Selig Solomon, Esquire

21 Penny Lane
Baltimore, MD 21209-2723

Phone: 410-484-2529
Fax: 410-484-7321
Email: shazam@erols.com

January 19, 2004

HAND DELIVERED

Geoffrey Griffis, Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, DC 20001

Re: BZA Application No. 17108
Folger Park North, LLC
206, 208 & 210 D Street, S.E.
Square 763, Lots 26, 27 & 28 (collectively the "Property")

APPLICANT'S OPPPOSITION TO MOTION TO APPEAR AS PARTY AND MOTION FOR CONSOLIDATION OF APPEAL AND APPLICATION
Additionally
APPELLEE'S MOTION TO STRIKE APPEAL

Dear Mr. Griffis:

This letter will serve as formal opposition to Mr. Nettler's Motion To Appear as a Party and the Motion to Consolidate With Appeal No. 17085. Both motions are without legal justification, ill conceived and unfounded as a strict matter of law. Additionally, the Appellee hereby files his formal motion to strike appeal 17085.

The appeal as submitted to you on or about September 12, 2003 cannot lawfully be accepted by the Board of Zoning Adjustment, due to the fact that the appeal, by the Appellant's own admission on page 8, paragraph 3 of their "statement in support of the appeal" was *knowingly* submitted outside of the sixty day filing deadline as set forth in Section 3112.2 of the zoning regulations and ***does not*** meet any of the definitions for extensions as the code specifically states:

> The Board may extend the sixty-day deadline for the filing of an appeal ***only*** if the appellant demonstrates that:
>
> (1) there are exceptional circumstances that are outside of the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board, and

BZA
Case No. 17108
Exhibit No. 29

Board of Zoning Adjustment
District of Columbia
CASE NO. 17108
EXHIBIT NO. 29

(2) ***the extension of time will not prejudice the parties to the appeal, as identified in 3119.1.***

There has never been even the remotest suggestion of any circumstances outside of the appellant's control that substantially impaired their ability to file their appeal within the time constraints set forth in the regulations. Throughout their voluminous submissions to this Board, and others, counsel for appellants cite various sections of the regulations and code in support of their argument only when it suits their purpose but now suggest that those same rules and regulations can cavalierly be ignored when it goes against them. The appellants recognize that the regulations and code have been devised for a specific reason so proceedings before the Board can proceed in an orderly manner and ensure each of the participants their rights to due process.

This matter has been very costly to the appellees, in both time and money, to defend against allegations that are false, contrary to the stated regulations, and harassing in nature just for the sake of harassment. Any further extension in time to the appellants will only cause further irreparable harm to the appellees.

When reviewing a ruling of an administrative body, the majority rule of law in the courts of these United States, and the District of Columbia, holds that the court will not ordinarily substitute their judgment for that of the administrative body because the court makes the assumption that the administrative body has greater knowledge in the subject matter than the court. However, the singular red flag that court's will routinely embrace as a reason to interfere with and overrule the administrative body, is when they fail to follow their own rules and regulations in arriving at a decision.

Therefore, consistent with, and in accordance with the zoning regulations, the appellant's appeal must be stricken from the record. To do any less is to deny the appellees their rights under the regulations without due process. Further, the simple fact that DCRA has changed their position on their earlier ruling and has asked the owners of Folger Park to submit a request for variance to BZA, as will be detailed below, the appeal is now rendered moot.

In addition to the appeal being unacceptable as a matter of black letter law, it is also replete with numerous misstatements, presented as "facts," as well as gross and violent misrepresentations of the existing law and conditions of the property in question.

At the very beginning of counsel's statement in support of party status, there is the statement "...the construction has resulted in a trespass on and under the Neighbors' properties. This trespass has been acknowledged and admitted to by the applicant both at various community meetings and in writing." In support of that proposition counsel offers two letters from the owners of Folger Park North and the president of the general contractor, Glen Lindengren. Again, at page 12 of their submission counsel states that "...the footings extend approximately eight inches (8") into the right of way and the piping much further into the right of way,...." There is absolutely not even a scintilla of

evidence ever proffered by the appellants nor is it available to support such outlandish and unfounded accusations.

The truth is quite different than this series of misrepresentations would have one believe. Neither letter that counsel for appellant uses to shore up her position ever stated that there was an encroachment on the adjoining properties. Rather, the letters refer primarily to the excavation of dirt and state, that if any concrete had gotten onto adjoining property that it was "miscellaneous overflow or spillage" and never was or is a part of the footings for the project. Further, both letters make it abundantly clear that all of the construction is *"wholly within the property lines."*

The most damning piece of hard evidence that counters the unfounded accusations of appellant's counsel is that on October 10, 2003, the owner's had a wall check survey on the property performed by an independent surveyor at the behest of the DC Surveyor's office. The official report clearly shows that all construction on the project ***is entirely within the lot lines.*** The survey is a public document and on file for anyone to observe or review at the Surveyor's office at DCRA. Counsel for the appellants stated quite publicly at the most recent CHRS meeting that she had in excess of ten years of zoning experience, which now leads one to conclude that the misrepresentations as to any encroachments on the neighbor's property are, a) the result of careless negligence, b) gross incompetence (which I don't believe), or, c) counsel is knowingly attempting to mislead this Board.

Application to BZA for a Variance.

The application to BZA requesting a variance for this project did not just happen but was the result of numerous discussions, protests, and joint efforts on the part of the owners and DCRA. When the original stop work order was issued on the project by DCRA the owners filed formal protests with DCRA and requested an audience to learn what basis or justification there might have been for such an action.

The action taken by DCRA in issuing a stop work order was a great surprise to us for several very cogent reasons, not the least of which was the failure of DCRA to follow their own prescribed rules and regulations. Title 12, Chapter 1, Section 116.2 of the Construction Codes states in unequivocal terms that when issuing the stop work order that the authority is mandated to delineate a description of the alleged violation of the codes and must specifically refer to that code section which has allegedly been violated. This explanation must also be framed in accordance with Title 11, chapter 20, Section 2000.4 as it relates to this particular project. To date the owners have never received any response to their legitimate requests. It should also be noted that ANC6B also requested, in writing, an explanation from DCRA the specific nature of the code violation for issuance of the stop work order and as of this writing still not received an answer.

It is also important to note, that over the period of the last sixteen months, zoning officials at DCRA have conducted ***no less than five*** reviews of this project, focused on the applicability of the zoning codes to the three proposed town-homes. Initial

applications for building permits were submitted on August 5, 2002. (As an aside, counsel for appellants, on page 13, makes the outrageous statement of "fact" that the owners "took considerable time between the purchase of the property and beginning the application process for permits...." Closing took place on June 14, 2002, which is an elapsed time of 45 days between sale and application process.) The earliest written approval of this project by Zoning occurred as of September, 2002, with the latest review being completed, with re-certification of Zoning approval, as of July 22, 2003. In each instance, the zoning administrator, or his/her representative, certified that the homes are a ***'a matter of right'*** project. These reviews were not precursory or limited reviews. In more than one instance the actual permit application process was halted by Zoning for approximately two weeks, prompted by enquiries from the appellants as to the legitimacy of the lot sizes, etc., which are the very same issues being raised by the appellants herein. In each and every instance either the owners or the architect were called in to DCRA to answer questions, provide documentation, etc. in support of their position. IN EACH CASE, THE OFFICIALS CONDUCTING THE REVIEW WERE UNANIMOUS IN THEIR DECISION AND RULING THAT THE PROJECT BE APROVED, AND THE PERMITS BE GRANTED AS 'MATTER OF RIGHT' CONSTRUCTION.

The owners have the absolute right under law to justifiability rely upon the actions of DCRA, and other official agencies, in approving the work and plans each step of the way for them to proceed. Having justifiably relied on those actions, the owners have expended to date in excess of two million dollars for development of the project and are obligated for still more. Based upon the actual facts of the case, the outrageous allegation by appellant's counsel on page 12 of their submission that the owners created their own hardship is just another of the many misstatements of counsel for the appellants that permeates their entire submission.

Ultimately, the owners were granted a meeting with DCRA after the participation of members of the Congressional Appropriations Subcommittee for the District of Columbia and representatives of Mayor William's office in the proceedings. Following a series of meetings between the parties DCRA asked if the owners would be amenable to submit the request for variance to BZA with the result that the decision of BZA would be the final order and DCRA would no longer be involved. Therefore, the statement by appellant's counsel in their submission that the variance would not be dispositive of the entire matter is not correct. That was the whole intent of DCRA and the parties at the time of negotiating the agreement.

Although the owners still strongly maintain that their original position is correct as a matter of law, we are pragmatists after all and agreed to file the requested variance. There then followed numerous discussions between the owners and DCRA as to the proper place for filing, the form the request should take, who would be the proper person to receive such a request, etc. Counsel for DCRA suggested that they would like the owners to hold the District of Columbia harmless as a result of any damages that might have accrued from the time of issuing the stop work order. A satisfactory agreement was reached between the parties and executed, which included an obligation by DCRA that they would favorably support the owner's variance request before BZA.

These discussions and negotiations went on for the better part of the month of October, 2003. AT NO TIME WAS THERE A DATE CERTAIN BY WHICH THE FINAL AGREEMENT HAD TO BE ACHIEVED. None of the parties engaged in the discussion ever made such a requirement and would so testify. Counsel for appellant's was never a party to any of these proceedings but once again makes a statement of 'fact' that is totally out of line with reality.

The entire matter of the request for variance did not involve the appellants as parties but is strictly a matter between the owners and DCRA as a result of a negotiated agreement. Therefore, the appellants have absolutely no standing to intervene as a party since they don't speak for DCRA and certainly they don't speak for the owners. Certainly the appellants can, and should be heard before BZA as interested landowners pursuant to the existing regulations, but not as parties. There are provisions in the rules and regulations for an ANC to file for party status but not persons such as the appellants. The single purpose for the appellants to try and insert themselves in the process of the variance as a party is to further obfuscate the proceedings and cause delay with more of their misrepresentations and misstatements. The owners hereby request the motion to join as parties be emphatically denied.

Samples of Misstatements and Misleading facts presented as 'truth'

Because of the skewed facts included by the appellants with parts of their original appeal now attached to their latest submission, the owners must address some of them directly as to their gross and intentional inaccuracy.

Appellant's counsel has stated that building was not allowed on "800" numbered lots. To further shore up their false position appellant's state that the 800 numbers were eliminated or deleted by Pepco while the property was under Pepco ownership. This is simply not true as there is absolutely no provision in the codes that prohibit the building on an 800 numbered lot and all certified plats and official records from the Surveyor's office, including existing tax records for the individual lots, from 1942 onward, clearly show that lots 800, 801, and 802 did, and continue to exist without change.

As a part of their appeal the appellants state that, "the developers mislead the public by filing for building permits in a haphazard fashion, and not filing for all permits at the same time." Appellant's call the owners efforts a 'grand scheme' to circumvent the rules and to deceive the District. This a blatant falsehood as the building permits were all applied for on the same day, most recent re-application date was April 2, 2003 for all three permits, and the first Building Permits were all granted on the same day, May 23, 2003 (foundation and first floor) with the follow-up to these permits having been granted on August 25, 2003 (balance of 2nd thru 4th floors).

Additionally, appellant's counsel stated that, "the owners started construction of the homes prior to having permits." Another blatant misconstruing of the facts as the building permits were issued on May 23, 2003 and commencement of the demolition did

not occur until mid June, 2003. Not only are these documents a matter of public record but appellant's counsel is aware of this schedule from direct observation and the reporting of her clients through dated pictures.

In an effort to create further confusion by obfuscating true facts, appellant's counsel states on page 14 of their latest submission that, "...these properties are adjoining and, at the time of the granting of the applications for building permits and were unimproved." That is interesting since on the prior page appellants recognize that there is an existing Pepco former substation in support of another of their spurious allegations wherein it is alleged that the owners began demolition prior to the granting of building permits. Not only is that obviously inconsistent and misleading but the simple fact is that the building permits were issued on May 23, 2003 and the demolition didn't occur until the middle of June, 2003. Again, these are demonstrable facts, clearly visible to all of the parties, and again the documents are both public and on file. In the face of such overwhelming facts and physical evidence, I can only be of the opinion that appellant's counsel is trying to intentionally mislead this Board into believing that the owners have done something illegal and acted without the proper permitting.

Appellants have also stated through counsel that the owners never did an environmental study on the property. Notwithstanding, the owners did in fact commission both a Phase I (November, 2001) and a Phase II study (April, 2002) be performed prior to the actual purchase of the property, both of which are on file and available for review.

On page one of the Statement in Support of Appeal appears the allegation that, "Finally, the Owner has illegally closed the portion of the north-south alley adjacent to the Properties." In fact, valid alley closure permits, authorized both by DCRA and the Fire Marshall, do indeed exist, were granted on June 4, 2003 and are both posted at the site in accordance with existing rules and regulations. This information was physically in possession of appellant's counsel ***prior*** to the filing of their appeal on September 12, 2003 as well as prior to counsel's appearance at the December 2, 2003 meeting of the ANC. Further, one of the appellants, Larry Smith, when speaking to the owner's onsite Superintendent on August 9, 2003, confirmed that he was aware that the owners had a permit to close the alley. The job site Superintendent wrote on August 10, 2003, when summarizing his conversation with Mr. Smith of the previous day, that, "*He is aware that we have a permit to close the alley knowing we needed it to construct the project.*"

The owners took all of the steps required to obtain this permit, under the direction and support of DCRA. We can only surmise the true intent and purpose of the appellants in making such a blatantly incorrect statement of existing facts.

As a final point of the extent of the pettiness of the appellant's assertions, they stated in their appeal that, "someone is living in the construction trailer." There is not the slightest shred of demonstrable evidence to support this fact. In fact, at the December 2, 2003 meeting of the ANC where appellant's counsel brought this point up again as a statement of 'fact', Mr. Larry Smith, who is one of the appellants and is a resident on site, totally

disagreed and stated that he never believed that anyone was living in the construction trailer.

There are many other examples of appellant's intentional misleading statements but appellees will reserve that for another time. As to appellant's voluminous misleading and misstated enclosures, I would merely point out that old adage that you cannot make a silk purse out of a sow's ear, or today's high tech computer variation on that theme that garbage in equals garbage out.

For the reasons presented herein and others to be presented at a hearing on this matter the appellant's appeal filed on September 12, 2003 should be either stricken or determined to be moot and the motion to intercede as parties should be denied.

Respectfully submitted,



Selig Solomon

Cc: Folger Park North, LLC
Denzel Noble, DCRA
DCRA Zoning Administrator
Ellen McCarthy, Jennifer Steingasser, Travis Parker
Office of Planning
Karen Edwards, Esq. DCRA Office of General Counsel
Richard B. Nettler, Esq.
Jeannine Zigner, Esq.