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Sept. 13, 2007

By Hand Delivery

Carol Mitten
Chairperson, D.C. Zoning Commission
441 4th Street, Room 210
Washington, DC 20001

David Avitabile
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**Re: Z.C. Case No. 07-12
The George Washington University—Mount Vernon Campus
Special Exception Application for Amendment to and Further
Processing of an Approved Campus Plan
Pelham Replacement Project
Motion to Strike Portions of Filing from ANC 3D dated Sept. 11, 2007**

Dear Ms. Mitten:

On September 11, 2007, ANC 3D filed a letter with the Zoning Commission that responds to the Applicant's July 30, 2007 submission in the above-captioned case (the "**Letter**"). In addition, the Letter also includes additional letters as well as photographs from persons both in support of and opposition to the case as attachments (the "**Attachments**"). The Attachments constitute improper post-hearing submissions that were not permitted by the Commission and circumvent the Commission's clear direction on what post-hearing submissions were allowed and when they were to be filed. On behalf of the Applicant, we respectfully request that these Attachments not be accepted into the record pursuant to 11 DCMR § 3121.9 for the reasons that follow and as discussed more fully below:

1. The Attachments are post-hearing responses from non-parties;
2. The Attachments constitute untimely comments filed after the record was closed;
3. The Attachments include comments already captured by ANC 3D in its Letter; and
4. The Attachments go well beyond the limited scope set forth by the Commission for the University's post-hearing submission.

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EXHIBIT NO. 3D
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EXHIBIT NO. 50

I. The Attachments are post-hearing responses from non-parties.

The applicable rules¹ afford all parties to a case the opportunity to file written responses to any post-hearing submissions. 11 DCMR § 3121.6. Here, ANC 3D was the only party in the case other than the Applicant and therefore retained a right to respond to the Applicant's July 30 post-hearing submission. Id. The Attachments, by contrast, are letters from individuals who were not parties in the case and therefore had no right to file a direct response to the Applicant's post-hearing submission. By coming in as exhibits to ANC 3D's Letter, the individuals are effectively being afforded a right to respond to the Applicant's post-hearing submission even though they were not afforded party status.

II. The Attachments constitute untimely comments filed after the record was closed.

Section 3121.5 of the Zoning Regulations permits the record to be kept open for a stated period for the receipt of specific exhibits or information, as directed by the presiding officer. At the close of the July 2 public hearing in this case, the Commission clearly established a deadline of July 30, 2007 for all comments from interested persons in the case other than ANC 3D. Tr. 184-85. Here, therefore, the Commission left open a generous period of time for individuals to file comments directly with the Commission following the public hearing. The authors of the Attachments—individuals who were present at the hearing—chose not to avail themselves of this opportunity.

Moreover, the Commission was clear that beyond July 30, the record was closed and ANC 3D “will be the only ones that have the prerogative to respond.” Id. Indeed, pursuant to 11 DCMR § 3121.7, the Commission also allowed ANC 3D a generous six-week period to file its written response so that ANC 3D could assemble comments, prepare a response, and discuss the matter at its regularly scheduled September meeting.² Again, if the Attachments are accepted into the record of this proceeding, the individuals would effectively be permitted to circumvent the July 30 deadline established by the Commission for submissions by individuals in support or opposition.

¹ Pursuant to 11 DCMR § 3104.5, the Commission shall apply the Board of Zoning Adjustment Rules of Practice and Procedure in processing, reviewing, and approving all applications for special exception approval for college and university uses.

² Despite this extra time, the Letter itself was filed after the deadline established by the Commission at the close of the public hearing in the case.

III. The Attachments include comments already captured by ANC 3D in its Letter.

The ANC Letter is clear that it incorporated the views expressed in the written comments and letters as part of ANC 3D's own post-hearing submission. This is consistent with the Commission's directive, which was for individuals who sought to comment on the University's post-hearing submission to do so through the ANC, because the ANC was the only party with a right to respond. Tr. 184-85. Since the ANC considered the comments of these individuals in submitting its Letter, there was no need to specifically include their individual letters and comments as well.

Additionally, including these written comments but not other relevant written or oral comments improperly suggests that these comments were the last word from the community.

- For example, following the receipt of the August 29, 2007 letter from the Berkeley Terrace Neighbors that is included in the Attachments, the University promptly responded by phone. The University indicated that although it believed that the combination of the Pelham landscaping plan and the Enhanced Plan would meet the needs of Berkeley Terrace, GW would add an additional 20 trees as requested by Berkeley Terrace. Further, the University informed ANC 3D that it had agreed to accommodate this request by testimony at ANC 3D's public meeting on September 5, 2007.
- As another example, at the September 5 ANC meeting, Mr. McClain followed comments related to his letter in the Attachments with oral testimony that he felt that the Enhanced Landscaping Plan was a "good plan" that he hoped would address his screening concerns and that he was "pleased with the new plants" that were chosen.

Finally, including the Attachments as exhibits to ANC 3D's Letter improperly suggests that they should be afforded great weight as the position of the ANC. The Attachments, which are simply letters from individuals to the ANC, were not adopted as the official position of the ANC through any motion or by any vote.³

³ Indeed, the ANC Letter itself should not be afforded "great weight." In order for an ANC determination to be afforded "great weight," it must include a vote on the motion to adopt the report to the BZA or Commission. 11 DCMR § 3115.1(g). The Letter indicates no motion was made nor vote taken on the University's post-hearing submission, and indeed no such motion or vote took place following discussion of the post-hearing submission at ANC 3D's September 5, 2007 public meeting.³ Therefore, the Letter is not a "written report" of the ANC as defined under § 3115.1 that is entitled to "great weight," and the Commission is not required to articulate specific findings and conclusions with respect to each issue and concern raised by ANC 3D in the Letter.

IV. The Attachments go well beyond the limited scope set forth by the Commission for the University's post-hearing submission.

Finally, the comments included in the Attachment go well beyond the scope of the University's post-hearing submission and, indeed, the scope of the above-captioned case. The Commission requested that the University provide the following in its post-hearing submission: (1) amend the landscaping plan for the entire campus to reflect how landscaping was actually planted, when new landscaping will be installed, and include screening along Foxhall Road, (2) clarify whether stormwater runoff in the northeast corner of the Campus is being collected or is allowed to run into W Street, (3) provide views of the Pelham Project from the houses on W Street, and (4) identify where the reallocation of gross floor area for the Pelham Replacement Project will come from. See Tr. 57-62, 178-82. The University's post-hearing submission accordingly limited its response to the above issues.

Again, the comments included in the Attachments go beyond the University's post-hearing submission to address campus-wide issues not related to either the further processing or campus plan amendment applications. Indeed, ANC 3D itself recognized that the University's responses were limited to issues associated with the Pelham Replacement Project and acknowledged that the issues raised by individuals in the Attachments regarding landscaping and views related to "future construction," particularly at the proposed Hillside site, rather than the Pelham Replacement Project. Accordingly the Attachments are not germane to the limited response afforded to ANC 3D on the University's post-hearing submission and should not be admitted into the record.

Conclusion

For the reasons set forth above, the Attachments should be struck from the record and not received into the Commission's files for the above-captioned case.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely yours,


Maureen Dwyer


David Avitabile

cc: Charles Barber/Alicia O'Neil

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this letter and enclosure were delivered by hand or first class mail to the following on September 13, 2007.

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David M. Avitabile