

Government of the District of Columbia
Foggy Bottom and West End
Advisory Neighborhood Commission 2A



c/o West End Library

1101 24th Street NW

Washington, DC 20037

April 20, 2010

Meredith Moldenhauer, Chairperson
D.C. Board of Zoning Adjustment
441 4th Street, NW, 2nd Floor South
Washington DC 20001

RE: BZA Appeal No. 18029, Statement of ANC 2A (via electronic copy)

Dear Chairperson Moldenhauer and Members of the Board:

Attached please find ANC 2A's statement in the matter of BZA Appeal No. 18029. If you should have any questions, please contact me at (202) 253-2612.

Sincerely,

Rebecca K. Coder
Chair

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18029
EXHIBIT NO. 23

Board of Zoning Adjustment
District of Columbia
CASE NO.18029
EXHIBIT NO.23

APPEAL No. 18029

BEFORE THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

STATEMENT OF ADVISORY NEIGHBORHOOD COMMISSION 2A

The Foggy Bottom and West End Advisory Neighborhood Commission ("ANC 2A") hereby joins with the Friends of Francis Field in its appeal pursuant to 11 DCMR §§ 3100 and 3101, from a September 25, 2009, decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Certificate of Occupancy No. CO903586, in violation of Zoning Commission Order No. 06-35, in the CR District at premises 1255 25th Street, N.W. (Square 24, Lot 883). As the affected ANC, ANC 2A is automatically a party to the appeal by virtue of 11 DCMR §3199.1(a).

ANC 2A urges that despite Vornado's assertion of mootness, there remains a controversy respecting the complete delivery of the amenities and public concern respecting a general failure to follow the Zoning Order No. 06-35 and prescribed regulations, protocols and procedures, which the Board is obligated to uphold. In addition, because the Zoning Orders and governing rules were not followed, the parties directly affected and which were to have benefited from the amenities, were placed in a no-win situation. A costly protest over the amenities was necessary because it appeared that the amenities were not going to be delivered as proposed, promised and ordered.

Under § 2409.9 of the Zoning Regulations, any modification to an approved PUD that cannot be approved by the Zoning Administrator shall be submitted to and approved by the Zoning Commission. (See: Zoning Commission Order No. 960-A; Z.C. Case No. 01-13A).

If in fact, Vornado, as it acknowledged in its pre-hearing statement of January 29, 2010, that by March of 2009, it was concerned about its ability to fulfill the Zoning Order, it should have returning to the Zoning Commission at that time, to address the issues.

Instead, the ANC only became aware in late August, 2009 of the existence of the escrow agreement between the developer applicant and the Department of Parks and Recreation (DPR). Although this Commission is a party in the zoning case to which this escrow agreement referred, the ANC 2A was never served with this document. The initial request to obtain it from DPR was refused, and this Commission was only able to obtain it by the filing of a Freedom of Information Act Request with DPR. The ANC 2A received the copy on September 9, 2009.

Upon review, it was apparent that not only was the agreement in violation of the appropriate process but, it was also inaccurate as far as the amenities to be provided as outlined in the zoning order. At that time, the ANC agreed to take formal action.

The Friends of Francis Field in its statement thoughtfully articulates not only the current status of fulfilling the amenities as put forth in the Zoning Order but the fact that the ZA exceeded his limited authority when he accepted an escrow to satisfy conditions 10b and 10c of the order.

Again, ANC 2A urges the BZA to address this type of violation because such violations recur and tend to escape review that is timely and effective. More specifically, the issue of this particular violation and satisfaction of the Zoning Order is not moot, because the amenities are lacking in delivery and full delivery may not be forthcoming.

The ANC 2A respectfully requests that the BZA take this occasion to make clear that neither the DCRA, the Zoning Office, nor the ZA have the authority to change terms of a ZC or BZA order by issuing Certificate(s) of Occupancy before the clear and agreed upon conditions of the Zoning Commission's Orders are met. Substantial completion, as Vornado urges, is relative. The ANC 2A is concerned about that which is not completed, which is significant due to its community appeal, appearance and usefulness. Likewise, ANC 2A respectfully requests that the BZA order that, despite Vornado's arguably substantial completion of the work necessary to the delivery of the promised amenities, Vornado committed to and therefore must satisfy the Zoning Order's requirement for the complete delivery of the amenities. The Friends of Francis Field have carefully detailed the defects in

the delivery of the amenities to date. Under the circumstances, the ANC 2A submits that no permanent Certificate of Occupancy be issued until the work is completed, not simply substantially complete.

ON BEHALF OF THE COMMISSION.

Sincerely,

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Rebecca Coder, Chair
ANC 2A

Attachments:

At its September 16, 2009 meeting, ANC 2A passed the following resolutions regarding the issue currently before the BZA.

i) Resolution in the form of a letter to DCRA regarding 1255 25th St. apartments

Matthew LeGrant
Zoning Administrator
DC Department of Consumer and Regulatory Affairs
941 North Capitol Street NE
Washington, D.C. 20002

Re: Zoning Commission Case Number 06-35 (1227-1231 25th Street NW dba West End 25 at 1255 25th Street, NW)

Dear Mr. LeGrant:

At ANC 2A's regularly scheduled meeting on Wednesday, September 16, 2009, the commission examined Certificates of Occupancy issued by your Department for the property in the above-referenced zoning case, in which ANC-2A is a party. These are:

#CO0902392, dated 06/26/09,

#CO0903063, dated 08/12/09, and.

#CO0903410, dated 09/08/09.

The issuing of these certificates appears to be in violation of the order in that zoning case, which clearly states that no certificates of occupancy are to be issued for that property until the neighborhood amenities and benefits listed in the zoning order have been delivered.

At the September 16, 2009, meeting of Advisory Neighborhood Commission 2A, with a quorum present, the commissioners passed a resolution, presented in the form of this letter, to request you to withdrawal the improperly issued certificates, and to not issue any further certificates of occupancy for this property until you or your department have explained to this Commission the means by which you have determined that conditions 10b and 10c of the zoning order have been complied with, as our records and our physical examination of the sites mentioned in the zoning order show no work completed.

As to condition 10b:

This condition requires the developer applicant to first provide "a landscape plan for Francis Field ...," and then install improvements valued at \$150,000. Exhibit 40 of the order specifies these improvements as "trees, park lighting, furniture, trash receptacles, and a drinking fountain."

Our records show that the landscape plan by the developer applicant's landscape architect, which was submitted to the Commission of Fine Arts on January 22, 2009, was not approved. Furthermore, we find no evidence and that the developer applicant or his landscape architect have taken any steps since then to move this approval forward, and have not yet replied to the directions of the Commission of Fine Arts, contained in a letter of January 29, 2009.

Visual inspection of Francis Field also shows none of the improvements to have been installed.

We became aware in late August of the existence of an escrow agreement between the developer applicant and the Department of Parks and Recreation (DPR). Although this Commission is a party in the zoning case to which this escrow agreement refers, we were never served with this document. Our initial request to obtain it from DPR was refused, and this Commission was only able to obtain it by the filing of a Freedom of Information Request with DPR. We received the copy on September 9, 2009.

This agreement, dated June 18, 2009, is an attempt by the developer to satisfy condition 10b, by putting funds in escrow.

We believe this escrow agreement constitutes a change in both the conditions and intent of the zoning order, and needs to be submitted and approved by the Zoning Commission before it can be considered by DCRA.

Furthermore, the escrow agreement contains several errors of fact. Most importantly, it misreads both the zoning order in condition 10b, and is counter to the agreement reached between the developer, ANC-2A, DPR, and Friends of Francis Field, by putting a value on the labor and materials for the landscape design and subtracting this value from the \$150,000 that the order requires in actual field improvements.

In addition, this agreement also attempts to satisfy part of condition 10c by putting funds in escrow with DPR for the ornamental fence. We submit that the fences are not on land under DPR control, but rather are in public space under the management of the District Department of Transportation.

Finally, the intent and wording of the zoning order are that the amenities actually be delivered before any certificates of occupancy are issued.

As to condition 10c:

This condition requires "landscape and streetscape improvements to 25th Street NW ... the removal of the existing chain-link fence ... and replacement with an ornamental metal fence." Exhibit 27 of the order specifies "streetscape improvements along both sides of 25th Street, including sidewalk paving, planting strips, and the creation of tree boxes" These improvements were valued at \$200,000 in total.

Visual inspection shows that the chain-link fence has not been removed, that the ornamental fence has not been installed, and that no streetscape improvements whatever have been made on the west side of 25th Street NW.

This Commission requests an explanation of the manner in which the DCRA Zoning Administrator has determined that the conditions of the zoning order, particularly 10b and 10c, have been satisfied by the developer applicant.

Sincerely,

Armando Irizarry
Chair, ANC 2A

Cc: Council Member Jack Evans
Rebecca Coder, ANC 2A02

ii) Resolution to Appeal the Issuance of Certificate(s) of Occupancy for 1255 25th Street, NW

Whereas, the DC Department of Consumer and Regulatory Affairs (DCRA) has issued three Certificates of Occupancy for 1227-1231 25th Street, NW dba 1255 25th Street, NW in June, August and September 2009;

Whereas, the Zoning Order in Case No. 06-35 specifies that "No certificate of occupancy for any building approved by this Order shall be issued until the following amenities have been provided:

Francis Field: contribution of design, materials, and labor for improvements to Francis Field to (1) prepare a landscape plan for Francis Field that includes the addition of trees, park lighting, furniture, trash receptacles, and a drinking fountain, and (2) following approval by DPR, install the improvements, consistent with the Memorandum of Understanding included with Exhibit 40 of the record, valued at \$150,000.

The landscape and streetscape improvements to 25th Street, N.W., in accordance with the plans marked as Exhibits 27, 31, and 40 of the record. These improvements shall include, subject to approval by the appropriate District agency or agencies, the removal of the existing chain-link fence along the west side of 25th Street N.W. and replacement with an ornamental metal fence."

Whereas, a visual inspection of the areas cited in the Zoning Order shows that none of these amenities have been delivered; and,

Whereas, ANC 2A, per DC Municipal Regulation (DCMR) 3112.2, has the right to file a timely appeal with the Board of Zoning Adjustment related to such a decision as it relates to the enforcement of the Zoning Regulations;

Therefore be it resolved, ANC 2A is empowered to act on its right to file an appeal with the BZA, and designates all commissioners or their representatives including legal counsel if retained, to proceed with the appropriate timely application process.

This resolution, was passed, with a quorum present, by a vote of our Commission, 6-0, today, on Wednesday, September 16, 2009.

iii) Email correspondence with ANC 2A

September 9, 2009 (via email)

Commissioner Rebecca Coder - ANC 2A-02

Rebecca: I have placed a call to Vornado's counsel as to what agreements regarding Condition 10c (the streetscape improvements) have been made, and I am awaiting a response. I will let you know the result.

Best Regards,

Matthew Le Grant

Zoning Administrator

Dept of Consumer and Regulatory Affairs

Government of the District of Columbia

941 North Capitol St NE Suite 2000

Washington, DC 20002

Phone: 202 442-4652

FAX: 202 442-4871

Email: matt.legrant@dc.gov

<https://mail.dc.gov/owa/redir.aspx?C=383885d7fa104673bd83f61d7b0f25c6&URL=http%3a%2f%2fdoz.dc.gov%2fmain.shtm>

From: Coder, Rebecca K. (ANC 2A02)

Sent: Wednesday, September 09, 2009 2:35 PM

To: LeGrant, Matt (DCRA)

Subject: FW: Compliance with Zoning Order for 1229-1231 25th Street NW (dba 1255 25th Street, NW)

Matt,

One quick question. Does VORNADO have a separate escrow agreement in place with DDOT for the west side of 25th Street streetscape improvements as outlined on page 8 of the Zoning Order 06-35 (this included the cost of the ornamental fence and I believe was valued at \$250,000 for both east and west improvements).

Let me know.

Thanks,

R

Rebecca K. Coder

Advisory Neighborhood Commissioner

ANC 2A-02

Phone (202) 253-2612

rebecca.coder@anc.dc.gov or 2A02@anc.dc.gov

From: Coder, Rebecca K. (ANC 2A02)
Sent: Wed 9/9/2009 11:15 AM
To: LeGrant, Matt (DCRA)
Cc: Armando Irizarry; Kimbel, Sherri (COUNCIL); gary@smart.net; jw@janewilner.com; jim.oconnell@earthlink.net
Subject: Compliance with Zoning Order for 1229-1231 25th Street NW (dba 1255 25th Street, NW)

Matt,

I am in receipt of a copy of the escrow agreement between DC Department of Parks and Recreation (DPR) and VORNADO/Charles E Smith related to the zoning order for 1229-1231 25th Street, NW (dba as 1255 25th Street, NW) and the related community amenities that are to be delivered in advance of any certificate of occupancy.

Upon quick review, not only does the agreement appear to be in violation of the appropriate process but also appears to be inaccurate as far as the amenities to be provided as outlined in the zoning order.

ANC 2A (Foggy Bottom and West End) will review this further and expand upon this at our monthly public meeting next Wednesday, September 16 and provide something to DCRA et al formally at that time.

Please contact me with any questions.

Best,

Rebecca

cc: Armando Irizarry, ANC 2A chair
Sherri Kimbel, Councilmember Evans' Office
Gary Griffith, Secretary Friends of Francis Field
Jane Wilner, President Friends of Frances Field
Jim O'Connell, President Condominium

Rebecca K. Coder
Advisory Neighborhood Commissioner
ANC 2A-02
Phone (202) 253-2612
rebecca.coder@anc.dc.gov or 2A02@anc.dc.gov

CERTIFICATE OF SERVICE

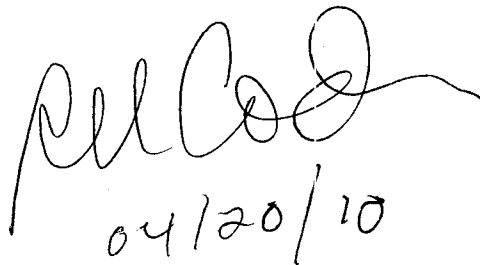
I hereby certify that copies of the foregoing report were served by electronic mail, on this 20th day of April, 2010 upon:

David Avitable
Goulston & Storrs
2001 K Street, NW 11th Floor
Washington, DC 20006-1042
davitable@goulstonstorrs.com

Gary Griffith
Secretary, Friends of Francis Field
2501 M Street, NW #609
Washington, DC 20037
gary@smart.net

Jay Surabian
Assistant Attorney General
Office of the Attorney General of the District of Columbia
Office of the General Counsel for the Department of Consumer and Regulatory Affairs
1100 4th Street, SW, 5th Floor
Washington, DC 20024
Jay.surabian@dc.gov

Constance J. Miller, Esq.
Counsel for ANC 2A
Manning & Sossamon PLLC
1120 20th Street, NW
Suite 700, North Building
Washington, DC 20036
cmiller@manning-sossoman.com



04/20/10

Government of the District of Columbia
Foggy Bottom and West End
Advisory Neighborhood Commission 2A



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Washington, DC 20037

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District of Columbia

CASE NO. 18029

EXHIBIT NO. 23

RECEIVED
D.C. OFFICE OF ZONING
2010 APR 20 AM 11:39

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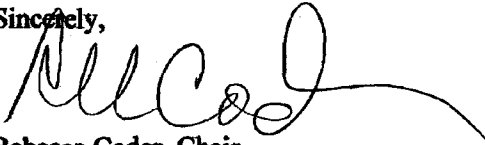
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Commissioner Rebecca Coder - ANC 2A-02

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Dept of Consumer and Regulatory Affairs

Government of the District of Columbia

941 North Capitol St NE Suite 2000

Washington, DC 20002

Phone: 202 442-4652

FAX: 202 442-4871

Email: matt.legrant@dc.gov

<https://mail.dc.gov/owa/redir.aspx?C=383885d7fa104673bd83f61d7b0f25c6&URL=http%3a%2f%2fdc.oz.dc.gov%2fmain.shtm>

From: Coder, Rebecca K. (ANC 2A02)

Sent: Wednesday, September 09, 2009 2:35 PM

To: LeGrant, Matt (DCRA)

Subject: FW: Compliance with Zoning Order for 1229-1231 25th Street NW (dba 1255 25th Street, NW)

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R

Rebecca K. Coder

Advisory Neighborhood Commissioner

ANC 2A-02

Phone (202) 253-2612

rebecca.coder@anc.dc.gov or 2A02@anc.dc.gov

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CERTIFICATE OF SERVICE

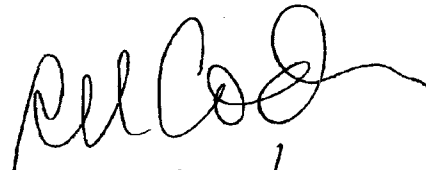
I hereby certify that copies of the foregoing report were served by electronic mail, on this 20th day of April, 2010 upon:

David Avitable
Goulston & Storrs
2001 K Street, NW 11th Floor
Washington, DC 2006-1042
davitable@goulstonstorrs.com

Gary Griffith
Secretary, Friends of Francis Field
2501 M Street, NW #609
Washington, DC 20037
gary@smart.net

Jay Surabian
Assistant Attorney General
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