SHANNON & WRIGHT LLP

January 12, 2024

Mr. Anthony J. Hood, Chair
and members of the Zoning Commission
Office of Zoning
441 4th Street, N.W., Suite 200-S
Washington, D.C. 20001

submitted via IZIS

Re: Zoning Commission Case No. 87-23A
Application of The George Washington University for Modification of PUD
Zoning Commission Order 563
2001 Pennsylvania Avenue, N.W. (Square 78, Lot 853) and other parcels

Dear Mr. Hood and Members of the Zoning Commission:

The Arts Club of Washington (the "Arts Club") replies to the response of the George Washington University ("GWU") to the Arts Club's opposition to GWU's request for modification to Zoning Commission Order No. 563 (modified) in Case No. 87-23A. The Arts Club ordinarily does not submit fourth-order filings, but the response makes too many misstatements of fact and innuendoes against the Arts Club to ignore.

As before, should there be any questions or concerns in connection with this submission, the requests of the Arts Club, or any additional materials, please do not hesitate to contact me at 571-620-1930 or mwright@shannonwright.law (as before: not .com). Thank you very much.

Very truly yours,

Minturn Wright, Esq.

enc.: Reply

c.: through IZIS, etc.

The Arts Club of Washington's Reply to Response to Opposition to Request for Modification

The Arts Club, mindful of its readers' time, will not repeat the introduction and background set out in its Opposition. It will instead address the Response directly.

GWU admits that the then-owner of the parcel at 2001 Pennsylvania Avenue (the "Property") entered into a Lease pursuant to which the Arts Club leased 37,000 square feet of transferrable development rights ("TDRs") to the owner, which used these TDRs to build the building currently standing on the parcel. It further admits that the Zoning Commission approved the proposed Planned Unit Development in its Order 563. It omits, however, that the Lease, which gives the Arts Club the right to approve or disapprove of changes in the use of 2001 Pennsylvania Avenue, is acknowledged in Order 563 (Decision Section 8 *et seq.*), which is incorporated by reference in a Covenant (Section 1) recorded in the land records to ensure the compliance of the owners of the Property with the terms of Order 563. The Covenant is binding on the landowner parties and their successors in interest (Section 9).

GWU, curiously, further admits that the building "operated for many years as a commercial office building with ground-floor retail" and asserts that its proposed administrative use of the building is permitted office use, but elides over its plan to eliminate the ground-floor retail, saying only that it "may desire" to do so someday. If this is so, it can request approval of that change later. It also suggests its proposed "identification signage" and "university uses" will "help activate the street", although it provides no evidence for this, or for the implied assertion that the street needs "activating." These vague, unsupported statements are typical of the Response and the Application.

GWU also asserts that the Arts Club benefits from rental payments of "approximately $186,000 per year in current dollars" in the 1986 lease. It does not explain how it arrives at that figure, or why it does not report actual dollars, although it is not difficult to figure out: the actual base rent, as set in the Lease, is substantially less.

GWU devotes considerable text to discussing the Arts Club's use of the rent money, before suggesting "has not been able to confirm" that annual reports of its uses have been made; it does not detail what steps it took to try to confirm this suggestion. The undersigned prepared and submitted the most recent report, for Fiscal Year 2025; it was indeed made. GWU goes on to criticize the Arts Club for daring to function as a private club and to charge for some of its events to help defray the costs of, *e.g.*, maintaining the historic Monroe House, as if it did not charge, *e.g.*, tuition to defray its own expenses.

Only after these suggestions and calumnies does GWU make its arguments. Its first argument is that the Arts Club is not an owner of the subject property. While the Arts Club does not own the land of 2001 Pennsylvania Avenue, it does own the TDRs (more than three-quarters of a football field worth), and it is consensus in the United States that TDRs are property: they are a separate asset, they can be owned, marketed, leased (as here), and conveyed, and they have legal recognition. Under certain circumstances, they can be taxed. In short, they are part of the

"bundle of sticks" that comprise property rights—and thus property.[1] This property is owned by the Arts Club.

GWU argues that *1330 Conn. Ave. v. D.C. Zoning Comm'n*, 669 A.2d 708 (D.C. 1995), supports its assertion that the Arts Club need not be included in the application. However, that case actually ruled that an owner of another building and a **lessee** need not be included in a PUD modification application. *Id.* at 709 ("Petitioner is the ground lessee of the land"). The Arts Club is a **lessor**, as it leased its TDRs to the owner of the Property. It is thus an owner of "[p]roperty . . . that is the subject of the modification", 11-Z DCMR §300.5, and not just of another building in the PUD, as in *1330 Conn. Ave*. It should be included in the application.

GWU bolsters its argument by claiming that if the Commission were to acknowledge that the TDRs are a property right in 2001 Pennsylvania Avenue, it would give the Arts Club a veto over GWU's efforts to modify the PUD and its use of the building. It ignores the provision in the Lease (and thus the Covenant) that does the same thing.

GWU then turns to the Lease itself, asserting that the "Lease [d]oes [n]ot [g]rant the Arts Club an [a]pproval [r]ight" over its proposed changes. It moves from there to say the Zoning Commission is not affected by the Lease. In so doing, it skips over the Covenant, as discussed earlier. The Covenant is binding on the parties thereto, and their successors, "and with the District of Columbia". Covenant at p. 2. As before, it incorporates by reference the Order, *id.*, ¶ 1, and thus the Lease, whose "benefits and burdens . . . shall run with the land", Order at pp. 14-15. GWU cannot "wish away" the Covenant and the Lease, which runs with the land, and certainly cannot take advantage of the benefits thereof while ignoring the burdens. The Lease gives the Arts Club the right to approve or disapprove "**any aspect** of the [2001 Pennsylvania Avenue] Project", Section 2.2 (emphasis added)—not just the initial application. That GWU did not even ask the Arts Club for its approval before making the application was its own mistake; the Arts Club should not suffer for it.

GWU repeatedly says that the Arts Club's concerns can be raised at a hearing. However, it has failed to meet the prerequisites for such a hearing. It plays down the Arts Club's concerns by noting that Pepperdine University has a (much smaller) presence on the block. Lastly, it suggests it will "continue to endeavor to engage with the Arts Club", omitting that the Arts Club

---

[1] While the District of Columbia Court of Appeals has not ruled directly on this issue, many states' courts have done so. See, *e.g.*, *Shands v. City of Marathon*, 411 So. 3d 452, 477 (Fla. Dist. Ct. App. 2025) ("the general understanding [is] that transferable development rights are an interest in real estate"); *Vill. at Treehouse, Inc. v. Prop. Tax Adm'r*, 2014 COA 6, ¶ 22, 321 P.3d 624, 628 ("[T]ransferable development rights . . . 'are appropriately viewed as one of the fractional interests in the complex bundle of rights arising from the ownership of land.'"); *Saddle Ridge Corp. v. Board of Review*, 2010 WI 47, 325 Wis. 2d 29, 784 N.W.2d 527 (Wis. 2010) (noting that "real property" includes "not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto", ¶45, and concluding it is taxable, ¶76); *W. Montgomery Cnty. Citizens Asso. v. Md.-National Capital Park & Planning Com.*, 309 Md. 183, 187, 522 A.2d 1328, 1330 (1987) ("The concept of TDRs is simple and straightforward. Ownership of land carries with it a bundle of rights"). That Maryland considers TDRs to be property, *see also* "Transfer of Development Rights Programs", https://planning.maryland.gov/Pages/OurWork/ RRP/envr-planning/transfer-dev-rights.aspx, is of particular importance, as D.C. law is derived from Maryland law, and Maryland decisions, "particularly those relating to the law of property, are accorded the most respectful consideration by our courts." *Roberts-Douglas v. Meares*, 624 A.2d 405, 419, fn. 20 (D.C. 1992).

reached out to it this Fall and was rebuffed (the communications reflected in the exhibits are all from last Spring). The Arts Club's offer was refused, and GWU has made no counteroffer. This is not engagement.

It appears (from repetition of the issue) that GWU thinks that the rent paid to the Arts Club (which it consistently overstates) is too high. It omits that the rent, by virtue of its being in the lease, and thus the Order and Covenant, among other sources, was readily ascertainable before it bought the building. Either it considered the rent, and concluded it was worthwhile, or it failed to perform its due diligence, in which case it should not be complaining to the Zoning Commission.

For each of these reasons, and for all of them, the Zoning Commission should disregard the Response, and instead credit the Opposition, etc. It should decline to set this matter for hearing, and require GWU to prepare an application that meets all of the requirements in this unique situation. The Arts Club and the undersigned remain available to answer any questions and respond to any further concerns.

Respectfully submitted,

The Arts Club of Washington

By: 

Minturn Wright, Esq.