BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Advisory Neighborhood Commission 2A
Appellant

Appeal No. 16701
Public Hearing: April 10, 2001

RESPONSE OF THE GEORGE WASHINGTON UNIVERSITY, INTERVENOR

I. Introduction

The subject appeal was filed on January 19, 2001 by Advisory Neighborhood Commission (ANC) 2A (the "Appellant"). The appeal challenges the December 27, 2000 decision of Michael Johnson, Zoning Administrator, to issue Building Permit No. B434036 to allow construction by The George Washington University ("GW" or "University") of a mixed use building at 1957 E Street, N.W. (the "Property"). This building permit was issued pursuant to a planned unit development ("PUD") on the site approved and extended by the District of Columbia Zoning Commission pursuant to Zoning Commission Orders Nos. 746, 746-A and 746-B, attached hereto as Exhibit A. The University is the owner of the Property. Pursuant to Section 3199 of the Supplemental Rules of Practice and Procedure before the Board of Zoning Adjustment, GW is a party to the appeal.

The University is in support of the decision of the Zoning Administrator to issue Building Permit No. B434036. The University believes that the Zoning Administrator properly applied the Zoning Regulations in determining that the application for the building permit complied with the applicable provisions of 11 DCMR and the PUD Orders. Accordingly, the University requests that the appeal be denied.

COPY

BZA
Case No. 16701
Exhibit No. 25

Board of Zoning Adjustment
District of Columbia
CASE NO.16701
EXHIBIT NO.25A1

II.
Summary Statement Of Issues Defined By Appellant

While the Appellant did not file a pre-hearing statement, in its March 21, 2001 resolution, the Appellant raised a series of issues, which it asserts constitute error on the part of the Zoning Administrator. These issues are:

1. The University filed building permit applications untimely, that is after deadlines set by the Zoning Commission in the PUD Orders.

2. The use of the PUD site by the University violates the PUD.

3. The Zoning Administrator should have reviewed the proposed uses of the PUD site for compliance with Z.C. Order No. 746 prior to completion of construction.

4. The University did not comply with the District of Columbia Environmental Policy Act ("DCEPA") (D.C. Code § 6-981 et seq.) and must do so prior to issuance of the permit.

III.
Summary Response Of The George Washington University

The issues raised by the Appellant are not grounded in fact, have no basis in law and thus, cannot be sustained by the Board. The University followed all proper procedures when applying for the building permit. Likewise, the District applied all appropriate regulations and standards when reviewing the building permit application and in reaching its decision to grant the building permit. Building Permit No. B434036 was properly issued and this appeal should be denied.

IV.
Detailed Response To Issues

A.
The University Timely Filed For Building Permits

In its resolution dated March 21, 2001, the Appellant incorrectly states that the University had until December 10, 1997 to apply for its building permits. This statement is simply wrong. Pursuant to Zoning Commission Order No. 746-B, included in Exhibit A, the University had until December 10, 1999 to apply for its building permit and until December 10, 2000 to begin construction. The building permit application and the building permit customer control receipt, attached as Exhibits B and C, clearly show that the application was filed on December 7, 1999. Actual construction, pursuant to an excavation and sheeting and shoring permit, a copy of which is attached as Exhibit D, was commenced at the end of October 2000. Thus, the University complied with deadlines set by the PUD Orders.

B.
University Use Of The Property Is Permitted

The PUD Orders rezoned the property from the SP-2 Zone District to the C-3-C Zone District and permitted the construction of a mixed-use building for residential and commercial uses. Specifically, the project was approved to include 174,563 square feet of commercial space (5.79 FAR) and 65,423 gross square feet of residential space (2.17 FAR). There is no prohibition in the PUD Orders as to any use. All uses permitted in the C-3-C Zone District are permitted provided that the building contains at least 2.17 FAR of residential uses. The PUD Orders do not prohibit university use from either the permitted commercial or permitted residential uses.

Further, the PUD Orders No. 746 do not condition approval on the ownership of the site. In fact, to do so would have been unlawful. In National Black Child Development Institute, Inc. v. District of Columbia Board of Zoning Adjustment, 483 A.2d 687, 691 (D.C. 1984), attached as Exhibit E, the District of Columbia Court of Appeals held that it is impermissible to limit zoning relief to a particular property owner. However, the identity of the owner of the property is the very crux of the Appellant's argument. When the Zoning Commission originally heard this PUD application, the appellant ANC supported the application. Now, because it is the University building the same PUD, the Appellant is attempting to stop its construction through this appeal of the building permit.

The Appellant also objects to the University's plans to use a building that is not within its campus plan boundary. This objection is not grounded in current law. It is well established that a private university cannot be prohibited from occupying commercially zoned off-campus property. In Spring Valley Heights Citizens Association v. District of Columbia Board of Zoning Adjustment, 644 A.2d 434 (D.C. 1994), attached as Exhibit F, the Court of Appeals found that American University could not be precluded from locating its law school off-campus in a commercially zoned building in which a college or university use is permitted as a matter-of-right. The Board recently relied on that precedent in denying an appeal of Watergate West, Inc., challenging the issuance of a permit for 2616 Virginia Avenue. In BZA Appeal 16507, the BZA found that the University could establish a dormitory off-campus as a matter-of-right because the underlying zoning permitted dormitory use without special exception approval. (See Exhibit G.)

The zoning and permissible uses at 1957 E Street are currently defined by the PUD Orders. The University cannot be precluded from establishing university uses at 1957 E Street. The University's planned uses of the Property are consistent with the uses approved by the PUD.

GW will use the PUD site for academic, office and residential uses, as well as for housing. The fact that the commercial uses planned will serve students and the residential portion of the PUD will house students is immaterial. Pursuant to the PUD Orders, these uses are permitted as a matter-of-right.

C.

The Zoning Administrator Cannot Review Whether Uses At The PUD Site Comply With The Terms Of The PUD, Until Such Time As The PUD Is Built And In Use

In reviewing the University's building permit application, the Zoning Administrator reviewed the architectural plans and uses proposed by the University. The Zoning Administrator then made the determination that these plans and uses were consistent with the PUD Orders. As stated above, the uses that are proposed by the University (housing, office and academic uses) are consistent with the uses that are approved pursuant to the PUD.

It is impossible to investigate whether the University is actually using the PUD site for these uses until the PUD is built and in use. Once it is built, it must be assumed that DCRA will insure that it is being used for the permitted uses, residential and commercial. If it is not, then DCRA will cite the University for a violation and enforce the terms of the PUD.

D.

The University Complied With The D.C. Environmental Policy Act And Appellant's Argument Is Moot

Pursuant to the District of Columbia Environmental Policy Act, as part of the building permit application process, the University was required to complete an Environmental Impact Screening Form ("EISF") for review by the Department of Health ("DOH"). The University completed this form and submitted to the DOH, and the EISF is attached as Exhibit H. The DOH, as the lead agency for the DCEPA, is responsible for determining whether additional

environmental analysis need be effectuated. In fact, in response to the EISF, DOH required additional analysis, in particular, an ambient air quality study. The University retained Apex Environmental, an expert in these matters, and submitted the study to the DOH. The District approved this study and "determined that there would be no significant adverse environmental impacts from the proposed project . . . therefore . . . an Environmental Impact Statement will not be required." (See Memorandum from DOH to BLRA dated October 20, 2000, as well as other supportive memoranda, attached as Exhibit I.) As a result of this approval, the Department of Health gave its approval to the building permit application. Therefore, the Appellant's request that the University comply with the DCEPA is moot because the University has complied. It undertook the appropriate analysis of environmental issues, and the District reviewed and approved them, prior to the issuance of the building permit.

V.
Conclusion

The issuance of Building Permit No. B434036 was appropriate. The University met the requirements of, and the Zoning Administrator properly applied, the Zoning Regulations and Zoning Commission Orders Nos. 746, 746-A and 746-B. The PUD Orders permit any commercial and/or residential uses allowed in the C-3-C Zone District provided that at least 2.17 FAR of the PUD be utilized as residential. It is uncontested that the University is building in accordance with the approved PUD plans and that 2.17 FAR is being built for residential uses. The ownership and/or occupancy of the permitted uses of the PUD are not regulated by the PUD Orders nor could they be regulated under well-established, existing District of Columbia law.

For all of the above reasons, the appeal should be denied and the decision of the Zoning Administrator should be upheld.

Respectfully submitted,

Phil T. Feola

Sarah E. Shaw

April 10, 2001

List of Exhibits

Exhibit A: Zoning Commission Orders Nos.746, 746-A and 746-B.

Exhibit B: Building Permit Application

Exhibit C: Building Permit Customer Control Receipt

Exhibit D: Excavation and Sheeting and Shoring Permit

Exhibit E: National Black Child Development Institute, Inc. v. District of Columbia Board of Zoning Adjustment, 483 A.2d 687 (D.C. 1984)

Exhibit F: Spring Valley heights Citizens Association v. District of Columbia Board of Zoning Adjustment, 644 A.2d 434 (D.C. 1994)

Exhibit G: BZA Appeal 16507

Exhibit H: Environmental Impact Screening Form

Exhibit I: District Memoranda Relating to Environmental Review

A

Government of the District of Columbia

ZONING COMMISSION

ZONING COMMISSION ORDER NO. 746
Case No. 93-5F/91-18P
(Final PUD & Map Amendment @ 19th & E Sts., N.W. - AGC)
November 15, 1993

Pursuant to notice, a public hearing of the Zoning Commission for the District of Columbia was held on July 26, 1993, to consider an application from the Associated General Contractors of America (AGC). The application requested second-stage (final) approval of a Planned Unit Development (PUD) and related Map Amendment, pursuant to the provisions of Chapter 24 and Section 102, respectively, of the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning. The public hearing was conducted in accordance with the provisions of 11 DCMR Subsection 3022.

FINDINGS OF FACT:

1. The application which was filed on March 3, 1993, requested a second-stage (final) approval of a planned unit development (PUD) and a related change of zoning from SP-2 to C-3-C for Square 122, Lot 835.

2. By Z.C. Order No. 720, in Case No. 91-18P, dated July 13, 1992, the Zoning Commission granted first-stage (Preliminary) approval of a PUD and the related change of zoning from SP-2 to C-3-C for the PUD site. The Proposed PUD will have a gross floor area of 239,986 square feet, and floor area ratio (FAR) of 7.96, of which 174,563 square feet and a 5.79 FAR would be devoted to commercial uses and 65,423 square feet and 2.17 FAR devoted to residential uses. The building will have a height of 107 feet, a lot occupancy of 100 percent and provide below grade parking for about 200 cars.

3. The applicant, the AGC, proposes to construct a larger and more modern office facility, which can accommodate its headquarters' present and future needs and have sufficient rental space to enable the AGC remain in the District of Columbia. AGC also proposes to develop a 47-56 unit apartment component as part of the project.

4. The PUD site is zoned SP-2 and is located at 1957 E Street, N.W. It is on the north side of E Street between 19th and 20th Streets. The site is 30,159 square feet in area and rectangular in shape, with approximately 311 feet of linear frontage on E Street, N.W. and approximately 97 feet of linear frontage on both 19th and 20th Streets, N.W.

5. The western portion, approximately one-third of the PUD site is presently developed with a four-story building used as the AGC headquarters. The remainder of the site is used as a surface parking lot.

6. The PUD site is contiguous to Mitchell Hall, a nine-story George Washington University dormitory, to the northeast and a five-story public parking garage to the northwest in Square 122.

7. The area surrounding the subject site contains a wide variety of land uses. Major office development is located to the south, east and west. Immediately east, across 19th Street, N.W., is the General Services Administration ("GSA") office building which is 107 feet in height and occupies the entire square. The American Red Cross local headquarters building is situated west of the site across 20th Street, N.W. and is approximately 66 feet in height. To the south across E Street and a three-block-long Federal park, are the federal Office of Personnel Management and Department of Interior office buildings.

8. The SP-2 zone district permits matter of right, medium/high-density development, including all kinds of residential uses, with limited offices for non-profit organizations, trade associations and professionals permitted as a special exception requiring approval of the Board of Zoning Adjustment; a maximum height of 90 feet; a maximum floor area ratio ("FAR") of 6.0 for residential and 3.5 for other permitted uses; and a maximum lot occupancy of 80 percent for residential uses, 200 percent for other permitted uses.

9. The C-3-C zone district permits matter of right major business and employment centers of medium/high-density development, including office, retail, housing and mixed-uses; a maximum height of 90 feet; a maximum FAR of 6.5; and a maximum lot occupancy of 100 percent.

10. Under the PUD process of the Zoning Regulations, the Zoning Commission has the authority to consider this second-stage (final) PUD application. The Commission may also impose development conditions, guidelines and standards that may exceed or be less than the matter of right standards identified above for height, FAR, lot occupancy, parking and loading, or for yards and courts. The Commission may also approve uses that are permitted as special exceptions and would otherwise require approval by the Board of Zoning Adjustment.

11. The District of Columbia Generalized Land Use Element of the Comprehensive Plan for the National Capital includes the PUD site in the high-density, commercial land use category.

12. AGC proposes to construct the project in two phases on land which it owns in fee simple. The proposed mixed-use development includes approximately 174,563 square feet of commercial office space (5.79 FAR) and approximately 65,423 gross square feet of residential space (2.17 FAR). The proposed roof elevation of the 8th floor of the office component is 94 feet, measured from E Street and is aligned with the cornice of the GSA building. There is a 20-foot setback along the three street frontages and then the top floor rises to 107 feet in height. The total density of the project is 7.96 FAR. The building will occupy 100 percent of the lot and there will be 200 parking spaces in a parking garage below grade.

13. Loading and parking access to the office portion of the development will be from 19th Street, N.W. loading and parking access to the residential portion of the development will be from 20th Street, N.W. There will be two 12' x 30' and one 10' x 20' loading berths for the office portion of the building. There will be one 12' x 30' and one 10' x 20' loading berths for the residential portion of the building.

14. AGC, through its representative at the public hearing, indicated that it continues to remain in the District of Columbia where it has been located since 1918 and is anxious to achieve second-stage approval of the project so it can move forward with the development. Approval of the subject application would allow the retention of a major, national association; provide approximately 323 new, permanent jobs in the District of Columbia; and create approximately 437 construction jobs over a two-year period; and result in an increase of approximately $2.54 million annually in tax revenues to the District of Columbia. The application indicates that the proposed PUD results in the efficient and economical utilization of the site; provides attractive urban design and new residential housing units; and adequately assures the protection of the public health, safety, welfare and convenience. The project is consistent with the existing physical character and land use patterns in the area; will not adversely impact the various District services; and will result in a positive financial impact to the District of Columbia.

15. AGC's architect and urban planner, indicated at the public hearing that the second-stage application meets all of the standards set forth in the Zoning Commission's first-stage

Order (Zoning Commission Order No. 720). The architect/urban planner testified that the office component's eighth floor roof line will be at 94 feet in order to match the cornice line on the adjacent GSA building's facade. The building will have a maximum height of 107 feet, matching the 107-foot height of the GSA building. He indicated that the proposed project was in complete conformance with the high-density, commercial land use designation of the site on the Comprehensive Plan Generalized Land Use Map. He testified that the proposed uses are consistent with the surrounding land uses and the goals and objectives of the Comprehensive Plan and that the project will not have any adverse land use impact on the surrounding area.

16. The architect/urban planner testified that the setbacks have been increased to 20 feet along the street frontage perimeter of the building, above the 94-foot height elevation and that the penthouse has been lowered into the top floor so that only 8 feet of the mechanical penthouse is exposed to exterior view. He indicated that the height of the project has been carefully examined and redesigned so as to minimize any potential impact on the surrounding properties.

17. The architect/urban planner described the consultation process with the community and indicated that the community had significant input into the design detail and the landscaping plans. Through the testimony of the architect/urban planner, AGC requested certain flexibility in the following development features:

    a. Vary the number of residential units to allow for larger or smaller units, in response to market conditions, so long as there are no less than 47 residential units in the project with no reduction in the gross square footage devoted to residential use;

    b. Change the location and design of all interior components including partitions, structural slabs, doorways, hallways, columns, stairways, location of elevators and electrical/mechanical rooms, so long as the variations do not change the exterior envelope of the building including the penthouse;

    c. Make minor adjustments in the window detailing, including the flexibility to shift the location of entrance doors on the ground floor to accommodate tenant uses;

d. Make minor design changes in response to requirements and final approval of the Commission of Fine Arts;

e. Provide not more than 5,000 square feet of ancillary, retail-related space on the ground floor of the property;

f. Vary the type of planting materials based on the availability at the time completion so long as the plant sizes and species are comparable to those shown on the landscaping plan;

g. Change the location and types of parking spaces provided, increase the number of spaces provided and make other modifications to below-grade space to accommodate the needs of office tenants, residential tenants and handicapped persons, including the potential elimination of a level of commercial parking without reduction of the total number of required spaces.

18. AGC requested that the project be permitted to be developed in two-phases with the office component being developed in the first phase. AGC proposes to apply for a building permit for the residential component within one year of the issuance of the Certificate of Occupancy for the office component and that, upon receipt of the building permit, AGC must achieve a Certificate of Occupancy for the residential component within two and one-half years.

19. AGC's transportation consultant, testified that the traffic generated by the project can be accommodated on the existing street network and that all intersections would operate at acceptable levels of service. He indicated that he had studied the two additional intersections, as requested by the Department of Public Works and the Commission pursuant to the first-stage approval of the project, and found that neither of these intersections would be adversely affected by the proposed project. He concluded that the project would not create any adverse transportation impact on the District or the neighborhood, that the project satisfied a number of goals and policies of the District of Columbia and is consistent with the transportation element of the Comprehensive Plan.

20. The District of Columbia Office of Planning (OP), by report dated July 15, 1993 and by testimony at the public hearing, indicated that the applicant has met the conditions for the final approval of the second-stage PUD application, as specified by the Zoning Commission Order No. 720. The OP

also indicated that the applicant has made substantial effort to reduce the proposed project's height and perceived bulk and has designed a structure that would he appropriate for the area in which it would be located.

21. The OP added, that the project would be an asset to the surrounding neighborhood and to the city as a whole. Accordingly, the OP recommended approval of the second-stage PUD and the related map amendment, subject to the following conditions regarding the development of the residential component of the project.

    a. The project may be developed in two phases with the office component being developed in the first-phase;

    b. Within one year of issuance of the certificate of occupancy for the office component, the AGC must apply for a building permit for the residential component; and

    c. Upon receipt of a building permit, the AGC must receive a certificate of occupancy for the residential component within two and one-half years.

22. The OP's report also contained the applicant's proposals that the enforcement of the above conditions be handled by the appropriate civil infractions official of the District government. That, any violations of the final PUD order be prosecuted in accordance with Section 2407.5 of the Zoning Regulations and Section 1229.1(c) of the civil infractions law, which specified that failure to comply with a Zoning Commission order will result in substantial fines.

23. Advisory Neighborhood Commission ("ANC") 2A, by letter dated July 26, 1993 and by testimony at the public hearing, supported the application. ANC 2A expressed satisfaction that AGC has made bona fide efforts to work with the community and to accommodate the community's concerns within its project.

24. There were no other persons or parties in support of or in opposition to the proposal either entered into the record or appearing at the public hearing.

25. At the conclusion of the hearing, the Commission finds that the proposed PUD is consistent with the requirements set forth in 11 DCMR Section 2400.

26. The Commission finds that the proposed PUD will provide essential housing in the Downtown area and will act as a model for mixed-use development in this transition area between the high-density Central Employment Area and the residential Foggy Bottom neighborhood.

27. The Commission finds that the PUD project and map amendment from SP-2 to C-3-C are in conformance with the Land Use Element of the Comprehensive Plan which designates the site for high-density, commercial uses.

28. The Commission further finds that the proposed urban design approach of the project is consistent with the urban design element of the Comprehensive Plan and the tenets of the L'Enfant and McMillan Plans.

29. The Commission finds that the on-site parking spaces and loading facilities will adequately serve the commercial and residential components of the project. The Commission concurs with AGC's transportation expert that the proposed project will not have an adverse impact on the traffic network in the area.

30. The proposed action of the Zoning Commission to approve the application with conditions was referred to the National Capital Planning Commission ("NCPC") under the terms of the District of Columbia Self-Government and Governmental Reorganization Act.

31. NCPC, by letter dated November 4, 1993, indicated that the proposed action of the Zoning Commission to approve the PUD and related map amendment with conditions would not adversely affect the Federal interest in the National Capital nor be inconsistent with the Comprehensive Plan for the National Capital.

CONCLUSIONS OF LAW

1. The Planned United Development process is appropriate means for controlling development of the site in a manner consistent with the best interests of the District of Columbia.

2. The development of this PUD carries out the purposes of Chapter 24 of the Zoning Regulations to encourage the development of well-planned residential, commercial and mixed-use developments which will offer a variety of building types with more attractive and efficient overall planning and design, not achievable under matter-of-right development.

3. The development of the project is compatible with District-wide and neighborhood goals, plans and programs and is sensitive to environmental protection and energy conservation.

4. The approval of this application is not inconsistent with the Comprehensive Plan for the National Capital because it will produce needed housing, be a catalyst for redevelopment in a transition area, strengthen the distinguishing physical characteristics of the area, and increase employment opportunities.

5. The approval of the application is consistent with the purposes of the Zoning Act and the Zoning Map of the District of Columbia, which includes stabilizing land values and improving mixed-use areas.

6. The application can be approved with conditions which ensure that the development will not have an adverse affect on the surrounding community or the District. The project will enhance and promote the revitalization of the area.

7. The approval of this application will promote orderly development in conformity with the entirety of the District of Columbia Zone Plan as embodied in the Zoning Regulations and Map of the District of Columbia.

8. This application is subject to compliance with D.C. Law 2-38, the Human Rights Act of 1977.

9. The Zoning Commission has accorded ANC 2A the "great weight" consideration to which it is entitled.

DECISION

In consideration of the Findings of Fact and Conclusions of Law, the Zoning Commission for District of Columbia hereby orders approval of the second-stage PUD and an amendment to the Zoning Map from SP-2 to C-3-C, for Square 122, Lot 835 subject to the following guidelines, conditions and standards:

1. The planned unit development (PUD) shall be developed in accordance with the plans prepared by the architectural firm of Florance, Eichbaum, Esocoff and King, and marked Exhibit No. 5B of the record and as modified by the following guidelines, conditions and standards.

2. The PUD site shall be developed with mixed-use buildings, including residential and commercial uses with below-grade parking.

3. The floor area ratio (FAR) for the PUD project shall not exceed 7.96, of which not more than 5.79 FAR shall be devoted to commercial use and not less than 2.17 FAR shall be devoted to residential use.

4. The height of the PUD project shall not exceed one hundred and seven feet (107'), exclusive of the penthouses as shown on Exhibit No. 5B. That portion of the building which exceeds a height of ninety-four (94) feet shall be setback from the 19th, 20th and E Streets property lines at least 20 feet.

5. The mechanical penthouses shall be developed as shown on Exhibit No. 5B and shall not exceed eight feet in height above the parapet of the roof of the office component.

6. The PUD project shall be developed with 47 to 56 residential units.

7. There shall be a minimum of 200 on-site parking spaces with at least one parking space designated for each residential unit. Additional parking spaces may be permitted in public vaults.

8. Loading areas, driveways and walkways shall be located on the site as shown on Exhibit No. 5B of the record.

9. Landscaping shall be provided as shown on the landscape plan marked as Exhibit No. 5B of the record.

10. Antennas shall be permitted on the roof of the building subject to the applicable Zoning Regulations.

11. The entire PUD project may be developed in two phases; that is, the residential component being one phase and the office component being the other phase.

12. If the PUD project is developed in one phase or if the residential component is developed in the first phase, the requirements as contained in Condition Nos. 13 and 14 of this order, shall not apply.

13. If the office component is developed in the first phase, the applicant must apply for a building permit for the residential component within one year of the issuance of the certificate of occupancy for the office component. Upon receipt of the building permit for the residential component, the applicant must receive a certificate of occupancy for the residential component within 2 1/2 years of receipt of the building permit for the residential component.

14. The applicant shall promptly file with the Office of Zoning (OZ) a copy of the certificate of occupancy for the office component, a copy of the building permit application for the residential component, and a copy of the certificate of occupancy for the residential component. Each of the aforementioned copies shall include a cover letter that clearly indicates the date on which the certificates of occupancy were issued by the Department of Consumer and Regulatory Affairs (DCRA) as well as the date on which the building permit application for the residential component was made with DCRA.

15. The applicant shall have the flexibility on the final detailing of the proposed project to:

a. Vary the number of residential units to allow for larger or smaller units, in response to market conditions, so long as there are not less than 47, nor more than 56, residential units at the site with no reduction in the gross square footage devoted to residential use;

b. Change the location and design of all interior components including partitions, structural slabs, doorways, hallways, columns, stairways, location of elevators and electrical/mechanical rooms, so long as the variations do not change the exterior envelope of the building including the penthouse;

c. Make minor adjustments in the window detailing, including the flexibility to shift the location of entrance doors on the ground floor to accommodate tenant uses;

d. Make minor design changes in response to requirements and final approval of the Commission of Fine Arts;

e. Provide not more than 5,000 square feet of ancillary, retail space on the ground floor of the project; and

f. Change the location and types of parking spaces provided, increase the number of spaces provided and make other modifications to below-grade space to accommodate the needs of office tenants, residential tenants and handicapped persons, including the potential elimination of a level of commercial parking without reduction of the total number of required spaces.

16. No self-illuminated signs shall be permitted. Other illuminated signs lit indirectly from ground-mounted or building-affixed lighting shall be permitted. Any signs affixed to the

building must be at the first or second floor level, not larger than twenty-four inches (24") in height and subject to review and approval by the Commission of Fine Arts. Inscriptions in the stone or precast concrete materials of the facades may occur elsewhere and are subject to review and approval by the Commission of Fine Arts.

17. No building permit shall be issued for the PUD project until the applicant has recorded a covenant in the land records of the District of Columbia, between the owner and the District of Columbia, satisfactory to the Office of Corporation Counsel and the Zoning Division of the Department of Consumer and Regulatory Affairs (DCRA). The covenant shall bind the owner and all succesors in title to construct on and use the property in accordance with the order and amendments thereto of the Zoning Commission.

18. The change of zoning from SP-2 to C-3-C for the PUD site shall be effective upon recordation of the PUD covenant as required by 11 DCMR 2407.

19. The Office of Zoning shall not release the record of this case to the Zoning Division of DCRA until the applicant has filed a certified copy of said covenant with the records of the Zoning Commission.

20. The PUD approved by the Zoning Commission shall be valid for a period of two years from the effective date of the order. Within such time, the applicant must file for a building permit as specified in 11 DCMR 2407.1 and 2406.8. Construction shall start within three years of the effective date of the order.

21. Pursuant to D.C. Code Section 1-2531 (1987), Section 267 of D.C. Law 2-38, the Human Rights Act of 1977, the applicant is required to comply fully with the provisions of D.C. Law 2-38, as amended, codified as D.C. Code, Title 1, Chapter 25, (1987), and the order would be conditioned upon full compliance with those provisions. Nothing in the order shall be understood to require the Zoning Division of DCRA to approve permits if the applicant fails to comply with any provisions of D.C. Law 2-38, as amended.

Vote of the Zoning Commission taken at the public meeting on September 13, 1993: 5-0 (John G. Parsons, Jerrily R. Kress, William L. Ensign, William B. Johnson and Maybelle Taylor Bennett - to approve with conditions).

This order was adopted by the Zoning Commission at the public meeting on November 15, 1993 by a vote of 5-0: (Jerrily R. Kress, John G. Parsons, William L. Ensign, Maybelle Taylor Bennett and William B. Johnson, to adopt as corrected).

In accordance with the provisions of 11 DCMR 3028, this order is final and effective upon publication in the D.C. Register; that is, on 12-10-93.

MAYBELLE TAYLOR BENNETT
Chairperson
Zoning Commission

MADELIENE H. ROBINSON
Director
Office of Zoning

zco746/VCE/LJP

EXHIBIT C

Government of the District of Columbia
ZONING COMMISSION

ZONING COMMISSION ORDER NO. 746-A
Case No. 93-5F/91-18P
(PUD and Map @ 1957 E Street, N.W.
March 11, 1996

By Z.C. Order No. 746 dated November 15, 1993, the Zoning Commission granted approval of an application from the Associated General Contractors of America (AGC) for a second-stage planned unit development (PUD) and an amendment to the Zoning Map from SP-2 to C-3-C for Lot 835 in Square 122 located at 1957 E Street, N.W. pursuant to the provisions of Chapter 24 of the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning.

The PUD approval was for the construction of a mixed-use building, including residential and commercial uses with below grade parking for 200 cars. The PUD will be the site of the new AGC headquarters. The PUD project would have a maximum floor area ratio (FAR) of 7.96 of which not more than 5.79 FAR will be devoted to commercial use and not less than 2.77 FAR will be devoted to residential use.

Z.C. Order No. 746 became final and effective on December 10, 1993. The validity of that order was for two years; that was until December 10, 1995, provided application for a building permit was filed within that period of time, after which construction would have to start by December 10, 1996.

Pursuant to 11 DCMR 2406.10 of the Zoning Regulations, the Commission may extend the validity of the PUD approval for good cause shown upon a request made before the expiration of the approval.

By letter dated November 13, 1995, counsel on behalf of the AGC, filed a request to extend the validity of the previously approved PUD for a period of two years.

This letter indicated that the basis for an extension of the validity of the PUD is as follows:

> "Unfortunately, the real estate recession in the area and the unavailability of financing for the project without a substantial pre-leasing commitment from another office user (in addition to the AGC) makes it impossible for the applicant to proceed at the present time. The applicant

has retained a well regarded local commercial broker to seek such additional tenants for the project. Since the approval of the PUD, the AGC (through its brokers) has actively solicited both private and federal tenants for the portion of the new office building which will not be for the AGC's own use. The applicant will proceed as expeditiously as possible as soon as tenant commitments and financing can be secured."

By memorandum dated November 29, 1995, the District of Columbia Office of Zoning (OZ) referred this matter to the District of Columbia Office of Planning (OP) for an analysis of whether any amendments to the Zoning Map or Regulations, or to the Comprehensive Plan, since the Zoning Commission initially decided the case will affect the request.

By memorandum dated December 29, 1995, OP recommended that the applicant's request be granted and stated that no purpose would be served in this instance by denying the request. OP indicated the following:

"The zoning classification applicable to the site has not changed since the PUD was originally approved in November 1993. The Comprehensive Plan Amendments Act of 1994, effective October 6, 1994, changed the land use classification of the site from high-density commercial to medium-density commercial and high-density residential. The Comprehensive Plan Amendments Act is consistent with the Commission's previously approved mixed-use PUD for the site.

The applicant has stated that it has invested a great deal of time and money through a commercial broker to seek the additional tenant(s) necessary to secure financing. That search has been unsuccessful to date. In short, the present request for a time extension is the result of current adverse market conditions.

The Zoning Commission has the authority to approve PUD time extensions. In the Office of Planning's opinion, no purpose would appear to be served by denying the requested extension. Accordingly, the Office of Planning recommends that the Zoning Commission grant a two-year extension of Order No. 746, pursuant to Subsection 2406.10 of 11 DCMR."

On February 12, 1996, at its regular monthly meeting, the Zoning Commission considered the request of counsel for AGC and the OP report.

The Zoning Commission concurs with the OP and the applicant. The Commission also determined that an extension of time of the validity of this PUD is in the best interest of the District of Columbia, is consistent with the intent and purpose of the Zoning Regulations and Zoning Act, and is not inconsistent with the Comprehensive Plan for the National Capital.

In consideration of the reasons set forth in this order, the Zoning Commission for the District of Columbia hereby ORDERS that the validity of Z.C. Order No. 746 be EXTENDED for a period of two years; that is until December 10, 1997. Prior to the expiration of that time, the applicant shall file for a building permit, as specified in 11 DCMR 2406.8. Construction shall start within one year; that is not later than December 10, 1998.

Vote of the Zoning Commission taken at the public meeting on February 12, 1996: 4-0 (Maybelle Taylor Bennett, John G. Parsons, Jerrily R. Kress and Herbert Franklin, to approve a two-year PUD extension).

This order was adopted by the Zoning Commission at its public meeting on March 11, 1996 by a vote of 4-0: (Jerrily R. Kress, John G. Parsons and Herbert M. Franklin, to adopt; Maybelle Taylor Bennett, to adopt by absentee vote; Howard Croft not present, not voting).

In accordance with the provisions of 11 DCMR 3028, this order is final and effective upon publication in the D.C. Register; that is, on MAR 29 1996.

JERRILY R. KRESS
Chairperson
Zoning Commission

MADELIENE H. DOBBINS
Director
Office of Zoning

zco746-A/SDB/LJP

ZONING COMMISSION ORDER NO. 746-B
Case No. 93-5F/91-18P
(PUD and Map @ 1957 E Street, N.W.)
February 8.1999

By Z.C. Order No. 746, dated November 15, 1993. the Zoning Commission granted approval of an application from the Associated General Contractors of America (AGC) for a second-stage planned unit development (PUD) and an amendment to the Zoning Map from SP-2 to C-3-C for Lot 835 in Square 122 located at 1957 E Street, N.W. , pursuant to the provisions of Chapter 24 of the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning.

The PUD approval was for the construction of a mixed-use building, including residential and commercial uses with below grade parking for 200 cars. The PUD will be the site of the new AGC headquarters. The PUD project would have a maximum floor area ratio (FAR) of 7,96 of which not more than 5.79 FAR will be devoted to commercial use and not less than 2.17 FAR will be devoted to residential use.

Z.C. Order No. 746 became final and effective on December 10, 1993. The validity of that order was for two years; that was until December 10, 1995, provided an application for a building permit was filed within that period of time, after which construction would have to start by December 10, 1996.

By Z.C. Order No. 746-A, dated March 29, 1996, the Zoning Commission approved an extension of the validity period of the PUD for two years; that was until December 10, 1997, provided an application for a building permit was filed within that period of time, after which construction would have to start by December 10, 1998.

Pursuant to 11 DCMR 2406.10 of the Zoning Regulations, the Commission may extend the validity of the PUD approval for good cause shown upon a request made before the expiration of the approval.

By letter dated December 9, 1997, counsel on behalf of AGC, filed a request to extend the validity of the previously approved PUD for a period of two years.

This letter indicates that the basis for an extension of the validity of the PUD is as follows:

> "The recently concluded real estate recession has made developers and financiers more prudent. Large projects cannot be financed, and thus are not started, without a substantial portion of the project committed to long-term leases. This unavailability of financing for the project, without a substantial preleasing commitment from another office user (in addition to the AGC), makes it impossible for the AGC to proceed at the present time. The AGC is actively continuing discussions with potential tenants. Since the approval of the PUD, the AGC, independently and through its brokers, has actively solicited both private and federal tenants for the portion of the new office building which will not be for the AGC's own use. The AGC will proceed as expeditiously as possible to begin construction of the PUD as soon as tenant commitments and financing can be secured."

The District of Columbia Office of Zoning (OZ) referred this matter to the District of Columbia Office of Planning (OP) for an analysis of whether any amendments to the Zoning Map or Regulations, or to the Comprehensive Plan, since the Zoning Commission initially decided the case will affect the request.

By memorandum dated April 9, 1998, OP recommended that the applicant's request be granted and stated that no purpose would be served in this instance by denying the request. OP indicated the following:

> "The applicant has stated that the grounds for its previous request for an extension of time have not changed. It has invested a great deal of time and money through a second commercial broker and a construction manager to seek the additional tenant(s) necessary to secure refinancing, spending a total of approximately $45,000 in doing so. That search has been unsuccessful to date. In short, the present request for another time extension is the result of the continuing adverse office market conditions in the District.
>
> The Zoning Commission has the authority to approve PUD time extensions. In the Office of Planning's opinion, no apparent purpose would be served by denying the requested extension. Accordingly, the Office of Planning

> recommends that the Zoning Commission grant a second two-year extension of Order No. 746, pursuant to Subsection 2406.10 of 11 DCMR."

On April 13, 1998, at its regular monthly meeting, the Zoning Commission considered the request of counsel for AGC and the OP report. The Zoning Commission concurs with OP and the applicant. The Commission also determined that an extension of time of the validity of this PUD is in the best interests of the District of Columbia, is consistent with the intent and purpose of the Zoning Regulations and Zoning Act, and is not inconsistent with the Comprehensive Plan for the National Capital.

In consideration of the reasons set forth in this order, the Zoning Commission for the District of Columbia hereby ORDERS that the validity of Z.C. Order Nos. 746 and 746-A be EXTENDED for a period of two years; that is until December 10, 1999. Prior to the expiration of that time, the applicant shall file for a building permit, as specified in 11 DCMR 2406.8. Construction shall start within one year; that is not later than December 10, 2000.

Vote of the Zoning Commission taken at the public meeting on April 13, 1998: 3-0 (Maybelle Taylor Bennett, Jerrily R. Kress and John G. Parsons to approve a two-year PUD extension).

This order was adopted by the Zoning Commission at its public meeting on March 8, 1999, by a vote of 4-0: (John G. Parsons, Anthony J. Hood, Angel F. Clarens and Jerrily R. Kress, to adopt –Herbert M. Franklin abstained.)

In accordance with the provisions of 11 DCMR 3028, this order is final and effective upon publication in the D.C. Register; that is, on _____.



PRE-FILE NUMBERS	ZONING DISTRICT	FILE NUMBER	PERMIT NUMBER

GOVERNMENT OF THE DISTRICT OF COLUMBIA

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION (CONSTRUCTION PERMITTING DIVISION (7720))

BLRA-33 (Rev. 10/91)

APPLICATION FOR CONSTRUCTION PERMITS OR PRIVATE PROPERTY

(PRINT IN INK OR TYPE. DO NOT WRITE IN SHADED AREAS OR ON PAGE 4)

ERASING, CROSSING OUT, WHITING OUT, OR OTHERWISE ALTERING ANY ENTERED INFORMATION WILL VOID THIS APPLICATION

(A) ALL APPLICANTS MUST COMPLETE ITEMS 1 THRU 27

1. Address of Proposed Work	Suite No.:	2. Lot:	3. Square:	4. Application Date:
957 E STREET NW		B35	122	12-7-99

5. Owner of Building or Property:	6. Address: (include Zip)	7. Phone:
GEORGE WASHINGTON UNIVERSITY	2025 F St. NW Suite 100 WASH DC 20052	202 Work: 994 4458 Home:

8. Agent for Owner: (if applicable)	9. Address: (include Zip)	10. Phone:
ARLOS REYES	1726 EYE ST NW WASHINGTON DC 20006	202 Work: 234-7345 Home:

Type of Proposed Work (check all applicable boxes):

- ☑ New Building
- ☐ Addition
- ☐ Alteration and Repair
- ☐ Raze Building
- ☐ Retaining Wall
- ☐ Fence
- ☐ Shed
- ☐ Awning
- ☐ Garage
- ☐ Sign
- ☐ Other (Specify) _____

Description of Proposed Work: To erect: on 11 story MULTI USE BUILDING ACADEMIC / RESIDENTIAL / OFFICES

OK to file. [signature] 12/7/99

12. Existing Use(s) of Building or Property:	14. Ex. No. of Stories of Bldg.:	15. Ex. No. of Dwelling Units:
VACANT	1	0
13. Proposed Use(s) of Building or Property:	**17. Prop. No. of Stories of Bldg.:**	**18. Prop. No. of Dwelling Units:**
ACADEMIC Residential / OFFICES	11/7	5

19. Starting Date of Work:	20. Completion Date of Work:	21. Method of Removing Construction Debris:	22. Does the proposed work involve disturbing the earth or razing a building?
2000	2002	☐ Pick-up Truck ☐ Dumpster ☐ Other (specify):	☑ Yes, answer q. 23 ☐ No, SKIP q. 23-27

23. Is that area of disturbed earth more than 50 sq. ft.?	24. Soil Erosion Control Methods:	25. Area of Offsite Drainage:	26. No. of Footings or Columns:	27. Size of Footings or Columns:
☑ Yes, answer q. 24-25 ☐ No, SKIP q. 24-25	See drwgs	See drwgs sq. ft.	See plans	See drwgs sq. ft.

ALWAYS SIGN THE APPLICATION ON PAGE 3 (SECTION I).

lete Section B if the proposed work is new building, addition or alteration. (Page 2)
lete Section C if the proposed work is razing a building. (Page 2)
ete Section D if the proposed work is a retaining wall. (Page 2)
ete Section E if the proposed work is a fence. (Page 3)
ete Section F if the proposed work is a shed/garage. (Page 3)
ete Section G if the proposed work is an awning. (Page 3)
ete Section H if the proposed work is a sign. (Page 3)

375

19296

...ORY APPEARS ...ISTRATION

2

...LDING, ADDITION, & ALTERATION (COMPLETE ITEMS 28 THRU 60)

28.	29. Lic. No.:	30. Architect's Address: (include Zip)	31. Phone:
R. H. KING KCF/SHG	004186	1825 I ST., NW (SUITE 250) 20006	202 842 2100
Engineer's Name:	33. Lic. No.:	34. Engineer's Address: (include Zip)	35. Phone:
Building Contractor's Name:	36A. Lic. No.:	37. Contractor's Address:	38. Phone:

Type of Construction	40. Fire Suppression:	41. Booster Pump:	42. Total Lot Area:	43. Breakdown of Lot Area (= 100%):
☐ Masonry ☐ Steel ☐ Wood ☐ Other: ☐ Concrete	☒ Fully Sprinklered ☐ Standpipe System ☐ Partially Sprinklered ☐ None ☐ Other:	☒ New ☐ Existing ☐ None	30,150 sq. ft.	a. Building: 100 % b. Paved Area: Ø % c. Greenery: Ø %

44. Present Gross Floor Area of Bldg.:	45. Proposed Gross Floor Area of Bldg:	46. Floors involved in this permit:	47. Projection beyond building line?
sq. ft.	331,243 sq. ft.	☒ All ☐ Floors	☐ Yes; answer q. 48-52 ☒ No, SKIP q. 48-52

48. Number and type of projection:	49. Distance of projection:	50. Width of projection:	51. Width of building frontage: ft.
			52. Signature of Owner (projection only):

53. Water or Sewer Excavation?	54. Driveway Construction?	55. Sheeting/Shoring Necessary?	56. Elevators involved?	57. No. and type of elev.:	58. Plans Certified by Engineer?
☒ Yes ☐ No	☒ Yes ☐ No	☒ Yes ☐ No	☒ Yes, answer q. 57 ☐ No, SKIP q. 57	8 TRACTION ELEVATORS	☒ Yes, cert. is attached ☐ No

Estimated Cost of Work:
New/Add.: $22,000,000 00
Alt/Rep.: $ Ø
Total: $22,000,000 00

Volume of New Bldg. or Addition: cubic ft.

(C) RAZING A BUILDING (COMPLETE ITEMS 61 THRU 83)

61. Raze Contractor's Name:	62. Contractor's Address: (include Zip)	63. Phone:
Insurance Company:	65. Policy or Certif. No.:	66. Expir. Date:

67. Raze Method:	Building Material:	68. Raze Entire Building?	70. Building Condemned?	70A. Building Vacant?	71. Public Space Vault?	72. Disconnect Water and/or Sewer?	73. Size of Water Connection:
		☐ Yes ☐ No	☐ Yes ☐ No	☐ Yes ☐ No	☐ Yes ☐ No	☐ Yes ☐ No	in.

Plumber's Name:	75. Lic. No.	76. Length: ft.	77. Width: ft.	78. Height: ft.	79. Volume: cu. ft.	80. Party Wall?
						☐ Yes ☐ No

Asbestos in the Building?
☐ No ☐ Yes, Location

82. Raze Contractor Signature:

83. Owner's Signature:

(D) RETAINING WALL (COMPLETE ITEMS 84 THRU 93)

The retaining wall will not reduce the number of possible parking required by D.C. Zoning Regulations

84. Cost of Work:	85. Material:	86. Height: ft.	87. Color:	88. Location:
				☐ Entirely on Owner's Land ☐ Party Line with Adjacent Neighboring Land*

* If party wall, the owner of the adjoining property must agree to the erection of the retaining wall and this application.

Signature of Adjoining Owner:	90. Phone: Work / Home
Address of Adjoining Owner:	92. Lot: / 93. Square:

(E) FENCE (COMPLETE ITEMS 94 THRU 102)

This fence will not obstruct any required parking space required by D.C. Zoning Regulations.

94. Material and Type:	95. Height: ft.	96. Color:	97. Location: ☐ Entirely on Owner's Land ☐ Party Line with Adjacent Neighboring Land *

* If party fence, the owner of the adjoining property must agree to the erection of the fence and this application.

98. Signature of Adjoining Owner:	99. Phone: Work Home
100. Address of Adjoining Owner:	101. Lot: / 102. Square:

(F) SHED OR GARAGE (COMPLETE ITEMS 103 THRU 113)

103. Number:	104. Length: ft.	105. Width: ft.	106. Area: sq. ft.	107. Height: ft.	108. Volume: cu. ft.	109. Estimated Cost of Work: $
110. Material of Roof:	111. Material of Sides:	112. Wall thickness: ☐ External ( ) inches ☐ Party ( ) inches				113. Color:

(G) AWNING (COMPLETE ITEMS 114 THRU 123)

114. Number:	115. Color:	116. Type: ☐ Folding ☐ Fixed	117. Projections: Beyond bldg. line ____ in. Beyond pt. of attachm. ____ in.	118. Height of lowest part of awning: (a) ____ ft above sidewalk (b) ____ ft above parking (c) ____ ft above grade

119. Material of Frame:	120. Material of Covering:	121. Lettering on Awning? ☐ Yes ☐ No	122. Fixed posts? ☐ Yes ☐ No	123. Over sidewalk cafe? ☐ Yes ☐ No

(H) SIGN (COMPLETE ITEMS 124 THRU 144)

124. Number:	125. Electric Signs? ☐ Yes, answer q. 126-132 ☐ No, SKIP q. 126-132	126. Type: ☐ Incandes. ☐ Fluoresc. ☐ Neon	127. Power ____ VA	128. Electrical Contractor: Lic. No.:

129. Address of Electrical Contractor (include Zip)	130. Signature of Licensed Electrician:	131. Phone:	132. License No.:

133. Height relative to building and ground: (a) ____ ft ____ in above sidewalk (b) ____ ft ____ in above roof (c) ____ ft ____ in is bldg height (d) ____ ft ____ n above projection of window (e) ____ ft ____ in from roof to sign's bottom	134. Material of Sign:	135. Type of Sign:	136. Color:

137. Width: ft.	138. Length: ft.	139. Area of Sign: sq. ft.	140. Width of Business Frontage: ft.

141. C of O Number for Building:	142. Sign Contractor Lic. No.	143. Sign Contractor's Address:	144. Phone:

(I) APPLICANT'S SIGNATURE

A. OWNER: I hereby certify that I am the owner of the property; that the application and plans are complete and correct to the best of my knowledge; and that if a permit (or permits) is issued, the construction will conform to the D.C. Construction Codes, the Zoning Regulations, and other applicable laws and regulations of the District of Columbia.

Signature of Owner: _____ Address: _____ Date: _____

B. AGENT: I hereby certify that I have the authority of the owner to make this application. I declare that the application and plans are complete and correct to the best of my knowledge. The owner has assured me that if a permit (or permits) is issued, the construction will conform to the D.C. Construction Codes, the Zoning Regulations, and other applicable laws and regulations of the District of Columbia.

Signature of Agent: _____ Address: 1746 IRWIN ST. NW Date: 12-7-99

OK TO FILE file

(J) APPROVALS (DO NOT WRITE ON THIS PAGE. OFFICIAL USE ONLY).

A. PERMIT CONTROL

1. Fine Arts by: _____ Date: _____
2. Historic by: _____ Date: _____
3. PADC by: _____ Date: _____
4. Cap. Gateway by: _____ Date: _____
5. W.H./ Obs. Precinct by: _____ Date: _____
6. Flood Control by: _____ Date: _____
7. WMATA by: _____ Date: _____
8. Condem. by: _____ Date: _____
9. RLA by: _____ Date: _____
10. Rental Accom. by: _____ Date: _____
11. Chinatown Distr. by: _____ Date: _____
12. Utility Clearance by: _____ Date: _____
13. General Liability Ins. Policy Clearance by: _____ Date: _____

B. CLEARANCE TO FILE PLANS

1. Zoning by: _____ Date: _____
2. DPW — Permit and Records Division
   Access to Parking Street ☐ Street ☐ Alley
   Cleared by: _____ Date: _____
3. DPW - Consumer Engineer
   Cleared by: _____ Date: _____
4. ERA - Erosion Control
   Cleared by: RC Date: 12-9-99

rictions of the Permit:

SEPARATE PLANS FOR PLUMBING AND MECHANICAL INSTALLATIONS. PERMITS ARE REQUIRED.

C. PLANS AND APPLICATION APPROVAL

1. ☑ Information Counter by: [illegible] Date: 12-7-99
2. ☐ Information Center by: _____ Date: _____
   - ☐ (a) ABC Board by: _____ Date: _____
   - ☐ (b) Noise Control by: _____ Date: _____
   - ☐ (c) Industrial Safety by: _____ Date: _____
   - ☐ (d) Vector Control by: _____ Date: _____
   - ☐ (e) D.C. Animal by: _____ Date: _____
   - ☐ (f) Police Dept. by: _____ Date: _____
3. ☐ Zoning by: _____ Date: _____
   Zoning Update by: _____ Date: _____
4. ☐ DPW - Permit and Records Division/Deposit #
   Sidewalk Deposit $_____ Driveway Deposit $_____
   by: _____ Date: _____
5. ☐ Water/Sewer Design Branch
   Consumer Eng. by: _____ Date: _____
6. ☐ Environmental Regulation Administration
   - ☐ Environmental Policy Review
     Control No.: _____
     by: _____ Date: _____
   - ☐ Erosion Control by: _____ Date: _____
   - ☐ Storm Water Mgmt. by: _____ Date: _____
     Plan No. _____
7. ☑ Mechanical Eng. Review by: _____ Date: 2/7/00
8. ☑ Plumbing Eng. Review by: _____ Date: 2/7/00
9. ☐ Electrical Eng. Review by: _____ Date: _____
10. ☐ Health Plan Review
    - ☐ (a) Food Plan Review by: _____ Date: _____
    - ☐ (b) Medical X-ray Plan Rev. by: _____ Date: _____
11. ☐ D.C. Fire Dept. (Fire Prevention Plan Review Section) by: _____ Date: _____
12. ☑ Elevator Plan Rev. Sec. by: _____ Date: _____
13. ☐ Plumbing Insp. Rev. by: _____ Date: _____
14. ☐ Construction Insp. Branch (Field Check) by: _____ Date: _____
15. ☐ Historic Pres. Div. by: _____ Date: _____
16. ☐ Structural Eng. by: _____ Date: _____
17. ☐ Permit and Certificate Issuance Counter By: _____ Date: _____

☐ Q.C. By: _____ Date: _____

REPORT WASTE, FRAUD, OR ABUSE BY ANY GOVERNMENT OFFICE OR OFFICIAL, CALL THE INSPECTOR GENERAL AT 1-800-521-1639

Number _____ Date _____

) Use(s) _____

☐ New bldg.
☐ P.O.D.
☐ File in room 329

BZA Case No.: _____

PUD Order No.: 746

DPW — PUBLIC SPACE

Street Name: _____
Street Width: _____
Road Width: _____
Sidewalk Width: _____
Parking: _____
Restrictions: _____

375

Case # 93-5F/91-18 P.

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION
PERMIT PROCESSING DIVISION
PERMIT & CERTIFICATE ISSUANCE BRANCH

Filing Fee No. A 09296

RECEIPT FOR FILING FEE

ADDRESS OF PROPOSED WORK:	SQUARE	LOT	PERMIT NO.
1757 "E" St, NW	122	835	
RECEIVED FROM:			FILING FEE
Carlos Rojas			2000 —

Balance of Permit Fee To Be Paid At Time of Issuance

Chief, Permit & Certificate Issuance Branch
Clerk

Acct. 1215-Building Permit

WHITE COPY — CUSTOMER YELLOW COPY — FILE COPY PINK COPY — OFFICE

PHONE NO. : 2022244592 Dec. 09 1999 12:24AM P3

GW FACILITIES DEVELOPMENT --SEP.12.2000-- 1:47PM FROM: CARLOS ROJAS ARCH SERV

C

ANNEX

1129 AA

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
PERMIT SERVICE CENTER

1129-B

BUILDING PERMIT CONTROL BATCH SHEET

Date: 12 / 7 /99 Intake Time: 3 ☐AM ☐PM	LOG NO. 99- 13269	Review Completion Due: ☐AM ☐PM
Address: 1957 "E" St (W)		Actual Time Review Was Completed ☐AM ☐PM

REQUIRED REVIEWS (Checked boxes only)	REVIEWER	COMPLETION TIME	REVIEW STATUS
☐ PUBLIC SPACE		☐AM ☐PM	☐ Approved ☐ HFC ☐ Ref. to DPW ☐ Conf. w/ Applicant
☐ ZONING 5/13/00 PUD # 746		☒AM ☐PM	☐ Approved ☒ HFC ☐ Ref. to BZA ☐ Ref. to Zoning Administr. ☐ Conf. w/ Applicant
☐ SOIL EROSION NC		☐AM ☐PM	☐ Approved ☐ HFC ☒ Ref. to DOH ☐ Conf. w/ Applicant
☐ STORMWATER MGMT.		☐AM ☐PM	☐ Approved ☐ HFC ☐ Ref. to DOH ☐ Conf. w/ Applicant
☐ AIR QUALITY		☐AM ☐PM	☐ Approved ☐ HFC ☐ Ref. to DOH
☐ EIS		☐AM ☐PM	☐ Approved ☐ HFC ☐ Ref. to DOH
☐ WATER AND SEWER		☐AM ☐PM	☐ Approved ☐ HFC ☐ Ref. to WASA ☐ Conf. w/ Applicant ☐ WASA Deposit Required
☐ MECHANICAL/PLUMBING		12/7 ☐AM ☐PM	☒ Approved ☐ HFC ☐ Conf. w/ Applicant
☐ ELECTRICAL		12/8 ☐AM ☐PM	☐ Approved ☒ HFC ☐ Conf. w/ Applicant
☐ FIRE PROTECTION		12/9 ☐AM ☐PM	☐ Approved ☒ HFC ☐ Conf. w/ Applicant
☐ STRUCTURAL		☐AM ☐PM	☐ Approved ☐ HFC ☐ Conf. w/ Applicant

REMARKS

1129 AA

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
PERMIT SERVICE CENTER
941 N Capitol Street, NE, Suite 2300, Washington, DC 20001 ☎ 202-442-4470

BUILDING PERMIT CUSTOMER CONTROL RECEIPT

Date: 12/7/99 Intake Time: ☐AM ☐PM	PROJECT CONTROL NUMBER 99 - 1129AA (Use this number to check on status of your project today)	Review of Your Project Shall Be Completed by: ☐AM ☐PM

☐ Your project will be processed today. Complete review comments or the permit will be ready to pick up by the completion time shown above.

☒ Your project is too complex to be processed today and it **MUST BE FILED.** Please pay the filing fee and return to the intake Counter with proof-of payment, to be assigned a ***FILE JOB NUMBER.***
Complete comments on your filed job will be available on

_____ / _____ / 1999

For other information on the review status of your project, call (202) **442-4547** and refer to your **FILE JOB NUMBER** shown below.

Your Intake Service Representative :	Your Review Expedition Manager :	**FILE JOB NUMBER** 1129AA (Use this number to check on status of your filed job by calling (202) 442-4547)

TO REPORT WASTE, FRAUD OR ABUSE BY ANY D.C. GOVERNMENT OFFICE OR OFFICIAL, CALL THE INSPECTOR GENERAL ON 1-800-611-1639. ALL CALLS ARE CONFIDENTIAL.



PERMIT

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Form BLRA-15
(Rev. 9/30/91

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

BUILDING PERMIT

PERMIT NO. B430399

Date 10/24/00 (Type) MISC.

Address of work 1957 E STREET NW

Lot 035 Square 122

TOTAL PERMIT FEE $

FILING FEE $

(Owner) NO. DATE

FEE PAYABLE $ 500.00

FOR INSPECTIONS CALL 442-4641

Permission is hereby granted to

GEORGE WASHINGTON UNIVERSITY

who is authorized to perform the work described herein at the address shown above in strict accordance with the conditions stated on BOTH sides of this permit.

Authorized work and conditions of performance thereof:

UNDERPINNING AND BRACKET PILES FOR ADJACENT BUILDINGS (2). EXCAVATION AND SHEETING AND SHORING FOR PROPOSED NEW UNIVERSITY BUILDING.

Builder—

Width of Bldgs. Length Height Value $ No. of Bldgs.

Zone R5D To be occupied as: ACADEMIC/RESIDENTIAL No. of Stories 10

Height of terrace above grade Projections:

Address of owner 2025 F STREET NW

Deposit No. Amount $

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

L. JORDAN 32301

DIRECTOR

Chief, Permit Issuance Branch

By

Permit Clerk

Store 001 D.C. GOVERNMENT
Reg# 0/24/00 15:53 Clk# 11
Receipt 125094 Amount $****500.00
EB22CE15 BUILDING STRUCTURE & EQUI

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the witness involved.[1] The error of the trial court was in considering the Jencks statements in this case to be those of Officer Hassell, rather than those of Officer Allen, and thereby striking her identification testimony while leaving Officer Allen's identification testimony intact. Because the Jencks Act *only* permits the imposition of its sanctions on the "testimony of the witness who gave the statement, rather than on the one who received it," *Hardy v. United States, supra*, 316 A.2d at 870, the ruling was clearly erroneous.[2]

The majority, however, concludes that the government's "gross negligence" may be excused in the case at bar because appellant failed to request "at trial the sanction he now seeks on appeal." In their willingness to sustain this appellant's conviction, my colleagues once again end-run the Jencks Act to avoid its legislative mandate. This time we employ a waiver analysis which, in my view of the law, is inconsistent with the main objective of the Act, *i.e.*, the maximum truth in the courtroom. Moreover, the majority's rationale effectively transforms the judiciary's role in the overall scheme of the statute, reducing the trial judge's part from one of special custodian of the goal of the Act to one of merely an interested observer who will not comply with the mandate unless requested to do so.

Finally, one comment on the majority's precautionary alternative ruling, *i.e.*, its holding that the trial court's action, assuming it was misdirected, was harmless error in view of the "independent source doctrine." Assuming that this judicial engraftment on the Act is a viable one, in view of its incompatibility with the express wording of the statute (*see Fields v. United States*, 368 A.2d 537, 544-45 (D.C.1977) (Mack, J., dissenting)), as well as its potential for rendering meaningless our repeated admonition that notes taken of initial descriptions of assailants be kept and produced (*Moore v. United States*, 353 A.2d 16, 19, *aff'd after remand*, 363 A.2d 288 (D.C. 1976); *United States v. Jackson, supra*, 450 A.2d at 425), I do not see how it could apply under the instant circumstances. I respectfully dissent.

1. Appellant concedes that a mistrial, the other sanction available under the Jencks Act, was inappropriate in this case because the notes are lost or destroyed and therefore would not be produced at another trial.

2. The fact that the trial judge gave, at appellant's request, a variant of the missing witness instruction does not alter my conclusion. Although such an instruction may be an appropriate sanction under limited circumstances, *see Williams v. United States, supra*, 355 A.2d at 788 n. 9, it clearly does not suffice where there has been a finding of gross negligence or bad faith. *See United States v. Jackson, supra*, 450 A.2d at 427.



NATIONAL BLACK CHILD DEVELOPMENT INSTITUTE, INC., Petitioner,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent.

No. 83-1434.

District of Columbia Court of Appeals.

Argued Oct. 2, 1984.

Decided Nov. 8, 1984.

Property owner appealed action of the board of zoning adjustment in granting a use variance imposing three restrictive conditions. The Court of Appeals, Nebeker, J., held that: (1) board of zoning adjustment did not exceed its authority in granting variance; (2) imposing personal conditions upon grant of variance was unlawful per se; and (3) condition limiting property owner to 12 employees regulated use of property, and was therefore not unlawful per se; however, it was unsupported by evidence in record, and instead was based only on a

finding that property owner had 12 employees at time it applied for its variance.

Remanded.

1. Zoning and Planning ⇐536

Burden is on applicant to meet all three criteria for issuance of use variance, namely, unique physical aspect or other extraordinary or exceptional situation or condition of a specific piece of property, undue hardship, and no harm to the public or zone plan, and hardship element must not be result of actions undertaken by landowner in knowing violation of zoning regulations.

2. Zoning and Planning ⇐508

Use variance was properly issued to nonprofit corporation so that its property could be used as office space, in view of board of zoning adjustment's findings that there existed other extraordinary or exceptional situation and undue hardship.

3. Zoning and Planning ⇐501

Imposition of personal conditions upon grant of use variance was unlawful per se.

4. Zoning and Planning ⇐501

Personal conditions upon issuance of variance impermissibly regulate business conduct of owner, rather than use of his property, and are unlawful per se.

5. Zoning and Planning ⇐726

On remand, should board of zoning adjustment decide to impose generic conditions upon issuance of use variance, it must hear evidence from property owner regarding impact upon it of those conditions and must weigh that evidence in making its determination.

6. Zoning and Planning ⇐501, 539

Condition upon issuance of use variance limiting property owner to 12 employees regulated use of property, and was therefore not unlawful per se; however, it was unsupported by evidence in record, and instead was based only on a finding that property owner had 12 employees at time it applied for its variance.

7. Zoning and Planning ⇐537

If board of zoning adjustment imposes condition upon issuance of use variance limiting number of employees at site, it must base its findings on reliable, probative, and substantial evidence in the record as a whole.

Louis R. Moffa, Jr., Washington, D.C., for petitioner.

Charles L. Reischel, Deputy Corp. Counsel, Washington, D.C., with whom John H. Suda, Principal Deputy Corp. Counsel, and Charlotte Brookins-Pruitt, Asst. Corp. Counsel, Washington, D.C., were on brief, for respondent.

Before PRYOR, Chief Judge, NEBEKER, Associate Judge, and PAIR, Associate Judge, Retired.

NEBEKER, Associate Judge:

Petitioner National Black Child Development Institute, Inc. (NBCDI) appeals the action of the Board of Zoning Adjustment (BZA) in granting a use variance imposing three restrictive conditions. Petitioner, a nonprofit corporation,[1] sought a variance to permit its property, located in an R-5-D residential zone, to be used as office space. After holding a public hearing on the NBCDI's application, the BZA voted on March 2, 1983, to grant a use variance, but imposed the following restrictive conditions:

(1) The use of the subject premises shall be limited to the National Black Child Development Institute, Inc.

1. NBCDI is incorporated under the laws of California. It has its national headquarters in the District of Columbia, where it is authorized to operate under a Certificate of Authority granted by the Office of the Recorder of Deeds. NBCDI is tax exempt under § 501(c)(3) of the Internal Revenue Code of 1954, as amended; it is not a private foundation within the meaning of § 509(a) of the Code.

(2) The number of employees shall not exceed a maximum of twelve.

(3) At such time as the applicant may offer the property for sale, it shall be advertised and sold for use only for the purpose permitted in the zone district applicable to the property.

By motion the NBCDI sought reconsideration or rehearing by the BZA, contending that the conditions imposed were illegal and unsupported by evidence in the record.

On December 1, 1983, the BZA issued a final order denying the NBCDI's motion. Appeal to this court followed.[2] We specify the scope of the relief in this case by leaving intact the grant of the variance. *See* D.C.Code § 1-1510 (1981). We hold, however, that because no valid public policy is served by confining a variance to an individual entity, any personal condition imposed by the BZA to restrict a use variance is unlawful *per se*. We remand the case to the BZA for rehearing (1) to determine whether it has authority to impose generic restrictions on petitioner's use variance; (2) to hear testimony from petitioner regarding the impact on it of any such conditions; and (3) to set forth in the record any evidence supporting such conditions.

In 1976, the NBCDI purchased its property at 1463 Rhode Island Avenue, N.W. The area was then, as now, zoned for residential use. The site is a fairly level trapezoid-shaped lot of approximately 1,850 square feet. It is improved with a brick townhouse having three stories and a basement. The NBCDI purchased the property to obtain office space in the District of Columbia. It had initially conditioned its purchase of the property on the seller's obtaining a variance to permit use as office space. The seller's attorney, however, pointed out that under zoning regulations as they then existed, the NBCDI qualified as a social service center; so long as it was operating under a grant from either the District of Columbia or federal government, it could obtain a certificate of occupancy immediately, as of right, without a hearing.

Having such a grant, the NBCDI purchased the property and made improvements. It applied for, and received, two successive temporary certificates of occupancy, their dates coinciding with those of grants the NBCDI held. In 1978, after its most recent certificate had expired,[3] but before the Zoning Administrator's Office had acted upon its application for a new certificate, emergency amendments to the zoning regulations went into effect. The emergency amendments eliminated the provision that had permitted social service centers under District or federal contract to operate offices as of right in an R-5-D district.[4]

The present application for a variance was filed on September 24, 1982, and granted with the restrictive conditions listed above. While acknowledging the authority of the BZA to grant a variance, the NBCDI argues that conditions (1) and (3) are unlawful because they regulate the property owner personally, and that condition (2) is not based upon substantial evidence in the record. We agree.

I

Authority of the BZA to Grant the Variance

[1] The NBCDI sought its variance under § 8207.11 of the District of Columbia

2. D.C.Code § 11-722 (1981) confers jurisdiction upon this court to review final actions of the BZA.

3. The certificate of occupancy was issued on April 4, 1978, but bore an expiration date of July 31, 1977. Since NBCDI had no valid certificate at the time the amendments went into effect, it could not qualify as a non-conforming user.

4. The newer regulations permitted only "community based residential facilities" to operate as of right in R-5-D districts. NBCDI used its property only for offices and meeting facilities, and had no residents. (Record at 7, 110).

Zoning Regulations.[5] Section 8207.11 authorizes the BZA to grant a use variance based on three criteria: (1) unique physical aspect or "other extraordinary or exceptional situation or condition of a specific piece of property," (2) undue hardship, and (3) no harm to the public or the zone plan. *Monaco v. District of Columbia Board of Zoning Adjustment*, 407 A.2d 1091, 1096 (D.C.1979). The burden is on the applicant to meet all three criteria, *id.* at 1101, and the hardship element must not be the result of actions undertaken by the landowner in knowing violation of zoning regulations. *Clerics of St. Viator, Inc. v. District of Columbia Board of Zoning Adjustment*, 320 A.2d 291, 294 (D.C.1974) (drop in number of young men entering the priesthood, making maintenance of large seminary a hardship, not "self-imposed"); *see also and compare Clouser v. David*, 114 U.S.App.D.C. 12, 13, 309 F.2d 233, 234 (1962), *cert. denied*, 372 U.S. 929, 83 S.Ct. 874, 9 L.Ed.2d 733 (1963) (hardship was self-imposed where nonconforming use was created in direct, knowing violation of the zoning provisions; and the cost of creating it could not then serve as reason for the variance).

Initially, this court read the first two criteria to require that the hardship justifying a use variance must arise from the nature of the land itself. *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535, 539, 542 (D.C.1972). Subsequent decisions, however, modified *Palmer*, permitting the BZA to weigh more fully the equities in an individual case. *DeAzcarate v. District of Columbia Board of Zoning Adjustment*, 388 A.2d 1233, 1237 (D.C.1978); *Clerics of St. Viator, Inc., supra*, 320 A.2d at 294 (factors extraneous to land may be considered in determining existence of hardship).[6] Finally, in *Monaco*, we permitted the BZA to apply a more flexible standard for determining hardship when a "public service," or nonprofit entity, is the applicant. *Monaco, supra*, 407 A.2d at 1099.

[2] In applying the *Monaco* three-part test to grant a variance to the NBCDI, the BZA did not exceed its authority. The Board found that there existed (1) "other extraordinary or exceptional situation" and (2) undue hardship. *See Monaco, supra*, 407 A.2d at 1096. The BZA found that the NBCDI's work benefited black children and families within the District, that the Institute had received temporary certificates of occupancy under regulations that had been altered by the 1978 amendments to preclude the NBCDI's qualifying for future certificates under them, and that the great expense of operating offices at another site would cause serious detriment to the Institute.[7] It held that the NBCDI's situation is unique, that its work does promote the public welfare, and that denial of the variance would cause undue hardship.

However, to insure that its grant of the variance met the third part of the *Monaco* test, no harm to the public or zone plan, the BZA imposed the three restrictive conditions at issue here. In determining whether imposition of such conditions lies within

5. Section 8207.11, adopted pursuant to D.C.Code § 5–424(g)(3) (1981), provides:

> Where, by reason of exceptional narrowness, shallowness or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under this Act would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, [BZA may] authorize, upon an appeal relating to such property, a variance for such strict application so as to relieve such difficulties or hardship, provided such relief can be granted without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map.

6. The focus in these cases was on the "other extraordinary or exceptional situation" language of § 8207.11.

7. NBCDI pays $11,400 annually on its first trust on its property. The Institute has approximately 3,000 square feet of office space. NBCDI would require the same amount of space in another building. Annual rental costs would range from $54,000 (at $18.00 per square foot) to $72,000 (at $24.00 per square foot). (Record at 200.)

the BZA's authority, we confront a new question of law within this jurisdiction.

II

Authority of the BZA to Impose Conditions Upon Grant of Variance

In imposing restrictive conditions, the Board draws upon its general mandate to insure that a proposed variance would have no detrimental effect on the neighborhood or zone plan.[8] *Sec. e.g., Monaco, supra,* 407 A.2d at 1101. We do not hold that the Board may never impose conditions in granting a variance. The record as it stands is inadequate to permit a determination regarding conditions in general. We hold only that the conditions imposed by the BZA in this instance are unlawful. On remand of the case, the BZA should more fully set forth the source of its authority to impose conditions and the specific findings supporting any such conditions.

A. *Conditions Personal to the NBCDI*

[3–5] The first and third conditions imposed by the BZA, however, limit the use variance to the NBCDI and provide for termination of the variance upon transfer of title. The BZA argues that the limitations are necessary to preserve the integrity of the zoning plan. Authorities generally disfavor personal conditions; rather, conditions, like the variance itself, must run with the land. *Dexter v. Town Board of Town of Gates,* 36 N.Y.2d 102, 104, 365 N.Y.S.2d 506, 508, 324 N.E.2d 870, 871 (1975); *Vlahos Realty Co. v. Little Boar's Head District,* 146 A.2d 257, 260 (N.H. 1958); *see also* 3 R.M. ANDERSON, AMERICAN LAW OF ZONING 2d § 18.69 (1977); 6 P.J. ROHAN, ZONING AND LAND USE CONTROL § 43.03[2] (1984). We adopt this position. Personal conditions impermissibly regulate the business conduct of the owner, rather than the use of his property, and are unlawful *per se.*[9] We reserve judgment, however, regarding generic conditions, such as might limit the variance granted here and its transfer to "the NBCDI or any similarly situated nonprofit organization." The conditions would thus be structured to run

8. The BZA attempts to distinguish the circumstances here from those in *Monaco.* In *Monaco,* the Republican National Committee (RNC) had received assurances from zoning authorities that their townhouse properties on Capitol Hill could be used as offices. The RNC had acted in reliance on those assurances and was, eventually, granted its variance under the three-part test, which this court held could be applied with greater flexibility to nonprofit, service entities. *Monaco, supra,* 407 A.2d at 1099, 1101.

Here, the BZA urges, applicant never received any guarantees from zoning authorities that a permanent certificate of occupancy would be granted. Furthermore, the NBCDI proceeded inappropriately, in the BZA's view, by failing to appeal the December 7, 1982, denial of their application for a permanent certificate of occupancy by the Office of Planning and Development (OPD). OPD had denied the application on the grounds that the NBCDI did not qualify as a social service center under the amended regulations. (Record at 201.) The distinctions the BZA draws are not dispositive. As the BZA points out in its findings, the use the NBCDI made of its property has not changed in scope or character since 1976 when it purchased the property and received a temporary certificate of occupancy under the current zoning regulations.

The 1978 changes in zoning, however, permitted only residential facilities to qualify as social service centers. The NBCDI could reasonably conclude that appeal of OPD's denial was futile because the NBCDI's property was not a residential facility. The NBCDI acted, not in reliance on assurances of zoning authorities, but on the regulations as they existed at the time it initially purchased and renovated its property to meet its needs and the District's health and safety standards. The situation is, therefore, not materially different from that in *Monaco* in that the circumstances suggest good faith, reasonable efforts to comply. *Compare Clouser v. David, supra.*

9. In its brief and at oral argument, the NBCDI pointed out that the restrictive conditions imposed by the BZA would cause it to lose its variance if it were, for example, to reincorporate, even while retaining a substantially identical purpose and mode of operation. Furthermore, its property is its most important source of internal funding. Its ability to use its property to raise operating funds via loans is severely curtailed by the first and third conditions. The BZA did not permit the NBCDI to present evidence regarding impact of the conditions. It denied rehearing after imposing these conditions and the conditions were not addressed in the earlier proceedings.

with the land, requiring any future occupant to show that it fits within the genre. On remand, should the BZA decide to impose such generic conditions, it must hear evidence from the NBCDI regarding the impact upon it of those conditions and must weigh that evidence in making its determination. *See Monaco, supra*, 407 A.2d at 1101; *accord Allentuck v. District of Columbia Minimum Wage and Industrial Safety Board*, 261 A.2d 826, 832-33 (D.C. 1969) (record must reveal sufficient basic findings and a reasoned application of these findings to agency policy and the law).

B. *Conditions Limiting Number of Employees*

[6, 7] The second condition limits the NBCDI to twelve employees. This condition does regulate use of the property, and is therefore not unlawful *per se*. It is, however, unsupported by evidence in the record, and instead is based only on a finding that the NBCDI had twelve employees at the time it applied for its variance. (Record at 196.) The BZA heard no evidence from the NBCDI regarding its present or future needs for staff, nor did it relate the conditions to specific findings regarding traffic, parking, or availability of public transportation. If the BZA imposes a condition limiting the number of employees at the site, it must base its findings on reliable, probative, and substantial evidence in the record as a whole. *Monaco, supra*, 407 A.2d at 1101; *Allentuck, supra*, 261 A.2d at 833.

The case is remanded for proceedings in accordance with this opinion.

John T. PATRICK, Appellant,

v.

Walter HARDISTY, Appellee.

No. 83-1146.

District of Columbia Court of Appeals.

Argued Oct. 2, 1984.

Decided Nov. 8, 1984.

Owner of property filed a complaint for possession of property against party in possession, with whose brother owner had once entered into written contract for sale. The Superior Court, Henry H. Kennedy, J., determined that the allegations constituted a plea of title and granted the owner's motion for summary judgment. The party in possession appealed. The Court of Appeals, Pryor, C.J., held that the highly ambiguous factual record created questions for the trier of fact as to whether an oral agreement existed, and the rights of the parties under it, thus precluding summary judgment.

Reversed and remanded.

1. Federal Courts ⇐1055

Summary judgment may be granted in action if pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits show that there is no issue of material fact and that moving party is entitled to judgment as matter of law. Civil Rule 56(c).

2. Federal Courts ⇐1055

Party moving for summary judgment bears burden of demonstrating absence of any factual issue. Civil Rule 56(c).

3. Federal Courts ⇐1055

To survive motion for summary judgment, opposing party need only show that there is sufficient evidence supporting claimed factual dispute to require jury or judge to resolve parties' differing versions of truth at trial. Civil Rule 56(c).

F

SPRING VALLEY WESLEY HEIGHTS CITIZENS ASSOCIATION, et al., Petitioners,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent,

and

American University, Intervenor.

No. 92-AA-980.

District of Columbia Court of Appeals.

Argued March 17, 1994.

Decided June 23, 1994.

Community organizations petitioned for review of Board of Zoning Adjustment (BZA) order in which Board determined that it lacked authority to prohibit private university from occupying commercially zoned off-campus property. The Court of Appeals, Schwelb, J., held that: (1) BZA lacked jurisdiction to proscribe university's matter-of-right use of building located in commercially zoned district, and (2) BZA's procedure in reaching jurisdictional question was appropriate.

Affirmed.

1. Zoning and Planning ⇐288

College or university use is permitted in commercially zoned district as matter of right.

2. Statutes ⇐219(1)

Court of Appeals accords great weight to any reasonable construction by administrative agency of its own authority.

3. Zoning and Planning ⇐354

Board of Zoning Adjustment (BZA) lacked authority to prohibit private university from acquiring commercially zoned off-campus property for purpose of constructing new law school on that property, even if university's agreement with third parties, as incorporated in prior BZA-approved campus plan, could be read to forbid off-campus site; college or university use in building located in commercially zoned district was permitted as matter of right, and, if BZA were to attempt to proscribe such matter-of-right use, it would be exercising powers reserved to Zoning Commission. D.C.Code 1981, § 5-424(e).

4. Administrative Law and Procedure ⇐447.1

Jurisdiction of administrative agency cannot be extended by agreement of parties.

5. Zoning and Planning ⇐359

No evidentiary or trial-type hearing was required on university's motion for clarification of Board of Zoning Adjustment (BZA) order, since sole question presented by motion for clarification related to BZA's jurisdiction and was thus one of law, and petitioners were provided with reasonable opportunity to present their legal arguments.

6. Zoning and Planning ⇐354

Operation of any doctrine of estoppel, including judicial estoppel, against party to hearings before Board of Zoning Adjustment (BZA) cannot confer on BZA authority which it does not possess under applicable statute and regulations. D.C.Code 1981, § 5-424.

Neil B. Siegel, with whom William H. Mandir, Washington, DC, was on the brief, for petitioners.

John Payton, Corp. Counsel, at the time the statement was filed, with whom Charles L. Reischel, Deputy Corp. Counsel, Washington, DC, filed a statement in lieu of brief.

Maureen E. Dwyer, with whom Louis P. Robbins, Washington, DC, was on the brief, for intervenor.

Before WAGNER, Chief Judge, and SCHWELB, Associate Judge, and GALLAGHER, Senior Judge.

SCHWELB, Associate Judge:

The principal substantive question presented for our consideration is whether the Board of Zoning Adjustment (BZA) correctly concluded that it lacked the authority to prohibit American University (the University)

from occupying commercially zoned off-campus property for the purpose of constructing a new law school on that property. We sustain the BZA's construction of its own authority and hold that there was no procedural error requiring reversal. If the University has precluded itself by agreement with local community organizations from constructing the law school on the newly acquired site—an issue on which we take no position—then, as the BZA explicitly recognized, the associations may take action to vindicate their rights in an appropriate forum.

I.

This case is a sequel to *Glenbrook Road Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 605 A.2d 22 (D.C.1992). In *Glenbrook*, this court affirmed the BZA's approval of the University's plan to locate its law school on campus at the Cassell Center. As we noted in *Glenbrook*, the BZA approved the University's campus plan but "conditioned its approval of the proposed site for the law school on the incorporation of the terms of the July 11, 1989 agreement between several community organizations and the University." *Id.* at 29–30. Condition 5 of the BZA's order provides in pertinent part that the terms and conditions of that agreement are "incorporated in this order as though fully set forth herein and shall be enforceable in the same manner as any other condition contained in an order of this Board." Paragraph B of the agreement, which the BZA incorporated into its order, restricts "approval of any building, other than the presently proposed law school building, or an enlargement of existing buildings, on the north side of Massachusetts Avenue."

[1] On March 17, 1992, this court issued its decision in *Glenbrook* affirming the decision of the BZA. Thirteen days later, on March 30, 1992, the University, abandoning its insistence in *Glenbrook* that the Cassell Center and nothing but the Cassell Center would meet its needs, entered into a contract to purchase a building at 4801 Massachusetts Avenue, N.W. (the 4801 building) which is located off campus on the north side of Massachusetts Avenue, some four blocks from the Cassell Center, for the purpose of placing the law school at that location.[1] The 4801 building is in a commercially zoned district, and a college or university use is permitted there as a matter of right. *See Draude v. District of Columbia Bd. of Zoning Adjustment*, 527 A.2d 1242, 1246 (D.C.1987); 11 DCMR § 701.6(f) (1991). The contract provided for a 90–day period during which the University was to determine the feasibility of its plans for the 4801 building.

As a part of the feasibility study, representatives of the University applied for a certificate of occupancy for the 4801 building. On May 26, 1992, the Zoning Administrator advised the University by letter that

> considering the terms of both the BZA order and the agreement, I am of the opinion that before I can approve applications for the American University to occupy premises [at] 4801 Massachusetts Avenue, N.W., it will be necessary for the University to seek modification of its Campus Plan.

On June 18, 1992, the University filed a motion with the BZA in which it requested the Board to clarify its order and to declare that the order was not intended to restrict the University's use and occupancy of off-campus property where such use and occupancy were consistent with the zoning classification applicable to that property. The University served notice of its application on the participants in the prior BZA proceedings. In response, some organizations supported the University's request, while others opposed it.

On July 8, 1992, the BZA granted the University's motion. The Board held in pertinent part as follows:

> The Board's jurisdiction may not extend beyond that expressly set forth in the D.C.Code and the Zoning Regulations. In the instant case, the Board's authority is limited to the areas of residential property

1. The University represents that at the time of the *Glenbrook* litigation it was not aware of the potential availability of the 4801 building.

located within the campus plan boundaries as specifically reviewed and considered by the Board through the special exception process.

* * * * * *

If the scope of the agreement extends beyond the parameters to which the Board's consideration is applicable, the parties to such agreement are not precluded from seeking clarification or enforcement of the private agreement through appropriate channels.

Petitioners, several community organizations opposed to the University's plans, have asked this court to review the BZA's order of July 8, 1992.

II.

[2] We accord great weight to any reasonable construction by an agency of its own authority. *Watergate Improvement Associates v. Public Service Comm'n of the District of Columbia*, 326 A.2d 778, 785 (D.C.1974). "Indeed, the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Id.* (quoting *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1969)). We must therefore determine if the BZA's construction of its authority was clearly wrong.

The BZA's powers are those defined by statute and regulation. *See* D.C.Code § 5–424 (1988); 11 DCMR §§ 3100 *et seq.* This court, like other courts, has been "reluctant to read into a statute powers for a regulatory agency which are not fairly implied from the statutory language, since the agency is statutorily created." *Chesapeake & Potomac Tel. Co. v. Public Service Comm'n of District of Columbia*, 378 A.2d 1085, 1089 (D.C.1977). "Absent express statutory or regulatory authority, a regulatory agency may not impose remedial measures." *Davidson v. District of Columbia Bd. of Medicine*, 562 A.2d 109, 112 (D.C.1989).

[3] The statute which sets out the BZA's authority explicitly provides that the Board "shall not have the power to amend any regulation or map." § 5–424(e). Petitioners have cited no provision in the statute or regulation, and we know of none, which would empower the BZA to take the action which petitioners claim that it has taken here. Indeed, "[t]he Home Rule Act explicitly provides that the Zoning Commission is the exclusive agency vested with power to enact zoning regulations for the District of Columbia." *Tenley and Cleveland Park Emergency Committee v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331, 336 (D.C.1988). The 4801 building is located in a commercially zoned district in which a college or university use is permitted as a matter of right. *Draude, supra*, 527 A.2d at 1246. If the BZA were to attempt to proscribe such matter-of-right use, it would be exercising powers reserved to the Zoning Commission.[2] 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.[3]

2. Recently, in Zoning Commission Order No. 752, 41 D.C.Reg. 1201 (Feb. 14, 1994), the Commission rejected a proposal by a member of the Council of the District of Columbia (which was also supported by several Advisory Neighborhood Commissions) that it amend applicable regulations to provide that "any relocation of a major use within or outside the campus plan, even if to a so-called matter-of-right use, be subjected to ... [BZA] review and approval." The Commission concluded that the petition "does not have sufficient merit to warrant the authorization of a public hearing, is not in the best interest of the District of Columbia, and is inconsistent with the intent and purpose of the Zoning Regulation and the Zoning Act." 41 D.C.Reg. at 1203. The Commission's decision that the regulations should not be amended to grant the BZA the authority which petitioners claim that it exercised in this case reinforces our conclusion that no such authority exists under present law.

3. On June 30, 1992, the Office of Corporation Counsel, responding to a request for legal advice by the Acting Director, Office of Zoning, concluded as follows:

> The Motion to Clarify Condition No. 5 involves questions of law concerning the jurisdiction of the Board. Consideration of this motion clearly does not require further testimony from interested parties.
>
> In light of the above, the BZA should issue an order clarifying that Condition No. 5 applies only to the property included within the boundaries of the University campus that was

[4] Petitioners contend that by incorporating the July 11, 1989 agreement into its Order, the Board explicitly prohibited the action which the University now proposes to take. The University claims, on the other hand, that the agreement and the Board's order were meant to apply only to the area of residential property located within the campus plan boundaries. We do not decide this issue, because, irrespective of which interpretation of the agreement is correct, the result is necessarily the same. If, as the University contends, the order and agreement cover only "on campus" uses for which a special exception was required, then there is no conflict between Condition No. 5 and the University's proposed action. On the other hand, even if the agreement prohibits off-campus uses available to the University as a matter of right, the order incorporating the agreement could not extend the BZA's power beyond its statutory authority, for the jurisdiction of an administrative agency cannot be extended by agreement of the parties. *American Airlines v. Air Line Pilots Ass'n*, 91 F.Supp. 629, 632 (E.D.N.Y.1950); *In re Glen Rock*, 135 A.2d 506, 511 (N.J.1957); 73 C.J.S. *Public Administrative Law and Procedure* § 51(b), at 504–05 (1983).

Petitioners rely on *Levy v. District of Columbia Bd. of Zoning Adjustment*, 570 A.2d 739 (D.C.1990), but that decision affords them scant solace. This court held in *Levy* that, in approving a campus plan, the BZA must determine whether the proposed use for which a special exception is sought is likely, *as a whole*, to become objectionable to neighboring property because of noise, traffic, number of students, and other conditions. *Id.* at 751. To that end, the BZA was obliged to consider the effects on the neighborhood of proposed street closings, pedestrian bridges, and height restrictions, notwithstanding the Board's lack of authority to approve or disapprove such proposals. *Id.* at 750–51. To hold that in approving or disapproving a campus plan, the BZA may, and in fact must, consider the consequences of proposals which it has no authority to regulate is a far cry indeed from holding that the agency is empowered to proscribe uses of property which are permissible as a matter of right under existing zoning classifications. The decision in *Levy*, in our view, does not undermine the Board's conclusion that it was without authority to do what petitioners say it did.

III.

[5] Petitioners also object to the procedures utilized by the BZA in granting the University's motion for clarification. They claim that a full-scale evidentiary hearing should have been held. They also question whether the Board is authorized to issue clarifications of its orders years after the fact.

We think it important to note that the sole question presented by the University's motion for clarification related to the BZA's jurisdiction, and was therefore one of law. Accordingly, no further testimony was required.[4] We emphasize that the BZA did not decide the dispute between the parties as to the meaning of the agreement and, in particular, the question whether the agreement was restricted to on-campus structures, or whether it was also intended to apply to off-campus buildings on the north side of Massachusetts Avenue. It may well be that resolution of this dispute would require an evidentiary hearing. As we have noted at page 4, however, the Board explicitly declined to preclude enforcement of the agreement in an appropriate forum.

The BZA being of the opinion that the jurisdictional question presented to it could most effectively be resolved by entertaining a motion for clarification, we are not disposed to second-guess the Board. Although the University acknowledges that there is no

before the BZA, and not to any other property where a college or university use is permitted as a matter of right.

4. Noting the University's "concession" that the clarification proceedings constituted a "contested case," petitioners argue that a trial-type hearing was required. We have held, however, that "a matter retains its status as a contested case even if there are no disputed 'adjudicative facts' necessitating a hearing." *District of Columbia v. Douglass*, 452 A.2d 329, 331 (D.C.1982) (citations omitted). Here, as we have noted, there are no disputed "adjudicative facts."

statutory or regulatory provision expressly authorizing motions for clarification, or prescribing procedures for such motions, there is Zoning Commission precedent for the BZA's action. In Zoning Commission Order No. 474, 32 D.C.Reg. 5942 (Oct. 7, 1985), a party before the Commission filed a motion for reconsideration of a Condition of an order issued by the Commission six months earlier. The Commission declined to act on the motion for reconsideration, but elected instead to issue an order of clarification:

> The Zoning Commission believes that a clarification of its intent in Z.C. Order No. 453 regarding lot occupancy is in the best interest of the District of Columbia and is consistent with the intent and purpose of the Zoning Regulations and the Zoning Act.
>
> In consideration of the reasons set forth herein, the Zoning Commission of the District of Columbia hereby orders CLARIFICATION of its intent in Z.C. Order No. 453 regarding lot occupancy.

32 D.C.Reg. at 5943–44 (capitalization in original).

Given the nature of the issue presented to the BZA in this case, we conclude that the Board acted reasonably in following the procedure previously utilized by the Commission in Order No. 474. Since the issue was solely a legal one, and since the petitioners were provided with a reasonable opportunity to present their legal arguments, no trial-type hearing was required, and the procedure utilized by the Board fully protected petitioners' substantive rights.

Finally, given the purely legal character of the issue before the Board, as well as our dispositive substantive holding that the BZA lacks jurisdiction to proscribe matter-of-right uses of property located off campus, the shortcomings attributed by petitioners to the Board's procedures could not affect the result. Accordingly, even if we agreed with petitioners' procedural contentions, which we do not, a remand would serve no useful purpose.[5]

IV.

[6] For the foregoing reasons, the order of the Board of Zoning Adjustment is *Affirmed*.[6]



Gerald McKINNON, Appellant,

v.

UNITED STATES, Appellee.

Nos. 91-CF-792, 92-CO-883.

District of Columbia Court of Appeals.

Argued Oct. 7, 1993.

Decided July 7, 1994.

Defendant was convicted following jury trial of first-degree burglary while armed,

5. Petitioners cite 11 DCMR § 3301.1 (1991), which provides that

> [T]he Board may, for good cause shown, waive any of the provisions of this chapter, if in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

Even if we were to assume that a waiver of a trial-type hearing is necessary where the question before the Board is purely one of law, there was no prejudice here to petitioners and no unlawful conduct on the part of the Board. To require the Board, notwithstanding the foregoing considerations, to issue findings of fact and conclusions of law about its reasons for any waiver would delay the resolution of the controversy when the dispositive legal issue has already been settled by our decision in this case.

6. Petitioners also invoke the doctrine of judicial estoppel. *See Plough, Inc. v. Nat'l Academy of Sciences*, 530 A.2d 1152, 1159 n. 10 (D.C.1987). They argue that the University took a position in *Glenbrook* regarding the meaning of Condition No. 5 contrary to the position which it is taking in the present controversy. We conclude, however, that even if the University did take a contrary position in the earlier litigation—an issue which we do not decide—the BZA's jurisdiction cannot be expanded by the actions of private parties. See text, *supra* at 437 and authorities there cited. The operation of any doctrine of estoppel against the University could not confer on the Board authority which it does not possess under the applicable statute and regulations.