Testimony of Michael Thomas,
Commissioner, ANC 2A02
On Behalf of ANC 2A

ZONING COMMISSION
CASE No. 06-12
EXHIBIT No. 76

Zoning Commission Cases 06-11 and 06-12

Thank you, Madame Chair and Members of the Commission. I am Michael Thomas. I reside at 2501 M Street NW in the West End, where I serve as Commissioner for ANC 2A02, and am here tonight as the authorized spokesperson for ANC 2A.

The ANC requests that the pending applications be denied, as failing to satisfy either the legal requirements for campus plans or the public policies undergirding those requirements.

Like Charles Barber, and like your chair Carol Mitten, I participated in the 2000 campus plan proceedings, then as president of the Foggy Bottom Association. Comparing that experience with my Army service, I think "veteran" ***is*** an appropriate term. Ironically, this is the year I chose to "re-enlist" in community affairs.

How We Got Here – A Very Short History

In 2000 and 2001, many of us from the community, from OP and from the university, put in hundreds and hundreds of hours in preparation, negotiation, mediation, and hearings, in an effort to craft a plan that could enable the university to fulfill its mission while leaving the residents able to count on a future in the kind of residential neighborhood Foggy Bottom had been for many years.

Mr. Hood asked, why are we here. We don't think he got an adequate answer. The 2000 plan isn't perfect, but it does recognize the reality that university campuses are unusually, perhaps uniquely, intense uses of land, because of their complex

interconnectedness and synergies, the levels of activity generated at all hours, the massing of large numbers of young adults, and other factors. The Comprehensive Plan, previous planning directors, the BZA and this Commission have confirmed repeatedly that this unusually intense use of land must be limited to prevent damage to or displacement of residential neighborhoods. GWU's impacts on Foggy Bottom are particularly singled out in the Comp Plan as matters of concern.

The Board shared the concern of OP and ANC 2A "about the continued vitality of the Foggy Bottom and West End neighborhoods, as pressures associated with University expansion threaten their livability and stable residential character." The Board agreed with OP that GWU's aggressive expansion had brought Foggy Bottom and West End "to the 'tipping point,' if not beyond." It expressly found that "the University's use of its residentially-zoned property ***within the campus boundaries*** for non-residential uses has become objectionable to the surrounding neighborhoods." (BZA Order 16553-F, p 5, emphasis added) That finding meant that GWU's on-campus uses were already violating the standard of 11 DCMR 210.2, which requires that university uses be located so that they are "not likely to become objectionable to neighboring property..." The Board further agreed with FBA that "[o]nce properties are part of the university inventory, they are irretrievably lost to the residential community." (Id, p 12) The concern was that the character of Foggy Bottom/West End as a residential community was being destroyed, in violation of Section 210 and the policy it stood for.

Accordingly, a plan was adopted that for the first time imposed limits on GWU's population and student housing practices that were coupled with enforcement mechanisms. The response of the university was to sue in every court that would hear them (the Supreme Court would not). Their response is instructive – they did not sue just to invalidate provisions they had not sponsored, but to

declare illegal or unconstitutional any and all measures that would constrain their growth, including enforcement of limits they had themselves proposed. They lost on all key arguments.

The last court order was issued a year ago, but GWU had already been for several months actively seeking ways to overthrow the standards, not only of the 2000 campus plan, but of the zoning regulations on which it was based.[1] They now seek previously unimaginable new authority. Aggregating the permissions GWU seeks, the total is 2,837,602 square feet of net new constructed space (1,788,245 for the campus proper, 182,188 for the GWU portion of Square 80, and 867,169 for Square 54). That additional space would be 33% more than the 2.1 million square feet in the entire Empire State Building, and 75% of the occupiable 3.8 million square feet of space in the Pentagon, the largest office building in the world. They seek to evade the standards of Section 210, and to substitute looser standards formulated for different purposes in Chapter 24, or even less meaningful standards as conditions to the plan. That, Mr. Hood, is why we are here.

This brief history establishes a predicate for the evidence you will hear and the arguments we and others from the community will make. I wish I could tell you that the massive effort of 2000 and subsequent years had produced a diminution of impacts and a more secure residential community. It has not. Those who live on the campus boundaries are particularly beset, with a massive influx of students and activities, especially near what has become the new extended southern boundary; but those in blocks further outside the campus will also tell you that traffic, noise, student behavior and

[1] The ANC was invited to be involved in discussions with OP, FBA and GWU about plans for Square 54, in late 2004 and early 2005, and the ANC attempted to do so. However, the effort failed when OP allowed GWU to change the framework of the discussions and dictate who could be present. Thereafter, OP and GWU proceeded to draft, without discussion with the ANC, plan proposals for the campus as well as for Square 54.

other impacts have continued and increased. The reasons for limits and their enforcement, then, remain. But instead of enhancing the imperfect 2000 plan, the Commission is being asked to tear it up, and in so doing to change the settled rules of campus planning and increase impacts on the neighborhood. The burden on the applicant to show why the laboriously crafted, judicially tested limits and enforcement mechanisms of the current plan should be jettisoned should be very heavy indeed.

The Effort to Repeal Section 210

Let me turn to an analysis of what GWU is attempting to do in overturning the legal framework for campus plans.

11 DCMR 210 is the core provision of the Zoning Regulations addressing campus plans. In recognition of the unusually high level of impacts that campus uses generate in adjoining residential neighborhoods, Section 210 contains two key provisions to limit and contain those impacts: a campus-wide FAR limit (which is 3.5 in areas zoned for densities over R-5-B); and a requirement that uses be located so as "not likely to become objectionable to neighboring property because of noise, traffic, number of students, or other objectionable conditions." GWU is approaching the 3.5 FAR limit,[2] and has already been found by the BZA to be conducting uses within the campus that were objectionable to surrounding neighborhoods. They now seek to escape Section 210 entirely, because it is inconsistent with their ambitions.

First, note that Section 210.1 requires that a campus plan be approved as a special exception, and 210.4 requires submission of "a plan for developing the campus as a whole..." Here, GWU has

[2] GWU claims to have 837,848 square feet of remaining FAR under "the current Campus Plan regulations," that is, the 3.5 FAR limit of Sections 210 and 402. (Email from Sherry Rutherford, attached). That seems very high, but others will have to justify the numbers.

submitted three sets of applications. The ones you are hearing now do not show the location, height and bulk of all present and proposed improvements (omitting two major squares), nor analyze their interconnections and synergies and aggregate impacts, as contemplated by the regulation. (The traffic study does include the other projects).You will never have an integrated plan before you, and there is no effort to develop an evidentiary basis for a determination of compliance with the "not likely to become objectionable" standard for aggregate impacts. GWU has already testified in this proceeding that the commercial development of Square 54 is integral to, and in fact a precondition to, their being able to do the rest of their proposed build out. On the other hand, dedicating some or all of the space available in Square 54, the largest undeveloped parcel by far within the campus boundaries, to university uses would relieve the pressure on the remainder of the campus. The burden should be on the applicant to show no likelihood of objectionable impacts from the ***totality*** of their plan. Instead, they point to Square 54 when it suits their purposes, as for example in their list of purported public benefits to their campus plan PUD proposal (page 5), but not when it might reveal problems.

Next, consider the effects of framing this application as a massive Planned Unit Development rather than as a special exception under the protective provisions of Section 210. First, as to the FAR limit: They seek to re-zone the sites to be intensively developed to C-3-C and C-4, thereby escaping the 3.5 FAR limit of Sections 210.3 and 402, which apply only to residential properties; and then to claim additional height and massing relief contemplated by Chapter 24. OP concedes that the resulting FAR is approximately 5.0 (OP Report, page 4), or a 43% increase over what would be allowed under 210 and 402.

We submit that that result is impermissible, both as a matter of law and as a matter of policy. First, there is the hoary principle in the

law that where two legal standards lead to different results, as Section 210 and Chapter 24 do here, the provision more narrowly drawn to address the issues at hand prevails. Particularly, where a provision is drawn to protect specified interests or an identifiable protected class, it can be considered overruled or amended only by provisions that expressly state that as the intent. Here, Section 210 is drawn for the express purpose of setting the policy boundaries between university growth and preservation of residential neighborhoods. This commission has had several invitations to revise or replace Section 210, and has declined to do so. There is nothing in the regulations to indicate that Chapter 24 was intended to be applied to campus plans, overriding the protective provisions (FAR limit and finding of no likely objectionable impact) of Section 210.[3]

The proposal makes a mockery of the regulations, and would mean to neighborhoods that there were no operative, knowable, or reliable limits on university growth. Note that the method proposed here could just as easily lead to FARs much higher than 5.0, depending only on the chutzpah of the applicant and the willingness of the Commission to accept "public benefits" or "amenities" thought to match the value of the prize sought.

Second, note the effort to evade the "not likely to become objectionable" standard of Section 210.2. GWU makes no substantive effort to meet that standard, but it does suggest that by maintaining headcounts at nominally the same numbers, and by "growing up, not out" with the greatest future massing in the core of the campus, there will be no added impacts of adding over 2.8 million square feet of net new construction, including state-of the

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[3] Section 2405.7 allows the Zoning Commission to approve uses by special exception ***within*** PUDs where that would otherwise require approval of the BZA; there is no provision that allows the Commission to use umbrella PUDs in order to exchange the "flexibility" and very different standards of Chapter 24 for the standards of Section 210.

art facilities intended to be magnets of excellence. To state the proposition is nearly to refute it. If GWU succeeds in becoming a great research university, with a massive new science center and other research facilities in Foggy Bottom, will not scientists, seminars, conferences, flock to it? If they add over a thousand parking spaces, are they expecting no increased traffic? Do they expect no growth in attendance at their burgeoning sports, cultural, and other commercial attractions on campus? Can they account for the added traffic generated by the retail development they intend to spread throughout the campus? And note that they do not propose to "maintain" their headcount caps, but to redefine them in ways that the Zoning Administrator has found inadequate to measure the impacts of students housed elsewhere but educated in Foggy Bottom. If it moves undergraduate students into on-campus dormitories, GWU will retain the off-campus facilities (including HOVA, City Hall, Aston, and Columbia Plaza) as university properties. They do not commit to particular uses for those properties, but they will remain part of the densely interconnected *de facto* campus. The burden is on the ***applicant*** to show that their proposed uses will not be likely to become "objectionable because of noise, traffic, number of students or other objectionable conditions." In the face of the BZA's earlier findings, upheld by the courts, and the massive additions they seek, that is a formidable burden. This record provides no substantial evidence that would permit granting the applications.

Next, let us examine the ***grounds*** put forward by OP for using PUDs instead of the protective provisions of Section 210. First, note that OP never cites or refers to Section 210, a remarkable omission. OP's first justification for GWU's development plan is that it "reflects...the space needs of the university," as though that was the applicable standard. (OP Final Report, Page 3). OP's principal claim is that PUDs provide "the only process that will adequately provide certainty to all sides about how the plan will be fulfilled." (Id, page 19). They argue that, without PUDs, this

Commission and OP are without adequate tools to control where, at what height and massing, and for what uses, new construction will occur.

That is simply not true. Section 210.4 requires an applicant's plan to show "the location, height, and bulk, where appropriate, of all present and proposed improvements, including but not limited to" all buildings, parking and loading facilities; screening, signs, streets, and public utility facilities; athletic and other recreational facilities; and a description of all activities to be conducted and the capacity of all proposed development. Note that what can be required is not limited to the listed items. Note also that Section 210.3 permits bulk requirements for particular buildings to be increased, so long as the total bulk does not exceed that prescribed for the district under Section 402.4. Assume that Chapter 24 did not exist, and that the challenge was to formulate requirements, consistent with Section 210, that would give adequate control. There is ample talent and experience in OP and on this Commission to meet that challenge. This Commission can require the applicant to do essentially everything it would do in an adequate first stage PUD application. There is no reason to accept OP's assertion (Report page 22) that Section 210 allows GWU to allocate density on a piecemeal basis – this Commission can require otherwise. It could also fine-tune what would be required in a further processing application, to approach the design control allowed under a second-stage PUD application.

What, then, is the real difference between Section 210 and Chapter 24? It is the presumption that, once you are in PUD mindset, re-zoning and relief from height and massing limits are unremarkable, are in fact the whole point of the exercise. They simply need to be balanced by public benefits. OP says as much, by saying that the PUD process "is intended to ensure that the development potential exists for the university to accommodate" its space needs. (OP Final Report, page 19) That is, GWU's ambitions can't be

accommodated under Section 210. And once you are in Chapter 24, there is a different standard to weigh impacts on the neighboring community: Section 2403.3 provides, "[t]he 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." Substantial impacts, then, can be allowed, if the proffered benefits are alluring enough. That is a much more forgiving standard than Section 210.2, reflecting the fact that Chapter 24 was written contemplating discrete parcels that offered unusual opportunities if developed thoughtfully, not major university campuses co-located with and greatly impacting residential neighborhoods.

For the above reasons, GWU's proposal for a campus-wide PUD, and development projects subject to PUDs, violates Section 2400.4, which provides that "the PUD process shall not be used to circumvent the intent and purposes of the Zoning Regulations..."

A Few Words about "Public Benefits"

The Commission must not allow itself to take its eyes off the task at hand, which is to apply Section 210. Neither should it allow itself to be seduced by GWU's ambition to build a newly-defined "world-class university," limited to Foggy Bottom, or by the "benefits" on offer as listed in the PUD application.

GWU argues that, to be a world-class research university, it must be allowed to add substantially to its facilities, to approach the six hundred square feet per student that Georgetown University and others provide. This ambition is coupled with the assertion that students come to GWU principally because of its location in Foggy Bottom, an interesting admission for an ambitious university to make. Therefore, we are to conclude, they need to add millions of square feet in Foggy Bottom, and not elsewhere, since they have

no interest in reducing student enrollment. But Georgetown chose a very different (and successful) model of excellence: To have about two-thirds as many students (13,500 or so, only half of whom are undergraduates); and to build most of its facilities in a wholly-owned, self-contained campus. Further, GU located its law school in an area that truly needed and benefited from development, far from its core campus.

Even after pointed ANC inquiry, GWU failed to provide any evidence that they had made an effort to investigate the real possibilities of satellite campuses, to test the idea that even scholars in Renaissance literature would come to GWU only if they could be next to the White House. The Mayor has told the Council that "the development of satellite campuses is strongly encouraged to relieve growth pressure around existing campuses," pointing to the employment, educational, and revitalization benefits of such satellite campuses. (July 2006 Mayor's Draft Comprehensive Plan, EDU-3.3, page 12-19) Here, however, the Mayor's Director of Planning seems to think that such benefits can be put off until after 2025. In the meantime, facility space per student in Foggy Bottom would rise from 300 to 400, awaiting only the next GWU president with an edifice complex to ask to raise that to 500 or 600 square feet per student. The ambition is a worthy one, and there would be benefits to the community of GWU's being a better university, but it need not, and cannot consistent with the law, be done in the manner proposed by GWU.

The "public benefits" listed by GWU in its PUD application (page 5) are not relevant to a proper determination under Section 210. We note, however, that they fall into two categories: Those which are not public benefits at all, do not relate to this application, or reflect existing legal obligations of GWU; and those which are potentially beneficial but could be done by GWU in the absence of a PUD and in any event come at too great a cost. The Square 54 proposal appears here twice, as increased retail and as added tax

revenues.[4] GWU is already legally required (after strenuous court challenge) to pull most of its undergraduates into the campus. We note that new condominium buildings and apartment houses in the West End nevertheless have large contingents of students, in at least one case a majority of units in a large new apartment complex. The proposed historic district reflects a late conversion by GWU, which has torn down many structures that would have qualified for preservation; and the conversion is obviously reluctant, conditioned on GWU's getting more than they earlier dreamed possible. Standing alone, it would be welcome; as a price for building the equivalent of 75% of the Pentagon in Foggy Bottom, it is not.

Some comments on proposed plan conditions.

Condition #1: The language makes clear that GWU can again change its mind about its "needs," or about what is politically achievable, and request to amend or abandon this plan, even if it gets what it asks for. OP's assertion that this represents a "long-term maximum" (OP Final Report, page 7) is not even binding on the next Director of Planning. GWU's counsel has acknowledged that this is not a "no more" clause, and that if it were, it would not be enforceable.

Condition #2: The unstated implication, but the realistic one based on recent history, is that GWU ***will*** initiate litigation if it gets less than it has asked for, or is burdened with anything it has not volunteered. It is likely there will be litigation in any event.

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[4] Nowhere is there an analysis of how much tax revenue is lost through development of much of the rest of Foggy Bottom on a tax-free basis, the loss of sales tax to G-World cards, etc. See, Sol S. Shalit, "Growth and Expansion of Private Universities in the District of Columbia," filed by FBA; and DC tax rolls relating to GWU, filed by Commissioner Miller.

Condition #6: The first listed requirement for a PUD application, that GWU demonstrate compliance with the Zoning Regulations, means in this context the Zoning Regulations as emasculated by impliedly replacing the standards of Section 210 with those of Chapter 24. This is made very clear in two ways. First, in 6(b), the applicant is required to show that proposed height, bulk, etc are "sensitive to and compatible with adjacent and nearby non-university owned structures and uses." This standard lacks even the substance of 2403.3, which requires that impacts "not be found to be unacceptable." It is a further stealth attempt to repeal Section 210.2 by implication. Second, in 6(d), in lieu of the required certification by the applicant under Section 210.8 that the proposed construction is ***within*** the FAR allowed under Section 210.3, GWU would only be required to report the FAR that would ***result*** from the construction. That is because OP doesn't intend that there be any FAR limits on universities, and certainly not the one in the regulation.

Condition #7: The enforcement condition of the current plan should be re-written, given that GWU has been allowed to escape any enforcement of the conditions on its current plan by the expedient of filing an application for one form of relief (a new plan) rather than another (a request for further processing). The enforcement provision should read: "No application or request for any further or additional rights, including but not limited to applications under Chapters 2 or 24 of Title 11, DCMR, shall be received for filing unless accompanied by a certification by the Zoning Administrator that the applicant is in compliance with Conditions 1-25 set forth herein." (and including thereafter the last sentence of Condition 7 as proposed). Further, inasmuch as GWU has been unable or unwilling to explain how much margin of error is granted them by requiring only "substantial compliance," the word "substantial" should be deleted. That would put the onus to create a margin of safety on the entity which has control of the

elements of compliance, instead of allowing further impacts on the neighborhood, which has no power to affect compliance.

Condition #8: The promise to refrain from purchasing residentially-zoned properties in Foggy Bottom/West End for university uses is laudable. That still allows purchase and conversion to university uses of non-residentially-zoned property, making them part of the web of intense use patterns that is the campus; and they would still own, and presumably use for university uses, several residentially-zoned properties in the FB/WE area. In addition, they could, and according to Mr. Katz would, continue to purchase for investment in the area.

Condition #9: The concept of an advisory committee or other means of regular communication and consultation between the university and the ANC and residents has merit, and in fact the 2000 negotiations expended considerable effort on it. Unfortunately, this proposal has the seeds of its own failure within it, in part because it proceeds from the assumption that GWU wants to make a record of reaching out, and the community is not interested. That was not the history; without getting into detail, neighborhood leaders felt repeatedly let down by OP and GWU in trying to frame, and stick to, a forum for discussion. (see footnote 1, above) This proposal is structured to allow GWU to set the rules if any community member does not attend the initial meeting, and to block any action thereafter based on the rules or their ever-present quorum. It must be remembered that GWU representatives are paid to attend meetings; community representatives are volunteers who must carve time out of their lives to attend. If the concept is going to lead to anything useful, it will have to be re-written with input from ANC 2A.

Condition #10: For the reasons set out in FBA's motion, in which the ANC joined, the count should be of every person educated by the university. At the very least, it should include every person

educated by the university who has rights to use facilities at the Foggy Bottom campus, and thereby to add to intensity of use and resulting impacts. The OP Final Report notes that the intent is to "count every student having an individual effect in the neighborhood." (Page 12) The Zoning Administrator recommended inclusion of Mount Vernon students who take classes at Foggy Bottom. That moves in the right direction, but still does not account for all persons being educated who have "an individual effect in the neighborhood."

Condition #11: It is entirely unclear, even after GWU's testimony, whether this provision captures every person employed by GWU whose employment or associated benefits require or permit him or her to be present on the Foggy Bottom campus. A much simpler definition would be to simply count all faculty and staff employed by the university and correct for duplication. The Zoning Administrator noted that the auditor reported practical difficulties retrieving needed data about faculty and staff, which provides further support for making the task as simple, and inclusive, as possible.

Thank you for this opportunity to present the views of ANC 2A. We believe that if you thoughtfully consider the history of this applicant, the requirements of the law, and the reasons for the protective provisions of Section 210, you will reject these applications.

From: ANC 2A <anc2a@earthlink.net>
To: ANC 2A Commissioners
Subject: FW: Responses to Commissioner Inquiries
Date: Aug 29, 2006 7:16 PM

Commissioners:

Below are answers from Sherry to questions posed at our last meeting.

Thanks,
Vince

------ Forwarded Message
From: Sherry Rutherford <srutherf@gwu.edu>
Date: Tue, 29 Aug 2006 15:11:37 -0400
To: 'ANC 2A' <anc2a@earthlink.net>
Subject: Responses to Commissioner Inquiries

Dear Vince,

As you are aware, during the Commissioner question and answer period following the Campus Plan presentation at the August 19 ANC public meeting, the Commission posed three questions to which I did not provide "live" answers. The University's responses to those inquiries follow:

1. Remaining FAR on the Foggy Bottom Campus (under current Zoning Regulations)

This information is detailed in Exhibit T of the Foggy Bottom Campus Plan: 2006 - 2025. Specifically, the existing FAR for residentially-zoned property within the Campus Plan boundaries (which includes 1,460,269 square feet of land area) is 2.93 (or 4,273,094 square feet of gross floor area). The current Campus Plan regulations permit 3.5 FAR in residentially-zoned property within the Campus Plan boundaries (or 5,110,942 square feet of gross floor area, based on the existing campus residential land area noted above), which results in a remaining 837,848 square feet of gross floor area.

2. Use of satellite campus to accommodate University space needs

Consistent with its Strategic Plan, over the past several years the University has pursued a strategy to relocate certain administrative functions and staff from the Foggy Bottom campus to the University's Loudoun County "Virginia" campus. These migrations have been aimed at freeing up space at the Foggy Bottom campus to provide additional classrooms and the enhanced delivery of student services (i.e., improved customer service centers in core areas such as student accounts, payroll and financial aid). In addition, the Mount Vernon Campus accommodates many of the University's athletic and recreational facilities (including NCAA soccer and softball fields, a pool, and six outdoor tennis courts), and a project to replace the existing Pelham residence hall to provide additional undergraduate student housing at Mount Vernon is currently in the preliminary planning stage. The University continues to pursue opportunities for maximizing space on the Foggy Bottom campus for its core academic and student service functions.

3. Evaluation of the two-Stage PUD process

The University conducted its own due diligence review with respect to the two-stage PUD process and concluded it to be an appropriate zoning mechanism to achieve the development plan set forth in the Foggy Bottom Campus Plan: 2006 - 2025.

Very truly yours,

Sherry

Sherry K. Rutherford

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------ End of Forwarded Message