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April 24, 2009

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BY HAND

Marc Loud, Chairman
Board of Zoning Adjustment
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Washington DC 20001

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BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17337
EXHIBIT NO. 74
Reference Number
029598.00001

Re: BZA Application No. 17337 – Application of N Street Follies LP;
MOTION TO STRIKE “SUPPLEMENTAL MATERIALS” FILED BY THE
APPLICANT ON APRIL 14, 2009.

Dear Chairman Loud and Members of the Board:

This firm represents Tabard Corporation, an intervening party in opposition, in connection with the remand of the above-mentioned case from the District of Columbia Court of Appeals. We recently received a copy of certain “Supplemental Materials” from the Applicant in this case, which indicate that the Applicant intends to move forward in presenting its “case in chief” at the upcoming hearing on April 28, 2009, despite having filed in February a request to postpone the hearing, which to our knowledge was unopposed. We hereby move to strike said “Supplemental Materials,” as the record was closed in this matter at the conclusion of this case on June 27, 2006. Although the District of Columbia Court of Appeals has remanded the case for further proceedings, those proceedings have yet not commenced and thus the record is not properly open to receive amended plans. In addition, and regardless of whether the Board grants this Motion to Strike, we hereby request that the Board order a Schedule on Remand establishing the dates by which additional filings may be made and how the case will be handled by the Board, as is required by 11 DCMR § 3124.3. In support, we offer the following:

Procedural History

The Applicant filed the instant application for special exception and variance relief in order to construct and operate a hotel at the subject property, which is located in the Dupont Circle Historic District, on March 31, 2005. Prior to filing the application, the Applicant met with staff at the Historic Preservation Office (“HPO”) and were informed that their conceptual design would not be recommended for approval because the project was too large and inconsistent with the character of the neighborhood, and thus would likely be denied by the Historic Preservation Review Board (“HPRB”). Nevertheless, the Applicant proceeded with conceptual review before the HPRB, while at the same time seeking zoning relief from the Board.

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The Applicant requested postponement of the first scheduled hearing before the Board on November 1, 2005, which was granted. It then amended its plans at the eleventh hour, filing supplemental materials in the form of a prehearing statement on January 10, 2006 and presented its case on January 24, 2006. The Board also heard testimony from the Office of Planning, but did not have time to finish the case before adjourning that evening. The hearing was continued to February 28, 2006. The Applicant filed another set amended plans with the BZA on February 21, 2006.

Before the continuation hearing, the HPRB ruled, on February 23, 2006, that it could not approve the plans because of numerous design deficiencies. Then, on February 28, 2006, the Applicant again requested a continuance from this Board to allow it additional time to consult with HPO staff and go back to the HPRB, attempting to avoid proceeding before the Board with rejected plans. The Board granted the second request for postponement and rescheduled the continuation hearing for June 27, 2006.

The Applicant failed to submit revised plans in the intervening months, and on the rescheduled hearing date, indicated to the Board and the parties in opposition that it intended to seek a third postponement of the case. In response, Tabard made an oral motion to dismiss the application, which was supported by the other parties in opposition. The Board agreed and dismissed the application because it found that the application was moot; i.e., even if the application and plans were approved by the Board, the project would have to be constructed according to plans that the HPRB had already determined could not be approved. The Board dismissed the case in a written order, noting that nothing precluded the Applicant from coming back to the Board once they had received approval of a concept plan by HPRB.

The Applicant appealed the dismissal to the Court of Appeals. The Court heard argument in May of 2008 and reversed the BZA in an order dated June 5, 2008, remanding the case for further proceedings on the application. The Court stated, "Here, petitioner has properly filed its application for zoning relief before the BZA and has the right to have its application decided on the merits. Accordingly, we reverse and remand for further proceedings not inconsistent with this opinion." Indeed, the Court's order requires that the application pending at the time of dismissal be decided on the merits; the order does not require the Board to allow the Applicant to continue to amend its application *ad infinitum*.

The Request for Postponement

Despite having known for nearly eight months that the Board would be taking up this matter on remand, in fact, even after agreeing in writing to the proposed hearing date of April 28

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in a letter to Richard Nero, Acting Director of the Office of Zoning, the Applicant once again filed a request for postponement, and indicated that it would further amend its application.

This Applicant has been running what amounts to a shell game for over four years, in which Tabard, the other parties in opposition, and this Board have been compelled to participate. The record in this case reflects that the Applicant has made numerous requests for postponement with the intention of revising the project plans. The parties in opposition have diligently prepared for a hearing and arrived back before the Board on more than one occasion to find that the Applicant has made no changes and intends to seek further postponement of the case, the Applicant not having communicated its intent in advance of the hearing. Tabard has spent enormous sums of money and time in participating in this never-ending case, and remains prejudiced, having not had the chance to cross-examine the Applicant's witnesses or rebut the Applicant's testimony and evidence, some three years after that testimony and evidence were presented.

Now, the Applicant indicates simultaneously that it is and is not prepared to go forward with this case. Pursuant to 11 DCMR § 3124.3, in the event of further hearing on a matter, the Board must provide "notice of further hearing, plus a designation of issues to be addressed...to any party who participated in the earlier proceedings or to representative parties made pursuant to designations made under § 3112.15 at least ten (10) days prior to the date set for further hearing." As such, the Board should issue an Order Establishing a Schedule on Remand, as it has done in previous cases.¹

The Order Establishing a Schedule on Remand should provide guidance on, *inter alia*:

- (1) whether notice of the application should be re-sent to neighbors within 200 feet of the subject property in light of the change in ownership over the lengthy duration of this case;
- (2) whether the Subject Property will be posted again notifying the general public of the hearing date;
- (3) whether the Board will accept revised plans containing material changes to the Application, and a deadline for filing same and serving all parties;
- (4) the amount of time Follies will have to present any amendments, and the amount of time the parties in opposition will have to review and respond to same; and, finally
- (5) whether the Board will dismiss the action for failure of the applicant to comply with any of the deadlines set.

¹ See, BZA Order No. 16553.
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The Board would be well within its discretion to set a schedule as outlined above, and to dismiss for failure to meet any deadlines set by the Board, pursuant to 11 DCMR §§ 3124.3 and 3100.6, respectively. Without such an order, we submit that the Board should not accept additional materials into the record in this case, and should in fact strike the “Supplemental Materials” filed by the Applicant on April 14.

Failure to Serve All Parties

Moreover, the Applicant’s “Supplemental Materials” should be stricken for failure to be served on all parties as required by the Board’s Rules of Procedure. The Applicant has not only appeared before the Board numerous times in this and other cases, it is aptly represented by counsel who is versed in the Board’s Rules of Procedure. Thus, we find it inexcusable that the Applicant’s recent filings in this case have not been properly served on all parties to this matter.

Tabard was not served with a request by the Applicant to postpone the upcoming hearing scheduled for April 28, 2009. Likewise, it appears that none of the other parties to this case, namely, the Advisory Neighborhood Commission and Science Service, Inc., were served. Pursuant to §3111.1 of the Zoning Regulations, all motions (including requests for postponement) are to be served on all parties.

Further, the “Supplemental Materials” filed by the Applicant on April 14, 2009, apparently as a “prehearing statement” as allowed by 11 DCMR § 3113.8, were served on some parties but not all. The Certificate of Service included in that filing notes that service was made on William A. Green, Director of Operations for Science Service, Inc., a Party in Opposition, and to Richard B. Nettler of this firm for Party Opponent Tabard. The Certificate of Service does not list the Advisory Neighborhood Commission, which, in addition to automatically being a Party in this matter under 11 DCMR § 3106.2, actively participated in this case as a Party Opponent. In addition, the Certificate of Service does not indicate that the “Supplemental Materials” were provided to the Office of Planning.

While Tabard does not expressly object to the Applicant’s Request for Postponement, we submit that the Board should consider that request carefully and should not grant such request without establishing the method by which this case will be considered on remand. We submit that the Court remanded the application before the Board at the time of dismissal. Tabard is prepared to move forward with its case in opposition to that Application and will appear at the hearing on April 28, 2009, however, we strenuously object to the introduction of new materials at this time.

We respectfully request that the Board consider carefully the history and behavior of the Applicant in this case, and not waste any more resources by continuing this matter indefinitely.

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To that end, we move that this Board issue and Order Establishing a Schedule on Remand and strike the "Supplemental Materials" filed by the Applicant on April 14, 2009.

Sincerely,


Kinley R. Bray

Cc: George Keys, Esq.
Science Services, Inc.
ANC 2B
Mike Silverstein, ANC 2B Chairman (via electronic mail)
Jennifer Steingasser & Joel Lawson, Office of Planning (via electronic mail)
Jeremiah Cohen, Tabard Inn (via electronic mail)

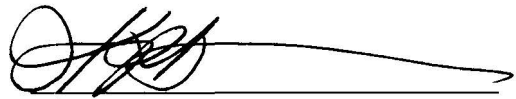
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was on this April 24, 2009, mailed, first-class, postage pre-paid, to the following:

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