West End Citizens Association
Washington, D.C.

Boundaries: 15th Street on the East • Potomac Park on the South
Rock Creek and the Potomac on the West • N Street on the North

September 23, 2002

Ms. Jerrily R. Kress
Director
Office of Zoning
441-4th Street, N.W. - Suite 210
Washington, DC 20001

Re: WECA's Appeal of DCRA & ZA's Administrative Decisions, 1957 E Street, NW; Accompanying Letter to Form 125

Dear Ms. Kress:

In compliance with the Office of Zoning's "Instructions" for filing an Appeal of an administrative decision(s), the West End Citizens Association (WECA) is herein providing an original and 20 copies of a typewritten Form 125 and this accompanying letter for its Appeal of certain administrative decisions by Department of Consumer and Regulatory Affairs (DCRA) Administrator David Clark and Zoning Administrator (ZA) Robert Kelly relating to 1957 E Street, N.W. As required by the Instructions, the other Parties (the Owner of the property and the Advisory Neighborhood Commission) are copied herein.

On September 5, 2002, the WECA filed a Form 124, Notice of Intent to File an Appeal. Attached was a copy of the WECA's August 20th letter to Messrs. Clark and Kelly. By letter dated September 12th, you acknowledged this filing and stated that the WECA had 30 days from September 6th to file an Appeal. Several documents are attached to this Accompanying Letter to Form 125, as indicated herein.

After a change in ownership of 1957 E Street to the George Washington University (GWU), on:

(a) April 12, 2000 (i.e., nearly 2 1/2 years ago), the Foggy Bottom and West End Advisory Neighborhood Commission (ANC-2A) passed a unanimous resolution objecting to GWU's change in plans for the previously-approved Planned Unit Development (PUD);
(b) January 19, 2001, ANC-2A filed an Appeal of the former ZA's December 28, 2000 Building Permit (Appeal No. 16701);
(c) June 5, 2001, the Board of Zoning Adjustment (BZA) granted the ANC-2A/WECA Appeal;
(d) August 17th, GWU co-signed an "Agreement" with the WECA;
(e) August 31st, GWU filed a PUD Modification Request (ZC Case No. 01-17M/93-5F/91-18P); and
(f) August 16, 2002, the Zoning Commission's Final Order, which largely granted the WECA's requests, was published.

BZA
Case No. 16950
Exhibit No. 10

Board of Zoning Adjustment
District of Columbia
CASE NO.16950
EXHIBIT NO.10

The Instructions for an Appeal require the following:

A. All Appellants are required to submit in specific detail each and every exception they have to the administrative decision. Details should state the allegations of error in the administrative decision - "why it was in error" and reference the relevant Sections of the Title 11 DCMR Zoning Regulations and/or Map.

B. A detailed statement at the time of filling explaining how the appellant intends on proving their case.

C. In the case of an area variance ... - Not applicable.

The WECA takes exception to the following administrative decisions, all of which are indicated on the Form 125:

(1) DCRA issued an August 16, 2002 Certificate of Occupancy (CofO) for 1957 E Street, N.W. without full compliance with Zoning Order No. 746-C;

(2) DCRA failed to issue daily fines under 11 DCMR §3201;

(3) ZA tried to improperly add conditions to a Zoning Order; and

(4) DCRA failed to timely (within 10 business days) respond to an August 28th Freedom of Information Act (FOIA) request.

This Accompanying Letter will detail each of these errors, including why each was in error and how the WECA intends on proving its case.

11 DCMR Chapter 32, Administration and Enforcement, provides the framework for enforcement of Zoning Orders, including Section 3201, Penalties, and Section 3205, Compliance with Conditions in Orders. Specifically, 11 DCMR §3200.2 provides for appeals to the BZA of "any decision of an administrative officer granting ... a certificate of occupancy or by any other administrative decision based in whole or part upon any Zoning Regulations." Also, 11 DCMR §3201.l provides that a property owner in violation of the provisions of 11 DCMR "**shall** ... **be punished** by a fine of not more than one hundred dollars ($100) per day for each and every day the violation continues" (emphasis added). And, 11 DCMR §3205.1 provides, "This section shall apply when a ... certificate of occupancy has been issued under the authority of an order of the ... Zoning Commission, and the order of the ... Commission sets forth any condition to the issuance of the ... certificate of occupancy, or to the approval of a ... planned unit development," and 11 DCMR §3205.4 provides, "Any person who owns ... shall at all times comply with any condition to the issuance of the certificate of occupancy."

As detailed in the WECA's August 20, 2002 letter to DCRA (**Attachment A**), Zoning Order No. 746-C required DCRA - prior to issuance of a CofO - to receive:

(1) proof of a $100,000 contribution payable to the Foggy Bottom Feeding Program Foundation, Inc. no later than on the date of issuance of a CofO;

(2) proof of GWU's compliance with the DC Environmental Policy Act for each project initiated since August 17, 2001, the date of the GWU-WECA Agreement; and

(3) proof of GWU's catalog and website publications restricting student parking in the Foggy Bottom/West End Area, starting in publications for the Fall 2002 semester.

DCRA failed to obtain proof for each of these conditions prior to its August 16, 2002 issuance of a CofO. In fact, to this day, GWU is out of compliance with all three, as detailed below.

On August 28th, DCRA read the WECA the e-mail it sent earlier that day to GWU stating that GWU needed to present a $100,000 check payable to the Foundation. This e-mail is proof positive of GWU's noncompliance. The WECA requested a copy of this e-mail in its August 28th FOIA. A record of each of the ZA's 10 telephone conversations with the WECA, and various faxes and e-mails between them, from August 14th (i.e., before publication of the Order and before issuance of the CofO) to September 5th is provided in **Attachment B**.

Despite GWU's co-signed August 17, 2001 Agreement with the WECA, GWU is still not complying with the DC Environmental Policy Act (DC Code §8-109.01 *et seq.*). For example, for Zoning Commission Case No. 01-21CP (Square 43), which GWU filed on August 31, 2001, i.e., 14 days after the GWU-WECA Agreement, there is no mention in GWU's August 31st Application, GWU's November 21st detailed Statement, the Office of Planning's (OP's) November 30th Report, or the Commission's January 14, 2002 Order No. 958 of GWU's attention to and compliance with the DC Environmental Policy Act. This includes no completion by GWU of even DCRA's screening form, no textual discussion, no alternatives for consideration, no OP referral to DCRA, etc. In fact, in a letter filed November 29, 2001, the WECA raised a host of adverse environmental effects (e.g., blocked air and light for the three Square 43 townhouses to be surrounded by GWU's proposed high-rise building). The WECA may provide an affidavit from Square 43 owner and WECA Board Member Donald Kreuzer, who is an adversely affected Party. The WECA, if needed, could also provide copies of the relevant documents in the Case No. 01-21CP file.

And, despite GWU's August 17, 2001 and February 8, 2002 letters to the WECA and the Zoning Commission, respectively, GWU has still not notified Freshmen and Sophomores living <u>on campus</u> in the Foggy Bottom/West End Area that they are restricted from bringing cars to school or parking in the Foggy Bottom/West End Area. This information was neither published in GWU's catalog nor on its website, as promised. To date, the GWU only provided a copy of an undated "The George Washington University in the Community: GW Guide to Living Off Campus" for students living <u>off campus</u> (cover page, Table of Contents and p. 6 are provided in **Attachment C**). The WECA may provide one or more student witnesses to confirm GWU's noncompliance.

ZA sent a September 6, 2002 letter to the WECA, GWU and a non-profit corporation, which was not a Party to the case. In response to GWU's concerns, ZA tried to improperly add conditions to a Zoning Order. 11 DCMR §3029.5 only allow Parties (including GWU and the WECA) to file a Motion for Reconsideration of an Order within 10 days after publication of the Order. GWU did not file such a Motion; instead, it asked ZA to improperly add conditions through the backdoor. There is no authority in the Zoning Rules for DCRA to do so. As a consequence, on September 13th, the WECA responded (**Attachment D**). WECA's letter additionally indicated that the Foundation has still not received a $100,000 check and that GWU's attempted Rube

Goldberg scheme failed since the ZA did not agree to serve as an Escrow Agent. In its August 28th FOIA, the WECA specifically requested a copy of the ZA's notification to GWU to this effect.

With respect to daily fines, 11 DCMR §3201.1, cited above, is clear that daily fines to be issued by DCRA for each violation of a Zoning Order condition are nondiscretionary, i.e., only the amount of the fines DCRA levies is discretionary. To date, DCRA has not yet issued any citation although the ZA reported to the WECA on August 29th that it unsuccessfully attempted to do so on August 28th.

With respect to its August 28th FOIA request (**Attachment E**, including the ZA's acknowledgment of receipt), DCRA has still not provided any of the requested information, which, by law, was due no later than September 12th (DC Code §2-532(c)). As indicated above, this included but was not limited to the ZA's notification to GWU that he would not agree to serve as an Escrow Agent and the ZA's August 28th notification to GWU of its noncompliance with the condition requiring issuance of a $100,000 check payable to the Foundation no later than on the date of issuance of a CofO. The WECA intends to submit these documents and possibly others after DCRA provides the requested information.

If you have any questions about this filing, please call Barbara Kahlow on 226-3058. Thank you.

Sincerely,

John C. Batham

John C. Batham
President

Attachments

cc The Honorable Carol J. Mitten, Chair, Zoning Commission
Alan Bergstein, Esq., Corporation Counsel
Elizabeth Elliott, Chair, ANC-2A
Phil Feola, Esq., Counsel for GWU