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Via Hand Delivery

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Re: George Washington University Planned Development/ No. ZC-06-11

Dear Director McCarthy:

We have been retained by the Foggy Bottom Association (“FBA”) and write concerning the recent filing of George Washington University entitled, “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” (“Application”) and the “Foggy Bottom Campus Plan: 2006-2025” (“new campus plan”). On behalf of the FBA, we ask that the Office of Planning (“OP”) issue a recommendation to the D.C. Zoning Commission that the Application is without merit and, accordingly, that it should *not* be set-down for a Zoning Commission hearing.

In support of this request, we advance three contentions:

- **First**, the FBA contends that the Application upends the zoning regulatory process, in that it would: jettison the existing Campus Plan that has almost four years to run, bypass the zoning provisions dedicated to campus plans, and substitute the PUD zoning regulations as the vehicle for approving the new campus plan. This patently violates the strictures and spirit of the Zoning Regulations of the District of Columbia.
- **Second**, the FBA contends that the OP’s recommendation on the Application of GWU is a “major action” requiring an Environmental Impact Statement (“EIS”). No informed decision can be made on the Application and new campus plan – which proposes to extend to the year 2025 – without the guidance provided by an EIS.
- **Third**, the FBA contends that any consideration of the Application and the new campus plan is prohibited by the operation of Condition 9(d) and Condition 20

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of the existing Campus Plan. Condition 9(d) prohibits the issuance of any permit while GWU is in violation of Condition 9(a)-9(c). Condition 20 explicitly provides that *no* permit may be issued while GWU is in violation of *any* Condition of the Campus Plan. Because GWU is in violation of Condition 8 and Condition 9(a) of the Campus Plan, no agency of the District of Columbia may issue any permit or license.

The Application Violates the Regulatory Structure and Purpose of the Zoning Regulations and Process

FBA's first objection to the Application of GWU is that it implicitly assumes – in contradiction of reality – that either there is no existing Campus Plan, or that it is about to expire. But there is a Campus Plan and its term extends until 2010. Indeed, the Board of Zoning Adjustment expended almost two years considering the Campus Plan in proceedings that are memorialized in a 4337 page record. The Campus Plan was fashioned after considering the input from a large number of stakeholders, who, like the Foggy Bottom Association, often expended significant resources in advancing their recommendations to the BZA. Thus, the existing Campus Plan is a product of the BZA's weighing of the interests of the University, of the residents of the Foggy Bottom areas and the city at-large, of many other interest groups, and the District of Columbia. Were the OP to accept GWU's new filing – and thus to jettison the existing Campus Plan – it would break faith with the community, cast insult on all of the efforts expended, and establish a precedent of a disastrous magnitude.

The second objection to the Application of GWU is that it is deficient in process. As the U.S. Court of Appeals for the District of Columbia Circuit has noted, universities are afforded particularized treatment under the D.C. Zoning Regulations. *See generally, George Washington University v. District of Columbia*, 318 F.3d 203, 205-206 (D.C. Cir. 2003). Under the zoning scheme for universities, codified at 11 District of Columbia Municipal Regulations (“DCMR”) §§ 210, 302, 322, et seq., 507, 615, 701 & 3035, a university seeking use in areas zoned residential or “special purpose,” as is the case here, “... shall be permitted ... a special exception ... and 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.” In general, the process is initiated when the university submits a campus plan that describes its general intentions for new land use over a substantial period. (Indeed, the new campus plan would extend to 2025). Importantly, the Commission must be assured that the campus plan is consistent with all of the “District Elements” of the District’s “Comprehensive Plan.” If approved by the Commission – an approval that is usually subject to a set of conditions designed to minimize the impact of the proposed development – the campus plan establishes distinct limitations within which all future construction may occur. After a campus plan is approved, new construction is reviewed on a site-by-site basis under the zoning regulations pertaining to “Planned Unit Development” (“PUD”).

GWU's filing – entitled “Approval of a Planned Unit Development and Zoning Map Amendment” – attempts to invoke a “super” PUD zoning process that irreconcilably conflicts

with the exacting strictures and spirit of the Zoning Regulations. The OP should reject the Application on this basis alone, and should abide, in this regard, the warning expressed in § 2400.4 of the Zoning Regulations that, "... the PUD process shall not be used to circumvent the intent and purposes of the Zoning Regulations, nor to result in action that is inconsistent with the Comprehensive Plan." But here GWU attempts to do just that by:

1. Invoking the PUD regulations at the beginning of the process – effectively placing the “cart before the horse” and, additionally, using these regulations to “trump” the limitations set forth in the “Special Exception” regulations and the Elements of the Comprehensive Plan;
2. Aggregating individual PUDs into a “super” PUD, thereby overwhelming the resources of concerned stakeholders who are unable to respond effectively to such a massive filing;
3. Invoking in the same filing a “re-zoning” application seeking to rezone three large parcels from the current lower-density “R-5-D” zone, to high density (“high bulk major business and employment”) “C-1-C” zones, in violation of the current Campus Plan and Comprehensive Plan; and,
4. Seeking approval of the addition of not less than 1.74 million square feet of new construction – not including the Square 54 project or the Square 80 project – and a radical increase in the “Floor Area Ratio” (“FAR”) from the existing 3.5 FAR limitation, in derogation of the “Special Exception” regulations and the Campus Plan.

As it considers GWU’s attempt to “end-run” around the existing Campus Plan, the OP must review not just the University’s words, but, as well, its actions. For example, GWU asserts that its filings would simplify the OP’s work and provide “management control.” In fact, the Application creates unnecessary work when that work has already been done. And the Application, because of its vagueness and generalities, keeps GWU in control and gives none to the OP. As far as GWU’s actions, the University attacked the existing Campus Plan in court before the signature ink was barely dry. This speaks volumes about GWU’s “good faith” during the process. Now that the Court has upheld the legality of the Campus Plan, GWU demands that OP act as if it does not exist, and consider a new campus plan without the limitations of the plan that exist. To permit the Application to be set-down for hearing by the Commission would condone this inappropriate conduct.

The OP Must Await the Guidance Provided by an EIS

The District of Columbia Environmental Policy Act of 1989, as amended, (“DCEPA”) provides that the environmental impact of “proposed District Government and privately initiated actions” be examined “to afford the fullest possible preservation and protection of the environment.” § 6-981. There can be no doubt that the Application and new campus plan require the preparation of an Environmental Impact Statement under the DCEPA. Because no such EIS has been prepared, any consideration of the Application must, at a minimum, be postponed.

The Application contemplates the addition of almost two million square feet of construction (even excluding the Square 54 and Square 80 construction projects) likely to cost more than \$20 million; the rezoning of three sites from R-5-D zoning to high density C-3-C zoning; a radical increase in the FAR that will increase density and, therefore, noise, traffic, and congestion; the busing of thousands of students to the Foggy Bottom site; and the addition of numerous pollution source points. The new campus plan stretches to the year 2025 and will have a major, deleterious environmental impact on the Foggy Bottom community. The preparation of an EIS is therefore not only warranted, but mandated, in particular because the Application contemplates actions that will surely degrade the air quality of the Foggy Bottom neighborhood – a neighborhood which is already at a “tipping point” on the brink of unacceptable air quality. Indeed, the District of Columbia Department of Health states that, *circa* 2002, “there was no remaining ‘air margin’ in the [Foggy Bottom neighborhood].” *Foggy Bottom Association v. D.C. Board of Zoning Adjustment*, 791 A.2d 64, 73 (D.C. 2002).

Moreover, the OP’s review of the Application and new campus plan is a “major action” pursuant to §§ 6-982 & 6-983 of the DCEPA, and therefore requires an EIS. Specifically, the Office of Planning is an “authority of the District of Columbia” and the Application and new campus plan is a “new project” or activity leading to the issuance of a “lease, permit, license, certificate, other entitlement, or permission to act by an agency of the District government.” Pursuant to 11 DCMR Sec. 2407.1, the OP’s consideration and finding of merit (or lack of merit) permits the D.C. Zoning Commission to act upon the Application. Pursuant to the DCEPA, then, the OP cannot consider the Application of GWU until an EIS has been prepared (by the D.C. Office of Health) and carefully considered by the OP.

Finally, by operation of law, the OP must review and consider an EIS before making any recommendation to the Zoning Commission. D.C. Mun. Regs. tit. 11, § 507.2 (2005), pertaining to zoning requests by Colleges and Universities, explicitly provides:

Upon receiving an application for an approval under this section, the Commission shall submit the application to the D.C. Office of Planning for coordination, review, report, and impact assessment, along with reviews in writing from all relevant District department and agencies, including the Department of Transportation and Housing and Community Development, and, if a historic landmark or historic district is involved, the State Historic Preservation Officer.

The D.C. Office of Health is, by any measure, a relevant agency, and the EIS it must prepare is a writing that must be considered by OP before it issues a recommendation. Indeed, by its very name, the OP is the D.C. office responsible for considering the comprehensive, orderly growth of the District of Columbia, and the overall environmental consequences of that growth. It can not perform this vital function and properly review the Application of GWU in the absence of an EIS. For this reason, too, the Application should be deemed without merit and should not be set for a hearing.

The OP Must Not Consider the Application until GWU is in Compliance with the Existing Campus Plan

Condition 9(d) of the Campus Plan prohibits the issuance of any new permit to “construct or occupy buildings for nonresidential use on campus” if GWU is not in compliance with the conditions of the Final Order. All relevant courts state that this provision, “clearly serves two important functions that advance the District’s goals.” See, *George Washington University v. District of Columbia*, 318 F.3d 203, 211 (D.C. Cir. 2003); *George Washington University v. District of Columbia*, 391 F. Supp. 2d 109, 111-112 (D.D.C. 2005); *George Washington University v. D.C. Bd. of Zoning Adjustment*, 831 A.2d 921, 935 (D.C. 2003). This condition “strengthens the University’s incentive to comply with the housing provisions” and it “keeps housing and non-housing growth proceeding in parallel.” See, *George Washington University*, 318 F.3d at 211. Because the Application and new campus plan seek permits to construct and occupy buildings for non-residential use, and because GWU is not in compliance with various conditions of the Campus Plan, the OP should suspend any consideration of the filing.

First, it is indisputable that the GWU student “headcount” exceeds the 20,000 cap set forth in Condition 8. In upholding the legality of Condition 8 in the face of an attack by GWU, the District of Columbia Court of Appeals described the terms of Condition 8 as follows:

As a condition of approval of the campus plan, Condition 8 imposes limitations on student enrollment and the employment of faculty and staff. During the ten-year life of the plan, total student enrollment, including undergraduate and graduate students, both full and part-time, may not exceed 20,000 at any one time.

George Washington University, 831 A.2d at 937.

The simplicity of this definition – a student headcount – was intended to eliminate confusion or dissent. There can be no doubt that Condition 8’s requirements and implications were appreciated by GWU from the outset. Indeed, as the Court of Appeals states, GWU never challenged Condition 8 before the Board, but rather represented that it should be continued in each successive campus plan. See, *George Washington University*, 831 A.2d at 937.

Given the Court of Appeal’s imprimatur on the 20,000 student enrollment limitation, it is surprising, to say the least, that GWU has so blithely violated Condition 8. In a letter recently provided to the Office of Planning in connection with its announced intention to file an application for a new campus plan, GWU included a document entitled, “GW Student Enrollment: Methodology for Counting Students under the BZA Campus Plan Order.” This document clearly reveals that the “On Campus Enrollment” (“total headcount”) for the Fall 2004 semester was 20,335. Thus, the enrolled “headcount” for the Fall semester of 2004 exceeded the limitations of Condition 8 by 335 students.

Data compiled by the GWU Office of Institutional Research and posted on its web site (http://www.gwu.edu/~ire/on_campus_e05.htm and Attachment B hereto) confirms that the

enrolled "headcount" in the Fall of 2005 continued to exceed the Condition 8 limitations. The Fall 2005 enrolled "headcount" was 20,318, and exceeded the Condition 8 limitations by 318 students.

But the University's own numbers are suspect. For example, it appears that GWU has excluded from the campus headcount a large number of students actually taking classes on campus, including: foreign exchange students; English as a Second Language students; and School without Walls students. These students, who apparently number almost 2,000, contribute to the noise, congestion, pollution, and activities that the residential community finds objectionable. We understand that the Office of the Zoning Administrator is commissioning an independent auditor to examine the student headcount. Certainly, the OP should stay its hand until the Auditor's Report is available.

Faced with the fact that its own website evidences its breach of Condition 8, GWU brazenly attempts, in the "Methodology Document," to escape from the consequences of its violation by redefining "headcount." Under the creative accounting set forth in the Methodology Document, GWU purports to *subtract* various categories of students – students abroad; continuous enrollment students, Mt. Vernon housed students – to reach a headcount of 18,783. This attempt at "compliance by subtraction" cannot – and does not – withstand the barest scrutiny.

The dissembling evident in GWU's subtractions in the Methodology Document is highlighted by its Application and new campus plan, which, not uncoincidentally, contains a new definition of "headcount" set forth in Tab Q. Tab Q is unsurprisingly entitled: "Enrollment Methodology," and is a slightly modified version of the Methodology Document. The inclusion of this methodology is an admission by GWU that its current enrollment violates Condition 8 in the existing Campus Plan. GWU's attempt to "bootstrap" itself into compliance by submission of a new campus plan while in violation of the existing Campus Plan cannot – and should not – be tolerated.

Second, GWU is indisputably in violation of Condition 9(a). This Condition requires that no later than August 31, 2006, the University must provide beds for at least 5,600 full-time undergraduate students on campus when the full-time undergraduate enrollment reaches 8,000, and one bed on campus for each full-time undergraduate in excess of that number. In its "Biannual Reports Required for GW Foggy Bottom Campus Plan; BZA Application No. 16563F" ("the Biannual Report") dated February 28, 2006, GWU states that the *average* number of undergraduates enrolled "for Fall 2005 and Spring 2006" is 8,121. As GWU clearly admits, this number is an *average* and thus conflicts with definition of "headcount" endorsed in the U.S. Court of Appeals decision quoted above. The truer number of undergraduates is set forth by GWU's Office of Institutional Research which lists 9,912 undergraduates enrolled on the GWU Campus as of the Fall 2005. (Even this higher number is suspect because it apparently excludes a number of undergraduates taking classes at the University, including foreign students.) Assuming the same number of undergraduates for the Fall 2006 semester, as reported for the Fall 2005 semester, GWU must have available 7,512 beds. ($8,000 \times .70 = 5,600 + 1912 = 7,512$).

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The Report states that GWU has housing for 5,512 (not 7,512) undergraduate students, and thus is abjectly in non-compliance with Condition 9(a), and will not be by August 31, 2006.

The duplicitous nature of GWU's Bi-Annual reporting sheds a bright light on its disregard for the existing Campus Plan. Again, this behavior should not be rewarded by acceptance of the GWU Application.

* * * * *

GWU asked the United States Court of Appeals for the District of Columbia Circuit to void the Campus Plan and the limitations it imposed on GWU's expansion immediately after the Campus Plan's promulgation. Now that the Federal Circuit Court of Appeals has upheld the Campus Plan's constitutionality, GWU is attempting another end-run around the Campus Plan by applying for a new campus plan that eliminates the strictures now confining its growth. The OP should reject this brazen attempt to jettison the approved Campus Plan that was carefully crafted during an extended hearing process with the input of many stakeholders, and that remains in effect for four more years. On behalf of the FBA, we respectfully request a response to the contentions discussed above within ten (10) days, so that the FBA can promptly and fully consider its legal options regarding GWU's recent filings.

Respectfully submitted,



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