

Exhibit D

ZONING COMMISSION
District of Columbia

CASE NO. 07-23
EXHIBIT NO. 13 (FAB "D")

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District of Columbia
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EXHIBIT NO.13

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

T-045 P.002/013 F-061



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Application No. 16566-H of the President and Directors of Georgetown College, pursuant to 11 DCMR § 3104.1, for a special exception for the review and approval of the University Campus Plan - years 2000-2010 under Section 210 in the R-3 and C-1 Districts at premises bounded by Glover Archbold Parkway to the west, the National Park Service property along the Chesapeake & Ohio Canal and Canal Road to the south, 35th Street, N Street to 36th Street, and 36th Street to P Street to the east and Reservoir Road to the north. (Square 1222, Lots 62, 801-810; Square 1223, Lots 85-86, 807-810, 812, 815, 826, 827, 831, 834, 846-847, 852-853, 855, and 857-858; Square 1226, Lots 91, 94-101, 104-105, 803-804, 806, and 811-815; Square 1248, Lots 123-125, 150-157, 800-802, 804-806, 829-831, and 834-835; Square 1321, Lots 815-817)

HEARING DATES: June 13, 2000 and July 18, 2000

DECISION DATES: September 5, November 8, and December 5, 2000;
April 5, 2005; August 16, 2007

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. _____

EXHIBIT NO. _____

ORDER ON SECOND REMAND

On January 31, 2000, the President and Directors of Georgetown College ("University" or "Applicant") filed a self-certified application pursuant to 11 DCMR § 3104 for a special exception under § 210 of the Zoning Regulations for approval of its proposed University Campus Plan for Years 2000-2010. In addition to the Applicant, parties in this proceeding are Advisory Neighborhood Commission ("ANC") 2E, the Burleith Citizens Association, Citizens Association of Georgetown ("CAG"), Cloisters in Georgetown Homeowner's Association, Foxhall Community Citizens Association, Georgetown Residents Alliance, and Hillandale Homeowners Association.

Following a public hearing, the Board voted to approve the campus plan subject to 19 conditions. An order reflecting that decision was issued March 29, 2001. The Board subsequently revised some of the conditions of approval in an order on reconsideration issued August 6, 2001 (Order No. 16566-A). Both Orders henceforth will be referred to collectively as "Original Campus Plan Order."

The Applicant appealed the Original Campus Plan Order to the District of Columbia Court of Appeals. By order issued December 4, 2003, the Court of Appeals vacated the Board's decision and remanded the case for further proceedings. *See President and Directors of Georgetown College v. District of Columbia Board of Zoning Adjustment*, 837 A.2d 58 (D.C. 2003) ("Georgetown I").

At a public meeting on June 22, 2004, the Board indicated its intent to conduct further proceedings on the application, and requested submissions from the parties recommending issues they believed should be addressed on remand. Submissions were received from the Applicant

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and two parties in opposition, Citizens Association of Georgetown and Hillandale Homeowners Association. By order issued October 15, 2004, the Board directed any party that wished to do so to submit a proposed order either granting or denying the application in whole or in part, including findings of fact, conclusions of law, and any proposed conditions necessary to mitigate potential adverse impacts identified based on the existing record in this proceeding (Order No. 16566-D).

The Order further directed that:

Each proposed condition should be followed by an explanation as to how it is consistent with the principles and concerns expressed in the Court of Appeal's decision and cite the specific finding(s) of fact or conclusion(s) of law that support its imposition.

The Applicant, Citizens Association of Georgetown, and Hillandale Homeowners Association submitted proposed orders.

At a public meeting on April 5, 2005, the Board voted to approve the University's application subject to seven conditions, revising some conditions and omitting others that had been adopted in the Original Campus Plan Order. An order reflecting that decision was issued June 7, 2005 (Order No. 16566-F) ("2005 Order").¹ An order certifying the Applicant's campus plan, as revised to reflect the conditions of approval in the 2005 Order, was issued February 3, 2006 (Order No. 16566-G).

The 2005 Order was appealed to the Court of Appeals by the Citizens Association of Georgetown, which challenged the Board's determinations with respect to the enrollment cap and argued that the Board erred in eliminating uncontested provisions from the Original Campus Plan Order.

By decision issued June 7, 2007, the Court of Appeals affirmed the 2005 Order with respect to the Board's findings pertaining to the enrollment cap and the use of an average enrollment, but again remanded the matter for an explanation of why five uncontested provisions included in the campus plan originally approved by the Board in the Original Campus Plan Order were not included in the revised campus plan approved by the 2005 Order. *See Citizens Association of Georgetown v. District of Columbia Board of Zoning Adjustment*, 925 A.2d 585 (D.C. 2007) ("*Georgetown II*").

Because *Georgetown I* vacated the Original Campus Plan Order in its entirety, on remand the Board undertook an independent review of the record, made findings of fact based on substantial evidence in the record, drew conclusions of law from those facts, and formulated conditions necessary to mitigate potential adverse impacts consistent with the requirements of the Zoning Regulations. In doing so, it remained mindful of the admonition in *Georgetown I* to adopt only conditions necessary to mitigate identified potential adverse impacts related to the university use of property in a Residence district and not to intrude to an impermissible degree into the

¹ Order No. 16566-F corrected an inadvertent omission from the Board's initial order on remand (Order No. 16566-E, issued June 1, 2005).

management prerogatives of the University. As stated by the Chair at the outset of the Board's April 5, 2005 deliberations:

This was, of course, returned to us with all graciousness from the Court of Appeals, and I would note that it was done and I find, reading the actual remand order, is informative and I think that this Board, if I might, has gone to great strides in not replicating the errors that it had in the past as were evidenced in this case.

And it really goes to... the point of understanding the facts in each individual case, understanding their impact and acting accordingly, whether approving or denying applications and if approving and conditioning applications, that those conditions would be based directly on facts presented and evidence and that the conditions would be measurable, understandable and would go towards mitigating any potential adverse impact.

Transcript of Board of Adjustment Public Meeting of April 5, 2005 ("Tr.") Tr. 143-135.

The Chair concluded his preliminary remarks by stressing the Board's intent to take "an enlightened look on the case that is below us, the case that was already presented, an enlightened look that goes to addressing the concerns that the Court had." Tr. 147.

Consistent with that approach and the principles stated in *Georgetown I*, the Board did not unquestioningly accept a proposed condition simply because the parties proffered it. A Board order is not a negotiated document and an otherwise invalid condition is not legitimized by the lack of any objection. As stated by the Chair with respect to one of the uncontested conditions, just "because the university didn't object to it or the Court of Appeals didn't strike it themselves, that's not the persuasive discussion that [is] needed to keep it in". Tr. 175. It is for that reason that the Board requested the parties to provide a rationale for each condition proposed.

Georgetown II did not question the Board's authority to reject the uncontested conditions, but faulted the Board for not explaining the basis for its actions in its written order. *Georgetown II* did not suggest that the Board acted without any discussion at all and, as the transcript of the April 5, 2005 deliberations makes clear, the Board went through each and every condition proposed and articulated the basis for accepting or rejecting each one.

This Order will reduce those determinations to writing with respect to the five conditions at issue based upon the transcript, the Board Members' individual and collective recollection of their reasoning, and applicable legal principles. As noted throughout the transcript, each Board member had reviewed the record, which included any conditions proposed by the parties and any arguments offered in support of these conditions.

Discussion of Uncontested Conditions Rejected by the Board

The *Georgetown II* decision identified the uncontested conditions as follows:

Condition 6, requiring the mandatory reporting of data regarding off-campus

student conduct; Condition 8, restricting the use of the Performing Arts Center, Harbin Field, and McDonough Arena; Condition 9, restricting the helipad for medically necessary purposes; Condition 13, requiring the University to include certain information in future Campus Plan applications; and Condition 14, requiring the University to submit periodic reports regarding its compliance with the Campus Plan.

837 A.2d at 593 n6.

The condition numbers stated in this footnote are not the numbers given those conditions in the Original Campus Plan Order, but new numbers proposed by the Applicant in its submission to the Board of December 23, 2004 (Exh. 289). Because the remand instruction was for the Board to provide "an explanation as to why several uncontested provisions included in the Original Campus Plan were not included in the Revised Campus Plan". 837 A.2d at 593, this Order will refer to the numbering and text used in the Original Campus Plan Order. In addressing each uncontested condition, the Board will also indicate the number used in the *Georgetown II* footnote quoted above, as well as the pages in the April 5, 2006 transcript that contain the relevant Board discussion.

First Uncontested Condition:

9. The Applicant shall make publicly available data indicating the number and types of complaints received concerning student misconduct, and the outcome of each complaint, including whether sanctions were imposed and whether any fines paid. The Applicant shall also report this information quarterly to the Office of Planning, the Zoning Administrator, ANC 2E, and the Alliance for Local Living, and to other interested community organizations that may request the information.

[Referred to as Condition 6 in *Georgetown II* and in the Board's deliberations, the latter of which is reflected in Tr. 169 -170.]

There is nothing in the record to suggest that this condition would serve any purpose not already served by Condition No. 3 of the 2005 Order. That condition requires the University to implement and enforce its programs, described in Findings of Fact Nos. 35 through 37 of the 2005 Order and set forth in Exhibit 191 of the Record ("the University's Off-Campus Student Affairs Program"). Finding of Fact 37 (g) specifically references the University's program to monitor, track, evaluate and share statistics with "ALL" regarding student misconduct off-campus. See also Appendix Q of the 2000 Campus Plan at 7.

As a result of the University's comprehensive approach to addressing community concerns, as set forth in its Off-Campus Student Affairs Program, the 2005 Order, indicated that:

The Board was not persuaded by the parties in opposition that the university use is currently creating adverse impact on neighboring property The University's off-campus programs are a reasonable approach that will allow the University to monitor off-campus student activity in a proactive manner to

prevent adverse impacts that off-campus student houses or vehicles may otherwise have on the community.

2005 Order, page 17.

Having found that the University is not creating adverse impacts and that its programs will proactively prevent such impacts arising in the future, the Board had no basis for requiring that more measures be taken.

In addition, the proposed condition would needlessly burden the University with the responsibility for sending reports four times a year to various entities, some, such as the Office of Planning and the Zoning Administrator, who would have no need for this information because the statistics by themselves would not provide grounds for any action on their part.

The Board therefore chose to exclude this uncontested condition in the 2005 Order, concurring with Board Member Mann's observation that this is a program that can be "conducted independently by the University and by other regulatory authorities." Tr. 170.

Second Uncontested Condition

12. The Performing Arts Center, Harbin Field, and McDonough Arena shall be used for purposes related to the University or the community, and not for non-University events whose primary purpose is revenue generation.

[Referred to as Condition 8 in *Georgetown II* and in the Board's deliberations, the latter of which is reflected in Tr. 171 -173.]

No explanation for this condition is given in the Original Campus Plan Order. That Order made no finding that events primarily intended to generate revenues are more likely to have adverse impacts than events not primarily held for that purpose. Nor is there evidence in the record to support this distinction. This condition places restrictions on the University's use of its facilities based upon the purpose, rather than the impact of use, something that this Board now understands is beyond its ability to dictate.

Moreover, the Board also finds the condition to be vague and unenforceable. The Original Campus Plan Order did not explain how enforcement agencies were to determine whether revenue generation is the primary purpose of an event, or whether revenue is a secondary or irrelevant consideration. The vagueness of the terminology used and the absence of objective criteria make this condition virtually impossible to understand or enforce. This condition is neither necessary to mitigate adverse impacts nor enforceable; therefore, the Board did not include it in the 2005 Order.

Third Uncontested Provisions

13. The helipad shall be used only for medically necessary purposes. The Applicant shall provide monthly reports regarding use of the helipad, including credible

evidence of medical necessity associated with its use, to ANC 2E, the Alliance for Local Living, and other community organizations that request the information.

[Referred to as Condition 8 in *Georgetown II* and in the Board's deliberations, the latter of which is reflected in Tr. 170 -173.]

This condition not only possesses all of the flaws of Condition No. 12, but also has the potential to cause great harm. As with Condition No. 12, the Original Campus Plan Order offered no basis for regulating this helipad's use. And, to use the same standard the condition would have imposed, there is no "credible evidence" in the record that the hospital has or will use the helipad in the absence of medical necessity. While the parties in opposition may envision the hospital routinely flying in patients in non-emergency circumstances, the Board will need more than suspicion to second-guess the use of life-saving measures. Indeed, the possibility that the hospital might erroneously deny the use of the helipad raises serious concerns. In any event, the condition is unenforceable. Whereas Condition No. 12 would turn District enforcement officials into economists; this condition would require a medical degree. As a matter of practicality and risk avoidance, the Board doubts that the Zoning Administrator can or would attempt to enforce this provision.

In rejecting the inclusion of this condition, the Board was particularly mindful of the guiding principle enunciated in *Georgetown I*:

The University has rights and the neighbors have rights, and a temperate, rational, and balanced approach is called for.

837 A.2d at 71.

Condition No. 13 is neither temperate nor rational, but crosses "the line between the exercise of legitimate zoning and land use authority and an *ultra vires* intrusion upon the University's educational mission." *Id* at 74-75 (footnote omitted).

Fourth and Fifth Uncontested Conditions

17. The Applicant shall include, in all future applications for further processing of the campus plan, the following information:
 - a) Actual enrollment of traditional undergraduate students, as of 30 days prior to the hearing date, including documentation and an explanation of the methods and assumptions used in the calculation;
 - b) Whether the Southwest Quadrangle project has been completed, and, if so, the date it began use as an undergraduate dormitory;
 - c) A progress report on the implementation and operation of the Off-Campus Student Affairs Program, including information on number of complaints received concerning student misconduct, reported violations, and outcomes, including what

sanctions were imposed and the fines paid, if any;

d) The number of off-street parking spaces within campus boundaries, as of 30 days prior to the hearing date, including documentation and an explanation of the methods and assumptions used in the calculation; and

e) A status report on the Transportation Management Program.

[Referred to as Condition 13 in *Georgetown II* and in the Board's deliberations, the latter of which is reflected in Tr. 183 -184.]

19. No special exception application filed by the University for further processing under this plan may be granted unless the University proves that it has consistently remained in substantial compliance with Conditions 1 through 18 set forth in this Order. Further, any violation of a condition of this Order shall be grounds for the denial or revocation of any building permit or certificate of occupancy applied for by, or issued to, the University for any University building or use approved under this plan, and may result in the imposition of fines and penalties pursuant to the Civil Enforcement Act, D.C. Code §§ 6-2701 to 6-2723.

[Referred to as Condition 14 in *Georgetown II*² and in the Board's deliberations as reflected in Tr. 191 - 194.]

These two conditions will be discussed together. Condition No. 19, if included in the 2005 Order, would have made proof of substantial compliance with the preceding conditions an element of obtaining Zoning Commission approval of requests for further processing and Condition No. 17 specifies information that must be submitted with a further processing application, presumably to demonstrate that such compliance exists. The term "further processing" means "the further processing of an approved campus development plan to permit the construction and use of a specific building or structure within a campus". 11 DCMR § 3104.4.

Whatever legitimacy Condition No. 17 has is dependant upon the validity of Condition No. 19. Condition No. 19 is not directed at the University, but is either an effort to instruct the Zoning Commission as to how it should decide further processing applications or an unnecessary statement of the law as it already exists. If compliance with campus plan conditions is already an element of proof for obtaining further processing approval, then the condition adds nothing and need not appear. However, if the condition was intended to change or add to existing law, it would constitute an infringement upon the Zoning Commission's authority in this area. As of December 8, 2000, the Zoning Commission possessed the exclusive jurisdiction to hear all

² Footnote 6 of the *Georgetown II* decision described this condition as "requiring the University to submit periodic reports regarding its compliance with the Campus Plan". No such requirement has ever been imposed by the Board. Based upon the order in which this condition is described in the footnote, and the description given it during Board's deliberation, it will be assumed the footnote is referring to Condition No. 19, which, in fact, was not included in the 2005 Order.

further processing applications regardless of whether the campus plan was approved by BZA or the Commission. While it was appropriate for BZA to customarily include a condition of this kind when it had the authority to decide further processing applications so as to give notice of its understanding of the burden of proof, only the Zoning Commission may now establish the substantive and procedural prerequisites for obtaining further processing approval.

Similarly, the Board does not believe it is appropriate or necessary to indicate how the University is to make or defend its case, as Condition No. 17 purports to do. If proof of compliance is indeed an element for further processing of a case, it is for the University to determine how to make that showing. The Board will not be deciding further processing cases brought under the authority of the 2005 order, and cannot speak for the body that will do so. Subsection 210.4 of the Zoning Regulations (Title 11, DCMR) already sets forth the minimum amount of information that must be provided in a further processing application. If the Commission desires more, it can add to this list through a rulemaking, or can specifically request additional information in a pre-hearing order or at any point thereafter.

For these reasons the Board rejected the inclusions of Condition Nos. 17 and 19 in the 2005 Order.

CONCLUSION

The five uncontested provisions were not supported by substantial evidence in the record. The conditions were neither reasonable nor likely to prevent or mitigate any identified potential adverse impact. Instead the conditions "intruded to an impermissible degree into the management prerogatives of the University", *Georgetown I*, 837 A.2d at 63 or involved processes that are regulated by others, including those of the Zoning Commission.

For these reasons, the Board did not make compliance with these requirements a condition of the 2005 Order approving the Campus Plan.

As in the case of the 2005 Order, this Order is being issued without a proposed version being circulated to the parties for exceptions as described at D.C. Official Code § 2-509 (d). That provision provides that:

Whenever in a contested case a majority of those who are to render the final order or decision did not personally hear the evidence, no order or decision adverse to a party to the case (other than the Mayor or an agency) shall be made until a proposed order or decision, including findings of fact and conclusions of law, has been served upon the parties and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of those who are to render the order or decision, who, in such case, shall personally consider such portions of the exclusive record, as provided in subsection (c) of this section, as may be designated by any party.

The Board is familiar with the arguments made before the Court of Appeals with respect to this issue and is aware that the *Georgetown II* decision believed it unnecessary to reach its merits.

The Board has also reviewed the Court of Appeals decision in *Sherman v. District of Columbia Com'n on Licensure to Practice Healing Arts*, 476 A.2d 667 (D.C. 1984), and believes that the principles stated therein support a conclusion that the exception process is not required here

As here, the *Sherman* decision involved a remand from the Court of Appeals. However, unlike the remand in *Sherman*, all of the Board members who are approving the issuance of this order have previously read the record and offered the parties an opportunity to make arguments in support of all conditions they offered, including the conditions the Board rejected. Moreover, the scope of this remand is far more limited than the one involved in *Sherman*, in that the Court has only asked this Board to explain its rejection of five uncontested conditions. Under the logic of the *Sherman* case, the Board only needed to read the record, afford an opportunity for argument, and satisfy itself that this Order accurately reflects its deliberations, which it in fact did. The Board fulfilled the first two requirements after the *Georgetown I* remand and did not need to do so again after the second remand. By adopting this order, the Board signifies its agreement that the order accurately explains why the five uncontested conditions were excluded from the 2005 Order. Having acted in a manner consistent with the principles stated in the *Sherman* case, it need not submit a proposed version of this order to the parties.

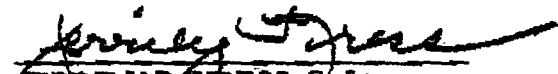
It is therefore **ORDERED** that this Order on second remand is hereby **ADOPTED** in satisfaction of the remand instructions made in *Georgetown I*.

VOTE: 3-2-0 (Ruthanne G. Miller, Curtis L. Etherly, Jr., and John A. Mann II voting to adopt the order; Marc D. Loud not voting, not having heard the case; and Zoning Commission member not participating, not voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Order.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

Final Date of Order: AUG 17 2007

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 10 DAYS AFTER IT BECOMES FINAL.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment**



BZA APPLICATION NO. 16566-H

As Director of the Office of Zoning, I hereby certify and attest that on AUG 17 2007, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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**BOARD OF ZONING ADJUSTMENT
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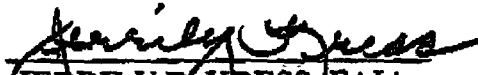
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