

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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ZONING COMMISSION

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SPECIAL PUBLIC MEETING

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TUESDAY
AUGUST 21, 2001

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The Meeting of the District of Columbia Zoning Commission convened at 10:00 a.m. in the Office of Zoning Hearing Room at 441 4th Street, Northwest, Washington, D.C., Carol J. Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

CAROL J. MITTEN	Chairperson
ANTHONY J. HOOD	Vice Chairperson
JAMES HANNAHAM	Commissioner
PETER G. MAY	Commissioner (Architect of the Capital)

COMMISSION STAFF PRESENT:

Alberto P. Bastida, Secretary, ZC

OTHER AGENCY STAFF PRESENT:

John Fondersmith, Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:

Alan Bergstein, Esq.

Marie Sansone, Esq.

I-N-D-E-X

Zoning Commission Case No 01-17MM/93-5F/91-18P

Presentation by Charles Barber, Counsel for
George Washington University 5

Presentation by Barbara Kahlow of
West End Citizens Association. 10

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ANC 2A 13

Preliminary Matters. 19

Presentation by John Fondersmith, Office
Of Planning. 22

P-R-O-C-E-E-D-I-N-G-S

10:05 a.m.

CHAIRPERSON MITTEN: Good morning ladies and gentleman. This is a special public meeting of the Zoning Commission for Tuesday, August 21, 2001. My name is Carol Mitten. Joining me this morning are Anthony Hood who serves as Vice Chair of the Zoning Commission and Commissioners Peter May and James Hannaham.

The case before us this morning is Zoning Commission Case Number 01-17MM/93-5F/91-18P, which is a PUD modification for 1957 E Street, N.W. and I'd like to thank everyone for being here this morning. I know that we put everyone under the gun a little bit by offering to have this meeting and I'd like to thank the Commissioners also for coming during the month of August, which is usually when we're on a break and we hope that this morning will be productive.

I'd like to modify the agenda, first off, and take the status report that we asked for from the various parties to this case, take that first, followed by preliminary matters and then we'll take up the consent calendar item.

What I'd like to do with the status reports is, everyone has filed a written status report. I think the idea was, originally, since their time would be short, was that the University would file a written report and the ANC and West End Citizens would have the opportunity to make an oral report, but

1 everyone had been able to file a written report, so what I
2 would ask is that you take no more than five minutes to amplify
3 anything that you would like in your written submission and not
4 to be redundant.

5 I will give everyone the opportunity to amplify
6 anything in their written report, you're not required. So we
7 will be begin with the University. Is there anything that
8 you'd like to amplify in your written submission?

9 MR. BARBER: Good Morning, Ms. Mitten and members
10 of the Commission. My name is Charles Barber. I am Senior
11 Counsel to George Washington University. In that capacity, I
12 was the lead negotiator for George Washington, which resulted
13 in the agreement with the West End Citizens Association, which
14 was filed.

15 I'm here to tell you that negotiating land use
16 agreements is hard work. It's particularly difficult in the
17 Foggy Bottom area and lord knows I've tried. It takes a lot of
18 time. It takes the willingness of both parties to see the
19 issues from the other persons viewpoint and it's takes a
20 oneness to make concessions.

21 George Washington University and to it's credit,
22 the West End Citizens Association stepped up to the plate, put
23 in the hard work, made the concessions and arrived at an
24 agreement. We both feel very proud of that because we think it
25 portends good things for the community and for relationships to

1 come.

2 For the University's standpoint, we entered to
3 these negotiations fully believing and believing today that we
4 had the full legal right to proceed with building this building
5 as currently designed. We played by the rules. We went the
6 Zoning Administrator, not once, but twice. Two Zoning
7 Administrators, who took their time in reviewing our building
8 permit and consulted with counsel and issued a building permit.

9 We went ahead because the zoning order required
10 us to begin construction by date certain and nine months later
11 we were told that the Zoning Administrator exceeded his
12 authority.

13 We do not believe that's the case, but
14 notwithstanding that, we fully appreciate this opportunity to
15 file a PUD modification request and remove the cloud from this
16 project and I want to express my appreciation to the Commission
17 and to the Chair, in particular, for moving expeditiously and
18 at least indicating a willingness to consider this matter on
19 the consent calendar.

20 First of all, there would not have been an
21 agreement had the West End not come to the table, acted in good
22 faith, had a specific set of issues, which related to the
23 amenities, argued for them vigorously and if the University had
24 not been able to see that these issues benefit not just the
25 parties, but the greater Foggy Bottom west end community and so

1 we put resources into this agreement.

2 Not just in the retail space, but in the
3 \$500,000.00 going toward the Foundation that will provide food
4 to the elderly and the homeless through Sholl's and that's not
5 just a commitment of money. It's a commitment of time and
6 other resources because we insisted on having a minority board
7 representation on that Foundation, so we see that as an ongoing
8 vehicle.

9 I think the parties have something to be proud of
10 here. In order to reach an agreement, you gotta show up, you
11 got to come to the table and one party did not come to the
12 table and it was not because of lack of invitation.

13 I repeatedly requested a representative of the
14 ANC to sit down and negotiate and the only response I got was a
15 linkage between this case and the DW Foggy Bottom campus
16 planning case, which is on remand to the Board of Zoning
17 Adjustment and I pointed out to counsel the August 8 order
18 setting up this hearing restricts submissions to this case and
19 they have two separate cases, two separate tribunals, two
20 separate different issues and two separate time frames.

21 We're building a building that on one side is
22 three stories out of the ground. We need a resolution to this
23 case, but the ANC refused to show up. The only response I got
24 was, well, the ANC doesn't want you to build this building and
25 to build and occupy this building.

1 And as a negotiating push, I don't know what to
2 do with that and counsel was quite candid, he said he has
3 nothing particular to offer on this case, but they'd be willing
4 to withdraw concession on this case in exchange for concessions
5 on the other case. I'm willing to meet on the other case and I
6 will, but they shouldn't be linked to this case.

7 In closing, George Washington University and I
8 believe the West End would join this, in asking the Commission
9 to send a message and that message would be that where the
10 parties do the heavy lifting, put in the time and the effort
11 and take that leap of faith, which is required, and for us
12 coming to the table and actually reaching a agreement.

13 When parties do that, that result will be
14 rewarded. And why should it be rewarded? Because negotiated
15 resolutions among parties is a preferred way of handling many
16 zoning disputes, particularly as regards to these sets of
17 issues of amenities.

18 The parties know these issues far more intimately
19 than the Board can ever know them. The parties will have to
20 live with this far after the terms of the Board expires and
21 with a negotiated agreement, the parties have a shared
22 commitment to the success of that.

23 I submit that this Board can best send that
24 message by approving GW's application for PUD modification and
25 approving on the consent calendar today.

1 CHAIRPERSON MITTEN: Could you summarize, Mr.
2 Barber?

3 MR. BARBER: I'm sorry?

4 CHAIRPERSON MITTEN: I think your five minutes are
5 up. Sorry.

6 MR. BARBER: Thank you very much.

7 CHAIRPERSON MITTEN: Thank you. Before you step
8 away, are there any questions for Mr. Barber? Thank you.

9 MR. BARBER: Thank you.

10 CHAIRPERSON MITTEN: Can we have the
11 representative from the West End Citizens Association, please,
12 Ms. Kahlow?

13 MS. KAHLOW: I'm Barbara Kahlow. I'm representing
14 the West End Citizens Association today. Last April, BZA
15 granted intervenor party status to the West End in the related
16 BZA appeal case.

17 Accompanying me today is Sara Maddux. She is a
18 Board Member of the West End Citizens Association and the
19 former Chairman of the ANC 2A. In that capacity she served as
20 the community's lead negotiator in the AGC PUD negotiations
21 back in 1993.

22 Last September, before any onsite construction,
23 the West End initiated the Foggy Bottom West End community's
24 objections to GW's plans for this site.

25 The West End contended that GW needed to file a

1 PUD modification request, which included amenities to replace
2 those eliminated after GW purchased the property from the AGC.

3 Also last September, the West End applied to the Zoning
4 Commission for party status in this PUD, since the plans and
5 amenities differed after the change in ownership.

6 Last Friday, as Mr. Barber just said, after
7 participation in the BZA directed settlement negotiations, the
8 West End executed an agreement with GW which provides both
9 onsite and offsite amenities and other protections to the
10 immediately, impacted community.

11 The agreement greatly benefits not only the
12 immediate, impacted community east of Washington Circle, but
13 also elderly and poor residents of D.C. and the homeless. For
14 example, the provisions include 5000 square feet of new retail
15 for the District of Columbia and the community.

16 Second, a \$500,000.00 subsidy for a program at
17 Sholl's cafeteria for meals at no charge or at reduced rates
18 for D.C.'s elderly and poor residents and the homeless.

19 Third, GW's agreement to comply with the D.C.
20 Environmental Policy Act for all future construction projects.

21 Believe me, that's a big deal.

22 And fourth, a new GW policy for restricted
23 student parking by GW freshmen and sophomores living the Foggy
24 Bottom West End area.

25 There are many other provisions, but I'm not

1 going to go through that because you all have read the
2 agreement.

3 The West End's principal objective has been
4 realized. Since GW filed the PUD modification request and the
5 agreement provides amenities which replace those eliminated.

6 Now the West End requests the Zoning Commission,
7 one, grant the West End the party status as requested last
8 September, so that it can participate in further proceedings
9 and two, promptly approve the PUD modification request
10 incorporating the substantive provisions that were in the
11 agreement, in your order.

12 Since ANC 2A chose not to participate at all in
13 the BZA directed settlement negotiations, the ANC's call for
14 further delay should not be accommodated. The affect would be
15 months of delay, without any change in the end result, without
16 the immediate benefit of the substantial amenities which are in
17 the public interest.

18 Thank you very much.

19 CHAIRPERSON MITTEN: Thank you. Any questions for
20 Ms. Kahlow?

21 VICE CHAIRPERSON HOOD: Madam Chair, may I just
22 ask one question?

23 CHAIRPERSON MITTEN: Please.

24 VICE CHAIRPERSON HOOD: Ms. Kahlow, did the West
25 End Citizens Association have a meeting of the whole in August

1 or did the Association give the Officers the right to handle
2 any business or any concerns in the month of August?

3 MS. KAHLOW: The West End gave the Officers the
4 authority, which is common with most community organizations.
5 I was the Vice Chairman of the Foggy Bottom Association for
6 several years and that is how it worked in that Association as
7 well.

8 VICE CHAIRPERSON HOOD: Okay, thank you.

9 CHAIRPERSON MITTEN: Thank you very much. Can we
10 have the representative from the ANC 2A?

11 MR. DRAUDE: Good morning, Madam Chair and members
12 of the Commission. My name is James Draude. I'm an attorney.

13 I represent the Advisory Neighborhood Commission 2A. I'm
14 counsel of record in both of the cases currently pending before
15 the Board of Zoning Adjustment and entered my appearance here
16 with our filing yesterday.

17 Let me just address the, although Mr. Barber, I
18 think, strayed into the merits of the case, let me stick to
19 addressing the status of settlement discussions.

20 First, the Board of Zoning Adjustment issued two
21 orders in two cases on Friday, August the 3rd, inviting the
22 parties to discuss settlement of each of those cases. The
23 first being this case, which I will refer to as the AGC case
24 and the second being the campus plan case.

25 I differ with Mr. Barber regarding the import of

1 those orders, both from reading the text of the orders and from
2 the position of the Board at any rate.

3 The Board did not order the parties to discuss
4 the settlement of these two cases separately or together.
5 Furthermore, the Board is a neutral, adjudicative body. It is
6 not in the position to be ordering litigating parties to
7 discuss settlement on any terms or within any particular scope.

8 That's up to the parties and it's been Mr. Barber's position
9 for that some reason, I think he over reads the Boards orders,
10 but even if the Board thought that was what they were doing, it
11 plainly is well beyond the scope of a proper operation for an
12 adjudicative body.

13 The ANC held an executive meeting with it's
14 attorney on Monday, following the issuance of those two order
15 to discuss both cases.

16 We came to the conclusion it's not like the
17 parties don't understand the parties positions in the
18 litigation. They've litigated this case, the AGC case for nine
19 months or so. They've litigated the campus plan case for
20 several years, so we were having a discussion that was not
21 based on some new insight or new party. We have been dealing
22 with the University for a long time.

23 We came to the conclusion that the parties who
24 have fought the ANC and the University's views on this
25 particular case are so far apart that it would not be

1 productive to simply put the ANC's position on this case on the
2 table.

3 We saw the possibility, however, that the campus
4 plan case, which deals with a much more extensive of
5 geographically and scope of issues that it might be possible,
6 if you talked about both cases at the same, or negotiated both
7 cases at the same time, that the ANC might be able to make
8 concessions on one case, in exchange for concessions on the
9 other case.

10 On August 7, the following day, I sent a letter
11 to counsel for GW, informing them that we were formulating
12 proposals on both cases. I further noted in response to
13 counsel for GW's oral remarks, that the ANC does not alone bear
14 the responsibility for formulating settlement proposals and
15 putting issues on the table and that ANC would be pleased to
16 consider any proposals that GW wanted to put forward, at any
17 time.

18 Now the bottom line is that the University never
19 made a proposal, formal or informal, to ANC 2A, on this case or
20 on the campus plan case. There's been a lot of posturing, in
21 writing, in the report that you got, and this morning, over who
22 was negotiating with whom and who was going to negotiate.

23 The bottom line is that if you want to make a
24 settlement, make a proposal. The ANC thought and still thinks
25 that the most realistic way of making a proposal is to make a

1 proposal on both cases and we have done that informally and
2 confidentially in an attorney to attorney meeting.

3 But the bottom line is the University has taken a
4 position that they will not discuss both cases together and
5 they have never made a settlement proposal.

6 I will not attempt to address the merits of the
7 agreement between the University and the West End Citizens
8 Association. The West End Citizens Association, they're
9 certainly entitled to enter into any agreement that they want
10 to with the University to end their participation in the BZA
11 appeal on any terms that they chose.

12 I would note and I think Ms. Kahlow, this
13 morning, recognized, that this proceeding, before this
14 Commission, is a request for a modification of a prior PUD.
15 Under the terms of the rules, the only parties to this
16 proceeding right now are the original parties to the PUD, which
17 were the property owner and the ANC, not the West End Citizens
18 Association. They're not currently a party in this case.

19 CHAIRPERSON MITTEN: Can you summarize, Mr.
20 Draude, please?

21 MR. DRAUDE: I'm finished.

22 CHAIRPERSON MITTEN: Very good. Before you step
23 away, are there any questions for Mr. Draude? One thing that I
24 would like to say is that I understand that there's a long
25 standing relationship that ANC 2A and the University have.

1 There's a long standing relationship between West End Citizens
2 and the University and what we were hoping for is at least and
3 you were completely correct, you were not ordered nor could the
4 BZA order you to engage in a dialogue with the University.

5 We were attempting to encourage that and I think
6 no one would have predicted that the University would have been
7 able to achieve an agreement with West End Citizens, based on
8 some of the past history, and yet by engaging in a dialogue
9 they were able to do that.

10 What we're looking for is people to change the
11 way they have been dealing with each other because a dialogue
12 is preferable to silence and the fact that you chose to couple
13 the settlement discussions on the campus plan and the
14 settlement discussions on this case, that won't prevent this
15 body from going forward and making a decision, so by not
16 engaging in a separate discussion, or at least, attempting to
17 reach some closure on a position related to 1957 E Street,
18 we're left without any input from the ANC and that's very
19 unfortunate.

20 MR. DRAUDE: Well, let me make clear that we did
21 not ask the University nor have we suggested that the schedules
22 in either of these cases be changed or in some way suspended
23 pending settlement discussions.

24 Settlement discussions can, I've litigated cases
25 for 25 years. Parties can discuss settlement and litigate at

1 the same time and it happens all the time and we did not
2 suggest to the University nor did we want to imply to here,
3 that we were requesting that the schedules be altered.

4 Although you state that you're left in silence, I
5 hope you at least read that we filed yesterday in accordance
6 with the scheduled briefing.

7 CHAIRPERSON MITTEN: Yes, we did.

8 MR. DRAUDE: All right.

9 CHAIRPERSON MITTEN: Anything else?

10 MR. DRAUDE: (Nothing.)

11 CHAIRPERSON MITTEN: Thank you, Mr. Draude.

12 Now, Mr. Bastida, we'll go to preliminary matters.

13 SECRETARY BASTIDA: The Office of Zoning has a
14 preliminary matter, Madam Chairman.

15 On Monday, August 13, 2001 at approximately 4:30
16 p.m. the Law Office of Shaw Pittman filed an application for a
17 minor modification?-.

18 CHAIRPERSON MITTEN: Could you speak up, Mr.
19 Bastida?

20 SECRETARY BASTIDA: Yes, sure. On Monday, August
21 13, 2001 at approximately 4:30 p.m. the Law Office of Shaw
22 Pittman filed an application for a minor modification to Zoning
23 Commission 93-5F/9118F case, which is the AGC PUD, with a
24 request for a consent calendar modification.

25 The Office of Zoning, after reviewing further

1 information, believe that the request modification should not
2 be considered under the consent calendar umbrella.

3 That concludes my preliminary matter and thank
4 you.

5 CHAIRPERSON MITTEN: So just for clarification,
6 you are, with the additional information that we now have,
7 you're removing the item from the consent calendar and
8 replacing it under hearing action?

9 SECRETARY BASTIDA: That is correct, Madam
10 Chairman.

11 VICE CHAIRPERSON HOOD: Madam Chair, if I could
12 just add without getting into the merits of the case. If
13 anyone knows and has watched this Commission and what I've said
14 in the past. I've always had a problem with the way we deal
15 with minor modifications.

16 This issue, I do not believe, is consistent with
17 the Commission's intent in improving the original PUD. Having
18 been one of those Commissioners who voted to extend one of the
19 many times that it's been asked to be extended.

20 Secondly, I think it does have an effect on the
21 PUD's impact on the surrounding area and also, I think there's
22 a balance issue with the amenities and the benefits, so that's
23 where I am. I was going to request that this come off. I'm
24 glad staff has proposed that.

25 Also, if I could just say two other comments.

1 The West End Citizens Association, unfortunately, and I can say
2 this from having been there. I'm a President of a civic
3 association. Unfortunately, we do not have the great weight
4 accorded to us by law. That's something that I would encourage
5 the citizens of civic associations to work on.

6 But the ANC, unfortunately, did not come to the
7 table, but they do, by law, get the great weight. While I
8 concur with some of the comments I heard from Mr. Barber, I
9 just believe that this Commission should move forward and maybe
10 deal with this at a hearing because as far as in my eyesight
11 and I'm not just picking on this case. I've always had a
12 problem with minor modifications. You can look at a memo dated
13 back to early 2000s, so it's just not this particular case.
14 Minor modifications are just what they should be, minor
15 modifications.

16 Thank you, Madam Chair.

17 CHAIRPERSON MITTEN: Thank you. We have a proposed
18 hearing action, which would be to set down this proposed
19 modification for public hearing and I believe we have a report
20 from the Office of Planning in that regard, Mr. Fondersmith.

21 MR. FONDERSMITH: Yes.

22 CHAIRPERSON MITTEN: Could you turn on your
23 microphone before you.

24 MR. FONDERSMITH: Thank you, Madam Chairman. We
25 have a written report, but very simply, and of course we just

1 received the materials yesterday. Also, and we go over some of
2 the background?-.
3

3 SECRETARY BASTIDA: Excuse me, Madam Chairman.
4 Would you waive the Office of Planning filing of this report?

5 CHAIRPERSON MITTEN: Absolutely.

6 SECRETARY BASTIDA: Thank you.

7 MR. FONDERSMITH: Thank you, Madam Chair. I
8 should have requested that in the beginning.

9 The bottom line is here that while we recognize
10 the work that's gone into this, we think that because of the
11 precedent of this case and because of this issues, the
12 complexity with the PUD, the Office of Planning recommends that
13 the Zoning Commission hold a public hearing, expedited as much
14 as possible, on the PUD modifications and, of course, that's
15 PUD modifications as first requested by the University on the
16 13th and then the additional modifications proposed by the
17 University and supported by, in the agreement, with the West
18 End Citizens Association.

19 We think that just, in the long run, will provide
20 a cleaner record and also a better base for precedent of this
21 kind of case in the future.

22 CHAIRPERSON MITTEN: Thank you, Mr. Fondersmith.
23 Any questions for Mr. Fondersmith?

24 Well, we have a recommendation from the Office of
25 Planning to set this modification to the 1957 E Street PUD down

1 for public hearing and I so move.

2 VICE CHAIRPERSON HOOD: I'll second it.

3 CHAIRPERSON MITTEN: Any discussion? All those in
4 favor, please say aye.

5 (Chorus of ayes.)

6 CHAIRPERSON MITTEN: Those opposed, please say no.

7 (No response.)

8 CHAIRPERSON MITTEN: Mr. Bastida, would you record
9 the vote.

10 SECRETARY BASTIDA: The staff will record the
11 vote, 4 - 0, Ms. Mitten moving and Mr. Hood seconding. Mr. May
12 and Mr. Hannaham voting on the affirmative.

13 CHAIRPERSON MITTEN: Thank you, Mr. Bastida, and I
14 would just like to remind the University that for approval of a
15 second stage PUD, a detailed statement was required as to the
16 uses and their locations within the project and if you could
17 please specify the type of residential housing that you intend
18 and I would assume that it would be what is indicated, in
19 detail, in the agreement with West End Citizens Association and
20 also the number of dormitory beds that would include and a
21 break down of the commercial component, which would include, at
22 least, the retail that's been specified, classrooms and
23 academic offices and to the extent that there are any other
24 significant uses that we should know about, like conference
25 facilities. We would like to have that articulated as well.

1 Any other concerns that the Commission would like
2 to pass on at this time?

3 VICE CHAIRPERSON HOOD: Madam Chair, I would echo
4 what the Board of Zoning Adjustment had asked, that all groups
5 and all parties sit at a table. I just have problem with
6 linking the cases up. I had nothing to do with the other case.

7 I'm dealing with 1957 E Street that's in front of me and I
8 would appreciate it if the parties included all ANC, West End
9 and the applicant, would deal with 1957 E Street, as opposed to
10 trying to link them both up because the other one, I didn't sit
11 on the case. I'm not cognizant. I don't even know what's
12 going on.

13 I think that we could accomplish and move forward
14 as the BZA had asked. We can't make you. We just ask that you
15 try to make our jobs a little easier and come to some type of
16 agreement. If not, we'll do it.

17 Thank you.

18 CHAIRPERSON MITTEN: Mr. Hannaham?

19 COMMISSIONER HANNAHAM: Yes, Madam Chairman, I'd
20 appreciate it if in consideration of the preparation for the
21 revised PUD, that the parties think creatively about the public
22 interest that this particular revised PUD might bring and think
23 creatively. I'd very much appreciate a creative kind of look
24 at the public benefits. Thanks.

25 CHAIRPERSON MITTEN: Thank you, Mr. Hannaham. I

1 hope that this opportunity for public hearing, which is not
2 what you had hoped for today, will not detract in any way from
3 the improved relationship that you've been building with the
4 community and I hope that by the time we have a public hearing,
5 that the improved relationship will have extended to ANC 2A and
6 that we can have a consensus of some kind because that's
7 preferable to the Commission, then having to impose conditions,
8 ourselves, without input from the community.

9 Thank you and with that, this special public
10 meeting is adjourned. Before we take that up, the issue, as it
11 relates to Ms. Kahlow's request for party status will be taken
12 up at the time of the public hearing on the modification.

13 We're adjourned.

14 (Whereupon, the special public meeting of the
15 D.C. Zoning Commission was concluded at 10:35 a.m.)