

Government of the District of Columbia
ADVISORY NEIGHBORHOOD COMMISSION 3-D
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November 3, 2014

Mr. Lloyd Jordan, Chairperson
Board of Zoning Adjustment
441 4th Street NW
Room 200S
Washington, DC 20001

**RE: Board Of Zoning Adjustment (BZA) Appeal No. 18857: ANC 3D Appeal
Of Decision By The Department Of Consumer and Regulatory Affairs
(DCRA) To Issue Building Permit No. FD1400058**

Dear Mr. Jordan:

At its regularly scheduled meeting on Wednesday, August 6, 2014, with a quorum present at all times, Advisory Neighborhood Commission (ANC) 3D voted 4-0-2 to file an appeal with the Board of Zoning Adjustment (BZA) of a July 14, 2014 decision by DC Zoning Administrator (ZA) Matthew LeGrant to approve the American University (AU) building permit application #FD1400058 allowing the construction of a two-story parking garage for the AU East Campus building project in an R-5-B district. The permit application had been filed with DCRA by AU on January 14, 2014.

The DC Zoning Commission (ZC) approved a one-story underground parking garage for the site in DC Zoning Case. No. 11-07 (**American University Campus Plan And Further Processing of the East Campus**). The effect of the ZA's decision is to allow a substantial change to the project that was not presented to the ZC and – in fact – conflicts with plans and drawings submitted by AU and included in ZC Order 11-07 (**American University Campus Plan And Further Processing Of the East Campus**).

The reasoning cited by Mr. LeGrant was that the drawings and plans submitted by AU as part of the Further Processing application, the second stage of campus plan approval, were for “illustrative purposes only.” Section 210.4(a) of the Zoning Code is specific in requiring a university to submit a detailed plan for campus development that includes “building and parking and loading facilities” as a prerequisite to request a Special Exception. ANC 3D believes that failure to require applicants to adhere to plans submitted as part of zoning approvals can create conditions in neighborhoods in which zoning outcomes vary significantly from plans approved by either the ZC or the BZA.

Moreover, if allowed to stand, the ZA's decision would nullify the significance of the Campus Plan **second stage** Further Processing proceedings and allow applicants virtually complete freedom to design and construct what they wish – without community input or review by the ZC as long as the applicant adheres only to the very general guidelines covered in the **first stage** of Campus Plan review.

The number of levels of underground parking at the site has been important to residents throughout the Campus Plan process because of concerns over damage to the foundations of residential homes adjacent to the site and the potential disruption of groundwater flow.

ANC 3D believes the decision of the ZA to approve a permit for the two-story parking garage is flawed and should be reversed and that AU should be required to submit an application to the ZC to modify ZC Order 11-07 for purposes of building the two-story underground parking garage. In this way, the ZC could determine – with public input – whether this significant change in building plans complies with Subsection 210 of the DC Zoning Code that permits university usage in a residential zone **only** if the uses are not likely to become objectionable to neighboring property.

Summary Of Facts:

- AU submitted its 10-year Campus Plan in March, 2011 for first stage review by the ZC. AU also submitted an application for Further Processing of the East Campus – the second stage review which requires a higher level of detail – in March, 2011 to be considered simultaneously by the ZC.
- The East Campus was to be built on the site of an existing surface parking lot and was to consist of six buildings and include a single-story underground parking garage in addition to surface parking.
- In all community meetings in advance of filing the application for the Further Processing of the East Campus, AU officials advised the community and ANC 3D that it only wanted to excavate deep enough to build a one-story underground parking garage.
- AU submitted its plans for the Further Processing of the East Campus on March 18, 2011 (Exhibit 8, **Attachment A**) which included narrative stating in Section 9.1.3(b) that the site would include a “single below grade level of parking.”
- In a May 20, 2011 filing with the Zoning Commission, AU submitted diagrams of the East Campus site that included the single level story of parking (Exhibit 50, **Attachment B**).
- In their testimony at a ZC hearing on June 9, 2011, AU representatives testified that the underground parking garage would be one level and supplemented their comments with drawings and plans (Exhibit 242, **Attachment C**).

- Although AU revised some aspects of its East Campus plans throughout the hearing process, at no time did AU submit any information or offer any testimony suggesting that it would build anything but a single level underground parking garage.
- ZC Order 11-07 approving the Further Processing of the East Campus specifically references Exhibit 50 and Exhibit 242 in Paragraph 145 (**Attachment D**). The Order contains no information that would suggest approval of anything other than the single level parking garage represented to the ZC.
- Conditions No. 39 and 40 of Z.C. Order 11-07 (**Attachment E**) allows AU some design flexibility on (1) internal components that include “partitions, structural slabs, doors, hallways, columns, stairways, mechanical rooms, elevators, and toilet rooms, provided that the variations do not change the exterior configurations of the structures;” (2) the selection of exterior materials “within the color ranges and material types proposed based on availability;” and (3) minor refinements to exterior details and dimensions, including belt courses, sills, bases, cornices, railings, trim, and façade patterns.” However, these conditions do not list the depth of below grade structures or the number of levels as elements for which flexibility is granted.
- On May 10, 2014, a petition to the ZA signed by residents of Westover Place – representing 107 of the 140 townhome complex immediately adjacent to the East Campus site – expressed concern that the “deeper excavation at the site raises serious issues for adjacent homes that were not considered by the ZC, including damage to foundations stemming from underground water flow.” They called on the ZA to delay issuing a permit for excavation and require that AU submit a request to the ZC to modify the plans. “We note that any homeowner seeking a building permit would be required to go back to the ZC to seek a modification if their changes were on the scale as those planned by AU,” the petition said.
- In granting the permit to allow for excavation of a 2-story underground parking garage, the ZA justified his decision in a July 14, 2014 (**Attachment F**) e-mail saying that plans and drawings submitted as part of the Further Processing case were “for illustrative purposes only.” The ZA reaffirmed the decision and rationale in an August 7, 2014 e-mail (**Attachment G**). The submissions made by AU to the ZC during the Campus Plan and Further Processing proceedings were not characterized by AU or the ZC as being “for illustrative purposes only.”
- Section 210.4(a) of the Zoning Code is very specific in requiring a university to submit a detailed plan for campus development that includes “buildings and parking and loading facilities” as a prerequisite to seek a Special Exception under Campus Plan rules. Drawings and plans convey the detail. No Zoning Order can be reasonably expected to include narrative covering every aspect of architectural drawings and building plans. This is precisely why such plans and drawings are required to be submitted and then referenced in the Order, as is the case with the single level of underground parking in the Further Processing proceeding.

- The ZA's rationale would suggest that any applicant for a Special Exception or variance is free to revise plans after approval by the ZC or the BZA unless the ZC or BZA Order – and not merely the applicant's submission – is so detailed as to cover every aspect of a building plan or architectural drawing. In fact, the opposite is true which is why Orders include very specific language on what aspects of a project are entitled to “flexibility.” No such flexibility was granted by the ZC to AU for depth of construction or the number of underground levels.

Case Narrative:

ANC 3D formally voted on May 7, 2014 by a vote of 6-3 – with a quorum present at all times – to ask the ZA to withhold approval of the building permit to allow excavation for the 2-story underground parking garage and require AU to submit an application to the ZC to modify ZC Order 11-07. (***Attachment H***) The basis of this request was that AU's new construction plans for the East Campus, which also eliminated an approved underground bus turn-around, varied significantly from those approved by the ZC and could create objectionable conditions for residents living adjacent to the site, including potential for damage to the foundations of homes bordering the site.

In explaining the decision to approve the building permit, the ZA argued there was no specific reference in the Order limiting AU to a one-level underground parking garage. He further stated that the “record of the Campus Plan proceedings does not have any other reference to this issue.” He dismissed the diagrams and architectural plans and drawings for the one-story underground parking garage incorporated and referenced in ZC Order 11-07 (Exhibits #50 and #242: ***Attachments B and C***) saying that such drawings were “for illustrative purposes only and did not bind American University to be limited to have only one level of underground parking.”

In approving the permit, the ZA has not argued that the changes in the university's building plans represent only a minor modification. Instead, he justified the decision on the basis that materials submitted for zoning proceedings are presented only for “illustrative purposes” and that zoning decisions – which are made on the basis of the plans submitted – are not binding on an applicant. If drawings and plans submitted and approved as part of zoning proceedings are not binding, then all Zoning Orders would be required to include detailed narrative descriptions of all building plans and drawings to ensure that the decisions of the ZC and the BZA are implemented as part of the construction process. This seems both unreasonable and impractical.

Section 210.4(a) of the DC Zoning Code is very specific in stating that a University is required to submit a detailed plan for campus development that includes “buildings and parking and loading facilities” as a prerequisite to request a Special Exception. Such detailed plans and drawings are not an option, according to zoning regulations.

The record in the zoning case is very clear in showing that AU proposed a one-story underground parking garage; no other alternative proposals were presented during the Campus Plan proceeding; and the ZC's review of the East Campus Further Processing application was based on a university proposal for a one-story underground parking garage.

As ANC 3D said in its May 9 letter to the ZA, AU's plans for a one-story parking garage are outlined in Exhibit 50 of the record in ZC Case 11-07. The narrative of the Campus Plan and Further Processing submitted by AU to the Zoning Commission on March 18, 2011 offers a detailed description of the proposed East Campus development and specifically makes reference in Section 9.1.3(b) to a "single below grade level of parking." (Exhibit 8, **Attachment A**.) AU made reference again to the one-story underground parking garage in a May 20, 2011 filing (Exhibit 50, **Attachment B**) and then in June 9, 2011 testimony before the Zoning Commission (Exhibit 242, **Attachment C**).

At no time during the zoning hearings did American University submit a revised plan that the parking garage would exceed the one-level underground garage proposed in the original plan. Z.C. Order 11-07, Paragraph 145 refers to Exhibit #50 and #242 (**Attachment D**), as the ZA acknowledges. Nor is there any reference in the Order, the transcript, or the plan, itself, which offers any contradictory information suggesting the underground parking garage will not be a single level, as proposed. The ZA cannot point to any contradictory information in the record of the case.

In arguing that plans and drawings were only submitted in this Further Processing case for "illustrative purposes," the ZA justifies his decision on the basis that "there were a large number of exhibits in the Campus Plan case." This would be expected of a Campus Plan application that proposed nearly 1 million gsf of new development. Such extensive filings are a requirement of Section 210 of the Zoning Code. Suggesting the case involved "a large number of exhibits" is not a justification for dismissing drawings and plans that demonstrate the scope and details of the proposed new development.

Conditions 39 and 40 of the ZC Order 11-07 (**Attachment E**) grants AU some design flexibility, but it does not list the depth of below grade structures or levels as elements for which flexibility is granted. Nevertheless, the Zoning Administrator does not even cite Conditions 39 and 40 as a reason for his decision. Instead, the Zoning Administrator relies on a conclusion that drawings and plans are not "binding" on an applicant once approval of the project, including building plans, is given by zoning officials.

Conclusion:

ANC 3D believes this is an unprecedented decision and must be challenged if the integrity of the decision-making processes of the ZC and BZA is to be upheld. The record in this case speaks for itself:

1. AU submitted plans for the East Campus Further Processing in a March 18, 2011 filing to the Zoning Commission outlining a one-story underground parking garage (Exhibit 8, **Attachment A**)
2. AU specifically referenced the one-level underground parking garage in a May 20, 2011 filing to the Zoning Commission (Exhibit 50, **Attachment B**).
3. AU again specifically referenced the one-level underground parking garage at the June 9, 2011 hearing of the Zoning Commission (Exhibit 242, **Attachment C**).

Although the ZA has not justified his decision on the basis that the law authorizes approval of minor modifications, ANC 3D believes this change in building plans in this case is not a minor modification and that AU should have made a filing with the ZC seeking a modification of ZC Order 11-07.

If allowed to stand, the ZA's decision would nullify the significance of the Campus Plan **second stage** Further Processing proceedings and allow applicants virtually complete freedom to design and construct what they wish – without community input or review by the ZC or the BZA, so long as they stay within the very general guidelines typically covered in the **first stage** of Campus Plan review. The Zoning Commission approved the plans for the one-level underground parking garage, as submitted by AU, and now AU should be required to comply with these plans or be required to seek modification of the ZC Order 11-07 from the ZC consistent with the zoning regulations of the District of Columbia.

Thank you for your consideration of this appeal.

Sincerely,



Gayle Trotter
Chair, ANC 3D

Attachment A.	Exhibit 8. Narrative For Further Processing Application Submitted By American University for Development Of The East Campus, March 18, 2011, Z.C. Case No. 11-07.
Attachment B.	Exhibit 50, ZC Case No. 11-07, May 20, 2011.
Attachment C.	Exhibit 242, ZC Case No. 11-07, June 9, 2011.
Attachment D.	ZC Order 11-07, Paragraph 145, Page 31
Attachment E.	ZC Order 11-07, Conditions No. 39 and 40, Page 67
Attachment F.	July 14 E-Mail From ZA Matt LeGrant
Attachment G.	August 7 E-Mail From ZA Matt LeGrant
Attachment H.	May 9, 2014 ANC 3D Letter To ZA Matt LeGrant

CERTIFICATE OF SERVICE

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