

December 1, 2014

Mr. Anthony Hood, Chairman
District of Columbia Zoning Commission
441 4th Street NW
Suite 210S
Washington, DC 20001

Re: Request for a Minor Modification to an Approved Campus Plan Further Processing Application – Zoning Commission Order No. 11-07

Dear Chairman Hood and Members of the Commission:

American University (AU) has requested that the Zoning Commission (ZC) review and approve a minor modification of an Approved Campus Plan Further Processing for a two-story underground garage on the East Campus that was the subject of a recent hearing (Case No. 18857) before the Board of Zoning Adjustment (BZA). The BZA proceeding was prompted by a filing of Advisory Neighborhood Commission (ANC) 3D and the Spring Valley-Wesley Heights Citizens Association (SVWHCA) challenging the decision of the DC Zoning Administrator (ZA) to issue a foundation-to-grade building permit to allow excavation for a 2-story underground garage on the basis that plans approved by the ZC in Z.C. Order 11-07 limited the garage to one-story. AU has further requested that the ZC act on the application for a minor modification at its next public meeting on December 8, 2014.

ANC 3D offers the following comments based on (a) resolutions it has approved at its meetings on May 7, 2014 and August 6, 2014; (b) comments from residents expressed at ANC 3D meetings from April – October, 2014; (c) an analysis of the relevant DC zoning rules; and (d) the Z.C. 11-07 case record.

1. AU's request for the December 8 hearing denies ANC 3D, as the Appellant in BZA Case No. 18857, sufficient time to review and consider the merits of the application at a

publicly noticed meeting, as required under DC Statute 1-309.10 and to allow for public comment to the ANC on the application, as required under DC Statute 1-309.11;

2. AU's application for modification of its Approved Campus Plan Further Processing Application is incomplete in that it only addresses modifications for foundation-to-grade construction, but does not include additional modifications for above-grade construction. The modifications in above-grade construction also are inconsistent with the plans approved by the Zoning Commission in Z.C. Order No. 11-07 and require approval by the ZC;
3. The request for a minor modification is not timely and inconsistent with Section 3129.3 of the DC Zoning Code which specifies that requests for modification of plans must be filed no later than two years from the date of the May 17, 2012 Final Order; and
4. The change in the underground garage and the additional above-grade modifications are not minor modifications – individually or in their totality – and, as such, warrant a public hearing at the ZC to assess and determine if the amended plans are consistent with the review standards set out in Section 210.2 of the Zoning Code that the modified structures are “not likely to become objectionable to neighboring property because of noise, traffic, number of students, or other objectionable conditions.”

Background

The Zoning Commission issued its Order in Z.C. 11-07, 2011 AU Campus Plan and Further Processing of an Approved Plan for the East Campus, on May 17, 2012. The Order required AU to hold a pre-construction community meeting on planned construction for the East Campus 90 days before construction activity was scheduled to start (Number 41(c), Page 68). AU convened this meeting on March 17, 2014. The community learned at this meeting that the gross square footage (gsf) of planned construction for the East Campus deviated from the gsf approved in Z.C. Order No. 11-07 and that construction would include a two-story underground parking garage instead of the one-story garage with the bus turn-around approved in Z.C. Order No. 11-07.

Beginning on March 19, ANC 3D and community representatives sought clarification from AU about changes in the approved plans. AU administrators responded that the buildings would be constructed consistent with Z.C Order No. 11-07 and refused to provide any additional details. Meeting requests by ANC 3D and community representatives were denied. ANC 3D,

the SVWHCA, and Neighbors for a Livable Community (NLC) also sought a special meeting of the Community Liaison Committee (CLC) consistent with the CLC's established rules that require a special meeting to be convened by AU if any member of the CLC makes such a request. The CLC was mandated in Z.C. Order No. 11-07 "for the purpose of fostering consistent communication between the University and the surrounding neighborhoods" (Number 16, Page 61). AU refused to convene a special meeting of the CLC to discuss the changes.

AU then advised ANC 3D, SVWHCA, and NLC that the university could not discuss any modifications until applications for construction permits were filed with the DCRA in early May. ANC 3D and community representatives learned subsequently in a May 17, 2014 meeting with the DC Zoning Administrator (ZA) that AU had actually applied to DCRA for its foundation-to-grade permit on January 14, 2014 to allow excavation for the 2-story underground garage to begin.

AU agreed to present the modified plans for the East Campus at the May 7, 2014 meeting of ANC 3D. AU told ANC 3D that the modifications were minor and could be approved by the ZA and that it was not necessary to seek approval of the modification or approval of an amendment to the Campus Plan Further Processing application from the ZC. Later that evening, ANC 3D voted with a quorum present at all times, to ask the ZA to delay issuing the construction permits because the plans appeared to deviate significantly from those approved in Z.C. Order No. 11-07.

Representatives of ANC 3D, the SVWHCA, and NLC met with the ZA on May 17 to discuss the changes in AU's building plans and provide him information from the case record. He was also presented with a petition from 107 of 140 Westover Place homeowners expressing concerns about the potential impact of the deeper excavation on their homes, including damage to foundations stemming from redirected underground water flow.

On July 17, 2014, the ZA approved the foundation-to-grade permit to allow excavation for the 2-story underground garage. The ZA added that the permit application for above-grade construction was still being reviewed to determine if the building plans conformed with Z.C. Order No. 11-07 and that he would advise us when the decision was made. Recently, AU has reported that the permit has not yet been issued.

AU began work at the site in mid-summer and discovered a high concentration of mercury in the groundwater. This raised new concerns within the community about possible

contamination of the site stemming from AU’s use as a federal chemical weapons testing and experimental station -- the American University Experimental Station (AUES) – during World War I. The discovery of mercury at the site delayed AU from obtaining dewatering permits from the District Department of the Environment (DDOE).

At its August 6, 2014 meeting, ANC 3D approved a resolution, with a quorum present at all times, to ask DDOE and AU to conduct additional testing at the site, using protocols approved by the DDOE, for chemical agents commonly found at the AUES site over the last 23 years. DDOE advised ANC 3D that the agency did not have the regulatory authority to require any additional testing for AUES chemicals.

ANC 3D voted at its August 6, 2014 regularly scheduled meeting with a quorum present at all times to appeal the ZA decision to issue the foundation-to-grade construction permit to the BZA. SVWHCA also filed an appeal and ANC 3D and SVWHCA asked the BZA to enjoin the appeals to facilitate BZA review. The BZA convened a hearing on November 18. Several concerns were raised by the BZA at this hearing and a decision hearing was scheduled for December 16. AU argued that the appeal should be denied because the ZA’s approval was consistent with the Campus Plan Application and Further Processing approved by the ZC and because the change in the underground parking structure “will not result in any exterior change to the development of the East Campus.” Subsequently, AU “in the interest of expediency and to help assuage concerns raised by the BZA,” submitted a filing on November 20 seeking approval from the Zoning Commission at its December 8 meeting for a minor modification of the plans.

I. AU’s Request For A December 8 Hearing Denies ANC 3D Sufficient Time To Review and Assess the Merits of the Application

AU’s November 20 application requesting that the ZC review and approve its application for a modification at the ZC’s December 8 hearing is untimely and unfairly limits the ability of ANC 3D to fully participate in the case. The next regularly scheduled meeting of ANC 3D is December 9. The timing of the November 20 application – combined with the Thanksgiving holiday – also prevents ANC 3D from scheduling a special meeting to consider this application to provide a recommendation by the December 1 deadline for filing comments in this case. The compressed schedule sought by AU denies ANC 3D, which filed the initial challenge at the BZA that has prompted this application, the time required to consider the merits of the

application, including hearing from members of the public. AU seeks to limit public participation in this case even further by requesting that no public hearing on the application be held by the ZC on the basis that its request is “truly minor in nature.”

ANC 3D, on the other hand, is required to comply with the relevant DC statutes that require ANCs to provide the public with an opportunity to comment on the AU application seeking approval for a change in plans. These statutes recognize that the public interest is served through transparent proceedings that allow for public participation.

DC Statute 1-309.10 requires the ANC to consider applications filed with the Zoning Commission “in a meeting with notice given in accordance 1-309.11 which is open to the public.” DC Statute 1-309.11 further stipulates that the Commission must provide the public with seven days notice of its meeting, “hear the views of residents within the Commission area,” and comply with the city’s open meeting laws.

Although ANC 3D appreciates AU’s interest in resolving this issue quickly, AU filed its permit application that was the subject of the BZA hearing on January 14, 2014. It has had many months to seek this modification from the Zoning Commission – even rejecting all suggestions from ANC 3D and other community representatives to do so. Now that the BZA has raised issues with the ZA’s decision to issue the permit, AU now “in the interest of expediency” wants the Zoning Commission to act on an application along a timeline that does not allow for meaningful input from ANC 3D or the community. This is simply unfair, especially given that (a) ANC 3D initiated the challenge at the BZA and (b) AU’s November 20 request for a minor modification comes more than 30 months after Z.C. Order No. 11-07 was issued.

We believe the public interest is served by ensuring that ANC 3D has sufficient time to review the application, obtain public input, and offer a formal recommendation on the merits of the case based on a review of the standards outlined in Section 210 of the Zoning Code. The matter should not be granted expedited review by the ZC.

II. AU’s Application For Modification Of Z.C. Order 11-07 Is Incomplete

AU’s application submitted to the ZC on November 20 only covers modifications stemming from the BZA proceeding challenging the foundation-to-grade construction permit. AU also has submitted permit applications for above-ground construction that include

modifications to plans approved in Z.C Order No. 11-07 on which the ZA has not yet taken action. These include:

- An increase of 9,851 gross square feet – a deviation greater than four percent – above the limits approved by the Zoning Commission that alters the exterior configurations of the structures;
- A reduction in the height of buffer buildings that were intended to serve in part as a noise barrier to the neighboring residential property; and
- The relocation of the AU Public Safety Office, a 24 hours/seven days a week operation, to the East Campus resulting in an increased level of intensity of use than outlined during the lengthy hearing process on the Campus Plan and Further Processing.

AU should be seeking to amend the Order for these above-grade modifications as well. If the ZA issues a permit without requiring AU to seek an amendment to Z.C. Order No. 11-07, the ZA decision may also be challenged at the BZA further risking construction delays.

Yet, AU wants the Zoning Commission to act immediately on only one modification it has made because it was the subject of a recent BZA hearing. AU should amend its November 20 application to include all the modifications for the site instead of inviting yet another contentious zoning proceeding at the BZA based on the underlying principle embodied in Section 3125.7 of the DC Zoning Code stipulating that approval of an application includes approval of the plans submitted with the application unless conditions in the Order specifically indicate otherwise. This would seem a more judicious approach to ensuring that construction is completed by Fall 2016.

III. AU's Request For A Minor Modification Is Not Timely

AU states in its November 20 filing that its request for a modification is timely because it comes less than two years since the Court of Appeals issued a final decision on an appeal of Z.C. Order No. 11-07. AU cites Section 3130.5 to justify this argument. However, AU is misreading Section 3130.5 to obscure the fact that its 2-year limit on seeking a modification of the Order has expired.

Section 3129 of the Zoning Code deals specifically with modification of approved plans. Section 3129.3 states clearly: “A request for minor modification of plans shall be filed with the

Board not later than two years after the date of the final order approving the application.” The date of the final Order was May 17, 2012. Therefore, AU should have applied for a minor modification no later than May 17, 2014. Notably, AU could have made the filing since it applied for its permit for the foundation-to-grade construction on January 14, 2014 – four months earlier than the deadline for filing an application for modification – consistent with Section 3129.3.

Although AU cites Section 3130 as conveying authority for extending the deadline, Section 3130 clearly governs only the timeline for obtaining permits to begin construction, not filing modifications. Section 3130 stipulates that a permit must be obtained within two years of the approval of an Order, but that the period for obtaining the permit can be extended based on a court’s final determination of an appeal.

AU already has its permit. The case before the Zoning Commission now is not an appeal of a permit, but rather approval of a modification of an Order. Section 3129 establishes the standards for review of the modification request, not Section 3130.

Regardless, it is the view of ANC 3D that the modifications proposed by AU are not minor modifications.

IV. The Changes Proposed By AU Are Not Minor Modifications

The modifications made by AU to the plans approved in Z.C. Order 11-07 are not minor modifications. Although AU has not yet made detailed plans available for review of all the modifications, residents – dating back to the ANC 3D April 2, 2014 meeting – already have expressed serious concerns with the changes. For example:

A.Two-story Underground Garage: AU has addressed one concern raised by ANC 3D at the BZA hearing concerning the elimination of the bus turn-around in the plans approved in the Z.C. Order. By agreeing to a condition that prevents buses from using the East Campus site, AU has eliminated concerns about bus idling and fumes at the surface parking lot on the East Campus that the underground bus-turn around was intended to address.

1. Loading Facilities, Bicycle Parking, and Emergency and Service Vehicle Access:

AU has not yet addressed whether the modifications will impact access to the East Campus site by emergency and service vehicles. The plans submitted by AU in its

November 20 filing also do not show loading facilities, as referenced in Paragraph 145, Findings of Fact, Z.C. Order 11-07, or bicycle parking, as referenced in Paragraph 146, Findings of Fact, Z.C. Order 11-07.

AU indicated in testimony during the campus plan proceedings that the East Campus site would be accessed by service vehicles and emergency vehicles, such as ambulances, through the underground garage. However, AU has also indicated recently that the underground bus turn-around was not feasible due to engineering issues related to the height of the underground garage. AU's plans included in its November 20 application show no specific height measurements, so it is not possible to determine if service and emergency vehicles will be able to access the site through the garage. If they are not, it raises questions about how the building will be serviced, including the location and adequacy of loading facilities. For example, will trucks be forced to unload on neighboring streets? Will there be a need for a service road on the East Campus? How will an emergency vehicle access the site? These were issues raised during the campus plan proceedings. AU testified during the hearings that trucks and emergency vehicles (and buses) could access and service the site from the garage, including for loading and unloading. The modifications in the plans raise questions if this is still the case.

The condition proposed by AU about bus access to the East Campus does not address the others issues of loading, bicycle parking, and service and emergency vehicle access that have been raised as a result of the modifications.

2. Environmental Concerns: Residents have expressed concern that a deeper excavation at the site could result in damage to their foundations stemming from groundwater flow given the high water table at the construction site. Z.C. Order No. 11-07 stipulates that AU shall repair, at its own expense, any damage to the properties of an adjacent property owner (Number 41(b), Page 68). AU has indicated that this requirement would not apply to below-grade damage stemming from redirected underground water flow.

AU has acknowledged the challenges at the site for groundwater flow. In fact, AU has reported installing 260 wells to remove the groundwater entering the construction site, so that the impact on construction is minimized. But, AU has conducted no assessment that it has made available to the public analyzing the impact of these wells on neighboring property, including whether AU's wells will have unintended consequences for neighboring property that is downhill from the site or how the deeper excavation may disrupt groundwater flow in a way that could damage neighboring properties.

The issue took on added significance when the community learned that AU had discovered high concentrations of mercury in the groundwater at the site. AU is continuing to sample and test the groundwater and soil at the site, but is not required to share any information with the community – and so far has been reluctant to share any information about the testing with the ANC or community representatives.

Consequently, the deeper excavation at the site may create objectionable conditions as outlined in Section 210.2 of the Zoning Code. AU argues that objections based on environmental issues are “not within the ZC’s jurisdiction.” In making this argument, AU seeks to rewrite zoning law. Section 210 outlines the standards for review stating that a university structure can be located in a residential community only “so that it is not likely to become objectionable to neighboring property because of noise, traffic, number of students, or other objectionable conditions.” Section 210 does not include language: “except for issues related to environmental matters.”

Moreover, the Green Area Ratio Requirements (Chapter 34) recently added to the Zoning Code further demonstrate that environmental issues fall within the jurisdiction of the ZC. AU’s own submission of an environmental noise report into the record of Z.C. 11-07 further undermines AU’s argument in this case.

Likewise, AU’s argument that the modification should be approved because it is an underground garage and has no “publicly perceptible” impacts seeks to carve out a new standard for Campus Plan and Further Processing review – that universities are free to

revise building plans after they have been approved if in the university's view the change is not publicly perceptible or if the change has no impact on the above-grade appearance of the development. Section 210 does not limit the scope of objectionable conditions on the basis that the impact is above or below ground – or that the two are interrelated.

Finally, AU has cited numerous permits issued by DDOE that AU has obtained for the East Campus construction. However, none of these permits are tied to the issues and concerns that have been raised by the community about potential damage to foundations stemming from redirected groundwater flow. As DDOE has indicated to ANC 3D, regulations limit the scope of DDOE's review of the overall project and the issues raised by the community fall outside the regulatory authority of the DDOE.

B.Above Grade Changes: The above grade changes also have potential impacts that need to be further explored as part of a hearing, especially the decision by AU to reduce the height of the buffer buildings.

1.Noise and Height of Buffer Buildings: AU argued during the campus plan hearings that the buffer buildings – because of their height – would serve as a noise buffer for the surrounding neighborhood. Specifically, AU submitted an Environmental Noise Study concluding that the 34' building height would mitigate neighbors' noise objections. Z.C. Order No. 11-07 further stipulates that the “buffer buildings will be sited to block noise” and specifies the buildings will be 34' in height (Paragraph 133, Findings of Fact). Altering the height of the buildings could expose adjacent residential property to objectionable noise.

2. Intensity of Use: AU stressed throughout the lengthy ZC hearing on the Campus Plan and East Campus Further Processing that the use of the site would not create objectionable conditions because the residential and administrative uses would not be of a high intensity. AU added that the administrative buildings would be classrooms and faculty offices. Now, AU has indicated it plans to move its Public Safety operations, including the headquarters for the Campus Police, to the site. This is a 24-hour, seven

day a week intense use of the site that is inconsistent with the characterizations offered by AU during the Campus Plan hearing process. Although AU has provided few details of its plans, this relocation of its Public Safety operations to the East Campus may create objectionable conditions for neighboring property and warrants review.

Individually, but certainly in their totality, the modifications at the site are more than minor modifications. Consequently, the modifications warrant a hearing at the Zoning Commission to assess whether the changes are consistent with Section 210 of the Zoning Code and with the findings of the ZC, as outlined in Z.C. Order No. 11-07.

Conclusion

ANC 3D shares AU's interest in ensuring that construction at the East Campus is complete by the fall semester, 2016. However, if the timeline is not met, AU has nobody to blame but itself. AU's failure to comply with existing zoning law, including Sections 3125 and 3129, is not justification for granting AU's request for a minor modification without a hearing to assess whether the changes are consistent with Section 210 of the Zoning Code.

AU has had more than enough time to seek approval from proper zoning authorities for the changes to its East Campus building plans. ANC 3D has consistently encouraged AU to communicate these changes to the community and work with the community to address any potential concerns. ANC 3D also has worked to create opportunities for those discussions to take place. AU's resistance to working with the community on these changes has left ANC 3D and community representatives with no other option under the law but to file a challenge before the BZA.

Instead, AU appears now to be trying to game the system: testifying before the BZA that it does not need approval from the ZC to modify its Zoning Order and now seeks approval of select changes in plans from the Zoning Commission on an accelerated basis.

ANC 3D believes that the Zoning Commission should (1) require AU to make a complete filing seeking approval of all the changes it is making in the East Campus construction plans; and (2) schedule a hearing with sufficient time for parties to prepare and obtain input from ANCs and relevant DC agencies on the application.

Sincerely,

A handwritten signature in black ink that reads "Gayle Trotter". The signature is fluid and cursive, with "Gayle" on the first line and "Trotter" on the second line.

Gayle Trotter

Chair, ANC 3D

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached letter were delivered on December 1, 2014 to the following:

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