GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission

Z.C. CASE NO.: 02-26

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ZONING COMMISSION
District of Columbia
CASE NO. 02-26
EXHIBIT NO. 98

ATTESTED BY: _____
Alberto P. Bastida, AICP
Secretary to the Zoning Commission

ZONING COMMISSION
District of Columbia
CASE NO.02-26
EXHIBIT NO.98

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission

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ZONING COMMISSION ORDER NO. 02-26
CASE NO. 02-26
(Application by George Washington University for Further Processing of an Approved Campus Plan Under § 210 to Modify Conditions of Approval of the Lerner Health & Wellness Center at 2301 G Street, N.W. (Square 42, Lot 847))
June 14, 2004

Pursuant to public notice, the Zoning Commission for the District of Columbia held a public hearing on December 2, 2002 and May 24, 2004 to consider an application from the George Washington University ("University" or "Applicant") pursuant to §§ 210 and 3104.4 of the Zoning Regulations for "further processing" special exception relief, under an existing campus plan, to amend an order of the Board of Zoning Adjustment ("BZA" or "Board") in Application No. 16276 (March 31, 1998). The Applicant sought to modify two conditions adopted by the BZA that restricted the use of the Lerner Health and Wellness Center ("Center").

Procedural Background

Public Notice. The Office of Zoning published a notice of public hearing in the *D.C. Register* on August 30, 2002 (49 DCR 8343). The Office of Zoning also mailed a notice of public hearing to the owners of all property within 200 feet of the subject property; the Office of Planning; 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 the Applicant.

Applicant's Case. The Applicant presented testimony from witnesses who described current and projected use of the Center and explained why the University sought to extend its membership privileges beyond those previously approved by the BZA. Paul Brailsford, co-founder and chief executive officer of Brailsford and Dunlavey, a firm involved in the development of quality-of-life facilities for universities, testified as an expert on the demand and use of recreational and intercollegiate sports facilities. He concluded that the Center was not optimally utilized and that an additional 3,000 members could be reasonably accommodated without causing an adverse impact to the Center or to the adjacent neighborhood. The Applicant's traffic expert, Nicole White of Gorove/Slade Associates, prepared a study of traffic and parking based on 3,000 potential new users of the Center. The traffic expert testified that on any given day, approximately 13 percent of the current membership uses the Center, with fewer than 10 percent of students and 20 percent of faculty and staff who use the Center arriving by private vehicle; those who drive to the Center park either on the street or in one of the University's parking

facilities. The traffic expert concluded that the current usage of the Center results in a negligible impact on the surrounding community and street system, and that the University's proposal to expand membership would result in a minimal increase in traffic.

The University requested modification of the conditions adopted by the BZA to increase the number of potential users of the Center and to expand its hours of operation. As finally proposed, the University sought to extend membership at the Center to approximately 1,300 additional potential users who would be: (a) 445 students and 85 faculty and staff from the University's Mount Vernon campus; (b) 145 members of the President's Club (which includes members of the Board of Trustees and supporters of and potential donors to the University), about 100 of whom currently use the Smith Center; (c) students, faculty, and staff, on an organized basis, from the School Without Walls, a public high school located within the campus plan boundary; (d) approximately 122 immediate neighbors or members of neighboring institutions, comprising people living in the Remington Condominiums and St. Mary's Court senior community residence facility – both within 200 feet of the Center – as well as members of St. Mary's Church and the Independent Order of Odd Fellows Lodge; and (e) guests of members – up to 25 on a weekday and 50 on a weekend. The University also proposed to extend the Center's hours of operation so as to permit the facility to remain open until 1:00 a.m. every day.

Government Reports. By reports dated November 25, 2002 and May 6, 2004, and by testimony at the public hearing, the Office of Planning ("OP") recommended changes to the conditions adopted by the Board of Zoning Adjustment so as to allow certain increases in memberships in the Center and to extend its hours of operation. OP also recommended a three-year term on the condition permitting expanded membership in order to evaluate the impact of students in new residence halls on-campus on the use of the Center and the impact of increased memberships on the Foggy Bottom neighborhood.

The Office of Planning recommended extension of membership at the Center to approximately 1,021 additional potential users, who would be: (a) 530 students, faculty, and staff from the University's Mount Vernon campus; (b) 102 residents of St. Mary's Court (50 memberships) and the Remington Condominium (52 memberships); (c) 20 members of two immediately adjacent institutions, St. Mary's Church and the Odd Fellows Lodge (10 memberships each); and (d) 369 students and faculty of the School Without Walls. OP recommended against permitting additional members of the President's Club, in part because they were most likely to create adverse traffic impacts on the surrounding neighborhood. OP also recommended against permitting guests of members, so as to avoid changing the nature of the Center as a university use. With respect to the Applicant's proposal to modify the operating hours of the Center, OP recommended that the Center should be permitted to remain open until 11:30 p.m. daily.

By memorandum dated November 26, 2002, the District Department of Transportation ("DDOT") supported OP's recommendation to revise Condition No. 1 to limit new members to residents of the Foggy Bottom/West End community together with students, faculty, and staff from the Mount Vernon campus, provided that adequate transit service was provided to and from the Mount Vernon campus. DDOT also concurred with OP's recommendation to limit the closing hours of operation to 11:30 p.m. seven days per week. DDOT acknowledged that

extension of the Center's closing hour would have little traffic impact, but expressed concern that the extension might result in noise impacts or "other disruption" to the community.

ANC Report. By letter dated November 26, 2002, ANC 2A submitted a resolution in opposition to the application. The resolution stated the ANC's objections that the University was attempting to change the use of the Center approved by the BZA from a low-intensity support facility to a more intensely used facility; that the faculty, staff, and students of the Mount Vernon campus should not be included in the membership of the Center without review of the Foggy Bottom and Mount Vernon campus plans; and that the University was attempting to include additional unapproved changes, such as earlier opening hours, inclusion of a greater number of users of the facility, and inclusion of intercollegiate sports activities. ANC 2A also contended that modifying the membership categories to include non-University parties would violate the District of Columbia Human Rights Act and would expose the University, the Commission, and the District "to legal recourse from any excluded party under the Act."

By letter dated May 4, 2004, ANC 2A reiterated its opposition to the proposed expanded use of the Center as the improper conversion of a university use into a quasi-commercial facility in a residential zone. The ANC also challenged the University's "apparent lack of compliance" with the cap on the number of students at the Foggy Bottom campus adopted as part of the approved campus plan. ANC 2A stated that the conditions adopted by the BZA limiting the categories of users and the hours of operation should not be changed, because those conditions were "clearly working to prevent the University from creating any further objectionable effects (including increased traffic, noise, and too-intense use, e.g.)" with the Center.

Persons in support. Approximately 10 residents of the Foggy Bottom neighborhood testified in support of the application, generally objecting that the conditions adopted by the BZA had excluded neighborhood residents from benefiting from use of the Center. Cynthia Jachles, a resident of the 2400 block of Virginia Avenue, N.W., proposed to increase membership of the Center by 100 residents of the Foggy Bottom neighborhood on a first-come, first-served basis.

Persons in opposition. A representative of the Foggy Bottom Association, testifying in opposition to the application, asserted that expanded membership and increased hours of operations for the Center would have an adverse impact on the neighborhood and its taxpaying businesses.

Campus Plan Proceeding. By order dated March 29, 2001 in Application No. 16553, the Board of Zoning Adjustment approved the University's Foggy Bottom Campus Plan through June 30, 2009, subject to certain conditions. The University filed a petition for review with the District of Columbia Court of Appeals.[1] On July 31, 2001, the Court of Appeals, at the BZA's request,

[1] The University also filed a civil action in the United States District Court for the District of Columbia challenging the constitutionality of the BZA Order. On June 15, 2001, the District Court issued a preliminary injunction preventing enforcement of Condition No. 9 of the March 29, 2001, Board Order during academic year 2001-2002, or until further order of the Court. After the Board issued its Final Order on Remand, the University again sought a preliminary injunction before the District Court and the parties filed cross motions for summary judgment. On April 12, 2002, the District Court entered a declaratory judgment holding that Condition No. 9 (except the unchallenged

remanded the case without limitation as to the scope of the remand proceeding. The Board held evidentiary hearings on September 17 and 21, 2001, issued a proposed Order, and then issued a Final Order on Remand, effective January 23, 2002, that incorporated and adopted the March 29, 2001 Order, except as revised.

Pursuant to the approved Campus Plan, no special exception application filed by the University for further processing under the plan may be granted unless the University proves that it has consistently remained in substantial compliance with the conditions of the campus plan. Further, Condition No. 9(e) provided that no special exception would be granted, and no permit to construct or occupy a building for nonresidential use on campus would be issued, whenever a semiannual report submitted by the University revealed that the University was not in compliance with the provisions of Condition No. 9, except special exceptions and permits for projects in which a student housing component would occupy at least 50 percent of the floor area.

At a public meeting held March 10, 2003, the Commission determined that the University was not then in compliance with Condition 9(a) of the Board's Final Order on Remand. In accordance with Condition No. 9(e), 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.

On July 3, 2003, the District of Columbia Court of Appeals stayed Conditions No. 9(a) and 9(e), as well as Condition No. 10, which mandated that all freshmen and sophomores live in University housing within the campus plan boundary. Since the Court had stayed the condition upon which the Commission had based its denial, the University, by letter dated September 4, 2003, asked the Commission to reopen the record to receive further evidence and to decide the application on its merits. By letters dated October 17, 2003, ANC 2A and the Foggy Bottom Association stated their opposition to the University's request.

Four days after the date of the University's request, the District of Columbia Court of Appeals issued its decision in *George Washington v. BZA*, 831 A. 2d 921 (D.C. 2003), which affirmed the Board's Order in major part but invalidated Conditions No. 9(a) and 9(f). The Court upheld Condition No. 9(b) to the extent it imposed on-campus housing obligations to be met after August 2006 and Condition No. 10. Although Condition No. 10 was affirmed, the Court stayed its effectiveness pending a second remand to the Board.

The Court's order did not become immediately effective, because both parties filed petitions for rehearing. The District did not seek a rehearing concerning Condition No. 9(a), upon which the

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reporting requirement) and Condition No. 10 violated substantive due process, but upholding the amended Order and the Zoning Regulations against other challenges. On appeal, the United States Court of Appeals reversed the District Court judgment to the extent it had invalidated portions of the Order. *See George Washington University v. District of Columbia*, 318 F.3d 203 (D.C. Cir. 2003). The Supreme Court denied further review. *See George Washington University v. District of Columbia*, – U.S. – , 124 S.Ct. 155, 157 L.Ed.2d 45 (2003).

Commission's denial of this application was based, but questioned the Court's decision to stay Condition No. 10 pending remand. The applicant also questioned the stay, but only as to its temporary nature, arguing that the condition remained invalid.

Thus, even though the Court struck down the condition that resulted in the denial of this application, uncertainty remained whether Condition No. 10 would once more become effective prior to the conclusion of these proceedings. At a public meeting on October 20, 2003, voted to defer consideration until the status of the condition was finally resolved.

The Court of Appeals denied both parties' petitions for rehearing on December 23, 2003, and the Order became final shortly thereafter. The Commission, at its regularly public meeting held February 19, 2004, once again took up the applicant's motion, and requested additional information pertaining to recent operation of the Center and to the University's compliance with conditions of approval of its campus plan. Notice of the continued hearing was published in the *D.C. Register* on March 19, 2004 (51 DCR 2873), and the hearing was held May 13, 2004.

In its Order on Second Remand (Application No. 16553-I, April 26, 2004), the Board revised its conditions of approval of the University's Campus Plan, but declined to take further action with respect to Condition No. 10. Issuance of the Order on Second Remand, which modified the Board's prior order consistent with the mandate of the Court of Appeals decision, ended the stay of Condition No. 10, making it necessary for the applicant to demonstrate compliance with that condition. For the reasons noted below, the Commission has determined that, for purposes of this proceeding, that University has demonstrated compliance with that condition, so that this application may be decided on its merits.

FINDINGS OF FACT

1. The subject property is located at 700 23rd Street, N.W., at the northwest corner of the intersection of 23rd and G Streets, N.W. (Square 42, Lot 847). The subject property is located within the University's campus plan boundaries and is zoned R-5-D.

2. The subject property is improved with a four-story structure with four underground levels, three of which are used for parking. The building houses the Lerner Health and Wellness Center, which is used for physical fitness and recreational activities.

3. Construction and use of the Center was conditionally approved by the Board of Zoning Adjustment by order issued March 31, 1998 in Application No. 16276. The conditions of approval require that: (a) use of the facility is limited to the students, faculty, and staff of the Foggy Bottom campus and (b) operation of the facility must 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 testified that actual usage of the Center has been significantly below the building capacity; the Center was constructed to

hold almost 2,000 users at any given time, but has operated at 12.5 percent of capacity during its routine peak period of use.

5. The Center opens at 6:00 a.m. Peak hours of use are Monday through Wednesday, 6:00 p.m. to 8:00 p.m.

6. The Center's only intercollegiate facility is squash courts. The squash courts do not have seating for spectators, and the scheduling of intercollegiate squash activities at the Center will not appreciably increase the occupancy or the intensity of the Center. All other intercollegiate sports occur at the Smith Center, which does not have squash courts for intercollegiate play.

7. The Commission credits OP's conclusion that holding intercollegiate squash matches at the Center would not result in an adverse impact in the neighborhood because of the limited number of team members involved and the lack of spectator space in the Center.

8. The University's Smith Center is available for use by persons other than students, faculty, and staff of the Foggy Bottom campus, including alumni, persons who live or work nearby, and University supporters. The University indicated its intention to renovate the Smith Center for use solely as a facility for intercollegiate athletics.

9. The University runs a shuttle bus service between the Foggy Bottom and Mount Vernon campuses 24 hours per day. Shuttle buses run every 10 minutes between 7:00 a.m. and 7:00 p.m., and are scheduled no less frequently than every 20 minutes during the school year. A shuttle bus stop is located one block from the Center. The shuttle buses have had as many as 68,000 users in a one-month period, and almost 500,000 riders for each of the past two years.

10. Most students at the Mount Vernon Campus take classes at the Foggy Bottom Campus and are currently eligible to use the Center.

11. The membership of the President's Club includes 44 members of the University's Board of Trustees as well as other supporters of the University. The Commission credits OP's testimony that additional members of the President's Club are most likely, among the Applicant's proposed expanded categories of membership, to create adverse traffic impacts on the surrounding neighborhood, because they are most likely to arrive on campus by private vehicle.

12. The Commission credits the testimony of the Applicant's traffic expert that current use of the Center is not generating adverse traffic impacts in the surrounding neighborhood, and that most current users arrive at the Center on foot or by public transportation.

13. The Commission credits OP's testimony that permitting guests of members would jeopardize the nature of the Center as a university use.

14. The School Without Walls is a public high school located within the University's campus plan boundaries. The University has a relationship with the school, so that some of its students and faculty are enrolled in University classes and are permitted to use certain University facilities, such as the library.

15. The Commission finds that the Applicant has satisfied its burden of proving substantial compliance with conditions of approval of the University's campus plan during the 2003/2004 academic year. With respect to Condition No. 10, the Commission credits the Applicant's testimony that housing assignments were begun in December and completed by March, and notes that the stay of Condition No. 10 was lifted relatively late in the academic year (on April 26, 2004, the date of the BZA's decision in its Order on Second Remand, Application No. 16553-I). The Commission credits the Applicant's testimony that no additional beds were available on campus for freshmen and sophomore students.

16. The Commission credits OP's testimony that the membership and hours of operation of the Center can be expanded consistent with the requirements of §§ 210 and 3104 of the Zoning Regulations.

CONCLUSIONS OF LAW

The Applicant is seeking special exception approval, pursuant to §§ 210 and 3104 of the Zoning Regulations, for further processing of its approved campus plan to modify the conditions of approval for the use of the Lerner Health & Wellness Center. The Commission is authorized to grant a special exception where, in the judgment of the Commission based on a showing through substantial evidence, the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps, subject to certain conditions specified in §§ 210 and 3104.1.

In considering the University's application, the Commission notes that the Center is a university use that would not be permitted in the R-5-D zone but for its approval as a special exception consistent with the University's approved campus plan. Accordingly, any changes to the conditions of approval adopted by the Board of Zoning Adjustment in initially approving the construction and use of the Center must maintain its purpose as a university use.

The Commission concludes that certain categories of expanded membership proposed by the University can be permitted consistent with the university use of the Center. They are: (a) students, faculty, and staff of the University's Mount Vernon campus, many of whom are already permitted to use the Center; members of the University's Board of Trustees; and students of the School Without Walls, a public high school located within the campus plan boundary that has an on-going relationship with the University, provided that the high school students are engaged in organized activities at the Center under the supervision of school faculty.

The Commission concludes that the other categories of expanded membership proposed by the University, the Office of Planning, and a person in support of the application lack sufficient

connection to the university use of the Center and would therefore be incompatible with the special exception allowing a university use in a Residence zone. These categories are: (a) members of the President's Club (except for those members who are also members of the Board of Trustees); (b) immediate neighbors and members of neighboring institutions; and (c) guests of members.

With regard to hours of operation, the Commission concurs with the Office of Planning that a closing time of 11:30 p.m. is appropriate for all days of the week. The Commission is not persuaded by the Applicant that the Center could remain open until 1:00 a.m. without causing noise or other objectionable conditions adversely affecting the use of nearby residential property.

The Commission accorded ANC 2A the "great weight" to which it is entitled. In doing so, the Commission fully credited the unique vantage point that ANC 2A holds with respect to the impact of the proposed modification of use of the Center on the ANC's constituents. However, the Commission concludes that the ANC has not offered persuasive advice that would cause the Commission to find that expanded use of the Center, as approved in this Order, is contrary to the Zoning Regulations and would adversely affect the use of neighboring property.

The expanded membership approved in this Order will maintain the university use of the Center and thus will not alter its character from a low-intensity support facility to a more intensely used facility, or a quasi-commercial facility. The Commission does not agree that the faculty, staff, and students of the Mount Vernon campus should not be included in membership of the Center without review of the University's campus plans. The University's application for further processing is consistent with the approved campus plan for the Foggy Bottom campus, and does not affect the Mount Vernon campus plan. The ANC's argument that modifying the membership categories to include non-University parties would violate the District of Columbia Human Rights Act is moot in light of the Commission's decision not to expand membership of the Center beyond its university use. The Commission is not persuaded by the ANC's contentions that the University has attempted to make unauthorized changes to the use of the Center or is out of compliance with its approved campus plan.

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 11 DCMR §§ 3104.1 and 210.1, that the modification of the conditions of BZA Order No. 16276, to the extent granted herein, will be in harmony with the general purpose and intent of the Zoning Regulations and Map and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map. Nevertheless, the Commission believes that a time limit should be placed on the modification, so that the Commission can determine whether this prediction is correct.

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** and that the conditions set forth in BZA Order No. 16276 are modified to read as follows:

1. Use of the Center shall be limited to:
   (a) students, faculty, and staff of the University's Foggy Bottom and Mount Vernon campuses;
   (b) members of the University's Board of Trustees; and
   (c) students of the School Without Walls, in organized activities under the supervision of school faculty.

2. The expanded categories of membership enumerated in Condition No. 1 shall be in effect for three years from the effective date of this Order. Absent new special-exception approval by the Zoning Commission, membership of the Center after the three-year period shall be as originally approved by the Board of Zoning Adjustment by order issued March 31, 1998 in Application No. 16276; that is, use of the facility shall be limited to the students, faculty, and staff of the Foggy Bottom campus.

3. The Center shall open no earlier than 6:00 a.m. and close no later than 11:30 p.m. on all days.

Vote of the Zoning Commission taken at its public meeting on June 14, 2004: **4-0-1** (Carol J. Mitten, Anthony J. Hood, Kevin Hildebrand, and Gregory N. Jeffries (by absentee vote) to approve with conditions; John G. Parsons not participating, not voting).

In accordance with the provisions of 11 DCMR § 3028, this order shall become final and effective upon publication in the *D.C. Register*; that is, on DEC 2 4 2004.

CAROL J. MITTEN
Chairman
Zoning Commission

JERRILY R. KRESS, FAIA
Director
Office of Zoning