

Via E-mail

zesubmissions@dc.gov

May 12, 2010

Zoning Commission
441 4th Street, NW
Suite 210S
Washington, DC 20001

2012 MAY 12 PM 5:22

RECEIVED
D.C. OFFICE OF ZONING

**Re: Response to Applicant's May 5th Submission Regarding Construction
Mitigation Measures: Zoning Commission Case No. 09-03.**

Dear Chairman Hood and Members of the Zoning Commission:

This is a response from the Fort Baker Drive Party to the Applicant's May 5th submission, which described the Applicant's intended "Construction Mitigation Measures" relating to the construction of Skyland Town Center and the impact thereof on the Fort Baker Drive homes. The Fort Baker Residents urge the Commission to view the Applicant's response in light of the PUD Evaluation Standards and Comprehensive Plan directives, including 11 DCMR 2403.3 which states that "[t]he impact of the project on the surrounding area and the operation of city services and facilities shall not be found to be unacceptable, but shall instead be found to be either favorable, capable of being mitigated, or acceptable given the quality of public benefits in the project."

Throughout this process the Applicant has been dismissive of the Fort Baker Drive's residents' legitimate concerns about the safety and preservation of their homes. In the last hearing session, Mr. Green claimed that the Fort Baker Drive Residents told him to "buy us out or we'll sue you." In addition to the fact that Mr. Green's statement was a blatant and calculated misrepresentation, it completely mischaracterizes the Fort Baker Drive Party's position on the Construction Management Agreement.

The Fort Baker Drive Residents live in homes that have been destabilized apparently due to a continuing soil erosion condition caused by the creation and existence of "God's Dump." God's Dump is located on property that will be developed as part of Skyland Town Center. In a consent order dated May 23, 1979 (attached hereto as Exhibit A, and previously submitted to the Commission), the city ordered Andrew God to remove and re-grade the subject landfill. It appears that Mr. God and the City then proceeded to ignore the consent order as well as the required removal and re-grading. The effect was to move an existing channel north toward the homes on Fort Baker Drive over the course of the last 30 years. The channel now rests adjacent to these homes, and the artificially altered soil continues to undermine the stability of the Fort

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Baker Drive homes. As a consequence, each of the homeowners has had to invest tens of thousands of dollars in helical piers to help stabilize their homes. The Fort Baker Drive Residents hired professional engineers who confirmed that their homes would suffer significant damage if the proposed Skyland Town Center were built. The Applicant has offered no testimony by any expert that states in absolute terms that they can build on God's Dump without further damage to these homes.¹

Based on the above information, the Fort Baker Drive Residents offered the Applicant two options: (1) provide a legally enforceable guarantee that they would be reimbursed for any damage done to their homes without them having to litigate (the homeowners are afraid that they will find themselves in court fighting with a powerful developer while having the burden of proof that the damage was caused by the development) or (2) buy their homes so that the development could move forward without further impediment. Despite the fact that these residents had lived in their homes for many years, they were willing to give up their homes (rather than fight this proposal), so that this popular project could go forward.

This latter option could be accomplished without economic harm to the Applicant. The Applicant could purchase the four Fort Baker Drive properties at market value and rent them out in the normal course of business. It would then be able to sell the homes, presumably at no loss (if one believes the Applicant's assertions that the Skyland construction and operation will not significantly impact the value of these four homes). The Fort Baker Drive Residents believe that it is unfair for them to have to shoulder the sole risk of damage to the Fort Baker Drive homes. If the Applicant truly believes its own claims, it has nothing to lose in making such a deal.

In any event, the Fort Baker Drive Party should come out of this ordeal no worse off than they were going in – they are not investors in this project. They deserve to be kept whole, and that is all they have asked for. The Fort Baker Residents have put forward several proposals regarding a legally enforceable guarantee, but the Applicant was not at all interested in such an offer. In fact, the Applicant laughed it off, and then fabricated the “buy us out or we’ll sue you” claim.

The Applicant has instead offered a weak Construction Mitigation Agreement proposal that essentially provides that the Applicant will be liable for damage to the Fort Baker Drive Homes (as it would be without an agreement), but also inaccurately identifies “significant structural integrity problems that result in the shifting and settling of the foundations” under the Fort Baker Drive homes.² This reference is an obvious insight into the Applicant's future (likely spirited and well-funded) defense against any claims of damage from the Fort Baker Drive residents. The Fort Baker Drive Residents are in an untenable position; they fear for their homes

¹ It is illogical for the District to now be facilitating development of land that the District claimed (successfully and accurately) was unfit to remain in place. In 1979, the District caused the Superior Court to order the removal and re-grading of the subject landfill. 30 years later, with no such removal and re-grading having taken place, the City now advocates development (instead of removal and re-grading) of such land.

² It is the soil, not the structures, that has integrity issues, and it is the City's (Applicant's) property that has caused such soil integrity issues.

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and their safety and the Applicant refuses to offer any reasonable guarantee against the loss of those homes. Rather, they simply offer to do what they would be obligated to do under the law anyway when the eventual damage occurs.

Finally, the burden is on the Applicant to show that impact of their PUD on the surrounding area will not be unfavorable and will not be inconsistent with the Comprehensive Plan's directive regarding soil erosion, among other things. The Applicant has not met that burden.

Sincerely,

A handwritten signature in dark ink, appearing to read "Martin P. Sullivan". The signature is fluid and cursive, with the first name "Martin" being more prominent.

Martin P. Sullivan

cc: Paul Tummonds, Goulston & Storrs
Office of Planning
DDOT
ANC 7B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division
DISTRICT OF COLUMBIA, et al.
Plaintiffs
v.
NORTHCOTE CORPORATION, et al.
Defendants

MAY 23 1979
CIVIL ACTION NO. 7811-78

CONSENT ORDER

This suit was brought by plaintiffs to obtain a declarator judgment that the defendants have placed fill material on District of Columbia public space without a permit to do so, have refused to remove it after having been directed to do so by the plaintiffs, and to obtain the immediate removal of all material placed on public space and restore the public space to its original condition. The plaintiffs and defendants have consented without trial or adjudication of any issue of fact or law herein to the entry of this Order and without this Order constituting any admission by any party hereto with respect to any issue of fact or law herein.

NOW, THEREFORE, upon consent of the parties hereto, it is agreed as follows:

1. The defendants admit all jurisdictional facts set forth in the Complaint filed hereto to the extent that they relate to either defendant.

2. Defendants will remove forthwith all fill material placed or allowed to be placed ~~in the vicinity of~~ in the vicinity of 20th Street, S.E. and Austin Street, S.E. adjoining the property of ~~the District of Columbia~~ and shall be directed by the District of Columbia.

3. The defendants will commence removal operations ~~on or about~~ on or about June 21, 1979 and complete removal of the material within 30 days of the date of the Order, subject to weather permitting, during normal business hours, until the

Exhibit A

removal and regrading set forth below had been completed. All fill material shall be removed and the public space regraded within 120 days of June 21, 1979.

4. The defendants shall immediately notify the District of Columbia in writing of any circumstances or conditions which come to their attention that may cause or in any way lead to a failure by them to meet the requirements of this Order.

5. The parties hereto agree that, for the purposes of this litigation, the boundaries of public space have been determined by a survey conducted by the District of Columbia Surveyor, a copy of which shall be furnished by plaintiffs to the defendants.

6. The defendants will regrade their property from existing elevations adjoining the public space, which is the subject of this Order, during and after the removal activity, so as to create a stable slope and establish vegetation on such slope to prevent further erosion onto the public space identified in the survey. In addition, the defendants may construct a barrier at the edge of their property adjoining public space at 28th Street, S.E. to prevent erosion onto public space. ~~Such a barrier shall be constructed so as to be capable of fulfilling the purpose for which it is constructed.~~

7. The defendants shall take steps to return the public space to the condition it was prior to the placement of fill on that public space and shall reestablish a seeded vegetation cover.

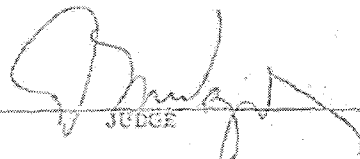
8. Should the removal of fill from public space in Austin Street, S.E. reveal the existence of a stream on that public space, the natural course of which flows onto the adjoining property of the defendants, the defendants shall regrade their property or take other appropriate action to create positive drainage of the stream from public space. Otherwise, defendants shall not be responsible for any water condition in Austin

Consent order p

Street, S.E. resulting from the removal of fill material pursuant to the direction of the District. Defendants shall not cause to be done anything with respect to its property adjoining Austin Street, S.E. which will bring about a channeling of water from defendants' property onto Austin Street, S.E. Any future grading of Austin Street, S.E. performed by the District or under the direction or control of the District or the District of Columbia shall not result in water being diverted or channeled onto the properties of the Defendants.

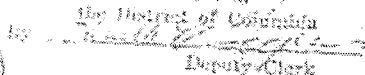
9. Defendants shall abide by and conform to all applicable laws and regulations of the District of Columbia during the execution of this Order.

10. The terms of this Order shall apply to and be binding upon the parties hereto, their agents, servants, successors, heirs and assigns.


JUDGE

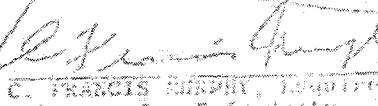
DEFENDANT


Northgate Corporation
By: ANDREW GOD, JR.
President

A TRUE COPY
TEST: MAY 23 1979
JOSEPH M. BURTON
Clerk, Superior Court of
the District of Columbia
By: 
Deputy Clerk

DEFENDANT


Andrew God, Jr.


C. FRANCIS MURPHY, Esquire
Attorney for Defendants

DISTRICT OF COLUMBIA


H. C. C.

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2010, a copy of this submission was mailed by U.S. Mail, and e-mailed, to the following:

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Jeffrey Jennings
D.C. Dept. of Transportation
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Martin P. Sullivan