**IN THE DISTRICT OF COLUMBIA COURT OF APPEALS**

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| **THE GEORGE WASHINGTON UNIVERSITY,**<br><br>**Petitioner,**<br><br>**v.**<br><br>**DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT,**<br><br>**Respondent.** | **No. 02-AA-172**<br>**(Argued on June 19, 2003)** |

**THE GEORGE WASHINGTON UNIVERSITY'S OPPOSITION TO THE BZA'S MOTION FOR RECONSIDERATION**

The District of Columbia Board of Zoning Adjustment ("BZA") has asked the Court to "reconsider"[1] its July 3 Order staying certain housing requirements that the BZA imposed in its Campus Plan Order. Specifically, the Court stayed conditions that would otherwise prevent the University from proceeding with its fully approved plans for important academic projects until the University had aggregated 5,600-plus beds within the campus boundaries or acquired sufficient beds on an interim basis outside Foggy Bottom/West End altogether. The BZA now claims that the Court overlooked certain "important considerations" in granting the motion as to Condi-

[1] Neither the Rules of this Court, nor even the Superior Court Rules, recognize a "Motion for Reconsideration." *Williams v. Vel Rey Props.*, 699 A.2d 416, 418 n.6 (D.C. 1997). In this Court, although petitions for rehearing are occasionally loosely referred to as seeking "reconsideration," Rule 40 governing petitions for rehearing applies only to requests for rehearing after judgment has been entered. *See* Rule 40(a) (petition for rehearing may be filed within 14 days after entry of judgment). The Court's July 3 Order is not a final judgment in this matter, so it is not the proper subject of a petition for rehearing, which is no doubt why the BZA captioned it as a "motion for reconsideration." The latter, however, has no more basis in the Rules at this stage than the former.

BZA
Case No. 16553
Exhibit No. 409

Board of Zoning Adjustment
District of Columbia
CASE NO.16553
EXHIBIT NO.409

tion 9b, and asks the Court to amend its Order to effectively reinstate *just* that Condition as though it were a stand-alone requirement.

The BZA's motion is a back door attempt to have the Court reinstate Condition 9a, which is for all practical purposes subsumed within Condition 9b. Condition 9a established the threshold requirement that the University accumulate a minimum of 5,600 beds within its campus boundaries. Condition 9b then required that, for every student enrolled over a "base number" of 8,000, the University acquire an additional bed. The District has always explained that Condition 9b simply means that, if the University has 8,001 full-time undergraduates, it must have 5,601 beds; if it has 8,002 full-time undergraduates, it must have 5,602 beds, and so forth.[2] Its current suggestion that Condition 9b can somehow be enforced without also enforcing 9a is either intentionally misleading or completely illogical.

The District now argues that Condition 9b should be reinstated because it is "entirely prospective" and "cannot create irreparable harm because the university retains full control over its enrollment size." (Motion at 1.) First, the BZA ignores the fact that Condition 9b is predicated on the very same improper goals and analysis that permeate all of the BZA's proposed "housing requirements," and, like Condition 9a, is explicitly designed to reduce the number of students in Foggy Bottom. Moreover, the District's motion demonstrates again on a number of levels its failure to comprehend the way a university operates and the practical implications of the BZA's proposals.

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[2]*See, e.g.,* R. 4354 ("The University must provide accommodations in on-campus dormitories for 70% of the first 8000 undergraduates (5600 beds) and an additional bed for each full-time undergraduate over 8000."); and R. 4363 ("By obliging the University to provide 5600 beds on campus, and an additional bed whenever undergraduate enrollment exceeds 8000, the Board expects the number of students forced to find housing off-campus to decline...").

Basically, the District now seeks to cap the University's enrollment at 8,000, by creating a situation where the housing requirement would spring into effect in full whenever the 8,001st undergraduate enrolls.[3] Retaining only Condition 9b would mean that the University could begin construction of its School of Business, in full compliance with the housing requirement; then, if 8,001 undergraduates enroll this Fall instead of 8,000, all construction would have to be halted at an exorbitant cost until the University acquires the full complement of 5,601 on-campus or remote beds. Such a situation would create enormous instability and be of no benefit to the public, particularly under the circumstances where the University's expedited construction of on-campus housing is in full swing in any event.

Additionally, understood in a real world context, the practical implications of the BZA's theoretical approach make it completely unworkable. Despite its arguments that the University has "full control" over its enrollment, as the District must be aware, it is not nearly so simple or precise. The University offers admission to a certain number of students but by definition has no certainty as to how many will accept those offers, and even of those who accept, there is no certainty as to how many will follow through on their notices of acceptance and actually enroll in the University. GW has explained to the District time and again that it does not have a final headcount for its undergraduate enrollment until mid-fall due to its inability to predict exactly how many students will arrive and stay past the "add/drop" period. Under the BZA's proposed scenario, in order to protect itself against non-compliance, the University would have to either

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[3] This approach is consistent with the District's apparent attempt to undermine the intent and effect of the Court's July 3 Order by discouraging the University from going forward with its academic construction projects, which the District knows would be extremely costly to delay midstream. Corporation Counsel, for example, has publicly commented on the Stay Order, stating that GW would "build at its own risk" if it obtained permits for its School of Business and commenced construction during the stay. *The Georgetown Current,* Wednesday, July 9, 2003 at 39 (copy attached at Tab A).

reduce dramatically the number of admissions it offers so as to eliminate any chance of exceeding 8,000, or "bank" a large number of beds that may in fact be unnecessary. The former is a constraint on university admissions policies that is not the proper subject of land use regulation, as the University has already demonstrated in earlier papers. The latter would be extremely costly and, by removing beds from the general housing stock, would also disserve the BZA's stated goals — even if those goals were legally legitimate.

The District supports its motion with limited statistics regarding the growth in the University's undergraduate enrollment over the past decade. It ignores, however, its own acknowledgement of the fact that overall University student enrollment has stayed relatively constant since 1985. (R. 4350 ("The total student body for academic year 2001-2002 is approximately the same size as in 1985, between 17,000 and 18,000."). There was no evidence that students (whether undergraduate or graduate) occupied more beds in Foggy Bottom/West End today than they did in 1985, even if such evidence would have been an appropriate topic for the BZA to consider. (GW will not in this brief reiterate all of the reasons why, under the District of Columbia Human Rights Act and other fundamental common law principles of land use regulation, the BZA ought to be blind to the "occupation" or "type" of person who lives in a neighborhood.)

Another aspect of Condition 9b that the District fails to address is that it is one of the more irrational elements of the Campus Plan Order. It requires the University to build new, expensive beds on the assumption that every undergraduate over 8,000 will occupy those beds. As the District well knows, and the BZA acknowledged, many GW undergraduates are married, have children, or cannot live in University housing due to religious, financial, or other reasons. (R. 4350 ("Of those [8044 undergraduates], the University estimated that 1239 were students who commuted from outside the District of Columbia, held religious beliefs or had disabilities

inconsistent with dormitory life, were married, or had children.") And many are commuters from Maryland, Virginia and other parts of the District of Columbia. (R. 4350.) Were the Court to grant the BZA's motion, GW could admit 150 new commuter students from Virginia, and be forced to acquire 150 beds somewhere outside Foggy Bottom/West End that would sit empty.

Finally, on page 3 of its motion, the BZA describes its parade of horribles that supposedly warrant reinstatement of Condition 9b. It argues that, "Without condition 9b, the university could continue to try to accommodate future growth by acquiring more properties in Foggy Bottom/West End that would no longer be available to the general public." Thus, the BZA, through its counsel, still openly seeks to convince this Court that it should help the BZA prevent GW, a private institution, from acquiring property for by-right use. This Court has already ruled that the BZA simply cannot regulate ownership or acquisition of property. *Watergate West v. Board of Zoning Adjustment,* 815 A.2d 762, 767 (2003) ("zoning controls use, not ownership"). And it cannot limit a university's by-right use of its property once it is acquired. *Id.* and *Spring Valley,* 644 A.2d 434, 438 (D.C. 1994) ("the BZA lacks jurisdiction to proscribe matter-of-right uses of property located off campus"). There is no basis for effectively reversing those sound principles in this case.

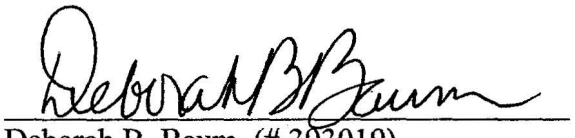
## CONCLUSION

Though preliminary in nature, the Court's July 3 Order was based not only on the parties' briefing on the motion for stay, but on a full record, including the briefs and argument of both parties (and *amici* supporting both sides) on the merits. To now reinstate Condition 9b

would create an unstable situation that would further goals that are facially improper under District of Columbia law.

Dated: July 21, 2003

Respectfully submitted,



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# Court delays mandate for GWU dormitories

By CHRIS KAIN
*Current Staff Writer*

The D.C. Court of Appeals has set aside, at least temporarily, requirements that George Washington University house 70 percent of its undergraduates on campus or outside Foggy Bottom and West End.

The court also set aside the board-imposed penalty — a prohibition on building permits for any nonresidential construction projects. University officials had chafed at the requirement as overly harsh.

In a one-paragraph order released Thursday, a three-judge panel agreed to issue the stay pending its decision on the university's appeal, which alleges that the D.C. Board of Zoning Adjustment violated the city's human rights law and unduly interfered with the university's academic growth. The court heard oral arguments in the case on June 19.

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## STAY

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The provision in question had taken effect earlier this year when another court — the U.S. Court of Appeals for the D.C. Circuit — overturned the university's challenge to the Board of Zoning Adjustment order on the grounds that the rules infringed on constitutional rights.

The zoning board had originally set an August 2002 effective date.

A longer-term provision — which requires that the university house 70 percent of its undergraduates on campus by Aug. 31, 2006 — remains unaffected by the stay.

Bob Ludwig, assistant director of media relations for George Washington University, said Tuesday that the university would withhold detailed comment until the court reaches a final decision.

"We're pleased that the stay was granted," said Ludwig.

Peter Lavallee, spokesperson for the D.C. Office of the Corporation Counsel, said that attorneys are still reviewing the effect of the stay. He said that District lawyers believe that the university would "build at its own risk" if it obtains permits for a project now but the Court of Appeals ultimately decides to uphold the zoning board's decision.

Since February, the city has been holding up permission for renovations to the business school, as well as a plan to lengthen hours at the university's health and wellness center.

Foggy Bottom residents had spent months trying to convince the D.C. Office of Planning and the Board of Zoning Adjustment to act to curb what they consider the university's unfettered expansion over several decades. Activists said they hope that the stay will not reflect the final ruling.

"We'll just have to wait and see how this plays out, I think," said Foggy Bottom Association vice president Barbara Spillinger.

Advisory neighborhood commission chair Dorothy Miller was less circumspect.

"It's very unfortunate," said Miller, a vocal critic of university policies and past zoning applications. "It was the only protection we had. ... They're already above the student quota. They don't follow anybody's rules. The city doesn't have any enforcement."

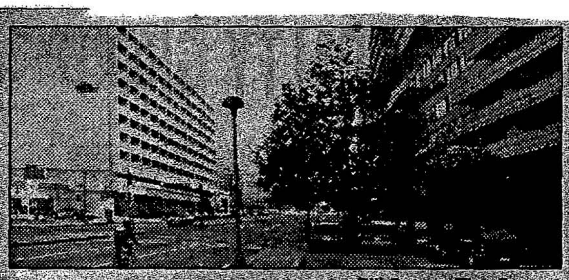
Miller challenged the university's claims that the zoning conditions placed an undue hardship on its academic growth. She noted that the case began in 1999 when the university submitted its draft campus plan, with residents pressing ever since for more on-campus housing.

"They had three years to prepare for this," said Miller. "They knew what was coming. ... The only reason they have a problem is they put up one dormitory in 30 or 40 years."

Construction of a residence hall in the mid-1990s ended the hiatus, and now the university is constructing a 10-story, 700-bed dormitory on 22nd Street north of Virginia Avenue, as well as a four-story, 200-bed complex across the street.

The larger building, however, is the subject of another court case, now pending in D.C. Superior Court. Adjacent property owner Donald Kruezer is seeking a preliminary injunction to halt the project, which he claims extends over his property line.

The court will hear further testimony on his claim Monday. The hearing is expected to include George Washington University's cross-examination of Kruezer.



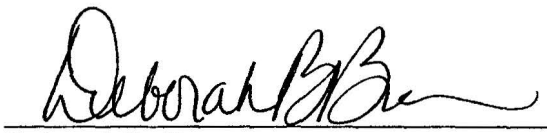
Bill Petros/The Current

**The university bought the former Howard Johnson Hotel for student housing.**

## CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July 2003, I caused a copy of the foregoing, The George Washington University's Opposition to the Motion by the Board of Zoning Adjustment For Reconsideration of Stay of Condition 9b to be served by hand on the following counsel of record for the District of Columbia:

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