GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16950 of the West End Citizens Association, pursuant to 11 DCMR §§ 3100 and 3101, of the administrative decisions of David Clark, Director, and Robert Kelly, Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Certificate of Occupancy No. 39477 on August 16, 2002 to The George Washington University, permitting the occupancy of the subject property for residential (apartment) and parking use, pursuant to a Planned Unit Development in a C-3-C zone district at premise 1957 E Street, N.W. (Square 122, Lot 835).

HEARING DATES: December 17, 2002 and January 14, 2003
DECISION DATE: March 4, 2003

DECISION AND ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

This appeal was brought by the West End Citizens Association (WECA), a nonprofit association involved with civic matters within the "Foggy Bottom/West End" community. On September 23, 2002, WECA filed an appeal with the Office of Zoning (OZ) of the decision of then-Zoning Administrator (ZA), Robert Kelly, to approve the issuance of Certificate of Occupancy (C of O) No. 39477 to The George Washington University (University). The C of O enabled the University to occupy part of a multi-story building for apartment and parking uses pursuant to an approved Planned Unit Development (PUD) at premise 1957 E Street, N.W. (subject property). In its appeal document, WECA contended that the C of O should not have been issued because the University was not in compliance with Zoning Commission Order No. 746-C, the order that granted the University authority to build the PUD. WECA also contended that the ZA tried to improperly add conditions to a Zoning Commission Order, failed to timely respond to a Freedom of Information Act (FOIA) request and erred in not issuing daily fines for alleged non-compliance.

WECA alleged that the University had failed to comply with two conditions and one provision of Zoning Order No. 746-C. Specifically, WECA alleged that the University had not complied with Condition No. 9(a), which states that, on the day the C of O for the subject property is issued, the University shall make the first of five $100,000 contributions to the Foggy Bottom Feeding Program. WECA also alleged non-compliance with Condition No. 12, which states that the University shall comply with the D.C. Environmental Policy Act (D.C. Official Code § 6-981 *et seq.* (2001)) on all future campus construction projects. Lastly, WECA contended that the University had failed to

#59

Board of Zoning Adjustment
District of Columbia
CASE NO.16950
EXHIBIT NO.59

comply with finding of fact No. 32, which notes an agreement between WECA and the University to manage student parking in the Foggy Bottom/West End area and reiterates certain intentions of the parties concerning the implementation of this agreement.

By letter dated September 25, 2002, OZ notified the University, the Director of the Department of Consumer and Regulatory Affairs (DCRA), under whom the ZA operates, Advisory Neighborhood Commission (ANC) 2A, the ANC member for Single Member District 2A05, the Councilmember for Ward 2 and the District of Columbia Office of Planning (OP), of the filing of the appeal. Pursuant to § 3112.14 of Title 11 of the District of Columbia Municipal Regulations (DCMR), OZ, by letter dated October 25, 2002, notified the ZA, WECA, ANC 2A and the University of the hearing date of December 17, 2002. The University was notified of the filing of the appeal and the hearing date because, as owner of the subject property, it is a party to the appeal pursuant to 11 DCMR § 3199.

The Board held a public hearing on the appeal on December 17, 2002, which was continued to January 14, 2003. During the December 17th hearing, Ms. Barbara Kahlow and Ms. Sara Maddux argued the appeal for WECA. Ms. Kahlow presented WECA's arguments on the University's alleged non-compliance in three areas: the Condition 9(a) feeding program contribution, the D.C. Environmental Protection Act (DCEPA) and the parking agreement with WECA. Ms. Maddux testified further concerning parking in the Foggy Bottom/West End area. She also testified as to two new alleged grounds for appeal which did not appear on the appellant's September 23, 2002 appeal document. Ms. Maddux brought up the University's alleged failure to provide required retail at the subject property (Condition No. 9(b) of Order 746-C) and its alleged failure to implement an approved landscape plan (Condition No. 7 of Order 746-C).

At the December 17, 2002 hearing, the ZA testified, explaining and defending his actions. WECA questioned him regarding, among other things, his alleged improper addition of conditions to a Zoning Commission Order, his alleged failure to respond timely to a FOIA request, and his alleged failure to impose fines. He denied any irregular or improper acts or wrongdoing.

The University, through its counsel, and the testimony of the University's Senior Counsel, Mr. Charles Barber, asserted that the University was in compliance with Condition 9(a), that Condition 12 (DCEPA) applied prospectively only, and therefore did not apply here, that the parking issue arose out of a private agreement between the University and WECA, and that it was therefore not properly before the Board, and that the other two issues, concerning the required retail and the landscape plan, were not yet ripe for review.

By virtue of 11 DCMR § 3199.1, ANC 2A is a party to this appeal. The ANC did not present any testimony on December 17th, but on December 29, 2002, the ANC held a special meeting and designated Ms. Dorothy Miller and Ms. Elizabeth Elliott to represent

it at the continued hearing scheduled for January 14, 2003. At this continued hearing, Ms. Kahlow and Ms. Maddux again appeared on behalf of the appellant. The two ANC representatives, Ms. Miller and Ms. Elliott, testified that the ANC was not taking a position with regard to this appeal, but was remaining neutral.

After the January 14th hearing, the Board requested the submission of additional information, after the receipt of which the Board held a public decision meeting on March 4, 2003. At the decision meeting, the Board decided, by a vote of 5-0-0, to deny the appeal on all grounds.

FINDINGS OF FACT

1. The subject property, acquired by the University in 1999, is located at 1957 E. Street, N.W. On the property, the University is building a multi-story building for residential (apartment) and parking use.
2. The subject property is zoned C-3-C and is located in the Foggy Bottom/West End Neighborhood of the District of Columbia.
3. Pursuant to Zoning Commission Order No. 746, dated December 10, 1993, a Planned Unit Development requested by the Associated General Contractors of America was approved for the subject property and the property was rezoned from an SP-2 zone district to the current C-3-C zone district. The 1993 Order approved the site for the construction of a mixed-use building, with both residential and commercial uses. The PUD approved a floor area ratio (FAR) of 5.79 for commercial space and a FAR of at least 2.17 for residential space.
4. Zoning Commission Order No. 746 was extended for two years, until December 10, 1997, by Order No. 746-A, with construction to begin not later than December 10, 1998. Order No. 746-B extended Order No. 746 for another two years, requiring the acquisition of a building permit by December 10, 1999, and the commencement of construction not later than December 10, 2000.
5. After purchasing the subject property in 1999, the University obtained approval from the ZA for several non-major changes to the approved PUD plans, as well as a building permit approving construction of the project, under the original PUD order, *i.e.*, Order No. 746. WECA and Advisory Neighborhood Commission 2A appealed the ZA's actions. On appeal, the Board of Zoning Adjustment overturned the issuance of the building permit and held that the ZA had exceeded his discretion in that the proposed changes should have been presented to the Zoning Commission as a PUD modification.
6. The University, therefore, applied to the Zoning Commission for modifications to the approved PUD plans. After appropriate application and public hearing on the matter, the Zoning Commission approved modifications to the PUD in Order No. 746-C, which granted the University permission to proceed with the construction of the building on the subject property, but modified the PUD with additional

terms and conditions which the University is obligated to perform. (Exhibit A to Exhibit No. 29).

7. The Department of Consumer and Regulatory Affairs, through the Zoning Administrator, issued Certificate of Occupancy No. CO39477 for the building on August 16, 2002. WECA now alleges that the University failed to abide by certain conditions of Order No. 746-C and that therefore issuance of the C of O was error on the part of the ZA.

Condition No. 9(a) of Zoning Commission Order No. 746-C

8. Condition No. 9(a) of Order 746-C states, in relevant part, 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 first $100,000 contribution shall be made on the date of the Certificate of Occupancy for the Subject Property.** ... The contribution shall be conditioned so that no portion of the $500,000 contribution ... may be used for salaries, expenses and other costs relating to the 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.** (Emphasis added.)

9. Zoning Commission Order No. 746-C (Order 746-C) became effective on August 16, 2002.

10. On August 12, 2002, the University wrote to Mr. Batham, a representative of the Foggy Bottom Feeding Program Foundation (Foundation) and informed him that the University was about to apply for a C of O for the residential wing of the building on the subject property. (Exhibit No. 30). The letter pointed out that the Foundation did not yet have a feeding program in operation and therefore requested that, pursuant to Condition 9(a), the Foundation designate an alternative, existing feeding program to receive the University's first $100,000 contribution.
11. DCRA issued the first Certificate of Occupancy for the building on the subject property on August 16, 2002. (Exhibit No. 23).
12. By August 16, 2002, the Foundation had not designated an alternative feeding program, but instead, members of WECA requested more time to establish the Foundation's own feeding program.
13. On August 16, 2002, the University sent Mr. Batham and the ZA a letter explaining that, because the Foundation's feeding program was not yet operating and an alternative had not been designated, the University had, on August 16th, deposited the first $100,000 contribution in an interest-bearing escrow account at Riggs Bank under the name of "George Washington University Elliott School Escrow Account." (Exhibit D to Exhibit No. 29).
14. The term of the escrow account was three months, with its expiration on November 16, 2002, although the money could be removed from the account earlier. (*See,* Exhibit No. 28, fn. #1). The University designated the ZA as escrow agent for the account.
15. In the August 16th letter referenced in Finding of Fact No. 12, the University proposed the following solutions to the situation: If the Foundation's feeding program were operating prior to November 16, 2002, the money from the escrow would be paid to it at that time. If the Foundation's program were still not operating at that time, the money would be paid to an alternative feeding program selected by the Foundation. If, however, the Foundation's program did not yet exist and the Foundation had not yet selected an alternative program by November 16th, the University would request the Zoning Commission to determine how the money should be applied.
16. The Foundation, to which Condition 9(a) directs the first $100,000 contribution, was operating as a nonprofit organization on August 16, 2002. However, Condition 9(a) also places two conditions on the contribution: (1) "no portion of the $500,000 contribution ... may be used for salaries, expenses and other costs relating to administering the program," and (2) "its exclusive use to provide food and meals to needy, elderly, or other low-income residents." On August 16, 2002, the Foundation's feeding program was not operating.
17. It appears, from a series of e-mails between the ZA and the DCRA staff, sent between August 19, 2002 and August 29, 2002, that the ZA did not desire to be escrow agent for the University and that DCRA was concerned about the University's unilateral decision to set up the escrow account without WECA's prior agreement. (*See,* Attachments B & C to Exhibit No. 27).

18. On August 28, 2002, the ZA sent an e-mail to the University stating "it would appear that GWU (the University) is now in violation of Condition 9(a) of Order 746-C." (*See,* Attachment B to Exhibit No. 27).
19. On September 6, 2002, however, the ZA sent a letter to the Foundation, Mr. Batham, in his capacity as president of WECA, and the University. (Exhibit No. 28). The letter finally concludes that the University did not violate Condition 9(a) and requests that the Foundation either certify that its own feeding program has been established or that it designate an alternative feeding program. The letter goes on to state that, as soon as the Foundation takes one of these actions, the ZA will direct the proper disposition of the escrow funds.
20. In his September 6, 2002, letter, the ZA specifically requested one of two things from the Foundation:

    > 1) A resolution by the Board of Directors, duly adopted in accordance with D.C. law and the bylaws of the Foundation, certifying that a feeding program has been established and that the Foundation is prepared to operate the feeding program in conformance with the requirements of the Zoning Commission Order; or
    > 2) A resolution by the Board of Directors, duly adopted in accordance with D.C. law and the bylaws of the Foundation, designating an existing non profit food service program to receive the first $100,000, in lieu of the Foundation.

21. In Zoning Commission Order 746-D, effective February 7, 2003, of which the Board took judicial notice at the March 4, 2003 decision meeting, the Zoning Commission added the following language to Condition 9(a), clarifying its meaning:

    > 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.

22. At a Board of Directors' meeting on February 27, 2003, the Foundation approved the existing food service program of St. Mary's Court Housing Development Corporation to be the recipient of the first $100,000 contribution. The money was to be placed in the Foundation's account and then transferred to the use of St. Mary's Court.

Condition No. 12 -- District of Columbia Environmental Policy Act

23. Condition No. 12 of Order No. 746-C states: "[t]he 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 projects.**" (Emphasis added.)
24. The Board finds that the Condition applies only prospectively and therefore does not apply to the building on the subject property.

Parking Restrictions

25. Findings of Fact No's. 6(h) and 32 of Order 746-C note that the University had a private agreement with WECA to restrict freshmen and sophomores living in the Foggy Bottom/West End area from bringing cars to the University (with certain exceptions) and that the University would publish this restriction in its printed materials. These two findings of fact merely re-state the facts as they existed at the time. They do not require the University to do anything, nor do they amount to a condition of Zoning Commission Order No. 746-C.
26. This agreement between the University and WECA amounts to a private contract, which was not incorporated into Zoning Commission Order No. 746-C.

Condition No. 9(b) -- Provision of Required Retail

27. Condition 9(b) of Order 746-C states:

> The University shall use its best efforts to fill the retail space called for in this Order ... with appropriate retail tenants. In the event that the University, despite its best efforts, is unable to rent the space within one (1) year of the issuance of the certificate of occupancy for the subject property, the University shall commence operation of the retail operation in the space under its own authority within that time frame. ... The University shall provide status reports on such retail operations on an annual basis to the Zoning Administrator, WECA and ANC 2A.

28. Condition No. 9(b) does not create a duty on the part of the ZA to contact the University to determine what the University is doing in order to implement and/or comply with this condition.
29. Condition 9(b) clearly allows the University one year from August 16, 2002 within which to provide the retail tenants required by Order 746-C. This appeal was brought on September 23, 2002, and therefore this issue was not ripe for the Board's consideration.

Condition No. 7 -- Implementation of Landscape Plan

31. Condition No. 7 in Order 746-C states that the University shall implement the same landscaping plan for this project as that approved in the original PUD. This landscaping plan, however, is not in the record.
32. At the time this appeal was brought, only a portion of the building on the subject property was completed. The Board finds that there was not yet any way to determine whether the University would properly implement the landscape plan and that, therefore, this issue was not ripe for the Board's review.

Alleged Failure to Issue Daily Fines for Non-Compliance

33. DCRA did not issue any fines to the University for non-compliance with any aspect of Zoning Commission Order No. 746-C.

CONCLUSIONS OF LAW AND OPINION

An appeal to the Board may be taken by any person aggrieved by any decision of any District official in the administration and/or enforcement of the zoning regulations, including the issuance of a certificate of occupancy. 11 DCMR §§ 3100.2 and 3200.2. The Board's regulations arise out of the authority and jurisdiction conferred upon it by D.C. Official Code § 6-641.07(f) (2001), in accordance with §8 of the Zoning Act of 1938 (52 Stat. 797, 799, as amended). D.C. Official Code § 6-641.07(g) limits the Board's jurisdiction to the decisions/actions "in the carrying out or enforcement of any regulation adopted pursuant to this subchapter and subchapter V of this chapter," *i.e.,* Subchapter IV. Zoning Regulations and Subchapter V. Chanceries. The Board therefore has no subject matter jurisdiction over WECA's claims as to non-compliance with the DCEPA or with FOIA. Nor does the Board have jurisdiction to rule upon alleged non-compliance with any aspect of any private agreement between WECA and the University, whether relating to parking or another subject.

The Board, however, does have jurisdiction over WECA's remaining claims, *to wit:* whether the University complied with Conditions 9(a), 9(b) and/or 7 of Order 746-C, whether the ZA improperly added conditions to Order 746-C, and whether the ZA erred in not issuing daily fines for alleged non-compliance. The Board will discuss each claim briefly, in turn.

Condition 9(a)

After a careful analysis of the whole of Condition 9(a), the Board concludes that the clear intent of the Zoning Commission was to provide money only for the Foundation's feeding program and not merely to provide money to the Foundation, to be used as it saw fit. The money is to be used by the Foundation only to feed the "needy, elderly, and other low-income" residents, and not for "salaries, expenses and other costs relating to administering the Feeding Program." Condition 9(a) seems to pre-suppose the operation

of the Foundation's feeding program prior to the first contribution and does not say that the University will provide the money to enable the Foundation to start a feeding program.

Although the Board finds that the Commission's intent was clear in Order No. 746-C, it was further clarified in Order No. 746-D, wherein the Commission specifies that, if neither the Foundation's feeding program is established nor an alternative program been selected by the Foundation within a prescribed period of time, the University shall choose a food service or homeless program to receive the contribution. Order No. 746-D does not say that if the Foundation's feeding program is not yet established, the contribution should go directly to the Foundation to be used to establish such a program. The Commission was concerned that the money go to feed the poor and homeless, not that the money go to the Foundation.

Acting on the Zoning Commission's intent, in its August 12th letter, the University asked the Foundation to designate an alternative feeding program, as its feeding program was not yet operational. As of the date of the issuance of the C of O, August 16, 2002, the Foundation's program was still not established and the Foundation had not yet designated an alternative program. The University decided to open the escrow account to hold the first $100,000 contribution until one of these things occurred, otherwise it would have to return to the Commission for guidance. The ZA determined that the University's actions did not violate Condition 9(a).

The Board finds that the creation of the escrow account was a reasonable attempt by the University to comply with Condition 9(a). The University reasonably read Condition 9(a) to require the money to be paid to the Foundation's feeding program or a designated alternate, and not to the Foundation itself. With the Foundation's feeding program not established and no alternate designated on August 16th, when the C of O was issued, the University was in danger of not complying with Condition 9(a) if it did not do something. The escrow account set aside the $100,000 until such time as all the requirements of Condition 9(a) were met, or the Zoning Commission gave further guidance. No only was this not a violation of Condition 9(a), but it was actually the University's to attempt to comply with the Condition. Therefore, the Board concludes that the ZA did not err in finding that the University was not violating Condition 9(a).

Condition 9(a) could be interpreted to condition the issuance of the first C of O for the subject property on the payment of the first $100,000 contribution. The Board, however, does not find this interpretation persuasive because the language of Condition 9(a) does not support it. The language shows no clear intent on the part of the Zoning Commission to make the payment a prerequisite to the issuance of the C of O. Instead, the language merely says that the first $100,000 contribution shall be made "on the date of the Certificate of Occupancy." This language could as easily be read to require the issuance of the C of O first, before the contribution was made. The Board therefore finds that

Condition 9(a) did not make payment of the first $100,000 contribution a condition precedent to the issuance of the C of O. It merely mandated that the contribution had to be made on the same day that the C of O was issued. Therefore, the Board concludes that the ZA did not err in issuing the C of O on August 16, 2002.

Addition of Conditions to Order

Finding of Fact No. 19 sets forth the two requests by the ZA which the appellants call improper conditions added to Order No. 746-C. These requests were made in order to obtain proof that the Foundation's feeding program was operational or to obtain a designation of an alternative feeding program, to which to direct the first $100,000 contribution. This appears to the Board to be a reasonable way for the ZA to attempt to acquire the information necessary to avoid any non-compliance with Condition 9(a). The Board concludes that these requests by the ZA were made in an attempt to implement Condition 9(a) and were not improper additions of new conditions to Order 746-C.

Condition 9(b)

Finding of Fact No. 28 sets forth Condition 9(b)'s requirement that the University provide retail operations in the building on the subject property. Condition 9(b) states that this retail must be provided within one year of the issuance of the C of O. Because the first C of O was issued on August 16, 2002, the University has/had until August 16, 2003, to provide the required retail operations. Therefore, when this appeal was filed on September 23, 2002, this issue was not yet ripe for the Board's review.

Condition No. 7

Condition No. 7 of Order 746-C states that the University must implement the same landscape plan for the subject property as that approved in the original PUD. At the time this appeal was brought, however, only one section of the building was complete. In fact, the C of O issued on August 16, 2002 applied only to the residential part of the building. The rest of the building was still under construction. Under these circumstances, the Board finds that it was too early to know whether or not the University would comply with Condition 7 and therefore concludes that this issue was not ripe for the Board's review.

Non-Issuance of Daily Fines

DCRA did not issue any daily fines to the University for non-compliance with Order 746-C. Because the Board finds that the University did not violate any of the complained-of provisions or conditions of Order 746-C, the Board concludes that the ZA did not err in not issuing such daily fines. Moreover, the Board doubts whether such a refusal could serve as grounds for an appeal in view of the absolute discretion normally afforded enforcement decisions. *Heckler v. Chaney,* 470 U.S. 821 (1985).

For the reasons stated above, the Board concludes that the appellant, WECA, has not met its burden of demonstrating that the ZA erred in any of the ways alleged by appellant herein, over which the Board has jurisdiction. It is hereby **ORDERED** that this appeal is **DENIED.**

VOTE: **5-0-0** (Geoffrey H. Griffis, Anne G. Renshaw, Curtis L. Etherly, Jr., David A. Zaidain and Peter G. May, to deny).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order and Authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY: Jerrily Kress
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: APR 01 2004

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. LM/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPEAL NO. 16950

As Director of the Office of Zoning, I hereby certify and attest that on APR 01 2004 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY: Jerrily Kress

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