January 2, 2019

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Frederick L. Hill, Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Suite 200S
Washington, DC 20010

Re: BZA Case No. 19877 and BZA Case No. 19895
D.C. Department of General Services' Prehearing Statement

Chairperson Hill and Honorable Members of the Board:

On behalf of Intervenor D.C. Department of General Services, please find enclosed a Prehearing Statement for the subject appeals. Neighbors for Responsive Government, one of the two appellants herein, also appealed the Board's Order in BZA Case No. 19450, the underlying case approving the Ward 3 Short-Term Family Emergency Shelter at 3320 Idaho Avenue NW. In October 2018, the Court of Appeals affirmed the Board's decision in that matter, allowing DGS to move forward with construction of the emergency shelter.

This appeal is scheduled to be heard by the Board on January 9, 2019. Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

BY: Meridith H. Moldenhauer

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Board of Zoning Adjustment
District of Columbia
CASE NO.19895
EXHIBIT NO.22

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of January, 2019 a copy of the foregoing Prehearing Statement was served, via electronic mail, on the following:

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Meridith H. Moldenhauer

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF **BZA CASE NO. 19877**
ANGELA BRADBERY, ET. AL.

APPEAL OF **BZA CASE NO. 19895**
NEIGHBORS FOR RESPONSIVE GOVERNMENT

D.C. DEPARTMENT OF GENERAL SERVICES' PREHEARING STATEMENT

Intervenor D.C. Department of General Services ("DGS") files this prehearing statement and requests that the Board dismiss the subject appeals.[1] The appeals concern minor modifications to architectural plans reducing the size of the Ward 3 Short-Term Family Housing Shelter (the "Project") at 3320 Idaho Avenue NW (the "Property"), which was approved by the Board as part of BZA Case No. 19450 (the "Approved Case").

In the subject appeals, NRG and specific ANC 3C Commissioners Angela Bradbery, Nancy MacWood, and Maureen Boucher (the "ANC Commissioners") challenge the August 7, 2018 decision of the Department of Consumer and Regulatory Affairs' Zoning Administrator to approve a request by DGS for minor modifications to architectural plans that were previously approved by the Board pursuant to Subtitle A §§ 304.10, 304.11 of the Zoning Regulations (the "Request for Modification"). These challenges fail because:

1. The Zoning Regulations expressly authorize the Zoning Administrator to approve modifications to BZA-approved architectural plans.
2. The Request for Modification meets the conditions and requirements of Subtitle A §§ 304.10, 304.11, including compliance with the intent of the Board's Order in the Approved Case.

Subtitle A § 304.10 was enacted specifically for an instance such as this, where a permit applicant proposes minor changes to BZA-approved plans. DGS has clearly demonstrated that the

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[1] DGS requested that the Board consolidate the appeals due to similar subject matter and parties. *See* BZA Case No. 19895, Ex. 4; *see* BZA Case No. 19877, Ex. 10. Both NRG and DCRA have consented to the Motion to Consolidate Appeals. *See* BZA Case No. 19895, Ex. 5, 20. However, as of this filing, the Board has not yet ruled upon the Motion to Consolidate Appeals.

minor modifications comply with all conditions of Subtitle A § 304.10 and remain consistent with the intent of the Board as reflected in the Approved Case. Therefore, DGS requests that the Board deny the appeal and allow DGS to move forward with construction of the Project.

STATEMENT OF FACTS

A complete recitation of the facts pertinent to this matter is attached as **Exhibit A**. The Statement of Facts in **Exhibit A** should be cross-referenced for any pre-defined terms that are not within the body of this Prehearing Statement.

I. The Approved Plans

The Board approved the Application pursuant to the architectural plans submitted by DGS in the Approved Case at Exhibit No. 237 (the "Approved Plans"). A copy of the Approved Plans is attached at **Tab A**. The relevant portion of the Approved Plans are as follows:

A. The Playground and Southern Side Yard

The Approved Plans identify a "Playground" area that is approximately 3,600 square feet in size (the "Playground"). *See* **Tab A**, pg. 7. The Playground is located behind the proposed shelter building (the "Building"). *See* **Tab A**, pg. 7. Notably, the Approved Plans neither identify any equipment in the Playground, nor specify a particular use of the Playground. *See* **Tab A**, pg. 7.

To the south of the proposed Playground, the Approved Plans identify a 63-foot-wide southern side yard between the proposed shelter building and the southern property line. *See* **Tab A**, pg. 7. The side yard is to be planted and includes an existing 7-foot-tall existing wall that would remain at the site. *See* **Tab A**, pg. 6-7.

B. The Trash/Delivery Area

The Board granted variance relief from the requirement that DGS provide a full 30-foot loading berth for the Project. *See* **Tab B**. In lieu of a formal loading berth, DGS proposed a trash

and delivery area (the "Trash/Delivery Area") to the north of the Building that is located between the building and the Parking Garage. *See* **Tab A**, pg. 7. In the Approved Plans, the Trash/Delivery Area is accessed from a 16-foot-wide driveway off Idaho Avenue NW that provides entrance to the parking garage as well. *See* **Tab A**, pg. 7. DGS proposed a delivery "cut-out" adjacent to the shelter building and recessed trash area further toward the rear of the Project. *See* **Tab A**, pg. 7.

II. The Request for Modification

During the building permit phase for the Project, DGS submitted the Request for Modification, as outlined in **Exhibit A**. The Request for Modification includes a narrative statement as to the proposed changes to the Approved Plans as well as how DGS meets the standard for the Zoning Administrator to approve a modification under Subtitle A § 304.10. *See* **Tab D**, pgs. 1-5. The Request for Modification also includes a comparison between the Revised Plans and the Approved Plans. *See* **Tab D**, pgs. 69-80.

As reflected in the Request for Modification, the changes to the Approved Plans are minor in nature and *reduce* the footprint, height and gross square footage of the Project. Some of the modifications in the Revised Plans are responsive to comments received during permit reviews by DCRA, DDOT's Public Space Committee and the federal Commission of Fine Arts. Additionally, some of the changes are directed by the finished construction of the by-right Parking Garage. As it relates to this appeal,[2] the pertinent changes in the Revised Plans are as follows:

A. The Playground and Southern Side Yard

The play area in the rear of the Project has been reduced in size from 3,600 square feet to 3,485 square feet. With the proffer discussed below, the play area will consist of 2,485 square feet for playground equipment, 800 square feet as a deck for parents to monitor their children, and

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[2] For a complete list of the modifications in the Revised Plans please see the Request for Modification. *See* Tab ____.

approximately 200 square feet of trees and shrubs ringing the deck.[3] The play area has also been shifted toward the south in response to the final location of the Parking Garage. *See* **Tab D**, pgs. 71-72.

The Project's southern side yard remains the same as the Approved Plans, which have a 63'1" southern side yard between the shelter building and the Property's southern lot line. The southern side yard will now be used as a bioretention area that cannot be disturbed, and will include the decking mentioned above. *See* **Tab D**, pgs. 71-72.

B. The Trash/Delivery Area

The distance between the Parking Garage and the Project has been reduced from 29'-0 to 17'-7". *See* **Tab D**, pgs. 71-72. In conjunction with the change in the distance to the Parking Garage, the trash area has been relocated to the east to facilitate trash truck access. The delivery "cut-out" was also removed. *See* **Tab D**, pgs. 71-72.

ARGUMENT

The Zoning Regulations expressly authorize the Zoning Administrator to approve modifications to architectural plans that are previously approved by the Board. Here, DGS sought minor modifications to the Approved Plans following the Board's approval of the Application. The Zoning Administrator correctly applied the requirements of Subtitle A §§ 304.10, 304.11 and granted DGS' Request for Modification. Throughout the building permit process, DGS has engaged with the community, ANC 3C and the Ward 3 Short-Term Family Housing Advisory Team and answered questions as well as responded to FOIA requests. The Appellants fail to provide a basis demonstrating that the Zoning Administrator erred in approving the Request for Modification. Accordingly, the appeals should be denied.

[3] In the Approved Plans, the deck is 1,000 square feet. Pursuant to DGS' proffer, the deck will now be 800 square feet and the tree/shrub buffer will be 200 square feet.

I. The Zoning Regulations expressly authorize the Zoning Administrator to permit modifications to architectural plans that are previously approved by the Board

Pursuant to Subtitle A §§ 304.10, 304.11, the Zoning Administrator "is authorized to permit modifications to approved plans" that were previously approved by an order of the Board. In assessing a modification request, the Zoning Administrator must determine that the modification is "consistent with the intent of the Board of Zoning Adjustment," and that the modification meets conditions (a) through (h) set forth under Subtitle A § 304.10. Under Subtitle A § 304.11, the applicant for the building permit must submit a written request to the Zoning Administrator that details the proposed modifications and how the modifications meet the conditions under § 304.10. The permit applicant is also required to serve a copy of the request on the any parties to the underlying Board case as well as the affected ANC.

Simply put, the minor modifications in the Revised Plans are exactly the type of changes to approved plans that were intended to fall under the Zoning Administrator's authority pursuant to Subtitle A § 304.10. Despite this clear authority in the Zoning Regulations, the Appellants allege that "the requested changes are not within the jurisdiction of the Zoning Administrator and are contrary to the requirements of Subtitle A § 304.10." *See* NRG Appeal, Ex. 1, pg. 14-15. Instead, the Appellants claim that approval of the Revised Plans requires the filing of a "modification of consequence" or "modification of significance" pursuant to Subtitle Y §§ 703, 704. In this regard, the Appellants' arguments are incorrect and directly contrary to the plain language of the Zoning Regulations.

As a brief background, Subtitle A § 304.10 was enacted by the Zoning Commission as part of Case No. 08-06F following the Zoning Regulations Rewrite in 2016. The Office of the Zoning Administrator specifically requested such a text amendment because the 1958 Zoning Regulations provided no guidance on deviations from BZA-approved plans "other than requiring that any and all changes obtain BZA approval." *See* ZC Case No. 08-06F, Ex. 2. However, the Zoning

Administrator felt that such a practice was "unworkable as nearly all changes, no matter how small . . . would require a return to the BZA." *See* ZC Case No. 08-06F, Ex. 2. This is particularly notable when most BZA-approved plans "are conceptual and not based on detailed permit-level drawings." *See* ZC Case No. 08-06F, Ex. 2.

The Zoning Administrator requested that the Zoning Commission consider a text amendment that would codify the "long-standing practice of permitting changes that do not affect the specific area of relief granted by the BZA and that conform to the Zoning Regulations." *See* ZC Case No. 08-06F, Ex. 2. This would mimic the flexibility that is "commonly found in Zoning Commission Orders, where standard language permits flexibility to deviate from the approved plans." *See* ZC Case No. 08-06F, Ex. 2. Thus, the intent of Subtitle A § 304.10 was to introduce a regulation that would "establish clear parameters as to the extent of what changes could be made to BZA approved plans," while limiting disruption for permit applicants and increased case load for the Board that would result from minor changes requiring further proceedings before the Board. *See* ZC Case No. 08-06F, 9/22/16 Hearing Tr. 72; *see also* ZC Case No. 08-06F, Ex. 2.

The Request for Modification embodies the intent of this regulation. The Revised Plans *decrease* the size of the Project and do not increase any area for which DGS sought zoning relief in the Approved Case. As described in more detail below, the Revised Plans meet all the conditions set forth under Subtitle A § 304.10 and comply with the intent of the Board in the Approved Case. DGS complied with the procedural requirements of Subtitle A § 304.11 as well. DGS submitted a written request to the Zoning Administrator that included a comprehensive list identifying the type and extent of the modifications in the Revised Plans. *See* **Tab D**. In the Request for Modification, DGS clearly explained how the Revised Plans meet the conditions of Subtitle A § 304.10. *See* **Tab D**. DGS served the Request for Modification on ANC 3C as well

as NRG. *See* **Tab D**. DGS also provided the August 6th Letter to clarify any additional issues pertaining to the Request for Modification. *See* **Tab E**.

In sum, Subtitle A § 304.10 was enacted by the Zoning Commission for situations such as the Revised Plans. The goal of the regulation is to promote efficiency for permit applicants who seek to make minor changes to BZA-approved plans. The modifications to the Approved Plans authorized by the Zoning Administrator are within his authority under the Zoning Regulations and should be upheld.

II. The Revised Plans approved by the Zoning Administrator meet the conditions of Subtitle A § 304.10

Further, the Zoning Administrator properly exercised his authority under the Zoning Regulations in approving the Request for Modification because DGS demonstrated that the Revised Plans meet the conditions of Subtitle A § 304.10. DGS outlined the Revised Plans and the satisfaction of each condition in the Request for Modification, submitted on July 23, 2018, as well as in the follow-up August 6th Letter to the Zoning Administrator. *See* **Tabs D, E**. In light of this appeal, the points made in these two written submissions bear repeating.

(a) The modifications do not violate any condition of approval included in the Order;

The Order includes the "boilerplate" conditions that the Board imposes when approving an application for zoning relief. *See* **Tab B**, pgs. 36-37. The Order does not incorporate any conditions that are unique to the Approved Case or the Project. *See* **Tab B**, pgs. 36-37. Thus, the Zoning Administrator correctly concluded that the Revised Plans do not violate any conditions of approval in the Order.

However, the Appellants argue that the Zoning Administrator's exercise of authority under Subtitle A § 304.10 is, in itself, a violation of the "condition" in the Order that the Application is granted "subject to the approved plans at Exhibit 237" that cannot be altered "unless the Board orders otherwise." *See* NRG Appeal, Ex. 1, pg. 15. In essence, the Appellants claim that the

Zoning Administrator is not authorized to permit modifications to the Approved Plans because only the Board can do so. This is a completely circular argument in which the Appellants indirectly ask the Board to disregard the plain language of the Zoning Regulations.

Subtitle A § 304.10 is clear in establishing authority in the Zoning Administrator to authorize minor revisions to the Approved Plans. As reflected in the legislative intent of this regulation, Subtitle A § 304.10 was enacted specifically to obviate the need for a permit applicant to return to the Board for these minor revisions. Instead, a permit applicant can seek an administrative approval from the Zoning Administrator. The Appellants urge an interpretation that would completely undermine the Zoning Administrator's authority and render Subtitle A § 304.10 unenforceable.

The Revised Plans meet the requirements of Subtitle A § 304.10(a) because they do not violate any condition of approval in the Board's Order. The Appellants alternative interpretation of this condition should be rejected as inconsistent with the plain language and intent of this regulation.

> *(b) The modification will not increase, expand, or extend any area of relief granted by the Order;*

The Order grants special exception relief for an emergency shelter use (Subtitle U § 420.1(f)) and area variance relief for number of primary structures on a lot (Subtitle C § 302.2), loading (Subtitle C § 901.1), height and number of stories (Subtitle F § 303.1). The Revised Plans do not increase, expend or extend any area of relief provided for in the Order. In fact, the Revised Plans *decrease* the building height. It follows that the Revised Plans meet condition (b) under Subtitle A § 304.10.

> *(c) The modification will not create any need for new relief;*

The Revised Plans will not require new relief from the BZA. The Revised Plans reduce the Project's footprint and overall gross square footage.

(d) The modification will not change a principal use from that approved in the Order;

The Revised Plans will not change the Property's use as a 50-unit emergency shelter for families experiencing homelessness.

(e) The modification will not increase the number of stories;

The Revised Plans will not add a story to the Project.

(f) The modification will not increase by more than two percent (2%) the building gross floor area, the percentage of lot occupancy, building height or penthouse height; provided that the permitted increase of two percent (2%) or less must be the direct result of structural or building code requirements;

The Revised Plans will decrease the footprint of the Project, and correspondingly, the lot occupancy. The building height is proposed to be reduced by one inch from 69' to 68'11", and the gross square footage is proposed to be reduced from approximately 45,295 square feet to approximately 41,894 square feet. The Project does not have a penthouse. As such, the Revised Plans meeting condition (f) under Subtitle A § 304.10.

(g) The modification will not increase by more than two percent (2%) the number of dwelling units, hotel rooms, or institutional rooms within the approved square footage;

The Revised Plans will not increase or change the number of dwelling units at the Property.

(h) The modification will not increase or decrease by more than two percent (2%) the number of parking or loading spaces depicted on the approved plans.

The Revised Plans will not alter the number of parking or loading spaces at the Property. The 23 parking spaces required for the Project are provided in the Parking Garage. Further, as noted above, the Applicant obtained zoning relief for loading. Thus, the Approved Plans and the Revised Plans do not provide a formal loading berth. Therefore, the Revised Plans meet condition (h) under Subtitle A § 304.10.

In sum, the Revised Plans meet each specific condition set forth in Subtitle A § 304.10. As described below, the modifications in the Revised Plans also comply with the intent of the

Board's Order. Accordingly, the Zoning Administrator correctly exercised his authority under the Zoning Regulations and approved the Request for Modification.

III. The Revised Plans approved by the Zoning Administrator are consistent with the intent of the Board's Order

In addition to the specific conditions of Subtitle A § 304.10, the Zoning Administrator correctly determined that the Revised Plans are consistent with the intent of the Board's Order in conformance with the general requirement of Subtitle A § 304.10. The Appellants argue that certain elements of the Revised Plans, including the Playground, southern side yard, and the Trash/Delivery Area are not consistent with the intent of the Board Order.[4] This assertion ignores the nature of the Approved Plans as well as the specific findings of the Board in the Approved Case.

A. The Playground and Southern Side Yard

The revised Playground and southern side yard are consistent with the intent of the Board's Order because the Playground and southern side yard remain substantially the same size as in the Approved Plans. The Approved Plans identify 3,600 square feet as a generic "Playground," while the Revised Plans (as amended with the proffer) simply distinguish 2,485 square feet for playground equipment and 800 square feet for a deck for parents to supervise their children. While the Playground is shifted slightly to the south as a result of the final location of the Parking Garage, the southern side yard remains 63'1" in width as reflected in the Approved Plans. The southern side yard will now include the approximately 800 square foot deck and will be partially converted to bioretention area, but otherwise will remain unchanged from the Approved Plans.

[4] Among other minor changes, the Appellants argue that removal of the basement area is not consistent with the Board's Order because bicycle storage was proposed in the basement area. As part of the permitting process, DGS identified a new location for bicycle storage on the first floor. Thus, NRG incorrectly asserts that bicycle storage has been eliminated from the Project.

As to the Playground, the Board's Order identifies that "an outdoor play area will be provided at the rear of the building along the western edge of the subject property." *See* **Tab B**, pg. 14. Further, the Order describes the Playground as "containing approximately 3,600 square feet of space" that will be "divided into two or three zones to provide recreational space for children of different ages." *See* **Tab B**, pg. 14. This finding of fact directly relates to testimony during a hearing on the Project that DGS "plan[s] to engage specialists that design playground equipment once we get to that stage to be able to appropriately design that playground for the different groups." (McNamara Test. 3/1/17 BZA Hearing Tr: 101 Lines 3-6).

In the Approved Case, the Board also recognized that DGS moved the Playground from the south side of the building to the west in an effort to respond to community comment that "the playground . . . as now proposed, [is] not likely to create any adverse impacts on the neighborhood." *See* **Tab B**, pg. 23. As part of its conclusions of law, the Board found that the Project would not have an adverse impact in terms of traffic, noise or operations because "[a]ll operations will be contained within the building with the exception of the small play area, which will be located on the western edge of the property adjacent to an area of community gardens…" *See* **Tab B**, pg. 22.

The Appellants claim that a "gathering area" such as a deck was not contemplated in the Approved Case and that such a proposal "represents a new use at the site." *See* NRG Appeal, Ex. 1, pg. 16-17; *see* ANC Appeal, Ex. 2, pg. 5-6. These arguments demonstrate a fundamental misunderstanding of the Board's Order and the Request for Modification. The Approved Plans feature doors and windows on the Project's ground level facing the southern side yard. *See* **Tab A**, pg. 13. This design element was incorporated in the Approved Plans to provide access to the southern side yard and Playground, and allow for direct sight lines to these areas. *See* **Tabs A, E**. Further, the deck is not a "new use" of the Property, but instead a refinement of the programming

related to the Playground. The southern side yard was previously identified as a "planted" area in the Approved Plans. *See* **Tab A**, pg. 7. Yet, there is no prohibition in the Zoning Regulations restricting the use of a side yard – planted or not – by residents or any other tenant/owner of a property in the District. Likewise, the Board's Order does not include any conditions that limit the use of the Playground or the southern side yard.

Importantly, the Revised Plans do not undermine any of the conclusions the Board made in the Approved Case. The Board relied on several factors in determining that the Project would not have an adverse impact on the neighborhood in terms of noise or operations. Specifically, the Board found that

> The emergency shelter use is not likely to generate any adverse impacts relating to noise or operations. Operation of the emergency shelter will be supervised by staff who will be on-site 24 hours each day. All operations will be contained within the building with the exception of the small play area, which will be located on the western edge of the property adjacent to an area of community gardens….
>
> Operation of the emergency shelter use will be guided by a "good neighbor agreement" devised by a community advisory team that will conduct ongoing discussions to address any concerns about the emergency shelter that may arise in the future. *See* **Tab B**, pg. 22.

Thus, the Board found that the Project would not have adverse impact due to noise or operations based upon the 24-hour staff, containment of shelter operations in the building and the rear play area, and the ability to negotiate and discuss a "Good Neighbor Agreement."[5] Further, as pointed out by NRG, the Property already generates a certain amount of noise from the existing police station. (3/1/17 BZA Hearing Tr: 213-14, 256).

The Revised Plans do not diverge from the Board's conclusions as to adverse impact. The Playground has been slightly reduced in size, but is still located in the same vicinity as in the Approved Plans. *See* **Tab D**, pg. 72. The southern side yard remains 63'1" from the shelter

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[5] DGS has already completed a "Good Neighbor Protocol" with the community and ANC.

building to the southern lot line. *See* **Tab D**, pg. 72. The side yard will still have a landscaped area with trees and other greenery, and the existing 7-foot wall will remain as well. *See* **Tab D**, pg. 71-72. Per DGS' proffer, explained below, the deck would be ringed by trees and shrubs, and there will be additional restrictions on the use of the deck to further limit any impacts. The retention of the wall, the landscaping and the separation between the deck and the southern property line will act as a sufficient buffer for the residential uses to the south.

The Revised Plans further the overarching goal of the Project: to provide a safe and dignified emergency shelter for families experiencing homelessness. *See* **Tab B**, pg. 8, 10, 12. The Homeless Shelter Replace Act, which authorized funds for construction of the Project, directly references this goal of safety and security. *See* **Tab B**, pg. 12. The Project was designed to comply with statutory requirements and guidelines from the Interagency Council on Homelessness, which also sought to "enhance personal safety" through shelter design elements. *See* **Tab B**, pg. 12-13. As testified to by Director Zeilinger, one aspect of this policy goal is to ensure that parents can "provide the proper amount of attention to young children." (3/1/17 BZA Hearing Tr: 43 Lines 3-5). Therefore, the Revised Plans further the intent of the Order by providing an outdoor space where parents can directly supervise children at the Playground.

B. The Trash/Delivery Area

Likewise, the modifications to the Trash/Delivery Area in the Revised Plans are consistent with the intent of the Board's Order because there remains an on-site area for trash and deliveries that is adjacent to the shelter building. The minor modifications to the Trash/Delivery Area include widening of the driveway from 16-feet-wide to 20-feet-wide, repositioning of the designated trash area approximately 30-feet closer to Idaho Avenue, and removal of a delivery "cut-out" area. *See* **Tab D**, pg. 72. Importantly, as in the Approved Plans, there remains a designated area for trash and delivery trucks to service the Project. *See* **Tab D**, pg. 72.

The Appellants fundamentally misstate the conclusions of the Board as to the Trash/Delivery Area. NRG claims that the Revised Plans "would eliminate 100% of the approved number of loading spaces." *See* NRG Appeal, Ex. 1, pg. 18. NRG also alleges that the "elimination" of the delivery "cut-out" alters the Board's finding that the proposed Trash/Delivery Area is "sufficient to accommodate the project." *See* NRG Appeal, Ex. 1, pg. 18-19.

First, the Board did not approve any loading berths for the Project. Instead, the Board approved area variance relief from the loading requirements of Subtitle C § 302.2 so that the Project would *not* have any formal loading berths. *See* **Tab B**. In lieu of a loading berth, DGS proposed the Trash/Delivery Area to the north of the shelter building with access directly from Idaho Avenue NW. *See* **Tab A**, pg. 7. The Board concluded that area variance relief from the loading requirement was warranted, in part, because

> OP found that no substantial detriment to the public good was likely to result because the Applicant will provide an area on-site to accommodate deliveries in a location that will not be visible from adjacent streets or residences. *See* **Tab B**, pg. 31, 33.

In coming to this conclusion, the Board relied on DGS's traffic consultant, the only traffic expert who testified at the BZA Hearing, and the findings of the Department of Transportation ("DDOT"). DGS' traffic consultant testified that no large trucks will be accessing the Property because residents will not have personal furniture and will not require moving trucks. (White Test. 3/1/17 BZA Hearing Tr: 64 Lines 3-5). Further, the only deliveries for the Project would be a trash truck (anticipated three times per week) and a food delivery van that would drop off food twice a day because the Project would not have a commercial kitchen. (White Test. 3/1/17 BZA Hearing Tr: 64). DDOT concurred that the Applicant's "proposed loading area is sufficient to accommodate the project," noting the relatively limited use of the facilities for meal deliveries and trash pick-up, and that all loading activity will occur via a delivery space. *See* **Tab B**, pg. 22. Accordingly, the Board concluded that "a designated loading area and trash storage area on the

north side of the building, will be adequate to accommodate twice-daily food deliveries by van and trash collection." *See* **Tab B**, pg. 22.

The Revised Plans provide for a substantially similar Trash/Delivery Area that will be sufficient to accommodate food deliveries and trash collection. The removal of the delivery "cut-out" will not change this conclusion because there remains a substantial designated area adjacent to the shelter building where trucks can idle to service the Project. *See* **Tab D**. Further, in the August 6th Letter, DGS provided written confirmation that DDOT did not have any concerns with the proposed truck movements in the Revised Plans. *See* **Tab E**, pg. 10. DDOT also found the revised Trash/Delivery Area "is sufficient to safely accommodate garbage collection and deliveries." *See* **Tab E**, pg. 10. Accordingly DDOT continues "to support the [Revised Plans] and have no new operational concerns." *See* **Tab E**, pg. 10.

Therefore, the Revised Plans are consistent with the intent of the Board's Order as to the Trash/Delivery Area because the Revised Plans do not alter any of the Board's basis for supporting variance relief from the Project's loading requirements. As confirmed by DDOT, the revised Trash/Delivery Area is sufficient to meet the needs of the site, and all deliveries and trash pickup can continue to be accommodated. Therefore, the Zoning Administrator appropriately found that the Revised Plans are consistent with the Board's intent.

C. Stormwater Runoff

NRG also raises issues pertaining to stormwater runoff at the Property. *See* NRG Appeal, Ex. 1, pgs. 20-21. NRG acknowledges that stormwater runoff was not addressed or discussed as part of the Approved Case or in the Request for Modification. *See* NRG Appeal, Ex. 1, pg. 20. Indeed, issues of stormwater runoff are governed by the District's Department of Energy & Environment ("DOEE") and are not within the purview of the Board of Zoning Adjustment. The Property will continue to comply with all environmental and stormwater runoff regulations after

the Project is constructed. Nonetheless, this issue is not relevant to an analysis of the appeals because the issue was not raised in the Approved Case or in the Request for Modification. As such, NRG's allegation should be disregarded.

VOLUNTARY PROFFER

During the pendency of the subject appeals, DGS has worked with the community toward a resolution of this matter. In exchange for the ANC and NRG withdrawing the subject appeals, DGS would make the following five voluntary proffers as to the configuration of the proposed deck and the use thereof:

1. DGS will reduce the size of the proposed deck by 20% from the current 40' x 25' (1,000 square feet) to 40' x 20' (800 square feet).
2. DGS will add trees and shrubs around the proposed deck in order to create an additional noise buffer. The trees and shrubs will be approximately 20' in width on the south side of the deck and approximately 6'-8' in width on the west side of the deck.
3. The hours during which the deck can be used will be limited to 7:00 a.m. to 9:00 p.m. in accordance with D.C. Code § 22-1321(d).
4. Amplified or unreasonably loud music from any device played outside the proposed shelter building will be prohibited. "Unreasonably loud" music means sound that is above 60 decibels, which is the level established by the D.C. Parks & Recreation Permit Policies and Regulations.
5. Flood lights on the deck and playground will be prohibited.

This proffer is intended to benefit neighbors by reducing the size of the proposed deck, which is a primary issue raised in the appeals, and introducing certain design features and use restrictions to limit any potential impacts of the deck. These voluntary changes will not affect the Revised Plans approved by the Zoning Administrator.

On December 17, 2018, the ANC passed Resolution 2018-042 stating that the subject appeals would be withdrawn if DGS makes the five proffers noted above. However, DGS will not reopen the Approved Case to incorporate the five proffers as conditions of approval in the Order, as requested by the ANC in Resolution 2018-042. The five proffers can be implemented by DGS once the subject appeals are withdrawn, but without modifying the Approved Case.

CONCLUSION

In approving the Request for Modification, the Zoning Administrator exercised his express authority pursuant to Subtitle A § 304.10 of the Zoning Regulations. This regulation was enacted specifically for an instance such as the Revised Plans, where a permit applicant proposes minor changes to BZA-approved plans. Importantly, DGS has clearly demonstrated that the Revised Plans comply with all conditions of Subtitle A § 304.10 and remain consistent with the intent of the Board as reflected in the Approved Case and the Order. DGS has also voluntarily proffered to reduce the proposed deck, which will benefit the neighbors and minimize any potential impacts of the deck. Therefore, DGS requests that the Board deny the appeal and allow DGS to move forward with construction of the Ward 3 Short-Term Family Emergency Shelter.

Respectfully submitted,
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