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**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

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Application of
Dorchester Associates LLC

BZA Application No. 17309
Public Hearing: October 31, 2006
ANC 3D

**CHAIN BRIDGE ROAD/UNIVERSITY TERRACE PRESERVATION
COMMITTEE'S MOTION TO EXCLUDE AND STRIKE THE APPLICANT'S
UNAUTHORIZED "REBUTTAL" SUBMISSION AND TESTIMONY**

The Chain Bridge Road/University Terrace Preservation Committee (the "Preservation Committee") is a long-standing party in Opposition in these proceedings before the Board of Zoning Adjustment (the "Board").

The Preservation Committee, by and through undersigned counsel, respectfully submits this Motion to Exclude and Strike the Applicant's Unauthorized "Rebuttal" Submission and Testimony. In support of this Motion, the Preservation Committee states that the Applicant's voluminous "Rebuttal" Submission (and accompanying testimony) was unauthorized, knowingly filed at the hearing in violation of the Board's Rules and longstanding practice, beyond the permitted scope of rebuttal and comprised almost entirely of new material which has created a fundamentally unfair and unbalanced proceeding favoring the Applicant and leaving the Office of Planning, Advisory Neighborhood Commission 3D and the Preservation Committee unable to respond and at an insurmountable disadvantage.

The Board has the absolute authority and responsibility to regulate the course of these hearings rather than allowing the Applicant to define the nature, scope and duration of the hearing and the role of the parties.

**BOARD OF ZONING ADJUSTMENT
District of Columbia**

CASE NO. 17309
EXHIBIT NO. 167
Board of Zoning Adjustment
District of Columbia
CASE NO. 17309
EXHIBIT NO. 167

CHRONOLOGY

- February 18, 2005:** Application filed.
- April 12, 2005:** Applicant filed First Pre-Hearing Statement.
- April 26, 2005:** Hearing continued until July 19, 2005 at Applicant's request.
- July 19, 2005:** Hearing continued a second time at Applicant's request until January 10, 2006.
- December 23, 2005:** Applicant filed Second Pre-Hearing Statement.
- December 27, 2005:** Applicant filed Supplement to Second Pre-Hearing Statement.
- January 10, 2006:** Hearing rescheduled until April 11, 2006.
- April 4, 2006:** Applicant filed Third Pre-Hearing Statement.
- April 11, 2006:** Applicant presented its case in chief. The Applicant's case presentation, including questions from the Board, lasted more than the allotted one-hour. April 11, 2006 Hearing Transcript, pages 177-272 (96 pages).
- The Applicant's case was completed without offering direct testimony from its expert witnesses,¹ Mr. Osborne George (Traffic), Mr. James Afful (Civil Engineering, Storm Water Management,) and Mr. Tom Bonifant (Tree Care).²
- The Hearing was continued until July 18, 2006. Although the Applicant had completed its case in chief, the Board requested the Applicant to submit a Landscaping Plan.³
- June 29, 2006:** Applicant submitted a Fourth Pre-Hearing Statement, including 1) a "new naturalistic Landscape Plan;" 2) a new Tree Protection Plan; 3) a "refined" Tree Preservation Plan; 4) a revised Storm Water Management Plan; and 5) at least seven

¹ The absence of direct expert testimony from the Applicant was recognized by the Board. Zoning Commission member, Mr. John Parsons noted, "I am surprised that you are not responding with your tree expert this afternoon." April 11, 2006 Haring Transcript, Page 242.

² Mr. Bonifant is Maryland licensed tree care expert. Mr. Bonifant is not a licensed or certified arborist in any jurisdiction. The Chain Bridge Road/University Terrace Overlay District specifically requires that the removal of protected trees must be certified to by a tree care professional certified by the International Society of Arboriculture. 11 DCMR § 1568.2.

³ Zoning Commission member, Mr. John Parsons noted, "[t]here's absolutely no landscaping on this site." April 11, 2006 Hearing Transcript, Page 266.

(7) new documents showing changes to Lots A, C, D, E, F, 2 and 4.

July 18, 2006:

Applicant allowed to make presentation exceeding one hour on its revised Landscaping Plan, including changes to Storm Water Management. July 18, 2006 Hearing Transcript, Pages 78-114 (36 pages). Report of the Office of Planning was presented.

The Preservation Committee presented its case in opposition, including testimony from Robert M. Sussman, Esquire, Chair of the Preservation Committee, and its expert witnesses: Mary K. Sears, P.E. (Civil Engineering, Storm Water Management), Edward P. Milhous (ISA certified Arborist; American Society of Consulting Arborists Registered Consulting Arborist) Mr. Allen Neyman (Architect Licensed in D.C., Maryland, Virginia, four other States), Mr. Stephen G. Peterson, P.E. (Traffic Engineer). Mr. Rudy Djabbarzadeh, an independently recognized party in opposition, also testified as part of the Preservation Committee's case presentation. The combined presentation of both parties was limited to one hour by the Board. July 18, 2006 Hearing Transcript Pages 253-317 (64 pages).

As a result of the late hour (adjourned at 8:16 p.m.) and nearly exhausted court reporter's audio recording tape, the conclusion of the hearing was continued until September 19, 2006 to allow Applicant to make its rebuttal and closing statement.

The record was left open for the Applicant to Submit its list of rebuttal witnesses by September 8, 2006. The Applicant's then – counsel, Norman M. Glasgow, Jr., Esq., responding to Chairperson Griffis' inquiry, indicated no desire to file any written submissions before September 19, 2006.

CHAIRPERSON GRIFFIS: . . .And, Mr. Glasgow, are you anticipating as part of your rebuttal having any formal submissions into the record prior to the 19th?

MR. GLASGOW: I don't – I am not understanding the question.

CHAIRPERSON GRIFFIS: I wasn't aware of – maybe in your mind you might have some written submissions that you wanted to put into the record prior to the 19th.

MR. GLASGOW: I think we were just going to come to the hearing and just do rebuttal.

CHAIRPERSON GRIFFIS: And just go ahead.

MR. GLASGOW: Like we normally do.

CHAIRPERSON GRIFFIS: Understood, understood. I'm going to ask one thing of you. On September 8th if we could get a list of witnesses that you're anticipating calling, and let me be clear on this.

July 18, 2006 Hearing Transcript, Page 353.

- September 8, 2006:** Applicant through new counsel, George R. Keys, Esquire,⁴ submitted list of "rebuttal" witnesses, including one witness (Howard J. Rosenberg) without any prior involvement in this application (and never subject to Board questioning or cross-examination) and three witnesses who did not provide direct testimony during the Applicant's case in chief presentation, including Messrs. Osborne George, Tom Bonifant and James Afful.
- September 19, 2006:** At the beginning of its "Rebuttal" presentation, the Applicant for the first time and in direct contradiction to the Board's instructions, submitted a "Rebuttal" filing, dated September 19, 2006 ("Rebuttal Submission"). The Rebuttal Submission, a 1.5 inch thick three-ring binder contained at least 160 pages, including numerous detailed and colored drawings dated September 1, 2006. As more fully catalogued below, the Rebuttal Submission contained almost entirely (96.25%) new material which exceeded the limited scope of rebuttal.

⁴ Mr. Keys is an experienced zoning practitioner having appeared before the Board on numerous occasions.

Applicant's "Rebuttal Submission"
Dated (Filed) September 19, 2006

Section/Subject Matter	# of Pages	# of New Pages	Description
Area Comparison	55	55	
Context	14	13	1 Drawing dated 9/1/06 13 new photographs 1 existing drawing
Traffic	7	7	7 drawings dated 9/1/06
SWM/Utility Install	5	5	4 drawings dated 9/1/06
Disturbance Area	3	3	3 drawings dated 9/1/06
Erosion/Sediment	2	2	2 drawings dated 9/1/06
Tree Protection	2	2	2 drawings dated 9/1/06
Critical Root Zone	44	44	derived from larger drawing dated 9/1/06
House 4	10	5	5 drawings dated 9/1/06
House B	9	9	9 drawings dated 9/1/06
House H	9	9	9 drawings dated 9/1/06
Totals	160	154	96.25% of the "Rebuttal" Submission was NEW material

Over strenuous objections from the Preservation Committee, and ANC3D, the Board accepted the "Rebuttal Submission" and allowed the Applicant's "Rebuttal" presentation to proceed. The Applicant provided direct testimony from Messrs. Stan Andrulis,⁵ James Afful, Tom Bonifant and Osborne George.

⁵ Mr. Andrulis is a licensed architect in Michigan, but is not licensed in D.C., Maryland or Virginia. During his lengthy "Rebuttal" testimony, Mr. Andrulis admitted to limited experience in residential development and construction with most of his experience until recently in large-scale commercial

The Applicant's "Rebuttal" presentation lasted at least 2 hours and 45 minutes. September 19, 2006 Hearing Transcript, Pages 169-272 (103 pages).

During the course of the Applicant's "Rebuttal" presentation, additional new material was submitted into the record beyond the "Rebuttal Submission," including two (2) drawings from O. R. George and three (3) pages labeled "SWM Conceptual Plan" dated September 18, 2006.

ARGUMENT

A. Applicant Must Meet Its Burden of Proof Within Established Procedures.

It is beyond dispute that the Applicant bears the burden of proof in these proceedings. 11 DCMR § 3119.2. The Board's Rules make it clear that it is the Applicant's affirmative responsibility to present its case in the first instance and have that presentation subject to complete scrutiny by the Board, government agencies and any parties. 11 DCMR § 3113.8.

1. The Applicant Has Monopolized These Proceedings.

In addition to the Applicant's obligation to put forth its case in filings before the hearing and during its case in chief presentation, the Board's Rules and practices require that the hearing proceed in a fair and balanced manner. 11 DCMR § 3117.4 explicitly provides the Applicant a total of 60 minutes to present its case, exclusive of cross-examination, and the parties in opposition the same 60 minutes to respond. The Board may deviate from these established time limitations, but must do so in a manner to **"ensure reasonable balance in the time allocation between proponents and opponents."** 11 DCMR § 3117.5.

buildings in the U.S. and Europe. Mr. Andrulis also admitted that he had never worked on a project using directional drilling. September 19, 2006 Hearing Transcript, Page 216.

Based on the number and duration of the presentations and numerous written submissions, the Applicant has been given an overwhelmingly disproportionate opportunity to make its case. The Applicant has been allowed to make extensive presentations on three (3) separate occasions, involving almost four (4) times as much hearing time, exclusive of cross-examination, as the Opposition and has submitted four (4) different Pre-hearing Statements, including one Supplement, and most recently, the voluminous "Rebuttal Submission" containing almost exclusively new material.

**Comparison of Applicant and Opposition Presentations
(By Transcript Pages)**

Date	Applicant	Opposition
April 11, 2006	96 Transcript pages	0
July 18, 2006	36 Transcript pages	64 Transcript Pages
September 19, 2006	103 Transcript Pages (2 hours 45 minutes)	0
Total	235	64

In addition to the extreme disparity in presentation time afforded the Applicant, the Office of Planning, ANC3D and opposing parties were not allowed to respond to the Applicant's substantial "Rebuttal Submission" which was almost entirely new material and beyond the limited scope of rebuttal. Given the volume and complexity of the new material submitted, cross-examination is not a reasonable or effective substitute for the parties' right to respond in writing and provide direct testimony which the Board has denied. Although applicable to all the contested issues in this case, the inability of the parties to respond in writing and by testimony on the critical issue of tree preservation should be of greatest and most immediate concern to the Board in attempting to evaluate

the suitability and true impact of this Application. The Applicant's last minute and unauthorized "Rebuttal Submission" and testimony has precluded the Office of Planning through Mr. Earl Eustler of the Urban Forestry Administration and the Preservation Committee's ISA-certified arborist from submitting their expert evaluations of the new material and testimony.

2. The Applicant's "Rebuttal Submission" Was Not Authorized.

The Board, at the conclusion of the July 18, 2006 hearing, clearly closed the record for the Applicant except to submit a list of rebuttal witnesses by September 8, 2006. In fact, the Chairperson, specifically asked the Applicant's counsel whether he intended to file anything in writing before the next hearing. Counsel responded unequivocally that no submission was anticipated or requested and that "rebuttal" would proceed solely on the basis of oral testimony. Based on this inquiry, the Board issued clear instructions to the Applicant which were knowingly and intentionally violated both in substance and timing.

3. The Applicant's "Rebuttal Submission" Was Untimely.

Not satisfied with violating the Board's clear instructions, the Applicant waited until the beginning of the hearing to submit its 160 page "Rebuttal Submission" which contained at least 154 pages of new material exceeding the proper scope of rebuttal.

Beyond fundamental fairness and efficiency to the Board, Office of Planning, ANC3D and the Opposition, the Board's Rules and practices require that written submissions be filed prior to the hearing. 11 DCMR § 3113.8 (Applicant required to file 14 days before the hearing), 11 DCMR § 3114.2 (public agencies required to file 7 days before hearing), 11 DCMR § 3115.1 (ANC required to file 7 days before hearing). In

addition to the general rules applicable to the Applicant, the Board explicitly instructed the Applicant to file its witness list by September 8, 2006. Although greatly exceeding the scope authorized, there was no ambiguity or uncertainty that the Board required that any filing was due no later than September 8, 2006.

The Applicant has offered no explanation, reasonable or otherwise, for waiting until the day of the hearing to file its "Rebuttal Submission." Significantly, most of the materials in the "Rebuttal Submission" are dated September 1, 2006 which clearly establishes that the Applicant was capable of filing the material, although unauthorized, in a timely and fair manner. Instead, the Applicant sought strategic advantage in ambushing the Board, Office of Planning, ANC3D and the Opposition with a last minute filing that no one was capable of responding to in an informed or timely manner. The Applicant's unauthorized and untimely actions have needlessly prolonged these proceedings.

B. The Applicant's "Rebuttal Submission" and Testimony Greatly Exceeded the Proper Scope of Rebuttal

Rebuttal is not a last minute opportunity for the Applicant to present its case in chief or rescue a fundamentally flawed and/or incomplete application without the meaningful opportunity for the Office of Planning, ANC3D or opposition to respond. Significantly, the Applicant's "Rebuttal Submission" and Testimony are equal to or greater in quantity and duration than its original Prehearing Statement and hearing presentation.

Beyond its sheer magnitude, the substance of the Applicant's "Rebuttal Submission" and testimony exceeds the accepted scope of rebuttal. In properly limiting the scope of rebuttal, the Board should be guided by this established standard:

Generally, a party holding the affirmative of [burden of proof] an issue is bound to present all of the evidence on the case in chief, before the close of the proof, and may not add to it by the device of rebuttal. **Thus, rebuttal testimony offered by the [Applicant] should rebut the testimony brought out by the [Opposing Party] and consist of nothing which could have been offered in chief. The [Board] may properly exclude rebuttal testimony if the testimony could have been presented during the offering party's case in chief, even in a bench trial.** 75 AM. Jur. 2d Trial § 373.

Based on this standard, the Applicant's "Rebuttal Submission" and Testimony improperly attempts to use rebuttal to substantially change, provide missing information and/or introduce new concepts to complete an otherwise flawed case in chief.

More than eighteen (18) months since filing the original application and five (5) months since presenting its case in chief, the Applicant is desperately attempting to:

1. Introduce numerous new drawings dated September 1, 2006;
2. Reduce and change the configuration of at least nine (9) of the thirteen (13) proposed houses;
3. Adopt new, incredible, and extraordinary construction techniques and equipment, including directional drilling and the "Ditch-Witch," and sheeting and shoring;
4. Present long requested, but withheld, soil erosion and sediment control methods;
5. Create a new Stormwater Management and Utility Installation Plan which does not comply with WASA standards; and
6. Embrace new and untested tree preservation methods and critical root zone documentation, including an entirely new Area of Disturbance Plan.

Rather than properly answering the difficult questions to its existing case in chief raised by the Board, Office of Planning, ANC3D, and Opposition, the Applicant is at the eleventh hour proposing to substantively change, modify and supplement its original plan without meaningful opportunity for scrutiny and response to the moving target.

C. The Applicant Has Challenged the Authority and Willingness of the Board to Regulate These Proceedings

The Board delayed the Applicant's rebuttal presentation for its own convenience based on time constraints, not to fundamentally alter or expand the nature and scope of the rebuttal permitted or to permit the Applicant to submit new materials and plans to rescue its fatally flawed and not credible case.

The Applicant has exploited the unintended opportunity of these circumstances (and two months) to dramatically alter the nature and scope of these proceedings for its exclusive benefit and to the disadvantage of all the parties. The Board's Rules and longstanding practice have never allowed any Applicant to make a written submission as part of its rebuttal. Had this hearing proceeded in the normal course on July 18, 2006, the Applicant would have proceeded directly with its rebuttal at the conclusion of the Preservation Committee's opposition case. The Applicant would have been limited to responding to the issues raised by the Office of Planning, ANC3D and the Preservation Committee.

Although we can all only speculate on the exact content of what contemporaneous rebuttal by the Applicant would have been, it is beyond dispute that all of the following would NOT have occurred:

1. No 160 page "Rebuttal Submission" by the Applicant including numerous new drawings and plans dated September 1, 2006;

2. No "Rebuttal" Testimony by the Applicant for at least 2 hours and 45 minutes on the new material in the "Rebuttal Submission";
3. NO need to postpone cross-examination; and
4. No cloud or dispute over the procedure or fairness of the hearing.

D. Decisive Action is Mandated to Exclude and Strike the Applicant's "Rebuttal Submission" and Testimony

The Applicant's "Rebuttal Submission" and testimony is unauthorized, untimely and beyond the scope of permitted rebuttal, and without decisive action by the Board, will destroy the balance and fundamental fairness of these proceedings. Given the Board's stated unwillingness to re-open the record for direct testimony and written submission from the Office of Planning, Urban Forestry Administration, ANC3D and Opposition, and inevitable further "rebuttal" from the Applicant, no alternative exists but to eliminate the offending and inappropriate materials and testimony from the record and close these proceedings.

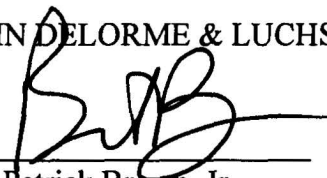
The Board is entitled to respect for its established Rules and procedures and authority to fairly regulate these proceedings. When that respect is not demonstrated by the Applicant, the Board cannot be reluctant to act decisively to enforce compliance.

For the foregoing reasons, the Preservation Committee respectfully urges the Board to grant this Motion and Strike and Exclude the Applicant's "Rebuttal Submission" and testimony.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

By:


John Patrick Brown, Jr.

By: 15/
Stephanie A. Baldwin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Chain Bridge Road/University Terrace Preservation Committee's Motion to Exclude and Strike the Applicant's Unauthorized "Rebuttal" Submission and Testimony was served by electronic mail and/or by first-class mail, postage prepaid, this 25th day of October 2006 upon:

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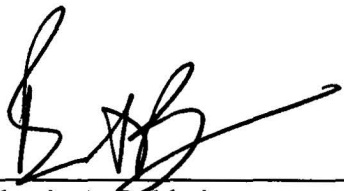
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