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ZONING COMMISSION
District of Columbia
CASE NO. 11-07C
EXHIBIT NO. 83
ZONING COMMISSION
District of Columbia
CASE NO. order-11-07C
EXHIBIT NO.83

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 11-07C
Z.C. Case No. 11-07C
American University
(Modification of an Approved Further Processing Application @
American University's East Campus)
February 2, 2015

Application of The American University (the "University," "AU," or "Applicant"), pursuant to § 3129 of the Zoning Regulations, requesting approval of a modification to an approved further processing application for the development of the AU East Campus. In accordance with § 3035.4 of the Zoning Regulations, this case was heard and decided by the Zoning Commission for the District of Columbia ("Commission") using the rules of the D.C. Board of Zoning Adjustment at 11 DCMR §§ 3100 *et seq*. For the reasons stated below, the Commission hereby approves the modification application, subject to conditions.

HEARING DATE: February 2, 2015

DECISION DATE: February 2, 2015

FINDINGS OF FACT

Application, Parties, and Hearing

1. The Commission approved the AU Campus Plan and East Campus Further Processing application pursuant to Z.C. Order No. 11-07. Z.C. Order No. 11-07 approved the American University Campus Plan for the period from 2011-2022 and approved a Further Processing application for the construction of six buildings on the East Campus. The East Campus is located across Nebraska Avenue, N.W. from the central campus, and is bounded by Nebraska Avenue, NW, Massachusetts Avenue, N.W., a shared property line with the Westover Place Townhomes, and New Mexico Avenue, N.W.
2. For the East Campus, the Commission approved the development of 590 residential beds in three buildings, three additional academic and administrative buildings, and 150 parking spaces and loading facilities in an underground garage, pursuant to the special exception standards of 11 DCMR § 210 (Exhibit ["Ex."] 1.)
3. On November 20, 2014, AU filed an application to modify the underground parking garage on the East Campus to construct two below-grade parking levels rather than one level. AU sought approval of the application as a minor modification under the Commission's Consent Calendar procedures (11 DCMR § 3030), noting that the same number of underground parking spaces (150) will be provided. The modification application also requested the ability to remove a below-grade bus turnaround which was depicted in the plans approved by the Commission. AU requested that the Commission review the application at the Commission's December 8, 2014 public meeting. (Ex. 1)

4. On December 1, 2014, Advisory Neighborhood Commission (“ANC”) 3D filed a letter in opposition to the minor modification application which noted the following issues. (i) AU’s request for a decision on December 8, 2014 denies ANC 3D sufficient time to review and assess the merits of the application; (ii) AU’s modification application was incomplete because it did not address above-grade modifications to the plans, including changes in the gross floor area, height of the buffer buildings, and relocation of the AU Public Safety Office to the East Campus; (iii) AU’s request for a minor modification was not timely, and (iv) AU’s proposed changes are not minor modifications. (Ex. 4)
5. On December 1, 2014, the Spring Valley-Wesley Heights Citizens Association (“SVWHCA”) filed a letter in opposition to the minor modification application which noted the following issues. (i) AU’s request for a minor modification was not timely, (ii) AU’s proposed changes are not minor modifications and require a public hearing; and (iii) AU’s request for a minor modification was improper given its Intervention in BZA Appeal No. 18857. (Ex. 6)
6. At the Commission’s December 8, 2014 public meeting, the Commission removed the modification application from the Consent Calendar and scheduled this application for a public hearing
7. Notice of the public hearing was published in the *D.C. Register* on December 19, 2014 and was mailed to ANC 3D and ANC 3E and to owners of all property within 200 feet of the East Campus.
8. The public hearing on the application was conducted on February 2, 2015. The hearing was conducted in accordance with the provisions of 11 DCMR § 3129.8, which notes that the scope of the hearing is limited to the impact of the modification on the subject of the original application, and shall not permit the Commission to revisit its original decision.
9. In addition to the Applicant, ANCs 3D and 3E were automatically parties in this proceeding. ANC 3D submitted a report and resolution in support of the application with conditions (Ex. 18) ANC 3D also provided oral testimony at the public hearing. (Ex. 74) ANC 3E did not participate in this application.
10. The Commission received a timely party status request from the Westover Place Homes Corporation (“Westover Place”) in support of the application. (Ex. 14.) At the public hearing, the Commission granted party status to Westover Place as a Party in Support.
11. At the February 2, 2015 hearing, the University presented evidence and testimony from David Dower, Assistant Vice President for Planning and Project Management at American University, and Linda Argo, Assistant Vice President, External Relations and

Auxiliary Services at American University. Mr. Dower and Ms Argo answered questions from the Commission and ANC 3D.

12. At the public hearing, the Commission heard testimony from the Office of Planning (“OP”) which addressed their report which supported the application. (Ex. 7)
13. The District Department of Transportation (“DDOT”) filed a report in this case which was supportive of the application. (Ex. 17.)
14. At the conclusion of the public hearing on February 2, 2015, the Commission took final action to approve the application in Case No 11-07C, subject to conditions.

Proposed Modification Application and Condition Regarding Charter Buses and Motorcoaches

15. After the Commission approved the Further Processing application for the East Campus, the University commenced preparation of the construction drawings necessary for building permits. Based upon further engineering and structural analysis, AU realized that it would not be possible to provide 150 below-grade parking spaces in a single level of parking and to provide a bus turn-around area below-grade. Instead, AU submitted plans that provide the required 150 below-grade parking spaces and loading facilities in two below-grade levels. The second below-grade level will be only a partial level and will not cover the same footprint as the first below-grade level. (Ex. 1)
16. The requested modification changes the underground location of some of the parking spaces. However, the same number of parking spaces (150) will be provided in an underground garage, and the entry/exit will still be from New Mexico Avenue, as the Commission approved in the order. In addition, the proposed modification will not be publicly perceptible in any way since it will be entirely below grade. The change to the number of levels will have no effect on the location, height, or bulk of the buildings. (11 DCMR § 210 4.) Similarly, because it will be consistent with the order’s requirement for 150 underground parking spaces, the modification will not be objectionable to neighboring property because of noise, traffic, number of students, or other objectionable conditions. (11 DCMR § 210 2) (Ex. 1)
17. In regard to the removal of the below-grade bus turnaround, the University proposed a condition to the order (proposed Condition No. 42) which states:
 42. The University will not allow any charter buses or motor coaches to enter the East Campus property, including the surface parking lot.

AU argued that this proposed condition addresses any issues or concerns that may be raised by any Parties regarding adverse impacts related to noise or odors from charter

buses or motor coaches, as they will not be permitted to come to the East Campus property (Ex. 1.)

18. At the public hearing, AU's representatives presented testimony and answered questions from the Commission regarding: the proposed second level of below-grade parking spaces, the clearance provided in the garage to allow trucks and some emergency vehicles to access the garage and loading areas; the circulation pattern for the AU shuttle bus; and the permits that have been obtained for developing the East Campus, including dewatering permits. AU's representatives also presented testimony and answered questions regarding the Zoning Administrator's approval of the building permit for the East Campus buildings and the Zoning Administrator's determination that the gross floor area of the buildings on the East Campus and building height of the buffer buildings were consistent with the Commission's approval of Z.C. Order No. 11-07 (Transcript ["Tr "] of 2/2/15 public hearing.)
19. In response to questions from the Commission, AU's representatives testified that they agreed to ANC 3D's revisions to proposed Condition No. 42 regarding the prohibition of charter buses and motor coaches from entering the East Campus property. The AU representatives also testified that no modifications were being proposed to Condition No. 41(b) of Z.C. Order No. 11-07, which requires the University to repair, at its own expense and as promptly as reasonably possible, any damage to the properties of an adjacent property owner, and any improvements thereon, caused by and resulting from the construction work conducted on the East Campus.
20. The AU representatives also agreed, in response to the request of Westover Place, to hold a discussion with the community regarding East Campus traffic routes at the next regularly scheduled construction update meeting (Tr. of 2/2/15)

Office of Planning

21. By report dated December 3, 2014, and by testimony at the public hearing, OP recommended approval of the University's modification application. OP's report noted that "Order No. 11-07 does not include any discussion of the number of below-grade parking levels relative to the approval of the East Campus further processing application. The number of parking levels is not discussed as a Finding of Fact nor included as a Condition of Approval. The provision of the parking spaces on the East Campus was discussed relative to the number of spaces (Finding of Fact #145, page 31) and vehicular access from New Mexico Avenue, N.W. (Finding of Fact #144, page 31). There are no changes proposed to the number of vehicle parking spaces, the provision of below-grade parking loading, or the access from New Mexico Avenue." (Ex. 7.)
22. The OP report also noted that it did a word search of the public hearing transcripts for the words "below-grade," "underground," "parking," and "East Campus" and such search did

not reveal any discussion or testimony by any parties, individuals or the Commission regarding the number of below-grade levels of parking. The OP report concluded that, “it does not appear that the issue of the number of below-grade parking levels was a material fact upon which the Commission based its original approval of the 2011 American University Campus Plan or the further processing of the East Campus (Ex 7)

- 23 The OP report also noted that “the below-grade bus turnaround provided a means to mitigate any impact of the buses on neighboring properties. The same purpose is achieved, if not exceeded, by the proposed condition to ‘not allow any charter buses or motor coaches to enter the East Campus property, including the surface parking lot’” (Ex 7)

District Department of Transportation

- 24 By report dated January 21, 2015, DDOT concluded that “the proposed modification will have no adverse impacts on the travel conditions of the District’s transportation network. The transportation impacts of the 150 parking spaces were reviewed as part of the Campus Plan and appropriately mitigated during that process. In addition, DDOT agrees with the Applicant’s proposed condition to prohibit motor coaches and charter buses to come to the East Campus, in order to reduce noise idling impacts ” (Ex 17)

ANC 3D

25. In a letter dated January 23, 2015, ANC 3D noted that at a meeting held on January 14, 2015, with a quorum present at all times, by a vote of 8-2 ANC 3D voted to support the application with conditions. With regard to the Applicant’s proposed Condition No. 42, ANC 3D suggested the following language:

- AU shall not allow any charter buses or motor coaches (defined by AU as large capacity buses that transport visitors to campus and excluding AU-owned and operated shuttle buses) to enter the East Campus property, including the surface parking lot, and shall not allow any loading or unloading of buses or motor coaches on public streets, including, but not limited to, New Mexico, Nebraska, or Massachusetts Avenue; and
- AU shall require all charter buses or motor coaches (defined by AU as large capacity buses that transport visitors to campus and excluding AU-owned and operated shuttle buses) to load, unload, and park at the AU Transportation Center on the main campus.

(Ex. 18.)

- 26 ANC 3D also voted unanimously (10-0) at its January 14, 2015 meeting to offer the following additional recommendations to the ZC:

- The language in ZC Order No. 11-07 is not always clear and concise and has potential for interpretation which has led to ongoing disputes and/or misinterpretations of the Zoning Commission's decisions. ANC 3D recommends that Zoning Orders be written more clearly to reflect the Zoning Commission's decisions.
- ZC Case No 11-07C demonstrates the need for a more formalized definition of the role of the Zoning Administrator, which clarifies the scope of responsibility assigned to the position. This definition should be included in the DC Zoning Regulations.

(Ex 18)

27. At the February 2, 2015 public hearing, the Secretary of ANC 3D provided oral testimony In addition to the condition and recommendations noted in Finding of Fact Nos. 25 and 26, the Secretary of ANC 3D noted that many residents expressed concerns at the January 14, 2015 ANC meeting that the deeper excavation required for the two-story garage may have unintended consequences from underground water flow that would result in damage to the foundations of adjacent homes AU indicated that such damage was unlikely and cited DC agency review of the permit application. The Secretary of ANC 3D stated that AU offered no evidence for its assertion that DC agencies had considered this specific issue; and, staff of the District Department of the Environment ("DDOE"), in several meetings with ANC 3D representatives about groundwater issues at the site, indicated its permit review process was limited and did not include an assessment of potential changes in underground flow stemming from the construction
28. ANC 3D consequently considered recommending additional language for Condition No. 41(b) of Z C Order No 11-07, which, as noted, requires AU to repair damage to the properties of adjacent property owners "caused by and resulting from the construction work conducted on the East Campus " After extensive discussion, ANC 3D affirmed its view that based on the existing language of Condition No. 41(b), AU would be responsible for repairing damage related to underground water flow, and asks the ZC to affirm the ANC's position on this issue ANC 3D also expressed concern that the modification requested by AU could impact access to the East Campus by emergency and service vehicles as lower height levels in the two-story underground parking garage might prevent ambulances and service vehicles from accessing the site, as originally proposed in the Campus Plan Further Processing proceeding, and, as a means of ensuring low intensity use of the site given it borders a townhome complex. At the ANC's January 14, 2015 meeting, AU representatives outlined alternative plans for ambulances and large service vehicles to access the site that did not appear objectionable to neighbors and, consequently, to ANC 3D (Ex 74)

Party in Support

29. In oral testimony and written submission to the Commission, the President of the Board of Directors of Westover Place stated that Westover Place has a vested interest in ensuring that the East Campus fits into the existing neighborhood and that Westover Place is currently dealing with all the ramifications of an active construction site: noise, dust, and ground vibrations to name just a few concerns. The Westover Place representative noted Westover Place's support for the request for the modification subject to the presentation of further detail on traffic management. Westover Place requested that in its deliberations regarding this request, the Commission should resist any actions that may cause further delay to the schedule as outlined in Z.C Order No. 11-07, as any delay, even a minor one, stretches out the inconvenience and disruption to our community. (Ex. 76.)
30. Westover Place noted that in its review of the voluminous filings in Z.C Case No 11-07, the University offered a number of documents on the underground garage proposing several different garage capacities. Westover Place noted that during the further processing application, the University testified that the garage would provide underground parking for the East Campus, and would be the method for service vehicles and buses to serve retail, academic, administrative and housing on East Campus. This included an underground bus turnaround. OP, in their report to the Commission, endorsed the 150 car garage and the Commission included it as part of Z.C. Order No. 11-07. Westover Place supported the enlarged garage during its Campus Plan testimony and still supports the concept. The Westover Place representative noted that there are concerns in the community about the garage disrupting ground water flow and possibly impacting Westover homes. The Westover Board of Directors does not believe that the University would intentionally construct East Campus in a manner which would imperil Westover Place homes and structures, and knowing that a Condition in the original order (Condition No. 41(b) of Z.C. Order No 11-07) clarifies the responsible party if any property damage results, Westover Place concluded that this portion of the request should be approved. (Ex. 76)
31. Westover Place also testified that American University's offer to prohibit charter buses or motor coaches from entering the East Campus property was a step in the right direction as any action that reduces traffic and its ensuing noise on East Campus reduces a potential objectionable condition and thus has a positive impact on the Westover Place community. The Westover Place Board of Directors supported the University's request to prohibit charter buses and motor coaches from entering East Campus. (Ex 76)
32. The Westover Place representative testified that there are still some concerns regarding the traffic into and out of East Campus. To address this issue, Westover Place requested that the University agree to hold a discussion with the community on East Campus traffic routes during its next construction update meeting. The University should review

planning regarding traffic into and out of East Campus, as well as, the impact of traffic on adjacent arteries and surrounding neighborhood streets. The Westover Place representative testified that since traffic management addresses post-construction activity, this request should not further delay the ongoing construction (Ex 76)

Testimony and Letters in Support

- 33 David Fehrmann, a resident of Westover Place, presented testimony in support of the modification application. Mr. Fehrmann noted that he participated in all of the Campus Plan meetings and public hearings regarding the development of the East Campus. He testified that further delay of East Campus construction is not in the best interest of Westover Place or the greater neighborhood (Ex. 77)
- 34 Numerous letters in support of the application, from residents of Westover Place and the surrounding community, were submitted into the record. These letters noted support for the two-level parking garage and the prohibition of buses entering the East Campus. These letters also noted that any delays to the construction schedule for the East Campus is not in the best interest of the community and only extends the period of construction impacts on Westover Place and the surrounding community. (Ex 19-29, 31, 32, 50, 62, 69)

Testimony in Opposition

35. Three residents of Westover Place (Teresa Guzman, Charles Privot, and Benjamin Tessler) presented testimony in opposition to the application. Ms. Guzman cited the following reasons for her opposition to the modification application: emergency vehicles (such as ambulances) would not be able to access the East Campus via the garage and will create noisy conditions; increased traffic impacts will occur with the revised loading berths, the deeper excavation could potentially affect groundwater flow and the original language in the Commission order is too vague about AU's responsibility to repair damage; the location of the AU Office of Public Safety on the East Campus will add to the noise and disturbance of the adjacent neighbors; and the AU shuttle buses accessing the East Campus is contradictory to the original approval of the East Campus. (Ex. 53, Tr. 2/2/15, pp 62-65.)
- 36 In testimony in opposition to the modification application, Mr. Privot noted his concerns about the excavation's impact on the high water table on the site and the potential for water damage to Westover homes. Mr. Privot also raised questions about traffic congestion in the area and the need for AU to provide 150 below-grade parking spaces. (Ex. 73, Tr 2/2/15, pp. 65-74, 80-87)
- 37 Mr. Tessler's opposition to the modification was based on the increased intensity of the use of the East Campus and the need to clarify responsibility for any damage that may

occur to Westover Place homes Mr Tessler noted the inability for emergency vehicles to access the site, the location of the Office of Public Safety on the East Campus, and the ability of AU shuttle buses to access the East Campus as examples of the increased intensity of use of the East Campus property. Mr. Tessler also noted the potential for water damage of Westover Place homes and the inadequacy of the existing language in Z C Order No 11-07 to protect the property interests of Westover Place residents. (Ex 78, Tr. 2/2/15, pp. 74-87)

Letters in Opposition

38 Numerous letters in opposition to the application were submitted into the record. In general, these letters opposed the modification for the following reasons: emergency vehicles would not be able to access the East Campus via the garage, increased traffic impacts will occur with the revised loading berths as larger trucks will come to the main campus and then, smaller delivery trucks will come to the East Campus; the deeper excavation could potentially affect groundwater flow, the original language in the Commission's order is too vague about AU's responsibility to repair damage, the location of the AU Office of Public Safety on the East Campus will add to the noise and disturbance of the adjacent neighbors; and the AU shuttle buses accessing the East Campus is contradictory to the original approval of the East Campus. (Ex. 33-49, 51-61, 63-68, 70)

CONCLUSIONS OF LAW

The Applicant requested that the Commission approve an application to modify approved plans, pursuant to 11 DCMR § 3129. Based upon the record in this case, the Commission concludes that the University has satisfied the filing and notice requirements of 11 DCMR §§ 3129. The parties to the original application were served a copy of the modification application, and ANC 3D and The Westover Place Homes Corporation acted as parties in the modification application.

The Commission also concludes that the Applicant has satisfied the burden of proof, that the "impact of the modification on the subject of the original application," 11 DCMR 3129.9, would not cause the university use "to become objectionable," (11 DCMR § 210.2.) The Commission concludes that the proposal to create two levels of below-grade parking, rather than the one level of below-grade parking, while maintaining the same number of below-grade parking spaces (150) and the same point of access from New Mexico Avenue will in and of itself have no discernable impact As to the elimination of the below-grade bus turnaround, the Commission notes the purpose of the turnaround was to mitigate impacts of larger vehicles coming to the East Campus, such as noise and fumes from idling buses, on neighboring properties. The Commission concludes that the revised Condition No. 42 will mitigate those same potential adverse impacts by prohibiting charter buses and motor coaches from coming to the East Campus The Commission finds that no adverse impacts or dangerous conditions will result from AU's shuttle bus entering the East Campus, picking-up and dropping-off students, and then exiting the East Campus

The Commission also notes the testimony of the Applicant regarding the Zoning Administrator's approval of the building permit application for the above-grade structures on the East Campus. In particular, the Applicant described the gross floor area of the approved buildings on the East Campus and the heights of the "buffer buildings" on the East Campus. The Commission has no concerns with the Zoning Administrator's approval of the building permit application with regard to these two issues.

The Commission accorded the written recommendation of OP the "great weight" to which it was entitled pursuant to D.C. Official Code § 6-623.04 (2001). As discussed in this Order, the Commission concurs with the recommendation of OP to grant the University's modification of the Further Processing application.

The Commission is required under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)) to give "great weight" to the issues and concerns raised in the written report of the affected ANC. To satisfy the great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. The Commission accepted the ANC's revisions to the Applicant's proposed new Condition No. 42 and found its advice persuasive in that regard. As to the ANC's recommendations that the Commission should add clarity to its orders and to the scope of the Zoning Administrator's role, neither of these issues is relevant to this modification. Nevertheless, the Commission notes that it rigorously reviews its orders for clarity. As to clarifying the scope of the Zoning Administrator's authority, if such a need exists it that can only be accomplished through the Mayor's submission and the Council's adoption of an amendment to the last reorganization plan setting forth the ZA's functions.

The Commission received testimony, both in support and opposition to the application, from residents of Westover Place. The Commission recognizes the comments of those people in support of the application that they want construction activity to move forward as expeditiously as possible. The Commission's approval of this modification application is consistent with those desires from Westover Place residents. The Commission also notes the concerns that were raised by some Westover Place residents regarding potential below-grade water damage to Westover Place Homes, as well as ANC 3D's analysis of Condition No. 41(b) of Z.C. Order No. 11-07. The Commission finds that there is no need to place any additional conditions on its approval of the East Campus project. The Commission finds that the existing conditions of approval in Z.C. Order No. 11-07, including Condition No. 41(b), adequately address the issue of any damage caused by and resulting from construction activity on AU's East Campus. The Commission also acknowledges the concerns that were raised by some residents of Westover Place regarding the ability of some emergency vehicles, such as ambulances, to access the below-grade parking level. The Commission notes the testimony of the AU representative that there is sufficient clearance to allow an ambulance to access the below-grade parking level. However, the Commission believes that emergency vehicles will likely access the site in the most appropriate manner to address the emergency situation that is presented. In regard to AU's proposal to

locate the Office of Public Safety on the East Campus, the Commission finds that such a use is consistent with the academic/administrative functions that were approved on the East Campus.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia concludes that the Applicant has met the burden of proof pursuant to 11 DCMR § 3129 and it is therefore **ORDERED** that American University's proposed modification to the approved plans for the East Campus be **GRANTED**, subject to the following conditions:

- 1 The below-grade parking for the East Campus shall be constructed in accordance with the plans included with the Applicant's November 20, 2014 submission and presentation to the Zoning Commission on February 2, 2015. (Ex. 1, 2B-2C, 72)
- 2 A new condition, Condition Number 42, shall be added to Z C Order No 11-07 as follows
 42. AU shall not allow any charter buses or motor coaches (defined by AU as large capacity buses that transport visitors to campus and excluding AU-owned and operated shuttle buses) to enter the East Campus property, including the surface parking lot, and shall not allow any loading or unloading of buses or motor coaches on public streets, including, but not limited to, New Mexico, Nebraska, or Massachusetts Avenue, and AU shall require all charter buses or motor coaches (defined by AU as large capacity buses that transport visitors to campus and excluding AU-owned and operated shuttle buses) to load, unload, and park at the AU Transportation Center on the main campus.
- 3 The Applicant, at its next construction update meeting, will hold a discussion with the community regarding East Campus traffic routes.
4. 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, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, or place of residence or business. Sexual harassment is a form of sex discrimination which is prohibited by the Act In addition, harassment based on any of the above protected categories is prohibited by the Act Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

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VOTE: 5-0-0 (Robert E. Miller, Anthony J. Hood, Marcie I. Cohen, Peter G. May, and Michael G. Turnbull to approve).

BY ORDER OF THE D.C. ZONING COMMISSION
Each concurring member approved the issuance of this Order.

FINAL DATE OF ORDER: May 7, 2015