

BEFORE THE
DISTRICT OF COLUMBIA ZONING COMMISSION

GEORGE WASHINGTON UNIVERSITY
FOGGY BOTTOM CAMPUS PLAN & PUD

Z.C. No. 06-11 & 12

MOTION TO STRIKE

The Foggy Bottom Association ("FBA") and Advisory Neighborhood Commission 2A, parties in opposition in these consolidated cases, hereby move to strike the memorandum dated 4 January 2007 from the District Department of Transportation ("DDOT") for the following reasons.

The filing is untimely. At the hearing on 30 November 2006, the Commission instructed FBA and the ANC to file written questions with DDOT on issues raised by FBA's traffic expert, Joe Mehra, by 7 December 2006, with DDOT's written answers due on 21 December 2006. This two-week period was offered even though DDOT representative at the hearing, Jeffrey Jennings, told the Commission that DDOT could file a response within three business days.

FBA and the ANC made a timely filing, but DDOT did not. Indeed, it appears that DDOT did not begin work on the matter until *after* its filing deadline, when counsel for FBA and ANC was asked by DDOT on 29 December 2006 to provide copies of Mr. Mehra's testimony, which had been provided to DDOT previously.

The response is incomplete. FBA and the ANC filed 15 questions. DDOT purports to answer only 11 of them.

The response is prejudicial to the parties. The Commission's deadline contemplated that parties would be able to address DDOT's statements in proposed findings of

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fact and conclusions of law, which were due on 29 December 2006. By submitting its incomplete “answers” after that deadline and after the record has closed, DDOT made it impossible for parties to respond to points made.

Moreover, DDOT’s responses underscore why the procedure utilized by the Commission here is prejudicial and contrary to rules applicable to such a “contested case” proceeding. First, there is no opportunity for follow-up questions to evasive answers. Thus, Question 3(f) notes DDOT’s written testimony that the proposed underground garages will only “try” to “assist” in resolving congestion and asks whether it would be fair to conclude that DDOT does not have much confidence that the garages will *in fact* “assist” in resolving congestion. DDOT responds that it does not enforce zoning requirements, which is no answer to a direct question about traffic impacts.

Second, the procedure deprives parties in opposition of the procedural fairness built into contested case proceedings. Instead of having to answer questions under oath at a public hearing, DDOT is allowed to draft answers that are not under oath and with the luxury of knowing that there will be no follow-up.

Third, there is nothing to prevent DDOT from receiving *ex parte* communications from the applicant or the applicant’s traffic expert, who may seek to “explain” why an opposing expert’s testimony should not be credited. No such explanation would appear in the record if the agency is excused from testifying, and parties will not be able to explore whether the agency’s analysis is independent or based on extra-record facts.

We note in this regard that Ms. Reed, the DDOT witness, acknowledged that DDOT had received a memorandum from Wells & Associates in response to Mr.

Mehra's initial testimony – a fact that would not have been elicited but for questions asked of Ms. Reed during the hearing.

Here too, it is telling that one of the questions that DDOT refuses to answer in its 4 January 2007 filing involves the identity of any persons outside DDOT who provided information in connection with the preparation of DDOT's answers and the nature of that information (Question 14). DDOT's failure to respond raises questions about the independence of the analysis offered.

For these reasons, FBA and ANC 2A respectfully ask that the motion be granted.¹

Respectfully submitted,

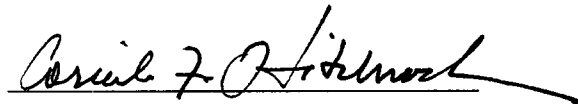


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11 January 2007

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically this 11th day of January, 2007 upon Maureen E. Dwyer and David Avitabile, counsel for the applicant, at Maureen.Dwyer@pillsburylaw.com and David.Avitabile@pillsburylaw.com, upon Barbara Kahlow of the West End Citizens Association at Barbara.Kahlow@verizon.net, with a copy to Jeffrey Jennings of DDOT at Jeffrey.Jennings@dc.gov.



¹ To the extent that the Commission may conclude that leave is required to file this motion, FBA and the ANC request that leave be granted, since there is no way otherwise to object to an untimely submission.