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July 15, 2001

**BY HAND**

Ms. Sheila Cross Reid
Chairperson
Board of Zoning Adjustment
441 Fourth Street, N.W., Room 201
Washington, D.C. 20001

Re: BZA Application No. 16740; 2989 Arizona Avenue, N.W. (the "Property")
Hearing Date: July 31, 2001
**REQUEST FOR PARTY STATUS AND STATEMENT IN OPPOSITION TO THE RELIEF REQUESTED**

Dear Ms. Reid and members of the Board of Zoning Adjustment:

On behalf of Chain Bridge Road/University Terrace Preservation Committee (the "Committee") and the Palisades Citizens Association ("PCA"), we request that the Board of Zoning Adjustment permit the Committee and PCA to appear as parties in opposition to the relief requested in the above-referenced application. Additionally, we request that the relief sought by the instant application be denied. In support hereof, we provide the following:

## A. STATEMENT IN SUPPORT OF PARTY STATUS.

With regard to the requirements of 11 DCMR § 3106.2(a)-(d), we state as follows:

a. The persons seeking party status are the Chain Bridge Road/University Terrace Preservation Committee (the "Committee") and the Palisades Citizens Association ("PCA"). Their respective addresses are 2824 Chain Bridge Road, N.W., Washington, D.C. 20016; and P.O. Box 40603, Palisades Station, Washington, D.C. 20016;

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b. The Committee and PAC request to appear as a parties to this matter;
c. The persons will appear in opposition to the application; and
d. The persons will appear through undersigned legal counsel.

In accordance with 11 DCMR § 3106.2(e), we provide the following:

1. Members of PAC and the Committee [11 DCMR § 3106.2(e)(1) through (3)].

PAC was formed in 1916. Members of PAC reside in the Palisades area, which is located in Northwest Washington along the Potomac River, between Foxhall Road, Loughboro Road and the District Line. Many of PAC's members live within 200 feet of the property which is the subject of this application, and their property values are adversely affected by the actions of the applicant and by the relief sought by the applicant. PAC has been admitted as a party in other matters before the BZA which has affected its members.

In 1997, faced with the imminent threat of uncontrolled development believed by the residents of Chain Bridge Road and University Terrace neighborhoods to be entirely inappropriate for the area, the citizens of these neighborhoods worked together to develop a zoning overlay that would afford protection to the heavily wooded and steeply sloped neighborhood. The Committee was formed in response to these concerns and spearheaded the efforts in obtaining the Chain Bridge Road/University Terrace Overlay (the "Overlay"). The members of the Committee are residents of the Overlay area, which is bounded by MacArthur Boulevard to the south, Battery Kemble Park/Chain Bridge Road to the east, Loughboro Road/Nebraska Avenue to the north and University Terrace to the west. At least one member resides adjacent to the Property, with the others residing (and owning property) within the Overlay district, and within 200 feet of the property which is the subject of this application. Like PAC, the property values of the Committee's members are adversely affected by the actions of the applicant and by the relief sought by the applicant.

2. Brief History of the Overlay.

In 1992, in Order No. 713, the Zoning Commission approved the creation of a tree and slope overlay to protect the Woodland- Normanstone area adjacent to Rock Creek Park. In its order, the Commission concurred in the report of the Office of Planning suggesting that the proposed Woodland Normanstone Overlay be made generic, so that it could be applied to other areas. Notably, the Commission concluded:

> ...the TSP (Tree and Slope Protection) Overlay is an appropriate means of maintaining the integrity of neighborhoods that are adjacent to streams and parks. The commission further believes that the TSP Overlay will help preserve the natural topography and mature trees to

> the maximum extent feasible in a residential neighborhood, and will prevent significant adverse impact on adjacent open space, parkland, stream beds or other environmentally sensitive natural areas. (DC Register, March 20, 1992, p. 1943.)

§1511.4 of the TSP lays out the criteria for where its application would be appropriate:

> The TSP Overlay District is designed for residential neighborhoods that have a significant quantity of steep slopes, have stands of mature trees, are located at the edge of stream beds or public open spaces, and have undeveloped lots and parcels subject to potential terrain alteration and tree removal. It is not suitable for mapping on neighborhoods where nearly all lots are already developed on a rectangular grid system and where the existing mature trees are either yard trees or street trees.

These criteria were equally applicable to the Chain Bridge Road/University Terrace neighborhoods and, as such, in March 1997, the Committee filed a petition with the Zoning Commission for adoption of the Overlay. The Zoning Commission issued a set-down Order on August 1, 1997, thus placing the tree-removal provisions in effect. On June 14, 1999 (with an effective date in July 1999), the Overlay was adopted to protect and preserve the natural topography and mature trees in the neighborhood and to protect the park-like setting of the area by regulating alterations or disturbances of terrain and destruction of trees.

3. Impact of the Requested Relief and the Unique Interests of the Committee and PCA [11 DCMR § 2106.2(e)(4)&(5)].

Based on their involvement in the adoption of the Overlay, as well as the close proximity of their members to the Property, the Committee and PCA stand to suffer substantial harm if the Board were to grant the requested relief. This harm is magnified by the fact that this is the first case brought before the Board under the Overlay. Moreover, this is the first case in which a property owner has violated the Overlay regulations and, as such, were the Board to grant the relief requested, it would create a precedent by which a property owner could violate the Overlay and, after-the-fact, request the Board to condone its actions.

As the driving force behind the Overlay, the Committee and PCA have a stake in seeing that the Overlay regulations are enforced. Had the applicant approached the community and filed for a special exception prior to removing the trees from the Property, both the community and the Board would have had the ability to negotiate with the applicant and to ensure that no harm was done to the neighborhood or the intent of the Overly, as embodied in the Zoning Regulations. However, by

coming to the Board after clear-cutting the Property, the applicant has stripped the community and the Board of these powers. The applicant, by removing protected old-growth trees, has exposed the Property, as well as surrounding properties, to erosion and has taken no action to abate such erosion. These detrimental effects could have prevented had the applicant first applied for a special exception. Sadly, although it may be possible to mitigate further damage, the damage caused by the applicant's actions cannot be reversed. Were the Board to grant the relief requested, the harm to the members of the Committee and PCA by allowing the applicant, and others that follow, to clear-cut their property in violation of the Overlay, without reprimand or higher scrutiny, is undisputedly more significant than the harm to persons in the general public. The Committee and PCA's interests simply cannot be protected by merely testifying in opposition to the Application. Rather, to ensure that the Committee and PCA's interests are adequately protected, they must be granted party status.

## B. STATEMENT IN SUPPORT OF DENIAL OF THE RELIEF REQUESTED BY THE APPLICATION.

1. Factual Background.

On February 11, 1999, the Property was listed for sale at an asking price of $159,000. The listing for the Property contained the statement that "Tree-slope overlay zoning change will affect this property – may need variance to build."

On or about April 29, 2001, Kat Witouski, the real estate agent representing the Jacobsen, the applicant, in his purchase of the Property, requested information regarding the Overlay from the listing agent. In response, Ms. Witouski was sent a copy of the Notice of Proposed Rule Making, Zoning Commission Case No. 97-6. Also provided to the applicant's agent was the phone number for the Office of Zoning in the event that either the applicant's agent or the applicant had any questions regarding the tree/slope overlay. On or about May 13, 1999, the applicant contracted to purchase the Property.

On or about July 30, 1999, after the effective date of the Overlay, the applicant purchased the property for $130,000, which was $19,000 less than the asking price. The sale of the Property occurred after the expiration of the due diligence period provided to the applicant. Given the information in the listing for the Property and the applicant's request for additional information regarding the Overlay (and the response to that request), it must be assumed that the applicant either had actual or constructive knowledge of the Overlay and its restrictions on the development of the Property, including the restrictions on tree removal.

On January 20, 2000, the applicant filed for a building permit, which was issued on October 30, 2000. Despite his knowledge of the Overlay and the restrictions of the Overlay, on or about

November 11, 2000, the applicant began cutting down trees on the Property and removing the stumps from the Property. Contrary to the representations in the application, the Committee and PCA have been able to verify that the number of trees removed far exceeds the amount permitted under the regulations in each category that is protected. While, the bull-dozing of a significant portion of the Property and slope cut into the Property may make it impossible to determine with absolute certainty the true extent of the damage to the Property caused by the applicant's actions, a reasonable estimate is that no less than fifty to sixty (50-60) trees of diverse sizes and varieties have been removed. Presumably, the applicant is claiming that fewer trees were removed, as he is relying on the number of stumps which are visible, in an attempt to minimize the impact of his illegal action. The applicant has not taken into consideration the stumps he had removed from the Property.

On December 11, 2000, the Department of Consumer and Regulatory Affairs ("DCRA") issued a stop-work order. Since the applicant had removed the trees from the site in an amount in excess of that permitted by the zoning regulations, he was required to obtain a special exception before construction on the site. Almost six months late, despite request to do so earlier from the community, the applicant filed the instant application.

2. Criteria for Special Exceptions From the Overlay.

In addition to the specific special exception criteria established for the Overlay, 11 DCMR § 3108.1 permits the Board to grant special exceptions, pursuant to the following:

> Pursuant to authority contained in the Zoning Act of June 20, 1938 (52 Stat. 797), as amended, the Board is authorized to grant special exceptions, as provided in this title where, in the judgement of the Board, those special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps, subject in each case to the special conditions specified in this title . . .

In short, the Board is empowered to grant a special exception where it finds

(1) The proposed use is in harmony with the Zone Plan and Zone Maps; and

(2) The proposed use is not likely to adversely affect the use of neighboring property.

The Board's discretion in reviewing an application for a special exception is limited to a

determination of whether the applicant has complied with requirements of the section. As outlined below, the applicant cannot meet the requirements for the requested relief.

The Overlay places significant restrictions on the removal of trees so as to protect the fragile environment in the Chain Bridge Road/University Terrace area and to protect the adjoining parks and streams. Specifically, the Overlay prohibits the removal, cutting down or fatally damaging of:

(1) Any tree that has a circumference of seventy-five inches (75 in.) or more at a height of four and one-half feet (4.5 ft.) above ground;

(2) More than three (3) trees that have a circumference of more than thirty-eight inches (38 in.) at a height of four and one-half feet (4.5 ft.) above ground; or

(3) More than twenty-five percent (25%) of the total circumference inches of trees.

11 DCMR § 1568.1.

The criteria for a special exception from these restrictions are:

(1) The tree removal must be limited to the maximum extent consistent with construction of a building permitted by the standards of the Overlay;

(2) The applicant must demonstrate that there are specific physical characteristics of the lot that justify the exception;

(3) The excepted building and overall site plan of the lot shall be generally consistent with the purposes of the Overlay and not adversely affect neighboring property; and

(4) The Board may impose requirements as to design, appearance, tree protection practices during construction, buffering, and other requirements as it shall deem necessary to achieve the purposes of the Overlay.

11 DCMR § 1569.1.

As stated above, the Overlay was drafted in accordance with the TSP, which was intended to include "a number of individual overlay zone districts that may be established and mapped from time to time, consistent with the general provisions of [the TSP]." 11 DCMR § 1511.2. The criteria for special exceptions are identical between the TSP and the Overlay and, when the Overlay was adopted, it was intended that the seven year restriction set forth in Section 1514.1(f) would apply to the Overlay. Specifically, Section 1514(f) provides that:

> Where removal or cutting [of] trees has occurred that would be prohibited by this section if a building permit were contemporaneously applied for, no building permit shall be issued for a period of seven (7) years from such removal or cutting unless a special exception is granted by the Board of Zoning Adjustment pursuant to § 1515.

Apparently, the applicant must be proceeding pursuant to Section 1514.1(f) of the Zoning Regulations, since it is clear that the Overlay *only* provides for the filing of an application for a special exception *after* tree removal when such removal was performed "*prior to the effective date of [the Overlay].*" 11 DCMR § 1568.3. This section is inapplicable to the instant application, as the tree removal in question occurred after the effective date of the Overlay.

3. The Relief Requested is Not in Harmony with the General Purpose and Intent of the Zoning Regulations.

By clear-cutting the Property and subsequently seeking approval by the Board of a special exception to ratify his actions, the applicant has deprived the Board of the ability to balance the factors set forth in 11 DCMR § 1569.1. Given this egregious conducts and its negative impact on the Board's ability to perform its functions, the application warrants a higher level of scrutiny than it would have had the applicant filed for a special exception prior to removing trees from the Property. Had the applicant taken this latter course of action, it is unlikely that the Board would have granted a special exception of the magnitude requested but, rather, would have allowed a special exception that was more compatible with the Overlay. However, the applicant has deprived the Board of this ability to ensure that any special exception, and subsequent tree removal, is in harmony with the Overlay.

With regard to the specific factors for special exceptions from the Overlay requirements, as set forth in 11 DCMR § 1569.1, the applicant cannot meet these requirements.

First, it is likely that a lesser degree of tree removal would have allowed for the construction of a building on the Property which would have been consistent with the Overlay, as well as the surrounding neighborhood. Had this route been taken, community members, the Office of Planning, the Department of Public Works, Tree Maintenance Division, the Department of Recreation and

Parks, DCRA, Soil Erosion Branch and the National Park Service, would have been afforded the opportunity to provide input as to the design of any building to the Property so as to protect the Property and the neighborhood. Additionally, the Board would have been permitted to apply the standards of the Overlay and would have had the opportunity to take into consideration both the natural state of the Property, the input by the these government agencies and community members, and the applicant's proposal. Instead of taking the time necessary, which most likely would have resulted in a far lesser intrusion to the Property, both in the nature of the disturbance to the natural state of the Property (i.e., the existence of numerous mature-growth trees and undisturbed slope), as well as the size of any building to be constructed, the applicant has attempted to obtain the maximum development possible without regard to the Zoning Regulations.

Second, it is questionable as to how the applicant will show specific physical characteristics of the Property which justify the exception, as he has significantly altered the property (through tree and stump removal and regrading) and has failed to accurately represent to the Board the prior condition of the Property. Given that the Property has been essentially wiped clean by the removal of trees, bull-dozing of a significant portion of the Property, cutting of the slope and resulting erosion of the Property, the Board cannot accurately determine whether the relief is justified.

Third, the applicant's plans are not consistent with the Overlay. The proposed building does not take into consideration what could have been constructed had the applicant abided by the zoning regulations. Although the applicant has revised the proposed landscape plans for the Property so as to incorporate trees which are native to the area, the proposed landscaping is insufficient, as both the number and the size of trees to be replanted are still inadequate, especially in comparison to what has been removed. The proposed landscaping will not serve to protect the surround environs from further damage and the applicant's proposal does not serve to protect the park-like setting of the Overlay. Indeed, many of the new plantings proposed by the applicant are not even on his property but in the public space or on the property of adjoining property owners

4. The Proposed Special Exception Will adversely Affect the Use of Neighboring Property.

Aside from the applicant's disregard to the Overlay and its restrictions on tree removal, the applicant's lack of concern to the harm to the neighborhood (or respect to the Overlay and the Zoning Regulations) and the surrounding environs is most notable by his failure to protect the Property from further erosion while pursuing the application. The removal of almost all trees from the Property, along with cutting into the slope of the Property, has left it exposed to erosion. The applicant has failed take any action to prevent erosion since the issuance of the stop-work order on December 11, 2000, over seven months ago.

Clearly, the removal of the large number of mature trees from the Property has adversely

affected the neighborhood. The applicant has made no effort to mitigate such damage but, rather, proposes to construct a house which is inconsistent with the Overlay and surrounding neighborhood. If the applicant were permitted to continue construction as proposed, he would be prevented from providing adequate reforestation of the Property, thus only furthering the harm to the neighborhood.

## CONCLUSION

The applicant has attempted an end run around the Overlay by clear-cutting the Property. In the process, the applicant has not only undermined the purpose of the Overlay, he has caused significant, irreversible harm to both the Property and surrounding neighborhood and has demonstrated complete lack of sensitivity for the environmentally sensitive nature of the Overlay area. Accordingly, for the foregoing reasons, we request that the Chain Bridge Road/University Terrace Preservation Committee and the Palisades Citizens Association be allowed to appear as parties at the hearing scheduled for July 31, 2001, in the above-referenced matter. Additionally, we further request that the Board deny the relief requested.

We appreciate your consideration.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Richard B. Nettler

Richard B. Nettler

Jeannine Rustad Zigner

cc: John Patrick Brown, Jr., Esquire
Ms. Judith Lanius (by facsimile)
Eleanor Robert Lewis, Esq., Chair, ANC 3D (by hand)
Ms. Sherri M. Pruitt, Board of Zoning Adjustment (by hand)
Ms. Maxine Brown-Roberts, Office of Planning (by hand)