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March 30, 2004

BY HAND
Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, DC 20001

Re: BZA Application No. 17108
206, 208 & 210 D Street, S.E.
Our File No. 092314.00000

Dear Mr. Griffis:

Per the Board's request at the close of the February 24, 2004 hearing, enclosed you will find twenty-one (21) copies of the proposed findings and facts and order of the Neighbors. Per my discussion with the Office of Zoning, we are filing a day late due to computer problems. We hereby request that the Board accept the late filing.

Thank you for your attention to this matter.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Richard B. Nettler
Jeannine Rustad

Enclosures (as stated)
cc: Mary Ann Snow & James Marsh
Larry & Louise Smith
ANC 6B (w/encl.)
Capitol Hill Restoration Society (w/encl.)
Joel Lawson, Office of Planning (w/encl.)

Word 45651543.1

BZA
Case No. 17108
Exhibit No. 54

Board of Zoning Adjustment
District of Columbia
CASE NO. 17108
EXHIBIT NO. 54

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FROM: Richard B. Nettler
Jeannine Rustad Zigner

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DATE: March 30, 2004

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MESSAGE:

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17108 of Folger Park North, L.L.C., pursuant to 11 DCMR §3103.2, for a variance from the lot width and lot area requirements under section 401, to allow the construction of three flats (two-family dwellings) in the CAP/R-4 District at premises 206, 208 and 210 D Street, S.E. (Square 763, Lots 26, 27, and 28).

HEARING DATES: January 27, 2004 & February 24, 2004
DECISION DATE: April 6, 2004

DECISION AND ORDER

Folger Park North, L.L.C. ("Folger") is seeking area variances from the lot width and area requirements of section 401 of the zoning regulations for the properties located at 206, 208 and 210 D Street, S.E. (the "Properties"). Folger filed the instant application after a stop work order was issued by the Department of Consumer and Regulatory Affairs ("DCRA") on or about September 16, 2004, on the basis that the subject lots did not meet the lot area or lot width requirements. Although aware of the risks involved, Folger elected to proceed with construction prior to a final determination of this application. Despite continuing with construction, Folger requested, and was granted, an expedited hearing on the basis that the buildings were at risk due to exposure. At the applicant's request, the expedited hearing date of January 27, 2004 was continued to February 24, 2004. After a public hearing, the Board denied the application for the area variances.

Preliminary and Procedural Matters.

Parties. -- The appellant in this case, Folger Park North, L.L.C., is represented by Richard Aguglia of Hunton & Williams.

Notice of Appeal and Notice of Public Hearing. By memoranda dated _____, the Office of Zoning advised ANC 6B, the ANC commissioner for the single-member district within which the property is located, the Ward 6 councilmember and the D.C. Office of Planning. of the filing of the application. The Board scheduled a public hearing on the appeal for January 27, 2004. Pursuant to 11 DCMR § 3103.2, the Office of Zoning, on _____, 2003, mailed Folger, ANC 6__ and the neighbors within 200 feet of the subject property notice of hearing. Notice of hearing was also published in the D.C. Register on _____, 2003, at __ DCR _____.

Applicant's Case. It is the applicant's position that the development of the three (3) town homes on the subject properties is permitted as a matter of right and that the stop work order was erroneously issued. However, the applicant did not appeal the stop work order but, rather, filed the instant application. With regard to the instant application, it is the applicant's position that it meets the test for the area variances. The applicant argues that the uniqueness and practical difficulty arise out of the approval by the District of its subdivision and building permits and that there is no harm to the

public good. The applicant also asserts that practical difficulty would arise from the construction of two flats, as such flats would be disproportionately large for the neighborhood. The applicant claims that the three town homes are an improvement to the area over the previously existing Potomac Power and Electric ("Pepco") substation. The applicant presented testimony of its members Alger Stoneburner and Chris Doefler, as well as its architect, John Maiden and its consultant, Fred Green.

Preliminary Matters. Two adjoining households to the immediate west of the subject properties timely applied for and were granted party status. These households, who are represented by Richard B. Nettler, Esquire and Jeannine Rustad, Esquire of the law firm of Robins, Kaplan, Miller & Ciresi L.L.P., are Mary Ann Snow & James Marsh (320 2nd Street, S.E.) and Larry & Louise Smith (322 2nd Street, S.E.)(collectively referred to as the "Neighbors"). Raymond Winters, the owner of 312 and 318 2nd Street, S.E. requested party status but did not appear at the hearing and, therefore, Mr. Winter's request was denied.

The Neighbors filed a motion to consolidate the instant application with their appeal involving the subject properties, BZA Appeal 17085 on the basis that both cases involved the same set of facts and witnesses. The motion was denied at the January 27, 2004 hearing.

The Neighbors' Position. It is the Neighbors' position that the development is not permitted as a matter of right and that Folger has not met the test for the requested variances. With regard to the matter of right argument, the Neighbors assert that the lots were not grandfathered under § __ of the zoning regulations. As to the area variance test, the Neighbors assert that the actions of the District do not give rise to uniqueness or practical difficulty, as the actions of the Districts were due, in large part, to misstatements and misrepresentations of Folger, and were made in the context of ongoing zoning reviews of the project which had not been finalized and therefore could not be relied upon. The Neighbors also argue that a third variance is needed from the side yard requirements of § 405 of the zoning regulations, as the end units (206 and 210 D Street, S.E.) are semi-detached homes. The Neighbors each testified and also presented testimony of Harry Charles ("Chas") Langalen, a professional land surveyor, of A. Morton Thomas and Associates, Inc., Consulting Engineers, who was accepted as an expert in surveying.

Government Reports. The Office of Planning submitted a report recommending approval of the application if the three lot subdivision is considered "valid", resulting in the lots being considered three "legal non-conforming" lots. If, on the other hand, the Board finds that the three lot subdivision is not considered valid, resulting in the property being considered one legal lot (which may permit subdivision into two legal lots), the Office of Planning recommends the subject application be denied as the variance test has not been adequately met. The Office of Planning also raised the question as to whether a side yard variance was required for 206 and 210 D Street, S.E.

The Metropolitan Police Department, Fire and Emergency Medical Services Department, DC Department of Transportation, and Department of Parks and Recreation all noted no concerns with this application.

The Department of Health (DOH) noted that the former use of the site for the Pepco substation would warrant soil investigation. According to DOH, and as indicated on the permit applications in the record, the applicant completed separate Environmental Intake Forms for the individual lots and failed to disclose ownership of adjoining lots in the information supplied by the applicant on these forms. DOH indicated that the applicant also provided to OP a copy of a Phase 1 Environmental Site Assessment (ESA) prepared by Dominion Environmental Group, Inc. for the current owners prior to sale of the Pepco site and prior to demolition of the former Pepco building. However, it is not clear to DOH that this environmental review was submitted to any District or federal agency as part of an environmental assessment.

The Department of Housing and Community Affairs notes support for the proposal, in that it provides 6 new units of housing.

The Water and Sewer Agency notes a number of potential technical issues, normally dealt with through the building permit process, but does not note support or opposition to the proposal.

ANC 6B. ANC 6B reviewed the then proposed building design at its February 2003 meeting, and adopted a motion in support of the design. The ANC voiced concern that the units would be used by lobbying firms, rather than as residences, and noted that the properties did not appear to meet current zoning standards. The ANC further reviewed the subject application at its February 9, 2004 meeting and voted to support the variances. Moreover, the ANC also voted to support Appeal 17085.

Persons in Support of the Application. There were no persons who testified in support of the application.

Persons in Opposition of the Application. Mary Beth Oquinn and Roger Oba, who reside at ____ 2nd Street, S.E. testified in opposition of the application. The Capitol Hill Restoration Society ("CHRS") also testified in opposition of the application. It was CHRS's testimony that the applicant had not demonstrated any unique conditions to the Property that necessitate a variance; that there was no demonstrated practical difficulty caused by the zoning regulations; and, that there would be detriment to the surrounding neighborhood by way of increased density. CHRS also stated that Folger's claims that it would be forced into bankruptcy if the variances were not granted did not qualify them for a variance.

Summary of Evidence

1. The subject property is located at 206, 208 and 210 D street, S.E., Square 763, Lot 26, 27 and 28 (the "Property"), previously known as 210 D Street, S.E., Lot 4 (assessment and taxation lots 800, 801 and 802) in Square 763. The Property is located in the Capital Hill Historic District.

2. Each lot has a lot width of sixteen feet (16'). Lot 26 has a lot area of 1,447 square feet, Lot 27 has a lot area of 1,529 square feet and Lot 28 an area of 1,529 square feet.

3. Square 763 is bounded by D Street S.E. to the south, 3rd Street S.E. to the east, C Street S.E. to the north, and 2nd Street S.E. to the west. Directly to the south is Folger Park; to the northwest of the square is the Library of Congress Madison Building. The square is predominantly developed with 2 to 3 story row houses, but also includes a 6-story apartment building facing C Street S.E., and a sport club and an American Legion building along D Street S.E. The square is served by an internal alley system with access from C Street, and normally from D Street, which has been closed due to the construction at the Property since approximately July 2003.

4. The Property itself faces D Street, and is bound by alleys to the north and east. To the west are the rear yards of properties facing 2nd Street, and a narrow walkway easement, collectively owned by a group of 2nd Street property owners. Only 210 D Street (Lot 28) is accessible directly off the public alley. Neither Lot 26 nor 27 has access to its proposed parking space from either the street or alley. Although the plans depict a driveway, the permit applications all indicate that there is no driveway.

5. Maps from the early 1900's indicate that the property was subdivided into three tax lots, and developed with a row house on each.

6. In 1942, Pepco applied for a Building Permit to construct a one story plus basement substation, and the structure was constructed in 1943. On February 20, 1948, Certificate of Occupancy No. 118519 was issued for 210 D Street, S.E., Lots 800 and 802 for use as a "public utility – electric power substation" (the "substation"). The substation, although no longer in use since some time in the 1970s, was not demolished until July 2003.

7. Folger purchased the Property on June 14, 2002. Upon the purchase of the Property, a sign was erected on the Property announcing the coming of three (3) luxury town homes. Plans for the proposed development of the Property were drawn up and dated July 1, 2002. However, it was not until February 2003 that any public action was taken with regard to the Property.

8. On or about November 11, 2002, Folger applied for a raze permit for 210 D Street, S.E., (lots 800,801 & 802 in square 763).[1] The owner of Property listed on the application as Folger Park North, LLC, with an address of 5000 Gardner Drive, Alexandria, VA 22304, and was signed by W.J. Maiden for the owner. There was no environmental review performed and the description of the Property in question was "Raze Ancillary STORAGE Building. No Electric or Plumbing Utilities."

9. On November 13, 2002, Demolition Permit No. B424724 was issued with the building listed as "Ancillary storage building, no electric or plumbing utilities".

10. On February 11, 2003, Folger presented its conceptual design for the proposed development of the Property to Advisory Neighborhood Commission (ANC 6B). Although ANC 6B adopted a motion in support of the design, the commissioners voiced concern that the units would be used by lobbying firms, rather than as residences, and noted that the properties did not appear to meet current zoning standards. The staff report of the Historic Preservation Division of the Office of Planning for the conceptual design of the Property indicated that HPD had been concerned about the compliance with zoning and had called DCRA and had been informed by DCRA that the proposed development was permitted as a matter of right. The failure of the units/lots to meet zoning standards was reiterated by a member of the Historic Preservation Review Board at the hearing for the conceptual design of the development.

11. On April 2, 2003, Folger filed three separate applications for building permits for the Property. On the permit application for Lot 26 (206 D Street), which was filed by Elizabeth Johnson, the owner was listed as Folger Park North, LLC, with an address of 206 D Street (210 was crossed out). The applications for 208 and 210 D Street, S.E. (Lot 27) were filed by W.J. Maiden. The address of the owner, Folger, was listed as 208 D Street (210 crossed out) and 210 D Street, respectively. Each application (1) listed the existing use of land was listed as "vacant", (2) stated that no sheeting/shoring was necessary[2] and (3) indicated that there was no driveway.

12. On April 21, 2003, an application for a foundation permit was filed for 210 D Street, S.E. (Lot 28). This permit application, filed by W.J. Maiden, listed the owner as Chris Doefler, with an address of the owner listed as 210 D Street, S.E. As with the building permit applications, it was claimed that no sheeting/shoring was necessary. Attached to the application was a copy of a certificate of occupancy for 210 D Street, S.W. (Square 495, Lot 839). A notation on section J "Restrictions of the Permit" was "Approved for foundation only.

13. On April 29, 2003, applications for foundation permits were filed for 206 and 208 D Street, S.E. (Lot 26 and 27, respectively). These applications were filed by Elizabeth Johnson and listed the owner as Chris Doefler with the address of the owner as 210 D Street, S.E. It was claimed

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1 The application was dated November 5, 2002, but wasn't signed until November 11, 2002.

2 The application for 210 D Street had checked "yes" for sheeting and shoring, but then crossed that answer out.

on the applications that no sheeting/shoring was necessary. Attached to each the application was a copy of a certificate of occupancy for 210 D Street, S.W. (Square 495, Lot 839). A notation on section J "Restrictions of the Permit" was "Approved for foundation. On the Environmental Intake Form for each lot, Folger checked "no" on questions 1-3. Question 1 asks "Does the owner of this site own adjacent or abutting property?" Question 3 asks "Is additional activity planned by the applicant for this site or any site within the same square during the next three years that requires a permit?" Yes answers to either of these questions require the submission of a site plan to the EIS Coordinator of DCRA. If no plan exists, the applicant is required to submit a written explanation to the EIS Coordinator.

14. On May 23, 2003, permit Nos. B451616, B451615 and B451617 were issued for the foundations for Lots 26, 27 and 28, respectively.

15. In June 2003, the Property was fenced in, including the Neighbors' right of way, and a trailer was placed on the public alley to the east of the Property. In late June or early July 2003, the Pepco substation was razed.

16. On or about July 7, 2003, the private right of way behind the Neighbors' properties3, was excavated by the applicant.

17. On July 22, 2003, the zoning division of DCRA signed off on the applications for building permits.

18. On July 25, 2003, three separate applications for plumbing permits were filed for each lot. The owner and address of the lot was listed as Chris Doefler, 210 D Street.

19. The Neighbors each testified that, upon the fencing in of the right of way behind their property and subsequent excavation of that right of way, they became alarmed and concerned about the nature of the development and started to make inquiries to DCRA. Through these inquiries and their own research, they learned that the proposed three flats may not comply with the zoning regulations.

20. On August 25, 2003, building permits were issued for construction of flats on the Property -- permit no. B454260 for Lot 26, B454262 for Lot 27, and B454261 for Lot 28.

21. On September 16, 2003, a stop work order was issued on the basis that the lot width and area did not meet the requirements and, therefore, variances were need for the development. At the time of the issuance of the stop work order, the construction on the Property was approximately four three (3') above grade.

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3 So the right of way measures ___ x ___ and runs parallel to the western border of the Property. The right of way adjacent to 326-322 2nd Street is owned by those property owners and is a part of those lots. The remainder of the easement was [JR to fill in].

22. Folger, through its witnesses Mr. Stoneburner, Mr. Green and Mr. Maiden, testified that, although they did not agree with the basis for the stop work order, rather than appeal the stop work order, Folger elected to apply for area variances. So as to allow construction to continue, Folger entered into an indemnification agreement with the District. Mr. Stoneburner testified that this arrangement was made through the assistance of Congressman Cottingham. Mr. Stoneburner verified that, at the time the stop work order was issued, they were only three (3) weeks into the above-grade construction and only thirty-six inches (36") above-grade.

23. Mr. Stoneburner, Mr. Maiden and Mr. Green testified that they reasonably relied on the District in approving the project, alleging that the District had approved the development seven (7) times. Those approvals consisted of (1) the approval of the subdivision; (2) HPD call to DCRA regarding compliance with the zoning regulations; (3) HPRB approval of the conceptual design; (4) zoning sign off on the demolition permit; (5) zoning sign off on the foundation permits; (6) zoning sign off on the building permits and (7) approval by Robert Kelly, then Zoning Administrator for DCRA.

24. Mr. Stoneburner testified that he had identified the Property as a possible development site in 2001. At that time, he contacted Pepco about purchasing the Property. Pepco provided him with a plat showing the three assessment and taxation lots – lots 800, 801 and 802 (the "A&T Lots"). With this information, as well as a plat showing the previously existing row dwellings on the Property, Mr. Stoneburner met with Toye Bello of DCRA to discuss what could be developed on the Property. Mr. Stoneburner testified that Mr. Bello agreed that three (3) flats could be constructed on the Property as a matter of right. However, on cross examination, Mr. Stoneburner acknowledged that he did not inform Mr. Bello that the Property was improved with the Pepco substation, which occupied each A&T lot or, Lot 4. Mr. Stoneburner also admitted that he failed to inform Mr. Bello that the Property was part of a single lot of record – Lot 4.

25. Mr. Green testified that he became involved in the project in February, 2003, when a problem arose with the then-zoning administrator, Robert Kelly, questioning the ability to develop the Property, as a matter of right, with three (3) flats. Mr. Green testified that he had a meeting with Mr. Kelly in which he provided Mr. Kelly with the plat of the Property from Pepco showing the three A&T lots, as well as the documentation regarding the previously existing town homes on the Property. Mr. Green acknowledged that he did not inform Mr. Kelly that, since 1942, the Property had been improved with a Pepco substation.

26. With regard to the attachment to the building permit applications of the certificate of occupancy for 210 D Street, S.W., Mr. Maiden, who filed only one of the building permit applications, denied having attached the certificate of occupancy. Mr. Maiden testified that he suspected that DCRA must have attached the certificate of occupancy. However, Mr. Maiden did not offer any basis or substantiation for this suspicion.

27. With regard to the excavation of the Neighbors' right of way, Mr. Stoneburner testified that they had not planned to take this action but, when they began to excavate the Property, the ground under the right of way began to erode, leaving Folger no choice but to excavate the right of way. Contradicting this testimony, Mr. Smith testified that, shortly after the excavation, he spoke with Folger's foreman, who informed Mr. Smith that Folger opted to excavate the right of way so that they could construct a two-sided wall, rather than one-sided, on the western edge of the development so as to save money. Mrs. Smith testified that, during excavation, the impact of the excavation caused significant shaking of her house. The Neighbors testified that, as a result of the excavation, their brick walls along the right of way suffered significant damage. Furthermore, Mr. Stoneburner did not indicate that Folger obtained any modification of its plans from DCRA to approve the two-sided wall on the western edge of the Property.

28. Mr. Stoneburner testified that the uniqueness of the Property stemmed from the seven (7) approvals from DCRA and that these approvals gave rise to a practical difficulty. However, Mr. Stoneburner acknowledged that the "approvals" of DCRA were based on information provided to DCRA by Folger and that the final approval, which resulted in the issuance of the building permits, was quickly vacated by DCRA at the same time that the Neighbors filed an appeal of the issuance of the building permits. Mr. Stoneburner also admitted that Folger never obtained a zoning opinion as to what could be done with the Property as a matter of right.

29. Mr. Stoneburner testified that the practical difficulty arose from Folger's reliance on the District approvals of the development. Mr. Stoneburner also testified that Folger would face bankruptcy if the variances were denied. It was for financial reasons, according to Mr. Stoneburner, that Folger elected to proceed with construction while the application was pending, rather than await the outcome.

30. Mr. Stoneburner testified that at least 45% of the properties within the surrounding 4 blocks had lot widths of sixteen feet (16'). Based on this assertion, Mr. Stoneburner argued that the proposed development would not have an adverse affect on the surrounding neighborhood. Mr. Stoneburner also argued that the development was an improvement over the previously existing Pepco substation. He pointed out that Folger had improved the private right of way.

31. Mr. Stoneburner testified that, during his meetings with the District in which he was informed that three (3) flats could be constructed as a matter of right, he only showed the District the plats which depicted the Pepco substation on the three A&T Lots, as well as the plat with the previously existing row houses. On cross examination, Mr. Stoneburner testified that he did not show the District officials the plat that showed Lot 4. However, when questioned by Board member Miller, Mr. Stoneburner changed his testimony and stated that he took over all the plats for the Property from the Surveyor's office, including the ancient plat depicting Lot 4, to his meeting with the zoning administrator. Contrary to this assertion in Mr. Stoneburner's changed testimony, Mr.

Langelan testified that one was not allowed to remove these plats from the Surveyor's office and that in order to obtain a copy of the plats, one had to photograph the plats.

32. The Office of Planning testified that whether or not the application should be granted hinged on whether the subdivision of the Property into Lots 26, 27 and 28 was "valid". It was the Office of Planning's opinion that, if the subdivision was valid, then the requested variances for lot width and area were supportable, as the flats would be located on legal non-conforming lots. If, on the other hand, the issuance of the subdivision is deemed invalid, OP opined that the requested variances are not supportable and do not meet the variance test, as it would be possible to subdivide the property into 2 larger, conforming lots for development as flats, for which the provision of the required side yard would be possible. OP acknowledged that a 2-lot subdivision would be more in keeping with current zoning regulations, and such larger lots would not be out of character with this particular portion of streetscape (which includes a large health club and other larger non-residential buildings). On cross examination, OP admitted that there was no basis in the zoning regulations which would validate the subdivision. OP also raised question as to whether a variance from the side lot requirements of section 405 of the zoning regulations was necessary.

33. The Water and Sewer Design Section of DC WASA submitted a memorandum to the Office of Planning regarding the Property. The WASA memorandum made it clear that WASA had not reviewed the project prior to the issuance of the permits, as WASA made the following comments:

a. If the applicant intended to use existing water and sewer connections, these connections must be inspected to determine if they meet the current DC WASA standards;

b. Proposed locations of the storm/sanitary sewers, and water lines connection. There are sewers within the alleys near this property. Note that DC WASA does not allow any connections to alley sewers unless the applicant makes a request for a waiver;

c. Future average and maximum daily water demand;

d. Future average and maximum daily wastewater discharge from the new buildings;

e. Water flow requirements for fire protection will be needed to evaluate impact of the new development on the water system;

f. Erosion and sediment control plan approval from DOH; and

g. All new water and sewer facilities designed for public space must meet the DC WASA design criteria and specifications. At the appropriate time, the design consultant shall request a pre-design meeting with DC WASA to facilitate the permitting process for the proposed development.

34. The Department of Health noted that:

> The former use of the site would warrant soil investigation. The applicant completed separate Environmental Intake Forms for individual lots, *although there appear to be errors regarding ownership of adjoining lots in the information supplied by the applicant on these forms*. The applicant has also provided to OP a copy of a Phase 1 Environmental Site Assessment (ESA) prepared by Dominion Environmental Group, Inc. for the current owners prior to the sale of the PEPCO site and prior to the demolition of the former PEPCO building. It is not clear to OP that this environment review was submitted to any district or federal agency as part of an environmental assessment.

35. The Deputy Director for Development Finance submitted a memorandum to the Office of Planning in support of the application on the basis that it would provide 6 units of new housing in the Capitol Hill neighborhood. However, the memorandum did not address how the application met the test for a variance.

36. The Metropolitan Police Department, Fire and Emergency Medical Services Department, DC Department of Transportation and Department of Parks and Recreation all noted no concerns with the application.

37. ANC 6B did not timely submit a letter but did testify, through commissioner David Sheldon, in support of the application. In a post hearing submission, ANC 6B indicated that, with a quorum present, the ANC voted to support the application 3-2-2. However, the ANC failed to testify as to how the applicant met its burden of proof for the requested variances. Contradicting an assertion that the ANC deliberated and found that the applicant could meet the variance tests, Mr. Marsh testified that he attended the ANC meeting in which the vote was taken in support of the application and that each of the commissioners voting to support the application admitted some doubt as to whether the applicant could satisfy its burden of proof with regard to the variance test.

38. Mrs. Smith testified briefly at the hearing and submitted a written statement with the Neighbors' post-hearing submissions. Mrs. Smith testified that she could watch the digging of the huge foundation pit on the Folger Park property out her kitchen window. She explained that the excavation work was slow because of the hardness of the clay and each time the big claw connected with the earth there was a loud clank, and there would be significant shaking of her house. Mrs.

Smith testifies that one morning in the first week of July, 2003, she observed that the developers had dug out all the peach trees that edged the property line between the Property and her property. She took special note of the fact that her own peach tree was well on her side of the property line, and satisfied, proceeded to the health club. An hour later when she came out, she discovered that her peach tree was gone as was the back four feet of her property and that the right of way along the Property line had been excavated. Mrs. Smith testified that the Neighbors had not given permission for this excavation nor had had they received any warning.

39. Mrs. Smith explained that when she and Mr. Smith bought their house in 1991, there was an ancient brick wall behind the house running contiguous with our neighbor's walls. This wall is between their bricked in garden and the back four feet of their property. Mrs. Smith testified that all the neighbors who back up to this path have an easement to cross their property and that owned by our neighbors to the south, so that they can get out of the back of their houses in case of fire and for the disposal of refuse as well as access for workmen and those delivering heavy appliances. Mrs. Smith testified that without warning or permission a few days after their land was removed all the gates that accessed the right of way were nailed shut by the developers. Mrs. Smith testified that after her husband broke the gate free, it was nailed shut again, still without a word from the developers.

40. Mrs. Smith testified that the Neighbors sent a letter of protest to the developers regarding the taking of their land, with copies of the letter sent to others including their ANC representative. Mrs. Smith testified that the developers sent a letter back, dated August 8, claiming that they were sorry they had dug away the right of way and would be replacing it in October. Mrs. Smith next testified that a few days after they received the response letter from the developers, Alger Stoneburner and Chris Doefler, who appeared unhappy, stopped by to visit her. The developers explained that the taking away of the easement was "an accident", and happened because the soil was so loose and just slipped away. Mrs. Smith testified that she knew the land was not loose, as she had watched the digging, and she knew from her husband's talk with the site foreman that the developers had planned all along to take the easement because they wanted to build a two-sided wall. However, Mrs. Smith testified that, as she was alone in the house and nervous, she did not contradict the developers.[4] Mr. Smith testified that he arrived home shortly after the two developers visited his wife. Mr. Smith testified that his wife was visibly upset by the visit. Mr. Smith testified that the developers threatened retaliation if they continued to raise these issues.

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4 Both developers explained that the original delay between their purchase of the Property and start of construction was due to the fact that they had been told originally by the city that they could build only two townhouses because of the size of the lot and that it took them six month before someone showed us how we could build three

41. Mr. Smith testified briefly at the hearing and submitted written testimony. Mr. Smith testified as to the excavation of the rear of his Property and boarding up his gate by Folger. Because this gate was their only exit in case of fire, Mr. Smith testified that he removed the plywood. The next day the developers had nailed it back even tighter. Mr. Smith testified that he tore it off again to make sure that he and his wife had a rear fire escape, only to have Folger reseal the gate.

42. Mr. Smith testified that, based on this belief, on August 7 the Neighbors wrote the developers a letter, raising both sets of issues—their destruction of their property and the developers' flaunting of the District's zoning and building processes.[5]

43. Mr. Smith testified that in a letter dated August 8, 2003, the developers replied to the Neighbor's August 7, 2003 letter and extended their "assurances" to restore the right of way by October 30 and suggesting that the Neighbors "maintain the temporary blocking of access from the rear gates." They also said that they were "compelled to inform" us of their deep concern regarding any time or money costs resulting from our letter.

44. Mr. Smith testified that, as a result of the research conducted by Ms. Snow on their behalf, it had been clear to him at least since September that the developers have needed a zoning variance to build the three flats. However, contrary to this clear need, Mr. Smith testified that the developers had stubbornly insisted they do not need such a variance and proceeded to do what they wanted "as a matter of right." Mr. Smith testified that their appearance in opposition was not made to seek relief from the developers' invasion of our property but, rather, was to ensure that the developers have to play by the same rules as everyone else.

45. On rebuttal, Mr. Stoneburner and Mr. Doefler each admitted to having visited Ms. Smith at her house, but denied having made any statements as to their knowledge that only two (2) flats could be built as a matter of right.

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[5] In response to this letter, Mr. Smith testified that on Saturday afternoon, August 9, 2003, he went to the building site to. It was Mr. Smith's testimony that Stan explained that east basement wall (next to the Health Club) would be poured with only one side of a form, (the other will be earth). In contrast, the form for the west wall, would have two sides. Mr. Smith testified that Stan said they computed the cost of doing it with just one side and decided it would be cheaper for them to use a two-sided form. This would be cheaper even though it would require them to dig out enough space west of the west side of the form to install it. To do this required them to remove almost all of the easement.

46. Mr. Marsh testified to the concern of the Neighbors about the density of the project - 6 units in an area he described as already congested with noise, pedestrians, and (especially) rerouted truck traffic as a result of changes to traffic patterns imposed by Capitol Hill police following the attacks on September 11th. Mr. Marsh also testified as to possible harm to the surrounding neighborhood due to lack of environmental impact studies for the Property.

47. Ms. Snow testified that she and her neighbors first saw a sign go up on the Property regarding development of three town homes in 2002, but that a significant amount of time lapsed before there was any action

48. Ms. Snow testified that she and Mrs. Smith attended the February 27, 2003 HPRB hearing at which the architectural renderings submitted by Folger were addressed. It was Ms. Snow's recollection that HPRB member Amy Weinstein commented that she did not understand how the developers were able to get a variance and that Folger did not say anything that was directly responsive to her comment.

49. It was Ms. Snow's testimony that, upon the fencing in of the Property in June 2003, including the right of way behind their property, her and her husband, Mr. Marsh, became increasingly concerned about the proposed development. Ms. Snow and Mr. Marsh then re-reviewed the plans for the development and Mr. Marsh measured the depth of their property. Ms. Snow testified that, on June 30, 2003, after having checked the deeds for the Neighbors properties, she called Maiden & Associates to inform them that they have fenced in the Neighbors' property and that the plans for the development contained an inaccurate measurement as to the depth of the Neighbors' properties. Phil Maiden, with whom Ms. Snow spoke, replied that the plans were only "preliminary."

50. After the right of way behind their homes was excavated on or about July 7, 2003, Ms. Snow testified that she began calling DCRA on behalf of the Neighbors to discuss the zoning and building permit issues. Ms. Snow testified that she was told repeatedly that in an R-4 district, the lots must be a minimum 18 feet wide and 1800 square feet in area, and that anything less would require a variance. Ms. Snow further testified that DCRA also told her that no building permits had been issued for the property, and DCRA could not find a permit to raze the building. Ms. Snow stated that she was instructed by DCRA to contact Juan Scott, the building inspector, regarding the lack of building permits and a permit to raze the building. Over the next month and a half, Ms. Snow made numerous calls/visits to DCRA, inquiring about the need for variances, which she was assured were required, and the status of any applications for building permits.

51. In late July 2003, Ms. Snow spoke to the superintendent at the site, and he said to her, something in the nature of, "I'm sick of you people," that he had half a mind to tear our fences down, and, that they had already been delayed enough by how hard the ground was to dig out.

52. Ms. Snow confirmed that, on August 7, 2003, the Neighbors sent, by federal express, a letter to the developers regarding their destruction of the right-of-way and the substandard lot width and area of the lots. Ms. Snow testified that, shortly thereafter, they received a letter dated August 8, 2003 from the developers in response to their letter. Folger's letter advised the Neighbors, among other things, that right-of-way would be replaced no later than October 30, 2003. On August 14, 2003, Ms. Snow testified that she stopped at DCRA and requested copies of all applications pertaining to 210 D Street, S.E. She was provided with copies of applications for lot 206, 208, and 210 D Street, S.E. Ms. Snow testified that it was clear to her from reading the applications that DCRA had not been adequately informed that the three lots were being constructed as one large development comprised of three adjoining two-family town homes. She further testified that it appeared that no environmental impact study had been triggered because the developer represented on each application that the developer did not own an adjacent lot, and did not intend to do any construction on an adjacent lot within the next three years. Ms. Snow testified that she did not understand how the lots had been created without a variance, since she had been told repeatedly by DCRA representatives what the lot width and area requirements were in an R-4 district, and these lots did not conform. Ms. Snow spoke with a representative in the Surveyor's Office, who pulled out a very old plat map, which she was informed was at least a hundred years old. Ms. Snow explained that on top of that portion of the map showing Lot 4 in Square 763 was a small piece of paper - a transparency - showing the boundaries of the Pepco substation. The representative of the Surveyor's Office told me that the lot on which the Pepco building had been built was always only one record lot, and that the three lot lines shown on the developer's plans were always only tax and assessment lots, and were never lots of record, until the land was subdivided in 2002. Ms. Snow ordered and obtained a copy of the 2002 subdivision plat map by Folger.

53. Ms. Snow testified that, shortly after receiving letter from the developers, Mrs. Smith informed her that Mr. Stoneburner and Mr. Doefler came to her home and asked her if she liked their letter, and explained that they were told, initially, that they could only build two town homes, and that it took them about six months to figure out how they could build three, because they wanted to build three. Ms. Snow testified that, on or about August 16 or 17, 2003, Tracy Gruis, the daughter of Mr. and Mrs. Gruis - the owners of 324 and 326 Second Street, S.E., now deceased - was visiting her parents' homes. Ms. Gruis and Ms. Snow looked at the foundation and a pipe in the excavated right of way which encroached on Ms. Gruis's property and in the shared right-of-way.

54. and all information on any environmental impact studies that were conducted on the Pepco property. Ms. Snow never received a response to that request.

55. On August 27, 2003, counsel for the Neighbors sent written correspondence to DCRA regarding the substandard lots and the need for variances for the development of the Property, as approved by DCRA in the permits issued August 25, 2003.

56. Ms. Snow testified that on September 3, 2003, they learned that building permits had been issued on or about August 25, 2003.

57. On September 12, 2003, BZA Appeal No. 17085 was filed on behalf of the Neighbors appealing, *inter alia*, the issuance of the building permits. Ms. Snow testified that, at about the same time, prior to hurricane Isabel, which began on Thursday, September 18, 2003, the right-of-way was replaced with some kind of substance that did not appear to be soil. Since they could now walk on the pathway behind our property, the Neighbors removed the boards that had been placed against their gates. Ms. Snow testified that they discovered that the boards had been attached with long screws and mollies, which were difficult to remove, and that the screws damaged the mortar between the bricks. Ms. Snow further testified that the weight of the boards in conjunction with the lack of underground support caused significant stress to the fences and gates. Ms. Snow testified that she was unable to close her gate as before, and had to support it with a cinder block.

58. It was Ms. Snow's testimony that sometime thereafter, the Neighbors learned that, on or about September 16, 2003, Mr. Denzil Noble sent a letter to the developers informing them that the subdivision was flawed and should not have been approved, and that the developers needed to seek a variance through the Board of Zoning Adjustment. A second Stop Work Order was issued. At that time, the construction consisted solely of the foundation floor and foundation walls, rising about three feet (3') above the ground. Ms. Snow testified that, on or about November 13, 2003, Ms. Gruis, provided her with a copy of a letter from Linden Contracting, Inc. to her. It was explained to Ms. Snow that this letter was received in response to a letter Ms. Gruis had written to the applicant on October 23, 2003, in which Ms. Gruis told the developer that the foundation and black pipe must be removed from her property. Linden's response was that the concrete was "miscellaneous overflow or spillage," which would be 8 feet or more underground, and provided no conflict with any future use of her site, and that the black plastic pipe "was shown on the approved plans and provides hydrostatic pressure relief to both sides of the site."

59. Ms. Snow testified that construction has been ongoing since mid-September and that it was difficult for the Neighbors to understand why the developers have been permitted to continue construction before the instant application had been concluded. It was clear to the Neighbors that by the time this administrative process concluded, the construction would be substantially completed.

60. With regard to the adverse impact of the development, Ms. Snow testified that the fact that the developers dug away land that did not belong to them, placed part of their foundation on that land, and installed a pipe designed to "provide hydrostatic pressure relief to both sides of the site" on land they do not own, makes it clear that the developers are unable to build these three, nonconforming buildings within the boundaries of their own lot lines. Ms. Snow explained that it should be of significant concern to the community and to this Board that the developers failed to do what was necessary to have an environmental impact study done to ensure that the land they were going to excavate was free from PCBs and other possible contaminants. It also should be of

significant concern to the community and to the Board that the developers did not take the steps required by DC WASA with respect to the hydraulic loading that will be placed on the storm and sanitary sewers from each new building, as well as with respect to planning for erosion and sediment control.

Ms. Snow further explained that it was her understanding of the zoning regulations that the CAP/R-4 zone district is intended to be a low to medium density area. Contrary to this zone designation, Ms. Snow testified that the immediate neighborhood was already highly congested because of the large number of apartment buildings, the sports club, and the American Legion club. Ms. Snow testified that there is heavy commuter traffic during the day, making on the street parking exceedingly scarce, and that this parking problem is not limited to the daytime hours. Ms. Snow testified that almost every evening, when she returns home from work at 7:00, 7:30, or 8:00 p.m., she has to drive around for many minutes, sometimes ten, fifteen minutes or more, looking for a place to park near her home. Ms. Snow explained that the evening traffic and parking congestion results from the fact that Maryland and Virginia residents use the sports club on D Street, S.E., evening events that are held at the American Legion hall on 3rd and D Street, S.E., and, occasionally, late evening Congressional matters take place, which require Congressional staffers, who park in the area, to work later than usual. Ms. Snow testified that the three additional, two-family townhouses, having only one off-street parking space provided for each of the flats, will create greater congestion in this area.

61. Ms. Snow testified that she failed to understand why the developers did not comply with the zoning regulations and build two, flats on the site. With regard to the developers contention that two 24-foot wide townhouses would be too large for the area, and that they would not have received approval from the Historic Preservation Review Board, Ms. Snow pointed out that the flats would not have to be 24 feet wide; they could be 18 or 20 feet wide, with front and side yards. Moreover, it was her opinion that the Historic Preservation Review Board would not have found that two larger townhouses as being out-of-character with the neighborhood, because there are many homes in the area that are larger than 18 and 20 feet wide, although not as tall as the townhouses being constructed by the developers.

62. Chas Langelan testified as an expert surveyor on behalf of the Neighbors regarding the process of subdividing property. Mr. Langelan testified that it was necessary to subdivide the Property in question to obtain record lots, which were required for building permits. Mr. Langelan testified that, based on his experience, there was no basis for the creation of the three substandard record lots in the Property. Mr. Langelan, in response to the Board's question, testified that Lot 4 had been created on March 17, 1797.

63. The Capitol Hill Restoration Society submitted a letter in opposition to the application and Gary Peterson, the chairman of the CHRS Zoning Committee, testified in opposition at the hearing. It was CHRS's opinion that the applicant had not demonstrated that there was any

unique conditions about the Property, in that Lot 4 was a regular shaped rectangle with 48 feet of frontage on D Street, S.E. and containing 4,505 square feet of land in single ownership. CHRS pointed out that Lot 4 could have easily been subdivided into two lots that would not have needed any variances. CHRS was also of the opinion that there was no practical difficulty caused by the zoning regulations that would prevent the applicant from using the Property. CHRS pointed out that the construction of larger row-houses, which could have been done as a matter of right, had been done elsewhere on Capitol Hill, including in the unit block of 7th Street, N.E. and the 400 Block of East Capitol Street, S.E. Finally, CHRS testified that the proposed development was detrimental to the zone plan and maps, which contemplate minimum lot width and area of 18 feet and 1800 square feet, respectively. CHRS stated that, although Folger's claims of bankruptcy were regrettable, it would be a bad precedent to allow a variance to justify construction that a developer undertook at its own risk.

64. Mary Beth Oquinn and Richard Oba testified in opposition to the application. It was their testimony that the development adversely affected the neighborhood by way of increased traffic, negative impact on the vehicular and public safety of the interior alley ways of Square 763 and incompatibility of the development with the surrounding neighborhood. Their testimony illustrated how the adjoining alleys, sidewalks and easements suffered from undermining, subsidence and other damage as a result of the construction. This damage, according to Mr. Oba, gives rise to increased risk of public alleyway collapse. Mr. Oba further testified that the failure to provide any side yard significantly narrowed the alley's effective width, the impact of which was impossible to determine without any turning radius studies or site distance studies. Finally, Mr. Oba testified that the design of the buildings would result in added storm water flow around the site. As to the increased density, Mr. Oba pointed out that Square 763 contains 3 multi-family apartment buildings containing about 95 residential units, a sports club with extended evening and weekend hours of operation, an adjoining office building, and a civic organization/institution operating with numerous day and evening events. These uses already create an unusually high demand on the road and alley ways, as well as parking and public services in the area.

FINDINGS OF FACT

Based on the evidence of record, the Board finds as follows:

1. The Board finds that Folger was previously issued building permits for the construction of three flats on the Property but that a stop work order was imposed by DCRA when it was brought to the attention of DCRA by the Neighbors that the Lots were substandard and that there was no basis for grandfathering the Property to be developed with three flats. The Board finds that DCRA correctly and timely notified the applicant that the subdivision was issued in error and that variance relief was necessary.

2. The Board finds that Folger had knowledge, or should have had knowledge, that its proposed development was not permitted as a matter of right no later than February, 2003. The Board finds that Folger obtained its permit approvals by making misstatements and omission in its permit applications. This finding is supported by the permit applications itself, as well as the reports submitted by DOH and WASA.

3. The Board finds that the testimony of the applicant was not credible and that the testimony of the Neighbors was credible. Based on this finding and the testimony of Louise Smith, the Board finds that Folger had actual knowledge that it could only build two (2) flats as a matter of right when it purchased the Property and used its misstatements and omissions in order to obtain the permits for three (3) flats.

4. The proposed development of the Property with three (3) flats requires variances from the lot width and lot area requirements of section 401.3 of the zoning regulations. The mere fact that there previously existed three town homes on the Property does not create any grandfathered rights, as the most recent improvement to the Property was with the Pepco substation, which occupied all three lots since prior to the adoption of the existing zoning scheme

5. The Board finds that the applicant has shown a complete disregard for the zoning and other applicable regulations through its misstatements and omissions, taking of the neighbors' property and continuance of construction prior to the final out come of this matter.

6. Folger's proposal does not demonstrate that the Property is subject to a unique condition and that practical difficulties preclude compliance with the zoning regulations. Rather, the Board finds that Folger did not reasonably rely, to its detriment, on the issuance of the subdivision or any of the piecemeal permits received for the Property. Rather, the Board finds that any practical difficulties were self-created, that is the Board finds that the District's approvals were based on misstatements, misrepresentations and omissions by Folger in its applications, and, in any event, had been timely revoked. As to the financial difficulty Folger will face by the denial of the variances, the Board finds that this does not rise to the level of a practical difficulty. Rather than await the outcome of this proceeding, Folger elected, at its own risk and by indemnifying the District, to proceed with construction.

7. In addressing the issues and concerns raised by the Office of Planning, the Neighbors and the CHRS, the Board also finds that the applicants' proposal will result in the need of variances from the side yard requirements for Lots 26 and 28. The Board finds that, had the Property been developed as a matter of right, the need for the three (3) variances could have been avoided, or mitigated.

8. The Board finds that granting the variances will result in harm to the public good by way of increased traffic, decreased parking and detriment to the safety in the surrounding alley, sidewalk and streets. The Board further finds that there is harm to the public good due to water,

sewer and drainage issues, as well as the potential for environmental damage. However, because of the applicant's misstatements, misrepresentations and omissions, the District was unable to provide complete testimony of the extent of such harms.

CONCLUSIONS OF LAW.

The Proposed Development is Not as a Matter of Right.

The applicant asserted that, although it had applied for the area variances, it still believed that the development was as a matter of right. However, the Property does not meet any of the exceptions to the area requirements of section 401 of the zoning regulations.

The first exception is section 401.1, which provides that:

> Except as provided in chapters 20 through 25 of this title, in the case of a building located, on May 12, 1958, on a lot with a lot area or width of lot, or both, less than that prescribed in § 401.3 for the district in which it is located, the building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title.

11 D.C.M.R. § 401.1. In determining whether this section has any applicability, all one must look to is what existed at the property as of May 12, 1958. *See*, e.g. BZA Application No. 17034, December 2, 2003 Transcript at 34 – 46. As of May 12, 1958, the Property was improved with the Pepco substation, not three (3) townhouses, as alleged by the applicant.

With regard to the applicant's argument that the Pepco substation somehow grandfathers the use of the Property as substandard lots, this is simply not the case. Although it is immaterial that the 1942 through 1948 documents regarding the substation show the assessment and taxation ("A&T") lots (lots 800-802), as the structure was actually constructed on a portion of record lot 4. Moreover, the applicant's argument ignores the plain language of this provision which states that "the building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title." These buildings do not comply with the zoning regulations, as they are constructed on substandard lots.

Finally, section 3202.3 of the zoning regulations prohibits the construction on anything but a record lot. Thus, the mere fact that prior to 1958, improvements had been constructed on A&T lots on the Property does not serve as justification to violate section 3202.3, or the conversion of A&T lots into substandard record lots.

The Property does not meet the criteria for an exception to the area requirements under sections 401.2 and 401.4 of the zoning regulations. Section 401.2 of the zoning regulations provides:

> Except as provided in § 401.3, in the case of an unimproved lot in single ownership on November 1, 1957, that has a lot area or width of lot less than that specified in § 401.3 for the district in which it is located and that does not adjoin another unimproved lot in the same ownership, a structure may be erected on the lot if both the lot area and width of lot are at least eighty percent (80%) of the lot area and width of lot specified under § 401.3; provided, that the structure shall comply with all other provisions of this title.

As of November 1, 1957, only one record lot existed, that being record lot 4. There were three (3) assessment and taxation lots ("A&T lots"), as of May 12, 1958; however, there is no authority that A&T lots give rise to a "grandfathered right" for record lots. Even assuming the previous individual A&T lots (i.e. A&T Lots 800, 801 & 802) provide a basis for the current subdivision , section 401.2 is inapplicable in the instant matter, as these properties were improved as of November 1, 1957. 11 D.C.M.R. § 401.2; *see* BZA Application No. 17034, December 2, 2003 Transcript at 34 – 46 (finding that November 1, 1957 is the date to look to in determining whether the property is unimproved for the purpose of this section).

Section 401.4 provides the following exception to 401.3:

> In the case of an unimproved plot of ground in single ownership on November 1, 1957, that has a lot area or width of lot less than two hundred percent (200%) of that prescribed in § 401.3 or the district in which it is located and that does not adjoin another unimproved plot of ground in the same ownership, two structures may be erected on the lot; provided, that each structure shall be erected on a lot that complies with eighty percent (80%) of both the required lot area and width of lot specified in § 401.3; and provided further, that each structure shall comply with all other provisions of this title.

Given that Lot 4 was greater than 200% of the required lot width and lot area, this section does not apply. Furthermore, Lot 4 was improved as of November 1, 1957.

The previous residential homes that existed on the Property in the early 1900s do not create any grandfathering rights because of the intervening use of and improvements on the property with the Pepco substation. As clearly depicted on the plat for the substation, the substation was constructed on Lot 4.

The applicant has argued that the substation only occupied lot 801 and that lots 800 and 802 were vacant. In support of this contention, the applicant points to the DC assessment records, which listed these properties as unimproved? However, as this Board discussed in BZA Appeal No. 17034, unimproved means "lands once improved that have reverted to a state of nature as well as lands that have never been improved" and "unimproved land" means land "not built upon or otherwise improved for use, retained in the wild or natural state." Up until early July 2003, lots 800 and 802 were improved, as the Pepco substation extended onto those properties by 8.5 feet (or, more than half the width of those lots).

Moreover, with respect to the "grandfathering" in this matter, the applicant has not attempted to build on the A&T lots, which it claims are grandfathered. Instead, the applicant is building on subdivided lots it created. *See Sagalyn v. Foundation for Preservation of Historic Georgetown*, 691 A.2d 107, 112 & 114 (taking an A&T lot and converting it into a record lot held to be a subdivision). As lots 26, 27 and 28 did not exist prior to 2002, they could not have acquired any rights under section 401.1 or 401.2 of the zoning regulations. Furthermore, in creating the subdivision, the applicant was required to either (1) create conforming lots or (2) to the extent nonconforming lots were created, maintain those lots as vacant.

The applicant's argument that sections 2000.2, 2000.4 and 2000.5 provide an exemption from the application of the area requirements of section 401.3 ignores the plain language of these provisions. For example, the final sentence of section 2000.2 provides that

> It is the intent of this title that nonconformities may not be enlarged upon, expanded, or extended, nor may they be used as a basis for adding other structures or uses prohibited elsewhere in this title.

Thus, the fact that the Pepco substation existed on the Property at the time of the adoption of the zoning regulations does not allow the replacement of the substation with new construction on substandard lots. Similarly, section 2000.4 only allows the continuation of a nonconforming use existing as of May 12, 1958, it does not allow the replacement of a nonconformity with a new nonconformity, as the applicant is attempting.

The applicant misrepresents the location of the Pepco substation as having been constructed on the "middle" lot with a partial encroachment on the two outlying lots. Not only does the certificate of occupancy documentation make it clear that the substation was constructed on lots 800 through 802, the applicant's own exhibit (Office of Zoning Exhibit 10) illustrates this fact. As depicted on the plat submitted with the building permit for the Pepco substation, the substation was constructed on the southern end of the Property and spanned across the entire width of lot 801 (the "middle" lot) and eight feet (8'), or half the width of lots 800 and 802 (the "outlying" lots).

Finally, the applicant fails to cite to section 2000.6, which explicitly prohibits changes in nonconformities. Specifically section 2000.6 provides that:

> A nonconforming use of land or of land with structures incidental to the use of the land shall neither be extended in land area nor changed to any use except a use permitted in the district in which the property is located.

In short, irrespective of whether the substation was nonconforming, as alleged by the applicant, any such nonconformity does not grandfather a different nonconformity. Likewise, the previously existing row houses from the 1920s do not grandfather the row houses now under construction and almost complete, as there was an intervening use at the time of the adoption of the zoning regulations – the Pepco substation.

The Applicant has Failed to Meet its Burden for the Area Variances.

The Board is authorized to grant variances from the strict application of the zoning regulations in order to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property... ." D.C. Official Code § 6-641.07(g)(3) (2001); 11 DCMR § 3103.2. Relief can be granted only "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map." *Id.* An applicant for an area variance must make the lesser showing of "practical difficulties," as opposed to the more difficult showing of "undue hardship," which applies in use variance cases. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). The applicant in this case, therefore, had to make three showings: uniqueness of the property, that such uniqueness results in "practical difficulties" to the applicant, and that the granting of the variances would not impair the public good or the intent and integrity of the zone plan and regulations.

Uniqueness of the Property

Based on the record herein, the Board is constrained to find that the applicant has met its burden of proofing the existence of any uniqueness of the Property or practical difficulty in the compliance with the zoning regulations.

Section 3103.2 of the zoning regulations, with respect to the Board's authority to grant variances, states that variances may be granted:

> . . . where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations, or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition

> of a specific piece of property, the strict application of any regulation adopted under D.C. Official Code §§ 6-641.01 to 6-651.02 would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, to authorize, Title 11 District of Columbia Municipal Regulations upon an appeal relating to the property, a variance from the strict application so as to relieve the difficulties or hardship; provided, that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

11 DCMR § 3103.2 (emphasis added).

Immediately prior to the subdivision of the Property into three (3) nonconforming lots, the Property was a large, rectangular flat property improved only with a Pepco substation that was no longer in use. There was nothing exceptional in the size, shape, dimension or topography of the Property. Indeed, the applicant has failed to offer any argument as to any such conditions. There was nothing that prevented the applicant from subdividing the Property into two conforming lots and developing the Property as a matter of right.

The applicant's sole argument on uniqueness is that DCRA's alleged seven (7) approvals of the development constitutes "other extraordinary or exceptional situation or condition of" the Property, so as to satisfy the uniqueness prong of the variance test. However, the Board concludes that the District only approved the project on a maximum of two (2) occasions – the first when the District approved the subdivision – which has now BEEN determined to have been approved in error - and the second on August 25, 2003, when the District issued the building permits – which it stopped work on within three (3) weeks of issuing. More importantly, the Board concludes that the applicant did not rely in good faith on the District's approvals of its proposed development. Instead, the Board concludes that any approvals by the District were made in reliance on the applicant's misstatements, misrepresentations and omissions, without which the District would have required the applicant to apply to the Board prior to issuing any permits.

The extent of the applicant's actions and misstatements can be summarized as followed:

a. The applicant applied for the permits in a piecemeal manner and under different names;
b. The applicant misrepresented the nature of the structure being demolished;

c. The applicant misrepresented the fact that it owned vacant, adjacent property within Square 763 and that it was undertaking additional development within the Square;
d. The applicant attached a certificate of occupancy for a flat for a property at 210 D Street, S.W. to its foundation permit applications, presumably as evidence of the preexisting use of the property; and
e. The applicant misrepresented the lot depth of the adjacent properties of 324 and 326 2nd Street, S.E. as being 75½ feet (as opposed to their actual depth of 81'9.5"), as well as the nature of the right of way to the west of the property (which the applicant represented to be an "Alley").

The fact that the Historic Preservation Division of the Office of Planning confirmed with DCRA that no variance relief was necessary does not bolster the applicant's case. Instead, it is merely a continued illustration of the fact that DCRA was mistaken as to the nature of the development, which, again, was a direct result of the applicant's misinformation provided to DCRA.

Assuming the Property is Unique, Any "Practical Difficulties" do Not Arise from Such Uniqueness but, Rather, Arise from the Applicant's Affirmative Actions.

Even if the Board were to adopt the applicant's argument with regard to uniqueness that DCRA's actions with regard to the Property created a extraordinary and exception circumstance for the Property, any such "uniqueness" does not give rise to any practical difficulties in the applicant's ability to use its Property if the zoning regulations were to be strictly applied. The difficulties that the applicant complains of are, quite simply, self-created.

The applicant claims that the denial of the variances requested will result in possible bankruptcy for its investors, who have already expended $2.4 million under the impression that construction of the three row houses was matter of right. To the contrary, this money has been expended at the applicant's own risk when it proceeded with construction after the issuance of the stop work order in September 2004. It is undisputed that, at the time of the issuance of the stop work order, the construction was only three feet (3') above grade. Clearly then, the applicant could have taken steps to protect the foundations from the elements, waited for the Board's decision and then, if necessary, reconfigured the development to conform to the zoning regulations. Although there may have been some financial loss, it would have been much less than the claimed $2.4 million. Furthermore, the applicant has failed to show how any uniqueness of the property gave rise to practical difficulties in complying with the zoning regulations. Instead, developing three (3), as opposed to two (2), row houses was simply the preferred development of the applicant.

The fact that difficulties complained of by the applicant are self-created (or self-imposed) is one of the many factors that can be considered by the Board in determining whether there are any practical difficulties. *See Gilmartin v. Board of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C. 1990); *Azacarate v. Board of Zoning Adjustment*, 388 A.2d 1233, 1239 (D.C. 1978) *see also* 83 Am. Jr. 2nd, Zoning & Planning § 828. In *Azcarate*, the court noted that the self-created hardship rule is a "manifestation of the equitable principle of estoppel," and explained that "where an applicant for an applicant for an area variance, or his predecessor in title, has committed an affirmative act which directly results in the hardship complained of, variance relief will be withheld." *Azacarate*, 388 A.2d at 1239, citing 2 A. RATHKOPT, LAW OF ZONING, § 48-6 (3rd. ed. 1972). Examples of instances where courts have denied area variances based on self-created hardships resulting from direct actions of the applicant include situations where: (1) a substandard lot results from a faulty survey and the surveyor was hired by the applicant; (2) the applicant proceeded with construction in disregard of applicable zoning ordinances or without the necessary permits; (3) a substandard lot was created and the deficiency could have been avoided. *See* 83 Am. Jr. 2nd, Zoning & Planning §§ 824-827. Additionally, the Board may consider weather there is an alternate use of the property that would require a less extensive variance. *Id.* at § 827.

In *Azacarate*, the court found that the hardship at issue – the failure of the configuration of the lot in question to meet the lot-width requirements of the zoning regulations -- was not a direct consequence of the applicant's sole affirmative acts, as the zoning officials played a "significant part by approving three separate applications during the original subdivision of [the lot]." *Id.* In so holding, the Court noted that variances are "designed to provide relief from the strict letter of the regulations, protect zoning legislation from constitutional attack . . . and prevent usable land from remaining idle." *Azacarate*, 388 A.2d at 1236, *citing Palmer v. Board of Zoning Adjustment*, D.C.App., 287 A.2d 535, 541 (1972); *see Daniel v. Board of Zoning Adjustment*, 329 A.2d 773, 775 (1974); *Salsbery v. Board of Zoning Adjustment*, 318 A.2d 894, 896 (1974). The Court acknowledged that:

> This is not to say that any subsequent event will invariably result in unusual conditions supporting the grant of a variance, particularly if an affirmative act of the applicant is the direct and sole cause of the hardship complained of.

Azacarate, 388 A.2d at 1237, n.9.

The instant matter is clearly distinguishable from the *Azacarate* case in two primary aspects. First, unlike in *Azacarate*, it was the applicant, and not DCRA, that played a significant role in creating the substandard lots – a condition which could have been avoided. In *Azacarate*, DCRA approved the substandard subdivision of the property on three (3) separate occasions (the original subdivision and then subsequent redrawings of the lot lines). The instant matter involves only one (1) subdivision. Upon information and belief, the applicant used the fact that there had previously

existed three row houses on the Property to convince the Surveyor that the subdivision was legal. However, this is simply no justification for the creation of substandard lots of record.

Second, the property in *Azacarate* was rendered undevelopable, as the substandard lot that was created was sold to a third party. In the instant matter, three (3), as opposed to one, substandard lot were created by the applicant. Additionally, the applicant is currently the owner of all three (3) substandard lots and could re-subdivide them so as to create lots that comply with the area requirements.

The applicant also claims economic hardship if the zoning regulations are strictly enforced. However, not only did the applicant take considerable time between the purchase of the Property and beginning the application process for permits to develop the Property, the applicant was put on notice early on that there were potential zoning issues. Moreover, the applicant cannot show that it would have been economically infeasible to develop the Property in a manner that complies with the zoning regulations.

Furthermore, hardship rule is a "manifestation of the equitable principle of estoppel," *Azacarate*, 388 A.2d at 1239. Elements of estoppel are (1) extensive and permanent improvements, (2) made in good faith, (3) in justifiable and reasonable reliance upon, (4) affirmative acts of the District, (5) without notice that the improvements might violate the zoning regulations and (6) equities that strongly favor the petitioners. *Rafferty v. DC Zoning Commission*, 662 A.2d 191, 192 n. 1 (because the petitioners had constructive notice of PUD restrictions, could not have justifiably relied on the issuance of the building permits contrary to those restrictions). Equitable estoppel not favored when sought against a government entity. *Saah v. DC Board of Zoning Adjustment*, 433 A2d 1114, 1116 (DC 1981).

In this case, the applicant does not satisfy the elements for equitable estoppel. As of the date of the stop work order, the applicant had not made substantial improvements to the Property. To the contrary, it is undisputed that the construction was only three feet (3') above-grade. These improvements were not made in good faith, as the applicant's building permit applications were replete with material misstatements, misrepresentations and omissions. The applicant was not justified in its reliance on the subdivision or permits, as the issuance of the subdivision and permits was based on the applicant's own misrepresentations. There were no affirmative acts by the District. Instead, it was the applicant's affirmative acts in misleading the District that lead to the issuance of permits. The applicant had notice that the proposed development violated the zoning regulations no later than February 2003. However, by the applicant's own words, it took them six (6) months to figure out how to build three, as opposed to two, flats.

<u>There Would be No Practical Difficulty in Developing Two Conforming Plats.</u>

The applicant supports its argument of practical difficulty by essentially saying that, if two conforming lots had been created, the resulting homes would be have been large and out of proportion with the neighboring houses. This argument falls short of proving any practical difficulty with complying with the zoning regulations for several reasons.

First, the argument ignores the simple fact that the applicant would not have been required to build to the same footprint as the current structures occupy. That is, there is no requirement that the applicant build large houses and, in fact, the applicant could build smaller houses that would be in conformity with the neighborhood. For example, the applicant could have built houses with either a smaller footprint and/or with only two (2) stories. This would address the applicant's concern that HPRB may not approve a design plan for two (2) large town homes.

Second, as raised by the Office of Planning, pursuant to section 405.3 of the zoning regulations, the outside lots of the new row houses are required to have side yards. Had the applicant created (two) conforming lots and, consequently, complied with the side yard requirements of the zoning regulations, the resulting homes would not have been unexceptionally wide or large.

Third, as set forth above, any "practical difficulty" arises out of the applicant's own actions of creating substandard lots. Simply put, there was nothing unique about the property, which is flat and rectangular, that makes it difficult for the applicant to comply with the zoning regulations.

Larger lots would have not only resolved any issues regarding side yard requirements, but would have also help overcome the problem of parking space location. With fewer units on larger lots, the applicant could have provided the required parking and, possibly, additional parking. As it is, the applicant has failed to prove that it will be able to provide access to the parking shown on its plans.

The applicant's representative stated that if they were to build on conforming lots, the resulting homes would have been disproportionably large for the neighborhood. Nowhere does the applicant explain satisfactorily, however, why such a conforming development could not be built so as to be "in character" with the surrounding neighborhood. The applicant's assertion of the existence of practical difficulties is not enough; there must be proof of their existence in the record. There is nothing in the record pointing to any real practical difficulty in abiding by the zoning regulations.

Finally, it is the zoning regulations, and not the design preferences of a particular applicant, that determines what lot size is appropriate for properties within the R-4 zone district. The fact that the applicant would prefer smaller lots than allowed in order to achieve aesthetic conformity (or any other benefit it may perceive) does not rise to the level of practical difficulty.

Therefore, based on the facts before it, the Board concludes that there is no uniqueness of the Property or practical difficulty arising out of the strict application of the zoning regulations.

Harm to the Public Good.

The approval of the requested variances would result in harm to the surrounding community and harm to the public good by way of increased traffic congestion and parking, as well potential over taxation of the water/sewer facilities for the Square.

The subject property is located within one block of the Library of Congress and two blocks of the Capitol. The two (2) block radius within the property is improved with numerous apartment buildings, condominiums, office buildings and other commercial facilities. By way of example, St. Peters Church is located directly to the east of Square 763 on 2nd Street, S.E. Also in that square (Square 733) is an apartment building and the Republican National Committee building. In Square 763, to the immediate east of the property across the public alley, is a private club with offices. There is also an apartment building along 3rd Street and one on C Street in Square 763. Since September 11, 2002, the traffic patterns in the neighborhood have been redirected and parking surrounding the Capitol and attending buildings restricted. This, along with the mixed uses in the vicinity, has caused a burden on streets such as 2nd and D Streets, S.E. by way of traffic and parking. In deed, this neighborhood suffers one of the most severe parking shortages in the Capitol Hill district. Allowing three (3) flats will only serve to exacerbate this already undue burden on the neighborhood in terms of parking and traffic. In contrast, if two smaller, more compatible units were constructed, the maximum increase would be approximately four to six (4-6).

With regard to parking, the applicant shows one parking space per unit. However, when questioned about a covenant for the shared driveway, the applicant testified that they do not yet have one in place, as they are unaware as to the exact location of the driveway. This raises grave concern about the ability of the applicant to provide the requisite parking, given that the plans submitted to the District show a driveway and, yet, the applicant is unsure where that driveway will be located. Thus, with three lots, it is impossible to provide two parking spaces per lot. In contrast, it would be possible to provide two (2) parking spaces per lot if two (2) conforming lots had been created.

As to harm to the public good concerning storm water run off and demand for water by the new development, it is clear that insufficient information has be provided to the District. Furthermore, given the narrow width of the lots and the lack of side yards, storm water run off had to be provided underneath the Neighbor's right of way and underneath the property at 324 (the Smith property) and 326 2nd Street, S.E. Granting the requested variance would condone the taking of neighboring property for the purpose of developing a non-matter of right development. Given that the WASA could not determine the impact of this development on the surrounding public systems, granting a variance without full comment and review by WASA would be premature.

The Applicant Needs a Side Yard Variance for the Two End Units.

As pointed out by the Office of Planning, as the two end homes do not adjoin another row house, they must comply with the side yard requirements. *See* 11 DCMR § 405.3. Specifically section 405.3 provides that:

> In R-2, R-3, R-4, and R-5 Districts, when a one-family dwelling, flat, or multiple dwelling is erected that does not share a common division wall with an existing building or a building being constructed together with the new building, it shall have a side yard on each resulting free-standing side.

While this provision is arguably in conflict with section 405.6, a review of the legislative history and subsequent interpretation of section 405.3 removes any ambiguity of the intent of that section, which is to ensure that semi-detached buildings provide a side yard. *See* Office of Planning report at 7.

That a side yard is required for the exterior lots (Lots 26 and 28) is consistent with the Board's decision in BZA Application 16811. In that decision, in interpreting section 405.3, the Board stated that

> The Board rejects the arguments of the Zoning Administrator and the property owners that § 405.3 does not apply as long as a dwelling has (at least) one common division wall. Subsection 405.3 must be read in its entirety. The first clause employs the general phrase "one-family dwelling," defined in § 199.1 as "a dwelling used exclusively as a residence for one (1) family," rather than the more specific classifications, "one-family detached," "one-family semi-detached dwelling," or "row dwelling," all defined in § 199.1. If the purpose of § 405.3 was limited to the preventing the construction of only one-half of a pair of semi-detached dwellings as urged by the property owners, then the regulation would have used the specific term "one-family semi-detached dwelling," and not the general term, "one-family dwelling."

The last clause of the sentence, in requiring "a side yard on each resulting free-standing side," refers to each one of potentially two free-standing sides. Moreover, the use of the word "resulting" indicates that the free-standing side results from the absence of a common division wall with an adjacent building, such that a side yard must be provided on each side of the dwelling that does not share a common division wall with an adjacent building.

Subsection 405.5, which states that "[a] side yard shall not be required along a side street abutting a corner lot in a Residence District," provides an exception to § 405.3. Thus, at the end of a row of row dwellings, except in the case of a corner lot, the last dwelling (a semi-detached dwelling) must provide a side yard.

In BZA Appeal No. 16811, the Zoning Administrator argued that the purpose of 405.3 was to prevent property owners from constructing a semi-detached dwelling to within one foot or so of the lot line. Subsection 405.3, however, does not address the required minimum width of side yards. Rather, it specifies circumstances under which a side yard must be provided. Subsections 405.6 and 405.9 specify minimum side yard width requirements. These regulations were in place prior to the adoption of § 405.3. Therefore, § 405.3 could not have been intended to prevent narrow, one-foot side yards, since §§ 405.6 and 405.9 already required a semi-detached dwelling to provide one side yard, a minimum of eight feet in width.

Finally, the Zoning Administrator argued that an interpretation of § 405.3 as requiring a side yard on the side of a dwelling that does not share a common division wall would not make sense in light of § 401.3, which prescribes for row dwellings in the R-4 District a minimum lot area of 1,800 square feet and a minimum lot width of 18 feet. The Zoning Administrator noted that the provision of an 8-foot wide side yard on an 18-foot wide lot would leave only 10 feet for the dwelling. Subsection 401.3, however, also prescribes for a one-family semi-detached dwelling in the R-4 District a minimum lot area of 3,000 square feet and a minimum lot width of 30 feet. Subsection 101.6 provides in pertinent part that "Where a lot is divided, the division shall be effected in a manner that will not violate the provisions of this title for yards . . . applicable to that lot or any lot created." To comply with the side yard requirement of § 405.3, property should be subdivided such that the end lot (that is not a corner lot) of a row of lots subdivided for purposes of constructing row dwellings will have sufficient width to accommodate a semi-detached dwelling.

Likewise, in BZA Application No. 16709, the Board denied a variance from, *inter alia*, section 405.3. In that case, the applicant requested the area variances so as to allow the conversion of the property, which was purchased two (2) years earlier as a two-unit (*ie*, a flat) rental property, to an owner-occupied, one-family dwelling and to construct an addition so as to provide them with an increased amount of interior living space in which to raise a family. In denying the requested variance, the Board found that the configuration of the property did render the property unique but that there was no practical difficulty in complying with the zoning regulations. Specifically, the Board stated that the identified practical difficulties – "the amount of interior living space that would be available if they converted the flat to a one-family dwelling without variance relief, the elongated floor plan of the dwelling, and the split floor levels within the building" and the preference for "a larger home, with an improved interior circulation pattern, in which to raise a family" -- was merely the preferred option of the applicant, but not the only option. The Board pointed out that the applicant had not proven that alternative methods of combining the two units to create a one-family dwelling were unnecessarily burdensome or rose to the level of "peculiar and exceptional practical difficulties" required for variance relief. *Id.* Alternatives to the applicants proposal, as pointed out by the Board, included combining the two units into a one-family dwelling without variance relief (*ie*, without the addition), or alternatively, continue the two-family rental use of the property. *Citing Barhour v. District of Columbia Board of Zoning Adjustment*, 358 A.2d 326, 327 (D.C. 1976), the Board noted that:

> The fact that an expansion requiring a variance is personally preferable to other methods not requiring variances does not constitute a unique property situation. Further, this case does not present a situation where no use could be made of the property absent a variance. as in A.L.W., Inc. v. District of Columbia Board of Zoning Adjustment, [338 A.2d 428 (1975)].

Id.

ANC and OP Great Weight

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). The Board has seriously considered the report of ANC 6B. Although the ANC voted to support applicant's project, its letter also indicated that it unanimously voted to support the Neighbors' appeal in BZA Appeal No. 17085. Moreover, the ANC failed to delineate how the applicant met its burden of proof for the required variances and, as testified to by the Neighbors, the commissioners who voted to support the application each acknowledged that there was serious doubt as to whether the applicant could meet the variance test. Taking into consideration not only the ANC's final recommendation, but the issues raised by the Neighbors as to the ANC's deliberations, as well as the findings of fact and conclusions of law set forth above, particularly the Board's determination that the applicant has failed to meet the three variance tests, the Board is not persuaded by the ANC's recommendation.

Similarly, the Board has carefully considered OP's report and recommendations. The Board cannot find any basis for the validity of the subdivision – the creation of which is at the heart of this matter. In fact, OP's own analysis of the validity of the subdivision supports the finding of both DCRA and this Board that the subdivision is invalid. Finding that the subdivision was invalid, the Board agrees with OP's recommendation that the applicant has not met its burden of proof with regard to the requested variances.

CONCLUSION

Based on the record before the Board and for the reasons stated above, the Board concludes that the applicant has failed to satisfy the burden of proof with respect to the application, pursuant to 11 DCMR § 3101.2, for a variance from the lot area and lot width requirements under § 401.1. The Board further concludes that a variance is required from the side yard requirements under §405.3, and that the applicant ahs failed to satisfy the burden of proof with respect to this additional variance to allow the construction of 3 flats in the CAP/R-4 district at premises 206, 208 and 210 D Street, S.E. (Square 763, Lots 26, 27 and 28).

It is therefore **ORDERED** that the application be **DENIED**.

VOTE: 5-0-0 (Geoffrey H. Griffis, David A. Zaidain, Ruthanne Miller and _____, to deny.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each voting Board member has approved the issuance of this Order denying the application.