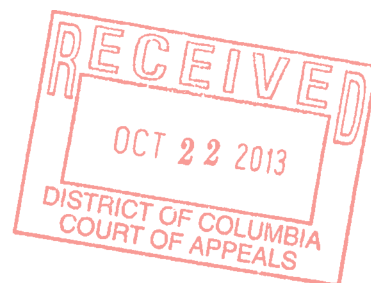
**DISTRICT OF COLUMBIA**
**COURT OF APPEALS**




**ROUZEBEH E. MAZANDERAN,**

**Appellant,**

**v.** — **13-AA-1**

**D.C. DEPARTMENT OF PUBLIC WORKS,**

**Respondent.**

**CONSENT MOTION OF LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT AND TO FILE OUT OF TIME**

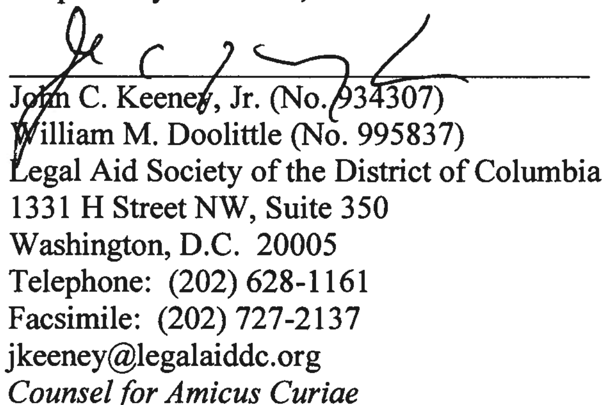
*Amicus* Legal Aid Society of the District of Columbia (Legal Aid) respectfully requests that this Court grant permission to file the accompanying brief as *Amicus Curiae* and to file out of time. Pursuant to Rule 29 of this Court's rules, *Amicus* state as follows in support of this Motion:

1. This case presents a novel issue of importance to certain individuals who may qualify for Legal Aid services: whether the Department of Public Works may use a Notice of Violation, and impose civil penalties (as a precursor to property liens), when the NOV's cited regulatory violation, throwing or depositing litter on vacant lots, does not apply to naturally growing wild weeds.
2. *Amicus* Legal Aid has an interest in the correct interpretation and proper enforcement of regulatory penalties on *pro se* elderly and disabled property owners in the District.
3. Appellant Rouzebeh E. Mazanderan, and Gregory Cumming, Office of Attorney General, counsel to Appellee District of Columbia Department of Public Works have each consented to the filing of this *Amicus Curiae* brief, and to the late filing.

4. This *Amicus Curiae* brief is concededly untimely. Rule 29(e) of this Court's rules provides that an amicus brief must be filed "no later than 7 days after the principal brief of the party being supported is filed," but also provides that "the court may grant leave for later filing." To the extent that this *Amicus Curiae* brief also opposes the District's August motion for summary affirmance, it is similarly untimely and for the same reasons set forth in paragraph 5 below, Legal Aid seeks leave for the untimely filing.
5. The principal brief in this case was filed on July 8, 2013, and the 7-day deadline for filing an amicus brief was Monday, July 15, 2013. *Amicus* only learned of this case recently and has promptly prepared this brief to be of assistance to the Court.
6. *Amicus's* request for late filing does not delay ultimate disposition of the case, as it does not change other briefing deadlines. Any prejudice to the District evaporates if the District is permitted to file a response to this untimely *Amicus Curiae* brief. *Amicus* Legal Aid consents to the District filing a response to the attached brief either as a reply in support of the District's pending motion or as a supplemental brief on the merits.

WHEREFORE, pursuant to Rule 29 of this Court's rules, *Amicus* respectfully requests that this Court grant leave to file the accompanying *Amicus Curiae* brief and to file out of time.

Respectfully submitted,



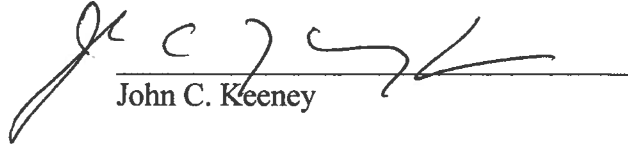
John C. Keeney, Jr. (No. 934307)
William M. Doolittle (No. 995837)
Legal Aid Society of the District of Columbia
1331 H Street NW, Suite 350
Washington, D.C. 20005
Telephone: (202) 628-1161
Facsimile: (202) 727-2137
jkeeney@legalaiddc.org
*Counsel for Amicus Curiae*

## CERTIFICATE OF SERVICE

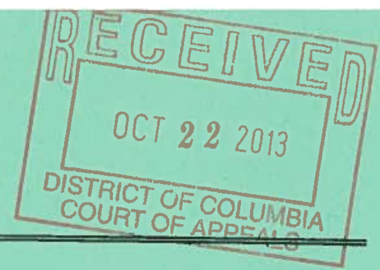
I hereby certify that I caused a true and correct copy of the foregoing Motion of the Legal Aid Society of D.C. for Leave to File Amicus Curiae Brief in Support of Appellant and to File Out of Time to be delivered by first-class mail, postage prepaid, this 22 day of October, 2013, to:

Rouzebeh E. Mazanderan
P.O. Box 1723
Beltsville, MD 20704-1723
*Appellant*

Irvin B. Nathan
Todd S. Kim
Donna M. Murasky
Gregory M. Cumming
Office of the Attorney General
441 4th Street, N.W., Suite 600S
Washington, D.C. 20001
*Counsel for Appellee*



John C. Keeney




No. 13-AA-1

**DISTRICT OF COLUMBIA COURT OF APPEALS**

**ROUZEBEH E. MAZANDERAN,**

*Appellant,*

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS,**

*Appellee.*

On Appeal from the Office of Administrative Hearings

# BRIEF OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, AS AMICUS CURIAE IN OPPOSITION TO SUMMARY AFFIRMANCE AND IN SUPPORT OF APPELLANT

John C. Keeney, Jr. (No. 934307)
William M. Doolittle (No. 995837)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
Telephone: (202) 628-1161
Facsimile: (202) 727-2137
jkeeney@legalaiddc.org
*Counsel for Amicus Curiae*

## RULE 28(a)(2)(B) DISCLOSURE STATEMENT

The Legal Aid Society of the District of Columbia is a District of Columbia non-profit corporation. It has no parents, subsidiaries or stockholders.

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## INTEREST OF AMICUS CURIAE

The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Legal Aid By-Laws, Art. II, Sec. 1. Legal Aid is the oldest general civil legal services program in the District of Columbia. Since its inception, Legal Aid has represented numerous indigent tenants and participated as amicus curiae in many appeals. The Legal Aid Society has an interest in the correct interpretation and proper enforcement of regulations purporting to penalize this 73-year-old disabled appellant.

## INTRODUCTION

The issue for this Court is whether the plain words of the Litter Control Act regulate the height of growing vegetation. The regulation for which Mr. Mazanderan was cited, 24 DCMR § 1002.1, implements the Litter Control Act, and bans "throw[ing] or deposit[ing]" litter on vacant lots. It does not, by its terms, cover naturally growing weeds.

DPW issued a Notice of Violation ("NOV") to Appellant Rouzebeh Mazanderan, owner of a vacant lot in the District, based on § 1002.1. Although the ALJ below, and DPW before this Court, recast the NOV as about litter and debris, the NOV specified overgrown weeds on Mr. Mazanderan's lot. The ALJ and DPW ignored the record in the NOV about overgrown weeds, an implied concession that § 1002.1 does not apply to growing vegetation.

The text of 24 DCMR § 1002.1 mentions weeds in only one context, and that context makes clear that it refers only to dumping grass and weed clippings *as litter*. This is consistent with the regulation's purpose, to implement the *Litter* Control Act. Prior OAH precedent, previously noted by this Court, is consistent with that interpretation. Instead, the height of overgrown weeds—and the time limit for penalty-free corrective action—are regulated under other specific District statutes. Unauthorized civil penalties have a substantial impact on property owners, resulting in property liens and the potential loss of property.

There was no substantial evidence that the debris, a separately enumerated item from weeds in the cited regulation, violated the Litter Control Act. Some *de minimis* debris was observed at reinspection, when the DPW inspector found no violation. The NOV focused on weeds, containing specific instructions to cut and remove the overgrown vegetation. The vague, general reference in the NOV to cleaning the lot can only be understood in light of the accompanying, specific references to overgrowth. The NOV was about weeds, and not anything else.

The NOV failed to give Mr. Mazanderan notice of the other provision DPW now contends on appeal could have been a violation. The NOV cited § 1002.1, which prohibits throwing or depositing litter on a vacant lot. DPW offered no evidence that Mr. Mazanderan threw or deposited litter on his own property. Failing to clean up litter is governed by a different regulation, § 1002.2. Mr. Mazanderan was given notice of the "law or regulation violated" as required by D.C. Code 8-803(d)(2), only for § 1002.1, not any other regulation or law. As a result, the NOV was legally deficient for DPW's new theory on appeal.

Finally, the ALJ imposed an additional $300 penalty for Mr. Mazanderan's failure to attend the OAH hearing. Because there was no substantive violation, this Court's precedent requires the dismissal of the ancillary, procedural penalty as well.

In any event, Appellee's motion for summary affirmance is wholly misplaced.

## STATEMENT OF THE CASE

ALJ McClendon issued his Final Order ("Order") on December 18, 2012. Mr. Mazanderan filed a petition for review with this Court on January 2, 2013. Mr. Mazanderan filed a letter brief with this Court on July 8, 2013. On August 9, 2013, DPW filed a motion for summary affirmance of the ALJ's order. Amicus urges the Court to reject DPW's efforts to regulate overgrown weeds using an inapplicable litter control statute.

Amicus requests that the Court treat this response as its brief in the event the Court denies DPW's motion for summary affirmance, pursuant to D.C. App. R. 27(c).

## STATEMENT OF FACTS

This appeal involves a dispute over a Notice of Violation ("NOV") issued by the Appellee, D.C. Department of Public Works ("DPW") to the Appellant, Mr. Mazanderan, regarding a lot owned by the latter at 1033 16th St., N.E., Washington, D.C. 20002—Lot number 4074-0828.

On June 8, 2012, Jose Ingea, an inspector for DPW, passed Mr. Mazanderan's lot at the address above while on patrol. *See* Transcript at 7:21-8:6. Inspector Ingea took at least two pictures of the lot. *See* Transcript at 8:4-6. On June 14, 2012, Inspector Ingea returned and served the NOV by posting it on the fence surrounding Mr. Mazanderan's lot. *See* Transcript at 9:6-12. The NOV identified the regulation violated, 24 DCMR § 1002.1. *See* NOV. Inspector Ingea's notes on the NOV more specifically instructed what Mr. Mazanderan needed to do, "Please clean your vacant lot and cut all weeds on your vacant lot. Keep your vacant lot clean at all times. Thank you." *See* NOV. Inspector Ingea separately explained what was required to abate the violation, "Cut All Vegetation/Overgrowth from the Entire Property and Properly Dispose." *See* NOV. Within six days, Mr. Mazanderan had removed the overgrowth. Inspector

Ingea would later testify that when he returned on June 20, 2012 to reinspect the property, "the vacant lot had already been cleaned." *See* Transcript at 9:19-10:2.

Mr. Mazanderan filed an answer to the NOV with the Office of Administrative Hearings ("OAH"), denying the violation. *See* Answer. Administrative Law Judge ("ALJ") Samuel McClendon scheduled a hearing for September 12, 2012. Mr. Mazanderan requested a continuance due to a medical appointment, and ALJ McClendon granted the request. The hearing took place on November 14, 2012, although Mr. Mazanderan did not attend. *See* Transcript at 6:8-10. At the hearing, Inspector Ingea testified that he had observed an "overgrowth of weeds and also some debris on the property." *See* Transcript at 8:2-3; *see also* Transcript at 8:10-11, 13-14. Inspector Ingea explained that he had issued the NOV because "the condition of this vacant lot was like that for a long while." *See* Transcript at 10:11-14.

On December 18, 2012, ALJ McClendon issued the Final Order, which upheld the NOV. ALJ McClendon found that the property is a vacant lot, and that it had "overgrown grass and weeds interspersed with litter and debris." *See* Order at 2. The ALJ also found that Mr. Mazanderan had violated 24 DCMR § 1002.1, which prohibits only "throw[ing] or deposit[ing]" litter on a vacant lot, by violating a different regulation, uncharged in the NOV, 24 DCMR 1002.2, which states that "[n]o deposit shall be permitted to remain on a vacant lot . . . ." *See* Order at 3-4. He also found that, by failing to appear for the hearing, Mr. Mazanderan violated D.C. Code § 8-805(e), which states that "[a] person who has responded to a notice of violation and fails, without good cause, to appear at the scheduled hearing shall be liable for a penalty equal to twice the amount of the civil fine plus any costs." *See* Order at 5. ALJ McClendon ordered Mr. Mazanderan to pay a $300 penalty for the violation, and an additional $300 penalty

for Mr. Mazanderan's failure to appear at the hearing. The total penalty is unclear in the Order, either $450 (*sic*) or $600.[1] *See* Order at 6.

Mr. Mazanderan filed a petition for review with this Court on January 2, 2013. Mr. Mazanderan filed a letter with the Court on July 8, 2013, raising several objections to the OAH decision. *See* Br. of Appellant. Specifically, Mr. Mazanderan claimed that there was no litter on the property, and that the inspector did not mention litter or debris in the NOV. *See id.* Mr. Mazanderan also explained that he missed the hearing for medical reasons. *See id.*

On August 9, 2013, DPW filed a motion for summary affirmance. *See* Mot. of Resp. D.C. Dep't of Pub. Works for Summ. Aff. (hereafter "DPW Motion"). The motion argued that there was substantial evidence of litter, and that the penalty for Mr. Mazanderan's absence at the hearing was proper. *See id.*

## ARGUMENT

### I. Summary Affirmance is Inappropriate.

A motion for summary affirmance, like any motion for summary disposition, carries the "heavy burden of demonstrating both that [the requested] remedy is proper and that the merits of [the] claim so clearly warrant relief as to justify expedited action. . . . [citing cases]." *Oliver T. Carr Mgmt., Inc. v. Nat'l Deli., Inc.*, 397 A.2d 914, 915 (D.C. 1979). Summary affirmance is appropriate only in a case for which further briefing or oral argument could not be of *any* help to the Court.

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[1] The Order is clearly erroneous on its face, and cannot be summarily affirmed. The Order states that Mr. Mazanderan must pay a fine and statutory penalty of "FOUR HUNDRED FIFTY DOLLARS ($600)." Earlier in the Order, the ALJ found a $300 fine and a separate $300 dollar penalty, suggesting that the intended total was $600. *See* Order at 4, 5.

This is not that case. The legal issues presented by DPW's NOV against Mr. Mazanderan are not nearly as "narrow and clear-cut" as DPW's motion suggested. *See* DPW Motion at 1 (citing *Oliver T. Carr Mgmt., Inc.*, 397 A.2d at 915). DPW's argument for summary affirmance relies on a regulation that does not apply to Mr. Mazanderan's passive conduct and that gives DPW no authority whatsoever over the height of growing vegetation. Further, DPW failed to present any, much less substantial, evidence that Mr. Mazanderan permitted "litter" to remain on his property. Because there was no violation, OAH may not penalize Mr. Mazanderan for his absence at the hearing. DPW's claim does not "so clearly warrant relief as to justify expedited action," and thus does not carry the "heavy burden" demanded for summary affirmance. It is not even close.

To the contrary, when reviewing OAH orders, this Court will hold unlawful and set aside "any action or findings and conclusions found to be: [a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [i]n excess of statutory jurisdiction, authority, or limitations or short of statutory jurisdiction, authority, or limitations or short of statutory rights; [or] . . . [u]nsupported by substantial evidence." D.C. Code § 2-510; *see also* D.C. Code § 2-1831.16(g) (applying standards of review in § 2-510 to the review of OAH orders). This Court has articulated the specific standard of review for OAH orders: "(1) OAH [must make] findings of fact on each materially contested issue of fact, (2) substantial evidence [must support] each finding, and (3) OAH's conclusions [must] flow rationally from its findings of fact. [citing cases]." *Rodriguez v. Filene's Basement, Inc.*, 905 A.2d 177, 180-181 (D.C. 2006).

## II. The Regulation Cited in the Notice of Violation to Mr. Mazanderan Gives DPW No Authority Over the Height of Growing Vegetation.

The NOV charged Mr. Mazanderan with violating a regulation that has nothing to do with growing weeds: "No person shall *throw or deposit*, or cause to be *thrown or deposited*, on any vacant lot or open space in the District any of the following . . ." 24 DCMR § 1002.1 (emphasis added). Weeds are listed among the things not to be "thrown or deposited," *see* § 1002.1(a), but the context makes it clear that the prohibition applies to clippings and cut weeds. The plain meaning of the language makes sense. After all, the cited regulation is part of the *Litter* Control Act, not some hypothetical "Overgrown Weeds Act." *See* D.C. Code § 8-801 (the "Litter Control Administrative Act of 1985").

The inapplicability of this Act to growing weeds was noted in passing by this Court in *Washington v. D.C. Dep't Pub. Works*, 954 A.2d 945, 946 (D.C. 2008). In that case, an ALJ had dismissed an enforcement action under 24 DCMR § 1002.1 against a property owner who had allowed "tall grass and weeds" to grow on her lot. *See id.* Finding that there was no litter on the property, the ALJ dismissed the charge against the property owner.[2] *See id.* Although this Court did not review the ALJ's analysis on this point, the Court's holding—that a "lateness penalty" could not be assessed against a property owner who had not committed a substantive violation of the Act—assumed that the ALJ's reasoning was correct. *See id.* at 949. At least one other previous OAH Order is in accord. *See D.C. Dep't Pub. Works v. Mial*, 2005 D.C. Off. Adj. Hear. LEXIS 76, at *5 ("Section 1002.1 . . . does not apply to naturally occurring vegetation that grows on a vacant lot.").

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[2] This interpretation is consistent with common sense and with the dictionary definitions of "throw"—"to propel through the air by a forward motion of the hand and arm"—and "deposit"—"to lay down" or "to let fall"—actions that have no relevance to growing vegetation. *Throw*, *Deposit*, Merriam-Webster.com, Oct. 21, 2013, http://www.merriam-webster.com/dictionary/.

With different protections for the landowner, overgrown weeds are amply regulated by *other* provisions in the District, none of which was charged in this NOV. The section of the D.C. Code covering "Environmental Control and Protection" requires property owners to "remove . . . any weeds . . . of 4 or more inches in height within 7 days . . . after notice from the Director of the Department of Human Services [to do so]." *See* D.C. Code § 8-301. It is an axiom of statutory interpretation that a more specific provision takes precedence over a general one. *Speyer v. Barry*, 588 A.2d 1147, 1163 (D.C. 1991) ("where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail . . . ." quoting 2A N. Singer, Sutherland Statutory Construction § 51.05 (4th ed. 1973)); *In re O.M.*, 565 A.2d 573, 581 (D.C. 1989) ("[W]hen a statute of broad general application . . . is inconsistent with a more specific provision . . . the latter provision 'must govern or control, as a clearer and more definite expression of the legislative will . . . .'" quoting 82 C.J.S. Statutes § 347(b) (1953)).

The NOV provision, § 1002.1, does not apply to growing vegetation at all, while D.C. Code § 8-301 specifically addresses a property owner's "[d]uty to remove weeds." D.C. Code § 8-301. Importantly, Mr. Mazanderan did not violate § 8-301, which is violated only when a property owner is given notice to remove the weeds by the Department of Human Services *and fails to comply with that notice for more than seven days*. *See* D.C. Code § 8-301. DPW reinspected Mr. Mazanderan's property six days after posting the NOV and found that the lot "had already been cleaned." *See* Transcript at 9:19-10:2. The more specific provision provides an additional protection for property owners, a grace period of seven days. DPW may not circumvent that grace period simply by invoking a different regulation. According to § 8-301's

"clearer and more definite expression of the legislative will," Mr. Mazanderan cannot be punished for the overgrown weeds he timely removed from his property.

Additional provisions specifically regulate growing vegetation. A housing inspector may require the owner of a residential property to deposit collateral for a violation of D.C. Code § 8-301 if "reinspection of the premises indicates that [the violation has] not been corrected." 14 DCMR §§ 108.1, 108.4. In addition, housing regulations prohibit "vegetative growth," including weeds over 10 inches tall. *See* 14 DCMR §§ 100.1, 800.10, 899.1. The Fire Chief has authority to order property owners to "cut down and remove[]," "[w]eeds, grass, vines or other growth," if the growth is "capable of being ignited and endangering property." International Code Council, International Fire Code ICC IFC (2006) at § 304.1.2 (incorporated into the D.C. Fire Prevention Code by 12H DCMR § 101.1). The Fire Chief may also seek fines for the violation or for failure to comply with an order to remove the ignitable growth. *See* 12H DCMR §§ 112.1, 112.3. Finally, the Bureau of Rodent Control has authority to enforce a ban on weeds or grass 8 inches high or higher. *See* D.C. Code § 8-2103.05; D.C. Code § 8-2101.02.

The stakes are high for elderly homeowners in the District. Even relatively small penalties can result in a lien on the homeowner's property. *See* D.C. Code § 8-807(f)(1)(A) ("The amount to be paid under a notice of violation and any other charges, expenses, costs, penalties and interest shall be a continuing and perpetual lien in favor of the District upon all real and personal property belonging to a person named in the notice . . . ."). In recent times, District property owners have lost their property through the automatic tax lien and tax sale system, often over penalties or overdue tax bills of under $200. *See* Michael Sallah et al., *Homes for the Taking: Liens, Loss, and Profiteers*, Wash. Post, Sept. 8, 2013, available at http://www.washingtonpost.com/sf/investigative/2013/09/08/left-with-nothing/. These legal and

policy considerations highlight the mistaken disconnect between the NOV and the ALJ's Order. Inspector Ingea issued the NOV for the weeds growing on Mr. Mazanderan's property. The NOV so stated. The only abatement required under the NOV—"Cut All Vegetation/Overgrowth From The Entire Property And Properly Dispose"—had nothing to do with litter. The inspector notes contained vague instructions to "clean your vacant lot," and to "keep your vacant lot clean," but did not refer to litter. Instead, the specific instruction was to "cut all weeds on your vacant lot." *See* NOV. Even during Inspector Ingea's testimony, the weeds were front and center, while the unspecified "debris" seemed an afterthought. Inspector Ingea testified that he observed "a lot of overgrowth of weeds and also some debris on the property." Testimony at 8:2-3. Inspector Ingea presented two pictures to document what he observed, Exhibits 100 and 101. He explained that "Exhibit 100 shows overgrowth of weeds. It also shows some debris on the property." Testimony at 8:9-11. Exhibit 101 was offered to show "the same thing." Id. at 8:13-14. In concluding his testimony, Inspector Ingea made clear that the NOV was issued because of the weeds. When the ALJ asked if Inspector Ingea had anything to add before concluding, Ingea justified the issuance of the NOV in this way, "The condition of this vacant lot was like that for a good while, so that's why you see the notice of violation." Testimony at 10:11-14. Inspector Ingea offered no testimony that he had observed the property on prior occasions. Thus, the only evidence that the lot had been in that state "for a long while" was the height of the vegetation. "[T]hat's why [DPW issued] the Notice of Violation."

The ALJ attempted to rescue DPW's case by changing the subject from weeds to "litter"—for which there was no evidence presented—and "debris," which was mentioned in passing, but which the inspector found was not a violation when he reinspected the property on June 20. DPW, in its motion before this Court, also ignores the weed overgrowth specified in the

NOV. *See* DPW Motion. DPW did not present any, much less substantial, evidence of litter, and the ALJ's conclusion to the contrary had no factual basis. The NOV, and DPW's evidence, were about weeds, not litter. Because § 1002.1 does not give DPW authority to regulate overgrown weeds, the NOV did not prohibit the stated conduct.

**III. The Record Has No Evidence of "Litter."**

DPW bore the burden of proving its case by a preponderance of the evidence." *See* 1 DCMR § 2822.1 ("the proponent of an order shall have the burden of proof"); D.C. Code 8-805(b) (Litter Control Act violation must be established by a preponderance of evidence). DPW offered absolutely no evidence that Mr. Mazanderan violated § 1002.1 by throwing or depositing litter on his own vacant lot.

DPW's NOV and testimony focused on the overgrown weeds on Mr. Mazanderan's property, not on litter. The ALJ stated that Exhibits 100 and 101 showed "overgrown grass and weeds interspersed with litter and debris[,]" Order at 2. There was no such testimony about "litter" by the witness who observed the lot, took the pictures, and issued the NOV about weeds, a NOV that also does not mention "litter." Yet the ALJ's conclusions of law contained no reference to grass and weeds. Order at 4. The ALJ may have recognized that § 1002.1 does not govern growing vegetation, and excluded that portion of DPW's evidence from his legal conclusions. In any event, the ALJ recast DPW's enforcement action as a litter case, instead of a weeds case, even though Inspector Ingea, through his NOV, was clearly enforcing what he thought was a prohibition on overgrown weeds.

As noted above, the NOV makes no specific reference to litter, and the inspector's notes contain only a general request to clean up the lot, alongside a specific request to address the weeds. *See* NOV. The abatement instructions in the NOV make no reference to litter, focusing exclusively on trimming the vegetation on the property. *See* NOV. At the hearing, Inspector

Ingea introduced two pictures to show the condition of the lot, Exhibits 100 and 101. *See* Testimony at 8; Exhibits 100 and 101. Inspector Ingea introduced another photo, Exhibit 104, to show the condition of the lot at the time of his reinspection. Exhibit 104 shows roughly the same amount of debris as Exhibits 100 and 101, a *de minimis* amount. Yet Inspector Ingea testified that, at the time he took the picture in Exhibit 104, "the vacant lot was already clean." *See* Testimony at 10:1-2. If the debris did not cause the property to fail reinspection, the presence of the same amount of debris could not have been a violation in the first place. DPW's evidence of a "litter" violation was non-existent; any "debris" was not a violation because it passed reinspection. DPW did not meet the preponderance of the evidence requirement, and the ALJ's conclusion that it did was not based on substantial evidence. The ALJ's ruling should be overturned. It cannot be summarily affirmed.

## IV. Uncharged Offenses, Not in the NOV, Were Improperly Considered by the ALJ.

The ALJ committed legal error by upholding a NOV that cited a regulation that had not been violated. The Litter Control Act requires that the NOV include "[t]he law or regulation violated." D.C. Code § 8-803(d)(2). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also In re Jones*, 898 A.2d 916, 920, 922 (D.C. 2006) (reversing contempt conviction based on an "uncharged violation of [a] stay away provision" in a CPO).

The NOV charged Mr. Mazanderan with a violation of 24 DCMR § 1002.1, which states that "[n]o person shall throw or deposit, or cause to be thrown or deposited" various forms of

litter on a vacant lot. *See* Order at 3. DPW presented no evidence suggesting that Mr. Mazanderan threw or deposited litter on his own vacant lot in violation of § 1002.1. The ALJ instead found an uncharged violation of a separate regulation not cited in the NOV, § 1002.2, which prohibits "permit[ting] a deposit [of litter] to remain on a vacant lot." DPW presented evidence only of overgrown vegetation and "debris." The ALJ had no authority to enforce a different offense than the one charged in the NOV. DPW's NOV raises the due process concerns that a faithful application of § 8-803(d)(2) would avoid. It is impossible for Mr. Mazanderan to respond to unnamed charges that DPW failed to include in the NOV.

The ALJ erroneously reasoned that the two regulations arose from a single statute passed as a single provision by the D.C. Council, and so they should be "read together" as a single regulation. *See* Order at 3 & n.1, 4 ("Any inconsistency between [the regulations and the law as passed] must be resolved in favor of the language actually passed by the Council.") This distinction makes no difference. It does not transform a NOV's citation of a single regulation into a *sub silentio* charge of another unnamed regulation.

For this proposition, the ALJ relied on a misreading of *Sheetz v. District of Columbia*, 629 A.2d 515, 519 (D.C. 1993), which had nothing to do with a charging document, such as a NOV. In *Sheetz*, a regulation governing the publication of tax sale notices in newspapers did not match exactly the language passed by the Council. In publishing notice of a tax sale, the government had complied with the language passed by the Council, but had not complied with the published regulation. The Court found the notice to have been adequate, and held that "[t]he law as enacted must prevail over the regulation as incorrectly and improvidently published." *Id.* at 519. Unlike *Sheetz*, the regulation in the NOV was correctly published; the NOV's regulation simply was not violated.

The ALJ committed legal error by extending *Sheetz* beyond the opinion's express limitations, and by ignoring significant differences between that case and Mr. Mazanderan's. In *Sheetz*, the two provisions governed the same conduct, but provided slightly different requirements. In this NOV, the provision as passed and the provision cited govern different conduct—the Council's language covers both dumping *and* failing to clean up litter; the regulation charged in the NOV covers only dumping litter. The property owners in *Sheetz knew which law the District was attempting to apply to them.* Mr. Mazanderan, by contrast, was charged with throwing or depositing something on his property. He did not receive "actual notice" that DPW intended to penalize him under some other regulation for failing to remove others' litter from his lot. *See Sheetz* at 519. If the District had cited the intended violation, as published, Mr. Mazanderan would have "received . . . information" he did not receive "as a result of the steps which the District did take." *See id.* In *Sheetz*, this Court did not opine on, much less discard, the general rule that in a civil enforcement action, the government must notify the individual of the law allegedly violated. *See* D.C. Code § 8-803(d)(2) (Litter Control Act NOV must include "the law or regulation violated"). The ALJ relied on his misinterpretation of *Sheetz* to effect an amendment of the NOV. This was legal error.

## V. Because There Was No Substantive Violation of the Only Law Cited in the Notice of Violation, This Court's Precedent Requires that Other Penalties Be Vacated.

The ALJ added $300 to Mr. Mazanderan's penalty because Mr. Mazanderan failed to attend the OAH hearing.[3] *See* Order at 5. This Court has made it clear that procedural penalties apply "only in cases in which the respondent has violated a substantive provision of the Litter Control Act." *See Washington v. D.C. Dep't of Pub. Works*, 954 A.2d 945, 949 (D.C. 2008). In

[3] Mr. Mazanderan claimed that his absence was related to his medical care. *See* Br. of Appellant. at 1.

*Washington*, the property owner had been charged with a violation of § 1002.1 based on overgrown weeds on her property. The ALJ in that case overturned the substantive violation, finding that § 1002.1 did not apply to the "naturally occurring and planted vegetation" on the lot. The ALJ dismissed the substantive violation, but imposed an administrative "lateness penalty" for the owner's failure to answer timely the NOV. The penalty for failing to answer a notice of violation appears in D.C. Code 8-807(c)(1); the penalty for failure to attend a scheduled hearing, relevant to Mr. Mazanderan, appears in the next subparagraph in 8-807(c)(2). The penalties are of a kind. This Court's reasoning in *Washington* applies equally to penalties for failing to attend a hearing under the same Act. Because Mr. Mazanderan did not violate the Litter Control Act, the $300 penalty for failing to attend the hearing should be dismissed.

## CONCLUSION

Summary affirmance has no support in this case of a supposed violation of an uncharged regulation. This Court should deny DPW's motion.

Respectfully submitted,

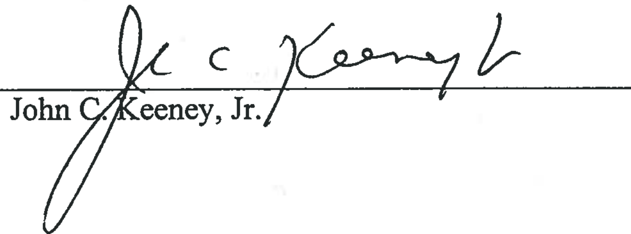
John C. Keeney, Jr. (No. 934307)
William M. Doolittle (No. 995837)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
Telephone: (202) 628-1161
Facsimile: (202) 727-2132
jkeeney@legalaiddc.org
*Counsel for Amici Curiae*

## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Amicus Brief to be delivered by first class mail postage prepaid this 22 day of October 2013 to each of the following:

Rouzebeh E. Mazanderan
P.O. Box 1723
Beltsville, MD 20704-1723
*Appellant*

Irvin B. Nathan
Todd S. Kim
Donna M. Murasky
Gregory M. Cumming
Office of the Attorney General
441 4th Street, N.W., Suite 600S
Washington, D.C. 20001
*Counsel for Appellee*



John C. Keeney, Jr.