BEFORE THE
DISTRICT OF COLUMBIA ZONING COMMISSION

BOSTON PROPERTIES, INC. *ET AL.*, CONSOLIDATED PUD AND RELATED MAP AMENDMENT FOR SQUARE 54	)	Z.C. No. 06-27

MOTION OF FOGGY BOTTOM ASSOCIATION
TO STAY EFFECTIVE DATE OF DECISION

The Foggy Bottom Association ("FBA" or the "Association"), a party in opposition, respectfully moves the Commission to stay the effective date of the order in this case (the "Order"), which was served on 5 October 2007 and is scheduled for publication in the DISTRICT OF COLUMBIA REGISTER (which would make it final and effective) on 12 October 2007.

The Association hereby asks the Commission to stay the effective date of this Order until the effective date of the final orders in the companion cases involving the proposed Campus Plan for George Washington University ("GWU") for 2007-2025 (Z.C. Case No. 06-11) and a Planned Unit Development application involving development on the GWU campus (Z.C. Case No. 06-12). The purpose of this request is to allow environmental review of these three cases to proceed on the same track and not be considered on a "piecemeal" basis that could understate environmental consequences of these three cases. In support of this motion the Association states as follows.[1]

1. The Association filed a preliminary motion to postpone the hearing in this case until after the Applicants had satisfied the requirements of the District of Columbia Environmental Policy Act of 1989, D.C. Code § 8-109.01 *et seq.* ("DCEPA" or the "Act"), *i.e.*, by submitting

[1] We note that footnote 1 of the Order states that the Commission approved the campus plan proposal in Z.C. Case No. 06-11 for a twenty-year term commencing upon the effective date of this Order. Since the order in No. 06-11 has not yet issued or published in the DISTRICT OF COLUMBIA REGISTER, the import of this statement is not clear, although it does suggest that the Commission can, if it so chooses, coordinate the effective dates of these orders.

the requisite Environmental Impact Screening Form ("EISF") or forms and by going through the environmental review required under the DCEPA. The Association argued that scheduling the environmental review first would have benefitted the Commission by providing a fuller record on the impact of the proposed development on the community. The Commission rejected this argument, leaving environmental considerations to another agency at a future date. *See* Order Findings 5, 64, 65.

2. The Association respectfully disagrees with that conclusion, but does not seek to reargue the point. However, the Association does seek limited relief in the form of a stay of the effective date of this Order until such time as orders in the other two cases become effective. By granting such a stay, the Commission can help avoid piecemeal review of environmental concerns – a concern raised in our preliminary motion, but not addressed in the Order.

3. This PUD case and the two companion cases are part of a consolidated, multi-year development proposal that will profoundly affect the Foggy Bottom and West End neighborhoods and their residents. The Applicants here and in the other two cases have prosecuted the applications as separate cases, which means that each case will result in three orders and thus three EISFs seeking review under the DCEPA. Therein lies the problem. By breaking a large-scale project of this sort into smaller parts, the magnitude of the proposed development – and its environmental impact on the community – may be unlawfully minimized.

4. Such "segmentation" or "piecemealing" of a project is forbidden under the federal National Environmental Policy Act, upon which the DCEPA is based. "Piecemealing" is a tactic of "dividing an overall plan into component parts, each involving action with less significant effects." *Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 298 (D.C. Cir. 1987). This "rule against segmentation was developed to insure that interrelated projects the overall effect of

which is environmentally significant not be fractionalized into smaller, less significant actions." *Id.*, citing *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430 (5th Cir. 1981).

5. A good illustration of this is *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985), which involved a proposal to build a causeway, a cargo terminal and an industrial park on an island. The agency "piecemealed" the project by focusing on the causeway and cargo terminal, without considering questions of related industrial development. The court, in an opinion by then-Judge Breyer, rejected this segmentation as an effort to create a loophole that did not exist in the law.

6. So too in this case, it would make no sense to divide environmental review of the campus plan from the environmental review covering the related PUD, and from environmental review of the Square 54 PUD. However, such a splintered analysis could occur unless the Commission coordinates effective dates of the orders in these cases.

7. Why is this so? The answer lies in the timetable governing environmental) An applicant begins the environmental review process by filing an EISF. Under applicable regulations (*see* 20 DCMR § 7200 *et seq.)* the reviewing agency is required to make a determination within 30 working days after receiving an EISF as to whether the proposed action is likely to have a substantial negative impact on the environment; if such an impact is identified, an environmental impact statement will be required (20 DCMR § 7205.1).

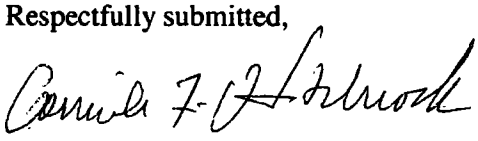
8. If zoning decisions that involve related matters are issued separately and take effect separately, it is likely that EISFs will be filed separately, thus forcing the reviewing agency to process them piecemeal. Such a result would be contrary to the DCEPA and could mask the extent of the environmental impact of a large-scale project.

9. A uniform effective date for all three orders would thus be in the public interest and be consistent with the DCEPA. Otherwise the environmental review process would have to

proceed in a "first-in, first-out" process, which benefits no one.[2]

For the foregoing reasons, the Foggy Bottom Association respectfully requests that the Commission stay the effective date of its order in this case and to establish a uniform effective date for the orders in this case and the two pending GWU cases (Nos. 06-11 and 06-12).

Respectfully submitted,



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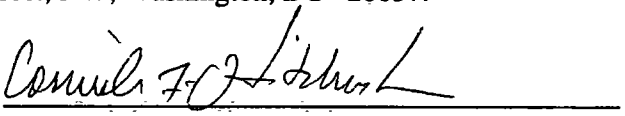
11 October 2007

CERTIFICATE OF SERVICE

I hereby certify that copies of this motion were served electronically this 11th day of October, 2007 upon Phil E. Feola, counsel for the applicant, at phil.feola@pillsburylaw.com and upon Barbara Kahlow, on behalf of the West End Citizens Association, at barbara.kahlow@verison.net and by first class mail, postage prepaid, upon Advisory Neighborhood Commission 2A, 1101 24th Street, NW, Washington, DC 20037.



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[2] One additional matter requires brief comment, although it does not affect the overall analysis. Finding 65 of the Order questions whether approval of a PUD application is even an "action" covered by the DCEPA, citing a provision of the statute dealing with when an agency can compel an applicant (in lieu of the agency) to prepare an EIS. The argument appears to be that an applicant cannot be compelled to pay for an EIS if the "action" involves a request for "permission to act," and a PUD application is said to be a request for permission to seek a building permit. *Compare* D.C. Code § 8-109.03(c)(3)(B) *with* D.C. Code § 8-109.02(1).

The argument errs for three reasons. First, questions of who will pay for an EIS arise only after the EISF has been filed and the initial agency review has been conducted. Second, even if one reaches a point where the cost allocation issue should arise, the cited statute allows a District agency to require an applicant to pay for an EIS if the matter relates to an "entitlement." Approval of a PUD order is plainly an "entitlement" to seek a building permit. Third, even if a PUD order is merely a "permission to act," section 8-109.03(a) is clear that *someone* is required to prepare an EIS if and when an agency determines that a major action is "likely to have a substantial negative impact on the environment, if implemented."