



Nonetheless, despite being authorized to issue five Permits, DDOT is unreasonably limiting the number of Permits issued to four. DDOT's unjustified decision to refuse to issue a fifth Permit to Bird reflects that DDOT is committed to engaging in an *ad hoc* selection process designed to prevent Bird from continuing operations in the District.

DDOT's handling of Bird's appeal is unlawful. As an example, on administrative appeal the Hearing Officer's recommendation to DDOT was limited to recalculating Bird's application scores for appealed scores. *See* 24 DCMR § 3317.12. While the Hearing Officer recognized that Bird's original scoring was improper and increased eleven of Bird's appealed application scores, she also unilaterally reduced four scores which Bird had not appealed. The result of the Hearing Officer's unauthorized reductions was a four-point decrease in Bird's appealed application score, which ensured that Bird's score would be fifth highest by one point.

The Hearing Officer also refused to provide Bird an opportunity to be heard at a hearing on appeal. Thus, the Hearing Officer based her recommendation to DDOT on items which Bird did not appeal and for which Bird was not provided an opportunity to present argument. Further, despite Bird's request, the Hearing Officer chose not to defer her recommendation to DDOT until after Bird received a complete response to its pending FOIA request and had an opportunity to supplement its appeal.

Finally, the Hearing Officer abused her discretion by failing to remand Bird's application to the evaluators for further proceedings upon a finding that Bird's application was "incomplete," which only occurred due to her unauthorized reduction of non-appealed scores.

In sum, DDOT's Permit application and appeal process suffered from numerous material defects resulting in arbitrary and capricious determinations affecting the scoring of Bird's

application, violation of Bird's due process rights, and an abuse of discretion by both the Director of the DDOT and by the Hearing Officer.

Bird respectfully requests that the Court overturn DDOT's Final Decision as arbitrary, capricious, an abuse of discretion, and not in accordance with law and regulation, and (i) issue Bird a Permit to continue serving the District or (ii) in the alternative remand the matter to DDOT for a complete re-scoring of Bird's application and a new Permit award decision consistent with the Court's findings. In awarding relief, the Court is also respectfully requested to award Bird its costs of filing this petition for review including reasonable attorneys' fees.

## **II. Background**

### **A. Bird's Longstanding Presence in the District**

Bird is a technology-driven mobility company that has facilitated more than 175 million rides since its founding in 2017, operating in cities worldwide. Bird makes cities safer and more livable by reducing car usage, traffic, and carbon emissions. Bird was among the first e-scooter providers operating in the District and has served its residents since early 2018. *See Ex. A*, Article. During that time, over 500,000 riders have traveled over 2.6 million miles using Bird's scooters. These zero-emissions rides avoided CO2 emissions and made real progress toward the District's goal of a 60% reduction in greenhouse gas emissions by 2030. Bird is the only provider who is truly aligned with the District's goal of reducing the number of cars commuting into the city by creating a broad network of micro-mobility transportation resources that extends beyond the District's city limits along key commuter corridors in Arlington, Alexandria, and Montgomery County.

Bird has received strong support from communities throughout the region and was honored to receive letters of support from local organizations such as Martha's Table and City Year D.C.

**Ex. B**, Appeal, pp. 2, 75. Bird also enables jobs for the District’s residents. In just the past two years, Bird generated \$4.8 million in revenues for its e-scooter Fleet Managers, who run their own small businesses with local teams that receive support, training materials, and professional development from Bird. *Id.* pp. 2, 51.

**B. The Earlier Permit Process**

On November 5, 2018, DDOT had released a permit application and began accepting applications for dockless scooter providers to operate in the District. Initially, DDOT issued permits to eight providers of dockless scooters and bicycles to begin operations on January 1, 2019. Bird was among the original companies which were issued conditional permits under this earlier program.

DDOT subsequently announced if the eight original companies wanted to continue to operate in the District, they would need to reapply for a permit, and that DDOT would only issue permits for a total maximum of 10,000 scooters. The deadline to submit applications for the 2020 Public Right of Way Occupancy Permits (“PROWOPs”) was November 21, 2019.

Despite receiving a score above the established permit award baseline (121 points), DDOT did not award a PROWOP to Bird. On January 2, 2020, Bird filed an appeal of DDOT’s decision. On February 21, 2020, the Hearing Officer rescored six of Bird’s application criteria and raised its score by two points from 129 to 131, now approaching but still below the level of the nearest successful applicants score of 137.

However, in March 2020, before Bird filed its intended petition for review in this Court challenging DDOT’s re-scoring decision process, DDOT issued a general stay and extension for all then-existing permit holders as a result of the COVID-19 crisis. As a result, Bird was permitted

to continue serving the District with its e-scooter service, but the underlying issues with that permitting process were never addressed and resolved.

### **C. 2023 Shared Fleet Device Permit A Process**

On October 14, 2022 the District returned to its permitting process and published application instructions for the 2023 Shared Fleet Device Permit A. *See Ex. C*, Administrative Issuance. Pursuant to 24 DCMR 3314.24, the District was allowed to award ***up to five*** Permits for a two-year term. The permit application included 52 detailed questions, with applicants receiving a score out of the 624 total possible points following an evaluation by four different evaluators. *See* 24 DCMR § 3317.2.

The District's scoring criteria did not afford the evaluators with the unfettered discretion to make subjective judgments about the quality of an applicant's submission. Rather, the District set forth objective standards for what responses could earn a score of "1," "2," or "3" in each scoring category for each question. *See Ex. C*.

Under the District's criteria, a score of "1" represents an incomplete answer or one that states or indicates the applicant would not comply with the District's requirements. *Id.* A score of "2" represents a complete answer that meets the District's requirements. *Id.* And, a score of "3" represents a complete answer that exceeds the District's requirements. *Id.*

DDOT evaluated Bird's timely application, and Bird received an initial total application score of 438. **Ex. D**, Nov. 16, 2022 DDOT Email. Despite being permitted to award five permits, DDOT chose to award only ***four*** permits to applicants whose scores ranged from 446 to a high score of 491. *Id.*

Bird recognized numerous errors and discrepancies in the District's scoring of its application. For example, Evaluators One through Three awarded Bird consistent scores between

112-116, including a total of only seven “1” scores. *See Ex. B*, Appeal at 9-10. However, Evaluator Four awarded Bird a total score of just 97 and gave Bird *twelve* “1” scores. *Id.* Such sharp disagreement over whether Bird provided a complete response to the questions, by itself, indicates mistakes and irregularities on the part of the scorers. Indeed, Evaluator Four’s scoring was 19 points lower than Bird’s highest score and included more “1” scores than the other three evaluators combined, despite that Bird provided full and complete answers to each of the District’s questions. *Id.* Given the significant deviation from the other evaluators, Evaluator Four’s assigned scores were clearly erroneous outliers and demonstrated either a misunderstanding of the District’s scoring criteria or bias against Bird.

The scoring errors and inconsistencies were not limited to just Evaluator Four. As another example, Bird received a blank or “0” score in one category from Evaluator One, which was a clear error as the District’s criteria did not allow for such a score. **Ex. E**, Initial Scoring. Bird should have received at least a “2” for this category, as its response was complete. In other scoring categories, Bird’s response unambiguously and indisputably exceeded the District’s requirements, yet it did not receive the full “3” points available. *See Ex. B*, Appeal. While Evaluator Four’s scoring issues are most blatant, the other evaluators to a greater or lesser degree did not properly or consistently follow the evaluation procedure guidelines.

Correcting the District’s errors would have increased Bird’s score significantly by twenty points and would have placed Bird solidly in the top four scoring applicants, resulting in Bird receiving a Permit.

#### **D. Appeal of Permit Award**

On November 29, 2022, Bird timely submitted an appeal of the DDOT’s denial of its application and provided a detailed challenge to the scoring for various application questions. **Ex.**

**B**, Appeal. Specifically, Bird challenged the scoring for questions 7, 14, 17, 19, 22, 24, 27, 28, 32-34, 40, 44, 45, and 50 (referred to as the “Appealed Questions”). *See id.*

Bird’s due process rights in its appeal to DDOT were frustrated by DDOT’s failure to disclose the submitted applications of the other applying operators or their corresponding scores. Bird requested such documents informally to DDOT and then formally on November 25, 2022 via a District of Columbia Freedom of Information Act (FOIA) request. In response, DDOT provided only an anonymized scoresheet of Bird and the other applicants, identified only by number. *See Ex. D*, Nov. 16, 2022 DDOT Email, *Ex. F*, FOIA Response. As a result, Bird was unable to examine other operator scores relative to their submission content and compare those evaluations with Bird’s. Bird appealed the inadequacy of the FOIA response which appeal has been denied. *Ex. G*, FOIA Appeal and Denial.

On December 9, 2022, counsel for Bird contacted the DDOT Hearing Officer and asked multiple questions regarding the appeal process, including whether (i) the Hearing Officer would hold a hearing on the appeal; (ii) DDOT would reserve its decision on appeal pending the response to Bird’s FOIA request and give Bird opportunity to supplement its appeal; and (iii) Bird could continue operating in the District while the appeal and any subsequent proceedings remained pending. *Ex. H*, Dec. 9, 2022 Letter.

The Hearing Officer responded to Bird’s letter on December 22, 2022 and stated (i) that DDOT would not hold any hearings as part of the appeal process; (ii) the Hearing Officer had already made her recommendation to DDOT (despite the pending records request); and (iii) Bird’s ability to operate in the District would expire on December 31, 2022. *Ex. I*, Dec. 22, 2022 Letter. DDOT, through Director Lott, issued DDOT’s Final Decision on December 23, 2022 which

attached the Hearing Officer's underlying memorandum to Director Lott detailing her findings and re-scoring decisions (or "Final Report."). **Ex. J**, Final Decision.

In the Final Decision, DDOT increased the scoring for eleven of Bird's Appealed Questions, indicating serious underlying flaws in the original application review process. *See id.* However, in addition to the increase of some of the point scores for the Appealed Questions, the Hearing Officer also arbitrarily reduced four of Bird's scores from "2" to "1". *See id.* Critically, these scoring reductions were made to portions of Bird's application scoring which Bird did not appeal. *Compare Ex. B*, Appeal, *with Ex. J*, Final Decision.

As a result of DDOT's unjustified four-point reduction to unchallenged scores, Bird's score was adjusted to 445, one point lower than the fourth-place applicant, which was awarded a Permit. *Compare Ex. J*, Final Decision, *with Ex. D*, Nov. 16, 2022 DDOT Email.

The DDOT Hearing Officer's unauthorized reductions were fatal to Bird's ability to displace the fourth-place applicant or even receive a fifth permit award because the loss of those four points reduced Bird's total score for Section 3.7 of the application, Past Performance, below 50% of the 36 available points for that criterion. *See Ex. J*, Final Decision p. 6. Under the terms of DDOT's application process, this rendered Bird's application as incomplete and thus ineligible for a permit award. *Id.* Nonetheless, in such situations, under the applicable regulations, as noted in greater detail below, the Hearing Officer has the authority to remand an incomplete application to the review panel for rescoring. *See* 24 DCMR § 3317.12 (c). Thus, at minimum, the Hearing Officer should have remanded Bird's application for further consideration.

Instead of providing Bird an opportunity to be heard on its appeal, allowing Bird to submit supplemental materials in support following the DDOT's complete response to Bird's FOIA request, or remanding its application for further consideration, DDOT issued its Final Decision

denying Bird's appeal based on its unilateral and unlawful reduction of scores which were not challenged on appeal. **Ex. J**, Final Decision. In addition, the Hearing Officer appeared to have inconsistently reviewed and re-scored various questions, in certain cases determining whether or not an evaluator's score was reasonable, but in other cases directly re-scoring an application question based upon her own subjective determination as to the adequacy of Bird's response without reference to the evaluator's particular scoring. *See e.g.*, **Ex. J**, Final Decision (comparing reasoning for adjusting scores for Question Nos. 27 and 28).

On December 28, 2022, Bird contacted DDOT raising its concerns with the application and appeals process and requesting that it reconsider its ruling and issue Bird a fifth Permit, as was clearly permissible under 24 DCMR § 3314.24. **Ex. K**, Dec. 28, 2022 Letter. On January 5, 2023 DDOT responded to Bird's letter and denied its request to reconsider DDOT's ruling, noting that Bird had exhausted its administrative appeal options. **Ex. L**, Jan. 5, 2023 Letter.

Bird respectfully requests that the Court overturn DDOT's Final Decision as arbitrary, capricious, an abuse of discretion, and not in accordance with law and regulation, and (i) issue Bird a Permit to continue serving the District or (ii) in the alternative remand the matter to DDOT for a complete re-scoring of Bird's application and a new Permit award decision consistent with the Court's findings. In awarding relief, the Court is also respectfully requested to award Bird its costs of filing this petition for review including reasonable attorneys' fees.

### **III. Jurisdiction**

This Court has jurisdiction to review agency decisions that do not constitute a contested case. A "contested case" is defined by § 1-1502(8) of the District of Columbia Administrative Procedure Act, D.C. Code § 1-1502(8) as a proceeding before the Mayor or any agency in which the legal rights, duties, or privileges of specific parties are required by any law or by constitutional

right, to be determined after a hearing before the Mayor or before an agency. The principal manifestation of a contested case is its character as a quasi-judicial process based upon particular facts and information, and immediately affecting the interests of specific parties in the proceeding. This quasi-judicial process consists of a trial-type hearing, which is statutorily or constitutionally compelled. As the Permit process did not include any hearing or anything approaching a quasi-judicial process, jurisdiction lies with this Court.

#### **IV. Standard of Review**

Under the District of Columbia Administrative Procedure Act, this Court may overturn an agency decision if it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Bowles v. D.C. Dep't of Emp't Servs.*, 121 A.3d 1264, 1269 (D.C. 2015) *McNeal v. District of Columbia Dep't of Emp't Servs.*, 917 A.2d 652, 656 (D.C. 2007) (citing D.C. CODE § 2-510 (a)(3)).

The Court will affirm an administrative agency decision when (1) the agency made findings of fact on each contested material factual issue, (2) substantial evidence supports each finding, and (3) the agency's conclusions of law flow rationally from its findings of fact. *Georgetown Univ. v. District of Columbia Dep't of Emp't Servs.*, 971 A.2d 909, 915 (D.C. 2009). "An administrative order can only be sustained on the ground relied on by the agency." *Walsh v. District of Columbia Bd. of Appeals & Review*, 826 A.2d 375, 380 (D.C. 2003) (citation and internal quotation marks omitted).

However, when the agency fails to "explain [its] reasoning in arriving at a[n] ... award" such that the court is "unable to meaningfully review the decision to determine whether it is based on substantial evidence," the court must remand the case back to the agency. *Jones v. District of*

*Columbia Dep't of Emp't Servs.*, 41 A.3d 1219, 1225 (D.C. 2012). *See also Jameson's Liquors, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 384 A.2d 412, 417 n.6 (D.C. 1978).

## **V. Argument**

DDOT's 2023 Permit application process, including its appeals procedure and the final decisions of its Hearing Officer issued as a result, was arbitrary, capricious, and an abuse of discretion for a number of reasons: (i) DDOT's unauthorized and arbitrary decision to limit the number of Permit awardees to only four when the applicable regulations allowed for five Permit awards, (ii) the Hearing Officer's unauthorized and unlawful reduction of unchallenged scores; (iii) the Hearing Officer's failure to provide a hearing as part of the appeals process; (iv) the Hearing Officer's failure to defer her rescoring decisions and recommendation to Director Lott until after Bird had received a response to its FOIA request and had an opportunity to supplement its appeal; and (v) the Hearing Officer's failure to remand Bird's application to the evaluators upon a finding that it was incomplete because of the Section 3.7 score now falling below 50% of the total score available – again due to the unauthorized reduction of points to non-appealed scores.

### **A. DDOT's Decision to Issue Only Four Permits was Arbitrary.**

The Permit application process in issue here created a series of fundamental flaws leading to an arbitrary and capricious permitting decision denying Bird the continued ability to provide dockless scooters to District residents and visitors for rental use.

DDOT's decision to only issue four Permits, despite the fact that it was authorized to issue five, was arbitrary and capricious. Any decision to limit the number of licenses must be based on the decisions of the District of Columbia City Council. *See Palace Rest., Inc. v. Alcoholic Beverage Control Bd.*, 271 A.2d 561, 562 (D.C. 1970) (“if a decision intending to limit the number of Class “C” licenses were made the Council would have to make it”); *Clark's Liquors, Inc. v. Alcoholic*

*Beverage Control Bd.*, 274 A.2d 414, 417 n.6 (D.C. 1971) (Council made provision in the regulations that limits the number of retail Class “A” licensees to 300).

The applicable regulations governing the District’s 2023 dockless mobility device program are based upon 24 DCMR §§ 3314 *et seq.* Section 3314.24 provides that the DDOT had authority to issue up to five Permits to e-scooter operators. For some unknown reason, DDOT refused to issue the full number of Permits allowed and has inexplicably limited the number of Permits issued to four. DDOT has declined to issue a fifth Permit to Bird despite that Bird’s final application score remains in material doubt and, even if it remains unaltered, is still only one point below the score of the fourth Permit awardee.

DDOT has further refused to provide any reasoning for its decision not to issue a fifth Permit. Its decision is particularly curious, as DDOT previously granted conditional permits to ten operators in 2019. Under the circumstances, DDOT’s refusal to grant Bird a fifth Permit as specifically allowed by applicable regulation is arbitrary and capricious and should be overturned.

**B. The Hearing Officer’s Reduction of Scores was Unauthorized.**

The Hearing Officer’s unilateral decision to reduce four of Bird’s scores was unauthorized and should be disregarded. “It is a basic tenet of administrative law that an administrative agency is bound to follow its own rules and regulations.” *Macauley v. District of Columbia Taxicab Comm’n*, 623 A.2d 1207, 1209 (D.C. 1993). Pursuant to 24 DCMR § 3317.12, the Hearing Officer was required to make a recommendation to the DDOT Director following review of an appeal. The Hearing Officer’s recommendation shall include only one of the following courses of action:

- (a) Dismiss the appeal in its entirety;
- (b) Recalculate appealed scores the Hearing Officer believes were scored in error; or

- (c) For companies that are appealing the Director's application disqualification the Hearing Officer may remand the application to the review panel for scoring.

24 DCMR § 3317.12 (emphasis added). Thus, under the applicable regulations the Hearing Officer's ability to recalculate scores was limited only to "appealed" scores which the Hearing Officer believes were scored in error.

Here, however, the Hearing Officer went far beyond her authority and reduced four of Bird's scores from "2" to "1," despite that Bird had not appealed such scores. Specifically, the Hearing Officer reduced four of the scores provided by evaluators for Question Nos. 34 and 35 contained within Section 3.7 of the application, Past Performance. *See Ex. J*, Final Decision.

Notably, Bird did not appeal any aspect of any evaluator's score for Question No. 35. *See Ex. B*, Appeal. Thus, Bird's appeal did not include any discussion of Question No. 35, and the Hearing Officer's decision to reduce Bird's score here by two points was not authorized by 24 DCMR § 3317.12 (b) because Bird had not challenged any scoring related to its application answer to Question No. 35.

With respect to Question No. 34, the Hearing Officer reduced the scores given by the First and Third Evaluators from "2" to "1, a loss of another two points. *Ex. J*, Final Decision at 5. However, Bird only challenged the "1" scores given by the Second and Fourth Evaluators for this question; Bird did not challenge the "2" scores awarded by the First and Third Evaluators. *Ex. B*, Appeal at 7-8. Since Bird did not appeal the scores given by the First and Third Evaluators, and never argued that those scores should have been increased to "3s," the Hearing Officer had no authority to recalculate those scores under 24 DCMR § 3317.12(b). The decision to rule on issues that Bird did not appeal is particularly egregious as it not only violated the applicable regulations, but as discussed in greater below, the Hearing Officer also refused to grant a hearing or allow Bird

to supplement its appeal pending the final resolution of its FOIA request. Thus, the Hearing Officer ruled on issues which were not on appeal and without providing Bird any opportunity to address her concerns.

As the Hearing Officer did not limit her review of Bird's appeal to the recalculation of "appealed scores," her recommendation to DDOT to reduce the four points in question violated 24 DCMR § 3317.12. Without the Hearing Officer's unlawful reduction of those four points, Bird would have scored the fourth-highest score of all applicants, which would have secured it a Permit. However, by including those reductions in the re-scoring exercise, this ensured that Bird would remain in fifth place – one point lower than the fourth-place applicant.

The Hearing Officer's decision is an apparent *post-hoc* rationalization of the DDOT's original determination that Bird had scored too low below the scoring range of the four successful applicants and would not receive a Permit. Such *post-hoc* rationalization is not favored and is not worthy of deference by the Court. *Armstrong v. Archuleta*, 77 F. Supp. 3d 9, 19 n.12 (D.D.C. 2014) ("Not all agency interpretations are worthy of deference, such as those advanced by an agency as a 'post-hoc rationalization' for agency action in litigation or where there is no reason to suspect the interpretation reflects the agency's 'fair and considered judgment on the matter in question.'") (quoting *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 131 S. Ct. 871 (2011)).

Because the Hearing Officer's recommendation was not limited to appealed scores and amounted to a *post-hoc* rationalization of the denial of Bird's application, it violated 24 DCMR § 3317.12. As such, the Court should disregard the scores which were unlawfully reduced, adjust Bird's application score to 449, and award Bird a Permit.

Moreover, other scores remain in doubt because of the inconsistent and arbitrary methods the Hearing Officer used in conducting her review. At times she conducted her review as one

would expect an administrative hearing officer to do: to examine the rationality and reasonableness of the scores awarded by the four evaluators in light of the questions asked by the application and the adequacy of the answers provided by Bird.<sup>2</sup>

In certain instances (eg. Question Nos. 19, 22, 27, and 50), the Hearing Officer re-scored answers because she did not accept the evaluator's particular logic; however, for others she did not independently re-calculate the score as requested by Bird because she deferred to the evaluator's apparent reasoning (eg. Question No. 7). *See Ex. J*, Final Decision. In other instances (eg. Question Nos. 17, 24, 28, and 34), she unilaterally re-scored the application directly with no reference to the evaluators' findings. *Id.* As a prime example, the Hearing Officer deducted two points for Bird's response to Question No. 34 as allegedly inadequate, but as noted above, there is no evidence that she ever discussed her re-scoring with the evaluators who had given Bird "2" scores for its response to that question.

This serves to further illustrate the arbitrariness of the District's application review process set forth in 24 DCMR § 3317 because it provides no meaningful guidance to either applicants or DDOT as to the manner in which challenged scores are to be recalculated: based on a review of the evaluators' logic and reasoning or based upon the Hearing Officer's unilateral and subjective judgment.

**C. The Appeal Process Violated Bird's Due Process Rights.**

The Hearing Officer denied Bird its right to due process when reviewing its appeal by refusing to provide a hearing on appeal and by refusing to defer her recommendation pending Bird's opportunity to receive a response to its FOIA request and supplement its appeal. Courts have explained that "if due process means anything, it means notice and the opportunity to be

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<sup>2</sup> Because the scoring matrix Bird has been provided only shows raw scores without supporting narrative, *see Ex. E*, Bird presumes that the Hearing Officer consulted the evaluators to some extent about their scores.

heard.” *Brooks v. District of Columbia*, 2011 U.S. Dist. LEXIS 173251, at \*12 (D.D.C. Aug. 10, 2011) (citing *Propert v. Dist. of Columbia*, 948 F.2d 1327, 1331, 292 U.S. App. D.C. 219 (D.C. Cir. 1991)). In this case, Bird received neither.

On December 9, 2022, counsel for Bird contacted the Hearing Officer and asked numerous questions about the procedural nature of the appeals process. **Ex. H**, Dec. 9, 2022 Letter. Among other things, Bird asked if the Hearing Officer would entertain a hearing on its appeal to discuss its application, and whether DDOT would defer its decision until Bird had the opportunity to receive a response to its FOIA request and supplement its application accordingly. *Id.*

Instead of providing notice to Bird that it would not have any further opportunity to present argument or supplement its application or that the Hearing Officer intended to recalculate scores which Bird did not appeal, the Hearing Officer waited until December 22, 2022 – the day she issued her recommendation to DDOT – to respond to Bird’s questions. **Ex. I**, Dec. 22, 2022 Letter. By that time, it was too late. The DDOT issued its Final Decision the next day. **Ex. J**, Final Decision.

Bird was unable to present evidence or testimony at any hearing supporting its appeal, obtain a complete response to its FOIA request and submit relevant findings in support of its appeal, or have any opportunity to respond to the Hearing Officer’s consideration of scores which Bird did not appeal. The Hearing Officer denied Bird’s due process rights and made her recommendation in a vacuum without providing Bird a full and fair opportunity to present all relevant evidence or even be aware of the issues on which the Hearing Officer was basing her recommendation. Because Bird’s due process rights were violated, the Court should set aside DDOT’s Final Decision and award Bird a Permit, or in the alternative, order that DDOT re-score Bird’s application consistent with applicable law and regulation.

**D. The Hearing Officer Abused Her Discretion by Refusing to Remand Bird's Application.**

The Hearing Officer abused her discretion by reducing Bird's unchallenged scores to a level which rendered Bird's application incomplete and then in failing to remand the application for rescoring. Under 24 DCMR § 3317.12(c), on appeal of an application which was disqualified, the Hearing Officer is authorized to remand the application to the review panel for further consideration.

Bird was not appealing an application disqualification decision but rather was challenging specific scores made by the four evaluators. However, when the Hearing Officer unilaterally reduced unchallenged scores, she effectively now rendered Bird's application "incomplete" when clearly it was not incomplete as submitted nor after it had been evaluated originally. Specifically, the application instructions provided that a score of 50% or less than the total available score for a particular application section results in the application being incomplete.

As noted above, the Hearing Officer reduced Bird's score to Question Nos. 34 and 35 by a total of four points. **Ex. J**, Final Decision. These reductions affected Bird's overall scoring for Section 3.7 of the application for Past Performance. *Id.* As a result of the reductions, Bird's score fell below 50% of the total points available for Section 3.7; thus, its application was considered by the Hearing Officer for the first time to be incomplete. Of course, Bird had no opportunity to challenge the reduction of its scores or the determination that its application was incomplete.

Particularly because the Hearing Officer determined for the first time on appeal that Bird's application was considered incomplete, she should have remanded it to the review panel for further consideration and to allow Bird to address any concerns. Instead, the Hearing Officer issued her recommendation to DDOT denying Bird's application without any transparency and without providing Bird with an opportunity to respond properly. Accordingly, the Hearing Officer's

decision was an abuse of discretion, and the Court should set aside DDOT's Final Decision and award Bird a Permit, or in the alternative, order that DDOT re-score Bird's application consistent with applicable law.

## **VI. Conclusion**

For the reasons stated above, Bird respectfully requests that the Court set aside DDOT's Final Decision, award Bird a Permit, and for all other relief the Court deems equitable and just. Alternatively, Bird requests that the Court remand Bird's application to DDOT for complete review and re-scoring, and, as a result, award Bird a Permit if it now displaces the fourth-highest applicant, or otherwise award Bird a fifth Permit.

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Respectfully submitted,

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