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July 12, 2017

Via Hand Delivery  
Members of the DeKalb County Board of Commissioners  
c/o David Cullison  
Senior Planner, Historic Preservation  
330 W. Ponce de Leon Ave, 3rd Floor  
Decatur, Georgia 30030

Re: Appeal of Certificate of Appropriateness for 1551 Briarcliff Road

Dear Commissioners,

We are writing on behalf of Residential Recovery Fund, LLC (“Minerva USA”) (“Minerva”) in response to appeals filed on July 5 and 6, 2017, (the “Appeal”) by three residents of Briar Park Court and one resident of 1616 Briarcliff Road (collectively herein referred to as “Appellants”). We object to the appeal as being without merit and as filed by persons without standing to appeal. The following statement is a combination of the responses to the four individual appeals. We understand that four appeals would allow a twelve page response.

#### **A. Introduction**

On April 17, 2017, the DeKalb County Historic Preservation Commission (“HPC”) approved Minerva’s Certificate of Appropriateness (“COA”) in accordance with the provisions contained in Chapter 13.5, Historic Preservation, of the DeKalb County Code of Ordinances (the “DeKalb Code”) and in accordance with the Druid Hills Historic District - Design Manual (the “Design Manual”). Minerva’s application was filed on behalf of the Property owner, New World Communications of Atlanta, Inc., and consisted of a request to divide property into two parcels and to construct on one of those parcels, 1551 Briarcliff Road (the “Property”), two multifamily

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buildings consisting of a total of twenty-four (24) units. In its original submittal, Minerva's site plan showed, among other things, buildings slightly encroaching into the County required stream buffer on the Property. The Property consists of 2.2 acres of land and is zoned O-I (Office-Institutional) and at the time the application was submitted was in the Town Center Character Area land use category that allows a maximum of sixty (60) units per acre. Minerva's proposed development meets the requirements of both the Dekalb County Zoning Ordinance and the County's Comprehensive Plan.

Several appeals were filed on April 27. On May 23, 2017, the DeKalb County Board of Commissioners ("BOC") considered these appeals and determined that the HPC erred in its decision to approve the COA. The BOC reversed the HPC's decision and remanded the application with direction that it be reviewed again in consideration of Druid Hills Guidelines 4.1.2, 4.1.3, 8.1 and 8.3. In addition, the BOC instructed Minerva to have an archeological evaluation made of the Property, as recommended in Guideline 10.0.

Minerva, for and on behalf of the Property owner, modified its application in response to the BOC decision (the "Modified Application") by submitting an archaeological evaluation of the Property, modifying its site plan to move the buildings out of the stream buffers and create conservation easements on the undeveloped area. On June 19, 2017, the HPC reviewed the Modified Application and the appeal documents and responses by Minerva and confirmed its approval of the COA (the "June HPC Decision").

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On July 5 and 6, 2017, the Appellants filed appeals of the June HPC Decision. Appellants allege that the HPC acted in an arbitrary and capricious manner because it approved a COA application that had not been altered from the original submittal, that the COA violates the provisions of the Design Manual by allowing the cutting down of trees and development of green space in the Historic District and that the new development will create hazardous traffic conditions.

**B. Appellants Do not Have Standing to File the Appeal**

Appellants do not have standing to appeal. Section 13.5-8(12) of the DeKalb County Code allows any person adversely affected by any decision made by the HPC to appeal its decision to the BOC. It defines an “adversely affected” person as “the applicant or any owner of adjoining property or owner of property whose property line is within one thousand five hundred (1,500) feet of the applicant's property according to the DeKalb County tax records.” This definition does not conform to state law for an appeal of an HPC decision. The HPC is an “administrative agency,” which is “a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.” Const. art. 1, § 2, par. 4; art. 6, § 1, par. 1. A person is “aggrieved” where he can show “an interest in the agency decision that has been specially and adversely [impacted] thereby.” Bd. of Natural Resources v. Ga. Emission Testing Co., 249 Ga.App. 817 (2001). In other words, such an individual must demonstrate special damage suffered as a result of the

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decision appealed from, rather than some damage common to all those similarly situated. Ga. Power Co. v. Campaign for a Prosperous Ga., 255 Ga. 253 (1985).

The Appellants offer no arguments or evidence that they are aggrieved parties. Appellants state that development of the Property for the multi-family buildings will create hazardous traffic conditions, cause the loss of trees in an urban growth forest, create stormwater runoff, or will reduce greenspace. Appellants fail to prove how their property values will be affected or how they will suffer injuries special to them as a result of these effects that are not common to all those similarly situated. In fact, one of the Appellants sold his house in the Briar Park neighborhood on July 10, 2017 while this pending application is common public knowledge for 73% more than that appraised value, according to the tax assessment.

The Appellants' true complaint is that the Property will be developed at all. However, such development is to be expected in a thriving urban community. The mere "increase in inconveniences stemming from urban growth – such as increases in traffic – is insufficient to confer standing." Garden Hills Civic Ass'n Inc. v. Metropolitan Atlanta Rapid Transit Authority, 273 Ga. 280 (2000). The Appellants do not have standing to file this Appeal and the filing of this Appeal is nothing more than an attempt to delay construction of a legitimate project.

**C. Appellants Improperly Construe the Standard of Review**

Section 13.5-8(12) states that “the standard of review shall be an abuse of discretion. An abuse of discretion exists where the record presented to the governing authority shows that the preservation commission exceeded the limits of its authority or that the preservation commission's decision was not based on factors set forth in the Section 13.5-8(3) or the guidelines adopted by the preservation commission pursuant to Section 13.5-6 or that the preservation commission's decision was otherwise arbitrary and capricious.” Appellants argue that in order to base its decisions on the factors set forth in the guidelines, the HPC must look beyond the four corners of the Druid Hills Guidelines and expand its scope to what the Appellants subjectively believe it should say. They urge the BOC to make a similarly subjective decision.

This is a misinterpretation of the role of the BOC’s review during an appeal. In an appeal of a decision by an administrative agency, the review of evidentiary issues is limited to determining whether factual findings are supported by any evidence (emphasis added). Professional Standards Comm. v. Smith, 257 Ga.App. 418 (2002); Georgia Dept. of Agriculture v. Brown 270 Ga.App. 646 (2004). Deference must be given to an administrative agency's interpretation of statutes and to the agency's own rules and regulations, because agencies provide a high level of expertise and an opportunity for specialization unavailable in the judicial or legislative branches. Northeast Georgia Medical Center, Inc. v. Winder HMA, Inc., 303 Ga.App. 50 (2010); Upper Chattahoochee Riverkeeper, Inc. v. Forsyth County, 318 Ga.App. 499 (2012).

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In this case, the HPC's decision was supported by any evidence and, therefore, deference must be given to the HPC's decision that the Modified Application conforms to Design Guidelines 4.1.2, 4.1.3, 8.1 and 8.3 based on the changes made.

**D. Approval of Minerva's Modified Application Was Proper as the Application Was Modified in Response to the BOC's May 23, 2017 Decision.**

On May 23, 2017, the BOC reversed the HPC's decision and remanded the application to the HPC with direction that the application be reviewed again in consideration of Druid Hills Guidelines 4.1.2, 4.1.3, 8.1 and 8.3. In addition, the BOC instructed Minerva to have an archeological evaluation made of the property, as recommended in Guideline 10.0.

In response, Minerva hired an independent licensed consultant to conduct an archaeological evaluation of the Property as instructed by the BOC. The results of the evaluation indicated that the site did not contain any historically significant characteristics. Minerva also modified its site plan to move the buildings slightly to the west so that none of the buildings encroached into the stream buffers. In addition, Minerva offered to create conservation easements on undeveloped areas, *including developable land outside of the stream buffers*, so that they could not be developed in the future. On June 19, 2017, the HPC reviewed the Modified Application and the appeal documents and responses by Minerva and confirmed its approval of the COA.

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As indicated above, the BOC must affirm the HPC's decision as its factual findings are supported by any evidence. The BOC must give deference to the HPC's interpretation of its statutes and rules and regulations because the HPC provides a high level of expertise and an opportunity for specialization unavailable to the BOC.

**E. The June HPC Decision Resulted in the Protection of the Natural Landscape as Contemplated in Guidelines 4.1.2 and 4.1.3.**

The proposed plan fully meets the requirements of the Design Guidelines 4.1.2 and 4.1.3. Both of these sections refer to F.L. Olmstead's original design for Druid Hills, and also the later subdivision designers, i.e. O.F. Kauffman. In the illustration maps in the Design Guidelines, it is clear that the subject property was not included in either the original Olmstead subdivision design boundaries, or in the subsequent expanded Kauffman subdivision boundaries. In addition, the drainage channel abutting the Property is not identified as part of the Peavine/Lullwater Creek Watershed's creek system, as shown in Illustration F of the Design Guidelines.

Moreover, the design of the proposed development meets the requirements of the Design Guidelines to protect the natural and cultural landscape, as outlined in Sections 4.1.2 and 4.1.3. The design of the proposed development follows the natural topography and includes the preservation of drainage ways and stream corridors within rear yard spaces. Significant expanses of the natural landscape surrounding the creek corridors were preserved to create a network of

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open space areas. The landscaping will be predominately vegetated in naturalistic designs and the yards will be composed of lawn, ornamental shrubs, ground cover plantings, small trees and large shade trees of many native varieties. Finally, the streets are lined with small or large trees and the drives and walks connect the residences to the streets. In conclusion, the Modified Application fully and completely meets the requirements of Design Guidelines 4.1.2 and 4.1.3, without exception.

**F. The June HPC Decision Properly Applied Guideline 8.1 (Open Space and Parkland Preservation and Conservation).**

The proposed plan fully meets the requirements of the Druid Hills Design Guideline 8.1. As discussed above, the Property was not identified as an open space or a stream corridor by Olmstead nor was it a part of his original design area. The Design Guidelines recommend that “The Druid Hills Civic Association or the DeKalb County Historic Preservation Commission should consider discussing with private property owners the concept of conservation easements, in combination with tax credits, to preserve the private “open spaces.”” In accordance with this recommendation, and in response to requests from both the Druid Hills Civic Association Land Use representative and the Historic Preservation Commission, Minerva agreed to place a perpetual conservation easement on the entire stream buffer area, as well as a large portion of developable land, to perpetually preserve the private open space for the benefit of the entire community (see drawing showing proposed conservation easement area submitted to the HPC and in the record).



In addition, Section 8.1 recommends “removal of exotic species by the most environmentally responsive approach possible.” Minerva will remove these species prior to placing the preservation easement on the open space. In conclusion, the Modified Application fully and completely meets the requirements of Design Guidelines 8.1, without exception.

**G. The June HPC Decision Properly Applied Guideline 8.3 (Protection of the Historic Watershed Design and Design Concept)**

The Design Guidelines notes that the Druid Hills Historic District is contained within the Peavine and Lullwater Creeks Watershed and that the watershed is also comprised of a system of secondary and tertiary streams that feed these major creeks. The Design Guidelines state that there should be a 25-foot setback from the top of creek banks in accordance with state law at the time. Dekalb County currently requires a 75-foot stream buffer setback from the top of the stream bank, which is included in Minerva’s current design. As indicated above, Minerva moved the buildings out of the stream buffer area in the Modified Application so that there is no longer an encroachment into the stream buffer. Section 8.3 of the Design Guidelines states “Olmstead’s design placed rear lot lines along these streams and natural drainage ways as a method of protection and flood control.” In addition, a conservation easement will be placed on the green space areas on the site, including the stream buffer and developable land. Minerva’s proposed lot division plan also places the rear property line along the natural drainage way. Therefore, the Modified Application meets the requirements of Design Guideline 8.3.

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**H. Minerva submitted an archeological study as contemplated by Guideline 10.0.**

Minerva submitted an archeological study performed by R.S. Webb & Associates and dated June 5, 2017 with its Modified Application. Based on literature review and archeological field survey tests, the archeological study concluded that there are no archeological resources in the project area. In conclusion, the Modified Application fully and completely meets the requirements of Design Guidelines 10.0, without exception.

**I. Conclusion**

The Appeal must be denied because the Appellants do not have standing to file this appeal. Moreover, the Appeal must be denied because the HPC's findings are supported by any evidence and the BOC must give deference to the HPC's decision. Granting the Appeal would constitute a taking of Residential Recovery Fund, LLC ("Minerva USA")'s and New World Communications of Atlanta, Inc.'s without just compensation and without due process in violation of Article I, Section I, Paragraphs 1 and 2, and Section III, Paragraph 1 of the Georgia State Constitution and the Fifth and Fourteenth Amendments to the Federal Constitution. In addition, Dekalb County is hereby notified pursuant to O.C.G.A. § 36-11-1 of Minerva's and the Property owner's intention to seek damages, including diminution of the value of the Property

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and attorney's fees and costs and expenses of litigation in the event there is an unconstitutional decision by the BOC affecting the Property.

WHEREFORE, Minerva respectfully requests that the Appeal be dismissed for the reasons set forth herein above.

Sincerely,

THE GALLOWAY LAW GROUP, LLC



Laurel David

cc.

Brian Davison, Minerva

Overtis (O.V.) Brantley is the Chief Legal Officer for DeKalb County

Barbara Sanders, Clerk to the Board of Commissioners