Members of the Board of Zoning Appeals
City of Alexandria
301 King Street
Alexandria, VA 22314

October 4, 2011

Re: BZA Number 2011- 0012, 4646 Seminary Road, Appeal of Planning Director's Determination

Gentlemen and Lady:

On June 20, 2011, Seminary Hill Association, Inc. (SHA) and Don Fullerton appealed the June 16, 2011, determination by the Planning Director that the purported applicant, Alexandria City Public Schools (ACPS), was entitled to partial or full relief from zoning and city code obligations relating to height, setback and illumination. In addition to the positions staked out in the Appeal, we have obtained a Memorandum of Understanding (MOU) between ACPS and the Department of Recreation, Parks and Cultural Activities (RPCA) that conclusively demonstrates that RPCA is the true and sole party in interest in the Special Use Permit (SUP) application (not the ACPS). Because RPCA is the true applicant, it may not take advantage of the height restrictions applicable to the construction, expansion or reconstruction of public schools.

We have also received documents in response to the Freedom of Information Act (FOIA) which (1) demonstrate conclusively that the illumination requirements in Section 13-1-3 of the City Code apply and (2) further substantiate that RPCA is the party in interest for purposes of the height regulations.[1]

In common parlance, the MOU and the FOIA documents are "smoking guns" on the height and illumination issues, and the Planning Director's June 16 Determination must be reversed as a matter of fact and law.

This letter supplements the positions explained in the June 20, 2011, appeal, which continues to apply in full. [2]

STANDARD OF REVIEW

In 2007, the Supreme Court of Virginia set forth the standards in evaluating whether a Planning Director's determination must be reversed. *Trustees of Christ and St. Luke's Episcopal Church v. Board of Zoning Appeals of City of Norfolk*, 273 Va. 375, 641 S.E.2d 104 (2007). In *Board of Zoning Appeals v. 852, LLC,* 257 Va. 485, 514 S.E.2d 767 (1999), the landowner challenged the zoning administrator's interpretation of the York County Zoning Ordinance

[1] The fact that RPCA is the party in interest is relevant to the height issue only. The identity of the party in interest is irrelevant to the illumination issue – all are required to comply with the Illumination restrictions of Section 13-1-3 of the City Code, regardless of which department of the government is the party in interest.
[2] Appellant Fullerton has filed a separate supplement to the June 20 Appeal simultaneously. SHA adopts and incorporate appellant Fullerton's supplement in full.

governing the calculation of density credits which determined the amount of developable land. The Supreme Court of Virginia held that the zoning administrator's interpretation was plainly wrong, and it reviewed the principles governing the assessment of the administrator's interpretation of the zoning ordinance:

> When an ordinance is plain and unambiguous, there is no room for interpretation or construction; the plain meaning and intent of the ordinance must be given it. *Donovan v. Board of Zoning Appeals,* 251 Va. 271, 274, 467 S.E.2d 808, 810 (1996); *McClung v. County of Henrico,* 200 Va. 870, 875, 108 S.E.2d 513, 516 (1959). . . . "Nevertheless, if the administrative interpretation of a portion of an ordinance is so at odds with the plain language used in the ordinance as a whole, such interpretation is plainly wrong, and must be reversed." *Cook v. Board of Zoning Appeals,* 244 Va. 107, 111, 418 S.E.2d 879, 881 (1992).

The *Trustees of Christ* decision confirmed that this standard still applies. Any deference given to the Planning Director's determination is limited to interpreting ambiguities and confusion in the code. No such ambiguities and confusion exist here. As explained in detail in the June 20 appeal, this supplemental letter, and appellant Fullerton's supplemental letter, the Planning Director's decision is fatally flawed because, among other reasons, it is plainly wrong and is at odds with the plain language of the ordinance (both in specifics and as a whole) regarding height, setback and illumination. Adding weight to this finding is that the Planning Director is plainly wrong on the facts. As a result, the Supreme Court of Virginia has found that that such plain error "must be reversed."

After considerable research, SHA has been unable to locate a single determination in Virginia remotely close to the Planning Director's determination here. SHA has located other Virginia jurisdictions specifically rejecting the unsupported opinions the Planning Director urges here, and requiring local governments to comply with the Zoning Code as written when seeking to install stadium lighting in residential zones. For example, on April 22, 2011, the Loudon County Zoning Administrator issued a determination that found, among other things, that the Loudon County RPCA must comply with illumination and lighting standards that are nearly verbatim to Section 13-1-3 of the Alexandria City Code.

SETBACK

For the reasons set forth in the June 20 appeal, and in appellant Fullerton's supplemental appeal, the Planning Director's June 16 determination regarding setback must be reversed because a SUP and a site plan are wholly independent and separate legal documents under the Zoning Code, with different purposes and standards, and it is contrary to the plain language of the code to pretend that a SUP could borrow from a site plan standard to evade compliance with code. In any case, even under the Planning Director's plainly wrong determination, the SUP application must be returned to the Planning Commission for it to make a finding whether there is any detrimental impact upon the neighborhood, in accordance with the provision that the Planning Director's determination says is applicable here.

ILLUMINATION

As explained in detail in the June 20 Appeal, Hammond is zoned as an R-8 property and is therefore required to meet illumination restrictions in Section 13-1-3 of the City Code. To summarize, Section 13-1-3 limits illumination into side and rear yards to .25 footcandles. In this instance, the lights would spill about .44 footcandles (taking the contractor's calculation at face value).[3] In her June 16 determination, the Planning Director simply states that this section does not apply, providing no reasons or explanation. Instead, the Planning Director states in response that the applicant can meet the .60 footcandles restriction applicable to public sidewalks. In addition to being irrelevant and non-responsive, FOIA documents revealed that the Planning Director, RPCA, ACPS, and others in city government (such as Transportation and Environmental Services) admit and know full well that Section 13-1-3 applies, and are simply choosing to ignore their own formal decisions and the plain language used in the ordinance.

After the city filed the SUP application, the city conducted a normal review of the application. In correspondence to the applicant and its contractor, the city's Department of Transportation & Environmental Services (T&ES) and Planning and Zoning (P&Z) submitted comments on the application (Exhibit 5). Significantly, P&Z and T&ES wrote the following comment back to the contractors on December 10, 2010:

> Lighting should be shielded to mitigate impact upon adjoining properties per Section 13-1-3 of Code of the City of Alexandria, 1981, as amended.

Exhibit 5, page 4. To make sure that this point was understood completely and fully, a city employee handwrote a notation immediately after this comment stating "0.25 foot candles @ property line." *Id.* The city also attached Section 13-1-3, and underlined the specific illumination restrictions. There was no misunderstanding -- the city concluded unequivocally that Section 13-1-3 applies and the stadium lighting must comply with those legal restrictions (just as it would to any other property owner.) Exhibit 5, pp. 6-7. Every department was given an opportunity to comment on these instructions to the applicant, and all chose to accept it and send it to the applicant.

On January 20, 2011, the contractor, on behalf of the applicant, submitted a formal response to those comments. Among other things, it stated that:

> ***The proposed lights will use technology that shields and directs the lights to prevent glare on neighboring residential properties along the south side of North Pickett Street, the east side of Seminary Road, and the west side of North Pegram Street. Lighting levels will meet City of Alexandria code requirements set forth in Section 13-1-3.***

(Exhibit 6, p. 2). Again, to make sure they were being clear, RPCA and the contractor put those words in italics and bold in the original.

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[3] The calculation of .44 footcandles was a conclusion reached by the contractor, without any oversight or scrutiny by any city official. The FOIA documents demonstrate that the likely number invading neighboring properties is much higher than what has been admitted.

The application of Section 13-1-3 was clearly understood and accepted by both the city and applicant. After the January 20, 2011, response from the contractor, Section 13-1-3 is not mentioned again until the public noticed this violation and brought it up (nor is there any indication that the city, ACPS, RPCA, or the contractor ever thought its official position that Section 13-1-3 applied was incorrect). Shortly after the city directed compliance with Section 13-1-3, and the applicant committed to compliance, an illumination analysis demonstrated conclusively that RPCA and the contractor could not come close to meeting this requirement. As a result, it appears that the Planning Director chose to give this requirement a blind eye, presumably hoping that the public would not figure out that Section 13-1-3 is the illumination standard at issue. In any case, no citizen would ever be permitted to flood neighboring properties with invasive lighting in violation of law and regulation, and neither should RPCA.

The government is not exempt from the law.

In addition, the construction and operation of stadium lighting, as proposed, will result in an immediate and ongoing violation of Section 13-1-3. Under these circumstances, the city staff report and endorsement of the project by city officials is unlawful unless and until the illumination requirements are met. The City has a legal duty to apply and enforce these regulations, including sister organizations within the city government. Here, the Planning Director chooses to ignore not only illumination limitations required by law but existing zoning and the restrictions on the size of construction of improvements, front yard setback requirements, as well as requirements for and amendment of an existing site plan for Hammond Middle School. Once the magnitude and scope of a previously approved plan is materially and substantially modified such as here with reconfiguration of the existing bus lanes, retaining walls, and removal and redesign of the existing storm water detention system, it is required to pursue either a modification to the existing site plan or submit a new site plan. The city has done neither.[4]

HEIGHT

In her June 16, 2011 decision, the Planning Director made a series of statements suggesting that ACPS is the party in interest in seeking lighted fields at Francis C. Hammond Middle School. As pointed out in great detail in the appeal, that position makes no sense for many reasons, such as the fact that no middle school children need fields at 10:00 p.m. every evening and the fact that ACPS has acted as nothing more than a pass-through to RPCA for any questions or issues relating to the SUP application. At the June 7, 2011, Planning Commission hearing, Commissioners publicly stated that the identity of the true applicant and party in interest is vague and elusive. The applicant and the Planning Director insist that the party in interest is ACPS and therefore they may advance convoluted and tortured theories to evade scrutiny. The Planning Commission never did get to the bottom of the identity of the party in interest, although the June 16 determination relating to height restrictions completely relies upon the party in interest being ACPS.

[4] Documents produced in response to FOIA demonstrate that pursuit of a SUP with a grading plan (which only requires staff review), vice a SUP with proper amendments to the Hammond Site Plan (which requires public review), was a knowing decision by ACPS, RPCA and P&Z. Appellant Fullerton's Supplemental letter explains why this should serve as another basis to reverse the Planning Director.

ACPS and RPCA signed a Memorandum of Understanding (MOU) (Exhibit 1) in 2007 that governs the management and maintenance of athletic fields adjacent to schools or located on school property, including Hammond. City Council authorized the MOU on a 7-0 vote, making it legally binding upon the City of Alexandria.[5] The MOU provides that RPCA is responsible for maintenance of the outdoors part of the school grounds, including the installation of synthetic turf, while ACPS is responsible for the indoors of the facilities and the skating rink. The purpose of the agreement is, in part, to allow ACPS to focus upon its main mission: educating the students of Alexandria, while RPCA assumed all responsibility for managing athletic fields, including the Hammond fields.

Neither ACPS, RPCA, nor the Planning Director, disclosed the existence or relevance of the MOU during the budget and SUP process, and no mention is made in the June 16 determination. It was not produced in response to the FOIA request. We learned of the MOU's existence through a newsletter from the T.C. Williams Parent Teacher's Association. The newsletter emphasized that the lights at Hammond would be for RCPA (not ACPS) use after 6:30 p.m. and on weekends. The newsletter then explained that:

> The ACPS and RPCA have operated the fields in the City under a joint MOU for some time. That basically means that the lines that have existed for so long between these two parts of government in essence no longer exist. The fields are simply City fields.

This passage is a fair (if understated) summary of the MOU: Contrary to what the Planning Director states in her June 16 determination, management of the fields at Hammond (including conversion to synthetic turf and installation of lights) is the sole province of RPCA. Page 7 of the MOU contains a map of Hammond Middle School which clearly identifies that the responsibilities of ACPS ends at the school buildings and in-line skate rink, and RPCA is responsible for most of the other property on school grounds. Page 3 of the MOU contains the following statement:

> The City and ACPS recognize that consideration should be given to making capital improvements on school grounds maintained by RPCA. Such improvements could include, but are not limited to; new irrigation systems, synthetic fields, engineered play areas, miracle fields, etc. The RPCA will consult with ACPS staff during the development of the City Manager's proposed CIP.

Thus, there is no ambiguity and the MOU is dispositive: the SUP application is the province of RPCA, and it is inappropriate and contrary to written, binding agreements and City Council directed policy to continue pretending that the SUP application at issue is an ACPS matter for the purpose of evading law and regulation. As a result, we respectfully request that the BZA consider the MOU and the fact that the Planning Director is flatly wrong – the lights at Hammond have nothing to do with ACPS. As demonstrated in the June 20 Appeal, there was little doubt over who the real party in interest is here – it's RPCA, although the city insists upon continuing the charade that ACPS is the applicant and party in interest. The MOU and

[5] The technical title of the document is "School Outdoor Maintenance Agreement," but is referred to in city documents as the MOU. City Council authorized the MOU on June 26, 2007.

newsletter confirm that RPCA is the responsible government organization, and the Planning Director's June 16 determination should be reversed.

Further confirmation that RPCA is the party in interest, and that ACPS is merely acting as a front to wrongfully evade height requirements, are in documents produced in response to the FOIA. For example, in an email dated November 19, 2011 from the Deputy Planning Director to the Planning Director and Deputy City Manager (shortly after the SUP was filed), the Deputy Planning Director states that ACPS disclosed that it has NO INTEREST in stadium lighting. Its interest lies exclusively with the conversion of the field. ACPS made crystal clear that the lights were solely within the purview of RPCA, and that ACPS has no interest. After noting that ACPS is applying for the SUP because RPCA will not support conversion of fields for the children of Alexandria without lighting it for adults, the Deputy Planning Director stated:

> The Schools are paying for the field work and the lights at Hammond but want it to be very clear that lights are not required for a middle schools program. If [RPCA] were not insisting, they would not be doing it.

November 19, 2010, e-mail, Deputy Planning Director to Planning Director and Deputy City Manager (who forwarded it to the City Manager) (Exhibit 2). The email confirms that ACPS wanted nothing to do with the lighting, recognizing that lighting the field is an RPCA matter since no students of ACPS (nor any children) would be using playing fields at 10 p.m. each evening, and the schools reap no benefit of lighting (yet is stuck with the $2 million bill, out of education funding for our children). Recognizing the threat this posed to RPCA plan to evade public scrutiny, as well as law and regulation, the FOIA request demonstrated that ACPS was put under enormous political pressure from senior city officials to pretend that it had an interest in the stadium lighting.[6] Nothing could be further from the truth.

Indeed, RPCA continues to maintain that stadium lighting is necessary for it to support conversion to a turf field. For example, the Planning Director suggested postponing the Planning Commission hearing from June 7 to the fall to allow adequate time to consider the "serious and important" issues surrounding this application, among other political reasons. RPCA strongly opposed any postponement. Significantly, the Chairwoman of the Parks and Recreation

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[6] For example, the FOIA records also showed that the city panicked when ACPS made clear its position that the lights had nothing to do with the schools. ACPS has never disavowed that position. Yet the Deputy City Manager directed ACPS, RPCA and P&Z to meet to develop a more palatable public answer to the question of "where did the idea for lights come from?" He directed ACPS, RPCA and P&Z "not to say that the lights are required by the City or a City policy on returfed fields." (Exhibit 3). While city staff and organizations naturally complied with the misleading instructions from the Deputy City Manager and continue pretending that the lights are for the children of ACPS, the fact that the Deputy City Manager directed city staff to minimize and dismiss the city's interests and overstate ACPS' interest (despite the plain facts) does not change the most important fact for this appeal: the lighting towers have nothing to do with the schools and RPCA does not come close to meeting the criteria for height relief based upon the construction, renovation or reconstruction of a public school. A variance is required.

Notably, on June 22, 2011, the Deputy City Manager sent another email to the City Manager and Director, RPCA (but not ACPS), expressing concern that in light of this appeal, ACPS will take the position that "the lights are a City project because night use would be largely for adults." For its part, ACPS has never stated that it has an interest in the lights for students at Hammond or any other ACPS school (nor should it be given any credibility if ACPS is pressured to change its position now).

Commission wrote to the Planning Director, Chairman of the Planning Commission and the Director of RPCA, making plain that RPCA is the true party in interest regarding stadium lighting:

> Spending a million bucks to put in an artificial turf field without lights is fiscally irresponsible. Pretty much a waste.

May 22, 2011 e-mail from Chairwoman, Parks and Recreation Commission to Chairman, Planning Commission, Planning Director, and Director, RPCA (Exhibit 4).[7] Notably, ACPS is not included in any of the email traffic or correspondence regarding the timing of the hearing (or any other issue); ACPS is simply irrelevant. This email confirms the continued accuracy and completeness of the November 19 statement from the Deputy Planning Director: ACPS has no interest in the stadium lighting and is only allowing its name to be used on the application because RPCA will not support conversion of the turf field for the students of Hammond without lighting it for adults, many of whom are non-residents of Alexandria.

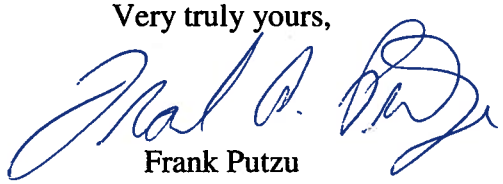
The plain fact is RPCA is the party in interest for stadium lighting. The Planning Director's June 16 determination is premised on incorrect facts, in addition to its fatal legal flaws. At the Planning Commission hearing, several commissioners and speakers remarked that the real party in interest was vague and elusive, and suspected that ACPS was being manipulated. RPCA and ACPS, unsurprisingly, said nothing about the point.

We now know why the applicant evaded revealing the true party in interest: It is RPCA, and as a result is required to obey the law and regulations, and seek a height variance from the height regulations, just like everybody else.

CONCLUSION

The June 20 Appeal continues to apply in full and this letter should be viewed as supplementing the appeal as it applies to violations of height and illumination restrictions; for the reasons set out in the June 20 appeal, the Planning Director rendered a fatally flawed and reversible decision on setback, too. We reserve the right to continue to inform the BZA of information as it becomes available.

Very truly yours,



Frank Putzu
Authorized Representative, Seminary Hill Association, Inc.

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[7] Whether installation of turf field without lights is appropriate and responsible is a policy matter for the Planning Commission and City Council. SHA notes that T.C. Williams High School, Episcopal High School, Bishop Ireton High School and St. Stephen's/St. Agnes all have synthetic turf and track without lights. They obviously have reached a different conclusion – that installation of synthetic turf and track without lights is fiscally responsible.