IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

THE GEORGE WASHINGTON UNIVERSITY, Petitioner, v. DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent.	No. 02-AA-172

2003 SEP 25 A 12:30
CORPORATION COUNSEL
APPELLATE DIVISION

PETITION OF THE GEORGE WASHINGTON UNIVERSITY FOR REHEARING, OR, IN THE ALTERNATIVE, FOR REHEARING EN BANC

INTRODUCTION

This case presents issues of fundamental importance to all universities in the District of Columbia, not only for Petitioner, The George Washington University ("GW" or "the University"), for this year, but for other universities, both this year[1] and for decades to come. It also has ramifications for all potential victims of discrimination. The division's opinion addresses the parameters of the zoning regulators' authority in imposing intrusive, far-reaching conditions on a university's "campus plan," which plans govern a university's growth and development over a ten-year period. The opinion also analyzes an issue of first impression, the important intersection between the District of Columbia Human Rights Act ("DCHRA") and the zoning regulations.[2] It ultimately condoned the

[1] For example, Georgetown University has challenged the imposition by the Board of Zoning Adjustment ("BZA") of certain conditions in Case No. 01-AA-1182, scheduled for oral argument on October 1, 2003. While the case raises different factual and legal issues, there are overlapping principles underlying both cases.

[2] As this full Court has observed, "...the Human Rights Act is among our most important laws and is to be vigorously enforced by all agencies and officials of the District Government." *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 32 (D.C. 1987) (*en banc*) (internal quotation marks and citation omitted).

BZA
Case No. 16553
Exhibit No. 413

Board of Zoning Adjustment
District of Columbia
CASE NO.16553
EXHIBIT NO.413

BZA's mandates, admittedly designed with the expressed intent of keeping students, a protected class of persons under the DCHRA,[3] out of a particular neighborhood.

The division struck down a condition in GW's Campus Plan Order in which the BZA imposed an interim housing measure that took effect while GW aggregated the 5,600-plus beds on campus that the Order requires by 2006. The interim measure (dubbed "Phase I" in the opinion) froze all of the University's non-residential development – whether for classrooms, research laboratories or medical outreach programs – unless and until GW exported more than 1,000 of its undergraduates to other neighborhoods outside Foggy Bottom/West End ("FBWE"). The division upheld, however, the long-term on-campus housing condition, including its provision that prevents the University from counting toward the 5,600-plus bed requirement more than 1,400 beds already existing in by-right residence halls just outside the BZA-defined campus boundaries. GW respectfully submits that the division:

> Overlooked the fact that the BZA's mandated long-term campus housing requirement has the same purpose of ridding FBWE of student residents, and the same effect of rendering by-right residence halls in FBWE redundant, as the interim provision it struck down for those reasons.
>
> Overlooked the inherent inconsistency of its analysis of aspects of the long-term housing requirement with the decision in *Watergate West, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 815 A.2d 762, 767 (D.C. 2003), in which it was held that GW's off-campus residence halls are a matter-of-right use in the high-density residential neighborhoods surrounding GW, and that such use may not be constrained by the BZA.
>
> Overlooked the fact that, while the University has, as the division stressed, consistently volunteered that it would have 5,600 on-campus beds by 2006, it has never agreed that it would add an additional on-campus bed for every additional student it enrolled, or that it should exclude from its count the existing 1,400-plus beds in by-right residence halls just outside the campus boundaries.

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[3] The DCHRA prohibits discrimination based on "matriculation." D.C. Code § 2-1401.01 (2001).

Adopted an internally inconsistent rule of law that provides on the one hand that "the [DCHRA] may be invoked against any application of the zoning regulations which discriminates, in purpose or effect, on grounds prohibited by the [DCHRA]" (Op. at 31) and that the BZA's conditions in this case "were 'aimed at limiting, and even rolling back, encroachment into [FBWE] by the university—or, more precisely, its students.'" *Id.* at 32. On the other hand, it held that this discriminatory provision, whose "principal purpose was the protection of FBWE from the perceived bane of too many students" (*Id.*), did not violate the DCHRA.

ARGUMENT

I. PROHIBITING THE UNIVERSITY FROM COUNTING MATTER-OF-RIGHT RESIDENCE HALLS IN MEASURING COMPLIANCE WITH THE BZA'S HOUSING REQUIREMENT IS AS UNLAWFUL IN PHASE II AS IT IS IN PHASE I

A. The Division's Analysis

The BZA-imposed housing mandate at issue required GW to provide housing for a minimum of 5,600 undergraduates within its campus boundaries (70% of a baseline enrollment of 8,000), plus one more bed for every undergraduate the University enrolls above 8,000, regardless of whether each additional student would want or need housing. Recognizing that the University already had more than 1,400 beds in high-density residential neighborhoods adjacent to and nearby the campus boundaries that are zoned to permit dormitories and apartment buildings as matter-of-right uses (*see* Map, attached at Tab A for the Court's convenience), the BZA nevertheless prohibited GW from counting those beds toward its required number. As an interim measure, during "Phase I" or up until 2006, the BZA permitted the University to count off-campus beds toward its total, apparently in recognition of the impossibility of constructing the requisite on-campus beds virtually overnight, but only permitted them in the count if they were located outside of FBWE.

The division struck down Phase I of the BZA Order, which would have required the University to acquire immediately an additional 1,500-plus beds either outside FBWE or on campus. Phase II, of course, requires the University to acquire the same number of beds, but gives GW until 2006 to

acquire them, and prohibits the beds from being anywhere but on campus. In either case, they cannot be in the FBWE neighborhood surrounding GW, regardless of its zoning. The division held that Phase I was arbitrary and capricious and "an impermissible exercise of the Board's authority." (Op. at 46.) The latter point was in realistic recognition of the fact that the interim requirement effectively rendered the University's existing 1,400-plus matter-of-right beds in FBWE to be redundant. The division explained:

> ...In this case, the BZA did not attempt, in its order, *directly* to prohibit the University from utilizing its FBWE properties as dormitories. Indeed, the Board recognized that it had no authority to issue such a prohibition. In our view, however, the requirement that the University secure approximately 1500 beds outside FBWE during Phase I is the equivalent of a direct ban, for it puts the University to the following unpalatable choices: either create irresistible incentives for undergraduates housed in FBWE dormitories to move into the newly-acquired units outside that neighborhood, or allow the newly-acquired beds to lie largely vacant — a choice that would be very difficult, if not impossible, for the University to make. The FBWE dormitories vacated as a result of these incentives or measures would presumably then revert to non-dormitory use.
>
> In fact, it appears that such a return to pastures was what the Board had in mind when it required the University to acquire beds outside FBWE. ... Realistically appraised for what it does, [Phase I] amounts to the exercise by the Board of authority which the law entrusts to the Zoning Commission and not to the BZA, namely, the authority to rezone. *See Watergate West,* 815 A.2d at 768. That the Board has done so indirectly rather than directly does not save [Phase I]. ... (Op. at 45-56 (footnote omitted).]

The division nevertheless upheld the prohibition on counting off-campus beds in Phase II of the BZA Order, distinguishing in a footnote, the long-term housing requirement on the grounds that it was "not aimed at FBWE, but at the development of the campus and it does not require the University to acquire numerous beds far from campus so that the student residents of the FBWE dormitories are likely to be removed from the neighborhood." (Op. at 46, n. 27.) The opinion does not address the fact that students being "removed from FBWE dormitories" is as clearly the intended result of Phase II as it is of Phase I. Apart from that note, the opinion does not explain why the

Phase I analysis does not apply equally to Phase II, when, as discussed below, the matter-of-right residence halls just outside the campus boundaries will be equally useless, and the University will be faced with equally unpalatable choices regarding the use of significant properties that can as a practical matter no longer be put to their intended – and permitted – uses.

B. The Division Overlooked the Fact that the Intended Effects of Phase II, the Long-Term Housing Requirement, Were Also Discriminatory

Although the Phase II housing mandate does not require acquisition of properties outside FBWE, like Phase I, it requires the University to acquire 1,500-plus additional beds – they simply have to be within the campus boundaries. The 5,600 campus beds, combined with GW's existing 1,400 beds in FBWE that are outside the campus boundaries in residence halls such as the "Hall on Virginia Avenue," the former Howard Johnson's Hotel, mean that the University would have more than 7,000 beds for undergraduates in and immediately around its campus. As with Phase I, with an enrollment of 8,000, the University simply cannot use 7,000 beds; the BZA itself acknowledged that, historically, approximately 15% of undergraduates (or 1,200 of 8,000) are commuters or otherwise are not suited for residence hall life (for example, married, or with children), thus leaving a maximum of 6,800 of 8,000 who would be suitable for University housing, even if GW mandated every one of them to live in University housing. (BZA Order 16553E at 7.) And that does not include the number of students who simply choose to live off campus rather than in University housing (whether for financial or personal preference reasons), and who have historically been permitted by the University to do so. In short, unless it is to flatly require that all of its students live in University housing (which it does not believe either the BZA or the Court expected it to do) the only way for GW to fill all of the additional 1,500 beds required by the Order is to enroll more students. But the mischief in the housing condition as it stands is that, if the University enrolls more students to fill the new beds (or the existing off-campus

properties), the required number of on-campus beds goes up, one-for-one, thus requiring GW to build even more beds.

By way of example, the BZA acknowledged that the University's enrollment in Fall 2001 was 8,044. (BZA Order 16553F at 2, ¶2.) Therefore, assuming constant enrollment, once GW completes its 5,600 beds on campus, it would have ample room among the 1,400 beds off campus to house the 44 students above the 8,000 baseline; instead it would be required to add 44 more beds on campus. In short, the FBWE off-campus beds in matter-of-right residence halls are equally redundant in Phase II as they are in Phase I. And the BZA intended the forced redundancy long-term as plainly as it did in the interim plan – otherwise it would have allowed those beds to be counted toward the University's fulfillment of its goal after it had 5,600 on-campus beds.

The division also suggested that a significant factor justifying its upholding the housing condition in its entirety was the University's having volunteered that its own plans called for having 5,600 beds on campus by 2006. What was perhaps not perceived was the fact that, while the University clearly made a commitment to aggregate 5,600 beds on campus (and is on track to do so), it *never* agreed that it could satisfy a requirement that it add an additional bed for every additional student enrolled; and it *never* agreed that its off-campus, by-right properties should be excluded from any count of beds toward its housing requirement. *See* BZA Order 16553F at 7 (finding the University's proposal, which counted GW's off-campus beds, "inadequate because it essentially permits the University to house an unacceptably large number of students in FBWE"). The result of this condition is effectively to limit any future growth in the University's full-time undergraduate population, notwithstanding the availability of existing beds in areas of FBWE adjacent to the campus that are expressly zoned to permit "dormitories" as a by-right use, and notwithstanding that GW's campus is well within the applicable density limitations. *See* BZA Order No. 16553 at ¶6(b).

Under the BZA's formulation, as upheld in this case, the University is effectively precluded from using its existing off-campus residence halls in FBWE for the use for which they are intended, and which is expressly permitted as a matter-of-right for any owner — except, under the BZA Order, GW. That notion is inconsistent with the decision in *Watergate West*, where, as the division acknowledged in its analysis of Phase I, "the court recognized — consistently with the BZA's own position — that the BZA may not prevent a university from using housing in a residentially zoned area as a dormitory when such use is permitted by 11 DCMR § 210.1." (Op. at 45, citing *Watergate West,* 815 A.2d at 766-67). The court in *Watergate West* also recognized the fundamental principle of land use regulation, which the BZA Order also violates, that the BZA may only regulate use, not ownership, of land. In this case, any other university could populate a dormitory in FBWE as a matter-of-right, whereas GW could not.

The BZA has thus effectively rezoned FBWE by imposing use restrictions that a) are not found in the current zoning; and b) apply only to one user, GW. The BZA's "Phase II" is therefore also "an impermissible exercise of the BZA's authority" (Op. at 46) on both grounds. On this basis, GW does not challenge the conclusion that the BZA legitimately required that the University have a minimum of 5,600 beds on its campus, as it did express its intent to build that number, subject to applicable District permitting procedures. GW merely seeks the Court's reexamination of the BZA's exclusion of the off-campus residence halls from its overall housing count in the event that its enrollment exceeds 8,000, thus requiring more than 5,600 "campus" beds.

II. THE DISTRICT OF COLUMBIA HUMAN RIGHTS ACT

A. The Division's Analysis

The division held that "the Human Rights Act proscribes discrimination against students by the BZA in the exercise of the Board's authority to enforce the zoning regulations," (Op. at 28), and

that the DCHRA "may be invoked against any application of the zoning regulations which discriminates, in purpose or effect, on grounds prohibited by the Act" (Op. at 31). Rejecting the District's argument that the BZA action is not subject to the DCHRA, the division wrote, "It would surely be incongruous to suggest that a 'highest priority' remedial statute such as the DCHRA proscribes individual refusals to rent to students by private landlords, but that it has no application to allegations that a District agency has effectively excluded numerous students from a neighborhood in one fell swoop, by limiting the availability in that neighborhood of housing designed for occupancy by students." (Op. at 29.)

And the division understood that limiting the availability of housing for students in FBWE is admittedly what the BZA sought to, and did, accomplish. It acknowledged that the BZA's housing requirements were "aimed at limiting, and even rolling back, encroachment into [FBWE] by the university — or, more precisely, its students." (Op. at 32.) It even observed that "the principal purpose of the BZA's actions was the 'protection' of FBWE from the perceived bane of too many students." (*Id.*) It soundly rejected the District's arguments that the housing conditions were not discriminatory because they did not prohibit undergraduates from living in FBWE, stating, "To the extent that this condition is meant to suggest that Revised Condition 9 was not designed to 'protect' FBWE from 'too many' students, and from the perceived undesirable traits and behavior of some undergraduates, it cannot be reconciled with the record." (*Id.*)

The division then nevertheless held that the BZA's action here did not violate the DCHRA because it did not believe that the DCHRA was intended to prevent a "balancing approach between students and neighboring residents." (Op. at 36.) It based its conclusion on the zoning regulations' requirement that university use be "not likely to become objectionable to neighboring property because of noise, traffic, *number of students,* or other objectionable conditions," 11 DCMR § 210.2;

and the Comprehensive Plan's reflection of the neighbors' preference that the "University must continue to construct student dormitories...[and] must be sensitive to the surrounding residential neighborhood," 10 DCMR § 1358.1. Thus, the division reconciled what it saw as a conflict between two statutes by holding that admitted discrimination of *this sort* was not intended to be prohibited by the DCHRA. (Op. at 36.)

B. The Division Misapplied the Regulations and Comprehensive Plan

The division read the Comprehensive Plan and the zoning regulations as necessarily permitting the BZA's action. Respectfully, the zoning regulations, by permitting consideration of "number of students" is more appropriately read to permit consideration of density on campus, which the BZA routinely regulates, and with which the University consistently and easily complies [*see* BZA Order 16553 at ¶ 6,], than as trumping the DCHRA. Not only does the BZA require GW to submit information on its aggregate FAR within its campus, but it must also comply, as do all property owners, with occupancy limits on its individual structures. The regulation at issue does not open the door to discriminatory measures that limit housing choices in nearby neighborhoods.

Nor does the Comprehensive Plan, insofar as it merely encourages building of "more dormitories," sanction discriminatory BZA action.[4] Even if it did, this Court has previously held that the more than 600-page Comprehensive Plan frequently conflicts, either internally, or with other District laws or policies. When it does, the Comprehensive Plan, particularly its "District elements," of which the Ward 2 element is one, must be understood as merely "advisory." *Tenley and Cleveland Park Emergency Committee v. Bd. of Zoning Adjustment,* 550 A.2d 331, 337-38 (D.C. 1988), *cert. denied,* 489 U.S. 1082 (1989) (*"TECPAC").* "Although the Plan serves as an important policy

[4] Indeed, the Comprehensive Plan itself touts fair housing under the DCHRA and the elimination of discrimination in housing as a "major goal." 10 DCMR §§ 300.7 and 300.8 (1995).

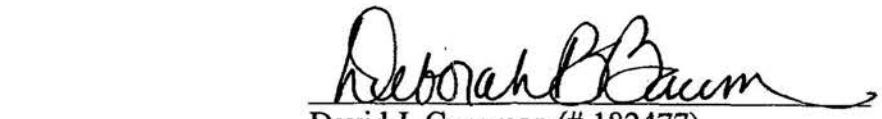
guide, its legal mandate is more limited." *Id.* at 338. The Court in *TECPAC* held that, even where the zoning regulations were inconsistent with the Comprehensive Plan, the development should proceed as permitted by the zoning regulations because the legislative intent behind the Comprehensive Plan was that it was to provide a guide for future amendment of the regulations, if appropriate, which amendment was the sole province of the Zoning Commission. *Id.* at 340. In this case, the zoning regulations permit the University's use of "dormitories" in the surrounding high-density neighborhood, and under *TECPAC,* the Comprehensive Plan should not supersede that right, and certainly should not supersede the DCHRA's important principles.

CONCLUSION

Based on the foregoing, the University respectfully requests that either the division that decided this case, or alternatively, the full Court, rehear this case in order to fully consider the matters set forth herein.

Dated: September 25, 2003

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September 2003, I caused a copy of the foregoing, The George Washington University's Petition for Rehearing, or in the Alternative, Rehearing En Banc, to be served by hand, on the following counsel of record for the District of Columbia:

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Document #: 1351699 v.1



- CAMPUS BOUNDARIES
- FOGGY BOTTOM WEST END BOUNDARIES
- GWU RESIDENTIAL HOUSING WITHIN CAMPUS BOUNDARIES
- GWU RESIDENTIAL HOUSING IN PROGRESS/OR UNDER CONSTRUCTION
- POTENTIAL GWU RESIDENTIAL/MIXED-USE DEVELOPMENT SITES WITHIN CAMPUS BOUNDARIES
- GWU RESIDENTIAL HOUSING OUTSIDE CAMPUS BOUNDARIES
- LOW DENSITY RESIDENTIAL IN FOGGY BOTTOM WEST END (FB/R3)

George Washington University

Foggy Bottom West End

March 3, 2002

District of Columbia
Court of Appeals

GEORGE WASHINGTON UNIVERSITY,	:	
Petitioner,	:	
v.	:	No. 02-AA-172 (Decided September 11, 2003)
BOARD OF ZONING ADJUSTMENT,	:	
Respondent.	:	

PETITION BY THE BOARD OF ZONING ADJUSTMENT FOR REHEARING

The Board of Zoning Adjustment petitions for rehearing of two portions of the Division's opinion and judgment:

(1) the stays of conditions 9(b) and 10, neither of which the Court held to be unlawful, and the remand of both conditions to the Board (slip op. at 52 and n. 32); and

(2) the holding that condition 9, requiring the university to provide more housing opportunities for its students, discriminates against students. *Id.* at 31-33 & n. 17.[1]

A. STATEMENT IN SUPPORT.

1. The Court sustained condition 10. *Id.* at 51. It nevertheless stayed the condition indefinitely pending "action by the Board on remand." *Id.* at 52. The Court also sustained condition 9(b) for Phase II (*id.* at 18) but never discussed its validity between now and 2006. Even so, the Court stayed that provision as well.

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[1] We also urge the Court to omit footnotes 13 and 19, slip op. at 22 & 37 and the cross-reference to note 13, *id.* at 23. As the Court recognized, the parties did not brief the issue discussed there, discussion of the issue is not necessary to resolve the appeal, and the Court does not decide it. The introduction of a needless and undeveloped issue may result in unintended consequences in future litigation and serves no discernible purpose in this one.

a. Although stays of valid provisions of administrative orders may be justified pending exhaustion of judicial review on the ground that reversal by higher authority remains possible, stays of *valid* administrative orders beyond the judicial review process are exceptional, if not unprecedented. Once there is a final judicial determination that the administrative decision is valid, the decision normally becomes fully enforceable. Otherwise, valid administrative orders that protect other parties to the dispute and that carry out valid public policies remain suspended even after a court has concluded there is *no* lawful basis for invalidating the decision. Concomitantly, it has always been up to the losing party to persuade the agency that there are compelling reasons for amending an order that is otherwise valid. *See* slip op. at 21, n. 12 (if conditions cannot reasonably be complied with, university may ask the administrative agency for relief). That places the onus where it belongs.

The stays in this case have extraordinary and disturbing consequences: the prevailing party (here, a quasi-judicial agency defending its order, the interests of the prevailing parties in the proceedings before it, and public policies) is told that its order is valid but unenforceable while the "losing" party is able to avoid compliance indefinitely. That anomaly is compounded because the stay creates an incentive for the "losing" party to prolong further administrative proceedings, especially if it fears that the decision will not be changed for its benefit.

It is not that university in this case has no means to bring problems arising from the campus plan to the appropriate agency's attention. As the Court knows, the zoning regulations anticipate that changes to campus plans may become necessary over the course of the plan. *See id.* at 21, n. 12 (the university may apply to the Zoning Commission to amend the campus plan for good cause); 11 D.C.M.R. § 3035.1, Z.C. Order 932, 47 D.C.R. 9725, 9738 (2000) ("Effective December 8, 2000,

the Zoning Commission shall hear and decide all applications * * * for * * * amendment of a campus development plan"). The GW campus plan is equally explicit. R. 3488, condition 1 (campus plan remains in effect until 2009 or until Zoning Commission determines that it should be altered).

Amendment proceedings are properly *de novo* and require new hearings in which all proper parties have the opportunity to introduce evidence, cross-examine witnesses, and advance legal arguments. *See* 11 D.C.M.R. § 3035.5, Z.C. Order 932, 47 D.C.R. at 9738 (adopting BZA Rules of Practice and Procedure for campus plan amendments and other campus plan issues). That is the procedure provided for when a campus plan provision is valid but may no longer be justified or needed.

b. Remand to the Board raises additional difficulties, both legal and practical. Under § 3035.1 only the Commission may amend valid provisions of campus plans, including plans previously approved by the Board. The regulations no more authorize the Board to change conditions 9(b) and 10 than to change other valid aspects of the GW plan. To the extent that this case is being remanded for further action on conditions 9(a) and 9(f), moreover, we are authorized to state that the Board's sole action on those conditions will be a *pro forma* order conforming the Board decision to this Court's judgment.

On the practical side, three of the five Board members are new and did not participate in the prior proceedings. The Board's rules of procedure permit such members to vote only after "having read the transcript and reviewed the complete record." 11 DCMR § 3105.15. The Zoning Commission, which promulgated the Board's rules of procedure, forbids the Board to waive that rule. 11 DCMR § 3100.5. Thus, any remand requiring more than the issuance of an order implementing the judgment would force the three new members to read the entire 4377-page record. This imposes a

major burden on the Board in order to revisit provisions that unanimous prior board memberships approved and that this Court held to be valid.

c. The Court apparently believed that it would be possible to have a "negotiated resolution" of changes to condition 10 (and inferentially condition 9(b) as well). Slip op. at 52. Both the Board and the Commission are quasi-judicial bodies. They cannot "negotiate" changes to their decisions. They are empowered only to decide. Of course, the private parties to this dispute are free to negotiate and, if they agree, to present a united position to the agency. Given the historic intransigence by all the private parties in this case, such an agreement is highly unlikely. It will certainly not come quickly. In the meantime, however, the Court's stay of valid provisions of the campus plan means that valid provisions of the campus plan remain unenforceable.

d. There are additional reasons why a stay and "remand" should not be substituted for the amendment mechanism established by the zoning regulations. With respect to condition 9(b), the Court correctly held that it serves a valid purpose in Phase II of the campus plan. Slip op. at 18 ("The one-for-one provision is therefore an important element of the overall plan, for it protects the finite housing stock in FBWE from additional pressure from 'student only' housing"). Condition 9(b) serves an equally important role in Phase I. It prevents the university from increasing its student enrollment between now and 2006 unless it provides new housing on campus or outside Foggy Bottom/West End adequate to accommodate the increase. As the Court noted (slip op. at 17), the evidence in the record supported the Board's finding that recent increases in enrollment had become "'objectionable to neighboring property.'" Condition 9(b) serves to ensure that there will be no additional increases (or harm) until the university makes suitable accommodations available. That function is as legitimate before 2006 as it is after. It should not be further stayed.

If condition 9(b) causes the university problems sufficient to justify amending the campus plan (including an extension to come into compliance), the proper course is for the university to apply to the Zoning Commission in accordance with the applicable zoning regulations.

As for condition 10, the Court accepted the university's contention that the Virginia Avenue dormitory had been "specially designed to house freshmen" and was suitable only for them. Slip op. at 8; *see also, id.* at 47 (quoting district court decision). If there is support in the 4377-page record for that characterization, it eluded counsel for the District. The university's lengthy briefs contain no record citation for the assertion. *Watergate West v. BZA*, 815 A.2d 762, 763 (D.C. 2003), describes the building only as "a dormitory for 388 students." The university's characterization first surfaced in an affidavit filed in the district court *after* the administrative proceedings had ended. If there is evidence to support the university characterization, it was never presented to the Board and was never subjected to cross-examination by the other parties to the administrative proceeding, much less to Board fact-finding.

The Board should not now be compelled to reopen the record for–and become embroiled in disputes about–evidence that the university could have presented during the protracted Board proceedings (which included a remand). *Cf.* slip op. at 25, quoting *Miller v. Avirom*, 127 U.S. App. D.C. 367, 370, 384 F.2d 319, 322 (1967). Rather, if there is to be further tinkering with condition 10, it should be left to the Zoning Commission in a properly brought campus plan amendment proceeding.[2]

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[2] The Court's stay of condition 10 may be redundant in the short term as a practical matter. Condition 10 requires the university to provide on-campus housing for freshmen and sophomores only "to the extent such housing is available." Zoning enforcement authorities might plausibly conclude that campus housing for freshmen and sophomores is unavailable this academic year (continued...)

e. Finally, it is far from clear from the Court's opinion what Board actions will cause the stays of conditions 9(b) and 10 to expire. The opinion states that the stays remain in force "pending action" by the Board but it is not self-evident what "action" suffices. The opinion's terse language creates confusion for the Board, the parties, and the District's enforcement agencies. Whatever the Board does will likely spawn new appeals (and, possibly, more remands) even though judicial sanction of both conditions should have ended the Board's further involvement with the campus plan.

The indefinite stays, as well as the "remand" of conditions 9(b) and 10 to the Board, should be vacated.

2. The Court's holding that portions of condition 9 discriminate against students misstates both the intent and the effect of the BZA order. While reasonable minds may draw different inferences about intent, the Court's statements about the effect of the order can be disproved as a matter of fact.

Throughout the proceedings, the District has argued that the Board had no *intent* to discriminate against students. The Board's principal purpose was to prevent the university's explosive expansion into a fragile residential community, expansion caused by unrestrained growth in enrollment coupled with the university's refusal to build housing on its residentially-zoned campus to accommodate that growth. *See id.* at 14-15. The Board's initial solution was to place a hard cap on enrollment. On remand, its solution was a " soft cap," compelling the university to make more on-campus housing available for its swelling student population. In short, the Board's intent

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[2] (...continued)
because it is already fully occupied.

throughout was to change the university's behavior, not to discriminate against students or restrict their rights.

However that may be, the *effect* of condition 9 is not discriminatory. There is simply nothing in condition 9 that justifies the Court's statement that "70% of the University's undergraduates *must* reside on campus or, if off campus, then outside FBWE." *Id.* at 33, n. 17; italics added. Nor does the condition 9 support the Court's statement that undergraduates cannot live in Foggy Bottom but that expelled students can. *Id.* at 33.

Nothing in the language of condition 9 converts the university's obligations to provide housing into restrictions on individual students. Suppose that the Zoning Commission required a residential developer to provide more apartments for low-income families or for large families with many children as a condition for approval of a planned unit development. No one would seriously claim that the Commission had *discriminated against* those families by making more housing available. It should be equally clear that low-income families will not have been "steered" to the new units even if the developer reduces the rent below market rate in order attract them. And the developer's obligation to provide affordable housing does not force any family to move into it.

There is no meaningful distinction between the hypothetical and the present case. Under condition 9, students can live wherever they wish. It is highly probable that they will gravitate to available university housing, especially on campus. *See* M. Al-Azar, "At GU, More Students Calling Campus Home," *Washington Post*, at B1, Aug. 30, 2003 (reporting that Georgetown University students are delighted with additional on-campus housing, enough for 90% of undergraduate enrollment); R. 1478-1479, 2345 (GWU student Residence Hall Association recommendation that housing be provided on "campus or within one block of the campus boundaries"). Condition 9 does

not require any student to move or exclude any student from housing in Foggy Bottom or elsewhere. Because condition 9 has no discriminatory effect, no individual student would have a cause of action for a violation of the Human Rights Act (even if the Comprehensive Plan and the zoning regulations did not exist).

The Court should revise its opinion to state that condition 9 does not restrict where students may live and has no discriminatory effect. The Court should also reconsider its conclusion that the BZA intended to discriminate against students.

B. CONCLUSION.

The petition should be granted.

Respectfully submitted.

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CERTIFICATE OF SERVICE

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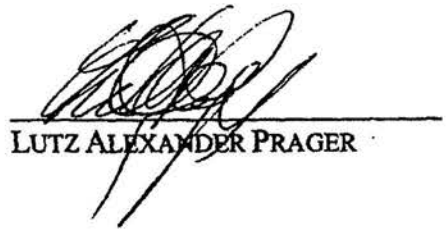
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