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

December 31, 2002

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The Honorable Geoffrey H. Griffis
Chairman
D.C. Board of Zoning Adjustment
441-4th Street, N.W. - Suite 210
Washington, DC 20001

Re: BZA Appeal No. 16950 - Additional Documents Supporting WECA's Appeal of DCRA & ZA's Administrative Decisions, 1957 E Street, N.W.

Dear Chairman Griffis and Members of the Board:

As requested by the Board of Zoning Adjustment (BZA) at its December 17, 2002 hearing on BZA Appeal No. 16950, enclosed herewith are additional documents for the record in support of the West End Citizens Association's (WECA's) appeal of the administrative decisions by the Department of Consumer and Regulatory Affairs (DCRA) generally and the Zoning Administrator (ZA) specifically regarding 1957 E Street, N.W. They include the following:

(1) Attachment A - copies of the BZA's three Orders (16701-A, 16701-B, and 16701-C) relating to the Foggy Bottom-West End community's successful appeal of the December 2000 administrative decision by the ZA in the issuance of a building permit for 1957 E Street, N.W.;

(2) Attachment B - a copy of the August 17, 2001 contractual settlement "Agreement" between the George Washington University (GWU), owner of the 1957 E Street property, and the WECA, which was negotiated at the specific behest of the BZA[1] and with the active participation and witness by the DC Corporation Counsel. In Order No. 16701-C, the BZA stated, "GW entered into a settlement agreement with WECA with respect to the PUD amenities and benefits and conditions that both parties believe should be included in any PUD modification order the [Zoning] Commission might approve"; and

(3) Attachment C - arguments to support the WECA's view that GWU must produce for this Appeal No. 16950 the Environmental Impact Screening Forms (EISFs) for all cases GWU initiated since its co-signature of Paragraph No. 8 in the August 17, 2001 contractual settlement "Agreement" - also embodied in Condition No. 12 in Zoning Order No. 746-C - which requires GWU to comply with the DC Environmental Policy Act (DCEPA), effective August 17, 2001. This provision was key before the WECA would agree to co-sign any Agreement. Part of the WECA's logic included:

BZA
Case No. 16950
Exhibit No. 36

[1]BZA Order No. 16701-A stated, "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."

Board of Zoning Adjustment
District of Columbia
CASE NO.16950
EXHIBIT NO.36

(a) DCRA's October 2000 error[2] in opining that the 1957 E Street property was in the Central Employment Area (CEA) and, thus exempt from DCEPA, when, in fact, DC law specifically indicated that the 1957 E Street property was outside of the CEA and, thus, subject to DCEPA; and

(b) the legal arguments advanced in November 2000 by the Foggy Bottom-West End community before the DC Court of Appeals in Foggy Bottom Association v. DC BZA (791 A.2d 64 (D.C. App. 2002)), including about the BZA's refusal to postpone its approval of GWU's proposed new hospital until after (i) a DCEPA-required EISF was filed, and (ii) the need for an Environmental Impact Statement (EIS) had been determined.

11 DCMR § 3200.2 provides for appeals to the BZA of "any decision of an administrative officer granting ... a certificate of occupancy." 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." In fact, DCEPA case law cites 11 DCMR § 3205.4. In Foggy Bottom Association v. DC BZA, the court's opinion states, "Failure to abide by the conditions, in whole or in part, shall be grounds for revocation of any building permit or certificate of occupancy" (*Id* at 13-14) and "the conditions attached to the approval are binding, and that subsequent issuance of the building permit or certificate of occupancy depends on compliance with them. Furthermore, such permits or certificates, once issued, can also be revoked if those conditions are not met" (*Id* at 32-3).

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

Sincerely,

John C. Batham
President

Attachments

cc The Honorable Carol J. Mitten, Chair, Zoning Commission
Alan Bergstein, Esq., Corporation Counsel
ANC-2A (c/o St. Mary's Court)
Phil Feola, Esq., Counsel for GWU

[2] In an October 23, 2000 letter (included in the ZA's 4/25/01 submission in Appeal No. 16701) from DCRA/Noble to GWU/Honey, DCRA erroneously told GWU that the 1957 E Street site was located within the CEA and, thus, was exempt from the DCEPA.

Attachment A

48 D.C. REG. 8273,

DISTRICT OF COLUMBIA REGISTER

ISSUE: Volume 48, Number 35

ISSUE DATE: **August** 31, 2001

SUBJECT: BOARDS, COMMISSIONS, AND AGENCIES

AGENCY: GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

48 D.C. REG. 8273

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To view a specific page, enter p* and the page number. E.G. p*1.

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 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, [*8274] 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: [*8275]

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). [*8276]

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

FINAL DATE OF ORDER: August 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."

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*48 D.C. REG. 8559, **

DISTRICT OF COLUMBIA REGISTER

ISSUE: Volume 48, Number 36

ISSUE DATE: **September** 7, 2001

SUBJECT: BOARDS, COMMISSIONS, AND AGENCIES

AGENCY: GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

48 D.C. REG. 8559

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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 NO. 16701-B

ORDER EXTENDING STAY

Due to the expiration at the close of business today, August 21, 2001, of the order (BZA Order No. 16701-A, dated August 7, 2001) granting The George Washington University (GW) a temporary stay of the effectiveness of the Board's final Decision and Order in the above-referenced appeal, the Board of Zoning Adjustment reviewed GW's Supplemental Motion to Stay BZA Order No. 16701, dated August 13, 2001, in an executive session on August 21, 2001. The Board also reviewed the opposition to the motion filed by Appellant Advisory Neighborhood Commission 2A, dated August 20, 2001, and the letter in support of the motion filed by Intervenor **West End Citizens** Association, dated August 20, 2001.

As time is of the essence, the Board is issuing a summary order today. A full order stating the reasons for the Board's action will be issued shortly.

After reviewing the supplemental motion and the responses thereto, the Board ORDERED the stay granted in BZA Order No. 16701-A EXTENDED until the Zoning Commission's written

order taking final action on GW's PUD modification request (whether approving, approving with modification, or disapproving the request) becomes final and effective. If the Zoning Commission approves a PUD modification, the stay shall be automatically extended until the Department of Consumer and Regulatory Affairs issues GW a [*8560] building permit pursuant to the PUD modification order. If GW withdraws its PUD modification request, the stay shall terminate automatically.

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

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

DATE OF ORDER: August 21, 2001

PURSUANT TO 11 DCMR § 3125.6, THIS 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.

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*48 D.C. REG. 9266, **

DISTRICT OF COLUMBIA REGISTER

ISSUE: Volume 48, Number 40

ISSUE DATE: **October** 5, 2001

SUBJECT: BOARDS, COMMISSIONS, AND AGENCIES

AGENCY: GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

48 D.C. REG. 9266

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Appeal No. 16701-C 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 DATES: June 5, 2001; July 31, 2001; August 3, 2001; August 21, 2001; and September 4, 2001

ORDER NO. 16701 - C

ORDER EXTENDING STAY

and

DIRECTING THAT MOTION FOR RECONSIDERATION BE HELD IN ABEYANCE

This matter is before the Board of Zoning Adjustment pursuant to post-hearing motions filed by The George Washington University (GW) for reconsideration of the Board's final Decision and Order in this appeal, BZA Order No. 16701 dated July 12, 2001, and for a stay of the effectiveness of the Decision and Order. After several meetings in which the Board discussed the merits, the Board determined at its regularly scheduled public meeting held September 4, 2001, to hold the motion for reconsideration in abeyance and, at its executive session held August 21, 2001, to stay the effectiveness of the Decision and Order pending completion of related Planned Unit Development (PUD) modification proceedings by the Zoning Commission.

Procedural History

On January 19, 2001, the appellant, Advisory Neighborhood Commission (ANC) 2A, filed an appeal with the Board challenging on various grounds the decision of the Zoning Administrator to approve the issuance of a building permit to GW 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 PUD and related Zoning Map amendment for the property. The Zoning [*9267] Administrator is the Appellee in this case. Pursuant to 11 DCMR § 3199.1, GW, as the owner of the property that is the subject of the appeal, is automatically a party to the case. The Board granted **West End Citizens** Association (WECA) party status to intervene in the appeal in support of the appellant.

After a public hearing, the Board concluded that the Zoning Administrator had erred in approving the issuance of the building permit to construct the PUD because the building plans did not, as required by 11 DCMR § 2407.2 (1991), conform in all respects to the plans approved by the Zoning Commission, as modified by the PUD order. In its July 12, 2001, Decision and Order, the Board granted the appeal in part as to the Zoning Administrator's lack of authority to approve the (1) elimination of one of two separate garage entrances, (2) elimination of balconies on the residential component of the building, (3) change in exterior materials, and (4) change in use of the PUD from commercial and residential use to institutional or university use. The Board also denied the appeal in part on several grounds that are not relevant here. Pursuant to D.C. Code, 2001 Ed. § 6-641.07(g)(4) (formerly codified at D.C. Code § 5-424(g)(4) (1994 Repl.)), the Board reversed the Zoning Administrator's approval of the issuance of the building permit. Ex. 50.

GW timely filed a Motion for Reconsideration and to Re-Open the Record hereafter, the "Motion for Reconsideration" on July 20, 2001, asking the Board to accept new evidence and reconsider its decision that the Zoning Administrator lacked authority to approve the four PUD modifications identified above. Ex. 56. WECA opposed the motion on July 23, 2001, arguing that it contained factual errors and requesting a hearing on the new materials included in the motion. Ex. 57. ANC 2A opposed the motion on July 27, 2001, and requested "that this PUD be returned immediately to the Zoning Commission for review." Ex. 59.

On July 27, 2001, GW filed a Motion for Stay of Decision asking the Board to stay the effectiveness of its Decision and Order pursuant to 11 DCMR § 3126.9 "until such time as the Board considers and reaches a decision regarding the University's Motion for Reconsideration and to Re-open the Record." Ex. 61. GW stated that construction on the 1957 E Street building was continuing pursuant to the disputed permit, and that if the Decision and Order were not stayed, GW would incur approximately $ 12 million in construction-related costs to stop work. GW filed an affidavit from Arthur J. Bean, Director of GW's Construction Programs, on July 30, 2001, providing additional information on the anticipated costs. Ex. 63.

Also on July 30th, the Board received a letter from ANC 2A in opposition to the requested stay. The ANC stated that it had not received a copy of GW's motion, and was thus prevented from responding to the motion. In its letter, the ANC again "respectfully requests that this PUD be returned immediately to the Zoning Commission for review." Ex. 65. WECA also submitted a partial response to the Motion for Stay on July 30th, arguing that GW's motion was not timely filed within the ten-day period after issuance of the Board's Decision and Order; that the motion was incomplete, since it did not address the four-part test used in deciding motions for stay; and that in any event, GW could not meet the four-part test. Ex. 62. [*9268]

The Board, with four members present, took up consideration of GW's Motion for

Reconsideration and Motion for Stay at a special public meeting on July 31, 2001. Board Member Anne M. Renshaw moved to deny GW's Motion for Reconsideration; however, her motion failed for lack of a second. Tr. at 79. Chairperson Sheila Cross Reid then moved to grant GW's Motion for Reconsideration for purposes of discussion, and Member Geoffrey H. Griffis seconded the motion. Tr. at 79-80. After discussion of the balconies, only one of the four matters that were the subject of GW's Motion for Reconsideration, bogged down, Member Griffis called for the question. The Board then voted 2 - 2 - 1; with two members voting grant reconsideration, two members opposed, and one member, the Zoning Commission representative, not present, not voting. Tr. at 94. Chairperson Reid then moved to reopen the record and rehear the matters addressed in the Motion for Reconsideration, which motion was seconded by Member Griffis. This motion also resulted in a 2 - 2 - 1 tie vote, with the Zoning Commission representative not present, not voting. Tr. at 94. The Board then decided to take the Motion for Reconsideration up again at its next regularly scheduled decision meeting on September 4, 2001. Tr. at 97.

The Board also discussed GW's Motion for Stay on July 31, 2001. Since the ANC and WECA had not had an adequate time in which to respond to the motion and supporting affidavit, the Board scheduled the motion for a special decision meeting on August 3rd, with the ANC and WECA to submit any additional responses to the motion by August 2nd. Tr. at 97-105.

On August 1, 2001, WECA filed additional objections to GW's Motion for Stay, including objections to the scheduling of the decision meeting on the motion. WECA again argued that GW had not demonstrated that it met the four-part test for stays. Ex. 64.

On August 2, 2001, ANC 2A filed a letter with the Board, authorizing James T. Draude from the law firm Driscoll & Draude to represent the ANC. Ex. 67. The ANC also filed a letter opposing both GW's Motion for Reconsideration and Motion for Stay. The ANC argued that as a result of the Board's tie vote on the Motion for Reconsideration on July 31, 2001, the Motion for Reconsideration was denied, making GW's Motion for Stay moot. The ANC argued that the Board lacks authority to reconsider a motion for reconsideration. It also argued that since Zoning Commissioner Herbert M. Franklin abstained from voting on the merits of the appeal on June 3, 2001, on the grounds that the appeal, if granted by the Board, might result in a Zoning Commission PUD proceeding, the remaining Zoning Commission members would be disqualified from participating in the Board case. Finally, the ANC stated that it had not received a copy of the Motion for Stay, despite the fact that GW certified that it was hand-delivered to the ANC. With the supplemental affidavit filed by GW on July 30, 2001, the ANC believed its response would not be due until August 6th at the earliest. The ANC concluded that for those reasons, any action by the Board on GW's Motion for Stay on August 3rd would be improper. Ex. 68.

GW filed a response to WECA's submissions on August 2, 2001, arguing that in light of the exigent circumstances, the Board could properly waive the normal seven-day time period allowed for response to post-hearing motions. GW pointed out that as a result of the Board's customary August recess, if the Board did not take up the Motion for Stay as soon as possible, [*9269] the Department of Consumer and Regulatory Affairs would be left without any guidance as to the disputed building permit. Ex. 69.

As Commissioner Franklin was unavailable due to an extended vacation, the Zoning Commission designated its Chairperson to participate in and decide on the post-hearing motions. At its August 3, 2001, special public meeting, the Board, by consensus, deferred action on GW's Motion for Stay, and decided instead, on its own motion, to issue a temporary stay until August 21, 2001. The Board selected that date based on information from the Zoning Commission Chairperson that the Zoning Commission was prepared to convene a special public meeting on August 21, 2001, to entertain an application from GW to amend the PUD. The Board, voting 4 - 0 - 1, with one member not present, not voting,

granted GW a temporary stay in order to afford it the opportunity to explore the possibility of settlement negotiations with ANC 2A and WECA; to file a request with the Zoning Commission for modification of the PUD; and to supplement its Motion for Stay.

In its written order dated August 7, 2001, BZA Order No. 16701-A, Order Granting Temporary Stay, the Board established several deadlines within the temporary stay period. First, GW was given until Monday, August 13th, by which to file with the Zoning Commission a written PUD modification request. BZA Order 16701-A specified that any PUD modification request that GW might file would be without prejudice to the arguments advanced by GW in the BZA appeal case. Second, in accordance with 11 DCMR § 3030.8, ANC 2A, the only party to the PUD proceedings, was given until August 20th to respond to any request that GW might file with the Zoning Commission. Third, BZA Order 16701-A directed GW to file by August 20th, a written status report with the Zoning Commission, with a copy provided to the Board, regarding its request for PUD modification and the status of any settlement negotiations. Due to the limited time available, the order did not require ANC 2A to provide a written status report, but provided that both GW and ANC 2A were to provide oral reports to the Zoning Commission during the August 21st Zoning Commission meeting. The order also provided that WECA could request the Zoning Commission for an opportunity to present an oral report. Fourth, the order directed that any corrected or revised motion for stay by GW was to be filed with the Board by August 13th, with responses from ANC 2A and WECA due by August 20th. Finally, with the exception of the corrected or revised motion for stay, all submissions and reports due pursuant to the order were to be restricted to PUD modification issues. Ex. 71.

On August 13, 2001, GW filed a Supplemental Motion to Stay BZA Order No. 16701 until such time as the Board decides GW's Motion for Reconsideration. GW argues first that it will be irreparably harmed if a stay is not granted as a result of the costs that would be incurred in stopping construction work. GW also states that an indefinite suspension of construction would seriously harm the academic reputation and functioning of the Elliott School of International Affairs, which has been anticipating the availability of the new building for the 2002 academic year, as well as that of the Law School, which expects to move into the existing Elliott School building. Finally, a delay in the completion of the building would hamper GW's goal of increasing student housing on or near campus. Second, GW argues that a stay will not harm the appellants because the risk of continued construction falls entirely upon GW, not the appellants. GW acknowledges that if the Board ultimately denies its Motion for Reconsideration, GW will [*9270] either need to obtain Zoning Commission approval for its present plans or modify them to comport with the original PUD approval. Third, GW argues that the public interest favors a stay because the citizens of the District of Columbia have a great stake in the continued success of the University. Finally, citing federal case law relating to stays, GW argues that where the balance of hardships and the public interest weigh heavily in favor of a stay, a stay will issue if the moving party has demonstrated that there are serious issues going to the merits of its claims. Ex. 74.

GW filed a request to modify the PUD with the Zoning Commission on August 13, 2001, asking that the PUD be modified to permit the elimination of the garage door entrance, the elimination of the balconies, the change in building materials, and the change in use to institutional use. Ex. 79. Also, on August 13th, GW filed a Supplemental Motion to Stay BZA Order No. 16701 with the Board. Ex. 74. Subsequently, GW entered into a settlement agreement with WECA with respect to the PUD amenities and benefits and conditions that both parties believe should be included in any PUD modification order the Commission might approve. GW, however, was not able to arrive at an amicable resolution of the ANC issues by the August 20th status report deadline. Ex. 79.

On August 20, 2001, ANC 2A filed an opposition to GW's Supplemental Motion for Stay. The ANC argues that the Board lacks authority and jurisdiction to rule on GW's motion or to take

further action in this case. The ANC argues that the effect of the Board's tie votes on July 31, 2001, on the motion to grant GW's Motion for Reconsideration and the motion to re-open the record, was to deny GW's Motion for Reconsideration. The ANC argues that as a result, all of the Board's subsequent actions, including its decision to grant a temporary stay and to schedule further consideration of GW's Motion for Reconsideration, are invalid. Finally, the ANC argues that when GW continued construction after the ANC had filed its appeal challenging the building permit, GW assumed the risk that the permit might be ultimately found to be in error and that any harm that GW might suffer if a stay is not granted would be self-inflicted. Ex. 77.

WECA filed a letter, dated August 20, 2001, supporting a stay until the Zoning Commission issues a final order on GW's PUD modification request. Ex. 78.

Since BZA Order No. 16701-A, the Order Granting Temporary Stay, was due to expire at the close of business on August 21, 2001, the Board met in executive session on August 21st to review and consider GW's Supplemental Motion for Stay. After reviewing the motion and the responses thereto, the Board, voting 4 - 0 - 1, with one member not present, not voting, decided to extend the stay until the Zoning Commission's written order taking final action on GW's PUD modification request becomes final and effective. The Board ordered that if the Zoning Commission approves a PUD modification, the stay shall be automatically extended until the Department of Consumer and Regulatory Affairs issues GW a building permit pursuant to the PUD modification order. If GW withdraws its PUD modification request, the stay shall terminate automatically. Because time was of the essence, the Board issued a summary order, to be followed by a full order, this order, stating the Board's reasons for its actions. Ex. 80. [*9271]

The Board took up GW's Motion for Reconsideration at its September 4, 2001, regularly-scheduled decision meeting and voted 5 - 0 - 0 to defer consideration of the motion in accordance with the terms as the stay order.

Jurisdiction--The Effect of the Tie Votes

Under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 799, as amended; D.C. Code, 2001 Ed. § 6-641.07(h)), "The concurring vote of not less than a full majority of the members of the Board shall be necessary for any decision or order." The Board's Rules of Practice and Procedure likewise provide in 11 DCMR § 3125.2 that "The concurring vote of at least a full majority of the Board shall be necessary for any decision." Since the Board is composed of five members, a decision to grant GW's Motion for Reconsideration requires at least three affirmative votes.

A tie vote occurs when 50 percent of a body votes in favor of a motion and 50 percent votes against the motion. If there is no way to break a tie vote, the motion is lost. A tie vote that is not broken by a subsequent vote thus operates to deny the relief that was the subject of the motion. *See Morrison v. District of Columbia Bd. of Zoning Adjustment*, 422 A.2d 347, 349 n.5 (D.C. 1980) (tie votes); *see also Hubbard v. District of Columbia Bd. of Zoning Adjustment*, 366 A.2d 427, 428 (D.C. 1976) (failure to achieve super-majority vote tantamount to denial of motion for rehearing).

In the instant case, however, the Board determined that it was possible to break the tie vote on the chairperson's motions to grant GW's Motion for Reconsideration and to re-open the record by requesting the Zoning Commission representative on the Board to review the record and participate in the decision. A similar situation occurred in *Morrison*, 422 A.2d at 349, and is described as follows:

> At a meeting on May 2, 1979, the Board, by a 2-2 vote, was unable to dispose of a motion to vacate the previous order in the case. The Board deferred consideration of the issue until June 6 and requested the chairman, who had previously recused himself, to read the record and participate in the case. The chairman assented to the Board's request, noting that the matters originally causing his recusal had been resolved. On July 9, 1979, the Board issued a final order reinstating and incorporating its January 30, 1979 order, which granted intervenor's application.

The court noted that "Had the chairman not participated in the decision and the vote remained at 2-2, intervenor would have been denied the application." 422 A. 2d at 349 n.5. Likewise in *Hubbard*, the court acknowledged that a new vote could be taken on remand on a motion to grant a motion for rehearing that had failed for lack of the required number of votes, but found such a procedure unwarranted in light of the protracted history of the *Hubbard* case. 366 A.2d at 428. *See also Robert's Rules of Order Newly Revised* 44, 66-68, 265-84, 343-44 (Sarah Corbin Robert ed. 1970); *Webster's New World Robert's Rules of Order: Simplified and Applied* 65-66, 278-82 (1999) (tie votes, motions to reconsider the vote). [*9272]

Therefore, the chairperson's motions to grant reconsideration and to re-open the record are not lost as yet, and GW's Motion for Reconsideration remains pending. Contrary to the ANC's arguments, the Board has not lost jurisdiction over this case and may properly reschedule GW's Motion for Reconsideration for decision and decide GW's Supplemental Motion for Stay.

Composition of the Board

Herbert M. Franklin, the Zoning Commission representative on the Board of Zoning Adjustment for the hearing on the instant appeal, abstained from voting on the merits of the appeal, expressing concern that he might be called upon to decide a PUD modification request involving the subject property in a subsequent Zoning Commission proceeding. Tr. at 28-29 (June 5, 2001). Subsequently Commissioner Franklin went on an extended vacation, and was not available for the decision meetings at which GW's motions for reconsideration and stay were discussed. As a result of the tie votes on July 31, 2001, the Board asked the Zoning Commission to designate another Commissioner to participate in and decide on the post-hearing motions in this case. The Zoning Commission designated its Chairperson, Carol J. Mitten, who then read the record and transcripts in order to participate in the decision on the motions. n1 The ANC argues that since Commissioner Franklin abstained from voting, the other Commissioners would be disqualified from participating in this case.

n1 Under 11 DCMR § 3126.8, "No member shall vote on any post-hearing motion unless the member participated in and voted on the original decision, or the member read the transcript of the hearings and reviewed the record."

A Board member is not required to cast a vote on a case, and may abstain from voting. The fact that Commissioner Franklin stated that he was 'inclined to abstain' from voting, Tr. at 28 (June 5, 2001), however, does not mean that he was disqualified, or that another Zoning Commissioner designated to replace him during his absence should likewise abstain from voting. In this case, while Commissioner Franklin expressed concern about his participation given the possibility of future PUD modification proceedings, he was not required by law to disqualify himself.

The District of Columbia Court of Appeals reviewed the statutory relationship between the

Zoning Commission and the Board of Zoning Adjustment in *Sheridan-Kalorama Neighborhood Council v. District of Columbia Board of Zoning Adjustment*, 341 A.2d 312 (1975). The Zoning Act of 1938, which created the Board of Zoning Adjustment, expressly provides that one member of the Board shall be a member of the Zoning Commission or a member of the staff thereof, and that the Zoning Commission member of the Board serves, in effect, at the pleasure of the Commission. 341 A.2d at 317; *see* D.C. Code § 6-641.07(a)-(b). The court characterized the Board as "an adjunct of, and in a sense complimentary to, the Zoning Commission," 341 A.2d at 317, and recognized that the Zoning Commission member of the Board would be in regular contact with other Zoning Commission members and aware of their views as to matters actually pending before the Commission and matters of general policy. *Id.* at 317-18. The court stated that while the Zoning Commission member to the Board is thus authorized to express the Commission's general policy concerns to the Board and to cast his or her vote with full knowledge of the attitudes and policy positions of the other Commission [*9273] members, he or she is bound to cast a vote in the Board proceedings based exclusively on the Board's record of proceedings. *Id.* at 318. The court concluded that there is "no essential conflict between serving as the Zoning Commission member of the Board and casting a vote based exclusively upon the record before it." *Id.* Therefore, the Zoning Commission representative to the Board in the instant case is not disqualified from participating in and deciding GW's post-hearing motions, provided the Zoning Commission representative bases his or her decision exclusively on the Board's record of proceedings.

Timeliness of the Motion for Stay

The Board's Rules of Practice and Procedure in 11 DCMR ch. 31 do not specify a deadline for the filing of a motion for stay pending reconsideration. Under 11 DCMR § 3126.9, "Unless the Board orders otherwise, neither the filing nor the granting of a motion for reconsideration or rehearing shall automatically stay the effect of a final decision." *See also* 11 DCMR § 3130.4 (stays pending appeal). Since GW filed its Motion for Stay when its Motion for Reconsideration was pending, the Motion for Stay is timely.

The Four-Part Test for Granting Stays

To prevail on its motion for stay, GW 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 A.2d 340, 344 (D.C. 1988) (administrative agency required to consider the four specified factors in considering a motion for a stay). Where the last three factors strongly favor interim 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).

First, with construction well underway, the Board is concerned that the denial of a stay would result in substantial, if not irreparable, financial injury to GW. As shown by the affidavits of Arthur J. Bean, Director of GW's Construction Programs, and Louis H. Katz, GW Vice-President and Treasurer, GW would incur approximately $ 12 million in costs to halt construction, including costs associated with labor, materials, termination of contracts, stabilization and securing the construction site, remobilization, and lost income. Delay in construction could harm the academic reputation and functioning of the Elliot School, which anticipates relocating to the new building for the 2002 academic year, as well as that of the Law School, which anticipates using the existing Elliott School building. A delay would also frustrate GW's goal of increasing student housing.

Second, ANC 2A will not be harmed by a stay because, as GW acknowledges, it continues construction at its own risk, with full knowledge that it may have to modify its building plans to revert back to the 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. In opposing the stay, ANC 2A had requested that the PUD be returned [*9274] immediately to the Zoning Commission for review. Since GW's PUD modification request is presently pending before the Zoning Commission, the ANC is not harmed by the stay.

Third, for the same reasons that the ANC is not harmed by a stay, the public interest is not harmed by a stay.

Finally, because these three factors strongly favor relief, the Board has greater flexibility in weighing the criteria relating to GW's likelihood of success on the merits. *Barry*, 529 A.2d at 321. GW cites *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), for the proposition that where the balance of hardships and public interest weigh strongly in favor of interim relief, a stay will issue if the moving party has demonstrated serious issues going to the merits of its claims. This case stands for the proposition that a stay is appropriate where the moving party has raised questions that are "fair ground" for litigation and "for more deliberative investigation." In the instant case, GW's Motion for Reconsideration presents additional factual materials and arguments going to the merits that, if the record were to be re-opened and the issues reconsidered, would present fair ground for litigation and more deliberative investigation.

Moreover, under D.C. Code § 6-641.07(g)(4), the Board "may make such order as may be necessary to carry out its decision . . . ." Granting a stay in this case aids in carrying out the Board's decision. It allows GW and the parties to proceed with PUD modification proceedings before the Zoning Commission without the delay, uncertainties, and expense of further proceedings before the Board. Further Board proceedings may ultimately be unnecessary if the Zoning Commission approves GW's PUD modification request. Therefore, the Board has determined to stay the effectiveness of its decision pending completion of the PUD modification proceedings. If the Zoning Commission approves a PUD modification, the stay shall be extended until GW obtains a building permit pursuant to the terms of the PUD modification order. If, on the other hand, GW withdraws its request or the Zoning Commission disapproves the PUD modification, the stay shall terminate automatically.

Deferral of GW's Motion for Reconsideration

Since GW has filed a PUD modification request with the Zoning Commission which includes the four modifications identified by the Board in BZA Order No. 16701 as requiring Zoning Commission approval, the Board has determined that it is appropriate to hold GW's Motion for Reconsideration in abeyance pending completion of the Zoning Commission proceedings. Therefore, the Motion for Reconsideration shall be held in abeyance concurrent with the terms of the stay issued in this case.

ORDER

Based on the above, it is hereby **ORDERED** that:

[*9275]

1. The stay granted in BZA Order No. 16701-A, which stays the effectiveness of the Board's final Decision and Order, BZA Order No. 16701 dated July 12, 2001, is extended until such time as the Zoning Commission's written order taking final action on GW's PUD modification request (whether to approve, approve with modifications, or disapprove the request) becomes final and effective;

2. If the Zoning Commission approves a PUD modification, the stay shall

automatically be extended until the Department of Consumer and Regulatory Affairs issues GW a building permit pursuant to the PUD modification order, at which time the stay shall terminate automatically;

3. If the Zoning Commission disapproves GW's PUD modification request, the stay shall terminate automatically when the Commission's written order disapproving the modification becomes final and effective;

4. If GW withdraws its PUD modification request, the stay shall terminate automatically upon the filing with the Zoning Commission of the notice of withdrawal;

5. GW's Motion for Reconsideration and to Re-Open the Record shall be held in abeyance for so long as the stay remains in place pursuant to paragraphs 1 through 4 of this order; and

6. GW shall immediately notify the Board in writing, with copies served on all parties, of:

A. Any action taken by GW to request the withdrawal of its application for a PUD modification;

B. Any final order that the Zoning Commission may enter with respect to GW's PUD modification request; and

C. The issuance of a building permit to GW pursuant to any PUD modification order the Zoning Commission may approve.

Vote taken August 21, 2001, to extend the stay:

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

Vote taken September 4, 2001, to order GW's Motion for Reconsideration and to Re-Open the Record held in abeyance: [*9276]

VOTE: 5 - 0 - 0 (Sheila Cross Reid, David W. Levy, Anne M. Renshaw, Geoffrey H. Griffis, and Carol J. Mitten (by absentee vote), to approve).

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

FINAL DATE OF ORDER: September 26, 2001

PURSUANT TO 11 DCMR § 3125.6, THIS 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.

◀ prev Document 8 of 10 next ▶

AGREEMENT

THIS AGREEMENT ("Agreement") is made this 17th day of August, 2001, by and between THE GEORGE WASHINGTON UNIVERSITY ("GW"), a federally-chartered institution of higher education, its successors and assigns, and the WEST END CITIZENS ASSOCIATION ("WECA"), a non-profit organization in the District of Columbia.

RECITALS

WHEREAS, pursuant to Zoning Commission Orders No. 746, 746-A and 746-B (the "PUD Order"), the D.C. Zoning Commission (the "Zoning Commission") conditionally approved and extended a planned unit development ("PUD") and corresponding amendment to the Zoning Map for property located at address 1957 E Street, N.W., Washington, D.C. (Square 122, Lot 835) (the "Property"); and

WHEREAS, GW now owns the Property and wishes to develop the building provided for by the PUD (the "Building"); and

WHEREAS, on December 28, 2000, the Department of Consumer and Regulatory Affairs ("DCRA") issued GW Building Permit No. B434036 allowing construction of the Building, including certain modifications to the plans approved by the PUD Order, such modifications having been approved by the Zoning Administrator and the Commission of Fine Arts; and

WHEREAS, an appeal was made to the Board of Zoning Adjustment ("BZA"), appealing the issuance of Building Permit No. B434036, and BZA Order No. 16701 upheld the appeal, holding that Building Permit No. B434036 had been improperly issued; and

WHEREAS, without prejudice to GW's position in BZA Appeal No 16701, GW filed a PUD Modification Request with the Zoning Commission on August 13, 2001, attached as

Exhibit A, in order to obtain permission from the Zoning Commission to proceed with the construction and use of the Building as provided for by the current plans; and

WHEREAS, GW and the WECA agree to jointly request, in writing, that the BZA extend its stay until the Zoning Commission issues a final Order on GW's PUD Modification Request pursuant to BZA Order 16701-A and DCRA issues a building permit pursuant thereto, and the WECA agrees to support GW's defense of any appeal and GW's application for a Certificate of Occupancy; and

WHEREAS, GW has committed to the WECA to separately address student parking in the Foggy Bottom/West End Area; and

WHEREAS, as a condition of the WECA's support for the PUD Modification Request, in its entirety, GW and the WECA are desirous of entering into this Agreement, as outlined by the terms below.

NOW, THEREFORE, for and in consideration of the mutual promises contained herein, the receipt of which are hereby acknowledged, the parties hereto hereby agree as follows:

1. **Recitals**. The Recitals are incorporated by reference as though fully set forth herein.

2. **Retail square footage.**

(a) The Building shall include approximately 3300 square feet of on-site street level community-oriented retail space with doors to the retail opening on E and 20th Streets. This retail space will include an area formerly designated as the loading dock for the residential portion of the Building on 20th Street at the Northwest corner of the Building. As a result of providing this retail space, GW shall restrict all deliveries to the Building to the loading dock located on the 19th

Street side of the Building, the underground parking garage, and the E Street entrances. The WECA shall support, in writing, a modification to the PUD eliminating the loading dock on the residential side of the Building.

(b) GW shall also make available to the public, as well as its students, faculty and staff, approximately 1700 square feet of community-oriented retail space in Mitchell Hall, located at 514 19th Street, NW, immediately north of the Building. GW will encourage public use of this space through appropriate outdoor signage and changes to the landscaping in front of the retail area. In addition, GW will be responsible for building out the interior space, as needed, for a retail tenant. This retail space shall be maintained for a minimum of 10 years.

3. **Use of the loading docks.** GW shall restrict truck deliveries via the loading dock to times other than 7:00 a.m. to 9:30 a.m. and 4:00 p.m. to 6:30 p.m., Monday through Friday.

4. **Enforcement of construction hours.** The construction hours for the Building shall be limited to 7:00 a.m. to 7:00 p.m. Monday through Saturday. Compliance with these construction hours shall be enforced by the District of Columbia government to the fullest extent of the law. GW shall appoint, and provide reasonable notice to the adjacent and nearby community residents of, a telephone contact for receiving and responding to complaints and inquiries from the surrounding community concerning excessive noise and construction outside of these hours. GW may request a special permit required to work extended hours from DCRA only to address circumstances constituting a threat to public safety, health and welfare. In seeking such a special permit, GW shall consult with a

committee (including invitations to ANC-2A and the WECA) of neighborhood residents to be established and take appropriate action to mitigate any adverse impact on surrounding properties from such extended work hours.

5. **Landscaping and Street Lighting.** GW shall implement the same landscaping plan for the PUD as that proposed by the Associated General Contractors in its PUD application, dated January 1993, Exhibit B in Z.C. Case No. 93-5F/91-18P, with additional landscaping for areas along 20th Street that will no longer be devoted to loading facilities. In addition, GW will provide street lighting for the Building.

6. **Residents of the Building.** GW shall restrict residential occupancy in the Building to (a) juniors, seniors and graduate students, and (b) students enrolled in an honors program.

7. **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") for the public benefit of the operation of a program at Sholl's Cafeteria to provide meals for no charge or at reduced rates to elderly and poor residents of the District of Columbia and the homeless. The Foundation shall be organized under governing documents that are approved in advance of filing by GW and the WECA and that are prepared pro bono or otherwise not at the WECA's expense. Until the GW donation is expended, the Foundation shall provide GW an annual report on the Foundation's operation and

permit GW to audit such operations upon reasonable notice. In addition, GW shall be afforded the opportunity to appoint one or more representatives to the Foundation board. Representatives from GW and the International Monetary Fund shall constitute less than the majority of the board.

8. **Environmental Compliance.** GW shall comply with the D.C. Environmental Policy Act (D.C. Code § 8-109.01 et seq., 2001), subject to any applicable amendments, regulations and judicial interpretation, on all future campus construction projects. This paragraph makes no determination as to GW's prior compliance with the D.C. Environmental Policy Act.

9. **WECA Commitments.** In exchange for GW's commitments identified in Section 2 - 8, above, the WECA agrees to support GW's PUD Modification Request, as amended by the request to eliminate the loading dock as referenced in Section 2, above, and the amenities described herein, as well as to support any GW request to the BZA in Appeal No. 16701 for a stay of the BZA Order, dated July 12, 2001, pending the Zoning Commission's issuance of a final Order on the PUD Modification Request. Further, the WECA agrees to support GW in any appeal of the Zoning Commission's Order for the PUD Modification Request, any building permit issued pursuant thereto, as well as GW's application for a Certificate of Occupancy.

10. **Conditions Necessary for GW's Performance.** GW's commitment to enforce construction hours, to convene a committee of adjacent and nearby community residents, and to appoint and provide notice of a telephone contact for construction-related complaints and inquiries, set forth in Section 4, above, shall

be effective immediately upon the execution of this Agreement. Upon approval by the Zoning Commission of the PUD Modification Request, GW will take all reasonable efforts to secure any additional necessary approvals required to complete the construction according to the PUD as modified, including any approvals required by the Commission of Fine Arts and DCRA. Upon securing such approvals, GW will take all reasonable efforts to complete construction on a timely basis and to complete the build-out of the retail space described herein within 6 months of GW's securing a Certificate of Occupancy for the Building. GW's performance of sections 2, 3, 5, 6 and 7 is dependent upon receipt of a Certificate of Occupancy for the Building pursuant to the PUD, as modified herein. GW agrees to make all reasonable efforts to secure such Certificate of Occupancy on a timely basis.

11. **Incorporation**. GW and the WECA shall request that this Agreement be attached to and incorporated in the Zoning Commission's Order for the PUD Modification Request.

12. **Remedies**. This Agreement does not limit any common law or statutory rights or remedies available to any entity or person relating to damages sustained to person or property attributable to activities of GW.

13. **Severability**. This Agreement and the rights and obligations of the parties hereunder shall be construed in accordance with the laws of the District of Columbia. If any term, provision, covenant or agreement contained herein, or the application thereof to any person or circumstances, shall be held to be invalid, illegal or unenforceable, the validity of the remainder of this Agreement or the

application of such term, provision, covenant or agreement to the persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby.

14. **Binding Effect**. This Agreement is binding upon and shall inure to the benefit of the heirs, successors, assigns, parents, and subsidiaries, affiliates and related entities of GW and the WECA, and shall run with the land.

15. **Authority to Execute**. Each of the parties executing this Agreement represents and warrants to each of the other parties hereto that: (i) it has the full power and authority to enter into this Agreement and to consummate the transaction described herein without obtaining any further approvals or consents, and (ii) the entering into of this Agreement will not constitute or result in a violation or breach by any such party of any judgment, order, writ, injunction or decree issued against or imposed upon it or any agreement to which it is a party or by which it is bound.

16. **Modification/Waiver/Breach**. No change or modification of this Agreement shall be valid unless the same is in writing and signed by GW and the WECA. No waiver of a breach or default shall be deemed a waiver of any subsequent breach or default.

17. **Notices**. Any notices permitted or required under this Agreement shall be in writing and delivered to the parties at the addresses set forth below or to such other addresses as a party may specify by written notice to the other(s). Notices shall be effective upon delivery to the party, with best efforts to ensure actual receipt by the party. Notices sent by Federal Express or other recognized

overnight courier services for next-day delivery shall be presumed received on the following business day. Notices sent by certified mail, return receipt requested and postage prepaid, shall be presumed received three business days after the date of mailing unless such notice is returned unclaimed.

To GW:	Charles K. Barber, Esq. Office of the General Counsel The George Washington University Suite 525 Washington, D.C. 20052
Copy to:	Phil T. Feola, Esq. Shaw Pittman LLP 2300 N Street, N.W. Washington, D.C. 20037
To WECA:	West End Citizens Association c/o Barbara F. Kahlow 2555 Pennsylvania Avenue, N.W. #404 Washington, D.C. 20037

18. Counterparts. This Agreement may be executed in counterparts and via original or facsimile signature.

IN WITNESS WHEREOF, the parties hereto have signed and delivered these presents as their own free act and deed as of the date and year first herein above written.

The George Washington University,
federally chartered institution of higher
education

By: _____

Its: Vice President and Treasurer

Subscribed and sworn to before me this 17th day of August 2001. Witness my hand and official seal.

_____
Notary Public

My Commission Expires: 06-30-2005

West End Citizens Association

By: John L. Batham

Its: President

Subscribed and sworn to before me this 17th day of August 2001. Witness my hand and official seal.

_____
Notary Public

My Commission Expires: 06-30-2005

The George Washington University
WASHINGTON DC

OFFICE OF THE VICE PRESIDENT AND TREASURER

August 17, 2001

Mr. John C. Batham
President
West End Citizens Association
P.O. 58098
Washington, D.C. 20037-8098

Ms. Sara Maddux
Board Member
Monroe House Condominium Association
522 21st Street, N.W.
Washington, D.C. 20006

Re: GW Campus Plan, BZA Application No. 16553

Dear Mr. Batham and Ms. Maddux:

Please be advised that the University commits to proffer to the Board of Zoning Adjustment (BZA) in the remand of the above referenced case a condition restricting Freshmen and Sophomores living in the Foggy Bottom/West End Area (as defined on page 11 of the BZA Order, dated March 29, 2001) from bringing cars to school or parking in the Foggy Bottom/West End Area. In essence, this condition would provide that the George Washington University (GW) 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.

Both GW and the West End Citizens Association (WECA) recognize that neither GW nor the WECA have enforcement authority of this policy.

Sincerely,

Louis Katz
Vice President and Treasurer

2121 I STREET, N.W. • SUITE 701 • WASHINGTON, DC 20052 • (202) 994-6600 • FAX (202) 994-9304

Attachment C

GWU's Compliance with and DC's Enforcement of the DC Environmental Policy Act

The Board of Zoning Adjustment (BZA) asked the West End Citizens Association (WECA) to submit arguments to support its view that the George Washington University (GWU) must produce for this Appeal No. 16950 the Environmental Impact Screening Forms (EISFs) for all cases GWU initiated since August 17, 2001. 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 Zoning Order No. 746-C states, "The University shall comply with the D.C. Environmental Policy Act (D.C. Code § 6-981 *et seq.*) ... on all future campus construction projects."

The WECA believes that the issue of GWU's compliance with and the timing of DC's enforcement of the DC Environmental Policy Act (DCEPA) needs to be considered broadly due to the obvious adverse impact of GWU's continuing expansion into the Foggy Bottom-West End residential community, including outside of its old and new campus plan boundaries. The WECA believes that both the BZA and Zoning Commission (ZC) need to consider the cumulative adverse environmental effects of GWU's expansion instead of looking at each new case in isolation. GWU's expansion not only threatens the continued quality of residential life in Foggy Bottom-West End but also negatively affects the Foggy Bottom-West End community with a variety of environmental, economic, and social impacts. For example, there is reduced housing for long-term residents, reduced on-street parking, increased traffic, excessive late-night noise, negatively-affected property values, and substantial rent increases.

To enforce Condition No. 12 in the ZC's 1957 E Street Planned Unit Development (PUD) Order No. 746-C, the Zoning Administrator (ZA) should routinely review each GWU project for compliance with the DCEPA - including a completed EISF - before he makes a report to the BZA or ZC. In addition, the BZA/ZC should also review a completed EISF before acting on any GWU application. DC's zoning rules require GWU to show that a proposed project "is not likely to become objectionable to neighboring property because of noise, traffic, number of students, or other objectionable conditions" (11 DCMR § 210.2). In the new hospital case, GWU only completed an EISF after the BZA's approval action, i.e., after the BZA supposedly considered the totality of objectionable conditions. This was completely illogical.

Because of diverse adverse impacts, all of GWU (including the 1957 E Street property) was specifically excluded by the DC City Council from the Central Employment Area (CEA) and thus is subject to the DCEPA (the second time is now codified in Sec. 199.1 of the Comprehensive Plan Amendment Act of 1999, DC Act 12-609).

The Department of Consumer and Regulatory Affairs' (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 1997 implementing rules (at 20 DCMR §7204.1) for the 1989 DCEPA 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.

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).

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). The Orders for all three cases have no mention whatsoever of GWU's compliance with the DCEPA. And, EISFs were required for all three of these "major" actions.

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 ZC's January 14, 2002 Order of GWU's attention to and compliance with the DCEPA. 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). A WECA Board Member, 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. Thus, to enforce Condition No. 12 in Zoning Order No. 746-C, GWU should produce for this Appeal the EISFs for all cases GWU initiated since August 17, 2001.

Since the 1989 enactment of the DCEPA, there has been only one EIS prepared - for the Georgetown University cogenerator case (Citizens Coalition, *et al.* v. DC BZA (619 A.2d 940 (D.C. App. 1993)). In contrast, for Federal properties, under the 1969 National Environmental Policy Act (NEPA), EISs are routinely prepared to protect communities. The bottom line is that DC – especially DCRA, the DC Department of Health, ZA, ZC and BZA - needs to take environmental protection as a serious matter to protect communities in DC.

The BZA can make a difference by using this Appeal and Condition No. 12 in Zoning Order No. 746-C to begin to routinely consider GWU's adverse environmental effects on the Foggy Bottom-West End community, consistent with the stated purpose of the DCEPA: "to promote the health, safety and welfare of District of Columbia ("District") residents, to afford the fullest possible preservation and protection of the environment through a requirement that the environmental impact of proposed District government and privately initiated actions be examined before implementation" (DC Code § 8-109.01).

The Honorable Carol J. Mitten
Chairman
D.C. Zoning Commission
441-4th Street, N.W. – Suite 210
Washington, DC 20001

RECEIVED
D.C. OFFICE OF ZONING
2002 DEC 31 AM 11:54

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

December 31, 2002

RECEIVED
D.C. OFFICE OF ZONING
2002 DEC 31 AM 11:54

The Honorable Geoffrey H. Griffis
Chairman
D.C. Board of Zoning Adjustment
441-4th Street, N.W. - Suite 210
Washington, DC 20001

Re: BZA Appeal No. 16950 - Additional Documents Supporting WECA's Appeal of DCRA & ZA's Administrative Decisions, 1957 E Street, N.W.

Dear Chairman Griffis and Members of the Board:

As requested by the Board of Zoning Adjustment (BZA) at its December 17, 2002 hearing on BZA Appeal No. 16950, enclosed herewith are additional documents for the record in support of the West End Citizens Association's (WECA's) appeal of the administrative decisions by the Department of Consumer and Regulatory Affairs (DCRA) generally and the Zoning Administrator (ZA) specifically regarding 1957 E Street, N.W. They include the following:

(1) Attachment A - copies of the BZA's three Orders (16701-A, 16701-B, and 16701-C) relating to the Foggy Bottom-West End community's successful appeal of the December 2000 administrative decision by the ZA in the issuance of a building permit for 1957 E Street, N.W.;

(2) Attachment B - a copy of the August 17, 2001 contractual settlement "Agreement" between the George Washington University (GWU), owner of the 1957 E Street property, and the WECA, which was negotiated at the specific behest of the BZA[1] and with the active participation and witness by the DC Corporation Counsel. In Order No. 16701-C, the BZA stated, "GW entered into a settlement agreement with WECA with respect to the PUD amenities and benefits and conditions that both parties believe should be included in any PUD modification order the [Zoning] Commission might approve"; and

(3) Attachment C - arguments to support the WECA's view that GWU must produce for this Appeal No. 16950 the Environmental Impact Screening Forms (EISFs) for all cases GWU initiated since its co-signature of Paragraph No. 8 in the August 17, 2001 contractual settlement "Agreement" - also embodied in Condition No. 12 in Zoning Order No. 746-C - which requires GWU to comply with the DC Environmental Policy Act (DCEPA), effective August 17, 2001. This provision was key before the WECA would agree to co-sign any Agreement. Part of the WECA's logic included:

[1]BZA Order No. 16701-A stated, "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."

(a) DCRA's October 2000 error[2] in opining that the 1957 E Street property was in the Central Employment Area (CEA) and, thus exempt from DCEPA, when, in fact, DC law specifically indicated that the 1957 E Street property was outside of the CEA and, thus, subject to DCEPA; and

(b) the legal arguments advanced in November 2000 by the Foggy Bottom-West End community before the DC Court of Appeals in Foggy Bottom Association v. DC BZA (791 A.2d 64 (D.C. App. 2002)), including about the BZA's refusal to postpone its approval of GWU's proposed new hospital until after (i) a DCEPA-required EISF was filed, and (ii) the need for an Environmental Impact Statement (EIS) had been determined.

11 DCMR § 3200.2 provides for appeals to the BZA of "any decision of an administrative officer granting ... a certificate of occupancy." 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." In fact, DCEPA case law cites 11 DCMR § 3205.4. In Foggy Bottom Association v. DC BZA, the court's opinion states, "Failure to abide by the conditions, in whole or in part, shall be grounds for revocation of any building permit or certificate of occupancy" (*Id* at 13-14) and "the conditions attached to the approval are binding, and that subsequent issuance of the building permit or certificate of occupancy depends on compliance with them. Furthermore, such permits or certificates, once issued, can also be revoked if those conditions are not met" (*Id* at 32-3).

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

Sincerely,

John C. Batham
President

Attachments

cc The Honorable Carol J. Mitten, Chair, Zoning Commission
Alan Bergstein, Esq., Corporation Counsel
ANC-2A (c/o St. Mary's Court)
Phil Feola, Esq., Counsel for GWU

[2] In an October 23, 2000 letter (included in the ZA's 4/25/01 submission in Appeal No. 16701) from DCRA/Noble to GWU/Honey, DCRA erroneously told GWU that the 1957 E Street site was located within the CEA and, thus, was exempt from the DCEPA.

Attachment A

48 D.C. REG. 8273,

DISTRICT OF COLUMBIA REGISTER

ISSUE: Volume 48, Number 35

ISSUE DATE: **August** 31, 2001

SUBJECT: BOARDS, COMMISSIONS, AND AGENCIES

AGENCY: GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

48 D.C. REG. 8273

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To view the next page, type .np* and ENTER
To view a specific page, enter p* and the page number. E.G. p*1.

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

*48 D.C. REG. 8559, **

DISTRICT OF COLUMBIA REGISTER

ISSUE: Volume 48, Number 36

ISSUE DATE: **September** 7, 2001

SUBJECT: BOARDS, COMMISSIONS, AND AGENCIES

AGENCY: GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

48 D.C. REG. 8559

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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 NO. 16701-B

ORDER EXTENDING STAY

Due to the expiration at the close of business today, August 21, 2001, of the order (BZA Order No. 16701-A, dated August 7, 2001) granting The George Washington University (GW) a temporary stay of the effectiveness of the Board's final Decision and Order in the above-referenced appeal, the Board of Zoning Adjustment reviewed GW's Supplemental Motion to Stay BZA Order No. 16701, dated August 13, 2001, in an executive session on August 21, 2001. The Board also reviewed the opposition to the motion filed by Appellant Advisory Neighborhood Commission 2A, dated August 20, 2001, and the letter in support of the motion filed by Intervenor **West End Citizens** Association, dated August 20, 2001.

As time is of the essence, the Board is issuing a summary order today. A full order stating the reasons for the Board's action will be issued shortly.

After reviewing the supplemental motion and the responses thereto, the Board ORDERED the stay granted in BZA Order No. 16701-A EXTENDED until the Zoning Commission's written

order taking final action on GW's PUD modification request (whether approving, approving with modification, or disapproving the request) becomes final and effective. If the Zoning Commission approves a PUD modification, the stay shall be automatically extended until the Department of Consumer and Regulatory Affairs issues GW a [*8560] building permit pursuant to the PUD modification order. If GW withdraws its PUD modification request, the stay shall terminate automatically.

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

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

DATE OF ORDER: August 21, 2001

PURSUANT TO 11 DCMR § 3125.6, THIS 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.

◀ prev Document 9 of 10 next ▶

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*48 D.C. REG. 9266, **

DISTRICT OF COLUMBIA REGISTER

ISSUE: Volume 48, Number 40

ISSUE DATE: **October** 5, 2001

SUBJECT: BOARDS, COMMISSIONS, AND AGENCIES

AGENCY: GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

48 D.C. REG. 9266

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Appeal No. 16701-C 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 DATES: June 5, 2001; July 31, 2001; August 3, 2001; August 21, 2001; and September 4, 2001

ORDER NO. 16701 - C

ORDER EXTENDING STAY

and

DIRECTING THAT MOTION FOR RECONSIDERATION BE HELD IN ABEYANCE

This matter is before the Board of Zoning Adjustment pursuant to post-hearing motions filed by The George Washington University (GW) for reconsideration of the Board's final Decision and Order in this appeal, BZA Order No. 16701 dated July 12, 2001, and for a stay of the effectiveness of the Decision and Order. After several meetings in which the Board discussed the merits, the Board determined at its regularly scheduled public meeting held September 4, 2001, to hold the motion for reconsideration in abeyance and, at its executive session held August 21, 2001, to stay the effectiveness of the Decision and Order pending completion of related Planned Unit Development (PUD) modification proceedings by the Zoning Commission.

Procedural History

On January 19, 2001, the appellant, Advisory Neighborhood Commission (ANC) 2A, filed an appeal with the Board challenging on various grounds the decision of the Zoning Administrator to approve the issuance of a building permit to GW 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 PUD and related Zoning Map amendment for the property. The Zoning [*9267] Administrator is the Appellee in this case. Pursuant to 11 DCMR § 3199.1, GW, as the owner of the property that is the subject of the appeal, is automatically a party to the case. The Board granted **West End Citizens** Association (WECA) party status to intervene in the appeal in support of the appellant.

After a public hearing, the Board concluded that the Zoning Administrator had erred in approving the issuance of the building permit to construct the PUD because the building plans did not, as required by 11 DCMR § 2407.2 (1991), conform in all respects to the plans approved by the Zoning Commission, as modified by the PUD order. In its July 12, 2001, Decision and Order, the Board granted the appeal in part as to the Zoning Administrator's lack of authority to approve the (1) elimination of one of two separate garage entrances, (2) elimination of balconies on the residential component of the building, (3) change in exterior materials, and (4) change in use of the PUD from commercial and residential use to institutional or university use. The Board also denied the appeal in part on several grounds that are not relevant here. Pursuant to D.C. Code, 2001 Ed. § 6-641.07(g)(4) (formerly codified at D.C. Code § 5-424(g)(4) (1994 Repl.)), the Board reversed the Zoning Administrator's approval of the issuance of the building permit. Ex. 50.

GW timely filed a Motion for Reconsideration and to Re-Open the Record hereafter, the "Motion for Reconsideration" on July 20, 2001, asking the Board to accept new evidence and reconsider its decision that the Zoning Administrator lacked authority to approve the four PUD modifications identified above. Ex. 56. WECA opposed the motion on July 23, 2001, arguing that it contained factual errors and requesting a hearing on the new materials included in the motion. Ex. 57. ANC 2A opposed the motion on July 27, 2001, and requested "that this PUD be returned immediately to the Zoning Commission for review." Ex. 59.

On July 27, 2001, GW filed a Motion for Stay of Decision asking the Board to stay the effectiveness of its Decision and Order pursuant to 11 DCMR § 3126.9 "until such time as the Board considers and reaches a decision regarding the University's Motion for Reconsideration and to Re-open the Record." Ex. 61. GW stated that construction on the 1957 E Street building was continuing pursuant to the disputed permit, and that if the Decision and Order were not stayed, GW would incur approximately $ 12 million in construction-related costs to stop work. GW filed an affidavit from Arthur J. Bean, Director of GW's Construction Programs, on July 30, 2001, providing additional information on the anticipated costs. Ex. 63.

Also on July 30th, the Board received a letter from ANC 2A in opposition to the requested stay. The ANC stated that it had not received a copy of GW's motion, and was thus prevented from responding to the motion. In its letter, the ANC again "respectfully requests that this PUD be returned immediately to the Zoning Commission for review." Ex. 65. WECA also submitted a partial response to the Motion for Stay on July 30th, arguing that GW's motion was not timely filed within the ten-day period after issuance of the Board's Decision and Order; that the motion was incomplete, since it did not address the four-part test used in deciding motions for stay; and that in any event, GW could not meet the four-part test. Ex. 62. [*9268]

The Board, with four members present, took up consideration of GW's Motion for

Reconsideration and Motion for Stay at a special public meeting on July 31, 2001. Board Member Anne M. Renshaw moved to deny GW's Motion for Reconsideration; however, her motion failed for lack of a second. Tr. at 79. Chairperson Sheila Cross Reid then moved to grant GW's Motion for Reconsideration for purposes of discussion, and Member Geoffrey H. Griffis seconded the motion. Tr. at 79-80. After discussion of the balconies, only one of the four matters that were the subject of GW's Motion for Reconsideration, bogged down, Member Griffis called for the question. The Board then voted 2 - 2 - 1; with two members voting grant reconsideration, two members opposed, and one member, the Zoning Commission representative, not present, not voting. Tr. at 94. Chairperson Reid then moved to reopen the record and rehear the matters addressed in the Motion for Reconsideration, which motion was seconded by Member Griffis. This motion also resulted in a 2 - 2 - 1 tie vote, with the Zoning Commission representative not present, not voting. Tr. at 94. The Board then decided to take the Motion for Reconsideration up again at its next regularly scheduled decision meeting on September 4, 2001. Tr. at 97.

The Board also discussed GW's Motion for Stay on July 31, 2001. Since the ANC and WECA had not had an adequate time in which to respond to the motion and supporting affidavit, the Board scheduled the motion for a special decision meeting on August 3rd, with the ANC and WECA to submit any additional responses to the motion by August 2nd. Tr. at 97-105.

On August 1, 2001, WECA filed additional objections to GW's Motion for Stay, including objections to the scheduling of the decision meeting on the motion. WECA again argued that GW had not demonstrated that it met the four-part test for stays. Ex. 64.

On August 2, 2001, ANC 2A filed a letter with the Board, authorizing James T. Draude from the law firm Driscoll & Draude to represent the ANC. Ex. 67. The ANC also filed a letter opposing both GW's Motion for Reconsideration and Motion for Stay. The ANC argued that as a result of the Board's tie vote on the Motion for Reconsideration on July 31, 2001, the Motion for Reconsideration was denied, making GW's Motion for Stay moot. The ANC argued that the Board lacks authority to reconsider a motion for reconsideration. It also argued that since Zoning Commissioner Herbert M. Franklin abstained from voting on the merits of the appeal on June 3, 2001, on the grounds that the appeal, if granted by the Board, might result in a Zoning Commission PUD proceeding, the remaining Zoning Commission members would be disqualified from participating in the Board case. Finally, the ANC stated that it had not received a copy of the Motion for Stay, despite the fact that GW certified that it was hand-delivered to the ANC. With the supplemental affidavit filed by GW on July 30, 2001, the ANC believed its response would not be due until August 6th at the earliest. The ANC concluded that for those reasons, any action by the Board on GW's Motion for Stay on August 3rd would be improper. Ex. 68.

GW filed a response to WECA's submissions on August 2, 2001, arguing that in light of the exigent circumstances, the Board could properly waive the normal seven-day time period allowed for response to post-hearing motions. GW pointed out that as a result of the Board's customary August recess, if the Board did not take up the Motion for Stay as soon as possible, [*9269] the Department of Consumer and Regulatory Affairs would be left without any guidance as to the disputed building permit. Ex. 69.

As Commissioner Franklin was unavailable due to an extended vacation, the Zoning Commission designated its Chairperson to participate in and decide on the post-hearing motions. At its August 3, 2001, special public meeting, the Board, by consensus, deferred action on GW's Motion for Stay, and decided instead, on its own motion, to issue a temporary stay until August 21, 2001. The Board selected that date based on information from the Zoning Commission Chairperson that the Zoning Commission was prepared to convene a special public meeting on August 21, 2001, to entertain an application from GW to amend the PUD. The Board, voting 4 - 0 - 1, with one member not present, not voting,

granted GW a temporary stay in order to afford it the opportunity to explore the possibility of settlement negotiations with ANC 2A and WECA; to file a request with the Zoning Commission for modification of the PUD; and to supplement its Motion for Stay.

In its written order dated August 7, 2001, BZA Order No. 16701-A, Order Granting Temporary Stay, the Board established several deadlines within the temporary stay period. First, GW was given until Monday, August 13th, by which to file with the Zoning Commission a written PUD modification request. BZA Order 16701-A specified that any PUD modification request that GW might file would be without prejudice to the arguments advanced by GW in the BZA appeal case. Second, in accordance with 11 DCMR § 3030.8, ANC 2A, the only party to the PUD proceedings, was given until August 20th to respond to any request that GW might file with the Zoning Commission. Third, BZA Order 16701-A directed GW to file by August 20th, a written status report with the Zoning Commission, with a copy provided to the Board, regarding its request for PUD modification and the status of any settlement negotiations. Due to the limited time available, the order did not require ANC 2A to provide a written status report, but provided that both GW and ANC 2A were to provide oral reports to the Zoning Commission during the August 21st Zoning Commission meeting. The order also provided that WECA could request the Zoning Commission for an opportunity to present an oral report. Fourth, the order directed that any corrected or revised motion for stay by GW was to be filed with the Board by August 13th, with responses from ANC 2A and WECA due by August 20th. Finally, with the exception of the corrected or revised motion for stay, all submissions and reports due pursuant to the order were to be restricted to PUD modification issues. Ex. 71.

On August 13, 2001, GW filed a Supplemental Motion to Stay BZA Order No. 16701 until such time as the Board decides GW's Motion for Reconsideration. GW argues first that it will be irreparably harmed if a stay is not granted as a result of the costs that would be incurred in stopping construction work. GW also states that an indefinite suspension of construction would seriously harm the academic reputation and functioning of the Elliott School of International Affairs, which has been anticipating the availability of the new building for the 2002 academic year, as well as that of the Law School, which expects to move into the existing Elliott School building. Finally, a delay in the completion of the building would hamper GW's goal of increasing student housing on or near campus. Second, GW argues that a stay will not harm the appellants because the risk of continued construction falls entirely upon GW, not the appellants. GW acknowledges that if the Board ultimately denies its Motion for Reconsideration, GW will [*9270] either need to obtain Zoning Commission approval for its present plans or modify them to comport with the original PUD approval. Third, GW argues that the public interest favors a stay because the citizens of the District of Columbia have a great stake in the continued success of the University. Finally, citing federal case law relating to stays, GW argues that where the balance of hardships and the public interest weigh heavily in favor of a stay, a stay will issue if the moving party has demonstrated that there are serious issues going to the merits of its claims. Ex. 74.

GW filed a request to modify the PUD with the Zoning Commission on August 13, 2001, asking that the PUD be modified to permit the elimination of the garage door entrance, the elimination of the balconies, the change in building materials, and the change in use to institutional use. Ex. 79. Also, on August 13th, GW filed a Supplemental Motion to Stay BZA Order No. 16701 with the Board. Ex. 74. Subsequently, GW entered into a settlement agreement with WECA with respect to the PUD amenities and benefits and conditions that both parties believe should be included in any PUD modification order the Commission might approve. GW, however, was not able to arrive at an amicable resolution of the ANC issues by the August 20th status report deadline. Ex. 79.

On August 20, 2001, ANC 2A filed an opposition to GW's Supplemental Motion for Stay. The ANC argues that the Board lacks authority and jurisdiction to rule on GW's motion or to take

further action in this case. The ANC argues that the effect of the Board's tie votes on July 31, 2001, on the motion to grant GW's Motion for Reconsideration and the motion to re-open the record, was to deny GW's Motion for Reconsideration. The ANC argues that as a result, all of the Board's subsequent actions, including its decision to grant a temporary stay and to schedule further consideration of GW's Motion for Reconsideration, are invalid. Finally, the ANC argues that when GW continued construction after the ANC had filed its appeal challenging the building permit, GW assumed the risk that the permit might be ultimately found to be in error and that any harm that GW might suffer if a stay is not granted would be self-inflicted. Ex. 77.

WECA filed a letter, dated August 20, 2001, supporting a stay until the Zoning Commission issues a final order on GW's PUD modification request. Ex. 78.

Since BZA Order No. 16701-A, the Order Granting Temporary Stay, was due to expire at the close of business on August 21, 2001, the Board met in executive session on August 21st to review and consider GW's Supplemental Motion for Stay. After reviewing the motion and the responses thereto, the Board, voting 4 - 0 - 1, with one member not present, not voting, decided to extend the stay until the Zoning Commission's written order taking final action on GW's PUD modification request becomes final and effective. The Board ordered that if the Zoning Commission approves a PUD modification, the stay shall be automatically extended until the Department of Consumer and Regulatory Affairs issues GW a building permit pursuant to the PUD modification order. If GW withdraws its PUD modification request, the stay shall terminate automatically. Because time was of the essence, the Board issued a summary order, to be followed by a full order, this order, stating the Board's reasons for its actions. Ex. 80. [*9271]

The Board took up GW's Motion for Reconsideration at its September 4, 2001, regularly-scheduled decision meeting and voted 5 - 0 - 0 to defer consideration of the motion in accordance with the terms as the stay order.

Jurisdiction--The Effect of the Tie Votes

Under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 799, as amended; D.C. Code, 2001 Ed. § 6-641.07(h)), "The concurring vote of not less than a full majority of the members of the Board shall be necessary for any decision or order." The Board's Rules of Practice and Procedure likewise provide in 11 DCMR § 3125.2 that "The concurring vote of at least a full majority of the Board shall be necessary for any decision." Since the Board is composed of five members, a decision to grant GW's Motion for Reconsideration requires at least three affirmative votes.

A tie vote occurs when 50 percent of a body votes in favor of a motion and 50 percent votes against the motion. If there is no way to break a tie vote, the motion is lost. A tie vote that is not broken by a subsequent vote thus operates to deny the relief that was the subject of the motion. *See Morrison v. District of Columbia Bd. of Zoning Adjustment*, 422 A.2d 347, 349 n.5 (D.C. 1980) (tie votes); *see also Hubbard v. District of Columbia Bd. of Zoning Adjustment*, 366 A.2d 427, 428 (D.C. 1976) (failure to achieve super-majority vote tantamount to denial of motion for rehearing).

In the instant case, however, the Board determined that it was possible to break the tie vote on the chairperson's motions to grant GW's Motion for Reconsideration and to re-open the record by requesting the Zoning Commission representative on the Board to review the record and participate in the decision. A similar situation occurred in *Morrison*, 422 A.2d at 349, and is described as follows:

> At a meeting on May 2, 1979, the Board, by a 2-2 vote, was unable to dispose of a motion to vacate the previous order in the case. The Board deferred consideration of the issue until June 6 and requested the chairman, who had previously recused himself, to read the record and participate in the case. The chairman assented to the Board's request, noting that the matters originally causing his recusal had been resolved. On July 9, 1979, the Board issued a final order reinstating and incorporating its January 30, 1979 order, which granted intervenor's application.

The court noted that "Had the chairman not participated in the decision and the vote remained at 2-2, intervenor would have been denied the application." 422 A. 2d at 349 n.5. Likewise in *Hubbard*, the court acknowledged that a new vote could be taken on remand on a motion to grant a motion for rehearing that had failed for lack of the required number of votes, but found such a procedure unwarranted in light of the protracted history of the *Hubbard* case. 366 A.2d at 428. *See also Robert's Rules of Order Newly Revised* 44, 66-68, 265-84, 343-44 (Sarah Corbin Robert ed. 1970); *Webster's New World Robert's Rules of Order: Simplified and Applied* 65-66, 278-82 (1999) (tie votes, motions to reconsider the vote). [*9272]

Therefore, the chairperson's motions to grant reconsideration and to re-open the record are not lost as yet, and GW's Motion for Reconsideration remains pending. Contrary to the ANC's arguments, the Board has not lost jurisdiction over this case and may properly reschedule GW's Motion for Reconsideration for decision and decide GW's Supplemental Motion for Stay.

Composition of the Board

Herbert M. Franklin, the Zoning Commission representative on the Board of Zoning Adjustment for the hearing on the instant appeal, abstained from voting on the merits of the appeal, expressing concern that he might be called upon to decide a PUD modification request involving the subject property in a subsequent Zoning Commission proceeding. Tr. at 28-29 (June 5, 2001). Subsequently Commissioner Franklin went on an extended vacation, and was not available for the decision meetings at which GW's motions for reconsideration and stay were discussed. As a result of the tie votes on July 31, 2001, the Board asked the Zoning Commission to designate another Commissioner to participate in and decide on the post-hearing motions in this case. The Zoning Commission designated its Chairperson, Carol J. Mitten, who then read the record and transcripts in order to participate in the decision on the motions. n1 The ANC argues that since Commissioner Franklin abstained from voting, the other Commissioners would be disqualified from participating in this case.

n1 Under 11 DCMR § 3126.8, "No member shall vote on any post-hearing motion unless the member participated in and voted on the original decision, or the member read the transcript of the hearings and reviewed the record."

A Board member is not required to cast a vote on a case, and may abstain from voting. The fact that Commissioner Franklin stated that he was 'inclined to abstain' from voting, Tr. at 28 (June 5, 2001), however, does not mean that he was disqualified, or that another Zoning Commissioner designated to replace him during his absence should likewise abstain from voting. In this case, while Commissioner Franklin expressed concern about his participation given the possibility of future PUD modification proceedings, he was not required by law to disqualify himself.

The District of Columbia Court of Appeals reviewed the statutory relationship between the

Zoning Commission and the Board of Zoning Adjustment in *Sheridan-Kalorama Neighborhood Council v. District of Columbia Board of Zoning Adjustment*, 341 A.2d 312 (1975). The Zoning Act of 1938, which created the Board of Zoning Adjustment, expressly provides that one member of the Board shall be a member of the Zoning Commission or a member of the staff thereof, and that the Zoning Commission member of the Board serves, in effect, at the pleasure of the Commission. 341 A.2d at 317; *see* D.C. Code § 6-641.07(a)-(b). The court characterized the Board as "an adjunct of, and in a sense complimentary to, the Zoning Commission," 341 A.2d at 317, and recognized that the Zoning Commission member of the Board would be in regular contact with other Zoning Commission members and aware of their views as to matters actually pending before the Commission and matters of general policy. *Id.* at 317-18. The court stated that while the Zoning Commission member to the Board is thus authorized to express the Commission's general policy concerns to the Board and to cast his or her vote with full knowledge of the attitudes and policy positions of the other Commission [*9273] members, he or she is bound to cast a vote in the Board proceedings based exclusively on the Board's record of proceedings. *Id.* at 318. The court concluded that there is "no essential conflict between serving as the Zoning Commission member of the Board and casting a vote based exclusively upon the record before it." *Id.* Therefore, the Zoning Commission representative to the Board in the instant case is not disqualified from participating in and deciding GW's post-hearing motions, provided the Zoning Commission representative bases his or her decision exclusively on the Board's record of proceedings.

Timeliness of the Motion for Stay

The Board's Rules of Practice and Procedure in 11 DCMR ch. 31 do not specify a deadline for the filing of a motion for stay pending reconsideration. Under 11 DCMR § 3126.9, "Unless the Board orders otherwise, neither the filing nor the granting of a motion for reconsideration or rehearing shall automatically stay the effect of a final decision." *See also* 11 DCMR § 3130.4 (stays pending appeal). Since GW filed its Motion for Stay when its Motion for Reconsideration was pending, the Motion for Stay is timely.

The Four-Part Test for Granting Stays

To prevail on its motion for stay, GW 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 A.2d 340, 344 (D.C. 1988) (administrative agency required to consider the four specified factors in considering a motion for a stay). Where the last three factors strongly favor interim 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).

First, with construction well underway, the Board is concerned that the denial of a stay would result in substantial, if not irreparable, financial injury to GW. As shown by the affidavits of Arthur J. Bean, Director of GW's Construction Programs, and Louis H. Katz, GW Vice-President and Treasurer, GW would incur approximately $ 12 million in costs to halt construction, including costs associated with labor, materials, termination of contracts, stabilization and securing the construction site, remobilization, and lost income. Delay in construction could harm the academic reputation and functioning of the Elliot School, which anticipates relocating to the new building for the 2002 academic year, as well as that of the Law School, which anticipates using the existing Elliott School building. A delay would also frustrate GW's goal of increasing student housing.

Second, ANC 2A will not be harmed by a stay because, as GW acknowledges, it continues construction at its own risk, with full knowledge that it may have to modify its building plans to revert back to the 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. In opposing the stay, ANC 2A had requested that the PUD be returned [*9274] immediately to the Zoning Commission for review. Since GW's PUD modification request is presently pending before the Zoning Commission, the ANC is not harmed by the stay.

Third, for the same reasons that the ANC is not harmed by a stay, the public interest is not harmed by a stay.

Finally, because these three factors strongly favor relief, the Board has greater flexibility in weighing the criteria relating to GW's likelihood of success on the merits. *Barry*, 529 A.2d at 321. GW cites *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), for the proposition that where the balance of hardships and public interest weigh strongly in favor of interim relief, a stay will issue if the moving party has demonstrated serious issues going to the merits of its claims. This case stands for the proposition that a stay is appropriate where the moving party has raised questions that are "fair ground" for litigation and "for more deliberative investigation." In the instant case, GW's Motion for Reconsideration presents additional factual materials and arguments going to the merits that, if the record were to be re-opened and the issues reconsidered, would present fair ground for litigation and more deliberative investigation.

Moreover, under D.C. Code § 6-641.07(g)(4), the Board "may make such order as may be necessary to carry out its decision . . . ." Granting a stay in this case aids in carrying out the Board's decision. It allows GW and the parties to proceed with PUD modification proceedings before the Zoning Commission without the delay, uncertainties, and expense of further proceedings before the Board. Further Board proceedings may ultimately be unnecessary if the Zoning Commission approves GW's PUD modification request. Therefore, the Board has determined to stay the effectiveness of its decision pending completion of the PUD modification proceedings. If the Zoning Commission approves a PUD modification, the stay shall be extended until GW obtains a building permit pursuant to the terms of the PUD modification order. If, on the other hand, GW withdraws its request or the Zoning Commission disapproves the PUD modification, the stay shall terminate automatically.

Deferral of GW's Motion for Reconsideration

Since GW has filed a PUD modification request with the Zoning Commission which includes the four modifications identified by the Board in BZA Order No. 16701 as requiring Zoning Commission approval, the Board has determined that it is appropriate to hold GW's Motion for Reconsideration in abeyance pending completion of the Zoning Commission proceedings. Therefore, the Motion for Reconsideration shall be held in abeyance concurrent with the terms of the stay issued in this case.

ORDER

Based on the above, it is hereby **ORDERED** that:

[*9275]

1. The stay granted in BZA Order No. 16701-A, which stays the effectiveness of the Board's final Decision and Order, BZA Order No. 16701 dated July 12, 2001, is extended until such time as the Zoning Commission's written order taking final action on GW's PUD modification request (whether to approve, approve with modifications, or disapprove the request) becomes final and effective;

2. If the Zoning Commission approves a PUD modification, the stay shall

automatically be extended until the Department of Consumer and Regulatory Affairs issues GW a building permit pursuant to the PUD modification order, at which time the stay shall terminate automatically;

3. If the Zoning Commission disapproves GW's PUD modification request, the stay shall terminate automatically when the Commission's written order disapproving the modification becomes final and effective;

4. If GW withdraws its PUD modification request, the stay shall terminate automatically upon the filing with the Zoning Commission of the notice of withdrawal;

5. GW's Motion for Reconsideration and to Re-Open the Record shall be held in abeyance for so long as the stay remains in place pursuant to paragraphs 1 through 4 of this order; and

6. GW shall immediately notify the Board in writing, with copies served on all parties, of:

A. Any action taken by GW to request the withdrawal of its application for a PUD modification;

B. Any final order that the Zoning Commission may enter with respect to GW's PUD modification request; and

C. The issuance of a building permit to GW pursuant to any PUD modification order the Zoning Commission may approve.

Vote taken August 21, 2001, to extend the stay:

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

Vote taken September 4, 2001, to order GW's Motion for Reconsideration and to Re-Open the Record held in abeyance: [*9276]

VOTE: 5 - 0 - 0 (Sheila Cross Reid, David W. Levy, Anne M. Renshaw, Geoffrey H. Griffis, and Carol J. Mitten (by absentee vote), to approve).

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

FINAL DATE OF ORDER: September 26, 2001

PURSUANT TO 11 DCMR § 3125.6, THIS 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.

◀ prev Document 8 of 10 next ▶

AGREEMENT

THIS AGREEMENT ("Agreement") is made this 17th day of August, 2001, by and between THE GEORGE WASHINGTON UNIVERSITY ("GW"), a federally-chartered institution of higher education, its successors and assigns, and the WEST END CITIZENS ASSOCIATION ("WECA"), a non-profit organization in the District of Columbia.

RECITALS

WHEREAS, pursuant to Zoning Commission Orders No. 746, 746-A and 746-B (the "PUD Order"), the D.C. Zoning Commission (the "Zoning Commission") conditionally approved and extended a planned unit development ("PUD") and corresponding amendment to the Zoning Map for property located at address 1957 E Street, N.W., Washington, D.C. (Square 122, Lot 835) (the "Property"); and

WHEREAS, GW now owns the Property and wishes to develop the building provided for by the PUD (the "Building"); and

WHEREAS, on December 28, 2000, the Department of Consumer and Regulatory Affairs ("DCRA") issued GW Building Permit No. B434036 allowing construction of the Building, including certain modifications to the plans approved by the PUD Order, such modifications having been approved by the Zoning Administrator and the Commission of Fine Arts; and

WHEREAS, an appeal was made to the Board of Zoning Adjustment ("BZA"), appealing the issuance of Building Permit No. B434036, and BZA Order No. 16701 upheld the appeal, holding that Building Permit No. B434036 had been improperly issued; and

WHEREAS, without prejudice to GW's position in BZA Appeal No 16701, GW filed a PUD Modification Request with the Zoning Commission on August 13, 2001, attached as

Exhibit A, in order to obtain permission from the Zoning Commission to proceed with the construction and use of the Building as provided for by the current plans; and

WHEREAS, GW and the WECA agree to jointly request, in writing, that the BZA extend its stay until the Zoning Commission issues a final Order on GW's PUD Modification Request pursuant to BZA Order 16701-A and DCRA issues a building permit pursuant thereto, and the WECA agrees to support GW's defense of any appeal and GW's application for a Certificate of Occupancy; and

WHEREAS, GW has committed to the WECA to separately address student parking in the Foggy Bottom/West End Area; and

WHEREAS, as a condition of the WECA's support for the PUD Modification Request, in its entirety, GW and the WECA are desirous of entering into this Agreement, as outlined by the terms below.

NOW, THEREFORE, for and in consideration of the mutual promises contained herein, the receipt of which are hereby acknowledged, the parties hereto hereby agree as follows:

1. **Recitals.** The Recitals are incorporated by reference as though fully set forth herein.

2. **Retail square footage.**

(a) The Building shall include approximately 3300 square feet of on-site street level community-oriented retail space with doors to the retail opening on E and 20th Streets. This retail space will include an area formerly designated as the loading dock for the residential portion of the Building on 20th Street at the Northwest corner of the Building. As a result of providing this retail space, GW shall restrict all deliveries to the Building to the loading dock located on the 19th

Street side of the Building, the underground parking garage, and the E Street entrances. The WECA shall support, in writing, a modification to the PUD eliminating the loading dock on the residential side of the Building.

(b) GW shall also make available to the public, as well as its students, faculty and staff, approximately 1700 square feet of community-oriented retail space in Mitchell Hall, located at 514 19th Street, NW, immediately north of the Building. GW will encourage public use of this space through appropriate outdoor signage and changes to the landscaping in front of the retail area. In addition, GW will be responsible for building out the interior space, as needed, for a retail tenant. This retail space shall be maintained for a minimum of 10 years.

3. **Use of the loading docks.** GW shall restrict truck deliveries via the loading dock to times other than 7:00 a.m. to 9:30 a.m. and 4:00 p.m. to 6:30 p.m., Monday through Friday.

4. **Enforcement of construction hours.** The construction hours for the Building shall be limited to 7:00 a.m. to 7:00 p.m. Monday through Saturday. Compliance with these construction hours shall be enforced by the District of Columbia government to the fullest extent of the law. GW shall appoint, and provide reasonable notice to the adjacent and nearby community residents of, a telephone contact for receiving and responding to complaints and inquiries from the surrounding community concerning excessive noise and construction outside of these hours. GW may request a special permit required to work extended hours from DCRA only to address circumstances constituting a threat to public safety, health and welfare. In seeking such a special permit, GW shall consult with a

committee (including invitations to ANC-2A and the WECA) of neighborhood residents to be established and take appropriate action to mitigate any adverse impact on surrounding properties from such extended work hours.

5. **Landscaping and Street Lighting.** GW shall implement the same landscaping plan for the PUD as that proposed by the Associated General Contractors in its PUD application, dated January 1993, Exhibit B in Z.C. Case No. 93-5F/91-18P, with additional landscaping for areas along 20th Street that will no longer be devoted to loading facilities. In addition, GW will provide street lighting for the Building.

6. **Residents of the Building.** GW shall restrict residential occupancy in the Building to (a) juniors, seniors and graduate students, and (b) students enrolled in an honors program.

7. **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") for the public benefit of the operation of a program at Sholl's Cafeteria to provide meals for no charge or at reduced rates to elderly and poor residents of the District of Columbia and the homeless. The Foundation shall be organized under governing documents that are approved in advance of filing by GW and the WECA and that are prepared pro bono or otherwise not at the WECA's expense. Until the GW donation is expended, the Foundation shall provide GW an annual report on the Foundation's operation and

permit GW to audit such operations upon reasonable notice. In addition, GW shall be afforded the opportunity to appoint one or more representatives to the Foundation board. Representatives from GW and the International Monetary Fund shall constitute less than the majority of the board.

8. **Environmental Compliance.** GW shall comply with the D.C. Environmental Policy Act (D.C. Code § 8-109.01 et seq., 2001), subject to any applicable amendments, regulations and judicial interpretation, on all future campus construction projects. This paragraph makes no determination as to GW's prior compliance with the D.C. Environmental Policy Act.

9. **WECA Commitments.** In exchange for GW's commitments identified in Section 2 - 8, above, the WECA agrees to support GW's PUD Modification Request, as amended by the request to eliminate the loading dock as referenced in Section 2, above, and the amenities described herein, as well as to support any GW request to the BZA in Appeal No. 16701 for a stay of the BZA Order, dated July 12, 2001, pending the Zoning Commission's issuance of a final Order on the PUD Modification Request. Further, the WECA agrees to support GW in any appeal of the Zoning Commission's Order for the PUD Modification Request, any building permit issued pursuant thereto, as well as GW's application for a Certificate of Occupancy.

10. **Conditions Necessary for GW's Performance.** GW's commitment to enforce construction hours, to convene a committee of adjacent and nearby community residents, and to appoint and provide notice of a telephone contact for construction-related complaints and inquiries, set forth in Section 4, above, shall

be effective immediately upon the execution of this Agreement. Upon approval by the Zoning Commission of the PUD Modification Request, GW will take all reasonable efforts to secure any additional necessary approvals required to complete the construction according to the PUD as modified, including any approvals required by the Commission of Fine Arts and DCRA. Upon securing such approvals, GW will take all reasonable efforts to complete construction on a timely basis and to complete the build-out of the retail space described herein within 6 months of GW's securing a Certificate of Occupancy for the Building. GW's performance of sections 2, 3, 5, 6 and 7 is dependent upon receipt of a Certificate of Occupancy for the Building pursuant to the PUD, as modified herein. GW agrees to make all reasonable efforts to secure such Certificate of Occupancy on a timely basis.

11. **Incorporation**. GW and the WECA shall request that this Agreement be attached to and incorporated in the Zoning Commission's Order for the PUD Modification Request.

12. **Remedies**. This Agreement does not limit any common law or statutory rights or remedies available to any entity or person relating to damages sustained to person or property attributable to activities of GW.

13. **Severability**. This Agreement and the rights and obligations of the parties hereunder shall be construed in accordance with the laws of the District of Columbia. If any term, provision, covenant or agreement contained herein, or the application thereof to any person or circumstances, shall be held to be invalid, illegal or unenforceable, the validity of the remainder of this Agreement or the

application of such term, provision, covenant or agreement to the persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby.

14. **Binding Effect**. This Agreement is binding upon and shall inure to the benefit of the heirs, successors, assigns, parents, and subsidiaries, affiliates and related entities of GW and the WECA, and shall run with the land.

15. **Authority to Execute**. Each of the parties executing this Agreement represents and warrants to each of the other parties hereto that: (i) it has the full power and authority to enter into this Agreement and to consummate the transaction described herein without obtaining any further approvals or consents, and (ii) the entering into of this Agreement will not constitute or result in a violation or breach by any such party of any judgment, order, writ, injunction or decree issued against or imposed upon it or any agreement to which it is a party or by which it is bound.

16. **Modification/Waiver/Breach**. No change or modification of this Agreement shall be valid unless the same is in writing and signed by GW and the WECA. No waiver of a breach or default shall be deemed a waiver of any subsequent breach or default.

17. **Notices**. Any notices permitted or required under this Agreement shall be in writing and delivered to the parties at the addresses set forth below or to such other addresses as a party may specify by written notice to the other(s). Notices shall be effective upon delivery to the party, with best efforts to ensure actual receipt by the party. Notices sent by Federal Express or other recognized

overnight courier services for next-day delivery shall be presumed received on the following business day. Notices sent by certified mail, return receipt requested and postage prepaid, shall be presumed received three business days after the date of mailing unless such notice is returned unclaimed.

To GW:	Charles K. Barber, Esq. Office of the General Counsel The George Washington University Suite 525 Washington, D.C. 20052
Copy to:	Phil T. Feola, Esq. Shaw Pittman LLP 2300 N Street, N.W. Washington, D.C. 20037
To WECA:	West End Citizens Association c/o Barbara F. Kahlow 2555 Pennsylvania Avenue, N.W. #404 Washington, D.C. 20037

18. **Counterparts.** This Agreement may be executed in counterparts and via original or facsimile signature.

IN WITNESS WHEREOF, the parties hereto have signed and delivered these presents as their own free act and deed as of the date and year first herein above written.

The George Washington University,
federally chartered institution of higher
education

By: _____

Its: Vice President and Treasurer

Subscribed and sworn to before me this 17th day of August 2001. Witness my hand and official seal.

_____
Notary Public

My Commission Expires: 06-30-2005

West End Citizens Association

By: John L. Batham

Its: President

Subscribed and sworn to before me this 17th day of August 2001. Witness my hand and official seal.

_____
Notary Public

My Commission Expires: 06-30-2005

The George Washington University
WASHINGTON DC

OFFICE OF THE VICE PRESIDENT AND TREASURER

August 17, 2001

Mr. John C. Batham
President
West End Citizens Association
P.O. 58098
Washington, D.C. 20037-8098

Ms. Sara Maddux
Board Member
Monroe House Condominium Association
522 21st Street, N.W.
Washington, D.C. 20006

Re: GW Campus Plan, BZA Application No. 16553

Dear Mr. Batham and Ms. Maddux:

Please be advised that the University commits to proffer to the Board of Zoning Adjustment (BZA) in the remand of the above referenced case a condition restricting Freshmen and Sophomores living in the Foggy Bottom/West End Area (as defined on page 11 of the BZA Order, dated March 29, 2001) from bringing cars to school or parking in the Foggy Bottom/West End Area. In essence, this condition would provide that the George Washington University (GW) 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.

Both GW and the West End Citizens Association (WECA) recognize that neither GW nor the WECA have enforcement authority of this policy.

Sincerely,

Louis Katz
Vice President and Treasurer

2121 I STREET, N.W. • SUITE 701 • WASHINGTON, DC 20052 • (202) 994-6600 • FAX (202) 994-9304

Attachment C

GWU's Compliance with and DC's Enforcement of the DC Environmental Policy Act

The Board of Zoning Adjustment (BZA) asked the West End Citizens Association (WECA) to submit arguments to support its view that the George Washington University (GWU) must produce for this Appeal No. 16950 the Environmental Impact Screening Forms (EISFs) for all cases GWU initiated since August 17, 2001. 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 Zoning Order No. 746-C states, "The University shall comply with the D.C. Environmental Policy Act (D.C. Code § 6-981 *et seq.*) ... on all future campus construction projects."

The WECA believes that the issue of GWU's compliance with and the timing of DC's enforcement of the DC Environmental Policy Act (DCEPA) needs to be considered broadly due to the obvious adverse impact of GWU's continuing expansion into the Foggy Bottom-West End residential community, including outside of its old and new campus plan boundaries. The WECA believes that both the BZA and Zoning Commission (ZC) need to consider the cumulative adverse environmental effects of GWU's expansion instead of looking at each new case in isolation. GWU's expansion not only threatens the continued quality of residential life in Foggy Bottom-West End but also negatively affects the Foggy Bottom-West End community with a variety of environmental, economic, and social impacts. For example, there is reduced housing for long-term residents, reduced on-street parking, increased traffic, excessive late-night noise, negatively-affected property values, and substantial rent increases.

To enforce Condition No. 12 in the ZC's 1957 E Street Planned Unit Development (PUD) Order No. 746-C, the Zoning Administrator (ZA) should routinely review each GWU project for compliance with the DCEPA - including a completed EISF - before he makes a report to the BZA or ZC. In addition, the BZA/ZC should also review a completed EISF before acting on any GWU application. DC's zoning rules require GWU to show that a proposed project "is not likely to become objectionable to neighboring property because of noise, traffic, number of students, or other objectionable conditions" (11 DCMR § 210.2). In the new hospital case, GWU only completed an EISF after the BZA's approval action, i.e., after the BZA supposedly considered the totality of objectionable conditions. This was completely illogical.

Because of diverse adverse impacts, all of GWU (including the 1957 E Street property) was specifically excluded by the DC City Council from the Central Employment Area (CEA) and thus is subject to the DCEPA (the second time is now codified in Sec. 199.1 of the Comprehensive Plan Amendment Act of 1999, DC Act 12-609).

The Department of Consumer and Regulatory Affairs' (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 1997 implementing rules (at 20 DCMR §7204.1) for the 1989 DCEPA 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.

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).

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). The Orders for all three cases have no mention whatsoever of GWU's compliance with the DCEPA. And, EISFs were required for all three of these "major" actions.

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 ZC's January 14, 2002 Order of GWU's attention to and compliance with the DCEPA. 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). A WECA Board Member, 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. Thus, to enforce Condition No. 12 in Zoning Order No. 746-C, GWU should produce for this Appeal the EISFs for all cases GWU initiated since August 17, 2001.

Since the 1989 enactment of the DCEPA, there has been only one EIS prepared - for the Georgetown University cogenerator case (Citizens Coalition, *et al.* v. DC BZA (619 A.2d 940 (D.C. App. 1993)). In contrast, for Federal properties, under the 1969 National Environmental Policy Act (NEPA), EISs are routinely prepared to protect communities. The bottom line is that DC – especially DCRA, the DC Department of Health, ZA, ZC and BZA - needs to take environmental protection as a serious matter to protect communities in DC.

The BZA can make a difference by using this Appeal and Condition No. 12 in Zoning Order No. 746-C to begin to routinely consider GWU's adverse environmental effects on the Foggy Bottom-West End community, consistent with the stated purpose of the DCEPA: "to promote the health, safety and welfare of District of Columbia ("District") residents, to afford the fullest possible preservation and protection of the environment through a requirement that the environmental impact of proposed District government and privately initiated actions be examined before implementation" (DC Code § 8-109.01).

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 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, [*8274] 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: [*8275]

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). [*8276]

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

FINAL DATE OF ORDER: August 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."

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