ShawPittman LLP

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September 21, 2004

By Hand Delivery

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

Re: Potomac Foods – BZA Application No. 17200
Pre-Hearing Statement of the Applicant

Dear Mr. Griffis:

Enclosed please find the pre-hearing statement of Potomac Foods, the applicant in the above-mentioned BZA application. The applicant looks forward to presenting its case to the Board at the public hearing on October 5, 2004.

Respectfully submitted,

Allison C. Prince/ADH

Allison C. Prince

Ashleigh D. Horne

Ashleigh D. Horne

Enclosures

cc: ANC 3F
John Moore, OP

BZA
Case No. 17200
Exhibit No. 23

Document #: 1432192 v.1

Board of Zoning Adjustment
District of Columbia
CASE NO. 17200
EXHIBIT NO. 23

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Application of Potomac Foods

BZA Application No. 17200
Public Hearing: October 5, 2004
ANC 3F

STATEMENT OF THE APPLICANT

I.
NATURE OF RELIEF SOUGHT

The subject site is located in Square 1971, Lot 822, at premises known as the rear of 4422 Connecticut Avenue, N.W. (the "**Property**"). Potomac Foods (the "**Applicant**") requests a special exception under Section 214 of the Zoning Regulations to permit the continued use of the Property as an accessory parking lot in a R-1-B Zone District. Section 214 allows the continued use of the Property for accessory parking provided certain conditions are met. By Order No. 16541, dated March 21, 2000, the Board of Zoning Adjustment (the "**Board**" or "**BZA**") approved the use of the site as a parking lot for a period of four (4) years, subject to certain conditions. The Applicant initially wished to renew this special exception for a period of seven (7) years. After discussions with the Office of Planning, the Agreed to request a term of four (4) years. Following further discussions with the Commissioners of Advisory Neighborhood Commission 3F, the Applicant has agreed to request a term of two (2) years.

II.
JURISDICTION OF THE BOARD

The Board has jurisdiction pursuant to § 3104.1 to grant the requested special exception relief.

III.
BACKGROUND

The Applicant requests a special exception to continue the use of the Property as accessory parking for the Burger King restaurant located at 4422 Connecticut Avenue, N.W. The Property has been in continuous operation as accessory parking for the Burger King with minimal impact on the neighborhood since it was approved in 1982. The lot has been well maintained since that time. The Board renewed the use in 2000 for four years by Order No. 16541 (the "**2000 Order**"). A copy of the 2000 Order is attached as Exhibit A.

III
DESCRIPTION OF PROPERTY AND PROPOSED USE

The Property is located in the Van Ness neighborhood in the R-1-B Zone District. The surrounding area includes several low-scale retail establishments such as a car wash, a realtor's office, and a dry cleaning establishment. Several single-family homes front on 35th Street, located behind the Property.

The Property is situated behind a Burger King restaurant located at 4422 Connecticut Avenue, N.W. (Square 1971, Lot 29) (the "**Burger King Lot**") and is separated from that building by a public alley. The Property contains 9,100 square feet of land area. As shown on the site plan attached as Exhibit B, the lot provides sixteen parking spaces and requires one-way traffic circulation. A wooded area, landscaped with grass and several mature trees, buffers the parking lot use from the residential uses to the rear. The residential uses are further buffered by fences and the rear yard of a private garage. Photographs of the Property are attached as Exhibit C.

The Applicant recently has made numerous improvements on the lot in response to concerns raised by the Office of Planning and members of the community. As shown in the photographs attached as Exhibit C, the markings on the lot have been repainted. The Applicant has removed grease stains located near the dumpsters by pressure washing the paved surfacing. The Applicant also has removed a bench that had been erected on the Property by the neighboring car wash. The Applicant has ordered two new trash cans that will be placed on the Property to discourage littering by customers using the lot. The Applicant also has agreed to prune the trees located on the Property, including any limbs that hang over neighboring residences. The Applicant plans to install new landscaping at the appropriate time, which will include new flowers and other decorative elements.

IV.
THE APPLICANT COMPLIES WITH THE REQUIREMENTS OF § 3104.1 AND § 214 OF THE ZONING REGULATIONS AND IS ENTITLED TO SPECIAL EXCEPTION RELIEF

In order to meet the burden of proof for a special exception under § 3104.1, an applicant must demonstrate that the proposed use will be in harmony with the general purpose of the Zoning Regulations and will not tend to affect adversely the neighboring property. The requested special exception, if granted, will not detrimentally affect the public good or substantially impair the intent, purpose, and integrity of the zone plan because it meets the criteria of 11 DCMR § 214.

A. Section 214

The proposed use should be approved because it meets the requirements of § 214.

- Section 214.2: The parking lot is in an open area, no portion of which extends above the level of the adjacent finished grade.

- Section 214.3: The parking spaces are located in their entirety within 200 feet of the area to which they are accessory.

- Section 214.4: The parking spaces are separated from the Burger King building by only an alley.

- Section 214.5: The parking lot satisfies the requirements of Chapter 23 of the Zoning Regulations. The parking lot's surface is paved with materials that form an all-weather, impervious surface, and it is designed so that there are no vehicles that project over any building or lot line. The surface of the parking lot has been well-maintained and is in good condition. There are no other uses and no structures on the Property, and there are no vehicular entrances within forty feet of any intersection. The lighting is directed entirely on the surface of the parking lot. All parts of the lat are cleaned regularly. The parking lot does not provide a forty-two inch high wall along the western border of the Property, which abuts the residential properties. The Applicant received a waiver from this requirement in a past application. The Property remains adequately buffered from adjacent residential uses by wooden fences, the garage wall, and landscaping such as trees and bushes.

- Section 214.6: The Burger King Lot provides only eight parking spaces, which is not sufficient to provide adequate parking for the Burger King's customers. It is not feasible to locate additional accessory spaces on the main lot.

- Section 214.7: There will be no adverse traffic, noise, or other objectionable impacts resulting from the location of accessory parking spaces on the subject site. The Property has been used as accessory parking for the Burger King Lot for more than twenty years and has been operated with minimal impact on neighboring properties. The lot also decreases the

likelihood of objectionable traffic because encourages customers of the Burger King to park their cars in the lot rather than on the neighboring residential streets.

The Office of Planning has expressed concern that the adjacent car wash frequently uses a portion of the Property to dry cars after being washed. The Applicant has not agreed to allow the car wash to use the Property and has informed the owners of the car wash that they should not use the Applicant's property for the car wash.

As set forth below, the owners of adjacent residential property expressed concerns about trash, noise, landscaping, and rodents in the area. The Applicant has agreed to several conditions to reduce any impact the lot may have on these properties.

With regard to trash, the Applicant has agreed to increase the trash pick-up to three times per week. The trash previously had been scheduled for pick-up once per week. As stated above, the Applicant has agreed to place two trash cans on the Property to discourage customers using the lot and pedestrians using the alley from littering on the Property. The Applicant also has agreed to weld shut the side doors of the dumpster located closest to the residential property to decrease the likelihood of any odor reaching their properties. The dumpsters currently are located on the portion of the Property closest to the Burger King Lot, which is the furthest from the residential uses.

Neighbors also were concerned about noise from deliveries, trash pick-up and the drive through loud speaker. To address the noise from deliveries and trash pick-up, the Applicant has agreed to limit deliveries and trash pick-up to the hours of 10:00 am and 6:00 pm. The Applicant also installed a chain at the entrance and exit of the lot to discourage loitering when the restaurant is not open.

Burger King also hired a sound engineer to perform a study of the drive through at the property line. The resulting report is attached as Exhibit G ("Sound Study"). At the request the neighbors, the study was performed in the evening between 8:00 and 9:00 p.m.. The engineer found the level of sound is dependent upon the number of cars in line for the drive through. The ambient noise from traffic, insects, and other environmental factors at the residential property line was over 57 dBA. The drive-through at that location also measured at 57 dBA. Thus, the sound level resulting from the drive-through was not distinguishable from the ambient sound level at that location. The sound level of the ambient noise at the property line abutting the car wash was 60 dBA, and the sound level of the drive-through speaker at that location measured 62 dBA. As explained in the Sound Study, this does not constitute a violation of the D.C. noise code. However, the 200 Order states that sound created by the drive-through speaker system shall not be over 60 dBA. Following the 2000 Order, the drive-through speaker system was adjusted to create a maximum of 60 dBA. However, the Applicant recently purchased a new drive-through system, which has not been adjusted. The new system can be manually adjusted to result in a sound level that is less than 60 dBA, and the Applicant is willing to make that adjustment.

ANC 3F has proposed a condition requiring the system to create a sound level of no more than 40 dBA at night. Because the ambient noise is 57 dBA at the residential property line and is 60 dBA at the northern property line abutting the car wash, the suggested 40 dBA is not appropriate for this site.

The Applicant is willing to adjust the sound level of the drive-through speaker system so that it is no more than 60 dBA at the property line in order to comply with the 2000 Order and to accommodate the wishes of the residential neighbors. However, the drive-through speaker

system is located on the Burger King Lot. The Burger King Lot is located in the C-3-A Zone District, and, accordingly, the restaurant use is permitted as a matter-of-right on that property.

The neighbors also expressed concern about the landscaping on the western property line. As shown in the photographs attached as Exhibit C, the landscaping has been well-maintained in a healthy, growing condition. Even so, immediately abutting neighbors were concerned about overhanging limbs from the trees planted in that area. The Applicant has agreed to have the trees pruned provided that the neighbors agree to provide access to their yards. The applicant also has agreed to mow the grass twice per week during the appropriate seasons and plans to add additional flowers and plants to the area.

Although they did not indicate that rodents are a pervasive problem, neighbors expressed concern that rodents had entered their back yards upon occasion. In order to reduce the likelihood that the use of the lot would attract rodents, the Applicant has contracted with an exterminator, who shall perform monthly extermination services.

B. Section 3104.1

The special exception, if granted, will not detrimentally affect the public good or substantially impair the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. The Property has been used as a parking lot since 1982, over 20 years, with minimal impact on neighboring properties, traffic in the area, or the zone plan. The . As demonstrated above, this application meets the criteria set forth in § 214.

Further, the proposed use is well-maintained and adequately buffered from adjacent residential uses. The photographs attached as Exhibit C show the landscaping and fencing located on the western border of the Property. The fences, garage wall, and trees located in that area provide a significant buffer for those properties.

VI
COMMUNITY INPUT

The Applicant contacted Carl Kessler, the ANC Commissioner representing the applicable SMD, in July of 2003 to discuss the use of the parking lot. In September of 2003, the Applicant appeared before ANC 3F during its regularly scheduled meeting to ask the community whether there were any concerns about the lot. No issues regarding the use or maintenance of the lot were raised at that time. Following the meeting, an ANC commissioner informed us by telephone that the trash in the dumpsters often was overflowing. The Applicant immediately increased the trash pick-up from once per week to twice per week. The Applicant later increased the trash pick-up to three times per week.

On August 18, 2004, the Applicant met with Carl Kessler and three neighbors whose properties abut the rear of the parking lot. The neighbors mentioned several concerns related to trash, noise, landscaping and vector control. As set forth above, the Applicant has addressed these concerns. In addition, a representative of the Applicant has agreed to act as a liaison with the ANC and the community.

On September 20, 2004, ANC 3F voted unanimously to approve the application for two years, with conditions. The Applicant has agreed to all of the ANC's proposed conditions except for the condition limiting volume of the drive-through to 40 dBA. In addition, although the Applicant has agreed to weld only one of the doors shut on the dumpster, because the Burger King employees would be unable to reach the dumpsters to deposit the trash if the only access were through the top. The Applicant has agreed to the conditions set forth below.

VII.
WITNESS

1. A representative of the Applicant

VIII.
EXHIBITS IN SUPPORT OF APPLICATION

Exhibit A	BZA Order No. 16541
Exhibit B	Site Plan for the parking lot
Exhibit C	Photographs of the Parking Lot
Exhibit D	Copy of a portion of the Sanborn Map outlining the Property
Exhibit E	Copy of the Zoning Map showing the Property
Exhibit F	Outline of witness testimony
Exhibit G	Sound Study

IX.
PROPOSED CONDITIONS

1. Deliveries and trash pick-up shall be limited to the hours of 10:00 a.m. to 6:00 p.m. daily.
2. Trash pick-up shall occur at least three times per week. The number of pick-ups shall be increased if the dumpsters are overflowing on a regular basis between pick-ups. On each of the dumpsters, the side door facing the western property line shall be welded closed.
3. Two trash cans shall be maintained on the parking lot and emptied once per day, more often if they are overflowing with trash.
4. The trees located on the Property shall be pruned at least once per year. All trees on the Property that overhang an abutting residential neighbor's property shall be

pruned if an effected resident requests such an action and gives the Applicant permission to enter his/her property.

5. All parts of the lot shall be kept free of refuse or debris and shall be paved or landscaped. Landscaping shall be maintained in a healthy growing condition and in a neat and orderly appearance.
6. An exterminator shall perform monthly extermination services to control any rodents. The exterminator's treatments shall be more frequent if a neighbor notified the Applicant of any rodent infestations. In addition, the portion of the fence owned by the Applicant and located on the Property shall be reinforced underground to help prevent any rodents from entering the neighbors' properties.
7. A cable or chain shall be installed to close the entrance of the parking lot to vehicles at 9:00 p.m. each night.
8. The Applicant shall appoint an neighborhood and ANC liaison. The Applicant shall notify the ANC and all residences within 200 feet of the Property of the name, telephone number, and e-mail address of the appointed liaison. When that individual is no longer designated to act as the liaison, the Applicant shall use the same procedure to notify the neighborhood of his or her successor.
9. Due to the fire marshal's concerns, collected grease shall be stored in sealed containers at the back of the Burger King building and shall not be stored on the Property.
10. The Applicant shall provide to the ANC and the residences within 200 feet an annual report summarizing its compliance with the conditions.

X.

CONCLUSION

For all of the above reasons, the Applicant respectfully requests approval of the subject application.

Respectfully submitted,

Allison C. Prince

Allison C. Prince

Ashleigh D. Horne

Ashleigh D. Horne

September 21, 2004

Document #: 1420251 v.1

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application No. 16541 of Potomac Foods Company II, Inc., pursuant to 11 DCMR 3104.1, for a special exception under Section 214 to continue the use of an existing accessory parking lot in an R-1-B District at premises 4422 Connecticut Avenue, N.W. (Square 1971, Lot 822).

HEARING DATE: March 1, 2000
DECISION DATE: March 1, 2000 (Bench Decision)

SUMMARY ORDER

The Board provided proper and timely notice of public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 3F and to owners of property within 200 feet of the site.

The site of this application is located within the jurisdiction of ANC 3F. ANC 3F, which is automatically a party to this application, submitted a written statement in support of the application.

As directed by 11 DCMR 3119.2, the Board has required the applicant to satisfy the burden of proving the elements which are necessary to establish the case for a special exception pursuant to 11 DCMR 214. No person or entity appearing as a party to this case testified in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, the Board concludes that the applicant has met the burden of proof, pursuant to 11 DCMR 3104.1, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map. It is therefore **ORDERED** that this application be **GRANTED, SUBJECT** to the following **CONDITIONS:**

(a) This Order has been approved for four years;

(b) Potomac Foods Company II shall remove the dumpster used for kitchen grease and replace it with a system that accumulates the kitchen grease inside the restaurant building until it is disposed of off-site;

(c) Potomac Foods Company II shall reduce the audio volume of the drive-through speakers at the back of the restaurant to a level that does not disturb residential neighbors and in no event should it exceed 60 decibels;

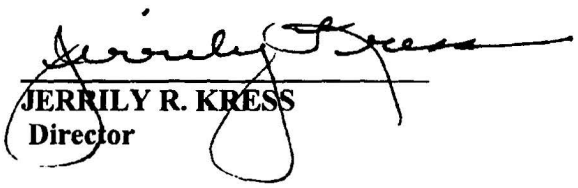
(d) Trash collection shall be carried out up to four times per day as the need is observed.

(e) There shall be ongoing communication between the Advisory Neighbor Commission and the Applicant.

Pursuant to 11 DCMR 3101.6, the Board has determined to waive the requirement of 11 DCMR 3125.3 that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is appropriate in this case.

VOTE: 5-0-0 (Rodney Moulden, Robert Sockwell, Anne Renshaw, Anthony Hood and Sheila Cross Reid to approve).

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

ATTESTED BY: 

JERRILY R. KRESS
Director

Final Date of Order: MAR 21 2000

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBSECTION 3125.6.

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

So/16541/3-6-00/poh

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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BZA APPLICATION NO.: 16541

As Director of the Office of Zoning, I certify and attest that on MAR 21 2000 a copy of the order entered on that date in this matter was mailed first class, postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

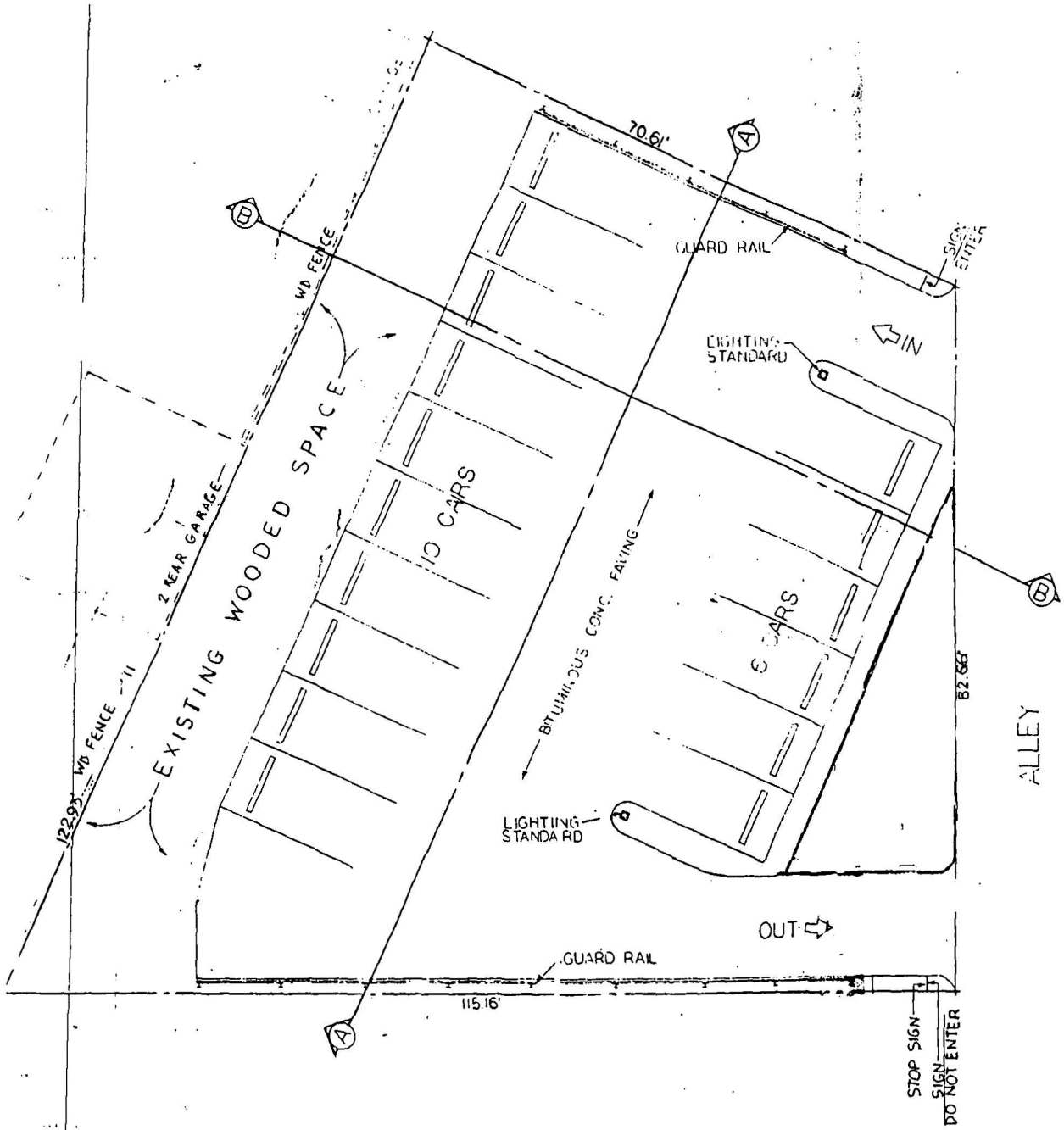
Allison C. Prince, Esquire
Wilkes , Artis, Hedrick & Lane
1666 K Street, NW, Suite 1100
Washington, D.C. 20006

David J. Bardin, Chairperson
Advisory Neighborhood Commission 3F
P.O. Box 32920
Washington, D.C. 20016

Attested by: _____
JERRILY R. KRESS, FAIA
Director

Attest/16541/3-6-00/poh

B



LOT 822
SQ 1971
AREA 9099.6 SC

ADDITIONAL PARKING SPACE
SCALE: 1" = 10'-0"

NORTH

ADDITIONAL PARKING SPACES

DRAWN

C




ODYSSEY





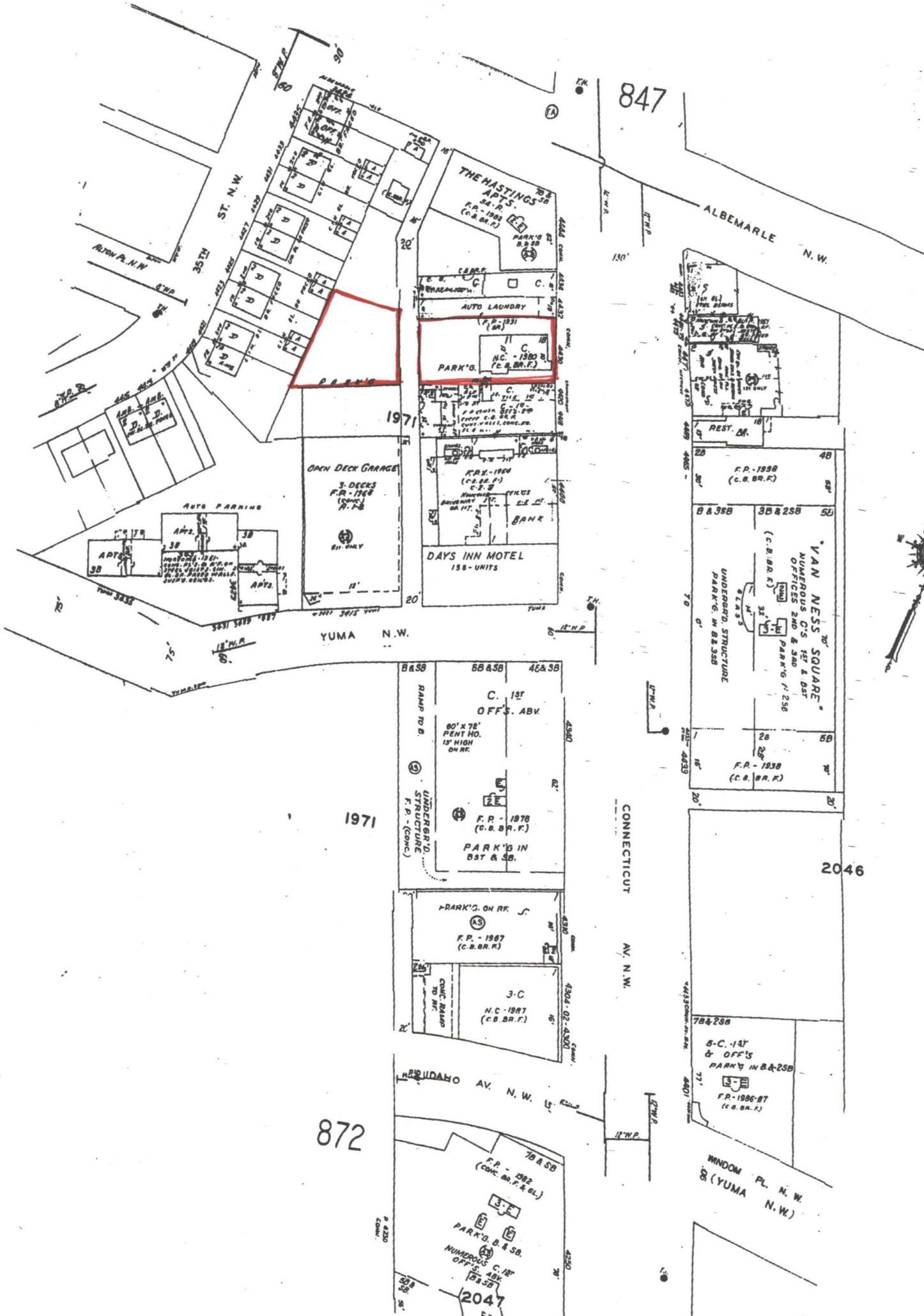



6yd
CARDBOARD ONLY
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8yd
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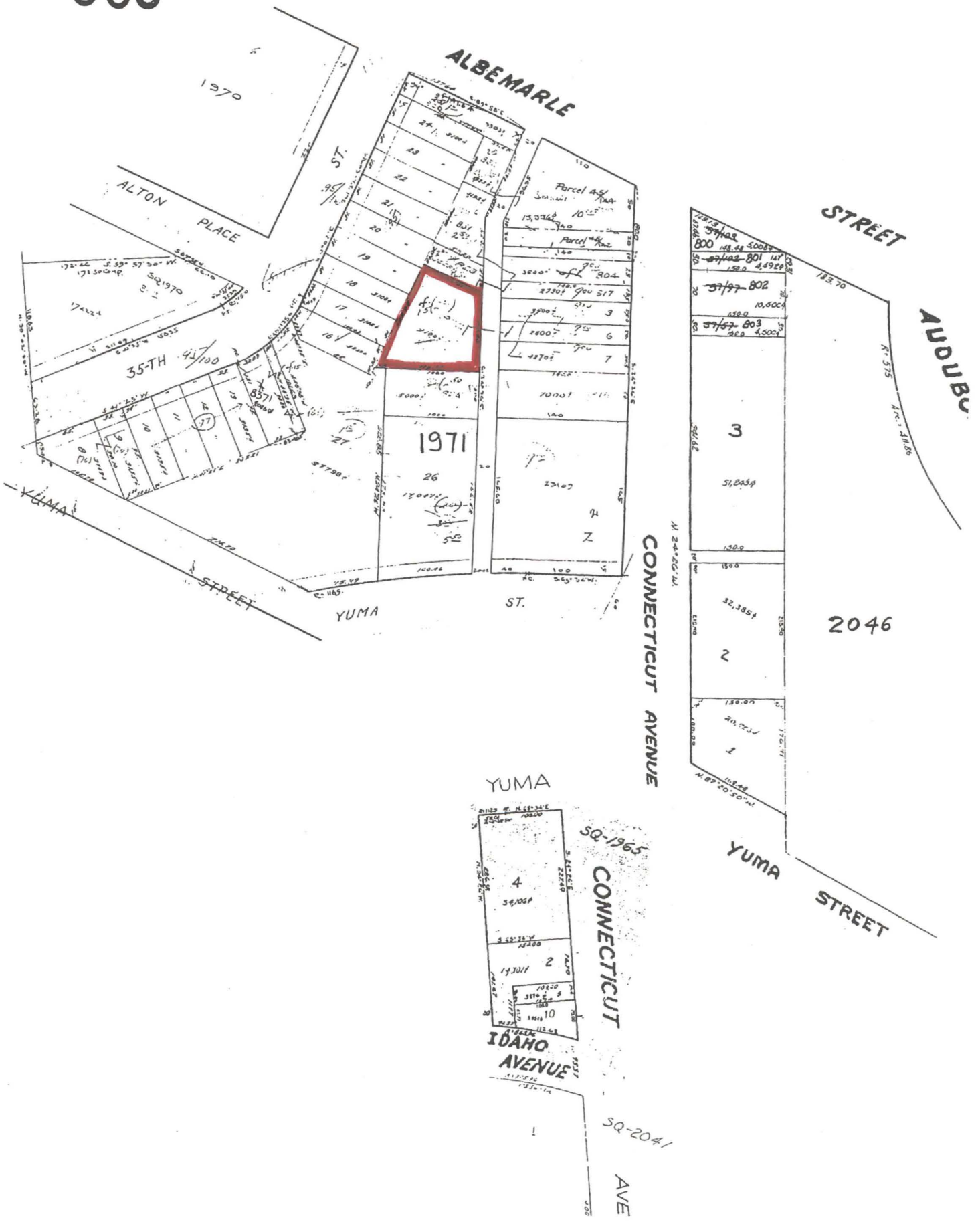

PUBLIC NOTICE
HEARING


SANDYSM

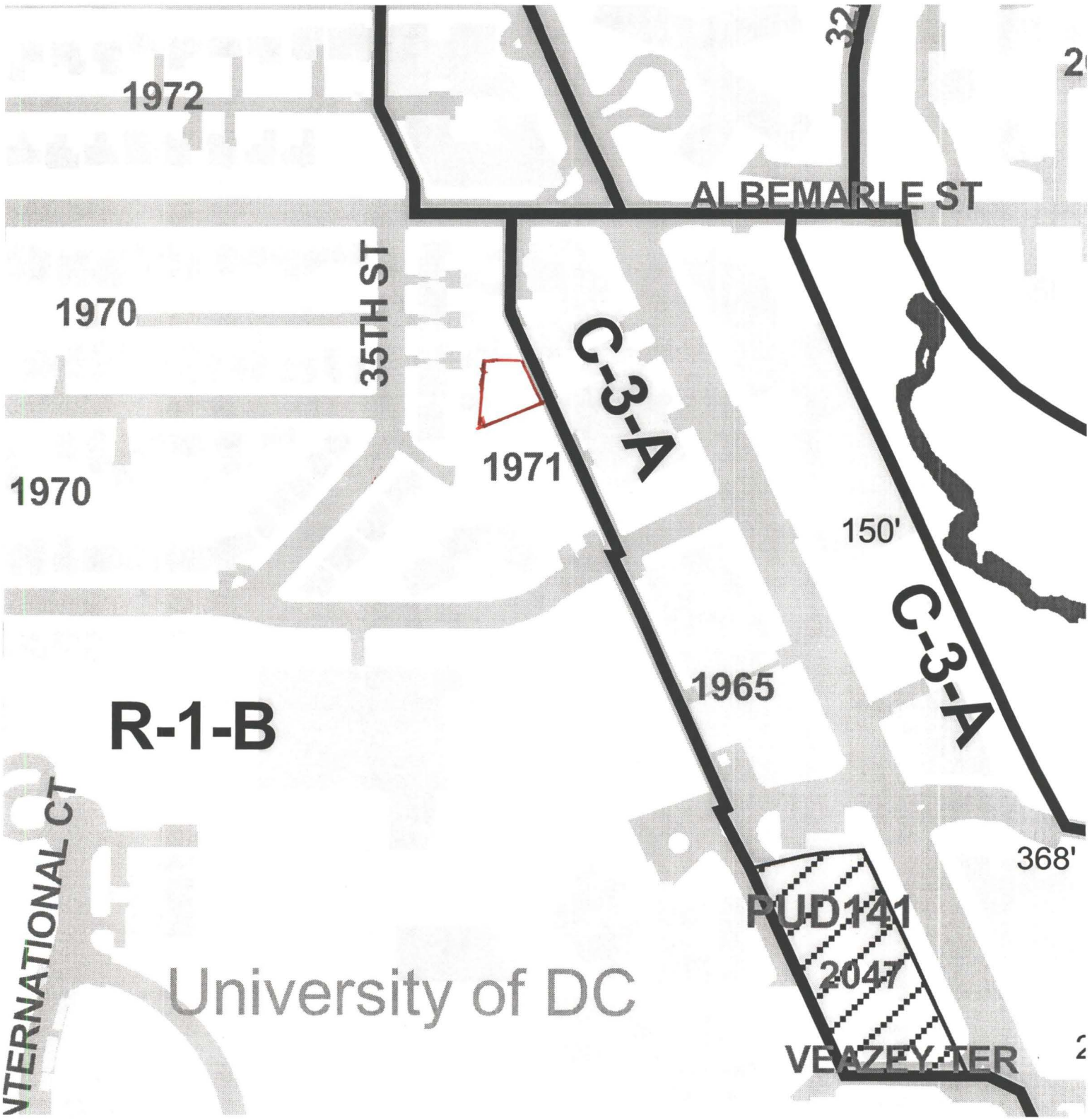
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847
THE HASTINGS APTS.
54-R.
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(C.B.BR.F.)
PARK'G
AUTO LAUNDRY
(F.P.-1931
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C.
NC.-1980
(C.B.BR.F.)
PARK'G.
1971
OPEN DECK GARAGE
3-DECKS
F.R.-1968
(CONC.
R.F.)
AUTO PARKING
APTS.
38
APT.
3B
DAYS INN MOTEL
138-UNITS
BANK
F.P.Y.-1964
(C.B.BR.F.)
C.B.
YUMA N.W.
ALBEMARLE N.W.
REST.
F.P.-1998
(C.B.BR.F.)
B & 3SB
3B & 2SB
"VAN NESS SQUARE"
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PARK'G. IN B & 3SB
F.P.-1938
(C.B.BR.F.)
5B & 4SB
4B & 3B
C. 1ST
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13' HIGH
ON RF.
F.P.-1978
(C.B.BR.F.)
PARK'G IN
BST & SB.
UNDERGR'D.
STRUCTURE
F.P.-(CONC.)
RAMP TO B.
PARK'G. ON RF.
F.P.-1967
(C.B.BR.F.)
3-C
N.C.-1987
(C.B.BR.F.)
CONC. RAMP
TO RF.
CONNECTICUT AV. N.W.
2046
7B & 2SB
5-C.-1ST
& OFF'S
PARK'G IN B & 2SB
F.P.-1986-87
(C.B.BR.F.)
IDAHO AV. N.W.
872
7B & 5B
F.P.-1982
(CONC.BR.F.& EL.)
PARK'G. B. & SB.
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WINDOM PL. N.W.
(YUMA N.W.)

860


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OUTLINE OF TESTIMONY OF
THE REPRESENTATIVE OF THE APPLICANT

I. Continual Use of the Rear Portion of the Property for Accessory Parking Spaces Since 1982

II. Maintenance of the Parking Spaces

III. Landscaping

IV. Community Issues

G

MILLER, BEAM & PAGANELLI, INC.
CONSULTANTS IN ACOUSTICS, VIBRATION & AUDIOVISUAL SYSTEM DESIGN

September 20, 2004

Ashley Horne
Shaw Pittman, LLP
2300 M Street NW
Washington, D.C. 20037

RE: 4422 CONNECTICUT AVENUE BURGER KING NOISE MEASUREMENTS

Dear Ms. Horn:

An acoustical survey was performed at the Burger King at 4422 Connecticut Avenue in Washington, D.C. on September 16, 2004. The purpose of the survey was to measure noise produced by the drive through loudspeaker to determine compliance with Washington, D.C. noise code. A Rion NA-27 real time analyzer was used for the measurements. This instrument complies with ANSI requirements for a type 1 instrument, is under current calibration, and was field calibrated prior to making the measurements. The measurements were made between 8:00 and 9:00 p.m. The weather conditions were warm with no perceptible wind.

Ambient measurements were made along the property lines of the car wash and the residences which were behind the Burger King parking lot. The ambient sound pressure level measured 60 dBA along the car wash property line. The ambient sound pressure level measured 57 dBA at the property line behind the Burger King parking lot. There was light traffic on Connecticut Avenue during the ambient measurements. The noise from traffic dominated the ambient level.

Measurements were made at the same locations along the property lines of the drive through loudspeaker with one car at the loudspeaker placing an order. The sound pressure level measured 62 dBA at the car wash property line and 57 dBA at the residential property line behind the parking lot. The level at the residential property line measured the same as the ambient level. With this level of ambient noise, the loudspeaker was slightly audible at the property line behind the parking lot. It is likely that the loudspeaker level was below the ambient level since the level did not increase behind the parking lot.

Washington, D. C. noise code states a maximum allowable level of 60 dBA for daytime (defined by 7:00 a.m. to 9:00 p.m.) and 55 dBA for noise occurring at nighttime. The noise code also states that measurements should be corrected by taking ambient noise levels into account. According to the noise code, for noise sources that measure within 4 dBA of ambient levels, measurements cannot indicate true source level. Loudspeaker sound levels between 9:00 p.m. and 7:00 a.m. may be more than 4 dBA higher than the ambient level. Since the drive through loudspeaker measurement was very close to the background level, another measurement would

be necessary when background levels are significantly lower to determine the true level of the loudspeaker.

To facilitate an understanding of the measured sound pressure levels, a basic coverage of the principles involved is necessary. Generally, a change of 3 dBA is perceived as slightly noticeable. A change of 6 dBA is generally perceived as clearly noticeable. A 10 dBA change is generally perceived as twice as loud for an increase or half as loud for a reduction by 10 dBA. However, if a change in character of the sound also occurs, although the sound may still be noticeable, it can seem less apparent depending on which frequencies are attenuated. For example, attenuation of high frequencies can result in a noise sounding more distant. Feel free to call regarding any questions on the above measurements.

Sincerely,

Kelton Mitchell

Kelton Mitchell
Consultant