a *fait accompli.*

STATEMENT OF THE ISSUES PRESENTED BY THE WRIT OF MANDAMUS AND BY THE RELATED MOTION FOR STAY PENDING RESOLUTION OF THE PETITION

The fundamental question presented by the accompanying Petition For Writ Of Mandamus is whether mandamus should issue to compel Respondents, the Board Of Zoning Adjustment and its members, to initiate and assure compliance with the environmental impact review requirements of the District Of Columbia Environmental Policy Act. D.C. CODE ANN. §§6-983 - 900 (1995 & Supp. 1999).

The question presented by the related Motion For Stay Pending Court's Resolution Of Accompanying Petition For Writ Of Mandamus is whether The Alliance has demonstrated a strong showing that it is likely to prevail on the merits of its Petition For Writ Of Mandamus and, if so, whether the additional criteria governing the judicial stay of administrative proceedings have been satisfied.

JURISDICTION

Jurisdiction to issue the requested writ of mandamus exists in this Court pursuant to the All Writs Act, 28 U.S.C. § 1651, DC Ct. App. R. 21(a) of the Rules of the District of Columbia Court of Appeals, and the District of Columbia Administrative Procedure Act (hereinafter "APA"), D.C. CODE ANN. § 1-1501 - 1510 (1999).[7]

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[7] The All Writs Act is applicable to the District of Columbia Court of Appeals. *Morrow v. District of Columbia*, 135 U.S. App. D.C. 160, 417 F.2d 728 (D.C. Cir. 1969). *See also Citizens Ass'n of Georgetown v. Washington*, 291 A.2d 699, 703 (D.C. 1972) (explaining

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ARGUMENT

I. THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS TO COMPEL RESPONDENTS' COMPLIANCE WITH THE CLEAR MANDATE OF THE DISTRICT OF COLUMBIA ENVIRONMENTAL POLICY ACT

Although mandamus is an extraordinary remedy, a writ may properly issue to compel an agency to adhere to the requirements of a statute where there is a "clearly defined statutory duty that government officials are failing to perform, " *Committee of Blind Vendors v. District of Columbia*, 736 F. Supp. 292, 315-16 (D.D.C. 1990), *rev'd on other grounds,* 28 F.3d 130 (D.C. Cir. 1994) (citing *13th Regional Corp. v. Department of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980)). A writ of mandamus will issue where the nature of the duties to be performed is "ministerial in nature, which is a question of statutory interpretation." *Id.* at 316 (citing *13th Regional Corp.). See also United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931); *Timus v. District of Columbia Dep't of Human Rights*, 633 A.2d 751, 756 n.6 (D.C. 1993) (noting that mandamus is appropriate to compel agency compliance with the dictates of a statute); *Thomas v. Vinson*, 80 U.S. App. D.C. 346, 348, 153 F.2d 636, 638 (D.C. Cir. 1946) ("Mandamus may compel the performance of a ministerial duty."); *Ballou v. Kemp*, 68 App. D.C. 7, 13, 92 F.2d 556, 562 (1937) ("Mandamus is the orthodox remedy to compel the

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that mandamus will lie in cases within the ultimate jurisdiction of the Court of Appeals and that contested cases within the meaning of the APA are such cases). An application for a special exception to allow the construction of a private school in a residential zone is a "contested case" within the meaning of the APA. *Rose Lees Hardy Home & School Ass'n v. BZA*, 324 A.2d 701 (D.C. 1974). *See also, Dillard v. Yeldell*, 334 A.2d 578, 579 (D.C. 1975) (providing that the D.C. Court of Appeals has jurisdiction to compel agency action unlawfully withheld or unreasonably delayed, pursuant to the APA, in contested cases.).

performance of a ministerial duty.").[8] As demonstrated in the discussion that follows, the conditions justifying the issuance of a writ of mandamus have been satisfied here and a writ should issue to compel the BZA and its members to comply with the mandatory requirements of the District Of Columbia Environmental Policy Act.

A. The DCEPA Requires the Mayor and All District Agencies, Including The BZA, To Comply with its Environmental Impact Statement Process.

The DCEPA requires that "[*w*]*henever* the Mayor or a board, commission, authority or person proposes or approves a *major action* that is likely to have substantial negative impact on the environment, if implemented, the Mayor, board, commission, authority, or person *shall* prepare or cause to be prepared . . . a detailed EIS [Environmental Impact Statement] at least 60 days prior to implementation of the proposed major action . . . ." D.C. CODE ANN. § 6-983(a) (1995) (emphasis added). The major provisions of the DCEPA are mandatory in nature. No discretion is left to the Mayor or to D.C. agencies when considering actions that trigger the statute's environmental impact assessment requirements.

The DCEPA defines an "action" to be "a project or activity that involves the issuance of a lease, permit, license, certificate, other entitlement, or permission to act by an agency of the District government." *Id.* at § 6-982(1)(B). Quite clearly, the BZA's decision to grant a special exception that would authorize implementation of GWU's 10 Year Campus Plan for the massive redevelopment of the 23 acre Mount Vernon College campus is an "action" under the terms of the DCEPA.

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[8] "[A] ministerial duty may be . . . defined to be some duty imposed expressly by law, not by contract or arising necessarily as an incident to the office, involving no discretion in its exercise, but mandatory and imperative." *Apfel v. Mellon*, 59 App. D.C. 94, 97, 33 F.2d 805, 808 (1929).

It is equally clear that the BZA's decision would be a "major action," as that term is defined by the DCEPA. Under the statute, a "major action" means any action that "costs over $ 1,000,000 and that *may* have a significant impact on the environment . . . ." *Id.* at § 6-982(2) (emphasis added). Again, it is clear that the provisions of the DCEPA are triggered here. The GWU's 10 Year Campus Plan, which contemplates significant construction activities over this extended period, obviously will entail the expenditure of well more than $ 1 million.[9] It is equally apparent that the major construction activities contemplated by the GWU Plan *"may* have a significant impact on the environment."

The DCEPA's implementing regulations demonstrate that the BZA's consideration of GWU's application for a special exception constitutes a "major action" that triggers the provisions of this Act.[10] Under those implementing regulations, an action may have a significant impact on the environment if any one of 16 enumerated conditions is presented, including, *inter alia*, that the "action might disrupt or divide the physical arrangement of an existing community"

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[9] The $1 million trigger is to be determined by reference to 1989 dollars, adjusted in accordance with the Consumer Price Index. D.C. CODE ANN. § 6-982 (2) (1995). Although the GWU 10 Year Campus Plan submitted to the BZA does not include cost projections, it is clear that implementation of even portions of the Plan would cost more than $1 million. For example, the D.C. Council recently approved 380 million dollars in tax exempt bonds for GWU. Over 15 million of that sum is allocated for two structures proposed for construction in Phase 1 of the Campus Plan. D.C Council Report, New Money Project Section, ¶¶ 18 and 19 and Resolution thereto. Council Report and Resolution attached as Gen. App. J. Moreover, if there were any question as to whether the proposed action would trigger the statutory amount under the DCEPA, it would be incumbent on the agency considering the action – in this case the BZA – to determine the possible costs of the action as a part of its responsibilities to assure compliance with the DCEPA.

[10] The DCEPA's implementing regulations are located at 44 D.C. Reg. 2798 (1997) (to be codified at D.C. Mun. Regs. tit. 20, §§ 7200 - 7299.1 (b) (adopted May 9, 1997)). These regulations will be cited throughout this memorandum as if they have been codified, and they are attached for the Court's convenience as Gen. App. L.

or that the "action might extend a sewer trunk line with capacity to serve new development." *See* D.C. Mun. Regs. tit. 20, § 7201.2 (a) - (p) (setting forth all 16 conditions) (Gen. App. L). If any of the sixteen enumerated conditions exists, the board or agency responsible for the first District government authorization of the project, or the "lead agency," must coordinate the preparation and review of an Environmental Impact Screening Form (hereinafter "EISF"), a document which is designed to assist in determining whether the action "is likely to have a substantial negative impact on the environment, if implemented." If this the statuory criteria is satisfied, the DCEPA then requires the preparation of a detailed EIS. *See* D.C. CODE ANN. § 6-983 (1995). *See also* §§ 7201.1 and 7203.1 (Gen. App. L) (describing responsibilities of the lead agency).[11]

The statutory requirements for the preparation and review of an EIS are equally detailed and also leave nothing to the discretion of the lead agency or any other agency. The DCEPA requires that the EIS be written in a "concise manner," D.C. CODE ANN., § 6-983(a) (1995), and sets forth a list of subjects and issues that are to be described and analyzed. *See id.*, §§ 6-983(a)(1) - (a)(11). *See also* D.C. Mun. Regs. tit. 20, §§ 7206.2 (a) - (k) (setting forth detailed

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[11] For the convenience of the Court, a copy of the EISF is included as Gen. App. K. As that document indicates, the EISF is "designed to assist applicants and District government agencies to determine in an orderly manner," whether the proposed major action is likely to have [a] substantial negative impact on the environment, "either during the construction or operation phase of the project." *See* EISF, at p.1. Applicants are instructed to complete Part 1 of the form and the lead agency reviewers are to complete Part 2. *Id.* at pp. 2 and 6. The lead agency is also directed to submit the EISF to the agency delegated with the power to implement the Act. § 7203.2 (Gen. App. L). This "reviewing" agency also reviews the EISF and makes recommendations to the lead agency regarding the project's environmental impacts. If, after reviewing the requisite materials, the lead agency determines that the project is likely to have an adverse impact on the environment, "[n]o lease, permit, license, certificate, or other entitlement shall be issued by the District government until the EIS has been prepared consistent" with the DCEPA and the implementing regulations. § 7205.2 (Gen. App. L).

requirements for the preparation, review, and public comment, *inter alia*, of an EIS).[12] Finally, no board or agency, including an independent board like the BZA, is exempt from the mandatory EIS process of the DCEPA. [13]

In sum, the DCEPA sets forth a number of clear, mandatory requirements and vests no

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[12] The only discretionary provisions in the regulations concern whether or not the lead, or other, agency "may" request additional information when making determinations pursuant to the Act. *See, e.g.*, §§ 7203.4 and 7203.5 (providing that the lead agency can request the applicant to provide more information and the "reviewing agency" can request the lead agency for more information). Every other provision of the regulations, in relation to private actions, uses the word "shall."

[13] The only actions exempt from the mandatory requirements of the law, which are expressly set forth in the statute, as follows:

> (a) No EIS shall be required . . . with respect to an action:
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> (1) For which an EIS has been prepared in accordance with the National Environmental Policy Act of 1966 . . . (2) For which a 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 . . . (3) Whose impact on the environment has been considered in the functional equivalent of an EIS; (4) That which has reached a critical stage of completion prior to October 18, 1989 . . . (5) Of an environmentally protective nature; (6) Exempted by rules approved pursuant to § 6-909(a); (7) Within the Central Employment Area as defined in the Zoning Regulations . . .; or (8) For which a lease, permit, certificated, or any other entitlement or permission to act by a District government agency has been approved before December 31, 1989.

D.C. Code Ann. § 6-986 (a)(1) - (8) (1995). The regulatory exemptions are virtually identical and add that "any action that costs less than 1 million dollars . . . based on 1989 dollars adjusted annually according to the Consumer Price Index . . . ." is exempt from any EIS requirement. D.C. Mun. Regs. tit. 20, § 7202.1 (a) - (h).

significant discretion in the Mayor or the other D.C. agencies regarding the determination whether an EIS must be prepared and evaluated. The DCEPA clearly requires a determination whether the BZA is being called upon to approve a "major action that is likely to have a substantial negative impact on the environment, if implemented," and, if so, the statute dictates a detailed set of Environmental Impact Statement requirements and a process to be followed. There is absolutely no support in the statute or regulations on which the BZA can base its refusal to comply with the DCEPA.

B. BZA's Lawless Conduct May Be Premised On Its Misinterpretation Of Current District Law.

Prior BZA decisions and the somewhat cryptic comments offered by the Chairperson and Corporation Counsel suggest that the BZA may consider itself exempt from the requirements of the DCEPA. If that is the case, the BZA is plainly mistaken. Indeed, it appears that the BZA's view of the law is based in substantial part on regulations and decisions that are no longer in effect.

A prime example of the BZA's apparent reliance on superceded law is its recently-decided GWU Hospital case, which the Chairperson made reference to denying The Alliance's initial motion. *See* Elliott Aff., ¶ 8; BZA Decision and Order of Application No. 16389 (decided May 19, 1999) ("the Hospital Case"), attached as Gen. App. M. In that case, GWU sought a special exception with respect to an already approved Campus Plan for its Foggy Bottom Campus to allow its construction and use of a replacement hospital in a residentially zoned district. *See* Hospital Case, at 1. Residents living near the Foggy Bottom Campus argued that the BZA could not act on the application until the Applicant, GWU, complied with the

statutory environmental impact requirements of the DCEPA. In its Decision and Order granting the special exception, the BZA denied that it had to comply with the DCEPA at the special exception stage stating in relevant part:

> *[T]he necessary environmental review will occur as part of the building review process [by the Department of Consumer and Regulatory Affairs ("DCRA")] if the Board grants the application . . .*
>
> By Mayor's Order 92-151, issued December 1, 1992, the Director of the Department of Consumer and Regulatory Affairs . . . was delegated the authority to require preparation of an EIS and to designate a lead agency to prepare an EIS, or cause an EIS to be prepared. *Pursuant to 20 DCMR § 7203.1(a), DCRA is generally the lead agency responsible for the coordination of the preparation and review of an EIS.* The necessary environmental impact assessment will be carried out as part of the permitting process for construction of the new hospital.

Hospital Case, at p. 2 (emphasis added).

The BZA presumably was unaware at the time of its decision of the Hospital Case that the Mayor's Order on which it relied, which purported to delegate authority for implementation of the Act to the DCRA, had been superceded by Mayor's Order 98-86, issued May 29, 1998.[14] An even more fundamental error in the BZA's decision of the Hospital Case was its reliance on a former version of D.C. Mun. Regs. tit. 20, § 7203.1(a), which had designated the DCRA as the "lead agency," responsible for the coordination and review of the EISF and, if necessary, the EIS

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[14] Mayor's Order 98-86 re-delegates authority to implement the Act, including the promulgation of regulations, from the DCRA to the D.C. Department of Health. *See* Mayor's Order 98-86 attached as Gen. App. O. Consequently, the DCRA no longer has authority, pursuant to the Act, and each occurrence of the term "DCRA" in the regulations promulgated in 1997, (Gen. App. L), should be replaced by the term "Department of Health." The superceded Mayor's Order, 982-151 is attached as Gen. App. N for the Court's convenience.

in certain circumstances.[15] Consequently, this version of § 7203.1(a), however, was superceded more than two years before the Hospital case was decided; and Section 7203.1(a) of the regulations had been amended to the current version of the regulations, which define the "lead agency" as the first agency called upon to authorize a project. *See* § 7203.1(a) (Gen. App. L).[16]

Apart from its errors in deciding the Hospital Case, the BZA's reliance on that decision as precedent for resolving The Alliance's Motion To Initiate Environmental Review would be mistaken for another, equally fundamental reason. A critical factual distinction exists that

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[15] Former § 7203.1(a) stated, in relevant part:

> The lead agency responsible for the coordination of the preparation and review of the EISF, and the EIS if necessary, shall be as follows:
>
> (a) For any major action proposed by an applicant that requires any license, permit, certificate of occupancy or other approval from the [DCRA], that Department shall be the lead agency . . . .

See 37 D.C. Reg. 7588, 7593-7594 (Notice of Proposed Rulemaking, Nov. 30, 1990), attached hereto as Gen. App. P. These regulations were finalized at 37 D.C. Reg. 8262 (1990).

[16] The current form of § 7203.1(a) reads, in relevant part:

> The lead agency responsible for the coordination of the preparation and review of the EISF, and the EIS if necessary, shall be as follows:
>
> (a) For any major action proposed by an applicant that would require any license, permit, certificate of occupancy or other approval from a District Agency prior to implementation, the District agency responsible for the *first District government authorization* of the project shall be the lead agency . . . .

D.C. Mun. Regs. tit. 20, § 7203.1(a) (Gen. App. L).

distinguishes GWU's application in this case from the Hospital Case that renders that BZA decision irrelevant, even if it was correctly decided: the potential environmental issues presented by GWU's 10-Year Campus Plan for the Mount Vernon Campus are markedly different than those presented by the Hospital Case. The Hospital Case involved a single building at a single site in the Foggy Bottom Campus, which had previously been authorized as a special exception to an already-approved Campus Plan. Here, by contrast, GWU seeks approval of a master plan for a ten-year program of construction and development of an entire campus site. The significance of this distinction cannot be overemphasized.

The BZA's position may also reflect its reliance on *Glenbrook Road Ass'n v. BZA*, 605 A.2d 22 (D.C. 1992), which this Court decided shortly after the implementation of the Act in reliance on the former – and now superceded – version of D.C. Municipal Regulations. The basic holding in the *Glenbrook Road Association* case was that a "grandfather" provision of the DCEPA excused the BZA from compliance with the statute, which is certainly not a consideration here.[17] Moreover, like the Hospital Case, *Glenbrook* involved a single

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[17] In *Glenbrook*, the BZA had voted at a public hearing held on December 6, 1989 to approve the special exception to American University, which approved American University's plan for a new law school. The BZA did not issue its final written order until February 21, 1990, however. *Glenbrook Road Ass'n v. BZA*, 605 A.2d 22, 36 (D.C. 1992). During that interim period, the DCEPA was enacted, including a grandfather clause, "which exempts from its requirements any action 'for which . . . entitlement or permission to act by a District government agency has been approved before December 31, 1989.'" *Id.* Because the final written decision was issued outside the grandfather clause period, the neighborhood groups attempted to argue that the Act should apply. As the Court noted, however, the groups had failed to present this argument to the BZA "between January 1, 1990, when the Act became effective, and February 21, 1990, when the Board issued its written decision . . . ." *Id.* at 37. Therefore, the Court held that the groups had waived the "grandfather clause" issue, and it did not decide the issue. *Id.* at 36-37. Instead, the Court held that the DCEPA was not violated. Significantly, in ruling in favor of the BZA, the Court noted the newly-proposed regulations, and expressly commented that "[e]nvironmental concerns are important, and we would be more reluctant to treat the

construction project that was to be initiated and implemented at one point in time. As noted previously, the environmental compliance issues are significantly different here, where the matter before the BZA involves the approval of a 10 Year Plan that will be implemented in stages over an extended period of time. Thus, the *Glenbrook* case has no precedential value to this case.

The Alliance is aware of only two other D.C. Court of Appeals decisions discussing the DCEPA in the context of an application before the BZA. Both were decided prior to the effective date of the current regulations and neither generally exempts applications to the BZA from the requirements of the DCEPA. Thus, neither supports the Board's position.

In *Concerned Citizens of Brentwood v. BZA*, 634 A.2d 1234 (D.C. 1993), the Petitioner challenged the BZA's decision to allow an applicant to build and operate a recycling center on property zoned for commercial and light manufacturing use, as a matter of right, without obtaining a variance. Petitioner argued that the BZA had violated the DCEPA because it did not "require an [EIS] assessing the applicant's proposed use of the property." *Id.* at 1241. But, because the "purpose of the [BZA] hearing [at issue on appeal] was not to decide whether to grant a variance, but rather to determine whether a variance was necessary at all," *id.* at 1240, the Court believed that "Petitioner's invocation of the DCEPA [was] premature." *Id.* at 1241. In ruling in favor of the BZA, the Court held that "[s]ince the BZA order did not result in the issuance of any 'license, permit, certificate, or authorization' specified in section 7203.2, the

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[grandfather clause] point as having been waived if there were any appreciable danger that such a holding would contribute to the abdication of environmental values. But there is no realistic threat of such baleful consequences. Under proposed regulations promulgated November 30, 1990 . . . pursuant to the DCEPA, *the [DCRA] is the "lead" agency responsible for overseeing the preparation of an [EIS] whenever a building permit is required. Id.* at 37, citing to the **former** version of section 7203.1(a) (Gen App. P.) (emphasis added).

requirements of the DCEPA were not yet applicable and the BZA did not err in failing to await the preparation of an environmental impact statement." *Id.* at 1242.

In *Citizens Coalition v. BZA*, 619 A.2d 940 (D.C. 1993), a citizens group sought review of the BZA's order granting special exception relief to Georgetown University for the construction of an addition to an existing power plant. During the BZA proceedings, the applicant, Georgetown, had prepared an EIS for the BZA in order to "demonstrate compliance with the environmental regulations . . . under the [DCEPA].". *Citizens Coalition*, 619 A.2d at 950. While the case was before the BZA, the Coalition requested that the BZA itself prepare an "independent EIS" before granting approval to Georgetown. *See* BZA Decision at 1, attached as Gen. App. Q. The BZA denied that request finding that it was "not the 'lead agency' for review of environmental issues and that the preparation of such a statement would go beyond the expertise and jurisdiction of the Board." *Id.* at 19. The Court of Appeals affirmed.

Citizens Coalition offers no legitimate support for the BZA's actions here. The basic issue in that case was whether the BZA had an obligation to prepare a second, independent EIS.[18] That is not the issue in this case. Moreover, this Court did not even address the BZA's obligation to create an independent EIS or even the BZA's conclusion that it was not the "lead agency." The Court simply found that the BZA had sufficiently considered the environmental impacts of

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[18] Only one EIS is required for each major action. *See* D.C. Mun. Regs. tit. 20 § 7206.3 (Gen. App. L). This was true even under the prior regulations, which had been approved at the time the *Citizens Coalition* case was decided. *See* § 7206.3 (Gen. App. P). Therefore, the Court probably could not have required the BZA to prepare another EIS. Moreover, as noted above, The Alliance is not requesting the BZA prepare its own EIS, it is simply requesting that the BZA comply with the DCEPA and cause the preparation of an EIS if one is necessary for this project. Furthermore, in accordance with the regulations, the applicant is required to prepare the EIS, not the agency. § 7206.1 (Gen. App. L).

the power plant and did not even discuss whether the preparation of an independent EIS would be beyond the expertise or jurisdiction of the BZA. *See id.* at 950.

In sum, the BZA can find no support in the statute, regulations or the relevant District of Columbia case law that it is exempt from complying with the DCEPA. The statute and the case law are to the contrary.

II. MANDAMUS IS THE APPROPRIATE REMEDY TO COMPEL THE BZA TO INITIATE THE ENVIRONMENTAL IMPACT STATEMENT PROCESS IN CONSIDERATION OF GWU'S SPECIAL EXCEPTION APPLICATION FOR CAMPUS PLAN APPROVAL

A. Mandamus Is The Appropriate Remedy To Compel The BZA To Comply With Its Discretionary Duties Under The DCEPA.

Mandamus is the appropriate remedy to compel the BZA to act in compliance with the DCEPA. The law provides clearly defined, statutory duties. The imperative "shall" is used throughout the statute and applicable regulations, leaving no doubt that the Board's performance under the Act is considered imperative and mandatory. *See Ballou v. Kemp*, 68 App. D.C. 7, 9-10, 92 F.2d 556, 558-59 (1937) (explaining that the word 'shall' in its ordinary sense is imperative and should be construed as meaning must in a statute in which a public body is directed to do certain acts); *see also, Association of Civilian Technicians v. Federal Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive," when the language of a statute is plain) (citations omitted). The language of the DCEPA is clear and the duties under the DCEPA are plainly prescribed. Further, nothing in the Act exempts any particular agency, including the BZA, from compliance, and the case law

suggests nothing to the contrary.

Consequently, the BZA's compliance with the DCEPA is a ministerial duty whose performance can be compelled by mandamus. *See Thomas v. Vinson*, 80 U.S. App. D.C. 346, 348, 153 F.2d 636, 638 (1946) ("Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be a provision or implication to the contrary.").[19] The case for judicial compulsion is particularly compelling here. By arbitrarily refusing to initiate the statutory process required to assure the proper and timely compliance with the DCEPA EIS requirements, the BZA has virtually assured that it will not "afford the fullest possible preservation and protection of the environment" D.C. CODE ANN. §6-981 (1995). Environmental review will not even be considered until it is too late, and -- even then -- the environmental issues will be addressed in a piecemeal fashion.

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[19] Although there is no case law involving mandamus relief to enforce provisions of the DCEPA, federal courts construing The National Environmental Policy Act, ("NEPA"), 42 U.S.C. §§ 4332- 4370(e) (1994 & Supp. 1999), on which the DCEPA is closely modeled, *compare* 42 U.S.C. § 4332(C) (1994) *with* D.C. CODE ANN., § 6-983(b)(1) - (11) (1995), have consistently held that duties under the NEPA are ministerial and nondiscretionary in nature. *See, e.g., Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973) ("NEPA's specific requirements . . . clearly speak in mandatory terms, and do not leave the determination [regarding whether to prepare an EIS] to administrative discretion) (citations omitted); *Chesapeake Bay Foundation, Inc. v. United States*, 445 F. Supp. 1349, 1354 (E.D. Va. 1978) ("[M]andamus jurisdiction under [the federal mandamus statute] is proper as to the issue of whether an EIS is required by NEPA, since such a procedure, if required, is mandatory and not discretionary."); *Borough of Morrisville v. Delaware River Basin Comm'n.*, 382 F. Supp. 543, 546 (E.D. Pa. 1974) ("The procedures surrounding the preparation of a NEPA environmental impact statement have been held to be agency action which can be mandamused by the courts . . . . [and] [t]he decision as to which projects fall within the statute is not left to the agency's discretion but is a question for the courts to decide.") (citations omitted). Furthermore, "all agencies of the Federal Government" are required to comply with NEPA. 42 U.S.C. § 4332(2) (1994).

In sum, because the duties to be performed under the DCEPA are ministerial and nondiscretionary in nature, mandamus is the appropriate remedy to compel the BZA to comply with the Act.

B. Normal Appellate Review Is Ineffective To Provide An Adequate Remedy For Petitioner Or To Ensure Appropriate Application Of The DCEPA.

The Alliance recognizes that "[a] writ [of mandamus] is not a substitute for appeal and will not issue where adequate appellate review is available." *Stebbins v. Stebbins*, 673 A.2d 184, 191 (D.C. 1996); *see also People's Counsel of the District of Columbia v. Public Service Comm'n*, 414 A.2d 516, 517-18 (D.C.1980). Normal appellate review of the BZA's denial of Petitioner's Motion to Initiate Environmental Review would be wholly inadequate in this case, however.

Forcing The Alliance to await the BZA's final decision on the special exception would effectively deprive Petitioner of an effective remedy. If the writ is denied, The Alliance will be forced to continue through the current BZA process and then appeal the BZA's final decision on GWU's special exception, if granted. Absent a judicial stay at that point in the process, GWU will pursue its plans for construction on the campus. *See* D.C. Ct. App. R. 18 (stay of an agency decision is not automatic pending appeal.). When the Court of Appeals finally decides that the BZA should have complied with the DCEPA before approving GWU's 10 Year Mount Vernon College Campus Plan, a comprehensive environmental assessment of the total impact of GWU's complete Plan will be impossible, since the construction process will have exacted an irreversible and irretrievable commitment of resources on the part of GWU for the development of the Mount Vernon Campus and consequent irreparable harm to the Petitioner. This is precisely why

the environmental impacts of actions are required to be considered and resolved early in any approval process. *See* D.C. CODE ANN. § 6-983(c)(1)(requiring that the EIS determination be made within 30 days of receipt of the application); *see also* D.C. Mun. Regs. tit. 20, § 7200.2 (discussing actions proposed by District agencies and that the EIS process should be integrated at the earliest stages of planning for major actions when the widest range of feasible alternatives is open and before there has been an irretrievable commitment of resources).

No comparable injuries would be imposed on Respondents or GWU if a writ of mandamus issues. Requiring the BZA to consider the environmental impacts of the 10 Year Campus Plan at the same time it considers GWU's application for approval of that Plan would benefit the BZA and the District government by conserving their resources. Issuance of a writ at this time would also promote the consistent and certain application of the DCEPA, to the benefit of the public. Indeed, unless an environmental review occurs at this stage of GWU's Campus Plan, no District agency will ever have the opportunity to review the entire comprehensive plan and assess its impacts in their totality. Any later judicial determination that the DCEPA environmental assessment should have been initiated by the BZA would force the BZA to reopen the proceedings on the Campus Plan at a later time, thus causing unnecessary interruptions for GWU and unnecessary expenditure of District resources.

Finally, any prejudice to GWU if the writ is issued before their application is decided would be minor. In seeking BZA approval of its 10 Year Campus Plan, GWU has evidenced its intention to commit substantial resources over a considerable period of time to effect dramatic changes in the Mount Vernon Campus. Any possible delays in the regulatory approval and construction process that may be required to ensure that *all* of GWU's construction activities are

undertaken in compliance with the requirements of the DCEPA would represent only a small delay in the 10 year process. Furthermore, initiating the entire construction process in compliance with applicable environmental requirements would be less costly to GWU than the mid-term revision of plans that will invariably result when the BZA's compliance with the requirements of the DCPA is mandated at a later time.

For all of these reasons, a writ of mandamus should issue, compelling Respondents to initiate immediate actions that are required to assure that the mandates of the District of Columbia Environmental Policy Act are satisfied in the BZA's consideration of GWU's request for a special exception for its 10 Year Campus Plan.

III. A STAY OF THE BZA PROCEEDINGS PENDING RESOLUTION OF THIS PETITION, OR A STAY OF BZA's APPROVAL OF GWU'S APPLICATION FOR A SPECIAL EXCEPTION, IS NECESSARY TO EFFECTUATE PETITIONER'S MANDAMUS RELIEF

Courts considering a request for a stay in the District of Columbia must assess the following:

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? . . . (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest?

Washington Metro. Area Transit Comm'n. v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)(internal quotations omitted). These criteria are satisfied.

The Alliance has demonstrated, at a minimum, a strong likelihood of prevailing on the merits of its dispute with the BZA. Mandamus is appropriate to compel the Board's performance

of a clearly defined, nondiscretionary and ministerial statutory duty that it has refused to perform. In spite of the BZA's refusal to provide a clear articulation of its grounds for declining to initiate the required environmental assessment process, The Alliance has addressed and effectively dismissed the BZA's most likely arguments. *See* Parts II A & B, *supra.*

The Alliance has also demonstrated that irreparable harm will likely result if a stay is denied, especially in consideration of the BZA's expected date of decision in early January, 2000. The DCEPA required that the BZA make a determination regarding whether an EIS has to be prepared, "within 30 days . . . of receipt of an application . . . . D.C. CODE ANN. § 6-983(c)(1) (1995). While the BZA already has defaulted in this statutory obligation, its resumption of administrative proceedings in continuing noncompliance of its statutory obligations will only aggravate the injury already inflicted, and will make effective final relief even less likely than it is today. Effective relief can only be afforded if the BZA is required to comply with its statutory obligations when all options remain open, which is prior to the time that the Board and GWU have made commitments and expenditures in furtherance of an ill-considered Campus Plan.

A stay of the current BZA proceedings pending this Court's considered review and resolution of the Petition would assure a greater chance that the required environmental policies will be honored at a time that is closer to the time required by the law. It will also afford the Court adequate time to consider and resolve statutory issues that are presented for the first time in the factual context of the Board's initial consideration of a comprehensive plan for a lengthy development of a campus grounds.

There is no question that the balance of injuries favors issuance of a stay. As argued,

irreparable harm is likely to result to The Alliance and its members if GWU is allowed to implement its Campus Plan and the BZA is later compelled to comply with the environmental review process. On the other hand, a stay of the BZA proceedings -- or at least a stay of the BZA's issuance of any order approving GWU's 10 Year Campus Plan -- will leave the parties in essentially the same position as they are today, with relatively minor delays in the ultimate and proper consideration of GWU's Plan. Disruption at a later stage to force compliance with the requirements of the DCEPA will most likely be more detrimental to the BZA and to GWU than any other likely alternative.

Finally, the public interest will be served by staying the BZA proceedings, or in the alternative, staying the BZA's decision on GWU's application, pending the outcome of this Petition. The DCEPA was enacted in 1989 "to promote the health, safety and welfare of District of Columbia . . . residents [and] to afford the fullest possible preservation and protection of the environment through a requirement that the environmental impact of proposed District government and privately initiated actions be examined before implementation . . . ." D.C. CODE ANN. § 6-981 (1995). Because a stay would force the environmental review to occur a reasonable time before any construction could begin, its issuance would serve both the law and the public interest.

CONCLUSION

For the foregoing reasons, this Court should issue a stay, ordering that all BZA proceedings in *In re Application of The George Washington University*, BZA Case No. 16505 (1999), be stayed pending this Court's consideration and resolution of the accompanying Petition

For Writ Of Mandamus, and the Court should issue the requested Writ, compelling Respondents Board Of Zoning Appeals and its members to initiate the process required by the District of Columbia Environmental Policy Act to determine whether an Environmental Impact Statement is required, to obtain the required EIS, and to assure timely and appropriate consideration of the relevant environmental issues by the appropriate agencies of the District of Columbia.

Respectfully submitted,

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