

BEFORE THE DISTRICT OF COLUMBIA ZONING COMMISSION

PRESIDENT AND DIRECTORS OF GEORGETOWN
COLLEGE: APPLICATION FOR SPECIAL
EXCEPTION APPROVAL OF AMENDMENT TO AND
FURTHER PROCESSING OF AN APPROVED
CAMPUS PLAN AND RELATED RELIEF

Z.C. No. 07-23

2007 SEP 24 PM 1:00

DC OFFICE OF ZONING

RECEIVED

**OPPOSITION OF GEORGETOWN UNIVERSITY TO MOTION OF CITIZENS
ASSOCIATION OF GEORGETOWN TO REINSTATE PROCEDURAL CONDITIONS FOR
THE FURTHER PROCESSING OF GEORGETOWN UNIVERSITY APPLICATIONS**

The President and Directors of Georgetown College (“Georgetown University” or the “University”), through its counsel, opposes the request of the Citizens Association of Georgetown (“CAG”) that this Commission incorporate two Procedural Conditions into the University’s 2000-2010 Campus Plan that would govern further processing review and defer its review of the pending further processing applications in Zoning Commission Case No. 07-23 until those two Conditions are incorporated. CAG’s request seeks to breathe new life into a legal argument that has been conclusively resolved against it after years of litigation. These Procedural Conditions were already considered in conjunction with the Board of Zoning Adjustment’s review of the existing Campus Plan, and were ultimately excluded from the Campus Plan after eight years of deliberation and appeal. Furthermore, the Zoning Commission would need to open up a separate proceeding on the entire Campus Plan to consider the Conditions, and such consideration would be premature at this time. As we develop in greater detail below:

1. The Procedural Conditions were already conclusively eliminated by the BZA after exhausting deliberations over the existing Campus Plan, and any further challenge should have been properly brought in connection with those proceedings.

ZONING COMMISSION
District of Columbia

CASE NO.

EXHIBIT NO.

07-23

ZONING COMMISSION
District of Columbia
CASE NO. 07-23
EXHIBIT NO. 20

2. Consideration of the Procedural Conditions by the Zoning Commission is inappropriate at this time, because the current applications before the Zoning Commission involve further processing applications under the existing Campus Plan, and it would be premature for the Commission to consider the inclusion of the procedural conditions prior to the submission of a new Campus Plan.

Accordingly, we request that this Commission rule on this issue at its October 15, 2007 Public Meeting so that it may proceed with its consideration of the above-captioned applications without delay under the current Campus Plan at the scheduled public hearing on October 22, 2007.

ARGUMENT

I. THE PROCEDURAL CONDITIONS WERE ALREADY CONCLUSIVELY ELIMINATED IN CONNECTION WITH THE EXISTING CAMPUS PLAN

The Citizens Association of Georgetown (“CAG”) has requested that the Zoning Commission add two new conditions to Georgetown University’s Campus Plan that would require the University to prove “substantial compliance” with conditions of the Campus Plan prior to the approval of any special exception application, and would further require the University to submit certain information with each further processing application, presumably to demonstrate that the University is in substantial compliance with the Campus Plan (together, the “Procedural Conditions”).

Georgetown University originally filed its 2000-2010 Campus Plan on January 31, 2000 with the Board of Zoning Adjustment (“BZA”). The BZA first approved the Campus Plan in 2001, subject to a series of conditions (the “original Campus Plan”). Included with these conditions were the two Procedural Conditions at issue here. The University appealed the original Campus Plan to the D.C. Court of Appeals, which vacated the entire BZA decision—including the Procedural Conditions—and remanded it to the BZA.

In 2005, after conducting further proceedings on the Campus Plan, the BZA approved the Campus Plan again in Order No. 16566-F, subject to a new series of conditions (the “**revised Campus Plan**” or “**current Campus Plan**”). The revised Campus Plan did not include the Procedural Conditions. CAG then appealed the revised Campus Plan to the D.C. Court of Appeals, which affirmed the BZA’s determination but remanded the matter to the BZA a second time for explanation as to why certain conditions (including the Procedural Conditions) were not part of the revised Campus Plan. On August 17, 2007, the BZA issued Order No. 16566-H, which explained its decision not to incorporate certain conditions into its revised Campus Plan order. In its order on the second remand, the BZA detailed the findings of fact and conclusions of law that led the BZA to exclude the Procedural Conditions.

CAG has therefore received ample opportunity to make its case for the need to include the Procedural Conditions to the BZA, and, having failed to prevail in that forum, should be collaterally estopped from arguing the same issue to the Zoning Commission. After exhaustive consideration and deliberation, the BZA conclusively determined that the Procedural Conditions “were neither reasonable nor likely to prevent or mitigate any identified potential adverse impact.” See BZA Order No. 16566-H at 8. Indeed, as the BZA’s most recent order makes clear, the Board was mindful of the D.C. Court of Appeals’ order to “adopt only those conditions necessary to mitigate identified potential adverse impacts related to the university use.” Id. at 2 (emphasis added). Therefore, when the BZA deliberated over the revised Campus Plan after the first remand from the D.C. Court of Appeals, it “independently reviewed 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.” Id. Moreover, the BZA—as the entity most familiar with the potential impacts of the Campus Plan—has

explained that it deliberately removed the Procedural Conditions because they were neither “appropriate” nor “necessary” to offset the University’s potential impacts. Id. at 8.

Even if there were a reason to revisit—yet again—the BZA’s decision and order regarding the Procedural Conditions, CAG has failed to use the proper procedures for challenging the BZA’s determination. First, pursuant to Section 3126 of the Zoning Regulations, CAG had the opportunity to file a motion for reconsideration with the BZA within 10 days of issuance of the final written order, but failed to do so. Second, CAG could have appealed the BZA Order to the D.C. Court of Appeals, but failed to do so within the period of time set forth in Rule 15 of the Rules of the District of Columbia Court of Appeals. Third, the BZA Rules of Practice of Procedure do not provide CAG with any right to appeal the BZA’s decision to the Zoning Commission. 11 DCMR § 3128.5.¹ Therefore, the Zoning Commission does not have the authority to consider CAG’s request as a challenge of the BZA’s decision, and would have to consider the request under its own authority.

II. CONSIDERATION OF THE PROCEDURAL CONDITIONS BY THE ZONING COMMISSION IS INAPPROPRIATE AT THIS TIME

CAG alleges that the Zoning Commission should impose the Procedural Conditions prior to its consideration of the further processing applications in order to ensure University compliance with the conditions of the revised Campus Plan. Thus, having unsuccessfully advanced that position in the prolonged litigation against the BZA, CAG now asks the Zoning

¹ The BZA Rules are clear that there is no right of appeal from the BZA to the Zoning Commission. The BZA Rules do provide the Zoning Commission with a limited opportunity to review the decisions of the BZA *sua sponte*. However, this is a “discretionary internal review process.” 11 DCMR § 3128.6. Further, pursuant to Section 3128.1 of the Regulations, the Zoning Commission must make such determination within ten days of the issuance of the final Order. Once the Order becomes effective, the Zoning Commission may no longer review the BZA’s decision. Finally, within the context of the Zoning Commission’s own authority over campus plan decisions, the *sua sponte* provisions of the BZA Rules do not apply. See 11 DCMR § 3104.5.

Commission to apply the Campus Plan as if CAG's position had prevailed. This course of action is unnecessary and inappropriate for the reasons that follow.

First, the current application before the Zoning Commission involves further processing applications under the revised Campus Plan, and the BZA has already conclusively determined that the Procedural Conditions put forth by CAG are not required to mitigate against potential adverse impacts under that Plan. As mentioned above, the BZA approved the University's revised Campus Plan with those conditions that it concluded were "necessary to minimize any potential adverse impacts on neighboring property associated with the university use." BZA Order No. 16566-F at 16. The conditions of approval for the revised Campus Plan, in conjunction with the Campus Plan itself and Zoning Regulations as a whole, therefore provide adequate protections to minimize potential adverse impacts. The Zoning Commission has already evaluated a number of projects under the revised Campus Plan and did not require additional process or documentation in order to evaluate the University's compliance with the revised Campus Plan. See Z.C. Order No. 05-31 at 2; Z.C. Order No. 05-06 at 1 (concluding that the requested special exception relief will not tend to adversely affect the use of the neighboring property in accordance with the Zoning Regulations and Map).

Second, the Zoning Commission already denied virtually identical requests by CAG in previous further processing proceedings. During its consideration of a further processing application for an addition to house a second CyberKnife in Z.C. Case No. 05-06, CAG requested that the Zoning Commission intervene in the BZA Campus Plan proceeding, either by *sua sponte* review or through an emergency rulemaking, to impose the same Procedural Conditions. Tr. May 5, 2005 at 20-26. And in Z.C. Case No. 05-31, CAG requested the Zoning Commission re-impose another condition that had been removed by the BZA. See Tr. Nov. 28,

2005 at 14-33. The Commission declined to act on both requests, noting in 05-31 that “for me to come up here and sit up here and second guess [the BZA], I’m not in the frame of doing that at this time.” Id. at 26; see also id. at 30-31 (“I’m not in favor of undoing—believe me, undoing anything the BZA has already done . . .”).²

Third, it would be premature for the Commission to consider the inclusion of the procedural conditions prior to the submission and consideration of a new Campus Plan. Again, the BZA evaluated potential conditions of the revised Campus Plan in the context of the entire Campus Plan, based on its detailed review of the record, and selected only those conditions that it concluded were necessary to offset potential adverse impacts. The University does not have an application for a campus plan before the Commission at this time. Therefore the Zoning Commission would need to open up a separate proceeding and need to read the entire BZA record in order to properly evaluate CAG’s request in the context of the entire Campus Plan. Absent a full-blown campus plan deliberation, the Zoning Commission would not be able to evaluate the need for Procedural Conditions requested by CAG. The Zoning Commission may elect to evaluate additional procedures in its consideration of the University’s next Campus Plan. Until that time, however, the Zoning Commission should evaluate the University’s further processing applications based on the conditions selected by the BZA that govern the existing Campus Plan.

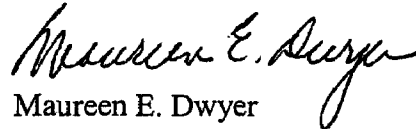
CONCLUSION

For the foregoing reasons, we respectfully request that the Zoning Commission continue its consideration of Georgetown University’s applications for further processing without delay at the scheduled public hearing. We look forward to addressing any issues or concerns the Zoning

² Both of the above quotations are attributed to Commissioner Hood.

Commission may have about the proposed further processing applications, campus plan amendment, and related relief during that hearing.

Respectfully submitted,


Maureen E. Dwyer


David M. Avitabile

Pillsbury Winthrop Shaw Pittman
2300 N Street NW
Washington, DC 20037
(202) 663-8834
Attorneys for Georgetown University

September 24, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this motion was delivered by hand and electronic delivery on September 24, 2007.

Stephen Mordfin
Office of Planning
801 North Capitol Street, N.E.
4th Floor
Washington, DC 20001

ANC 2E
3265 S Street NW
Washington, DC 20007

Richard deC. Hinds
Counsel for CAG
Cleary Gottlieb Steen & Hamilton, LLC
2000 Pennsylvania Avenue, NW
Washington, DC 20007



David M. Avitabile