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

ORDER 16701A
ORDER GRANTING TEMPORARY STAY

The Board of Zoning Adjustment issued a final Decision and Order in this case on July 12, 2001. On July 20, 2001, the intervenor and owner of the subject property, The George Washington University (GWU), filed a "Motion for Reconsideration and to Re-Open the Record" (hereafter, "motion for reconsideration"). Pursuant to the Board's Rules of Practice and Procedure, neither the filing nor the granting of a motion for reconsideration or rehearing automatically stays the effectiveness of the Board's final orders. 11 DCMR § 3126.9. GWU, therefore, on July 27, 2001, filed a "Motion for Stay of Decision" until such time as the Board considers and reaches a decision on GWU's motion for reconsideration.

The appellant, Advisory Neighborhood Commission (ANC) 2A, and the West End Citizens Association (WECA), an intervenor in support of the appeal, oppose both GWU's motion for reconsideration and GWU's motion for stay on various procedural and substantive grounds. On July 31, 2001, the Board commenced deliberation on GWU's motion for reconsideration, but after both a motion to deny GWU's motion for reconsideration and a subsequent motion to grant GWU's motion for reconsideration failed for lack of the required three votes, the Board determined to reconsider its vote on the motion to grant GWU's motion for reconsideration and scheduled GWU's motion for reconsideration for further deliberation on September 4, 2001. The Board also deferred consideration of the motion for stay until August 3, 2001, to allow ANC 2A and WECA additional time for response. ANC 2A and WECA remain opposed to GWU's motion for

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stay, and indicate that they still have not had sufficient time to adequately respond to the motion.

To prevail on a motion for stay, the party seeking the stay must demonstrate that it is likely to prevail on the merits, that irreparable injury will result if the stay is denied, that the opposing parties will not be harmed by a stay, and that the public interest favors the granting of a stay. *See Kuflom v. District of Columbia Bureau of Motor Vehicle Services*, 543 Ad.2d 340, 344 (D.C. 1988) (administrative agency required to consider the four specified factors in considering a motion for stay). Where the last three factors strongly favor temporary relief, only a "substantial" showing of likelihood of success, not a "mathematical probability," is necessary for an agency to grant a stay. *See Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Perhaps because motions for stay are relatively uncommon in Board of Zoning Adjustment proceedings, there was some question whether GWU fully addressed in its written submissions the requirements specified by the Court of Appeals for obtaining a stay from an administrative agency. The Board therefore determined to provide GWU the opportunity to correct or revise its motion for stay, and considered whether to grant GWU a temporary stay based upon the Board's own motion.

Based upon its familiarity with the record in this case, the Board has determined that a brief, temporary stay from August 3, 2001, through the close of business on August 21, 2001, is warranted. With construction well underway, the Board is concerned that the denial of a temporary stay would result in substantial, if not irreparable, financial injury to GWU. Any cessation of construction should be accomplished in an orderly fashion to minimize harm to GWU and the public. The parties opposing the stay, on the other hand, will not be harmed by a stay because GWU continues construction at its own risk, with full knowledge that it may have to modify its building plans to revert back to the planned unit development (PUD) as approved in 1993 or that some adjustment in the PUD benefits and amenities package may be required if the Zoning Commission ultimately approves a PUD modification. For the same reason, the public interest is not harmed by a stay. Because these three factors strongly favor relief, the Board has greater flexibility in weighing whether a stay should be granted on the grounds that GWU is likely to succeed on the merits. In this case, a stay is possible because the Zoning Commission has indicated that it will hold a public meeting on August 21, 2001, during which time the Commission is willing to review the status of any requests by GWU for a modification of the PUD and a summary of the results of the efforts by all parties to arrive at an amicable resolution of this dispute.

A temporary stay will afford GWU the opportunity to (1) explore the possibility of settlement negotiations with ANC 2A and WECA; (2) file a request for modification of the PUD with the Zoning Commission; and (3) prepare and serve a corrected or revised motion for stay pending reconsideration, PUD modification, or other action appropriate to the circumstances. To avoid the continued uncertainties, expense, and delay of litigation, whether in an administrative or judicial setting, the parties are strongly encouraged to pursue settlement of this PUD dispute.

Based on the above, it is hereby **ORDERED** that the final Decision and Order in BZA Appeal No. 16701 is **STAYED** from August 3, 2001, until close of business, August 21, 2001, on the following conditions:

1. No later than the close of business Monday, August 13, 2001, GWU may file a written request to modify Z.C. Order No. 746, extended by the Zoning Commission in Z.C. Order No. 746-A and Z.C. Order No. 746-B, with the Zoning Commission and request that the modification be placed on the Consent Calendar. GWU shall serve ANC 2A, WECA, and the Zoning Administrator with a copy of the request by hand delivery at the same time or prior to filing the request with the Zoning Commission. The request for modification shall be without prejudice to the position asserted by GWU in its motion for reconsideration and without prejudice to any appeal GWU may wish to bring with respect to the Board's final Decision and Order or to any order the Board may ultimately enter with respect to GWU's motion for reconsideration;

2. Pursuant to 11 DCMR § 3030.8, ANC 2A may have until 12:00 noon, Monday, August 20, 2001, to file a written response with the Zoning Commission concerning any request for PUD modification GWU may file. ANC 2A shall serve by fax or hand delivery copies of its written response on GWU, the Zoning Administrator, and WECA prior to or at the same time the response is filed with the Zoning Commission.

3. GWU shall file a written status report with the Zoning Commission, with a copy provided to the Board, no later than 12:00 noon Monday, August 20, 2001, regarding its request for PUD modification, if any; a detailed summary and the results of any PUD settlement negotiations; and any other matters it deems pertinent to the filing and processing of its request for a PUD modification, whether through the consent calendar procedure or as a second-stage PUD approval. The report shall be summary in nature and brief in length, with copies served by hand delivery on ANC 2A, WECA, and the Zoning Administrator prior to or at the time of filing with the Zoning Commission.

4. GWU and ANC 2A shall present brief oral status reports to the Zoning Commission at a public meeting on August 21, 2001, at 10:00 a.m. Upon request from WECA, the Zoning Commission may elect to hear an oral report from WECA. The oral reports should address the same matters as contained in GWU's written report, but in greater detail.

5. Any corrected or revised motion for stay shall be filed with the Board and served on ANC 2A, WECA, and the Zoning Administrator by hand delivery no later than close of business, Monday, August 13, 2001. Any response or opposition to the motion shall be filed with the Board and served on GWU by hand delivery or fax no later than 12:00 noon, Monday, August 20, 2001.

6. Except for any corrected or revised motion for stay and any response thereto, all submissions and reports shall be restricted to PUD modification issues.

VOTE: 4 – 0 – 1 (Carol J. Mitten, Geoffrey Griffis, Sheila Cross Reid, and David Levy, to grant; Anne M. Renshaw, not present, not voting).

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

ATTESTED BY: Jerrily Kress
JERRILY R. KRESS, FAIA
Director

FINAL DATE OF ORDER: AUG - 7 2001

UNDER 11 DCMR 3101.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

MS/8.7.01

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 16701A

As Director of the Office of Zoning, I hereby certify and attest that on AUG - 7 2001, a copy of the foregoing Order in BZA Appeal No. 16701A 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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ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning