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ZONING COMMISSION
District of Columbia

CASE NO. 06-12

EXHIBIT NO. 252

ZONING COMMISSION
District of Columbia
CASE NO.06-12
EXHIBIT NO.252

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 06-11B/06-12B**

Z.C. Case Nos. 06-11 and 06-12

**Applications of The George Washington University for Special Exception Approval of a
Campus Plan and for Approval of a First-Stage Planned Unit Development and
Related Zoning Map Amendments for the Foggy Bottom Campus**

Order on Remand

May 24, 2010

This proceeding concerns two applications submitted by The George Washington University (“Applicant,” “University,” or “GW”) concerning its Foggy Bottom campus: Z.C. Case No. 06-11, an application for special exception approval of “The Foggy Bottom Campus Plan: 2006-2025” (“Campus Plan”) and Z.C. Case No. 06-12, an application for review and first-stage approval of a planned unit development and related amendments to the Zoning Map of the District of Columbia applicable to University-owned properties within the campus boundaries. The Zoning Commission for the District of Columbia (the “Commission”) consolidated the applications and considered Z.C. Case No. 06-11 pursuant to §§ 210, 3035, and 3104 of the Zoning Regulations, and Z.C. Case No. 06-12 pursuant to chapters 24 and 30 of the Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations. By order effective October 26, 2007, the Commission approved the applications subject to conditions (Z.C. Order No. 06-11/06-12).

Parties to this proceeding, in addition to the Applicant, are Advisory Neighborhood Commission (“ANC”) 2A, the Foggy Bottom Association (“FBA”) and the West End Citizens Association (“WECA”). FBA appealed the Commission’s decision to the District of Columbia Court of Appeals (“Court of Appeals” or “DCCA”). By decision dated September 3, 2009, the Court of Appeals affirmed the Commission’s decision except to remand “for further proceedings with respect to the method of counting students.” *Foggy Bottom Ass’n v. D.C. Zoning Comm’n*, 979 A.2d 1160, 1176 (D.C. 2009).

The pertinent portion of the Court of Appeals ruling that resulted in this remand is as follows:

One of the more contentious issues during the hearings was the method of calculating the number of students using the Foggy Bottom campus, for the purpose of enforcing limits. . . . The University proposed a “primary relationship” test, which would, in general, count all students who either live or take classes on the Foggy Bottom campus, but exclude those students who either reside or take all their classes at GW’s satellite campus, Mount Vernon. FBA advocated an “intensity of use” test, whereby all students using the Foggy Bottom campus would be included, regardless of whether they were also counted in a different campus’s plan. The Commission adopted GW’s “primary relationship” test without much analysis

The Commission did not address FBA's argument that all students coming to the Foggy Bottom campus add to the strain on the neighborhood, and therefore should be counted in the campus plan, regardless of whether those students are also accounted for in the Mount Vernon plan.

...

Because the Commission did not demonstrate a rational connection between its findings of fact and its conclusion, we remand to give the Commission the opportunity to articulate its reasoning.

979 A.2d at 1173-1174.

PRELIMINARY MATTERS

Pursuant to the Court of Appeals' instruction to the Commission that it "articulate its reasoning" for adopting the University's methodology for counting students, the Commission determined it would issue a written order that sets forth its explanation as to why the primary relationship test proposed by the Applicant should be used with respect to the method of counting students rather than the intensity of use test proposed by FBA, based on the evidence in the record of Z.C. Case Nos. 06-11 and 06-12.

To assist the Commission in its proceedings on remand, and mindful of the Court of Appeals' limited instruction to "articulate its reasoning" for its decision, the Commission, through the issuance of a Procedural Order on Remand requested that the University, as the prevailing party on the issue, provide the Commission with a proposed order that would cure the deficiencies found by the Court of Appeals. Specifically, the Commission asked the Applicant to propose findings of fact based on the exclusive record of Z.C. Case Nos. 06-11 and 06-12, and conclusions of law that flow from those findings of fact.

The Commission also provided FBA, ANC 2A, and WECA the opportunity to submit a revised version of the proposed order for the sole purpose of making such corrections to the Applicant's characterization of their respective positions or the Commission's rationale as each considered necessary. Again, the Commission directed these parties to base any additional or revised factual finding on the exclusive record of the case. Only FBA provided a proposed revised order.

Pursuant to § 3005.25 of the Commission's Rules of Practice and Procedure, a Commissioner may vote at a decision meeting even if he or she had not attended any of the prior hearings or meetings if they have read the transcript and reviewed the complete record. Pursuant to the Procedural Order on Remand, the Applicant and FBA cited the transcript page or the exhibit that supported each statement made in the Applicant's proposed order and FBA's proposed revision and filed a copy of all non-duplicative referenced transcript pages and exhibits cited. These

submissions constitute the transcript and the complete record for the purposes of this limited remand, all of which have been read by the four participating Commissioners.

This order was not sent to WECA, FBA, or ANC 2A for the filing of exceptions and the presentation of argument, as had been stated in the Applicant's proposed order. Such procedures are followed "[w]henever in a contested case a majority of those who are to render the final order or decision did not personally hear the evidence." Section 10(d) of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1208; D.C. Official Code § 1-1509 (d)). When the proposed order was filed, this Commission consisted of five members; three of whom (and thus a majority) had not heard the case. However, as a result of an intervening resignation, there were but four Commissioners available to decide whether to adopt this order on the date that the matter was scheduled for decision. Of these four, only two "had not personally heard the evidence." These Commissioners did not constitute a majority of those who were to "render the final order."

In addition, this order is not the final order in the case, but a supplementary order that explains the basis for a decision already made and not disturbed by the Court of Appeals. The entities adversely affected by the decision were given an opportunity to comment on the proposed order submitted by the Applicant and, since this adopted order is substantially similar to the order proposed, it serves no purpose to repeat the process. Nevertheless, even though this is not a traditional final order, all parties will be able to utilize the reconsideration process set forth at 11 DCMR § 3029 for the limited purpose of identifying any deficiency in the Commission's compliance with the remand instruction.

The use of the present tense (the Commission finds, concludes, etc.) reflects the findings and conclusions that led to the adoption of Z.C. Order No. 06-11/06-12), but which were not expressly stated in that order. This Commission makes no finding other than that this adopted order adequately articulates the basis for the Commission's decision to utilize the primarily relationship methodology.

FINDINGS OF FACT

1. The University proposed a set of conditions as a part of its 2007 Foggy Bottom Campus Plan. *See* Exhibit 31 at p. 13 (GW Pre-Hearing Submission); *see also id.* at Exhibit Y (Pre-Hearing Submission: Proposed Conditions).¹ These conditions included definitions to provide clarity and specificity to the University's commitments and to promote transparency with respect to issues of Campus Plan compliance. *Id.*
2. As a part of these definitions, the University proposed a detailed methodology for determining what constitutes a "Foggy Bottom student" under the student head count and

¹ All citations are to the record for Z.C. Case No. 06-11.

student full-time equivalent (“FTE”) count for purposes of determining maximum student enrollment at the Foggy Bottom campus. *See* Exhibit 31 at Exhibit Q (Pre-Hearing Submission: Enrollment Methodology). To determine whether a student enrolled in a creditable course at GW was a “Foggy Bottom student,” the University separated the categories of students who have a “primary relationship” with the Foggy Bottom campus from those categories of students who were either “associated with other campuses” or “otherwise not present or active on the Foggy Bottom campus.” *See* Exhibit 99 at pp. 5-6 (GW Supplemental Submission). The University asserted that this approach would appropriately measure student impact at the location where the students had a “primary relationship” while promoting the continued use of satellite campuses as a means to accommodate its space and growth needs. *Id.*

3. In response to questions raised by the Commission and FBA during the first night of hearings and to provide guidance as to which students had a “primary relationship” to the Foggy Bottom campus and therefore should be counted as “Foggy Bottom students,” the University prepared a detailed submission that, in part, described the categories of students enrolled at GW and articulated why each category was, or was not, a “Foggy Bottom student,” considering the rights, privileges, and practices of each category of student with respect to the Foggy Bottom campus. *Id.* at p. 6; *see also id.* at Exhibit B.

Mount Vernon Students

4. GW operates two campuses in the District of Columbia: the Foggy Bottom campus and the Mount Vernon campus. Both campuses are located in residence zone districts and are therefore subject to the requirements of § 210 of the Zoning Regulations (Title 11 DCMR). The two campuses offer traditional undergraduate classes, residence halls, and student support and recreational facilities. *Id.* at Exhibit B pp. 1-2; *see also* Exhibit B at p. 5.
5. As a part of the proposed 2007 Foggy Bottom Campus Plan, the University re-evaluated the relationship between the Foggy Bottom and Mount Vernon campus plans. Under the 2000 Foggy Bottom campus plan, the University had excluded all students counted under the approved Mount Vernon Campus Plan; that is, Mount Vernon residents and non-resident/commuter students. The Mount Vernon campus is subject to its own enrollment limitations, *see id.* at Exhibit B. p. 6, and the University noted that the practice of excluding all students enrolled at the satellite campus was consistent with other institutions that exclude students on satellite campuses completely from the enrollment counts associated with their main campus. *See* Exhibit 99 at p. 5 n. 3; *see also id.* at Exhibit B p. 6 n. 8.
6. Under the 2007 Foggy Bottom Campus Plan, the University proposed to include all Mount Vernon nonresident or commuter students who also take classes at the Foggy

Bottom campus as “Foggy Bottom students.” *Id.* at Exhibit B at p. 6. Students who reside on the Mount Vernon campus or who take all of their classes at Mount Vernon would be excluded from the definition of “Foggy Bottom students.” *Id.*

7. With regard to the students who reside at the Mount Vernon campus, the University argued, the primary impacts from these students are on the community in which they reside; that is, the residential neighborhood surrounding the Mount Vernon campus, not the residential neighborhoods surrounding the Foggy Bottom campus. The University asserted that these students were unlikely to generate objectionable impacts at the Foggy Bottom campus due to their limited contact with the Foggy Bottom campus as well as GW initiatives such as the shuttle bus that minimizes the traffic and parking impacts of travel between the Foggy Bottom and Mount Vernon campuses. *Id.* at pp. 6-7. The Commission agrees with this analysis and finds that:
 - a. While the students who reside at the Mount Vernon campus or who take all of their classes at Mount Vernon use certain facilities at the Foggy Bottom campus, the impacts of those students on neighborhoods surrounding the Foggy Bottom campus are similar to the impacts of other visitors to the campus in that they have limited contact and do not impose significant impacts on the use of neighboring property.
 - b. Mount Vernon campus residents are unlikely to create objectionable conditions related to traffic or parking in the neighborhoods abutting the Foggy Bottom campus, because those students do not enjoy reciprocal parking privileges at the Foggy Bottom campus and, in any event, are likely to travel using a GW-operated shuttle bus between the two campuses. *Id.*
 - c. While Mount Vernon campus residents may travel to Foggy Bottom to participate in student activities, the Mount Vernon campus provides a “full panoply” of student-oriented programming, and technological advancements limit the students’ need to travel to Foggy Bottom for course-related materials such as textbooks and library research materials. *Id.* at pp. 5-6.

Other Off-Campus Students

8. The University also offers education programs at locations other than the Foggy Bottom and Mount Vernon campuses.
 - a. A third campus is located in Loudoun County, Virginia, which generally offers graduate degree and certificate programs as well as research centers. *Id.* at Exhibit B at p. 2. As such, the Loudoun County campus serves a different set of

nontraditional students pursuing executive and other part-time programs as well as graduate students engaged in research. *See* Exhibit 99 at p. 5.

- b. The University's education centers offer graduate degree programs targeted to working adult professionals who live nearby, and corporate/government sites, which offer programs similar to those offered at the education centers but are more limited because they are keyed toward the hosting government or corporate institution. *Id.*
 - c. The University also offers distance learning programs and courses. *Id.*
9. The University contended, and the Commission agrees, that the categories of students served at the locations described in finding of fact 8 should be considered "off-campus students" who lack a "primary relationship" to the Foggy Bottom campus, but instead have a primary relationship with the location that directly provides their education. Specifically, the Commission finds it is appropriate to consider students at these facilities to be off-campus students because:
- a. These students have limited rights and privileges to use Foggy Bottom campus facilities or to participate in Foggy Bottom campus activities. *Id.* at Exhibit B at p. 3.
 - b. These students are not eligible to live in GW housing, do not have any rights to use the Lerner Health and Wellness Center, are not permitted to participate in organized intercollegiate athletics or student government, and generally do not participate in other student activities. *Id.* Students enrolled for at least one credit at the Foggy Bottom campus are eligible to use the Lerner Health & Wellness Center. *Id.* at p. 3 n. 2.
 - c. While these students are permitted to use the main library at the Foggy Bottom campus as well as the student bookstore, modern technologies and University policies, as well as a branch library at the Loudoun County campus, limit the need for these students to travel to the Foggy Bottom campus. *Id.* at pp. 3-4.

Office of Planning Report

10. In its report, the Office of Planning ("OP") agreed with the University's proposed definition, which it found was "intended to count every student having an individual effect on the [Foggy Bottom/West End] neighborhood." Exhibit 51 at p. 12 (OP Report). OP agreed with the exclusion of students "living at or attending all of their classes at [the] Mount Vernon Campus," but did not specifically address FBA's contention that GW's proposed method would not adequately measure the intensity of use of the campus. *Id.*

Zoning Administrator Audit

11. At the request of OP as well as FBA and ANC 2A, the Office of the Zoning Administrator (“ZA”) conducted an audit of GW’s student enrollment to assess GW’s compliance with the 2000 campus plan as well as to “request Zoning Commission guidance in conducting future student counts in the District of Columbia.” Exhibit 81 at p. 1 (ZA Audit). The audit report explained GW’s enrollment methodology and its definitions, including how students at the Mount Vernon campus and other locations are counted, and the ZA accepted this explanation. *See id.* at pp. 2-3; *see also* Tr. Oct. 11, 2006 at pp. 29-30 (testimony of then-ZA Bill Crews stating “we accepted the university’s methodology of how they’re counting students”); Exhibit 81 at Appendix A pp. 3-8.
12. Based on the audit results, the ZA recommended that the Commission further “refine and clarify the definition and methodology for conducting future head counts.” *Id.* at p. 4. Specifically, the ZA recommended that Mount Vernon students who attend classes at Foggy Bottom should be included in the Foggy Bottom head count, even if they are already counted under the Mount Vernon campus plan. However, at the public hearing on the applications, the ZA clarified that this was his recommendation only, and that the ultimate decision was a “policy decision” left up to the Commission. *See* Tr. Oct. 11, 2006 at pp. 31-32 (“So whatever the Commission determines, the more specific the better, of what they consider to [be] a person having an impact on the neighborhood, the better off we all are.”).

FBA Argument

13. FBA proposed that a “Foggy Bottom student” should be defined as either all students enrolled at GW or “the number of persons being educated by GW who at any given time attend classes or have the right to use facilities at the Foggy Bottom campus” since “all such persons add to the intensity of uses” at Foggy Bottom. *See* Exhibit 207 at pp. 3-4 (FBA and ANC 2A joint submission regarding GW’s Proposed Conditions); *see also* Exhibit 187 at pp. 7-9 (FBA PowerPoint); Exhibit 188 at Tab 4 (FBA Memorandum regarding Enrollment Data). FBA testified that the University’s headcount methodology began with the reporting of students to the U.S. Department of Education and the Internal Revenue Service and then proceeded to eliminate categories of students, including students from the Loudoun County campus and other enrolled students such as students studying abroad, continuous enrollment students, and Mount Vernon students. Exhibit 48, Oberlander Declaration, at pp. 7-10; *see also* Exhibit 81 at Exhibit Q. In urging the Commission to focus on the intensity of use of the Foggy Bottom campus, FBA stated that there “is still too little information being disclosed about student enrollment,” even though the University had the burden of justifying its “primary relationship” proposal and exclusions of students from the overall limit. Exhibit 188 at Tab 4, p. 1.

14. FBA testified that the University had changed methodologies over time and in FBA's view had been inconsistent in who was being counted. *Id.* at pp. 1-3. Essentially, FBA argued that GW should count students based on its total enrollment, as reported to such agencies as the Department of Education, or, at minimum, that headcount should include "every person educated by the university who has rights to use the facilities provided students at the Foggy Bottom campus, since all such persons add to the intensity of uses and thereby the impacts on the co-located residential community." Exhibit 207 at pp. 3-4; Exhibit 188 at Tab 4.
15. FBA's proposed findings of fact and conclusions of law included a holding that the University had not carried its burden as the Applicant on the methodology issue because it has "not provided adequate evidence to identify exactly how many students who live at Mt. Vernon and elsewhere are not being counted. Since the number of students is an important element of campus plan cases, since concerns about overenrollment were continuously expressed in the 2000 campus plan case and again in this case, this omission is serious." Exhibit 219, Proposed Conclusion of Law 4. c. 5.
16. With regard to Mount Vernon students, FBA stated that these students come to Foggy Bottom for classes and other activities and should be counted as Foggy Bottom students. *Id.* FBA cited findings in the ZA's audit that in the fall 2005 semester, 481 students who lived on the Mount Vernon campus were taking courses at the Foggy Bottom campus, including 292 (or 60%) who were taking 75% or more of their courses in Foggy Bottom, and, similarly, during the Spring 2006 semester, 427 students living at the Mount Vernon campus took classes at the Foggy Bottom campus, including 253 taking at least 75% of their courses at Foggy Bottom. Exhibit 81, Attachment p. 5.
17. FBA called for adoption of a definition that it claimed "realistically measures the impact of usage of the Foggy Bottom campus" and "to the extent that the Commission uses headcount, the standard should be objective, clear and enforceable." Exhibit 187 at p. 9. Under cross-examination, FBA's president testified that the focus should not be on where a student's "primary" activities took place, and that, as to students from other campuses, "If they use it, I guess they should count in some way," although she acknowledged that "it's very hard to quantify." *See* Tr. Sept. 28, 2006 at pp. 145-46.
18. The Zoning Administrator testified at the hearing that FBA's proposed definition of "persons being educated at any given time" was vague and that he would need "much more clarification" on how to count the number of Foggy Bottom students under that definition. Tr. Oct. 11, 2006 at p. 30.

CONCLUSIONS OF LAW

The Zoning Regulations specify that the number of students is one factor that the Commission must take into account when assessing whether a university use in a Residence Zone is likely to become objectionable to neighboring property. (11 DCMR § 210.2.) The Applicant has proposed a Foggy Bottom campus enrollment methodology that is based upon whether a student enrolled in a creditable GW course maintains a primary relationship with the Foggy Bottom campus. The proposed methodology does not count students who reside at the Mount Vernon campus, even if they take classes at the Foggy Bottom campus; moreover, it does not count students who take all of their classes at the Mount Vernon campus. The proposed methodology also does not count off-campus students, including those students enrolled at the Loudoun County campus, at other learning sites, and through distance learning, unless they are also enrolled in a course at Foggy Bottom.

The Commission agrees with the University and OP that the determination of whether a student who is enrolled in a creditable course at GW is to be counted in the definition of Foggy Bottom student enrollment should be based on whether that student maintains a primary relationship with the Foggy Bottom campus. The University's proposed definition conforms to FBA's stated goal, which was to "realistically measure[] the impact of usage of the Foggy Bottom campus" with an "objective, clear and enforceable" standard. *See* Exhibit 187 at p. 9. The University presented sufficient evidence that the categories of students enrolled at GW but excluded from the definition of "Foggy Bottom students" have, by virtue of their primary relationship with another campus, limited contact with the Foggy Bottom campus. Therefore, the Commission finds that the categories of students excluded by GW are not likely to create impacts objectionable to property neighboring the Foggy Bottom campus due to noise, traffic, number of students, or other objectionable conditions, and should logically be excluded from the definition of a "Foggy Bottom student."

The Commission finds that the number of students who reside at the Mount Vernon campus or who take all of their classes at the Mount Vernon campus are not likely to generate impacts objectionable to property neighboring the Foggy Bottom campus due to noise, traffic, number of students, or other objectionable conditions. *See also* Tr. Mar. 12, 2007 at p.117 (concluding that students who live at Mount Vernon should not count towards the Foggy Bottom campus housing requirement). These students do not reside on the Foggy Bottom campus or in the residential neighborhoods surrounding the campus, and are unlikely to impose noise or other impacts related to student conduct. The University provides a shuttle bus between the two campuses and imposes parking policies that minimize the traffic and parking impacts of Mount Vernon residents who come to the Foggy Bottom campus. The impacts of these students are primarily experienced at the Mount Vernon campus, where they reside, and are accounted for under the Mount Vernon campus plan. The Commission does not agree with FBA's contention that the University has not met its burden on this point.

The Commission finds that the other categories of off-campus students are appropriately excluded from the Foggy Bottom count because “they have extremely limited impact—if any at all—on the Foggy Bottom campus.” *See* Exhibit 99 at p. 4. These categories of students are generally not entitled to the full rights and privileges afforded to Foggy Bottom students, such as the right to live in University housing, use certain facilities, or participate in certain activities, and in any event are not likely to need or desire to come to the Foggy Bottom campus. To the extent that any off-campus student is enrolled in a class at the Foggy Bottom campus as well as at an off-campus location—and is therefore more likely to impose impacts on the Foggy Bottom campus—the University counts those students toward the Foggy Bottom student headcount and FTE count. *See id.* at Exhibit B p. 2.

The Commission therefore concludes that the Foggy Bottom student enrollment methodology set forth by the Applicant provides an appropriate standard by which to measure student impacts associated with the Foggy Bottom Campus Plan, because it accounts for all students who have a primary relationship with the Foggy Bottom campus and are therefore likely to generate impacts due to noise, number of students, traffic, parking, or other objectionable conditions. The Commission also concludes that the students not counted under this enrollment methodology are unlikely to generate impacts due to noise, number of students, traffic, parking, or other objectionable conditions. In particular, the Commission concludes that students who reside at the Mount Vernon campus are unlikely to create objectionable impacts at the Foggy Bottom campus because the Mount Vernon campus features its own facilities, services, and programming for these students and the University provides a shuttle service between the two campuses that ensures these students will not cause objectionable impacts due to traffic or parking. The Commission notes that this determination is consistent with the treatment of other institutions of higher education in the District of Columbia with satellite campuses, which do not count the students at such satellite locations within the applicable population counts for the main campus.

For these reasons, the Commission finds that that the University has met its burden on this point and rejects FBA’s contention that all students coming to the Foggy Bottom campus add to the strain on the neighborhood, and therefore should be counted in the campus plan, regardless of whether those students are also accounted for in the Mount Vernon plan. For this same reason, the Commission must disagree with the ZA’s suggestion that all Mount Vernon campus students who attend classes at the Foggy Bottom campus should be counted. The Commission does agree with the ZA that FBA’s proposed definition of “persons being educated at any given time” is vague and therefore would be difficult to apply.

The recommendations of OP are entitled to great weight under D.C. Official Code § 6-623.04 (2001). OP agreed with the Applicant’s proposed methodology and concluded it was “intended to count every student having an individual effect on the [Foggy Bottom/West End] neighborhood.”

The Commission is required to accord the issues and concerns raised by ANC 2A the “great weight” to which they are entitled pursuant to D.C. Official Code § 1-308.10(d) (2001). The ANC did not submit comments in response to the Applicant’s proposed order in this remand proceeding and its written report originally submitted in response to the original application did not directly address the issue that was the subject of the remand.

DECISION

Based upon the above Findings of Fact and Conclusions of Law, the Zoning Commission for the District of Columbia hereby **ORDERS** that Zoning Commission Order No. 06-11/06-12, effective October 26, 2007, shall be supplemented by the addition of the above Findings of Fact and Conclusions of Law.

On May 24, 2010, upon motion by the Commissioner Turnbull, as seconded by Chairman Hood, the Zoning Commission **ADOPTED** this Order at its public meeting by a vote of 4-0-1 (Anthony J. Hood, Konrad W. Schlater, Peter G. May, and Michael G. Turnbull to adopt; third Mayoral appointee position vacant, not voting).

In accordance with the provisions of 11 DCMR § 3028, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on June 18, 2010