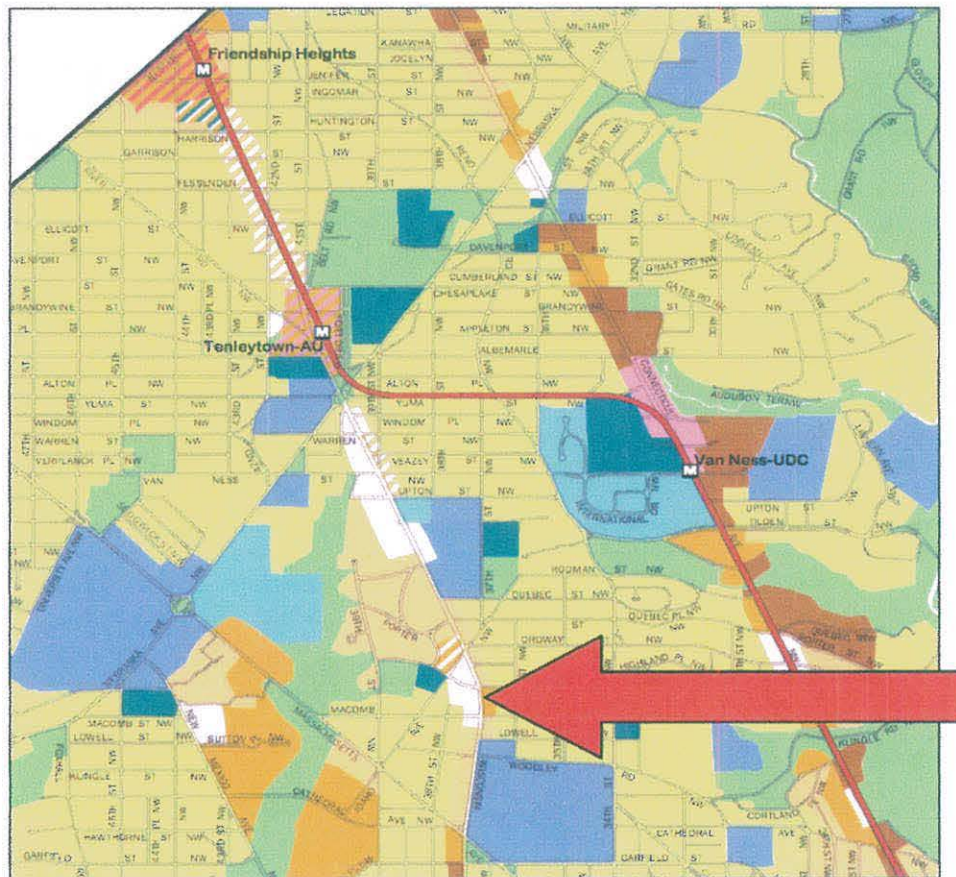


Zoning Commission Case No. 08-15

WISCONSIN NEWARK NEIGHBORHOOD COALITION

Opposition to Friendship-Macomb SC INC PUD

April 14, 2009



Section of the Future Land Use Map of the Comprehensive Plan, 2006, showing the PUD location and the Comprehensive Plan Future Land Use map designation for the Macomb/Wisconsin Local Neighborhood Commercial Center.

ZONING COMMISSION
District of Columbia

CASE NO. 08-15
ZONING COMMISSION
District of Columbia
CASE NO. 08-15
EXHIBIT NO. 175

WISCONSIN AVENUE NEIGHBORHOOD COALITION
STATEMENT IN OPPOSITION TO CASE 08-15

Friendship Shopping Center Planned Unit Development

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WISCONSIN AVENUE NEIGHBORHOOD COALITION
STATEMENT IN OPPOSITION TO CASE 08-15

Friendship Shopping Center Planned Unit Development

I. BACKGROUND

The Wisconsin/Newark Neighborhood Coalition is a coalition of residents of the neighborhoods located near the proposed development. Although we support the stated goals of the Friendship Shopping Center Planned Unit Development (PUD) project – to develop a vibrant, neighborhood-oriented project, including an expanded and modernized supermarket, that will be an asset to the surrounding community, we believe that the proposed PUD requests too many significant changes to the existing zoning requirements and is fundamentally inconsistent with the Comprehensive Plan. The PUD, as currently proposed, would result in too many adverse impacts to the local community. Therefore, the Coalition opposes approval of the PUD as currently proposed by Friendship-Macomb SC, Inc. (“Applicant”).

It is important to start with some background.

On Christmas Eve of 1973, Congress enacted the Home Rule Act that at last gave the District self-rule. The Act provided that the Mayor shall prepare and implement a Comprehensive Plan for the District of Columbia. The Home Rule Act established that zoning in the District must not be inconsistent with the Comprehensive Plan.

The District adopted its first enforceable Comprehensive Plan in 1984 and added the Land Use element in 1985. This Plan designated the small commercial area at Macomb-Wisconsin as a low density, local neighborhood shopping center, to consist of small shops and services serving the surrounding residential neighborhoods. Subsequent amendments to the Plan have never changed that designation and have clarified that the idea of “surrounding neighborhood” contemplates a service area of usually less than one mile.

Following the 1985 Plan adoption, a coalition of neighborhood groups presented the Zoning Commission with a petition to rezone this small (two and one-half blocks long) commercial strip. In response, the Commission in 1989 changed the previous C-2-

A zoning to C-1; it also adopted the Neighborhood Commercial Overlay Zone regulation (Chapter 13), including the Macomb-Wisconsin ("MW") Overlay District. The Zoning Commission adopted the MW overlay zone to provide added protection to this little commercial area. The community's petition and the Commission's restrictive new zoning enjoyed overwhelming neighborhood support.

A significant feature of the Macomb/Wisconsin commercial center is that a single entity owns three lots that together comprise some 80% of the area of the entire commercial district. The Commission recognized in its 1989 rezoning that the size of these lots could lead to large-scale redevelopment inconsistent with the Comprehensive Plan, the intent of the downzoning, and the character of the existing commercial center. Accordingly, the Commission adopted §§1308.2-1308.3 to provide for review of large developments in the MW zone, including their scale and massing, "to ensure compatibility with and enhancement of the primary neighborhood retail function of the commercial area." To that end, §1308.3, which remains in effect, requires that any major redevelopment proposal for lots over 10,000 square feet in Macomb/Wisconsin Overlay District must be referred to the BZA for review as a Special Exception pursuant to specific criteria set forth at §1304 of the Overlay regulation.¹

In the 1980's, the three large lots were owned by a real estate development company. Perhaps recognizing that the new Overlay restrictions limit the scope of any potential redevelopment of its properties, that owner sold the properties to the present owner, the Giant Food Company or an affiliate. The land Giant acquired was fully rented out. Existing tenants included a large neighborhood-serving variety store called G.C. Murphy's and a number of other smaller shops. Giant eliminated Murphy's and the other shops on the South Block, as well as a CVS Drug Store on the north block. Giant has left the South Block storefronts empty for years. It has installed its own pharmacy in place of CVS. Giant continues to operate its food store, but in manner that is generally not up to

¹ The Applicant and the Office of Planning contend that under PUD §§2405.7-2405.8, the Zoning Commission can itself perform the review mandated by §1308.3. See, e.g., Applicant's Pre-Hearing Submission, Oct. 24, 2008, p. 10, n. 2. This is an inaccurate reading of §2405.7, which by its clear terms is limited to the Zoning Commission's PUD authority over uses. Please see WNNC Petition to Refer Case 08-15 to the Board of Zoning Adjustment dated September 24, 2008, Petitioners' Opposition to Applicants' Motion to Dismiss dated November 14, 2008, and Letter to Chairperson Hood dated Jan. 12, 2009.

the expectations of its nearby neighbors nor, one hopes, consistent with Giant's own standards for its other stores.

Understandably, Giant's management of its food store and the rest of its South Block property has produced great dissatisfaction in the neighborhood. Many people are fed up with the current situation and adamantly want an improved grocery store, whatever else happens. The Commission has heard from a large number of these people, due in part to a well-orchestrated letter-writing campaign. As the Commission reviews those letters, it should consider how many of those letters emphasize any aspect of the PUD other than the new supermarket, and how many are from individuals who live beyond the one-mile distance that the Plan contemplates as the area to be served by this little shopping center.

Our group certainly shares the desire for a better grocery store in our neighborhood, but we are very concerned that many other aspects of the PUD proposal take it far beyond the local commercial center that the Comprehensive Plan specifies for this small area.

II. DISCUSSION.

This brief background statement gives context to the detailed discussion that follows. The discussion shows how the applicant's current PUD proposal, particularly for the north block, dishonors 25 years of analysis, planning and regulation for the Macomb/Wisconsin area.

In reviewing this PUD application or any development proposal, the Zoning Commission, as a decision-making governmental body, is bound by the Comprehensive Plan's Implementation element. That element specifically states, "Ensure that the Zone Map is not inconsistent with the Comprehensive Plan Future Land Use Map." (Policy IM-1.3.2; emphasis added.) The Implementation element adds:

Since the Land Use Element integrates the policies of all other District elements, it should be given greater weight than the other elements. (Policy IM-1.3.4.)

Appendix B to this Statement identifies additional Comprehensive Plan provisions controlling the Zoning Commission's review of the PUD application.

We urge the Commission to focus on the heart of this case: Whether the Applicant's proposal is not inconsistent with the Comprehensive Plan's Future Land Use Map and whether—to quote the MW Overlay—the proposed uses, vehicular access and the scale and massing of this large PUD do in fact ensure compatibility with and enhancement of the primary neighborhood retail function of the Macomb/Wisconsin commercial area

1. The PUD Proposal For The North Block Is Inconsistent With The Comprehensive Plan Land Use Designations Because Of The Excessive Scale Of The Project.

The Comprehensive Plan Future Land Use Map does not contemplate that development all along Wisconsin Avenue will be uniform. Instead, the Macomb/Wisconsin Plan designation of "Low Density Commercial" differs sharply from the "Mixed Use Corridor" or "Multi-Neighborhood Center" designations found further up the avenue, from Tenleytown to Friendship Heights. See Appendix I-A, Future Land Use Map. There, the Plan expressly couples moderate or medium density commercial with medium density residential in the same zone district. This means that the Plan, as shown on the Future Land Use Map, contemplates that businesses in those areas will serve more than their local neighborhood and that the commercial zones will include a substantial housing element. Both Tenleytown and Friendship Heights are served by Metrorail.

The Future Land Use Map also calls for mixed use along the entire stretch of Wisconsin Avenue between Tenleytown and Friendship Heights, from Brandywine up to Fessenden Street. The Map designates that area for low density commercial use but with added housing in the same location. The Brandywine-Fessenden designated mixed use area lies between Wisconsin Avenue's only two Metrorail stations--no development in that area would be more than four-tenths of a mile from one or the other of these Metrorail stations; most would be closer. Accordingly, that entire area qualifies for

transit-oriented development (“TOD”) under the Comprehensive Plan.² It follows that the area can tolerate the somewhat greater density that would result from adding housing, because it enjoys access to public transportation by Metrorail.

The Macomb/Wisconsin commercial center is at least one mile away from the nearest Metrorail stations, located at Tenleytown and Cleveland Park.³ The Plan’s Future Land Use and Policy Maps have never designated anything more than low density commercial use as present or future uses for this small commercial area. The Applicant’s 3.81 FAR mixed use PUD proposal for the North Block is suited to Tenleytown or Friendship Heights. The density of its North Block proposal would probably be excessive even in the Brandywine-Fessenden area, and it is clearly inappropriate at the Macomb/Wisconsin site.

The Applicant asks the Commission to rezone the North Block from MW/C-1 to C-2-A to accommodate its ambitious North Block proposal. C-1 and C-2-A are the two zone districts that are sometimes deemed to be compatible with the Comprehensive Plan’s low density commercial designation. Two Ward 3 local neighborhood commercial centers -- Cleveland Park/Connecticut Avenue and Woodley Park -- are already zoned C-2-A, rather than the C-1 zoning that the Commission adopted, through a full public rulemaking procedure, for the Macomb/Wisconsin shopping district. But even in those larger Ward 3 C-2-A commercial centers, the Zoning Commission adopted special Overlay provisions to hold development to less than the full C-2-A height and FAR potential allowances.

For density, a C-2-A zone, if granted, would allow the Applicant to increase residential density from 1.0 FAR (C-1) to 2.5. However, the Applicant requests an even

² At the April 4, 2009 hearing, DDOT testified that it considers anything within one-half mile of a Metrorail station to be Metrorail accessible. See also, LU-1.3 Transit-Oriented and Corridor Development, Land Use element at page 3-19.

³ The District Department of Transportation (DDOT) indicates that the area has adequate bus service. Past experience by local residents casts doubt on that assertion. In any case, reliance on additional surface transportation by large buses will obviously increase highway congestion and ambient pollution, in contrast with the District’s excellent underground Metrorail system. The Comprehensive Plan does not include bus service in its TOD definitions. Further, the Applicant has not supplied the Zoning Commission with the information as to replacing the existing bus waiting areas on Newark Street. This is yet another area where the Applicant has failed to satisfy its burden of proof and the city agency has failed to perform the due diligence needed to enable the Zoning Commission to act knowledgeably.

greater North Block FAR allowance, to a total FAR of 3.81 (of which the commercial share on this commercial block would be a meager 0.75 FAR!) In contrast, the Cleveland Park NC Overlay limits density to 2.0 FAR in spite of the C-2-A conventional zoning. For building heights, C-2-A zoning, if granted, would permit heights up to 50 feet, but the Applicant instead requests 61 feet.⁴ In contrast, the NC Overlay at Cleveland Park limits heights to 40 feet in spite of the C-2-A conventional zoning. The totality of height and density waivers that the Applicant requests for the North Block would in essence catapult the North Block zoning limits from C-1 to almost C-3-A levels. Lot occupancy 75%; FAR 4.0; maximum height 65 feet.⁵

Granting the Applicant's request for rezoning and additional waivers would result in zoning inconsistent with the Future Land Use Map's basic designation for this area. The Comprehensive Plan prohibits the Zoning Commission from rezoning to accept that level of density here. The Applicant has failed to carry its burden of proof that the PUD would not be inconsistent with the Plan, under §2403.2 and §2403.4 of the zoning regulations.

2. The PUD Proposal For The North Block Is Inconsistent With The Comprehensive Plan Because It Is A Mixed Use, Medium Density Residential Project.

The PUD would construct approximately 165,000 square feet of residential development while reducing the current non-grocery commercial square footage from about 97,000 square feet to about 80,000 square feet. The result is a mixed-use project

⁴ The Office of Planning Final Report, Feb. 9, 2009, and its testimony at the April 6, 2009 hearing assert that the Overlay area has "2-3 story retail buildings." (E.g., Final Report p.2.) In fact, no building in the commercial area exceeds two stories; Giant and the storefronts that it emptied out are in a single story building. OP's lack of due diligence in determining the facts has led it to exaggerate existing commercial heights, which falsely implies that ~~higher~~ the proposed five story north block building is more nearly compatible with the existing commercial area than is actually the case.

⁵ Although the Commission has PUD power to expand a zone district's conventional zoning, it should carefully consider the wisdom of first granting a more lenient zone category and then, on top of that, permitting close to the maximum additional PUD bonus achievable in the new, more generous base zone. Compare Commission Order 943, a Downtown Development Overlay text amendment where the Commission concluded that it should not award both transferable development rights and an FAR bonus for the same action. See below, Section 6.a.iii, p. 19.

heavily oriented toward housing. The Plan's designation does permit some housing in a neighborhood commercial area, but the predominant characteristic is to be one- to three-story commercial buildings. Surprisingly, instead of respecting the Future Land Use Map, the Applicant expressly admits that it is proposing a "21st century mixed-use development." (Pre-hearing submission, 18-19.) Thus, by its own admission, the Applicant's project would unlawfully violate the Future Land Use Map's designation.⁶

It is striking to look at the example that the Future Land Use Map provides in defining "mixed use:"

The general density and intensity of development within a Mixed Use area is determined by the specific mix of uses. If the desired outcome is to emphasize one use over the other (for example, ground floor retail with three stories of housing above), the map may indicate the dominant use by showing it at a slightly higher density (in this case, "Moderate Density Residential/ Low Density Commercial") . . . (Emphasis added.)

Thus, the Plan expressly recognizes that even three stories of housing—not the PUD's four--over the ground level retail results in a mixed use district that combines low density commercial with moderate density residential. Here, the PUD proposes four stories of housing. This would make this development a low density commercial/medium density residential mixed use area. The proposal is plainly inconsistent with the express definition contained on the Plan's Future Land Use Map.⁷ The Applicant has failed to carry its burden of proof under §2403.2 and §2403.4 of the zoning regulations.

Although the PUD regulations allow for lots to be combined for PUD purposes, they do not tolerate PUD developments that would be used "to circumvent the intent and purposes of the Zoning Regulations, nor to result in action that is inconsistent with the Comprehensive Plan." §2004.4. That is exactly what this PUD proposal would do.

⁶ The Office of Planning also admits that the project is actually a mixed use development. Office of Planning Report, Feb. 9, 2009, p. 1 and p. 2. For OP to trumpet a mixed use development in an area that the Future Land Use Map does not designate for mixed use constitutes an additional, somewhat shocking lack of due diligence by that Office.

⁷ We find it disappointing that the Commission's notice of hearing for this case blandly states that "a PUD in the C-2-A Zone District is permitted a maximum height of 65 feet and a maximum FAR of 3.0, rather than acknowledging that those are limits that may be allowed if the PUD Applicant shows that the project meets the Commission's stringent criteria.

The inconsistency of the Applicant's project with the Comprehensive Plan and the Map designation is confirmed by another of the applicant's zoning relief requests. The Applicant proposes to provide 124 parking spaces on the North Block, all of them for the residences. This is twice the amount of residential parking required by the zoning regulations. However, at the same time it asks to be excused from providing any of the required 93 commercial spaces there. In fact, it proposes to include no parking whatsoever for North Block commercial tenants' employees and patrons in the north block garage. Allocating all of the North Block parking exclusively to the residences reveals the Applicant's intention to emphasize housing rather than to preserve and enhance the existing commercial character of the North Block.

The Applicant expects North Block commercial patrons to park in the South Block's garage. Even there, however, it seeks a waiver from the total number of commercial spaces that zoning requires for the combined North and South Block commercial users.

The Comprehensive Plan's Low Density Commercial designation means that the area may include both auto-oriented and pedestrian-oriented shopping areas. The Plan does not contemplate that the retail patrons will all be pedestrians or users of public transportation. Many will drive, and the lack of commercial parking in the North Block will inevitably lead to north block shoppers availing themselves of convenient street parking in the adjoining neighborhoods, with obvious adverse impacts on neighboring property, contrary to §2403.3 of the Zoning Regulations. The Applicant clearly failed to carry its burden of proof of compliance with §2403.3, in violation of §2403.2.

The solution for all of this is clear: by reducing the total amount of North Block housing and curbing the excess residential parking allocation, the Applicant could free up North Block parking for that block's commercial patrons. The reduction in housing would allow the project to achieve a balance between commercial and residential uses that would be more consistent with the provisions of the Comprehensive Plan and the MW Overlay.

The parking issues raised by the application are further addressed in a separate statement.

3. The Proposal For The North Block Presents Additional Concerns.

a. Roof structure waivers. The zoning regulations' roof structure restrictions are intended to ensure that they are not intrusive, are designed as part of the building and don't impact adjoining buildings because of noise, ugliness, etc. The application requests seven areas of roof structure relief. It wants to avoid the required setbacks, to employ multiple enclosures of roof equipment, to use enclosures of varying heights and, on the South Block, to have pop-up stairs from individual units to the roof. Granting all these waivers would remove needed area protections that the related regulations attempt to supply.

b. Loading berth waivers. The application provides fewer and smaller loading docks than zoning requires for the North Block's 124 residential units, and it also proposes that these same docks serve the north block retail. The application itself recognizes the inadequacy of this proposal, admitting that a dedicated on-street loading zone may be needed on Idaho Avenue. (Pre-Hearing Submission, Oct. 24, 2008, Exhibit E.) Using the public street for PUD loading would eliminate on-street public parking and seriously add to the other traffic problems that the PUD would inevitably create. The result would be unacceptable congestion on a street that the PUD would in any case burden with increased traffic and decreased parking, including substantial truck traffic going to and from the Giant loading docks on the next block of Idaho. The PUD's inadequate North Block loading design would add further unacceptable PUD impacts on the neighborhood. The Applicant has failed to carry its burden of proof under §2403.2 and §2403.3 of the zoning regulations.

4. The Proposal For The South Block Would Be Acceptable If The Applicant Made Important Adjustments To Its PUD Request.

The South Block PUD design raises Comprehensive Plan issues and does not fully meet existing zoning. However, the physical approach is not unreasonable for a Local Neighborhood Center, since it remains generally compatible with the primary neighborhood retail function of the commercial area. With some modification, the South Block proposal, if offered independently of the North Block, could be a worthwhile improvement to the local neighborhood commercial center, as many neighbors have written to confirm.⁸

a. Expansion Of The Commercial Zone And R-5-A Zoning Issues.

i. WNNC will support reducing the R-5-A zone to accommodate a major supermarket if its other concerns are met. The Applicant's South Block lot is split-zoned east to west, with C-1 on the eastern, Wisconsin Avenue, side and R-5-A behind it, running back to Idaho Avenue. For the South Block, the PUD designers faced the dilemma of trying to find space for a much larger grocery store and its loading docks while preserving local neighborhood-type small retailer space along Wisconsin Avenue. Their solution was to propose expanding the commercial zone by reducing the residential zone by half, from 53,000 square feet to approximately 25,000 square feet. We question the need or appropriateness of imposing a supermarket as large as the one proposed in this local commercial area. Also, we suspect that a number of Giant's projections underplay the probable negative impacts of such a large store. Nevertheless, we reluctantly defer to Giant's business determination in this regard as long as this deference is viewed as an element of compromise relating to the overall project.

ii. WNNC will support the needed additional waiver to construct row houses on a single lot in an R-5-A zone if its other concerns are met. The applicant seeks

⁸ The applicant has asserted to the community that the five story, 3.81 FAR North Block building is essential to the economic viability of the overall PUD redevelopment project. However, it has steadfastly refused to provide financial data that would allow verification of its position and accordingly has failed to meet its burden of proof of that claim.

to build a group of row houses in the remaining R-5-A space, even though such structures are not allowed in R-5-A zones nor on single lots, and even though the adjoining neighborhood is characterized by single-family homes. The Applicant has requested a waiver from the ban against any housing other than single or semi-detached in R-5-A zones, but it has failed to ask for a waiver for building multiple structures on single lot. WNNC would not oppose a supplemental filing by the Applicant to request this waiver, if the other south block problems are solved.

b. The Zoning Commission Should Not Rezone The South Block.

All of the south block commercial area, including both the PUD property and the portion of the block that is not subject to the PUD, is zoned MW/C-1. The C-1 conventional zone district, of course--

Permits matter-of-right neighborhood shopping and low density development to a maximum lot occupancy of 60% for residential use, a maximum FAR of 1.0, and a maximum height of three (3) stories/forty (40) feet. (DCOZ Summary of Zoning Districts.)

The commercial element of the PUD's South Block proposal appears to be consistent with the existing MW/C-1 designation, assuming expansion of the MW/C-1 zone into the current residential area and satisfaction of the requirements of §1308. The PUD proposes to add a limited amount of residential use in the commercial zone, namely the lofts along Newark, which will include affordable housing. If this housing fails to meet the C-1 residential lot occupancy requirements (due at least in part to the applicant's decision to reduce the residential zone?), the Zoning Commission's PUD authority enables it to grant flexibility to accommodate this housing under the MW/C-1 zone. This would be consistent with the Comprehensive Plan's policies in support of introducing a limited amount of housing into neighborhood commercial zones.

The Applicant nonetheless requests that its part of the South Block be rezoned to C-2-A. The requested rezoning, if granted, would needlessly divide the commercial zoning of a single block. This would raise two concerns. Not only would the door be

opened for more intensive subsequent redevelopment of the PUD's portion of the block⁹ but additionally, in time, it could become another PUD-based stepping stone for arguing that the remainder, non-PUD portion of the South Block should also be rezoned. That would create yet another threat to survival of this area as a local neighborhood shopping center.

The Applicant is apparently requesting upzoning of the South Block so that it can "borrow" South Block FAR limits for use on the North Block.¹⁰ The PUD regulation permits this "borrowing" in a combined PUD, but only to the extent that it does not violate the Comprehensive Plan. Here, that caveat is not met: The North Block PUD cannot "borrow" South Block density if it would result in violating the Comprehensive Plan. See §2400.4. Once again, the Applicant has failed to carry its burden of proof under §2403.2, in this instance because of the violation of §2400.4.

The MW/C-1 zone should be retained. This zoning should, of course, apply throughout the commercially-zoned portion of the South Block, as it exists now or as the Zoning Commission may decide to expand it under the PUD.

c. The PUD's South Block Loading Proposals Have Major Deficiencies.

The south block loading docks present several important issues that, if not resolved prior to PUD approval, would unacceptably impact the surrounding area. A separate group of PUD opponents will discuss these problems more fully.

⁹ Under C-2-A, the South Block density could be increased beyond the current PUD proposal for that block provided that the Commission properly rejects the Applicant's proposal to shift some South Block density to support excessive North Block development. See also, footnote 10, below, and accompanying discussion.

¹⁰ Under cross-examination at the hearing held April 6, 2009, the Office of Planning ("OP") seemed oddly reluctant to acknowledge that North Block FAR can only be justified by transferring a portion of the South Block's theoretical density allowance under C-2-A to the North Block. However, that conclusion is obvious. The Applicant's Zoning Tabulations chart (Pre-Hearing Submission, Oct. 24, 2008, Exhibit B) admits that the North Block building has a 3.81 FAR. Compare that admission with OP's Table (OP Final Report, February 9, 2009, p. 4), which shows that the PUD Proposal has a total FAR of 1.99. The only way to reach OP's FAR result is to aggregate the FAR of the two blocks and find that the North Block does indeed take a portion of the South Block allowance. Minimal requirements of due diligence would call for OP to know and discuss the FAR allotment of the two blocks.

i. The supermarket loading dock would unacceptably impact neighboring residences and must be redesigned. Despite the Applicant's plan to expand the South Block commercial zone to take over about half of the existing R-5-A zone, the Applicant proposes to run its loading dock driveway off Idaho Avenue and through the remaining residential area rather than taking advantage of the expanded commercial zone. When members of the community raised this issue with the Applicant's representatives, those representatives invited them to present a configuration that would keep loading traffic away from the existing residences. The community did so, but the Applicant flatly rejected the community's proposal. The Zoning Commission must step in and protect the neighboring residences from the PUD's intrusive supermarket loading design. The Applicant has failed to carry its burden of proof under §2403.2 and §2403.3 of the zoning regulations.

ii. The loading solution for the non-supermarket retail is deficient. For its non-supermarket retail users and Newark Street residential lofts, the PUD offers a single, 30-foot loading berth located in the small alley off Macomb Street. This alley is already overused for loading and trash collection (and rat traps). Current users include high-traffic restaurants and an adjacent apartment building. Adding loading for the PUD's retail and lofts would measurably increase the already-severe congestion along that block of Macomb Street.

The excess loading capacity off Idaho Avenue that Giant would provide for its own supermarket cannot make up for the deficient Macomb Street loading arrangements that Giant offers for its prospective retail and residential tenants. The Applicant has failed to carry its burden of proof under §2403.2 and §2403.3 of the zoning regulations. The Zoning Commission should reject the Applicant's South Block loading proposal.

5. The Proposal Improperly And Unacceptably Seeks To Eliminate The Neighborhood Commercial Overlay Zone From Its Properties.

- a. The Zoning Commission Does Not Have Authority Under The PUD Regulation To Remove The MW Overlay.

The Zoning Commission's lack of authority under the PUD regulation to remove the Macomb/Wisconsin Overlay from the Applicant's properties is fully addressed in WNNC's separate pleadings to the Commission and will not be discussed here. See Footnote 1, above.¹¹

b. The Comprehensive Plan Favors Neighborhood Commercial Overlays.

The Rock Creek West element of the Plan recognizes that Neighborhood Commercial Overlay zones serve to allow a mix of retail uses and retain a human scale along neighborhood shopping streets. (Pages 23-1—23-2.) Not only should NC overlays be retained; a Rock Creek West Element action directive explicitly calls for consideration of additional NC overlay zones in the Ward's neighborhood commercial centers in order, among other things, to ensure that new development achieves neighborhood compatibility and is responsive to community concerns about building height, buffers and transitions between uses. (Action RCW-1-1-A.) The Applicant's request to remove the Overlay flies in the face of the Plan's support for these important zoning devices. The Applicant has failed to carry its burden of proof under §2403.2 and §2400.4 of the zoning regulations.

c. Applicant's Request To Remove The Overlay Reveals Its Recognition That Its Proposed Development Is Inappropriate For The MW Overlay District And Therefore It Is Inconsistent With The Comprehensive Plan.

The Neighborhood Commercial Overlay Zone regulation, including its special provisions for the Macomb/Wisconsin zone district, is a critical element in protecting this small commercial zone from excess development and ensuring the primary neighborhood retail character of the commercial area. The applicant's request to eliminate the Overlay from its properties dramatically reveals that the applicant recognizes that its project fails to respect the scale and character of the zone district as mandated by the Overlay, and

¹¹ At the April 6, 2009 hearing, the Office of Planning offered a quite inscrutable explanation positing that the Overlay would underlie the PUD. In an early meeting with OP, OP offered the neighbors a distinct, similarly unpersuasive rationale in contending that the Commission has power under the PUD regulation to remove an NC Overlay. The Commission should reject OP's Alice-in-Wonderland legal theories.

thus that its current proposal is inconsistent with the various aspects of the Comprehensive Plan that the Overlay enforces.¹²

d. The PUD Seeks To Evade The MW Overlay's Restaurant Limitations, To The Likely Detriment Of The Neighborhood.

The overall Macomb/Wisconsin Overlay zone district, including the Applicant's parcels, runs along Wisconsin Avenue from just south of Macomb Street north to Idaho Avenue. Among other things, the neighborhood commercial overlay provisions limit the percentage of tenants such as restaurants and banks, which are able to pay higher rents and therefore tend to replace other desirable local retailers.

Currently, restaurants and bars account for just under the 25% of the total linear frontage of the entire existing MW Overlay zone. Most of these existing food establishments are located in the roughly 20% of the of the zone district that is not owned by the applicant. They comply with the Overlay's 25% limitation only because most of the PUD applicant's property is not occupied by restaurants or bars. If the applicant's lots, which comprise 80% of the total area of the existing overlay, were removed from the Overlay district, the small residual MW overlay zone would be rendered vastly out of compliance with the Overlay's limits. At the same time, the applicant would be free to offer the PUD's limited non-grocery retail space to even more restaurants, further tilting the commercial zone toward restaurant domination.

The applicant is aware of the threat. In its Supplemental Pre-Hearing Submission dated January 30, 2009, it offers to limit restaurants, prepared food shops, and fast food establishments to 25% of the linear street frontage of the commercially zoned portions within the PUD. (Jan. 30, 2009 submittal, p. 3.) However, this "limit" would total 375 linear feet, enough for six or seven new restaurants. In combination with the existing restaurants, this could change our local retail-oriented commercial center into a major dining and entertainment destination district, in stark conflict with the Comprehensive Plan's policy and future land use map designations for the zone.

¹² The Office of Planning Final Report states that the PUD would be consistent with the aim of the Overlay. (Report, Feb. 9, 2009, p. 10.) It took this position again in its testimony at the April 6, 2009 hearing, although it also conceded that the PUD could not be built under the Overlay. The two OP positions seem incompatible.

In addition, the PUD would allow fast food establishments. The existing C-1 zoning bars these establishments, which often result in increased litter and other undesirable impacts. Instead of offering to exclude fast-food establishments, the applicant specifically includes them in its proposal regarding food service establishments allowable within the PUD.

e. Removing The Overlay From The PUD Parcels Would Destroy the MW/NC Overlay.

The PUD applicant's properties account for some 80% of the entire Macomb/Wisconsin Overlay Zone. Removing the MW Overlay from the Applicant's property would effectively kill the entire MW Overlay, since the remaining area would be of such minimum size and would be thrust so vastly out of compliance with one of the NC overlay regulation's major protective functions. This result would directly conflict with the Comprehensive Plan's encouragement of neighborhood commercial overlay zones, and it would disregard the express purpose and intent of the overlay zone regulations.

Without the protective Overlay, there is a significant likelihood that the character of this neighborhood commercial zone would change radically. In addition to the proposed major housing presence, the area could well become an entertainment destination district filled with numerous bars, restaurants, and other attractions. This would further reduce space for neighborhood-serving retailers, and it would exacerbate the challenging traffic, parking, and other impacts of a major new supermarket added to existing conditions and other forthcoming burdens, such as the new condo conversion underway on the east side of Wisconsin at Newark Street.

In support of its request to remove the Overlay, the applicant and OP make a very curious argument. It asserts that a PUD map amendment removing the Overlay does not threaten the integrity of the overlay district because the map amendment will terminate if the project is not built or the PUD use terminates. (Pre-Hearing Submission, Oct.24, 2008, p. 9; see also Footnotes 11 and 12.) If the applicant does not intend to build and use its project, why has it filed its application?! In reality, the applicant has provided no evidence or credible argument in support of its request to remove the Overlay. It has

failed to carry its burden of proof in demonstrating why this relief is warranted. The Zoning Commission should deny the requested relief.

6. The Limited Public Benefits And Amenities Offered By The PUD Do Not Justify The Significant Rezoning And Additional Waivers Requested By The Applicant.

a. Public Benefits and Amenities Analysis.

The Applicant's January 16 submission to ANC 3-C lists ten "Project Amenities and Public Benefits." These purported amenities and benefits fall woefully short of the standards set by the PUD regulation. The regulations require these benefits to be "superior features" that are of a "significantly greater extent than would likely result from development of the site under the matter-of-right provisions" of the zoning regulations. §2403.6. The Zoning Commission must evaluate the public benefits "in proportion to the flexibility or incentives requested," §2400.3, and balance the project benefits and adverse impacts "according to the specific circumstances of the case." §2403.8.

While a PUD is intended to provide flexibility in a proposed development, the PUD must remain consistent with the underlying goals of the zoning requirements and local conditions. Importantly, the PUD process must not be used to circumvent the intent and purposes of the Zoning Regulations," §2400.4, and this of course includes the intent and purposes of an existing local Neighborhood Commercial Overlay District. Indeed, the NC regulations provide that where there is a conflict between the Overlay chapter and the underlying zoning, the more restrictive provisions of the Overlay shall govern. §1301.3. In reviewing the PUD application, the Applicant carries the burden of proof to justify the granting the major zoning change and waivers it requests. § 2403.2. This application fails to meet that burden.

The weak public benefits claimed by the Applicant fail to provide "superior features" that are "significantly greater" than would be realized by a project constructed as a matter-of-right. The purported benefits are particularly inadequate in light of the sweeping nature and extent of the PUD and the Applicant's requested major zoning changes and waivers.

i. The new grocery store had been proposed matter-of-right. The Applicant lists a new grocery store and other retail as uses of special value use. (Oct. 24, pp. 19-20.) One would hardly expect the Giant Food Company to redevelop its land, even under matter-of-right zoning, without expanding and upgrading its decrepit existing store. Similarly, street-front retail is a minimum expectation for a neighborhood shopping district. These are not “superior features” or “significantly greater” than would occur in any acceptable matter-of-right redevelopment of a Comprehensive Plan-designated local neighborhood shopping center.

On May 3, 1992, the present Applicant entered into a Letter of Agreement with the Cleveland Park Citizens Association (“CPCA”) and the Office of Planning (Letter of Agreement – Friendship Shopping Center Wisconsin Avenue and Newark Street NW) under which the Applicant committed itself to build a state of the art supermarket under matter of right zoning. It cannot now claim that such a store could only occur by means of a planned unit development and that it should be deemed a public benefit that would not occur without a PUD. CPCA is a party in this case and will address this issue.

The Applicant cites Case 06-27, the Boston Properties case, for the flat assertion that a grocery store is a project amenity. That case, however, involved the site of a vacant hospital, where the introduction of a grocery store would clearly benefit the neighborhood. There was no preexisting grocery store; no grocery store tenant had even been identified. Here, a supermarket operator is the owner-applicant and has already indicated that it would develop an improved store even under matter-of-right zoning.

ii. The PUD’s 80,000 square feet of neighborhood retail and commercial space is less than the pre-existing amount of non-grocery store retail space. The Applicant’s proposal provides somewhat less non-supermarket retail space than the amount already present on the PUD’s properties. The Applicant again cites Case 06-27, and also Case 03-11, Columbia Hospital, to claim that the Zoning Commission has found that neighborhood retail is a project amenity. Both of those cases offered their communities new retail in place of vacant hospitals—an infinite increase, and clearly a benefit to neighbors who previously did not have meaningful neighborhood retail. Here,

non-grocery neighborhood retail already existed, in greater quantity than the PUD now proposes. Indeed, such retail is mandated by the Comprehensive Plan including the Future Land Use Map. In this area, neighborhood retail does not meet the PUD regulations' requirements for a qualifying public benefit.

iii. The Applicant offers the bare minimum of affordable housing. The application sets aside 13,148 square feet, or eight percent of the residential gross floor area, for affordable housing; half of this, about 4% of the total, would be for low-income households. (Prehearing submittal p. 17.) This would be no more than the level of affordable housing that would be required by Inclusionary Zoning, if those regulations were in effect, which at present is not the case.

The Applicant cites this small percentage of affordable housing as justification for raising lot occupancy by an extra 15 %, to a total of 75%, instead of the 60% figure that would govern under either of the two zones that may qualify as Neighborhood Commercial, C-1 and C-2-A. But it also asks the Commission to consider this same feature as a public benefit.

This request is comparable to the issue that the Commission addressed in its Order 943, a text amendment to the Downtown Development Overlay District, Housing Priority Area. The Commission considered a proposal to allow additional FAR for qualifying residential properties but concluded:

The Commission does not agree that the additional 0.5 FAR should be eligible to earn transferable development rights, since the additional 0.5 FAR already constitutes a bonus or development incentive.
(Order 943, 7/26/01, p. 4.)

Similarly, the applicant here can't have it both ways: Inclusionary housing is not both a vehicle for expanding permissible lot occupancy and an amenity justifying a series of PUD flexibilities. This is especially so since the requested waiver seeks a far more generous waiver than is needed for the affordable housing offered.

In any case, housing is at best a dubious amenity in a zone district that the Plan does not designate for any sort of mixed use and where the primary purpose is to be neighborhood retail.

iv. & v. The PUD's design and open spaces are not superior to what a matter-of-right development should provide in a desirable commercial area, and they do not balance the PUD's extensive rezoning and waiver requests. The Applicant suggests that the project's design is a public amenity. (Pre-Hearing Submission, p. 17.) It particularly cites trees, paving features and marked crosswalks. Surely the Applicant is not suggesting that matter-of-right redevelopment in this desirable neighborhood would not be done in an attractive manner? A promise of marked crosswalks, bicycle racks and the like does not begin to satisfy the balancing requirement that weighs amenities against the extensive change in character, upzoning and additional waivers that the Applicant is requesting.

It is striking that although the Applicant's project pushes the limits of lot occupancy requirements, still it seeks credit for not building on the four small spaces it has left open. The largest of these adjoins the Giant loading driveway south of the proposed townhouses and is left open in an inadequate attempt to buffer the supermarket's loading driveway from the existing residences. This "open space" is not located where the general public is likely to use it for anything, and it should be regarded as inadequate mitigation rather than as an amenity. The other public areas are much smaller. There is upper-floor open space, but that is only for the north block residents and is supplied because the zoning regulations so require.

Given the several and varied nearby green spaces open to the public in the neighborhood of the PUD, one of them across the street from the PUD, the small open spaces offered by the PUD are of little need. This smattering of small spaces is insignificant when balanced against the disproportionate scale of the project.

vi. The Applicant's site planning and inadequate underground parking and internal loading facilities are not amenities or benefits. The Applicant claims credit for transforming the neighborhood shopping center into a "21st century mixed-use development." (Pre-hearing submission, 19.) As discussed earlier, the Comprehensive Plan does not contemplate mixed-use developments in the MW local neighborhood commercial zone. As noted in the first point in this statement, the Applicant's claim of a mixed use development as an "amenity" is actually an admission that the level of housing

it has proposed is inappropriate for this neighborhood shopping center and is inconsistent with the Comprehensive Plan.

It is curious for Applicant to claim underground parking as an amenity even while requesting a waiver from both the number and the location of parking spaces that the regulations require. The Applicant's parking under its expanded building replaces open surface parking on each block, which the Comprehensive Plan has recognized as contributing to an area's light and air. The proposed South Block underground parking, with spaces insufficient in number and location, is at best a trade-off, not a benefit or amenity.

The Applicant's Pre-Hearing Submission makes the curious claim that eliminating surface parking and reducing curb cuts from eight to five will enhance vehicular access. (Pre-Hearing Submission p. 19.) In reality, the project would reduce entry points and eliminate the light and air of open surface parking, forcing all traffic to wind into an underground space or, just as likely, to seek parking in the neighborhood. Terminating the surface lot is not, of itself, an amenity, and in fact it eliminates the existing transition from commercial to residential. Further, by seeking to eliminate all north block commercial parking, the proposal diminishes the safety of pedestrians, who currently park in a surface lot located on the north block and under the proposal would have to park in the south block and cross Newark Street to reach north block retailers. In particular, the placement of the remaining curb cuts will encourage pedestrians and vehicles to converge at the same points in the development, creating conflicts between automobiles and pedestrians.

vii. The Applicant should offer a first source employment agreement under matter of right zoning. (Pre-Hearing Submission, p. 20.) We are happy to learn that the applicant will work with the District to employ District residents. This is hardly a reason to build a project that does not conform to the Comprehensive Plan, Future Land Use Map or zoning objectives, and we trust that it is not a feature that the applicant would fail to provide under matter-of-right construction.

viii. Green building initiatives and Giant's "customary sustainable features" should not qualify as superior to its matter of right stores. The Applicant's Pre-Hearing Submission makes general claims as to environmental benefits including stormwater management, water use reduction and tree plantings. (Prehearing submittal, p. 19.) We would trust that any 21st century development, particularly one located in a desirable section of the Nation's capital, would take this approach. The Applicant also states, "The new Giant supermarket will incorporate sustainable features that are customary to its new stores." Features that are "customary to its new stores" obviously do not meet the test of being "superior features" that are of "significantly greater extent than would likely result from development of the site under the matter-of-right provisions."

ix. Traffic planning is at best mitigation, not an amenity. The Applicant included traffic planning in listing project benefits for the ANC. (ANC Memo, Jan. 16, 2009, p. 2.) It did not list this as a benefit in its Pre-Hearing Submission to the Zoning Commission, and the subject is highly debatable. The Applicant's offer to the ANC of (inadequate) funding for traffic calming measures after the project is built confirms that the traffic that the project will generate is a concern, not an amenity. In addition, acknowledging that traffic impacts will have to be addressed after the project is built means that the Applicant has not met its burden of proving that the impacts will be acceptable. Traffic issues are addressed in a separate statement.

x. Parking space for the surrounding community does not balance the Applicant's request for waivers of its own parking requirements. While the community will welcome any measures that alleviate parking in the neighborhood, even just 30 spaces, the Commission should look at the Applicant's proffer in the light of its request for a waiver from its own required parking spaces. The Commission might also note that patrons of area establishments outside of the PUD area currently avail themselves of far more than 30 spaces in the existing Giant surface lot on a regular basis. Although Giant is under no obligation to allow this current use, it must be acknowledged as a practical matter that the loss of this free commercial parking will have negative impacts on nearby streets.

xi. The Applicant has not supplied information to support its claim of revenue for the District as a public benefit. (Oct. 24, p. 20.) The Applicant made a general claim of increased District tax revenues in its Pre-Hearing Submission.¹³ (P. 20.) It did not make this claim to the ANC. Its claim has no details and fails to address potential added burdens that the project may cause, such as infrastructure costs, increased traffic and, most significantly, the potential impact on surrounding high-tax residential areas, including the potential for reduced residential property values and taxes in the neighborhood if increased traffic and parking issues diminish the attractiveness of nearby residences. It is submitted that the general “tax revenue” claim is a make-weight argument that is not helpful to the hard analyses that this project requires.

xii. The Applicant cannot claim compliance with the Comprehensive Plan as a public benefit, particularly because the project does not comply with the Comprehensive Plan. The Applicant’s Pre-Hearing Submission claimed consistency with the Comprehensive Plan as a public benefit. (P. 20.) Compliance with the law is a requirement, not a benefit or amenity. A matter-of-right project would also have to meet that test. In any case, as has been shown, the project conflicts with the essential land use policies of the Comprehensive Plan including the Future Land Use Map, which, as the Plan states, are the “cornerstone” of the Comprehensive Plan and must be given greater weight than the other elements. (Land Use Element Overview, p. 3-1.) Simply stated, this PUD cannot accurately claim compliance with the Plan as a public benefit or otherwise.

b. Public Benefits And Amenities Conclusion.

PUD standards require that a project may qualify for approval “by being particularly strong in only one or a few of the categories” of public benefits, “but must be acceptable in all proffered categories and superior in many.” § 2403.10. Here, the

¹³ At the April 6, 2009 hearing the Office of Planning, when asked, confirmed that benefits to the city would be a project public benefit. This claim is not contained in the OP Final Report. There is no indication that OP has performed any sort of benefit/burden analysis to verify its facile assumption. This is another example of OP’s failure of due diligence.

Applicant has thin or non-existent support for several of the purported benefits of the project, and is far from satisfying the burden of proving that the project is “particularly strong” in one or more categories and offers “superior” public benefits in many categories. Its purported benefits fail to justify the requested PUD relief.

7. The Applicant Has Not Provided Economic Justification For The Scale Of Its Proposal.

In meetings with the Applicant, community members have supported improving the supermarket but urged reduction of the housing component. The Applicant has consistently responded that reducing the housing component would render the overall project uneconomical. However, it has equally consistently refused to provide demolition/construction cost estimates that would allow independent verification of its claim. If the Applicant contends that it must have medium density housing to make this project economically viable, it has the burden of proving that statement. Without such proof, the claim--which would not, in any case, justify violating the Comprehensive Plan--must be rejected, and the conclusion must be reached that the applicant has given no credible reason not to scale back the residential component of the north block.¹⁴

III. CONCLUSION

In sum, the proposed PUD fails to comply with well-established land use requirements and limitations applicable to the M-W Overlay Zone District. The Applicant’s proposal ignores twenty-five years of planning and zoning and seeks instead to re-write the well-considered rules crafted specifically to protect this local neighborhood commercial center. WNNC supports the South Block proposal, if modified to retain MW/C-1 zoning and meet other neighborhood concerns, but the North Block proposal requires substantial modification to produce a proposal that will be not

¹⁴ It has been suggested that Giant’s only long-term interest is in the south block, where its supermarket is located, and that it will try to sell the north parcel once it obtains Zoning Commission authorization for the requested level of North Block redevelopment. If, despite WNNC objections, the Zoning Commission approves the PUD application, the Commission must ensure that any conditions, including conditions relating to traffic mitigation, loading management and dedicated South Block parking, run with the land and are binding on any subsequent North Block owner.

inconsistent with the Comprehensive Plan including the Future Land Use Map and will protect the primary neighborhood retail function of the commercial area.

APPENDICES

Appendix 1. Future Land Use Maps (excerpts).

Appendix II. DC Comprehensive Plan Requirements for the Macomb/Wisconsin Commercial Zone.

Appendix III. Comparison Of ANC #03 Resolution and WNNC Position.