammar), there simply is no reasonable basis for concluding that the "unimproved" and "single ownership" qualifiers apply to different periods of time. In order for Mr. Johnson's interpretation to be correct -- that is, in order for the qualifiers to relate to different time periods -- there would have to be a comma after the term "unimproved lot" so as to set off the "in single ownership on November 1, 1957" qualifier from the rest of the sentence. There is no such comma in the regulations. Both conditions refer to the November 1, 1957 date, a fact emphasized by the set-off of the phrase from the rest of the sentence through commas. The alternative position that the unimproved condition relates to the present day (the one relied upon by the letter ruling) is nonsensical. Under that theory, the regulations in § 401.3 would have little or no force. That is, one would need only demolish an

existing structure to make a lot "unimproved" and enjoy freedom from the standard zoning requirements of § 401.3. This would render § 401.3 largely meaningless, quite literally permitting the exception (§ 401.2) to swallow the rule (§ 401.3). The ANC 2E is prepared to demonstrate that the lots were *not* unimproved on November 1, 1957. A nursing home wing (constructed in 1956) occupied and straddled the three lots. Hence, § 401.2 cannot properly apply.

2. In order for the exception of § 401.2 to apply, the lot must "not adjoin another unimproved lot in the same ownership." Lots 19, 20, and 21 are adjoining lots. On July 11, 2001, when the letter ruling was issued, lots 19, 20, and 21 were all unimproved and under the same ownership. Specifically, they were all owned by Herbert and Patrice Miller. The letter ruling states that "it is my understanding that *at the time of development*, one or more of the lots will be owned and developed by separate companies/entities so that the ownership does not adjoin another previously unimproved lot." (Emphasis supplied.) Section 401.2 demands compliance contemporaneous with its operation. Section 401.2 cannot be applied pursuant to the "understanding" that at some future point a condition will be satisfied. Otherwise, the section would be phrased in the future tense (*i.e.*, ". . . and that *will not* adjoin another improved lot") and would contain the qualifier of "at the time of development." Such language is not found in the regulations. The interpretation contained in the letter ruling was in error and the decision should not have been issued on the basis of a condition that was not present.

3. The letter ruling states that "[t]he Subject Properties meet the minimum lot width of 20 percent [sic] set forth in Section 401.3 of the Zoning Regulations." It is likely that the Zoning Administrator intended to write "20 feet" rather than "20 percent" as there is no reference in Section 401.3 of the Zoning Regulations to a minimum lot width of "20 percent." The letter ruling's statement is incorrect. The lots measure 20.5 feet along the front property line. However, the front property line is the wrong measurement to use. The front property line of the lots runs at an angle between 20 and 21 degrees west of due North. The side lot lines run due East. Because of the angled front property line, the side lot lines do not meet the front property line at a 90 degree (or perpendicular) angle. In short, the lots are on a skew. The Zoning Regulation definitions provide that "[w]here the building line is on a skew, the width of the lot shall be the distance between the side lot lines perpendicular to the axis of the lot taken where either side lot line intersects the building line." 11 DCMR § 199.1. Hence, the 20.5 foot measurement along the front property line is not the appropriate measurement for lot width. Instead, because the building line is "on a skew," one must measure the distance between the side lot lines perpendicular to the axis of the lot taken where the side lot line intersects the front property line. Contrary to the letter ruling's statement, the proper measurement process reveals a lot width of less than 20 feet (it leads to a lot width of approximately 19.15 to 19.27 feet, depending upon the angle used for the front property lines (32nd Street)).

4. The letter ruling applies an exception on top of an exception. Finding, erroneously, that the exception of § 401.2 for lot area applied (allowing a smaller lot area for the construction of rowhouses), the letter ruling applied the 2 percent discretionary adjustment from section 401.7 on top of that exception. Section 401 contains the minimum lot dimensions and includes in § 401.2 its own exception to the standard minimums of § 401.3. The application of the 2 percent discretionary adjustment § 401.7 is intended to apply to the standard minimum lot dimensions, not the exceptions to those lot dimensions.
5. The Zoning Administrator applied § 401.7 to allow the 2 percent deviation needed for the lots to fall within the minimum lot area (after having erroneously applied the exceptions provided by § 401.2). As a condition of applying the discretionary adjustment, § 401.7(b) requires that the deviations "shall be deemed by the Zoning Administrator not to impair the purpose of the otherwise applicable regulations." The letter ruling contains no finding or consideration as to the impairment of the purpose of the otherwise applicable zoning regulations, a requirement under § 401.7(b).
6. The second to last sentence of the letter ruling states that the lots "comply with the standards of 401.3 of the Zoning Regulations and can be developed as a matter-of-right under zoning." This is an incorrect conclusion. The lots are not in compliance with § 401.3 of the Zoning Regulations (the *standard* lot dimensions). Indeed, even under the Zoning Administrator's analysis, the lots are not in compliance with § 401.3 as his analysis rested entirely upon a misapplication of §§ 401.2 and 401.7.

In light of the foregoing, ANC 2E asks the Board of Zoning Adjustment to find whether the lots in question were erroneously deemed eligible for an exception under D.C. Zoning Regulations, including whether:

1) the lots were unimproved on November 1, 1957 as required by § 401.2 of the Zoning Regulations;
2) the lots were adjoining another unimproved lot in the same ownership at the time the matter of right was granted, as prohibited by § 401.2 of the Zoning Regulations;
3) the lots possess the minimum lot widths required by § 401.3 of the Zoning Regulations, measured in accordance with definition of "lot width" contained in § 199.1 of the Zoning Regulation definitions;
4) the Zoning Administrator can use the 2 percent discretionary adjustment of § 407.1 in conjunction with other exceptions under the zoning regulations;
5) the Zoning Administrator failed to consider whether the granting of the deviation for development of the property would not impair the purpose of the applicable regulations, as required by § 401.7(b) of the Zoning Regulations; and
6) the Zoning Administrator erred in concluding that the lots complied with the standards of § 401.3 of the Zoning Regulations.

DETAILED STATEMENT EXPLAINING HOW APPELLANT INTENDS TO PROVE THE CASE

Appellant ANC 2E intends to prove the case through a legal analysis of the letter ruling at issue as well as through the submission of: (1) surveyor certifications regarding the lot dimensions; (2) zoning maps exhibiting the lots, the Zoning Administrator's letter ruling; (3) written and/or verbal testimony of persons with knowledge of facts and legal issues bearing upon this case; and (4) documents to demonstrate, among other things, the improved status of the lots on November 1, 1957, the ownership of the lots at the time of the Zoning Administrator's decision, the current width and area of the lots, and other items bearing upon the matter.

ATTACHMENT 1

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

Building and Land Regulation Administration
Office of the Zoning Administrator

July 12, 2001

Mr. John T. Epting
Shaw Pittman
2300 N Street, NW
6th Floor
Washington, DC 20037

Re: Development of Lots 19, 20 and 21 in Square 1270 (the "Subject Properties")

Dear Mr. Epting:

This letter confirms the ability to develop the Subject Properties in Square 1270, Lots 19, 20 and 21 as a matter-of-right under zoning as conditioned herein (see Exhibit A). The Subject Properties are situated on the east side of the 1500 block of 35th Street N.W. between P and Q Streets. The properties are zoned R-3. According to the records of the Surveyor's Office of the District of Columbia, Lots 19, 20 and 21 were recorded in May of 1881 and consist of 1,573 (1572.8 rounded to 1573) square feet of land area (Exhibit B).

The Subject Properties meet the minimum lot width of 20 percent set forth in Section 401.3 of the Zoning Regulations. While the Subject Properties do meet the minimum lot area of 2000 square feet for row dwellings, there is an exception to the minimum lot area under certain circumstances. Under Section 401.2, "...in the case of an unimproved lot in single ownership on November 1, 1957, which has an area or width of lot less than that specified in § 401.3 for the district in which it is located and which does not adjoin another unimproved lot in the same ownership, a structure may be erected on the lot if both the area and width of lot are at least eighty percent (80%) of the area and width of lot specified under § 401.3; Provided, that the structure shall comply with all other provisions of this title."

Therefore, Section 401.2 establishes several criteria which are satisfied by the Subject Properties. The lots are unimproved, and were in single ownership on November 1, 1957. The second standard will also be satisfied. Furthermore, it is my understanding that at the time of development, one or more of the lots will be owned and developed by separate companies/entities so that the ownership does not adjoin another previously unimproved lot.

Applying the 80 percent rule to the Subject Properties (1573 square feet of land area) yields the following: The minimum lot area for R-3 (new dwelling) is 2,000 square feet. The 80 percent rule yields a minimum lot area of 1,600 square feet of land area. Section 407.1 provides the Zoning Administrator with the authority to permit a deviation of not more than two (2) percent of the area requirements, including those as scribed in section 401 (the minimum lot requirements). Applying the 2% deviation to the 1,600 square foot minimum yields a permitted lot size of 1,568 square feet of land area. The Subject Properties (1,573 square feet) exceed this figure, and thus comply with the standards of 401.3 of the Zoning Regulations and can be developed as a matter-of-right under zoning.

If you have any additional questions regarding the issues addressed in this letter, please feel free to call me at (202) 442-9554.

Respectfully,

Michael D. Johnson
Zoning Administrator
District of Columbia

Enclosures

MDJ/mdj/jc
Miller House (32nd St.) to JE

ATTACHMENT 2

ANC 2E Resolutions Adopted by Unanimous Votes Concerning Development on the 1500 Block of 32nd Street, N.W.

December 3, 2002

- Whereas, the property known at the Bowie-Sevier-Miller house is an historic landmark whose viewing should not be obstructed nor its property subdivided for the purpose of additional housing, and
- Whereas, the potential development of five three story row houses is out of scale proportionally and whose design is not in harmony with the narrow street, and
- Whereas, the re-construction time of the main property was indicated as eighteen months and is not yet complete after forty eight months causing neighbors loss of enjoyment of property ownership, and
- Whereas, the contemplated construction would place an additional burden on the residents by adding another twenty -four to thirty-six months of construction vehicles and dirt, and
- Whereas, the new homes would drastically compromise the light and view of the existing houses on the west side of 32nd Street and those on the west end of the 3100 block of Q Street, and Whereas, notice has not been properly given to the residents of the area, and
- Whereas, the easement requested by ANC 2E in 1998 has not been met;
- Therefore, ANC 2E recommends against approval of the conceptual plans as presented.

February 4, 2003

- ANC 2E objects to the plans presented for the construction of five houses proposed for the east side of the 1500 block of 32nd St. The proposed houses are incompatible and out of scale with others on the opposite side of 32nd Street. The development of these houses would result in loss of light to houses on the west side of 32nd Street and on the south side of the 3100 block of Q Street, and would obliterate existing open space, important to the ambiance and character of this exceptionally narrow street. Furthermore, considering the protracted amount of time ongoing over several years for the reconstruction of the adjoining main property of the Bowie-Sevier House, causing neighbors to endure noise, dirt, unhealthy breathing conditions, great inconvenience and loss of enjoyment of their property, ANC 2E shares the reservations expressed by neighbors regarding any development of this property which would add to the years of disruption and disturbance of the peace for these neighbors.

April 1, 2003

- ANC 2E continues to object to the plans presented for the construction of five houses proposed for the east side of the 1500 block of 32nd St., as being incompatible and out of scale with others on the opposite side of 32nd Street, and destructive to the ambiance and character of this exceptionally narrow street.

April 29, 2003

- ANC 2E appeals to the Board of Zoning Adjustment to review the July 12, 2001 ruling of the D.C. Zoning Administrator granting the ability to develop the three center lots (lots 19, 20, and 21) on the property located on the east side of the 1500 block of 32nd Street, N.W., "as a matter of right," on the grounds that the Zoning Administrator's decision is flawed and contains legal and factual errors.

- ANC 2E asks the Board of Zoning Adjustment to find whether the lots in question were erroneously deemed eligible for an exception under D.C. zoning regulations, including whether:
  1) the lots were unimproved on November 1, 1957, as required by the regulations;
  2) the lots were adjoining another unimproved lot in the same ownership at the time the matter of right was granted;
  3) the lots possess the minimum lot widths required by section 401.3, measured in accordance with zoning regulation definitions of "lot width";
  4) the Zoning Administrator can use the 2 percent discretionary adjustment in conjunction with other exceptions under the zoning regulations;
  5) the Zoning Administrator failed to consider whether the granting of the deviation for development of the property would not impair the purpose of the applicable regulations."; and
  6) the Zoning Administrator erred in concluding that the lots complied with the standards of section 401.3 of the Zoning Regulations.

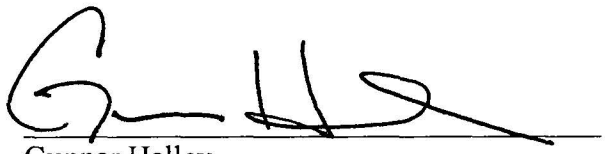
CERTIFICATE OF SERVICE

I, Gunnar Halley, do hereby certify that on this 9th day of May, 2003, copies of the attached document were delivered by first-class mail on the following parties:

Strategic Georgetown, LLC
c/o ResAgent, Inc.
1025 Connecticut Avenue, N.W., Suite 400
Washington, DC 20036

G'town 32nd Street, LLC
c/o ResAgent, Inc.
1025 Connecticut Avenue, N.W., Suite 400
Washington, DC 20036

Herbert S. Miller and Patrice R. Miller
3124 Q Street, N.W.
Washington, DC 20007



Gunnar Halley