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November 9, 2006

VIA HAND DELIVERY

Board of Zoning Adjustment
for the District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: Motion to Strike Late Filings
BZA Appeal No. 17519
1812 35th Street, N.W.

Dear Members of the Board:

On behalf of 1812 35th Street Associates, LLC, the property owner and party in the above-referenced case, we hereby move to strike the late submissions filed on November 7, 2006 by Advisory Neighborhood Commission 2E and Richard Schmidt. The documents were submitted after the close of the record, are therefore untimely and should not be received into the files of the Board.

Section 3121.9 of the Zoning Regulations explicitly states that "[a]ny material received by the Board after the close of the record that bears upon the substance of the appeal or application shall be returned by the Director and not received into the files of the Board." Here, the record was closed at the conclusion of the hearing on October 17, 2006, except for the limited purposes of allowing the parties to submit a brief on the motion to dismiss and any participant to submit proposed findings of fact and conclusions of law. Both documents were to be filed no later than November 1, 2006, as the transcript clearly demonstrates.

CHAIRPERSON GRIFFIS: Thank you very much. Follow-up clarifications? Anything else? Guidance needed? Very well. Well, let's close the proceeding then in our afternoon and in this appeal. Let's assess whether we were requesting any filings from those participants at this time.

* * *

CHAIRPERSON GRIFFIS: ... So I don't see -- I'm not hearing any objection then on making those dates for the single filing and that of the two elements that the record is open for for all of the participants.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17519
EXHIBIT NO. 25

Board of Zoning Adjustment
District of Columbia
CASE NO. 17519
EXHIBIT NO. 25

I am requiring both of you to brief that case. However, findings and conclusions are open to all.

* * *

[L]et's just do that. The 1st of November, '06 would be the filings at 3:00 or by 3:00. That will give us ample time to get those out and issued.

Okay. Very well. Anything else then? Any other questions or clarifications of procedures? Thank you all very much. I appreciate your patience with us this afternoon in getting through this entirely and we will call this for a decision on the 14th. Thank you all very much.

See BZA Transcript in BZA Appeal No. 17519, October 17, 2006, at 152-56 (emphasis added) (copy attached).

Thus, any reply or other document submitted after the close of the record October 17, 2006, is untimely and should be returned to the sender without review or consideration by the Board.

Significantly, the ANC is unable to cite any rule under the Zoning Regulations that would allow a reply to the proposed findings of fact and conclusions of law submitted by the parties. While the ANC refers to section 3121.6, the plain language of that section limits replies to "specific exhibits, information or legal briefs" submitted after the close of the record and does not extend to "proposed findings of fact and conclusions of law." The regulations clearly distinguishes between "proposed findings of fact and conclusions of law" and "specific exhibits, information or legal briefs" and they are not interchangeable. Under basic tenets of statutory construction, when particular language in is used one provision of section but is omitted in another provision of the same section, the disparate inclusion or exclusion is presumed to be intentional and purposeful.¹ Here, the Zoning Commission expressly limited replies to "specific exhibits, information and legal briefs." Consequently, the ANC is precluded from replying to the property owner's proposed finding of fact and conclusions of law.

Similarly, the Board should also reject the letter attached to the ANC's submission from Nixon Peabody on behalf of Richard Schmidt, who participated in the hearing and testified in support of the appeal. Mr. Schmidt cites no rule or regulation that would permit the Board to

¹ The statutory construction maxim *expressio unius est exclusio alterius* – "the mention of one thing implies the exclusion of another" – makes clear that the ANC is precluded from responding to the owner's proposed findings of fact and conclusions of law. See *School Street Associates Limited Partnership v. District of Columbia*, 764 A.2d 798, 808 (D.C. 2001), quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) and *Russello v. United States* 464 U.S. 16, 23 (1983); see also *McCray v. McGee*, 504 A.2d 1128, 1130 (D.C. 1986) (holding that there is a presumed inference that all omissions should be understood as exclusions), quoting 2A Sutherland, *Statutes and Statutory Construction* § 47.23 (4th ed. 1984); see also 73 Am. Jur. 2d *Statutes* §211 (1974) and *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929).

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accept his submission after the close of the record on October 17, 2006. While participants in the hearing were invited to submit proposed findings of fact and conclusions of law, those submissions were due on November 1, 2006. Mr. Schmidt's submission fails on both counts: it does not constitute proposed findings of fact and conclusions of law and it is untimely. Thus, under section 3121.9, Mr. Schmidt's letter should likewise be returned and not received into the record.

Respectfully submitted,

HOLLAND & KNIGHT LLP



Carolyn Brown

Attachment

cc: Laurie Horvitz, counsel to ANC 2E (via mail)
Vernon Johnson, counsel to Richard Schmidt (via mail)
Stephanie Ferguson, Office of the General Counsel, DCRA (via mail)
Bill Crews, Zoning Administrator (via mail)

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GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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APPEAL OF ADVISORY NEIGHBORHOOD
COMMISSION 2E
APPEAL NO. 17519 - ANC-2E

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TUESDAY,
OCTOBER 17, 2006

+ + + + +

The Public Hearing convened in
Room 220 South, 441 4th Street, N.W.,
Washington, D.C., 20001, pursuant to notice
at 9:30 a.m., Geoffrey H. Griffis,
Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice-Chairperson
CURTIS ETHERLY, JR.	Board Member
JOHN A. MANN, II	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

MICHAEL G. TURNBULL Commissioner (AOC)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLY BAILEY	Sr. Zoning Specialist
TRACEY W. ROSE	Sr. Zoning Specialist
ESTHER BUSHMAN	General Counsel

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1 which you have rejected twice before. Thank
2 you.

3 CHAIRPERSON GRIFFIS: Thank you
4 very much. Follow-up clarifications?
5 Anything else? Guidance needed? Very well.
6 Well, let's close the proceeding then in our
7 afternoon and in this appeal. Let's assess
8 whether we were requesting any filings from
9 those participants at this time.

10 We had one, as I recall, as we
11 opened up the briefing of the Woodley Park
12 case. We'll keep the record open for that
13 as it relates to whether there is an issue
14 to dismiss the relevancy of 405 and also
15 2001. And then I guess we keep the record
16 open also for draft orders on this case.

17 Let's look at the schedule and
18 see. Let me assess whether we can make our
19 next decision making, which is the 14th of
20 November, a date that is becoming very
21 familiar to me today. Is that a
22 possibility?

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1 In terms of the briefing, I don't
2 believe -- I would not tend to think that I
3 would need responses from all of those based
4 on the briefing, the legal briefing of the
5 relevancy of the case that was cited today,
6 so we could have those submitted in at the
7 first point and then the last date of filing
8 would be, of course, that 30th of October.
9 That would be the draft orders, findings of
10 facts, conclusions.

11 So what we would have is a
12 briefing in by the 20 -- hm. Well, we could
13 do them all together, frankly. I don't have
14 any difficulty with that unless others do.
15 Is there a difficulty in timing on that for
16 submissions? No?

17 MS. BROWN: No, Mr. Chair.

18 CHAIRPERSON GRIFFIS: ANC?

19 MS. HORVITZ: The only issue that
20 Mr. Eason is raising is when would the
21 transcript be available for purposes of
22 findings of fact or what is the normal delay

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1 on that? I mean, I can just make it up as I
2 recall it, but --

3 CHAIRPERSON GRIFFIS: That
4 probably wouldn't be off base. However, I
5 think you would be about two weeks out for
6 the transcript.

7 MS. HORVITZ: I mean, I would
8 rather proceed as quickly as possible even
9 without it, but if that's a consideration
10 for anybody, I would just raise that.

11 CHAIRPERSON GRIFFIS: Okay.

12 MS. BROWN: I think it's just a
13 matter of ordering it from the recorder.

14 CHAIRPERSON GRIFFIS: Yes. I
15 think you can expedite a transcript, but I'm
16 not familiar with all the particulars of
17 that. Okay. So I don't see -- I'm not
18 hearing any objection then on making those
19 dates for the single filing and that of the
20 two elements that the record is open for for
21 all of the participants.

22 I am requiring both of you to

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1 brief that case. However, findings and
2 conclusions are open to all.

3 MS. BROWN: Mr. Chairman, a
4 clarification. I think you mentioned
5 October 30th. Usually, your filings are due
6 on a Tuesday. I just want to clarify.

7 CHAIRPERSON GRIFFIS: Yes, that's
8 a Monday, right?

9 MS. BROWN: Yes.

10 CHAIRPERSON GRIFFIS: Yes.

11 MS. BROWN: Okay.

12 CHAIRPERSON GRIFFIS: Yes. It's
13 what some -- am I mistaken in doing it that
14 way? I guess going to the 14th, to that
15 Tuesday. We can do it later that week.

16 MR. MOY: Yes, you can do it
17 later that week because the decision won't
18 be until the 14th.

19 CHAIRPERSON GRIFFIS: We have the
20 next week that I'm trying to avoid, because
21 we have a huge amount of filings coming in
22 and we have the general election, which

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1 obviously -- I don't know about obviously,
2 makes for a difficulty and then a holiday,
3 so the filings and packaging from the staff
4 level I was just trying to avoid.

5 The 31st is a Tuesday. Then we
6 could go even the second or the 1st at 3:00,
7 which would be that Wednesday. Does that --
8 let's just do that. The 1st of November,
9 '06 would be the filings at 3:00 or by 3:00.
10 That will give us ample time to get those
11 out and issued.

12 Okay. Very well. Anything else
13 then? Any other questions or clarifications
14 of procedures? Thank you all very much. I
15 appreciate your patience with us this
16 afternoon in getting through this entirely
17 and we will call this for a decision on the
18 14th. Thank you all very much.

19 (Whereupon, the matter was
20 concluded at 7:45 p.m.)

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