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BEFORE THE DISTRICT OF COLUMBIA ZONING COMMISSION

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BOSTON PROPERTIES, INC, KSI SERVICES, INC,
AND THE GEORGE WASHINGTON UNIVERSITY,
SQUARE 54 CONSOLIDATED PLANNED UNIT
DEVELOPMENT AND ZONING MAP AMENDMENT

Z.C. Nos. 06-27

**OPPOSITION OF BOSTON PROPERTIES, INC, KSI SERVICES, INC, AND THE
GEORGE WASHINGTON UNIVERSITY TO MOTION OF FOGGY BOTTOM
ASSOCIATION TO POSTPONE CASE PENDING PREPARATION OF A
CONSOLIDATED ENVIRONMENTAL REVIEW**

Boston Properties, Inc., KSI Services, Inc., and The George Washington University, collectively ("Applicant"), through its counsel, opposes the request of the Foggy Bottom Association ("FBA") that this Commission defer consideration of the Square 54 Consolidated PUD Zoning Map Amendment Application ("Application") pending the completion of an environmental review. The FBA filed an identical preliminary motion in the *Foggy Bottom Campus Plan: 2006-2025* PUD application, Z.C. Nos. 06-11 and 06-12. The Zoning Commission unanimously dismissed this motion on September 14, 2006. See Z.C. Case Nos. 06-11 & 06-12 Public Hr'g Tr. 9, Sept. 14, 2006 attached hereto as Exhibit A.

The purpose of the FBA's motion (as it was with the other failed motion) is to delay action on the Application, which involves approval for a transit-oriented, mixed-use development including prime office, residential and retail uses on the site of the old George Washington University Hospital. The Commission has already held that none of the grounds cited by the FBA provide any basis for postponement of the public hearing. The Applicant respectfully requests that this Commission follow its own precedent by dismissing this Motion. Furthermore, the Applicant submits that:

ZONING COMMISSION
District of Columbia

CASE NO. 06-27
EXHIBIT NO. 23A

ZONING COMMISSION
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1. The Commission dismissed the FBA's motion for postponement of the hearings on the *Foggy Bottom Campus Plan: 2006-2025* Z.C. Nos. 06-11 and 06-12, which was filed on identical grounds.
2. The District of Columbia Environmental Protection Act specifically mandates that environmental review take place after a major action receives zoning approval, but before construction commences.
3. The District of Columbia Court of Appeals has held that environmental review is legally required to take place before construction actually commences, not before zoning approval is granted.
4. The Zoning Commission and the Board of Zoning Adjustment have repeatedly held that environmental review is part of the building review process and not the zoning approval process. Most relevantly, this Commission reiterated this position in Z.C. Case No. 03-29, a case involving an application for consolidated review and approval of a planned unit development submitted by The George Washington University ("the University").
5. Practical considerations necessitate that environmental review be conducted as part of the building permit stage, not the planning review stage.

Accordingly, we respectfully request that this Commission deny the FBA's motion and proceed with its consideration of the above-captioned applications without delay at the scheduled public hearing on November 20, 2006.

ARGUMENT

1. **The Commission denied the FBA's identical request for postponement of the hearings on the *Foggy Bottom Campus Plan: 2006-2025* Z.C. Nos. 06-11 and 06-12.**

On September 14, 2006, the Commission unanimously dismissed the FBA's motion for postponement of the hearings on the *Foggy Bottom Campus Plan: 2006-2025* Z.C. Nos. 06-11 and 06-12 dated August 31, 2006. That motion was filed on identical grounds as the one currently before this Commission.

In moving to dismiss the FBA's motion filed in *Foggy Bottom Campus Plan: 2006-2025* Z.C. Nos. 06-11 and 06-12, Chairperson Mitten stated the following:

I think our position should be as it has been in the past that this is -- that we are not the lone agency in these matters. This has been actually litigated a couple of times whether it should, in fact, be done at this stage. And I don't think we need to revisit it. And I would move that we deny the motion to postpone the case pending preparation.

Z.C. Case Nos. 06-11 & 06-12 Public Hr'g Tr. 9, Sept. 14, 2006 (emphasis added). Moreover, this Commission specifically rejected the FBA's argument that postponement was necessary due to alleged "piecemealing" that would "have the effect of limiting the ability of [agencies]" to complete their reviews. *Id.* at 10. Ultimately, the Commission voted 5-0-0 to dismiss the motion.

The Applicant respectfully requests that the Commission follow its own precedent by rejecting the FBA's motion, which at its core amounts to nothing more than an attempt to slow down the University's entire Integrated Development Plan including this Application.

2. **The District of Columbia Environmental Protection Act specifically mandates that environmental review take place after a major action has obtained zoning approval, but before construction commences.**

In its Motion, counsel for the FBA asserts that the Zoning Commission should defer consideration of the above-captioned cases pending the completion of the environmental review required by the DCEPA." *FBA Motion at 15*. The FBA claims that the PUD is a "major action" under the District of Columbia Environmental Policy Act of 1989 ("DCEPA" or the "Act"), D.C. Code § 8-109.01, which requires the completion of an Environmental Impact Screening Form ("EISF") and, if necessary, the preparation of an Environmental Impact Statement ("EIS"). *FBA Motion at 6-7*. According to the FBA, the Zoning Commission's consideration of the Square 54 PUD should be postponed until the EISF and EIS are completed.

The FBA's position lacks all merit. Rather, it is well-established in the District of Columbia that the environmental review process need only commence after the project has obtained zoning approval from the Zoning Commission or the Board of Zoning Adjustment.

Specifically, the environmental review process occurs as part of the building review process, which is performed by the District of Columbia Department of Consumer and Regulatory Affairs (“DCRA”) following an application for a building permit. Therefore, even if an EIS is required for this project (which is yet to be determined), statutorily, the process need only commence AFTER the Commission approves the project.

As detailed on the Environmental Review Process page on its website, DCRA integrates environmental review into building review, including how it determines whether preparation of an EISF or EIS is required. See DCRA, Environmental Review Process at <http://dcra.dc.gov> (follow “Building/Land Regulations” hyperlink, then “Environmental Review Process” hyperlink).¹

The D.C. Environmental Protection Act mandates reviews of the EIS at the permitting stage. D.C. Code § 8-109.3(a) (2001) requires that the EIS be prepared at least sixty days “prior to implementation of the proposed major action” (emphasis added). The D.C. Court of Appeals has held that “implementation” of a zoning approval occurs when construction actually begins. See *Foggy Bottom Ass’n v. D.C. Bd. of Zoning Adjustment*, 791 A.2d 64, 73 (D.C. 2002). The DCEPA specifically permits the environmental review to take place after a “major action” has already been “approved,” but before it has been “implemented.” Section 8-109.03(a) provides:

Whenever . . . a . . . commission . . . proposes or approves a major action that is likely to have substantial negative impact on the environment, if implemented, the . . . commission . . . shall prepare . . . a detailed EIS at least 60 days prior to implementation of the proposed major action

(emphasis added).

Moreover, the DCEPA expressly exempts planning review from the EIS requirements. Under D.C. Code § 8-109.06(a)(2) an EIS is not required with respect to actions “[f]or which a

¹ The direct link can be found at <http://dcra.dc.gov/dcra/cwp/view,a,1342,q,600463,dcraNav,%7C33408%7C.asp>.

request has been made for the authorization or allocation of funds for a project that involves only a feasibility or planning study for a possible future action that has not been approved, adopted, or funded.” Although the Zoning Commission may consider environmental factors in its review of a proposed PUD, its review of environmental factors should be limited to addressing issues related to the PUD evaluation standards set forth in 11 DCMR § 2400, *et seq.*

Finally, under § 8-109.03(a)(10) of the DCEPA, the FBA, Advisory Neighborhood Commission (“ANC”), and other “interested members of the public” will have an opportunity to comment on the EIS when the environmental impact is assessed by the DCRA, the agency designated by the Mayor as the “lead agency” for such environmental review.

It is clear from the language of the statute that any environmental review or request for EIS should only take place after the project receives zoning approval and has applied for a building permit. Therefore, the FBA’s request that the Commission now postpone the Square 54 hearings for this reason lacks all merit and should be dismissed on that reason alone.

3. **The District of Columbia Court of Appeals has held that environmental review is legally required to take place before construction actually commences, not before zoning approval is granted.**

The District of Columbia Court of Appeals has held that environmental review be conducted only 60 days before the commencement of construction on a given project. Specifically, the Court addressed this issue in *Foggy Bottom Ass’n v. D.C. Bd. of Zoning Adjustment*, 791 A.2d 64, 73 (D.C. 2002), a case involving the University and the FBA. In *Foggy Bottom*, the FBA argued that the BZA had erred by dismissing its motion to postpone the hearings until after the reviewing agency had reviewed the need for an Environmental Impact Statement (“EIS”). 791 A.2d at 72. Rejecting the FBA’s argument, the Court upheld the BZA’s

decision and held that the BZA's action satisfied the DCEPA because the "implementation" of a zoning approval only occurs when construction actually begins. *Id.* at 73.

4. **The Zoning Commission and Board of Zoning Adjustment have repeatedly held that environmental review is part of the building permit process and not a part of zoning review.**

Both the Zoning Commission and Board of Zoning Adjustment ("BZA") have held that the determination of whether an EIS is required, and any subsequent environmental review, is within the purview of DCRA and should be considered during the review of a building permit application. *See, e.g.*, Z.C. Order No. 02-30 at 16; Z.C. Order No. 842 at 9; BZA Order No. 16389 at 2; BZA Order No. 16457 at 8; BZA Order No. 16138 at 8, 9; BZA Order No. 15519-B, at 9; BZA Order No. 15434 at 19; BZA Order No. 15435 at 7.

In Z.C. Case No. 03-29, this Commission considered an application by the University for consolidated review and approval of a PUD for Square 103. In that case, the FBA again argued that the project required an environmental impact statement. Z.C. Order No. 03-29 at 7. During the public hearing, counsel for ANC 2A, which also opposed the project, argued that the preparation of an EIS was important for the Commission's consideration of the proposed PUD. *See* Z.C. Case No. 03-29 Public Hr'g Tr., 98-101, Feb. 19, 2004 (the "Public Hearing").² In response to this argument, the Chair of the Commission replied:

Just -- just let me clarify something for you because this comes up periodically. That's a part of the -- of the building permitting process and that's not a part of the review that takes place before the Zoning Commission.

Id. at 100.

Counsel for ANC 2A continued to push on the issue, but the Chair reiterated that the Zoning Commission does not consider environmental issues, and that counsel should "move on to another subject." *Id.* at 100-01.

² A copy of the relevant portions of the transcript is attached to this motion as Exhibit B.

5. **Practical considerations necessitate that environmental review be conducted as part of the building permit stage, not the planning review stage.**

Finally, environmental reviews should be conducted at the building permit stage both as a practical matter and as a matter of government efficiency. Frequently, a complete environmental review must consider aspects of interior design of a building that are beyond the scope of a zoning hearing. For example, air quality reviews may focus on the exterior ventilation of vehicle exhaust from parking garages. Only once the building's systems are fully designed does it become possible to have a complete picture of the impact a proposed building could have on the environment. Such a full mechanical system design can only occur after zoning approval is obtained.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the FBA's motion be denied and that the Zoning Commission continue its consideration of the Square 54 Consolidated Planned Unit Development and Zoning Map Amendment without delay at the scheduled public hearing on November 20, 2006. We look forward to addressing any issues or concerns the Zoning Commission may have about the PUD and zoning map amendment during that hearing.

Respectfully submitted,




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Attorneys for:
Boston Properties, Inc. and KSI Services
Inc.

November 13, 2006

CERTIFICATE OF SERVICE

I hereby certify that copies of the Opposition of Boston Properties, Inc., KSI Services, Inc., and The George Washington University to the Motion of the Foggy Bottom Association to Postpone the Case pending the Preparation of a Consolidated Environmental Review were hand delivered to the persons listed below on November 13, 2006.



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ZONING COMMISSION

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PUBLIC HEARING

+

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IN THE MATTER OF:

5 Case NO. 06-11

5 Case NO. 06-12

THE GEORGE WASHINGTON UNIVERSITY5

W44444444444444444444444444444448

Thursday,
September 14, 2006

Hearing Room 220 South
441 4th Street, N.W.
Washington, D.C.

The Public Hearing of Case No. 06-11 and 06-12 by the District of Columbia Zoning Commission convened at 6:30 p.m. in the Office of Zoning Hearing Room at 441 4th Street, N.W., Washington, D.C., Carol J. Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

CAROL J. MITTEN	Chairperson
ANTHONY J. HOOD	Vice-Chairperson
GREGORY JEFFRIES	Commissioner
JOHN PARSONS	Commissioner (NPS)
MICHAEL G. TURNBULL	Commissioner (AOC)

OFFICE OF ZONING STAFF PRESENT:

SHARON S. SCHELLIN Secretary
DONNA HANOUSEK Zoning Specialist

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WASHINGTON, D.C. 20005-3701

OFFICE OF PLANNING STAFF PRESENT:

STEPHEN MORDFIN
TRAVIS PARKER
JENNIFER STEINGASSER
ELLEN MCCARTHY

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

ALAN BERGSTEIN, ESQ.

The transcript constitutes the minutes
from the Public Hearing held on September 14, 2006.

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1 MS. SCHELLIN: Staff would record the vote
2 5-0-0 to approve party status to West End Citizens'
3 Association and the Foggy Bottom Association.
4 Commissioner Mitten moving, Commissioner Parsons
5 seconding, Commissioners Jeffries, Hood and Turnbull
6 in favor.

7 CHAIRPERSON MITTEN: Thank you. Next we
8 have two motions from the Foggy Bottom Association.
9 We have a motion from them to postpone the case
10 pending preparation of a consolidated environmental
11 review. We won't be taking all arguments on these
12 motions. We have had a response to the motion from
13 the applicant and this has been -- this is a matter
14 that has come before the Commission and the BZA a
15 number of times.

16 I think our position should be as it has
17 been in the past that this is -- that we are not the
18 lone agency in these matters. This has been actually
19 litigated a couple of times whether it should, in
20 fact, be done at this stage. And I don't think we
21 need to revisit it. And I would move that we deny the
22 motion to postpone the case pending preparation.

23 MR. THOMAS: Madam Chair, Michael Thomas,
24 ANC-2A02. If I could, just as a preliminary matter,
25 state for the record that the ANC is also represented

1 by Mr. Hitchcock.

2 CHAIRPERSON MITTEN: Okay.

3 MR. THOMAS: And that we do join in these
4 two motions. And unless and until on a specific we
5 notify the Commission that we have a different
6 position, the positions that he puts forward will be
7 the positions of the ANC.

8 CHAIRPERSON MITTEN: Okay.

9 MR. HITCHCOCK: Yes.

10 CHAIRPERSON MITTEN: Thank you.

11 MR. HITCHCOCK: And we will try to clarify
12 that. May I add one point, Madam Chair? I don't want
13 to revisit the issue, but there is a separate issue
14 presented here that was not presented previously and
15 that's the issue of piecemealing or segmentations
16 splitting these matters up into a number of different
17 procedures -- proceedings which have the effect of
18 limiting the ability of this Commission, the Health
19 Department, whomever to provide the kind of cumulative
20 or comprehensive review that the statute provides.

21 We have cited authority in our motion for
22 why this is the sort of thing that's not allowed at
23 the federal level. I would revisit the arguments that
24 have been put forward for why it is important to
25 consider environmental issues earlier rather than

1 later. But this is a separate issue here.

2 CHAIRPERSON MITTEN: I understand.

3 MR. HITCHCOCK: Apart from the others.

4 Thank you.

5 CHAIRPERSON MITTEN: Thank you. And just
6 for clarification, not on this point, but to Mr.
7 Thomas' point, when it is time for cross examination
8 by the ANC, Mr. Hitchcock will do it for both Foggy
9 Bottom and the ANC together. We will not have
10 separate representations. Is that right?

11 MR. HITCHCOCK: Yes.

12 CHAIRPERSON MITTEN: Okay.

13 MR. HITCHCOCK: That's the principal
14 intent.

15 CHAIRPERSON MITTEN: Okay.

16 MR. HITCHCOCK: ANC-2A will be making its
17 own presentation.

18 CHAIRPERSON MITTEN: Okay.

19 MR. HITCHCOCK: Foggy Bottom will be
20 making its own presentation, but in an effort to try
21 to streamline the process, I'll be doing work for
22 both.

23 CHAIRPERSON MITTEN: That's great. Okay.
24 Great. Thank you.

25 MR. HITCHCOCK: So we'll be done in less

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1 than six nights.

2 CHAIRPERSON MITTEN: Good, because we only
3 scheduled four. Okay. So back to the motion. I move
4 that we deny the motion to postpone the case pending
5 preparation of a consolidated environmental review.
6 And just to your specific point, I mean, I think, you
7 know, we have had counsel from the Office of the
8 Attorney General and we will, in our order on this,
9 set forth the analysis. But, you know, the fact of
10 the matter is is that this is a first-stage PUD and so
11 there's no permissions being granted. No specific
12 permissions being granted. So there's other matters
13 that -- as to what is before us. These are not
14 permissions to even build specific buildings. So I
15 just wanted to make that point. We're not going to
16 have a little discussion here.

17 Okay. Can I get a second on the motion?

18 COMMISSIONER TURNBULL: Second.

19 CHAIRPERSON MITTEN: Thank you. Any
20 discussion on the motion? All those in favor, please,
21 say aye.

22 ALL: Aye.

23 CHAIRPERSON MITTEN: Those opposed,
24 please, say no. Mrs. Schellin?

25 MS. SCHELLIN: Staff will record the vote

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1 5-0-0 to deny the motion for postponement for
2 environmental impact study. Commissioner Mitten
3 moving, Commissioner Turnbull seconding, Commissioners
4 Jeffries, Parsons and Hood in favor of denial.

5 CHAIRPERSON MITTEN: Thank you. Next is
6 the motion of the Foggy Bottom Association to dismiss
7 the case for noncompliance with BZA Order No. 16553I
8 and this has to do with the view of the Foggy Bottom
9 Association that the university is out of compliance
10 with the order and there is a condition of that order
11 that says in part that "No special exception
12 application filed by the university for further
13 processing under this plan may be granted, unless the
14 university proves that it has remained in substantial
15 compliance with Conditions 1 through 19 set forth in
16 this order."

17 There is more that I could say about why
18 I think this motion should be denied, but the emphasis
19 that I just want to make is that the idea was special
20 exception for further processing shall not be granted.
21 So there's two points. One is this is not an
22 application for further processing as we use that
23 terminology. This is to review a new Campus Plan
24 proposal and for a PUD. So it's not further
25 processing and it's also that such -- the intent of

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GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

ZONING COMMISSION

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PUBLIC HEARING
CASE NO 03-29
THE GEORGE WASHINGTON UNIVERSITY -- NEW RESIDENCE
HALL

+ + + + +

THURSDAY

FEBRUARY 19, 2004

+ + + + +

The Public Hearing of the District of Columbia Zoning Commission convened at 6:30 p.m. in the Office of Zoning Hearing Room at 441 4th Street, Northwest, Washington, D.C., Carol Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

CAROL MITTEN	Chairperson
ANTHONY J. HOOD	Vice Chairperson
JOHN G. PARSONS	Commissioner (National Park Service)

OFFICE OF ZONING STAFF PRESENT:

Alberto P. Bastida,	Secretary, ZC
Sharon Schellin,	Zoning Specialist

OFFICE OF PLANNING STAFF PRESENT:

John Fondersmith,	Office of Planning
Ellen McCarthy,	Office of Planning

OFFICE OF CORPORATION COUNSEL STAFF PRESENT:

Mary Nagelhout, Esq.

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1 capital gain would have a different motivation behind
2 and if it wasn't subject to the same kind of scrutiny
3 that the -- that this institution has, it could get by
4 and pass with far less and I think that that's
5 something that is -- that is -- that everybody has to
6 recognize.

7 MR. NORTON: All right. Now, with respect
8 to the sustainable design in the environmentally sound
9 aspects which I think have been listed as a -- as a
10 possible amenity, did -- did GW prepare an
11 environmental impact statement under the D.C.
12 Environmental Control Act?

13 MR. DUTTON: We will be doing that as part
14 of the process, but it hasn't been done yet.

15 MR. NORTON: Has not been done yet?

16 MR. DUTTON: No, because --

17 MR. BARBER: Excuse me. This is not an
18 environmental impact statement. We will comply during
19 the building process. Applying for the building
20 permit process with all the environmental laws which
21 requires initially an environmental screening form and
22 then the Department of Health determines whether the
23 environmental impact statement is required.

24 MR. NORTON: Well, just so we're clear
25 though. This is not exempt from that. Is it? It's

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1 over a million dollars and it's outside the central
2 employment area.

3 MR. BARBER: No, it -- it -- it is covered
4 by that.

5 MR. NORTON: Okay. But, in any event,
6 there hasn't been any environmental impact statement
7 done yet. Is that correct?

8 MR. DUTTON: The -- the form has not been
9 filled out or handed in yet. It will be part of the
10 process. We'll determine whether the impact statement
11 is required. That hasn't been --

12 MR. NORTON: Okay.

13 MR. DUTTON: The city determines whether
14 you need to do that.

15 MR. NORTON: Just for purposes of this
16 Board, have -- have -- has the information that would
17 be provided on the environmental forms that have to be
18 filed with the -- with the city, have -- has that been
19 provided to this Board?

20 MS. HONEY: None -- none of that's been
21 collected yet. It's not been done.

22 MR. NORTON: So, in terms of -- of
23 analyzing and weighing the issues with respect to the
24 PUD and the -- the amenities and the -- the minuses,
25 this Board doesn't have that information. Is that

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1 correct?

2 MS. HONEY: Correct.

3 MR. NORTON: Okay.

4 CHAIR MITTEN: Just -- just let me clarify
5 something for you because this comes up periodically.
6 That's a part of the -- of the building permitting
7 process and that's not part of the review that takes
8 place before the Zoning Commission.

9 MR. NORTON: I understand that and the
10 only reason, Madam Chairman, that I raise it is -- is
11 that this is a -- I mean when you're asking for a PUD,
12 it becomes a -- a -- a -- essentially a weighing of
13 benefits issue. In other words, are the amenities
14 sufficient to outweigh the detriment in that sort of
15 thing and it seems to me that at least that's
16 something that ought to be considered in connection
17 with this.

18 CHAIR MITTEN: But, to the extent that
19 there's anything --

20 MR. NORTON: I mean you don't have to make
21 the final determination as to exactly whether this
22 meets environmental standards, but it seems to me with
23 respect to -- particularly in a place like this where
24 there's a -- you know, we're talking about a lot of
25 people that are being put in there. It's something

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1 that -- that this Board should at least consider in
2 weigning these issues.

3 CHAIR MITTEN: That's what I'm trying to
4 tell you is that we don't.

5 MR. NORTON: Well --

6 CHAIR MITTEN: We -- we don't. So, I -- I
7 just need you to move on to another subject.

8 MR. NORTON: Well, I -- I will move on.

9 CHAIR MITTEN: Yes, there you go.

10 MR. NORTON: I will move on then. Thank
11 you very much.

12 Originally as I understand it when you
13 were trying to do a 14-story building, GW agreed to
14 attempt to get a LEED certification that this was an
15 environmentally sustainable building. Isn't that
16 correct?

17 MR. BARBER: No, we had talked about
18 pursuing an -- an LEED certification. That was one of
19 the things we had discussed at that time.

20 MR. NORTON: And you didn't -- you didn't
21 indicate that to the -- to the Planning Commission or
22 to the -- the Office of Planning?

23 MR. BARBER: I indicated what I said --

24 MR. NORTON: Did you do that?

25 MR. BARBER: -- that -- that we would

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