

John Patrick Brown, Jr., Esq.
jpb@gdllaw.com

Lyle M. Blanchard, Esq.
lmb@gdllaw.com

June 10, 2022

BY IZIS

Mr. Anthony J. Hood, Chairman
D.C. Zoning Commission
One Judiciary Square
441 4th Street, N.W.
Second Floor
Washington, D.C. 20001

Re: Zoning Commission Case No. 22-13
Application of The Wesley Theological Seminary of the United Methodist Church
for Approval for a Campus Plan to Thrive in Place (2022-2032)
4500 Massachusetts Avenue, N.W.
Square 1600, Lots 6 (818 and 819), 7, 8 and 9.

Dear Chairman Hood and Members of the Commission:

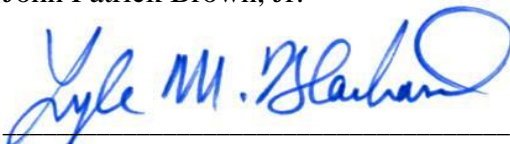
Enclosed please find the written expert testimony of Mr. Shane L. Dettman to be presented at the June 13, 2022 Public Hearing.

Thank you for your consideration.

Sincerely,
GREENSTEIN DELORME & LUCHS, P.C.



John Patrick Brown, Jr.



Lyle M. Blanchard

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2022, the foregoing letter and enclosure was delivered via electronic mail to the following:

Ms. Jennifer Steingasser

Mr. Joel Lawson

Mr. Stephen Cochran

D.C. Office of Planning

1100 4th Street, SW

Suite E650

Washington, D.C. 20024

Jennifer.steingasser@dc.gov

joel.lawson@dc.gov

stephen.cochran@dc.gov

Mr. Aaron Zimmerman

D.C. Department of Transportation

55 M Street, SE, Suite 400

Washington, D.C. 20003

aaron.zimmerman@dc.gov

ANC 3D

3D@anc.dc.gov

Mr. Ben Bergmann, Chair, ANC 3D

3D08@anc.dc.gov

Ms. Elizabeth Pemmerl, ANC 3D02

3D02@anc.dc.gov

ANC 3E

3E@anc.dc.gov

Mr. Jonathan Bender, Chair, ANC 3E

jonbender@gmail.com

Commissioner Gianinno, ANC 3E05

3E05@anc.dc.gov

William Clarkson

Spring Valley Neighborhood Association

wclarksonv@gmail.com

Dennis Paul

Neighbors for a Livable Community

dennis.paul@verizon.net

William F. Krebs

Spring Valley-Wesley Heights Citizens

Association

w_krebs@msn.com



John Patrick Brown, Jr., Esq.

Response to Spring Valley-Wesley Heights Citizens Association and Neighbors for Livable Community Zoning Compliance Analysis

On June 6, 2022, Spring Valley-Wesley Heights Citizens Association and Neighbors for Livable Community, together referred to herein as “SVWHCA-NLC,” submitted a “zoning compliance analysis,” within which SVWHCA-NLC asserts that the dormitory use within the Applicant’s proposed campus plan is a commercial use, and thus not permitted under the 2016 Zoning Regulations (“ZR16”). In its submission, SVWHCA-NLC also raises questions regarding the applicability of Inclusionary Zoning to the proposed dormitory, and concerns regarding objectionable conditions. The following contains the Applicant’s response to SVWHCA-NLC’s submission.

Campus Plan Commercial Use Provisions

A dormitory is not a commercial use under ZR16

In its submission, SVWHCA-NLC takes the position that the proposed dormitory is a primary “special use commercial real estate development,” and thus is not permitted on the Wesley Theological Seminary (“WTS”) campus. In support of its position, SVWHCA-NLC refers to the definition of the “Education, College/University” use category under Subtitle B § 200(j), stating that only “ancillary commercial uses” are permitted on the WTS campus. SVWHCA-NLC further states that the limit on on-campus commercial activity imposed by the Education, College/University use category definition is reinforced by the campus plan regulations in Subtitle X § Section 101.

First, SVWHCA-NLC states that on-campus commercial activity shall be “customarily incidental to a university use.” *See* 11-X DCMR § 101.3. Further, SVWHCA-NLC cites Subtitle X § 101.4, which states that “[t]he campus plan process shall not serve as a process to create general commercial activities or developments unrelated to the educational mission of the applicant...” SVWHCA-NLC asserts that the proposed dorm is not an “ancillary commercial use” and is not “customarily incidental” to WTS’ educational functions given its ownership structure, number of beds, and the percentage of WTS students that will reside in the dormitory relative to the total number of beds. Rather, SVWHCA-NLC asserts that the proposed dormitory is a primary “special use commercial real estate development,” and thus is not permitted on the WTS campus. Lastly, SVWHCA-NLC states that even if the Commission determined that ZR16 does not limit commercial uses, the Commission would still be barred from approving the dormitory because Subtitle X § 101.3(b) limits the total floor area of “all commercial uses” on a campus to no more than 10% of the total campus plan gross floor area. SVWHCA-NLC accurately summarizes the limitations on commercial uses imposed under the campus plan regulations of Subtitle X § 101. However, SVWHCA-NLC errs in its submission where it claims the proposed dormitory is a commercial use. As thoroughly discussed below, the proposed dormitory **is not** a commercial use (ancillary, incidental or otherwise), but rather is a [primary] college / university education use that is permitted on the WTS campus by special exception under the campus plan regulations of Subtitle X § 101, and is aligned with WTS’ educational mission “to equip persons for Christian

ministry and leadership in the church and the world, to advance theological scholarship, and to model a prophetic voice in the public square.”

Under ZR16, a dormitory is expressly stated as being a type of facility that falls within the “Education, College/University” use category. As stated in 11-B DCMR § 200.2(j)(2), this particular use category may include, but is not limited to, “accessory athletic and recreational areas, **dormitories**, cafeterias, ancillary commercial uses, multiple academic and administrative buildings, or sports facilities.” Emphasis added. The plain language of the definition clearly shows that a dormitory is a completely separate use from any [ancillary] commercial uses that may also fall within the Education, College/University use category. Said differently, the proposed dormitory is not a type of [ancillary, customarily incidental, or primary] commercial use, but rather the proposed dormitory is the use. The ownership structure and financing mechanism used to construct and operate the proposed dormitory has no bearing whatsoever on the fact that the building will be operated in every way as a dormitory. As related to the provisions of ZR16, and specifically the campus plan provisions by which the Commission is reviewing the proposed WTS campus plan, the proposed dormitory will be constructed and continually operated as “a residence hall providing rooms for individuals or for groups...¹” and will not in any way resemble a commercial use within the parameters of ZR16.

The Applicant acknowledges that the manner in which the proposed dormitory will be constructed is different than how existing WTS dormitories have been constructed, and different than what might ordinarily occur on other campuses in the District. However different it may be, that does not make the proposed dormitory a commercial use. It is still considered a “dormitory” under ZR16. To be sure, the Applicant discussed this specific question with the Zoning Administrator (“ZA”) in December 2019. As part of that discussion, the Applicant described the partnership between WTS and Landmark, as well as the occupancy profile of the proposed dormitory being comprised of WTS and non-WTS students. Upon evaluation, the ZA concluded that “a new **student residence project** which includes units featuring private baths and kitchens, and offering occupancy to [non-WTS] students, can be considered a **dormitory** use, pursuant to the Zoning Regulations.” In the interest of transparency, the Applicant will note that the ZA acknowledged that the Commission will be the “ultimate arbiter of the proposed dormitory use specifics” pursuant to the campus plan and further processing procedures.

Intent of commercial use provisions under Subtitle B § 200.2(j)(2) & Subtitle X § 101

The references to “ancillary commercial use” in the Education, College / University use category definition, and the campus plan provisions relating to commercial uses are inapplicable to the proposed dormitory use. This is made clear by a review of the legislative history leading to the adoption of ZR16. The current language of the campus plan provisions first appeared in the zoning regulations when the Commission adopted ZR16 in March 2016, which followed a multi-year effort of detailed analysis of every aspect of the zoning regulations. As part of that analysis, the Commission, with support from the Office of Planning (“OP”), evaluated permissions related to ancillary campus uses. The guidance provided on this topic clearly reveals that the Commission

¹ See Merriam-Webster definition for “dormitory.”

was focused on limiting non-residential uses on campuses when it adopted the campus plan regulations. This is consistent throughout the entire record related to the adopted of ZR16. For example, prior to initiating its review of the actual text for ZR16 (Z.C. Case No. 08-06A), the Commission, with support from OP and various stakeholder working groups, evaluated a wide range of concepts relating to specific areas of the zoning regulations, including “campus/institutional” uses. *See* Z.C. Case No. 08-06-7.

As part of its evaluation of the campus/institutional concept, the Commission and OP specifically analyzed the regulation of ancillary campus uses. In its November 19, 2008, report to the Commission, OP states “[l]arge hospital complexes often contain medical offices, gift shops, restaurants, and other uses otherwise not allowed in residential zones. Universities are packed with student serving businesses and university related office buildings. Even large churches can have book stores.”² The focus on ancillary non-residential uses is continued in OP’s supplemental report entitled “Institutional Uses in Residential Zones Worksheet.”³ Indeed, the Commission’s deliberations related to this issue are entirely focused on the regulation of non-residential uses on campus, and make no mention of a dormitory as part of those deliberations.⁴ Consequently, the Commission’s focus on non-residential uses as related to its evaluation of commercial uses on campuses was carried forward during the adoption of ZR16.⁵ Thus, the foregoing clearly demonstrates that SVWHCA-NLC’s conflation of WTS’ proposed dorm with the campus plan provisions dealing with commercial uses is misplaced. The language of the current campus plan regulations, and the legislative history supporting said regulations, clearly are intended to limit non-residential uses such as offices, retail and service, and eating and drinking establishments on campuses, and are not intended to apply to WTS’ proposed dormitory.

Ground lease / ownership structure does not make proposed dormitory a commercial use

SVWHCA-NLC proclaims that the ground lease mechanism used by WTS to construct the proposed dormitory makes the dormitory a “special use commercial real estate development” that is unrelated / not consistent with WTS’ stated education mission. It does not. Despite the ownership structure and ground lease mechanism being used by WTS to construct the proposed dormitory, the building will remain a dormitory use under the zoning regulations that is closely aligned with WTS’ housing needs and academic programming. As discussed in the Applicant’s application, the proposed dormitory will replace currently outdated on-campus student housing facilities, and will allow WTS to thrive in place through ground lease rent that will allow WTS to maintain the operations and educational programming necessary to achieve its mission in face of recent declines in enrollment. Unlike institutions that may have healthier endowments or that offer programs that historically lead to higher incomes (such as law and medical schools), WTS’ ability to continue to subsidize its educational programs and housing costs through ground lease rent from the proposed dormitory is critical for students pursuing a theological degree for a career path in Christian ministry and leadership in the church.

² *See* Z.C. Case No. 08-06-7, Exhibit 4 at pg. 15-16.

³ *See* Z.C. Case No. 08-06-7, Exhibit 39 at pg. 5.

⁴ *See* Z.C. Case No. 08-06-7, transcripts for December 11, 2008 and February 23, 2009.

⁵ *See* Z.C. Case No. 08-016A, Exhibit 2 at pg. 14.

Furthermore, the fact that the proposed dormitory will house American University (“AU”) students does not change the proposed dormitory use to some other commercial use under ZR16, nor does it affect its relationship to WTS’ mission. The proposed dormitory will provide housing to WTS students and immediate family members, and students attending immediately adjacent AU. As SVWHCA-NLC well knows, non-WTS students are already allowed to reside on the WTS campus under prior Commission campus plan approvals. Pursuant to Z.C. Order No. 03-40B, the Commission approved a modification to the WTS campus plan “to permit an increase in the amount of housing to be leased to non-WTS graduate students.” Specifically, the Commission permitted up to 55 non-WTS students to reside on the WTS campus (approximately 32% of the total approved 172 beds). A year later, pursuant to Z.C. Order No. 03-40C, the Commission approved another modification to the WTS campus plan to allow up to 87 non-WTS students to reside on-campus (approximately 51% of the total approved 172 beds). These non-WTS students pay rent for the ability to reside in existing WTS dormitories, and WTS uses that rent to maintain the operations and educational programming necessary to achieve its mission. The fact that WTS is receiving rent from non-WTS students, in accordance with approvals granted by the Commission, to support its mission does not make the existing WTS dormitories a commercial use. This is exactly what is proposed in the subject application, the only exception being that Landmark will construct the proposed dormitory and will own the improvement for the term of the ground lease. This creative ownership structure does not make the proposed dormitory a commercial use, nor does it change the land use pattern that already exists on the WTS campus. Albeit on a larger scale, WTS students and immediate family members, and non-WTS students (now solely restricted to AU students) will continue to reside on the WTS campus, and the rent received from students residing on-campus will help WTS sustain its operations and educational programming within the District. The proposed dormitory being occupied by a greater percentage of non-WTS students compared to what is currently permitted, and WTS now receiving its rent payments through Landmark for the term of the ground lease does not change the fact that the proposed dormitory is a use that falls within the “Education, College/University” use category and is not a general or ancillary commercial use under ZR16.

Other campus plan ground lease precedent

The Commission has recent experience with development being undertaken on a campus pursuant to a ground lease between an institution and a third party. Specifically, pursuant to Z.C. Order No. 16-18A, the Commission approved the new MedStar medical/surgical pavilion on the campus of Georgetown University (“GU”), which is nearing completion. In accordance with the Commission’s approval, MedStar is constructing the new medical/surgical pavilion on a portion of the GU campus under the terms of a long-term ground lease. Similar to the arrangement between WTS and Landmark for the proposed dormitory, GU will continue to own the land upon which the new medical/surgical pavilion is constructed, and MedStar will own and operate the actual improvement. The fact that GU and MedStar are using a ground lease whereby GU will receive rent from MedStar does not make the new medical/surgical pavilion a commercial use under ZR16. The use is a hospital, which is permitted in the zone underlying the GU campus and is related to the GU medical program. Similarly, despite the ground lease / ownership structure between WTS and Landmark, the proposed dormitory is an education, college/university use that is permitted by

special exception under the campus plan process and is related to the WTS' student housing program and academic mission.

Applicability of Inclusionary Zoning (“IZ”)

In its submission, SVWHCA-NLC states that “the WTS Campus Plan application is silent on how the proposed commercial student housing apartment development will meet requirements.⁶ The specific IZ provision that SVWHCA-NLC focuses on is the exemption provision at 11-C DCMR § 1001.6(c), which states “[h]ousing developed by or on behalf of a local college or university exclusively for its students, faculty, or staff.” Referring to this provision, SVWHCA-NLC states that “[f]or the Landmark and WTS proposed student apartment housing to be exempt from IZ regulations, it must be developed **exclusively and only** for WTS students, faculty, or staff.” The Applicant agrees with SVWHCA-NLC in this regard, and has never asserted that the proposed dormitory is exempt from IZ. It is also important to note that a dormitory or student housing project that fails to satisfy the language of the IZ exemption is not prohibited under the Zoning Regulations. It simply means the student housing is subject to all applicable IZ requirements under ZR16 and Department of Housing and Community Development (“DHCD”) IZ administrative regulations. Indeed, the language of this particular IZ exemption proves that a dormitory may house students from the institutional campus upon which it is located, as well as students from another institution.

The application is silent on this particular question because the Applicant believes it is best addressed during further processing, after the Applicant receives initial guidance from the Commission on the proposed campus plan and has a chance to discuss certain administrative aspects of the IZ regulations with DHCD when dealing with a student dormitory, particularly one that would be limited to WTS and AU students under the Commission's campus plan order. While additional coordination with OP and DHCD is necessary, the Applicant's research has shown that the ability for students to occupy IZ units was contemplated by the D.C. Council when it passed the Inclusionary Zoning Implementation Act of 2006 (the “IZ Act”). Specifically, Section 106 of the Act states that “a person enrolled as a full-time student in a college or university shall not be eligible to apply to rent or purchase an IZ unit unless the annual income of his or her parent or guardian would qualify under the eligibility standards established by the Mayor, or unless that student is a part of a household that otherwise qualifies for the IZ unit.” This provision of the IZ Act is promulgated in the DHCD IZ administrative regulations.⁷

⁶ It is worth noting that *if* the proposed dormitory was in fact a commercial use under ZR16, it would not be subject to the IZ regulations. The IZ regulations apply to “Inclusionary Developments,” which is defined as “[a] residential development that is subject to the provisions of Subtitle C, Chapter 10, Inclusionary Zoning, as a Mandatory Inclusionary Development (including an IZ Plus Inclusionary Development) or Voluntary Inclusionary Development, or that is required to comply with the provisions therein by an order of the Zoning Commission or of the Board of Zoning Adjustment, as established by Subtitle C § 1001.2.”

⁷ See Section 2209.6 of the DHCD IZ administrative regulations stating “a full-time student shall not be eligible for the household registration list unless they are dependents of parents or guardians whose household would otherwise meet the requirements for the IZ program.”

The Applicant is fully aware of the IZ regulations as they relate to the occupancy profile of the proposed dormitory, and will be fully prepared to discuss the specifics of how the dormitory will satisfy applicable provisions of the IZ regulations with the community and the Commission during further processing. Until then, it is important to note that nothing related to the proposed dormitory can be constructed until the Applicant successfully completes further processing on the proposed dormitory.

Objectionable Conditions

SVWHCA-NLC concludes their submission with comments regarding potential objectionable conditions, which the Commission must evaluate as part of its review of the Applicant's campus plan application. What SVWHCA-NLC remains silent on are existing objectionable conditions that might be favorably addressed by the increase in on-campus housing provided by the proposed dormitory. Such existing objectionable conditions include impacts on parking, noise, and affordable housing caused by students that currently reside in surrounding single family homes and nearby multi-family developments. These are impacts SVWHCA-NLC has previously testified before the Commission in several campus plan and specific development proposals. In fact, SVWHCA has specifically urged the Commission to better utilize the campus plan process to help address the District's affordable housing crisis, stating

*"[t]he campus planning process also provides an opportunity for this Commission to address affordable housing. Take for example, American University. As the growth in undergraduate enrollment outpaces the supply of on campus housing, we are losing affordable units in our neighborhood to university master leasing programs. So, in our campus planning process and as we consider the future of rent control, we must be as vigilant in safeguarding affordable housing as we are in mandating affordable housing through inclusionary zoning."*⁸

In this respect, the Applicant agrees with SVWHCA-NLC that the campus plan process is an opportunity to help address the issue of affordable housing, as well as other issues. As already set forth in the Applicant's application statement, the proposed dormitory has real potential to attract students that are currently residing in nearby single family homes and multi-family developments, some of which might be affordable. Notably, this is also something that is expressly encouraged in the Education Facilities Element of the Comprehensive Plan, which states

*"[e]ncourage the provision of on-campus student housing in order to reduce college and university impacts on the housing stock, especially the affordable housing stock, in adjacent neighborhoods. Consider measures to address the demand for student housing generated by non-District institutions with local branches."*⁹

⁸ See Z.C. Case No. 19-10, Valor Development, LLC, Planned Unit Development, Testimony of SVWHCA, dated October 10, 2019 at Exhibit 213.

⁹ Policy EDU-3.3.4: Student Housing (10-A DCMR 1214.9)