

FOXHALL CRESCENTS HOMEOWNERS ASSOCIATION

May 9, 2022

BY EMAIL – 3d08@anc.dc.gov

Chairman Benjamin Bergmann
Advisory Neighborhood Commission Ward 3D
4201 Cathedral Avenue, NW
123E
Washington, DC 20016

**Re: Ward 3D ANC Meeting May 11, 2022
Construction of Home at 4509 Foxhall Crescents, NW
BZA Application # 20636**

Dear Chairman Bergmann:

As President of the Foxhall Crescents Homeowners Association (“FCHOA”), I am writing to you in connection with the Advisory Neighborhood Commission (“ANC”) meeting scheduled next Wednesday, May 11, 2022, regarding the application by Penguin LLC to build a home on the theoretical lot located at 4509 Foxhall Crescents NW.

This plan will be submitted to and is scheduled to be reviewed at an upcoming meeting of the Board of Zoning Adjustment (“BZA”). This application has not been fairly considered or presented to the ANC, and this letter hopes to correct some of the incorrect information that the ANC has about this lot.

The intention of this letter is to provide you the truth and facts about this application and, hopefully, persuade you to follow the 2014 ANC and not oppose the application before you.

Applications to develop this lot have been before the ANC twice in the past; once in 1993 and in 2014. The ANC approved the 1993 application by Mr. and Mrs. Godley and did not oppose the 2014 application by Mr. Motlagh. The application before the ANC today is very similar to the 2014 application. *The majority of the FCHOA neighborhood supports the application before the ANC, and we are very concerned that the biased views of a few homeowners who acted in their own self-interest against that of our community have swayed the ANC not to support this application.*

It is important to note that Foxhall Crescents is a community of 26 homes (27 with the one requested for approval at 4509) located on private property. We maintain all of our own roads and infrastructure, including storm water drains, and do not rely on the city for maintenance or waste services. We do use city water.

Design and Size of the Home

Foxhall Crescents was designed by noted Washingtonian architect, Arthur Cotton Moore. The homes in the neighborhood are all similar in design and are modeled after The Crescents in Bath, England. See Exhibit A.

The lot 4509 is zone R-1-A and is 13,516 square feet, with an allowed maximum lot occupancy of 40 percent and a maximum height of 40 feet.

The Godley application presented to the ANC/BZA (application # 15882) in 1993 was not consistent in design with the homes in Foxhall Crescents. It was a large L-shaped home with 7,040 square feet and a three car garage. See Exhibit B. The original homes in Foxhall Crescents were about 3,500 to 4,200 square feet. The FCHOA and the ANC approved the application. The BZA approved it and the Order was issued on January 5, 1994.

The application before the ANC/BZA in 2014 (application # 18708) by Mr. Motlagh was for the exact home that Arthur Cotton Moore designed, which was identical in design with the other homes. See Exhibit C. The ANC did not oppose this application, and the BZA approved the application and the Order was issued on February 11, 2015.

The application now before the ANC/BZA (application # 20636) by Penguin LLC is for a home that is identical in design to the other homes in Foxhall Crescents, but it is a bit larger in width and depth. Mr. Motlagh proposed a home 34' x 52' and Penguin proposes a home 38x57. The proposed home is 4,967 square feet and centered nicely on the lot, leaving ample buffers on both sides and front and back. See Exhibit D. Some other FCHOA homes in the vicinity of the 4509 lot have received FCHOA approval to expand their original footprint and at least one home is now about 5,000 square feet. Thus, the size of the proposed home is in alignment with existing homes in the neighborhood. Even with the increased size, the lot occupancy will only be 16%, compared to the maximum of 40% that is allowed.

The home has been positioned to face the road instead of the original plan for its side to be visible from the street because Arthur Cotton Moore had originally planned for another house to be built beside 4509 at 4511. The 4511 lot was sold and is no longer part of Foxhall Crescents, so it is more aesthetically pleasing to have the 4509 home face the street, and its front will be identical to other homes in our neighborhood in line with Arthur Cotton Moore's plan. See Exhibit E and BZA Architectural Plans at <https://app.dcoz.dc.gov/Exhibits/2010/BZA/20636/Exhibit40.pdf>.

Within the last week, the FCHOA Board polled its homeowners regarding this planned home and the majority of the homeowners in the neighborhood fully support the home at 4509 being built as proposed.

Drainage from 4509

The Single Member District ANC Commissioner for lot 4509, Chuck Elkins, wrote an unfavorable letter regarding this application. We believe he was unduly influenced by the minority of homeowners in our neighborhood who have misled him, including Mr. Godley, the

former owner of 4509. Contrary to their current claims of adverse impacts, at the time of the Godley application in 1993, the Godley's submitted a surface water report and a subsurface soil and groundwater report and assured the BZA that "we believe that the possibility of an adverse effect caused by erosion, soil erosion or groundwater, the evidence shows that that is not going to be a threat to either property itself or to the adjacent properties, based on these experts."

According to the transcript of that BZA hearing, Mrs. Godley testified:

This shows, basically, the footprint of the house and indicates that there are drains – there is one major drain currently that was constructed under the original plans for the development to catch all of the runoff from that street. If you will recall from the first driveway, the proposed street went straight down the hill abutting into the current street. So, as a result of that, an oversized drain was put in there, and it is there existing today, to catch that runoff coming straight down the street.

Transcript of BZA hearing December 22, 1993 at 29.

That drain has been maintained through these intervening years, and there is no currently anticipated runoff problem with respect to 4509. It is important that the ANC and BZA be aware that one of the former FCHOA Board members who filed for party status and owns the property adjacent to the 4509 lot, Andy Wong, has been funneling his drainage water onto the 4509 lot for at least the past decade. In fact, a picture that I took last week shows a picture of Mr. Wong's home and his gutter downspout connected to a black plastic drainage pipe that runs across his property and drains onto 4509. See Exhibit F. In the picture that I took of the exit point of the drainage pipes, you will note that there are actually FOUR drains coming off Mr. Wong's property at 4507 and draining onto the 4509 lot. See Exhibit G. One of Mr. Motlagh's attorneys noticed the same thing in 2012. Thus, one of the loudest opponents of any development on 4509 and complainants regarding storm water was actually *creating* runoff coming from 4509.

Another FCHOA resident who lives at 4510, challenged the recent assertions by former FCHOA Messrs. Godley, Wong, and Fox that stormwater drainage is an issue with 4509. The homeowner, Melanie Stern, who lives directly below 4509 reminded Mr. Fox that the only drainage problem in that area of the neighborhood "had nothing to do with the property at 4509," but was due to inadequate drainage in front of her home that the FCHOA Board had delayed fixing for years (Mr. Godley was president of the Board during this time). See Exhibit H.

The applicant has committed to fully comply with all water drainage requirements under DC law and has committed to submitting a stormwater management plan. In addition, he has developed and submitted a soil and erosion plan. Penguin LLC has also committed that it will notify the the ANC and the FCHOA Board if he requests any special DOEE storm water accommodations on the property. (The FCHOA Board requested that they be notified and Penguin agreed).

Construction Management

Penguin LLC has developed a Construction Management Agreement that has been reviewed by the FCHOA Board. The agreement addresses communication, neighborhood safety, insurance, protective measures during construction (such as silt fence, sump pump and filter bag, storm

water drainage inlet clearing and cleaning, parking of construction vehicles, hours of construction, road repairs, landscaping, etc.). The FCHOA Bylaws do not require a Construction Management Agreement, however, the one presented offers far more than any measures the FCHOA would have asked for.

The FCHOA Board is appreciative of Penguin's gestures and is confident that these measures will be effective. Mr. Zumot, owner of Penguin, has personally assured the FCHOA Board that he will take all actions promised and will fully cooperate with the Board to address any issues that may arise during construction.

Variance Requested

Penguin LLC, the applicant, has sought a variance from the 24 foot wide accessway required by C § 305.3(b), pursuant to X § 1000, to the 16 foot requested to accommodate the width of the existing street. The Office of Planning report dated May 5, 2022, did not find any reason not to grant the request and noted that "Granting the requested variance should not result in impairment to the intent of the Regulations to provide access to residential properties, provided FEFMS and MPD have no objections."

The FCHOA supports the requested variance to avoid disruption of existing streets and additional expense to the FCHOA.

Heritage Tree

The DDOT approved the removal of 20 trees on the 4509 lot, which have been removed. A Heritage Tree, a Tulip Poplar, that was not approved to be removed was cut down. We are aware that Commissioners Elkins and Rao and others are quite upset about this action.

There are some important facts regarding the tree, however, that have not been brought to the attention of the ANC:

- The BZA approved the removal of that very heritage tree over the objections of the Office of Planning when it approved Mr. Motlagh's plans in 2014. Thus, the neighborhood was prepared for the tree to be removed.
- The tree was on a slope and leaning toward where the home would be built.
- When the tree was cut down, it was revealed that it was diseased. The trunk reveals a deep cavity in the base of the trunk of the tree, which measures approximately 4 feet deep and a smaller cavity. A pathologist is analyzing the degree to which the tree was diseased. See Exhibit I.
- The DC arborist told another Board member and myself that it can be difficult to assess whether a Tulip Poplar is diseased or not and said the largest of the two that fell "was just one we missed." It looks like the one that was cut may have been another that was difficult to diagnose.
- Penguin LLC worked diligently with the former FCHOA board for over nine months and never got a single approval to advance the development of the lot. The previous Board

planned to use the Tulip Poplar as the reason the FCHOA would not approve the planned home and no alternative development plan would be given consideration.

DC law §8-651.04a(c) provides that anyone who cuts down a Heritage Tree without the approval of the Mayor is subject to a fine of \$300 per inch of circumference. Subsection (d) of the law provides that the Mayor may increase the fine by regulation, which the Mayor has not done. Some Commissioners have declared that the ANC should deny the application because the Heritage Tree was cut down. There is no legal basis for such action. As the BZA noted in the Godley application, "In the absence of documentary evidence of a restrictive covenant, depriving the applicant the right to develop on this lot may constitute a taking" in violation of the Constitution.

Clean Hands Issue

At the ANC 3D April 6, 2022 meeting, there was discussion that the Penguin application should be denied due to the cutting of the tree, which was viewed by some as "unclean hands." That would be unfair because there is a lack of "clean hands" all around on this issue.

- The applicant cut down the Heritage Tree in violation of §8-651.04a.
- The former FCHOA Board president and ANC Commissioner Jason Rao trespassed on 4509, took inflammatory pictures, and called regulatory agencies to investigate. Jason Rao is not the ANC Commissioner assigned to 4509.
- The former FCHOA Board violated the DC Nonprofit Corporation Act with respect to how it handled Penguin's request to build a home on 4509 and the Motlagh request in 2012-15. Under DC law, boards of directors must act in good faith and have a duty to act in the interests of the members of the entity, not in their own interest.
- Former FCHOA Board member Andy Wong has been diverting his property's storm water onto 4509 while simultaneously claiming lot 4509 has storm water management issues and requires special engineering attention.

As noted above, the ANC should not take action or recommend that the BZA take actions that are outside the scope of the law or would constitute a taking in violation of the U.S. Constitution.

Other Issues raised by Foxhall Crescents Neighbors

The former FCHOA Board violated the DC Nonprofit Corporation Act and acted in their own interest instead of that of their members. A majority of the FCHOA neighbors called a Special Meeting to remove two of the Board members, Gene Godley and Andy Wong. At the Special Meeting, they resigned to avoid the vote of removal. The FCHOA president at that time, John Fox, also resigned.

Nevertheless, Mr. and Mrs. Godley, Mr. Fox, and Mr. and Mrs. Robert Sharkey have continued to oppose the 4509 development and have confused the issue by claiming there is an easement on the 4509 lot that would preclude development and the Agreement that Mr. Motlagh was pressured to sign at the BZA hearing on November 5, 2014 is not being enforced. These issues are red herrings.

There is no easement on the 4509 lot. When Foxhall Crescents was originally developed, lot 4511 was behind lot 4509 and an easement across 4509 allowed for the driveway to 4511. As noted above, the 4511 lot was sold and an amendment to the FCHOA Bylaws on July 20, 1981 removed the 4511 lot from the FCHOA, which eliminated the need for the easement. The Amendment was signed by all homeowners and mortgage holders and filed with DC Land Records. The BZA Order for the Godley application noted that, "There are no restrictive covenants on the lot that prohibit construction of a single-family dwelling on the lot." Indeed, Penguin's counsel did a title search and there was no easement on the Godley deed, the Motlagh deed, or the Penguin deed.

Another issue that keeps getting raised by the opponents to the 4509 development has to do with the Agreement that was entered into between Mr. Motlagh and the FCHOA and related combined opposition parties Godley, Sharkey, and Wong at the BZA hearing on November 5, 1994. That Agreement was a voidable transaction under the DC Code §29-406.70 on conflicting interest transactions, plus it exceeded the authority of the FCHOA board members who signed it. The FCHOA Board voided the Agreement by unanimous vote on March 29, 2022. Furthermore, Peter Kolker, attorney for Penguin LLC, noted to the ANC at its April 6, 2022 meeting that the Agreement was not enforceable because (1) it was not filed with the DC Land Records, thus Penguin had no notice of it at the time it purchased the property, and (2) the Agreement had not been signed by all of the property owners of the 4509 lot. See Exhibit J.

Summary

The majority of the FCHOA community supports the 20636 application before the ANC and BZA. **The FCHOA requests the ANC follow the lead of the ANC in 2014 and take no position on application 20636 for the following reasons:**

- We are a self-contained, private property community that maintains its own infrastructure, drainage system, and waste. A majority of the FCHOA community is in favor of this development, and it will have minimal impact on other surrounding neighborhoods.
- The size of the proposed home is in alignment with existing homes in the neighborhood. Even with the increased size, the lot occupancy will only be 16%, compared to the maximum of 40% that is allowed.
- The design of the home will be the Type 6 home designed by Arthur Cotton Moore and thus will be identical to the existing homes in the neighborhood.
- The storm water management issue has been exaggerated by former board members, and the neighbor at 4507 has been draining his property's runoff water onto 4509 while simultaneously claiming there was a water runoff issue with 4509.
- Storm water drainage will be managed by (1) the extra large drain that was installed when the addition was first developed, in anticipation of the homes at 4509 and 4511 (now not part of FCHOA), (2) the storm water management plan that Penguin has committed to develop, and (3) the commitment of Penguin to meet DOEE requirements.

- Penguin has offered a Construction Management Plan to the FCHOA which is more than adequate.
- The requested access variance from 24 feet to 16 feet to accommodate the existing street was approved in 1994, 2014, and was viewed as not problematic by the Office of Planning in their May 5, 2022 report.
- The Heritage Tree was diseased and had been approved for removal by the BZA in the 2015 Motlagh BZA Order over the objections of the OP. Homes in the FCHOA neighborhood have been damaged by diseased Heritage Tree and Special Tree Tulip Poplars which fell after DC had deemed healthy and refused to allow their removal.
- The fine for cutting a Heritage Tree is \$300 per circumference inch. That is the only penalty allowed by law. Action by the ANC or DC agencies that is retaliatory in nature in response to the cutting is outside the scope of authority.
- There are "unclean hands" all around on this application: by the applicant, the former FCHOA board, the former FCHOA president and ANC Commissioner Rao, and by the owner at 4507 who diverts his water onto 4509.
- There is no easement or other restriction that would interfere with the development of the proposed home on 4509. The deed to 4509 does not contain an easement.
- The Agreement entered into between the FCHOA and Mr. Motlagh has been voided by the FCHOA Board. The Agreement was not enforceable on Penguin anyway because it was never filed with the DC Land Records prior to Penguin purchasing the lot, and it had not been signed by all the previous landowners of 4509.
- Depriving Penguin the right to develop the lot in the absence of any restrictive covenant would constitute a taking in violation of the Constitution.

Thank you for your consideration.

Sincerely,



Jody R. Westby
President, FCHOA
4501 Foxhall Crescents NW
Washington, DC 20007

Exhibits A-J

cc: All 3D ANC Commissioners

EXHIBIT A

ARTHUR COTTON MOORE

ARCHITECTURE MASTER PLANNING PAINTING FURNITURE WRITING MEDIA ABOUT

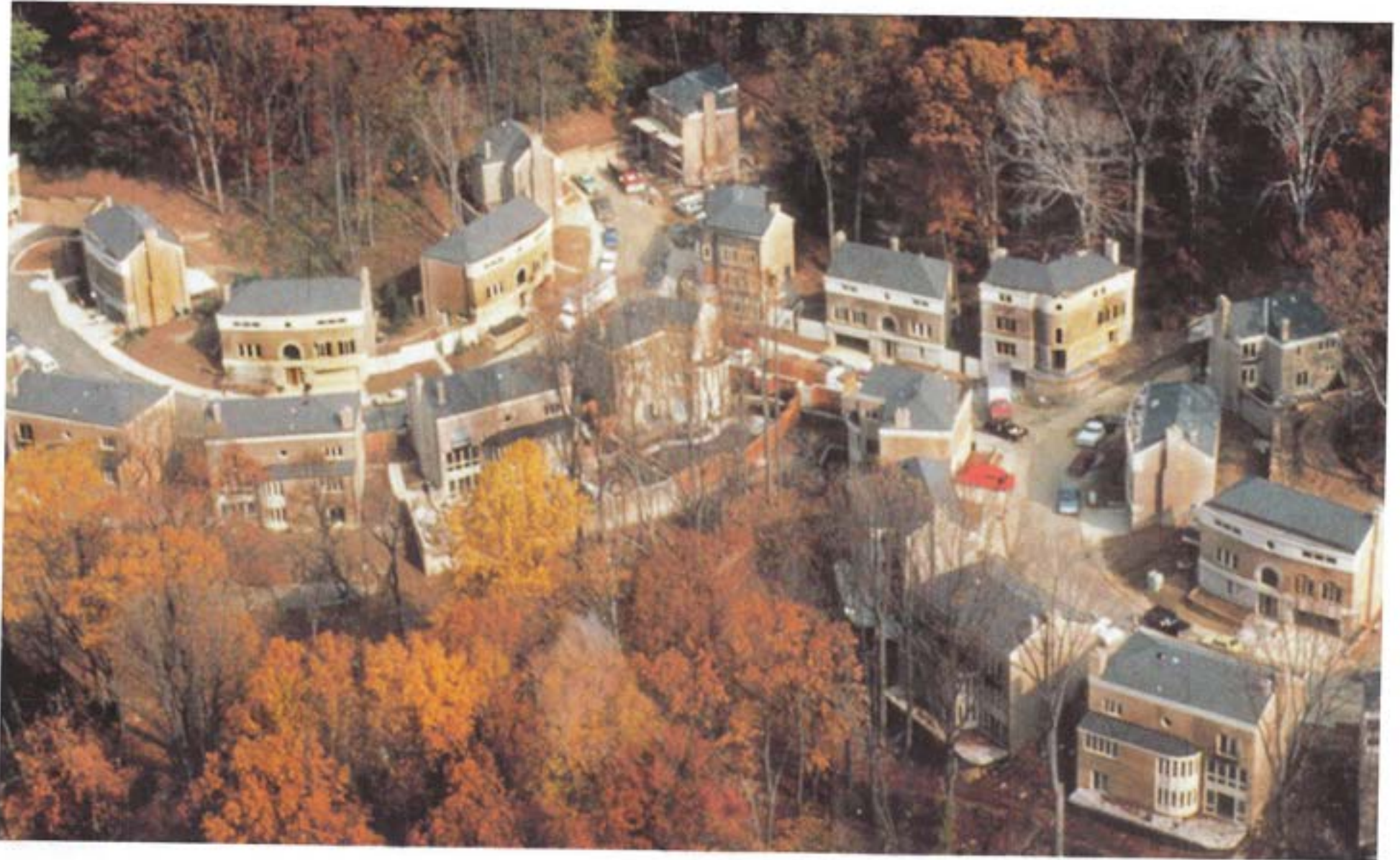
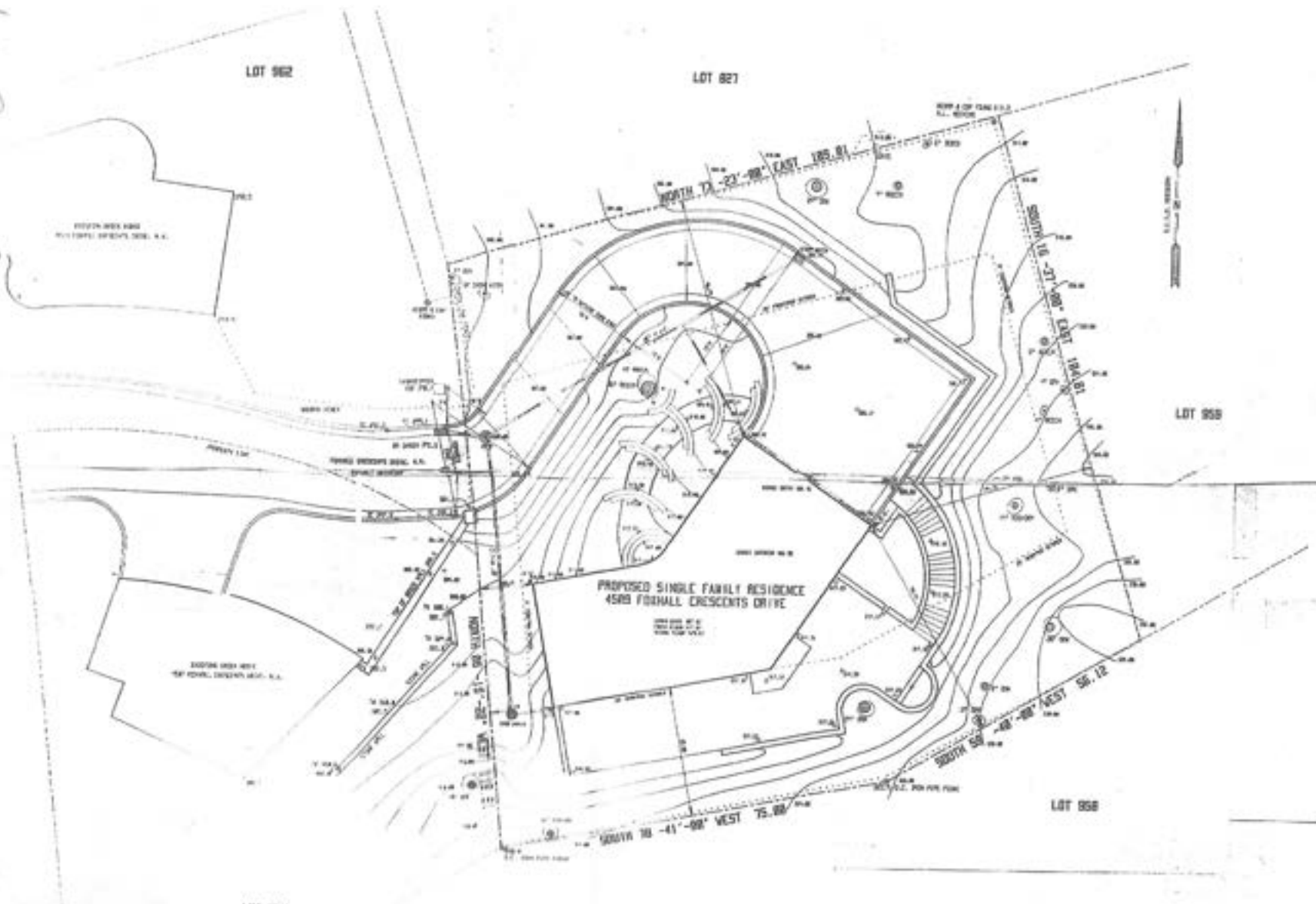


EXHIBIT B

Godley's plan

Handwritten notes at the top of the page:
 1389/1389A = 010
 1389/1389B = 010
 1389/1389C = 010
 1389/1389D = 010
 1389/1389E = 010
 1389/1389F = 010
 1389/1389G = 010
 1389/1389H = 010
 1389/1389I = 010
 1389/1389J = 010
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 1389/1389V = 010
 1389/1389W = 010
 1389/1389X = 010
 1389/1389Y = 010
 1389/1389Z = 010



PROPOSED SITE PLAN

DATE	7/2/03
SCALE	AS SHOWN

LOT 968, SQUARE 1397
 TOTAL AREA OF 4.4 LOT 968
 RECORD - 13,875 SQ. FT. OR 0.3128 ACRES
 COMPRISES - 10,517 SQ. FT. OR 0.2400 ACRES

PROPOSED RESIDENTIAL SITE
 4500 FORHALL CRESCENTS, N.W.
 WASHINGTON, D.C. 20007

WARD & ASSOCIATES, P.C.
 1400 K STREET, N.W., SUITE 2000
 WASHINGTON, D.C. 20004
 PHONE: (202) 338-4000

EXHIBIT C

Motlagh



FOXHALL

CS

4508 FOXHALL CRESCENTS DRIVE N.W.
WASHINGTON, DC 20007

AMIR MOTLAGH
4508 FOXHALL CRESCENTS DRIVE, NW
WASHINGTON, DC 20007
amirmotlagh@hotmail.com

December 9, 2013

SHEET SCHEDULE

- C8 COVER SHEET
- A.1 BASEMENT & FIRST FLOOR PLANS
- A.2 SECOND FLOOR PLAN & FRONT ELEVATION
- A.3 LEFT & RIGHT ELEVATIONS
- A.4 REAR ELEVATION

EXHIBIT D

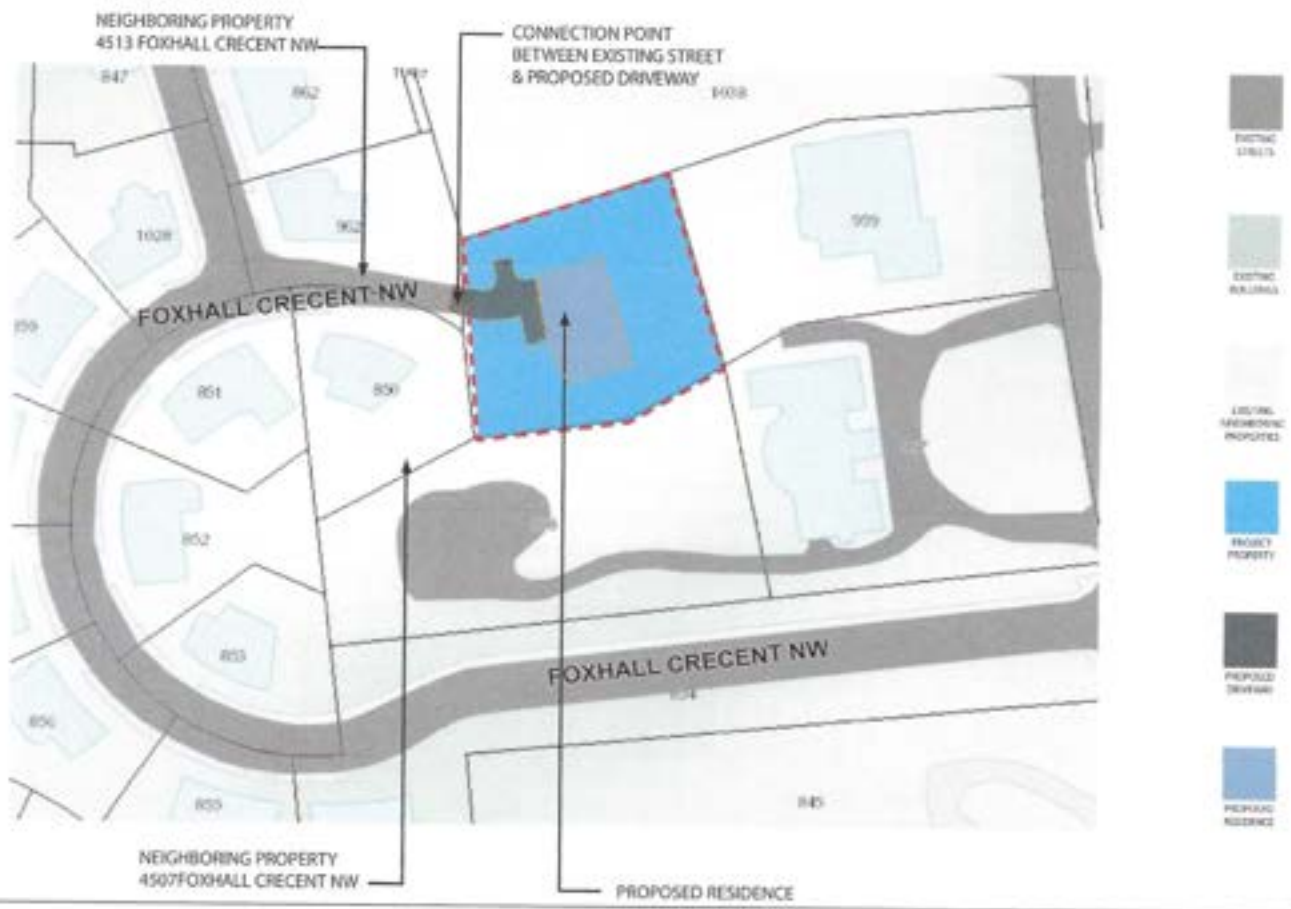


EXHIBIT E

Penguin



WEST ELEVATION (FRONT)

EXHIBIT F



EXHIBIT G





EXHIBIT H

From: Jody R Westby westby@mindspring.com
Subject: Comments regarding March 27 Special Meeting
Date: May 8, 2022 at 5:45 PM
To:



From: melanie stern
Subject: Re: Comments regarding March 27 Special Meeting
Date: March 22, 2022 at 3:27:35 PM EDT
To: John Fox

Hi John,

Thank you for the information.

It would be helpful if you could provide dates as to when each event occurred that you are referring to:

For example: When did Motlagh buy the property?

Were there other owners of the property and when?

How many meetings were there, and what were the dates and what was addressed.

Also, I am not sure you have the correct facts regarding damage to the properties on our street regarding past runoff issues. Where did you get your facts from?

Please provide more detail. What damage was actually done?

As I remember, the damage was because the drainage system near my house was not sufficient to collect water from the rain. This had nothing to do with the property at 4509. My house was the one that was **most adversely affected** due to lack of a proper drain in front of my house and up the street. **I am wondering why you didn't mention my name.**

As everyone can see there is now a **big drain and big deep curb** in front of my house at 4510 to address the overflow resulting from heavy

rains.





I bought my house in 2005. Whenever there was a major storm, water would collect in front of my house and back up into my driveway very close to my garage door. After a rainstorm, all the neighbors could see the large puddle in my driveway and in front of my house when they drove up and down the street. ***You couldn't miss the big puddle in front of my house and the water in my driveway!*** The little drain that was originally there could not collect the rain that drained downhill. It is important to note that my house sits at the lowest point on our street.

After I notified the Board many times, the Board after 7 years in 2017 put in a new drain in front of my house and fixed the grade. The whole process was a nightmare for me. If you have noticed the **pink curbs** in the development, this was the result of curbs that were replaced that were damaged as a result of runoff in our streets.

Lastly, this is the view from my window of the property at 4509. When we decide about the layout of the house on the street, we should be most concerned about how it appears as one drives up the street, regardless of the past designs. I hope a sketch will be provided to the homeowners.



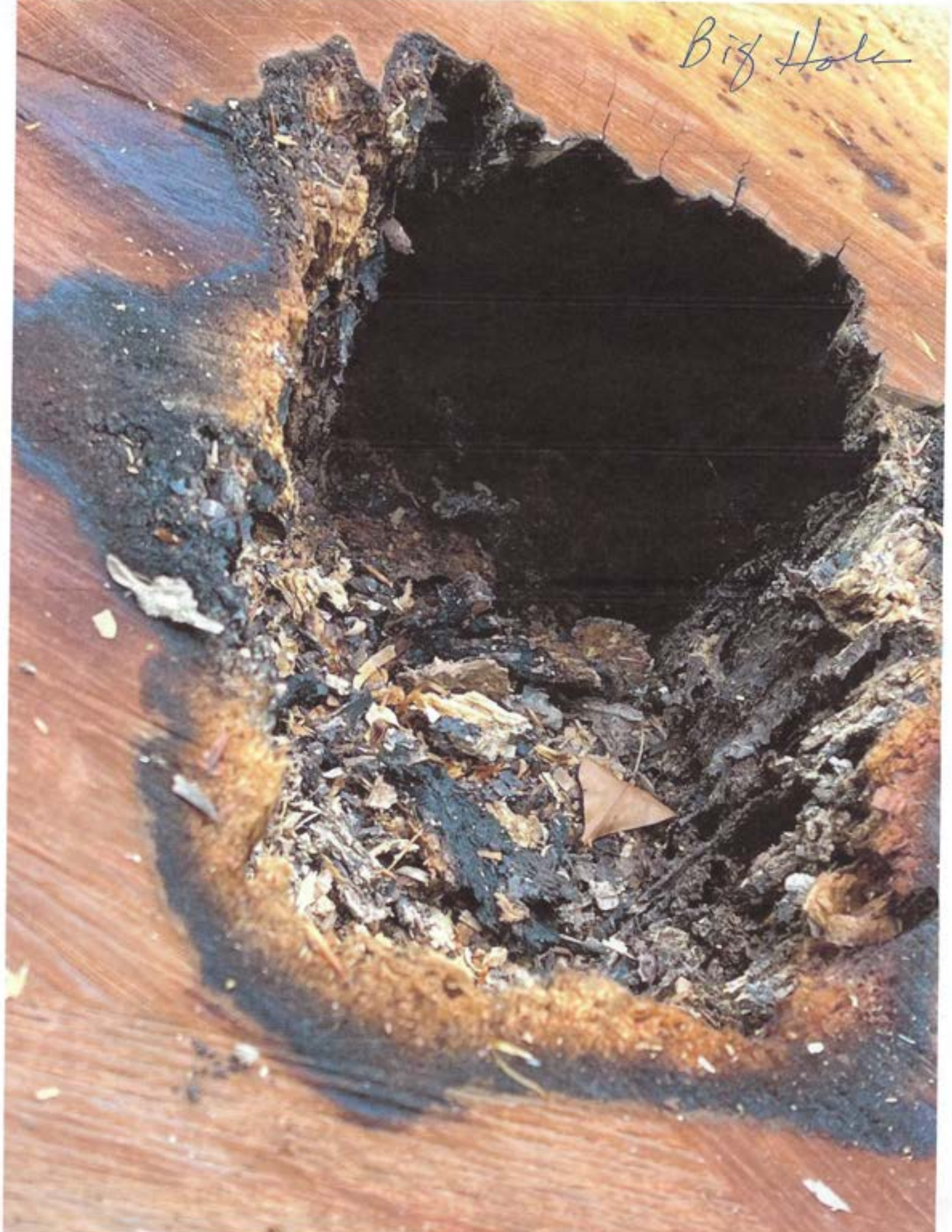


Best,

Melanie Stern

EXHIBIT I

Big Hole



Small Hole









Depth of Hole

Depth of Hole

EXHIBIT J



ZUCKERMAN
SPAEDER

Peter R. Kolker
PARTNER
Zuckerman Spaeder LLP
pkolker@zuckerman.com
(202) 778-1812

April 6, 2022

VIA E-MAIL

Commissioner Charles Lowrey Elkins
Commissioner Jason Rao
Advisory Neighborhood Commission 3D
chuck.elkins@anc.dc.gov
3D06@anc.dc.gov

**Re: 4509 Foxhall Crescents, N.W.
Penguin, LLC BZA Application**

Dear ANC 3D Commissioners:

Together with zoning attorney Cynthia Giordano of Saul Ewing, Arnstein & Lehr, I represent Penguin, LLC in connection with its plan to construct a residence at 4509 Foxhall Crescents, N.W., Washington, D.C. (the "Property") I am writing to you with respect to the ANC's consideration of Penguin LLC's application to the Board of Zoning Adjustment, which I understand will be considered at this evening's ANC meeting, which I will be attending via Zoom.

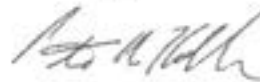
In this letter, I address the relevance to Penguin LLC of the agreement entered into by Amir Motlagh and others in connection with Mr. Motlagh's BZA application in 2014 (the "Motlagh Agreement"). Although the BZA approved Mr. Motlagh's request for a special exception and variance in 2014, Mr. Motlagh never went forward with the construction. After two years, the BZA approval lapsed. As you know, Penguin, LLC purchased the Property in 2021 and was not a party to the Motlagh Agreement entered into seven years earlier. Neither Mr. Motlagh nor any other party recorded the Motlagh Agreement in the District of Columbia land records, so a purchaser of the Property who had not signed the Agreement (Penguin LLC did not sign it) would not be bound by the Motlagh Agreement. Recording of an agreement in the land records is the method by which it is made applicable to a subsequent owner of the Property and since that did not happen, Penguin, LLC is not bound by its provisions. While I am aware of paragraph 10 of the Motlagh Agreement which states that it will be binding on subsequent purchasers of the Property, in my view that provision is a nullity in the absence of recordation of the agreement on the land records.

I am also aware that the Foxhall Crescents Home Owners Association has taken the position that the Motlagh Agreement does not apply to the Property and there appear to be other legal impediments to application of the Agreement to Penguin, LLC including that not all owners

of the Property in 2014 had signed the Motlagh Agreement. So there are several reasons why the Motlagh Agreement should not be considered by the ANC. The absence of recordation of the agreement is itself a sufficient basis to find that the agreement is not applicable to Penguin, LLC and that as owner of the Property, it may proceed with its BZA application and, if approved, construction of the residence without regard to the Motlagh Agreement.

As I will be in attendance (via Zoom) at this evening's ANC meeting, I will be glad to answer any questions you or other ANC Commissioners may have.

Sincerely,



Peter R. Kolker

cc: Jody R. Westby (by email to: westby@globalcyberrisk.com)
Meredith Moldenhauer (by email to: MMoldenhauer@cozen.com)
Cynthia Giordano (by email to: Cynthia.Giordano@saul.com)