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February 28, 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, Proposed Zoning Order**

Dear Chairman Griffis:

On behalf of The George Washington University, the property owner in the above-captioned appeal, we submit the University's Proposed Findings of Fact and Conclusions of Law in this case.

Please be advised that yesterday, February 27, 2003, the University was advised orally that the Foggy Bottom Feeding Program Foundation, Inc., the not-for-profit identified in Condition 9(a) of Zoning Commission Order No. 746-C ("**Order**"), has identified an alternative existing feeding program to which it will direct the University's donation as required by the Order. If this proves to be the case, the issues of this appeal related to Condition 9(a) are further mooted.

Thank you for your consideration.

Sincerely,

Phil Feola

Martin P. Sullivan

Attachments

cc: Charles Barber, Esq.

BZA
Case No. 16950
Exhibit No. 50



Board of Zoning Adjustment
District of Columbia
CASE NO.16950
EXHIBIT NO.50

**THE GEORGE WASHINGTON UNIVERSITY'S**

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Appeal No. 16950 of the West End Citizens Association ("**WECA**") pursuant to 11 DCMR §§ 3100 and 3101, of the administrative decision of the Zoning Administrator, Zoning Review Branch, Department of Consumer and Regulatory Affairs, issuing a Certificate of Occupancy No. 39477 on August 16, 2002 to The George Washington University to permit occupancy of a portion of a multi-story building for University apartments and parking pursuant to a Planned Unit Development ("**PUD**") in a C-3-C Zone District at premises 1957 E Street, N.W. (Square 122, Lot 835).

Hearing Date: December 17, 2002 and January 14, 2003.

Decision Date: March 4, 2003.

## ORDER

Preliminary Matters:

1. The ANC 2A requested permission to intervene in this appeal. However, the ANC 2A did not present any evidence that indicated that it took such position with regard to this appeal in a formal meeting, after appropriate notice and with a quorum present.

2. The Board granted the ANC 2A additional time to pass the appropriate resolutions. As of the date of the closing of the record, however, the ANC did not submit the required materials.

## FINDINGS OF FACT

1. The subject appeal was filed timely on September 23, 2002 by WECA ("**Appellant**"). The appeal challenges the decision of Robert Kelly, the Zoning Administrator, to approve the issuance of a Certificate of Occupancy No. 39477 to The George Washington University

("**University**") to occupy a multi-story building for apartment and parking uses pursuant to an approved PUD at premises 1957 E Street, N.W. ("**Subject Site**").

2. The University is the owner of the Subject Site. Pursuant to §3199 of the Zoning Resolutions, the University is a party to the appeal.

3. Pursuant to Zoning Commission Order No. 746, dated December 10, 1993, a Planned Unit Development ("**PUD**") was approved for the Subject Site, which rezoned it from the SP-2 Zone District to the C-3-C Zone District upon recordation of the PUD covenant and approved the construction of a mixed use building for residential and commercial uses. The PUD was approved to include 5.79 FAR commercial space and at least 2.17 FAR residential space.

4. Zoning Commission Order No. 746 was extended by Order No. 746-A and 746-B whereby a building permit application was to be filed by December 10, 1999 and construction to begin by December 10, 2000.

5. After appropriate application and public hearing on the matter, the Zoning Commission approved modifications to the PUD by Zoning Commission Order No. 746-C which granted the University permission to proceed with the construction of the Project as modified by Order No. 746-C and added additional terms and conditions which the University is obligated to perform.

6. The Appellant asserts that the University failed to abide by certain conditions of Zoning Commission Order No. 746-C. This alleged failure and the Zoning Administrator's issuance of the Certificate of Occupancy despite such alleged failure constitute error on the part of the Zoning Administrator. On these bases, WECA argues that the Certificate of Occupancy should

never have been issued and should be revoked. The conditions that WECA alleges have not been satisfied are:

a. that the University did not fulfill its requirements pursuant to Condition No. 9(a) of Zoning Commission Order No. 746-C because it failed to make a $100,000 contribution to the Foggy Bottom Feeding Program Foundation, Inc. ("**Program**") no later than the date of issuance of the Certificate of Occupancy for the building;

b. the University failed to comply with District of Columbia Environmental Policy Act for each project initiated since August 17, 2001, the date of an Agreement by and between WECA and the University, as required by Condition No. 12 of Order No. 746-C; and

c. the University failed to publish parking restrictions related to the Foggy Bottom/West End area starting in its publications for Fall Semester 2002.

7. The WECA presented written evidence and oral testimony during the hearing further articulating its position. WECA argued that the Zoning Administrator failed to secure proof of the satisfaction of the above noted conditions and, therefore, erred in issuing the Certificate of Occupancy.

8. WECA also took exception to the Zoning Administrator's and DCRA's failure to issue daily fines against the University for its alleged failure to comply with the Conditions of Order No. 746-C; that the Zoning Administrator improperly added Conditions to the PUD Order; and that DCRA failed to respond to its Freedom of Information Act request in a timely manner.

9. WECA presented the Board with additional supporting information including: (a) excerpts of the District of Columbia's Strategic Neighborhood Action Plan for Foggy Bottom, The George Washington University and the West End; (b) a number of e-mails from the Zoning Administrator to the University; (c) a number of internal e-mails between DCRA officials and others; (d) a November 2002 Greenwire article about the regional air pollution problem; (e) two e-mails from University students regarding the absence of parking restrictions in the University's policies; and (f) a GWHachet article concerning the University's Hospital. In a response to a request from the Board, the appellant filed additional materials into the record on December 31, 2002 including copies of: (1) three BZA Orders (Nos. 16701-A, 16701-B and 16701-C); (2) a copy of the August 17, 2001 agreement between the University and West End Citizens Association ("**Agreement**"); and (3) a legal brief supporting WECA's view that the University must produce the Environmental Impact Screening Forms for all building permit applications initiated by the University since August 17, 2001.

10. Sara Maddux, Secretary of WECA and a resident at 522 21st, N.W. testified on behalf of WECA with regard to the issues in this appeal. She indicated that as the University has expanded its student enrollment and faculty and support staff, it has drawn more individuals with automobiles searching for parking in the Foggy Bottom/West End area. This increase in size of the University has created a negative impact on the neighborhood. Ms. Maddux provided photographs and a license plate analysis for the Board's review.

11. Ms. Maddux also claimed that the University has not implemented the requirement of providing retail use on the ground floor pursuant to Zoning Commission Order No. 746-C, as well not following the landscaping plan which the Zoning Commission approved.

12. Ms. Maddux also testified that the Foggy Bottom Feeding Program Foundation, Inc. was a viable, not-for-profit entity with a competent Board of Directors organized under the laws of the District of Columbia. She stated that the Program was not yet operational because it needed the contribution required under Condition No. 9(a) to begin.

13. Ms. Barbara Kahlow, representing the appellant, delivered a detailed historical summary of events leading to the appeal as well as the District's failure to apply appropriate fines against the University and challenged the University's ability to open the apartment portion of the project prior to making the $100,000 contribution to the Program. Her statement also expressed WECA's belief that Condition No. 12 of Order No. 746-C applied to all University projects, subsequent to the date of the Agreement, not Zoning Order No. 746-C. She testified that since August 17, 2001, the date of the University/WECA Agreement, the University has filed for building permits for three major projects without compliance with the D.C. Environmental Policy Act.

14. Ms. Kahlow also testified that the failure to enforce student parking restrictions violated the terms of the Agreement as well as the PUD Order and that the University was also out of compliance with other zoning orders such as The George Washington University Hospital and the Health and Wellness Center Orders. Finally, Ms. Kahlow testified that the Zoning Administrator, by letter dated September 6, 2002 to WECA, improperly added Conditions to the Zoning Order beyond his authority.

15. Ms. Kahlow, on behalf of WECA, requested that until the University is in full compliance with the University/WECA Agreement and Order No. 746-C, including the issuance of a $100,000 check to the Program and publication of a non-ambiguous student parking

restriction policy, that the BZA direct DCRA to: (a) immediately revoke the Certificate of Occupancy for the apartment use and not allow students to live in the building starting in January 2003; (b) not issue a Certificate of Occupancy for the institutional uses in the eastern portion of the project; and (c) issue daily maximum fines, retroactively to August 16, 2002, for the continued violation of the Zoning Order and for those projects in Squares 43, 56 and 57 which are yet to be completed.

16. Mr. Robert Kelly, Zoning Administrator of the District of Columbia testified that when presented with the Zoning Order he understood that the University was put in an untenable position by Condition No. 9(a). It required, in his opinion, that the University make a contribution of $100,000, prior to the issuance of a Certificate of Occupancy, to the Foggy Bottom Feeding Program Foundation, Inc., but only if that Foundation was operating such a Program. Further, Condition No. 9(a) require that the monies to be donated by the University were to be used only for feeding the needy and elderly in the area. He stated that Condition No. 9(a) provided an alternative to the University if the Foundation Program was not operating. This alternative requires the University to give the $100,000 contribution to an existing feeding program chosen by the Foundation Board. At the date of the issuance of the Certificate of Occupancy, however, the Foundation Program was not operating and the University had requested the Foundation Board to designate an existing program. The Foundation Board failed to respond. Thus, the Zoning Administrator testified that what he did was interpret the intent of the Zoning Commission to ensure that the contribution was delivered to an appropriate feeding program, but not allow the Foundation to hold up the University indefinitely for its failure to act.

17. Mr. Kelly testified that he sent a letter to the University with copies to WECA that outlined his decision in which he articulated the three options available to the University. These

included: (1) a donation to the Foundation if the Program were operating; (2) a donation to a program chosen by the Foundation; or (3) if neither of the above occurred, that the University would file a request with the Zoning Commission to help clarify the issue and break the impasse. Mr. Kelly entered this letter into the record.

18. Mr. Kelly testified that he believed satisfaction of Condition 9(a) was a prerequisite of the issuance of the Certificate of Occupancy at issue hearing. He stated that compliance with all the other conditions of the Zoning Commission Order No. 746-C needed to occur prior to the issuance of the final Certificate of Occupancy for the entire project, including compliance with the landscaping and retail requirements as set out in Order No. 746-C.

19. Charles Barber, Esq., Senior Counsel of the University testified on behalf of the University that he sent a letter, dated August 12, 2002, which was entered into the record, to the Foundation in which he requested that the Foundation identify an existing alternative program to which the University could donate the $100,000 since the Foundation's Program had not been established. He testified that the Foundation did not respond and, to date, he had not received a response to his request. Mr. Barber testified that the University felt that it was put in a "no win" position because of the Foundation's inaction. Thus, the University, after consultation with the Zoning Administrator, placed $100,000 in an escrow account in order to show its good faith and move the project forward. After it became apparent that the Foundation did not set up a Program nor responded to the University's request to choose a different existing program, the University filed, as suggested in the Zoning Administrator's letter, with the Zoning Commission a request to modify Condition No. 9(a) to clarify the Commission's intent and allow it to move forward with the donation if the conditions were not fulfilled by the Foundation.

20. With regard to the parking restriction, Mr. Barber first noted, that the parking restriction is not a condition of Zoning Commission Order No. 746-C Mr. Barber further testified that the University had placed on its web site the restrictions required pursuant to the Agreement and at the request of the Board submitted that web site address to the Board on January 2, 2003.

21. Mr. Barber also testified that with regard to compliance with the Environmental Policy Act, that Condition No. 12 is plain on its face and can only be applied prospectively after the date of Zoning Commission No. 746-C which was effective on August 16, 2002 not 2001 as suggested by appellant. Further, he testified that the University always submits the required environmental forms for all of its projects. Those forms are reviewed in due course and approved, denied or approved with conditions by the District of Columbia, as required by D.C. law, as part of the building permit process. He provided, into the record, letters of compliance with the Environmental Policy Act for two University projects, Townhouse Row and Square 43, which actually were approved prior to the effective date of Zoning Commission Order No. 746-C, He indicated that the only project for which permits had been applied subsequent to August 16, 2002 is the Business School and the review of that application has yet to be completed.

22. Mr. Barber also testified that with regard to the retail uses in the project, the University fully intends to build out and market those uses, but at this point WECA's appeal is premature because Zoning Commission Order No. 746-C gives the University a full year within which to use its best efforts to achieve the retail goal. The University also stated that the issue raised in the hearing with regard to compliance with the Landscape Plan (Condition 9(b) of Order No. 746-C) is premature since the entire project was not completed at the time of the issuance of the Certificate of Occupancy being challenged here.

23. Advisory Neighborhood Commission 2A, through testimony of Ms. Elizabeth Elliott, immediate past chairperson of the ANC and ANC Commissioner Dorothy Miller testified that at a special meeting held on December 29, 2002, the ANC voted to allow it to be represented by Commissioner Miller and Ms. Elliott at the hearing and voted unanimously to take "no position on this appeal and to reconfirm to the Board its original ongoing opposition to the entire 1957 E Street Project." The ANC is concerned with the Foggy Bottom Feeding Program Foundation and that the amenities contained in the Zoning Commission approval of the project containing Zoning Commission Order No. 746-C are not appropriate.

24. Parking Restrictions in Foggy Bottom/West End:

Evidence was presented into the record that the University and WECA entered into an arrangement by which the University agreed to publicize its parking restrictions to incoming students including discouraging students living in the Foggy Bottom/West End from bringing automobiles to campus. The Board finds that this arrangement was a private agreement between the parties and is not contained in the Conditions of Zoning Commission Order No. 746-C. Thus, it is outside the authority of the Zoning Administrator to consider whether, or not, the University has violated this arrangement, a private contract between the parties, in issuing or failing to issue a Certificate of Occupancy.

25. District of Columbia Environmental Policy Act:

Zoning Commission Order No. 746-C was issued by the Zoning Commission on August 16, 2002. That same day the University received a Certificate of Occupancy for a portion of the PUD. Condition No. 12 of Zoning Commission Order No. 746-C states "the University shall comply with the D. C. Environmental Policy Act (D.C. Code §6-981 et seq.),

subject to any applicable amendments, regulations or judicial interpretation, on all future campus construction projects" (emphasis added). It is clear by the language of this Condition that the Zoning Commission intended the application of D.C. Environmental Policy Act to all future University projects, that is, after the effective date of Zoning Commission Order No. 746-C. The Zoning Administrator did not know, nor could have known, about projects that may or may not have been permitted after August 16, 2002 when he approved the application for a Certificate of Occupancy on August 16, 2002, and therefore did not err in issuing the Certificate of Occupancy on those grounds.

26. Zoning Commission Order Condition No. 9(a):

a. The full text of Condition No. 9(a) is as follows:

The University shall provide the following amenities as part of this PUD and the University shall provide a written report on the status of these amenities, annually from the effective date of this Order, to the Zoning Administrator of the District of Columbia, ANC 2A, and WECA. Where reports on individual amenities are referenced below, such reports will be included in the annual report, unless otherwise indicated.

(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 shall 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 shall pay for the build-out of University food service venues, if necessary, in an amount not to exceed $250,000. The University will also pay the cost of securing all necessary permits to operate the Feeding Program at the University venues. 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 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. The University shall provide evidence of the annual payments for the Feeding Program each year to the Zoning Administrator, with copies to AINC 2A and WECA. (Emphasis added).

b. Mr. Robert Kelly, the Zoning Administrator of the District of Columbia, testified that he believed Condition No. 9(a) placed the University in a untenable position. It required the University to pay $100,000 by the date of the issuance of the Certificate of Occupancy to the Foggy Bottom Feeding Foundation Program, Inc., but only if that Program was operating. He stated that the Zoning Commission Order No. 746-C, Condition No. 9(a) directed the University to pay the money to an alternative program as directed by the Foundation if the Program was not operating. Through correspondence, the Zoning Administrator concluded that the Foggy Bottom Feeding Program Foundation, Inc. had not begun to operate and, therefore, the University was prohibited from making such contribution to that Foundation. Further, because the Foundation failed, or refused, to identify an alternative recipient, the University could not proceed in that manner either. Mr. Kelly's September 6, 2002 letter outlined the conditions upon which he issued the Certificate of Occupancy. It stated that if, in fact, the Feeding Program was established in the 90 days subsequent to August 16, 2002, the University was to make the required contribution; in the alternative, he stated if the Feeding Program was not established, the University would make a contribution to an alternative feeding program as identified by the Foundation; or if neither of the above occurred, that the University would apply to the Zoning Commission for clarification as to how to satisfy the intent of the Zoning Commission.

7. On November 4, 2002, the University made such application to the Zoning Commission or clarification with regard to Condition No. 9(a).

8. On February 7, 2003 the Zoning Commission issued an Final Order, Zoning Commission No. 746-D, which amended Condition No. 9(a) to clarify what the University was to do in the vent that neither the Foundation program was up and operating and/or an alternative feeding rogram was not chosen by the Foundation.

9. Upon request of the University, the Board reopened the record to allow the inclusion of oning Commission Order No. 746-D into the record.

0. Zoning Commission Order No. 746-D amended Condition 9(a) to read as follows:

> 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 shall 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 shall pay for the build-out of University food service venues, if necessary, in an amount not to exceed $250,000. The University will also pay the cost of securing all necessary permits to operate the Feeding Program at the University venues. 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 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 AINC 2A and WECA. (New text underlined).

**CONCLUSIONS OF LAW AND OPINION**

The Board of Zoning Adjustment has jurisdiction to hear this appeal and render a decision in order pursuant to D.C. Code, § 524(f). Pursuant to 11 DCMR § 3119.2, the appellant has the burden of proof in this matter. In considering an application for a Certificate of Occupancy, the Zoning Administrator is required to determine whether the building was built in accordance with plans approved as part of the permit application and any conditions identified by a Zoning Commission Order have been met. To reverse the Zoning Administrator's decisions approving the issuance of a Certificate of Occupancy, the appellant must demonstrate to the Board by a preponderance of the evidence that the Certificate of Occupancy was issued in error or such issuance would violate conditions of the PUD Order or the Zoning Regulations.

Based on the above Findings of Fact, the Board concludes that the Certificate of Occupancy was properly issued. The Board concludes that: (1) whether or not the University abided by its contract with WECA with regard to parking restrictions in Foggy Bottom/West End is not germane to the jurisdiction of the Board of Zoning Adjustment or the Zoning Administrator; (2) the application of the D.C. Environmental Policy Act as articulated in the Zoning Commission Order No. 746-C is clearly for projects started by the University after the

effective date of Zoning Commission Order No. 746-C, August 16, 2002, none of which could have been before the Zoning Administrator for his review on August 16, 2002 when he issued the Certificate of Occupancy for this project; (3) the original Condition No. 9(a) of Zoning Commission Order No. 746-C placed the University in a position of never being able to satisfy that Condition; subsequently, the Zoning Commission has clarified its position with regard to Condition No. 9(a) by adopting new language pursuant to Zoning Commission Order No. 746-D thereby making the appeal on this point moot; and (4) that the claims regarding non-compliance with the conditions relating to landscaping and retail use are premature.

**Conclusion**

The Board acknowledges that ANC 2A took no position on this appeal and accords the ANC position the "great weight" to which it is entitled by law. The Board concludes that the issuance of the Certificate of Occupancy by the Zoning Administrator of the Department of Consumer and Regulator Affairs for this project was appropriate. Reviewing the Certificate of Occupancy application, the Zoning Administrator applied the Zoning Regulations and the conditions of the Zoning Orders in accordance with the plain language of the Regulations and those Orders and consistent with past precedence of the District of Columbia. The Board concludes that the appellant has failed to prove by a preponderance of the evidence, that the Certificate of Occupancy was issued in error, therefore the appeal of WECA is denied.

February 28, 2003

ShawPittman LLP

**Certificate of Service**

I hereby certify that on February 28, 2003 a copy of the foregoing Proposed Findings of Fact and Conclusions of Law was hand delivered and mailed first class, postage prepaid as follows:

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