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June 1, 2001

VIA HAND DELIVERY

Ms. Sheila Cross Reid
Chairperson
D.C. Board of Zoning Adjustment
441 Fourth Street, N.W.
Second Floor
Washington, D.C. 20001

Re: BZA Appeal No. 16701

Dear Chairperson Reid and Members of the Board:

Enclosed please find ten hard copies, as well as one disk copy, of The George Washington University's proposed Findings of Fact and Conclusions of Law for the above-referenced appeal.

Should the Board need anything further, please contact either of t e undersigned.

Sincerely,

Phil T. Feola/ES

Phil T. Feola

Sarah E. Shaw

Sarah E. Shaw

cc: Charles Barber, Esq.

Enclosures

BZA
Case No. 16701
Exhibit No. 45

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Board of Zoning Adjustment
District of Columbia
CASE NO.16701
EXHIBIT NO.45

ShawPittman

CERTIFICATE OF SERVICE

I hereby certify that, on June 1, 2001, a copy of the attached material was served by hand delivery to:

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Sarah E. Shaw

DRAFT FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appeal No. 16701 of Advisory Neighborhood Commission 2A, pursuant to 11 DCMR §§ 3100 and 3101, of the administrative decision of the Zoning Administrator, Zoning Review Branch, Department of Consumer and Regulatory Affairs, issuing a building permit (No. B434036) on December 28, 2000, to The George Washington University to permit the construction of an 11-story multi-use building pursuant to a planned unit development in a C-3-C Zone District at premises 1957 E Street, N.W. (Square 122, Lot 835).

Hearing Date: April 10 and May 1, 2001
Decision Date: June 5, 2001

ORDER

PRELIMINARY MATTERS

1. The West End Citizens Association (WECA) applied for and was granted party status.

2. Dorothy Miller, Advisory Neighborhood Commissioner (ANC) for Single Member District 2A-05, requested party status. The request for party status was denied, but Ms. Miller was permitted to make a statement within the case-in-chief of the ANC 2A, the appellant in this appeal.

FINDINGS OF FACT

1. The subject appeal was filed on January 19, 2001 by Advisory Neighborhood (ANC) 2A (the "appellant"). The appeal challenges the decision of Michael D. Johnson, the Zoning Administrator, to approve the issuance of Building Permit No. 434036 to The George Washington University (the "University" or "GW") to construct an 11-story multi-use building pursuant to a planned unit development (PUD) at premises 1957 E Street, N.W ("PUD Site" or "Subject Site").

2. The University is the owner of the Subject Site. 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.

3. Pursuant to Zoning Commission Order No. 746, dated December 10, 1993, a PUD was approved for the Subject Site, which rezoned it from the SP-2 Zone District to the C-3-C Zone District upon recordation of the PUD Covenant, evidence of which is included in Exhibit No. 27 of the record, and approved the construction of a mixed-use building for residential and commercial uses. The PUD was approved to include 5.79 FAR of commercial space and at least 2.17 FAR of residential space. Zoning Commission Order No. 746 specifically grants a wide range of design flexibility to the property owner.

4. Order No. 746 was extended by Order No. 746-A and, most recently, by Order No. 746-B. Pursuant to the Extension granted by Order No. 746-B, a building permit application was to be filed by December 10, 1999, and construction had to commence by December 10, 2000. (Orders No. 746, 746-A, 746-B are hereinafter collectively referred to as the "Orders".) (Exhibit No. 25.)

5. The appellant raised four issues on appeal, which it asserts constitute error on the part of the Zoning Administrator, and which are the basis on which they argue that the building permit should be revoked. These issues are:

   (i) the University filed building permit applications and began construction untimely;

   (ii) the use of the PUD site by the University violates the PUD;

   (iii) the University did not comply with the District of Columbia Environmental Policy Act ("DCEPA") (D.C. Code § 6-981 et seq.) and should have done so prior to issuance of the permit; and

   (iv) whether proper notice of the building permit application had been given to the ANC.

6. PUD Deadlines. As to the issue of whether the University met certain deadlines with regard to the application for the building permit and the start of construction, the Board finds as follows:

   A. The building permit application had to be filed by December 10, 1999 and construction had to begin by December 10, 2000. (Exhibits No. 25 and 27.)

   B. Michael D. Johnson, Zoning Administrator, granted Building Permit No. 434036. He appeared and testified at the hearing on the appeal. As to the question of timeliness of the building permit application and the start of construction, he testified that, after evaluation and review, he determined that the University met all deadlines relating to the filing of the building permit application and the start of construction. (Tr. 4/10/01, p.72)

   C. The University submitted a copy of the building permit application, as well as the building permit customer control receipt, both dated December 7, 1999, evidencing the fact that the University met the deadline for filing a building permit prior to December 10, 1999. (Exhibits No. 25 and 27.)

   D. The University submitted a copy of the excavation/sheeting and shoring permit, dated October 24, 2000. (Exhibit No. 25.)

   E. Mark Thiefault, a project engineer charged with overseeing the construction of the PUD for the University, in an affidavit, stated that the building permit application was filed on December 7, 1999. This affidavit also stated that the excavation sheeting and shoring permit was issued on October 24, 2000, and that construction of the PUD began on October 30, 2000, pursuant to the

excavation/sheeting and shoring permit, therefore evidencing the fact that the University met the requirement that it begin construction by December 10, 2000. (Exhibit No. 27.)

7. Compliance with PUD Orders. On the question of whether the development and use of the PUD site by the University violates the specific requirements and conditions of the PUD approved in the Orders, the Board makes the following findings:

   A. Mr. Johnson testified that he undertook a careful and detailed review of the University's plans for the Subject Site as those plans related to the requirements of the PUD outlined in Order No. 746. He further testified that he reviewed documentation from the University, had meetings with the neighbors of the project, including representatives of the appellant and the intervenor party in opposition, WECA, and he sought the advice of Corporation Counsel. After this careful review, Mr. Johnson testified, he determined that the conditions of the PUD, as outlined in Order No. 746, are fully satisfied by the University's planned use of the property. (Tr. 4/10/01, pp. 92, 93.)

   B. Based on review of the plans by Mr. Johnson and his staff, Mr. Johnson specifically testified that the University's plans meet the PUD requirement for providing between 47 and 56 new residential units. (Tr. 4/10/01, pp. 95, 96).

   C. Mr. Johnson further testified that after review of the University's plans by him and his staff, it was determined that any changes reflected in the plans, compared to the plans approved pursuant to Order No. 746, were minor in nature. (Tr. 5/1/01, p. 208.)

   D. Pursuant to Section 2409.6 of the Zoning Regulations, the Zoning Administrator has authority to approve minor modifications to final plans for a PUD.

   E. The University will develop at least 2.17 FAR as residential uses and not more than 5.79 FAR (actually 4.64 FAR) as other uses permitted in the C-3-C Zone District as required by Order No. 746. (Exhibit No. 27.)

   F. Mr. Johnson further testified that pursuant to the PUD, the subject property is within the C-3-C Zone District and that the owner of the subject property may use the land for any use allowed in the C-3-C Zone District, so long as the conditions of the PUD are met. Mr. Johnson stated that use of the subject property by the University for university purposes (academic office, residential) are uses permitted in the C-3-C Zone District. (Tr. 4/10/01, pp. 95, 96).

   G. The Orders do not prohibit the University from owning the PUD Site, nor is there any language in Order No. 746 restricting, or prohibiting, students from occupying the residential portion of the PUD. (Exhibit No. 40.)

   H. There is nothing in the original PUD Application to suggest that the residential portion of the building would be condominiums, and there is no requirement in Order No. 746 mandating that the residential portion of the building be condominiums. (Tr. 5/1/01, p. 208; Exhibit No. 40.)

I. A comparison of the specific plans approved pursuant to Order No. 746 and the building permit plans submitted by the University show that they are entirely consistent. The building mass, rhythm, materials, height and fenestration of the building permit plans reflect the Zoning Commission approval of Order No. 746. (Exhibit No. 40.)

J. In Order No. 746, the Zoning Commission recognized the need for a certain amount of flexibility in this project, and, as a result, conditioned approval on the owner of the PUD site having a certain amount of flexibility in regard to:

i. the number of residential units;

ii. the location and design of the interior of the building;

iii. window detailing and the location of entrances;

iv. design changes in response to the Commission of Fine Arts approval process;

v. the potential retail space on the ground floor; and

vi. potential changes in the location and types of parking spaces provided and other modifications to below-grade space to accommodate the needs of the office tenants.

(Exhibits No. 25 and 27.)

K. Thomas Butcavage, recognized as an expert in architecture by the Board, and the project architect of record for the University, stated that in making its decision of whether to purchase the PUD Site, the University consulted with its architect to determine whether its needs could be met within the confines of the PUD Orders. He stated that he concluded that the University could achieve its objectives within the restrictions of the PUD. Mr. Butcavage further testified that, in his professional opinion, the plans submitted by the University as part of the building permit application are in total compliance with the PUD requirements. (Tr. 5/1/01, pp. 104 105,114.)

L. Mr. Butcavage testified that the PUD underwent review and critique by the Commission of Fine Arts, and, as a direct result of this process, the University made very minor design changes to the PUD, including the elimination of balconies in order to make the two pavilions more symmetrical. (Tr. 5/1/01, pp., 106, 107, 108, 124).

M. Mr. Butcavage further testified that the University consulted with then Acting Zoning Administrator, Armando Lourenco, and obtained confirmation that the minor modifications to the plans, which evolved during the normal course of plan refinement, fell within the flexibility parameters of Order No. 746. (Tr. 5/1/01, pp. 108, 109.)

N. Specifically, the Acting Zoning Administrator confirmed that the reduction in total FAR of the project, so long as the PUD did not exceed 5.79 FAR, for commercial use, and consisted of at least 2.17 FAR, for residential use, was permitted. Additionally, the Acting Zoning Administrator confirmed that providing one garage instead of two garages was a minor modification, within the flexibility granted by Order No. 746. (Exhibit No. 32.)

O. Gladys Hicks, recognized by the Board as an expert in zoning, testified that the plans submitted by the University as part of its building permit application are consistent with the requirements of Order No. 746. (Tr. 5/1/01, p. 138.)

P. Ms. Hicks testified further that the University's meeting with, and follow-up letter to, Armando Lourenco, the Acting Zoning Administrator, is a common practice for property owners to utilize in order to obtain confirmation that a minor change is permissible within the confines of a PUD order as well as pursuant to the Zoning Regulations. (Tr. 5/1/01, p. 139.)

Q. Ms. Hicks stated that there is nothing in Order No. 746 that would prohibit the University, including University students, from using either the residential or the commercial component of the PUD. (Tr. 5/1/01, p. 149.)

R. Ms. Hicks testified that, in her opinion, the Zoning Administrator's decision to grant the building permit on December 28, 2000 was correct. (Tr. 5/1/01, p. 141.)

8. DCEPA. As to the issue of whether the University complied with the District of Columbia Environmental Policy Act ("DCEPA") (D.C. Code Section 6-981 et seq.), the Board finds as follows:

A. Mr. Johnson stated that the Zoning Administrator's Office of the Department of Consumer and Regulatory Affairs does not complete a detailed environmental review of projects, but rather collects information regarding environmental impacts from the building permit applicant and refers the information to the Department of Health for its review. The Department of Health then determines whether a more complete environmental evaluation is needed. (Tr. 4/10/01, p. 99.)

B. Mr. Johnson testified that the Department of Health reviewed the Environmental Impact Screening Form for this project as part of the building permit application and determined that a full Environmental Impact Statement was not necessary. (Tr., 4/10/01, p. 100; Exhibits No. 25 and 27.)

C. The University presented precedent that indicates it is inappropriate for the Board, in this appeal, to consider whether the University complied with the DCEPA because

the jurisdiction of the Board is limited to administration and enforcement of the Zoning Regulations, and the DCEPA is outside the scope of the Zoning Regulations. (Exhibits No. 25 and 27.)

D. The University also presented signed memoranda from the District of Columbia Department of Health to indicate that the appropriate environmental review was completed and that it was determined that an environmental impact statement was not necessary for the PUD project. (Exhibits No. 25 and 27.)

9. Notice. As to the question of whether ANC 2A had been properly noticed by DCRA that a building permit application had been filed by the University, the Board finds as follows:

A. The University presented precedent that such a notice requirement is not within the jurisdiction of the Zoning Administrator. (Exhibit No. 27.)

B. The University also presented evidence that the ANC had actual notice that the University was moving forward with the development of the site, including an April 12, 2000 ANC resolution in opposition to the University's development and use of the site (Exhibits No. 1, 20 and 27.)

CONCLUSIONS OF LAW AND OPINION

The Board of Zoning Adjustment has jurisdiction to hear this appeal and render a decision and order pursuant to D.C. Code, § 5-424(f). Pursuant to 11 DCMR § 3119.2, the appellant has the burden of proof in this matter. In considering an application for a building permit, the Zoning Administrator is required to determine whether the plans for the proposed building meet the requirements of the Zoning Regulations. To reverse the Zoning Administrator's decision approving the issuance of the building permit, the appellant must demonstrate to the Board by a preponderance of the evidence that the building permit was issued in error because the proposed building would violate the Zoning Regulations.

Based on the above findings of facts, the Board concludes that Building Permit No. 434036 was properly issued. The Board concludes that (i) the University timely filed the application for its building permit and timely began construction; (ii) the use of the PUD Site by the University is permitted pursuant to Zoning Commission Orders No. 746, 746-A and 746-B; (iii) it is not within the jurisdiction of the Board to evaluate whether the University complied with the DCEPA, nor is the issue of whether ANC 2A received notice of this building permit application properly before this Board.

Timeliness

Pursuant to the Orders, the University had until December 10, 1999 to apply for its building permit and until December 10, 2000 to begin construction. Based on the evidence submitted by the University, as well as the testimony at the hearing, the Board concludes that by applying for its building permit on December 7, 1999 and beginning construction on October 30, 2000, and the University met the time deadlines set in the Orders.

University Use of the Property

The Board concludes that the University's planned construction of the PUD and use of the property are permitted. Based upon Zoning Commission Orders No. 746, 746-A and 746-B, upon recordation of the PUD Covenant, the property was rezoned from the SP-2 Zone District to the C-3-C Zone District. Therefore, the Board concludes that all uses permitted in the C-3-C Zone District are permitted in the project, provided that the building contains at least 2.17 FAR of residential uses and no more than 5.79 FAR of commercial uses. The Orders do not prohibit university use from either the permitted commercial or permitted residential uses.

The appellant's implication that because the residential component of the PUD will house students, it is somehow a violation of the Orders, is without merit.

The Board concludes that the University cannot be precluded from establishing university uses at 1957 E Street because the University's planned uses of the Property (academic, office and residential) are consistent with the uses approved by the PUD.

The Board further concludes that it would have been illegal for the Orders to condition approval of the PUD on the ownership of the site. The Board notes that in National Black Child Development Institute, Inc. v. District of Columbia Board of Zoning Adjustment, 483 A.2d 687, 691 (D.C. 1984), the District of Columbia Court of Appeals held that it is impermissible to limit zoning relief to a particular property owner.

The Board holds 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), 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 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 No. 1650 ', 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.

Thus, the Board concludes, the appellant's argument that the University cannot own this PUD and use the residential portion for students and the commercial portion for academic offices, cannot be sustained and fails as a matter of law and fact.

The Board concludes that the Zoning Commission, the Office of Planning and the appellant have already evaluated the substance of the PUD. The Board does not have jurisdiction to evaluate the merits of the PUD as part of this appeal.

The Board concludes that the minor differences between the plans approved as part of Order No. 746 and the plans submitted by the University as part of its building permit application are minor in nature and are permitted pursuant to Condition No. 15 of Order No. 74(and the flexibility granted by 11 DCMR §2409.6. The Board holds that none of these changes violate the intent, purpose or language of the PUD Orders.

Environmental Review

The Board concludes, and Board precedent supports, that both the evaluation of the environmental impacts of the PUD and the environmental review process are beyond the expertise and jurisdiction of this Board.

The Board notes that the evidence presented by the Zoning Administrator and the University through written documentation, as well as testimony, demonstrates that an environmental impact screening form was completed and evaluated by the Department of Health, and a determination was made by the Department of Health that no further environmental impact statement was necessary.

Notice

The Board concludes that the requirement that an ANC be notified of a building permit application for a property within its boundaries is part of the ANC law. Therefore, the Board concludes that whether such a law was properly complied with is not properly before the Board The Board finds that the jurisdiction of the BZA in this appeal is limited to the Zoning Administrator's administration and enforcement of the Zoning Regulations

The Board notes, ANC 2A had constructive notice of this building permit application, as evidenced by its April 12, 2000 opposition to the University's development and use of the site.

Furthermore, the Board concludes that it has accorded the ANC 2A the great weight to which it is entitled. As the ANC is the appellant, the Board has addressed the ANC's issues.

Conclusion

The Board concludes that the issuance of the Building Permit 434036 by the Zoning Administrator of the Department of Consumer and Regulatory Affairs for a mixed-use building on the PUD site was appropriate. In reviewing the building permit application and the requirements of the PUD to which the property in question is subject, the Zoning Administrator applied the Zoning Regulations in accordance with the plain language of the Regulations, the PUD Orders and consistently with past precedents of the District of Columbia. The Board concludes the appellant has failed to prove by a preponderance of the evidence, that the building permit for the proposed mixed-use building was issued in error; therefore, the appeal of Advisory Neighborhood Commission 2A is denied.

VOTE: