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February 24, 2003

By Hand Delivery

Mr. Geoffrey Griffis, Chairman
Board of Zoning Adjustment
441 4th Street, N.W.
Second Floor
Washington, DC 20001

Re: BZA Appeal No. 16950, Request to Re-Open the Record

Dear Chairman Griffis:

On behalf of The George Washington University, the property owner in the above-captioned appeal, we respectfully request that the Board re-open the record in this case in order to take administrative notice of Zoning Commission Order No. 746-D, a copy of which is attached. This Order, which became effective on February 7, 2003, modified Condition No. 9(a) of the PUD Order 746-C which permitted the construction of the Project which is the subject of the appeal.

As the Board is well aware, compliance with Condition 9(a) was one of the three issues raised by the West End Citizens Association ("**WECA**") in its appeal of the issuance of a Certificate of Occupancy for the Project. We believe inclusion of this Order in the record of this appeal, and the explanation of the change to Condition 9(a) provided by the Zoning Commission in the Order, will make WECA's appeal on this issue moot.

Thank you for your consideration.

Sincerely,

Phil Feola

Martin P. Sullivan

Attachments

BZA
Case No. 16950
Exhibit No. 48

Board of Zoning Adjustment
District of Columbia
CASE NO. 16950
EXHIBIT NO. 48

ShawPittman LLP

Certificate of Service

I hereby certify that on February 24, 2003 a copy of the foregoing Request to Re-Open the Record was hand delivered and mailed first class, postage prepaid as follows:

Jack Batham
West End Citizens Association
P. O. Box 58098
Washington, D.C. 20037

West End Citizens Association, Hand Delivered
c/o Barbara Kahlow
2555 Pennsylvania Avenue, N.W.
Apt. No. 404
Washington, D.C. 20037

ANC 2A, Hand Delivered
St. Mary's Court
725 24th Street, N.W.
Washington, D.C. 20037



Phil Feola

Document #: 1307008 v.1

ZONING COMMISSION ORDER NO. 746-D
Case No. 01-17M/93-5F/91-18P
Minor Modification to the Planned Unit Development Order
at 1957 E Street, N.W.
November 18, 2002

The Zoning Commission for the District of Columbia, at its regularly scheduled meeting held on November 18, 2002, approved an application from The George Washington University (the "Applicant" or the "University") for a minor modification to an approved planned unit development (PUD) for property located at 1957 E Street, N.W., Square 122, Lot 29, pursuant to Chapters 1, 24, and 30 of the District of Columbia Zoning Regulations. Because the modification was deemed minor, within the meaning of 11 DCMR § 3030.2, a public hearing was not conducted.

The Commission determined that this modification request was properly before it under the provisions of §§ 2409.9 and 3030 of the Zoning Regulations.

FINDINGS OF FACT

The Zoning Commission, by Order No. 746-C, dated June 10, 2002,[1] approved a number of modifications to a previously approved PUD at 1957 E Street, N.W. (Square 122, Lot 29). The approval, among other things, granted the University permission to use the residential portion of the building for student apartments and the commercial portion of the building for academic and office use. The Commission's Order and Decision was subject to a number of conditions, including Condition 9(a).

Condition 9(a) requires the University to contribute $500,000 (over five [5] years) for "the purpose of operating a program for providing meals at reduced rates for the needy, elderly, and other low income residents of Foggy Bottom." The contribution is required to be made in increments of $100,000 per year for five (5) years to "the Foggy Bottom Feeding Program Foundation, Inc. (the Foundation)." The condition requires that the "entirety of the $500,000 contribution paid by the University shall be conditioned upon its exclusive use to provide food and meals for the needy, elderly, and other low income residents." The condition further requires that "if, for any reason, the Feeding Program cannot operate as described above, or the Feeding Program fails to comply with the above-stated funding condition, then the University shall pay $100,000 a year to an existing, non-profit food service program selected by the Foundation until (a) the Feeding Program begins or resumes operation; (b) the Feeding Program

[1] The Order was published in the August 16, 2002, edition of the *D.C. Register* at 49 DCR 8011.

achieves compliance with the funding condition; or (c) the $500,000 is fully expended, whichever comes first." Thus, the condition requires a $100,000 payment to the Foundation unless the Foundation is not operating said Feeding Program. In this event, the Foundation must choose the non-profit food service program to which the particular contribution of $100,000 must be made.

However, Condition 9(a) does not indicate what should happen in the event that the Foundation fails to indicate its choice of an alternative food service program within a reasonable period of time. Since the University is in the process of implementing this condition, it has requested the following modification be made to Condition 9(a) to address this scenario:

> If the Foundation neither establishes the Feeding Program in compliance with this condition, nor identifies an alternative existing food service program within 30 days after receipt of a written request from the University to the Foundation, the University shall select a non-profit food service and/or homeless program operating within the Foggy Bottom area and not affiliated with George Washington University to be the donee of the contribution, and said contribution shall be delivered within 10 business days after the expiration of the above-referenced 30-day period.

The University also requests that Condition 9(a) be modified by inserting "the Foundation and" in the condition's last sentence immediately after "each year to".

On November 18, 2002, at its regular monthly meeting, the Zoning Commission reviewed the application as a Consent Calendar matter and granted approval of the minor modification to the approved PUD.

The Zoning Commission finds that the modification of this condition will clarify the original condition, thereby implementing the full force and intent of the condition when originally crafted by the Zoning Commission.

The Zoning Commission concludes that approving the modification is appropriate and is not inconsistent with the intent of 11 DCMR §§ 2409.9 and 3030.

The Zoning Commission further concludes that its decision is in the best interest of the District of Columbia and is consistent with the intent and purpose of the Zoning Regulations.

CONCLUSIONS OF LAW

Upon consideration of the record in this application, the Zoning Commission finds that the proposed modification is minor and consistent with the intent of the previously approved Zoning Commission Order No. 746-C. Further, the Commission concludes that its decision is in the best interest of the District of Columbia and is consistent with the intent and purpose of the Zoning Regulations.

Advisory Neighborhood Commission ("ANC") 2A filed a letter in opposition to this request, arguing that the Zoning Commission did not have jurisdiction to modify the PUD, because an

appeal of Zoning Commission Order 746-C had been filed in the District of Columbia Court of Appeals. ANC 2A offered no authority for this position and the Commission finds that the argument is without basis. The Court of Appeals has not stayed the Order under appeal. The Order thus remains fully effective notwithstanding the appeal, and the University is free to proceed based upon the approved plans. Like any other successful PUD applicant, the University may request, and the Commission may grant, such modifications as are necessary to effectuate the Commission's intent. To hold otherwise would effectively freeze approved projects where no stay has been granted. The Commission is not, as has been suggested, reconsidering the Order being appealed, but rather adding a small detail necessary to ensure that its intent with respect to this feeding program contribution will not be frustrated.

West End Citizen's Association (WECA) also filed a letter in opposition, arguing that the requested change was substantial and "reach[es] the heart of the PUD's amenities package." The Commission does not agree. No change is being made to either the amount or purpose of the charitable condition. Further, the proposed modification does not impact any physical or other material aspect of the PUD, but only clarifies an existing condition, allowing the University to effectively comply with it. No other conditions of the approved PUD will be affected and the material facts relied on by the Commission in approving the PUD have not changed.

Section 3030.1 of the Zoning Regulations allows "the Commission, in the interest of efficiency, to make, without public hearing, minor modifications and technical corrections to previously approved final orders, rulemaking, or other actions of the Commission, including corrections of inadvertent mistakes." The requested contingent procedure falls squarely within the scope of § 3030.1. The consideration of this request as a Consent Calendar item without a public hearing is therefore appropriate.

The issues or concerns raised by ANC 2A are, for the most part, legal in nature and have been fully addressed above. The Commission has thus given these issues and concerns "great weight" in accordance with D.C. Official Code § 1-309(d) (2001).

The approval of the modification is not inconsistent with the Comprehensive Plan.

DECISION

In consideration of the Findings of Fact and Conclusions of Law herein, the Zoning Commission for the District of Columbia hereby orders **APPROVAL** of the application for a minor modification of an approved PUD. Condition No. 9(a) of Order No. 746-C is hereby revised to read (changes underlined):

> 9(a). The University shall contribute $500,000 over five (5) years for the purpose of operating a program of providing meals at reduced rates for the needy, elderly, and other low income residents of Foggy Bottom (the "Feeding Program") at one or more food service venues in Foggy Bottom, such as venues in University-owned or leased facilities. The $500,000 contribution will be $100,000 a year for five (5) years to the Foggy Bottom Feeding Program Foundation, Inc. (the "Foundation"), an established District of Columbia nonprofit corporation organized by the representatives of the

University and WECA. The Foundation will set the eligibility requirements and provide oversight for the Feeding Program. The first $100,000 contribution will be made on the date of the Certificate of Occupancy for the Subject Property. Subsequent payments shall be made on the next four succeeding anniversaries of the Certificate of Occupancy. In addition to the $500,000 contribution, the University will pay for the build-out of University food service venues, if necessary, in an amount not to exceed $250,000. The University will also pay the cost of securing all necessary permits to operate the Feeding Program at the University venues. The contribution shall be conditioned so that no portion of the $500,000 contribution or the $250,000 "build out" referenced above may be used for salaries, expenses, and other costs relating to administering the Feeding Program. The entirety of the $500,000 contribution paid by the University shall be conditioned upon its exclusive use to provide food and meals to needy, elderly, and other low income residents. If, for any reason, the Feeding Program cannot operate as described above, or if the Feeding Program fails to comply with the above-stated funding condition, then the University shall pay $100,000 a year to an existing, nonprofit food service program selected by the Foundation until (a) the Feeding Program begins or resumes operation; (b) the Feeding Program achieves compliance with the funding condition; or (c) the $500,000 is fully expended, whichever comes first. If the Foundation neither establishes the Feeding Program in compliance with this condition, nor identifies an alternative existing food service program within 30 days after receipt of a written request from the University to the Foundation, the University shall select a non-profit food service and/or homeless program operating within the Foggy Bottom area and not affiliated with the University to be the donee of the contribution, and said contribution shall be delivered within 10 business days after the expiration of the above-referenced 30-day period. The University shall provide evidence of the annual payments for the Feeding Program each year to the Foundation and the Zoning Administrator, with copies to ANC 2A and WECA.

This Order was **ADOPTED** by the Zoning Commission at its public meeting on November 18, 2002, by a vote of **4-0-1** (Anthony Hood, Carol Mitten, Peter May, and James Hannaham; John Parsons not voting, not having participated in the case).