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December 30, 2004

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VIA HAND DELIVERY
Ms. Carol Mitten
Chairperson
c/o Alberto Bastida
D.C. Zoning Commission
441 4th Street, N.W.
Room 210 South
Washington, DC 20001

RE: ZC Case No. 04-23

Dear Chairperson Mitten and members of the Commission:

Enclosed please find an original and 20 copies of the ANC-2A's proposed Findings of Fact and Conclusions of Law. Thank you for your consideration.

With Best Regards,

Sarah Elizabeth Roland

Encl.

cc: Maureen Dwyer, Esq.
Ellen McCarthy & John Fondersmith

ZONING COMMISSION
District of Columbia
CASE NO. 04-23
EXHIBIT NO. 36

ZONING COMMISSION
District of Columbia
CASE NO.04-23
EXHIBIT NO.36

ZONING COMMISSION OF THE DISTRICT OF COLUMBIA

Application of the George Washington University Campus Plan Amendment — **Case No. 04-23**

PARTY ANC-2A'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to notice, the District of Columbia Zoning Commission held a public hearing on December 2, 2004 to consider The George Washington University's application for modification of Campus Plan Condition 10 pursuant to 11 DCMR Section 3104, and 11 DCMR Section 210. The hearing was conducted in accordance with Chapter 31 of the same title.

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FINDINGS OF FACT:

1. On September 17, 2004, The George Washington University ("GW") filed an application for modification of Condition 10 of the Campus Plan. GW's proposed language would permit freshmen to live on campus or in the Hall on Virginia Avenue ("HOVA") under the Campus Plan. On October 15, 2004, a public hearing was noticed for December 2, 2004.

2. Under the Zoning Regulations, Campus Plans are intended to reflect a university's future development, and the regulations delineate when and where a special

exception my be granted that would amend or alter the Campus Plan.

3. GW premises its application on the assertion that amending the campus plan to permit freshman to live in HOVA will not be objectionable to neighboring property due to noise, traffic, number of students or other objectionable conditions, and that doing so will further the goals and objectives of the Ward 2 elements of the Comprehensive Plan. (Preliminary Statement of the Applicant at 3). In its application, GW asserts the following two reasons in support of these contentions:

a. GW's first asserted reason for the amendment is that upperclassmen at GW "generally prefer" to live in apartment-style housing with kitchens or cooking facilities. (Preliminary Statement of the Applicant at 3).

b. As the other reason, GW asserts that when it bought the hall in 1998, it did so specifically to house freshmen and thus "the interests of justice" would be served by permitting amendment to the Campus Plan to allow freshmen to continue living there. (Preliminary Statement of the Applicant at 3).

4. By Order dated September 11, 2003, the Court of Appeals sustained Condition 10 stating the following:

> If Condition 10 imposes serious hardship on the University, the University is, of course, free to request the BZA, following this remand, to amend its order. Indeed, . . . a negotiated resolution of the issue may be possible and would undoubtedly be in the interests of justice.

(George Washington University v. BZA, 831 A.2d 921 (D.C. 2003)).

5. The Office of Planning issued its report concerning Case No. 04-23 on November 23, 2004 recommending against modification of condition 10 to permit freshmen to live in HOVA.

6. Specifically, the Office of Planning reiterated its long standing concern about the impact of University activities on the adjacent Foggy Bottom/West End communities. (OP Rep. at 6). OP similarly reiterated the value to the District in preserving and enhancing the residential neighborhoods including Foggy Bottom. (OP Rep. at 6).

7. OP also noted the potential adverse impacts of having freshmen and sophomores outside the campus boundary due to their youth and relative immaturity, which has been acknowledged by the University in the past. (OP Rep. at 6).

7. The Comprehensive Plan for Ward 2 contains specific sections addressing the Applicant's growth into

the Foggy Bottom neighborhood and its negative impact on the residential aspect of Foggy Bottom. (Comprehensive Plan, Section 1358.1).

8. The Commission has been involved in numerous recent projects concerning the Applicant. As the Office of Planning noted in its report:

> The Zoning Commission . . . has granted five further processing requests under this Campus Plan . . ., approved a PUD modification with respect to the Elliot School of International Studies (which resulted in that facility being included within the campus boundaries) and notes that currently (at the time the order was written), the Commission is considering the University's request to modify a further processing granted under the previous campus plan (Zoning Case No. 02-26 which involved modifications of the conditions of approval of the Lerner Health & Wellness Center) and the University's request for a planned unit development for a new dormitory (Zoning Case No. 03-29 for anew residence hall at 2025 F Street, N.W.). Clearly, the Zoning Commission has been involved with a number of projects of the George Washington University Foggy Bottom Campus over the past four years.

(OP Rep. at 5).

9. The ANC-2A submitted a report recommending against modification of Condition 10. The Zoning Commission recognizes its duty to give great weight to the report submitted by the ANC-2A.

10. The Report of the ANC-2A specifically points out the Applicant's continued non-compliance with other

Conditions in the Campus Plan such as the 20,000 student enrollment cap placed on it via Condition 8. (See GW's website http://www.gwu.edu/~ire/unduplicated_e03.htm listing the 2003-2004 total enrollment at 23,714 and the total FTE at 18,858).

11. Condition 8 places a 20,000 total student enrollment cap, including both full and part-time undergraduate and graduate students.

12. At the December 2, 2004 hearing, the Commission heard testimony and received evidence from parties GW and ANC-2A, and from the Office of Planning. The Commission also heard statements from interested persons in support of and in opposition to the application.

13. At the hearing, the Applicant testified that, according to its student disciplinary statistics, HOVA freshmen had fewer disciplinary actions than other GW freshmen. (12/02/04 Transcript at 17). The Applicant, however, did not produce any conclusive documented figures for the Commission to consider.

14. The Applicant has indicated previously, that freshmen and sophomores continue to account for most of the disciplinary incidents among the total student population.

15. The Applicant did not submit evidence that it will reduce freshman enrollment following the three largest freshman classes in history during the past three years.

16. The Applicant did not dispute the fact that a University can mandate where its students will live, or the fact that schools around the country already impose housing requirements on their students.

17. As the figures supplied by the Foggy Bottom Association, utilizing in large part GW's own figures, that GW has exceeded the 20,000-student enrollment cap mandated by the BZA by approximately 1,600 in 2001, by approximately 2,400 in 2002, and by approximately 2,800 in 2003. (BZA Order on Application No. 16553, condition 8).

18. The Office of Planning Report and the testimony of the Office of Planning representatives at the hearing reflect that the Office of Planning urged that GW make a specific commitment for future student housing at the old hospital site (Square 54). GW refused to provide such information to the Office of Planning, stating that "decisions have not been made for that site," and did not provide such information to the Commission at the hearing or otherwise. (Office of Planning Report at 8).

19. GW has refused to provide such information despite its own previous acknowledgement that the old

hospital site would provide "enough housing for three or four universities." (Deposition of President Stephen J. Trachtenberg, Kreuzer v. GW, Case No.03-00003645, Nov. 24, 2003 at 71).

20. The Commission recognizes that the Campus Plan at issue is now half-way through the ten-year time period it was designed to encompass. The Commission also recognizes the extensive, litigious five year history of this campus plan, culminating, in relevant part, in Condition 10 being sustained by the Court of Appeals and subsequently the BZA's 10th Order concerning the Campus Plan.

21. Subsequent to the December 2, 2004 hearing, the Applicant submitted proposed conditions upon its continued use of HOVA for freshmen. Those proposed conditions were as follows:

> For so long as GW is permitted to house freshmen in the Hall on Virginia Avenue, the University will continue to operate this residential hall on the same general basis as it has in the past. Specifically, GW will:
>
> 1. Give early decision students priority in the selection of HOVA in order to facilitate the continuation of early admit students as the majority of the HOVA population;
> 2. Provide a variety of Living and Learning Communities designed to attract socially and politically conscientious students to live and study at HOVA;
> 3. Provide one full time professional staff member for the residence hall, as well as

a live-in community facilitator for each of the eight floors;

4. Provide professional security personnel on the ground floor on a 24 hour basis; and
5. Provide additional security to routinely patrol the building and grounds.

(GW Letter to Mitten dated December 8, 2004). There is no comment on record from the Office of Planning concerning the Applicant's proffered conditions on use.

CONCLUSIONS OF LAW

Title 11, section 3104 of the DCMR provides authorization to grant special exceptions to a Campus Plan where, "in the judgment of the Board,[1] the special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely, the use of neighboring property in accordance with" the conditions set forth in Section 210. As such, it is the judgment of the Commission that the Application for modification is not consistent with the purpose of the Zoning Regulations.

The subsections of Section 210 at issue in this matter are 210.2 and 210.7. As section 210.2 sets forth, the

[1] Pursuant to Section 3104.4, the Zoning Commission shall hear special exception cases concerning amendment of a campus plan. Pursuant to Section 3035.5, the Zoning Commission shall use the BZA rules of Practice and Procedure contained in Chapter 31 of Zoning Regulations for processing special exception applications concerning campus plans.

primary purpose of the Campus Plan process is to ensure that University use is "not likely to become objectionable to neighboring property because of noise, traffic, number of students, or other objectionable conditions." (11 DCMR § 210.2; see also OP Rep. at 7). Section 210.7 further provides that, in reviewing a campus plan application, the Commission must also consider relevant portions of the Comprehensive plan. (11 DCMR § 210.7).

The parties, courts and zoning authorities have witnessed extensive negotiation, consideration and litigation concerning the 2000-2009 GW Campus Plan. The core issue has been whether the Applicant's use is likely to become objectionable to neighboring Foggy Bottom properties. For the reasons contained herein, the Commission finds that the Applicant has not established that its proposed modification and use will not be objectionable to the neighboring properties in Foggy Bottom, and will be consistent with the Comprehensive Plan.

In its September 11, 2003 Order, the Court of Appeals noted that, if Condition 10 imposed serious hardship on GW, GW was free to seek amendment. The Applicant's submitted reasons for seeking amendment were 1) general student housing preferences, and 2) the applicant's intent when purchasing the property in 1998. Neither represents a

"serious hardship" worthy of amending Condition 10 in light of the extensive, in-depth analysis of this Campus Plan by administrative bodies and courts over the past five years.

The Applicant also cites to the Court of Appeals' language in its reasoning that permitting freshman to live off campus in HOVA is "in the interests of justice." The Applicant, however, fails to cite to any "injustice" that will occur if they are not permitted to house freshmen in HOVA. The only inconvenience offered by the applicant is the notion that it may have to alter the room style in HOVA in order to appeal to upperclassmen.

During the hearing, the applicant argued that "the Court [of Appeals] said in its decision that the use of HOVA for student housing was probably in the interest of justice and suggested that the BZA might want to re-look at that condition." (12/2/04 Transcript at 14). The Court of Appeals said no such thing. Rather, the Court said that 1) if GW faced some serious hardship due to Condition 10, it was free to seek amendment, and 2) in such a case, a negotiated resolution of the issue may be possible, and would likely be in the interests of justice. (George Washington University v. BZA, 831 A.2d 921 (D.C. 2003)).

At the December 2, 2004 hearing the Applicant spoke to its original intent in committing to house freshmen and

sophomores in housing merely controlled by the university. The Applicant also expressed that it has a "tough time" enticing upper classmen to live in a dormitory style residence hall. (Transcript at 34). As OP noted, however, the Applicant has not met its burden of proving why HOVA is incapable of housing upper classmen, and there is no reason why it could not be converted to house juniors and seniors. (12/2/04 Transcript at 52-53).

The Commission finds that the Applicant's concerns with housing upperclassmen in HOVA, while understandable, are not compelling enough to constitute a serious hardship. Given the objectionable conditions created by housing freshmen and sophomores off-campus and the Applicant's lack of a serious hardship in complying with Condition 10, the Commission finds the applicant has not made an adequate case to support an amendment of Condition 10. Further, according to the Applicant's own testimony, HOVA would not house as many upperclassmen as the freshmen it currently houses. The Commission finds that, in addition to housing more mature students in HOVA, housing fewer total students in HOVA will lessen the objectionable effects on the surrounding neighborhood.

The Commission also finds that the proposed conditions on use offered by the Applicant on December 8, 2004 are

insufficient. (Letter from Applicant to Commission dated December 8, 2004). All of the conditions are ill-defined, contain no enforcement mechanisms, and fail to express any promise that the HOVA will be inhabited in any particular manner -- only that it will "facilitate" such habitation. Thus the Applicant's submitted conditions, similar to its application for modification of Condition 10 fall far short of meeting its burden or even its own stated goal of "serving both the mission of the University and the larger public good." (GW Application at 6 (emphasis added)).

Finally, the Applicant has not shown good faith in its failure to comply with other aspects of the Campus Plan. Enrollment, as advertised on their website, and in numerous publications is more than 23,000 students—well over the 20,000 student cap set by Condition 8. The Applicant's continued noncompliance with the enrollment cap does not lend support to the Applicant's argument that the interests of justice will be offended by not granting the application to modify Condition 10. Further, the Applicant's argument concerning the "art" of admitting freshmen misses its mark. The Applicant has increased freshmen enrollment for the previous three consecutive years. The Applicant's loose commitment to "do what [they] can do to juggle the number of offers [they] make" to incoming freshmen supports a

finding by this Commission that the Applicant is at least partially responsible for the hardships it complains of in the application at issue.

In weighing all the proffered "hardship" that the Applicant would face when, if ever, it comes into compliance with Condition 10, against the effect of continuing objectionable conditions on the Foggy Bottom neighborhood, and taking into account the recommendations against modification by the Office of Planning, the ANC-2A, the Foggy Bottom Association, the Watergate East, and the Watergate West, the Commission finds that the Applicant has not made a sufficient case for modifying Condition 10 to permit freshmen and sophomores to live in HOVA.

In consideration of the Findings of Fact and Conclusions of Law contained herein, the Zoning Commission of the District of Columbia hereby orders that the application for modification of Condition 10 in the campus plan be and it hereby is **DISAPPROVED.**

This Order was Adopted by the Zoning Commission at its public meeting held on _____, 2004 by a vote of _____.

In accordance with the provisions of 11 DCMR §2038, this order shall become final and effective upon publication in the D.C. Register; that is, on _____.

_____
Carol J. Mitten, Chair
Zoning Commission

_____
Jerrily R. Kress, FAIA
Director, Office of Zoning