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November 24, 2004

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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 the Applicant's proposed Findings of Fact and Conclusions of Law for the above-referenced application.

Thank you for your consideration of this matter.

Sincerely,

Edward L. Donohue

Enclosure

cc: Advisory Neighborhood Commission 3E (via UPS; w/enclosure)
Advisory Neighborhood Commission 3C (via UPS; w/enclosure)
Jennifer Steingasser, Office of Planning (via UPS; w/enclosure)
Karen Thomas, Office of Planning , (via UPS; 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. 40

Board of Zoning Adjustment
District of Columbia
CASE NO. 17211
EXHIBIT NO. 40

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17211 of the National Broadcasting Company, pursuant to 11 DCMR §3104.1, for a special exception to permit the continued operation of a commercial broadcast tower under section 211, in the R-1-B District at premises 4001 Nebraska Avenue, N.W. (Square 1722, Lot 1).

HEARING DATE: October 26, 2004
DECISION DATE: December 7, 2004

PROPOSED DECISION AND ORDER

On June 29, 2004, the National Broadcasting Company (the "Applicant") filed an application with the Board of Zoning Adjustment ("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 4001 Nebraska Avenue, N.W., also known as Lot 1 in Square 1722. The Board, at its October 26, 2004 public hearing, heard testimony from the Applicant, Nancy MacWood, Chair of Advisory Neighborhood Commission ("ANC") 3C, and Councilmember Phil Mendelson as a person in opposition to the application.

The Board, at its December 7, 2004 public meeting, after discussion and deliberation on the application, approved the application by a vote of 5-0-0.

PRELIMINARY MATTERS:

Self-Certification The zoning relief requested in this case was self-certified pursuant to 11 DCMR §3113.2.

Jurisdiction The Board does not have jurisdiction to regulate any level of broadcast tower radio frequency ("RF") interference ("RFI") and radio frequency emission ("RFE"), as those areas are regulated by the Federal Communications Commission. The Board finds that it is preempted from any regulation of RF and does not base its decision on any RF issue. In submitting information and testimony regarding RF emissions, the Applicant specifically stated that it was not waiving any rights it has under the law. To the extent the Board has considered this issue, it credits the evidence demonstrating that the RF levels at the Applicant's site are substantially below the applicable, federal requirements. Exhibits 24, 28.

Request for Party Status Nancy MacWood, Chair of ANC 3C, which abuts the Applicant's property to the east, requested party status. Exhibit 26. The Applicant did not oppose this request. The request was filed on October 19, 2004, which was less than the required fourteen (14) days prior to the date set for the hearing, as indicated in Section 3106.2 of the Zoning Regulations. Nonetheless, the Board voted to waive the requirement of Section 3106.2 and to grant the request for party status.

Office of Planning (OP) Report and Testimony OP recommended approval of the application and continuation of the existing 1955 tower to accommodate the needs of both the Applicant and the tower tenants. Exhibit 25. The OP report discusses in detail each element of Sections 211 and 3104 in connection with the application. Exhibit 25, pages 3-9. In preparing its report and testifying during the public hearing, OP was not required to conduct a study concerning tower capacity in the District or in adjacent jurisdictions, nor was OP required to obtain information about the ability of the tenants on the 1955 tower to relocate. Neither of these are elements listed in Section 211 of the Zoning Regulations and therefore are not applicable criteria. Based upon its analysis of Sections 211 and 3104, OP found that the Applicant met each required element of Section 211. OP also found that maintenance of the 1955 tower is beneficial to the public good and the special exception may be granted without substantially impairing the intent, purpose, and integrity of the zone plan. OP stated that whenever possible, co-location of antennas on an existing tower is encouraged to limit the visual intrusion of antennas, and that continuation of the 1955 tower complies with current and proposed Zoning Regulations, which encourage co-location on structures to diminish the adverse visual impact of numerous antennas at various locations within a given coverage area. OP found that the presence of the 1955 tower is not readily visible from public space at grade and it is removed from public right-of-ways, which thereby ensures the safety of the public from falling ice and any other mounted structure on the tower's frame. OP estimated that the 1988 tower would require a substantial height increase to support the additional equipment currently supported by the 1955 tower. OP found that the 1955 tower complies with the specified criteria of Section 211, that the Applicant sufficiently demonstrated the need for the 1955 tower's continuance, and that none of the reasons for the Board's approval granted on January 21, 2004, (BZA Order 15708-A) have changed to deny the tower's continuance. OP thus recommended approval subject to the conditions that the tower is maintained in a muted grey color to minimize its appearance and the Applicant, through its Community Liaison, shall continue to meet with neighborhood representatives upon the request of ANC 3E and 3C. OP originally conditioned its approval for a period of two (2) years from the date of the Order, but retracted this condition during its testimony during the public hearing on October 26, 2004.

National Park Service ("NPS") The NPS, by letter dated October 15, 2004, indicated it does not oppose the continued use of the 1955 tower. Exhibit 27. The letter states that the Applicant has worked in good faith with the NPS to meet the conditions imposed in Order No. 15708-A, and that NPS expressed its approval of the re-painted, muted grey color of the tower. The letter also indicates that NPS continues to work with the Applicant to develop the final language of the scenic easement and are confident that a final document will be executed by the end of 2004. Based upon this, NPS stated that it believes the Applicant has complied with the requirements of Order No. 15708-A and does not oppose the continued use of the 1955 tower.

ANC 3E Report ANC 3E voted not to oppose the application for a special exception for the continued use of the 1955 tower. Exhibit 30.

ANC 3C Report and Testimony ANC 3C opposed the special exception. ANC 3C stated that the existence of two towers is a more visible presence than is the presence of one tower, and that the height of the 1955 tower is greater than what is necessary given that the old tower is not used

for NBC broadcast transmissions. ANC 3C argued that the Applicant's uses on the 1955 tower could be moved to the 1988 tower, and thus there is no necessity as described in 11 DCMR §211 for the continued use of the 1955 tower. ANC 3C also argued that the application should be denied based upon the Environmental Element of the Ward 3 Plan of the District of Columbia Comprehensive Plan. Exhibits 26, 32, 38.

Person Testifying in Opposition to the Application Councilmember Phil Mendelson testified as an individual in opposition to the application. His written testimony is included in the record as Exhibit 33. Councilmember Mendelson testified that there is no need for two towers at the Applicant's facility, that two towers violate public policy (citing the 1910 Height Act, the Comprehensive Plan, the Zoning Regulations, and BZA Case 14258), and that continued use of the 1955 tower is contrary to Sections 411 and 1403.13(e) of the Comprehensive Plan. Councilmember Mendelson also displayed an approximately 20 year old photograph showing the view of the Applicant's towers from his condominium unit in McLean Gardens.

Closing of the Record Upon hearing the testimony presented at the October 26, 2004 public hearing, the BZA closed the record but for the following additional submissions:

A. From the Applicant:

1 – Information regarding the interpretation of 11 DCMR §211.5 and a narrative explaining the difficulties associated with potentially requiring the current occupants of the Applicant's 1955 tower to relocate; and

2 – a copy of 47 CFR §1.1306 read by Mr. Robert Denny during the hearing.

B. From the ANC 3C:

1 – Any response to the Applicant's above submission.

C. From Councilmember Phil Mendelson:

1 – A copy of the photograph displayed during Councilmember Mendelson's testimony.

Post-Hearing Submissions Both a copy of 47 CFR §1.1306 (Exhibit 31) and the Preemption Memorandum (Exhibit 34) were submitted on October 26, 2004 at the close of the public hearing. On November 3, 2004, the Applicant submitted information regarding the interpretation of 11 DCMR §211.5 and a narrative explaining the difficulties associated with potentially requiring the current occupants of the Applicant's 1955 tower to relocate. Exhibit 37. Nancy MacWood, Chair of ANC 3C, submitted a response letter, dated November 16, 2004, and included as Exhibit 38 of the record. Councilmember Mendelson has not submitted a copy of the photograph displayed during his testimony.

FINDINGS OF FACT:

The Property

1. The Site, which is located at 4001 Nebraska Avenue, N.W., 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, and vehicular access to the property is from a 310-foot long driveway from Nebraska Avenue.

2. 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 pursuant to Order No. 13554.

3. The Site is surrounded by a number of institutional uses. 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.

Pertinent Zoning History

A. Initial Approval of Facility and Modifications

4. Pursuant to Appeal No. 4159, which was issued in 1955, the Board granted the Applicant a use variance and special exception relief to permit the establishment of a studio and office facilities, and to construct a 459 foot high antenna tower and temporary parking lot on the Site. Applying the standard for a use variance, which is more stringent than that for the current special exception application, the Board found that the application should be granted because the strict application of the Zoning Regulations result in exceptional and undue hardship upon the Applicant by virtue of the extraordinary and exceptional condition of the site.

5. In 1959, pursuant to Appeal No. 5494, the Board granted the Applicant a variance to permit the establishment of accessory off-street parking, and in Appeal No. 8234, the Board 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.

6. 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. However this approval expired and the addition was not built. Pursuant to Order No. 12011, the Board reinstated its previous approval of the second story addition to the existing offices, and also granted approval to locate a temporary office structure on the Site for two years during construction of the addition. A two year extension of time for the temporary office structure was

approved in Order No. 12539.

7. In 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. 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.

B. Master Plan Approval

8. 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 Order No. 13554. The approved master plan 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. The approved plans indicated that the new tower would be installed on top of a parking garage or deck. The master plan approval does not expire until November 25, 2006.

C. 1992 Special Exception Approval Pursuant to §211 of the Zoning Regulations

9. 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. The parking 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. 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, but the 1955 tower was not removed.

10. The Board found that the 1988 tower was built on an equilateral triangular base, having footing separation of 60 feet instead of the approved 90 feet. The Board found that 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.

11. In 1992, the Applicant filed an application pursuant to Section 211 of the Zoning Regulations seeking approval to permit continued use of the 1955 tower.

12. As outlined in Order No. 15708-A, the Board held public hearings on the application and voted in February 1993 to grant the special exception. The Board issued its written decision in 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.

13. Pursuant to Order No. 15708-A, dated January 21, 2004, the Board granted the Applicant's

request to continue usage of the 1955 tower. During the public meeting on October 7, 2003, during which the Board voted to issue Order No. 15708-A, each Board member indicated that they reviewed the entire record of the case. Moreover, a review of Order No, 15708-A indicates that the Board analyzed each element of Section 211 and 3104, and did not rely solely on the Applicant's uses on the 1955 tower, in issuing the order.

14. We accept the Findings of Fact and Conclusions of Law recently enunciated in Order No. 15708-A as true and applicable in this proceeding. None of the facts underlying the Board's finding that the Applicant met it's burden of proof have changed since the issuance of Order No. 15708-A. The Board specifically found:

> 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.

Order No. 15708-A at ¶¶ 20-21. No evidence has been introduced showing a change of conditions or a change in other considerations materially affecting the merits of the application. As the Court of Appeals held in First Baptist Church of Washington v. D.C. Board of Zoning Adjustment, 342 A.2d 695, 701 (D.C. 1981), before the Board can decline to reissue a special exception permit, opponents must introduce evidence of change of condition and other considerations materially affecting merits of the subject application. ANC 3C (and Councilmember Phil Mendeson) has failed to meet this burden, as it has not presented any evidence different from what the Board considered in issuing Order No. 15708-A.

15. Order No. 15708-A includes a number of conditions. The Applicant complies with each of the conditions, as follows: (1) the Applicant and the NPS have negotiated a "Deed of Easement," pursuant to which the Applicant is granting a permanent scenic easement

interest in a portion of the Applicant's property; (2) the Applicant repainted the 1955 tower in a muted-grey tone, and the NPS has approved the repainting of the 1955 tower; (3) the Applicant formed the Community Liaison/Advisory Council, with representatives from both ANC 3E and ANC 3C; and (4) the Applicant's General Manager speaks to operators of other broadcast facilities on occasion, regarding matters of a non-competitive nature.

The Current Special Exception Application

16. The 1955 tower is set back from the lot lines and neighboring properties a substantial distance. The tower is set back approximately 600 feet from Nebraska Avenue and approximately 200 feet from the Glover-Archbold Park.

17. Visibility of the 1955 tower is minimized as a result of the generous setbacks, landscaping and existing vegetation on the Site. The muted grey painting of the tower, which has been approved by the Park Service, helps the tower blend with the skyline.

18. The 1955 tower currently has an approximate height of 443 feet, which is 200 feet lower than the 1988 antenna tower, and is also much less than that permitted under the master plan approval. As the Board previously found, 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 provided for a tower that would be 3,510 square feet in coverage and would have a volume of 771,030 cubic feet. Thus, as the Board previously found, the approved master plan tower would have been approximately twice as large as the combined area and volume of the two existing antenna towers.

19. The record indicates that 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.

20. The Board recognizes that federal law regarding RF emissions preempt the establishment of local standards concerning RF emissions. In any event, we note that 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, and that the Applicant's expert witness submitted a report and testified 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, we find that the continued use of the tower will not adversely affect the use of neighboring property.

21. The Comprehensive Plan elements concerning RF emissions are not applicable in this matter. Section 112.3 of the Comprehensive Plan provides that "the District elements of the Plan are a guide intended to establish broad policies and goals while affording flexibility for future implementation *and are not binding policy directives.*" 10 DCMR §112.3 (emphasis added). Moreover, as the Court of Appeals held in Tenley and Cleveland Park Emergency Committee v. D.C. Board of Zoning Adjustment, 550 A.2d 331 (D.C. 1988), the Comprehensive Plan is not self-executing, and although the Plan is a policy guide, its legal mandate is limited and does not control government decisions, and the task of implementing

the policy decisions is the responsibility of the agencies charged with regulatory authority concerning the subject matter. The Zoning Commission has not incorporated Sections 411 and 1403.13(e) of the Comprehensive Plan into the Zoning Regulations, and thus they are not elements of the legal standards that must be considered in applications filed pursuant to Section 211 of the Zoning Regulations.

22. Section 211.3 of the Zoning Regulations recognizes that visual intrusions in the skyline, such as tenants, are a necessary occurrence, and thus does not require that towers be completely screened from all views. Rather, Section 211.3 requires that a tower be mounted so as to *minimize to the greatest practical degree its visibility*, or appropriately screened by landscaping or other techniques so as to *soften or minimize the visibility* of the antenna. Based upon photographs taken from various lines of sight included in the record, the 1955 tower appears to be mounted in a location which minimizes its visibility to the greatest extent possible, and its muted grey painting helps to achieve this effect. The base of the 1955 tower is also appropriately screened by landscaping. 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.

23. As we have previously found, 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. Moreover, the record includes substantial evidence from a number of tenants on the 1955 tower regarding the need for continued usage of the tower. See Exhibits 24, 37.

24. UniVision, a tenant on the 1955 tower, submitted a letter dated November 1, 2004, stating that its location on the 1955 tower is instrumental in broadcasting to its viewership of 28,140 customers and is critical to provide technically satisfactory and economic transmission in the Washington Region. Exhibit 37, Tab E.

25. 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.

26. 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.

27. The retention of the 1955 tower is essential to service the community. 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.

28. The D.C. Friendship Fire Association, also located on the 1955 tower, submitted a letter of support stating the 1955 tower is instrumental to enable the association to report emergency incidents throughout the Washington area, and to enable their staff volunteers to assist at the scenes of major emergency incidents. Exhibit 24, Tab 20.

29. The Federal Government, operating as the Federal Radio Service Corp, also has an antenna on the 1955 tower. They also submitted a letter of support which states that their antenna on the 1955 tower provides critical communication support to the federal government and provides a significant contribution to the security of federal government communications. Exhibit 24, Tab 20.

30. At the Board's Public Hearing on this application on Tuesday, October 26, 2004, the Board requested that the Applicant submit information regarding the interpretation of 11 DCMR §211.5 and a narrative explaining the difficulties associated with potentially requiring the current occupants of the Applicant's 1955 broadcast tower to relocate to another tower.

31. In response, the Applicant filed a letter stating that the leasing of tower space is a key economic consideration in the construction, maintenance and continued use of broadcast towers. Exhibit 37. The Applicant submitted a "Regional Tower Inventory" that indicates the leasing of broadcast towers in the Washington region is a common practice, marked by a few towers with a number of tenants transmitting and broadcasting from each tower. The response letter filed by ANC 3C did not dispute this contention, and the Board thus finds the Applicant's submission to be an accurate assessment of the availability of tower space in the region.

32. With regard to the interpretation of Section 211.5, the Applicant submitted that a primary rule of statutory interpretation is that the intent of the legislature is to be found in language which is used in the statute, and that provisions of a regulation must be viewed in context of the larger statutory structure and a key to understanding a provision is to look at sections surrounding such provision. The post-hearing submission by ANC 3C also indicates that the Board must look at sections surrounding Section 211.5 in order to understand its meaning.

33. Section 211.1 provides that the purpose of Section 211 is to regulate the erection and alteration of antennas and towers for commercial broadcasting. Nothing in the regulation ties the erection or alteration of the antennas or towers to the needs of any particular user. Indeed, in Order No. 15708-A, this Board recently found that the Applicant met its burden of proof in establishing that the height of this particular tower is necessary to render satisfactory service and did not base this finding solely on the Applicant's broadcasting needs.

34. The Board's decision in Application No. 13524 demonstrates that an application for special exception approval to continue usage of a broadcast tower is not limited to the unique broadcast needs of the Applicant. In Application No. 13524, the District of Columbia filed an application for a special exception for use of the District's radio tower by commercial businesses. The application was filed pursuant to Section 3101.47, which is the same

language of Section 211.5 of the current Zoning Regulations.[1]

35. The site in Application No. 13524, which is located at 6001 Georgia Avenue, N.W., is owned by the District and is improved with the Police Department's 4th District Headquarters. The site contained an existing 455 foot radio tower that has been on the property since 1977. Although the Police Department used a portion of the tower for its two-way communications, the District filed the application to allow a commercial broadcaster to increase the height of the tower so Channel 50 could broadcast from the tower. In granting the application, the Board did not rely on the specific needs of the Applicant/District. In fact, Channel 50 was not a party to the case. Rather the Board specifically relied on the needs of the broadcaster located on the tower and found that: (1) "It is neither [sic] technically nor economically feasible to locate the *Channel 50* television transmitter off-site;" (2) "The proposed height is reasonably necessary to render satisfactory service to the area of *Channel 50*;" and (3) "The tower has not adversely affected the use of neighborhood property since its installation in 1977, and the additional *Channel 50* antennas proposed will not significantly change the impact of the tower." Order No. 13524, ¶¶ 12, 14 and 16 (emphasis added). Thus, the overall height of the tower was tied to the needs of the prospective tenant (Channel 50) and not the applicant.

36. The Board's conclusion in Application No. 13524 thus demonstrates that the Board is not required to rely on the unique needs of the property owner, as opposed to the needs of the tower tenants, in determining whether an applicant has met its burden under section 211.5.

37. We credit the testimony of OP and the Applicant indicating that the District has a policy of encouraging co-location of antennas. Section 201.6 of the Zoning Regulations provides that an addition of an antenna to an existing broadcast tower shall be permitted as a matter of right in all zoning districts, provided the size of the tower is not increased and the appearance of the tower is not changed in a manner that causes an adverse impact on the surrounding area. 11 DCMR §201.6. Requiring each broadcaster to apply for a separate tower for it's antennas would result in more towers being constructed in the District. This result would be contrary to the policies of the District, as embodied in the Zoning Regulations, and sound public policy.

38. Economic considerations are part of the criteria for constructing and maintaining a broadcast tower. 11 DCMR §211.6. Although the Applicant derives revenues from leasing part of the 1955 tower, we credit the Applicant's evidence that such revenues are returned to the community through job creation and maintenance, and public service activities such as community interest programming and events. The Board also credits the Applicant's evidence that absent the revenues from the 1955 tower leasing activities, the Applicant would likely be forced to curtail some of its operations, which would increase the possibility of layoffs, and a reduction in public service programming. It is important to note that the Applicant has been operating pursuant to previous approvals from this Board, including the approval of the Applicant's master plan in Order No. 13554, which permits the construction

[1] Section 3101.473 provided: "The proposed height of the tower is reasonably necessary to render satisfactory service to all parts of its service area." Section 211.5 provides: "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."

of a much larger tower. The record does not contain any evidence indicating that the Applicant has received any complaints regarding the 1955 tower since it has been in operation. As the Board found, "that master plan tower would have a greater load bearing capacity, most likely resulting in larger and more antennas than the 1955 tower." See BZA Order No. 15708-A at ¶21. The larger tower was not built because a more economical solution was found which consisted of (1) not constructing the garage or parking deck upon which the master plan tower was to have been constructed since the Applicant obtained additional parking at the nearby National Presbyterian Church, and (2) constructing a new tower that is much smaller than the tower approved by the master plan.

39. The Board credits the Applicant's testimony that technology is changing rapidly and additional antenna space is likely to be required in communication operations, and that 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. Several significant technological developments have occurred since the erection of the 1988 tower. The FCC mandated that every television station must convert from the existing analog broadcast standard to a new high definition digital system ("HDTV") for broadcast. The FCC has licensed an additional channel to every existing television station, requiring stations to build new transmitting facilities for HDTV 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.

40. 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 the Applicant to transmit live news coverage of events in places in central Washington.

41. The Board credits the Applicant's evidence that 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. Exhibit 24. UniVision, a tenant on the 1955 tower, indicated by letter that prior to locating on the Applicant's 1955 tower, they conducted a study to determine local sites that met their broadcasting needs. Exhibit 24, Tab E. After considering a number of sites, they determined that the Applicant's 1955 tower provides the best location to meets its economic and broadcasting needs. UniVision also indicated that it has invested a substantial amount of money to broadcast in the District, including $30 million spent to purchase the license to air on Channel 14, and over $3 million at the Applicant's site, including approximately $550,000 in facility upgrade costs and $2,710,000 in antenna and transmitter costs. 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.

42. 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 and its tenants 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 no material facts underlying the previous approvals have changed since the issuance of Order 15708-A.

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.

Pursuant to Order No. 15708-A, dated January 21, 2004, the Board granted the Applicant's request to continue usage of the 1955 tower, finding that the Applicant met its burden of proof pursuant to Section 211 of the Zoning Regulations. As the Court of Appeals held in First Baptist Church of Washington v. D.C. Board of Zoning Adjustment, 342 A.2d 695, 701 (D.C. 1981), before the Board can decline to reissue a special exception permit, opponents must introduce evidence of change of condition and other considerations materially affecting merits of the subject application. ANC 3C (and Councilmember Phil Mendeson) has failed to meet this burden, as it has not presented any evidence different from what the Board considered in issuing Order No. 15708-A.

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 have 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 16, 17, 19, 22). 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.

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. The Applicant has met its burden of satisfying this requirement. The 1955 tower is set back 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 is at least 120 feet from the nearest property line and exceeds the required set back. Moreover, the 1955 tower currently has an approximate height of 443 feet, which is 200 feet lower than the 1988 antenna tower, and is also much less than that permitted under the master plan approval. 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. The master plan 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 approved master plan tower would have been approximately twice as large as the combined area and volume of the two existing antenna towers. Finally, 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. (See, Findings of Fact 16, 18, 19, 25)

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. Section 211.3 of the Zoning Regulations recognizes that visual intrusions in the skyline are a necessary occurrence, and thus does not require that towers be completely screened from all views. Rather, Section 211.3 requires that a tower be mounted so as to *minimize to the greatest practical degree its visibility*, or appropriately screened by landscaping or other techniques so as to *soften or minimize the visibility* of the antenna. The 1955 tower is mounted such that its visibility is limited to the greatest extent possible. Visibility of the tower is minimized as a result of the generous setbacks, landscaping and existing vegetation on the Site. The muted grey painting of the tower, which has been approved by the Park Service, helps the tower blend with the skyline. Based upon photographs included in the record, which are taken from various lines of sight, the 1955 tower appears to be mounted in a location which minimizes its visibility to the greatest extent possible. The base of the 1955 tower is also appropriately screened by landscaping. 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. (See, Findings of Fact 15-17, 22)

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, as 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. (See, Finding of Fact 25).

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. As we have previously found, 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.

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, and the record includes substantial evidence from a number of tenants on the 1955 tower regarding the need for continued usage of the tower. For example, UniVision, a tenant on the 1955 tower, submitted a letter dated November 1, 2004, stating that its location on the 1955 tower is instrumental in broadcasting to its viewership of 28,140 customers and is critical to provide technically satisfactory and economic transmission in the Washington Region. Moreover, retention of the 1955 tower is essential to service the community. 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. The D.C. Friendship Fire Association, also located on the 1955 tower, submitted a letter of support stating the 1955 tower is instrumental to enable the association to report emergency incidents throughout the Washington area, and to enable their staff volunteers to assist at the scenes of major emergency incidents. The Federal Government, operating as the Federal Radio Service Corp, also has an antenna on the 1955 tower. They also submitted a letter of support which states that their antenna on the 1955 tower provides critical communication support to the federal government and provides a significant contribution to the security of federal government communications. (See, Findings of Fact 23, 26-29, 41)

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. Economic considerations are part of the criteria for constructing and maintaining a broadcast tower. Although the Applicant derives revenues from leasing part of the 1955 tower, we credit the Applicant's evidence that such revenues are returned to the community through job creation and maintenance, and public service activities such as community interest programming and events. The Board also credits the Applicant's evidence that absent the revenues from the 1955 tower leasing activities, the Applicant would likely be forced to curtail some of its operations, which would increase the possibility of layoffs, and a reduction in public service programming. (See, Finding of Fact 38)

Also, 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. UniVision, a tenant on the 1955 tower, indicated by letter that prior to locating on the Applicant's 1955 tower, they conducted a study to determine local sites that met their broadcasting needs. After considering a number of sites, they determined that the Applicant's 1955 tower provides the best location to meets its economic and broadcasting needs. UniVision also indicated that it has invested a substantial amount of money to broadcast in the District, including $30 million spent to purchase the license to air on Channel 14, and over $3 million at the Applicant's site, including approximately $550,000 in facility upgrade costs and $2,710,000 in antenna and transmitter costs. 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. (See,

Finding of Fact 38, 41).

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 during the 1955 permit process.

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 reviewed the application and submitted a report recommending approval and testified in support of the application at the Public Hearing on October 26, 2004.

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). As discussed above, the height and continued use of the 1955 tower is critically needed for the Applicant and its tenants 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 no material facts underlying the previous approvals have changed since the issuance of Order 15708-A. (See Finding of Fact 42).

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 Section 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 ANCs issues and concerns.

In this case, there are two affected ANCs, ANC 3E and ANC 3C. The site is located entirely within ANC 3E; no portion of the site is located within ANC 3C. The Board has carefully considered the submissions made by each ANC. 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 letter not to oppose granting the special exception application.

ANC 3C (and Councilmember Phil Mendelson) argued that the application should be denied since the Applicant failed to meet its burden of establishing its need for the tower, and that continued use of the 1955 tower violates public policy and the Comprehensive Plan. However, as discussed above, we find that the Applicant has sufficiently demonstrated that the "need" for the tower is not limited to the Applicant's usage, but also includes the needs of the tower tenants, and that the evidence of record demonstrates that the Applicant has met its burden pursuant to Section 211.5 in showing the need for continued usage of the 1955 tower. (See, Findings of Fact 24, 26-29, 33-36, 39, 41). Moreover, the record indicates that leasing of broadcast towers in the Washington region is a common and essential practice, marked by a few towers with a number of tenants transmitting and broadcasting from each tower. We credit the testimony of the Office of Planning and the Applicant indicating that the District has a policy of encouraging co-location of antennas, which public policy is applicable in this case. (See, Findings of Fact 31, 37). Moreover, neither ANC 3C or Councilmember Phil Mendelson have indicated how the Board can apply the provisions of the Comprehensive Plan they cited without violating the FCC's regulations and the federal government's preemption in this area. (See, Finding of Fact 20). Finally, with respect to the argument that the application should be denied based upon provisions of the Comprehensive Plan, we find such argument to be unpersuasive because the Zoning Commission has not incorporated Sections 411 and 1403.13(e) of the Comprehensive Plan into the Zoning Regulations, and thus they are not elements of the legal standards that must be considered in applications filed pursuant to Section 211 of the Zoning Regulations. (See, Finding of Fact 21)

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:**

1) The Applicant shall, through its Community Liaison/Advisory Committee, continue to meet with neighborhood representatives upon the request of ANC 3E and 3C.

2) The Applicant shall maintain the 1955 tower in a muted grey color to help minimize its appearance.

3) The Applicant shall record the Deed of Easement granted to the National Park Service.

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, John G. Parsons and John A. Mann II, in favor of the motion)

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

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

DATE OF FINAL ORDER:_____

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