**BOARD OF ZONING ADJUSTMENT**
**OF THE DISTRICT OF COLUMBIA**

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| **Subject of Appeal:** | Department of Consumer and Regulatory Affairs, Office of the Zoning Administrator, Subdivision Determination for 3113 Albemarle Street, NW (Square 2041, Lot 22); New Building Permit B1808452; New Building Permit B1812270; Excavation Only Permit EX1900002; New Building Permit B1812271, and Excavation Only Permit EX1900001 |
| **Appellants:** | Rita & Poul Arendal; Paquita Attaway; Leah & Cyrus Frelinghuysen; Kathryn & John Harllee; and Marjorie Share & Joel Swerdlow |
| **Property:** | 3113 Albemarle Street, NW (Square 2041, Lot 22), *now subdivided as* 3113 Albemarle Street, NW (Square 2041, Lot 24); 3128 Appleton Street, NW (Square 2041, Lot 25); and 3124 Appleton Street, NW (Square 2041, Lot 26) |
| **Property Owner:** | Soapstone Valley Ventures, LLC; Robert A. Gottfried, President |
| **Affected ANC:** | ANC 3F |

## STATEMENT OF APPELLANTS

Appellants submit this Statement of Appeal in support of their appeal of a subdivision decision of the Department of Consumer and Regulatory Affairs' ("DCRA") Office of the Zoning Administrator ("ZA"), regarding property at 3113 Albemarle Street, NW (Square 2041, Lot 22), owned by Soapstone Valley Ventures, LLC ("Owner"), for which various building and excavation permits have since been issued. On June 5, 2018, the ZA approved the subdivision at issue, certifying that the subdivision complied with the provisions of the Zoning Regulations of the District of Columbia. *See* Ex. A, Subdivision, Square 2041 (June 6, 2018). The rationale for the ZA's decision to approve the subdivision was apparently reflected in a May 18, 2018, "Determination Letter" that the ZA provided to an engineering firm hired by the Owner. *See* Ex. B, Letter from Le Grant to Landsman with Attachments ("ZA Letter"). None of this was known to Appellants until late September. And, as detailed below, at least part of the ZA's decision was based on an erroneous interpretation of the Zoning Regulations. Accordingly, Appellants request that the Board set aside the ZA's decision and order the DCRA to revoke all permits issued.

## I. BACKGROUND

### A. Historic Designation and Subdivision

There is a significant backstory regarding the property at issue. The property, formerly owned by the Polish government and occupied by Polish Ambassador Romuald Spasowski, is located at 3101 Albemarle Street, NW. In May 2017, by unanimous decree, the Historic Preservation Review Board designated Ambassador Spasowski's house and a portion of the surrounding land as an historic landmark. *See* Ex. C, Letter from DC Office of Planning to ANC 3F (May 10, 2017). The property now resides on the National Register of Historic Places.[1] The Designation describes the landmark as follows:

> The dwelling at 3101 Albemarle Street NW is a stately two-story, central-passage-plan, Colonial Revival-style, stone house constructed in 1926 in the emerging suburban neighborhood of Forest Hills. Constructed for owners Howard and Katie Fulmer as a single-family dwelling, it sits high upon a hill on the north side of Albemarle Street, one block east of Connecticut Avenue and facing the trail entrance to the Soapstone Valley.

*Id.* The property is considered the "gateway" to Forest Hills. In September 2017, the Owner subdivided the historically-designated property (Lot 23) from the remaining property associated with the estate (Lot 22). *See* Ex. D, Subdivision, Square 2041 (Sept. 13, 2017).

### B. The Owner's Now-Abandoned Planned Unit Development

On November 20, 2017, the Owner submitted an Application for a Planned Unit Development ("PUD") encompassing both Lots 22 and 23. *See* Case No. 17-22. The PUD proposed to re-zone the property from the R-8 to the R-3 zone to allow the construction of five row houses and a detached single family house, all on Lot 22. *See* Case No. 17-22, Ex. 2 at 7-8. The Owner also requested relief from the zoning regulations for the R-3 Zone. *See id.* The Owner also highlighted

[1] National Register of Historic Places Program: Weekly List (Sept. 15, 2017), https://www.nps.gov/nr/listings/20170915.htm

certain unique features of the property, such as the "variation in topography" and "the existence of heritage trees," which "constrain development of the Project and result in noncompliance with certain development standards," while noting that the Owner had a "commitment to respecting the boundaries of the root systems of the heritage trees on the Property." Case No. 17-22, Ex. 2 at 6-7.

The Owner's PUD was referred to the Office of Planning to prepare a "Setdown Report." *See* Case No. 17-22, Ex. 4. Various neighbors submitted letters opposing the PUD. *See* Case No. 17-22, Ex. 10-11; Ex. E, Letter from Frelinghuysen to Lawson (Feb. 5, 2018).[2] Of importance to this appeal, as indicated in one letter, there exists a fifteen foot (15 ft.) Building Restriction Line ("BRL")[3] along the southern side of Appleton Street, and the only existing house on that side of the block is set back an additional ten feet (10 ft.) from that BRL. *See* Case No. 17-22, Ex. 11 and 11A. Documents obtained online from the Surveyor's Office appear to confirm the existence of this BRL. *See* Ex. F, Surveyor's Office, Plat of Computation (July 15, 1952).

Months passed. Nothing appeared to be happening, at least as far as the neighbors could tell. Finally, on September 28, 2018, the Commissioner for ANC 3F03 sent an email to some people who had been following the PUD process, explaining that the Owner had withdrawn the PUD, sold the landmark house, and had received building permits only to build a house on the lot at the corner of Albemarle and 32nd Streets as a matter-of-right, and that plans to develop the rest of the site "were under development." *See* Ex. G, Email from Rutenberg (Sept. 28, 2018).

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[2] During discussions about the PUD before the ANC, the Owner claimed that he could divide Lot 22 into three lots as a matter-of-right, but that claim was—and now remains—disputed. *See* Ex. E, Letter from Frelinghuysen to Lawson (Feb. 5, 2018).

[3] The Zoning Regulations do not appear to define a Building Restriction Line, but do mention one in the context of a "Building Line," defined to mean: "A line beyond which property owners have no legal or vested right to extent a building or any part of a building without special permission and approval of the proper authorities; ordinarily a line of demarcation between public and private property, but also applied to building restriction lines, when recorded on the records of the Surveyor of the District of Columbia." 11-B DCMR § 100.2.

Unbeknownst to anyone in the neighborhood, the Owner had apparently successfully sought to subdivide Square 2041, Lot 22, into three lots, including one with a pipe-stem configuration and accessory dwelling, but never gave any indication of withdrawing the PUD during that time. Soon thereafter, many of the trees on the property were cleared. On October 22, 2018, permits dated October 2, 2018, were posted on the three properties.

Prior to September 28, 2018, the Appellants received no official notification of the withdrawal of the PUD application nor approval of the subdivision of Lot 22 into three buildable lots. It is only through informal word-of-mouth communications that Appellants learned the Owner intended to build three houses and an accessory dwelling on those lots. After receiving the September 28, 2018 email from the Commissioner for ANC 3F03 and observing the felling of dozens of trees, one of the Appellants contacted the Historic Preservation Office, which directed his inquiry to the ZA. *See* Ex. H, Email from Calcott to Frelinghuysen (Oct. 2, 2018). On October 17, 2018, the same Appellant contacted the ZA about the subdivision. *See id.* On October 19, 2018, the ZA provided a copy of his Determination Letter and its attachments, together with an explanation for the decision made therein. *See id.* Subsequent exchanges with the ZA proved incapable of changing the ZA's determination, necessitating this appeal.

## II. JURISDICTION

Appellants' appeal is timely in these circumstances. An appeal must be filed within sixty (60) days from the date the person appealing a decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision. *See* 11-Y DCMR § 302.2. Here, Appellants received no notice and had no knowledge of the Owner's application for the subdivision or the approval of the subdivision until their ANC Commissioner emailed them on

September 28, 2018, just days before trees were cleared. Indeed, the Owner did not even file a motion to withdraw the PUD until October 29, 2018. *See* Case No. 17-22, Ex. 14.

## III. STANDING OF APPELLANTS

Appellants have standing to pursue this appeal, as they have and will be adversely impacted to varying degrees by the improper subdivision and/or construction of houses that do not satisfy zoning requirements. Appellants all reside within 200 feet of the property. *See* Case No. 17-22, Ex. 2D. As explained below, the ZA improperly approved a gerrymandered lot that does not comply with zoning requirements, resulting in increased density. The increased density on Appleton Street will likely reduce light to nearby residences, increase traffic, exacerbate parking issues, and adversely affect the privacy some of the Appellants. Moreover, views of the landmarked property will be blocked or diminished, as will the general character of the neighborhood. The property stands as a "gateway" to Forest Hills, which will be irrevocably harmed by the construction of houses that fail to meet the minimum zoning requirements. (Maintaining views to the landmarked mansion and its connection with Soapstone Valley was a top priority of the Historic Preservation Office, with height and positioning limitations promised by the Owner as part of the PUD package.) Appellants are therefore "aggrieved" pursuant to 11-Y DCMR § 302.12(f)(2). This appeal will be supported via witness testimony, as well as photographic and other documentary evidence.

## IV. ISSUES ON APPEAL

### A. The ZA's Determinations Conflict with the Zoning Regulations

The ZA's approval of the subdivision was based on an erroneous interpretation of the Zoning Regulations, resulting in a violation of 11-A DCMR § 101.6, and/or was made without complete information that nonetheless produced the same result. Specifically, the ZA made a series of erroneous determinations regarding the front setbacks required for the three subdivided lots. These

determinations necessarily impact the side and rear yard requirements. In addition, it appears the ZA did not take into account a Building Restriction Line on the south side of Appleton Street NW.

Setbacks are ***required*** in the R-8 zone. *See* 11-D DCMR § 505.1 (stating that a "front setback ***shall*** be provided")[4] (emphasis added). In this case, however, notwithstanding the clear language in the Zoning Regulations, the ZA determined either that no setback was required or incorrectly assessed the amount of setback required. Under the Zoning Regulations, "[w]hen a zone has a front setback requirement, ***all buildings and structures must be set back from the entire length of all street lot lines,*** except as provided in Subtitle B § 317." 11-B DCMR § 314.1 (emphasis added). Front setbacks are regulated in one of three ways: (1) by a single setback distance that is applicable to all buildings or structures in a zone; (2) by a setback range for a zone, within which all buildings and structures in a zone must be set back from a street lot line; or (3) by "an existing range of blockface" cited for a zone, whereby "buildings and structures in the zone must be set back between from the street lot line by at least as much as the existing building on the blockface closest to the street, and no more than the existing building on the blockface furthest from the street." 11-B DCMR § 314.3(a)-(c). In residential zones, "[a] proposed building façade or structure facing a street lot line shall be located a distance: (a) Not closer to the street than the point of the building façade closest to the street, based on all the buildings located along the blockface[.]" 11-B DCMR § 315.1.

As discussed above, the property that was subdivided is located in the R-8 zone. In the R-8 zone, "[a] front setback shall be provided within the range of existing front setback of all residential buildings within the R-8 . . . zone[], on the same side of the street in the block where the building is proposed." 11-D DCMR § 505.1. The R-8 zone also requires a minimum rear yard of twenty-five feet (25 ft.). 11-D DCMR § 506.1. Finally, the minimum side yard requirement is twenty-four (24

[4] The use of the "word 'shall' is mandatory and not discretionary." 11-B DCMR § 101.1(d).

ft.) in the aggregate, "with no single side yard having a width of less than eight feet (8 ft.)." 11-D DCMR § 507.1.

**1. The Determination regarding Lot A (3113 Albemarle St. NW)**

With respect to Lot A, the ZA erroneously determined: "Lot A fronts on 32nd Street, NW. No houses currently front or exist along 32nd Street, NW in this block, therefore there is no front setback for Lot A." Ex. B, ZA Letter at 1. While under 11-B DCMR § 315.3, an owner of a corner lot "may choose the street lot line that shall determine the application of any front setback requirement," the ZA's determination that no setback is required conflicts with the regulations set forth above, which ***necessitate*** a setback. *See, e.g.*, 11-D DCMR § 505.1; 11-B DCMR § 315.1. Just because no houses currently exist along that block of 32nd Street does not obviate the need for a setback. Specifically, even if there is no building or BRL currently in existence on 32nd Street, such that 11-D DCMR § 505.1 does not "apply," the clear language of that provision and other regulations regarding front setbacks dictates there be a setback. This is plain from the mandatory "must" or "shall" language of 11-B DCMR §§ 314.1, 314.3, and 315.1, as well as 11-D DCMR § 505.1.

Here, there is a fifteen foot (15 ft.) BRL line further north of Lot A along 32nd Street ***on the same side of the street in the block where the building is proposed***, such that, at a minimum, there should be a fifteen foot (15 ft.) setback for any house on Lot A, assuming the owner chooses 32nd Street for the application of the front setback requirement. On the other hand, if the Owner should choose Albemarle Street for the application of the front setback requirement, then the setback should be at least twenty-two feet (22 ft.) because there is a twenty-two foot (22 ft.) BRL along a large portion of that block of Albemarle Street.

It is worth mentioning that the Owner's PUD application differed from an original plan to build along 32nd Street because of the newly-enacted Tree Canopy Protection Amendment Act of

2016 related to Heritage Trees. When asked by neighbors to build the townhouses along 32nd Street rather than Albemarle Street, the Owner cited the Heritage Tree protections as an obstacle. The footprint of the proposed single-family house and townhouses under the PUD is similar to what is being proposed now. In other words, the Owner is attempting to do what was apparently impossible under the PUD. Appellants have grave concerns that the health of the Heritage Trees on the property may be impacted by the proposed development.

**2. The Determinations regarding Lots B and C (3124 and 3128 Appleton St. NW)**

With respect to Lots B and C, the ZA erroneously found as follows:

> [T]here is currently no front setback range on Appleton Street, NW, as only one house currently fronts Appleton Street, NW within this block. Assuming Lot C is constructed prior to the building on Lot B, I re-confirm that there is no front yard setback for Lot C. Once the building on Lot C is constructed a range will be established for Lot B between the house on Lot C and the existing house at 3120 Appleton Street, NW.

Ex. B, ZA Letter at 1. The ZA's reasoning here is flawed for various reasons. First, as explained above, a setback is required by the Zoning Regulations, so the notion that there is "no front yard setback for Lot C" fails as a matter of basic statutory interpretation. To the extent the ZA's determination was based on the fact that there was no "range" upon which to determine a setback under 11-D DCMR § 505.1, then the ZA should have looked to the general provisions regarding setbacks. Those provisions provide that a new building should "be set back between from the street lot line by at least as much as ***the existing building*** on the blockface closest to the street." 11-B DCMR § 314.3(c) (emphasis added). The use of the term "building" (*i.e.*, what has been built) in this instance indicates that a setback will apply, even if there is only a single building rather than a "range" of buildings. In residential zones, a proposed house must not be closer to the street than the point of the house façade closest to the street. *See* 11-B DCMR § 315.1.

And, in this case, there are at least a few measurements by which a setback should be calculated. First, there is an existing residential building directly to the east of Lot C, as the ZA recognized—that is, 3120 Appleton Street NW. The house at 3120 Appleton Street NW is set back twenty-five feet (25 ft.). *See* Case No. 17-22, Ex. 11 and 11D. Therefore, any house constructed on Lot C must have a front setback of twenty-five feet (25 ft.). Once the proposed house on Lot C is required to have a front setback of twenty-five feet (25 ft.) to comply with the setback of the house at 3120 Appleton Street NW, then it becomes impossible for the proposed house on Lot C to satisfy the twenty-five foot (25 ft.) rear yard requirement. This is due to the fact that the depth of the lot is only approximately fifty-eight feet (58 ft.). When one accounts for a twenty-five foot (25 ft.) setback rather than the four foot (4 ft.) front setback that the Owner envisions, then the rear yard shrinks from about twenty-six feet (26 ft.) to five feet (5 ft.). In other words, given the dimensions of the proposed house, the lot cannot comply with zoning requirements and should not have been approved as part of this subdivision. Indeed, when one considers the dual requirements of a twenty-five foot (25 ft.) front setback and a twenty-five foot (25 ft.) rear yard, given that the depth of the lot is only fifty-eight feet (58 ft.), the only conforming house would have to be just eight feet (8 ft.) deep.

Second, there appears to be a fifteen foot (15 ft.) BRL along the south side of Appleton Street NW that the ZA did not take into account. *See* Case No. 17-22, Ex. 11 and 11A; Ex. F, Surveyors Office, Plat of Computation (July 15, 1952). Even if the proposed house on Lot C is required to have a fifteen foot (15 ft.) front setback rather than a twenty-five foot (25 ft.) setback, it is still not possible for that house to satisfy the twenty-five foot (25 ft.) rear yard requirement, which the house can only satisfy as a result of an improper four foot (4 ft.) front setback, as shown in the ZA's Letter. *See* Ex. B, ZA Letter at 2. Moreover, although the proposed house on Lot B will apparently have a

front setback of fifteen feet (15 ft.) because of the BRL, any house on Lot B should actually be set back as much as the house located at 3120 Appleton Street NW, for the reasons explained above.

In addition, the ZA's interpretation of the regulations as applied to the Owner's apparent plans to construct a building on Lot C prior to building on Lot B condones a scheme of development that is designed to circumvent or otherwise diminish the front setback requirements. The ZA implicitly admits that if the Owner constructed a house on Lot B first, where there is a fifteen foot (15 ft.) BRL to contend with, then there would be a problem with building a house on Lot C. If the ZA understood that potential noncompliance with the Zoning Regulations could result from the subdivision based on construction staging, the subdivision should not have been approved. As explained below, the Zoning Regulations, and the R-8 zone regulations in particular, are meant to be the ***minimum*** of what is required and must be interpreted to prevent overcrowding and to preserve the "park-like" character of the neighborhood, not to cram the maximum number of houses possible on undeveloped property directly next to an historic landmark.

**B. The Subdivision Conflicts with Overall Purposes of the Zoning Regulations**

In addition to failing to meet certain requirements imposed by the Zoning Regulations, as described above, the subdivision conflicts with the overall purpose and intent of the Zoning Regulations, particularly the Forest Hills Tree and Slope Residential House Zone related regulations. In their interpretation and application, the Zoning Regulations are to be held to be "***the minimum requirements*** adopted for the promotion of the public health, safety, morals, convenience, order, prosperity, and general welfare to (a) Provide adequate light and air; (b) ***Prevent undue concentration of population*** and ***the overcrowding of land***; and (c) Provide distribution of population, business and industry, and use of land that will tend to create conditions favorable to transportation, protection of property, civic activity, and recreational, educational, and cultural

opportunities; and that will tend to further economy and efficiency in the supply of public services." 11-A DCMR § 101.1 (emphases added). The Zoning Regulations were designed with consideration of, *inter alia*, the "[c]haracter of the respective zones" and the "[e]ncouragement of the stability of zones and of land values in those zones." 11-A DCMR § 101.2.

The purposes of the Forest Hills Tree and Slope Residential House Zones are to: "***Preserve and enhance the park-like setting*** [of Forest Hills] by regulating alteration or disturbance of terrain, destruction of trees, and the ground coverage of permitted buildings and other impervious surfaces . . . .; ***Preserve the natural topography and mature trees to the maximum extent feasible*** in the Forest Hills neighborhoods; Prevent significant adverse impact on adjacent open space, parkland, stream beds, or other environmentally sensitive natural areas; and Limit permitted ground coverage of new and expanded buildings and other construction, so as ***to encourage a general compatibility between the siting of new buildings or construction and the existing neighborhood***." 11-D DCMR § 500.1 (emphases added). The regulations also indicate that these zones have "a significant quantity of steep slopes, stands of mature trees, are located at the end of stream beds and public open spaces, and have undeveloped lots and parcels subject to potential terrain alteration and tree removal." 11-D DCMR § 500.2.

The Owner's proposed development conflicts with the aforementioned regulations. The subdivided property is located in the R-8 zone, which requires a minimum lot size of 7,500 square feet for lots in Square 2041. *See* 11-D DCMR § 502.1. The entirety of Square 2041, Lot 22 has been measured at 24,835 sq. ft. *See* Ex. D, Subdivision, Square 2041 (Sept. 13, 2017). Theoretically, therefore, Lot 22 could be subdivided into three lots. However, as indicated in the Owner's PUD, various natural features of the property such as "variation in topography" and "the existence of heritage trees" act to "constrain development" of the property. *See* Case No. 17-22, Ex. 2 at 6-7. As

expected, due to the existence of many heritage trees and the steep slopes that exist between and across Lots 22 and 23, a straightforward matter-of-right subdivision could not be accomplished.

Instead, to meet the minimum lot size requirement for Lot C, the Owner created a grossly misshapen, gerrymandered-looking lot that defies the front setback and rear yard requirements, as discussed above. *See* Ex. B, ZA Letter Attachments; *see also* Ex. I, Map Highlighting Square 2041, Lot 26 (a.k.a. Lot C). The lot consists of two separate pieces of land facing two separate streets connected by an approximately five foot (5 ft.) wide and one hundred foot (100 ft.) long pipestem "path." The shape of this lot is clearly intended to circumvent the minimum lot area requirement of 11-D DCMR § 502.1.[5] Without the portion of land facing 32nd Street, the area where the proposed house on Lot C would be built is likely just 5,500 sq. ft.

The subdivision also conflicts with 11-D DCMR § 500.1 in multiple ways. First, this amount of development, including a 2-story accessory dwelling on a gerrymandered lot, has already negatively impacted the park-like setting of the neighborhood, caused alteration of terrain, destruction of trees, and appears to envision extensive new buildings and impervious surfaces that may have an adverse impact on the Soapstone Valley stream bed, which lies directly south of the property. This increased density and overcrowding of land is completely incompatible with the existing neighborhood and may impact both the stability of and land values in the R-8 zone. *See* 11-A DCMR §§ 101.1 and 101.2.

[5] For Lot C, it appears that the Owner not only plans to build a house on the eastern portion of the lot facing Appleton Street, but also plans to build a "2-Story Accessory Building" fronting on 32nd Street. *See* Ex. B, ZA Letter, Concept Plans. Yet the ZA's Letter cryptically refers to "an accessory apartment ***within*** the main building in the cellar." *Id.* (emphasis added). To the extent the "path" that connects the two portions of land that make up Lot C is the "permanent access" to this accessory building, the width of the path would violate 11-U DCMR § 253.8(c)(1). And this access would be particularly difficult given the steep slope that divides Lots 22 and 23, which the ZA appeared to recognize by citing the applicability of 11-D DCMR § 509.2.

## V. CONCLUSION

The ZA's approval of this subdivision was based on erroneous interpretations of the provisions regarding the required setbacks and failed to take into account the general Zoning Regulation provisions that apply to the Forest Hills neighborhood, which exist to preserve the park-like setting of the neighborhood. Front setbacks are required in the R-8 zone. Yet the ZA determined that ***no setback*** was required for both Lot A and Lot C, even though there is an existing building next to Lot C with a twenty-five foot (25 ft.) setback, as well as BRLs of fifteen feet (15 ft.) along both 32nd and Appleton Streets. When these determinations are considered in the broader context of the Zoning Regulations applicable to Forest Hills, clear conflict exists. Appellants therefore respectfully request that the Board grant their appeal, set aside the ZA's determinations, and revoke the permits that have been issued, so as to ensure that any development of the property conforms to the Zoning Regulations.

Dated: November 21, 2018

Respectfully submitted,

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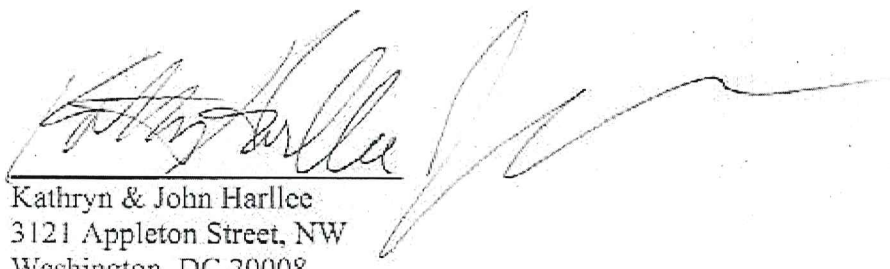

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## APPENDIX: LIST OF EXHIBITS

| Exhibit | Title |
|---|---|
| A | Subdivision, Square 2041, Surveyor's Office, D.C. (June 6, 2018) |
| B | Letter from Le Grant to Landsman with Attachments (May 18, 2018) |
| C | Letter from DC Office of Planning to ANC 3F (May 10, 2017) |
| D | Subdivision, Square 2041, Surveyor's Office, D.C. (Sept. 13, 2017) |
| E | Letter from Frelinghuysen to Lawson (Feb. 5, 2018) |
| F | Surveyor's Office, District of Columbia, Plat of Computation (July 15, 1952) |
| G | Email from Rutenberg re "Albemarle St Developments" (Sept. 28, 2018) |
| H | Emails from Frelinghuysen to Gutowski, Callcott, and Le Grant (Oct. 2, 2018) |
| I | Map Highlighting Square 2041, Lot 26 |

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above document and the accompanying exhibits were served via mail on this 21st day of November, 2018, with courtesy copies sent by email, to the following:

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