District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D.C. 20001

GARLAND F. PINKSTON
CLERK OF COURT

Telephone: 879-2700
Area Code 202

September 10, 2007

07-AA-998 Dorchester Associates, LLC vs. D.C. Board of Zoning Adjustment

District of Columbia Zoning Adjustment
Jerrily Kress, Director
441 4th Street, N.W.
Suite 210S
Washington, D.C. 20001

Dear Sir/Madam:

Pursuant to the rules of this Court I am transmitting, herewith, a copy of the petition for review filed September 7, 2007, in the above-entitled case.

Yours very truly,

Garland F. Pinkston
Clerk of Court

By: Ruth Garrett
Information Center Supervisor

cc: Todd Kim, Esq./Edward Schwab, Esq.

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17309
EXHIBIT NO. 178

Board of Zoning Adjustment
District of Columbia
CASE NO. 17309
EXHIBIT NO. 178

DISTRICT OF COLUMBIA COURT OF APPEALS
PETITION FOR REVIEW

APPEAL NO. 07-AA-998

DORCHESTER ASSOCIATES, LLC

Petitioner

v.

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
Respondent

BZA Application No. 17309

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DISTRICT OF COLUMBIA
COURT OF APPEALS

PETITION FOR REVIEW

The undersigned, Jordan & Keys, LLP, counsel for Dorchester Associates, LLC, seeks review by the District of Columbia Court of Appeals of the Decision and Order of the District of Columbia Board of Zoning Adjustment in Application No. 17309 entered on the 7th day of August, 2007, out of the presence of the parties and served by first class mail, a copy of which is attached hereto as Exhibit A.

The names, addresses and telephone numbers of all other parties and their counsel who appeared in the agency proceeding are listed below:

Chain Bridge Road/University Terrace Preservation Committee
c/o John Patrick Brown, Esq.
Greenstein, DeLorme & Luchs, P.C.
1620 L Street, N.W. - Suite 900
Washington, D.C. 20036-5605

Chain Bridge Road Citizens for Responsible Growth
c/o Mark Brodsky, Esq.
1746 N Street, N.W.
Washington, D.C. 20036

Rudi E. Djabbarzadeh
2740 Chain Bridge Road, N.W.
Washington, D.C. 20016-3404

Chairperson, Advisory Neighborhood Commission 3D
P.O. Box 40846 Palisades Station
Washington, D.C. 20016

Lewis Mulitz
2895 University Terrace, N.W.
Washington, D.C. 20016-3474

Single Member District Commissioner 3D05
Advisory Neighborhood Commission 3D
P.O. Box 40846 Palisades Station
Washington, D.C. 20016

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(202) 483-8300 (tel.)
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Attachment: Exhibit A

Certificate of Service

It is hereby certified that a copy of the foregoing Petition for Review of Dorchester Associates, LLC on the decision and order of the Board of Zoning Adjustment in Application No. 17309 has been sent by first class, postage prepaid, on the 7th day of September, 2007 to:

Chain Bridge Road/University Terrace Preservation Committee
c/o John Patrick Brown, Esq.
Greenstein, DeLorme & Luchs, P.C.
1620 L Street, N.W. - Suite 900
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P.O. Box 40846 Palisades Station
Washington, D.C. 20016

George R. Keys, Jr.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 17309 of Dorchester Associates, LLC, pursuant to 11 DCMR 3104.1, for a special exception under § 2516 of the Zoning Regulations to allow the construction of a theoretical lot subdivision for thirteen detached one-family dwellings, including a modification of the requirement for twenty-five foot wide roadways under § 2516 (d), in the CB/UT/R-1-A zone 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, October 31, 2006

DECISION DATE: January 9, 2007

DECISION AND ORDER

On or about February 18, 2005, Dorchester Associates, LLC (Dorchester or the applicant), filed an application with the Board of Zoning Adjustment (Board) pursuant to 11 DCMR § 3104.1, for a special exception to permit the construction of 13 detached one-family homes on a single subdivided lot. Following several days of public hearing, the Board voted to deny the application at a decision meeting held on January 9, 2007.

PRELIMINARY MATTERS

Applicant The Applicant was initially represented by Norman Glasgow, Jr., Holland & Knight, LLP. (See, Exhibit 2, Authorization pursuant to § 3106.1 of the Zoning Regulations). Holland & Knight withdrew as counsel, and Jordan & Keys, George Keys, Esq., noted its appearance on or about September 19, 2006 (Exhibit 157).

Self-Certification The zoning relief requested in this case was self-certified pursuant to 11 DCMR § 3113.2 (Exhibit 3).

Notice of Public Hearing Pursuant to 11 DCMR 3113.3, notice of the hearing was sent to the Applicant, all entities owning property with 200 feet of the applicant's site, the Advisory Neighborhood Commission (ANC) 3D, and the Office of Planning (OP). The Applicant posted placards at the property regarding the application and public hearing and submitted an affidavit to the Board to this effect.

ANC The subject site is located within the area served by Advisory Neighborhood Commission 3D (the ANC), which is automatically a party to this application. The ANC filed a report indicating that at a public meeting on April 6, 2005, with a quorum present, the ANC voted to

oppose the application (Exhibit 52). The Applicant filed additional submissions during the course of the proceedings, and the ANC filed a second report in which it re-affirmed its opposition to the project (Exhibit 82). Alma Gates, the ANC's representative, testified during the proceedings, and also submitted her testimony in writing.

Requests for Party Status

At the public hearing on April 26, 2005, the Board considered requests for party status from the Chain Bridge Road/University Terrace Preservation Committee (Exhibit 48), Rudy Djabbarazadeh (Exhibit 49), Arthur Watson (Exhibit 45), and Richard England (Exhibit 43), each in opposition to the application. The Board also considered a request from the Chain Bridge Road Citizens for Responsible Growth/Lewis Mulitz, who sought party status as a proponent of the application (Exhibit 47).

Chain Bridge Road/University Terrace Preservation Committee (the Committee or the Opposition) The 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, and was represented by Greenstein DeLorme & Luchs, PC, John Patrick Brown, Jr., Esq. The Committee's request for party status was granted, with no objection from the Applicant.

Rudy Djabbarazadeh Mr. Djabbarzadeh owns nearby property at 2730, 2738, and 2740 Chain Bridge Road, NW and was also represented by Mr. Brown. Mr. Djabbarzadeh agreed to join with the Committee in his case presentation.

Arthur Watson and Richard England Mr. Watson resides at 2828 Chain Bridge Road, NW, and Mr. England resides at 2832 Chain Bridge Road, NW. The Board denied their individual applications, but allowed them to participate in the proceedings through the Committee.

Eric Hovde Mr. Hovde resides at 2911 University Terrace, NW. However, Mr. Hovde did not appear at the first day of public hearing on April 26, 2005, and his request for party status was denied.

Chain Bridge Road Citizens for Responsible Growth/Lewis Mulitz (Citizens for Responsible Growth) The Citizens for Responsible Growth comprises a group of property owners in the area, and was represented by Mark Brodsky, Esq. Mr. Brodsky indicated that he would call witnesses during the proceedings, including Lewis Mulitz. Mr. Mulitz is the owner and occupant of 2895 University Terrace, NW. The Citizens for Responsible Growth was granted party status as a proponent of the application.

Other Persons/Entities in Opposition/Support

The Board received numerous submissions in opposition, including several letters from area residents, letters from the Palisades Citizens Association, a letter from the Chain Bridge Road Corporation, and a "petition" in opposition from the Chain Bridge Road Corporation. The Board also received a letter in support from Bernard Gewirz, a resident of the 2600 block of Chain Bridge Road, NW. In addition, the Board heard testimony in opposition from several area residents; for example: Richard England (2832 Chain Bridge Road), Michael Edwards (2822

University Terrace) and Andrea Mitchell (2710 Chain Bridge Road). There was no testimony from residents who were in support of the project.

Government Report Submissions

Office of Planning (OP) Report

OP filed an initial report dated April 19, 2005, stating that it was unable to make a recommendation without review and comments from the Department of Transportation (DDOT), the Department of Health (DOH) and the National Park Service (NPS) (Exhibit 54). In its report, OP expressed concern regarding the viability of trees that were "close to construction areas". In a supplemental report dated January 3, 2006, OP expressed "general" support for the application (Exhibit 79). However, OP stated that its support for the project was subject to several conditions, including a reduction in the number of homes from 13 to 12.[1] In particular, OP noted that the dwelling proposed on Lot F would be sited too close to the adjacent property. OP's representative, Maxine Brown Roberts, testified at the public hearing and explained that most of the special exception requirements would be met by the proposal. However, Ms. Roberts also explained that she had specific concerns regarding the dwellings proposed at Lot F and Lot 3. In particular, she stated that the dwelling proposed at Lot F, which would be only 11 feet from the neighboring residence, would be too close to the existing neighbor. In addition, she stated that the home proposed at Lot 3 would give the appearance of "towering" over Chain Bridge Road.

Department of Transportation

The Department of Transportation (DDOT) reviewed the traffic study prepared by the Applicant and submitted an initial report and supplemental report (Exhibits 55 and 68). DDOT concluded that the proposed project would have a minor impact in terms of capacity and level of service on the adjacent street system (Exhibit 55). Because the internal roadway servicing nine lots would accommodate only one-way traffic, DDOT first suggested widening it from 16 feet to 20 feet (Exhibit 55). DDOT later commented that a 16 foot roadway would suffice, so long as the Applicant provided two shoulder areas to allow cars to wait while other cars passed in the opposite direction (Exhibit 68).

Urban Forestry Administration (UFA)

The District's UFA, within DDOT, also reported to OP and/or the Board, through written reports and testimony on two separate hearing dates. Earl Eustler, a certified arborist, presented the UFA's position, and was cross-examined by the Applicant's attorney. The UFA reviewed the tree inventory that was submitted by the Applicant that assessed the condition of trees having a circumference of more than 38 inches (See, Exhibit 54, Attachment 4). Through its report to OP, the UFA accepted the Applicant's tree assessment, noting that the assessment had been prepared by a certified arborist (Exhibit 54, Attachment 5). However, the UFA maintained throughout the proceedings that the Applicant's tree and slope protection plan was inadequate. Early in the proceedings, the UFA stated that more details were required from the Applicant (Exhibit 54, p. 3). Once details were provided, the UFA concluded that the trees were at risk, stating, among

[1] At the time report was prepared, OP also requested additional information regarding tree remediation and soil and sediment control. This information was provided during the public hearing.

other things that: the proposed stormwater drains posed a threat to the tree roots, and the proposed entranceway posed a threat to the Beech trees (See, Exhibit 140, Supplemental OP report dated July 21, 2006, transmitting UFA report, and Exhibit 168). Mr. Eustler also claimed that the tree protection plan violated the Overlay provision prohibiting the removal of more than three trees on a single lot (*See*, § 1568.1(b).)

The Fire and Emergency Medical Services Department (Fire and EMS)
After reviewing the site plans and conducting an on-site visit, the Acting Fire Marshal informed OP that the fire hydrants were too far from the proposed development (Exhibit 54, Attachment 7).

Department of Health (DOH) (Watershed Protection Division)
Through its report to OP, DOH noted that the proposed stormwater management plan would meet the District's requirements. DOH noted that there is no existing storm sewer system at Chain Bridge Road. Consequently, it is imperative that a "comprehensive on-site storm water management system" be put in place to control anticipated additional runoff from the proposed development in order to prevent "adverse impact[s] [to] the receiving creek" (Exhibit 79, Attachment 1). DOH also noted that infiltration/exfiltration systems should be placed away from slopes, and that post development peak discharge should not exceed the two-year pre-development discharge. At the time of OP's supplemental report, DOH had not received erosion and sediment control plans; therefore, DOH did not provide comments regarding the impact with respect to erosion and/or sediment control.

National Park Service (NPS)
David Murphy, of the NPS, testified at the public hearing on July 18, 2006. He expressed concerns about the "massive, billboard presentation" of the proposed homes and potential adverse impacts on Battery Kemble Park. He also noted the risk of adverse impact on the Park and neighboring streams if the stormwater management system were not carefully maintained (T., p. 234-237).

The Applicant's Case
The Applicant filed numerous submissions, including the initial application with plans, a pre-hearing statement, a revised pre-hearing statement and supplement, a tree inventory report prepared by a consulting arborist, landscaping plans, a tree and slope protection plan (including revisions and supplemental materials), stormwater management plans, and a traffic measurement report.

Morton Bender, managing partner of Dorchester Associates, testified for the Applicant, as well as several expert witnesses: Stan Andrulis, Project Architect; Steven Sher, Land Use Planning and Zoning; Osborne George, Transportation Engineer; James Afful, Civil Engineer and Stormwater Management; Howard Rosenberg, Structural Engineer; and Thomas Bonifant, Tree Care Expert.

The Opposition's Case
The Opposition filed numerous submissions, including Pre-Hearing Statements and supplements, reports prepared by a certified arborist and a traffic consultant, photographs, charts reflecting density comparisons, and an overview of the proposed tree removal. The Opposition also presented testimony from several expert witnesses: Mary Sears, Greenehorne & O'Mara, expert in Civil Engineering and Stormwater Management; Edward Milhous, Certified Arborist; Allen Neymann, Architect licensed in District of Columbia, Maryland and Virginia; and Stephen Peterson, Traffic Engineer.

The Proceedings
The Board held public hearings on seven dates over a course of more than 18 months, including:

April 25, 2005 – After establishing the parties to the proceeding, the Board continued the hearing until July 19, 2005 at the Applicant's request. The Applicant stated that it wanted more time to meet with members of the community regarding their concerns (Exhibit 59), and the Opposition did not object to the request (Exhibit 63).

July 19, 2005 – The Board again continued the hearing until January 10, 2006 at the Applicant's request (Exhibit 69) over the Opposition's objection (Exhibit 71).

January 10, 2006 – The Board continued the hearing until April 11, 2006, at the request of the Opposition (Exhibit 80).

April 11, 2006 – The Applicant completed its case presentation. At the conclusion of the proceedings, the Board asked the Applicant to submit an updated landscaping plan and stormwater management plan, and also submit grading plans.

July 18, 2006 – The Applicant presented its updated plans that had been submitted, and reports were given by Maxine Brown Roberts, the Office of Planning (OP), Earl Eustler, the Urban Forestry Administration (UFA). Afterwards, the Opposition completed its case presentation, and all parties were allowed to cross-examine the witnesses. Due to the lateness of the hour, the case was continued to September 19, 2006, to allow for rebuttal by the Applicant, and closing statements by all parties. The record was left open to allow the applicant to submit a list of rebuttal witnesses by September 8, 2006.

September 19, 2006 – The Applicant filed a binder with documents and presented rebuttal testimony over the objection of the Opposition. The Opposition contended that it was disadvantaged because it only received the binder on the hearing date. The Applicant contended that the testimony and evidence addressed points made by the Opposition at the last hearing. The Board allowed the Applicant's rebuttal presentation, but also continued the case to October 31, 2006, so that the Opposition could review the submissions and testimony. The Board also stated that it would entertain a Motion to Strike by the Opposition.

October 31, 2006 – Prior to the hearing, the UFA submitted a supplemental report (Exhibit 168). In addition, the Opposition filed a Motion to Strike, claiming that the Applicant's filings and presentations exceeded the scope of rebuttal (Exhibit 167), and the Applicant filed a Response to the Motion (Exhibit 169). At the hearing, the Board considered the filings and heard argument by the parties. After fully exploring the issues, the Board denied the Motion to Strike, but allowed cross-examination of the rebuttal witnesses. The Opposition conducted

cross-examination. The Board also admitted the UFA report, questioned Mr. Eustler regarding the report, and allowed Applicant to cross-examine Mr. Eustler. In addition, the Opposition's witnesses were allowed to respond, and the Applicant was allowed to cross-examine them following a short break during the proceedings. At the conclusion of the hearing, the Board closed the record, except to allow proposed Findings of Fact and Conclusions of Law by December 19, 2006.

Post-Hearing Submissions

Both the Applicant and the Opposition filed proposed Findings of Fact and Conclusions of Law (Exhibits 173 and 174).

FINDINGS OF FACT

The Property

1. The subject property is located along Chain Bridge Road, NW, and is currently undeveloped. A small portion of the site was formerly developed with a one-family detached home that was demolished a few years ago.

2. The site is approximately 3.28 acres in size, with approximately 574 feet of frontage on Chain Bridge Road, a narrow, winding, wooded country lane which dates back to Colonial times. The upper portion is flat but fairly steep around the eastern and southern perimeter, and slopes down towards the lower portion of the site. The lower portion of the site is very steep and slopes towards adjacent properties.

3. The underlying zone district on the property is R-1-A, a zone which permits one-family detached residential dwellings. However, the site is also governed by the Chain Bridge/University Terrace Overlay District (CBUT Overlay). The Overlay was created in 1999 by Zoning Commission Order No. 863 "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 by providing for widely spaced residences". *See*, 11 DCMR §§ 1565 through1569 (the Overlay provisions).

4. The Overlay provisions establish a maximum lot occupancy limitation of 30% for lots of 9,000 square feet or more. *See*, § 1567.1

5. The Overlay provisions limit maximum impervious surface coverage to 50% of a lot. *See*, 1567.2

The Neighborhood

6. The neighborhood surrounding the property consists of predominantly one-family detached homes along Chain Bridge Road. Chain Bridge Road between MacArthur Boulevard and Loughboro Road is a heavily wooded area with a sloping topography occupied by one-family detached dwellings. The dwellings range in size from 1,776 square feet to more than 14,000 square feet at the north end of Chain Bridge Road.

7. To the east of the site is Battery Kimble Park, a 57 acre park maintained by the National Park Service.

8. To the north of the site is the Chain Bridge Road School, a designated historic building that is now used as a residence. The School is served by an existing driveway that runs from Chain Bridge Road, around and in front of the building.

9. Access to the site 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 alee of mature, specimen-quality American Beech trees which are sensitive and uniquely vulnerable to disturbance.

The Proposed Project

The Lots

10. The applicant proposes to subdivide the property into 13 record lots, Lots 1through 4 and Lots A through I (Exhibit 54, Attachments 2 and 3). The new lots would vary in size from approximately 9,500 square feet to almost 12,200 square feet, and each lot would be developed with a home that is tailored to that lot.

11. The lot occupancy proposed for each home is identified in a chart attached to OP's report, and ranges from a low of 22% (Lot 2) to a high of 32% (Lot 3). (Exhibit 54, Attachment 2).

12. The proposed impervious surface coverage ranges from a low of 34%, to a high of 49% coverage on three of the proposed lots (Exhibit 54, Chart at Attachment 2).

13. The project would permit a variety of house sizes, architecture, form, materials, and landscaping. However, the proposed lot and house size represents a departure from the existing development on Chain Bridge Road. 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 of 9,938 square feet at the proposed project. Also, the average house size in the existing neighborhood is substantially smaller than the average house size at the proposed project.

14. In general, the homes on Chain Bridge Road between MacArthur Boulevard and the subject property are spaced far apart. There are 13 homes along the first half of the road or an average of one per 203 feet.

Access

15. The applicant proposes to create two roadways by repaving two existing driveways off Chain Bridge Road. One roadway would be created from the curvilinear driveway serving the historic School to the north. The other roadway would be created from the driveway which formerly served a single home.

16. As proposed, the roadway located at the northern end of the property, running around and in front of the School, would serve three homes (Lots 1, 2, and 3), and would be widened to a width of 20 feet and a radius of 30 feet at the cul-de-sac. The Historic Preservation Review Board (HPRB) reviewed the proposed extension and repaving of the roadway at its April 28, 2005 meeting, and stated that the roadway extension will not impact the historic building.

17. As proposed, the central roadway bisecting the site, would serve nine homes, would be 16 feet wide and would also terminate in a cul-de-sac with a 60 feet diameter.

18. As proposed, the 13th home, located at the southern end of the property, would have its own driveway off Chain Bridge Road.

Stormwater Management

19. Because of the impervious lot coverage proposed, the large roofs of the 13 homes proposed, the steep topography at the property, and a history of flooding in the area, the proposed development requires the construction of an extensive stormwater management system.

20. In response to the Board's request, the Applicant submitted a revised stormwater management plan prior to the public hearing on April 11, 2006. The proposed stormwater 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. The runoff 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 into the Potomac River.

Landscaping and Grading

21. The Applicant initially stated that a grading plan was not necessary because he proposed to build onto the natural topography. However, the Applicant submitted a Landscape Master Plan at the Board's request. The Applicant stated that the plans purported to be more "naturalistic" and consistent with the Overlay (Exhibit 136).

Tree Preservation

22. The applicant submitted a tree inventory prepared by Lew Bloch, a certified arborist (Exhibit 54, Attachment 4). This inventory assessed the health and structural stability of trees at the site that were larger than 38 inches in circumference.

23. The Applicant's initial filing identified general measures to protect the trees and slope (Exhibit 54, Attachment 6, dated September 1, 2004). Among other things, the plan stated that: "As required, additional protection measures will be instituted on an individual basis for those trees that will have work done within their drip line".

24. The Applicant proposes to remove a total of nine trees which are between 38 and 75 inches in circumference. Although thirteen lots are proposed after development, the property currently consists of four parcels or two taxation and assessment lots. Three of the trees are located within proposed Lot G, two of the trees are located within proposed Lot D, two of the trees are located

within proposed Lot 4, and one tree is located in the middle of the central roadway (Exhibit 136, Project Drawings, Tab: "All Trees").

25. The Applicant submitted a tree preservation plan dated August 16, 2005, which outlined methods of protection for trees during construction and identified those trees that could be impacted by construction (Exhibit 76). The plan was prepared by Tom Bonifant, of Bonifant Tree Service, Inc.

26. The Applicant maintains that the disturbance of critical root zones will not threaten the trees' survival (Exhibit 163).

The Impact of the Proposed Development

27. The Board finds that the substantially smaller lot and larger dwelling sizes are out of character with the existing neighborhood. Also, the siting of the proposed dwellings, particularly the dwelling on Lot F which is only 11 feet from the neighboring residence, is out of character with the existing neighborhood and inconsistent with the purpose of the Overlay.

28. The Board also agrees with the testimony presented by the representative from the National Park Service: the development would have a "billboard effect", particularly the proposed dwelling at Lot 3 which would tower over Chain Bridge Road.

29. The Board credits the testimony and report presented by Mary Sears, Civil Engineer and stormwater management expert; in particular, findings that: (a) the Applicant did not provide sufficient calculations to determine whether stormwater retention and discharge facilities are sufficient to handle the stormwater on the property, (b) the proposed stormwater management methods are untested, (c) the proposed stormwater management methods are not typically used in residential developments, (d) the capacity and constructability of the stormwater management system is unknown, and (e) the extensive grading and excavation required for the installation of the system will threaten the survival of protected trees.

30. Because the effectiveness of the proposed stormwater system has not been demonstrated, neighboring property owners would not be protected from runoff damage.

31. Because the effectiveness of the proposed stormwater system has not been demonstrated, adjacent parkland and parkland downstream would not be protected from additional stormwater runoff or lower quality of water.

32. The Board credits the testimony and reports presented by the UFA, and the testimony presented by Earl Eustler. In particular, the Board adopts his findings that: (a) the density and number of houses proposed, and the required infrastructure would fatally damage an overwhelming number of protected trees; (b) although the proposed stormwater management is in close proximity to, and in many cases, conflicts with the trees' critical root zones, the tree preservation plan does not adequately detail the necessary construction safeguards; (c) the scope of pre-construction tree pruning is understated, especially the pruning of the sixteen American Beech trees.

CONCLUSIONS OF LAW

The Motion to Strike and Exclude

As set forth in the Preliminary Matters, the Opposition filed a "Motion to Exclude and Strike the Unauthorized 'Rebuttal' Submission and Testimony. This motion is denied. Under the Board's Rules of Procedures, an applicant may present "rebuttal" evidence. § 3117.11(b)(7). After closely examining the evidence presented, the Board concludes that the filings and testimony did address various points that were raised by the Opposition. Therefore, the Board considered these filings and this testimony when deciding this application.

The § 1568.1(b) Claim

The Board also considered the Opposition's claim that the Applicant's tree protection plan violated this section of the Overlay on its face. Section 1568.1(b) limits tree removal to no more than three trees per lot. The Opposition claims that the proposed tree protection plan violates § 1568.1(b) because it allows for the removal of more than three trees on a single "lot". This claim (submitted through the UFA report and testimony from the Opposition) rests upon an assumption that compliance with this provision should be based on the lots as now exist, rather than the lots as will exist following subdivision that is being requested in this proceeding. The Board agrees with the Applicant that it is the latter circumstance that controls. All zoning compliance in a § 2516 proceeding must be based upon the lots to be created, otherwise any findings by the Board would be irrelevant to the project before it and made moot instantly when the subdivision occurs. Thus, the Board believes that the tree removal restrictions, apply to the 13 lots that would be created after subdivision and concludes that the tree removals contemplated for each of these lots are consistent with § 1568.1(b).

The Special Exception

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 a theoretical lot subdivision for thirteen one-family homes, including approval of two sixteen foot wide roadways, instead of the required twenty-five foot wide roadways under § 2516 (d), in the CBUT/R-1-A zone in the 2800 block of Chain Bridge Road, NW.

The Board can grant a special exception where, in its judgment, two general tests are met, and, the special conditions for the particular exception are met. First, the requested special exception must "be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps." 11 DCMR § 3104.1. Second, it must "not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Map" 11 DCMR § 3104.1.

The Board concludes that the proposed theoretical lot subdivision would adversely affect the use of neighboring property in the area for several reasons: the density of the project would be out of character with the area and inconsistent with the purposes of the Overlay, the proposed home on Lot 3 would tower over Chain Bridge Road creating a "billboard effect", the proposed home on

Lot F would be much too close to the neighboring property owner, the proposed stormwater management sewers are untested and dependent upon a high level of maintenance which is not guaranteed, the system creates a risk to downstream property owners and neighboring parkland, and the system poses a risk to the critical root zones of the protected trees.

Because this application fails under the general test for a special exception, it is not necessary to evaluate each of the special exception criteria. However, as will be set forth below, the applicant has not met the criteria in subsection 2516.9, for the same reasons that it does not meet the general test for a special exception. Sub-section 2516.9 requires that the applicant must comply with "substantive provisions of this title" and that the proposed development shall not likely have an adverse effect on the present character and future development of the neighborhood.

For this same reason, the Board cannot find compliance with the specific requirement of § 2516.9, which provides, in part, that the proposed development ... shall not likely have an adverse effect on the present character and future development of the neighborhood. Indeed, the Board is persuaded that the proposed project will be inconsistent with the present character of the neighborhood.

The ANC Issues and Concerns

The Board is required under Section 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; now codified at D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's written recommendations. To give great weight, the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns.

The ANC's primary concerns were: (1) the proposed project seeks to maximize the allowable density, lot occupancy, number of homes, and impervious surface coverage, and is therefore inconsistent with the CB/UT Overlay; (2) the proposed project is not in keeping with the character of the neighborhood; (3) the proposed project will result in the release of additional stormwater onto neighboring terrain, and will exacerbate measures taken by neighbors to alleviate flooding; and (4) the proposed project will adversely effect tree protection, slope protection, and the protection of nearby parkland.

As set forth above, the Board found these ANC concerns persuasive.

The Board is also required under D.C. Official Code § 6-623.04 (2001) to give "great weight" to OP recommendations. OP expressed concerns regarding the viability of trees as well as concerns that the proposed dwelling at Lot F is too close to the neighboring property and that the proposed dwelling at Lot 3 would "tower" over Chain Bridge Road.

For the reasons discussed above, the Board also finds OP's concerns persuasive.

Accordingly, the Board concludes that the proposed project would have an adverse impact upon the use of neighboring property and that the special exception would not be in harmony with the general purpose and intent of the Zoning Regulations. The applicant has, therefore, not satisfied its burden of proof for a special exception under §2516 to allow the construction of thirteen one-family dwellings.

It is therefore **ORDERED** that the application for special exception relief is **DENIED.**

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and John G. Parsons to deny)

Vote taken on January 9, 2007

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: AUG 07 2007

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPLICATION NO. 17309

As Director of the Office of Zoning, I hereby certify and attest that on August 7, 2007, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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c/o John Patrick Brown, Jr., Esquire
Greenstein, DeLorme & Luchs, P.C.
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Chain Bridge Road Citizens for Responsible Growth
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Washington, D.C. 20016

Single Member District Commissioner 3D05
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ATTESTED BY:

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Director, Office of Zoning

TWR