

**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

**Appeal of the Chain Bridge Road University Terrace
Preservation Committee of DCRA's Issuance of
Building Permit Nos. B1611845, 1611846 and 1611848**

ANC 3D05

STATEMENT OF APPEAL

The Appellant, the Chain Bridge Road Preservation Committee (“Preservation Committee”), by and through undersigned counsel, respectfully submits this Appeal to the Board of Zoning Adjustment (“Board” or “BZA”) of the January 13, 2017 issuance by the Department of Consumer and Regulatory Affairs (“DCRA”) of Building Permit Nos. B1611845, B1611846, and B1611848 for the construction of three (3) three-story with cellar detached single-family dwellings with swimming pools and driveways (the “Building Permits”) at 3006, 3010 and 3016 University Terrace, N.W. (Square 1426, Lots 51, 52 and 53) (formerly Lot 903) (the “Subject Property”) in the R-1-A/Chain Bridge Road University Terrace (“CBUT”) Overlay zone. The Building Permits were erroneously issued by DCRA in violation of the Zoning Regulations, including specifically the CBUT Overlay 11 DCMR §1568.1 (1958)¹, for the numerous reasons set forth below and must be REVOKED.

I. SUMMARY OF APPEAL

- A. Subdivision of the Underlying Unimproved Lot Does Not Allow Tree Removals Based on the Number of New Subdivided Lots Created.
- B. The “Heritage” Kentucky Coffee Tree will be Fatally Damaged by the Development Approved by the Building Permits.
- C. The CBUT Overlay Does Not Allow the Large Scale Transplanting of Protected Trees to Circumvent the Tree Removal Restrictions and Topographic Protections.

¹ The developer elected to submit and process the Building Permits under the then applicable 1958 Zoning Regulations.

II. SUBJECT PROPERTY

The Subject Property is part of the larger six acre plus estate formerly owned by Mrs. Louisa Duemling, a DuPont heir and active philanthropist, and her now deceased diplomat husband, Robert Duemling, which also included their residence at 2950 University Terrace, N.W. and part of the former Lot 863 (including the underlying Lot 903).

An old farmhouse located at the center of the subject Property was demolished in the early 2000's. As a result of the longstanding presence of the farmhouse and then its demolition, there is significant soil and root disruption in what is now Lot 52. Exhibit "A" (Photograph showing location/outline of former farmhouse). In October 2009, the entire Duemling property, including underlying Lot 903, was consolidated into a single Assessment and Taxation Lot, Lot 863 of 269,247 square feet or 6.18 acres. Exhibit "B". By Subdivision Plat recorded on May 6, 2014, the unimproved Lot 903 was subdivided to create Lots 50, 51, 52 and 53 Exhibit "C". Taken together Lots 51, 52 and 53 are the same land as the underlying Lot 903. Compare Exhibits "B" and "C".

On November 13, 2015, Mr. James C. Biddle² as Substitute Trustee of the Louisa Copeland Duemling Revocable Trust transferred Lots 50, 51, 52, and 53 and Lot 964 (2950 University Terrace) to University Terrace, L.P., a Delaware limited partnership ("Developer") and encumbered the properties with a \$2.71 Million Dollar Deed of Trust. Mr. Biddle is also the Manager of the Delaware limited liability company which serves as the General Partner of University Terrace, L.P.

² Mr. Biddle is Mrs. Duemling's son.

III. JURISDICTION

The Board has jurisdiction for the Appeal pursuant to 11 DCMR Subtitle Y -§ 302.1 (ZR 2016). The Appeal is timely pursuant to Subtitle Y- § 302.2 having been filed within sixty (60) days of the January 13, 2017 issuance of the Building Permits. The Preservation Committee first received actual confirmation from DCRA on January 27, 2017 that the Building Permits had been issued. Prior to that date and continuing to the current date, the routinely unreliable DCRA on-line Permit Tracking System lists the Building Permits as “Ready for Issuance”, but not issued. Exhibit “D”.

On July 8, 2016, Developer’s counsel received an e-mail confirmation from the Zoning Administrator of an analysis of the proposed development provided by counsel. Exhibit “E”. Under no circumstances, is this informal, unpublished and private communication a final, appealable decision. This informal communication lacks the formality of a Zoning Determination Letter, was never intended to serve that purpose, and was never posted on DCRA’s website. Whether explicitly stated or not, a formal Zoning Determination is always contingent on the obtaining OF all necessary building permits. In this case, the applications for the Building Permits were not filed until five weeks later on August 12, 2016. Exhibit “D”.

IV. PRESERVATION COMMITTEE’S STANDING

The Preservation Committee is a neighborhood 501(c)(3) charitable organization dedicated to the protection and preservation of the unique and special arboreal, topographical and landscaping features in addition to the historic, residential and park-like character of the Chain Bridge Road/University Terrace neighborhood. The Preservation Committee was instrumental in the 1999 creation of the Chain Bridge Road/University Terrace Overlay District and remains dedicated to the enforcement of the overlay on behalf of the more than seventy (70) households it

represents. Mrs. Duemling was an early and active supporter of the CBUT Overlay and generous contributor to the Preservation Committee.

From early 2005 through mid-2009, the Preservation Committee successfully opposed the BZA Application of Dorchester Associates, LLC for a theoretical lot subdivision for thirteen single family detached dwellings in the 2800 Block of Chain Bridge Road, N.W. in the R-1-A/CBUT zone. In denying the application, the Board found that the proposed project would violate the CBUT Overlay, including specifically fatally damaging protected trees. BZA Order No. 17309 (August 7, 2007), *aff'd*, *Dorchester Associates, LLC v. DC Board of Zoning Adjustment [Respondent] and Chain Bridge Road University Terrace Preservation Committee [Intervenor]*, 976 A.2d 200 (D.C. 2009).

The Preservation Committee and its members, as the “Aggrieved Party”, have standing to file this Appeal and will be adversely and substantially affected by the improvements illegally authorized by the Building Permits. Specifically, the Preservation Committee’s active members are immediately adjacent to the Subject Property: Sandra Joo and Reid Figel at 2950 University Terrace, and Gordon Kitt at 3020 University Terrace; and immediately across the street: Constance Carter at 3027 University Terrace and Thomas Nurmi at 3025 University Terrace.

The Preservation Committee and the Developer’s team have met on several occasions to discuss the proposed projects, exchanged information and explored options. Despite these good faith activities, the parties have to date not been able to resolve the disputed issues. In order to preserve its rights, the Preservation has informed the Developer’s team of the necessity of filing this Appeal. At the same time, Preservation Committee has suggested a post-appeal cooling off period, including mediation, to continue to work to a solution of the disputed issues which would allow the project to proceed with agreed upon compliance with the CBUT Overlay.

V. THE CBUT OVERLAY

On March 17, 1997, the Preservation Committee through its then counsel, submitted an application for a Map and Text Amendment to establish the CBUT Overlay in area including approximately forty-four acres. The slated purpose of the proposed overlay was:

To protect and preserve the natural topography, mature trees, stream beds, and natural vegetation in the neighborhood and to deter the desecration of a historic cemetery owned by the Union Burial Society. The TSP overlay is also intended to preserve the park-like setting of the area by regulating alterations or disturbances of terrain, destruction of trees, coverage with impervious surfaces, and by providing for widely spaced residences.

The proposed overlay zone would further refine the existing R-1 zoning by adding several restrictions designed to retain major trees, reduce grading, and control the amount of ground coverage with buildings and impervious surfaces in the interests of maintaining the special environmental qualities of the neighborhood.

Zoning Commission Order No. 863 (Z.C. Case No. 97-6) (“ZC Order 863”). Exhibit “F”.

The Preservation Committee was keenly aware that the “neighborhood has a large number of lots or parcels with subdivision and development potential... and the potential for specific damaging effects of future development, such as tree removal and excessive grading.”

Id.

The Zoning Commission “set down” the application for a public hearing which occurred on May 18, 1998. Numerous parties and persons testified in support of the application, including the National Park Service, Phil Mendelson (then, Chair of ANC 3C), ANC 3D, the Palisades Citizen’s Association, Ellen McCarthy (later Director of the Office of Planning), Judith Lanius an architectural historian, numerous residents of the neighborhood and Preservation Committee members.

Mrs. Duemling, then a Co-Chair of the Preservation Committee, testified through her husband, Ambassador Duemling. This testimony was focused on the entire neighborhood, but more importantly directly applicable to the Subject Property:

My name is Robert Duemling and I live with my wife, Louisa, at 2950 University Terrace, Northwest.

We are new members of this neighborhood. We bought some land there about five years ago and built a new house. And what attracted us to this neighborhood, we had also recently lived in Georgetown before, but what attracted us were primarily the openness, the open space, and the very large, mature trees.

Shortly after our initial purchase, it became possible to buy an adjoining property, which the previous owner had planned to, on which the previous owner had planned to build five houses. But we are keeping that land as an open greensward of meadows and trees. Together, our property comprises a little under five acres.

To our mind, there are two sides to preserving the quality of a neighborhood like this.

One is to enhance its inherent characteristics. To that end, in addition to keeping land open, we have planted over 50 new trees, and worked hard at nourishing and preserving the existing stands of tulip poplars, elms, and evergreens. My wife also happens to be a keen gardener, so we have planted lots of shrubs and flowers. The second, the other side of preservation is what you do not do. To our minds, you do not cut down large trees or build the largest possible house on the available site.

May 18, 1998 Transcript of Public Hearing, pp. 24-25.

Although the proposed overlay focused specific attention on the protection of trees, it was also acknowledged that there was a relationship with maintaining the natural topography. This correlation between the sloped natural topography and the stands of mature trees was an important element of the overlay's purposes and protections. ZC Order No. 863.

The Office of Planning testified in support of the application and specifically agreed with the Preservation Committee's assessment that "[a]s a result of the large wooded lots and steep slopes, the area has a park-like, semi-rural character which is extremely rare in the District."

No party or person opposed the application to establish the CBUT Overlay. Id.

As enacted by the Zoning Commission, the intent and purpose of the CBUT, is clearly stated:

1565.1 The Chain Bridge Road/University Terrace (CB/UT) Overlay District is established 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, ground coverage of permitted buildings and other impervious surfaces, and by providing for widely spaced residences.

1565.2 The purposes of the CB/UT Overlay District shall be as follows:

- (a) To preserve the natural topography and mature trees to the maximum extent feasible in a residential neighborhood.

11 DCMR §§1565.1, 1565.2 (1958 Regulations) (Emphasis added)

VI. PROPOSED DEVELOPMENT

The Developer, based on the Building Permits proposes to build three (3) large four level (3 stories, plus cellar) speculative homes. Although, each of the lots is large in lot area, the footprint of each house is also large with lot occupancy approaching the maximum for Lots 51 (25.5%) and 53 (24.7%), plus each house will have a swimming pool which can only be accomplished at the expense of additional soil disturbance, tree removals, and alteration of the existing natural topography. The footprint of each of the houses is as follows:

- Lot 51 – 5,623 sf.
- Lot 52 – 3,886 sf.
- Lot 53 – 4,791 sf.

Conceptual Site Plan, Exhibit “G”.

In addition to the large house footprints and swimming pools, each house will require construction of substantial driveways from University Terrace. Id.

The scale of the proposed development is substantial and can only be pursued based on “heroic” and costly tree preservation efforts, including large scale removal and transplantation of protected trees, “floating” or bridging over tree roots to install driveways and pools with artificial irrigation, root pruning, sheet and shoring, interior waterproofing of foundations, root padding and mulching.

Exhibit “H” (Report of Ed Milhous, Tree Please, Registered Consulting Arborist).

On a very limited basis, each of these extraordinary tree preservation methods might be appropriate and successful. However, on the large scale proposed, there is no margin for error or failure and the totality of the tree preservation plan does not comply with the letter or spirit of the CBUT overlay’s strict tree removal restrictions and there is no reasonable basis to conclude that it will be successful as claimed. Exhibit “H”.

VII. VIOLATIONS OF THE CBUT OVERLAY

As detailed below, the Building Permits were issued in violation of the CBUT overlay, including specifically 11 DCMR §1568.1 (1958 Regulations) which provides:

1568 LIMITATIONS

1568.1 Except as provided in § 1568.2, constructing a building, accessory building, or an addition to a building, or creating any impervious surface area, subdividing any

unimproved lot, subdividing any improved lot so as to increase the number of principal structures thereupon shall be permitted as a matter-of-right only if the following tree removal limitations are complied with:

- (a) No tree that has a circumference of seventy-five (75 in.) or more at a height of four and one-half feet (4 ½') above ground shall be removed, cut down or fatally damaged;
- (b) No more than three (3) trees that have a circumference of more than thirty-eight inches (38) at a height of four and one-half feet (4 ½') above ground shall be removed, cut down or fatally damaged, and none of these shall be located within twenty-five feet (25') of any building restriction line or lot line abutting a public street
- (c) The total circumference inches of all trees removed or cut down on a lot shall not exceed twenty-five percent (25%) of the total circumference inches; Provided, that this section shall not abrogate the right to remove or cut down up to three (3) trees as provided in paragraph (b); or any tree having a circumference of twelve inches (12) or less at a height of four and one-half feet (4 ½') above ground.

1568.2 The prohibitions of § 1568.1 shall not apply to the removal or cutting down on any dead or unhealthy tree or a tree that creates an unsafe condition. The need for removal of any tree shall be certified by a tree care professional certified by the International Society of Arboricultural.

1568.3 A special exception must be obtained for a building permit for a site on which trees were removed, cut down or fatally damaged prior to the effective date of these regulations, if the removal, cutting, or damage:

- (a) Would have been prohibited by § 1568.1; and
- (b) Occurred within seven years of the application date.

1568.4 The minimum lot size for homes within the CB/UT Overlay district shall be 9,500 sf. for lots subdivided after the effective date of this provision.

11 DCMR 1568 (Emphasis added).

A. Subdivision of the Underlying Unimproved Lot Does Not Allow Tree Removals Based on the Number of New Subdivided Lots Created.

The Zoning Commission in Order No. 863 specifically made the CBUT applicable to “lots... 902-905... in Square 1426;” Z.C. Order No. 863, p.12) Exhibit “F”. In doing so, the Commission identified Lot 903 as an individual lot subject to the Overlay’s restrictions. Lot 903 included what is now Lots 51, 52 and 53. Exhibits “B” and “C”. Further, it is undisputed that Lot 903 is unimproved after demolition of the old farmhouse. Exhibit “A”. As a result, the subdivision and future development of Lot 903 is limited to the singular removal restrictions of §1568.1(a) - (c). Nowhere in the clear language of §1568.1 or the stated intent and purpose of the CBUT Overlay is there any support for increasing the tree removal limitations based on a subdivision of an existing unimproved lot creating multiple additional lots.

B. The “Heritage” Kentucky Coffee Tree will be Fatally Damaged by the Development Approved by the Building Permits.

The healthy Kentucky Coffee located on Lot 52 is a “heritage” tree with a circumference of approximately 128.8 inches and is absolutely protected by §1568.1(a) and may not be “removed or fatally damaged”. Despite repeated luke-warm oral assurances from the Developer’s landscaper, this tree will not survive the development of the immediately adjacent houses on Lots 52 and 53 which substantially and fatally disrupt the Critical Root Zone (“CRZ”). Exhibit “H”. Although, the Preservation Committee requested that the Developer provide CRZ drawings for the project, the landscaper was either unwilling or unable to provide that

information claiming that it was not necessary for determining the survivability of this heritage tree and other protected trees.

The Preservation Committee's arborist completed his own independent CRZ analysis of this heritage tree. Based on this evaluation of a conservative CRZ radius (12 inches per inch of tree diameter), the previous damage to the tree's root zone from the prior farmhouse and its demolition, and the proposed houses on Lot 52 and 53 and the driveways, the CRZ will be so substantially comprised by the construction and suspended driveways that the tree has no "reasonable chance of survival", even with the other heroic efforts under the tree preservation plan. Exhibit "H".

C. The CBUT Does Not Allow the Large Scale Transplanting of Protected Trees to Circumvent the Tree Removal Restrictions and Topographic Protections.

For Lot 52, compliance with the tree removal restriction of the CBUT Overlay are entirely dependent of the transplantation of twenty-five (25) protected trees. Specifically, the proposed construction requires that these 25 trees be "removed" from their existing locations and relocated to new locations that will not interfere with the proposed new houses. There is no basis in the Overlay's "tree removal limitations" that would authorize transplanting of trees and certainly not on the large scale proposed for the sole purpose of circumventing these central restrictions. This is entirely at odds with the intent, purpose and clear reading of the Overlay. The Overlay is intended "to preserve and enhance the park-like setting of the [area] by regulating alteration or disturbance of terrain, destruction of trees..." with the purpose to "preserve the natural topography and mature trees to the maximum extent feasible." The removal from and transplanting of these trees from the original location to a new location will endanger the survival of the trees, disrupt the terrain and topography of both locations and wholly disrupt the

existing, natural park-like setting. Once removed, the proposed development will further disrupt and forever alter the existing terrain and topography with unforeseen consequences. The Overlay was never intended to allow this type of activity for the sole purpose of allowing otherwise prohibited tree removals and development.

VIII. WITNESSES

1. Representatives of the Preservation Committee
2. Mr. Ed Milhous, Tree Please, Certified Consulting Arborist as an expert witness (Resume attached as Exhibit "I")

IX. EXHIBITS

Exhibit "A": Photograph showing location/outline of former farmhouse.

Exhibit "B": October 2009 A&T Plat creating Lot 863 (including Lot 903)

Exhibit "C": May 2014 Subdivision Plat creating Lots 50-53.

Exhibit "D": DCRA Outline Permit Tracking System for the Building Permits

Exhibit "E": July 8, 2016 email from Zoning Administrator.

Exhibit "F": Z.C. Order No. 863.

Exhibit "G": Conceptual Site Plan.

Exhibit "H": Report of Ed Milhous, Tree Please

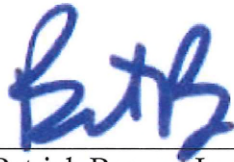
Exhibit "I": Resumer of Ed Milhous.

3. CONCLUSION

For the foregoing reasons, Building Permit Nos. B1611845, B1611846, and B1611848 were issued in violation of the Zoning Regulations and this Appeal must be GRANTED and the Building Permits REVOKED by DCRA. The Preservation Committee reserves the right to supplement this Statement of Appeal in its authorized prehearing submissions and at the hearing.

Date: February 28, 2017

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing BZA Appeal, Statement in Support of Appeal, and supporting documentation was filed electronically with the Office of Zoning and was served by first-class mail and electronic mail as indicated, this 28th day of February, 2017, upon the following:

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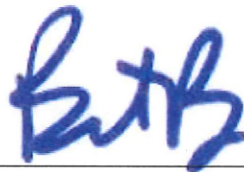
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