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**MOTION TO DISMISS THE PETITION AND STATEMENT IN OPPOSITION TO  
THE PROPOSED MAP AND TEXT AMENDMENTS**

The Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints, on behalf of The Church of Jesus Christ of Latter-day Saints, an unincorporated association (the "Church"), hereby moves to dismiss the petition to expand the Sixteenth Street Heights Overlay District (the "Overlay District"), which was filed by Joseph Martin on behalf of Advisory Neighborhood Commission ("ANC") 4C. Because Mr. Martin filed the petition without the authorization of ANC 4C, the petition should be dismissed.

In the alternative, the Church requests that the Commission deny the proposed map and text amendments on the merits. First, ANC 4C has presented no evidence demonstrating any material change in circumstances since the original adoption of the Overlay District that would justify the proposed expansion. Second, the proposed expansion of the Overlay District is inconsistent with the District's Comprehensive Plan. Finally, as discussed in detail in the supplemental memorandum attached hereto, the proposed map and text amendments would violate the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), the

CASE NO.

EXHIBIT NO.

Religious Freedom Restoration Act of 1993 ("RFRA"), and the Free Speech and Free Exercise Clauses of the First Amendment of the U.S. Constitution. For these reasons, the Church respectfully requests that the Commission dismiss or deny the petition to expand the boundaries of the Overlay District. Alternatively, the Commission should exclude the Church property from the expanded boundaries given the discriminatory effect it has on the Church under RFRA and RLUIPA.

If the Commission determines that there is sufficient evidence to justify the proposed expansion of the Overlay District, the Church requests that the Commission hold that the proposed chapel at 4901 16<sup>th</sup> Street, N.W. is vested under the current R-1-B zoning designation for the property and is therefore permitted as a matter of right.

## **II.** **FACTS**

The Church has been searching for a permanent home in the District of Columbia for two of its local congregations—the Washington, D.C. Third Ward and the Mount Pleasant Branch—for nearly fifteen years.<sup>1</sup> Prior to 1996, the Church leased an old bank building in the Brightwood neighborhood for use as its meetinghouse or chapel. Because the former bank was not handicap-accessible, the Church was forced to relocate its congregations after only a few years at that location. In 1996, the Church purchased an existing church at 3423 Holmead Place, N.W., which it has used as its chapel for the last twelve years. Due to the subsequent growth in the size of the two congregations, however, the Holmead Place chapel can no longer meet the Church's operational needs.

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<sup>1</sup> Congregations in the Church are called "wards." The term does not refer to or correspond with the District of Columbia's electoral districts, also called "wards." For example, about a third of the members of the "Washington, D.C. Third Ward" live in the District's Ward 4.

In November of 2005, the Church purchased an aging convent and chapel located at 4901 16<sup>th</sup> Street, N.W. (Square 2710, Lot 15), which is located within the proposed expansion area. The property is located within the R-1-B District, which allows churches and other religious uses as a matter of right. Although the existing buildings on the site were too small to accommodate the Church's current needs and projected future growth, the site itself was perfectly adapted for the construction of a new chapel. In May of 2006, the Church commissioned Stanmyer and Noel architects to design and prepare architectural drawings for the construction of a new chapel on the property. The new chapel was carefully designed to meet the operational needs of the congregations while minimizing its impact on the surrounding community. Due to the large size of the lot, the proposed chapel will be sufficiently set back from 16<sup>th</sup> Street, Emerson Street, and all neighboring properties. Although the proposed chapel is required to provide only 28 parking spaces under the Zoning Regulations, the new building will provide 72 off-street parking spaces in response to neighborhood concerns. Unlike the existing facilities on Holmead Place, which have only two off-street parking spaces, the proposed chapel will not result in any spillover parking on the surrounding streets.

In 2006, the Church filed an application with the Department of Consumer and Regulatory Affairs ("DCRA") to demolish the existing structures on the property. After completion of asbestos abatement, disconnection of utilities, inspections and final clearances, the DCRA issued the raze permit on March 22, 2007, and ANC 4C was provided notice of the permit the following month. The demolition of the structures and related cleanup work was completed in May 2007. Because the construction of the proposed chapel is projected to cost more than one million dollars, the Church was required to file an environmental impact screening form ("EISF") as a condition precedent to the issuance of a building permit. *See* 20

DCMR § 7200.1. The EISF process involves consultation with multiple District agencies and examines the potential impacts of a proposed development project on the surrounding community. The Church filed the EISF in February of 2008. In July of 2008, the District determined that the construction of the proposed chapel was not "likely to have a substantial negative impact on the environment." The Church filed an application for a building permit with DCRA on August 8, 2008.

Beginning in October of 2007, a small (but vocal) number of area residents began to express concerns regarding the construction of the new chapel and the perceived lack of notice with respect to the demolition of the existing structures on the site. In October and November of 2007, a number of e-mails circulated among this group of residents acknowledged that the proposed use of the property was permitted as a matter of right under the Zoning Regulations and discussed potential methods of thwarting the construction of the chapel. In November of 2007, one of those residents first suggested in a group e-mail that "an emergency moratorium, abatement, or extended overlay on zoning" might be the only means of preventing the construction of a new chapel on the property. Some of the referenced e-mails are attached hereto as Exhibit A. That same month, representatives of the Church met with Councilmember Muriel Bowser and with members of the community to discuss the proposed project. During its monthly meeting on January 8, 2008, ANC 4C discussed the construction of the proposed chapel on the property. On April 8, 2008, ANC 4C voted to approve a resolution, marked as Exhibit 13 of the record in this case, supporting "the 16<sup>th</sup> Street Heights Collaborative and their reasoning in extending the 16<sup>th</sup> Street Overlay to protect neighborhood character." Significantly, the representative of ANC 4C02, the Single Member District within which the Church's property is located, was not present and thus did not vote to support the resolution. *See Minutes of ANC 4C*

Public Meeting (April 8, 2008), attached hereto as Exhibit B. On April 15, 2008, Joseph Martin, Chairman of ANC 4C, filed the present petition with the Zoning Commission to expand the boundaries of the Sixteenth Street Heights Overlay District. The expansion area includes the site of the Church's proposed chapel. The Commission voted to schedule a public hearing on the proposed map and text amendments at its public meeting on June 9, 2008.

### **III.** **ARGUMENT**

#### **A. The Proposed Zoning Map and Text Amendments Are Not Properly Before the Commission**

Section 3010.1 of the Zoning Regulations provides that any "proceeding before the Commission shall be initiated by the filing of an application or petition with the Commission on the form and in the number that the Commission may prescribe, except that the Commission may initiate a case on its own motion." 11 DCMR § 3010.1. The D.C. Code further provides that an ANC may initiate a proposal for action by the District government. D.C. Code § 1-309.10(h)(1) (2001). Usually, no official action may be taken by the ANC unless a quorum is present and that an official action requires the approval of a simple majority of those commissioners present and voting.<sup>2</sup> An ANC may authorize one or more of its commissioners to represent it in proceedings before the Zoning Commission, provided that such authorization is provided in writing and specifically states that the authorization "includes the power of the agent or representative to bind the person in the case before the Commission." 11 DCMR § 3002.3.

The petition to expand the boundaries of the Overlay District was filed with the Office of Zoning on April 15, 2008 by Joseph Martin. On the application form, Mr. Martin clearly indicated that he was filing the petition in his official capacity as the chairman of ANC 4C. In

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<sup>2</sup> ANC 4C does not publish its by-laws on its website; all other ANC bylaws reviewed include this provision. The District's office that supports ANCs has not responded to requests for additional information.

support of the petition, Mr. Martin attached a resolution adopted by ANC 4C at its monthly meeting on April 8, 2008. That resolution, which is marked as Exhibit 13 of the record in this case, does not authorize Mr. Martin to file a petition with the Zoning Commission on the ANC's behalf for the purpose of expanding the boundaries of the Overlay District. On the contrary, the ANC's resolution merely noted that "Advisory Neighborhood Commission 4C supports the 16<sup>th</sup> Street Heights Collaborative and their reasoning in extending the 16<sup>th</sup> Street Overlay to protect neighborhood character." Similarly, the official minutes of the meeting on April 8, 2008, attached hereto as Exhibit B, simply state that the "Commission voted to adopt and submit a Resolution to support community concerns and ANC voted six to one to support letter to the Office of Zone [sic] and BZA regarding community concerns relating to the size and scope of the project being developed by the Church of Latter Day Saints." In short, Mr. Martin did not have the authority to file the present petition on behalf of ANC 4C. For that reason, the Commission should dismiss the petition.<sup>3</sup>

**B. The Proposed Expansion of the Sixteenth Street Heights Overlay District Is Not Warranted by Any Change in Circumstances since Its Original Adoption**

In adopting the original Overlay District, the Commission found that "approximately one in every ten (10) houses in the neighborhood has been converted to a nonresidential use, a much higher ratio than has been identified for any other R-1 zoned neighborhood in the District of Columbia." Zoning Commission Order No. 757, Case No. 92-2 (effective July 29, 1994), at 26. The Commission further noted that the boundaries of the Sixteenth Street Heights "neighborhood are well established and encompass a significant geographic area." *Id.* Importantly, the

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<sup>3</sup> The Church also notes that ANC 4C did not comply with the procedural requirements of Chapter 30 of the Zoning Regulations, which require, *inter alia*, that the petitioner file with the Office of Zoning no fewer than twenty days before the public hearing "the names and addresses of the owners of all property proposed to be rezoned." 11 DCMR § 3013.3. ANC 4C similarly failed to submit a list of witnesses or written summaries of the testimony to be presented at the hearing. See 11 DCMR § 3013.1. The approval of the proposed map and text amendments, given ANC 4C's failure to provide adequate notice of the evidence to be presented in support of its sweeping proposal to downzone nearly 25 acres of land, would represent a serious denial of due process to the owners of that property.

Commission did not include the proposed expansion area within the original Overlay District, most likely because the area to the south was not subject to the same pressures.<sup>4</sup> In fact, in its rationale for the overlay, the Commission noted that the area was a particularly small, discrete one that was purposefully limited only to the geographical area that was specifically affected by an inordinate increase in nonresidential uses.

The ANC's resolution in support of the proposed expansion makes broad, sweeping, conclusory statements to justify the expanded boundaries without any factual support whatsoever. For example, the ANC claims that "the number of non-residential facilities continues to increase at an alarming rate with a domino effect resulting in residential housing being marketed targeting non-residential uses and the drop in housing." It further notes that "the area has witnessed a significant conversion of residential housing which has resulted in approximately 50 non-residential facilities in the community." Finally, the resolution proclaims that "approximately one in every ten (10) houses has been converted to a non-residential use—much higher than any other R-1 zoned neighborhood" – a mere recitation of the purposes of the Overlay District as set forth in Section 1551.3 of the Zoning Regulations.

These assertions have no basis in fact. The proposed expansion area includes 143 lots containing approximately 1,059,366 square feet of land area (24.32 acres). In addition to the site of the proposed LDS chapel, only thirteen lots within the proposed expansion area are currently devoted to nonresidential uses. All but two of those lots were used for nonresidential purposes when the Commission first adopted the Overlay District in 1994. The only conversion of a

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<sup>4</sup> Interestingly, the area currently zoned Sixteenth Street Heights ("SSH") Overlay District is not suffering from any pressures from nonresidential uses, either, as originally feared. Since its enactment of the SSH in 1994, only two applicants have sought permission to establish nonresidential uses in the Overlay District. A request for church programs under Sections 216 and 1553 was granted under BZA Case No. 16826, and a request for a child development center under Sections 205 and 1553 at 5705 14<sup>th</sup> Street, N.W. was denied in BZA Case No. 17652. Both requests would have required special exception relief regardless of the SSH Overlay District. That is, the area was already protected from these nonresidential uses *without* the need for the additional requirements of the Overlay District.

residential property to nonresidential use involved two contiguous lots in Square 2714. Lot 804 is improved with a detached single-family dwelling and has been held in common ownership with vacant Lot 805 for many decades. When the Overlay District was initially adopted in 1994, the lots were used for residential purposes. In 1999, the properties were purchased by a nonprofit organization. With the exception of those two lots, there has not been a single conversion of a residential dwelling to a nonresidential use since the adoption of the original Overlay District. In addition, the property located at 5019 16<sup>th</sup> Street, N.W. (Square 2713, Lot 22), which is located within the proposed expansion area, was converted from religious to residential use following the adoption of the Overlay District. The document attached hereto as Exhibit C compares the uses of the properties within the proposed expansion area in 1994 with their current use. It is clear that the mix of residential and nonresidential uses has been remarkably stable over the last fourteen years. In fact, most of the churches within the proposed overlay expansion have been neighborhood anchors for more than 50 to 75 years. (See Exhibit D attached). Significantly, the site proposed for the LDS chapel has not been converted from a residential dwelling, but will merely be converted from one religious use (a convent with a chapel) to another. In short, ANC 4C's claim that the proposed expansion area is under siege from nonresidential conversions is simply not true.

In addition to exaggerating the risk of nonresidential conversions within the proposed expansion area, ANC 4C also misrepresents the degree of public support for the map and text amendments. The ANC's resolution in support of the proposed expansion states that "the community bounded by the [proposed expansion] area ... is seeking the support of ANC 4C to be included in the 16<sup>th</sup> Street Heights Overlay District." In support of its petition for the proposed map and text amendments, the ANC filed a signed petition, marked as Exhibit 5 of the



record in this case, opposing the construction of the proposed chapel at 4901 16<sup>th</sup> Street, N.W. The petition makes no mention of the proposed expansion of the Overlay District, so it is unclear why it is offered as support for the map amendment.

Even if it were reasonable to assume that at least some of the signatories would be willing to support the expansion in order to block construction of the chapel, the petition is signed by 81 individuals, *only 25 of whom actually own property within the proposed expansion area*. Those individuals collectively own 19 lots, which contain approximately eight percent of the land within the proposed expansion area. The petition hardly evidences a groundswell of support for the proposed map and text amendments. And, as noted above, the representative of ANC 4C02, the Single Member District in which the Church's property is located, did not attend the meeting at which the resolution was approved and therefore did not vote to support the resolution. The distorted facts, misleading statements and conclusory, fear-based arguments presented by the ANC are insufficient to meet the exacting standards for a well-reasoned decision to amend the Zoning Map.

It is also important to note that ANC 4C vehemently opposed the creation of the Sixteenth Street Heights Overlay District in 1994 "because it was objectionable, misleading, unreasonable, and unconstitutional." Zoning Commission Order No. 757, at 18. In that case, the ANC "objected to the notion that the change of use from residential to non-residential will destroy the quality of life in the 16<sup>th</sup> Street Heights area." *Id.* In addition, the ANC also noted that the boundaries of the Sixteenth Street Heights neighborhood had always been understood to extend no farther south than Kennedy Street. *Id.* at 19. Finally, the ANC "found to be unconstitutional, the creation of laws by the city government with respect to hindering religion or religious practices." *Id.* Given these prior statements, it is curious that ANC 4C would seek to

expand the boundaries of the Overlay District without providing any evidence that circumstances have changed since its original adoption. The ANC's abrupt and unexplained reversal on this issue demonstrates the contrived nature of the proposed map and text amendments.

Like the petition itself, the report prepared by the Office of Planning provides no evidentiary support for an amendment of the Zoning Map or the Zoning Regulations. The report claims that there are a total of 18 nonresidential uses within the proposed expansion area that account for approximately 38.96 percent of the land area within the area. Office of Planning Final Report (September 12, 2008), at 3. Based on these facts, the Office of Planning concludes that the "neighborhood is clearly at a saturation point" with respect to nonresidential uses of property. Even if one were to assume the accuracy of this statement, it would not justify the proposed expansion of the Overlay District.<sup>5</sup> As noted above, there has been no net increase in the number of nonresidential uses in the proposed expansion area since the adoption of the Overlay District in 1994. The proposed expansion area is no more "saturated" with nonresidential uses than it was when the Overlay District was originally established.<sup>6</sup> If this area did not merit inclusion in the Overlay District in 1994, there is simply no reason that it should be included now.

**C. The Proposed Expansion of the Sixteenth Street Heights Overlay District Is Inconsistent with the Comprehensive Plan**

In its report recommending that the Commission adopt the proposed map and text amendments, the Office of Planning concludes that the proposed expansion of the Overlay District would not be inconsistent with the Comprehensive Plan. Office of Planning Final

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<sup>5</sup> A number of the purported nonresidential uses identified by the Office of Planning are either vacant or devoted to residential use.

<sup>6</sup> Other neighborhoods are equally "saturated" but are in no need of an overlay. For example, the segment of Massachusetts Avenue Heights between the Naval Observatory to Ward Circle, which is principally zoned R-1-B, boasts over eight houses of worship, including the National Cathedral and St. Sophia's Greek Orthodox Church.

Report (September 12, 2008), at 5. In support of this statement, the report cited the Planning and Development Priorities Section of the Rock Creek East Area Element, which notes that neighborhood residents "have expressed concerns about the growth of particular land uses, including group homes, churches, and related facilities such as day care centers and social service centers." 10 DCMR § 2207(e). Importantly, however, the Comprehensive Plan did not see enough merit to these concerns to develop a corresponding policy to address them. In fact, there is no policy anywhere in the Plan that elevates the relative importance of residential land uses over religious land uses.

On the contrary, the Land Use Element of the Comprehensive Plan emphasizes that houses of worship should be encouraged throughout the District:

*Policy LU-2.3.6: Houses of Worship* - Recognize churches and other religious institutions as an important part of the fabric of the city's neighborhoods. Work proactively with the faith-based community, residents, ANCs, and neighborhood groups to address issues associated with church transportation needs, operations, and expansion, so that churches may be sustained as neighborhood anchors and a source of spiritual guidance for District residents.

10 DCMR § 311.8.

Unlike the merely precatory language cited in the Office of Planning's report, Policy LU-2.3.6 is an explicit policy designed to guide the District's land use decisions. In addition, the policies set forth in the Land Use Element must be given priority over competing policies in other elements of the Comprehensive Plan. See 10 DCMR § 300.3 (stating that "[b]ecause the Land Use Element integrates the policies and objectives of all the other District Elements, it should be given greater weight than the other elements as competing policies in different elements are balanced"). The proposed expansion of the Overlay District is inconsistent with these express policies and objectives of the District's Comprehensive Plan. The churches depicted on the document attached as Exhibit D, for example, were established at approximately

the same time as the surrounding neighborhood and are an integral part of its character-defining features. It is unclear why the Office of Planning failed to address this overriding language of Policy LU-2.3.6.

The Generalized Policy Map of the Comprehensive Plan is similarly unsupportive of the proposed expansion of the Overlay District. The area of the proposed expansion is designated as a Neighborhood Conservation Area. The Framework Element of the Comprehensive Plan states that Neighborhood Conservation Areas are designed to maintain existing land uses and to ensure that new development "will consist primarily of scattered site infill housing, public facilities, and *institutional uses*." 10 DCMR § 223.4 (emphasis added). In other words, the Generalized Policy Map specifically contemplates the development of new institutional uses within Neighborhood Conservation Areas. Finally, the Framework Element provides that the "diversity of land uses and building types ... should be maintained" in Neighborhood Conservation Areas. 10 DCMR § 223.5. The proposed expansion of the Overlay District would undermine this objective by creating significant obstacles for any development other than detached single-family homes. The neighborhood has maintained its stable diversity of residential and nonresidential land uses without the need for the special exception provisions of the Overlay District.

**D. The Proposed Expansion of the Sixteenth Street Heights Overlay District Violates Federal Statutory and Constitutional Law**

The evidence of record clearly demonstrates that ANC 4C's general concern with the purported impacts of nonresidential development within the proposed expansion area is simply a pretext for the petition's true objective: halting the construction of the Church's proposed chapel. Because the petition is based upon a discriminatory intent and would substantially burden the free exercise of religion, the proposed map and text amendments would violate RLUIPA, RFRA, and the Free Speech and Free Exercise Clauses of the First Amendment of the U.S. Constitution.

For the convenience of the Commission, the Church has presented these statutory and constitutional objections to the proposed expansion of the Overlay in the supplemental memorandum attached hereto. The Church hereby incorporates that memorandum as if fully set forth herein.

**E. If the Commission Votes to Expand the Boundaries of the Sixteenth Street Heights Overlay District, the Proposed Chapel Should Be Exempt from Its Requirements**

Section 3202.5 of the Zoning Regulations provides that if a building permit application is filed before the Commission votes to schedule a public hearing on a map amendment affecting the property to which the building permit is related, the building permit may be processed under the Zoning Regulations in effect at the time the application is filed. 11 DCMR § 3202.5(a). On the other hand, if an application is filed after the Commission votes to set down the proposed amendment, the permit application will be processed "in accordance with the most restrictive zone classification being considered for the site." 11 DCMR § 3202.5(b). The Commission voted to schedule a public hearing on the proposed map and text amendments on June 9, 2008, and the Church filed a building permit application for the proposed chapel with DCRA on August 8, 2008. Because the Church filed the building permit application for the proposed chapel approximately two months after the date on which the Commission set down the present petition for hearing, the review of that application by the District would ordinarily be required to comply with the requirements of the Sixteenth Street Heights Overlay District.

In this particular case, however, the Commission should hold that the pending application is vested under the existing R-1-B zoning designation for the property. The Church filed an EISF for the proposed chapel in February of 2008—more than three months before the Commission voted to schedule a public hearing on the proposed map and text amendments. Section 3202.5 is designed protect the integrity of the Zone Plan while maintaining predictability

and ensuring that new amendments to the Zoning Regulations and Zoning Map are not applied retroactively to the prejudice of parties who have made significant investments in reliance on the existing regulatory framework. *See, e.g.,* Zoning Commission Order No. 03-14 (effective October 17, 2003); Zoning Commission Order No. 516, Zoning Commission Case No. 86-22 (effective January 16, 1987). Because the EISF is a necessary prerequisite to the issuance of a building permit for the proposed project under the District of Columbia Environmental Policy Act of 1989, D.C. Code § 8-109.01 *et seq.*, it should be treated as the functional and legal equivalent of a building permit application. The proposed expansion of the Overlay District should not be applied to the pending building permit application for the proposed chapel.

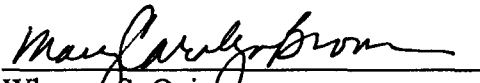
The Church further notes that the special exception process required by Section 1553.2 would be redundant with respect to the proposed chapel. The EISF process involves an extensive review process that evaluates the potential impacts of a proposed development on the surrounding neighborhood. The EISF process is far more comprehensive than the review contemplated under the special exception standards set forth in Section 1553.2. It would be a substantial waste of public and private resources to subject the construction of the proposed chapel to the requirements of the Sixteenth Street Heights Overlay District. If the Commission determines that the proposed expansion of the Overlay District is warranted, it should nonetheless exempt the proposed chapel from its requirements.

V.  
**CONCLUSION**

For all of the foregoing reasons, the Commission should dismiss or deny the petition for an expansion of the Sixteenth Street Heights Overlay District.

Respectfully submitted,

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