Testimony of Barbara Kahlow
representing the West End Citizens Association
before the Board of Zoning Adjustment on BZA Appeal No. 16950
Appeal of DCRA & ZA's Administrative Decisions on 1957 E Street, NW
December 17, 2002

This afternoon, along with Sara Maddux, I, Barbara Kahlow, am representing the Appellant, the West End Citizens Association (WECA). The WECA, founded in 1910 and one of the oldest citizen associations in DC, is the principal community organization in the George Washington University (GWU) neighborhood.[1] Unfortunately, the 1957 E Street land use case before you today has been going on for over 11 years (see my attached history of key dates). The Board of Zoning Adjustment (BZA) has been involved in the case since September 2000.

Historical Summary

In September 2000, both the WECA and the Foggy Bottom and West End Advisory Neighborhood Commission (ANC-2A) filed motions with the BZA, which were referred to the Zoning Administrator (ZA). On January 19, 2001, ANC-2A filed BZA Appeal No. 16701 objecting to the ZA's December 28, 2000 improper issuance of a building permit to GWU for 1957 E Street, NW. On April 10, 2001, the BZA granted "Party" status to the WECA in this Appeal. On June 5th, the BZA granted the community's Appeal, thereby requiring GWU to file a Planned Unit Development (PUD) Modification Request with the Zoning Commission (ZC).

On August 31st, GWU filed a PUD Modification Request. On November 15th, the ZC granted "Party" status to the WECA. On August 16, 2002, the final ZC Order approving GWU's PUD modification was published.

I regret that the WECA was forced to again appeal to the BZA the administrative decisions since August 16th by the Department of Consumer and Regulatory Affairs (DCRA) generally and the ZA specifically relating to 1957 E Street. On August 7, 2001 (i.e., a year before), the BZA issued Order No. 16701A. It stated, "To avoid the continued uncertainties, expense, and delay of litigation, whether in administrative or judicial setting, the parties are strongly encouraged to pursue settlement of this PUD dispute."

Based on the BZA's direction and in good faith, the WECA entered settlement negotiations with GWU, with active participation by the DC Corporation Counsel. The bottom line is that the WECA trusted GWU to meet the terms of its August 17, 2001 binding contract (the "Agreement") with the WECA and the ZC's August 16, 2002 Order. And, the WECA relied on the fact that DCRA would enforce any zoning Orders. Sadly: (1) GWU has failed to comply with multiple terms and conditions; (2) DCRA improperly issued a Certificate of Occupancy (CofO) despite GWU's noncompliance; and (3) since then, DCRA has failed to issue the required daily fines.

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[1] In contrast, the sister Foggy Bottom Association is centered around the Foggy Bottom Historic District.

Case No. 16950
Exhibit No. 32

Board of Zoning Adjustment
District of Columbia
CASE NO.16950
EXHIBIT NO.32

DC Policy

Mayor Williams' recently-issued District of Columbia Strategic Neighborhood Action Plan (SNAP) for the Foggy Bottom, GWU and West End area includes the Mayor's desire for DC enforcement actions with meaningful fines when GWU is not in compliance (see Attachment A in WECA's 12/2/02 Additional Documents). On August 28, 2002, ZA sent GWU an e-mail, captioned "Feeding Program Payment," stating that GWU is not in compliance with ZC Order No. 746-C (see Attachment B in WECA's 12/2/02 Additional Documents). ZA stated, "We are informed by the Foundation that it has not received the first $100,000 contribution. If that is so, it would appear that GWU is now in violation of that Order and should take immediate steps to bring itself into compliance."

However, since August 28th (i.e., for 3 1/2 months), DCRA has failed to issue the required daily fines. An August 29th internal DC e-mail explains, "I'm looking to see if we can just not enforce those kinds of Zoning Commission orders" (see Attachment C in WECA's 12/2/02 Additional Documents). This revelation is incredible and, no doubt, troublesome not only to the WECA but also to the BZA.

Appeal

The WECA's Appeal took exception to the following administrative decisions:

(1) DCRA issued an August 16, 2002 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; and
(3) ZA tried to improperly add conditions to a Zoning Order.

As detailed in the WECA's August 20, 2002 letter to DCRA (Attachment A in the Appeal), 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.

No Daily Fines Yet

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 §3201.1 provides that a property owner in violation of the provisions of 11 DCMR "shall ... be punished by a fine ... for each and every day the violation continues." 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."

With respect to daily fines, 11 DCMR §3201.1 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. Nonetheless, to date, DCRA has not yet issued any citation or fine.

No $100,000 Contribution Yet to Foggy Bottom Feeding Program Foundation

Condition No. 7 in GWU's August 17, 2001 contract with the WECA (the "Agreement") states, "*Subsidy to Foundation.* GW shall provide $100,000 after issuance by the Zoning Commission of its PUD modification Order, $100,000 upon issuance of the Certificate of Occupancy, and then $100,000 annually on the anniversary of the Certificate of Occupancy, for a period of three years, for a total of $500,000, to a non-profit entity ("Foundation")."

As mentioned in the WECA's August 20th filing (Attachment A in the Appeal), on August 14th (i.e., **before** DCRA issuance of a CofO), the WECA sent a fax to DCRA about Condition No. 9(a) in the Order. It stated,

> ... before DCRA can legally issue a CofO it must ensure that GWU is in compliance with the PUD conditions. The conditions include a requirement for GWU to write a check for $100,000 to the Foggy Bottom Feeding Program Foundation, which GWU has not yet done (p. 10 of ZC Order No. 746-C). The condition reads, "The University shall contribute $500,000 over five (5) years ... The $500,000 contribution will be $100,000 a year for five (5) years to the Foggy Bottom Feeding Program Foundation, Inc. ... The first $100,000 contribution shall be made on the date of the Certificate of Occupancy for the Subject Property.

The Foundation was incorporated on March 27th. However, it could not complete establishment of a new Feeding Program until the written Order was in hand. GWU acknowledged this in a March 29th memorandum to the WECA. GWU's memorandum stated, "The University representatives named in the Articles [of Incorporation] look forward to working with the representatives of the West End Citizens Association, once the GW PUD modification is approved."

On August 16th (i.e., on the date of publication of the Order), GWU unilaterally tried to change the terms of the Order by setting up a Rube Goldberg-type non-traditional escrow account - with conditions no where found in the Order - in its bank (Riggs) instead of in the Foundation's bank (First Union). The Riggs account is captioned "George Washington University Elliott School Escrow Account" but includes no mention of ZA Kelly, GWU's intended escrow agent. Also,

there is no mention whatsoever of the Foundation even though the Order requires GWU to issue a check to the Foundation. And, the Employer Identification Number (EIN) for the account is undoubtedly that of GWU instead of that for the Foundation. This is clearly a sham account, which clearly is in violation of the Order.

On August 19th, the ZA sent an e-mail to GWU saying, "I need to go on record that the Zoning Administrator has not agreed with GWU to be an escrow agent and that any type of arrangement to do so would require agreement of GWU, WECA, and DCRA in a mutual action to comply with the BZA order" (see Attachment B in WECA's 12/2/02 Additional Documents). Additionally, DCRA's August 28th e-mail to GWU, saying "GWU is now in violation of that Order and should take immediate steps to bring itself into compliance" (also in Attachment B), is proof positive of GWU's noncompliance.

Attachment B to the Appeal is a record of the ZA's ten 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.

The bottom line is that both **the GWU-WECA Agreement and Zoning Order No. 746-C do not require the feeding program to be operational as a precedent to GWU's first $100,000 contribution**. In fact, the ZC failed to approve GWU's April-May 2002 proposal to condition GWU's contribution to the Foundation on GWU's prior approval of the Foundation's budget ("as soon thereafter as a budget is approved by the Foundation and the University") and to provide no time limit for GWU's "approval," thus possibly delaying indefinitely the Foundation's work and the feeding program amenity to our community. GWU's noncompliance to date is evidence of its continuing intention to control its contribution to the Foundation and the Foundation's work.

On November 18th, in its oral discussion of GWU's November 4th non-Minor Modification Request, the ZC added a condition - without a public hearing - which substantially undercut its own Order. The Commission acted favorably on Vice Chairman Anthony Hood's recommendation regarding the feeding program to add "not affiliated with the university" (11/18/02 transcript, pp. 76-7). However, Condition 9(a) of the Order further provides, "In addition to the $500,000 contribution, the University shall pay for the build-out of University food service venues, if necessary, in an amount not to exceed $250,000. The University will also pay the cost of securing all necessary permits to operate the Feeding Program at the University venues" (p. 10).

In fact, the Foundation Board (including GWU) is considering a multiple-sites program, including at least one University-affiliated site, such as the new GWU Hospital cafeteria. Since most of the cafeterias in Foggy Bottom are GWU-affiliated, the effect of the ZC's change, if finalized, would be to strangle the new program to benefit the elderly and needy in Foggy Bottom and to forfeit the additional $250,000 amenity. As a consequence, the WECA intends to timely file a Motion for Reconsideration after the Revised Order is published.

Noncompliance with DC Environmental Policy Act

Paragraph No. 8 in GWU's August 17, 2001 contract with the WECA states, "*Environmental Compliance*. GW shall comply with the D.C. Environmental Policy Act ... **on all future campus construction projects**" (emphasis added, i.e., all projects after August 17, 2001). Condition No. 12 in the Decision part of the Order states, "The University shall comply with the D.C. Environmental Policy Act (D.C. Code § 6-981 *et seq.*), subject to any applicable amendments, regulations or judicial interpretation, on all future campus construction projects" (p. 12).

In the new GWU hospital case (BZA No. 16389), in a December 7, 1999 memorandum, the DC Department of Health commented,

> The final result of these studies and of our review of the methodology and results is that the 23rd Street corridor just south of Washington Circle will experience peak CO [carbon monoxide] concentrations that are just below the applicable health standard, with essentially no room to spare on the high side of the estimated range.
>
> The significance of this result is important because the replacement hospital project does not include any use of the existing facility, located on the east side of 23rd Street. The consultant's study does not take into account any traffic that may be generated by future uses for the existing building or the land, which that structure occupies. Future uses for that building will need to take into account that it appears for now, the air resource south of Washington Circle is essentially used up by this project (and by existing traffic) (p. 2).

The Foggy Bottom Association's lawsuit regarding the proposed new hospital included GWU's noncompliance with the DC Environmental Policy Act.

Since the August 17, 2001 GWU-WECA Agreement was co-signed, GWU has filed three major projects in the 23rd Street Corridor just South of Washington Circle. All were approved by the ZC, with Orders published on April 12, 2002 (in Order Nos. 957, 958 & 954, respectively): Lot 55 in Square 57 (Case No. 01-20CP), Lot 26 in Square 43 (Case No. 01-21CP), and Lot 30 in Square 56 (Case No. 01-25CP). Incredibly, the Orders for all three cases have no mention whatsoever of GWU's compliance with the DC Environmental Policy Act (DC Code §8-109.01 *et seq.*). DCRA's website states that,

> Every applicant for a building permit must first complete the EIF [Environmental Intake Form] for submission with the application for a permit. The purpose of the EIF is to assist DCRA staff in determining whether or not an EISF [Environmental Impact Screening Form] with supporting documentation is required. All forms must be fully completed by each applicant before a determination can be made. If an EISF is required, DCRA's final determination, based on input from reviewing agencies, will indicate whether or not the proposed project is likely to have substantial negative impact on the

community, and whether or not an Environmental Impact Statement (EIS) is required (http://dcra.dc.gov/information/build_lar/environ_review/main.shtm).

DCRA's implementing rules at 20 DCMR §7204.1 indicate that EISFs are required for major actions (defined as an action costing $1 million or more) which are not specifically exempted by 20 DCMR §§7202.1 or 7202.2. Thus, EISFs were required for all three of these major projects.

For example, for Square 43, which case 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 DCRA's 7-page EISF, 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). WECA Board Member Donald Kreuzer, who owns three townhouses in Square 43, is clearly an adversely affected Party. Only recently, he accidentally learned, after Verizon added equipment to his properties without his consent, that part of his property is over the property line. Undoubtedly, an EISF or EIS would have uncovered this peculiarity.

Curiously, Paragraphs 2 in the Orders for Square 43 and Square 57 state, "Pursuant to Commission practices relating to campus plans, this application was not accompanied by a self-certification form or a memorandum from the Zoning Administrator certifying the required zoning relief." In contrast the Order for Square 56 states, "A zoning certification from the Zoning Administrator confirming the project's conformance with all of the applicable zoning standards except the penthouse requirements were [sic] received into the record" (49 DCR 3549).

To enforce Order No. 746-C, the ZA should review each GWU project for compliance with the DC Environmental Policy Act.

GWU's noncompliance is not a trivial matter due to DC's noncompliance with the Clean Air Act (CAA). In fact, on November 13, 2002, the Environmental Protection Agency (EPA) proposed to reclassify DC from a "serious" ozone nonattainment area to a "severe" ozone nonattainment area due to DC's failure to attain the 1-hour ozone National Ambient Air Quality Standards (NAAQS) by November 15, 1999, the date set forth in the CAA (67 FR 68805-14). The effect of this reclassification will be to set a new attainment deadline for DC and to require DC to submit a State Implementation Plan (SIP) revision that meets the CAA's requirements. These include enforceable transportation control strategies and measures to offset projected growth in vehicle miles traveled or number of vehicle trips. If DC fails to submit a complete severe area SIP, EPA

will start a sanctions clock. The bottom line is that DC needs to consistently consider the traffic impact of each new GWU project.

No Student Parking Restriction Yet

On August 17, 2001, GWU Vice President and Treasurer Louis Katz sent WECA an accompanying letter to the GWU-WECA Agreement restricting Freshmen and Sophomores living in the Foggy Bottom /West End Area from bringing cars to school or parking in the Foggy Bottom/West End Area. GWU agreed to "publish in University documents (e.g., its catalog and Internet communications, including its website) its policy that Freshmen and Sophomores living in the Foggy Bottom/West End Area should not bring cars to school. For those few granted exceptions by the University, the University will arrange for parking in University parking facilities."

The August 17, 2001 letter was made a part of the Commission's case record. On February 8, 2002, GWU submitted a followup letter to the Commission which stated, "the University will voluntarily adopt and publish this policy beginning in University documents for Fall 2002." The Order states, "the University, by letter dated February 8, 2002, made part of this record, will voluntarily adopt and publish this [student parking restriction] policy beginning in University documents for Fall 2002" (#32, p. 7).

On August 16, 2002, the WECA asked GWU in an e-mail (cc ZA Kelly) for proof of compliance with this provision. To date, GWU has not provided the necessary proof.

In fact, GWU has still not notified Freshmen and Sophomores living on campus 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, GWU only provided a copy of an undated "The George Washington University in the Community: GW Guide to Living Off Campus" for students living off campus.

In fact, GWU has not yet implemented the promised parking restriction policy. Attachment E to WECA's December 2nd Additional Documents includes e-mails from two GWU sophomores regarding the absence by GWU of the promised parking restriction policy for freshmen and sophomores living in the Foggy Bottom/West End Area.

Miss Maddux will provide documented proof of the adverse consequences to WECA Members and the community of this continuing noncompliance.

GWU's Noncompliance with Additional Zoning Orders

Attachment F to WECA's December 2nd Additional Documents is a copy of a November 18th article in one of GWU's publications entitled "Residents cite GW Hospital violations." In preparation for today's testimony, I received an earful from community residents about additional conditions for which GWU is out of compliance with recent zoning orders. Three examples

include: very early and very late hours of operation of the loading dock at the new hospital in Square 40, open vs. closed loading dock doors at the new hospital, and inclusion of intramural athletics at the Health and Wellness Center in Square 42. The bottom line is that GWU is a bad neighbor since it consistently fails to comply with conditions in BZA and ZC Orders, i.e., not only for 1957 E Street but also for other projects as well.

Improper ZA Attempt to Add Conditions to ZC Order

The 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, the 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 the 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 (see Attachment D in the Appeal). 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, as indicated above, the ZA did not agree to serve as an Escrow Agent.

Summary

The WECA requests that, until GWU is in full compliance with the GWU-WECA Agreement and Order No. 746-C - including issuance of an unconditional $100,000 check to the Foundation and publication of the promised nonambiguous student parking restriction policy - the BZA direct DCRA to:

(1) under 12 DCMR §1184.3, immediately revoke the August 16, 2002 CofO for the dormitory use in the western part of 1957 E Street, i.e., to not allow students to live in the building starting in January 2003;
(2) not issue a CofO for the institutional uses in the eastern part of 1957 E Street; and
(3) under 11 DCMR §3201, retroactively (back to August 16, 2002) and in the future, issue daily maximum fines "for each and every day the violation continues" – not only for the 1957 E Street PUD violations but also for those related to the not-yet-completed projects in Squares 43, 56 and 57.

The WECA requests that the entire file for Appeal No. 16701 be included in the record of this Appeal (No. 16950).

Key History of 1957 E Street: 1991-2002

1991-1993

1991 - Associated General Contractors (AGC) filed a PUD application

11/15/93 - ZC approved the AGC PUD (Case No. 93-5F/91-18P, Order No. 746)

1999

6/99 - GWU purchased 1957 E Street from the AGC

2000

2/29/00 - without required prior referral to ANC-2A, DCRA issued a Raze Permit

4/12/00 - unanimous ANC-2A resolution vs. GWU's "secret" change in plans for the PUD

9/00 - ANC-2A & WECA filed motions with ZC & BZA, which were referred to ZA

12/28/00 - without required prior referral to ANC-2A, DCRA/ZA issued a Building Permit

2001

1/19/01 - ANC-2A filed Appeal No. 16701 relating to the improperly-issued Building Permit

4/10/01 - BZA granted "Party" status to Intervener WECA

5/1/01 - WECA testified on Appeal No. 16701 (see Exh. H for Partial History: 1991-2001)

6/5/01 - BZA granted the community's Appeal in Order No. 16701

8/7/01 - BZA issued Order No. 16701A, which stated "To avoid the continued uncertainties, expense, and delay of litigation, whether in administrative or judicial setting, the parties are strongly encouraged to pursue settlement of this PUD dispute"

8/17/01 - WECA co-signed a binding contract (the "Agreement") with GWU

8/31/01 - GWU filed a PUD Modification Request with ZC

11/15/01 - ZC granted "Party" status to WECA

2002

1/17/02 - WECA testified in support of GWU's PUD Modification Request

6/10/02 - ZC's oral decision to approve GWU's PUD Modification Request

8/14/02 - WECA alerted DCRA not to issue a CofO until GWU issues the required $100,000 check to the Foggy Bottom Feeding Program Foundation

8/16/02 - ZC's Final Order No. 746-C was published

8/16/02 - DCRA -- **without ZA's knowledge** -- issued a CofO

8/20/02 - WECA wrote DCRA & ZA about GWU's noncompliance with at least three provisions in ZC Order No. 746-C

9/5/02 - WECA filed a Notice of Intent to File an Appeal

9/23/02 - WECA filed Appeal No 16950

11/4/02 - GWU filed a PUD "Minor" Modification Request with the ZC

11/8/02 - WECA submitted extensive argument in opposition to GWU's **non-Minor** Modification Request

11/18/02 - without a public hearing, ZC orally granted GWU's Modification Request -- a Revised Order has not yet been published but the **WECA intends to submit a timely Motion for Reconsideration** since the ZC's oral decision substantially revised the Order without a public hearing

12/2/02 - WECA submitted additional documents to support Appeal No. 16950