EXHIBIT LOG

CASE NO. 16869

EXHIBIT NO.	NATURE OF EXHIBIT	EXHIBIT DATE	NO. PAGES	DATE REC'D
27.	Set of Plans (SAME as exhibit No. 4 that was misplaced)		12	4/29/02
28.	Photographs & Site	—	3	4/30/02
29.	Witness Cards	—	1	4/30/02
30.	Ltr. from Andrew James Misicka, Chairman, ANC 1C in support	—	1	5/2/02
31.	Ltr. from Jonathan L. Farmer w/attached materials	5/8/02	49	5/8/02
32.	Ltr. from Jonathan Farmer w/Proposed Findings of Fact and Conclusions of Law	5/24/02	15	5/24/02
33.	Rev'd. Application Information to ANC 6A	5/10. +V.O.	~~34~~	6/16/02
34.	Memorandum to the BZA	7/30/02	2	—
35.	Ltr. from Jonathan L. Farmer, re: height relief w/attached Applicant's Proposed Findings of Fact & Conclusions of Law & Transcript	8/2/02	38	6/18/02
36.	Final BZA Order 16869	9/23/02	12	—
37.	Attestation	4	2	—
38.				
39.				

ZONING COMMISSION
District of Columbia
Case 02-37
Exhibit 1

ZONING COMMISSION
District of Columbia
CASE NO.02-37
EXHIBIT NO.1A1

EXHIBIT LOG

CASE NO. 1686

EXHIBIT NO.	NATURE OF EXHIBIT	EXHIBIT DATE	NO. PAGES	DATE REC'D
14.	Referral to SMDRC		1	3/7/02
15.	Referral to HRC/C		1	" "
16.	Referral to DP		1	3/7/02
17.	Additional Check per Variance		1	3/8/02
18.	Orig. Notice of Project	—	2	3/12/02
19.	" " HRC/C	—	3	" " "
20.	" " App. and Agent	—	2	" " "
21.	Attestation	—	1	3/12/02
22.	Affidavit of Posting	4/12/02	~~2~~	~~4/16/02~~
23.	OP REPORT	4/23/02	9	4/23/02
24.	Ltr. from JONATHAN L. FARMER requesting a waiver to allow additional statement in support	4/25/02	16	4/25/02
25.	OP REPORT	4/25/02	3	4/24/02
26.	Affidavit of MAINTENCE	4/19/02	2	4/29/02

EXHIBIT LOG

CASE NO. 1869

EXHIBIT NO.	NATURE OF EXHIBIT	EXHIBIT DATE	NO. PAGES	DATE REC'D
1.	Application Fee	3/5	1	3/5/02
2.	Survey Plat	10/4/01	1	" "
3.	Self Certification		1	" "
4.	Plans of Site		11	" "
5.	Color Photos		1	" "
6.	Receipt of Submission	3/5	1	" "
7.	Letters of Authorization	3/4	1	" "
8.	Statement		1	" "
9.	Addt. Property Owners		9	" "
10.	Address of Lessee		1	" "
11.	Acknowledged Letter		1	" "
12.	Copy of Receipt for Check		1	3/5/02
13.	Referral to Councilors		1	3/7/02

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

★ ★ ★

BZA APPLICATION NO. 16869

As Director of the Office of Zoning, I hereby certify and attest that on SEP 2 3 2002 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Jonathan L. Farmer, Esq.
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Josh Gibson, Commissioner 1A05
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BZA
Case No. 16869
Exhibit No. 37

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rsn

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

★ ★ ★

Application No. 16869 of King's Creek, LLC, pursuant to 11 DCMR § 3103.2, for a variance from the floor area ratio requirements under section 402, a variance from the lot occupancy requirements under section 403, a variance from the non-conforming structure provisions under subsection 2001.3, and a variance to exceed the height requirements under section 400 to construct an addition to an existing building for a mixed use (residential and retail) development in an R-5-B District at premises 2329 Champlain Street, N.W. (Square 2563, Lot 103).

Hearing Date: April 30, 2002
Decision Dates: June 4, 2002, August 6, 2002

DECISION AND ORDER

Kings Creek, LLC, the owner of Lot 803 in Square 2563, filed a self-certified application with the Board of Zoning Adjustment on March 5, 2001, pursuant to 11 DCMR § 3103.2, for a variance from the floor area ratio requirements under section 402, a variance from the lot occupancy requirements under section 403, a variance from the non-conforming structure provisions under subsection 2001.3, and a special exception pursuant to section 1403.1, to construct an addition to an existing building for a mixed use (residential and retail) development at premises 2329 Champlain Street, N.W. (Square 2563, Lot 103). On June 4, 2002, after a public hearing, the Board granted the application by a vote of 4-1. For the reasons stated below, the Board determined that a height variance, and not a special exception, was required. Therefore, on August 6, 2002, at its regularly scheduled public meeting, the Commission voted 4-0 to reopen the record and to reconsider its decision to grant the height relief requested. At that meeting, the Board granted the application for a height variance by a vote of 4-0-1, with one member not present, not voting.

PRELIMINARY AND PROCEDURAL MATTERS

Notice of Application and Notice of Hearing. By memoranda dated March 7, 2001, the Office of Zoning advised the Zoning Administrator; D.C. Office of Planning; Advisory Neighborhood Commission (ANC) 1C, the ANC for the area within which the property that is the subject of the application is located; the ANC Commissioner for the affected single-member district; and the Ward 1 Councilmember, of the application.

BZA
Case No. 16869
Exhibit No. 36

The Board scheduled a public hearing on the application for April 30, 2002. Pursuant to 11 DCMR § 3113.13, the Office of Zoning on March 12, 2002, mailed the applicant, the owners of all property within 200 feet of the subject property, and ANC 1C notice of the hearing.

The applicant submitted an affidavit of posting, indicating that 3 zoning posters were posted on the site, on March 12, 2002.

Applicant's Case. Representing the applicant at the hearing was the law firm of Griffin, Farmer & Murphy, LLP. At the hearing for this case, the applicant presented testimony from expert witnesses and exhibits depicting the details of the proposed project.

Public Agency Reports and Memoranda. The Office of Planning ("OP") submitted a report dated April 23, 2002, that expressed concerns about the height of the applicant's project but supported the project in all other respects. On April 26, 2002, OP submitted a supplemental report stating its support of the height for the proposed project. OP based its support on the design features of the project, including the setbacks, and the fact that setbacks, and the corresponding height increase, is necessary to mitigate the adverse effect on air and light for the surrounding properties that building on that lot would otherwise have.

ANC Report. In its report received May 2, 2002, ANC 1C indicates that on April 16, 2002, at a scheduled and duly-noticed public hearing with a quorum present, ANC 1C unanimously supported the application. The ANC stated that the project was a welcome addition to the neighborhood. The ANC further noted the Applicant's efforts to solicit neighborhood comment on the project. The ANC supported the effort to provide additional light, air and outdoor space in the neighborhood.

Request for party status. There were no requests for party status

Persons in Support of the Application. Councilmember Jim Graham, in a letter dated March 8, 2002, urged this Board to approve this application, noting that the application met the expressed goals of the Reed-Cooke Overlay. The Councilmember also stated that the project would enhance the ambiance and reduce heat effects in his recommendation for approval. He noted that the Applicant had incorporated his suggestion for setbacks to avoid the creation of a "canyon" effect on Champlain Street.

Persons in Opposition to the Application. There were no persons in opposition to the application.

Darnell Bradford El, Chairman of the Reed-Cooke Neighborhood Association testified hat he did not have a position on the application but that he was concerned with the "process". He requested that the matter be continued to allow further review by community residents. Under cross examination, Mr. Bradford El stated that he had not attended any of the previously held meetings between the community and the Applicant. In response, this Board left the record open for the Reed-Cooke Neighborhood Association to provide comments. However no additional comments were received.

Closing of the Record. The record closed at the conclusion of the public hearing on April 30, 2002, but was left open for the Applicant to provide a memorandum on whether the height relief requested was a special exception or a variance under the Zoning Regulations. This memorandum was submitted and received in timely manner.

Decision Meetings. At its decision meetings on June 4, the Board voted 4-1-0 to grant the application.

After June 4th decision, the Board determined that a variance, and not a special exception, was required for approval of the project's height. The applicant stated that the subject property was within the Reed-Cooke overlay, and therefore the applicant was applying for a special exception under § 1403.1 to exceed the height requirements. However, the subject property is not in the Reed-Cooke overlay by virtue of § 1400.1, which provides that portions of the listed squares "that are zoned non-residentially as of January 1, 1989" are included in the overlay. While the applicant's square, 2563, is included in the list provided for in the regulation, the square was zoned residentially on the January 1, 1989, date. Therefore, the applicant's square is not included in the overlay.

In addition, even if the applicant's property was within the overlay, a special exception for the height requested is not provided for in the regulations. The applicant requesting a special exception to exceed the 40-foot height requirement of the Reed-Cooke overlay for a 69-foot high structure, well in excess of the 50-foot matter of right height in an R-5-B district. An applicant may apply for a special exception to exceed the requirements of the Reed-Cooke overlay only up to the matter of right limits. To allow otherwise would allow the overlay to create a less stringent height requirement by offering a special exception where a variance was otherwise required, which was plainly not the Zoning Commission's intent when it established the overlay. See 11 DCMR § 1400.4 (when there is a conflict between the overlay and the underlying zone, the more restrictive requirements apply).

At its August 6, 2002, regularly scheduled public meeting, the Board granted the application for a height variance by a vote of 4-0-1.

Findings of Fact

1. The subject property is located in the R-5-B District on the east side of Champlain Street, N.W., north of its intersection with Kalorama Road, N.W.

2. The subject property is a 9,652 square feet lot occupied with a two-story building with a footprint of 9,395 square feet. Lot occupancy is 97.3 percent. The height of the existing structure is 31.5 feet. The total existing building area is 18,401 square feet.

3. The subject site is improved with a stone, steel, concrete and brick structure that was erected as an automobile garage in 1924. The site is currently used as retail, office and storage space, but is vacant on the second floor.

4. The existing building is in need of rehabilitation, as represented by the applicant at the public hearing.

5. The subject site was originally zoned CM. The site was re-zoned by the Zoning Commission to R-5-B in 1987.

6. The R-5-B Zoning District permits developments of moderate height and density. The nearby Reed-Cooke Overlay District is designed to protect existing housing, provide for new residential development, and encourage small-scale business development that does not adversely affect the residential uses.

7. The surrounding area has a wide variety of buildings including auto repair shops, electroplating facilities, open parking lots, two story single family residential buildings and apartment houses, some of which are between five and seven stories. Directly to the west of the subject site is a mixed use development, known as the Lofts of Adams Morgan that contains 57 residential units, 4,000 square feet of retail space and has a height of 56 feet.

8. The Applicant proposes a mixed-use development on the subject site. The existing building on the site will be retained in its entirety and four additional levels with 13 residential apartments will be constructed. The existing retail use on the first floor will be retained while the second floor will be renovated for parking and residential use. The improvements will add 19,539 square feet for a total of 37,940 for the entire structure.

9. The applicant will provide 13 parking spaces for the residential units.

10. The Applicant has agreed, in consultation with representatives of neighborhood interests and ANC 1C, to provide at least one "affordable" residential unit in the project.

11. The Applicant testified that the existing structure, while not a designated landmark, was a unique architectural style that had substantial significance in the neighborhood. It further stated that one of its main goals was to ensure the continued presence of the Brass Knob, an existing tenant, because of its long time and much-desired presence in the neighborhood.

12. As explained by the applicant's architect, the proposed structure represents an attempt to meet the challenges of the site and maximize the residential character of the immediate neighborhood, while minimizing its impact on the surrounding neighborhood.

13. The structure was designed with a series of setbacks that minimized the visual impact of the addition from the street while providing the maximum amount of light and air for both the residential units and the abutting street. The height of the proposed structure compatible with the height of the development immediately across the street to the west.

14. The Applicant will provide additional outdoor space for each unit in a manner that adds to the neighborhood aesthetic.

15. The architectural design of the units and overall project is innovative and of significant merit.

16. The Office of Planning noted the requests for relief would not cause any "substantial detriment to the public good" and would not substantially impair the intent, purpose or integrity of the zone plan embodied in the Zoning Regulations or Map "because the proposal fulfilled the intent of increasing residential use and the height was mitigated by the setbacks that allowed light to the street and the units themselves." In its testimony, the Office of Planning noted that the Applicant had met with community representatives and organizations and received their approval and agreed with their various proposals.

Variance from §§ 403 and 2001.3

17. Section 403.2 allows a maximum lot occupancy of 60% for developments in the R-5-B district.

18. The existing building has a lot occupancy of 97.2% and is therefore nonconforming as to lot occupancy.

19. The addition will increase the lot occupancy, due to a proposed overhang included in the structure, to 99%.

20. Section 2100.3(a),(b) & (c) together provide that an addition to a nonconforming structure may be made, provided the structure is conforming as to lot occupancy, the addition conforms to structure requirements, and the addition does not increase the nonconforming aspect of the structure.

21. The addition, to a nonconforming structure, will not conform to lot occupancy requirements, other structure requirements, will increase an existing nonconformity, and create a new nonconformity, and therefore a variance from §§ 403 and 2100.3(a), (b) & (c) is required.

Variance from §§ 402 and 2001.3(c)

22. The maximum allowable FAR in a R-5-B district is 1.8, pursuant to § 402.

23. The existing building has a FAR of 1.9 and is therefore nonconforming with respect to FAR.

24. The applicant proposed an additional 2.0 FAR, for a total of 3.9 FAR.

25. Section 2100.3(c) provides that the "addition or enlargement itself shall not increase or extend any existing, nonconforming aspect of the structure. . .".

26. The addition will increase the FAR of the overall structure and therefore variances from §§ 402 and 2100.3(c) are required.

Variance from § 400.1 height requirements

27. The height limit for buildings in an R-5-B is 50 feet (11 DCMR § 400.1)

27. The proposed structure will be 69.6 feet in height and therefore a variance from § 400.1 is required.

Conclusions of Law

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799, as amended; D.C. Official Code § 6-641.07(g)(3) (2001)), to grant variances from the strict application of the Zoning Regulations. The applicant is seeking variances from §§ 400.1, 402, 403, and 2100.3 for an increase in FAR, lot occupancy, height, and to construct an addition to a nonconforming structure. The notice requirements of 11 DCMR § 3113 for the public hearing on the application have been met.

The Board is authorized to grant variances where "by reason of exceptional narrowness, shallowness, or shape of a specific property. . . or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or conditions" of the property, the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property. . ." D.C. Code § 6-641.07(g)(3), 11 DCMR § 3103.2. Where an applicant seeks an area variance, as here, the above standard of "practical difficulties" applies, with the "undue hardship" standard applying only to use variances. Palmer v. Board of Zoning Adjustment, 287 A.2d 535 (D.C. App. 1972).

Additionally, variance relief can be granted only "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map". Id.

In reviewing a proposed variance, the Board is required under D.C. Official Code § 6-623.04 to give "great weight" to OP recommendations. The Board is also required under D.C. Official Code § 1-309.10(d) to give "great weight" to the affected ANC's recommendations. Under § 3 of the Comprehensive Advisory Neighborhood Commissions Reform Act of 2000, effective June 27, 2000 (D.C. Law 13-135, D.C. Official Code § 1-309.10(d)(3)(a) (2001)), 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.

The applicant's property is exceptional in two respects, both of which give rise to practical difficulties. First, as noted by the ANC 1C and the Office of Planning, the site is currently occupied by a historic structure. The applicant and community stress the importance of preserving this structure because of its aesthetic appeal and because it adds to the architectural variety of the area. However, the structure is underutilized, being vacant on its second floor. Any addition to the structure, because of its existing nonconformity as to lot occupancy, would require a variance from § 2100.3 of the Zoning Regulations. Any reconstruction on the site as a matter of right would therefore require demolition of the existing structure in whole or in part. Demolition of the structure

would be a loss to the community at large because of the structure's value to that community.

The site it is also unique because it is surrounded by structures that have created a canyon effect. This canyon effect has served to deprive the street and the subject property of light and air and therefore creates a practical difficulty. To overcome this difficulty, the applicant proposes to extend the building upwards, taking advantage of the slope of the site, to provide more light and air to the units. Also, in order to avoid contributing to this canyon effect, the applicant is adding significant setbacks to the third and fourth, fifth, and sixth stories. The setbacks increase in size with the vertical rise of the building. Strict application of the zoning regulations would therefore result in an adverse impact to this neighborhood. Therefore, granting to permit the applicant to exceed allowable FAR and height limits is appropriate.

The Board therefore finds that these circumstances constitute an "exceptional situation", and that, as a result of these circumstances, the strict application of the zoning regulations would result in peculiar and exceptional practical difficulties upon the owner of the property.

As noted by ANC 1C and the Office of Planning, the applicant's proposed project will not be detrimental to the public good. One parking space is provided for each new housing unit created by this project, minimizing any impact on parking in the area that might arise from the increased density. Also, the proposed project will utilize the existing rear entrance to the building as its primary means of parking access. Thus, there will be no interference with pedestrian traffic. The height and density of the proposed project is, due to topography and existing structures, compatible with the heights and densities of other buildings and developments in the immediate area. Moreover, the applicant's proposal, due to high quality and innovative design, will serve to benefit the greater public, while adding much needed housing stock to the District.

The variances will not be detrimental to the zone plan where the underlying R-5 zone is intended to "permit a flexibility of design", 11 DCMR § 350.1, and contains numerous multi-unit apartment buildings.

For the reasons stated above, the Board concludes the applicant has met its burden of proof. It is hereby **ORDERED** that the application is **GRANTED.**

Public Meeting of June 4, 2002

VOTE: **4-1-0** (Geoffrey H. Griffis, Curtis Etherly, Anne M. Renshaw, David M. Levy, to approve variances from §§ 402, 403, and 2001.3, Peter G. May to oppose).

Public Meeting of August 6, 2002

VOTE: **4-0-1** (Geoffrey H. Griffis, Curtis Etherly, Anne M. Renshaw, David A Zaidain, to approve a variance from § 400.1, Peter G. May, not present not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: SEP 2 3 2002

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, 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 PURPOSES OF SECURING A BUILDING PERMIT.

THE APPLICANT SHALL COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C.LAW 2-38, AS AMENDED, CODIFIED AS CHAPTER 14 IN TITLE 2 OF THE D.C. CODE. SEE D.C. CODE SECTION 2-1402.67 (2001). THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THE HUMAN RIGHTS ACT. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER. NOTE IN SECTION 2-1401.01 OF THE D.C. HUMAN RIGHTS ACT. THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITY, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE

ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16869

As Director of the Office of Zoning, I hereby certify and attest that on SEP 23 2002 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Jonathan L. Farmer, Esq.
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rsn

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

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August 2, 2002

Mr. Geoffrey H. Griffis
Chairperson
District of Columbia
Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210
Washington, D.C. 20001

RECEIVED
D.C. OFFICE OF ZONING
2002 AUG -2 AM 10: 54

Re: BZA Application No. 16869 of Kings Creek, LLC

Dear Mr. Griffis:

We are aware, through conversations with staff, of the continuing controversy over the issue of whether the requested height relief is a variance or a special exception under section 1403 of the Zoning Regulations (Reed-Cooke Overlay). We are particularly concerned because the applicant, as explained below, has specifically addressed these concerns as instructed by the Board at the close of the public hearing. The delay in the issuance of the appropriate order reflecting the Board's decision is affecting our effort to secure financing and begin this unique project in a timely manner. We offer the following information and suggestions to further expedite the issuance of the proper order. Attached for your convenience is a copy of the previously submitted proposed order as well as relevant portions of the transcript of the hearing and the public meeting.

At the end of the hearing on April 30, 2002, the issue of the variance versus special exception was addressed by the Board. We were asked to brief the issue and submit said brief for the Board's review. At that time we expressed our view that the proposed project met the standard for both a variance and a special exception and asked the Board if we could submit the proposed findings and conclusions in the alternative. We did so submit and explained how the proposed height met both standards. These findings were submitted as part of the public record, served on all other participating parties and were fully discussed by the Board prior to its decision. The brief noted that every overlay had special exception provisions and that the Zoning Commission, when asked to eliminate the special exception provision from the Reed-Cooke Overlay, specifically declined to exclude that provision from the regulations. Further, the Zoning Commission **did not imply** any limitations on the Board's ability to grant a special exception under the regulations. Rather, it established strict criteria for the granting of the special

BZA
Case No. 16869
Exhibit No. 35

exception.

We believe that further delay in the issuance of the order can be avoided if the BZA would consider the alternative draft order which addressed the variance for height. While we still believe that the special exception for height was proper under the regulations, further delay in issuance of the order is extremely harmful to the success of the project. We would therefore request that the Board issue the appropriate order at its next public meeting rather than wait for September. Please contact the undersigned if we can be of further assistance.

Thank you for your time and consideration.

Respectfully submitted,

GRIFFIN, FARMER & MURPHY, LLP

By: _____
Jonathan L. Farmer,
On behalf of the Applicant, Kings Creek, LLC

BEFORE THE BOARD OF ZONING ADJUSTMENT

OF THE DISTRICT OF COLUMBIA

Applicant's Proposed Findings of Fact and Conclusions of Law

Application of King's Creek, LLC, pursuant to 11 DCMR §3103.2, for a variance from the floor area ratio requirements under Section 402, a variance from the lot occupancy requirements under Section 403, and a variance from the non-conforming structure provisions under Section 2001.3, and pursuant to 11 DCMR §3104.1, a special exception to exceed the height provisions (Section 1402) of the Reed-Cooke Overlay District under Section 1403, to construct an addition to an existing building for a mixed use (residential and retail) development in the Reed-Cooke/R-5-B District at premises 2329 Champlain Street, N.W. (Square 2563, Lot 103).

Hearing Date: April 30, 2002
Decision Date: June 4, 2002

Summary of Evidence:

1. The subject property is located in the RC/R-5-B District on the east side of Champlain Street, N.W. north of its intersection with Kalorama Road, N.W.

2. The subject property is a 9,652 square feet lot occupied with a two story building with a footprint of 9,395 square feet. Lot occupancy is 97.3 percent. The height of the existing structure is 31.5 feet. The total existing building area is 18,401 square feet.

3. The subject site is improved with a stone, steel, concrete and brick structure that was erected as an automobile garage in 1924. The site is currently used as retail, office and storage space.

4. The subject site was originally zoned CM. The site was re-zoned by the Zoning Commission to R-5-B in 1987. The Zoning Commission created the Reed-Cooke Overlay in 1991 and the provisions of said overlay apply to the subject site.

5. The RC/R-5-B Zoning District permits developments of moderate height and density. This zone is designed to permit flexibility for all types of urban residential developments along with those institutional and semi-public buildings that are compatible with adjoining residential units. The Reed-Cooke Overlay District is designed to protect existing housing, provide for new residential development, and encourage small-scale business development that does not adversely affect the residential uses.

6. The RC/R-5-B Zoning District allows a lot occupancy of 60 percent, a floor area ratio of 1.8 and a maximum height of 40 feet. A total of 7 parking spaces would be required by the Applicant's proposal in this Zoning District.

7. The subject site is located in the Reed-Cooke neighborhood and is surrounded by a variety of uses but the area is predominantly residential. The area has a wide variety of buildings including auto repair shops, electroplating facilities, open parking lots, two story single family residential buildings and apartment houses, some of which are between five and seven stories. Directly to the west of the subject site is a mixed use development, known as the Lofts of Adams Morgan that contains 57 residential units, 4,000 square feet of retail space and has a height of 56 feet.

8. The Applicant proposes a mixed use development on the subject site. The existing building on the site will be retained in its entirety and four additional levels with 13 residential apartments will be added to the structure. The existing retail use on the first floor will be retained while the second floor will be renovated for parking and residential use. The Applicant has agreed with representatives of neighborhood interests to provide at least one "affordable" residential unit in the project.

9. The Applicant testified that, after due consideration of the requirements of the Reed-Cooke Overlay District, it was determined that the goals of the District would be best achieved by retaining the existing structure and its existing retail tenant. He stated that the existing structure, while not a designated landmark, was a unique architectural style that had substantial significance in the neighborhood. He further stated that one of his main goals was to ensure the continued presence of the Brass Knob in the Adams Morgan neighborhood because of its long time and much desired presence in the neighborhood. The Applicant indicated that the existing structure's unique physical construction provided an opportunity to add a significant amount of additional residential housing to the neighborhood. The Applicant explained that, in consultation with neighborhood representatives and organizations, the project was designed to avoid any possible adverse effects by providing parking for each unit and to provide additional outdoor space for each unit in a manner that added to the neighborhood aesthetic. The Applicant stated that the retention of the existing structure was a unique challenge that presented difficulties that could only be overcome by a special architectural design embodied in this project.

10. The project architect, Gregory Kearley, testified that the proposed structure represented an attempt to meet the challenges of the site and maximize the residential

character of the immediate neighborhood. He stated that the structure was designed with a series of setbacks that minimized the visual impact of the addition from the street while providing the maximum amount of light and air for both the residential units and the abutting street. He further testified that the height of the structure was compatible with the neighborhood and that it was specifically compatible with the height of the development immediately across the street to the west.

11. By memorandum dated April 23 and April 25, 2002 and by oral testimony at the April 30, 2002 public hearing, the D.C. Office of Planning stated that the subject application met all zoning requirements and recommended that it be approved. The memorandum noted that the proposed variances to increase the FAR and to address the lot occupancy issue and the special exception request to increase the height of the building meet the requirements of the Zoning Regulations. The Office of Planning further noted that the proposal to provide a mixed use development is a goal envisioned for the area covered by the Reed-Cooke Overlay. The Office of Planning noted the requests for relief would not cause any "substantial detriment to the public good" and "would not substantially impair the intent, purpose or integrity of the zone plan embodied in the Zoning Regulations or Map "because the proposal fulfilled the intent of increasing residential use and the height was mitigated by the setbacks

that allowed light to the street and the units themselves." In its testimony, the Office of Planning noted that the Applicant had met with community representatives and organizations and received their approval and agreed with their various proposals.

12. Darnell Bradford El, Chairman of the Reed-Cooke Neighborhood Association testified that he did not have a position on the application but that he was concerned with the "process". He requested that the matter be continued to allow further review by community residents. Under cross examination, Mr. Bradford El stated that he had not attended any of the previously held meetings between the community and the Applicant. In response, this Board left the record open for the Reed-Cooke Neighborhood Association to provide comments, however no additional comments were received from Mr. Bradford El or the Neighborhood Association.

13. The Board also left the record open for the Applicant to provide a memorandum on whether the height relief requested was a special exception or a variance under the Zoning Regulations. This memorandum was submitted and received in timely manner. Applicant concluded in this memorandum that the relief from the height restrictions of the Zoning Regulations is a special exception under Section 1403 of the Regulations.

14. ANC 1C filed a report in timely manner on the Applicant's proposal. In this report the ANC recommended approval of the application as requested and supported rapid development of the project. The ANC stated that the project was a welcome addition to the neighborhood and in their opinion met the expressed goals of the Reed-Cooke Overlay. The ANC further noted Applicant's efforts to solicit neighborhood comment on the project. The ANC supported the effort to provide additional light, air and outdoor space in the neighborhood.

15. Councilmember Jim Graham, in a letter dated March 8, 2002, urged this Board to approve this application, noting that the application met the expressed goals of the Reed-Cooke Overlay. The Councilmember also stated that the project would enhance the ambiance and reduce heat effects in his recommendation for approval. He noted that the Applicant had incorporated his suggestion for setbacks to avoid the creation of a "canyon" effect on Champlain Street.

16. There was no opposition to the application at the public hearing or in the record. No other persons or parties appeared at the hearing to testify in support of or in opposition to the application.

Findings of Fact:

Based on the evidence of record, the Board finds as follows:

1. The shape of the site, its topography and the existing non-conforming conditions of the structure thereon create "an extraordinary or exceptional situation or condition as to lot occupancy:"

   (a) The site is burdened with an architecturally significant and unique structure of neighborhood value whose continued existence is important to all involved. The property is unique due to an exceptional situation because it was originally developed under the requirements of the then imposed commercial and industrial zones. As a result of re-zoning, the structure became non-conforming in so far as the lot occupancy and FAR requirements of the RC/R-5-B zones.

   (b) Strict application of the Zoning Regulations in this instance would result in peculiar and exceptional practical difficulties for the Applicant. Compliance with the current regulation would require demolition of the existing structure in whole or part thus destroying the architecturally significant structure. The structure is sound and adds to the variety of

architectural styles in the Reed-Cooke area. Applicant's proposed addition does not increase the non-conformity of the structure as to lot occupancy.

(c) The variance requested by the Applicant as to lot occupancy will not cause detriment to the public nor will it impair the zone plan in any way. The retention of the existing building will not impair light and air and Applicant's proposal, through setbacks, will only enhance the public benefits. Full lot occupancy is common in the Reed-Cooke area. Retention of the existing business is consistent with both the Comprehensive Plan and the stated purposes of the Reed-Cooke Overlay.

2. The non-conforming conditions of the site as to building and to FAR require variance relief from the maximum FAR in the R-5-B District and for increasing a non-conforming structure as required under Section 2001.3 of the Zoning Regulations. The existing structure has a FAR of 1.9 and the maximum allowable FAR in the R-5-B District is 1.8. The building became non-conforming as to FAR when the zoning was changed under the Reed-Cooke Overlay. Applicant's proposal to retain the existing structure and uses naturally increases the FAR through the addition of the residential units.

(a) The subject site is unique because the Applicant's proposal retains the whole of the existing architecturally significant building. This is an extraordinary or exceptional condition that shapes the Applicant's proposal.

(b) Strict application of the Zoning Regulations in this instance would result in the loss of the existing structure thus creating a practical difficulty for the Applicant and imposing an undue hardship for the owners of the existing business. Demolition of the structure would be a loss to the community at large because of the loss of the historic character and elimination of architectural variety in the area.

(c) The requested variances will not be a detriment to the public good because they allow the retention of a building that contributes to the architectural character in the neighborhood. It will also allow the existing retail use to remain and the addition of residential uses in accordance with the stated purpose of the Reed-Cooke Overlay. The proposed increase in FAR allows the Applicant to create additional housing units in a manner that minimizes the visual impact along Champlain Street by setting back each additional level from the parapet line. This allows additional light to reach the street and the new residential units. This

enhances the quality of life in the area without detriment to the public good or impairment of the zone plan.

3. Section 1403 of the Regulations provides that relief from the specific requirements of the Reed-Cooke Overlay District may be granted by the Board if specific criteria are met. The Applicant's proposal meets these criteria in full:

(a) **The use, building or feature at the proposed site, intensity and location substantially advance the stated purposes of the Reed-Cooke Overlay District**

The Reed-Cooke Overlay was intended to provide new housing, protect existing housing, maintain appropriate heights and densities, encourage small-scale business development, protect nearby residences and ensure that non-residential uses serve the local community. The Applicant's proposal is completely compatible with these express purposes. Applicant's proposal provides thirteen new housing units. The height and density of the proposed project is, due to topography and the existing structures compatible with the heights and densities of other buildings and developments in the immediate area. The proposal also provides for retention of the Brass Knob, a long serving local business that provides for the needs of

housing renovators in the immediate area. The project will be developed by a local construction company which employs local residents and thus addresses the employment needs of the local communities. The project is designed to be self-sufficient in construction staging, thus protecting local residences from any undue harm or adverse impacts.

(b) **Vehicular egress and access is designed to minimize pedestrian conflict and creates no objectionable traffic conditions**

The proposed project will utilize the existing rear entrance to the building as its primary means of parking access. thus there will be no interference with pedestrian traffic. Only thirteen cars will utilize the garage space and will have no appreciable effect on traffic conditions in the area. The alley way ensures that most traffic will not utilize Champlain Street as egress to the site.

(c) **Adequate Off-Street Parking is Provided for the Users**

One parking space is provided for each new housing unit created by this project. There is existing parking for the use of the Brass Knob. Most customers, however, arrive by foot as is typical for a truly local retail business.

(d) **There is no noise associated with the operation of the proposed uses that will adversely affect the neighbors**

The existing structure was built as an automotive garage and has brick and masonry walls surrounding concrete slabs. No particular noise will be generated by the retail or housing uses that would adversely affect the quality of life in the neighborhood. Construction of the addition will be in accordance with applicable law and regulation and will not produce any adverse effect. Construction will occur primarily within the existing structure, thus minimizing most associated noise.

(e) **There is no associated storage of materials, or outdoor processing, fabricating, or repair associated with the project**

As previously stated, the bulk of the construction will occur within the building. There is no outdoor processing or storage associated with the existing retail use or planned housing units.

(f) **The use, building, or features of the proposed project will not adversely affect adjacent property nor will it be detrimental to the public health, safety or welfare**

This project is designed to complement the Reed-Cooke neighborhood by increasing the available housing stock without detracting from that already available. Applicant has worked hard to contact its neighbors and incorporate their views and concerns into the design of the project. ANC 1C has voted unanimously to support this application at its public forum on April 16, 2002. It is inherent in the nature of the project that it will produce no detrimental or otherwise adverse effects in its own environs. For these reasons, this proposal qualifies for the grant of the requested special exception.

Conclusions of Law and Opinion

Based on the evidence of record, the Board concludes that the Applicant is seeking area variances to allow an increase in the floor area requirements under Section 402, to allow continued non-conforming lot occupancy under Section 403 and allow an increase to the non-conforming structure under Section 2001.3 of the Regulations. The Board further concludes that the Applicant is seeking a special exception to exceed the height provisions of the Reed-Cooke Overlay District under Section 1403 of the Regulations.

Granting such variances requires a showing through substantial evidence of a practical difficulty upon the Applicant arising out of some

unique or exceptional condition of the property such as exceptional narrowness, shape or topographical condition. The Board must find that the application will not be of substantial detriment to the public good and will not substantially impair the intent, purpose and integrity of the zone plan.

The Board concludes that the Applicant has met the burden of proof in this application. The Applicant has submitted evidence that demonstrates a unique, extraordinary and exceptional condition in the existing non-conforming structure that creates a practical difficulty for the Applicant in further developing the property.

The Board further concludes that increase in FAR, height, and lot occupancy to produce additional housing and retain the existing retail business will be accomplished through this proposal without substantial detriment to the public good.

The Board further concludes that the requested variances may be granted without substantially impairing the intent, purpose and integrity of the zone plan for the RC/R-5-B District.

Finally, the Board concludes that the Applicant has fully addressed and met the criteria for an increase in height as a special exception under Section 1403 of the Zoning Regulations as shown in the Findings of Fact.

In light of the foregoing it is hereby ordered that the application is **granted**.

Vote:

By Order of the D.C. Board of Zoning Adjustment

Attested by: _____
Jerilee Kress
Director

Final Date of Order: _____

GOVERNMENT

OF

THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

APRIL 30, 2002

+ + + + +

RECEIVED
D.C. OFFICE OF ZONING
2002 MAY 13 AM 5:02

ORIGINAL

The Public Meeting convened in Room 200 South, 441 Fourth Street, Northwest, Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
ANNE MOHNKERN RENSHAW	Vice Chairperson
CURTIS ETHERLY, JR.	Board Member
DAVID LEVY	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

CAROL J. MITTEN (Case Nos. 16871 and 16861)	Commissioner
PETER MAY (Case Nos. 16832 and 16869)	Commissioner

STAFF PRESENT:

SHERI M. PRUITT	Secretary, BZA
BEVERLY BAILEY	Office of Zoning
PAUL O. HART	Office of Zoning
JOHN NYARKU	Office of Zoning

STAFF PRESENT: (CONT.)

JOHN FONDERSMITH	Office of Planning
MAXINE BROWN-ROBERTS	Office of Planning
KAREN THOMAS	Office of Planning
DAVID McGHETTIGAN	Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:

MARIE SANSONE, ESQ.

Association give us in writing their decision on any decision making that they have done as an association.

We would also ask, as we ask of all of our associations, just to give, as you've indicated, the breakdown of the association and, you know, the size, the members, what's a quorum, the date that notice of the meeting and also the vote that was upheld; very similar to what the ANC is required.

We would like to ask the applicant to submit findings of fact and conclusion of law on this.

We would also like to have a briefing, and this is new that has come to light by one of the Board Members. We need to have a briefing on why the height relief is a special exception and not a variance.

And let me give you a quick indication of the fact of one interpretation can be in the Reed-Cooke overlay that it's a - not its interpretation, its strict reading of it is the special exception of the height limitation, but there is an - there could be an interpretation that says that special exception allows you to go to 50 feet, which would be a matter of right within the R-5-B, and then a variance would need to take you beyond 50 feet.

So, that is the issue that we'd like addressed, whether that's true or not, in terms of

your interpretation.

MR. FARMER: Let me - can I just phrase a question?

CHAIRPERSON GRIFFIS: Yes.

MR. FARMER: Looking at the language in the zoning regulations themselves, and I believe in the special exceptions, which is 1403, it speaks to the requirements of this chapter as - and I think is that the question you're really asking?

CHAIRPERSON GRIFFIS: Yes.

MR. FARMER: Okay.

CHAIRPERSON GRIFFIS: I mean, I guess we could go further. Ms. Sansone, if you want to-

MS. SANSONE: Yes, Mr. Chairman, I think that's the issue. It's - that provision talks about the requirements of this chapter, meaning the Reed-Cooke chapter.

However, there's an earlier provision that says that the more restrictive of the underlying or overlaying zoning regulations apply, and the underlying zoning regulations would be the R-5-B. So, that's the issue.

CHAIRPERSON GRIFFIS: That's the crux of it, is the special exception 40 to 50 feet and then you need to go to the more restrictive regulation

where the more restrictive regulation is a variance that takes you above 50 feet.

Again, just a briefing on that would, I think, be very helpful in the deliberation. Now, that is going to need to be expedited in terms of - I see the indications of - let me not forget, but we'll see if there's an opportunity for that.

Anyway, that's going to need to be expedited because obviously that goes to findings of fact and conclusions of law and the test that you're going to be putting together before the decision making.

So, I'm going to ask you to give me an idea of when you could. We would obviously love to have that middle of next week, end of next week.

MR. FARMER: You want it, you get it.

CHAIRPERSON GRIFFIS: I mean, be realistic, because I mean - this is not everything. I'm just asking on the briefing of the issue of the variance and/or special exception on the height.

MR. FARMER: I think I can do that, Your Honor.

CHAIRPERSON GRIFFIS: Okay. I think that would just be helpful for everybody involved, so, if we can do that.

SECRETARY PRUITT: I'm sorry, Mr. Farmer, what date did you say?

MR. FARMER: You're looking for the middle of next week, which was May-

SECRETARY PRUITT: May 1st is the middle of the week.

MR. FARMER: May 1st is tomorrow. So, you're looking at May 7th, May 8th.

CHAIRPERSON GRIFFIS: May 8th is a Wednesday. I mean, I think-

SECRETARY PRUITT: Yes, May 8th is a Wednesday.

CHAIRPERSON GRIFFIS: I think if May 8th is submitted, would be great. I think if it's by the end of next week, that's fine. I'll give you some, you know, wiggle room on that, but I think clearly by the end of next week.

SECRETARY PRUITT: Because we actually do - even to allow for everything to come in, it's going to be a little tight at least - my understanding is you want to leave the record open for the Reed-Cooke organization to submit information and anyone else who did not submit any information is allowed to submit into the record written testimony, but that would be due by May 10th, and the applicant has a week to the

and that then turns - opens the door back up to opportunity for party status.

CHAIRPERSON GRIFFIS: It does and it doesn't.

MR. BRADFORD-EL: Oh, okay.

CHAIRPERSON GRIFFIS: The Board did deliberate on that, because that was our big issue, and we have in the past, and we are currently look at the application in terms of the notification and the announcement of the relief sought, in the fact and the specifics of this case that there were three variances - I should probably read that in front of me before I waiver off in this late afternoon and lose specifics.

SECRETARY PRUITT: Three variances.

CHAIRPERSON GRIFFIS: There were three variances-

SECRETARY PRUITT: FAR, lot occupancy and non-conforming.

CHAIRPERSON GRIFFIS: -identified in special exceptions, but the point is all the notification clearly signified that there was a variance going to this and a special exception.

If the special exception goes away, and a variance is added, it is not this board's opinion that that changes the application so dramatically that it

would have influenced any public testimony or public opinion or involvement in this case and so, therefore, we're not asking for a re-notification and a re-announcement of this application, nor are we continuing the public hearing. Anything else?

MR. BRADFORD-EL: No, that's fine.

CHAIRPERSON GRIFFIS: Okay.

SECRETARY PRUITT: However, sir, the brief will be available in the folder, so you're more than welcome to - it's part of the public record, so you will have access to it.

CHAIRPERSON GRIFFIS: Okay. And the applicant has indicated that they'll provide a copy also, so we love that good faith stuff, so we'll keep that going.

MR. FARMER: I guess as far as having my cake and eating it too, should I address both standards in the brief?

CHAIRPERSON GRIFFIS: Both - you mean the findings of fact?

MR. FARMER: Special - well, yes.

SECRETARY PRUITT: In the brief or findings of fact?

MR. FARMER: Actually, I was thinking initially of the brief.

CHAIRPERSON GRIFFIS: Well, the brief, what I want you to do is just look to brief us whether you think it is a variance or special exception. The findings of fact will be based on what we decide on it. That's why there's a rush to get that brief in.

MR. FARMER: Right. Okay.

CHAIRPERSON GRIFFIS: Does that make sense. I mean-

MR. FARMER: Well, let me real plain about what my concern is. That notice was reviewed with the zoning staff and the zoning administrator as well, so I'm kind of thinking it would probably be best for me to consult with them as well before I put forth this brief.

I don't think that's a problem time wise, but I just wanted you to be aware of that. I'm thinking in terms of the actual content of the brief itself to the extent that not any more addressing strictly the legal issue, but I think I will also be addressing how it affects this case.

CHAIRPERSON GRIFFIS: Right. I don't

MS. SANSONE: Mr. Chairman, since the proposed findings of fact and conclusions of law are due before the Board makes the decision, it would probably be to the applicant's advantage to address

both standards and put them in the alternative. That way, he's covered both ways.

CHAIRPERSON GRIFFIS: And that's where you were going with, right?

MR. FARMER: Exactly.

CHAIRPERSON GRIFFIS: And that - you know, I'm not going to stop you from doing more work, but trying to get it down to a little less, but that's fine.

MR. FARMER: Okay.

CHAIRPERSON GRIFFIS: Okay. Take a deep breath, and we'll turn it over to you when you're ready, sir, to-

MR. FARMER: If I could have Mr. Kostelac join me at the table.

Mr. Chairman, in summation, I'd like to address some of the issues that were raised by Mr. Bradford-El, just in terms of notice and the process and what's going on here, just so the Board is clear as to exactly how we got to this particular point today.

I think it's very important to understand that we've started this process in developing this building at the site very early.

We've made numerous community contacts

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY

JUNE 4, 2002

+ + + + +

RECEIVED
D.C. OFFICE OF ZONING
2002 JUN 18 AM 8:43

ORIGINAL

The Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
ANNE MOHNKERN RENSHAW	Vice Chairperson
DAVID ZAIDAIN	Board Member
CURTIS ETHERLY, JR.	Board Member

ZONING COMMISSION MEMBER PRESENT:

JAMES HANNAHAM
PETER MAY

C-O-N-T-E-N-T-S

AGENDA ITEM	PAGE
PRELIMINARY MATTERS	3
PUBLIC HEARING MINUTES	3
MOTION: 16831 Application of Jose R. Sanchez .	9
CASES TO BE DECIDED:	
16839 Appeal of Advisory Neighborhood Commission 4A	15
16808 Application of Abigail Parker . . .	17
16811 Appeal of David and Janet Pritchard	24
16869 Application of Kings Creek, LLC . .	44
16553G Application of The George Washington University	70
15163 Application of Saint James Washington Limited Partnership I	80

Let me first state I think we were all a little taken aback on paper looking at the fact of the height increased that was requested. And it is one issue that we need to bring up immediately and that is whether we were looking at this as a variance or a special exception and we have a submission to that. Actually, let's take that up and then I'll get into the substance of the height itself.

I felt that the submission was very strong in making its case that, in fact, the Reed-Cooke Overlay is the provision of which we should be following and that is because it speaks directly to and I'd note 1403.1A that it clearly spells out the use of the building, the features at the size, intensity, location proposed, my point saying they're outlying all of these in the overlay clearly taking understanding that this should regulate any sort of project that comes through and also lays out the fact that it is a special exception.

Based on the fact that this overlay specifically goes to size and states building as if they're talking about the massing of the structure, I don't see any reason and I'm not compelled to move beyond the overlay into the further text of the R-5-B District.

And additionally, I should point out also going down to G, the use building, feature, size, intensity, location, looks to how all that fits into and actually the special exception case and there is also provisions within the Overlay that speak directly to height and the regulation of that height.

So I would be inclined to continue as advertised that we look at the variance in the height. I should not use that word. The increase in the height to be a special exception.

Yes, Mr. May?

MR. MAY: Mr. Chairman, I read over the submission from the Applicant and I have to say I did not find their argument as persuasive with regard to the variance versus the special exception and -- but I think that given all of the other tests that are involved, the variances that are requested, the special exception that's requested, that when we evaluate the project as a whole, I don't see that there's any essential difficulty to evaluating the height issue as a special exception.

I would interpret the regulations to require it be considered as a variance, but we have other variance tests being applied here, so I don't -- I think that the -- that we are well covered in

considering the case as a whole and considering the height issue as a special exception.

CHAIRPERSON GRIFFIS: I think we ought to be careful though because, well, we ought to be clear. I think what I can glean from what you've just stated and I would concur with is the fact that the variance tests that are being made for the application could easily be applied to a variance for the height, but in total clarity, I think it is fairly persuasive, the fact that the Reed-Cooke Overlay was to -- and as submitted, it was really to speak to somehow, however we would define it, but good design and how design, massing and use and intensity and buildings would fit into this area and it was specific enough to make its own overlay and I think that the requirements within that overlay are the most restrictive in terms of the larger picture of really what is looking to be accomplished in this specific neighborhood and I think that the special exception goes to that and -- but I don't know that we need to belabor too much more. If there's consensus, we can pursue on special exception, but Mr. May, did you want to say something else?

MR. MAY: I think that the -- your sense that the intention of the Reed-Cooke Overlay is I think absolutely on target and I think there is a

particular concern with building height and I think, however, that where I part on this is simply that it's what we're considering is whether -- is our ability to make exceptions to that overlay as opposed to the extent by which we abide by it. I just think that we're -- as I said, I'm not uncomfortable with pursuing it as a special exception, particularly considering that what we have to evaluate here in the case of the height in some ways may be the more stringent standard which is no adverse impact.

CHAIRPERSON GRIFFIS: Exactly. And that's where -- I note your point and maybe this will be the last piece said on it, but the Reed-Cooke Overlay outlines very specifically how one takes exception to the requirements and I think it is more productive for us and I think it perhaps can be more difficult for Applicants, but more productive for us to follow 1403 in its exceptions.

So with that, let us talk and we'll come back to the height issue, but let us talk about the variance from the floor-area ration requirements, also the variance from the lot occupancy requirements, the variance from nonconforming structure provisions under 2001.3.

And I think we can get through the pretty

the specifics of it and also to go through, of course, all of the tests for all the variances which again were stated and I think clearly the special exception as we have outlined comes in full compliance with the 1403 and I will leave it at that.

Others, discussion, questions on the motion?

MR. MAY: Mr. Chairman?

CHAIRPERSON GRIFFIS: Yes.

MR. MAY: I would like to suggest that we vote separately on the height issue because the objection that I have and I still have with this is the special exception for the height.

Can we vote separately on the variances versus the special exception?

CHAIRPERSON GRIFFIS: I'm inclined not to, actually, because I don't see how we'd take away the height special exception and remove it from the project itself that's in front of us, unless we don't -- to me, that's tantamount to us sending it back to the Applicant and say redesign it and if we need to do that, then I would say the motion would probably fail.

I see them all too intertwined and connected to really separate them out and I don't see us and I don't want us, although others can give their

opinions, I don't want us to establish a height either, if we start looking at conditions that there can only be a certain amount that's beyond our purview at this point and I don't think that would be the thing to do.

MR. MAY: I wouldn't suggest that, but what does concern me is that while I find that I can support the variances for the reasons that are stated in the case, I do not find that I can support the height.

CHAIRPERSON GRIFFIS: But the basis of this case is that in order to maintain the existing structure, and actually keep it occupied while it's constructed and provide parking within the existing structure, there has to be an addition on top and that addition on top has to -- is presented before us. So I don't see how we disconnect the two.

MR. MAY: It's the height as proposed. There's no doubt that they would need a special exception in order to increase the height, but I mean -- if this were a case where the height being proposed were 50 feet or even 60 feet, it would be much easier to vote in favor, but at nearly 70 feet it's still highly problematic for me.

MEMBER ETHERLY: If I understand where

opinions, I don't want us to establish a height either, if we start looking at conditions that there can only be a certain amount that's beyond our purview at this point and I don't think that would be the thing to do.

MR. MAY: I wouldn't suggest that, but what does concern me is that while I find that I can support the variances for the reasons that are stated in the case, I do not find that I can support the height.

CHAIRPERSON GRIFFIS: But the basis of this case is that in order to maintain the existing structure, and actually keep it occupied while it's constructed and provide parking within the existing structure, there has to be an addition on top and that addition on top has to -- is presented before us. So I don't see how we disconnect the two.

MR. MAY: It's the height as proposed. There's no doubt that they would need a special exception in order to increase the height, but I mean -- if this were a case where the height being proposed were 50 feet or even 60 feet, it would be much easier to vote in favor, but at nearly 70 feet it's still highly problematic for me.

MEMBER ETHERLY: If I understand where

you're coming from, Mr. Chairman, I think what you're saying is you can't -- if you don't buy the height, then you can't buy the variances.

CHAIRPERSON GRIFFIS: Absolutely. I think I can, but that's what I'm asking. That's what I'm asking you to sell me.

MEMBER ETHERLY: I understand what you're talking about Mr. May and to me, my point, it's a different application and I'd rather -- if it fails, then -- I think it was strong in its testimony. You look at the base fact that the existing structure with parapet is over 30 feet high. There's not a lot of height within the limits of 40 feet to add on to this building to actually make it conforming with the intent of the Reed-Cooke in terms of providing the housing or actually which is -- I think what the Reed-Cooke Overlay is looking to do is create these urban structures which are mixed use structures. How do you do that if you really can't in any way add on to this and that's where I think special exception is appropriate at this point and the height also.

VICE CHAIR RENSHAW: Mr. Chairman, would you address the point of the precedent that this may be setting for height in the Reed-Cooke Overlay?

CHAIRPERSON GRIFFIS: I think the

precedent that this sets will be that the height and any variance from the height in the Reed-Cooke Overlay would be a special exception case before this Board.

MEMBER ETHERLY: And I would note also through you, Mr. Chairman, to Ms. Renshaw, that one of the things that gave me comfort was the topography that we discussed here and you're not necessarily going to see that with every additional property in this particular area, so I see that as a unique enough circumstance such that the potential for setting a precedent here isn't one that I think is one that's going to be easily followed in subsequent cases.

MR. ZAIDAIN: I was going to say. I think the point that you brought up, Mr. Chair, is that the special exception process kind of keeps it from setting a precedent where each individual case that is over and above what is allowed as a matter of right comes to this Board for its assessment of impacts, etcetera, etcetera, so and that being said each individual case is going to have its own different impacts. It's going to be in different locations and it's going to have different development parameters and as they come in at special exceptions, they ought to be evaluated on their own merits in that way.

CHAIRPERSON GRIFFIS: I would agree with

Government of the District of Columbia

OFFICE OF ZONING

441 4TH STREET, N.W.
SUITE 210
WASHINGTON, D.C. 20001
(202) 727-6311

MEMORANDUM

TO: Board of Zoning Adjustment

THRU: Jerrily R. Kress, FAIA
Director

FROM: Richard S. Nero, Jr. RSN
Special Assistant

DATE: July 30, 2002

RE: **Application No. 16869 of Kings Creek, LLC**, pursuant to 11 DCMR § 3103.2, for a variance from the floor area ratio requirements under section 402, a variance from the lot occupancy requirements under section 403, and a variance from the nonconforming structure provisions under section 2001.3, and pursuant to 11 DCMR § 3104.1, a special exception to exceed the height provisions (section 1402) of the Reed-Cooke Overlay District under section 1403, to construct an addition to an existing building for a mixed-use (residential and existing retail) development in the RC/R-5-B District at premises 2329 Champlain Street, N.W. (Square 2563, Lot 103).

On April 30, 2002, the Board approved the above-cited application, which included approval of a special exception to allow an increase in building height under section 1403 of the Reed-Cooke Overlay District. It has subsequently been determined, following consultation with the Office of the Corporation Counsel, that the requested relief from the height requirements should have been considered as a variance from the maximum matter-of-right height provisions of the underlying R-5-B District instead of a special exception.

Buildings in an R-5-B District may be built up to 50 feet as a matter of right. The Reed-Cooke Overlay restricts building heights in an R-5-B District to 40 feet. Section 1403 (Exceptions) of the Reed-Cooke Overlay allows the Board to grant a special exception from the height requirements of the overlay. By implication, a special exception cannot be approved for a height that exceeds the matter of right limit in the underlying R-5-B district. To find otherwise would, in effect, make the overlay less restrictive than the underlying district, which, as the Board is already aware, is not in keeping with the intent of the overlay. The applicant's proposed building would be over

BZA
Case No. 16869
Exhibit No. 34

69 feet, well over the 50-foot height limits for the R-5-B District. Therefore, a variance from the height requirement is required for the applicant's proposed project.

The Office of Zoning requests that the Board, on its own motion, reopen the record to reconsider the height of the building as a height variance pursuant to 11 DCMR §§ 3103.2 and 400. If the Board decides to reconsider the application, the OZ suggests the applicant supplement the record with arguments in support of the variance from the height requirements or that a rehearing is scheduled. The Board could then vote on the variance at its public meeting in September, 2002, or re-hear case, limited to the height variance, on October 15, 2002.

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May 24, 2002

RECEIVED
D.C. OFFICE OF ZONING
2002 MAY 24 AM 11:08

D.C. Board of Zoning Adjustment
441 4th Street, N.W., Suite 200
Washington, D.C. 20001

Re: BZA Application No. 16869
Proposed Findings of Fact and
Conclusions of Law

Dear Members of the Board:

The Applicant in the above-referenced matter hereby submits its Proposed Findings of Fact and Conclusions of Law in accordance with the Board's instruction at the conclusion of the hearing on April 30, 2002.

Please contact the undersigned if there are any additional questions or concerns at (202) 429-9000.

Sincerely yours,

GRIFFIN, FARMER & MURPHY, LLP

By _____
Jonathan L. Farmer
Counsel for Applicant
King's Creek, LLC

Enclosure
JLF:jih
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BZA
Case No. 16869
Exhibit No. 32

BEFORE THE BOARD OF ZONING ADJUSTMENT

OF THE DISTRICT OF COLUMBIA

Applicant's Proposed Findings of Fact and Conclusions of Law

Application of King's Creek, LLC, pursuant to 11 DCMR §3103.2, for a variance from the floor area ratio requirements under Section 402, a variance from the lot occupancy requirements under Section 403, and a variance from the non-conforming structure provisions under Section 2001.3, and pursuant to 11 DCMR §3104.1, a special exception to exceed the height provisions (Section 1402) of the Reed-Cooke Overlay District under Section 1403, to construct an addition to an existing building for a mixed use (residential and retail) development in the Reed-Cooke/R-5-B District at premises 2329 Champlain Street, N.W. (Square 2563, Lot 103).

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D.C. OFFICE OF ZONING
2002 MAY 24 AM 11: 08

Hearing Date: April 30, 2002
Decision Date: June 4, 2002

Summary of Evidence:

1. The subject property is located in the RC/R-5-B District on the east side of Champlain Street, N.W. north of its intersection with Kalorama Road, N.W.

2. The subject property is a 9,652 square feet lot occupied with a two story building with a footprint of 9,395 square feet. Lot occupancy is 97.3 percent. The height of the existing structure is 31.5 feet. The total existing building area is 18,401 square feet.

3. The subject site is improved with a stone, steel, concrete and brick structure that was erected as an automobile garage in 1924. The site is currently used as retail, office and storage space.

4. The subject site was originally zoned CM. The site was re-zoned by the Zoning Commission to R-5-B in 1987. The Zoning Commission created the Reed-Cooke Overlay in 1991 and the provisions of said overlay apply to the subject site.

5. The RC/R-5-B Zoning District permits developments of moderate height and density. This zone is designed to permit flexibility for all types of urban residential developments along with those institutional and semi-public buildings that are compatible with adjoining residential units. The Reed-Cooke Overlay District is designed to protect existing housing, provide for new residential development, and encourage small-scale business development that does not adversely affect the residential uses.

6. The RC/R-5-B Zoning District allows a lot occupancy of 60 percent, a floor area ratio of 1.8 and a maximum height of 40 feet. A total of 7 parking spaces would be required by the Applicant's proposal in this Zoning District.

7. The subject site is located in the Reed-Cooke neighborhood and is surrounded by a variety of uses but the area is predominantly residential. The area has a wide variety of buildings including auto repair shops, electroplating facilities, open parking lots, two story single family residential buildings and apartment houses, some of which are between five and seven stories. Directly to the west of the subject site is a mixed use development, known as the Lofts of Adams Morgan that contains 57 residential units, 4,000 square feet of retail space and has a height of 56 feet.

8. The Applicant proposes a mixed use development on the subject site. The existing building on the site will be retained in its entirety and four additional levels with 13 residential apartments will be added to the structure. The existing retail use on the first floor will be retained while the second floor will be renovated for parking and residential use. The Applicant has agreed with representatives of neighborhood interests to provide at least one "affordable" residential unit in the project.

9. The Applicant testified that, after due consideration of the requirements of the Reed-Cooke Overlay District, it was determined that the goals of the District would be best achieved by retaining the existing structure and its existing retail tenant. He stated that the existing structure, while not a designated landmark, was a unique architectural style that had substantial significance in the neighborhood. He further stated that one of his main goals was to ensure the continued presence of the Brass Knob in the Adams Morgan neighborhood because of its long time and much desired presence in the neighborhood. The Applicant indicated that the existing structure's unique physical construction provided an opportunity to add a significant amount of additional residential housing to the neighborhood. The Applicant explained that, in consultation with neighborhood representatives and organizations, the project was designed to avoid any possible adverse effects by providing parking for each unit and to provide additional outdoor space for each unit in a manner that added to the neighborhood aesthetic. The Applicant stated that the retention of the existing structure was a unique challenge that presented difficulties that could only be overcome by a special architectural design embodied in this project.

10. The project architect, Gregory Kearley, testified that the proposed structure represented an attempt to meet the challenges of the site and maximize the residential

character of the immediate neighborhood. He stated that the structure was designed with a series of setbacks that minimized the visual impact of the addition from the street while providing the maximum amount of light and air for both the residential units and the abutting street. He further testified that the height of the structure was compatible with the neighborhood and that it was specifically compatible with the height of the development immediately across the street to the west.

11. By memorandum dated April 23 and April 25, 2002 and by oral testimony at the April 30, 2002 public hearing, the D.C. Office of Planning stated that the subject application met all zoning requirements and recommended that it be approved. The memorandum noted that the proposed variances to increase the FAR and to address the lot occupancy issue and the special exception request to increase the height of the building meet the requirements of the Zoning Regulations. The Office of Planning further noted that the proposal to provide a mixed use development is a goal envisioned for the area covered by the Reed-Cooke Overlay. The Office of Planning noted the requests for relief would not cause any "substantial detriment to the public good" and "would not substantially impair the intent, purpose or integrity of the zone plan embodied in the Zoning Regulations or Map "because the proposal fulfilled the intent of increasing residential use and the height was mitigated by the setbacks

that allowed light to the street and the units themselves." In its testimony, the Office of Planning noted that the Applicant had met with community representatives and organizations and received their approval and agreed with their various proposals.

12. Darnell Bradford El, Chairman of the Reed-Cooke Neighborhood Association testified that he did not have a position on the application but that he was concerned with the "process". He requested that the matter be continued to allow further review by community residents. Under cross examination, Mr. Bradford El stated that he had not attended any of the previously held meetings between the community and the Applicant. In response, this Board left the record open for the Reed-Cooke Neighborhood Association to provide comments, however no additional comments were received from Mr. Bradford El or the Neighborhood Association.

13. The Board also left the record open for the Applicant to provide a memorandum on whether the height relief requested was a special exception or a variance under the Zoning Regulations. This memorandum was submitted and received in timely manner. Applicant concluded in this memorandum that the relief from the height restrictions of the Zoning Regulations is a special exception under Section 1403 of the Regulations.

14. ANC 1C filed a report in timely manner on the Applicant's proposal. In this report the ANC recommended approval of the application as requested and supported rapid development of the project. The ANC stated that the project was a welcome addition to the neighborhood and in their opinion met the expressed goals of the Reed-Cooke Overlay. The ANC further noted Applicant's efforts to solicit neighborhood comment on the project. The ANC supported the effort to provide additional light, air and outdoor space in the neighborhood.

15. Councilmember Jim Graham, in a letter dated March 8, 2002, urged this Board to approve this application, noting that the application met the expressed goals of the Reed-Cooke Overlay. The Councilmember also stated that the project would enhance the ambiance and reduce heat effects in his recommendation for approval. He noted that the Applicant had incorporated his suggestion for setbacks to avoid the creation of a "canyon" effect on Champlain Street.

16. There was no opposition to the application at the public hearing or in the record. No other persons or parties appeared at the hearing to testify in support of or in opposition to the application.

Findings of Fact:

Based on the evidence of record, the Board finds as follows:

1. The shape of the site, its topography and the existing non-conforming conditions of the structure thereon create "an extraordinary or exceptional situation or condition as to lot occupancy:"

   (a) The site is burdened with an architecturally significant and unique structure of neighborhood value whose continued existence is important to all involved. The property is unique due to an exceptional situation because it was originally developed under the requirements of the then imposed commercial and industrial zones. As a result of re-zoning, the structure became non-conforming in so far as the lot occupancy and FAR requirements of the RC/R-5-B zones.

   (b) Strict application of the Zoning Regulations in this instance would result in peculiar and exceptional practical difficulties for the Applicant. Compliance with the current regulation would require demolition of the existing structure in whole or part thus

destroying the architecturally significant structure. The structure is sound and adds to the variety of architectural styles in the Reed-Cooke area. Applicant's proposed addition does not increase the non-conformity of the structure as to lot occupancy.

(c) The variance requested by the Applicant as to lot occupancy will not cause detriment to the public nor will it impair the zone plan in any way. The retention of the existing building will not impair light and air and Applicant's proposal, through setbacks, will only enhance the public benefits. Full lot occupancy is common in the Reed-Cooke area. Retention of the existing business is consistent with both the Comprehensive Plan and the stated purposes of the Reed-Cooke Overlay.

2. The non-conforming conditions of the site as to building and to FAR require variance relief from the maximum FAR in the R-5-B District and for increasing a non-conforming structure as required under Section 2001.3 of the Zoning Regulations. The existing structure has a FAR of 1.9 and the maximum allowable FAR in the R-5-B District is 1.8. The building became non-conforming as to FAR when the zoning was changed under the Reed-Cooke Overlay. Applicant's proposal to retain the existing structure and uses naturally increases the FAR through the addition of the

residential units.

(a) The subject site is unique because the Applicant's proposal retains the whole of the existing architecturally significant building. This is an extraordinary or exceptional condition that shapes the Applicant's proposal.

(b) Strict application of the Zoning Regulations in this instance would result in the loss of the existing structure thus creating a practical difficulty for the Applicant and imposing an undue hardship for the owners of the existing business. Demolition of the structure would be a loss to the community at large because of the loss of the historic character and elimination of architectural variety in the area.

(c) The requested variances will not be a detriment to the public good because they allow the retention of a building that contributes to the architectural character in the neighborhood. It will also allow the existing retail use to remain and the addition of residential uses in accordance with the stated purpose of the Reed-Cooke Overlay. The proposed increase in FAR allows the Applicant to create additional housing units in a manner that minimizes the visual impact along

Champlain Street by setting back each additional level from the parapet line. This allows additional light to reach the street and the new residential units. This enhances the quality of life in the area without detriment to the public good or impairment of the zone plan.

3. The extraordinary or exceptional condition caused by retention and utilization of the existing structure require variance relief from the height provisions of the regulations.

   (a) The existing building cannot be utilized to provide housing due to its existing lot occupancy and bulk. There is no practical way to provide housing with its required parking without substantially increasing the height of the building by constructing on top of the existing structure.

   (b) The practical difficulties for the Applicant are further increased by the need to provide adequate light for the street and the new units through a series of setbacks. These difficulties are exceptional because lower heights would result in a substantial reduction in the amount of housing produced thus rendering the project impractical.

   (c) The requested height variance will not cause a

detriment to the public good nor will it impair the intent of the zone plan. As stated in the Office of Planning report, the proposed height of this project is consistent with other structures in the area. The provision of additional light and open space through the use of setbacks provide unique aesthetic value to the community and further enhances this project. In addition, Applicant has chosen to utilize one floor of the existing structure to provide additional parking thus alleviating a significant neighborhood concern.

Or In the Alternative:

3. Section 1403 of the Regulations provides that relief from the specific requirements of the Reed-Cooke Overlay District may be granted by the Board if specific criteria are met. The Applicant's proposal meets these criteria in full:

(a) **The use, building or feature at the proposed site, intensity and location substantially advance the stated purposes of the Reed-Cooke Overlay District**

The Reed-Cooke Overlay was intended to provide new housing, protect existing housing, maintain appropriate heights and densities, encourage small-scale business development, protect nearby residences and ensure that non-residential uses serve the local

community. The Applicant's proposal is completely compatible with these express purposes. Applicant's proposal provides thirteen new housing units. The height and density of the proposed project is, due to topography and existing structures compatible with the heights and densities of other buildings and developments in the immediate area. The proposal also provides for retention of the Brass Knob, a long serving local business that provides for the needs of housing renovators in the immediate area. The project will be developed by a local construction company which employs local residents and thus addresses the employment needs of the local communities. The project is designed to be self-sufficient in construction staging, thus protecting local residences from any undue harm or adverse impacts.

(b) **Vehicular egress and access is designed to minimize pedestrian conflict and creates no objectionable traffic conditions**

The proposed project will utilize the existing rear entrance to the building as its primary means of parking access. thus there will be no interference with pedestrian traffic. Only thirteen cars will utilize the garage space and will have no appreciable effect on traffic conditions in the area. The alley way ensures that most traffic will not utilize Champlain Street as

egress to the site.

(c) **Adequate Off-Street Parking is Provided for the Users**

One parking space is provided for each new housing unit created by this project. There is existing parking for the use of the Brass Knob. Most customers, however, arrive by foot as is typical for a truly local retail business.

(d) **There is no noise associated with the operation of the proposed uses that will adversely affect the neighbors**

The existing structure was built as an automotive garage and has brick and masonry walls surrounding concrete slabs. No particular noise will be generated by the retail or housing uses that would adversely affect the quality of life in the neighborhood. Construction of the addition will be in accordance with applicable law and regulation and will not produce any adverse effect. Construction will occur primarily within the existing structure, thus minimizing most associated noise.

(e) **There is no associated storage of materials, or**

outdoor processing, fabricating, or repair associated with the project

As previously stated, the bulk of the construction will occur within the building. There is no outdoor processing or storage associated with the existing retail use or planned housing units.

(f) **The use, building, or features of the proposed project will not adversely affect adjacent property nor will it be detrimental to the public health, safety or welfare**

This project is designed to complement the Reed-Cooke neighborhood by increasing the available housing stock without detracting from that already available. Applicant has worked hard to contact its neighbors and incorporate their views and concerns into the design of the project. ANC 1C has voted unanimously to support this application at its public forum on April 16, 2002. It is inherent in the nature of the project that it will produce no detrimental or otherwise adverse effects in its own environs. For these reasons, this proposal qualifies for the grant of the requested special exception.

Conclusions of Law and Opinion

Based on the evidence of record, the Board concludes that the Applicant is seeking area variances to allow an increase in the floor area requirements under Section 402, to allow continued non-conforming lot occupancy under Section 403 and allow an increase to the non-conforming structure under Section 2001.3 of the Regulations. The Board further concludes that the Applicant is seeking a special exception to exceed the height provisions of the Reed-Cooke Overlay District under Section 1403 of the Regulations.

Granting such variances requires a showing through substantial evidence of a practical difficulty upon the Applicant arising out of some unique or exceptional condition of the property such as exceptional narrowness, shape or topographical condition. The Board must find that the application will not be of substantial detriment to the public good and will not substantially impair the intent, purpose and integrity of the zone plan.

The Board concludes that the Applicant has met the burden of proof in this application. The Applicant has submitted evidence that demonstrates a unique, extraordinary and exceptional condition in the existing non-conforming structure that creates a practical difficulty for the Applicant in further developing the property.

The Board further concludes that increase in FAR, height, and lot occupancy to produce additional housing and retain the existing retail business will be accomplished through this proposal without substantial detriment to the public good.

The Board further concludes that the requested variances may be granted without substantially impairing the intent, purpose and integrity of the zone plan for the RC/R-5-B District.

Finally, the Board concludes that the Applicant has fully addressed and met the criteria for an increase in height as a special exception under Section 1403 of the Zoning Regulations as shown in the Findings of Fact.

In light of the foregoing it is hereby ordered that the application is **granted**.

Vote:

By Order of the D.C. Board of Zoning Adjustment

Attested by: _____

Jerilee Kress
Director

Final Date of Order: _____

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May 8, 2002

Mr. Richard S. Nero
Special Assistant to the Director
D.C. Board of Zoning Adjustment
441 4th St., N.W. Suite 210 South
Washington, D.C. 20001

RECEIVED
D.C. OFFICE OF ZONING
2002 MAY -8 AM 3:45

Re: BZA Application #16869
2329 Champlain Street, N.W.

Dear Mr. Nero:

Pursuant to the instructions of the BZA in the above-referenced case, we hereby submit the following materials:

1. Memorandum on Special Exceptions in the Reed-Cooke Overlay,
2. Letter from Councilmember Graham in support of this project,
3. Photographs of the model presented at the hearing,
4. Height Study of the Proposed Project indicating exact heights of the various floors, and
5. Letter of Support from ANC 1C

Copies of the Applicant's Proposed Findings of Fact will be presented on May 23rd pursuant to the Board's instruction. Please contact the undersigned at (202) 429-9000 if there are any concerns or questions.

Sincerely yours,

GRIFFIN, FARMER & MURPHY, LLP

BZA
Case No. 16869
Exhibit No. 31

By _____
Jonathan L. Farmer
Counsel for King's Creek, LLC

Enclosures
cc: ANC 1C

BEFORE THE BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA

Application of King's Creek, LLC
for Variance and Special Exception
Relief at 2329 Champlain Street, N.W.
(Square 2563, Lot 103)

BZA Application No. 16819
Hearing Date: April 30, 2002
Decision Date: June 2, 2002
ANC 1C

MEMORANDUM

The Board of Zoning Adjustment, at the conclusion of the public hearing in the above-referenced matter, requested that the Applicant provide a memorandum addressing the issue of whether the relief requested from the height provisions of the Zoning Regulations, in general, and specifically from the provisions of the Reed-Cooke Overlay constitutes a request for a variance or a special exception as a matter of law. After due consideration and discussion with appropriate authorities, the Applicant submits that the requested relief is a special exception under §1403 of the Zoning Regulations and, if the Board deems that the criteria thereunder is met by the application, then said special exception must be granted. The reasons for this conclusion are addressed below.

ARGUMENT

Section 3105.2 of the Zoning Regulations states that the Board shall have original jurisdiction to grant special exceptions in accordance with the provisions of Section 3108. Section 3108 states that the Board is authorized to grant special exceptions where, in the judgement of the Board, such an exception would be in harmony with the general intent and purpose of the Regulations and Zoning Map and will not adversely affect the use of neighboring property. It should be noted that special exceptions are not limited to use but are applied to the whole of the Zoning Regulations. For example, it should be noted that exceptions are provided for density, and height in many of the examples specifically described in 3108.1

provided certain described conditions are met.

A. The Zoning Commission Specifically Created Special Exception Relief from the Requirements of the Reed-Cooke Overlay District

In 1987, the Zoning Commission amended the Zoning Map to conform to the Comprehensive Plan for the National Capitol Area by changing those areas zoned C-M-2 to C-2-B and R-5-B in order to promote the retention of housing and appropriate commercial uses as well as promoting the creation of new housing opportunities in the Reed-Cooke Area. See Zoning Commission Order No. 523, April 13, 1987 (attached). The Commission, in conjunction with the Office of Planning, then proceeded to develop an appropriate text amendment known as the Reed-Cooke Overlay to further regulate growth in the area and to implement those provisions of the Comprehensive Plan that designated the Reed-Cooke area as a special treatment area. It was the Commission's intention to change the area from an industrial designation to a moderate density residential land use category. See Zoning Commission Order No. 523-A, February 11, 1991 (attached).

During the public hearings on the proposed overlay, the Zoning Commission had a direct opportunity to consider whether special exceptions were appropriate for the proposed Reed-Cooke Overlay. The Reed-Cooke Neighborhood Association (RAM), in testimony and written comment, specifically urged that special exceptions not be allowed as a means of relief from the Reed-Cooke Overlay provisions. See Z.C. Order No. 523-A, p.2. After due consideration of the testimony of RAM and other interested parties, the Commission adopted Section 1403 of the Zoning Regulations to provide conditions for relief from the strict application of the provisions of the Reed-Cooke Overlay. The Commission intentionally created standards for relief from all requirements of the chapter, including height, that comprised the requirements of the Overlay, as a special exception in Section 1403.1 of the Regulations. The Commission's intentions were clear and unequivocal. It

created the special exception provision of the Reed-Cooke Overlay to provide a tool by which development proposals could be evaluated to determine whether such proposals could achieve the stated purposes of the Reed-Cooke Overlay. See Z.C. Order No. 523-A, p.7. In the instant application before this Board, the Applicant's proposal meets the criteria for special exception as provided by the Zoning Commission in Section 1403.

B. The Zoning Commission has Provided Special Exception Relief for All Overlays in the Zoning Regulations.

Every overlay district created by the Zoning Commission provides for special exception relief from specific requirements of the various overlays as expressed in the Zoning Regulations. The special exception provisions provide maximum flexibility for the Board of Zoning Adjustment to evaluate development proposals and determine whether the stated goals of the overlays are being met. It was not the Zoning Commission's intent to limit relief to the form of variances only, particularly for the Reed-Cooke Area. Special exceptions encourage good design and creative approaches to the restrictions of the specific overlays.

C. The Board of Zoning Adjustment is Authorized to Grant Special Exceptions in the Reed-Cooke Overlay District.

As shown above, the Zoning Commission specifically created a special exception for the Reed-Cooke Overlay that provides relief from all of the restrictive provisions of Chapter 14 of the Zoning Regulations. The Board is authorized to grant special exceptions where, in its judgement, those special exceptions are in harmony with the general purpose and intent of the Zoning Regulations. The Board, in evaluating requests for exceptions, is limited to a determination of whether the exception sought meets the requirements of the particular regulation on which the application is based. Stewart v. District of Columbia Board of Zoning Adjustment, 305 A. 2d 516, 518 (D.C. 1973); see also French v. District of Columbia

Board of Zoning Adjustment; 658 A 2d 1023, (D.C. 1995). Applicants have the burden of showing that a particular proposal complies with the special exception regulation but once that showing has been made the Board must grant the application. First Baptist Church v. District of Columbia Board of Zoning Adjustment, 432 A. 2d 695 (D.C. 1981). In the instant case, Applicant clearly seeks special exception relief from the height requirements of the Reed-Cooke Overlay and relief must be granted if the Board determines that applicable requirements are met.

CONCLUSION

For the reasons expressed, Applicant's request for relief from the height provisions of the Reed-Cooke Overlay is a special exception under Section 1403 of the Zoning Regulations.

Respectfully submitted,

Jonathan L. Farmer
Griffin, Farmer & Murphy, LLP
Counsel for Applicant
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E:\Clients\Kostelac, Dominque & Kings Creek, LLC\memorandum 050702.wpd

Government of the District of Columbia

ZONING COMMISSION

ZONING COMMISSION ORDER 523-B
Case No. 88-13
(Reed-Cooke Special Treatment Area:
Text and Map Amendment)
February 11, 1991

The Zoning Commission initiated this case to consider amendments of the text and map of the Zoning Regulations that would implement the Comprehensive Plan for the National Capital, and in particular, Section 1128 of the Land Use Element, which reads as follows:

Section 1128. Reed-Cooke Special Treatment Area

(a) The Reed-Cooke area is designated as a special treatment area.

(b) The policies established for the Reed-Cooke special treatment area are as follows:

(1) Protect current housing in the area, and provide for the development of new housing.

(2) Maintain heights and densities at appropriate levels; and

(3) Encourage small-scale business development that will not adversely affect the residential community.

D.C. Law 8-129, the District of Columbia Comprehensive Plan Amendments Act of 1989, became effective on May 23, 1990. Law 8-129 did not amend Sec. 1128; however, Sec. 2(a)(10)(L) of Law 8-129 adopted Sec. 1136(b)(42) to provide that the Generalized Land Use Map, as revised, would generally depict the Reed-Cooke Special Treatment area as "included in the moderate density residential land use category."

The Zoning Commission believes that the action that it effects by this order harmonizes Sec. 1128 and Sec. 1136(b)(42) of the Land Use Element. The rezoning action protects current housing and provides for the development of new housing, by rezoning the C-M-2 zoned portions to R-5-B, C-2-A, or C-2-B, within the Reed-Cooke (RC) Overlay. These zoning map changes provide a favorable zoning environment for continued residential and new residential development.

This contrasts sharply with the previous C-M-2 zoning, under which no new dwelling would be allowed. See 11 DCMR 800.4.

Consideration of this case has been long and has presented the Commission with the need to make a difficult choice. The amendment to the Land Use Element reflects the same difficulty. Existing residential, commercial, and industrial uses are juxtaposed in the area. All are thriving, at least sufficiently to deserve protection. These uses are not easily made compatible, and their proximity causes problems that detract from the reasonable enjoyment of the residential uses. The difficulties are compounded by narrow, crowded streets, and sharply-angled and dog-leg intersections.

The Office of Planning conscientiously crafted a proposal that undertook to resolve these issues. The OP proposal clearly established the correct direction and included the essential elements of the decision that the Commission has reached. That proposal was to rezone the area to C-2-B within the RC Overlay. OP concluded that a C-2-B base zone would protect and encourage residential uses consistently with the Comprehensive Plan, and at the same time provide a greater measure of viability for the established commercial and industrial uses, again consistent with the plan, than would an R-5-B base.

The Commission's conclusion is different in several ways from the OP recommendation, but is essentially based on the OP analysis. The Commission has decided that a substantial area of R-5-B base zoning is reasonable and necessary to protect current housing and provide for the development of new housing, and that a lower height limit is necessary to effect the same policies.

The final action that the Commission effects by this Order is based upon two notices of proposed rulemaking, which appeared in the D.C. Register on August 3, 1990, and November 9, 1990 (37 DCMR 5106 and 7139, respectively). The second notice followed a public hearing on September 13, 1990, at which the Commission considered several issues that were not within the scope of the earlier public hearing. The comments on the proposed rules are set forth below.

RAM, the Read-Cooke Neighborhood Association, urged that special exceptions not be allowed as a means of relief from the RC Overlay provisions; that access to and from parking uses be limited to streets wider than sixty feet; and that assembly halls, auditoriums, and public halls, be added as prohibited uses. RAM also observed that the Citadel Soundstage had stopped operating.

assembly halls, auditoriums, and public halls, be added as prohibited uses. RAM also observed that the Citadel Soundstage had stopped operating.

ANC 1-C continued to urge the Zoning Commission to set a hearing on pure residential zoning; limit height to 50 feet, including roof structures within the 50-foot limit; and provide linkage for housing for low and moderate income families, with the benefits linked to the Reed-Cooke area. ANC 1-C also supported proposed 11 DCMR 1400.5(c) and (d), and 11 DCMR 1401.1(u) through (x).

The 18th & Columbia Road Business Association supported the 50-foot height limit; parking uses, with ANC review, rather than as a special exception; and flexibility for the height and floor area of PUDS.

A number of property owners or their counsel requested particular exemptions or changes to accommodate various specific properties, including the Security Storage Site at 1701 Florida Ave., the site leased by C&P Telephone Co. at 1711 Florida Ave., and the former National Geographic warehouse at 1707 Kalorama Road.

The Zoning Commission referred both notices of proposed rulemaking to NCPC, the National Capital Planning Commission. By comments dated October 4, 1990, and December 14, 1990, NCPC reported that the proposed amendments would not adversely affect the federal establishment or other federal interests in the National Capital, nor be inconsistent with the Comprehensive Plan.

At its meeting on February 11, 1991, the Zoning Commission considered the written comments, and determined:

1. Deletion of proposed sub-sections 1401.2 and 1401.3 is appropriate, because of the termination of the particular use that the provisions would have protected;

2. The preferred version of proposed sub-section 1402.1 is the version that includes an incentive to provide low and moderate income household units;

3. It would not be practical to prohibit access to parking uses from streets that are not wider than sixty feet; and

4. Other recommended changes have been considered, but do not require explicit discussion.

The Zoning Commission believes that the proposed amendments to the Zoning Regulations are in the best interest of the District of Columbia, are consistent with the intent and purpose of the Zoning Regulations and Zoning Act, are not

inconsistent with the Comprehensive Plan for the National Capital, and will appropriately implement and advance the objectives and policies established in the Comprehensive Plan.

In consideration of the reasons set further herein, the Zoning Commission hereby orders APPROVAL of amendments to the Zoning Regulations to establish and map a Reed-Cooke Overlay Zone District, and make related amendments to the Zoning Map. The specific amendments to the Zoning Regulations are as follows:

1. Amend the text of the Zoning Regulations by adopting a new Chapter 14 of Title 11, to read as follows:

CHAPTER 14 REED-COOKE OVERLAY DISTRICT

1400 GENERAL PROVISIONS

1400.1 The Reed-Cooke Overlay District is applied to the portions of Squares 150, 2557, 2558, 2560, 2562, 2563, 2566, 2567, and 2572 in the Reed-Cooke Special Treatment Area, as defined in the Comprehensive Plan, that are zoned non-residentially as of January 1, 1989.

1400.2 The purposes of the District are as follows:

(a) To implement the objectives of the Reed-Cooke Special Treatment Area (Section 1128 of the Comprehensive Plan as adopted), which are to:

(1) Protect current housing in the area, and provide for the development of new housing;

(2) Maintain heights and densities at appropriate levels; and

(3) Encourage small-scale business development that will not adversely affect the residential community.

(b) To ensure that new non-residential uses serve the local community by providing retail goods, personal services, and other activities that contribute to the satisfaction of unmet social, service, and employment needs in the Reed-Cooke and Adams-Morgan community; and

(c) To protect adjacent and nearby residences from damaging traffic, parking, environmental, social, and aesthetic impacts.

1400.3 The Reed-Cooke Overlay District and the underlying commercial and residential zone districts shall together constitute the Zoning Regulations for the geographic area identified in sub-section 1400.1.

1400.4 Where there are conflicts between this chapter and the underlying zoning district, the more restrictive regulations shall govern.

1400.5 In addition to other applicable provisions of this title, the requirements of this chapter shall apply to the following:

(a) All new construction;

(b) All additions, alterations, or repairs that, within any 18 month period exceed in cost 50 percent (50%) of the assessed value of the structure as set forth in the records of the Office of Property Assessment on the date of the application for a building permit;

(c) Any use that requires a change in the use listed on the owner's or lessee's certificate of occupancy; and

(d) Any existing use that requires a new permit from the Alcoholic Beverage Control Board.

1400.6 If there is a dispute between the property owner and the Zoning Administrator about the cost pursuant to sub-section 1400.5(b), the cost shall be determined by the average of the estimates furnished by three independent qualified contractors, the first of whom shall be selected by the owner, the second of whom shall be selected by the Zoning Administrator, and the third of whom shall be selected by the first two contractors.

1400.7 The estimates provided for by sub-section 1400.6 shall be prepared and submitted according to a standard procedure and format established by the Zoning Administrator, and the cost of estimates shall be at the expense of the property owner.

1401 USE PROVISIONS

1401.1 The following uses are prohibited in the Reed-Cooke Overlay District:

(a) Bar or cocktail lounge;
(b) Off-premises alcoholic beverage sales;
(c) Restaurant or fast food restaurant;
(d) Hotel or inn;
(e) Transient accommodations that are not home occupations;
(f) Movie theater;
(g) Gasoline service station or repair garage;
(h) Automobile laundry;
(i) Drive-through;
(j) Automobile or truck sales;
(k) Boat or other marine sales;
(l) Motorcycle sales or repair;
(m) Automobile rental agency that stores or services automobiles within the Overlay District;
(n) Billiard parlor or pool hall;
(o) Video game parlor;
(p) Bowling alley;
(q) Funeral mortuary or other similar establishment;
(r) Parcel delivery service establishment other than one that is exclusively dedicated to serving a sound stage or a movie, video, or television production facility that existed on the effective date of this chapter;
(s) Veterinary hospital;
(t) On-premises dry cleaning establishment;
(u) Assembly hall, auditorium, or public hall;
(v) Bus passenger depot;
(w) Antenna tower in excess of twenty (20) feet in height;
(x) Satellite reception dish that is greater than fifteen (15) feet in diameter; and
(y) Any use prohibited in the CR District by sub-section 602.1 of this title, except a parking lot as permitted by sub-section 1403.2 of this chapter.

1402 HEIGHT AND BULK PROVISIONS

1402.1 The maximum height permitted in the Reed-Cooke Overlay District shall not exceed forty (40) feet plus roof structure as defined in this title; provided that in the RC/C-2-B District the Board of Zoning Adjustment may approve a maximum height of fifty (50) feet with appropriate set-backs from the street, plus roof structures, subject to

determination by the Board that the project will provide for the on-site construction or substantial rehabilitation of low and moderate income household units, as defined by the regulations of the Department of Housing and Community Development of the District of Columbia, of a total gross floor area equal to fifty percent (50%) of the additional gross floor area made possible by this exception.

1402.2 For the purpose of this chapter, no Planned Unit Development shall exceed the matter-of-right height, bulk, and area requirements of the underlying district.

1403 EXCEPTIONS

1403.1 An exception from the requirements of this chapter shall be permitted only if granted by the Board of Zoning Adjustment as a special exception after a public hearing, and subject to the following criteria:

(a) The use, building, or feature at the size, intensity, and location proposed will substantially advance the stated purposes of the Reed-Cooke Overlay District;

(b) Vehicular access and egress shall be designed and located so as to minimize conflict with pedestrian ways, to function efficiently, and to create no dangerous or otherwise objectionable traffic condition;

(c) Adequate off-street parking shall be provided for employees, trucks, and other service vehicles;

(d) If located within a C-2-B zone, the use shall not be within 25 feet of a Residence District, unless separated therefrom by a street or alley;

(e) Noise associated with the operation of a proposed use will not adversely affect adjacent or nearby residences;

(f) No outdoor storage of materials, nor outdoor processing, fabricating, or repair shall be permitted; and

(g) The use, building, or feature at the size, intensity, and location proposed will not adversely affect adjacent and nearby property or be detrimental to the health, safety, convenience, or general welfare of persons living, working, or visiting in the area.

1403.2 A parking lot or parking garage shall be permitted if approved by the Board of Zoning Adjustment as a special exception, subject to the following:

(a) The parking lot or garage shall meet the conditions specified in sub-sections 214.4 through 214.8 of chapter 2 of this title;

(b) The parking lot or garage shall meet the conditions set forth in sub-section 1403.1 of this section; and

(c) The Board may require that all or a portion of the parking spaces be reserved for residential parking, unrestricted commercial parking, accessory parking for uses within 800 feet, and shared parking for different uses by time of day.

2. Rezone from C-M-2 to RC/C-2-B the following lots and squares:

a. In Square 2560, Lots 64, 125, 875, and 882;

b. In Square 2572, Lot 36;

c. In Square 2562, all lots now zoned C-M-2 and not occupied by the Marie Reed School, including Lots 95, 97, and 824;

d. In Square 2567, Lots 58 through 60, 81, and 851;

e. In Square 2566, all lots now zoned C-M-2 and not rezoned to RC/R-5-B in the following paragraph numbered 3; and

f. Any lot in Square 2560, 2567, or 2572 that is now zoned C-M-2 and not specifically listed in this paragraph.

3. Rezone from C-M-2 to RC/R-5-B the following lots and squares:

a. In Square 2563, Lots 73, 79 through 81, 97, 98, 101, 816, 862, 879, 880, 883 through 885, and 887;

b. In Square 2558, the portion of the Square that is now zoned C-M-2;

c. In Square 2562, the portion of the Square that is now zoned C-M-2 and occupied by the Marie Reed School;

d. In Square 2566, Lot 36; Lot 55 (or 95) (occupied by Colortone Press); and Lots 839 and 841 from Ontario Road to a line parallel to and 70 feet east of Ontario Road; and

e. Any lot in Square 2558 or 2563 that is now zoned C-M-2 and is not specifically listed in this paragraph.

4. Rezone from C-M-2 to RC/C-2-A following lots and squares:

a. In Square 2557, Lot 800;

b. In Square 150, Lot 800; and

c. Any lot in Square 150 or 2557 now zoned C-M-2, and not specifically listed in this paragraph.

Vote of the Zoning Commission on proposed action on April 16, 1990: 4-0, in part; 5-0, in part; and 3-1, in part (Maybelle Taylor Bennett, John G. Parsons, Tersh Boasberg, and William Ensign to approve proposed amendments to the text of Title 11; and, except as specified herein, to approve proposed amendments to the Zoning Map; Lloyd D. Smith not voting, not present; Maybelle Taylor Bennett, John G. Parsons, Tersh Boasberg, William Ensign, and Lloyd D. Smith to approve proposed rezoning in Square 2562; John G. Parsons, Maybelle Taylor Bennett, and Tersh Boasberg to approve proposed rezoning in Square 2566; William Ensign, opposed; Lloyd D. Smith not present, not voting).

Vote of the Zoning Commission on proposed action on October 15, 1990: 4-1 in part, and 5-0 in part (Lloyd D. Smith, John G. Parsons, Maybelle Taylor Bennett, and William Ensign to approve an alternative text of 11 DCMR 1402.1; Tersh Boasberg, opposed; and Lloyd D. Smith, John G. Parsons, Maybelle Taylor Bennett, William Ensign, and Tersh Boasberg to approve proposed 11 DCMR 1400.5(c) and (d), and 11 DCMR 1401.1(u) through (y).

This order and amendments to Title 11, DCMR, and to the zoning map, were revised and adopted by the Zoning Commission at its meeting on February 11, 1991, by a vote of 5-0 (Maybelle Taylor Bennett, William L. Ensign, Tersh Boasberg, Lloyd D. Smith, and John G. Parsons to approve.

Pursuant to 11 DCMR 3028, this Order shall be final and effective when it is published in the D.C. Register, that is, on APR 26 1991.

TERSH BOASBERG
Chairman
Zoning Commission

EDWARD L. CURRY
Executive Director
Zoning Secretariat

nopr88-19/LJP63

(corrected 2-16-88)

Government of the District of Columbia
ZONING COMMISSION

ZONING COMMISSION ORDER NO. 523
Case No. 86-12
(Reed-Cooke Map Amendment)
April 13, 1987

Pursuant to notice, a public hearing was held by the Zoning Commission for the District of Columbia on October 20, 1986. At that hearing session, the Zoning Commission considered proposed amendments to the Zoning Map of the District of Columbia. The public hearing was conducted in accordance with the provisions of Section 3021 of the Zoning Regulations.

On May 12, 1986, the Zoning Commission initiated action to consider the review of various text and/or map amendments that, among other issues and areas of the city, included the Reed-Cooke neighborhood.

During the following months, the Zoning Commission received letters or comments from Councilmembers Clarke and Smith, the 18th and Columbia Road Business Association, Hoskinson and Davis, Inc., Advisory Neighborhood Commission (ANC) 1C, the Reed-Cooke Neighborhood Association (RAM), the Legal Aid Society and Andrew Wechsler, that addressed various issues in the Reed-Cooke area, which included, but was not limited to, conformance with the Comprehensive Plan, a moratorium on demolition permits, the retention of housing, and the loss of jobs in connection with the loss of commercial property.

On September 8, 1986, at its regular monthly meeting, the Zoning Commission considered a memorandum dated September 2, 1986, from the Office of Planning (OP) requesting the expedited processing of Case No. 86-12 so that certain residential uses would be retained. The Commission determined that it would expedite the process and authorized the scheduling of a public hearing for the case.

For the purpose of advertising for hearing, the Commission approved a proposal, which was intended to provide for land use control over future development of the area, and to make the zoning not inconsistent with the Comprehensive Plan.

The Land-Use Element of the Comprehensive Plan for the National Capital designates the Reed-Cooke area as a "Special Treatment Area", and defines it as a pocket of C-M-2 in the Adams Morgan Community.

The notice of public hearing, which was published in the District of Columbia Register on September 19, 1986, includes a proposal to change the zoning of various lots in Squares 2560, 2562, 2563, 2566, 2567, and 2571 from C-M-2 to R-5-B.

The C-M-2 District permits medium bulk commercial and light manufacturing uses, to a maximum floor area ratio (FAR) of 4.0 and a maximum height limit of sixty feet, with new residential uses prohibited.

The R-5-B District permits matter-of-right development of general residential uses including single-family dwellings, flats, and apartments to a maximum lot occupancy of sixty percent, a maximum floor area ratio (FAR) of 1.8 and a maximum height of sixty feet.

The District of Columbia Office of Planning (OP), by memorandum dated October 10, 1986, and by testimony presented at the public hearing, supports R-5-B rezoning, particularly for major clusters of existing housing. The OP believes that this is consistent with the Comprehensive Plan, with the surrounding zoning and with the medium density goal. Zoning options would apply to the remainder of the area. Mixed use or commercial-industrial zoning applied to existing residences would be an encouragement for redevelopment and in conflict with city goals.

The OP further believes that rezoning to R-5-B would fulfill the Comprehensive Plan designation of the residential component as medium density. This zone district is also moderate enough in permitted FAR (1.8) to serve as a conservation zone for row dwellings. The R-5-B is the predominate surrounding residential zone. It should be noted that 1.8 FAR is only three stories at 60 percent lot coverage. Many older row dwellings exceed 60 percent coverage, so that many row dwellings of only two stories are not far below a 1.8 FAR. This margin leaves little incentive for land assembly and new development under R-5-B controls. The R-5-B leaves the smaller row houses with some opportunity for construction of additions without going to the Board of Zoning Adjustment (BZA) for approval. The alternative of mapping R-4 (0.9 FAR) or R-5-A (1.0 FAR) would make most of the existing row dwellings nonconforming structures, thereby requiring BZA approval of an addition to a nonconforming structure.

Advisory Neighborhood Commission (ANC) 1C, by testimony presented at the public hearing supported the proposal.

ANC-1C, by letter dated November 21, 1986, supports the OP and the Reed-Cooke Neighborhood Ass'n. (RAM), with the exception of the Colortone Press property, for which it took no position at this time. The submission by ANC-1C did not comply with the requirements of Title 11, DCMR 3011.7 (c), (d), and (e) in that it did not state that the ANC gave proper notice of its meeting, did not state the number of members of the ANC that constitute a quorum, and did not set forth the ANC's issues and concerns, other than very general support of the rezoning proposal.

Councilmembers Betty Ann Kane, Hilda H. Mason, Frank Smith, and John Ray, by testimony presented at the public hearing and/or by letters, supported the proposal or the position of the residential community groups.

The Commission heard testimony and received letters from many persons in support of the proposal or modification thereto. Issues associated with support for the proposal included the following:

1. Retention and potential increase of residential uses;

2. Conformance with the Comprehensive Plan;

3. Less commercial-related traffic; and

4. Help provide for a good racial mix of people.

The Commission also head testimony and received letters from many persons, that represented the business community, in opposition to the proposal for the following reasons:

1. The proposal had no planning basis and lacked adequate economic and fiscal impact studies;

2. That certain properties were proposed for rezoning in error; that their exterior appearance read residential but their uses were conforming commercial uses;

3. The economic loss to affected business and property owners;

4. The adverse social impact on the quality of life for resident/business persons in the area;

5. Loss of tax revenues and jobs to the city; and

6. The adverse affect on the Whitman Walker Clinic.

With the exception of one affected property, the Zoning Commission concurs with the position of the Office of Planning, ANC-1C, and others.

The Commission is mindful of the fact that in all area-wide rezoning actions, some properties will become non-conforming in some manner. The Commission, however, believes that the issues related to retention and preservation of housing and non-inconsistency with the Comprehensive Plan over-shadows the concerns of various business interests.

The Commission believes that the Whitman Walker Clinic, which is a medical facility, should not be adversely affected because of its value and service to the neighborhood and the city. The Commission is mindful that the owner of the clinic is completing a comprehensive renovation of the interior space of the existing conforming structure and use. The Commission believes that rezoning said property to render the structure and use as non-conforming would be inappropriate and unwarranted.

A notice of proposed rulemaking was published in the D.C. Register on February 6, 1987 (34 DCR 1055). As a result of that notice, the Commission received comments from the Citadel Corporation Pension Plan, Albert Ceccone, the 18th and Columbia Road Business Association, Linowes and Blocher, the Reed-Cooke Neighborhood Association, and Devres, Inc.

On March 9, 1987, at its regular monthly meeting, the Commission considered the comments of the aforementioned persons and determined that it needed additional information relative to actual use of various properties vis-a-vis the exterior appearance of the use of those properties. The Commission requested the OP to submit an inventory of uses chart. The Commission also provided an opportunity for the above-mentioned persons to comment on the chart.

On April 13, 1987, at its regular monthly meeting, the Commission considered a memorandum dated March 25, 1987 from the OP regarding the inventory of uses, a letter dated April 2, 1987 from the 18th and Columbia Road Business Association, a letter dated April 3, 1987 from the Reed-Cooke Neighborhood Association, and a letter dated April 3, 1987 from the law firm of Linowes and Blocher.

At that same meeting and subsequent to discussion of the aforementioned submissions, the Commission determined that it would not rezone lots 73, 79, 80, and 81 in Square 2563, because it was inappropriate to do so. The Commission, also determined that it needed additional information to consider the disposition of lot 880 in Square 2563. Consequently, the Commission requested the OP to provide it with photographs and additional material that would help the

Commission to better understand the use and improvement on lot 880 in Square 2563.

On April 20, 1987 at a special meeting, the Commission considered two memoranda dated April 17, 1987 from the OP. Subsequent to discussion, the Commission voted 2-1 not to rezone lot 880 in Square 2563. Because the Commission did not have a majority vote to carry the motion, the Chairman left the record open for a member of the Commission, who was not in attendance, to cast an absentee vote. On April 27, 1987, said member of the Commission voted not to rezone lot 880 in Square 2563.

The Zoning Commission believes that the proposed amendments to the Zoning Map of the District of Columbia are in the best interest of the District of Columbia, are consistent with the intent and purpose of the Zoning Regulations and Zoning Act, and are not inconsistent with the Comprehensive Plan for the National Capital.

The proposed action of the Zoning Commission to rezone various properties in the Reed-Cooke area was referred to the National Capital Planning Commission, pursuant to the District of Columbia Self-Government and Governmental Reorganization Act. The NCPC, through its Executive Director and by report dated February 4, 1987, found that the proposed action of the Zoning Commission would not adversely affect the Federal Establishment or other Federal interests in the National Capital, nor be inconsistent with the Comprehensive Plan for the National Capital.

The submission by Advisory Neighborhood Commission - 1C did not satisfy the Zoning Commission's procedural requirements for an ANC to be accorded the "great weight" to which it would be entitled. The Zoning Commission notes that the special statutory role of ANCs also entails specific procedural responsibilities. The Zoning Commission is therefore of the view that the "great weight" requirement does not apply to the submission of ANC-1C. Nonetheless, the Zoning Commission has considered that submission in its decision.

In consideration of the reasons set forth herein, the Zoning Commission for the District of Columbia hereby orders APPROVAL of the following amendments to the Zoning Map of the District of Columbia:

1. CHANGE FROM C-M-2 TO C-2-B

   SQUARE 2560 - lot 838; and

2. CHANGE FROM C-M-2 TO R-5-B

a. SQUARE 2560 - lots 32, 41, 42, 43, 44, 809, 817, 827, 852, 853, 854, 855, 856, 857, 858, and 859;

b. SQUARE 2562 - lots 66, 67, 68, 69, 70, 71, 72, 73, and 825;

c. SQUARE 2563 - lots 74, 75, 82, 83, 84, 85, 834, 858, and 888;

d. SQUARE 2566 - lots 9 and 822;

e. SQUARE 2567 - lots 49, 50, 51, 52, 53, and 54; and

f. SQUARE 2571 - lots 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 919, 924, and 959.

Vote of the Zoning Commission taken at the public meeting on December 8, 1986: 4-0 (John G. Parsons, George M. White, Lindsley Williams, and Patricia N. Mathews, to approve C-2-B and R-5-B - Maybelle T. Bennett, not voting, not having participated in the case).

This order, exclusive of one property, was adopted by the Zoning Commission at its public meeting on April 13, 1987, by a vote of 4-0 (Patricia N. Mathews, George M. White, John G. Parsons and Lindsley Williams, to adopt as amended - Maybelle T. Bennett, not voting not having participated in the case).

On April 20 and 27, 1987, the Commission voted the disposition of that one remaining property by a vote of 3-1 (Patricia N. Mathews, John G. Parsons, and George M. White, not to rezone lot 880 in Square 2563 - Lindsley Williams, opposed and Maybelle T. Bennett, not voting not having participated in the case).

In accordance with the provisions of Section 3028 of the Zoning Regulations, this order is final and effective upon publication in the D.C. Register, that is on 29 MAY 1987.

LINDSLEY WILLIAMS
Chairman
Zoning Commission

EDWARD L. CURRY
Acting Executive Director
Zoning Secretariat

H

District of Columbia Court of Appeals.

Kindy FRENCH, et al., Petitioners,
v.
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent,
Ann Cullen, Intervenor.

No. 92-AA-1064.

Argued Jan. 7, 1994.
Decided May 15, 1995.
As Amended May 16, 1995.

Property owner applied to Board of Zoning Adjustment for area variance and special exception to allow her to lease property to nonprofit organization and both requests were granted. Two neighbors opposing application filed a motion for reconsideration, which Board denied. Neighbors appealed. The Court of Appeals, Terry, J., held that: (1) Board's order was not moot; (2) filing of petition for review with Court of Appeals did not operate to stay effect of Board's order; (3) as a matter of first impression, holding that filing of a petition for review shall not operate to stay the effect of a Board's order was purely prospective; (4) Board's grant of a special exception permitting property owner to lease building to nonprofit organization was supported by substantial evidence; and (5) Board's decision to grant variance was supported by substantial evidence.

Affirmed.

West Headnotes

[1] **Zoning and Planning** ⚿**570**
414k570 Most Cited Cases

Board of zoning adjustment's order granting property owner's request for area variances and special exception to allow nonprofit organization to lease building was not moot, although particular organization had decided not to occupy property, where order did not assume that building would be leased by any particular nonprofit organization and conditions set forth in order would be applied to any organization that leased property.

[2] **Zoning and Planning** ⚿**501**
414k501 Most Cited Cases

Like the variance itself, any conditions imposed on the granting of a variance must run with the land.

[3] **Zoning and Planning** ⚿**501**
414k501 Most Cited Cases

Conditions set forth in board of zoning adjustment order could not lawfully have been applied only to one particular nonprofit organization but had to be applied to any organization that leased property.

[4] **Zoning and Planning** ⚿**501**
414k501 Most Cited Cases

Personal conditions imposed on granting of a variance impermissibly regulate business conduct of owner, rather than use of his property and are unlawful per se.

[5] **Zoning and Planning** ⚿**546**
414k546 Most Cited Cases

The filing in Court of Appeals of petition for review of decision of board of adjustment regarding variance did not operate to stay the effect of board's order. D.C.Code 1981, § 1-1510(a).

[6] **Municipal Corporations** ⚿**169**
268k169 Most Cited Cases

Office of corporation counsel has no authority to modify either a statute or a regulation; any opinion of corporation counsel that conflicts with either a statute or a regulation is necessarily invalid.

[7] **Courts** ⚿**100(1)**
106k100(1) Most Cited Cases

In deciding whether to apply new rule of law retroactively or prospectively, Court of Appeals considers several factors: extent of reliance by parties on previous rule, need to avoid any alteration of property or contract rights, policy of rewarding plaintiffs who seek to initiate just changes in law, and desire to avoid unduly burdening administration of justice with retroactive changes in law.

[8] **Courts** ⚿**100(1)**
106k100(1) Most Cited Cases

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Holding that filing of petition of review would not operate to stay effect of board of zoning adjustment's order was purely prospective as property owner and board had reasonably relied on corporation counsel's opinion that petition for review of board decision tolled date for applying for a building permit; opinion was issued by city's top legal office 18 years previously and had never been challenged, and successful parties before board traditionally had not obtained either certificate of occupancy or building permit until judicial review had been completed.

[9] **Courts** ⚿**100(1)**
106k100(1) Most Cited Cases

Holding is purely prospective, meaning that it will apply only to orders entered on or after date of a court opinion, and has no application to an order on review before court.

[10] **Zoning and Planning** ⚿**605**
414k605 Most Cited Cases

[10] **Zoning and Planning** ⚿**703**
414k703 Most Cited Cases

Court of Appeals' standard of review for orders of board of zoning adjustment is whether agency made findings of facts on each material contested issue of fact, substantial evidence supported each finding, and board's conclusions flow rationally from its findings of fact. D.C.Code 1981, § 1-1510(a)(3)(E).

[11] **Zoning and Planning** ⚿**703**
414k703 Most Cited Cases

Court of Appeals must uphold decisions made by board of zoning adjustment if they rationally flow from findings of facts supported by substantial evidence in record as a whole.

[12] **Zoning and Planning** ⚿**605**
414k605 Most Cited Cases

Because board of zoning adjustment is charged with interpreting zoning regulations, the Court of Appeals must defer to board's interpretation of those regulations, related to matters within its expertise, unless that interpretation is plainly wrong or inconsistent with regulations or with statute under which board acts.

[13] **Zoning andPlanning** ⚿**490**
414k490 Most Cited Cases

Board of zoning adjustment, in evaluating request for special exceptions to zoning regulations, is limited to determination whether exception sought meets requirements of particular regulation on which the application is based. D.C. Mun.Regs. title 11, § 3108.1.

[14] **Zoning and Planning** ⚿**488**
414k488 Most Cited Cases

[14] **Zoning and Planning** ⚿**536**
414k536 Most Cited Cases

Applicant for special exception has burden of showing that proposal complies with regulation for special exceptions, but once that showing has been made, board of zoning adjustment ordinarily must grant the application. D.C. Mun.Regs. title 11, § 3108.1.

[15] **Zoning and Planning** ⚿**278.1**
414k278.1 Most Cited Cases

Only existing residential buildings may be converted to office use by nonprofit organizations under regulation allowing conversion. D.C. Mun.Regs. title 11, § 217.1.

[16] **Zoning and Planning** ⚿**278.1**
414k278.1 Most Cited Cases

Board of zoning adjustment's interpretation of zoning regulation governing use of existing residential buildings by nonprofit organizations required only that structure be residentially zoned, not that it be in actual use as a residence, in order to qualify for use by nonprofit organization. D.C. Mun.Regs. title 11, § 217.1.

[17] **Zoning and Planning** ⚿**605**
414k605 Most Cited Cases

When actual language of zoning regulation could reasonably be interpreted either as the board of zoning adjustment reads it or as litigants read it, the Court of Appeals must accept the board's interpretation.

[18] **Zoning and Planning** ⚿**354**
414k354 Most Cited Cases

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As zoning commission is exclusive agency vested with responsibility for assuring that zoning regulations are not inconsistent with comprehensive plan, board of zoning adjustment, whose limited function is to assure that regulations adopted by zoning commission are followed, has no authority to implement comprehensive plan.

[19] **Zoning and Planning** ⚿**503**
414k503 Most Cited Cases

Board of zoning adjustment properly granted area variance from size requirement and extensively explained the basis for its decision especially considering the unusual size and shape of lot and minor deviation from size requirement. D.C. Mun.Regs. title 11, § 217.1.

[20] **Zoning and Planning** ⚿**359**
414k359 Most Cited Cases

[20] **Zoning and Planning** ⚿**361**
414k361 Most Cited Cases

Board of zoning adjustment, as trier of fact, may credit evidence upon which it relies to the detriment of conflicting evidence, and need not explain why it favored evidence on one side over that on the other.

[21] **Zoning and Planning** ⚿**703**
414k703 Most Cited Cases

Court of Appeals must uphold board of zoning adjustment's decision so long as it is supported by substantial evidence, even though there may also be substantial evidence to support a contrary decision.
***1025** Richard B. Nettler, Washington, DC, for petitioners.

Lutz Alexander Prager, Asst. Deputy Corp. Counsel, with whom John Payton, Corp. Counsel at the time the brief was filed, and Charles L. Reischel, Deputy Corp. Counsel, Washington, DC, were on the brief, for respondent.

Whayne S. Quin, with whom Louis P. Robbins, Washington, DC, was on the brief, for intervenor.

Before WAGNER, Chief Judge, [FN*] and TERRY and KING, Associate Judges.

FN* Judge Wagner was an Associate Judge of the court at the time of argument. Her status changed to Chief Judge on June 14, 1994.

TERRY, Associate Judge:

The Board of Zoning Adjustment ("the Board" or "the BZA") granted Ann Cullen's application for area variances and a special exception, enabling her to modify and lease a building which she owns on Leroy Place, N.W., as office space for a non-profit organization. Two neighbors who had opposed the application, Kindy French and Emanuel Friedman, filed a motion for reconsideration, which the Board denied. Ms. French and Mr. Friedman then filed a petition in this court seeking review of both the original order and the denial of their motion to reconsider. Before us they make several arguments: (1) that the Board's order is moot because the non-profit organization to which Mrs. Cullen intended to rent the building eventually decided to lease other premises; (2) that the Board erred in denying their motion for reconsideration when it was learned after the hearing that Mrs. Cullen had attempted to have the building assessed as residential property, whereas during the hearing she had persuaded the Board that residential use was unreasonable; (3) that the Board's order has expired because Mrs. Cullen failed to apply for either a building permit or a certificate of occupancy in the six months following issuance of the order, as required by 11 DCMR § 3104.1 (1994); [FN1] (4) that the portion of the order which granted the special exception was not supported by substantial evidence and did not conform to the District of Columbia Comprehensive Plan; and (5) that the portion of the order which granted one of the area variances was not supported by substantial evidence. We find all but the third argument to be without merit. Moreover, while we agree with the third argument and hold that the effectiveness of the Board's order was not tolled by the filing of this petition for review, we nevertheless conclude that under *Mendes v. Johnson*, 389 A.2d 781 (D.C.1978) (en banc), this holding should be applied only prospectively, to BZA orders entered on or after the date of this opinion. Accordingly, we affirm the order under review.

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FN1. The present zoning regulations took effect in September 1991, a few months after Mrs. Cullen filed her application. While the substance of the pertinent regulations remained unaltered, some of the section numbers were changed in the 1991 revision. In this opinion, all references to the regulations will cite the current section numbers in the latest (1994) codification.

I

At issue in this case is a four-story building located at 2110 Leroy Place, N.W., within the Sheridan-Kalorama Historic District. [FN2] Mrs. Cullen and her family have owned the building for more than fifty years, during ***1026** which time they have leased it to various tenants, mainly foreign governments. The most recent tenant was the government of Italy, which used the building as office space for its embassy's military attache. The Italian government vacated the premises in May 1990.

FN2. The building sits on a trapezoid-shaped, almost triangular lot facing Leroy Place on the north. It has a frontage of 45.48 feet along Leroy Place, a depth of 116.74 feet along a public alley to the east, a width of 7.49 feet at the south, and a depth of 113.33 feet along the property line to the west. It is a semi-detached brick building with a full basement, built in the late 1930s. The area of the lot is approximately 2,928 square feet.
The surrounding area is developed with a mix of uses. Most of the neighboring properties are residential, but there are also several chanceries and buildings occupied by non-profit organizations. Across the street, on the other side of Leroy Place, are several four-story row houses and a nine-story hotel.

The seeds of the present dispute were planted on June 12, 1991, when Mrs. Cullen applied to the Board for area variances and a special exception so that she could modify the property and lease it to a non-profit organization called the Council for Early Childhood Professional Recognition ("the Council"). [FN3] Until that time, the building had been zoned for residential purposes only, [FN4] despite its longtime use as a chancery. [FN5] Moreover, Mrs. Cullen sought permission to make improvements on the property, such as building an enclosed fire stair, which would require the addition of a fourth-floor porch.

FN3. Mrs. Cullen had entered into an agreement in September 1990 to lease the building to the Council, which would use it as office space for approximately thirty-five employees. The Italian military attache (the prior tenant) had forty employees.

FN4. The property is in an R-3 zoning district. Such districts are
designed essentially for row dwellings, but there shall be included in an R-3 district areas within which row dwellings are mingled with one-family detached dwellings, one-family semi-detached dwellings, and groups of three (3) or more row dwellings. To maintain a family-life environment, permitted related uses are the same in R-3 districts as in R-1 districts.
11 DCMR § 320.1.

FN5. Mrs. Cullen and her family have owned the property since 1939. From 1945 to 1953 the building was occupied by the Chinese Commission on Aeronautical Affairs. The Italian government leased it from 1953 to 1990.

Mrs. Cullen's application involved two sets of zoning regulations. First, since the building already exceeded the permissible lot occupancy for an R-3 zone, [FN6] she requested a variance relieving her from the requirements of 11 DCMR § 2001.3(a), which provides that a non-conforming structure and any additions made to it must conform to the percentage-of-lot occupancy requirements for its zoning classification. Although the proposed improvements would not consume any additional lot space, an area variance was needed so that the

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structure as a whole would conform to the pertinent zoning regulations.

FN6. R-3 zoning permits only a forty percent lot occupancy, whereas Mrs. Cullen's building occupied seventy-seven percent of the lot prior to any of the proposed improvements. *See* 11 DCMR § 403.2.

In addition, Mrs. Cullen sought a variance from the requirements of 11 DCMR § 217.1(b), which provides that an existing residential structure may not be used for office space by a non-profit organization unless it contains at least 10,000 square feet of gross floor area. Although the Leroy Place building allegedly had a gross floor area of only 8,782 square feet at the time Mrs. Cullen filed the application, [FN7] she stated that the proposed modifications would increase the floor area to 10,702 square feet. [FN8] In addition, Mrs. Cullen applied for a special exception under 11 DCMR § 217.5, which states that any additions to buildings occupied by non-profit organizations "shall require the prior approval of the Board." [FN9]

FN7. There was some uncertainty before the Board about the current gross floor area of the building, but the Zoning Administrator recalculated the figure and found it to be 9,572 square feet.

FN8. In its final order, the Board rejected this figure and found that the gross floor area after the proposed modifications would be 9,990 square feet.

FN9. In the alternative, Mrs. Cullen also asked the Board to grant a variance from the requirements of 11 DCMR § 2003, which allows for a change in the use of a structure so long as the proposed use will be "either a dwelling, flat, apartment house, or a neighborhood facility." 11 DCMR § 2003.5. Both the Office of Planning and the Board rejected this request for a use variance, and Mrs. Cullen has not filed a cross-petition in this court challenging that ruling.

In September 1991 the District of Columbia Office of Planning ("the OP") recommended that the Board conditionally approve Mrs. Cullen's application. [FN10] Specifically, the OP concluded that Mrs. Cullen's request for an area variance under 11 DCMR § 217.1 ***1027** was reasonable because the building's square footage would comply with the regulation after the proposed additions were completed. Moreover, the OP noted that the proposed addition "is needed, in part, to satisfy the fire and building code. Therefore, the addition has its own merit, removing the main objection to the application of Section [217.1]." Finally, considering the building's long history of office use, the OP acknowledged that "major alterations to the interior of the building would be required" to convert it back to residential use.

FN10. The Office of Planning recommended that the Board impose several conditions on Mrs. Cullen and the Council. The Board's order includes these restrictions plus an additional one.

In the meantime, dozens of area residents submitted letters opposing Mrs. Cullen's application, most of whom argued that the neighborhood already had an oversupply of vacant office space, and that the parking and delivery demands of the Council's offices would significantly impair the quality of life in the neighborhood. [FN11] Among those opposing the application was Frank Smith, a member of the Council of the District of Columbia from Ward 1, where the property is located. Councilman Smith asserted that the proposed office use "would have an adverse impact on traffic, parking, loading, and noise on the residential population" in the 2100 block of Leroy Place. In addition, the Advisory Neighborhood Commission for the Sheridan-Kalorama area (ANC 1-D) passed a resolution opposing the application.

FN11. The OP observed, however, that according to Mrs. Cullen "the proposed use would attract very few visitors to the site. Virtually all transactions would be

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> handled by telephone or correspondence, and almost all business meetings would be held off-site. The Council anticipates an average of four deliveries per day."

On September 25, 1991, the Board held a public hearing on Mrs. Cullen's application. Extensive testimony was presented by several witnesses, some favoring the application, some opposing it. During the hearing Mrs. Cullen submitted a report prepared by Osborne R. George, a traffic analyst, comparing the impact that the Italian military attache had had on the neighborhood with the projected impact of the Council's occupancy. According to his report, the attache had forty employees, compared with the Council's thirty-five; that all forty drove to work, whereas only four of the Council's employees would do so (the rest relied on public transportation); and that the attache received ten to fifteen more daily deliveries than the Council was expected to receive. Additionally, the attache regularly had an average of thirty daily visitors, occupied twenty-three on-street parking spaces, three of which were reserved exclusively for diplomatic vehicles, and often held evening activities. By contrast, Mr. George projected that the Council would have visitors infrequently, would occupy no parking spaces on the street, [FN12] and would be closed at night.

> FN12. The Council agreed to provide off-street parking for its four employees who drove to work.

Thomas Cullen, the applicant's husband, testified about the history of the building. He also noted that the building is much larger than any other residential structure on the block. Real estate agents had estimated its value as a residence to be between $600,000 and $800,000, but they had also said it would be difficult to convert it back to residential use. The agents had told Mr. Cullen that the best use for the building would be as a chancery or as office space for a non-profit organization. Following this advice, the Cullens decided that the Council would be a suitable occupant, especially because its proposed use was substantially less of a burden on the neighborhood than the recent use by the Italian military attache. An architect, Cal Bowie, testified that the percentage-of-lot occupancy variance was needed in order to bring the building into compliance with the building code by installing a second emergency exit.

In opposing the application, George Colver, chairman of the Committee of 100 on the Federal City, urged the Board not to grant the variance in light of the fact that the Office of Planning had recommended that section 217 be deleted from the zoning regulations, and that a decision by the Zoning Commission on the OP's proposal was expected in the near future. [FN13]

> FN13. In a memorandum filed contemporaneously with the hearing, the Office of Planning advised the Board of its proposal to repeal section 217. The OP conceded, however, that "the Zoning Commission has not discussed these proposals in detail or held public hearings on them. These proposals have no legal force at this time." In its final order, the Board concluded that the OP's proposal was irrelevant to the disposition of Mrs. Cullen's application.

***1028** Petitioner Kindy French, who lives at 2120 Leroy Place, gave a statement to the Board. In addition to reiterating other arguments already made in opposition to the application, Ms. French pointed out that, according to an architect, the building at 2110 Leroy Place could be returned to residential use "for a price less than that of the office conversion that the applicants propose." [FN14]

> FN14. Ms. French submitted a letter from the architect, John Thompson, stating that 2110 Leroy Place "is viable for a residential renovation." He estimated that such a renovation would reduce the size of the house to 7,800 square feet and would cost between $375,000 and $450,000. Mrs. Cullen, on the other hand, obtained two preliminary cost estimates from experienced renovation contractors. One of them said that a renovation would cost between $600,000 and $800,000; the other said it could go as high as $1.5 million. Mrs. Cullen's architect testified

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that these figures were consistent with his experience.

A few weeks later the Board voted unanimously [FN15] to grant Mrs. Cullen's application, with several restrictions as set forth in the Board's minutes:

FN15. One member did not vote because she had not been present at the hearing.

1. The number of employees at the subject site shall not exceed thirty-five;
2. The hours of operation shall be restricted to normal daytime business hours.
3. The applicant [or her tenant] shall lease off-street parking spaces to accommodate employees who drive to the site.
4. All large meetings and conferences shall be held [elsewhere].
5. All deliveries shall be made through the basement door located adjacent to the public alley. No deliveries shall be accepted through the Leroy Place entrance.
6. The applicant shall establish and maintain a community liaison program, in cooperation with the Advisory Neighborhood Commission, which shall provide a forum for addressing issues and concerns of the facility and its neighbors as necessary.

In due course the Board issued its final order. It found that, in light of the lot's irregular shape, its steeply sloping grade, and the building's large size and previous use as a chancery, exceptional conditions were present which warranted approval of the requested variances. Furthermore, the Board emphasized that the proposed use by the Council was "less intense" than the previous use by the Italian military attache in many critical respects, such as the number of employees, traffic generation, and on-street parking demands.

The Board also said that the 10,000-square-foot requirement contained in section 217.1 of the zoning regulations was intended "to establish a standard of reference, not an inflexible rule," and thus could be waived in an appropriate case. In addition, the Board reasoned that "[t]he proposed addition of the fire stair is necessary to ensure the fire safety of the building and is not proposed merely to increase the size of the structure in an attempt to meet the 10,000 square feet requirement." Responding to complaints by some of the neighbors that the proposed use of the building would increase the risk of criminal activity at night when the building was unoccupied, the Board found that "reinstitution of a viable use will alleviate the security impacts presently presented by an existing vacant building."

Given these factual findings, the Board concluded that "the proposed use, as hereinafter conditioned, is in harmony with existing uses and structures in the area, several of which include higher intensity residential and institutional uses." Thus, subject to the six conditions it had already approved, the Board granted a special exception to permit the Council, as a non-profit organization, to occupy the building, and granted the area variances which Mrs. Cullen had requested. [FN16]

FN16. The Board derives its authority to grant variances and special exceptions from 11 DCMR §§ 3107-3108.

Petitioners filed a motion for reconsideration with the Board, asserting that the Council no longer was interested in renting the building, that Mrs. Cullen had listed the ***1029** property for sale as appropriate for chancery or residential purposes, and that Mrs. Cullen had applied to the Board of Equalization and Review to have the property reassessed as residential property, rather than commercial property, for tax purposes. In light of these developments, petitioners asserted, the Board's order should be vacated as moot because the Board's decision and the conditions placed upon its approval of Mrs. Cullen's application had been based on the specific proposal for use by the Council. Furthermore, said the motion, Mrs. Cullen's attempt to have the building reassessed negated her assertion at the hearing that the building was unfit for residential use.

In its order denying Ms. French's motion, the Board said that its decision "to approve the use of the [building] by a non-profit organization subject to the specified conditions applies generally to its use by any non-profit organization which complies with the conditions imposed by the Board." Moreover, the Board observed that its order

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provided Mrs. Cullen with a permissive, not mandatory, use of the structure, and that under the regulations she had the prescribed period of time (six months) to make the building available as office space for a non-profit organization, or else the order would expire. *See* 11 DCMR § 3104.1.

II

[1] Petitioners contend that the Board's order granting Mrs. Cullen's request for area variances and a special exception should be vacated as moot because the Council has decided not to occupy the property. In the alternative, petitioners claim that the Board's order no longer has any legal effect, since Mrs. Cullen failed to apply for a building permit or certificate of occupancy within the time prescribed by regulation.

We reject petitioners' mootness argument. First, as a factual matter, the Board's order granting Mrs. Cullen's application did not require, or assume, that the building would be leased to any particular non-profit organization. As long as the tenant agreed to abide by the limitations imposed by the Board's order, Mrs. Cullen was free to lease the property to any non-profit organization that she might choose. Of course, since the pending lease to the Council was at issue when Mrs. Cullen's application came before the Board, the resulting order and findings of fact do make specific reference to the Council. But there is nothing in the Board's order suggesting that occupancy by the Council was a necessary condition to the grant of the special exception or the area variances. Petitioners suggest that "other non-profit organizations may have different impacts on traffic and the neighborhood simply because of the number of employees to be housed, the number of deliveries or visitors to the property from the particular use, how many employees use public transportation and how many employees walk to work," but their concern is unfounded because of the conditions included in the Board's order. Any tenant, now or in the future, would have to comply with those conditions, or else it could not occupy the building.

[2][3][4] Furthermore, petitioner's argument runs contrary to the well-established principle that any conditions imposed on the granting of a variance, "like the variance itself, must run with the land." National Black Child Development Institute v. District of Columbia Board of Zoning Adjustment, 483 A.2d 687, 691 (D.C.1984) (citations omitted). Indeed, the conditions set forth in the Board's order in this case could not lawfully have been applied only to the Council. "Personal conditions impermissibly regulate the business conduct of the owner, rather than the use of his property, and are unlawful *per se*." *Id.* (footnote omitted); *see also* Dexter v. Town Board of Town of Gates, 36 N.Y.2d 102, 104, 324 N.E.2d 870, 871, 365 N.Y.S.2d 506, 508 (1975) (special exception applies without regard to identity of person who owns or occupies building). Thus the Board properly ruled that the limitations imposed on the variances granted to Mrs. Cullen could, and would, be applied to any organization that leased the property. [FN17]

FN17. Petitioners also contend that under "estoppel principles" this case should be remanded for reconsideration in light of Mrs. Cullen's efforts to have the building reclassified as residential property for taxation purposes. They do not press this point with vigor, however, nor do they cite a single case in support of their argument. We find no merit in it, especially since the Board made clear that its decision merely allowed a permissive, not a mandatory, use of the building.

***1030** Finally, petitioners claim that the Board's order no longer has any legal effect because Mrs. Cullen failed to apply for a building permit or certificate of occupancy within six months from the date of the Board's order. [FN18] In opposing this argument, Mrs. Cullen cites an advisory opinion, issued in December 1977 by the Office of the Corporation Counsel, which concluded that "the running of the six-month period for applying for a permit under a Board decision is tolled by the filing and pendency of ... a petition for judicial review." 2 Ops.Corp.Counsel 238, 242 (1977). Despite clear statutory language to the contrary, [FN19] the Corporation Counsel concluded that to require a successful applicant "to undertake prompt construction of a structure" before a final decision by a reviewing court would be impractical because the court might well reverse the Board's order approving the application. *Id.* at 241. In the absence of any case law from this court, the Corporation Counsel relied on *Tantimonaco v.* Zoning Board of Review, 102 R.I. 594, 232 A.2d

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385 (1967), and *Belfer v. Building Commissioner*, 363 Mass. 439, 294 N.E.2d 857 (1973). In Tantimonaco the Supreme Court of Rhode Island held that, despite contrary statutory authority,

> common prudence understandably acts as a brake against incurring obligations, the benefits of which would be cancelled by an adverse decision of this court.... [W]e think it clear that the requirement of activating a permit set forth in an ordinance does not apply during such time as the legality of a permit is open to question by reason of litigation amounting to an appeal from the issuance thereof.

102 R.I. at 599, 232 A.2d at 388. *Belfer* is to the same effect. Mrs. Cullen relies heavily on Tantimonaco and *Belfer* in asking us to hold that her time for obtaining a building permit has been tolled by the filing of the instant petition for review.

Petitioners, understandably, disagree and urge us instead to follow the reasoning of *Gold v. Kamin*, 170 Ill.App.3d 312, 524 N.E.2d 625, 120 Ill.Dec. 595 (1988). In *Gold* the Appellate Court of Illinois rejected the reasoning of *Tantimonaco*, concluding that, in light of the applicable administrative review statute and court rules, "a stay must ordinarily be sought and granted in order to toll the running of a time period in an administrative variance proceeding." *Id.* at 315, 524 N.E.2d at 627, 120 Ill.Dec. at 597. Petitioners bolster their argument by citing our own decision in *Upper Georgia Avenue* Planning Committee v. Alcoholic Beverage Control Board, 500 A.2d 987 (D.C.1985), in which we struck down another Corporation Counsel opinion that was contrary to a statute:

> We now hold, however, that both the Corporation Counsel's opinion and the Board's ruling based upon it are erroneous because they are contrary to the plain meaning of the statute.... We must give effect to the legislative intent insofar as we can discern it from the statutory language.

Id. at 990-991 (citation omitted).

[5][6] We agree with petitioners that, under *Gold* and *Upper Georgia Avenue*, the order issued by the Board has expired because Mrs. Cullen failed to apply for a building permit within six months, as the regulation requires, and because her time for doing so has not been tolled by the filing of the instant petition for review. The plain language of D.C.Code § 1- 1510(a) could not be clearer. It states, without any ambiguity, that the filing of a petition for review in this court "shall not" operate to stay the effect of an agency's order. The statute simply will not permit a court--or an administrative agency such as the BZA--to accept the contrary ***1031** view of the Corporation Counsel. [FN20] This point has been settled at least since 1985, when Upper Georgia Avenue was decided. Moreover, under D.C.Ct.App.R. 18, a party may apply to this court for a stay of an agency order pending appellate review, which Mrs. Cullen failed to do. [FN21] This fact, when viewed in conjunction with Mrs. Cullen's uncontested failure to obtain, or even to seek, a building permit within the prescribed period of time, leads us inexorably to conclude that the Board's order was not tolled by the filing of the instant petition.

> FN18. 11 DCMR § 3104.1 provides:
> No order of the Board authorizing the erection or alteration of a structure shall be valid for a period longer than six(6) months unless, within that period, the plans for the erection or alteration are filed for the purpose of securing a building permit.

> FN19. D.C.Code § 1-1510(a) (1992) states in pertinent part: "Filing of a petition for review shall not in itself stay enforcement of the order or the decision of the Mayor or the agency, as the case may be."

> FN20. Our holding is not affected by the fact that the six-month limit arises from a regulation (11 DCMR § 3104.1, *supra* note 18) rather than a statute. Given our controlling precedent in *Upper Georgia* Avenue, we conclude that the Corporation Counsel has no authority to modify either a statute or a regulation, and that any opinion of the Corporation Counsel that conflicts with either a statute or a regulation is necessarily invalid.

> FN21. Nor does it appear that she sought a stay from the Board itself. Assuming that the Board's own rules allow it to grant such a stay, section 1-1510(a) would not preclude it from doing so.

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We are mindful nevertheless that, until today, the standard practice in the District of Columbia has been to accept the view of the Corporation Counsel, wrong as it is, that such a tolling occurs. Indeed, at oral argument counsel for both the Board and Mrs. Cullen asserted that the Corporation Counsel's opinion was widely assumed to be still in effect when the petition for review was filed in this case, and that, as a consequence, any changes to the established tolling practice should be prospectively applied. We invited the parties to file supplemental briefs on this issue after oral argument. Petitioners asserted in their supplemental filing that Mrs. Cullen failed to demonstrate any reliance on the Corporation Counsel's opinion and that the rule of prospective application announced in *Mendes v.* Johnson, supra, should therefore not apply. Mrs. Cullen, in response, attempted to distinguish *Upper* Georgia Avenue and reiterated her argument that we should follow *Tantimonaco* and *Belfer*.

[7] In deciding whether to apply a new rule of law retroactively or prospectively, this court considers several factors, including (1) the extent of reliance by the parties on the previous rule, (2) the need to avoid any alteration of property or contract rights, (3) the policy of rewarding plaintiffs who seek to initiate just changes in the law, and (4) the desire to avoid unduly burdening the administration of justice with retroactive changes in the law. *Mendes v.* Johnson, supra, 389 A.2d at 789; *accord,* Sanders v. Sanders, 602 A.2d 663, 667 (D.C.1992). We do so in this case, focusing particularly on the first factor and, to a lesser degree, on the second. In Mendes a majority of the en banc court concluded that "[w]here retroactive application of a new rule would result in substantial disruption of settled transactions and/or injustice to a party because of reliance on the continued validity of the prior legal rule--especially one of long standing--courts are extremely reluctant to accord retroactive effect to overruling decisions." 389 A.2d at 789. The court went on to stress that any reliance must be reasonable in order to avoid retroactive application of the new rule. *Id.* at 790.

[8][9] Applying this standard in the factual setting of this case, we are satisfied that both Mrs. Cullen and the Board reasonably relied on the Corporation Counsel's opinion. We note, first of all, that no decision of this court has ever squarely addressed the precise issue at hand. Thus, while our holding today does not represent a new rule in the sense that it overrules prior law in the District of Columbia, it certainly decides "a matter of first impression in a manner not clearly foreshadowed." *Sanders v.* Sanders, supra, 602 A.2d at 667 n. 5. Although the opinions of the Corporation Counsel are not valid legal authority, the mere fact that they have been issued by the city's top legal officer may cause interested persons (and government agencies) to rely on them in good faith, in the belief that following the Corporation Counsel's advice will present no legal hazards. The Corporation Counsel's opinion was issued in 1977 and, until now, has never been challenged in this court. Mrs. Cullen and the Board have asserted, without contradiction from petitioners, that successful parties before the Board traditionally have not ***1032** obtained either a certificate of occupancy or a building permit until judicial review has been completed. *See* Upper Georgia Avenue, supra, 500 A.2d at 990 (absent overruling decision by this court, Board was entitled to rely on Corporation Counsel opinion as a guiding statement of law). In these circumstances we conclude that our holding today should be "purely prospective," which means that it will apply only to BZA orders entered on or after the date of this opinion, and that it has no application to the order on review in this case. Mendes v. Johnson, supra, 389 A.2d at 789 n. 21. We recognize that such a purely prospective holding is unusual, *see* Robinson v. Washington Internal Medicine Associates, 647 A.2d 1140, 1146 n. 7 (D.C.1994) (opinion of King, J.), but given the long history of this case and the hardship that would result if we were to ignore Mrs. Cullen's reasonable reliance on the Corporation Counsel's opinion, *see* Mendes v. Johnson, supra, 389 A.2d at 789-790, we conclude that a purely prospective rule is the fairest under the circumstances presented here. [FN22]

FN22. Counsel for the Board has informed us that the Zoning Commission recently amended the zoning regulations by adding a new regulation, 11 DCMR § 3104.5, 42 D.C.Reg. 2115 (1995), which essentially codifies the tolling rule set out in the 1977 opinion of the Corporation Counsel. Since this amendment did not become effective until more than two and a half years after the BZA order at issue here and does not purport to be retroactive, we conclude that it has no effect on the outcome of this case. We express no view

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here as to whether the new section 3104.5 may be in conflict with D.C.Code § 1-1510(a).

III

Petitioners maintain that the Board's grant of a special exception permitting Mrs. Cullen to lease her building to a non-profit organization is not supported by substantial evidence and is inconsistent with both the District of Columbia Comprehensive Plan, D.C.Law No. 5-76 (1984), and existing case law. In particular, petitioners argue that the Board misapplied the provisions of 11 DCMR § 217, noting that the building has a gross floor area of less than 10,000 square feet and that it was not used for residential purposes before Mrs. Cullen filed her application, and arguing that the Board failed to make adequate findings about the number and placement of on-site parking spaces or the adequacy of off-site arrangements.

[10][11][12] Our three-part standard of review is a familiar one. We must determine (1) whether the agency made findings of fact on each materially contested issue of fact, (2) whether substantial evidence supports each finding, and (3) whether the Board's conclusions flow rationally from its findings of fact. *Levy v. District of Columbia* Board of Zoning Adjustment, 570 A.2d 739, 746 (D.C.1990); *Perkins v. District of Columbia* Department of Employment Services, 482 A.2d 401, 402 (D.C.1984); D.C.Code § 1- 1510(a)(3)(E). "We must uphold decisions made by the BZA if they rationally flow from findings of fact supported by substantial evidence in the record as a whole." Draude v. District of Columbia Board of Zoning Adjustment, 582 A.2d 949, 953 (D.C.1990) (citations omitted). Moreover, because the Board is charged with interpreting the zoning regulations, Page Associates v. District of Columbia Board of Zoning Adjustment, 463 A.2d 649, 655 (D.C.1983), "[t]his court must defer to the Board's interpretation of those regulations, related to matters within its expertise, unless that interpretation is plainly wrong or inconsistent with the regulations or with the statute under which the BZA acts." *Concerned* Citizens of Brentwood v. District of Columbia Board of Zoning Adjustment, 634 A.2d 1234, 1242 (D.C.1993) (citations omitted); *accord,* Dietrich v. District of Columbia Board of Zoning Adjustment, 320 A.2d 282, 286 (D.C.1974). Guided by these principles, we are satisfied that the Board properly considered and addressed all relevant factors in approving Mrs. Cullen's application.

[13][14] Under the zoning regulations, "the Board is authorized to grant special exceptions ... where, in the judgment of the Board, those special exceptions will be in harmony with the general purpose and intent" of the regulations. 11 DCMR § 3108.1. In evaluating requests for special exceptions, the Board "is limited to a determination whether the exception sought meets the requirements" of the particular regulation on ***1033** which the application is based. *Stewart v. District* of Columbia Board of Zoning Adjustment, 305 A.2d 516, 518 (D.C.1973). The applicant has the burden of showing that the proposal complies with the regulation; but once that showing has been made, "the Board ordinarily must grant [the] application." Id.; *see* First Baptist Church v. District of Columbia Board of Zoning Adjustment, 432 A.2d 695, 698 (D.C.1981).

[15][16] Petitioners maintain, and we agree, that only "existing residential buildings" may be converted to office use by a non-profit organization under 11 DCMR § 217.1. [FN23] We part company with petitioners, however, over their assertion that a building must be both zoned for residential use and actually used for residential purposes in order to qualify under section 217.1. Instead, we sustain the Board's conclusion that the phrase "existing residential buildings" requires only that a structure be residentially zoned, not that it be in actual use as a residence, in order to qualify for use by a non-profit organization. As the Board explained in its order:

> FN23. Section 217.1 states, in pertinent part, that "[t]he use of existing residential buildings ... by a non-profit organization for the purposes of the non-profit organization shall be permitted," if approved by the Board, subject to certain conditions as set forth in the regulation (such as the requirement that the gross floor area be at least 10,000 square feet). At issue here is the meaning of the term "existing residential buildings."

The Board has previously applied the provisions of 11 DCMR [§ 217.1] to residentially zoned

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buildings which were not devoted to residential use at the time of the Board's consideration of the cases. The Board believes that the intent of the Zoning Regulations was to permit both the conversion of residential uses and the continuance of non-residential uses subject to Board review and approval.

[17] We uphold the Board's construction of section 217.1 for two primary reasons. First, as we have mentioned, this court must accept the Board's interpretation of the zoning regulations unless that interpretation is plainly erroneous or inconsistent with the regulation itself. *Concerned Citizens*, supra, 634 A.2d at 1242. Since the actual language of the regulation could reasonably be read either as the Board reads it or as petitioners read it, we must accept the Board's interpretation. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843, 104 S.Ct. 2778, 2781-2782, 81 L.Ed.2d 694 (1984); *Udall v.* Tallman, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801-802, 13 L.Ed.2d 616 (1965); *Bowles v. Seminole Rock* & Sand Co., 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945); *Dupont Circle* Citizens Ass'n v. District of Columbia Zoning Commission, 431 A.2d 560, 565 (D.C.1981). Indeed, it is in these types of situations--when the language used in the regulation is less than precise--that the Board's construction is most useful, for it is the Board's duty to assure that special exceptions are issued in a manner that is "in harmony with the general purpose and intent of the Zoning Regulations." 11 DCMR § 3108.1. Furthermore, as Mrs. Cullen demonstrates in an appendix to her brief, the Board on at least four prior occasions has interpreted the regulation concerning non-profit organizations in a manner consistent with its ruling here.

Second, since applications for special exceptions under section 217.1 are not granted as a matter of right but are evaluated on a case-by-case basis, there is little danger that the issuance of a special exception in this case will establish a precedent permitting a flood of non-profit organizations into any particular zoning district. Rather, the careful and thorough scrutiny given by the Board to the application in this case reflects the nature of the burden which any applicant must satisfy when seeking a special exception.

Furthermore, we find it unreasonable, particularly under the facts of this case, to limit section 217.1 to buildings which are being used for residential purposes at the time the application is filed. Before the Board Mr. Cullen testified that, given the size and location of the building, it was not appropriate for residential use. He pointed out that the building overlooks a hotel parking lot with one side abutting the Guinean chancery, while the other side faces the dumpsters and parking lots behind several buildings along ***1034** Connecticut Avenue, which is just half a block away. In addition, the architect, Mr. Bowie, testified that the building generally would not be a desirable residence and explained his reasons for saying so. Given this evidence, we find the Board's construction of section 217.1 to be reasonable and in harmony with the regulations as a whole.

Moreover, as Mrs. Cullen emphasizes in her brief, the Board made detailed findings as to the impact that the presence of a non-profit organization would have on the parking situation in the neighborhood. Significant also are the conditions placed on the special exception, which were mostly aimed at minimizing the congestion generated by the non-profit occupant of Mrs. Cullen's building. In particular, the Board noted:

> The proposed non-profit office use is less intense than the previous chancery use in terms of number of employees, *traffic generation and on-street parking impacts.* The impacts of the proposed use on nearby residential uses are minimal due to the physical separation of the premises from residential uses and the conditions hereafter imposed by the Board. [Emphasis added.]

On this point also, we find no reason to disagree with the Board. The report by Mrs. Cullen's traffic expert, Osborne George, supported the Board's finding that the proposed use would, in many respects, be less intrusive than the use made by the building's previous occupants. In addition, to ensure that the actual traffic resulting from the proposed non-profit use closely mirrored the projections made by the expert, the Board imposed stringent limitations on the use of the property. [FN24]

FN24. See page 1028, *supra.*

We turn next to petitioners' claim that the Board's

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order violates the Comprehensive Plan. Specifically, petitioners argue that the Comprehensive Plan, as amended, explicitly designates the area surrounding the Cullen property for "moderate density residential" use. [FN25] Relying on this provision, and on the proposal by the Office of Planning to rescind section 217 altogether, petitioners claim that the Board should not have granted the special exception.

> FN25. *See* Amendment to the District of Columbia Comprehensive Plan Act of 1984, D.C.Law 8-138, § 2, 37 D.C.Reg. 55, 82 (June 5, 1990), which provides:
> The area bounded by Connecticut Avenue, N.W., Leroy Place, N.W., the west side of Phelps Place, N.W., and the south side of Bancroft Place, N.W., is included in the moderate density residential land use category.

[18] This court has held, however, that "the Zoning Commission is the exclusive agency vested with the responsibility for assuring that the Zoning Regulations are not inconsistent with the Comprehensive Plan." *Tenley & Cleveland Park* Emergency Committee v. District of Columbia Board of Zoning Adjustment, 550 A.2d 331, 341 (D.C.1988), *cert. denied*, 489 U.S. 1082, 109 S.Ct. 1539, 103 L.Ed.2d 843 (1989). Given this holding, we must decline to consider petitioners' arguments based on the Comprehensive Plan, since the Zoning Commission has not been heard from in this case (nor, as far as we know, have its views been sought). The Board's limited function is to assure that the regulations adopted by the Zoning Commission are followed; it has "no authority to implement the Comprehensive Plan." *Id.* at 341 n. 22. This court's role, in turn, is to determine whether the Board did its job properly. Thus the only question before us is whether the Board correctly followed the regulations--not the Comprehensive Plan--in granting Mrs. Cullen's application.

In any event, even though the Comprehensive Plan categorizes Leroy Place as a "moderate density residential" area, this does not mean that the buildings on Leroy Place must be devoted exclusively to residential use. The implementing regulation for this portion of the Comprehensive Plan states that "row houses and garden apartments" should constitute the "predominant," not exclusive, use in such an area. 10 DCMR § 1103.2 (1994).

For these reasons we reject petitioners' challenge to the granting of the special exception.

IV

[19] Finally, petitioners contend that the Board erred in granting the area variance ***1035** which relieved Mrs. Cullen from the 10,000-square-foot requirement of section 217.1. In its findings of fact, the Board extensively explained the basis for its decision to grant this variance. First, the Board noted that the Zoning Commission never intended the requirement to be inflexible, but that it was merely designed to establish a "standard of reference" which could be waived or modified in appropriate cases. The Board also emphasized that "the requested variance relief requires the showing of exceptional circumstances inherent in the property which creates a practical difficulty upon the owner."

After reviewing the evidence, the Board found that such exceptional circumstances existed, given the site's "irregular shape, steeply sloping grade, the large size and physical configuration of the existing building, and its previous history of chancery use." On the basis of this finding, the Board concluded that "it is not reasonable to consider the building for single- family purposes due to its size, configuration, and history, and that the variance will ensure the preservation of and continued use of the existing structure."

[20][21] Applying the long-established substantial evidence test, we have no difficulty in affirming the Board's order. As this court has held:

> The Board is empowered ... to grant an area variance where it finds three conditions: (1) the property is unique because, *inter alia*, of its size, shape, or topography; (2) the owner would encounter practical difficulties if the zoning regulations were strictly applied; (3) the variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zoning plan.

Roumel v. District of Columbia Board of Zoning Adjustment, 417 A.2d 405, 408 (D.C.1980). The record demonstrates that the Board considered these

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three elements and found that an area variance was appropriate under the circumstances. We find no error in the Board's assessment. Considering the unusual size and shape of the lot and the minor deviation from the 10,000- square-foot requirement, [FN26] we cannot say that the variance was unwarranted. The mere fact that petitioners presented contrary evidence as to the feasibility of restoring the structure as a residence is immaterial. As the trier of fact, the Board "may credit the evidence upon which it relies to the detriment of conflicting evidence, and need not explain why it favored the evidence on one side over that on the other." *United Unions, Inc. v. District of Columbia* Board of Zoning Adjustment, 554 A.2d 313, 315-316 (D.C.1989) (citations and footnote omitted). "We must uphold the Board's decision so long as it is supported by substantial evidence, even though there may also be substantial evidence to support a contrary decision, as there is in this case." *Upper Georgia Avenue, supra,* 500 A.2d at 992 (citations omitted). In these circumstances, we will not disturb the Board's ruling.

FN26. See note 8, *supra.*

V

The decision of the Board of Zoning Adjustment is therefore

Affirmed.

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C

District of Columbia Court of Appeals.

NEIGHBORS AGAINST FOXHALL GRIDLOCK, et al., Petitioners,
v.
DISTRICT OF COLUMBIA **BOARD** OF **ZONING** ADJUSTMENT, Respondent,
and
The Field School, Intervenor.

No. 01-AA-53.

Argued Feb. 5, 2002.
Decided Feb. 28, 2002.

Neighbors sought judicial review of **Board** of **Zoning** Adjustment's (BZA) granting of special exception for private school in residential zone. The Court of Appeals, Farrell, J., held that: (1) evidence established that proposed left-turn lane would ameliorate traffic impacts, and (2) neighbors were not prejudiced by failure of Board to tape record direct examination and cross-examination of their traffic expert.

Affirmed.

West Headnotes

[1] **District of Columbia** ⇐6
132k6 Most Cited Cases

An agency must elaborate, with precision, its response to the issues and concerns raised by an Advisory Neighborhood Commission (ANC), articulating why the particular ANC itself, given its vantage point, does or does not offer persuasive advice under the circumstances. D.C.Code 1981, § 1-261(d).

[2] **District of Columbia** ⇐6
132k6 Most Cited Cases

Giving "great weight" to the issues and concerns raised by an Advisory Neighborhood Commission (ANC) is not a quantum requirement, and thus, the agency is not obliged to follow the ANC's recommendations or adopt its views. D.C.Code 1981, § 1-261(d).

[3] **District of Columbia** ⇐6
132k6 Most Cited Cases

Advisory Neighborhood Commissions (ANC) do not enjoy "expert" status that is entitled to special deference as such; rather, the agency must pay specific attention to the source, as well as the content, of ANC recommendations, giving them whatever deference they merit in the context of the entire proceedings, including the evidence and views presented by others. D.C.Code 1981, § 1-261(d).

[4] **Zoning and Planning** ⇐539
414k539 Most Cited Cases

Testimony that proposed left-turn lane could accommodate stacking of as many as five cars, and that Department of Public Works (DPW) would engage in "further refinements" during design process to maximize safety in turn lane and at stop light and intersection, established that traffic impacts of proposed school could be ameliorated, in application to **Board** of **Zoning** Adjustment (BZA) for special exception for private school in residential zone. D.C. Mun.Regs. tit. 11, § 206.

[5] **Zoning and Planning** ⇐539
414k539 Most Cited Cases

Evidence that combined frontage of private-school property could actually provide 512 feet for combined taper, deceleration lane, and stacking lane for left turns, that Department of Public Works (DPW) would engage in "further refinements" during design process, and that other measures, such as staggered hours of school opening, mandatory car pooling by students, and shuttle bus service to public transit locations, would reduce expected impact of traffic, established that combined 474-foot minimum distance of taper, deceleration lane, and stacking lane for left turns was sufficient so that private school was not likely to become objectionable to adjoining and nearby properties because of traffic conditions, as element for special exception for private school in residential zone. D.C. Mun.Regs. tit. 11, § 206.2.

[6] **Zoning and Planning** ⇐539
414k539 Most Cited Cases

Evidence that private school's buildings would occupy only seven percent of the 10.5-acre property

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and that total impervious surface was only 27 percent, while the residential district had lot occupancy limit of 40 percent, and that measures could ameliorate impacts of noise, traffic, storm water run-off, and other objectionable effects, established that special exception for private school would be in harmony with general purpose and intent of residential zoning in the neighborhood. D.C. Mun.Regs. tit. 11, § 206.

[7] **Zoning and Planning** ⇐543
414k543 Most Cited Cases

Neighbors were not prejudiced by failure of **Board** of **Zoning** Adjustment (BZA) to tape record the direct examination and cross-examination of their traffic expert at pre-deliberation hearing for which two of five Board members were absent, and thus, absent Board members were not disqualified from voting on special exception for private school in residential zone; by the time Board began its deliberations, expert's testimony had been superseded in importance by Department of Public Works' (DPW) revised study of traffic impacts, and Board received multiple written reports addressing traffic impacts from experts representing both sides, as well as from independent experts at DPW and Office of Planning (OP). D.C. Official Code, 2001 Ed. § 6-641.07(h); D.C. Mun.Regs. tit. 11, §§ 206.2, 3105.15.

[8] **Zoning and Planning** ⇐542.1
414k542.1 Most Cited Cases

Neighbors' allegation that **Board** of **Zoning** Adjustment (BZA) had not noticed that testimony of neighbors' traffic expert had not been tape recorded did not establish that Board paid inadequate attention to the evidence when it issued special exception for private school in residential zone. D.C. Official Code, 2001 Ed. § 2-509(c); D.C. Mun.Regs. tit. 11, § 206.

***248** Eric Von Salzen, with whom Marta I. Tanenhaus, Washington, DC, was on the brief, for petitioners.

Phil T. Feola, with whom Deborah B. Baum, Paul A. Tummonds, Jr., and Amy E. Goldfrank, Washington, DC, were on the brief, for intervenor.

Robert R. Rigsby, Corporation Counsel, Charles L. Reischel, Deputy Corporation Counsel, and William J. Earl, Assistant Corporation Counsel, filed a statement in lieu of brief for the District of Columbia **Board** of **Zoning** Adjustment.

Before FARRELL, RUIZ, and GLICKMAN, Associate Judges.

FARRELL, Associate Judge:

The District of Columbia **Board** of **Zoning** Adjustment (the Board or the BZA) granted an application for a special exception filed by the Field School and The Morris and Gwendolyn Cafritz Foundation, permitting establishment of a private school on property occupied by the Cafritz House, a residence on Foxhall Road, Northwest. In considering the application, the principal issue the Board had to contend with was the acknowledged risk that location of the Field School on Foxhall Road would impair traffic safety on that north-south roadway, specifically on a portion the Board described as "narrow, curved, and hilly, with poor visibility." Petitioners, who are coalitions of property owners residing near the proposed school site, raise substantive and procedural challenges to the Board's decision granting the special exception. They contend, in summary, that the Board failed to give the required "great weight" to the opposition filed by the Advisory Neighborhood Commission (ANC); that in finding the proposed school use in harmony with the zoning regulations and that it would not "become objectionable to ... nearby property" because of traffic and other conditions, the Board paid insufficient attention to national highway design standards and otherwise failed to articulate its reasons clearly; and that the Board's inadvertent failure to record a portion of the evidentiary hearing resulted in the *de facto* "disqualification" of two votes--leaving less than the required majority--in favor of the application. After considering each of these contentions, we affirm the Board's decision.

***249 I.**

[1][2][3] Just recently this court re-emphasized the statutory requirement that issues and concerns raised by ANC officials " 'be given great weight during the deliberations by the governmental agency,' " and that " 'those issues ... be discussed in the written rationale for the governmental decision

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taken.' " *Foggy Bottom Ass'n v. District of* Columbia Bd. of Zoning *Adjustment,* No. 99-AA-1105, 791 A.2d 64, 76 (D.C.2002) (quoting D.C.Code § 1-261(d) (1999)). As reflected both in the statute and in this court's decisions, the latter requirement means that "an agency must elaborate, with precision, its response to the ANC issues and concerns," articulating "why the particular ANC itself, given its vantage point, does or does not offer persuasive advice under the circumstances." *Kopff* v. District of Columbia Alcoholic Beverage Control Bd., 381 A.2d 1372, 1384 (D.C.1977). [FN1] On the other hand, as we stated in *Kopff,* " 'great weight' in this context is not a quantum requirement," *id.* at 1384; and the agency " 'is not obliged to follow the ANC's recommendations or adopt its views.' " *Draude v. District of Columbia* Bd. of Zoning Adjustment, 582 A.2d 949, 953 (D.C.1990) (citation omitted). The ANCs do not enjoy " 'expert' status, entitled to special deference as such," *Kopff,* 381 A.2d at 1384; *see* Foggy Bottom, 791 A.2d 64, slip op. at 28-29; rather, the agency must "pay specific attention to the source, as well as the content, of ANC recommendations, giving them whatever deference they merit in the context of the entire proceedings, including the evidence and views presented by others." *Kopff,* 381 A.2d at 1384.

> FN1. As the Board pointed out, the statutory section pertaining to "great weight" was revised in 2000 and expressly requires the agency, among other things, to "articulate with particularity and precision the reasons why the [ANC] does or does not offer persuasive advice under the circumstances." D.C.Code § 1-309.10(d)(3)(B) (2001). Petitioners do not contend that this amendment alters the level of consideration agencies must accord the ANC's views.

The Board took note of its "great weight" responsibility and explained that it had "carefully considered the ANC's reports." But it made that consideration vulnerable to challenge by erroneously pointing out that, at the time the ANC made its final recommendation, "it [the ANC] did not have the benefit of hearing" the final report submitted by the Department of Public Works (DPW) concerning the traffic impacts of the proposed school and whether those could be ameliorated. It is true that DPW's administrator, Kenneth Laden, did not *testify* about the results of DPW's investigation and its recommendation until after the ANC's final position had been submitted, but DPW's report stating its conclusions had been circulated beforehand, and the ANC specifically referenced DPW's recommendations in its final statement of opposition dated July 18, 2000. The ANC's recommendation was not deficient for any lack of familiarity with what traffic experts (either the parties' experts or DPW) were recommending.

[4] Despite this error, we are persuaded that the Board "c[a]me to grips with the ANC view" in the manner required by the statute. *Kopff,* 381 A.2d at 1384. With regard to traffic impacts, the ANC explained that it had previously recommended "conditional approval" of the application because the initial traffic plan proposed by the school envisioned two entrances to the school from Foxhall Road and "a 10-car 'stacking' lane" for cars traveling south and turning left into the ***250** school grounds. [FN2] In the meantime, though, "the applicant [had] amended its traffic plan at least partly in response to recommendations by [DPW]," so that the northern entrance would be closed and the stacking lane reduced "from 10 to 3 cars." These changes, in the ANC's view, would likely have an objectionable impact on traffic safety and congestion in the neighborhood. The Board concluded otherwise, "credit[ing] the opinion of DPW and the applicant's traffic experts that the proposed school can be located on Foxhall Road in a manner that would not create objectionable traffic conditions." In a lengthy portion of its opinion headed "Traffic Impacts," it explained why it accepted DPW's view that "if certain conditions, which are incorporated in this order, are met," traffic safety would not be adversely affected. In particular, it noted testimony that the proposed left-turn lane could accommodate stacking of as many as five cars, and that DPW would engage in "further refinements" during the design process to maximize safety in the turn lane and at the stop light and intersection being created. In sum, although the Board well knew the ANC's position that nothing short of a ten-car stacking lane would insure safety, [FN3] it chose to credit contrary expert opinion that a combination of alternative design measures would achieve that result. This was within its authority to give the ANC's views "whatever deference they merit[ed] in the context of the entire proceedings,

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including the evidence and views presented by others," *Kopff*, 381 A.2d at 1384 (emphasis added), but without being bound by them.

FN2. "Stacking" was the term used by the experts to refer to alignment of vehicles one behind the other in a center turn lane. This new lane, achieved by widening the roadway, would also have a taper and a deceleration component before the stacking area was reached.

FN3. Although the ANC complained of the proposed closing of the north entrance to the school site, it did not explain why in its view that closing would create a traffic safety problem. DPW, by contrast, had stated its view that having one entrance (with a signal light) instead of two would increase traffic safety.
The ANC had also expressed concern about the inadequacy of design measures addressing storm water runoff. The BZA addressed this concern specifically in sections of the decision entitled "Other Objectionable Conditions" and "Impacts on Use of Neighboring Property."

II.

As a private school seeking to locate in a residential neighborhood, the Field School was obliged to obtain a special exception. *See* 11 DCMR § 206 (1995). A special exception will be granted if the BZA finds that the proposed use is in harmony with the general purpose and intent of the Zoning Regulations and the Zoning Map, 11 DCMR § 3104.1, 46 D.C.Reg. 7891 (1999), and meets the special conditions listed in 11 DCMR § 206. At issue here is the condition, recited in 11 DCMR § 206.2, that "[t]he private school shall be located so that it is not likely to become objectionable to adjoining and nearby property because of ... traffic ... conditions."

DPW recognized that locating the proposed school on Foxhall Road "presents a potential traffic safety problem due to restricted sight lines, drivers traveling at speed in excess of the posted 25 mph limit, and high traffic volumes." DPW proposed, and in granting the special exception the Board adopted, what the Board termed "numerous, stringent conditions" designed to deal with the "traffic and public safety" issues. Of particular importance are the following two:

* * * *

***251** 14. Before a certificate of occupancy may be issued, Foxhall Road adjacent to the Field School property must be widened to allow the development of [a] southbound left turn lane on Foxhall Road into the proposed school site. The construction must provide a minimum sight distance of 305 feet for northbound traffic and 364 feet for southbound traffic. The length of the combined taper, deceleration, and stacking distance must be a minimum of 474 feet. The applicant shall submit its design and engineering plans to DPW for review and approval. The final design and engineering plans must be approved by DPW.

* * * *

16. Before a certificate of occupancy may be issued, a traffic control signal must be located at the southern entrance to stop traffic on Foxhall Road to allow safe turns into and out of the school property. The traffic control signal must provide a priority green light to traffic on Foxhall Road and only be activated to stop northbound Foxhall Road traffic when there are vehicles stacked in the left turn lane.

[5] Petitioners first contend that the Board failed in its duty to "give [ ] full and reasoned consideration to all material facts and issues," *Dietrich v. District* of Columbia Bd. of Zoning Adjustment, 293 A.2d 470, 473 (D.C.1972), by disregarding expert testimony that a left turn lane at this location would require far greater road length than is available at the site. Specifically, they cite their expert's testimony that the length of the new lane required to meet national design standards [FN4] would extend well beyond the boundary of the Field School's frontage on Foxhall Road (the School could contribute the land needed to widen the road only along its own frontage). We do not agree, however, either that the Board ignored this testimony or that it was cavalier in its treatment of the industry standard. First, the Board specified that the combined distance of the left turn lane must be "a minimum of 474 feet," doing so after it noted the testimony of James Long, an expert for the applicants, "that the frontage of the subject property could actually provide 512 feet for the combined

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taper, deceleration lane, and stacking lane"--additional footage DPW could presumably take into account in the "further refinements" the Board contemplated. Second, although this total frontage was still substantially short of what petitioners' expert said was required by the AASHTO standards, the Board reasonably looked to those standards--as had DPW--as "general guidelines to be applied to the extent possible," rather than as fixed norms applicable to every situation. [FN5] The complete package of conditions the Board imposed to reduce the expected impact of traffic--including staggered hours of school opening, mandatory car pooling by students, and shuttle bus service *252 to Metrorail and other locations--convinced it that the left turn lane could be engineered in such a way as to minimize the risk of accidents. [FN6]

FN4. The standards referenced were recommendations by the American Association of State Highway and Transportation Officials (AASHTO).

FN5. The foreword to the AASHTO guidelines, *A Policy on Geometric Design of Highways and Streets,* includes the following language with regard to the manner in which the guidelines are to be implemented: "The intent of this policy is to provide guidance to the designer by referencing a recommended range of values for critical dimensions. Sufficient flexibility is permitted to encourage independent designs tailored to particular situations." American Association of State Highway and Transportation Officials, *A Policy on Geometric Design of Highways and Streets,* (1994) at xiiii.

FN6. Indeed, the Board found from testimony that "[ ]the proposed traffic signal, school zone, and warning signs and lights are expected to have a traffic-calming effect" on a roadway where the speed limits were often ignored.

We nonetheless would be troubled by the Board's conclusion as to traffic if we agreed with petitioners' suggestion at oral argument that DPW--on whose recommendation the Board heavily relied--took for granted that a left turn lane (and traffic signal) would solve the traffic safety problems, leaving only for debate the precise length and configuration of the lane (*e.g.*, stacking length versus taper or deceleration length). But we are satisfied that DPW, and the Board in turn, took nothing for granted. At his first scheduled appearance before the Board, DPW's administrator Laden declared that, although in reviewing the initial proposal DPW "supported most of the traffic plan as provided by the Applicant," the agency was not going to make a recommendation without further study and site inspection:

> Our bottom line position is, we are not going to recommend to this Board, or anyone else that a left-lane turn be established if it cannot be done safely, and before we can make a definitive decision as to whether this would be a safe lane, we do want to take a second look at it.

Only after DPW submitted its final report and was questioned about it at a hearing, did the Board accept its recommendation that a left turn lane, combined with other conditions, would resolve the traffic concerns. The Board did not prejudge the traffic issue but addressed it in a reasoned and reasonable manner.

[6] Petitioners further contend that the Board failed to address, "except in the most perfunctory way," the broader question of whether the proposed school would be "in harmony with the general purpose and intent" of the residential zoning in this neighborhood. Petitioners are correct that a private school is not permitted as a matter of right in a residential (R-1-A) zone; a special exception must be sought and obtained. But we do not agree that the Board viewed parsimoniously its role in passing upon the application for a special exception. In stating that its role was "limited," the Board used that term in the precise sense the court did in Stewart v. District of Columbia Bd. of Zoning Adjustment, 305 A.2d 516 (D.C.1973):

> **Special exceptions**, unlike variances, are expressly provided for in the Zoning Regulations. The Board's discretion to grant **special exceptions** is limited to a determination whether the exception sought meets the requirements of the regulation. The burden of showing that the proposal meets the prerequisite enumerated in the particular regulation pursuant to which the exception is sought rests with the applicant....

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> [T]he applicant must make the requisite showing, and once he has, the Board ordinarily must grant his application.

Id. at 518 (citation omitted). The Board's analysis leading it to conclude that the school would fit harmoniously in the neighborhood cannot fairly be termed perfunctory. It considered the size of the proposed school-- in terms of both enrollment and space occupancy--in relation to the character of a residential neighborhood, noting for example that "[w]hile the R-1-A District has a lot occupancy limitation of 40 percent, the proposed school buildings would only occupy 7 percent of the [10.5 acre] property" and "[t]he total impervious surface ... only 27 percent of the property." ***253** [FN7] It considered as well the noise and traffic impacts, storm water run-off, and other objectionable effects before explaining in each instance how conditions on approval of the application could ameliorate them. And lastly, it gave the required "great weight," D.C.Code § 6-623.04 (2001), to the view of the Office of Planning that the proposed school would not be inconsistent with the character of the neighborhood:

> FN7. Earlier the Board noted the view of other neighbors favoring the application that the school use would "ensure the preservation of green space ... in lieu of alternative development schemes such as a high-density residential development that could pave and cover up to 60 percent of the land."

> OP observed first that schools by their very nature are associated with residential areas; second, that Foxhall Road, with 17,500 vehicles per day, is a busy arterial road, not a quiet residential collector street; third, the area has already been characterized by a number of institutional uses, including the former Mt. Vernon College, St. Patrick's Church and School, the Kreeger Museum, and several embassies; and finally, that the design of the new school buildings would retain various elements from the existing mansion to evoke a residential feel, the buildings would be "tucked into" the slope to minimize the perceived bulk, and there would be substantial vegetative buffering.[[FN8]]

> FN8. As the Board pointed out, OP had made its recommendation mindful of the District of Columbia Comprehensive Plan's "call to preserve and enhance the quality of stable residential neighborhoods." We do not agree with petitioners that the Board "shut its eyes to the Comprehensive Plan." It is true, as a matter of law, that the Board has "no power to implement the Comprehensive Plan," *Tenley & Cleveland* Park Emergency Comm. v. District of Columbia Bd. of Zoning Adjustment, 550 A.2d 331, 341 n. 22 (D.C.1988), but, in any case, the Board's analysis--like the OP's--was in keeping with the Plan's injunction to preserve the character of residential neighborhoods.

All told, the Board's conclusion that the proposed use was in harmony with the zoning regulations and, as conditioned, would have no adverse impacts on the neighborhood "rationally flow[ed] from findings of fact supported by substantial evidence in the record as a whole." *Draude,* 582 A.2d at 953 (citation omitted). As a matter of substantive law, we find no reason to disturb it.

III.

[7] Petitioners' final challenge is to a procedural irregularity resulting from the fact that, because of mechanical failure, no recording was made of the direct or cross examination of the applicants' traffic expert, Louis Slade, at the evidentiary hearing. [FN9] This in turn meant that two members of the five-member Board who were absent personally from all or a portion of that testimony, and later voted to grant the application, had no record of it to review before casting their vote. Petitioners point out that, for the Board to render any decision or order, the affirmative vote of at least three members is required, *see* D.C.Code § 6-641.07(h), and that in order to vote on a decision a Board member must *either* have attended the hearings *or* have read the transcript of any hearing that he or she did not attend. *See* 11 DCMR § 3105.15, 46 D.C.Reg. 7896 (1999). Petitioners therefore argue that the two members who did neither of these in regard to Slade's testimony were "disqualified" from voting, thereby erasing the four-vote majority.

> FN9. In the absence of a court reporter at the May 10, 2000, hearing, the parties had

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agreed that the proceedings would be tape recorded.

***254** Intervenors counter that the inability of the two members to review a portion of the record was non-prejudicial given the vast amount of record material they presumptively did review. This naturally gives rise to the question whether an inquiry into prejudice *vel non* is permissible in this context. If, as petitioners argue, the effect of a member's neither attending a hearing nor reading a transcript of it is to disqualify him--to render him ineligible to vote on a matter--then no room would seem to be left for consideration of actual prejudice. But we do not read the regulations in question to impose that disqualification. 11 DCMR § 3105.14, 46 D.C.Reg. 7896 states that "[a] member absent at the decision meeting may cast an absentee vote only if the member attended all of the hearings on the appeal or application." By contrast, § 3105.15, 46 D.C.Reg. 7896 states that "[a] member attending the decision meeting and having read the transcript and reviewed the complete record may participate and may vote even though that member may not have attended any or all of the prior meetings or hearings on the appeal or application." The pivotal distinction is between attendance and absence at "the decision meeting," where, as in this case, the members hear oral argument, exchange views, and ultimately vote. Unlike the member absent from that meeting who must have attended "all of the hearings" to vote, the member attending it need not have attended "any or all" of the prior proceedings. (The two members in question here concededly attended that meeting.) There is the key additional qualification that the latter "have read the transcript and reviewed the complete record," but petitioners read that provision too strictly, in our view, by saying that it permits no imperfection in the record available to a member who was present at the all-important decision meeting. (Indeed, one disposed to read the language strictly would have to note the distinction between "transcript" and " *complete* record.") Our reading of the regulation must harmonize with the statutory principle that, "[i]n reviewing administrative orders and decisions, ... [t]he Court may invoke the rule of prejudicial error." D.C.Code § 2-510(b) (2001); *see* Arthur v. District of Columbia Nurses' Examining Bd., 459 A.2d 141, 146 (D.C.1983). So reading it, we proceed to inquire whether the absence of a record of Slade's testimony can be said to have meaningfully affected the ability of the two members to deliberate and vote.

The answer to that question is no. The parties agree that Slade's testimony would have amounted to under two hundred transcript pages. The entire written record before the Board numbered 2735 pages. The size of the record cannot be determinative, of course, because the reports and testimony of traffic safety experts such as Slade were, as we have seen, of central importance to the Board's task. Yet the centrality of expertise to its consideration of the traffic issues bears negatively on whether there was prejudice from the omission here. The Board received multiple written reports addressing the traffic impacts from experts representing both sides, as well as from the independent experts at DPW and OP. In the main, those experts also testified and were cross examined at the hearings. If the pattern in every other instance held true in the case of Slade, then his testimony on direct was substantially a summary of the detailed analysis provided in his written report, and the cross examination substantially a reprise of the written criticisms made of his analysis by petitioners' experts. Moreover, in their proposed findings of fact and conclusions of law petitioners summarized Slade's testimony at the hearing as having "relied upon his third ***255** traffic report of May 19, 2000"; and they went on to list multiple points on which he had been cross examined and to rebut his conclusions by reciting the testimony and written findings of their experts. All members of the Board thus had at least that familiarity with his live testimony.

Of most significance, perhaps, is that Slade testified *before* DPW made its final (or "second look") study of the expected traffic impacts. DPW's report then became the basis for Slade's final written report [FN10] and--after thorough cross examination of administrator Laden about DPW's conclusions--the keystone of the Board's findings of fact and conclusions regarding traffic. [FN11] Slade's oral testimony, in other words, although inadequately preserved for review by individual Board members, had largely been superseded in importance by the time the Board began its deliberations.

FN10. "The final Gorove/Slade report dated June 2, 2000," the Board noted, was

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> "prepared in response to the final DPW report."

FN11. *See, e.g.*, paras. 28 and 41 of the Board's opinion:

> According to DPW, use of the site for the proposed private school presents a potential traffic safety problem due to restricted sight lines, drivers travelling at speeds in excess of the posted 25 mph limit, and high traffic volumes. DPW was also concerned that some of the drivers who would be travelling to the school would be relatively young and inexperienced. DPW, therefore, applied conservative engineering requirements and traffic control policies in developing its recommendations. In its report dated May 22, 2000, Ex. 439, DPW stated that the proposed school could be accommodated at the site if certain conditions, which are incorporated in this order, are met. DPW requested that any approval of this application be conditioned upon the applicant meeting DPW's recommended design criteria for the widening of Foxhall Road and the construction of a dedicated left- turn lane, eliminating use of the northern entrance for school traffic, and installing a traffic signal at a relocated southern entrance.
>
> * * *
>
> The Board credits the opinion of DPW that, with the conditions recommended by DPW, the proposed private school would not result in objectionable traffic conditions.

[8] We cannot help but note, however, that the Board's treatment of the matter of the unrecorded testimony is troubling. The two Board members in question stated on the record their intent to review the transcript of the hearing portions they had missed, yet the Board's decision gives no indication that the recording failure was brought to its attention by those members or staff--at a time when remedial measures, if thought needed, were still feasible. Petitioners thus argue that "the BZA paid so little attention to the evidence that it decided this case without noticing that a part of the hearings had not been recorded." We do not agree with that assessment, even while we are constrained to remind the Board of its obligation to maintain--and to *consider*--"an official record in each contested case, to include testimony and exhibits," D.C.Code § 2-509(c) (2001), presumably meaning a complete record. Based upon the record of these proceedings, including the active questioning of witnesses by all Board members, and the Board's detailed findings of fact and conclusions of law, we reject any suggestion that it did not take seriously its responsibilities in considering the application. The Board's decision, therefore, is

Affirmed.

END OF DOCUMENT

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JIM GRAHAM
COUNCILMEMBER, WARD ONE
COUNCIL OF THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20004

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Chair,
Human Rights, Latino Affairs &
Property Management Subcommittee

2nd Vice Chair,
Board of Directors, WMATA/Metro

March 8, 2002

D.C. Board of Zoning Adjustment
Second Floor
441 4th Street, NW
Washington, DC 20001

Re: BZA Application #16869
2329 Champlain Street, NW; Kings Creek LLC

To The D.C. Board of Zoning Adjustment:

The purpose of this letter is to urge the Board to approve BZA Application #16869. The project meets the goals of the Reed-Cooke Overlay (11 DCMR 1402) by providing new housing while retaining The Brass Knob Warehouse, a well known local retailer, with whom a long term lease has been signed.

The proposed design add three levels, "terracing" each of those levels back. It also, in response to a suggestion of mine, has a "U" shaped set-back design above the second floor so that there is not a "canyon" effect created on Champlain Street. In addition, each of the thirteen dwellings will have a terrace with greenspace enhancing the ambiance and reducing heat effects. There will be twelve parking spaces provided and secure bicycle parking on the second level, which is already used for parking. Above the third floor will be cabanas for the purpose of rooftop gardens. It is intended that a significant portion of the roof be covered in greenspace/garden.

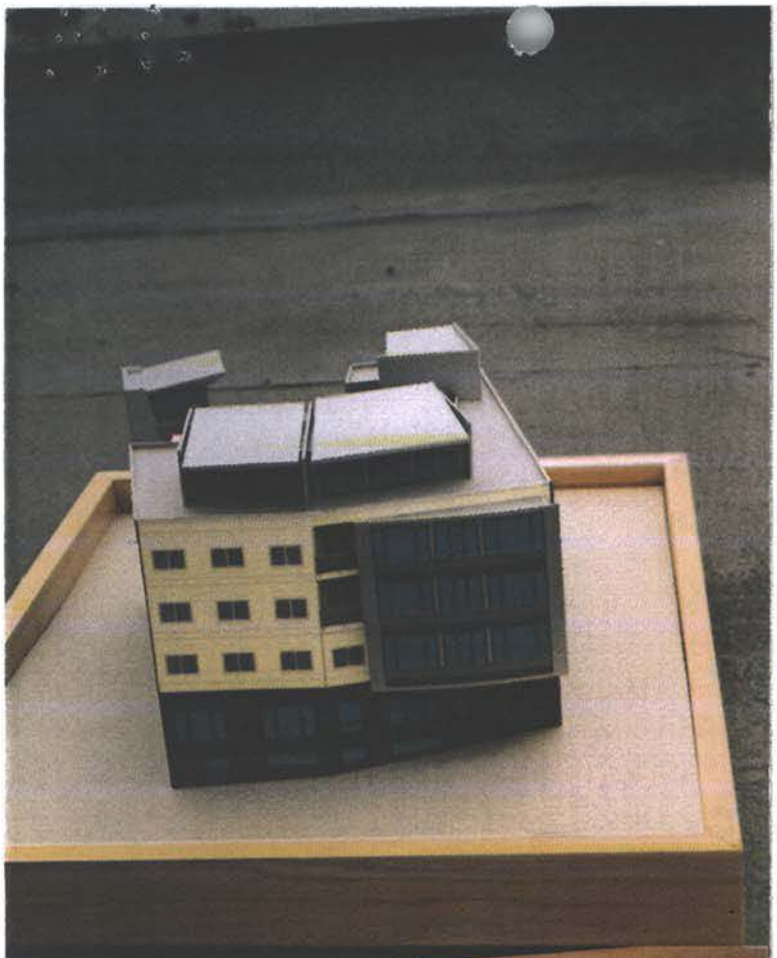
The design also retains the original building circa 1924, which is an appealing stone structure, complimentary to much of the architecture that was on the street.

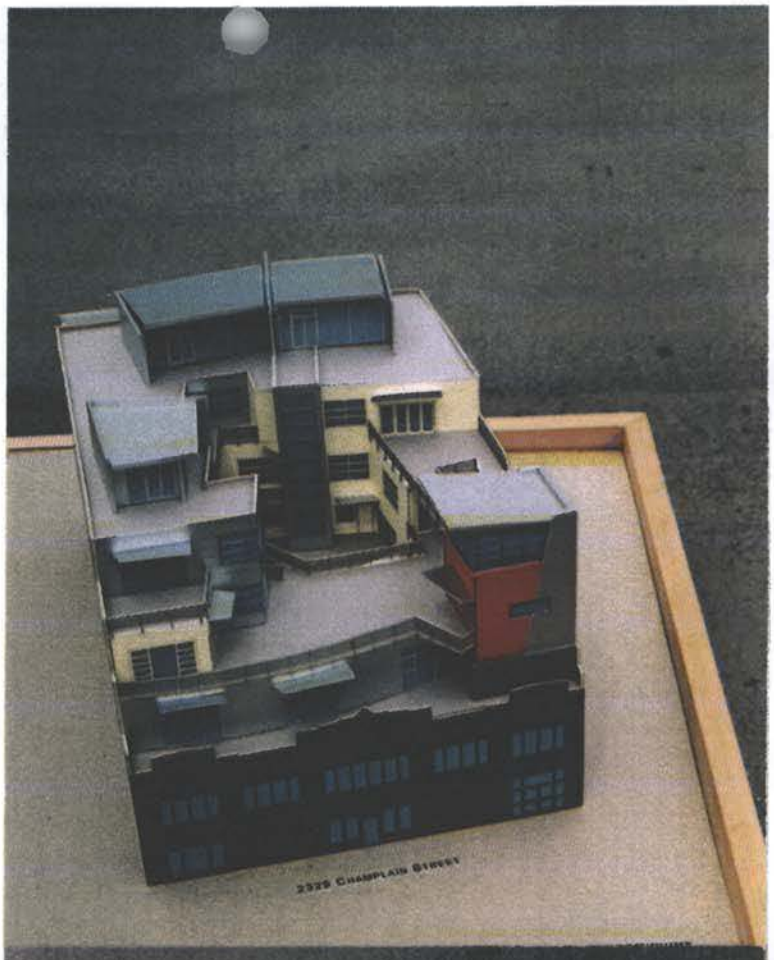
Therefore, I would respectfully request that the Board approve this application.

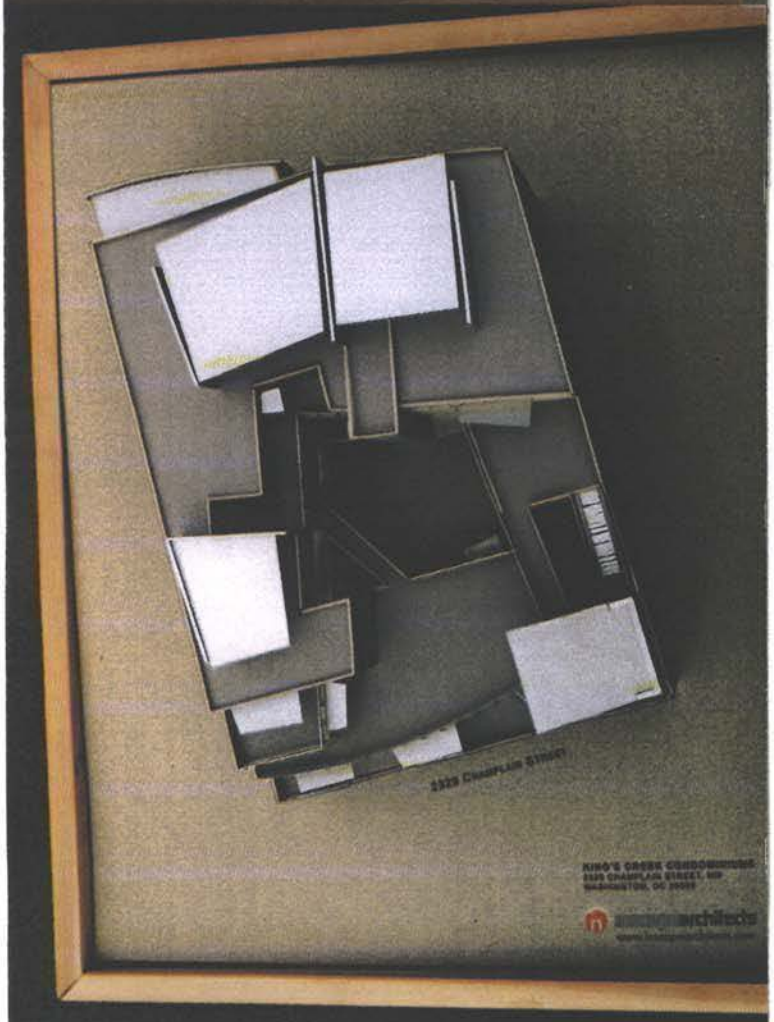
Sincerely yours,

Jim Graham

cc: Dominique Kostelac, Kings Creek LLC

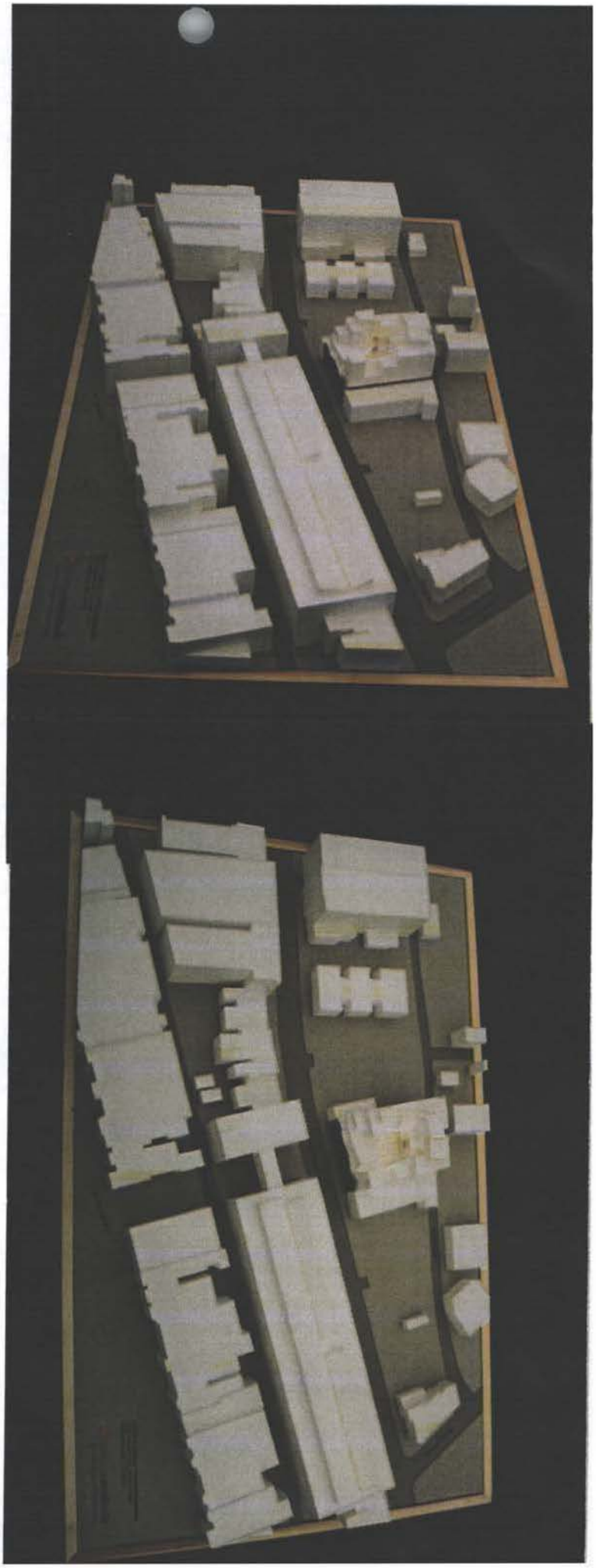


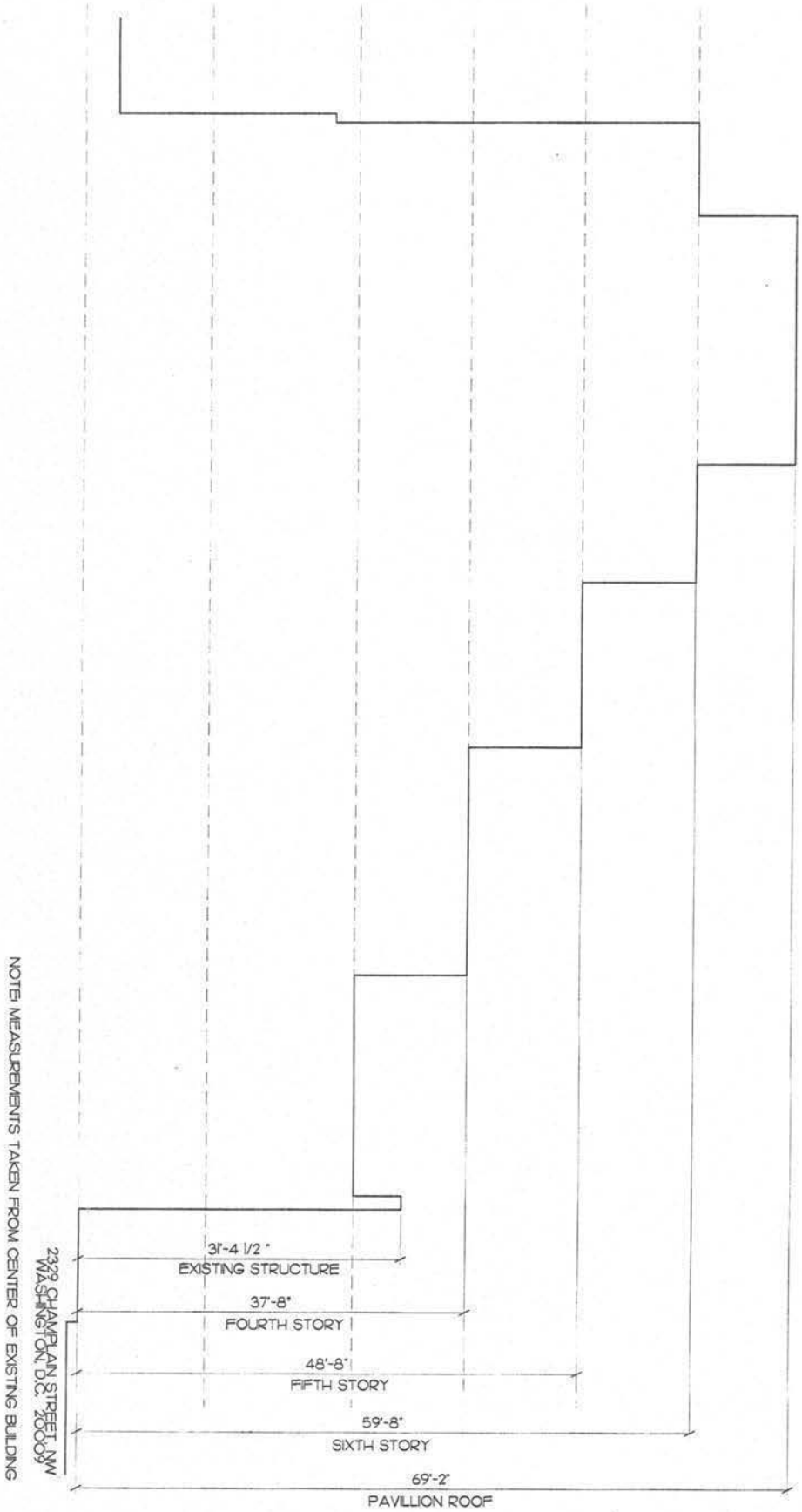

2329 Champlain Street


2329 Champlain Street









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ISSUE 30 APRIL 02

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Advisory Neighborhood Commission 1C

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202-332-2630 • http://www.anc1c.org

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Vice Chair
Mark Wright (1C02)

Treasurer
Josh Gibson (1C07)

Secretary
Pete Klempay (1C09)

Alan Roth (1C01)

Jobi Jovanka-Magana (1C05)

Eleanor Johnson (1C06)

Dan Brody (1C08)

Vacant (1C04)

The District of Columbia
Board of Zoning Adjustment
Room 200
441 4th Street, NW
Washington, DC 20001

Re: BZA Application No. 16869
2329 Champlain Street, NW

Dear Members of the Board:

On April 16, 2002, ANC 1C held a public meeting to discuss the application of King's Creek LLC, BZA Application No. 16869 for variances and a special exception. Proper notice of this meeting was given by the ANC in a timely manner. Eight members of the ANC were present at that meeting. A proper quorum requires the presence and participation of five members.

ANC 1C considered and discussed the presentation by the applicant and supports rapid development of the project. In our opinion the project is a welcome addition to the neighborhood and meets the expressed goals of the Reed-Cooke Overlay. In addition, the applicant has undertaken a significant effort to solicit neighborhood comment on the design and impact of the project. We support the applicant's effort to provide additional air, light and outdoor space in the community by providing setbacks capable of creating additional residential development in the neighborhood. The original building and site are unique and present practical difficulties for the applicant, which are solved by the proposed design for the benefit of the neighborhood.

ANC 1C hereby recommends that Application No. 16869 be approved as requested by King's Creek, LLC in its entirety. The ANC has voted 8-0 to support the application and submit this report to the Board.

Please feel free to call me if you have any questions, 202-667-1488

Thank you for your consideration.

FOR THE COMMISSION,

Andrew James Miscuk
Chairman, Adams Morgan ANC, ANC 1C

Advisory Neighborhood Commission 1C

PO Box 21652, NW, Washington, DC 20009
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Secretary
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Alan Roth (1C01)

Jobi Jovanka-Magana (1C05)

Eleanor Johnson (1C06)

Dan Brody (1C08)

Vacant (1C04)

The District of Columbia
Board of Zoning Adjustment
Room 200
441 4th Street, NW
Washington, DC 20001

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D.C. OFFICE OF ZONING
2002 MAY -2 PM 5:41

Re: BZA Application No. 16869
2329 Champlain Street, NW

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Please feel free to call me if you have any questions, 202-667-1488

Thank you for your consideration.

FOR THE COMMISSION,

Andrew James Miscuk
Chairman, Adams Morgan ANC, ANC 1C

BZA
Case No. 16869
Exhibit No. 30

WITNESS CARD CASE NO. 16869

Proponent _____ OPPONENT _____

Name Darnell Bradford El

Address 2422-17th St. N.W

City Washington D.C. Zip 20009

DAYTIME PHONE No. 202-497-9484

WITNESS CARD CASE NO. 16869

Proponent X OPPONENT _____

Name GREGORY KEMPLEY

Address 1612 20th ST, NW

City DC Zip 20009

DAYTIME PHONE No. 265-9002

WITNESS CARD CASE NO 16869 -

Proponent ✓ OPPONENT _____

Name Dominique Kostelac

Address 3411 Oakwood Terr. NW DC

City Washington DC Zip 20010

DAYTIME PHONE No. 202 483 4984

JONATHAN L. FARMER
ATTORNEY AT LAW

GRIFFIN, FARMER & MURPHY, LLP

1912 SUNDERLAND PLACE, N. W.
WASHINGTON, D.C. 20036-1608
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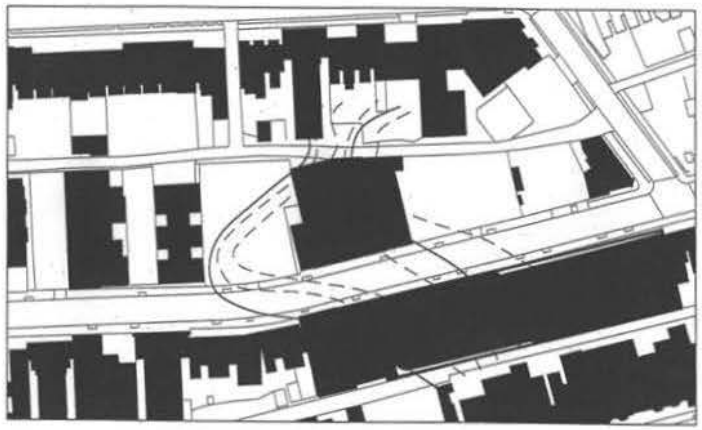
DIRECT: (202) 530-7153
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E-MAIL: jfarmer@washlaw.com

BZA
Case No. 16869
Exhibit No. 29

BZA
Case No. 16829
Exhibit No. 28


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PLATING
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& REPAIR Co



GENERAL NOTES / ZONING ANALYSIS

GENERAL INFORMATION	EXISTING BUILDING	DC HEIGHT, AREA, AND DENSITY REGULATIONS	PROPOSED BUILDING
SQUARE: 2563			
LOT: 103			
ZONED: RC - R5B			
MINIMUM LOT AREA: NON PRESCRIBED			
BUILDING AREA 1ST FLOOR	9,395 SF		SAME
BUILDING AREA 2ND FLOOR	9,006 SF		SAME
BUILDING AREA 3RD FLOOR	NONE		7,506 SF
BUILDING AREA 4TH FLOOR	NONE		5,878 SF
BUILDING AREA 5TH FLOOR	NONE		5,090 SF
BUILDING AREA 6TH FLOOR	NONE		1,063 SF
TOTAL BUILDING AREA:	18,401 SF		37,940 SF
PARKING:	0		13
PARKING AREA:	NONE	285 SF/SPACE	4,796 SF / 400 SF/SPACE
LAND AREA:	9,652 SF		
BUILDING HEIGHT:	24'-6"	40'	69'-2"
FLOOR AREA RATIO:	1.9	1.8	3.9
LOT OCCUPANCY:	100%	60%	100%
REAR YARD:	NONE	15' MIN	NONE
SIDE YARD:	NONE REQUIRED		
COURT WIDTH:	NONE	15' MIN	30' +/-
COURT AREA:	NONE	350 SF	929 SF +/-

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BZA - REVIEW SET

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D101 FIRST FLOOR DEMOLITION PLAN
D102 SECOND FLOOR DEMOLITION PLAN

A101 FIRST FLOOR PLAN
A102 SECOND FLOOR PLAN
A103 THIRD FLOOR PLAN
A104 FORTH FLOOR PLAN
A105 FIRTH FLOOR PLAN
A106 FIFTH FLOOR PLAN/ROOF PLAN
A107 ROOF PLAN
A301 WEST (FRONT) ELEVATION
A302 EAST (REAR) ELEVATION

BZA
Case No. 16869
Exhibit No. 27

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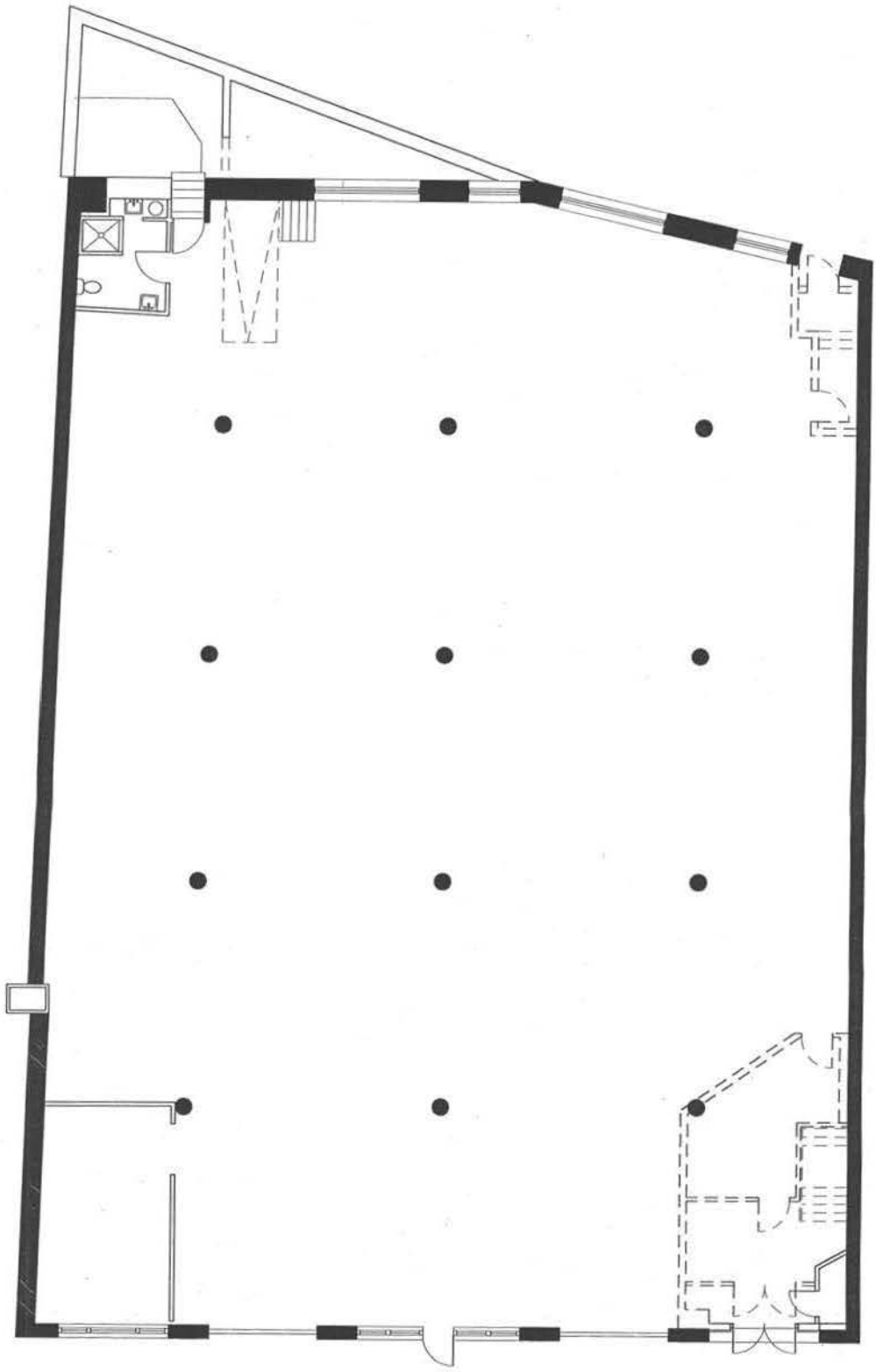
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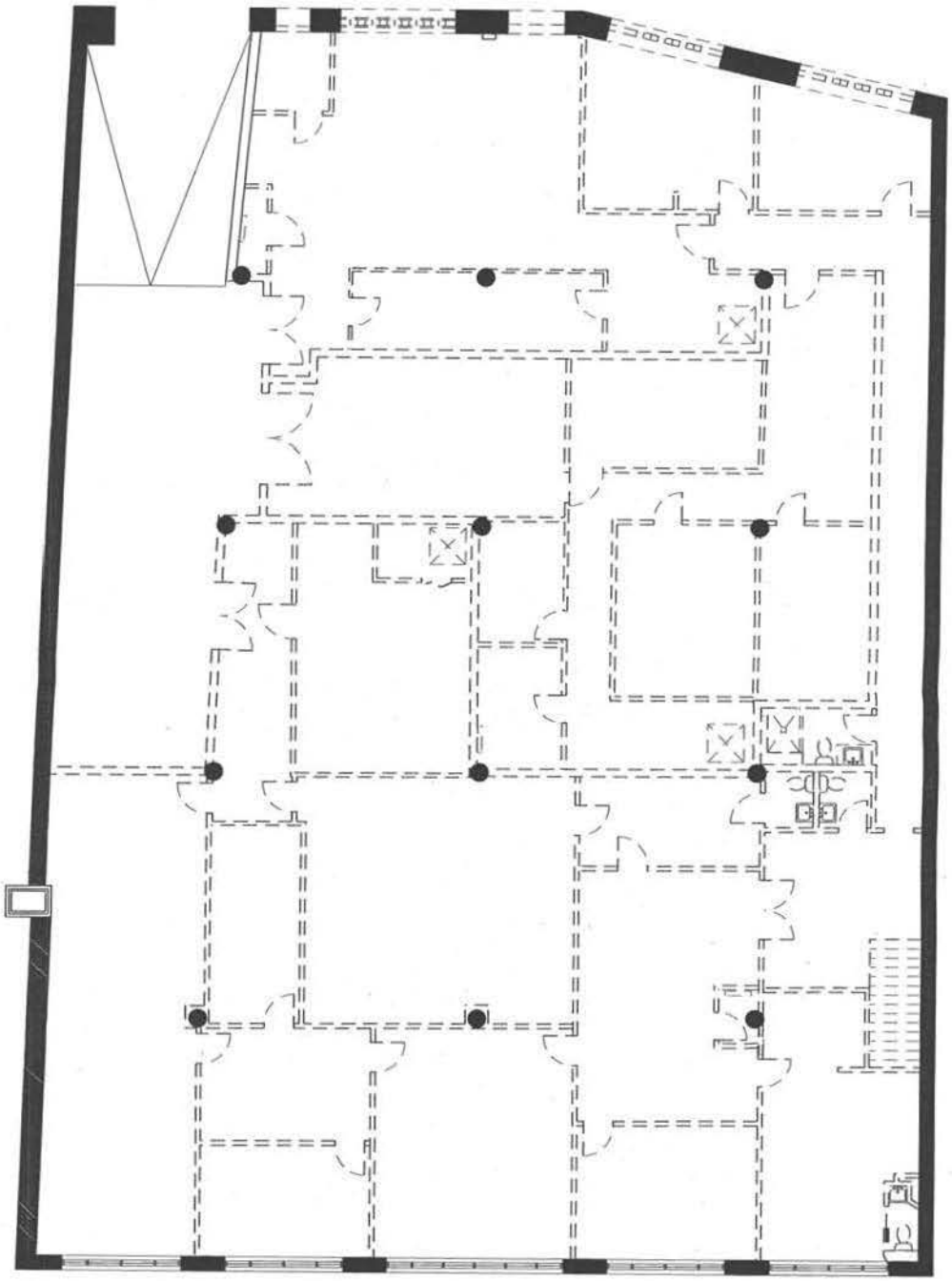
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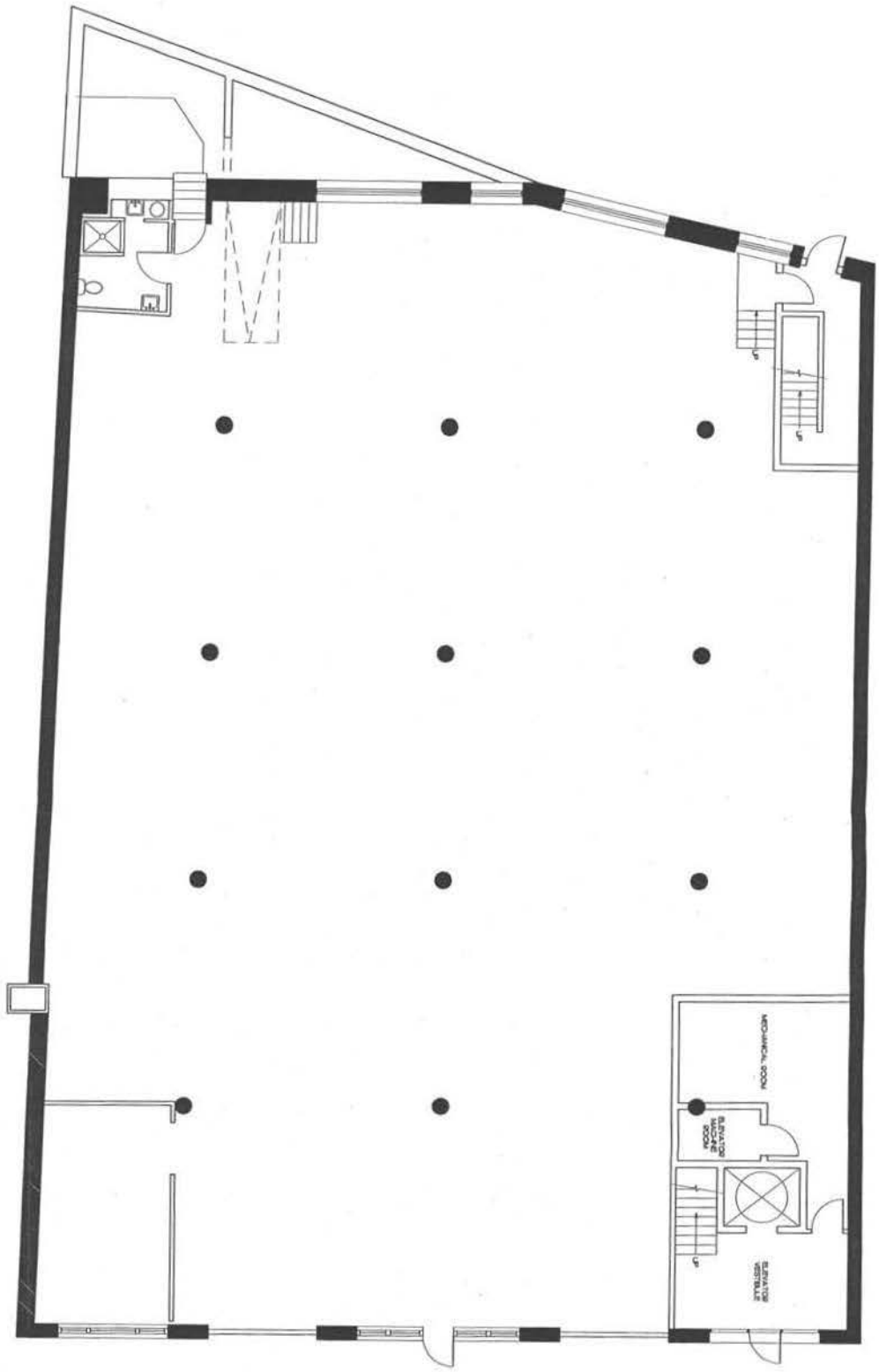
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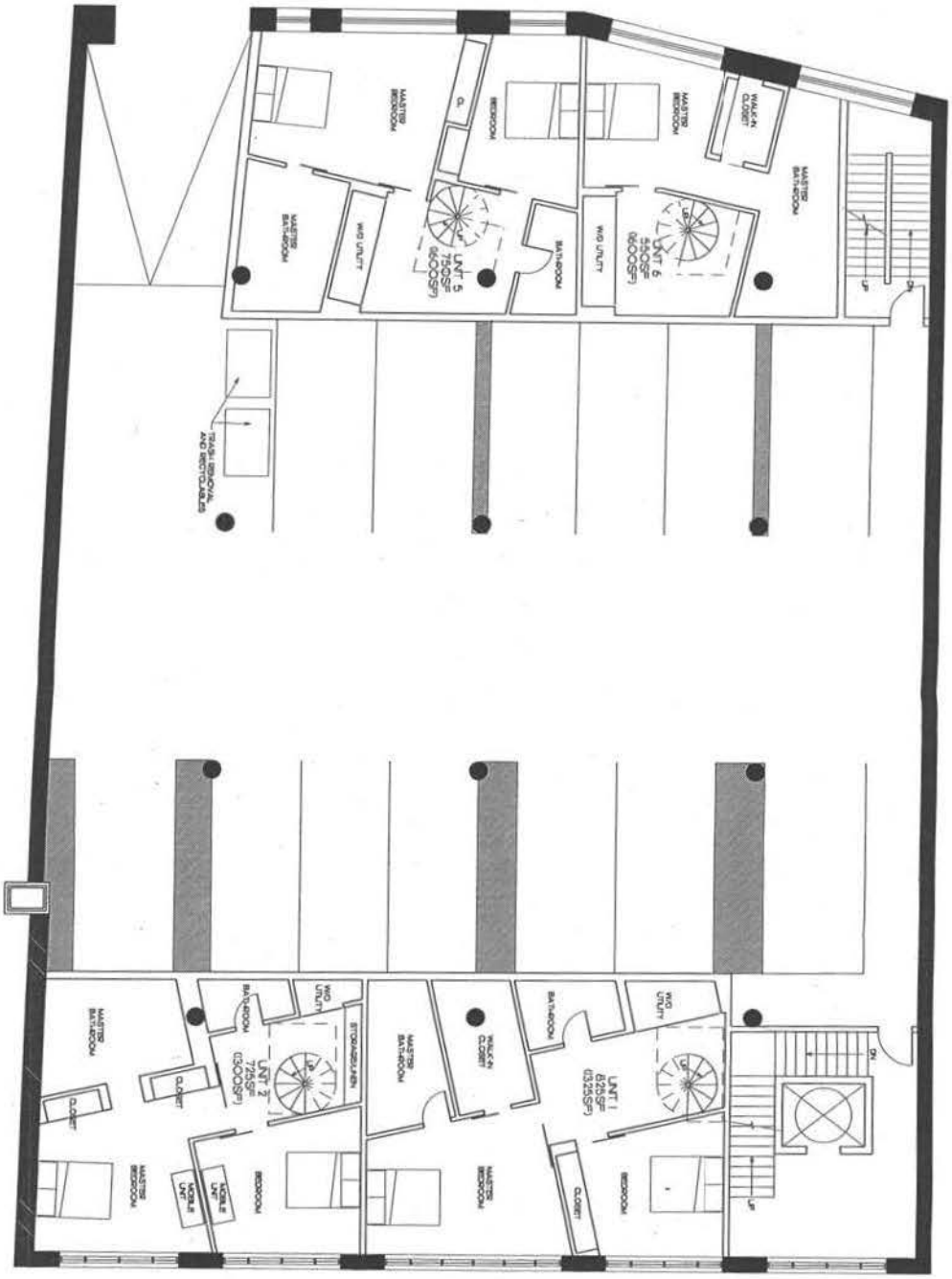
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A101	SCALE: 3/16" = 1'-0"	30 APRIL 02	SUBMISSIONS	FIRST FLOOR PLAN	KINGS CREEK 2329 CHAMPLAIN STREET, NW WASHINGTON, D.C. 20009

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A102

3/16" = 1'-0"

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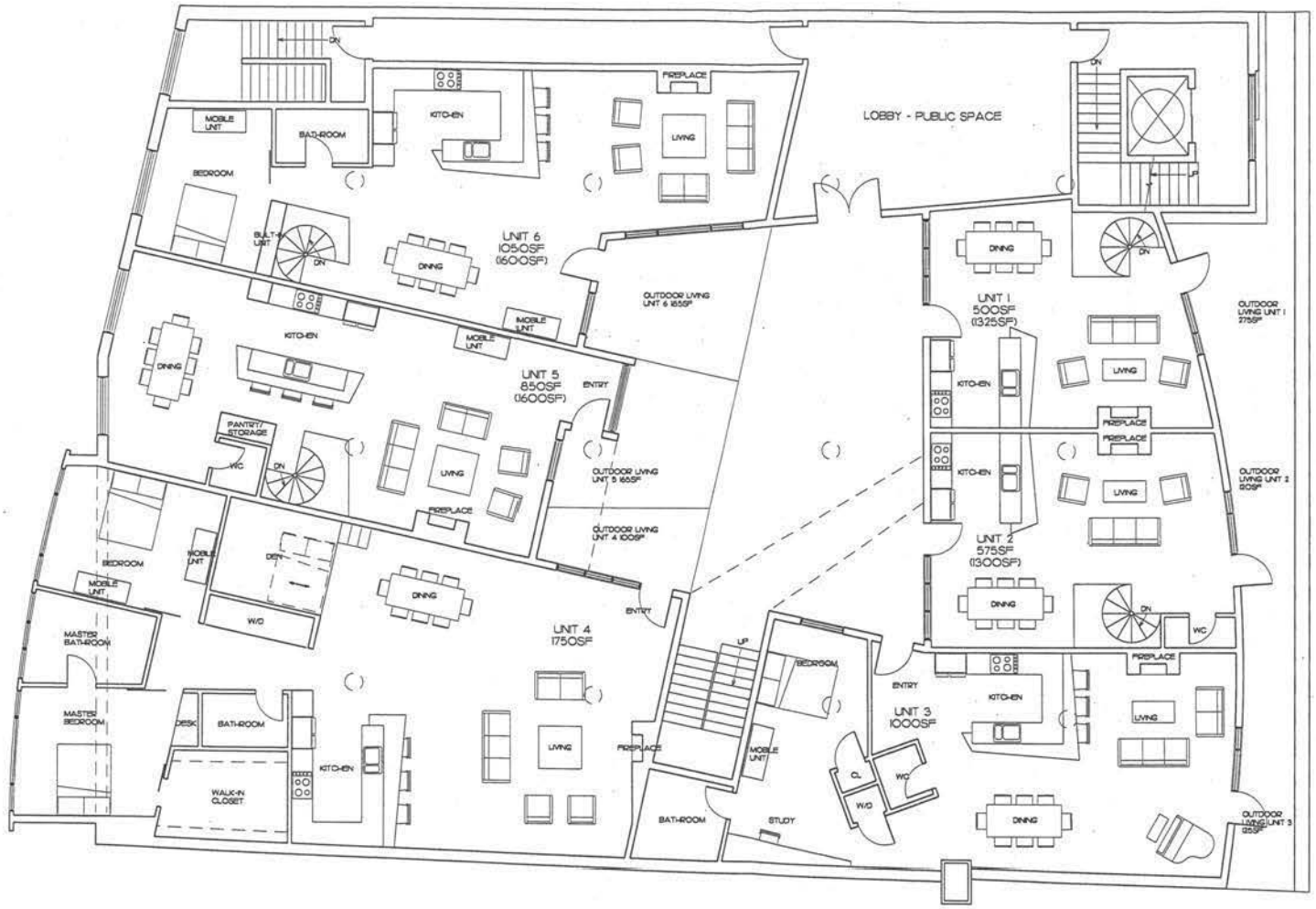
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SECOND FLOOR PLAN

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THIRD FLOOR PLAN

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SCALE 3/16" = 1'-0"

ISSUE 30 APRIL 02

A103



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FOURTH FLOOR PLAN

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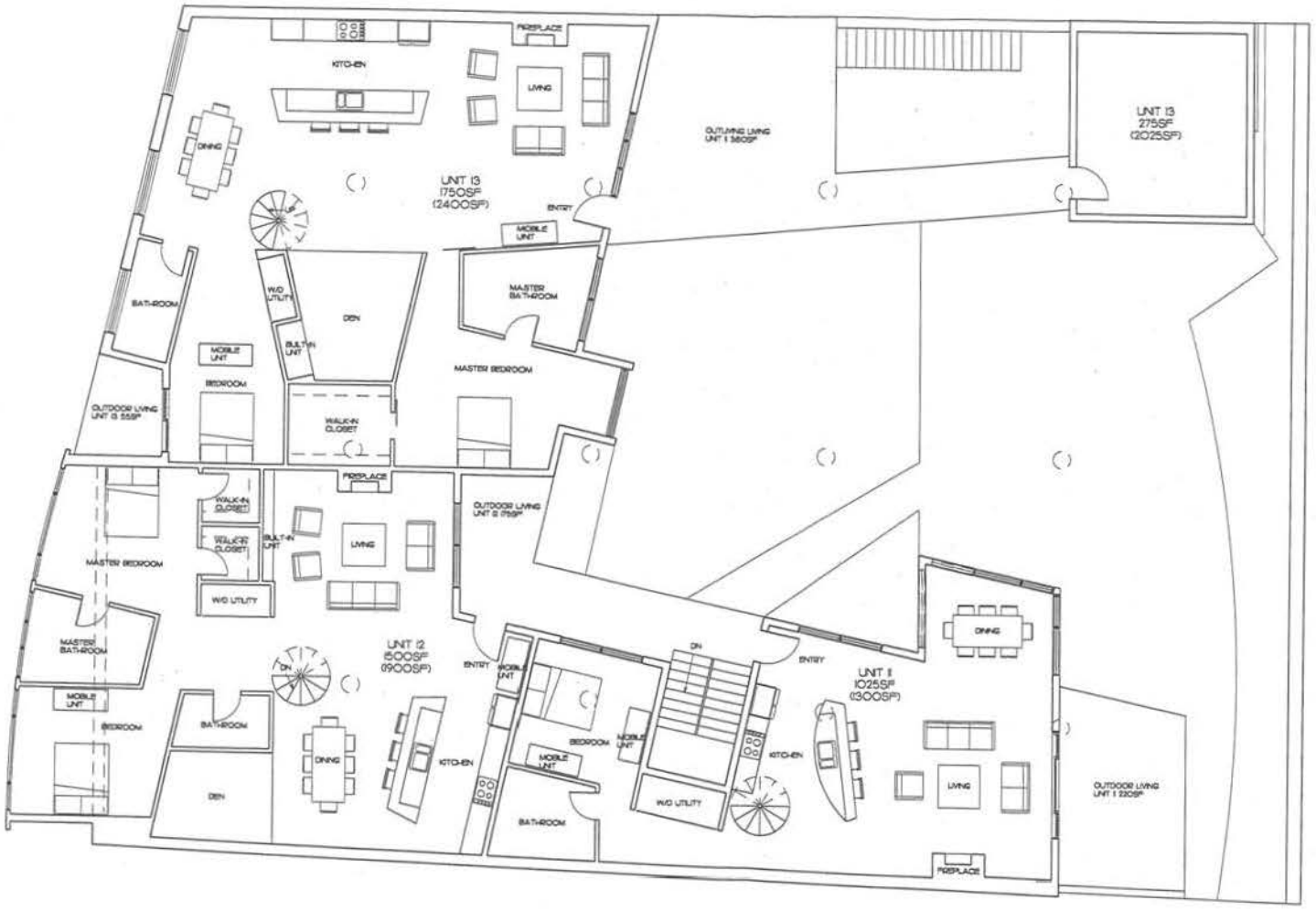
REVISIONS

3/16" = 1'-0"

SCALE

30 APRIL 02

A104



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FIFTH FLOOR PLAN / ROOF TOP

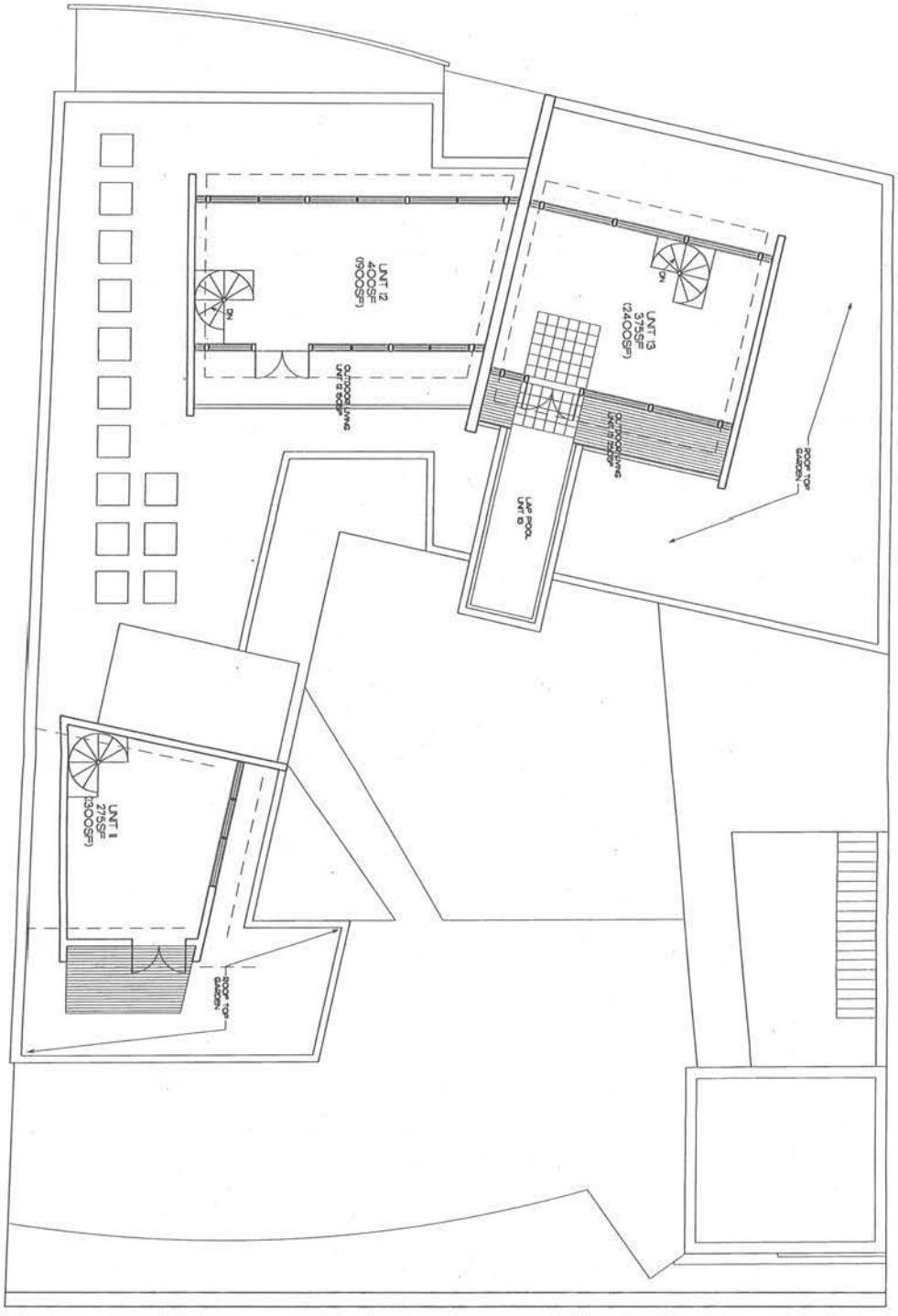
REVISIONS

3/16" = 1'-0"

SCALE

30 APRIL 02

A105



A106

3/16" = 1'-0"
SCALE

30 APRIL 02
ISSUE

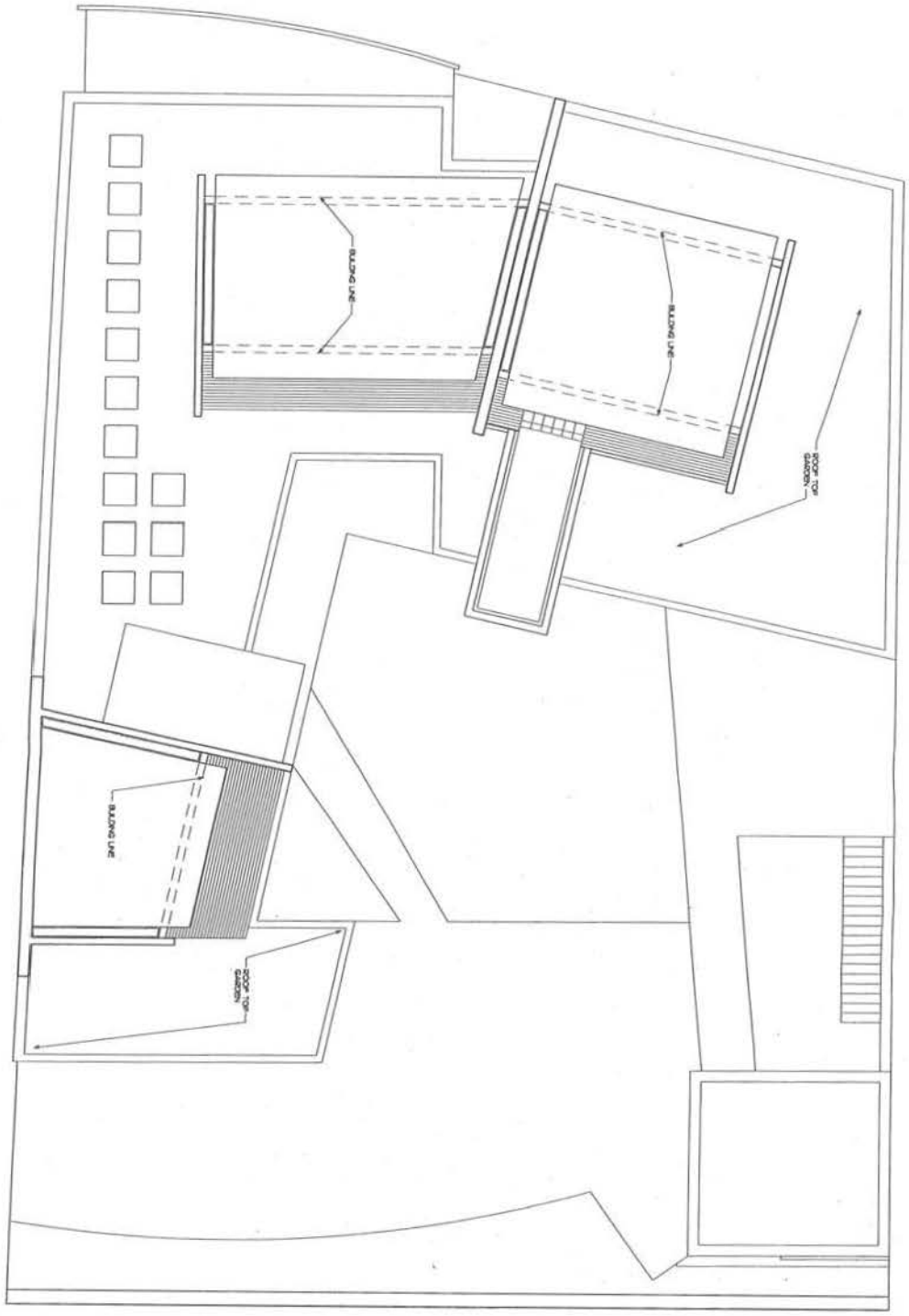
REVISIONS

FIFTH FLOOR PLAN /
ROOF TOP

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A107

3/16" = 1'-0"

SCALE

30 APRIL 02

ISSUE

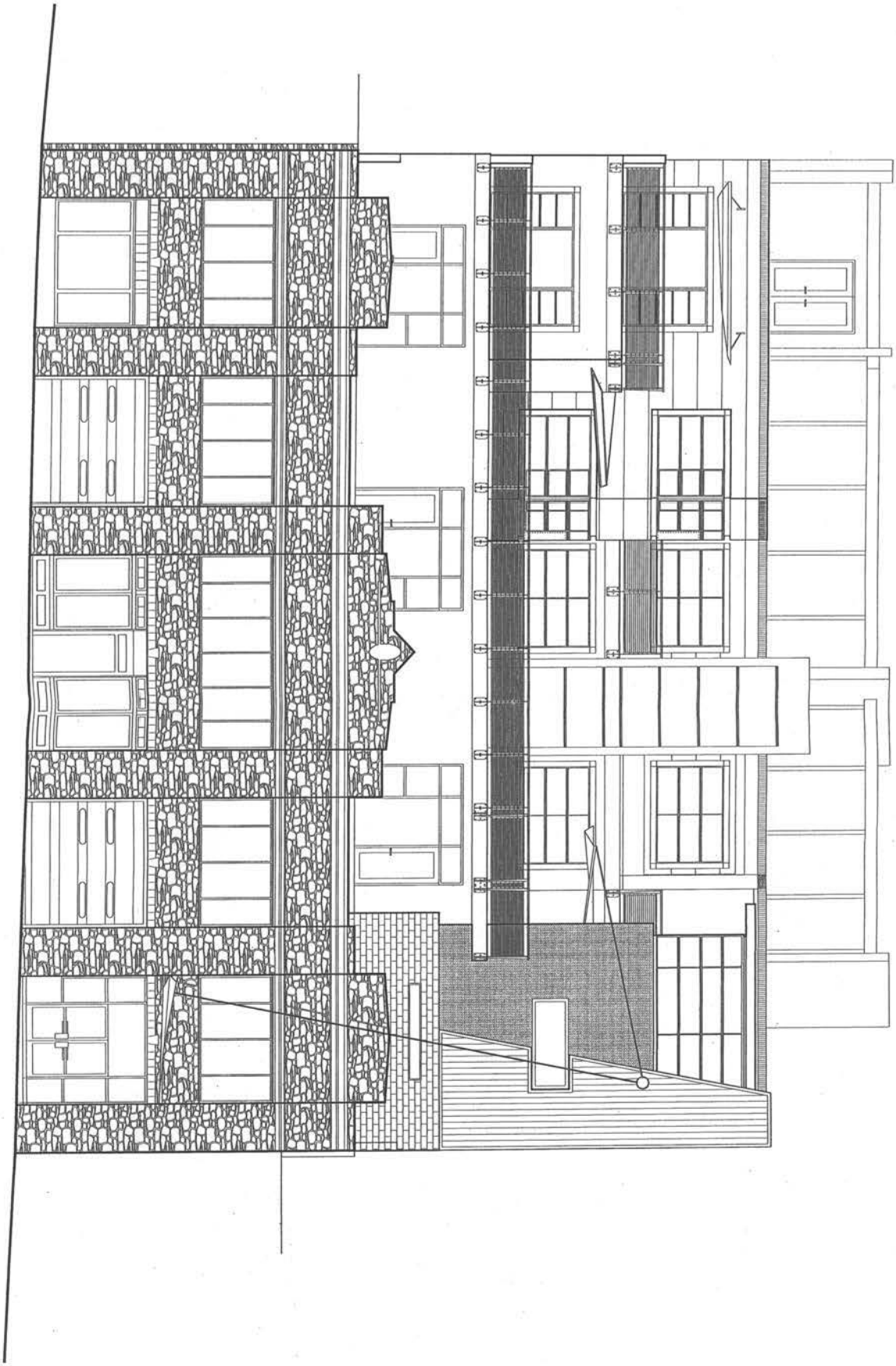
REVISIONS

ROOF TOP

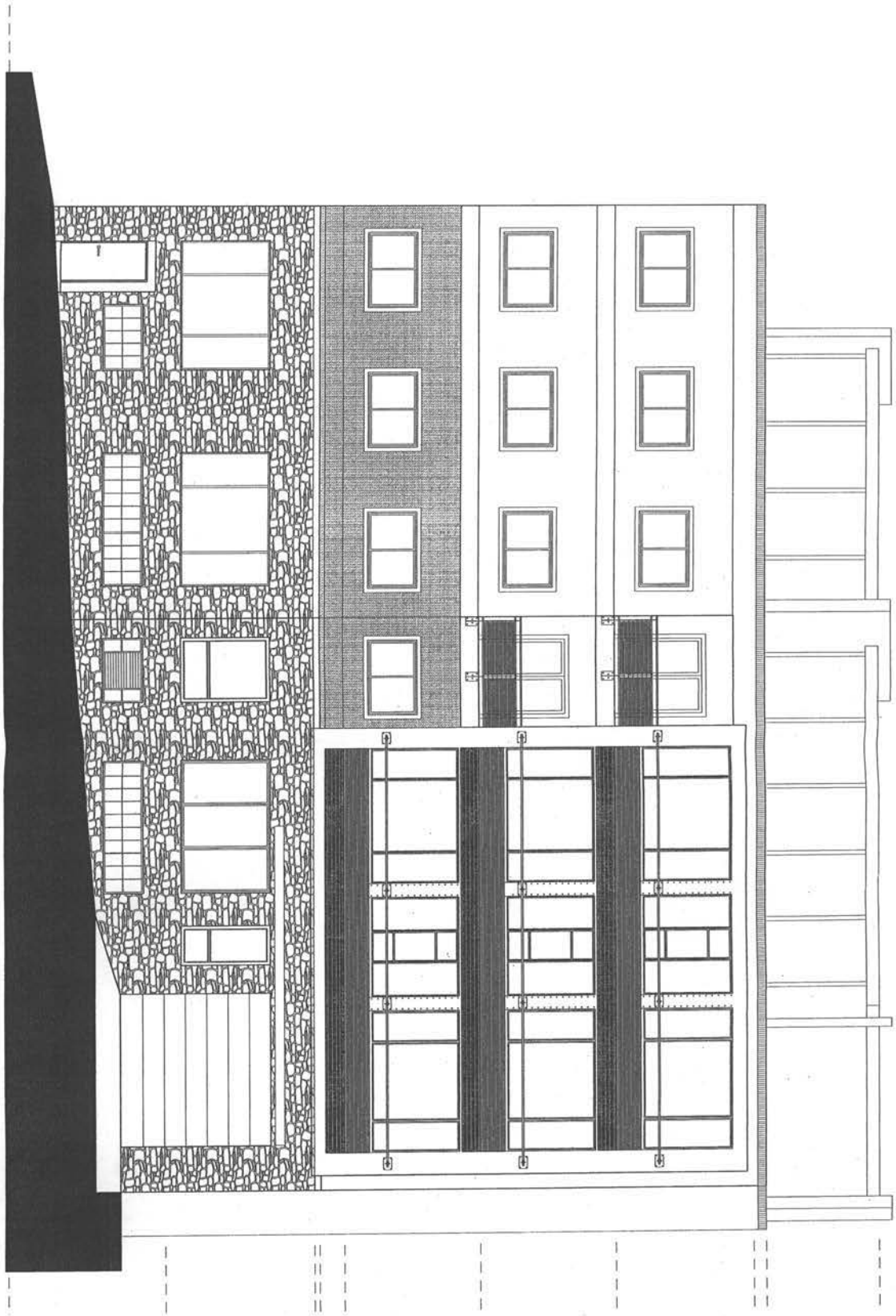
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A301	1/4" = 1'-0" SCALE 30 APRL 02 ISSUE	REVISIONS	WEST (FRONT) ELEVATION	KINGS CREEK 2329 CHAMPLAIN STREET, NW WASHINGTON, D.C. 20009	INSCAPE ARCHITECTS 1612 20TH STREET NW SUITE 400 WASHINGTON, DC 20009 T: 202.265.9002 F: 202.265.9021
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A302

ISSUE 30 APRIL 02

SCALE 1/8" = 1'-0"

REVISIONS

EAST (REAR) ELEVATION

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BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

NOTICE: See reverse side of this form for instructions.

In Re: Kings Creek, LLC (Applicant's Name) BZA Application Number: 16869

AFFIDAVIT OF POSTING (Maitenance)

DISTRICT OF COLUMBIA, ss:

Paul Lancaster (Name of person posting the property), being first duly sworn, do hereby depose and say that:

I, Paul Lancaster (Name of person posting the property), posted 2 (no. of posters) orange zoning poster(s) ("Notice of Public Hearing") furnished by the Director of the Office of Zoning on private property known as 2329 Champlain (address of premises) on 4/19/02 (date of posting) at 12:00 p.m. (time of posting). The zoning posters were placed in plain view of the public on the street frontages as listed on this affidavit below.

RECEIVED
D.C. OFFICE OF ZONING
2002 APR 29 PM 2:35

I have taken, or authorized to be taken, 3 (number of photos) photograph(s) of the orange zoning posters where they have been placed. The photographs, attached hereto, clearly show each zoning poster as seen by the public. The photographs are numbered and correspond to the following street frontages:

Photograph Number	Street Frontage
1. Top #1	front 2329 Champlain
2. middle #2	front 2329 Champlain
3. bottom #3	Upper window / front 2329 Champlain

Signature

Subscribed and sworn to before me this 19th (date) day of April (month), 2002 (year)

ALEXANDER DJORDJEVICH
Notary Public, District of Columbia
My Commission Expires March 31, 2004

Notary Public, D.C.

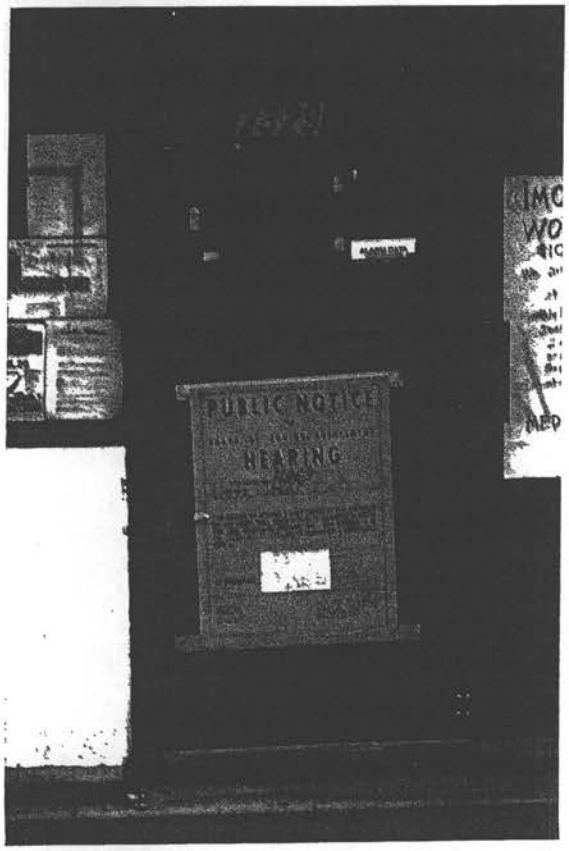
My commission expires on: My Commission Expires March 31, 2004

Attach photograph(s) here. (See instruction No. 1)

BZA
Case No. 16869
Exhibit No. 26



#1



#2



#3

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING



RECEIVED
D.C. OFFICE OF ZONING
2002 APR 26 PM 3:20

Office of the Director

Memorandum

TO: Board of Zoning Adjustment

FROM: Andrew Altman, Director
Office of Planning

DATE: April 25, 2002

SUBJECT: Supplemental Report
BZA Application #16869 (Kings Creek, LLC)
2329 Champlain Street, N.W. (Square 2566, Lot 103)

BZA
Case No. 16869
Exhibit No. 25

The Office of Planning submitted a report on April 23, 2002 regarding the request for lot occupancy and FAR variances and a special exception to allow an increase in the height of the building over that permitted by the Reed-Cook Overlay. We deferred our recommendation for these requests to allow further discussions with the applicant and community representatives.

As stated in our original report of April 23, 2002, OP felt that the applicant had met the requirements for granting the variances for the FAR and the lot occupancy. However, we had some concerns with the proposed building height of 69.6 feet, as we feared it could set a precedent for other properties in the neighborhood to request additional height over that permitted. After further analysis, and distinguishing the characteristics of this property and project from the characteristics of the other properties and how they may be developed in the future, we have concluded that we can support the additional height requested.

OP's support for an increase in the height limit is based on the fact that the applicant has incorporated some unique design features into the development. In order to achieve these elements and also make the project possible, the additional height is necessary. To mitigate the effect of the height, the 3rd through 6th floors are substantially setback and from the street some of the upper levels will not be visible (Attachment 1).

Secondly, Champlain Street is a narrow, 50-foot, right-of-way and if all the levels of the building were built flush with the parapet wall, light to the units as well as to the street could be minimized or blocked. The setbacks and open space areas created by the design will mitigate such a situation. Further, the design has incorporated both private and common open space areas that allow light into the units as well as provide residents with outdoor space. The common areas can be landscaped and roof gardens are proposed on the top floor. The outdoor space will include 3,530 feet of private open space, 1,650 square feet of public/common outdoor space and 2,000 square feet dedicated to circulation space and will be an asset to the residents in this urban area.

#25

The increase in height can also be justified as the building is grandfathered from having to provide parking spaces, Section 2100; however, the applicant is providing one parking space per unit, which is space that could have been converted to residences. The parking spaces provided will help to alleviate the lack of parking in the area.

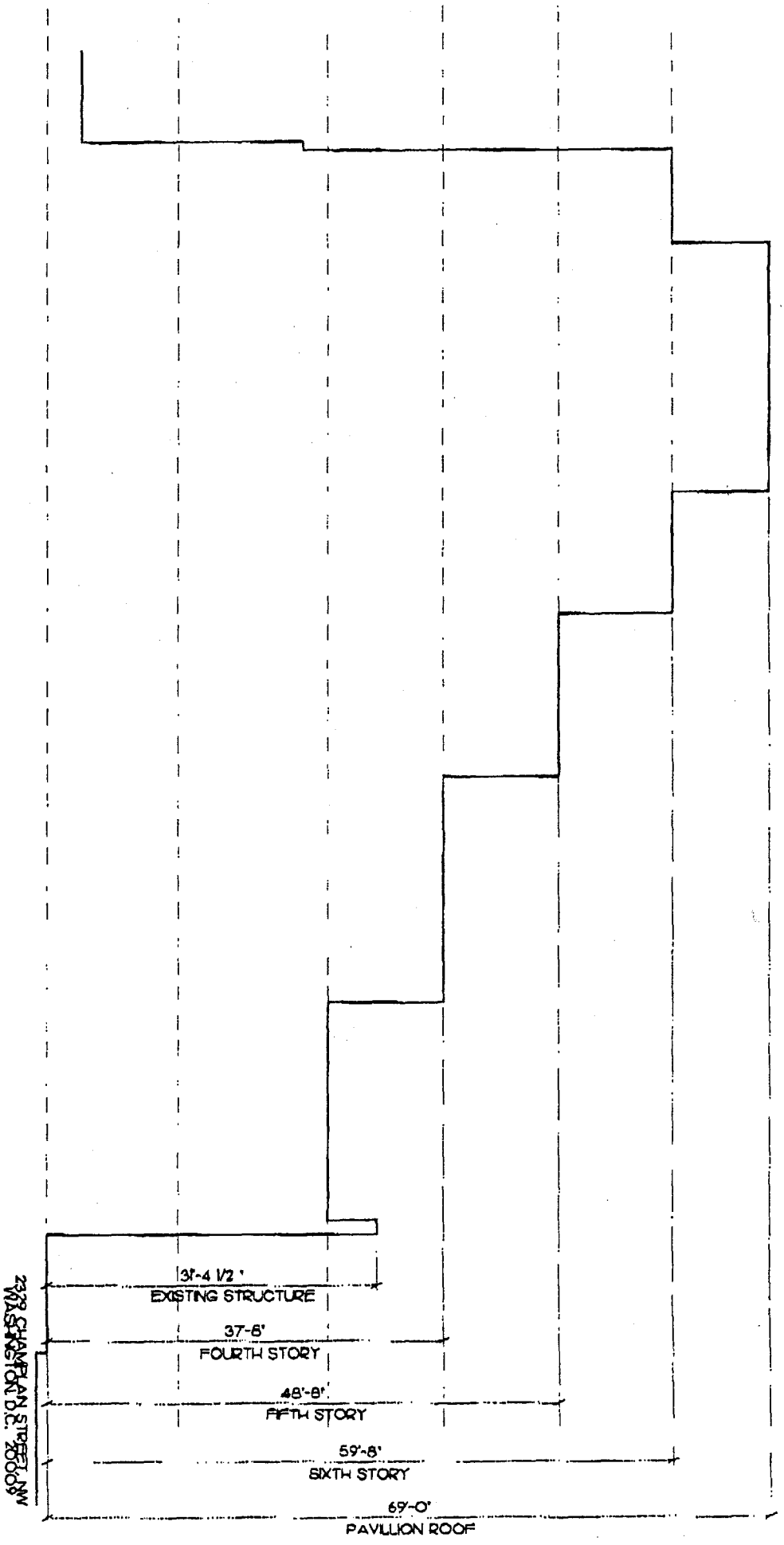
SUMMARY AND RECOMMENDATION

The proposed variances to increase the FAR, and to address the lot occupancy and the special exception request to increase the height of the building meet the provisions of Sections 3103.2 and 1403.1 of the Zoning Regulations for granting variances and a Special Exception in the Reed-Cooke Overlay District respectively. The proposal to provide a mixed-use development is a goal envisioned for the area covered by the Reed-Cook Overlay. The request to increase the FAR and height on this site will not cause any "substantial detriment to the public good" and "will not substantially impair the intent, purpose, and integrity" of the zone plan as embodied in the Zoning Regulations or Map", as they will fulfill the intent of increasing residential use and the height will be mitigated by stepping back the building from the parapet wall and allowing light to the street and the units themselves. The Office of Planning therefore recommends that the Board of Zoning Adjustment **APPROVE** the variances and special exception requested. OP also supports and recommends that the Board adopt the conditions outlined in the Memorandum of Understanding between the Applicant and the community.

Attachment

1. Cross Section shown the variations in height.

AA/mbr


31'-4 1/2"
EXISTING STRUCTURE
37'-6"
FOURTH STORY
48'-8"
FIFTH STORY
59'-8"
SIXTH STORY
69'-0"
PAVILION ROOF
MASSACHUSETTS AVENUE, N.W.