TOWN OF CHESTER
DEVELOPMENT REVIEW BOARD

In re: Zachary's (Zaremba Group, Dollar General Proposal),

Conditional Use Application No. 430

INTERESTED PARTIES CUNNINGHAM ET AL.'S MOTION TO RECONSIDER

Shawn Cunningham and the more than ten other persons who signed the Petitions in this matter hereby move the Development Review Board (DRB) to reconsider its ruling dated April 16, 2012. There are numerous errors and omissions in the ruling and also in the process itself which require correction.

1. Authority to Reconsider

This request to reconsider is submitted pursuant to 24 V.S.A. §§4471-4472, the Municipal Administrative Procedure Act, 24 V.S.A. §§ 1201-1210, and the common law. Under § 4471(b) and § 4472(a), the Vermont Rules of Civil Procedure govern all appeals from the DRB. The Vermont Rules of Civil Procedure and the common law not only authorize but require that a motion to reconsider be filed with a tribunal in order to raise, with the tribunal, errors in the tribunal's decision that were unknown to litigants prior to the decision, and also to avoid a miscarriage of justice or an unnecessary appeal. In re Entergy Nuclear Vermont Yankee, LLC, 2007 VT 103, ¶ 13, 14, 17, 182 Vt. 340, 346-47, 939 A.2d 504, 508-09 (summarizing law on duty to file motion to reconsider to address errors not apparent until ruling, citing precedents involving administrative agency decisions); South Village Communities LLC, Docket # 74-4-05 Vtec, 9/14/06 (motion to reconsider appropriate to relieve a party against the unjust operation of the record resulting from the mistake or inadvertence of the court and not the fault or neglect of a party).

The purpose of a post-judgment motion is not to repeat arguments made previously by a party, which arguments the tribunal considered and rejected. Petitioners therefore do not repeat here the arguments they made to the DRB which the DRB has considered and rejected. However, certain errors and omissions in the ruling require correction so that on appeal the Environmental Court can make an informed decision and will not have to order a remand just to determine how or why the DRB made its decision.

2. Errors and Omissions Apparent in the Ruling

The Petition: The Findings fail to note that at the October 10, 2011, hearing, a Petition was filed with the Board with the signatures of 49 town residents, and fails to note the contents of the Petition, which stated:

> Pursuant to 24 V.S.A 4465(b), we, the undersigned registered voters or real property owners of Chester, wish to participate as interested parties in the matter of Application by the Zaremba Group to the Chester Development Review Board for a conditional use permit for construction of a Dollar General retail store, on Main Street in Chester. We allege that the application, if granted, will not be in accord with the policies, purposes, or terms of the Town Plan and zoning bylaws of Chester. We authorize Shawn Cunningham as our representative.

Counsel for the Petitioners: The Findings fail to note that at the October 10, 2011, November 14, 2011, and December 12, 2001 hearings, the undersigned counsel was present on behalf of Mr. Cunningham and the signers of the Petition, fails to note that I spoke, and fails to note the issues I addressed. The Findings incorrectly purport to list every person who was present and who participated.

Expert Witness for the Petitioners: The Findings fail to note that at the November 14, 2011, hearing, expert witness Jean Vissering was sworn in and testified on behalf of Mr. Cunningham and the signers of the Petition, and that I was present on their behalf. Again, the Findings incorrectly purport to list every person who was present and who participated.

Regrettably, the Findings and Conclusions completely fail to mention the content of what Ms. Visssering testified about, and completely fail to accept or reject her expert opinions. It is as if she had never testified.

Mr. Cunningham's Testimony: The Findings fail to note that at the November 14, 2011, hearing Mr. Cunningham was present, was placed under oath, and testified, and again the Findings and Conclusions fail to mention, accept or reject the contents of his testimony.

Mr. Veliz's Testimony: The Findings fail to note that at the November 14, 2011, hearing Mr. Veliz was present, was placed under oath, presented a video, and testified, and again the Findings and Conclusions fail to mention, accept or reject the contents of his testimony.

Traffic (section 9.4(c)(1)(C)): Despite many statements by my clients about traffic, and despite questioning of the applicant's traffic expert by Board members and members of the public, there is not a single Finding about traffic congestion, traffic delays, etc. There are Conclusions of Law that address traffic, but the conclusions are what we call "conclusory" and do not cite to or provide any footing in the actual testimony and questioning.

Character of the Area (section 9.4(c)(1)(B)): Despite expert testimony by Ms. Vissering on the character of the area and substantial testimony by my clients and members of the public about this, there is not a single Finding on this critical subject. Again, while there is a Conclusion of Law about this, it is conclusory and lacks any indication that it was based on actual sifting of the evidence. It is impossible for the reader to determine what the Board found to be the existing character of the area, or how the Board determined that there would be no adverse affect on the existing character. We see only the Board's conclusion, not why it reached that conclusion.

In addition, the conclusion itself fails to recognize the legal standards applicable to protecting the character of the area. There are clear legal standards set by our Supreme Court. The standard is not whether the proposed use is an allowed use, which is all the existing conclusion states.

At the hearing held on January 9, 2012, the Board stated that it did not want to receive any legal guidance from the attorneys. Thus neither Attorney Cooper nor I submitted any. It is not too late to consider what those standards are. Under both the Chester ordinance and the conditional use statute[1], the applicant must prove that the proposed use "shall not adversely affect" "the character of the area affected." The area affected is not just the immediate neighborhood of a project such as houses within view of a project; it is any area that may actually be affected by the project. Nor is the "area affected" defined by zoning district; the statute does not refer to zoning districts. Any deterioration of an affected area, including "incremental" change caused by a project, that may be a "material" and "significant" harm, is not lawful under the conditional use statute and the ordinance. If the harm to the character of the area will be immaterial or insignificant, it may be approved -- but not otherwise. Harm that is material and significant must result in conditional use denial. In re John Russell Corp., 2003 VT

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[1]. The conditional use statute, section 4407(2), states: "Conditional uses. In any district, certain uses may be permitted only by approval of the board of adjustment or the development review board, if general and specific standards to which each permitted use must conform are prescribed in the appropriate bylaws and if the board of adjustment or development review board after public notice and public hearing determines that the proposed use will conform to such standards. Such general standards shall require that the proposed conditional use shall not adversely affect: (A) The capacity of existing or planned community facilities; (B) The character of the area affected; (C) Traffic on roads and highways in the vicinity; (D) Bylaws then in effect; or (E) Utilization of renewable energy resources." (Underlining added.) Section 4407(2) has been modified but the modification does not go into effect until 2011. See §§ 4414 and 4481.

93 ¶ 33, 176 Vt. 520, 727-28, 838 A.2d 906, 916 (conditional use permit reversed because of "the risk that the character of the neighborhood will incrementally shift"); In re Miller, 170 Vt. 64 (1999) (the "shall not adversely affect" test involves harm that is material and significant); In re Walker, 156 Vt. 639, 558 A.2d 1058, 1059 (1991) ("substantially materially adverse impact" is the conditional use standard).

Ms. Vissering's testimony addressed this criterion. The actual content of her testimony, for example her testimony about the suburban, strip-mall appearance of the project and its departure from the existing character of the area, is never addressed in the Board's order.

Special Criterion A: The ruling misquotes and then does not actually discuss the wording of Special Criterion A. The standard is that the project must "adhere harmoniously to the New England architectural appearance that gives the center of Chester its distinct regional character and appeal." The misquoted version refers to the appearance of Chester generally, not its center -- a critical difference, which my clients pointed out to you at the hearings.

The reader can glean from the ruling that the Board has concluded that the building materials cited will conform to the misquoted standard, but the reader cannot determine *why* the Board reached this conclusion. Findings must set forth *why*.

Again, Ms. Vissering specifically addressed this criterion, and her expert testimony is neither accepted nor rejected. If Board decided Ms. Vissering was wrong about what constitutes the "New England architectural appearance that gives the center of Chester its distinct regional character and appeal," or why this project does not "adhere harmoniously" to that standard, the Order does not inform the reader how or why the Board reached this conclusion.

3. Improperly Constituted Board

It has now come to our attention that two of the five members of the Board were not reappointed, and their terms expired on March 3, 2012, prior to the decision to close the hearings and prior to the deliberations that occurred on or after March 12. Under the governing statutes, as we understand them, the Board had to have a minimum of five members. It did not. Moreover, one of the members who had not been reappointed provided the third vote in favor of the applicant. Therefore: a) there was no properly constituted Board on March 12 or at any time afterwards; b) the vote to close the hearings was invalid, the hearings remain open and the 45 days has not begun to run; and c) there was not a majority vote in favor of the applicant nor any legally valid decision. To remedy this, we suggest that the Board duly notice another hearing after it regains the legally required membership, and that it then enter deliberative session to consider the evidence afresh and apply the governing legal standards.

Date: April 24, 2012

/s/ James A. Dumont

James A. Dumont, Esq.
Law Office of James A. Dumont, Esq.
15 Main St., PO Box 229
Bristol VT 05443
dumont@gmavt.net