

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 11-07E

Z.C. Case No. 11-07E

The American University

(Minor Modification of an Approved Campus Plan Further Processing)

October 19, 2015

Application of The American University (“AU” or “Applicant”), pursuant to § 3129.7 of the Zoning Regulations, requesting approval of a minor modification to a condition of an approved further processing application for the development of the AU East Campus. In accordance with § 3035.5 of the Zoning Regulations, this case was decided by the Zoning Commission for the District of Columbia (“Commission”) using the rules of the D.C. Board of Zoning Adjustment at 11 DCMR §§ 3100 *et seq.*¹ For the reasons stated below, the Commission hereby approves the modification application.

FINDINGS OF FACT

1. On April 13, 2015, the Commission approved in Z.C. Case No. 11-07D, a modification to Condition No. 41(c) of Z.C. Order No. 11-07 and 11-07C regarding the construction of the East Campus. The new Condition No. 41(c) was amended to read as follows:

41. (c) The University shall be permitted construction hours of Monday-Friday 7:00 a.m. to 7:00 p.m. From September 1, 2015 to the completion of outdoor construction work (expected to occur on or around February 29, 2016), AU will be able to work on Saturdays from 8:00 a.m. to 4:00 p.m. only in the event that the University experiences a lost day of construction activity due to weather. The University will inform Westover Place Home Owners Corporation, for distribution to their resident home owners, and the ANC of a lost day of construction activity by 9:00 a.m. on the day of lost construction activity. Interior work not creating an impact on adjacent properties may take place outside of these hours.
(Exhibit [“Ex.”] 1.)

2. On September 30, 2015, AU filed a minor modification application with the Commission in order to amend Condition No. 41(c) of Z.C. Order No. 11-07D to allow construction activities to occur on the East Campus on Saturdays from 8:00 a.m. to 4:00 p.m. (Ex. 1.)

¹ This application was decided under the Zoning Regulations of 1958, which were repealed as of September 6, 2016 and was replaced by new text. Among the changes made in the Zoning Regulations of 2016 was to expand the types of modifications that could be decided without a hearing. (See 11-Z DCMR § 703.) Therefore, the Commission’s decision in this case had no relevance to modification requests filed under the current Zoning Regulations.

3. AU noted that it made a presentation to the Community Liaison Committee regarding the status of construction activity on the East Campus on September 24, 2015. At that meeting, AU representatives stated that 33 work days were impacted due to rain during the period of April-August 2015, and that due to the restrictions on Saturday work prior to September 1, 2015, these days were not able to be made up. AU noted that the District of Columbia Building Code allows construction to occur in residential zones from 7:00 a.m. to 7:00 p.m. Monday through Saturday and that the proposed hours are still less than what is permitted in residential zones under the D.C. Building Code. AU stated that its general contractor now believes that their ability to maintain schedule and complete construction of the East Campus prior to the start of the fall 2016 semester will be impacted unless they are able to work each and every Saturday until the project is completed. (Ex. 1.)
4. In regard to § 3129.7, AU requested that the Commission waive the requirement to have a hearing on this application. AU argued that the facts of the proposed request are straight-forward, the period of construction activity is temporary, and the proposed minor modification application does not impact the ultimate use and operation of the buildings on the East Campus. AU argued that holding a public hearing on this limited and specific issue of the permitted hours of construction activity will not provide the Commission with any additional information that cannot be obtained from the written responses of all interested Parties. (Ex. 1.)
5. ANC 3D and 3E were automatically parties in this proceeding. ANC 3D submitted letters in opposition to this application. ANC 3E did not participate in this application.
6. In a letter dated October 12, 2015, ANC 3D noted that at a regularly scheduled public meeting on October 7, 2015, with a quorum present at all times, the ANC voted to oppose the minor modification application by a vote of 5-1 “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.” ANC 3D’s submission noted that it opposed the minor modification for the following reasons:
 - a. The request for a minor modification is not timely based on § 3129 of the Zoning Code;
 - b. A bench decision as opposed to a hearing denies the neighbors the opportunity to participate fully in a case that has direct impact on their property – and given divisions in the neighborhood over the issue, a hearing is appropriate in this case;
 - c. AU has not fully used its existing hours and the extended hours approved by the Commission last April in another modification;
 - d. Given that this project is consistently 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

- e. The minor modification will not provide AU with the zoning relief that 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% of freshman and sophomores and 67% of all undergraduates on campus until January 2017, and that every effort be made to house these students on campus in the Fall 2016. (Ex. 4.)
- 7. On October 13, 2015, homeowners and residents of Westover Place Homes Corporation filed a letter and signed petitions with the Commission in opposition to the minor modification application. The letter noted that “Our chief reason for so opposing AU’s request is that it will prove disruptive and objectionable to the enjoyment of our homes on weekends.” The letter also noted that AU has not used the existing and extended construction hours granted by the Commission and that there is little reason to believe that using the Saturdays will enable the project to be completed on time. The letter supported the “provision of 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.” The letter also “strongly urged that any Commission consideration of American University’s request be via a public hearing so that neighbors may have an opportunity to voice their concerns.” (Ex. 5.)
- 8. On October 14, 2015, AU submitted a letter in response to the ANC 3D resolution. AU stated that this application “is a very simple request by the University, in order to maintain its construction schedule on the East Campus and provide the required number of on-campus residential beds by the fall 2016 semester, it is necessary to work on Saturdays.” AU noted that this conclusion was based on the expertise of AU’s internal project management team and their general contractor. The letter also noted the September 30, 2015 submission, where AU stated that it “will continue the process of open dialogue with the community that has worked to date to address day-to-day construction related impacts on adjacent properties.” AU also noted that while ANC 3D has requested that a public hearing be held on this application, AU believes that a public hearing is not necessary for the Commission to determine whether it should grant the requested minor modification. Moreover, if a public hearing is scheduled for this minor modification application, the time that will have elapsed prior to the public hearing will make this request moot. In order to be of value to the ultimate construction schedule for the East Campus, the ability to undertake outdoor work on Saturdays must begin as soon as possible. (Ex. 6.)
- 9. On October 16, 2015, ANC 3D submitted a response to AU’s October 14, 2015 letter. The ANC 3D response noted the importance of the Commission obtaining input from affected residents and stressed that holding a “hearing is necessary to allow the Zoning Commission to balance the needs of the University with those of the community.” (Ex. 7.)
- 10. On October 19, 2015, the Commission received an e-mail from the Board of Directors of Westover Place Homes Corporation which noted that “Westover Place Homes Corporation represents the owners of the 149 properties in our townhouse community who are also its shareholders. The Board of Directors has not changed its position from that expressed in

earlier hearings. The overwhelming sentiment in our community is that the Commission takes no action that would jeopardize the expeditious completion of the construction in East Campus. By Z.C. Order No. 11-07 that construction is to be completed by Fall, 2016.” (Ex. 8.)

CONCLUSIONS OF LAW

1. The Applicant requested that the Commission approve an application to modify an approved condition of the Commission’s approval of the American University East Campus, pursuant to 11 DCMR § 3129.7. Based upon the record in this case, the Commission concludes that the University has satisfied the applicable filing and notice requirements of 11 DCMR §§ 3129 *et seq.* The parties to the original application were served a copy of the modification application.
2. The Commission finds that the Applicant is seeking a modification of a condition of Z.C. Order No. 11-07D and not plans that were approved by the Commission. Therefore, the time limit for the filing of minor modifications enumerated in § 3129.3 is not applicable to this application, as § 3129.3 only applies to applications that seek to modify approved plans.
3. The Commission recognizes that § 3129.7 states that “a request to modify other aspects of a Board order may be made at any time, but shall require a hearing.” The Commission (and the Board of Zoning Adjustment), pursuant to §3100.5², has the following authority: “Except for §§3100 through 3105, 3121.5, and 3125.4, the Board may, for good cause shown, waive any of the provisions of this chapter if, in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.” The Commission agrees with the Applicant that holding a public hearing on this limited and specific issue of the permitted hours of construction activity would not provide the Commission with any additional information that could not be obtained from the written responses of all interested Parties.
4. While the Commission gives great credence to the information provided by ANC 3D and some residents and homeowners of Westover Place regarding the impact of construction activity on the East Campus, the Commission recognizes that the Applicant will be seeking construction hours on Saturdays that are otherwise permitted by the D.C. Construction Code. The Commission finds that the proposed construction activity on Saturdays during the fall and winter months will likely have less adverse impact on adjacent property owners due to colder weather than at other times in the year. The Commission also credits the information provided into the record from the Board of Directors of the Westover Place Homes Corporation and specifically notes their statement that “the overwhelming sentiment in our community is that the Commission takes no action that would jeopardize the expeditious completion of the construction in East Campus.” The Commission finds that the interests of all parties are best served by allowing for the most expeditious

² In accordance with §3035.5, the Commission followed the rules of the D.C. Board of Zoning Adjustment at 11 DCMR §§ 3100 *et seq.*

completion of the construction of the East Campus, which is accomplished by approving the proposed construction hours on Saturday. For these reasons, the Commission determined that it was not necessary to hold a public hearing on this application and that approving this application without a public hearing is appropriate and does not prejudice the rights of any party.

5. The Commission accorded the issues and concerns raised by ANC 3D in their letter dated October 12, 2015 the “great weight” to which they are entitled pursuant to D.C. Official Code § 1-309.10(d) (2001). As noted above, the Commission finds that § 3129.3 is not applicable to this case so there is no timeliness issue. The Commission’s decision as to the appropriateness of deciding this application without a public hearing is addressed in Paragraphs 3 and 4 of the Conclusions of Law provided above. The Commission does not believe that the ANC’s arguments as to whether AU has fully utilized the previously expanded construction hours or AU’s past arguments about its ability to maintain its construction schedule are relevant to the Commission’s decision on this application. Finally, the Commission is tasked with addressing the request of AU that is the subject of this application, construction hours on Saturdays. If AU ultimately follows the ANC’s recommendation that it seek an alternative modification to the housing requirement established in Z.C. Order No. 11-07, the Commission will review that request when, or if, it is filed.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia concludes that the Applicant has met the burden of proof pursuant to 11 DCMR § 3129.7 and it is therefore **ORDERED** that The American University’s proposed modification to the approved conditions for the East Campus be **GRANTED**. The Conditions in Z.C. Order Nos. 11-07, 11-07C, and 11-07D remain unchanged except as follows: Condition No. 41(c) of Z.C. Order No. 11-07D is amended to read as:

- 41.(c) The University shall be permitted construction hours of Monday-Friday 7:00 a.m. to 7:00 p.m., and Saturdays from 8:00 a.m. to 4:00 p.m.

On October 19, 2015, upon the motion of Commissioner May, as seconded by Vice Chair Cohen, the Commission took **FINAL ACTION** to **APPROVE** the application at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Marcie E. Cohen, Robert E. Miller, Peter G. May, and Michael G. Turnbull to approve)

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *D.C. Register*; that is on February 1, 2019.

BY ORDER OF THE D.C. ZONING COMMISSION

Each concurring member approved the issuance of this Order.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING