BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

In Re Application Of:	:	
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D.C. Department of General Services	:	**BZA Case Number 19450**
Ward 3 Homeless Shelter Project	:	
3320 Idaho Avenue, NW	:	

Pre-Hearing Statement of Neighbors for Responsive Government

Introduction and Summary

Neighbors for Responsive Government ("NRG") opposes the District of Columbia's request for multiple zoning variances and a special exception that are required if it is to be permitted to place a 185-resident, six-story shelter at 3320 Idaho Avenue, NW, on the site of the Metropolitan Police Department's critical Second District Station (the "Site").

NRG urges the Board to reject the requested variances and special exception. NRG's position is *not* in opposition to the concept of a homeless shelter in Ward 3. Rather, NRG's position reflects concerns about the *size and scope* of the proposed shelter structure on this particular site, and about the impact of its size and scope on neighbors and the community at large. These are issues that fall precisely within the jurisdiction of the BZA.

The proposed building, as reflected in the Department of General Service's ("DGS") application, is fundamentally incompatible with the neighborhood. It will loom over the surrounding single-family homes, cut off their sunlight, air, and open sight-lines, and dwarf the adjacent two-story single-family houses, the Police Station, and nearby low-rise town homes. Indeed, the proposed building has twice as many stories and is nearly twice the height of a building that would ordinarily be permitted in the RA-1 Zone. It will also adversely affect the adjacent community gardens, shutting off sunlight to multiple individual garden plots for much of each morning during growing season. Moreover, the full adverse consequences of the District's plan are not known, because its application is fatally incomplete.

The proposed shelter would house more than *45 times as many residents* as permitted as a of right under current zoning regulations. DGS has asked the Board for the right to build this enormous facility without having conducted a reasonable inquiry into alternative sites, with no loading dock of any kind, without having developed a plan for essential police parking during construction, and without properly ameliorating the noise, traffic, and congestion that the addition of 185 residents plus visitors and more than a dozen staff on a single lot will bring to this otherwise quiet residential neighborhood, to neighborhood playgrounds, and to the local elementary school. Its application should be denied.

Interest of NRG

NRG was formed in June 2016 by numerous Cathedral Heights residents who live in very close proximity to the Site. NRG speaks for dozens of neighbors whose homes are located within a few blocks of the proposed shelter, including many whose properties fall within the 200-foot perimeter of the Site.

Because the impact of this proposed shelter on the neighborhood and individual residents of the neighborhood can best be understood in light of the specific variances and exceptions requested by the DGS, NRG has organized this submission in a manner that addresses each of the requested variances and special exceptions separately. However, it is worth pointing out that the collective effect of the DGS's requests, if granted, will be more than the sum of the parts. NRG believes and asserts that the collective effect of granting these variance and exception requests would result in a wholesale change in the character of the neighborhood.

I. The Board Should Reject DGS's Application Because it Is Incomplete and Does Not Comply with the Board's Rules.

The Board's Rules require an applicant, in its application, to provide: "Architectural plans and elevations in sufficient detail **to clearly illustrate any proposed structure to be erected or altered, landscaping and screening, and building materials, and where applicable, parking and loading plans.**" Y-§300.8(c) (emphasis added). The deadline for supplemental submissions is 21 days prior to a scheduled hearing. *Id.* at § 300.15. That deadline passed on February 8, 2017.

DGS's plans do not comply with this rule. The District's original plan was to build a two-level parking garage behind the police station. But its original filing package contained no architectural plans for that garage, no drawings of the structure or how it will look or fit into the neighborhood; no information concerning how the plans will eliminate problems caused by headlights shining on neighboring houses at all hours; and no sun studies demonstrating the effect of the garage on neighboring properties,[1] including the Newark Street Community Garden, which DGS admits "must be preserved" and is "an important source of pride for the city and surrounding community," DGS's Second Zoning Statement (Feb. 8, 2017) at 9, 6 ("DGS's Revised Statement"). In short, the design of the proposed garage was an undefined mystery.

DGS substantially revised its plans on February 8 to increase the size of the proposed parking garage to three-levels, in order to satisfy certain zoning defects

[1] *See* Bd. Ex. 7, page A1.10 (original drawings, including sun studies that are limited to the shelter building).

with the original plan.[2] Thus, the revised garage is an integral part of the proposed development. Yet, **DGS admits that the three-tier parking deck is not even designed yet**. DGS's Revised Statement at 3, n.1.

Thus, DGS's February 8th filing does not provide any details of its plan to build a 3-level parking deck – and it certainly does not provide a "clear illustration" as required by Y § 300.8(c). Like its first filing, the new filing does not include any architectural plans for the new parking facility; no drawings of the new, higher structure and how it will look or fit into the neighborhood; no information concerning how the plans will eliminate problems caused by headlights shining on neighboring houses at all hours; and no sun studies demonstrating the effect of the higher parking building on the community garden. Further, to address the defects of its initial proposal, which would have only provided garage access to the police, DGS now proposes to allow the garage to be accessed by the police and residents, staff and visitors to the shelter. However, the revised materials provide no information regarding how shared access to the parking garage between the shelter and Police Station will be effectuated or how the shelter and the Police Station will share parking in a way that ensures that police property is secured and police operations are not impeded.[3] This lack of any timely information concerning the parking garage is a fundamental defect in the application.

Moreover, on February 17, just two weeks before the scheduled hearing and long past the deadline established by the regulations, DGS amended its application to seek a further special exception to allow parking during construction on the tennis courts and community gardens on lot 849 and the tennis courts on lot 848 (which is owned by the Federal Government).[4] It also is considering the need to convert the

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[2] Before the parking garage was enlarged, the District's plan would have violated parking standards and necessitated further relief from the Board.

[3] Tab B to DGS's Revised Statement, Bd. Ex. 75B, is a letter dated Jan. 27, 2017, from Commander Melvin Gresham of the Metropolitan Police, who states that he has "reviewed the plans for the project." He then states that the shelter will not impact the ability of police officers to perform their normal duties, since the shelter "will have its own separate entrance drive way and will not impede ingress and egress access to the rear of the police station." Of course, the plans provided by the District to date, show a **common driveway** that is to serve **both** the police and the shelter. *See* Tab A to DGS's Revised Statement at C1.2. Thus, Commander Gresham's statement has no basis in the record as it stood when he made it, which was more than a week before the District disclosed its "new" plans for a larger parking garage that would be shared by the police, the shelter, and members of the public. That letter is entitled to no weight.

[4] DGS's Revised Statement admits that lot 848 is "federally-owned land that cannot be utilized for the Project," and that the garden is "an important source of pride for the city and surrounding community." Id. at 3, 6. We agree. Moreover, in 1973 jurisdiction over the land comprising Lot 848 was transferred to the District of

asphalt walkway on lot 848 that runs next to the Newark Street Playground and the main section of the Community Garden into an access road suitable for high volumes of police traffic. Although DGS only conceded this need in the context of its new decision to build a three-level parking garage, the need for temporary parking during construction of the garage does not differ based on the number of levels in the garage (except that it will take longer to build three levels than to build two levels, thus requiring temporary parking for a longer period of time). **In short, the need for parking during construction has always been present, but has been ignored by DGS.**

DGS's Revised Prehearing Statement did not even mention its plan for long-term temporary parking on the tennis courts while the garage is being built. On February 15th, the District modified its "plans" yet again, informing the Ward 3 Short-Term Family Housing Advisory Team that in addition to considering the tennis courts for "temporary" parking during construction, the DGS is also considering another alternative: cordoning off approximately 60 spaces on neighborhood streets and designating them exclusively for police. The plan to change the use of these properties raises entirely new and disturbing issues and affects new members of the community. They are entitled to a chance to weigh in. Yet, no notice to families located within 200 feet of these material changes and newly affected properties has been provided, in violation of Y §401.2(d).

The District's plan is so ill-formed that the District has not been able to provide any information to the community about the details or how the District will implement it. Its February 17 amendment is devoid of details and includes no drawings or concrete plans. Moreover, DGS does not even attempt to show that it is entitled to this special exception under the requirements of U § 203.1(j) This is further evidence that DGS has not resolved the serious parking issues related to this proposed shelter, and that its withdrawal of a request for a variance relating to parking is as misleading as it is untimely.

The Application to the Board contains no drainage studies to show how runoff from the proposed use of the tennis courts and Community Garden for parking will impact adjacent, downhill lands, including the Newark Street Playground; no study of how runoff from construction and from the completed garage will affect those lands; no safety study related to the use of a road for high-speed police activity next to a children's playground and the Community Garden; no information concerning how the plans will eliminate potential problems caused by headlights shining on neighboring houses at all hours from the temporary parking on the tennis courts; no information concerning the effect of exhaust fumes from about 70 police vehicles parked in the area of the tennis courts on adjacent homes; and no noise studies

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Columbia "for recreation and related purposes." **Exhibit 1.** Parking is neither "recreation" nor a "related purpose." The Board cannot expressly or implicitly condone the District's plans to use those lands for a substantial period of time for parking.

showing how the use of the tennis courts for a police parking lot will affect adjacent homes. Nor does the Application address how a community with an already critical shortage of on-street parking, could tolerate the withdrawal of 60 spaces for the exclusive use of police.

Moreover, the need for temporary parking is not the only concern that NRG has about the construction phase. DGS is silent about the damage it will likely cause during construction. It is clear, however, that there will be significant and undisclosed adverse impacts. The Police Station and parking lot occupy most of the current site. It is not clear how the District will be able to construct the parking garage and shelter without removing the wall behind the Station and intruding directly into adjacent properties, destroying major sections of the existing garden plots and terrain. There is no discussion of where and how the District will stage the heavy equipment needed to dig the foundations, pour concrete, erect steel, and perform the other heavy construction tasks that this project will require, all the while *not* interfering with vital police services and operations. The community is entitled to those answers.

The requirement that an application be completed in a timely manner is not a mere technicality. *It is the essence of due process in the context of any zoning decision.* The community (and the affected ANCs) needs full, timely information, including without limitation final design plans, site drawings, sun studies, drainage studies, waste removal and garbage collection studies, safety studies, and traffic studies, to provide informed comments about the revised plans. Indeed, the ANC is entitled to at least 30 business days' written notice to comment on proposed land use changes. D.C. Code § 1-309.10(b). The District's new plans fail to comply with either the Zoning Regulations or the ANC Act, and leave the ANC, and the community, guessing as to the true plans of the Applicant. For all of these reasons, the Application should be rejected.

II. The Board Should Deny the Requested Variances and Special Exception Because they Result from Self-Imposed Problems, and the District Recognized in Court, and the Court Agreed, that Use of the Site Is Not Mandatory, and that Full Zoning Review Is Available and Appropriate.

There is a common theme running through DGS's position before the Board. All of the zoning variance relief sought by the District relates directly to problems with the site that it has selected for its Ward 3 shelter. But that only demonstrates that the site selection was fatally flawed – the District was free to look for and consider alternate sites – indeed, it was required to do so to build a shelter for more than 25 residents on the Site. But it simply did not do that. The fundamental flaws in the selected site do not justify the massive zoning incompatibilities between the proposed shelter, zone RA-1 and the surrounding neighborhood. Rather, these problems demonstrate that zoning relief is not appropriate or available.

The District's entire argument for a variance to allow for two primary structures on one lot is its assertion that "pursuant to D.C. Law 21-141, the short-term family shelter in Ward 3 must be located at the Property." DGS's Revised Statement at 11. DGS similarly argues that it needs to build a six-story building that does not conform to zoning regulations because:

> the location of existing structures on the Property and the Community Garden drive the need for zoning relief as to height and number of stories. Namely, the existing structures, including the MPD Station, parking lot, and refueling area, limit the available space for the Project. This limitation is compounded by the Community Garden, which must be preserved and, accordingly, cannot be built upon. The result of these restrictions is that the Project faces a practical difficulty in complying with the maximum height and number of stories.

DGS's Revised Statement at 9 (also discussing limitations imposed by the site's topography). The District also argues that it cannot provide a loading dock because "the MPD building and Community Garden limit the amount of area the building may occupy on the lot and, therefore, inhibit the Applicant's ability to incorporate a loading berth and service/delivery space." *Id.* at 10.

The District's argument that it "**must**" build its proposed shelter on the selected Site is flatly contradicted by the express language of D.C. Law 21-141, and by the positions successfully presented by both the Council and the Mayor in D.C. Superior Court in defense of a lawsuit brought by NRG challenging the Council's and the Mayor's failure to present their selection of the Site to ANC3C. There, the Council and the Mayor argued that the site choice in the statute is merely a preliminary decision, that may later be changed, and that is subject to full zoning review. Applicant may not be heard to advance an inconsistent position to the Board.

As the Council successfully argued to the Superior Court:

> Section 3(a)(2) of the Shelter Act **does not direct the construction of a shelter at the Idaho Avenue Site or any other location**, nor does it specify that some set number of housing units be established within the bounds of the ANC. **Instead, it authorizes, but does not require**, the Mayor to use the funds that have been appropriated for capital project HSW03C to construct a shelter of up to 50 units at the Idaho Avenue Site.

Defendant Council of the District of Columbia's Motion to Dismiss Plaintiffs' Complaint (Case No. 2016-CA-006290 B, D.C. Super. Ct. November 23, 2016) at 19-20 (emphasis added).[5] **Exhibit 2.**

The Mayor presented the Court with a similar construction of the Act:

> Because **the Homeless Shelter Act only authorizes preliminary actions**, none of which would allow the construction complained of, no notice was required. An action that only sets forth how a construction project may proceed but does not authorize construction is not final.... **The Homeless Shelter Act only authorizes mayoral actions rather than commanding them, and those actions are only ones that must be made prefatory to any decision to begin construction of the various shelters.** See the Homeless Shelter Act, § 3(a)(2), Compl. (Dkt. No. 1) Ex. 1 at 2-3 ("The Mayor is authorized to use funds ... provided, that the contract" be approved by the Council). **No final decision has been made about construction of a shelter at the Police Station site because none has been authorized.**

The District of Columbia's Motion to Dismiss Complaint (Case No. 2016-CA-006290 B D.C. Super. Ct. December 6, 2016) at 21-22 (emphasis added). **Exhibit 3.**

The Court accepted these arguments in dismissing NRG's complaint for lack of a concrete injury in fact:

> **As noted at oral argument, no final actions have been taken; the Shelter Act only authorizes preliminary actions by which the construction project may proceed**. *See, e.g. Foggy Bottom Ass'n v. D.C. Zoning Ass'n*, 979 A.2d 1160, 1165-66 (D.C. 2009). The Shelter Act authorizes Mayoral actions; no final decision has been made regarding the Police Station site.

Neighbors for Responsive Government et al., v. Mayor Muriel Bowser, District of Columbia, et al., Case No. 2016 CA 006290 B (February 7, 2016) at 14 (emphasis added). **Exhibit 4**.

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[5] Consistent with the Council's argument, the statute states only that "[t]he Mayor is authorized to use funds appropriated for capital project HSW03C-Ward 3 Shelter to construct a facility to provide temporary shelter for families experiencing homelessness containing up to 50 DC General Family Shelter replacement units on District-owned land at 3320 Idaho Avenue, N.W." D.C. Law 21-141, § 3(a)(2).

Notably, contrary to Applicant's position here, the Council made clear to the Court that it considered its site selection to be **subject to full zoning review by the BZA**, that that review must not be influenced by the Council's authorization of the use of the Property, and **that the issue of the potential use of an alternative site or sites were all open questions before the BZA**:

> The ANC is correct that constructing a shelter containing up to 50 housing units at the Idaho Avenue Site, which is zoned RA-1, *see* http://maps.dcoz.dc.gov/zr16, will require the District to obtain zoning relief from the Board of Zoning Adjustment. *See* 11-U DCMR § 420.1(f).... The concerns raised by the ANC in its Resolution No. 2016-031, regarding a potential change in use of the Idaho Avenue Site, such as co-location of a shelter with the existing police station, parking, **and the potential use of an alternative site or sites (Exhibit 2 to Complaint at ¶ 4), all fall within the ambit of the factors that the BZA must consider in determining whether to permit the required special exception.** Moreover, as noted above, the ANC objected to, and **the Council removed** from the introduced version of the Shelter Act, language that would have expressed the "sense of the Council" that it "supports the approval by the Board of Zoning Adjustment of such special exceptions and variances as needed for each of the projects...."

Exhibit 2 at 20 n.58 (emphasis added).

The Council made clear that it "has taken no position on, and in any event the BZA remains free to grant or deny, a special exception for the construction of a shelter containing up to 50 housing units at the Idaho Avenue Site." *Id.* The Council went even farther and expressly told the Court that it "has no authority over zoning matters." *Id.* at 21 n.59. "The Zoning Commission's jurisdiction over zoning matters is therefore exclusive....[and] the BZA's role is to 'assure that the regulations adopted by the Zoning Commission are followed.'" *Id.* (citations omitted). The Council therefore concluded that "to the extent Plaintiffs' comments and recommendations relate to the potential change in use of the Idaho Avenue Site, they should not have been directed to the Council in the first instance, but rather to the appropriate zoning authority, in this case the BZA." *Id.*

In sum, the District made clear to the Superior Court that the Shelter Act did not mandate the use of the Property and that the BZA retained plenary authority to implement the Zoning Regulations without any influence from the Council. Among other things, the District argued to the Court that the inappropriateness of the selection of the Site was properly an issue for the Board.

The District's assertion that because this location was selected by the Council as the site for the Ward 3 shelter, the shelter "**must** be located at the Property," Prehearing Statement at 11 (emphasis in original), fails for another reason. This assertion seems to treat DGS, the applicant, which is a part of the District of Columbia government, as an entity distinct from the Council and the Mayor, who selected this site for the shelter, while recognizing that it had to undergo BZA review and approval. Indeed, in Neighbors' lawsuit challenging the Council and the Mayor for failing to first obtain the views of ANC3C before enacting the legislation, both the Mayor and the Council moved to dismiss the lawsuit as premature, in that the plaintiffs first had to seek relief in this BZA proceeding. In other words, the District's true position is that it is not "requiring" itself to do anything but seek BZA approval to proceed with the project at this location. The reality is that there is no compulsion to use this Site, as there is no evidentiary record in this case that the District's programmatic needs cannot be met using some other site. This site is simply the one the District chose, and it did so knowing full well that it already contained a primary structure, i.e., the 2nd District Police Station and accompanying improvements. Thus, whether variance relief is judged under the "practical difficulty" or "undue hardship" standard, the problem is one of self-creation.

Applicant cannot now be heard to argue that it must build on this Site. Rather the choice of the Site and the problems with the Site were, or should have been, fully known by Council when it passed the Shelter Act and by the Mayor when she signed the Act. Any problems with the Site are self-imposed hardships. Far from supporting zoning relief, problems with the Site militate against zoning relief, as discussed below in the discussion of each requested variance and special exception.

III. The Board Should Deny the Requested Variances To Co-Locate Two Primary Structures on the Same Lot and To Build a Building that Is Twice the Permitted Height and Lacks a Loading Dock.

A. The Burden is on the Applicant To Prove that it Satisfies the Requirements for Each Variance.

The Zoning Regulations establish the requirements for the granting of a variance. The burden of proof to establish each of the requirements with competent evidence in the record rests with the applicant, even if no contrary evidence is presented. X § 1002.2. The specific standard of hardship differs depending on whether applicant seeks a use variance or an area variance. However, in all cases, the applicant must show that "the 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." *Id.*, § 1000.1. As discussed below, DGS fails to meet this requirement – the requested relief cannot be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan.

Further, to qualify for an area variance, an applicant "must prove that, as a result of the attributes of a specific piece of property described in Subtitle X § 1000.1, the strict application of a zoning regulation would result in peculiar and exceptional practical difficulties to the owner of property." *Id.*, § 1002.1(a). To qualify for a use variance, an applicant "must prove that, as a result of the attributes of a specific piece of property described in Subtitle X § 1000.1, the strict application of a zoning regulation would result in exceptional and undue hardship upon the owner of the property." *Id.*, § 1002.1(b). The attributes "described in Subtitle X § 1000.1" are: "exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations, or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property."

DGS does not seek or attempt to argue that it is entitled to a use variance. Instead, it argues that it is entitled to three area variances because, it asserts, there is a "confluence" of four factors that constitute an "exceptional situation or condition": (1) the location of the existing structures on the lot; (2) the pre-existing community gardens; (3) the site's topographical changes, and (4) "the Project's programmatic needs."

In fact, this alleged "confluence of factors" is driven entirely by the fourth one – the alleged "programmatic needs"—because the other three factors arise from the District's decision to select the Site without regard to alternatives, i.e., properties the District owns or could acquire suitable for a 50-family emergency shelter that are not beset with the need for multiple variances. The District knew or should have known about the lack of conformity to RA-1 zoning standards for its project when it chose the Site. Given the breadth of options it had in this respect, and particularly in the absence of record evidence to the contrary, the Board should disregard factors (1) – (3) asserted by the Applicant. *See A.L.W., Inc. v. BZA*, 338 A.2d 428 (1975) (knowledge of a site's zoning noncompliance when the property is acquired is one factor that may be taken into account in exercising discretion to grant or deny an area variance).

As for the fourth factor—programmatic needs-- the District claims that it must have a building that houses 50 families, with no more than 10 families per floor.[6] Citing *Gilmartin v. District of Columbia Board of Zoning Adjustment*, 579 A.2d 1164 (D.C. 1990), the District asserts that this programmatic need "uniquely affect[s] the Project" and therefore qualifies as an "exceptional condition affecting this Property." This effort to fit within the *Gilmartin* precedent makes no sense.

Variance caselaw in the District has established a "three-prong" test for when grant of an area variance is proper – i.e., when the Board

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[6] *See* First Applicant Statement at 3-4: "Accordingly, sleeping units will be limited to no more than 10 units per floor in order to create a small, family-centric environment that promotes privacy and ensures security."

> finds three conditions: (1) the property is unique because, *inter alia*, of its size, shape, or topography; (2) the owner would encounter practical difficulties if the zoning regulations were strictly applied; (3) the variances would not cause substantial detriment to the public good and would not substantially impair the integrity of the zoning plan.

French v. District of Columbia Board of Zoning Adjustment, 658 A.2d 1023, 1035 (1995). In *Gilmartin*, the Court of Appeals concurred with a BZA determination of uniqueness, in connection with area variances for the size and location of a carriage house parking space on property for which there was no showing of size, shape or topographical uniqueness. 579 A.2d at 1166-68. The Court's rationale for upholding the BZA on the first prong of the area variance test was as follows:

> What makes this property different from others is the fact that two specific easements cross the subject property in a particular fashion in relation to the improvement on the property so as to preclude the use of that portion of the property for a parking space. Thus, it is the unique confluence of the particular location of the carriage house in relation to the property boundaries on the north and the easements on the south that makes it necessary for the intervenors to seek the variances, as BZA found. This, in effect, **makes the property unique.**

Id. at 1168 (emphasis added). *Gilmartin* therefore is hardly ample precedent for departure from the need to demonstrate uniqueness. As the *Gilmartin* court reiterated from earlier cases:

> To support a variance, it is fundamental that the difficulties or hardships be due to unique circumstances peculiar to the applicant's property and not to the general conditions in the neighborhood. There is no requirement that the uniqueness inheres in the land at issue.... The statue does not preclude the approval of a variance where the uniqueness arises from a confluence of factors. The critical point is that the extraordinary or exceptional condition **must affect a single property**

Id. (citations and internal quotation marks omitted; emphasis added). Here, the stated "programmatic needs" — even assuming all of them are legitimate to the emergency homeless shelter program and dictate the size of the shelters[7] — are not unique to this particular property; they apply to every property where the District

[7] Whether that is so is discussed in Part IV.C.1., *infra.*

might seek to locate the shelter deemed sufficient to satisfy those needs. In short, "programmatic needs" cannot be a justification for finding this particular Site unique, such that any area variance relief is warranted.

Moreover, without the Site constraints arising from the existing primary structure and supporting facilities and the Community Garden and tennis courts on the property, it is amply sized for construction of a shelter meeting all the asserted programmatic needs, with a loading dock, all necessary parking, and setbacks from adjacent properties that would greatly minimize the building's impact on its neighbors. The reality, however, is that the pre-existing uses of the property, including the 2nd District Police Station, will continue. In other words, the property has no demonstrable uniqueness characteristics aside from the presence of its continuing pre-existing uses.[8]

B. The Requested Variance To Build Two Incompatible Primary Structures on One Lot Should Be Denied.

DGS seeks variance relief under C §302.2, i.e., permission to place two primary structures on one lot. DGS characterizes this request as an area variance and its entire argument is that it satisfies the requirement for an area variance. *See* DGS's Zoning Statement Cover Letter, (January 3, 2017) ("DGS requests area variances"); DGS's Zoning Statement (January 3, 2017) (DGS's First Statement") at 5, 6 ("The Board is authorized to grant an area variance"); DGS's Revised Statement, Heading V, at 4, 5 ("all three prongs of the area variance test are satisfied").

In fact, DGS is barking up the wrong variance tree. It is actually seeking a *use variance* disguised as an area variance, and does not even attempt to argue that it satisfies the requirements for the grant of a use variance. Thus, the requested variance cannot be granted and must be denied as a matter of law.

Variance types are as specified in X §1001. An area variance is a request to vary from an area requirement. X §1001.2. Under the specific examples in X §1001.3 (a) and (b), the loading variance being sought is an area variance, **but a variance from the one-primary-structure-per-lot requirement is not among the other examples of area variances**. A use variance is for a use that is not permitted as of right or as a special exception in the zone, X §1004.1(a), or is for a use expressly prohibited in the zone. X §1004.1(b). The standard of proof for a use variance is higher than for an area variance. X §§1002.1 (a) & (b).

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[8] The notion that the property's topography is an exceptional condition is asserted, but cannot be demonstrated in reality. There may be a change in elevation of 18 feet from the north to the sound end of the property, but all the new, shelter-related construction is to take place in a relatively flat, gently sloping area at the south end.

In this case, a second primary structure on one lot is not permitted as of right and such use is not sought by special exception. Hence what is sought is a use variance. But, a use variance is not available to DGS, because the District proceeded to select this property for a second primary structure knowing that it would require the use variance. That is a self-imposed hardship, which alone is sufficient to defeat a use variance request. *Oakland Condo. Ass'n v. BZA.* 22 A.3d 748, 755 (2011); *National Black Child Dev. Inst. V. BZA*, 483 A.2d 687, 690 (1984); *Salsbery v. BZA*, 357 A.2d 402, 404 (1976); *A.L.W., Inc. v. BZA*, 338 A.2d 428, 431 (1975). In fact, even if this variance could be characterized as a "hybrid," i.e. a "use-area" variance, it is one that, if granted, "would drastically alter the character of the zoned district," warranting application of the undue hardship standard, *Taylor v. BZA*, 308 A.2d 230, 232-33 (1973). Thus, it must be denied as a self-imposed hardship.

However, even if the requested variance were to be incorrectly viewed as an area variance, DGS is not entitled to that variance. Its sole argument in support of its requested variance relief is that the Shelter Act requires the use of this Site. DGS's First Statement at 12 (the "Applicant is required to construct the shelter on the Property."); DGS's Revised Statement at 11 (the Council has dictated that "the short-term facility must be located at the Property"). As discussed above, in Part II, that argument is wrong. The law is clear that it does not require the use of this site – rather it authorizes DGS to proceed, **subject to the need to obtain zoning relief under applicable zoning standards**. In short, Applicant has failed to justify the need for or its entitlement to this variance.

C. <u>The Requested Height Variance Should Be Denied</u>.

As discussed above, DGS is seeking a height variance because it selected a Site that does not allow it to meet its asserted programmatic needs in a way that complies with applicable zoning regulations. But DGS has made no showing that it must place its shelter on this Site – indeed, it did not even look for or consider other sites where lesser or no height relief would be needed. For that reason, any asserted difficulty is a self-imposed hardship that alone justifies variance denial.

Moreover, the requested height variance cannot be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan. The Site is zoned RA-1, which means that the surrounding neighborhood consists primarily of single family homes, low rise garden apartments, and row homes that are no more than 40 feet and three stories high. Indeed, the maximum height permitted in the zone is 40 feet and 3 stories. Moreover, directly south of (and immediately adjacent to) the planned shelter, Idaho Ave and Macomb Street have even lower density zoning, zone R-1-B, which is designed to protect quiet residential neighborhoods of primarily single family homes and moderate-sized lots.

The District seeks a variance in order to build a building that is 72 feet and 6 stories (*plus* a mechanical penthouse), essentially twice as high as is ordinarily

permitted in the RA-1 zone. The proposed building will be located just a few yards from an existing two-story single-family residence. It will loom over not just that residence, but all of the nearby single-family homes, depriving them of their privacy, and cutting off their sunlight, air and open sight-lines. The relative size and position of the proposed shelter building is demonstrated on **Exhibit 5**.[9] The building will, similarly, dwarf the Police Station building and nearby, low-rise townhomes, similarly blocking their light, air and sight lines. It will also adversely affect the adjacent community gardens, shutting off sunlight to multiple individual garden plots for much of each morning during growing season. Bd. Ex. 7 at A1.10. These are exactly the values and effects that building height limits are designed to protect. The requested height variance should be denied.

The District's attempt to justify its requested variance simply ignores these properties – the ones most directly and seriously affected by the proposed shelter, and instead argues that the new shelter is not out of scale with Vaughan Place (including WTOP). DGS's Revised Statement at 4, 13. But those buildings are across Newark Street, to the north of Lot 849 –away from the south end of the lot where the shelter is to be built, and shielded by distance and topography from the R-1-B zoned single-family homes that will sit immediately next to and directly below the shelter. Even the Cathedral Commons building across Idaho Avenue, which is prominently marked on the District's drawings, is in better scale to the neighborhood than the proposed shelter. The Giant, CVS buildings and loading dock, along with the apartments above the CVS and the townhouses fronting Idaho Avenue, are all in proper proportion to the height of the other residential properties near the shelter – essentially three floors from above the street, not six as proposed for the shelter.

Moreover, the buildings cited by the District were the result of PUD processes, which included significant community input, intensive regulatory oversight, and compromise to minimize community impact. There has been nothing of the sort here. The buildings that came out of that PUD process were carefully limited in their location, and should not be allowed to serve as precedent for further overly large development. That would lead to a domino effect of over-development in violation of the Zone Plan and would allow the exception to become the rule.

Finally, the DGS Revised Statement asserts (at 13) that there are buildings with similar density. That is false. There is no building in the neighborhood with anything near the density of the proposed shelter – 185 residents on a footprint that is approximately 8,000 square feet.[10]

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[9] This rendering was prepared to scale by Phillip Renfrow, a D.C. licensed architect.

[10] The sample floor plan in the District's Revised submission now shows beds for 33 residents, plus 4 trundle beds (denoted + T on the plans), per floor. That is a total of 185 residents. See Bd. Ex. 75A2 at A1.03. The trundle beds were not previously identified on the plans. Accord Transportation Assessment, Bd. Ex. 40 at 22.

In short, Applicant has failed to satisfy its burden of proof to justify the requested height variance. That variance cannot be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan

D. The Requested Loading Dock Variance Should Be Denied.

DGS's request for a variance to proceed without a required loading dock is also directly attributable to the fact that it selected a site that does not allow it to meet its asserted programmatic needs in a way that complies with applicable zoning regulations. As above, DGS has made no showing that it must place its shelter on this Site – indeed, it did not even look for or consider other sites. For that reason, any asserted difficulty in complying with this requirement is a self-imposed hardship that alone justifies variance denial.

Moreover, the requested loading dock variance cannot be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan. The DGS's Revised Statement (at 10-11) relies entirely on its Transportation Assessment ("TA," Bd. Ex. 37) to support its claim that no loading dock is necessary. But the discussion in the TA is entirely conclusory and has no supporting evidence or analysis. Therefore DGS has failed to meet its burden of proof.

The TA's discussion about the lack of need for a loading dock ignores the many needs that a loading dock serves, including repair and maintenance of large systems (e.g., boilers and HVAC systems), furniture replacements when new furniture is needed, and, notably, trash pick-up. In addition, while the TA parrots DGS's assertion that residents will not have possessions that they may wish to take with them when offered the opportunity to stay in the shelter, there is no evidence supporting that assertion. Inclusion of an unsupported assumption in a Transportation Assessment does not make it evidence. It remains an unsupported assumption.

Common sense dictates that a loading and service delivery dock is an absolute necessity for a facility proposing to house 185 residents who will be regularly coming and going with their possessions. Moreover, since residents will be eating in common dining facilities with meals provided by the shelter, food trucks and other service vehicles will arrive twice daily for deliveries. It must be anticipated that a facility this large will also experience emergency vehicles arriving to assist residents in distress. They, too, will need such a dock.

DGS also relies on the TA's assertion (again, parroting DGS), that a loading dock is not needed for trash pickup, which allegedly will be handled by two trash bins located at the rear of the project. Again, however, the TA offers no analysis of whether these bins will be sufficient, or how a trash pickup truck will be able to access the bins.

The proposed approach to trash is manifestly inadequate and threatens the public good. As noted on Bd. Ex. 75A1, pages C1.1 and C1.2, DGS proposes to provide one or two modest sized bins (described as dumpsters), directly behind the Play Area, and directly adjacent to the south wall of the site. Even though DGS provides a footnote to the drawings saying that they are "Not For Construction" but rather "for concept only," the drawings demonstrate that DGS has failed to adequately address the issue of trash collection and removal. The two dumpsters in the drawing appear to occupy less room than the single parking spot to which they are adjacent. It is preposterous to suggest that such limited trash facilities would be adequate for a shelter with 185 residents, including babies in diapers and children, a staff of ten or more, visitors, twice daily food services, and other necessary trash considerations. DGS has utterly failed to provide any analysis of a) how trash will be safely stored on the premises, without hazard to children in the adjacent play area and the neighbors in immediate proximity to the garbage location; b) how trash collection vehicles can safely access the dumpsters, particularly when cars are parked in the spaces along the back of the shelter; and c) how rats, deer, raccoons, other animals and vermin will not infest the garbage site. Additionally, with the proposed location of the dumpsters at the rear of the premises, there is no traffic plan that assures that District garbage trucks can actually reach the containers and load their contents into their trucks. Given the proximity of the dumpsters to children's play area, parking behind the building, the rear wall separating the shelter from the Community Garden, and the neighbors immediately adjacent to the designated trash dump area, a detailed plan is required. DGS's failure to present such a plan is a failure to prove that the proposed development is consistent with the public good and is, itself, cause for denial of the application.

IV. The Board Should Deny the Requested Special Exception To Exceed the Maximum Anticipated Size of an Emergency Shelter by a Factor of Seven.

A. The Proposed Use Is Not an Emergency Shelter, and Therefore Is Not Permitted in Zone RA-1 Without a Use Variance, Which Applicant Has Not Sought.

DGS asserts that the proposed shelter is a permitted use in zone RA-1, because it is an "emergency shelter" as that term is used in the Zoning Regulations. See Application (seeking special exception relief to build an "emergency shelter"); DGS's First Statement at 1, 13-16; DGS's Revised Statement at 1, 15-18. There is serious doubt, however, that the proposed use qualifies as an emergency shelter. If it is not an "emergency shelter," it is not a permitted use, and DGS has not applied for a necessary use variance to place anything other than an emergency shelter at the Site.

The D.C. Zoning Handbook, which was released by the Office of Zoning to describe the 2016 Zoning Regulations, describes an "emergency shelter" as "[a] use providing thirty (30) days or less of temporary housing to indigent, needy, homeless, or transient individuals. Emergency shelter uses may also provide ancillary services

such as counseling, vocational training, or similar social and career assistance."[11] The District has *never suggested* that the residents will be expected to stay for thirty days or less.

If the District intends to argue that the definition of "emergency shelter" in the 2016 zoning regulations is at variance with the Zoning Handbook, because it does not include the 30-day limitation, [12] that would not square with the concept of "emergency shelter," which necessarily contemplates a brief, emergency stay.

This is clear from the District Department of Human Service's ("DHS") own website. DHS is the agency that coordinates the District's response to homelessness and that has jurisdiction over the proposed shelter. Its website defines "emergency shelter" as follows: "[e]mergency or low-barrier shelters are designed to keep people safe from extreme weather conditions. The Emergency Shelter program provides beds on a first come, first served basis, to any homeless person. It is sometimes also referred to as emergency shelter."[13]

DHS contrasts "emergency shelter" with "temporary shelter," which it describes as follows: "The City of Washington, DC temporary shelter also known as short-term shelters are often open 24 hours a day. Temporary shelter programs offer various onsite services for both families and individuals. Most shelters not only provide a warm and safe place to sleep, but also offer on-site assessment and case management. Their goal is to help individuals immediately start working on making the transition from homelessness to more stable, long-term housing."[14] In short, this facility does not meet DHS's own concept of an "emergency shelter." Rather, it is a temporary shelter.

The District repeatedly refers to this shelter as "short-term family housing," DGS's Revised Statement at 4, 6, 7, 8, 14, 15, and its drawings describe the shelter as "short-term family housing," not an emergency shelter. Moreover, the District asserts that its plan is consistent with the Comprehensive Plan's call for more "neighborhood-

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[11] http://handbook.dcoz.dc.gov/use-categories/emergency-shelter/.

[12] See Subtitle B, §100.2 (definition of "emergency shelter"), which defines the word as "[a] facility providing temporary housing for one (1) or more individuals who are otherwise homeless as that arrangement is defined in the Homeless Services Reform Act of 2005, effective October 22, 2005 (D.C. Law 16-35; D.C. Official Code §§ 4-751.01 et seq.); an emergency shelter use may also provide ancillary services such as counseling, vocational training, or similar social and career assistance." But the definition does include the concept of "temporary housing."

[13] https://dhs.dc.gov/service/emergency-shelter

[14] https://dhs.dc.gov/service/temporary-shelter

based supportive housing and single room occupancy (SRO) units, rather than through institution-like facilities and large-scale emergency shelters," Id. at 14. In other words, the District is attempting to have it both ways – asserting that this is an "emergency shelter" to qualify for the only potentially applicable special exception use in zone RA-1, but at the same time asserting that it really is not an emergency shelter, but is more like the kind of supportive and SRO housing called for in the Comprehensive Plan.

Whatever the District is arguing, its own website and documents confirm that it is proposing something other than an "emergency shelter" as that term is used in the Zoning Regulations. There is no other use category into which the proposed shelter plausibly fits that would be allowed in the RA-1 zone, either by right of by special exception. Accordingly, the application should be viewed as in effect seeking a variance to permit a use not otherwise permitted in the zone. A use variance has not been sought, of course, because the DGS cannot demonstrate (and has not attempted to demonstrate) that its denial would result in "undue hardship," as that term is used in the Regulations. X 1002.1 (a) & (b). That standard precludes DGS from receiving a use variance when it has actual or constructive knowledge, as here, that the use would not conform to the Zoning Regulations. *Oakland Condo. Ass'n v. BZA.* 22 A.3d 748, 755 (2011); *A.L.W., Inc. v. BZA,* 338 A.2d 428, 431 (1975).

B. The Proposed Shelter Stretches the Contemplated Scope of the Special Exception in Subtitle U, §420.1(f) Beyond the Breaking Point, and Thus Requires a Use Variance.

Even if the proposed shelter were deemed to qualify as an "emergency shelter," DGS should not be entitled to rely on the special exception in U §420.1(f), because the size of the proposed shelter is far beyond anything contemplated by the Zoning Regulations for Zone RA-1.

The Zoning Regulations define the contemplated scope of an emergency shelter in Zone RA-1 in two ways. First, the Regulations permit a shelter for up to 4 residents as a matter of right. U §401.1(a); U §301.1; U §202.1(h). Second, the Regulations allow a special exception for a shelter designed to house 5 to 25 residents if certain defined conditions are met. U §420.1(f). While it is true that DGS may seek further relief to exceed the 25-resident maximum, nothing in the Regulations suggests that the authority granted by that further exception would be unlimited. For example, it cannot be seriously argued that a shelter the size of D.C. General, which houses close to 300 families, or nearly 1000 individuals, could ever be consistent with the purpose and intent of the RA-1 zone, which is to "provide[] for areas predominantly developed with low- to moderate-density development, including detached dwellings, rowhouses, and low-rise apartments." F § 300.2. There must necessarily be some limit to the size of an emergency shelter that can be permitted in the RA-1 Zone.

NRG submits that any reasonable limits on the special exception authority granted by section U 420.1(f) is exceeded by the shelter proposed by DGS. The proposed shelter is designed to house 185 residents. That is 46 times the size permitted as of right in the zone, and more than 7 times the size contemplated by the top of the range for an ordinary special exception in the zone. A facility of this size is no more intended for the RA-1 zone than is a D.C. General-sized facility. The magnitude of the deviation itself is compelling evidence of the inappropriateness of the development. The Board should conclude that a shelter of the size proposed is not a permissible use in zone RA-1.

C. In Any Event, Applicant Fails To Comply with the Mandatory Conditions Set Forth in U §420.1(f) that Must Be Met To Qualify for a Special Exception for a Shelter of the Proposed Size.

As discussed above, the largest emergency shelter permitted as of right in zone RA-1 is a shelter for up to 4 residents. To build a larger shelter, DGS must satisfy the requirements for a special exception, including the specific conditions set forth in U § 420.1(f). If the Board concludes that DGS does not require a use variance for a shelter that is so far beyond the size contemplated by the Zoning Regulations, and concludes that the proposed "emergency shelter" is considered eligible for evaluation under U § 420.1(f), the propose size of the shelter dictates that the application should undergo the most rigorous scrutiny possible for compliance with the mandatory special exception conditions and criteria.

In general, to obtain a special exception, an applicant has the burden of proving, with competent evidence, that the special exception "(a) [w]ill be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps; (b) [w]ill not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps; and (c) [w]ill meet such special conditions as may be specified in this title." X §§ 901.2, 901.3. The applicant will have the full burden of proof regardless of whether evidence is presented in opposition. *Id.* § 901.3.

1. DGS Has Not Met the Special Conditions Specified in U § 420.1(f)(6) Because it Presents No Evidence that its Program Goals and Objectives Cannot Be Met by a Smaller Shelter, and Because it Did Not Conduct a Reasonable Search for Alternative Sites.

DGS is required to prove that "The program goals and objectives of the District of Columbia cannot be achieved by a **facility of a smaller size** at the subject location and if **there is no other reasonable alternative to meet the program needs of that area of the District.**" U § 420.1(f)(6)(emphasis added). This condition contains two parts – the inability to use a smaller shelter at the site, and the lack of reasonable alternatives (including alternative sites). The Applicant fails to meet either condition.

Despite the fact that the question of a smaller size shelter that would be in keeping with RA-1 zoning has been raised repeatedly by members of the community in public forums, the District has been inflexible and refused to even consider this suggestion. The District has also refused to entertain the suggestion that there could be more than one shelter in Ward 3 that would collectively satisfy the goal of housing 50 units in the aggregate in Ward 3.

DGS's Prehearing Statement interprets the (f)(6) requirement as met by merely asserting that the District's program goals "cannot be achieved by a facility of a smaller size at the Property." This is an inadequate demonstration, one hardly sufficient to justify construction of the very large, out-of-neighborhood-scale structure desired.

DGS cannot rely on its frequently cited fallback position that the District is mandating fifty units, which ties the hands of DGS. The legislation does no more than state that the Site will accommodate **up to** 50 units, which leaves a lesser amount within the purview of the Act. Nor can DGS justify its obstinacy by stating that the wrap-around services it is planning to provide require a fifty-unit building. These wrap around services do not even include child care and could easily and efficiently be shared with two or more smaller shelters. DGS's submission is wholly silent about (i) the cost of providing smaller shelters compared to the cost of the larger one proposed, (ii) the cost of wrap-around services that it intends to provide at the proposed shelter; and (iii) the cost of sharing those wrap-around services among multiple shelters. There is no showing, for example, that the cost of security personnel does not vary with scale, social service workers are not able to commute from one shelter to another, or that the dining room and computer room add substantially to the shelter's cost. The District simply takes the approach that DC General is too large but has failed to consider, let alone attempt to justify, that shelters smaller than fifty families would meet the programmatic needs of the District.

Moreover, DGS has failed entirely to even address the second requirement of the condition, that there is "no other reasonable alternative to meet the program needs of that area of the District." This is not a redundant statement about proof of the need for a facility of this size; it is about the District's burden of proof to demonstrate that there are no reasonable alternative **sites** in Ward 3. *See* Applicant's Revised Statement at 18 (discussing only the issue of smaller shelter).[15]

In other cases related to this same program, DGS acknowledged that the proper construction of the condition contained in Subtitle U § 420.1(f)(6) requires a thorough search for alternative sites. Thus, the Applicant's responses to this requirement in BZA Cases No. 19451 (Ward 6 Emergency Shelter); No. 19289 (Ward

[15] The issue of the failure to consider alternative sites was raised by ANC3C as far back as June 20, 2016, in its resolution objecting to the lack of process by the Council and Mayor in selecting the Site and calling for a full evaluation of possible alternative sites. **Exhibit 7.**

4 Emergency shelter); and No. 19290 (Ward 5 emergency Shelter), **Exhibit 6** (excerpts from DGS submissions), expressly asserted, without providing evidence, that the District had undertaken "an aggressive search for alternative sites."[16] The District cannot make the same assertion here, because it is demonstrably false.

The record in this case is bereft of any evidence that there was ever a meaningful search for alternative sites in Ward 3 for a fifty-family emergency shelter, let alone more than one site that would allow for smaller shelters compatible with predominantly residential neighborhoods, which in the aggregate would meet the policy goals of the District. It is, of course, DGS's affirmative burden to show that a diligent search was conducted and not Neighbor's burden to demonstrate the absence of such an effort.[17]

A reasonable search would require at a minimum that a Request for Proposals or a Solicitation for Offers be issued seeking sites for the District to purchase, along with a reasonable internal analysis of whether there was City-owned inventory that would be a suitable site. The Homeless Shelter Replacement Act of 2016 authorizes the Mayor to use designated funds to construct emergency homeless shelters on District owned or City-acquired land. Two of the sites for shelters -- in Wards 1 and 4 -- are on City-acquired land. There is no evidence that the District attempted to search for any alternative sites that are currently owned or that could be acquired.[18]

The record will show that there was one *de minimis* and ineffective effort by Council Member Cheh to address potential sites. This occurred in April 2016, as support for the Mayor's initial leasing plan collapsed. The Mayor's plan was widely criticized as being too costly. See Washington Post Article. (April 18, 2016). **Exhibit 9**. The Mayor had proposed placing a shelter at 2619 Wisconsin Avenue. The evidence will show that Ms. Cheh stated publicly that she received emails suggesting

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[16] That assertion in those cases was likely false, but it was not challenged. In any event, a naked assertion cannot properly satisfy the District's stringent burden of proof.

[17] As discussed above, *see supra* Part II, the Council expressly recognized that the issue of site selection and the lack of a search for alternatives was properly a question for consideration by BZA.

[18] In September 2014, DGS issued a Solicitation for Offers (**Exhibit 8**) seeking ***leased*** properties to be used for shelters in each Ward. This represented the Mayor's initial plan: to rely on private developers who were to build family homeless shelters on land they owned in order to enter into a long-term lease with the District, with the land reverting back to the developer at the end of the lease term. No similar SFO has been issued in connection with the Council's plan to use only properties currently owned or to be acquired by the District, as reflected in the Shelter Act.

alternative sites for the shelter from residents who opposed the Wisconsin Avenue site. Ms. Cheh stated that alternative site suggestions "bubbled up" from e-mails.

Accordingly, by letter dated April 6, 2016 Ms. Cheh requested that DGS Director Christopher Weaver advise on the suitability of three sites: 3320 Idaho Avenue, Northwest; 3101 Albemarle Street, Northwest and 4100 River Road, Northwest. **Exhibit 10.** The DGS Director responded by letter dated April 29, 2016, concluding that each of these sites "are not suitable for our purposes". The Director concluded that the Idaho property was unsuitable because the site was already occupied by an active Metropolitan Police Station. a park, and a Department of Public Works refueling station. These existing uses and structures were deemed "complicating factors" that rendered this "unsuitable for our purposes." The other two sites were also rejected. **Exhibit 11.**

The District has never suggested, quite understandably, that the inquiry made by Ms. Cheh satisfies the District's burden to explore alternative sites. Allowing citizen generated e-mails to define the extent of the search needed for the selection or evaluation of sites is patently absurd. DGS is the District agency with the expertise and mission to execute real property acquisitions in the District by purchase or lease. According to DGS, the Contracts and Procurement Division of DGS is a "forward leaning, multi-faceted acquisitions operation committed to advancing transparent, accountable and efficient procurement practices in support of DGS' mission." See DGS.dc.gov. And DGS rejected the Idaho Avenue Site.

Despite the requirements of U § 420.1(f)(6), no evidence has been advanced by the District that DGS (or any other agency) undertook a search for properties, either District-owned or privately owned, that were suitable for the Short Term Housing Initiative after the Mayor's plan was voted down and the Council decided to authorize the Mayor to expend funds relating to the construction of a short term homeless Shelter on District owned or District acquired sites.

The evidence will also show that the District is experiencing large increases in expected costs for the proposed Ward 3 shelter project even before the first shovel of dirt is turned. Despite the claims that the use of District owned land would provide substantial savings, the severe constrictions of the Site have led to substantial increases that dwarf the cost of suitable alternate land. The Wisconsin Avenue site originally favored by the Mayor was valued at $2.5 million. *See Committee Report on Bill 21-688,* May 17, 2016 at 6. **Exhibit 12.** By contrast, the three-story parking structure, which is necessary to meet zoning requirements for parking, is projected to cost $9.5 million, or almost four times the cost of the Wisconsin Avenue site. *The Northwest Current article, 2/8/17,* **Exhibit 13.** That does not even factor in the cost of paving over the tennis courts in lot 848-849, the construction cost of a temporary road to access that ad hoc parking site during construction, and the cost of restoration of the Community Gardens and new tennis courts when construction is completed. The cost of the shelter building itself, originally estimated by the Council at $12.5 million, **Exhibit 12** at 4, has now grown to $14.5 million, as disclosed at the ANC3C

meeting in January 2017. This is not just a question of mounting costs, it is directly relevant to a determination of what is a reasonable alternative. With the cost of the Idaho Avenue Site now likely to exceed $25 million, this dramatically widens the universe of reasonable alternatives, which must be evaluated before a special exception is granted.

2. Applicant Has Not and Cannot Meet the Special Condition Specified in Section 420.1(f)(4) Because it Presents No Evidence that the Shelter Will Not Have Adverse Impacts on the Neighborhood.

Subsection U, § 420.1(f)(4) requires the District to prove that the "facility shall not have an adverse impact on the neighborhood because of traffic, noise, operations, or the number of similar facilities in the area."[19] DGS cannot meet this standard. DGS has provided no traffic or noise studies of any kind. The Transportation Assessment does not discuss either traffic or noise. The Prehearing Statement asserts rather than demonstrates compliance, claiming no adverse impact on the neighborhood in conclusory terms, explaining only that the facility will be self-contained and buffered.

The record before the Board, including the evidence presented by NRG, will demonstrate the myriad ways in which the District's optimistic vision is unfounded, and that applicant has failed to meet its burden of proof for both the special exception and variances that it seeks. Among other evidence of adverse impacts:[20]

- The District has not analyzed the traffic or safety effects of the proposed shelter, from the new, enlarged parking garage, or from the high-volume police access road proposed on Lot 848 next to the Newark Street Playground;

- Operation of a six-story shelter immediately next to private homes will adversely affect the privacy interests of the residents of those properties, and will cut off their light, air and views;

- The operations of the Second District will be disrupted during construction, and likely thereafter. The letter from DCHSEMA is carefully worded, and refers only to the absence of "District wide plans . . . that specifically call for use" of the Second District Station. It says nothing about how the station has been used, or what changes will need to be made;

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[19] In addition, the general standard for variances requires proof that variance will not harm the public good or the intent, purpose or integrity of the zone plan. X § 1000.1.

[20] Issues that were known in June 2016 were identified in the ANC3C resolution adopted on June 20, 2016. See **Exhibit 7.**

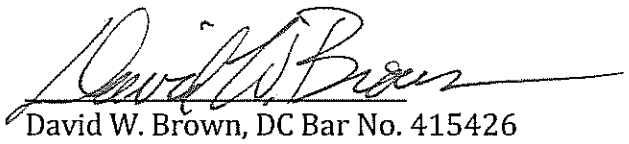
- The District has failed to account for and analyze runoff, exhaust fumes, and other nuisances (e.g., headlight glare) arising from the new parking garage, the temporary parking plan, and the construction of the shelter;

- The new plans require the destruction for a substantial period of time of the tennis courts and a substantial part of the Community Garden, which DGS said must be preserved and could not be used;

- The plans call for the destruction of old-growth trees on Idaho Avenue, a street that has had its canopy decimated by the Giant development;

- The cost of the development is already spiraling out of control, and this project will cost significantly more than purchasing property that is not affected by the presence of the police station.

Respectfully submitted,



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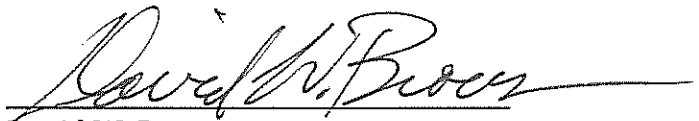
February 21, 2017

CERTIFICATE OF SERVICE

The Neighbors for Responsive Government, by and through the undersigned counsel, on February 21, 2017, served the foregoing Prehearing Statement, Exhibits, Testimony Summaries by first class, postage prepaid mail on the applicant, Meridith Moldenhauer, Esq., Griffin, Murphy, Moldenhauer & Wiggins, LLP, 1912 Sunderland Place, NW, Washington, DC 20036; and the DC Office of Planning, 1100 4th Street, SW, Suite 650 East, Washington, DC 20024; and via email to the local ANC, Advisory Neighborhood Commission 3C, Nancy MacWood, Planning and Zoning Committee Chairperson, nmacwood@gmail.com; via email to Angela Bradbery, Single Member District 3C06, 3C06@anc.dc.gov.

Respectfully submitted,



David W. Brown

NEIGHBORS FOR RESPONSIVE GOVERNMENT
WITNESS SUMMARIES

Patricia H. Wittie

Mrs. Wittie and her husband own and live in the property at 3847 Macomb Street (theoretical Lot 851), which abuts both Lot 849 and Lot 848. They purchased the property in 1982 and raised their family there. Mrs. Wittie also has a plot in the Newark Street Community Gardens, where she grows vegetables; and she is an "Ambassador" volunteer at the N Street Village Shelter for Women.

Mrs. Wittie will testify about the manner in which the proposed shelter building will alter the character of the zoned district. She will further testify concerning noise, traffic, and parking issues, as well as the impact on the community gardens.

Christopher J. Sweeney

US Navy Captain Christopher J. Sweeney, his wife Dede, and their two young children (ages 7 and 9) live at 3304 Idaho Avenue NW, which is the third house down the street from the site of the proposed shelter. They have owned the property since 2005, although from April 2014 to October 2016, they were forward deployed in Japan for Captain Sweeney's tour as U.S. Navy Commodore of Destroyer Squadron 15, where he was in charge of the all the U.S. destroyers forward deployed in the Western Pacific. He is now active duty at the Pentagon.

Captain Sweeney will testify about safety, noise, traffic, parking, and based on his military experience, the placement of noncombatants (the homeless) on the same site as first responders. He will also discuss the unfairness of having to endure yet another major zoning exception on Idaho Avenue after already having the Giant loading dock and townhouses built on the street.

Yvonne Thayer

Yvonne Thayer owns the property at 3308 Idaho Ave and has lived there for 33 years. She raised her children there. She works on refugee issues for the Department of State, most recently in Lebanon and Jordan.

Ms. Thayer will testify about the proposed shelter's impairment of the integrity and purpose of the zone plan with regard to height, size, proximity, noise, traffic, destruction of privacy and screening old growth trees, as well as damage caused by construction, and rodent infestation.

Arnold Lutzker

Mr. Lutzker and his wife live at 3215 Idaho Avenue, NW, one block from the proposed shelter. They have lived there since 1978. They have raised their three children in that home, all of whom attended John Eaton Public School (for which the Lutzkers were co-presidents of the Home and School Association during their children's attendance there). They have extensively renovated their home (which was built in 1927) over the many decades they have lived there, including major improvements in the past two years.

Mr. Lutzker will testify regarding his and neighborhood concerns about the shelter's storage and collection of the garbage and debris, the absence of the loading dock and parking.

Nora Stavropoulos

Nora Stavropoulos is a real estate professional and along with her husband George Stavropoulos who is an architect, own the home directly adjacent to the proposed location of the shelter on Idaho Avenue NW. That address is 3310 Idaho Avenue NW. They have purchased and developed a number of homes in the area. The home on Idaho Avenue was purchased in June 2014 because of their love for the neighborhood and because their children are also homeowners in this community. They presently reside at 3124 38th Street and have done so for the last 11 years. The property on Idaho was purchased with the goal of renovating, expanding and adding an elevator for their senior years. The house was leased to students for two years while the plans were developed. Last spring plans were finally completed (plans are available for viewing) and they hoped to begin the process until within a couple of days the news broke from the DC Council of the proposed plan.

Nora Stavropoulos will testify using the personal perspective of an individual who is a developer, property owner and resident in the community along with her concerns on property devaluations and the unfairness for those who own property within a few hundred yards of the proposed shelter.

Tara A. Stanton

Ms. Stanton owns 3821 Macomb Street, which is within 200 feet of the proposed shelter site. She purchased this property in November 2016 after a three year search for a single family home in a safe and residentially zoned neighborhood. She is currently between her two homes and has been a resident of McLean Gardens since July 2002 at 3801 39th Street. She is a federal sales account manager for NetApp and often works from a home office.

Ms. Stanton will testify about the manner in which the proposed shelter building will alter the zoned district and her concerns about this potential change since she has lived in this

neighborhood for over 14 years. She also will testify about the traffic and parking problems that plague this immediate area.

Brian A. Powers

Mr. Powers and his wife Alice live in the property located at 3212 38th St. NW, a block and a half from shelter. They purchased the property in 1985 and raised their three children there, who all attended public schools.

Mr. Powers will testify that the Vaughn Place and Cathedral Commons developments were covered by PUDs. Like the proposed shelter, they do not reflect the predominantly residential character of the neighborhood with garden apartments, town homes, and single family residences. Mr. Powers will further testify about comments made to him by Councilwoman Cheh explaining how the Idaho Ave NW site was selected as the site for the shelter.