VENABLE LLP

575 7th Street, NW
Washington, DC 20004-1601

Telephone 202-344-4000
Facsimile 202-344-8300

www.venable.com

Jerry A. Moore III (202) 344-4763 jmoore@venable.com

February 2, 2004

2004 FEB -1 PM 11:19
D.C.
OFFICE OF ZONING

VIA HAND DELIVERY

Jerrily R. Kress, FAIA
Director, Office of Zoning
441 Fourth Street, N.W.
Suite 220
Washington, D.C. 20001

Re: Z.C. Case No. 02-26: The George Washington University Lerner Health and Wellness Center

Dear Ms. Kress:

Enclosed for filing is the applicant's **revised** proposed Findings of Fact, Conclusions of Law and Order in the above-referenced case. Kindly disregard the proposed Findings of Fact, Conclusions of Law and Order that was submitted by the applicant on January 30, 2004.

Sincerely,

Jerry A. Moore III

JAM/ymhc

Enclosure

cc: Advisory Neighborhood Commission 2A
c/o Ms. Dorothy Miller
2440 Virginia Avenue, N.W.
Apt. D206
Washington, D.C. 20037

The Foggy Bottom Association
c/o West End Library
24th L & Streets, N.W.
Washington, D.C. 20037

bcc: Charles R. Barber, Esquire

ZONING COMMISSION
District of Columbia
Case No. 02-26
Exhibit No. 67

ZONING COMMISSION
District of Columbia
CASE NO.02-26
EXHIBIT NO.67

The Zoning Commission for the District of Columbia

Order No. 02-26
Z.C. Case Number 02-26

The George Washington University -
Application for Special Exception under 11 D.C.M.R. § 210
for Premises at 2301 G Street, N.W. (Square 42, Lot 847)

February 9, 2004

2004 FEB -1 AM 11:14
GOVERNMENT OF D.C.
OFFICE OF ZONING

Pursuant to Public Notice, The Zoning Commission for the District of Columbia (the "Commission") held a public hearing December 2, 2002 to consider an application from the George Washington University ("the University" or "the Applicant"), pursuant to Sections 210 and 3104.4 of the Zoning Regulations, for "further processing" special exception relief, under an existing campus plan, to amend the Board of Zoning Adjustment's (the "BZA") March 31, 1998 Order No. 16276 (the "Order") to modify condition number one restricting the classes of users at the Lerner Health and Wellness Center (the "Center") and to amend condition number two to permit the Center to remain open until 1:00 a.m. on all days except Saturday.

The public hearing was conducted in accordance with the provisions of 11 D.C.M.R. Sections 210 and 3104.4.

Procedural Background

Public Notice. The Office of Zoning ("OZ") published a notice of public hearing in the D.C. Register on _____. A copy of the public hearing notice was posted in the Office of Zoning and copies were provided to the District of Columbia public library system.

By letter dated _____, the Office of Zoning mailed a Notice of Public Hearing to the owners of all property within two hundred feet of the subject property; the District of Columbia Office of Planning ("OP"); the District Department of Transportation; Advisory Neighborhood Commission ("ANC") 2A, the ANC for the area within which the property is located; the single member ANC district for the subject property; the Ward 2 Councilmember; the Zoning Administrator; and to the Applicant.

The applicant submitted an affidavit of posting dated _____ indicating that on _____ it posted the property with three (3) zoning notices, (1) on each of its street frontages on New York Avenue, NW, 23rd Street, NW and G Street, NW.

Office of Planning Report. By memorandum dated November 25, 2002 and by testimony at the public hearing the Office of Planning ("OP") recommended that Condition 1 of BZA Order No. 16276 be revised to allow the University authority to offer the use of the Center to residents in the Foggy Bottom/West End area; that the use of the Center by the students, faculty and staff on the Mt. Vernon campus of the University be considered subject to an augmentation of the University's transit service; and that Condition 2 of BZA Order No. 16276 be revised to allow the Center to remain open until 11:30 p.m. on all days.

Report of the District Department of Transportation. By memorandum dated November 26, 2002, the District Department of Transportation ("DOT") supported the Office of Planning's recommendation to revise Condition 1 to limit new members to residents of the Foggy Bottom/West end community together with students, faculty and staff from the Mt. Vernon campus, provided that adequate transit service is provided to and from the Mt. Vernon campus. DOT also concurred with the Office of Planning's recommendation to limit the closing hours of operation to 11:30 p.m. seven days a week. In making this recommendation DOT acknowledged that the extension of the Center's closing hour will have little traffic impact, but could "possibly" result in a noise impact or "other [unexplained] disruption" to the community. DOT further recommended that the Center develop a transportation management plan when special events with more than 50 participants occur at the Center and that the University provide additional bicycle

storage facilities and establish policies to further encourage transit usage.

ANC Report. By letter dated November 26, 2002, Advisory Neighborhood Commission 2A submitted a resolution in opposition to the application. In that resolution the ANC contended that the University is attempting to change the use that was first approved for the Center in BZA Order No. 16276; that the modifications proposed by the University cannot be implemented without a review of the University's Foggy Bottom Campus Plan and of its Mt. Vernon Campus Plan; that the requested additions to membership would transform the Center from a low intensity use to a high intensity use which is inappropriate at the edge of the campus boundary; that the University is attempting to introduce a high intensity intercollegiate sports activity at the Center; that modifying the membership categories to offer memberships to selected persons who are not affiliated with the

University constitutes a violation of the anti-discrimination provisions of the District of Columbia Human Rights Act; and that the approval of this application will result in the Center becoming a quasi-commercial facility with no connection to the University's educational mission.

Public Hearing. On December 2, 2002, the Zoning Commission held a public hearing on the application. Charles Barber, Esquire and Tony Vecchione, both of the University, testified to the reasons that the University seeks to extend membership privileges beyond those that have been approved by the BZA, its efforts to obtain neighborhood support, the requests that the University has received from people who live and work in the community, efforts made by the University to ensure that its usage projections are correct, the current user profile at the University's Smith Center, the current user profile at the Center, the projected use of the Center if this application is approved and to the ability of the Center to accommodate additional

users. University representatives also testified about the desire to provide students in particular a healthy recreational alternative in the later hours by extending closing time until 1:00 a.m. on most nights. According to the University's representatives, students are typically out that time of night and complaints have been received about any disruptive conduct by students leaving the Center at closing.

Paul Brailsford, co-founder and CEO of Brailsford and Dunlavey, a firm that provides facility planning and project management services for the development of quality of life facilities for independent school, higher education and municipal clients, testified as an expert on the demand and use of recreational and intercollegiate sports facilities. He noted the trends and usage profiles of the Center compared with other universities and membership options, hours of operation and membership patterns that are common to university facilities of this type. He opined further on projected use patterns at the Center, the

impact that approval of the application would have on daily utilization by day, week and month and the University and community market demand for expanded services, together with the benefits to the University and to the neighborhood. His report noted that most schools are expanding recreation center operating hours until 1:00 a.m. and 2:00 a.m. to provide students with an alternative activity to going to bars. The Center is the only facility of those he surveyed that is open less than 100 hours per week. He concluded that the Center is not optimally utilized and that, when the current and the projected utilization rates are considered, an additional 3,000 members can be reasonably accommodated without causing an adverse impact to the Center or to the adjacent neighborhood.

Nicole White of Gorove/Slade Associates testified as an expert on existing and projected traffic and parking conditions. Her written report and oral testimony indicated that approximately 17,000

students, 2,000 faculty and 7,800 staff are enrolled or employed at the University's Foggy Bottom campus. All 17,000 students have membership rights. Approximately 1,000 of the 9,800 faculty and staff have purchased memberships at the Center. When she divided the 2,375 average weekday patrons into the total of 18,000 people who currently qualify for memberships and she was able to conclude that only 13% of those currently eligible to use the Center on an average day actually do so. She testified that the Center has a capacity of 1,973 persons and presented data which showed that the Center experiences the most traffic entering and exiting the facility between the hours of 6:00 p.m. and 7:00 p.m. when an average of 243 persons are using the Center. Her report concluded that the approval of this application will have no adverse traffic, pedestrian of parking impact because, in this urban setting, most of those who do use, and are projected to use the Center access the building by foot or

by public transportation. She also submitted oral and written evidence that extending the closing hour of the Center will have a minimal impact on traffic and parking because of the diminished traffic during later hours and the aforestated means of access.

Ten residents of the Foggy Bottom neighborhood appeared and testified in support of the application. In the main, those witnesses objected to the BZA condition that excluded neighborhood residents from benefiting from the use of the Center. Supporting witnesses concluded David Lehrman, Commissioner-elect for ANC 2A-01. He testified to his belief that the target population for an extended membership would be the people who are already on campus or who live in the neighborhood.

A representative of the Foggy Bottom Association testified in opposition to this application alleging that an expanded membership

and increased hours of operations will have an adverse impact on the neighborhood and its "tax paying businesses."

Legal Proceedings. By Order dated March 29, 2001, the D.C. Board of Zoning Adjustment conditionally approved the University's Campus Plan through June 9, 2009. By its terms, to receive future special exceptions from the Zoning Commission, the University must be in compliance with Conditions 1 through 19. The University challenged portions of that Order in the U.S. District Court for the District of Columbia and won a preliminary injunction against enforcement of certain conditions. Subsequently, after another public hearing, the BZA issued a "Remand Order" dated January 23, 2002, that modified condition nos. 2, 9 and 17 of the original order but left other conditions in tact. Thereafter, the University renewed its legal challenge. Subsequently, by Order dated April 12, 2002, the U.S. District court declared several conditions of the Remand Order to be

invalid and unenforceable. Otherwise, the BZA Order and all other conditions were upheld.

The District of Columbia appealed the U.S. District Court's Order to the U.S. Court of Appeals for the District of Columbia. By Order dated February 4, 2003 the appellate court reinstated the previously invalidated conditions of the Remand Order. Concurrently, the University appealed the Remand Order to the District of Columbia Court of Appeals.

At a public meeting held March 10, 2003, on advice of counsel, the Commission determined that the University was not then in compliance with Condition 9(a) of the Remand Order which, in pertinent part, requires the University to, by August of 2002, supply 5,600 beds for its undergraduate students either on its Foggy Bottom Campus or outside of the Foggy Bottom neighborhood. Relying on Condition 9(e) of the Remand Order which specifically states "that no

special exception shall be granted whenever a semi-annual report reveals the University is not in compliance with the provisions of Condition 9," the Commission determined that the University had not demonstrated that it was in compliance with Condition 9(a) and, for that reason, the Commission voted to deny Application No. 02-26. No order reflecting that vote was issued.

Later, on July 3, 2003, the D.C. Court of Appeals stayed the provisions of Conditions 9(a), 9(b), 9(f) and 10 pending further order of that court. The effect of this action was to remove the procedural obstacle, as determined by the Commission on March 10, 2003, to the Zoning Commission moving forward to finally decide this application on its merits.

By letter dated September 4, 2003, the University requested the Commission to reopen the record to receive further evidence and to modify this application.

In a decision and Order dated September 11, 2003, the D.C. Court of Appeals, inter alia, invalidated Condition 9(a) of the Remand Order and continued the stay of Condition 10.

By letters dated October 17, 2003, Advisory Neighborhood Commission 2A and the Foggy Bottom Association stated their opposition to the University's request to reopen the case record and to modify the application.

At its regular meeting on October 20, 2003, the Commission noted that both the District of Columbia and the University had filed cross motions for a rehearing of the District of Columbia Court of Appeals Order of September 11, 2003. Concluding that the question of compliance with the Remand Order was still undecided in litigation, the Commission determined to wait for further action by the Court of Appeals before it decided this application on its merits. The

University's motion to receive further evidence into the case record was denied.

On December 23, 2003, the D.C. Court of Appeals issued an Order denying both parties' motions for a rehearing of its September 11, 2003, Order.

The Commission met at its regular meeting on February 9, 2004, and determined that, for purposes of this proceeding, the D.C. Court of Appeals has relieved the University of the obligation of complying with Conditions 9(a) of the Remand Order, as well as Condition 10 of the original order at this time, and accordingly the University was entitled to a decision on the merits of this application.

CONTESTED ISSUES

1. In considering the issues raised by the ANC, the Commission finds that it concurs with the BZA determination in application no. 16276 that the Center is not a major use on this

campus. Even with the additional membership that is proposed, at peak periods the usage of this building is projected by the University and its expert consultants to be substantially less than that of other buildings located at the core of the campus. The ANC did not challenge these projections and presented no support of its own that the expanded membership would contribute to or exacerbate objectionable conditions in the adjoining neighborhood.

2. The Commission disagrees with ANC's contention that the District of Columbia Human Rights Act, as amended, precludes the Commission from fashioning an order that would extend the University's ability to offer memberships at the Center to non-University individuals who reside in the adjacent neighborhood. The ANC contends that such a policy would constitute discrimination on the basis of "place of residence" in violation of the Act. Besides taking the unseemly stance of taking a position is directly adverse of the interest

of its own constituents, the ANC's position is directly contrary to the plan language of the Human Rights Act. Although Section 2-1402.31 does prohibit discrimination of the basis, inter alia, of residency in a "place of public accommodation", the Center is not such a place. Section 2-1402.02 (24) defines "place of public accommodation" and expressfully excludes "any institution, club, or place of accommodation which is in its nature distinctly private...". Clearly, the George Washington University is a private institution and the Center is part of this private institution. Therefore, the prohibition on discrimination on the basis of residency in Section 1402.31 does not apply to the University or to the Center.

Further, Section 2-1402.41 provides a prohibition against discrimination by institutions of higher education, but contains no mention of "place of residence" as an unlawful basis of discrimination. Thus, the D.C. Human Rights Act does not prohibit an institution of

higher education from making membership decisions with respect to the Center on the basis of residency.

3. With regard to the ANC's contention that approving this application will create a quasi-commercial facility unrelated to the University's educational mission, the Commission disagrees. The Center will be owned and managed by the University, and will provide health and wellness services primarily for the benefit of its students, faculty and staff. Extending those benefits as proposed, to persons who are either otherwise affiliated with the University or to persons who reside near to the Center, does not alter or substantially diminish its primary purposes, as testified by the University's expert on the demand and use of recreational sports facilities, such facilities are common on campuses of high education institutions and frequently include community members.

4. The ANC's contention that the approval of this application will change the use that was approved for this building in BZA application No. 16276 is without an evidentiary basis to support it. On the other hand, there is sufficient evidence in the record to justify a conclusion that the University proposes no change to the health and wellness uses that were approved by the BZA.

5. The ANC's contends that the University is increasing the intensity of use at the Center by transferring intercollegiate sports activities that are currently located at the Smith Center. The Commission finds that it is satisfied with testimony of University representatives there are no spectator facilities at the Center and that the scheduling of intercollegiate squash activities at the Center has not appreciably increased the occupancy or the intensity of the approved uses at the Center. This finding is supported by the expert testimony and evidence submitted by the University's traffic and parking

consultant and by University's expert facilities consultant and there is no evidence to the contrary.

6. Finally, the ANC's contention that the approval of this application requires a modification to the approved plans for the University's Foggy Bottom and Mt. Vernon campuses is without merit. Section 210.4 of the Zoning Regulations requires the University to develop its campus(es) according to an approved plan showing the location, height and bulk of all of its present and proposed developments. The Commission has approved such plans for the University's Foggy Bottom and Mt. Vernon campuses. The Foggy Bottom campus plan, viewed together with the special exception granted in BZA Order No. 16276, and with the special exception requested here, satisfies the requirements of Section 210.4. There is no building or new use being proposed for the University's Mt. Vernon

campus so the campus plan provisions of Section 210.4 are not applicable to this application.

FINDINGS OF FACT

1. The subject property is located at 700 23rd Street, NW on the Northwest corner of the intersection of 23rd and G Streets, NW. It is located within the approved George Washington University Campus boundaries on lot 947 in Square 42.

2. The site is located in an R-5-D District and is improved with a four story structure with four underground levels, three of which are used for parking. As a part of its mission, the University uses the building as a Health and Wellness Center that provides recreational and physical fitness activities to the university community.

3. On March 31, 1998, the BZA approved a special exception for the construction and use of the Center finding that the Campus Plan "... clearly anticipates an athletic facility within its periphery such

as the Health and Wellness Center that has been proposed." That order limited the use of the Center to the "... students, faculty and staff of the Foggy Bottom Campus" and mandated that "... operation of the facility shall end at 10:00 p.m., Monday through Saturday and at 8:00 p.m. on Sundays."

4. The Center opened in August 2001. The University has since gathered and submitted into evidence data that demonstrates the actual usage of the Center to be significantly below building capacity and less than the level that the BZA previously found to be the maximum that could be sustained without creating an adverse traffic impact. Further, the University submitted evidence that the Center was constructed to hold almost 2,000 single users at any given time, but that the actual usage profile demonstrates that the Center only operates at 12.5% of its capacity during its highest period of use, thus leaving the building occupancy at 87.5% under capacity. The

University evidence analyzed usage experience during the hours and days that the Center was open. No evidence to the contrary was presented.

5. The University's expert traffic consultant submitted a report and testified at the hearing that less than 10% of the students and less than 20% of the faculty and staff who use the Center arrive there by private vehicle. Of those who did drive to the Center, they either found street parking or parked in one of the University's parking facilities. The traffic consultant concluded that, based on its research, the current usage of the Center results in a negligible impact on the surrounding community and the surrounding street system. No evidence to the contrary was presented.

6. In this application, the University proposes to extend membership at the Center beyond the students, faculty and staff of its Foggy Bottom campus to a potential additional 3,000 users including

university students, faculty and staff (regardless of campus), university officials, members of the University President's Club, university alumni, their respective guests and to people who live and work in the neighborhood, including residents of St. Mary's Court, members of St. Mary's Church, students at the School Without Walls and to the owners of the Remington Condominiums.

7. With the existing usage data as a guide, the University's expert traffic consultant submitted evidence and testified that the approval of the proposed additional users would not have an adverse traffic impact because even with the projected patronage, the Center will still operate well under capacity and result in a .4% increase in traffic, a level that the traffic expert concludes to have an insignificant impact on area traffic conditions. The report also concluded that the existing sidewalk system can accommodate the projected increase in

pedestrian usage. The Commission accepts the evidence of the traffic consultant.

8. The University submitted evidence that 445 students reside on its Mt. Vernon Campus from which 75 additional users of the Center are projected; that transportation between the Foggy Bottom and Mt. Vernon campuses is facilitated by University shuttle buses which are scheduled no less frequently than every 20 minutes during the school year; that there is a shuttle bus stop located one block from the Center; that the friends and supporters of the University who are members of the President's Club category would add a maximum of 247 new users to the Center; and that the community memberships would be limited to 1,000. There was no evidence to the contrary.

9. The University submitted evidence that students on its Mt. Vernon campus would likely arrive on the Foggy Bottom campus by shuttle bus; that many of the President's Club members are likely to

be already on the campus, and that the residents and members of the nearby establishments are already located in the neighborhood and thus, unlikely to have an additional traffic impact. There was no evidence to the contrary.

10. By letter dated February 28, 2003, the University submitted the biannual report that is required by the Remand Order. The University also submitted a status report on its compliance with the conditions of the campus plan Orders. These submissions demonstrated that the University was in compliance with all applicable conditions then in effect. There is no evidence to the contrary.

CONCLUSIONS OF LAW

1. The Zoning Commission is authorized under 11 D.C.M.R. Section 210.1 to approve a special exception in an R-5-D District for a college or university use.

2. The public notice and public hearing requirements for the special exception have been met.

3. As directed by 11 D.C.M.R. Section 3119.2, the Commission has required the applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to Section 3104.1 for special exception relief under Section 210.

4. Based upon the record before the Commission and having given "great weight" to the ANC, the Commission concludes that the applicant has met the burden of proof pursuant to the 11 D.C.M.R. Sections 3104.1 and 210.1, that the requested relief can be granted subject to the conditions set forth below as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Commission further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

DECISION

In consideration of the findings and conclusions set forth in this Order, the Zoning Commission for the District of Columbia hereby **ORDERS**, that this application be **GRANTED** subject to the following conditions:

1. Use of the Center shall be limited to students, faculty and staff of the University's Foggy Bottom and Mt. Vernon campuses, friends and supporters of the University who are members of the President's Club and to persons who reside within 500 feet of the Center or who are members of organizations that are located within that boundary.

2. The University will maintain a regular shuttle service between the Mt. Vernon campus and the Foggy Bottom campus during the hours that the Center is

open so long as Mt. Vernon campus students are permitted access to the Center.

3. The Center shall close at 1:00 a.m. on all days except Saturdays when the facility shall close at 11:00 p.m.

BY ORDER OF THE ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA

Each concurring member has approved the issuance of this Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director

FINAL DATE OF ORDER:_____

Pursuant to 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOME EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURES AND RENOVATIONS WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

THE APPLICANT SHALL COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, CODIFIED AS CHAPTER 25 IN TITLE 1 OF THE D.C. CODE. *SEE* D.C. CODE § 1-2531 (1999 Repl.). THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THE HUMAN RIGHTS ACT. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.