

May 17, 2019

VIA IZIS

Anthony Hood, Chairman
D.C. Zoning Commission
Office of Zoning
441 4th Street, N.W., Suite 200-S
Washington, DC 20001

Re: **Case No. 18-19: Pre-Hearing Submission – Lots 97, 1025-1031, 1036, and 1037
in Square 5860, and Lots 991 and 89 in Square 5861 (the “Property”)**

Dear Chairman Hood and Members of the Commission:

In accordance with 11-Z DCMR §401.5, the Petitioner hereby supplements the Map Amendment Petition for the Property to the Northern Howard Road (“NHR”) Zone District. Petitioner would like to address some concerns raised in the record and in the Commission’s related conversations in Zoning Commission Case 18-18. Aristotle Theresa, Aiyi’nah Ford, and Current Area Residents East of the River (“CARE”) alleged in filings in the case record that the case was inappropriately set down as a rulemaking when it should be considered as a contested case (Exhibits 40, 41, and 45). Petitioner has discussed this issue with Mr. Theresa, Ms. Ford, and CARE, and they have withdrawn their opposition to the Petition as shown in Exhibit 48 in the Record. However, Petitioner would still like to address the concerns they raised for the case record. Further, Commissioners raised concerns about how to weigh the Petition given the Community Benefits Agreement (“CBA”) Petitioner entered into the case record at Exhibit 44A based on the Commission’s request. Therefore, Petitioner provides the below detail and context for the map amendment.

Petitioner maintains the map amendment was appropriately set down by the Commission as a rulemaking.¹ The Map Amendment petitions to rezone a large, strategically located site near the Metrorail station which will have a key role in the redevelopment of Ward 8. The eight-acre Property is separated by Howard Road and located in two separate Advisory Neighborhood Commissions (“ANCs”). The Property will be a prominent new neighborhood near the South Capitol Street Corridor Project (where the new Frederick Douglass bridge will be located) and

¹ Zoning Commission Case 18-18, which proposes the NHR Zone District, is, by definition a rulemaking case. Filed by the Office of Planning, this text amendment considers broad policy implications through the creation of a new Special Purpose Zone for a large area in the District ripe for development. Pursuant to 11-Z DCMR § 201.5(a), all text amendments to the Zoning Regulations are rulemaking cases. Further, 11-Z DCMR § 201.6 notes cases filed by an Office of Planning report are rulemaking cases.

will serve as a gateway to Poplar Point, which is a major policy priority. The Petition will achieve consistency with the high-density commercial and residential uses in the Central Employment Area called for in the Comprehensive Plan. Thus, the Map Amendment petitions for a policy-based decision to effectuate the Comprehensive Plan's call for greater density, affordable housing, and sustainability for a broad area of the District with a significant impact in this Ward. Therefore, it is appropriately categorized as a rulemaking.

The Zoning Commission is empowered to conduct rulemaking proceedings by the D.C. Code and the Zoning Regulations.² According to the Zoning Regulations, "rulemaking cases are legislative in nature and present issues for resolution at a public hearing that potentially affect large . . . property or the public in general."³ Further, the Regulations state that map amendments initiated by private entities when "the petitioner does not own all of the property proposed to be rezoned . . . or [the property] otherwise [is] of a character that raises land use policy questions to a greater degree than highly localized issues of fact and effects on neighboring properties" are categorized as rulemakings.⁴ In this case, Petitioner does not own all of the Property. Further, given the Comprehensive Plan's Future Land Use Map for the Property in contrast with its current Zoning designation, the Petition presents larger "land use policy" questions that are not focused on "localized issues of fact or effects on neighboring properties" because the Petition is for a large swath of land to be developed at some point in the future consistent with the Comprehensive Plan. Therefore, the Petition is appropriately categorized as a rulemaking under the Zoning Regulations.

The Court of Appeals has repeatedly affirmed the ability of the Zoning Commission to rezone property through rulemaking action.⁵ The Court has clarified the distinction between contested cases and rulemakings by noting that in contested cases the Commission is "primarily concerned with the immediate legal rights, duties, or privileges of specific parties, rather than with general policy of future applicability"⁶ while in rulemaking cases the Commission is "acting in a legislative capacity, making policy decisions directed toward the general public."⁷ Further, the Court has clarified that when a case "involv[es] the broad-based issue of the appropriate future development of an area of the District of Columbia," the case is appropriately classified as a rulemaking.⁸ Here, the Petition aligns with the cases where the Court has upheld rulemaking decisions because the Petition is about "policy decisions directed toward the general public" for the "broad-based issue of the appropriate future development of an area of the District." The Petition furthers the Comprehensive Plan's Future Land Use, housing, affordable housing, and sustainability policies for the future development of this large area of the District.

The Zoning Commission has repeatedly rezoned properties through the rulemaking process when initiated by private parties, including many properties of smaller size, singly-

² D.C. Code §6-641.01 (2019); 11-Z DCMR §100.6.

³ 11-Z DCMR §201.5.

⁴ 11-Z DCMR § 201.7(b).

⁵ See, e.g., *Schneider v. District of Columbia Zoning Commission*, 383 A.2d 324 (1978) (dismissing a petition for review of a rezoning because the rezoning was appropriately decided as a rulemaking).

⁶ *Capitol Hill Restoration Society v. District of Columbia Zoning Commission*, 287 A.2d 101, 105 (1972) (internal quotations omitted).

⁷ *Chevy Chase Citizens Association v. District of Columbia Zoning Commission*, 327 A.2d 310, 313 (1974).

⁸ *Schneider*, 383 A.2d at 329.

owned, less spread out than the Property, and with fewer public policy considerations.⁹ The Petitioner recognizes there is currently an appeal of a rezoning by the Commission decided as a rulemaking.¹⁰ While the Petitioner does not agree with the appellant's contention that the Commission erred in considering that rezoning a rulemaking, even if the Court were to grant the appellant's contention, the Petition here is distinguishable in many ways. Most primarily, the property at issue in the *PAL* appeal is a single lot owned by a single entity. Therefore, the Commission's decision was focused on a smaller area of the District with a more limited impact. By contrast, the Property covers an eight-acre area composed of multiple lots owned by individuals more than the Petitioner which has broader policy implications about future development in this area. Additionally, the *PAL* appeal largely centered on the ability of the property owner to appropriately participate in the proceedings before the Commission. Conversely, the Petition here, similar to the rulemaking in Zoning Commission Case 18-18, will involve a "wide cross section of the community stat[ing] their views, pro and con, about the proposed amendment."¹¹ Therefore, even if the Court reversed the Commission in the *PAL* appeal, that decision would not have an impact on the Petition.¹²

Finally, during the text amendment proceedings in Case 18-18, the Commission heard testimony regarding Petitioner's relationship with the community. While the Commission appropriately acknowledged that the Petitions had no relation to any agreements with the community or even action by the Petitioner, the Commission encouraged Petitioner to work with the community, knowing that cooperation is often in the best interest of neighbors. Petitioner has always intended to continue working with the Advisory Neighborhood Commissions with the long-aim of being a good member of this community. To that end, the Petitioner demonstrated its good faith in working with the community by submitting the CBA to the Commission. The CBA is merely intended to be an indication to the Commission that the Petitioner intends to be a good neighbor within the community. The CBA should have no impact on the Commission's review of the proposed Map Amendment, and Petitioner did not submit it into the record as such. Rather, Petitioner believes the Map Amendment alone furthers the Comprehensive Plan's strong policies around the future of high-density development in the Central Employment Area. The Petition also serves significant goals of the Comprehensive Plan's focus on housing, affordable housing, and sustainability that will have a lasting future impact on any development at the Property.

For the foregoing reasons, the Petitioner believes the rezoning was appropriately set down by the Commission as a rulemaking. Please feel free to contact John at (202) 721-1108 or

⁹ See, e.g., Zoning Commission Order No. 966-A (rezoning several lots to the Capitol Hill Commercial Overlay District); Zoning Commission Order No. 07-25 (rezoning several lots constituting approximately 4.5 acres from the R-5-A to the R-5-C Zone); Zoning Commission Order 15-09 (rezoning multiple squares constituting 10 acres from the R-5-B to the R-4 Zone); Zoning Commission Order 16-25 (rezoning two lots constituting .55 acres on Virginia Avenue from the RA-5 to the MU-2 Zone); and Zoning Commission Order 18-01 (rezoning a single lot constituting .87 acres on Vermont Avenue from the RF-1 to the ARTS-2 Zone).

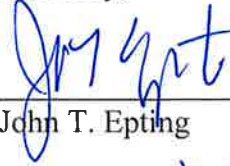
¹⁰ *PAL DC Storage, LLC v. District of Columbia Zoning Commission*, Case No. 18-AA-730 (District of Columbia Court of Appeals).

¹¹ *Dupont Circle Citizen's Association v. District of Columbia Zoning Commission*, 343 A.2d 296, 300 (1975).

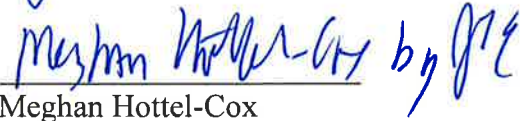
¹² Petitioner recognizes the Commission recently changed a map amendment petition from a rulemaking to a contested case. See Zoning Commission Case No. 19-03. However, the Petition is distinguishable from that case because the Property is eight times the size of the property at issue there. Therefore, there are greater policy considerations and a much broader impact in the Petition than in a smaller series of infill properties.

Meghan at (202) 721-1138 if you have any questions regarding the above. We look forward to the Commission's consideration of this matter at the June 6th public hearing.

Sincerely,



John T. Epling



Meghan Hottel-Cox

Certificate of Service

The undersigned hereby certifies that copies of the foregoing document will be sent by first-class mail or hand delivery to the following addresses on May 17, 2019.

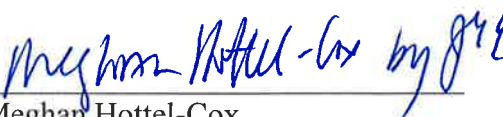
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