GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 20221 of Chain Bridge Road/University Terrace Preservation Committee, pursuant to 11 DCMR Subtitle Y § 302, from the decision made on October 23, 2019 by the Office of Tax and Revenue to create A&T Lots 841-847, as subsequently filed with the Office of the Surveyor at the Department of Consumer and Regulatory Affairs, located in the 2700 Block of Chain Bridge Road, N.W. in the R-21 zone. (Square 1425, Lots 841-847)

HEARING DATES: March 18, 2020 and June 10, 2020
DECISION DATE: June 17, 2020

Pursuant to notice, at its June 17, 2020, public meeting, the Board of Zoning Adjustment (the "**Board**") considered the appeal (the "**Appeal**") filed by the Chain Bridge Road/University Terrace Preservation Committee (the "**Appellant**") pursuant to Subtitle Y § 302 of the Zoning Regulation (Title 11 of the District of Columbia Municipal Regulations, Zoning Regulations of 2016, to which all references are made unless otherwise specified) that alleged that:

- The October 23, 2019, Office of Tax and Revenue ("**OTR**") creation of assessment and taxation ("**A&T**") Lots 841-847 (formerly A&T Lots 831-839) in Square 1425, located in the 2700 Block of Chain Bridge Road, N.W., (the "**Property**") as subsequently filed with the Office of the Surveyor ("**Surveyor**") at the Department of Consumer and Regulatory Affairs ("**DCRA**"),

violated the Zoning Regulations applicable to the R-21 zone in which the Property is located. For the reasons explained below, the Board voted to **DISMISS** the Appeal.

FINDINGS OF FACT

I. BACKGROUND

PARTIES

1. The following were automatically parties pursuant to Subtitle Y § 501.1:
   - The Appellant;
   - DCRA;
   - Dorchester Associates, LLC (the "**Owner**");
   - Advisory Neighborhood Commission ("**ANC**") 3D, in whose district the Property is located and so the "affected" ANC per Subtitle Y § 101.8.

2. The Board received no requests for intervenor status.

Board of Zoning Adjustment
District of Columbia
CASE NO.20221
EXHIBIT NO.40

<u>NOTICE</u>

3. Pursuant to Subtitle Y § 500.4, the Office of Zoning ("**OZ**") sent notice of the Appeal and the March 18, 2020,[1] public hearing by a January 30, 2020, letter (Ex. ["**Ex**."] 7-19) to:
   - The Appellant;
   - The Zoning Administrator (the "**ZA**") at DCRA;
   - The Owner;
   - ANC 3D;
   - Single Member District ANC 3D05;
   - The Office of ANCs;
   - The Office of Planning;
   - The Chairman of the D.C. Council;
   - The At-Large members of the D.C. Council; and
   - The Councilmember for Ward 3, the ward in which the Property is located.

4. OZ also published notice of the March 18, 2020, public hearing in the January 24, 2020, *D.C. Register* (67 DCR 0632) as well as through the calendar on OZ's website.

II. THE APPEAL

5. The Appeal (Ex. 2):
   - Challenged the A&T Plat created on October 23, 2019, by OTR, creating seven new tax lots on the Property;
   - Asserted that the Owner later filed the A&T Plat with the Surveyor for the purpose of obtaining building permits for the construction of seven new detached principal dwellings; and
   - Urged the Board to revoke the A&T Plat for zoning purposes on the grounds that the proposed development:
     - Would violate zoning requirements with respect to lot frontage and lot width;
     - Had not been shown to comply with restrictions applicable in the R-21 zone, especially with respect to the protection of trees (the Appellant later withdrew the claim of error relating to the tree protection provisions (Ex. 26)); and
     - Should be subject to approval as a theoretical lot subdivision under Subtitle C § 305.

III. RESPONSES TO THE APPEAL

<u>DCRA</u>

6. DCRA asked the Board to dismiss the Appeal for lack of jurisdiction because:
   - The A&T Plat did not constitute either a "first writing" or a "final determination" by the ZA;

---

[1] The Board rescheduled the public hearing to a virtual public hearing on June 17, 2020, due to the March 11, 2020, COVID-19 public health emergency. (Ex. 24.) OZ provided notice of the virtual public hearing to the parties. (Ex. 30.)

- The Appeal must be dismissed as "founded entirely on the A&T Plat issued by the OTR," which did not constitute an order, requirement, decision, determination, or refusal made by the ZA that would be subject to review by the Board (Ex. 22); and
- In its pre-hearing statement, DCRA asserted that the lots shown on the A&T Plat conformed to applicable zoning requirements. (Ex. 23.)

OWNER

7. The Owner:
   - Asked the Board to dismiss one of the four claims of error raised in the appeal, concerning tree protections in the R-21 zone, on the ground that the ZA had not made any written decision on tree protection regulations in connection with the Property and "therefore, the issue is not ripe for consideration by the Board" (Ex. 20); and
   - Asserted that other claims of error in the appeal should either be found moot, because no theoretical lot subdivision was required, or denied because the "well-vetted Subdivision" of the Property by OTR created lots that were consistent with zoning requirements, including with respect to lot frontage and lot width requirements in the R-21 zone. (Ex. 21.)

ANC

8. The ANC submitted a March 4, 2020, report (Ex. 25, the "**ANC Report**") stating that, at its regularly scheduled and publicly noticed monthly meeting, with a quorum present, the ANC voted:
   - To express the following issues and concerns:
     - "the overlay zone that protects this neighborhood" and urged the Board "to give great deference to its protections against developers who attempt to avoid the spirit of the overlay/zone and find loopholes by which they can carry out projects that threaten to change the character of the neighborhood;" and
   - To support the Appeal.

THE PROPERTY

9. The Property is an irregularly shaped parcel with an area of approximately 143,190 square feet (3.28 acres) abutting Chain Bridge Road, N.W. (Square 1425, Lots 841-847).

10. The Property, which is currently undeveloped, is characterized by a sloping terrain and contains numerous trees. The site is not located in an historic district.

11. The Property is located in the Chain Bridge Road/University Terrace Residential House zone (R-21). (*See* Subtitle D, Chapter 13.) The R-21 zone is mapped on a residential neighborhood located at the edge of stream beds and public open spaces that have steep slopes, substantial stands of mature trees, and undeveloped lots and parcels subject to potential terrain alteration and tree removal. (Subtitle D § 1300.3.) The purposes of the Chain Bridge Road/University Terrace Residential House zone (R-21) are to:
    (a) provide for areas predominantly developed with detached houses on large lots;

> *(b) preserve and enhance the park-like setting of the area by regulating alteration or disturbance of terrain, destruction of trees, and ground coverage of permitted buildings and other impervious surfaces, and by providing for widely spaced residences;*
> *(c) preserve the natural topography and mature trees to the maximum extent feasible in a residential neighborhood;*
> *(d) prevent significant adverse impact on adjacent open space, parkland, stream beds, or other environmentally sensitive natural areas;*
> *(e) limit permitted ground coverage of new and expanded buildings and other construction so as to encourage a general compatibility between the siting of new buildings or construction and the existing neighborhood; and*
> *(f) limit the minimum size of lots so as to prevent significant adverse impact on existing infrastructure, especially on traffic and pedestrian safety, and to achieve the other purposes listed in this subsection*. Subtitle D § 1300.1.

12. The Property was formerly designated as tax lots 831-839. (Ex. 2B2.)

13. The Owner devised a plan to subdivide the Property into seven record lots for the development of a new detached principal dwelling on each lot (the "**Project**"). As shown on the Owner's conceptual plan, the seven new lots would be irregularly shaped. (*See* Ex. 2B1.)

14. The Owner met with the ZA on October 5 and 24, 2018 to discuss plans for a subdivision and the construction of detached principal dwellings at the Property as a matter of right. (Ex. 21.)

ZA's November Letter

15. The ZA discussed his review of the planned subdivision in a letter dated November 13, 2018, (Ex. 2B, the "**ZA's November Letter**") to counsel for the Owner.

16. In the ZA's November Letter, the ZA recognized that zoning requirements would apply to the subdivision and concluded that "each of the proposed lots conforms with the requirements set forth in the Zoning Regulations and … the subdivision of the existing tax lots to record lots should be able to proceed as a matter-of-right pursuant to Subtitle C § 302.1."[2] The ZA's November Letter explained the ZA's determination that each new lot would comply with the development standards set forth for subdivisions in Subtitle C § 300 *et seq.* with respect to lot frontage, lot area, and lot width.

17. With respect to lot frontage, the Zoning Regulations required that the length of at least one street lot line must be at least 75 percent of the required lot width (where a minimum lot width is required) (Subtitle C § 303.2). Because the R-21 zone requires a minimum lot

---

[2] Pursuant to the then-effective Subtitle C § 302.1, "Where a lot is divided, the division shall be effected in a manner that will not violate the provisions of [the Zoning Regulations] for yards, courts, other open space, minimum lot width, minimum lot area, floor area ratio, percentage of lot occupancy, parking spaces, or loading berths applicable to that lot or any lot created."

width of 75 feet, the ZA concluded in the ZA's November Letter that the required lot frontage was at least 56.25 feet. (*See* Subtitle D 1302.1).

18. The ZA's November Letter explained the ZA's determination that the Owner's proposal would comply with the lot frontage requirement because the seven lots would each have frontage of at least 56.25 feet. According to the ZA's November Letter, the proposed new lots would have the following lot frontages:
    - 56.25 feet – Lots 1 and 7
    - 80 feet – Lot 2
    - 88 feet – Lot 3
    - 86 feet – Lots 5 and 6; and
    - 101 feet – Lot 4.

19. With respect to lot width, the Zoning Regulations required a minimum of 75 feet for a lot in the R-21 zone. (*See* Subtitle D 1302.1.) As proposed, the Project would create seven new interior lots. The ZA's November Letter recognized the rule of measurement set forth in Subtitle C § 304.1[3] for interior lots and stated that "the Zoning Regulations provide no specific clarity" with respect to measuring lot width "[i]n the case of an irregularly shaped lot or angular lot line."

20. The ZA's November Letter stated the ZA's determination that the Owner's proposal, as shown in the conceptual plan, would comply with the minimum lot width requirement of the R-21 zone because each lot would have a lot width of at least 75 feet. According to the ZA's November Letter, the proposed new lots would have lot widths of:
    - 75 feet - Lots 1, 2, 3, 5, 6, and 7; or
    - 77 feet, 6 inches - Lot 4.

21. With respect to lot area, the Zoning Regulations required a minimum of 9,500 square feet for any lot in the R-21 zone created after July 20, 1999 (*see* Subtitle D 1302.1). The ZA's November Letter explained the ZA's determination that the Project would satisfy the lot area requirement because each new lot would have a lot area in excess of the minimum requirement. As proposed, the lot areas of the irregularly shaped new lots would range from 12,350 square feet (Lot 5) to 34,577 square feet (Lot 1). Specifically, the proposed lots would have the following sizes:
    - Lot 1 - 34,577 square feet;
    - Lot 2 - 16,009 square feet;
    - Lot 3 - 20,392 square feet;
    - Lot 4 - 32,074 square feet;
    - Lot 5 - 12,350 square feet;
    - Lot 6 - 13,535 square feet; and
    - Lot 7 - 13,573 square feet.

---

[3] Pursuant to Subtitle C § 304.1, the lot width of an interior lot must be "determined as follows: (a) Establish two points by measuring along each side lot line a distance of thirty feet (30 ft). from the intersection point of each side lot line and the street lot line; (b) Measure the distance of a straight line connecting the two points described in paragraph (a) of this subsection; and (c) The distance of the straight line connecting the two points described in paragraph (b) of this subsection shall be the 'lot width' of the lot."

22. The ZA's November Letter stated that "each of the proposed seven lots will individually allow for improvement with a new single dwelling unit in compliance with the [applicable] general development standards." The ZA's November Letter addressed the zoning requirements governing:
    - front setback (Subtitle D § 1305.1);
    - lot occupancy (Subtitle D § 1304.2);
    - floor area ratio, rear yard (Subtitle D § 1306.1);
    - side yard (Subtitle D § 1307.1);
    - courts (Subtitle D § 203.1);
    - pervious surface (Subtitle D § 1308.1);
    - vehicle parking and access (Subtitle C § 701 *et seq*);
    - bicycle parking (Subtitle C § 802.1); and
    - inclusionary zoning (Subtitle C § 1001.2(c)).

23. The ZA's November Letter recognized that a restrictive covenant "runs with land prohibiting any construction within 25 feet of Chain Bridge Road NW." Because "[e]ach of the proposed lots provides for a building site more than 25 feet from Chain Bridge Road NW," the ZA concluded that "all of the proposed single family dwelling units will be built in compliance with the restrictive covenant."

24. The ZA's November Letter concluded that, based on the ZA's review of plans and exhibits provided by the Owner, the Project "complies with the R-21 Zone District requirements, and the Project may be permitted as a matter-of-right." As a result, when a subdivision application was filed for the Project, the ZA's office "will sign off on the plat drawings that are consistent with the lot dimensions as long as the plat is consistent with the plans" identified by the ZA.

25. A disclaimer at the conclusion of the ZA's November Letter stated that:

    > *This letter is issued in reliance upon, and therefore limited to, the questions asked, and the documents submitted in support of the request for a determination. The determinations reached in this letter are made based on the information supplied, and the laws, regulations, and policy in effect as of the date of this letter. Changes in the applicable laws, regulations, or policy, or new information or evidence, may result in a different determination. This letter is* ***NOT*** *a "final writing", as used in [Subtitle Y §] 302.5 of the Zoning Regulations (Title 11 of the District of Columbia Municipal Regulations), nor a final decision of the ZA that may be appealed under [Subtitle Y §] 302.1 of the Zoning Regulations, but instead is an advisory statement of how the ZA would rule on an application is reviewed as of the date of this letter based on the information submitted for the ZA's review. Therefore this letter does* ***NOT*** *vest an application for zoning or other DCRA approval process (including any vesting provisions established under the Zoning Regulations unless specified otherwise therein), which may only occur as part of the review of an application submitted to DCRA.* (emphasis in original)

26. The ZA's November Letter was first posted on DCRA's website on January 7, 2019, where it was seen by the Appellant. (Ex. 2.)

27. On February 21, 2019, the Appellant contacted the ZA to express objections about the ZA's November Letter and to request a meeting. After meeting with the ZA on April 8, 2019, the Appellant "agreed to disagree on the substance [of the ZA's November Letter] and defer further action until the Owner took official steps to proceed with the proposed subdivision to create the Record Lots contemplated." (Ex. 2.)

28. By letter dated July 1, 2019, the Appellant provided notice to the Owner "that it did not agree with the proposed Record lot configuration utilizing long disfavored pipe stem lots…." The letter described the Appellant's disagreement with "the ZA's preliminary, non-binding and incomplete conclusions," especially with respect to the configuration of the lots and compliance with tree and slope protections. Given that "[a]t this point, the proposed subdivision appears to be hypothetical…and not formally established," the Appellant recommended the theoretical lot subdivision process to the Owner as "the mechanism to establish a better…development plan" consistent with zoning requirements. (Ex. 2, 2D.)

29. At the request of the Owner, OTR configured the Property as seven A&T lots, numbered 841-847, shown on the A&T Plat signed by the Chief Assessor at OTR on October 23, 2019. (Ex. 2A, 17.)

30. The ZA did not draft, review, or approve the A&T Plat, which was not recorded by the Office of the ZA. (Ex. 22.) The ZA testified that his office had "really nothing to do with the A&T plat…. [A]ny person can go over to the OTR and request an A&T plat. It is reviewed purely by OTR and without the input of [the ZA's] office or the Office of Surveyors." (BZA Public Hearing Transcript of June 10, 2020 ["**Tr**."] at 49.)

31. The form employed by OTR's Real Property Tax Administration, Maps & Title Section for a Division of Lots Request Application did not reflect that any zoning review would be undertaken as part of the creation of an A&T lot. Rather, the form stated that the application must "clearly show" all dimensions of the property in question "so that the OTR may compute the area of each new lot for A&T purposes." (Ex. 22A.)

32. The Owner submitted the A&T Plat to the Surveyor for filing. The Appellant found a copy of the A&T Plat at the Surveyor on December 9, 2019.

33. The A&T Plat was not recorded in the records of the Surveyor, as would be required in the case of a subdivision creating lots of record (*see* the definition of "Lot of Record," Subtitle B § 100.2).

34. As shown on the A&T Plat, the seven tax lots are irregularly shaped. While all the tax lots front on Chain Bridge Road, three of them (A&T Lots 842, 844, and 847) utilize a pipestem configuration for frontage along the public street. The lot areas of the new tax lots range from 12,503 square feet (A&T Lot 843) to 34,600 square feet (A&T Lot 847). The new tax lots have the following sizes:

- Lot 841 - 13,619 square feet;
- Lot 842 - 13,334 square feet;
- Lot 843 - 12,503 square feet;
- Lot 844 - 32,044 square feet;
- Lot 845 - 20,445 square feet;
- Lot 846 - 16,050 square feet; and
- Lot 847 - 34,600 square feet. (Ex. 2A.)

35. The Property is located within the Highway Plan, which was not known to the Owner when the proposed subdivision was reviewed by the ZA before preparing the ZA's November Letter. Citing D.C. Official Code § 9-103.02, the Owner asserted that the Property cannot be subdivided into record lots due to its location in the Highway Plan. (Ex. 21, 21A.)

36. With certain exceptions not relevant to this appeal, a building permit shall not be issued for the proposed construction of any structure unless plans for that construction "fully conform" to the provisions of the Zoning Regulations. (Subtitle A § 301.1.)

37. The provisions of the Zoning Regulations include a general rule stating that a building permit shall not be issued for the proposed construction of any principal structure unless the land for that construction has been divided so that each structure will be on a separate lot of record. (Subtitle A § 301.3.) Exceptions to the general rule are listed (*see* Subtitle A § 301.3(a)-(f)) or are created "as provided in the building lot control regulations for Residence Districts in Subtitle C and § 5 of An Act to amend an Act of Congress approved March 2, 1893, entitled 'An Act to provide a permanent system of highways in that part of the District of Columbia lying outside of cities,' and for other purposes, approved June 28, 1898 (30 Stat. 519, 520, as amended; D.C. Official Code § 9-101.05)…."

38. D.C. Official Code § 9-101.05 addresses an owner's use of property "over or upon which any highway or reservation [is] projected upon any map filed under §§ 9-103.01 to 9-103.05," until condemnation of the land. The owner "shall have the free right to the use and enjoyment of [that property] for building or any other lawful purpose, and the free right to transfer the title thereof, until proceedings looking to the condemnation of such land shall have been authorized and actually begun…."

39. Pursuant to D.C. Official Code § 9-103.01, the Mayor is authorized and directed to prepare a plan for the extension of a permanent system of highways, generally 90 to 160 feet in width. Under D.C. Official Code § 9-103.02, the Mayor is authorized and directed to prepare a highway plan in sections, and to prepare a map of each section of the plan showing the boundaries and dimensions of the streets and lots within that section. The map must be recorded by the Surveyor, and "after any such map shall have been so recorded no further subdivision of any land included therein shall be admitted to record in the Office of the Surveyor … unless the same … be in conformity to such map…."

40. The Zoning Regulations provide a theoretical lot subdivision process in Subtitle C § 305, which authorizes the Board to grant, as a special exception, a waiver of Subtitle C § 302.1, the provision mandating that any division of a lot must result in lots that comply with applicable zoning requirements. Under this process, the Board may allow multiple primary

buildings on a single record lot in an R zone, subject to certain requirements. Within a plan of theoretical subdivision, the individual theoretical lots serve as boundaries for assessment of compliance with the Zoning Regulations, including the development standards set forth in Subtitle C § 305.3. The proposed development must comply with the substantive intent and purpose of the Zoning Regulations and must not be likely to have an adverse effect on the present character and future development of the neighborhood. (Subtitle C § 305.6.) The Board may impose conditions on aspects of the proposed development if necessary to protect the overall purpose and intent of the Zoning Regulations. (Subtitle C § 305.7.)

41. In 2007 the Board denied a self-certified application submitted by the Owner for a special exception under § 2516 of the then-effective 1958 Zoning Regulations to allow 13 detached dwellings in a theoretical lot subdivision at the Property, which was then zoned CB/UT/R-1-A[4] and was configured as Lot 827 and Parcels 12/63, 12/293, and 12/294 in Square 1425. The Board's decision was based on its determinations that the proposal was inconsistent with the purposes of the CB/UT overlay, especially with respect to density, did not incorporate adequate measures for stormwater management or tree preservation, and would have an adverse effect on the use of neighboring property and on the present character and future development of the neighborhood, contrary to the requirements for approval of a theoretical lot subdivision. *See Application No. 17309* of Dorchester Associates, LLC (order issued August 7, 2007); *affirmed, Dorchester Associates LLC v. District of Columbia Bd. of Zoning Adjustment*, 976 A.2d 200, 214 (D.C. 2009) (Board "properly applied the regulatory requirements for both the CB/UT Overlay District and special exceptions to its examination of the extensive record developed during its proceedings," which contained substantial evidence to support Board's findings and conclusions about the adverse impacts of the proposed development on the character and future development of the neighborhood, and on the use of neighboring properties).

42. The Owner has not applied for building permits to authorize the construction of dwellings at the Property since the creation of A&T lots 841-847. (Ex. 20.) The ZA has not approved any plans or building permits for the dwellings contemplated on record lots in the ZA's November Letter or on the A&T lots shown in the A&T Plat. (Ex. 23.)

CONCLUSIONS OF LAW

1. Section 8 of the Zoning Act authorizes the Board to "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal" made by any administrative officer in the administration or enforcement of the Zoning Regulations. (D.C. Official Code § 6-641.07(g)(1) (2008 Repl.).) Appeals to the Board of Zoning Adjustment "may be taken by any person aggrieved, or organization authorized to represent that person, or by any officer or

[4] Under the 1958 Zoning Regulations, the Chain Bridge Road/University Terrace (CB/UT) overlay district was "established to preserve and enhance the park-like setting of the Chain Bridge Road/University Terrace area by regulating alteration or disturbance of terrain, destruction of trees, and ground coverage of permitted buildings and other impervious surfaces, and by providing for widely spaced residences. 11 DCMR § 1565.1. The R-1 district was "designed to protect quiet residential areas now developed with one-family detached dwellings and adjoining vacant areas likely to be developed for those purposes," where R-1-A was characterized by low-density area requirements. (11 DCMR §§ 200.1, 200.3.)

department of the government of the District of Columbia or the federal government affected, by any decision of [an administrative officer] granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or part upon any zoning regulations or map" adopted pursuant to the Zoning Act (D.C. Official Code § 6-641.07(f) (2008 Repl); *see also* Subtitle X § 1100.2, Subtitle Y § 302.1.) The Board has no jurisdiction to hear and decide any appeal or portion of any appeal where the order, requirement, decision, determination, or refusal was not based in whole or in part upon any zoning regulation or map. (Subtitle X § 1100.3.)

2. A zoning appeal must be filed within 60 days from the date the appellant had, or reasonably should have had, notice or knowledge of the administrative decision complained of. (Subtitle Y § 302.2.) A zoning appeal may be taken only from the first writing that reflects the administrative decision complained of to which the appellant had notice, and no subsequent document may be appealed unless that document modifies or reverses the original decision or reflects a new decision. (Subtitle Y § 302.5.)

3. The Appellant asserted that the Board has jurisdiction to consider this appeal under Subtitle Y § 302.1 and that the appeal was timely filed within 60 days of the creation of the A&T Plat and its filing by the Surveyor. (Ex. 2.) According to the Appellant, the A&T Plat was created "for the purpose of obtaining building permits for a single-family detached dwelling on each of the lots" in a procedure that allowed the Owner to bypass the subdivision process for the creation of record lots, which was contemplated by the review in the ZA's November Letter and that would have been subject to review and approval by the ZA and subject to an appeal to the Board by the Appellant. The Appellant argued that the A&T Plat "was issued by OTR and accepted by DCRA in violation of the Zoning Regulations" and therefore should be "revoked for zoning purposes." (Ex. 2.)

4. The Appellant decided to appeal the A&T Plat after the location of the Property in the Highway Plan became known, when the Appellant concluded that the Owner would be able to bypass the subdivision process. According to the Appellant, in this "unique situation," the A&T Plat was "the functional and actual equivalent of the establishment by Subdivision of seven Record Lots." The Appellant contended that the A&T Plat was a decision appealable to the Board because, based on the A&T Plat, "the Owner is now fully entitled to submit and obtain building permits for each of the lots without further zoning review of the lots created." (Ex. 26.)

5. The Owner also recognized the A&T Plat as an appealable decision and urged the Board to deny the appeal on the grounds that the "subdivision" created by the A&T Plat was consistent with all zoning requirements and that the other claims of error, concerning theoretical lot subdivision and tree protection provisions, were moot and not yet ripe, respectively. According to the Owner, a theoretical lot subdivision was not necessary when, as here, a project would satisfy all zoning requirements, rendering that claim of error moot, and the tree protection claim was not ripe because the ZA had not yet made a written determination with respect to the tree protection provisions set forth in the Zoning

Regulations.[5] The Owner asserted that the A&T Plat otherwise constituted a zoning decision appealable to the Board because the tax lots reflected in the A&T Plat were the same as those reviewed and found compliant with zoning requirements by the ZA in the ZA's November Letter. The Owner contended the ZA's November Letter reflected the ZA's determination that the proposed subdivision complied with all zoning requirements so that the development could be undertaken as a matter of right after a subdivision application was filed for the project; however, since the creation of record lots was not possible due to the location of the Property within the Highway Plan, the Owner obtained the designation of seven tax lots instead of undertaking a subdivision to create record lots. According to the Owner, the creation of A&T lots, as opposed to record lots, did not change any zoning aspect of the planned development because the proposed subdivision reviewed by the ZA and attached to the ZA's November Letter was "substantially similar to the Subdivision approved by OTR." (Ex. 21.)

6. DCRA urged the Board to dismiss the appeal on several grounds, including that the administrative decision at issue – OTR's creation of the A&T Plat – was not a final determination by the ZA and therefore was not within the Board's jurisdiction. (Ex. 22.) The Board does not agree with DCRA that an appeal to the Board must involve a determination by the ZA; instead, the Zoning Act defined the Board's jurisdiction to hear and decide an appeal where an appellant claims error in "any order, requirement, decision, determination, or refusal" made by any administrative officer in the administration or enforcement of the Zoning Regulations. (D.C. Official Code § 6-641.07(g)(1) (2008 Repl.).) Appeals to the Board may concern any administrative decision "based in whole or in part upon any zoning regulation or map" adopted pursuant to the Zoning Act. (D.C. Official Code § 6-641.07(f) (2008 Repl.); *see also* Subtitle X § 1100.2, Subtitle Y § 302.1.) A decision may be appealed to the Board so long as that decision was "made in the administration or enforcement of the Zoning Regulations." Thus, an appealable decision must have been made based on a zoning regulation or map but need not necessarily have been made by the ZA.

7. Nonetheless, the Board agreed with DCRA that the appeal must be dismissed because the administrative decision challenged in this proceeding was not a zoning decision within the scope of the Board's jurisdiction. In opposing DCRA's motion, neither the Appellant nor the Owner demonstrated how OTR's creation of A&T lots constituted a zoning decision for purposes of bringing an appeal to the Board in accordance with the Zoning Act. OTR created the A&T Plat for taxation purposes and not, as argued by the Appellant, for purposes of allowing the Owner to obtain building permits without further zoning review. The Owner requested the A&T Plat once the Owner no longer anticipated the subdivision of the Property into record lots. The creation of the A&T Plat did not entail any zoning review and did not eliminate the requirement for the Owner to obtain building permits before undertaking any construction at the Property. The ZA testified that, before approving a building permit application for a tax lot at the Property, in the absence of a record lot subdivision due to the Highway Plan, the Office of the ZA "would conduct the same analysis based on an A&T lot" as would normally be done in the "typical process

[5] In light of the Appellant's withdrawal of its claim of error related to the tree protection provisions, the Board concludes that the Owner's motion to dismiss that aspect of the appeal is moot.

[involving] a record lot." (Tr. at 43-44.) The ZA did not suggest that a zoning analysis of each tax lot at the Property had already occurred in connection with or for purposes of the ZA's November Letter but stated that a determination of zoning compliance would be done for each "individual lot's plat at the time of the building permit application." (Tr. at 51, 56-57.)

8. The Owner repeatedly referred to the creation of the A&T Plat as a "subdivision" of the Property "approved" by OTR and "resulting in the creation" of A&T lots (see, *e.g.*, Ex. 21). The Appellant disagreed, noting that the "A&T Plat is not a subdivision plat," which "is a creation of the Office of Surveyor." However, without citing any specific provision, the Appellant asserted that "the Zoning Regulations provide an alternative in this case, which is the creation of the A&T plat, which…is not a subdivision plat, but it is the functional equivalent of a subdivision." (Tr. at 26.)

9. The Board does not find that OTR's creation of A&T lots for taxation purposes constituted a zoning decision equivalent to the approval of a plan of subdivision reviewed for zoning purposes by the ZA. For zoning purposes, a division of property must be effected in a manner that will not violate the Zoning Regulations relating to matters such as yards and other open space, lot width and area, lot occupancy, and parking applicable to that lot and to any lot created in the division. (Subtitle A § 101.6.) Neither the Appellant nor the Owner demonstrated that any zoning review was undertaken in the creation of the tax lots at the Property nor that the OTR process was based wholly or in part on any zoning regulation or map. The ZA did not create, review, or approve the creation of the A&T lots, which were instead created by a separate agency for reasons unrelated to zoning.

10. The parties generally agreed that the boundaries of the tax lots created by OTR, as shown in the A&T Plat, matched those of the planned subdivision reviewed by the ZA for purposes of the ZA's November Letter.[6] Regardless, the Board concludes that the claims of error brought by the Appellant in this proceeding are not properly the subject of an appeal to the Board because the creation of the A&T Plat was not a zoning decision that entailed a final determination of zoning matters related to the potential development of the Property. OTR's creation of the A&T Plat was not a zoning decision.

11. In urging the Board to deny the appeal, finding compliance with lot frontage and width requirements based on the A&T Plat, the Owner argued that the Board has previously asserted its jurisdiction to review "zoning decisions" made in connection with actions taken by other agencies. The Board was not persuaded by this argument and reiterates instead that its jurisdiction in an appeal is limited to decisions based on a zoning regulations or map. Citing *Appeal No. 19023* (Advisory Neighborhood Commission 2A; order issued March 6, 2019), known as the "River Inn" case, the Owner contended that, in that case, the

[6] The configuration of lots considered in the ZA's November Letter appears similar to the lots shown on the A&T plat, but the lot areas are not always identical and the parties did not claim that the lot boundaries were the same in each instance. According to the Owner "the subdivision reviewed by the ZA is substantially similar to the Plat approved by OTR." (Ex. 27.) DCRA acknowledged "a slight deviation between the calculations contained in the A&T Plat (BZA Ex. 2A) and the 'Preliminary Lot Configuration' (of November 5, 2018) (BZA Ex. 2B1) referenced in the ZA's Letter (dated November 13, 2018) (BZA Ex. 2B)." (Ex. 23.)

Board reviewed "the ZA's decision to allow the Owner to obtain a public space permit in connection with an outdoor café." Rather, in that proceeding the Board reversed a determination by the ZA applying a zoning regulation; specifically, that an outdoor café operated by a hotel was permissible under the Zoning Regulations because the café, located in public space in front of the hotel building, would not constitute an expansion of the hotel's commercial adjunct space. The Board rejected a contention that "the Board never has the authority to regulate uses in public space" in deciding that "the Zoning Regulations at issue are not regulating the public space, but the extent to which a hotel use may be expanded." The Board's decision in the River Inn appeal was an interpretation of the Zoning Regulations separate from, and not a substitute for, the process necessary for the hotel to obtain approval for the use of public space. (*See also Appeal No. 17468* (Advisory Neighborhood Commission 6A; order issued February 16, 2007) (appeal of trade approvals, such as electrical and plumbing, was dismissed as an untimely appeal of a building permit because the decision complained of – expansion of an apartment house – was authorized by the issuance of the building permit; DCRA's decisions to issue the trade approvals did not authorize an increase in number of units and were not based in whole or in part on an interpretation of the Zoning Regulations).

12. Given the lack of review and approval of the A&T Plat for zoning purposes, the Board was not persuaded by the Appellant's contention that the A&T Plat was "the first writing embodying the ZA's earlier non-appealable" letter as "the functional and actual substitute for a Subdivision creating ZA approved Record Lots." (Ex. 26.) Nor was the Board persuaded that the "actual acceptance" of the A&T Plat "into the official records of the D.C. Surveyor at DCRA in the same manner" as a subdivision meant that the A&T Plat had "the same zoning significance" as a subdivision creating lots of record. On the contrary: a subdivision would be subject to review and approval by the ZA and would be recorded by the Surveyor. The creation of A&T lots was not subject to review or approval by the ZA and the resulting A&T Plat was merely accepted for filing by the Surveyor, without any significance for zoning purposes.

13. The Owner contended that the zoning decision at issue in this appeal was not made in the A&T Plat but in the ZA's November Letter, and therefore, the appeal was not timely because the "Appellant first had knowledge of the zoning decision complained of on January 7, 2019 [i.e., when the ZA's November Letter, as the "first writing" of the zoning decision complained of, was posted on DCRA's website], which is 350 days before the filing of this appeal." (Ex. 21.) According to the Owner, the creation of the A&T Plat designated lots consistent with zoning requirements, as had been "confirmed" in the earlier ZA's November Letter. The Owner argued that, "with or without the disclaimer" stated in the ZA's November Letter, "the plat of computation…codifies and is a final act that is appealable." (Ex. 27.)

14. DCRA disagreed, contending that the ZA's November Letter was an "advisory statement" and not a "final determination," which therefore could not be considered the "first writing" of a zoning decision. DCRA did not consider the ZA's November Letter an appealable decision since it contained "a conspicuous and explicit disclaimer stating it may not be considered a 'final decision' under Subtitle Y § 302.1." (Ex. 22.) The Appellant also argued

that the ZA's November Letter "was not a 'final decision' appealable" under Subtitle Y § 302.1, because the letter was "specifically premised on the future 'subdivision of the Property into seven record lots.'"

15. The Board concludes that the ZA's November Letter was not the "first writing" of an appealable zoning decision. The ZA's November Letter expressly was "an advisory statement" based solely on the materials provided at the time by the Owner. The letter was not definitive but stated the ZA's initial conclusion that a subdivision of the existing tax lots to record lots "*should be able* to proceed as a matter-of-right" (emphasis added) based on the information then available to the ZA. As the Owner later learned, this information did not include the location of the Property within the Highway Plan, which might have affected the ZA's conclusion; nor did the ZA ask the Owner to submit any additional information that might have been needed for a final determination of zoning compliance in a review of a subdivision plat but was not necessary for purposes of the advisory letter. The ZA's November Letter contained other indicia of a lack of finality, such the statements recognizing the possibility that "laws, regulations, and policy" might be amended before a final zoning determination was made and that the ZA's advisory opinion did not vest any application for any DCRA approval process.

16. The ZA's November Letter did not grant final approval of any application but was written with the clear expectation that the Owner would later submit an application requiring review and approval by the ZA. The disclaimer included in the ZA's November Letter stated that the Office of the ZA "will sign off on the plat drawings that are consistent with the lot dimensions so long as the plat is consistent with the plans attached…." The ZA's November Letter contemplated the filing of a subdivision application, which the Owner now says is not possible. The Board finds no basis to conclude that the A&T Plat was a substitute for a final determination of zoning compliance, because the tax lots were created without any official determination that the A&T Plat was consistent with the plans reviewed by the ZA for purposes of the ZA's November Letter.

17. The Owner argued that the disclaimer stated in the ZA's November Letter was "not enforceable" and should be disregarded in this case because, under the Zoning Regulations, "the Board has the authority to look at the global facts of a particular decision and decide whether it constitutes an appealable first writing under Subtitle Y §§ 302.1 and 302.5." (Ex. 27.) The Board agrees with the Owner that the Board, and not the ZA, "determine[s] what is and is not subject to an appeal" and that a zoning determination letter may be an appealable decision under some circumstances. In deciding whether a determination letter or other communication from the ZA constitutes the "first writing" of the zoning decision at issue in an appeal, the Board has considered factors such as the information available to the ZA, whether the decision stated in the communication was specific to the property at issue, whether the writing was unambiguous in communicating the decision, and whether the language of the writing suggested that the decision was subject to change. (*See, e.g., Appeal No. 19374* (Dupont Circle Citizens' Association, order issued February 27, 2019) (listing factors considered by the Board in deciding whether a determination letter could be considered an appealable decision); *Appeal No. 19023* (Advisory Neighborhood Commission 2A, order issued March 6, 2019) (in the River Inn case, a determination letter

contained a final decision by the ZA); and *Appeal No. 18300* (Ausubel, order issued April 11, 2012) (an email, sent by DCRA to the appellant before a permit was issued for neighboring property, was the administrative decision complained of in the appeal because the email was unambiguous, it cleared the way for the issuance of the permit, and the ZA made the decision after being fully briefed on the issues).)

18. The Board declines to find, under the circumstances of this case, that the ZA's November Letter was the first writing of a zoning decision and therefore an appealable decision. The ZA's November Letter contained an express disclaimer that it was not a final decision and plainly anticipated further action by the Owner before a final determination would be made.[7] The ZA was not "fully briefed" before writing the ZA's November Letter, which was an advisory statement based solely on information provided by the Owner, without the more thorough process that would be undertaken before the ZA would approve an application for a subdivision or a building permit. (*See Appeal No. 18522* (Washington Harbour Condominium Unit Owners' Association; order issued December 13, 2013 (a determination letter was not appealable as a final determination of zoning compliance where the ZA had not been "fully briefed" on the Owners' proposal but relied on materials provided by the owners that did not include the type of detailed construction documents that would be required for any subsequently filed building permit application, and the letter did not bind the ZA or clear the way for a permit because the letter contained no statement from the ZA promising to approve any subsequently submitted building permit application for the project without further review or preclude a "thorough vetting analysis" of a building permit application and plan set).)

19. Under the circumstances in this case, the ZA's November Letter was not sufficient to place the Appellant on notice of a final zoning determination but plainly stated that no final zoning determination had been made. The fact that the subsequent action would not take the anticipated form of a subdivision application did not transform the preliminary assessment stated in the ZA's November Letter into a final determination of zoning review and approval.

20. Despite its contention that the appeal was an untimely challenge of the ZA's November Letter, the Owner also argued that, in this appeal, "the Board has basic questions of lot width and lot frontage that it can resolve now," since "[t]here is a clear written decision by the ZA applying the Zoning Regulations, a formal action taken by the OTR…, the

---

[7] The disclaimer states that the ZA's November Letter is "**<u>NOT</u>** a 'final writing', as used in [Subtitle Y §] 302.5 of the Zoning Regulations…nor a final decision of the ZA that may be appealed under [Subtitle Y §] 302.1…." Subtitle Y § 302.5 refers to the "*first* writing…that reflects the administrative decision complained of," and specifies that "[n]o subsequent document…may be appealed unless the document modifies or reverses the original decision or reflects a new decision." Subtitle Y § 302.1 does not refer to a "final" decision but states that any "person aggrieved" or other eligible appellant "may file a timely zoning appeal." In deciding whether an administrative decision is appealable, the Board will consider whether that decision is final. *See, e.g., Appeal No. 18522* (Washington Harbour Condominium Unit Owners' Association, order issued December 13, 2013) (a determination letter was not an appealable decision, and did not preclude a subsequent appeal of a final administrative determination, where it lacked elements of finality); *Appeal No. 18469* (Lynch, order issued March 19, 2013) (the appealable form of the zoning decision complained of was the ZA's approval of permits, where that approval was unequivocal, was made public by posting on DCRA's permit information verification system, and represented a final decision; Appellant's argument that plans could have changed in response to reviews by other disciplines, requiring additional zoning review, was speculative).

necessary parties are participating, and the issues have been fully briefed." (Ex. 27.) The Owner objected that dismissal of this appeal would "perpetuate uncertainty over the Owner's property while the Owner awaits an 'appealable' zoning decision at some unknown later date" so that the "Owner will be forced to spend time and money developing plans and obtaining permits with a cloud over the property and little assurance that the plans can come to fruition." According to the Owner, "the decision made by the ZA in the Determination Letter has not and will not change from 442 days ago when the Determination Letter was issued, 287 days when the [A&T] Plat was approved, and into the future if and when a building permit is filed." (Ex. 27.) The Board did not find this objection a persuasive reason not to dismiss the appeal, which did not state a claim of error arising from the administration of the zoning regulations. Contrary to the Owner's assertions, the ZA's November Letter did not state a final decision of zoning compliance, nor was the A&T Plat approved for zoning compliance. Moreover, the Board cannot determine that the ZA's analysis would be the same now without considering whether (as stated in the disclaimer) any "[c]hanges in the applicable laws, regulations, or policy, or new information or evidence" might "result in a different determination." Although the Owner contended that the Board could "conclude that the [A&T] Plat is a first writing that can be appealed as to issues of lot width and frontage," the Board concludes instead that, under the circumstances of this appeal, the ZA has yet to make a final determination about lot width, lot frontage, and any other zoning issues attendant to the Owner's plan to construct seven dwellings at the Property.

21. DCRA asserted two other reasons why the appeal should be dismissed, relating to notice and to a claim of ambiguity in the A&T Plat, but the Board did not find either of those arguments persuasive. With regard to notice, DCRA contended that, since notice of the filing and public hearing was not provided to OTR, the appeal must be dismissed for failure to notify the governmental agency whose decision was the subject of the appeal, as is required under Subtitle Y §§ 500.4 (c) and 504.1(c). (Ex. 22.) In opposing the motion, the Owner disputed that notice to OTR was required and asserted that, even if so, "the appropriate remedy is not dismissal of the appeal" but to require "the Office of Zoning to provide any required notice to OTR" so as to avoid an "unwarranted and unjust" penalty on the Appellant. (Ex. 26.) The Owner also opposed the motion, on the ground that notice to DCRA was proper as the agency whose decision was challenged in the appeal. (Ex. 27.) The Board rejected DCRA's contention that the appeal should be dismissed for lack of notice to OTR. In its appeal challenging OTR's creation of tax lots, the Appellant attempted to frame the matter as a zoning decision by stating that the A&T Plat had been submitted to the Surveyor for the purpose of obtaining building permits. DCRA did not indicate why notice to OTR was required under the circumstances, acknowledged that OTR's action did not constitute a zoning decision, and did not dispute that notice of the appeal and hearing was provided to DCRA, consistent with the requirements of Subtitle Y, on January 30, 2020.

22. DCRA also argued that the appeal must be dismissed because the A&T Plat was ambiguous and not a "first writing" under Subtitle Y § 305.1. The Board makes no finding with respect to the claim of ambiguity, which DCRA did not identify, but notes that the "first writing" rule refers to the first writing of a zoning decision to which an appellant had notice. In this

case, the Board concludes that the creation of the A&T Plat and its filing by the Surveyor were not "zoning decisions" because those administrative decisions were not based in whole or part on any zoning regulations or map. Because the administrative decision challenged in this appeal was not a zoning decision, the appeal is outside the scope of the Board's jurisdiction. The decision complained of, the creation of the A&T Plat, could not be a "first writing" of a zoning decision for purposes of an appeal to the Board, because the creation of the A&T lots was not a zoning decision.

"GREAT WEIGHT" TO THE WRITTEN REPORT OF THE ANC

23. The Board must give "great weight" to the issues and concerns raised in a written report of the affected ANC that was approved by the full ANC at a properly noticed meeting that was open to the public pursuant to § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976. (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2012 Repl.); *see* Subtitle Y § 406.2.) To satisfy this great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. The District of Columbia Court of Appeals has interpreted the phrase "issues and concerns" to "encompass only legally relevant issues and concerns." *Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978).

24. In this case, the ANC Report supported the appeal but acknowledged not being "in a position to evaluate the legal arguments advanced in this case." The ANC Report expressed concern about the calculation of lot width at the Property, questioned under what circumstances the Owner would have been required to follow the subdivision process instead of the A&T Plat process, and asserted that the creation of A&T lots "was pursued to eventually file building permit applications for the newly-created lots." The ANC Report expressed "its strong preference for the use of easements and shared driveways instead of the creation of pipe stem driveways" to minimize the need for new curb cuts. (Ex. 25.) The Board acknowledges the issues and concerns stated by ANC Report, but concludes that the matters raised by the ANC Report are outside the scope of this proceeding and not germane to the issues raised by the motion to dismiss the appeal.

DECISION

Based on the findings of fact and conclusion of law, the Board finds no zoning decision in the claim of error related to the Office of Tax & Revenue's October 23, 2019, issuance of the A&T plat creating Lots 841-847 in the 2700 block of Chain Bridge Road, N.W. (Square 1425, Lots 841-847) in the R-21 zone, and the subsequent filing of this A&T plat by the Office of the Surveyor, DCRA. Accordingly, it is therefore **ORDERED** that the **APPEAL** is **DISMISSED** as outside the scope of the Board's jurisdiction.

VOTE (June 17, 2020): 4-0-1 (Frederick L. Hill, Carlton E. Hart, Lorna L. John, and Michael G. Turnbull to **DISMISS** the appeal; one Board seat vacant)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of Board members approved the issuance of this order.

ATTESTED BY: ______________________

SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: April 12, 2021

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

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