BEFORE THE DISTRICT OF COLUMBIA ZONING COMMISSION

Application of Monument Residential LLC on behalf of BRE/Watergate LLC, for Modification of Approved Planned Unit Development	)))	ZC No. 03-16

APPLICANT'S OPPOSITION TO MOTION OF WATERGATE EAST, INC. TO POSTPONE HEARING

Applicant Monument Residential LLC, on behalf of BRE/Watergate LLC ("Monument"), opposes the request by Watergate East, Inc. ("Watergate East") to postpone indefinitely the public hearing noticed for March 1, 2004 and scheduled to continue on March 4, 2004.

Watergate East has not provided good cause for the open-ended continuance. First, Watergate East claims that it might not be able to mount an opposition to Monument's request for modification to the PUD until such time, if ever, that Watergate East resolves internal governance issues. See Motion of Watergate East, at 5 ("[W]ithout a postponement, WEI's ability to engage in vigorous advocacy to protect its economic interests and quality of life will be severely hampered.").

Watergate East has moved to appear as a party in opposition and can certainly be prepared to present its case either on March 1 and/or on the scheduled continuation date of March 4. Monument's plans for the Hotel building are well-known to Watergate East's current board as well as to all owners in Watergate East. Indeed, a majority of the owners who have expressed a view on this issue[1] have voted to sell to Monument the property already subject to the ground lease to the Hotel, understanding that such property would be used by the for parking and support purposes following the conversion to a cooperative building. Watergate East does

[1] Out of 73,837 shares eligible to vote, 33,428 shares (54%) were voted in favor of the sale and in support of the project and 28,535 shares (46%) were voted against the sale and in opposition to the project.

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not need more time to prepare an opposition.[2] If Watergate East later changes its position to support the request, that change can be introduced into the record at the appropriate time.

Second, Watergate East's internal governance problems are not a legitimate basis to delay further the Zoning Commission's consideration of Monument's request for approval of the PUD Modification. Corporation Counsel advised the Commission at the hearing on January 29, 2004, when this case was first postponed, that the issues involving the Watergate East lawsuit did not affect the Zoning Commission's ability to proceed: "In my view, I don't think there is any legal impediment to proceeding tonight." (Transcript at p.21, Statement of Ms. Glazer). Monument agrees and further urges that the same conclusion be applied to the current request.

Third, Watergate East was granted the extension it sought, to allow time for a decision from the Delaware Court of Chancery on a petition brought by residents of Watergate East on the status and effect of the vote referenced above. The Zoning Commission postponed the hearing for over a month. In an order entered on February 25, 2004, the Delaware Court held that Watergate East is required to take another vote to resolve the issue of the sale of the property to Monument. The Court further found that the president of the Watergate East board had misled the members regarding the clear legal requirements for the vote. A copy of the Chancery Court order is attached. Thus, the issue regarding the sale of the property must still be presented to, and voted on by, the members of Watergate East. The party that has been hurt by the delay is Monument and Monument should not be further prejudiced by the request for an additional open-ended postponement.

Regardless of the outcome of the vote and regardless of which group within Watergate East ultimately controls the board,, Watergate East is still bound by a long-term ground lease for

[2] In its Motion, Watergate East requests that, if the Commission denies the requested postponement, it be allocated an additional half-hour to present its case in opposition. Monument does not oppose Watergate East's request for such additional time so long as the matter is not postponed.

the below grade space currently used by the Hotel for meeting rooms and parking space. The use of that underground space is essentially unaffected by the proposal before the Zoning Commission since, following approval, that space will continue to be used for meeting rooms and for parking for the converted building. If this ground-leased property is later sold to Monument, as was anticipated when this application was filed, there is no additional impact on Watergate East. Again, the issue of which group ultimately controls Watergate East and whether Watergate East ultimately decides to sell the space has no bearing on the land use issues pending before the Commission.

Watergate East is incorrect in arguing that all property owners affected by a modification to a Planned Unit Development must consent to the modification. See Motion to Postpone Hearing, at 3. Over the years, the Zoning Commission has approved numerous modifications to PUDs without the consent or even the involvement of other owners of properties covered by the PUD. For example, in Zoning Commission Order 101-A (Case No. 92-5M/74-10F), the Commission approved a change in zoning affecting below-grade space for one building out of the three buildings covered by the PUD and the other property owners were not required to be applicants. Similarly, in Zoning Commission Order 481 (Case No. 85-10M/79-14F), the Commission approved modifications to only the northern portion of the Hillandale property at the request of an owner who had acquired that portion through foreclosure, in an application that was not joined by the other owners of the property covered by the PUD. See also Zoning Commission Order 195-A (Case No. 94-16M/77-16F)(single owner of townhome granted modification without application by other owners). Indeed, in Zoning Commission Order 668-D (Case No. 94-4M/89-81C), the Commission granted the application of the developer of the National Academy of Sciences site to modify an approved PUD by changing the zoning status of

adjoining property owned by the District of Columbia and used for a fire station when the District was not a party to the application.

In previous cases involving modifications to the Watergate PUD, the Commission has granted modifications without the involvement of, and in one of the cases, even over the objection of, individual constituent members of the Watergate Complex. For example, in Zoning Commission Order No. 631 (Case No. 89-6M/62-19), the Commission approved the modification of this PUD to allow the expansion of the Hotel's health club, with Watergate West, Inc. admitted as a party in opposition.

In sum, this case is ripe for action by the Zoning Commission. The voting and litigation involving various groups within Watergate East may not be resolved for some time. Monument should not be held hostage to the resolution of those issues. The Commission can consider the application and the merits of the Monument proposal and the matter should not be postponed further, much less indefinitely as requested by Watergate East.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2004, a copy of the foregoing Opposition to Motion to Postpone was hand-delivered to:

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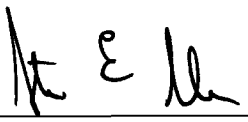
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Re: *Baring, et al. v. Watergate East, Inc., et al.*
Civil Action No. 192-N

Dear Counsel:

This Court was petitioned, under a procedure set out in Delaware's General Corporation Laws,[1] to determine the validity of the January 22, 2004, vote of Watergate East's members regarding the sale of some of Watergate East's property to Monument Residential. As I will explain fully in this letter, the January 22nd vote was invalid, but Watergate East's members are entitled to another opportunity to express their will on this issue.

Watergate East's board of directors, directly and through various committees, has deliberated and considered the proposed sale since at least the middle of last year. The sale, as the parties are well aware, is a highly contentious matter. Some directors, and many residents, oppose the sale because they feel that it will harm their quality of life. The proposed sale may well hasten the demise of the famed Watergate Hotel.

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[1] *See* 8 *Del. C.* § 225(b).

Inaccurate Statements Made by Watergate East Directors

On numerous occasions the board's president, Mr. William Condrell, communicated with members about the status of Watergate East's negotiations with Monument Residential. Unfortunately, many of those letters and memos contained inaccurate and misleading information. Most of the confusion has been generated by a failure to appreciate the meaning of Watergate East's governing documents and Delaware law.

Watergate East's certificate of incorporation does not require that 75% of its members approve the proposed sale of property to Monument Realty. The eighth article of Watergate East's certificate requires 75% approval if the sale is for "all" of its assets. The proposed sale is clearly not for "all" of Watergate East's assets.

In addition, Delaware law does not require that a majority of Watergate East's members approve the proposed sale. Under Delaware law, only a sale of "substantially all" of the Watergate East's assets must be approved by a majority of its members.[2] Watergate East is valued at over $80 million dollars. By any quantitative measure, the proposed sale is of an insubstantial portion of Watergate East's overall assets. I understand members have expressed deep concern regarding the "quality of life" impact of the proposed sale and the conversion of the Watergate Hotel into residential housing. But under Delaware law, these concerns do not mean that the sale is for "substantially all" of Watergate East's assets.[3]

In Mr. Condrell's correspondence to members before the January 22nd vote, these important facts were not communicated. In fact, Mr. Condrell's letter of January 12, 2004, which included a proxy form for the members' use, stated that article eight of the certificate of incorporation required 75% of Watergate East's members approve the proposed sale.[4] As I have already mentioned, this is incorrect. In fact, on January 12th the board

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[2] *See* 8 *Del. C.* § 271(a).

[3] *See Thorpe v. CERBCO, Inc.*, 1995 Del. Ch. LEXIS 96, at *34 (Del. Ch. Aug. 9, 1995); *Gimbel v. Signal Cos., Inc.*, 316 A.2d 599, 607 (Del. Ch. 1974).

[4] Mr. Condrell's letter is attached as Exhibit 14 to Plaintiffs' Opening Brief in Support of its Application for Declaratory Relief.

was informed by its lawyers that Watergate East was not bound by such a requirement.[5] Moreover, Mr. Condrell was aware as early as November of 2003 that his interpretation of Watergate East's certificate of incorporation was probably incorrect. A memo stating that a 75% vote was not required was sent from David Cox, one of Watergate East's lawyers, to Mr. Condrell on November 12, 2003.[6]

Watergate East's members were entitled to accurate information about the nature of their important vote *before* it was taken.[7]

A New Vote is Required

In my opinion, although no Delaware statute or provision of Watergate East's governing documents required the vote held on January 22nd, such a vote should nonetheless occur. I reach this conclusion for two reasons. First, Mr. Condrell and the board have consistently told the members that they would be given the opportunity to vote *and* that their vote would count. It is inequitable at this late stage to deny Watergate East's members this important opportunity to express their will when for so long they were lead to believe that they would be given such an opportunity.[8]

Second, I am concerned about the ability of the directors to evaluate the sale in a manner that comports with their fiduciary duties to the members of Watergate East. The directors of a non-profit membership corporation have a duty to act in the best interest of the corporation's members, and must set aside their parochial interests.[9] In this situation, I am not confident that this is possible. Watergate East's directors have developed entrenched positions on the proposed sale and the board is, to be generous, fractious and closely divided on this issue. Further, Mr. Condrell has not given accurate information to Watergate East's members (and perhaps other directors).

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[5] The draft minutes of the January 11, 2004 special meeting of the board are attached as Exhibit 24 to Plaintiffs' Opening Brief.

[6] The memo is attached as Exhibit 31 to Plaintiffs' Opening Brief.

[7] *See Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998).

[8] This conclusion is based on the legal doctrine known as equitable estoppel. *See Wilson v. American Ins. Co.*, 209 A.2d 902, 903-04 (Del. 1965); *Waggoner v. Laster*, 581 A.2d 1127 (Del. 1990).

[9] *See Oberly v. Kirby*, 592 A.2d 445, 461-62, 472 (Del. 1991).

Part of the problem may be that as a non-profit housing cooperative, Watergate East does not operate like a "normal" corporation. The corporation's members live in the building owned by the corporation. And the corporation is not run to make money, but rather to fulfill the housing needs of its members.

The members should be the ones who decide this issue.

An Elevated Voting Standard is Not Required

In this new vote, 75% of Watergate East's members do not have to approve the sale. Moreover, an absolute majority (over 50% of all those entitled to vote) does not have to approve the sale. The only voting standard required is that found in Watergate East's by-laws. Under article 29 of the by-laws only a majority of those present at a meeting (or represented by proxy) are required to vote in favor of the proposed sale. The board of directors may increase this threshold only if it determines that doing so is in the best interest of Watergate East's members.

Most importantly, the board must inform members that any voting threshold set above a majority of those present at the meeting is not required under Delaware law or Watergate East's governing documents. Also, the board must honestly and candidly communicate to its members the rationale for setting any elevated voting requirement. In my own moment of candor, however, I must admit that it seems disproportionate to require a supermajority of the members to decide an issue that has almost evenly divided the board.

IT IS SO ORDERED.

Very truly yours,

/S/ William B. Chandler III

William B. Chandler III

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