BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

In Re Application Of:	:	
	:	
D.C. Department of General Services	:	**BZA Case Number 19452**
Ward 5 Homeless Shelter Project	:	
1700 Rhode Island Avenue, NE	:	

Pre-Hearing Statement of Citizens For Responsible Options

Introduction and Summary

Citizens For Responsible Options ("CFRO") opposes the District of Columbia's request for multiple special exceptions being sought from the Board in order to place a 150-resident, six-story shelter at 1700 Rhode Island Avenue, N.E. (the "Site").

CFRO urges the Board to reject the relief requests. CFRO's opposition 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 confronting single-family houses.

The proposed shelter would house more than 37 *times as many residents* as permitted as 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 inadequate on-site parking, with no loading dock, and without properly ameliorating the noise, traffic, and congestion that the addition of 150 residents plus visitors and more than a dozen staff on a single lot will bring to this residential neighborhood. Its application should be denied.

Interest of CFRO

CFRO was formed in July 2016 by numerous residents who live in very close proximity to the Site. CFRO 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 special exceptions requested by the DGS, CFRO has organized this submission in a manner that addresses each of the requested special exceptions separately. However, it is

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worth pointing out that the collective effect of the DGS's requests, if granted, will be more than the sum of the parts. CFRO believes and asserts that the collective effect of granting these requests would result in a wholesale, undesirable change in the character of the neighborhood.

I. The Board Should Deny the Requested Special Exceptions Because They Result from Self-Imposed Problems, as the District Admitted in Court.

There is a common theme running through DGS's position before the Board. All of the zoning relief sought by the District relates directly to problems with the site that it has selected for its Ward 5 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 MU-4, and the surrounding neighborhood. Rather, these problems demonstrate that zoning relief is not appropriate or available.

DGS's argument that it the District is statutorily mandated to 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 presented by both the Council and the Mayor before D.C. Superior Court in defense of a lawsuit brought by CFRO challenging the Council's and the Mayor's failure to present their selection of the Site to ANC5B. 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 the choice is subject to full zoning review. The District should not be heard to advance an inconsistent position to the Board.

As the Council stated to the Superior Court:

> Section 3(a)(4) of the Shelter Act **authorizes, but does not require**, the Mayor to use the funds that have been appropriated for capital project HSW05C to construct a shelter of up to 50 units at the Rhode Island Avenue Site.

Defendant Council of the District of Columbia's Motion to Dismiss Plaintiffs' Complaint (Case No. 2016-CA-007152 B, D.C. Super. Ct. December 14, 2016) at 13 (emphasis added).[1] **Exhibit 1.**

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

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[1] Consistent with the Council's argument, the statute states only that "[t]he Mayor is authorized to use funds appropriate for capital project HSW05C-Ward 5 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 1700 Rhode Island Avenue, N.E." D.C. Law 21-141, § 3(a)(4).

> 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)(4), Compl. (Dkt. No. 1) Ex. 1 at 3 ("The Mayor is authorized to use funds ... provided, that the contract" be approved by the Council). . . . **[N]o final decision has been made about construction of a shelter at the Police Station Site. In fact, none has been authorized.**

The District of Columbia's Motion to Dismiss Complaint (Case No. 2016-CA-007152 B D.C. Super. Ct. December 14, 2016) at 18-19 (emphasis added). **Exhibit 2.** The Court considered these arguments and granted the motions to the grounds that plaintiffs had not alleged any concrete injury in fact. *Citizens for Responsive Options, et al., v. Mayor Muriel Bowser and the Council for the District of Columbia,* Case No. 2016 CA 007512 B (February 15, 2016) at 7 (emphasis added). **Exhibit 3.**

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:

> Constructing a shelter containing up to 50 housing units at the Rhode Island Avenue Site, which is zoned MU-4, *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 § 513.1(b)....

Exhibit 1 at 14 n. 42 (emphasis added). In sum, the District's position in Superior Court regarding the Rhode Island Avenue, N.E., Site was that the Shelter Act did not mandate the use of that Site and that the BZA retained plenary authority to implement the Zoning Regulations without any influence from the Council.

Indeed, in CFRO's lawsuit challenging the Council and the Mayor for failing to first obtain the views of ANC5B before enacting the Shelter Act, 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, just 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 could not meet the asserted programmatic needs on the Site without relief from the development standards applicable to this MU-4 zoned property. Thus, the problems DGS has encountered, and for which relief is sought, are ones of self-creation.

The District cannot now be heard to argue that building a homeless shelter on this Site is mandatory. 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 special exception.

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

A. The Proposed Use Is Not an Emergency Shelter, and Therefore Is Not Permitted in Zone MU-4 Without a Use Variance, which DGS Applicant Has Not Sought.

DGS seeks special exception relief in the MU-4 zone for an "emergency shelter" as that term is used in the Zoning Regulations. 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."[2] The District has *never suggested* that, for this Ward 5 shelter, 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,[3] that would not square with the concept of "emergency shelter," which necessarily contemplates a brief, emergency stay.

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

[3] See Subtitle B, §100.2 (definition of "emergency shelter"), which defines the term 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

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. That 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."[4]

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."[5] 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." Applicant's Revised Statement at 4, 6, 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-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 MU-4, 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 is contemplated in the Zoning Regulations. There is no other use category into which the proposed shelter plausibly fits that would be allowed in the MU-4 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

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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." This definition does include the concept of "temporary housing."

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

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

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 U § 513.1(b) Beyond the Breaking Point, and Thus Requires a Use Variance.

Even if the proposed shelter qualifies as an "emergency shelter," DGS should not be entitled to rely on the special exception in U § 513.1(b), because the size of the proposed shelter is far beyond anything contemplated by the Zoning Regulations for Zone MU-4.

The Zoning Regulations define the contemplated scope of an emergency shelter in Zone MU-4 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 §513.1(b).

While it is true that DGS may seek to exceed the 25-resident maximum, nothing in the regulations suggests that such authority 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 compatible with the permitted uses in the MU-4 zone, which is intended to "provide[] for areas predominantly developed with low- to moderate-density development, including detached dwellings, rowhouses, and low-rise apartments." Zoning Regs., Sub. F § 300.2. There must necessarily be some limit to the size of an emergency shelter that can be permitted in the MU-4 Zone.

CFRO submits that any reasonable limits on the special exception authority granted by section U § 513.1(b) is exceeded by the shelter proposed by DGS. The proposed shelter is designed to house 150 residents. That is 37 times the size permitted as of right in the zone, and more than 6 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 MU-4 zone than 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 the MU-4 Zone.

C. In Any Event, Applicant Fails To Comply with the Mandatory Conditions Set Forth in U § 513.1(b) 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 the MU-4 Zone 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 § 513.1(b). 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 § 513.1(b), the proposed 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 §513.1(b))(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 § 513(b)(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). DGS fails to meet either condition.

Despite the fact that the question of a smaller size shelter that would be in keeping with MU-4 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 5 that would satisfy the goal of housing 50 units in the aggregate.

DGS's Prehearing Statement interprets this 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 Police Station 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 requires 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 proposed shelter, (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 takes the approach that DC General is too large but has failed to consider, let alone attempt to justify, that shelters smaller than fifty would meet the programmatic needs of the District.

Moreover, Applicant 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 5. *See* Applicant's Revised Statement at 18 (discussing only the issue of smaller shelters).

In other cases related to this same program, DGS acknowledged that the proper construction of the "reasonable alternative" language 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 4 Emergency shelter); and No. 19290[6] (Ward 5 Emergency Shelter), **Exhibit 4** (excerpts from applicant submissions), expressly asserted, without providing evidence, that applicant had undertaken "an aggressive search for alternative sites."[7]

The record in this case is bereft of any evidence that there was ever a meaningful search for alternative sites in Ward 5 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

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[6] This initial Ward 5 application, BZA Case No. 19290, for a different location was withdrawn when the final version of the Shelter Act selected the Rhode Island Avenue Site. The Preliminary Justification Statement makes reference to the other two sites being considered and asserts that they were "found to be too small to meet the District's programmatic goals." BZA Case No. 19290, Ex. 7 at 7, **Exhibit 4.** This is a direct, contradictory reference to the suitability of the 1700 Rhode Island Avenue, N.E. location.

[7] 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

policy goals of the District. It is, of course, DGS's affirmative burden to show that a diligent search was conducted and not CFRO's burden to demonstrate the absence of such an effort.[8]

A reasonable search would require at a minimum that a Request for Proposals or a Solicitation of 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 -- were on City-acquired land. There is no evidence that the District attempted to search for any alternative sites in Ward 5 that are currently owned or that could be acquired.

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. Despite the requirement of U § 513.1(b), 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.

2. DGS Has Not Met and Cannot Meet the Special Condition Specified in Section 513.1(b)(4) Because It Has Presented No Evidence that the Shelter Will Not Have Adverse Impacts on the Neighborhood.

Subsection U, § 513.1(b)(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." DGS cannot meet this standard. DGS has provided no noise study and an inadequate traffic study. 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 CFRO, will demonstrate the myriad ways in which this optimistic vision is unfounded, and that DGS has failed to meet its burden of proof for the relief it seeks.

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[8] 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.

III. DGS Cannot Obtain Building Height and FAR Relief Via a Special Exception and Such Relief Should Be Denied in Any Event.

A. Special Exception Relief Is Not Available for Excess Building Height or FAR

DGS originally sought seven variances. DGS's explanation of the need for them is attributable to constraints of the chosen site, given that it was the "only viable site" in Ward 5 that was found after an "exhaustive search." As explained above, however, the evidence of record is merely the assertion of an "exhaustive search," not the demonstration of one. It may be that, in theory, the property, if vacant, is amply sized for construction of the shelter with no (or at least fewer) variances: a loading dock, all necessary parking, setbacks from adjacent properties, height at or below the maximum, and so forth. The reality, however, is that the pre-existing structures on the property will continue—the police station, the 150-foot antenna, and its concrete support building. In other words, the property has no demonstrable uniqueness characteristics aside from the presence of the pre-existing use structures. The variances therefore could not be justified on property uniqueness, but rather would have to be evaluated under the alternative "practical difficulties" standard. But even for area variances, one factor weighing against their grant is that the difficulty is self-imposed, as is surely the case here, selecting a property already quite intensely developed. *See A.L.W., Inc. v. BZA,* 338 A.2d 428, 431-32 (1975).

In an effort to avoid these difficulties, the DGS attorney has, at the last minute, radically changed the framework for the relief from applicable development standards. No longer is any of the relief sought as variance relief; now it is all special exception relief. While this change is seemingly authorized by G 1200.4, that general provision must be read in light of the more specific G §101.5, which limits its applicability by excluding special exception relief as to building height and FAR. Only variance relief is possible for excess building height and FAR. The Preliminary Statement is erroneously predicated on special exception relief. Should DGS seek to remedy this deficiency by amending its Prehearing Statement just a few days before the hearing, Citizens reserves the right to respond to the revisions in any such amendment in relation to building height and FAR variance relief.

In any event, Citizens submit that the switch to special exception relief does not excuse DGS from having to show that the requested relief is genuinely needed. Special exception relief is not "in harmony with the general purpose and intent of the Zoning Regulations and the Zoning Maps," X §901.2 (a) and G §1200.4(a), if the relief is not truly needed. Otherwise, special exception relief could be rather indiscriminately sought and granted upon the mere request of an applicant. The specific relief requests are discussed below, but the overall picture must be taken into consideration. Whether styled variances or special exceptions, filing as many as seven relief requests for one project is a tacit acknowledgement that the "fit" between the zoning of the property and the use proposed for it is, at the least, rather poor. This alone enhances the likelihood that granting all the requested relief would be in

substantially disharmony with the Zoning Regulations and Maps. This concern is further heightened by the fact that many of the reductions are not for minor deviations from the development standards of the MU-4 zone, but rather for major deviations — 40% or so. At the hearing, Citizens will present testimony and evidence detailing the myriad ways in which granting the requested relief will be detrimental to those residing in proximity to the property, and thus will not meet the special exception approval criteria in X §901.2 (b) and G §1200.4(b).

B. Excess Building Height

According to the Prehearing Statement, DGS seeks a building height increase of 20 feet — 70 instead of the MU-4 zone maximum of 50, or an increase of (70-50)/50 = 40%. This increase is driven in part by the decision to construct what is described as an "addition" to the 1922 vintage decommissioned police station on the site, which will apparently be partly demolished. The initial application reveals that but for the partial retention of the police station building, the height could be reduced by 6 to 8 feet. The initial application also reveals that while there should be no more than 10 units per floor to meet program needs and designs, the first floor has no living units at all. With a larger lot, the first floor could contain both the staff offices/communal facilities as well as 10 units, with the result that a building at or near 50 feet in height, meeting the goal of 10 unites per floor, is possible on an adequately sized site. In short, the need for a 40% height increase special exception is directly tied to and dependent upon the asserted claim that there is no other viable site in Ward 5 for the homeless shelter.

The DGS Prehearing Statement also employs arguments for the increased height that do not withstand scrutiny. First, as noted above, DGS is incorrect in concluding that relief for increased building height is available by special exception in the MU-4 zone. Second, DGS simply ignores that the greatest impact of the increased height is felt on the abutting property immediately to the north. Instead, DGS points to the existence of the 17th Street right-of-way as separating the project from homes across the street to the west, and erroneously claims that the tallest portions of the addition are on the east side of the property, when in fact the addition is a uniform 70' height all along the north wall.

C. Excess Floor Area Ratio (FAR)

DGS seeks an FAR of 3.51, whereas the maximum FAR allowed in the MU-4 zone is 2.5. This is a variance of (3.51-2.5)/2.5 = 40.4%. Once again, the increase is driven in part by the existence of structures on the property whose floor area must be counted, as they will not be demolished. In addition, the initial application notes that at 2.5 FAR, and 950 sq ft per unit, only 32 units could be built, even if the lot were vacant. This makes clear that the major problem with FAR is that the lot, at 12,336 sq ft, is too small. In fact, the Mayor's shelter dispersal goal is to provide 50 units in a single shelter in each Ward, so not even a 70-foot structure is adequate for program goals if this site is the one chosen. At 950 sq ft per unit, a 50-unit shelter would need

a gross floor area of at least 47,500 feet. At 2.5 FAR, an MU-4 lot would need to have 47,500/2.5 = 19,000 sq ft. In other zones in Ward 5, the lot size necessary for a 50-unit homeless shelter might be more or less than 19,000 sq ft, depending on the zone and its FAR requirement. Again, the need for a 40% increase special exception is directly tied to and dependent upon the asserted claim that there is no other viable site in Ward 5 for the homeless shelter.

The DGS Prehearing Statement also employs arguments for the increased FAR that do not withstand scrutiny. First, as noted above, DGS is incorrect in concluding that FAR relief is available by special exception in the MU-4 zone. Second, DGS compares this project to a project that would get increased FAR for compliance with Inclusionary Zoning requirements. This is an illegitimate comparison. This project is not subject to those requirements, which are geared to using increased FAR as an incentive for private developers to include affordable housing units in their development plans. Third, DGS argues nonsensically that the addition itself would comply with the 2.5 FAR maximum, effectively ignoring the existence of the mass of the existing police station. Fourth, DGS employs the same erroneous arguments for increased FAR that it does for increased building height, as noted above.

IV. DGS HAS NOT DEMONSTRATED ENTITLEMENT TO SPECIAL EXCEPTION RELIEF ON PARKING, LOT OCCUPANCY, OPEN COURT WIDTH REAR/SIDE YARD, AND LOADING REQUIREMENTS

A. The 86% Decrease In The On-Site Parking Requirement is Unjustified Because the Site Is Inappropriate for the Use

U § 513.1(b)(2) specifies that when a special exception for an emergency shelter with more than 25 persons is granted, "[t]here shall be adequate, appropriately located, and screened off-street parking to provide for the needs of occupants, employees and visitors to the facility." This standard does not set the parking needs of "occupants" and "visitors" at zero, yet that is exactly what is proposed in this application, by providing only three on-site parking spaces, identified in the Transportation Statement as exclusively for staff. As explained above, if the concept of "emergency shelter" is going to be stretched to the breaking point to include a facility of this size, it must fully and completely comply with the special exception criteria. That includes subparagraph (b)(2), which has plainly not been met. DGS does not have the option of seeking a special exception from a special exception requirement, which is what in effect would have to be allowed to overlook the absence of occupant and visitor parking on the Site. Moreover, a quantitative assessment of the parking in relation to C §701.5, which matches uses to parking space requirements for an emergency shelter (.5 spaces per 1,000 sq ft of GFA), reveals that staff parking is also seriously impacted by the proposed shelter plans. DGS states that parking needs are satisfied with 22 spaces (.5 per 1,000 sq ft of GFA), for an "emergency shelter." But only 3 on-site spaces are proposed, which is a significant shortfall from the standard requirement, by 19 spaces.

The parking minimum of C §701.5 –22 spaces – is proposed to be reduced by special exception relief to 3. This would be a (22-3)/22 = 86% reduction. DGS claims that there is adequate on-street parking within 600 feet of the property. The Transportation Assessment includes an on-street parking inventory/utilization analysis, but it is not geared to this 600-foot limitation and presents otherwise inconclusive data on DGS's claim of adequate on-street parking. In any case, no request is made for special exception relief under C § 703.2(c), which is the proper evaluative framework for relief from parking requirements on the basis of on-street parking. That framework requires proof that the reduction allowed is only for spaces that cannot be provided on site. C § 703.3. DGS's own arguments make clear that it is not possible to fit 22 (and maybe not even 11) parking spaces on the Site while still achieving a facility of the desired size. If so, then again the necessity for most, if not all, of the parking reduction is tied directly to the apparent conclusion that there is no viable site in Ward 5 for the homeless shelter large enough to provide the required on-site parking.

B. The 22% Increase In Lot Occupancy Is Unjustified Because the Site Is Inappropriate for the Use

DGS seeks a lot occupancy of 73%, whereas the maximum lot occupancy allowed in the MU-4 zone is 60%. This is an increase of (73-60)/60 = 22.3%. DGS makes the same argument for the lot occupancy increase as is made for the FAR increase. Existing structures covering 28% of the property preclude maximizing their FAR potential. The amount of increased lot occupancy sought, measured in square feet, is .13 x 12,336 = 1604 sq ft., which means a total of 9005 sq ft. of gross floor area on the property. No increase in the MU-4 zone would be needed if the lot were 9005/.6 = 15,008 sq ft. Again, in other zones in Ward 5, depending on the lot occupancy requirement for the zone, there may be no need for relief. Here, the need for the increase is directly tied to and dependent upon the asserted claim that there is no other viable site in Ward 5 for the homeless shelter.

The DGS Prehearing Statement also employs arguments for increased lot occupancy that do not withstand scrutiny. As with the FAR and building height arguments, DGS erroneously argues that lot occupancy would not be a problem if the police station and antenna structures did not already occupy 28% of the property. These structures cannot be ignored; they all contribute to the demonstrable overcrowding of the lot. DGS also attempts to justify greater lot occupancy with many of the same erroneous arguments used for increased building height and FAR.

C. The 27% Reduction In Open Court Width Is Unjustified Because the Site Is Inappropriate for the Use

DGS has designed the addition to the police station in a way that it has an open court on the south side with a width of 17 feet, whereas the minimum court width in any MU zone for a building height of 69.83 feet is 23.33 feet. G § 202.1. Hence, a reduction of 6.33 feet from the minimum is sought, or 6.33/23.33 = 27%. The initial

application makes clear that a redesign to eliminate the narrow court would result in a loss of up to 5 living units. Hence, the court width variance request is directly related to achieving the number of living units proposed, i.e., 46, which itself is a 4-unit shortfall on the statutory goal of "up to 50 units." Inspection of the site plan for the project, however, makes clear that if the property were just 7 feet wider, there would be no need for the open court variance, and it might even mean achieving the goal of space for the full 50 units for Ward 5 as part of the Mayor's homeless shelter Ward dispersal plan. So once again, the need for the reduction is tied directly to and dependent upon the asserted claim that there is no other viable site in Ward 5 for the homeless shelter.

In the Prehearing Statement, DGS notes that the court's purpose is to allow light and air into the structure. The unnoted irony in this claim is that, at the very same time, it is proposing to effectively shut out most of the light and air to the condominium building under construction immediately north of the property, which is employing a similar courtyard design, using the same south-facing orientation as DGS wishes to use. This impact is discussed in greater detail in the next section in relation to the north lot line of the Site, shared with the condominium.

D. The Rear Yard Reduction Requests Are Incomplete and Unjustified

DGS states that the rear yard requirement in the MU-4 zone is 15 feet, measured from the center line of the public alley behind the rear lot line to the first 25 feet of the rear building wall, and measured from the rear lot line above the first 25 feet of the rear building wall. DGS is thus treating the east lot line, which is parallel to 17th Street, N.E., and to the public alley, as a rear lot line. While the diagrams supplied by DGS do not provide any scaled drawings in confirmation of these figures, the applicant claims that the rear yard for the lower 25 feet of the building is 7.5 feet, i.e., 7.5 feet short of the 15-foot minimum, a reduction of 50%. Above the 25-foot plane, the shortfall is the entire 15 feet, for a 100% reduction.

DGS is not seeking a reduction for the north lot line, which is opposite Rhode Island Avenue, N.E. It is being converted from its long historical use as a rear lot line in order to be treated as a side lot line, and it is proposed to have a setback from the building of 11.9 feet, just a little more than the minimum of 11.64 feet for a building height of 69.83 feet. G §406.1. This designation change is both questionable and highly problematic. It is questionable because what is proposed is an "addition" to a building that has fronted on Rhode Island Avenue, N.E. for the past 95 years, and adjacent development has taken place in light of such treatment. The switch should not be allowed if it would have significant adverse effects on the property abutting that rear lot line. The north lot line should therefore be treated as a continued, rear lot line. B 317.2 provides that a lot may have more than one rear lot line.

With the continued second rear lot line, two considerations would come into play. First and least significant, the reduction needed from the 15-foot rear yard requirement would be 3.1 feet, or 3.1/15 = a 21% reduction, increasing the total

number of relief requests to eight. More significantly, the project could not comply with G 1201.1(a) which would require the windows on the north side of the addition to be at least 40 feet from the abutting building to the north. In fact, those windows will be about 12 feet from the adjacent condominium building under construction immediately adjacent to the property to the north. Special exception relief from this 40-foot requirement, reducing it by 70% to 12 feet, could not possibly be justified, given the drastic impact of this 70-foot building on the loss of light and air to the condominium units whose construction was plainly predicated on a continuation of the rear yard setback requirements for the police station and any "addition" to it.

In any event, whether all the required yard setback relief has been properly sought or not, there is no question that significant relief is made necessary for a building of the desired size because of the combination of the existing structures on the property and the lot's overall small size in relation to the dimensions of the proposed addition to and retrofit of the police station. DGS has expressly stated (in the initial application) that without the relief requested, the project would lose, or substantially reduce the size of, 12 housing units and support facilities on floors 3 through 6. No doubt there would be similar losses on the north side if relief is needed there and is denied. Once again, therefore, the need for the relief is tied directly to, and dependent upon, the asserted claim that there is no other viable site in Ward 5 for the homeless shelter, one not encumbered by existing development to be retained, and large enough to meet yard requirements while still constructing the desired facility.

E. There Are Unresolved Questions About the Loading Berth and Delivery Space Special Exception

The proposed shelter is required to have a loading berth and a delivery space. C §901.1. What DGS proposes is to be excused from providing any loading berth, and to turn one of its four parking spaces into a delivery space. Special exception relief is sought from this requirement, on the grounds that a dedicated loading berth is unnecessary, due to the limited number of deliveries, which can be accommodated with public alley access to the delivery area at the rear of the building. The Gorove/Slade Statement reports 20 truck or van deliveries per week in the alley, including twice daily food deliveries. The first floor diagram included in the application is consistent with this delivery plan. What is missing from the application is any demonstration that it would be in the public interest to allow the public alley to be so used on a daily basis. Further compounding this uncertainty, the loading space suffers from the same deficiency as the parking spaces, in that the drive aisle leading to the space is too narrow. This problem is even more severe for trucks than it will be for passenger cars attempting to enter and exit the other three parking spaces.

F. There are Unaddressed Issues Regarding the Antenna

The Prehearing Statement is all but silent regarding the 150-foot tall communications antenna on the Site. Such antennas are subject to numerous zoning requirements. B §1300 *et seq.* The impact of the project on the antenna is not explained. Nor is the impact of the antenna on the future occupants of the Site explained. The Board should require a complete explanation of how and why there will be no zoning compliance issues and concerns relating to the co-located antenna if the Application is granted.

Conclusion

Much of the zoning relief sought is related to site constraints that are particular to this location (no loading dock, increased height and bulk, and the presence of another primary structure). Yet the drastic increase in the number of individuals to be housed in the facility (far over the ordinary special exception range), if lawful in the MU-4 zone at all, requires a showing that no reasonable alternative site is available. No attempt at such a showing has been made; the mere existence of this requirement is not even acknowledged. Zoning relief simply cannot be granted by the Board on the basis of such a manifestly deficient application.

Respectfully submitted,

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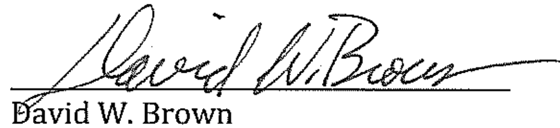
February 21, 2017

CERTIFICATE OF SERVICE

The Citizens for Responsible Options, 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; the local ANC, Advisory Neighborhood Commission 5B, 1920 Irving Street, NE, Washington, DC 20018, and the DC Office of Planning, 1100 4th Street, SW, Suite 650 East, Washington, DC 20024.

Respectfully submitted,



David W. Brown

Citizens for Responsible Options
Summary of Witness Testimony

Tom Kirlin

My name is Tom Kirlin. My wife and I have enjoyed Brookland for 35 years. We live 2 ½ blocks from the proposed emergency homeless shelter at 1700 Rhode Island Avenue, NE and own three rental houses two blocks from the site. In the 1970s I worked with neighborhood arts programs, in the '80s I helped DC youths find summer jobs and consulted with the American Institute of Architects and HUD on neighborhood revitalization. I've also advised federal agencies on public policy and governance issues.

I will testify that the Department of Housing and Community Development's FY 2016 *Comprehensive Annual Performance Evaluation Report* (CAPER) to HUD declares Ward 5 a "de facto social service district" and that building a shelter at this site would increase the city's risk of not complying with the Fair Housing Act of 1968. Further, DDOT traffic studies, a 2014 Rhode Island NE Steetscape Master Plan and an August 2015 Brookland "liveablity" study all demonstrate that the proposed emergency shelter, if built, would have significant adverse pedesterian and vehicle impacts on nearby Ward 5 Brookland residents. Applicant's request for special exceptions should be denied.

Frederick Wilkes

My name is Frederick Wilkes and I live at 2916 17th street across the street from the proposed temporary housing facility. I moved here in 2009 to spend my retirement with my wife Delores in her family home. I expected our golden years would be quiet and relaxing. This neighborhood is like a quiet gem in the midst of a bustling city.

I will testify on issues regarding the size of the structure and resulting adverse impact, increasing automotive and pedestrian traffic impacts, and the loss of sunlight impact.

Delores Wilkes

My name is Delores Wilkes and I live at 2916 17th St—directly across the street from the site of the proposed shelter. I have lived in this house dating back 65 years to my childhood. I will testify regarding the adverse impact on light, traffic management, and pedestrian safety.

Carolyn Warren

My name is Carolyn Warren. I live at 2904 17th St NE, which is directly across the street from the proposed short term family housing facility. I have lived here about 50 years and raised my children here.

I will testify about the adverse impact of increased traffic from the proposed facility, and in particular about the impact on the neighbors with disabilities and the parking difficulties for them.

I will also address the potential impact on children residing in the property, who will be exposed to fumes from the car painting shop and high density traffic adjacent to their play area in the front of the building.

Tad Czyzewski

Tad Czyzewski is a Ward 5 resident who has lived in Brookland for over 7 years. His home is located on 17th Street NE within one block, and line of sight, to the proposed structure at 1700 Rhode Island Ave NE. Mr. Czyzewski has a Bachelor of Arts degree in Historic Preservation from the University of Mary Washington where his degree emphasis was on architecture and preservation planning.

Mr. Czyzewski will testify that the proposed massing of the building to accommodate the FAR and lot occupancy variances, as well as the parking spaces variance, will have an adverse impact on the existing streetscape and adjacent residents.

Faraz Khan

I am Faraz H Khan; my business partner, Mr. Reza Damani, and I own the most severely impacted property at 2909 17th St NE, right next to the proposed building. We have developed dozens of properties in Washington, DC Metropolitan area in the last 15 years, including Mixed use Buildings, Multifamily Condominium Buildings, Single dwelling houses, Row houses, and Commercial buildings.

The requested variance to go up an additional 19 feet and eliminate the 20' rear setback, if granted, will directly impact our, as a matter of by right, newly constructed Multifamily building by blocking all the sunlight to the courtyard, which was designed on the fact that there will never be any building in front of the courtyard because of the rear setback of 20' and height restriction of 50'.

The proposed design is already impacting an interested buyer who is reconsidering his offer to buy one of our units. The proposed towering structure will block the sunlight to all the living and dining rooms and kitchens of all the six units of the building; the lower units will be the most impacted ones.

Jeff Steen

My name is Jeff Steen. I live at 1620 Hamlin Street NE, which is roughly 300 feet from the proposed emergency homeless shelter at 1700 Rhode Island Avenue, NE.

Approving the special exception to allow only three parking spots for this facility will have a negative impact for me and my neighbors. Currently, there are already times when I am not able to find parking on the same block that I live on. Forcing shelter employees and the visitors of those housed in the shelter to park their vehicles on residential streets that already lack adequate parking spaces on certain days will result in current residents having to park even further from their homes.

Additionally, the current zoning and the comprehensive plan for this area allows for higher density residential and commercial structures to be built than currently exist. Several of these project are already underway, and once completed, they will result in many more vehicles being parked on the residential streets neighboring the shelter. For example, a new development at 1715 Hamlin Street is proposing 18 residential units with 1 parking space and 2 car share spaces. These residents will be forced to compete with current residents and future shelter employees and visitors for the limited amount of parking spaces available.

John Iskander

Witness summary not available at the time of this filing but we will supplement this filing with a detailed summary of John Iskander's testimony.

Sandra Campbell

Witness summary not available at the time of this filing but we will supplement this filing with a detailed summary of Sandra Campbell's testimony.

Joseph Cassidy

I am a 15 year resident of 5B03, a member of the DC Criminal Defense Bar, and currently employed as an Emergency Room nurse at the Washington Hospital Center. I will testify on the adverse impacts of each of the requested special exceptions (height, occupancy, parking etc) on those of us residing in SMD 5B03. Many more suitable and appropriate alternatives have been proposed by the concerned citizenry and arbitrarily dismissed.

Dina Mukhamedzhanova

Dina Mukhamedzhanova lives within 70 feet of the site of the proposed facility. She has a background in data analysis and data architecture, and has a PhD in Applied Mathematics. She is the Treasurer of Citizens for Responsible Options.

She will testify on issues related to the emergency communications tower and its associated equipment. She will testify on the zoning issue of whether there are other reasonable alternatives to meet the homeless shelter program needs.

David Forrest

David Forrest is a seven-year resident of Brookland and lives in a house located 70 feet from the site of the proposed facility. He has a doctorate degree in materials engineering from MIT, a Professional Engineering license, and 39 years of engineering practice experience in industry and government. He manages a portfolio of over $50M in R&D program funding.

He will testify on the inadequacy of the planned parking spots for the facility, the adverse impact and loss of sunlight to his property, deep flaws in the parking study that was performed, and on automotive traffic pattern conflicts with the pedestrian traffic.

Forrest Exhibit List

Exhibit 1. Council's Motion to Dismiss pp. 13, 14

Exhibit 2. DC's Motion to Dismiss pp. 18-19

Exhibit 3. Court Order 2/7/16 p. 14

Exhibit 4. Excerpts from Prior BZA Statements

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CITIZENS FOR RESPONSIBLE OPTIONS, ET AL. Plaintiffs, v. COUNCIL OF THE DISTRICT OF COLUMBIA, ET AL. Defendants.	Case No. 16-CA-007152 B Judge Alfred S. Irving, Jr. Next Event: 1/6/17 Initial Conference

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT COUNCIL OF THE DISTRICT OF COLUMBIA'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendant Council of the District of Columbia ("Council"), through counsel, submits this memorandum of points and authorities in support of its Motion to Dismiss the Complaint filed by Plaintiffs Citizens for Responsible Options, *et al.* ("Plaintiffs").

Introduction

Plaintiffs are a non-profit association and several individuals who reside within the boundaries of Advisory Neighborhood Commission 5B ("ANC 5B" or "the ANC"). Together, they seek a declaratory judgment[1] that would invalidate section 3(a)(4) of the Homeless Shelter Replacement Act of 2016, effective July 29, 2016 (D.C. Law 21-141; 63 DCR 8453) (the "Shelter Act"), duly enacted District legislation that provides:

[1] Plaintiffs also seek to enjoin the Defendants from taking any action furthering implementation of section 3(a)(4) of the Shelter Act. Having passed the legislation in question, however, no action remains to be taken by the Council. Plaintiffs' request for injunctive relief against the Council is therefore moot, as well as barred for all the reasons set forth herein regarding Plaintiffs' claims of entitlement to declaratory relief.

EXHIBIT 1

II. Plaintiffs' Complaint Fails to Present Issues Ripe for Judicial Resolution, Given That Any Alleged Harm to Plaintiffs is Entirely Contingent on Future Events and Plaintiffs Have Not Exhausted Available Administrative Remedies.

Plaintiffs' claims are non-justiciable not only because they present political questions regarding matters expressly committed by the District Charter to the Council, but also because they are not ripe for judicial resolution. It is well-settled that "declaratory judgment authority does not supersede the rules of justiciability." *Smith v. Smith*, 310 A.2d 229, 231 (D.C. 1973) (citation omitted). *See also Matter of D.M.*, 562 A.2d 618, 620 (D.C. 1989) ("The trial court's authority to issue a declaratory judgment is limited to deciding justiciable claims.") (citation omitted). If the resolution of a legal question "depends on contingencies which may not come about, that question is not ripe for judicial resolution." *Smith*, 310 A.2d at 231.

Here, Plaintiffs mistake the effect of section 3(a)(4) of the Shelter Act, arguing that it constitutes a "'change [in] the use of property owned or leased by or on behalf of the government,'" (Complaint at ¶ 34) (quoting D.C. Code § 1-309.10(b)), and a "'final policy decision' by defendants on 'public improvements . . . affecting [the] ANC5B area'," (Complaint at ¶ 36) (quoting D.C. Code § 1-309.10(c)(1)). According to Plaintiffs, the "shelter location" in Ward 5 is now "fixed by statute," (Complaint at ¶ 45), and the Council has "plac[ed] thereon a 35 - 50-unit homeless shelter" (Complaint at ¶ 1). This simply is not true and demonstrates a fundamental misunderstanding of the Council's action and the bill it passed. Section 3(a)(4) of the Shelter Act authorizes, <u>but does not require</u>, the Mayor to use the funds that have been appropriated for capital project HSW05C to construct a shelter of <u>up to</u> 50 units at the Rhode Island Avenue Site. Similarly, Plaintiffs do not allege that the Mayor has taken any steps to utilize these funds for the purpose of constructing the shelter in question, only that she "intends" to do so. (Complaint at ¶ 32). Given that the harm alleged in Plaintiffs' Complaint

unquestionably "depends on contingencies which may not come about," *Smith*, 310 A.2d at 231 (citation omitted), Plaintiffs' claim of entitlement to declaratory relief is not yet ripe.[41]

Furthermore, judicial resolution of Plaintiffs' claims is premature for another reason: the fact that constructing a shelter for more than 5 individuals at the Rhode Island Avenue Site would require a special exception from the BZA.[42] Section 13(c)(4) of the ANC Act (D.C. Official Code § 1-309.10(c)(4)) requires the Office of Zoning to provide each affected ANC with notice of "applications, public hearings, proposed actions, and actions on all zoning cases," and section 13(d) (D.C. Official Code § 1-309.10(d)) requires an affected ANC to consider each such action and the District to give great weight to the issues and concerns raised by the affected ANC. Thus, the ANC will have every opportunity to make its concerns regarding the proposed change in use of the Rhode Island Avenue Site known to the BZA, the government entity

[41] Relatedly, Plaintiffs allege that the Shelter Act "authorizes the Mayor to award a contract for construction of the shelter on the Site via a Request for Proposals to be issued by the Department of General Services." (Complaint at ¶ 31). However, section 4 of the Shelter Act makes clear that, to the extent required by section 451 of the Home Rule Act, any contract entered into by the Mayor must be submitted to the Council for its approval. (Shelter Act at § 4). Accordingly, the Shelter Act does not confer on the Mayor authorization to enter into any contract that she does not already possess the inherent authority to enter.

[42] Constructing a shelter containing up to 50 housing units at the Rhode Island Avenue Site, which is zoned MU-4, *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 § 513.1(b) (permitting only by special exception in zone MU-4 "[e]mergency shelter use for five (5) to twenty-five (25) persons, not including resident supervisors or staff and their families," provided, among other conditions, that "[t]here shall be adequate, appropriately located, and screened off-street parking to provide for the needs of occupants, employees, and visitors to the facility," "[t]he proposed facility shall meet all applicable code and licensing requirements," "[t]he facility shall not have an adverse impact on the neighborhood because of traffic, noise, operations, or the number of similar facilities in the area," and that "[t]he Board of Zoning Adjustment may approve a facility for more than twenty-five (25) persons, not including resident supervisors or staff and their families, only if the Board of Zoning Adjustment finds 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").

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Citizens for Responsible Options, *et al.*, *Plaintiffs,* v. Council of the District of Columbia, *et al.* *Defendants.*	2016 CA 007152 B (Judge Irving) Next Event: Initial Scheduling Conference January 6, 2017

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DISTRICT OF COLUMBIA'S MOTION TO DISMISS COMPLAINT

INTRODUCTION

Plaintiffs challenge the lawfulness and validity of paragraph 3(a)(4) of D.C. Law 21-141, the "Homeless Shelter Replacement Act of 2016" (the Homeless Shelter Act), which authorizes steps prefatory to construction of a homeless shelter in Ward 5. (See *Neighbors for Responsive Government, et al. v. Council of the District of Columbia, et al.*, 2016 CA 006290 B (Judge Di Toro) (a nearly identical challenge to the paragraph on the Ward 3 shelter).) The challenged paragraph conditionally authorizes construction of a shelter for homeless families on land located at 1700 Rhode Island Avenue, N.E. (the Police Station Site). Plaintiffs claim that the Council of the District of Columbia (the Council) and Mayor Muriel Bowser (the Mayor) were each required to provide particular advance notice before approving the bill with paragraph 3(a)(4) in it.

Unfortunately for plaintiffs, a mere failure to provide required notice is insufficient injury to confer standing on a plaintiff. Even if it were, the law under which plaintiffs bring this action does not and, indeed, cannot require advance

EXHIBIT 2

Councilmember McDuffie discussed the letter with the public and with members of the Mayor's Administration at the March 17, 2016 hearing. *See*, for examples, Committee of the Whole Hearing (Mar. 17, 2016), see Note **Error! Bookmark not defined.**, at 6:30:00, 10:11:05 (discussion with then-Department of General Services Director Christopher Weaver); 11:42:38 (discussion with City Administrator Rashad Young). Thus, plaintiffs' representatives, including both the Council and the Mayor, provided public notice and responded to public comments on both the 25th Place site and the Police Station Site. Because the language complained of resulted only from a modification of an announced plan, no further notice was required by the ANC Act and, thus, this case should be dismissed.

D. No Notice Was Required Because No Final Action Towards Construction Has Been Taken.

The ANC Act requires that commissioners be advised before certain actions are taken, but only *final* actions. 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. See *Foggy Bottom Ass'n v. D.C. Zoning Comm'n*, 979 A.2d 1160, 1165-66 (D.C. 2009) ("The decision did not allow GW to begin construction, but rather only set forth the conditions under which the Commission would allow GW to continue with the zoning process.")

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)(4); Compl. (Dkt. No. 1) Ex. 1 at 3 ("The Mayor is authorized to use funds ... provided, that the contract" be approved by the Council). Even as of the filing of this motion, no final decision has been made about construction of a shelter at the Police Station Site. In fact, none has been authorized. *See* Sec. IV below. Thus, even if plaintiffs were correct that the Council or the Mayor were required to provide advance notice under the ANC Act for some of their actions here, neither is required to do so under the circumstances presented in this case.

III. Plaintiffs Lack Standing to Maintain This Action as They Were Not Denied Their Rights Under the ANC Act Because They Received Adequate Notice and Their Concerns Were Heard.

Plaintiffs complain that the Council and the Mayor failed to provide notice required by the ANC Act and, thus, denied plaintiffs an opportunity to comment regarding the enactment of the Homeless Shelter Act. *See, e.g.,* Compl. (Dkt. No. 1) at ¶¶ 38-41. Plaintiffs are mistaken. Even if the ANC Act gave plaintiffs a right to advance notice, plaintiffs received sufficient notice and, thus, have had the opportunity to exercise all of their rights. Therefore, plaintiffs have not suffered an injury under the ANC Act sufficient to grant them standing and the case should be dismissed.

A. Plaintiffs Had Actual Notice Under the ANC Act, Because they Knew of the Proposal Prior to its Passage.

The Court should dismiss the complaint because plaintiffs received actual notice of the proposed actions well before the actions were taken and still longer before the law became effective. When a party has received actual notice of a proposed action, failure to provide formal notice under the ANC Act is harmless

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CITIZENS FOR RESPONSIBLE OPTIONS, *et al.*, Plaintiffs, v. COUNCIL OF THE DISTRICT OF COLUMBIA, *et al.*, Defendants.	2016 CA 007152 B Judge Alfred S. Irving, Jr.

ORDER

Pending before the Court are three dispositive motions: Plaintiffs' Motion for Summary Judgment; Defendant Council of the District of Columbia's Motion to Dismiss; and Defendant District of Columbia's Motion to Dismiss. Plaintiffs filed their motion on November 15, 2016. By order dated November 30, 2016, the Court granted Defendants until December 14, 2016, to file oppositions to Plaintiffs' Motion for Summary Judgment. On December 29, 2016, the Court granted the Parties' Consent Motion to Set a Briefing Schedule, permitting Plaintiffs until January 12, 2017 to file a reply on their Motion for Summary Judgment and to file oppositions to Defendants' motions to dismiss. The Court's December 29 Order also granted Defendants leave to file replies on their motions to dismiss by January 31, 2017. All of the Parties' filings were timely. Upon consideration of the motions, and the oppositions and replies, the Court concludes that Plaintiffs lack standing to bring this action. As such, the Court is constrained to dismiss Plaintiffs' Complaint without prejudice.

I. BACKGROUND

For the past ten years, the District of Columbia has sheltered approximately 300 families at D.C. General, a former hospital. Pl.'s Mot. Summ. J. 3. Although the District originally envisioned D.C. General as a temporary facility, it remains the District's primary emergency shelter for homeless families. *Id.* In recent years, the District has endeavored to replace D.C. General with a network of dispersed shelters in each of the District's wards. *Id.* As part of the

EXHIBIT 3

District's plan, on February 11, 2016, Bill 21-620 was introduced before the Council, which contained plans for 301 units to be built at sites in Wards 1, 3, 4, 5, 6, 7, and 8. *Id.*; Compl. ¶ 17. Under the Bill, in Wards 3, 4, 5, and 6, a private developer was initially slated to construct units on private land that would be leased to the District. Compl. ¶ 17.

On March 17, 2016, the Council, sitting as the Committee of the Whole, held a hearing on the Bill. Compl. ¶ 19. There was strong opposition to the proposed sites in Wards 3, 4, 5, and 6, largely because of questions concerning the cost-effectiveness of the District's leasing land from private developers. Pl.'s Mot. Summ. J. 4. On May 17, 2016, the Committee of the Whole issued a report on the Bill, which proposed to replace several of the sites, including the proposed Ward 5 site, with land either owned or to be acquired by the District. *Id.* The proposed site in Ward 5 was changed from 2625 25th Place, NE, to either of two District-owned properties: 326 R Street, NE or 1700 Rhode Island Avenue, NE, the site of the Old Youth Division Police Station. *Id.*; Compl. ¶ 20.

On May 17, 2016, the Council voted to approve the Bill, with an amendment striking from consideration the 326 R Street, NE site and leaving 1700 Rhode Island Avenue, NE as the sole designated site for Ward 5. Compl. ¶ 25; Pl.'s Mot. Summ. J. 4. With the Mayor's approval, the Bill became D.C. Act 21-412. Compl. ¶ 26. On July 29, 2016, at the end of the Congressional review period, the Bill became D.C. Law 21-141 ("the Shelter Act"). *Id.* Section 3(a)(4) of the Shelter Act authorizes the Mayor to implement Capital Project HSW05C, which contemplates constructing shelter space for up to 50 families at 1700 Rhode Island Avenue, NE. *Id.* ¶ 31; Pl.'s Mot. Summ. J. 4.

In the unique structure of the District's government, the city's eight wards are divided into Advisory Neighborhood Commissions ("ANCs") and each ANC is further divided into single-member districts ("SMDs"). *See* D.C. Code §§ 1-309.01-02. The ANC Act empowers

ANCs to advise "the Council of the District of Columbia, the Mayor and each executive agency, and all independent agencies, boards and commissions of the government of the District of Columbia" with respect to an array of proposed matters of government policy. *Id.* § 1-309.10(a). At least thirty days before a proposed government action, "written notice . . . shall be given by first-class mail to . . . the [ANC] Commissioner representing the single-member district affected by said actions." *Id.* § 1-309.10(b). The relevant organ of the District's government proposing the action must subsequently give "great weight" to any issues and concerns that an ANC raises." *Id.* § 1-309.10(d)(3)(A).

The site at 1700 Rhode Island Avenue, NE is located within ANC5B and SMD5B-03. Pl.'s Mot. Summ. J. 5. The individual Plaintiffs in this case are residents of ANC5B and SMD5B-03. Compl. ¶¶ 3-8. Plaintiff, Citizens for Responsible Options ("CFRO"), is a non-profit association whose members are residents of ANC5B and SMD5B-03. Compl. ¶ 2. Collectively, Plaintiffs contend that the Council failed to provide adequate notice to either ANC5B or to the single-member district commissioner of SMD5B-03 of its intention to select the 1700 Rhode Island Avenue, NE site for the Ward 5 homeless shelter. *Id.* ¶¶ 1, 39. As a result, Plaintiffs contend that neither ANC5B nor SMD5B-03 had an opportunity to raise their issues and concerns with the site, which the Council would have been required to give "great weight" before enacting the legislation. *Id.* ¶¶ 41-43. Because of the Council's alleged failure to provide proper notice, on September 27, 2016, Plaintiffs filed the instant Complaint, seeking a declaratory judgment finding Section 3(a)(4) of the Shelter Act unlawful, null, and void and enjoining Defendants from taking further action in implementing Section 3(a)(4). *Id.* ¶¶ 46-47.

II. APPLICABLE LAW

"Standing is a threshold jurisdictional question which much be addressed prior to and independent[ly] of the merits of a party's claims." *UMC Dev., L.L.C. v. District of Columbia,*

120 A.3d 37, 42 (D.C. 2015) (quoting *Grayson v. AT&T Corp.*, 15 A.3d 219, 229 (D.C. 2011)). A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is an appropriate mechanism for challenging a plaintiff's standing. *UMC Dev. L.L.C.*, 120 A.3d at 43. In reviewing such a motion, the court must accept the facts in the complaint as true and construe the complaint in the plaintiff's favor. *Id.* (citing *Grayson*, 15 A.3d at 232).

Although the District of Columbia Courts were not established under Article III of the Constitution, the District of Columbia Court of Appeals applies the constitutional requirement of a "case or controversy" and the prudential prerequisites of standing. *Padou v. D.C. Alcoholic Beverage Control Bd.*, 70 A.3d 208, 211 (D.C. 2013) (citing *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206 (D.C. 2002)). In enforcing standing requirements, the Court of Appeals has looked to federal standing jurisprudence, both constitutional and prudential. *Padou*, 70 A.3d at 211 (citing *Friends of Tilden Park*, 806 A.2d 1206).

To establish constitutional standing, a plaintiff must show (1) an injury in fact, (2) a causal connection between the injury and the defendant's conduct, and (3) redressability. *Padou*, 70 A.3d at 211 (citing *Brentwood Liquors, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 661 A.2d 652, 654-55 (D.C. 1995)). To demonstrate the requisite injury in fact, a plaintiff must have suffered "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Friends of Tilden Park*, 806 A.2d at 1207 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). An association may also have standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of Tilden Park*, 806 A.2d at 1207 (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). "At least the

first of these three conditions of associational standing is inherent in the constitutional 'case and controversy requirement.'" *Friends of Tilden Park*, 806 A.2d at 1207 (citing *Commercial Workers Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555-56 (1996)).

When considering procedural injury as a basis for standing, the Supreme Court has recognized that a procedural injury is "special" because a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Friends of Tilden Park*, 806 A.2d at 1211 (quoting *Lujan*, 504 U.S. at 572 n.7); *Smith v. Henderson*, 982 F. Supp. 2d 32, 42 (D.D.C. 2013). However, a mere procedural injury is insufficient to establish standing; a plaintiff must demonstrate that the procedural injury threatens a separate "concrete interest that is the ultimate basis of [the plaintiff's] standing." *Friends of Tilden Park*, 806 A.2d at 1211-12 (quoting *Lujan*, 504 U.S. at 573 n.8); *Smith*, 982 F. Supp. 2d at 42; *accord Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing.").

III. ANALYSIS

In their Complaint, Plaintiffs assert that they have standing because the individual Plaintiffs own residential property within the geographic boundaries of ANC5B, which is where the 1700 Rhode Island Avenue, NE site is located. Compl. ¶ 15. The Complaint further asserts that Plaintiff CFRO has standing as a non-profit association "seeking to remedy the failure of the Council to provide notice to ANC5B and other neighborhood groups and an opportunity for meaningful input on the selection of the [1700 Rhode Island Avenue, NE] Site . . . ." *Id.* ¶ 16. To buttress their standing argument, Plaintiffs cite to *Kopff v. District of Columbia Alcoholic Beverage Control Board*, in which the Court of Appeals held that "ANC area residents

(including ANC Commissioners as individual citizens) have standing to initiate legal action to assert the rights of the ANC itself." 381 A.2d 1372, 1376-77 (D.C. 1977). When an ANC's statutory rights are violated, and it is hindered in performing its advisory function, the Court of Appeals explained that "the actual injury is suffered by the residents themselves; they are the ones harmed by the ANC's inadequate presentation of neighborhood views." *Id.* at 1377.

Plaintiffs' claim that the Council's failure to provide adequate notice under the ANC Act to ANC5B and the single-member district commissioner for SMD5B-03 is a claim of procedural injury. In *Friends of Tilden Park*, the Court of Appeals unequivocally rejected the notion that a procedural injury alone is sufficient to confer standing on a plaintiff. 806 A.2d at 1211. The plaintiff in *Friends of Tilden Park* cited to *Speyer v. Barry*, a Court of Appeals decision pre-dating the Supreme Court's decision in *Lujan*, to support its unsuccessful argument that a procedural injury alone was sufficient for a plaintiff to establish standing. In *Speyer*, the plaintiffs' procedural injury was the denial of a statutory right to oppose the issuance of a certificate of need for a residential treatment center for emotionally disturbed children. 588 A.2d at 1161-62. The *Speyer* plaintiffs lived in the neighborhood surrounding the proposed treatment center site and claimed that the treatment center threatened their interests in "neighborhood tranquility, property values, public safety and traffic congestion." *Id.* at 1160-61. The Court in *Friends of Tilden Park* held that "*Speyer* neither holds nor implies that a plaintiff whose interests are not concretely 'affected' by the denial of a procedural right would nonetheless have standing to challenge that denial in court." 806 A.2d at 1212.

Similarly, in *Smith v. Henderson*, plaintiffs, a group of parents and ANC Commissioners, brought a number of claims related to the District of Columbia Public Schools Chancellor's decision to close several schools, including a claim that the Chancellor failed to provide affected ANC Commissioners with notice under the ANC Act. 982 F. Supp. 2d at 38. The United States

District Court for the District of Columbia held that none of the plaintiffs had alleged sufficient concrete injury stemming from the lack of notice to the affected ANCs. *Id.* at 43. While the court acknowledged that ANC area residents have standing to bring an action to assert the rights of the ANC, under *Kopff*, the court held that none of the plaintiffs satisfied the injury in fact requirement of standing because none of the plaintiffs had children enrolled in any of the schools slated for closure. *Id.* at 44.

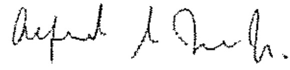
Mindful of *Kopff*, as well as subsequent developments in standing jurisprudence, and construing the facts in Plaintiffs' favor, the Court concludes that Plaintiffs lack standing, here, because they have failed to allege that they have suffered a sufficient injury in fact. Unlike the plaintiffs in *Speyer*, Plaintiffs' Complaint does not allege that the Council's failure to provide notice of its decision to select the 1700 Rhode Island Avenue, NE site for Ward 5's homeless shelter threatens any concrete interest that they have in the site. *See* 588 A.2d 1161-62. Instead, like the plaintiffs in *Smith*, Plaintiffs have merely alleged a procedural injury based on an apparent lack of notice under the ANC Act. *See* 982 F. Supp. 2d at 43-44. Because Plaintiffs have failed to allege that the lack of notice threatens a separate concrete interest in the 1700 Rhode Island Avenue, NE site, Plaintiffs have not satisfied the constitutional prerequisite of standing. *See Friends of Tilden Park*, 806 A.2d at 1211-12; *Smith*, 982 F. Supp. 2d at 44. The Court is, therefore, constrained to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction. *See* Super. Ct. Civ. R. 12(b)(1).

ACCORDINGLY, it is this 15th day of February, 2017, hereby

ORDERED that Defendants' Motions to Dismiss are **GRANTED**; and it is further

ORDERED that Plaintiffs' Complaint is **DISMISSED WITHOUT PREJUDICE**; and it is further

ORDERED that Plaintiffs' Motion for Summary Judgment is **DENIED**.



Alfred S. Irving, Jr.
Associate Judge
(*Signed in Chambers*)

Copies to:

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BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application for 850 Delaware Avenue, SW
Square 590E, Lot 800

PRELIMINARY STATEMENT OF COMPLIANCE WITH BURDEN OF PROOF

This statement is submitted by the District of Columbia in support of an application pursuant to 11-X DCMR §§ 901.2 and 1000.1 for (i) special exception relief pursuant to 11-U DCMR § 320.1(a) to permit an emergency shelter in the RF-1 District with more than 15 persons; (ii) special exception relief pursuant to 11-C DCMR § 703 for a partial reduction in the number of required parking spaces; and (iii) a variance from the building height and number of stories requirement of 11-E DCMR § 303.1, to permit the construction of a new emergency shelter with ground and cellar level medical care use in the RF-1 District at 850 Delaware Avenue, SW (Square 590E, Lot 800) (the "Site").

Pursuant to 11-Y DCMR § 300.15, the Applicant will file its Prehearing Statement with the Board of Zoning Adjustment ("BZA" or "Board") no fewer than 21 days prior to the public hearing for the application. In this statement, and at the public hearing, the Applicant will provide testimony and evidence to meet its burden of proof to obtain the Board's approval of the requested variance and special exception relief. The following is a preliminary statement demonstrating how the Applicant meets the burden of proof.

I. BACKGROUND

A. Description of the Site and Surrounding Area

As shown on the architectural plans and elevations included with this application (the "Plans"), the Site consists of Lot 800 in Square 590E, which is owned by the District of Columbia, and has a total land area of approximately 24,187 square feet. Lot 800 is the only lot in Square 590E and is a corner lot bounded by H Street, SW to the north, private property to the east, I Street, SW to the south, and Delaware Avenue, SW to the west. The Site is generally triangular in shape. The northwest portion of the Site includes a portion of former U.S. Reservation No. 220 (the "Reservation 220"), which was transferred from the jurisdiction of the National Park Service to the District of Columbia for highway purposes in 1957. *See* Sheet s 4-5 of the Plans, indicating the "Property Boundary for Federal Land" in blue, and the Transfer of Jurisdiction of Reservation 220, dated February 20, 1957, and also included in the application materials. Reservation 220 has a land area of approximately 11,065 square feet, and approximately 4,878 square feet of Reservation 220 is included in Lot 800. *See* Sheet 2 of the Plans; the Transfer of Jurisdiction of Reservation 220; and the Topographic Survey of Square 590E and Reservation 220, all included in the application materials.

The Site is presently improved with a 3-story building that the Applicant proposes to raze in connection with redevelopment of the Site. The existing building houses the Unity Health Care

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XHIBIT NO.9

EXHIBIT 4

The District Department of General Services will ensure that the proposed emergency shelter will meet all applicable code requirements, and DHS will ensure that the facility will meet all applicable licensing requirements.

> *Section 203.1(h)(5) – 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.*

The emergency shelter will not have an adverse impact on the neighborhood because of traffic. The proposed emergency shelter use is anticipated to generate a nominal number of new vehicular trips, such that the project will not create any adverse traffic conditions. As stated above, residents of similar sites within the District typically do not have cars, and 12 on-site parking spaces will be sufficient for the staff who work at the emergency shelter. Moreover, the Site is within close walking distance of the Waterfront, Federal Center, and Navy Yard Metrorail stations, multiple Metrobus routes, car-share spaces, and Capital Bikeshare stations, which will accommodate many of the employee and visitor trips to the Site and further reduce potential increases in traffic generated by the emergency shelter use. The Site is also located in a mixed-use, walkable neighborhood, such that residents and staff at the Site will be able to accomplish daily errands on foot rather than needing to rely upon a private vehicle.

The emergency shelter will not have an adverse impact on the neighborhood because of noise or operations. The emergency shelter will be a residential use, and inherently will not produce any adverse impacts due to noise or operations. The emergency shelter will operate similar to a multi-family apartment building, which use is found in multiple locations in the surrounding neighborhood. The proposed facility will be self-contained, with on-site dining, laundry, recreation areas, and total wrap-around services for the residents. There will be no central kitchen or food preparation on-site, and instead meals will be delivered twice each day, with deliveries utilizing the on-site loading facilities. Trash will be picked up in the rear yard, accessed through the ingress and egress established for on-site parking and loading.

> *Section 203.1(h)(6) – The Board of Zoning Adjustment may approve more than one (1) emergency shelter in a square or within one thousand feet (1,000 ft.) only when the Board of Zoning Adjustment finds that the cumulative effect of the facilities will not have an adverse impact on the neighborhood because of traffic, noise, or operations;*

As confirmed by the Department of General Services, there are no other emergency shelters located in the square or within 1,000 feet of the Site.

> *Section 203.1(h)(7) – The Board of Zoning Adjustment may approve a facility for more than fifteen (15) persons, not including resident supervisors or staff and their families, only if the Board of Zoning Adjustment finds 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.*

The emergency shelter will house up to 166 persons, not including resident supervisors or staff and their families. The program goals and objectives of the District of Columbia cannot be achieved by a facility of a smaller size at the Site and there are no other reasonable alternative locations to meet the program needs of Ward 6. *See* Homeless Shelter Act, Sec. 2(7), stating that "[i]t is in the best interest of the District to construct these new temporary shelter facilities on District-owned land, in part to avoid the disruption to the provision of services in the continuum of care that would accompany the eventual expiration of leases." The aggregate number of units in the replacement sites is the minimum necessary to meet that need. Thus, a facility for more than 15 persons at the Site is an absolute necessity. The District undertook an aggressive search for sites throughout the District, and the Council designated the Site as the Ward 6 emergency shelter location.

A restriction on the number of occupants to a maximum of 15 would require that there be at least 12 separate emergency shelter facilities in Ward 6 to house the maximum of 166 persons that can be accommodated at the Site, each of which would be limited to a maximum of 15 persons, and each required to be located at least 1,000 feet from each other, and not in the same square as each other. The delivery of comprehensive, on-site wrap-around services for the residents could not efficiently or effectively be replicated at numerous different smaller facilities spread throughout Ward 6. The program requires that the comprehensive services be delivered in one central location in each Ward. *See* Homeless Shelter Act, Sec. 2(8), stating that each of the facilities will "allow the District to provide small-scale, community-based temporary housing services throughout the District." Thus, it is impractical to achieve the District's program goals in Ward 6 with a smaller facility or series of facilities, and there is no other reasonable alternative to meet the District's program goals for Ward 6, other than what is being proposed.

D. <u>The Applicant Meets the Test for a Special Exception Relief for Parking Under 11-C DCMR § 703.2</u>

The BZA may grant a full or partial reduction in the number of required parking spaces, subject to the general special exception requirements of Subtitle X, and the applicant's demonstration of compliance with at least one of the eight conditions listed in 11-C DCMR § 703.2. In this case, the project complies with several of the eight listed conditions as follows:

> 11-C DCMR § 703.2(b) - *The use or structure is particularly well served by mass transit, shared vehicle, or bicycle facilities*, and
>
> 11-C DCMR § 703.2 (c) - *Land use or transportation characteristics of the neighborhood minimize the need for required parking spaces*

The Site is particularly well-served by mass transit, shared vehicle, and bicycle facilities. The Site is conveniently located within close walking distance of four different Metrorail lines (approximately 0.3 miles from the Waterfront Metrorail station, which services the Metrorail Green line, approximately 0.4 miles from the Federal Center Metrorail station, which services the Metrorail Blue, Orange, and Silver lines, and approximately 0.5 miles from the Navy Yard Metrorail station, which services the Metrorail Green line). The Site is also located within 0.3 miles of nine different bus lines; within 0.4 miles of seven Zipcar locations; and within 0.4 miles

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application for 5505 5th Street, NW
Square 3260, Lot 54

PRELIMINARY STATEMENT OF COMPLIANCE WITH BURDEN OF PROOF

This statement is submitted by 5th Street Partners LLC, on behalf of the District of Columbia Government, in support of an application pursuant to 11 DCMR §§ 3104.1 and 3103.2 for (i) special exception relief pursuant to 11 DCMR § 732.1 to permit an emergency shelter in the C-2-A District; (ii) a variance from the height requirements of 11 DCMR § 770.1; (iii) a variance from the floor area ratio ("FAR") requirements of 11 DCMR § 771.2; and (iv) a variance from 11 DCMR § 2001.3 to permit the construction of an addition to an existing non-conforming structure that already exceeds the maximum permitted building height limitation in the C-2-A District at 5505 5th Street, NW (Square 3260, Lot 54) (the "Site").

Pursuant to 11 DCMR § 3113.8, the Applicant will file its Prehearing Statement with the Board of Zoning Adjustment ("BZA" or "Board") no fewer than 14 days prior to the public hearing for this application. In this statement, and at the public hearing, the Applicant will provide testimony to meet its burden of proof to obtain the Board's approval of the requested special exception and variance relief. The following is a preliminary statement indicating how the Applicant meets the burden of proof.

I. BACKGROUND

A. Description of the Site and Surrounding Area

The Site consists of Lot 54 in Square 3260 and has a total land area of approximately 8,722 square feet. Square 3260 is bounded by Longfellow Street, NW to the north, 4th Street, NW to the east, Kennedy Street, NW to the south, and 5th Street, NW to the west. The Site is in the southwest portion of Square 3260 with frontage on 5th Street. The Site is otherwise bounded by private property to the north, east, and west, and abuts a public alley at its northeastern-most corner for approximately nine feet. The Site is presently improved with a vacant 5-story building. The Applicant proposes to adaptively reuse the existing building and construct a new addition to the building in connection with redevelopment of the Site.

The Site is located in the heart of the Kennedy Street neighborhood, which is a mixed-use community located in northwest Washington DC. Kennedy Street, NW is a one-mile corridor extending from North Capital Street on the east to Georgia Avenue on the west, and is developed with a mix of retail and service uses. "The institutions along Kennedy Street—its churches, service agencies, and charter school—help to anchor a neighborhood characterized by easy links to DC's Metro system via several bus routes... The Kennedy Street neighborhood encompasses the Brightwood Park and South Manor Park neighborhoods and is home to eclectic specialty shops and a full range of services." *Washington DC Economic Partnership, DC Neighborhood Profiles*

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Pursuant to 11 DCMR § 2101.1, the minimum parking requirement for an emergency shelter for 16 or more persons is as prescribed by the Board. The District of Columbia government has determined, based upon experience with other such housing in the District, that the 11 on-site parking spaces will be adequate for the needs of building occupants, employees, and visitors. The Department of Human Services ("DHS") has found at other similar facilities in the District that residents typically do not have cars. The on-site parking is sufficient for the staff and employees who work at the Site.

> *Section 358.5 – The proposed facility shall meet all applicable code and licensing requirements.*

DGS will ensure that the proposed emergency shelter will meet all applicable code requirements, and DHS will ensure that the facility will meet all applicable licensing requirements.

> *Section 358.6 – 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.*

The emergency shelter will not have an adverse impact on the neighborhood. As stated above, there is adequate off-street parking at the Site for the emergency shelter use, such that the proposed new use will not create any adverse traffic conditions. There are also a variety of public transportation options in the surrounding area, including a Metrobus stop at the corner of 5th and Kennedy Streets, NW that is served by the 62, 63, and E4 Metrobus lines, a Capital Bikeshare station at the corner of 5th and Kennedy Streets, NW, and five permanent carshare locations within 0.4 miles of the Site. The Site is also located in a mixed-use, walkable neighborhood, such that residents and staff at the Site will be able to accomplish daily errands on foot.

Moreover, the emergency shelter will be a residential use, and inherently will not produce any adverse impacts due to noise. The proposed use will also not adversely impact the neighborhood due to its operations because it will operate similar to a multi-family apartment building, which use is found in close proximity to the Site. The proposed facility will be self-contained, with on-site dining, laundry, playground and total wrap-around services for the residents. There will be no central kitchen or food preparation on-site. Meals will be delivered twice each day, and the delivery van will use the parking area. In addition, there are no similar facilities in the area.

> *Section 358.7 – The Board may approve more than one (1) community-based residential facility in a square or within five hundred feet (500 ft.) only when the Board finds that the cumulative effect of the facilities will not have an adverse impact on the neighborhood because of traffic, noise, or operations.*

There are no other community-based residential facilities located in the square or within 500 feet of the Site.

> *Section 358.8 – The Board may approve a facility for more than twenty-five (25) persons, not including resident supervisors or staff and their families, only if the Board finds 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.

The emergency shelter will house approximately 149 persons, not including resident supervisors or staff and their families. The program goals and objectives of the District of Columbia cannot be achieved by a facility of a smaller size at the Site and there is no other reasonable alternative to meet the program needs of Ward 4. It is imperative that all 270 units at DC General be replaced before DC General can be closed. The aggregate number of units in the replacement sites across all eight Wards is the minimum necessary to meet that need. Thus, a facility for more than 15 persons at the Site is an absolute necessity. The District has undergone an aggressive search for sites throughout the District, and the Site is a viable and desirable location where the District was able to negotiate an LOI on terms favorable to the District's needs. Further, it activates an otherwise vacant blight on the neighborhood.

D. The Applicant Meets the Test for Special Exception Relief Under 11 DCMR § 3104.1

In addition to satisfying the specific requirements set forth in 11 DCMR § 732.1, the Applicant must also demonstrate that the requested special exception meets the more general requirements of 11 DCMR § 3104.1. Before granting an application for a special exception, the Board must determine that the requested relief "will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps." 11 DCMR § 3104.1. The stated purposes of the Zoning Regulations are set forth in section 6-641.02 of the D.C. Code:

> Zoning maps and regulations, and amendments thereto, shall not be inconsistent with the comprehensive plan for the national capital, and zoning regulations shall be designed to lessen congestion in the street, to secure safety from fire, panic, and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the undue concentration of population and the overcrowding of land, and to promote such distribution of population and of the uses of land as would tend to create conditions favorable to health, safety, transportation, prosperity, protection of property, civic activity, and recreational, educational, and cultural opportunities, and as would tend to further economy and efficiency in the supply of public services. Such regulations shall be made with reasonable consideration, among other things, of the character of the respective districts and their suitability for the uses provided in the regulations, and with a view to encouraging stability of districts and of land values therein.

D.C. Code § 6-641.02 (2001). Those purposes are reproduced in the text of the Zoning Regulations as well. *See* 11 DCMR §§ 101.1-101.2.

The adaptive reuse of the existing building on the Site as an emergency shelter for 49 families is consistent with the purposes described above. The project will promote the appropriate distribution of population to create conditions that are favorable to health, safety, and prosperity,

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application for 2266 25th Place, NE
Square 4258, Lot 35

PRELIMINARY STATEMENT OF COMPLIANCE WITH BURDEN OF PROOF

This statement is submitted by Jemal's Tony LLC, on behalf of the District of Columbia Government, in support of an application pursuant to 11 DCMR §§ 3104.1 and 3103.2 for (i) special exception relief to locate an emergency shelter in the C-M-2 District pursuant to 11 DCMR 802.28, and (ii) a variance from the requirement of 11 DCMR 802.28(c) to allow an emergency shelter to be located within 1,000 feet of a solid waste handling facility, at 2266 25th Place, NE (Square 4258, Lots 35) (the "Site").

Pursuant to 11 DCMR § 3113.8, the Applicant will file its Prehearing Statement with the Board of Zoning Adjustment ("BZA" or "Board") no fewer than 14 days prior to the public hearing for this application. In this statement, and at the public hearing, the Applicant will provide testimony to meet its burden of proof to obtain the Board's approval of the requested special exception relief. The following is a preliminary statement indicating how the Applicant meets the burden of proof.

I. BACKGROUND

A. Description of the Site and Surrounding Area

The Site consists of Lot 35 in Square 4258 and has a total land area of approximately 55,067 square feet. The Site is zoned C-M-2 and is located within the boundaries of Advisory Neighborhood Commission ("ANC") 5C. Square 4258 is generally bound by CSX rail tracks and a small segment of 24th Street to the north, Bladensburg Road to the south, 25th Place to the east, and Queens Chapel Road to the east, all in the northeast quadrant of the District of Columbia. The Site is an irregularly shaped lot located in the northern portion of the square at the terminus of 25th Place, and has partial frontage along 25th Place and 24th Place. Currently, Lot 35 is improved with a vacant, two-story warehouse.

The areas to the east and west of the Site are zoned C-M-1 and C-M-2, and are primarily devoted to light-manufacturing and industrial uses. To the immediate east, across 25th Place, is a bus storage and maintenance facility owned and operated by the Washington Metropolitan Area Transit Authority (WMATA). There are residential neighborhoods further east that are zoned R-1-B and R-5-A. The Fort Lincoln New Town development, including the Shops at Dakota Crossing retail uses, is located approximately 0.8 miles to the east.

The area immediately north of the rail tracks is zoned C-M-1 and also subject to the Langdon Overlay (LO) District, which exists for purposes of protecting the residential neighborhood that exists further north, and to encourage retention of existing commercial and light manufacturing uses and businesses under special controls that protect quality of life and the

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As a result of the distance between the two shelters, the operational differences described above, the low number vehicular trips expected to the proposed emergency shelter, and the residential character of the proposed shelter, the cumulative effects of having two emergency shelters within 1,000 feet of each other within this area of the District will not result in adverse impacts on traffic, noise, or operations. First, the proposed emergency shelter and the existing Adams Place Emergency Shelter are located approximately 930 feet apart, only 70 feet shy of the 1,000 foot threshold, and the area between the two shelters is predominately used for commercial and light-industrial uses.

With respect to operations, the two emergency shelter programs are different in several key ways. First, the Adams Place Emergency Shelter is a low-barrier, unaccompanied adult men's shelter that provides shelter on a nightly, first-come first-serve basis. The proposed shelter at 2266 25th Place will serve families with minor children who apply for and receive a shelter placement from DHS. There will be no walk-in services provided at the Site. Rather, families will be offered accommodations from a central intake center on Rhode island Avenue, NE, and families will have 24-hour access to their private units until exiting homelessness to permanent housing. In addition, the proposed facility will have far less turnover than the daily turnover experienced at the Adams Place Emergency Shelter. For example, according to information provided by the District, families in short-term family housing programs have a current median length of stay of approximately 140 days. Finally, given the types of surrounding uses, the concurrent operation of two emergency shelters in this area will not have an adverse impact on neighboring and nearby properties. The closest residential areas to the north will be buffered by the CSX rail tracks.

Furthermore, as stated above, it is expected that most of the residents of the proposed shelter will not own a vehicle. Rather, resident families will likely be dropped off or rely upon the Metrobus routes that are in close proximity to the proposed shelter. To assist with travel costs, the District intends to offer residents public transportation vouchers. Thus, the majority of vehicle trips will be generated by staff and visitors to the accessory clinic which is expected to be a modest number that will not create adverse traffic conditions. Furthermore, given the distance between the two shelters the cumulative number of vehicle trips generated by both facilities will likely be imperceptible compared to existing traffic and circulation in the area. Finally, given the limited operation of the Adams Place Emergency Shelter, the residential character of the proposed emergency shelter, and the distance between the two shelters and other residential areas, there will be no adverse noise impacts that result from approval of a second emergency shelter in this area.

> *Section 802.28(g) - The Board may approve a facility for between one hundred and fifty-one (151) and three hundred (300) persons, not including resident supervisors or staff and their families, only if the Board finds 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 there is no other reasonable alternative to meet the program needs of that area of the District, provided that no shelter shall be approved that would increase the total number of emergency shelter residents housed within the square to exceed four hundred and fifty (450) persons.*

The emergency shelter will contain no more than 50 private family units, 5 of which will be two-bed units, 32 will be three-bed units, 21 will be four-bed units, and 2 will be five-bed units. As a result, the building will be capable of accommodating up to 200 people, not including resident supervisors or staff and their families. The Site achieves the program goals and objectives of the District of Columbia, as well as its legal obligation to provide shelter to families in private rooms. The program goals and objectives of the District of Columbia cannot be achieved by a facility of a smaller size at the Site, and there is no other reasonable alternative to meet the program needs of Ward 5. It is imperative that all 270 units currently at DC General be replaced before DC General is closed. The aggregate number of units across the eight short-term family housing sites proposed by the Mayor will meet that need, and thus a facility for more than 150 persons at the Site is a necessity. The District has undergone an aggressive search for sites throughout the District, and the Site is both a viable and desirable location for the proposed facility. No other site in Ward 5 was able to meet the program requirements. During the site selection process, the District was presented with three possible Ward 5 locations for providing short-term family housing; however, the Site was the only one that was deemed feasible as the other two sites were found to be too small to meet the District's programmatic goals. In addition, the District was able to negotiate a Letter of Intent for the proposed emergency shelter at the Site that is favorable to its needs.

> *Section 802.28(h) - The Board shall submit the application to the D.C. Office of Planning for coordination, review, report, and impact assessment, along with reports in writing of all relevant District departments and agencies, including but not limited to the Departments of Transportation and Human Services and, if a historic district or historic landmark is involved, the State Historic Preservation Officer.*

The Board will refer the application to the D.C. Office of Planning (OP) upon submission by the Applicant, at which time OP will coordinate with all applicable District agencies.

D. <u>The Applicant Meets the Test for Special Exception Relief Under 11 DCMR § 3104.1</u>

In addition to satisfying the specific requirements set forth in 11 DCMR § 802, the Applicant must also demonstrate that the requested special exception meets the more general requirements of 11 DCMR § 3104.1. Before granting an application for a special exception, the Board must determine that the requested relief "will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps." 11 DCMR § 3104.1. The stated purposes of the Zoning Regulations are set forth in section 6-641.02 of the D.C. Code:

> Zoning maps and regulations, and amendments thereto, shall not be inconsistent with the comprehensive plan for the national capital, and zoning regulations shall be designed to lessen congestion in the street, to secure safety from fire, panic, and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the undue concentration of population and the overcrowding of land, and to promote such distribution of population and of the uses of land as would tend to create conditions favorable to health, safety, transportation, prosperity, protection of property, civic activity, and recreational, educational, and