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Hand Delivered

Mr. Anthony Hood, Chairperson
D.C. Zoning Commission
Office of Zoning
441 4th Street N.W., Suite 210
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**Re: Case No. 08-15: Wisconsin Avenue Giant,
Motion to Dismiss Petition to Refer Case No. 08-15 to BZA**

Dear Chairperson Hood and Members of the Commission:

Friendship-Macomb SC Inc., through its counsel, moves to dismiss the request of the Wisconsin/Newark Neighborhood Coalition to refer Zoning Commission Case No. 08-15 to the Board of Zoning Adjustment on the grounds that the MW Overlay requires review by the Board of Zoning Adjustment (“BZA”), for the following reasons:

I. Summary

1. The PUD-related Zoning Map Amendment will rezone the Property and remove the Property from the MW Overlay and eliminate the requirement for BZA review under Section 1308.3.
2. Notwithstanding the PUD-related Zoning Map Amendment, the Zoning Commission has the authority to review requests for special exceptions—including the relief called for under Section 1308.3—as a part of its review of the PUD.

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District of Columbia

3. The review and approval by the Zoning Commission through the PUD process provides the public review called for under Section 1308.2.
4. Neither the “Wisconsin/Newark Neighborhood Coalition” nor the individual authors of the petition are parties to the proceeding below, and they therefore lack standing to bring the petition.

Accordingly, we request that this Commission retain its jurisdiction over the case for consideration at an upcoming public hearing.

II. Overview

The Property (Square 1920, Lot 813 and Square 1920-N, Lots 1 and 2) is currently located in the MW/C-1 and R-5-A Zone Districts. In conjunction with an application (Zoning Commission Case No. 08-15) for a planned unit development for the Property, the Applicant filed an application for a related amendment to the Zoning Map for approximately 152,848 square feet of the site to the C-2-A Zone District. The balance of the property, approximately 25,388 square feet, is proposed to remain in the R-5-A Zone District. The map amendment, if approved, will remove the MW Overlay designation from the site for purposes of the PUD.

A. The PUD-related Zoning Map Amendment Will Rezone the Property and Remove It From the MW Overlay and Eliminate the Requirement for BZA Review Under Section 1308.3.

Under the Zoning Act of 1938, the Zoning Commission “shall exercise all the powers and perform all the duties with respect to zoning in the District” (D.C. Code § 6-621.01). This power includes the power to “divide the District of Columbia into districts or zones,” (D.C. Code § 6-641.01), as well as the power to “from time to time amend the regulations . . . or the maps” (D.C. Code § 6-641.03). Indeed, the Commission is the sole agency that is granted authority to amend the Zoning Map; the BZA is has no power to amend the regulations or maps (D.C. Code § 6-641.07). The Commission’s legislative power to amend the Zoning Map necessarily includes the authority to rezone property into, or out of, an overlay district. Therefore, under the

express terms of the Zoning Act and as a matter of legislative principle, the present Zoning Commission retains the power to modify or remove the MW Overlay.¹

The regulations that govern the review and approval of Planned Unit Developments specifically permit related requests to change the zoning of the property involved (see 11 DCMR § 2406.2). Furthermore, the Commission has the authority to remove overlay district designations, including neighborhood commercial overlay designations, from property through PUD-related map amendments (see, e.g. Z.C. Order No. 05-37, approving removal of H Street Overlay designation from a portion of the property through a map amendment). The Zoning Regulations do not distinguish overlay zones from base zone districts. Both types of zones are applied through a zoning map amendment procedure, and both types of zones may be removed through a zoning map amendment procedure. Nothing in the Zoning Regulations suggests that the use of a PUD-related zoning map amendment somehow precludes rezonings into, or out of, overlay districts.

Moreover, PUD-related map amendments removing property from overlay districts do not threaten the integrity of the overlay district because the Commission is able to consider the effect of the map amendment in light of the merits of the PUD. A PUD-related zoning map amendment is a conditional, temporary change to existing zoning that does not begin until a PUD covenant is recorded, ceases if the PUD is not built, and ends once the PUD use terminates. Moreover, since the map amendment is tied to the PUD, the Commission may impose greater limitations on the permitted height, density, and uses than what is otherwise permitted in the requested zone category. Therefore, the Commission may condition the map amendment in a manner that furthers the purposes of the PUD yet protects the core features of an overlay district.

Here, the Applicant has requested that the Commission rezone the Property out of the MW Overlay, which removes the requirement for special exception review and approval of the proposed development under Section 1308.3. The Commission clearly has the power to rezone the Property out of the MW Overlay, as demonstrated by the text of the Zoning Act, Zoning Regulations, and prior precedent. The

¹ It is a fundamental principle of law that one legislature cannot bind its future successors, and no prior Commission could create a zone category that would bind future Zoning Commissions to maintain that zone category. See William Blackstone 1 Commentaries *90 (“Acts of parliament derogatory from the power of subsequent parliaments bind not.”) Therefore, the 1989 Zoning Commission could not have created an overlay that future Commissions could not modify or rescind.

Commission may use a PUD-related map amendment to remove the MW overlay zone designation just as it may amend the Zoning Map to change the base zone designation from C-1 to C-2-A. Finally, as discussed in greater detail in Section C, *infra*, the effect of removing the MW Overlay is consistent with the intent and purposes of the Zoning Regulations, since the Commission will essentially conduct the same “public review” required under the MW Overlay through its review and approval of the PUD.

The rezoning, if approved, will remove the MW Overlay’s required special exception review, and the petition to refer the application to the BZA should therefore be dismissed.

B. Notwithstanding the PUD-related Zoning Map Amendment, the Zoning Commission Has Authority to Review Special Exceptions As a Part of its Review of the PUD.

Petitioners argue that the Commission cannot review and approve the special exception required under the MW Overlay because (1) the Commission is only permitted to review certain types of special exceptions through the PUD process and (2) the Commission’s authority under the PUD regulations is limited to the express language of the Zoning Regulations. As discussed above, the map amendment removing the Property from the MW Overlay eliminates the need for special exception approval under Section 1308.3. Even if the Overlay were to be retained, however, the Commission retains the authority to review and approve the special exception under Section 1308.3, for the reasons discussed below.

Under Petitioner’s limited reading, any powers not expressly delegated to the Commission by itself under the PUD Regulations are somehow reserved for the BZA. Petitioners ignore, however the fundamental structure of the Zoning Act and Zoning Regulations, which establish the Zoning Commission as the lead entity for zoning in the District of Columbia, and grant the Commission broad power over the BZA—including the power to establish special exceptions. As noted above, the Zoning Act grants the Zoning Commission the authority to “exercise all the powers and perform all the duties with respect to zoning in the District” (D.C. Code § 6-621.01). Moreover, the Act grants the Zoning Commission authority to establish special exceptions to the provisions of the Zoning Regulations subject to specific principles, standards, rules, conditions, and safeguards established by the Commission (see D.C. Code § 6-641.07(d)). The BZA’s limited power to grant special exceptions exists only insofar as the Commission has established those exceptions. Indeed, the Commission even possesses the authority to establish the rules of organization and procedure that govern the BZA (D.C. Code § 6-641-07(c)).

This zoning structure makes it clear that the Commission retains the ultimate authority to determine what constitutes a special exception. To this end, the Commission also has made it clear that it retains the authority to review and approve such special exceptions in conjunction with its authority over certain applications, such as PUD applications, applications for design review under the Southeast Federal Center and Capital Gateway Overlays, and applications for further processing of a campus plan. Finally, even for special exceptions that are initially reviewed and approved by the BZA, the Commission retains the authority to, *sua sponte*, review any final decision of the BZA (11 DCMR § 3128).

Therefore, even if the MW Overlay were to be retained, the Commission possesses the ability to grant the special exception under its own authority and regulations. Under Section 2405.7 of the Regulations, the Commission has established its authority to approve special exceptions that might otherwise be required under strict provisions of the Regulations. Furthermore, under Section 2405.8, the Commission has established that it is not required to apply the standards normally applied by the BZA when reviewing such special exceptions. The Commission's authority under Sections 2405.7 and 2405.8 includes both traditional "use" exceptions (i.e. university use under Section 210 of the Regulations) as well as other exceptions. For example, the Commission routinely grants relief from the roof structure regulations under Section 411 as a part of many PUDs.

Contrary to the assertions of the petitioners, the Commission's authority to review special exceptions through the PUD process must include, of course, the authority of the Zoning Commission to grant the special exception detailed in Section 1308.3 of the Regulations. To suggest otherwise would require the review and approval of the proposed development by both the Zoning Commission and BZA. Such a process would require Zoning Commission to defer to the decision of the BZA, which is clearly inapposite with the establishment of the Zoning Commission as the primary zoning entity. Furthermore, as discussed in greater detail below, the Commission will effectively conduct the "public review" called for in the MW Overlay regulations through the PUD process. Dual review would also be woefully inefficient, and require an applicant to undertake over two years of review and approval that would cover essentially the same ground. Finally, as discussed above, the map amendment removing the Property from the MW Overlay eliminates the need for special exception approval under Section 1308.3.

For all of the above reasons, the Commission has the authority to review special exceptions under a PUD, including the exception detailed in Section 1308.3.

C. **The review and approval by the Zoning Commission through the PUD process provides the public review called for under Section 1308.2.**

Petitioners suggest that the proposed use of the PUD process would circumvent the intent and purposes of the Zoning Regulations because it obviates the need for BZA review of the special exception under Section 1308.3. Petitioners ignore the purpose of Section 1308.3, which is to ensure that the “public review of large developments” under Section 1308.2 is conducted. The PUD process itself will provide the public review of the development called for under the MW Overlay. A separate public hearing before the BZA would add nothing to this process and, in any event, is unnecessary under the Regulations.

The Commission’s review and approval of the PUD is, of course, a public process that requires a public hearing. During the course of the public hearing before the Commission, all persons will be able to voice their support for the benefits generated by the PUD, or their concern over its perceived impacts, including the members of the Wisconsin/Newark Neighborhood Coalition. Therefore, the PUD will permit public review of the proposed redevelopment, consistent with the intent and purposes of the MW Overlay and the Zoning Regulations as a whole.

Moreover, as a matter of practice, the Commission is well-positioned to evaluate whether the proposed development is consistent with the purposes and intent of the Zoning Regulations. As described above, the Zoning Commission retains broad authority to implement the zone plan in the District of Columbia, through changes in the text of the Regulations, amendments to the Zoning Map, and the approval of PUDs that enhance and improve the District of Columbia. Furthermore, in conjunction with its review and approval of a PUD, the Commission evaluates whether the proposed PUD is not inconsistent with the Comprehensive Plan. Through the PUD process, the Commission will comprehensively consider whether the proposed development is compatible with and enhances the “neighborhood retail function of the commercial area” and essentially conducts the public review of large developments specifically called for under Section 1308.2 of the MW Overlay.

D. Neither the “Wisconsin/Newark Neighborhood Coalition” nor the individual authors of the petition are parties to the proceeding below, and they lack standing to bring the petition.

The petition is brought by two authors both as themselves and on behalf of the “Wisconsin/Newark Neighborhood Coalition”. Only a party to the proceedings in Case No. 08-15 possesses standing to permit such a motion. Under the Zoning Commission’s rules of practice and procedure, in order to participate as a party, an affected person or persons must file a request for party status that establishes why the person or persons are particularly aggrieved by the requested zoning action. For this reason, the request must include, among other information, a written statement setting forth why the person should be granted party status, including reference to (i) the property owned by the person that will be affected by the Commission’s action; (ii) the distance between the person’s property and property that is the subject of the application before the Commission; (iii) the alleged environmental, economic, social, or other impacts likely to affect the person’s property as a result of the Commission’s action; and (iv) an explanation of how the person’s interests would likely to be more significantly, distinctively, or uniquely affected in character or kind by the proposed zoning action than those of other persons in the general public.

The petitioners have not filed any such request for party status, nor has any request been granted by the Zoning Commission. Furthermore, the petition herein includes no reference to any of the criteria necessary to establish a claim for party status. The membership and mission of the Coalition is not discussed nor disclosed, which makes it impossible to ascertain whether the organization or individuals are particularly aggrieved. The only information provided by the Coalition are the addresses of the two co-authors. Neither individual resides within the 200-foot radius that the Regulations establish as the range for which notice of the proposed application and hearing are required; one co-author resides over 700 feet from the development site and the other resides over 1500 feet from the site.

Even if the petition contained information detailing its request for party status, the Wisconsin/Newark Neighborhood Coalition would still lack the authority to request the petition because the Commission has not granted the request for party status. Therefore, the petitioner’s motion must be dismissed for lack of standing.

III. Conclusion

The Commission’s review and approval of the PUD and related Map Amendment will eliminate the requirement for BZA special exception review under Section 1308.3 of the Regulations. Even if the map amendment were not required,

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the Commission would retain the authority to review and approve the special exception, and its review and approval through the PUD process would provide the "public review" required under Section 1308.2. Finally, the petitioners lack standing to bring the petition, since they have not yet been established as a party to the proceeding. For all of the above reasons, the petitioner's motion should be dismissed.

Sincerely yours,


Phil Feola


David Avitabile

cc: Alan Bergstein, Esq. (By-hand)
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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2008, a copy of the attached letter and enclosure was delivered via first-class mail, to the following:

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