

## **ABSTRACT**

### **TOWN AND GOWN: THE D.C. BOARD OF ZONING ADJUSTMENT INTERFERES IN COLLEGE AND UNIVERSITY DECISION MAKING**

Recent litigation in Washington, D.C. has spurred questions about what choices colleges and universities are allowed to make for themselves. The D.C. Board of Zoning Adjustment (“BZA”), responsible for granting exceptions to local zoning restrictions, has the authority to impose conditions, including enrollment caps and building moratoriums, on colleges and universities. This Note discusses recent litigation involving Georgetown University and George Washington University and the resulting impact on neighbors, students, the BZA, and colleges and universities.

**TOWN AND GOWN: THE D.C. BOARD OF ZONING ADJUSTMENT INTERFERES IN COLLEGE AND  
UNIVERSITY DECISION MAKING**

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**INTRODUCTION**

Recent litigation in Washington, D.C. (“D.C.”) has spurred questions about what choices colleges and universities are allowed to make for themselves. The D.C. Board of Zoning Adjustment (“Board” or “BZA”), responsible for granting exceptions to local zoning restrictions, has the authority to impose conditions on colleges and universities. For example, the D.C. BZA has specified a minimum percentage of college and university students who must live on campus, and it has tried to impose an enrollment cap on the number of college and university students. The BZA does not have the authority to give exact specifications on how those conditions must be carried out, but unless the condition is found to exceed the BZA’s authority, colleges and universities must follow these conditions or be subject to a building moratorium.

George Washington University (“GWU”) and Georgetown University (“Georgetown”), both located in D.C., have learned the powers of the D.C. BZA. Georgetown College appealed the BZA’s approval of its campus plan subject to nineteen conditions and asked for appellate court review of those conditions.<sup>1</sup> Georgetown was successful in getting some conditions reversed, most notably the BZA’s attempt to freeze Georgetown enrollment until 2010 at a level set in the 1990s.<sup>2</sup> GWU asked for federal and state court review of the BZA’s conditions on its campus plan for development from 2001 to 2009.<sup>3</sup>

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<sup>1</sup> *President and Directors of Georgetown College v. District of Columbia Bd. of Zoning Adjustment*, 837 A.2d 58, 58 (D.C. 2003) (hereinafter *Georgetown*).

<sup>2</sup> *Id.*

<sup>3</sup> *George Washington Univ. v. District of Columbia Bd. of Zoning Adjustment*, 831 A.2d 921 (D.C. 2003) (hereinafter *GWU State*); *George Washington Univ. v. District of Columbia*, 318 F.3d 203 (D.C. Cir. 2003) (hereinafter *GWU Federal Appellate*).

This Note examines the D.C. BZA's authority and its influence over GWU and Georgetown. Part I provides background on zoning, the BZA, and special exceptions. Part II explains the context and setting of the GWU and Georgetown neighborhoods; Part III addresses the recent litigation and the ways colleges and universities can challenge zoning regulations and conditions. Part IV concludes with a discussion of the impact on neighbors, students, the BZA, and colleges and universities.

## **I. BACKGROUND**

Consistent with a romantic, American ideal of a neighborhood with a park, school, and churches, colleges and universities were historically considered "favored uses" along with religious institutions, and therefore allowed where other nonresidential uses were not.<sup>4</sup> This romantic ideal has given way to modern realities of traffic jams, noise pollution, and trash accumulation. The D.C. Court of Appeals described the transition:

Historically, schools and churches have enjoyed special treatment with respect to residential zoning ordinances and have been permitted to expand into neighborhoods where nonconforming uses would otherwise have not been allowed. . . . [T]he advent of the automobile, as well as the growth and diversification of religious and educational institutions, brought a host of new problems. Sprawling universities brought increased traffic and other unexpected inconveniences to their neighbors, while the benefits these universities conferred were becoming less relevant to the residents of the immediately surrounding areas. Thus, neighbors who may have formerly welcomed the construction of a new school began to view its arrival with distrust and concern that it would necessarily bring people from other communities into the neighborhood to disrupt its peace and quiet.<sup>5</sup>

Today colleges and universities do not enjoy such a preferred status. In D.C., colleges and universities are "afford[ed] no privileged position."<sup>6</sup>

Colleges and universities, like all prospective builders in D.C., are regulated by local zoning laws, which are enforced and approved by a local BZA. The BZA's responsibility is "to determine whether a reasonable accommodation has been made between the University and the

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<sup>4</sup> *Georgetown*, 837 A.2d at 68.

<sup>5</sup> *Id.* at 70 (quoting *Cornell Univ. v. Bagnardi*, 503 N.E.2d 509 (N.Y. 1986)).

<sup>6</sup> *Marjorie Webster Junior Coll., Inc. v. District of Columbia Bd. of Zoning Adjustment* 309 A. 2d 316, 318 (D.C. 1973).

neighbors which does not interfere with the legitimate interests of the latter... or... with the legally protected interests of the former.”<sup>7</sup> The BZA must uniquely balance the interests of the community with the interests of colleges and universities in determining what new construction and improvements are allowed in certain zones.

#### **A. ZONING**

Zoning at the state level first started in the mid-1920s when a Standard Zoning Enabling Act was proposed by the U.S. Department of Commerce.<sup>8</sup> This Act was adopted by many states and provides a common statutory basis for zoning.<sup>9</sup> Built on the nuisance law concept, zoning was a response that established residential districts protected from other invading uses.<sup>10</sup> By specifying particular types of buildings and uses allowed only in certain areas, in contrast to nuisance law, zoning is “designed to *prevent* harmful effects” on neighbors, rather than compensate a neighbor after the fact or issue an injunction to halt an objectionable use after an expensive law suit.<sup>11</sup>

Typical zoning includes commercial uses (generally factories and businesses), residential uses (generally houses and neighborhoods), and special purpose uses (this varies by community); each of these uses is further subdivided to distinguish types within the three broad categories, e.g., commercial use is often subdivided into high- and low-density uses. Importantly, BZAs have the authority to grant special exceptions for each category of use, allowing a particular building, development, or use to be allowed, with permission, in an area zoned for another purpose.<sup>12</sup>

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<sup>7</sup> *Georgetown* 837 A.2d at 70 (citations omitted).

<sup>8</sup> DANIEL R. MANDELKER, *LAND USE LAW* (4th ed. 1997).

<sup>9</sup> *Id.* at 108.

<sup>10</sup> *Id.*

<sup>11</sup> JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 952 (5th ed. 2002).

<sup>12</sup> MANDELKER, *supra* note 8, at 111.

In D.C., colleges and universities are allowed as a matter of right in areas zoned for high-density commercial use.<sup>13</sup> This means colleges and universities can neighbor industrial factories without having to seek BZA approval. However, colleges and universities, allowed only by special exception in land zoned for residential or special purpose uses, most often must go through the BZA approval process in order to expand.<sup>14</sup> “Under our zoning regulations, a college has no right to locate in a residentially zoned district unless it conforms to all of the requirements of the [Zoning Board].”<sup>15</sup> Since parts of the GWU and Georgetown campuses are located in residential and special purpose zones—and new property acquired is most often not located in high-density commercial districts—the universities must go through the BZA special exception approval process in order to construct new buildings or make modifications within those zones.

## **B. BOARDS OF ZONING ADJUSTMENT**

Boards of Zoning Adjustment, or BZAs as they are commonly called, are administrative agencies, their authority defined by statute and regulation.<sup>16</sup> BZAs have three main powers: to hear appeals from interpretations of zoning ordinances, authorize variances,<sup>17</sup> and grant special exceptions.<sup>18</sup> They may not act in excess of the authority given them.<sup>19</sup>

The D.C. BZA is comprised of five members<sup>20</sup> and has statutory authority, among other things, to “make special exceptions to the provisions of the zoning regulations in harmony with

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<sup>13</sup> *GWU Federal Appellate*, at 205.

<sup>14</sup> *Id.*

<sup>15</sup> *Marjorie Webster Junior Coll., Inc. v. District of Columbia Bd. of Zoning Adjustment* 309 A. 2d 316, 318–319 (D.C. 1973).

<sup>16</sup> *MANDELKER supra* note 8, at 111

<sup>17</sup> Variances are often confused with special exceptions. A variance, granted to a particular property owner or user, is a forgiveness of the zoning rules in order to avoid unnecessary hardship if a literal enforcement of the zoning regulations was applied. *Id.* A special exception, often called a conditional use, is a granting of permission that allows a use in an area which is predominately zoned for a different use but allows that particular use when permission is granted. *Id.* In essence, a special exception is planned for and thought of in advance, but a variance is only contemplated when circumstances arise which create a hardship.

<sup>18</sup> *Id.* at 111.

<sup>19</sup> *Id.* at 111

<sup>20</sup> D.C. CODE § 6-441.07(a) (2001). These six members are: (1) a member or staff member of the National Capital Planning Commission, (2) a member or staff member of the Zoning Commission, (3)

their [the zoning regulations'] general purpose and intent.”<sup>21</sup> All Board meetings are open to the public,<sup>22</sup> and community members can voice their concerns during meetings. The Board is “obligated to give great weight in its deliberations to ‘the issues and concerns raised in the recommendations of’” the neighbors, specifically of the Advisory Neighborhood Counsel (ANC).<sup>23</sup> The BZA can condition its permission on certain criteria that a college or university must meet before the college expands, as implicit in the authority to grant special exceptions is the authority to place reasonable conditions upon such approval.<sup>24</sup> Conditions that the BZA have imposed on colleges and universities include placing an enrollment cap on the number of students, setting a minimum percentage of the students who must live on campus, and requiring the college or university to monitor its students living off campus.<sup>25</sup> The BZA’s conditions must be adhered to by the college or university unless they can prove that the conditions are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>26</sup> Violations of the conditions result in fines, penalties against the University, and possible moratoriums against on-campus construction.<sup>27</sup> If a college or university does not want to or cannot meet the conditions, the next step is to challenge the condition by appealing to a state or federal court.<sup>28</sup>

### C. SPECIAL EXCEPTIONS

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three other residents who are appointed by the D.C. Mayor with at least one of them owning his/her own home. *Id.*

<sup>21</sup> *Id.* § 6-641.07(d).

<sup>22</sup> *Id.* § 6-641.07(c).

<sup>23</sup> Spring Valley-Wesley Heights Citizen Association v. D.C. Zoning Commission, 856 A.2d 1174 (D.C. 2004). This case concerned the 2000 Campus Plan, approved by the Zoning Commission instead of the BZA, at American University in D.C.

<sup>24</sup> *GWU Federal Appellate*, 318 F.3d at 928.

<sup>25</sup> See *infra* Part II(B).

<sup>26</sup> D.C. CODE § 2-510 (a)(3)(A) (2001).

<sup>27</sup> *Georgetown*, 837 A.2d at 63.

<sup>28</sup> Jurisdiction is granted by the D.C. Administrative Procedure Act which allows colleges and universities, among other aggrieved parties, to appeal when they are “suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of . . . an agency . . . in a contested case.” D.C. CODE § 2-509 (2001).

In order to get approved for a special exception, a college or university in D.C. must go through a two-stage process with the BZA.<sup>29</sup> The first stage involves broad and long-term planning with approval of general intentions for a campus plan, while the second stage involves shorter time frames with approval of specific projects.<sup>30</sup>

In the first stage, the college or university must submit a campus plan that describes general intentions for new land use over a substantial time period.<sup>31</sup> Since the 1920s, colleges and universities are required in this stage to demonstrate to the BZA that the use of the campus, under the campus plan, is “not likely to become objectionable in a residential district because of noise, traffic, and number of students.”<sup>32</sup> Recently, colleges and universities have had the extra burden of apprising local neighbors about their intentions to build before seeking approval so that neighborhood groups can prepare for the Board’s public hearing on the proposed building.<sup>33</sup> At the hearings, the Board reviews proposed orders from the college or university and holds public proceedings to get input from various community groups, such as the Department of Public Works, the Office of Planning (“OP”), and Advisory Neighborhood Councils (“ANCs”).<sup>34</sup>

Regarding testimony from these outside groups, the D.C. Court of Appeals has stated that “the Board is required by statute to give ‘great weight’ to the concerns of the ANC and of the OP.”<sup>35</sup> Additionally, the Board is free to give “appropriate consideration” to neighbors’ testimony and complaints of residents.<sup>36</sup> The Board might vote on certain items during public meetings, but the BZA must issue a written order approving the campus plan and articulating the accompanying conditions, if any. The written order is most often released to the parties and to the public months later. The Board must address the issues and concerns raised by the ANC in the written

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<sup>29</sup> *Georgetown*, 837 A.2d at 58.

<sup>30</sup> *Id.* at 66.

<sup>31</sup> For example, the GWU campus plan at issue in *GWU State* and *GWU Federal Appellate* was for a ten-year period, 2001-2010. *GWU State*, 831 A.2d at 926.

<sup>32</sup> D.C. CODE § 6-641.01 (2001); *Georgetown* at 58.

<sup>33</sup> *Spring Valley-Wesley Heights Citizens Assoc. v. District of Columbia Zoning Commission*, 856 A.2d 1174 (D.C. 2004).

<sup>34</sup> *GWU Federal Appellate*, 318 F.3d at 64.

<sup>35</sup> *GWU State*, 831 A.2d at 25.

<sup>36</sup> *Id.*

rationale, explaining and elaborating why the ANC, “given its vantage point, does—or does not—offer persuasive advice under the circumstances.”<sup>37</sup>

If the campus plan is approved, the BZA often conditions its approval on a set of requirements which are designed to minimize the impact of the proposed development.<sup>38</sup> If the campus plan is denied, the BZA must submit a written answer explaining why, and the college or university then has the opportunity to amend and resubmit their campus plan. A D.C. college or university, dissatisfied with the conditions on which the campus plan is contingent or in disagreement with a denial of the campus plan, may appeal the BZA’s decision to a federal or state appellate court.<sup>39</sup>

Once the campus plan is approved the second stage begins. In the second stage the Board reviews specific projects that the college or university intends to undertake, evaluating the changes to ensure they are consistent with the campus plan and zoning regulations. Colleges and universities cannot make improvements that are inconsistent with the campus plan.<sup>40</sup> Proceedings for the second stage occur when the college or university is ready to begin making the changes outlined in the campus plan, ranging from a few days to years after the campus plan has been approved during stage one. Here, again, public meetings are held with the BZA and concerned local groups, with the BZA making the final decision whether each project will proceed and under what conditions. Neighbors and local groups have the same opportunity to voice their concerns and issues in the second stage of the special exception process as in the first.

Despite the sometimes lengthy two-stage review process, special exceptions are most often granted.<sup>41</sup> In reviewing a request for a special exception:

The Board is limited to a determination whether the exception sought meets the requirements of the particular regulation on which the application is based. The applicant has the burden of showing that the proposal complies with the

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<sup>37</sup> Levy v. District of Columbia Bd. of Zoning Adjustment, 570 A.2d 739, 746 (D.C. 1990).

<sup>38</sup> *Id.* See *infra* Part III for a discussion of conditions imposed on Georgetown and GWU.

<sup>39</sup> D.C. CODE § 2-509 (2001).

<sup>40</sup> Levy, 570 A.2d at 749.

<sup>41</sup> *GWU Federal Appellate*, 318 F.3d at 208.

regulation; but once that showing has been made, the Board ordinarily must grant the application.<sup>42</sup>

Both George Washington University and Georgetown College have undergone this two-stage special exception process, as both campuses are located on some land by right and on other land by special exception. For both GWU and Georgetown recent litigation occurred after the first stage, with GWU appealing the revised conditions<sup>43</sup> and Georgetown appealing conditions that the BZA imposed with its approval.<sup>44</sup> GWU challenged the conditions imposed in the order from the Board, contending that some of the long-range conditions were arbitrary, capricious, and irrational, and in the contrary, that the BZA's short-term conditions lacked any rational basis and had no significant relationship to the BZA's goals or to a legitimate zoning purpose.<sup>45</sup> Additionally, GWU claimed that the conditions discriminated against students and were therefore invalid because they violated the District of Columbia's Human Rights Act ("DCHRA").<sup>46</sup>

In *Georgetown*, the BZA justified the nineteen conditions they imposed as necessary to protect Georgetown's neighbors from problems caused by university residents, such as increased traffic and noise.<sup>47</sup> Georgetown challenged the conditions arguing, as the court states, that several were not supported by substantial evidence, some addressed issues "not within the authority or competence" of the BZA, and that the Board had overstepped its bounds by "intruding into the minutiae of university administration."<sup>48</sup>

## II. CONTEXT: GWU & GEORGETOWN NEIGHBORHOODS

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<sup>42</sup> *Id.* at 208 (citation omitted).

<sup>43</sup> GWU first chose to appeal the conditions in the federal court system. The case went to a federal district court and was remanded to the BZA after the court issued a preliminary injunction against some of the conditions. Upon reviewing the Revised Conditions, GWU again brought suit in federal district court. Some of the Revised Conditions were found unconstitutional by the district court, and both parties appealed to the Court of Appeals for the Federal Circuit. *GWU Federal Appellate* is the Circuit Court's review of the Revised Conditions.

<sup>44</sup> *Georgetown*, 837 A.2d at 58.

<sup>45</sup> *GWU State*, 831 A.2d at 927

<sup>46</sup> *Id.*

<sup>47</sup> *Georgetown*, 837 A.2d at 66.

<sup>48</sup> *Id.* at 58.

George Washington University, established by federal charter in 1821, is named after the nation's first president and located in the Foggy Bottom-West End ("Foggy Bottom") area of D.C.<sup>49</sup> Foggy Bottom, a neighborhood of primarily single-family households,<sup>50</sup> is in the western part of D.C., south of Dupont Circle and between Lafayette Square and Georgetown.<sup>51</sup> It's on the Potomac River and was once considered a neighborhood primarily for the city's industrial workers, with buildings dating from the 1870s to the 20<sup>th</sup> century.<sup>52</sup> Located in this historic district, GWU's campus includes all three types of zones: commercial, residential, and special purpose.<sup>53</sup> GWU is located by right in the area zoned for high-density commercial use and by special exception in the areas zoned for residential and special purpose.<sup>54</sup>

Georgetown University, founded in 1789 and the oldest Catholic and Jesuit University, has a 104-acre campus located in the Georgetown neighborhood of D.C. The neighborhood is located in the northwest corner of the city and traditionally was and still is considered a "fashionable," more affluent area of the city.<sup>55</sup> The neighborhood consists of historic homes and parks, specialty and chain retail stores, restaurants, and the University. Notably, the D.C. public subway (Metro) system does not reach to Georgetown. While much of the neighborhood area occupied by Georgetown is zoned for residential use, specifically low-to-moderate density residential row dwellings, the University, like GWU, is located on land zoned for all three uses: residential, commercial, and special purpose.<sup>56</sup>

### **III. COLLEGE AND UNIVERSITY CHALLENGES TO ZONING BOARD'S AUTHORITY**

Colleges and universities have recently challenged the Washington, D.C. BZA on both constitutional grounds and state law grounds, claiming that the zoning board has exceeded its

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<sup>49</sup> See [www.gwu.edu](http://www.gwu.edu) for information on George Washington University.

<sup>50</sup> <http://www.cr.nps.gov/nr/travel/wash/dc20.htm> Last visited March 31, 2005.

<sup>51</sup> See [www.culturaltourism.org/information2550/information.htm?area=2525](http://www.culturaltourism.org/information2550/information.htm?area=2525).

<sup>52</sup> *Id.*

<sup>53</sup> *GWU State*, 831 A.2d at 921.

<sup>54</sup> *Id.*

<sup>55</sup> <http://www.cr.nps.gov/nr/travel/wash/dc15.htm>. Last visited March 31, 2005.

<sup>56</sup> *Georgetown*, 837 A.2d at 63.

authority, including discriminating against students and imposing unreasonable conditions on the granting of a special exception. When successful, a college or university will not have to satisfy those conditions upon which the campus plan is contingent. GWU was not ultimately successful in federal court, nor were they or Georgetown successful in state court when challenging recent conditions.

#### **A. CONSTITUTIONAL CHALLENGES**

Due process, as guaranteed by the Fifth Amendment of the United States Constitution, has been grounds for challenging the BZA's authority as imposed on a college or university. GWU originally brought this claim in federal district court,<sup>57</sup> but the decision was appealed by both GWU and D.C. to the Federal Circuit in 2002.<sup>58</sup> At the district court level, the University was partially successful, the court holding that certain of the BZA's conditions were unconstitutional.<sup>59</sup> The Board's order was then remanded back to the BZA for reconsideration of certain conditions including the requirement that GWU must house approximately 70% of their undergraduate students either on-campus or outside of Foggy Bottom.<sup>60</sup> Both sides appealed from the district court's decision, and on appeal, the decision was reversed, the U.S. Court of Appeals for the District of Columbia holding there were no constitutional violations in the BZA order.<sup>61</sup>

The D.C. Circuit applied the Eight Circuit's test of whether "the statute or regulation [granting the BZA its authority to decide on special exceptions] places substantial limits on the government's exercise of its licensing discretion."<sup>62</sup> Finding that the BZA, in essence, must grant a special exception if the qualifying criteria are met and also that that BZA's process of application of the regulations indicated that the BZA recognized substantial limits on its discretion, the court held that the regulations imposed the necessary "substantial limits" on the BZA's

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<sup>57</sup> *George Washington Univ. v. District of Columbia*, 148 F. Supp. 2d 15 (D.D.C. 2001) (hereinafter *GWU Federal District*).

<sup>58</sup> *GWU Federal Appellate*, 318 F.3d at 203.

<sup>59</sup> *GWU Federal District*, 148 F. Supp. at 15.

<sup>60</sup> *Id.* at 15.

<sup>61</sup> *GWU Federal Appellate*, 318 F.3d at 212.

<sup>62</sup> *Id.* at 207 (quoting *Bituminous Materials v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997)).

discretion.<sup>63</sup> The BZA can deny a college or university a special exception only if the proposed use is “likely to become objectionable,” and the court felt this limitation was sufficient to constitute “substantive limitations on official discretion,” as required by statute.<sup>64</sup> Additionally, the court found the BZA’s procedures and conduct to be indicative of it realizing limits on its discretion, finding that the BZA’s procedures were formal and noting that the order included detailed findings of fact and reasoning.<sup>65</sup> The court found no substantive due process violation but declined to rule on whether a similar challenge could be brought in state court. Unsatisfied with the result in federal court, GWU brought a later action in state court challenging some of the same conditions.<sup>66</sup>

## **B. WHEN THE BZA EXCEEDS ITS BOUNDS**

Since BZAs are local boards promulgated by state law, challenges to authority can also be brought in state courts. Applying local law, state courts have a broader scope of review for a BZA decision than does a federal court.<sup>67</sup> As the highest local court in D.C. stated, while the facts are the same in state and federal court, the state court looks at the facts “through a significantly different legal prism.”<sup>68</sup> Therefore, it is possible for a college or university to prevail in state court, even if does not do so in federal court.

### **i. DISCRIMINATION BASED ON STUDENT STATUS**

George Washington University challenged the Board contending that the imposed conditions violated the District of Columbia’s Human Rights Act (“DCHRA”) by discriminating against

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<sup>63</sup> *Id.* at 208.

<sup>64</sup> *Id.* at 208; *See also* D.C. Mun. Regs., tit.11, § 210.1.

<sup>65</sup> *GWU Federal Appellate*, 318 F. 3d at 208.

<sup>66</sup> In the federal court, due process “imposes only very slight burdens on the government to justify its actions,” but state law holds local government to a stricter standard. *Id.* As a result, a party might get a different result in state court than in federal court.

<sup>67</sup> *GWU State*, 831 A.2d at 931 (discussing different legal standards between the case at hand and prior federal litigation).

<sup>68</sup> *Id.* at 931.

students.<sup>69</sup> The DCHRA is intended to prohibit discrimination for any reason “other than that of individual merit, including. . . matriculation.”<sup>70</sup> Matriculation is defined as “the condition of being enrolled in a college, or university,”<sup>71</sup> and, therefore, college students are a protected class under the DCHRA.<sup>72</sup>

The D.C. BZA responded to GWU's claim by stating that the DCHRA does not apply to the activities of the BZA or to zoning at all.<sup>73</sup> The court held to the contrary that the DCHRA does apply to the BZA's administration of zoning laws and must be considered in combination with the District's Comprehensive Plan and applicable zoning regulations.<sup>74</sup> The D.C. Comprehensive Plan, enacted in 1984 by the Council of the District of Columbia, is a document used to forecast growth and planning in D.C.<sup>75</sup> The Comprehensive Plan directs the BZA and other agencies to consider its objectives when evaluating, among other things, campus plans.<sup>76</sup> The Plan includes detailed provisions for each neighborhood in D.C., and a “major theme” of the Plan is to “stabilize and improve the District's neighborhoods.”<sup>77</sup> In discussing the Foggy Bottom area of D.C., the Comprehensive Plan states:

Intense student pressure on Foggy Bottom's housing stock outside the campus, combined with the impact of university generated traffic has had a negative effect on residential Foggy Bottom. The University must continue to construct student dormitories to alleviate pressure on the housing stock outside of the boundaries of the campus plan. The University must be sensitive to the surrounding residential neighborhood.<sup>78</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 939.

<sup>71</sup> D.C. CODE § 2-1401.02(18) (2001 & 2003 Supp.).

<sup>72</sup> *GWU State*, 831 A.3d at 938.

<sup>73</sup> *Id.* at 938.

<sup>74</sup> *Id.* at 927.

<sup>75</sup> *Id.* at 941. See also D.C. MUN. REGS., tit 11, § 101.1(a). The current version of the Comprehensive Plan, a detailed planning document proposed by the mayor of D.C. and enacted by the Council of the District of Columbia, was enacted in 1984.

<sup>76</sup> *GWU State*, 831 A.3d at 941.

<sup>77</sup> *Id.* at 942.

<sup>78</sup> D.C. MUN. REGS., tit. 10, § 1358.1.

The Council of the District of Columbia enacts the Comprehensive Plan, and they are committed to following the DCHRA since its enactment in 1977.<sup>79</sup> Applying the DCHRA to the facts at hand and looking at the situation as a whole, the court found that the BZA was within their bounds to condition approval because the number of students has an impact in the surrounding neighborhood, and conditions designed to minimize the effect of the students can be considered.<sup>80</sup> The Council does not “consider the long-standing practice of considering the ‘number of students’ in the BZA’s assessment of campus plans as constituting forbidden discrimination on account of matriculation.”<sup>81</sup> A main purpose of the revised conditions was the protection of Foggy Bottom from the perceived problems of too many students that would result from further “encroachment” into the neighborhood.<sup>82</sup> Accordingly, the BZA was within their bounds when using the number of students as a factor in trying to alleviate and assessing impact on the surrounding Foggy Bottom neighborhood. The conditions designed to reduce the impact based on requiring a certain percentage of on-campus housing were not a violation of the DCHRA when considered in light of the Comprehensive Plan and local zoning regulations.<sup>83</sup>

Georgetown attempted to use the same discrimination argument when it challenged the BZA conditions, and the same D.C. court quickly reached the same conclusion.<sup>84</sup> The court stated it was an “identical contention” to the one made by GWU, and confirmed that the University could not win on that point because the DCHRA did not invalidate the zoning regulations.<sup>85</sup>

## ii. ARBITRARY AND CAPRICIOUS CONDITIONS

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<sup>79</sup> *GWU State*, 831 A.2d at 941.

<sup>80</sup> *Id.* at 943.

<sup>81</sup> *Id.* at 943.

<sup>82</sup> *Id.* at 941-942.

<sup>83</sup> *Id.*

<sup>84</sup> *Georgetown*, 837 A.2d at 66 n6.

<sup>85</sup> *Id.*

Conditions that the BZA impose on colleges and universities cannot be arbitrary or capricious.<sup>86</sup> Courts have upheld a number of conditions which do not seem, at least on the surface, to be within the traditional realms of the BZA's authority, i.e., to grant variances, make special exceptions, and exercise other powers authorized by the Zoning Act of 1938.<sup>87</sup> Despite the seeming disconnect, the BZA is allowed to impose conditions which will reduce the neighborhood impact, but the BZA is not allowed to control university processes and procedures.

For example, in *GWU State*, the D.C. Court of Appeals held that requiring the University to acquire on-campus or non-Foggy Bottom off-campus housing within a few months for approximately 1500 undergraduates was arbitrary and capricious.<sup>88</sup> The court held that the BZA failed to publish adequate findings that it would be possible for the University to do this in such a short time, and the Board also failed to address new parking and traffic concerns this requirement would create.<sup>89</sup>

As another example, the same court held in *Georgetown* that the BZA's condition that an enrollment freeze be installed so that student population would remain at 1990 levels until the year 2010 was arbitrary and capricious and crossed the line between exercise of legitimate zoning and ultra vires intrusion upon the University's mission.<sup>90</sup> There were not sufficient evidentiary findings to explain the BZA's conclusion of the enrollment freeze, and the court overturned the BZA's ruling saying:

[The focus of reasoning] was on the use of the [enrollment] cap as a means by which the Board could place financial pressure on the University and could make Georgetown's 'shoe pinch' until the University did what. . . 'the community' wanted done. . . . [T]he record lacks substantial evidence supporting the BZA's freeze of the University's enrollment, potentially until 2010, at the level set in 1990.<sup>91</sup>

Another condition which the court found unrelated to the BZA's expertise and did not promote the goal of a reasonable accommodation between Georgetown University and its

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<sup>86</sup> *GWU State*, 831 A.2d at 932.

<sup>87</sup> D.C. MUN. REGS., tit. 11, §3100.1 (2003).

<sup>88</sup> *GWU State*, 831 A.2d at 947.

<sup>89</sup> *Id.* at 947.

<sup>90</sup> *Georgetown*, 837 A.2d at 74.

<sup>91</sup> *Id.* at 76.

neighbors was the requirement that a complaint hotline, primarily used to address neighbors' concerns, be staffed twenty-four hours a day.<sup>92</sup> Similar to the enrollment cap condition, the court found that requiring a complaint hotline was within BZA's bounds, but forcing the university to staff the hotline continuously, even though few, if any, calls were received on weekdays during normal business hours, exceeded the scope of BZA's authority.<sup>93</sup> Additionally, conditions which specify the composition of a Hearing Board designed to respond to complaints and sanction student violations<sup>94</sup> and a requirement to inform a student's parents when that student has violated a housing rule<sup>95</sup> are unreasonable and outside the BZA's scope of authority.

In sum, while the Board has the authority to impose certain conditions, they do not have the authority to give exact specifications on how those conditions must be carried out. In specifying how the conditions must be executed, the BZA is imposing on the college or university's educational mission and is overstepping their own administrative bounds. Court opinions show that the Board must explain their reasoning for these specific conditions and justify why a high level of control is necessary.

### C. CONSEQUENCES OF VIOLATING A CONDITION

There are strict penalties for not adhering to the conditions that the BZA imposes, which is likely part of the reason colleges and universities are quick to challenge the conditions in court. Most often, a penalty imposed by the BZA is placing a moratorium on any nonresidential on-campus construction. As contained in Condition 19 in Georgetown College's special exception approval, a violation by the University of any of the conditions "shall be grounds, inter alia, for placing a moratorium on any nonresidential on-campus construction and for the imposition of fines or penalties against the University."<sup>96</sup> The lesser penalty of a fine is not cause for concern

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<sup>92</sup> *Id.* at 78.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 79 (stating that the BZA's expertise "in land use issues does not... translate into special competence regarding the proper staffing of a University's disciplinary body." *Id.* at 79).

<sup>95</sup> *Id.* at 80.

<sup>96</sup> *Georgetown*, 837 A.2d 58 at 63.

by most colleges and universities, yet the moratorium penalty is considered quite severe. The moratorium penalty is justified because it serves the purpose of restricting non-residential new construction when that land space could instead be used to construct new residences.

GWU is subject to the moratorium penalty per Revised Condition 9(e). It specifies a non-residential moratorium for on-campus building if GWU fails to provide on-campus beds as required.<sup>97</sup> The reasoning behind this condition is that the University should be punished for not meeting the requirements of the campus plan and instead diverting resources to other new expansion. A witness for GWU admitted at trial, “We have a mature, older campus, and it’s getting to be a zero sum that, if you do academic, you can’t do housing.”<sup>98</sup> In essence, the witness told the court there are limited resources—both money and, more importantly, available land—and if those resources are used for creating new academic classrooms, offices, or laboratories, that space cannot be used for residences. In *GWU State*, the D.C. court found that this penalty, if imposed for a meaningful violation was not necessarily irrational and unreasonable and indeed, without such a penalty, the conditions, as a practical matter, would be unenforceable.<sup>99</sup> In *Georgetown*, however, the same court explained that applying such a strict penalty to a de minimis or unrelated condition would be considered inappropriate and unreasonable.<sup>100</sup>

#### **D. PROBLEMS WHEN COURTS CHANGE THEIR MINDS**

As the series of *GWU* decisions show, parties often appeal the court’s rulings or try other avenues, i.e., federal or state court, to get the result they desire. Because cases are remanded and overturned, both the college or university and the BZA are potentially left in a confusing situation. In order to compensate for this uncertainty, the D.C. Court of Appeals has looked at the practicality of the situation and allowed equity to be a factor in making their decision.

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<sup>97</sup> *GWU State*, 831 A.2d at 934.

<sup>98</sup> *Id.* at 935 n11.

<sup>99</sup> *Id.* at 936.

<sup>100</sup> *Georgetown*, 837 A.2d at 63.

For example, the federal district court in *GWU Federal Appellate* held that some of the BZA's conditions were unconstitutional, and therefore, GWU did not have to follow them.<sup>101</sup> On appeal, however, the Court of Appeals for the Federal Circuit reversed the earlier ruling, holding that all of BZA's regulations and conditions were constitutional, and therefore, the University was required to meet those conditions.<sup>102</sup> Between the first case and the appeal, while the conditions were considered unconstitutional, GWU was—understandably—not making any progress toward the on-campus housing requirement. Because of the judicial process, the D.C. state court held in *GWU State* that GWU could not reasonably be expected to meet the goal at the prior deadline and not granting an extension or providing some other equitable change in the condition was unacceptable.<sup>103</sup> The court held that the BZA must allow the university to include in its total percentage of on-campus housing the Foggy Bottoms residences which had been created for freshman, even though originally this housing unit was not to be factored into the minimum required by the university.<sup>104</sup>

### III. AFFECTED PARTIES

Four main groups affected by the BZA rulings and court proceedings are (1) neighbors, (2) students, (3) BZAs, and (4) colleges and universities. These four groups have a relationship both inside and outside the courtroom. Colleges and university neighbors are no strangers to BZA meetings where special exception proceedings are held or to the courtroom where the BZA rulings are appealed. While the students are transient residents at colleges and universities, often they remain in the communities where they obtained their degree, later becoming neighbors.<sup>105</sup>

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<sup>101</sup> 148 F.Supp.2d 15.

<sup>102</sup> *GWU Federal Appellate*, 318 F.3d at 206.

<sup>103</sup> *GWU State*, 831 A.2d at 929.

<sup>104</sup> *Id.*

<sup>105</sup> For example, over one-third of 2002 Georgetown Law graduates remain in D.C. to practice after graduating. See <http://www.law.georgetown.edu/career/placement.html>.

## A. NEIGHBORS

Neighbors have the opportunity to speak out by contacting local zoning boards, creating Advisory Neighborhood Commission (ANCs), and complaining to courts. The BZA, in trying to please both the university and neighborhood residents, listens to the complaints, and gives a lot of deference to the neighbors' issues and concerns. In fact, the "Board is required by statute to give 'great weight' to the concerns of the ANC."<sup>106</sup> Given the purpose of zoning, it is imperative that zoning regulations and the Boards that enforce those regulations are doing the best they can to improve the community and keep local residents living harmoniously with neighboring colleges and universities. Like the BZA, courts also place weight on what the neighbors have to say, allowing them to testify in open court as to the impact the university and its students have had on the neighborhood.

Unfortunately for colleges and universities, most often the people who speak out are the ones who are unhappy about the university students. Neighbors complain about extra trash, noise, and traffic created by students. In the Georgetown neighborhood local residents complained at their regular meeting not only about students but about additional inconveniences, such as debris and noisy trucks, brought about by on-campus construction of the Southwest Quadrangle.<sup>107</sup> Interestingly enough, the construction of those buildings was being done with permission from the BZA after the Board had addressed neighborhood concerns and decided that in order to reduce off-campus housing the University had to construct new on-campus residences.<sup>108</sup> Georgetown had even fast-tracked the project and lobbied to have a temporary traffic light installed to avoid some of the traffic dilemmas.<sup>109</sup> Despite the University's efforts and even with a blessing from the BZA, the BZA, local neighbors still complain. As an article in Georgetown's student the BZA, local neighbors still complained. As an article in Georgetown's

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<sup>106</sup> *GWU State*, 831 A.2d at 933. See also D.C. CODE §§1-309.10(d)(3)(A), 6-623.04 (2001).

<sup>107</sup> Editorial, *Construction Complaints Too Loud*, THE HOYA, Jan. 23, 2001. Found at <http://www.thehoya.com/editorials/012301/edit.htm>. *The Hoya* is Georgetown University's student newspaper.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

student newspaper concludes, “[S]ome neighbors complain just for the sake of complaining.”<sup>110</sup> With any new construction there will be some inconveniences and neighbors should remind themselves that the end result of the project will be fewer undergraduates living down the street, renting from absent landlords and more undergraduates sleeping on campus property, under University control.

Some neighbors, however, do speak up even when they have good things to say. In *Georgetown*, letters supporting the University and off-campus students were submitted by neighbors, testifying that university students and faculty provide tutoring to neighboring elementary school children, give medical outreach services, and assist economic and human development of community organizations.<sup>111</sup> This evidence that colleges and universities are serving the community in positive ways could also be used to help convince BZAs to grant special exceptions, and, college and universities hope it will also help other neighbors see the benefits of having a college or university in their neighborhood.

## **B. UNIVERSITY STUDENTS**

Notably absent from court decisions and discussions at BZA meetings are the people who are really suffering the consequences of the college and university zoning regulations: the students. It is students who must move from dorm to dorm and who are required to live on campus. It is the students who pay the price of housing—either on-campus or off—and increased tuition to fund new building projects. When students are required to live on campus, they are also forced to pay the university-regulated price of on-campus housing; few undergraduate students at GWU and Georgetown, in particular freshman and sophomores, are permitted the luxury of price-shopping for housing. Off-campus housing in D.C. is expensive, and an on-campus option does allow students easy access to housing close to other university

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<sup>110</sup> *Id.*

<sup>111</sup> *Georgetown*, 837 A.2d at 64.

amenities. Being guaranteed a bed on-campus has different connotations from being forced to live on campus, however, and not all students prefer to remain on campus.

Another result of the BZA decisions has been the enrollment cap. Perhaps surprisingly, at least one student<sup>112</sup> agrees that these caps are for the best. In the student newspaper he wrote that dorms and classrooms were already “cramped,” and he reminisced about freshman living in dorm lounges because of a lack of housing.<sup>113</sup> Of course, not all students agree, and some question why a local Board has more authority about school affairs than do college and university officials.

### **C. BOARDS OF ZONING ADJUSTMENT**

The D.C. BZA has better defined parameters for their conditions and rulings after these cases. Having courts rule that the BZA has overstepped its bounds further defines and elaborates on the statutory authority granted to these administrative agencies. This should help define the reach of the BZA and clarify what conditions they can lawfully impose and which are outside their expertise. From the *GWU* and *Georgetown* cases the BZA has learned they can impose conditions that achieve their goals of preventing noise, traffic, and other objectionable conditions in neighborhoods, but the college or university should be left to their own methods in achieving those goals.

Some confusion remains, however, because, as seen in the *GWU* set of cases, not all courts apply the same standards and reach the same conclusions.<sup>114</sup> Instead of clarifying the role of the BZA this could be seen as muddying the waters, and without a careful plaintiff, the BZA may outstep its bounds. Those who are subject to the BZA's orders must pay attention to the conditions and decide the best forum to pursue legal action, if they indeed decide to do so.

Courts occasionally warn the BZA when they are close to stepping out of bounds by remanding a

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<sup>112</sup> Matthew Axelrod, Georgetown University, Class of 2002.

<sup>113</sup> Matthew Axelrod (Editorial), *Student Commends GU Enrollment Cap*, THE HOYA, Apr. 10, 2001. See <http://www.thehoya.com/editorials/041001/edit4.htm>.

<sup>114</sup> See *supra* notes 57-68 and accompanying text (discussing different standards and results between federal and state courts).

case without making a ruling per se on that issue.<sup>115</sup> In doing so, the courts might also be giving the plaintiff an idea to bring the action in another court or providing additional grounds for appeal.

#### **D. COLLEGES AND UNIVERSITIES**

Colleges and universities have learned the hard way that they must object early to BZA rulings, and if they want to contest a condition in the special exception approval, they better do it “loudly and clearly” or risk waiving that issue on appeal.<sup>116</sup> By stating this prominently in their decisions, courts established that colleges and universities need to be consistent in what they present to the Board and should be ready to accept the consequences of their actions. Courts have not looked favorably on colleges and universities who make a suggestion regarding, for example, a specific number for an enrollment cap, then chose to raise issue with that number on appeal.<sup>117</sup> In addition, in the future colleges and universities ought to be more careful about what they concede to during BZA hearings because courts hold universities to their statements. Campus plans should be drafted thoughtfully and broadly, so as not to preclude later options.

Creating an on-campus group of students who is able to recruit community members and neighbors to testify about positive impacts college and university students are having on the community would also benefit the university. This would promote good neighbor relations while also establishing a base of neighbors who look favorably upon the college or university and its students.

Due to conflicting court decisions and local zoning regulations, it is difficult for colleges and universities to compare their circumstances to other institutions in other cities and states. However, all colleges and universities can be jointly concerned about their role and voice in zoning proceedings. Concerns about losing revenue from tuition and having to cap the number of undergraduates are real and universal among colleges and universities. Additionally, colleges

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<sup>115</sup> See e.g., *Georgetown*, 837 A.2d at 82 (“On remand, however, the BZA may wish to take a fresh look at this provision to determine whether it is likely to accomplish what it is apparently designed to achieve.”)

<sup>116</sup> *Id.* at 73.

<sup>117</sup> *GWU State*, 831 A.2d at 937–938.

and universities can be concerned about their reputations—possibly a good reputation could develop if there are good relations between the college or university and its on-campus residents, however, if students feel their voices are not heard or that the college or university lacks the power to achieve their goals, then the university will suffer.

## **CONCLUSION**

The relationship between neighbors and colleges and universities is a tenuous one, and each is very aware of the other. Local BZAs are in the difficult position of balancing the interests of both in order to promote an integrative community. Neighborhoods continue to struggle with the evolution and consequences of zoning regulations and procedures. Recent court decisions in Washington, D.C., have helped to define the parameters of the local BZA's authority, and colleges and universities are becoming more careful in their campus plans realizing they can challenge BZA's regulations but must be consistent in order to be successful. Nonetheless, BZAs, neighbors, and colleges and universities must continue to understand each other's needs in order to foster healthy communities, and courts must continue to clarify and refine the boundaries of the BZA's authority so that colleges and universities can adequately plan and stop spending their time and money on lengthy court proceedings.

## Bibliography

Matthew Axelrod (Editorial), *Student Commends GU Enrollment Cap*, THE HOYA, Apr. 10, 2001. <http://www.thehoya.com/editorials/041001/edit4.htm>.

D.C. CODE § 2-509 (2001).

D.C. CODE § 2-510 (a)(3)(A) (2001).

D.C. CODE § 2-509 (2001).

D.C. CODE § 2-1401.02(18) (2001 & 2003 Supp).

D.C. CODE § 6-441.07(a) (2001).

D.C. CODE § 6-641.01 (2001).

D.C. MUN. REGS., tit. 10, § 1358.1 (2003).

D.C. MUN. REGS., tit 11, § 101.1(a) (2003).

D.C. Mun. Regs., tit.11, § 210.1 (2003).

D.C. MUN. REGS., tit. 11, §3100.1 (2003).

JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 952 (5th ed. 2002).

Editorial, *Construction Complaints Too Loud*, THE HOYA, Jan. 23, 2001. Found at <http://www.thehoya.com/editorials/012301/edit.htm>.

George Washington Univ. v. District of Columbia Bd. of Zoning Adjustment, 831 A.2d 921 (D.C. 2003).

George Washington Univ. v. District of Columbia, 318 F.3d 203 (D.C. Cir. 2003).

George Washington Univ. v. District of Columbia, 148 F. Supp. 2d 15 (D.D.C. 2001).

<http://www.cr.nps.gov/nr/travel/wash/dc15.htm>.

<http://www.cr.nps.gov/nr/travel/wash/dc20.htm>.

<http://www.culturaltourism.org/information2550/information.htm?area=2525>.

<http://www.gwu.edu>.

<http://www.law.georgetown.edu/career/placement.html>.

Levy v. District of Columbia Bd. of Zoning Adjustment, 570 A.2d 739, 746 (D.C. 1990).

DANIEL R. MANDELKER, LAND USE LAW (4th ed. 1997).

Marjorie Webster Junior Coll., Inc. v. District of Columbia Bd. of Zoning Adjustment 309 A. 2d 316 (D.C. 1973).

President and Directors of Georgetown College v. District of Columbia Bd. of Zoning Adjustment, 837 A.2d 58 (D.C. 2003).

Spring Valley-Wesley Heights Citizens Assoc. v. District of Columbia Zoning Commission, 856 A.2d 1174 (D.C. 2004).