ZONING COMMISSION
FOR THE DISTRICT OF COLUMBIA

RE: Application of Monument Residential LLC, on behalf of BRE/Watergate LLC, for Modification of Approved Planned Unit Unit Development (Square 8, Lot 807) ) ZC Case. No. 03-16

SUPPLEMENTAL FILING OF WATERGATE EAST, INC.

Watergate East, Inc., ("WEI"), a Delaware Corporation, hereby files with this Commission the decision reached by the Court of Chancery of the State of Delaware in *Baring, et al, v. Watergate East, Inc., et al*, C.A. No. 192-N (Court of Chancery, New Castle County, DE, filed Jan. 29, 2004). This decision invalidates the vote of the special meeting of WEI membership held on January 22, 2004 concerning whether to enter into the proposed Agreement to convey 46,277 square feet of space owned by WEI to Monument Residential LLC ("Monument"), and directs WEI to submit the matter for a new vote by the membership of WEI.

While the decision of the Delaware Court of Chancery does not address WEI's participation in this Zoning Commission proceeding, the terms of the proposed Agreement with Monument, if executed by WEI, would require WEI to support Monument's application to amend the Planned United Development for the Watergate Complex in order to allow for a housing cooperative project as an alternative use of the Watergate Hotel. As a result, WEI has determined that it is unable to participate as an advocate on any matter concerning Monument's application at the Zoning Commission proceeding, presently scheduled for March 1 and 4, 2004, until the new membership vote takes place.

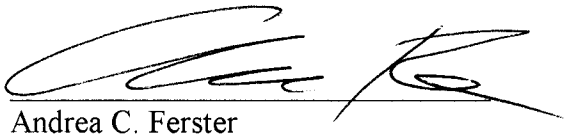
The Board of Directors of WEI has made not yet met or made a decision about when this matter must be submitted to a vote by its membership, in accordance with decision and order of

ZONING COMMISSION
District of Columbia
Case 03-16
Exhibit 72

ZONING COMMISSION
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EXHIBIT NO.72

the Delaware Court of Chancery, and consistent with the notice and other requirements of WEI's bylaws. The next regularly scheduled meeting of WEI's membership is WEI's annual membership meeting, which meeting must occur in the first, second, or third week of April. *See* Bylaws of WEI, Section 22.

Respectfully submitted:



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Counsel for Watergate East, Inc.

February 27, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on February 27, 2004, a copy of the foregoing Supplemental Filing was served by facsimile and first-class mail on:

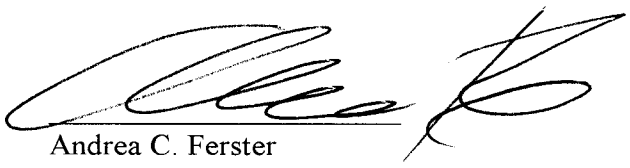
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Decided: February 25, 2004

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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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