BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

In Re: Board of Zoning Adjustment Order No. 16566

APPLICANT'S STATEMENT
REGARDING PROCEEDINGS ON REMAND

The President and Directors of Georgetown College ("Georgetown" or "The University") submit this statement in response to the Board's request that all Parties to this proceeding advise the Board, in "bullet point" or summary style, of their respective positions with respect to remand proceeding in light of the Court of Appeals' Order. Specifically, the Parties were asked to describe: a) the issues that the Board must address on remand; and b) the appropriate procedure to be followed in addressing those issues.

The Court's decision requires three categories of revision by the Board: (1) a substantive change in Condition 2 necessary to conform the conditions to the record evidence; (2) the deletion of Conditions 3(c), 4(b), 5, 6, 8, and 10 whose imposition the Court held exceeded the Board's authority, and (3) the revision of Conditions 7, 14, and 15 consistent with the reasoning of the Court. The first two categories entail essentially ministerial changes; the third permits more consideration on the part of the Board but that consideration only involves compliance with legal standards that can be addressed by the parties in written submissions. Georgetown submits that a close examination of the issues that the Court has indicated must be addressed suggests only one reasonable approach as to procedure: The Board should promptly invite the parties to submit Proposed Orders on Remand, supported by brief written submissions addressing the basis for their proposals, as they deem necessary. Georgetown proposes a schedule implementing this procedure, which contemplates that the Board would then circulate its proposed Order on

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Remand for comment by the parties before its final adoption by the Board. This conclusion as to procedure flows logically from the outline of the issues set forth below, and serves important legal and practical objectives as well.

Issues

- Condition 2: (Enrollment Cap)

The Court remanded this condition for further consideration consistent with Order, which states that the hearing record does not support the denial of the University's requested enrollment increase or the continuance of the pre-existing cap. (Opinion at 23 ("We find little, if any, support in the record for the finding that the modest enrollment increase ...disapproved by the Board would have contributed to or exacerbated objectionable conditions in the adjoining neighborhoods") and 27 ("records lacks substantial evidence supporting the BZA's freeze of the University's enrollment.") Consistent with the Court's Order, the Board should revise Condition 2 to permit a cap of 6016 applicable to "traditional full-time undergraduate students", which revision would be an effectively ministerial act based on the Court's decision. There is no basis in the Court's decision, however, for hearing new evidence on this issue. The Board already heard and considered the parties' evidence, including the ANC's support of the University's requested increase, during the lengthy hearing in 2000, and the Court has concluded that that evidence was too insubstantial to support the freeze on the pre-existing cap reflected in Condition 2. Under the circumstances, only the revision of Condition 2 to permit a cap of 6016 would respect the Court's opinion.[1] In making that revision, Georgetown assumes that the Board would also want to take the opportunity to clarify that the University's compliance with any such cap is to be measured by the average of the University's spring and fall enrollment figures for "traditional full time undergraduates" as defined in the original order, which was the metric used to identify the benchmark enrollment figures that underlay the entire consideration of this issue in the original proceeding.[2]

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[1] The University continues to believe that the Board does not have the legal authority to impose a cap on enrollment. In this proceeding, however, the Court has determined that this issue is not properly before the Court. For that reason and consistent with the logic of the Court's opinion, the University contends that the Board should at this juncture continue the cap at the increased level requested by the University. We note, however, the Court's skepticism of the BZA's authority to impose caps at all (Opinion at 24-25 ("we are of the opinion that the imposition by the BZA of an enrollment cap at least approaches (if, indeed, it does not cross) the line between the exercise of legitimate zoning and land use authority [fn omitted referring Board to *Black's Law Dictionary* definition of "zoning"] and an *ultra vires* intrusion upon the University's educational mission.").

[2] The Court of Appeals did not consider this issue. Rather, it has surfaced in a further processing case before the Zoning Commission, in connection with the University's request to construct its new Performing Arts Center. In Zoning Commission Case No. 02-32, some

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- Condition 3(c): (Frequency of community education workshops)

Court struck down this condition (Opinion at 34, n.22 (this is a matter that "the University, and not the BZA, should decide"), so it must simply be removed, as the Court determined the subject matter to be outside the scope of the BZA's authority.

- Condition 4(b): (Frequency of distribution of Code of Conduct)

Court struck down this condition (Opinion at 34, n.22 (this is a matter that "the University, and not the BZA, should decide"), so it must simply be removed, as the Court determined the subject matter to be outside the scope of the BZA's authority.

- Condition 5: (Requirement of bringing claim before Hearing Board without Complainant's pursuit)

Court struck down this condition (Opinion at 34, n.22 (this is a matter that "the University, and not the BZA, should decide"), so it must simply be removed, as the Court determined the subject matter to be outside the scope of the BZA's authority.

- Condition 6: (24-hour Hotline)

Court struck down this condition (Opinion at 31, (striking down Condition 6 among other reasons, because, "this Condition is unrelated to the BZA's expertise..."), so it must simply be removed.

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neighbors complained that the University's practice of averaging was not permitted under the Order, which is silent on that point. It was contemplated that the University would bring a proceeding seeking to amend the Order to clarify that the existing practice was permitted, but the Court of Appeals' vacation of the Order has rendered that approach effectively impossible to date. As amply demonstrated in the record before the BZA in the original Campus Plan proceeding, the University has historically calculated its enrollment figures based on such averages, and the data supplied to the BZA for purposes of the Campus Plan case was expressly stated in terms of averages. It therefore would be logical for this Board to clarify that it intended no change in the University's practice of averaging semester enrollment figures to calculate the cap. As the record before the BZA amply demonstrates (and the University expects to provide to the Board a written submission with citation to relevant portions of the record, along with its Proposed Order on Remand, if the Board chooses to address this issue) it was such averaging that produced the enrollment numbers in the record originally considered by the Board. Disallowing averaging would ironically have the effect of eroding materially the increases ordered by the Court.

- Condition 7: (Investigations of housing/sanitation regulations and monitoring enforcement)

The Court held that it could not sustain Condition 7 as written, and held that the requirement that the University monitor enforcement of various District regulations was "far beyond what can reasonably be imposed on a private institution" (Opinion at 32). Therefore, that portion of Condition 7 must simply be eliminated. With respect to the legal issues Georgetown had highlighted regarding the balance of Condition 7, the Court suggested that on remand, the Board might attempt to fashion a remedy that would be substantially as effective as Condition 7 without the potential of violating FERPA, and that the parties could be heard on this legal issue. (Opinion at 32-33, n.21.) This is not a matter dependent on facts or evidence. It is a question of legal authority. The parties' positions on FERPA were amply expressed in the record on appeal, and, to the extent that the BZA deemed it necessary to formulate another variation on Condition 7 at all in light of the Court's opinion, the parties would have an opportunity to both propose their own new conditions and to comment on the legality of the Board's proposed new condition, if any, when the draft order is circulated for comment.

- Condition 8: (Composition of hearing committees)

Court struck down this condition as an "extraordinary intrusion into the University's disciplinary procedures...[which] substituted the Board's view for the University's on a matter of educational policy far removed from zoning considerations," (Opinion at 33), so it must simply be removed.

- Condition 10: (Parent Notification)

Court struck down this condition because it implicates a balancing of competing considerations regarding student privacy and interests of safety and discipline which is "a responsibility more appropriately left to the University than to the BZA," (Opinion at 34), so it must simply be removed.

- Condition 14: (DMV and Collection of License Plate Info)

Court identified "consultation" aspect of Condition 14 as moot, and noted that the BZA "may wish to take a fresh look at [the collection of information] provision to determine whether it is likely to accomplish what it was apparently designed to achieve." (Opinion at 38-39.) This "fresh look" merely requires consideration of the practical realities of the condition as framed. Certainly the elimination of the consultation requirement in light of the DMV's comments is ministerial and does not require any further process.

- Condition 15: (Parking)

Court remanded this condition for clarification as to not being intended as both a maximum and a minimum number of spaces. (Opinion at 38.)

Procedure

The Court's decision does not contemplate the Board hearing additional evidence. Nor could the practical realities support such a process:

- This proceeding was formally commenced over four years ago, when the University filed its Campus Plan application in January 2000. Although the University is about to begin its 2005 academic year, nearly halfway through the decade its Campus Plan was designed to cover, it currently has no Campus Plan, and no enrollment cap, its previously-approved plan having been vacated by the Court. It also has projects that it wishes to commence, which will, it believes, further both its academic and cultural goals and meet the community's concerns. Its ability to proceed with projects outlined under its 2000-2010 Campus Plan may be hampered by the absence of an approved Campus Plan Order. A streamlined proceeding that permits the Board to focus on and address the discrete issues raised by the Court's Order without an inappropriate and wasteful broadening of the issues would respect and best serve the Board and all interested parties. The prolonged and unnecessary delay of a final Order in this case would serve no legitimate interest.

- The Court's opinion, as described above, identifies conditions that were not within the Board's authority to impose (*e.g.*, Conditions 3(c), 4(b), 5, 6, 8, 10), conditions that were not supported by substantial evidence (*e.g.*, Condition 2), and conditions that require clarification or elimination to either comport with relevant law (*e.g.*, Condition 7) or to comport with the Board's actual intent (*e.g.*, Condi-

tion 15). The hearing record in this case closed more than three years ago, and it is that record that properly underlies the Board's revision of its Order. Hearing additional evidence is neither necessary nor productive to fulfill these objectives. Rather, as the discussion above makes clear, the Court's opinion contemplated, at most, a reconsideration by the Board of the manner in which certain of the conditions it addressed may be restructured to comply with the legal principles set forth in the Court's opinion.

- Much of the Campus Plan was not addressed by the Court and should not be reconsidered on remand. Hearing additional evidence would put the Board in an anomalous position of having an Order based largely on a four-year old record, but in part based on some new evidence, reflecting potentially different conditions. The Campus Plan should be uniform in context.

For these reasons, Georgetown respectfully suggests that the Board establish the following schedule:

At its September public meeting the Board announces that all parties may file proposed Orders within two weeks from that date, along with a short statement of reasons, if necessary, why any particular condition should be framed in the manner proposed.

By its October public meeting, the Board can take final action, and issue its proposed Order on Remand, on which the parties may comment within 30 days.

By its November public meeting, the Board can then issue a final Order.

Through this process, the University may have a final Campus Plan Order in place this year under which it could operate. Otherwise, we fear, it may be much longer before it will have any Campus Plan.

Dated: August 2, 2004

Respectfully submitted,

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Certificate of Service

I hereby certify that on August 2, 2004 a copy of the foregoing document was mailed first class, postage pre-paid, to the following parties:

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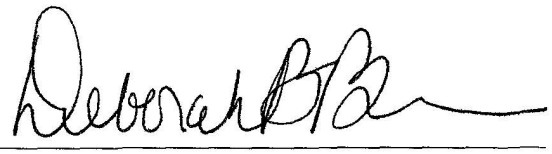
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