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May 6, 2004

BY HAND
Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, DC 20001

Re: BZA Application No. 17143 of Marquette University
502 East Capitol Street, N.E. (Square 840, Lot 23)

Dear Mr. Griffis:

On behalf of our client, Marquette University, enclosed you will find the proposed summary order for the above-referenced matter. For your convenience, we are also enclosing a copy of the portion of the July 21, 1999 transcript from BZA Application No. 16459 referenced in the order.

Thank you for your attention to this matter.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Richard B. Nettler
Jeannine Rustad

Enclosures (as stated)
cc: ANC 6B (c/o Bill Crews; w/encl.)
John Moore, Office of Planning (by email; w/encl.)
Gary Petersen, The Capitol Hill Restoration Society (by email; w/encl.)
Father Timothy O'Brien (email; w/encl.)
Rick Nero (by email; w/encl.)

Word 45657729.1

BZA
Case No. 17143
Exhibit No. 34

Board of Zoning Adjustment
District of Columbia
CASE NO. 17143
EXHIBIT NO. 34

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Application No. 17143 of Marquette University, pursuant to 11 DCMR § 3104.1for a special exception under Section 206.1 to continue the use of the premises as a private school for twenty (20) students and two (2) staff persons in an R-4 District at premises located at 502 East Capitol Street, N.E. (Square 840, Lot 23).

HEARING DATE: April 20, 2004
DECISION DATE: April 20, 2004

SUMMARY ORDER

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, by mail to Advisory Neighborhood Commission (ANC) 6B and to owners of property within 200 feet of the site.

The subject property of this Application is located within the jurisdiction of ANC 6B, which is automatically a party to this application. ANC 6B submitted a letter in support of the application. The Office of Planning (OP) submitted a report in support of the application. A letter of support was also submitted by the Capitol Hill Restoration Society ("CHRS").

By BZA Order 16459, dated March 17, 2000, the Board approved the use of the basement of the subject property for use as a private school for the student training seminars of the Les Aspin Center for Government (the "Center"), the Applicant's congressional internship program. The Center has been in operation for over six (6) years. The Board indicated in 1999 that the Center would not likely have an adverse impact on adjoining and nearby properties, if the Applicant complied with the conditions that were established. The Board's rationale for approving the application in 1999 was:

- the Applicant agreed to limit the number of students and staff to 22 persons;
- to alleviate visual intrusions, the Applicant stated that it would not have more than one reception approximately every three (3) months would not place any additional signs on the residence indicating that a school is present on the site;
- to address traffic concerns, students attending the Center would be allowed to have cars in Washington, D.C. and staff would park in a nearby garage and driveway.

In approving the instant application, the Board noted the long standing use of the subject property for the Center without incident or complaint. Further mitigating any potential impact on the surrounding community is the fact that the use is limited to a small portion

of the property and is confined to the basement of the subject property. Finally, unlike the previous case, there was no opposition to the instant application.

Both as a preliminary a matter and during its deliberations, the Board took note of the fact that, although the Applicant is a university, relief was sought under the provisions of section 206, for a private school, rather than section 210, for a campus plan approval. The Board discussed whether it would be more appropriate for the Applicant to seek relief from the Zoning Commission pursuant to section.

Counsel for the Applicant argued that section 210 of the zoning regulations governing campus plans is aimed at controlling institutions of higher learning that are located in *numerous* buildings, not the basement of a residence. Because of this intent, section 210.3 and 210.4 of the zoning regulations state that:

> 210.3 The maximum bulk requirements normally applicable in the districts may be increased for specific buildings or structures; Provided, that the total bulk of all buildings and structures on the campus shall not exceed the gross floor area prescribed for the R-5-B district. In all other residential districts, similar bulk increases may also be permitted; provided, that the total bulk of all buildings and structures on the campus shall not exceed the gross floor area prescribed for the R-5-D district. Because of permissive increases as applicable to normal bulk requirements in the low-density districts regulated by this title, it is the intent of this subsection to prevent unreasonable campus expansion into improved low-density districts.
>
> 210.4 The applicant shall submit to the Board a plan for developing the campus as a whole, showing the location, height, and bulk, where appropriate, of all present and proposed improvements, including but not limited to the following: (a) Buildings and parking and loading facilities; (b) Screening, signs, streets, and public utility facilities; (c) Athletic and other recreational facilities; and (d) A description of all activities conducted or to be conducted on the campus, and of the capacity of all present and proposed campus development.

The Applicant argued that these regulations are aimed at multiple building conditions that create a campus within the midst of a residential district and not the subject situation.[1] In

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[1] The Applicant also pointed out that the ongoing use actually qualifies as a private club, which is a matter of right use in the underlying CAP/R-4 zone district, and the property was purchase initially after being advised by the District of Columbia Government that the [private club use was permitted as a matter of right. The Zoning Regulations define a private club as including circumstances where a

any event, the Applicant pointed out that the standards for approving each special exception use are essentially the same. Finally, the Applicant pointed that, because it is not seeking to take advantage of the extra density available under 210.3, and the majority of the property is used as a private residence, there is no harm to the community in allowing the Applicant to continue the use of the premises under a special exception pursuant to section 206 of the zoning regulations.

This issue was discussed extensively in the previous case, BZA Application No. 16459, in which the Applicant's position on the appropriateness of section 206 was supported by the Office of Corporation Counsel ("OCC"). In the previous case, Alan Bergstein, Assistant Corporation Counsel opined that, if there is just one building involved, there is no campus plan *per se* and, therefore, section 210 is inapplicable. Specifically, Mr. Bergstein stated that:

> The principle difference is that if there is a campus per se, then there needs to be a campus plan. In other words, if there is more than one building, you need a campus plan, and a special exception can be consolidated in the campus plan. In other words, you can have a campus plan and consolidate that with a special exception for the use itself. The other difference is that in an R-1 zone, colleges get additional bulk flexibility, which if you are applying as a private school, you don't get. In other words, if you are electing to be considered a private school, then you won't get the flexibility requirements of 210.3. But there is a different demarcation between these two uses -- between private schools and colleges and universities. As I said, the basic standard is the same except that when a university establishes itself, it has to have a "campus plan". But in

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> building and facilities or premises used or operated by an organization or association for some common avocational purpose such as, but not limited to, a fraternal, social, educational, or recreational purpose; Provided, that the organization or association shall be a non-profit corporation and registered with the U.S. Internal Revenue Service, that goods, services, food, and beverages shall be sold on the premises only to members and their guests, and that office space and activities shall be limited to that necessary and customarily incidental to maintaining the membership and financial records of the organization.

11 DCMR § 199.1. Marquette obtained a certificate of occupancy for use of the basement as a private club, which certificate was appealed by the CHRS in February 1997. In an effort to be a "good neighbor" and to resolve the appeal by CHRS, the Applicant agreed to pursue a special exception and turn in the certyificate of occupancy that had been issued to it.

> this case, there is really no -- if I am correct -- campus. It is a single [building] – [2]

BZA Application 16459, July 21, 1999 Transcript at p. 128. Mr. Bergstein stated that the crucial difference is that, under the campus plan provisions, an applicant is able to take advantage of extra density allowances under section 210.3 of the zoning regulations. According to Mr. Bergstein, as the Applicant in this matter is only using the basement of the subject premises, there would be no benefit to the Applicant to pursue a campus plan.

Finally, as to the issue of the appropriate relief, the Board noted that this was a self-certified application[3] and, as in the previous case, the Board decided to hear the case under section 206 of the zoning regulations, rather than transfer the matter to the Zoning Commission for a hearing under the campus plan provisions of section 210. Commissioner Anthony Hood, who had voted in support of the requested relief in BZA Application No. 16459, expressed concern over the Board's approach in the instant application and, in light of his concern, abstained from voting on the instant application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for special exception under § 206. No parties appeared at the public hearing in opposition to this application or otherwise requested to participate as a party in this

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[2] Steve Cottingham, on behalf of Marquette University interjected at this point that "It is one -- it is the basement in this building. That is the only space we are talking about." *Id.*

[3] In BZA Application No. 16459, Commissioner Pruitt noted that:

> The thing with the self-certification is the applicant takes the burden of saying that this is the type of zoning relief that is required. I may suggest that maybe you go forward and if once it gets back to the zoning administrator they determine it comes under 206, that is the burden of a self-certification that then it would have to come back forward. If, for some reason, 206 is upheld and it goes through, then Mr. Gottlieb has the ability to appeal the Zoning Administrations [sic] decision. I mean, that is one course. [T]hat is why self-certification is done. It allows people to move expeditiously through the process, but they also take that burden and responsibility that they may have to go back through the process if they did not choose the correct zoning and that is just the understanding.

BZA Application No. 16459, July 21, 1999 Transcript at p. 131. Accordingly, the Order for the application stated that:

> As for the issue of whether the provisions of Section 210 of the Zoning Regulations should apply, the Board notes that in self-certifying, the applicant takes the risk of any misidentification of use. The Board's approval is limited to whether a special exception for the use certified should be granted.

Order, BZA Application No. 16459 at p. 6. No appeal was ever taken of the issuance of the certificate of occupancy issued pursuant to BZA Application No. 16459. Moreover, there was no opposition to the instant application.

proceeding. Accordingly, as set forth in the provisions and conditions below, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the ANC and OP reports, the Board concludes that the Applicant has met the burden of proof pursuant to 11 DCMR §§ 3104.1 and 206, that the requested relief can be granted, subject to the conditions set forth below, as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3111.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by Findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED** with the following **CONDITIONS**:

1. Enrollment at the School shall be limited to an average of twenty (20) students over the year and two (2) full-time staff persons.
2. The Les Aspin Center shall be operated between the hours of 1:00 and 5:00 p.m., but shall be permitted, on an irregular basis, to have lectures for students in the evening.
3. The Applicant shall not permit any part of the Premises to be used for other than official receptions for the Les Aspen Center on a yearly basis or for any functions that are not attended by students and their guests; nothing herein shall be misconstrued to prohibit the resident of the Premises from using the residential portions in a manner consistent with such residential use.
4. The Applicant shall establish a liaison with Advisory Neighborhood Commission 6B to maintain a working relationship regarding the school use. To further this end, a representative of the Applicant shall either attend a meeting of the full ANC or meet with the SMD commissioner for the subject property on an annual basis.
5. Approval shall be for **FIFTEEN (15) YEARS**.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is appropriate in this case.

VOTE: 3-0-2 (Geoffrey H. Griffis, Ruthanne Miller and John Mann, II to grant; Anthony Hood abstaining; Curtis Etherly not present, not voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member approved the issuance of this order.

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

FINAL DATE OF ORDER: _____

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 (10) DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

PURSUANT TO 11 DCMR 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ, (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT.

DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

July 21, 1999 Transcript
BZA Application 16459

GOVERNMENT

OF

THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

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WEDNESDAY

JULY 21, 1999

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The Public Hearing convened in Room 220, 441 Fourth Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Sheila Cross Reid, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

SHEILA CROSS REID	Chairperson
BETTY KING	Vice Chair
JOHN PARSONS	Zoning Commission

STAFF PRESENT:

SHERI PRUITT	Director
PAUL HART	Staff
JOHN NYARKU	Staff
BEVERLY BAILEY	Staff
ALAN BERGSTEIN	Office of Corporation Counsel

institution of higher learning -- that is 210. The next row is school-private school, trade school, college or university. So that each one of those entities are separated. And then you see finally the third category, school-private other than trade school. The phrase college or university does not appear in that row.

MR. COTTINGHAM: Which was the point I was raising of how you had initially claimed it specifically excluded universities. Instead, you were really just arguing by omission.

MR. BERGSTEIN: It does say private school in both places. In one instance it says private school with college or university and the other says private school without college or university. And then the listing above it says college, university, or other academic institutions of higher learning. The main difference between a college or university is that section, in the private school section. The actual standard is the same in the sense that 206.2 says, "A private school shall be located so that it is not likely to become objectional..." And 210 has that same standard. The principle difference is that if there is a campus per se, then there needs to be a campus plan. In other words, if there is more than one building, you need a campus plan, and a special exception can be consolidated in the campus plan. In other words, you can have a campus plan and consolidate that with a special exception for the use itself. The other difference is

that in an R-1 zone, colleges get additional bulk flexibility, which if you are applying as a private school, you don't get. In other words, if you are electing to be considered a private school, then you won't get the flexibility requirements of 210.3. But there is a different demarcation between these two uses -- between private schools and colleges and universities. As I said, the basic standard is the same except that when a university establishes itself, it has to have a "campus plan". But in this case, there is really no -- if I am correct -- campus. It is a single --

MR. COTTINGHAM: It is one -- it is the basement in this building. That is the only space we are talking about.

MS. KING: Do you own the entire building?

MR. COTTINGHAM: We do. The rest of it is used for residential space.

MS. KING: I am sorry, I can't hear you.

MR. COTTINGHAM: The rest of it is residential.

MS. KING: Oh. Associated with the university or rented out to --

MR. COTTINGHAM: Owned by the university.

MS. KING: But --

MR. COTTINGHAM: The entire building is owned by the university.

MS. KING: Yes, I understand. But the people who rent --

MR. COTTINGHAM: The program director, Father O'Brien, lives there.

MS. KING: I see. Okay. This entire building is for the use of Marquette, but that is the only building you own in the District of Columbia?

MR. COTTINGHAM: Correct.

MR. SIMON: And just to flesh out the issue of whether or not they are the same or different, also in Section 9-12, page 9-8, schools and colleges, you will see once again that there is a distinction or a separation between private school, trade school, college or university. Each are being considered a distinct, separate entity.

MR. BERGSTEIN: With respect to -- but we are in an R zone here.

MR. SIMON: Yes. But my point is simply again that that phraseology appears once again, indicating that those are not synonymous, but are actually separate entities.

MR. BERGSTEIN: How would the advertisement of this as a college or university versus the advertisement that this is a private school prejudice you if the standard appears to be the same in terms of the location, the objectionability, and is subject to the same special exception standard and there is no campus?

MR. SIMON: Well, there would be some additional information. There would still be the necessity of a campus plan, whether or not you consider one building to be

a campus or not a campus, and the issues of impact upon the neighborhood would be more fully mapped out. You would have the traffic study.

MS. PRUITT: Madam Chair?

CHAIRPERSON REID: Yes?

MS. PRUITT: May I just make a suggestion? The thing with the self-certification is the applicant takes the burden of saying that this is the type of zoning relief that is required. I may suggest that maybe you go forward and if once it gets back to the zoning administrator they determine it comes under 206, that is the burden of a self-certification that then it would have to come back forward. If, for some reason, 206 is upheld and it goes through, then Mr. Gottlieb has the ability to appeal the Zoning Administrations decision. I mean, that is one course. that is why self-certification is done. It allows people to move expeditiously through the process, but they also take that burden and responsibility that they may have to go back through the process if they did not choose the correct zoning and that is just the understanding.

CHAIRPERSON REID: Are you a preliminary matter?

MS. NEAL: Yes.

CHAIRPERSON REID: Then come forward and state your name, please.

MS. KING: And address.