CONSORTIUM OF UNIVERSITIES
OF THE WASHINGTON METROPOLITAN AREA

One Dupont Circle, NW, Suite 200, Washington, DC 20036-1110
(202) 331-8080 • (202) 331-7925 fax • (202) 331-7955 TTY • http://www.consortium.org

January 30, 2004

Ms. Carol Mitten
Chairman
District of Columbia Zoning Commission
441 4th Street, NW
Washington, DC 20001

Dear Chairman Mitten and Members of the Commission:

Earlier this month, the Zoning Commission took action on a new zoning overlay for the Southeast Federal Center (SEFC). During your deliberations, you referenced correspondence from our organization opposing the unprecedented listing of colleges and universities as a prohibited use. We respectfully requested then and repeat now that college and university use should be considered as a special exception matter.

This letter and its attachments are intended to initiate an amendment to the SEFC regulations designating "colleges and universities" as an acceptable use subject to the Zoning Commission's normal special exception process. Due to both the irreparable damage the current regulations are causing our members and the unusual manner in which this prohibition was included in your final draft, we are seeking immediate emergency action from the Zoning Commission.

Commission members were concerned during your discussion on January 12, 2004 that an item as significant as college and university use would go un-noticed and un-objected to throughout such a long process. There is a simple explanation: This prohibition was never included in previously published versions of the proposed zoning regulations. It was never described nor discussed at any public meeting. In fact, in all the years of work on this project prior to 2003, in the original February 14, 2003 request from General Services Administration (GSA), and in last year's published records and debate before the Zoning Commission hearings in June and September, there was no proposal for prohibiting college and universities from the SEFC site.

The Consortium and the public were first made aware of the proposed prohibited use when the Zoning Commission published the proposed regulations for a final time in late 2003 with comments due back by December 28, 2003. Upon reviewing those proposed regulations and seeing the prohibition for the first time, the Consortium promptly contacted the Zoning Commission with our objection and concerns.

ZONING COMMISSION
District of Columbia
Case No. 03-06
Exhibit No. 62

ZONING COMMISSION
CASE NO.03-06
EXHIBIT NO.62

The college and university prohibition was introduced by the District's Office of Planning (OP) in an August 3, 2003 document without explanation or attention. It is noted that this change was not in the original GSA proposed overlay. Although the August 3 changes were described as "refinements and clarifications," obviously this unprecedented prohibited use goes much further. It should have been highlighted and the subject of timely deliberation and decision by the Zoning Commission.

But that didn't happen and the Zoning Commission passed the regulations with the undebated provision. That was not right, and we respectfully ask the Zoning Commission to take immediate corrective action. An emergency amendment is required.

The release of the Zoning Commission SEFC overlay regulations is a critical milestone for the project. Developers and interested parties have been following SEFC's progress very closely and are eagerly preparing proposals to quickly advance this project. The prohibition against college and university use is preventing these parties as well as Consortium members and other higher education institutions from exploring options that include this type of use. That needs immediate attention.

Throughout the District (except for WO areas), college and universities are at least special exception uses. While the specifics and details of a particular plan are properly subject to Zoning Commission review and approval, the prohibition cannot be found or justified anywhere else in the District. We are requesting that colleges and universities be considered a special exception use for the SEFC subject to Zoning Commission review and approval.

It is my understanding that the Office of Planning fully supports both this amendment and the need for immediate emergency action by the Zoning Commission.

Thank you for your consideration.

Sincerely,

John B. Childers

John B. Childers
President & CEO

Attachment

cc: Jerrily Kress

PROPOSED AMENDMENT

DATE: January 29, 2004

TO: District of Columbia Zoning Commission

FROM: John Childers, President and CEO, Consortium of Universities

SUBJECT: **Emergency Action: Zoning Commission Case #03-06-Proposed Amendment**

APPLICANT: The Consortium of Universities of the Washington Metropolitan Area

I. RECOMMENDED ACTION:

The Consortium of Universities of the Washington Metropolitan Area (the Consortium) recommends that Zoning Commission Case #03-06, a final rulemaking for a map amendment for the Southeast Federal Center for initial zoning of CR, R-5-E, and R-5-D, be amended by emergency action to include college or university use by special exception; and that a text amendment to create a new SEFC Overlay District be approved as amended by the Consortium's proposed emergency action.

II. BACKGROUND

On November 28, 2003, the Zoning Commission published a Notice of Proposed Rulemaking ZC Case No. 0306 (Map Amendment & Southeast Federal Center Overlay District) in the D.C. Register. This document was the first public announcement that the Zoning Commission was considering the adoption of an Office of Planning (OP) proposal to restrict college or university use in the newly rezoned Southeast Federal Center (SEFC) site.[1] Pursuant to proper procedure, the Consortium filed comments in the case opposing the restriction on December 23, 2003.

At its January 12, 2004 meeting, the Zoning Commission approved the Proposed Rulemaking, adopting final rules for the SEFC. The Commissioners discussed the Consortium's comments about the restriction, suggesting that the Commission would request that the Consortium make a formal request for an amendment. The Commissioners seemed to believe the college or university restriction had been in the proposed rulemaking all along, and they were therefore loath to change the proposal at the last minute. Therefore,

---

[1] There has been confusion about who proposed the college or university use restriction. A review of the case file and attendant materials reveals that the only previous publication of the proposed text on February 14, 2003 did not include the restriction. It first surfaces in an August 3, 2003 Office of Planning (OP) Response to the General Services Administration's (GSA's) proposed text for publication of the rulemaking. OP's recommendation is unaccompanied by an explanation for the change, but GSA clearly notes that it was not the GSA's idea. The restriction is subsequently repeated in OP's Final Report to the Commission, a document not routinely made publicly available prior to the publication of a proposed rulemaking. Again, the OP report does not include an explanation for the proposed exclusion.

here is the Consortium's formal request for emergency action to amend the final rulemaking. Rationale for the amendment is also included.

III. PROPOSED AMENDMENT TO THE SEFC OVERLAY—refer to the proposed amendment at attachment 1.

OP has identified the base zoning for the site as CR, 5-R-D, 5-R-E, and WO with an overlay "designed to provide additional guidance and flexibility so the overall vision for the site can be realized."[2] Because restricting college or university use is actually a diminution of the Zoning Commission's flexibility, the Consortium proposes an amendment that would give the Commission full authority to put the site to its fullest use consistent with CR and R-5 residential zoning in other parts of the city.

The following table highlights the changes the amendment would make.

Current Section	Advertised Section	Description of Proposed Change:
1803.1	1803.1	SEFC/CR Prohibited Uses: • Remove *"College or University"* as such a prohibition would be inconsistent with the goals and objectives of the AWI, and contrary to the Zoning Regulations and the Comprehensive Plan. As will be discussed below, the Consortium of Universities of the Washington Metropolitan Area feels that these uses should instead be permitted by special exception.
1803.2	1803.2	SEFC/CR Uses Permitted by Special Exception: Add *"College or University"* as uses consistent with the intent for the area.
1804.1	1804.1	SEFC/R-D & E Prohibited Uses: • Remove *"College and University"* as prohibited uses. As will be discussed below, the Consortium of Universities of the Washington Metropolitan Area feels that these uses should instead by permitted by special exception.
1804.2	1804.2	SEFC/R-5-D & E Uses Permitted by Special Exception: • Add *"College and University"*

IV. RATIONALE FOR PROCEEDING ON AN EMERGENCY BASIS

It is important that the proposed amendment be adopted on an emergency basis to quickly rectify the exclusion of college or university use from the SEFC site. The Commission appears to have adopted the restriction without fully knowing its history, purpose and potential ramifications on land use precedent and other zoning laws. With quick action, the

[2] See OP Final Report on Zoning Commission Case #03-06, August 25, 2003, page 4. (OP Final Report).

Commission can forestall any delay in adopting the SEFC rules and avoid further delay of this important project.

V. THE CONSORTIUM'S ANALYSIS OF THE PROPOSED AMENDMENT

The Consortium endorses changing the SEFC Overlay to permit college or university use so that the Commission's vision for the overlay—to make the SEFC an integral part of the AWI and create a prime location for mixed use, high-density residential development with a new, integrated waterfront park—can be realized. The Consortium supports the amendment for the following reasons:

The amended rules will better reflect the goals and objectives of the AWI.

The final rulemaking, with the ban on college or university use, would not fully advance the goals and objectives of the AWI, as identified in OP's Final Report. Specifically, OP suggests that the proposed regulations governing the SEFC would "build strong waterfront neighborhoods[3]." Higher education institutions contribute to neighborhood strength.

Colleges and universities and their affiliated teaching hospitals currently represent nine of the District's top 20 private employers. Universities provide 21,829 jobs for District residents resulting in $40 million worth of income taxes paid to the city. District higher education institutions circulate $309 million within the District's economy, entertain more than 530,000 visitors a year and purchase goods and services valued at $2.5 billion. Howard University Hospital's emergency room treated more than 47,000 patients in 2002. Seventy-five thousand District residents, more than half of them graduate students and adult learners, are enrolled in D.C. institutions. From a simple economic argument, therefore, the District would be shortsighted in barring its largest private employment sector from the 42 acres covered by the proposed new zoning rules as it is trying to strengthen the likelihood that the new neighborhood will grow and thrive.

In addition, given the current demands for post-secondary educational services in the District, this prohibition is particularly nonsensical. The greatest increase in higher education enrollment in the District of Columbia since the late nineties has been in graduate programs and professional development courses. More and more adults see enhanced education as their opportunity to better themselves and increase their paychecks.

Residents in the southeast quadrant of the city have been particularly disadvantaged in access to post-secondary educational facilities. There are no non-federal higher education institutions east of the Anacostia River and only two—Southeastern University and Georgetown University Law Center—in the vicinity of the SEFC site. Moreover, the Southwest Washington/Navy Yard neighborhood proximate to the SEFC site reported a 40% high school drop out rate in 2000 according to D.C. Agenda's 2004 Issue Scan. Further limiting post-secondary educational development in this already underserved part of the city

[3] See OP Final Report, page 9.

will harm District residents and significantly impair their ability to pursue educational opportunity in their own neighborhood, where it is most convenient.

In addition, the prohibition on post-secondary educational use, not just facilities, could adversely impact some businesses in the new neighborhood. For example, every company strives to enhance its workers' skills and knowledge. Would this bar make company-training programs illegal? Would the zoning prohibit all kinds of post-secondary educational services such as professional development? The limitation adds confusion rather than clarity and constriction rather than flexibility. It should therefore be dropped from the final rulemaking.

The amended rules will make "mixed use" and "high-density residential" zoning classifications in the SEFC consistent with those classifications across the city.

OP states that the SEFC site will continue the vision of the Near Southeast Design framework by providing a central and relatively undeveloped site for mixed-use development and an important opportunity for connecting existing residential areas to the waterfront. The proposed zoning and overlay therefore calls for mixed-use development on the site.[4]

Neither the Consortium nor any of its members are currently planning to initiate a college or university facility or program in the SEFC area. Nonetheless, banning all college and university activity from the site creates a case of first impression by barring a use that zoning regulations permit by special exception in all other mixed-use and residential districts elsewhere in the city.

The OP Final Report gave no explanation for its recommendation to add "College or University" as a prohibited use, but OP staff indicated that large institutional facilities would not fit into the "vision" for the site as a mixed-use, high density, predominantly residential area. This argument could make sense but for the fact that libraries, museums and private schools are permitted with Zoning Commission approval in the new SEFC/CR District and hospitals, private schools and arts uses are permitted with Zoning Commission approval in the new SEFC/R-5-D and R-5-E districts.

Not all college and university facilities and programs require the large footprint OP presumably envisioned when it recommended banning post-secondary use. Indeed, in some instances, a post-secondary facility or program could be smaller than a museum or arts facility. Whatever its size, higher education institutions contribute to the vibrancy of the community. [5]

---

[4] Ibid.

[5] In a recent case the Zoning Commission approved the establishment of a small educational facility, the University of Notre Dame, in an SP district abutting a R-5-B neighborhood. In Zoning Commission Case No. 02-25, the Commission found that implementation of Notre Dame's Campus Plan "will help conserve and enhance the neighborhood and create a center of knowledge and learning by bringing a vibrant, but small, center of learning to Dupont Circle. It will enhance the urban character of the area without creating traffic and parking problems. Further, it will promote economic development by bringing more residents to the neighborhood, who will patronize local businesses without contributing to traffic or parking problems." See

While it is clear the Commission is seeking to more strictly control land use in the SEFC through the overlay than the base zoning allows, it is completely inexplicable how university use (prohibited) differs from private secondary school use (permitted) in terms of impact on the proposed new CR or R-5 district. Clearly, therefore, it is not institutional use that the Zoning Commission is seeking to prohibit but specifically post-secondary educational use. Such an unprecedented carve-out would make the CR and R-5 districts in the SEFC inconsistent with like zones elsewhere. Given the lack of explanation for such a monumental deviation from standard zoning practice, the limitation should be struck from the final rulemaking.

The amended rules will avoid conflicts with existing zoning regulations.

The Consortium's proposed amendment would preempt possible conflicts with zoning regulations that the SEFC language does not address. Even if it wanted to, can the Commission limit a use that zoning regulations specifically permit in like-zoned neighborhoods across the city? The United States Court of Appeals in a recent case described the District's regulation of university land use:

> "The District's zoning scheme for universities, promulgated by the Zoning Commission pursuant to authority granted by D.C. Code sec. 6-641 and codified at 11 District of Columbia Municipal Regulations ("DCMR") sec. 210, 302.2 & 507 permits university use as a matter of right in areas zoned for high-density commercial use. For land zoned residential or "special purpose," it permits university use as a special exception. . ." .George Washington University v. District of Columbia Board of Zoning Adjustment, 831 A.2d 921 (D.C. 2003).

District zoning regulations further explicate that colleges and universities are eligible uses, by special exception, in CR districts. 11 DCMR 615.1 states:

> "College or university use shall be permitted by special exception in a CR District when authorized by the Zoning Commission under sec. 3104, if the Commission considers that this use is appropriate in furthering the objectives of the CR Districts, subject to the provisions of this section."

Section 3104.4 establishes the principle that:

> "College, university or other academic institution of higher learning" is permitted by special exception in **any R,** SP, **CR,** or W District."

Thus, even if the Commission sought to adopt the college or university ban permanently, it would then have to consider amending current regulations found at 11 DCMR sections 3104.4, 322 and 615. The final rulemaking, unless altered from the proposed rulemaking published in the D.C. Register, presumably doesn't do that. Rather than pursuing additional

---

Case No. 02-25, Modification and Further Process of Notre Dame Campus Plan, 50 DCMR 2535, March 28, 2003, pg. 2537, Finding 15.

amendments to bring the rules into conformity with current zoning law, the prohibition should simply be dropped.

The amended rules avoid establishing a troubling precedent for the rezoning of federal property transferred to District ownership.

These regulations pose a problematic precedent for future transfers of federal property to the District where the Commission must establish new zoning for previously unzoned property. In an earlier example, the District acquired waterfront property from the federal government. The Commission approved new rules that also banned post-secondary educational use from the newly created W-O districts. The Consortium did not protest because it understood the Commission's stated purpose—to create a "park-like" setting next to the river to take advantage of the District's unique Potomac and Anacostia frontage. In addition, all other large institutions were banned as well meaning the new regulations did not select colleges and universities for disparate treatment. Existing W regulations did not have to be amended because the WO district was a wholly new subset of the W classification.[6]

This newly proposed SEFC rulemaking does treat universities differently than other similar institutions. It would be unfortunate if the Commission chose this time, while embarking on an exciting piece of a large new project—development of the Anacostia Waterfront—to create zoning precedent without explanation that conflicts with existing zoning regulations by excluding higher education uses from areas with appropriate densities for such a use.

The amended rules address procedural deficiencies in notice and explanation surrounding the adoption of the prohibition in the SEFC rules.

Upholding the ban would set troubling precedent in another way. Its inclusion in the SEFC rules is virtually undocumented and nearly completely unexplained. As the Commission's first attempt to so broadly bar such a routine use in a CR and R-5 District, at the very least, the recommendation should have been accompanied by a separate public notification and a clear and specific explanation for the limitation, including a rationale for excluding universities, while permitting museums, hospitals and private schools. Since neither the Zoning Commission in its deliberations, nor the OP in its Final Report, fully explained the change, the prohibition should be stripped from the final rulemaking.

The amended rules forestall conflict with the Comprehensive Plan.

In a recent Georgetown University case, the D.C. Court of Appeals wrote:

> Generally in the District of Columbia as elsewhere, "uses of land for post-secondary educational purposes are 'highly favored,'" 2 Robert M. Anderson, American Law of Zoning sec. 12.09, at 508 and it has long been recognized that universities serve the public welfare and morals in important ways." The President and Directors of Georgetown College v. District of Columbia Board of Zoning Adjustment, No. 01-

[6] See Zoning Commission for the District of Columbia Notice of Proposed Rulemaking, Case No. 02-42 (Text Amendment-Waterfront Open Space Zone District W-O).

AA-1182 (D.C. Circ. Dec. 4, 2003) quoting Glenbrook Road Association v. District of Columbia Board of Zoning Adjustment, 605 A2d at 22, 34 (D.C. 1992) (citing Cornell Univ. v. Bagnardi, 503 N.E. 2d, 509, 514 (N.Y. 1986)).

Footnote 11 of that case added from the Glenbrook Road case states that:

> "'a university . . . is not presumed, for purposes of the Zoning Regulations, to be the land use equivalent of the bubonic plague.'" Id at 32.

In contrast, this particular zoning case designates universities on a par with sanitariums.

The Comprehensive Plan takes a different view. Section 203.2 of the land use elements of the Comprehensive Plan states that policies should be established that "encourage interaction between the District's universities and the District's business community to further the District's economic development program, particularly as it relates to the research and development sectors." Section 204.2 suggests the District should adopt policies to stimulate private sector growth objectives by "encouraging increasing university participation in economic development efforts." Barring universities from even as small a portion as 42 acres runs counter to this objective and could therefore impermissibly run afoul of the Comprehensive Plan.

V. THE PROPOSED AMENDMENT

To address these deficiencies in the final rulemaking for Case No. 03-06 (Map Amendment & Southeast Federal Center Overlay District), the Consortium suggests four changes and amendments to the proposed rulemaking, published on November 28, 2003, and finalized at the Commission's January 12, 2004 meeting (publication pending). These changes would include amendments to the following sections:

- In 1803.1—prohibited uses within the SEFC/CR District, delete *"College and University"*;
- In 1803.2—addition of *"College and University"* as a special exception use;
- In 1804.1—prohibited uses within the SEFC/R-5-D and R-5-E Districts, delete *"College and University"*;
- In 1804.2-addition of *"College and University"* as a special exception use.

VI. RECOMMENDATION

Adopt the amendment proposed by the Consortium.

ATTACHMENTS

1. Revised Chapter 18 Language

ATTACHMENT 1

PROPOSED LANGUAGE TO AMEND THE FINAL RULEMAKING OF THE SOUTHEAST FEDERAL CENTER OVERLAY DISTRICT BY EMERGENCY ACTION

1803. SEFC/CR ZONING DISTRICT

1803.1 Within the SEFC/CR District, the following buildings, structures, and uses are not permitted:

(a) Parking lot or garage as a principal use located on or above grade, except as a temporary use as permitted by special exception in section 1803.2.

1803.2 Notwithstanding sections 601 and 602 of this title, within the SEFC/CR District, the following buildings and uses are permitted by special exception if approved by the Zoning Commission, in accordance with the standards specified in section 1808 and procedures specified in section 1809 of this title:

(a) Art gallery;

(b) Automobile, truck, or motorcycle accessory sales, including installation;

(c) Automobile rental agency, provided the use has no exterior automobile storage area;

(d) Cabaret;

(e) College or University

(f) Dental lab;

(g) Department store;

(h) Gas Station;

(i) Hotel/inn;

(j) International organization;

(k) Library;

(l) Museum;

(m) Place of worship which may include a parsonage, vicarage, rectory, or Sunday School buildings, as well as any related programs associated with the place of worship in accordance with section 216;

(n) School, private, public, or trade;

(o) All buildings and structures with frontage along M Street;

(p) Temporary parking lot or garage as principal use located at or above grade; and

(q) Solid, freestanding walls and/or security gates exceeding a height of four feet, including structural supports.

1804 SEFC/R-5-D AND R-5-E ZONING DISTRICTS

1804.1 Within the SEFC/R-5-D and R-5-E Districts, the following buildings, structures, and uses are not permitted:

(a) Museum;

(b) One-family dwelling or flat;

(c) Parking lot or garage as a principal use located on or above grade, except as a temporary use as permitted by special exception in section 1804.2; and

(d) Sanitarium.

1804.2 Within the SEFC/R-5-D and R-5-E Districts, the following buildings, structures, and uses are permitted only if approved by special exception by the Zoning Commission, in accordance with the standards specified in section 1808 and procedures specified in section 1809 of this title:

(a) Arts, cultural or hotel use, subject to an overall cap of 1.0 FAR within the R-5-D and R-5-E Districts;

(b) College and University;

(c) Hospital;

(d) Place of worship which may include a parsonage, vicarage, rectory, or Sunday school buildings, as well as any

related programs associated with the place of worship in accordance with section 216;

(e) Private club, lodge, fraternity house, sorority house, dormitory;

(f) School, private, public, or trade;

(g) All buildings and structures that abut the Open Space Area, as described in section 1805.4, whether or not a street intervenes;

(h) Temporary parking or or garage as a principal use located on or above grade; and

(i) Solid, freestanding walls and/or security gates exceeding a height of four feet.