GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16701 of Foggy Bottom and West End Advisory Neighborhood Commission 2A, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Zoning Review Branch, Department of Consumer and Regulatory Affairs, in the issuance of 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 to the effect that the permit violates the conditions of the planned unit development (PUD) including, but not limited to, the conversion of residential to dormitory and office to academic uses, increased property size, and adverse environmental impact in a C-3-C District at premises 1957 E Street, N.W. (Square 122, Lot 835).

HEARING DATES: April 10, 2001; May 1, 2001

DECISION DATE: June 5, 2001

DECISION AND ORDER

Advisory Neighborhood Commission 2A filed an appeal with the Board of Zoning Adjustment on January 19, 2001, challenging on various grounds the decision of the Zoning Administrator to approve the issuance of a building permit to The George Washington University to construct an 11-story, multi-use building at 1957 E Street, N.W., pursuant to Z.C. Order No. 746, a Zoning Commission order approving a planned unit development and related Zoning Map amendment for the property. After a public hearing, the Board granted the appeal in part and denied the appeal in part, reversing the Zoning Administrator's approval of the permit.

Preliminary and Procedural Matters

Parties. The appellant in this case, the Foggy Bottom and West End Advisory Neighborhood Commission (ANC 2A), is represented by its Chairperson, Elizabeth B. Elliot. The appellee, the Zoning Administrator, is represented by the Civil Division of the Office of the Corporation Counsel. The owner of the property that is the subject of the appeal, The George Washington University (GW), a party to this case pursuant to 11 DCMR § 3199.1, is represented by ShawPittman.

The West End Citizens Association (WECA) timely applied for party status to intervene in the appeal. The Board granted WECA party status pursuant to 11 DCMR §§ 3106.3 and 3112.15 due to WECA's long-standing interest in maintaining and improving the quality of

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residential life in the immediate GW neighborhood, the Foggy Bottom – West End area. Barbara Kahlow represented WECA at the hearing.

Dorothy Miller, ANC Commissioner for Single-Member District (SMD) 2A-05, also requested party status. The property that is the subject of this appeal borders SMD 2A-05. Ms. Miller has been actively involved for many years in zoning matters involving her single-member district and ANC 2A, and sought to participate in the hearing as a party to assist the ANC. The Board denied Ms. Miller's request, since she could assist the ANC without party status. At the Board's suggestion, ANC 2A permitted Ms. Miller to make a statement within the ANC's case-in-chief.

Notice of Appeal and Notice of Public Hearing. By memoranda dated February 7, 2001, the Office of Zoning advised ANC 2A, the Zoning Administrator, the ANC commissioner for the single-member district within which the property is located, the Ward 2 councilmember, and the D.C. Office of Planning of the filing of the appeal.

The Board scheduled a public hearing on the appeal for April 10, 2001. Pursuant to 11 DCMR § 3112.14, the Office of Zoning, on February 14, 2001, mailed ANC 2A, the Zoning Administrator, and GW notice of hearing. Notice of hearing was also published in the *D.C. Register* on February 16, 2001, at 48 DCR 1345. The notice incorrectly identified the street address of the property as "1957 F Street, N.W."; however, this was harmless error, as the correct square and lot number were provided.

Appellant's Case. ANC 2A complained that GW had filed its building permit application after the deadline established in the planned unit development (PUD) order had expired, and that the ANC had never received notice from the Department of Consumer and Regulatory Affairs (DCRA) about the filing of the application. The ANC argued that GW had made substantial changes to a project to be constructed pursuant to a PUD order and related Zoning Map amendment, such that the PUD required additional Zoning Commission review and approval; that GW had changed the proposed use of the project from long-term residential use to dormitory use and from office use to academic use; and that the project should undergo a full environmental impact study. The ANC's case included testimony from Ms. Elliot, as a resident of the single-member district within which the subject property is located, and from Ms. Miller, as the ANC Commissioner for SMD 2A-05.

The ANC, along with the intervenor, WECA, requested the Board to submit the project to the D.C. Office of Planning for review before any decision in this case was made. The Board does not customarily refer appeals to the Office of Planning and elected not to do so in this case.

Zoning Administrator's Case. Zoning Administrator Michael D. Johnson discussed the permitting process. He acknowledged that DCRA had not provided ANC 2A with notice of the building permit application. He stated that the changes made to the building plans by GW were minor modifications and in compliance with the PUD order and Zoning Regulations. He also stated that the Office of the Zoning Administrator does not have authority over the environmental review process, but that that function is handled within DCRA's Building and Land Regulation Administration.

Property Owner's Case. GW presented testimony from Tom Butcavage of Smith Group, the architectural firm that designed the PUD as well as the building permit plans, and Gladys Hicks, who was recognized as an expert in the Zoning Regulations. GW argued that it had complied with all PUD deadlines; that the Board lacks jurisdiction to hear appeals based upon the ANC notification law; that the PUD modifications were within the scope of the Zoning Administrator's approval authority; that the Zoning Map amendment allowed GW to use the property for any matter-of-right use permitted under the amended zone district classification of the property; and that the Board lacks jurisdiction to hear appeals relating to compliance with the Environmental Policy Act.

Intervenor's Case. WECA presented testimony from Barbara Kahlow and Sara Maddox. WECA complained that the PUD modifications had been made through a secret process; that the Zoning Administrator lacked authority to approve the changes; that as a result of the changes, the PUD no longer provided the public benefits or amenities required by the PUD order; that GW was required to submit a request to modify the PUD to the Zoning Commission; and that the Environmental Policy Act requirements apply since the PUD is located outside the Central Employment Area.

Closing of the Record. The record closed at the conclusion of the hearing on May 1, 2001, with the exception of specific materials requested by the Board and the parties' proposed findings of fact and conclusions of law.

Decision Meeting. At its decision meeting on June 5, 2001, the Board, voting 3 – 0 – 2, with one member abstaining and one member not voting, not having participated in the hearing, granted the appeal in part, determining that the Zoning Administrator had exceeded his authority in approving certain PUD modifications, including the elimination of one of two garage entrances, the elimination of balconies from the residential component of the building, the change in exterior materials from stone and face brick to pre-cast concrete panels, and the addition of institutional uses to the approved commercial office and residential uses. The Board denied the appeal in part as to the questions relating to ANC notification of the building permit application, the timeliness of the permit application and construction start, and compliance with the District of Columbia Environmental Policy Act. As several of the PUD modifications were outside of the scope of the Zoning Administrator's approval authority, the Board reversed the Zoning Administrator's approval of the building permit application.

FINDINGS OF FACT

The Subject Property and Zoning History

1. The subject property is located at 1957 E Street, N.W. (Square 122, Lot 835), on the north side of E Street between 19th and 20th Street, outside of the GW campus plan boundaries.

2. In Z.C. Order No. 746, effective December 10, 1993 (hereafter, the PUD order), the Zoning Commission approved an application from the Associated General Contractors of

America (AGC) for a second-stage PUD and a related amendment to the Zoning Map from SP-2 to C-3-C for the subject property. Ex. 25, attachment A.

3. The PUD order in Condition No. 1 requires the applicant to develop the PUD "in accordance with the plans prepared by the architectural firm of Florance, Eichbaum, Esocoff and King" (hereafter, the approved 1993 PUD drawings, Ex. 40-C), as modified by the guidelines, conditions, and standards contained in the order.

4. With respect to uses, the PUD order states in Condition No. 2 that "The PUD site shall be developed with mixed-use buildings, including residential and commercial uses with below-grade parking."

5. AGC had proposed to build the PUD in two phases, with the first phase to consist of a commercial office building to house AGC headquarters and provide additional commercial office space for lease and a second phase, to consist of a residential building to provide no more than 56 residential units.

6. The PUD order in Condition No. 15 grants the property owner a wide range of flexibility on the final detailing of the project.

7. The PUD covenant, which was recorded in the Office of the Recorder of Deeds, provides that "The [PUD] covenant shall bind the owner and all successors in title to construct on and use the property in accordance with the order and amendments thereto of the Zoning Commission." Ex. 27, Attachment F.

8. The PUD Covenant provides:

> The Subject Site will be developed and used in accordance with the plans approved by [Z.C. Orders Nos. 746 and 746A] and in accordance with the conditions and restrictions contained in said Orders, subject to such changes thereto as the Zoning Commission and/or the Zoning Administrator of the District of Columbia may authorize. AGC covenants that it will use the Subject Site only in accordance with the terms of the Orders, as the same may be further modified from time to time, subject to the terms and conditions contained herein and the provisions of Chapter 24 of the Zoning Regulations.

9. In 1999, AGC sold the subject property to GW.

Timeliness of Building Permit Application and Construction Start

10. The PUD order required the applicant to file an application for a building permit by December 10, 1995, and begin construction by December 10, 1996.

11. On March 29, 1996, the Zoning Commission, in Z.C. Order No. 746-A, extended the PUD deadlines, with the application for a building permit due by December 10, 1997, and construction to begin by December 10, 1998. Ex. 25, Attachment A.

12. The Zoning Commission granted a further extension in Z.C. Order No. 746-B, effective March 19, 1999, giving the applicant until December 10, 1999, to file for a building permit and until December 10, 2000, to start construction. Ex. 25, Attachment A.

13. GW applied for a building permit pursuant to the PUD order on December 7, 1999, to erect an 11-story, multi-use building for the following proposed uses: "academic, residential, and offices." Ex. 25, Attachment A.

14. DCRA issued GW Permit No. B430399, on October 24, 2000, for the excavation and sheeting and shoring of the subject property for the construction of the "proposed new university building" and the underpinning and stabilization of adjacent buildings. Ex. 25, Attachment D.

15. GW began construction pursuant to the excavation and sheeting and shoring permit on or about October 30, 2000.

16. On December 28, 2000, DCRA issued GW Permit No. B434036 to erect an 11-story multi-use building for academic, residential, and office uses. Ex. 28, page 29.

17. The Board finds that GW applied for a building permit and began construction within the deadlines established in the PUD order, as extended in Z.C. Order No. 746-B.

ANC Notification of Building Permit Application

18. Due to insufficient staffing and resources, DCRA did not notify ANC 2A of GW's building permit application.

19. On October 2, 2000, ANC 2A, unaware that the Zoning Commission had granted AGC a second extension of time in which to construct the PUD, sent the Zoning Commission a letter, requesting the Zoning Commission to declare the PUD null and void on the grounds that the PUD order had expired and that GW planned to use the PUD for institutional uses. The ANC had formulated its position in a resolution as early as April 12, 2000. *See* Exs. 16, 20.

20. Prior to the issuance of the building permit, the Office of Zoning had forwarded the letter from ANC 2A, which detailed the ANC's concerns relating to the PUD, to the Zoning Administrator. The Office of Zoning also advised ANC 2A to pursue its concerns with the Zoning Administrator. *See* Ex. 20.

21. The Board finds that ANC 2A had actual notice that GW was about to undertake construction at the site, the opportunity to pursue its zoning concerns with the Zoning Administrator prior to the issuance of the building permit, and the opportunity to timely appeal to the Board the substantive zoning issues relating to the issuance of the permit.

Whether the Zoning Administrator Had Authority to Approve the PUD Modifications

22. During the permitting process, GW proposed several modifications to the PUD, which were approved by the Zoning Administrator.

23. Floor Area Ratio Modification. GW proposed decreasing the gross floor area of the commercial component by combining Floors 1 and 2 into a single first floor and Floors 3 and 4 into a second floor. This combination would reduce the commercial floor area ratio (FAR) from 5.79 to 4.34 and result in a total FAR of 6.62, of which 2.28 would be devoted to residential uses. The Zoning Administrator concurred on May 14, 1999, that the reduction in total and commercial FAR was within the scope of flexibility provided by the PUD approval. Ex. 32. Condition No. 3 of the final PUD approval specifies that "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." The Board finds therefore that the modification conforms with the maximum total FAR, maximum commercial FAR, and minimum residential FAR conditions established in the PUD order.

24. Garage Entrance Modification. GW also sought to eliminate one of two garage entrances.

25. As proposed by AGC, AGC would remain in its existing building, build the commercial component of the PUD, move into the commercial component, and then demolish its existing building and build the residential component. To address its parking needs, AGC had proposed two separate garages for each phase of the project, with a garage entrance on 19th Street for the commercial component and then, upon completion of the residential component, a second garage entrance on 20th Street. Tr. at 109 (May 1, 2001).

26. Section 4.1 of the second-stage PUD application (Ex. 40-B) describes pedestrian and vehicular access to the building:

> Pedestrian access to the residential building is from E Street, and vehicular access for loading berths and parking is from 20th Street. Two (2) loading berths are provided within the building at grade. Access to the parking garage is adjacent to the loading berths, and leads directly down to four (4) levels of below grade parking which contain, in the aggregate, not less than one (1) parking space for every dwelling unit.
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> The main pedestrian access to the office building is centered beneath this central recessed feature [of the office building]. A secondary office entrance to the east, symmetrical with the residential building entrance, will provide AGC with its own identifiable entrance.

> Loading and parking access occur off 19th Street, where space is provided within the building line [for] three (3) internal loading berths. Parking access leads down to three (3) levels of below grade parking below a basement office and storage level. One Hundred Thirty-eight (138) parking spaces and nine (9) tandem spaces are provided, or about 1:1,212 GSF office area.

27. Separate access for the commercial and residential components of the PUD is also discussed in section 5.3 of the second-stage PUD application, relating to conformance with the first-stage approval.

28. Finding No. 13 in the PUD order states, "Loading and parking access to the office portion of the development will be from 19th Street, N.W. [and] loading and parking access to the residential portion of the development will be from 20th Street, N.W."

29. Under Condition No. 7 of the PUD order, "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 provided in public vaults."

30. Under Condition No. 8 of the PUD order, "Loading areas, driveways and walkways shall be located on the site as shown on Exhibit 5B of the record [the approved 1993 PUD drawings]."

31. The approved 1993 PUD drawings show that there would be two garages, one for the 9-story commercial building and one for the 11-story residential building; as well as two garage entrances, one on 19th Street, N.W., for the commercial building, and one on 20th Street, N.W., for the residential building.

32. GW proposed to modify the approved 1993 PUD drawings by creating a single garage below-grade, with a single entrance and exit on 19th Street. The 1999 building permit plans (Ex. 40-A) show only one garage entrance. GW argued that the elimination of the 20th Street garage entrance is within the flexibility provided in the PUD order, since Condition No. 15 provides the developer with flexibility to:

> 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;
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> 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;
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> . . . .
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> 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.

33. The Zoning Administrator on May 14, 1999, concurred with GW that the elimination of one of the garage entrances is within the flexibility provided by the PUD order. Ex. 32.

34. The Board finds that the flexibility provided by the PUD order does not extend to the elimination of one of the garage entrances:

(a) Condition No. 15(b) only applies to changes in the location and design of interior components, not exterior components or the exterior building envelope.

(b) Condition No. 15(c), which authorizes "minor adjustments" in window detailing and "entrance doors" on the ground floor to accommodate tenant uses, does not pertain to garage doors used for vehicular entrance and exit to the parking garages. The term "entrance door" in Condition No. 15(c) refers to the entry doors used for pedestrian access. These doors are shown on the approved 1993 PUD drawings as "residential entry," "commercial entry," and "AGC entry," and are described in the second-stage PUD application as providing "pedestrian access." The garage entrances on the other hand are marked "parking in" and "parking out" on the approved 1993 PUD drawings, and are described in the PUD application as providing "parking access." However, even if the term "entrance door" could be construed to include a garage door, the elimination of a garage entrance is not a "minor adjustment" since it could impact site accessibility; site planning; the location and design of loading areas, driveways, and walkways; traffic circulation patterns; traffic and pedestrian safety; and urban design and architectural considerations. *See* Tr. at 189 (May 1, 2001).

(c) The second-stage PUD application, PUD order, and approved 1993 PUD drawings, as well as the Zoning Regulations, all clearly distinguish "parking spaces" from vehicular access to parking garages.[1] Therefore, Condition No. 15(f) does not provide flexibility to eliminate a garage entrance, since it relates only to the location, types, and number of parking spaces and other modifications to below grade space.

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[1] The term "parking space" is defined in 11 DCMR § 199.1 (1995) as "an off-street area accessible and of appropriate dimensions to be used exclusively for the temporary parking of a motor vehicle." Requirements for parking spaces are found in chapter 21 of the Zoning Regulations. "Entrances and exits" to parking garages, on the other hand, are regulated under chapter 23 of the Zoning Regulations, in §§ 2301.2 – 2301.3.

35. Further, the Board finds that there are no provisions in 11 DCMR § 2407.6 (1991)[2] that would authorize the Zoning Administrator to approve the elimination of a garage entrance as a minor PUD modification.

36. Number of Dwelling Units. Condition No. 6 of the PUD order states that "The PUD project shall be developed with 47 to 56 residential units."

37. The building permit application indicates that the number of proposed dwelling units is "5" units.

38. The 1999 building permit plans indicate that GW is developing the building to provide 55 dwelling units. *See also* Tr. at 136 (May 1, 2001).

39. The Board finds that DCRA's failure to require GW to correct its permit application to state the actual number of dwelling units is harmless error, since the 1999 building permit plans show that GW is providing 55 units, which is within the range required by the PUD order.

40. Elimination of Balconies. The approved 1993 PUD drawings include balconies for the residential units.

41. The balconies are eliminated in the 1999 building permit plans.

42. Under Condition No. 15(d) of the PUD order, the applicant was given flexibility on the final detailing of the project to "Make minor design changes in response to requirements and final approval of the Commission of Fine Arts."

43. There are no other conditions in the PUD order that would provide the applicant the flexibility to eliminate the balconies from approved 1993 PUD drawings.

44. GW proposed to the Commission of Fine Arts that eliminating the balconies would not compromise the use of the building and was consistent with the design intent. GW felt this would make the two pavilions more symmetrical.

45. A Commission of Fine Arts memorandum dated March 20, 2000, indicates that the Commission had no objection to the issuance of a permit based on plans dated March 3, 2000, which did not include balconies.

46. The balconies are a design element that is typical of an upscale, urban residential building. Tr. at 161 (May 1, 2001); Ex. 35.

47. According to Sara Maddox, a member of a group that worked closely with AGC during the PUD process, the balconies served to characterize the residential units as "homes." Ex. 35.

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[2] Since this PUD pre-dates the 1995 amendments to 11 DCMR ch. 24, the Board has applied the September 1991 edition of Title 11 of the *District of Columbia Municipal Regulations*. A copy of chapter 24 as published in the 1991 edition is attached. It does not appear, however, that the 1995 amendments changed the PUD regulations with respect to the procedures to be followed by the Zoning Commission in approving a PUD and related map amendment or by an applicant in seeking a PUD modification, other than to re-number the pertinent provisions.

48. The Board finds that the balconies are part of the PUD amenities and public benefits package.

49. The Board finds therefore that the elimination of the balconies from the residential units is not a "minor design change."

50. The Board finds that Condition No. 15(d) authorizing the applicant to make minor design changes in response to the Commission of Fine Arts does not extend to the elimination of the balconies because (1) the elimination of the balconies was made in response to design suggestions from GW, not in response to the requirements of the Commission of Fine Arts; and (2) even if the elimination of the balconies was made in response to the requirements of the Commission of Fine Arts, it is not a "minor design change," since the balconies are a PUD amenity and public benefit, negotiated during the PUD process and as such was weighed by the Zoning Commission in its decision to approve the PUD and related Zoning Map amendment.

51. The Board finds that there are no provisions in 11 DCMR § 2407.6 (1991) that would authorize the Zoning Administrator to approve the elimination of balconies.

52. Change in Exterior Materials. Section 5.3 of the application for second-stage PUD approval, relating to conformance with first-stage approval, indicates that the applicant was required to submit as part of its second-stage application, "detailed architectural plans" indicating "building materials." Section 4.2 of the application, relating to design treatment, provides that "The dominant material of the main facades will be a warm limestone or granite. The base courses will be granite."

53. The approved 1993 PUD drawings show the exterior materials as stone and face brick. The 1999 building permit plans on the other hand show the exterior materials as pre-cast concrete panels.

54. The Board finds that the change from stone and face brick to pre-cast concrete panels constitutes a change in the nature and quality of exterior materials.

55. The Board finds that the nature and quality of the exterior materials is a PUD amenity and public benefit, weighed by the Zoning Commission in its decision to approve the PUD and related Zoning Map amendment.

56. The Board finds that there are no provisions in the flexibility afforded by the PUD order or the Zoning Administrator's minor modification authority under 11 DCMR § 2407.6(1991) that would include a change in the exterior materials.

57. Retail Space. The PUD order, in Condition No. 15(e), did not require the provision of retail space; but instead, provided that if the applicant chose to provide retail space, it was limited to 5,000 square feet.

58. Therefore, the Board finds that any reduction or elimination in the retail space to be provided is within the flexibility afforded the applicant under Condition No. 15(e).

59. Number of Parking Spaces. Condition No. 7 of the PUD order specified a minimum of 200 on-site parking spaces. The 1999 building permit plans show there will be 201 parking spaces. The Board finds that the number of parking spaces to be provided conforms with the PUD order.

The Effect of the Related Zoning Map Amendment

60. The PUD order approved the upzoning of the property in connection with the PUD from SP-2 to C-3-C.

61. The Special Purpose or SP District is designed to preserve and protect areas adjacent to Commercial Districts that contain a mix of row houses, apartments, offices, and institutions at a medium to high density. *See* 11 DCMR §§ 500.1, 500.3. The SP-2 District is a medium-high density district, with new residential development to be at a higher density than new office development, both to be compatible with surrounding properties. 11 DCMR § 500.4. University uses are permitted in an SP District as a special exception, subject to Zoning Commission approval under 11 DCMR §§ 507 and 3104, 47 DCR 9725 (2000).[3]

62. The C-3 Districts are designed to accommodate major business and employment centers supplementary to the C-4 District, the Central Business District. 11 DCMR § 740.1. The C-3-C District permits medium-high density development, including office, retail, housing, and mixed-use development. 11 DCMR § 740.8. University uses, an institutional use, are permitted as a matter of right in a C-3-C District. *See* 11 DCMR §§ 741.1 (any use permitted in a C-2 District under § 721.1 is permitted as a matter of right in a C-3 District), 721.1 (any use permitted in a C-1 District under § 701 is permitted as a matter of right in a C-2 District), 701.6(f) (college, university, or other academic institutions of higher learning are permitted as a matter of right in a C-1 District).

63. The application for second-stage approval of the PUD indicates that the underlying zoning change from SP-2 to C-3-C was sought concurrent with the PUD in order to permit an increase in maximum density; that is, floor area ratio.

64. With a few exceptions, the application for second-stage approval simply describes the residential use of the proposed PUD as "residential." The "Notice of Intent to File" describes the residential component as "residential apartments." Section 4.1 of the application discusses the potential internal reconfiguration of the residential units to respond to "market conditions," suggesting that the units would consist of apartment or condominium units. Section 4.7, which addresses the requirements of the Zoning Regulations for loading facilities, characterizes the

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[3] Effective December 8, 2000, the Zoning Commission transferred responsibility for the special exception approval of college and university uses from the Board of Zoning Adjustment to the Zoning Commission. 47 DCR 9725 (2000)

residential component as an "apartment structure." Section 5.3, relating to conformance with the first-stage approval characterizes the residential units as "apartments." The traffic analysis included in the application also characterizes the residential component as "apartment units" ("The proposed project is to include . . . 55 residential apartment units."; "The trip generation for the residential portion of the PUD application was based upon the proposed 55 apartment units for the site.").

65. There are no provisions in the application for second-stage approval that would indicate that the PUD would be used for institutional uses, such as university uses.

66. ANC 2A and WECA presented testimony that during the PUD process, AGC had represented that it was seeking PUD approval to accommodate the needs of its headquarters office, and that it sought to build a condominium project to sell the units to help pay for the other portions of its building, to lease a portion of the office building to commercial tenants to generate income to support its building, and to provide retail space to meet the needs of its residents and commercial tenants. ANC 2A and WECA indicated that neighborhood residents supported the PUD with the proposed condominium housing because it would contribute to the stability of the neighborhood and to the residential base, which would generate property and income taxes for the District of Columbia. Ex. 35.

67. In its 1999 building permit application, GW states that it intends to use the building for academic, residential, and office uses. The 1999 building permit plans characterize the PUD as an "academic and residential building," and show it will contain a number of classrooms. The Board finds therefore that the Zoning Administrator, at the time he reviewed and approved the issuance of the permit, knew or should have known that GW intended to use the subject property for university uses.

68. The Zoning Administrator stated that as a result of the related map amendment, GW may use the PUD for any matter-of-right use permitted in the C-3-C District; however, he also added the caveat that "the PUD does have a controlling interest as well." Tr. at 96 (Apr. 10, 2001).

69. GW argued that as a result of the related map amendment, it may change the use of the PUD from commercial office and residential to academic, residential, and office uses; that is, in whole or in part, to university uses.

70. A Zoning Map amendment that is approved in conjunction with a PUD is contingent upon the completion of the PUD "as directed" by the Zoning Commission. 11 DCMR § 2400.11 (1991). Thus, the construction of any development that is inconsistent with the PUD order results in the reversion of the zoning controls to the pre-existing map. *Id.*

71. There is nothing in the PUD order or in the record in the instant case that would indicate that the Zoning Commission evaluated any proposed use of the PUD other than commercial office space and residential use, with a small amount of ancillary retail use.

72. There are no provisions in the flexibility afforded by the PUD order or the Zoning Administrator's minor modification approval authority under 11 DCMR § 2407.6 that would encompass a change in use of an approved PUD.

73. The Board finds that the Zoning Administrator did not have authority to approve the addition of institutional uses to the approved commercial office and residential uses.

Environmental Policy Act

74. On October 23, 2000, the Deputy Administrator of the DCRA Building and Land Administration determined that the GWU building "is exempt from submission of an Environmental Impact Screening Form pursuant to 7202.1 of the regulations of the Environmental Policy Act of 1989. The location of this project, 1957 E Street NW, is located within the Central Employment Area of the District of Columbia." Ex. 28, page 35.

75. The Comprehensive Plan Amendment Act of 1998, effective April 27, 1999 (D.C. Law 12-275), 46 DCR § 199.1 (1999), excluded the location of the subject property from the Central Employment Area.

76. The Board finds that the subject property is not located within the boundaries of the Central Employment Area as defined in the Zoning Regulations at 11 DCMR § 199.1, 45 DCR 1045, 1047 (1998), incorporating by reference the boundaries established in the Comprehensive Plan at 10 DCMR § 199.1.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Code § 5-424(g)(1) (1994)), to hear and decide appeals where it is alleged by an appellant that an administrative officer erred in any administrative decision based in whole or in part upon any Zoning Regulation or Zoning Map.[4] This appeal is properly

[4] The Board does not agree with GW's assertion that the Board's jurisdiction is limited to reviewing the decisions of the Zoning Administrator. Section 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Code § 5-424(g)(1) (1994), expressly authorizes the Board to

> hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by the *Inspector of Buildings or the Mayor of the District of Columbia or any other administrative officer or body* in carrying out or enforcement [of any Zoning Regulation].

The duties, powers, rights, and authority of the Inspector of Buildings have been transferred to the Department of Consumer and Regulatory Affairs. *See* Note to D.C. Code § 5-424; *see also* 11 DCMR § 3200.2 (authorizing appeals from "any decision of an administrative officer granting or refusing a building permit or granting or withholding a certificate of occupancy or any other administrative decision based in whole or part upon any Zoning Regulations or Zoning Maps . . . ."). Thus, while the Board may hear appeals from the final decisions of administrative officers other than the Zoning Administrator and from other agencies; the Board may not pass upon any regulatory scheme other than the Zoning Regulations.

before the Board pursuant to 11 DCMR §§ 3100.2, 3101.5, and 3200.2. The notice requirements of 11 DCMR § 3112 for the public hearing on the appeal have been met.

The appellant, ANC 2A, appeals the decision of the Zoning Administrator to approve the issuance of a building permit for a PUD on a variety of procedural and substantive grounds.

Timeliness of Building Permit Application and Construction Start

At the time of the hearing, ANC 2A did not have Z..C. Order No. 746-B, which extended the PUD deadlines for the filing of a building permit application and the beginning of construction. ANC 2A therefore questioned the timeliness of the application and construction start. The Board concludes that GW filed its building permit application and commenced construction within the deadlines established by the PUD order, Z.C. Order No. 746, as extended by Z.C. Order Nos. 746-A and 746-B.

ANC Notification of Building Permit Application

Section 13 of the Advisory Neighborhood Commissions Act of 1975, effective Oct. 10, 1975 (D.C. Law 1-21, as amended; D.C. Code § 1-261(b), (c)(1) and (3) (1999)),[5] required DCRA to provide ANC 2A with 30 days written notice of GW's building permit application. It is undisputed that DCRA failed to provide ANC 2A with any form of written notice regarding GW's building permit application.

The Board has customarily ruled that it does not have jurisdiction to enforce the ANC law. Nonetheless, in *Tenley and Cleveland Park Emergency Committee v. District of Columbia Board of Zoning Adjustment*, 550 A.2d 331 (D.C. 1988) (*TACPEC)*, the District of Columbia Government urged the Court of Appeals to rule that the Board has ancillary jurisdiction to consider certain limited threshold procedural issues, such as ANC notification requirements, that arise in substantive zoning disputes before the Board. 550 A.2d at 342. The Court did not reach the jurisdictional question since the ANC in *TACPEC* had received a list of construction applications from DCRA sufficient to provide it with "adequate notice" of the pending application.[6] In an earlier case, *Shiflett v. District of Columbia Board of Appeals and Review*,

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[5] These provisions were amended by § 3 of the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, effective June 27, 2000 (D.C. Law 13-135, 47 DCR 5519 (2000)). The 2000 amendments require 30 days written notice, excluding Saturdays, Sundays, and legal holidays of District government actions, including the formulation of any final policy decision or guideline with respect to permits affecting an ANC area. In addition, DCRA must ensure that each ANC is provided at least twice monthly by first-class mail with a current list of construction and demolition permit applications.

[6] GW cites *Penn-Branch Citizens' Ass'n v. District of Columbia Board of Zoning Adjustment*, No. 80-802 (D.C. Mar. 13, 1981), for the proposition that the enforcement of the ANC notification requirement is outside of the Board's jurisdiction. The *Penn-Branch* decision is a "Memorandum Opinion and Judgment"; that is, a decision of the District of Columbia Court of Appeals without a published opinion. Under D.C. App. R. 28(b), unpublished opinions of the Court of Appeals

431 A.2d 9, 11 (D.C. 1981), the Court held that while DCRA erred in failing to notify an affected ANC of a building permit application, that error was harmless because the ANC had actual knowledge of the impending construction and thus an opportunity to present its views to DCRA.

Based on *TACPEC* and *Shiflett*, the Board concludes that in the context of this appeal, which is based upon allegations that the Zoning Administrator erred in the application of the Zoning Regulations, DCRA's error in failing to provide ANC 2A notice of GW's building permit application was harmless. The ANC had actual knowledge that GW was about to begin construction, along with the opportunity to present its views to the Zoning Administrator prior to the issuance of the permit and to timely appeal, based upon alleged errors in the application of the Zoning Regulations, the Zoning Administrator's approval of the issuance of the permit. The Board does not otherwise have jurisdiction to address the ANC's complaints regarding lack of notice.

The Zoning Administrator Lacked Authority to Approve Certain PUD Modifications

The Zoning Regulations in 11 DCMR § 2407.2 (1991) require the Zoning Administrator to review a building permit application made pursuant to a PUD order for conformance with the PUD order and the approved PUD plans:

> The [Zoning Administrator] shall not approve a permit application unless the plans conform in all respects to the plans approved by the Zoning Commission, as those plans may have been modified by any guidelines, conditions, or standards that the Zoning Commission may have applied.

Subsection 2407.6 (1991) authorizes the Zoning Administrator to approve certain minor modifications in final, approved PUD plans:

> The [Zoning Administrator] shall have the authority to approve minor modifications in the final plans as approved by the Zoning Commission. These modifications shall be limited to the following:
>
> (a) A change not to exceed two percent (2%) in the height, percentage of lot occupancy, or gross floor area of any building;

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shall not be cited in any brief, except when they are relevant under the doctrines of law of the case, res judicata, or collateral estoppel, or in a criminal action or proceeding involving the same defendant, or in a disciplinary action or proceeding that (1) was decided prior to January 1, 1991, or (2) involves the same respondent.

Since none of these exceptions would be applicable in the case presently before the Board, the Board has not relied upon the *Penn-Branch* decision.

(b) A change not to exceed two percent (2%) in the number of residential units, hotel rooms, institutional rooms, or gross floor area to be used for commercial or accessory uses;

(c) A change not to exceed two percent (2%) in the number of parking or loading spaces; and

(d) The relocation of any building within five feet (5 ft.) of its approved location in order to retain flexibility of design or for reasons of unforeseen subsoil conditions or adverse topography.

The Zoning Regulations provide further direction regarding the processing of requested modifications. Under § 2407.7 (1991), "In reviewing and approving any requested modification, the [Zoning Administrator] shall determine that the proposed modification is consistent with the intent of the Zoning Commission in approving the planned unit development." Subsection 2407.8 (1991) provides "Following its approval of any modifications, under § 2407.6, the [Zoning Administrator] shall report to the Zoning Commission the modification approved under this section." Finally, § 2407.9 (1991) specifies that

> Any modifications proposed to an approved planned unit development that cannot be approved by the [Zoning Administrator] shall be submitted to and approved by the Zoning Commission. The proposed modification shall meet the requirements for and be processed as a second-stage application.

The Zoning Commission amended § 2407.9 effective June 11, 1993, in 40 DCR 3741 to provide a "Consent Calendar" procedure for Zoning Commission review and approval of "minor modifications and technical corrections" beyond the scope of the Zoning Administrator's approval authority:

> Any modifications proposed to an approved planned unit development that cannot be approved by the [Zoning Administrator] shall be submitted to and approved by the Zoning Commission. The proposed modification shall meet the requirements for and be processed as a second-stage application, except for such minor modifications and technical corrections as provided in Section 3030 of this title.

The June 11, 1993, rulemaking also defined the term "minor modification" in § 3030.1[7] to mean "modifications of little or no importance or consequence as determined in the sole discretion of the Commission." Under § 3030.6[8]

> Any member of the Zoning Commission may remove any item from the Consent Calendar for any reason. Any matter which is not placed on the Consent Calendar or is removed from the Consent Calendar shall be acted upon by the Zoning

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[7] This definition has since been placed in § 3030.2, 46 DCR 7853, 7881 (1999).
[8] This provision is now found in § 3030.12, 46 DCR 7853, 7882 (1999).

> Commission according to the applicable procedures contained in other sections of this title.

Thus, if the Director of the Office of Zoning determines that a requested PUD modification should not be placed upon the Consent Calendar or if the Zoning Commission determines that a requested modification should be removed from the Consent Calendar, the requested modification must meet the requirements for and be processed under 11 DCMR § 2405 (1991) as a second-stage PUD application, with notice and public hearing. *See Foggy Bottom Ass'n v. District of Columbia Zoning Comm'n*, 639 A.2d 578, 582 (D.C. 1994).

In this case, the Zoning Administrator approved several changes to the PUD, some of which the Board concludes were not encompassed by either the flexibility provided by the PUD order or the Zoning Administrator's minor modification authority under 11 DCMR § 2407.6.

First, any changes in the number and location of garage entrances could impact the site plan; site access; the location and design of loading facilities, driveways, and walkways; traffic circulation patterns; traffic and pedestrian safety; and urban design and architectural considerations. As determined in Finding No. 34, there are no provisions in the PUD order that would grant the applicant flexibility to modify the PUD design by eliminating a garage entrance. Further, there are no provisions under § 2407.6 relating to the Zoning Administrator's authority to approve minor modifications that would include the number and location of garage entrances. Therefore, the Board concludes that the Zoning Administrator lacked authority to approve the elimination of one of the two garage entrances.

Second, the approved 1993 PUD drawings include as a design element balconies for the residential units. The balconies are eliminated in the 1999 building permit plans. GW argues that it may eliminate the balconies pursuant to Condition No. 15(d) of the PUD order, which provides GW the flexibility to "Make minor design changes in response to the requirements and final approval of the Commission of Fine Arts." GW's architect, however, testified that the elimination of the balconies was not made in response to the requirements of the Commission of Fine Arts, but rather at GW's behest. Condition 15(d) therefore does not provide GW the flexibility to eliminate the balconies.

The provision of balconies, which are typical of upscale residential projects, was a PUD amenity and public benefit, s*ee Foggy Bottom Ass'n*, 639 A.2d at 583-84 (the "nature of the design" is a PUD amenity and public benefit); and was negotiated during the PUD process. The elimination of the balconies thus potentially affects the balance of interests struck by the Zoning Commission in approving the PUD and related Zoning Map amendment. The Board concludes therefore that the flexibility provided in the PUD order relating to the final detailing of the project does not extend to the elimination of the balconies. Further, there are no provisions in 11 DCMR § 2407.6 that would authorize the Zoning Administrator to approve design changes.

Third, like the balconies, the nature and quality of the exterior materials is a PUD amenity and public benefit, such that a change in the exterior materials could potentially affect the balance of interest struck by the Zoning Commission in approving the PUD. *See Foggy Bottom Ass'n*, 639 A.2d at 583-84. The Board concludes that there are no provisions in the

PUD order that would afford GW the flexibility to alter the exterior materials from stone and face brick to pre-cast concrete panels. Further, there are no provisions in 11 DCMR § 2407.6 that would authorize the Zoning Administrator to approve a change in the exterior materials.

Finally, the Zoning Administrator approved several other changes to the PUD. The Board concludes that these changes were either within the scope of flexibility provided by the PUD order or within the Zoning Administrator's minor modification authority provided by regulation. As explained in Findings Nos. 23 and 57-59, these changes include the reductions in floor area ratio, the elimination of the retail space, and the change in the number of parking spaces from 200 to 201. Further, while GW's building permit application incorrectly stated that the project would provide five dwelling units, the Zoning Administrator had relied upon the 1999 building permit plans, which showed a total of 55 dwelling units, which is consistent with the PUD order.

The Zoning Administrator Lacked Authority to Approve a Change in Use of the PUD

The Board agrees with the Zoning Administrator and GW that there is nothing in the law or PUD approval that would preclude the University from owning the subject property or from building and using the PUD in accordance with the terms and conditions established in the PUD order. The Board also agrees with the Zoning Administrator and GW that if the subject property were zoned C-3-C independently of the PUD order, university uses would be permitted as a matter of right. *See Spring Valley Wesley Heights Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 664 A.2d 434 (D.C. 1994). However, those are not the issues presented by the instant case. The issue in this case is whether, given the related Zoning Map amendment from SP-2 to C-3-C in the PUD order, GW may use the PUD for institutional uses without first obtaining a PUD modification order. Based on the following analysis, the Board concludes that GW may not use the property for institutional uses in the absence of a Zoning Commission order approving a modification in the use of the PUD.

An applicant for a PUD approval may apply for a change in zoning in conjunction with the PUD. 11 DCMR § 2404.2 (1991). The proposed map amendment does not stand alone; but rather, the Zoning Commission evaluates the PUD together with the proposed map amendment. *See* 11 DCMR § 2405.9 (1991). If approved, the change in zoning does not become effective until the applicant records a covenant in the land records of the District of Columbia binding the owner and all successors in title to construct on and *use* the property only in accordance with the PUD order or any amended PUD order. 11 DCMR §§ 2406.12, 2407.3 (1991). If the applicant fails to complete the PUD *as approved* within the time limits established by the Zoning Commission, the benefits granted under the application terminate and the zoning controls revert to the pre-existing regulations and map. *See* 11 DCMR §§ 2400.11, 2405.11, 2406.11 (1991).

The PUD regulations thus specify that prior to filing an application for a PUD with the Office of Zoning, an applicant must mail a written notice of its intent to file the application to the affected ANC, the owners of all property within a 200 feet radius of the subject property, and any other person the applicant determines to be appropriate to receive the notice. Among other things, the notice of filing must describe the proposed *use* of the project. 11 DCMR §§ 2404.7 -

2404.9 (1991). An applicant for first-stage approval of a PUD must include in its application a statement of the proposed *use* of each building and a breakdown of the total gross floor area and floor area ratio for each *use*. 11 DCMR § 2404.11(d), (e)(3) (1991). The D.C. Office of Planning, in its report to the Zoning Commission, on a first-stage PUD application, must address "The appropriateness, character, scale, mixture of *uses*, and design of the *uses* proposed for the proposed development, and other identifiable public benefits." 11 DCMR § 2405.4(b) (1991). An application for a second-stage approval must include "A detailed statement as to the *uses* to be located in the project, including the location, number, size, and types of stores, offices, residential, institutional, industrial, and other uses." 11 DCMR § 2404.12(b) (1991). The PUD regulations explicitly reference the Zoning Commission's review of uses in 11 DCMR §§ 2403.16 and 2403.17 (1991). Subsection 2403.16 states:

> Notwithstanding the other prerogatives of the Zoning Commission in approving *uses* in planned unit developments, the Zoning Commission shall reserve the option to approve any use that is permitted as a special exception and that would otherwise require the approval of the Board of Zoning Adjustment.

Accordingly, the Zoning Commission's review of the proposed uses of a PUD is an integral part of the PUD review and approval process.

The approval of a PUD, including its proposed uses, and an associated map amendment are interrelated. *See Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n*, 426 A.2d 327, 335-38 (D.C. 1981). Thus, in *Gray v. Trustees, Monclova Township*, 313 N.E.2d 366 (Ohio 1974), *cited in Foggy Bottom Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 639 A.2d 578, 583 (D.C. 1994), the court held that a change in the approved use of PUD requires a PUD modification. The court described the overall zoning classification of the PUD area as "nominal" because it does not, in itself, indicate the specific zoning restrictions, including use restrictions, in the area. These restrictions are ascertainable only by referring to the approved plans for the development. Similarly, in *Firstbank Company v. City of Springfield, Illinois*, 625 N.E.2d 804, 805 (Ill. App. 1993), the court recognized that:

> The properties [within a PUD] are restricted to the uses set forth by the developer when the plan was approved, and in order to use a portion of a PUD for a use other than the use specified, an owner must petition the City for a use change.

A change in use could affect whether the PUD is "in accordance with the intent and purpose of the Zoning Regulations, the PUD process, and the preliminary approval," 11 DCMR § 2406.6 (1991), and therefore requires Zoning Commission review and approval.

In the case before the Board, the second-stage PUD application indicates that rezoning was sought for purposes of increased density, not for purposes of changing a use permitted by special exception to a use permitted as a matter of right. There is no evidence in this case that the Zoning Commission or any other participant in the PUD process ever considered that the proposed PUD would be used, in whole or in part, for university uses, a distinct type of

institutional use recognized by the Zoning Regulations.[9] The PUD order, which does not address any use other than commercial office use, residential use, and ancillary retail use, does not permit the PUD to be used for institutional uses. The PUD covenant binds GW to use the property in accordance with the PUD order. Thus, the related change in zoning from SP-2 to C-3-C does not permit GW to use the PUD for any use permitted as a matter of right in a C-3-C District, but only for the specific uses approved in the PUD order.

The Board concludes that GW may only use the PUD for commercial office use, residential use, and ancillary retail use. Institutional uses require a PUD modification. A Zoning Map amendment granted in connection with a PUD is dependent upon full compliance with all aspects of the PUD order, including use. No matter-of-right uses, other than those specified in the PUD order, may be undertaken under the amended zoning designation.

Compliance with Environmental Policy Act

The appellants urge the Board to determine that DCRA has failed to comply with the Environmental Policy Act and to require GW to prepare an Environmental Impact Statement. The Board does not have jurisdiction to consider appeals relating to an administrative agency's compliance with the Environmental Policy Act.

ORDER

For the reasons stated above, the Board concludes that the appellant has met its burden of proving by a preponderance of the evidence that the Zoning Administrator erred in approving the issuance of the building permit because the building plans do not conform in all respects to the plans approved by the Zoning Commission, as modified by the guidelines, standards, and conditions in the PUD order, as required by 11 DCMR § 2407.2 (1991). It is hereby **ORDERED** that the appeal is **GRANTED IN PART** as to the Zoning Administrator's lack of authority to approve the elimination of a garage entrance, the elimination of the balconies, the change in the exterior materials, and the change in use of the PUD; and **DENIED IN PART** as to the requirement for prior ANC notification of the building permit application, timeliness of the building permit application and construction start, and compliance with the Environmental Policy Act. Pursuant to D.C. Code § 5-424(g)(4), the Zoning Administrator's decision to approve Building Permit B434036 is **REVERSED**.

VOTE: 3 – 0 – 2 (Susan Morgan Hinton, Anne M. Renshaw, and Sheila Cross Reid, to grant; Herbert M. Franklin, abstaining; Geoffrey H. Griffis, not present during the hearing, not voting).

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[9] See, e.g., 11 DCMR § 2400.1 (1991), which states that the PUD process "is designed to facilitate the development of well-planned residential, *institutional*, commercial, and mixed-use development . . . ." Under § 2404.12(b) (1991), an application for second-stage PUD approval must include "A detailed statement as to the uses to be located in the project, including the location, number, size and types of stores, offices, residential, *institutional*, industrial, and other uses."

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

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JUL 12 2001

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 16701

As Director of the Office of Zoning, I hereby certify and attest that on JUL 12 2001, a copy of the foregoing Decision and Order in BZA Appeal No. 16701 was mailed first class, postage prepaid, to each party and public agency who appeared and participated in the public hearing and who is listed below:

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