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October 12, 2004

EDWARD L. DONOHUE
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By Hand Delivery

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

Re: Board of Zoning Adjustment Application No. 17211 of NBC to Continue Use of a Broadcast Tower at 4001 Nebraska Ave., N.W. (Square 1722, Lot 1)

Honorable Members of the Board:

On behalf of the applicant in the above-referenced case, enclosed please an original and twenty copies of its prehearing submission in support of the above-referenced application.

Should you have any questions regarding this matter, please do not hesitate to contact me at (202)-419-2455.

Sincerely,

Edward L. Donohue

Enclosure

cc: Advisory Neighborhood Commission 3E (via Hand Delivery; w/enclosure)
Advisory Neighborhood Commission 3C (via Hand Delivery; w/enclosure)
Jennifer Steingasser, Office of Planning (via Hand Delivery; w/enclosure)
Karen Thomas, Office of Planning , (via Hand Delivery; w/enclosure)
Michael Jack; NBC (Via UPS; w/enclosure)
Andrew Fossett, NBC (Via UPS; w/enclosure)
Rachael Manning-Hymel, NBC (Via UPS; w/enclosure)
Chuck Lindner, NBC (Via UPS, w/enclosures)
Whayne S. Quin and Kyrus L. Freeman, Holland & Knight LLP (w/enclosures)

BZA
Case No. 17211
Exhibit No. 24

Board of Zoning Adjustment
District of Columbia
CASE NO. 17211
EXHIBIT NO. 24A1

BEFORE THE BOARD
OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

APPLICATION OF THE NATIONAL BROADCASTING COMPANY

BZA APPLICATION NO. 17211

HEARING DATE: OCTOBER 26, 2004
ANC 3E

STATEMENT OF THE APPLICANT

I.
NATURE OF RELIEF SOUGHT

This statement is submitted on behalf of the National Broadcasting Company (the "Applicant"), the parent company of the owner of property located at 4001 Nebraska Avenue, N.W., Lot 1 in Square 1722 (the "Site") in support of the application to the Board of Zoning Adjustment (the "BZA" or "Board"), pursuant to 11 DCMR §3104.1, for a special exception to permit the continued operation of a broadcasting tower pursuant to Section 211 of the Zoning Regulations at the Site. This application seeks the identical approval from the Board that was most recently granted on January 21, 2004 in BZA case number 15708-A. See BZA Order No. 15708-A, dated January 21, 2004, attached hereto as Exhibit 1.

II.
JURISDICTION OF THE BOARD

The Board of Zoning Adjustment (the "BZA" or "Board") has jurisdiction to grant the special exception relief requested herein pursuant to Sections 211 and 3104 of the District of Columbia Municipal Regulations (the "Zoning Regulations"). 11 DCMR §§211 and 3104.

III.
BACKGROUND

A. Description of the Site and Surrounding Area

The Site is located at 4001 Nebraska Avenue, N.W., also known as Lot 1 in Square 1722. See Sanborn Atlas, attached hereto as Exhibit 2, and Surveyor's Plat, attached hereto as Exhibit 3. The Site consists of approximately 315,810 square feet of land area, and is shaped similar to a baseball diamond. The Site has approximately sixty feet of frontage on Nebraska Avenue. Vehicular access to the Site is from a 310-foot long driveway from Nebraska Avenue.

Square 1722 is located on the east side of Nebraska Avenue between Massachusetts Avenue to the south and Upton Street to the north. The Site is currently improved with a three-story commercial broadcasting facility, two broadcasting towers and 172 on-site parking spaces. The existing office facility totals approximately 180,000 square feet of floor area, which is only approximately 57% of the 312,000 square feet of gross floor area approved by the Board in the Applicant's master plan. The Site is zoned R-1-B. See Zoning Map, attached hereto as Exhibit 4.

The Site is surrounded by a number of institutional uses. See Arial Photograph of Site, attached hereto as Exhibit 5. The U.S. Department of Homeland Security offices are located to the south of the Site. The National Presbyterian Church headquarters and school facilities are located to the immediate north of the Site. To the east of the Site is Glover-Archbold Park followed by property in the C-3-A district and the McLean Gardens residential development in the R-5-A District fronting on Wisconsin Avenue.

B. Prior Zoning History

(i) Initial Approval of Facility and Modifications

Pursuant to Appeal Number ("No.") 4159, which was issued in 1955, the Board granted the Applicant variance and special exception relief to permit the establishment of a studio and office

facilities, and to construct a 459 foot high antenna tower (the "1955 tower") and temporary parking lot on the Site. See Appeal No. 4159, public hearing June 1, 1955, attached hereto as Exhibit 6. In 1959, the Board granted the Applicant a variance to permit the establishment of accessory off-street parking. See Appeal No. 5494, public hearing May 20, 1959, attached hereto as Exhibit 7. The Board subsequently granted a variance to permit the construction of a 16,280 square foot addition to the southern side of the existing office building and to provide an additional 55 parking spaces at the Site. See Appeal No. 8234, public hearing June 16, 1965, attached hereto as Exhibit 8.

The Applicant was also granted approval to construct an 8,140 square foot addition to the addition approved in Appeal No. 8234. See Appeal No. 10120, public hearing August 13, 1969, attached hereto as Exhibit 9. However, due to unfavorable economic conditions and the passage of time, this approval expired and the addition was not built. The Board subsequently reinstated its previous approval to permit a second story addition to the existing offices, and also granted the Applicant permission to locate a temporary office structure on the Site for two years during construction of the addition. See Board Order No. 12011, dated October 22, 1975, attached hereto as Exhibit 10. A two year extension of time for the temporary office structure was approved in BZA Order No. 12539, dated March 7, 1978, and attached hereto as Exhibit 11.

In BZA Order No. 13222, the Board granted the Applicant relief to construct in two phases an addition containing approximately 15,185 square feet in floor area, and to continue use of the temporary office structure for two years from commencement of the proposed new construction. See BZA Order No. 13222, dated July 28, 1980, attached hereto as Exhibit 12. The Board issued this order subject to a condition that no additional applications for the Site would be approved until a master plan for the Site was prepared and submitted for review. Id. at page 8.

(ii) Master Plan Approval

In 1981, the Board approved the Applicant's master plan calling for the construction of additions to the existing studio and office building over a twenty-five year period. See BZA Order No. 13554, dated November 25, 1981, attached hereto as Exhibit 13. The approved master plan, a copy of which is attached hereto as Exhibit 14, envisioned expansion of the Site in three phases, ultimately resulting in a gross floor area of 312,000 square feet, a 322 space parking garage, and the installation of a 659 foot tower structure to replace the original tower. Id. at ¶¶ 10-14. The approved plans indicated that the new tower would be installed on top of a parking garage or deck. The additional height was approved in order to improve broadcast range and capacity. The master plan approval does not expire until November 25, 2006.

(iii) Special Exception Approval Pursuant to §211 of the Zoning Regulations

The tower approved in the master plan was not built. The Site has not been built-out to 312,000 square feet, which was also approved by the master plan. Moreover, the structure upon which the tower approved in the master plan was to have been constructed was never erected because the Applicant obtained additional parking at a nearby location. Thus, the Applicant applied for, and obtained a permit to construct a new 657 foot tower in 1988 (the "1988 tower") in the general location approved by the master plan. See Building Permit Number B334281, dated October 13, 1988, attached hereto as Exhibit 15. The 1955 tower was not removed. The 1988 tower was built on an equilateral triangular base, having footing separation of 60 feet instead of the approved 90 feet. The 1955 tower and the 1988 tower combined have a bulk of approximately 50 percent of the bulk approved for the larger tower set forth in the master plan.

In 1992, the Applicant filed an application pursuant to Section 211 of the Zoning Regulations seeking modification of the previous master plan approval to permit the continued use

of the 1955 tower. The Board held public hearings on the application and voted in February 1993 to grant the special exception. However, the Board did not issue its written decision until December 1994, by which time three of the four-member majority had been out of office for over a year because their terms had expired. An appeal was brought to the District of Columbia Court of Appeals (the "Court") based in part on this procedural defect. The Board then requested that the Court remand the case so its current Board members could consider the application on the merits. The Court granted the Board's motion and issued an order remanding the application to the Board for further proceedings.

By Order dated January 21, 2004, the Board granted the Applicant's request to continue usage of the 1955 tower. See BZA Order No. 15708-A, dated January 21, 2004, attached hereto as Exhibit 1. The Board concluded that the Applicant satisfied each element of Section 211. Moreover, the Board found that continuance of the 1955 tower is consistent with the intent of the original master plan and that the master plan approval should be modified to permit continued use of the 1955 tower. Specifically, the Board stated:

> The combined volume or bulk of the two towers is well within the approved envelope of the master plan. The purpose of the 1981 master plan was to plan for the future needs and probable physical development for the NBC facility. The master plan set forth the basic design and scope of three phases of contiguous physical expansion. The 1955 tower covered an area of 390 square feet and had a volume of 59,670 cubic feet. The 1988 tower covered an area of 1,560 square feet with a volume of 342,680 cubic feet. The master plan, on the other hand, provided for a tower that would be 3,510 square feet in coverage and would have a volume of 771,030 cubic feet. Thus, the master plan envelope for the tower was almost twice as large as the combined area and volume of the two existing antenna towers.
>
> The Board is persuaded that continuance of the 1955 tower would actually result in less impact on the surrounding neighborhood than if the master plan tower were constructed. The master plan tower would have larger structural members, 18 inches to 24 inches in width, and would be closer to Glover-Archbold Park than the other

two towers. In addition, the master plan tower would have greater load bearing capacity, most likely resulting in larger and more antennas than the 1955 tower.

BZA Order No. 15708-A at ¶¶ 20-21.

C. Compliance with Conditions of Board Order Number 15708-A

As discussed above, the Board issued Order No. 15708-A subject to a number of conditions. The Applicant complies with each of the conditions, as outlined below:

- Condition #1: Approval shall be until December 1, 2004, as intended by the previous Board at the time it deliberated on this case.

This condition does not require any action by the Applicant. However, the Applicant has filed the current application, which seeks the identical approval previously granted by the Board, in order to make the approval permanent.

- Condition #2: The applicant shall grant the National Park Service a permanent scenic easement of a portion of the site consistent with Exhibit No. 48 of the record.

The Applicant and the NPS have negotiated a "Deed of Easement," pursuant to which the Applicant grants a permanent scenic easement interest in a portion of the Applicant's property. The parties have negotiated all of the essential elements of the Deed of Easement and are in the process of finalizing the document. The Deed of Easement will be recorded among the land records of the District of Columbia.

- Condition #3: The applicant shall repaint the 1955 tower a color subject to the approval of the National Park Service.

The Applicant repainted both the 1955 tower and the 1988 tower a muted-gray tone in 1992. This repainting was approved by both the Federal Aviation Administration and the Federal Communication Commission. See Correspondence regarding repainting of towers, attached hereto as Exhibit 16. The NPS also approved the repainting of the 1955 tower, and will be submitting a letter to this effect prior to the hearing on this application.

- Condition #4: The Applicant shall establish and maintain a Community Liaison/Advisory Council which shall meet with the neighborhood representatives upon the request of Advisory Neighborhood Commissions 3E and 3C. The applicant's General manager or his/her designee(s) shall provide any relevant information about their operations upon request, including but not limited to information regarding use of the broadcast towers, real property improvements, parking and traffic issues, or community outreach efforts. The applicant shall also provide upon request information regarding its intentions to seek any licenses or approvals required by any agencies of the Federal or District of Columbia governments regarding station operations. The applicant's General Manager shall use his/her best efforts to establish an on-going dialogue with the operators of other broadcast facilities within the boundaries of Advisory Neighborhood Commissions 3E and 3C.

The Applicant met with both Amy McVey, Chair of ANC 3E, and with Nancy MacWood, Chair of ANC 3C, on separate occasions in June to begin planning the formation of the Community Liaison/Advisory Council. Since these initial meetings, the Applicant has been in continual communications with both ANC's about how best to form the Community Liaison/Advisory Council and who would constitute its membership. Commissioner Amy Hoang of ANC 3E is the designated representative for ANC 3E, and Commissioner Trudy Reeves of ANC 3C is the designated representative for ANC 3C. The Applicant expects to have a meeting with the ANC designees at a mutually agreed upon date and time to finalize formation of the Community Liaison/Advisory Council. Further, although the ability of the Applicant's General Manager to maintain an on-going dialogue with operators of other broadcast facilities within the boundaries of Advisory Neighborhood Commissions 3E and 3C is limited due to anti-trust concerns, the General Manager does speak to operators of such other broadcast facilities on occasion, regarding matters of a non-competitive nature.

IV.
THE APPLICANT MEETS THE TEST FOR SPECIAL EXCEPTION RELIEF TO CONTINUE USAGE OF THE BROADCAST TOWER

A. Standard for Approving Special Exception Relief.

Pursuant to Section 211 of the Zoning Regulations, the Board may permit the use of commercial broadcast towers subject to the conditions discussed below. Moreover, the Board is authorized to grant special exceptions as provided in the Zoning Regulations where, in the Board's judgment, two general tests are met, and the conditions of the particular exception are met. First, the requested special exception must "be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps." 11 DCMR §3104.1. Second, it must "not tend to affect adversely, the use of neighboring property in accordance with the Zoning regulations and Zoning Map." 11 DCMR §3104.1.

Relief granted through a special exception is presumed appropriate, reasonable and compatible with other uses in the same zoning classification, provided the specific regulatory requirements for the relief requested are met. In reviewing an application for special exception relief, "[t]he Board's discretion ... is limited to a determination of whether the exception sought meets the requirements of the regulations." *First Baptist Church of Washington v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 695, 701 (D.C. 1981) (*quoting Stewart v. District of Columbia Board of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)). If the applicant meets its burden, the Board must ordinarily grant the application. Id.

B. Compliance with Section 211

Section 211 of the Zoning Regulations provides that the Board may permit the use of an antenna for commercial broadcasting subject to a number of conditions. As discussed below, the Applicant meets each of these conditions, and thus satisfies the requirements of Section 211.

(i) The proposed location, height, and other characteristics of the antenna shall not adversely affect the use of neighboring property.

The 1955 tower is setback from the lot lines and neighboring properties a substantial distance. The tower is setback approximately 600 feet from Nebraska Avenue and approximately 200 feet from the Glover-Archbold Park. The 1955 tower currently has an approximate height of 443 feet, which is 200 feet lower than the 1988 antenna tower. Further, the height of the tower is much less than that permitted under the Board's previous master plan approval. As the Board has recognized, the 1955 tower covers an area of 390 square feet and has a volume of 59,670 cubic feet. The 1988 tower covers an area of 1,560 square feet with a volume of 342,680 cubic feet. The master plan, on the other hand, provides for a tower that would be 3,510 square feet in coverage and would have a volume of 771,030 cubic feet. Thus, the Board approved a master plan tower that would be approximately twice as large as the combined area and volume of the two existing antenna towers. The continued use of the tower will not result in an increase in office space, number of employees, vehicular or pedestrian traffic, or the establishment of other commercial uses on the Site.

Federal law regarding RF emissions preempt the establishment of local standards concerning RF emissions. Part 1 of the FCC's Rules and Regulations contains provisions implementing the National Environmental Policy Act of 1969 (NEPA). NEPA requires all federal agencies to evaluate the potential environmental significance of an agency action. Exposure to RF energy has been identified by the FCC as a potential environmental factor that must be considered before a facility, operation or transmitter can be authorized or licensed. The FCC's requirements dealing with RF exposure can be found in Part 1 of its rules at 47 C.F.R. § 1.1307(b). The exposure limits themselves are specified in 47 C.F.R. § 1.1310 in terms of frequency, field strength, power density and averaging time. Facilities and transmitters licensed and authorized by the FCC must

either comply with these guidelines or else an applicant must file an Environmental Assessment (EA) with the FCC as specified in 47 C.F. R. § 1.1301 *et seq.*

The Applicant has recently certified to the FCC that the Site complies with the maximum permissible radiofrequency electromagnetic exposure limits for controlled and uncontrolled environments. See Application For Renewal of Broadcast Station License, attached hereto as Exhibit 17. Moreover, Robert Denny of Denny and Associates has conducted an RF survey of the Site and his final report, which will be submitted prior to the hearing on this application, will show that the levels of RF exposure on the Site fall well below the FCC mandated levels for maximum permitted exposure, and thus do not pose a health or safety risk. Thus, the continued use of the tower will not adversely affect the use of neighboring property.

(ii) The antenna shall be mounted in a location that minimizes to the greatest practical degree its visibility from neighboring property and from adjacent public space, or that is appropriately screened by landscaping or other techniques so as to soften or minimize the visibility of the antenna.

Visibility of the 1955 tower is minimized as a result of the generous setbacks, landscaping and existing vegetation on the Site. The muted gray painting of the tower helps the tower blend with the skyline. The FCC, FAA and National Park Service have approved the painting of the tower. See Exhibit 16. In photos taken of the Site from various locations, it is clear that the original smaller tower is mounted in a location which minimizes its visibility. See Photographs of Site, attached hereto as Exhibit 18. It is also appropriately screened by landscaping as shown on the photographs. Moreover, the 1955 tower is located near the rear of the Site, which is closer to the surrounding institutional uses and Park Service land than to residential uses.

The height of the tower does not exceed that which is reasonably necessary to render satisfactory service. The 1955 tower supports a variety of transmitting and receiving antennas. There are multiple antennas for radio and TV transmission, microwave reflectors, flat panel

antennas and 2-way radio antennas. At the time that the Board reviewed and approved the master plan, it acknowledged that the original tower had limited space and thereby approved an additional 200 feet of vertical height in Expansion Phase II so as to satisfy future requirements to transmit over physical obstructions. See Exhibit 13. The retention of the 1955 tower is essential to service the community and for the effective operation of the Applicant.

(iii) Each part of the ground-mounted commercial broadcast antenna, including support system and guy wires, shall be removed a minimum of ten feet (10 ft.) from each lot line or a distance of at least one-sixth of the mounted height of the antenna, whichever is greater.

The 1955 tower is self-supporting and does not have guy wires. The 1955 tower currently measures approximately 443 feet in height, which yields a minimum required setback of approximately seventy-five feet from the lot line. The 1955 tower is at least 120 feet from the nearest property line, and thus exceeds the required setback.

(iv) The proposed height of the tower shall not exceed that which is reasonably necessary to render satisfactory service to all parts of its service area.

The height and continued use of the 1955 tower is critically needed for the Applicant to render important services to all parts of its service area. The tower is used by several providers of news programs throughout the area, the nation, and the world. The space on the tower is occupied by antennae that are critical to the operation of TV stations. Moreover, there are currently antennas on the 1955 tower used by the federal government, the D.C. police, and fire emergency response personnel. Interruption of service would adversely affect these tower tenants and the Applicant. Finally, technology is changing rapidly and additional antenna space is likely to be required in communication operations. The Applicant needs the flexibility to adapt to such unanticipated changes and to provide antenna space for other companies and agencies to do the same in order to better serve the community.

(v) No transmission equipment shall be located in a Residence District, unless location in the district is necessary to render satisfactory and reasonably economical transmission.

The continued use of the broadcast tower is necessary for technically satisfactory and economic transmission and is critically needed by the Applicant for operation and economic viability. Continued operation of the 1955 tower enables live news coverage of events in places in central Washington. Moreover, several significant technological developments have occurred since the erection of the 1988 tower. The FCC has said that every television station must convert from the existing analog broadcast standard to a new high definition digital system for broadcast. The FCC has licensed an additional channel to every existing television station, requiring stations to build a new transmitting facilities for high definition television on the new additional channel. At some undetermined future time stations will turn off their old analog channels, but stations will be broadcasting on their old analog channel and the new high definition digital channel simultaneously for a number of years. This means that every television station must use at least one additional television antenna while continuing to use its existing antennas.

The loss of the 1955 tower would be a severe hardship to the Applicant and to tenants of the tower. For instance, denial of the current application would require Channel 14, which is the only full-power Spanish language television broadcaster in the Washington area, to either relocate to another tower or move to the Applicant's 1988 tower and broadcast at a lower power from a lower elevation, and thus render impaired service to their viewership. Also, WKYS-FM, a locally-owned radio station in an industry dominated by national conglomerates, would lose the reliability and continuity of service permitted by their locations on both the 1955 and 1988 towers.

The high definition decision of the FCC increases the severity of that hardship. The amount of tower space in Washington that accommodates television antennas is extremely limited. Allowing the Applicant to use the small tower to help defray the immense costs of implementing

high definition makes this station more financially viable at no detriment to the Washington community.

While it is true that revenues are derived from tower leasing activities on the part of station owners such as the Applicant, such revenues are returned to the community through job creation and maintenance, and public service activities such as community interest programming and events (a representative listing of which is attached hereto as Exhibit 19). Absent the revenues from the tower leasing activities, the Applicant would likely be forced to curtail its operations, which would increase the possibility of layoffs, and a reduction in public service programming.

(vi) If review by the Historic Preservation Review Board or Commission of Fine Arts is required, concept review and approval shall occur before review by the Board of Zoning Adjustment.

This review is not required. Therefore, this condition is inapplicable.

(vii) No height of an antenna tower in excess of that permitted by the Act to Regulate the Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452, as amended; D.C. Official Code §§ 6-601.01 to 6-601.09 (formerly codified at D.C. Code §§ 5-401 to 5-409 (1994 Repl. & 1999 Supp.))), shall be permitted, unless the height is approved by the Mayor.

The height of the tower was previously approved by the District.

(viii) Before taking final action on an application for use as an antenna tower, the Board shall submit the application to the D.C. Office of Planning for review and report.

The Applicant has discussed its application with the Office of Planning. The Office of Planning will submit a report on the application a minimum of seven days before the public hearing on the application.

(ix) The Applicant shall have the burden of demonstrating the need for the proposed height, and that full compliance with the matter-of-right standards would be unduly restrictive, prohibitively costly, or unreasonable.

Matter of right standards would permit only one ground mounted antenna not to exceed a height of 12 feet at its highest point (See Sections 201.2 – 201.5 of the Zoning Regulations). As discussed above, the height and continued use of the 1955 tower is critically needed for the Applicant to render important services to all parts of its service area. The Applicant meets each element for special exception approval. Moreover, the Board's issuance of Order No. 15708-A in 2004 permitting the continued use of the 1955 tower indicates that compliance with the matter of right standard would be unduly restrictive and unreasonable. The Applicant is entitled to rely on the previous approvals and continue the previously approved usage because nothing has changed since the issuance of the Order.

C. Compliance with 11 DCMR §3104.1

Continuation of the 1955 tower is in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps. The broadcast facility and tower have been operating at the Site since 1955 and have been subject to periodic special exception review since that time. The 1955 tower has been compatible with the surrounding neighborhood and has not adversely affected the use of neighboring properties. To date, the Applicant has not received any complaints from its neighbors regarding use of the 1955 tower.

The 1955 tower has a minimal impact on the neighborhood from a visual standpoint. First, the 1955 tower is setback from the lot lines in excess of the Zoning Regulations, and is setback a distance of approximately 600 feet from Nebraska Avenue and approximately 200 feet from the Glover-Archbold Park. The Applicant has granted the National Park Service a scenic easement that will run with that land to ensure the views from Glover-Archbold Park will not be diminished. Moreover, the National Park Service supports the continued use of the 1955 tower. Second, the overall size of the 1955 tower, even when combined with the 1998 tower, is much less than that

permitted under the Board's previous master plan approval. The master plan approved by the Board provided for a tower that would be 3,510 square feet in coverage and would have a volume of 771,030 cubic feet. However, the 1955 tower covers an area of 390 square feet and has a volume of 59,670 cubic feet, and the 1988 tower covers an area of 1,560 square feet with a volume of 342,680 cubic feet. Thus, the master plan envelope for the tower is almost twice as large as the combined area and volume of the two existing antenna towers. Third, the tower is painted a muted gray, which helps to minimize its visibility. The National Park Service has approved this color. Finally, in addition to the large setback from residential areas, views of the base of the 1955 tower are further reduced since the Site is extensively landscaped and there is significant vegetation on the Site.

Continuation of the use of the 1955 tower will not result in increased density or traffic. The continued use of the 1955 tower will not result in an increase in office space, number of employees, vehicular or pedestrian traffic, or the establishment of other commercial uses on the Site. Finally, continued use of the 1955 tower will not result in any harmful health or safety concerns, which are regulated by the FCC.

V.
MEETINGS WITH THE COMMUNITY

The Applicant has worked with the community in an effort to obtain their support. Specifically, at its regularly scheduled meeting of September 9, 2004, the Applicant met with Advisory Neighborhood Commission ("ANC") 3E, the affected ANC, and discussed the Applicant's application. Moreover, on September 13, 2004, the Applicant met with the Planning and Zoning Committee of ANC 3C to discuss the application. The Applicant met with the full ANC 3C and did an additional presentation on Monday, September 20, 2004. ANC 3E is expected

to vote on the Applicant's application at its October 14th meeting, and ANC 3C is expected to vote on the application at its October 18th meeting.

On June 9, 2004, the Applicant had a very productive meeting with representatives of the National Park Service at the Site. The Park Service supports the current application and will be submitting a letter to this effect prior to the hearing. The Applicant has also received letters of support for this application from tenants of the 1955 tower. See Letters of Support, attached hereto as Exhibit 20.

VI.
EXHIBITS SUBMITTED IN SUPPORT OF THE APPLICATION

Exhibit 1:	BZA Order No. 15708-A, dated January 21, 2004
Exhibit 2:	Portion of the Sanborn Atlas showing the Site highlighted in yellow;
Exhibit 3:	Surveyor's Plat of the Subject Property
Exhibit 4:	A portion of the Zoning Map showing the Site highlighted in yellow;
Exhibit 5:	Arial Photograph of Site
Exhibit 6:	Appeal No. 4159, public hearing June 1, 1955
Exhibit 7:	Appeal No. 5494, public hearing May 20, 1959
Exhibit 8:	Appeal No. 8234, public hearing June 16, 1965
Exhibit 9:	Appeal No. 10120, public hearing August 13, 1969
Exhibit 10:	Board Order No. 12011, dated October 22, 1975
Exhibit 11:	BZA Order No. 12539, dated March 7, 1978
Exhibit 12:	BZA Order No. 13222, dated July 28, 1980
Exhibit 13:	BZA Order No. 13554, dated November 25, 1981
Exhibit 14:	Master Plan (Approved pursuant to BZA Order No. 13554)
Exhibit 15:	Building Permit Number B334281, dated October 13, 1988
Exhibit 16:	Correspondence regarding repainting of towers

Exhibit 17: Application For Renewal of Broadcast Station License

Exhibit 18: Photographs of Site

Exhibit 19: Description of the Applicant's public service activities

Exhibit 20: Letters of Support

Exhibit 21: Outline of Testimony of Michael Jack

Exhibit 22: Outline of Testimony of Chuck Lindner

Exhibit 23: Outline of Testimony of Robert Denny

VII.
WITNESSES

A. Michael Jack, NBC

B. Chuck Lindner, NBC

C. Robert Denny, Denny and Associates

VIII.
CONCLUSION

For the reasons stated above, the requested relief meets the applicable standards for special exception relief under the Zoning Regulations. Accordingly, the Applicant respectfully requests the Board to grant the application.

Respectfully submitted,

HOLLAND & KNIGHT, LLP

By: _____
Whayne S. Quin

By: _____
Edward L. Donohue

By: _____
Kyrus L. Freeman*

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who are members of the D.C. Bar

 # 2315296_v1

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 15708-A of the National Broadcasting Corporation, pursuant to 11 DCMR 3108.1, for a special exception under Section 211 to modify a condition of the Board's previous Order No. 13554 to continue to operate a commercial broadcasting tower in an R-1-B District at premises 4001 Nebraska Avenue, N.W. (Square 1722, Lot 1).

HEARING DATES: September 23, 1992 and December 16, 1992
DECISION DATES: January 6, 1993, February 3, 1993, October 7, 2003

PROPOSED DECISION AND ORDER ON REMAND

Beginning in 1955, the Board of Zoning Adjustment (the Board) granted permission to the National Broadcasting Corporation (NBC) to operate a broadcast studio office building with an antenna tower and parking. After the initial 1955 approval, NBC filed a series of applications with the Board and was granted permission to make various changes at the site, including permission to replace the original antenna tower with a new one. NBC constructed a new tower in 1988 but also continued to use the original tower. In 1992, NBC applied to the Board for special exception approval to continue the use of the original 1955 tower.

The Board held public hearings on the application and voted in February 1993 to grant the special exception. However, the Board did not issue its written decision until December 1994, by which time three of the four-member majority had been out of office for over a year because their terms had expired. An appeal was brought to the District of Columbia Court of Appeals based in part on this procedural defect. The Board then requested the Court to remand the case so its current Board members could consider NBC's application on the merits. The Court granted the Board's motion and issued an order remanding the application to the Board for further proceedings. The present members of the Board have reviewed the entire administrative record, including the public hearing transcripts. Based upon its review of the record, the Board adopts the substance of the previous decision and order, as set forth below. This decision and order is based solely upon the record as it existed on December 16, 1992, the date upon which the record was closed.

Government Report Submissions

Office of Planning (OP) Report. OP recommended approval of this application, concluding that the applicant met the requisite burden of proof under Section 211 of the

Zoning Regulations. The report concluded that the tower is necessary to adequately serve the needs of the applicant and the community and that it would not adversely impact the neighborhood. The report analyzed the history of the tower and other approvals by the Board and recognized that a number of technological changes have taken place that make it necessary for the applicant to continue using the smaller tower.[1] These changes include the District of Columbia Police Department usage as well as other future needs such as the high definition television requirement of the Federal Communications Commission. OP pointed out that the site is large and surrounded by institutional uses and noted the deep set backs for the antenna.

National Park Service Report The National Park Service recommended that the application be denied, contending that the 1955 tower, painted orange and white, would adversely impact Glover-Archbold Park and other parks and vistas throughout the District of Columbia. The principal objection of the Park Service was its understanding that a new tower would "replace" the older tower. The Park Service recommended that all of the devices on the tower should be painted black to match the color on the present black tower. In response, the applicant proffered that it would: (a) repaint the lower tower as necessary using a paint that would blend with the skyline and would be subject to FAA and FCC approval, and (b) dedicate a permanent scenic easement to the Park Service for a portion of the site.

ANC Reports

Advisory Neighborhood Commission (ANC) 3E ANC 3E supported the requested special exception, noting the following: The preexisting lower antenna is adjacent to the newer and taller antenna, both of which are substantially set back from all property lot lines. The applicant and its representatives have been good neighbors making positive contributions to the community in many areas. No complaints concerning the operation of the station or the antenna towers have been received. No evidence suggests that the continuation of the tower would intensify in any way the existing operation of the station either as to the number of people or amount of traffic, pedestrian or vehicular. The applicant's representatives represented that they will continue to provide a close liaison with the ANC. The subject grounds are carefully maintained and screened from surrounding property. The subject tower is reasonably necessary for the satisfactory and economic transmission and maintenance of the facility. The preexisting antenna tower serves the District of Columbia police and other important users. It appears that the newer antenna tower could not structurally support the antennas that are used on the lower tower. Interruption of service would have a severe and adverse impact on the facility.

[1] Many of the findings of fact in this decision are based upon the state of technology as it existed in 1992 when the administrative record was closed. Obviously, much has changed since then.

Advisory Neighborhood Commission (ANC) 3C ANC-3C opposed the special exception, noting the following: The case should be considered as a variance rather than as a special exception. The tower is unnecessary for NBC's operations. The tower intensifies the commercialization of NBC's site. The potential health hazards must be weighed against the necessity for the additional antennas. The tower is visually obtrusive. The tower, with its many additional antennas, will increase radio interference problems experienced by neighboring property users. There is nothing about the site that constitutes an exceptional situation, creating a hardship, that warrants relief. The tower is inconsistent with the zoning regulations applicable to the area, and would adversely affect the use of neighboring property.

FINDINGS OF FACT

The Property

1. The property is located on the east side of Nebraska Avenue between Massachusetts Avenue to the south and Upton Street to the north, and is known as premises 4001 Nebraska Avenue, N.W. It is zoned R-1-B.

2. The site consists of 315,810 square feet or 7.25 acres in land area. It has 60 feet of street frontage on Nebraska Avenue. The site is shaped somewhat like a baseball diamond. Vehicular access for the site is from a 310-foot long driveway from Nebraska Avenue. There is a 222-car parking lot on the site. An additional 144 spaces are provided on the adjacent site of the National Presbyterian Church. The site is developed with a two-story brick structure and a radio tower. A ground floor plus two-story addition is currently being constructed on the site. The existing structure totals approximately 124,000 square feet of floor area.

3. To the south of the subject site is the U.S. Naval Security Station with its communication facilities, including a large antenna and other miscellaneous structures close to Glover-Archbold Park. To the north of the site is the National Presbyterian Church headquarters and school facilities. The site is located in an R-1-B District. To the east of the site is Glover-Archbold Park followed by property in the C-3-A District and the McLean Gardens residential development in the R-5-A District fronting on Wisconsin Avenue.

Pertinent Zoning History

4. The Board first granted a use variance to NBC to establish an office building, and special exceptions to establish an office building with parking and a broadcast studio with tower (Appeal No. 4159, public hearing June 1, 1955). Later, following a change in the Zoning Regulations, the Board granted a use variance to

permit continuation and enlargement of accessory parking facilities (Appeal No. 5494).

5. In BZA Appeal No. 8234, dated June 16, 1965, the Board granted a use variance to permit an addition to the office building established under Appeal No. 4159. The existing building then contained 91,370 square feet and the addition provided an additional 16,280 square feet.

6. In Appeal No. 10120, dated November 16, 1979, the Board granted the applicant a use variance to permit a second floor addition to the addition permitted under Appeal No. 8234. That addition would have contained a floor area of approximately 8,140 square feet. However, the second floor addition was not constructed at that time and the Board approval for it expired.

7. In Appeal No. 12011, the Board reinstated Order No. 10120 and also granted permission to locate a temporary office structure at the property during the period of construction of the proposed second floor addition. To alleviate its continuing space concerns, NBC sought and obtained a two year extension of time for the temporary office structure (BZA Order No. 12539, dated March 7, 1978).

8. In Application No. 13222 dated July 28, 1980, the Board granted the applicant a use variance to permit a ground floor plus two-story addition to the existing structure. As a condition of approval and prerequisite to future zoning relief, the applicant was required to submit a proposed "master plan" for future development of the site.

9. NBC presented a proposed master plan to the Board with Application No. 13554 in
which it sought approval for additions to the broadcast studio and office building, including a new antenna tower.

10. On November 25, 1981, the Board approved the additions and master plan, subject to the following conditions:

    a. The additions shall be phased and constructed in accordance with the master plan marked as Exhibit No. 10 of the record.

    b. The applicant shall secure the approval of the Director of the National Capital Region of the National Park Service for the proposed storm water drainage into Glover-Archibold Park.

11. The Board's opinion, reflecting the proposed master plan, noted that, in the future, a new larger tower structure would be installed on top of a parking garage or deck

to improve broadcast range and capacity, and the larger tower would "replace" the existing 1955 tower.

12. The new larger tower was constructed in 1988 in the general location approved by the master plan, but the 1955 tower was never removed. The garage or parking deck upon which the 1988 tower was to have been constructed was never erected because NBC obtained additional parking at the nearby National Presbyterian Church and its adjoining parking lot.

13. The 1988 tower was built, instead, on an equilateral triangular base, having footing separation of 60 feet instead of the approved 90 feet. The 1955 tower and the 1988 tower combined have a bulk of approximately 50 percent of the bulk approved for the larger antenna set forth in the master plan.

14. By letter dated February 25, 1992, the Zoning Administrator notified the applicant that under BZA Order No. 13554, the 1955 tower was to have been replaced by the 1988 tower. The Zoning Administrator advised the applicant to either remove the 1955 tower or seek special exception approval allowing it to remain. The applicant filed this application seeking modification of the previous master plan approval to permit the continued use of the 1955 tower.

The Special Exception Application

15. The two antenna towers are set back from the lot lines to conform to the Zoning Regulations, and are set back a distance of approximately 600 feet from Nebraska Avenue and approximately 200 feet from Glover-Archbold Park. The 1955 tower has an approximate height of 459 feet, a height which is 200 feet lower than the 1988 antenna tower. This height was approved by the District government during the 1955 permit process under the Act to Regulate the Height of Buildings in the District of Columbia (36 Stat. 452, as amended; D.C. Official Code §§ 6-601.01 through 6-601.09). During prior proceedings the Board found this height to be reasonably necessary to render satisfactory service, and this Board adopts that particular finding based upon testimony by the applicant. The 1955 tower is approximately 30 feet from the 1988 tower at the closest point. Each part of the ground mounted antenna tower is set back a minimum of 10 feet from each lot line or a distance of at least 1/6 of the antenna height. The 1955 tower is not located within close proximity to the neighboring residential properties.

16. The 1955 tower has a minimal impact on the neighborhood from a visual standpoint. The 1955 tower is in a location which minimizes, to the greatest practical degree, its visibility from neighboring properties by virtue of its proximity to the newer tower and its main building. Set backs are provided from all property lines substantially more than is required under the Regulations. The

site has been extensively landscaped and the visibility of the 1955 tower has been minimized. The visual obtrusiveness of the two towers together represents a minor skyline protrusion and the height of both towers is much less than permitted under the Board's previous master plan approval. The 1955 tower is set back from residential areas at substantial distance and is visually shielded by distance, existing vegetation and the existing larger tower.

17. Continuation of the 1955 tower will not result in adverse impacts to the community with respect to increased density or traffic. The commercialization of the site will not be increased by a continuation of the 1955 tower and will not result in an increase in office space, number of employees, vehicular and pedestrian traffic or the establishment of other commercial uses on the site. The Board also finds that the continued use of the antenna tower will not increase existing radio interference problems, if any.

18. Continuation of the 1955 tower will not result in adverse impacts on the neighborhood stemming from the electromagnetic effects of the tower. Antennas located on the tower are licensed by the Federal Communications Commission, and the applicant has complied with all requirements of the Federal Communications Commission regarding safety of radio frequency broadcasts. In addition, the Board adopts the finding proffered by the applicant's expert engineer; i.e.: that the electromagnetic frequency is within recommended industry guidelines. The American National Standard Institutes recommended standard for impact is 1,000 microwaves per square centimeter (UM/CM2). The applicant's engineering consultant, Smith and Powstenko, noted that the maximum ground level power intensity from the main WRC/TV facility is .0014 MW/CM2 which would fall at a location 69 meters from the tower base. This ground level power was likened to something less than would occur with a child's walkie-talkie transmitter.

19. With respect to the alleged health hazards stemming from the electromagnetic frequencies, the Board is not persuaded by the evidence or arguments presented by the opposition. While the record contains articles concerning the purported hazards of electromagnetic frequencies, the claims within these articles were neither persuasive nor applicable to either of the towers in this case. The Board is more persuaded by the applicant's testimony that the power generation on the site is negligible, representing a minute portion of that which is allowed under applicable laws.

20. The Board is persuaded that the continuance of the 1955 tower along with the new tower is consistent with the intent of the original master plan and the approval based upon the master plan should therefore be modified to permit its continuation. The combined volume or bulk of the two towers is well within the

approved envelope of the master plan. The purpose of the 1981 master plan was to plan for the future needs and probable physical development for the NBC facility. The master plan set forth the basic design and scope of three phases of contiguous physical expansion. The 1955 tower covered an area of 390 square feet and had a volume of 59,670 cubic feet. The 1988 tower covered an area of 1,560 square feet with a volume of 342,680 cubic feet. The master plan, on the other hand, provided for a tower that would be 3,510 square feet in coverage and would have a volume of 771,030 cubic feet. Thus, the master plan envelope for the tower was almost twice as large as the combined area and volume of the two existing antenna towers.

21. The Board is persuaded that continuation of the 1955 tower would actually result in less impact on the surrounding neighborhood than if the master plan tower were constructed. The master plan tower would have larger structural members, 18 inches to 24 inches in width, and would be closer to Glover-Archbold Park than the other two towers. In addition, the master plan tower would have greater load bearing capacity, most likely resulting in larger and more antennas than the 1955 tower.

22. The Board credits the applicant's testimony that a continuation the 1955 antenna is critically needed for NBC's operational and economic viability. Space for antennae and antenna towers is in high demand, particularly in this area of the District. The 1955 tower is used by several providers of news programs throughout the area, the nation, and the world. As recognized in the master plan and by the Board in previous orders, NBC needs the flexibility to meet unanticipated changes in technology that require additional antenna space. The space on the 1955 tower is occupied by antennae which are critical to the operation of the TV station. These antenna include receiver microwave links from the Clock Tower at 12th Street and Pennsylvania Avenue that enable NBC-WRC to receive pictures and sound from the Mall area and the District Building. These links also allow the station to receive important news breaks and items from the White House. Additionally, there are two microwave links from the State Department, including the Channon Building and a microwave link from Capitol Hill. Of particular importance are four antennae housed on the small tower serving the District of Columbia police department. There are other antennae used by various service providers, including private two-way uses for security and other endeavors. Interruption of service would adversely affect the NBC/WRC facility.

CONCLUSIONS OF LAW

The Board is authorized under the Zoning Act of June 20, 1938 (52 Stat. 797, as amended, D.C. Code § 6-641.07(g)(2) (2001), to grant special exceptions as provided in the Zoning Regulations. The applicant applied under 11 DCMR § 3104.1 for a special

exception pursuant to 11 DCMR § 211 to permit the continued use of the 1955 tower at its broadcast studio facility.

The Board can grant a special exception where, in its judgment, two general tests are met, and, the special conditions for the particular exception are met. First, the requested special exception must "be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps." 11 DCMR § 3104.1. Second, it must "not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Map" 11 DCMR § 3104.1.

The applicant has established that the continuation of the 1955 antenna tower is in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps. The broadcast facility and tower has been operating at the site since 1955 and has been subject to periodic special exception reviews since that time. During this time period the tower has been compatible with the surrounding neighborhood, and there is no evidence to suggest that it would be incompatible with the neighborhood in the future (Findings of Fact 14-21). Likewise, the tower has not adversely affected the use of neighboring properties in the past; and, there is no evidence to suggest that its continued use would adversely effect the neighborhood in the future (Findings of Fact 14-21).

Under Section 211.1 of the Zoning Regulations, the Board may permit the use of commercial broadcast antenna subject to the following provisions:

The proposed location, height, and other characteristics of the antenna shall not adversely affect the use of neighboring property. Because the 1955 tower is set back from lot lines substantially more than required under the Zoning Regulations and is also set back from neighboring residential properties, its location does not adversely affect the use of neighboring properties. The height of the 1955 tower, only 459 feet, is 200 feet less than the approved 1988 tower and less than the master plan tower previously approved by the Board. The comparatively low height of the existing tower will have no impact on the use of neighboring property (See, Findings of Fact 14-15).

The antenna shall be mounted in a location that minimizes to the greatest practical degree its visibility from neighboring property and from adjacent public space, or that is appropriately screened by landscaping or other techniques so as to soften or minimize the visibility of the antenna. Because of the generous setbacks and the landscaping at the site, visibility of the tower is minimized (See, Findings of Fact 14-15). Provided the orange and white tower is repainted to "soften" its visual impact, the Board concludes that this condition will be satisfied.

Each part of a ground-mounted commercial broadcast antenna, including support system and guy wires, shall be removed a minimum of ten feet (10 ft.) from each lot line or at a

distance of at least one-sixth of the mounted height of the antenna, whichever is greater. This condition is met (See, Finding of Fact 14).

The proposed height of the tower shall not exceed that which is reasonably necessary to render satisfactory service to all parts of its service area. This condition is met (See, Findings of Fact 14 and 20).

No transmission equipment shall be located in a Residence District, unless location in the district is necessary for technically satisfactory and reasonably economical transmission. The 1955 tower is not only necessary for technically satisfactory and economic transmission; it is critically needed for NBC's operational and economic viability (See, Finding of Fact 21).

If review by the Historic Preservation Review Board or Commission of Fine Arts is required, concept review and approval shall occur before review by the Board of Zoning Adjustment. This review is not required. Therefore, this condition is inapplicable.

No height of an antenna tower in excess of that permitted by the Act to Regulate the Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452, as amended; D.C. Official code §§ 6-601.01 to 6-601.09 (formerly codified at D.C. Code §§ 5-401 through 5-409 (1994 Repl. & 1999 Supp.))), shall be permitted, unless the height is approved by the Mayor. The height of the 1955 tower was approved by the District government[2] during the 1955 permit process (See, Finding of Fact 14).

Before taking final action on an application for use as an antenna tower, the Board shall submit the application to the D.C. Office of Planning for review and report. The Office of Planning (OP) reviewed the application and submitted a report recommending approval.

The applicant shall have the burden of demonstrating the need for the proposed height, and that full compliance with matter-of-right standards would be unduly restrictive, prohibitively costly, or unreasonable. Matter of right standards would permit only one ground mounted antenna not to exceed a height of 12 feet at its highest point (See, Sections 201.2—201.5 of the Zoning Regulations). Since 1955, when the subject tower was first approved and built, the Board has recognized that compliance with the matter-of-right standard would be unduly restrictive and unreasonable. The applicant has not only demonstrated the need for the existing 459 feet tower, it has previously demonstrated the need for towers with a greater height, i.e., the 659 feet 1988 tower, and the proposed master plan tower which was approved for 659 feet but would have appeared taller because it was to have been built atop a parking garage (See, Findings of

[2] The District of Columbia did not have a mayor at that time. Height approval was obtained from the Commissioners of the District of Columbia instead.

Fact 4, 10, 14). The Board is persuaded that the applicant has satisfied its burden of demonstrating the continued need for the existing 459 feet tower.

For the reasons stated above, the Board concludes that the applicant has satisfied the burden of proof with respect to the application for a special exception under § 211 to allow the continued use of the 1955 tower in a residential zone.

ANC Issues and Concerns

The Board is required under Section 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; now codified at D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. To give great weight the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns.

In this case, there are two affected ANCs, ANC 3E and ANC 3C. The Board has carefully considered the reports made by each ANC. However, it finds only the report made by ANC 3E to be persuasive. As stated in the Findings of Fact, the Board agrees with ANC 3E that the continued use of the 1955 tower will not adversely impact on the neighborhood and is reasonably necessary to the applicant's operations. Accordingly, the Board gives great weight to ANC3E's recommendation to grant the special exception application.

With respect to the report by ANC 3C, the Board finds that it has not offered persuasive advice. ANC 3C maintains that this application must be evaluated under the criteria for variance relief under Section 3103 of the Zoning Regulations. The ANC is incorrect in this respect. The applicant is seeking special exception relief under Sections 3104 and 211 of the Zoning Regulations, not variance relief. Therefore, the applicant does not have to demonstrate under Section 3103.2 that that the property is affected by an exceptional condition creating a practical difficulty or undue hardship upon the owner. With respect to the ANC's other concerns; i.e. commercialization at the site, health hazards, and visual obtrusiveness, the Board is not persuaded that these issues present a significant problem for the neighborhood (See, Findings of Fact 14-18).

The Board further concludes that, as hereinafter conditioned, the special exception can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map and that the granting of the requested relief will not tend to adversely affect the use of neighboring property in accordance with the regulations and map. It is therefore **ORDERED** that the application is **GRANTED, SUBJECT** to the following **CONDITIONS:**

Approval shall be until December 1, 2004, as intended by the previous Board at the time it deliberated on this case.

The applicant shall grant the National Park Service a permanent scenic easement of a portion of the site consistent with Exhibit No. 48 of the record.

The applicant shall repaint the 1955 tower a color subject to the approval of the National Park Service.

The applicant shall establish and maintain a Community Liaison/Advisory Council which shall meet with neighborhood representatives upon the request of Advisory Neighborhood Commissions 3E and 3C. The applicant's General Manager or his/her designee(s) shall provide any relevant information about their operations upon request, including but not limited to information regarding use of the broadcast towers, real property improvements, parking and traffic issues, or community outreach efforts. The applicant shall also provide upon request information regarding its intentions to seek any licenses or approvals required by any agencies of the Federal or District or Columbia governments regarding station operations. The applicant's General Manager shall use his/her best efforts to establish an on-going dialogue with the operators of other broadcast facilities within the boundaries of Advisory Neighborhood Commissions 3E and 3C.

Therefore, for the reasons stated above, it is hereby **ORDERED** that: The motion to approve the special exception is **GRANTED**.

VOTE: **5-0-0** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller, David A. Zaidain and John G. Parsons, in favor of the motion)

The vote was taken on October 7, 2003 to affirm order and send proposed order out for exceptions. The order was sent to all of the parties for exceptions and arguments on November 4, 2003. No exceptions or arguments were received by the established deadline of November 25, 2003. The Board voted at its decision meeting on January 6, 2004, to **ISSUE** this Order by a **VOTE** of **4-0-1** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller, and David A. Zaidain in favor of the motion, John G. Parsons, not present, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

DATE OF FINAL ORDER: JAN 2 1 2004

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. SG/RSN

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 15708-A

As Director of the Office of Zoning, I hereby certify and attest that on JAN 2 1 2004 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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Alan Bergstein
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441 4th Street, N.W., 7th Floor
Washington, DC 20001

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

rsn

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 15708-A of the National Broadcasting Corporation, pursuant to 11 DCMR 3108.1, for a special exception under Section 211 to modify a condition of the Board's previous Order No. 13554 to continue to operate a commercial broadcasting tower in an R-1-B District at premises 4001 Nebraska Avenue, N.W. (Square 1722, Lot 1).

HEARING DATES: September 23, 1992 and December 16, 1992
DECISION DATES: January 6, 1993, February 3, 1993, October 7, 2003

PROPOSED DECISION AND ORDER ON REMAND

Beginning in 1955, the Board of Zoning Adjustment (the Board) granted permission to the National Broadcasting Corporation (NBC) to operate a broadcast studio office building with an antenna tower and parking. After the initial 1955 approval, NBC filed a series of applications with the Board and was granted permission to make various changes at the site, including permission to replace the original antenna tower with a new one. NBC constructed a new tower in 1988 but also continued to use the original tower. In 1992, NBC applied to the Board for special exception approval to continue the use of the original 1955 tower.

The Board held public hearings on the application and voted in February 1993 to grant the special exception. However, the Board did not issue its written decision until December 1994, by which time three of the four-member majority had been out of office for over a year because their terms had expired. An appeal was brought to the District of Columbia Court of Appeals based in part on this procedural defect. The Board then requested the Court to remand the case so its current Board members could consider NBC's application on the merits. The Court granted the Board's motion and issued an order remanding the application to the Board for further proceedings. The present members of the Board have reviewed the entire administrative record, including the public hearing transcripts. Based upon its review of the record, the Board adopts the substance of the previous decision and order, as set forth below. This decision and order is based solely upon the record as it existed on December 16, 1992, the date upon which the record was closed.

Government Report Submissions

Office of Planning (OP) Report. OP recommended approval of this application, concluding that the applicant met the requisite burden of proof under Section 211 of the

Zoning Regulations. The report concluded that the tower is necessary to adequately serve the needs of the applicant and the community and that it would not adversely impact the neighborhood. The report analyzed the history of the tower and other approvals by the Board and recognized that a number of technological changes have taken place that make it necessary for the applicant to continue using the smaller tower.[1] These changes include the District of Columbia Police Department usage as well as other future needs such as the high definition television requirement of the Federal Communications Commission. OP pointed out that the site is large and surrounded by institutional uses and noted the deep set backs for the antenna.

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The Property

1. The property is located on the east side of Nebraska Avenue between Massachusetts Avenue to the south and Upton Street to the north, and is known as premises 4001 Nebraska Avenue, N.W. It is zoned R-1-B.

2. The site consists of 315,810 square feet or 7.25 acres in land area. It has 60 feet of street frontage on Nebraska Avenue. The site is shaped somewhat like a baseball diamond. Vehicular access for the site is from a 310-foot long driveway from Nebraska Avenue. There is a 222-car parking lot on the site. An additional 144 spaces are provided on the adjacent site of the National Presbyterian Church. The site is developed with a two-story brick structure and a radio tower. A ground floor plus two-story addition is currently being constructed on the site. The existing structure totals approximately 124,000 square feet of floor area.

3. To the south of the subject site is the U.S. Naval Security Station with its communication facilities, including a large antenna and other miscellaneous structures close to Glover-Archbold Park. To the north of the site is the National Presbyterian Church headquarters and school facilities. The site is located in an R-1-B District. To the east of the site is Glover-Archbold Park followed by property in the C-3-A District and the McLean Gardens residential development in the R-5-A District fronting on Wisconsin Avenue.

Pertinent Zoning History

4. The Board first granted a use variance to NBC to establish an office building, and special exceptions to establish an office building with parking and a broadcast studio with tower (Appeal No. 4159, public hearing June 1, 1955). Later, following a change in the Zoning Regulations, the Board granted a use variance to

permit continuation and enlargement of accessory parking facilities (Appeal No. 5494).

5. In BZA Appeal No. 8234, dated June 16, 1965, the Board granted a use variance to permit an addition to the office building established under Appeal No. 4159. The existing building then contained 91,370 square feet and the addition provided an additional 16,280 square feet.

6. In Appeal No. 10120, dated November 16, 1979, the Board granted the applicant a use variance to permit a second floor addition to the addition permitted under Appeal No. 8234. That addition would have contained a floor area of approximately 8,140 square feet. However, the second floor addition was not constructed at that time and the Board approval for it expired.

7. In Appeal No. 12011, the Board reinstated Order No. 10120 and also granted permission to locate a temporary office structure at the property during the period of construction of the proposed second floor addition. To alleviate its continuing space concerns, NBC sought and obtained a two year extension of time for the temporary office structure (BZA Order No. 12539, dated March 7, 1978).

8. In Application No. 13222 dated July 28, 1980, the Board granted the applicant a use variance to permit a ground floor plus two-story addition to the existing structure. As a condition of approval and prerequisite to future zoning relief, the applicant was required to submit a proposed "master plan" for future development of the site.

9. NBC presented a proposed master plan to the Board with Application No. 13554 in
which it sought approval for additions to the broadcast studio and office building, including a new antenna tower.

10. On November 25, 1981, the Board approved the additions and master plan, subject to the following conditions:

    a. The additions shall be phased and constructed in accordance with the master plan marked as Exhibit No. 10 of the record.

    b. The applicant shall secure the approval of the Director of the National Capital Region of the National Park Service for the proposed storm water drainage into Glover-Archibold Park.

11. The Board's opinion, reflecting the proposed master plan, noted that, in the future, a new larger tower structure would be installed on top of a parking garage or deck

to improve broadcast range and capacity, and the larger tower would "replace" the existing 1955 tower.

12. The new larger tower was constructed in 1988 in the general location approved by the master plan, but the 1955 tower was never removed. The garage or parking deck upon which the 1988 tower was to have been constructed was never erected because NBC obtained additional parking at the nearby National Presbyterian Church and its adjoining parking lot.

13. The 1988 tower was built, instead, on an equilateral triangular base, having footing separation of 60 feet instead of the approved 90 feet. The 1955 tower and the 1988 tower combined have a bulk of approximately 50 percent of the bulk approved for the larger antenna set forth in the master plan.

14. By letter dated February 25, 1992, the Zoning Administrator notified the applicant that under BZA Order No. 13554, the 1955 tower was to have been replaced by the 1988 tower. The Zoning Administrator advised the applicant to either remove the 1955 tower or seek special exception approval allowing it to remain. The applicant filed this application seeking modification of the previous master plan approval to permit the continued use of the 1955 tower.

The Special Exception Application

15. The two antenna towers are set back from the lot lines to conform to the Zoning Regulations, and are set back a distance of approximately 600 feet from Nebraska Avenue and approximately 200 feet from Glover-Archbold Park. The 1955 tower has an approximate height of 459 feet, a height which is 200 feet lower than the 1988 antenna tower. This height was approved by the District government during the 1955 permit process under the Act to Regulate the Height of Buildings in the District of Columbia (36 Stat. 452, as amended; D.C. Official Code §§ 6-601.01 through 6-601.09). During prior proceedings the Board found this height to be reasonably necessary to render satisfactory service, and this Board adopts that particular finding based upon testimony by the applicant. The 1955 tower is approximately 30 feet from the 1988 tower at the closest point. Each part of the ground mounted antenna tower is set back a minimum of 10 feet from each lot line or a distance of at least 1/6 of the antenna height. The 1955 tower is not located within close proximity to the neighboring residential properties.

16. The 1955 tower has a minimal impact on the neighborhood from a visual standpoint. The 1955 tower is in a location which minimizes, to the greatest practical degree, its visibility from neighboring properties by virtue of its proximity to the newer tower and its main building. Set backs are provided from all property lines substantially more than is required under the Regulations. The

site has been extensively landscaped and the visibility of the 1955 tower has been minimized. The visual obtrusiveness of the two towers together represents a minor skyline protrusion and the height of both towers is much less than permitted under the Board's previous master plan approval. The 1955 tower is set back from residential areas at substantial distance and is visually shielded by distance, existing vegetation and the existing larger tower.

17. Continuation of the 1955 tower will not result in adverse impacts to the community with respect to increased density or traffic. The commercialization of the site will not be increased by a continuation of the 1955 tower and will not result in an increase in office space, number of employees, vehicular and pedestrian traffic or the establishment of other commercial uses on the site. The Board also finds that the continued use of the antenna tower will not increase existing radio interference problems, if any.

18. Continuation of the 1955 tower will not result in adverse impacts on the neighborhood stemming from the electromagnetic effects of the tower. Antennas located on the tower are licensed by the Federal Communications Commission, and the applicant has complied with all requirements of the Federal Communications Commission regarding safety of radio frequency broadcasts. In addition, the Board adopts the finding proffered by the applicant's expert engineer; i.e.: that the electromagnetic frequency is within recommended industry guidelines. The American National Standard Institutes recommended standard for impact is 1,000 microwaves per square centimeter (UM/CM2). The applicant's engineering consultant, Smith and Powstenko, noted that the maximum ground level power intensity from the main WRC/TV facility is .0014 MW/CM2 which would fall at a location 69 meters from the tower base. This ground level power was likened to something less than would occur with a child's walkie-talkie transmitter.

19. With respect to the alleged health hazards stemming from the electromagnetic frequencies, the Board is not persuaded by the evidence or arguments presented by the opposition. While the record contains articles concerning the purported hazards of electromagnetic frequencies, the claims within these articles were neither persuasive nor applicable to either of the towers in this case. The Board is more persuaded by the applicant's testimony that the power generation on the site is negligible, representing a minute portion of that which is allowed under applicable laws.

20. The Board is persuaded that the continuance of the 1955 tower along with the new tower is consistent with the intent of the original master plan and the approval based upon the master plan should therefore be modified to permit its continuation. The combined volume or bulk of the two towers is well within the

approved envelope of the master plan. The purpose of the 1981 master plan was to plan for the future needs and probable physical development for the NBC facility. The master plan set forth the basic design and scope of three phases of contiguous physical expansion. The 1955 tower covered an area of 390 square feet and had a volume of 59,670 cubic feet. The 1988 tower covered an area of 1,560 square feet with a volume of 342,680 cubic feet. The master plan, on the other hand, provided for a tower that would be 3,510 square feet in coverage and would have a volume of 771,030 cubic feet. Thus, the master plan envelope for the tower was almost twice as large as the combined area and volume of the two existing antenna towers.

21. The Board is persuaded that continuation of the 1955 tower would actually result in less impact on the surrounding neighborhood than if the master plan tower were constructed. The master plan tower would have larger structural members, 18 inches to 24 inches in width, and would be closer to Glover-Archbold Park than the other two towers. In addition, the master plan tower would have greater load bearing capacity, most likely resulting in larger and more antennas than the 1955 tower.

22. The Board credits the applicant's testimony that a continuation the 1955 antenna is critically needed for NBC's operational and economic viability. Space for antennae and antenna towers is in high demand, particularly in this area of the District. The 1955 tower is used by several providers of news programs throughout the area, the nation, and the world. As recognized in the master plan and by the Board in previous orders, NBC needs the flexibility to meet unanticipated changes in technology that require additional antenna space. The space on the 1955 tower is occupied by antennae which are critical to the operation of the TV station. These antenna include receiver microwave links from the Clock Tower at 12th Street and Pennsylvania Avenue that enable NBC-WRC to receive pictures and sound from the Mall area and the District Building. These links also allow the station to receive important news breaks and items from the White House. Additionally, there are two microwave links from the State Department, including the Channon Building and a microwave link from Capitol Hill. Of particular importance are four antennae housed on the small tower serving the District of Columbia police department. There are other antennae used by various service providers, including private two-way uses for security and other endeavors. Interruption of service would adversely affect the NBC/WRC facility.

CONCLUSIONS OF LAW

The Board is authorized under the Zoning Act of June 20, 1938 (52 Stat. 797, as amended, D.C. Code § 6-641.07(g)(2) (2001), to grant special exceptions as provided in the Zoning Regulations. The applicant applied under 11 DCMR § 3104.1 for a special

exception pursuant to 11 DCMR § 211 to permit the continued use of the 1955 tower at its broadcast studio facility.

The Board can grant a special exception where, in its judgment, two general tests are met, and, the special conditions for the particular exception are met. First, the requested special exception must "be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps." 11 DCMR § 3104.1. Second, it must "not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Map" 11 DCMR § 3104.1.

The applicant has established that the continuation of the 1955 antenna tower is in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps. The broadcast facility and tower has been operating at the site since 1955 and has been subject to periodic special exception reviews since that time. During this time period the tower has been compatible with the surrounding neighborhood, and there is no evidence to suggest that it would be incompatible with the neighborhood in the future (Findings of Fact 14-21). Likewise, the tower has not adversely affected the use of neighboring properties in the past; and, there is no evidence to suggest that its continued use would adversely effect the neighborhood in the future (Findings of Fact 14-21).

Under Section 211.1 of the Zoning Regulations, the Board may permit the use of commercial broadcast antenna subject to the following provisions:

The proposed location, height, and other characteristics of the antenna shall not adversely affect the use of neighboring property. Because the 1955 tower is set back from lot lines substantially more than required under the Zoning Regulations and is also set back from neighboring residential properties, its location does not adversely affect the use of neighboring properties. The height of the 1955 tower, only 459 feet, is 200 feet less than the approved 1988 tower and less than the master plan tower previously approved by the Board. The comparatively low height of the existing tower will have no impact on the use of neighboring property (See, Findings of Fact 14-15).

The antenna shall be mounted in a location that minimizes to the greatest practical degree its visibility from neighboring property and from adjacent public space, or that is appropriately screened by landscaping or other techniques so as to soften or minimize the visibility of the antenna. Because of the generous setbacks and the landscaping at the site, visibility of the tower is minimized (See, Findings of Fact 14-15). Provided the orange and white tower is repainted to "soften" its visual impact, the Board concludes that this condition will be satisfied.

Each part of a ground-mounted commercial broadcast antenna, including support system and guy wires, shall be removed a minimum of ten feet (10 ft.) from each lot line or at a

distance of at least one-sixth of the mounted height of the antenna, whichever is greater. This condition is met (See, Finding of Fact 14).

The proposed height of the tower shall not exceed that which is reasonably necessary to render satisfactory service to all parts of its service area. This condition is met (See, Findings of Fact 14 and 20).

No transmission equipment shall be located in a Residence District, unless location in the district is necessary for technically satisfactory and reasonably economical transmission. The 1955 tower is not only necessary for technically satisfactory and economic transmission; it is critically needed for NBC's operational and economic viability (See, Finding of Fact 21).

If review by the Historic Preservation Review Board or Commission of Fine Arts is required, concept review and approval shall occur before review by the Board of Zoning Adjustment. This review is not required. Therefore, this condition is inapplicable.

No height of an antenna tower in excess of that permitted by the Act to Regulate the Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452, as amended; D.C. Official code §§ 6-601.01 to 6-601.09 (formerly codified at D.C. Code §§ 5-401 through 5-409 (1994 Repl. & 1999 Supp.))), shall be permitted, unless the height is approved by the Mayor. The height of the 1955 tower was approved by the District government[2] during the 1955 permit process (See, Finding of Fact 14).

Before taking final action on an application for use as an antenna tower, the Board shall submit the application to the D.C. Office of Planning for review and report. The Office of Planning (OP) reviewed the application and submitted a report recommending approval.

The applicant shall have the burden of demonstrating the need for the proposed height, and that full compliance with matter-of-right standards would be unduly restrictive, prohibitively costly, or unreasonable. Matter of right standards would permit only one ground mounted antenna not to exceed a height of 12 feet at its highest point (See, Sections 201.2—201.5 of the Zoning Regulations). Since 1955, when the subject tower was first approved and built, the Board has recognized that compliance with the matter-of-right standard would be unduly restrictive and unreasonable. The applicant has not only demonstrated the need for the existing 459 feet tower, it has previously demonstrated the need for towers with a greater height, i.e., the 659 feet 1988 tower, and the proposed master plan tower which was approved for 659 feet but would have appeared taller because it was to have been built atop a parking garage (See, Findings of

[2] The District of Columbia did not have a mayor at that time. Height approval was obtained from the Commissioners of the District of Columbia instead.

Fact 4, 10, 14). The Board is persuaded that the applicant has satisfied its burden of demonstrating the continued need for the existing 459 feet tower.

For the reasons stated above, the Board concludes that the applicant has satisfied the burden of proof with respect to the application for a special exception under § 211 to allow the continued use of the 1955 tower in a residential zone.

ANC Issues and Concerns

The Board is required under Section 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; now codified at D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. To give great weight the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns.

In this case, there are two affected ANCs, ANC 3E and ANC 3C. The Board has carefully considered the reports made by each ANC. However, it finds only the report made by ANC 3E to be persuasive. As stated in the Findings of Fact, the Board agrees with ANC 3E that the continued use of the 1955 tower will not adversely impact on the neighborhood and is reasonably necessary to the applicant's operations. Accordingly, the Board gives great weight to ANC3E's recommendation to grant the special exception application.

With respect to the report by ANC 3C, the Board finds that it has not offered persuasive advice. ANC 3C maintains that this application must be evaluated under the criteria for variance relief under Section 3103 of the Zoning Regulations. The ANC is incorrect in this respect. The applicant is seeking special exception relief under Sections 3104 and 211 of the Zoning Regulations, not variance relief. Therefore, the applicant does not have to demonstrate under Section 3103.2 that that the property is affected by an exceptional condition creating a practical difficulty or undue hardship upon the owner. With respect to the ANC's other concerns; i.e. commercialization at the site, health hazards, and visual obtrusiveness, the Board is not persuaded that these issues present a significant problem for the neighborhood (See, Findings of Fact 14-18).

The Board further concludes that, as hereinafter conditioned, the special exception can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map and that the granting of the requested relief will not tend to adversely affect the use of neighboring property in accordance with the regulations and map. It is therefore **ORDERED** that the application is **GRANTED, SUBJECT** to the following **CONDITIONS:**

Approval shall be until December 1, 2004, as intended by the previous Board at the time it deliberated on this case.

The applicant shall grant the National Park Service a permanent scenic easement of a portion of the site consistent with Exhibit No. 48 of the record.

The applicant shall repaint the 1955 tower a color subject to the approval of the National Park Service.

The applicant shall establish and maintain a Community Liaison/Advisory Council which shall meet with neighborhood representatives upon the request of Advisory Neighborhood Commissions 3E and 3C. The applicant's General Manager or his/her designee(s) shall provide any relevant information about their operations upon request, including but not limited to information regarding use of the broadcast towers, real property improvements, parking and traffic issues, or community outreach efforts. The applicant shall also provide upon request information regarding its intentions to seek any licenses or approvals required by any agencies of the Federal or District or Columbia governments regarding station operations. The applicant's General Manager shall use his/her best efforts to establish an on-going dialogue with the operators of other broadcast facilities within the boundaries of Advisory Neighborhood Commissions 3E and 3C.

Therefore, for the reasons stated above, it is hereby **ORDERED** that: The motion to approve the special exception is **GRANTED**.

VOTE: **5-0-0** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller, David A. Zaidain and John G. Parsons, in favor of the motion)

The vote was taken on October 7, 2003 to affirm order and send proposed order out for exceptions. The order was sent to all of the parties for exceptions and arguments on November 4, 2003. No exceptions or arguments were received by the established deadline of November 25, 2003. The Board voted at its decision meeting on January 6, 2004, to **ISSUE** this Order by a **VOTE** of **4-0-1** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller, and David A. Zaidain in favor of the motion, John G. Parsons, not present, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

DATE OF FINAL ORDER: JAN 2 1 2004

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. SG/RSN

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 15708-A

As Director of the Office of Zoning, I hereby certify and attest that on JAN 2 1 2004 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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Washington, D.C. 20006

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St. Mary's Church
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Washington, D.C. 20016

Nancy MacWood, Chairperson
Advisory Neighborhood Commission
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Dept. of Consumer and Regulatory Affairs
Building and Land Regulation Administration
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Washington, DC 20009

Councilmember Kathleen Patterson
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Washington, DC 20004

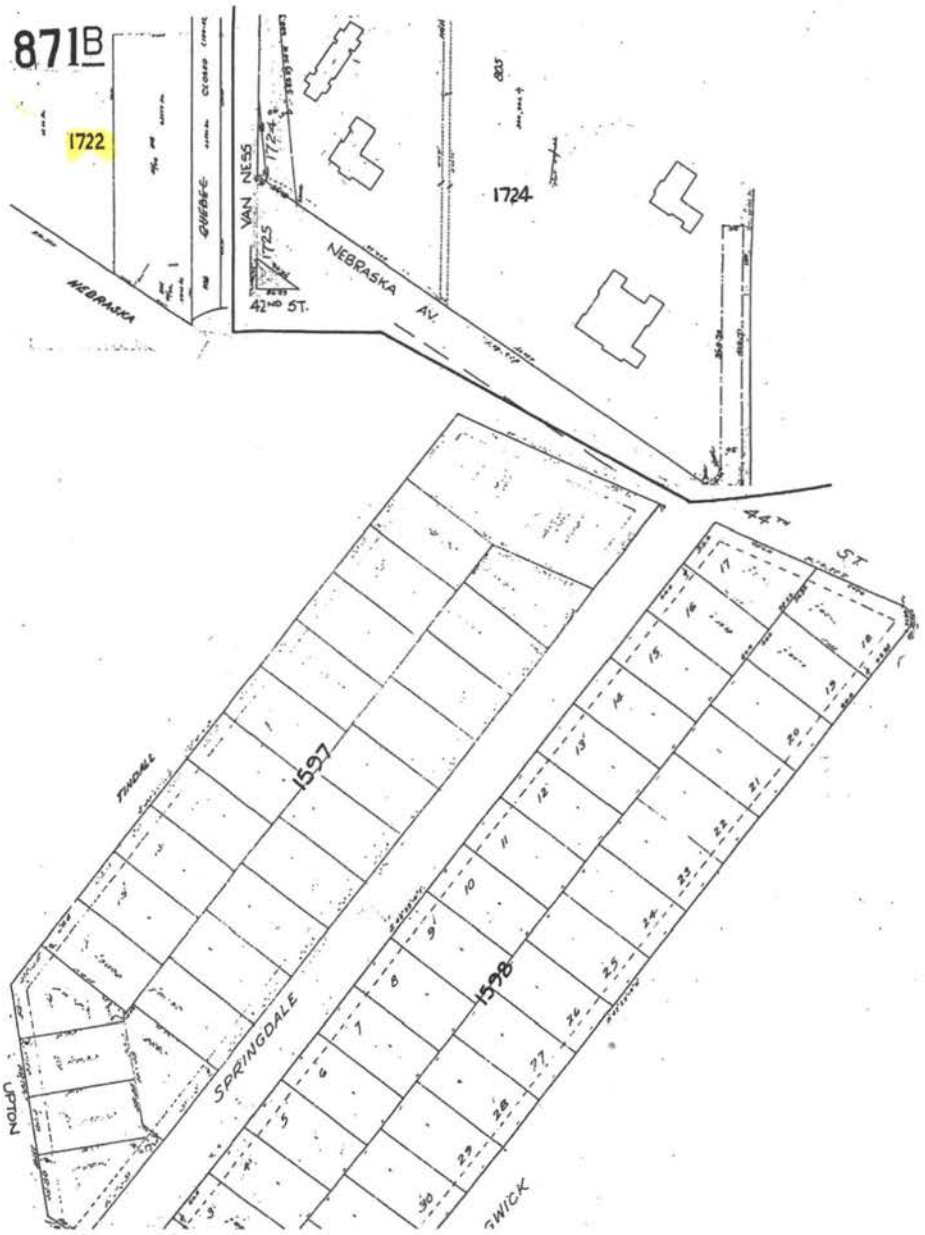
Alan Bergstein
Office of the Corporation Counsel
441 4th Street, N.W., 7th Floor
Washington, DC 20001

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

rsn

2


871B
1722
1724
1725
VAN NESS
NEBRASKA
NEBRASKA AV.
42nd ST.
44th ST
1597
1598
SPRINGDALE
TWICK
UPTON

3

DISTRICT OF COLUMBIA GOVERNMENT
OFFICE OF THE SURVEYOR

Washington, D.C., May 20, 2004

Plat for Building Permit of SQUARE 1722 LOT 1

Scale: 1 inch = 100 feet Recorded in Book 149 Page 94

Receipt No. 11792

Furnished to: HOLLAND & KNIGHT

Surveyor, D.C.

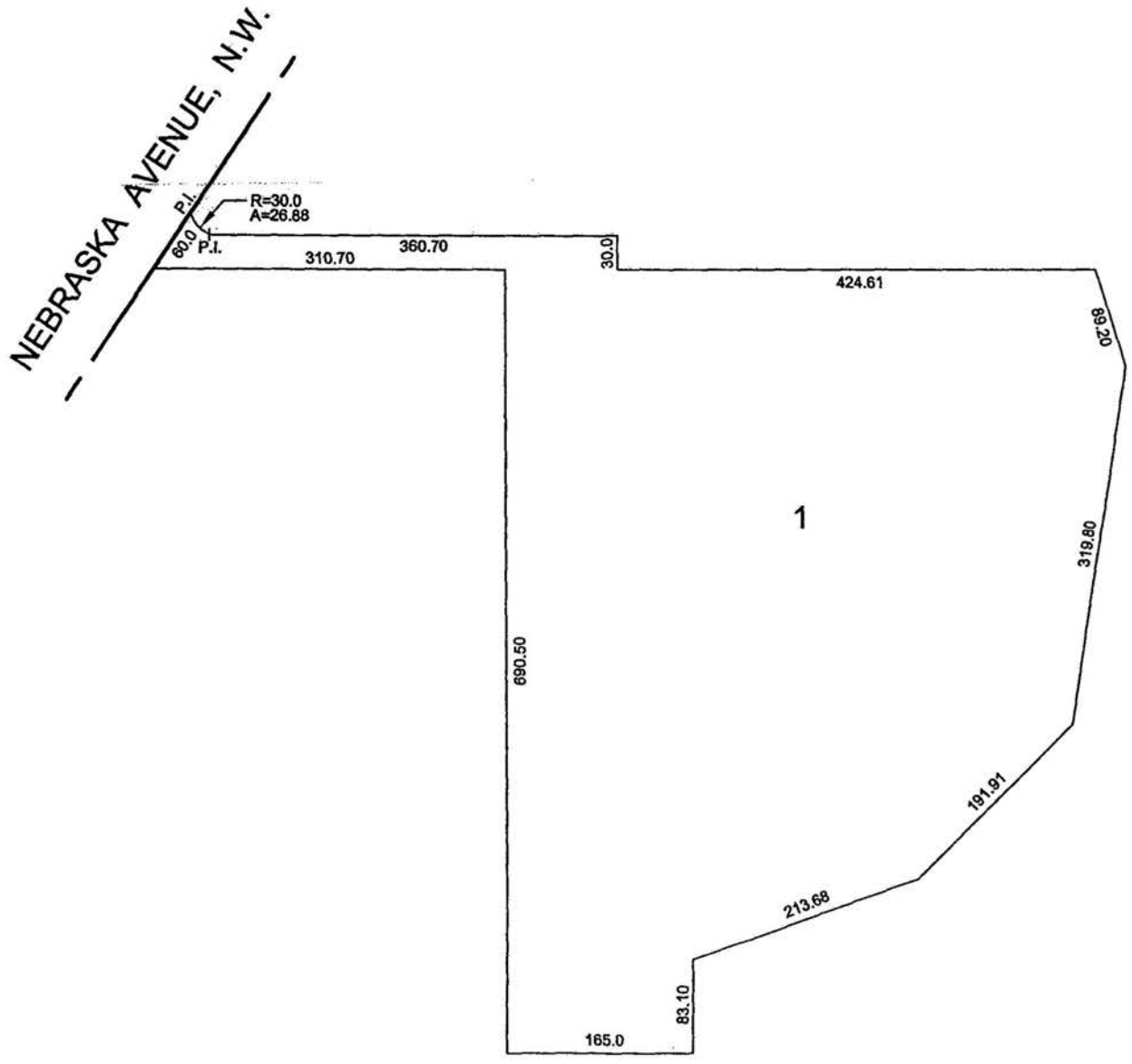
By: L.M.A.

I hereby certify that all existing improvements shown hereon, are completely dimensioned, and are correctly platted; that all proposed buildings or construction, or parts thereof, including covered porches, are correctly dimensioned and platted and agree with plans accompanying the application; that the foundation plans as shown hereon is drawn, and dimensioned accurately to the same scale as the property lines shown on this plat;and that by reason of the proposed improvements to be erected as shown hereon the size of any adjoining lot or premises is not decreased to an area less than is required by the Zoning Regulations for light and ventilation; and it is further certified and agreed that accessible parking area where required by the Zoning Regulations will be reserved in accordance with the Zoning Regulations, and that this area has been correctly drawn and dimensioned hereon. It is further agreed that the elevation of the accessible parking area with respect to the Highway Department approved curb and alley grade will not result in a rate of grade along centerline of driveway at any point on private property in excess of 20% for single-family dwellings or flats, or in excess of 12% at any point for other buildings. (The policy of the Highway Department permits a maximum driveway grade of 12% across the public parking and the private restricted property.)

Date: _____

_____
(Signature of owner or his authorized agent)

NOTE: Data shown for Assessment and Taxation Lots or Parcels are in accordance with the records of the Department of Finance and Revenue, Assessment Administration, and do not necessarily agree with deed description.

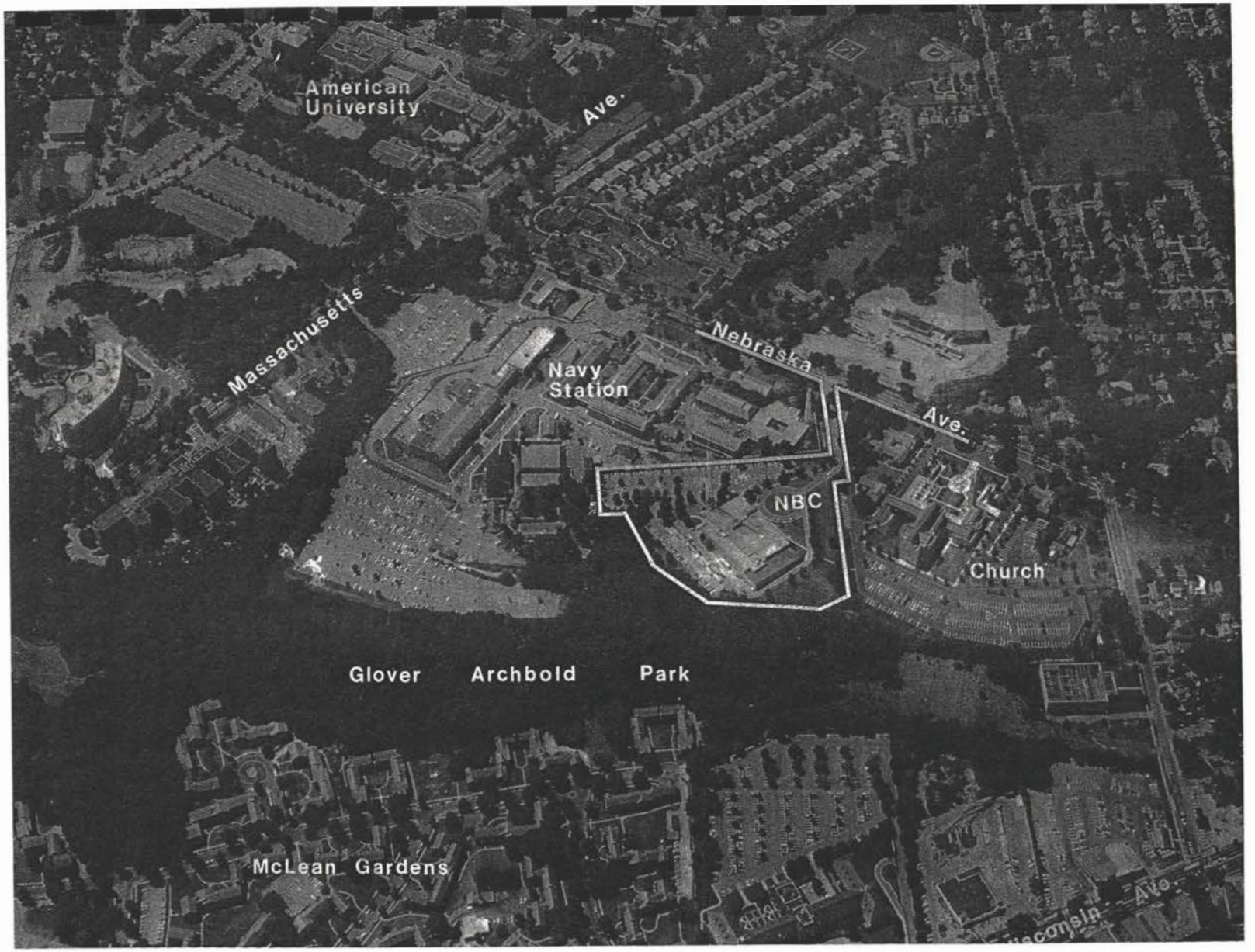


SO-11792(2004)

4


R-1-B
R-1-B
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R-1-B
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GOV
C-2-B
C-2-B
R-2
R-5-A
D/R-5-A
R-5-B
R-5-A
R-1-A
D/R-1-B
D/R-1-B
GOV
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WH/C-1
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R-5-A
R-1-B
CBUT/R-1-A
WH/R-1-B
R-1-B
R-5-B
GOV
WH/R-1-A

5


American University
Ave.
Massachusetts
Nebraska
Navy Station
Ave.
NBC
Church
Glover
Archbold
Park
McLean Gardens
Ave.

6

(C O P Y)

Appeal #4159 PUBLIC HEARING—June 1, 1955

Mr. Schwab:

I move that the following Order be entered:

ORDERED:

That the appeal of G. Willard Furlow for a variance from the use provisions of the residential district to establish studio and office facilities of the National Broadcasting Company, to establish antenna tower and transmitting facilities, and to establish a temporary automobile parking lot at 4001 Nebrasks Avenue, N.W., parcels 33/87 and 34/78 (square near 1722), be conditionally granted.

As the result of an inspection of the property by the Board, and from the records and the evidence adduced at the hearing, the Board finds the following facts;

(1) Appellant's property known as "Grasslands" is a tract of approximately seven acres improved with one relatively small old building now used as classrooms by the Georgetown Day School. This school, which leases the property, will move to new quarters at the beginning of the 1955 Fall term. The subject property is of a peculiar and exceptional shape having only a narrow thirty foot access to Nebraska Avenue the sole street upon which it has frontage. The bulk of the land lies in the rear of and abutting the east and north lines of the Naval Communications Center located at Massachusett and Nebrasks Avenues. Frontages, as indicated along this Navy property, total about 865 feet. The north line of the site is adjacent to the grounds of the Washington City Orphanage with a frontage thereon of about 625 feet. The remaining boundary of about 890 feet abuts United States Government parking land which lies to the east.

(2) Appeal to this Board is made on behalf of the National Broadcasting Company, as contract purchaser, which company plans the erection of a two-story and basement building occupying about one-seventh of the site and accommodating

an estimated maximum of 223 employees operating in several "shifts". It will be used as studios, offices and for the housing of transmitting equipment and facilities for the operation of a television and frequency modulcation broadcasting station. This portion of the appeal has been filed under the variance provisions of the zoning law. The Company also plans the construction of a 459 feet high antenna tower which will be 849 feet above mean sea level. Parking spaces for the accommodation of 150 automobiles to be used incidental to the over-all operation have also been requested. The tower and the parking spaces are filed as special exceptions under Part, 2, Section XXIII of the Zoning Regulations.

(3) The zoning and land use pattern of the area surrounding and in close proximity to the proposed installations consist of "A" Area zoning (apartment houses) of the site under consideration and a similar classification of land to the south along Massachusetts Avenue. Property to the north and west of the location is in an "A" Restricted Area District which permits the construction of single-family homes and churches only. Details of the Naval Communications Center operation referred to under finding of fact (1) are not of record but the operation does embrace a considerable office occupancy which is currently being conducted on a 24 hour basis. This operation generates a material amount of automobile traffic with incidental parking on public space along many of the street frontages within the area. The use, being a Federal Government activity, is not subject to the application of District of Columbia Zoning Regulations; but is a character of activity which would require First Commercial zoning if in privateownership. Two large apartment houses abutt the north side of Massachusetts Avenue east of Nebraska Avenue and are located south of the Navy center. The grounds of the American University are located diagonally opposite the Navy center on the south side of Massachusetts Avenue. Under permit authorized by this Bord as a variance from the use provisions of the "A" Restricted Area District a philanthropic institution (The Baptist Home of the

District of Columbia) will be constructed along the west side of Nebraska Avenue directly opposite the Naval Communications Center. This use, which also includes a church, will extend north from Massachusetts Avenue a distance of about 700 feet. There are two other properties in reasonably close proximity to the Naval Communications Center, the Nebrasks Avenue frontage of each of which is affected adversely by the Naval Operation across the street. Each of these properties is developed with a dwelling house on acreage parcels, the closest dwelling being about 869 feet from the proposed television tower and a comparable distance from the studio proposed by the applicant. The property of the Washington City Orphan Asylum also referred to in finding of fact (10) is used by the Hillcrest Children's Center, composed of three philanthropic institutions providing for the psychiatric treatment, education and resident care of emotionally disturbed children. These are nonconforming uses, each of which was authorized (in lieu of the orphanage) at this location by this Board. The nearest of these institutional buildings is more than 300 feet removed from the studio building proposed; about 250 feet removed from the nearest parking are proposed; and more than 500 feet removed from the proposed television tower.

(4) There was a considerable number of objections to the granting of this appeal registered at the public hearing. Nearly all these objections were made by home owners, most of whom reside one-fourth of a mile or more fromthe proposed site. Six of these protestants own homes within less than 600 feet of Wisconsin Avenue, a heavily traveled commercially developed thoroughfare. All six homes are located almost one-fourth of a mile from the site under consideration. Objection was also filed by the Board of Lady Managers of the Hillcrest Children's Center; but the owner of this property, through its Board of Trustees, favors the granting of the appeal. Objections were based principally upon two grounds: (a) increased traffic and diminution of property values by reason of the commercial character of the activities proposed and (b) the fear

that approval of the application would be an effective entering widge for expansion of other commercial facilities . Testimony wasoffered by three real estate experts to the effect that the installation proposed by N.B.C. would have no adverse affect whatsoever on the value and stability of single-family homes and other development within the area. A traffic expert testified that the installation would not result in dangerous or otherwise objectionable tra fic conditions. There was no expert testimony to the contrary.

(5) The National Capital Planning Commission recommends approval of that portion of this appeal seeking the erection of a 459 foot high television and FM antenna tower. The Federal Communications Commission and the Civil Adronautics Authority have each indicated tentative approval of the tower height as requested at this specific location.

(6) A letter fromthe Department of the Navy shows that it has no plans now, or within the next ten years, concerning the use of the property here under consideration by this Board; it neither favors nor objects to the use of the property for a television studio; it does not object to the tower height proposed; it does not object to the erection of any apartment building permitted by existing Zoning Regulations on this property.

(7) The Building Regulations of the District of Columbia (due to limited access) permit the construction of one apartment building only on this site. The erection of a studio and tower as proposed would not violate any provisions of the District of Columbia Building Regulations.

(8) The highest and best use of appellant's property as permitted by the existing zoning would be the construction of an eight-story apartment house; but the evidence is conclusive that the erection of any large, medium, or low density apartment building is economically unfeasible and therefore impracticable.

(9) The proposed antenna tower is to be removed from all lot lines a distance of at least one-sixth of its height above ground; the transmission equipment requested is technically necessary for satisfactory and reasonably

economical trqnsmission; and the height of the tower is reasonably necessary to render satisfactory service to all parts of the District of Columbia. (That portion of the appeal dealing with "satisfactory service " was covered by exhaustive engineering details under rules of procedure previously adopted by this Board in other tower cases. The validity and the application of these details was not refuted by contesting witnesses).

(10) Subject to restrictions and safeguards to be made a part of this order, the tower as proposed at this location will not affect adversely the use of neighboring property in accordance with the Zoning Regulations and map; nor will it be inharmonious with the general purpose and intent of the Zoning Regulations and map.

(11) Exceptional practical difficulties and exceptional and undue hardship based upon (a) the close proximity of the Naval Communications Center, a commercial office use, and (b) the fact that the property is essentially "landlocked" by reason of inadequate and limited street faclities, has been proven by the appellant. The studio (and ancillary parking) is, in this case, and subject to the same restrictions indicated in finding of fact numbered (9) above, a proper use of this property and one which 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.

OPINION:

This Board has been most meticulous in its review and dissemination of the facts in this case. In addition to the usual site inspection by the Board as a group, individual Members have made several re-checks of the site area and detailed inspection of the immediate neighborhood principally because the feeling has persisted among us that the vigorous and concerted objections to NBC's proposed installation must be based uponsome tangible and materials facts which the record fails completely to disclose. These inspections have yielded nothing in support of the objectors' contentions; but on the contrary have had the effect

of substantiating fully much of the testimony and conclusions drawn by the applicant through its witnesses and consel.

With respect to the effect of the tower upon the adjoining residential community, comparison is perhaps one of the best methods of determining this question. To this end the comparable WMAL tower on the American University campus was carefully viewed and its effect on nearby home properties analyzed. Notwithstanding the fact that this tower is considerably more prominent than will be the one to be erected by NBC and is much closer to more dwellings, its adverse affect upon the adjoining Spring Valley community is seemingly non-existent. It is true, of course, as properly expressed by the National Capital Planning Commission in its report to the Board that "wherever located in the city a tower of over 800 feet elevation will be visible from residences". In this case, however, the site is of substantial size and almost completely surrounded by parkway and institutional uses which would serve to buffer the tower base from residential uses in the vicinity. We agree with the conclusion of the Planning Commission that it would be difficult to find a suitable elevation for this facility which would result in less damage to residential properties.

The necessity for the height requested in order to give proper service to the residents of the District of Columbia has not been seriously challenged and needs little comment except that the record is conclusive that many residents of the District of Columbia, even with the increased height authorized hereunder, will still be unable to receive line-of-sight television transmission. Our conclusion is that the contentions of objectors insofar as they relate to the effect of the tower on the surrounding residential community, are not substantiated by the facts.

The request of NBC for a variance from the use provisions of the Residential "A" Area District to permit the studio building and offices which it believes necessary as a part of its program to provide local color television to the city, raises an entirely different zoning question. In order to grant

the relief sought this Board must find: First, that there exists some exceptional and extraordinary situation or condition inherent in or surrounding this specific property which would preclude itsnormal and logical development as provided by applicable Zoning Regulations, and by reason thereof result in peculiar and exceptional practical difficulties and undue hardship upon the owner. This is spelled out by the statute specifically in terms of exceptional narrownexs, shallowness, shape, or topographicalconditions, and in a "cover-all" clause "or other extraordinary or exceptional situation or condition of the property". Secondly, even if such a finding is affirmatively made the Board must still find that the relief sought can be granted without substantial detriment to the public good, and without substantially impairing the intent, purppse, and inte rity of the zone plan as embodied in the Zoning Regulations and map.

The fact that appellant bought this tract of land at a low price ten years ago; later was able to have it rezoned to a more favorable classification; and subsequently sold a small part of it to the United States Government for park purposes at a price in excess of that which he paid for the entire parcel, is wholly immaterial. He should not be penalized here solely because either by good fortune or foresight he was able to realize a profit on his investment. It is equally true also t hat he should not be grantedrelief under a variance application solely because he might have made a poor investment. It is patently clear that the hardship contemplated by the statute must, in all cases, go back to exceptinnal and unsuaul conditions which are inherent in the land, and that by reason of such factors development must not be practical. Here, development under normal conditions would logically result in the construction of an apartment house of some type; but the evidence is clear there are no lending agencies which are willing to finance such a project, the reasons therefor being inadequate access to street frontage and the close proximity of a high concentrated commercial office operation which has already had adverse affect upon

residential property located as much as one-fourth mile distant. The location of this Government activity in such close proximity to appellant's land in and of itself, and with no more raises serious doubts as to the practical adaptability of it for residential construction of any character whatsoever.

There was considerable testimony with respect to the removal of certain Highway Plan streets which at one time crossed this parcel, the Navy Property, and the institution land to the north. Regardless of all other factors which may have been involved in those proceedings, these streets were removed by the Commissioners, D.C. and the Planning Commission for two obvious reasons, the first and more important of these being the fact that the Glover Archbold Parkway will be a non-access expressway and that many proposed streets leading to it serve no useful purpose under a Highway planning system. The other reason is the fact that th Navy requested the closings.

In evaluating the effect of the proposed studio building uponthe adjoining community we agree fully withthe contention of objectors that we may not make a comparison between this building and any apartment building permitted by the Zoning Regulations. It would be wholly illogical for us to find on the one hand that the construction of an apartment building is impractical, which finding we have made, and to also find that this same building which cannot be constructed might have a greater adverse affect upon the neighborhood than would the construction proposed. A critical analysis of this question must therefore be made solely upon the facts of the constructionand use proposed and no more. Analyzing this portion of the application it seems clear to us that the NBC operation, being entirely self contained, quiet, unobstrusive because of low height and screening by other commercially used buildings, and except for access roadway of thirty feet only, being no extension whatsoever of a commercial activity into the adjoining residential community north of existing commercial use, that it will provide an excellent use for this difficult property and at the same time serve as an effective transition between

existing and probable strictly residential construction to the north and the somewhat intensive commercial development to the south and west. We believe the installation will have no adverse affect upon the surrounding neighborhood; but on the contrary believe it will have a stabilizing influence upon this same neighborhood, and at the same time operate to contain the Navy Communications office usage which is the source of all the land use problems now obtaining in this immediate area.

The containment basis of this decision is wholly consistent with other actions of this Board and the Zoning Commission in this area, and so far as we are able to foresee completes the containment pattern desired with the exception of special treatment which may have to be afforded frontages of the old David Lawrence site and a portion of the Parker property, both of which are located on the west side of Nebraska Avenue opposite the Navy installation. Development dificulty under "A" Restricted zoning which is apparently inherent in this frontage is already present by reason of existing Navy office usage and will not be accentuated to any marked degree if at all by the access roadway approved under the terms of this order.

In order further to effectuate a stabilizing program and further to protect values of neighboring properties and in order that theNBC installation on "Q" area gound may not be used as a springboard for further commercial expansion or apartment development, the Board directs appellant to:

File with the Zoning Commission an application to change the zoning of entire parcels 33/87 and 34/78 from Residential, 40' "A" Area to Residential, 40' "A" Restricted Area and to diligently prosecute such application. If the Zoning Commission approves the change requested this Board, subject to further conditions to be outlined herein, will authorized the issuance of necessary permits forthe tower, studios and parking. If, on the other hand, the request for rezoning is rejected by the Zoning Commission, the Board will give further consideration to the appeal on the merits.

Further conditions of approval shall be:

1. Details of parking arrangement including spacing, driveways, screening and suffacing shall require Board approval prior to issuance of permit and shall be temporary not to exceed a term of two years subject to renewal in the discretion of the Board.

2. Entrance driveway shall be paved to a width of not less than twenty-two feet and obstructions by way of existing trees and other planting removed from the opening in a manner acceptable to the Department of Vehicles and Traffic (Director of Planning shall submit application to the Department of Vehicles and Traffic for consultation and review).

3. The north 125 feet of the parcel exclusive of driveway and access to the property shall not be used for automobile parking or for any other purpose requiring building construction, but shall be used entirely as a landscaped screening area. Acceptable planting shall also be placed along the north side of the driveway entrance.

4. Any sign or signs shall require Board approval prior to permit issuance.

This Order, insofar as it relates to the height of the tower shall be subject to approval by the Commissioners, D.C. as required by law.

Motion seconded by Mr. Clouser and carried (Coe, Schwab, Clouser voting "aye") with Messrs. Nolen and Scrivener not voting by reason of voluntary disqualification.