



GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADVISORY NEIGHBORHOOD COMMISSION 3D

PO Box 40486, Palisades Station

Washington, DC 20016

***PALISADES – KENT - SPRING VALLEY - WESLEY HEIGHTS - NEW MEXICO/CATHEDRAL –
THE AMERICAN UNIVERSITY - FOXHALL VILLAGE -BERKELEY***

October 12, 2015

Mr. Anthony Hood, Chairman
District of Columbia Zoning Commission
441 4th Street NW
Suite 210S
Washington, DC 20001

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**Re: ZC Case No. 11-07E: Request for a Minor Modification to an Approved
Campus Plan Further Processing Application – Zoning Commission Order
No. 11-07 – Proposed Revision to Permitted Construction Hours to Allow
Work on Saturdays.**

Dear Chairman Hood and Members of the Commission:

American University (AU) has requested that the Zoning Commission (ZC) review and approve a minor modification of an Approved Campus Plan Further Processing to allow outdoor construction to occur on Saturdays from 8 AM- 4PM on its East Campus construction site across from the Main Campus on Nebraska Avenue adjacent to a residential neighborhood. The ZC limited construction hours at the site in ZC Order 11-07 to “mitigate any adverse impact on adjacent properties resulting from construction activity.” The hours approved in the Order were Monday – Friday 7:30 AM to 4 PM. The hour limitation only applied to “outdoor construction work” and specified that interior work could take place outside those hours.

During the ZC’s hearings on the Further Processing, AU’s willingness to limit construction activity at the site to weekdays was a linchpin of AU’s argument that the construction would not present “objectionable conditions” for neighbors and was a key factor in the ZC’s approval of the Further Processing application.

The East Campus is being built on 8 acres and consists of five separate buildings immediately adjacent to the Westover Place townhome development. Construction at the site began in Spring 2014 – nearly two years after the ZC approved the Further Processing for the new construction project.

In April 2015, AU sought a minor modification to the Further Processing Order to extend the hours at the site. AU reported to Advisory Neighborhood Commission (ANC) 3D at the April 1 public meeting that “50 construction days or ten weeks had been lost due to weather” and that this threatened the ability of the University to complete the project in time for students to occupy the new residence halls in Fall 2016.

Neighbors were divided over the AU request, so ANC 3D successfully negotiated a compromise acceptable to AU, neighbors, and the ANC to extend “outdoor construction” hours to Monday – Friday 7 AM to 7 PM and to allow Saturday work hours after September 1 if the university experienced a lost day of construction activity due to weather during the preceding week. AU indicated that the completion of “outdoor construction work” (i.e. when the buildings were up and AU construction crews could begin working on the interior of the buildings) “on or around February 29, 2016” would enable AU to meet its schedule for opening the new student residence halls in August 2016. The late February date was included by the ZC as part of the modification language it approved in April 2015.

In supporting this modification in April 2015, ANC 3D noted that the compromise agreement achieved “a balance between (a) AU’s need for flexibility in its work schedule to ensure the project is completed on time and (b) residents’ interests in being able to enjoy their property free of the noise and dirt of outside construction taking place immediately adjacent to their homes.”

Further, ANC 3D understood from AU that this modification would provide AU with the flexibility it needed to complete the project on time.

AU has now – six months later – submitted another modification request for extended hours. According to AU, another 33 days of work were lost at the site from April – August 2015 due to weather – putting the August 2016 completion and occupancy date in peril again.

The immediate application for a minor modification was submitted after AU informed residents of Westover Place on Thursday, September 10 that it would do “outside construction work” at the site on Saturday, September 12 “due to wet conditions at the site” on September 10. Westover Place residents noted that this was not in compliance with the modification approved by the ZC in April 2015 because outdoor construction work was occurring at the site on September 10 despite the “wet conditions.” AU canceled plans to work on Saturday, September 12 because such work would not have been in compliance with the ZC Order as modified in April 2015.

Until AU announced plans to work on Saturday, September 12, the University had given no indication to the community or the ANC that construction days had been lost from April – August 2016. In fact, AU advised the community that work was on schedule – and even possibly ahead of schedule – at a community construction update meeting on June 16, 2015.

ANC 3D Review

At its regularly scheduled meeting on October 7, 2015 at the Sibley Hospital Medical Building, and with a quorum (5) present at all times, ANC 3D considered the application for a minor

modification for extended hours at the AU East Campus construction site. Representatives of AU, a representative of the Westover Place Home Owners Association Board, several Westover Place residents, and other nearby residents spoke to the application at the October 7 ANC meeting.

AU stated the following:

- Weather conditions during Summer 2015 delayed the project another 33 days.
- Construction crews are not now working the full schedule of weekday hours, as modified and expanded by the ZC last April. Work generally shuts down by 5 PM (or earlier) instead of 7 PM as provided for in the modification approved by the ZC in April 2015.
- The additional Saturday work hours being requested by AU would provide approximately 13 more construction days (weather permitting) for AU to complete outdoor construction work.
- AU is now on schedule to complete outdoor construction work by the first week of February, not “on or around February 29” as anticipated in the modification approved by the ZC in April 2015 – suggesting AU is ahead of schedule despite any lost work days.
- AU was not planning to increase its undergraduate student population in Fall 2016 beyond current levels and the University would be able to meet the requirements of ZC Order 11-07 to make on campus housing available to 85 percent of full-time freshman and sophomores and 59 percent of its full-time undergraduate students in Fall 2015. Therefore, without an increase in undergraduate students, AU should be able to provide housing to undergraduate students on campus under the zoning standards now in place.
- AU noted that ZC Order 11-07 requires AU to make on campus housing for all full-time freshman and sophomore students and for 67 percent of all full-time undergraduates beginning with the Fall 2016 semester and that the East Campus housing is essential to meet that requirement. Failure to do so would put AU out of compliance with ZC Order 11-07.

A representative of Westover Place Homeowners Association Board advised ANC 3D that its position had not changed since April and that it was generally in support of any request from AU that might contribute to completing construction by August 2016. However, several residents of Westover Place objected to the request for modified hours to include Saturdays until outdoor construction is completed saying that it would prove disruptive and prevent them from enjoying their homes on the weekend. They cited noise and traffic as objectionable conditions that would result from the Saturday work hours.

ANC 3D was presented with a petition signed by 45 Westover Place residents objecting to AU's request for a minor modification. These residents questioned whether the additional Saturday work hours would enable AU to complete the project on time and called for a modification that would delay the housing requirement scheduled to take effect in Fall 2016 to January 2017 to allow AU to remain in compliance with ZC Order 11-07 as it completes construction of the new student residence halls. They requested a public hearing in this case.

Another Wesley Heights resident told the ANC that the objectionable impacts of Saturday construction work at the site, particularly traffic problems, would be experienced by other residents in the Wesley Heights neighborhood, not just Westover Place residents.

Based on the application and other information provided at the October 7 meeting, ANC 3D voted 5-1 to oppose the modification sought by AU on the basis that the University had not met its burden of proof in this case and ANC 3D called for a hearing by the ZC in this case. Specifically, the ANC approved the following motion:

“ANC 3D opposes the minor modification for the following reasons:

- 1. The request for a minor modification is not timely based on Section 3129 of the Zoning Code;***
- 2. A bench decision as opposed to a hearing denies neighbors an opportunity to participate fully in a case that has a direct impact on their property – and given divisions in the neighborhood over the issue, a hearing is appropriate in this case;***
- 3. AU has not fully used its existing hours and the extended hours approved by the Zoning Commission last April in another modification;***
- 4. Given that the project has consistently been behind schedule, there is no reason to think that an additional 13 days of external work on weekends – that would prove disruptive and objectionable to neighbors – will enable the project to be completed on time; and***
- 5. The minor modification will not provide AU with the zoning relief it needs to complete the project in a timely way and therefore, ANC 3D encourages AU to consider an alternative modification to delay the effective date of the requirement that the university house 100 percent of freshman and sophomores and 67 percent of all undergraduates on campus until January 2017, and that every effort be made to house these students on campus in the Fall 2016.”***

The Request for a Minor Modification is Not Timely

AU states in its September 30, 2015 filing that its request for a modification is timely because it comes less than two years since the DC Court of Appeals issued a final decision on an appeal of ZC Order No. 11-07. AU cites Section 3130.5 to justify this argument. However, AU is misreading Section 3130.5 to obscure the fact that its 2-year limit on seeking a minor modification of the Order expired on May 17, 2014.

Section 3129 of the Zoning Code deals specifically with the modification of approved plans. Section 3129.3 states clearly:

“A request for minor modification of plans shall be filed with the Board not later than two years after the date of the final order approving the application.”

The date of the final Order was May 17, 2012. Therefore, AU should have applied for a minor modification no later than May 17, 2014. Section 3129 includes no provision that “tolls the time limits” of the Order. Although AU cites Section 3130 as conveying authority for extending the

deadline, Section 3130 clearly governs only the timeline for obtaining permits to begin construction, not filing modifications. Section 3130 stipulates that a permit must be obtained within two years of the approval of an Order, but that the period for obtaining the permit can be extended based on a “court’s final determination” of an appeal. Section 3130.5 specifies that time limits associated with court action relate only to the time limitations in this “section (Section 3130)” of the Zoning Code. There is nothing in Section 3130 that would indicate such language applies to limits outlined beyond Section 3130.

AU already has its permit. The case before the Zoning Commission now is not an appeal of a permit, but rather approval of a modification of an Order. Section 3129 establishes the standards for review of the modification request, not Section 3130.

ANC 3D does not believe the relief sought in the application is a “minor modification.”

ANC 3D Believes A Hearing Is Justified In this Case

AU’s misinterpretation of the standards for review in this case would be sufficient to justify a hearing. However, as ANC 3D learned at its October 7 public meeting, there is significant disagreement within the community over the proposed modification sought by AU. Residents objecting to AU’s request provided ANC 3D with vital information that had not been provided by AU that addressed the objectionable conditions that would result from granting this modification. ANC 3D believes those residents have a right to be heard at the ZC which can only happen if a hearing is scheduled.

Although ANC 3D understands AU seeks to expedite the approval process, it does not find that AU has provided sufficient evidence that its need to work on Saturdays outweighs residents’ rights to a hearing on an issue that would affect their quality of life and enjoyment of their homes.

AU Has Not Used Expanded Hours Already Approved In April 2015

Despite indicating as far back as January 2015 that the project was behind schedule by 50 days due to weather, AU has not fully used the extended construction hours approved by the ZC in April 2015. Residents reported to ANC 3D and AU confirmed – both at the October 7 ANC 3D public meeting and the September 24 quarterly meeting of the Community Liaison Committee (CLC) – that work stops at the site generally between 4 PM and 5 PM on weekdays instead of 7 PM – the extended weekday work hours requested by AU and approved by the ZC – with community support – in April 2015. Given that the extended hours have not been used, ANC 3D questions the need for a further extension of hours to work approximately 13 Saturdays between October and February to complete “outdoor construction work.”

ANC 3D Questions Whether Added Saturday Work Hours Will Impact Project Completion

AU offers conflicting information on the status of the project. AU says it expects to complete “outdoor construction work” – that is, that buildings are up and that interior construction work

can begin – by early February despite the loss of 33 days of construction work during the summer due to weather. When AU sought a modification in April 2015 because of 50-days lost to weather, the University indicated the additional hours would enable “outdoor construction work” to be completed by the end of February – and that this would provide AU with the cushion it needed to ensure that the new student housing would be available in Fall 2016. Based on the current schedule provided by AU for completion of “outdoor construction work” in early February 2016, it actually appears that AU may be ahead of schedule despite the 33-day weather delay during the summer.

Although it is important that every reasonable effort be made to complete the student housing on time, it is also important to question whether another request for modified work hours – to include Saturdays – will achieve the desired objective, especially given that it will result in the objectionable conditions the ZC sought to mitigate when it approved limits on Saturday construction hours in Z.C. Order 11-07 so as to “mitigate any adverse impact on adjacent properties resulting from construction activity.”

The scope and impact of the construction on nearby residents should not be trivialized. This is not construction of a single office building or residential facility. It is construction of a 5-building complex across 8 acres of land immediately adjacent to a residential neighborhood. Neighbors agreed to extend weekday hours last April and to make provisions for Saturday work if future weather delays resulted in a lost weekday work day. But, it is another matter for outdoor construction work to take place consistently on Saturdays over a 3-4 month period.

AU must be required to show that such a change is absolutely necessary and reasonably likely to achieve the desired outcome. The application now before the ZC does not provide such evidence.

There is no question that the timeline for completion of this project is tight with little margin for error or delay. ANC 3D appreciates the situation in which AU now finds itself and the impact this may have on the quality of student life for the Fall 2016 semester. ANC 3D is equally concerned about the potential residual impact on the larger community if the residence halls are not completed on time. However, ANC 3D cannot help but note that AU waited nearly two years after the ZC approved the Further Processing for this application to begin construction. Neighbors immediately adjacent to the site should not be expected to bear the responsibility of that delay or other weather or environmental-related delays at the site (all of which have occurred). Saturday work hours will result in objectionable conditions which the ZC sought to mitigate by imposing limits on construction hours at this unique campus site.

Residents have an interest in making sure the new East Campus student housing becomes available as soon as possible so that students can be housed on campus. However, AU must be able to show that increasing outdoor construction hours to include Saturdays between now and February 2016 can do more than just serve as an “insurance policy” or “comfort zone” for the general contractor in hopes that an additional 13 work days will compensate for a loss of nearly 83 work days (50 days before April 2015 and another 33 days since April 2015) due to weather – not to mention the nearly 2-year lag in beginning the project after its approval by the ZC. ANC 3D does not find that enhancing the comfort level of the contractor compensates for the

construction impacts that will be experienced by residents during weekend hours when residents rely on being able to enjoy the peace and quiet of their homes and obtain a respite from the pressures and challenges of the weekday construction schedule.

The Minor Modification Will Not Provide AU With the Zoning Relief it Needs

ANC 3D agrees with nearby residents that AU should seek a modification of ZC 11-07 Condition No. 5, which would waive new on campus housing requirements for the Fall 2016 semester. Based on AU's own figures, it appears that AU could meet the existing housing requirements on campus in Fall 2016 if the opening of the new East Campus student housing is not possible. Delaying the effective date of the new requirements scheduled for Fall 2016 would provide AU with the zoning relief it needs should it not be possible to meet the current construction schedule. Residents, who are most likely to be impacted by the additional Saturday hours, have indicated their willingness to accommodate a change to Condition No. 5 of the Order to ensure that AU remains in compliance with ZC Order 11-07.

Conclusion

For these reasons, ANC 3D opposes the minor modification requested by AU and calls on the ZC to schedule a public hearing in this case so that residents who are likely to be directly impacted by the new work hours have an opportunity to be heard before the ZC. Thank you for the opportunity to express our views on this application. ANC 3D requests that the ZC give great weight to the ANC's views as outlined in this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Smith", written in a cursive style.

Thomas M. Smith
Chair, ANC 3D

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached letter were delivered on October 12, 2015 to the following:

Mr. Joel Lawson
DC Office of Planning
1100 4th Street SW, Suite E650
Washington, DC 20024

Mr. Paul Tummonds
Goulston & Storrs PC
1999 K Street NW
Suite 500
Washington, D.C.

Ms. Linda Argo
American University
4400 Massachusetts Avenue NW
Washington, DC 20016

Spring Valley-Wesley Heights Citizens
Assn.
c/o Dr. Jeffrey Kraskin
4600 Massachusetts Avenue NW
Washington, DC 20016

Westover Place Homeowners Corp.
c/o Mr. Larry Joseph
4373 Westover Place NW
Washington, DC 20016

Neighbors For A Livable Community
c/o Mr. Dennis Paul
3700 University Avenue NW
Washington, DC 20016

Tenley Neighbors Association
c/o Ms. Judy Chesser
3901 Alton Place NW
Washington, DC 20016

Tenley Campus Neighbors Assn.
c/o Ms. Allison Fultz
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue NW
Suite 800
Washington, DC 20036

ANC 3E
c/o Lisner Home
5425 Western Avenue NW
Suite 219
Washington, DC 20015

ANC 3F
4401-A Connecticut Avenue NW
Box 244
Washington, DC 20008-2322



Thomas M. Smith
Chair ANC 3D