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February 17, 2010

Hand Delivered

Marc Loud, Chairperson
D.C. Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, DC 20001

**Re: BZA Appeal No. 18029
Supplemental Pre-Hearing Statement of Owner**

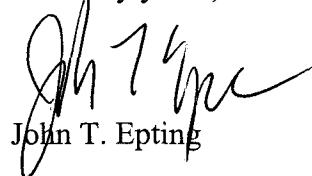
Dear Chairperson Loud and Members of the Board:

Enclosed please find copies of the D.C. Court of Appeals' recent decision in *Foggy Bottom Association v. D.C. Zoning Commission*, No. 07-AA-1197 (D.C. 2010) ("**FBA II**"), an appeal of the Commission's approval of a PUD for the old GW Hospital site in Square 54. In its decision, the Court affirmed all aspects of the PUD, including challenges to the sufficiency of the proposed amenities. Of particular relevance to the matter before this Board, the Court concluded that

ultimately what matters is not whether a particular amenity will necessarily materialize, but that the entity seeking PUD approval will "follow through" in "good faith," the "process of implementing [the] amenities."

FBA II at 3-4 (citation omitted). The Court's decision clearly affirms the Zoning Administrator's determination that issuance of the CO for the PUD at 1255 25th Street NW was reasonable given Vornado's extensive efforts to receive approval for and construct the improvements to Francis Field. And in any event, as argued in both DCRA and Vornado's pre-hearing statements, the issue is or will soon be moot, since construction is now underway.

Sincerely yours,



John T. Epting



David Avitabile

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18029

EXHIBIT NO. 18

Board of Zoning Adjustment
District of Columbia
CASE NO. 18029
EXHIBIT NO. 18

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2010 a copy of the attached letter, statement, and exhibits was served by hand, U.S. Mail, and/or electronic mail on the following:

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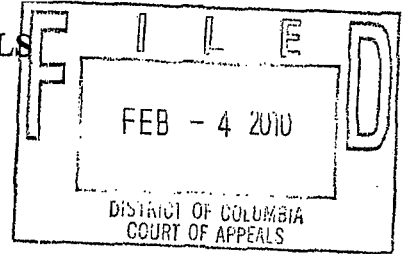
A handwritten signature in black ink, appearing to read "David Avitabile", is written over a horizontal line.

David Avitabile

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 07-AA-1197

FOGGY BOTTOM ASSOCIATION,
PETITIONER,
(Z.C. Case No. 06-27)



v.

DISTRICT OF COLUMBIA ZONING COMMISSION,
RESPONDENT,

and

THE GEORGE WASHINGTON UNIVERSITY
and BOSTON PROPERTIES, INC.,
INTERVENORS.

Petition for Review of a Decision of the
District of Columbia Zoning Commission

(Argued April 3, 2009)

(Decided February 4, 2010)

Before FISHER, BLACKBURN-RIGSBY, and THOMPSON, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

This petition seeks review of a decision of the District of Columbia Zoning Commission approving an application by the George Washington University and others (hereafter collectively “GWU”) for approval of a planned unit development (“PUD”) and amendment of the District’s Zoning Map from R-5-D to C-3-C for Square 54, Lot 30, the site of the former George Washington University Hospital. In all major respects, the issues raised here by petitioner were answered (adversely to petitioner) in our recent decision, *Foggy Bottom Ass’n v. District of Columbia Zoning Comm’n*, 979 A.2d 1160 (D.C. 2009) (“FBA I”). We affirm.

Petitioner first contends, as it did in *FBA I*, that the Commission erred in treating this

application in accordance with the standards for PUD¹ developments, rather than exclusively under the regulations governing land use for colleges and universities, specifically 11 DCMR § 210 (2003). For the reasons stated in *FBA I*, *supra*, 979 A.2d at 1167-70, we reject this contention. No more here than in *FBA I* has petitioner shown why the Commission erred in concluding that the use of the PUD process in this re-development is compatible with the campus plan process and not inconsistent with the Comprehensive Plan. *See* 11 DCMR § 2400.4.²

Similarly unavailing, in light of *FBA I*, is petitioner's argument that the Commission erred in not requiring the preparation of an Environmental Impact Statement ("EIS") before approving the PUD application. As in the case of the campus plan application at issue in *FBA I*, requiring an EIS before approving the PUD that GWU sought for Lot 30 would be premature. *See FBA I*, *supra*, 979 A.2d at 1165-67. Moreover, after the Commission issued its decision, GWU did obtain a ruling by the appropriate District agency that an EIS was unnecessary in light of a preliminary environmental review that was based upon GWU's submission of an Environmental Impact Screening Form ("EISF"). Indeed, that fact essentially moots petitioner's contention regarding an EIS. *See Foggy Bottom Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 791 A.2d 64, 72 (D.C. 2001).

Finally, petitioner argues that the Commission erred by not addressing the likelihood that an important amenity GWU offered would actually materialize. *See generally* 11 DCMR § 2403.8. Here too, however, *FBA I* is instructive, because it also considered and rejected an argument that "the proffered amenities are not sufficiently feasible and the conditions imposed are not realistically enforceable" *FBA I*, *supra*, 979 A.2d at 1171. We agree with the Commission that ultimately what matters is not whether a particular amenity will necessarily materialize, but that the entity seeking PUD approval will "follow through," in

¹ The Planned Unit Development process offers "flexibility of development and other incentives, such as increased building height and density; provided, that the project offers a commendable number or quality of public benefits and that it protects and advances the public health, safety, welfare, and convenience." *FBA I*, *supra*, 979 A.2d at 1168 (quoting 11 DCMR § 2400.2); *see generally id.* at 1167-70 (describing the PUD process).

² The Commission addressed at great length petitioner's arguments that the proposed PUD was inconsistent with the Comprehensive Plan. In particular, it persuasively explained why the proposed PUD was consistent with Square 54's Institutional designation. The Commission was within its authority to consider a variety of opinions — including the opinions of the Office of Planning as well as the Advisory Neighborhood Commission — in determining compatibility with the Comprehensive Plan, *see George Washington Univ. v. District of Columbia Bd. of Zoning Adjustment*, 831 A.2d 921, 933 (D.C. 2003), and was not compelled to accept the contrary opinions of others such as the ANC.

“good faith,” the “process of implementing [the] amenities.” *Id.*

Here, the Commission approved the application based on an entire package of amenities, only one of which petitioner challenges. *Compare Comm. of 100 in the Fed. City v. District of Columbia Dep’t of Consumer & Regulatory Affairs*, 571 A.2d 195 (D.C. 1990) (court’s remand to agency turned on lack of feasibility findings as to amenities that had been presented as justifying a finding of “special merit” under the Preservation Act).³ Moreover, the Commission credited the testimony of GWU’s retail consultant that the proposed grocery store would succeed, as well as the Office of Planning’s representation that zoning approval was a practical condition of obtaining a letter of intent from a grocery store tenant. We have no reason to disturb the Commission’s weighing of amenities in the approval process.

Accordingly, we affirm.

ENTERED BY DIRECTION OF THE COURT



GARLAND PINKSTON, JR.
Clerk of the Court

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³ See also *FBA I, supra*, 979 A.2d at 1172 n.19 (distinguishing *Comm. of 100*).