The FCHOA Board will ask all neighbors and all construction vehicles not to park in front of the Godley's steps to the entrance to their home. That should not, however, preclude cars or vehicles from parking along between the Godley entrance and 4509, which could accommodate two vehicles and is open to all in the neighborhood for parking.

EASEMENT

When Foxhall Crescents was originally developed, lot 4511 was behind lot 4509 and an easement across 4509 allowed for a driveway to 4511 to provide access to 4511 The 4511 lot was sold and the First Amendment to the FCHOA Bylaws on July 20, 1981 removed the 4511 lot from the FCHOA, which eliminated the need for the easement. It is important to note that the 1994 BZA Order for the Godley application noted that, "There are no restrictive covenants on the lot that prohibit construction of a single-family dwelling on the lot." Indeed, Penguin's counsel did a title search and there was no easement on the Godley deed, the Motlagh deed, or the Penguin deed.

The 4509 home, facing forward, will have a driveway to its entrance, the same as all other homes in the neighborhood. Not all homes have a sidewalk. For example, 4519 does not have a sidewalk; it only has a driveway and a paved entryway. The opponents claim there is an easement that requires a paved area for common use. However, an email from Mr. Sharkey to the FCHOA Board dated November 16, 2021, **Mr. Sharkey stated: "There should be an agreement that the "driveway" is not a street which is part of the "common properties" under the Bylaws to be maintained by the FCHOA (including snow removal).**"

First of all, adding a paved area for common use will increase the impervious surface, which will increase storm water run-off. Secondly, the quote above indicates Mr. Sharkey really does not want a street; he wants a driveway that the owner will maintain. That is precisely what is proposed in Penguin's application. The easement is another distraction raised by the opposition that is a non-issue.

OTHER ISSUES RAISED BY OPPONENTS

Several other issues raised by the opponents are distracting and not applicable to BZA authority over this matter. Some have to do with the illegal cutting of a Heritage tree, FCHOA Bylaws, others have to do with false claims of an easement on 4509 and an illegal agreement that the opponents presented to the BZA, which was incorporated into the BZA Order of 18709. I will address them briefly here.

Cutting of Heritage Tree

A Tulip Poplar Heritage Tree was not approved to be removed, but it was cut down by the applicant. There The BZA approved the removal of that very tree in its 2014 Order for application 18709 over the objections of the Office of Planning. It had to be removed to allow the house to be properly placed on the site. The same was true with this application, regardless of which way the house faced.

After the tree was cut down, it was shown to be seriously diseased. Two other Tulip Poplars, one a Heritage Tree and one a Special Tree, fell on homes in our neighborhood and narrowly risked the loss of life. DC arborist Yasha Magarik told me and another FCHOA board member that this

type of tree can be hard to diagnose, and the one that fell "was just one we missed." Another Tulip Poplar Heritage tree that approved to be down at the same time the one on 4509 was being considered also proved to be diseased after it was cut.

The fine for cutting a Heritage Tree without approval is $300/inch of circumference. The Mayor has the right to increase the fine by regulation, but she has not done so. Nevertheless, DDOT has stated that it will not take any further action on the 20636 application until the Heritage Tree issue is resolved. This includes responding to plans submitted to the Office of Planning. The ANC went so far as to encourage the BZA to deny the applicant the right to build the requested home on lot 4509 in retaliation for the cutting of the Heritage Tree. As the BZA knows, to bar the owner from building as an additional penalty would constitute an impermissible taking of his property.

The cutting of the Heritage Tree is not a matter that should impact BZA consideration. **The Office of Planning memo to the BZA dated June 9, 2022, stated that, "After discussions with the Office of Zoning Legal Division (OZLD) it appears, as removing the tree was not a zoning matter, that the zoning process can proceed."**

Agreement Between FCHOA and Motlagh Included in BZA Order Re Application 18709

The former FCHOA Boards from 2012-2022 operated in violation of the DC Nonprofit Corporation Act ("Act") with respect to the BZA applications 18709 and 20636. The Act requires Board members to act in good faith (part of the duty of loyalty) and "in a manner the director reasonably believes to be in the best interests of the nonprofit corporation." §29-406.30.

At the time of application 18709 in 2013-14, Messrs. Godley, Wong, and Sharkey were all FCHOA board members. Mr. and Mrs. Godley, Mr. and Mrs. Sharkey, and Mr. Wong were personally registered as opponents and given party status. Mr. and Mrs. Godley even hired their own personal attorney, who they then had enter an appearance on behalf of the FCHOA and make filings and represent the FCHOA in front of the ANC and BZA – all unbeknownst to the FCHOA homeowners. These Board members had personal and familial involvement in the matter and were violating their fiduciary duty of loyalty and not acting in good faith by acting in their own self-interest instead of that of the FCHOA community.

The FCHOA believes it is important to bring to the BZA's attention that the opponents of application 20636 (Godley and Sharkey) previously served as FCHOA Board members and in application 18709 they:

- Acted in violation of the DC Nonprofit Corporation Act by violating their duty of loyalty and good faith

- Presented an illegal agreement between the applicant of 18709 and the FCHOA to the BZA and asked the BZA to include it in their Order of Feb. 11, 2015, which it did. See BZA Exhibit 86, pages 11-14.

At the final BZA hearing on 18709, Mr. Motlagh was pressured into signing an agreement between the FCHOA and him, which he believed would give him HOA approval. This agreement was included in BZA Order 18709. It was, however, an illegal agreement because it was a voidable

conflict of interest transaction under D.C. law, and it exceeded the authority of the FCHOA board members. The agreement imposed numerous obligations on Mr. Motlagh, and the FCHOA directors intended that the agreement run with the land and bind all future property owners. The FCHOA Board members made a mistake, however, in drafting the agreement and only required it to be recorded in the Land Records by the *subsequent* owner in the Land Records **after** the lot was sold by Mr. Motlagh. Additionally, the FCHOA Board members did not ensure that all of the owners of 4509 signed the agreement.

The FCHOA homeowners became fully aware of the situation and on March 27, 2022, a majority of the FCHOA community called a Special Meeting to remove Board members Gene Godley and Andy Wong because they refused to abstain from voting on matters involving 4509. At the meeting, they resigned rather than face a removal vote. The then-President of the FCHOA, John Fox, also resigned.

Peter Kolker, attorney for Penguin, told the ANC at its April 6, 2022 meeting that the Agreement between Motlagh and the FCHOA was not enforceable because it was not recorded in the DC Land Records, thus Penguin had no notice of it when it purchased the lot, and the Agreement had not been signed by all of the land owners of the 4509 lot. His opinion letter is Exhibit J of BZA Document 55A.

The agreement was unanimously voided by the FCHOA Board on March 29, 2022 as a voidable transaction under the DC Code §29-406.70. It now has no legal bearing on 4509 and the BZA should give it no weight regarding application 20636.

FCHOA Bylaws

The BZA does not enforce the FCHOA Bylaws, and the current FCHOA Board strongly disagrees with the opponents' self-serving interpretation of various provisions of the Bylaws in their testimony and filings to the BZA.

<u>FCHOA Bylaws Undisturbed Perimeter</u>

The FCHOA Bylaws provide for an "undisturbed perimeter." An "undisturbed perimeter shall mean that area of Foxhall Crescents within thirty (30) feet of the exterior boundary of Foxhall Crescents (*except for certain areas specifically excluded for vehicular or other access* and seven (7) additional exceptions), all as more particularly shown on Exhibit B." (emphasis added) The undisturbed perimeter was intended to leave a landscaped area around the neighborhood to help preserve the natural feeling of the old Rockefeller estate and to serve as a natural buffer around the homes. It basically applies to the backside of properties because their back borders are on the perimeter of the Foxhall Crescents addition.

Exhibit B is terribly out of date and has legends that are impossible to read; it includes all five planned Foxhall Crescents, including a pond, when only three were built without a pond. Hardly anyone in the neighborhood is aware of this provision or abides by it. Homeowners have created their backyards to suit their taste and many of these were done under proposals approved when Mr. Godley was president of the board. One such proposal, which was recently completed, involved bringing in four truck loads of boulders to create a heavy stone wall on the border of the

property, which was then filled with dirt to create a level surface. There is certainly no 30 feet of natural landscaping there. Other yards have terraces, backyard kitchens, large decks and swimming pools that run to the edge of the property.

The opponents claim that the proposed site plan will result in "intrusions" on the 30-foot undisturbed perimeter on the property. The fact is, as their own exhibits show, the patio in the Godleys' backyard completely intrudes onto the 30 foot perimeter of their yard. (Construction of this patio was approved by the Board at the time Mr. Godley chaired the Board.)

The fact is, the Applicant's site plan shows there will be minimal intrusion on the 30 foot perimeter of their land, and the driveway turn around stub is within the vehicular exception in italics above. Moreover, as was the case for the Godleys, such exceptions may be allowed by the Board, and the Board has fully approved the applicant's site plan.

No Restrictions on 4509 for Grading and Tree Removal

The FCHOA Bylaws were initially implemented in 1981 and have been amended three times.

- The First Amendment removed grading and tree restrictions from 4509 since it was the only lot undeveloped. The Amendment stated, "There shall be no grading restrictions on Lot 4509" and "No tree removal restrictions shall apply to Lot 4509." All other members, except the Developer, had grading and tree removal restrictions imposed on them pursuant to Article IX, Sections 2 and 4, respectively of the 1981 Bylaws. The First Amendment was signed and notarized by all homeowners and mortgage holders and recorded in the DC Land Records as instrument 26285.

- The Second Amendment in 1984 established additional bylaw provisions that govern today. It was approved by a vote of the homeowners only signed by the President of the FCHOA and notarized.

- The Third Amendment to the Bylaws was made on May 4, 1994. It specifically cited the First and Second Amendments to the Bylaws and noted their instrument numbers as recorded in the DC Land Records. The Third Amendment also made minor amendments to the Bylaws and noted, "These modifications are mostly non-substantive in nature, and were made to properly reflect the post-development status of the Association." This Third Amendment was **not** signed by all of the property owners and mortgage holders. In fact, the 1994 Bylaws were not even recorded in the DC Land Records; only the Third Amendment was filed.

The opposition argues that the 1994 Third Amendment of the Bylaws did away with the removal of the restrictions on lot 4509 because the removal is not mentioned in the 1994 Bylaws. That is convenient for their position, but the FCHOA Board is not in agreement with that position – for several good reasons.

- The First Amendment was signed by **all** the owners and mortgage holders in the community and each signature was notarized. There were also Joinders for Purposes of

Waiving all Rights to Dower or Curtsey that were signed by owners and notarized. The First Amendment **and all signatures and notaries** were properly recorded in the DC Land Records.

- The First Amendment was specifically cited in the Third Amendment of the Bylaws.

- The Third Amendment **does not** indicate the First Amendment was being eliminated by the Bylaw Amendments.

- The Third Amendment was an amendment of the Bylaws; it was not a Restatement of the Bylaws.

- Moreover, Article XIII, Section 1 of the 1981 Bylaws stated that, "A modification or amendment once adopted as provided for herein shall then constitute part of the official Bylaws of the Association, and all Members shall be bound to abide by such modification or amendment." To impose the tree and grading restrictions on 4509 would have required a specific amendment stating that the removal of restrictions on 4509 were no longer applicable, which did not occur.

- The Article XIII, Section 1 of the 1981 and 1994 Bylaws also state, "Notwithstanding the foregoing, no amendment shall be made which adversely affects ... an existing use of or improvements upon a Member's site, without such affected Member's express approval." There is no evidence that the then-owner of lot 4509, which was no longer the Godleys, consented to having tree and grading restrictions imposed on lot 4509 after they were removed in the First Amendment.

- Article XIII, Section 3 of the 1981 and 1994 Bylaws also require the prior written consent of mortgagees if an amendment affects the rights, priorities, remedies, or interests of the mortgagee. Imposing grading and tree restrictions on site 4509 would impact mortgagees in such a manner.

- The removal of tree and grading restrictions from 4509 is a right and interest of the 4509 property owner, and the granting of this right in the First Amendment was signed by all owners and mortgage holders of the entire community. Article XIII ensures that such a right will not be taken without the owner's express approval and written consent of mortgagees. No such evidence of owner approval or mortgagee consent to impose grading or tree restrictions on 4509 exists.

- Therefore, the Third Amendment and 1994 Bylaws **could not** have eliminated the First Amendment's removal of restrictions on Lot 4509 because the Third Amendment was only signed by the President of the FCHOA, based upon the required two-thirds vote of the members, and no express approval from the owner of 4509 or written consent of a mortgagee exists.

- Thus, Lot 4509 does not have grading or tree restrictions, therefore no action taken by Penguin has violated the FCHOA Bylaws.

SUMMARY

My fellow FCHOA Board members and I are here today to provide these **facts and the truth** behind the application and **to ask the BZA to follow the precedent of the two previous BZAs that approved applications to build a home on this lot, and approve application 20636.**

This is not a complicated application. It has been made complicated by three homeowners who have misstated the facts and contrived issues and convinced D.C. agencies (DOEE and DDOT) to intrude upon the BZA decision making process in this application in retaliation for the cutting of the Heritage Tree. The BZA legal department rightly extracted that issue and said it is outside of the BZA process. Denying the owner the right to build on his lot would be a taking in violation of the U.S. Constitution.

The design of the home adheres to the design of the homes Arthur Cotton Moore planned for our neighborhood. The FCHOA homeowners want this house built, as proposed, facing the street.

The FCHOA community is not concerned about storm water management. We do not have a problem today even after the trees have been removed and recent heavy rains have fallen. There has been no dirt in the street or water building up in driveways. The applicant has agreed to the most stringent storm water management requirements and must meet DOEE approval to build on the lot. The FHCOA is comfortable leaving the storm water management issue to DOEE's competent engineers.

The Construction Management Agreement that is in the application has been reviewed by the FCHOA board and is acceptable to us. It is in alignment with DC law and our Bylaws.

As a neighborhood matter, I can assure the BZA that the FCHOA Board will ask all homeowners and Penguin not to park in front of the entrance to the Godley home, thereby ensuring two unobstructed passages for emergency personnel: through the front entrance and through the garage onto the street.

The undisturbed perimeter will be maintained by the applicant, even though lot 4509 borders are primarily shared with the back property lines of 2510 and 2500 Foxhall Road, defeating the purpose of the undisturbed perimeter.

The FCHOA Board and the majority of its homeowners are asking the BZA to help us reach this objective by allowing the final home in Foxhall Crescents to finally be built after 40 years.

Thank you Mr. Chairman and Members of the BZA for your consideration of our views.

Jody R. Westby, President Foxhall Crescents Homeowners Association

CERTIFICATE OF SERVICE

I hereby certify that, on June 20, 2022, a copy of the foregoing Motion to Support BZA Application 20636 was served upon the following:

1. **D.C. Office of Planning**

   Matthew Jessick, AICP, Development Review Specialist

   Via email: matthew.jesick@dc.gov

2. **District Department of Transportation**

   Mr. Jonathan Rogers, DDOT

   Mr. Aaron Zimmerman, DDOT

   Via email: Jonathan.rogers@dc.gov

   Aaron.zimmerman@dc.gov

3. **Neighborhood Commission 3D**

   Via email: 3D@anc.dc.gov

4. **Advisory Neighborhood Commissioner SMD Chuck Elkins**

   Via email: 3D01@anc.dc.gov

5. **Advisory Neighborhood Commissioner SMD Jason Rao**

   Via email: 3D06@anc.dc.gov

6. **Cynthia Giordano, Saul Ewing Arnstein & Lehr**

   Via email: cgiordano@saul.com

7. **Rajai Zumot, Penguin LLC**

   Via email: rzumot@zumot.net

Jody R. Westby
President, Foxhall Crescents Homeowners Association