

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington D.C. 20001**

Appeal of Advisory Neighbor Commission 3D
and Spring Valley-Wesley Heights Citizens Association

Appeal No. 18857

DCRA'S PREHEARING STATEMENT

There is no dispute that the Zoning Commission approved the construction of a new underground parking garage on American University's East Campus. The issue is whether the garage can only consist of one underground level as Appellants contend. The problem with Appellants' argument is that there is no language in the Zoning Commission Order limiting the number of permissible underground levels. But there is language in the Order providing that the garage will provide 150 parking spaces. Because the garage approved by the Zoning Administrator will provide the required 150 spaces, it is consistent with the Order. Therefore, this Appeal should be denied.

FACTS

This case involves the interpretation of the Zoning Commission's (ZC) Order in Case No. 11-07. That case involved American University's (AU) proposed Campus Plan for 2011-2022 and an application to construct various improvements on the AU East Campus including an underground parking garage.

The ZC proceedings were extensive. Over 700 documents were filed in the case and testimony was presented over the course of many days. Numerous groups, including Appellants ANC 3D and Spring Valley-Wesley Heights Citizens Association

(Spring Valley), objected to the East Campus proposal. Among other things, Appellants argued that AU's plans would not provide enough on campus parking. Exhibit 1, Spring Valley Pre-Hearing Statement, p. 16; Exhibit 2, Written Testimony of ANC 3D, p. 18.

Appellants did not, however, make any request that the ZC restrict the number of underground parking levels on the East Campus. Actually, the opposite appears to be true. In a joint presentation that included Appellant Spring Valley, a request was made "that more underground parking should be built." Exhibit 3, Joint Presentation, p. 7. And during testimony before the ZC, Appellant ANC 3D made suggested changes to the East Campus proposal that it recognized could "require[] AU to increase the amount of the underground parking at the site." Exhibit 4, September 22, 2011 Transcript Excerpt, p. 198.

Ultimately, the ZC approved the Campus Plan and the proposal for the East Campus. In regards to the East Campus, the ZC order allowed AU to construct six buildings and replace a surface parking lot with the underground garage. Specifically, paragraph 145 of the ZC order provides that:

The existing surface parking lot will be removed, except for a portion at the eastern end with space for approximately 200 vehicles. (The University described the remaining surface parking lot as an area "reserved for a future signature academic building, similar to the Katzen Arts Center" sometime after 2020). An underground garage, providing approximately 150 parking spaces as well as loading facilities, will be constructed with access from New Mexico Avenue. The development will result in a net loss of approximately 500 parking spaces. (Ex. 8, 50.) [Exhibit 5, ZC Order.]

In reliance on the ZC decision, AU applied for and was granted permits to begin construction of the East Campus. Appellants filed this Appeal arguing that the permit plans improperly show a two level underground garage on the East Campus. The Zoning Administrator had approved the issuance of the permits, concluding that the

garage complied with the ZC order because it would contain 150 parking spaces.

Appellants, on the other hand, argue that only a one level underground garage is allowed by the ZC order.

ARGUMENT

The question is whether the ZC approved a 150 parking space underground garage, as concluded by the Zoning Administrator, or a one level garage, as argued by Appellants. The language in the ZC Order indicates that the ZC approved a 150 space garage.

The only substantive discussion¹ of the garage is found in paragraph 145 of the Order. This paragraph provides:

The existing surface parking lot will be removed, except for a portion at the eastern end with space for approximately 200 vehicles. (The University described the remaining surface parking lot as an area “reserved for a future signature academic building, similar to the Katzen Arts Center” sometime after 2020). An underground garage, providing approximately 150 parking spaces as well as loading facilities, will be constructed with access from New Mexico Avenue. The development will result in a net loss of approximately 500 parking spaces. (Ex. 8, 50.)

[Exhibit 5.]

Importantly, this paragraph states that the garage will provide “approximately 150 parking spaces.” But notably absent is any language addressing the number of permissible levels. Since there is language in the Order requiring the garage to provide 150 spaces but no language in the Order limiting the garage to one underground level, it follows that the ZC approved a 150 space garage, not a one level garage.

¹ Paragraph 146 also mentions the garage but only to state that it will contain bicycle parking.

Appellants' contrary position is based on the fact that exhibits 8, 50, and 242 submitted during the ZC case show a one level garage. But Appellants put too much weight on these exhibits for the simple reason that there is no language in the Order requiring AU to build the garage exactly as shown on any specific drawings or plans.² While Condition 38 of the ZC Order does specifically require the East Campus buildings to be "sited" as shown on ZC Exhibits 589 and 602, there is no similar language requiring the garage to have the underground depth shown on exhibits 8, 50, and 242.

Furthermore, there wasn't even any discussion in the ZC case regarding how many levels the garage could be. Appellants never requested that the garage be limited to one level. Rather, it could be argued that implicit in the positions they advocated before the ZC was the contention that more underground parking should be required. The joint presentation made on behalf of Appellant Spring Valley included a request "that more underground parking should be built" and Appellant ANC 3D seemed to recognize that its suggested changes to AU's plans could "require[] AU to increase the amount of the underground parking at the site." Thus, the lack of any specific conditions regarding the garage, other than the fact that it be sited under the East Campus buildings, be underground, and provide 150 spaces, is unsurprising.

Appellants attempt to get around the fact that the Order never actually states that the garage must be built precisely as shown on exhibits 8, 50, and 242 by arguing that

² A very recent decision by the Board indicates that the language in the ZC Order would control over any conflicting information contained in the exhibits provided to the ZC. In Case No. 18793, *Appeal of 22 West, A Condominium and ANC2A*, the issue was whether a PUD order allowed a hotel to construct more than one sign. On October 28, 2014, the BZA issued an oral decision concluding that only one sign was allowed because the ZC order itself only referenced one sign. The Board rejected the argument that an exhibit presented in the ZC case showing four signs allowed the hotel to construct numerous signs. A written opinion has not yet been issued in the *22 West* case.

Section 210.4 of the Zoning Regulations requires such a result. However, all that Section 210.4 says is that “[a]s a prerequisite to requesting a special exception for each college or university use, the applicant shall have submitted to the Commission for its approval a plan... showing the location, height, and bulk... [of] parking and loading facilities.” By its plain terms, this provision simply requires plans to be submitted showing the parking facilities. It does not require the actual construction to exactly match what is shown on those plans.

But even if Section 210.4 required the parking facilities to have “the location, height, and bulk” as shown on the ZC exhibits, the three things Section 210.4 states must be shown on the plans, that would not help Appellants in this case. The reason being that the complaint here is not that the garage is going to have a different “location, height, or bulk” than what is shown on the plans. Rather, the complaint is that the underground depth of the garage does not match the plans. Section 210.4 doesn’t require the plans to show the underground depth of the parking facilities. It follows that Section 210.4 cannot be read to require the underground depth of the parking facilities to match what is shown on the plans.

Finally, it is worth addressing Appellants claim that a decision in favor of AU will give colleges “virtually complete freedom to design and construct what they wish – without community input or review as long as the applicant adheres to the very general guidelines.” That concern is vastly overblown as there is a very easy way for the ZC to make sure that construction exactly matches the plans, if that is what the ZC desires. The ZC could simply say in the Order that construction should match what is shown on a specific drawing. Here, there is no such language with regard to the underground garage.

CONCLUSION

This appeal should be denied. The only language in the Order addressing the underground garage requires it to provide 150 parking spaces. The garage at issue will include 150 spaces. So it is consistent with the ZC Order. And contrary to Appellants' arguments, there is no language in the Order limiting the garage to one level.

Respectfully Submitted,

MELINDA BOLLING
General Counsel
Department of Consumer and
Regulatory Affairs

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John Postulka
Assistant General Counsel
Office of General Counsel
Department of Consumer and
Regulatory Affairs
1100 4th Street, N.W., Suite 5266
Washington, D.C. 20024
(202) 442-8403 (office)
(202) 442-9447 (Fax)
john.postulka@dc.gov
*Attorney for Department of
Consumer and Regulatory Affairs*

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November 2014, a copy of the foregoing Brief was served via e-mail to:

Paul Tummonds
PTummonds@goulstonstorrs.com
AU

AND

Michael Mazzuchi
Spring Valley
Mazzuchidc@gmail.com

Gayle Trotter
ANC 3D
3D@ANC.dc.gov

Appellants

Date: 11/10/14



John Postulka
Assistant General Counsel