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August 20, 2001

VIA FACSIMILE and
BY HAND DELIVERY

Jerrily R. Kress
Director
Office of Zoning
Room 210
441 Fourth Street NW
Washington, D.C. 20004

Re: BZA Appeal No. 16701

Dear Ms. Kress:

This letter is Advisory Neighborhood Commission 2A's ("ANC 2A") opposition to the supplemental motion to stay filed by George Washington University ("GWU") in the above-referenced case on August 13, 2001. For the reasons set forth below, the Board lacks authority and jurisdiction to rule on GWU's motion or to take any further action in this case.

On July 20, 2001, GWU filed a timely "Motion for Reconsideration and to Reopen the Record" -- note that GWU's motion was both a motion for reconsideration and a motion to reopen the record for further evidence. The other parties to the case filed oppositions to GWU's motion. As proponent of the motion, GWU must obtain three affirmative votes of the members of the Board to grant the motion (D.C. Code 5-424(h)). At a duly noticed, regular meeting on July 31, 2001, the Board considered GWU's motion.

The Board's Order No. 16701A, dated August 3, 2001, states that, at its meeting on July 31, the Board first voted on a motion to deny GWU's motion, which failed for lack of the necessary three votes, and then voted on a motion to grant GWU's motion, which also failed for lack of the necessary three votes. The transcript of the Board's July 31 meeting shows otherwise. First, Ms. Renshaw moved to deny GWU's "Motion for Reconsideration and to Reopen the Record" and to allow the Board's final order of July 12, 2001 to stand (Tr. 9-10). Ms. Renshaw's motion failed for lack of a second (Id.), and there was

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no vote on Ms. Renshaw's motion (contrary to the suggestion in the Board's Order No. 16701A). Then, the Chair moved to grant GWU's motion for reconsideration, which was duly seconded by Mr. Griffis (Tr. 9-10, 24-25). After discussion, the Board then voted two-to-two on the Chair's motion (Id.). The Chair then moved to grant GWU's motion to reopen the record, which was duly seconded by Mr. Griffis, and the Board voted two-to-two on the Chair's motion (Tr. 25). The effect of those tie votes was to deny GWU's "Motion for Reconsideration and to Reopen the Record".

The D.C. Court of Appeals has held that a vote by this Board on a motion that does not receive the requisite number of affirmative votes is a denial of the motion. Hubbard v. District of Columbia Board of Zoning Adjustment, 366 A.2d 427 (D.C. App. 1976). In that case, the applicant for a special exception filed a motion for a rehearing. At that time, the Board's rules required four affirmative votes to grant a rehearing. The Board vote on the motion for rehearing was three yes, one abstain, and one absent. The Board, nevertheless, scheduled and held a new hearing and granted the application for special exception. The D.C. Court of Appeals reversed the Board's decision. The Court held that the vote on the motion for rehearing constituted a denial of the motion for lack of the requisite number of affirmative votes and that the Board's actions after the purported grant of the motion (holding a hearing and granting the application) were invalid (366 A.2d at 427-428):

> [W]e hold that the Board's action after the purported grant of rehearing was invalid, and that the motion must be treated as denied, thus to require a one-year waiting period before reapplication can be made. * * *
>
> The vote originally recorded was valid in all respects; the effect given it was erroneous. The vote of 3 (three) to 0 (zero) in favor of rehearing operated as a denial of rehearing. We deem it so now.[1]

Thus, the Board's tie votes on July 31 on GWU's "Motion for Reconsideration and to Reopen the Record" operated as a denial of that motion, and the Board's subsequent actions in this case are

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[1] Courts in other jurisdictions have reached the same conclusion regarding the effect of votes that do not receive the necessary number of affirmative votes. Montgomery County Board of Appeals v. Walker, 180 A.2d 865 (Ct. App. 1962); Miller v. Board of Zoning Adjustment of the Township of Boonton, 171 A.2d 8 (N.J. Super. Ct. 1961); Stafford Smith v. Zoning Board of Adjustment of the Borough of Madison, 158 A.2d 223 (N.J. Super. Ct. 1960).

invalid, including Order No. 16701A purporting to grant a temporary stay, to schedule further consideration on GWU's motion for stay, and to schedule further consideration on GWU's motion for reconsideration and to reopen the record.

On August 13, 2001, GWU filed a supplemental motion to stay the Board's final decision in this case until the Board decides GWU's motion for reconsideration or to reopen the record. The Board's rules allow the Board to grant a stay during the pendency before the Board of a motion for reconsideration or for rehearing (11 DCMR 3126.9). Since the Board denied GWU's motion for reconsideration and to reopen the record on July 31, 2001, the Board lacks authority to rule on GWU's motion for a stay and that motion now is moot.

In sum, this case ended on July 31, 2001, and the Board has no authority or jurisdiction to take any further actions in this case.

GWU's supplemental motion for stay also requests the Board to stay the Board's final decision in this case pending decision by the Zoning Commission on GWU's application for modification of the subject PUD. The Board has no jurisdiction to issue such a stay.

ANC 2A also incorporates herein the arguments previously made by the parties in opposition to GWU's original motion for a stay. This appeal was filed shortly after the Zoning Administrator issued a building permit to GWU. Notwithstanding the pendency of this appeal, GWU elected to take the risk of commencing construction prior to the Board's decision. No commercial developer would start construction under similar circumstances. Having taken the risk, GWU now seeks to avoid the consequences of its decision by arguing that it will be greatly harmed by failure to stay the Board's final decision in this case. Whatever such harm occurs was self-inflicted by GWU's reckless decision to commence construction while zoning approval was still very much in question.

Sincerely,

James T. Draude

James T. Draude

Attorney for ANC 2A

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Letter were sent via facsimile prior to Noon on August 20, 2001 to:

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