

BEFORE THE DISTRICT OF COLUMBIA ZONING COMMISSION

THE GEORGE WASHINGTON UNIVERSITY)
FOGGY BOTTOM CAMPUS PLAN: 2006-2025 AND)
FIRST-STAGE PLANNED UNIT DEVELOPMENT)
AND ZONING MAP AMENDMENT)

ZONING COMMISSION
District of Columbia
Z.C. Nos. 06-12
CASE NO. 06-12
EXHIBIT NO. 38

**OPPOSITION OF THE GEORGE WASHINGTON UNIVERSITY TO MOTION OF
FOGGY BOTTOM ASSOCIATION TO POSTPONE CASE PENDING PREPARATION
OF A CONSOLIDATED ENVIRONMENTAL REVIEW**

The George Washington University ("University"), through its counsel, opposes the request of the Foggy Bottom Association ("FBA") that this Commission defer consideration of the Campus Plan and related applications for zoning approval pending the completion of consolidated environmental review. The purpose of this motion is to delay action on the above captioned applications,¹ which involve concept approval for a new campus plan and related first stage planned unit development. None of the grounds cited by the FBA or its expert in support of its motion provide any basis for postponement of the public hearing. Rather, it is well-established as a matter of law that the environmental review process occurs as part of the building review process, not as part of planning review. Specifically, the University submits that:

DC OFFICE OF ZONING
RECEIVED
SEP 11 PM 3:30

1. The District of Columbia Environmental Protection Act specifically permits environmental review to take place after a major action has already been approved, but before it has been implemented.
2. The District of Columbia Court of Appeals has held that environmental review is legally required to take place before construction actually commences, not before zoning approval is granted.

¹ The FBA Motion also references two related applications pertaining to proposed development of the University's campus. The two related applications are an application for the consolidated review and approval of a PUD involving the School Without Walls in the 2100 block of F Street, NW (Z.C. Case No. 06-17) and an application for the consolidated review and approval of a PUD involving Square 54, the former site of the GW Hospital (Z.C. Case No. 06-27). Both applications have been scheduled for public hearings before this Commission later this fall.

3. The Zoning Commission and the Board of Zoning Adjustment have repeatedly held that environmental review is part of the building review process and not the zoning approval process. Most relevantly, in Z.C. Case No. 03-29, a case involving the University's application for consolidated review and approval of a planned unit development, this Commission reiterated this position.
4. Practical considerations necessitate that environmental review be conducted as part of the building permit stage, not the planning review stage.

Accordingly, we request that this Commission proceed with its consideration of the above-captioned applications without delay at the scheduled public hearings.

ARGUMENT

1. **The District of Columbia Environmental Protection Act specifically permits environmental review to take place after a major action has already been approved, but before it has been implemented.**

In its Motion to Postpone Case Pending Preparation of a Consolidated Environmental Review ("FBA Motion"), dated August 31, 2006, counsel for the FBA asserts that the Zoning Commission should defer consideration of the above-captioned cases pending the completion of the environmental review required by the DCEPA." *FBA Motion at 15*. The FBA claims that the PUD is a "major action" under the District of Columbia Environmental Policy Act of 1989 ("DCEPA" or the "Act"), D.C. Code § 8-109.01, which requires the completion of an Environmental Impact Screening Form ("EISF") and, if necessary, the preparation of an Environmental Impact Statement ("EIS"). *FBA Motion at 6-7*. According to the FBA, the Zoning Commission's consideration of the PUD should be postponed until the EISF and EIS are completed.

Assuming an EIS is required for this project, it is well-established in the District of Columbia that the environmental review process occurs as part of the building review process, which is performed by the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") following an application for a building permit. *See sources cited supra* Section 3.

The building permit application and review takes place when construction of the building is imminent, following any applicable reviews or approvals by the Zoning Commission or Board of Zoning Adjustment. As detailed on the Environmental Review Process page on its website, DCRA integrates environmental review into building review on its website, including how it determines whether preparation of an EISF or EIS is required. See DCRA, Environmental Review Process at <http://dcra.dc.gov> (follow “Building/Land Regulations” hyperlink, then “Environmental Review Process” hyperlink).² As the Office of Planning noted in its September 5, 2006 Final Report (“OP Final Report”), “the regulations call for this process to be completed at the building permit stage and not at the time of a first-stage PUD where there are no building plans or designs.” OP Final Report at 23.

Review of the EIS at the permitting stage is appropriate. D.C. Code § 8-109.3(a) (2001) requires that the EIS be prepared at least sixty days “prior to implementation of the proposed major action” (emphasis added). The D.C. Court of Appeals has held that “implementation” of a zoning approval occurs when construction actually begins. See *Foggy Bottom Ass’n v. D.C. Bd. of Zoning Adjustment*, 791 A.2d 64, 73 (D.C. 2002). The DCEPA specifically permits the environmental review to take place after a “major action” has already been “approved,” but before it has been “implemented.” Section 8-109.03(a) provides: “Whenever . . . a . . . commission . . . proposes or approves a major action that is likely to have substantial negative impact on the environment, if implemented, the . . . commission . . . shall prepare . . . a detailed EIS at least 60 days prior to implementation of the proposed major action” (emphasis added).

² The direct link can be found at <http://dcra.dc.gov/dcra/cwp/view,a,1342,q,600463,dcraNav,%7C33408%7C.asp>.

Accordingly, it is entirely appropriate and consistent with the DCEPA that the environmental review occur following review by the Office of Planning and Zoning Commission but before actual construction of the building. Under § 8-109.03(a)(10) of the DCEPA, the FBA, Advisory Neighborhood Commission (“ANC”), and other “interested members of the public” will have an opportunity to comment on the EIS when the environmental impact is assessed by the DCRA, which has been designated by the Mayor as the “lead agency” for such environmental review.

Furthermore, the DCEPA expressly exempts planning review from the EIS requirements. Under D.C. Code § 8-109.06(a)(2) an EIS is not required with respect to actions “[f]or which a request has been made for the authorization or allocation of funds for a project that involves only a feasibility or planning study for a possible future action that has not been approved, adopted, or funded.” Although the Zoning Commission may consider environmental factors in its review of the proposed PUD, its review of environmental factors should be limited to addressing issues related to the PUD evaluation standards set forth in 11 DCMR § 2400, *et seq.*

2. **The District of Columbia Court of Appeals has held that environmental review is legally required to take place before construction actually commences, not before zoning approval is granted.**

The District of Columbia Court of Appeals addressed this issue in great detail in *Foggy Bottom*, a case involving the same parties and in which the FBA made the same argument. In that case, the FBA claimed the Board of Zoning Adjustment (“BZA”) erred by failing to postpone its proceedings until the EIS review was completed. The Court upheld the BZA’s decision, finding that any error by the BZA in failing to postpone the proceedings was harmless because the Department of Health later determined that the EIS was not necessary and because the review occurred before construction actually began on the project. *Foggy Bottom*, 791 A.2d

at 71. Again, the Court held that “implementation” of a zoning approval occurs when construction actually begins. *Id.* at 73. Accordingly, because the EIS review took place in the course of applying for a building permit, the “key requirement” of the DCEPA was met: namely, “that the EIS review occur before the major action is actually ‘implemented’”; that is, before construction on the building actually commenced. *Id.*

3. **The Zoning Commission and Board of Zoning Adjustment have repeatedly held that environmental review is part of the building permit process and not a part of zoning review.**

Both the Zoning Commission and Board of Zoning Adjustment (“BZA”) have held that the determination of whether an EIS is required, and any subsequent environmental review, is within the purview of DCRA and should be considered during the review of a building permit application. *See, e.g.*, Z.C. Order No. 02-30 at 16; Z.C. Order No. 842 at 9; BZA Order No. 16389 at 2; BZA Order No. 16457 at 8; BZA Order No. 16138 at 8, 9; BZA Order No. 15519-B, at 9; BZA Order No. 15434 at 19; BZA Order No. 15435 at 7.

In Z.C. Case No. 03-29, this Commission considered an application by the University for consolidated review and approval of a PUD for Square 103. In that case, the FBA again argued that the project required an environmental impact statement. Z.C. Order No. 03-29 at 7. During the public hearing, counsel for Advisory Neighborhood Commission (“ANC”) 2A, which also opposed the project, argued that the preparation of an EIS was important for the Commission’s consideration of the proposed PUD. *See* Z.C. Case No. 03-29 Public Hr’g Tr., 98–101, Feb. 19, 2004 (the “Public Hearing”).³ The Chair of the Commission replied: “Just -- just let me clarify something for you because this comes up periodically. That’s a part of the – of the building permitting process and that’s not a part of the review that takes place before the Zoning

³ A copy of the relevant portions of the transcript is attached to this motion as Exhibit A.

Commission.” *Id.* at 100. Counsel for ANC 2A continued to push on the issue, but the Chair reiterated that the Zoning Commission does not consider environmental issues, and that counsel should “move on to another subject.” *Id.* at 100-01.

4. **Practical considerations necessitate that environmental review be conducted as part of the building permit stage, not the planning review stage.**

Finally, environmental reviews should be conducted at the building permit stage both as a practical matter and as a matter of government efficiency. Frequently, a complete environmental review must consider aspects of interior design of a building that are beyond the scope of a zoning hearing. For example, air quality reviews may focus on the exterior ventilation of vehicle exhaust from parking garages. It is only when the building is fully designed that environmental regulators can get a complete picture of the impact of a proposed building. Indeed, there is even less justification for environmental review for a campus plan or first-stage planned unit development. With campus plans and first-stage PUDs, buildings are presented only in concept, and the plans fail to present enough information about each specific structure for a full and proper environmental assessment.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the FBA’s motion be denied and that the Zoning Commission continue its consideration of the Foggy Bottom Campus Plan: 2006-2025 and First Stage Planned Unit Development and Zoning Map Amendment without delay at the scheduled public hearings. We look forward to addressing any issues or concerns the Zoning Commission may have about the proposed campus plan, PUD, and zoning map amendment during that hearing.

Respectfully submitted,



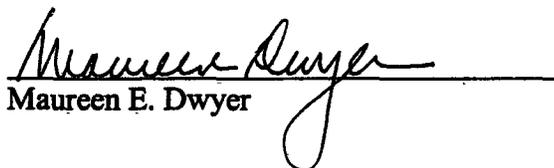
Maureen E. Dwyer
Pillsbury Winthrop Shaw Pittman
2300 N Street NW
Washington, DC 20037
(202) 663-8834

Attorney for:
The George Washington University

September 11, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this motion was served by e-mail and first-class mail, postage prepaid, upon Cornish F. Hitchcock, 5301 Wisconsin Avenue, NW, Suite 350, Washington, DC 20015.



Maureen E. Dwyer

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

ZONING COMMISSION

+ + + + +

PUBLIC HEARING
CASE NO 03-29
THE GEORGE WASHINGTON UNIVERSITY -- NEW RESIDENCE
HALL

+ + + + +

THURSDAY

FEBRUARY 19, 2004

+ + + + +

The Public Hearing of the District of Columbia Zoning Commission convened at 6:30 p.m. in the Office of Zoning Hearing Room at 441 4th Street, Northwest, Washington, D.C., Carol Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

CAROL MITTEN	Chairperson
ANTHONY J. HOOD	Vice Chairperson
JOHN G. PARSONS	Commissioner (National Park Service)

OFFICE OF ZONING STAFF PRESENT:

Alberto P. Bastida,	Secretary, ZC
Sharon Schellin,	Zoning Specialist

OFFICE OF PLANNING STAFF PRESENT:

John Fondersmith,	Office of Planning
Ellen McCarthy,	Office of Planning

OFFICE OF CORPORATION COUNSEL STAFF PRESENT:

Mary Nagelhout, Esq.

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

A G E N D A

OPENING REMARKS 4

PRELIMINARY MATTERS 6

APPLICANT'S PRESENTATION 21

OFFICE OF PLANNING REPORT 112

REPORTS OF ANY OTHER GOVERNMENT AGENCIES 135

REPORT OF ANC 2A 135

ORGANIZATIONS AND PERSONS IN SUPPORT 149

ORGANIZATIONS AND PERSONS IN OPPOSITION 158

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 capital gain would have a different motivation behind
2 and if it wasn't subject to the same kind of scrutiny
3 that the -- that this institution has, it could get by
4 and pass with far less and I think that that's
5 something that is -- that is -- that everybody has to
6 recognize.

7 MR. NORTON: All right. Now, with respect
8 to the sustainable design in the environmentally sound
9 aspects which I think have been listed as a -- as a
10 possible amenity, did -- did GW prepare an
11 environmental impact statement under the D.C.
12 Environmental Control Act?

13 MR. DUTTON: We will be doing that as part
14 of the process, but it hasn't been done yet.

15 MR. NORTON: Has not been done yet?

16 MR. DUTTON: No, because --

17 MR. BARBER: Excuse me. This is not an
18 environmental impact statement. We will comply during
19 the building process. Applying for the building
20 permit process with all the environmental laws which
21 requires initially an environmental screening form and
22 then the Department of Health determines whether the
23 environmental impact statement is required.

24 MR. NORTON: Well, just so we're clear
25 though. This is not exempt from that. Is it? It's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 over a million dollars and it's outside the central
2 employment area.

3 MR. BARBER: No, it -- it -- it is covered
4 by that.

5 MR. NORTON: Okay. But, in any event,
6 there hasn't been any environmental impact statement
7 done yet. Is that correct?

8 MR. DUTTON: The -- the form has not been
9 filled out or handed in yet. It will be part of the
10 process. We'll determine whether the impact statement
11 is required. That hasn't been --

12 MR. NORTON: Okay.

13 MR. DUTTON: The city determines whether
14 you need to do that.

15 MR. NORTON: Just for purposes of this
16 Board, have -- have -- has the information that would
17 be provided on the environmental forms that have to be
18 filed with the -- with the city, have -- has that been
19 provided to this Board?

20 MS. HONEY: None -- none of that's been
21 collected yet. It's not been done.

22 MR. NORTON: So, in terms of -- of
23 analyzing and weighing the issues with respect to the
24 PUD and the -- the amenities and the -- the minuses,
25 this Board doesn't have that information. Is that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 correct?

2 MS. HONEY: Correct.

3 MR. NORTON: Okay.

4 CHAIR MITTEN: Just -- just let me clarify
5 something for you because this comes up periodically.
6 That's a part of the -- of the building permitting
7 process and that's not part of the review that takes
8 place before the Zoning Commission.

9 MR. NORTON: I understand that and the
10 only reason, Madam Chairman, that I raise it is -- is
11 that this is a -- I mean when you're asking for a PUD,
12 it becomes a -- a -- a -- essentially a weighing of
13 benefits issue. In other words, are the amenities
14 sufficient to outweigh the detriment in that sort of
15 thing and it seems to me that at least that's
16 something that ought to be considered in connection
17 with this.

18 CHAIR MITTEN: But, to the extent that
19 there's anything --

20 MR. NORTON: I mean you don't have to make
21 the final determination as to exactly whether this
22 meets environmental standards, but it seems to me with
23 respect to -- particularly in a place like this where
24 there's a -- you know, we're talking about a lot of
25 people that are being put in there. It's something

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 that -- that this Board should at least consider in
2 weighing these issues.

3 CHAIR MITTEN: That's what I'm trying to
4 tell you is that we don't.

5 MR. NORTON: Well --

6 CHAIR MITTEN: We -- we don't. So, I -- I
7 just need you to move on to another subject.

8 MR. NORTON: Well, I -- I will move on.

9 CHAIR MITTEN: Yes, there you go.

10 MR. NORTON: I will move on then. Thank
11 you very much.

12 Originally as I understand it when you
13 were trying to do a 14-story building, GW agreed to
14 attempt to get a LEED certification that this was an
15 environmentally sustainable building. Isn't that
16 correct?

17 MR. BARBER: No, we had talked about
18 pursuing an -- an LEED certification. That was one of
19 the things we had discussed at that time.

20 MR. NORTON: And you didn't -- you didn't
21 indicate that to the -- to the Planning Commission or
22 to the -- the Office of Planning?

23 MR. BARBER: I indicated what I said --

24 MR. NORTON: Did you do that?

25 MR. BARBER: -- that -- that we would

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701