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

February 28, 2003

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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 - Findings of Fact and Conclusions of Law
WECA's Appeal of DCRA & ZA's Administrative Decisions, 1957 E Street, N.W.

Dear Chairman Griffis and Members of the Board:

This letter transmits Appellant West End Citizens Association's (WECA's) proposed Findings of Fact and Conclusions of Law for BZA Appeal No. 16950, 1957 E Street, N.W. (Square 122, Lot 835). The WECA is also providing the Office of Zoning with an electronic copy of this document in WordPerfect format.

If any additional information is needed, please call Barbara Kahlow on 226-3058. Thank you.

Sincerely,

John C. Batham
President

Attachment

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

BZA
Case No. 16950
Exhibit No. 51

Board of Zoning Adjustment
District of Columbia
CASE NO.16950
EXHIBIT NO.51

Findings of Fact and Conclusions of Law
for BZA Appeal No. 16950 Objecting to Administrative Decisions on 1957 E Street, N.W.

FINDINGS OF FACT:

1. ZC Approval of AGC PUD. 1957 E Street, N.W. (Lot 835, Square 122) was zoned SP-2 until, on November 15, 1993, the Zoning Commission (**ZC**) conditionally approved a planned unit development (**PUD**) for the Associated General Contractors (**AGC**), with an associated map change to C-3-C, if and only if the PUD was built according to the conditions in ZC Order No. 746 (Case No. 93-5F/91-18P). On March 11, 1996 and February 8, 1999, the ZC twice extended its approval for the AGC PUD in ZC Orders No. 746-A and 746-B, respectively.

2. Community Successful Appeal of ZA Improper Building Permit. In June 1999, the George Washington University (**GWU**) purchased Lot 835, Square 122 from the AGC. Despite September 2000 Motions filed by the Foggy Bottom and West End Citizens Association (**ANC-2A**) and the West End Citizens Association (**WECA**) to the ZC and Board of Zoning Adjustment (**BZA**), which were referred to the Zoning Administrator (**ZA**), on December 28, 2000, the ZA issued a building permit to GWU for 1957 E Street. On January 19, 2001, ANC-2A filed BZA Appeal No. 16701 objecting to the improper issuance of this building permit. On April 10th, the BZA granted Intervenor "Party" status to the WECA. On June 5th, the BZA granted the community's Appeal, thereby requiring GWU to file a PUD Modification Request with the ZC. The BZA issued Order Nos. 16701-A, 16701-B, and 16701-C (entered in the record as Attachment A in WECA's 12/31/02 filing) relating to the community's successful Appeal.

3. BZA Directed Settlement. On June 5, 2001 - memorialized in BZA Order No. 16701-A - the BZA directed, "To avoid the continued uncertainties, expense, and delay of litigation, whether in administrative or judicial setting, the parties are strongly encouraged to pursue settlement of this PUD dispute." In response, on August 17th, with active participation by the DC Corporation Counsel, GWU and the WECA signed a contractual settlement "Agreement" (entered in the record as Attachment B in WECA's 12/31/02 filing). BZA Order No. 16701-C 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."

4. ZC Approval of GWU PUD Modification. On August 31, 2001, GWU filed a PUD Modification Request. On November 15th, the ZC granted "Party" status to the WECA. On August 16, 2002, ZC Order No. 746-C, which conditionally approved GWU's PUD Modification Request, was published (entered in the record by the Office of Zoning on 9/24/02 with WECA's 9/23 Appeal).

5. DCRA Improper CofO. On August 14, 2002, the WECA, via fax to Department of Consumer and Regulatory Affairs (**DCRA**) Director Dave Clark, alerted DCRA that GWU was not yet in compliance with ZC Order No. 746-C, which was expected to be published on August 16th (entered in the record as Attachment B1 in WECA's 9/23/02 Appeal). The fax advised DCRA that Condition No. 9(a) required GWU to unconditionally issue a check for $100,000 to

the Foggy Bottom Feeding Program Foundation no later than on the date of the Certificate of Occupancy (**CofO**) and that such a check had not yet been issued. Nonetheless, on August 16th, DCRA improperly issued a CofO.

In an August 20th letter to the DCRA Director and ZA (Attachment A in the 9/23/02 Appeal), the WECA provided additional noncompliance information, including the absence of proof not only for the $100,000 contribution but also for compliance with the DC Environmental Policy Act (**DCEPA**) and the institution of the promised student parking restriction policy change.

Before DCRA's August 16th issuance of the CofO, ZA was unaware of any condition in Zoning Order No. 746-C except Condition No. 9(a) (12/17/02 transcript, pp. 122-3). This is evident by the fact that, on August 22nd, ZA asked the WECA to fax him the rest of the Order (see Attachment B in WECA's 9/23/02 Appeal). The entire zoning regime is dependent upon DCRA's checking that every condition in a zoning Order has been met before its issuance of a CofO.

6. Foggy Bottom Feeding Program Foundation. On March 27, 2002, the Foggy Bottom Feeding Program Foundation was incorporated. On March 29th, GWU sent a memorandum to the WECA, which acknowledged that the Foundation could not complete establishment of a new feeding program until the written Zoning Order was in hand. The Order was published on August 16th. The Minutes for the August 19th meeting of the Board of the Foundation stated, "Upon receiving the funding from George Washington University as provided in the Zoning Order, the members of the Board would begin approaching appropriate vendors" (entered in the record in WECA's 2/3/03 filing).

7. WECA Appeal of DCRA and ZA Administrative Decisions. On September 5, 2002, the WECA filed a Notice of Intent to File an Appeal. On September 23rd, the WECA filed Appeal No. 16950. The WECA appealed the administrative decisions of DCRA Director David Clark and ZA Robert Kelly on August 16th and continuing thereafter to the effect that DCRA: (a) issued an August 16th CofO for 1957 E Street, N.W. without full compliance with Zoning Order No. 746-C; (b) failed to issue daily nondiscretionary fines under 11 DCMR §3201; and (c) tried to improperly add conditions to a Zoning Order -- in a September 6th letter from ZA to two Parties (GWU and the WECA) and a non-profit corporation which was not a Party to the case.

On December 2nd, the WECA filed additional documents in support of its Appeal, including: relevant pages in Mayor Williams' new District of Columbia Strategic Neighborhood Action Plan (**SNAP**) (Attachment A); e-mails from ZA to GWU regarding ZA's refusal to serve as an escrow agent and an August 28th e-mail (i.e., after issuance of the CofO) admonition that GWU is not in compliance with the Order ("We are informed by the Foundation that it has not received the first $100,000 contribution. If that is so, it would appear that GWU is now in violation of that Order and should take immediate steps to bring itself into compliance") (Attachment B); internal DC government e-mails, including one advising ZA not to issue a

citation to GWU for its noncompliance ("I'm looking to see if we can just not enforce those kinds of Zoning Commission orders") (Attachment C); and, two November e-mails from GWU sophomores regarding the absence by GWU of its promised parking restriction policy (Attachment E).

8. BZA Consideration of Appeal No. 16950. The BZA held a December 17, 2002 hearing on Appeal No. 16950, which was continued on January 14, 2003. The WECA was represented by Barbara Kahlow and Sara Maddux. Ms. Maddux is a former Chair of ANC-2A and a current Board Member of both the WECA and the Foggy Bottom Feeding Program Foundation. On December, 17, 2002, the BZA established a December 31st deadline for additional documents and a January 7, 2003 deadline for responses to the additional documents. The WECA met both deadlines. On January 2nd, GWU filed its additional documents, i.e., after the deadline. On January 14th, the BZA established a February 7th deadline for additional documents and a February 14th deadline for responses to the additional documents. The WECA met the former (filing on February 3rd) and, since no other Party (including ANC-2A) provided additional documents, no response was required from the WECA. No responses were filed by other Parties to the WECA's February 3rd filing.

9. Mayor Enforcement Policy Change. The SNAP for the Foggy Bottom, GWU and West End area includes the Mayor's desire for DC enforcement actions with meaningful fines when GWU is out of compliance.

10. No Daily Fines or Revocation. 11 DCMR Chapter 32, Administration and Enforcement, provides the framework for enforcement of Zoning Orders, including Section 3201, Penalties, and Section 3205, Compliance with Conditions in Orders. Specifically, 11 DCMR §3200.2 provides for appeals to the BZA. Also, 11 DCMR §3201.1 provides for non-discretionary fines "for each and every day the violation continues." And, 11 DCMR §3201.5 provides applicability to CofOs when a Zoning Order conditions issuance of a CofO. Lastly, 11 DCMR §3205.4 provides that property owners "shall at all times comply with any condition to the issuance of the certificate of occupancy." Nonetheless, since August 16, 2002, DCRA has failed to issue any daily fines for the ZA's acknowledged noncompliance by GWU with Zoning Order No. 746-C.

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" (791 A.2d 64 (D.C. App. 2002), pp. 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 pp. 32-3).

At the December 17th hearing, the ZA testified that there have been no fines issued to date (12/17/02 transcript, p. 146).

11. No $100,000 Contribution to Foggy Bottom Feeding Program Foundation. Condition No. 9(a) in Zoning Order No. 746-C requires GWU to make an unconditional $100,000 contribution to the Foggy Bottom Feeding Program Foundation no later than on the date of the CofO, i.e., by August 16, 2002. At the December 17th hearing, the ZA testified, "it was clear that the Certificate of Occupancy and the $100,000.00 deposit were tied together" (12/17/02 transcript, p. 135) and "the Certificate of Occupancy and the deposit were tied together in the same sentence" (12/17/02 transcript, p. 138).

However, instead, on August 16th, GWU unilaterally tried to change the terms of the Zoning Order by establishing a totally GWU controlled escrow account without even any mention of the Foundation. Also, GWU used its Employer Identification Number (**EIN**) instead of the Foundation's EIN (12/17/02 transcript, p. 186). In addition, the account had no escrow agent independent of GWU since the ZA refused to serve as an escrow agent upon advice from its Counsel that all Parties, including the WECA, would have to agree to any change in terms of the Zoning Order (ZA wrote GWU, "I need to go on record that the Zoning Administrator has not agreed with GWU to be an escrow agent and that any type of arrangement to do so would require agreement of GWU, WECA, and DCRA in a mutual action to comply with the [Zoning] order") (entered in the record as Attachment B in WECA's 12/2/02 filing). The WECA never agreed to GWU's unilateral action. Condition No. 9(a) does not require the feeding program to be operational as a precedent to GWU's first $100,000 contribution.

At the December 17th hearing, GWU admitted that the escrow agreement is "outside of the order" (12/17/02 transcript, p. 178) and that "There is nothing in the order which speaks to an escrow type of arrangement" (12/17/02 transcript, p. 186). The ZA stated, "I think it helped in my mind comply with the intent of the order, maybe not the letter of the order" (12/17/02 transcript, p. 137).

12. DC Law Exclusion from the CEA. To ensure that any GWU development within its Campus Plan area would need to fully comply with the DCEPA, Section 199.1 of the Comprehensive Plan Amendment Act of 1999 (passed by the DC City Council on 12/31/98) specifically excluded GWU's Campus Plan area from the Central Employment Area (**CEA**). To ensure compliance with the DCEPA, the Act also specifically excluded 1957 E Street, N.W. from the CEA.

13. Noncompliance with DCEPA. On October 23, 2000, DCRA incorrectly opined that 1957 E Street was in the CEA and, thus, not subject to the DCEPA (WECA's 12/31/02 filing, p. 2). The stated purpose of the DCEPA is "to promote the health, safety and welfare of the 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). As a consequence, the WECA insisted on a provision in the August 17, 2001 GWU-WECA contractual Agreement. Paragraph No. 8 in the contractual Agreement required GWU to comply with the DCEPA on all future campus construction projects, i.e., all projects after August

17th. Condition No. 12 in the August 16, 2002 Zoning Order No. 746-C also requires GWU to comply with the DCEPA.

Since August 17, 2001, GWU filed three "major" projects in the 23rd Street Corridor just South of Washington Circle. All three Zoning Orders have no mention whatsoever of GWU's compliance with the DCEPA. DCRA's implementing rules at 20 DCMR §7204.1 require Environmental Impact Screening Forms (EISFs) to be completed for each "major" action costing $1 million or more. Also, the Office of Zoning case files for all three major projects do not include the required EISFs. On December 31st, the WECA submitted additional arguments (see especially Attachment C) for why the BZA should require production of all three EISFs, which DCRA and ZA should have reviewed prior to issuance of the August 16, 2002 CofO for 1957 E Street. To enforce Condition No. 12 in Zoning Order No. 746-C, the ZA should routinely review each GWU project for compliance with the DCEPA - including a completed EISF.

14. No Student Parking Restriction. Accompanying the August 17, 2001 GWU-WECA contractual Agreement, GWU Vice President and Treasurer Louis Katz sent the WECA a same-day letter restricting Freshmen and Sophomores living the in the Foggy Bottom/West End Area from bringing cars to school or parking in the Foggy Bottom/West End Area. The letter also states, "For those few granted exceptions by the University, the University will arrange for parking in University parking facilities" (entered in the record as Attachment B in WECA's 12/31/02 filing). On February 8, 2002, GWU submitted a followup letter to the Zoning Commission (entered in the record as an Attachment to WECA's 1/7/03 filing). Zoning Order No. 746-C states, "the University, by letter dated February 8, 2002, made part of the record, will voluntarily adopt and publish this [student parking restriction] policy in University documents for Fall 2002. The University intends to maintain this policy at least until June 30, 2009" (Finding No. 32, p. 7).

On August 16, 2002 (i.e., the same day as publication of the Order and issuance of the CofO), the WECA asked GWU in an e-mail (with a copy to the ZA) for proof of compliance with this provision (entered in the record as Attachment B3 in WECA's 9/23/02 Appeal). GWU did not provide any proof. Attachment E to the WECA's December 2nd filing includes November 2002 e-mails from two GWU sophomores regarding the absence by GWU of the promised parking restriction policy.

GWU's January 2, 2003 filing proves that GWU failed to adopt this policy change prior to the start of the Fall 2002 semester. Instead, on October 31st (i.e., well after the start of the Fall 2002 semester and after the students had already brought their cars to the Foggy Bottom/West End Area), GWU posted a less than clear document on its website, including such terms as "[g]enerally discouraged" and "should not" instead of a clear prohibition. The proviso "For those few granted exceptions by the University" is nowhere indicated. Also, GWU demonstrated no efforts to inform returning Freshmen and Sophomores for the Spring 2003 semester that they were restricted from bringing cars to the Foggy Bottom/West End Area. GWU's October 31,

2002 effort was too little, too late, and utterly ineffective in meeting its commitment to restrict student parking from Fall 2002 until June 30, 2009.

15. Noncompliance with Other ZC PUD Conditions. Paragraphs 11, 13 and 14 herein present Findings about noncompliance with the requirements in Zoning Order No. 746-C for GWU to: contribute by August 16, 2002 $100,000 to the Foggy Bottom Feeding Program Foundation (Condition No. 9(a)), comply with the DCEPA (Condition No. 12), and restrict student parking (Findings Nos. 24 & 32). In addition, at the December 17, 2002 hearing and its January 14, 2003 continuation, the WECA discussed GWU's noncompliance with the Order's requirements to: provide on-site retail space (Conditions Nos. 2 & 9(b); 12/17/02 transcript, pp. 109-111), provide off-site retail space (Conditions Nos. 4 & 9(b)), restrict non-rush hour truck deliveries (Condition No. 5; 1/14/03 transcript, p. 192), and implement the precise previously-approved landscaping plan (Condition No. 7; 12/17/02 transcript, pp. 111-2).

Mrs. Kahlow summarized, "we need this Board to say to [DCRA] there has to be enforcement, [GWU] can't operate ex-territorially. [GWU] ha[s] to follow the conditions" (12/17/02 transcript, p. 70) and "GW runs on its own sense of entitlement" (1/14/03 transcript, p. 192).

16. Future GWU Compliance. The record in this Appeal includes evidence of GWU's noncompliance with the terms of other BZA and ZC Orders (e.g., 12/17/02 transcript, pp. 91-2). Therefore, the Board finds that, in the future, GWU should scrupulously comply with each condition in a BZA and ZC Order and with each requirement of DC law, e.g., GWU needs to fully comply with the DCEPA and DC's rules and procedures for implementing this law.

17. ZA Attempt to Improperly Add Conditions to ZC Order. On September 6, 2002, the ZA sent a letter to two Parties (the WECA and GWU) and a non-profit corporation, which was not a Party to the Zoning Commission case. The ZA attempted to improperly add conditions to Zoning Order No. 746-C. There is no authority in the Zoning Rules for ZA to do so. In a September 13th reply letter to ZA, the WECA objected to this unauthorized attempt (Attachment D in the WECA's 9/23/02 Appeal). In the December 17th hearing, the ZA was unable to provide any legal authority citation for this attempt, instead saying that it was his "attempt to solve this dilemma" and "attempt to solve the circular situation" (12/17/02 transcript, pp. 158 & 160).

18. ANC-2A. Since the WECA filed Appeal No. 16950 on September 23, 2002, ANC-2A held no public discussion about the Appeal and failed to pass any substantive resolution about the Appeal (1/14/03 transcript, p. 172). As a consequence, the views of one current and one former ANC-2A Commissioner - expressed at the January 14, 2003 continuation hearing as neither in favor of nor opposed to the Appeal - are not entitled to great weight. In addition, ANC-2A did not put the Appeal on its January 15th meeting agenda, as Dorothy Miller promised the BZA it would do (1/14/03 transcript, p. 174).

CONCLUSIONS OF LAW:

Based on the findings of fact and evidence of record, the Board concludes that GWU failed to comply with various conditions in Zoning Order No. 746-C prior to issuance of a CofO. These include Condition No. 9(a), which required GWU to make an unconditional $100,000 contribution to the Foggy Bottom Feeding Program Foundation by no later than the date of the CofO. Condition No. 9(a) does not require the feeding program to be operational as a precedent to GWU's first $100,000 contribution.

Based on the findings of fact and evidence of record, the Board finds that DCRA failed to issue daily nondiscretionary fines under 11 DCMR §3201 to GWU for its noncompliance with Zoning Order No. 746-C, starting on August 16, 2002, when DCRA issued a CofO.

Based on the findings of fact and evidence of record, the Board finds that GWU failed to meet its promise to the Zoning Commission and the WECA to restrict student parking in the Foggy Bottom/West End Area, starting with the Fall 2002 semester (Findings Nos. 24 & 32).

Based on the findings of fact and evidence of record, the Board finds that the ZA, in a September 6, 2002 letter, tried to add a condition to the Zoning Order without any legal authority to do so.

In light of the foregoing discussion, the Board concludes that appellant WECA has shown by a preponderance of the evidence that DCRA and the ZA erred in issuing a CofO before GWU fully complied with the conditions in Zoning Order No. 746-C which were required for issuance of a CofO. Therefore, the Board directs DCRA to: (1) revoke the CofO for the western part of the 1957 E Street property; (2) do not issue or revoke, if already issued, a CofO for the eastern part of 1957 E Street property; and (3) retroactively issue day fines to GWU for each and every day that GWU was and remains in noncompliance with Zoning Order No. 746-C, i.e., starting on August 16th and continuing until today.

In light of the foregoing discussion, the Board additionally concludes that the WECA's appeal is **GRANTED**.