

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 17540-B/17541-B of Application of Capitol Hill Day School, pursuant to 11 DCMR § 3130.6, for a Two-Year Extension of BZA Orders in Application Nos. 17540 and 17541, and pursuant to 11 DCMR § 3129, for a Minor Modification of Plans.

Original Application No. 17540 of Capitol Hill Day School, pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy requirements of § 404, a variance from the rear yard requirements of § 403, and a variance from the floor area ratio requirements of § 1203.3 of the Capitol Interest Overlay District, and pursuant to 11 DCMR §3104.1, for a special exception pursuant to § 1202.1, to allow the construction of an addition to a private school, and pursuant to § 206, to reconfigure the layout of an existing parking lot, at premises 210 South Carolina Avenue, S.E., in the CAP/R-4 District (Square 765, Lot 803).

Original Application No. 17541 of Capitol Hill Day School, pursuant to 11 DCMR § 3104.1, for a special exception pursuant to §§ 206 and 1202.1 to allow the continued operation of a private school for thirty (30) students in pre-kindergarten through eighth grade and five (5) faculty and staff members in the basement through second floor at premises 214 South Carolina Avenue, S.E., in the CAP/R-4 District (Square 765, Lot 802).

HEARING DATES (Original Applications): November 28, 2006 and January 16, 2007
DECISION DATE (Original Applications): February 6, 2007
FINAL DATE OF ORDER (Order No. 17540/17541): June 11, 2007
DECISION ON 2009 MOTION TO EXTEND ORDER: April 7, 2009
DATE OF ORDER ON 2009 MOTION (Order No. 17540-A/17541-A): April 10, 2009
DECISION ON 2011 MOTIONS TO EXTEND ORDER AND MINOR MODIFICATION TO PLANS (Order No. 17540-B/17541-B): July 12, September 13, October 4, and November 8, 2011.

ORDER ON MOTIONS TO EXTEND THE VALIDITY
OF BZA ORDER NO. 17540/17541
AND FOR MINOR MODIFICATION OF PLANS

This application and order concerns two motions, one filed pursuant to 11 DCMR § 3130.6 to extend the validity of BZA Orders in Application Nos. 17540 and 17541 and the other for a minor modification of approved plans pursuant to 11 DCMR § 3129. For the reasons stated below, the Board of Zoning Adjustment (“Board” or “BZA”) grants both requests.

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The Underlying BZA Applications and 2007 Consolidated Order

On February 6, 2007, the Board approved the Capitol Hill Day School's ("Applicant" or "School") request for variance and special exception relief for two properties that were the subject(s) of what were originally filed by the Applicant as two applications but were addressed by the Board in a single order addressing both properties. The approvals for the two properties pertained to the Dent Building at 210 South Carolina Avenue, S.E., and an adjacent townhouse at 214 South Carolina Avenue, S.E. ("subject property"). The Board, with conditions, approved a variance from the lot occupancy requirements of § 404, a variance from the rear yard requirements of § 403, and a variance from the floor area ratio requirements of § 1203.3 of the Capitol Interest Overlay District, and pursuant to 11 DCMR §3104.1, for a special exception pursuant to § 1202.1, to allow the construction of an addition to a private school, and pursuant to § 206, to reconfigure the layout of an existing parking lot, at premises 210 South Carolina Avenue, S.E., in the CAP/R-4 District (Square 765, Lot 803). Also, in the same order, the Board approved the Applicant's request for a special exception pursuant to §§ 206 and 1202.1 to allow the continued operation of a private school for thirty (30) students in pre-kindergarten through eighth grade and five (5) faculty and staff members in the basement through second floor at premises 214 South Carolina Avenue, S.E., in the CAP/R-4 District (Square 765, Lot 802). The Board authorized a single, consolidated order for both applications, with conditions, that was issued on June 11, 2007 (BZA Order No. 17540/17541). Under the Order, and pursuant to § 3130.1 of the Zoning Regulations, the Order was valid for two years from the time it was issued – that is, until June 11, 2009.

2009 Motion to Extend

On March 20, 2009, the Board received a request from the Applicant for a two-year extension in the authority granted in Order No. 17540/17541 (the "Order"). That time extension request was made pursuant to § 3100.5 of the Zoning Regulations, whereby the Applicant requested that the Board waive the provisions of § 3130.1, which limited the validity of the underlying order to two years from the date of its issuance, and extend the validity of its prior order, as conditioned, for an additional two years, thereby allowing the Applicant additional time to apply for a building permit for the project as originally proposed.

At the time of this request, the Zoning Regulations did not expressly authorize the BZA to extend the validity of an order past the two-year limit set forth in § 3130.1. Consequently, the Applicant requested the waiver of the two-year limit in § 3130.1 pursuant to § 3100.5.¹ Finding that the Applicant met the criteria set forth in § 3100.5 for "good cause" due to the Applicant's

¹ Subsection 3100.5 of the Regulations states in full:

Except for §§ 3100 through 3105, 3121.5 and 3125.4, the Board may, for good cause shown, waive any of the provisions of this chapter if, in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

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inability to secure financing and the poor economic conditions in the District together with the Applicant's inability to secure all required government agency approvals by the expiration of the 2007 Order because of delays beyond the Applicant's control, the Board waived the limitation in § 3130.1 of the Zoning Regulations and extended the validity of BZA Order No. 17540/17541, for a period not to exceed two years from the Order's expiration date, thereby establishing a new expiration date of the order of June 11, 2011. Neither the plans nor the conditions changed from the underlying final order. (BZA Order No. 17540-A/17541-A.)

2011 Request for Extension of BZA Order and Motion for Minor Modification

Motion for Minor Modification.

On June 1, 2011, the Applicant filed a request for a minor modification of approved plans for BZA Application Nos. 17540 and 17541, pursuant to 11 DCMR § 3129. (Exhibits 124 (17540) and 70 (17541).) In its request, the Applicant indicated that, notwithstanding the Board's 2007 approval of the addition, the extension of that authority in 2009 to construct the addition, and the Applicant's efforts to finance and construct the addition, the Applicant determined that the addition is economically infeasible and indicated that it no longer intends to construct the approved addition. Instead, the Applicant plans to renovate, rehabilitate, and reconfigure the interior of the Dent Building at 210 South Carolina Avenue, S.E. In order to undertake these minor modifications to the Dent Building, the Applicant sought the Board's approval of this plan modification. The request for plan modifications also included a request to alter the conditions in the Order for Application Nos. 17540 and 17541 to account for the addition that would no longer be constructed.

The record indicates that the request for minor modification of approved plans was served on the parties to the case, pursuant to § 3129.4 of the Zoning Regulations. Pursuant to that subsection, all parties are allowed to file comments within 10 days of a request for minor modification being filed. The record shows that notice of the motion for minor modifications of plans was provided to the Office of Planning ("OP"), Advisory Neighborhood Commission ("ANC") 6B, the affected ANC, and Bradley and Catherine Pine. (*See*, Certificate of Service, Exhibits 124 (17540) and 70 (17541).)

The record shows that there was no response from ANC 6B or Mr. and Mrs. Pine to the Applicant's request for minor modification of plans. OP filed a memorandum in response to the request, recommending approval of the Applicant's request, provided that four conditions from prior orders pertaining to the Applicant's use of 214 South Carolina Avenue ("214 Building") either were reinstated or the Applicant provide an adequate demonstration of why those conditions are no longer relevant. (Exhibits 125 (17540) and 71 (17541).) The Applicant responded that after reviewing the four conditions pertaining to the 214 Building that OP recommended be reinstated, it agreed to the reinstatement of those conditions. (Exhibits 126 (17540) and 72 (17541).)

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Section 3129, specifically § 3129.3, indicates that a request for minor modification “of plans shall be filed with the Board not later than two (2) years after the date of the final order approving the application.” (11 DCMR § 3129.3.) The consolidated order, Order No. 17540/17541, regarding BZA Application Nos. 17540 and 17541 was issued on June 11, 2007 and was set to expire on June 11, 2009. However, the 2009 order, Order No. 17540-A/17541-A, extended the validity of the 2007 Order to June 11, 2011. The Applicant filed the request for a minor modification of plans on June 1, 2011, prior to the expiration date of June 11, 2011. Thus, the Board accepted the Applicant’s request for a minor modification as timely.

The Applicant described the modifications to its plans as follows:

The barrier free entry at the rear on the north elevation and replacement of a skylight on the north roof will comprise the only modifications to the exterior of the building. A sloped sidewalk from Second Street, SE will replace existing steps up to the parking at the rear of the building and down to an existing door into the building. A retaining wall will be provided to separate this walkway from the raised parking area. This work will not be visible from the front of the building on South Carolina Avenue and will be slightly visible from public space on Second Street, SE.

(Tab “D”, Exhibits 124 (17540) and 70 (17541).)

The criteria articulated in § 3129 for reviewing a minor modification of approved plans is as follows:

Subsection 3129.6 states that “[a]pproval of requests for modification of approved plans shall be limited to minor modifications that do not change the material facts upon which the Board based its original approval of the application.”; and

Subsection 3129.5 states that “a decision on a request for minor modification of plans shall be made by the Board on the basis of the written request, the plans submitted therewith, and any responses thereto from other parties to the original application.”

The modifications the Applicant requested meet the above criteria insofar that they are minor and do not change the material facts on which the zoning relief was approved, and therefore no new relief is required. The Applicant stated that the modifications being sought are minor and would not prejudice any party. The only modifications to the exterior of the building will be the barrier-free entry at the rear of the north elevation and replacement of a skylight on the north roof. A sloped sidewalk from Second Street, S.E., will replace existing steps up to the parking at the rear of the building and down to an existing door into the building. A retaining wall will separate the walkway from the raised parking area. The work will not be visible from the front of building on South Carolina Avenue and only slightly visible from public space on Second Street, S.E. In addition, no one objected to the request.

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Based upon the record before the Board, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR § 3129.1, that the requested relief can be granted being in harmony with the general purpose and intent of the Zoning Regulations and Map. No parties opposed this application. Accordingly, a decision by the Board to grant this request for a minor modification of approved plans would not be adverse to any party.

Motion to extend validity of order.

As indicated heretofore, the motion for minor modification of plans was filed June 1, 2011, and the Order in the case was due to expire on June 11, 2011. The motion for minor modification was placed on the Board's meeting agenda for July 12, 2011. As a preliminary matter at its July 12, 2011 meeting, the Board, by consensus, accepted the motion for minor modification but found that this motion for a minor modification, by itself, did not serve as a request for an extension of the validity of the underlying order. Further, the Board found that the Order needed to have its validity extended in order for the Board to act on the request for modification. The Board waived its rules and allowed the Applicant time in which to file an amended application to include a separate motion for a time extension of the validity of the Order.

The Board rescheduled its decision of the request for minor modification of approved plans to September 13, 2011 to allow time for the Applicant to file an amended application, pursuant to § 3130.6 of the Zoning Regulations, for a two-year time extension of the validity of the Order that would have otherwise expired on June 11, 2011. The Board gave the Applicant until September 6, 2011, to file its amended application with an explicit time extension request.

On September 1, 2011, within the time allotted by the Board, the Applicant filed an amendment to its June 1st application and requested a two-year extension of the effectiveness of the consolidated Order, pursuant to 11 DCMR § 3130. (Exhibits 128 (17540) and 73 (17541).)

The motion for a time extension was served on the parties to the case. (*See*, Certificate of Service, Exhibits 128 (17540) and 73 (17541).) Pursuant to § 3130.6(a), an extension request such as this one must be served on all parties to the application and those parties are then allowed 30 days to respond. (11 DCMR § 3130.6(a).) In order to give the parties sufficient time in which to respond to the motion filed on September 1st, the Board rescheduled its decision on the two motions that was scheduled for September 13, 2011, first to October 4th, and subsequently, to November 8th, which is when the Board made its decision to grant the motions.

Preliminary matters

After the issuance of the 2009 order extending the validity of Order No. 17540/17541, but prior to the filing of the requests discussed herein, the Zoning Commission ("Commission") adopted amendments to § 3130 that specifically authorized the Board to extend the time limits of § 3130.1. *Z.C. Order No. 09-01*, 56 DCR 4388 (June 5, 2009). Among other things, the new provisions allowed for only one extension of an order. (11 DCMR § 3130.6.)

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The first question for the Board was whether the Applicant was barred from making its request due to the language in § 3130.6 which expressly allows the Board to grant only one extension. As in prior cases, the Board found that the prior extension is not counted towards this limit. (*See*, BZA Order No.17600-B/17606-C.) As explained above, the new regulation was not in effect as of the final date of the order granting the first request for an extension. Section 6(A) of the District of Columbia Administrative Procedure Act, D.C. Official Code § 2-502 (6)(A), defines a rule to mean the “whole or any part of any Mayor's or agency's statement of general or particular applicability *and future effect*” (emphasis added). Therefore, the limit of one extension stated in the new rule was prospective only, so that the prior extension does not count towards this limit.

Also, there is a 30-day filing prerequisite for a request for a time extension under 11 DCMR § 3130.9. Subsection 3130.9 reads as follows:

A request for a time extension filed at least thirty (30) days prior to the date upon which an order is due to expire shall toll the expiration date for the sole purpose of allowing the Board to consider the request.

The Commission adopted § 3130.9 to expressly permit the tolling of an order if a request is filed at least 30 days before expiration. By this provision the Commission modified the precedent that allowed tolling to occur no matter how close to the expiration date the request was filed. The flip side of this rule is that if a request to extend an order is filed less than 30 days before the order's expiration date, the order will expire unless the Board grants the request before that date.

However, under these circumstances, the Board may waive this limitation pursuant to § 3100.5 and retain jurisdiction over the case and issue an order *nunc pro tunc*. In this instance, the request for a minor modification of plans was filed on June 1, 2011, prior to the date, but less than 30 days before the Order's expiration date of June 11, 2011. By granting the Applicant leave to amend its motion for modification by September 6, 2011, with a request to extend the final order's validity, the Board waived the effect of § 3130.9, and thereby tolled the Order's expiration. Thus, the Board retained jurisdiction to consider both requests.

All parties to the case were served with both motions and given the appropriate amount of time in which to respond to them. No objections to either motion were filed; thus, a waiver of § 3130.9 would not prejudice any party. Had the Board not granted leave to request an extension of time the Board would not have been able to consider the motion for minor modification, despite that it was timely filed. The Board therefore concludes that there is good cause for waiving this requirement and thereby waives the 30-day filing prerequisite to toll the expiration of the Order.

The merits of the request to extend

As previously discussed, the Zoning Commission adopted 11 DCMR § 3130.6 in Zoning Commission Case No. 09-01. The Section became effective on June 5, 2009.

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Section 3130.6 of the Zoning Regulations states in full:

- 3130.6 The Board may grant one extension of the time periods in §§ 3130.1 for good cause shown upon the filing of a written request by the applicant before the expiration of the approval; provided, that the Board determines that the following requirements are met:
- (a) The extension request is served on all parties to the application by the applicant, and all parties are allowed thirty (30) days to respond;
 - (b) There is no substantial change in any of the material facts upon which the Board based its original approval of the application that would undermine the Board's justification for approving the original application; and
 - (c) The applicant demonstrates that there is good cause for such extension, with substantial evidence of one or more of the following criteria:
 - (1) An inability to obtain sufficient project financing due to economic and market conditions beyond the applicant's reasonable control;
 - (2) An inability to secure all required governmental agency approvals by the expiration date of the Board's order because of delays that are beyond the applicant's reasonable control; or
 - (3) The existence of pending litigation or such other condition, circumstance, or factor beyond the applicant's reasonable control.

(11 DCMR § 3130.6.)

The Board concludes that the Applicant has met the criteria set forth in § 3130.6. The motion for a time extension was served on all the parties to the application and those parties were given 30 days in which to respond pursuant to § 3130.6(a). The record shows that the Applicant served the time extension request on all parties to the original application. (*See*, Certificate of Service, Exhibits 128 (17540) and 73 (17541).) No one objected to the request.

In satisfaction of § 3130.6(b), the Applicant stated that the minor modifications sought by the Applicant pursuant to § 3129 are limited to modifications that do not change the material facts upon which the Board based its original approval of the application, taking into consideration the Applicant's decision not to pursue construction of the addition and all other matters addressed by the Board in its 2007 Order, e.g., establishment of an overall cap of students and faculty and staff

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for the Applicant's school as a whole, determination of permitted hours of operation, etc. Furthermore, the minor exterior modifications do not affect any existing site improvements, including the parking lot, the area for bus storage, play areas, retaining walls, or any other matters. Finally, the minor exterior modifications do not pertain to or affect FAR, building height, yard, court, parking or any other zoning issues or requirements. The modifications are depicted in the plans attached as Exhibits 124 (Application No. 17540) and 70 (Application No. 17541), Tab D. Based on the evidence in the record, the Board concludes that the Applicant has met the requirements of § 3130.6(b) that the material facts remain unchanged despite the minor modifications to the approved plans. There have been no changes to the zone district classification applicable to the property or to the Comprehensive Plan affecting this site since the issuance of the Board's Order.

With respect to the requirements of § 3130.6(c), the Board required that the Applicant submit "substantial evidence" for the record to meet that subsection's requirements. On November 3, 2011, the Applicant submitted for the record a notarized affidavit by the Applicant's business manager whereby he provided the required "substantial evidence" under § 3130.6(c). In the affidavit the Applicant's business manager indicated that the requests to modify the plans and the time extension were due to the 2008-2009 economic recession and its aftermath which resulted in a drop in student enrollment below 200 students. The Applicant also stated that the decline in enrollment brought about a drop in revenue that was required to cover the amortization costs for a loan which was needed to build the addition. This affected the school's campaign pledges and other financial activities. The business manager further stated that these circumstances led the Applicant's Board of Trustees to vote to abandon the project to build an addition, due to ballooning cost estimates while the useable space in the proposed structure would have been smaller than the Applicant desired. (Exhibits 130 (17540) and 74 (17541).)

The Board concludes that the Applicant's decline in enrollment, campaign pledges, and other revenue, which led to the Applicant's inability to cover the costs of the necessary financing, and its decision to abandon the building of the addition, as attested to by its business manager, constitute the "good cause" required under § 3130.6(c)(1). Neither the ANC nor any other party to the applications objected to an extension of the Order.

The time extension, therefore, would not prejudice the rights of any party. For these reasons, the Applicant is requesting an extension of two years in the validity of the consolidated Order for Application Nos. 17540/17541. The Board concludes that the extension is appropriate under the current circumstances.

In its motion to extend the validity of the Order, the Applicant further indicated that the Board, in the Order, not only had approved the addition that now is not to be built, but also had established overall student and faculty and staff caps on the school as a whole, that is, without regard to the separate properties at 210 and 214 South Carolina Avenue, S.E., and established other conditions, such as hours of operation, that applied to the school as a whole. In the motion, the Applicant requested that any order issued granting the motion delete all references to the addition and matters directly related to the addition and set forth those other conditions that do not pertain

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to the addition which would continue in force and effect. The Board agrees and this order sets forth 11 new conditions for these applications that supersede the conditions in the 2007 Order.

Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirements of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party and is appropriate in this case.

Pursuant to 11 DCMR §§ 3129 and 3130, the Board of Zoning Adjustment hereby **ORDERS APPROVAL** of Application Nos. 17540 and 17541 for a minor modification of approved plans and for a two-year time extension of Order No. 17540/17541, which Order shall be valid until **June 11, 2013**, within which time the Applicant must file plans for the proposed structures, pursuant to the modified plans in Exhibits 124 (Application No. 17540) and 70 (Application No. 17541), Tab D in the record, with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit, and Order No. 17540/17541 is hereby modified and the conditions therein superseded **WITH THE FOLLOWING CONDITIONS:**

1. No classroom or tutorial space shall be located above the first floor level of the building at 214 South Carolina Avenue, S.E.
2. The total number of students enrolled in the School shall not exceed 255.
3. The educational program offered by the Applicant shall not extend beyond a day program and an after-school program for pre-kindergarten through eighth grade students (except for a summer camp that serves the same grade levels and is also subject to all other conditions set forth in this Order).
4. No more than forty-three (43) faculty and staff members shall be employed at the School.
5. The Applicant shall provide parking spaces on the subject property to accommodate twenty (20) automobiles during normal (i.e., daytime) hours of operation and three (3) school buses after hours. During the day, if the school buses are not in use, they shall be parked behind the Dent Building or in an alternative off-site, off-street location.
6. The normal hours of operation of the School shall be from 8:00 a.m. to 6:00 p.m., Monday through Friday.
7. Evening and weekend functions and activities for gatherings of twenty-five (25) or more persons shall be limited to those functions and activities that are customary to an elementary school, such as theatrical or musical productions, back-to-back nights, science, math and arts fairs, and similar activities, and shall not exceed on average more than two (2) per month. No facilities within the Dent or 214 Buildings shall be made available for commercial purposes.

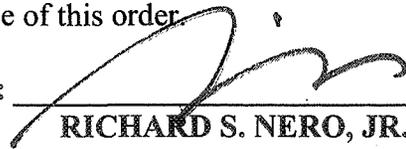
8. The Applicant shall ensure that any lights on the exterior of the Dent Building or the 214 Building do not shine onto any neighboring properties.
9. The Applicant shall provide faculty and staff with incentives, such as the MetroCheck program, to encourage the use of public transportation or to carpool to and from the subject property.
10. All previous orders and conditions therein pertaining to the subject property shall remain in effect until issuance of a valid building permit for the renovation of the Dent Building, at which time this Order and the conditions herein shall supersede all such previous orders and their conditions.
11. The Applicant shall maintain a community liaison and shall meet with concerned neighbors and other interested parties, including the local ANC representative, a minimum of four (4) times per year. All property owners within 200 feet of the subject property shall be notified in advance of such meetings and shall be invited to attend.

VOTE: **4-0-1** (Meridith H. Moldenhauer, Lloyd J. Jordan, Nicole C. Sorg, and Jeffrey L. Hinkle to Approve; No Zoning Commission member participating or voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this order.

ATTESTED BY:


RICHARD S. NERO, JR.
Acting Director, Office of Zoning

FINAL DATE OF ORDER: NOV 28 2011

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 § 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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



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As Acting Director of the Office of Zoning, I hereby certify and attest that on **NOV 28 2011**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, or delivered by electronic mail in the case of those ANCs and SMDs that have opted to receive notices thusly, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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