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May 1, 2017

Anthony J. Hood, Chairman  
Zoning Commission  
441 4<sup>th</sup> Street, N.W., Suite 220  
Washington, D.C. 20001

Re; CASE NO. 13-14 (Vision McMillan Partners, LLC and Office of the Deputy Mayor for Planning and Economic Development - Remand from the Court of Appeals)

Dear Chairman Hood and Members of the Zoning Commission:

Friends of McMillan Park (“FOMP”), a party in opposition to the above-referenced application, hereby file this motion *in limine* to bar Applicants Deputy Mayor of Planning and Economic Development (“DMPED”) and Vision McMillan Partners (“VMP”) from presenting any new expert witnesses or rebuttal testimony, including testimony by the D.C. Department of Energy and the Environment (“DOEE”), as part of its rebuttal case on May 1, 2017.

In the alternative, if the Commission permits the Applicants to introduce rebuttal witnesses not previously identified by Applicants, FOMP requests that the hearing scheduled for May 1, 2017 be postponed, and that Applicants be required to submit a list of rebuttal witnesses and a summary of their testimony at least 14 days prior to the new hearing date in accordance with 11 DCMR Subtitle Z, § 408.10. FOMP also submits the attached exhibits in order to provide a more complete context for several documents submitted by the Applicants, as permitted by this Commission’s rules. *Id.* Subtitle Z, § 408.7.

### Background

At the hearing on April 19, 2017, the Applicants presented their case, consisting of testimony from Leonard Bogorod, who was qualified as an expert in fiscal and economic impact analysis, Mathew Bell, who was qualified as expert in architecture, and Shane Dettman, who was qualified as an expert in planning. Several representatives of the Applicants also testified. The Applicants elected not to present an expert witness to address environmental issues, relying instead on the agency report presented by DOEE on April 6, 2017.

FOMP presented four witnesses, including Dr. Sacoby Wilson, an expert in environmental health science, who testified on the potential impacts of the McMillan development on public health, Dr. Brett Williams, who was qualified as an expert in gentrification and displacement, and Ms. Laura Richards, who qualified as expert in zoning and who testified on comprehensive plan issues.

After the Applicants' counsel completed cross-examination of FOMP's witnesses, the Applicants requested that the Commission adjourn the hearing, over the objections of FOMP, due to the unavailability of the representative of DOEE, who the Applicants wished to call as a rebuttal witness. This request was granted by the Commission over FOMP's strenuous objections, and this Commission continued the hearing to May 1, 2017 to allow the Applicants to present their rebuttal witnesses and closing statement.

The Chairman also granted FOMP leave to present the in-person testimony of Claudia Barragan at the hearing scheduled for May 1, 2017, despite the fact that FOMP had not requested this. Rather, FOMP only sought to include Ms. Barragan's written testimony into the record. The Commission denied this request, notwithstanding the fact that the Commission's rules permit the submission of written testimony by witnesses. *See* 11 DCMR Subtitle Z, § 408.7 ("Every party shall have the right to present. . . oral and documentary evidence."). Only expert witnesses are required to be present in person. *Id.*, §203.9 ("an expert witnesses shall be present at the hearing and be available for questions from the Commission and cross-examination by another party").<sup>1</sup>

In their pre-hearing submission, the Applicants indicated that "In the event a particular rebuttal witness has not already been accepted by the Commission as an expert in their respective

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<sup>1</sup> In light of the Chairman's repeated assertions that counsel intended to "deceive" the Commission by distributing Ms. Barragan's written testimony during Dr. Wilson's oral presentation (Transcript 4/19/17, at 251, 266), FOMP hereby provides for the record a complete description of the underlying facts. This statement is necessary due the seriousness with which the D.C. Rules of Professional Responsibility treat allegations that conduct by licensed D.C. attorneys is intended to deceive a tribunal. *See* D.C. Rules of Professional Responsibility, Rule 3.3.(d) (an attorney may not knowingly assist a client to engage in conduct that the lawyer knows is "fraudulent"); *id.*, Rule 1(d) (defining "fraud" and "fraudulent" as including conduct that "has a purpose to deceive.").

The facts here show no objective evidence of any intent to deceive this tribunal. Counsel for FOMP distributed Ms. Barragan's written testimony while Dr. Wilson was delivering his oral testimony because Dr. Wilson intended to and did adopt Ms. Barragan's testimony, as permitted by this Commission's rules. *See* 11 DCMR Subtitle Z, § 408.1(e) (adoption of another witness' testimony). While FOMP apologizes for any confusion caused by the timing of distribution of Ms. Barragan's written statement, the facts do not objectively support any characterization of this distribution as an attempt to "deceive" this Commission. Ms. Barragan's testimony was not attached or appended to any other document distributed to the Commission or in any respect hidden, and her testimony was clearly labeled, in large type on the front page of her testimony, as "Testimony of Claudia Barragan." A copy of this front page is attached hereto as Exhibit B. As a result, the Commissioners quickly understood that this was not Dr. Wilson's testimony. Accordingly, the record indicates no intent to deceive the Commission.

field, the Applicant will submit the witnesses' resume for the Commission's consideration prior to the witnesses testimony." Applicants' Prehearing Submission, at 20 (March 13, 2107). To date, no resumes of rebuttal witnesses have been submitted by the Applicants.

On April 20, 2017, counsel for FOMP sent an email to Applicants' counsel requesting that the Applicants identify their rebuttal witnesses and provide a summary of rebuttal testimony. On April 25, 2017, Norman Glasgow, counsel for the Applicants, declined to provide any information about the Applicants' rebuttal witnesses, based on his view that the Commission's Rules in Subtitle Z, Chapter 9, governing remand proceedings, do not require this. *See* attached Exhibit A. In fact, this Commission's order scheduling this remand proceeding specifically notes that the hearing will be held in accordance with 11 DCMR Subtitle, Z, Chapter 4. These rules provide that "[i]f surprise to the applicant or to a party in a contested case is clearly shown and the inability to proceed is demonstrating, a hearing may be adjourned to allow the applicant or party sufficient time to offer rebuttal evidence." *See* 11 DCMR Subtitle Z, § 408.10.

#### Discussion

FOMP requests that Applicant be barred from presenting any testimony by any expert who did not previously testify as part of the Applicants' case or identified as a witness in the Applicants' prehearing submission. The Applicants have had ample time to prepare their opening and rebuttal cases, and allowing new expert witnesses at this point would result in unfair surprise and be unduly prejudicial to FOMP, given the Applicants' refusal to provide a witness list or summary testimony to FOMP. *See* 11 DCMR Subtitle Z, § 408.10.

FOMP also specifically objects to the Applicants' use of DOEE as a rebuttal witness. DOEE testified as a public agency on April 6, 2017, not as one of the Applicants' witnesses. The rules of this Commission only permit rebuttal by the Applicant; public agency officials are not afforded any opportunity to present rebuttal testimony. *See* 11 DCMR Subtitle Z, § 408.9.

Nor is it appropriate for the Applicants to call a public agency as a rebuttal witness. The Applicants failed to present any testimony on environmental issues in their case in chief, choosing instead to rely on the DOEE's agency report at the April 6<sup>th</sup> hearing and on DOEE's written Environmental Assessment. FOMP's environmental witness Dr. Wilson therefore responded only to DOEE's testimony and report. By choosing to rely on DOEE's report and testimony and failing to present any testimony on environmental issues as part of the Applicants' case, the Applicants waived their right to present rebuttal testimony on environmental issues.

The Applicants chose to rely on DOEE's testimony and neglected to include any environmental expert as part of their opening case. DOEE was not present at the hearing on April 19, 2017, despite the clear intention by the Commission to conclude the hearing on this date, presumably in recognition that rebuttal testimony by an agency witness is not permitted. Given that the Applicants had an opportunity to present their own environmental witness and declined to do so, it is unfair and prejudicial to allow DDOE to provide rebuttal testimony on May 1, 2017.

In the alternative, if the Commission permits the Applicants to introduce new rebuttal expert witnesses not previously identified by Applicants in their pre-hearing submission or presented during the Applicants' case in chief, FOMP requests that the hearing scheduled for May 1, 2017 be postponed, and that Applicants be required to submit a list of rebuttal witnesses and a summary of their testimony at least 14 days prior to the new hearing date, in accordance with 11 DCMR Subtitle Z, § 408.9.

#### Additional Evidence

For purposes of completeness, FOMP submits the following additional exhibits to provide context for Applicants' documentary evidence and testimony, as permitted by 11 DCMR Subtitle Z, § 408.7, as follows:

1. The Land Disposition Agreement ("LDA"), referenced by the Office of Planning and by the Applicants in their testimony, and which was the subject of the D.C. Council Report on Proposed Resolution 20-1084, attached to the Applicants' Prehearing Submission as Exhibit G. *See* Exhibit C. This LDA is a matter of public record. <https://dmped.dc.gov/page/land-surplus-and-disposition-agreements>
2. The schedules referenced and described in the LDA and the D.C. Council Report on Proposed Resolution 20-1084. *See* Exhibit D. These schedules are a matter of public record. <https://dmped.dc.gov/page/land-surplus-and-disposition-agreements>
3. The full Comprehensive Housing Strategy Task Force, Homes for an Inclusive City, excerpts of which are attached to the Applicants' Prehearing Submission as Exhibit I. *See* Exhibit E. This report is also available online. [https://www.brookings.edu/wp-content/uploads/2016/06/housingstrategy\\_fullreport.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/housingstrategy_fullreport.pdf)

#### Conclusion

Accordingly, FOMP requests that the Applicants rebuttal testimony be limited solely to experts or persons who testified as part of their opening case.

Sincerely,



Andrea C. Ferster

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Motion In Limine was served on May 1, 2017, by **email** to:

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