

Exhibit F: Additional Information on Substantial Compliance Standard

At the October 11th public hearing, Mr. Crews was asked by Con Hitchcock whether he was aware of any provision of the Zoning Regulations that used the term “substantial compliance” and Mr. Crews could not immediately cite any examples. (Tr., p. 27.) In fact, there are numerous examples of provisions of the Zoning Regulations that use both that precise phrase as well as phrases similar in intent. These examples demonstrate that the Zoning Commission, the BZA and the Zoning Administrator each have a long-standing history of exercising their judgment in interpreting the meaning of “substantial compliance.” While a more simplistic, formulaic approach of requiring strict compliance under the GW Foggy Bottom Campus Plan may appear easier to enforce, the complexities of the various compliance issues necessitate the exercise of discretion and judgment under the “substantial compliance” standard in this zoning case, for reasons similar to the numerous cases where the standard is already required.

Campus Plan Cases

The *substantial compliance* standard is already in place for several campus plans. The BZA adopted this standard in the campus plan orders for the George Washington University Campus Plan 2000-2009, the American University Campus Plan 2000-2010 and the Georgetown University Campus Plan 2000-2010. Throughout the appeals process for the George Washington University Campus Plan case, no question was raised as to the meaning or enforceability of this standard.

Zoning Regulations

The term *substantial* is also extensively used throughout the zoning regulations. Clearly, both the BZA and the Zoning Commission have a long history of interpreting this phrase in the context of the zoning regulations. Examples include the following sections of the regulations:

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| Section 223.2: | The addition shall not have a <i>substantially</i> adverse effect on the use of enjoyment of any abutting or adjacent dwelling or property. |
| Section 223.2(c): | The addition ... shall not <i>substantially</i> visually intrude |
| Section 330.1: | The R-4 District is designed to include those areas ... within which there have been a <i>substantial</i> number of conversions |
| Section 330.5(i): | For purposes of this subsection, a “handicap” means, with respect to a person, a physical or mental impairment which <i>substantially</i> limits |
| Section 354.8 (d): | The size and character of the apartment house, since the tenants of the apartment house will be expected to furnish all or <i>substantially</i> all of the financial support of the requested adjunct. |
| Section 356.6: | The hotel shall be of sufficient size and character so that the financial support of the requested adjunct may be expected to be furnished entirely or <i>substantially</i> by the hotel guests. |

- Section 802.4: ... if the Board finds that the applicant has demonstrated by *substantial* evidence that
- Section 1304.1: Exceptions from the requirements of this chapter shall be permitted ... subject to the following requirements: the excepted use ... will *substantially* advance the stated purposes of the NC Overlay.
- Section 1403.1(a): The use ... proposed will *substantially* advance the stated purposes of the RC Overlay District.
- Section 1700.3(d): To *substantially* achieve the specific land use and development policies for the following Downtown subareas
- Section 1705.1(d): Reinforce the area's economic viability by encouraging mixed use development, including *substantial* housing
- Section 1906.1(a): Exceptions from the requirements of the ARTS District ... if ... will *substantially* advance the purposes of the ARTS overlay district.

PUD Regulations

The PUD provisions of the Zoning Regulations, in particular, contain numerous references to the substantial test:

"It is the intention of the Commission that any second-stage application that is *substantially* in accordance with the elements, guidelines, and conditions of the first-stage approval shall be granted a hearing." (Section 2408.3)

"The Commission may extend the time periods ... provided ... there is no *substantial* change in any of the material facts upon which the Commission based its original approval of the PUD" (Section 2408.10)

"... an extension of the validity of a PUD may be granted by the Commission for good cause shown if an applicant has demonstrated with *substantial* evidence" (Section 2408.11)

"If the matter is set down for a public hearing, the Commission ... shall make every effort to expedite cases regarding which the Office of Planning reports and comments at the meeting suggest that: (1) the case has *substantial* merit in the public interest" (Section 3011.7)

Zoning Administrator

Similar discretionary authority is given to the Zoning Administrator under Section 3202.6 of the Zoning Regulations which requires him to process building permits authorized by orders of the BZA in accordance with the Zoning Regulations in effect on the date those orders are promulgated, provided the building permit applications and plans are "sufficiently complete to

permit processing without *substantial* change or deviation.” The Zoning Administrator is given this same authority with respect to certificates of occupancy under Section 3203.9, which again uses the phrase “without *substantial* change or deviation.”

Variance Test

The granting of any variance relief under the regulations is premised on a finding by the BZA that:

“the relief can be granted without *substantial* detriment to the public good and without *substantially* impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map” (Section 3103.2) and every BZA Order approving a variance contains this language.

Chancery Cases

Finally, the term “substantial compliance” is used throughout Chapter 10 of the regulations dealing with the Mixed Use Diplomatic Overlay District and Chancery uses. Specifically, Section 1001.4 states that:

“To ensure compatibility with historic landmarks and historic districts, *substantial compliance* with District of Columbia and federal regulations governing historic preservation shall be required with respect to new construction and to demolition of or alteration to historic landmarks.”

Further, Section 1002.8 empowers the Foreign Missions Act/Board of Zoning Adjustment with the authority to make the final determination as to *substantial compliance* with DC Law 2-144 and the federal regulations governing historic preservation. In a long line of chancery cases, this standard has been interpreted and applied by the FMA-BZA and the courts have upheld the *substantial compliance* standard. Further, both the FMA-BZA and the courts have recognized that this *substantial compliance* standard does not require strict compliance. In *Sheridan Kalorama Historical Association v. Christopher*, 49 F.3d 750, 759 (DC Cir. 1995) the court stated:

“The FMA requires the DCFMA-BZA to consider only whether an applicant has substantially, not strictly, complied with federal historic preservation regulations.”

Conclusion

In summary, the Zoning Regulations are replete with examples of discretionary authority accorded to the BZA, the Zoning Commission and the Zoning Administrator and there is no basis to suggest that same discretionary authority cannot be applied here in determining whether the University is in substantial compliance with the conditions of the Campus Plan. Further, proposed Condition 7 refers to substantial compliance with all Conditions 1 through 25. Many of these conditions – e.g., the creation of an Advisory Committee, providing students with information about housing opportunities outside the Foggy Bottom/West End Area, processing the Historic District application, finalizing the Streetscape Plan with DDOT – inherently require a subjective analysis as to whether the intent of the condition has been met, rather than a strictly

numerical analysis. Accordingly, *substantial compliance* is the appropriate standard. Indeed, this standard is no different than the evaluation the Zoning Commission will make at the time of each second-stage PUD filing as to whether the application is “*substantially in accordance with the elements, guidelines and conditions of the first-stage approval....*”