VOL. 60 – NO. 51 FRIDAY, NOVEMBER 29, 2013

District of Columbia REGISTER

HIGHLIGHTS

- DC Council schedules a public hearing on Bill 20-413, Residency Requirement for Government Employees Amendment Act of 2013
- DC Council schedules a public hearing on Bill 20-573, Sustainable DC Omnibus Act of 2013
- DC Council schedules a public oversight roundtable on "Setting Teachers Up for Success"
- Board of Elections schedules a public hearing on the proposed measure "District of Columbia Right to Housing Act of 2014
- Department of Health announces a payment adjustment for participants in the District of Columbia Health Professional Recruitment Program
- Public Service Commission gives notice of the net reimbursable budgets for the Commission for Fiscal Year 2014
- DC Retirement Board certifies winner of Retired Teacher Trustee Election
- Public Employee Relations Board publishes opinions

DISTRICT OF COLUMBIA REGISTER

Publication Authority and Policy

The District of Columbia Office of Documents and Administrative Issuances (ODAI) publishes the *District of Columbia Register* (ISSN 0419-439X) (*D.C. Register*) every Friday under the authority of the *District of Columbia Documents Act,* D.C. Law 2-153, effective March 6, 1979 (25 DCR 6960). The policies which govern the publication of the *D.C. Register* are set forth in Title 1 of the District of Columbia Municipal Regulations, Chapter 3 (Rules of the Office of Documents and Administrative Issuances.) Copies of the Rules may be obtained from the Office of Documents and Administrative Issuances. Rulemaking documents are also subject to the requirements of the *District of Columbia Administrative Procedure Act,* District of Columbia Official Code, §§2-50l *et seq.*, as amended.

All documents published in the *D.C. Register* must be submitted in accordance with the applicable provisions of the Rules of the Office of Documents and Administrative Issuances. Documents which are published in the *D.C. Register* include (1)) Acts and resolutions of the Council of the District of Columbia; (2) Notices of proposed Council legislation, Council hearings, and other Council actions; (3) Notices of public hearings; (4) Notices of final, proposed, and emergency rulemaking; (5) Mayor's Orders and information on changes in the structure of the District of Columbia government (6) Notices, Opinions, and Orders of District of Columbia Boards, Commissions and Agencies; (7) Documents having general applicability and notices and information of general public interest.

Deadlines for Submission of Documents for Publication

ODAI accepts electronic documents for publication using a Web-based portal at www.dcregs.dc.gov. To submit a document, obtain a username and password from your department's ODAI liaison. If you do not know your liaison, email ODAI at dcdocuments@dc.gov to request for your department's ODAI liaison. For guidelines on how to format and submit documents for publication, email ODAI at dcdocuments@dc.gov.

The deadline for receiving documents from the District of Columbia Agencies, Boards, Commissions, and Public Charter schools is TUESDAY, NOON of the week of publication. The deadline for receiving documents from the District of Columbia Council is WEDNESDAY, NOON of the week of publication. If an official District government holiday falls on Monday or Friday, the deadline for receiving documents remains the same as outlined above. If an official District government holiday falls on Tuesday, Wednesday or Thursday, the deadline for receiving documents is one day earlier from the deadlines outlined above.

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ODAI publishes the *D.C. Register* ONLINE every Friday at www.dcregs.dc.gov. Copies of the *D.C. Register* are also available for public review at each branch of the District of Columbia Public Library and in each Advisory Neighborhood Commission office. There are no restrictions on the republication of any portion of the *D.C. Register*. News services are encouraged to publish all or part of the *D.C. Register*.

Legal Effect of Publication - Certification

Except in the case of emergency rules, no rule or document of general applicability and legal effect shall become effective until it is published in the *D.C. Register*. Publication creates a rebuttable legal presumption that a document has been duly issued, prescribed, adopted, or enacted and that the document complies with the requirements of the *District of Columbia Documents Act* and the *District of Columbia Administrative Procedure Act.* The Administrator of the Office of Documents hereby certifies that this issue of the *D.C. Register* contains all documents required to be published under the provisions of the *District of Columbia Documents Act.*

DISTRICT OF COLUMBIA
OFFICE OF DOCUMENTS AND ADMINISTRATIVE ISSUANCES

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CONTENTS

ACTIONS OF THE COUNCIL OF THE DISTRICT OF COLUMBIA CONT'D

COUNCIL HEARINGS CONT'D

OTHER COUNCIL ACTIONS

ACTIONS OF THE COUNCIL OF THE DISTRICT OF COLUMBIA CONT'D

COUNCIL HEARINGS CONT'D

Reprogramming Requests – cont'd

ACTIONS OF THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES

PUBLIC HEARINGS

EMERGENCY RULEMAKING

EMERGENCY AND PROPOSED RULEMAKING

ACTIONS OF THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES CONT'D

EMERGENCY AND PROPOSED RULEMAKING CONT'D

NOTICES, OPINIONS, AND ORDERS
MAYOR'S ORDERS

BOARDS, COMMISSIONS, AND AGENCIES

ACTIONS OF THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES CONT'D

NOTICES, OPINIONS, AND ORDERS CONT'D
BOARDS, COMMISSIONS, AND AGENCIES CONT'D

ACTIONS OF THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES CONT'D

NOTICES, OPINIONS, AND ORDERS CONT'D
BOARDS, COMMISSIONS, AND AGENCIES CONT'D

ACTIONS OF THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES CONT'D

NOTICES, OPINIONS, AND ORDERS CONT'D
BOARDS, COMMISSIONS, AND AGENCIES CONT'D

COUNCIL OF THE DISTRICT OF COLUMBIA
NOTICE OF INTENT TO ACT ON NEW LEGISLATION

The Council of the District of Columbia hereby gives notice of its intention to consider the following legislative matters for final Council action in not less than **15 days.** Referrals of legislation to various committees of the Council are listed below and are subject to change at the legislative meeting immediately following or coinciding with the date of introduction. It is also noted that legislation may be co-sponsored by other Councilmembers after its introduction.

Interested persons wishing to comment may do so in writing addressed to Nyasha Smith, Secretary to the Council, 1350 Pennsylvania Avenue, NW, Room 5, Washington, D.C. 20004. Copies of bills and proposed resolutions are available in the Legislative Services Division, 1350 Pennsylvania Avenue, NW, Room 10, Washington, D.C. 20004 Telephone: 724-8050 or online at www.dccouncil.us.

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COUNCIL OF THE DISTRICT OF COLUMBIA PROPOSED LEGISLATION

BILLS

B20-573 Sustainable DC Omnibus Act of 2013

Intro. 11-06-13 by Chairman Mendelson at the request of the Mayor and referring specific Subtitles of this legislation as indicated below:

Title I – Jobs
Subtitle A – *Improving Building Benchmarking Data through Direct Electronic Reporting* – Government Operations for 120 days, or until March 19, 2014, then to Transportation and the Environment
Subtitle B – *Assisting Building Owners by Clarifying Responsibility for Benchmarking Data* – Government Operations for 120 days, or until March 19, 2014, then to Transportation and the Environment
Subtitle C – *Improving Energy Efficiency through Comprehensive Energy Planning* – Transportation and the Environment

Title II – Health and Wellness
Subtitle A – *Improving Indoor Air Quality through Expanded Randon Contractor Certification* – Transportation and the Environment
Subtitle B – *Encouraging Alternative Fuels through Tax Incentives* – Finance and Revenue for 120 days, or until March 19, 2014, then to Transportation and the Environment
Subtitle C – *Encouraging Alternative Fuel Infrastructure Installation through Tax Incentives* – Finance and Revenue for 120 days, or until March 19, 2014, then to Transportation and the Environment

BILLS CON'T

Title III – Equity and Diversity
Subtitle A – *Reducing Single Occupancy Vehicle Use by Encouraging Transit Benefits* – Business, Consumer and Regulatory Affairs for 120 days, or until March 19, 2014, then to Transportation and the Environment

Subtitle B – *Encouraging Environmental Stewardship through Education and Outreach* – Education for 120 days, or until March 19, 2014, then to Transportation and the Environment

Title IV – Climate and the Environment
Subtitle A – *Protecting the District's Waterways through Pollution Prevention* – Business, Consumer and Regulatory Affairs for 120 days, or until March 19, 2014, then to Transportation and the Environment
Subtitle B – *Promoting Urban Agriculture through Program Improvement* – Transportation and the Environment
Subtitle C – *Growing the Urban Canopy through Enhanced Tree Management* – Transportation and the Environment

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B20-574 Board of Elections Nominating Petition Circulator Affidavit Amendment Act of 2013

Intro. 11-13-13 by Councilmember McDuffie and referred to the Committee on Government Operations

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B20-575 Party Officer Elections Amendment Act of 2013

Intro. 11-13-13 by Councilmember McDuffie and referred to the Committee on Government Operations

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B20-576 Vault Fee Assessment Amendment Act of 2013

Intro. 11-14-13 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Transportation and the Environment

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B20-577 Shiloh Way Designation Act of 2013

Intro. 11-19-13 by Councilmember Wells and referred to the Committee of the Whole

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B20-583 Bezner Real Property Tax Relief Act of 2013

Intro. 11-19-13 by Councilmember Wells and referred to the Committee on Finance and Revenue

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PROPOSED RESOLUTIONS

PR20-553 Public Employee Relations Board Charles J. Murphy Confirmation Resolution of 2013

Intro. 11-13-13 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Government Operations

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PR20-554 Public Employee Relations Board Cater M. DeLorme Confirmation Resolution of 2013

Intro. 11-13-13 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Government Operations

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PR20-559 Commission on African Affairs Kedist Geremaw Confirmation Resolution of 2013

Intro. 11-20-13 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Government Operations

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PR20-560 Commission on African Affairs Dr. Akua Asare Confirmation Resolution of 2013

Intro. 11-20-13 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Government Operations

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PR20-561 Board of Accountancy Mr. Mohamad K. Yusuff Confirmation Resolution of 2013

Intro. 11-20-13 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Business, Consumer, and Regulatory Affairs

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PR20-562 Board of Accountancy Mr. Abdool S. Akhran Confirmation Resolution of 2013

Intro. 11-20-13 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Business, Consumer, and Regulatory Affairs

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PR20-563 Board of Accountancy Mr. Joseph S. Drew Confirmation Resolution of 2013

Intro. 11-20-13 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Business, Consumer, and Regulatory Affairs

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PR20-564 Commission on the Arts and Humanities Rogelio A. Maxwell Confirmation Resolution of 2013

Intro. 11-21-13 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Finance and Revenue

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COUNCIL OF THE DISTRICT OF COLUMBIA

COMMITTEE ON TRANSPORTATION & THE ENVIRONMENT

MARY M. CHEH, CHAIR

NOTICE OF PUBLIC HEARING ON

Bill 20-344, the Special Event Waste Diversion Act of 2013

Wednesday, February 5, 2014
at 11:00 a.m.
in Room 500 of the
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

On Wednesday, February 5, 2014, Councilmember Mary M. Cheh, Chairperson of the Committee on the Transportation and the Environment, will hold a public hearing on Bill 20-344, the Special Event Waste Diversion Act of 2013. The hearing will begin at 11:00 a.m. in Room 500 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W.

Bill 20-344 would require organizers of parades, festivals, and other large special events that use public space to provide for recycling in addition to trash collection services at their large public events.

The Committee invites the public to testify or to submit written testimony, which will be made a part of the official Hearing Record. Anyone wishing to testify should contact Ms. Aukima Benjamin, staff assistant to the Committee on Transportation and the Environment, at (202) 724-8062 or via e-mail at abenjamin@dccouncil.us. Persons representing organizations will have five minutes to present their testimony. Individuals will have three minutes to present their testimony. Witnesses should bring 8 copies of their written testimony and should submit a copy of their testimony electronically to abenjamin@dccouncil.us.

If you are unable to testify in person, written statements are encouraged and will be made a part of the official record. Copies of written statements should be submitted to Ms. Aukima Benjamin, staff assistant to the Committee on Transportation and the Environment, John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Suite 108, Washington, D.C. 20004. They may also be e-mailed to abenjamin@dccouncil.us or faxed to (202) 724-8118. The record will close at the end of the business day on February 18, 2014.

COUNCIL OF THE DISTRICT OF COLUMBIA

COMMITTEE ON TRANSPORTATION & THE ENVIRONMENT
COMMITTEE ON ECONOMIC DEVELOPMENT

NOTICE OF JOINT PUBLIC HEARING ON

B20-368, the Air Quality Amendment Act of 2013

B20-569, the Air Pollution Disclosure and Reduction Act of 2013

Thursday, January 2, 2014
at 11:00 a.m.
in Room 412 of the
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

On Thursday, January 2, 2014, Councilmember Mary M. Cheh, Chairperson of the Committee on the Transportation and the Environment, and Councilmember Muriel Bowser, Chairperson of the Committee on Economic Development, will hold a joint public hearing on the Air Pollution Disclosure and Reduction Act of 2013 and the Air Quality Amendment Act of 2013. The hearing will begin at 11:00 a.m. in Room 412 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W.

Bill 20-368, the Air Quality Amendment Act of 2013, would amend the Air Pollution Control Act of 1984 and the District of Columbia Municipal Regulations to establish a procedure for receiving, monitoring, and responding to air quality complaints and to increase the maximum penalties for air quality violations. Bill 20-569, the Air Pollution Disclosure and Reduction Act of 2013, would require disclosure of and emissions standards for the operation of demand response generating sources in the District. The Air Pollution Disclosure and Reduction Act of 2013 would also require property owners to disclose knowledge of elevated levels of radon to potential purchasers or tenants, and knowledge of substantial indoor mold to potential tenants.

The Committee invites the public to testify or to submit written testimony, which will be made a part of the official Hearing Record. Anyone wishing to testify should contact Ms. Aukima Benjamin, staff assistant to the Committee on Transportation and the Environment, at (202) 724-8062 or via e-mail at abenjamin@dccouncil.us. Persons representing organizations will have five minutes to present their testimony. Individuals will have three minutes to present their testimony. Witnesses should bring 8 copies of their written testimony and should submit a copy of their testimony electronically to abenjamin@dccouncil.us.

If you are unable to testify in person, written statements are encouraged and will be made a part of the official record. Copies of written statements should be submitted to Ms.

Aukima Benjamin, staff assistant to the Committee on Transportation and the Environment, John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Suite 108, Washington, D.C. 20004. They may also be e-mailed to abenjamin@dccouncil.us or faxed to (202) 724-8118. The record will close at the end of the business day on January 16, 2014.

Council of the District of Columbia
COMMITTEE ON GOVERNMENT OPERATIONS
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, NW, Washington, DC 20004

COUNCILMEMBER KENYAN R. MCDUFFIE, CHAIRPERSON
COMMITTEE ON GOVERNMENT OPERATIONS

ANNOUNCES A PUBLIC HEARING ON

BILL 20-413 THE "RESIDENCY REQUIREMENT FOR GOVERNMENT EMPLOYEES AMENDMENT ACT OF 2013"

December, 18 2013, 10:00 AM
Room 412 John A. Wilson Building
1350 Pennsylvania Ave., NW
Washington, D.C. 20004

On December 18, 2013, Councilmember Kenyan R. McDuffie, Chairperson of the Committee on Government Operations will convene a public hearing on the "Residency Requirement for Government Employees Amendment Act of 2013." This public hearing will be held in Room 412 of the John A. Wilson Building, 1350 Pennsylvania Ave, NW at 10:00 AM.

The purpose of this hearing is to give the public the opportunity to comment on this measure. The stated purpose of "Residency Requirement for Government Employees Amendment Act of 2013" is to amend the District of Columbia Government Comprehensive Merit Personnel Act of 1978 to require all District government employees appointed to the Career Service, Legal Service, Education Service and any newly created service to be bona fide residents of the District at the time of appointment or within 180 days of appointment, to define "hard to fill" positions, provisions to exempt appointments from the residency requirement, and to require quarterly reports to the Council regarding all hard to fill appointments.

The Committee invites the public to testify or to submit written testimony, which will be made a part of the official record. Anyone wishing to testify at the hearing should contact Mr. Ronan Gulstone, Committee Director for the Committee on Government Operations at (202) 724-8028, or via e-mail at rgulstone@dccouncil.us, and provide their name, address, telephone number, organizational affiliation and title (if any) by close of business December 16, 2013. Representatives of organizations will be allowed a maximum of five (5) minutes for oral presentation and individuals will be allowed a maximum of three (3) minutes for oral presentation. Witnesses should bring 10 copies of their written testimony and if possible submit a copy of their testimony electronically to rgulstone@dccouncil.us.

If you are unable to testify at the hearing, written statements are encouraged and will be made a part of the official record. Copies of written statements should be submitted either to the Committee, or to Ms. Nyasha Smith, Secretary to the Council, 1350 Pennsylvania Avenue, N.W., Suite 5, Washington, D.C. 20004. The record will close at the end of the business day on January 3, 2014.

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARYAND PUBLIC SAFETY
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, NW, Washington, D.C. 20004

REVISED

COUNCILMEMBER TOMMY WELLS, CHAIRPERSON
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

BILL 20-461, THE "MARRIAGE LICENSE ISSUANCE AMENDMENT ACT OF 2013"

BILL 20-475, THE "DOMESTIC PARTNERSHIP TERMINATION RECOGNITION AMENDMENT ACT OF 2013"

BILL 20-467, THE "RECORD SEALING FOR NON-VIOLENT MARIJUANA POSSESSION ACT OF 2013"

Thursday, December 19, 2013
11 a.m.

Council Chamber Room 500
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, D.C. 20004

Councilmember Tommy Wells, Chairperson of the Committee on the Judiciary and Public Safety, will convene a public hearing on Thursday, December 19, 2013, beginning at 11 a.m. in Room 412 of the John A. Wilson Building. The purpose of this hearing is to receive public comment on Bill 20-461, Bill 20-475, and Bill 20-467. **The public hearing will convene in the** C**ouncil Chamber, Room 500.**

Bill 20-461, the "Marriage License Issuance Amendment Act of 2013 would eliminate the three-day waiting period for issuance of a marriage license. This bill may be viewed online at http://dcclims1.dccouncil.us/images/00001/20130920153031.pdf.

Bill 20-475, the "Domestic Partnership Termination Recognition Amendment Act of 2013" would amend a provision to allow couple who initiate domestic partnerships in other jurisdictions to terminate their domestic partnership in the District of Columbia and have that termination recognized by other jurisdictions. This bill may be viewed on line at http://dcclims1.dccouncil.us/images/00001/20130924105439.pdf.

Bill 20-467, the "Record Sealing for Non-Violent Marijuana Possession Act of 2013" would amend the District of Columbia Uniform Controlled Substances Act of 1981 to require that all criminal history record information and conviction records for non-violent misdemeanor or felony possession of marijuana be sealed by the Metropolitan Police Department and the

District of Columbia Superior Court, if the marijuana conviction is the only prior criminal history. The bill may be viewed online at http://dcclims1.dccouncil.us/images/00001/20130923163947.pdf.

The Committee invites the public to testify. Those who wish to testify should contact Tawanna Shuford at 724-7808 or tshuford@dccouncil.us, and furnish their name, address, telephone number, and organizational affiliation, if any, by 5 p.m. on Tuesday, December 17, 2013. Testimony may be limited to 3 minutes for individuals and 5 minutes for those representing organizations or groups. Witnesses should bring 15 copies of their testimony. Those unable to testify at the public hearing are encouraged to submit written statements for the official record. Written statements should be submitted by 5 p.m. on Friday, January 3, 2014 to Ms. Shuford, Committee on the Judiciary and Public Safety, Room 109, 1350 Pennsylvania Ave., NW, Washington, D.C., 20004, or via email at tshuford@dccouncil.us.

COUNCIL OF THE DISTRICT OF COLUMBIA

COMMITTEE ON TRANSPORTATION & THE ENVIRONMENT

MARY M. CHEH, CHAIR

NOTICE OF PUBLIC HEARING ON

Bill 20-573, the Sustainable DC Omnibus Act of 2013

Wednesday, January 8, 2014
at 11:00 a.m.
in Room 500 of the
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

On Wednesday, January 8, 2014, Councilmember Mary M. Cheh, Chairperson of the Committee on the Transportation and the Environment, will hold a public hearing on Bill 20-573, the Sustainable DC Omnibus Act of 2013. The roundtable will begin at 11:00 a.m. in Room 500 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W.

The Committee invites the public to testify or to submit written testimony, which will be made a part of the official Hearing Record. Anyone wishing to testify should contact Ms. Aukima Benjamin, staff assistant to the Committee on Transportation and the Environment, at (202) 724-8062 or via e-mail at abenjamin@dccouncil.us. Persons representing organizations will have five minutes to present their testimony. Individuals will have three minutes to present their testimony. Witnesses should bring 8 copies of their written testimony and should submit a copy of their testimony electronically to abenjamin@dccouncil.us.

If you are unable to testify in person, written statements are encouraged and will be made a part of the official record. Copies of written statements should be submitted to Ms. Aukima Benjamin, staff assistant to the Committee on Transportation and the Environment, John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Suite 108, Washington, D.C. 20004. They may also be e-mailed to abenjamin@dccouncil.us or faxed to (202) 724-8118. The record will close at the end of the business day on January 22, 2014

COUNCIL OF THE DISTRICT OF COLUMBIA

COMMITTEE ON TRANSPORTATION & THE ENVIRONMENT

MARY M. CHEH, CHAIR

NOTICE OF PUBLIC HEARING ON

The District of Columbia Streetcar System

and

Bill 20-431, the Transportation Infrastructure Mitigation Amendment Act of 2013
Bill 20-546, the Transportation Infrastructure Improvements GARVEE Bond Financing Amendment Act of 2013
B20-549, the Integrated Premium Transit System Amendment Act of 2013
Bill 20-576, the Vault Fee Assessment Amendment Act of 2013

Wednesday, January 22, 2014
at 11:00 a.m.
in Room 500 of the
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

On Wednesday, January 22, 2014, Councilmember Mary M. Cheh, Chairperson of the Committee on the Transportation and the Environment, will hold a public oversight roundtable on the District of Columbia Streetcar System. The Roundtable will begin at 11:00 a.m. in Room 500 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W.

The District Department of Transportation has planned an 8-line, 37-mile streetcar system throughout the District. Passenger service is expected to begin on the initial H Street / Benning Road segment in early 2014. The District is already spending tens of millions of dollars on the streetcar system and has budgeted an additional $400 million during the next 6 years. At the same time, the Mayor has convened a task force to consider the future governance and financing of the system, and he has solicited private companies to help build, operate, and maintain the first 22-miles of streetcar service. The purpose of this hearing is to discuss the status of the initial segment, plans for future lines, proposals from the private sector, governance alternatives, and financing options for the streetcar system.

In addition, the Committee will also consider a series of technical bills related to the District Department of Transportation. Bill 20-431 would create a fund to receive money from developers to pay for traffic studies and mitigation. Bill 20-546 would allow the District to issue GARVEE bonds to fund the Frederick Douglass Memorial Bridge project. Bill 20-549 would allow the District to contract with private entities to design, build, operate, and maintain transit systems. Bill 20-576 would clarify that any changes in vault fees would apply only prospectively.

The Committee invites the public to testify or to submit written testimony, which will be made a part of the official Hearing Record. Anyone wishing to testify should contact Ms. Aukima Benjamin, staff assistant to the Committee on Transportation and the Environment, at (202) 724-8062 or via e-mail at abenjamin@dccouncil.us. Persons representing organizations will have five minutes to present their testimony. Individuals will have three minutes to present their testimony. Witnesses should bring 8 copies of their written testimony and should submit a copy of their testimony electronically to abenjamin@dccouncil.us.

If you are unable to testify in person, written statements are encouraged and will be made a part of the official record. Copies of written statements should be submitted to Ms. Aukima Benjamin, staff assistant to the Committee on Transportation and the Environment, John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Suite 108, Washington, D.C. 20004. They may also be e-mailed to abenjamin@dccouncil.us or faxed to (202) 724-8118. The record will close at the end of the business day on February 4, 2014

COUNCIL OF THE DISTRICT OF COLUMBIA

COMMITTEE ON TRANSPORTATION & THE ENVIRONMENT

MARY M. CHEH, CHAIR

NOTICE OF PUBLIC OVERSIGHT ROUNDTABLE ON

Implementation of the Bicycle Master Plan
Bicycle Infrastructure in the District

Monday, December 16, 2013
at 11:00 a.m.
in Room 500 of the
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

On Monday, December 16, 2013, Councilmember Mary M. Cheh, Chairperson of the Committee on the Transportation and the Environment, will hold a public oversight roundtable on Implementation of the Bicycle Master Plan and Bicycle Infrastructure in the District. This hearing will begin at 11:00 a.m. in Room 500 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W.

The Committee invites the public to testify or to submit written testimony, which will be made a part of the official Hearing Record. Anyone wishing to testify should contact Ms. Aukima Benjamin, staff assistant to the Committee on Transportation and the Environment, at (202) 724-8062 or via e-mail at abenjamin@dccouncil.us. Persons representing organizations will have five minutes to present their testimony. Individuals will have three minutes to present their testimony. Witnesses should bring 8 copies of their written testimony and should submit a copy of their testimony electronically to abenjamin@dccouncil.us.

If you are unable to testify in person, written statements are encouraged and will be made a part of the official record. Copies of written statements should be submitted to Ms. Aukima Benjamin, staff assistant to the Committee on Transportation and the Environment, John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Suite 108, Washington, D.C. 20004. They may also be e-mailed to abenjamin@dccouncil.us or faxed to (202) 724-8118. The record will close at the end of the business day on December 30, 2013.

COUNCIL OF THE DISTRICT OF COLUMBIA

COMMITTEE ON TRANSPORTATION & THE ENVIRONMENT

MARY M. CHEH, CHAIR

NOTICE OF PUBLIC OVERSIGHT ROUNDTABLE ON

Parking in the District

Wednesday, January 29, 2014
at 11:00 a.m.
in Room 500 of the
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

On Wednesday, January 29, 2014, Councilmember Mary M. Cheh, Chairperson of the Committee on the Transportation and the Environment, will hold a public oversight roundtable on-street parking in the District and the District Department of Transportation's parking program and Parking Action Agenda. Topics will include residential parking, visitor parking, commercial parking, performance parking, and accessible parking. The roundtable will begin at 11:00 a.m. in Room 500 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W.

The Committee invites the public to testify or to submit written testimony, which will be made a part of the official Hearing Record. Anyone wishing to testify should contact Ms. Aukima Benjamin, staff assistant to the Committee on Transportation and the Environment, at (202) 724-8062 or via e-mail at abenjamin@dccouncil.us. Persons representing organizations will have five minutes to present their testimony. Individuals will have three minutes to present their testimony. Witnesses should bring 8 copies of their written testimony and should submit a copy of their testimony electronically to abenjamin@dccouncil.us.

If you are unable to testify in person, written statements are encouraged and will be made a part of the official record. Copies of written statements should be submitted to Ms. Aukima Benjamin, staff assistant to the Committee on Transportation and the Environment, John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Suite 108, Washington, D.C. 20004. They may also be e-mailed to abenjamin@dccouncil.us or faxed to (202) 724-8118. The record will close at the end of the business day on February 11, 2014

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON EDUCATION
NOTICE OF PUBLIC OVERSIGHT ROUNDTABLE

1350 Pennsylvania Avenue, NW, Suite 119, Washington, DC 20004

COUNCILMEMBER DAVID A. CATANIA
CHAIRMAN, COMMITTEE ON EDUCATION
ANNOUNCES A PUBLIC OVERSIGHT ROUNDTABLE
on

Setting Teachers Up for Success

on

Saturday, December, 14, 2013
at 10 a.m.
McKinley Technology Education Campus
Auditorium
151 T Street NE,
Washington DC 20002

Councilmember David A. Catania, Chairman of the Committee on Education, announces the scheduling of a Public Oversight Roundtable by the Committee on setting teachers up for success.

The purpose of the public oversight roundtable is to hear from District of Columbia public school educators about their experience and perspective on the state of public education and how they and their students can be set up to succeed.

District of Columbia public school teachers—both DCPS and charter schools—wishing to testify should contact Jamaal Jordan at 202-724-8061 or jjordan@dccouncil.us no later than 5 p.m. on Thursday, December 12, 2013. Members of the general public may submit written testimony which will be made part of the official record. Copies of written statements should be submitted to the Committee on Education no later than 5 p.m. on Friday, December 27, 2013.

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Council of the District of Columbia
Committee on Business, Consumer, and Regulatory Affairs
Notice of Public Roundtable

John A. Wilson Building 1350 Pennsylvania Avenue, NW, Suite G-6 Washington, DC 20004

Councilmember Vincent B. Orange, Sr., Chair
Committee on Business, Consumer, and Regulatory Affairs

Announces a Public Roundtable on the Following Measures:

- **PR20-282, the "District of Columbia Occupational Safety and Health Board Kathleen McKirchy Confirmation Resolution of 2013**
- **PR20-284, the "District of Columbia Occupational Safety and Health Board Michael Kirkpatrick Confirmation Resolution of 2013**
- **PR20-285, the "District of Columbia Occupational Safety and Health Board Aryan Rodriguez Bocquet Confirmation Resolution of 2013"**
- **PR20-286, the "District of Columbia Occupational Safety and Health Board Earl Woodland Confirmation Resolution of 2013"**
- **PR20-510, the "Board of Funeral Directors Charles Bowman Confirmation Resolution of 2013"**
- **PR20-511, the "Real Estate Commission Ulani D. Prater Gulstone Confirmation Resolution of 2013"**
- **PR20-515, the "Commission on Fashion Arts and Events Jennifer M. Fisher Confirmation Resolution of 2013"**
- **PR20-516, the "Commission on Fashion Arts and Events Marcus A. Williams Confirmation Resolution of 2013**
- **PR20-524, the "Board of Barber and Cosmetology Mr. Paul Rose Confirmation Resolution of 2013**
- **PR20-526, the "Real Estate Commission Stephen W. Porter Confirmation Resolution of 2013"**
- **PR20-535, the "Alcoholic Beverage Control Board Victor H. Rodriguez Confirmation Resolution of 2013"**
- **PR20-536, the "Alcoholic Beverage Control Board James N. Short Confirmation Resolution of 2013"**

Thursday, December 5, 2013, 10 A.M.
John A. Wilson Building, Room 412
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

Councilmember Vincent B. Orange, Sr. will convene a public roundtable of the Committee on Business, Consumer, and Regulatory Affairs on Thursday, December 5 at 10:00 a.m. in Room 412 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Washington, DC for the purposes of receiving testimony on the following measures:

- PR20-282, the "District of Columbia Occupation Safety and Health Board Kathleen McKirchy Confirmation Resolution of 2013
- PR20-284, the "District of Columbia Occupation Safety and Health Board Michael Kirkpatrick Confirmation Resolution of 2013
- PR20-285, the "District of Columbia Occupation Safety and Health Board Aryan Rodriguez Bocquet Confirmation Resolution of 2013"
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- PR20-524, the "Board of Barber and Cosmetology Mr. Paul Rose Confirmation Resolution of 2013
- PR20-526, the "Real Estate Commission Stephen W. Porter Confirmation Resolution of 2013"
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- PR20-536, the "Alcoholic Beverage Control Board James N. Short Confirmation Resolution of 2013"

Individuals and representatives of organizations who wish to testify at the public hearing are asked to contact Ms. Faye Caldwell, Administrative Assistant to the Committee on Business, Consumer, and Regulatory Affairs, or Gene Fisher, Committee Director, at (202) 727-6683, or via e-mail at fcaldwell@dccouncil.us or gfisher@dccouncil.us and furnish their names, addresses, telephone numbers, and organizational affiliation, if any, by the close of business Friday, November 29 , 2013. Each witness is requested to bring 20 copies of his/her written testimony. Representatives of government agencies, corporate industry, and industry organizations will be limited to 5 minutes in order to permit each witness an opportunity to be heard. Individual witnesses will be limited to 3 minutes.

If you are unable to testify at the public oversight roundtable, written statements are encouraged and will be made a part of the official record. The official record will remain open until close of business Monday, December 9, 2013. Copies of written statements should be submitted to the Committee on Business, Consumer, and Regulatory Affairs, Council of the District of Columbia, Suite G-6 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004.

COUNCIL OF THE DISTRICT OF COLUMBIA

EXCEPTED SERVICE APPOINTMENTS AS OF OCTOBER 31, 2013

NOTICE OF EXCEPTED SERVICE EMPLOYEES

D.C. Code § 1-609.03(c) requires that a list of all new appointees to Excepted Service positions established under the provisions of § 1-609.03(a) be published in the D.C. Register. In accordance with the foregoing, the following information is hereby published for the following positions.

COUNCIL OF THE DISTRICT OF COLUMBIA			
NAME	**POSITION TITLE**	**GRADE**	**TYPE OF APPOINTMENT**
Bell, Geoffrey	Communications Assistant	1	Excepted Service - Reg Appt
Kang, Irene	Legislative Director	4	Excepted Service - Reg Appt
Scott, Tommesha	Staff Assistant	2	Excepted Service - Reg Appt
Dougherty, Laisha	Constituent Services Coordinator	2	Excepted Service - Reg Appt
Chandler, Kenneth	Legislative Assistant	5	Excepted Service - Reg Appt
Franklin, Nicole	Administrative Assistant	3	Excepted Service - Reg Appt
Williams, Kelly	Constituent Services Director	6	Excepted Service - Reg Appt

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

ABBREVIATED NOTICE OF INTENT TO CONSIDER LEGISLATION

The Council of the District of Columbia hereby gives notice of its intention to take action in less than fifteen days on "Sense of the Council Against Amending the 1910 Height Act Resolution of 2013" PR20-557 to allow for the proposed resolution to be considered at the December 3, 2013 Legislative Meeting. The abbreviated notice is necessary to allow the Council to act in a timely manner due to the time-sensitive nature of the issue, in light of the National Capital Planning Commission's approval of transmission of its staff recommendations on the Height Act to the U.S. House Committee on Oversight and Government Reform on November 19, 2013.

COUNCIL OF THE DISTRICT OF COLUMBIA
Notice of Reprogramming Requests

Pursuant to DC Official Code Sec 47-361 et seq. of the Reprogramming Policy Act of 1990, the Council of the District of Columbia gives notice that the Mayor has transmitted the following reprogramming request(s).

A reprogramming will become effective on the 15th day after official receipt unless a Member of the Council files a notice of disapproval of the request which extends the Council's review period to 30 days. If such notice is given, a reprogramming will become effective on the 31st day after its official receipt unless a resolution of approval or disapproval is adopted by the Council prior to that time.

Comments should be addressed to the Secretary to the Council, John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Room 5 Washington, D.C. 20004. Copies of reprogramming requests are available in Legislative Services, Room 10.
Telephone: 724-8050

Reprog. 20-128: Request to reprogram $550,000 of Fiscal Year 2014 Special Purpose Revenue funds budget authority within the District Department of Transportation (DDOT) was filed in the Office of the Secretary on November 19, 2013. This reprogramming ensures that DDOT's expenditures are property aligned with each administration.

RECEIVED: 14 day review begins November 20, 2013

Reprog. 20-129: Request to reprogram $750,000 of Capital funds budget authority and allotment within the Department of Parks and Recreation (DPR) was filed in the Office of the Secretary on November 19, 2013. This reprogramming is needed for the design/build construction services contract for the modernization and renovation of the Carter G. Woodson Memorial Park.

RECEIVED: 14 day review begins November 20, 2013

Reprog. 20-130: Request to reprogram $9,055,941 of Fiscal Year 2014 Local funds budget authority from the District Retiree Health Contribution (DRHC) to the Department of Public Works (DPW) was filed in the Office of the Secretary on November 25, 2013. This reprogramming ensures that DPW will be able to complete the replacement of all trash receptacles and recycling containers for District households within the fiscal year.

RECEIVED: 14 day review begins November 26, 2013

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF PUBLIC HEARINGS
CALENDAR

WEDNESDAY, DECEMBER 4, 2013
2000 14TH STREET, N.W., SUITE 400S,
WASHINGTON, D.C. 20009

Ruthanne Miller, Chairperson
Members:
Nick Alberti, Donald Brooks, Herman Jones, Mike Silverstein

Show Cause Hearing (Status) **9:30 AM**
Case # 13-CMP-00313; F Street Restaurant, LLC, t/a Finemondo Restaurant 1319 F Street NW, License #60527, Retailer CR, ANC 2C
No ABC Manager on Duty, Failed to Take Steps Necessary to Ascertain Legal Drinking Age

Show Cause Hearing (Status) **9:30 AM**
Case # 13-CMP-00228; R I Associates, t/a Holiday Inn Central, 1501 Rhode Island Ave NW, License #16066, Retailer CH, ANC 2B
Failed to Take Steps Necessary to Ascertain Legal Drinking Age, Failed to Post Pregnancy Sign

Fact Finding Hearing **9:30 AM**
Case # 13-251-00100; Café Dallul, Inc. t/a Rendezvous Lounge, 2226 18th Street NW, License #14272, Retailer CT, ANC 1C
Aggravated Assault Inside of the Establishment

Show Cause Hearing **10:00 AM**
Case # 12-CMP-00187; Mimi & D, LLC, t/a Vita Restaurant and Lounge/Penthouse Nine (formerly Mood), 1318 9th Street NW, License #86037 Retailer CT, ANC 2F
Failed to Comply With the Terms of it's Offer in Compromise dated October 24, 2012

Show Cause Hearing **11:00 AM**
Case # 13-AUD-00047; Restaurant Enterprises, Inc., t/a Smith Point, 1338 Wisconsin Ave NW, License #60131, Retailer CR, ANC 2E
Failed to Maintain Documentation Showing All Sales and Purchase Invoices, Failed to Maintain on Premises Three Years of Adequate Books and Records Showing All Sales

BOARD RECESS AT 12:00 PM
ADMINISTRATIVE AGENDA
1:00 PM

Show Cause Hearing **1:30 PM**
Case # 12-251-00358; Samuel Payton Davis Sr., Inc., t/a S&P Wine & Liquors
2316 Pennsylvania Ave SE, License #85239, Retailer A, ANC 7B
Allowed the Establishment to be Used for the Sale of Illegal Drugs and Paraphernalia, Allowed the Establishment to be Used for an Unlawful or Disorderly Purpose, No ABC Manager on Duty

Protest Hearing **1:30 PM**
Case # 13-PRO-00131; Historic Restaurants, Inc. t/a Washington Firehouse
1626 North Capitol Street NW, License #92685, Retailer CT, ANC 5E
New Application

Protest Hearing **4:30 PM**
Case # 13-PRO-00120; Adams Morgan F & B, LLC, t/a Jack Rose, 2007 18th Street NW, License #81997, Retailer CR, ANC 1C
Renewal Application

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

11/29/2013

Notice is hereby given that:
License Number: ABRA-073188 **License Class/Type: C Restaurant**
Applicant: Simply Home Cuisine, LLC
Trade Name: D C Noodles
ANC: 2B09

Has applied for the renewal of an alcoholic beverages license at the premises:

1410 U ST NW, WASHINGTON, DC 20009

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

1/13/2014

HEARING WILL BE HELD ON

1/27/2014

AT 10:00 AM, 2000 14th Street, NW, 4th Floor, Washington, DC 20009

ENDORSEMENTS:

Days	Hours of Operation	Hours of Sales/Service	Hours of Entertainment
Sunday:	11 am - 2 am	11 am -2 am	-
Monday:	11 am - 2 am	11 am - 2 am	-
Tuesday:	11 am - 2 am	11 am - 2 am	-
Wednesday:	11 am - 2 am	11 am - 2 am	-
Thursday:	11 am - 2 am	11 am - 2 am	-
Friday:	11 am - 3 am	11 am - 3 am	-
Saturday:	11 am - 3 am	11 am - 3 am	-

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

11/29/2013

Notice is hereby given that:
License Number: ABRA-092074 **License Class/Type: D Tavern**
Applicant: Toro Bar Corporation
Trade Name: La Troja Bar
ANC: 4C

Has applied for the renewal of an alcoholic beverages license at the premises:

3708 14TH ST NW, WASHINGTON, DC 20010

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

1/13/2014

HEARING WILL BE HELD ON

1/27/2014

AT 10:00 AM, 2000 14th Street, NW, 4th Floor, Washington, DC 20009

ENDORSEMENTS:

Days	Hours of Operation	Hours of Sales/Service	Hours of Entertainment
Sunday:	10am - 2 am	10am -2 am	-
Monday:	10am - 2 am	10am - 2 am	-
Tuesday:	10am - 2 am	10am - 2 am	-
Wednesday:	10am - 2 am	10am - 2 am	-
Thursday:	10am - 2 am	10am - 2 am	-
Friday:	10am - 3 am	10am - 3 am	-
Saturday:	10am - 3 am	10am - 3 am	-

***RESCIND**

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Posting Date: November 8, 2013
Petition Date: December 23, 2013
Hearing Date: January 6, 2014
Protest Date: March 5, 2014

License No.: ABRA-093550
Licensee: Andy Lee Liquor, Inc.
Trade Name: TBD
License Class: Retailer A
Address: 914 H Street, NE
Contact Information: Cynthia Simms 202 821-3043

WARD 6 ANC 6A SMD 6A01

Notice is hereby given that this applicant has applied for a license under the D.C. Alcoholic Beverage Control Act and that the objectors are entitled to be heard before the granting of such license on the Hearing Date at 10:00 am, 2000 14th Street, N.W., 400 South, Washington, DC 20009. Petitions and/or requests to appear before the Board must be filed on or before the Petition Date. The Protest Hearing Date is scheduled for 1:30pm on March 5, 2014.

NATURE OF OPERATION
New Liquor Store with tasting.

HOURS OF OPERATON
Sunday through Saturday 9 am – 10 pm

HOURS OF SALES/SERVICE/CONSUMPTION
Sunday through Saturday 9 am – 10 pm

BOARD OF ELECTIONS

NOTICE OF PUBLIC HEARING
RECEIPT AND INTENT TO REVIEW INITIATIVE MEASURE

The Board of Elections shall consider in a public hearing whether the proposed measure "District of Columbia Right to Housing Act of 2014" is a proper subject matter for initiative, at the Board's Meeting on Wednesday, January 8, 2014 at 10:30am., One Judiciary Square, 441 4th Street, N.W., Suite 280, Washington DC.

The Board requests that written memoranda be submitted for the record no later than 4:00 p.m., Thursday, January 2, 2014 to the Board of Elections, General Counsel's Office, One Judiciary Square, 441 4th Street, N.W., Suite 270, Washington, D.C. 20001.

Each individual or representative of an organization who wishes to present testimony at the public hearing is requested to furnish his or her name, address, telephone number and name of the organization represented (if any) by calling the General Counsel's office at 727-2194 no later than Friday, January 3, 2014 at 4:00 p.m.

The Short Title, Summary Statement and Legislative Text of the proposed initiative read as follows:

Short Title

District of Columbia Right to Housing Initiative of 2014

Summary Statement

In recognition that

(1) All District of Columbia residents have a right at all times to housing adequate to maintain, support, protect and afford for District of Columbia residents below poverty level.

(2) The costs of providing adequate and accessible housing to all in need are outweighed by the costs to increased medical care and suffering attending the failure to provide such housing and

(3) The District of Columbia should provide housing to those below poverty level

Hereby establishes in law the right to adequate housing. Provides identification of those in need of housing and provision of such housing.

Legislate Text

By Electors of the District of Columbia

To establish the right of all individuals to adequate housing and the policy of the District of Columbia to provide such housing.

Be it enacted by the electors of the District of Columbia that this measure may be cited as the District of Columbia Right to Housing Act of 2014.

Sec 2: Establishment of right
All persons in the District of Columbia shall have the right to adequate housing.
Adequate housing is that which to a reasonable degree maintains protects and supports Human health is accessible for individuals/families earning 0-40,000 dollars a year or below poverty level, and in compliance with (United Nations Declaration of Human Rights 1948).

Article 17.

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his poverty.

Article 25.

- (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
- (2) Motherhood and childhood are entitled to special care and assistance. All children, whether, born in or out of wedlock, shall enjoy the same social protection.

sec. 3 Declaration of Policy
In the interest of preventing human suffering and reducing the costs of medical care and police protections and in recognition of the right of all persons to adequate housing. It is by the electors declared public policy of the district of Columbia to provide adequate housing to all persons homeless and/or earning 0-40,000 dollars a year or below poverty level in the district of Columbia requesting such housing and willing to abide by reasonable regulation regarding such housing.

sec. 4 Definitions:

Homeless:
Person that has no present possessory interest in accommodation and the means necessary to obtain such interest or

The person has possessor interest in an accommodation but is unable to secure entry to that accommodation occupation of the accommodation would likely lead to violence from another occupant

Economic Discrimination:

Discrimination based on economic factors, can include job availability, wages, the prices and/or availability of goods and services, and the amount of capital investment funding available to minorities for business. This can include discrimination against workers, consumers, and minority-owned businesses.

One-fourth ruling

One fourth or 25% local revenue used to provide housing
One fourth or 25% federal allocation used to provide housing
One fourth or 25% property manager/landlord reduction in rental costs
One fourth or 25% individual income

Ruling shall be conducted on case by case basis

Sec.5 Provision of Housing
Within thirty days of the date of the initiative becomes effective and at least once each year thereafter the mayor shall take reasonable steps to assess the level of homeless persons and/or those earning 0-40,000 dollars a year desiring housing and to determine current level of housing available, creation, and adequacy of existing units.

The District of Columbia adopts ¼ ruling to provide best affordability for persons at or below poverty level up to, and not exceeding 40,000 dollars a year of income.

District of Columbia Office of Human Rights adopts basis for discrimination term economic discrimination.

Sec.6: Judicial review.

Requires Office of Human Rights to investigate and enact penalties provided by section 5 of this initiative.

Any person aggrieved by a failure of District of Columbia to provide housing or by an action that is likely to lead to such a failure declared to be a right by this initiative may sue for relief in any court of competent jurisdiction. The court may grant such relief as it deems appropriate. Sovereign immunity shall not bar actions to enforce right established by this initiative. Reasonable attorney's fee and court costs may be awarded to prevailing party other than government for actions brought under this section.

Sec.7 Severability.

No provision of this initiative or its application to any person cannot be held invalid.

Sec.8 Effective date.

This measure shall take effect as provided by initiative measures of the Electors of the District of Columbia in section 3 of public law 95-526 Amending the initiative referendum and recall charter amendment act of 1977 and acts of the council of the District of Columbia section 602(c) of the District of Columbia self-governing and governmental reorganization.

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
CONSTRUCTION CODES COORDINATING BOARD

NOTICE OF EMERGENCY RULEMAKING

The Chairperson of the Construction Codes Coordinating Board (Chairperson), pursuant to the authority set forth in Section 10 of the Construction Codes Approval and Amendments Act of 1986 (Act), effective March 21, 1987 (D.C. Law 6-216; D.C. Official Code § 6-1409 (2012 Repl.)) and Mayor's Order 2009-22, dated February 25, 2009, and the Director of the Department of Consumer and Regulatory Affairs (Director), pursuant to the authority set forth in Section 12 of the Green Building Act of 2006 , effective March 8, 2007 (D.C. Law 16-234; D.C. Official Code § 6-1451.11 (2013 Supp.)) as amended (Green Building Act), and Mayor's Order 2010-1, dated January 1, 2010, hereby give notice of the adoption of the following emergency rulemaking amending Subtitle A (Building Code Supplement) of Title 12 (D.C. Construction Codes Supplement of 2008) of the District of Columbia Municipal Regulations.

To clearly show the changes being made to the Building Code Supplement, additions are shown in underlined text and deletions are shown in ~~strikethrough~~ text.

Pursuant to 1 DCMR § 311.4(e), emergency rulemakings are undertaken only for the immediate preservation of the public peace, health, safety, welfare, or morals. This emergency rulemaking is necessitated by the immediate need to provide public clarity on the Green Building Act provisions dealing with applicability of the law to construction projects, the process for submitting a financial security for certain projects, drawdowns of the financial security, and verification of compliance with the Green Building Act.

A notice of emergency and proposed rulemaking was previously published in the *D.C. Register* on August 2, 2013 (60 DCR 11287). Pursuant to Section 10(a) of the Act and Section 12(a) of the Green Building Act, a proposed resolution to approve the proposed amendment was submitted to the Council of the District of Columbia for a forty-five- (45) day period of review. This emergency rulemaking ensures that no lapse in the regulations occurs during the council review period.

This emergency rulemaking was adopted on November 25, 2013 and became effective on that date. This emergency rulemaking will remain in effect for up to one hundred twenty (120) days from the date of effectiveness and will expire on March 24, 2014.

Subtitle A (Building Code Supplement) of Title 12 (D.C. Construction Codes Supplement of 2008) of the District of Columbia Municipal Regulations is amended as follows:

Chapter 2A (Definitions) is amended as follows:

Insert the following new definitions in Section 202A of the Building Code to read as follows:

NEW CONSTRUCTION (For Chapter 13A). The construction of any *building* or *structure* whether as a stand-alone, or an *addition* to, a *building* or *structure*. The term "new construction"

includes new *buildings* and *additions* or enlargements of existing buildings, exclusive of any *alterations* or *repairs* to any existing portion of a *building*.

RESIDENTIAL OCCUPANCIES (For Chapter 13A). Residential Group R-2, R-3 or R-4 occupancies, and *buildings* regulated by the *Residential Code*.

SUBSTANTIAL IMPROVEMENT (For Chapter 13A). Any *repair* or *alteration* of, or *addition* to, a *building* or *structure*, the cost of which equals or exceeds 50 percent of the market value of the *building* or *structure* before the *repair*, *alteration*, or *addition* is started.

Amend the following definitions in Section 202A of the Building Code to read as follows:

FLOOR AREA, GROSS (For Chapter 13A). The definition of *gross floor area* set forth in DCMR Title 11 (Zoning Regulations), Section 199 (Definitions), ~~shall have the same meaning as in the Zoning Regulations, 11 DCMR § 199,~~ and as interpreted by the Zoning Administrator, is incorporated by this reference.

PROJECT (For Chapter 13A). Construction that is all or a ~~single or multiple buildings that are~~ part of one development scheme, built at one time or in phases.

Chapter 13A (Green Building Promotion) is amended to read as follows:

CHAPTER 13A GREEN BUILDING ACT REQUIREMENTS

Strike Chapter 13A of the International Building Code (2006) in its entirety and insert new Chapter 13A in the Building Code in its place to read as follows:

1301A General

1301A GENERAL

1301.1 Green Building Act of 2006 requirements. An applicant for permits subject to Section 1301.1.1 or Section 1301.1.2 shall comply with Sections 1301.1.3 through 1301.1.11 and the Green Building Act of 2006, effective March 8, 2007 (D.C. Law 16-234; D.C. Official Code §§ 6-1451.01 *et seq.* (~~2008 Repl. &~~ 2012 Repl. & 2013 Supp.)), as amended ("Green Building Act" or "GBA"). Other components of the Green Building Act are administered by other District of Columbia agencies. The applicant shall have the option of requesting a Green Building Act Preliminary Design Review Meeting ("GBA PDRM") with the Department, at the discretion of the applicant.

1301.1.1 Publicly-owned or publicly financed projects. This section shall apply to each *project* that is *new construction* or a *substantial improvement* ~~where the scope of work at the *project* is equivalent to Level 3 *alterations* as defined in the *Existing Building Code*~~; and is either:

1. A District-owned or District instrumentality-owned *project*; or

2. A *District financed* or *District instrumentality financed project*, where the financing represents at least 15 percent of the *project*'s total cost.

1301.1.1.1 Energy Star Target Finder Tool. Each *project* of 10,000 square feet (929 m^2) or more of *gross floor area* shall be designed and constructed to achieve a minimum score of 75 points on the Energy Star Target Finder Tool. The applicant shall provide plans and supporting documents in sufficient detail and clarity to enable the *code official* to verify compliance with this section.

Exceptions:

1. Building occupancies for which the Energy Star tool is not available.

2. *Alterations*.

1301.1.1.2 Non-residential projects. A *project* which does not contain *residential occupancies* ~~Residential Group R occupancies~~ that equal or exceed 50 percent of the *gross floor area* of the *project*, including allocable area of common space, shall be deemed a non-residential *project* and shall be designed and constructed so as to achieve no less than the applicable LEED standard listed in Section 1301.1.3, at the Silver level or higher. The applicant shall provide plans and supporting documents in sufficient detail and clarity to enable the *code official* to verify compliance with this section.

Exceptions:

1. Educational Group E (covered by Section 1301.1.1.3).

2. Space designed and occupied for *residential occupancies* ~~Residential Group R occupancies~~ in a non-residential *project* (covered by Section 1301.1.1.4).

3. Space designed and occupied for non-residential uses located in a residential ~~Residential Group R occupancy~~ *project* (covered by Section 1301.1.1.5).

4. Space designed and occupied for non-residential uses located in a District-owned or a District instrumentality-owned building (covered by either Section 1301.1.1.6 or Section 1301.1.1.7 as applicable).

1301.1.1.3 Educational Group E. A *project* of Educational Group E occupancy ~~owned, operated or maintained by the D.C. Public Schools (DCPS), or a public charter school,~~ shall be designed and constructed to meet the LEED standard for Schools, at the Gold level or higher. The applicant shall provide plans and

supporting documents in sufficient detail and clarity to enable the *code official* to verify compliance with this section. This section shall apply only to the following: (1) schools owned, operated or maintained by the District of Columbia Public Schools (DCPS); and (2) District of Columbia public charter schools.

Exceptions:

1. Where sufficient funding is not available to meet the applicable LEED standard for Schools at the Gold level, then the *project* shall meet the LEED standard for Schools at no less than the Certified Level of LEED standard for Schools. ~~For the purpose of determining the applicability of this exception, "sufficient funding" shall mean the lack of committed public funds in an approved District budget to fund the LEED standard for Schools at the Gold level.~~ Prior to submitting a permit application under this exception, the applicant shall obtain an exemption based on insufficient funding from DDOE pursuant to Section 1301.1.11.

2. Where a *project* for Educational Group E occupancy is located in only a portion of a *building*, then only that portion of the *building* that is the subject of the *project* shall comply with this Section 1301.1.1.3.

1301.1.1.4 Project containing Residential Group R occupancies. Where a *project* contains 10,000 square feet (929 m^2) or more of *gross floor area* for *residential occupancies* ~~Residential Group R occupancies~~, including the allocable area of common space, then the *residential occupancies* of the *project* shall be designed and constructed to meet or exceed the Enterprise Green Communities standard, or a substantially equivalent standard as determined by the *code official*. The applicant shall provide plans and supporting documents in sufficient detail and clarity to enable the *code official* to verify compliance with this section. A ~~This~~ self-certification checklist shall be submitted to the *code official* with the application for the certificate of occupancy of the residential component of the *project*. The residential component of the *project* shall not be required to meet a LEED standard.

1301.1.1.5 Interior construction of a mixed use space in a Residential Group R project. Where *residential occupancies* ~~Residential Group R occupancies~~ exceed 50 percent of the *gross floor area* of the *project*, including allocable area of common space, and the *project* contains at least 50,000 contiguous square feet (4645 m^2) of *gross floor area*, exclusive of common space of the non-residential occupancies, then the space designated for non-residential occupancies shall be designed and constructed to meet or exceed one or more of the applicable LEED standards listed in Section 1301.1.3 at the Certified Level. The applicant shall provide plans and supporting documents in sufficient detail and clarity to enable the *code official* to verify compliance with this section.

1301.1.1.6 Interior tenant fit-out alteration in a District-Owned or a District

Instrumentality-Owned Project. Where a *project* in a District-owned or a District instrumentality-owned building involves the alteration of 30,000 square feet (2787 m^2) or more of *gross floor area* for a single non-residential occupancy, exclusive of common space, for which space a certificate of occupancy for non-residential use has been or would be issued, ~~and the scope of work is equivalent to Level 3 *alterations* as defined in the *Existing Building Code*,~~ then the portion of the *project* subject to alteration shall be designed and constructed to meet or exceed one or more of the LEED standards listed in Section 1301.1.3 at the Certified Level. The applicant shall provide plans and supporting documents in sufficient detail and clarity to enable the *code official* to verify compliance with this section.

1301.1.1.7 Interior tenant fit-out in new construction. Where a *project* in a District-owned or a District-instrumentality-owned building involves the fit-out for tenant occupancy of shell space or spaces of 30,000 square feet (2787 m^2) or more of *gross floor area* for a single non-residential occupancy, exclusive of common space, for which space a certificate of occupancy would be issued, the portion of the *project* subject to tenant fit-out shall be designed and constructed to meet or exceed one or more of the applicable LEED standards listed in Section 1301.1.3 at the Certified Level. The applicant shall provide plans and supporting documents in sufficient detail and clarity to enable the *code official* to verify compliance with this section.

1301.1.2 Privately-owned projects. This section shall apply to a *project* that is privately-owned and is either *new construction* or <u>*substantial improvement.*</u> ~~an alteration where the scope of work is equivalent to Level 3 *alterations* as defined in the *Existing Building Code.*~~ This category includes a *project* involving improved and unimproved real property acquired by sale from the District or a District instrumentality to a private entity;~~,~~ unimproved real property leased from the District or a District instrumentality to a private entity;~~,~~ and any *project* where less than 15 percent of the *project*'s total *project* cost is *District financed* or *District instrumentality financed.*

1301.1.2.1 Energy Star Target Finder Tool. Each *project* of 50,000 square feet (4645 m^2) or more of *gross floor area* shall estimate the *project*'s energy performance using the Energy Star Target Finder Tool and submit this data to the *code official* with the permit application.

Exception: *Building* occupancies for which the Energy Star tool is not available.

1301.1.2.2 Privately-owned non-residential projects. In addition to compliance with Section 1301.1.2.1, each non-residential *project* of 50,000 square feet (4645 m^2) or more of *gross floor area* shall be designed and constructed to meet or exceed one or more of the LEED standards listed in Section 1301.1.3 at the Certified Level. A "non-residential *project*" shall mean a *project* where 50 percent or more of the *gross floor area*, including allocable area of common

space, is occupied or intended for occupancy for uses that are not *residential occupancies* ~~Residential Group R occupancies~~. The applicant shall provide plans and supporting documents in sufficient detail and clarity to enable the *code official* to verify compliance with this section.

1301.1.2.3 Interior construction of mixed use space in a residential project. ~~Residential Group R project.~~ Where *residential occupancies* ~~Residential Group R occupancies~~ exceed 50 percent of the *gross floor area* of the *project*, including allocable area of common space, and the *project* contains at least 50,000 contiguous square feet (4645 m^2) of *gross floor area*, exclusive of common space of the non-residential occupancies, then the space designated for non-residential occupancies shall be designed and constructed to meet or exceed one or more of the applicable LEED standards listed in Section 1301.1.3 at the Certified Level. The applicant shall provide plans and supporting documents in sufficient detail and clarity to enable the *code official* to verify compliance with this section.

1301.1.2.4 Educational Group E. A *project* of Educational Group E occupancy shall be designed and constructed to meet the LEED standard for Schools, at the Gold level or higher. The applicant shall provide plans and supporting documents in sufficient detail and clarity to enable the *code official* to verify compliance with this section. This section shall apply only to the following: (1) schools owned, operated or maintained by the District of Columbia Public Schools (DCPS); and (2) District of Columbia public charter schools.

Exceptions:

1. Where sufficient funding is not available to meet the applicable LEED standard for Schools at the Gold level, then the *project* shall meet the LEED standard for Schools at no less than the Certified Level of LEED standard for Schools. Prior to submitting a permit application under this exception, the applicant shall obtain an exemption based on insufficient funding from DDOE pursuant to Section 1301.1.11.

2. Where a *project* for Educational Group E occupancy is located in only a portion of a building, then only that portion of the building that is the subject of the *project* shall comply with this Section 1301.1.2.4.

1301.1.2.5 Terminology. Where the term "gross floor space" is used in the Green Building Act, the term shall mean *gross floor area*.

1301.1.3 LEED standards. Applicants, in consultation with the U.S. Green Building Council (USGBC) listed in Chapter 35, shall utilize one or more of the following LEED standards listed in Chapter 35 as appropriate for the type of *project* or occupancy:

1. New Construction & Major Renovations

2. Commercial Interiors

3. Core & Shell

4. Healthcare

5. Retail: Commercial Interiors

6. Retail: New Construction & Major Renovations

7. Schools

1301.1.3.1 LEED version. An applicant for permits subject to Sections 1301.1.1.2 through 1301.1.1.7 (excluding residential *projects* subject to 1301.1.1.4) or Sections 1301.1.2.2 through 1301.1.2.~~4~~3 shall register the *project* with the USGBC or shall meet the LEED requirements without USGBC registration and provide verification of compliance in accordance with alternatives 2 or 3 of Section 1301.1.4.1. ~~If the applicant chooses to meet the LEED requirements without USGBC registration, the earliest version of the appropriate LEED standard that shall be used is the version with USGBC open registration in effect one year prior to whichever of the following interactions of the applicant with the District of Columbia came first:~~

~~1. The approval of a land disposition agreement;~~

~~2. The submission of an application to the Board of Zoning Adjustment for a variance or special exception relief;~~

~~3. The submission of an application to the Zoning Commission for a planned unit development or other approval requiring Zoning Commission action;~~

~~4. The submission of an application to the Historic Preservation Review Board or Mayor's Agent for the Historic Preservation Review Board;~~

~~5. The filing of a building permit application for the primary scope of work of the *project*, which shall not include applications for raze, sheeting and shoring, foundation or specialty, miscellaneous or supplemental permits; or~~

~~6. Other substantial land use interactions with the District as determined by the *code official*.~~

1301.1.3.1.1. Prior USGBC registration Where an applicant has registered a *project* with the USGBC using an earlier version of the LEED

standards listed in Section 1301.1.3 and Chapter 35, and the USGBC will continue the certification process under the earlier version, then the applicant may elect to have verification of the *project* based upon such earlier LEED version.

1301.1.3.1.2 Verification of compliance without USGBC registration. Where an applicant elects to meet the LEED requirements without USGBC registration, the applicant shall use the LEED standards listed in Section 1301.1.3.

Exception: Where the applicant has engaged in at least one of the interactions with the District of Columbia listed below, then the applicant may elect to have verification of the *project* based upon an earlier LEED version, provided that the earliest version of the appropriate LEED standard that shall be used is the version in effect one year prior to whichever of the following interactions of the applicant with the District of Columbia came first:

1. The approval of a land disposition agreement;

2. The submission of an application to the Board of Zoning Adjustment for a variance or special exception relief;

3. The submission of an application to the Zoning Commission for a planned unit development or other approval requiring Zoning Commission action;

4. The submission of an application to the Historic Preservation Review Board or Mayor's Agent for the Historic Preservation Review Board;

5. The filing of a building permit application for the primary scope of work of the *project*, but not applications for other types of permits, including, but not limited to, applications for raze permits; sheeting and shoring, foundation and other specialty permits; supplemental permits; or miscellaneous permits; or

6. Other substantial land-use interactions with the District as determined by the *code official*

1301.1.3.2 Enterprise Green Communities version. An applicant for permits subject to Section 1301.1.1.4 shall register the *project* with Enterprise Green Communities or with the entity that certifies compliance with an *approved* substantially equivalent standard; or, the applicant shall meet the applicable standard without registration of the *project* and provide verification of compliance in accordance with alternatives 2 or 3 of Section 1301.1.4.1.

1301.1.3.2.1 Prior registration. Where an applicant has registered a *project* with the Enterprise Green Communities or with an entity that certifies compliance with an *approved* substantially equivalent standard, using an earlier version of the applicable standards listed in Chapter 35, then the applicant may elect to have verification of the *project* based upon such earlier version, provided that the certifying organization will continue the certification process under the earlier version.

1301.1.3.2.2 Verification of compliance without registration. Where an applicant elects to meet the Enterprise Green Communities standard (or an *approved* substantially equivalent standard) without registration, the applicant shall use the Enterprise Green Communities standard listed in Chapter 35 or, if applicable, the *approved* substantially equivalent standard.

Exception: Where the applicant has engaged in at least one of the interactions with the District of Columbia listed in Section 1301.1.3.1.2, then the applicant may elect to have verification of the *project* based upon an earlier version of the appropriate standard, provided that the earliest version of the appropriate standard that shall be used is the version in effect one year prior to whichever of the interactions of the applicant with the District of Columbia listed in Section 1301.1.3.1.2 came first.

1301.1.4 Verification. Evidence that a *project* meets or exceeds the LEED standard required by Sections 1301.1.1.2 through 1301.1.1.7 or Sections 1301.1.2.2 through 1301.1.2.4~~3~~ or the Enterprise Green Communities Criteria (or *approved* substantially equivalent standard) required by Section 1301.1.1.4, shall be submitted to the *code official* within 24 calendar months after the *project*'s receipt of the first certificate of occupancy issued for occupiable space in a *story above grade plane*.

1301.1.4.1 Evidence required. For purposes of this section, verification of compliance shall be established by the following:

1. A certification by the USGBC that the *project* meets or exceeds the applicable LEED standard required by Sections 1301.1.1.2 through 1301.1.1.7 or Sections 1301.1.2.2 through 1301.1.2.4~~3~~, or if applicable a certification by Enterprise Green Communities (or entity that certifies an *approved* substantially equivalent standard) that the *project* meets or exceeds the applicable standard required by Section 1301.1.1.4; or

2. A determination by the *code official* that the *project* meets or exceeds the LEED standard required by Sections 1301.1.1.2 through

1301.1.1.7 or Sections 1301.1.2.2 through 1301.1.2.4~~3~~, or if applicable the Enterprise Green Communities Criteria (or *approved* substantially equivalent standard) required by Section 1301.1.1.4; or

3. A certification by an *approved agency* or *approved source* that the *project* meets or exceeds the LEED standard required by Sections 1301.1.1.2 through 1301.1.1.7 or Sections 1301.1.2.2 through 1301.1.2.4~~3~~, or if applicable the Enterprise Green Communities Criteria (or *approved* substantially equivalent standard) required by Section 1301.1.1.4.

1301.1.4.2 Extension. The *code official*, for good cause and upon written request, is authorized to extend the period for verification of compliance for up to three consecutive one year periods.

1301.1.5 Financial security. Before issuance of the first certificate of occupancy for occupiable space in a *story above grade plane* of a privately-owned *project* subject to the provisions of Sections 1301.1.2.2 through 1301.1.2.4~~3~~, the applicant shall provide to the *code official* evidence of financial security to cover the amount of fine that would be imposed under the Green Building Act for non-compliance with the provisions of Sections 1301.1.2.2 through 1301.1.2.4~~3~~.

1301.1.5.1 Amount of financial security. The amount of the potential fine on a *project*, and thus the amount of financial security, shall be as follows:

1. $7.50 per square foot of *gross floor area* of construction if the *project* is less than 100,000 square feet (9290 m^2) of *gross floor area* of the *project*.

2. $10.00 per square foot of *gross floor area* of construction if the *project* is equal to or greater than 100,000 square feet (9290 m^2) of *gross floor area* of the *project*.

The amount of a fine for non-compliance under this sub-section, and thus the amount of security, shall not exceed $3,000,000. When applying the provisions of this Section 1301.1.5 to interior construction of a mixed use space in a residential ~~Residential Group R~~ *project* covered by Section 1301.1.2.3, the *gross floor area* of the *project* shall be deemed to mean the contiguous *gross floor area*, exclusive of common space, of the non-residential occupancies. The amount of this fine shall be subject to modification based upon the form of security for performance as provided for in Sections 1301.1.5.2.1 through 1301.1.5.2.3.

1301.1.5.2 Security for performance/form of delivery. The financial security requirement shall be met through one of the following four methods.

1301.1.5.2.1 Cash. If this option is elected, cash shall be deposited in an

escrow account in a financial institution in the District in the names of the applicant and the District. A copy of a binding escrow agreement of the financial institution shall be submitted to the *code official* in a form satisfactory to the Office of the Attorney General, which provides that the funds can be released upon direction of the District ~~where remitted~~ pursuant to Section 1301.1.6. If cash is used as the financial security, the amount of the financial security posted shall be discounted by 20 percent.

1301.1.5.2.2 Irrevocable letter of credit. If this option is elected, an irrevocable letter of credit benefitting the District shall be submitted to the *code official* in a form satisfactory to the Office of the Attorney General from a financial institution authorized to do business in the District. The irrevocable letter of credit, issued by the financial institution, shall comply with applicable regulatory requirements. If an irrevocable letter of credit is used as the financial security, the amount of the financial security posted shall be discounted by 20 percent.

1301.1.5.2.3 Bond. If this option is elected, a bond benefitting the District, which complies with applicable regulatory requirements, shall be submitted to the *code official* in a form satisfactory to the Office of the Attorney General. If a bond is used as the financial security, the amount of the financial security posted shall be discounted by 20 percent.

1301.1.5.2.4 Binding pledge. If this option is elected, a binding pledge shall be submitted to the *code official* in a form approved by the Office of the Attorney General. The binding pledge shall be recorded as a covenant in the land records of the District against legal title to the land in which the *project* is located and shall bind the *owner* and any successors in title to pay any fines levied under Section 1301.1.6.1.

1301.1.6 Enforcement. Where a *project* fails to provide pursuant to Section 1301.1.4 satisfactory verification of the *project*'s compliance with the requirements of Sections 1301.1.2.2 through 1301.1.2.4~~3~~ within the prescribed time frame and any extensions thereof granted by the *code official* pursuant to Section 1301.1.4.2, the *code official* is authorized to draw down on the financial security submitted as cash, irrevocable letter of credit or bond, pursuant to the terms ~~by submission by the District~~ of the original security documentation, provided that where a binding pledge has been provided, the *code official* is authorized to enforce such pledge agreement pursuant to its terms. The amounts thus drawn down from the financial security shall be deposited in the Green Building Fund set up under the Green Building Act.

1301.1.6.1 Financial security drawdowns. If a *project* fails to provide satisfactory verification of compliance, the drawdowns of the financial security in the form of cash, irrevocable letter of credit, or bond shall be as follows:

1. Failure to provide proof of compliance within 24 calendar months

after the *project*'s receipt of the first certificate of occupancy for occupiable space in a *story above grade plane*: 100 percent drawdown; or

2. Miss up to three LEED points in the applicable LEED standard: 50 percent drawdown; or

3. Miss more than three LEED points in the applicable LEED standard: 100 percent drawdown.

1301.1.6.2 Binding pledge fines. If a *project* fails to provide satisfactory verification of compliance within 24 calendar months after the *project*'s receipt of the first certificate of occupancy for occupiable space in a *story above grade plane* and a binding pledge is used as the form of financial security, one or more fines shall be due and payable per the amounts set out in 1301.1.5.1 as may be modified pursuant to Section 1301.1.6.1.

1301.1.7 Release of financial security. If, within 24 calendar months following the issuance of the first certificate of occupancy for occupiable space in a *story above grade plane*, the *project* fulfills the requirements of Section 1301.1.4, the financial security shall be released by the District of Columbia and, as applicable, returned.

1301.1.8 Remediation. If within 24 months after receipt of the first certificate of occupancy for occupiable space in a *story above grade plane*, or within the extension periods granted to the *project* per Section 1301.1.4.2, the *project* does not meet the requirements of Section 1301.1.4, the *project owner* shall, at its own cost, design and renovate the *project* to meet or exceed the current edition of the LEED standard for Existing Buildings: Operations & Maintenance at the Certified Level. The *project owner* shall submit sufficient data to the *code official* to verify compliance with this section. The *project owner* shall provide to the *code official* certification, by the *owner*'s *registered design professional* or an *approved agency* or an *approved source* that the *project* complies with this section.

1301.1.9 Additional fine. If within 48 calendar months after receipt of the first certificate of occupancy for occupiable space in a *story above grade plane*, a *project*~~,~~ subject to Section 1301.1.2~~3~~ fails to provide satisfactory verification in accordance with the provisions of Section 1301.1.4 or Section 1301.1.8, the *project owner* shall pay a monthly fine of $0.02 per square foot of *gross floor area* of the *project* to the District of Columbia. The fine shall be a civil penalty, due and payable annually. The fine shall be in addition to any fines issued under Section 1301.1.6 and shall not be subject to the $3,000,000 limit under Section 1301.1.5.1.

1301.1.10 Appeals. Determinations made by the *code official* under Sections 1301.1.1 through 1301.1.9 may be appealed pursuant to Section 112 of the *Building Code*.

1301.1.11 Exemptions. A request for an exemption from application of the Green

Building Act, or the implementing regulations set forth in Section 1301, to any *project* may be made to DDOE pursuant to the provisions of Chapter 35 (Green Building Requirements) of DCMR Title 20 (Environment), and D.C. Official Code § 6-1451.10 (2012 Repl.).

DEPARTMENT OF HEALTH

NOTICE OF EMERGENCY RULEMAKING

The Acting Director of the Department of Health, pursuant to the authority set forth in § 201(a) of the District of Columbia Uniform Controlled Substances Act of 1981, effective August 5, 1981 (D.C. Law 4-29; D.C. Official Code § 48-902.01(a) (2012 Repl.) and Mayor's Order 98-49, dated April 15, 1998, hereby gives notice of the adoption, on an emergency basis, of the following amendments to Section 1201.1 of Chapter 12 (Controlled Substances Act Rules) of Subtitle B (Public Health & Medicine), Title 22 (Health), of the District of Columbia Municipal Regulations (DCMR).

The emergency rules would amend the list of Schedule I drugs to include cannabimimetic agents. Emergency rulemakings are necessary for the immediate preservation of the public peace, health, safety, welfare, or morals, pursuant to 1 DCMR § 311.4(e). Emergency action is necessary because the cannabimimetic drugs have no legitimate medical use, are readily available, and pose an immediate risk to public health and safety because of their harmful effects when abused. Those effects of abuse include vomiting, anxiety, agitation, irritability, seizures, hallucinations, tachycardia, elevated blood pressure, and loss of consciousness.

The emergency rulemaking was adopted on November 4, 2013, and will remain in effect for one hundred twenty (120) days or until March 4, 2014, unless superseded by publication of another rulemaking notice in the *D.C. Register*.

Section 1201.1 of Subtitle B (Public Health & Medicine), Title 22 (Health), of the DCMR is amended by adding a new paragraph (f) to read as follows:

(f) ***Cannabimimetic agents:*** Unless specifically exempted or unless listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of any of the following substances or its salts, isomers, salts of isomers, analogs or derivatives, whenever the existence of such salts, isomers, salts of isomers, analogs or derivatives is possible within the specific chemical designation:

(1) 1-pentyl-1 *H* -indol-3-yl)(2,2,3,3-tetramethylcyclopropyl) methanone (other names: UR-144, 1-pentyl-3-(2,2,3,3-tetramethylcyclopropoyl) indole);

(2) [1-(5-fluoro-pentyl)-1 *H* -indol-3-yl](2,2,3,3-tetramethylcyclopropyl) methanone (other names: 5-fluoro-UR-144, 5-F-UR-144, XLR11, 1-(5-fluoro-pentyl)-3-(2,2,3,3-tetramethylcyclopropoyl) indole); and

(3) *N* -(1-adamantyl)-1-pentyl-1 *H* -indazole-3-carboxamide (other names: APINACA, AKB48).

DEPARTMENT OF BEHAVIORAL HEALTH

NOTICE OF SECOND EMERGENCY AND PROPOSED RULEMAKING

The Acting Director of the Department of Behavioral Health ("the Department"), successor to the Deparment of Mental Health effective October 1, 2013, pursuant to the authority set forth in Sections 5113, 5115, 5117, and 5118 of the the Fiscal Year 2014 Budget Support Emergency Act of 2013 ("BSEA"), the "Department of Behavioral Health Establishment Emergency Act of 2013", signed July 30, 2013 (D.C. Act 20-130; 60 DCR 11384), the Fiscal Year 2014 Budget Support Act of 2013 ("BSA"), signed August 28, 2013 (D.C. Act 20-157; 60 DCR 12472), and any substantially identical emergency, temporary, or permanent versions of the BSEA, hereby gives notice of the adoption, on an emergency basis, of a new Chapter 53 entitled "Treatment Planning Services Provided to Department of Mental Health Consumers in Institutional Settings - Description and Reimbursement", of Subtitle A (Mental Health) of Title 22 (Health) of the District of Columbia Municipal Regulations (DCMR).

The Department certifies mental health providers to provide mental health rehabilitation services (MHRS) to Department consumers in the community. Occasionally, some consumers are hospitalized or placed in some other type of institutional setting. The public mental health providers need to work with the consumers and the institution treatment team to assist in the consumer's transition to and continuity of care while in the institutional setting, and later in the development of a mental health service plan; that is, a plan to address discharge, treatment, and other services for the consumer after discharge to the community, and for the consumer to develop skills to transition to the community. These necessary services, when provided while the consumer is in an institutional setting, cannot be billed as a Medicaid service, which has caused consumers to go without this necessary service due to the providers having concerns about payments. Therefore, the proposed rules establish the non-Medicaid reimbursement requirements and rates for those providers who provide treatment planning services to Department consumers hospitalized or in certain other institutional settings at the time of receiving the service.

Pursuant to 1 DCMR § 311.4(e), emergency rulemakings are undertaken only for the immediate preservation of the public peace, health, safety, welfare, or morals. Issuance of these rules on an emergency basis is necessary to ensure the provision of these critical services to consumers who are in an institutional setting. Without the establishment of these codes and reimbursement rates, providers may be unable to provide the necessary coordination and treatment planning with the consumer and institutional staff to ensure continuity of care while the consumer is in the institutional setting, and for the consumer's successful transition back into the community. Thus, emergency action is necessary for the immediate preservation of the health, welfare, and safety of adults and children, youth, and their families with mental illness in need of mental health services.

The original emergency and proposed rulemaking was adopted by the Director of the Department of Mental Health and became effective on on June 19, 2013, and was published in the *D.C. Register* on July 5, 2013 at 60 DCR 9910. The Department received one comment requesting clarification on whether or not the MHS-CPTI service applied to all consumers,

including those in Assertive Community Treatment (ACT). As a result, language was added to clarify that the MHS-CPTI service is for all consumers, including those receiving ACT or Community-Based Intervention (CBI) services. The rules were also changed to reflect the new name of the agency, the Department of Behavioral Health. The second emergency rulemaking was adopted on October 11, 2013 and will remain in effect for one hundred twenty (120) days or until February 7, 2013, unless superseded by publication of another rulemaking notice in the *D.C. Register*, whichever comes first.

The Director also gives notice of intent to take final rulemaking action to adopt the proposed rules in not less than thirty (30) days after the date of publication of this second notice in the *D.C. Register*.

Title 22-A (Mental Health) of the District of Columbia Municipal Regulations is amended by adding a new Chapter 53 to read as follows:

CHAPTER 53 TREATMENT PLANNING SERVICES PROVIDED TO DEPARTMENT OF BEHAVIORAL HEALTH CONSUMERS IN INSTITUTIONAL SETTINGS - DESCRIPTION AND REIMBURSEMENT

5300 PURPOSE

5300.1 This chapter establishes the reimbursement rates for the treatment planning and supportive treatment services provided by certified Mental Health Rehabilitation Services (MHRS) providers to Department of Behavioral Health (Department) consumers while the consumer is in an institutional setting. Establishment of these reimbursement rates will allow the Department to reimburse providers using non-Medicaid local funds for continuity of care services, discharge treatment planning and transitional services while the consumer is in an institutional setting.

5300.2 Institutional settings in which these services shall be provided and may be reimbursed pursuant to this rule include: an Institute for Mental Disease (IMD); a hospital; a nursing facility (nursing home or skilled nursing facility); a rehabilitation center; a Psychiatric Residential Treatment Facility (PRTF); a Residential Treatment Center (RTC); or a correctional facility for defendants or juveniles.

5300.3 Nothing in this chapter grants to an MHRS provider the right to reimbursement for costs of providing services to a consumer in an institutional setting. Eligibility for reimbursement for these services provided by an MHRS provider to a consumer in one of the institutional settings listed in Subsection 5300.2 is determined solely by the Human Care Agreement (HCA) contract between the Department and the MHRS provider and is subject to the availability of appropriated funds. Claims for reimbursement pursuant to this chapter must be submitted in accordance with the Department billing policy.

5301 DESCRIPTION OF REIMBURSABLE SERVICES

5301.1 Reimbursable "Mental Health Service – Continuity of Care Treatment Planning, Institution" services (MHS-CTPI) are services to assist consumers in institutional settings. MHS-CTPI is to be used for any mental health service not for discharge treatment planning or Rehab/Day purposes provided by an MHRS provider to any consumer, including those enrolled in Assertive Community Treatment (ACT) or Community-Based Intervention (CBI) services, in an institutional setting.

5301.2 In order to be eligible for reimbursement, MHS-CTPI shall only be provided by an MHRS provider through a mental health professional or credentialed worker to a Department consumer who is in an institutional setting listed in Subsection 5300.2.

5301.3 Mental Health Service – Discharge Treatment Planning, Institution (MHS - DTPI) is a service to develop a mental health service plan for treating a consumer after discharge from an institutional setting. It includes modifying goals, assessing progress, planning transitions, and addressing other needs, as appropriate.

5301.4 In order to be eligible for reimbursement, MHS-DTPI shall only be provided by an MHRS provider through a mental health professional or credentialed worker to a Department consumer who is in an institutional setting who is not enrolled in Assertive Community Treatment (ACT) or Community-Based Intervention (CBI).

5301.5 In order to be eligible for reimbursement, MHS-DTPI (ACT) shall be provided only by a member of an MHRS Assertive Community Treatment (ACT) team to a consumer who is enrolled in ACT services and preparing for discharge from the institution setting.

5301.6 In order to be eligible for reimbursement, MHS-DTPI (CBI) shall be provided only by a member of an MHRS Community-Based Intervention (CBI) Team, all levels, to a child or youth who is enrolled in CBI and preparing for discharge from the institutional setting.

5301.7 Community Psychiatric Supportive Treatment Program – Rehab/Day Services (CPS-Rehab/Day) is a day treatment program provided in the community designed to acclimate the consumer to community living.

5301.8 In order to be eligible for reimbursement, CPS-Rehab/Day Services shall only be provided by a certified MHRS Rehabilitation/Day Services provider.

5301.9 All services must be provided in accordance with Department policies regarding care to consumers to be eligible for reimbursement.

5302 REIMBURSEMENT RATE

5302.1 The rates for reimbursement are as set forth below:

CODE	SERVICE	RATE	UNIT	UNITS AUTHORIZED
H0032HK	Mental Health Service – Continuity of Care Treatment Planning, Institution for all MHRS consumers (MHS-CTPI)	$19.19	15 minutes	Up to 24 units within 180 days without prior authorization for continuity of care services
H0032	Mental Health Service – Discharge Treatment Planning, Institution for all consumers except those in ACT or CBI (MHS-DTPI)	$19.19	15 minutes	Based on medical necessity at time of authorization, for discharge planning.
H0046HT	Mental Health Service – Discharge Treatment Planning, Institution - ACT consumers (MHS-DTPI(ACT))	$31.57	15 minutes	Based on medical necessity at time of authorization for discharge planning.

CODE	SERVICE	RATE	UNIT	UNITS AUTHORIZED
H0046HTHA	Mental Health Service – Discharge Treatment Planning, Institution – CBI consumers (MHS-DTPI (CBI))	$31.35	15 minutes	Based on medical necessity at time of authorization for discharge planning.
H0037	Community Psychiatric Supportive Treatment Program – Rehab/Day Services (CPS – Rehab/Day)	$144.77	Per day, at least 3 hours	Based on medical necessity at time of authorization; only within sixty (60) days of discharge unless pursuant to court order.

5303 ELIGIBILITY

5303.1 Only a certified MHRS provider with an HCA that has provided one of these identified services to a Department consumer may be reimbursed for services billed to the Department under this chapter.

5303.2 Reimbursement for MHS-CTPI requires prior authorization from the Department after 24 units billed within 180 days.

5303.3 Reimbursement for MHS-DTPI, MHS-DTPI (ACT), MHS-DTPI (CBI) and CPS-Rehab/Day requires prior authorization from the Department.

5304 SUBMISSION OF CLAIM

5304.1 In order for claims to be eligible for reimbursement, the MHRS provider shall:

(a) Submit claims through the Department's electronic billing system pursuant to this chapter, the Department billing policy, and the terms of the HCA between the Department and the MHRS provider; and

(b) Complete appropriate documentation to support all claims under its HCA with the Department and shall retain such documentation for a minimum

of six (6) years or longer if necessary to ensure the completion of any audit.

5304.2 The Department will reimburse an MHRS provider for a claim that is determined by the Department to be eligible for reimbursement pursuant to the terms of this chapter, applicable Department policies, and the HCA between the Department and the MHRS provider, subject to the availability of appropriated funds.

5305 AUDITS

5305.1 An MHRS provider shall, upon the request of the Department, cooperate in any audit or investigation concerning claims for the provision of these services. Failure to cooperate or to provide the necessary information and documentation shall result in recoupment of the reimbursement and may result in other actions available to the Department pursuant to applicable policies and the HCA.

5399 DEFINITIONS

5399.1 When used in this chapter, the following terms shall have the meaning ascribed:

Assertive Community Treatment or **"ACT"** - Intensive, integrated rehabilitative, crisis, treatment, and mental health rehabilitative community support provided by an interdisciplinary team to adults with serious and persistent mental illness by an interdisciplinary team. ACT is provided with dedicated staff time and specific staff to consumer ratios. Service coverage by the ACT team is required twenty-four (24) hours per day, seven (7) days per week. ACT is a specialty service.

Consumer - Adult, child, or youth who seeks or receives mental health services or mental health supports funded or regulated by the Department.

Community-Based Intervention or "CBI" - Time-limited, intensive mental health services delivered to children and youth ages six (6) through twenty-one (21) and intended to prevent the utilization of an out-of-home therapeutic resource or a detention of the consumer. CBI is primarily focused on the development of consumer skills to promote behavior change in the child or youth's natural environment and empower the child or youth to cope with his or her emotional disturbance.

Continuity of Care services – Coordination of services towards the stability of consumer-provider relationships over time. .

Correctional facility - A prison, jail, reformatory, work farm, detention center, or any similar facility maintained by either federal, state or local authorities for the purpose of confinement or rehabilitation of adult or juvenile criminal offenders or suspected offenders.

Hospital - A facility equipped and qualified to provide inpatient care and treatment for a person with a physical or mental illness by, or under, the supervision of physicians to patients admitted for a variety of medical conditions.

Institute for Mental Disease or "IMD" - A hospital, nursing facility, or other institution with more than 16 beds which is primarily engaged in providing diagnosis, treatment or care of persons with mental illnesses, including medical attention, nursing care and related services.

Mental Health Rehabilitation Services or **"MHRS"** - Mental health rehabilitative or palliative services provided by a Department-certified community mental health provider to consumers in accordance with the District of Columbia State Medicaid Plan, the provider's Human Care Agreement with the Department, and Chapter 34 of this title.

MHRS provider - An organization certified by the Department to provide MHRS. MHRS provider includes CSAs, sub-providers, and specialty providers.

Nursing facility - A facility that primarily provides to residents skilled nursing care and related services for the rehabilitation of injured, disabled or sick persons, or on a regular basis, health-related care services above the level of custodial care to other than individuals with developmental disabilities.

Psychiatric Residential Treatment Facility or "PRTF" - A psychiatric facility that (1) is not a hospital and (2) is accredited by the Joint Commission on Accreditation of Healthcare Organizations, the Commission on Accreditation of Rehabilitation Facilities, the Council on Accreditation of Services for Families and Children, or by any other accrediting organization with comparable standards that is recognized by the state in which it is located and (3) provides inpatient psychiatric services for individuals under the age of twenty-two (22) and meets the requirements set forth in §§ 441.151 through 441.182 of Title 42 of the Code of Federal Regulations, and is enrolled by the District of Columbia Department of Health Care Finance (DHCF) to participate in the Medicaid program.

Rehabilitation facility – An inpatient facility that provides comprehensive rehabilitation services under the supervision of a physician to inpatients with physical disabilities. Services include physical therapy, occupational therapy, speech pathology, social or psychological services, and orthotics or prosthetics services.

Residential Treatment Center or "RTC" - A facility which houses youth with significant psychiatric or substance abuse problems who have proven to be

too ill or have such significant behavioral challenges that they cannot be housed in foster care, day treatment programs, and other nonsecure environments but who do not yet merit commitment to a psychiatric hospital or secure correctional facility.

All persons desiring to comment on the subject matter of this proposed rulemaking should file comments in writing not later than thirty (30) days after the date of publication of this notice in the *D.C. Register*. Comments should be filed with the Rena Justice, Assiostant Attorney General, Office of the General Counsel, Department of Behavioral Health, at 64 New York Ave., NE, 3nd Floor, Washington, D.C. 20002, or e-mailed to Rena.Justice@dc.gov. Copies of the proposed rules may be obtained from dmh.dc.gov or from the Department of Behavioral Health at the address above.

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health Care Finance (DHCF), pursuant to the authority set forth in an Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 774; D.C. Official Code § 1-307.02 (2012 Repl. & 2013 Supp.)) and Section 6(6) of the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2012 Repl.)), hereby gives notice of repeal of Section 937, entitled "Behavioral Support Services", and adoption, on an emergency basis, of a new Section 1919, entitled "Behavioral Support Services" of Chapter 19 (Medicaid Program) of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR).

These emergency and proposed rules establish standards governing reimbursement of behavioral support services provided to participants in the Home and Community-Based Waiver for Individuals with Intellectual and Developmental Disabilities (ID/DD Waiver) and conditions of participation for providers. The ID/DD Waiver was approved by the Council of the District of Columbia and renewed by the U.S. Department of Health and Human Services, Centers for Medicaid and Medicare Services for a five-year period beginning November 20, 2012. These rules amend the previously published rules by: (1) deleting Section 937 and codifying the rules in Section 1919; (2) specifying the eligibility criteria for the utilization of one-to-one behavioral support services; (3) establishing guidelines for the submission of annual diagnostic updates to amend the DAR and accompanying behavioral referral worksheet; (4) establishing record maintenance and reporting guidelines; and (5) amending the annual service utilization limits for activities related to behavioral support services.

Pursuant to 1 DCMR § 311.4(e), emergency rulemakings are undertaken only for the immediate preservation of the public peace, health, safety, welfare, or morals. Emergency action is necessary for the immediate preservation of the health, safety, and welfare of ID/DD Waiver participants who are in need of behavioral support services. Based upon current reporting and record maintenance requirements, there are insufficient safeguards in place to ensure that providers are adhering to adequate service delivery management practices. By taking emergency action, this rule will clarify the duties and responsibilities of behavioral support providers and enable the District to enhance quality by monitoring the services being delivered to beneficiaries.

The emergency rulemaking was adopted on November 5, 2013 and became effective on that date. The emergency rules shall remain in effect for one hundred and twenty (120) days or until March 4, 2013, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*.

The Director also gives notice of the intent to take final rulemaking action to adopt this proposed rule not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Section 937 (Behavioral Support Services) of Chapter 9 (Medicaid Program) of Title 29 (Public Welfare) of the DCMR is repealed.

A new Section 1919 (Behavioral Support Services) is added to Chapter 19 (Home and Community Based Services for Individuals with Intellectual and Developmental Disabilities) of Title 29 (Public Welfare) of the DCMR to read as follows:

1919 BEHAVIORAL SUPPORT SERVICES

1919.1 The purpose of this section is to establish standards governing Medicaid eligibility for behavioral support services for persons enrolled in the Home and Community-Based Services Waiver for Individuals with Intellectual and Developmental Disabilities (Waiver), and to establish conditions of participation for providers of behavioral support services.

1919.2 Behavioral support services are designed to assist persons who exhibit behavior that is extremely challenging and frequently complicated by medical or mental health factors.

1919.3 To qualify for Medicaid reimbursable behavioral support services, the person shall have specific behavioral support needs that jeopardize their health, safety, and wellbeing and/or interfere with their ability to gain independence and acquire community living skills.

1919.4 Medicaid reimbursable behavioral support services shall:

(a) Be recommended by the person's support team;

(b) Be identified in the person's ISP and Plan of Care;

(c) Be prior authorized by DDS before the commencement of services; and

(d) Be recommended by a physician or Advanced Practice Registered Nurse (APRN) if the services are one-to-one behavioral supports related to a medical condition.

1919.5 To qualify for Medicaid reimbursable one-to-one behavioral supports, a person shall meet one (1) of the following characteristics:

(a) Exhibit elopement resulting in risk to self or others;

(b) Exhibit behavior that is life threatening to self and others;

(c) Exhibit destructive behavior causing serious property damage;

(d) Exhibit sexually predatory behavior; or

(e) Have a medical condition that requires one-to-one services.

1919.6 In order to be eligible for Medicaid reimbursement, a physician or APRN shall issue an order for one-to-one behavioral supports associated with a medical condition which shall include all of the following information:

(a) A specific time period or duration for the delivery of services;

(b) A description of the behavioral problems that result from the medical condition that causes the person to be at risk;

(c) The responsibilities of each staff person delivering supports; and

(d) A justification for the need for one-to-one behavioral supports.

1919.7 Medicaid reimbursable behavioral support services shall consist of the following activities:

(a) Development of a Diagnostic Assessment Report (DAR) in accordance with the requirements described under Section 1919.16;

(b) Development of a Behavior Support Plan (BSP) in accordance with the requirements described under Sections 1919.17 through 1919.19;

(c) Implementation of positive behavioral support strategies and principles based on the DAR and BSP;

(d) Training of the person, their family, and support team to implement the BSP;

(e) Evaluation of the effectiveness of the BSP by monitoring the plan at least monthly, developing a system for collecting BSP-related data, and revising the BSP;

(f) Counseling and consultation services for the person and their support team; and

(g) Participating in the person's quarterly medication review.

1919.8 Within ninety (90) days of service authorization, a provider of Medicaid reimbursable behavioral supports services shall:

(a) Administer the diagnostic assessment;

(b) Complete the DAR based on the results of the diagnostic assessment and the accompanying behavioral support referral worksheet ("worksheet"); and

(c) Complete the BSP when recommended by the DAR.

1919.9 The DAR shall be effective for three (3) years except as indicated in Section 1919.10, or for persons receiving one-to-one behavioral supports, which shall be updated annually. The behavioral supports provider shall submit a diagnostic update to amend the DAR and accompanying worksheet to the Department on Disability Services (DDS), Service Coordinator.

1919.10 When a person experiences changes in psychological or clinical functioning, the behavioral supports provider shall submit a diagnostic update to amend the DAR and accompanying worksheet to the DDS Service Coordinator at any time during the three (3) year period, upon the recommendation of the support team.

1919.11 The worksheet accompanying the DAR shall include the number of hours requested for professional and paraprofessional staff services to address recommendations in the DAR.

1919.12 The diagnostic update shall include a written clinical justification supporting the reauthorization of services.

1919.13 The diagnostic update shall be reviewed by the person and their support team in consultation with behavioral supports staff.

1919.14 The BSP shall be effective for one (1) calendar year which shall correspond with the person's ISP year, unless revised or updated in accordance with the recommendations of the DAR and accompanying worksheet.

1919.15 To be eligible for Medicaid reimbursement, the diagnostic assessment shall include the following activities:

(a) Direct assessment techniques such as observation of the person in the setting in which target behaviors are exhibited, and documentation of the frequency, duration, and intensity of challenging behaviors;

(b) Indirect assessment techniques such as interviews with the person's family members and support team, written record reviews, and questionnaires; and

(c) A written evaluation of the correlation between the person's environmental, psychological, and medical influences and the occurrence of behavioral problems.

1919.16 To be eligible for Medicaid reimbursement, the DAR shall include the following:

(a) The names of individuals to contact in the event of a crisis;

(b) A summary of the person's cognitive and adaptive functioning status;

(c) A full description of the person's behavior including background, and environmental contributors;

(d) The counseling and problem-solving strategies used to address behavioral problems and their effectiveness;

(e) A list of less restrictive interventions utilized, the results, and an explanation of why the interventions were unsuccessful;

(f) A list of proposed goals for achieving changes in target behaviors; and

(g) The recommendations to initiate, continue, or discontinue behavioral support services.

1919.17 In order to be eligible for Medicaid reimbursement, the BSP shall be developed utilizing the following activities:

(a) Interviews with the person and their support team;

(b) Observations of the person at his/her residence and in the community; and

(c) Review of the person's medical and psychiatric history including laboratory and other diagnostic studies, and behavioral data.

1919.18 In order to be eligible for Medicaid reimbursement, the behavioral supports staff that develops the BSP shall be responsible for:

(a) The coordination of the delivery of behavioral support services in the person's residential and day activity settings; and

(b) Obtaining the person's written informed consent and the approval of the person's substitute decision-maker, the support team, the provider's human rights committee, and DDS, when restrictive procedures are utilized.

1919.19 In order to be eligible for Medicaid reimbursement, the BSP shall include the following:

(a) A clear description of the targeted behavior(s) that is consistent with the person's diagnosis;

(b) The data reflecting the frequency of target behaviors;

(c) A functional behavioral analysis of each target behavior;

(d) A description of techniques for gathering information and collecting data;

(e) The proactive strategies utilized to foster the person's positive behavioral support;

(f) The measurable behavioral goals to assess the effectiveness of the BSP;

(g) If restrictive techniques and procedures are included, the rationale for utilizing the procedures and the development of a fade-out plan; and

(h) Training requirements for staff and other caregivers to implement the BSP.

1919.20 Each provider of behavioral support services shall comply with Sections 1904 (Provider Qualifications) and 1905 (Provider Enrollment) of Chapter 19 of Title 29 of the DCMR and consist of one (1) of the following provider types:

(a) A professional service provider in private practice as an independent clinician, as described in Section 1904 (Provider Qualifications) of Chapter 19 of Title 29 DCMR;

(b) A Mental Health Rehabilitation Services agency (MHRS) certified in accordance with the requirements of Chapter A-34 of Title 22 of the DCMR;

(c) A home health agency as described in Section 1904 (Provider Qualifications), of Chapter 19 of Title 29 DCMR; or

(d) A HCBS Provider, as described under Section 1904 (Provider Qualifications), of Chapter 19 of Title 29 DCMR.

1919.21 In order to be eligible for Medicaid reimbursement, each MHRS shall agency serve as a clinical home by providing a single point of access and accountability for the provision of behavioral support services and access to other needed services.

1919.22 Individuals authorized to provide professional behavioral support services without supervision shall consist of the following professionals:

(a) Psychiatrist;

(b) Psychologist;

(c) APRN or Nurse-Practitioner (NP) ; and

(d) Licensed Independent Clinical Social Worker (LICSW).

1919.23 Individuals authorized to provide paraprofessional behavioral support services under the supervision of qualified professionals described under Section 1919.22 shall consist of the following behavior management specialists:

(a) Licensed Professional Counselor;

(b) Licensed Social Worker (LISW);

(c) Licensed Graduate Social Worker (LGSW);

(d) Board Certified Behavior Analyst;

(e) Board Certified Assistant Behavior Analyst; and

(f) Registered Nurse.

1919.24 In order to receive Medicaid reimbursement, the minimum qualifications to draft a BSP shall be master's level degree psychologist working under the supervision of a psychologist or a LICSW.

1919.25 In order to receive Medicaid reimbursement, the minimum qualifications for providing consultation are a master's level psychologist, APRN, LICSW, LGSW or licensed professional counselor, with at least one (1) year of experience in serving people with developmental disabilities. Knowledge and experience in behavioral analysis shall be preferred.

1919.26 In order to receive Medicaid reimbursement, a LGSW may provide counseling under the supervision of an LICSW or a LISW in accordance with the requirements set forth in Section 3413 of Chapter 34 of Title 22 of the DCMR.

1919.27 In order to receive Medicaid reimbursement, each DSP providing behavioral support services and/or one-to-one behavioral supports shall meet the following requirements:

(a) Comply with Section 1906 (Requirements for Persons Providing Direct Services) of Chapter 19 of Title 29 DCMR;

(b) Possess specialized training in physical management techniques where appropriate, positive behavioral support practices, and all other training required to implement the person's specific BSP; and

(c) When providing one-to-one supports, the DSP shall not be assigned other duties so that he/she can ensure the person's safety, health, and well-being.

1919.28 Each provider of Medicaid reimbursable behavioral support services shall meet the requirements established under Section 1908 (Reporting Requirements) and Section 1911 (Individual Rights) of Chapter 19 of Title 29 DCMR.

1919.29 In order to be eligible for Medicaid reimbursement, each provider of Medicaid reimbursable behavioral supports services shall maintain the following documents for monitoring and audit reviews:

(a) A copy of the DARs and accompanying worksheets;

(b) A copy of the BSPs;

(c) A current copy of the behavioral support clinician's professional license to provide clinical services;

(d) The documentation and data collection related to the implementation of the BSP;

(e) The records demonstrating that the data was reviewed by appropriate staff; and

(f) The documents required to be maintained under Section 1909 (Records and Confidentiality of Information) of Chapter 19 of Title 29 DCMR.

1919.30 Medicaid reimbursement for behavioral support services shall be limited on an annual basis as set forth below. Services provided that exceed the limitations shall not be reimbursed except as provided in Section 1919.31:

(a) Development of a new BSP shall be limited to ten (10) hours;

(b) Reviewing and updating the existing BSP shall be limited to six (6) hours;

(c) Training of the person, their family, the support team, and residential and day staff, shall be limited to twelve (12) hours;

(d) On-site counseling, consultation and observations shall be limited to twenty-six (26) hours;

(e) Participation in behavioral review or treatment team meetings, delivering notes including emergency case conferences, hospital discharge meetings, interagency meetings, pre-ISP and ISP meetings, and human rights meetings shall be limited to twelve (12) hours;

(g) Quarterly medication reviews, reports and monthly data monitoring shall be limited to eight (8) hours; and

(h) Participation in psychotropic medication review meetings to deliver notes shall be limited to three (3) hours.

1919.31 In order to be eligible for Medicaid reimbursement, requests for additional hours beyond the annual limits described in Section 1919.30 may be approved by the DDS upon the submission of a diagnostic update to amend the DAR and accompanying worksheet.

1919.32 In order to be eligible for Medicaid reimbursement, requests for counseling as a behavioral support service shall be approved by a DDS designated staff member and shall be limited to counseling services that are not available under the District of Columbia State Plan for Medical Assistance.

1919.33 Medicaid reimbursable one-to-one behavioral support services provided by a DSP shall not be provided concurrently with day habilitation one-to-one services.

1919.34 The Medicaid reimbursement rate for each diagnostic assessment shall be two-hundred and forty dollars ($240.00) and shall be at least three (3) hours in duration, and include the development of the DAR and accompanying worksheet.

1919.35 The Medicaid reimbursement rate for behavioral support services provided by professionals identified in Section 1919.21 shall be one-hundred and three dollars and twenty cents ($103.20) per hour. The billable unit for fifteen (15) minutes is twenty-five dollars and eighty cents ($25.80) per fifteen (15) minute billable increment for at least eight (8) continuous minutes.

1919.36 The Medicaid reimbursement rate for behavioral support services provided by paraprofessionals identified in Section 1919.22 shall be sixty dollars ($60.00) per hour. The billable unit for fifteen (15) minutes is fifteen dollars ($15.00) for each fifteen (15) minute billable increment for at least eight (8) continuous minutes.

1919.37 The Medicaid reimbursement rate for one-to-one behavioral support services provided by DSPs shall be twenty-one dollars ($21.00) per hour. The billable unit for fifteen (15) minutes is five dollars and twenty-five cents ($5.25) per fifteen (15) minute billable increment for at least eight (8) continuous minutes.

Section 1999 (DEFINITIONS) is amended by adding the following:

Advance Practice Registered Nurse (APRN) or Nurse-Practitioner (NP) - An individual who is licensed to practice nursing pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1202 *et seq*.), or licensed to practice nursing in the jurisdiction where the services are being provided.

Behavior Management Specialist - An individual who has the training and experience in the theory and technique of changing the behavior of individuals to enhance their learning of life skills and adaptive behaviors,

and to decrease maladaptive behaviors, and who works under the supervision of a licensed practitioner.

Board Certified Behavior Analyst - An individual with at least a Master's Degree and a certificate from the Behavioral Analyst Certification Board (BCABA), in the jurisdiction where the credential is accepted.

Board Certified Assistant Behavior Analyst - An individual with at least a Bachelor's Degree and a certificate from the Behavioral Analyst Certification Board (BCABA), in the jurisdiction where the credential is accepted.

Fade-out plan - A plan used by providers to ensure that the restrictive technique or processes utilized are gradually and ultimately eliminated in the person's plan of care.

Functional Behavioral Analysis – A comprehensive and individualized process for identifying events that precede and follow a target behavior in order to develop hypotheses regarding the purpose of the target behavior and identify positive changes to be made.

Licensed Independent Clinical Social Worker - An individual who is licensed to practice social work pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1208 *et seq*.) or licensed to practice social work in the jurisdiction where the services are being provided.

Licensed Graduate Social Worker - An individual who is licensed to practice social work pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1208 *et seq*.) or licensed to practice social work in the jurisdiction where the services are being provided.

Licensed Independent Social Worker - An individual who is licensed to practice social work pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1208 *et seq*.) or licensed to practice social work in the jurisdiction where the services are being provided.

Licensed Professional Counselor - An individual who is licensed to practice counseling pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1207 *et seq*.) or licensed to practice counseling in the jurisdiction where the services are being provided.

Positive behavioral support strategies – An alternative to traditional or punitive approaches for managing challenging behaviors that focuses on changing the physical and interpersonal environment and increasing skills so that the person is able to get his/her needs met without having to resort to challenging behavior.

Proactive strategies – Specific interventions such as staff actions or environmental modifications that prevent the occurrence of target behaviors.

Psychiatrist - An individual licensed to practice psychiatry pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1202 *et seq*.) or licensed as a psychiatrist in the jurisdiction where the services are being provided.

Psychologist - An individual licensed to practice psychology pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1202 *et seq*.) or licensed as a psychologist in the jurisdiction where the services are being provided.

Registered Nurse- An individual who is licensed to practice nursing pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1202 *et seq*.), or licensed to practice nursing in the jurisdiction where the services are being provided.

Sensorimotor - Functioning in both sensory and motor aspects of bodily activity.

Target behavior - The challenging behaviors to be addressed by staff.

Comments on these rules should be submitted in writing to Linda Elam, Ph.D., Senior Deputy Director/Medicaid Director, Department of Health Care Finance, Government of the District of Columbia, 899 North Capitol Street, NE, 6th Floor, Washington DC 20002, via telephone on (202) 442-9115, via email at DHCFPubliccomments@dc.gov, or online at www.dcregs.dc.gov, within thirty (30) days of the date of publication of this notice in the *D.C. Register*. Additional copies of these rules are available from the above address.

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health Care Finance (DHCF), pursuant to the authority set forth in an Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 774; D.C. Official Code § 1-307.02 (2012 Repl. & 2013 Supp.)), and in Section 6(6) of the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2012 Repl.)), hereby gives notice of his intent to adopt an amendment to Title 29 (Public Welfare) of the District of Columbia Municipal Regulations ("DCMR"). The amendment will repeal Section 942, entitled "Family Training Services", of Chapter 9 (Medicaid Program) , and adopt, on an emergency basis, a new Section 1924, entitled "Family Training Services", of Chapter 19 (Home and Community-Based Waiver for Individuals with Intellectual and Developmental Disabilities).

These emergency and proposed rules establish standards governing reimbursement for professionals who provide family training services to caregivers of participants in the Home and Community-Based Waiver for Individuals with Intellectual and Developmental Disabilities ("ID/DD Waiver"), and conditions of participation for the Medicaid providers employing family training services professionals. The ID/DD Waiver was approved by the Council of the District of Columbia and renewed by the U.S. Department of Health and Human Services, Centers for Medicaid and Medicare Services for a five-year period beginning November 20, 2012. Family training services are training, counseling, and other professional support services offered to the families of persons enrolled in the ID/DD Waiver or to other uncompensated persons providing support to an ID/DD Waiver participant. These rules amend the previously published rules by: (1) deleting Section 942 and codifying the rules in a new Section 1924; (2) specifying the authorization requirements to obtain reimbursement for family training services; and (3) specifying various family training services utilization and monitoring requirements, including documents to be maintained for auditing.

Pursuant to 1 DCMR § 311.4(e), emergency rulemakings are undertaken only for the immediate preservation of the public peace, health, safety, welfare, or morals. Emergency action is necessary for the immediate preservation of the health, safety, and welfare of ID/DD Waiver participants who are in need of family training services. Based upon current service authorization, reporting and record maintenance requirements, there are insufficient safeguards in place to ensure that providers are taking the necessary steps to deliver adequate family training services. By taking emergency action, this rule will clarify the duties and responsibilities of family training services professionals and Medicaid providers employing these professionals, and enable the District to increase oversight and enhance quality of care.

The emergency rulemaking was adopted on November 8, 2013 and became effective on that date. The emergency rules shall remain in effect for one hundred and twenty (120) days or until March 8, 2014, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*. The Director of DHCF also gives notice of the intent to take final rulemaking action to adopt

these proposed rules in not less than thirty (30) days after the date of publication of this notice in the D.C. Register.

Section 942 (Family Training Services) of Chapter 9 (Medicaid Program) of Title 29 (Public Welfare) of the DCMR is repealed.

A new Section 1924 (Family Training Services) is added to Chapter 19 (Home and Community-Based Services for Individuals with Intellectual and Developmental Disabilities) of Title 29 (Public Welfare) of the DCMR to read as follows:

1924 FAMILY TRAINING SERVICES

1924.1 This section shall establish conditions of participation for Medicaid providers enumerated in § 1924.9 ("Medicaid Providers") and family training services professionals enumerated in § 1924.8 ("professionals") to provide family training services to caregivers of persons enrolled in the Home and Community-Based Services Waiver for Persons with Intellectual and Developmental Disabilities (ID/DD Waiver).

1924.2 Family training services are training, counseling, and other professional support services offered to uncompensated caregivers who provide support, training, companionship, or supervision to persons enrolled in the ID/DD Waiver.

1924.3 Uncompensated caregivers include any family member, neighbor, friend, companion, or co-worker who regularly provides uncompensated care to the person.

1924.4 In order to be eligible for reimbursement, each Medicaid provider must obtain prior authorization from the Department on Disabilities Services (DDS) prior to providing, or allowing any professional to provide, family training services. In its request for prior authorization, the Medicaid provider shall document the following:

(a) The ID/DD Waiver participant's need for additional, uncompensated support;

(b) The family training services professional who will provide the family training services; and

(c) The individual caregivers who will receive the family training services.

1924.5 In order to be eligible for Medicaid reimbursement, each family training services professional shall conduct an assessment of family training needs within the first four (4) hours of service delivery, and shall develop a training plan with training goals and techniques that will assist the ID/DD Waiver participant's unpaid caregivers. The training plan shall include measurable outcomes and a schedule

of approved family training services to be provided, and shall be submitted by the Medicaid provider to DDS before services are delivered.

1924.6 In order to be eligible for Medicaid reimbursement, each Medicaid provider shall document the following in the ID/DD Waiver participant's Individual Support Plan (ISP) and Plan of Care:

(a) The date and amount of family training services provided;

(b) The nature of the family training services provided;

(c) The professional who provided the family training services; and

(d) The individual caregivers who received the family training services.

1924.7 Medicaid reimbursable family training services shall include the following activities:

(a) Instruction about treatment regimens and other services included in the person's ISP and Plan of Care;

(b) Instruction on the use of equipment specified in the person's ISP and Plan of Care;

(c) Counseling aimed at assisting the unpaid caregiver in meeting the needs of the person; and

(d) Follow up training necessary to safely maintain the person at home.

1924.8 Medicaid reimbursable family training services shall be provided by the following professionals:

(a) Special Education Teachers;

(b) Licensed Graduate Social Workers;

(c) Licensed Clinical Social Workers;

(d) Physical Therapists;

(e) Occupational Therapists;

(f) Registered Nurses; or

(g) Speech Pathologists.

1924.9 In order to be eligible for Medicaid reimbursement, each family training services professional shall be employed by the following Medicaid providers:

(a) An ID/DD Waiver Provider enrolled by DDS; or

(b) A Home Health Agency as defined in Section 1999 of Chapter 19 of Title 29 of the DCMR.

1924.10 Each Medicaid provider shall comply with Section 1904 (Provider Qualifications) and Section 1905 (Provider Enrollment Process) of Chapter 19 of Title 29 of the DCMR.

1924.11 Each Medicaid provider shall maintain the following documents for monitoring and audit reviews:

(a) A copy of the most recent DDS approved ISP and Plan of Care, which shall include the documentation required by § 1924.6;

(b) The training plan developed in accordance with the requirements of § 1924.5 ; and

(c) The documents required to be maintained under Section 1909 (Records and Confidentiality of Information) of Chapter 19 of Title 29 of the DCMR.

1924.12 Each Medicaid provider shall comply with Section 1908 (Reporting Requirements) and Section 1911 (Individual Rights) of Chapter 19 of Title 29 of the DCMR.

1924.13 Medicaid reimbursement shall not be available when family training services are provided concurrently with the following ID/DD Waiver services:

(a) Supported living;

(b) Residential habilitation; or

(c) Host home without transportation.

1924.14 Medicaid reimbursable family training services shall not exceed a total of four (4) hours per day and one hundred (100) hours per year. Any hours in excess of these limits must be pre-approved by DDS pursuant to § 1924.15.

1924.15 In order to be eligible for Medicaid reimbursement, professionals requesting pre-approval from DDS to provide family training services in excess of four (4) hours per day and one hundred (100) hours per year must demonstrate the need for such services. The decision of DDS to approve or disapprove the request for additional services, in whole or in part, shall be final.

1924.16 The Medicaid reimbursement rate for family training services shall be sixty dollars ($60) per hour. The billable unit of service for family training services shall be fifteen (15) minutes.

Section (1999) DEFINITIONS is amended to read as follows:

Special Education Teacher- An individual with a Master's Degree in Special Education from an accredited college or university and a teacher's certificate in the jurisdiction where services are provided.

Physical Therapist – An individual who is licensed to practice physical therapy pursuant to Section 501 of the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1205.01) or licensed to practice physical therapy in the jurisdiction where services are provided.

Occupational Therapist – An individual who is licensed to practice occupational therapy pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1201 *et seq.*) or licensed to practice occupational therapy in the jurisdiction where services are provided.

Comments on these rules should be submitted in writing to Linda Elam, Ph.D., Medicaid Director, Department of Health Care Finance, Government of the District of Columbia, 899 North Capitol Street, NE, 6th Floor, Washington DC 20002, via telephone on (202) 442-9115, via email at DHCFPubliccomments@dc.gov, or online at www.dcregs.dc.gov, within thirty (30) days of the date of publication of this notice in the *D.C. Register*. Additional copies of these rules are available from the above address.

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF SECOND EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health Care Finance (DHCF), pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program and for other purposes, approved December 27, 1967 (81 Stat. 744; D.C. Official Code § 1-307.02 (2012 Repl. & 2013 Supp.)) and the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2012 Repl.)), hereby gives notice of the adoption, on an emergency basis, of an amendment to Section 903 of Chapter 9 (Medicaid Program) of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR), entitled "Outpatient and Emergency Room Services."

The effect of these emergency and proposed rules is to provide supplemental payments to hospitals located within the District of Columbia that participate in the Medicaid program for outpatient hospital services.

The corresponding amendment to the District of Columbia State Plan for Medical Assistance (State Plan) requires approval by the Council of the District of Columbia (Council) and the U.S. Department of Health and Human Services, Centers for Medicaid and Medicare Services (CMS). The State Plan amendment has been approved by the Council through the Medical Assistance Program Emergency Amendment Act of 2013, signed July 30, 2013 (D.C. Act 20-130; 60 DCR 11384) and is awaiting approval by CMS. These rules are contingent upon approval by CMS of the corresponding State Plan amendment.

A notice of emergency and proposed rulemaking was published in the *DC Register* on April 26, 2013 at 60 DCR 006236. Comments were received and two non-substantive technical changes were made. The first change clarifies that the additional payment adjustment for private children's hospitals is made on an annual basis. The second change conforms to the State Plan, which indicates the number of business days allowed for payments to occur. Since the State Plan amendment remains under review by CMS, a second notice of emergency and proposed rulemaking is required.

Pursuant to 1 DCMR § 311.4(e), emergency rulemakings are undertaken only for the immediate preservation of the public peace, health, safety, welfare, or morals. A second emergency action is necessary for the immediate preservation of the health, safety, and welfare of Medicaid beneficiaries who are in need of outpatient hospital services. By continuing to take emergency action, these proposed rules will ensure appropriate and needed payments to District hospitals and allow Medicaid beneficiaries access to needed outpatient medical services.

The second emergency and proposed rulemaking was adopted on October 31, 2013 and became effective on that date. The emergency rules will remain in effect for one hundred and twenty (120) days or until February 28, 2014, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*. The Director also gives notice of the intent to take final

rulemaking action to adopt these rules not less than thirty (30) days after the date of publication of this notice in the *D.C. Register*.

Section 903 (Outpatient and Emergency Room Services) of Title 29 (Public Welfare) of the DCMR is amended by adding the following new subsection:

903.6 Each eligible hospital shall receive a supplemental hospital access payment calculated as set forth below:

(a) Except as provided in Subsection (c) and (e), for visits and services beginning May 1, 2013 and ending on September 30, 2014, additional quarterly access payments shall be made to each eligible hospital in an amount equal to each hospital's FY 2011 outpatient Medicaid payments divided by the total applicable hospital FY 2011 outpatient Medicaid payments multiplied by one quarter of the total outpatient private hospital access payment pool of $41,025,417 minus $250,000. The private hospital access payment pool shall be equal to the available spending room under the private hospital upper payment limit;

(b) Applicable hospital FY 2011 outpatient Medicaid payments shall include all outpatient Medicaid payments to Medicaid participating hospitals located within the District of Columbia except for the United Medical Center;

(c) In addition to the payment established in Subsection (a), all private children's hospitals with less than 150 beds located in the District of Columbia that participate in the Medicaid program shall receive an additional annual amount of $250,000 as an adjustment to the quarterly access payments;

(d) In no instance shall a Disproportionate Share Hospital (DSH) hospital receive more in quarterly access payments than the hospital-specific DSH limit, as adjusted by the District in accordance with the District's State Plan for Medical Assistance (State Plan). Any private hospital quarterly access payments that would otherwise exceed the adjusted hospital-specific DSH limit shall be distributed to other qualifying private hospitals based on each hospital's FY 2011 outpatient Medicaid payments relative to the total qualifying private hospital FY 2011 outpatient Medicaid payments;

(e) For visits and services beginning May 1, 2013, quarterly access payments shall be made to the United Medical Center. Each payment shall be equal to one quarter of the public hospital access payment pool amount of $1,259,557. The public hospital access payment pool shall be equal to the lesser of the available spending room under the public hospital upper

payment limit and the hospital-specific DSH limit as adjusted by the District in accordance with the State Plan; and

(f) Payments shall be made 15 business days after the end of the quarter for the Medicaid visits and services rendered during that quarter.

903.99 Definitions

For purposes of this section, the following terms shall have the meanings ascribed.

Available spending room - The remaining room for outpatient hospital reimbursement that when combined with all other outpatient payments made under the District's Medicaid State plan shall not exceed the allowable federal outpatient hospital upper payment limit specified in 42 C.F.R. § 447.321.

Upper payment limit – The federal requirement limiting outpatient hospital Medicaid reimbursement to a reasonable estimate of the amount that would be paid for the services furnished by the group of facilities under Medicare payment principles consistent with 42 C.F.R. § 447.321.

Disproportionate Share Hospital – A hospital located in the District of Columbia that meets the qualifications established pursuant to Section 1923(b) of the Social Security Act (42 U.S.C. § 1396r–4).

Hospital-specific DSH limit - The federal requirement limiting hospital disproportionate share hospital (DSH) payments to the uncompensated care of providing inpatient and outpatient hospital services to Medicaid and uninsured individuals, consistent with Section 8 of Attachment 4.19-A of the District's federally approved Medicaid State plan.

Eligible Hospital – A hospital located in the District of Columbia that participates in the District of Columbia Medicaid program.

Comments on these rules should be submitted in writing to Linda Elam, Ph.D., Medicaid Director, Department of Health Care Finance, Government of the District of Columbia, 899 North Capitol Street, NE, 6th Floor, Washington DC 20002; via telephone at (202) 442-9115; via email at DHCFPubliccomments@dc.gov; or online at www.dcregs.dc.gov, within thirty (30) days of the date of publication of this notice in the *D.C. Register*. Additional copies of these rules are available from the above address.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Chancellor of the District of Columbia Public Schools (DCPS), pursuant to Section 103 of the District of Columbia Public Education Reform Amendment Act of 2007, effective June 12, 2007 (D.C. Law 17-9; D.C. Official Code § 38-172(c) (2012 Repl.)), and Mayor's Order 2007-186 (August 10, 2007), hereby gives notice of the adoption of the following emergency rulemaking to repeal Section 2405 (Student Grievance Procedure) of Chapter 24 (Student Rights and Responsibilities) of Subtitle E (Original Title 5), Title 5 (Education) of the District of Columbia Municipal Regulations (DCMR), and replace it with a new Section 2405 of Subtitle B (District of Columbia Public Schools), Title 5 (Education) of the DCMR.

The purpose of the rulemaking is to amend the language regarding the procedures for the filing, investigation, and resolution of complaints or grievances filed by students in cases of discrimination, bullying, or harassment. The amendment is necessary because DCPS must ensure that its grievance procedures contain language that satisfies requirements set forth by the U.S. Department of Education, Office of Civil Rights.

Emergency rulemakings are necessary for the immediate preservation of the public peace, health, safety, welfare, or morals, pursuant to 1 DCMR § 311.4(e). This emergency is necessitated by the immediate need to ensure that the regulations are in compliance with requirements set forth by U.S. Department of Education, Office of Civil Rights. The emergency rules were adopted on November 13, 2013 and took effect at that time. The rules will remain in effect for up to one hundred twenty (120) days, expiring on March 13, 2014, unless earlier superseded by a notice of final rulemaking.

As of October 1, 2009, Title V of the DCMR has been reorganized and Subtitle B is designated for regulations pertaining to DCPS. Accordingly, all future revisions to existing DCPS sections and drafts of new DCPS sections will contain the letter "B" before the number of the section and before each numbered sub-section. This emergency and proposed rulemaking contains the updated subtitle designation and substantive revisions to § 2405.

The proposed rulemaking will be submitted to the Council for a forty-five (45) day period of review. The Chancellor also hereby gives notice of the intent to adopt this rulemaking, in final, in not less than thirty (30) days from the publication of this notice in the *D.C. Register*, or upon approval of the rulemaking by the Council, whichever occurs later.

Section 2405 (Student Grievance Procedure) of Chapter 24 (Student Rights and Responsibilities) of Subtitle E (Original Title 5), Title 5 (Education) of the DCMR is repealed.

A new Section 2405 of Chapter 24 (Student Rights and Responsibilities) of Subtitle B (District of Columbia Public Schools) of Title 5 (Education) of the DCMR is added to read as follows:

2405 STUDENT GRIEVANCE PROCEDURE

2405.1 The grievance procedure set forth in this section shall apply to all grievances or complaints brought for any suspected violation of the following laws:

(a) Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability;

(b) Title II of the Americans with Disabilities Act of 1990, which also prohibits discrimination on the basis of disability;

(c) Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex;

(d) Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and national origin;

(e) The District of Columbia Human Rights Law, Title 2, Chapter 14 of the D.C. Official Code, which prohibits discrimination on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, political affiliation, source of income, and disability; or

(f) The Age Discrimination Act of 1975, which prohibits discrimination on the basis of age.

2405.2 The grievance procedure set forth in this section shall also apply to all grievances or complaints brought in the following instances:

(a) Where it is alleged that any student or group of students is being denied access to an adequate educational opportunity;

(b) Where it is alleged that the rights of students, or any individual student, are being denied or abridged;

(c) Where it is alleged that any student or group of students is being subjected to an arbitrary or unreasonable regulation, procedure, or standard of conduct;

(d) Where it is alleged that any student is being denied participation in any school activity for which the student is eligible;

(e) Where a student is a victim of bullying or harassment, including sexual harassment; and

(f) Any other violation of a right granted by law that does not have a specific grievance procedure or hearing process provided in this title.

2405.3 A student who has been suspended or expelled from school shall not bring a grievance pursuant to this section, but may file an appeal according to the procedure in Chapter B-25.

2405.4 An individual bringing a grievance about an issue set forth in 5-B DCMR §§ 2405.1 or 2405.2 shall follow the procedures contained in this section. An individual who is a victim of bullying or harassment, including sexual harassment, may follow these procedures or the procedures in 5-B DCMR § 2405.5. A grievance may be filed by a parent or guardian on behalf of a student, as consistent with § 2401.15 of this chapter.

(a) The individual bringing the grievance (the grievant) may make an informal complaint to the principal or other school official in charge of the program or activity. If the grievant makes a complaint to a teacher or administrator other than the principal or official in charge of the program or activity, that person shall advise the principal or official in charge of the program or activity of the nature of the complaint.

(b) If the principal is the subject of the grievant's complaint or otherwise involved in the circumstances surrounding the complaint, the grievant shall make an informal complaint to the Instructional Superintendent with jurisdiction over the principal's school.

(c) The person who receives the informal grievance shall investigate and attempt to resolve the problem though informal means, including but not limited to, meetings, conferences, and discussions. The person shall also make written documentation of all steps taken to investigate the matter.

(d) A resolution in the informal process shall be proposed, or a decision issued, by the principal or other school official to the grievant within ten (10) school days of the day that the grievant made the informal complaint.

(e) A grievant who is dissatisfied with the outcome of -- or chooses not to use -- the informal process, may file a written grievance with the principal or other responsible school official. Written grievances must be filed within forty-five (45) calendar days of the incident or circumstance being grieved or ten (10) calendar days of the completion of the informal process, if any, whichever is longer. The timeframes for submission shall be tolled in instances where the grievant did not comprehend or was not aware of the harassment.

(f) All complaints should include the following information, to the extent that is known by the grievant:

(1) The name, grade, and school attended by the student;

(2) The date, approximate time, and location of the incident;

(3) The type of bullying or harassment that was involved in the incident;

(4) The identity of the person(s) who committed the alleged acts of harassment;

(5) If the alleged harassment was directed towards other person(s), the identities of such persons;

(6) Whether any witnesses were present, and their identities; and

(7) A specific factual description of the incident, including any verbal statements or physical contact.

(g) The principal or other school official shall attempt to resolve the written grievance by beginning a formal investigation, including but not limited to conducting conferences with the grievant(s), students, parents, teachers, other school officials, and other involved parties and, when applicable, consultation with legal counsel, the Title IX Coordinator or the Section 504 Coordinator. The investigation shall also include the examination of any information submitted by the grievant and interviews with any witnesses identified by the grievant. The appropriate Instructional Superintendent shall be informed of the written grievance and investigation and may be consulted by the principal or other school official in an attempt to resolve the grievance.

(h) The principal or other school official who investigates a written grievance shall provide a written response to the grievant and the Instructional Superintendent.

(i) The written response shall be provided within ten (10) school days of the receipt of the written grievance; the parties should be notified if the investigation will take longer, including the reasons for the delay and the anticipated time frame.

(j) If the grievant is not satisfied with the response of the principal, the grievant may file an appeal with the Instructional Superintendent with jurisdiction over the school which the student attends or the grievance arose. If the Instructional Superintendent issued the initial response, the grievant may file an appeal with another school official designated by the Chancellor. The appeal shall be filed within ten (10) calendar days of

receipt or notice of the initial response.

(k) The Instructional Superintendent or other designee shall attempt to resolve the grievance by reviewing the principal's investigation and findings, and conducting further investigation of the grievance, including meeting with all involved parties and consulting with legal counsel as appropriate.

(l) The written response shall be provided within ten (10) school days of the receipt of the appeal.

(m) If the grievant is not satisfied with the response or the Instructional Superintendent or other designee is unable to achieve an adequate resolution, either the grievant or the Instructional Superintendent, or other designee may, within ten (10) calendar days of the written response, request that the grievance be brought before a grievance review panel to ensure appropriate and fair resolution of the grievance. The panel shall be comprised of three (3) persons appointed by the Chancellor or designee, and may include the Section 504 Coordinator, the Title IX Coordinator, individuals from the DCPS Office of Compliance, Office of the General Counsel, other Instructional Superintendents or school officials, and other disinterested persons with training and knowledge about the issues raised by the grievance.

(n) In all cases brought before the review panel, the panel shall provide the Instructional Superintendent, or other designee with written findings and recommendations for suggested implementation by the Instructional Superintendent, or other designee and the principal. The findings and recommendations shall be issued within ten (10) school days of receipt by the panel of the request referenced in § 2405.4(m).

(o) Within five (5) days of receipt of the findings and recommendations, the Instructional Superintendent, or other designee shall issue a final administrative decision, which shall be the final administrative decision of the school system. The Instructional Superintendent or other designee shall provide written notice of the decision to the grievant, the principal, and, if appropriate, the grievant's parent or guardian.

(p) A grievant may also file a complaint directly with the U.S. Department of Education, Office of Civil Rights without utilizing, or following the completion of, the procedures contained in this section. See: http://www.ed.gov/ocr/complaintprocess.html or call (202) 453-6020 for further information.

(q) A grievant may also file a complaint directly with the District of Columbia Commission on Human Rights without utilizing the procedures contained in this section. See http://www.ohr.dc.gov or call (202) 727-4559 for

further information.

2405.5 A grievant who is a victim of bullying or harassment, including sexual harassment, by an employee, students, or third parties may, at his or her option, choose to follow this procedure to resolve his or her complaint:

(a) An individual who is a victim of bullying or harassment may complain orally or in writing to any teacher, administrator, or counselor.

(b) If the grievant files his or her complaint orally, the teacher, administrator, or counselor shall prepare a written report of the conversation with the grievant. If the grievant complains in writing, it may be in any form. All complaints should include the following information, to the extent that is known by the grievant:

(1) The name, grade, and school attended by the student;

(2) The date, approximate time, and location of the incident;

(3) The type of bullying or harassment that was involved in the incident;

(4) The identity of the person(s) who committed the alleged acts of harassment;

(5) If the alleged harassment was directed towards other person(s), the identities of such persons;

(6) Whether any witnesses were present, and their identities; and

(7) A specific factual description of the incident, including any verbal statements or physical contact.

(c) All complaints and information contained therein will be kept confidential to the extent provided by law.

(d) The complaint shall be reported to the principal no later than the end of the next school day following the report of the complaint. The teacher, administrator, or counselor shall report complaints of severe or pervasive bullying or harassment no later than the end of the school day that the report of the complaint was made.

(e) If any principal, administrator or other school employee responsible for overseeing or investigating bullying or harassment complaints are implicated in the complaint, or have any actual or perceived conflict of interest, the complaint will be filed with the Instructional Superintendent

with jurisdiction over the school the student attends or at which the grievance arose for action.

(f) The principal is responsible for ensuring that all complaints are properly investigated and processed in accordance with these procedures, but may delegate responsibility for processing bullying and harassment complaints. The principal or designee shall take the following actions:

(1) Within one (1) school day – schedule and complete a confidential discussion of the allegations with the grievant. The subject of the allegations shall not be notified or be present during such discussion.

(2) Within ten (10) school days – the principal or designee shall complete his or her investigation and prepare a written report that includes a finding as to whether the allegations of bullying or harassment are substantiated; the parties should be notified if the investigation will take longer, including the reasons for the delay and the anticipated time frame. The investigation shall include, but not be limited to, the following matters: 1) interview with the grievant; 2) interview with the alleged victim (if not the grievant); 3) interviews with the subject(s) alleged to have committed the harassment or bullying; 4) interviews with employees and others (including students) who have knowledge of the facts alleged in the complaint (including those identified by the student who filed the complaint); and 5) review of all pertinent records (including those identified by the grievant). The report shall reflect the results of the investigation and shall be provided to all parties to the complaint. The report shall include a description of any follow up actions taken or to be taken, including any intervention or disciplinary actions (to the extent permitted by the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g; 34 C.F.R. § 99.1 *et seq*.).

(3) If the grievant is dissatisfied with the findings or actions contained in the report, the grievant may file a written grievance with the Instructional Superintendent with jurisdiction over the school the student attends or the location at which the grievance arose within ten (10) calendar days of the issuance of the principal's report. If such a grievance is filed, the process specified in §§ 2405.4(k)-2405.4(o) shall apply.

(g) A grievant may also file a complaint directly with the U.S. Department of Education, Office of Civil Rights without utilizing, or following the completion of, the procedures contained in this section. See: http://www.ed.gov/ocr/complaintprocess.html or call (202) 453-6020 for

further information.

(h) A grievant may also file a complaint directly with the District of Columbia Commission on Human Rights without utilizing the procedures contained in this section. See: http://www.ohr.dc.gov or call (202) 727-4559 for further information.

2405.6 The final decision of the Instructional Superintendent shall be the final administrative decision of the school system.

2405.7 Copies of the final decision shall be given to all parties.

2405.8 A copy of the Instructional Superintendent's final decision shall be sent to the Chancellor and the Chief of Schools.

2405.9 No grievant shall be subject to any retaliation from any teacher or school official. A grievant may use these procedures to complain of retaliation by students, teachers, or employees.

Comments on this rulemaking should be submitted, in writing, to Kaya Henderson, Chancellor, DCPS, at 1200 First Street, N.E., 12th Floor, Washington, D.C., 20002, within thirty (30) days of the date of publication of this notice in the *D.C. Register*. Additional copies of this rule are available from the above address.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2013-225
November 26, 2013

SUBJECT: Appointments – Science Advisory Board

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(2) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(2) (2012 Repl.), and section 12 of the Department of Forensic Sciences Establishment Act of 2011, effective August 17, 2011, D.C. Law 19-18, D.C. Official Code § 5-1501.11 (2012 Repl.), which established the Science Advisory Board ("Board"), it is hereby **ORDERED** that:

1. **DR. MICHAEL COBLE**, who was nominated by the Mayor on May 2, 2013, and deemed approved by the Council of the District of Columbia pursuant to Proposed Resolution 20-0251 on June 22, 2013, is appointed as a scientist member to the Board, for a term to end two years from the date of this appointment order.

2. **DR. WILLIAM GROSSHANDLER**, who was nominated by the Mayor on May 2, 2013, and deemed approved by the Council of the District of Columbia pursuant to Proposed Resolution 20-0252 on June 22, 2013, is appointed as a scientist member to the Board, for a term to end one year from the date of this appointment order.

3. **DR. CLIFTON P. BISHOP**, who was nominated by the Mayor on May 2, 2013, and deemed approved by the Council of the District of Columbia pursuant to Proposed Resolution 20-0253 on June 22, 2013, is appointed as a scientist member to the Board, for a term to end three years from the date of this appointment order.

4. **DR. SANDY ZABELL**, who was nominated by the Mayor on May 2, 2013, and deemed approved by the Council of the District of Columbia pursuant to Proposed Resolution 20-0254 on June 22, 2013, is appointed as a scientist member, and statistician, to the Board, for a term to end two years from the date of this appointment order.

5. **JOSEPH P. BONO**, who was nominated by the Mayor on May 2, 2013, and deemed approved by the Council of the District of Columbia pursuant to Proposed Resolution 20-0255 on June 22, 2013, is appointed as a scientist member, with expertise in quality assurance, to the Board, for a term to end two years from the date of this appointment order.

6. **DR. JAY SIEGEL**, who was nominated by the Mayor on May 2, 2013, and deemed approved by the Council of the District of Columbia pursuant to Proposed Resolution 20-0256 on June 22, 2013, is appointed as a forensic scientist member to the Board, for a term to end three years from the date of this appointment order.

7. **PETER M. MARONE**, who was nominated by the Mayor on May 2, 2013, and deemed approved by the Council of the District of Columbia pursuant to Proposed Resolution 20-0257 on June 22, 2013, is appointed as a forensic scientist member to the Board, for a term to end one year from the date of this appointment order.

8. **IRV LITOFSKY**, who was nominated by the Mayor on May 2, 2013, and deemed approved by the Council of the District of Columbia pursuant to Proposed Resolution 20-0258 on June 22, 2013, is appointed as a forensic scientist member to the Board, for a term to end three years from the date of this appointment order.

9. **DR. CHARLOTTE WORD**, who was nominated by the Mayor on May 2, 2013, and deemed approved by the Council of the District of Columbia pursuant to Proposed Resolution 20-0259 on June 22, 2013, is appointed as a forensic scientist member to the Board, for a term to end one year from the date of this appointment order.

10. **EFFECTIVE DATE:** This Order shall become effective immediately.

Vincent C. Gray

VINCENT C. GRAY
MAYOR

ATTEST: Cynthia Brock-Smith

CYNTHIA BROCK-SMITH
SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2013-226
November 26, 2013

SUBJECT: Appointment – Citizen Review Panel: Child Abuse and Neglect

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(2) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(2) (2012 Repl.), and in accordance with sections 351 and 352 of the Prevention of Child Abuse and Neglect Act of 1977, effective April 12, 2005, D.C. Law 2-22, D.C. Official Code §§ 4-1303.51 and 4-1303.52 (2012 Repl.), it is hereby **ORDERED** that:

1. **DAMON KING** is appointed as Chairperson of the Citizen Review Panel: Child Abuse and Neglect, replacing Dr. Betty Wilbert Nyangoni as Chairperson, and shall serve in that position at the pleasure of the Mayor.

2. **EFFECTIVE DATE:** This Order shall become effective immediately.

Vincent C. Gray

VINCENT C. GRAY
MAYOR

ATTEST: Cynthia Brock-Smith

CYNTHIA BROCK-SMITH
SECRETARY OF THE DISTRICT OF COLUMBIA

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF MEETING
AGENDA

WEDNESDAY, DECEMBER 4, 2013 AT 1:00 PM
2000 14th STREET, N.W., SUITE 400S, WASHINGTON, D.C. 20009

1. Review Request for License Class Change from CR to CT in Georgetown Moritorium Zone. ANC 2E. SMD 2E05. No pending citation. No investigation matters. Conflict with Settlement Agreement. ***Gypsy Sally,*** 3401 K Street NW, Retailer CR, License No. 090582.

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2. Review of Application for New Class DR License with Entertainment Endorsement and Summer Garden for Grocery Store with Approved Retailer Class B License. No Voluntary Agreement. No pending citations/fines. No investigative matters. No outstanding violations. ANC 2E. SMD 2E05. ***Dean & Deluca,*** 3276 M Street NW, Retailer B License No. 093723.

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3. Review Request for License Class Change from Retailer Class B to Retailer Class A. ANC 5B. SMD 5B05. No pending citation. No investigation matters. No Settlement Agreement. ***Brookland Market,*** 3736 10th NE, Retailer B, License No. 088495.

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4. Review Request for License Class Change from Retailer Class B to Retailer Class A. ANC 7C. SMD 7C03. Pending citations and fines. Outstanding violations. No Settlement Agreement. ***Capitol View Market,*** 4920 Central Avenue NE, Retailer B, License No. 076250.

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5. Review of letter dated November 22, 2013 requesting Removal of License from Safekeeping. ANC ***DC Noodles***, 1410-1412 U Street NW, Retailer , License No. 073188

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6. Review of letter requesting Extention of License in Safekeeping for one additional year. ***Pizzeriz Uno***. 3211 M Street NW, Retailer CR, License No. 003854.

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7. Review of Request for Change of Hours of Operations and Sales. No pending citation. No investigation matters. No Settlement Agreement. ANC 5E. SMD 5E02. ***Franklin Liquors & Market,*** 2723 7th Street NE, Retailer A, License No.089748.

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF MEETING
AGENDA

WEDNESDAY, DECEMBER 4, 2013 AT 1:00 PM
2000 14th STREET, N.W., SUITE 400S, WASHINGTON, D.C. 20009

1. Review Request for License Class Change from CR to CT in Georgetown Moritorium Zone. ANC 2E. SMD 2E05. No pending citation. No investigation matters. Conflict with Settlement Agreement. ***Gypsy Sally,*** 3401 K Street NW, Retailer CR, License No. 090582.

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2. Review of Application for New Class DR License with Entertainment Endorsement and Summer Garden for Grocery Store with Approved Retailer Class B License. No Voluntary Agreement. No pending citations/fines. No investigative matters. No outstanding violations. ANC 2E. SMD 2E05. ***Dean & Deluca,*** 3276 M Street NW, Retailer B License No. 093723.

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3. Review Request for License Class Change from Retailer Class B to Retailer Class A. ANC 5B. SMD 5B05. No pending citation. No investigation matters. No Settlement Agreement. ***Brookland Market,*** 3736 10th NE, Retailer B, License No. 088495.

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4. Review Request for License Class Change from Retailer Class B to Retailer Class A. ANC 7C. SMD 7C03. Pending citations and fines. Outstanding violations. No Settlement Agreement. ***Capitol View Market,*** 4920 Central Avenue NE, Retailer B, License No. 076250.

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5. Review of letter dated November 22, 2013 requesting Removal of License from Safekeeping. ANC ***DC Noodles***, 1410-1412 U Street NW, Retailer , License No. 073188.

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6. Review of letter requesting Extention of License in Safekeeping for one additional year. ***Pizzeriz Uno***. 3211 M Street NW, Retailer CR, License No. 003854.

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7. Review of Request for Change of Hours of Operations and Sales. No pending citation. No investigation matters. No Settlement Agreement. ANC 5E. SMD 5E02. ***Franklin Liquors & Market,*** 2723 7th Street NE, Retailer A, License No.089748.

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8. Review of Supplemental Documetion for Pending Grocery B Application. ANC 6C. SMD 6C05. ***Giant #2381***, 300 H Street NE, Retailer Grocery B, License No. 091952.

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9. Review of Supplemental Documentation for Pending Grocery B Application. ANC SMD. ***Trader Joe's***, 14th Street NW, Retailer Grocery B, License No. 093455.

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10. Review request from Michael D. Fonseca to amend licensee's approved menu. ***Avenue Suites/A Bar,*** 2500 Pennsylvania Avenue NW, Retailer CT, License No. 086545.

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11. Review of Resolution of Termination of Settlement Agreement between ANC 1D and Raven Grill. ***Raven Grill,*** 3125 Mount Pleasant Street NW, Retailer CT, Lic#: 000586.

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12. Review of Request for Reinstatement of Protest from ANC 3E. ***Civil Lounge***, 5335 Wisconsin Avenue NW, Retailer CT, Lic#: 090196. *No objection from the Applicant.*

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13. Review of letter dated November 12, 2013 from Cleveland Park Citizens Association, providing formal notification that every ABC matter is a substantial change concern to the CPCA.

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14. Review of letter dated November 9, 2013 from Rafael DeGennaro. ***Remington's,*** 639 Pennsylvania Avenue SE, Retailer CT, Lic#: 009328.

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15. Review of Request for Change of Address dated August 19, 2013 from Jerry A Moore III, Counsel for Bon Appetit Management Company. ***Bon Appetit***, 4400 Massachusetts Avenue NW, Retailer DR, Lic#: 071077.

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16. Review of Settlement Agreement dated November 22, 2013 between ANC 1A and TGI Friday's. ***TGI Friday's***, 3334-3336 14th Street NW, Retailer CR, Lic#: 092827.*

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17. Review of Amendment to the Settlement Agreement dated November 21, 2012 from ANC 6B. ***Old Naval Hospital Foundation***, 921 Pennsylvania Avenue SE, Retailer C, Lic#: 086926*

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18. Review of Settlement Agreement dated November 20, 2013 from ANC 6D and Capitol Skyline Hotel. ***Capitol Skyline Hotel***, 10 I Street SW, Retailer CH, Lic#: 072534.*

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19. Review of Settlement Agreement dated November 16, 2013 from ANC 6B and Trusty's Bar. ***Trusty's Bar***, 1420 Pennsylvania Avenue SE, Retailer CT, Lic#: 071352.*

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20. Review of Settlement Agreement dated November 16, 2013 from ANC 6B and 18th Amendment, ***18th Amendment***, 613 Pennsylvania Avenue SE, Retailer CT, Lic#: 072633.*

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21. Review of Settlement Agreement dated November 16, 2013 from ANC 6B and Pour House. ***Pour House***, 319 Pennsylvania Avenue SE, Retailer CT, Lic#: 025897.*

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22. Review of Settlement Agreement dated November 16, 2013 from ANC 6B and Phase I. ***Phase I***, 525 8th Street SE, Retailer CT, Lic#: 001200.*

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23. Review of Settlement Agreement dated November 16, 2013 from ANC 6B and Hawk 'n' Dove. ***Hawk 'n' Dove***, 329 Pennsylvania Avenue SE, Retailer CT, Lic#: 088059.*

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24. Review of Settlement Agreement dated November 16, 2013 from ANC 6B and Lola's. ***Lola's***, 711 8th Street SE, Retailer CT, Lic#: 086141.*

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25. Review of Settlement Agreement dated November 16, 2013 from ANC 6B and The Old Siam. ***The Old Siam***, 406 8th Street SE, Retailer CT, Lic#: 072023.*

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26. Review of Settlement Agreement dated November 16, 2013 from ANC 6B and Remington's. ***Remington's***, 639 Pennsylvania Avenue SE, Retailer CN, Lic#: 009238.*

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27. Review of proposal dated July 29, 2013 from Paul Pascal, Counsel for DCanter, to utilize a portion of the Licensee's space for tastings. ***DCanter,*** 545 8th Street SE, Retailer B, Lic#:090639.

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28. Review of Request dated November 20, 2013 from Premium Distributors of Washington to provide retailers with products valued at more than $50 and less than $500.

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29. Review of Request dated November 18, 2013 from Premium Distributors of Washington to provide retailers with products valued at more than $50 and less than $500.

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30. Review of Request dated November 14, 2013 from E & J Gallo to provide retailers with products valued at more than $50 and less than $500.

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31. Review of Request dated November 13, 2013 from E & J Gallo to provide retailers with products valued at more than $50 and less than $500.

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32. Review of Request dated November 13, 2013 from E & J Gallo to provide retailers with products valued at more than $50 and less than $500.

*** In accordance with D.C. Official Code §2-574(b) Open Meetings Act, this portion of the meeting will be closed for deliberation and to consult with an attorney to obtain legal advice. The Board's vote will be held in an open session, and the public is permitted to attend.**

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF MEETING
INVESTIGATIVE AGENDA

WEDNESDAY, DECEMBER 4, 2013
2000 14TH STREET, N.W., SUITE 400S, WASHINGTON, D.C. 20009

On December 4, 2013 at 4:00 pm, the Alcoholic Beverage Control Board will hold a closed meeting regarding the matters identified below. In accordance with Section 405(b) of the Open Meetings Amendment Act of 2010, the meeting will be closed "to plan, discuss, or hear reports concerning ongoing or planned investigations of alleged criminal or civil misconduct or violations of law or regulations."

1. Case#13-251-00132 Rosebar, 1215 CONNECTICUT AVE NW Retailer C Tavern, License#: ABRA-077883

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2. Case#13-251-00088 Pure Nightclub & Lounge, 1326 U ST NW Retailer C Nightclub, License#: ABRA-024613

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3. Case#13-251-00134 Player's Lounge, 2737 M.L. KING JR., AVE SE Retailer C Nightclub, License#: ABRA-001271

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4. Case#13-251-00133 Climax Restaurant & Hookah Bar, 900 FLORIDA AVE NW Retailer C Tavern, License#: ABRA-088290

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5. Case#13-CC-00115 Pho DC, 608 H ST NW Retailer C Restaurant, License#: ABRA-083808

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6. Case#13-CMP-00554 Ping Pong, 1 Dupont Circle CIR NW Retailer C Restaurant, License#: ABRA-086270

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7. Case#13-CC-00114 13th Street Market, 3582 13TH ST NW Retailer B Retail - Class B, License#: ABRA-078242

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8. Case#13-251-00129 Vita Restaurant and Lounge/Penthouse Nine, 1318 9TH ST NW Retailer C Tavern, License#:ABRA-086037

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9. Case#13-PRO-00131 Washington Firehouse Restaurant/Washington Smokehouse, NW Retailer C Tavern, License#: ABRA-092685

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10. Case#13-PRO-00126 TGI Fridays, 3334 - 3336 14th ST NW Retailer C Restaurant, License#: ABRA-092827

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11. Case#13-PRO-00120 Jack Rose, 2007 18TH ST NW Retailer C Restaurant, License#: ABRA-081997

DC MAYOR'S OFFICE ON ASIAN AND PACIFIC ISLANDER AFFAIRS

DC MAYOR'S COMMISSION ON ASIAN AND PACIFIC ISLANDER AFFAIRS

NOTICE OF REGULAR MEETING

The DC Mayor's Commission on Asian and Pacific Islander Affairs will be holding its regular meeting on Thursday, December 5, 2013 at 6:30 pm.

The meeting will be held at the OAPIA office at One Judiciary Square, 441 4th Street NW, Suite 721N, Washington, DC 20001. The location is closest to the Judiciary Square metro station on the red line of the Metro. All commission meetings are open to the public. If you have any questions about the commission or its meetings, please contact oapia@dc.gov or Andrew Chang at andrew.chang@dc.gov. Telephone: (202) 727-3120.

The DC Commission on Asian and Pacific Islander Affairs usually convenes monthly meetings to discuss current issues affecting the DC AAPI community.

CHILD AND FAMILY SERVICES AGENCY

DISTRICT OF COLUMBIA CITIZENS REVIEW PANEL

NOTICE OF PUBLIC MEETING

The District of Columbia Citizens Review Panel will be holding a meeting on Tuesday, December 3, 2013 at 6:30 p.m. The meeting will be held in the Mount Pleasant Library, MTP Large Meeting Room at 3160 16th St NW, Washington, DC 20010. Below is the agenda for this meeting.

For additional information, please contact Meron Meshesha at (202) 544-3144 or cpfs@centerchildprotection.org

December 3, 2013 Meeting of the DC Citizen Review Panel

Time: 6:30-9:00 PM
Day: Tuesday
Place: Mt. Pleasant Library, 3160 16th Street, NW, Washington, DC

PROPOSED AGENDA

6:30 PM Welcome/Introductions: *Damon King, Interim Chairperson*

6:40 PM Review and Approve: June 4, 2013 and September 28, 2013

6:45 PM Review and Approve Agenda

6:55 PM Treasurer's Report: *Rick Bardach*

7:00 PM Interim Chairperson's Report: *Damon King*

- Special welcome to new members (Sherrill Taylor and Claresa Venson)
- Thanks and appreciation to out-going Chairperson (Betty Nyangoni)
- Report on the status of Leadership Transition and next steps
- Expectations and priority activities
- Announcements and meeting attended on behalf of CRP
- Establishing a CRP Executive Committee

7:20 PM Facilitator Report: *Joyce N. Thomas*

- Status of Facilitator 2013 grant agreement with CFSA
- Follow-up/Action Items from Retreat
- Creating the 2014 work plan
- Members to be approved by DC City Council
- Recommendation for conducting a Strategic Plan in 2014
- Potential visitors/speakers to invite to future meetings
- What do you want the 2014 Annual Report to say?

7:50 PM Update from Task Force on Preparing Older Foster Youth for Independent Living: Rick Bardach
- 2014 Activities and Timelines

8:10 PM Establishing a Task Force on Medical Care Needs of Children in the Foster Care System:
- Review of the literature

8:30 PM Establishing a Task Force on Legislative Issues

8:45 PM Open Discussion and Input from CRP members on new Business

9:00 PM Adjournment

DISTRICT OF COLUMBIA
BOARD OF ELECTIONS

Certification of Filling a Vacancy
In Advisory Neighborhood Commissions

Pursuant to D.C. Official Code §1-309.06(d)(6)(D), If there is only one person qualified to fill the vacancy within the affected single-member district, the vacancy shall be deemed filled by the qualified person, the Board hereby certifies that the vacancy has been filled in the following single-member district by the individual listed below:

Rachel Reilly Carroll
Single-Member District 6D03

DISTRICT DEPARTMENT OF THE ENVIRONMENT

FISCAL YEAR 2014

PUBLIC NOTICE

Notice is hereby given that, pursuant to 40 C.F.R. Part 51.161, and D.C. Official Code §2-505, the Air Quality Division (AQD) of the District Department of the Environment (DDOE), located at 1200 First Street NE, 5th Floor, Washington, DC, intends to issue air quality permit #6002-R2 to operate one (1) 60 kW diesel-fired emergency generator set at the Cellco Partnership (DBA Verizon Wireless) property located at 4759 Reservoir Road NW, Washington DC 20007. The contact person for the facility is Pat Coby at (301)512-2464.

The permit application and supporting documentation, along with the draft permit are all available for public inspection at AQD and copies may be made available between the hours of 8:15 A.M. and 4:45 P.M. Monday through Friday. Interested parties wishing to view these documents should provide their names, addresses, telephone numbers and affiliation, if any, to Stephen S. Ours at (202) 535-1747.

Interested persons may submit written comments or may request a public hearing on this subject within 30 days of publication of this notice. The written comments must also include the person's name, telephone number, affiliation, if any, mailing address and a statement outlining the air quality issues in dispute and any facts underscoring those air quality issues. All relevant comments will be considered in issuing the final permit.

Comments on the proposed permit and any request for a public hearing should be addressed to:

Stephen S. Ours
Chief, Permitting Branch
Air Quality Division
District Department of the Environment
1200 First Street NE, 5th Floor
Washington, DC 20002
Stephen.Ours@dc.gov

No written comments postmarked after December 30, 2013 will be accepted.

For more information, please contact Stephen S. Ours at (202) 535-1747.

DISTRICT DEPARTMENT OF THE ENVIRONMENT

FISCAL YEAR 2014

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The permit application and supporting documentation, along with the draft permit are all available for public inspection at AQD and copies may be made available between the hours of 8:15 A.M. and 4:45 P.M. Monday through Friday. Interested parties wishing to view these documents should provide their names, addresses, telephone numbers and affiliation, if any, to Stephen S. Ours at (202) 535-1747.

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FISCAL YEAR 2014

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DISTRICT DEPARTMENT OF THE ENVIRONMENT

FISCAL YEAR 2014

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The permit application and supporting documentation, along with the draft permit are all available for public inspection at AQD and copies may be made available between the hours of 8:15 A.M. and 4:45 P.M. Monday through Friday. Interested parties wishing to view these documents should provide their names, addresses, telephone numbers and affiliation, if any, to Stephen S. Ours at (202) 535-1747.

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DISTRICT DEPARTMENT OF THE ENVIRONMENT

FISCAL YEAR 2014

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Emergency Generator to be Permitted

Equipment Location	Address	Engine Size	Fuel	Model Number	Serial Number
Thurgood Marshall Federal Judiciary Building	One Columbus Circle NE Washington, DC 20002	906 kW (1,214 HP)	No. 2 Fuel Oil (Diesel)	C27	MJE01919

The proposed emission limits are as follows:

a. Emissions shall not exceed those found in the following table as measured in accordance with the procedures found in 40 CFR 89, Subpart E: [40 CFR 60.4205(b), 40 CFR 60.4202(a)(2), and 40 CFR 89.112(a)]

Emission Standards	
Pollutant	**g/kW-hr**
NMHC+NO_x	6.4
CO	3.5
PM	0.20

b. Visible emissions shall not be emitted into the outdoor atmosphere from the generator, except that discharges not exceeding forty percent (40%) opacity (unaveraged) shall be permitted for two (2) minutes in any sixty (60) minute period and for an aggregate of twelve (12) minutes in any twenty-four hour (24 hr.) period during start-up, cleaning, adjustment of combustion controls, or malfunction of the equipment [20 DCMR 606.1]

c. An emission into the atmosphere of odorous or other air pollutants from any source in any quantity and of any characteristic, and duration which is, or is likely to be injurious to the public health or welfare, or which interferes with the reasonable enjoyment of life or property is prohibited. [20 DCMR 903.1]

The estimated emissions from the unit are as follows:

Pollutant	**Emission Rate (lb/hr)**	**Maximum Annual Emissions (tons/yr)**
Total Particulate Matter (PM - Total)	0.12	0.03
Sulfur Oxides (SO_x)	0.015	0.004
Nitrogen Oxides (NO_x)	13.74	3.44
Volatile Organic Compounds (VOCs)	0.11	0.03
Carbon Monoxide (CO)	0.76	0.19

The application to operate the generator and the draft permit are available for public inspection at AQD and copies may be made available between the hours of 8:15 A.M. and 4:45 P.M. Monday through Friday. Interested parties wishing to view these documents should provide their names, addresses, telephone numbers and affiliation, if any, to Stephen S. Ours at (202) 535-1747.

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DISTRICT DEPARTMENT OF THE ENVIRONMENT

FISCAL YEAR 2014

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Emergency Generator to be Permitted

Equipment Location	Address	Engine Size	Fuel	Model Number	Serial Number
Thurgood Marshall Federal Judiciary Building	One Columbus Circle NE Washington, DC 20002	906 kW (1,214 HP)	No. 2 Fuel Oil (Diesel)	C27	MJE01916

The proposed emission limits are as follows:

a. Emissions shall not exceed those found in the following table as measured in accordance with the procedures found in 40 CFR 89, Subpart E: [40 CFR 60.4205(b), 40 CFR 60.4202(a)(2), and 40 CFR 89.112(a)]

Emission Standards	
Pollutant	**g/kW-hr**
NMHC+NO_x	6.4
CO	3.5
PM	0.20

b. Visible emissions shall not be emitted into the outdoor atmosphere from the generator, except that discharges not exceeding forty percent (40%) opacity (unaveraged) shall be permitted for two (2) minutes in any sixty (60) minute period and for an aggregate of twelve (12) minutes in any twenty-four hour (24 hr.) period during start-up, cleaning, adjustment of combustion controls, or malfunction of the equipment [20 DCMR 606.1]

c. An emission into the atmosphere of odorous or other air pollutants from any source in any quantity and of any characteristic, and duration which is, or is likely to be injurious to the public health or welfare, or which interferes with the reasonable enjoyment of life or property is prohibited. [20 DCMR 903.1]

The estimated emissions from the unit are as follows:

Pollutant	**Emission Rate (lb/hr)**	**Maximum Annual Emissions (tons/yr)**
Total Particulate Matter (PM - Total)	0.12	0.03
Sulfur Oxides (SO_x)	0.015	0.004
Nitrogen Oxides (NO_x)	13.74	3.44
Volatile Organic Compounds (VOCs)	0.11	0.03
Carbon Monoxide (CO)	0.76	0.19

The application to operate the generator and the draft permit are available for public inspection at AQD and copies may be made available between the hours of 8:15 A.M. and 4:45 P.M. Monday through Friday. Interested parties wishing to view these documents should provide their names, addresses, telephone numbers and affiliation, if any, to Stephen S. Ours at (202) 535-1747.

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DISTRICT DEPARTMENT OF THE ENVIRONMENT

FISCAL YEAR 2014

PUBLIC NOTICE

Notice is hereby given that, pursuant to 40 C.F.R. Part 51.161, and D.C. Official Code §2-505, the Air Quality Division (AQD) of the District Department of the Environment (DDOE), located at 1200 First Street NE, 5th Floor, Washington, DC, intends to issue air quality permit #6757 to the Fort Myer Construction Company to operate one (1) crusher powered by a 275 horsepower caterpillar engine at Rhode Island Avenue, NE, Lot 5, Square 3605, Washington, DC 20018. The contact person for the facility is Lewis Shrensky, Executive Vice President at (202) 636-9535.

The proposed emission limits are as follows:

a. Emissions from the engine powering the crusher shall not exceed those found in the following table, as measured according to the procedures set forth in 40 CFR 89, Subpart E. [40 CFR 60.4205(b) 40 CFR 60.4202(a)(2) and 40 CFR 89.112(a)]

Pollutant Emission Limits (g/kW-hr)		
NMHC+NOx	CO	PM
4.0	3.5	0.20

b. Emissions of dust shall be minimized in accordance with the requirements of 20 DCMR 605 and the "Operational Limitations" of this permit.

c. The emission of fugitive dust from any material handling, screening, crushing, grinding, conveying, mixing, or other industrial-type operation or process is prohibited. [20 DCMR 605.2]

d. Emissions from the engine powering the crusher shall not exceed those achieved by proper operation of the equipment in accordance with manufacturer's specifications.

e. Visible emissions shall not be emitted into the outdoor atmosphere from stationary sources; provided, that the discharges not exceeding forty percent (40%) opacity (unaveraged) shall be permitted for two (2) minutes in any sixty (60) minute period and for an aggregate of twelve (12) minutes in any twenty-four hour (24 hr.) period during start-up, cleaning, soot blowing, adjustment of combustion controls, or malfunction of the equipment. [20 DCMR 606.1]

f. An emission into the atmosphere of odorous or other air pollutants from any source in any quantity and of any characteristic, and duration which is, or is likely to be injurious to the public health or welfare, or which interferes with the reasonable enjoyment of life or property is prohibited. [20 DCMR 903.1]

The estimated emissions from the engine and crusher are as follows:

Pollutant	**Maximum Annual Emissions (tons/yr)**
Carbon Monoxide (CO)	6.93
Oxides of Nitrogen (NO_x)	7.92
Total Particulate Matter, PM (Total)	3.24
Volatile Organic Compounds (VOCs)	3.04
Sulfur Dioxide (SO_x)	2.45

The application to operate the crusher and associated engine and the draft permit and supporting documents are available for public inspection at AQD and copies may be made available between the hours of 8:15 A.M. and 4:45 P.M. Monday through Friday. Interested parties wishing to view these documents should provide their names, addresses, telephone numbers and affiliation, if any, to Stephen S. Ours at (202) 535-1747.

Interested persons may submit written comments or may request a hearing on this subject within 30 days of publication of this notice. The written comments must also include the person's name, telephone number, affiliation, if any, mailing address and a statement outlining the air quality issues in dispute and any facts underscoring those air quality issues. All relevant comments will be considered in issuing the final permit.

Comments on the proposed permit and any request for a public hearing should be addressed to:

Stephen S. Ours
Chief, Permitting Branch
Air Quality Division
District Department of the Environment
1200 First Street NE, 5th Floor
Washington, DC 20002
Stephen.Ours@dc.gov

No written comments or hearing requests postmarked after December 30, 2013 will be accepted.

For more information, please contact Stephen S. Ours at (202) 535-1747.

DISTRICT DEPARTMENT OF THE ENVIRONMENT

FISCAL YEAR 2014

PUBLIC NOTICE

Notice is hereby given that, pursuant to 40 C.F.R. Part 51.161, and D.C. Official Code §2-505, the Air Quality Division (AQD) of the District Department of the Environment (DDOE), located at 1200 First Street NE, 5th Floor, Washington, DC, intends to issue air quality permit #6758 to the Fort Myer Construction Company to operate one (1) screener powered by a 99.9 horsepower caterpillar engine with associated conveying at Rhode Island Avenue, NE, Lot 5, Square 3605, Washington, DC 20018. The contact person for the facility is Lewis Shrensky, Executive Vice President at (202) 636-9535.

The proposed emission limits are as follows:

a. Emissions from the engine associated with the screener shall not exceed those found in the following table, as measured according to the procedures set forth in 40 CFR 89, Subpart E. [40 CFR 60.4205(b) 40 CFR 60.4202(a)(2) and 40 CFR 89.112(a)]

Pollutant Emission Limits (g/kW-hr)		
NMHC+NOx	CO	PM
4.7	5.0	0.40

b. Emissions of dust shall be minimized in accordance with the requirements of 20 DCMR 605 and the "Operational Limitations" of this permit.

c. The emission of fugitive dust from any material handling, screening, crushing, grinding, conveying, mixing, or other industrial-type operation or process is prohibited. [20 DCMR 605.2]

d. Emissions from the engine powering the screener shall not exceed those achieved by proper operation of the equipment in accordance with manufacturer's specifications.

e. Visible emissions shall not be emitted into the outdoor atmosphere from stationary sources; provided, that the discharges not exceeding forty percent (40%) opacity (unaveraged) shall be permitted for two (2) minutes in any sixty (60) minute period and for an aggregate of twelve (12) minutes in any twenty-four hour (24 hr.) period during start-up, cleaning, soot blowing, adjustment of combustion controls, or malfunction of the equipment. [20 DCMR 606.1]

f. An emission into the atmosphere of odorous or other air pollutants from any source in any quantity and of any characteristic, and duration which is, or is likely to be injurious to the public health or welfare, or which interferes with the reasonable enjoyment of life or property is prohibited. [20 DCMR 903.1]

The estimated emissions from the screener engine, screener, and conveying are as follows:

Pollutant	**Maximum Annual Emissions (tons/yr)**
Carbon Monoxide (CO)	2.52
Oxides of Nitrogen (NO_x)	2.88
Total Particulate Matter, PM (Total)	14.86
Volatile Organic Compounds (VOCs)	1.10
Sulfur Dioxide (SO_x)	0.89

The application to operate the screener, associated engine, and conveying and the draft permit and supporting documents are available for public inspection at AQD and copies may be made available between the hours of 8:15 A.M. and 4:45 P.M. Monday through Friday. Interested parties wishing to view these documents should provide their names, addresses, telephone numbers and affiliation, if any, to Stephen S. Ours at (202) 535-1747.

Interested persons may submit written comments or may request a hearing on this subject within 30 days of publication of this notice. The written comments must also include the person's name, telephone number, affiliation, if any, mailing address and a statement outlining the air quality issues in dispute and any facts underscoring those air quality issues. All relevant comments will be considered in issuing the final permit.

Comments on the proposed permit and any request for a public hearing should be addressed to:

Stephen S. Ours
Chief, Permitting Branch
Air Quality Division
District Department of the Environment
1200 First Street NE, 5th Floor
Washington, DC 20002
Stephen.Ours@dc.gov

No written comments or hearing requests postmarked after December 30, 2013 will be accepted.

For more information, please contact Stephen S. Ours at (202) 535-1747.

DISTRICT DEPARTMENT OF THE ENVIRONMENT

FISCAL YEAR 2014

PUBLIC NOTICE

Notice is hereby given that, pursuant to 40 C.F.R. Part 51.161, and D.C. Official Code §2-505, the Air Quality Division (AQD) of the District Department of the Environment (DDOE), located at 1200 First Street NE, 5th Floor, Washington, DC, intends to issue Permit #6789 to the George Washington University to construct and operate one natural gas fired emergency generator set, located in Washington, DC. The contact person for the facility is James Schrote, Executive Director, Facilities Services, at (202) 994-0543.

Emergency Generator to be Permitted

Equipment Location	Address	Equipment Size	Manufacturer and Model	Permit No.
Museum	701 21st Street NW Washington DC	355 kW generator 530 HP engine	Doosan D183TIC Engine/ Kohler Power Systems 350REZXB Generator	6789

The proposed emission limits are as follows:

a. Emissions from this unit shall not exceed those in the following table [40 CFR 60.4233(e) and Subpart JJJJ, Table 1]:

Pollutant Emission Limits (g/HP-hr)		
NOx	CO	VOC
2.0	4.0	1.0

b. Visible emissions shall not be emitted into the outdoor atmosphere from this generator, except that discharges not exceeding forty percent (40%) opacity (unaveraged) shall be permitted for two (2) minutes in any sixty (60) minute period and for an aggregate of twelve (12) minutes in any twenty-four hour (24 hr.) period during start-up, cleaning, adjustment of combustion controls, or malfunction of the equipment [20 DCMR 606.1].

c. An emission into the atmosphere of odorous or other air pollutants from any source in any quantity and of any characteristic, and duration which is, or is likely to be injurious to the public health or welfare, or which interferes with the reasonable enjoyment of life or property is prohibited. [20 DCMR 903.1]

The estimated maximum emissions from the emergency generator are as follows:

Pollutant	Maximum Annual Emissions (tons/yr)
Carbon Monoxide (CO)	0.184

Pollutant	**Maximum Annual Emissions (tons/yr)**
Oxides of Nitrogen (NO_x)	0.0263
Total Particulate Matter , PM (Total)	0.0101
Sulfur Dioxide (SO_x)	0.000597

The application to construct and operate the emergency generator and the draft permit and supporting documents are available for public inspection at AQD and copies may be made available between the hours of 8:15 A.M. and 4:45 P.M. Monday through Friday. Interested parties wishing to view these documents should provide their names, addresses, telephone numbers and affiliation, if any, to Stephen S. Ours at (202) 535-1747.

Interested persons may submit written comments or may request a hearing on this subject within 30 days of publication of this notice. The written comments must also include the person's name, telephone number, affiliation, if any, mailing address and a statement outlining the air quality issues in dispute and any facts underscoring those air quality issues. All relevant comments will be considered in issuing the final permit.

Comments on the proposed permit and any request for a public hearing should be addressed to:

Stephen S. Ours
Chief, Permitting Branch
Air Quality Division
District Department of the Environment
1200 First Street NE, 5th Floor
Washington, DC 20002
Stephen.Ours@dc.gov

No written comments or hearing requests postmarked after December 30, 2013 will be accepted.

For more information, please contact Stephen S. Ours at (202) 535-1747.

DEPARTMENT OF HEALTH

NOTICE OF PAYMENT ADJUSTMENT

The Acting Director of the Department of Health, pursuant to the authority set forth in section 9(c) of the District of Columbia Health Professional Recruitment Program Act of 2005 ("Act"), effective March 8, 2006 (D.C. Law 16-71; D.C. Official Code § 7-751.08(c)), hereby gives notice of the adjustment to the rate of repayment to participants in the District of Columbia Health Professional Recruitment Program established by section 3 of the Act. The payment amounts are being increased to reflect the rate of inflation since implementation of the program based on the change in the Consumer Price Index (CPI) since that time. Section 8(c) of the Act authorizes the Director to increase the dollar amount of the total loan repayment annually to adjust for inflation. Since 2012, the CPI has increased by 1.18%, therefore the new repayment amounts shall be as follows:

For physicians and dentists starting in fiscal year 2013:

For the first year of service, 18% of total debt, not to exceed $25,344;
For the second year of service, 26% of total debt, not to exceed $36,608;
For the third year of service, 28% of total debt, not to exceed $39,424; and
For the fourth year of service, 28% of total debt, not to exceed $39,424.

For all other health professionals starting in fiscal year 2013:

For the first year of service, 18% of total debt, not to exceed $13,939;
For the second year of service, 26% of total debt, not to exceed $20,134;
For the third year of service, 28% of total debt, not to exceed $21,683; and
For the fourth year of service, 28% of total debt, not to exceed $21,683.

The new loan repayment rates stated herein shall be effective upon publication of this notice in the *D.C. Register*.

MERIDIAN PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Educational & Operational Capacity Building Services

Meridian Public Charter School serves nearly 600 students in Pre-kindergarten through eighth grade in Washington, D.C. The mission of Meridian is to instill within our students the passion for learning and to build self-confidence and self-respect through academic achievement. We aim to do this by creating a secure and positive learning environment in which children are encouraged to develop their full potential, intellectually, physically, socially, and emotionally.

For information regarding the school please see: www.meridian-dc.org

RFP Process and Instructions Schedule and Deadlines:
Meridian anticipates that the proposal submission, review, and evaluation process for this procurement will take place according to the following schedule:

RFP Released	Responses Due	Award Contract
December 6, 2013	December 13, 2013	December 16, 2013

Terms:
Meridian seeks a contract beginning on December 18, 2013 for school improvement and capacity building services. The contract will be for one year with the option of annual renewal for three additional years conditional on satisfactory performance.

Description of anticipated services:
Meridian seeks a proven school consultant to lead targeted school improvement and capacity building efforts with the goals of:

- Ensuring 100% compliance with all DC performance and compliance regulations
- Increasing academic performance for all students by supporting intensive data-driven instructional interventions
- Increasing the school's capacity in operations, recruitment and fund development

Return of proposals:
Interested consultants should submit a proposal consisting of the following:

1. Qualifications and experience, including but not limited to:
   - brief (one-two paragraph) biographies of key staff members who would work on the project; and
   - detailed examples of current comparable projects, including contact information for references.

2. Description of consultant's approach and experience in the following areas of work:
   - Creating and monitoring systems for managing PMF and OSSE rules, regulations and performance standards
   - Designing and implementing proven academic interventions yielding concrete results
   - Implementing best practice recruitment and evaluation processes
   - Designing and maintaining fundraising initiatives

3. A fee structure.
4. Unsigned contract with the effective date blank/TBD must be included with the proposal.
5. Any other pertinent information may be included.

Please return your bid proposal by December 13, 2013 at 5:00pm. All proposals must be sent electronically in Portable Document Format (PDF). No hard copy proposals will be accepted.

Proposals should be sent with the email subject line: **2013 Meridian School Capacity Building Services-[*organization name]*.** The file should be: organization_name-2013-Capacity_Building_Proposal.pdf. Proposals should be emailed to: Tamara Cooper at tcooper@meridian-dc.org.

Proposals will be evaluated considering cost, ability to meet anticipated services, and past experience. Meridian reserves the right to not award a contract if the pool of applicants lacks sufficient experience or cost is prohibitive.

For questions regarding this RFP please contact:

Tamara Cooper
2120 13th St NW
Washington, DC 20009
Phone: (202) 387-9830
tcooper@meridian-dc.org

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

NOTICE OF REIMBURSABLE BUDGETS AND TOTAL GROSS JURISDICTIONAL REVENUES

ASMT2014, ASSESSMENTS FOR FISCAL YEAR 2014

1. The Public Service Commission of the District of Columbia ("Commission") hereby gives notice pursuant to Rule 1302.1 of Chapter 13 of Title 15 of the District of Columbia Municipal Regulations, "Rules Implementing the Public Utilities Reimbursement Fee Act of 1980" ("Chapter 13"), of the net reimbursable budgets for the Commission and for the Office of the People's Counsel ("OPC") for Fiscal Year 2014 ("FY 2014").[1] In addition, pursuant to Rule 1302.1(b), the Commission gives notice of the total gross revenue of each public utility, competitive electricity supplier, competitive natural gas supplier, and competitive local exchange carrier ("CLEC") for the preceding calendar year, calendar year 2012.

2. The net reimbursable budget for the Commission for FY 2014 is $11,611,989.16. The net reimbursable budget for OPC for FY 2014 is $6,565,522.88.

3. The total gross revenues of all public utilities, competitive electricity suppliers, competitive natural gas suppliers, and CLECs for the preceding calendar year, calendar year 2012, were $1,836,609,823.39.

[1] Rule 1302.1 states that: "[n]ot later than thirty (30) days following the start of each fiscal year, the Commission shall publish the following information in the *District of Columbia Register*: (a) The net reimbursable budgets for the Commission and the Office of the People's Counsel for that fiscal year; and (b) The total of the gross revenues of each public utility, competitive electric supplier, competitive natural gas supplier, and CLEC for the preceding calendar year." 15 DCMR § 1302.1. The Commission recognizes that this notice is being published beyond the 30-day period prescribed in the rule, but waives the time period in Rule 1302.1 since it is now correcting the error.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

PUBLIC NOTICE

FORMAL CASE NO. 1086, IN THE MATTER OF THE INVESTIGATION INTO THE POTOMAC ELECTRIC POWER COMPANY'S RESIDENTIAL AIR CONDITIONER DIRECT LOAD CONTROL PROGRAM;

AND

FORMAL CASE NO. 1109, IN THE MATTER OF THE INVESTIGATION INTO THE POTOMAC ELECTRIC POWER COMPANY'S DISTRICT OF COLUMBIA DYNAMIC PRICING PROGRAM PROPOSAL

1. The Public Service Commission of the District of Columbia ("Commission") hereby gives notice of its intent to act upon the Potomac Electric Power Company ("Pepco" or "Company") Proposed Advanced Metering Infrastructure ("AMI") Enabled Dynamic Pricing Plan [1] in not less than thirty (30) days from the date of publication of this Public Notice in the *D.C. Register*.

2. On October 7, 2013, Pepco filed a proposed Advanced Metering Infrastructure ("AMI") enabled dynamic pricing plan for the District of Columbia in which it seeks to implement the dynamic pricing program beginning on June 1, 2014, if approval is received from the Commission by January 31, 2014. If approval is not received by January 31, 2014, Pepco proposes a June 1, 2015 implementation.[2] In its filing, Pepco requests that the Commission approve the following items: (1) Pepco's proposed residential dynamic pricing plan (called the "Peak Energy Savings Credit")[3] including associated tariff revisions, a true-up mechanism, and an education campaign; (2) tariff revisions that describe the manner that dynamic pricing and the Energy Wise Rewards Program™ ("EWR") billing credits will operate for those customers who participate in both; (3) a pilot program of residential In Home Displays ("IHDs") to convey detailed energy usage information and dynamic pricing signals, with the cost of the program to be recorded as a regulatory asset and recovered through a subsequent base distribution rate case;

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[1] Pepco's filing was initially docketed in *Formal Case No. 1083, In the Matter of the Investigation into the Policy Matters Pertaining to the Implementation of the Smart Grid* ("*Formal Case No. 1083*") *and in Formal Case No. 1086, In the Matter of the Investigation into the Potomac Electric Power Company's Residential Air Conditioner Direct Load Control Program* ("*Formal Case No. 1086*"), filed October 7, 2013. The filing was subsequently transferred from *Formal Case No. 1083* to *Formal Case No. 1109, In the Matter of the Investigation into the Potomac Electric Power Company's District of Columbia Dynamic Pricing Program Proposal* ("*Formal Case No. 1109*"), in this document, Pepco's filing will be referred to as "Pepco's Tariff Application." However, the filing will remain in *Formal Case No. 1086* since a part of the Company's proposal relates to its Direct Load Control ("DLC") Program.

[2] *Formal Case Nos. 1086* and *1109*, Pepco's Tariff Application.

[3] Under the Company's proposed plan, all residential distribution customers will be placed under a critical peak rebate form of dynamic pricing called (Critical Peak Rebate Program-CPR).

and (4) a pilot program to remotely reduce the load of window air conditioning units, with the cost of the program to being recorded as a regulatory asset and recovered through a subsequent rate case.[4]

3. Specifically, under the Company's proposed plan, "[a]ll District of Columbia residential distribution customers will be automatically enrolled in dynamic pricing regardless of whether they purchase their energy supply through Pepco's Standard Offer Service ("SOS") rate or through a competitive supplier."[5] However customers who participate in a supplier's or a curtailment service provider's demand response program that is bid into the PJM demand response market will not be able to participate in Pepco's CPR program to prevent duplicate bidding of the resource into the PJM market.[6] The Company indicates that the Peak Energy Savings Credit ("PESC") dynamic pricing rate "will be applied to the distribution portion of customer bills"[7] for customers who have AMI meters. Pepco states that "[c]ustomers who participate in a supplier's or a curtailment service provider's demand response program that is bid into the PJM demand response market will not be able to participate in Pepco's Critical Peak Rebate ("CPR") program to prevent duplicate bidding of the resource into the PJM Market."[8] Pepco proposes to establish an initial dynamic pricing credit of $1.25 per kWh. Pepco states that under the PESC, "the distribution service portion of a customer's bill is modified by a credit calculated by applying the bill credit amount of $1.25 per kWh to the difference between actual kWh consumption and a Customer Base Line ("CBL") level of consumption during the Peak Savings period designated by the Company."[9] Pepco indicates that under the proposed PESC rate, "customers will have the opportunity to earn bill credits for energy reductions that occur during designated periods, but they will not face higher electricity rates if they are unable to reduce their energy use."[10]

4. Pepco asserts that the "[d]ynamic pricing will apply year-round with an emphasis on summer activations (typically during the months of June through September)" and that "Typical Peak Savings events will occur during summer weekday afternoons due to the high electricity loads that result from the use of air conditioning [ ] to combat high temperature and humidity conditions."[11] Pepco states that it "will notify Customers of an anticipated Peak Saving event by 9 p.m. on the day prior to an event" and that it "anticipates that it will call a minimum

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4 *Id*. at 1.

5 *Id*. at 3.

6 *Id* at n3.

7 *Id*. at 7.

8 *Id*. at 3.

9 *Id*. at 7.

10 *Id*. at 3.

11 *Id*. at 9.

of four and a maximum of 15 Peak Savings events per summer."[12] Also, the Company proposes that for "PJM – declared emergencies, the duration of each Peak Savings event will match or exceed the length of the PJM emergency event"[13] because Pepco proposes to make the "duration of Critical Events be consistent with PJM market rules."[14]

5. According to Pepco, the funding for the credit would be primarily "sourced from demand response market opportunities within the PJM capacity and energy markets."[15] Pepco proposes to establish an "annual distribution rate true-up mechanism for the difference between PJM market revenues, PJM market transactional costs, customer credit payments, and ongoing program operational expenses."[16] The Company states that the "true-up would be applied to residential distribution customer bills as an adjustment to the distribution price charged per kWh of consumption."[17] According to the Company, "An annual true-up adjustment filing would be made during the month of November and an adjustment would be made effective as of the billing month of January for the prior years over or under collection due to changing kWh distribution sales."[18]

6. Pepco states that its "existing EWR Program currently provides summer monthly billing credits to program participants in exchange for permitting the cycling of their central air conditioners/heat pumps in accordance with the terms of the program."[19] The Company asserts that to "integrate dynamic pricing with these programs when the dynamic pricing rebate becomes effective, Pepco proposes to establish a monthly billing credit true-up for EWR customers."[20] Pepco submits that "under the Company's proposal, EWR Program participants would continue to earn their annual EWR credit and have the opportunity to earn additional credits by reducing energy use during PESC events."[21] The Company asserts that this "proposal seeks to maximize 1) available EWR demand reductions; 2) customer program participation; and 3) participant satisfaction."[22]

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12 *Id*. at 10 and 11.

13 *Id*. at 10.

14 *Id*.

15 *Id*. at 3-4.

16 *Id*. at 13.

17 *Id*.

18 *Id*.

19 *Id*. at 26.

20 *Id*.

21 *Id*.

22 *Id*.

7. Pepco proposes to establish an IHD pilot for residential customers "to determine whether these devices assist customers in better managing their electricity use and responding to PESC events."[23] The Company asserts that "one recent study has estimated that the use of IHDs could reduce residential customer energy use between 3 and 13%."[24] According to the Company, "the IHD pilot will begin during Q1 2014 and continue throughout the year, assuming Commission approval of the pilot is received no later than January 31, 2014" and "a report summarizing the findings of the pilot will be prepared and available by the end of Q2 2015." [25] Pepco asserts that the "results of the pilot will help to determine whether IHDs should be offered/incented by Pepco in the future."[26] Pepco states that "IHD devices also provide customers with detailed energy use information directly from their installed AMI meters" and that "displayed data can include instantaneous electric energy use data, daily energy use, weekly energy use, and an estimate of associated electricity costs."[27] Also, the Company submits that "alerts concerning PESC and EWR events can be provided directly to the IHD device to encourage customer energy reductions."[28] Pepco "proposes to establish a regulatory asset to account for these costs" and "will seek recovery of the costs in a subsequent distribution rate case . . ."[29]

8. The Company states that it "currently offers smart thermostats or direct load equipment to residential customers through the existing EWR Program."[30] Pepco asserts that the "EWR Program permits Pepco to reduce participant residential central air conditioning compressor load during high demand periods by sending a signal to the direct load control equipment to cycle compressors."[31] According to the Company, "significant numbers of District of Columbia residential customers rely upon the use of window air conditioners for their cooling needs, and those units are not eligible for inclusion in the EWR program."[32] Pepco states that "existing technology is available to remotely control window AC units."[33] Pepco asserts that "at this time, the Company proposes to establish a residential window air conditioner pilot program

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23 *Id*.

24 *Id*.

25 *Id*.

26 *Id*.

27 *Id*. at 28.

28 *Id*.

29 *Id*.

30 *Id*. at 29.

31 *Id*.

32 *Id*.

33 *Id*.

that would operate during the summer of 2014."[34] The Company "proposes to establish a regulatory asset to account for these costs" and "will seek recovery of the costs in a subsequent distribution rate case . . ."[35]

9. Finally, Pepco states that it "has developed an education campaign for PESC in the District of Columbia."[36] According to the Company, the key objectives of the PESC education campaign include the following:

> (1) "to explain Pepco's PESC program clearly and simply, so customers will participate by reducing energy use during the designated hours on Peak Savings Days; (2) to explain the difference between and benefits of the PESC and EWR programs. The EWR Program provides an enabling tool where by Pepco can automatically reduce a residential customer's central air conditioner energy use and the PESC Program permits each residential customer to reduce their energy use directly through own actions; (3) encourage customers to enroll in My Account, Pepco's online account management and energy analysis tool, and learn about the many tolls that are available to help customers reduce and manage their electricity consumption; and (4) help customers understand that reducing peak usage on the hottest days of summer will help to reduce energy prices and ultimately reduce electric costs for all customers.[37]

10. Pepco asserts that there will be communications challenges for the campaign such as "addressing limited customer awareness concerning the PESC program, reaching Spanish speaking and other non-English speaking customers, reaching low income customers, communicating with elderly customers, customers with disabilities, and others who may need electricity during Peak Energy Days for medical or health reasons.[38] Pepco indicates that to address these and other communication challenges it has "developed a plan for the campaign, based on proven tactics and lessons learned during the Maryland phase-in experience with PESC."[39] Pepco states that "vulnerable customers and caretakers will receive targeted messaging both through written communications and community outreach."[40]

11. If Pepco's Application is approved as filed, Pepco represents that changes would need to be made to the following tariff pages:

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34 *Id*. at 30.

35 *Id*.

36 *Id*. at 14.

37 *Id*. at 14-15.

38 *Id*. 15-16.

39 *Id*. at 16. Pepco has been operating a similar program in Maryland since June 2012.

40 *Id*. at 17.

POTOMAC ELECTRIC POWER COMPANY, P.S.C. of D.C. No. 1
17th Revised Page No. R-1
17th Revised Page No. R-2
63rd Revised Page No. R-2.1
39th Revised Page No. 2.2
13th Revised Page No. R-3
13th Revised Page No. R-3.1
13th Revised Page No. R-4
13th Revised Page No. R-4.1
11th Revised Page No. R-5
11th Revised Page No. R-5.1
8th Revised Page No. R-29
1st Revised Page No. R-50
1st Revised Page No. R-50.1
Original Page No. R-51
Original Page No. R-51.1

12. Accordingly, Pepco seeks approval of its proposed residential dynamic pricing plan with the associated tariff revisions and approval of the pilot programs for the In Home Displays and the window air conditioning unit program. The Commission seeks comments on the design, details, appropriateness, cost, impact on competition, and other policy, financial and practical aspects of the four proposed programs.

13. Pepco's Application is on file with the Commission and may be reviewed at the Office of the Commission Secretary, 1333 H Street, N.W., Second Floor, West Tower, Washington, D.C. 20005, between the hours of 9:00 a.m. and 5:30 p.m., Monday through Friday or may be obtained by visiting the Commission's website at www.dcpsc.org. The Application can be found in eDocket under Formal Case No. 1109. Copies of Pepco's Application are also available upon request, at a per-page reproduction cost by contacting the Commission Secretary at 202-626-5150 or bwestbrook@psc.dc.gov.

14. All persons interested in commenting on Pepco's proposed dynamic pricing Application, CPR program, IHD program and window air conditioning unit pilot program may submit written comments and reply comments no later than thirty (30) and forty-five (45) days, respectively, after publication of this Public Notice in the *D.C. Register* with Brenda Westbrook-Sedgwick, Commission Secretary, at the above address. After the comment period has expired, the Commission will take final action on Pepco's Application.

DISTRICT OF COLUMBIA RETIREMENT BOARD

NOTICE OF PUBLIC INTEREST

CERTIFICATION OF WINNER OF THE ELECTION TO SERVE AS THE RETIRED TEACHER MEMBER OF THE BOARD

The District of Columbia Retirement Board (the "Board") is required to conduct elections for its retired member representatives to the Board. *See* D.C. Official Code § 1-711(b)(2) (2001). In accordance with the Board's Rules for the Election of Members to the Board ("Election Rules"), the Board, through the American Arbitration Association ("AAA"), conducted an election for the representative of the retired District of Columbia teachers.

The ballots were counted on Wednesday, November 20, 2013, at 900 7th Street, N.W., ML Level, Washington, D.C., in the presence of Board representatives, and under the supervision of AAA.

AAA submitted the Certification of Results to the Board on November 21, 2013. Pursuant to section 408.1 of the Election Rules, the Board hereby certifies the results of the elections and declares the winner to be Mary A. Collins, a retired District of Columbia teacher.

Pursuant to section 408.4 of the Election Rules, any eligible candidate for this election may petition the Board in writing for a recount of votes within seven (7) calendar days of the date of publication of the certification of the winner. The petition must be filed at the Board's executive office located at 900 7th Street, N.W., 2nd Floor, Washington, D.C. 20001. In the absence of a request for a recount, the election results will become final and cannot be appealed thirty (30) days after this publication of the Board's certification.

The Election Rules and the Certification of Results can be accessed on the Board's website:

http://www.dcrb.dc.gov

Please address any questions regarding this notice to:

Eric O. Stanchfield, Executive Director
D.C. Retirement Board
900 7th Street, N.W., 2nd Floor
Washington, D.C. 20001

SELA PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSAL

Accounting and Financial Services

Sela Public Charter School is requesting proposals to provide accounting and financial services. Sela Public Charter School will enter into a contract with a vendor selected as part of this RFP process in January 2013.

Requests for Proposals can be found at the Sela Public Charter School Website www.selapcs.org or by sending a request for a copy of the RFP to:

Jason Lody, Executive Director
Sela Public Charter School
jlody@selapcs.org

The deadline for submitting proposals is 5:00p.m. on Friday, December 13, 2013. An original proposal must be submitted via email to jlody@selapcs.org with the subject heading **"Your Company Name – Accounting/Financial Services Bid"** in the e-mail subject line. Late proposals and/or proposals submitted via postal service or facsimile will not be accepted.

Application Timeline

- RFP Released on Monday, November 25, 2013
- Proposal Submission Deadline Friday, December 13, 2013 at 5:00 p.m.
- Awards Announced (via email) Wednesday, December 18, 2013

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

BOARD OF DIRECTORS

NOTICE OF PUBLIC MEETING

The Board of Directors of the District of Columbia Water and Sewer Authority (DC Water) will be holding a meeting on Thursday, December 5, 2013, at 9:30 a.m. The meeting will be held in the Board Room (4th floor) at 5000 Overlook Avenue, S.W., Washington, D.C. 20032. Below is the draft agenda for this meeting. A final agenda will be posted to DC Water's website at www.dcwater.com.

For additional information, please contact Linda R. Manley, Board Secretary at (202) 787-2332 or linda.manley@dcwater.com.

DRAFT AGENDA

1.	**Call to Order**	Board Chairman
2.	**Roll Call**	Board Secretary
3.	**Approval of November 7, 2013 Meeting Minutes**	Board Chairman
4.	**Committee Reports**	Committee Chairperson
5.	**General Manager's Report**	General Manager
6.	**Action Items** Joint-Use Non Joint-Use	Board Chairman
7.	**Other Business**	Board Chairman
8.	**Adjournment**	Board Chairman

OFFICE ON WOMEN'S POLICY AND INITIATIVES

DISTRICT OF COLUMBIA COMMISSION FOR WOMEN

NOTICE OF PUBLIC MEETING

Wednesday, December 4, 2013
6:45 PM – 8:45 PM

John A. Wilson Building
1350 Pennsylvania Avenue, NW
Room 301
Washington, DC 20004

The District of Columbia Commission for Women will hold its monthly meeting on Wednesday, December 4, 2013 at 6:45pm. The meeting will be held at the John A. Wilson Building, 1350 Pennsylvania Avenue, NW, Room 301, Washington, DC 20004.

For additional information, please contact Terese Lowery, Executive Director at (202) 724-7690 or women@dc.gov.

DRAFT AGENDA

I. **Call to Order**

II. **Welcome Remarks and Introduction of Mayor Vincent C. Gray**

III. **Summary Presentation of Commission Accomplishments and Strategic Guide for Action**

IV. **Discussion of Priority Issues and Select Commission Position Papers**

V. **Discussion of Upcoming Commission Events**

VI. **Questions and Open Dialogue with the Mayor**

VII. **Closing Remarks**

VIII. **Adjournment**

Please note that this is a draft agenda and subject to change.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 18544 of Penn Avenue Partnership LLC, pursuant to 11 DCMR §§ 3104.1 and 3103.2 for a special exception from the roof structure provisions under § 411, a variance from the off-street parking provisions under § 2101, a variance from the size of parking space requirements under § 2115, and a variance from the loading requirements under § 2201, to allow a residential project in the C-2-A District at 1550 Pennsylvania Avenue, S.E. (Square 1077, Lot 130).

HEARING DATE: April 30, 2013
DECISION DATE: May 21, 2013

DECISION AND ORDER

The applicant in this case is Penn Avenue Partnership LLC ("Applicant"). The Applicant filed an application with the Board of Zoning Adjustment ("Board") on February 12, 2013 regarding the development of a residential project located at 1550 Pennsylvania Avenue, S.E. (the "Property"). The Property is located in the C-2-A Zone District. The application sought variance relief under 11 DCMR § 3103.2 from § 2101 (§§ 2101.1 and 2115.2[1]) regarding the parking spaces provided in the project and variance relief from the Section 2201 (§ 2201.1) regarding the loading facilities provided in the project. The Applicant also requested special exception relief for the proposed roof structure, which was of varying height.

The Board held a public hearing on April 30, 2013. At a public meeting on May 21, 2013, the Board voted 5-0 to grant the application for the variance and special exception relief, subject to conditions.

FINDINGS OF FACT

Preliminary Matters

1. Applicant. The application was filed by Penn Avenue Partnership LLC on February 12, 2013. (Exhibits 1-8.)

2. Application. The application requested special exception relief pursuant to § 3104.1 from the roof structure requirements of 411.5, which is made applicable to properties in Commercial Zones by § 777.1; variance relief pursuant to § 3103.2 from the number and amount of required loading facilities (§ 2201.1); variance relief from the number of required parking

[1] The initial application also sought relief from § 2115.4, which requires that compact parking spaces be provided in groups of at least five contiguous spaces. In response to DDOT comments, the Applicant made modifications to the entrance to the parking garage and the layout of the parking garage which made relief from § 2115.4 no longer necessary.

spaces (§ 2101.1), and variance relief from the requirement that a garage consist of at least 25 parking spaces in order to provide compact parking spaces (§ 2115.2). (Exhibits 4, 8.)

3. Notice of Application and Notice of Public Hearing. By memoranda dated February 13, 2013, the Office of Zoning ("OZ") advised the D.C. Office of Planning ("OP"), the Zoning Administrator, the District of Columbia Department of Transportation ("DDOT"), the Councilmember for Ward 6, Advisory Neighborhood Commission ("ANC") 6B, the ANC within which the Property is situated, and the Single Member District Commissioner, ANC 6B09, of the application. (Exhibits 12-18.)

4. Pursuant to 11 DCMR § 3113.13, OZ mailed the Applicant, the owners of all property within 200 feet of the Property, and ANC 6B, notice of the April 30, 2013, hearing. Notice was also published in the *D.C. Register*. The Applicant's affidavits of posting and maintenance indicate that three zoning posters were posted beginning on April 11, 2013, in plain view of the public. (Exhibits 17-20, 23.)

5. Request for Party Status. ANC 6B was automatically a party in this proceeding. Mohamed R. Badissy, a resident of 821 Kentucky Avenue, S.E., attempted to file a party status request with the Board on April 14, 2013. However, this Party Status request was not properly filed with OZ and was not officially accepted by the Board until the date of the public hearing. At the public hearing, the Board granted party status to Mr. Badissy. (Exhibit 31.)

6. Motion for Request for Additional Relief. On April 26, 2013, Mr. Badissy filed a motion requesting that the Applicant include a request for a variance from the rear yard requirements of § 774. At the public hearing on April 30, 2013, the Board heard testimony from the Applicant as to why the project did not require rear yard relief, and the Applicant submitted a document detailing how the rear yard was properly calculated so that no relief was necessary. The Board agreed with the Applicant that rear yard relief was not needed. (Exhibits 28, 33.)

7. Applicant's Case. The Applicant presented testimony and evidence from Greg Selfridge, representative of the Applicant and Steve Dickens, an expert in architecture. Their relevant testimony is reflected in the Findings of Fact that follow.

8. Post-Hearing Submissions. At the conclusion of the public hearing, the Board requested that the Applicant submit additional information regarding the amount of the roof structure that is devoted to accessory rooftop use; information as to whether the Property is eligible for Residential Permit Parking ("RPP") privileges; and any revisions to the plans which were necessary to address DDOT's concerns with the project. The Applicant was required to file this information by May 7, 2013, and all parties and District agencies were permitted to provide responses by May 14, 2013. The Applicant submitted the requested information on May 7, 2013. (Exhibit 36.) DDOT submitted its supplemental report on May 14, 2013. On May 13, 2013, Mr. Badissy submitted a motion to extend the period of time in which to file his comments on the post-hearing submissions. On May 21, 2013, Mr. Badissy filed a post-hearing submission which responded to the Applicant's May 7, 2013 submission. Mr.

Badissy's May 21, 2013 submission reiterated the arguments that he made at the public hearing, the principal arguments being that the Applicant had failed to satisfy the exceptional condition and practical difficulty standards of the variance test regarding the number of parking spaces provided in the Project. Mr. Badissy's May 21, 2103 submission noted that if the BZA does decide to grant the variance, it should only do so in return for withholding RPP rights from future tenants of the project.

9. ANC 6B. On April 9, 2013, at a properly noticed public meeting, ANC 6B voted 9-0 to support of the application. The ANC submitted a letter dated April 16, 2013, along with a Memorandum of Understanding signed by the Applicant and neighboring property owners most affected by the project, memorializing its support and noting that the proposed project's impact on light, air, and privacy will be negligible. (Exhibit 26.)

10. Organization and Persons in Support of Application. The Capitol Hill Restoration Society Zoning Committee ("Committee") submitted a letter, dated April 29, 2013, into the record supporting the application. The Committee determined that the Applicant complied with the test for variance relief and voted unanimously to support the requested variances. The Committee also found that the building will not affect the light and air or privacy and use and enjoyment of neighboring properties. The Committee voted unanimously to support the application. Shannon Welch, who lives at 829 Kentucky Avenue, S.E., testified in support of the application at the public hearing. Ms. Welch noted the Applicant's willingness to work with her and her neighbors to address their concerns. (Exhibit 29; Tr. of April 30, 2013 public hearing, p. 94-96.)

11. Party in Opposition to the Application. Mohamed R. Badissy filed a request for party status in opposition to the application and was granted Party Status at the Public Hearing on April 30, 2013. In written materials and in testimony at the public hearing, Mr. Badissy stated that the Applicant failed to satisfy the relevant variance standards, including a showing of exceptionality and practical difficulty. Mr. Badissy also testified as to the appropriateness and necessity of the BZA imposing RPP restrictions on the future tenants of the building. (Exhibit 31; Tr. p. 97-102.)

12. Person in Opposition to the Application. The Board received a letter from Sid Iyer, a resident of 807 Kentucky Avenue, S.E., which noted his objection to the request for relief from the off-street parking requirements. Mr. Iyer stated that there is a significant shortage of off-street parking spaces along Kentucky Avenue. Mr. Iyer did not present any testimony at the public hearing. (Exhibit 21.)

The Subject Property and the Surrounding Area

13. The Property is located in the C-2-A Zone District in Ward 6. The Property is irregularly shaped and has frontage along Pennsylvania Avenue, S.E., Kentucky Avenue, S.E., and Barney Circle. The grade of the Property drops off north to south and west to east. The west

end of the Property is approximately six feet higher than the east end of the Property. (Exhibit 4.)

14. A 10-foot wide alley (known as "Freedom Way") borders the Property to the north. The Property is the last property before Pennsylvania Avenue enters Barney Circle and crosses over the Anacostia River on the John Phillip Sousa Bridge, or conversely, the first property that one passes along Pennsylvania Avenue after crossing the bridge, as one heads towards the Capitol Hill neighborhood and Downtown. The Property is located approximately two blocks from the Potomac Avenue Metro Station. Three-story row dwellings are found adjacent to the property on Pennsylvania Avenue and 2½-story row dwellings are found along Kentucky Avenue, S.E. across the alley from the Property. (Exhibit 4.)

The Applicant's Proposed Project

15. The Applicant is proposing to redevelop the site with a five-story residential building ("Project"). The Project will be 50 feet tall with a floor area ratio of 3.0, and a lot occupancy of 72.6%. The design of the building effectively utilizes the change in grade of the Property as well as the irregularly shaped lot to create an attractive residential structure that will serve as a distinctive architectural marker at this key intersection. Freedom Way is currently only 10 feet wide and includes a sharp turn at the southern end, adjacent to the Property, which is difficult for vehicles to navigate. Residents of the neighborhood told the Applicant that people frequently head the wrong way (northbound) on Freedom Way in order to avoid this sharp turn. At the request of DDOT and the community, the building was pulled back from the lot lines along Freedom Way in order to allow for improved vehicular travel movements along Freedom Way. (Exhibits 4, 24, 36.)

16. The parking spaces provided in the Project are located at-grade along Freedom Way in the rear of the building, and in one below-grade level of parking. Access to the below-grade parking level in the building was originally proposed from the Kentucky Avenue right-of-way adjacent to the alley. In response to issues raised by DDOT, the Applicant pushed the entrance to the parking garage further back into the site, so that the entrance was solely from Freedom Way.

17. The application sought a variance of 11 parking spaces, based on the ultimate range of residential units included in the Project, and the ability to provide compact parking spaces in a parking garage with less than 25 parking spaces. The Applicant submitted a Comprehensive Transportation Review ("CTR") which addressed the expected parking demand for the Project and the impacts that this Project will have on the surrounding streets and community. The CTR concluded that "the proposed development is expected to generate little parking demand, based on land use, development density, transit availability and convenience, bicycle and pedestrian facility availability, and resident demographics." The CTR also noted that "additional parking spaces are available on the street within a very short walk of the proposed development and thus should additional parked vehicles be generated

by this development, there appears to be adequate on-street capacity to handle a modest increase." (Exhibits 24, 36.)

18. The Applicant proposed a Transportation Demand Management plan ("TDM") that included the following elements:

- The Applicant will provide to each residential lessee or purchaser, either: (i) a SmarTrip card with a value of $75; or (ii) a first year membership to Capital Bikeshare or a car sharing service (valued at $75);

- The Applicant will coordinate with a car sharing service to determine the feasibility of locating a car sharing vehicle in the adjacent public space. The final determination on whether and how many car sharing vehicles will be located in the adjacent public space will be made by the car sharing service and DDOT;

- Bicycle parking (28 bike parking spaces with inverted U racks) will be provided on-site. Bicycle parking for the residents will be provided on the ground floor or in the garage;

- The Applicant will unbundle all costs related to the parking spaces from the sales price or lease amount of each residential unit;

- The Applicant will designate a Loading Coordinator for the site to coordinate residential move-in/move-out. All residents shall be required to notify the Loading Coordinator of move-in/move-out dates;

- No truck idling will be permitted;

- The property website will include links to CommuterConnections.com and goDCgo.com;

- The building will manage parking to reflect the urban nature of the District of Columbia, with parking located on the alley and in an underground facility accessible off the alley; and

- During construction, the Applicant will maintain or coordinate relocation of any existing bus stops.

(Exhibit 36.)

19. The Applicant agreed to limit the number of RPP permits that the Project will be eligible to receive. The Applicant noted that since it was seeking a 25% reduction of the required number of parking spaces in the Project, it would work with DDOT to establish a program where DDOT will limit the number of RPP permits that it issues for the Project, by 25% or, if necessary, include a prohibition from obtaining such permits in 25% of its residential lease agreements.

20. The Project requires relief from the requirement to provide a 55-foot loading berth. The Applicant noted that given the size of the proposed residential units, it is unlikely that residents of the Project will be utilizing trucks that require a 55-foot loading berth. In addition, during the negotiation of the TDM with the adjacent neighbors, the Applicant consistently heard of the adjacent neighbor's desire to remove truck traffic from Freedom Way, given its narrow width and sharp turn at the southern end. Initially, the Project included a 30-foot loading berth and associated 100 square foot loading platform and a 20-foot service and delivery space. In response to comments received from DDOT and the Board, the Applicant made revisions to the plans which removed the proposed 30-foot loading berth. The Applicant noted that the removal of the 30-foot loading berth will not adversely impact any adjacent properties since this project does not include any retail uses, the loading demand will be predominantly related to residential move-ins/outs which will be monitored by the Loading Coordinator. The Applicant discussed the proposed removal of the 30-foot loading berth with the community representatives that signed the ANC sponsored MOU. Those community representatives support the proposed removal of the loading berth, as it is consistent with their desire to minimize the total number of trucks that utilize Freedom Way. The final plans for the Project submitted by the Applicant provide a 20-foot service and delivery space. (Exhibits 4, 24, 36.)

21. The Project includes a mechanical penthouse for the elevator overrun that is 18 feet, six inches in height. This height is also applied to other portions of the roof structure in order to provide space for taller mechanical equipment (freeing roof space below for vegetated green roofs and common roof decks). The remainder of the roof structure, at the northwest and southeast ends, is only 13 feet tall. In a post-hearing submission, the Applicant provided information to the Board which showed that the area of the vegetated green roof was maximized to help satisfy the project's requirements for stormwater retention and treatment and the accessory roof space in the roof structure is 20% of the area of the outdoor roof deck. (Exhibits 4, 24, 36.)

Special Exception Relief – Roof Structure

22. In this case, the Applicant seeks relief pursuant to § 411.11, from § 411.5, which applies to Commercial Zones by virtue of § 777.1. Subsection 411.5 requires penthouses to consist of a uniform height.

23. The Applicant is providing a shorter roof structure (only 13 feet tall) at the northwest and southeast ends of the building, in order to allow the roof structure height to step down in the direction of the lower-scaled row dwellings across the alley and across Kentucky Avenue. The step-down sculpts the massing of the roof structure and reduces its visual impact. Though the Zoning Regulations require a penthouse to be of uniform height, the concurs with the Applicant that the intent of the Zoning Regulations, which is to reduce impacts of development on neighboring property, is better achieved by providing varying heights for the rooftop structure. Due to the siting of the building on the Property and the location and

height of the proposed penthouse structure, the roof structure will have a minimal effect, if any, on the light and air of neighboring properties. (Exhibit 4.)

Variance – Parking and Loading

24. The Property is subject to an exceptional condition because it is an irregularly shaped lot compounded by sloping topography, and the location of the street and alley frontages. These factors create challenges in designing an efficient site plan for the building and the below-grade parking level. In addition, the Property is served by a rather narrow 10 foot alley, which limits the size of vehicles that can effectively and conveniently access the loading facilities provided in this project. (Exhibit 4.)

25. The layout of the Project is consistent with the Department of Transportation's policy of having all vehicles (passenger cars and delivery trucks) access the Property from an alley rather than curb cuts on Pennsylvania Avenue or Kentucky Avenue. Any large delivery trucks that need a 55 foot loading berth would face a series of very difficult and awkward turning movements in order to access the Property from the 10 foot alley. For these reasons, the Applicant is faced with a practical difficulty in satisfying the requirement to provide a 55 foot loading berth on the Property. (Exhibit 4.)

26. The Project will include one level of below-grade parking and will also provide parking spaces in the rear of the building adjacent to the alley at-grade. The Applicant is requesting relief of 11 parking spaces and the ability to provide compact parking spaces in a garage with less than 25 parking spaces. (Exhibits 4, 24.)

27. The efficiency of the proposed parking garage level suffers from several site-related factors. The driveway ramp, for example, comes off the alley as required by DDOT policy. However, since the alley is at the higher end of the site, the driveway ramp must be longer than if the entrance were elsewhere on the site. The dimensions of the lot are somewhat small relative to the required widths and lengths of ramps, aisles and parking spaces. The provision of compact spaces in the parking garage provides some alleviation from these factors, but the site dimensions combined with the irregular shape of the lot create a very inefficient below-grade parking garage. Thus, in order to satisfy the Zoning Regulations' requirement to provide 42 parking spaces for this project, it would be necessary to add a second level of below-grade parking or to expand the parking garage area into the eastern portion of the English Basement level. (Exhibit 24.)

28. Expansion into the eastern portion of the English Basement level, although possible, would be very inefficient. The odd shape of the lot and the need to design around core elements (such as the elevator, stairs, trash chute, etc.) results in the creation of very few spaces in a large area. The elevator, for example, needs to be more or less in the center of this space in order to comply with the 1:1 setback at the roof level. This largely eliminates the possibility of an efficient double-loaded parking arrangement. Egress stairs could shift to locations different than at upper levels—indeed in larger buildings this is common—but in this small

floor plate, it would offset a disproportionate amount of usable space. Also of note is the community approval of English Basement residential units in this area, noting that such dwellings are common in the neighborhood and provide additional "eyes on the street" at the ground level. (Exhibit 24.)

29. A second level of parking in this project is even more inefficient than the first level of parking with all of the constraints noted above. The slope of the ramp heading down to a second level would be significant and would reduce the number of parking spaces on the first level. In addition, the eastern end of the property has a relatively high water table and the elevator core is located in the middle of English basement level which further limits the number of potential parking spaces on that level. (Exhibit 24.)

30. Providing a second level of parking is also extremely expensive given the vertical sheeting and shoring required along the alley and extensive waterproofing that would be necessary. This significant cost of creating a second level of parking ultimately puts the financial viability of this project in jeopardy.

31. The request for parking relief will not have an adverse effect on neighboring properties. The Board agrees with the conclusion reached in the CTR prepared by the Applicant's traffic engineer that "the proposed development is expected to generate little parking demand, based on land use, development density, transit availability and convenience, bicycle and pedestrian facility availability, and resident demographics." In addition, the Applicant's provision of 28 bicycle parking spaces on the Property and the implementation of the TDM (with the restriction on RPP permits) satisfies the test that granting the relief will not impair the intent, purpose, and integrity of the Zone Plan.

Office of Planning (OP) Report

32. By a report dated April 23, 2013, supplemented by testimony at the public hearing, OP recommended approval of the special exception and variance relief requested in the application. OP noted that the Property is irregularly shaped and sloped, the proposed site access is consistent with DDOT's policy which requires access from an alley rather than via curb cuts on Pennsylvania Avenue or Kentucky Avenue, and the Property is constrained by the narrow width of the alley. OP concluded that these factors impact the site design and create a practical difficulty for the Applicant. (Exhibit 25.)

33. In regard to the request for relief from the number of required parking spaces, OP noted that the "site's sloping topography, combined with the requirement to access the garage ramp from the alley (the higher end of the site), results in a longer driveway ramp than would otherwise be necessary." OP also noted that a second level of parking would be necessary to meet the minimum parking requirement which would be very inefficient. OP concluded that "the irregular shape of the lot, combined with the location of the Building's core elements, precludes the Applicant from efficiently expanding the underground parking into the eastern portion of the English Basement level." The OP Report noted that the Applicant worked

with the surrounding community and the ANC 6B representative to create the TDM, that the Property is served by public transportation, including the Potomac Avenue Metro Station (two blocks away), and that alternative means of transportation such as bike, bus and Metrorail should mitigate the impact of the proposed reduction in the number of parking spaces. Thus, OP concluded that relief from the number of parking spaces provided in the Project would not result in a detriment to the public good and that no substantial harm to the Zoning Regulations would result from the reduction in parking. (Exhibit 25.)

34. In regard to the request to provide compact parking spaces in a garage with less than 25 parking spaces, OP noted that the small size of the site creates a practical difficulty relative to the required widths and lengths of ramps, aisles, and parking spaces, thereby reducing the area that would normally be devoted to 9' X 19' parking spaces. Given the size of the lot, the Applicant would encounter practical difficulties if required to comply with the minimum parking space dimensions. OP noted that providing compact parking spaces would increase the efficiency of on-site parking and allow the development to provide on-site parking in a manner that would not negatively impact the use of adjacent properties. OP concluded that this proposed area of relief should not result in a substantial harm to the Zoning Regulations. (Exhibit 25.)

35. In regard to the request for loading relief, OP noted that the width of the alley limits the size of vehicles that could access the alley. OP supported the Applicant's revisions to the design of the building which would improve navigation for vehicles travelling eastbound. OP concluded that granting the relief would not cause substantial detriment to the public good, as the TDM included requirements for a Loading Coordinator and all tenants would be required to notify the Loading Coordinator of move-in/move-out dates. (Exhibit 25.)

36. OP also concluded that the roof structure relief was consistent with the Zoning Regulations and Zoning Maps and that the proposal would not tend to adversely affect the use of neighboring properties. Specifically, OP noted that the requirement to provide a roof structure of a single height would increase the visibility of the roof structure, as it would be significantly larger and taller than what is proposed. OP also noted that the roof structure is sufficiently set back from the street frontages, reducing their visibility from the street level. OP concluded that the location and design of the rooftop structure should minimize its visual impact. (Exhibit 25.)

Department of Transportation Report

37. DDOT, by its report dated April 23, 2013, noted that it had no objection to the variance requests from parking or loading. The DDOT Report included the following findings: (i) the project will generate minimal new vehicle trips; (ii) curbside parking in the vicinity has excess capacity; (iii) the site has excellent access to alternative transportation modes, including walking, biking and transit; (iv) future residents are likely to heavily utilize non-automobile modes of travel; and (v) long-term bike parking spaces may not be adequate. (Exhibit 27.)

38. The April 23, 2013 DDOT report noted four conditions of approval: (i) the Applicant should redesign the parking garage access such that public space on Kentucky Avenue is not utilized; (ii) the Applicant should demonstrate that the loading berth adequately accommodates a regulation 30 foot truck; (iii) the Applicant should increase the number of bicycle parking spaces from 28 to at least 41 to reflect a ratio of one long-term bike parking space for every two units, and to provide four inverted U-racks for short term public bike parking on the sidewalk in a location approved by DDOT; and (iv) as part of the TDM plan, the Applicant should offer a financial incentive to all new tenants instead of the initial occupants and limit the incentive to Capital Bikeshare membership or a subsidy to a car sharing service. (Exhibit 27.)

39. The Applicant's May 7, 2013 submission included a redesigned garage access point which removed the access point from the Kentucky Avenue public space and also removed the proposed 30 foot loading berth. The Applicant did not increase the number of bicycle parking spaces in the Project. The Applicant did modify its TDM to offer a financial incentive to all new tenants of the building, but did not limit that financial incentive to just Bikeshare and car sharing memberships. (Exhibit 36.)

40. In a report dated May 14, 2013, DDOT noted that the revised design for the garage access does not impact public space and that the revised design sufficiently addresses DDOT's concerns. The DDOT report also noted that the proposed design eliminates all off-street loading. The DDOT report concluded "Due to the limited loading needs of the site, the availability of curbside parking in the adjacent area, and the designation of a Loading Coordinator as part of the Applicant's Transportation Demand Management plan, DDOT has no objection to the Applicant's request for relief from on-site loading requirements."

CONCLUSIONS OF LAW AND OPINION

Special Exception Relief

The Board is authorized to grant a special exception where, in its judgment, the special exception will be "in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely, the use of neighboring property." (11 DCMR § 3104.1.) Certain special exceptions must also meet the conditions enumerated in the particular sections pertaining to them.

Subsection 777.1 applies the roof structure requirement of § 411 to Commercial Zones. The Applicant seeks relief from § 411.5, which requires the closing walls of penthouses to be of equal height.

Subsection 411.11 of the Zoning Regulations provides in part that

> Where impracticable because of operating difficulties, size of building lot, or other conditions relating to the building or surrounding area that would tend to

> make full compliance unduly restrictive, prohibitively costly, or unreasonable, the Board of Zoning Adjustment shall be empowered to approve, as a special exception under Section 3104, the location, design, number, and all other aspects of such structure, even if such structures do not meet the normal setback requirements…; provided, that the intent and purpose of this chapter and this title shall not be materially impaired by the structure, and the light and air of adjacent buildings shall not be affected adversely.

(11 DCMR § 411.11.)

The Applicant is providing a shorter roof structure at the northwest and southeast ends of the building, in order to allow the roof structure height to step down in the direction of the lower-scaled row dwellings across the alley and across Kentucky Avenue. The step-down sculpts the massing of the roof structure and reduces its visual impact. Though the Zoning Regulations require a penthouse to be of equal height, the Commission finds that the intent of the Zoning Regulations, which is to reduce impacts of development on neighboring property, is better achieved by providing varying heights for the rooftop structure.

The Board finds that the requested roof structure relief will not adversely affect, or be objectionable to, the surrounding properties. Portions of the elevator penthouse are 18 feet six inches tall and portions are 13 feet tall. In order to mitigate the appearance of the roof structure, the Applicant is reducing the height of a portion of the roof structure to 13 feet. The size of the roof structure is also appropriate for the accessible roof area. The roof plan and roof structure proposed in this Project minimizes both the height and bulk of the roof structures which serves as a positive feature for neighboring properties.

Variance Relief

The Applicant also seeks variances under 11 DCMR § 3103.1 from the number and amount of required loading facilities (§ 2201.1); the number of required parking spaces (§ 2101.1), and the prohibition against the use of compact car spaces in a garage with less than 25 parking spaces (§ 2115.2). The Board is authorized to grant variances from the strict application of the Zoning Regulations where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property … or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of the Zoning Regulations would "result in particular and exceptional practical difficulties to or exceptional or undue hardship upon the owner of the property…." (D.C. Official Code § 6-641.07(g) (3) (2001, 11 DCMR § 3103.2.) Relief can be granted only "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map." (D.C. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2.)

As noted in § 3103.7:

The standard for granting a variance, as stated in § 3103.2 differs with respect to use and area

variances as follows:

> (a) An applicant for an area variance must prove that as a result of the attributes of a specific piece of property described in § 3103.2, the strict application of a zoning regulation would result in peculiar and exceptional practical difficulties to the owner of property; and
>
> (b) An applicant for a use variance must prove that as a result of the attributes of a specific piece of property described in § 3103.2, the strict application of a zoning regulation would result in exceptional and undue hardship upon the owner of the property.

The Applicant seeks area variances because it request permission "to deviate from … [m]inimum parking or loading requirements to an extent greater than what may be permitted by special exception." (11 DCMR § 3103.5 (b).) The application has satisfied each element for the variances sought.

As to the request for a variance from the requirement to provide a 55-foot loading berth, the Board finds that this property is irregularly shaped, has a sloping topography and is bound by three streets and a narrow ten foot alley. The shape and slope of the lot creates challenges in designing an efficient floor plan complete with a 55-foot loading berth. The narrow width of the alley and the one-way configuration of Kentucky Avenue make it impossible for trucks that would require a 55-foot loading berth to be able to access such a berth on the Property from Freedom Way.

The absence of a 55-foot loading berth will neither cause substantial detriment to the public good, nor substantially harm the Zone Plan. The Board notes the Applicant's written and oral testimony that the surrounding community in fact wants to reduce the use of Freedom Way for trucks and loading of any kind. In addition, the Applicant has proposed conditions in its TDM which deal with how move-in/move-outs will occur and that no truck idling will be permitted.

As to the request to reduce its parking requirement by 11 spaces, the Board concludes that the Applicant is faced with a practical difficulty in providing the required number of parking spaces due to the irregularly shaped, sloped property, bound by a narrow alley which creates an inefficient parking layout and would require a costly second level of below-grade parking.

Reducing the number of parking spaces will neither cause substantial detriment to the public good nor substantially harm the Zone Plan. The Board concurs with the conclusions of the Applicant's traffic engineer that the "proposed development is expected to generate little parking demand, based on land use, development density, transit availability and convenience, bicycle and pedestrian facility availability, and resident demographics." The Board also agrees with the Applicant's traffic engineer that "additional parking spaces are available on the street within a very short walk of the proposed development and thus should additional parked vehicles be generated by this development, there appears to be adequate on-street capacity to handle a

modest increase." The Applicant has proffered a TDM plan which will help mitigate any potential adverse impacts that may arise as a result of granting the requested parking relief. In addition, the Board notes the Applicant's commitment to reduce, by 25%, the number of RPP permits that Project residents would ordinarily be eligible to receive. This is roughly equivalent to the reduction in parking granted and satisfies the condition of approval sought by the party in opposition.

Finally, the Board also finds that the Applicant met the variance test with respect to its request to provide compact parking spaces in a parking garage of less than 25 parking spaces. The Applicant has already demonstrated the exception conditions that make it practically difficult for it to provide the full number or parking spaces required and without this relief a further reduction would likely be needed. The Board agrees with the conclusions of the Office of Planning that providing compact parking spaces in this Project would increase the efficiency of on-site parking and will allow the Project to provide on-site parking in a manner that would not negatively impact the use of adjacent properties. Therefore this will not cause substantial detriment to the public good nor substantially harms the Zone Plan.

Great Weight

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations of the Office of Planning. D.C. Official Code §§ 1- 309.10(d) and 6-623.04 (2001).) Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive. Both ANC 6B and the OP recommended approval of the Applicant's special exception and variance requests. The Board agrees with the ANC's and OP's recommendation of approval.

For the reasons stated above, the Board concludes that the Applicant has met its burden of proof with respect to an application for variance and special exception relief pursuant to §§ 3103, 411.11 and 3104, from the provisions of 411.5, 777, 2101 (2101.1 and 2115.2), and 2201 (2201.1) to construct a residential building on the Property. **THEREFORE**, it is hereby **ORDERED** that the application is **GRANTED, SUBJECT** to the **CONDITIONS** below. For the purposes of these conditions the term "Applicant" means the person or entity then holding title to the Subject Property. If there is more than one owner, the obligations under the order shall be joint and several. If a person or entity no longer holds title to the Subject Property, that party shall have no further obligations under the order; however, that party remains liable for any violation of any condition that occurred while an owner. The **CONDITIONS** are as follows:

1. Development of the Project shall be in accordance with the plans submitted as Exhibit 36 of the record.

2. Each residential lessee or purchaser shall be provided either: (i) a SmarTrip card with a value of $75; or (ii) a first year membership to Capital Bikeshare or a car sharing service (valued at $75).

3. All costs related to the parking spaces shall be unbundled from the sales price or lease amount of each residential unit.

4. The Applicant shall designate a Transportation Management Coordinator who will expand internal marketing efforts for alternative transportation. The property website will include links to CommuterConnections.com and goDCgo.com. A Loading Coordinator will be designated to coordinate residential move-in/move-out, and residents shall be required to notify the Loading Coordinator of upcoming residential moves.

5. The Applicant shall coordinate with a car sharing service to determine the feasibility of locating a car sharing vehicle in the adjacent public space. The final determination on whether and how many car sharing vehicles will be located in the adjacent public space will be made by the car sharing service and DDOT.

6. There shall be at least 28 bike parking spaces in the Project and four inverted U-racks for short term bike parking on the adjacent sidewalk will be provided. Bicycle parking for the residents shall be provided on the ground floor or in the garage.

7. No truck idling shall be permitted.

8. During construction, the Applicant shall maintain or coordinate relocation of any existing bus stops.

9. The Applicant shall restrict residential parking permits to 25% less than what the building is eligible for by working with the Department of Transportation and, if necessary, provide in 25% of the residential lease agreements that the tenant may not apply for a permit.

VOTE: **4-0-1** (Lloyd J. Jordan, Jeffery L. Hinkle, S. Kathryn Allen, and Peter G. May to Approve; one Board seat vacant.)

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

FINAL DATE OF ORDER: November 20, 2013

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE

BZA APPLICATION NO. 18544
PAGE NO. 15

WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 18657 of 903 Florida Ave NE LLC et al, pursuant to 11 DCMR § 3103.2, for a variance from the lot area requirements under section 401, and a variance from the off-street parking requirements under subsection 2101.1, to allow the subdivision and construction of two flats in the R-4 District at premises 903, 905 and 907 Florida Avenue, N.E. (Square 931N, Lots 802, 804, and 803).

HEARING DATE: November 19, 2013
DECISION DATE: November 19, 2013

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board of Zoning Adjustment ("Board") provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register*, and by mail to Advisory Neighborhood Commission ("ANC") 6A and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6A, which is automatically a party to this application. The ANC submitted a letter in support of the application. The Office of Planning ("OP") submitted a report in support of the application. The Department of Transportation had no objection to the application.

Variance

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case, pursuant to § 3103.2, for a variance from §§ 401 and 2101.1. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports filed in this case, the Board concludes that in seeking a variance from §§ 401 and 2101.1, the applicant has met the burden of proving under 11 DCMR § 3103.2, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions

of law. It is therefore **ORDERED** that this application is (pursuant to Exhibit 9 – Plans) hereby **GRANTED.**

VOTE: **3-0-2** (Lloyd J. Jordan, S. Kathryn Allen and Robert E. Miller to APPROVE. The NCPC member necessarily absent and the third Mayoral member seat vacant.)

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

FINAL DATE OF ORDER: November 19, 2013

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 18662 of Douglas Memorial Methodist Church, pursuant to 11 DCMR § 3103.2, for a variance from the off-street parking requirements under § 2101.1, to allow the partial use of a church building by a child development center in the HS-R/C-2-A District at premises 800 11th Street, N.E. (Square 958, Lot 800).

HEARING DATE: November 19, 2013
DECISION DATE: November 19, 2013

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR §3113.2.

The Board of Zoning Adjustment ("Board") provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register*, and by mail to Advisory Neighborhood Commission ("ANC") 6A and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6A, which is automatically a party to this application. The ANC submitted a letter in support of the application. The Office of Planning ("OP") submitted a report in support of the application. The Department of Transportation submitted a report of no objection to the application.

As directed by 11 DCMR §3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case, pursuant to §3103.2, for a variance from § 2101.1. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports filed in this case, the Board concludes that in seeking a variance from § 2101.1, the applicant has met the burden of proving under 11 DCMR §3103.2, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

Pursuant to 11 DCMR §3100.5, the Board has determined to waive the requirement of 11 DCMR §3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application is hereby **GRANTED.**

VOTE: 3-**0-2** (Lloyd J. Jordan, S. Kathryn Allen, and Robert E. Miller to Approve; Jeffrey L. Hinkle not present, not voting; one Board seat vacant.)

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

FINAL DATE OF ORDER: November 21, 2013

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 18670 of Robert Rubin, pursuant to 11 DCMR § 3104.1, for a special exception for a rear addition to a one-family detached dwelling under section 223, not meeting the rear yard (section 404) requirements in the R-1-B District at premises 3704 Military Road, N.W. (Square 1873, Lot 41).

DECISION DATE: November 19, 2013 (Expedited Calendar)

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

Pursuant to 11 DCMR § 3181 this application was tentatively placed on the Board's expedited calendar for decision without hearing as a result of the applicant's waiver of their right to a hearing.

The Board provided proper and timely notice of the decision meeting for this application together with the information required by 11 DCMR § 3118.5 by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission (ANC) 3G and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 3G, which is automatically a party to this application. ANC 3G submitted a letter in support of the application. The Office of Planning (OP) submitted a report in support of the application. The Department of Transportation submitted a report of no objection to the application. The Board received several letters in support of the application.

No objections to expedited calendar consideration were made by any person or entity entitled to do by §§ 2118.6 and 2118.7 and no requests for party status were received. The matter was therefore called on the Board's expedited calendar for the date referenced above and the Board voted to grant the application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for special exception under section 223. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1 and 223, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes

that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application (pursuant to Exhibit 4 – Plat and Exhibit 12 – Elevation Plan) be **GRANTED.**

VOTE: **3-0-2** (Lloyd J. Jordan, S. Kathryn Allen and Robert E. Miller to APPROVE. The NCPC member necessarily absent and the third Mayoral member seat vacant.)

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

FINAL DATE OF ORDER: November 19, 2013

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

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.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 12-02
Z.C. Case No. 12-02
Bush at 50 Florida Avenue Associates, LLLP and B&B 50 Florida Avenue, LLC
(Consolidated PUD & Related Map Amendment @ Square 3516)
October 21, 2013

Pursuant to notice, the Zoning Commission for the District of Columbia (the "Commission") held a public hearing on July 11, 2013 to consider applications from Bush at 50 Florida Avenue Associates, LLLP and B&B 50 Florida Avenue, LLC (collectively the "Applicant"), for review and approval of a consolidated planned unit development ("PUD") and related map amendment to rezone Lots 134 and 819 in Square 3516 (the "PUD Site") from the C-2-A and C-M-2 Zone Districts to the C-3-B Zone District. The Commission considered the applications pursuant to Chapters 24 and 30 of the District of Columbia Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations ("DCMR"). The public hearing was conducted in accordance with the provisions of 11 DCMR § 3022. For the reasons stated below, the Commission hereby approves the applications.

FINDINGS OF FACT

The Application, Parties, and Hearing

1. On February 23, 2012, the Applicant filed applications and supporting materials with the Commission requesting approval of a consolidated PUD for the PUD Site, and a map amendment to rezone the PUD Site from the C-2-A and C-M-2 Zone Districts to the C-3-B Zone District. (Exhibits ["Ex."] 2-4.)

2. On June 4, 2012, the Applicant submitted a revised set of Architectural Plans and Elevations that replaced the plans included with the initial PUD application materials filed on February 23, 2012. (Ex. 11-12.)

3. By report dated June 15, 2012, the Office of Planning ("OP") recommended that the Commission schedule a public hearing on the applications. (Ex. 13.)

4. On June 25, 2012, the Commission voted to set down the applications for a public hearing.

5. On April 22, 2013, the Applicant submitted a Prehearing Statement. (Ex. 14-17.) The Prehearing Statement included the information required pursuant to § 3013 of the Zoning Regulations, revised Architectural Plans and Elevations, and a proposed construction management plan.

6. D.C. Water submitted a letter dated June 12, 2013 indicating that the water and sewer demands for the proposed building will likely be similar to the existing water and sewer demands of the buildings adjacent to and in the vicinity of the project site. (Ex. 24.) The letter also indicated that there is existing public water and sewer infrastructure located

within 250 feet of the PUD Site; therefore, the public water and sewer infrastructure is considered available per DCMR Title 12. The letter notes that a final determination of the existing public system's ability to support the proposed project will be made during the permitting process.

7. On June 21, 2013, the Applicant submitted a Supplemental Prehearing Statement. (Ex. 25.) The Supplemental Prehearing Statement included supplemental architectural sheets; a Transportation Impact Assessment prepared by O.R. George & Associates, Inc. and submitted to the D.C. Department of Transportation; a table demonstrating that the project's proposed parking ratio is consistent with the parking ratio of other recent condominium projects; a letter from McWilliams|Ballard, a well-known and reputable condominium marketing firm based in the Washington Metropolitan area, describing the need for the project's proposed parking ratio; a revised construction management plan addressing comments from property owners near the PUD Site; and a chart summarizing the proposed public benefits and amenities associated with the project, and the estimated value of each amenity where quantifiable.

8. On June 27, 2013, the Commission received a timely party status request in opposition from Kimberly Konkel on behalf of several property owners in the vicinity of the PUD Site and herself ("Party Opponents"). (Ex. 26.) The Commission granted party status to the Party Opponents. (7/11/13 Transcript ["Tr."], pp. 16-17.)

9. On July 3, 2013, the Applicant submitted additional witness resumes. (Ex. 28.)

10. David Soo and JC Calam, who reside at 33 Q Street, N.E., submitted a letter dated July 9, 2013 in opposition to the applications. (Ex. 30.)

11. The Eckington Civic Association ("ECA") submitted a letter, dated July 2, 2013, in support of the project. (Ex. 32.) ECA indicated that the Applicant presented the project to the community and the civic association a number of times during the past three years, including in 2011, on June 3, 2013, and on July 1, 2013. ECA indicated that each of these meetings have been well-attended by members of the community, and that the Applicant responded in great detail to the concerns raised by a number of citizens regarding shadows, building setbacks and privacy, truck and vehicle traffic, and construction issues. ECA also indicated that it believes the project will result in a number of benefits to the District of Columbia and the Eckington neighborhood, including replacing an industrial warehouse building with a well-designed building and additional density which will support the desire for additional retail. The letter concludes by stating that overall, the majority of the membership of ECA voted to support the project on July 1, 2013, and therefore ECA recommended that the Commission approve the application.

12. Advisory Neighborhood Commission ("ANC") 5E submitted a resolution in support of the project. (Ex. 33.) ANC 5E indicated that the Applicant and its representatives

attended the ANC's June 18, 2013 regularly scheduled public meeting, at which notice was properly given and a quorum was present, and over the course of nearly two years, the development team attended Single Member District ("SMD") community meetings, meetings with the Eckington Civic Association, and meetings with the SMD Commissioner. ANC 5E indicated that the Applicant presented a detailed analysis of the project, discussed the requested zoning relief and proffered public benefits and amenities, and responded to all the questions raised by the Commissioners and the community. ANC 5E noted that the Applicant's proposal to provide a below-grade garage for 210 vehicles will help to eliminate the potential demand for parking on adjacent residential streets, and ANC 5E found that the project includes substantial public benefits and amenities. ANC 5E indicated that its support of the project would be contingent upon the vote of ECA, and the resolution indicates that on July 1, 2013, the membership of ECA voted to support the project and proposed amenities. Thus, ANC 5E indicated that it also supports the project and believes that approval of the applications would not have any detriment to the general public good or on neighboring properties, but would rather be an improvement over the existing condition of the site, will help continue the positive development of the area, and will result in a number of important public benefits. ANC 5E therefore recommended that the Commission approve the applications.

13. After proper notice, the Commission held a public hearing on the applications on July 11, 2013.

14. The parties to the case were the Applicant, ANC 5E, and the Party Opponents.

15. OP testified in support of the project. The District Department of Transportation ("DDOT") submitted a report and testified in overall support of the project.

16. At the hearing, the Applicant submitted a copy of a report prepared by Mr. Steven E. Sher (Ex. 34), a brief in response to the issues raised by the Party Opponents (Ex. 35), the hearing PowerPoint presentation (Ex. 36), a materials board (Ex. 37), the resume of Jeffrey Richard of Wiles Mensch (Ex. 38), and a petition in support of the project signed by individuals in the vicinity of the PUD Site (Ex. 39).

17. Four principal witnesses testified on behalf of the Applicant at the public hearing, including Rick Brown, on behalf of B&B 50 Florida Avenue, LLC and Andrew A. Viola, on behalf of Bush at 50 Florida Avenue Associates, LLLP; George Dove on behalf of WDG Architecture, PLLC, as an expert in architecture; and Osborne R. George, P.E., PTOE, on behalf of O. R. George & Associates, Inc., as an expert in transportation planning and analysis. Based on their professional experience, as evidenced by the resumes submitted for the record, Mr. Dove and Mr. George were qualified by the Commission as experts in their respective fields.

18. A number of witnesses testified at the hearing on behalf of the Party Opponents. At the hearing, the Party Opponents submitted a constriction vibration noise study (Ex. 40), written testimony of Terrell McSweeny in opposition (Ex. 41), and a submittal regarding notice of an ANC 5E SMD meeting (Ex. 42).

19. On August 8, 2013, the Applicant submitted a Post-Hearing Submission. (Ex. 55.) The Post-Hearing Submission included Revised Architectural Plans and Elevations addressing the Commission's comments at the public hearing, a letter from 3D Structural Engineers, Inc. discussing the vibration impacts of the project, and the supplemental transportation slides presented by Mr. George at the public hearing.

20. On August 8, 2013, the Party Opponents submitted a letter. (Ex. 56.) The letter expressed disappointment with the outcome of the meeting the Party Opponents had with the Applicant held on July 22, 2013. The letter expressed the reasons for the Party Opponent's continued opposition to the project.

21. On August 15, 2013, the Applicant submitted a letter responding to the Party Opponent's August 8, 2013 letter. (Ex. 57.)

22. At its public meeting held on September 9, 2013, the Commission took proposed action to approve the applications and the plans that were submitted to the record.

23. On September 16, 2013, the Applicant submitted its list of final proffers and draft conditions, pursuant to 11 DCMR § 2403.15. (Ex. 59.)

24. On October 1, 2013, the Applicant submitted its list of proffers and draft conditions that it revised in light of comments received by the District of Columbia Office of the Attorney General. (Ex. 60.)

25. The application was referred to the National Capital Planning Commission ("NCPC") for review of any impacts on the federal interest under the Comprehensive Plan. By delegated action dated October 21, 2013, the Executive Director of NCPC found that the application was not inconsistent with the Federal Elements of the Comprehensive Plan for the National Capital. (Ex. 61.)

26. The Commission took final action to approve the applications on October 21, 2013.

The PUD Site and Proposed Development

27. The PUD Site has a combined land area of approximately 42,223 square feet and is located on the north side of Florida Avenue, N.E. with approximately 204.11 linear feet of frontage on Florida Avenue, N.E. The PUD Site is bounded by a 16-foot-wide public alley to the north, private property to the east, Florida Avenue, N.E. to the south, and

private property to the west. A 12-foot-wide public alley running north to south separates Lot 134 from Lot 819.

28. The PUD Site is split-zoned C-2-A (1,564 sq. ft. of land area) and C-M-2 (40,659 sq. ft. of land area). The C-M-2 portion of the site accounts for approximately 96% of the land area.

29. The District of Columbia Comprehensive Plan Future Land Use Map designates the PUD Site in the Mixed-Use, Medium-Density Commercial and Production, Distribution, and Repair ("PDR") land use categories. The District of Columbia Comprehensive Plan Generalized Policy Map designates the PUD Site as in a Main Street Mixed-Use Corridor.

30. Square 3516 is located in the northeast quadrant of the District and is generally bounded by Q Street, N.E. to the north, Eckington Place, N.E. to the east, Florida Avenue, N.E. to the south, and North Capitol Street, N.E. to the west.

31. The PUD Site is currently improved with a two-story warehouse and associated surface parking. The Applicant proposes to raze the existing building in connection with redevelopment of the PUD Site and to build a multiple-family dwelling building with ground-floor retail.

32. The Applicant proposes to rezone the entire site to C-3-B to facilitate the development of 196,029 square feet of residential use, 7,858 square feet of retail space, and associated parking in a below-grade garage for approximately 210 vehicles. The proposed development also includes approximately 1,384 square feet of plaza space adjacent to the westernmost retail space that can be utilized for an outdoor café area for the retailer. The residential use will be comprised of 182 residential units, including 16 units dedicated as affordable housing units. The project also includes 71 bicycle parking spaces (61 residential and 10 retail). The building will have varying heights and cornice lines, ranging from 60.75 feet at the northernmost portion of the PUD Site to a maximum height of 90 feet along the Florida Avenue frontage.

33. The total proposed density is 4.83 floor area ratio (“FAR”), which is less than the maximum permitted density of 6.0 FAR (utilizing IZ bonus density) in the C-3-B Zone District (11 DCMR §§ 771.2 and 2604.1) and is less than the maximum permitted density of 5.5 FAR under the C-3-B PUD requirements (11 DCMR § 2405.2). The net effect of the proposed rezoning is an increase in permitted density of 0.83 FAR and increases in permitted height of 10 feet for the middle portion of the building and 30 feet for the portion of the building fronting on Florida Avenue.

34. The proposed building is arranged around two court systems and a rear yard. The first court system opens to the southwest corner of the site and Florida Avenue. It includes a

public plaza at the ground level and a landscaped court with a two-level pool and communal recreation space at the second floor. The public plaza fronts Florida Avenue and has direct access to ground-floor retail spaces and to the residential building's main entrance. It is enhanced with planting beds and vertical planting screens that buffer the space from the alley and parking garage entrance. The court orientation capitalizes on mid-day and afternoon sunlight to improve the court areas, especially the second-level pool and communal space.

35. The second court system opens to the east interior lot line. The court facades and the adjacent lot line facades include corbeled masonry to provide architectural interest. The court space includes private terraces and landscaping and accommodates an existing five-foot fire egress easement that must be maintained for the adjacent property.

36. In deference to the scale of the existing row houses to the north of the PUD Site, the building mass steps down from 90 feet to 70 feet, then to 60 feet, and finally to a rear yard that, combined with the new alley dimension of 20 feet, buffers the row houses by 35 feet. The stepping down creates exterior spaces for green roofs and private residential terraces along the north edge of the PUD Site and coupled with the distance from the row houses facilitates the transmission of natural light to the row houses.

37. There is no public access to the main roof where a central mechanical system is employed to eliminate the need for a roof-top condenser unit for every residential unit. These design modifications create the opportunity to enhance the green roof area, eliminate concerns about noise and light pollution and eliminate the need for an additional, remote roof structure to house an exit stair.

38. Parking and loading access to the PUD Site is proposed via the adjacent public alley system to avoid the need for additional curb cuts along Florida Avenue. Parking and loading are accessed from the north-south alley. The loading area provides space for a 30-foot truck and a 20-foot service vehicle. The development provides for both the north-south and east-west portions of the public alley adjacent to the PUD Site to be widened to 20 feet. The development also provides protection of the row house immediately to the west of the PUD Site by eliminating the existing, adjoining parking lot and replacing it with an expanded alley right-of-way, sidewalk, plantings, and bollards.

Zoning Flexibility Requested

39. The Applicant requested flexibility from the roof structure requirements and the loading requirements of the Zoning Regulations.

40. **Roof Structure Setback.** The roof structure provisions of the Zoning Regulations require that all roof structures must be setback from all exterior walls a distance at least equal to their height above the roof. (§ 411.2 and § 770.6(b).) As shown on the roof plan included with the plans, the project includes one roof structure. The roof structure has a

height of 16 feet, and is thus required to be set back 16 feet from all exterior walls. The roof structure meets the setback requirements from all street frontages; however, flexibility is requested to allow a portion of the roof structure to be set back 10 feet and four inches in lieu of 16 feet from the edge of the roof adjacent to the internal courtyard. Although the roof structure requires setback relief along the edge of the internal courtyard, the structure meets the setback requirement from all street frontages. Moreover, the location of the roof structure is driven by the layout and design of the residential units within the building. In addition, the Applicant is providing the greatest setbacks possible given the size of the roof and the internal configuration of the proposed building. Thus, the Commission finds that the requested roof structure design will not adversely impact the light and air of adjacent buildings since the roof structure has been located to minimize its visibility. Therefore, the intent and purposes of the Zoning Regulations will not be materially impaired and the light and air of adjacent buildings will not be adversely affected.

41. **Loading**. The Applicant requested relief from the off-street loading requirements for the project. The loading requirements in § 2201.1 of the Zoning Regulations are based upon the proposed uses of the PUD Site. The project includes 7,858 square feet of retail use and 182 residential units, plus or minus 10%. Pursuant to § 2201.1 of the Zoning Regulations, an apartment house or multiple dwelling with 50 or more dwelling units is required to provide one loading berth at 55 feet deep, one loading platform at 200 square feet, and one service/delivery space at 20 feet deep. Loading facilities are not required for the retail use since it has less than 8,000 square feet of gross floor area. (§ 2201.1.) However, due to the anticipated needs of the residents' uses, the Applicant is seeking flexibility to provide one loading berth at 30 feet deep, in lieu of the required 55-foot loading berth, one loading platform at 200 square feet, and one service/delivery space at 20 feet deep. This requested flexibility is in accordance with the Comprehensive Plan's recommendations to consolidate loading areas within new developments and minimizing curb cuts on streets to the greatest extent possible, and to provide shared loading spaces in mixed-use buildings. Moreover, given the nature and size of the residential units, it is unlikely that the building will be served by 55-foot tractor-trailer trucks. In addition, the loading areas are likely to be used by the residents primarily when they move in or out of the building, and any subsequent use by residents will generally be infrequent since the building is anticipated to be condominiums and not rental units. Therefore, the Commission believes the requested flexibility will not have any adverse impacts.

Development Flexibility Requested

42. The Applicant has made every effort to provide a level of detail in the drawings that conveys the significance and appropriateness of the project's design for this location. Nonetheless, some flexibility is necessary that cannot be anticipated at this time. Thus, the Applicant also requests flexibility in the following areas:

a) To be able to provide a range in the number of residential units of plus or minus 10% from the 182 depicted on the plans;

b) To vary the location and design of all interior components, including partitions, structural slabs, doors, hallways, columns, stairways, and mechanical rooms, provided that the variations do not change the exterior configuration of the building;

c) To vary the number, location, and arrangement of parking spaces, provided that the total is not reduced below the number required under the Zoning Regulations;

d) To vary the sustainable design features of the building, provided the total number of LEED points achievable for the project is no fewer than the number of points required to be the equivalent of a Silver designation under the LEED 2009 for New Construction and Major Renovations rating standards;

e) To vary the final selection of the exterior materials within the color ranges and material types as proposed, based on availability at the time of construction without reducing the quality of the materials; and to make minor refinements to exterior details, locations, and dimensions, including window frames, doorways, glass types, belt courses, sills, bases, cornices, railings and trim; and any other changes to comply with all applicable District of Columbia laws and regulations that are otherwise necessary to obtain a final building permit; and

f) If the retail area is leased by a restaurant user, flexibility to vary the location and design of the ground-floor components of the building in order to comply with any applicable District of Columbia laws and regulations, including the D.C. Department of Health, that are otherwise necessary for licensing and operation of any restaurant use.

Public Benefits and Project Amenities

43. The Commission finds that the project incorporates a variety of public benefits and project amenities that include the following:

a) Housing and Affordable Housing (*11 DCMR § 2403.9(f)*) - Given that the majority of the PUD Site is currently zoned C-M-2, no new housing or affordable housing can be constructed on approximately 96% of the site. Thus, the Applicant's proposal to rezone the site will result in 196,029 square feet of new residential use, which is an amenity, including 16 new units devoted to affordable housing which is also an amenity;

b) Urban Design, Site Planning, and Comprehensive Plan Elements (11 DCMR § 2403.9(a), (b), and (j).) - Replacement of a warehouse building with surface parking in the front of the building along Florida Avenue with a new mixed-used development constructed to the property line with below-grade parking is consistent with many of the City's goals, including the following:

(i) Promoting transit-oriented and corridor development given the site's convenient walking distance to the New York Avenue Metro station and proximity to several major bus routes along Florida Avenue, N.E.;

(ii) Developing mixed residential and commercial uses rather than single purpose uses, particularly with a preference for housing above ground-floor retail uses;

(iii) Developing diverse housing types, including affordable units;

(iv) Rezoning land for non-industrial purposes when the land can no longer support industrial activities or is located such that industry cannot co-exist adequately with adjacent existing uses, particularly since the site is adjacent to residential uses to the north and west, and is adjacent to the growing NoMA neighborhood which is becoming increasingly commercial and residential and no longer suitable for industrial activities; and

(v) Implementing the Mid-City Area Element's goals of developing new residential uses in areas that are best able to handle high density, and redeveloping/rehabilitating vacant lots and abandoned structures within the community, particularly along Florida Avenue, North Capitol Street, and in the Shaw, Bloomingdale, and Eckington communities;

c) Public space improvements (11 DCMR §2403.9(a)) - The Applicant will be improving the configuration of the public sidewalk adjacent to the southern portion of the PUD Site, widening the east-west portion of the public alley adjacent to the north of the PUD Site, and widening the north-south public alley that divides the site near its western edge. The sidewalk and alley improvements will help improve circulation for the public and for individuals that utilize the existing alley system in the square. The estimated cost for these improvements is $265,000;

d) Environmental Benefits (11 DCMR § 2403.9(h).) - The project will provide a number of environmental benefits, including street tree planting and maintenance, landscaping, energy efficiency and alternative energy sources, methods to reduce stormwater runoff, and green engineering practices. Although the Applicant is

not seeking LEED-certification for the building, the proposed development is contemplated to meet rigorous energy and environmental design standards using the LEED 2009 for New Construction and Major Renovations rating system and is expected to incorporate features that would be the equivalent of the minimum number of points as shown on the theoretical LEED checklist included with the plans, so as to meet the Silver designation standard;

e) Transportation Benefits (11 DCMR § 2403.9(c).) - The proposed development includes 210 below-grade parking spaces and a total of 71 bicycle parking spaces (61 residential and 10 retail). The bicycle parking spaces will be installed at a cost of approximately $160,000. The three levels of below-grade parking will be constructed at an estimated cost in excess of $6,300,000 in order to ensure that there is an adequate supply of parking spaces for the condominium owners, which thus will diffuse the need for spill-over parking on the adjacent residential streets. The Applicant will request that DDOT remove the property from the list of properties eligible for Residential Parking Permits ("RPP"). If the property presently is not on the list of properties eligible for RPP, the Applicant will request that DDOT classify the property as ineligible for RPP. In addition, the Applicant has committed to offering each initial unit owner the choice of one of the following options:

(i) The payment of a one-time Capital Bikeshare annual membership fee (totaling $75 each) per unit for initial owners; or

(ii) The payment of a one-time car-sharing application and annual membership fee (totaling $85 each) per unit for initial owners; and

f) Uses of Special Value to the Neighborhood and the District of Columbia as a Whole (11 DCMR § 2403.9(i).)

(i) Prior to the issuance of a certificate of occupancy for the project, the Applicant has agreed to: 1) provide funds to Cultural Tourism DC of up to $220,000 towards the cost of the development and installation of eight signs for an Eckington Heritage Trail in the neighborhood; and 2) incur costs in the amount of $65,000 for the fabrication and installation of three-sided perimeter tree enclosures ("commonly referred to as "tree boxes") and mulch at the locations selected by the neighborhood and which shall be located on the north and south sides of Q Street and R Street, N.E. between North Capitol Street and Eckington Street; and

(ii) During the construction of the project, the Applicant has agreed to abide by a construction management plan, described in detail in Finding of Fact No. 70.

Compliance with PUD Standards

44. The Commission finds that the project advances the purposes of the Comprehensive Plan, is consistent with the Future Land Use Map, complies with the guiding principles in the Comprehensive Plan, and furthers a number of the major elements of the Comprehensive Plan.

45. The purposes of the Comprehensive Plan are six-fold: (1) to define the requirements and aspirations of District residents, and accordingly influence social, economic and physical development; (2) to guide executive and legislative decisions on matters affecting the District and its citizens; (3) to promote economic growth and jobs for District residents; (4) to guide private and public development in order to achieve District and community goals; (5) to maintain and enhance the natural and architectural assets of the District; and (6) to assist in conservation, stabilization, and improvement of each neighborhood and community in the District. (D.C. Official Code §1-245(b) (¶ 1-301.62).)

46. The Commission finds that the project significantly advances these purposes by promoting the social, physical and economic development of the District through the provision of a high-quality mixed-use development that will increase the housing supply, add new retail uses, and generate significant tax revenues for the District.

47. The Commission also finds that the project is consistent with many guiding principles in the Comprehensive Plan for managing growth and change, creating successful neighborhoods, increasing access to education and employment, connecting the city, and building green and healthy communities.

48. The Commission finds that the project is also consistent with many guiding principles in the Comprehensive Plan for managing growth and change, creating successful neighborhoods, and building green and healthy communities, as follows:

    a) *Managing Growth and Change*. In order to manage growth and change in the District, the Comprehensive Plan encourages, among other factors, the growth of both residential and non-residential uses. The Comprehensive Plan also states that redevelopment and infill opportunities along corridors is an important part of reinvigorating and enhancing neighborhoods. The proposed PUD is fully consistent with each of these goals. Redeveloping the PUD Site into a residential development with ground-floor retail will further the revitalization of the neighborhood;

    b) *Creating Successful Neighborhoods*. One of the guiding principles for creating successful neighborhoods is getting public input in decisions about land use and development, from development of the Comprehensive Plan to implementation of

the plan's elements. The proposed PUD furthers this goal since, as part of the PUD process, the Applicant worked with and received the support of ANC 5E and the ECA, and agreed to deliver a community benefits package which includes a number of items identified by the ANC as important community needs; and

c) *Building Green and Healthy Communities*. A major objective for building green and healthy communities is that building construction and renovation should minimize the use of non-renewable resources, promote energy and water conservation, and reduce harmful effects on the natural environment. As discussed in more detail above, the building will include a significant number of sustainable design features.

49. The Commission also finds that the project furthers the objectives and policies of many of the Comprehensive Plan's major elements as follows:

a) *Land Use Element.* For the reasons discussed above, the project supports the following policies of the Land Use Element:

(i) Policy LU-1.2.2: Mix of Uses on Large Sites. The project, which includes residential and retail uses, is consistent and compatible with adjacent uses and will provide a number of benefits to the immediate neighborhood and to the city as a whole. In addition, as discussed above, the proposed mix of uses on the PUD Site is consistent with the Comprehensive Plan Future Land Use Map's designation of the PUD Site;

(ii) Policy LU-1.3 Transit-Oriented and Corridor Development. The project exemplifies the principles of Transit-Oriented Development. The PUD Site is located within convenient walking distance of the New York Avenue Metro station and is served by several major bus routes along Florida Avenue, N.E. In addition, the project is consistent with the following principles:

(1) A preference for mixed residential and commercial uses rather than single purpose uses, particularly a preference for housing above ground-floor retail uses; and

(2) A preference for diverse housing types, including affordable units;

(iii) Policy LU-1.3.4: Design to Encourage Transit Use. The project has been designed to encourage transit use and helps to enhance the safety, comfort and convenience of passengers walking to local buses along Florida Avenue since the project incorporates ground-floor retail uses that will activate and animate the street frontages;

(iv) Policy LU-2.1.3: Conserving, Enhancing, and Revitalizing Neighborhoods. In designing the project, and consistent with this policy element, the architect has sought to balance the housing supply in the area and expand neighborhood commerce with the parallel goals of protecting the neighborhood character and restoring the environment;

(v) Policy LU-2.2.4: Neighborhood Beautification. Policy LU-2.2.4 encourages projects to improve the visual quality of the District's neighborhoods. The architect has designed the building to improve the visual aesthetics of the neighborhood. Moreover, the development of the PUD Site will be an improvement to the current neighborhood condition and will help to revitalize the area. The project also includes a significant amount of landscaped and open spaces with will help to enhance the streetscape;

(vii) Policy LU-2.3.3: Buffering Requirements. This policy encourages the use of buffers to ensure that new commercial development adjacent to lower-density residential areas provides effective physical buffers to avoid adverse effects. The project includes a number of elements designed to serve as buffers, including landscaping, height step-downs and setbacks, and other architectural and site planning measures that avoid potential conflicts. Furthermore, the project will eliminate the existing warehouse and provide new retail use opportunities along Florida Avenue; and

(vii) Policy LU-3.1.4: Rezoning of Industrial Areas. This policy encourages the rezoning of land for non-industrial purposes when the land can no longer support industrial or PDR activities or is located such that industry cannot co-exist adequately with adjacent existing uses. The immediately surrounding uses to the north and west are residential. As the PUD Site is located adjacent to the growing NoMA neighborhood, and as the surrounding area, particularly around the New York Avenue Metro station becomes increasingly committed to commercial and residential uses, the PUD Site is no longer suitable for industrial activities. The proposed development and rezoning supports the policy of rezoning industrial land to permit residential and commercial uses on land included in a targeted redevelopment area;

b) *Transportation Element*. The PUD Site is located on Florida Avenue, N.E., which enables the proposed project to help further several policies and actions of the Transportation Element of the Comprehensive Plan, including:

(i) Policy T-1.1.4: Transit-Oriented Development. The proposed project is an example of transit-oriented development and includes various transportation improvements, including the construction of new mixed uses along a major transportation corridor, bike storage areas, and public space improvements, including new lighting, bike racks, and sidewalk paving;

(ii) Policy T-2.2.2: Connecting District Neighborhoods. The project will help to encourage improved connections between District neighborhoods due to its location and convenient access to metrorail and bus routes;

(iii) Policy T-2.3.1: Better Integration of Bicycle and Pedestrian Planning. As shown on the Plans, the project architect has carefully considered and integrated bicycle and pedestrian planning and safety considerations in the development of the project;

(iv) Action T-2.3-A: Bicycle Facilites. This element encourages new developments to include bicycle facilities. The Applicant proposes to include secure bicycle parking and bike racks as amenities within the development that accommodate and encourage bicycle use. Specifically, the Applicant will be providing 71 bicycle parking spaces (61 residential spaces and 10 retail spaces); and

(v) Policy T-2.4.1: Pedestrian Network. The project will help to improve the city's sidewalk system to form a network that links residents across the city since the project includes public space improvements, including sidewalk paving;

c) *Housing Element*. The overarching goal of the Housing Element is to "[d]evelop and maintain a safe, decent, and affordable supply of housing for all current and future residents of the District of Columbia." (10 DCMR § 501.1.) The Commission finds that the project will help achieve this goal by advancing the following policies:

(i) Policy H-1.1.1: Private Sector Support. The project helps to meet the needs of present and future District residents at locations consistent with District land use policies and objectives. Specifically, the project will contain approximately 196,029 square feet of gross floor area devoted to residential uses, which represents a substantial contribution to the District's housing supply. The provision of new housing at this particular location, moreover, is fully consistent with the District's land use policies;

(ii) Policy H-1.1.4: Mixed-Use Development. The project is consistent with the goals of promoting mixed use development, including housing on commercially zoned land, particularly in neighborhood commercial centers, along Main Street mixed use corridors. The project will contain retail and residential uses along a Main Street Mixed-Use Corridor. This project represents exactly the type of mixed-use development contemplated by Policy H-1.1.4; and

(iii) Policy H-1.2.3: Mixed-Income Housing. The proposed development is mixed-income and includes both market-rate and affordable housing units. Thus, the project will further the District's policy of dispersing affordable housing throughout the city in mixed-income communities, rather than concentrating such units in economically depressed neighborhoods;

d) *Environmental Protection Element.* The Environmental Protection Element addresses the protection, restoration, and management of the District's land, air, water, energy, and biologic resources. This element provides policies and actions on important issues such as energy conservation and air quality, and specific policies include the following:

(i) Policy E-1.1.1: Street Tree Planting and Maintenance - encourages the planting and maintenance of street trees in all parts of the city;

(ii) Policy E-1.1.3: Landscaping - encourages the use of landscaping to beautify the city, enhance streets and public spaces, reduce stormwater runoff, and create a stronger sense of character and identity;

(iii) Policy E-2.2.1: Energy Efficiency - promotes the efficient use of energy, additional use of renewable energy, and a reduction of unnecessary energy expenses through mixed-use and shared parking strategies to reduce unnecessary construction of parking facilities;

(iv) Policy E-3.1.2: Using Landscaping and Green Roofs to Reduce Runoff - calls for the promotion of tree planting and landscaping to reduce stormwater runoff, including the expanded use of green roofs in new construction; and

(v) Policy E-3.1.3: Green Engineering - has a stated goal of promoting green engineering practices for water and wastewater systems.

As discussed in both the Environmental Benefits and Building Green and Healthy Communities sections of this statement, the Commission finds that the project will include street tree planting and maintenance, landscaping, energy efficiency,

methods to reduce stormwater runoff, and green engineering practices, and is therefore fully consistent with the Environmental Protection Element;

e) *Urban Design Element*. The goal of the Comprehensive Plan's Urban Design Element is to "[e]nhance the beauty and livability of the city by protecting its historic design legacy, reinforcing the identify of its neighborhoods, harmoniously integrating new construction with existing buildings and the natural environment, and improving the vitality, appearance, and security of streets and public spaces." (10 DCMR § 901.1.) The proposed PUD is also consistent with a number of the policies included in the Urban Design Element of the Comprehensive Plan. For example, the project is consistent with Policy UD-2.2.1 and Policy UD-2.2.7 because the proposed development will help to strengthen the architectural quality of the immediate neighborhood by relating the project's scale to the existing neighborhood context, while also avoiding overpowering contrasts of scale, height and density. In addition, as shown on the plans, the project includes an attractive, visually interesting and well-designed building façade. (*See* Policy UD-2.2.5.) The project is also consistent with the improved streetscape design and sidewalk management goals of Policy UD-3.1.1 and Policy UD-3.1.2 since the Applicant proposes to install street trees and the sidewalks and plantings adjacent to the PUD Site will enhance the visual character of these streets and provide a buffer to reduce the impacts of vehicle traffic; and

f) *Mid-City Area Element*. The PUD Site is located within the boundaries of the Mid-City Area Element. Subsection 2007.2 of the Comprehensive Plan explains the Mid-City Area Element's planning and development priorities. One stated priority is to develop new condominiums, apartments, and commercial centers in areas that are best able to handle high density. The area around the New York Avenue Metro station is listed as such an area. With its close proximity to the New York Avenue Metro station, the proposed PUD is consistent with a number of policies this area elements. Specifically, Policy MC-1.1.3 encourages the redevelopment of vacant lots and the rehabilitation of abandoned structures within the community, particularly along Florida Avenue, North Capitol Street, and in the Shaw, Bloomingdale, and Eckington communities.

Moreover, the PUD Site is located in the North Capitol Street/Florida/New York Avenue Business District under the Mid-City Area Element. The North Capitol commercial district is just a few blocks west of the New York Avenue Metro station and lies on the northern edge of the NoMA district. The Comprehensive Plan states that the "[c]onditions on the corridor are likely to change dramatically as NoMA is redeveloped with offices and high-density housing. The commercial district is well situated to benefit from these changes." (¶ 2017.3.) Policy MC-2.7.1 calls for upgrading the commercial district at Florida Avenue/North Capitol/New York Avenue by restoring vacant storefronts to active use and

accommodating compatible neighborhood-serving infill development. The project, which will redevelop the PUD Site, which is currently an underutilized site, and construct a residential development with ground-floor retail, is compatible with the PUD Site's immediate surrounding uses. Furthermore, the project is compatible with the NoMA Vision Plan and Development Strategy, which is district adjacent to the PUD Site.

Zoning Map Amendment Application

50. The PUD Site is split-zoned C-2-A (1,564 sq. ft. of land area) and C-M-2 (40,659 sq. ft. of land area). The C-M-2 portion of the site accounts for approximately 96% of the land area. The Applicant proposes to rezone the entire PUD Site to the C-3-B Zone District.

51. According to the District of Columbia Comprehensive Plan Future Land Use Map, the PUD Site is included in the Medium-Density Commercial land use category and the Production, Distribution, and Repair ("PDR") land use category. The Medium-Density Commercial category is used to define areas where buildings are generally larger and/or taller than those in moderate-density commercial areas but generally do not exceed eight stories in height. The C-2-B, C-2-C, C-3-A, and C-3-B Zone Districts are generally consistent with this land use category. The PDR category is used to define areas characterized by manufacturing, warehousing, wholesale and distribution centers, transportation services, food services, printers and publishers, tourism support services, and commercial, municipal, and utility activities which may require substantial buffering from noise, air pollution, and light-sensitive uses such as housing. The PUD Site appears to have been zoned C-M-2 because of its prior use as a warehouse. However, the PUD Site is presently bounded by residential uses to the north and west, with no buffers for these existing uses.

52. The Commission finds that the Applicant's proposal to rezone the PUD Site from the C-M-2 and C-2-A Zone Districts to the C-3-B Zone District to construct a mixed-use development is consistent with the Comprehensive Plan designation of the PUD Site. The proposed C-3-B Zone District is specifically identified as a Medium-Density Commercial District. The proposed mixed-use development will be built to a maximum density of approximately 4.83 FAR, which is consistent with the amount of density permitted in medium-density commercial zones and PDR zones. The building will be constructed to a maximum height of 90 feet, with a number of step-downs and setbacks, which is consistent with the maximum height permitted under the proposed C-3-B Zone District.

53. The PUD Site is located in the Main Street Mixed-Use Corridor category on the District of Columbia Comprehensive Plan Generalized Policy Map. Main Street Mixed-Use Corridors are traditional commercial business corridors with a concentration of older storefronts along the street. These corridors have a pedestrian-oriented environment with

traditional storefronts. Many have upper-story residential or office use. Conservation and enhancement of these corridors is desired to foster economic and housing opportunities and serve neighborhood needs.

54. The Commission finds that the project is consistent with this designation. The Applicant proposes to redevelop a currently underutilized site through construction of a mixed-use development on the PUD Site. As shown on the Plans, this new development is compatible with the surrounding uses. The Applicant proposes to build a multi-family dwelling building with ground-floor retail and the PUD Site has approximately 204.11 linear feet of frontage on Florida Avenue, N.E. The mix of new residential and retail uses in the project will help to improve the neighborhood fabric and bring new residents and retail uses to the area.

Office of Planning Reports

55. By report dated June 15, 2012, OP recommended that the Commission schedule a public hearing on the applications. (Ex. 13).

56. By report dated June 28, 2013, OP recommended that the applications be approved, subject to the Applicant addressing DDOT's conditions to mitigate any adverse traffic impacts due to the PUD Site's redevelopment. (Ex. 27.) OP indicated that the project will be constructed on a site which served a former light industrial use, and that the redevelopment would add to the District's housing stock and complement the revitalization of a vital intersection of major District arterials. OP indicated in its report that the proposed development and its related map amendment are not inconsistent with the Comprehensive Plan's objectives for the MidCity Area and the Generalized Land Use and Policy Maps. OP also indicated that it supports the Applicant's requested flexibility, and that the project includes a number of public benefits and amenities.

DDOT Report

57. By report dated July 3, 2013, DDOT indicated that after an extensive multi-administration review, DDOT found that: a) a robust network of pedestrian, bicycle, and transit infrastructure exists in close proximity to the proposed development; b) the proposed development will generate minimal new vehicle trips; c) the proposed vehicle parking supply is roughly double what DDOT has typically seen with similar recent projects; d) Florida Avenue is a constrained facility that is heavily congested during peak commuting times; e) the current alignment of Porter Street with Florida Avenue presents safety hazards for site access; f) the proposed development has non-conforming public space elements; and g) the proposed reconfiguration of the intersection of Porter Street with Florida Avenue will improve site access. (Ex. 29.) DDOT indicated that it has no objection to the applications and requested that the Commission's approval of the project be conditioned on the following requirements: a) The Applicant should lower the parking

supply for the subject property or commit to a robust performance monitoring program with trip generation at the levels predicted in the Applicant's Comprehensive Transportation Review; b) the Applicant should limit site access from Florida Avenue to right-in and right-out access; c) the Applicant should unbundle the cost of vehicle parking from the cost of residential units in order to not incentivize automobile usage; d) the Applicant should remove the SmartTrip Card transit subsidy and limit financial incentives to providing Capital Bikeshare membership or a subsidy to a car-sharing service; and e) the Commission should provide flexibility in their public space plan in order for DDOT to address issues, such as pylons that are proposed in public space, during the public space permitting process.

58. In response to DDOT's proposed conditions, the Applicant agreed to commit to a robust performance monitoring program as outlined in the DDOT report, to limit site access from Florida Avenue to right-in and right-out access, to unbundle the cost of vehicle parking from the cost of residential units in order to not incentivize automobile usage, and to remove the SmartTrip Card transit subsidy and limit financial incentives to providing Capital Bikeshare membership or a subsidy to a car sharing service. The Applicant also committed to ensuring that all public space improvements meet all the applicable requirements during the public space permitting process.

Contested Issues

59. The Party Opponents and a number of individuals raised concerns regarding potential loss of access to light, air, and privacy; potential increased traffic, the loss of on-street parking, and increased use of east-west public alley; construction issues; and the design of the project. The Commission has carefully reviewed and considered each of the points made both in writing and orally at the public hearing, and made in its post-hearing letter dated August 8, 2013, and makes the following findings.

60. **Loss of Access to Light, Air, and Privacy Concerns**. In its Party Status Request and at the public hearing, the Party Opponents asserted that the project will result in the loss of daylight to homes, the loss of the use of solar panels, diminish their views and privacy, and would subject them to light pollutions related to the outdoor lighting on the north side of the building. Individual members of the public expressed similar concerns. However, the Commission finds that it is well-settled in the District of Columbia that a property owner is not entitled to a view, light, or air across another person's property without an express easement, and a property owner has no right to a view across another person's property. *See Hefazi v. Stiglitz,* 862 A.2d 901, 911 (D.C. 2004) ("American courts have wisely refused to allow the acquisition by prescription of easements of light and air;" "[o]ne may obstruct his neighbor's windows at any time" and "[n]o action can be maintained for obstructing a view"); *see also Ash v. Tate,* 73 F.2d 518 (D.C. Cir. 1934) (no injunction under District of Columbia law to prevent adjoining landowner from erecting structure that cuts off light and air) and *Z.C. Order No. 11-03, Finding of Fact*

No. 91 ("The Commission finds that the viewsheds and property values of the Tiber Island homeowners are not protected by any restrictive covenants or by the Zoning Regulations. Nevertheless, the Commission finds that the PUD has been designed in such a way as to minimize the effects of the development on the adjacent residential community through appropriate setbacks and height limits.").

61. The Commission finds that the Applicant made significant efforts to minimize the visual impact of the project on neighboring property owners. For example, the Applicant designed the building to include a number of setbacks and step-downs in height in deference to the scale of the existing row houses to the north of the PUD site, and to minimize the mass of the project. As shown on the plans included in the record in this case, from south to north, the project has a height of 90 feet along Florida Avenue, steps down to an intermediate height of 70 feet, and then steps down to 60.75 feet for the portion of the building which is closest to the existing row houses to the north.

62. The Commission finds that the project is set back a substantial distance from the existing northern property line of the public alley and from the actual rear of the existing row houses. As shown on the "Overlay" plan included in the Applicant's materials: (1) the 90-foot portion of the project is set back approximately 74 feet four inches from the northern edge of the existing east-west alley, and approximately 94 feet four inches from the southern wall of the existing row houses to the north of the site given that the row houses include a 20-foot rear yard; (2) the 70-foot portion of the project is set back approximately 64 feet two inches from the northern edge of the existing east-west alley, and approximately 84 feet two inches from the southern wall of the existing row houses to the north of the site; and (3) the 60-foot portion of the project is set back approximately 36 feet from the northern edge of the existing east-west alley, and approximately 56 feet from the southern wall of the existing row houses to the north of the site. The Commission finds that these distances are substantial and are consistent with the distances between buildings throughout the District. Moreover, as shown on the site sections included in the record, the 60-foot north-facing elevation of the Subject Building is not substantially higher than the height of the existing row houses to the north given the grade of the existing alley relative to the existing homes.

63. The Applicant also had extensive shadow studies prepared that demonstrate the nominal impact of the project on access to light throughout the day, including during the winter and summer solstice, and the spring and autumn equinox. (See Ex. 25A and 55). The shadow studies demonstrate that the project will have a nominal impact on the light and air of adjacent properties when compared to a building that could be constructed on the site as a matter-of-right. (*See id*.) As shown on the shadow studies, the project will cast nominal shadows throughout the year, and the only time that the proposed building would cast any more shadows than a matter-of-right building would be at 8:00 a.m. on December 21st, which is the winter solstice and the shortest day of the year with the least amount of daylight.

64. To mitigate the potential light pollution effects of the project, the Applicant removed the rooftop deck that was shown in the previously submitted PUD plans from the final plans approved by this Order.

65. **Increased Traffic, Loss of On-Street Parking, and Use of East-West Public Alley.** In the Party Status Request and at the public hearing on the applications, the Party Opponents and individuals testified that the project will cause a negative impact on traffic in the neighborhood, will result in the loss of on-street parking, and that the proposed loading activates along the east-west portion of the public alley might impact their retaining walls. However, the Commission finds that the evidence of record demonstrates that the project will not generate an adverse impact on traffic in the neighborhood, nor will it result in the loss of any on-street parking spaces. The Commission also finds that the Applicant's reorientation of the proposed loading facilities, providing access from the north-south portion of the public alley, minimizes any potential adverse impacts to the retaining walls along the northern boundary of the east-west alley.

66. The Applicant submitted a Traffic Impact Assessment Report prepared by O.R. George & Associates to DDOT and to the Zoning Commission ("Traffic Report"). (Ex. 25B.) The Traffic Report demonstrates that the project will not generate any adverse traffic impacts. The Traffic Report concludes that the level of trip generation is minimal, since the project will only generate 22-25 trips during the weekday peak hours, and that the trips will be well-distributed throughout the network.

67. In addition, DDOT submitted a report assessing the safety and capacity impacts of the project on the transportation network. (Ex. 29.) DDOT's findings include the following: (1) given the Subject Building's location, DDOT expects a high percentage of residents in the proposed development to use transit, pedestrian, and bicycle infrastructure as their primary means of transportation during peak commuting times; (2) the Subject Building will generate minimal new vehicle trips; (3) the relative change in intersection delay between future no-build conditions and future build-out conditions are predicted to be minimal due to the small increase in estimated site-generated traffic; and (4) the Applicant's Transportation Demand Management plan includes strategies, programs, and services that will encourage the use of alternative modes of transportation. The Applicant has also agreed to implement the performance monitoring program as recommend by DDOT, which will ensure that congestion and traffic are further mitigated, and to limit site access from Florida Avenue to right-in and right-out access, to unbundle the cost of vehicle parking from the cost of residential units in order to not incentivize automobile usage, and to remove the SmartTrip Card transit subsidy and limit financial incentives to providing Capital Bikeshare membership or a subsidy to a car-sharing service.

68. The Commission finds that the Applicant's proposal to use the existing alleys, which the Applicant will be widening, is appropriate and will not cause an adverse impact on traffic. Parking and loading access to the site is proposed via the adjacent public alley system to avoid the need for additional curb cuts along Florida Avenue. In response to comments raised at the public hearing, the loading facilities have been relocated from the east-west portion of the public alley to the north-south portion of the public alley. The Commission finds that this reconfiguration substantially minimizes any potential impact to the retaining walls along the northern edge of the public alley. The development plan also provides for both alleys to be widened to 20 feet in order to facilitate delivery truck movements. (Ex. 55, 57.) The proposed 20-foot alleys are in accordance with DDOT standards and the loading facilities are located in accordance with DDOT's preference for loading to occur from alleys. The Applicant also submitted diagrams demonstrating that all truck turn movements can be accommodated in a safe manner, and the widened alleys accommodate loading berth access for trucks and delivery vehicles for the project. (Ex. 4A, at C-601 and C-604; Ex. 55.)

69. The Commission further finds that the project will not result in the loss of on-street parking given that the Applicant is providing ample parking within the project, and since the Applicant has agreed to restrict residents of the project from being eligible for Residential Parking Permits.

70. **Construction Issues**. In the Party Status Request and at the public hearing on the applications, the Party Opponents and individuals testified that the project may cause a risk of structural damage to nearby homes. Construction issues are governed by the D.C. Construction Code and therefore are not within the Commission's jurisdiction. However, the Commission notes that the Applicant has agreed to implement a Construction Management Plan to minimize any impacts on the adjacent residential uses from the construction of the project. (Ex. 25E.) The Plan includes a (1) traffic control plan; (2) construction truck plan; (3) construction parking plan; (4) construction communication plan; (5) site management plan; (6) debris removal plan; and (7) limited work hours. (*Id*.) The plan also provides that, prior to commencement and throughout the duration of construction activity on the project, the Applicant will survey and document all abutting properties immediately to the north of the east-west portion of the public alley for evidence of settlement and general condition. (*Id*.) The Applicant will also be available to survey and document any changes in conditions reported by any owner of an abutting property. (*Id*.) In the event that the Applicant ascertains there has been any damage caused as a direct result of the construction activity, the Applicant will make repairs rendering the condition of the property consistent with its prior condition. (*Id*.) The Commission believes that these commitments adequately address the concerns raised by the Party Opponents and individuals.

71. **Historic Significance and Design of The Building**. In its Party Status Request and at the public hearing on the applications, the Party Opponents testified that the project is not

compatible with the historic character of the neighborhood, does not fit with surrounding historic structures, and violates the Historic Preservation Review Board's *New Construction in Historic District Guidelines*. Similar concerns were expressed by individual members of the public.

72. The Commission finds that the historic preservation guidelines are not applicable in this case since the existing homes are not designated as historic landmarks, nor is the PUD Site included in any historic district. The applicable planning guidelines for development of the PUD Site are the Zoning Regulations and the Comprehensive Plan. The District of Columbia Comprehensive Plan Future Land Use Map designates the Subject Property as Mixed-Use, Medium-Density Commercial and Production Distribution and Repair ("PDR") land use categories. The District of Columbia Comprehensive Plan Generalized Policy Map locates the Subject Property within a Main Street Mixed-Use Corridor. As discussed above, OP submitted a report to the Commission recommending approval of the proposed PUD. The OP report included a detailed analysis indicating that the proposed PUD would further the policies of the Comprehensive Plan's Land Use, Housing, Urban Design, and Mid-City Area elements. (Ex. 27.) The OP report also indicated that the project would "add to the District's housing stock and complement the revitalization of a vital intersection of major District arterials." (Ex. 27.) The OP report further states that the Subject Building would result in a number of important public benefits and amenities, including quality urban design and site planning, landscaping and streetscape design, housing and affordable housing, and environmental benefits. (*Id*. at 6-8.) Based upon OP's recommendations, as well as the plans, materials board, and other evidence of record submitted by the Applicant, the Commission finds that the project will help to strengthen the architectural quality of the immediate neighborhood by relating the project's scale to the existing neighborhood context, while also avoiding overpowering contrasts of scale, height, and density.

CONCLUSIONS OF LAW

1. Pursuant to the Zoning Regulations, the PUD process is designed to encourage high-quality development that provides public benefits. (11 DCMR § 2400.1.) The overall goal of the PUD process is to permit flexibility of development and other incentives, provided that the PUD project "offers a commendable number or quality of public benefits, and that it protects and advances the public health, safety, welfare, and convenience." (11 DCMR § 2400.2.)

2. Under the PUD process of the Zoning Regulations, the Commission has the authority to consider this application as a consolidated PUD. The Commission may impose development conditions, guidelines, and standards which may exceed or be less than the matter-of-right standards identified for height, density, lot occupancy, parking and loading, or for yards and courts. The Commission may also approve uses that are

permitted as special exceptions and would otherwise require approval by the Board of Zoning Adjustment.

3. Development of the property included in this application carries out the purposes of Chapter 24 of the Zoning Regulations to encourage the development of well-planned developments, which will offer a project with more attractive and efficient overall planning and design, not achievable under matter-of-right development.

4. The retail and residential uses for this project are appropriate for the PUD Site. The impact of the project on the surrounding area and the operation of city services is acceptable, given the quality of the public benefits in the project. Accordingly, the project should be approved.

5. The application can be approved with conditions to ensure that any potential adverse effects on the surrounding area from the development will be mitigated.

6. The Applicant's request for flexibility from the Zoning Regulations is not inconsistent with the Comprehensive Plan. The Commission also concludes that the project benefits and amenities are reasonable trade-offs for the requested development flexibility.

7. Approval of this PUD is appropriate because the proposed development is consistent with the present character of the area, and is not inconsistent with the Comprehensive Plan. In addition, the proposed development will promote the orderly development of the site in conformity with the entirety of the District of Columbia zone plan as embodied in the Zoning Regulations and Map of the District of Columbia.

8. The proposal to rezone the Property from the C-2-A and C-M-2 Zone Districts to the C-3-B Zone District is not inconsistent with the Property's designation on the Future Land Use Map and the Generalized Policy Map, and with the Comprehensive Plan as a whole.

9. The Commission is required under § 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)) to give great weight to issues and concerns expressed in the affected ANC's written recommendation. In this case, ANC 5E voted to approve the applications. The Commission concurs with the ANC 5E's recommendation for approval, and has given the recommendation the great weight to which it is entitled.

10. The Commission is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163, D.C. Official Code § 6-623.04) to give great weight to OP recommendations. The Commission concurs with the OP's recommendation for approval, and has given the recommendation the great weight to which it is entitled.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia hereby **ORDERS APPROVAL** of the applications for review and approval of a consolidated planned unit development and related map amendment to rezone Lots 134 and 819 in Square 3516 from the C-2-A and C-M-2 Zone Districts to the C-3-B Zone District. For the purposes of these conditions, the term "Applicant" shall mean the person or entity then holding title to the PUD Site. If there is more than one owner, the obligations under this Order shall be joint and several. If a person or entity no longer holds title to the PUD Site, that party shall have no further obligations under this Order; however, that party remains liable for any violation of these conditions that occurred while an Owner. The approval of this PUD is subject to the guidelines, conditions, and standards set forth below:

A. Project Development

1. The development shall be developed in accordance with the Architectural Plans & Elevations, dated August 8, 2013 (Ex. 55), and as modified by the guidelines, conditions, and standards of this Order.

2. In accordance with the plans, the PUD shall be a mixed-used project consisting of approximately 203,887 square feet of gross floor area, with 196,029 square feet of gross square feet of floor area devoted to residential use and 7,858 square feet of gross floor area devoted to retail use.

3. The PUD shall have a maximum density of 4.83 FAR.

4. The PUD shall have varying heights and cornice lines ranging from 60.75 feet at the northernmost portion of the site to a maximum height of 90 feet along the Florida Avenue frontage.

5. The PUD shall provide parking for no less than 210 vehicles and 71 bicycle parking spaces (61 residential and 10 retail).

6. The Applicant shall have zoning flexibility with the PUD in the following areas:

    a) To be able to provide a range in the number of residential units and the corresponding residential floor area of plus or minus 10% from the 182 depicted on the Plans;

b) To reallocate or reconfigure the number of parking spaces provided, so long as the total amount of parking provided meets the applicable Zoning Regulations;

c) To vary the location and design of all interior components, including partitions, structural slabs, doors, hallways, columns, stairways, and mechanical rooms, provided that the variations do not change the exterior configuration of the buildings;

d) To vary the final selection of the exterior materials within the color ranges and material types as proposed, based on availability at the time of construction without reducing the quality of materials;

e) To vary the final selection of landscaping materials utilized, based on availability and suitability at the time of construction; and

f) To make minor refinements to exterior details and dimensions, including belt courses, sills, bases, cornices, railings and trim, or any other changes to comply with the District of Columbia Building Code or that are otherwise necessary to obtain a final building permit.

B. Public Benefits and Mitigation[1]

1. Public Space Improvements. The PUD shall provide public space improvements as shown on the Architectural Plans & Elevations, dated August 8, 2013, including improving the configuration of the public sidewalk adjacent to the southern portion of the PUD site; widening to 20 feet the east-west portion of the public alley adjacent to the north of the PUD site; and widening to 20 feet the north-south portion of the public alley that divides the site near its western edge.

2. The building shall be designed to include no less than the minimum number of points necessary to be the equivalent of a Silver designation as shown on the theoretical LEED score sheet submitted with the plans dated August 8, 2013. The Applicant shall put forth its commercially reasonable efforts to design the PUD so that it may satisfy such LEED standards, but the Applicant shall not be required to register or to obtain the certification from the United States Green Building Council.

[1] As explained above, the Commission recognizes the affordable housing component of this Project as a public benefit even though the Project is providing only the amount of affordable housing required by Chapter 26 of the Zoning Regulations. Since the Applicant is doing no more than what the law requires, there is no need to include a condition restating these mandatory obligations.

3. During the construction of the project, the Applicant shall abide by the Construction Management Plan included as Exhibit 25E of the record.

4. Prior to the issuance of a certificate of occupancy for the building, the Applicant shall submit to the Department of Consumer and Regulatory Affairs ("DCRA") evidence that:

   a) The Applicant provided $220,000 to Cultural Tourism DC for the development and installation of eight signs for an Eckington Heritage Trail in the neighborhood;

   b) The Applicant paid a contractor or otherwise incurred costs of $65,000 for the fabrication and installation of three-sided perimeter tree enclosures ("commonly referred to as "tree boxes") and mulch at the locations on the north and south sides of Q Street and R Street, N.E. between North Capitol Street and Eckington Street; and

   c) The eight heritage trail signs have been installed or are in the process of being developed and that the tree boxes and mulch have been installed.

C. Transportation Demand Measures

1. During the life of the project, the Applicant shall implement to following Transportation Demand Management ("TDM") measures:

   a) Provide off-street parking spaces accessible to the residential units, which shall not be less than the zoning required minimum but which may be in excess of a 1:1 ratio up to 210 parking spaces to deter spill-over parking on surrounding neighborhood streets;

   b) Each residential lease and purchase agreement shall contain a provision prohibiting the tenant/owner from applying for an off-site permit under the Residential Parking Permit Program;

   c) Provide seven designated parking spaces for retail use;

   d) Provide links to goDCgo.com and CommuterConnections.com on its developer and property management websites;

   e) Provide each initial residential unit owner upon move-in with a one-time choice of one of the following options:

      i) A $75 Capital Bikeshare annual membership fee; or

ii) An $85 car share application and annual membership;

f) Provide a carpool and mass transit coordinator and participation in the Guaranteed Ride Home Program;

g) Provide 10 fully accessible outdoor bike parking spaces for the retail use and 61 bike parking spaces in the parking garage for residential unit owners;

h) The Applicant will request that the District Department of Transportation remove the property from the list of properties eligible for Residential Parking Permits. If the property is not presently is not on the list of properties eligible for Residential Parking Permits, the Applicant will request that the District Department of Transportation classify the property as ineligible for Residential parking Permits; and

i) The Applicant shall limit site access to and from Florida Avenue to right-in and right-out access.

D. Miscellaneous

1. No building permit shall be issued for the PUD until the Applicant has recorded a covenant in the land records of the District of Columbia, between the Applicant and the District of Columbia, that is satisfactory to the Office of the Attorney General and the Zoning Division, DCRA. Such covenant shall bind the Applicant and all successors in title to construct and use the property in accordance with this order, or amendment thereof by the Commission. The Applicant shall file a certified copy of the covenant with the records of the Office of Zoning.

2. The PUD shall be valid for a period of two years from the effective date of Z.C. Order No. 12-02. Within such time, an application must be filed for a building permit for the construction of the project as specified in 11 DCMR § 2409.1; the filing of the building permit application will vest the Order. Construction of the project must commence within three years of the effective date of Z.C. Order No. 12-02.

3. The Applicant is required to comply fully with the provisions of the Human Rights Act of 1977, D.C. Law 2-38, as amended, and this order is conditioned upon full compliance with those provisions. 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 that is also prohibited by the Act. In addition, harassment based on any of the above protected categories is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

On September 9, 2013, upon the motion of Commissioner May, as seconded by Commissioner Miller, the Zoning Commission **APPROVED** the applications by a vote of **5-0-0** (Anthony J. Hood, Marcie I. Cohen, Robert E. Miller, Peter G. May, and Michael G. Turnbull to approve).

On October 21, 2013, upon the motion of Vice Chairman Cohen, as seconded by Commissioner Turnbull, the Zoning Commission **ADOPTED** this Order at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Marcie I. Miller, Robert E. Miller, Peter G. May, and Michael G. Turnbull).

In accordance with the provisions of 11 DCMR § 3028, this Order shall become final and effective upon publication in the *D.C. Register*; that is on November 29, 2013.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FILING
Z.C. Case No. 13-13
(Oxbridge Development at Ninth Street, LLC –Map Amendment @ Square 3831, Lots 42-45 & 830)
November 20, 2013

THIS CASE IS OF INTEREST TO ANCs 5B & 5E

On November 18, 2013, the Office of Zoning received an application from Oxbridge Development at Ninth Street, LLC (the "Applicant") for approval of a map amendment for the above-referenced property.

The property that is the subject of this application consists of Lots 42-45 and 830 in Square 3831 in Northeast Washington, D.C. (Ward 5), which is located 9th Street, N.E. The property is currently zoned C-M-1. The Applicant proposes a map amendment to rezone the property to the R-4 Zone District.

The C-M-1 Zone District permits development of low bulk commercial and light manufacturing uses to a density of 3.0 FAR, and a maximum height of three stories/40 feet with standards of external effects and new residential prohibited. A rear yard of not less than 12 feet shall be provided for each structure located in an Industrial District. No side yard shall be required on a lot in an Industrial District, except where a side lot line of the lot abuts a Residence District. Such side yard shall be no less than eight feet.

The R-4 Zone District permits matter-of-right development of single-family residential uses (including detached, semi-detached, row dwellings, and flats), churches and public schools with a minimum lot width of 18 feet, a minimum lot area of 1,800 square feet and a maximum lot occupancy of 60% for row dwellings, churches and flats, a minimum lot width of 30 feet and a minimum lot area of 3,000 square feet for semi-detached structures, a minimum lot width of 40 feet and a minimum lot area of 4,000 square feet and 40% lot occupancy for all other structures (20% lot occupancy for public recreation and community centers); and a maximum height of three stories/40 feet (60 feet for churches and schools and 45 feet for public recreation and community centers). Conversions of existing buildings to apartments are permitted for lots with a minimum lot area of 900 square feet per dwelling unit. Rear yard requirement is 20 feet.

This case was filed electronically through the Interactive Zoning Information System ("IZIS"), which can be accessed through http://.dcoz.dc.gov. For additional information, please contact Sharon S. Schellin, Secretary to the Zoning Commission at (202) 727-6311.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
University of the District of Columbia Faculty Association, NEA, Complainant,	PERB Case No. 90-U-10 Opinion No. 272
v.	
University of the District of Columbia, Respondent.	

DECISION AND ORDER

On February 13, 1990, the University of the District of Columbia Faculty Association, NEA (UDCFA) filed an unfair labor practice complaint (Complaint) with the D.C. Public Employee Relations Board (Board) alleging that the University of the District of Columbia (UDC) violated the Comprehensive Merit Personnel Act of 1978 (CMPA) D.C. Code Sections 1-618.4(a)(1), (2),(3) and (5) by its failure and refusal to comply with UDCFA's request for certain information concerning within-grade increases of bargaining-unit employees. UDC denied the commission of any unfair labor practice by Answer filed February 28, 1990. The Board, by notice issued May 18, 1990, ordered a hearing before a duly designated hearing examiner.

The Hearing Examiner, in a Report and Recommendation (R&R) issued on October 15, 1990, (a copy of which is attached hereto as Appendix 1), concluded that UDC had failed to bargain collectively in good faith with UDCFA by failing to provide it with information reasonably necessary and relevant to processing a grievance on behalf of bargaining-unit members (R&R at p.11). [1]/ Observing that previous decisions by the

[1]/ The Hearing Examiner found that the purpose of the information request, i.e., "the name of each faculty member who was not evaluated 'Less than Satisfactory' for the prior year who did not receive a within grade increase for the 1987-88 and/or 1988-89 academic years, unless he or she was already at the top step within grade," was to confirm whether or not an undetermined number of bargaining-unit employees received their appropriate within-grade

Board "have firmly established an exclusive representative's entitlement to information which will permit it to function in its representative capacities" (R&R at p. 8), [2]/ the Examiner ruled that UDC had a duty to provide the requested information for which "involved the matter of faculty step increases, i.e., wages," and therefore "was both relevant and necessary to a legitimate collective bargaining function to be performed by the Association, i.e., the investigation, preparation and processing of grievances under the negotiated grievance procedure." (R&R at p.9. [3]/) On the basis of the testimony of UDC officials (Tr. at 12 - 15), the Examiner rejected UDC's contention that notwithstanding any duty to provide, the requested information was simply unavailable, finding instead that the information sought was "either readily available to responsible UDC officials or of a type which could be readily compiled [without] undue burden" (R&R at p.9.) He rejected also UDC's argument that it had no duty to provide the information because UDCFA was precluded from pursuing the grievance for which UDCFA claimed the information was requested. The Examiner was unpersuaded by UDC's contention that a provision in the parties' collective bargaining agreement pertaining to within-grade increases was merely a reflection of "historical fact" to which UDCFA, by its execution of the collective bargaining agreement, agreed to be bound. The Examiner concluded instead that the parties' collective bargaining agreement contained (1) no express waiver of the right to file a

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(footnote 1 Cont'd)
step increases in preparation for filing a grievance pursuant to Article XVIII, Section C(2) of the parties' collective bargaining agreement. (R&R at pp. 2, 5 and 6.)

[2]/ American Federation of State, County and Municipal Employees v. D.C. General Hospital, et al., 36 DCR 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989); International Brotherhood of Teamsters, Local 639 and 730 v. D.C. Public Schools, 36 DCR 5993, Slip Op. No. 226, PERB Case No. 88-U-10 (1989) and University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, 36 DCR 2469, Slip Op. No. 215, PERB Case No. 86-U-16 (1989). The Examiner also noted the earlier, similar U.S. Supreme Court decision in NLRB v. ACME Industrial Co., 385 U.S. 432, 436 (1967), ("the employer's duty to disclose unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement"). (R&R at p.8.)

[3]/ Citing the landmark case of NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956) and Electrical Workers v. NLRB 648 F.2d 18 (D.C. Cir. 1980), the Hearing Examiner found information on employee wages to be "presumptively relevant."

grievance concerning matters covered under the provision and (2) a grievance procedure sufficiently broad in scope to encompass a grievance on the issue. (R&R at pp. 10 - 11.) [4]/

Finally, the Examiner recommended denial of UDCFA's request for an award of costs including attorney fees incurred in pursuing this matter. The Hearing Examiner based his ruling on his findings and conclusions that (1) UDCFA "has failed to state ... any of the costs it has incurred in pursuing this matter"; (2) "money damages (other than back pay), even where allowable, are not generally made in labor tribunals"; (3) UDC's defense to the action was not entirely without merit; and (4) with respect to attorney fees, the "American Rule," that attorney fees are generally not recoverable unless there is an explicit statutory or contractual basis for their entitlement, is appropriate "in the absence of explicit statutory authority [in the CMPA] on the question of attorney fees" and "the presence of at least one meritorious defense". (R&R at p.12.)

On November 7, 1990, UDC filed Exceptions to the Hearing Examiner's Report and Recommendation. No Exceptions were filed by Complainant which did, however, file a Response to UDC's Exceptions. UDC excepts to the Hearing Examiner's factual findings and conclusions of law in support of his conclusion "that the University's argument for dismissing the complaint on the basis that Complainant has raised an inappropriate issue under the [parties' collective bargaining agreement]" should be rejected (R&R at p. 11). We have considered UDC's Exceptions, which are discussed below. We adopt the Hearing Examiner's findings and conclusions to the extent consistent with this Decision and Order.

The crux of UDC's exceptions lies in its contention that no duty exists under the CMPA for an employer to provide information upon request to a union concerning matters arising under the term of the collective bargaining agreement to which they are a party. UDC argues that unlike Section 8(d) of the National Labor Relations Act (NLRA) the CMPA does not spell out the meaning of

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[4]/ The Hearing Examiner rejected the charges that UDC had violated D.C. Code Sec. 1-618.4(a) (1),(2) and (3), concluding that UDCFA had not provided sufficient evidence to warrant a finding of violation. No exceptions have been filed concerning these allegations. We agree with the Examiner's assessment and hereby dismiss these charges.

the employer's duty to bargain collectively. [5]/ UDC suggests that the 8(d) language in the NLRA was the (necessary) predicate for the Supreme Court's recognition of the NLRB's authority to require an employer to furnish information concerning grievances or other questions arising under the parties' collective bargaining agreement in NLRB v. ACME, supra n.2 at 436-37 (1967).

While UDC correctly notes that the CMPA and the NLRA are not identical, we have long held that the employer's duty under the CMPA includes furnishing information that is "both relevant and necessary to the Union's handling of the grievance" Teamsters, Local 639 and 730 v. D.C. Public Schools, supra, Slip Op. No. 226 at p.4, and that this obligation "flow[s] from th[e] duty to bargain in good faith." American Federation of State, County and Municipal Employees v. D.C. General Hospital, et al., supra, Slip Op. No. 227 at p.3. [6]/

Moreover, the Supreme Court based its ruling in ACME, supra, on Section 8(a)(5) of the NLRA which, in language followed in the CMPA, Sec. 1-618.4(a)(5), prohibits an employer from refusing to bargain collectively with the representative of its employees. The Court merely referred to Section 8(d) of the NLRA as "amplif[ying] by defining 'to bargain collectively'." 385 U.S. at 436. Thus, UDC's contention that the Board is without authority under the CMPA to require an employer to furnish such

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[5]/ NLRA Sec. 8(d) provides that "...to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder...[.]"

[6]/ UDC avers that UDCFA's request for information was made in bad faith and therefore UDC had no statutory duty to provide the information. In support of this exception, UDC quarrels with the Examiner's credibility determination and again asserts that no grievance is maintainable on these matters. We find nothing in the record to warrant a reversal of the Hearing Examiner's findings of fact on evidence that he duly considered (see R&R at pp. 5-6 and pp. 10-11), nor do we believe it is the Board's role to determine conclusively the meaning of contract provisions under which a grievance may (or may not) be filed and, if filed may (or may not) be sustained. Cf., ACME, 385 U.S. at 437-38.

information is unfounded. [7]/

With respect to the Teamsters' request for costs and attorney fees, our criteria for awarding costs pursuant to D.C. Code Section 1-618.13 were announced in AFSCME District Council 20, Local 2776, AFL-CIO v. Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245 at pp. 4 - 5, PERB Case No. 89-U-02 (1990). Applying those criteria here, we find an award of costs would not be in the "interest of justice" and therefore make no award. We also note that Section 1-618.13 does not refer to attorney fees, nor are we elsewhere given authority to award attorney fees.

For the foregoing reasons, we adopt the recommendations of the Hearing Examiner that Respondent UDC be found to have failed and refused to provide upon request information relevant and necessary to the performance of UDCFA's duties under the CMPA, and that by this failure and refusal the Respondent violated D.C.

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[7]/ We also find UDC's two remaining arguments unsupported by the record and thus without merit.

UDC contends that a grievance for which the information was sought would be untimely and therefore the information was not relevant and necessary for the performance of UDCFA's statutory duties. UDC acknowledges that under the parties' collective bargaining agreement a grievance is timely if filed "within 10 days of the occurrence or when the occurrence should have been discovered." (UDC Excep. at p. 9.) UDC's refusal to furnish the information prevented UDCFA from discovering whether or not a contractual violation had occurred. The Hearing Examiner found that UDCFA became aware only on December 13, 1989 that there "might" have been a violation of the parties' collective bargaining agreement and did so via UDC testimony at an arbitration hearing, and its request for the information followed promptly. (R&R at pp. 5-6.) UDC cites nothing that would show that a contractual violation should have been earlier discovered by UDCFA.

Finally, UDC argues that "[t]he contract language purportedly breached, merely states a past fact," and is not grievable. The Board found no merit in the same argument in AFSCME Council 20, AFL-CIO v. D.C. General Hospital, 36 DCR 7101, Slip Op. No. 227 at p. 4, PERB Case No. 88-U-29 (1989). There, the Board ruled that "arbitrability [is] an initial question for the arbitrator[.]" The Board found that the Union would need the information "to support its position in the arbitration proceeding in the event that the grievance was found arbitrable."

Code Sec. 1-618.4(a)(5) and (1) of the CMPA. [8]/

ORDER

IT IS ORDERED THAT:

1. University of the District of Columbia (UDC) shall cease and desist from refusing to furnish University of the District of Columbia Faculty Association (UDCFA) with the name of each faculty member who was not evaluated 'Less than Satisfactory' for the academic years immediately preceding 1987-88 and/or 1988-89, who did not receive a within grade increase unless he or she was already at the top step within grade.

2. UDC shall provide the information requested, as specified in paragraph 1 of this Order, not later than (14) days following the issuance of this Opinion.

3. UDC shall cease and desist from interfering, in any like or related manner, with the rights guaranteed employees by the Comprehensive Merit Personnel Act.

4. UDC shall post copies of the attached Notice conspicuously at all of the affected work sites for thirty (30) consecutive days.

5. UDC shall notify the Public Employee Relations Board, in writing, within fourteen (14) days of the date of this Order that the information specified in paragraph No. 1 of this Order has been provided to UDCFA and that the Notices have been posted accordingly.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

May 9, 1991

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[8]/ The Hearing Examiner, while concluding that UDC violated D.C. Code Section 1-618.4(a)(5), did not rule on the allegation that by the same conduct UDC violated D.C. Code Section 1-618.4 (a)(1). We hereby correct that error and find a derivative violation of D.C. Code Section 1-618.4(a)(1) for the reasons stated in AFSCME, Local 2776 v. Department of Finance and Revenue, 37 DCR 5658 Slip Op. No. 245, PERB Case No. 89-U-02 (1990).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: University of the District of Columbia Faculty Association/NEA, Complainant, and University of the District of Columbia, Respondent.	PERB Case No. 90-U-10 Opinion No. 272 (Erratum)

ORDER

This Order corrects an error on page 5 of the Board's Slip Opinion in the above-captioned matter appearing at 38 DCR 3463 (May 31, 1991). In the first paragraph, the 1st line, the sentence beginning "With respect to the Teamsters'..." is hereby corrected to the following: "With respect to UDCFA's..."

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

July 2, 1991

PERB Public Employee Relations Board

Government of the District of Columbia

415 Twelfth Street, N.W.
Washington, D.C. 20004
[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL FACULTY MEMBERS OF THE UNIVERSITY OF THE DISTRICT OF COLUMBIA (UDC): THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 272, PERB CASE NO. 90-U-10.

WE HEREBY notify our employees that the Public Employee Relations Board has found that we violated the law and has ordered us to post this Notice.

WE WILL cease and desist from refusing to provide the University of the District of Columbia Faculty Association (UDCFA) with requested information relevant and necessary to its representational duties.

WE WILL provide UDCFA with the requested names of each faculty member who was not evaluated "less that satisfactory" for the academic years immediately preceding 1987-88 and/or 1988-89, who did not receive within grade increases, unless he or she was already at the top step within grade.

WE WILL NOT in any like or related manner interfere with UDCFA's exercise of rights guaranteed to it by the Comprehensive Merit Personnel Act as the exclusive representative of a unit of employees at UDC.

UNIVERSITY OF THE
DISTRICT OF COLUMBIA

DATE:_____ BY:_____
President

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 2978,	
Complainant,	PERB Case No. 08-U-47
v.	Opinion No. 1433
District of Columbia Department of Health,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

Complainant American Federation of Government Employees, Local 2978 ("Union," "AFGE," or "Complainant") filed an Unfair Labor Practice Complaint ("Complaint"), against Respondent District of Columbia Department Health ("Agency," "DOH," or "Respondent") for alleged violations of sections 1-617.04(a)(1), (3), and (5) of the Comprehensive Merit Protection Act ("CMPA") by converting Union President Robert Mayfield from career status to term status and subsequently terminating his employment. (Complaint at 2). The Complainant filed a Motion for Preliminary and Injunctive Relief and a Motion for a Temporary Restraining Order. The Respondent submitted an Answer to the Complaint denying any violation of the CMPA. (Answer at ¶¶ 4-9). The matter was submitted to a Hearing Examiner, a hearing was held, and the parties supplied post-hearing briefs to the Hearing Examiner. In Slip Op. No. 1256, issued March 27, 2012, the Board adopted the Hearing Examiner's conclusion that the Respondent committed an unfair labor practice, and directed that Mr. Mayfield be reinstated to his position.

(Slip Op. No. 1256 at p. 11). Additionally, the Board ordered the Complainant to submit a verified statement as to the appropriate amount of back pay, and ordered the Respondent to provide a response to the verified statement within ten (10) days. *Id.* The Board stated that it would then issue a supplemental order ruling on the appropriate remedy in a subsequent order. *Id.*

II. Discussion

On July 2, 2012, the Union submitted a verified statement on the appropriate amount of back pay. Tyler Letter, June 18, 2012. DOH requested additional information from Mr. Mayfield, which was provided on October 17, 2012. McGillivary Verification at 1. On January 8, 2013, DOH submitted a worksheet to the Board reflecting a net payment amount to Mr. Mayfield of $112,757.33, and contributions to Mr. Mayfield's retirement account totaling $14,952.66. Levy e-mail, Jan. 8, 2013. Further, DOH noted that Mr. Mayfield's annual and sick leave had been restored. *Id.*

In an e-mail to the Board dated January 8, 2013, the Union asserted that the Agency's calculation of Mr. Mayfield's back pay did not include interest. Stewart e-mail, Jan 8, 2013. The Union requested interest at 4% per annum through January 4, 2013, totaling $16, 448.81. *Id.* In a subsequent e-mail, the Union stated that Mr. Mayfield requested that his annual leave be restored through a lump sum payment, instead of through restored leave. Stewart e-mail, January 9, 2013. The Union contended that under the CMPA, employees may only carry a certain amount of annual leave from year to year, and that under this "use or lose" policy, Mr. Mayfield stood to lose a great deal of any restored leave hours, "undercutting the make-whole remedy ordered by the [Board]." *Id.* In subsequent e-mails, the parties continued to debate the issue of whether interest was appropriate in this matter, and the appropriate method of complying with the Board's order in Slip Op. No. 1259 as it pertained to restoring annual leave.

On May 8, 2013, the parties attended mandatory mediation in an attempt to resolve the outstanding back pay issues. The mediation was unsuccessful, and on September 12, 2013, the Union sent a letter to the Board requesting a hearing on the issue of remedies. Stewart letter, Sept. 12, 2013. In response, the Agency opposed an additional hearing, stating:

> Since the issue of a determination of a make-whole remedy in this matter is strictly a legal issue, there is no need to hold an additional hearing in front of Hearing Examiner Johnson. Ms. Johnson has already issued her Report and Recommendation in this matter and is *functus officio* since [the Board] followed this Report and

Recommendation with its own Decision and Order of March 27, 2012.

Gerst letter, Sept. 16, 2013. Additionally, the Agency contended that Slip Op. No. 1256 did not mention an additional hearing in this case, and that the Board's rules do not provide for an additional hearing once a hearing examiner has issued the report and recommendation. *Id.* On October 1, 2013, the Union submitted a document styled "Request for Briefing Schedule or, Alternatively, for Hearing with Respect to Appropriate Remedy" ("Request"). In its Request, the Union asked the Board to issue a briefing schedule "so that the parties may submit briefs informing the Board of the parties' positions and providing the necessary information to form a basis for a 'supplemental order ruling on the appropriate remedy' contemplated by Slip Op. No. 1256. (Request at 2). Alternately, the Union asked the Board to set a hearing date. *Id.*

The parties' disagreements in this matter coalesce around two issues: (1) whether DOH must pay interest on the back pay award, and if so, at what rate; and (2) whether Mr. Mayfield's accrued annual leave must be restored via "restored hours" or as a lump sum payout. The majority of the arguments supporting each party's position have been presented to the Board in the form of e-mails dating back to December 2012. To clarify the parties' positions and aid the Board in resolving this matter, the parties are ordered to brief these issues, pursuant to the Board's investigatory powers. *See* Board Rule 520.8. The Complainant's brief will be due no later than 11:59 p.m. on November 29, 2013, and must be electronically filed via File & ServeXpress. The Respondent's brief will be due no later than 11:59 p.m. on December 30, 2013, and must be electronically filed via File & ServeXpress. After considering the parties' briefs, the Board will determine whether an additional hearing is necessary, or whether the Board may issue a decision on the pleadings in accordance with Board Rule 520.10.

ORDER

IT IS HEREBY ORDERED THAT:

1. The parties will submit briefs addressing: (1) whether the D.C. Dep't of Health must pay interest on the Robert Mayfield back pay award, and if so, at what rate; and (2) whether Mr. Mayfield's accrued annual leave must be restored via "restored hours" or as a lump sum payout?

2. The American Federation of Government Employees, Local 2978's brief must be filed no later than 11:59 p.m. on November 29, 2013, via the Board's File & ServeXpress electronic filing system.

3. The D.C. Dep't of Health's brief must be filed no later than 11:59 p.m. on December 30, 2013, via the Board's File & ServeXpress electronic filing system.

4. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

October 31, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-U-47 was transmitted via File & ServeXpress to the following parties on this the 31st day of October, 2013.

Ms. Nancy B. Stone, Esq.
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FILE & SERVEXPRESS

Mr. Andrew L. Gerst, Esq.
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FILE & SERVEXPRESS

/s/ Erin E. Wilcox

Erin E. Wilcox, Esq.
Attorney-Advisor

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 1000,	
Complainant,	PERB Case No. 13-U-07
v.	Opinion No. 1434
District of Columbia Department of Employment Services,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

Complainant American Federation of Government Employees, Local 1000 ("Union," "AFGE," or "Complainant") filed the above-captioned Unfair Labor Practice Complaint ("Complaint"), against Respondent District of Columbia Department of Employment Services ("Agency," "DOES," or "Respondent") for alleged violations of sections 1-617.04(a)(1) and (5) of the Comprehensive Merit Protection Act ("CMPA"). Specifically, the Union asserts that the Agency unilaterally implemented a new dress code policy without taking steps to bargain with the Union over the implementation or impact and effects of the policy. (Complaint at ¶ 6-7). Respondent filed an Answer and Affirmative Defenses ("Answer") in which it denies the alleged violations and raises the following affirmative defenses:

(1) The establishment and implementation of a dress code policy falls squarely within the statutory management right "to direct employees of the agencies" in D.C. Code § 1-617.08(a)(1);
(2) Article 25 of the parties' collective bargaining agreement ("CBA") recognizes the management right "to direct the employees of the Department"; and
(3) Identification and safety are two of the objectives of the dress code policy, which fall within the sole management right "to determine the agency's internal security practices" under D.C. Code § 1-617.08(a)(5)(D).

(Answer at 3). On August 15, 2013, the Union filed a Motion for Decision on the Pleadings ("Motion"), asserting that the issue in this case is well-settled under federal labor law, and requesting the Board issue a decision on the pleadings in accordance with federal labor law precedent. (Motion at 2).

II. Discussion

A. Facts

AFGE alleges that on or about October 12, 2012, the Agency announced the implementation of a dress code policy, called Administrative Issuance No. 701, to be fully implemented within thirty (30) days. (Complaint at ¶ 4). The policy stated that "DOES employees who violated any of these policies and procedures will be disciplined." *Id.* The Agency does not dispute this allegation, but contends that the policy was stated to be effective and implemented immediately, and that "Administrative Issuance No. 701 is a revision of Dress Standards Policy dated August 23, 1999, as stated in the Transmittal Letter attached to the Issuance." (Answer at 2). On October 14, 2012, AFGE demanded to bargain with the Agency over the dress code policy. (Complaint at ¶ 5; Answer at 2). The Union asserts that the Agency did not take any steps to bargain over the decision to implement the policy, nor has it taken any steps to bargain over the impact and effects of the policy. (Complaint at ¶ 6). The Agency denies this allegation, stating that the parties met for impact and effects bargaining on October 24, 2012. (Answer at 2). Further, the Agency admits that it took no steps to bargain with the Union over the decision to implement the policy, and contends that it had no legal obligation to do so. *Id.* AFGE alleges that the Agency has "unilaterally implemented the new dress code policy." (Complaint at ¶ 7). The Agency denies that it has implemented the new policy, but admits that it unilaterally implemented the revised dress code policy. (Answer at 2; emphasis added). AFGE contends that it has been a long-standing practice that employees were not held to any particular dress code, and were not disciplined for their attire or appearance, which the Agency denies. (Complaint at ¶ 8; Answer at 3).

B. Pleadings

a) Complaint and Answer

In its Complaint, AFGE alleges that the Agency violated D.C. Code §§ 1-617.04(a)(1) and (5) by unilaterally implementing a new dress code policy, where it had been a long-standing past practice at the Agency that employees were not held to any particular dress code and were not disciplined for their attire or appearance. (Complaint at ¶¶ 7-8). AFGE notes that while the Board has never addressed this issue, the National Labor Relations Board ("NLRB") has long held that the implementation of a dress code or any material change to an existing dress code is a mandatory subject of bargaining. (Complaint at ¶ 9 fn 1; *citing Medco Health Solutions of Los Vegas*, 357 NLRB No. 25 (2011); *Crittendon Hospital*, 342 NLRB 686 (2004); *Concord Docu-Prep, Inc.*, 207 NLRB 981 (1973)).

In its Answer, the Agency asserts that the establishment and implementation of a dress code policy "falls squarely within the statutory management right" to direct employees of the agency and determine the agency's internal security practices. (Answer at 3; *citing* D.C. Code §§ 1-617.08(a)(1) and (a)(5)(D)). Further, the Agency contends that Article 25 of the parties' CBA recognizes the management right "to direct employees of the Department." (Answer at 3).

b) Union's Motion for Decision on the Pleadings

Although titled a "Motion for Decision on the Pleadings," AFGE's Motion functions more like a reply to the Agency's Answer, and serves to flesh out the sparsely-pled Complaint. In its Motion, AFGE responds to the Agency's claim that the implementation of the dress code was a management right by asserting that "by imposing the new dress code without bargaining with the Union, the Agency has implemented a unilateral change to a mandatory subject of bargaining." (Motion at 1). Further, the Union states that the "novel issue now before the [Board] is whether the implementation of a dress code is a mandatory subject of bargaining." *Id.*

In its Answer, the Agency states that the dress code policy is not a new policy, but rather a revised policy which supplanted one previously issued in August 1999. (Answer at 2). In the Motion, the Union contends that the Agency's position is "in direct conflict to the emphatic denials of the existence of any policy by the Agency's Director Lisa Mallory and its Labor Relations Advisor Rahsaan Coefield in a series of emails to the Union in February of 2012." (Motion at 2-3; Motion Ex. 2). In these e-mails, Labor Relations Advisor Coefield states that "the Department of Employment Services has not adopted a Dress Standard Policy," and "The Department of Employment Services is not enforcing a Dress Standard Policy." (Motion at 3; Motion Ex. 2). Director Mallory wrote: "We do not have a dress standard policy at DOES," and later that "The Department of Employment Services has not adopted and is not enforcing a dress standard policy," reiterating in the same e-mail, "Again, DOES does not have and is not enforcing a dress standard policy. Assertions to the contrary are inaccurate. Accordingly, I cannot provide a cancellation date for a policy that was never enforced." *Id.*

In its Motion, AFGE acknowledges that the parties dispute whether the implementation of a dress code is a mandatory subject of bargaining. (Motion at 5). AFGE states that while the Board has not yet ruled on this issue, other labor relations authorities have concluded that the decision to impose or materially change a dress code is a mandatory subject of bargaining, and urges the Board to reach the same conclusion. *Id.* Further, AFGE contends that "[b]ecause the facts are not in dispute and the parties' disagreement represents a question of law, the Union seeks a decision on the pleadings." *Id.*

C. Analysis

Board Rule 520.10 provides that "[i]f the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral argument." Where the parties dispute material issues of fact, a decision on the pleadings is not appropriate. *See D.C. Nurses Association v. D.C. Dep't of Youth Rehabilitation Services*, 59 D.C. Reg. 12638, Slip Op. No. 1304, PERB Case No. 10-U-35 (2012). In the

instant case, the parties dispute whether the Agency had previously adhered to a dress code, or whether Administrative Issuance No. 701 constituted a new dress code policy. (Complaint at ¶¶ 7-8; Answer at 2-3). Additionally, the parties dispute whether impact and effects bargaining took place. (Complaint at ¶ 6; Answer at 2).

In its Motion, AFGE contends that the question of law – whether the implementation of a dress code is a mandatory subject of bargaining or a management right – supersedes the parties' factual disputes in this case. (Motion at 5). As AFGE correctly points out, the Board has not previously decided whether the decision to impose or materially change a dress code is a mandatory subject of bargaining. *Id.* AFGE urges the Board to look to decisions from the FLRA, the NLRB, and state labor boards in reaching its decision. *Id.*

AFGE first cites to two NLRB cases, *Medco Health Solutions of Las Vegas*, 357 NLRB No. 25 (2011), *aff'd in relevant part Medco Health Solutions of Las Vegas v. NLRB*, 701 F.3d 710 (D.C. Cir. 2012), and *Yellow Enterprise Systems, Inc.*, 342 NLRB 804, 811 (2004). (Motion at 5). While it is true that the Board looks to the NLRB for guidance when it lacks precedent on an issue, *see American Federation of Government Employees, Local 2714 v. D.C. Dep't of Parks and Recreation*, 50 D.C. Reg. 5049, Slip Op. No. 697 at p. 8, PERB Case No. 00-U-22 (2002), such consideration is inappropriate in the instant matter because the National Labor Relations Act has no parallel to the CMPA's statutory grant of management rights. AFGE recognizes this disconnect in its Motion, and urges the Board to consider precedent from the FLRA, whose governing statute provides a statutory reservation of management rights similar to that of the CMPA. (Motion at 5-6). In support of this argument, AFGE cites to *Veterans' Administration, West Los Angeles Medical Center*, 23 FLRA 278 (1986), and *U.S. Army, Aberdeen Proving Ground, Aberdeen, Maryland*, 32 FLRA 200 (1988). (Motion at 6).

In *Veterans' Administration*, an administrative law judge found, and the FLRA upheld, that while the FLRA has not decided whether or not dress codes are substantively negotiable, changes to a discretionary past practice of employee dress must be negotiated. 23 FLRA at 296. In that case, the existing dress code did not contain a prohibition against wearing sweaters or jackets with employee uniforms, and the FLRA ruled that the employer committed an unfair labor practice by eliminating the past practice of permitting sweaters and jackets without first notifying the Union or bargaining on the matter. *Id.* at 297. Further, the administrative law judge distinguished FLRA cases concerning uniforms for civilian military technicians, which "constitute a method and means of performing work because the employees belong to a military organization which is theoretically subject to mobilization at any time," and are not "aids to the comfort, health, or safety of the guard employees." *Id.* at 298. The judge went on to state that even assuming that dress constituted a "method and means" of performing cleaning work for the Veterans' Administration employees, in unilaterally changing the dress code, the employer failed to meet its obligation to bargain concerning the impact of the change. *Id.* While this case supports AFGE's assertion that changes to past practices must be bargained over, it does not conclusively support the contention that employee dress codes are mandatory subjects of bargaining.

In *U.S. Army*, the FLRA considered a union proposal to permit employees to wear shorts in certain areas of the workplace "so long as no detriment results to the employee and no safety health hazards [are] involved." 32 FLRA at 202. The employer alleged that the union's proposal was inconsistent with its right to assign work under the Federal Labor Relations Act because safety and health considerations would prevent the assignment of certain duties to employees who were not wearing long pants. Id. at 203. The FLRA rejected the employer's contention that the union's proposal interfered with its right to assign work, stating that the proposal contained no express requirement that specific work assignments be made or discontinued, and accommodated the employer's health and safety concerns. *Id.* at 203. Further, the union's proposal did not insulate employees from the consequences of being improperly attired to perform assigned work. *Id.* at 204. The FLRA similarly rejected the employer's contention that the union's proposal interfered with its right to determine its internal security practices, noting that the proposal permitted employees to wear shorts only in areas where non-hazardous materials are used and no health or safety hazards were involved. *Id.* at 204-205. The proposal was determined to be negotiable. *Id.* at 205. The FLRA's holding in *U.S. Army* illustrates that certain dress code proposals may be negotiable, but falls short of providing definitive support that dress codes are mandatory subjects of bargaining.

While the Agency urges the Board to determine whether the decision to impose or materially change a dress codes is a mandatory subject of bargaining, the Board finds that such an analysis is premature here as it is clear on the evidence presented there is a live dispute as to whether the Agency's dress code policy is an ongoing past practice. The Board has long held that an agency may not make unilateral changes to past practices without first engaging in the bargaining process. *See Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C. Metropolitan Police Dep't*, 60 D.C. Reg. 9212, Slip Op. No. 1391 at p. 18, PERB Case Nos. 09-U-52 and 09-U-53 (2013); *American Federation of Government Employees, Local 2978 v. D.C. Dep't of Health*, 59 D.C. Reg. 10736, Slip Op. No. 1275 at p. 2, PERB Case No. 11-U-21 (2012); *Fraternal Order of Police/Dep't of Corrections Labor Committee v. D.C. Dep't of Corrections*, 49 D.C. Reg. 8937, Slip Op. No. 679 at p. 5, PERB Case Nos. 00-U-36 and 00-U-40 (2002); *University of the District of Columbia Faculty Ass'n/NEA v. University of the District of Columbia*, 43 D.C. Reg. 5594, Slip Op. No. 387 at p. 2, PERB Case Nos. 93-U-22 and 93-U-23 (1996). In the instant case, AFGE asserts that the dress code policy is a new policy, and that the Agency has a "long-standing past practice that employees were not held to any particular dress code and were not disciplined for their attire or appearance." (Complaint at ¶ 8; Motion at 2-3; Motion Ex. 2). The Agency disputes that a past practice existed, and asserts that Administrative Issuance No. 701 is a revision of an August 1999 policy. (Answer at 2). In light of this dispute of material fact, a decision on the pleadings is not appropriate. *See* Board Rule 520.10. Instead, this matter will be processed through an unfair labor practice hearing to determine whether a past practice existed in which employees were not held to any particular dress code, and were not disciplined for their attire or appearance.

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, Local 1000's Unfair Labor Practice Complaint will be referred to a hearing examiner for an unfair labor practice hearing.

2. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.

3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

October 31, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-U-07 was transmitted via File & ServeXpress to the following parties on this the 31st day of October, 2013.

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FILE & SERVEXPRESS

/s/ Erin E. Wilcox

Erin E. Wilcox, Esq.
Attorney-Advisor

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 631, Complainant,	PERB Case No. 13-N-05
v.	Opinion No. 1435
District of Columbia Water and Sewer Authority, Respondent.	

DECISION AND ORDER

I. Statement of the Case

On April 15, 2013, the American Federation of Government Employees, Local 631 ("AFGE" or "Union") filed a Negotiability Appeal ("Appeal"), pursuant to Board Rule 532. AFGE and the District of Columbia Water and Sewer Authority ("WASA" or "Agency") are currently negotiating a successor collective bargaining agreement ("CBA") on working conditions. AFGE filed its Appeal in response to WASA's written communication of non-negotiability concerning five provisions in the proposed CBA. (Appeal at 1).

AFGE requests that the Board order WASA to commence negotiations on Article 21, Article 23, Article 34, Article 35, and Article 57, asserting that the topics found in the articles "are negotiable in accordance with law." (Appeal at 6).

On May 6, 2013, WASA filed an Answer to the Union's Appeal ("Answer"), asserting that it declared portions of Articles 21, 23, 34, 35, and 57 nonnegotiable because the provisions infringed upon the Agency's management rights. (Answer at 1). Further, WASA noted that the Union's appeal regarding Article 21 is now moot because the parties reached a tentative agreement on April 10, 2013. Similarly, WASA stated that on May 2, 2013, it rescinded its declaration of nonnegotiability pertaining to Article 23, section A, and that the portion of the Appeal related to Article 23, section A is moot. (Answer at 2).

II. Discussion

In *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, the Board adopted the U.S. Supreme Court's standard concerning subject for bargaining established in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 3342 (1975): "Under this standard, the three categories of bargaining subjects are as follows: (1) mandatory subjects, over which the parties must bargain; (2) permissive subjects, over which the parties may bargain; and (3) illegal subjects, over which the parties may not legally bargain." 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 2, PERB Case No. 82-N-01 (1982). D.C. Code § 1-617.08(b) provides that "all matters shall be deemed negotiable, except those that are proscribed by this subchapter." The Board has held that this language creates a presumption of negotiability. *Int'l Ass'n of Firefighters, Local 36 v. D.C. Dep't of Fire and Emergency Services*, 51 D.C. Reg. 4185, Slip Op. No. 742, PERB Case No. 04-N-02 (2004).

In *District of Columbia Dep't of Fire and Emergency Medical Services v. American Federation of Government Employees, Local 3721*, the Board considered one of the first negotiability appeals filed after the April 2005 amendment to D.C. Code § 1-617.08. 54 D.C. Reg. 3167, Slip Op. No. 874, PERB Case No. 06-N-01 (2007). In that case, the Board stated:

> [A]t first glance, the above amendment could be interpreted to mean that the management rights found in D.C. Code § 1-617.08(a) may no longer be a subject of permissive bargaining. However, it could also be interpreted to mean that the rights found in D.C. Code § 1-617.08(a) may be subject to permissive bargaining, if such bargaining is not considered as a permanent waiver of that management right or any other management right. As a result, [the Board indicated] that the language contained in the statute is ambiguous and unclear.

Id. at 8. The Board reviewed the legislative history of the 2005 amendment to determine the intent of the D.C. City Council. *Id.* The Board noted that analysis prepared by the Subcommittee on Public Interest stated:

> Section 2(b) also protects management rights generally by providing that no "act, exercise, or agreement" by management will constitute a more general waiver of a management right. This new paragraph should not be construed as enabling management to repudiate any agreement it has, or chooses, to make. Rather, this paragraph recognizes that a right could be negotiated. However, if management chooses not to reserve a right when bargaining, that should not be construed as a waiver of all rights, or of any particular right at some other point when bargaining.

Id.

III. Positions of the Parties

The Union's proposals are set forth below. The proposals are followed by: (1) WASA's arguments in support of nonnegotiability; (2) AFGE's arguments in support of negotiability; and (3) the findings of the Board.

Article 21: Job Changes and Placement

Section A – Internal Job Postings

> 2. During this period, employees who wish to apply for the open position or job may do so. The application shall be in writing, and it shall be submitted to the Human Resources Department. A review of an applicant's minimum qualifications shall be made by a representative of the Human Resources Department. An applicant covered by this Agreement who is not selected to fill the vacancy shall be notified in writing. Internal applicants shall be given preference over external applicants provided the internal applicants are equally qualified candidates to perform the job.

Agency: WASA states on that on April 10, 2013, the parties reached tentative agreement on Article 21, and attaches an exhibit showing the text of Article 21, which purports to be signed by each party's negotiators and dated April 10, 2013. (Answer at 2; Answer Ex. 1).

Union: AFGE notes that when the parties exchanged bargaining proposals on March 15, 2013, WASA declared the final sentence in Article 21, Section A(2) nonnegotiable. (Appeal at 2). On April 10, 2013, the Union proposed a counter offer retaining the sentence. *Id.*

Board: Answer Ex. 1 retains the final sentence in Article 21, Section 2(A), and was initialed by negotiators Barbara Hutchinson and Clifford Dozier. (Answer Ex. 1). The Board finds that the parties reached a tentative agreement on this proposal, and the Union's appeal of this proposal is moot.

Article 23: Job Descriptions

Section A – Copy of Job Description

> Each employee covered by this Agreement shall be supplied with a copy of his/her job description. The Union shall be supplied with a copy of each job description upon request. The Union shall be given the opportunity to review substantial changes in job descriptions prior to implementation.

Board: In its Answer, WASA states that on May 2, 2013, it notified the Union that it rescinded its declaration of nonnegotiability pertaining to Article 23, Section A. (Answer at 2, Answer Ex. 2). Therefore, the Board finds this issue moot.

Section B – Other Related Duties

> The clause found in the job descriptions, "performs other related duties as assigned," shall be construed to mean employees may be assigned to other related duties. Management recognizes that job assignments should be commensurate with job descriptions. The Union recognizes that at times Management must make exceptions to this policy. When such exceptions are necessary, the Authority shall make every effort to assign employees whose normal duties and pay level are most nearly associated with those of the temporary assignment. In all cases, such assignments shall be kept to a minimum, and an attempt shall be made to meet those needs on a voluntary basis. Management further agrees to take into consideration when making such assignments the employee's ability to perform the assignment.

Agency: WASA asserts that Article 23, Section B defines "other related duties" in a manner that infringes upon the Agency's management rights. (Answer at 2). WASA contends that in 2005, the Board declared other portions of Article 23 nonnegotiable, but did not consider Section B. *American Federation of Government Employees, Local 631 v. D.C. Water and Sewer Authority*, 54 D.C. Reg. 3210, Slip Op. No. 877, PERB Case No. 05-N-02 (2007) ("Slip Op. No. 877"). (Answer at 2). According to the Agency, AFGE now asserts that its position should be granted because WASA did not declare Section B nonnegotiable in 2005, but this position is not supported by the 2005 amendment to D.C. Code § 1-617.08(a-1), or the subsequent rulings of the Board interpreting that amendment. *Id.* Specifically, WASA notes that in Slip Op. No. 877, the Board held that "under D.C. Code § 1-617.08(a-1), the Board may no longer rely on the bargaining history of the parties in determining the issue of negotiability 'when there is a close question of whether or not a particular matter is a proper subject of bargaining.'" *Id.* WASA alleges that the Union's proposed language limits WASA's ability to "direct" and "assign" work to its employees, and uses the word "shall" four times. (Answer at 3). WASA notes that "[e]stablished principles of legal writing and contract interpretation both treat the word 'shall' as a mandate," and thus in four portions of Section B there is an unconditional mandate placed upon the Agency to: (1) interpret the phrase "other related duties" in a manner contrary to the CMPA; (2) make assignments based on the employee's level of pay and normal duties; (3) that work assignments be kept to a minimum; and (4) that WASA first seek volunteers before making assignments. (Answer at 3-4). Therefore, the Agency argues that these mandatory limitations on its ability to direct and assign its employees are contrary to the CMPA and should be deemed nonnegotiable. (Answer at 4).

Union: AFGE notes that the proposed language of Article 23, Section B is unchanged from the parties' current CBA, and that this article was the subject of the Board's decision in Slip Op. No. 877. (Appeal at 2-3). AFGE states that while the Board's decision in Slip Op. No. 877 declared the Union's proposal nonnegotiable because the Union wanted to bargain over changes in job descriptions, the Union's current proposal does not contain language impinging on management rights to assign or direct the work of employees by requiring bargaining over changes in job descriptions. (Appeal at 3). AFGE alleges that Article 23, Section B was reviewed by the Board

in Slip Op. No. 877, and that WASA did not challenge Section B in that case. *Id.* Further, AFGE contends that the language in Section B does not require the Agency to assign duties, interfere with its right to assign duties or work, and does not restrain the Agency in its right to direct employees in the performance of their duties; it reflects the parties' understanding of the term "other related duties" contained in job descriptions. *Id.*

Board: The proposal is nonnegotiable. In Slip Op. No. 877, considered the impact of the 2005 amendment to D.C. Code § 1-617.08. AFGE Local 631, Slip Op. No. 877 at p. 7-9. After examining the legislative history of the amendment, the Board made the following conclusions:

> (1) If management has waived a management right in the *past* (by bargaining over that right) this does not mean that it has waived that right (or any other management right) in any subsequent negotiations;
>
> (2) Management may not repudiate any previous agreement concerning management rights during the term of the agreement;
>
> (3) Nothing in the statute prevents management from bargaining over management rights listed in the statute if it so chooses; and
>
> (4) If management waives a management right *currently* by bargaining over it, this does not mean that it has waived that right (or any other management right) in future negotiations.

Id. at 8 (emphasis in original).

While the Union is correct that Article 23 is the subject of Slip Op. No. 877, in that decision the Board specifically noted that WASA did not raise any argument regarding subsection B of Article 23, and the Board did not analyze subsection B in its decision and order. *AFGE Local 631*, Slip Op. No. 877 at p. 9. In that case, the Board considered subsections A, D, E, and F only. *Id.* If the language of subsection B pertains to management rights, then subsection B does not become negotiable simply because WASA did not declare the section nonnegotiable in the 2005 negotiability appeal. *Id.* at 8.

The necessary question is whether Article 23, Section B infringes upon management rights under D.C. Code § 1-617.08(a). D.C. Code § 1-617.08(a)(1) grants management the sole right "[t]o direct employees of the agencies," while subsection (a)(2) grants management the sole right "[t]o hire, promote, transfer, assign, and regain employees in positions within the agency and to suspend, demote, discharge, or take other disciplinary action against employees for cause." The D.C. Court of Appeals has recognized that "verbs such as 'must' or 'shall' denote mandatory requirements... unless such construction is inconsistent with the manifest intent of the legislature or repugnant to the context of the statute." *Leonard v. District of Columbia*, 801 A.2d 82, 84-85 (2002). Taking into account this rule of construction, Article 23, Section B requires WASA to "make every effort to assign employees whose normal duties and pay levels are most nearly associated with those of the temporary assignment," and dictates both the duration of

those temporary assignments ("shall be kept to a minimum"), and the method of filling the temporary assignments ("an attempt shall be made to meet those needs on a voluntary basis."). The CMPA reserves the right to direct and assign employees solely to management. D.C. Code § 1-617.08(a)(1) and (2). Therefore, the Board finds that Article 23, Section B is nonnegotiable.

Article 34: Employee License and Certification

Section A: Authority Required License or Certification

> If it is determined by the Authority that employees holding certain positions should be certified or licensed, the Authority agrees that all employees with a minimum of twenty (20) years in the position and/or a related position at the Authority or its predecessor and an annual satisfactory work performance shall be exempt from licensing and certification requirements and may retain their present position. The Authority agrees to assure that all employees who are employed in such positions at the time this Agreement becomes effective shall be trained and otherwise assisted in satisfying this requirement. To accomplish this, the Authority shall supply and pay for the training of employees for whom such licensing or certification is required as part of their job requirements. Such training shall be available for at least twelve (12) months before any certification or licensing test is required, and any employee subject to this provision shall be allowed to retest at least twice thereafter before being deemed unable to continue in the affected position. If an employee fails the test, the Authority agrees to train the employee for a minimum of six (6) months, prior to the second and third test, in those skill areas in which the employee was deemed deficient. Subject to the rules of the testing agency, employees who wish to take the test again shall only be required to be re-tested in the areas in which they were deemed deficient.

Agency: WASA declared nonnegotiable the portion of the first sentence in Article 34, Section A that exempted employees with twenty years of service from any licensing or certification requirement determined by the Agency. (Answer at 4). WASA asserts that in Slip Op. No. 877, the Board addressed an appeal regarding changes to job descriptions by noting that "the establishment of qualifications for a new position is nonnegotiable as a management right because it is an integral part of management's decision as to how it will utilize employees to perform its work." *AFGE, Local 631*, Slip Op. No. 877 at p. 10. The Agency states that the same logic applies to any decision by management regarding the licenses or certifications an employee is required to possess, and cites to the Board's finding in Slip Op. No. 877 that it saw "no difference between bargaining over the establishment of qualifications for a new position and bargaining before changing an existing position." *Id.* WASA argues that the language at issue in Article 34, Section A creates a right for an employee to hold a position for which they would qualify due to years of service, without meeting the minimum qualifications established by the Agency – an outcome the Agency asserts is contrary to management rights under the CMPA. (Answer at 4-5).

Additionally, WASA contends that the Appeal makes an irrelevant distinction between licenses required by a regulatory body and licenses required by the Agency, stating that the question is not whether there should be different procedural requirements for licensure mandates issued by a regulatory body versus an employer, but whether the Agency should have to bargain over the exercise of its right to determine the qualifications and duties of its employees. (Answer at 5). WASA states that it has "expressed in clear and unambiguous terms that it is prepared to negotiate on procedural matters related to Article 34, Section A," but that it does not consider the language relating the twenty year service exemption to be procedural. *Id.* Further, WASA notes that although the Union states in its Appeal that it has conceded the issue of the twenty year exemption and attempted to bargain over the procedures for persons required to obtain a license or certification, the Agency contends that since filing the Appeal, the Union has refused to discuss Article 34 pending the Board's decision on its appeal of Article 34, Section A. *Id.* WASA states that "[h]aving conceded the issue of the twenty (20) year exemption as an impermissible infringement on management rights, if the Union is prepared to negotiate regarding procedural matters, the Authority is also prepared to do so." (Answer at 6).

Union: In its Appeal, AFGE draws a distinction between the language of Article 34, Section A, which it says applies only to Agency-required licensing and certifications, and the language of subsection B, which involves regulatory licensing. (Appeal at 4). The Union states that it presented a proposal "which removed the language and proposed procedures to provide training and testing" for employees which WASA requires to have licenses or certifications. *Id.* AFGE asserts that procedures for the exercise of management rights are negotiable, citing *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 2, PERB Case No. 82-N-01 (1982). (Appeal at 4).

Board: Appeal Exhibit 4 contains the Union and Agency's proposals for Article 34, Section A, dated April 10, 2013. (Appeal Ex. 4). The Agency's proposal strikes the portion of the first sentence exempting employees with twenty years of service from any licensing or certification requirement determined by the Agency. *Id.* The Union's proposal also strikes the portion of the first sentence exempting employees with twenty years of service from any licensing or certification requirement determined by the Agency. *Id.* Therefore, the dispute over this language is moot.

Notwithstanding, the procedures to implement management rights are negotiable. *See Teamsters Local Union No. 639 v. D.C. Public Schools*, 38 D.C. Reg. 1586, Slip Op. No. 263, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1991). Thus, the portions of Article 34, Section A that address procedural matters are negotiable, and the parties may bargain over these portions if they so choose.

Article 35: Leave

Section A: General

> In an effort to provide the Union with an opportunity to counsel employees with attendance issues prior to the issuance of a leave restriction letter or letter of

> warning, Management shall provide the Union President with a list of employees suspected of abusing sick leave, employees with excessive unscheduled emergencies or annual leave, or employees who are continually late for duty. The Union President shall provide Management a current list of the Union Stewards or Union Officials authorized to participate in this activity. Upon receipt of the list, the Union Steward and/or Union Official shall counsel those employees in an effort to minimize or eliminate attendance problems or issues.
>
> The provisions herein are not intended to completely cover all leave issues. In administering the leave, the Authority shall comply with D.C. and Federal FMLA.

Agency: WASA declared nonnegotiable a portion of the first sentence of Article 35, Section A, specifically the portion stating "In an effort to provide the Union with an opportunity to counsel employees with attendance issues prior to the issuance of a leave restriction letter or a letter of warning." (Answer at 6). WASA states that this language violates the management right to "suspend, demote, discharge or take other disciplinary action against employees for cause" guaranteed by D.C. Code § 1-617.08(a)(2). *Id.* Specifically, WASA asserts that the language restricts its ability to administer discipline for cause by requiring that the Union first be given an opportunity to counsel employees with attendance issues, which is a mandate that no action be taken by the Agency, even where cause exists, until the counseling takes place. *Id.* WASA rejects the Union's contention in its Appeal that a letter of leave restriction or warning are not forms of discipline, stating that both are part of the principles of progressive discipline mandated by Article 57 "Discipline" of the parties' CBA. *Id.* Further, the Agency states that Appendix A, Table of Appropriate Penalties, includes a specific charge that references "leave restriction," illustrating that "leave restriction" is considered discipline by the parties. (Answer at 7). According to the Agency, the Table of Appropriate Penalties demonstrates that "leave restriction" is a progressive step in the disciplinary process, and that failure to comply with leave restriction results in more severe sanctions. *Id.* Similarly, WASA notes that the Table of Appropriate Penalties includes a charge demonstrating that a "letter of warning" is considered a progressive step in the discipline process, as a response to excessive tardiness. *Id.* WASA states that any requirement that such a warning letter cannot be issued until the Union is first given an opportunity to counsel the employee is an infringement on its right to discipline an employee for cause. (Answer at 7-8).

Union: AFGE contends that leave restriction is not a disciplinary action, which is covered by a separate section of the CBA. (Appeal at 4-5). The Union states that the parties have negotiated over this language in the past, and that "the subject is a mandatory subject for bargaining since it does not impinge and/or restrain a management right." (Appeal at 5). AFGE asserts that the Board has held that "all subjects are negotiable, including the negotiation of the impact and effect of management rights." *Id*; citing *AFGE, Local 631*, Slip Op. No. 877 at p. 4.

Board: The proposal is nonnegotiable. The Board has previously held that imposing pre-conditions before an agency may discipline an employee for cause "unduly infringes management's right to discipline." *Washington Teachers Union, Local 6 v. D.C. Public Schools*, 46 D.C. Reg. 8090, Slip Op. No. 450 at p. 8, PERB Case No. 95-N-01 (1995). Additionally, the

Board has located Federal Labor Relations Authority ("FLRA") precedent stating definitively that "management's right to discipline includes placing an employee in a restricted leave use category." *National Federation of Federal Employees Local 405 and U.S. Dep't of the Army, Army Information Systems Command*, 42 FLRA 1112, 1131 (1991); *see also National Treasury Employees Union and U.S. De't of the Treasury, Bureau of the Public Debt*, 65 FLRA 509, 516-18 (2011); *National Treasury Employees Union and U.S. Dep't of the Treasury, Internal Revenue Service*, 66 FLRA 809, 812 (2012). Further, the FLRA has held that provisions or proposals that preclude management from imposing a leave restriction in response to a first offense of leave abuse affect management's right to discipline employees. *National Association of Government Employees Local R5-82 and U.S. Dep't of the Navy, Navy Exchange, Naval Air Station Jacksonville, FL*, 43 FLRA 25, 28 (1991); *see also National Federation of Federal Employees Local 858 and U.S. Dep't of Agriculture*, 42 FLRA 1169, 1170-72 (1991) (provision requiring agency to provide counsel and letter of warning prior to placing employees on leave restriction interferes with management's right to discipline employees); *American Federation of Government Employees Local 1156 and U.S. Dep't of the Navy, Navy Ships Parts Control Center*, 42 FLRA 1157, 1160-63 (1991) (preconditions which preclude an agency from imposing sick leave restriction directly interfere with management's right to discipline employees).

When the Board lacks precedent on an issue, it looks to the decisions of other labor relations authorities, such as the National Labor Relations Board ("NLRB") or FLRA for guidance. *See American Federation of Government Employees, Local 2741 v. D.C. Dep't of Parks and Recreation*, 50 D.C. Reg. 5049, Slip Op. No. 697 at p. 4, PERB Case No. 00-U-22 (2002) (Board used NLRB precedent to reason by analogy in case where Board lacked precedent on a particular issue); *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C. Metropolitan Police Dep't*, Slip Op. No. 1119 at p. 3, PERB Case No. 08-U-38 (Oct. 7, 2011) (Board relied on FLRA precedent to decide question of whether a bargaining unit member has a right to confer privately with a union representative); *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C. Metropolitan Police Dep't*, 48 D.C. Reg. 8530, Slip Op. No. 649, PERB Case No. 99-U-27 (2001) (Board looked to FLRA precedent to determine whether polling employees constituted direct dealing). In light of the fact that the FLRA has held management's right to discipline includes placing an employee on leave restriction, the Board will use this precedent as a guide in finding that this portion of AFGE's proposal is nonnegotiable.

Article 57: Discipline

Section C: Progressive Discipline

> 2. Where practicable, the Union shall be given the opportunity to counsel the employee before a corrective or adverse action is imposed upon an employee.

Agency: Similar to its objection to Article 35, Section A, WASA asserts that the language of Article 57, Section C(2) mandates a limitation on the Agency's ability to discipline an employee for cause. (Answer at 8). The Agency notes that in *District of Columbia Dep't of Fire and Emergency Medical Services v. American Federation of Government Employees, Local 3721*, 54

D.C. Reg. 3167, Slip Op. No. 874 at p. 10, PERB Case No. 06-N-01 (2007), the Board held that similar language which required the agency to allow "an insulated period of time for employees...to improve performance and attendance without safeguards allowing management to exercise its right to discipline its employees for cause" was nonnegotiable. (Answer at 8). WASA contends that the language at issue in the present case has the same effect and is likewise nonnegotiable. *Id.* According to WASA, the phrase "where practicable" is not sufficient to safeguard its right to discipline employees for cause because it is vague and undefined, failing to delineate which party decides what is "practicable" or even what standards will be used to determine practicability. *Id.* The Agency alleges that in Slip Op. No. 877, the Board found vague and undefined language nonnegotiable, and that in the instant case, if the vague words "when practicable" are removed, the remaining language would serve as a complete bar to the Agency's right to discipline an employee for cause without first waiting for the Union to counsel the employee. (Answer at 9). Finally, WASA contends that the language creates a standard where one had not previously existed. *Id.*

Union: The Union's proposal is the current language in the parties' CBA, and does not require the Union to have an opportunity to counsel an employee. (Appeal at 5). Instead, the proposal only states that the Union have the opportunity to counsel an employee "when practicable." *Id.*

Board: The proposal is nonnegotiable. In *D.C. Dep't of Fire and Emergency Medical Services v. American Federation of Government Employees, Local 3721*, 54 D.C. Reg. 3167, Slip Op. No. 847 at p. 10 (2012), the Board held that language which requires an agency to allow an insulated period of time for an employee to recover and improve performance, absent safeguards allowing management to exercise its right to discipline employees for cause, infringes on management's rights under the CMPA. The instant proposal requires that WASA, at least some of the time, allow an insulated period of time for employees to recover and improve their performance prior to the imposition of a corrective or adverse action. The qualifier "when practicable" does not diminish the fact that the proposal limits the Agency's ability to take disciplinary action against employees for cause, and therefore the Union's proposal impermissibly infringes on the Agency's rights under D.C. Code § 1-617.08(a)(2).

Section C: Progressive Discipline

> 5. When an employee has engaged in conduct where he/she is subject to more than one (1) violation, the employee shall be charged with the single most appropriate penalty as set forth in Appendix A of this Agreement.

Agency: WASA asserts that this language clearly forecloses its ability to discipline employees for cause. The CMPA grants the right for management to "suspend, demote, discharge or take other disciplinary action against employees for cause," without precondition or limitation. (Answer at 9; citing D.C. Code § 1-617.08(a)(2)). The Agency rejects the Union's argument in its Appeal that the language is purely procedural, stating that the language serves as an absolute bar to WASA issuing discipline for multiple offenses even when multiple offenses have occurred. *Id.* WASA asserts that by restricting the Agency's right to discipline to only the single most appropriate penalty when multiple charges are warranted is an absolute bar, not a

procedural matter. (Answer at 10). Thus, the Agency contends that language which allows misconduct on the part of the employee, but strictly prohibits management from suspending, demoting, discharging, or taking other disciplinary action is contrary to the CMPA. *Id.*

Union: The Union argues that Article 57, Section C(5) does not interfere with the Agency's right to discipline its employees because the parties may bargain over the impact and effects of management rights. (Appeal at 5). Instead, AFGE asserts that this section provides a procedure for the imposition of discipline, but does not require the imposition of any particular penalty by management. *Id.*

Board: The proposal is nonnegotiable. D.C. Code § 1-617.08(a)(2) grants management the sole right to "suspend, demote, discharge, or take other disciplinary action against employees for cause." On its face, AFGE's proposal prohibits WASA from assigning a penalty for each violation committed by an employee, instead limiting WASA to the "single most appropriate penalty." The Board finds that such a limitation is inconsistent with the management rights enumerated in D.C. Code § 1-617.08(a)(2), which provides that management retains the sole right to "suspend, demote, discharge, or take other disciplinary action against a employees for cause."

Section K: Immediate Administrative Leave

> 4. The following sections of Article 59, Expedited Grievance and Arbitration Procedure, shall apply to Section K of this Article:
>
> ...
>
> (b) Section G, Finality.

Section O: Active Duty Status

> Except in the special circumstances referred to in Section K above, an employee against whom corrective or adverse action has been proposed shall be kept in an active duty status until the arbitrator renders a final decision.

Agency: WASA alleges that the language of Article 57, Section O limits the Agency from imposing discipline on employees by cause, and that any argument that the language is merely procedural is meritless because the Board has previously considered such language and held that it was nonnegotiable. (Answer at 10). The Agency asserts that in *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C. Metropolitan Police Dep't Labor Committee*, 54 D.C. Reg. 2895, Slip Op. No. 842, PERB Case No. 04-N-03 (2007), the Board reviewed nearly identical language and found it to be nonnegotiable because the language limited management's right to discipline by establishing a standard where none existed[1]. *Id.* As

[1] The language read: "No discipline shall be implemented pursuant to this article until affirmed on appeal to an arbitrator or the Office of Employee Appeals, if such avenues are available and the employee and/or Union has not waived such appeal..." (Answer at 10).

the proposed language in the instant case "essentially mirrors the language that was prohibited by the Board" in that case, WASA urges the Board to declare the Union's proposal to be nonnegotiable. (Answer at 11).

Union: AFGE contends that Article 57, Section K(4)(b) and Section O do not restrict the Agency's right to impose discipline because they govern procedures, "which are applicable once a grievance has been filed and a disciplinary action is in arbitration." (Appeal at 5-6). The Union reiterates that procedures for the imposition of discipline are negotiable. (Appeal at 6; citing *UDCFA/NEA*, Slip Op. No. 43 at p. 4).

Board: The proposal is nonnegotiable. In *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C. Metropolitan Police Dep't*, 54 D.C. Reg. 2895, Slip Op. No. 842 at p. 5, PERB Case No. 04-N-03 (2007), the Board was asked to consider the following proposal:

> No discipline shall be implemented pursuant to this article until affirmed on appeal to an arbitrator or the Office of Employee Appeals (OEA), if such avenues of appeal are available and the employee and/or Union has not waived such an appeal. The decision of an arbitrator or the OEA shall be enforceable upon issuance and any disciplinary action approved by an arbitrator or the OEA shall be imposed no later than sixty (60) days following that decision. If the Department fails to act to impose discipline within this 60-day period, no discipline shall be imposed.

The Board concluded that the proposal was nonnegotiable because it limited management's right to discipline by establishing a standard where none exists. *Id*; citing *Washington Teachers Union, Local 6 v. D.C. Public Schools*, 46 D.C. Reg. 8090, Slip Op. No. 450, PERB Case No. 95-N-01 (1995). Further, the Board determined that the proposal would interfere with management's statutory right to discipline employees by preventing the agency from imposing disciplinary action under certain circumstances.

In the instant case, AFGE's proposal would require WASA to keep employees in an active duty status pending the final decision of an arbitrator, thus preventing WASA from imposing discipline until an arbitrator has issued an award. AFGE's proposal is substantially similar to the proposal at issue in *FOP/MPD Labor Committee*, and thus the Board will follow its holding in that case and find the instant proposal nonnegotiable.

ORDER

IT IS HEREBY ORDERED THAT:

1. The following proposals are moot:
   a. Article 21, Section A
   b. Article 23, Section A

c. Article 34, Section A

2. The following proposals are nonnegotiable:
   a. Article 23, Section B
   b. Article 35, Section A
   c. Article 57, Section C(2)
   d. Article 57, Section C(5)
   e. Article 57, Section K(4)(b) and Section O

3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

November 4, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-N-05 was transmitted via File & ServeXpress to the following parties on this the 4th day of November, 2013.

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Government of the District of Columbia

Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 2725 (on behalf of Saundra McNair and Gerald Roper),	
Complainant,	PERB Case Nos. 09-U-24 and 12-U-30
	Opinion No. 1436
v.	**Motion for Reconsideration**
District of Columbia Department of Consumer and Regulatory Affairs.	
Respondent.	

DECISION AND ORDER

Before the Board is a motion to reconsider the Board's award of costs in favor of the Complainant American Federation of Government Employees, Local 2725 ("Complainant" or "Union"). The motion to reconsider was filed by the Office of Labor Relations and Collective Bargaining ("OLRCB") on behalf of the Respondent District of Columbia Department of Consumer and Regulatory Affairs ("Respondent" or "Department").

I. Statement of the Case

On March 4, 2009, the Union filed an unfair labor practice complaint, case number 09-U-24, against the Department. The Union alleged in that case that the Department had failed to comply with an arbitration award issued in 2008. The Department agreed to settle that complaint but failed to complete the drafting of the settlement agreement as it had promised. As a result, the Union filed a second unfair labor practice complaint, case number 12-U-30, which the Board granted. *AFGE, Local 2725 (on behalf of McNair and Roper) v. D.C. Dep't of Consumer & Regulatory Affairs*, 60 D.C. Reg. 2593, Slip Op. No. 1362, PERB Case No. 12-U-30 (2013). Finding that the Department had demonstrated a pattern and practice of failure to implement awards and agreements, Board held that an award of costs was in the interest of justice. *Id.* at p. 6. The Union filed a motion for costs setting forth $112.99 in costs that it claimed. The costs were $48 for a witness's parking expenses and $64.99 for transportation expenses of the Union's

counsel. The Department filed an opposition to the motion, and the Union filed a reply to the opposition ("Reply"). In its decision and order on the motion for costs, the Board consolidated case numbers 09-U-24 and 12-U-30, granted the motion for costs, and ordered the Department to pay the Union $112.99 in costs within ten (10) days of the date of the order. *AFGE, Local 2725 (on behalf of McNair and Roper) v. D.C. Dep't of Consumer & Regulatory Affairs*, Slip Op. No. 1411, PERB Case Nos. 09-U-24 and 12-U-30 (Sept. 3, 2013) ("Slip Op. No. 1411").

The Respondent then filed the instant motion for reconsideration ("Motion"). The Complainant, which in its Reply had expressed its dismay at "Respondent's vitriolic response to the Union's motion for very minimal costs" (Reply at p. 1), elected not to file another brief replying to the Respondent's efforts to avoid paying those costs.

The Motion acknowledges that "PERB has the power to award costs" (Motion at p. 3) but objects that Slip Op. No. 1411 did not provide the guidance the Department had requested on what costs are allowable and what evidence is required to prove costs. The Motion also objected that the order to pay the costs in ten days denied the Department due process.

II. Discussion

A. Costs Awarded

The Department contends that the costs awarded were inadequately analyzed in Slip Op. No. 1411 and were "also unnecessarily punitive to DCRA." (Motion at p. 2). The Department objects that the Board did not use the federal statutes regarding costs that it had proposed and argues that "PERB has no criteria for what costs will be allowed and denied." (*Id.*).

The statute authorizing costs leaves the criteria for awarding costs to the Board's discretion: "The Board shall have the authority to require the payment of *reasonable* costs incurred by a party to a dispute from the other party or parties *as the Board may determine*." D.C. Code § 1-617.13(d) (emphasis added). The Board's criteria for what costs will be allowed were first set forth in *AFSCME Local Council 20, District 2776 v. D.C. Department of Finance and Revenue*, 37 D.C. Reg. 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). The criteria are:

1. The party to whom the payment is to be made was successful in at least a significant part of the case and the costs are attributable to that part of the case.

2. The costs are reasonable.

3. The award must be in the interest of justice.

Id. at pp. 4-5.

Those criteria were satisfied in this case. The Union's objective was to implement the arbitration award. The Union obtained a settlement implementing the arbitration award and an order that the Department complete the settlement. The costs are attributable to that effort because they involved filing an amended complaint and preparing for and attending the hearing

that led to the settlement. These costs "are the kind of costs that are ordinarily incurred in proceedings before the Board." *Spain v. F.O.P./Dep't of Corrs. Labor Comm.*, 46 D.C. Reg. 8352, Slip Op. No. 596 at p. 3, PERB Case Nos. 98-S-01 and 98-S-03 (1999). The Department characterizes the Union's documentation for the costs as "two quasi-affidavits, statements not notarized by a notary public." (Motion at p. 3). Notwithstanding, the Union's documentation is unobjectionable. The Board has requested expenses claimed by a party to be supported by "an affidavit explaining how it calculated its costs or other documentary evidence verifying" the costs. *Spain*, Slip Op. No. 596 at p. 3. The Union submitted both documentary evidence and affidavits. Notarization of an affidavit is not required. *See* Super. Ct. R. 9-I(e).

The costs are reasonable because they involve a modest amount of money for costs that were attributable to a part of the case in which the Complainant prevailed and were for matters ordinarily incurred in proceedings before the Board. In its earlier opinion, *AFGE, Local 2725*, 60 D.C. Reg. 2593, Slip Op. No. 1362, PERB Case No. 12-U-30 (2013), the Board found that an award of costs in this matter was in the interest of justice. The Department did not appeal or move for reconsideration of that opinion and does not dispute that it had demonstrated a pattern and practice of failure to implement awards and grievances. While that pattern and practice could be seen as justifying punitive costs, the imposition of $112.99 in costs cannot be considered "unnecessarily punitive." To the contrary, under the circumstances of this case, which involve protracted delays in implementing an arbitration award, the Board believes that the costs awarded are reasonable and not punitive.

The Respondent has compelled us to review the chronology of those delays here. The arbitration award that the Union has been trying to enforce was issued back in March of 2008. A year later the Union filed its first complaint (09-U-24) because the Department had failed to comply with the arbitration award. The parties reached a tentative agreement in December 2011, but the failure of the Department to complete the drafting of the settlement agreement in seven months induced the Union to file its second complaint (12-U-30) in July 2012. Although the Board then ordered the Department to complete the settlement and pay the Union's reasonable costs, the Department did neither, requiring the Union to file its third complaint (13-E-02) in March 2013. The Union's costs in bringing all those actions, which should have been unnecessary, over the course of five years are likely substantially more than the nominal costs the Union claimed. It is illogical to assert, as the Respondent does, that because the Union's nominal travel expenses are reasonable under the egregious circumstances of this case that any travel expenses, such as "meals at a four-star restaurant, overnights in the St. Regis Hotel and limousine service" (Motion at p. 4) could be held reasonable.

The Respondent insists that the Board pass not only on the claimed expenses but also on any other types and quantities of expenses that might be claimed in the future. The Respondent demands an "itemization of the costs allowable" (Motion at p. 1) and "guidance to litigants for identifying permissible and impermissible costs." (Motion at p. 2). The D.C. Court of Appeals has "previously held that 'the suggestion that this court may wish to give the [appellant] guidance on an issue not presented amounts to a request that we write an advisory opinion.'" *In re Estate of Bates*, 948 A.2d 518, 530 (D.C. 2008) (quoting *District of Columbia v. Wical Ltd.*

P'ship, 630 A.2d 174, 182 (D.C. 1993)). The court will not render advisory opinions in order to provide guidance:

> Our job as judges is to decide each case on the basis of the specific record before us, rather than to dispense advice with respect to issues that may arise on different facts in future cases. Indeed, our en banc court has disapproved the practice of providing "unsolicited guidance" regarding what it "behooves" trial judges (and, *a fortiori*, counsel) to do in hypothetical situations not before the court. . . .

Gilliam v. United States, 46 A.3d 360, 377 (D.C. 2012) (Schwelb, J., concurring) (quoting *Allen v. United States*, 603 A.2d 1219, 1228-29 n.20 (1992)). OLRCB has taken the position that no statute or rule authorizes PERB to issue advisory opinions either. *Doctors' Council of D.C. Gen. Hosp. v. D.C. Gen. Hosp.*, 34 D.C. Reg. 3629, Slip Op. No. 160 at pp. 1-2, PERB Case No. 86-N-01 (1987). Whether or not OLRCB was correct that PERB cannot render advisory opinions, it is clear that PERB is not required to. As a federal court put it, "[P]laintiffs cite no authority for the proposition that an administrative agency must render advisory opinions on request, and the Court is aware of none." *Chelsea Hosp. SNF v. Mich. Blue Cross Ass'n*, 436 F. Supp. 1050, 1064 (E.D. Mich. 1977).

Instead, the correct procedure for requesting the Board to issue broad guidelines is to petition for the amendment of the Board's rules in conformity with Rule 567.2, which provides, "Any interested person may petition the Board in writing for amendments to any portion of the rules and regulations and provide specific proposed language together with a statement of grounds in support of the amendment."

B. Allotted Time for Payment of Costs

The Board directed that the Department pay the costs within ten (10) days of the date of Slip Op. No. 1411, the order determining the amount of the costs. The Department contends that "[t]his part of the decision denies DCRA due process." (Motion at p. 5). Despite that claim, the Department does not assert that it is a person within the meaning of the Due Process Clause of the Fifth Amendment. Rather, the Department contrasts the ten-day period with the thirty days allowed for appeals to D.C. Superior Court by Superior Court Rule 1. The Department then speculates:

> If and when DCRA pays on time, then PERB can resist any appeal under the stated rule, claiming the costs were paid. DCRA would pay under protest, of course. But is this ten-day rule designed to avoid another critical Superior Court decision? Alternatively, does PERB seek to set up DCRA for some sort of contempt if it is late in paying? Then the Union could file some additional pleading and PERB could award more costs (costs upon costs).

(Motion at p. 5). The Department also claims that "[i]t is practically impossible for the D.C. paymasters to prepare a check within ten days." (*Id.*).

The Department was given ten days to pay the costs because that is the amount of time from the determination of costs that the Board has given to all other litigants who were ordered to pay costs. *See Council of Sch. Officers, Local 4 v. D.C. Pub. Schs.*, 59 D.C. Reg. 12673, Slip Op. No. 1318 at p. 3, PERB Case No. 12-E-05 (2012); *Washington Teachers' Union, Local #6 v. D.C. Pub. Schs.*, 59 D.C. Reg. 3463, Slip Op. No. 848 at p. 6, PERB Case No. 05-U-18, *motion for reconsideration denied and request for additional costs granted*, 59 D.C. Reg. 3537, Slip Op. 881 at p. 6, PERB Case No. 05-U-18 (2006); *Parker v. Am. Fed'n of Teachers*, Slip Op. No. 764 at p. 7, PERB Case No. 03-U-20 (Sept. 27, 2004); *Doctors' Council of D.C. Gen. Hosp. v. D.C. Health & Hosps. Pub. Benefit Corp.*, 47 D.C. Reg. 10108, Slip Op. No. 641 at p. 4, PERB Case No. 00-U-29 (2000); *AFGE, Local 2725 v. D.C. Housing Auth.*, 46 D.C. Reg. 10388, Slip Op. No. 603 at p. 4, PERB Case No. 99-U-18 (1999); *AFGE, Local 2725 v. D.C. Housing Auth.*, 46 D.C. Reg. 8356, Slip Op. No. 597 at p. 3, PERB Case No. 99-U-23 (1999); *Spain v. F.O.P./Dep't of Corrs. Labor Comm.*, 46 D.C. Reg. 4414, Slip Op. No. 581at p. 6, PERB Case Nos. 98-S-01 and 98-S-03 (1999); *Doctors' Council of D.C. Gen. Hosp. v. D.C. Gen. Hosp.*, 43 D.C. Reg. 5159, Slip Op. No. 475 at p. 3, PERB Case No. 92-U-17 (1996); *Doctors' Council of D.C. Gen. Hosp. v. D.C. Gen. Hosp.*, 43 D.C. Reg. 5142, Slip Op. No. 468 at p. 3, PERB Case No. 95-U-12 (1996).

If the Department felt that the Board should depart from that practice in this particular case, then rather than engage in rash and unfounded speculation about the Board's motives, the Department should have moved for an extension of time and explained why it has become too difficult to write a check in ten days.

Absent authority which compels reversal, the Board will not overturn its decision and order. *F.O.P./Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 60 D.C. Reg. 12,058, Slip Op. No. 1400 at p. 6, PERB Case No. 11-U-01 (2013). The Respondent has not presented any authority compelling reversal of Slip Op. No. 1411. Therefore, the motion for reconsideration is denied. Moreover, any further filings with the Board by the Respondent related to the costs it owes the Complainant, which are now a month and a half overdue, will be considered an abuse of the process and may result in the award of additional costs, interest, and fees.

ORDER

IT IS HEREBY ORDERED THAT:

1. The motion for reconsideration filed by the District of Columbia Department of Consumer and Regulatory Affairs is denied.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

October 31, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 09-U-24 and 12-U-30 is being transmitted to the following parties on this the 8th day of November, 2013.

Leisha A. Self
American Federation of Government Employees
Office of the General Counsel
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VIA FILE & SERVEXPRESS

James T. Langford
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VIA FILE & SERVEXPRESS

David McFadden
Attorney-Advisor

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Keith Allison, Edwin Hull, Tyrone Jenkins, Julian Lewis, Haywood McNeil, Tonia Adams, Maraia Wiley, Swanda Dunn, Mary Cade, Anthony Harris, Bernard Bryan, Rufus Wellington, Tamira Roberson, Reginald Wheeler, Therodole Anderson, Michael Ibigapo, Dexter Allen, Jr., Layard Banks, Mary Allen, Deniset Stewart, Eugenia Haines, Susan Armstrong, Richard Helms, Thomas Lewis, James Johnson, Jr., Ashley Green, Gerry Dyson, Hosen Green, David Thomas, Judy Brown, Doseph Stevenson, Temeka Smith, Lashawn Lattishaw, Robin Saunders, James Jones, Rome Ledbetter, Joseph Alexander, Shawn Franklin, Kerel White, Robert Murphy, Temika Herrell, Inga Campbell, Willie Colman, Beverly Risherson, Julia Broadus, Sheil Marr, James Miles, Keith Jarrett, Jackie Parker, Glameiz Groom, Donald Graham, William Bailey, Angola Childs, Lory Duddley, Tifany Cobbs, Derrell Roots, Benjamin Olubasusi, Wayne Taylor, Eric King, Francine Muhamand, Benita Bagley,	PERB Case No. 12-U-04
Complainants,	Opinion No. 1439
v.	Motion for Preliminary Relief
Fraternal Order of Police/District of Columbia Department of Corrections Labor Committee, Fraternal Order of Police, Lodge 1,	Motion to File Late Response to Motion for Preliminary Relief
Respondent.	

DECISION AND ORDER

I. Statement of the Case

On October 14, 2011, the above listed Complainants ("Complainants") filed a *pro se* Unfair Labor Practice / Standard of Conduct Complaint ("Complaint") with the Public Employee Relations Board ("PERB") against the Fraternal Order of Police/District of Columbia Department of Corrections Labor Committee, Fraternal Order of Police, Lodge 1 ("FOP" or "Union"), alleging 1) FOP "will" deprive a class of probationary employees from participating in a then upcoming Union election in violation of the Union's Bylaws; and 2) the Union's 2010 Election Rules violated the Union's Bylaws. (Complaint). Additionally, Complainants also seek Preliminary Relief in accordance with PERB Rules 520.15 and 544.15.

In its Answer, FOP generally denied the allegations and raised the affirmative defenses that: 1) PERB's Rules do not permit class action complaints; 2) Complainants failed to state a standard of conduct violation for which PERB can grant relief because alleged violations of the Union's Bylaws do not warrant PERB's intervention; 3) the Complaint provided no basis for its allegations beyond conjecture; 4) the Union's Bylaws required Complainants to first submit actions against the Union to the Labor Committee, which Complainants failed to do; and 5) the Complaint did not comply with PERB's filing Rules. (Answer, at 1-11). Additionally, FOP filed a request for an extension of time to file a late response to Complainant's Motion for Preliminary Relief. (Motion to File Late Response to Motion for Preliminary Relief, at 1-4).

II. Discussion

A complainant does not need to prove his/her case on the pleadings, but he/she must plead or assert allegations that, if proven, would establish a statutory violation of the CMPA. *Osekre v. American Federation of State, County, and Municipal Employees, Council 20, Local 2401*, 47 D.C. Reg. 7191, Slip Op. No. 623, PERB Case Nos. 99-U-15 and 99-S-04 (1998). When considering a dismissal, the Board views the contested facts in the light most favorable to the Complainant. *Id.*

A *pro se* litigant is entitled to a liberal construction of his/her pleadings when determining whether a proper cause of action has been alleged. *Thomas J. Gardner v. District of Columbia Public Schools and Washington Teachers' Union, Local 67, AFT AFL-CIO*, 49 D.C. Reg. 7763, Slip Op. No. 677, PERB Case Nos. 02-S-01 and 02-U-04 (2002).

Here, Complainants' allegation that FOP "will [deprive approximately 150] dues paying ["probationary employees"] in good standing ... their right to vote in the November 9, 2011 ... election" is unripe for consideration because it alleges something that Complainants assumed or believed would happen in the future.[1] (Complaint, at 2). Additionally, Complainants have not provided anything since the filing of their Complaint to establish that what they alleged "will" happen actually occurred, or that the Union did apply the 2010 Election Rules to the 2011 election. PERB only has jurisdiction to consider allegations that establish a past violation of the CMPA. *Osekre, supra.* Additionally, PERB Rule 520.4 states that: "Unfair labor practice complaints shall be filed not later than 120 days *after* the date on which the alleged violations occurred." (Emphasis added). PERB Rule 544.4 imposes a similar 120 day rule to Standards of Conduct complaints. As such, PERB lacks jurisdiction to consider Complainants' allegation because the violation had not yet occurred when the Complaint was filed. *Id.*

Additionally, PERB lacks jurisdiction to consider Complainants' allegation that the Union's 2010 Election Rules violated the Union's Bylaws because the allegation is untimely. The 120-day period for filing a complaint begins when the complainant first knew or should have known about the acts giving rise to the alleged violation. *Charles E. Pitt v. District of Columbia Department of Corrections*, 59 D.C. Reg. 5554, Slip Op. No. 998 at p. 5, PERB Case No. 09-U-06 (2009). Here, the 2010 Election Rules are dated March 1, 2010. (Complaint, Exhibit A). Therefore, the time period for Complainants to file a Complaint to challenge those Rules began to run on that date and expired 120 days later. *Id.*; and *Hoggard v. District of Columbia Public Employee Relations Board*, 655 A.2d 320, 323 (D.C. 1995) (holding that "time limits for filing appeals with administrative adjudicative agencies ... are mandatory and jurisdictional").

Even viewing the pleadings in the light most favorable to the Complainants cannot overcome the facts that the Complaint: 1) fails to state a claim for which PERB can grant relief; 2) is unripe; and/or 3) is untimely.[2] *Osekre, supra.* As such, the Complaint is hereby dismissed.[3]

[1] Complainants filed their Complaint on October 14, 2011, almost a full month prior to the election in question.
[2] The Board notes that even if the Complaint had been timely filed and had properly alleged a past statutory violation of the CMPA, it still would not likely have survived dismissal on grounds that Complainants failed to demonstrate how each named Complainant was individually "aggrieved", as required by PERB Rules 520.2 and 544.2. See *Antoino Rischardson, et al. v. Fraternal Order of Police/Department of Corrections Labor Committee*, Fraternal Order of Police, Lodge 1, Slip Op. No. 1426 at 2-3, PERB Case No. 11-S-01 (September 26, 2013).
[3] As a result of the Board's dismissal of the Complaint, it is not necessary to address Complainants' Motion for Preliminary Relief, Respondent's Affirmative Defenses, or Respondent's Motion to File Late Response to Motion for Preliminary Relief.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint is dismissed.

2. Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

October 31, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 12-U-04, Slip Op. No. 1439, was transmitted to the following parties on this the 13th day of November, 2013.

VIA U.S. MAIL and E-MAIL

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/s/ Colby Harmon
Attorney-Advisor - PERB

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 1000, Petitioner,	PERB Case Nos. 10-UM-02 and 13-RC-01
v.	Opinion No. 1438
District of Columbia, Department of Employment Services, Respondent.	

DECISION AND ORDER

I. Statement of the Case

The American Federation of Government Employees, Local 1000 ("Petitioner" or "Union") filed a petition for unit certification modification ("Petition"), naming as Respondent the District of Columbia, Department of Employment Services ("Respondent" or "Agency"). The Petition seeks to modify a bargaining unit in the Agency that a December 1981 certification of representative ("Certification") defined as follows:

> All non-professional employees of the Department of Employment Services; excluding all employees of the Office of the Director; all employees, except the Quality Control Unit, of the Office of Compliance and Independent Monitoring; all employees except those in purely clerical capacities of the Office of Budget and Accounting and Office of Equal Employment Opportunity; all Comprehensive Employment Training Act (CETA) employees; all management officials, confidential employees, and supervisors; any employee engaged in personnel work in other than purely clerical capacity; and any employee engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.

(Petition ¶ 7).

The Union requested that the unit be modified by adding to it "all unrepresented District Service (DS) professional employees in the Government of the District of Columbia Department of Employment Services, Office of Labor Standards, Workers Compensation, Hearings and Adjudication, Administrative Law Judges." (Petition ¶ 8). The Union alleged that there were approximately ten (10) program analysts and approximately fifteen (15) administrative law judges involved. The reason given for the requested modification was that "[c]hanges in positions as well as changes in the organization of the Department of Employment Services necessitate a change in the certification of the group of employees by this Local." (Petition at p. 1).

The Agency filed comments ("Comments") in which it objected to the addition of the administrative law judges and the program analysts and objected to the procedure itself. The Agency argues that the administrative law judges do not share a community of interest with the rest of the unit as required by D.C. Code 1-617.09. (Comments at pp. 2-3). The Agency contends that program analysts are already in the unit, with the exception of program analysts who directly support deputy directors and associate deputy directors. Adding to the unit the program analysts who support deputy directors and associate deputy directors would, the Agency argues, create a conflict of interest because of their access to confidential personnel information and their involvement with the administration of the collective bargaining agreement. (Comments at p. 3). Procedurally, the Agency took the position that a recognition petition was the proper vehicle for this case because Rule 510.5 requires in elections involving a unit of professionals and non-professionals that the professionals vote separately on "whether they desire a combined professional and non-professional unit." Bd. Rule 510.5. On that ground, the Agency contends that the Petition should be dismissed. (Comments at p. 3).

The Executive Director sent the Petitioner a deficiency letter notifying it that Rule 504.2(e)'s requirement that a petition for unit modification contain a "statement setting forth the specific reason for the proposed modification" was not satisfied by the Petition's vague assertion that "[c]hanges in positions as well as changes in the organization of the Department of Employment Services necessitate a change in the certification of the group of employees by this Local." Pursuant to Rule 501.3, the Executive Director gave the Petitioner ten days to submit the required statement in an amended petition. After that period expired without the deficiency having been cured, the Board dismissed the petition. *AFGE, Local 1000 v. D.C. Dep't of Employment Servs.*, 59 D.C. Reg. 10749, Slip Op. No. 1277, PERB Case No. 10-UM-02 (2012). The Petitioner moved for reconsideration on the ground that it had not received the deficiency letter. The motion was granted. *AFGE, Local 1000 v. D.C. Dep't of Employment Servs.*, 59 D.C. Reg. 15194, Slip Op. No. 1337, PERB Case No. 10-UM-02 (2012).

The Union then filed a document styled "Unit Modification/Recognition Petition" ("Amended Petition"), which prayed for unit recognition or, in the alternative, unit modification. (Amended Petition at pp. 5, 7-8). The Amended Petition cured the deficiency as well as responded to the Agency's objection that the matter should be raised in a recognition petition. Because the Amended Petition is in substance a recognition petition as well as a unit

modification petition, it was assigned a recognition case number, 13-RC-01, in addition to its unit modification number.

The Amended Petition alleges that hearing examiners hired within the Agency after 1982 were included within the bargaining unit. (Amended Petition ¶ 4). Subsequently, the D.C. Council adopted the Workers' Compensation Administrative Law Judges Amendment Act of 2000, D.C. Act Law 13-229, which provides that the "Mayor shall reclassify Office of Workers' Compensation Hearing Examiners as Administrative Law Judges and raise their level of compensation." (Amended Petition ¶ 5). The Union asserts that the administrative law judges should remain in the bargaining unit notwithstanding the name change. (Amended Petition ¶ 8). The Union also seeks to add program analysts and paralegals to the unit. (Amended Petition ¶¶ 24-27). The Union contends that all three groups of employees fall within the professional employees that the Certification recognized as being represented by the Union. (Amended Petition ¶¶ 24, 26). The Amended Petition concludes:

> Local 1000 respectfully requests that the PERB grant recognition of the Administrative Law Judges, Program Analysts, and the Paralegals as qualified members within the collective bargaining unit of Local 1000. Alternatively, should the PERB determine to deny recognition of the Administrative Law Judges, Program Analysts, and Paralegals as qualified members within the collective bargaining unit of Local 1000, the Local 1000 requests that the PERB grant a unit modification to include the persons currently employed as Administrative Law Judges, Program Analysts, and Paralegals within the DOES.

(Amended Petition at pp. 7-8).

The Amended Petition was accompanied by a showing of employee interest in support of the Amended Petition. The Executive Director requested the Agency to transmit to the Board in accordance with Rule 502.3 an alphabetical list of all employees in the proposed unit along with any comments. The Agency submitted the list. It did not submit any comments with the list but stated that it "requests that documents filed in the case in its prior iteration (PERB Case No. 10-UM-02) be incorporated in the case under its current case number."

The Executive Director evaluated the showing of interest and determined pursuant to Rule 502.4 that the Petition was properly accompanied by a thirty percent (30%) showing of interest as required by D.C. Code Section 1-618.10(b)(2) and Rule 502.2. In accordance with Rules 503.4 and 504.3, notices concerning the Amended Petition were posted. No requests to intervene, comments, or objections were received by the Board.

II. Discussion

As noted, the Respondent contends that the Union is attempting to add professionals to the bargaining unit and has failed to demonstrate a community of interest between the

professionals and the existing members of the unit. The Union contends that professionals are already in the bargaining unit, alleging that the Union "was recognized as the exclusive representative for collective bargaining in December 1981. This representation included both non-professional and professional employe[e]s." (Amended Petition ¶¶ 18-19). The Union further alleges that the administrative law judges, program analysts, and paralegals fall within language of the Certification giving the Union representation of professional employees. (Amended Petition ¶¶ 24, 26).

The language upon which the Union relies is quoted in paragraph 3 of the Amended Petition, where the Union alleges that "the Certification Orders provided Local 1000 exclusive representation '[c]onsisting of all career service professional, technical, administrative and clerical employees who currently have their compensation set in accordance with the District Service (DS) schedule, [and] who come within the personnel authority of the Mayor of the District of Columbia. . . .'"

The Certification did no such thing. The Certification, which the Union attached to both of its petitions, gave the Union exclusive representation of a bargaining unit containing all non-professional employees of the Agency with certain exceptions. *See supra* p. 1. Then the Certification placed that bargaining unit in Compensation Unit 1. The language that the Amended Petition represents as giving the Union exclusive representation over professional employees in the Agency is the description of Compensation Unit 1:

> UNIT 1: "Consisting of all career service professional, technical, administrative and clerical employees who currently have their compensation set in accordance with the District Service (DS) schedule, who come within the personnel authority of the Mayor of the District of Columbia, the Board of Trustees of the University of the District of Columbia, the District of Columbia General Hospital Commission, the District of Columbia Armory Board, except physicians at D.C. General Hospital, all Registered Nurses and all Licensed Practical Nurses, and who are currently represented by labor organizations certified as exclusive bargaining agents for non-compensation bargaining by the PERB or its predecessor."

(Un-numbered Ex. to Petition and Amended Petition at p. 3).

The Certificate did not give the Union exclusive representation of all of Compensation Unit 1, but rather it gave the Union exclusive representation of a part of Unit 1 (the bargaining unit) along with other unions having exclusive representation of other parts of Unit 1. The Board explained the process in *D.C. Corrections Union v. D.C. Department of Corrections*:

> Labor organizations that have been certified by the Board as exclusive bargaining representatives, in accordance with the

> CMPA, are certified to represent a group of employees that have been determined to be an appropriate collective bargaining unit for purposes of noncompensation terms-and-conditions bargaining. Once this determination is made, the Board then determines in what preexisting or new compensation unit to place these employees. The designated exclusive bargaining representative of the terms-and-conditions collective bargaining unit also bargains over compensation. This is so, notwithstanding the fact the exclusive representative may bargain on behalf of employees who are part of a larger compensation unit in conjunction with other exclusive representatives.

41 D.C. Reg. 6103, Slip Op. No. 326 at p. 7 n.9, PERB Case No. 91-RC-03 (1992).

The submissions of the Petitioner do not establish that the existing unit contains professionals. Whether the unit contains professionals is one of the issues disputed by the parties. That issue affects another issue raised by the Respondent: whether the administrative law judges share a community of interest with the rest of the unit as required by D.C. Code 1-617.09(a). In addition, the parties appear to take different positions on whether hearing examiners and project analysts are already in the unit and whether the inclusion of currently excluded project analysts would create a conflict of interest. Therefore, pursuant to Rules 502.10(e) and 504.5(d), this matter will be referred to a hearing examiner for an investigation and recommendation. *See NAGE, SEIU, Local R3-07 v. D.C. Office of Unified Commc'ns*, Slip Op. No. 1253 at p. 2, PERB Case No. 12-UC-01 (Mar. 28, 2012).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Board's Executive Director shall refer this matter to a hearing examiner.

2. Pursuant to Board Rule 550.4, the notice of hearing shall be issued at least fifteen (15) days before the hearing.

3. Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

October 31, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 10-UM-02 and 13-RC-01 is being transmitted to the following parties on this 8th day of November 2013.

Johnnie Walker
National Representative
AFGE District 14
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Washington, DC 20001

VIA FILE &SERVEXPRESS

Michael Levy
D.C. Office of Labor Relations &
Collective Bargaining
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Washington, D.C. 20001

VIA FILE&SERVEXPRESS

David McFadden
Attorney Advisor

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Keith Allison, Edwin Hull, Tyrone Jenkins, Julian Lewis, Haywood McNeil, Tonia Adams, Maraia Wiley, Swanda Dunn, Mary Cade, Anthony Harris, Bernard Bryan, Rufus Wellington, Tamira Roberson, Reginald Wheeler, Therodole Anderson, Michael Ibigapo, Dexter Allen, Jr., Layard Banks, Mary Allen, Deniset Stewart, Eugenia Haines, Susan Armstrong, Richard Helms, Thomas Lewis, James Johnson, Jr., Ashley Green, Gerry Dyson, Hosen Green, David Thomas, Judy Brown, Doseph Stevenson, Temeka Smith, Lashawn Lattishaw, Robin Saunders, James Jones, Rome Ledbetter, Joseph Alexander, Shawn Franklin, Kerel White, Robert Murphy, Temika Herrell, Inga Campbell, Willie Colman, Beverly Risherson, Julia Broadus, Sheil Marr, James Miles, Keith Jarrett, Jackie Parker, Glameiz Groom, Donald Graham, William Bailey, Angola Childs, Lory Duddley, Tifany Cobbs, Derrell Roots, Benjamin Olubasusi, Wayne Taylor, Eric King, Francine Muhamand, Benita Bagley,	PERB Case No. 12-U-04
Complainants,	Opinion No. 1439
v.	Motion for Preliminary Relief
Fraternal Order of Police/District of Columbia Department of Corrections Labor Committee, Fraternal Order of Police, Lodge 1,	Motion to File Late Response to Motion for Preliminary Relief
Respondent.	

DECISION AND ORDER

I. Statement of the Case

On October 14, 2011, the above listed Complainants ("Complainants") filed a *pro se* Unfair Labor Practice / Standard of Conduct Complaint ("Complaint") with the Public Employee Relations Board ("PERB") against the Fraternal Order of Police/District of Columbia Department of Corrections Labor Committee, Fraternal Order of Police, Lodge 1 ("FOP" or "Union"), alleging 1) FOP "will" deprive a class of probationary employees from participating in a then upcoming Union election in violation of the Union's Bylaws; and 2) the Union's 2010 Election Rules violated the Union's Bylaws. (Complaint). Additionally, Complainants also seek Preliminary Relief in accordance with PERB Rules 520.15 and 544.15.

In its Answer, FOP generally denied the allegations and raised the affirmative defenses that: 1) PERB's Rules do not permit class action complaints; 2) Complainants failed to state a standard of conduct violation for which PERB can grant relief because alleged violations of the Union's Bylaws do not warrant PERB's intervention; 3) the Complaint provided no basis for its allegations beyond conjecture; 4) the Union's Bylaws required Complainants to first submit actions against the Union to the Labor Committee, which Complainants failed to do; and 5) the Complaint did not comply with PERB's filing Rules. (Answer, at 1-11). Additionally, FOP filed a request for an extension of time to file a late response to Complainant's Motion for Preliminary Relief. (Motion to File Late Response to Motion for Preliminary Relief, at 1-4).

II. Discussion

A complainant does not need to prove his/her case on the pleadings, but he/she must plead or assert allegations that, if proven, would establish a statutory violation of the CMPA. *Osekre v. American Federation of State, County, and Municipal Employees, Council 20, Local 2401*, 47 D.C. Reg. 7191, Slip Op. No. 623, PERB Case Nos. 99-U-15 and 99-S-04 (1998). When considering a dismissal, the Board views the contested facts in the light most favorable to the Complainant. *Id.*

A *pro se* litigant is entitled to a liberal construction of his/her pleadings when determining whether a proper cause of action has been alleged. *Thomas J. Gardner v. District of Columbia Public Schools and Washington Teachers' Union, Local 67, AFT AFL-CIO*, 49 D.C. Reg. 7763, Slip Op. No. 677, PERB Case Nos. 02-S-01 and 02-U-04 (2002).

Here, Complainants' allegation that FOP "will [deprive approximately 150] dues paying ["probationary employees"] in good standing ... their right to vote in the November 9, 2011 ... election" is unripe for consideration because it alleges something that Complainants assumed or believed would happen in the future.[1] (Complaint, at 2). Additionally, Complainants have not provided anything since the filing of their Complaint to establish that what they alleged "will" happen actually occurred, or that the Union did apply the 2010 Election Rules to the 2011 election. PERB only has jurisdiction to consider allegations that establish a past violation of the CMPA. *Osekre, supra.* Additionally, PERB Rule 520.4 states that: "Unfair labor practice complaints shall be filed not later than 120 days *after* the date on which the alleged violations occurred." (Emphasis added). PERB Rule 544.4 imposes a similar 120 day rule to Standards of Conduct complaints. As such, PERB lacks jurisdiction to consider Complainants' allegation because the violation had not yet occurred when the Complaint was filed. *Id.*

Additionally, PERB lacks jurisdiction to consider Complainants' allegation that the Union's 2010 Election Rules violated the Union's Bylaws because the allegation is untimely. The 120-day period for filing a complaint begins when the complainant first knew or should have known about the acts giving rise to the alleged violation. *Charles E. Pitt v. District of Columbia Department of Corrections*, 59 D.C. Reg. 5554, Slip Op. No. 998 at p. 5, PERB Case No. 09-U-06 (2009). Here, the 2010 Election Rules are dated March 1, 2010. (Complaint, Exhibit A). Therefore, the time period for Complainants to file a Complaint to challenge those Rules began to run on that date and expired 120 days later. *Id.*; and *Hoggard v. District of Columbia Public Employee Relations Board*, 655 A.2d 320, 323 (D.C. 1995) (holding that "time limits for filing appeals with administrative adjudicative agencies ... are mandatory and jurisdictional").

Even viewing the pleadings in the light most favorable to the Complainants cannot overcome the facts that the Complaint: 1) fails to state a claim for which PERB can grant relief; 2) is unripe; and/or 3) is untimely.[2] *Osekre, supra.* As such, the Complaint is hereby dismissed.[3]

[1] Complainants filed their Complaint on October 14, 2011, almost a full month prior to the election in question.
[2] The Board notes that even if the Complaint had been timely filed and had properly alleged a past statutory violation of the CMPA, it still would not likely have survived dismissal on grounds that Complainants failed to demonstrate how each named Complainant was individually "aggrieved", as required by PERB Rules 520.2 and 544.2. See *Antoino Rischardson, et al. v. Fraternal Order of Police/Department of Corrections Labor Committee*, Fraternal Order of Police, Lodge 1, Slip Op. No. 1426 at 2-3, PERB Case No. 11-S-01 (September 26, 2013).
[3] As a result of the Board's dismissal of the Complaint, it is not necessary to address Complainants' Motion for Preliminary Relief, Respondent's Affirmative Defenses, or Respondent's Motion to File Late Response to Motion for Preliminary Relief.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint is dismissed.

2. Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

October 31, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 12-U-04, Slip Op. No. 1439, was transmitted to the following parties on this the 13th day of November, 2013.

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/s/ Colby Harmon
Attorney-Advisor - PERB

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of State, County, and Municipal Employees, District Council 20, Local 2921,	PERB Case No. 13-U-09
Complainant,	Opinion No. 1440
v.	Motion to Dismiss
District of Columbia Public Schools,	Motion for Extension of Time To File Opposition to Motion to Dismiss
and	
District of Columbia Office of the State Superintendent of Education,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

Complainant American Federation of State, County and Municipal Employees, District Council 20, Local 2921 ("Complainant" or "AFSCME" or "Union") filed an Unfair Labor Practice Complaint ("Complaint") against the District of Columbia Public Schools ("DCPS") and the District of Columbia Office of the State Superintendent of Education ("OSSE") (collectively, "Respondents"), alleging Respondents violated D.C. Code § 1-617.04(a)(1) and (5) ("Comprehensive Merit Personnel Act" or "CMPA"), by 1) miscoding certain positions in the bargaining unit as non-union employees for several years and thereby causing those employees to be deprived of benefits and grievance rights and further causing the Union to be deprived of dues and agency fee revenue; and 2) failing to provide documents the Union had requested in accordance with the Collective Bargaining Agreement ("CBA") between DCPS and AFSCME. (Complaint).

In their Answer, Respondents denied they violated the CMPA and raised several affirmative defenses. (Answer). Respondents further filed a Motion to Dismiss the Complaint, to which AFSCME filed an Opposition. (Motion to Dismiss); and (Opposition to Motion to Dismiss).

II. Background

AFSCME alleges that it and DCPS are parties to a CBA that remains current and effective pending negotiation of a successor agreement. *Id.*, at 2. AFSCME further contends that OSSE is bound by that same CBA because "OSSE is a successor employer to the Union's bargaining unit members who were transferred to OSSE from DCPS." (Complaint, at 2).

On an unspecified date in 2012, AFSCME contends it became aware via employee complaints that DCPS and OSSE may have failed to include certain employees in the bargaining unit despite those employees filling bargaining unit positions. (Complaint, at 2). On July 20, 2012, AFSCME requested that Respondents' common representative, the District of Columbia Office of Labor Relations and Collective Bargaining ("OLRCB"), provide the Union with "a listing of all the grade 7 and below OSSE and DCPS employees with their job titles who are coded WAA-XGA-WAE or any other non-bargaining unit code who may do AFSCME bargaining unit work." *Id.* After discussions, AFSCME narrowed its request to include only detailed information from 2009-2011 and "snapshot lists" from 2005-2008. *Id.*, at 2-3. AFSCME alleges the information Respondents provided for 2009-2012 showed that DCPS and OSSE had multiple employees who had been performing bargaining unit work, but whose positions were miscoded as non-union positions. *Id.*, at 3-4. AFSCME alleges Respondents' miscoding of these positions caused the employees in those positions to be deprived of optical and dental benefits enjoyed by Union members, as well as other bargaining unit benefits and contractual protections outlined in the CBA. *Id.*, at 4. Additionally, AFSCME alleges the miscoding deprived the Union of substantial dues and agency fee revenue. *Id.*

AFSCME alleges that prior to receiving the above stated information from Respondents, it "could not know or confirm that these positions were miscoded." *Id.*

On November 15, 2012, AFSCME demanded in writing that Respondents recode the positions into the bargaining unit and pay the "uncollected dues." *Id.* AFSCME further demanded that Respondents provide the requested information from 2005-2008. *Id.* AFSCME alleges that as of December 17, 2012, the date of the Complaint, Respondents had not complied with those demands. *Id.*, at 5.

In its Answer, Respondents admit DCPS is subject to the stated CBA, but deny that the CBA applies to or binds OSSE. (Answer, at 2).

Further, Respondents admit they received AFSCME's information request from July 20, 2012, and that the request was later narrowed as described. *Id.*, at 2. Respondents deny AFSCME's interpretation of the information they provided related to 2009-2012 and deny that

any of the listed positions were miscoded. *Id.*, at 3-4. Additionally, Respondents deny the Union's assertion that it could not have known if the positions were miscoded prior to receiving the information Respondents provided on grounds that AFSCME "receives a quarterly dues list of employees indicating the number of members in the bargaining unit" and that "[a]t any time during the years prior to Respondents' response on October 19, 2012, the Union could have requested information pertaining to how many or which employees are properly coded as being in the certified bargaining unit." *Id.*, at 4.

Respondents admit they received AFSCME's demand from November 15, 2012, but assert they provided the requested information related to 2005-2008 via email on December 18, 2012, the day after AFSCME filed its Complaint. *Id.*, at 5.

In addition to denying AFSCME's assertion that they violated the CMPA, Respondents raised the affirmative defenses that: 1) AFSCME fails to state a cause of action for which PERB can grant relief; 2) the facts establish a contractual dispute that falls outside of PERB's jurisdiction; 3) even if there is a valid cause of action, such is precluded under the doctrine of laches since AFSCME has, at all material times since 2005, received monthly dues statements that AFSCME had an affirmative duty to examine for errors or omissions; 4) AFSCME's Complaint is untimely; 5) even if there is a cause of action, any back-dues owed would have to be collected from the employees themselves and not from Respondents; 6) placing the affected employees into the bargaining unit would have the practical effect of reducing their wages since they would be placed on a different wage schedule and should therefore only be done with the express written consent of each employee, which the Union failed to provide; and 7) AFSCME's request for costs is unwarranted by the facts alleged. *Id.*, at 5-7.

On January 11, 2013, Respondents filed a Motion to Dismiss arguing that the Complaint should be dismissed because: 1) AFSCME failed to state a claim for which PERB can grant relief; 2) AFSCME failed to establish that it and OSSE are parties to the CBA by way of successorship; 3) no employees represented by AFSCME, including those identified by AFSCME in its Complaint, were transferred to OSSE; 4) the requested information relating to 2005-2008 has been provided; and 5) the Complaint's allegations constitute a contractual dispute that falls outside of PERB's jurisdiction. (Motion to Dismiss).

On January 18, 2013, AFSCME filed a motion for an extension of time to file an opposition to Respondents' Motion to Dismiss stating that an "unanticipated increase in work ... since the motion was filed" had prevented it from being able to "devote sufficient time to respond to the motion within the allotted five days." (Motion for Extension to File Opposition, at 1-2). On January 25, 2013, AFSCME filed its Opposition to Respondents' Motion to Dismiss arguing it was "not required to prove its case within the four corners of the complaint" but instead only needed to allege facts that, "if proven," would constitute a violation of the CMPA. (Opposition to Motion to Dismiss, at 1-2) (citing *District of Columbia Nurses Association v. District of Columbia Department of Youth Rehabilitation Services*, 59 D.C. Reg. 12628, Slip Op No. 1262, PERB Case No. 12-U-19 (2012)). Further, AFSCME contends that in order to dismiss the case, "PERB would have to make certain factual conclusions" that cannot be determined by

the pleadings alone. *Id.*, at 4. As such, AFSCME argues PERB should deny Respondents' Motion and assign the matter for an evidentiary hearing. *Id.*, at 5.

III. Discussion

A. AFSCME's Motion for an Extension of Time to Respond to Motion to Dismiss

PERB has held its purposes are generally best served by considering all of the information available to the parties insofar as it is filed in timely manner and in accordance with PERB's Rules. See *American Federation of Government Employees, AFL-CIO, Local 2978 v. District of Columbia Department of Health*, 60 D.C. Reg. 2551, Slip Op. No. 1356 at p. 10-11, PERB Case No. 09-U-23 (2013).

PERB Rule 501.2 requires a request for an extension of time to be filed at least three (3) days prior to the expiration of the filing period, but further provides that exceptions can be granted "for good cause shown" as determined by the Executive Director.

Here, while AFSCME did not file its Motion for Extension to File Opposition three (3) days prior to the expiration of the filing period set by PERB Rule 553.2, the Board notes that the stated period was only five (5) days and in order to meet the deadline set by PERB Rule 501.2, AFSCME would have needed to file its request for an extension almost immediately after Respondents filed their Motion to Dismiss. Therefore, in the interest of serving PERB's purposes, PERB, in its discretion, grants AFSCME's Motion for Extension to File Opposition and adopts AFSCME's January 25, 2013, Opposition to Dismiss into the record for consideration. *AFGE v. DOH, supra*, Slip Op. No. 1356 at p. 10-11, PERB Case No. 09-U-23.

B. Respondents' Affirmative Defenses and Motion to Dismiss

When considering a motion to dismiss, PERB views the contested facts in the light most favorable to the Complainant to determine if the allegations may, if proven, constitute a violation of the CMPA. See *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department, et al.*, 59 D.C. Reg. 5427, Slip Op. No. 984 at p. 6, PERB Case No. 08-U-09 (2009) (internal citations omitted). While a complainant does not need to prove its case on the pleadings, it must plead or assert allegations that, if proven, would establish a statutory violation of the CMPA. *Id.* If the record demonstrates that the allegations do concern violations of the CMPA, then PERB has jurisdiction over those allegations and can grant relief if they are proven. See *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 60 D.C. Reg. 9212, Slip Op. No. 1391 at p. 22, PERB Case Nos. 09-U-52 and 09-U-53 (2013).

Here, PERB rejects Respondents' contentions that the facts in AFSCME's Complaint establish a contractual dispute that falls outside of PERB's jurisdiction, and that AFSCME fails to state a cause of action for which PERB can grant relief. (Answer, at 6); and (Motion to

Dismiss, at 1-2, 5-6). PERB precedent holds that when an agency unilaterally places bargaining unit employees in non-bargaining unit positions and thereby deprives the union of the dues it would have earned had the employees been correctly classified, the agency should be held liable for the reimbursement of the union's fees—not the incorrectly classified employees. *National Association of Government Employees, Local R3-06 v. District of Columbia Water and Sewer Authority*, 47 D.C. Reg. 7551, Slip Op. No. 635 at p. 16, PERB Case No. 99-U-04 (2000). Therefore, because AFSCME's allegations, if proven, could establish a statutory violation of the CMPA over which PERB has authority to grant relief, the Board finds that AFSCME has stated a sufficient cause of action and that PERB has jurisdiction over this matter. *FOP v. MPD, supra*, Slip Op. No. 984 at p. 6, PERB Case No 08-U-09; and *FOP v. MPD, supra*, Slip Op. No. 1391 at p. 22, PERB Case Nos. 09-U-52 and 09-U-53.

Because Respondents' deny most—if not all—of AFSCME's allegations, PERB agrees with AFSCME that the Complaint cannot be dismissed at this time based solely upon the pleadings. (Opposition to Motion to Dismiss, at 4).

For instance, PERB cannot definitively conclude at this time that OSSE is a successor employer as AFSCME alleges. PERB has held that when "the functional role and employees of a public employer/agency are transferred to a new entity established to perform in the same capacity, ... the new agency is not a new employer for the purposes of collective bargaining" and "the entity [is thus] subject to the existing terms and conditions of employment contained in the collective bargaining agreement covering the employees placed under its authority." *American Federation of State, County and Municipal Employees, District Council 20, Locals 1200, 2776, 2401 and 2087 v. District of Columbia, et al.*, 46 D.C. Reg. 6513, Slip Op. No. 590 at p. 8, PERB Case No. 97-U-15A (1999) (internal citations omitted). In order to make such a determination, PERB looks to certain factors such as whether the "new employer uses the same facilities and work force to produce the same basic products or service for essentially the same customers in the same geographical area." *Id.* (citing *Valley Nitrogen Producers and International Union of Petroleum and Industrial Workers, Seafarers International Union of North America, AFL-CIO*, 207 N.L.R.B. 208 (1973)). Because the pleadings in the record do not provide enough information to apply these factors to the instant case, and based upon Respondents' assertion that "no employees within Complainant's bargaining unit were transferred from DCPS to OSSE", PERB cannot determine at this time whether OSSE is bound by the CBA between AFSCME and DCPS. *Id.*; and (Motion to Dismiss, at 2, 4).

Additionally, PERB cannot conclude at this time whether AFSCME's Complaint is timely under PERB Rule 520.4, which requires that "[u]nfair labor practice complaints ... be filed no later than 120 days after the date on which the alleged violations occurred." PERB does not have jurisdiction to consider unfair labor practice complaints filed outside of the 120 days prescribed by the Rule. *Hoggard v. District of Columbia Public Employee Relations Board*, 655 A.2d 320, 323 (D.C. 1995) (holding that "time limits for filing appeals with administrative adjudicative agencies...are mandatory and jurisdictional"). The 120-day period for filing a complaint begins when the complainant first knew or should have known about the acts giving rise to the alleged violation. *Charles E. Pitt v. District of Columbia Department of Corrections*,

59 D.C. Reg. 5554, Slip Op. No. 998 at p. 5, PERB Case No. 09-U-06 (2009). AFSCME contends it could not have known the employees were miscoded until October 19, 2012, when Respondents partially responded to its information request. (Complaint, at 4). Respondents contend that AFSCME knew or should have known about any discrepancies as early as 2005 on grounds that AFSCME has, at all material times since 2005, received monthly dues statements that it had an affirmative duty to examine for errors or omissions. (Answer, at 6).

Similarly, even if Respondents did provide all of the remaining information requested by AFSCME related to the coding of employees between 2005-2008 on December 18, 2013, it is still possible that Respondents violated D.C. Code §§ 1-617.04(a)(1) and (5) of the CMPA if AFSCME can prove that Respondents' production and delivery of the information was unreasonably or intentionally delayed. See *American Federation of Government Employees, Local 2725 v. District of Columbia Department of Health*, 59 D.C. Reg. 6003, Slip Op. No. 1003 at p. 4, PERB Case 09-U-65 (2009) (holding that an agency's refusal, without a viable defense, to produce information duly requested by a union constitutes violations of D.C. Code § 1-617.04(a)(5), and, derivatively, D.C. Code § 1-617.04(a)(1)).

Finally, because Respondents deny AFSCME's core allegation that the employees in question were miscoded, it is impossible to make any definitive determinations regarding that allegation by relying solely upon the pleadings in the record. (Answer, at 3-4).

PERB Rule 520.8 states: "[t]he Board or its designated representative shall investigate each complaint." Rule 520.10 states that "[i]f the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral argument." Rule 520.9 states that in the event "the investigation reveals that the pleadings present an issue of fact warranting a hearing, the Board shall issue a Notice of Hearing and serve it upon the parties." (Emphasis added).

Therefore, based on the issues of fact discussed herein in addition to others presented in the parties' pleadings, PERB finds it would be inappropriate for PERB to render a decision on the pleadings. Respondents' Motion to Dismiss is therefore denied. Pursuant to PERB Rule 520.9, PERB refers this matter to an unfair labor practice hearing to develop a factual record and make appropriate recommendations. *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 59 D.C. Reg. 5957, Slip Op. No. 999, PERB Case 09-U-52 (2009).

ORDER

IT IS HEREBY ORDERED THAT:

1. Complainant's Motion for Extension to File Opposition is granted.

2. Respondents' Motion to Dismiss is denied.

3. PERB shall refer the Unfair Labor Practice Complaint to a Hearing Examiner to develop a factual record and make appropriate recommendations in accordance with said record.

4. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.

5. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

October 31, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-U-09, Slip Op. No. 1440, was transmitted via File & ServeXpress™ and e-mail to the following parties on this the 13th day of November, 2013.

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/s/ Colby Harmon
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Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, AFL-CIO, Local 872,	
Complainant,	PERB Case No. 13-U-19
v.	Opinion No. 1441
District of Columbia Water and Sewer Authority,	Motion for Preliminary Relief
Respondent.	

DECISION AND ORDER

I. Statement of the Case

Complainant American Federation of Government Employees, AFL-CIO, Local 872 ("Complainant" or "AFGE" or "Union") filed an Unfair Labor Practice Complaint and Motion for Preliminary Relief ("Complaint") against the District of Columbia Water and Sewer Authority ("Respondent" or "WASA" or "Agency"), alleging WASA violated D.C. Code §§ 1-617.04(a)(1), (3), and (5) ("Comprehensive Merit Personnel Act" or "CMPA"), by 1) engaging in "a campaign of continuing harassment" against Chief Shop Steward, Kevin Jenkins ("Mr. Jenkins") and the officers of Local 872; 2) telling union officers and stewards not to consult with the union; 3) accusing employees and union officers of conducting union business when they speak with one another; 4) causing Mr. Jenkins to feel he cannot speak freely with employees; 5) causing members to be fearful of their right to representation by the Union; 6) informing Local 872 President, Jonathan Shanks ("Mr. Shanks") that he might be disciplined as a result of a complaint that had been raised by April Bingham ("Ms. Bingham"); 7) conducting an investigation of workplace violence complaints against Mr. Jenkins; and 8) refusing to provide documents the Union had requested in accordance with Article 18 of the parties' Collective Bargaining Agreement ("CBA"). (Complaint).

In addition, AFGE moved for preliminary relief pursuant to PERB Rule 520.15, arguing that WASA's alleged violations of the CMPA were "intentional and flagrant". *Id.*, at 4.

In its Answer, WASA denied it violated the CMPA as alleged and raised several affirmative defenses. (Answer). WASA further denied that AFGE is entitled to preliminary relief. *Id.*

II. Background

On November 26, 2012, Mr. Jenkins was placed on administrative leave in accordance with Article 57, Section K(1)(a) (governing discipline) of the CBA due to allegations that he had created a "hostile work environment" and violated WASA's Workplace Violence policy. (Complaint, at 2); and (Answer, at 2). As a result, Mr. Jenkins was asked to turn in his badge and leave the premises. *Id.* AFGE argues this action marked the beginning of a "campaign of continuing harassment against Mr. Jenkins ... because [he] had filed grievances against [WASA's] managers." (Complaint, at 2). WASA denies that such was the reason and instead contends it "had reasonable cause to place Mr. Jenkins on paid administrative leave" because approximately nine (9) employees had had filed written complaints accusing Mr. Jenkins of creating a hostile work environment. (Complaint, at 2); and (Answer, at 2).

As part of the investigation, Mr. Jenkins was interviewed by WASA Facilities and Security Manager, James Hollaway. *Id.* During the interview, Mr. Jenkins requested copies of the written complaints that had been filed against him but WASA denied that request. *Id.* WASA contends it had legitimate business reasons for denying Mr. Jenkins' request, such as the investigation was still ongoing, and because allegations of workplace violence are "highly sensitive in nature and require confidentiality in order to ensure maximum cooperation by employees." (Answer, at 2-3).

On January 7, 2013, WASA Customer Care and Operations Assistant General Manager Charles Kiely ("Mr. Kiely") and Labor Relations and Compliance Programs Manager C. Mustaafa Dozier ("Mr. Dozier") notified Mr. Jenkins that the workplace violence complaints had not been substantiated and that he could return to work without restrictions. (Complaint, at 2-3). At the meeting, Mr. Kiely directed Mr. Jenkins to notify his supervisor when he would be conducting union business. (Complaint, at 3); and (Answer, at 3). AFGE asserts Mr. Jenkins had "never failed to request and inform his supervisors when he was performing union business." (Complaint, at 3). WASA denies that assertion. (Answer, at 3).

When Mr. Jenkins reported back to work on January 14, 2013, his immediate supervisor, Leia Marshall ("Ms. Marshall"), asked to meet with him. (Complaint, at 3). AFGE alleges that Mr. Jenkins contacted Mr. Dozier to inquire about the meeting, and that Mr. Dozier informed Mr. Jenkins that based on comments Mr. Jenkins made in the January 7 meeting, Mr. Dozier believed Mr. Jenkins needed to enroll in COPE, an employee assistance program, because "Mr. Jenkins had a problem with women in authority positions." *Id.* WASA denies these allegations, but confirms that Mr. Dozier met with Mr. Jenkins on January 14 and discussed Mr. Jenkins'

possible enrollment in COPE. (Answer, at 3-4). WASA asserts Mr. Jenkins was not "required" to enroll in the program and that as of the date of its Answer, WASA had not referred him to the program. *Id.* WASA further asserts that Mr. Jenkins "refused to meet with Ms. Marshall" when she requested to meet with him on January 14. *Id.*

AFGE alleges Mr. Jenkins complained about Mr. Dozier's suggestion to WASA Support Services Assistant General Manager Katrina Wiggins ("Ms. Wiggins"), but that "Ms. Wiggins took no action on Mr. Dozier's statements." (Complaint, at 3). WASA asserts Ms. Wiggins informed Mr. Jenkins that the referral to COPE "was a suggestion, not a requirement, and that there was a reasonable basis to refer Mr. Jenkins to such program." (Answer, at 4).

AFGE alleges that because of these actions, "[b]argaining unit members ... have become fearful of speaking to union officers and stewards and have been told not to consult with the union"; that when union officers speak to employees, "the employees and union officers are accused of conducting union business"; and that WASA's treatment of Mr. Jenkins "has limited his interaction with bargaining unit members and caused Mr. Jenkins to feel he cannot speak freely with employees." (Complaint, at 3-4). AFGE further alleges that WASA's actions were "intentional and flagrant acts taken in disregard of the Union's rights as the exclusive representative of employees" and that the actions "were designed to and have interfered with Local 872's right to represent its bargaining unit members without fear, restraint, and coercion." (Complaint, at 4). Additionally, AFGE alleges that WASA's actions have caused the Union to be "regarded as ineffective by employees"; that they have "diminished the Chief Shop Steward's standing among his coworkers and bargaining unit members and acted as a restraint upon [his] right to carry out his duties of representation"; and that they "pose a continuing threat to the Union's right to represent bargaining unit members and create[d] a chilling effect on the rights of the exclusive representative, which is in violation of the public interest." *Id.* Based on these allegations, AFGE moved PERB to grant it preliminary relief under PERB Rule 520.15 and order WASA to cease and desist said actions. *Id.*, at 4-5. WASA denies these allegations and denies that AFGE is entitled to preliminary relief. (Answer, at 4-5).

In addition to the above allegations that form the basis of AFGE's request for preliminary relief, AFGE alleges WASA violated the CMPA and committed other unfair labor practices when it informed Mr. Shanks that he might be disciplined as a result of a complaint that had been raised by Ms. Bingham after a Labor-Management meeting; when it conducted its workplace violence investigation against Mr. Jenkins; and when it refused to provide documents related to Mr. Jenkins' workplace violence investigation that AFGE had requested in accordance with Article 18 of the parties' Collective Bargaining Agreement ("CBA"). (Complaint, at 5-6). WASA denies that Mr. Shanks was informed he might be disciplined as a result of Ms. Bingham's complaint; that its investigation of the workplace violence complaints against Mr. Jenkins violated the CMPA; and that its denial of AFGE's request for documents violated the CMPA. (Answer, at 5-7). WASA further asserts that after it provided AFGE with the reasons why it denied the information request, AFGE "never proffered an explanation as to why the information requested was relevant to the Union as the bargaining representative of certain employees." *Id.*, at 6.

WASA further denies that AFGE is entitled to its requested relief and raises the affirmative defenses that: 1) it had legitimate non-discriminatory reasons for the actions it took against Mr. Jenkins; 2) Mr. Jenkins suffered no loss of pay or damage as a result of its actions; 3) it had legitimate business reasons for withholding the information requested by the Union; 4) the Union failed to explain the relevance of its information request; 5) WASA's actions were conducted in accordance with the express management rights set forth in D.C. Code § 1-617.08 and Article 4 of the CBA; 6) the Complaint fails to state a cause of action upon which relief can be granted; 7) the Union is not entitled, on the law or the facts, to the relief requested, including but not limited to its request of attorneys' fees and costs; 8) some of AFGE's allegations may not be timely; and 9) PERB does not have jurisdiction over allegations that would require it to interpret the parties' CBA. *Id.*, at 7-9.

III. Discussion

Motions for preliminary relief in unfair labor practice cases are governed by PERB Rule 520.15, which in pertinent part provides:

> The Board may order preliminary relief ... where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, and the Board's ultimate remedy will be clearly inadequate.

American Federation of State, County and Municipal Employees, District Council 20, AFL-CIO, Locals 2091, 2401, 2776, 1808, 877, 709, 2092, 2087, and 1200, et. al. v. District of Columbia Government, 59 D.C. Reg. 10782, Slip Op. No. 1292, PERB Case No. 10-U-53 (2012).

Additionally, the Board's authority to grant preliminary relief is discretionary. *Id.* (citing *American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921, AFL-CIO v. District of Columbia Public Schools, D.C. Council 20, et al. v. District of Columbia Government, et al.*, 42 D.C. Reg. 3430, Slip Op. No. 330, PERB Case No. 92-U-24 (1992)). In determining whether to exercise its discretion under Board Rule 520.15, the Board applies the standard stated in *Automobile Workers v. National Labor Review Board*, 449 F.2d 1046 (D.C. 1971). *Id.* In *Automobile Workers, supra*, the D.C. Court of Appeals held that irreparable harm need not be shown. *Id.* However, the supporting evidence must "establish that there is reasonable cause to believe that the [the applicable statute] has been violated, and that the remedial purposes of the law will be served by *pendente lite* relief." *Id.* "In those instances where [the Board] has determined that the standard for exercising its discretion has been met, the [basis] for such relief [has] been restricted to the existence of the prescribed circumstances in the provisions of Board Rule 520.15 set forth above." *Id.* (citing *Clarence Mack, Shirley Simmons, Hazel Lee and Joseph Ott v. Fraternal Order of Police/Department of Corrections Labor Committee, et al*, 45 D.C. Reg. 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997)).

PERB Rule 520.8 states: "[t]he Board or its designated representative shall investigate each complaint." Rule 520.10 states that "[i]f the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral argument." However, Rule 520.9 states that in the event "the investigation reveals that the pleadings present an issue of fact warranting a hearing, the Board shall issue a Notice of Hearing and serve it upon the parties." (Emphasis added).

Here, AFGE's only justification for seeking preliminary relief is its assertion that WASA's actions were "intentional and flagrant" (which WASA denies). (Complaint, at 4). The Board finds that such a claim, by itself, does not constitute sufficient evidence to demonstrate that the effects of WASA's alleged actions against Mr. Jenkins are "widespread", are "seriously" affecting the public interest, that PERB's processes are being interfered with, and/or that PERB's ultimate remedy would be "clearly inadequate."[1] *See* PERB Rule 520.15. Furthermore, the Board finds that the pleadings currently in the record do not present enough evidence to definitively conclude that WASA violated the CMPA as alleged and therefore similarly fail to demonstrate a reasonable cause to establish that the remedial purposes of the law in this matter would be best served by *pendente lite* relief. *AFSCME, et. al. v. D.C. Gov't, supra*, Slip Op. No. 1292, PERB Case No. 10-U-53. As a result, the Board, in its discretion, denies AFGE's motion for preliminary relief. *Id.*

Based on the foregoing, and in light of WASA's denial that its actions violated the CMPA as well as its affirmative defenses, the Board finds that the parties' pleadings present an issue of fact that cannot be resolved on the pleadings alone. Therefore, pursuant to PERB Rule 520.9, the Board refers this matter to an unfair labor practice hearing to develop a factual record and make appropriate recommendations. See also PERB Rule 520.8; and *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 59 D.C. Reg. 5957, Slip Op. No. 999, PERB Case 09-U-52 (2009).

[1] AFGE included with its Complaint an Affidavit from Mr. Jenkins, in which he provides his account of WASA's alleged actions against him. (Complaint Exhibit 2). While Mr. Jenkins contends that since his return, "employees are afraid to be seen speaking with me", that they have informed him they have been told not to seek advice and representation from the union, and that WASA's actions "have had a chilling effect on me and have interfered with my ability to carry out my duties as the Chief Shop Steward", he does not indicate how many employees have told him those things. *Id.* As such, it is impossible for the Board to determine at this time whether the alleged effects of WASA's actions are indeed "widespread"; are "seriously" affecting the public interest; and/or whether its ultimate remedy would be "clearly" inadequate. See PERB Rule 520.15.

ORDER

IT IS HEREBY ORDERED THAT:

1. Complainant's request for preliminary relief is denied.

2. PERB shall refer the Unfair Labor Practice Complaint to a Hearing Examiner to develop a factual record and make appropriate recommendations in accordance with said record.

3. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.

4. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

October 31, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-U-19, Slip Op. No. 1441, was transmitted via File & ServeXpress™ and e-mail to the following parties on this the 13th day of November, 2013.

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