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May 8, 2009

OF COUNSEL:

HAROLD E. JORDAN

HAND-DELIVERED

Marc D. Loud, Chairman

District of Columbia Board of Zoning

441 4th Street, N.W. - Room 210 South

Washington, D.C. 20001

Re: BZA Application No. 17337 - Application of N Street Follies LP

Dear Mr. Loud:

This firm represents N Street Follies LP (the "Applicant") in connection with the remand of the case from the D.C. Court of Appeals to the Board. At the end of the public hearing on April 28, 2009, which continued the above-referenced matter until October 13, 2009, the Board allowed the Applicant an opportunity to respond to the motion to strike filed by the Tabard Corporation, a party opponent ("Tabard"). Tabard's motion petitions the Board to exclude the Supplemental Materials filed by the Applicant on April 14, 2009 (the "Supplement"). In its motion, Tabard alleges that the record in the case was closed on June 27, 2006, and upon the remand of the case to the Board by the District of Columbia Court of Appeals for further proceedings, "those proceedings have not yet commenced and thus the record is not properly open to receive" the Supplement.

Tabard's argument is fatuous, misconstrues the meaning of the remand order and requires the Board to adopt an unnecessarily narrow view of its power to efficiently shape and manage proceedings before it. For all of the reasons set forth below, we urge the Board to deny Tabard's motion to strike and to establish by means of a Scheduling Order, as requested by Tabard, to permit this matter to move forward to a conclusive hearing on October 13, 2009.

1. The Remand Order Was a Procedural Order Not Relying on the Developed Record Below.

The D.C. Court of Appeals in remanding the appeal recognized that the Board committed a procedural error in dismissing the Applicant's application on the grounds of mootness. Such a finding did not rely on the record developed in the proceeding before the Board or reach any of the issues which this Board must decide. To say, as Tabard does, that the established record in this case was somehow material or necessary to the Court's remand is completely disingenuous. In this

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EXHIBIT NO. 77

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instance, Tabard tries to distract the Board with superficial irrelevancies. The Court's decision is only that the Board had no legal basis to dismiss the application on the grounds claimed and the Board must render a decision on the merits of the case before it after a full "contested case" proceeding. How the case develops, and whether further amendments are permitted, are matters entirely within the Board's discretion.

2 There Is No Prohibition for the Board To Permit Amendment of Pending Applications Prior, and Subsequent, to the Closure of the Record

The Board's Rules of Practice and Procedure do not prohibit the Board from accepting amendments to an application. It is therefore not surprising that Tabard can cite to no regulation or decision of the Board for such a view.

The Board has in prior decisions resolved the question of additions and amendments to an application and even permitted amendments subsequent to a final decision.¹ In a case which has bearing on the instant matter since it involved parallel proceedings before the Historic Preservation Review Board ("HPRB"), the Board in its decisional document authorized further amendment of the plans. That case, Application No. 17651 of Consortium Three-Judiciary Square LLC, September 4, 2007, involved variances and a special exception for a building subject to HPRB approval. In the Summary Order, the Board applied the following condition:

The Applicant shall be allowed to amend the plans to address any comments by [HPRB], so long as such amendments do not trigger a need for any new areas of relief from this Board.

The referenced case is directly analogous to the instant application as the Applicant now comes before the Board before having secured conceptual design review from HPRB. Additionally, the case has applicability because the Applicant has not proposed any plan changes in the Supplement which increase the zoning relief required. Indeed, the Supplement goes in the other direction and conforms the proposed building with all applicable development standards for the DC/SP-1 zoning district.

¹The Applicant would note that the following cases (by no means an exhaustive listing) involved amendments to an application made at the public hearing: Application No. 15975 of Order of Ahepa, July 20, 1994; Application No. 14028 of 629 Limited Partnership, October 5, 1983; Application No. 13139 of Richard W. Naing, et al., March 5, 1980; Application No. 12311 of Ransom L. and Helen S. Eng, April 6, 1977.

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3. Applicant's Supplemental Information Filed on April 14, 2009 Constituted a *De Minimis* Amendment of the Application.

Tabard's motion exaggerates the extent of amendment made by the Supplement and the relevance of the changes to the Applicant's plans to the expressed concerns of Tabard. In effect, the Applicant has greatly simplified the case and eliminated the need for any variance relief by (1) reducing the profile of the elevator penthouse and eliminating the need for a stairway penthouse altogether, (2) reducing the room count in the hotel as a consequence of working with the Historic Preservation Office staff to preserve more of the exterior structure of 1745 N Street, N.W., (3) doing away with the need for a "court" variance by fully enclosing the gap between 1745 and 1751 N Street, N.W., and (4) preserving more of the interior structure of the buildings. As a result, the only issue left in the case is the special exception for a hotel use in the DC/SP-1 zone district. A different analysis might be required had the Applicant's proposed amendment requested additional or other types of zoning relief; but that is not the case here.

4. Absent Surprise or Unfair Advantage To One Party a Motion to Strike Is Inappropriate.

A motion to strike is an appropriate remedy to remove material which a party attempts to add to the record after the record has closed. In Application No. 17276-A of Phillips Park LLC, September 13, 2005, the Board rejected submissions by a party opponent which were filed after the Board officially closed the record at the end of the public hearing. Here, there is no question that the record has not closed and the parties may submit additional material for the record as the case further develops. The role of the Board in managing a "contested case" proceeding is to ensure basic fairness in the process to avoid surprise and disadvantage to a party who does not have an adequate time to review and respond to the materials placed in the record by an opposing party. While the Applicant could reasonably argue that Tabard which had received the Supplement fourteen (14) days prior to the hearing on April 28, 2009, had an adequate time to review the *de minimis* changes to the plans, the Board's decision to continue the case until October 13, 2009 essentially moots any complaint by Tabard about unfair surprise. There is plainly no harm to Tabard or any other party opponent from admitting the Supplement as there is ample time to study and peruse the filing and to organize its case in opposition.

5. The Board Should Admit the Supplement into the Record in this Case.

In the earliest conversations with the staff of the Office of Zoning ("OZ") about getting the remand case on the Board's calendar, we raised the question of where in the "contested case" proceeding the public hearing would resume. We were assured by the OZ staff that in view of the three year lapse during the pendency of the appeal, the intervening departure of all members of the Board and the Zoning Commission member participating in the case and the complexity of the record that the Applicant would be allowed to restate its case-in-chief. Under that assurance, the

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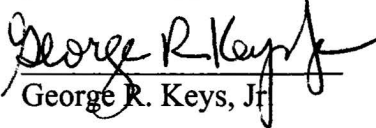
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Applicant was prepared to present a condensed version of the Applicant's case at the April 28, 2009 public hearing, as if the case were beginning again. Under § 3113.8 of the Board's Rules of Practice and Procedure the Applicant could submit no later than fourteen (14) days prior to the public hearing "any additional statements, information, briefs, reports . . . plans or other material that the applicant may wish to offer into evidence at the hearing." Accordingly, the Applicant filed the Supplement on April 14, 2009.² The Applicant in paring down the requested relief is making the Board's process more efficient and allowing the affected parties to focus on the salient issue in the case; i.e whether the application meets the special exception standards of § 512.

The Applicant requests that the Board deny the motion to strike filed by Tabard, admit the Supplement to the record as of April 14, 2009, and establish a Scheduling Order for the case as to the Board may seem fit and necessary.

Respectfully submitted,

JORDAN & KEYS PLLC
Attorneys for the Applicant

By: 
George R. Keys, Jr.

cc: Kinley R. Bray, Esq.
Science Service, Inc.
Advisory Neighborhood Commission 2B
Morton A. Bender

²The Applicant provided copies of the Supplement to Tabard and Science Service, Inc. by courier on April 14, 2009. Admittedly, the Applicant neglected to provide a copy of the Supplement to Advisory Neighborhood Commission 2B ("ANC 2B"), but as ANC 2B states in its April 20, 2009 letter to the Board (Exhibit No. 71) they obtained a copy on April 16, 2009, which would have been the earliest date they could have received the Supplement had the Applicant completed service by first class mail.