GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16507 of Watergate West, Inc., pursuant to 11 DCMR 3105 and 3106 (now 3100.2 and 3101.5), from the administrative decision of Armando Lourenco, Acting Zoning Administrator, Department of Consumer and Regulatory Affairs in the issuance of an occupancy permit (No. 85776/024273) issued on July 28, 1999, to George Washington University for the use of a dormitory housing 388 beds as a matter-of-right without the need for a special exception in an R-5-E District at premises 2601 Virginia Avenue, N.W. (Square 6, Lot 825).

Hearing Date: November 10, 1999
Decision Date: December 1, 1999

ORDER

Findings of Fact:

1. The subject appeal was filed on August 2, 1999, by J. Edward Sheridan, Chairman of Ad Hoc Committee, on behalf of Watergate West, Inc. (the "appellant"). The appeal challenges the decision of Armando M. Lourenco, then the Acting Zoning Administrator, to approve the issuance of Certificate of Occupancy No. 185776 to the George Washington University to use the premises at 2601 Virginia Avenue, N.W., as a "dormitory – 388 beds."

2. The George Washington University (hereinafter referred to as GW or the University) is the owner of the subject building. Pursuant to §3399 of the Supplemental Rules of Practice and Procedure before the Board of Zoning Adjustment, GW is a party to the appeal.

3. The appellant raised two essential issues which it asserts constitute error on the part of the Acting Zoning Administrator and which are the bases on which it argues that the certificate of occupancy should be revoked. First, University use is not permitted in a residential district as a matter-of-right and, therefore, approval from the Board of Zoning Adjustment (BZA) should have been required before the certificate of occupancy was issued. Second, the Acting Zoning Administrator should have determined that use as a dormitory is not consistent with the Comprehensive Plan.

4. As to the first basis, that approval from the BZA was required, the appellant argued that:

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A. The Zoning Regulations do not permit a "university" use as a matter-of-right in a residential district and that a special exception is required for such a use under §210.

B. A campus plan is required for a university use, the BZA has approved a campus plan for GW and the subject property is not included within the boundaries of the approved campus plan.

C. Use of the subject property as a dormitory is a de facto expansion of the campus plan boundaries.

D. Approval of the BZA is required for a dormitory within the campus boundaries and it does not make sense for the Zoning Administrator to allow a dormitory outside the campus boundary without BZA approval.

E. A rational reading of the Zoning Regulations would not include a university dormitory within the term "dormitory" permitted as a matter-of-right.

5. As to the second basis, that the Zoning Administrator should have determined that the proposed use was not consistent with the Comprehensive Plan, the appellant argued as follows:

A. The Comprehensive Plan (§112.6(c)) requires the Zoning Administrator and the BZA to evaluate a proposed certificate of occupancy in conjunction with the applicable sections of the Comprehensive Plan.

B. The Comprehensive Plan recognizes the deleterious effects of housing large numbers of GW students in residential areas outside the campus plan boundaries.

C. The Comprehensive Plan has a policy that GW should provide housing for its students within the current campus plan boundaries and that GW should stop converting buildings outside the campus boundaries to dormitories.

D. Therefore, the Zoning Administrator should have concluded that conversion of the subject property to a dormitory was inconsistent with the Comprehensive Plan and he should not have approved the certificate of occupancy.

6. Armando Lourenco, the Acting Zoning Administrator at the time the certificate of occupancy was issued, appeared and testified at the hearing on the appeal. He stated that he approved the certificate of occupancy for the following reasons:

A. A dormitory is a use permitted as a matter-of-right in an R-5 District and the proposed use was consistent with the definition of a dormitory as found in the dictionary.

B. A university campus plan only applies to property within the campus boundaries.

C. GW must follow the same zoning requirements as apply to any other property owner, including the provision of off-street parking.

D. The provisions of the Comprehensive Plan were considered and they led to the conclusion that the proposed use was consistent with the Plan.

7. As to the issue of whether BZA approval was required, GW argued that the Zoning Administrator properly interpreted and applied the Zoning Regulations for the following reasons:

A. The structure and plain language of the Regulations make it clear that approval from the BZA is not required for the proposed use at the subject location. A college or university use is first permitted in an R-1 District as a special exception under §210, as follows:

> "Use as a college or university that is an academic institution of higher learning, including college or university hospital, dormitory, fraternity, or sorority house *proposed to be located on the campus* of a college or university ..." (emphasis added)

The statement of uses permitted within the "college or university" use category includes, by example, enumerated uses that are not otherwise permitted in an R-1 District and any such use would therefore require BZA approval.

B. The structure of the Zoning Regulations is such that the zone districts are generally cumulative, from the most restrictive to the least restrictive, with all uses permitted in a given zone generally incorporated into and permitted within the next less restrictive zone. Uses which are permitted as special exceptions in more restrictive zones often are permitted as a matter-of-right in less restrictive zones. The import of the cumulative nature of the Regulations is that a use which might be deemed to be a college or university use and therefore requires BZA approval in a more restrictive zone eventually becomes a use which is permitted as a matter-of-right and does not require a special exception in a less restrictive zone.

C. Under §330.5(g) of the Regulations, a "private club, lodge, fraternity house, sorority house or dormitory, except when the use is a service customarily carried on as a business" is a use permitted as a matter-of-right in an R-4 District. Under §350.4, all those uses permitted in the R-4 District are permitted in an R-5 District as a matter-of-right. A dormitory is therefore permitted as a matter-of-right in an R-5-E District.

D. The requirements of §210 clearly apply only to dormitories on the campus of a college or university. Inclusion within the campus boundaries contains other implications, including the ability to aggregate the FAR with other property within the campus and to satisfy the parking requirements on a campus-wide basis. Since the subject property is not within the approved boundary of the GW Foggy Bottom campus, the proposed use must stand on its own in terms of satisfying all zoning requirements. However, BZA approval is not needed for a use that is specifically provided for as a matter-of-right.

E. The Court of Appeals upheld the proposition that the Zoning Administrator and the BZA must follow the Zoning Regulations in *Spring Valley Wesley Heights Citizens Association, et al. v. District of Columbia Board of Zoning Adjustment*, 644 A.2d 434 (D.C. App. 1994), upholding the BZA's decision that it was without authority to proscribe a use permitted as a matter-of-right:

> "If the BZA were to attempt to proscribe such matter-of-right use, it would be exercising powers reserved to the Zoning Commission. Under these circumstances, the BZA reasonably concluded that it lacked authority to prohibit the University from acquiring the property for the purpose of using it as a law school." (footnotes omitted)

F. Zoning regulates use, not ownership. A private party unassociated with the University may, as a matter-of-right, construct and/or operate a dormitory in the subject property and lease beds in that dormitory in whole or in part to GW students. If that use is permitted for a private party, then it is impossible to read the Regulations in a way that would deny the University the right to institute a use permitted for any other person.

G. The consistent policy and interpretation of the Zoning Regulations over many years has been to allow use of property in R-5 and SP Districts by colleges and universities for residential uses otherwise permitted in those zones as a matter-of-right and without requiring BZA approval, including the buildings at 3700 Massachusetts Avenue, N.W. (Alban Towers), 1239 Vermont Avenue, N.W. (former Eton Towers), 2601 16th Street, N.W. (former Meridian Hill Hotel), 1230 13th Street, N.W. (Sutton Plaza), 2201 Virginia Avenue, N.W. (Riverside Towers) and 2100 F Street, N.W. (The Dakota). For each of these buildings, a certificate of occupancy had been issued to a private party before the university acquired the property. A subsequent certificate of occupancy for the same use was issued to the university. In the case of the Meridian Hill Hotel, a subsequent certificate of occupancy was issued to the university for another permitted residential use. In none of these cases was approval from the BZA required.

H. The appellant's citation to *George Washington University v. District of Columbia Board of Zoning Adjustment*, 429 A.2d 1342 (D.C. App. 1981) does not stand for the proposition that the subject dormitory use is not a proper R-5-E use. The Court expressly noted that the case presented two principal questions:

> "(1) whether the Board of Zoning Adjustment (BZA or the Board) properly concluded that the intervenor has not abandoned his right to nonconforming use of his property, and (2) whether the Board erred in failing to take specific account of the effect of the proposed change in nonconforming use from a clothing store to a restaurant on the campus plan of George Washington University (GWU or the University)."

The Court specifically ruled that the BZA had properly considered, interpreted and applied the change of nonconforming use provisions then set forth in Article 71 of the Zoning Regulations and whether the University's campus plan was binding upon property not owned by the University. The Court was not asked to consider and did

not rule upon whether the University was able to construct a permitted dormitory use outside its campus boundaries.

I. Likewise, *Steve Levy, et al. v. District of Columbia Board of Zoning Adjustment*, 570 A.2d 739 (D.C. App. 1990), was not a case about whether the University was able to construct a permitted dormitory use outside its campus boundaries. *Levy* was a challenge to the BZA's approval of GW's campus plan. The Court's citations to the Zoning Regulations regarding college or university uses can in no way be construed to read that the Court was precluding a university from operating and occupying a building with a residential use otherwise permitted in the zone district applicable to the property. In fact, the Court noted the University's argument that the BZA could not set conditions more restrictive than the Zoning Regulations impose and that the "The University has a number of off-campus uses which exist as a matter of right in non-commercial districts." *Levy, supra*, at 753.

8. As to the issue that the Zoning Administrator should have considered and taken into account the Comprehensive Plan in approving the certificate of occupancy, GW argued as follows:
   A. The Zoning Administrator is required to interpret and apply the Zoning Regulations. The Zoning Administrator may not use the Comprehensive Plan to interpret the Zoning Regulations in a manner which is inconsistent with the plain meaning of the Regulations. It is the Zoning Commission which has the responsibility and authority under the Zoning Act to make the Zoning Regulations "not inconsistent with the Comprehensive Plan." See *Tenley and Cleveland Park Emergency Committee, et al. v. District of Columbia Board of Zoning Adjustment*, 550 A.2d 331 (D.C. App. 1988). The Court ruled that "the Zoning Commission is the exclusive agency vested with responsibility for assuring that the zoning regulations are not inconsistent with the Comprehensive Plan."

   B. The Court's ruling in *TACPEC, supra*, confirms the specific language of the Comprehensive Plan still in effect. In 10 DCMR 112.3, the Plan currently provides that "the District elements of the Plan are a guide intended to establish broad policies and goals while affording flexibility for future implementation *and are not binding policy directives.*" (emphasis added)

   C. The Court reaffirmed *TACPEC* in a case decided after §112 was added to the Comprehensive Plan. The Comprehensive Plan Amendments Act of 1994 was enacted by the Council on December 1, 1994, was signed by the Mayor on December 27, 1994 and became effective on March 21, 1995. On May 15, 1995, the Court decided *Kindy French, et al. v. District of Columbia Board of Zoning Adjustment*, 658 A.2d 1023 (D.C. App. 1995) in which the Court cited its opinion in *TACPEC* that "the Zoning Commission is the exclusive agency vested with the responsibility for assuring that the Zoning Regulations are not inconsistent with the Comprehensive Plan." The Court went on to restate that "The Board's limited function is to assure that the Regulations adopted by the Commission are followed; it has no authority to implement the Comprehensive Plan." The Court

also followed *TACPEC* in *Spring Valley*, also decided after the Comprehensive Plan was amended.

D. If the appellant's argument is sustained, the Zoning Administrator and/or the BZA would effectively be amending the Zoning Regulations to change the circumstances under which a matter-of-right use is permitted, a power which is expressly reserved under the Zoning Act to the Zoning Commission.

E. Notwithstanding that the Comprehensive Plan cannot be applied by the Zoning Administrator in a manner inconsistent with the plain meaning of the Zoning Regulations, the various Plan provisions cited by the appellant do not make the case that the proposed use is inconsistent with the Plan. The previous use of the subject property was a hotel. It has been converted from a transient accommodation to a dormitory housing GW undergraduate students for an academic year. The Plan provisions cited by the appellant generally speak to the loss of housing stock and problems associated with insufficient parking.

F. The subject property was built as and continually used as a hotel, not an apartment house or other permanent housing accommodation. No residential units were lost by the issuance of the certificate of occupancy.

G. The Acting Zoning Administrator determined that the subject building met all of the requirements of the Zoning Regulations, including those related to off-street parking and loading, before the certificate of occupancy was issued.

9. Advisory Neighborhood Commission 2A, by report dated October 20, 1999, advised the BZA that it recommended that the appeal be granted. . As the basis for that recommendation, the ANC argued that:
   A. University use is not permitted in a residential district as a matter-of-right and, therefore, approval from the Board of Zoning Adjustment (BZA) should have been required before the certificate of occupancy was issued; and

   B. The Acting Zoning Administrator should have determined that use as a dormitory is not consistent with the Comprehensive Plan.

   As set forth in the ANC's resolution, these arguments are virtually word-for-word the same arguments made by the appellant. The only additional comment made by the ANC which goes beyond the appellant's statement is that the ANC has a long-standing policy and goal that GW should provide housing for all undergraduate students within the boundaries of the current campus plan.

10. As to the issues raised by the appellant and the ANC, the Board finds as follows:
    A. The Zoning Regulations permit a dormitory as a matter-of-right in an R-5 District. For all the reasons cited by the Zoning Administrator and GW, approval from the BZA is not required as a college or university use if the premises is to be used for a use otherwise permitted as a matter-of-right in the particular zone.

B. The provisions of the Comprehensive Plan do not lead to the conclusion that a university dormitory should not be permitted on the subject site. The BZA concurs with the rationale cited by the Zoning Administrator and GW and notes that the property had been used as a transient housing accommodation since it was constructed. The BZA further notes that the Zoning Administrator required all of the requirements of the Zoning Regulations to be satisfied on this site, including the provision of the required number of off-street parking spaces and loading berths.

C. As to the ANC's policy that GW should house all its undergraduate students on campus, such a policy is not part of any approved plan or Zoning Regulation. GW has constructed a new dormitory on campus, and has made housing available to its students in property it owns both on and off campus. No other college or university in the District of Columbia is required to house all of its undergraduates on campus.

Conclusions of Law and Opinion:

In considering an application for a certificate of occupancy, the Zoning Administrator is required to determine whether the proposed use meets the requirements of the Zoning Regulations. The BZA concludes that a dormitory is a use expressly permitted by the Regulations as a matter-of-right in an R-5-E District and that the Zoning Administrator correctly applied the Regulations in making the decision to approve the certificate of occupancy. The Regulations specifically require BZA approval for a dormitory on a campus, but the reach of §210 does not extend beyond a campus to a use otherwise permitted. In so concluding, the BZA notes that some of the complementing provisions of the regulations (the ability to aggregate FAR or to satisfy parking on a campus-wide basis) also do not extend to property not on the campus.

The BZA also notes the long-standing and consistent interpretation of the Regulations to allow a university to operate a dormitory or apartment house in a residential district without BZA approval as a special exception. The BZA concludes that if the Zoning Administrator had reached a different conclusion for the subject property without any change in the Regulations, such a decision would have been arbitrary and capricious.

As to the issue of consistency with the Comprehensive Plan, the BZA concludes that the Court of Appeals decision in *Tenley and Cleveland Park Emergency Committee, et al. v. District of Columbia Board of Zoning Adjustment* still controls as to the Comprehensive Plan not being a self-executing document. The Zoning Commission is the body having exclusive jurisdiction over amendments to the Zoning Regulations. It would be improper for the Zoning Administrator to read the Comprehensive Plan to require an action not provided for in the Zoning Regulations.

The appellant's argument that the Comprehensive Plan was amended after *TACPEC* is not persuasive. The section interpreted by the Court in 1988 is still part of the Comprehensive Plan and the Board notes that the Court has cited *TACPEC* in decisions made after the Plan was amended. The Board also notes that §112.1 of the Plan specifies the intent to broadly interpret the District elements. The Plan requires the Zoning Administrator to evaluate an application for a certificate of occupancy in conjunction with the Plan, but §112.6(c) does not give the Administrator the authority to override the plain language of the Zoning Regulations.

The Zoning Administrator testified, however, that he took the Comprehensive Plan into account in approving the proposed use. His determination that the dormitory was consistent with the Plan is a reasonable interpretation of the intent of the Plan, which addresses generally the pressure on the housing stock occasioned by conversions to dormitories. The Zoning Administrator's conclusion that the use was consistent with the Plan also squared with the application of the Zoning Regulations.

The Board concludes that it has accorded to ANC 2A the great weight to which it is entitled under the statute. In addressing the issues raised by the appellant, the Board has also addressed the ANC's issues, since the ANC's resolution was virtually identical to the appellant's statement. Additionally the Board concludes that it is outside its authority in this proceeding to establish a policy to house all undergraduates on campus as a new requirement applicable to GW.

The Board concludes that the issuance of a certificate of occupancy for a dormitory on the subject property was appropriate for a residential use permitted as a matter-of-right in an R-5-E District, which is the highest intensity, least restrictive residential district. The Acting Zoning Administrator properly applied the Zoning Regulations in accordance with the language of the Regulations and consistent with past precedents of the District of Columbia, in determining that the proposed use was permitted without approval of the Board of Zoning Adjustment. The provisions of the Comprehensive Plan are not self-executing and the Zoning Administrator is without authority to apply the Regulations in a different manner than they are adopted by the Zoning Commission. In any event, the Board concludes that the appellants have not demonstrated that the conversion of a hotel to a dormitory is inconsistent with the Comprehensive Plan.

In consideration of the above findings of fact and conclusions of law, it is therefore hereby **ORDERED** that the appeal is **DENIED** and the decision of the Acting Zoning Administrator to issue certificate of occupancy No. 185776 is upheld.

Vote: 3-1 (Jerry Gilreath, Kwasi Holman and Sheila Cross Reid to deny the appeal and uphold the decision of the Zoning Administrator, Robert Sockwell opposed to the motion)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
DIRECTOR

Final date of order: FEB 11 2000

UNDER 11 DCMR 3103.1 (NOW 3125.9), "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO.: 16507

As Director of the Office of Zoning, I certify and attest that on FEB 11 2000 a copy of the order entered on that date in this matter was mailed first class, postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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Attested by: _____
JERRILY R. KRESS, FAIA
Director

Date: FEB 11 2000

Attest/Appeal #16507/1-14-00/poh