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June 26, 2003

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2003 JUN 26 P 3:17

BY TELECOPIER AND HAND-DELIVERY

Mr. Geoffrey H. Griffis
Chairperson
Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210
Washington, D.C. 20001

Re: BZA Appeal No. 16947

Dear Chairperson Griffis:

This firm is counsel for the Intervenor, Charles E. Smith Residential.

On June 25, 2003, I received a copy of what purports to be Appellant's Proposed Findings of Fact and Conclusions of Law. In reality, this 43-page document is an extensive factual and legal argument going well beyond the Appellant's presentation on the record. As the Board will recall, the Appellant chose to present no witnesses or other testimony at the hearing, and only a hand full of documents with no explanation or other information on the record.

Intervenor respectfully requests the Board to refuse to accept the Appellant's prohibited filing and return it to counsel pursuant to 11 DCMR § 3121.9. At the close of the hearing in this matter, the Board clearly closed the record with the limited exception of allowing the submission of Proposed Findings of Fact and Conclusions of Law by the parties. See May 13, 2003 Transcript, pp. 319-326 (attached). "[T]he record is closed. No additional

BZA
Case No. 16947
Exhibit No. 47

Board of Zoning Adjustment
District of Columbia
CASE NO.16947
EXHIBIT NO.47

submissions other than [Findings of Fact and Conclusions of Law]. Transcript, pp. 325-326.

Ignoring the Board's very clear instructions, the Appellant has attempted by the back door, to make its case having chosen not to do so on the record and subject to cross-examination and rebuttal. With the decision in this matter scheduled for July 1 (less than five (5) days from now), the Department of Consumer and Regulatory Affairs ("DCRA"), ANC 3F and the Intervenor have no reasonable opportunity to respond to the Appellant's prohibited filing. Acceptance of this document would be extremely prejudicial to DCRA, ANC 3F and the Intervenor, undermine the Board's authority and destroy the fundamental fairness of these proceedings.

For the foregoing reasons, Intervenor requests that the Board not to accept the Appellant's prohibited filing and return it to counsel without consideration by the Board members.

Thank you for your cooperation in this extremely sensitive matter.

Very truly yours,

GREENSTEIN DELORME & LUCHS, P.C.

By: _____
John Patrick Brown, Jr.

JPB/sp
Enclosure
cc: Charles E. Smith Residential
Matthew J. Green, Esq., DCRA
David Bardin, Esq., ANC 3F
Ms. Karen L. Perry, ANC 3F
Tamir Damari, Esq.

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So this is already back of work. So that's all I ask the Board is a little bit of indulgence on that.

CHAIRPERSON GRIFFIS: July isn't an indulgence?

MS. DAMARI: No, July is.

CHAIRPERSON GRIFFIS: Okay.

MS. DAMARI: I mean, but the date that I was going to propose would be June 20th, if that's okay.

CHAIRPERSON GRIFFIS: For your submissions?

MS. DAMARI: Yes.

MR. BROWN: Mr. Chair, do you propose simultaneous submissions by both parties and then an opportunity for both to respond to the other?

MR. ZAIDAIN: Well, Mr. Chair, that's what I was going to ask. The record is closed except for findings in fact. The arguments will be based on the record that's created.

CHAIRPERSON GRIFFIS: Right. There's no, there's no responses to those submissions. The only thing I would --

MS. DAMARI: Sometimes you can allow responses.

CHAIRPERSON GRIFFIS: I know.

MR. GREEN: Please don't do that, Mr. Chairman. Let's get on and get it over with.

CHAIRPERSON GRIFFIS: Hey, that's exactly what we're doing. It's the 20th. However, my hesitation only in terms of responses there was this whole issue of this affidavit that might come in that would be served.

And in which case, and you've already submitted --

MS. DAMARI: I can file that a lot earlier. I mean, that particular, if need be, I'll file that earlier. That's fine. No problem.

CHAIRPERSON GRIFFIS: That's right. That's what I want to know. If you can get that in early, get the responses and move on.

So starting back to the first date that we have then, it would be, actually, Ms. Bailey, is that correct? Or we can do it the week before on June 24th, is that correct? What the timing on that?

MS. BAILEY: To be honest with you, Mr. Chairman, I've kind of lost track. I've been trying to keep up with it, but --

CHAIRPERSON GRIFFIS: Okay, we'll decide on July 1, and we'll have submissions for findings and

conclusic , and it would be no soone than June 20, but we usually get that a week ahead of time, is that correct?

MS. BAILEY: Yes, sir.

CHAIRPERSON GRIFFIS: So we can set that for June 24?

MS. BAILEY: Certainly.

CHAIRPERSON GRIFFIS: Okay. And then what other records do we have for submissions, outside of what I just mentioned, that one affidavit? I don't, hold on. I don't have anything else? Do you have anything else?

I didn't take note of any other submissions that we would have at this point. Yes.

MS. PERRY: Mr. Damari asked me about the ANC minutes or when we had trouble. Do you want any of those documents or will you just take my word?

CHAIRPERSON GRIFFIS: No, I don't want that full submission of those minutes.

MS. PERRY: Okay.

CHAIRPERSON GRIFFIS: Unless other Board members feel that, okay. I think the issue was apparent on what was the cross examine and all that, what was being said. All right, so that's it.

In which case we'll have that, the

affidavit done. How soon can you get it in?

MS. DAMARI: The only reason why I'm hesitating is I know, I know at least Mr. Yuen is out of the country now. I know that for a fact. Oh, boy.

CHAIRPERSON GRIFFIS: The third of June?

MS. DAMARI: I'll have to figure out a way. I'll do it. I mean, I'll figure out a way. If it has to go overseas, it will go overseas, no problem. We'll do it the 3rd of June.

MR. BROWN: Will there be a response permitted?

CHAIRPERSON GRIFFIS: That's right. That's why I want it in early and then we'll get responses, you know, two weeks after that, and then we've got findings after that.

MR. GREEN: Mr. Chairman.

CHAIRPERSON GRIFFIS: Yes.

MR. GREEN: If I might get in on just one minor point. I do not believe that the Government can cross examine any affidavit. And I would strenuously object.

CHAIRPERSON GRIFFIS: Now there's, I understand the objection, based on the ability to cross examine. But we have written submissions and, I mean you can't cross examine a letter either.

MR. GREEN: No, but he had an opportunity ot have the individual present to present his position to be subject to cross examination and to respond.

And now we're going to let this man submit an affidavit. Mr. Chairman, I submit that's wrong.

MS. DAMARI: I would point out, for starters, that that's not Mr., that's not Mr. Green's exhibit, so I don't know what standing he has or what his posture is in objecting to my response to it.

CHAIRPERSON GRIFFIS: What's the substance of the affidavit that you're wanting to submit? What you objected to is based on its authenticity. And so my understanding, and it was my presumption that you were going to get some affidavit that stated that in fact the signature on this is not who it should be.

MS. DAMARI: No, let me be clear that that won't be. I don't want to be disillusioning. Let me be clear.

CHAIRPERSON GRIFFIS: Then what is it that we're getting an affidavit for?

MS. DAMARI: From what I understand that there was a, I objected on the basis that ordinarily a letter like this would not be admissible because there's no foundation for it.

And apparently because this is, it was let

in and I, and I wasn't going to tell Mr. Yuen to come from overseas --

CHAIRPERSON GRIFFIS: I understand that. What's the affidavit going to be?

MS. DAMARI: From what I understand, I don't know all the circumstances surrounding it, but it was a very, I just don't know, except to say, without revealing any client, you know, privileged conversations, that I had a conversation with Mr. Goldschmitt, who is my co-counsel, about this issue.

And he told me that this, that it's not as simple as it seems. I don't know, I don't even know if I'm going to proffer an affidavit.

MR. GREEN: Mr. Chairman, Mr. Chairman, any affidavit, now let's be honest now. The Appellant is the one that brought this appeal, not the government.

If he knew that his man was going to be in China or Russia or wherever he is, he had an obligation to put in here. Maybe we could have had a video deposition or something, I don't know. But he had that burden. He didn't meet his obligation and I do not believe, in all fairness, even though the government is capable of doing many things, the government is certainly not below the standard of the

law.

The government ought to be given the opportunity that any other entity would have. And that would be the right to cross examine. And to otherwise, is wrong, Mr. Chairman. The government strenuously objects.

CHAIRPERSON GRIFFIS: We don't have to raise the volume to get your point across. Comments.

MS. MILLER: I would agree with Mr. Green. That was my concern originally, when you agreed to let in the affidavit. It seems to me that he was on notice about that letter before this hearing.

And if it was so important, he should have had a witness here or an affidavit, at least, here today.

CHAIRPERSON GRIFFIS: Okay. Others?

MR. ZAIDAIN: I made the point earlier, so, I agree with Mr. Green.

CHAIRPERSON GRIFFIS: So we won't keep the record open for an affidavit to respond to Exhibit Number 12. Very well. Which means we don't have anything further to respond to, in which case we've got one date. June --

MS. BAILEY: Twenty-four, for the findings of fact, Mr. Chairman. And the record is closed. No

additional submissions other than that.

CHAIRPERSON GRIFFIS: That's correct. Very well. Everyone clear on the dates, submissions, times? July 1 is the decision making. Very well, thank you all very much. With that, oh, are we doing minutes today?

No, okay. With that, we're going to conclude the 13 May, 2003. I thank you all very much.

(Whereupon, the foregoing matter was concluded at 5:28 p.m.)