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2 April 2010

Hon. Anthony J. Hood, Chairman
District of Columbia Zoning Commission
441 Fourth Street, NW Suite 210
Washington, DC 20001

Re: Campus Plan Application of The George Washington University,
ZC Nos. 06-11& 06-12

Dear Chairman Hood and members of the Commission:

On behalf of the Foggy Bottom Association, I submit the attached response to the applicant's proposed order, while was filed pursuant to the Commission's procedural order on remand served 23 February 2010.

That order directed the applicant, as the prevailing party, to file and serve a proposed order that "cures the deficiencies found by" the Court of Appeals in *Foggy Bottom Association v. District of Columbia Zoning Commission*, 979 A.2d 1160 (D.C. 2009). The order limited other parties to filing a "revised version of the proposed order for the sole purpose of making such corrections to the Applicant's characterization of their respective positions or the Commission's rationale as each considers necessary."

FBA sought reconsideration of that order on 5 March 2010, arguing that this procedure violated the District of Columbia Administrative Procedure Act ("DCAPA"), which requires the Commission – not private parties – to outline the Commission's reasoning and to give parties an opportunity to respond. FBA further argued that because the campus plan decision never articulated *any* rationale for approving GW's proposed "primary relationship" test, it would be impossible for any party to articulate the Commission's reasoning, much less answer another party's hypothetical statement of that reasoning. The Commission denied that request at its meeting on 8 March 2010, stating that it did not reconsider procedural orders.

FBA reiterates the objections stated in its 5 March 2010 letter, which we

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hereby incorporate by reference. Apart from FBA's concerns about procedural fairness of the order's limitations, the DCAPA does not require the Commission automatically to reach the same conclusion on the student headcount issue. As our letter pointed out (at p. 2), the DCAPA requires agencies to take a "hard look" at the issues in a case and to spell out reasons for a given conclusion. Thus, neither the DCAPA nor the Court of Appeals' decision pre-ordains a result in this case, as the Commission might conclude after a "hard look" at the facts that the prior conclusion on headcount is untenable. Accordingly, without conceding the point and with the reservations noted in the prior paragraph, FBA's comments on GW's proposed order will be confined to the limitations set out in the Procedural Order on Remand.

Thank you for your consideration of these points.

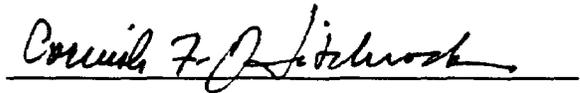
Very truly yours,



Cornish F. Hitchcock
Attorney for Foggy Bottom Association

CERTIFICATE OF SERVICE

I hereby certify that copies of this letter were served by first-class mail, postage prepaid, or electronic delivery this 2nd day of April, 2010, upon Maureen E. Dwyer and David M. Avitabile, Gouston & Storrs, 2001 K Street, NW, Suite 1100, Washington, DC 20006; Advisory Neighborhood Commission 2A, c/o West End Library, 1101 24th Street, NW, Washington, DC 20037; Barbara Kahlow, West End Citizens Association, 800 25th Street, NW, # 704, Washington, DC 20037; Jennifer Steingasser, Office of Planning, 2000 14th Street, NW, 4th Floor, Washington, DC 20009, and Alan Bergstein, Office of the Attorney General, 1100 15th Street, NW, Suite 800, Washington, DC 20005.



**RESPONSE OF FOGGY BOTTOM ASSOCIATION TO APPLICANT'S
SUBMISSION FOLLOWING PROCEDURAL ORDER ON REMAND¹**

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 06-11B/06-12B**

Z.C. Cases No. 06-11 and 06-12

**Applications of The George Washington University for Special Exception Approval of a
Campus Plan and for Approval of a First-Stage Planned Unit Development and
Related Zoning Map Amendments for the Foggy Bottom Campus**

**Order on Remand
[Date]**

This proceeding concerns two applications submitted by The George Washington University ("Applicant" or "University") concerning its Foggy Bottom campus: Z.C. Case No. 06-11, an application for special exception approval of "The Foggy Bottom Campus Plan: 2006-2025" ("Campus Plan") and Z.C. Case No. 06-12, an application for review and first-stage approval of a planned unit development and related amendments to the Zoning Map of the District of Columbia applicable to University-owned properties within the campus boundaries ("First-Stage PUD"). The Zoning Commission for the District of Columbia (the "Commission") consolidated the applications and considered Case No. 06-11 pursuant to §§ 210, 3035, and 3104 of the Zoning Regulations, and Case No. 06-12 pursuant to chapters 24 and 30 of the Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations. By order effective October 26, 2007, the Commission approved the applications subject to conditions (Z.C. Order No. 06-11/06-12).

Parties to this proceeding, in addition to the applicant, are Advisory Neighborhood Commission ("ANC") 2A, the Foggy Bottom Association ("FBA") and the West End Citizens Association ("WECA"). FBA appealed the Commission's decision to the District of Columbia Court of Appeals ("Court of Appeals" or "DCCA"). By decision dated September 3, 2009, the Court of Appeals affirmed the Commission's decision except to remand "for further proceedings with respect to the method of counting students." *Foggy Bottom Association v. D.C. Zoning Commission*, 979 A.2d 1160, 1176 (D.C. 2009).

The pertinent portion of the Court of Appeals ruling that resulted in this remand is as follows:

One of the more contentious issues during the hearings was the method of calculating the number of students using the Foggy Bottom campus, for the purpose of enforcing limits. .

¹ To avoid duplication, FBA has attached to this document those portions of the record that are cited herein and that are not attached to the applicant's submission.

. . The University proposed a “primary relationship” test, which would, in general, count all students who either live or take classes on the Foggy Bottom campus, but exclude those students who either reside or take all their classes at GW’s satellite campus, Mount Vernon. FBA advocated an “intensity of use” test, whereby all students using the Foggy Bottom campus would be included, regardless of whether they were also counted in a different campus’s plan. The Commission adopted GW’s “primary relationship” test without much analysis

. . . .
The Commission did not address FBA’s argument that all students coming to the Foggy Bottom campus add to the strain on the neighborhood, and therefore should be counted in the campus plan, regardless of whether those students are also accounted for in the Mount Vernon plan.

. . . .
Because the Commission did not demonstrate a rational connection between its findings of fact and its conclusion, we remand to give the Commission the opportunity to articulate its reasoning.

979 A.2d at 1173-1174.

PRELIMINARY MATTERS

Three of the Zoning Commission members who are to decide the case on remand, Peter May, William Keating, and Konrad Schlater, were not members of the Commission at the time of the hearing on the application. Pursuant to 11 DCMR § 3005.12, these members read the transcript and reviewed the complete record in order to participate and vote in the remand proceedings.

Pursuant to the Court of Appeals’ limited instruction to the Commission that it “articulate its reasoning” for adopting the University’s methodology for counting students, the Commission determined it would issue a written order that sets forth its explanation as to why the primary relationship proposed by the Applicant should be used with respect to the method of counting students rather than the intensity of use test proposed by FBA, based on the evidence in the record of Case No. 06-11/06-12.

To assist the Commission in its proceedings on remand, and mindful of the Court of Appeals’ limited instruction to “articulate its reasoning” for its decision, the Commission requested that the University, as the prevailing party on the issue, provide the Commission with a proposed order that cures the deficiencies found by DCCA. Specifically, the Commission asked the Applicant to propose findings of fact based on the exclusive record of Case No. 06-11/06-12, and conclusions of law that flow from those findings of fact.

The Commission also provided FBA, ANC 2A, and WECA the opportunity to submit a revised version of the proposed order for the sole purpose of making such corrections to the Applicant’s characterization of their respective positions or the Commission’s rationale as each considers necessary. Again, the Commission directed the parties to base any additional or revised factual finding on the exclusive record of the case.

Thus, the Commission did not in the first instance articulate “its reasoning,” but instead relied on the University to draft an order that may or may not reflect the reasoning of the Commission that decided this case originally. See Procedural Order on Remand at 2. Since the majority of the Commission members did not personally hear the evidence in this case, section 1509(d) of the District of Columbia Administrative Procedure Act, D.C. Code § 1-1509(d), requires the Commission to send a its proposed order to the parties and to afford each party adversely affected the opportunity to present exceptions and present arguments, which may be either oral or in the form of briefs or memoranda. See *Palisades Citizens Ass’n, Inc. v. District of Columbia Zoning Comm’n*, 368 A.2d 1143, 1145 n.6 (D.C. 1977). Upon receipt of the University’s proposed order and the limited responses permitted by the Procedural Order on Remand, the Commission adopted a proposed order of its own for comment by the parties. At its _____ public meeting, the Commission determined to allow the parties ___ weeks from the date of mailing of that proposed order to file written exceptions and arguments. At its public meeting on _____, the Commission reviewed the written comments received from the parties, [made several minor modifications to the proposed order,] and voted to adopt it as the final order on remand.

The Commission makes the following findings of fact and conclusions of law in response to the sole question presented on remand:

Findings of Fact

GW’s Argument

1. The University proposed a comprehensive set of conditions as a part of its 2007 Foggy Bottom Campus Plan. *See* Exhibit 31 at 13 (GW Pre-Hearing Submission); *see also id.* at Exhibit Y (Pre-Hearing Submission: Proposed Conditions).² These conditions included enhanced definitions to provide additional clarity and specificity to the University’s commitments and promote transparency with respect to issues of Campus Plan compliance. *Id.*
2. As a part of these enhanced definitions, the University proposed a detailed methodology for determining what constitutes a “Foggy Bottom student” under the student head count and student full-time equivalent count. *See* Exhibit 31 at Exhibit Q (Pre-Hearing Submission: Enrollment Methodology). The University explained that, in order to determine whether a student enrolled in a creditable course at GW was a “Foggy Bottom student,” it separated the categories of students that have a “primary relationship” with the Foggy Bottom campus from those categories of students that were either “associated with other campuses” or “otherwise not present or active on the Foggy Bottom campus.” *See* Ex. 99 at 5-6 (GW Supplemental Submission). This “primary relationship” test is not drawn from any external source that is used to measure the impact of students on a community, and the University has cited no campus plan case in which the Commission has articulated or used this

² All citations are to the record for Case No. 06-11.

standard. *Id.* The University asserted that this approach would appropriately measure student impact at the location where the students had a “primary relationship” while promoting the continued use of satellite campuses as a means to accommodate the space and growth needs of the District’s universities. *See id.*

3. In response to questions raised by the Commission and FBA during the first night of hearings and to provide guidance as to which students had a “primary relationship” to the Foggy Bottom campus and therefore should be counted as “Foggy Bottom students,” the University prepared a detailed submission that, in part, described the categories of students enrolled at GW and articulated why each category was, or was not, a “Foggy Bottom student” the rights, privileges, and practices of each category of student with respect to the Foggy Bottom campus. *Id.* at 6; *see also id.* at Exhibit B.

Mount Vernon Students

4. GW operates two campuses that are located in the District of Columbia: the Foggy Bottom campus and Mount Vernon campus. Both campuses are located in residential zone districts and are therefore subject to the requirements of Section 210 of the Zoning Regulations. These two campuses are the only GW locations that offer traditional undergraduate classes, residence halls and student support and recreational facilities. *Id.* at Exhibit B p.1-2; *see also* Exhibit B at p.5.
5. As a part of the 2007 Foggy Bottom Campus Plan, the University re-evaluated the relationship between the Foggy Bottom and Mount Vernon campus plans. Under the 2000 Foggy Bottom campus plan, the University had consistently excluded all students counted under the Mount Vernon Campus Plan; that is, Mount Vernon residents and non-resident/commuter students. Students at the Mount Vernon campus are subject to their own enrollment limitations, *see id.* at Exhibit B. p.6, and the University noted that the practice of excluding all students enrolled at the satellite campus was consistent with other institutions that exclude students on satellite campuses completely from the enrollment counts associated with their main campus. *See Ex. 99* at 5 n.3; *see also id.* at Exhibit B p.6 n.8.
6. Under the 2007 Foggy Bottom Campus Plan, the University agreed to include all Mount Vernon nonresident or commuter students who also take Foggy Bottom classes as “Foggy Bottom students.” *Id.* at Exhibit B p.6. 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.” *Id.*
7. With regard to the students who reside at the Mount Vernon campus, the University argued in a memorandum after the close of its testimony explained that the primary impacts from these students are on the community in which they reside; that is, the residential neighborhood surrounding the Mount Vernon campus, not the residential neighborhoods surrounding the Foggy Bottom community. No direct evidence was presented for that conclusion. *Id.* The University also argued in this memorandum, again without direct evidence, presented evidence that these students were unlikely to generate objectionable impacts on the Foggy Bottom campus due to their limited

contact with the Foggy Bottom campus as well as GW initiatives such as the shuttle bus that minimize the traffic and parking impacts of travel between the Foggy Bottom and Mount Vernon campus. *Id.* at 6-7.

- a. The University argued in its memorandum ~~presented evidence~~ that, while the students who reside at the Mount Vernon campus or take all of their classes at Mount Vernon do use certain facilities at Foggy Bottom, these impacts are similar to the impacts of other visitors to the campus; they have limited contact and do not impose significant impacts. No evidence was provided on this point. *See id.*
- b. The University also argued ~~provided evidence~~ that Mount Vernon residents were unlikely to impose traffic or parking impacts, since such students did not enjoy reciprocal parking privileges at the Foggy Bottom campus and, in any event, were likely to come to campus using a GW-operated shuttle bus between the two campuses. *Id.*
- c. Finally, the University stated that while Mount Vernon residents could travel to Foggy Bottom to participate in student activities, the Mount Vernon campus provides a “full panoply” of student-oriented programming, and technological advancements limited the need of such residents to travel to Foggy Bottom for course-related materials such as textbooks and library research materials. *Id.* at 5-6.

Other Off-Campus Students

8. The University’s memorandum also stated ~~presented evidence~~ regarding the locations other than Foggy Bottom where it offers education programs.
 - a. The University described its third campus in Ashburn, Virginia, which generally offers graduate degree and certificate programs as well as research centers. *Id.* at Exhibit B p.2. The University explained that its Loudoun County campus serves a different set of nontraditional students pursuing executive and other part-time programs as well as graduate students engaged in research. *See Ex. 99* at 5.
 - b. The University also described its education centers, which offer graduate degree programs targeted to working adult professionals that live nearby, and its corporate/government sites, which are similar to those offered at the education centers, but are more limited because they are keyed toward the hosting government or corporate institution. *Id.*
 - c. Finally, the University described its distance learning programs and courses. *Id.*
9. The University explained other categories of students at the locations above are considered to be “off-campus students” that lack a “primary relationship” to the Foggy Bottom campus, but instead have a primary relationship with the location that directly provides their education.

- a. The University's memorandum stated ~~presented evidence~~ that these off-campus students have limited rights and privileges of such students to use Foggy Bottom campus facilities or participate in Foggy Bottom campus activities. *Id.* at Exhibit B p. 3.
- b. The University's memorandum stated ~~presented evidence~~ that these off-campus students are not eligible to live in GW housing, do not have any rights to use the Lerner Health and Wellness Center, are not permitted to participate in organized intercollegiate athletics or student government, and generally do not participate in other student activities. *Id.* The memorandum added that students enrolled for at last one credit at the Foggy Bottom campus are eligible to use the Lerner Health & Wellness Center. *Id.* at 3 n.2.
- c. The University argued ~~presented evidence~~ that while these off-campus students are permitted to access and use the main library at Foggy Bottom as well as the student bookstore, modern technologies and University policies, as well as a branch library at the Loudoun County campus, eliminate the need for these students to travel to the Foggy Bottom campus. *Id.* at 3-4.

Office of Planning Report

10. In its report, the Office of Planning ("OP") agreed with the University's proposed definition, which it found was "intended to count every student having an individual effect on the [Foggy Bottom/West End] neighborhood." Exhibit 51 at 12 (OP Report). OP agreed with the exclusion of students "living at or attending ALL of their classes at [the] Mount Vernon Campus." *Id.* OP never addressed FBA's point that notwithstanding any "inten[t]" to count students, GW's proposed method would not adequately measure the intensity of use of the campus. *Id.*

Zoning Administrator Audit

11. At the request of the D.C. Office of Planning as well as FBA and ANC 2A, the Office of the Zoning Administrator ("ZA") conducted an audit of GW's student enrollment to assess GW's compliance with the 2000 campus plan as well as to "request Zoning Commission guidance in conducting future student counts in the District of Columbia." Ex. 81 at 1 (ZA Audit). The audit report explained GW's enrollment methodology and its definitions, including how students at the Mount Vernon campus and other locations are counted, and the ZA accepted this explanation. *See id.* at 2-3; *see also* Tr. Oct. 11, 2006 at 29-30 (testimony of then-ZA Bill Crews stating "we accepted the university's methodology of how they're counting students"); Ex. 81 at Appendix A p. 3-8. According to the ZA, the audit report also confirmed that GW was in compliance with its then-current campus plan condition regarding student enrollment. Ex. 81 at 2-4.

12. Based on the audit results, the ZA recommended that the Zoning Commission further “refine and clarify the definition and methodology for conducting future head counts.” *Id.* at 4. Specifically, the ZA also recommended that Mount Vernon students who attend classes at Foggy Bottom should be included in the Foggy Bottom head count, even if they are already counted under the Mount Vernon campus plan. His report indicated that this methodology, if used, would render GW out of compliance as full-time-enrollment limitations for Fall 2005. *Id.* However, at the hearing, the ZA clarified that this was his recommendation only, and that the ultimate decision was a “policy decision” left up to the Zoning Commission. *See* Tr. Oct. 11 at 31-32 (“So whatever the Commission determines, the more specific the better, of what they consider to [be] a person having an impact on the neighborhood, the better off we all are.”).

FBA Argument

13. FBA proposed that a “Foggy Bottom student” should be defined as either all students enrolled at GW or “the number of persons being educated by GW who at any given time attend classes or have the right to use facilities at the Foggy Bottom campus” since “all such persons add to the intensity of uses” at Foggy Bottom. *See* Ex. 207 at 3-4 (FBA and ANC 2A joint submission regarding GW’s Proposed Conditions); *see also* Ex. 187 at 7-9 (FBA Powerpoint); Ex. 188 at Tab 4 (FBA Memorandum regarding Enrollment Data). FBA’s testimony pointed out that the University’s headcount methodology began with the reporting of students to the U.S. Department of Education and the Internal Revenue Service and then proceeded to lop of significant categories of students, including students from the Loudoun County campus and other enrolled students (students studying abroad, continuous enrollment students, and Mount Vernon students. Ex. 48, Oberlander Declaration, pp. 7-10; see also Ex. 81 at Ex. Q. In urging the Commission to focus on the intensity of use of the Foggy Bottom campus, FBA stated that there “is still too little information being disclosed about student enrollment,” even though the University had the burden of justifying its “primary relationship” proposal and exclusions of students from the overall limit. Ex. 188 at Tab 4, p. 1. FBA testified how the University had changed methodologies over time and had been inconsistent in who was being counted. *Id.* at 1-3. Essentially, FBA argued that GW should count students based on its total enrollment, as reported to such agencies as the Department of Education, but that, at the very least any headcount should include “every person educated by the university who has rights to use the facilities provided students at the Foggy Bottom campus, since all such persons add to the intensity of uses and thereby the impacts on the co-located residential community.” Ex. 207 at 3-4; Ex. 188 at Tab 4. ~~FBA argued that GW should not be permitted to deduct students such as from the Loudoun County campus and other off campus students, students studying abroad, continuous enrollment students and Mount Vernon students. Ex. 188 at Tab 4. FBA’s proposed findings of fact and conclusions of law urged denial of relief on the headcount issue, stating that the University had not carried its burden as the applicant on the methodology issue because it has “not provided adequate evidence to identify exactly how many students who live at Mt. Vernon and elsewhere are not being counted.~~

Since the number of students is an important element of campus plan cases, since concerns about overenrollment were continuously expressed in the 2000 campus plan case and again in this case, this omission is serious.” Ex. 219, Proposed Conclusion of Law 4.c.5.

14. With regard to Mount Vernon students, FBA stated that these students come to the Foggy Bottom for class and other activities and should be counted as Foggy Bottom students. *Id.* The Zoning Administrator’s audit noted that in the fall 2005 semester, 481 students who live on the Mount Vernon campus are taking courses at the Foggy Bottom campus; of that total, 292 (or 60 percent of the total) are taking 75 percent or more of their courses in Foggy Bottom. Figures for spring 2006 were comparable (427 total; 253 taking at least 75% of their courses at Foggy Bottom campus. Ex. 81, Attachment p. 5.
15. FBA called for a definition that “realistically measures the impact of usage of the Foggy Bottom campus” and “to the extent that the Commission uses headcount, the standard should be objective, clear and enforceable.” Ex. 187 at 9. Under cross-examination, FBA’s president ~~concurred with the University’s position that those who imposed limited incidental impacts on~~ testified that as to students from other campuses that: “If they use it, I guess they should count in some way,” although she acknowledged that “it’s very hard to quantify.” ~~the Foggy Bottom campus should not count within the Foggy Bottom campus cap because these students would be “hard to quantify.”~~ See Tr. Sept. 28, 2006 at 145-46. When asked if she meant that the focus should be on whether the student’s “primary” activities took place, she said “no.” *Id.* at 146. At the hearing, the ZA also stated that FBA’s proposed definition of “persons being educated at any given time” ~~was too vague and he would need “much more clarification”~~ on how to count the number of Foggy Bottom students under that definition. Tr. Oct. 11 at 30.

Analysis

16. The Commission agrees with the University and OP that the determination of whether a student that is enrolled in a creditable course at GW should be counted in the definition of Foggy Bottom student enrollment should be based on whether that student maintains a primary relationship with the Foggy Bottom campus. The Commission finds that GW’s definition actually conforms to FBA’s stated goal, which was to “realistically measure[] the impact of usage of the Foggy Bottom campus” with an “objective, clear and enforceable” standard. *See* Ex. 187 at 9. The Commission finds that the University presented sufficient evidence that the categories of students enrolled at GW but excluded from the definition of “Foggy Bottom students” have, by virtue of their primary relationship with another campus, limited contact with the Foggy Bottom campus. Therefore, the Commission finds that the categories of students excluded by GW are not likely to impose objectionable impacts on the Foggy Bottom Campus due to noise, traffic, number of students, or other impacts and should logically be excluded from the definition of a “Foggy Bottom student.”

17. The Commission finds that the impacts of students who reside at the Mount Vernon campus or take all of their classes at the Mount Vernon campus are not likely to generate objectionable impacts at Foggy Bottom due to noise, traffic, number of students, or other impacts. *See also* Tr. Mar. 12, 2007 at 117 (concluding that students who live at Mount Vernon should not count towards the Foggy Bottom campus housing requirement). These students do not reside on the Foggy Bottom campus or in the residential neighborhoods surrounding Foggy Bottom, and are unlikely to impose noise or other impacts related to student conduct. Furthermore, the University provides a shuttle bus between the two campuses and imposes parking policies that minimize the traffic and parking impact of Mount Vernon residents who come to the Foggy Bottom campus. The impacts of these students are primarily experienced at the Mount Vernon campus, where they reside, and are accounted for under the Mount Vernon campus plan. As noted above, FBA submits that the University has not met its burden on this point.
18. The Commission finds that the other categories of off-campus students are appropriately excluded from the Foggy Bottom count because “they have extremely limited impact—if any at all—on the Foggy Bottom campus.” *See* Ex. 99 at 4. These categories of students are generally not entitled to the full rights and privileges afforded to Foggy Bottom students, such as the right to live in University housing, use certain facilities, or participate in certain activities, and in any event are not likely to need or desire to come to Foggy Bottom. Furthermore, the Commission finds that to the extent that any off-campus student is enrolled in a class at the Foggy Bottom campus as well as at the Loudoun County campus—and therefore more likely to impose impacts on the Foggy Bottom campus—GW counts those students toward the Foggy Bottom student headcount and FTE count. *See id.* at Exhibit B p. 2. As noted above, FBA submits that the University has not met its burden on this point.
19. For these reasons, the Commission affirms the Foggy Bottom student enrollment methodology set forth by the Applicant and endorsed by OP.

Conclusions of Law

The Zoning Regulations specify that the number of students is one factor that the Commission must take into account when assessing whether a university use in a residential zone is likely to become objectionable to neighboring property. 11 DCMR § 210.2. The Applicant has proposed a Foggy Bottom campus enrollment methodology that is based upon whether a student enrolled in a creditable GW course maintains a primary relationship with the Foggy Bottom campus. The proposed methodology does not count students who reside at the Mount Vernon campus, even if they take classes at the Foggy Bottom campus; moreover, it does not count students who take all of their classes at the Mount Vernon campus. The proposed methodology also does not count off-campus students, including those students enrolled at the Loudon County campus, at other learning sites, and through distance learning, unless they are also enrolled in a course at Foggy Bottom.

The Commission concludes that the Foggy Bottom student enrollment methodology set forth by the Applicant provides the appropriate standard by which to measure student impacts associated with the Foggy Bottom Campus Plan, because it accounts for all students who have a primary relationship with the Foggy Bottom campus and are therefore likely to generate impacts due to noise, student conduct, traffic and parking. The Commission also concludes that the students not counted under this enrollment methodology are unlikely to generate impacts due to noise, student conduct, traffic and parking. In particular, the Commission concludes that students who reside at the Mount Vernon campus are unlikely to impose objectionable impacts on the Foggy Bottom campus because the Mount Vernon campus features its own facilities, services, and programming for these students and the University provides a shuttle service between the two campuses that ensures these students will not cause objectionable impacts due to traffic or parking. The Commission notes that this determination is consistent with the treatment of other institutions of higher education in the District of Columbia with satellite campuses, which do not count the students at such satellite locations within the applicable population counts for the main campus. As noted above, FBA submits that the University has not met its burden on this point.

The Office of Planning Report, which agreed with the Applicant's proposed methodology and concluded it was "intended to count every student having an individual effect on the [Foggy Bottom/West End] neighborhood" is entitled to great weight under D.C. Code § 6-623.04 (2001)

The ANC's recommendation is also entitled to great weight. However, for the reasons stated in Z.C. Order No. 06-11/06-12, as supplemented in this order, the Commission does not find the ANC's reasoning persuasive.

Decision

Based upon the above Findings of Fact and Conclusions of Law, the Zoning Commission for the District of Columbia hereby orders Zoning Commission Order No. 06-11/06-12, effective October 26, 2007, shall be supplemented by the addition of the above Findings of Fact and Conclusions of Law.

The proposed order on remand was approved by the Zoning Commission at its public meeting on _____, by a vote of _____.

This final order on remand was approved by the Zoning Commission at its public meeting on _____, by a vote of _____.

In accordance with the provisions of 11 DCMR § 3028, this order shall become final and effective upon publication in the D.C. Register; that is, on _____.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOGGY BOTTOM ASSOCIATION,)	
)	
Plaintiff,)	
)	
vs.)	
)	Court No. 06 Civ. 0746 (RJL)
DISTRICT OF COLUMBIA OFFICE OF)	
PLANNING, <i>ET AL.</i> ,)	
)	
Defendants.)	
)	

DECLARATION OF GEORGE H.F. OBERLANDER, AICP

I, George H.F. Oberlander, AICP, declare as follows:

1. I have been asked by the law firm of Bode & Grenier, LLP to render my opinion whether the George Washington University ("GWU") is in compliance with Conditions 8 and 9(a)-(b) of the District of Columbia Board of Zoning Adjustment's ("BZA") January 23, 2002 Corrected Final Order On Remand ("Final Order") governing GWU's existing campus plan. I understand that this declaration will be filed to assist the Court in resolving plaintiff's motion for a preliminary injunction.

2. My expert qualifications are as follows. I have more than forty-five years of professional urban planning and zoning experience. I served, from 1979 to 1990, as the Associate Executive Director, D.C. Affairs of the National Capital Planning Commission, Washington D.C. In that capacity, I supervised the review of the several GWU Campus Plans submitted to the BZA and the Zoning Commission for the District of Columbia. In addition, I prepared Commission reports on those Campus Plans to the District of Columbia zoning authorities. I am familiar with the current GWU 2000-2010 Campus Plan and the proposed new GWU Campus Plan. My complete résumé is attached to this declaration as Exhibit K.

EX. 48, OBERLANDER DECLARATION
(RELEVANT EXCERPTS)

3. In preparing this declaration, I have reviewed the following data and information: the BZA's March 29, 2001 Order pertaining to Application No. 16553 of GWU; the BZA's December 21, 2001 Final Order On Remand; the BZA's January 23, 2002 Corrected Final Order On Remand (referred to here as the "Final Order"); the BZA's February 6, 2002 Order Certifying Campus Plan; the BZA's February 24, 2004 Order On Second Remand; the George Washington University's February 16, 2006 Application to the District of Columbia Zoning Commission for first stage review and approval of a planned unit development and zoning map amendment for the Foggy Bottom Campus; the George Washington University's Foggy Bottom Campus Plan: 2006-2025; the District of Columbia Office of Planning's April 10, 2006 "Setdown Report for George Washington University Campus Plan 2006-2025"; the George Washington University's February 28, 2006 "Biannual Report Required for GWU Foggy Bottom Campus Plan"; the George Washington University's 2003 Internal Revenue Service Form 990 ("Return of Organization Exempt From Income Tax"); the "Enrollment and Persistence" statistics issued by the George Washington University's Office of Institutional Research; the "Unduplicated Enrollment (All Campuses)" statistics issued by the George Washington University's Office of Institutional Research; the "On-Campus Enrollment Fall 2005" statistics issued by the George Washington University's Office of Institutional Research; the "Full and Part-time Faculty Appointments by School and Department Fall 2005" statistics issued by the George Washington University's Office of Institutional Research; the "Paid Personnel Fall 2005" statistics issued by the George Washington University's Office of Institutional Research; the "On-Campus Enrollment Fall 2002" statistics issued by the George Washington University's Office of Institutional Research; the "Virginia Campus Enrollment Fall 2005" statistics issued by the George Washington University's Office of Institutional Research; and other statistic information

prepared by the George Washington University's Office of Institutional Research and posted on GWU's website.

4. My opinion follows:

SUMMARY OF OPINION

Based on the information I have reviewed, analyzed, and discussed below, it is my opinion that the George Washington University is not in compliance with the existing Campus Plan. Specifically, GWU is out of compliance with conditions 8 and 9(a)-(b) of the Campus plan. Condition 9 of the Campus Plan requires that university-supplied beds be provided for 70% of the first 8,000 undergraduates, and one bed for every undergraduate student in excess of 8,000. The housing GWU provides its undergraduates is currently 1,754 beds short of this requirement. Condition 8 of the Campus Plan limits the enrollment "headcount" of GWU to 20,000 students, but the University has a current enrollment (Fall 2005) in excess of 24,000 students. Condition 8 further limits the "full-time faculty" to 1,552; the current faculty (2005) is 2,992. The Condition 8 limitation on faculty is thus exceeded by 1,440.

DISCUSSION

I. Conditions 8 and 9(a)-(b) of the Campus Plan

The Final Order comprising the Campus Plan provides certain Conditions to ensure that the proposed university use is "not likely to become objectionable to neighboring property because of noise, traffic, number of students or other objectionable conditions." 11 DMCR § 210.2. Pursuant to Condition 8, "Student enrollment (headcount) over the life of the plan shall not exceed 20,000 students and the student full-time equivalent shall not exceed 16,553. The number of full-time equivalent faculty and staff shall not exceed 1,550 and 9,000 respectively,

while the headcount for faculty and staff shall not exceed 2,236 and 10,293 respectively.” (BZA Order, March 29, 2001) (attached hereto as Exhibit A).

The Final Order also conditioned approval of GWU’s 2000-2010 Campus Plan on the “University’s promptly taking decisive steps to provide housing for the bulk of the undergraduate students on campus.” Final Order, January 23, 2002, at 5 (attached hereto as Exhibit B). This limitation was based on the BZA’s findings that the informal off-campus housing of undergraduate students in Foggy Bottom threatened the “livability and residential character” of Foggy Bottom. Thus, Condition 9 requires that GWU provide housing on-campus or outside Foggy Bottom for 70% (5,600 of the first 8,000 undergraduate students), plus one on-campus or non-Foggy Bottom bed for every full-time undergraduate student over 8,000. After August 31, 2006, the 5,600 beds are to be located entirely on campus. Final Order, Conditions 9(a)-(c).

II. Data and Analysis Relevant to Condition 8

A. Department of Education

The Department of Education (“DOE”) conducts an annual survey of enrollment information for every college and university. In the survey, GWU is identified as “Institution 131469” and the enrollment information it provides the DOE is set forth and retrievable at the website of the IES National Center for Education Statistics. For the year 2004, the online IES Report lists GWU’s student enrollment at 24,092 students. See IES Report (attached hereto as Exhibit C).

B. Internal Revenue Service Filings

As a non-profit Institution, GWU is required to file IRS Form 990. Educational institutions are required to disclose their student enrollment in this form. GWU’s IRS Form 990

filed in 2004 lists GWU's student enrollment in FY04 at 23,417 students for the Fall semester and 23,034 students for the Spring semester. (attached hereto as Exhibit G).

C. GWU's Office of Institutional Research

GWU's Office of Institutional Research reports on-line a "University Factbook" listing detailed enrollment data. Included in the Factbook is a page entitled "Unduplicated Enrollment (All Campuses)" (attached hereto as Exhibit H). The "Total Headcount" set forth for the Fall 2005 Semester is 24,099 students. There is separately listed in the Factbook the "Virginia Campus Enrollment" (attached hereto as Exhibit I). For the Fall 2005 Semester, the "Total Headcount" for the Virginia campus is 530 students. The total enrolled headcount for the GWU Foggy Bottom Campus is thus 23,569 students for the Fall 2005 Semester. $[24,099 \text{ (student enrollment/all campuses)} - 530 \text{ (student enrollment/Virginia campus)} = 23,569 \text{ total student enrollment (headcount) for Foggy Bottom Campus}]$. This assumes that none of the Virginia students take courses on GWU's D.C. campus. GWU's Office of Institutional Research explicitly states that GWU's Mt. Vernon campus is considered part of the Foggy Bottom campus, and there are no other GWU campus locations.

I believe the student "Enrollment" (headcount) reported by GWU's Office of Institutional Research has a high degree of reliability in that the almost identical student headcount figure was reported to the Department of Education and the Internal Revenue Service. I therefore conclude that GWU's "student enrollment (headcount)" in the language of Condition 8 has been exceeded by 3,569 students. $[23,569 \text{ (headcount)} - 20,000 \text{ (Campus Plan Limit)} = 3,569]$.

The Factbook also reports the number of Faculty at GWU. (attached hereto as Exhibit J). Specifically, the Office of Institutional Research reports that for the Fall 2005 Semester there were 4,478 faculty appointments (1,549 full time; 2,929 part time). Thus, it is clear that GWU

has violated Condition 8 by exceeding the faculty cap by 2,242. $[4,478 \text{ (faculty)} - 2,236 \text{ (faculty cap)} = 2,242]$.

III. Data and Analysis Relevant to Condition 9

Pursuant to the Campus Plan (Condition 17 of BZA Remand Order), GWU is required to submit semi-annually an audited Report concerning its compliance with Condition 9. (See Condition 17, attached as Exhibit B). Attached hereto as Exhibit D is the "Biannual Reports Required for GW Foggy Bottom Campus Plan; BZA Application No. 16553F" dated February 28, 2006 ("Biannual Report").

Preliminarily, the number of beds that GWU must provide undergraduate students may be computed by adding to the 5,600 beds required under Condition 9(a), the additional beds required under Condition 9(b). Pursuant to Condition 9(b), "whenever the headcount of full-time undergraduates exceeds 8000 (the "base number"), the University shall provide one bed on campus ... for each full-time undergraduate in excess of the base number." GWU's Office of Institutional Research lists the total number of undergraduates for the Fall 2005 semester (Unduplicated Enrollment) as 9,660. Thus, GWU must provide 7260 beds for its undergraduate population. $[5,600 \text{ (beds)} + (9660 \text{ (undergraduate headcount)} - 8000 \text{ (base)}) = 7260 \text{ beds}]$.

The Biannual Report lists "University supplied beds" as totaling 5512. It further notes that 605 beds are under development, and should be available for the Fall 2006 semester. Thus, based on the Biannual Report, GWU has violated Conditions 9(a) & (b) by providing 1754 fewer beds than that required. $[7260 \text{ (beds required by Condition 9)} - 5512 \text{ (current University supplied beds)} = 1748 \text{ bed deficiency}]$. Assuming 605 beds are constructed in time for the Fall 2006 semester, and the number of undergraduates does not increase in 2006 compared to 2005, GWU will have violated Conditions 9(a) & (b) by 1,143 beds.

IV. GWU's Redefinition Of Student Headcount

At Tab Q of the proposed new Campus Plan (2006-2025) Application, GWU proposes a new "Enrollment Methodology." I am advised that GWU is using "retroactively" this new method of counting student enrollment (headcount) with the effect of arriving at a Fall 2005 "Foggy Bottom Student Body Headcount" of 18,802. I state these opinions about the validity of the "new methodology" for determining student enrollment headcount, as used in Condition 8 of the existing Campus Plan.

First, GWU maintains it is entitled to subtract from the 24,099 Fall Enrollment figure 3,781 students that include the Virginia campus and "Off Campus" enrollment. In my opinion, as a matter of zoning regulation enforcement, these students should not be excluded. First, the federal government's definition of enrollment should control, unless a different definition is set forth in the BZA's Final Order – and it is not. The DOE's Integrated Postsecondary Education Data System ("IPEDS"), the "standard reporting mechanism for student enrollment for United States institutions of higher Education" (quote from GWU's auditors in Semi-Annual Report), explicitly provides a definition that contradicts GWU's enrollment subtraction. In its "Instructions for Enrollment" in the IPEDS's Enrollment Survey Form (attached hereto as Exhibit E), enrolled students are defined as:

Students included in report - Report all students enrolled in courses creditable toward a diploma, certificate, degree, or other formal award. Include students that are enrolled in courses that are part of a vocational or occupational program, **including** those enrolled in off-campus centers. Include high school students taking regular college courses for credit... Be sure to include full-time students taking remedial courses if the student is considered degree-seeking for the purpose of student financial aid determination. (emphasis in original)

Thus, based on the IPEDS enrollment definition there is no basis for subtracting 3,560 as GWU apparently wants the Zoning Commission to do.

In its proposed new “enrollment methodology,” GWU further proposes subtracting from the 20,318 student figure an additional 1,516 students to come into compliance with the 20,000 cap imposed by Condition 8. GWU cites three categories of students in the 1,516 subtraction exercise: (a) students who study abroad for a semester; (b) Continuous Enrollment students; and (c) Mount Vernon Students. In my opinion, the IPEDS specifically rejects subtraction from student enrollment the aforementioned categories of students.

The first category, “Study Abroad” students are treated in the IPEDS:

Students excluded from this report:

Students studying abroad (e.g. at a foreign university) if their enrollment at this institution is only an administrative record and the fee is only nominal.

In contrast to the IPEDS criteria, the students that GWU seeks to exclude are full tuition-paying students. Moreover, the students reside at the GWU campus for the second semester, and their place is usually filled with an (uncounted) foreign exchange student. In my opinion, there are no bases for subtracting from the student headcount those enrolled students who study abroad for a semester.

The second category of excluded students, “Continuous Enrollment” students is likewise contradicted by the definition of students by the IPEDS. The DOE explicitly requires universities to report all enrolled students and to include them in the “headcount.”

The third category of excluded students, “Mount Vernon Students,” is likewise not defensible under the IPEDS reporting system. The instructions provided by the IPEDS for “Students Included in this Report” explicitly provide that all students enrolled in courses creditable toward a diploma, certificate, or degree, “including those enrolled in off-campus centers” should be counted toward the number of enrolled students (emphasis in original). Thus,

any attempt to subtract the 925 enrolled students at the Mount Vernon campus would directly contradict IPEDS requirements.

In my opinion, the subtractions from enrollment proposed by GWU violate the purpose and spirit of the D.C. Zoning Regulations and the existing Campus Plan. A college or university is permitted to exist in a residential area like Foggy Bottom, and to expand its presence, so long as the university use is not likely to be objectionable to the residential community. 11 DCMR § 210.2. But the students GWU seeks to exclude from the enrollment headcount – such as the Mount Vernon students – are either bussed into the Foggy Bottom campus, or routinely visit the campus by automobile or other means of transportation. Thus, they contribute to the noise, pollution, congestion, and student body population – the objectionable factors – that supported the BZA’s decision to limit student encroachment in Foggy Bottom.

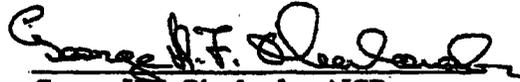
With regard to GWU’s violation of Condition 9, a few points are pertinent. In Attachment A of GWU’s semi-annual report is set forth an undergraduate student headcount based on the “Average for Fall 2005 and Spring 2006.” In my opinion, the use of an “average” for purpose of determining compliance with Condition 9 is inadequate. When the undergraduate body arrives for the Fall Semester, the beds that are to be provided by GWU under Condition 9 must be available – they cannot wait until the Spring Semester. Next, GWU subtracts from the headcount of full-time undergraduates these categories of students: (a) undergraduates at the Mount Vernon campus; (b) students studying abroad for the semester; and (c) students who are enrolled for administrative purposes. In my opinion, the undergraduate students in these categories should not be excluded for purposes of determining compliance with Condition 9 of the Campus Plan.

Condition 9 does not permit this exclusion; rather, it states the University must provide beds for “full-time undergraduate students.” Second, the students at the Mount Vernon campus are contemplated in the provisions of the Condition treating students “outside Foggy Bottom/West End.” Third, foreign exchange students (non-resident aliens) use the beds that would otherwise be occupied by the students that are studying abroad for the semester. And, when these students return to campus, they require a bed.

With regard to the faculty cap, it is my understanding that GWU maintains that it is entitled to obtain compliance by adding the faculty and staff caps (2,236 and 10,293 respectively) together. GWU thus contends because the reported faculty and staff employees for the Fall 2005 Semester, added together, is less than the sum set forth in Condition 8 for faculty and staff combined, then it is in compliance. In my opinion, this is incorrect. Condition 8 places an explicit cap on both faculty appointments and staff hires. Condition 8 nowhere permits the University to add these two separate categories – professional and non-professional – to win compliance. Cogent reasons support the separate caps on each. For example, the limitation on faculty also serves as a “soft cap” on student enrollment. The University must be sensitive to faculty/student ratios to be competitive. Moreover, the faculty is much more likely than lower level staff employees to use automobiles to commute to and from the University. Considering the University is at the “tipping point” for air quality, this is an important reason for independently limiting faculty headcount.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: July 18, 2006



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witness, Joe Mehra, who has identified some significant ways in which GWU has undercounted and underestimated the potential impact of traffic and parking demands that will be created by GWU's applications.

- ii. As the FBA pointed out, GWU is proposing to add the equivalent of eight or nine K Street office building within its campus (and that is before considering the Square 54 or School Without Walls developments). It is impossible to conclude that the effects on traffic from such a significant project will be minimal, as GWU asserts, and Mr. Mehra has convincingly identified areas in which GWU has understated the potential effects of more traffic on the Foggy Bottom and West End neighborhoods.
 - iii. The DDOT analyses were superficial and incomplete and raised more questions than they answered, thus foreclosing any meaningful reliance on DDOT's views. The fact remains that GWU has the burden of establishing that the proposed traffic consequences will not be objectionable, and GWU has failed to carry its burden on that point.
- c. Number of Students:
- i. The student population has been steadily increasing since approval of the 2000 Campus Plan Order, and GWU's handling of this issue has been a subject of concern and a major source of the friction that marks "town-gown" relations between GWU and its neighbors.
 - ii. The Commission has stated that it does not intend to use this proceeding as a forum for reviewing questions about compliance with the 2000 Campus Plan Order. The Commission can nevertheless understand why the community would feel suspicious and mistrustful because that Order speaks of an overall "headcount" limit on the student population, without ever suggesting a belief by the BZA that GWU could, in its discretion, ignore the IPEDS criteria used by the U.S. Department of Education and make its own computations as to who should be counted.

- iii. The Commission notes as well that GWU's record has not been a model of consistency. For example, the compliance affidavits cited by the FBA witnesses show that GWU carved out "continuous enrollment" students in 2005 and 2006 after making no such carveout in 2003.
 - iv. There was testimony that if GWU's methodology is to be used (with whatever refinements may suggest themselves in the course of this proceeding), then the Commission should reduce the overall cap. That would be something worth considering in a future case involving the post-2009 period. At a minimum, there appears to be a consensus among parties other than GWU as to the need to count in some manner those students who make use of the Foggy Bottom campus, regardless of whether they live on the Mt. Vernon campus and commute to classes in Foggy Bottom or whether they attend one of GWU's other campus but have privileges allowing them access to facilities at the Foggy Bottom campus.
 - v. GWU has not provided adequate evidence to identify exactly how many students who live at Mt. Vernon and elsewhere are not being counted. Since the number of students is an important element of campus plan cases, since concerns about overenrollment were continuously expressed in the 2000 campus plan case and again in this case, this omission is serious. As a result, the Commission concludes that GWU has not carried its burden of proof on that point.
- d. Other factors: As noted above, one of the biggest drawbacks to approving a new campus plan at this time is a lack of information about how well the 2000 Campus Plan Order has worked. The requirement that GWU house 70% of its undergraduates on campus only recently took hold, and it is too early to state whether that reform has had the desired effect. Indeed, testimony during the hearing suggests that the problems described during the 2000 testimony are still salient and unresolved. Even with new construction of dormitory space, however, and GWU's purported interest in "Grow Up, Not Out," there are still

issues such as the concentration of undergraduate housing on the campus southern periphery that continue to exist. Under the circumstances, the Commission cannot conclude at this point that approving a new set of development projects would be lacking in “objectionable” criteria.

- e. It should be noted that these applications (which involve 18 proposed sites), along with the Square 54 and Square 80 cases, would have the effect to creating 20 construction zones in coming years, as GWU adds considerable density to the neighborhood. This level of intensity is certain to have a negative impact of the existing residential neighborhood
 - f. Under the circumstances, the Commission is not convinced that GWU has sustained its burden of proving that its applications are consistent with Section 210 of the Zoning Regulations. The Commission believes that GWU’s effort here is at best premature and that the most sensible approach would be to continue working to implement the 2000 Campus Plan Order, with GWU to file a new application only as the expiration of that 2000 order draws near.
5. The Commission notes that there exists an opportunity to use the remaining time well. The Commission is persuaded by the citations of ANC 2A and the FBA to several collaborative methods that could be used to find consensus on these town-gown issues. The Commission believes that there would be a benefit to all concerned if GWU and the community could find ways to make a collaborative process work more effectively.
6. Even if the Commission were inclined to consider this case using PUD criteria, the asserted “public benefits” fall far short of justifying the considerable expansion in GFA that GWU is seeking here. Helping GWU achieve its long-term development goals is a private benefit, not a public benefit, and other benefits (new retail, new tax revenues) can be achieved without a PUD. GWU’s supposed agreement to purchase Foggy Bottom residential real estate only for “investment purposes” and without “directly” referring students to those properties lacks substance and cannot be enforced. If anything, it confirms GWU’s right to continue buying up residential properties in the neighborhood. A new historic district is one possible element, if approved by