BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

D.C. BOARD OF ZONING
2005 MAY 2 PM 2:18

Application of: Phillips Park LLC successor to First Capital Trust, LLC

BZA Application No.: 17276
Decision Date: April 5, 2005

MOTION TO STRIKE SUBMISSIONS OF THE FRIENDS OF WHITEHAVEN

At the conclusion of the March 8, 2005 hearing, the Board left the record open for the limited purpose of the submission of proposed findings of fact and conclusions of law by the parties; any argument regarding the authority of the Board to condition its order on matters related to construction; and a response to proposed conditions already submitted and any construction agreement reached by the parties. No new evidence was requested by the Board. Contrary to the instructions of the Board, on March 28, 2005, the Friends of Whitehaven ("FOW") submitted materials in addition to their proposed findings of fact and law that goes beyond what was authorized by the Board. Specifically, the FOW submitted (1) an "Addendum Clarification", (2) a Declaration of Julie H. Moore and (3) references to extra-record material in its proposed findings of fact and law. As these items go beyond the limited purposes for which the record was left open, they must be stricken from the record.

With regard to the Declaration of Julie H. Moore and other clarifications submitted of her testimony, the Friends are seeking to do what was expressly prohibited at the last hearing on the application when the record was closed. In that regard, Ms. Moore sought to provide additional testimony after the Applicant's rebuttal testimony. The Board refused to allow her to do so pointing out that the Applicant had the last word on the presentation of evidence at the hearing. *See* 11 D.C.M.R. § 3320.9 (b)(7). By submitting such a Declaration or any "clarifications" of evidence, which is not subject to cross-examination, the Friends violate this Board's order and

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the administrative due process rights of the Applicant.

Furthermore, to the extent that the FOW's proposed findings of fact and law present new evidence, either the proposed findings of fact must be stricken or such new evidence must be disregarded by the Board. For example, in footnote one to their submission, the FOW states that their proposed findings are meant to "clarify" their testimony at the hearing.[1] Proposed findings may not clarify testimony but, rather, may only reflect the testimony and other evidence already in the record. Similarly, paragraph 3 of the FOW's proposed findings of fact starts out "upon information and belief" and purports to present additional evidence on wetlands issues that FOW suggests was obtained by it after the hearing. As any statements and arguments must be based on evidence in the record, these paragraphs and any other aspects of the proposed findings relying on this extra-record suggestion must be disregarded as well or the entire document must be stricken.

The additional materials and information submitted by the FOW is entirely inappropriate. The FOW had over three (3) weeks to prepare their case. Moreover, as the FOW was represented by counsel, they have no excuse for violating the rules of procedure of the Board and the Board's order.

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[1] The FOW erroneously characterizes Ms. Julie Moore's testimony as "expert testimony" in their proposed findings. Ms. Moore was not proffered as an expert, and the proposed findings cannot be used as a mechanism to qualify her as such.

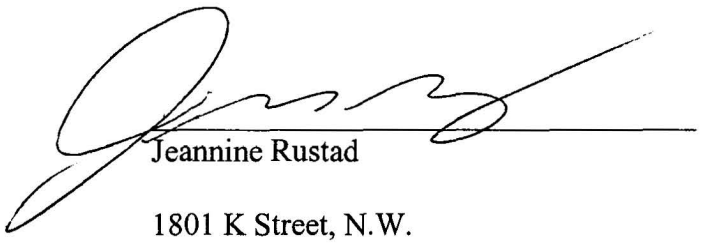
For the foregoing reasons, the Applicant respectfully requests that the Board strike the Addendum Clarification and Declaration of Julie H. Moore and either strike the proposed findings submitted by FOW or disregard those portions of the FOW's proposed findings that represent new evidence or do not accurately reflect the evidence of the record.

Respectfully submitted,

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



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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2005, a true and accurate copy of the foregoing Motion to Strike was served by hand on:

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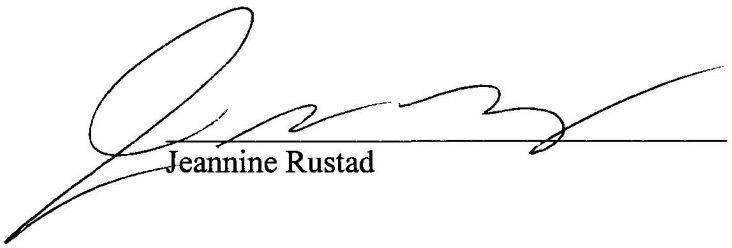
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