BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

In Re Application of:	)	**BZA Case No. 19705**
	)	**ANC 1B**
Madison Investments LLC	)	**Public Hearing Date: March 7, 2018**

REPLY TO OPPOSITION TO MOTION TO DISMISS APPLICATION

Madison Investments LLC ("Madison") has opposed the motion to dismiss of LDP Acquisitions LLC ("LDP"), making several arguments that do not characterize properly LDP's position and do not contest the motion's basic premise: that this Board should either dismiss the Application or defer ruling until the related legal disputes are decided.

First, LDP characterizes the motion inaccurately as a claim that the Office of Zoning should never have accepted the Application at the outset. *See* Opp. at 1-2. That is not what LDP is claiming. LDP does not argue that the Application was "incomplete" as filed, in the sense that the required materials for such an Application were not provided. Rather, LDP asserts – as is the case – that Madison has no business pursuing the Application because of LDP's superior rights in part of the affected real estate.

Second, Madison suggests that LDP is asking the Board to exceed its lawful authority by deciding legal issues and disputes that are outside of its jurisdiction and are presently pending in the Superior Court of the District of Columbia. *See* Opp. at 3-5. LDP recognizes that it is not for the Board to decide competing claims of ownership and priority over the affected real estate, and has not asked the Board to do so. Those matters are before and will be decided by the Superior Court in the matter styled as *LDP Acquisitions LLC v. Felix Nelson Ayala, et al.*, Civil Action No. 2017 CA 006699 B (Calendar 13; Judge John M. Campbell). In fact, although Madison does not disclose this in its filing, it has already sought and was granted leave (with the express consent of LDP) to intervene in the Superior Court case. The parties there can and will

litigate these issues and determine their respective rights. Judge Campbell has scheduled a hearing on LDP's motion for a temporary restraining order (the first step in moving forward to decide the legal disputes) for Monday, March 5, 2018. The legal issues will be decided through that proceeding and the subsequent litigation in that case.

In the interim, it is inappropriate for this Application to proceed. Madison does not deny that it rushed this Application forward as a means of gaining an advantage in the dispute regarding ownership of the Properties involved in the litigation (including the Property in which LDP holds its interest as a contract purchaser and holder of equitable title). That effort should be rejected.

Third, Madison suggests that it has authorization from the current record owners of the Property of which LDP holds equitable title, authorizing the filing of the Application. *See* Opp. at 5-6. Interestingly, Mr. and Mrs. Ayala, the current record owners of LDP's Property, furnish Affidavits saying that they "have not sold the Property" and support the filing of the Application. They do not deny, nor could they, that they entered into a contract to sell the Property to LDP. Nor do they mention the ongoing litigation in Superior Court, in which they are both parties. Madison also provides a letter from Martha's Table, Inc., which has no interest in the Property in which LDP holds equitable title, and therefore offers no valid support or authority for the Application to go forward.

Madison cites "Subtitle Y § 300.4" in support of the argument that it has shown authority to pursue the Application. Those provisions, however, and the other provisions in Chapters 2 and 3 of this Board's Rules of Practice and Procedure, deal only with the requirements for persons appearing before the Board to demonstrate that the party for whom they appear, or whom they purport to represent, has authorized the appearance. Parties may appear on their own

behalf or through a representative. These provisions are set forth in Sections 200.1 through 200.4, as well as Section 300.5, and nowhere do they elevate the authorization to appear as a representative to the legal status of a person permitted to file a zoning Application that would affect real estate in which another party – LDP, in this case – has superior rights and interests. Madison suggests that a contract purchaser may, under some circumstances, file an Application. *See* Opp. at 5. This is most certainly not the case, however, where – as here – a prior contract purchaser with priority rights has not authorized the filing and, in fact, objects to it.

Fourth, Madison claims that LDP's interests will not be affected by the Application. *See* Opp. at 6-7. LDP's real property rights and interests, however, are necessarily affected – and irreparably harmed, as a matter of law – by the tactics Madison has chosen to pursue. Upon execution of its contract, equitable title vested immediately in the purchaser, LDP. *See Ward v. Wells Fargo Bank, N.A.*, 89 A.3d 115, 122-23 (D.C. 2014) (citing *Grimes v. Newsome*, 780 A.2d 1119, 1121 (D.C. 2001)). Equitable title carries with it various rights and interests, even including the right to maintain an action for possession of the real property. *Ward*, 89 A.3d at 122-23 (citing *Fiske v. Bigelow*, 9 D.C. (2 MacArth.) 427, 433-34 (1876)). LDP's rights and interests in the affected real estate are undeniably unique. *See, e.g., Tauber v. Quan,* 938 A.2d 724, 732 (D.C. 2007) ("When land is the subject matter of the agreement, the legal remedy is assumed to be inadequate, since each parcel of land is unique.").

LDP has shown that it has superior rights and interests in the Property and would be irreparably harmed if an interloper such as Madison were permitted to employ the tactic of pursuing subdivision, combination, and extensive new construction involving LDP's Property and adjacent real estate. Rather than litigate the legal issues pending in the Superior Court, Madison chose to attempt an end run around the dispute and gain an advantage by pursuing this

Application, hoping to press it to a quick conclusion to discourage LDP from protecting its rights. It is axiomatic that a zoning Application filed by someone else, whether granted, denied, or forced to undergo or submit to various changes and conditions, would necessarily affect LDP's unique real property rights. Obviously, if a structure goes up on a group of lots combined together, including the so-called "Smucker's Property" (in which LDP holds equitable title), LDP's rights and interests will be profoundly affected – perhaps irretrievably so.

Our Courts have also recognized the unique nature of real property rights and interests and have maintained the sanctity of and protections for those rights and interests. Allowing Madison to trample those rights by carrying forward its own plans to develop LDP's Property will cause irreparable harm. These and other issues are the subject of the litigation in the Superior Court, in which Madison and others are parties. That litigation should go forward to determine these contested issues and claims.

Meanwhile, this Application should not proceed. Not only does Madison not have the right to proceed, but it is a waste of the Board's resources to spend the time reviewing the Application, conducting hearings, and rendering decisions. Those sorts of proceedings should await the outcome of the pending litigation.

Respectfully Submitted,

Vernon W. Johnson, III
Nixon Peabody LLP
799 Ninth Street, N.W.
Suite 500
Washington, D.C. 20001
(202) 585-8401 – Telephone
(202) 585-8080 – Fax
vjohnson@nixonpeabody.com

Counsel for LDP Acquisitions LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2018, I caused to be emailed a copy of this Reply to Opposition to Motion to Dismiss Application to the following:

Meredith H. Moldenhauer, Esq.
Cozen O'Connor
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
mmoldenhauer@cozen.com

District of Columbia Office of Planning
c/o Matthew Jesick
1100 4th Street SW, Suite E650
Washington, DC 20024
Matthew.Jesick@dc.gov

District Department of Transportation
55 M Street, SE, Suite 400
Washington, DC 20003
Patrick.Reed@dc.gov

Advisory Neighborhood Commission 1B
c/o James A. Turner, Chairperson
1B09@anc.dc.gov

Advisory Neighborhood Commission 1B
c/o Jon Squicciarini, SMD Commissioner
1B04@anc.dc.gov

Vernon W. Johnson, III