

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application No. 17309 of Dorchester Associates LLC, pursuant to 11 DCMR § 3104.1, for a special exception under section 2516, to allow thirteen detached single-family dwellings on a single subdivided lot, including approval of two sixteen foot wide roadways rather than twenty-five foot wide roadways under subsection 2516(d), in the CBUT/R-1-A District in the 2800 block of Chain Bridge Road, N.W. (Square 1425, Lot 827, Parcels 12/63, 12/293 and 12/294).

HEARING DATES: April 26, 2005; July 19, 2005; January 10, 2006; April 11, 2006; July 18, 2006; September 19, 2006 and October 31, 2006

DECISION DATE: January 9, 2007

DECISION AND ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

Application: This Application was filed on February 18, 2005 by and through then counsel for the Applicant, Norman M. Glasgow, Jr. of Holland & Knight, LLP.

Self-Certification: The zoning relief requested in this case was self-certified by the Applicant, pursuant to 11 DCMR § 3113.2.

Notice of Public Hearing: On March 3, 2005, pursuant to 11 DCMR § 3113.13, the Office of Zoning mailed the Applicant, the owners of property within 200 feet of the Subject Property, and ANC 3D notice of the April 26, 2005 hearing. Notice was also published in the D.C. Register. The Applicant posted placards at the property regarding the application and the public hearing and submitted an affidavit to the Board to this effect.

Requests for Party Status: At the April 26, 2005 hearing, the Board ruled on several requests for party status, including: 1) the Chain Bridge Road/University Terrace Preservation Committee ("Preservation Committee"), Mr. Rudy Djabbarzadeh, and the Chain Bridge Road Citizens for Responsible Growth.

The Board approved the Preservation Committee as a party in opposition. The Preservation Committee is a 501(c)(3) not for profit corporation dedicated to protecting the unique park-like character of the Chain Bridge Road/University Terrace neighborhood. The Committee is supported by contributions from members of the community. The Preservation Committee was instrumental in the creation of the Chain Bridge Road/University Terrace Overlay District in 1999 by the Zoning Commission. The Preservation Committee is actively involved in enforcing the CBUT Overlay's requirements on behalf of the seventy (70) families in the Overlay District. The Preservation Committee was represented by counsel, John Patrick Brown, Jr. of Greenstein DeLorme & Luchs, P.C.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17309
EXHIBIT NO. 174

Board of Zoning Adjustment
District of Columbia
CASE NO. 17309
EXHIBIT NO. 174

The Board also approved the request by Mr. Djabbarzadeh as a party in opposition as the owner-occupant of 2740 Chain Bridge Road, as well as the owner of several other properties which also abut or are in close proximity to the Subject Property. While recognized separately as a party in opposition, Mr. Djabbarzadeh indicated that he would participate in these proceedings as part of the Preservation Committee.

The Board also accepted the Chain Bridge Road Citizens for Responsible Growth, which through counsel, Mark Brodsky, Esquire, purported to represent Mr. Mullitz, an adjoining property within 200 feet of the subject property and Mr. Bernie Gewirz at 2650 Chain Bridge Road, as a "mild" proponent of the Application. Neither Mr. Mullitz nor Mr. Gerwirz appeared to testify in this proceeding.

ANC 3D: Advisory Neighborhood Commission is automatically a party to these proceedings. ANC 3D submitted numerous written reports and testified and participated in these proceedings, through its Chairwoman, Alma Gates, in opposition to this Application.

Persons in Opposition: Numerous resident of the Chain Bridge Road community requested to testify in opposition and were allowed to participate at various stages of these proceedings, including Mr. Richard England (2832 Chain Bridge Road), Mr. Michael Edwards (2822 University Terrace), Ms. Urquhart (2822 University Terrace), Ms. Andrea Mitchell (2710 Chain Bridge Road), Mr. Richard Richter (Battery Place), Officer Anthony McElwee, Metropolitan Police Department, William and Kathryn Barnard (2700 Chain Bridge Road) and a written report at Exhibit 144, Mr. Elliot Jones (2810 Battery Place), and Mr. Luther Carter (2722 Chain Bridge Road).

Expert Witnesses: Both the Applicant and Preservation Committee offered several expert witnesses. The Board examined the qualifications of each proposed expert witness and recognized the following experts:

a. For the Applicant:

1. Stan Andrulis as an Architect. The Board recognized that Mr. Andrulis was not licensed in D.C., Maryland or Virginia and that through subsequent testimony that his recent experience was primarily in large commercial projects in other states and foreign countries rather than in local single-family development. Mr. Andrulis was the Applicant's primary witness and provided testimony on a wide variety of issues beyond his limited area of expertise, including storm water management, tree preservation and construction methods. Mr. Andrulis freely admitted he had no direct experience with directional drilling and relied entirely on second and third hand information from unidentified sources;

2. Mr. James Afful in Civil Engineering and Storm Water Management;

3. Tom Bonifant as a tree care expert licensed only in Maryland, but not a certified or licensed arborist in any jurisdiction;

4. Mr. Osborne George as a Traffic Engineer;

5. Mr. Steven Sher, Director of Zoning at Holland & Knight in zoning and land use;
and

6. Ms. Lauren Wheeler in Landscape design.

b. For the Opposition:

1. Mary K. Sears, P.E. of Greenehorne & O'Mara, Inc. in Civil Engineering and Storm Water Management;

2. Edward P. Milhous as an ISA-Certified Arborist;

3. Allen Neymann as Architect licensed in D.C., Maryland, Virginia and four other states with substantial experience in D.C. residential real estate development;

4. Stephen G. Peterson, P.E. as a Traffic Engineer.

Course of The Proceedings: The Board held public hearings in this Application on seven (7) dates over a course of more than eighteen (18) months, including:

a. April 26, 2005: The Board continued the hearing until July 19, 2005 at the Applicant's request after establishing the parties to these proceedings;

b. July 19, 2005: The Board again continued the hearing until January 10, 2006 at the Applicant's request;

c. January 10, 2006: The Board continued the hearing without objection from the Applicant until April 11, 2006;

d. April 11, 2006: At this hearing, the Applicant completed its case in chief without offering direct testimony from several of its expert witnesses, including Mr. Osborne George (Traffic), Mr. James Afful (Civil Engineering) and Mr. Tom Bonifant (Tree Care). At the conclusion of this hearing, the Board requested a Landscaping Plan which had not been included in the Application or the case in chief;

e. July 18, 2006: The Board allowed the Applicant to make a lengthy presentation of its New Landscaping Plan. At the conclusion of this Applicant's supplemental presentation, the Office of Planning and Urban Forestry Administration testified and were subject to cross-examination by the Applicant and parties in opposition.

The Preservation Committee presented its case in opposition led by Mr. Robert Sussman, Chairman of the Preservation Committee, and direct testimony from its expert witnesses, including: Mary K. Sears, P.E. (Civil Engineering, Storm Water Management), Edward P. Milhous (ISA-Certified Arborist), Allen Neymann (Licensed Architect in D.C., Maryland, Virginia and four other States), Stephen G. Peterson, P.E. (Traffic Engineer). Mr. Djabbarzadeh also testified in opposition as part of the Preservation Committee case. The Preservation Committee and its experts were subject to cross-examination.

As a result of the late hour, the Board adjourned the hearing until September 19, 2006 for the Applicant to present any rebuttal and Closing Statement. The record was left open for the limited purpose of the Applicant submitting a list of rebuttal witnesses by September 8, 2006. The Applicant, through substitute counsel,¹ George Keys, submitted the witness list, but no other material.

At the beginning of the September 19, 2006 hearing, Applicant submitted for the first-time to the Board and the other parties a three-ring binder containing at least 160 pages of material ("Rebuttal Submission"), the majority of this material was dated September 1, 2006. ANC 3D and the Preservation Committee objected to the Board's acceptance of the last minute and voluminous Rebuttal Submission as beyond the proper scope of rebuttal, a direct and deliberate violation of the Board's instructions to the Applicant at the conclusion of the July 19, 2006 hearing, contrary to the Board's Rules and fundamentally unfair to the Board, ANC 3D and Preservation Committee's ability with no notice to review the last minute material and meaningfully participate in the rebuttal proceedings, including most importantly the right to cross-examine the Applicant's rebuttal witnesses, (at least three of which had not provided direct testimony during the Applicant's case-in chief presentation.) The Board deferred action of these objections raised and allowed the Applicant to proceed with its rebuttal testimony which lasted almost three (3) hours and greatly exceeded in duration and substance the one-hour originally allowed by the Board's Rules and actually taken by the Applicant for its case in chief. During the course of the Applicant's rebuttal testimony, additional new documents from Mr. James Afful and Mr. Osborne George were introduced and accepted into the record.

At the conclusion of the Applicant's rebuttal testimony, the Board continued the hearing until October 31, 2006 to allow the parties adequate time to review the last minute Rebuttal Submission and prepare for cross-examination of the Applicant's rebuttal witnesses. The Board also left the record open for the parties to submit written objections to the Rebuttal Submission and proposed remedial measures.

As authorized by the Board, the Preservation Committee filed a Motion to Exclude and Strike the Applicant's Unauthorized "Rebuttal Submission" and Testimony claiming that the last minute filing, comprised almost exclusively of new, revised and never before submitted material, violated the Board's specific limitations on what could be filed in the record, violated the specific filing deadline established by the Board, violated the Board's Rules and practices for the reasonable and fair filing of materials, exceeded the proper scope of rebuttal, and created a fundamental imbalance and unfairness in these proceedings causing extreme prejudice to ANC 3D and the parties in opposition. The Board denied this Motion, and allowed cross-examination of the Applicant's rebuttal witnesses to proceed. After cross-examination had concluded, the Board allowed two of the Preservation Committee's expert witnesses, Ms. Sears and Mr. Milhous, to make brief statements in opposition to the Applicant's rebuttal testimony and materials.

At the conclusion of the October 31, 2006 hearing, the Board closed the record except for the submission of proposed Findings of Fact and Conclusions of Law by December 19, 2006.

¹ Applicant's original counsel withdrew on or about September 1, 2006 with the Applicant citing a recently discovered conflict of interest.

Applicant's Case: The Applicant provided testimony and evidence from Mr. Morton Bender of Dorchester Associates; Stan Andrulis, the project architect; Mr. Tom Bonifant a tree care professional; Mr. Jams Afful, a civil engineer; Mr. Osborne George, a traffic engineer; Ms. Lauren Wheeler, a landscape designer; and Mr. Steven Sher, from Holland & Knight, LLP. Over the almost two years since the filing of this Application, the proposed project remains substantially unchanged and unresponsive to the objections and concerns raised by OP, ANC 3D and the parties in opposition.

Office of Planning Report: The Office of Planning ("OP") provided testimony and written recommendations to the Board which concluded that the Applicant "generally meets the requirements of the Zoning Regulations," but still expressed major concerns. July 18, 2006 Hearing Transcript, Page 149. "Meeting the minimum is not enough, because this is a special area." July 18, 2006 Hearing Transcript, Page 163. OP specifically conditioned its support for the Application on a number of modifications in the Applicant's plans, including the elimination of Lot F in order to reduce overall density, increase the separation between each of the proposed houses, and increase the separation between the proposed houses and the immediately adjacent houses to the west and north. OP's "general" support was also conditioned on the Applicant providing a remediation plan for removed trees, a soil and sediment control plan, a plan for monitoring trees during construction, and submission of a revised Site Plan reducing the height of the houses on Lots E, F and 3. The Applicant has not materially met the conditions set forth by OP, including the elimination of Lot F which OP testified was "inconsistent with the surrounding character" of the neighborhood. July 18, 2006 Hearing Transcript, Page 147. OP testified that if the Applicant did not meet all its conditions, it would not recommend approval. July 18, 2006 Hearing Transcript, Page 166.

Urban Forestry Administration: The Urban Forestry Administration, through Mr. Earl Eustler, an ISA-certified arborist, submitted three reports to the Board and testified at two hearings. In each report, the Urban Forestry Administration unequivocally opposed to the Application as "fundamentally flawed" in its magnitude and design and emphasized that the tree preservation plans proposed "do not meet the threshold of credibility." July 18, 2006 Hearing Transcript, Page 173. Specifically, the Urban Forestry Administration found that: the density and number of houses proposed and the required infrastructure would fatally damage an overwhelming number of protected trees; the proposed storm water management is in close proximity to and in many cases directly conflicting with the critical root zones, but the Applicant's tree preservation plan does not adequately detail the necessary safeguards during construction; the scope of pre-construction pruning of trees, especially the stately allée of sixteen American Beech trees, is understated and the actual level of pruning required will be injurious to the trees; the Applicant, over the last four years, has not undertaken any preconstruction tree preservation steps, including watering during the recent drought. July 18, 2006 Hearing Transcript, Page 173 – 187. Tree replacement is "not a suitable mitigation for poor construction plans or improper protection measures." First Report of Urban Forestry Administration, Page 2, Exhibit ____.

DDOT Report: DDOT submitted a report expressing concern about the narrowing of the proposed driveway of less than 20 feet for two-way traffic, but accepting the Applicant's proposal to install laybys as a measure to improve tree preservation. DDOT also accepted the

Applicant's "mitigating" proposal to install concave mirrors to improve visibility around the blind curve at the main entrance to the Subject Property.

Department of Health Report: The Health Department noted that the Applicant's "conceptual" storm water management proposal, if fully implemented, would meet the District's requirements, but imposed conditions that infiltration/exfiltration systems should be placed away from slopes, and the post development peak discharge should not exceed the 2-year pre-development discharge. The Health Department was unable to comment on the erosion and sediment control plans because the Applicant did not submit these plans for review.

ANC 3D Report: ANC 3D has been steadfast in its opposition to this application having reviewed the matter at numerous regular meetings and submitted several written recommendations in accordance with established procedures and is entitled to receive "great weight" as required by law. The ANC 3D objections can be summarized:

1. The proposed development seeks to maximize the development of the Subject Property, including density, lot occupancy, number of houses, and impervious surface coverage.
2. The maximized development is not in keeping with the character of the neighborhood and will remove or fatally damage a substantial number of protected trees under the CBUT Overlay and dramatically alter the topography of the site.
3. The proposed development has not provided adequate storm water management facilities, addressed traffic safety issues or provided any information on construction management.
4. The proposed development will have a substantial and adverse impact on the community and the abutting Battery Kemble Park.

National Park Service Report: David Murphy of the National Park Service testified at the hearing expressing concerns about the project and its overshadowing, "massive, billboard presentation" of the proposed houses and adverse relationship to Battery Kemble Park located on the opposite side of Chain Bridge Road. Specific concerns were raised about storm water management and the risk of adverse impact on the Park and neighboring streams if the system is not carefully maintained. July 18, 2006 Hearing Transcript, Pages 234-237.

Chain Bridge Road Corporation: The Board received a letter dated June 14, 2006 from the Chain Bridge Road Corporation, a cooperative with fifteen (15) single-family dwellings on Battery Place which runs parallel to Chain Bridge Road and shares a stream in the valley between Chain Bridge Road and Battery Place which would receive runoff from Applicant's property through a terra-cotta pipe through which discharges from Applicant's storm water management system would be released. The Chain Bridge Road Corporation stated its opposition to the proposed development, maintaining that the construction of 13 large houses will severely impact the properties of the cooperative's members because of drainage of storm water runoff into the stream and continued erosion of its banks during and after construction.

Palisades Citizens Association: The Palisades Citizens Association, through its President, Mr. William Spencer, testified in strong opposition to the Application, maintaining that the Applicant's plan is in violation of the CBUT Overlay's tree removal limitations, provides an

inadequate storm water management system, and proposes a a scale of development that is too intensive and out of character with the neighborhood and adjacent Battery Kemble Park. The Palisades Citizens Association expressed frustration that the Applicant has refused to enter a dialogue with the community. April 11, 2006 Hearing Transcript, Pages 280 - 286.

FINDINGS OF FACT

The Subject Property and Surrounding Area

1. The Subject Property is approximately 154,000 square feet (3.5 acres) and is currently comprised of two lots: Lot 822 (152,483 square feet) and Lot 827 (1,753 square feet) as shown on the current Sanborn Atlas included in the original Application filed with the Board, and subsequent submissions by the Applicant. Application, Exhibit __; Applicant's April 12, 2005 Prehearing Statement, Exhibit __. Based on its own submissions, the Applicant's reference to and reliance on four "lots" (Lot 827, Parcel 12/63, Parcel 12/93 and Parcel 12/294) is incorrect and misleading. The three Parcels no longer exist having been replaced by lot 822. Testimony of Mr. Keys, October 31, 2006 Hearing Transcript, Page 294. The District's records show that the Subject Property is owned by the Applicant as Lot 822 and 827 in Square 1425. In its self-certified Application, the Applicant, through its experienced land use counsel, defined the proposed development of thirteen houses "on a single subdivided lot." See also, Testimony of Mr. Steven Sher, April 11, 2006 Hearing Transcript, Page 215.
2. The Subject Property is located on the west side of Chain Bridge Road which is a narrow, winding, wooded country lane which dates back to Colonial times. On the opposite side of Chain Bridge Road, the Subject Property runs along the frontage of historic 57-acre Battery Kemble Park which is maintained by the National Park Service and is a popular gathering spot for dog walkers, joggers and hikers from all over the Metropolitan Washington area.
3. The Subject Property was occupied by a modest single-family dwelling owned by Gabe Murphy for over 50 years until this dwelling was demolished by the Applicant.
4. Immediately to the north of the Subject Property is an African American Schoolhouse (also owned by the Applicant) which has been designated as a DC and National Register Historic Landmark at the request of the Preservation Committee.
5. Chain Bridge Road between MacArthur Boulevard and Loughboro Road is a heavily wooded area with beautiful sloping topography occupied by single-family detached dwellings ranging in size from 1,776 square feet to more than 14,000 square feet at north end of Chain Bridge Road.
6. Access to the Subject Property from Chain Bridge Road is currently provided by a long-standing paved driveway that is slightly wider than 12 feet at its entrance and maintains the same width for most of the driveway's 200 foot length. The existing driveway is flanked on either side by a one-of-a-kind allée of mature, specimen-quality American Beech trees which are sensitive and uniquely vulnerable to disturbance.
7. The topography of the property is characterized by distinct north and south plateau areas separated by an abrupt change of grade. Long-standing residents recall that the plateaus were

constructed from fill removed from other areas of the property or trucked onto the site. July 18, 2006 Transcript, Page 263. The plateau areas are bordered by steep slopes on all sides of the property. The slopes along the western and northern boundaries are unstable and poorly retained and have a history of erosion and collapse during heavy storms. Because of the slopes, a large number of abutting homes sit several feet below the Applicant's property and are vulnerable to runoff and erosion and will be overshadowed by the large houses in close proximity proposed by the Applicant. In contrast to the plateaus, which are generally treeless, the border areas of the property are heavily wooded.

Zoning of the Property

8. The Subject Property is zoned R-1-A and also subject to the Chain Bridge Road/University Terrace Overlay District ("CBUT Overlay").

9. The CBUT Overlay was, at the urging of the Preservation Committee, established by the Zoning Commission in 1999 specifically "to preserve and enhance the park-like setting of the Chain Bridge Road University Terrace area by regulating alteration or disturbance of terrain, destruction of trees, and ground coverage of permitted buildings and other impervious surfaces, and for providing for widely spaced residences." 11 DCMR § 1565.1.

10. To achieve these objectives, the CBUT imposed more restrictive requirements on development for lot occupancy and impervious surface coverage and established restrictions on the removal, cutting down or fatally damaging of the existing trees.

11. Under the CBUT, the lot occupancy requirement applicable to this project is 35% for lots of 9,000 square feet or more.

12. The CBUT also limits the maximum impervious surface coverage to fifty percent (50%).

13. The CBUT also imposes strict tree removal limitations on development. Specifically, "constructing a building, accessory building, or an addition to a building, creating any impervious surface area, subdividing any unimproved lot, or subdividing any improved lot so as to increase the number of principal structures thereupon, shall only be permitted as a matter of right subject to the following tree removal limitations:

1. No tree that has a circumference of seventy-five inches (75 in.) or more at a height of four and one-half feet (4½ ft.) above ground may be removed, cut down, or fatally damaged ["Prohibited Trees"];
2. No more than three (3) trees that have a circumference of more than thirty-eight inches (38 in.) at a height of four and a half feet (4½ ft.) ["Protected Trees"] above ground may be removed, cut down, or fatally damaged and none of these may be located within twenty-five feet (25 ft.) of any building restriction line or lot line abutting a public street;
3. The total circumference inches of all trees removed or cut down on a lot may not exceed twenty-five percent (25%) of the total circumference inches of all trees on the lot having a circumference greater than twelve inches (12 in.); provided, that

this section does not abrogate the right to remove or cut down up to three (3) trees as provided in paragraph (b) of this subsection; or any tree having a circumference of twelve inches (12 in.) or less at a height of four and one-half feet (4½ ft.) above ground.

11 DCMR § 1568.1.

The Proposed Development

14. The Applicant proposes a theoretical lot development of the Subject Property with thirteen (13) large single-family detached dwellings. Over the lengthy course of these proceedings, the Applicant has made minor revisions to the Plan, but the Plan remains substantially unchanged. The average house size has been reduced an average of 423 square feet or about 5.4 percent.

15. The development plan proposes one house on Lot A to be accessed directly from Chain Bridge Road at the southeast corner of the Subject Property. Another nine (9) house (Lots B, C, D, E, F, G, H, I and 4) will be accessed and arranged around the existing 16-foot driveway with a cul-de-sac proposed for the terminus at the interior of the site. The remaining three (3) lots (Lot 1, 2 and 3) will be accessed by a private driveway from Chain Bridge Road north of the Subject Property and required to cross the adjacent landmark African American School House property.

16. Four (4) of the Lots (A, B, 3 and 4) have frontage on Chain Bridge Road and only Lot A has direct access to and from Chain Bridge Road.

17. The proposed development plan represents the absolute maximum number, size and density of houses that the Subject Property could accommodate under the most favorable site conditions (e.g. a flat, treeless, open site without any abutting neighbors or National Parks in close proximity). These houses will greatly increase impervious surface to around 44% of the property, resulting in new hardscape of over 65,000 square feet and more than 1.5 acres. The houses, generally exceeding, 7000 square feet in size, will be placed on small lots barely above the Overlay minimum of 9500 square feet.

18. The Subject Property is a tree-filled site with steep grades and is not an ideal site for development on a maximum scale.

19. The Applicant has been forced to go to extraordinary lengths in an attempt to make the Subject Property accommodate the maximum level of development proposed. For example, several of the proposed houses would be built into steep slopes and tower over either adjoining houses or Battery Kemble Park. The Applicant also proposes to use the narrow 12' main driveway as the principal means of ingress and egress, even though this driveway is too narrow for two-way traffic and is flanked by a precious allée of American Beech Trees that would be extremely vulnerable to disturbance during the construction process.

20. The Applicant has demonstrated a complete unwillingness to acknowledge the concerns raised by ANC 3D, the Preservation Committee, the Palisades Citizens Association, the Chain Bridge Road Corporation, the neighboring property owners and the many members of community who have voiced opposition to the proposed development before the Board.

Incompatibility with Neighborhood

21. The proposed lot and house sizes represent a drastic departure from the existing density of development on Chain Bridge Road. According to the Committee's review of District tax records, the average size of each single owner site on Chain Bridge Road in the existing neighborhood is 22,778 square feet, approximately half an acre, as compared to the average lot size for the proposed development plan of 9,938 square feet.

22. Similarly, the average house size in the existing neighborhood is substantially *smaller* than the average house size for the proposed development. By the Applicant's own calculation, the proposed mean house size is 19.9% larger than the mean house size in the existing neighborhood. By the Preservation Committee's calculation, the mean house size for the proposed development is twice the size of the mean house size of the existing neighborhood, even including one large (over 14,000 square foot) dwelling recently built over the community's claims of Overlay violations.

23. In general, the houses on the section of Chain Bridge Road between MacArthur Boulevard and applicant's property are spaced far apart; there are 13 houses along the first half of the road or an average of one per 203 feet. Most of the houses are designed to the rear to take advantage of large, hilly and wooded back lots, in contrast to the Applicant's proposed houses, which will leave virtually no green space.

24. The Board finds that the substantially larger houses proposed to be constructed by the Applicant on lots which average approximately half the size of the existing neighborhood are entirely out of character and incompatible with the existing neighborhood and would significantly alter the relationship between houses and the surrounding terrain which is a defining feature of the wooded and rustic Chain Bridge Road environment.

25. Testimony from the Preservation Committee's architect presented alternative development concepts in which fewer homes would be constructed in the plateau areas of the Property, avoiding damage to root systems of trees, locating structures away from steep slopes and Battery Kemble Park and reducing density. Testimony of Allen Neyman, July 18, 2006 Hearing Transcript, Page 293 - 297. As this testimony shows, compatibility with the existing neighborhood and tree preservation can only be achieved by reducing the number of lots to six (6) or seven (7).

26. According to the Preservation Committee's expert residential architect, matter-of-right development of the Subject Property is limited to six or seven lots. The Applicant claims that matter-of-right development would allow nine (9) lots. As a result, the proposed development ranges from 44% to almost 100% greater than permitted as a matter-of-right.

Tree Preservation and CBUT Overlay Compliance

27. Tree preservation is one of the central issues of this case and a defining characteristic of the Subject Property and the existing neighborhood. Tree preservation is important not only for compliance with the CBUT Overlay, which the Applicant is required to observe, but also for maintaining the unique character of the neighborhood and preventing adverse impacts to the residents and community.

28. The Applicant's plans call for intentional removal of at least 39 of the 145 trees on the Subject Property over 12 inches in circumference. Of these, at least 20 are over 38 inches in circumference. As described below, several of these trees will be removed in violation of the Overlay.

29. In addition, the maximized development proposed by the Applicant is an immediate and direct threat to the health, welfare and survivability of the existing Prohibited Trees and Protected Trees populations and in particular, the allée of American Beech trees flanking the main entrance driveway. The probable destruction of these trees due to damage to their root systems during and after construction represents a separate and additional violation of the Overlay.

Removal of Trees in Violation of the Overlay

30. The Applicant proposes to remove nine (9) Prohibited Trees, including at least five (5) trees with a Health Rating of Fifty Percent (50%) or greater in order to facilitate the proposed development, including:

- a. Tree No. 3 (110 inch Pin Oak) with a Health Rating of 60% (located in a steeply graded area between the proposed houses on Lots H and I).
- b. Tree No. 12 (124 inch Poplar) with a Health Rating of 70% (located between the footprint of the proposed house on 4 and proposed retaining wall).
- c. Tree No. 20 (126 inch Black Cherry) with a Health Rating of 50% (located in close proximity to the proposed house on Lot 2).
- d. Tree No. 38 (89 inch Sycamore) with a Health Rating of 60% (located in close proximity to the proposed House on Lot A).
- e. Tree No. 60 (83 inch American Holly) with a Health Rating of 50% (located in close proximity to the footprint of the proposed House on Lot E and the driveway for Lot F).

Applicant's "All Trees" Survey dated June 30, 2006, Exhibit ____.

These Health Ratings were reported by the Applicant's original tree expert, Mr. Lew Bloch, who concluded that a 50% rated tree "may be retained if there is no new construction close by the tree." Applicant's April 12, 2005 Pre-hearing Statement at Exhibit C. Exhibit ____.

31. The Applicant also proposes to remove a sixth Prohibited Tree, Tree No. 30 (114 inch Red Maple) with a Health Rating of 45% which is located within the proposed footprint of Lot F.

32. The Applicant has not provided the required certification from an ISA-certified arborist establishing that the Prohibited Trees to be removed are unhealthy or hazardous. 11 DCMR 1568.2. These Prohibited Trees are being removed because they are in the way of the Applicant's ambitious development plan, and their removal is in violation of the Overlay.

33. During cross-examination, Applicant's architect, Mr. Andrullis, conceded that, given the health ratings assigned by Applicant's initial arborist, removal of these Prohibited Trees would not be in compliance with the Overlay. October 31, 2006 Hearing Transcript, Page 184.

34. The Applicant also proposes to remove at least nine (9) Protected Trees between 38 inches and 75" inches in circumference even though the Overlay provides that only three trees in this class may be removed when "subdividing any unimproved lot." Applicant originally sought to circumvent this limitation based on an allocation of these trees among each of the four (4) "lots" (Lot 827 and Parcels 12/63, 12/293 and 12/294) that are claimed to currently exist on the Subject Property, on the basis that no more than three trees would be removed from any individual lot.

35. The Applicant has incorrectly and misleadingly asserted that the Protected Trees to be removed are allocated equally among the four (4) "lots." In fact, no Protected Trees to be removed are located on Lot 827, no Protected Trees are located on Parcel 12/63, two Protected Trees are located on Parcel 12/293, and seven Protected Trees are located on Parcel 12/294. On its face, this violates the tree removal restrictions under the CBUT Overlay.

36. Moreover, as described above, the Subject Property is in fact now comprised not of the four (4) claimed lots but of only two (2) lots, Lots 822 and 827, as shown on the Applicant's initial and subsequent filings. No Protected Trees will be removed from Lot 827 and a minimum of nine (9) Protected Trees will be removed from Lot 822 in direct violation of the CBUT Overlay.

37. There is no reasonable basis for allocating the Protected Trees among the thirteen (13) theoretical lots Applicant proposes to create by its subdivision, as Applicant's counsel belatedly argued on October 31, 2006, because the Overlay's restrictions apply on their face to the underlying "unimproved lot" before subdivision and the Applicant's eleventh-hour interpretation would subvert and undermine the purposes of the Overlay.

Destruction of Additional Trees During and After the Construction Process

38. The substantial footprints of the thirteen (13) proposed houses, the grading and construction activities required, installation of utilities, storm water management facilities and roadways, individually and cumulatively, will negatively impact the critical root zones of the existing and Protected Trees in a profound and injurious way.

39. The Applicant has proposed several methods for bridging over the critical root systems threatened by the proposed development. Even assuming that these extraordinary measures could prevent direct damages to the tree roots, the bridging will block water from reaching the tree roots, which will also be severely injurious to the trees. July 18, 2006 Transcript, Page 290.

40. The Applicant, over the last three years has taken no preventative measures to enhance the health of the existing and Protected Trees and increase the ability of those trees to withstand the proposed development.

41. The Urban Forestry Administration has provided a detailed analysis of the Applicant's development plan and proposed tree preservation measures. The Urban Forestry Administration

concluded, and the Board concurs, that the development plan is "fundamentally flawed," has not demonstrated a reasonable ability to protect the existing trees and will fatally damage a substantial number of Protected Trees, including the one-of-a-kind allée of American Beech trees, and will violate the letter and spirit of the CBUT Overlay tree protection provisions. The Urban Forestry Administration strongly recommended that this Application be denied.

42. On cross-examination by Applicant's counsel, the Urban Forestry Administration repeated its longstanding objection to the maximum scale of the proposed development: "[t]he current formulation of houses on the site are in excess of what the trees would tolerate." October 31, 2006 Transcript, Page 96.

43. The Urban Forestry Administration concluded that the Applicant's tree preservation plan is "fundamentally flawed" and "relies on the implementation of several seemingly far-fetched techniques" for which the Applicant doesn't "demonstrate a level of experience in many of the techniques that they have proposed that lend credibility to the proposal." October 31, 2006 Hearing Transcript, Pages 57 – 58.

44. The Preservation Committee's ISA-certified Arborist, Mr. Milhous, with experience in creating more than 500 tree preservation plans, testified that the Applicant's proposal has "so many conflicts and such an unrealistic presentation that, in my opinion, the vast majority of these trees are going to be gone within a few years of completion." July 18, 2006 Hearing Transcript, Page 292.

45. The likelihood that several Protected and Prohibited Trees would not survive as a result of damage from construction is a separate violation of the Overlay, which protects not only against deliberate removal of Protected and Prohibited Trees but against construction practices and techniques which will have the expected consequence of destroying such Trees.

Storm Water Management

46. Given the 44% (approximately 65,000 square feet, 1.5 acres) impervious lot coverage proposed by the Applicant, the large roofs of the thirteen (13) houses, and the steep topography of the Subject Property, the proposed development requires the construction of an extensive storm water management system.

47. The Applicant has conducted no geotechnical testing and provided no evidence to establish that proposed system can be installed as proposed in compliance with applicable requirements. In fact, undisputed testimony in the record indicates a substantial presence of fill dirt on the Subject Property which would not allow the the proposed storm water management system to function effectively.

48. The Preservation Committee's expert witness, Ms. Sears, testified that the proposed storm water plan "has various conflicts and areas of concern with regards to grading, storm water management construction, maintenance, erosion and sediment control and design capacity." July 18, 2006 Hearing Transcript, Page 275. The Applicant did not provide sufficient calculations to determine whether the storm water retention and discharge facilities are sufficient to handle the storm water on the subject property. July 18, 2006 Hearing Transcript, Pages 282 – 286.

49. Because the effectiveness of the proposed storm water management system has not been demonstrated, Applicant has not provided assurance that storm water runoff will not overflow the boundaries of his property and damage abutting properties.

50. The Applicant's plan provides that runoff would be collected at the southern edge of the property and then discharged through an existing 18 inch terra cotta pipe owned by neighboring landowners. September 19, 2006 Hearing Transcript, Pages 225 – 226. In the terra cotta pipes it would travel underground for a short distance and empty into a stream bed which passes through several downstream properties before crossing MacArthur Boulevard and flowing ultimately into the Potomac River. As several residents emphasized in their submissions to the Board, there is already a history of flooding from discharges from Applicant's property and erosion of the banks of the stream. Testimony of Richard Richter, July 18, 2006 Hearing Transcript, pages 212 – 213; Testimony of William Barnard, July 18, 2006 Transcript, Pages 215 – 217. The National Park Service likewise expressed concerns about the use of the terra cotta pipe and downstream impact on the environment from storm water discharges.

51. The Applicant has not made any provision for obtaining permission or required covenants from owners of the terra cotta pipe or the stream bed to which it empties. Such authorization is required before Applicant can discharge storm water onto affected neighboring properties.

52. In addition to Applicant's failure to establish the effectiveness of the proposed storm water management system in protecting neighboring properties from runoff damage, the extensive grading and excavating required for the installation of that system on the existing topography will threaten the survival of Protected Trees. July 18, 2006 Hearing Transcript, Pages 286 (Ms. Sears), Page 290 (Mr. Milhous).

53. As emphasized in the testimony of the Urban Forestry Administration, Ms. Sears and Mr. Milhous, the Applicant has resorted to extraordinary, untested, and impractical construction methods, including commercial-type sheeting and shoring, large-scale directional drilling, and the vertical and horizontal stacking of utility lines in order maximize development and attempt to save the Protected Trees. The conceptual storm water management plan is not integrated with, and at odds with the grading plan, location of the proposed houses, and tree preservation restrictions. The capacity and constructability of the system is unknown. July 18, 2006 Transcript, Page 277 – 286.

54. The Board finds that these construction methods are not credible in the context of a residential development and do not offer an enforceable or reasonable likelihood of success in preserving the Protected Trees and compliance with the CBUT Overlay.

55. The Applicant has not offered a credible plan for vertically and/or horizontally stacking the utilities below the existing main driveway from Chain Bridge Road. From the evidence presented, and expert testimony, the horizontal and vertical stacking of utilities does not comply with WASA requirements. In order to comply with WASA requirements, the Applicant will be forced to locate the utilities beyond the limits of the existing driveway, which would create a direct and potentially fatal impact on the critical root zones of the Beech trees. October 31, 2006 Hearing Transcript, Pages 254 – 255.

Traffic Safety

56. The volume of traffic created by the proposed development is not substantial, but will create new traffic hazards which pose a substantial and unwarranted risk to the residents of the property, the neighbors on Chain Bridge Road, visitors to Battery Kemble Park and the general public.

57. Chain Bridge Road is a narrow, winding road with limited visibility and a substantial number of speeding vehicles.

58. The main entrance to the proposed development on Chain Bridge Road which will serve nine (9) of the thirteen (13) houses is located at a narrow, blind curve in the road. Visibility from the entrance north on Chain Bridge Road is severely restricted and creates a dangerous condition.

59. The Applicant has proposed installing concave mirrors at the blind curve to increase visibility and safety.

60. Officer McElwee of the Metropolitan Police, who is the traffic patrol officer for this area, testified that this blind curve is a dangerous condition and that the installation of the proposed mirrors will not provide an adequate safety measure for the entrance at this location. "Quite honestly, you couldn't find a worse location along that stretch of road, because of the bend, to have a driveway there placed in. And the utilization of mirrors is not going to be a resolution to the problem." July 18, 2006 Hearing Transcript, page 215.

61. The Preservation Committee's traffic expert, Stephen Peterson, also noted the safety hazards created by the blind curve and recommended that mirrors are "not an appropriate measure to alleviate" limited sight distance and the Applicant must propose methods for improving sight distance to 200 – 250 feet from the current 30 feet. July 25, 2005 Report, Exhibit ____.

62. The existing main driveway is approximately 12 feet in width and does not allow two-way circulation. The Applicant has proposed to install laybys to facilitate vehicles traveling both ways. Given the crest of the existing driveway and its length, visibility is restricted between vehicles traveling in either direction on the driveway which will cause conflicts and unsafe conditions between oncoming vehicles. July 18, 2006 Hearing Transcript, Pages 301 – 304.

Impacts on Battery Kemble Park

63. The National Park Service representative, Mr. David Murphy, testified expressing concerns about the close proximity and extreme elevation of the four (4) houses fronting on Chain Bridge Road in relation to and overwhelming Battery Kemble Park on the opposite side of the narrow street. Mr. Murphy also raised concerns about the proposed "conceptual" storm water management plan on the immediately adjacent parkland and parkland downstream with the creation of additional flows or lower quality of water. July 18, 2006 Hearing Transcript, Pages 234 – 235.

Lack of Credible Implementation Commitments

64. The Applicant has offered no proposed conditions but has instead promised that the project would be constructed exactly as shown, including "grading and everything." April 11, 2006 Hearing Transcript, Pages 239 – 240. Nonetheless, Applicant has proposed no specific procedure for assuring that specific actions are taken to protect trees during construction. October 31, 2006 Hearing Transcript, Page 68.

65. Moreover, Applicant's experts testified that his storm water management and tree preservation plans would require considerable adjustment on a trial-and-error basis during the construction process but Applicant has proposed no mechanism to assure that these adjustments will not be damaging to Protected Trees or neighboring properties.

66. Applicant has also indicated that the success of landscaping, tree preservation and storm water management is greatly dependent on the actions of homeowners themselves but has provided no detail on how the homeowner association will be constituted to meet these responsibilities.

67. Nor has Applicant provided a construction management plan to demonstrate that construction will not damage historic Battery Kemble Park and Chain Bridge Road.

CONCLUSION OF LAW AND OPINION

The Board is authorized under the Zoning Act of June 20, 1938 (52 Stat. 797, as amended, D.C. Code § 6-641.07(g)(2) (2001)), to grant special exceptions as provided in the Zoning Regulations. The Applicant applied under 11 DCMR § 3104.1 for a special exception pursuant to 11 DCMR § 2516 to allow the construction of thirteen (13) single-family dwellings on a single subdivided lot. The notice requirements of 11 DCMR § 3113 for the public hearing on the application have been met.

To meet its burden of proof under Subsection 3104.1, the Applicant must demonstrate that the proposed development is in harmony with the general purpose and intent of the Zoning Regulations and Maps, that it will not adversely affect the use of the neighboring property in accordance with the Zoning Regulations and Maps, and that it meets the special conditions listed Subsection 2516 for theoretical lots. Further, under Subsection 2516.9, "The proposed development shall comply with the substantive provisions of this Title and shall not have an adverse effect on the present character and future development of the neighborhood."

Further, the Board is required under D.C. Code § 1-309.10(d) (2001) to give "great weight" to the affected ANC's recommendation. The Board must "articulate why the particular ANC itself, given its vantage point, does – or does not – offer persuasive advice under the circumstances." *Kopff v. District of Columbia Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1384 (D.C. 1977). The Board has carefully considered the ANC's reports and testimony and as discussed below finds the ANC's recommendations persuasive.

The Applicant has not satisfied its burden of proof. Based upon the findings of fact and having carefully considered the ANC's recommendations, the Board concludes that the proposed development does not meet the requirements of the Zoning Regulations. Specifically, the Board

finds that the proposed development is not in compliance with the substantive provisions of the CBUT Overlay in the Zoning Regulations, will adversely effect the present character of the neighborhood, will adversely impact the use of the adjacent and nearby properties, and is not in harmony with general purpose and intent of the Zoning Regulations and Maps.

Compliance with 11 DCMR § 2516.9. The Board concludes that the Applicant has not satisfied the specific requirements of § 2516.9.

First, it is clear from all the evidence, including the Applicant's own Application, submissions and testimony, that the proposed development is in violation of the tree removal limitations under the CBUT Overlay in which the Subject Property is located. The Applicant is removing at least five (5) Prohibited Trees with a circumference of 75 inches or greater without properly establishing that the Prohibited Trees are dead, unhealthy or hazardous as required under 11 DCMR 1568.2. Moreover, looking beyond the Applicant's attempts, even during closing argument, to obfuscate this issue, it is undisputed that the Applicant's development proposal will, at a minimum, voluntarily remove at least nine (9) Protected Trees with a circumference of more than 38 inches (but less than 75 inches). Under the CBUT Overlay, § 1568.1, the Applicant can only remove three (3) Protected Trees in "subdividing an unimproved lot . . . so as to increase the number of principal structures thereupon." The Applicant has offered several different interpretations of the applicability of the Protected Tree removal restrictions under Section 1568.1. The Board finds that these novel interpretations are not supported by the clear language in Section 1568.1 and would undermine the purpose and effectiveness of the restrictions. In this case, the Subject Property is a single unimproved lot which the Applicant proposes to subdivide into thirteen theoretical lots for purposes of increasing the number of principal structures from none on the underlying and existing vacant lot to thirteen houses. The tree removal limitations are imposed on the original or underlying lot that is being subdivided, not the lots to be created.

Accordingly, the Board concludes that the CBUT Overlay is violated by:

1. Removal of nine (9) Protected Trees from the "single subdivided lot" proposed by the Applicant upon which the thirteen (13) houses are to be constructed;
2. Removal of nine (9) Protected Trees from Lot 822; and/or
3. Removal of seven (7) Protected Trees from Parcel 12/294.

Further, the Board finds no legal or factual support for the Applicant's last minute assertion during closing arguments that the CBUT Overlay permits the removal of a total of thirty-nine (39) Protected Trees: three (3) Protected Trees for each of the thirteen theoretical lots proposed.

Finally, while the Board finds a violation of the CBUT Overlay tree removal limitations based on: a) the five (5) Prohibited Trees; and b) the nine (9) Protected Trees that the Applicant acknowledges will be removed, the Board also finds that the number of Protected Trees that will be removed or fatally damaged by the proposed development will be a substantially greater number and that the likely destruction of these trees represents a separate and additional violation of the Overlay.

Second, the Board concludes that the Applicant's proposed subdivision type development will have a profound and adverse impact on the present character and future development of the neighborhood for the following reasons:

1. The Subject Property and the Chain Bridge Road neighborhood are part of a unique wooded and low-density rustic enclave in the midst of an urban environment;
2. The substantial removal and fatally damaging of Protected Trees, especially the one-of-a-kind allée of American Beech trees, that will occur will dramatically and permanently alter the landscape and character of the neighborhood;
3. The number, size, density and impervious surface coverage of the proposed development is totally at odds with the character of the existing neighborhood. The Chain Bridge Road area is comprised of large, sloping, heavily wooded lots with substantially smaller houses than proposed by the Applicant on lots which are on average at least half the size of the lots in the area. Based on the existing average lot size in the neighborhood, six or seven lots with smaller houses would be more in keeping with the character of the neighborhood;
4. The Applicant's four (4) houses (A, B, 3 and 4) fronting on and towering over Chain Bridge Road will overwhelm and overshadow Batter Kemble Park immediately across the street and will visually impose on the existing character of Chain Bridge Road;
5. The Applicant's four (4) houses (A, D, E and F) on the south side of the Subject Property are too close to and will loom over the immediately adjacent homes, including the home owned by Mr. Djabbarzadeh; and

General Requirements for Special Exceptions (11 DCMR § 3104.1). Subsection 3104.1 requires first that the proposed development be in harmony with the Zoning Regulations and Map. The Subject Property is located in the R-1-A/CBUT zone district. Beyond the Applicant's failure to comply with the tree removal restrictions of the CBUT Overlay, the proposed development is wholly at odds with CBUT regulations and its place on the Zoning Map "to preserve and enhance the park-like setting of the Chan Bridge Road University Terrace area by regulating alteration or disturbance of terrain, destruction of trees, and ground coverage of permitted buildings and other impervious surfaces, and for providing for widely spaced residences." 11 DCMR § 1565.1.

Finally, the Board concludes that the Applicant's proposed development will adversely affect the use of neighboring properties. In addition to Board's conclusions detailed above, the Board also concludes that the proposed development would result in the creation of a traffic safety hazard at the main entrance to site at the blind curve which can not be properly mitigated by the proposed traffic mirrors and could be eliminated by improved site planning. Further, the narrowness of the main driveway, its length and limited sight-line is likely to create hazards for the residents and visitors. Finally, the proposed development is likely to create the flow of storm water off the site adversely affecting the immediate neighbors as well as others further

downstream and the general environment. These impacts would adversely affect the use of the neighboring property and require denial of the application.

For the reasons stated above, the Board concludes that the applicant has not met its burden of proof. It is hereby **ORDERED** that the application is **DENIED**.

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring Board member approved the issuance of this Decision and Order.

ATTESTED BY: _____

FINAL DATE OF ORDER: _____

UNDER 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBSECTION 3125.6 OF THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES.