

ZC Case 11-07C

2015 FEB -2 PM 1:14

There was a meeting of some neighbors over the weekend discussing AU and the upcoming Zoning Hearing.

We have a legal opinion posted below regarding indemnification from damage (all types including water) reviewed by two attorneys as well as comments from an informed source regarding water flow. Please make sure to take note of them.

What are the main issues that need to be addressed at the Zoning Commission:

Rejection or Acceptance of modifications to the approved plan including the change of a 1-story garage to a 2-story garage and the other changes that come with it.

- Clarification over whether AU will cover the costs of any damage stemming from water flow (AU was beyond equivocal at the ANC meeting) stemming from deeper excavations; and
- the increased intensity of use of the site.

The discussion at the recent ANC meeting reflected some important issues: what is most stunning is the increase in the overall intensity of use of the site. This is a big departure from the Zoning Order. Consider the plan approved by the Zoning Commission and what we have now. In approving the original plan, the Zoning Commission emphasized that the site would not have intense uses - it would be residential - buffered by administrative and faculty buildings that would be empty at night. This is what AU told the Zoning Commission at the time. Only the residence halls would be populated in the evening hours. Emergency vehicles (with the exception of fire trucks) would access the building through the garage so that they would not disturb the neighboring homes and the garage was laid out so that there was an entrance underground accessible by emergency vehicles for each building.

So, now what do we have: emergency vehicles (e.g. ambulances) will access the building from the street, not the parking lot. The only way for an emergency vehicle to fit in the underground garage is to park at the loading zone. It is not too efficient for an ambulance to park at a loading zone and then walk across the whole parking lot to access one of the building entrances. You have public safety operating on the East Campus including the dispatchers who would be dispatching personnel from the East Campus on a 24/7 basis - yes it is an administrative operation, as indicated by Linda, but the buildings were to be empty at night except for the dorms. (Do people think having public safety on the east campus is going to have an impact on student behavior? Public safety will not be patrolling the dorms. If there is a problem, they

have to be dispatched to the site. They are not allowed under AU's rules to be proactive.) And now, we have AU shuttle buses regularly - day and night - circulating through the East Campus surface parking lot - lights on at night - with all the brake noise and other noise associated with buses - and operating where the buffer is the smallest and least planted. It sure isn't going to make residents near Mass. Ave. too happy. It's like a little city now instead of a sleepy village, as AU had initially told the Zoning Commission.

The good news is that through our groups efforts we have called attention to the other changes, including changes in the heights of the buffer buildings. AU had revised the plans to reduce the buffer buildings. They realized that this could present a legal zoning issue for them and they now have revised the first set of revisions to the original plan to make it more reflective of the original plan. The buffer buildings and their height were designed to protect the community from noise. **Noise and damage to homes are major concerns for most people who we have spoken to in the community.**

The plan to have shuttle buses on the East Campus is a major departure from the campus plan that was approved by the zoning commission and changes the equation. This is another major change being announced - three years after the Zoning Commission approved the plan and nearly a year since construction began.

Plans approved by the Zoning Commission are not intended to evolve over the course of the construction phase. It reflects how poorly designed the building originally was when it was considered by the zoning commission.

The University is good at segmenting things, wearing us down by discussing one issue at a time, and then coming up with new issues. There is talk of them wanting to extend week day working hours and also working on Saturday, which may mean going to Zoning again.

When this is all built and occupied, many of us have huge concerns about noise from so many students living so close to our community. Several people along the wall with AU have mentioned that they would like to have the buildings constructed with windows that do not open. It would also be the 'green' thing to do, and certainly minimize noise from the dorms to our community.

What impact will the relocation of Public Safety office have. It seems like a heavy use that is not consistent with the environment on the East Campus. How will it effect neighboring homes.

Section 210 of the Zoning code states that a university structure can be located in a residential community only "so that it is not likely to become objectionable to neighboring property because of noise, traffic, number of students, or other objectionable conditions".

It seems that as a result of not building the building on the corner of Nebraska Ave and New Mexico that the University lost 7 - 10 parking spaces. By not properly accounting for lost spaces in their buildings due to support beams they lost more spaces. Hence the 2 story garage. Our immediate questions are why when they were drawing up plans did they not find that they would lose spaces due to these support beams. And, why when detailed plans were reviewed by city agencies with the University was this not discovered.

The other issue that was rumored is that the ramp of the one story garage was too steep, hence the need for 2 story garage. Again, more bad planning. One wonders what else that is unanticipated will come up as the East Campus is being constructed.

People at our meeting prefer the original Campus Plan agreed to by Zoning given the many other issues that arise as previously mentioned. If AU needs more parking spaces why not build the garage on the corner of Nebraska Avenue and New Mexico and have a park on top of it. Then, when they are ready they can construct a building on top of it.

Water - There are 260+ wells to remove ground water from the East Campus. That's a lot of water. What impact will digging deeper have on water flow. Indeed, what impact will there be with a one story garage? AU representatives said that they are not lawyers, but they would not read the language of AU to provide compensation in the event of water damage. There was a good deal of discussion at the ANC with differing opinions as to what coverage would be provided and should water damage be specifically addressed.

However, it is clear from the AU representative's statement that there is some ambiguity in the language, and that there would be a financial incentive for AU to take a very narrow reading of the liability language in the zoning order in order to avoid liability.

This is the language that is in the Zoning Commission Order - Z.C. Order No. 11-07, Z.C. Case No. 11-07 Page 68

Responsibility for Damage to Adjacent Properties - The University shall repair, at its own expense and as promptly as reasonably possible, any damage to the properties of an adjacent property owner, and any improvements thereon, caused by and resulting from the construction work conducted on the East Campus;

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To clarify, there are no private property owners adjacent to the East Campus within our community in the most restrictive use of the term. The term adjacent legally means touching. The property that is adjacent to the East Campus is our community perimeter wall and the sidewalk inside that wall. Beyond that for most of us, is our gates and patios, then our homes, which is our private property. Therefore the limitation to adjacent properties may not protect any private homes in our community.

Damage could happen above or below grade to homes that are in any location in our community. Furthermore, the damage to the underground rock and shell formation resulting from the construction may change the underground water flow to damage property further into the community.

The cause of the damage resulting from the disturbance of the underground rock and shell formation could be a direct or indirect cause for damage to a home. The language used by the University restricts cause - they are talking about direct cause, and may exclude an indirect cause. Cause is limited now to adjacent properties and may not protect properties within the community. It depends upon ones interpretation.

Proposed language suggested to us that would be broader and more protective is :

It is clearly understood and agreed that American University shall pay for any and all damages to the properties of Westover Place resulting directly or indirectly from any and all construction work of any nature performed by them and or on their behalf by any and all contractors or subcontractors retained by them and or on behalf of them to perform work on the property situated at (East Campus) address, Washington DC, after 1/1/2014.

The University shall also be responsible to assure that there is no interruption in the enjoyment or solitude of adjacent property Owners by the students, faculty or staff on the East Campus.

AU's plan to excavate another 7 feet for a two story garage on the East Campus will require constant pumping and discharging of the groundwater, which will alter the groundwater flow in the area.

Based on the Army Corps investigation, groundwater on the AU Campus and Spring Valley flows to the west. Based on AU's Apex report, groundwater on the East Campus flows to the South. Some of the groundwater on the north side of Nebraska Avenue that currently flows to the West, will likely flow to south side of Nebraska Avenue - toward the East Campus and Westover Place.

Complicating the situation, the Army Corps detected arsenic on the AU Campus, near the Ward Circle Building, but the Army Corps, EPA and AU decided not to remediate. The Army Corps has not installed any groundwater monitoring wells in this area and the investigation of the Nebraska Avenue parking lot was limited, with no or limited sampling of groundwater, soil or air. AU's contractors detected mercury during geotechnical borings on the East Campus. It would be prudent to determine the source and extent of the contamination.

Respectfully,

Benjamin Tessler - 4446 Westover Place NW btessler@msn.com

Benjamin Tessler 2/2/2015

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May 10, 2014

Mr. Matt LeGrant
Zoning Administrator
DC Department of Consumer and Regulatory Affairs (DCRA)
1100 4th Street SW
Washington, DC 20024

Submitted 2/2/2015
#07 signed copies
given to Mr. LeGrant
at meeting

**Re: Zoning Commission (Z.C.) Order 11-07 – American University
Campus Plan and Further Processings**

Dear Mr. LeGrant:

We, the undersigned, express our concern that American University (AU) is not in compliance with the specific terms of Zoning Commission (Z.C.) Order 11-07 (American University Campus Plan and Further Processings) for construction of the East Campus. It is our understanding that AU plans to prepare the site and begin construction in May, 2014. The purpose of this letter is to request that the issuance of any permits for the East Campus are delayed – and even denied – until neighbors have assurances from your office that building plans conform to the specifics of the Order.

We are concerned about the following plans that conflict with Z.C. Order 11-07.

- AU is not complying with the limits on the size of buildings outlined in the Zoning Order. ZC Order 11-07 specifies that the East Campus buildings shall be consistent with Exhibit 602(E).
- AU submitted plans to the Zoning Commission for a one-story parking garage below ground for 150 parking spaces (*Exhibit 50A*), but is planning now to build a two-story underground parking garage. This will require deeper excavation at the site and raises serious issues for adjacent homes that were not considered by the Zoning Commission, including damage to foundations stemming from underground water flow. Additionally, the underground garage was to include a charter bus turn around to remove buses from the Nebraska Avenue surface parking lot. Now, the underground garage will not have the bus turn around meaning that buses will use the surface lot adjacent homes subjecting residents to the effects of bus idling and bus exhaust fumes.
- AU is planning to install an exhaust vent for the garage in the buffer area that was to be dedicated solely to trees to shield nearby residences from noise. No mechanical equipment was to be located in the buffer area.
- AU committed to install the buffer upon completion of the construction of the buffer buildings and before construction began on other buildings on the East Campus site. Now, AU has reported it will not install the buffer until all construction is complete at the site.

These changes in approved plans are not a minor modification.

Also, the District of Columbia Court of Appeals issued a ruling on March 27, 2014 concluding that noise from mechanical operations on top of the East Campus buildings may create objectionable conditions in violation of the DC Zoning Code (Section 210.2). The Court has remanded the issue to the Zoning Commission for further action. AU has indicated it is not required under the terms of Z.C. Order 11-07 to mitigate the noise impacts from the mechanical equipment on the buildings. The Court's recent ruling may lead to new mandates from the Zoning Commission to comply with the Zoning Code.

First, we support a delay in issuing any permits for excavation and/or construction of the East Campus and ask that you require that AU submit a request to the DC Zoning Commission to modify the plans, as required under DC zoning rules. We note that any homeowner seeking a building permit would be required to go back to the Zoning Commission to seek a modification if their changes were on the scale as those planned by AU.

Second, we also would ask that the permits be delayed until the Zoning Commission complies with the District Court's remand on the noise issue. Until this issue is resolved, we believe it is premature to issue any permits for the site.

Sincerely

NAME

ADDRESS

