VENABLE LLP
Including professional corporations

1201 New York Avenue, N.W., Suite 1000
Washington, D.C. 20005
(202) 962-4800, Fax (202) 962-8300
www.venable.com

OFFICES IN

WASHINGTON, D.C.
MARYLAND
VIRGINIA

VENABLE
ATTORNEYS AT LAW

(202) 513-4763
jamoore@venable.com

February 28, 2003

D.C. ZONING COMMISSION
2003 FEB 28 PM 3:44
CASE NO.02-26
EXHIBIT NO.61

VIA HAND DELIVERY

Carol Mitten, Chair
District of Columbia Zoning Commission
441 Fourth Street, NW
Suite 210
Washington, D.C. 20001

Re: Zoning Commission Case 02-26 – the George Washington University's (the "University") Lerner Health and Wellness Center (the "Health and Wellness Center") request to modify the conditions contained in the Board of Zoning Adjustment (the "BZA") Order No. 16276

Dear Ms. Mitten and Members of the Commission:

The U.S. Court of Appeals for the District of Columbia has recently issued an opinion in The George Washington University v. District of Columbia, No. 02-7055 & 7060 (February 4, 2003) (the "USCA Opinion") This decision reversed Judge Louis Oberdorfer's Federal District Court decision declaring unconstitutional certain conditions in the Board of Zoning Adjustment (the "BZA") orders governing the University's Foggy Bottom Campus Plan. For the reasons stated below, the USCA Opinion should have no impact on the application now pending before the Zoning Commission involving the Health and Wellness Center, scheduled for a decision meeting on March 10, 2003.

Legal Significance of the USCA Opinion and the BZA Conditions

The USCA Opinion is not yet a final order. As such, the USCA Opinion cannot take effect until the court issues a mandate of reversal, which, in the absence of further filings, is projected to take place in the middle of March 2003. See FED. R. APP. P. 41, Circuit Rules 35, 40 and 41. However, the University is considering exercising its right to appeal the USCA Opinion or to challenge the BZA conditions in another forum. Such filings could impact the effective date of the USCA Opinion, as well as the date the BZA conditions Judge Oberdorfer's ruling struck down may become effective.[1] Thus, it is not clear at this time exactly when such conditions will assume any binding, legal significance. Until such time, Judge Oberdorfer's opinion declaring several of the BZA-imposed conditions unconstitutional is the binding law.

[1] Assuming the University timely files a petition for rehearing, the mandate automatically will be stayed pending the disposition of that motion by the D.C. Circuit. See FED R. APP. P. 41(d).

ZONING COMMISSION
District of Columbia
Case 02-26
61

ZONING COMMISSION
District of Columbia
CASE NO.02-26
EXHIBIT NO.61

BZA Enforcement Conditions

The BZA issued two orders in connection with the University's 2000 Campus Plan, an initial order, BZA Order 16553 on March 29, 2001 (the "March 29 Order") and a Remand Order on January 23, 2002 (the "Remand Order"). The Remand Order amended conditions 2, 9 and 17 of the March 29 Order, but otherwise left all other conditions in the initial order intact. Both orders contain enforcement conditions. However, even if both orders were fully effective today, neither would require any delay in deciding the Health and Wellness Center application.

A. The March 29 Order

The March 29 Order, in Condition 20, contains an enforcement condition which reads as follows:

> No special exception application filed by the University for further processing under this plan may be granted unless the University proves that it has consistently remained in substantial compliance with Conditions 1 through 19 set forth in this Order. Further, any violation of a condition of this Order shall be grounds for the denial or revocation of any building permit or certificate of occupancy applied for by, or issued to, the University for any University building or use approved under this plan, and may result in the imposition of fines and penalties pursuant to the Civil Enforcement Act, D.C. Code §§6-27-1 to 6-2723.

(emphasis added). The University is, and shall remain, in substantial compliance with Conditions 1 through 19 of the March 29 Order. The University has demonstrated its compliance through its November 18, 2002 prehearing submission to the Zoning Commission. The only condition not addressed in that submission is Condition 10, which states:

> Commencing in the Fall 2001 semester, the University shall require all full time freshmen and sophomore students to reside in University housing located within the campus boundary established by the Board, to the extent such housing is available. The University may exempt students who commute, are married or have children, or have disabilities or religious beliefs inconsistent with residence hall life. Prior to the Fall 2003 semester, housing commitments made to current University students may be taken into account when determining the amount of housing available.

Judge Oberdorfer struck down this condition as an unconstitutional violation of the University's rights. However, even if Condition 10 were reinstituted today, the University would be in

substantial compliance with this condition. Other than the stated exemptions, the University provides housing to all full-time freshmen and sophomores attending its Foggy Bottom campus. Although most of this housing is provided on-campus, some has been provided in off-campus University residence halls as on-campus housing was not available due to commitments made to upper classmen.[2]

B. The Remand Order

The Remand Order also imposes specific housing and reporting obligations on the University. Condition 9, in part, requires that:

> a. Beginning no later than August 31, 2002, the University shall provide beds for at least 5600 full-time undergraduate students on campus or outside the Foggy Bottom/West End area...
> b. Beginning in August 2002, whenever the head count of full-time undergraduate enrollment exceeds 8000 (the "Base Number"), the University shall provide on bed on campus or outside the Foggy Bottom/West End area for each full-time undergraduate in excess of the Base Number....
> e. No special exception shall be granted and no permit to construct or occupy buildings for nonresidential use on campus may be issued, and existing special exceptions and permits issued pursuant to the campus plan approved by this Order shall be subject to suspension and revocation, whenever a semiannual report reveals that the University is not in compliance with the provisions of this condition except special exceptions and permits for projects in which a student housing component would occupy at least 50% of the FAR. In addition, Condition 20 of the March 29, 2001, Order, shall apply to violations of this condition.

(Emphasis added). As matters of law and fact, the University is in substantial compliance with these conditions.

Irrespective of the University's legal challenge to the BZA conditions, the University is, nonetheless, aggressively adding undergraduate beds to its Foggy Bottom campus. The University is currently constructing approximately 720 new beds at its recently approved Square 43 site, 203 beds at its recently approved Square 57 site, and is actively reconfiguring existing

[2] Condition 10 permits the University to take into account such commitments until the Fall 2003 semester.

on-campus residence facilities to add an additional 150 beds. As recently as April 3, 2002, the Zoning Commission found, in Order Number 958, that:

> the University has moved aggressively to create three development proposals that will increase the number of on-campus beds by 1,097, or 14%. Given the legal controversy surrounding this issue, the University's substantive steps to increase the number of on-campus beds and the timing of the remand order, the Commission is satisfied that the University is taking reasonable steps to produce an overall housing plan in a timely manner.

The University has diligently and reasonably acted to substantially comply with the requirements imposed upon it by the BZA. There is no evidence to the contrary.

Moreover, District of Columbia law has determined that "substantial compliance is not strict compliance." See National Trust for Historic Preservation v. Dep't of State, 834 F. Supp. 453, 455; *rev'd in part on other grounds*, 49 F. 3d 750 (D.C. Cir. 1995). The District has ruled that "the sensible and equitable approach" is to find a party in substantial compliance with a requirement when it has complied "with the essential requirements of the provision as may be sufficient for the accomplishment of the purposes thereof." Wheeler v. District of Columbia Bd. of Zoning Adjustment, 395 A.2d 85, 90 (D.C. Ct. App. 1978). In these cases, the court looked to the purpose behind the requirement and if the party had complied to a degree sufficient enough to accomplish the purpose of the requirement, then the court ruled that the party was in compliance. In the present case, and notwithstanding the legal challenges, the University has taken diligent steps to rapidly create housing for its full-time undergraduate students of the Foggy Bottom campus. However, such housing cannot be created overnight. The purpose behind Condition 9 of the Remand Order is to ensure the University takes immediate and reasonable steps to ensure that it has a sufficient number of beds to house its freshmen and sophomore full-time undergraduate students on the Foggy Bottom campus (or outside of the Foggy Bottom/West End area). Condition 9 solely relates to the creation of housing, it does not apply to how the existing students, faculty and staff use an existing building on campus. The University has made, and continues to make, good faith efforts to comply with the conditions at the earliest reasonable time. Withholding this special exception as a penalty when the University is taking all reasonable steps to comply with the BZA's purposes is unnecessary and unwarranted to achieve compliance with the BZA conditions.

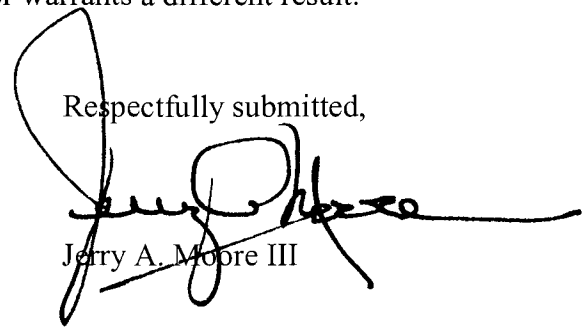
Second, by its own terms, Condition 9(e) only applies to special exceptions and permits "issued pursuant to the campus plan approved by this Order". The Center was approved and permitted under the 1985 campus plan, not the 2000 campus plan to which this condition applies. Only if the University applies for a special exception or construction permit under the

2000 campus plan, does it have to meet the requirements of Condition 9(e). Until such time, Condition 9(e), for all practical purposes, should have no effect on the University's request to increase the efficiency of the Center.[3]

Conclusion

Accordingly, the University respectfully requests the Zoning Commission proceed with its decision meeting, scheduled for March 10, 2003. For the reasons outlined above, nothing in neither the USCA Opinion nor the conditions contained in either the March 29 Order or the Remand Order requires or warrants a different result.

Respectfully submitted,



Jerry A. Moore III

[3] Despite ANC 2A's statements to the contrary, the University is in substantial compliance with all other conditions imposed by either the March 29 Order or the Remand Order.