ADVISORY NEIGHBORHOOD COMMISSION 3E
TENLEYTOWN AMERICAN UNIVERSITY PARK FRIENDSHIP HEIGHTS
WAKEFIELD CHEVY CHASE FORT GAINES
c/o Lisner Home 5425 Western Avenue, NW Washington, DC 20015

May 25, 2023

District of Columbia Zoning Commission
441 4th Street NW, Suite 200S
Washington DC 20001

Re: ZC Case #23-08, Wesley Seminary

Members of the Zoning Commission:

Wesley Theological Seminary ("Wesley"), which resides entirely within ANC 3E's boundaries, has applied for a Planned Use Development ("PUD") to build a new dormitory with 659 beds for Wesley and American University ("AU") students.

Given the housing shortage in the region and inside our ANC's boundaries, we support in principle the creation of over 600 beds. Given that this is a PUD, however, the project must provide an appropriate mix of amenities and mitigation. Some aspects of Wesley's current proposal give us pause, such as its intention to limit the Inclusionary Zoning beds it proffers to students.

The next event in this proceeding is a set down hearing. We understand that questions have been raised about the legal sufficiency of Wesley's PUD application. We take no formal position as to whether the case should be set down.

Rather, we write to say that we will work with Wesley to attempt to resolve our differences, whether that work is completed before the next setdown hearing or the hearing on the merits on the current application.

We hope and cautiously expect to be able to support Wesley's application to create well-needed housing.

ANC 3E approved this resolution at its meeting on May 11, 2023, which was properly noticed and at which a quorum was present. The resolution was approved by a vote of 6-0-0. Commissioners Jonathan Bender, Diego Carney, Matthew Cohen, Jeffrey Denny, Ali Gianinno, Rohin Ghosh, Amy Hall, and Tom Quinn were present.

ANC 3E

By Jonathan Bender, Chair

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RESOLUTION OPPOSING APPLICATION BY WESLEY THEOLOGICAL SEMINARY FOR A PUD AND CAMPUS PLAN CASES #23-08 AND 23-08(1)

WHEREAS:

1. Wesley Theological Seminary ("Wesley" or "Applicant") seeks PUD relief to permit a commercial entity to build a multi-story building on Wesley's land to provide housing ("Landmark Project") to students from both Wesley and American University ("AU").

2. As we understand the proposed arrangement, Wesley would give a ground lease to build and operate the Housing Units to Landmark Properties ("Landmark"), a publicly-traded commercial real estate investment trust.

3. DC like many jurisdictions suffers from a shortage of housing and, especially, affordable housing. Students as well as the population at large face this shortage.

4. The cost of higher education has increased much faster than the inflation rate as a whole.

5. Wesley faces financial challenges.

6. In principle, then, a housing development of the size and scope of the Landmark Project is desirable. It would provide hundreds of housing units, including IZ units, might reduce the cost of student housing in the area, and would help fund Wesley's operations.

7. Yet, aspects of the proposed Landmark Project are troubling.

Private IZ

8. In particular, Wesley seeks an exemption on Landmark's behalf from the need to comply with DC's long-established Inclusionary Zoning ("IZ") program.

9. Wesley contends that the IZ program is not a good fit for the new "dormitory," and instead proposes to assign Landmark "primary" responsibility – Wesley would play a role in qualifying *its* students for participation -- to administer a private IZ program open only to Wesley and AU students ("Private IZ"). Wesley submitted a summary of the proposed Private IZ program ("Summary") to the ANC on September 1, 2023.[1]

10. Wesley has admitted that AU has, to date, shown no interest in the Landmark Project and will not collaborate with Wesley or Landmark in any way regarding the project.

11. Thus, Wesley will help qualify its students for housing in the Landmark Property while only Landmark, a commercial entity, will qualify AU students.[2]

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[1] "Proposed IZ Program Description and Requested Zoning Flexibility to Implement the Program" (hereinafter "Private IZ Program"), attached hereto as Exhibit 1.
[2] *See id*. at 2.

12. Wesley states in the Summary that DCHD would oversee the Private IZ, but provides only Wesley's provision of a yearly report as a concrete example of such oversight.[3]

13. The Landmark Project is thus a strange hybrid. It is not what most people think of as a "dormitory," which is housing for students of a particular school where students have recourse to the administration of that school regarding the housing.

14. Here AU students have no recourse to their school, which has given no indication that it wants to have anything to do with the Landmark Project.

15. Furthermore, DC's Rental Housing Act defines a dormitory in pertinent part as follows:

> [A] building owned by an institution of higher education[,] in which at least 95% of the units are occupied by presently matriculated students of the institution of higher education[.][4]

16. It is unclear whether Wesley can even be said to "own" the Landmark Project, but it is highly unlikely that the project will be 95% occupied by Wesley students. Thus, per the Rental Housing Act, this project is commercial owned and operated housing, not a dormitory. AU students would need to look to the courts to resolve disputes that could not be resolved informally.

17. Likewise, the process for qualifying AU students for the Private IZ would differ from the process for Wesley students, since Wesley would play an (unspecified) role in qualifying Wesley students only.[5]

18. We also note that Wesley proposes that some of the larger IZ units would be set aside for "married and/or (likely Wesley) students with families."[6]

19. ANC 3E believes that it is important for IZ to provide larger units that families favor as well as the smaller units favored by many residents in new higher-end housing. Indeed, we have pressed developers in PUDs within our jurisdiction to offer more larger units overall and, thus, more larger IZ units.

20. It has been our understanding, however, that DC's Human Rights Law prohibits discrimination on the basis of family or marital status. It is unclear to us why a commercial owned and operated residential property such as the Landmark Project should be able to discriminate in the fashion it proposes.

21. Moreover, it is clear from Wesley's Summary that the school designed its proposal knowing that many if not most students who would benefit from the set asides would be "likely Wesley."[7]

22. The foregoing paragraphs illustrate one of the dangers of permitting a private actor to design a private IZ scheme – the private actor has incentive to design the scheme to favor its own interests (even if subtly).

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[3] *Id*.
[4] DC Code Sec. 42 42–3501.03(11)
[5] *See* "Private IZ Program" at 2.
[6] *Id*. at 3.
[7] *Id*.

23. We are not aware of any other educational institution – or any institution at all – that has been granted relief of the scope Wesley proposes.

24. The relief Wesley seeks is not "minor," as Wesley would have it. Rather, it is a substantial and heretofore unique deviation from a long-established program, and its implications extend into numerous other areas of established law.

25. Such changes in policy are best accomplished via the quasi-legislative process of rulemaking, in which the relevant agencies can make policy prospectively with input from all interested individuals and institutions, as opposed to the *ad hoc* process of a single zoning case.

Amenities

26. ANC 3E is also concerned about the amenity package proffered by Wesley.

27. If this project should be properly treated as a commercial PUD – and given that the project does not constitute a "dormitory," a strong case can be made that it should be – the amenities package proposed is woefully inadequate.

28. Even assuming the amenities package should be consistent with those for a dormitory, we believe the proffered amenities are sub-standard.

29. Typical PUD's that ANC 3E has supported have included substantial amenity packages including public space improvements, contributions to neighborhood institutions, commitment to LEED Certification, a retail agreement and IZ that greatly exceeds what is required by the DC Zoning Code.

30. ANC 3E is only aware of four proffered amenities in this project – a publicly accessible playground; continued access to a meeting spaces; a commitment to construct a LEED Gold building and a commitment to 10% of the beds being available in the IZ program to qualified applicants from families earning 60% of AMI, or its designated alternative structure, rather than the 8% the applicant claims are required under current zoning.

31. ANC 3E believes this proffer is inadequate and not commensurate with the unusual relief the applicant is seeking and that the proffer doesn't include amenities which would benefit residents of ANC 3E.

32. ANC 3E believes a project requiring a PUD necessitating such relief should include at least some of the following amenities to merit ANC 3E support: an increase in the IZ commitment to 15% of the total square footage with a mix of 30%, 50% and 60% of AMI units; a retail component on the ground floor which would serve both students and the adjacent community; a recreational component which is not already available in the immediate area such as a community garden, a skate park, pickleball courts or bocce courts.

33. There has also been some talk of somehow exempting the Landmark Project from the Rental Housing Act. We see no justification for doing so if indeed it could be done, and we believe that the Applicant and Landmark should commit not to seek or accept such an exemption.

Mitigation

34. The applicant in this case is proposing 391 underground parking spaces.

35. Dormitories in the District don't have any minimum parking requirements and a residential building of this density would only require one parking space per 3 dwelling units which would necessitate approximately 80 parking spaces. The concurrent Wesley Campus plan

requires 150 parking spaces. Dormitories are exempt from parking minimums, and if this project were treated as a dormitory as Wesley seeks, this project would be proposing 241 more parking spaces than required by zoning.

36. When a typical residential project provides more parking than required the District Department of Transportation requires a traffic mitigation package, the requirements of which become more robust the greater the project exceeds the parking minimums.

37. ANC 3E believes the proffered mitigation in this proposed project is wholly inadequate given that (viewed through the lens Wesley argues should be used) it exceeds the parking requirements by more than 260 percent.

38. Unless the applicant agrees to dramatically reduce the number of proposed parking spaces, ANC 3E believes that the mitigation proffered by the applicant should include full funding for 5 Capital Bikeshare Stations; covered bicycle parking at a ratio of space per dwelling unit; full funding for three covered bus shelters and a transit screen in a public location in the new building.

39. ANC 3E also believes this excessive amount of parking will generate vehicular movements that the current driveway on Massachusetts Avenue is not suited to handle. If the applicant chooses to proceed with this excess of parking ANC 3E believes that all egress and ingress should utilize University Avenue, where there is space for queuing and room for Wesley to add a traffic signal to facilitate left turns onto northbound Massachusetts Avenue - ANC 3E believes there should be a required future of assessment of the need for this traffic signal and that if warranted the applicant should have to construct such a signal.

40. More generally, ANC 3E further believes this excess parking will generate additional traffic which will add to traffic congestion in our community and create additional hazards to pedestrians.

41. ANC 3E also expects as a mitigation measure that Wesley Theological Seminary will support permanently re-opening the closed pedestrian gate between Wesley and AU.

NOW THEREFORE BE IT RESOLVED:

1. ANC 3E believes that a housing project of the size and scope Wesley proposes serving the targeted student populations is desirable and appropriate for the site.

2. Nonetheless, we cannot support the project as presently constituted. With the changes requested below, however, we expect that we would be able to support the project.

3. First, as described above, we believe that the Private IZ as currently proposed contains troubling aspects that, even if it was sensible for the ZC to grant an exemption to long-standing IZ requirements on a case-by-case basis, would mitigate against granting an exemption here.

4. We believe, however, that the ZC should not deviate from IZ policy on a case-by-case basis, and instead, perhaps in conjunction with DCHD, institute rulemaking (perhaps on an expedited basis) to establish alternatives to established IZ for certain situations, and a framework for determining whether such alternatives should be available.

5. Second, we believe that the applicant should work with ANC 3E to develop a robust community amenity package that is consistent with previous amenity packages associated with PUD's and commensurate with the relief sought.

6. Finally, we believe that Wesley must either dramatically reduce the proposed number of parking spaces or propose more aggressive traffic mitigation measures that will partially offset the harms we believe will come with so many spaces.

7. ANC 3E authorizes Commissioners Rohin Ghosh, Jonathan Bender and Tom Quinn to testify for the ANC at any proceedings connected to the above-referenced application and to submit or reply to any filings on behalf of the ANC at any proceedings connected to this case.

The resolution passed by a vote of 6-0-1 at a properly noticed meeting held on September 7, 2023, at which a quorum was present, with Commissioners Bender, Carney, Cohen, Denny, Ghosh, , Hall, and Quinn in attendance.

ANC 3E

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by Jonathan Bender
Chairperson

TESTIMONY OF JONATHAN BENDER, ANC 3E03

September 11, 2023

Good evening Mr. Chairman and fellow Commissioners. I am Jonathan Bender, ANC 3E03 and Chair, ANC 3E. I am here with my fellow commissioner, Tom Quinn, to present the testimony of ANC 3E.

Tonight I will speak first to introduce ANC 3E's report and then to focus on Wesley and Landmark's proposal to create a private IZ program. After that, Commissioner Quinn will speak about mitigation and amenities.

Mr. Chairman, ANC 3E believes that this is a project with promise, but the problems with it outweigh the promise at present. Therefore, we have to oppose it.

Wesley wants permission for a commercial entity to build a multi-story building on Wesley's land to provide housing to students from both Wesley and American University– but mostly for AU students. Wesley would give a ground lease to build and operate the housing to Landmark Properties, a publicly-traded commercial REIT.

DC has a shortage of housing, especially affordable housing. And Wesley faces financial challenges, as do many students.

In principle, then, a housing development of the size and scope of the Landmark Project would be a good thing. It would provide hundreds of housing units and would help fund Wesley's operations.

But there are aspects of this project that are troubling.

In particular, Wesley wants to exempt Landmark from the need to comply with DC's long-established Inclusionary Zoning program.

Wesley claims that the IZ program isn't a good fit for what it calls the new "dormitory," and instead wants to give Landmark "primary" responsibility to administer a private IZ program open only to Wesley and AU students. Wesley also says, however, that Wesley would play a role in qualifying *its* students for participation.

Wesley submitted a summary of the proposed Private IZ program to the ANC on September 1, 2023, which I believe it filed in this proceeding as Exhibit 28B. Unless I mention otherwise, descriptions of the proposed Private IZ program come from this document.

Wesley and AU haven't coordinated or collaborated on the Landmark Project at all. We had a near-shouting match between Wesley and AU representatives at last week's ANC meeting, so that situation doesn't look like it will change.

So, Wesley will help qualify *its* students for housing in the Landmark Property while only Landmark, a commercial entity, will qualify AU students.

Wesley says that DHCD would oversee the Private IZ, but the only concrete example it gives in its filings of what it expects that oversight to include is Wesley's promise to provide a yearly report.

For its part, DHCD, far from endorsing the Private IZ proposal, states in its comments to OP that it "has serious concerns with the ability to find qualified tenants for the IZ units in a building designated/restricted for college/university students."

DHCD then appears to say that what Landmark has proposed in the alternative would not even be IZ, but instead some kind of generic "affordable housing."

I do want to mention something that wasn't in my original prepared remarks, but a quick Google search suggests that Walter Reed, the only example the applicant gave for substituting "affordable housing" for IZ, has in the vicinity of 20% affordable units, some of them at the 30% AMI level. So perhaps that precedent stands for the proposition that exemption from IZ is appropriate *if*, and only if, the project is providing a genuinely commendable amount of affordable housing.

Notably, DHCD isn't here today, and no details of the novel arrangement Wesley wants the Zoning Commission to approve today have been negotiated.

The Landmark Project is a strange hybrid. It isn't – contrary to Wesley's characterization -- what most people think of as a "dormitory," which is housing for students of a particular school where students have recourse to the administration of that school regarding the housing. Here, AU students have no recourse to their school, which (as mentioned) has given no indication that it wants anything to do with the Landmark Project.

Furthermore, DC's Rental Housing Act defines a dormitory in pertinent part as follows:

> [A] building owned by an institution of higher education[,] in which at least 95% of the units are occupied by presently matriculated students of the institution of higher education[.] (DC Code Sec. 42 42–3501.03(11))

Here I should mention that Wesley relies on a 2020 e-mail from the Zoning Administrator, by its terms merely advisory and not final, in which he concluded that what Wesley is proposing "can be considered a dormitory use." The ZA said he based his finding on a definition from Webster's dictionary, to wit: "A residence hall providing rooms for individuals or for groups usually without private baths.'" This definition – which doesn't even mention education – proves too much. It would encompass SROs and some hostels, for instance. But it turns out that this definition didn't work for Wesley or Landmark, who "asserted that Webster's definition is somewhat outdated as today's universities provide dormitory rooms which often include private baths and on occasion, kitchens." The ZA then relied on that assertion, and some examples apparently given by Wesley and Landmark of things they termed "dormitories" that had those features, to find that the Landmark Project could be a dormitory.

So the ZA basically defined "dormitory" based on the applicant's claims about what constitutes a dormitory. Moreover, again, this definition, essentially "a residence hall with rooms for individuals or groups that may have kitchens and private bathrooms" doesn't even discriminate dormitories from commercial apartments.

There is no indication that the ZA considered or was made aware of the Rental Housing Act. There is similarly no indication that the ZA considered or was made aware of the IZ exemption contained in the Zoning Regulations at 11C Sec. 1001.6(c) for "[h]ousing developed by or on behalf of a local college or university exclusively for **its** students, faculty, or staff[.]" (emphasis added). I'd argue that most readers of this provision, which is consistent if even stricter than the Rental Housing Act definition, would conclude the Zoning Commission was

defining a dormitory here. Importantly, Landmark's counsel, Ms. Giordano, during her testimony today, characterized this provision during her testimony as a definition of "dormitory" that her client couldn't rely on because it didn't fit their building.

In any event, it is unlikely that the Landmark Project will ever have 95% occupancy by Wesley, so pursuant to both the Rental Housing Act definition and the definition the applicant concedes this body arrived at for dormitories, this project is not a dormitory, and thus it is commercial housing.

Returning to the few specifics Wesley has provided for Landmark's Private IZ, Wesley proposes that "a limited number of larger apartment units will… be set aside for married students and students with families." Wesley says later in its summary that these students will be "likely Wesley."

Although ANC 3E has consistently asked would-be PUD-developers to include at least some larger units, it's been our understanding that DC's Human Rights Law prohibits discrimination on the basis of family or marital status. It is unclear to us why a commercially-owned and operated residential property such as the Landmark Project should be able to discriminate in the fashion it proposes.

Moreover, it is clear from Wesley's Summary that the school designed its proposal knowing that many if not most students who would benefit from these set asides would be "likely Wesley."

All of this illustrates one of the dangers of permitting a private actor to design a private IZ scheme – the private actor has incentive to design the scheme to favor its own interests.

We aren't aware of any other DC educational institution – or any DC institution at all – that has been granted IZ relief of the scope Wesley proposes.

The relief Wesley seeks is not "minor," as Wesley would have it. Rather, it is a substantial and unique deviation from a long-established program, and its implications extend into numerous other areas of established law.

Big changes in policy like this are best accomplished via the quasi-legislative process of rulemaking, in which the relevant agencies can make policy prospectively with input from all interested individuals and institutions -- and here that would certainly include affordable housing advocates and experts – instead of the *ad hoc* process of a single zoning case in which few interested parties can be expected to know what's at stake.

Accordingly, we urge the Zoning Commission to deny Wesley's application and, if it believes that private IZ belongs in the District, to institute rulemaking, perhaps in conjunction with DHCD, to accomplish this goal.

Thank you again Commissioners, and I will now yield my time to Commissioner Tom Quinn.

ADVISORY NEIGHBORHOOD COMMISSION 3E

TENLEYTOWN AMERICAN UNIVERSITY PARK FRIENDSHIP HEIGHTS
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ANC 3E Testimony in ZC cases #23-08 and 23-08(1) #96-13A

Good afternoon members of the Zoning Commission.

My name is Tom Quinn and I am an Advisory Neighborhood Commissioner representing single member district 3E04.

Following up on Commissioner Bender's testimony I am here today to testify on behalf of ANC 3E in order to detail ANC 3E's concerns about the amenities and mitigation package associated with the proposal from Wesley Theological Seminary to construct a large residential building to house Wesley and American University Students.

ANC 3E is concerned about the amenity package proffered by Wesley. As Commissioner Bender has already testified if this project should be properly treated as a commercial PUD – and given that the project does not constitute a "dormitory," – the amenities package proposed is woefully inadequate.

Even assuming the amenities package should be consistent with those for a dormitory, we believe the proffered amenities are sub-standard. Typical PUD's that ANC 3E has supported have included substantial amenity packages including public space improvements, contributions to neighborhood institutions, commitment to LEED Certification, a retail agreement and IZ that greatly exceeds what is required by the DC Zoning Code.

ANC 3E is only aware of four proffered amenities in this project – a publicly accessible playground; continued access to a meeting space; a commitment to construct a LEED Gold building and a commitment to 10% of the beds being available in the IZ program to qualified applicants from families earning 60% of AMI, or its designated alternative structure, rather than the 8% the applicant claims are required under current zoning.

ANC 3E believes this proffer is inadequate and not commensurate with the unusual relief the applicant is seeking and that the proffer doesn't include amenities which would benefit residents of ANC 3E.

ANC 3E believes a project requiring a PUD necessitating such relief should include at least some of the following amenities to merit ANC 3E support: an increase in the IZ commitment to 15% of the total square footage with a mix of 30%, 50% and 60% of AMI units; a retail component on the ground floor which would serve both students and the adjacent community; a recreational component which is not already available in the immediate area such as a community garden, a skate park, pickleball courts or bocce courts.

With regards to mitigation the applicant in this case is proposing 391 underground parking spaces.

Dormitories in the District don't have any minimum parking requirements and a residential building of this density would only require one parking space per 3 dwelling units which would necessitate approximately 80 parking spaces. The concurrent Wesley Campus plan requires 150 parking spaces. Dormitories are exempt from parking minimums, and if this project were treated as a dormitory as Wesley seeks, this project would be proposing 241 more parking spaces than required by zoning.

As the zoning commission is aware when a typical residential project provides more parking than required the District Department of Transportation requires a traffic mitigation package, the requirements of which become more robust the greater the project exceeds the parking minimums.

ANC 3E believes the proffered mitigation in this proposed project is wholly inadequate given that when it is viewed through the lens Wesley argues should be used it exceeds the parking requirements by more than 260 percent.

Unless the applicant agrees to dramatically reduce the number of proposed parking spaces, ANC 3E believes that the mitigation proffered by the applicant should include full funding for 5 Capital Bikeshare Stations; covered bicycle parking at a ratio of space per dwelling unit; full funding for three covered bus shelters and a transit screen in a public location in the new building.

ANC 3E also believes this excessive amount of parking will generate vehicular movements that the current driveway on Massachusetts Avenue is not suited to handle. If the applicant chooses to proceed with this excess of parking ANC 3E believes that all egress and ingress should utilize University Avenue, where there is space for queuing and room for Wesley to add a traffic signal to facilitate left turns onto northbound Massachusetts Avenue - ANC 3E believes there should be a required future assessment of the need for this traffic signal and that if warranted the applicant should have to construct such a signal.

More generally, ANC 3E further believes this excess parking will generate additional traffic which will add to traffic congestion in our community and create additional hazards to pedestrians.

ANC 3E also expects as a mitigation measure that Wesley Theological Seminary will work with American University to permanently re-open the closed pedestrian gate between Wesley and AU.

It is ANC 3E's view that the height and density and use sought for the Project are appropriate *if* the Applicant provides a more robust amenities package which is commensurate with the Project's scope and if the applicant either dramatically reduces the number of proposed parking spaces or alternately increases the proposed traffic mitigation.

ANC 3E voted not to support this project with 6 commissioners voting in support of the resolution and 1 abstaining at its properly noticed public meeting on September 7, 2023.

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ANC 3E's CLOSING STATEMENT / REPORT IN ZC # 23-08 AND 23-08(1)

Landmark, a publicly-traded REIT, and Wesley seek to get something for nothing in this proceeding. They want you, Commissioners, to let them build a large commercial project that would otherwise require far more amenities than they are offering, but have you treat their project as an ordinary educational use. There is no precedent in DC for what they are asking nor have they presented a valid legal basis for it.

We covered much of this ground in our "Supplemental Report."[1] Here we seek primarily to respond to Wesley's omnibus closing submission, including evidence filed after the hearing at the Zoning Commission's request, and a couple of related issues we have not previously addressed.

The Zoning Administrator's Non-Determination Has No Legal Force

Wesley and Landmark's entire case rests on their claim that an opinion they got via secret meetings with the Zoning Administrator, including an unnoticed *ex parte* meeting in the midst of this contested case, trumps the Zoning Commission's (ZC) authority. Wesley and Landmark claim that the Zoning Administrator is the only entity in DC government that can decide how to categorize the use of a project in a PUD.

This would be a remarkable position, if true. It would call into question any PUD the ZC has ever approved if the file didn't contain a formal opinion from the Zoning Administrator (ZA) specifying the use at issue, given that, according to Wesley and Landmark, the ZA is the sole arbiter of use in DC.

[1] *See* Exhibit 42, https://app.dcoz.dc.gov/Exhibits/2010/ZC/23-08(1)/Exhibit98.pdf

Wesley and Landmark claim "the Zoning Administrator gets the last call."[2] This is false. Any party aggrieved by a final decision by the ZA concerning the zoning regulations has an absolute right of appeal to the Board of Zoning Administration (BZA).[3] Perhaps Wesley and Landmark believe that, if the ZC disagrees with the "call" of the ZA, it should stay its own proceedings and file its own appeal with the BZA.

We do not need to answer these questions in this case, however, because what Wesley and Landmark allege is the ZA's "last call" here is, by its terms, *not* a final decision, but a mere "advisory statement" with no legal force.[4] Indeed, both e-mails submitted by Wesley and Landmark to substantiate their contention that the ZA has "determined" that what they propose is a dormitory contain an almost comically-long disclaimer to the contrary, stating among other things that "[t]his email is NOT a 'final writing. . .' nor a final decision of the Zoning Administrator that may be appealed. . .[.] but instead is an advisory statement[.]"[5] In case the reader somehow did not yet understand, the disclaimer goes on to state:

> Therefore this email does NOT vest an application for zoning or other DOB approval process[.][6]

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[2] Sept. 11, 2023 Hearing Tr. at 34.

[3] 11 DCMR Sec. 3112.2

[4] *See* "E-mail from Matt LeGrant," Sept. 15, 2023 [submitted by Applicant as Exhibit 37-AC] and "E-Mail from Matt LeGrant," Jan. 31, 2020 [submitted by Applicant as Exhibit 16A]. ("DISCLAIMER: This email is issued in reliance upon, and therefore limited to, the questions asked, and the documents submitted in support of the request for a determination. The determinations reached in this email are made based on the information supplied, and the laws, regulations, and policy in effect as of the date of this email. Changes in the applicable laws, regulations, or policy, or new information or evidence, may result in a different determination. This email is NOT a "final writing", as used in Section Y-302.5 of the Zoning Regulations (Title 11 of the District of Columbia Municipal Regulations), nor a final decision of the Zoning Administrator that may be appealed under Section Y-302.1 of the Zoning Regulations, but instead is an advisory statement of how the Zoning Administrator would rule on an application if reviewed as of the date of this email based on the information submitted for the Zoning Administrator's review. Therefore this email does NOT vest an application for zoning or other DOB approval process (including any vesting provisions established under the Zoning Regulations unless specified otherwise therein), which may only occur as part of the review of an application submitted to DOB.") (emphasis in original)

[5] *Id*. (emphasis in original)

[6] *Id*. (all emphasis in original)

The time for submitting evidence in this case has closed. Thus, if, as Wesley and Landmark insist, the ZA alone must decide whether their proposed use constitutes a dormitory, *the ZC must deny the application without more because Wesley and Landmark failed to submit the binding ZA determination of use before the close of evidence*.

Only The Zoning Commission Can Close Definitional Gaps

If the ZC does choose to address the use question in this case, it must consider that it appears inadvertently to have left a gap in the zoning regulations. Plainly, the ZC was referring to what it defined as a dormitory in 11-C DCMR § 1001.6(c), "[h]ousing developed by or on behalf of a local college or university exclusively for its students, faculty, or staff." Yet no corresponding definition of dormitory appears in Subtitle B of the Zoning Regulations.

As discussed above, Wesley and Landmark have not submitted anything purporting to be a legal decision by the ZA as to the definition of dormitory, and it is not clear how the ZA could "categorize" a proposed use in a category not defined in Subtitle B if it wanted to do so. Only the Zoning Commission can enact regulations to add new use definitions. This should be done by rulemaking.

Wesley And Landmark's Remaining Rebuttal Misses The Mark

Wesley and Landmark claim that because dormitories are permitted in R Zones pursuant to a special exception approved by the ZC, it is fine to use a definition of dormitory that does not mention education at all and that is equivalent to the existing definition of "Apartment House." It is not surprising that a REIT like Landmark would make this contention, because it would open a large new market for Landmark. Such a change would permit – without rulemaking – every school in the district to offer housing for any other institution's students, subject only to the minimal requirements of a special exception. In making this argument, Wesley and Landmark concede that should they prevail on the terms they propose, the case will effect a sea change in educational housing policy in DC, one whose

implications have hardly been raised here, much less been carefully resolved after hearing from all relevant stakeholders and experts.

Wesley and Landmark also insist that the project they propose cannot be considered "commercial" because dormitories are examples of residential use and residential uses cannot be commercial. This merely assumes the answers to the questions raised. The initial question is whether the project they propose, which will primarily offer housing for another institution's students to generate revenue for Wesley and Landmark, can be considered a dormitory in the first place. That question is *not* answered merely by stating that dormitories are examples of educational usage.

Furthermore, Wesley and Landmark's claim that a use that is residential cannot be commercial is without merit. The Zoning Regulations do tend to refer to retail usages as commercial and dwellings as residential. Here, however, Wesley and Landmark concede that "commercial" is an undefined term.[7] Section 101.4 of Subtitle X provides that the "campus plan process shall not serve as a process to create general commercial activities or developments unrelated to the educational mission of the applicant[.]" The natural reading of this passage is not that "commercial" is to be contrasted with "residential," but instead with educational uses. Again, Wesley and Landmark's claim begs the fundamental question in this matter – is an apartment complex that primarily caters to students who are not enrolled at Wesley, that Wesley freely concedes has the primary purpose of generating revenue for Wesley, an educational or commercial use.

Dormitories In The US Appear Overwhelmingly To Be Limited To The Host Institutions' Students

To help answer the definitional question, the ZC asked Wesley and Landmark to submit a list of schools with dormitories that serve more than the host institution's students. Out of nearly 6000

[7] *See, eg*, Sept. 11, 2023 Hearing Tr. at 34.

postsecondary schools in the United States,[8] Wesley and Landmark apparently could locate *only two schools* with dormitories that served students other than their own.[9] Thus, Wesley and Landmark's research would seem to confirm that what we call "dormitories" in the US are overwhelmingly residences that serve only the host institutions' students.[10]

Of the two schools out of 6000, none are in DC, Maryland, or Virginia, or in any nearby state. Moreover, the two schools Wesley and Landmark identified are materially different than Wesley and AU. Both schools are tightly and formally interconnected with the other schools whose students they permit to occupy their dorms.

Gammon Theological Seminary ("Gammon") is part of a consortium of African American private institutions of higher education that was formed in 1929.[11] The schools in the consortium "share a long-established history of collaboration that allows students, faculty and staff to benefit from an expanded and enhanced educational environment."[12] The consortium has operated a program of cross-registration for more than half a century.[13]

The apparent sole other example Wesley and Landmark could locate is a residence building on the UC Davis campus that they say also permits students from Sacramento City College to use. Like

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[8] *See* "Fast Facts, National Center for Educational Statistics," https://nces.ed.gov/fastfacts/display.asp?id=1122

[9] *See* "Applicant's Post-Hearing Submission," at Exhibit 6. Wesley and Landmark attach a list of "public-private partnerships" to this Exhibit. With the exception of the UC Davis project already mentioned above (and thus apparently double-counted), it appears all of these projects are for one school's students but run by a third-party for the school.

[10] That the ZC previously permitted Wesley to fill a few vacant beds in its current dorm with AU students does not help Wesley and Landmark's case, because that use is ancillary, and ancillary commercial uses are permitted by educational institutions.

[11] "Historical Overview, AUCC," https://aucenter.edu/history/. Inasmuch as Wesley and Landmark were able to submit evidence regarding these schools after the close of testimony, in fundamental fairness the ZC should be able to review the public-facing websites for those institutions and parties in opposition should be able to cite same.

[12] "Cross Registration, AUCC," https://aucenter.edu/cross-registration/

[13] *Id*.

Gammon's consortium, Sacramento City College is part of a tight and longstanding partnership with Davis. In fact, the division of Sacramento City College at issue *is literally on UC Davis' campus*:

> The establishment of the Sacramento City College Davis Center at UC Davis West Village marks another milestone in a long partnership between the Los Rios Community College District and UC Davis. Over the last several years, the three higher education systems in California — community colleges, state universities and the UC system — have worked to smooth the path from two-year colleges to four-year universities for a greater number of students. In July 2015, the University of California and Los Rios Community College District announced a pathway program for ten of the most popular majors in the UC system.[14]

The contrast between these tightly-knit schools and Wesley and AU is stark. Uncontradicted testimony in this matter establishes that AU has consistently refused even to engage with Wesley concerning the project.

Moreover, there was discussion at the hearing about the putative ease with which students from the two schools could get onto each other's campuses via a gate between them. Yet testimony at the hearing established that AU created a barrier between the campuses at the behest of neighbors.[15] Those neighbors remain deeply concerned about the prospect that the gate may be re-opened and likely will object to more than minimal open hours. Thus, it is likely that students will need to walk a considerable distance to get between campuses, negating the physical proximity of the institutions.

Special Exception Relief In A PUD Is Limited To Situations For Which Regulations Otherwise Require A Special Exception For Relief

Although we have not commented on it before, we must note in our closing statement that Wesley and Landmark dramatically misstate the law with regard to Section 303.13 of Subtitle X. That

[14] "Sacramento City College," https://westvillage.ucdavis.edu/los-rios-community-college
[15] *See* Oct. 2, 2023 Hearing Tr. at 10.

section provides that "[a]s part of any PUD, the applicant may request approval of any relief *for which special exception approval is required*."[16]

The ZC routinely applies this provision in PUDs that require, for example, setback relief that would otherwise *require* a special exception from BZA. The only reasonable construction of Section 303.13 is that it simply permits the ZC to apply the special exception standard to issues which, outside the context of a PUD, would require a special exception per regulations.

Yet, Wesley and Landmark claim that this provision allows the ZC to use the deferential special exception standards to waive the IZ set aside requirement, *as well as* the requirement that waivers of the set aside requirement necessitate a showing that the requirement would otherwise deprive the owner of all viable economic use of their property. No regulation otherwise permits the grant of such relief via a special exception. Apparently, Wesley and Landmark construe "for which special exception relief is required" to mean "for which an applicant would prefer special exception relief." Wesley and Landmark cite no authority for this interpretation, which is at odds with the plain language of the regulations, and ANC 3E is aware of none. The Zoning Commission should reject it.

The Best Way To Proceed Is Rulemaking

What Wesley and Landmark propose is a commercial project; the educational use, that is*, the use by Wesley students, of the proposed building, is ancillary*. The only way Wesley and Landmark can claim they are not seeking height and density relief is by virtue of their proposed *new* definition of dormitory, a definition that apparently is used virtually nowhere in the US.

If the ZC wants to enable something like what Wesley and Landmark seek, it should do so via rulemaking, so that it can answer certain fundamental questions after hearing from all relevant parties

[16] (emphasis added)

and experts. The first such question is what we, as a city, are trying to achieve by departing from the near-universal rule that dormitories serve only the students of the host institution. For example, do we want to reduce the cost of student housing? Do we want to aid "house poor" – or property poor, more precisely – schools to monetize their properties? Perhaps we want to do both, or perhaps neither.

Whatever the answer, we should ensure that if schools (and perhaps other non-profit entities) are permitted to build these projects, they and their private-sector co-investors don't get a windfall at the expense of DC citizens in need of affordable housing and other amenities and mitigation. The ZC should ensure that such projects provide the same level of amenities, especially affordable housing, as they would have to provide were they built on land that did not belong to an educational institution. Developers all over the District are managing to build projects of the scale and scope of Wesley and Landmark's proposed project while providing substantially-greater amenities than Wesley and Landmark proffer, including often, we understand, affordable housing of 15% or higher. Wesley and Landmark, and similarly-situated developers, should provide this level of amenities, too.

The ZC Should Permit Changes To IZ Policy Only Through Rulemaking, As Well

Finally, as we have noted previously, Wesley and Landmark seek a major break with IZ policy in the District of Columbia. To be clear, based on Wesley and Landmark's own research, *DHCD has not approved a single private IZ program since DC's IZ program was enacted*.[17]

Even *before* DC's IZ program was created, DHCD had approved only a *single* private IZ scheme. As discussed in our "Supplemental Report," that was for artists' studios, which do not present the same

[17] *See* "Applicant's Supplemental Statement," at 4 [submitted as Exhibit 37]. At the October hearing, at least one Zoning Commissioner suggested that DHCD had approved many such programs. This may reflect confusion about the acronym "ADU." ADU in this context stands for "Affordable Dwelling Unit," not "Accessory Dwelling Unit." While the latter exist throughout the city, none of the former have come into existence after DC's IZ program began.

challenges as student affordable housing. Moreover, because no public IZ requirements yet existed, the stakes were far lower, as there was no established policy from which to deviate.

As with the definition of "dormitory," if the Zoning Commission wants to enable private IZ programs, it should do so by rulemaking, so it can hear from all interested parties, including especially experts on affordable housing best practices.

Conclusion

There are various good ways to get to yes on building new housing on or near Wesley's campus, but because the way Wesley and Landmark have proposed is contrary to law and embodies bad public policy, the Zoning Commission should deny their present application.

ANC 3E[18]

Jonathan Bender

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DN: cn=Jonathan Bender, o, ou, email=jbender@ibusinesslawyer.com, c=US
Date: 2023.10.30 12:45:50 -04'00'

by Jonathan Bender
Chairperson

[18] On September 7, 2023, ANC 3E authorized the undersigned as well as Commissioners Quinn and Ghosh to represent it in all proceedings in this matter. *See* Exhibit 26.