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February 22, 2005

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Via Hand Delivery

Board of Zoning Adjustment
District of Columbia Office of Zoning
One Judiciary Square, Suite 210 South
441 Fourth Street N.W.
Washington, D.C. 20001

RE: BZA Application No. 17282:

-Applicant's Response to the Submission of Raymond M. Poles, and

-Applicant's Draft Summary Order

Dear Members of the Board:

As directed by the Board of Zoning Adjustment ("Board" or "BZA") during the public hearing February 8th on the above-listed case, the Applicant, DAG Real Estate Holding Company LLC through its managing member Eyob (Joe) Mamo, submits the attached Draft Summary Order and the following response to the proposal filed with the BZA on February 15th by Raymond W. Poles (the "Poles submission").

We appreciate the opportunity to recommend conditions the Board may wish to include in a Summary Order approving the special exceptions. We have followed the guidance set forth by Chairman Griffis and other Board members during the hearing with regard to matters appropriate for inclusion in the Summary Order. In rationale statements following each of our proposed conditions, we have identified the purpose and origin of each and described how the proposed language compares with conditions set forth in BZA Order No. 16439, April 7, 1999, in which the Board granted the original application for the gasoline service station and food mini-mart.

Because the Poles submission raises certain matters that are beyond the scope of the proposed Summary Order, we address these matters first.

1. In Items 1, 2, and 3, the Poles submission asserts that residents of the 3100 block of Newton Street N.E. take issue with the Amended Voluntary Agreement entered into by Advisory Neighborhood Commission 5A, the ANC 5A-11 Single-Member-District

BZA
Case No. 17282
Exhibit No. 39

Board of Zoning Adjustment
District of Columbia
CASE NO. 17282
EXHIBIT NO. 39

meeting at which the application was discussed, and the letter of support from the vice president of the Women's Wing Association.

These are matters for the neighbors, the ANC Commissioners, and other community organizations and activists to sort out among themselves. By entering into the Amended Voluntary Agreement with ANC 5A, Mr. Mamo has made a binding commitment to work not only with the Commissioners, particularly the SMD 5A-11 Commissioner, but also with the constituents they represent, certainly including Mr. Poles and other Newton Street residents. ANC Commissioners are elected officials with a duty to represent their constituents and, by law, the Board is required to give great weight to their recommendations.

We understand Mr. Poles' preference for "more upscale businesses" and welcome his statement that Newton Street residents "stand willing to work with Mr. Mamo" to attract such businesses as tenants of the proposed addition. Through the Amended Voluntary Agreement, and through sworn testimony at the hearing, the Applicant is committed to work to that end.

2. Item 4 questions whether Mr. Mamo's construction permits were properly posted. Although this is not a matter before the Board, we want to assure you that the construction work on the gasoline service station was carried out with the authorization of all necessary construction permits and that the permits were properly posted when the work took place.

   The reason Mr. Poles did not see construction permits posted on the date he cited – Sunday, February 13 – was that the permitted construction had been completed by that time and Mr. Mamo had received a Certificate of Occupancy for the gasoline service station. A copy of the C of O, issued January 31st, is attached.

3. Item 5 refers to trash collection and removal of trees, both of which Mr. Mamo has agreed to as reflected in the Amended Voluntary Agreement with ANC 5A and also the Draft Summary Order attached.

4. Item 6 would require Mr. Mamo to build an 82-inch-wall (almost seven feet high) "mounted with a four feet (4 ft.) chain-linked fence from the gasoline station to Newton Street, receding to cover the last entrance towards Rhode Island Avenue; the purpose of which is to deter drug runners from scaling the wall if pursued by the police. A wall and fence should be built of equal size from the building facing the alley and then back towards Rhode Island Avenue."

   We cannot accept the proposal as stated in the Poles submission. From this description, and in the absence of a site-plan sketch, it appears that the Poles proposal would be a

fortress-type structure entirely unsuitable both in the C-2-A zone district and also in the adjacent R-1-B zone district applying to the 3100 block of Newton Street.

We understand and empathize with the concerns of Mr. Poles and his neighbors regarding drug activity in the neighborhood, but as Board member Etherly pointed out during the hearing, neighborhood criminal activity is a broader problem beyond the Board's jurisdiction and certainly beyond the power and authority of Mr. Mamo or any other neighborhood entrepreneur to police. Moreover, we believe a well-lit facility with the regular presence of employees and customers will have a positive crime-deterring impact, certainly far more so than the vacant boarded-up building that existed prior to Mr. Mamo's development.

As affirmed in our previous written submissions, hearing testimony, and the Draft Summary Order attached, Mr. Mamo will construct a brick wall "at least six feet (6 ft) high and twelve inches (12 in.) thick" along the small north-south portion of the rear lot line, perpendicular to Newton Street, that is not covered by the east-west rear wall of the building, pursuant to 11 DCMR §733.3.

5. Item 7 refers to refuse dumpsters. Again, Mr. Mamo has agreed to these terms, as reflected in our previous written submissions, hearing testimony, and the Draft Summary Order attached.
6. Item 8 states: "Graffito needs to be removed from the rear wall in the alley, and the wall should be painted and kept up regularly since it is, at times, used as 'tag-space' that can be seen by residents who face the wall."

   Mr. Mamo agrees to this request, subject to the approval of the Public Space Management Administration of the District Department of Transportation which controls the alley wall.
7. Item 9 requests security camera surveillance of the rear of the property. This is already included in the video surveillance system Mr. Mamo has installed and will put in operation when the gasoline service station opens for business.
8. Item 10 proposes to limit the hours of operation to 6 a.m.-10:00 p.m. for the gas station and other businesses. Mr. Mamo cannot agree to this because 24-hour operation has become the standard in the District for self-service gasoline service stations. The profit margin for such establishments is very thin. Round-the-clock operation is necessary in order to be competitive and turn a profit. Moreover, 24-hour operation was an element of the 1999 application which the Board approved.
9. Item 11 proposes to require an armed security guard on the premises during operational hours. Mr. Mamo cannot agree to this because of the cost, increased liability, and

inherent danger of having firearms on the premises, except in the hands of law enforcement officers.

10. Item 12 proposes a prohibition on the sale of "drug paraphernalia, alcohol, and sexual items/products" on the premises. District law prohibits the sale of alcoholic beverages on the premises of gasoline service stations, and Mr. Mamo will not permit any of his tenants to sell drug paraphernalia and sexual items/products, nor will he allow any other person to come on the property and attempt to sell such items or products.

By copy of this letter, we have informed Mr. Poles of the Applicant's responses to his submission. We appreciate the Board's consideration of our views and the Draft Summary Order attached.

Sincerely,

John Ray
Manatt Phelps & Phillips
Counsel to DAG Real Estate
Holding Company LLC

Attachments:
– Certificate of Occupancy
– Draft Summary Order

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing letter with all attachments was served by facsimile transmission and/or U.S. Mail, first class, postage prepaid, this 22nd day of February, 2005, upon the following:

Chairperson Joseph L. Bowser
Advisory Neighborhood Commission 5A
Slowe School Demountable
1322 Irving Street N.E.
Washington, D.C. 20017

ANC 5A-11 Commissioner Franklyn Malone
Advisory Neighborhood Commission 5A
Slowe School Demountable
1322 Irving Street N.E.
Washington, D.C. 20017

Ellen McCarthy, Interim Director
D.C. Office of Planning
801 North Capitol Street N.E.
Fourth Floor
Washington, D.C. 20002

Raymond Poles
3143 Newton Street N.E.
Washington, D.C. 20017

John Ray

C of O

CERTIFICATE OF OCCUPANCY

PERMIT NO.
CO 90885

THIS PERMIT IS VALID ONLY FOR THE PREMISES OF THE PROJECT ADDRESS

DATE : 1/31/2005

ADDRESS:	FLOOR(S):	PRCLID : (square) (lot)
9163 RHODE ISLAND AVE NE	1ST	WARD : ZONE :

PERMISSION IS HEREBY GRANTED TO:
CORPORATION : DAG PETROLEUM SUPPLIERS, LLC
ID No.: L07220

TRADING AS:

APPROVED USES :
GASOLINE SERVICE STATION

PREVIOUS USES :
GASOLINE SERVICE STATION

TYPE :	BZA NO. :	OCCUPIED SQ. FOOTAGE:	OCCUP. LOAD:	EXPIRATION DATE:
CHANGE OF OWNERSHIP		1,800		NONE

DESCRIPTION OF USE:
OLINE SERVICE STATION/ MOTOR VEHICLE FUELING STATION

FEE
$75.00

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless the expiration date is stated. VALID ONLY for the purpose of the above address or part thereof, and for the purpose(s) indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

David A. Clark
DIRECTOR

PERMIT CLERK:
JOSEPH REMBERT

DCRA
District of Columbia Department of Consumer & Regulatory Affairs
District of Columbia government
COPYCOPYCOPY
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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17282 of DAG Real Estate Holding Company, LLC, pursuant to 11 § 3104.1 for a special exception to enlarge a gasoline service station/mini-mart store under sections 726.1 and 2302, and a special exception to establish a fast-food restaurant in an adjoining structure under subsection 733.1, in the C-2-A District at premises 3101-3103 Rhode Island Avenue, N.E., (Square 4308, Lot 45).

HEARING DATE: **February 8, 2005**
DECISION DATE: **March 1, 2005**

SUMMARY ORDER

The Board provided proper and timely notice of public hearing on this application, by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 5A, the Office of Planning (OP) and to owners of property within 200 feet of the site.

The site of the application is located within the jurisdiction of ANC 5A. ANC 5A, which is automatically a party to this application, provided testimony by its Chairperson, Joseph Bowser, and a written report in support of the application. ANC 5A additionally provided a copy of the Amended Voluntary Agreement entered into between ANC 5A and Eyob (Joe) Mamo, managing member of the applicant entity. The Amended Voluntary Agreement, dated February 3, 2005, supersedes the Voluntary Agreement of March 26, 1999, between Mr. Mamo and the 5A-11 Commissioner at that time. The Board recognizes the Amended Voluntary Agreement as a binding and enforceable commitment by the applicant to take specified actions to address ANC 5A concerns. The Board gives great weight to the ANC 5A testimony and written report.

The OP submitted a written report making no recommendation on the application, pending receipt of a revised and expanded site and landscaping plan from the applicant. After receiving and reviewing the revised and expanded plan, the OP recommended approval of the application through testimony at the hearing.

As directed by 11 DCMR § 3119.2, the Board required the applicant to satisfy the burden of proving the elements which are necessary to establish the case for special exceptions pursuant to 11 DCMR §§ 726, 733, and 2302. Three witnesses appeared at the public hearing in opposition to the application. Raymond W. Poles, Arthur Jones, and Raymond Blake testified that they reside in the 3100 block of Newton Street N.E., adjacent to the applicant's site, and they are concerned that the applicant's establishment may have an adverse effect on their neighborhood. In accordance with the Board's instructions, the opponents timely filed a

memorandum proposing conditions for inclusion in the Board order. The applicant timely filed a response and an alternative proposal of conditions. The Board has considered both proposals.

Based upon the record before the Board, and having given great weight to the OP and ANC 5A reports and testimony in this case, the Board concludes that the applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1, 726, 733, and 2302, and that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. It is therefore **ORDERED** that this application be **GRANTED, SUBJECT** to the following **CONDITIONS:**

1. The gasoline service station, mini-mart store, and fast-food restaurant and/or other retail businesses located in the adjoining structure shall be protected by an electronic surveillance system composed of from 12 to 16 television cameras mounted at strategic locations to mounted at strategic locations to assure full and continuous visual monitoring of the interior and exterior premises, including the portion of the public alley that lies to the rear of the property. Television monitors will be placed inside the establishment for monitoring by employees. Videotapes or digital or other electronic images recorded by the surveillance system will be maintained for 30 days, or for any longer period that may be requested or required by law enforcement authorities or other government officials.

[RATIONALE: This expands Condition No. 3 of BZA Order No. 16439, adopting language included in the Amended Voluntary Agreement and the language proposed by the opponents regarding surveillance coverage of the rear of the property. The purpose is to protect the premises and the surrounding vicinity against loitering, disorderly conduct, and criminal activity and provide the means for immediate detection of any such activity so that law enforcement authorities can be summoned at once.]

2. The exterior premises shall be fully lighted at a sufficient foot candle level to assure proper operation of the electronic surveillance system and covered in such a way that rocks and other similar missiles cannot extinguish them. Six lights will be mounted on the exterior surfaces of the building, and additional lights will be mounted on seven poles, each approximately 13 feet in height, along the perimeter of the property.

[RATIONALE: This expands Condition No. 4 of BZA Order No. 16439, adopting language included in the Amended Voluntary Agreement. The purpose is to deter loitering, disorderly conduct, and criminal activity on the premises and in the surrounding vicinity.]

3. The electronic surveillance system and lighting shall be in operation and maintained in good working order from the outset of operations and throughout the life of the establishment. Lighting will be reviewed at least weekly for repairs as needed.

[RATIONALE: This is an adjunct to Conditions 2 and 3. It is an extension of Condition No. 5 of BZA Order No. 16439, and reflects language included in the Amended Voluntary Agreement.]

4. Trees, shrubbery, and flowers shall be planted and maintained on the premises in accordance with the applicant's site and landscaping plan provided to the Board on February 8, 2005, and in consultation with the 5A-11 Commissioner and residential neighbors. Plantings at the rear of the property will be low-growing to avoid providing cover for disorderly or criminal activities. Plantings will be chosen and properly maintained to enhance the attractiveness of the premises, but without obscuring the view of the electronic surveillance cameras.

[RATIONALE: This expands Condition No. 6 of BZA Order No. 16439, adopting OP recommendations, tracking language included in the Amended Voluntary Agreement, and adopting some aspects of the opponents' proposal. The purpose is to assure that the site provides an attractive appearance in the neighborhood, and that the landscaping is done in a way that fosters crime-prevention objectives.]

5. Employees shall be trained to have zero tolerance for criminal activities on the premises and in the vicinity and to call immediately for police assistance upon observing any such activity.

[RATIONALE: This revises Condition No. 7 of BZA Order No. 16439, reflecting language included in the Amended Voluntary Agreement. The purpose is to promote crime-prevention and neighborhood safety objectives.]

6. The property shall be cleaned daily with trash hauled away on a regular basis. Trash that accumulates daily shall be deposited in trash bins that are located in unobtrusive enclosed locations on the premises and away from public view.

[RATIONALE: This carries forward Condition No. 8 of BZA Order No. 16439 without change. The purpose is to assure that trash collection and disposal is carried out promptly, regularly, and in a manner that prevents adverse impact on the health, safety, and attractiveness of the neighborhood.]

7. The refuse dumpster enclosure on the premises shall be reconstructed in accordance with the requirements of 11 DCMR § 733.4.

8. A brick wall shall be constructed in accordance with specifications set forth at 11 DCMR § 733.3 along the north-south portion of the rear lot line, perpendicular to Newton Street, that is not covered by the east-west rear wall of the building.

[RATIONALE: These are new conditions, based upon the requirements for a special exception for a fast-food restaurant and based upon the OP report. Condition No. 7 also reflects comments made in the opponents' submission. The purpose is to assure compliance with fast-food

restaurant regulations intended to ensure the cleanliness of the premises and to provide a buffer between fast-food establishments and the adjacent residential zone district.]

9. The rear wall of the adjoining structure shall be painted in a color compatible with the brick exterior of the rear wall of the gasoline service station building.

[RATIONALE: This is a new condition, adopting an OP recommendation. The purpose is to improve the appearance of the rear wall as viewed by the residential neighbors.]

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3 that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is not prohibited by law. It is therefore **ORDERED** that this application be **GRANTED.**

VOTE:

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member has approved the issuance of this order.

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

FINAL DATE OF ORDER:_____

PURSUANT TO 11 DCMR § 3125.6, THIS 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.

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 OF ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT

THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

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