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August 12, 2005

BY HAND

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

Re: Application of Phillips Park, LLC, BZA Application No. 17276
Opposition to Motion for Reconsideration
2101 Foxhall Road NW, Square 1346, Lot 822

Dear Mr. Griffis:

For the following reasons, Phillips Park, LLC, the Applicant in the above-referenced matter, opposes the Motion for Reconsideration of Friends of Whitehaven (hereinafter "Friends") filed August 5, 2005:

Friends of the Whitehaven Offer No New Evidence.

Section 3126.6 of the Zoning Regulations provides that "[n]o request for rehearing shall be considered by the Board unless new evidence is submitted that could not reasonably have been presented at the original hearing." In their Motion for Reconsideration, Friends offers no new evidence to the Board, nor does it suggest that the evidence it wishes the Board to consider could not reasonably have been presented at the three hearings the Board of Zoning Adjustment held in this matter. Rather, Friends of the Whitehaven seeks to have the Board secure a second review of the case by certain District agencies that have already commented on, reviewed and supported the original application.

Friends' assertion in their Motion for Reconsideration, page 2, that the District of Columbia Department of Health did not testify before the BZA in this matter is patently false. To the contrary, Tim Karikari, the Technical Review Chief for Erosion and Sediment Control represented the Department of Health before the BZA and gave extensive testimony on the impact of the proposed development on the surrounding area. Mr. Karikari's office falls within the Watershed Protection Division of the Environmental Health Administration of the Department of Health, the local agency solely responsible for reviewing impacts of proposed development on water quality, including wetlands protection.

BZA
Case No. 17276
Exhibit No. 72

Board of Zoning Adjustment
District of Columbia
CASE NO. 17276
EXHIBIT NO. 72

The grounds upon which the Board may grant reconsideration are extremely narrow. *See* 11 DCMR § 3126.6. Mr. Karikari's testimony on behalf of the Department of Health was available to the Board at the time of the hearing.[1] Any new evidence Friends seeks to procure and present to the Board through a second referral of the application to the Department of Health certainly could have been presented at the time of the public hearing and is not "new evidence" within the meaning of 11 DCMR § 3126.6. Furthermore, as Mr. Karikari explained and as was mentioned repeatedly at the hearing on the matter, if the Board denies the motion for reconsideration, there is nothing to prevent Friends from seeking further review of the wetlands issue from those agencies having primary responsibility for addressing the issue, either at the time permits are sought or in response to whatever environmental assessment needs to be reviewed at that time. However, no legitimate basis has been presented by Friends for reopening the record in this case.

Indeed, the basis for the reconsideration request seems to rest on Friends' reliance on testimony from two of its witnesses, neither of whom was certified as an expert in the relevant area, which the Board rejected, in the face of a jurisdictional determination made by the Army Corps of Engineers. As the Court of Appeals has repeatedly recognized, it is not for the Board to make final determinations regarding issues outside its ultimate decisional authority, but merely to assess the impact of those issues on the surrounding neighborhood, which the Board clearly did here. *See Levy v. Board of Zoning Adjustment*, 570 A.2d 739, 751 (D.C. 1990).

The Record in this Case Contains Substantial Evidence in Support of the Board's Action

In their motion, Friends asks that the Board "supplement the record for the limited purpose of obtaining accurate information on...wetlands" on the Subject Property, because the Board's record contained "no factual basis" to determine that there existed on the property "non-natural or artificial" wetlands. *Friends Motion for Reconsideration*, p.1. To the contrary, the record in this matter demonstrates a full and fair hearing of the issues raised by Friends, and contains substantial evidence upon which the Board based its findings of fact and conclusions of law.

The Applicant submitted with the application a Phase I Environmental Site Assessment for the Subject Property, completed by Environmental Systems Analysis, Inc. ("ESA"), which identified wetlands "in the southern portion of the site," and "artificial wetlands" in the center of the site which were "created...due to a water main leak." *Exhibit P to the Application*, p. 6. Further, the United States Army Corps of Engineers performed a Jurisdictional Determination (JD) on September 28, 2004 and provided a field located wetland mapping to ESA, which was submitted as Exhibit Q to the Application. The Army Corps of Engineer's Jurisdictional Determination identified only natural wetlands in the "southern portion of the tract flowing from

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[1] Friends asks the Board to "remand" the matter to the agencies with jurisdiction to make decisions regarding wetlands. The Board does not act as an appellate body on wetlands issues, nor does it have authority to remand anything to any agency on an application for a special exception. Furthermore, the Board has no duty to withhold decision on an application if an agency to which it has referred an application for comment fails to provide such comments. *See*

west to east." The Jurisdictional Determination also noted that the identified wetlands require a 25-foot stream/wetland protection buffer as dictated by the District of Columbia Department of Health, Watershed Protection Division. *Id.*

Additionally, James Ingram, the Applicant's Expert in Environmental Science and the only non-governmental witness qualified to testify as an expert on the wetlands issue, testified that representatives of the Applicant met at the site with the Army Corps of Engineers and that:

> one of the most critical things that was discussed was the large area in the center of the site that's shown on some graphics as that I believe you all have that the consultants did not believe should be jurisdictional because of the previously discussed water leak. There was testing that was done of this water that confirmed the presence of chlorine and fluoride in the water. Also, this area did not meet one of the three parameters that are used to delineate wetlands. It did not have hydric soils. The Corps of Engineers only took jurisdiction over what has been referred to today as the southern wetland ...

Board Transcript, March 28, 2005, p. 304.

Mr. Ingram further testified about the process of identifying jurisdictional wetlands. While Friends' only include in their Motion for Reconsideration the qualification of Mr. Ingram's statement ("certainly it's an unusual situation to go out on a property and have a water leak and...in this case, an approximately three acre wet area in the center of it." Board Transcript, March 28, 2005, pp. 355-356), Mr. Ingram went on to testify:

> ...however, the process of delineating a wetland is pretty rigorous. I, myself, did not delineate this wetland, but I reviewed some of the information that was developed during the delineation process and the soil's criteria is one of the most important criteria and I, myself, have been on plenty of sites where there was an artificial source of water which would lead one to believe that there was a high probability of a wetland there, but, in fact, there were not underling hydric soils or wetland soils there....if that's the case, the Corps of Engineers cannot take jurisdiction over those areas. The legal boundaries of the wetlands are shown on that [Wetland/Waters Jurisdictional Determination] map"

The Jurisdictional Determination made by the Army Corps, and Mr. Ingram's testimony regarding the process by which the Army Corps delineates jurisdictional wetlands, was not countered with the testimony of any qualified expert in environmental science.

There is ample evidence to support the Board's finding that there existed "over three acres of non-natural or 'artificial' wetlands" (BZA Finding No. 5), including Mr. Ingram's testimony, cited above, which was based on his personal visits to the site and the wetlands delineation prepared and submitted to the United States Army Corps of Engineers and the Jurisdictional Determination issued by the Army Corps.

Although Ms. Julie Moore purported to offer expert testimony based on her experience as a botanist for the U.S. Fish and Wildlife Service and her apparent former employment or consulting work with the Army Corps of Engineers, Ms. Moore was not qualified nor was she offered as an expert witness in the fields of wetlands, biology, botany, environmental science, or any other field. Most importantly, Ms. Moore was never accepted by the Board as an expert witness of any kind. Moreover, Ms. Moore never addressed all of the criteria essential to a wetland determination.

The only testimony presented at the hearing which contradicted the testimony of the Applicant and the Jurisdictional Determination by the Army Corps of Engineers in the record was that of Mr. Slowinski, who offered himself as an expert in landscape architecture (but is not himself a licensed landscape architect), who testified that he walked the property and had reviewed the Jurisdictional Determination but believed it to be inaccurate with respect to the artificial or natural status of the wetlands he had seen. No basis for such inaccuracy was offered, and the Board would have committed reversible error if it relied on such unsubstantiated testimony by a lay person on such an issue. *See* Board Transcript, March 28, 2005, pp. 256-263.

The Board's review of special exception applications is limited to whether "in the judgment of the Board, the special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations and the Zoning 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." 11 DCMR § 3104.1. As recognized in *Glenbrook Road Association v. District of Columbia Board of Zoning Adjustment*, 605 A.2d 22 (DC 1992), the Board's function in special exception cases such as the present matter is to "determine whether a reasonable accommodation has been made between the [applicant] and the neighbors[,] which does not interfere with the legitimate interests of the latter." *Id.* at 25. Moreover, there exists no authority for any argument that the Board "must consider the arguments of adjoining and nearby neighbors as 'material' or that th[e] court must remand [a] matter to the BZA because of [any] alleged 'omission of any reference'" in an order to those objections. *See Lovendusky, et al. v. Board of Zoning Adjustment*, 852 A.2d 927, 932-933 (D.C. 2004).

With respect to wetlands or other environmental features, the Board referred the application to the Office of Planning for review and report on "the environment, relating to water supply, water pollution, soil erosion, and solid waste management." 11 DCMR § 2516.10. The Office of Planning supplied the report requested. The applicant addressed the issues required under the special exception regulations and the Board gave due credit to the testimony presented.

The Office of Planning referred the application to the Department of Health for review of any adverse impacts, and Mr. Karikari testified that the Department of Health was in agreement with the concept presented by the applicant. Board Transcript, February 22, 2005, p. 47. Additionally, the Office of Planning noted in their Report and Recommendation that "the Applicant has worked with the Army Corps of Engineers to determine wetlands issues, and have

preserved a small drainage channel and natural wetlands area...Directly adjacent to it will be the on-site underground storm retention area, designed to naturally filter to acceptable levels...in accordance with District regulations." Office of Planning Recommendation, February 8, 2005, p. 6.

The Board's finding was based on substantial evidence in the record, and upon adequate review by the agencies to which the application was referred. Friends' assertions to the contrary are entirely without merit and the Motion for Reconsideration filed by Friends on the wetlands issue should be denied as unfounded in fact and law.

The Board's Action Striking "Declaration of Julie Moore" was Clear and Proper, and No Further Explanation of the Administrative Record is Required

Friends' submission of new evidence in the form of a "Declaration of Julie Moore" as part of their proposed findings of fact and conclusions of law after the close of the record in this case was improper, and as such, the Board correctly granted the applicant's Motion to Strike such Declaration.

Contrary to Friends' assertion, the Board's denial of the Applicant's Motion to Strike "extra-record materials" contained within the proposed findings of fact and conclusions of law submitted by the opposition was sufficiently clear and did not create any question of the items which were to be excluded from the record. The Board declined to strike the proposed findings of fact and conclusions of law, Exhibit 59, in its entirety. To the extent, however, that the proposed findings relied on new evidence submitted within the extra-record Document that was submitted after the Board announced that the record was closed, the Chairman clearly stated that the Board would use its discretion and not rely on new information that was not received prior to the close of the record in making their findings. *See* Board Transcript, April 5, 2005, p. 7.

No line was blurred, as the Friends' suggest, in what the Board was to include or exclude in their consideration. The Board properly articulated each of the findings it made, the evidence it relied on in making those findings, and the conclusions of law it reached in light of those findings, in its Order. No further review of the Declaration of Ms. Moore or clarification of evidence in the record is required.

Finally, the case law relied upon by Friends has no application here[2] Friends cite in their Motion for Reconsideration several cases for the proposition that an agency may supplement the administrative record after the fact to "clarify" or explain agency findings. In the first place, one of the cases (*Public Power Council*), deals with an agency's attempt to expand on its record, on

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[2] The suggestion by Friends that it is seeking a remedy within the powers of the Board so that these issues need not be resolved by the Court, reeks of a veiled threat. While the Applicant cannot seek sanctions and attorneys fees from the Board for this frivolous Motion for Reconsideration, Court rules would permit it to do so in response to a similar challenge there.

appeal, rather than through a remand, and not Motions for Reconsideration from someone who appeared before the agency. This case is completely inapposite.

In addition, both cases relied upon deal with the Federal Administrative Procedures Act and not the rules which govern the Board's review of applications for zoning relief. *Cf. District of Columbia Hospital Association v. Barry*, 498 A.2d 216, 219 (D.C. 1985) (provisions of the Federal APA have no application to decisions of District of Columbia agencies).

Friends are also mistaken in its reliance on the decision in *Natural Resources Defense Council, Inc. v. Train*, 519 F.2d 287 (D.C. Cir. 1975). In *Natural Resources Defense Council, Inc. v. Train, supra* 519 F.2d at 291, the United States Court of Appeals for the District of Columbia Circuit remanded an action to the United States District Court when it discovered that the complete record upon which an Administrator at the United States Environmental Protection Agency had relied upon in a rulemaking proceeding had not been filed with the District Court for review.[3] This ruling has no bearing on whether the Board should reopen its record to receive Ms. Moore's declaration or any other "explanatory" evidence the Friends wish to submit, after the administrative record in this contested case closed. The Board relied, as it must, on the record before it and an obligation in a federal court by a federal agency (the EPA) to file an administrative record with that court has no relevance on whether this Board should expand its record to include arguments and "evidence" not made in a timely fashion. *See Harris v. Rental Housing Commission*, 505 A.2d 66 (D.C. 1986) (Record may held open for post-hearing memorandum discussing evidence already in the record but not new evidence following a hearing).

The Board's action in striking extra-record submissions and decision to accept proposed findings submitted by the Friends, insofar as they relied on record material, was eminently reasonable.

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[3] Friends are also wrong in their assertion that the D.C. Circuit "ultimately governs" the Board. Motion at p. 3.

Conclusion

Phillips Park, LLC respectfully requests that the Board deny Friends of the Whitehaven's Motion for Reconsideration as (1) Friends of the Whitehaven fail to proffer any new evidence that could not have been presented at the hearing; (2) the Board's decision was based on substantial evidence in the administrative record and required no further clarification, and (3) as set forth in the Board's Order and the record of this matter, Phillips Park, LLC has met the burden of proof for the requested relief.

Sincerely,

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

Richard B. Nettler

cc: Phillips Park LLC
Advisory Neighborhood Commission 3D
Office of Planning, Joel Lawson
Maggie Brady, Certain Residents of W Street, etc
Ms. Chandra Hardy
Alan Bergstein, Office of the Attorney General
William Snape, III, Esquire