

[DRAFT]

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 19960 of MCF 1400 Montana, LLC and MCFI Limited Partnership, pursuant to 11 DCMR Subtitle X, Chapter 9, for three special exceptions under Subtitle A § 207.2 for approval of a 35-foot adjustment of the boundary line to allow the bulk regulations of the MU-4 zone to extend into the portion of the property zoned RA-1, relief from Subtitle U § 421.1 to construct a new multi-family apartment building in the RA-1 zone, and relief from the screening requirement for surface parking lots under Subtitle C § 714.3 to permit one 24-foot break in the screening for vehicle ingress/egress, at premises 1400 Montana Avenue NE, (Square 4023, Lot 001).

HEARING DATES: April 3, 2019 and May 1, 2019
DECISION DATE: May 22, 2019

DECISION AND ORDER

MCF 1400 Montana, LLC and MCFI Limited Partnership (collectively the “Applicant”) filed an application with the Board of Zoning Adjustment (the “Board” or “BZA”) on January 15, 2019, for special exceptions pursuant to Subtitle X, Chapter 9, Subtitle A § 207.2 for approval of a 35-foot adjustment of the zone boundary line, Subtitle U § 421.1 for permission to construct a new residential multi-family development, and pursuant to Subtitle C § 714.3 for relief from the screening requirements for surface parking lots, to permit the construction of a new 106-108 unit apartment house¹ in the MU-4/RA-1 zones (the “Project”) at premises 1400 Montana Avenue N.E. (Square 4023, Lot 001) (the “Subject Property”) (the “Application”). For the reasons explained below, the Board voted to 5-0-0 to approve the Application.

PRELIMINARY MATTERS

Self-Certification. The zoning relief requested in this case was self-certified, pursuant to Subtitle Y § 300.6. (Exhibit 16.) In granting the certified relief, the Board made no finding that the relief is either necessary or sufficient. Instead, the Board expects the Zoning Administrator to undertake a thorough and independent review of the building permit and certificate of occupancy applications filed for this project and to deny any application for which additional or different zoning relief is needed.

¹ In the Applicant’s Prehearing filings, the Applicant amended the architectural plans and confirmed that the Project would have 108 units. (Ex. 39).

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Board of Zoning Adjustment
District of Columbia
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EXHIBIT NO.94

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Notice of Application and Notice of Hearing. By memoranda dated February 13, 2019, the Office of Zoning (“OZ”) sent notice of the filing of the Application to the D.C. Office of Planning (“OP”), the D.C. Department of Transportation (“DDOT”), the Office of the Deputy Mayor for Education (“DME”), the District’s Department of Parks and Recreation (“DPR”), the Office of Advisory Neighborhood Commissions (“OANC”), Advisory Neighborhood Commission (“ANC”) 5C, the ANC within which the Subject Property is located, the Single Member District 5C06 representative, ANC 5B (the adjacent ANC), the Councilmember for Ward Five, and the At-Large Councilmembers and the Council Chair. A public hearing was scheduled for April 3, 2019. (Ex. 18-25). Pursuant to 11-Y DCMR § 402.1(a), the Office of Zoning published notice of the hearing on the Application in the *D.C. Register*. (66 DCR 001819). On February 13, 2019, OZ sent notice of the public hearing to the Applicant, ANC 5C, and all owners of property within 200 feet of the Subject Property. Out of an abundance of caution and in response to questions by Zoning Commission Vice Chair Robert Miller at the May 1, 2019 public hearing, additional referrals were made by the Office of Zoning to the District’s Fire Marshall and Emergency Medical Service Department (“FEMS”), DC Water and Sewer Authority, and the District of Columbia Metropolitan Police Department (“MPD”) on May 3, 2019. (Ex. 84-86, Hearing Tr. 5/1/2019 at 91-94).

Request for Party Status. The Applicant and the ANC 5C were automatically parties in this proceeding. Bootz on the Ground Community Coalition (“BGCC”), through counsel, submitted a request for party status dated March 20, 2019. (Ex. 42). BGCC’s filing listed three members: Dorothy Davis, Minnie Elliot, and Yvonne Johnson. In support of its argument for party status, BGCC noted that its three members had been residents of long-term rentals in the vicinity of the Subject Property for at least 15 years. BGCC further claimed that one of its members lived “only one-half block away and arguably within 200 ft. of the site.” (Ex. 42 at 3).

BGCC’s party status request stated that it would testify as to the “adverse impacts of allowing significant upzoning, gaps in screening for parking, bulk expansion, and multi-family use with only IZ and limited, if any, family housing” and that such impacts would include “traffic intensification, parking concerns, increased pollution from emissions, inconsistency with the comprehensive plan, and displacement pressures.” (Ex. 42 at 1). BGCC claimed that the “changes to the existing zoning maps” would “undermine 11-A DCMR 101.1 because the proposed changes [would] not be in harmony with the general purposes and intents of the zoning regulations and maps pursuant to D.C. Code § 6-641.01. BGCC also stated that BGCC’s members were residents of Brookland Manor, and that because “this Application is being proposed by the same developer-Mid-City- and the proposed building is to be built in synergy” with the re-development of Brookland Manor, “the lack of family housing” in the Project would be “particularly injurious to BGCC membership.” (Ex. 42 at 3).

The Applicant responded in opposition to BGCC’s party status request. (Ex. 44). The Applicant argued that BGCC had not met its burden under 11-Y DCMR § 404 to demonstrate that it met all three criteria under Subtitle Y 404.13. The Applicant noted that BGCC’s party status request was deficient in a number of ways, but was critically deficient in that BGCC had not proved that any of its members’ interests “would likely be more significantly, distinctly, or uniquely impacted than

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the general public.” (Ex. 44 at 2). Additionally, the Applicant noted that not one of BGCC’s members lived within 200 ft. of the Subject Property, a requirement consistently used by the Board as a threshold for whether a person would be more impacted than the general public. *See* Z.C. Case No. 11-12, (Hearing Tr. 12/19/2011 at 35). *See also Application No. 17081 of St. Patrick’s Episcopal Day School* (the Board denied the party status request by consensus because the person requesting party status was not within 200 ft. of the Subject Property and, therefore, “would not be affected by the outcome of the case any more so than any other member of the general public”). (Ex. 44 at 2-3).

The Applicant also noted that BGCC’s party status request violated multiple requirements of Subtitle Y § 404, including failing to designate witnesses pursuant to Subtitle Y §§ 404.1(h), failing to serve all parties with the party status request pursuant to 404.6, failing to include a certificate of service pursuant to Subtitle Y § 404.7, failing to provide organizational documents as required under Subtitle Y § 404.1(g), and failing to include references to the actual distances between BGCC’s three members’ properties and the Subject Property pursuant to 404.1(i)(3).

At a public hearing on April 3, 2019, the Board heard BGCC’s counsel argue in support of their request. BGCC argued that two of its members lived within half of the block of the Project and that they would be uniquely impacted because the Project would “change the character of the neighborhood.” (Hearing Tr. 4/3/2019 at 112). BGCC also noted concerns about traffic and parking, especially traffic flow and pedestrian traffic by the Subject Property because of the nearby school, as well as changes to the view sheds. (*Id.* at 113).

The Applicant testified in opposition to BGCC’s party status request and presented a map showing that all three of BGCC’s members’ residences were more than 200 ft. from the Project. (*Id.* at 116 and Ex. 61) and that BGCC had not shown how its members would be uniquely impacted by the Project and requested relief. (*Id.*). BGCC conceded that the Subject Property was “more than 200 feet away” from the members of BGCC, but asserted that the distance was not a prerequisite for party status and that BGCC satisfied the standard. (Hearing Tr. 4/3/2019 at 121). BGCC continued to assert that BGCC would be uniquely impacted because its members walk past the site during their normal commute, either into the street or onto the Subject Property where no sidewalks currently exist, and thus qualified for party status. (*Id.*). The Board noted that the Subject Property was private property and BGCC had no right to use it. (Hearing Tr. 4/3/2019 at 122, 127). BGCC agreed that it had no right to use the Subject Property, but clarified that BGCC’s foot commute would be impacted because they walk past the Subject Property and use its adjacent intersections. (Hearing Tr. 4/3/2019 at 123, 125). No additional BGCC members formally came forward to testify or satisfy BGCC’s burden of proof and BGCC provided no supplemental documentation at the April 3, 2019 hearing. (Hearing Tr. 4/3/2019 at 110-131).

Based on the information in the record and testimony during the April hearing, the Board denied BGCC’s party status request finding that BGCC had not satisfied the requirements of Subtitle Y § 404.13 by showing how they were more uniquely impacted than the general public. (Hearing Tr. 4/3/2019 at 124-131). The Board noted that BGCC’s concerns regarding adverse impacts could be raised sufficiently by the ANC. (Hearing Tr. 4/3/2019 at 124-130). Further, the Board noted that

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none of BGCC's members lived within 200 feet of the Subject Property and no organizational documents for BGCC had been submitted to the record. (Hearing Tr. 4/3/2019 at 128, 130).

OP Report. OP submitted a report dated March 22, 2019, recommending approval of the request for special exception relief. (Ex. 43). OP required the Applicant to continue working with DDOT and the Public Space Committee on proposed improvements to public spaces on the eastern corner of the site and the Montana Avenue right-of-way main entrance to the building. (Ex. 43).

DDOT Report. DDOT submitted a timely report indicating that it had no objection to the approval of the Application, subject to the modification of the building entrance to comply with public space regulations and that the Project would not require any further BZA relief, implementation of the Applicant's Transportation Demand Plan, and the implementation of a new crosswalk across Evarts Street N.E. where it connects to Saratoga Avenue N.E. (Ex. 46).

ANC Report. Commencing January 25, 2019, the Applicant requested multiple times by email and telephone to be on the ANC 5C ANC agenda. (Ex. 62, 67). The Applicant's requests were followed by requests by the Board at both the April 3, 2019 and May 1, 2019 public hearing to let the Applicant present the Application to the ANC. The Applicant was ready to present at both the March and April 2019 full ANC meetings but was not permitted to by the ANC. (Ex. 62, 67, 89F). The Applicant presented at two ANC 5C06 single member district meetings on April 10th, 2019 and May 7th, 2019, and to the full ANC 5C at the May 15th public meeting. (Ex. 67, 89F, 93). ANC 5C submitted a written report, dated May 15, 2019, indicating that at a duly noticed public meeting on May 15, 2019, at which a quorum was present, it voted 4-2 in favor of the Application. (Exhibit 92). The ANC recommended that the applicant "reduce (the) number of units" and make the appearance of the building more "congruent with nearby residences." (Ex. 92). Both of these recommendations were discussed by the Applicant with the ANC at the May 15th meeting where Applicant explained the great care taken to ensure the Project would blend harmoniously with the neighborhood, showed detailed renderings of the Project's façade illustrating masonry and finishes consistent with the neighborhood, and discussed the unviability of reducing the number of units. (Ex. 93).

Persons in Support. Twenty-two neighbors, including the Subject Property's current tenant the Historic Berean Baptist Church, signed letters stating their support for the Project and one neighbor, Matthew Froust, submitted a signed testimonial in favor of the proposed project (Ex. 17, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79). D'Andre Phillips and Ross Ridenour testified in support of the Project during the May 1, 2019 public hearing. (Hearing Tr. 5/1/2019 at 101-107). In describing their support, the neighbors in support noted that the Project and requested relief would be in a location well suited for additional new and safe housing, the added neighborhood residents would provide much needed support for local businesses, completed sidewalks would be beneficial to the neighborhood, the Project would be compatible and in harmony with the neighborhood, the Project would make the neighborhood safer by providing "more eyes on the street," and generally expressed their support for the overall attractive design and landscaping. (See Ex. 17, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79)

Persons in Opposition. Two people in opposition to the Application filled out witness cards and were present at the April 3, 2019 board hearing to testify: Dorothy Davis and Cheryl Brunson (Ex. 63). Dorothy Davis was also present and testified in opposition at the May 1, 2019 hearing. (Ex. 83, Hearing Tr. 5/1/2019 at 108-112). At the May 1, 2019 hearing, Ms. Davis testified that she was “here to support this” but expressed her concerns that the Project would be too high in relationship to the single family homes across Saratoga and that the additional residents would add to traffic issues at the intersection of Saratoga Avenue and Montana Avenue. (Hearing Tr. 5/1/2019 at 109-111). Ms. Davis also noted that “a lot of senior and disabled people” walk past the Subject Property to reach the Rite Aid and 7-Eleven on Rhode Island Avenue and that crossing the street was difficult. (*Id.*).

There are no written letters of opposition.

FINDINGS OF FACT

The Property and the Surrounding Neighborhood

1. The Subject Property is located at 1400 Montana Avenue N.E. (Square 4023, Lot 0001) (the “Subject Property”). (Ex. 7).
2. As shown as early as 1943 on the District of Columbia’s Baist Maps, the Subject Property (shown therein as Parcel No. P143/35) was in single ownership prior to May 12, 1958 (Ex. 89).
3. The Subject Property is currently improved with a former drive through bank branch building, currently leased to the Historic Berean Baptist Church of Northwest Washington (the “Church”) through the end of 2019. (Ex. 7).
4. There are no residential dwellings on the Subject Property. (Ex. 7).
5. The Subject Property is not in a historic district, nor has the Subject Property been landmarked. (Ex. 7).
6. The Subject Property is split-zoned in MU-4 and RA-1 zones. (Ex. 8).
7. The surrounding neighborhood contains service, retail, and restaurant uses along Rhode Island Ave NE, as well as residential homes, multiple apartment buildings, and a recreation center in the immediate area. (Ex. 7, 43).
8. The Subject Property is a triangularly-shaped island that contains 38,926 sq. ft. of land area (Exhibit 7).

9. The Subject Property is generally bounded by Evarts Street NE to the north, Montana Avenue NE to the southwest, Saratoga Avenue NE to the southeast, and Rhode Island Avenue NE at the northwest corner. (Ex. 2, 7, 43).
10. Portions of the sidewalk are missing along Saratoga Avenue and Evarts Street, causing neighborhood residents, including those in wheelchairs, to use the streets or walk into the Subject Property. (Ex. 34, Hearing Tr. 4/1/2019, Hearing Tr. 5/1/2019 at 21, 75-76).
11. The lot currently provides 12,759 square feet of surface parking. (Ex. 7, Hearing Tr. 5/1/2019 at 16).
12. The Subject Property is located 0.4 miles from the nearest bicycle station, 0.1 miles from 9 Metrobus routes (86, B9, T18, 83, H6, T14, G9, B8 and S41), and just over half a mile to the Rhode Island Metrorail Station. (Ex. 7, 34, and 89A1).

The Applicant's Project Description

13. The Project fronts on Montana Avenue NE. The Applicant proposes to raze the existing building and construct a 108-unit apartment building² on the Subject Property. (Ex. 7, 89A1, and 89A2).
14. The Project will include inclusionary zoning units in satisfaction of the Inclusionary Zoning ("IZ") requirements under the Zoning Regulations and the units will be distributed proportionally throughout the building. (Ex. 7, 89A, Hearing Tr. 5/1/2019 at 8, 49).
15. The Project will have a building height of 48 feet-11 inches for the MU-4 zoned portion and 39 feet-9 inches for the RA-1 zoned portion (Ex. 89A1 and 89A2).
16. The architectural plans show a residential entry at the front of the building on Montana Ave NE and another entry at the rear of the building providing access to the rear surface parking. (Ex. 7, 89A1, and 89A2).
17. Five bays will project four feet into public space along Montana Avenue NE on each of the four floors in the MU-4 portion and four bays will project four feet into public space along Evarts Street NE on each of the three floors in the RA-1 portion. (Ex. 7, 89A).
18. The ground floor of the Project will contain a lobby area, fitness room, leasing office, mail room, and long-term bicycle storage, including all required long term bicycle storage and a bicycle repair area. (Ex. 7, Ex. 89A).

² The Applicant's Prehearing Statement (Ex. 39) modified the original Application (Ex. 7) and confirmed that the Project would be a 108-unit apartment building.
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19. The Project's floor area ratio ("FAR") will be compliant with the zoning requirements for the portion of the Project in the MU-4 zone and the RA-1 zone. (Ex. 89A1).
20. Under Subtitle B § 318.4, where a property lacks rear lot lines because the side lot lines converge at a point, the rear yard is measured as an arc from the point opposite the front line. The Project will meet the yard size requirements through having a rear yard in the MU-4 zone measuring a 15 ft. arc from the intersection of the Evarts Street lot line to the line of zone change, and a rear yard in the RA-1 zone measuring a 20 ft. arc from the intersection of Evarts Street and the Saratoga Street lot line intersection. (Ex. 89A1).
21. The MU-4 zone of the Project will comply with the zoning development standards for use, bulk, density, and height. (Ex. 7, 89A).
22. The RA-1 zone of the Project will comply with the zoning development standards for use, bulk, density, and height if the special exception under Subtitle A § 207.2 is permitted allowing for a 35-foot extension of the MU-4 zone into the RA-1 zone. (Ex. 7, 89A).
23. The Project complies with the zoning development standards for GAR. (Ex. 7, 89A).
24. The Project entails building a residential apartment building in the RA-1 zone, permitted under Subtitle U § 421.1 as a special exception in the RA-1 zone. (Ex. 7, 89A).
25. Except for the waiver requested under Subtitle C § 714.3 to permit a 24-foot wide gap in the screening for driveways and pedestrian entrances/exits, the surface parking will adhere to all landscaping and screening requirements under the Zoning Regulations. (Ex. 7, 89A, Hearing Tr. 5/1/2019 at 11).

The BZA Application and Requested Zoning Relief

26. On January 15, 2019, the Applicant submitted the Application to the Board of Zoning Adjustment seeking special exception relief under Subtitle A § 207.2 for permission to extend the MU-4 zone boundary line 35 feet into the RA-1 portion of the lot to allow the bulk and height permitted in the MU-4 zone to extend into the RA-1 zone; special exception relief under Subtitle U § 421.1 to allow the construction of a new residential development in the RA-1 zone; and special exception relief under Subtitle C § 714.3 to allow a 24-foot wide gap in the surface parking screening. (Ex. 7) to construct a 106-108 unit apartment building.
27. On March 13, 2019 the Applicant submitted revised plans for a 108 unit apartment building. (Ex. 39A).
28. The Applicant submitted updated plans on April 30, 2019. (Ex. 82A1 and A2).
29. At the May 1, 2019 public hearing, the Board requested that the Applicant submit updated

plans showing additional elevations and perspective renderings of the Project from each street illustrating the Project's relationship to the surrounding current and future neighborhood, a construction management plan, a traffic management plan for construction, and additional information regarding the changes in pervious surface between the existing conditions and the proposed Project. (Ex. 88, Hearing Tr. 5/1/2019 at 127-34).

30. On May 10, 2019, in response to the Board's request during the May 1, 2019 public hearing, the Applicant submitted updated plans showing elevations and perspective renderings of the Project illustrating the compatibility and harmony of its materials, design, and massing with the current and future neighborhood, including contextual illustrations of the Project with and without the zone boundary line extension. (Ex. 89A1-A2).
31. On May 10, 2019, the Applicant also submitted shadow studies to show the Project in context with the surrounding neighborhood and to illustrate that there would be no impact from the Project on the light and air of the current and future neighborhood, especially the single family dwellings on Saratoga Avenue. (Ex. 89A1 and A2).
32. In response to the Board and ANC's requests at the May 1, 2019 public hearing, the Applicant submitted a draft construction management agreement and draft traffic management agreement. (Ex. 89B and 89C).
33. At the Board's request during the May 1, 2019 public hearing, the Applicant submitted an updated landscaping plan and additional information regarding the changes in the pervious surface between the existing conditions and the proposed Project. (Ex. 89 A, 89E).

Party Status Request

34. BGCC's party status request was filed by their counsel and BGCC was represented by counsel at the April 3, 2019 public hearing. (Ex. 42, Hearing Tr. 4/3/2019 at 111-132).
35. BGCC's counsel was not present and did not testify at the May 1, 2019 public hearing. (Hearing Tr. 5/1/2019 at 1-150).
36. No members of BGCC testified at the May 1, 2019 public hearing explicitly in their capacity as a BGCC member.³ (Hearing Tr. 5/1/2019 at 1-150).
37. BGCC did not provide references to the actual distances between each of its members' residences and the Project as required under Subtitle Y § 404.1(i)(3).
38. No named members of BGCC live within 200 feet of the Subject Property. (Ex. 61)

³ Dorothy Davis, a member of BGCC, was present and testified at the May 1, 2019 hearing, but did not identify herself as a member of BGCC at that time. (Hearing Tr. 5/1/2019 at 106-118).

39. BGCC members and their families walk along Saratoga Avenue and Montana Avenue past the Subject Property on their daily commute. (Hearing Tr. 4/2/2019 at 112-125).
40. No members of BGCC will be more uniquely impacted than the general public. (Hearing Tr. 4/3/2019 at 116-128).
41. BGCC's party status request did not list witnesses or include a summary of witness testimony pursuant to Subtitle Y § 404.1(h). (Ex. 42, 44).
42. BGCC did not timely serve all parties or include a certificate of service with their party status request pursuant to Subtitle Y §§ 404.6 and 404.7. (Ex. 42, 44).
43. BGCC did not provide organizational documents for their nonprofit entity as required under Subtitle Y § 404.1(g).

General Special Exception Criteria

44. The Board of Zoning Adjustment may grant a special exception where it finds the special exception: "(1) Will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps; (2) Will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps; and (3) Subject in specific cases to special conditions specified in the Zoning Regulations." (D.C. Code § 6-641.07(g)(2) and 11 DCMR X § 901.2).
45. Subtitle A § 101.1 sets forth the purposes and intents for the Zoning Regulations overall, and is not the standard under which the Board considers special exception relief. Special exception relief is determined based on Subtitle X § 901.2 and the applicable specific conditions for the particular special exception at issue. (Ex. 65A, Hearing Tr. 5/1/2019 at 25-26, 46-47).
46. The general purpose and intent of the zoning regulations and zoning maps in MU-4 zones to permit moderate-density mixed use development and housing, specifically including the provision of housing and multiple family dwelling units, and the encouragement of safe and efficient conditions for pedestrian and motor vehicle movement and the promotion of active use of public transportation. (Hearing Tr. 5/22/19 at 26-27, Ex. 7, 65A). *See also* Subtitle G §§ 100.3 and 100.4. In particular, the MU-4 zone's purpose is to permit moderate-density mixed-use development, provide facilities for housing and commercial development outside the central core of the District, and is located in low to moderate density areas that provide access to main roadways and public transportation. (*See* Ex. 7, 60, 65A, and Hearing Tr. 5/22/19 at 27). *See also* Subtitle G §§ 400.3(a)-(c).
47. The general purpose and intent of the RA zones is to promote stable urban residential neighborhoods and to permit flexibility by allowing all types of residential developments. Further, the RA zones are intended to promote a walkable living environment and to

encourage compatibility between the location of new buildings and the existing neighborhood. (See Ex. 65A, Hearing Tr. 5/1/19 at 26). The purpose and intent of the RA-1 zone is to allow flexibility of design for all types of residential development, including apartment buildings, so long as the new buildings comply with the height, lot occupancy and area requirements for the zone. *See* Subtitle F § 100.3 (a)-(f).

48. The requested relief would allow the Applicant to construct a moderately-scaled, low-rise, three and four story apartment building including Inclusionary Zoning (“IZ”) Units distributed proportionally throughout the building. (Ex. 7).
49. The Project was strategically designed to not adversely affect the neighborhood through its elegant and attractive design, high quality finishes, lush landscaping, and strategic orientation along Montana Avenue. (Ex. 7, 89A1, and A2).
50. The Project will provide 108 units of additional housing to the District. (Ex. 7, 39, 89A).
51. The Project will not displace any District residents as there are currently no residential dwelling units on the Subject Property. (Ex. 7, 65A, 89A1 and A2).
52. The Board’s discretion is limited to determining if the regulation’s requirements are met, and if the burden is met, the Board ordinarily must grant the exception. *First Baptist Church of Wash. v. District of Columbia Bd. of Zoning Adjustment*, 432 A.2d 695, 701 (D.C. 1981) (quoting *Stewart v. District of Columbia Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)).

35-Foot Zone Boundary Line Extension

53. The Applicant seeks to extend the zone boundary of the MU-4 portion of the Subject Property 35 ft. into the RA-1 zone of the Subject Property. (Exhibits 7, 89A1, and 89A2).
54. No part of the bulk or height that the extension permits would go beyond 35 ft. into the RA-1 zone. (Exhibits 7, 89A1, and 89A2).
55. The RA-1 zone would extend 65-feet deep into the Subject Property from the frontage along Saratoga Avenue should the zone boundary line extension request be approved. (Ex. 89A1 and A2).
56. The Subject Property is an island, comprising the entire triangular block on which it is located. (Exhibits 7, 89A1, and 89A2).
57. The Project is separated by at least 96 feet from the closest single family dwelling and is surrounded on all sides by public rights of way and an additional 25 feet of public space along Montana Avenue NE and 19 feet of public space along Saratoga Avenue and Evarts

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Street, limiting any adverse impact of the extension of the zone boundary line. (Exhibits 7, 89A1, and 89A2).

58. The Project steps down on the eastern side, in line with the change in grade and the shift from MU-4 to RA-1 zoning. This shift also mirrors the surrounding neighborhood as it changes from bigger apartment houses on the opposite side of Montana Avenue and higher density on Rhode Island Avenue to single family homes toward the southwest along Saratoga Avenue. (Ex. 7, 43, 89A1, and 89 A1 and A2).
59. The Applicant's post hearing filings, especially the perspective renderings and additional elevations requested by the Board at the May 1, 2019 public hearing, illustrate the Project in context with both the surrounding current and future neighborhood and show that the Project's design massing is neighborhood appropriate. (Ex. 89 A1 and A2).
60. The Project's masonry façade and overall construction utilizing high-end materials, as well as the Project's lush landscaping show that the Project is harmonious with the current and future neighborhood.
61. The portion of the Project's apartment building frontage on Saratoga Avenue will extend approximately 83 linear feet and the remainder of the Project fronting on Saratoga Avenue will be surface parking lot and bioretention area. (Ex. 89A1 and A2, Hearing Tr. 5/1/2019 at 15-18).
62. The Project will be buffered on all sides by approximately 19-25 feet of public space. (Ex. 89A1 and A2, Hearing Tr. 5/1/2019 at 15).
63. The Project will be attractively landscaped, will preserve many existing trees, and will include approximately 17 additional trees to the Subject Property as well as additional trees in the public space surrounding the Subject Property. The landscaping plan also includes numerous native perennials and evergreen and deciduous shrubs. (Ex. 89A1 and A2, Hearing Tr. 5/1/2019 at 15).
64. The Project will comply with all stormwater and environmental requirements set forth by DDOT and DOEE. (Hearing Tr. 5/1/2019 at 16).
65. The Project is in line with the future plans for the neighborhood as outlined in the Comprehensive Plan and Rhode Island Avenue Diamond in the District Small Area Plan. (Ex. 65A, Hearing Tr. 5/1/2019 at 31).
66. There are several other apartment buildings across Montana Avenue, including the future planned unit development ("PUD") approved in Z.C. 14-18A (the "RIA PUD"). (Ex. 7, 43, Ex. 89A1 and A2, Hearing Tr. 5/1/2019 at 56).

67. OP found there would be no adverse impacts on the surrounding neighborhood, including, but not limited to, the light and air of the single family homes across from the Project on Saratoga Avenue, resulting from the requested zone boundary line extension. (Hearing Tr. 90-99).
68. OP found and the Applicant's shadow studies show that there will be no adverse impacts to the light and air of neighboring properties resulting from allowing the requested zone boundary line extension. (Hearing Tr. 5/1/2019 at 17-18, Ex. 89A1 and A2).
69. OP found there would be no adverse impact on the residents of neighborhood, including Brookland Manor or the future RIA PUD resulting from the additional bulk and density permitted by the requested zone boundary line extension. (Hearing Tr. 90-96).

New Multi-Family Residential Development in the RA-1 Zone

70. The Project requests special exception relief to build a residential apartment building in the RA-1 Zone. (Ex. 7, 43, 89A1 and 89A2).
71. The Application was referred to the relevant District of Columbia agencies for comment and recommendation on February 13, 2019, including DDOT, OP, OANC, DME and DPR. (Ex. 21, 22, 23, 24, 25). Out of an abundance of caution, and in response to questions from Zoning Commission Vice Chair Robert Miller at the May 1, 2019 public hearing, additional referrals were made by the Office of Zoning to the District's Fire Marshall and Emergency Medical Service Department ("FEMS"), DC Water and Sewer Authority, and the District of Columbia Metropolitan Police Department ("MPD") on May 3, 2019. (Ex. 84-86).
72. The public schools in the area that would be impacted by the apartment all have utilization rates well under capacity demonstrating that the schools have sufficient capacity to accommodate the number of students expected to serve the Project. (Ex. 7,11, 43).
73. In analyzing the Project's effect on public streets, DDOT concurred with Gorove Slade's traffic report that the Project is expected to generate fewer than 25 trips per hour in the peak direction, a number that is not impactful enough to trigger a full vehicular capacity analysis. (Ex. 46 and 91).
74. DDOT, OP, and Gorove Slade recognized that the Project is well suited to public transportation as it is located 0.4 miles from the nearest bicycle station, 0.1 miles from 9 Metrobus routes (86, B9, T18, 83, H6, T14, G9, B8 and S41), and just over half a mile to the Rhode Island Metrorail Station. (Ex. 7, 34, and 89A1).
75. The Traffic Report indicated that the Project's location is well suited for bicycle commuting as it has access to on and off street bicycle facilities including the Metropolitan Branch Trail and bicycle lanes along 18th Street and that all bicycle trips can be accommodated by the existing infrastructure. (Ex. 34, 89D).

76. OP pointed out in its report that recreation to accommodate the residents will be provided in multiple locations on the Subject Property, including the fitness room on the ground floor of the Project. OP also noted that “the site is located half a mile from the Noyes Recreation Center.”⁴ (Ex. 43).
77. DDOT indicated that the building entrance on Montana Avenue for the original project Application did not meet the public space regulations for step and ramp projections, and recommended approval with the condition of flexibility for the Applicant to modify the entrance in public space on Montana Avenue to comply with public space regulations. (Ex. 7, 46, 82A, 89A1 and 89A2).
78. OP recommended support for the Project and found the Project and requested relief to satisfy all the special conditions pursuant to Subtitle U § 421.1. (Exhibits 65A and 43).
79. The Applicant supplied with the Application a site plan and set of typical floor plans and elevations, a grading plan, a landscaping plan, and plans for any new rights-of-way and easements. (Ex. 5 (superseded), 7, 43, 59, 89A1, and 89A2).
80. OP found there would be no adverse impacts on the surrounding neighborhood, including, but not limited to, the light and air of the single family homes across from the Project on Saratoga Avenue, resulting from allowing a new apartment building in the RA-1 zone. (Hearing Tr. 90-99).
81. OP found that there would be no adverse impact on the residents of Brookland Manor or the future RIA PUD resulting from allowing a new apartment building in the RA-1 zone. (Hearing Tr. 90-96).

Surface Parking Lot Screening

82. The Project requests a 24-foot wide gap in the parking lot screening to allow all ingress and egress vehicular traffic to the Project’s surface parking and adjacent loading area to be accommodated by one 24-foot curb cut on Saratoga Avenue NE. (Ex. 7 and 89A2).
83. In early concept meetings with the Applicant, DDOT recommended that the Project have one curb cut instead of the two 20-foot curb cuts permitted as a matter-of-right that were originally considered by the Applicant. (Ex. 34, Hearing Tr. 5/1/2019 at 18-22).
84. Conceptual approval for the Project’s single 24-foot curb cut was provided by DDOT’s Public Space Committee at their March 28th public hearing. (Hearing Tr. 5/1/2019 at 23).

⁴ The Noyes Recreation Center is also known as Noyes Park and is adjacent to the Noyes Elementary School.
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85. A 24-foot curb cut meets DDOT standards for commercial curb cuts and is supported by DDOT. (Ex. 46).
86. All vehicular traffic, including loading trucks will be head in/head out. (Ex. 34, 89D).
87. The Project will reduce pedestrian-vehicular conflict through reducing the number of curb cuts on the Subject Property from the existing three to one, in line with DDOT's recommendation that there be only one curb cut rather than the two permitted as a matter-of-right. (Ex. 7, 34, 43, 46, 89D, 89A1, 89A2).
88. The Project includes construction of the missing sidewalks along the Subject Properties frontage on Saratoga Avenue and Evarts Street, which will improve pedestrian facilities and the walkability of the area. (Ex. 34, 46, 89D, 89A1, 89A2).
89. The Project includes all parking required by the Zoning Regulations (35 vehicular spaces) in a surface parking lot containing 34 physical spaces, including one car-share space, which is equal to three zoning parking spaces. The original Application included 33 spaces, but an additional space was added in response to community concerns. (Ex. 34, 81, 89A1, 89A2).
90. The Project will include all short-term and long-term bicycle parking required by the Zoning Regulations. (Ex. 7, 34, 46, 89C).
91. The Applicant has proposed a TDM Plan as outlined below. (*See* Ex. 34, 46, and 89D).
92. The lot is an island separated from all other properties by streets, thus there are no existing vegetation, buildings or protective and screening walls located on the adjacent property. (Ex. 7, 89A1, 89A2).
93. The Applicant submitted a Traffic Report prepared by their traffic expert Gorove Slade at Ex. 34, which is comprised of a multiple mode transportation review in satisfaction of DDOT's comprehensive transportation review requirements. The scope of the Traffic Report was confirmed by DDOT prior to the review. (Ex. 34, Hearing Tr. 5/1/2019 at 22).
94. DDOT and the Applicant's traffic expert, Gorove Slade, determined that there will not be a significant effect on vehicular traffic because there are less than 25 trips anticipated during peak hours resulting from this Project. (Ex. 34, 46, 89D).
95. The Applicant's expert in landscape architecture testified that there will be no increased particulate resulting from permitting a single 24-foot gap in the parking lot screening. (Hearing Tr. 5/1/2019 at 17-18).
96. The Applicant's expert in landscape architecture testified that there will be no increased noise from allowing one 24-foot gap in the surface parking lot screening. (Hearing Tr. 5/1/2019 at 17-18).

97. The Applicant's land use expert and landscape expert testified that the Project would have no adverse impact on the heat island effect and that the use of green roofs and extensive landscaping would result in no increase in the heat-island effect on the surrounding neighborhood. (Hearing Tr. 5/1/2019 at 18, 30-31).
98. OP testified and the Applicant's shadow studies show that there will be no adverse impacts to the light and air of neighboring properties resulting from allowing one 24-foot gap in the parking lot screening. (Hearing Tr. 5/1/2019 at 17-18, Ex. 89A1 and A2).

Community Outreach

99. The Applicant reached out to the ANC5C06 Single Member District Commissioner and ANC 5C Chairperson numerous times since January 25, 2019, by email, text, and telephone, requesting to be placed on the first available ANC meeting agenda in an effort to permit sufficient time to address any questions prior to the BZA hearing date. (Ex. 39 and 62).
100. The Applicant presented the Project to the surrounding neighborhood at a community meeting on March 14, 2019, and around 20-25 people attended the meeting. Members of the community and the Applicant engaged in a dialogue on sidewalk improvements, parking, storm water management, and traffic circulation. (Ex. 40).
101. The Applicant also met with members of the existing tenant at the Subject Property, the Historic Berean Baptist Church, prior to the March 14th meeting and received very positive feedback from the members regarding the inclusion of affordable housing in the Project via compliance with the District's Inclusionary Zoning requirements. (Hearing Tr. 5/1/2019 at 50). The Church submitted a letter in support of the Project. (Ex. 17).
102. On April 10, 2019, the Applicant presented the Application and answered questions at an SMD community meeting at the Brentwood Recreation Center. (Ex. 65).
103. The Applicant attended the 5C06 single member district meeting on May 7, 2019, and the Commissioner was pleased when the Applicant provided information on sidewalk improvements that would result from the Project. (Ex. 89F and 93).
104. The Applicant attended the ANC 5C meeting on May 15th and presented the Project to the full ANC 5C. At this meeting, with a quorum present, the ANC voted 4-2 in favor of the Project (Ex. 92 and 93).
105. The Applicant has promised to notify the ANC and the neighborhood of any impact on the community from the construction of the project, including any street and/or sidewalk closures. (Ex. 89B, 89C, and 93).

106. Twenty-two letters of support and one testimonial in support of the Project and requested relief were submitted to the record. (Ex. 17, 49-58, 68-79).
107. Two neighbors testified in support of the Project during the May 1, 2019 public hearing, noting that the Project would bring additional housing and will “help bring life to that location.” Both neighbors also testified that the Applicant’s parking and traffic plans would accommodate the Project and one of the neighbors note that it would be “great to have a completed sidewalk.” (Hearing Tr. 5/1/2019 at 101-07).
108. Dorothy Davis testified as a person in opposition to the Project, but stated that she was “here to support this” but expressed her concerns that the Project would be too high in relationship to the single family homes across Saratoga and that the additional residents would add to traffic issues at the intersection of Saratoga Avenue and Montana Avenue. (Hearing Tr. 5/1/2019 at 109-111). Ms. Davis also noted that “a lot of senior and disabled people” walk past the Subject Property to reach the Rite Aid and 7-Eleven on Rhode Island Avenue and that crossing the street was difficult. (*Id.*).

CONCLUSIONS OF LAW

The Applicant requests three forms of special exception relief pursuant to 11 DCMR Subtitle X, Chapter 9, under Subtitle A § 207.2 for approval of a 35-foot adjustment of the boundary line to allow the bulk regulations of the MU-4 zone to extend into the portion of the Subject Property zoned RA-1, relief from Subtitle U § 421.1 to construct a new multi-family apartment building in the RA-1 zone, and relief from the screening requirement for surface parking lots to permit one 24-foot break in the parking lot screening for vehicle ingress/egress pursuant to Subtitle C § 714.3 at premises 1400 Montana Avenue NE, (Square 4023, Lot 001). The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2001) to grant special exceptions, as provided in the Zoning Regulations, where, in the judgment of the Board, the special exception 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 Map, subject to specific conditions. (11-X DCMR § 901.2).

A request for party status in opposition was submitted on March 20, 2019 from BGCC. (Ex. 42). The Board denied BGCC’s party status request finding that none of BGCC’s members lived within 200 feet of the Subject Property and that BGCC had not demonstrated how any of its members would be more uniquely impacted than the general public as required pursuant to Subtitle Y § 404.13.

The Board notes that BGCC’s filing listed three members: Dorothy Davis, Minnie Elliot, and Yvonne Johnson. In support of its argument for party status, BGCC claimed that its three members had been residents of long-term rentals in the vicinity of the Subject Property for at least 15 years. BGCC further claimed that one of its members lived “only one-half block away and arguably within 200 ft. of the site.” (Ex. 42 at 3).

In relationship to BGCC's party status request, the Board considered the issues raised in BGCC's party status request to determine whether BGCC satisfied the standard for party status under Subtitle Y § 404.13 by showing that BGCC would be more uniquely impacted than the general public. Counsel for BGCC stated that BGCC would testify as to the "adverse impacts of allowing significant upzoning, gaps in screening for parking, bulk expansion, and multi-family use with only IZ and limited, if any, family housing" and that such impacts would include "traffic intensification, parking concerns, increased pollution from emissions, inconsistency with the comprehensive plan, and displacement pressures." (Ex. 42 at 1). BGCC claimed that the "changes to the existing zoning maps" would "undermine 11-A DCMR 101.1 because the proposed changes [would] not be in harmony with the general purposes and intents of the zoning regulations and maps pursuant to D.C. Code § 6-641.01. BGCC also stated that BGCC's members were residents of Brookland Manor, and that because "this Application is being proposed by the same developer-Mid-City- and the proposed building is to be built in synergy" with the re-development of Brookland Manor, "the lack of family housing" in the Project would be "particularly injurious to BGCC membership." (Ex. 42 at 3).

The Board recognizes that the Applicant opposed BGCC's party status request. (Ex. 44). The Applicant argued that BGCC had not met its burden under 11-Y DCMR § 404 to demonstrate that it met all three criteria under Subtitle Y 404.13. The Applicant noted that BGCC's party status request was deficient in a number of ways, but was critically deficient in that BGCC had not proved that any of its members' interests "would likely be more significantly, distinctly, or uniquely impacted than the general public." (Ex. 44 at 2). Additionally, the Applicant noted that not one of BGCC's members lived within 200 ft. of the Subject Property, a requirement consistently used by the Board as a threshold for whether a person would be more impacted than the general public. *See* Z.C. Case No. 11-12, (Hearing Tr. 12/19/2011 at 35). *See also Application No. 17081 of St. Patrick's Episcopal Day School* (the Board denied the party status request by consensus because the person requesting party status was not within 200 ft. of the Subject Property and, therefore, "would not be affected by the outcome of the case any more so than any other member of the general public"). (Ex. 44 at 2-3).

At a public hearing on April 3, 2019, the Board heard BGCC's counsel argue in support of their request. BGCC's counsel argued that two of its members lived within half of the block of the Project and that they would be uniquely impacted because the Project would "change the character of the neighborhood." (Hearing Tr. 4/3/2019 at 112). The Board recognizes that BGCC's counsel also noted concerns about traffic and parking, especially traffic flow and pedestrian traffic by the Subject Property because of the nearby school, as well as changes to the view sheds. (*Id.* at 113).

The Board credits the testimony provided by the Applicant in opposition to BGCC's party status request. The Board independently found that all three of BGCC's members' residences were more than 200 ft. from the Project. (*Id.* at 116 and Ex. 61) and determined that BGCC had not shown how its members would be uniquely impacted by the Project and requested relief. (*Id.*). The Board notes that BGCC conceded that the Subject Property was "more than 200 feet away" from the members of BGCC, but continued to assert that BGCC satisfied the standard and that BGCC would

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be uniquely impacted because its members walk past the site during their normal commute, sometimes either into the street or onto the Subject Property where no sidewalks currently exist. (Hearing Tr. 4/3/2019 at 121). During the April 3, 2019 hearing, Vice Chair Hart noted that the Subject Property was private property and BGCC had no right to use it. (Hearing Tr. 4/3/2019 at 122, 127). BGCC agreed that it had no right to use the Subject Property, but clarified that BGCC's foot commute would be impacted because they walk past the Subject Property and use its adjacent intersections. (Hearing Tr. 4/3/2019 at 123, 125). Importantly, the Board observed that no additional BGCC members formally came forward to testify or satisfy BGCC's burden of proof and BGCC provided no supplemental documentation at the April 3, 2019 hearing. (Hearing Tr. 4/3/2019 at 110-131).

The Board also notes that BGCC's party status request violated multiple requirements of Subtitle Y § 404, including failing to designate witnesses pursuant to Subtitle Y §§ 404.1(h), failing to serve all parties with the request pursuant to 404.6, failing to include a certificate of service pursuant to Subtitle Y § 404.7, failing to provide organizational documents as required under Subtitle Y § 404.1(g), and failing to include references to the actual distances between BGCC's three members' properties and the Subject Property pursuant to 404.1(i)(3).

Based on the information on the record and testimony during the April hearing, the Board denied BGCC's party status request finding that BGCC had not satisfied the requirements of Subtitle Y § 404.13 by showing how they were more uniquely impacted than the general public. The Board explained that BGCC's concerns regarding adverse impacts could be raised sufficiently by the ANC. (Hearing Tr. 4/3/2019 at 124-130). Further, the Board noted that none of BGCC's members lived within 200 feet of the Subject Property and no organizational documents for BGCC had been submitted to the record. (Hearing Tr. 4/3/2019 at 128, 130).

Although the Board denied BGCC's party status request, the Board considered the issues raised by BGCC in their party status request and at the April 23, 2019 hearing, as described in more detail below. However, because BGCC and/or their counsel failed to attend the May 1, 2019 hearing⁵ or present testimony on behalf of BGCC, the Board was not presented with substantial evidence in support of BGCC's arguments. Additionally, the District of Columbia Court of Appeals has been clear that a "sole allusion" to a challenged issue is not sufficient to preserve that issue for review on appeal. *See Goodman v. D.C. Rental Housing Com.*, 573 A.2d 1293, 1300-1302 (D.C. 1990). The Court will not "decide a case, in the absence of agency findings, on the basis of inferences or hunches drawn from what a lawyer said or didn't say." *See id.* Further, as demonstrated below, the Board was presented with substantial evidence from the Applicant contradicting BGCC's assertions.

Importantly, regarding the proper standard under which it should evaluate requests for special exception relief, the Board disagrees with BGCC's assertion that the requested relief will undermine Subtitle A § 101.2⁶ and that Subtitle A § 101.2 is relevant to the standard under which special

⁵ Dorothy Davis, a named member of BGCC, was present and testified at the May 1, 2019 public hearing, but testified in her capacity as a neighbor, not as a member or representative of BGCC. (Hearing Tr. 5/1/2019 at 107-13).

⁶ BGCC's party status request mistakenly referenced Subtitle A § 101.1 when it quoted Subtitle A § 101.2.

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exceptions should be evaluated. Rather, the Board credits the testimony of the Applicant's land use expert and OP and finds that Subtitle A § 101.1 sets forth the purposes and intents for the Zoning Regulations overall, and is not the standard under which the Board considers special exception relief. Consistent with its prior practice, the Board evaluates and determines special exception relief based on Subtitle X § 901.2 and the applicable specific conditions for the particular special exception at issue. (Ex. 65A, Hearing Tr. 5/1/2019 at 25-26, 46-47, 88-98).

Relief granted through special exception is presumed appropriate, reasonable, and compatible with other uses in the same zone. The Board's discretion "is limited to a determination of whether the exception sought meets the requirements of the regulations." *See First Baptist Church of Washington v. D.C. Bd. of Zoning Adjustment*, 432 A.2d 695, 701 (D.C. 1981) (quoting *Stewart v. D.C. Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)). Once the Applicant has meant its burden, the Board ordinarily must grant the application. *See id.*

General Special Exception Criteria pursuant to Subtitle X § 901.2

The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2001) to grant special exceptions, as provided in the Zoning Regulations, where, in the judgment of the Board, the special exception 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 Map, subject to specific conditions. (11-X DCMR § 901.2.)

As noted by the Applicant's land use expert and by OP, the purpose and intent of the MU zone provides for mixed-use developments, specifically including the provision of housing and multiple family dwelling units, and the encouragement of safe and efficient conditions for pedestrian and motor vehicle movement and the promotion of active use of public transportation. (Hearing Tr. 5/22/19 at 26-27, Ex. 7, 65A). *See also* Subtitle G §§ 100.3 and 100.4. In particular, the MU-4 zone's purpose is to permit moderate-density mixed-use development, provide facilities for housing and commercial development outside the central core of the District, and is to be located in low to moderate density areas that provide access to main roadways and public transportation. (*See* Ex. 60, 65A, and Hearing Tr. 5/22/19 at 27).

The general purpose and intent of the RA zones is to promote stable urban residential neighborhoods and to permit flexibility by allowing all types of residential developments. Further, the RA zones are intended to promote a walkable living environment and to encourage compatibility between the location of new buildings and the existing neighborhood. (*See* Ex. 65A, Hearing Tr. 5/1/19 at 26). The purpose and intent of the RA-1 zone is to allow flexibility of design for all types of residential development, including apartment buildings, so long as the new buildings comply with the height, lot occupancy and area requirements for the zone.

Based on the Findings of Fact and substantial evidence in the record, the Board finds the Project and requested relief to be in harmony with the intent of the Zoning Regulations in satisfaction of Subtitle X § 901.2(a), the requested relief will not tend to affect adversely the use of neighboring

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property in accordance with the Zoning Regulations and Zoning Map pursuant to Subtitle X § 901.2(b), and that the Project and requested relief satisfy the specific conditions for each special exception as required under Subtitle X § 901.2(c), as detailed specifically below.

Special Exception for 35-foot Boundary Line Extension for Split-Zoned Lots

Pursuant to Subtitle A § 207.2, the Board is permitted to grant special exception relief for split-zoned lots under single ownership on May 12, 1958 to allow “the regulations applicable to that portion of a lot located in the lesser restrictive zone that control the use, height, and bulk of structures and the use of land [to] extend to that portion of the lot in a restrictive use zone.” In addition to meeting the general special exception standard under Subtitle X, the Applicant must demonstrate that the Project satisfies the “specific conditions” of Subtitle A § 207.2 below:

- (a) The extension shall be limited to that portion of the lot in the more restrictive use zone but not exceeding thirty-five feet (35 ft.);*
- (b) In authorizing an extension, the Board of Zoning Adjustment shall require compliance with Subtitle A § 207.1(d);*
- (c) The extension shall have no adverse effect upon the present character and future development of the neighborhood; and*
- (d) The Board of Zoning Adjustment may impose requirements pertaining to design, appearance, screening, location of structures, lighting, or any other requirements it deems necessary to protect adjacent or nearby property.*

Based on the Findings of Fact, the Board concludes that the request for special exception relief satisfies the requirements of Subtitle A §207.2, as outlined below.

First, the Board finds that the Subject Property is a split-zoned lot in single lot ownership on May 12, 1958. (Ex. 93).

In satisfaction of Subtitle A § 207.2 (a), the Board finds that the extension of the MU-4 zone boundary will push the zone boundary line 35 feet into the portion of the lot zoned RA-1 and that the zone boundary line extension will not exceed 35 feet into the less restrictive zone. (See Ex. 7, 43, 89A and Hearing Tr. 5/22/19 at 12, 33).

As stated by the Applicant and OP, Subtitle A § 207.2(b) does not apply as no portion of the Subject Property is located in an R or RF zone. (See Ex. 7, 43).

Consistent with Subtitle A § 207.2(c), and based on the Findings of Fact and significant evidence in the record, the Board finds that the extension of the zone boundary lot will have no adverse effect upon the present character and future development of the neighborhood, as more fully described below.

The Applicant testified at length regarding the Project’s impact on the present character and future development of the neighborhood during the May 1 public hearing. The Board credits the testimony

of the Applicant's architect and OP regarding the compatibility of the Project and requested relief with the current neighborhood. Both the Applicant's architect Maurice Walters and OP testified that the Project satisfies the applicable height, bulk, lot occupancy, and FAR of the applicable zone. Further, OP and Mr. Walters testified that the step-down in the design of the Project's building from the MU-4 to the RA-1 zone on the east side of the Subject Property along Saratoga Avenue contributes to the Project's compatibility with the current character of the surrounding neighborhood by creating a transition from the mixed-use and moderate density of the MU-4 zone along Rhode Island Avenue to the residential zone and single family dwellings on the east side of Saratoga Avenue. (Hearing Tr. 5/1/2019 at 12, 91-96).

The Board also finds the Applicant's post hearing submissions showing perspective renderings and elevations of the Project in relationship to the existing buildings, especially the single family dwellings on Saratoga Avenue, particularly helpful in showing the Project compatibility with the current neighborhood. (Hearing Tr. 5/22/19 at 7-8, Ex. 89A2). The context elevations showing the difference between the proposed apartment building with and without the zone boundary line extension illustrate the significant distance between the proposed zone boundary line extension and the single family dwellings across from the Project on Saratoga Avenue. (Ex. 89A2). Not only will the Project step down in scale toward the single family dwellings, the additional bulk permitted by the zone boundary line will be approximately 165 feet from the closest single family dwelling. (Hearing Tr. 5/1/2019 at Ex. 89A2). Further the shadow studies submitted by Mr. Walters show no light and air impact on the single family dwellings across Saratoga resulting from the extension of the zone boundary. (Ex. 89A2).

The Board finds the Project will also be compatible with and will have no adverse impacts on the future development of the neighborhood. As noted above, the Board found the Applicant's post hearing submission of detailed perspective renderings and elevations showing the context of the Project from each direction with the future development of the neighborhood particularly helpful in illustrating the compatibility of the Project with the future character of the surrounding neighborhood, including the pending RIA PUD across Montana Avenue and potential development at the existing Rite Aid site at the corner of Evarts and Rhode Island Avenue. (Ex. 89A and B and Hearing Tr. 5/1/19 at 56). Additionally, the Board finds that Project will improve the walkability of the neighborhood by improving the connectivity of the sidewalks surrounding the perimeter of the Project and thus will contribute positively to the future character of the neighborhood. (Hearing Tr. 5/22/2019 at 21).

Accordingly, based on the Findings of Fact, the OP report and OP testimony, the Applicant's testimony and, especially after review of the illustrated renderings showing the context of the Project with the surrounding neighborhood, and the approximate 165-foot distance between the increased bulk permitted by the boundary line extension and the closest single family dwelling, provided in the Applicant's post hearing filings, the Board finds the Project will have no adverse impact on the character of the current and future surrounding neighborhood.

Based on the Findings of Facts, the Board's review of the Applicant's plans and the OP Report, in this case, the Board does not find it necessary to "impose requirements pertaining to design,

appearance, screening, location of structures, lighting, or any other requirements it deems necessary to protect adjacent or nearby property.” The Project is located on an island, as Lot 001 is the only lot on Square 4023 and is surrounded on all sides by public rights-of-way. (Ex. 7, 43). The closest neighbors are more than 100 ft. from the neighbors and the Project will comply with all screening and lighting requirements under the Zoning Regulations. (Hearing Tr. 5/1/2019 at 15). Further, especially after review of the supplemental renderings and elevations submitted at the request of the Board during the May 1, 2019 public hearing, the Board finds that the design and appearance as proposed will fit with the character of the neighborhood, the Application complies with the requirements of the applicable zones, and no required conditions are needed. (Hearing Tr. 5/22/2019 at 7-12). Accordingly, the Board deems no additional requirements are necessary to protect the adjacent or nearby property.

Therefore, based on the foregoing, the Board finds that the Applicant has demonstrated that it meets the specific conditions for special exception relief under Subtitle A § 207.2.

The Board also finds that the special exception relief requested to extend the zone boundary line of the MU-4 zone 35 feet into the portion of the Subject Property in the RA-1 zone will be in harmony with the general purpose and intent of the Zoning Regulations pursuant to Subtitle X § 902.1(a).

The Board credits the expert testimony of Stephen Varga the Applicant’s land use expert and OP, and finds that permitting the MU-4 zone boundary line to extend 35 feet in the RA-1 zoned portion of the Subject Property will be in harmony with both the intent of the MU-4 zone and the RA-1 zone as the Project will provide multi-family housing, one of the purposes and intents of both zones. (Hearing Tr. 5/1/2019 at 26-27, 89-99). The portion of the Project’s building in each zone will comply with the applicable zone’s height, setbacks, lot occupancy, and FAR requirements. (Ex. 7, 43, 89A and B). Further, even with the zone boundary line extension, the RA-1 zoned portion of the Subject Property will be 65 foot deep along the property line fronting on Saratoga Avenue across from single family dwelling units, which will enable a transition, as seen in the step-down design of the Project, from the MU-4 part of the Subject Property through the RA-1 zoned portion of the Subject Property to the lower density residential zone with single family dwellings across Saratoga Avenue. (Hearing Tr. 5/1/2019 at 87, Hearing Tr. 5/22/19 at 7-8).

Pursuant to Subtitle X § 902.1(b), the Board finds that the additional bulk and density permitted by the zone boundary line extension will have no adverse impacts on use of the neighboring properties. The Board acknowledges the ANC’s concerns as well as the concerns from one of the neighbors about the height of the Project and its impact on light and air on the single family dwellings across Saratoga Avenue, but the Board disagrees. (Hearing Tr. 5/1/2019 at 108-09, and Hearing Tr. 5/22/2019 at 7-8). Rather, the Board finds that the height, density, and mass of the Project meet the requirements of the applicable zones. Further, the Board finds that there will be no adverse impact on the light and air of neighboring properties as a result of the zone boundary line extension as illustrated in the shadow studies provided by the Applicant’s post-hearing filings and the context elevations supplied in the Applicant’s post hearing filings showing the mass of the proposed apartment building with and without the zone boundary line extension. (Ex. 89A1 and A2).

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While the Board denied the party status request in opposition from BGCC at the public hearing on April 3, 2019, the Board acknowledges that BGCC claimed that the request for relief to extend the zone boundary was “upzoning” and that such “upzoning” would adversely impact the neighbors by increasing the permitted density resulting in “traffic intensification, parking concerns, increased pollution from emissions, inconsistency with the comprehensive plan, and displacement pressures.” Further, BGCC argued that “the expansion of bulk [would] change the character of the neighborhood, totally eliminating open space, air, and flow.” (Ex. 42).

Because BGCC’s party status request was denied and neither counsel for nor members of BGCC⁷ failed to attend the May 1, 2019 hearing or present testimony on behalf of BGCC, the Board was not presented with substantial evidence in support of BGCC’s arguments. Additionally, as noted above, the District of Columbia Court of Appeals has been clear that a “sole allusion” to a challenged issue is not sufficient to preserve that issue for review on appeal. *See Goodman v. D.C. Rental Housing Com.*, 573 A.2d 1293, 1300-1302 (D.C. 1990). The Court will not “decide a case, in the absence of agency findings, on the basis of inferences or hunches drawn from what a lawyer said or didn’t say.” *See id.* Further, as demonstrated below, the Board was presented with substantial evidence from the Applicant contradicting BGCC’s assertions.

First, the Board credits the land use report and testimony of Stephen Varga, the Applicant’s land use expert, for clarifying that a special exception to permit a zone boundary line extension is not “upzoning.” Unlike a map amendment, which is regulated by Subtitle X § 500 and under the authority of the Zoning Commission, the special exception permitted under Subtitle A § 207.2 is specific to the Project and is not a permanent zone change that runs with the land. (Ex. 65 at 8, Hearing Tr. 5/1/2019 at 29).

Second, while the Board finds there will be some increased traffic resulting from the addition of a 108-unit apartment building in the neighborhood, based on the Traffic Reports, the DDOT report and testimony from the Applicant’s traffic expert Gorove Slade, the Board finds that there will not be sufficient increased traffic and parking issues to adversely impact the neighborhood. (Ex. 34, 46, Hearing Tr. 5/1/2019 at 23). The Applicant is providing surface parking for residents that complies with the required amount of vehicular parking spaces required by the Zoning Regulations. (Hearing Tr. 5/1/2019 at 14). Further, as indicated by the Applicant’s traffic expert, the location of the Project is well suited to public transportation and bicycle commuting. (Ex. 34, 89D). Reviewing increased pollution from emissions is not under the Board’s purview, but is an issue regulated by other DDOT and DOEE.

Pursuant to *French v. D.C. Bd. of Zoning Adjustment*, 658 A.2d 1034 (D.C. 1995), the Board does not have the authority to evaluate consistency with the Comprehensive Plan as part of its evaluation of applications for special exception relief. However, the Board acknowledges that the Applicant provided substantial evidence in the record showing that the relief requested for the extension of the zone boundary line would not be inconsistent with the Comprehensive Plan and would not

⁷ The Board notes that Dorothy Davis is a named member of BGCC but that she gave no indication that her testimony at the May 1, 2019 hearing was on behalf of BGCC—rather, she testified in her capacity as a neighborhood resident.
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increase displacement pressures. Mr. Varga, the Applicant's land use and planning expert provided a land use report and testimony regarding the Project's overall consistency with the Comprehensive Plan. (Hearing Tr. 5/1/2019 at 31). As noted by Mr. Varga, increasing the housing supply is specifically called for in the Northeast Element of the Comprehensive Plan and the Project and requested relief are supported by the Rhode Island Avenue Diamond in the District Small Area Plan. (*Id.*).

Additionally, based on the Findings of Fact, the Board notes that there are no existing residential dwellings on the Subject Property, and therefore the Board finds no District residents will be displaced as a direct result of the requested relief. (*See* Ex. 7, Hearing Tr. 5/1/2019 at 28).

Finally, the Board finds the post hearing submissions from the Applicant's architect persuasive in showing that how the expansion of bulk permitted by the zone boundary extension will not adversely impact the character of the neighborhood. In their party status request, BGCC argued that the "expansion of bulk" would "totally eliminate[e] open space, air, and flow." (Ex. 42 at 8). In particular, BGCC argued that the Project would block "view sheds." (Hearing Tr. 4/23/2019 at 113). In determining whether the requested relief will adversely impact the light and air of neighboring properties, the Board compares the requested relief to what is permitted as a matter-of-right, not with what currently exists. The Board credits the testimony of the neighbors who took the time to attend the May 1, 2019 public hearing in support of the Project. Mr. Ridenour, one of the neighbors who testified in support of the Project and lives across from street from the Project on Saratoga Avenue stated that the mass of the building, especially given its orientation on Montana Avenue, was not an issue or concern. (Hearing Tr. 5/1/2019 at 102-03). The Board was persuaded by the substantial evidence in the record, as summarized in the Findings of Fact, showing that the proposed relief's effect on the bulk and density of the Project will begin 65 feet deep into the Subject Property from the Saratoga Avenue frontage. (Ex. 89A and B, Hearing Tr. 5/1/2019 at 54, Hearing Tr. 5/22/2019 at 7). Further, the rendering showing the Project's height and bulk in the context of the neighborhood, with and without the zone boundary line extension, and the shadow studies showing the Project's impact on light and air on the surrounding neighborhood, illustrate the significant distance from neighboring properties and show no impact on the light and air of neighboring residences. (*Id.*)

Special Exception Approval for a Multi-Family Apartment Building in the RA-1 Zone

Pursuant to Subtitle U § 421.1, all new residential developments in the RA-1 zone, except those comprising all one-family detached and semi-detached dwellings, must be reviewed by the Board of Zoning Adjustment as special exceptions under Subtitle X. The Board is authorized to approve new residential developments that satisfy the general special exception standards of Subtitle X and the standards and requirements of Subtitle U § 421, below:

421.2 The Board of Zoning Adjustment shall refer the application to the relevant District of Columbia agencies for comment and recommendation as to the adequacy of the following:

- (a) Existing and planned area schools to accommodate the numbers of students that can be expected to reside in the project; and*
- (b) Public streets, recreation, and other services to accommodate the residents that can be expected to reside in the project.*

421.3 The Board of Zoning Adjustment shall refer the application to the Office of Planning for comment and recommendation on the site plan, arrangement of buildings and structures, and provisions of light, air, parking, recreation, landscaping, and grading as they relate to the surrounding neighborhood, and the relationship of the proposed project to public plans and projects.

421.4 In addition to other filing requirements, the developer shall submit to the Board of Zoning Adjustment with the application a site plan and set of typical floor plans and elevations, grading plan (existing and final), landscaping plan, and plans for all new rights-of-way and easements.

Based on the Findings of Facts and the substantial evidence in the record, the Board finds that the conditions set forth under Subtitle U §§ 421.1, 421.2, 421.3 and 421.5 have been satisfied as outlined below.

Pursuant to Subtitle 421.2, the Office of Zoning referred the Application to the relevant District of Columbia agencies for comment and recommendation as to the adequacy of existing and planned area schools to accommodate the numbers of students that can be expected to reside in the project; and public streets, recreation, and other services to accommodate the residents that can be expected to reside in the project. On February 13, 2019, the Board referred the Application to DDOT, the Office of the Mayor for Education, and the District Department of Parks and Recreation. (See Ex. 23, 24, 25). Additional referrals were made by the Office Zoning to the District's Fire Marshall and Emergency Medical Service Department ("FEMS"), DC Water and Sewer Authority, and the District of Columbia Metropolitan Police Department ("MPD") on May 3, 2019. (See Ex. 84-86).

Comments were received from OP, DDOT, FEMS, and the Metropolitan Police Department. OP submitted their report detailing their review of the Project and requested relief and recommended approval of all three forms of special exception relief requested. (Ex. 43). DDOT found that the Project would have no adverse impacts and recommended approval for the Project subject to three conditions: two related to Public Space and implementation of the Applicant's TDM Plan. (Ex. 46). FEMS stated that the "FEMS Office of the Fire Marshal has no objection to the approval of the Application provided that the Project would be developed in accordance with the requirements of Chapter Five of the Fire Code (2012 ed. IFC)." (Ex. 87). MPD submitted comments noting that the Application had been reviewed by the Fifth District Commander William Fitzgerald and his team. MPD had no objections to the Application but noted that the DDOT should be consulted about the potential increase in pedestrian and vehicular traffic. (Ex. 90). DDOT responded to MPD's comments noting that DDOT had already addressed the projected traffic volumes from the Project and had determined that "the site-generated peak hour traffic volumes would be relatively low and did not warrant further analysis of the transportation network," (Ex. 91). The Board acknowledges

that comments were not received by every agency to which referrals were made, but notes that this is common and that Subtitle U § 421.2 requires referrals to be made so agencies may have the opportunity to comment, not that comments actually must be received. (Hearing Tr. 5/1/19 at 92-93).

Based on the Findings of Fact as summarized above, the Board finds that all referrals were made by the Office of Zoning as required under Subtitle U § 421.2.

Pursuant to Subtitle U § 421.3, on behalf of the Board, the Office of Zoning forwarded the Application to OP on February 13, 2019. (Ex. 22). As required by Subtitle U § 421.3, OP reviewed and made applicable comments and recommendations regarding “*the site plan, arrangement of buildings and structures, and provisions of light, air, parking, recreation, landscaping, and grading as they relate to the surrounding neighborhood, and the relationship of the proposed project to public plans and projects.*” (See Ex. 43 and Hearing Tr. 5/1/2019 at 95-98).

In its report, OP commented that OP “finds the design and layout of the site to be generally acceptable, and supports the quality of the buildings design and materials proposed.” (Ex. 43 at 6). Regarding parking, OP stated that it does not favor surface parking lots but noted that surface parking lots are permitted by the Zoning Regulations. OP recommended that the Applicant “ensure that the proposed parking lot meets or exceeds all parking lot landscape requirements of Subtitle C § 715, especially where the parking lot fronts public streets.” (Ex. 43 at 6).

During the May 1, 2019 public hearing, OP testified that it had also reviewed the Project’s provisions of light, air, recreation, and grading as related to the surrounding neighborhood as well as the proposed project to public plans and projects. (Hearing Tr. 5/1/2019 at 96-97). OP found no impacts to the light and air of neighboring residences due to the over 100-foot separation between the Project and other buildings allowing for the flow of light and air as well as the orientation of the Project on the site being such that the shadow impact would mainly fall on the parking lot and to the north of the Subject Property on the Rite Aid site (if at all). (*Id.*) OP further testified that it reviewed the landscaping plans and found the landscaping plans for the Project in conformance with the Zoning Regulations and therefore acceptable. (*Id.* At 97-98). Additionally, OP testified that it had reviewed the existing and proposed grading plans in the record to understand the site development and had no specific comments regarding grading. (*Id.* at 98).

Accordingly, based on the above, the Board finds the requirements of Subtitle U § 421.3 for referral of the Application to OP and OP’s review and comment have been satisfied.

Pursuant to Subtitle U § 421.4, and as noted in the Findings of Facts, the Applicant submitted “a site plan and set of typical floor plans and elevations, grading plan (existing and final), landscaping plan, and plans for all new rights-of-way and easements” in addition to meeting all other filing requirements. (See Ex. 5, 39A, 59, 82A1 and A2, 65B, and 89A1 and A2). Therefore, the Board finds the Applicant has satisfied the requirements under Subtitle U § 421.4.

In sum, based on the Findings of Fact as outlined above, the Board finds the Applicant has satisfied the requirements of Subtitle U §§ 421.1-4, as well as Subtitle X 901.2 as described below.

The Board finds that the request for special exception relief to build a new apartment building on the RA-1 zoned portion of the Subject Property is in harmony with the general purpose and intent of the Zoning Regulations. As evidenced in the record, and testified to by the Applicant's architect and land use expert, as well as OP, new apartment buildings are permitted by right in the MU-4 zone and as a special exception in the RA-1 zone. (Ex. 43). The Project and requested relief are for a moderate-density residential use and residential developments are intended by both zones. (Hearing Tr. 5/1/2019 at 26-28). Further, in line with the intention of the Zoning Regulations, the Project conforms with the applicable zoning requirements for height, lot occupancy, and FAR. (Ex. 43, 89A and B). As shown in the Applicant's plans at 89A and B, and testified to by the Applicant's architect and land use expert as well as OP, the Project's step-down design from the MU-4 zone at Rhode Island Avenue to the RA-1 zone along Saratoga, together with the bulk of the building to be located along Montana Ave, ensure the Project and requested relief's compatibility with the surrounding neighborhood. (Ex. 89, Hearing Tr. 5/1/19 at 11-12, 26-27 and Hearing Tr. 5/22/19 at 7). Further, the island-like location of the Project on the only lot in Square 4023, surrounded on all sides by a significant buffer of landscaped public space and public rights-of-way, harmonizes the Project into the surrounding neighborhood. (*See* Hearing Tr. 5/1/2019 at 11-12, 26-27, 98-99).

Pursuant to Subtitle X § 901.2(b), the Board also finds that the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map. While the Board acknowledges the concerns raised by the ANC, neighbors, and BGCC, the Board credits the report and testimony of OP, the DDOT Report, the traffic and land use reports, and testimony of the Applicant's traffic and land use experts, architect, and landscape architect in concluding that the Project and requested relief will not adversely affect the use of the neighboring properties.

The Board finds the Project is designed to minimize impacts to the use of neighboring properties. As stated in the Findings of Fact, the Project complies with the applicable height, bulk, lot occupancy and area requirements. The Project's building is located along the portion of the Subject Property bordering Montana Ave and will eventually face another multi-family apartment building, part of the future RIA PUD. (Hearing Tr. 5/1/2019 at 95-97). The Board finds the step-down design of the Project mitigates and harmonizes the transition from the higher density permitted in the MU-4 zone to the lower density permitted in the RA-1 zone lessening any impacts on the use of neighboring properties. (Hearing Tr.5/22/2019 at 8).

In the RA-1 portion of the zone, for which relief is requested for permission to build a new residential apartment building, the applicable portion of the Project extends approximately 83 ft. along the Saratoga Avenue street front across from single-family dwellings, as the rest of the Subject Property along Saratoga Avenue will be screened surface parking and landscaped bioretention area. (Hearing Tr. 5/1/2019 at 15). The new apartment building in the RA-1 zone is further buffered by approximately 19-25 feet of Public Space, which will be landscaped according to the plans at 89A and B. (*Id.*). As illustrated by the shadow studies provided by the Applicant at

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Ex. 89B, because of the orientation of the Project's building and the fact that the closest neighboring properties are over 100 feet away, the Project and requested relief will have no impact on the light and air of neighborhood properties. (*See* Plans at 89 A and B, Hearing Tr. 5/1/2019 at 95-98 and 5/22/2019 at 7-8).

The ANC and neighbors raised concerns about the potential impacts on traffic conditions created by additional traffic from 108 new residential units to the neighborhood. (Hearing Tr. 5/1/2019 at 50-51 and 70-73). Additionally, BGCC raised concerns about traffic intensification in their party status request. (Ex. 42). However, while the Board acknowledges these concerns, the Board finds the DDOT Report and Applicant's Traffic Report persuasive in illustrating the minimal impact the Project is expected to have on the traffic conditions impacting the current and future character of the neighborhood. (*See* Ex. 34, 46, 89D). Further, the Board finds most of the traffic concerns raised by the ANC and neighbors were regarding traffic during construction, and that the Applicant's Traffic Management Plan and Construction Management Plan should sufficiently mitigate these concerns. (*See* Ex. 89B and C, Hearing Tr. 5/1/2019 at 65-76). Additionally, as noted above regarding the issues raised by BGCC, the District of Columbia Court of Appeals has been clear that a "sole allusion" to a challenged issue is not sufficient to preserve that issue for review on appeal. *See Goodman v. D.C. Rental Housing Com.*, 573 A.2d 1293, 1300-1302 (D.C. 1990). The Court will not "decide a case, in the absence of agency findings, on the basis of inferences or hunches drawn from what a lawyer said or didn't say." *See id.* Further, as demonstrated below, the Board was presented with substantial evidence from the Applicant contradicting BGCC's assertions.

The Applicant's traffic expert, Gorove Slade, provided testimony and submitted both a comprehensive and summary traffic report to the record. (Ex. 34, 89D, Hearing Tr. 5/22/2019 at 15-24). Gorove Slade found the location of the Project well suited for public transportation use and found the additional trips expected to be generated by future residents so minimal that a full vehicle study was not required. (*Id.*). Overall, Gorove Slade's traffic study found the Project would have no adverse impacts on the current or future development of the neighborhood. (*Id.*). After reviewing the Applicant's request, DDOT concurred with Gorove Slade's assessment that the requested relief would have no adverse impact on the current and future character of the neighborhood. (Ex. 46).

In their May 15, 2019 Resolution, the ANC recommended reducing the number of apartment units. (Ex. 92). The Board acknowledges this recommendation, but finds that as apartment buildings are permitted by right in the MU-4 zone and as a special exception in the RA-1 zone, the Board has no authority to ask the Applicant to reduce the number of units. (Hearing Tr. 5/22/2019 at 8).

Relief from the Parking Screening Requirement for Surface Parking Lots

Pursuant to Subtitle C § 714.2, surface parking lots must be screened according to the following provisions:

- (a) *Screening shall be provided around the entire perimeter of the surface parking area;*

(b) Gaps in the screening are allowed only to provide driveways and pedestrian exits or entrances that open directly onto a street, sidewalk or alley. No individual gap may exceed twenty feet (20 ft.) in width; and

(c) The screening shall be either:

(1) A wall or solid fence at least forty-two (42) inches high; or

(2) Evergreen hedges or evergreen growing trees that are thickly planted and maintained, and that are at least forty-two (42) inches in height when planted, and maintained in perpetuity.

Based on the Findings of Fact and as demonstrated by the Applicant's architectural and landscaping plans (Ex. 89A1 and A2), the Project will satisfy the requirements of Subtitle C § 714.2 except for the requirement under Subtitle C § 714.2(b) that gaps in the screening not exceed twenty feet (20 ft.). In this case, the Applicant requires relief to allow one 24 foot gap in the surface parking screening for vehicle ingress and egress to the parking lot.

As noted in the Applicant's filings, upon DDOT's recommendation, the Project will have one curb cut instead of two. A controlled access curb cut is required by DDOT to be 24 feet to allow both ingress and egress residential and truck traffic. As noted in the DDOT Report, commercial curb cuts are permitted to be 24 feet and DDOT has no objection to allowing the 24-foot gap in the surface parking screening. (Ex. 46).

Pursuant to Subtitle C § 714.3, the Board may grant relief from the surface parking lot screening requirements as a special exception pursuant to Subtitle X, and, as part of its determination, "the Board may consider" the following:

(a) Impacts on the pedestrian environment within adjacent streets, sidewalks, and other public areas;

(b) Existing vegetation, buildings or protective and screening walls located on adjacent property;

(c) Existing topographic conditions;

(d) Traffic conditions; and

(e) In granting a modification or waiver, the Board of Zoning Adjustment may require any special treatment of the premises that it deems necessary to prevent adverse impacts on neighboring properties or the general public.

Based on the Findings of Fact, the Board finds the Applicant has met the conditions for special exception relief under Subtitle C § 714.3, as outlined below.

Pursuant to Subtitle C § 714.3(a), the Board considered the impact of allowing a 24-foot gap in the surface parking lot screening as opposed to a 20-foot gap permitted as a matter-of-right. Based on the Findings of Fact, the Board's review of the Applicant's plans, the Traffic Report, the DDOT Report, the OP Report and the Applicant's testimony during the May public hearing, the Board finds that permitting an additional four feet to allow the Applicant to consolidate all residential ingress and egress to the Project will not adversely impact the pedestrian environment. The Board

agrees with OP and DDOT that permitting the Applicant to have one 24-foot curb cut instead of two 20-foot curb cuts will have less impact on the pedestrian environment as interactions with ingress and egress traffic to the Project will be consolidated into one area, which will reduce pedestrian/vehicle conflict. As noted by Gorove Slade, there are currently three curb cuts for the Subject Property totaling 71 feet with no parking screening. (Hearing Tr. 5/1/2019 at 20). Further, as noted by the Applicant and OP, the addition of continuous ADA compliant sidewalks around the perimeter of the Subject Property will improve the pedestrian environment as there are currently large areas on the Saratoga and Evarts frontages where there are no sidewalks, forcing neighborhood residents in wheelchairs to use the street. (Hearing Tr. 5/1/2019 at 21). Additionally, the Applicant will be working with DDOT to construct a new crosswalk at the intersection of Saratoga Avenue and Evarts Street, complete with curb ramps and detectable warning strips. (*Id.*)

During the May 1, 2019 public hearing, the ANC testified that the neighborhood was concerned about the walkability of the Project, specifically sidewalk closures during construction. (5/1/2019 Hearing Tr. 71-73). The Board has consistently held that issues pertaining to construction are outside the Board's purview. However, to address the walkability concerns raised by the ANC, the Board requested that the Applicant submit a traffic management plan during construction and a construction management plan. (Hearing Tr. 5/1/2019 at 129). The Applicant submitted a draft traffic management plan and a draft construction management plan at BZA Ex. 89C and 89D, detailing the Applicant's plans for notifying the surrounding community about any traffic impacts and sidewalk closures. Further, the Applicant testified that best efforts would be made to keep the sidewalks open during construction, but noted that closures could be necessary for limited periods of time.

The Board finds it unnecessary to consider existing vegetation, buildings, or protective and screening walls on adjacent property and existing topographic conditions pursuant to Subtitle C §§ 713.4(b) and (c). As noted by OP, there is no adjacent property to the Project because it is located on an island surrounded by public streets. (Ex. 43). Therefore, the Board's consideration of existing vegetation, buildings, or protective and screening walls on adjacent property was not applicable. Further, as also noted by OP, there were no existing topographic conditions related to the Applicant's requested relief to allow a 24-foot gap in the parking screening and therefore consideration of the existing topographic conditions of the Subject Property was not applicable. (Ex. 43).

Pursuant to Subtitle C § 713.4, the Board considered the traffic conditions related to the Applicant's request for relief from the parking screening requirements to allow a 24-foot gap in the parking lot screening. As previously noted, the Applicant is requesting the screening relief for the purposes of consolidating the ingress and egress traffic into the Project in one 24 foot curb cut on Saratoga Avenue.

The Applicant submitted a Traffic Report prepared by their traffic expert Gorove Slade at Ex. 34. The Traffic Report is comprised of a multiple mode transportation review in satisfaction of DDOT's comprehensive transportation review requirements. (Hearing Tr. 5/1/2019 at 22). The scope of the Traffic Report was confirmed by DDOT prior to the review. (Hearing Tr. 5/1/2019 at 22).

The proposed 24-foot curb cut will be located on Saratoga Avenue and will provide access to the surface parking lot and the Project's loading area on site and adjacent to the surface parking area. (Hearing Tr. 5/1/2019 at 21). A 24-foot curb cut is the appropriate size under DDOT standards for accommodating head in, head out service vehicle maneuvering for the Project. (Hearing Tr. 5/1/2019 at 21-22). The Applicant met with DDOT during the design of the site plan for the Project and DDOT indicated their support of the Project's single curb cut. (Hearing Tr. 5/1/2019 at 22-23, Ex. 46). In addition, DDOT public space committee gave conceptual approval for the single curb cut on Saratoga Avenue at their March 28th public hearing. (Hearing Tr. 5/1/2019 at 23).

The Board credits the testimony and Traffic Report of Gorove Slade in finding the Project's location is well suited to public transportation and the District's bicycle transportation infrastructure. (Hearing Tr. 5/1/2019 at 18-20, Ex. 34 and Ex. 89D, Ex. 46). The Subject Property has frontage on Montana Avenue, Saratoga Avenue, and Evarts Street and the northwest corner of the Subject Property is immediately south of the Rhode Island Avenue corridor. (Hearing Tr. 5/1/2019 at 19). Fourteen bus lines service the Project on Rhode Island Avenue and the nearest Metrorail station is the Rhode Island Avenue station for the Red Line in Brentwood, less than one mile from the Subject Property. (*Id.*)

The Project will have five short-term outdoor bicycle parking spaces and 36 long-term bicycle parking spaces in a bicycle storage room on the ground floor as required by the Zoning Regulations as well as a bicycle repair room. (Hearing Tr. 5/1/2019 at 23-24, Ex. 34, 46). As noted by Gorove Slade, the low volume streets on either side of Rhode Island Avenue are conducive to bicycle use. (Hearing Tr. 5/1/2019 at 19). Further, north/south bicycle lanes on 18th street, just east of the Subject Property, provide connectivity for bicycle commuting. (*Id.*) Additionally, the Metropolitan Branch Trail, which connects to Union Station to the south and Maryland to the north, is located less than a mile from the Subject Property. (*Id.*) Bicycle use will be served in the future by DDOT planned bicycle lanes and cycle tracks along Rhode Island Avenue. (*Id.*)

The Project will provide more than the 35 vehicular parking spaces required by the Zoning Regulations as it will provide 34 vehicular spaces including one car share space, which counts as three zoning parking spaces. (*Id.* at 20). DDOT concurred with the Traffic Report submitted by the Applicant that fewer than 25 trips per hour in the peak direction would be generated by the Project and therefore a full vehicular capacity analysis was not required. (Ex. 34, 46, 89D). As previously noted, the relief requested will allow all ingress and egress vehicular traffic for the Project to be consolidated to one 24-foot curb cut on Saratoga Avenue. While DDOT and Gorove Slade both found there would be minor increases in vehicular traffic, neither found that such increase would result in an adverse impact to the surrounding neighborhood. (Ex. 34, 46, Hearing Tr. 5/1/2019 at 22).

Based on the Findings of Fact, as summarized above, the Board has sufficiently reviewed and considered the traffic conditions related to the request for relief from the surface parking lot screening requirement pursuant to Subtitle C § 714.3(d).

Finally, pursuant to Subtitle C § 714.3, the Board may require “any special treatment of the premises that it deems necessary to prevent adverse impacts on neighboring properties of the general public” related to the modification of waiver of the surface parking lot requirements under Subtitle C § 714. In this case, based on the Findings of Facts and its review of the requested relief as detailed above, the Board does not find it necessary to require any special treatment of the premises to prevent adverse impacts on neighboring properties or the general public associated with the request for relief from the surface parking lot screening requirement to allow one 24 foot gap in the parking lot screening. However, the Board notes that, although not required, the Applicant is voluntarily proffering a TDM Plan, which is a condition supported by DDOT. Accordingly, as detailed below, the Board conditions its approval on the Applicant’s implementation of its TDM Plan.

Finally, the Board finds that the special exception relief request to allow a 24-foot gap in the surface parking lot screening will be in harmony with the general intent of the Zoning Regulations and will not tend to adversely impact the use of neighboring properties.

Both the purpose and intent statements of the MU-4 and RA-1 zones include providing for residential development and a walkable living environment. (Ex. 65A). The Board credits the testimony of OP, as well as the testimony and submissions of Applicant’s traffic and land use experts, and finds the Project and requested relief promote “a walkable living environment” and “encourage safe and efficient conditions for pedestrian and motor vehicle movement.” (See Ex. 34, 46, 65A, Hearing Tr. 5/1/19 at 16-22, 79-89). The completion of a continuous sidewalk system with DDOT compliant curbs, along with the requested relief to allow a single curb cut instead of two curb cuts, will further serve the walkability of the Project and reduce conflicts between pedestrians and vehicular traffic. (See *id.*).

Pursuant to Subtitle X § 902.1(b), the Board also finds that the approval of one 24-foot gap in the parking lot screening will not tend to adversely affect the use of neighboring properties. As described above, the Board fully considered the impacts from permitting the 24-foot gap in parking lot screening on the pedestrian environment and traffic conditions and found no adverse impacts. Additionally, the Board finds that permitting the 24-foot gap in parking lot screening will have no adverse impacts on the light and air of neighboring properties as the gap will be less than the two 20-foot gaps that would be permitted as a matter-of-right. (Hearing Tr. 5/1/2019 at 21). The Board also credits OP and DDOT’s support for the 24-foot gap and the ability to consolidate ingress and egress vehicular traffic and thus reduce conflicts with pedestrians in its finding of no adverse impacts on the use of neighboring properties. (Ex. 43, 46).

While, as noted above, the District of Columbia Court of Appeals has been clear that a “sole allusion” to a challenged issue is not sufficient to preserve that issue for review on appeal. See *Goodman v. D.C. Rental Housing Com.*, 573 A.2d 1293, 1300-1302 (D.C. 1990), the Board acknowledges the concerns raised by BGCC regarding harmful impacts on particulate and noise, light and air, as well as an “increase in the heat sink” resulting from the 24-foot gap in surface parking lot screening. (Ex. 42). However, the Board also notes that the Applicant submitted substantial evidence and testimony to the record contradicting BGCC’s assertions.

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First, as stated above, the Board notes that allowing one 24 foot gap in the surface parking lot screening will actually result in a 16-foot net decrease from the screening gaps permitted for two 20-foot curb cuts permitted as matter-of-right. (Hearing Tr. 5/1/2019 at 18). The Applicant's expert in landscape architecture, Ryan Moody, testified that the landscaping and parking lot screening would meet all other zoning, DDOT and DOEE requirements. Because the Project would be strategically landscaped with many native low perennials and deciduous and evergreen shrubs, as well as new trees, Mr. Moody testified that any particulates and air pollutants from lawn mower operations would be decreased due to the substantial decrease in lawn area from the existing conditions. (Hearing Tr. 5/1/2019 at 17). Additionally, the Board credits Mr. Moody's testimony that the "expansion of the tree canopy on site" and the added bioretention areas and green roofs would reduce the heat island effect. (*Id.*). Mr. Moody further testified that there would be no increase in noise, pollution or negative heat island effects from allowing a 24-foot gap in the surface parking lot screening. (*Id.* at 18).

In sum, the Board concludes that the Applicant has met its burden of proof for the special exceptions requested.

Great Weight to ANC and OP

Section 13 of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)(A)) (2014 ed.) requires that the Board's written orders give "great weight" to the issues and concerns raised in the written recommendations of the affected ANC. To give "great weight" the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns.

Based on its Findings of Fact, the Board finds the Applicant engaged in a continued good faith effort to communicate to ANC 5C and to respond to ANC 5C's concerns. After continued efforts to present to the ANC commencing just after filing on January 25, 2019, the Applicant presented the Application at two single member district meetings (April 10 and May 7, 2019) prior to the May 15, 2019 full ANC Meeting.

The Board waived the requirements of Subtitle X § 406.3 and permitted Kirsten Williams, Single Member District Commissioner for ANC 5C06, to testify as a party on behalf of ANC 5C during the May 1, 2019 public hearing. (Hearing Tr. 5/1/2019 at 85). ANC 5C was not represented by counsel at the May 1, 2019 public hearing and no one testified explicitly on behalf of BGCC. BGCC's counsel was not present at the May 1, 2019 public hearing. (*Id.*).

The Board considered the testimony of Commissioner Williams that "as far as the Project, there's really nothing wrong, per se," and, as stated in the Conclusions of Law, weighed the concerns raised by Commissioner Williams regarding traffic during construction, the ability of residents to continue to walk past the Subject Property along Saratoga Avenue, the height of the Project in the RA-1 zone, her wishes for more affordable housing, noise during construction, and her requests for both

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a traffic management agreement for traffic during construction and a construction management agreement. (Hearing Tr. 5/1/2019 at 64-76). The Board notes that Commissioner Williams also asked for a traffic study and that although a traffic study was already in the record at Ex. 34, the Applicant's submitted a summary traffic study with their post-hearing filings for further clarity at Ex. 89D. (Hearing Tr. 5/1/2019 at 72). The Board also notes that Commissioner Williams asked for "a height regulation for the zoning in that area" but acknowledges that changes to the Zoning Regulations are the purview of the Zoning Commission. (See Hearing Tr. 5/1/2019 at 72).

The testimony of Commissioner Williams was not subject to great weight as it was not previously authorized by the ANC, ratified within seven days, or specifically authorized by the ANC in their report at Ex. 92 as required by Subtitle X § 406.3. (Hearing Tr. 5/22/2019 at 85). However, the Board extended the time for ANC 5C to submit their report to May 20, 2019 so that ANC 5C could have the opportunity to hear the Applicant's presentation at their May 15, 2019 full ANC meeting and their report is thus subject to "great weight."

Accordingly, the Board gives great weight to the written report submitted by ANC 5C recommending approval of the Application, by a vote of 4-2 at their May 15, 2019 full ANC meeting. (Ex. 92.). In the "issues and concerns" section of its report, ANC 5C noted the "amenities accruing to the community; project staging mediation; distribution of affordable units within; traffic management; sidewalks; landscaping; ADA street crossing improvements; notification to ANC and public." (Ex. 92). ANC 5C also recommended reducing the number of units and making the appearance of the Project congruent with nearby residences. (Ex. 92).

The Board considered the issues and concerns raised by the ANC 5C Report. (See Hearing Tr. 5/22/2019 at 10-12). The Board notes that the Applicant proffered a number of amenities to the community, including inclusionary zoning units spread proportionally throughout the Project. (*Id.*). The Applicant testified that the construction of the Project would not occur at the same time as other neighboring projects such as the portion of the RIA PUD directly across Montana Avenue. (Hearing Tr. 5/1/2019 at 120). Further, the Applicant submitted both plans and traffic reports detailing their plans to improve the sidewalks and provide ADA street crossing improvements. (Ex. 34 and 89). Additionally, while the Board notes that construction issues are outside its purview, the Applicant submitted both a draft construction management plan and a draft traffic management plan outlining the Applicant's plans to notify the ANC and public regarding any traffic (during construction) or construction impacts on the neighboring community. (Ex. 89 B and C). The Board also finds the Applicant's landscaping plans to meet the requirements of the Zoning Regulations and to be in harmony with the neighborhood. (*See* Ex. 89A and D, Hearing Tr. 5/22/2019 at 12)).

The Board further acknowledges ANC 5C's recommendations to reduce the number of apartment units and make the appearance of the Project more congruent with the surrounding neighborhood. However, as previously noted, the Board finds that it has no authority to require the Applicant to reduce the number of apartment units and that apartment buildings are permitted as matter-of-right in the MU-4 zone. (Hearing Tr. 5/22/2019 at 8-12). Further, based on the testimony of the Applicant and the added renderings and elevations included in the post-hearing plans, as previously discussed,

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the Board finds the Project will be compatible and congruent with the surrounding neighborhood. (Ex. 89A and B, Hearing Tr. 5/22/2019 at 8-12).

Accordingly, as detailed above, the Board has given the ANC the great weight due in approving the Application.

The Board is also required under D.C. Official Code § 6-623.04 (2001) to give “great weight” to OP’s recommendation. For reasons stated in this Order, the Board concurs with OP’s recommendation to approve the relief requested.

Based upon the findings of fact and conclusions of law, and having given great weight to the ANC and OP reports, the Board concludes that the Applicant has met the burden of proof with respect to the requests for special exception relief pursuant to 11 DCMR Subtitle X, Chapter 9, under Subtitle A § 207.2 for approval of a 35-foot adjustment of the boundary line allowing the bulk regulations of the MU-4 zone to extend into the portion of the Subject Property zoned RA-1, relief from Subtitle U § 421.1 to construct a new multi-family apartment building in the RA-1 zone, and relief from the screening requirement for surface parking lots to permit one 24-foot break in the screening for vehicle ingress/egress pursuant to Subtitle C § 714.3, for the premises at 1400 Montana Avenue NE, (Square 4023, Lot 001).

It is therefore **ORDERED** that this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBITS 89-A and B AND THE FOLLOWING CONDITIONS:**

1. TDM Plan:
 - a. The Applicant will identify a TDM Leader (for planning, construction, and operations) at the building, who will act as a point of contact with DDOT/Zoning Enforcement with annual updates. The TDM Leader will work with residents to distribute and market various transportation alternatives and options;
 - b. The Applicant will provide TDM materials to new residents in the Residential Welcome Package materials; and
 - c. The Applicant will provide a bicycle repair station to be located in the secure long-term bicycle storage room.
2. Flexibility: the Applicant is granted flexibility for the design of the Project’s entrance on Montana Avenue for the purposes of working with DDOT to make the entrance compliant with public space regulations.

VOTE: 5-0-0 (Frederick L. Hill, Lesylleé M. White, Lorna L. John, Carlton E. Hart and Robert Miller (via absentee ballot) to APPROVE.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this order.

ATTESTED BY: _____

SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER:

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS

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PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.