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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:

Thee Foggy Bottom Association ("FBA") hereby requests reconsideration of the Procedural Order on Remand (the "Remand Order"), which was served on 23 February 2010. For the reasons set forth below, we respectfully submit that the order is procedurally deficient and deprives FBA and the community of an opportunity to be heard on the issues on remand.

Background.

As the Remand Order notes, the Commission that issued the 2007 campus plan order was faced with competing arguments on a central issue, namely, the proper methodology to measure the number of students associated with George Washington University's ("GW") Foggy Bottom campus. GW proposed a "primary relationship" test that would count only those students who live or take classes on the Foggy Bottom campus. GW's proposal excluded students who live on its Mount Vernon campus and are counted under a separate campus plan. GW also excluded students from its Loudoun County campus or other campuses, who also use GW's flagship Foggy Bottom campus and are not counted in any campus plan.<sup>1</sup>

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<sup>1</sup> Indeed GW's GradLife FAQs' web page touts the opportunities for graduate students (the primary population at the Loudoun campus) to take part in Foggy Bottom student life, including participation on intramural sports teams and use of the gym (the Lerner Health and Wellness Center), the Foggy Bottom counseling office, and GW student health services on K Street. <http://gradlife.gwu.edu/GradLifeFAQs/> There may of course

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By contrast, FBA urged the Commission to adopt an “intensity of use” test that considers the impact of all GW students who use the Foggy Bottom campus because their presence relates to their status as GW students and adds additional strains on a residential neighborhood. This view was endorsed by the Zoning Administrator.

The Commission’s order did not resolve these conflicting views. Instead Finding 47 of the 2007 campus plan order simply stated that GW’s headcount definition was being used based on a student’s “primary relationship” with the Foggy Bottom campus. The lack of an explanation for this choice prompted the remand.

The Remand Order does not set out a proposed finding of the Commission’s views on headcount methodology and give parties an opportunity to comment. Instead, the Remand Order directs GW, as the prevailing party, to “draft a proposed order on remand that cures the deficiencies found by DCCA.” FBA and other parties are given no opportunity to respond on the merits and can merely correct GW’s characterization of their positions or the Commission’s rationale. As we now demonstrate, this approach is contrary to law and should be set aside.

### Discussion.

1. It is a basic legal principle that agencies must demonstrate that they have taken a “hard look” at the issues raised in a case. *Eilers v. District of Columbia Bureau of Motor Vehicle Services*, 583 A.2d 677, 686 (D.C. 1990). This means that an agency must “make a meaningful attempt to come to grips with the difficult factual issues raised by the record, *id.* at 685. In addition, the agency must disclose the basis of its decision by an “articulation with reasonable clarity of *its* [the agency’s] reasons for the decision.” *Dietrich v. District of Columbia Board of Zoning Adjustment*, 293 A.2d 470, 473 (D.C. 1972), cited in *Washington Times v. Department of Employment Services*, 724 A.2d 1212 (D.C. 1999) (emphasis added).

There was no such “hard look” here. The parties know that the Commission ruled in GW’s favor in 2007, but they do not know *why* the Commission reached that conclusion. The procedures outlined in the Remand Order will not cure the deficiencies identified by the Court because that order asks GW to perform the impossible: It asks *GW* to explain the *Commission’s* reasoning from three years ago. Unless GW or its counsel are clairvoyant, that simply cannot be done.

Moreover, the record contains no explanation as to why the Commission

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be additional reasons for non-resident students to come to Foggy Bottom, *e.g.*, to see a GW basketball game or to socialize.

might have accepted GW's view, since GW's argument focused solely on Mount Vernon students who are counted under the Mount Vernon campus plan; GW made no attempt to address students from the Loudoun campus, who enjoy free shuttle bus service to Foggy Bottom and are not covered under any campus plan.

Thus, GW cannot refer to the existing record for reasons that would support a conclusion to adopt its proposed "primary relationship" test. That only way that GW can try to satisfy the Remand Order is to conjure up *new* arguments and new rationales that were not presented to the Commission previously and thus could not have been the basis for the Commission's decision. Moreover, the Remand Order expressly precludes FBA from responding to these arguments on the merits. That denial of a right to be heard violates the fundamental due process rights enjoyed by parties in contested cases under the District of Columbia Administrative Procedure Act ("DCAPA").

The DCAPA appears to contemplate a procedure to be used when, as has happened here, a majority of the agency members who will decide the case did not personally hear the evidence. In that situation, D.C. Code § 2-509(d) states that:

[N]o... decision adverse to a party to the case... shall be made until a proposed... decision, including findings of fact and Conclusions of law, has been served upon the parties and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of those who are to render the final decision, who... shall personally consider such portions of the... record... as may be designated by any party.

Cases from the Court of Appeals make it clear that the agency (or at least those members who participated in the original decision) is responsible for drafting and serving a proposed order to which all parties can respond before the agency makes a final decision. See *Sherman v. District of Columbia Commission on Licensure to Practice the Healing Arts*, 476 A.2d 667 (D.C. 1984); *Gallothom v. District of Columbia Alcoholic Beverage Control Board*, 820 A.2d 530 (D.C. 2003). This approach satisfies the due process goals of the DCAPA, since it puts a tentative position on the table, allows parties to comment, and gives new Commission members an opportunity to consider the wisdom of the various arguments, which they are free to accept or reject. This procedure is designed to assure that the agency – with the participation of all members – can give the issues the "hard look" that is required under the DCAPA.

By delegating initial drafting responsibility to GW as the "prevailing party," the Remand Order implies that the 2010 Commission must inevitably reach the same conclusion as the 2007 Commission. That is not the law. Indeed, such a result would be flatly inconsistent with the "hard look" requirement just cited.

Neither the DCAPA nor the Court of Appeals' decision requires the Commission to adhere to a prior decision, particularly if the Commission should conclude on reflection that the prior decision cannot be defended. That is certainly a possibility here. The fact that GW proposes to exclude some non-resident students who are covered by another campus plan is not a reason for refusing to consider the impact of *all* non-resident students, even those *not* covered by a campus plan.

It is certainly not unusual for agencies to reverse themselves after a court remand if they decide that the facts do not support the initial conclusion. It is also not unusual for newly appointed commissioners, exercising their independent judgment, to decide that they cannot agree with the prior ruling. *E.g., Taiwan Semiconductor Industry Ass'n v. Motorola, Inc.*, 266 F.3d 1339 (Fed. Cir. 2001) (new commissioners adopt prior dissenting opinion).

2. There is a final reason for the Commission to vacate the Remand Order and to engage in a more searching inquiry into the headcount issue. A recent issue of the GW HATCHET reported that GW was only 60 students away from exceeding the enrollment cap for the Fall 2009 semester, which was seen as posing a problem for GW's further growth. The article reported that GW's president informed the GW board of trustees that GW was planning to "manipulate" the Foggy Bottom headcount to enable GW to admit more students each year. D'Ambra and French, "Number of students on campus nears limit," GW HATCHET (5 November 2009) (copy attached).

It is, to say the least, disturbing to read that GW plans to "manipulate" Foggy Bottom enrollment to permit more students than the Commission approved in the 2007 campus plan order. It is also disturbing because GW's application asked the Commission to adopt a campus plan that would last for 20 years, yet only three years into the plan, GW wants to "manipulate" the numbers and criteria that GW itself proposed in order to fuel growth in the number of students. It is even more disturbing when the Remand Order tells such an applicant, in effect: "Draft an order on headcount that the neighbors can't try to rebut." Far from helping the Commission to take a "hard look" at the headcount issue, the procedures in the Remand Order could well prevent any kind of serious look at the issues. That is contrary to the DCAPA and prejudicial to the community that has to live with the results.

### Conclusion.

For these reasons, the deficiencies identified by the Court of Appeals cannot be remedied by the procedure outlined in the Remand Order. FBA respectfully submits that, given the complexity of the case and the centrality of the headcount issue to the ultimate decision, the Commission should reopen the case for a *de novo* examination of the headcount issue and receive new testimony or, at a minimum,

an opportunity for counsel to present argument and answer the Commission's questions. In the alternative, the Remand Order should be vacated, and the Commission should prepare and serve its own draft order under D.C. Code § 2-509(d), to which all parties can then respond on the merits.

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 5<sup>th</sup> day of March, 2010 upon Maureen E. Dwyer and David M. Avitabile, Pillsbury Winthrop Shaw Pittman, 2300 N Street, NW, Washington, DC 20037; Advisory Neighborhood Commission 2A, c/o West End Library, 1101 24<sup>th</sup> Street, NW, Washington, DC 20037; Barbara Kahlow, West End Citizens Association, 800 25<sup>th</sup> Street, NW, # 704, Washington, DC 20037; Jennifer Steingasser, Office of Planning, 2000 14<sup>th</sup> Street, NW, Washington, DC 20009; Alan Bergstein, Office of the Attorney General, 1100 15<sup>th</sup> Street, NW Suite 800, Washington, DC 20005.



Cornish F. Hitchcock

# Number of students on campus nears limit

**By: Amanda D'Ambra and Lauren French  
Hatchet Reporters**

**Posted: 11/5/09**

The University was 60 students away from exceeding the city-imposed enrollment cap for the Foggy Bottom campus this semester, likely reflecting increased interest in the University, but posing a problem for GW's future growth.

With the level of students close to reaching the full-time student cap, the University is looking for ways to decrease the student count by encouraging students to study abroad and moving programs to other campuses, University President Steven Knapp said last month at the Board of Trustees meeting.

The high enrollment numbers show that the University is able to attract and enroll more students than ever, but if the University accidentally exceeds the enrollment cap, GW will face substantial fines and other troubles from the D.C. government.

Two caps restrict the Foggy Bottom campus. The headcount cap limits Foggy Bottom to 20,000 students and is measured by subtracting students studying abroad, students enrolled without a defined graduation date, and students living or taking all of their classes at the Mount Vernon campus from the total number of students at the Foggy Bottom and Mount Vernon campuses, according to the spring 2009 Foggy Bottom Campus Plan Interim Compliance Report.

The other limit - the one the University is close to exceeding - is the full-time equivalent cap, which limits Foggy Bottom to 16,553 full-time or full-time equivalent students, who are "a fraction of part-time students" based on credit counts, the report states. Deputy General Counsel Charles Barber said the D.C. Zoning Commission has only generally addressed what the punishments for GW would be if the University exceeds either cap, but Barber said fines or the denial of future building permits could occur.

At the board meeting, Knapp said the University plans to look at ways to slightly manipulate the count of students at Foggy Bottom, thus enabling the University to admit more students each year.

One model mentioned is the "D-Plan," which is Dartmouth University's model. In that plan, students are required to spend part of their tenure at

Dartmouth on leave from the university, either abroad or in some other capacity.

GW has also looked in the past to "balance out" its study abroad numbers by encouraging more students to go abroad in the fall semester, said Senior Associate Vice President for Operations Alicia O'Neil. Another option is to move programs from the Foggy Bottom campus to the Mount Vernon or Virginia campuses. The forensic science department was moved to the Mount Vernon campus earlier this year, Knapp said.

While no definite plans have been set, Barber and O'Neil said the University is brainstorming ways to further rearrange Foggy Bottom enrollment and programs.

"In terms of moving programs, it's being considered. In terms of where and when and how, I don't think there have been any decisions yet," O'Neil said. She added, "There has long been a discussion in how to best use the Virginia campus."

Enrollment caps become an issue particularly at times when GW sees more students accept their admissions offers. This fall, for example, University officials thought more students would decide mid-summer to not attend GW because of the recession, but instead a record number of students accepted and stayed.

This high yield scares Asher Corson, an Advisory Neighborhood Commission 2A commissioner and president of the Foggy Bottom Association. Corson, who is also an alumnus of the University, said he does not believe GW would "maliciously" go over the cap but believes the method of counting "does not reflect reality."

Corson said GW might accidentally exceed its cap if more students attend than the University planned. The method of counting students has been a point of contention between the Foggy Bottom Association and the University. When the Zoning Commission approved GW's campus plan and passed the caps, the association filed an appeal against the Zoning Commission's decision.

Barber said he listened to the Foggy Bottom Association's "theory of the world" and said of the group, "They want to count everyone who steps foot on the campus."

Corson said the enrollment cap comes down to a "quality of life" issue.

"We are protecting our quality of life, more students mean noise, traffic and more people in Foggy Bottom," Corson said. "For the people in the neighborhood, it does not matter if students are taking one class or four, they are still on campus."