

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission**



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA

ZONING COMMISSION ORDER NO. 11-07(1)

Z.C. Case No. 11-07

**Order denying Motions for Reconsideration or Rehearing
(American University 2011 Campus Plan and Further Processing
of an Approved Campus Plan)**

June 11, 2012

By order issued May 17, 2012, the Zoning Commission for the District of Columbia (“Commission”) approved, subject to conditions, an application by American University (“University” or “Applicant”) for special exception approval pursuant to 11 DCMR §§ 3104.1 and 3035 and in accordance with § 210 of the Zoning Regulations, of an updated campus plan and for further processing approval, under the approved campus plan, of certain construction on the University’s campus in Northwest Washington, D.C. (*See* Z.C. Order No. 11-07, Z.C. Case No. 11-07, issued May 17, 2012 (“Order No. 11-07”).)

In addition to the University, Advisory Neighborhood Commissions (“ANCs”) 3D, 3E, and 3F were automatically parties to this case. The Commission granted party status in opposition to the application to the Spring Valley-Wesley Heights Citizens Association; the Neighbors for a Livable Community; the Westover Place Homes Corporation; the Tenley Campus Neighborhood Association; the Tenley Neighbors Association; and Robert Herzstein, a resident living near the University’s athletic fields.

Herzstein motion. On May 29, 2012, Robert Herzstein submitted a motion for reconsideration or rehearing of the Commission’s decision, alleging certain errors. According to Mr. Herzstein, Order No. 11-07 was “incorrect in dismissing Mr. Herzstein’s request” pertaining to landscape screening, stating that “Mr. Herzstein was addressing existing conditions, not ‘objectionable conditions that would result from approval of the Applicant’s proposal.’” The motion argues that the “existing conditions were in violation of conditions” adopted in the 2001 and 1989 orders approving the University’s campus plans, and alleges that “Mr. Herzstein did in fact ‘identify specific adverse impacts’” related to views from his property. (Exhibit 615.)

Mr. Herzstein’s motion also challenged “an impractical provision regarding dispute resolution” adopted by the Commission. According to Mr. Herzstein, “dispute resolution will not be a reality” because a “majority vote requirement will create an unrealistically high hurdle for any single neighbor or member of the Committee” and because of the method of selecting a mediator. In addition, Mr. Herzstein asserted that “he should have standing as a member of the liaison committee” because of “the long boundary his home shares with the campus.” (Exhibit 615.)

In a response in opposition to the motion, submitted June 5, 2012, the University asserted that Mr. Herzstein's motion "does nothing more than state Mr. Herzstein's displeasure with the Order" and "fails to assert any material effect from the alleged inaccuracies and omissions...." According to the University, the motion "fails to make any claims about how such alleged errors lead to incorrect legal conclusions or how the efficacy of the conditions in the Order would be impaired." (Exhibit 617.)

ANC 3D motion. By motion submitted May 29, 2012, ANC 3D requested reconsideration or rehearing on the ground that "portions of the ZC Order No. 11-07 are erroneous because they are incomplete, inaccurate, and arbitrary." The motion also alleged that by "excluding evidence in the Order offered by ANC 3D and ignoring specific recommendations of ANC 3D, the ZC Order also is erroneous in failing to comply" with the statutory provisions requiring the Commission to give great weight to the issues and concerns raised by the affected ANC. In particular, ANC 3D alleged that Order No. 11-07 was incomplete or erroneous with respect to issues and concerns raised by ANC 3D related to the proposed development of the East Campus, issues pertaining to traffic and parking, the Applicant's planned North and South Hall projects, and the cap on undergraduate enrollment.¹ (Exhibit 616.)

In a response in opposition to the motion, submitted June 5, 2012, the University asserted that ANC 3D's motion should be denied because it "does nothing more than rehash arguments about the existing record: arguments that the ANC had a full and fair opportunity to present over more than a year and that the Commission has already given the appropriate consideration." According to the University, ANC 3D "fails to present any new evidence and any reason why such evidence could not have been presented at the original public hearing" ... and "the Zoning Commission has already given great weight to the issues on which ANC 3D took a position during this case." (Exhibit 618.)

CONCLUSIONS OF LAW

Pursuant to § 3035.5, the Commission is required to apply the Board of Zoning Adjustment Rules of Practice and Procedure in chapter 31 of the Zoning Regulations that apply to special exception proceedings in processing, reviewing, and approving college and university uses. The Board's Rules of Practice and Procedure specify that a motion for reconsideration must "state specifically all respects in which the final decision is claimed to be erroneous, the grounds for the motion, and the relief sought." (11 DCMR § 3126.4.) A motion for rehearing must submit

¹ Although its submission is titled a "Motion for Reconsideration or Rehearing," ANC 3D also alleges that the "errors in the Order ... and the potential impacts on residents are so egregious as to warrant the Zoning Commission to stay, reconsider, and conduct a hearing" on specified portions of the Order. The ANC did not otherwise address a stay, and did not demonstrate that its request satisfied the criteria for issuance of a stay. Accordingly, to the extent that ANC 3D's motion for reconsideration or rehearing was also intended as a motion for stay, the Commission denies the request for a stay of the Order as without merit.

“new evidence...that could not reasonably have been presented at the original hearing.” (11 DCMR § 3126.6.)

The Commission was not persuaded that either motion for reconsideration or rehearing alleged any grounds to reconsider its decision in this proceeding, or to rehear the University’s application. The motions did not state specifically any respect in which the Commission’s decision was claimed to be erroneous, and the “reasons for reconsideration” listed in the motions did not present any new argument or testimony relevant to the Commission’s deliberations in this case. Rather, both motions submitted by Robert Herzstein and by ANC 3D provided only conclusory lists of perceived errors, without any reference to evidence in the record or any argument to explain the allegation.

The Commission concurs with the Applicant that the motions failed to provide grounds for any of the claims of error, as required by § 3126.4. Some of the grounds cited by Mr. Herzstein referred to conditions adopted in the University’s prior campus plans, which have expired and were not at issue in this proceeding. The motion otherwise challenges some findings and conclusions made by the Commission in Order No. 11-07 but does not specifically identify any alleged errors. The Commission concludes that Mr. Herzstein’s motion merely restates his arguments on various issues in this proceeding, which were previously considered by the Commission, and concurs with the Applicant that the motion “fails to make any claims about how such alleged errors lead to incorrect legal conclusions or how the efficacy of the conditions in the Order would be impaired.” (Exhibit 617.)

Similarly, the motion for reconsideration or rehearing submitted by ANC 3D did not state specifically the respects in which the final decision in Order No. 11-07 was claimed to be erroneous, but merely described portions of the order that ANC 3D deemed erroneous because they were “incomplete, inaccurate, and arbitrary.” (Exhibit 616.) The Commission concurs with the Applicant that ANC 3D’s conclusory statements in the motion “rehash arguments about the existing record” and do not provide grounds for reconsideration or rehearing. (Exhibit 618.)

The Commission also disagrees with ANC 3D’s allegation that the Commission failed to give great weight to the issues and concerns raised by ANC 3D in this proceeding. As is reflected in Order No. 11-07, the Commission did give great weight to the issues and concerns raised by ANC 3D and the other ANCs that participated in this proceeding. The “great weight” requirement does not compel the Commission to follow an ANC’s recommendations or adopt its views. (*Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment*, 634 A.2d 1234, 2141 (D.C. 1993); *Draude v. District of Columbia Bd. of Zoning Adjustment*, 582 A.2d 949, 953 (D.C. 1990); *Upper Georgia Avenue Planning Committee v. Alcoholic Beverage Control Board*, 500 A.2d 987, 993 (D.C. 1985).)

For the reasons discussed above, the motions for reconsideration or rehearing submitted by Robert Herzstein and by ANC 3D are hereby **DENIED**.

VOTE: **3-0-2** (Anthony J. Hood, Peter G. May, and Michael G. Turnbull to deny the Herzstein motion; Marcie Cohen not having participated, not voting; and one mayoral appointee position vacant, not voting.)

VOTE: **3-0-2** (Anthony J. Hood, Peter G. May, and Michael G. Turnbull to deny the ANC 3D motion; Marcie Cohen not having participated, not voting; and one mayoral appointee position vacant, not voting.)

BY ORDER OF THE D.C. ZONING COMMISSION
Each concurring member approved the issuance of this Order.

ATTESTED BY:



SARA A. BARDIN
OFFICE OF ZONING DIRECTOR

FINAL DATE OF ORDER: December 19, 2012