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BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17276-B
EXHIBIT NO. 78

RICHARD B. NETTLER
202-736-2720/2721

May 1, 2007

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BY HAND

Ruthanne G. Miller, Chair
Board of Zoning Adjustment for the District of Columbia
441 Fourth Street, NW, Second Floor South
Washington D.C. 20001

Re: Request for Minor Modification of Approved Order
BZA Case No. 17276-B
Our File No.: 092371.0003

Dear Chairperson Miller:

With this letter we are seeking a minor modification to a condition in BZA Order No. 17276-B related to the location of pools for lots located on the interior of the development site. We have spoken to Richard Nero in the Office of Zoning and, a representative of the applicant, has spoken with Alma Gates, Chairman of Advisory Neighborhood Commission (ANC) 3D. We understand that Ms. Gates has no objection to this modification. As a result of both of those conversations, and pursuant to section 3129.2 of the Zoning Regulations, we submit this letter to request a minor modification of the Board's Order No. 17276B. Since more than six months has elapsed from the date of the Board's decision, we also hereby request, consistent with actions taken by the Board in the past in other matters, that the Board waive its own rules pursuant to 3100.5 to allow such a modification at this time.

Condition #4 of BZA Order 17276-B states that "[t]he proposed dwellings shall be constructed behind the building setback lines shown on the Preliminary Grading Plan contained in Exhibit 50, Tab I of the record. Pools shall be constructed within building setback lines. With the exception of lots abutting parkland or the 44th Street right-of-way (lots A-10, A11, A29, A30, A12, A13, A34 and A35), patios at grade and decks at or below the main floor shall be permitted between the building setback line and the individual lot lines." The Applicant does not seek to alter the condition as it applies to those lots abutting parkland or the 44th Street right-of-way. However, it has become apparent that the language relating to the location of pools, on interior lots, is inconsistent with the zoning regulations and would preclude in-ground pools from being constructed, should a homeowner express a desire to do so.

The architectural guidelines offered by the Applicant, which included the pool limitations, were aimed at addressing the National Park Service concern that pools not encroach

Board of Zoning Adjustment
District of Columbia
CASE NO. 17276
EXHIBIT NO. 78A1

on the buffer rear yards against the Park. In that vein, decks and patios were permitted between the building setback line and the individual lot lines, with the exception of the lots specifically identified in Condition #4 of the Board's Order, that is, lots abutting parkland or the 44th Street right-of-way. Our reading of the guidelines, however, indicates that the language restricts all pools within the entire development to be within building setbacks. It was the Applicant's intent that the restriction on in-ground swimming pools for interior lots be identical to the restrictions on decks and patios. Thus, we believe the language in the Order should instead read as follows:

> "The proposed dwellings shall be constructed behind the building setback lines shown on the Preliminary Grading Plan contained in Exhibit 50, Tab I of the record. With the exception of lots abutting parkland or the 44th Street right-of-way (lots A-10, A11, A29, A30, A12, A13, A34 and A35), in-ground pools, patios at grade and decks at or below the main floor shall be permitted between the building setback line and the individual lot lines."

This modification has no impact on the approved plans, does not change the material facts the Board relied upon in approving the application, and impacts only lots that are located outside of both the parkland buffer and the 44th Street right-of-way, such as lots A-5; A-6; A-7; A-16; and A-24, which do not delineate a building setback line that is any different from what would be the location of a new residence. We believe this modification to be minor in nature and well within the Board's authority to approve pursuant to Section 3129.2 of the Zoning Regulations.

We hereby request that the Board waive the requirement of 3129.3 that request for modification of plans be filed with the Board not later than six (6) months after the date of the final order, and that the Board grant the foregoing modification pursuant to Section 3129.2.

Should you have any questions or require any further information, please let me know.

Sincerely,

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

Richard B. Nettler

cc: Richard Nero, Office of Zoning
Mr. Felipe Paraud
Advisory Neighborhood Commission 3D
Office of Planning, Joel Lawson
Certain Residents of W Street, etc
Ms. Chandra Hardy
William Snape, III, Esquire

PHILLIPS PARK LLC

HSBC BANK USA, NA
63-939/670

2313

4/27/2007

PAY TO THE ORDER OF DC Treasurer

$ **2,960.00

Two Thousand Nine Hundred Sixty and 00/100********** DOLLARS

MEMO BZA Modification #17276-B

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

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Application No. 17276 of Phillips Park, LLC, pursuant to 11 DCMR 3104.1, for a special exception from section 2516 of the Zoning Regulations to allow the construction of a theoretical lot subdivision for thirty-five single-family homes in the R-1-A zone district at 2101 Foxhall Road, NW, Square 1346, Lot 822.

HEARING DATES: February 15, 2005, February 22, 2005, and March 8, 2005
DECISION DATE: April 5, 2005

DECISION AND ORDER

On November 18, 2004, Phillips Park, LLC (Phillips or 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 construction of thirty-three[1] single-family homes on a single subdivided lot. Following three sessions of public hearing, the Board voted to approve the application at a decision meeting held on April 5, 2005.

PRELIMINARY MATTERS

Self-Certification The zoning relief requested in this case was self-certified pursuant to 11 DCMR § 3113.2 (Exhibit 5).

Notice of Public Hearing Pursuant to 11 DCMR 3113.3, notice of the hearing was sent to the applicant, all entities owning property with 200 feet of the applicant's site, the Advisory Neighborhood Commission (ANC) 3D, and the Office of Planning (OP). The applicant posted placards at the property regarding the application and public hearing and submitted an affidavit to the Board to this effect (Exhibit 30).

ANC 3D The subject site is located within the area served by Advisory Neighborhood Commission 3D (the ANC), which is automatically a party to this application. The ANC filed a report indicating that at a public meeting on February 2, 2005, with a quorum present, the ANC voted to support the application subject to various conditions (Exhibit 26). However, the ANC later submitted a letter asking for an opportunity to reconsider the matter, stating that the application had been substantially altered from what it had originally considered and voted on. The ANC also submitted a revised set of proposed conditions and provided testimony through its chairperson, Alma Gates. Among other

[1]The original application sought approval for thirty-five theoretical lots. However, the applicant modified its proposal after discussions with neighboring property owners.

things, Ms. Gates urged the Board to incorporate a construction management plan into any special exception approval.

Requests for Party Status

The Board granted three requests for party status: (a) Chandra Hardy, owner of 2001 Foxhall Road (the Hardy property) and the only adjacent residential property owner; (b) the Friends of Whitehaven (FOW), a District of Columbia non-profit association created for the protection of the Whitehaven National Parkland located to the south of the property, represented by William Snape; and (c) "Certain Residents of W Street" (Certain Residents), a group of nearby property owners located to the immediate north of the property on W Street and Foxboro Place, represented by Margaret Brady.

Although each of the entities was granted status as parties in opposition, they each indicated they were not necessarily opposed to the application, but had "concerns". Ms. Hardy's primary concerns pertained to construction activities and an alleged adverse impact on the mature trees at her property line. The concerns of the FOW pertained to alleged adverse impacts on the environment of the surrounding area as well as the property. The FOW also advocated for various measures to protect the wetlands located on and near the property. The concerns of the Certain Residents pertained to traffic safety and the character and density of the proposed development. However, the group also opposed the addition of a ninth matter-of-right house on W Street and advocated a different entrance point to the development.

Other Persons/Entities in Opposition/Support

The Colony Hill Neighborhood Association, comprised of 41 homeowners in a nearby neighborhood, submitted a letter into the record. The Association requested that the Board defer review of the application until such time as a "comprehensive traffic study" is done that takes into account future development of a nearby undeveloped parcel.

The National Park Service, through David Murphy, provided testimony regarding its concerns relating to storm water management, both on and off-site. Mr. Murphy also advocated use of a perimeter fence separating the property from adjacent federal parkland.

The District of Columbia Department of Health (Erosion and Sediment Control Section), through Tim Karikari, provided testimony that he agreed with the concept of the proposed storm water management plan.

Government Report Submissions

Office of Planning (OP) Report. OP filed an initial report stating that it generally supported the project, but needed additional information in order to make a final

recommendation (Exhibit 29). After reviewing the applicant's revised site plan, OP filed a supplemental report supporting the application with conditions (Exhibit 64). OP's representative, Jennifer Steingasser, testified at the public hearing in support of the application.

Department of Transportation The Department of Transportation (DDOT) reviewed the traffic study prepared by the applicant and submitted a report supporting the project and the creation of the entrance on Foxhall Road (Exhibit 24). DDOT concluded that the project would not affect the existing level of service of the surrounding street systems or adversely impact on the surrounding area from a transportation standpoint.

The Metropolitan Police Department The Metropolitan Police Department (MDP) submitted a letter into the record noting the heavy rush hour traffic and incidents of speeding near the proposed project on Foxhall Road.

Department of Housing and Community Development (DHCD) By memorandum dated January 6, 2005 to OP, DHCD indicated its support for the application.

Department of Parks and Recreation (DPR) Through its report to OP, DPR noted that it maintains a nearby neighborhood park with a playground, and also a recreation center with a multi-purpose room, soccer field, basketball court, tennis courts and a picnic area. DPR noted concerns regarding maintenance of the park space, maintenance of the interior boulevards and buffer spaces, access to interior spaces by the general public, and the use of native plants.

The Applicant's Case William Pryor, Managing Member of Phillips, LLC, testified for the applicant. The applicant also offered testimony from several expert witnesses during the public hearing: Anthony Barnes, Project Architect; Louis Slade, Traffic Operations Engineer; Stephen Petersen, Traffic Engineer; Keith Pitchford, Arborist; Cheng-Ho "Frank" Lin, Civil Engineer; Mary Sears, Civil Engineer and expert in storm water management; Roy Gauzza, Landscape Architect; and James Ingram, Environmental Scientist.

Disposition of Motions to Strike
Following the public hearing on March 8, 2005, the applicant moved to strike certain post-hearing submissions filed by FOW and by Ann Haas.

Motion to Strike Submissions of FOW (Exhibit 63) The applicant moved to strike an "Addendum Clarification" regarding the wetlands at the property (Exhibit 62), a "Declaration of Julie Moore" (Exhibit 57), a conservation biologist, and "references to extra-record materials" contained in FOW's proposed findings of fact and conclusions of law (Exhibit 59). The Board granted the motion to strike the "Addendum Clarification" and the "Declaration", finding that the hearing record had been closed except for the

limited purpose of allowing proposed findings of fact and conclusions of law, and proposed conditions of approval. The Board denied the motion to strike "extra-record materials" contained within the proposed order, finding that it would disregard any statements that were not germane or went beyond the scope of the administrative record.

Motion to Strike Submissions of Ann Haas (Exhibit 66) Following the public hearing, Ann Haas, the single member district ANC commissioner for the property, submitted the same "Declaration of Julie Moore" that had been submitted by FOW, and the applicant again moved to strike. The Board struck the Declaration submitted by Ms. Haas, also on the ground that the hearing record had been closed.

FINDINGS OF FACT

The Property

1. The subject property is located at 2101 Foxhall Road, NW (Square 1346, Lot 822) in an R-1-A zone in the Ward 3 neighborhood of Wesley Heights. It is bordered by W Street to the north, a portion of 44th Street to the east and a Federal park land, known as the Glover Archbold Park to the east, Whitehaven Park to the south, and Foxhall Road to the west.

2. The property is a large sloping site, containing 713,016 square feet, or just over 16 acres, with a mixture of open areas and some tree stands. It is irregularly shaped, with the Hardy property carved out of the southwest corner. There is 781.56 feet of frontage on W Street, 476.73 feet of frontage along Foxhall Road, and 566.09 feet along 44th Street. The portion of 44th Street to the east is a platted, dedicated street, which contains a District of Columbia Water and Sewer Authority maintained sanitary sewer main, but is unpaved.

3. The property has stood vacant[2] for some time and has grown fallow, overrun with many species of weed vegetation. Due to the overrun of non-native and weed-species, many of the native trees are either dead, dying, or in poor condition.

4. The property contains 36,541 square feet of natural wetland area (including a 25 foot buffer area), and is located in a natural stream system in the southern portion of the tract. These figures have been confirmed by a formal nontidal wetlands jurisdictional determination performed by the US Army Corps of Engineers (Exhibit 22, Tab 4).

5. The property also contains over three acres of non-natural or "artificial" wetlands that were formed as a result of a long-standing leaky municipal water line. These artificial wetlands are alleged to be entirely fed by the water main leaks.

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[2] There were various proposals to develop the property during the 1980s that were abandoned.

The Surrounding Area

6. The area surrounding the property consists of residential and institutional uses, as well as the parkland described above. The nearby parkland provides a home for many species of wildlife, including the whitetail deer and several piebald deer.

7. Surrounding residential neighborhoods include approximately eleven houses to the immediate north of the property on the north side of W Street. To the northwest are the Foxhall Crescent, Wesley Heights and Spring Valley developments, on Foxboro Place.

8. Institutional uses surrounding the property include: the Mt. Vernon campus of George Washington University to the west of the property across Foxhall Road, the Belgium chancery just north of the intersection of Foxhall Road and W Street, St. Patrick's Episcopal Church and Day School to the south on Whitehaven Parkway, the Lab School of Washington to the west of St. Patrick's, the Field School to the north of the property, and the German Embassy further south along Foxhall Road. To the immediate south of the property across Whitehaven Park is the former "Casey" estate, recently purchased by the "Friends of St. Patrick's" for use as an expanded school.

The Proposed Project

9. The applicant is proposing a theoretical lot subdivision to divide those portions of the property that do not abut a street (the interior property) into thirty-three assessment and taxation lots. Additionally, though not subject to this application, the applicant will build thirteen matter-of-right homes along Foxhall Road and W Street. The matter-of-right homes will include nine homes along W Street and four homes along Foxhall Road. The development will consist of two-story single-family detached dwellings and will be named Dunmarlin at Phillips Park (Dunmarlin). [3]

10. **The Lots** In order to provide land set-asides for open space, parkland, and protected wetlands, and to ensure that the development is environmentally sensitive; the applicant has proposed larger lots with restricted development areas. The lots created will have an average lot size of 11,016 square feet, well above the 7,500 square feet required in the zone, and larger than the average lot in the surrounding residential neighborhoods.

11. **Access** There will be two roadway entrances onto the property, one onto W Street, and the second onto Foxhall Road. The entrance onto W Street will align with Foxboro Place to the north and will connect the development with the existing residential neighborhood to the north. The entrance onto Foxhall Road will be located towards the southern border of the property, with one of the matter-of-right lots to be located to the

[3] The development plans evolved during the course of these proceedings, partly in response to concerns from the various agencies and parties and the ANC. The Board approval is based upon the plans and documents contained in the applicant's submissions of March 2, 2005, Exhibit 50.

south of the road. This new road will have a left and right turn lane, and the applicant will pay for the cost to install a traffic light at the proposed entrance.

12. Each of the proposed thirty-three theoretical lots will have direct access from the proposed internal roads. Additionally, the matter-of-right lots will have driveway access onto the internal roads, rather than from Foxhall Road or W Street. The internal roads will follow the natural contours of the property, allowing the "stepping down" of the homes. The widths of the internal roads will be a minimum of thirty feet. All homes that do not front either W Street or Foxhall Road will front on the internal roads.

13. **Foxhall Road Improvements** The applicant also proposes to redesign and widen Foxhall Road. Using a portion of its own property, it proposes to create a merge lane for traffic turning out of the property north onto Foxhall Road, a left turn lane on Foxhall Road for traffic turning into the property from the north, and a right turn lane into the property for traffic entering from the south.

14. **Sidewalks** Sidewalks will be incorporated on at least one side of every street in the property. Additionally, the applicant will construct sidewalks along the perimeter of the property along W Street and Foxhall Road. Covenants will require that the roads within the property, as well as the sidewalks, remain open to the general public. The sidewalks will be maintained by the homeowners association that will be created by the applicant.

15. **Green Space** The proposed development will also include 97,132 square feet of open public green space. The green space will consist of (a) a 3,819 square foot park at the corner of W Street and Foxhall Road, including a path leading from it into the interior portion of the property, (b) two tear drop islands along the interior road of 2,560 and 7,940 square feet, respectively, (c) 29,752 square feet of open space surrounding the wetland, (d) the natural wetland and wetland buffer, and (e) an additional 29,752 square feet of open space above the storm water management facility located to the immediate north of the wetland (See, Exhibit 50, Tab 13).

16. **Setbacks/Buffers/Tree Preservation** Each lot will have a minimum side yard of eight feet and a minimum front yard of twenty-five feet. The maximum lot occupancy will be forty percent. The proposed design will go beyond the twenty-five feet rear yard setbacks that are required in the zone. For those lots that abut parkland and/or 44th Street, the applicant has proposed thirty to forty feet non-disturbance buffer areas within which there can be no construction (See, Exhibit 50, Tabs 1, 5 and 13). These buffer areas may only be planted with trees and shrubs listed on an "approved species" plant list that will continue to be refined in consultations between Applicant's arborist and the National Park Service; and, weed, insect and disease infestation species within these areas must be controlled using specified environmentally "friendly" products. Approximately sixty-four of the 107 healthy trees at the property (60%) will be preserved, and 356 new trees of significant caliper will be planted, resulting in a total of 400 healthy indigenous trees

on the property (See Exhibit 50, Tab 4). In addition, a certified arborist will be retained by the applicant to oversee the grading and the construction of the property to insure the health of the trees slated for preservation.

17. **Grading** Because the existing topography is fairly steep and rolling in nature, the proposed grading of the property is designed to preserve the existing "bowl" shape found on the site, but at gentler slopes than exist now. Grading at the property will be minimized and there will be no grading at all in the wetland area, wetland buffer, parkland buffer, or area adjacent to the Hardy property.

18. **Architectural Guidelines** The applicant submitted proposed architectural guidelines that govern, among other things, the maximum allowable floor area ration (FAR) for any improvements on individual lots, and the location and size of swimming pools and other accessory structures. Final guidelines will be filed with the land records prior to the sale of any individual lot.

19. **Storm water Management** The applicant submitted a comprehensive plan with the application that provides for on-site and off-site storm water management (See, Exhibit 50, Tabs 2, 3, 6-11). The on-site plan provides for water quantity control and water quality control, and includes the use of rain gardens where feasible. The off-site plan provides that storm water between W Street and the entrance into the development would be captured and diverted in underground pipes to the storm drain system at Whitehaven Parkway.

The Impact of the Proposed Development

20. The Board credits the testimony and report presented by the applicant's traffic expert, Louis Slade, which was subject to peer review analysis and with which DDOT also concurs (See, Exhibit 22, Tabs 5, 6, and 9). In particular, the Board adopts the findings that (a) entranceways at W Street and Foxhall Road create the best traffic situation for the proposed development and for the neighborhood, and is preferable to by-right development which would allow direct driveway access from the conforming lots to existing streets; (b) the proposed development will have a negligible impact on traffic on Foxhall Road.; (c) the proposed development will create a new and safer means of access to and from Foxhall Road for the Certain Residents on or near W Street by adding a left turn lane for traffic traveling south on Foxhall Road turning into the development, and by adding a merge lane for vehicles turning from the development north onto Foxhall Road.

21. The Board credits the testimony and report presented by the applicant's expert arborist, Keith Pitchford (See, Exhibit 22, Tab 10). In particular, the Board adopts his findings that (a) based upon his tree survey, 64 trees at the property were suitable for preservation; and (b) lot lines along the eastern portion of the property had been shifted in order to preserve the maximum number of trees.

22. The Board credits the testimony and report presented by the applicant's expert landscape architect, Ray Gauzza. In particular, the Board adopts his finding that the proposed grading plan will not adversely impact on tree preservation at the property.

23. The Board credits the expert testimony presented by civil engineers Frank Lin and Mary Sears. In particular, the Board adopts Mr. Lin's testimony that the combined storm water management features will allow the applicant to manage both water quality and water quantity and that water would be captured at a fifteen year post development rate and released at the two year predevelopment rate and no greater flow than 2 cubic feet per second into the stream situated on parkland, thus assuring that the stream will not be subject to erosive degradation. This water capture rate is well above the requirements imposed by the District of Columbia Department of Health requirements.

24. The Board adopts Ms. Sears' testimony that water quality will be controlled through "best management practices" using: (a) a "filteras", a stand-alone filtering device located in streets and planted with small trees and shrubs, (b) bioretention systems, stand-alone filtering devices and surface treatments located in flat areas, and (c) a "Baysaver" system, a hydrodynamic separator that separates out coarse sediment, solid debris, fine sediment, and oil. The Board also credits Ms. Sears' testimony that only clean water at controlled flow rates will be returned to the natural wetland and it will be enhanced as a result of the proposed storm water management system.

25. The Board credits the testimony presented by the applicant's expert in environmental science, James Ingram. In particular, the Board adopts his findings that: (a) the artificial wetland at the property will be improved by the development due to the planned clean-up at its location, the removal of invasive species, and the removal of the chlorinated water being released into the wetlands area; and (b) the proposed 25 foot buffer is sufficient to protect the wetlands and the adjacent parklands.

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 § 2516 to allow the construction of a theoretical lot subdivision for thirty-three single family homes in the R-1-A zone at 2101 Foxhall Road, NW.

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 Board concurs with OP that the proposed theoretical lot subdivision will not be contrary to the purpose or intent of the Zoning Regulations, as each of the lots being created will provide greater than the minimum lot area and width required in this zone, and the form of the private streets and housing development is in keeping with both the zoning and the character of the neighborhood. The Board also concurs with OP that the proposed form of subdivision layout will not adversely affect the surrounding neighborhood. From the outside, the development will be consistent in form with other developments in the area. Road improvements may benefit access to some existing homes in the area.

Under section 2516 of the Zoning Regulations, the Board may permit a theoretical lot subdivision and two or more principal buildings or structures on a single subdivided lot, subject to the following provisions:

2516.2 This section applies to construction on a lot that is located in, or within twenty-five feet (25 ft.) of, a Residence District. The subject property is within a residential district.

2516.3 In addition to other filing requirements, the applicant shall submit to the Board, with the new application, four (4) site plans for all new rights-of-way and easements, and existing and preliminary landscaping and grading plans with approximate building footprints; provided: (a) The applicant shall also submit, either with the original application or at a later time, final landscaping and grading plans and two (2) sets of typical floor plans and elevations; and (b) If the applicant elects to submit the plans referenced in § 2516.3(a) at a later date, the Board's original approval shall be conditional, subject to a later public hearing and final decision on the project as a whole.
The applicant submitted preliminary and revised plans and documents as part of its application: site plans depicting existing conditions, site plans showing the proposed development, landscape plans, typical house plans, lot planting schematics, landscape design guidelines, grading plans, storm water management plans, water and sewer connections, street cross sections and traffic studies.

2516.4 The number of principal buildings permitted by this section shall not be limited; provided, that the applicant for a permit to build submits satisfactory evidence that all the requirements of this chapter (such as use, height, bulk, open spaces around each building, and limitations on structures on alley lots pursuant to § 2507), and §§ 3202.2 and 3203.3 are met All of the theoretical lots provide the required site area and width, as well as a building envelope providing the required setbacks Thus, the development will easily meet the various area requirements. Because the proposed buildings are single-family dwellings, the

proposed use is permitted in the zone and the proposed development meets the use requirements of the Zoning Regulations as well.

2516.5 If a principal building has no street frontage, as determined by dividing the subdivided lot into theoretical building sites for each principal building, the following provisions shall apply: The 33 internal theoretical lots do not have frontage on a public street. As such, the following provisions are applicable to those lots.

(a) The front of the building shall be the side upon which the principal entrance is located: All buildings on the theoretical lots front onto private streets, with pedestrian and vehicular entrance on that façade.

(b) Open space in front of the entrance shall be required that is equivalent either to the required rear yard in the zone district in which the building is located or to the distance between the building restriction line recorded on the records of the Surveyor of the District of Columbia for the subdivided lot and the public space upon which the subdivided lot fronts, whichever is greater; The required rear yard setback in the zone is a minimum of 25 feet. The front yards on all lots will be a minimum 25 feet and will comply with the requirement that they be "equivalent" to the required rear yard.

(c) (d) A rear yard shall be required; and [i]f any part of the boundary of a theoretical lot is located in common with the rear lot line of the subdivided lot of which it is a part, the rear yard of the theoretical lot shall be along the boundary of the subdivided lot. Each lot will have rear yards of at least 25 feet and will comply with this requirement (See site plan, Exhibit 50, Tab 5).

2516.6 In providing for net density pursuant to § 2516.11, the Board shall require at least the following:

(a) The area of land that forms a covenanted means of ingress or egress shall not be included in the area of any theoretical lot, or in any yard that is required by this title; As depicted on the site plan, roadways are not included in the theoretical lots.

(b) Notwithstanding any other provision of this title, each means of vehicular ingress or egress to any principal building shall be twenty-five feet (25 ft.) in width, but need not be paved for its entire width; As stated above, all internal roadways will be 30 feet in width (Finding of Fact 12).

(c) If there are not at least two (2) entrances or exits from the means of ingress or egress, a turning area shall be provided with a diameter of not less than sixty feet (60 ft.); Because there will be two entrances to the proposed development, this requirement is inapplicable.

(d) The requirements of paragraphs (a) and (c) of this subsection may be modified if the Board finds that a lesser width or diameter will be compatible with, and will not be likely to have an adverse effect on, the present character and future development of the neighborhood; provided, that the Board shall give specific

consideration to the spacing of buildings and the availability of resident, guest, and service parking. The applicant has not requested any modifications of these requirements.

2516.7 Where not in conflict with 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 §§5-401 to 5-409 (1994 Repl. & 1999 Supp.)), the height of a building governed by the provisions of this section, in all zone districts, shall be measured from the finished grade at the middle of the front of the building. All homes within the proposed development will conform to the height limit of 40 feet, as measured from the finished grade at the middle of the front of the building

2516.8 The provisions of this section shall also apply to buildings erected under the terms and conditions of § 410, relating to a group of one-family dwellings, flats, or apartment houses, or a combination of such buildings. Because § 410 applies only to the R-4 and R-5 zones, and the subject property is within the R-1-A zone, this section is inapplicable.

2516.9 The proposed development shall comply with the substantive provisions of this title and shall not likely have an adverse effect on the present character and future development of the neighborhood. The Board finds that the proposed development complies with all of the applicable provisions of the Zoning Regulations and that the proposed project will not have an adverse effect on the present character or future development of the neighborhood. The present character of the neighborhood will be maintained by creating a subdivision of single-family homes located on large lots, a subdivision that follows the natural contours of the property so as to allow for the
stepping down of homes, and a subdivision that maintains open green space and preserves trees. As to the effect on future development, the Board finds that the project will not create significant additional demand for government services. Storm water management will be handled entirely within the property. Internal roadways will be designed and constructed to DDOT specifications; and, although the roadways will be maintained by the homeowners' association, they will be open to the public. Also, by providing a new, safer access from Foxhall Road (with a traffic light and turning lanes), and allowing public access through the site, the project will likely result in improved access to existing homes on the north side of W Street. In addition, the Board concludes that the installation of storm water management and the "clean-up" at the property will enhance both the natural and artificial wetland areas. Finally, the Board believes that any potential adverse impacts to the neighborhood will be mitigated by the conditions imposed by this Order.

2516.10 Before taking final action on an application under this section, the Board shall refer the application to the D.C. Office of Planning for coordination, review, and report.

The application was forwarded to OP. In addition, various aspects of the application were reviewed by DDOT, the Metropolitan Police Department, the Department of Housing and Community Development, and the DC Department of Recreation. Issues and concerns raised by OP and other agencies are addressed in this Decision and Order.

Other than the special exception to permit multiple principle structures on a single subdivided lot, no other relief from the Zoning Regulations is required. The Board agrees with OP that the proposed development conforms to the overall purpose and intent of the Regulations, and the Comprehensive Plan.

The Board is persuaded that the project has been designed to be environmentally sensitive. Internal roads will follow the natural contours of the property, allowing the least amount of grading possible, as well as the preservation of a large number of trees. In addition to preserving approximately sixty percent of the specimen trees on the property, the applicant will be planting a large number of significant caliper trees, resulting in a net gain of healthy trees at the site. Furthermore, the proposed storm water management has been designed to include an innovative system that far exceeds the District's requirements for both water quality control and water quantity control. As explained in the Findings of Fact, the wetlands located on the site will actually be enhanced as a result of the removal of invasive plant species and abatement of the infiltration of chlorinated water and road run-off.

The Board concludes there will be no significant adverse environmental impacts, notwithstanding the assertions to the contrary by Ms. Hardy and the Friends of Whitehaven.

Ms. Hardy contends that the development will adversely affect the mature trees on the property line between her property and the development, and disputes the location of these trees as depicted on the applicant's tree survey. However, Ms. Hardy presented no empirical evidence that refuted either the tree survey or the evidence presented by the applicant's landscape architect and arborist. As stated previously, a significant number of trees will be preserved at the property – including those trees at the Hardy property line -- and a certified arborist will oversee the grading and construction at the property in order to insure the health of those trees slated for preservation.

The Friends of Whitehaven (FOW) contends, among other things, that the development will damage or destroy the wetlands and the nearby parklands. The Board does not agree. With respect to the wetlands, FOW proposes that approximately one-half of the subject property be protected with a "wetlands easement", a designation that is much

larger than the formal designation that was made by the Federal government. First, the Board has no authority to impose such a restriction on private property; and, second, the Board does not agree that the wetlands will be adversely impacted by the proposed development. As stated in the Findings of Fact, the Board concludes that the natural wetlands and artificial wetlands areas will both be enhanced as a result of the proposed storm water management system. Likewise, the Board concludes that the adjacent parklands will be protected, provided this special exception is conditioned upon the creation of non-disturbance buffer areas next to the parklands.

The Board also concludes that the development will have a negligible impact on traffic. The Certain Residents group contends that the development will exacerbate dangerous traffic conditions at the nearby intersection of Foxhall Road and W Street, and that the entrance to the development should be relocated along Whitehaven Park. For reasons explained below, the Board does not agree.

The Board concurs with OP and DDOT that the proposed development will not adversely affect parking, loading or traffic conditions in the area, and that the proposed development has been designed to mitigate existing and potential traffic problems. The internal roads will be designed to District standards and will accommodate the low level of traffic anticipated for the relatively small number of homes. Deliveries will be minimal, and will be accommodated by the road and driveway system proposed. Although the Police Department noted the excess speed along Foxhall Road, the Board agrees with the applicant that this condition will not be exacerbated by the development. It appears, in fact, that the roadway improvements associated with the development, particularly the turning lanes at the proposed entrance, may result in improved traffic conditions to the surrounding area.

The Board concludes that the proposed development will be compatible with the surrounding area when considering factors relating to urban design and site planning. The Board concurs with OP that the form of development – detached dwellings on relatively large lots – is in character with the surrounding community. As also noted by OP, the development will contain considerable amounts of shared public space and on-site open space resulting from the generous setbacks. The density, at less than three units per acre, is low and in keeping with the neighborhood.

The Board also concludes that the proposed development is consistent with planning considerations relating to recreation. As mentioned earlier, the Department of Parks and Recreation maintains a park and recreation center near the site of the proposed development. In addition, the development will contain large amounts of open green space which will be open to the public and which will be maintained by the homeowners association.

The Board may impose conditions with respect to the size and location of driveways; net density; height, design, screening, and location of structures; and any other matter that the Board determines to be required to protect the overall purpose and intent of the Zoning Regulations. The Board has considered numerous conditions proposed by the applicant, the ANC, and the parties in opposition. The grant of this special exception is subject to the specifically enumerated conditions set forth in this Decision and Order.

The 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 written recommendations.[4] 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.

The ANC report states that it supports the project, subject to various conditions. The following conditions were proposed: (1) that the applicant relinquish all right/claims to 44th Street that abuts the property and remove the concrete slabs and other remnants of the old road bed along the paper road, and work with the NPS to have 44th Street transferred to it; (2) that the applicant agrees to place covenants on the deeds of sale of properties that border on federal parkland that prohibit the placement of structures within the rear yard setback; (3) that the applicant will require that all swimming pools are constructed within the allowable lot footprint; (4) that the applicant agrees the homeowners association will prohibit the use of harmful chemicals/pesticides on properties within the development; (5) that the applicant will work with DDOT to maintain or improve the natural earthen berm fronting on 2001 Foxhall Road and ensure its minimal disturbance during improvements to Foxhall Road; (6) that the applicant agrees not to recommend to DDOT a right turn only policy from the east side of W Street; (7) that the applicant agrees not to request that DDOT fully signalize the traffic light on Foxhall Road at the Field School; and (8) that the applicant agrees to work closely with DDOT and to assume all costs related to the installation of a new "on demand" traffic light at the proposed new entrance on Foxhall Road. The ANC also requests that any Board approval be contingent upon a construction management agreement which it proffered with Ms. Hardy and a representative of the Certain Residents group.

With respect to the conditions proposed by the ANC, the Board finds that it has offered persuasive advice in some instances but not in others. The Board has addressed many of the ANC's concerns in the conditions of approval which are set forth below. For

[4] Alma Gates, the ANC chair, expressed additional "concerns" during her testimony and proposed further conditions during subsequent submissions. However, Ms. Gates acknowledged that the ANC majority did not necessarily share her views, and had not voted to support the additional proposed conditions. Thus, the Board does not give "great weight" to those additional concerns.

example, the applicant will work with the National Park Service regarding the closure of 44th Street. There will be non- disturbance buffer areas adjacent to the parklands. The buffer areas will be ensured by covenants that are recorded among the land records. Any swimming pools will be constructed within the setbacks. The applicant will assume the cost of the traffic light to be located at the proposed entrance of the development.

Other conditions requested by the ANC are beyond the Board's purview. For example, the ANC requests that the Board condition its approval on the applicant's working with DDOT to maintain the natural earthen berm at the Hardy property. However, the Hardy property is not the subject of this application and the Board cannot compel Ms. Hardy to comply with this condition. Nor can the Board compel DDOT to take specific actions regarding the planned improvements at Foxhall Road or direct a process whereby the applicant makes specific "recommendations" to DDOT. Finally, the Board has no authority to condition special exception approval on a construction management agreement. The Board is authorized by § 2516 to establish conditions "to protect the overall purpose and intent of the Zoning Regulations". Construction management plans do not control the impact of the operation of this development, but the impact of its construction, which is governed by the Construction Code. While the Board has encouraged the applicant and all parties to reach an agreement on construction related issues, it cannot require this.

The Board is also required under D.C. Official Code § 6-623.04 (2001) to give "great weight" to OP recommendations. For the reasons stated in this Decision and Order, the Board agrees with the advice received from the OP.

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 §2516 to allow the construction of thirty-three single-family homes on a single subdivided lot.

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 property shall be subdivided as shown on the plans and documents contained in Exhibit No. 50 of the record. Minor adjustments shall be permitted to accommodate tree preservation and/or grading.

2. Sidewalks shall be constructed on at least one side of the internal streets, as well as along the perimeter of the property along Foxhall Road and

W Street, in accordance with the site plan contained in Exhibit 50, Tab 5 of the record.

3. A minimum of two off-street parking spaces for each home shall be maintained at all times.

4. The proposed dwellings shall be constructed behind the building setback lines shown on the Preliminary Grading Plan contained in Exhibit 50, Tab 1 of the record. Pools shall be constructed within building setback lines. With the exception of lots abutting parkland or the 44th Street right-of-way (lots A-10, A11, A29, A30, A12, A13, A34 and A35), patios at grade and decks at or below the main floor shall be permitted between the building setback line and the individual lot lines.

5. The applicant shall establish a tree preservation and screening area adjacent to the national parklands in accordance with Exhibit 50, Tabs 4 and 13 of the record. The following conditions shall apply:

    a. A six foot picket fence of black wrought iron or equivalent finish shall be installed on the eastern and southern borders of the property. This fence shall not cross the natural wetland area;

    b. As illustrated on the Preliminary Grading Plan in Exhibit 50, Tab 1, lots A-10, A11, A29 and A30 will have a thirty foot non-disturbance buffer area and lots A12, A13, A34 and A35 will have a forty foot non-disturbance buffer area. This buffer area may only be planted with trees and shrubs on the "approved species" plant list. Weeds or insects and disease infestations within these areas may only be controlled using environmentally "friendly" disease control products. Compliance with this provision will be monitored by the homeowners association on a bi-annual basis. The non-disturbance buffer areas will be protected by a covenant recorded in the land records. The approved species plant list is the list of plants that shall be consistent with similar plant lists developed for Rock Creek Park and Glover Archbold Parkway. The non-disturbance buffer area shall be maintained to present no visually identifiable or actual man-made objects or treatments, thus being a landscape indistinguishable from the majority of the original forested landscape conditions of Glover-Archbold Parkway.

c. In connection with the application of a building permit for any of the houses on the lots listed in 5 (b) above, the Applicant shall submit to the Zoning Administrator a plan showing the spacing of trees within the setback area of the lots, the buffer areas, and the open spaces in accordance with plans contained in Exhibit No. 50 in the record. The entire non-disturbance buffer shall be recorded with each lot identified and shall be recorded prior to the issuance of any clearing, construction, or other permits for any site on the property. The purpose, intent, and conditions of the non-disturbance buffer shall be clearly identified in all individual lot deeds as well as in the subdivision legal instruments.

6. Architectural Guidelines shall be established in accordance with the "Dunmarlin Architectural Standards Outline" dated February 14, 2005, appended to the Applicant's proposed Findings of Fact and Conclusions of Law contained in Exhibit No. 60, Tab B. The final Architectural Guidelines may be more, but not less restrictive than this Outline and shall be recorded in the land records prior to the subdivision of the property. The final Architectural Guidelines must require that a minimum of thirty percent of the front façade of every dwelling be on or within three feet of the front yard building restriction line. The Architectural Guidelines may not be amended so as to remove this or any other restriction approved by this Decision and Order. All construction shall be in accordance with the final Architectural Guidelines.

7. Landscape Guidelines consistent with the landscape guidelines submitted by the applicant as Exhibit 22, Tab 11 of the record shall be filed with the land records prior to the subdivision of the property. Final Landscape Guidelines may be more, but not less restrictive than the guidelines submitted in the record and may not be amended so as to remove restrictions approved by this Decision and Order.

8. Covenants, conditions and restrictions consistent with this Decision and Order shall be recorded with the land records prior to the subdivision of the property. In addition to the required provisions set forth in these conditions, these documents shall require that the homeowners association maintain the storm water management facility and all open spaces, sidewalks and roads.

9. The construction entrance to the property shall be located on Foxhall Road at the proposed new entrance to the property. Construction will be

done in five phases in accordance with Exhibit 60, Tab A in the record. The applicant shall retain the services of an ISA certified arborist to oversee all phases of grading and construction to ensure the protection of trees slated for preservation in accordance with the Tree Preservation Plan contained in Exhibit 50, Tab 4 of the record. The applicant shall share with adjacent neighbors any construction plans that may impact trees on their properties. In no case shall any construction fence extend past the tree preservation line.

10. Individual lot landscaping shall be as depicted on the typical plans and sections provided in Applicant's Pre-hearing Statement at Exhibit 22, Tab 3 of the record, and shall be in accordance with the Revised Landscape Guidelines set forth in Exhibit 22, Tab 11 of the record.

11. A storm water drainage system shall be constructed in accordance with Exhibit 50, Tabs 2, 3, 10, 11, and 12 of the record. Where possible, filteras and bioretention systems shall be installed as proposed, and water will be captured at the fifteen year post development rate and released at the two year predevelopment rate. The applicant shall enter into maintenance agreements for the annual maintenance and upkeep of all storm water management systems, including the filteras, bioretention and Baysaver with capacities of retention structures and surface water release rates onto park land being not greater than a flow rate of 2 cubic feet per second.

12. Storm water management along Foxhall Road for the property shall be constructed in accordance with Exhibit 50, Tabs 2, 3, 10, 11, and 12 of the record. The applicant shall coordinate these improvements with DDOT's planned improvements to Foxhall Road. Storm water collected on or from Foxhall Road shall be conveyed to the existing or modified storm sewers currently on Whitehaven Street.

13. The entry-ways (vehicular and pedestrian) to the property shall remain open to the public in perpetuity. The homeowners association documents shall provide that this provision may not be amended or deleted without prior approval of the Board with notice to all parties, their successors or assigns. If 44th Street right –of-way is closed, the applicant shall support the transfer of 44th Street Right of Way to NPS for park purposes, in particular, for inclusion of the unbuilt portions of 44th Street into Glover Archbold Parkway.

14. The applicant shall assume all costs related to the installation of a new on demand traffic light at the proposed new entrance to the property.

15. Street lighting shall be fixtures selected and oriented so as not to cause direct illumination or glare on adjacent properties.
16. The applicant shall take measures to control soil erosion to protect the natural drainage channel and the adjacent parklands, subject to the approval of the District of Columbia Department of Health.

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann, II and John G. Parsons to approve.)

Vote taken on April 5, 2005

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

FINAL DATE OF ORDER: JUL 2 6 2005

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.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPLICATION NO. 17276

As Director of the Office of Zoning, I hereby certify and attest that on JUL 26 2005, 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. 20007

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c/o William Snape, III, Esquire
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Washington, D.C. 20016

Certain Residents of W Street
c/o Margaret Brady
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Zoning Administrator
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Alan Bergstein
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ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

RECEIVED
D.C. OFFICE OF ZONING
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Application No. 17276-A of Phillips Park, LLC, pursuant to 11 DCMR 3104.1, for a special exception from section 2516 of the Zoning Regulations to allow the construction of a theoretical lot subdivision for thirty-five single-family homes in the R-1-A zone district at 2101 Foxhall Road, NW, Square 1346, Lot 822.

HEARING DATES: February 15, 2005; February 22,2005 and March 8,2005
DECISION DATE: April 5, 2005
DATE OF DECISION OF MOTION FOR RECONSIDERATION: September 13,2005

ORDER DENYING RECONSIDERATION

On August 5, 2005, Friends of Whitehaven (FOW)[1] moved for reconsideration of the Board of Zoning Adjustment's (Board) July 26, 2005 order granting a special exception for a theoretical lot subdivision to Phillips Park, LLC (the Applicant). FOW alleged specific errors in the Board's order pursuant to 11 DCMR § 3126.4 and requested that the administrative record be re-opened and supplemented. On August 12, 2005, the Applicant filed its opposition to the request for reconsideration. See, 11 DCMR § 3126.5. At a decision meeting on September 13, 2005, the Board voted to deny FOW's motion for reconsideration.

FOW sets forth two specific errors allegedly made by the Board: (1) the Board lacked a factual basis upon which to conclude that the property contained three acres of non-natural or "artificial" wetlands (para.5, Findings of Fact); and (2) the Board's decision to strike the "Declaration of Julie Moore" and "Addendum Clarification" after the record was closed was improper, and its decision not to strike "extra-record materials" within FOW's proposed findiqgs of fact and conclusions of law was unclear. As a result, claims FOW, the record must be re-opened and supplemented. For reasons that will be explained below, the Board disagrees and denies the motion for reconsideration.

I. The Board had substantial evidence to find that artificial wetlands existed at the property.

The Court of Appeals has held that:

[1] FOW was a party in opposition to the special exception request.

> An agency such as the BZA must make "findings on 'each contested issue of fact.'" *Citizens Sass's. of Georgetown,* 402 A.2d at 41 (quoting D.C. Code § 1-1509(e) (1981))[2]. The Board need not provide its reasons for adopting one or another position on the "basic" or "underlying" facts which were themselves disputed by the parties. Id. at 44-46. Nevertheless, the Board must reach sufficiently detailed findings on basic factual issues to demonstrate that it has considered and ruled upon each of the party's contentions.

Draude, v. District of Columbia Board Of Zoning Adjustment, 527 A.2d 1242, 1251 (D.C. 1987).

FOW alleges that the Board's record contained "no factual basis" to find that "non-natural or artificial" wetlands existed at the property *(Motion for Reconsideration* at 1). This assertion is incorrect. The Board possessed ample evidence to make this finding.

As outlined in the opposition to this motion (Exhibit 72), the Board heard testimony to this effect from James Ingram, an expert in environmental science whose testimony was credited by the Board. And, contrary to FOW's statement, the Board also heard testimony to this effect from a representative of the DC Department of Health, Tim Karikari (Technical Review Chief for Erosion and Sediment Control).

In addition, the Board possessed persuasive documentary evidence delineating the "natural" and "artificial" wetland areas. The Applicant submitted a Phase I Environmental Site assessment for the property which identified both the natural wetlands in the southern portion of the site and the artificial wetlands "created. . . due to a water main leak" in the center of the site (Exhibit P appended to the special exception application). The Board also received a wetlands mapping prepared by the US Army Corps of Engineers. This document (appended as Exhibit Q to the special exception application) identified the natural wetlands area over which the Army Corps has jurisdiction. This "Jurisdictional Determination" identified the natural wetlands only in the "southern portion of the tract flowing from west to east", consistent with the Environmental Site Assessment submitted by the Applicant.

The Jurisdictional Determination made by the Army Corps, and Mr. Ingram's testimony regarding the process by which the Army Corps delineates jurisdictional wetlands, was not countered with the testimony of any qualified expert in environmental science. FOW did present testimony from two witnesses, Julie Moore and Kent Slowinski, both of whom disputed the existence and/or designation of the "artificial"

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[2] Now codified at D.C. Official Code § 2-509e) (2001).

wetlands. However, neither Ms. Moore nor Mr. Slowinski was certified as an expert in the field of wetlands, environmental science, or any other field.

As set forth in *Draude, supra*, the Board need not explain why it **adopted** Applicant's position over FOW's. It is sufficient that the Board had a factual basis for its findings on the wetlands. In this case that factual basis is set forth in the testimony of applicant's witnesses and the documentary evidence described above.

II. The Board's decisions regarding the motions to strike were clear and proper.

FOW argues that the Board's oral decision to strike certain post-hearing submissions was incorrect. It also claims that the decision not to strike "extra-record materials" within FOW's proposed findings of fact and conclusions of law was unclear. The Board finds to the contrary.

The decision to strike the "Declaration of Julie Moore" (the Declaration) and an "Addendum Clarification" (the Addendum) was proper. The Board closed the record, with the exception of proposed findings of fact and conclusions of law (which were to have been submitted by all parties), at the conclusion of the public hearing on March 8, 2005. FOW submitted the Declaration and Addendum after the record had been closed. Accordingly, at its April 5, 2005 decision meeting, the Board granted the Applicant's motion to strike the Declaration and Addendum. It denied the request to strike "extra-record materials" within FOW's proposed findings of fact and conclusions of law, stating that it would disregard any statements that were not germane or went beyond the scope of the administrative record. FOW maintains that the latter decision was confusing because "[i]t was not clear from the BZA Order where the motion to strike being granted ended and where the motion to strike being denied began".

However, the Board's decision was straightforward: the motion to strike that was granted addressed the documents referenced above; *i.e.*, the Declaration and the Addendum. The motion to strike that was denied addressed matters that were interwoven through FOW's proposed findings of facts and conclusions of law that were not based on the evidence of record.

FOW claims that the decision ta strike was incorrect because the record was incomplete regarding environmental issues. This claim lacks merit. The Board conducted three days of public hearing in which the Applicant and the three parties in opposition presented evidence and argument on all issues raised, including the environmental issues. Moreover, the Board deliberated on and made findings regarding the environmental issues on which FOW seeks a rehearing.

FOW has presented no basis for a rehearing on the wetlands issue.

FOW claims, finally, that the Board should "supplement the record for the limited purpose of obtaining accurate information on [the] **wetlands** in question". In effect, FOW requests a rehearing on the: wetlands issue, and specifically requests that the Board consider records from the DC Department of Health. However, FOW has presented no basis for a rehearing on the wetlands issue. As stated previously, the Board did hear testimony from the Department of Health at the original hearing; and FOW states no reason why any new evidence it seeks to offer now could not have been presented at that time.

Section 3126.6 of the Zoning Regulations (11 DCMR) provides that "[n]o request for rehearing shall be considered by the Board unless new evidence is submitted that could not reasonably have been presented at the original hearing." FOW has offered no new evidence in its Motion for Reconsideration that could not reasonably have been presented during the original hearing.

For these reasons, it is hereby **ORDERED** that the Motion for Reconsideration is **DENIED.**

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., and John A. Mann, II to deny; John G. Parsons to deny by absentee ballot)

Vote taken on September 13,2005

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

FINAL DATE OF ORDER: NOV 0 3 2005

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPLICATION NO. 17276-A

As Director of the Office of Zoning, I hereby certify and attest that on NOV 0 3 2005, 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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ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

TWR