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October 30, 2006

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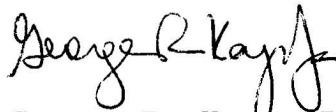
Geoffrey Griffis, Chairman
District of Columbia Board of Zoning Adjustment
441 Fourth Street, N.W. - Room 210 South
Washington, D.C. 20001

Re: BZA Application No. 17309
2600-block, Chain Bridge Road, N.W.

Dear Mr. Griffis:

In response to Chain Bridge Road/University Terrace Preservation Committee's Motion to Exclude and Strike the Applicant's Unauthorized "Rebuttal" Submission and Testimony, filed with the Board on October 25, 2006, please find enclosed ten (10) copies of the opposition thereto of Dorchester Associates LLC.

Very truly yours,



George R. Keys, Jr.

Enclosures

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17309

EXHIBIT NO. 169

Board of Zoning Adjustment
District of Columbia
CASE NO. 17309
EXHIBIT NO. 169

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BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Application of
Dorchester Associates LLC

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

APPLICANT'S OPPOSITION TO CHAIN BRIDGE ROAD/UNIVERSITY TERRACE
PRESERVATION COMMITTEE'S MOTION TO EXCLUDE AND STRIKE APPLICANT'S
REBUTTAL SUBMISSION AND TESTIMONY

Applicant, by and through counsel, respectfully submits its Opposition to the Chain Bridge Road/University Terrace Preservation Committee's (hereafter, "Committee") Motion to Exclude and Strike Applicant's Rebuttal Submission and Testimony (hereafter, "Motion").

Applicant opposes the Committee's Motion for the reasons that

- I. Applicant's rebuttal case was proper rebuttal¹;**
- II. The Board has proceeded appropriately;**

The Hearing has been reasonably balanced
The Committee has not been unfairly prejudiced
The Board has properly regulated the proceedings

- III. There is no basis upon which to strike Applicant's rebuttal case.**

I. Applicant's Rebuttal was Proper Rebuttal

The gravamen of the Committee's objection appears to be its misperception that Applicant's Rebuttal case exceeded the scope of rebuttal. Rebuttal evidence is typically defined as evidence which refutes the defense evidence and may consist of new witnesses or witnesses who have previously testified on the case in chief to answer some point first raised by the defendant's witnesses. Moreover, it is well established that trial judges (here, the Board) have wide discretion in permitting the introduction of evidence in rebuttal which might well have been brought out in the proponent's

¹ See attached Appendix for Summary of Rebuttal Exhibits.

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case in chief. See *McCormick on Evidence*, 5th ed (1999), Vol 1, at 11. In fact, as an administrative agency, the Board's proceedings are governed by more liberal and flexible evidentiary standards than judicial proceedings and are invested with a correspondingly greater discretion than trial judges in determining the admissibility of evidence. District of Columbia v. Public Service Comm'n of District of Columbia, 802 A.2d 373 (D.C. 2002).

Consistent with this broader role, Board members have the absolute right to ask questions of witnesses and seek information on elements of an application of particular importance to them.² Moreover, the Board is ultimately responsible for issuing findings of facts and conclusions of law that will withstand judicial scrutiny. Consequently, the Applicant's rebuttal must take into consideration both the Committee's case as well as the Board's concerns.

At the close of the public hearing on July 18, 2006, there was extensive discussion about the matters to be addressed during rebuttal. As Chairman Griffis noted,

"the tool of rebuttal is to address all those elements that were brought up and those that are actually going directly to the jurisdictions of the Board and directly to the application." (Tr. at 340, ln. 18-21.)

It was clear from the discussion that the Board was interested in a comprehensive rebuttal that was substantive and specific. Board members voiced their requests that specific issues be addressed. For example, Vice Chair Miller requested that Applicant address soil erosion and sediment control. (Tr. at 343, ln. 11-18.) Chairman Griffis agreed and referred to other elements he surmised would be addressed in rebuttal such as those relating to the Storm

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11 DCMR Zoning (Feb. 2003) § 3117.6 DCMR states that:
"Nothing in § 3117.3 [role of presiding officer at hearing] shall preclude members from questioning witnesses in any hearing before the Board."

Water Management Plan, construction, borings, trenching, tree preservation, access to the site ---all of which were matters raised by the Committee in their case presentation. In the end, notwithstanding the Committee counsel's efforts to unfairly restrict Applicant's rebuttal case, Chairman Griffis correctly left it up to Applicant to address such issues as Applicant saw fit. (Tr. at 343,ln 22 - 356.)

Applicant's rebuttal consisted of testimony from four (4) previously identified expert witness and a binder of "Rebuttal Exhibits". Each expert addressed specific points placed into contention by the Committee.³ As the attached Appendix illustrates, the Rebuttal Exhibits either directly rebutted the Committee's submissions or were merely supportive material for the expert's testimony and/or had, in fact, been included in Applicant's prior submissions.

Had the Committee taken the time to review Applicant's Rebuttal Exhibits before filing their motion, the Committee would have realized that the only exhibits submitted that could reasonably be considered "new material" were 3 pages relating to shoring walls, 3 pages relating to House 4, 1 page relating to House B, and 2 pages relating to House H - a total of 9 pages. And, of these exhibits, only 6 pages represent modifications to houses which are not in contention but illustrated the reduction in the area of disturbance.

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Mr. Andrulis addressed and corrected misleading information submitted to the Board after the July 18, 2006 hearing by the Committee relating to context and also addressed misunderstandings relating to construction techniques; Mr. Afful responded to testimony provided by the Committee's expert Mary Sears relating to SWM; Mr. Bonifant directly rebutted the Opposition's testimony contesting feasibility of Applicant's tree preservation plan; Mr. George specifically rebutted the Committee's testimony regarding traffic volume, safety and other transportation issues.

The Committee states that the Rebuttal Exhibits go beyond the scope of proper rebuttal and includes material that substantively changes its original plan. The Committee, however, has failed to provide any specifics to support this bald statement. Moreover, as the Applicant has shown, its submissions were targeted to respond to the technical objections raised by the Committee's several experts that in large part rested on their misunderstandings, misapprehensions and outright distortions of fact. Applicant's submissions must have succeeded, thereby triggering the Committee's meritless attack.

II. The Board has proceeded appropriately.

It is clear from the record thus far that the Board has made every effort to ensure a fair hearing. During a good portion of the hearings on both July 18, 2006 and September 19, 2006, the Board patiently dealt with procedural matters including the Committee's efforts to restrict Applicant's rebuttal case. The Board discussed at length the manner in which to proceed in order to assure a fair and reasonably balanced hearing.

A. The Hearing has been reasonably balanced.

The Committee argues that the hearing has thus far been unbalanced. To support its argument, the Committee presents a chart depicting transcript pages which it accords to either Applicant or the Committee. The problem with the Committee's argument and its chart is that it ignores several important factors. It ignores the fact that the regulations governing the Board's procedures provide for reasonable balance which does not equate with the equal time the Committee seems to demand.⁴ It ignores the fact that much of the

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DCMR Zoning (Feb. 2003) § 3117.5 states: "The Board may grant additional or lesser time to that under § 3117.4 to an appellant or applicant and persons and parties in support, or to a person or party in opposition, to present a case in

public hearings on both July 18, 2006 and September 19, 2006, included argument initiated by the Committee over procedural issues. In fact, a review of the transcript of the September 19th hearing reflects that over 30% of that hearing (46 of the 155 pages) dealt with procedural issues raised by the Committee. The Committee's argument also ignores the fact that much of the time the Committee attributes to Applicant's case is time spent responding to the Board's questions. The Committee also ignores the fact that it still has the opportunity to exercise its right to cross-examine Applicant's rebuttal witnesses after having over a month to review and consider the Rebuttal Exhibits.

B. There has been no unfair prejudice.

The Committee contends it was unfairly prejudiced when Applicant submitted the Rebuttal Exhibits in support of its experts' rebuttal testimony on September 19, 2006. This argument is equally incredulous. The Committee forgets that it did not present many of its submissions until July 18, 2006, the same day it presented its opposition case. Moreover, the Committee has now had well over one month to review Applicant's rebuttal submissions and prepare for its cross-examination of Applicant's rebuttal witnesses. Whereas, at the hearing on July 18, 2006, after the Committee presented its witnesses and exhibits, the Applicant was forced to cross-examine Committee witnesses without such an advantage. Furthermore, in direct contradiction to the Committee's assertion that its arborist was precluded from providing additional comments, the Board should note that Mr. Eustler submitted his post-hearing comments on October 25, 2006.

As for denying its request to submit sur-rebuttal in the form of written submissions, the Board offered the Committee the opportunity

opposition. The Board shall ensure reasonable balance in the time allocation between proponents and opponents." (Emphasis supplied.)

to present authority for this request. It is notable that the Committee has chosen not to nor has the Committee set forth what it might have presented in addition to Mr. Eustler's recent submission.

C. The Board has properly regulated the proceedings.

The Committee claims that the Applicant has challenged the Board's authority to regulate the proceedings, yet the Committee fails to provide any evidence of this. Rather, the Committee merely speculates about what might have been had the hearing been concluded on July 18, 2006. The fact is that the hearing was not concluded on July 18, 2006. Consequently, the Applicant had the opportunity to present a rebuttal responsive to the Board's concerns and the contested issues in this case.

The Committee argues that Applicant waived its right to present written submissions during its rebuttal case. That is also incorrect. When Chairman Griffis asked Mr. Glasgow, Applicant's former counsel, if he intended to include formal submissions as part of the rebuttal case, Mr. Glasgow stated:

"Well, we plan on responding in our rebuttal to anything that has been raised." (Tr. July 18, 2006, at 350, ln. 20,21.)... "It's our application and we can submit whatever it is that we wish to submit and the Board will either accept it or reject it." (Id, at 351, ln. 8-10.)

Moreover, it was well within accepted procedure for new counsel to present rebuttal as he deemed appropriate.

III. There is no basis for striking Applicant's rebuttal case.

It is well established that the party bearing the burden of proof has the right to present a rebuttal case. The Board's own procedures as well as the District of Columbia's Administrative Procedure's Act both recognize this.⁵ As shown above, Applicant's

⁵ 11 DCMR Zoning (Feb. 2003) § 3119.2; D.C. Code §2-509(b) (2001)

rebuttal case was specifically designed to respond to matters put into contention by the Committee's case. Applicant's rebuttal did not present new material that altered the basic plans previously submitted. The Committee repeatedly asserts that Applicant's rebuttal case dramatically changed the nature of the evidence. Yet, once again the Committee has failed to provide any support for this hollow assertion.

Conclusion

Wherefore, considering that the Committee has failed to show that Applicant's rebuttal was not within the scope of proper rebuttal or that the Board has proceeded unfairly, the Committee's motion must be denied.

Respectfully submitted,

JORDAN & KEYS, LLP

By: _____
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Attorney for Applicant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition was sent by facsimile transmission or first class mail, postage prepaid, on this 30th day of October, 2006, to:

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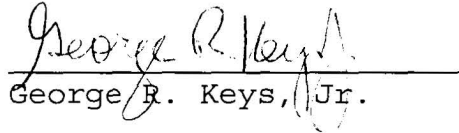
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APPENDIX

SUMMARY OF APPLICANT'S REBUTTAL EXHIBITS

Area Comparison (55 pages) At the hearing on July 18, 2006, the Committee criticized the layout and density of the project. Without prior notice to Applicant, the Committee submitted data regarding the size of houses in the area. Applicant reviewed public records to verify that newly submitted data and discovered that calculations were erroneous. The Committee used "living area" when discussing existing housing on Chain Bridge Road, but used "total building area" when describing the proposed project, thereby misleading the Board. Virtually all of Applicant's Rebuttal Exhibits consist of back-up documentation to correct and directly rebut the erroneous record created by the Committee.

Context (14 pages) This section consist of twelve (12) photographs and two (2) pages of context drawings, all of which had previously appeared in Applicant's presentation at the April 11, 2006 public hearing.

Traffic (7 pages) These documents directly rebut testimony regarding access to the site. At the July 18, 2006 hearing, Mr. Petersen, the Committee's traffic expert, testified that sight lines along the main drive were impaired thereby creating an unsafe condition. Therefore, Applicant submitted a site plan with a grid superimposed showing measuring points along the main drive as a means to illustrate Mr. Petersen's error. The remaining pages are merely graphs which further document and confirm Mr. Petersen's error.

SWM/Utility Install (5 Pages) The Committee's experts (Sears, Milhous and Eutsler) testified that Applicant's installation of storm water management controls and utilities could not be done without harming trees or creating larger disturbance areas than shown on Applicant's plans. These five (5) pages show how boring negates the objections of the Committee's experts.

Erosion/Sediment (1 Page) Exhibit D of Applicant's statement at the public hearing on January 10, 2006, described the elements of erosion and sediment control in writing, as a detailed plan is not usually required until the Applicant is at the stage of requesting building permits. This plan illustrates the description provided on January 10, 2006 in Exhibit D and was included to facilitate the Board's understanding of these elements.

Disturbance Area - (3 Pages), Tree Protection - (2 pages) and Critical Root Zone -(44 pages) - all address the elements of tree preservation. The Committee's experts argued on July 18, 2006 that the area of disturbance to construct houses and install SWM/utilities

must be so large that trees cannot be protected. The exhibit shows in a single plan impervious surfaces, residences, tree protection zones, the location of shoring walls, areas of overdig and critical root zones of all trees. This data was submitted in order to put data in one place to show how construction avoided severe impact on trees. Two pages show how shoring walls are built and bridges elevated to avoid tree roots and minimize disturbance. One page repeats detail of the original plans, but extends the critical root zone (hereafter, "CRZ") for some trees to a 1.5 factor. One page illustrates prior testimony about how to protect trees adjacent to bridges. Diagrams which enlarge the Tree Protection Plan show each tree on the project site in relation to proposed structures with CRZ shown. This is merely a detailed enlargement of the context of each tree and is clearly not new material.

What may be considered new about these diagrams is that the architect has added a computation showing the percentage of CRZ impacted by the structures, construction etc and indicates whether disturbance is temporary or permanent. This information was supplied to address the concerns the Board expressed regarding this element.

House 4 (9 pages) Six pages are identical to previously submitted plans for this house. One page shows reduction of garage and retaining wall. One page is simply another view in elevation and 1 page shows the new garage location.

House B (9 Pages) Eight pages are identical to previously submitted plans for this house. One page shows part of the first floor supported on piers.

House H (9 Pages) Six pages are identical to previously submitted plans. One page eliminates the retaining wall. One page reduces the basement size and 1 page is the elevation plan illustrating a previous page.