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Subject: WECA's Proposed Findings of Fact & Conclusions of Law: ZC Case Nos. 06-11 & 06-12
Attachments: WECA-findings-of-fact-campus-plan.doc

Zoning Commission (ZC) Members & Addressees – Attached herewith is an e-copy of the West End Citizens Association's (WECA's) proposed Findings of Fact & Conclusions of Law for ZC Case Nos. 06-11 & 06-12. Please note that the DC Department of Transportation (DDOT) failed to timely file its responses (due 12/21/06) to the critical 12/7 traffic questions posed by the Advisory Neighborhood Commission (ANC-2A)/Foggy Bottom Association and the WECA. The WECA asks the Commission to strike as untimely any late-filed DDOT responses for which the Parties could not analyze & reflect in their proposed Findings of Fact & Conclusions of Law. The WECA believes that late inclusion would be unfair to the Parties in opposition. - Barbara

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ZONING COMMISSION
District of Columbia

CASE NO. 06-11
EXHIBIT NO. 243 (Fax)

ZONING COMMISSION
District of Columbia
CASE NO.06-11
EXHIBIT NO.243

WECA's Proposed Findings of Fact and Conclusions of Law
(ZC Case Nos. 06-11 & 06-12)

Application No. 06-11 (The George Washington University – Special Exception Application for a Campus Plan) and No. 06-12 (The George Washington University – First Stage Planned Unit Development & Related Zoning Map Amendment)

HEARING DATES: September 14, September 21, September 25, September 28, 2006, October 11, 2006, and November 30, 2006

DECISION DATE: January 17, 2007

PRELIMINARY MATTERS:

The Foggy Bottom and West End Advisory Neighborhood Commission (ANC-2A) was a party in this proceeding. The Commission received requests for party status from the Foggy Bottom Association (FBA) and the West End Citizens Association (WECA). Both requests were granted.

FINDINGS OF FACT

1. After losing in litigation and less than two years after the 4/24/04 zoning Order governing the current campus plan was finalized (BZA No. 16553-1), on 2/6/06, the George Washington University (GWU) submitted a "Notice of Intent to File a Zoning Application" to replace its existing 10-year (2000-2009) campus plan with a new 20-year (2006-2025) campus plan. GWU additionally applied for Map Amendments for portions of Squares 55, 56, 75, 77, 79, and 101 to the C-3-C zone and a portion of Square 75 to the C-4 zone, with later-filed separate Map Amendment applications for Squares 54 and 80 to C-3-C and SP-2, respectively. Instead of solely requesting a traditional campus plan under the Zoning Commission's rules governing Colleges and Universities (11 DCMR §210), GWU additionally filed under Chapter 24. GWU requested an unprecedented "omnibus" planned unit development (PUD) for an unprecedented 20-year approval period and covering an unprecedented 20 Squares. In toto, GWU requested a 43 percent increase in density (from a maximum of 3.5 floor area ratio (FAR) to 5.0 FAR).
2. The Zoning Commission held hearings on Case Nos. 06-11 and 06-12 on 9/14/06, 9/21, 9/25, 9/28, 10/11, and 11/30. Parties and witnesses in opposition testified to the objectionable impacts to neighboring property because of noise (see Finding #11 below), traffic (see Finding #10 below), number of students (e.g., considerable testimony about student parking in the neighboring property, such as testimony by the WECA about student parking in the campus plan area, Foggy Bottom Historic District residents Russ Conlan & Susan Wallace about student parking in that area, and West End resident Kevin Carnahan about student parking in that area, 9/28 transcript, pp. 51, 164, 209 & 215, respectively), and a host of other objectionable

conditions (see Finding #12 below) if the request for a 43 percent increase in density was granted by the Commission.

3. On 9/14/06, the Zoning Commission granted "Party" status to the West End Citizens Association (WECA) and the Foggy Bottom Association (FBA) as well as the Foggy Bottom and West End Advisory Neighborhood Commission (ANC-2A), which is an automatic Party.
4. Both 11 DCMR §§210.4 and 210.8 speak to "the campus as a whole." In fact, the former states, "the applicant shall have submitted to the Commission for its approval a plan for developing the campus as a whole." And, the latter requires each new building to be "within the floor area ratio (FAR) for the campus as a whole." Nonetheless, on 3/23/06 and 5/17/06, GWU additionally submitted two separate "Notices of Intent to File a Zoning Application" for separate PUDs and requested Map Amendments for two Squares within the campus plan boundary – ZC Case No. 06-17 (School Without Walls) for Square 80 (Lots 55 and 829 only) and No. 06-27 for Square 54, respectively.
5. 11 DCMR §210.3 provides "that the total bulk of all buildings and structures on the campus shall not exceed the gross floor area prescribed for the R-5-B District." Nonetheless, GWU's four applications (Nos. 06-11, 06-12, 06-17 & 06-27) would result in a total FAR of 5.0, which would be a 43 percent increase over the 3.5 FAR cap, as prescribed for the R-5-D District. GWU's expansion request was made despite the Office of Planning's (OP's) April 2000 judgment that the residential community was near a "tipping point" where it could transform into a "University area."
6. The history of D.C.'s zoning rules governing campus plans reveal the Commission's consistent intent to cap cumulative density for campus buildings in all zoning districts, i.e., upzonings (such as to SP-2, C-3-C or C-4) would not exempt campus buildings from the height and density caps. For example, the 1958 rules governing campus plans stated, "the Board [now Commission] may vary the height, area, and density regulations for the *district* in which located, but in no case shall the height, area, and density of any proposed *buildings* or other *structures* exceed the limitations prescribed for an R-5-A District" (Sec. 3101.46(b), effective 5/12/58).
7. In Case No. 06-17, GWU exposed its intent to avoid the FAR cap in Sec. 210.3 by upzoning various sites (from a R zoning to a SP or C zoning) to exempt these sites from the cap. In its 6/23/06 pre-hearing submission for Square 80, it stated, "Under the MOU between DCPS [DC Public Schools] and GW, the University will compensate DCPS for additional development rights generated by rezoning to SP-2 under the PUD, which will remove the development from the aggregate floor-area-ratio cap that applies to residentially-zoned land within the Foggy Bottom Campus Plan boundaries" (p. 3).

The DCPS-GWU Memorandum of Understanding (MOU) states, "Avoidance of Aggregation Rule. For the density to have the maximum value for GW, it must avoid the 'aggregation rule' set forth in 11 DCMR § 210.8, which limits overall development on its campus ... To ensure this development will not count against the University's aggregate cap, the PUD site (currently zoned R-5-D) must be rezoned to a non-residential zone" (p. 5). Provision 5 of the MOU further states, "Termination. In the event that GW and DCPS are unable to obtain approval to rezone the PUD Site to a non-residential zone, or if the aggregation rule as set forth in 11 DCMR § 201.8 applies to this PUD ... then either party shall have the right to terminate this MOU" (p. 6).

8. GWU's request for a 20-year first-stage PUD is **unprecedented**. In 1994, the Commission proposed longer approval time periods for PUDs. But, in Order No. 785 (Case No. 94-15/84-3, 9/11/95, published 12/1/95), the Order stated, "The Vice President of the Foggy Bottom Association testified in opposition to the proposal" and "criticized and opposed the five years approved/action time period proposed in Section 2407.8. The association preferred the current two year approval/action time period provided in Section 2406.8" (42 DCR 6724). The final rule stated, "The first-stage approval shall be valid for a period of one year, unless a longer period is specified by the Commission" (Sec. 2407.10, 42 DCR 6626), which remains the identical language today. It further stated for second-stage PUDs, "The final planned unit development approved by the Zoning Commission shall be valid for a period of two (2) years, within which time application shall be filed for a building permit" (Sec. 2408.8, 42 DCR 6628), which remains today. The Commission's 2/8/79 PUD rules are identical, i.e., providing for first-stage approval for one year only (Sec. 7501.67).

As a consequence of the Commission's consideration and rejection of a longer time frame for first-stage PUDs, the Commission would need to conduct a rulemaking before it could approve a 20-year first-stage PUD.

9. GWU's request for an **unprecedented** "omnibus" PUD is a contrivance to circumvent the intent and purposes of the Zoning Regulations. The rules governing PUDs include no mention whatsoever of colleges and universities. The rules also do not anticipate the filing of an omnibus PUD covering 20 Squares and with a first-stage or even first and second-stage approvals for 20 years. On 9/28/06, the WECA presented a chart showing that only one PUD case involved more than 2 Squares (a federally-funded public housing project) and no case involved first-stage approval for more than 3 years (Attachment A to the WECA's 9/28/06 testimony). The OP report (9/5/06, p. 19) cited to the Washington Hospital Center/MedStar Health case but it involved only 1 large Square and a 1-year first-stage approval. In addition, the Washington Hospital Center PUD has only 1 access road, i.e., unlike GWU, it has no street grid. Even in 1979, the zoning rules stated, "the planned unit development process shall not be used to circumvent the intent and purposes of the Zoning Regulations (Sec. 7501.12 then and Sec. 2400.4 now).

10. On 12/7/06 and in previous filings, the FBA's expert traffic consultant raised a host of critical substantive issues with GWU's traffic analysis, which reveal that GWU's traffic impact analysis conclusions are not credible. In addition, as two other FBA witnesses testified, GWU's traffic analysis does not even consider the traffic impact generated by dozens of GWU activities in the sizeable Lisner Auditorium theater (730-21st), student athletics Charles E. Smith Center (600-22nd), Clyde Heck Marvin student Center (800-21st), Media and Public Affairs Building (805-21st), and other intensive-use buildings with auditoriums, such as the Elliott School of International Affairs (1957 E) (9/28/06 transcript, pp. 65-6 & 76).

Also, on 12/7/06, the WECA requested the D.C. Department of Transportation (DDOT) to explain separately for each of the 16 "failing" (E or F level of service (LOS)) intersections the underpinning for its initial overall conclusion of no objectionable traffic impact from GWU's request for a 43 percent increase in overall density. An independent analysis by DDOT is critical because, in the main, these 16 failing intersections would be negatively affected – even after GWU's proposed mitigation measures. In fact, 11 of the 16 increase in LOS grade despite mitigation.

11. On 9/28/06, Marija Hughes testified extensively about the currently objectionable noise situation created by GWU and the several still unresolved noise complaints, which she filed with the D.C. Department of Consumer and Regulatory Affairs (9/28/06 transcript, pp. 177-80). She referred to the noise complaint letters about GWU also filed by the Federation of Citizen Associations, ANC-2A and the FBA (*Ibid.*, pp. 179-80). She also discussed the adverse health implications, such as high blood pressure and hearing impairment.

In addition, multiple other community witnesses raised considerable noise problems, e.g., ANC-2A witness Michael Thomas (9/21 transcript, pp. 162-3 & 190-1), FBA witness Elizabeth Elliott (9/28 transcript, p. 65), and many other witnesses (e.g., see testimonies of Willie Becker, Donald Kreuzer, Russ Conlan, Sara Maddux, Susan Wallace & Kevin Carnahan, 9/28 transcript, pp. 152, 158, 162-3, 176, 209, & 214, respectively).

12. Community witnesses testified to a host of "other objectionable conditions," e.g., destruction of private property, vandalism, thefts, public drunkenness and vomiting, lewd behavior and public urination and feces, elderly persons being pushed off the sidewalks, and a variety of other objectionable conditions (e.g., see testimonies of Donald Kreuzer, Sara Maddux, Susan Wallace, and Abby Gilbert, 9/28 transcript, pp. 157-61, 174-7, 207-10, and 210-13, respectively).
13. For Case Nos. 06-11 and 06-12, GWU is out of compliance with the D.C. Environmental Policy Act, preventing the Commission from approving the pending Application at this time. In an 8/17/01 Memorandum of Agreement with the WECA, after GWU failed to do an Environmental Impact Statement (EIS) for its then new hospital, GWU agreed to comply with the D.C. Environmental Policy Act "on all

future campus construction projects” (Provision 8, p. 5, Attachment B to the WECA’s 9/28/06 testimony).

Federal rules state, “Timing. An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal ... The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made” and “shall be commenced no later than immediately after the application is received” (40 CFR § 1502.5). DC rules provide, “Agencies, boards, and commissions ... shall integrate ... the Environmental Impact Statement (“EIS) process with other planning processes at the earliest stages of their planning for major actions ... when the widest range of feasible alternatives is open for consideration” (20 DCMR § 7200.2).

GWU has not yet began an environmental analysis despite the codified provisions and the D.C. Department of Health’s 12/9/99 finding that “there is essentially no remaining air resource margin in the 23rd Street corridor just south of Washington Circle.” The D.C. Department of Health’s 1999 memorandum further advised the D.C. Department of Consumer and Regulatory Affairs, “we have also concluded that it is important for both of our agencies to pay close attention to future permit applications for the use of either the existing building or land at the site of the current George Washington University Hospital. The University Hospital System did not ask its contractor to take into account traffic that might be generated in the future by, or at, the existing site. Insofar as the technical analysis that is being used to support the permit application for the replacement hospital project does not take into account air pollution that might be generated by such future use, please be advised that future uses at this site [Square 54] may be found to be highly constrained” (pp. 1-2, emphasis added).

14. Even after the 2/22/06 filing of a formal complaint by a Foggy Bottom-West End resident with the U.S. Department of Justice, GWU remains out of compliance with the Federal Americans with Disabilities Act (ADA) since it continues to use its below ground theater known as “Lisner Downstage.” This facility has no elevator access for the handicapped and with no bathroom facility. In 3/98, GWU signed a Settlement Agreement with the U.S. Department of Justice for another ADA violation. GWU is obligated as a condition for receipt of Federal funds to fully comply with the ADA.
15. GWU’s *quid pro quo* proposal to not purchase additional residentially-zoned properties outside of the Campus Plan boundaries in the Foggy Bottom/West End area for university use does not adequately protect the Foggy Bottom-West End community since SP-zoned properties, such as the State Plaza Hotel at 2117 E Street, N.W. (Square 81) and the hotel at 515-20th Street, N.W. (Square 122, Lot 25), could be purchased and then used as GWU dormitories outside of the Campus Plan boundaries in the Foggy Bottom/West End area.

16. The current GWU Campus Plan for 2000-2009 established the following caps for the life of the 10-year plan: the number of students enrolled (headcount) at 20,000, faculty headcount at 2,236, and staff headcount at 10,293 (BZA No. 16553-I, Appendix Condition #8). The Zoning Administrator has not yet determined GWU's compliance with the faculty and staff headcounts. Also, as recommended by the WECA and consistent with Federal practice (see the WECA's 12/7/06 supplemental filing), the Commission finds that GWU should deduct all outsourcing of 10 or more employees from the staff headcount.
17. Condition #20 of the 10-year current GWU Campus Plan provides "No special exception application filed by the University for further processing under this plan may be granted unless the University proves that it has consistently remained in substantial compliance with Conditions 1 through 19 set forth in this Order" (BZA No. 16553-I, Appendix Condition #20). In years 1-6 of the 10-year current GWU Campus Plan, GWU implemented none of the required "detailed streetscape plan applicable to the entire campus" (BZA No. 16553-I, Appendix Condition #7).

In addition, on 11/30/06, the Zoning Administrator was unable to assure compliance with multiple other Conditions, e.g., Condition #15c relating to student vehicles (11/30 transcript, pp. 34-35) and #19c relating to aggregate FAR (11/30 transcript, pp. 56-57). Apparently, the Zoning Administrator is no longer able to assess aggregate FAR, which has historically served as the cornerstone to enforcement of campus plan growth.

CONCLUSIONS OF LAW AND OPINION

GWU filed an application requesting special exception review and approval of the Foggy Bottom Campus Plan: 2006-2025 pursuant to 11 DCMR §§ 3104 and 210, and, in connection with its campus plan application, filed a separate application requesting first-stage approval of a PUD and related amendment to the Zoning Map of the District of Columbia pursuant to 11 DCMR Chapter 24. The applications were consolidated and heard simultaneously.

The zoning rules governing Colleges and Universities state that "Use as a college or university shall be located so that it is not likely to become objectionable to neighboring property because of noise, traffic, number of students, or other objectionable conditions" (11 DCMR § 210.2).

The zoning rules governing PUDs state that "the PUD process shall not be used to circumvent the intent and purposes of the Zoning Regulations" (11 DCMR § 2400.4). The PUD Evaluation Standards provide that the Applicant shall have the burden of proof to justify the granting of the application according to the standards" (11 DCMR § 2403.2). The key standard is that "The impact of the project on the surrounding area ... shall not be found to be unacceptable, but shall instead be found to be either favorable, capable of being mitigated, or acceptable given the quality of public benefits in the project" (11 DCMR § 2403.3).

The Commission is authorized to grant approval where, in the judgment of the Commission based on a showing through substantial evidence, the application will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps, subject to certain conditions specified in § 210. D.C. Official Code §6-641.07(g)(2)(2001), 11 DCMR § 3104.1.

The Commission concludes that the Applications are likely to become objectionable to neighboring property because of noise, traffic, number of students, or other objectionable conditions. The Commission further concludes that the application for a PUD was used to circumvent the intent and purposes of the Zoning Regulations, and that the impact of the project on the surrounding area would be unacceptable and in capable of being mitigated.

DECISION

The Commission has afforded "great weight" to the issues and concerns raised in ANC-2A's recommendations, as required by law (Section 13 of the Advisory Neighborhood Commission Act of 1975, effective 10/10/75; D.C. Law 1-21, as amended, now codified at D.C. Code § 1-309.10).

At a public meeting on January 17, 2006, the Commission voted ___-___ to deny the application (___ voting in favor of the motion).

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia orders **DENIAL** of this application.

VOTE: ___-___ (___).

BY ORDER OF THE D.C. ZONING COMMISSION

Each concurring member approved the issuance of this order.