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Hand Delivered

Anthony Hood, Chairperson
District of Columbia Zoning Commission
Office of Zoning
441 4th Street, NW, Suite 210
Washington, DC 20001

Re: Z.C. Case No. 06-11
Opposition to Request by the Foggy Bottom Association ("FBA") for Public Hearing on Remand

Dear Chairman Hood and Members of the Commission:

The George Washington University (the "University"), through counsel, hereby opposes the request of the Foggy Bottom Association ("FBA") for a public hearing to address the limited issue regarding student enrollment methodology that was remanded to the Zoning Commission by the D.C. Court of Appeals in its decision in Foggy Bottom Ass'n v. D.C. Zoning Comm'n, 979 A.2d 1160 (2009).

Specifically, and as addressed in detail below, the University submits that:

- The Court remanded the matter solely for the Commission to articulate its reasoning for adopting GW's methodology for counting students who reside or take all of their classes at the University's Mount Vernon campus,
- A new hearing is unnecessary to address this limited issue since the original record contains extensive evidence on which the Commission based its decision,
- An order from the Commission explaining the connection between findings already in the record and its conclusions, without a further hearing, is consistent with the precedent campus plan remand cases for other universities.

All that remains is for the Commission to issue a written order that sets forth that reasoning.

Background

In its decision in Foggy Bottom Association, the Court largely affirmed the Commission's decision regarding the campus plan and related first-stage PUD. The Court determined, however, that the Commission had not addressed in its order FBA's argument that students who come to the Foggy Bottom campus should be counted under the Foggy Bottom campus plan, even if they are already counted under the Mount Vernon campus plan,. See id. at 1173-74. The Court therefore concluded that the Commission had not adequately explained why it selected GW's proposed "primary relationship" test as an accurate measurement of the "number of students" on the Foggy Bottom campus.[1] Accordingly, the Court remanded the case to the Commission solely to give it an "opportunity to articulate its reasoning" regarding the counting of Mount Vernon students within the Foggy Bottom campus plan. Id. at 1174.

Nothing in the Court's decision or directive indicated that it expected the Zoning Commission to reopen the matter and collect further evidence during the remand proceeding. Indeed, the Court specifically pointed out that FBA (as well as the University) had already presented evidence regarding the issue. Furthermore, the Court did not suggest that the "primary relationship" test was the wrong test, or that the Commission had misapplied it or otherwise miscounted the number of students on the Foggy Bottom campus. The Court's sole concern was that the Commission had not laid out its explanation for why it agreed with the University's testimony and adopted the "primary relationship" test as the proper method for analyzing the impact of Mount Vernon students.

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[1] Under the "primary relationship" methodology, the University expanded its definition of the number of students at Foggy Bottom to include, *inter alia*, all Mount Vernon nonresident or commuter students who also take Foggy Bottom classes. Only students who reside on the Mount Vernon campus or take all of their classes at Mount Vernon would be excluded from the definition of "Foggy Bottom students."

GW presented evidence that this approach would appropriately measure student impact at the location where the students had a "primary relationship" and that the primary impacts from these students are on the community in which they reside or take all of their classes (in this case, therefore, students who reside or take all of their classes at the Mount Vernon campus have a "primary relationship" to that campus and their impacts should be accounted for under the Mount Vernon Campus plan),. GW also presented evidence that these students impose limited impacts on the Foggy Bottom campus and, in particular, were unlikely to impose traffic or parking impacts since such students do not enjoy reciprocal parking privileges at Foggy Bottom and come to campus using a University-operated shuttle bus between the two campuses.

In its report, the Office of Planning ("OP") agreed with the University's proposed definition, including the exclusion of students living at or attending all of their classes at the Mount Vernon Campus.

I. A Public Hearing is Not Required for the Zoning Commission to "Articulate its Reasoning."

It is well settled that the D.C. Court of Appeals' role on review of a Zoning Commission order regarding a campus plan is "limited to determining whether the decision is arbitrary, capricious, or otherwise not in accordance with law." See Spring Valley – Wesley Heights Citizens Ass'n v. D.C. Zoning Comm'n, 856 A.2d 1174, 1176 (D.C. 2004). Furthermore, "the Commission's decision stands so long as it 'rationally flows from findings of fact supported by substantial evidence in the record as a whole.'" Id. (citation omitted). Therefore, when the Court remands a case back to the Zoning Commission for further proceedings, it does so either because it determined that (1) the Commission's findings were not supported by substantial evidence or (2) the Commission's decision did not flow rationally from that evidence. In the former instance, further proceedings are typically required because the record lacks the evidence needed to support its decision. In the latter instance, a hearing is not necessary because the evidence is already present—all that is required is for the Zoning Commission to articulate its reasoning.

Here, in its decision in Foggy Bottom Association, the Court remanded the matter to the Zoning Commission for the latter reason only, and requested that the Commission more fully articulate why it chose the student enrollment methodology that it did. Therefore, given the clear direction of the Court, a hearing on remand is unnecessary. The Commission's role on remand in this case is simply to explain why it concluded that GW's methodology was the most appropriate—not to gather additional evidence.

The extent of this remand is strikingly similar to the remands in other recent campus plan cases, where no additional public hearing was conducted after the matter was remanded from the Court to the zoning authorities.

- In an appeal of American University's most recent campus plan, the Court had upheld the bulk of AU's plan, but remanded the matter for an explanation of why the Commission declined to adopt ANC 3D's recommendations regarding parking enforcement. In so doing, the Court specifically noted that the Commission had merely failed to "articulate with particularity and precision" why it had disagreed with the recommendations of ANC 3D. See Spring Valley at 1180-81. On remand, the Zoning Commission did not hold a hearing to address the issue. Rather, it simply issued a written order that articulated the basis for its decision based on evidence already in the record. See Z.C. Order No. 949-B.

- In the second appeal of Georgetown University's most recent campus plan, the Court upheld the primary issues regarding student enrollment, but remanded the matter back to the BZA for further explanation of why the Board chose to eliminate certain conditions of approval. Again, the Court explained that the Board's error was simply a "failure to provide an explanation for its decision." See Citizens Ass'n of Georgetown v. D.C. Bd. of Zoning Adj., 925 A.2d 585, 593 (D.C. 2007) ("Georgetown II").[2] On remand, the Board did not hold a hearing, but simply issued a written decision containing the requested explanation.

II. The Original Record Contains Ample Evidence On Which the Zoning Commission May Base its Reasoning.

FBA claims that a hearing is required because the underlying data in the record is out of date and/or insufficient to address the issue, and out of a mistaken belief that as a matter of process, the new members of the Zoning Commission will require a hearing to address the issue. As discussed below, no further proceeding is required, as the record already contains sufficient and substantial evidence on which the members of the Zoning Commission may base their decision.

The Commission should reject FBA's efforts to introduce new data on types and numbers of students at the Foggy Bottom campus. As discussed above, the Court did not return the matter to the Commission because it believed the data on the number of students was suspect or otherwise inadequate to serve as "substantial evidence" for its decision. Cf. Georgetown I. Rather, the Court was quite clear that it only expected a limited discussion regarding the manner in which Mount Vernon students were counted on the remand. The Court remanded the case only to give the Commission an opportunity to explain why it drew the conclusions it did regarding the original data on number of students, and why it did not adopt or accept FBA's claims. The Commission should therefore reject the FBA's recent attempt to expand the scope of review beyond the original proceedings.

Furthermore, nothing in the Court's decision suggested that the original evidence gathered by the Commission would be inadequate or "stale" and therefore require a new public hearing to gather additional evidence. In fact, the Court specifically pointed to evidence presented by FBA in the original hearing as evidence

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[2] Note, by contrast, in its decision on the first appeal of Georgetown University's most recent campus plan, the Court specifically concluded that the record "lacks substantial evidence" supporting the Board's conclusions on student enrollment, which therefore required a further public hearing on remand. See President and Dirs. of Georgetown College v. D.C. Bd. of Zoning Adj., 837 A.2d 58, 74-75, 76 (D.C. 2003) ("Georgetown I").

that the Commission should address in the remand.[3] Moreover, the Court was very clear that its only concern was the counting of Mount Vernon resident students. See Foggy Bottom Ass'n at 1173-74. Indeed, the Court specifically acknowledged that students at the Loudoun campus are not counted as a part of District of Columbia campus plans. Id. at 1173 n.20. Therefore, FBA's attempt to expand the scope of the remand to collect current enrollment information or include other categories of students directly contradicts the clear direction of the Court.

Finally, the fact that some members of the Commission will need to review the record to participate in the decision does not affect the ability of the Commission to proceed based on the original record. In the AU campus plan remand case cited above, members of the Commission participated in the consideration of the issue on remand without a public hearing, even when they had not participated in the original proceeding. Compare Z.C. Order No. 949 at 41 and Z.C Order No. 949-B at 4 (two of the five Commissioners that participated in remand had not participated in the original decision). Indeed, given that new Zoning Commission members will already be reviewing the extensive record in this case, adding a further public hearing and associated filings would only serve to obfuscate, rather than clarify, the limited issue presented for their consideration.

Conclusion

For the reasons set forth above, the Commission should reject FBA's call for additional public hearings, and, once the Commission has had an opportunity to review the record, issue a written decision articulating the basis for its conclusions on the counting of Mount Vernon students.

Sincerely yours,

Maureen E. Dwyer

David M. Avitabile

[3] Indeed, FBA had ample opportunity to present data on these students during the six nights of public hearing, and, to the extent that other types of students are relevant to the Commission's decision, rebut the evidence presented by GW regarding the impacts of those students. FBA's call for a seventh night of public hearings would simply result in a rehashing of issues that were already raised—and addressed—during the original proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this letter was delivered by hand delivery or electronic mail on February 4, 2010.

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