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Attention:

Mr. Bruce Chatterton, Director

RE: Block 75 BCOT DRH 08-00067

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JUN 13 2008

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SERVICES

Memorandum

Dear Mr. Chatterton;

Enclosed herewith is NENA's and Ms Graham's memorandum in support of the Historic Preservation Commission's Decision.

Sincerely,

Michael R. Jones, PLLC



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Attorney at Law

Enclosure

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Attorneys for Susan Graham and the North End Neighborhood Association, Inc.

BEFORE THE BOISE CITY COUNCIL

An Appeal of the May 12, 2008 Decision of the Boise City Historic Preservation
Commission; DRH08-00067

MEMORANDUM IN SUPPORT OF DECISION OF COMMISSION

Susan Graham and the North End Neighborhood Association, Inc., by and through their attorneys identified above, hereby submit this Memorandum in support of the May 12, 2008 Decision of the Boise City Historic Preservation Commission.

RELEVANT FACTS

On May 12, 2008, at a duly convened Historic Preservation Public Hearing, the Historic Preservation Commission denied applicant's request to change the use of the property located at 1102 West Hays Street from undeveloped land to a temporary off-site parking lot. This property is zoned R-3HD/CD (Multi-Family Residential with Historic Design Review in a Conservation District). It is located within the national Fort Street Historic District, the Near North End Conservation District and the Hays Street Historic District. These Districts are intended to continue residential use, protect historical and

architectural character of the neighborhood using adaptive reuse methods and to provide a transition between the downtown and the North End.

In denying applicant's request for a change of use, the Commission made two separate determinations, either of which supports its ultimate conclusion to deny a Certificate of Appropriateness to the applicant. Firstly, the Commission determined that the requested parking lot failed to support, indeed violated, the goals, objectives and policies of the Boise City Comprehensive Plan and the applicable Neighborhood Ordinance. Secondly, the Commission determined that this change-in-use application is not congruous with the historical, architectural, archeological, educational and cultural significance of the Historical District. The Commission, therefore, refused to issue a Certificate of Appropriateness.

APPLICANT'S GROUNDS OF APPEAL

On May 28, 2008, applicant filed its appeal of the Commission's May 12, 2008 decision. In doing so, the applicant has stated in its "Application for Appeal" the following, and solely the following, as its two "Grounds for Appeal of the Commission's May 12, 2008 Determination:"

"1. The current condition of 1102 West Hays fails to meet BCC section 2-18-11.03 standards.

2. Motion and Approval by the Historic Preservation Commission was to deny a change of use on the referenced parcel. Application is not for a zoning change of use."

In point of fact, however, the first ground of applicant's appeal is wholly irrelevant. The "current condition of 1102 West Hays" is not at issue. Further, the second ground asserted by applicant is wholly erroneous. A new parking lot within the Conservation District is certainly a "change of use" ("You really need to focus on...the change in use for the Historic District...you get to decide if the change in use is appropriate at all" - May 12, 2008 Hearing Minutes, p.7, Counsel Teresa Sobotka speaking). Of equal or even greater importance, it is also a prohibited use ("The Boise City Code, the Near North End Conservation District...prohibits new parking lots in the Near North End of any type or nature" - May 12, 2008 Hearing Minutes, p.14, Michael Jones speaking). It must also be noted, however, that the two asserted "grounds of

appeal” are not properly before this Council in any event because, “If the findings of fact upon which the original decision was based are supported by substantial evidence, the City Council shall accept those findings.” Boise Municipal Code §11-03-07.5 G.1. In the instant case, the May 12, 2008 findings of the Historic Preservation Commission are supported by substantial evidence and applicant has not contended otherwise. On this basis alone, this appeal must be denied, especially given the mandate of Boise Municipal Code §11-03-07.5 G.7 specifically providing that the Commission’s findings are to be given deference.

THE FINDINGS OF THE COMMISSION

In denying applicant’s request for a Certificate of Appropriateness allowing a temporary off-site parking lot, the historic Preservation Commission determined that “the change in use did not comply with the comprehensive plan [Finding 1] and was not congruous [Finding 2].” Those findings should not be disturbed, nor do either of the two enunciated grounds of applicant’s appeal suggest otherwise.

FINDING 1: In reaching four separate Findings that “the change in use did not comply with the comprehensive plan,” any one of which Findings is sufficient to sustain the Commission’s determination to deny applicant’s request to change the use of the property located at 1102 West Hays Street from undeveloped land to a temporary off-site parking lot, the Commission determined that the proposed change of use did not support, indeed affirmatively conflicts with, the goals of the Boise City Comprehensive Plan. As stated by attorney Jones, “The Near North End Conservation District has made the determination that parking lots in this neighborhood are detrimental. It’s not my opinion, it is the opinion of the City Council and the adoption of their ordinance. Parking lots are detrimental to residential use and detrimental to public safety...[In this District], it’s clearly a prohibited use” - May 12, 2008 Hearing Minutes, pp.14 and 24). The Commission agreed. In particular, the Commission found:

Finding 1A: “[T]he new parking lot does not reflect the elements of the historic architecture and design that exist in the area. The area includes historic residential

structures and small parking structures. The parking lot is very different from those elements.”

Evidence in support: Before reaching its first Finding, the Commission was instructed by its legal counsel that “Your job is to see what works in historic preservation” - May 12, 2008 Hearing Minutes, p.9, Teresa Sobotka speaking. It then did so and, in reaching Finding 1A, the Commission noted the requirement of Boise Municipal Code §2-18-11.03(1) that requests of the instant nature “shall support the Boise City Comprehensive Plan goals, objectives and policies outlined within Chapter 5/Parks, Recreation and Cultural Resources, and the applicable neighborhood plans. New development within the North End/East End shall be designed to reflect elements of the historic architecture and design that exist in the area” (citing Boise City Comprehensive Plan, Policy 7, pages 8-33). The Commission determined that the requested parking lot did not meet these requirements.

Finding 1B: “Because the parking lot is visually incompatible and does not reflect the surrounding architectural and historic characteristics of the district, it will adversely affect the district and will not protect, enhance or preserve the designated district or its properties.”

Evidence in support: With respect to this issue, attorney Michael Jones presented evidence that the proposed parking lot was “not an appropriate use for a historic district” - May 12, 2008 Hearing Minutes, p.13. In reaching Finding 1.B, the Commission agreed, noting Boise City Comprehensive Plan, Objective 2, pages 5-16, in particular its goal “to protect, enhance and preserve Boise’s designated historic Landmarks, properties and districts,” concluding that the requested parking lot would not support that goal.

Finding 1C: “The proposed parking lot will not reflect the character of the adjacent historic residential neighborhood. Neither will it be compatible with it because of the amount of traffic it will produce and the general nature of surface parking lots.”

Evidence in support: In reaching Finding 1C, the Commission again found support in the Boise City Comprehensive Plan (in particular, the North End Plan @ page 17), noting “that the proposed use or design of the property should reflect the character of the adjacent neighborhood and be compatible with it,” and concluding that the requested parking lot did not meet either of these requirements. “I can’t support a parking lot. I

don't believe that a parking lot supports any of the things in Chapter 5 of the Comp Plan" - May 12, 2008 Hearing Minutes, p.26, Commissioner Stevens speaking.

Finding 1D: "The parking lot will not preserve the character of the North End, the housing type and mix, the vistas or the ambient environment. It will provide an appearance that is very different than anything that is around it and will adversely affect this character."

Evidence in support: In reaching Finding 1D, the Commission again supported its finding with the Boise City Comprehensive Plan (in particular, the North End Plan @ page 17), noting that another of the Plan's goals "is to preserve the character of the North End, the housing type and mix, the placement and number of trees, the vistas and ambient environment provided by the grid street patterns," and concluding that the requested parking lot did not meet these requirements. "I personally can't support that in that location" - May 12, 2008 Hearing Minutes, p.26, Commissioner Burry speaking.

Conclusion as to Finding 1 A-D: In reaching the above four findings, the Commission volunteered that the issue was not a "close call," that it found no need to balance valid competing interests to reach its conclusions, that "Looking at Finding 1 as a whole, the Commission found **nothing** within the plan or **anything** within the proposed application that supports the objectives outlined in the Comprehensive Plan" [emphasis added]. As stated by Commissioner Sewell, "In reviewing the criteria that we have to evaluate this Finding 1, that it supports the Boise City Comp Plan, I cannot find anything within the plan or anything within the proposed application that supports the objectives outlined in the application" - May 12, 2008 Hearing Minutes, p.25.

FINDING 2: In reaching two separate Findings that "the proposed change in use is not congruous," either of which Finding is sufficient to sustain the Commission's determination to deny applicant's request to change the use of the property located at 1102 West Hays Street from undeveloped land to a temporary off-site parking lot, the Commission determined that this change of use "is incongruous with the historical, architectural, archeological, educational or cultural significance of the District" (citing Boise Municipal Code §2-18-11.03(2)) and, additionally, contra to the Secretary of the Interior's Standards for the Treatment of Historic Properties (specifically pages 105 and

108). The Commission's legal counsel advised it that their focus was to be quite direct in this regard, *i.e.* "You will need to address change in use, period. You say if it's congruous or incongruous. You can either say we think it's congruous. We think it's incongruous" - May 12, 2008 Hearing Minutes, p.24, Teresa Sobotka speaking. Attorney Jones introduced evidence as to the incongruity. "The Near North End Conservation District is in Title 11, Chapter 20 of Boise City Code, Section 11-20-03 states, 'The following restrictions and allowances beyond the requirements of the R-3 Zone shall apply within the Near North End Zone...New off-site parking lots.' It's clearly a prohibited use...It's incongruous with the Historic District" - May 12, 2008 Hearing Minutes, p.24. The Commission agreed. "I don't think it's congruous and I don't think it fits with the Comp Plan, so I won't be supporting the application" - May 12, 2008 Hearing Minutes, p.26, Commissioner Stevens speaking

Finding 2A: "The setting is a historic residential neighborhood with single and small multi-family dwellings. The new parking lot is visually incompatible with this setting. Even if it is a temporary use you set a precedence that this could happen in other situations."

Evidence in support: In reaching Finding 2A, the Commission noted the recommendation of the Secretary of the Interior's Standards for the Treatment of Historic Properties (in particular page 108) against "Introducing new construction into historic districts that is visually incompatible or that destroys historic relationships within the setting," concluding that the proposed parking lot would violate these guidelines. As stated by attorney Michael Jones, "Once you allow this prohibited use, you are at the beginning of the end of historic preservation areas of town" - May 12, 2008 Hearing Minutes, p.25). The Commission agreed. "I worry about the temporary nature of this becoming a slippery slope which is exactly what we don't want there, which is parking" - May 12, 2008 Hearing Minutes, p.27, Commissioner McFadden speaking).

Finding 2B: "The new parking lot is incompatible in terms of materials including the gravel lot and concrete parking strips and in design. Staff's indicated as a temporary parking lot it could be congruous. If it was permanent it would not be congruous...there's nothing in our Ordinance under temporary...The Commission did not support staff's logic of a permanent parking lot not being congruous but a temporary parking lot being

congruous. The Commission's focus was on the use and not the length of time. They stated that it's very clear that a permanent parking lot is not okay in this spot...The Commission focused on the definition for congruous...'The sensitivity of a development proposal and maintaining the character of existing development.' The Commission found that the definition of congruous in their guidelines does not support a parking lot."

Evidence in support: In reaching Finding 2B, the Commission accepted the admission of the Staff report that, had a permanent parking lot been requested, it would unequivocally and undeniably be incongruous. "If the offsite temporary parking lot were to be a permanently improved surface parking facility...the request would be incongruous with the [Historical] District as it would...conflict with the adjacent residential properties" - May 12, 2008 Hearing Minutes, p.3, Sarah Schafer speaking. The Commission then heard the evidence of attorney Jones that the temporal quality of an incongruous use cannot make it congruous ("This is in the Near North End Conservation District where parking lots are prohibited. It's a prohibited use. There's no temporal time frame on it" - May 12, 2008 Hearing Minutes, p.12) and agreed with the same ("Staff's indicated...if it was permanent it would not be congruous...there's nothing in our Ordinance under temporary...I cannot support the temporary parking lot at this location" - May 12, 2008 Hearing Minutes, p.26, Commissioner Smith speaking). Commissioner Dawson agreed. "I don't see that there is a whole lot of difference between a parking situation that's temporary and one that's permanent. It almost seems that someday down the road there's going to be an end around trying to get a more permanent parking situation and I think that's a concern that many of us have even if we may not say it" - May 12, 2008 Hearing Minutes, p.27.

The Commission also noted the recommendation of the Secretary of the Interior's Standards for the Treatment of Historic Properties (in particular page 105) against "introducing new construction onto the building site which is visually incompatible in terms of size, scale, design, materials, color and texture, which destroys historic relationships on the site, or which damages or destroys important landscape features," concluding that the proposed parking lot is incompatible in terms of materials. The Commission was instructed by its legal counsel that "I need all of you to focus on whether or not the application...the change in use is congruous or incongruous with the

Historic District...That's what the whole focus is on. Whether or not it's congruous with the Historic District. Is it going to be detrimental to the Historic District, *i.e.* incongruous, or is it going to be congruous" - May 12, 2008 Hearing Minutes, pp.18 and 20. The answer was provided most eloquently by Commissioner Stevens, who stated that, "In our Guidelines, we have a definition for congruous that I'm going to read into the record. It's so long I'm just going to read the first sentence, 'The sensitivity of a development proposal and maintaining the character of existing development.' If we look at the definition of congruous in our Guidelines and you look at Chapter 4 of our Comp Plan...I can't support a parking lot. I don't believe that a parking lot supports any of the things in Chapter 5 of the Comp Plan ...'Promotes public understanding and appreciation for Boise's Historic areas...' or any of the objections that were read onto the record earlier. I have a hard time understanding the logic of a permanent parking lot not being congruous but a temporary parking lot being congruous...I can't support a temporary parking lot going in there...I don't think it's congruous and I don't think it fits with the Comp Plan so I won't be supporting the application." May 12, 2008 Hearing Minutes, p.26.

Conclusion as to Finding 2 A-B: In reaching the above two findings, the Commission found and determined that the proposed parking lot was incongruous with its neighborhood ("The new parking lot will not be unobtrusive. It will take an entire block. This will have an adverse effect on the historic character of the setting") and visually incompatible, either of which violate the express requirement of Boise Municipal Code §2-18-11.03(B) that "the request will be congruous with the historical, architectural, archeological, educational or cultural significance of the district." No evidence whatsoever was submitted to the Commission, nor could it be, that the proposed parking lot was somehow "congruous" with the "historic residential neighborhood" into which applicant sought to foist it.

SCOPE OF REVIEW

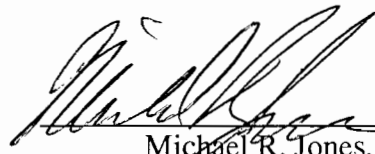
It is not the proper function of the City Council to now substitute its judgment for that of the Historic Preservation Commission. Neither is it the lawful responsibility of the City Council to determine if the Commission was "right" in its ultimate conclusion. Instead, as provided by Boise Municipal Code §11-03-07.5 G.1: "If the findings of fact

upon which the original decision was based are supported by substantial evidence, the City Council **shall** accept those findings” [emphasis added]. Further, in making that determination, the City Council must be mindful of Boise Municipal Code §11-03-07.5 G.7 providing that “Because the decision makers below are experts having recognized expertise in their substantive areas, the City Council shall give due consideration to a reasonable interpretation of a City Ordinance adopted by the review body.” Such should now occur in the instant case.

Applicant has raised only two grounds of appeal, firstly that “the current condition of 1102 West Hays fails to meet BCC section 2-18-11.03 standards” and secondly that its “Application is not for a zoning change of use.” Its first ground has absolutely nothing to do with this appeal. It is irrelevant in the extreme and merits no consideration, whatever consideration could otherwise be given to it. As for the application on appeal not being for a “change of use,” this assertion is wholly erroneous. As stated by the Commission’s legal counsel, the application was very much for a change of use – “You really need to focus on...the change of use for the Historic District...You get to decide yourselves if the change in use is appropriate at all” - May 12, 2008 Hearing Minutes, p.7. The Commission did so. It is not for this City Council to now substitute its judgment for theirs, but rather to give “due consideration” to the decision that was made only after a full public hearing and deliberation on the matter.

The City Council must deny the instant appeal.

DATED this 11th day of June, 2008


Michael R. Jones, PLLC
by Michael R. Jones

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