

**GOVERNMENT OF THE
DISTRICT OF COLUMBIA**

BOARD OF ZONING ADJUSTMENT

APPLICATION # 17837

HILLCREST HOMES ASSOCIATES LP

MOTION FOR RECONSIDERATION

BY

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17837

EXHIBIT NO. 57

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I. BACKGROUND

In 2005 Hillcrest Homes Associates, L.P. (the “Applicant”) approached the Hillcrest community in a series of meetings with a proposal to build 171 attached townhouses on a property situated along the District’s southeastern border with Prince Georges County, Maryland. The property, which contains approximately 547,592 square feet of land, or 12.57 acres lies within the R-1-B District. Due to very strong community opposition this proposal was dropped.

On June 2, 2008 the Applicant filed an application for area variances and a special exception seeking to build 54 detached townhouse type structures. For the record, it should be noted that from the time of their first plan in 2005 to the variance application filed on June 2, 2008 the Applicant has had no discussions, meetings or contact of any kind with the community or ANC.

This matter went before the Board of Zoning Adjustment on November 18, 2008. A decision and order was mailed to all the parties in the case on July 23, 2009. Julius Fleischman, who was granted party status, is filing this motion for reconsideration.

II. THE APPLICANT IS NOT FACED WITH AN EXCEPTIONAL OR EXTRAORDINARY SITUATION OR CONDITION JUSTIFYING VARIANCE RELIEF

In seeking relief from the strict application of the Zoning Regulations the Applicant relies primarily on five factors: 1) shape, 2) “limited” access to existing rights of way and lack of street frontage, 3) topography, 4) the fact the applicant intends to dedicate approximately 128,259 square feet of land for Southern Avenue and 5) the location of an existing surface parking lot serving an adjacent apartment house in Maryland. Each of these factors deserves a thorough, more critical analysis than the applicant has provided thus far.

The shape of this property has always been mentioned as some sort of “disadvantage” but the Applicant has never explained why. We would like to call to the attention of the Board the case of Washington Canoe Club v. District of Columbia Zoning Commission. In this case, the petitioner sought permission to build a boathouse on a long, narrow parcel of undeveloped, waterfront approximately 440 feet in length with a variable width of 94 to 127 feet. The zone, however, required a 100-foot setback from the waterfront. The commission found that a variance should be granted because it would be impossible to build any structure without a relaxation of the 100 foot

set back requirement. This decision was affirmed by the D.C. Court of Appeals and is consistent with the Standards for a variance.

The shape of the Applicant's property which is roughly triangular and spread over a number of acres is not only not stifling or restrictive in any way but completely wide open for the applicant to run roads, layout lots and build structures rather liberally (by matter of right as illustrated in their own exhibit). The shape of the Applicant's property could just as easily have been a parallelogram, a polygon, trapezoidal, or some other unusual or irregular shape. It is not the shape itself which governs the need for a variance but the restrictiveness of the shape as it relates to it's buildability. The type of restrictive condition which existed in the Washington Canoe Club property is not present at all on the Applicant's property. The Applicant's argument in this regard is completely without merit.

The alleged "limited" access to existing rights-of-way is being misrepresented as a justification for variance relief as well. The Applicant has access to four existing rights-of-way: Branch Avenue, Naylor Road, 32nd Street and 33rd Street. Having access to no less than four existing rights-of-way is a land developer's dream and what is being portrayed as a negative is actually a huge positive.

The lack of street frontage theory is also puzzling. What the Applicant appears to be saying is that it is somehow “entitled” to a large swath of frontage on existing roads and without which it should automatically be granted variance relief. It is common knowledge that a land developer constructs their own roads in a subdivision to create frontage for all their lots. Building this infrastructure is, by definition, what a land development firm does. With an abundance of access points to public streets and the ability to freely run roads throughout, the theory that the Applicant is plagued with lack of street frontage is totally baseless.

The issue of topography also appears to be subject to a great deal of misperceptions. The Applicant has stated that “the subject property is constrained by extreme topography, rising more than 100 feet from southeast to northwest.” If one were to review topographical maps, or simply drive through the Hillcrest neighborhood, they would find this same pattern of rolling land, punctuated by steep slopes and retaining walls all over. This notion was amplified upon in the BZA hearing when ANC Commissioner Robin Marlin explained to Chairperson Ruthanne Miller that many of the houses are built into the sides of hills or on top of hills which actually gives the neighborhood its character. After all, this is how it got the name “Hill Crest”. In fact, it is not unusual to see

changes in elevation of 10 to 20 feet from the front sidewalk to the front door of a house complimented by a combination of slopes and/or retaining walls. As a result, when the Applicant says there is a rise in elevation of more than 100 feet from one end of this tract of land to the other (a distance which appears to be approaching 1,000 feet) and that this is an unusual or exceptional situation, one can begin to see that this is actually laughable from the community's perspective and from anyone else who is familiar with the area. Furthermore, during the BZA hearing the Applicant freely admitted in response to questions on topography that there was no problem in utilizing the entire acreage for development. The topographical issue simply has no merit.

The applicant also makes an attempt to argue that the property is burdened by their prior agreement to dedicate approximately 128,259 square feet of land (2.59 acres) for the Southern Avenue right-of-way "significantly reducing the land area of the subject property."

Southern Avenue is a boundary street just like Eastern Avenue and Western Avenue. It is a matter of public record that this swath of land has been on the books since the 1800's. What the applicant appears to be saying is that it started with 12.57 acres, it suddenly "lost" 2.95 acres and it now has a net land area of 9.62 acres.

The net land area was, is, and always will be 9.62 acres. The sellers of this property, who owned the property for decades, and the Applicant, as a sophisticated developer, are both keenly aware of this “subtraction” from the equation and have long since factored this in. There is no surprise here. For the Applicant to now argue that it’s fortunes are dramatically affected by this “loss” of land and it is deserving of a variance as a result is totally misleading and strains credulity.

Finally, there is the issue of the location of an existing surface parking lot serving an adjacent apartment house in Maryland. This lot, consisting of 17,301 square feet (.397 of an acre) was the subject of a parking easement agreement between the Applicant and the apartment house owners after the Applicant bought the underlying property on November 21, 2005. If the Applicant was so concerned about the use of this sliver of land then why did they grant an easement for it? This is especially true since this apartment complex has an overabundance of parking lots most of which sit empty and are underutilized. Furthermore, this sliver of land, which sits squarely in the path of Southern Avenue, could be taken through the process of eminent domain and would not represent the slightest obstacle to development.

III. STRICT COMPLIANCE WITH THE ZONING REGULATIONS WILL NOT RESULT IN A PRACTICAL DIFFICULTY

The Applicant insists that strict compliance with the lot and building dimension requirements would result in a practical difficulty. However, their discussion on this matter is probably a textbook example of how not to present this information in that they completely ignore the larger issues which govern whether a practical difficulty exists and instead focus on dissecting and quantifying self-imposed practical difficulties which are irrelevant.

The nucleus of this matter is economics. Despite the mountain of paperwork on this case the Applicant makes only one or two references to the “economics of this development” in less than a sentence, without going further, and without providing any elaboration whatsoever. Unlike many of the other cases cited by the Applicant, the minimum lot and building dimension requirements can easily be met, it is just a question of how many matter of right units can be produced and the economics underlying all this. For this reason, and due to the complete absence of any economic data in the Applicant’s proposal, the question was asked at the November 18, 2008 hearing:

“What amount of the land is unbuildable from an economic, regulatory or environmental standpoint?”

The answer was, in so many words, “I don’t know”.

This response speaks volumes. Having spent months claiming there were all these “problems” with the site one would expect a well reasoned response buttressed by some sort of financial analysis. For example, as the grade begins to climb in the northwestern portion of the tract they could have said the increased costs associated with building extra retaining walls layered approximately another \$100,000 in costs per unit which when multiplied by 10 units (the approximate number of units which could be built in the northwestern part of the property) resulted in \$1 million which eliminated some of their builder profit. This would be a legitimate issue which could result in a practical difficulty if their numbers could be proven accurate. They could have said that the number of retaining walls and the height of the retaining walls to develop a certain definable portion of the site was unacceptable from a regulatory standpoint and backed it up with concrete numbers from the building codes. This would be a legitimate issue. They could have said that deforestation problems associated with developing a specific quantifiable portion of the land where the terrain exceeds a certain precise slope would result in excessive erosion and run afoul of environmental rules. This also would be a legitimate issue. Instead we were greeted with incoherent verbage devoid of thought process.

The gravity of their response, or lack thereof , is quite far reaching. Adverse economics or lack of profitability can translate into a practical difficulty.

A regulatory or environmental constraint could be unnecessarily burdensome. The idea that the Applicant didn't know about any of these problematic issues could mean that they simply didn't explore these very critical areas. In so doing, there is no indication that a practical difficulty exists which in turn makes them ineligible for a variance.

On the other hand, the accumulating weight of evidence from Section II would suggest that they may have known all along that they could utilize the vast majority of the land rather profitably and with minimal problems. After all, they didn't seem to have any difficulties in utilizing most of the land in their 2005 proposal to build 171 units. Furthermore, this may also be the reason that they have often said they could easily develop the entire site with 66 matter of right units. Instead, with the current proposal, they claim they are doing the community a favor by agreeing to the community's demand for open space. This is simply a red herring.

To set the record straight, the community never asked for, requested or demanded open space. This is simply something the Applicant conjured up as a diversionary ploy. If there were a matter of right development featuring 5,000 square foot lots and single family detached homes needing no such variances there would not be any need for a so-called "buffer". The "open space" would be around the houses themselves which is what the members of

the community enjoy now and what is most important to them.

Similarly, the community only asked for the closing off of 32nd and 33rd Streets in response to the Applicant's extremely aggressive proposal to massively overbuild the site with 171 townhouses. Once again, this is a moot issue with matter of right density.

As stated at the beginning of this section the variances the applicant is seeking arise from practical difficulties which are self-imposed. Obviously, when the proposed lots are substantially undersized the applicant would "need" variances for lot areas and widths, front yards, rear yards, side yards, etc. to build respectable houses. However, these are not "natural" restrictions they are burdened with such as an existing lot in the city where the boundaries are set in stone but created and limited by their very own design. Self-imposed "practical difficulties" are not worthy of variance relief and granting such relief under these circumstances would clearly be against the spirit and intent of the zoning regulations.

IV. THE APPLICANT IS ACTUALLY INCREASING THE DENSITY ON THE SITE FROM WHAT IS ALLOWED BY MATTER OF RIGHT

In order to gain traction for their proposal the Applicant has engaged in an elaborate cover-up regarding the true matter of right density on this site. This warrants a systematic analysis in order to dismantle any misperceptions which they may have created. In the “Outline of Testimony before the Board of Zoning Adjustment” by Steven E. Sher he states as follows:

“Based on net land area (after subtracting Southern Avenue right of way), assuming 5,000 square feet per lot, 83 lots would fit on the site”

What does this mean? If one looks closer at this what he has simply done is divide 419,333 square feet (or 9.62 acres) by 5,000 square feet to yield 83 lots. This is pure and utter nonsense. Where are the roads? Where is the infrastructure? You can’t just stack landlocked lots without access or frontage like sardines in a can. Why even insert such a silly calculation into this proposal unless it is intended to deceive someone.

The subterfuge continues with Appendix Q of the Applicant’s proposal which is titled “Site Plan Illustrating Matter of Right Density”. On Appendix Q, which is attached, they claim they can do 66 matter of right units, this time with roads. A closer examination of this sketch reveals several suspicious items. There is a scale but no dimensions at all appear on the actual plan.

The sketch is superimposed upon their current 54 unit plan and one can see that the Southern Avenue extension has been “pulled down” on the map over the original right of way area effectively shrinking the land area and width that has always been designated for this roadway. As a result, the fronts of numerous lots actually start in the middle of the right-of- way. Meanwhile, the roads, which are drawn with unparallel lines appear to be undersized. The whole sketch, which is quite amateurish, was “intended” to demonstrate the true matter of right density but instead is only masking it.

The concept of matter of right density becomes abundantly clearer when one looks at Exhibit A which shows what could be regarded as a typical cross section of the Hillcrest neighborhood. Four conforming lots (50’ by 100’) are bound by a DDOT approved 60 foot right of way on two sides. The lots use 20,000 square feet and the right of way uses 21,600 square feet. Having used just short of an acre of land (43,560 square feet) one has netted four lots which is not atypical.

In testimony at the hearing, Julius Fleischman, a developer with decades of experience, indicated he had investigated this land for building purposes. Being well acquainted with the property as he lived right next door to it for forty years, and using a similar starting point of a net land area of 9+ acres and after allowing for DDOT approved roads and rights of way, he and his

surveyors laid out approximately 30 to 35 lots. It is simply a physical and mathematical impossibility to attain a 54 unit density much less 66 units as the Applicant has described in Appendix Q without the use of smoke and mirrors. In fact, it was only following pointed questions at the BZA hearing that Aakash Thakker, on behalf of the Applicant, conceded it was just a “study” and that “DDOT ... the District or anybody else has said this is right.”

The implications of this are quite far reaching in that the crux of this case centers around the true matter of right density. The Office of Planning (OP), has evidently taken the Applicant’s information in this regard as gospel and not provided any critical analysis to discern what is the actual matter of right density. Meanwhile, the Applicant has used this somewhat lax, laissez faire policy on the part of OP as well as the sheer size of the property to camouflage this massive increase.

This being the case, the Board should not be unwittingly rezoning land through variances. If the Applicant was intent on trying to achieve a higher density from what is allowed by right this matter should have been before the Zoning Commission as a PUD or as a rezoning of the land.

V. GRANTING THE APPLICATION WILL BE DETRIMENTAL TO THE PUBLIC GOOD, INCONSISTENT WITH THE MASTER PLAN AND INCOMPATIBLE WITH THE HILLCREST NEIGHBORHOOD

The biggest concern the community has with the application is the question of consistency and compatibility or, in other words, the “fit” with the neighborhood. It is not enough to say that this proposal threatens the integrity of the zone plan or that there is inadequate spacing as well as light and air between each dwelling unit. For example, from bay windows on either side neighbors can literally reach out and shake hands. These and numerous other things are already known and, although they are highly important, there is a much larger issue at stake. In order to understand this issue one must understand the history of Hillcrest.

Hillcrest is a neighborhood which began some 80 years ago. All the lots are 5,000 square feet or larger and many were bought by people who built custom homes on them. These homes also have a rich variety of architectural styles. As a result, no two houses are alike. This has created a certain quaintness or charm which cannot be reproduced in a tract housing development such as that proposed by the Applicant. It is not that the spacing, configuration and type of housing the Applicant is proposing to build is tacky or ugly, it is that it is out of place.

The Applicant is keenly aware of this. They know full well they can't blend this project into the fabric of the neighborhood even though they have often boasted that this is one of the hallmarks of their developments wherever they build. If they did not view this project as incompatible or adverse then why have they steadily increased the buffer zone on this development as a selling point? As stated previously there would be no need for this with a by right development. In fact, it would be welcomed with open arms as opposed to secluded and isolated like a leper colony.

Similarly, one must place the concept of clustering on small lots within the context of the neighborhood. Hillcrest has enjoyed a pattern of development where the houses are on large lots which flow with the contour of the topography and are forgiving to the land. On the subject property the Applicant is seeking to develop and build rather intensively on more than half of the land with dramatically undersized lots and leave the rest alone. To illustrate the folly of this from a long term planning perspective let us assume this had been the allowed pattern of development for the past 80 years with patches of higher density allowed on some land followed by other more challenging topographical land being left idle (i.e. simply granting variances for convenience sake as would be the case here). The neighborhood would be a hodgepodge and not possess the character and charm everyone has come to know and enjoy so well. There would be extremely

high density areas followed by low or no density spots with no consistency whatsoever thereby making a mockery of the Zone Plan.

Contrary to the Applicant's opinion, the densities associated with the Marlborough House Apartments and Naylor Gardens are irrelevant. The Marlborough House is located in the State of Maryland. Naylor Gardens, although it is in the District, is an "adjacent neighborhood" featuring buildings with all brick construction surrounded by spacious grounds. The subject property is not only zoned R-1-B but unlike the other two properties is actually considered to be part of Hillcrest. This is further evidenced by the fact that the Baist's Surveys of Washington have this land designated as a continuation of Hillcrest as seen on Exhibit B. On these surveys one can clearly see the extension of 32nd and 33rd Streets as well as Hartford Street following Gainesville Street in alphabetical order.

Perhaps the Applicant may have had a thread of legitimacy with their clustering proposal if they didn't seek to increase the density by more than 50 per cent from what is allowed by matter of right. However, with this being the case, any remote chance they may have had of weaving this development into the fabric of the community is hopelessly lost.

VI. PROFITABLE DEVELOPMENT OF THE LAND PRECLUDES THE GRANTING OF VARIANCE RELIEF

The elephant in the room the Applicant has conveniently chosen to ignore both out of choice and necessity is that the subject property can be profitably developed with matter of right guidelines. Land has been profitably developed for decades in Hillcrest and under the Fleischman proposal described earlier for this very same property a reasonable builder profit was projected as well.

When this proposal is exposed to the light of day it is plain to see that the Applicant is merely seeking an array of variances to enhance its profitability. In fact, the Applicant is not only seeking to increase it's profits through a clustering layout but actually hike its profits even more by camouflaging a very large increase in density with this very same cluster design.

It is well settled, however, that an Applicant cannot seek variance relief simply to circumvent the Zoning Regulations and "jack up" its profits. The discussion in *Palmer v Board of Zoning Adjustment*, which is particularly instructive here buttresses this point:

"The nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case. But it is certain that a variance cannot be granted where property conforming to the regulations will produce a reasonable income but, if put to another use, will yield a greater return."

In light of the foregoing, for the Board to grant this Application would be completely contradictory to the case law in our jurisdiction and is certain to invite a great deal of debate in the Court of Appeals.

VII. CONCLUSION AND REMEDY

The Applicant is mired in a series of contradictions which are impossible to reconcile. After 2005 they claimed to have presented a number of proposals to the community but neither the ANC Commissioner nor any of the residents in this impacted district has had any such contact. The Applicant claims they are faced with a number of factors creating an exceptional or extraordinary situation or condition justifying variance relief but all of them proved to be illusory and were later nullified and contradicted by the Applicant's very own statements. The practical difficulties which the Applicant "encounters" are merely of their own making and easily remedied through proper planning. They claim *their development will not be detrimental to the public good* or incompatible with the Hillcrest neighborhood but they have closed off all the streets to it and steadily increased the buffer zone surrounding it in an effort to segregate it. And so on and on it goes.

The Applicant's schizophrenic presentation has placed them in an untenable position. Although it is mandatory for the Applicant to meet the burden of proof on all three tests to be granted variance approval it is extremely doubtful whether they have even met one. Moreover, casting an ominous shadow over this entire Application is the issue of density. Even if they somehow satisfied all three prongs of the variance test the Applicant's attempt to surreptitiously increase the density on this site not only makes them guilty of engineering a backdoor rezoning but leaves their entire case fatally defective.

In fashioning a remedy it is necessary to dispel certain myths or misperceptions. The Applicant, and even one of the members of the BZA, alluded to the notion that the site may be "underdeveloped" (i.e. it could or should have more density). However, subjective opinions are irrelevant and have no role here. The matter of right density is subject to a fairly accurate calculation plus or minus several units which cannot really be modified using some sort of surveyor wizardry. The Applicant, as a respectable developer, should have calculated by right density numbers comparable to those in the Fleischman proposal if it chose to operate on an ethical plane. Meanwhile, the BZA has a duty, obligation and responsibility to the public to enforce this by right density in keeping with the Zone Plan just as a judge would interpret and apply the law in an impartial and unbiased manner divorced from their own opinion.

Nor is this a “negotiation” between 1 and 54 units where the side which gives the most political contributions, has the right contacts or shows up with the most consultants, lawyers and engineers pulls the tug of war rope in their direction without regard to the facts, the rules and the law. Such gamesmanship has no place here.

This site has a natural matter of right density, akin to a center of gravity, which through sheer size limitations is in line with the Fleischman proposal’s 35 unit maximum benchmark. Any remedy must naturally flow from this. As a result, the density on this site must be restricted to matter of right guidelines. It is only after this necessary precondition has been met that the Applicant can reasonably proceed with their development proposal in terms of the size, spacing and configuration of their units and any corresponding variance requests. Without the enforcement of this precondition the *raison d’etre* of the BZA would be rendered meaningless.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of July, 2009, a copy of the foregoing Motion for Reconsideration was mailed via first class mail, postage prepaid, to:

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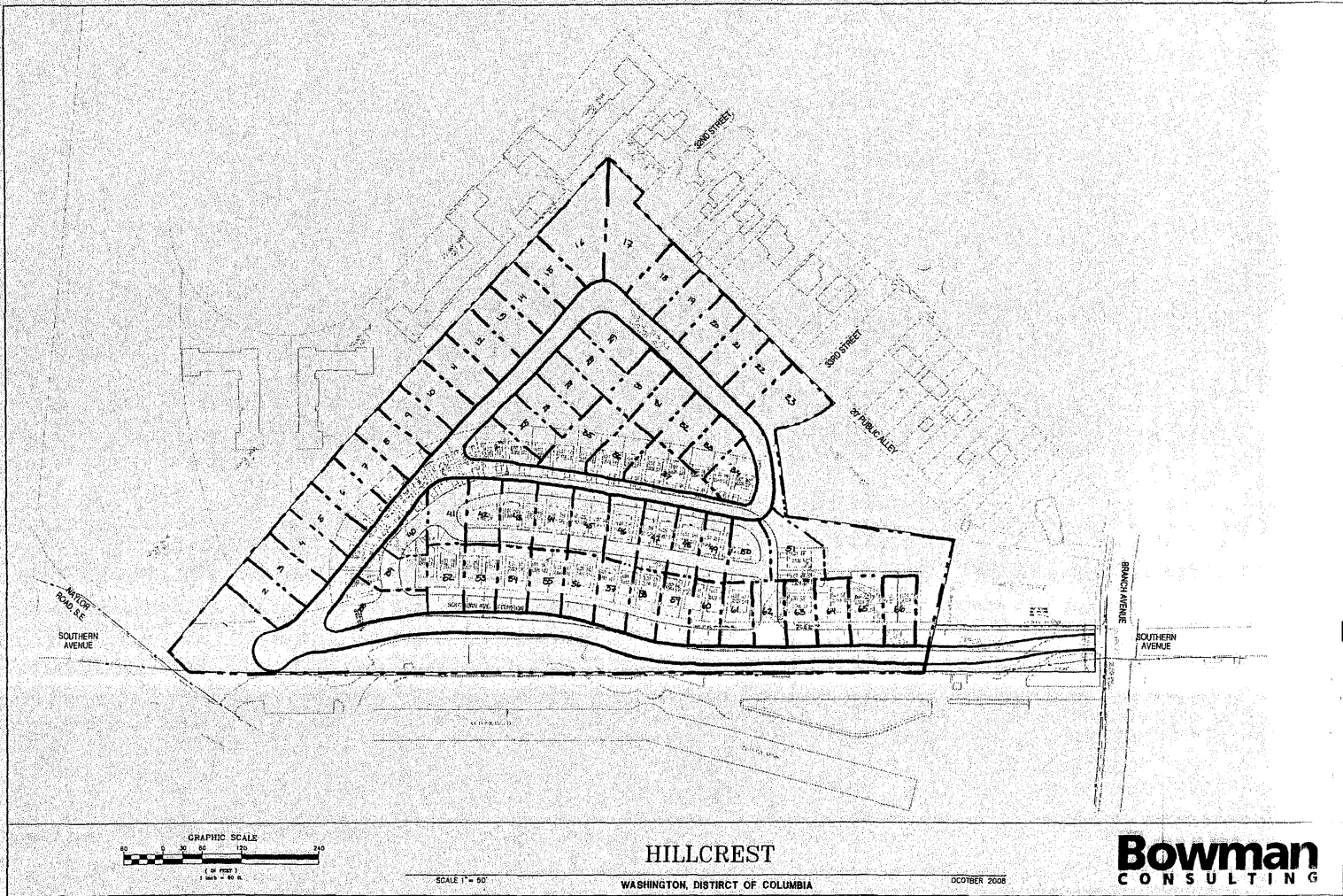
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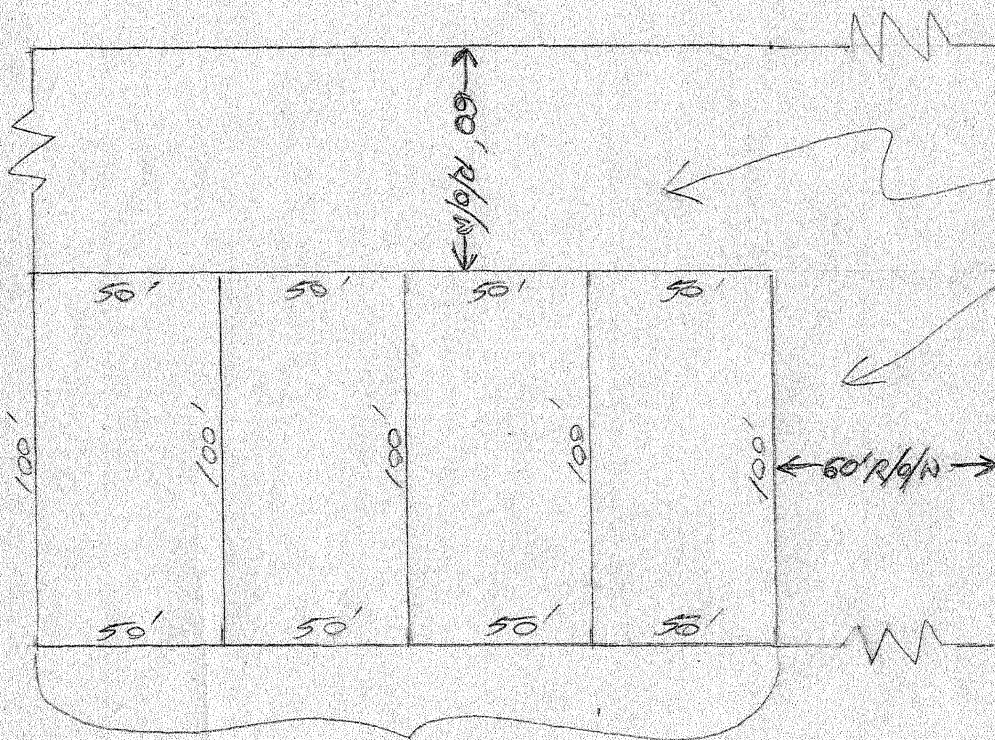
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Julius Fleischman





21,600 ϕ
(right of way
square footage)

TOTAL SQUARE FOOTAGE
OF CROSS SECTION

41,600 ϕ

20,000 ϕ
(4 x 5,000 ϕ
lot square footage)

SCALE 1/4" = 10'

