Form 150
(Revised 04/29/02)

Case No. 17276

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

MOTION

Friends of Whitehaven
Applicant, Appellant, Appellee, Party, Intervener*

VS

In Re Phillips Property
Applicant, Appellant, Appellee, Party, Inte

Motion of:*
(state what you want the Board to do)

Motion for Reconsideration

Points and Authorities:*
(state the each and every reason why the Board should grant your motion, including relevant references to the Zoning Regulatio

See attached (four page memo and motion)

CERTIFICATE OF SERVICE

I hereby certify that on this* 5th day of* August 2005 I served a copy of the forgoing entity that has requested party status; or entities that have be granted party status – on the above referenced BZA case via*

☐ First-class Mail ☐ Hand Delivery ☑ Other* e-mail

(ATTACH A LIST OF PARTIE (see p. 4, attached)

Signature: Wm Snape IV

Print Name:* William J. Snape IV Firm/Organization:* Attorney at Law

Address:* 5268 Watson St, NW City:* Washington State:* DC Zip:* 20016

* In the event an authorized agent files a motion on the behalf of the maker of the motion, a letter signed by the maker of the motion agent to act on his/her behalf shall accompany the notice of application.

To be notified of hearing and decision:
(Maker of Motion or Authorized Agent)*

Name:* William J. Snape, IV

Address:* 5268 Watson St, NW City:* Wash State:* DC Zip:* 20016

Phone No.:* 202-537-3458 Fax No.: E-Mail: billsnape@earthlink.net

ANY APPLICATION THAT IS NOT COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS ON THE BACK OF THIS FORM WILL N

Print Preview Clear Form

BZA
Case No. 17276
Exhibit No. 21

Board of Zoning Adjustment
District of Columbia
CASE NO. 17276
EXHIBIT NO. 21

BEFORE THE BOARD OF ZONING ADJUSTMENT (BZA)
DISTRICT OF COLUMBIA

FRIENDS OF WHITEHAVEN
MOTION FOR RECONSIDERATION

REGARDING SPECIAL EXCEPTION APPLICATION #17276
2101 FOXHALL ROAD, NW (SQUARE 1346, LOT 822),
OTHERWISE KNOWN AS THE "PHILLIPS PROPERTY"

AUGUST 5, 2005

Introduction

Pursuant to 11 D.C.M.R. § 3126.2, Friends of Whitehaven ("Friends") file this motion for reconsideration regarding approximately three acres of wetlands on the subject property, as well as related record issues. The BZA released its final written order on this application on July 26, 2005.

Summary of Argument

The BZA's determination that the Phillips property contains over "three acres of non-natural" wetlands is faulty and not supported by the record, and the BZA should seek to supplement the record for the limited purpose of obtaining accurate information on these wetlands in question.

Argument

I. The Wetlands on the Property

The BZA possessed no factual basis to determine that "over three acres" wetlands were "non-natural or 'artificial' wetlands formed as a result of a long-standing leaky municipal water line." BZA Order at ¶ 5. Both Friends' expert and applicants' expert both expressed doubt as to whether this wetland was "artificial" and neither could definitively confirm that these "artificial wetlands are alleged to be entirely fed by the water main leaks." Id.

As Friends' expert Julie Moore, a biologist with the U.S. Fish and Wildlife Service who has done significant professional wetlands work, stated about the artificiality of the wetlands in question: "I was told that was the case and at one time when I first went to the site, we could see below the old house site where water was coming out. *That appears to have stopped*, but the volume of the water is sufficient particularly in ... the two biggest kidneys that are parallel to each other. There's surface water now and there's long term wetland vegetation there. Dense stands of cattails and willow trees which indicates there's been a wetland there for some time." March 8 Transcript at 282-83 (emphasis added). See also Testimony of Kent Slowinski, March 8, at Attachment B

(map of wetlands on Phillips property). Ms. Moore also stated that the so-called southern or jurisdictional wetlands[1], identified by the Army Corps of Engineers, possessed "designated flagging that indicates wetland ... [w]hich also extend up a little beyond ... the southern area ... So, there's a southern area and then there's some additional wetlands in – in a narrow strip going to the west of the southernmost one." March 8 Transcript at 281-82. Even assuming, arguendo, that some of the over three acres of wetlands are "artificial," a fact at best unproven, the evidence before the BZA was uncontroverted that not all of this acreage was artificial. Id.

Applicant's expert, Mr. James Ingram, Environmental Scientist, admitted "certainly it's an unusual condition to gout on a property and have water leak and have a – in this case, an approximately three acre wet area in the center of it." March 8 Transcript at 355-56. Mr. Ingram did not himself delineate the wetland, and could not confirm that the wetlands were "artificial." Id. at 356. When questioned by undersigned counsel regarding the wetlands designated by the U.S. Army Corps of Engineers, Mr. Ingram admitted further admitted that no governmental agency has ruled that the three acres of wetlands in question are not protected wetlands. March 8 Transcript at 414-418. See also Tab 4, February 15, 2005 Prehearing Statement of the Applicant (Army Corps Wetlands Determination).

Indeed, the District possesses its own wetlands offices and regulations within and before the D.C. Department of Health, an agency which did not testify before the BZA about these wetlands. See generally 21 D.C.M.R. § 1103.2 (wetlands ... shall be protected from significant adverse hydrologic modifications, excessive sedimentation, deposition of toxic substances in toxic amounts, nutrient imbalances, and other adverse anthropogenic impacts); 11 D.C.M.R. § 2516.10 (BZA must refer to D.C. Office of Planning, which must consider the "environment, relating to water supply, water pollution, soil erosion, and solid waste management" and "the findings, considerations, and recommendations of other District government agencies."). Julie Moore's testimony and Friends' overall testimony addresses, inter alia, water supply, water pollution, and soil erosion matters. It is also not clear from the existing record what impact filling these three acres of wetlands[2] will have upon the adjacent National Park Service land.

Friends, therefore, request that the BZA solicit and consider the evidence and records now within and/or easily attainable from the D.C. Department of Health so that the three acres of wetlands in question are not misidentified and misclassified in an illegal fashion.

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[1] The BZA never did reconcile the definition of "jurisdictional" wetlands in this case. See, e.g., March 8 Transcript at 272, 277 (Vice Chairperson Miller). See also March 8 Transcript at 278, from Member Parsons, "...if we want the answers to these questions, Mr. Nettler, -- you'll get them – from somebody else." These answers were never forthcoming.

[2] Further, these wetlands support a number of federally protected bird species under the U.S. Migratory Bird Treaty Act, which was not mentioned in the BZA Order at ¶ 6, despite undisputed evidence by Friends on such species. See also Humane Society of the United States v. Glickman, 217 F.3d 882 (D.C. Cir. 2000).

II. The Record of this Case

The BZA granted a motion to strike by applicant regarding the Friends' March 28, 2005 Supplementary Submission, the "Declaration of Julie Moore" and an "Addendum Clarification." These documents were submitted not only at the request of the BZA to all parties, but also by filed by Friends specifically to address "the issue of wetlands identification and protection on and adjacent to the Phillips Property ... a significant issue left quite unresolved by the testimony of all parties." The BZA, however, denied applicants' motion to strike "extra-record materials" that BZA determined were "within the proposed order, finding that it would disregard any statements that were not germane or went beyond the scope of the administrative record." It was not clear from the BZA Order where the motion to strike being granted ended and where the motion to strike being denied began.

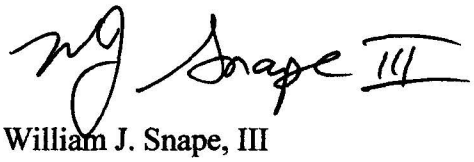
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Friends, therefore, request that the BZA accept all information and documents filed by Friends on March 28 pertaining to the outstanding issue of wetlands protection on the over three acres in question, and that the BZA additionally remand the matter to the agencies of jurisdiction to make an accurate and formal determination on these wetlands.

Conclusion

Thank you for your time and attention to this important matter. The Friends are seeking a remedy within the powers of the BZA so that the parties do not need to resolve these issues before the D.C. Court of Appeals and other fora. All parties have been served with a copy of this submission as required by D.C. law.

Respectfully submitted,



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All served by above e-mail addresses.

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