

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 11-07G(1)
Z.C. Case No. 11-07G
The American University
(Campus Plan Amendment and Further Processing of the Campus Plan –
Hall of Science Building)
ORDER DENYING MOTION FOR RECONSIDERATION AND REHEARING
September 17, 2018

The Zoning Commission for the District of Columbia (“Commission”) granted the application of The American University (“AU” or “Applicant”) for an amendment to the 2011-2022 American University Campus Plan and special exception approval for further processing of the 2011-2022 American University Campus Plan to permit the construction of a new Hall of Science (“HOS”) Building, granted by Z.C. Order No. 11-07G effective as of August 24, 2018 (“HOS Building Order”).

Procedural History of the Campus Plan Amendment and Further Processing Application

The Spring Valley Wesley Heights Citizens Association (“SVWHCA”), Neighbors for a Livable Community (“NLC”), and eight individual neighbors in opposition to the application – including Dr. Jessica Herzstein (collectively, the “Party Opponents”) were a party to the Campus Plan Amendment and Further Processing proceeding before this Commission.

The Commission held the original public hearing on the Campus Plan Amendment and Further Processing application on November 20, 2017. The Applicant made post-hearing submissions on January 8, 2018, February, 20, 2018, and March 5, 2018. (Exhibit [“Ex.”] 58, 58A-58J, 67, 69, 69A-69C.) The Party Opponents made post-hearing filings on January 16, 2018, February 20, 2018, and March 12, 2018. (Ex. 61, 66, 71.)

The Commission approved the Campus Plan Amendment and Further Processing application by vote on March 19, 2018. Z.C. Order No. 11-07G became final effective upon publication in the *D.C. Register* on August 24, 2018. (11-Z DCMR § 604.9.)

On August 31, 2018, the Party Opponents filed a request (“Motion”) that the Commission reconsider the findings and conclusions of Z.C. Order No. 11-07G relating to the use of Jacobs Field, noise arising from such usage, and specific conditions in the 2011-2022 American University Campus Plan (Conditions 17 and 25 in Z.C. Order No. 11-07) relating thereto. In addition, the Motion requested that the Commission hold further hearings related solely to the use of Jacobs Field. (Ex. 78.)

On September 7, 2018, the Applicant filed a response asking the Commission to deny the Motion (“Response”) pursuant to Subtitle Z § 700.8 of the Commission’s Rules of Practice and Procedure. (Ex. 79.)

At a regularly-scheduled public meeting on September 17, 2018, the Commission considered the Motion and the Response. The Motion was denied.

Rules of Procedure Pertaining to a Motion for Reconsideration or Rehearing

Pursuant to Subtitle Z § 700.6, a motion for reconsideration or rehearing must state with specificity the respect in which the final order is claimed to be erroneous, the grounds of the motion, and the relief sought. The Commission may not grant a request for rehearing unless new evidence is submitted that could not reasonably have been presented at the original hearing. (11-Z DCMR § 700.7.)

Commission’s Decision on the Use of Jacobs Field

The Commission’s decision in the HOS Building Order addressed two issues that are at the core of the Motion. First, the HOS Building Order addressed whether the Applicant’s use of Jacobs Field for non-University athletic events was contemplated and permitted by Conditions 17 and 25 of Z.C. Order No. 11-07. Second, the HOS Building Order addressed the concerns raised by the Party Opponent regarding the mitigation of impacts of such use of Jacobs Field on neighboring properties.

The Commission thoroughly reviewed AU’s compliance with the Conditions of approval of Z.C. Order No. 11-07, and in particular AU’s compliance with the Conditions related to the use of Jacobs Field for non-AU athletic events. In response to specific questions and comments asked by the Commission, AU addressed its satisfaction of Conditions 17 and 25 in two post-hearing submissions. (Ex. 58, 69). In addition, the Commission received information from the Party Opponent by their responses to AU’s post-hearing submissions in two post-hearing submissions. (Ex. 61, 71.) Thereafter, the Commission specifically addressed this issue in its Public Meetings of February 26, 2018 and March 19, 2018. The HOS Building Order includes 10 Findings of Fact (“FF”) that address the issues related to the use of Jacobs Field (FF Nos. 61-70). In particular, FF Nos. 69 and 70 state:

69. For the reasons stated in the Conclusions of Law, the Commission finds that the Applicant’s interpretation of its ability to offer Jacobs Field for non-University athletic event[s] is reasonable and in fact provides important opportunities for youth in the District.
70. American University is currently in discussions with the owners of 4710 Woodway Lane regarding the construction of a sound barrier wall. The wall would be approximately 360 linear feet long with a 200-foot-long, 15-foot-high segment to cover the player bench area of Jacobs Field. The remaining 80-foot segments on either end of the wall will be 10 feet tall. The estimated cost of design and construction of the sound barrier wall system is approximately \$500,000. (Ex. 58.)

The Commission expects the University to follow through on this expeditiously. (Transcript [“Tr.”] of March 19, 2018 Meeting, p. 19.)

The HOS Building Order included the following discussion of the use of Jacobs Field in the Conclusions of Law section:

The Commission also notes the Applicant’s written testimony and post-hearing submissions regarding how it is in compliance with the conditions related to the use of Jacobs Field. The Commission finds the Applicant’s interpretation of Condition Nos. 17 and 25 consistent with the spirit and intent of the original campus plan order. The types of non-university related athletic events described in the Applicant’s Exhibit No. 69B are exactly what the Commission intended by “special events” and provide an important benefit to District citizens, particularly its youth. The Applicant has also demonstrated that these events do not use amplified sound and therefore will have little if no impacts due to noise. However, other events do have the potential for noise impacts and the Commission expects the University to expeditiously conclude its discussions with the owners of 4710 Woodway Lane regarding the construction of a sound barrier as described in Finding of Fact No. 70.

The Party Opponent’s Allegations of Error

In the Motion, the Party Opponents raise the following allegations of error on the part of the Commission:

- The Commission’s decision and findings regarding Jacobs Field were not supported by substantial evidence;
- The Commission adopted an arbitrary, capricious, and legally erroneous interpretation of Conditions 17 and 25 in Z.C. Order No. 11-07 relating to Jacobs Field;
- The Commission should not have relied upon public policy considerations when evaluating the University’s compliance with Conditions 17 and 25; and
- The Commission lacked the authority to revise and re-interpret Conditions 17 and 25 relating to Jacobs Field in the context of a further processing case for a science building.

The Commission’s Decision and Findings Regarding the Use of Jacobs Field Was Supported by Substantial Evidence in the Record

The Party Opponents argued that the evidence before the Commission mandated a finding that the neighbors are still experiencing objectionable noise impacts from usage of Jacobs Field. The Motion states that the Commission erred by finding that unamplified special events were not creating adverse impacts upon neighbors due to noise and requested that the Commission strike the sentence, “The Applicant has also demonstrated that these events do not use amplified sound and therefore will have little if no impacts due to noise,” from the HOS Building Order.

The Commission notes the information presented by the Applicant regarding the noise studies that AU has undertaken since approval of the Campus Plan. The Commission recognizes that the Party Opponents still have concerns regarding the noise impacts related to the use of Jacobs Field. For that reason, the HOS Building Order included FF No. 70 and the language in the Conclusions of Law which noted its expectation that the University “expeditiously” concludes discussions with the Party Opponents regarding the construction of the sound barrier wall.

The Commission’s Interpretation of Conditions 17 and 25 of Z.C. Order No. 11-07 Were Not Arbitrary, Capricious, or Legally Erroneous

The Party Opponents argued that the Commission’s ultimate interpretation of Conditions 17 and 25 is not based upon the plain meaning of Z.C. Order No. 11-07 or any reasoned analysis of the record in this case. They further stated that Commission acted in an arbitrary, capricious, and legally incorrect manner by retroactively revising the conditions to suit the University’s current practices while ignoring the adverse impact of non-University athletics upon neighbors. The Party Opponent’s basis for these arguments is based on statements that were made by some Commissioners during the initial deliberations on this issue compared with the ultimate decision that the Commission made on this issue.

The Commission finds that the Party Opponents have not provided any evidence that FF Nos. 61-70 or the pertinent conclusions in the HOS Building Order are erroneous, arbitrary, or capricious. The Commission agrees with the Applicant’s statements that the public deliberations on this matter put on full display the appropriateness of the Commission’s ultimate decision that AU has remained in substantial compliance with Conditions 17 and 25 of Z.C. Order No. 11-07. The Commission’s decision on this issue was consistent with the substantial evidence that was provided in the record of this case. The Commission’s decision that AU remained in substantial compliance with the requirements of Conditions 17 and 25 was not erroneous, it was not arbitrary and capricious, and was the result of a well-reasoned and thoughtful analysis of the permitted use of Jacobs Field.

The Commission Did Not Rely Upon Public Policy Considerations When Evaluating the University’s Compliance with Conditions 17 and 25

The Party Opponents argued that the Commission erred by relying upon new policy considerations when evaluating the University’s compliance with the Conditions related to the use of Jacobs Field. The Party Opponents argued that the Commission’s reference to the “important benefit to District citizens, particularly its youth” of non-University related athletic events was evidence of the Commission’s failure to apply the correct legal standard in this further processing application. The Party Opponents stated, “Clearly, the Commission was trying to justify its preferred outcome in this case by mentioning the perceived needs of youth who are unaffiliated with the University.”

The Commission did not rely upon public policy considerations in making its determination that AU’s use of the Jacobs Field for non-University related events was consistent with Conditions 17 and 25. The Commission reviewed the information from AU which noted the types of non-University related athletic events that occurred on Jacobs Field and properly determined that those

uses were consistent with express language of Conditions 17 and 25, and the intent of the Zoning Commission when it approved those Conditions in the Z.C. Order No. 11-07.

The Commission's Did Not Revise or Re-Interpret the Meaning of Conditions 17 and 25 of Z.C. Order No. 11-07

The Party Opponents claim that the Commission should have required AU to file a request for the modification of the Conditions of Z.C. Order No. 11-07 which affect Jacobs Field. The Party Opponents allege that the Z.C. Commission erred in issuing findings and conclusions in this case without requiring AU to have filed such a modification request. The Commission does not find this argument to be convincing and notes that this argument assumes that AU's use of Jacobs Field was not in substantial compliance with Conditions 17 and 25. As noted above, the Commission appropriately concluded that AU was in substantial compliance with those conditions. Therefore, there was no need for AU to amend those conditions. Accordingly, there was no error by the Commission in not requiring AU to modify Conditions 17 and 25 of Z.C. Order No. 11-07.

Motion for Rehearing

The Party Opponents requested that if the Commission did not agree to modify the HOS Building Order in a manner that is consistent with its Motion, then the Commission should hold a full hearing "with respect to the objectionable conditions caused by non-University athletics at Jacobs Field". The Applicant opposed such a motion for rehearing and claimed that the Party Opponent had not satisfied the requirements of Subtitle Z § 700.7.

The Commission may not grant a request for rehearing unless new evidence is submitted that could not have been reasonably presented at the original hearing. The Commission finds that the Party Opponents motion for rehearing does not make any attempt to address how it satisfies this requirement and merely points to information that was already submitted into the record. Therefore, the request for rehearing is denied as it is not based on new evidence or evidence that was not reasonably available at the time of the Commission's public hearing on this matter.


For the above stated reasons, the Commission finds no new evidence not reasonably available at the time of the original public hearing on the instant application was presented by the Party Opponents. In addition, the Commission finds that its decision regarding the use of Jacobs Field was not in error, arbitrary, or capricious. Accordingly, the Motion is **DENIED**.

On September 17, 2018, upon the motion of Chairman Hood, as seconded by Vice Chairman Miller, the Zoning Commission took **FINAL ACTION** to **DENY** the Motion by a vote of **4-0-1** (Anthony J. Hood, Robert E. Miller, Peter G. May, and Michael G. Turnbull to approve; Peter A. Shapiro, not present, not voting).


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 November 9, 2018.

BY THE ORDER OF THE D.C. ZONING COMMISSION

A majority of the Commission members approved the issuance of this Order.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



SARA A. BARDIN
DIRECTOR
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