

**APPLICANT'S RESPONSE
TO
WISCONSIN-NEWARK NEIGHBORHOOD COALITION'S
APRIL 14, 2009 BRIEF
ZONING COMMISSION CASE NO. 08-15**

I. INTRODUCTION

The Wisconsin-Newark Neighborhood Coalition ("WNNC") has filed a statement in opposition to the proposed PUD and map amendment in Case No. 08-15. WNNC's statement is lengthy and raises a series of theoretical legal issues with the PUD. WNNC's arguments fail, however, for the following reasons:

- WNNC has misread and misapplied the applicable laws and regulations, including the Comprehensive Plan and the Zoning Regulations.
- WNNC has ignored clear language that establishes the consistency of the proposed PUD and map amendment with the PUD Site's Future Land Use map designation.
- WNNC's issues are not legal issues but rather issues of fact that have been addressed by the Applicant and supported by OP, DDOT, ANC 3C, and other individuals and organizations in support, such as the former director of the Office of Planning.
- The Applicant has established that the PUD and map amendment (a) are not inconsistent with the Comprehensive Plan and (b) address the Commission's PUD evaluation standards and guidelines in Chapter 24 of the Zoning Regulations.

WNNC's repetitive and aggressive cross-examination in this case reveals an important point: WNNC's true issue is not the Applicant's failure to address the questions, but simply WNNC's dissatisfaction with the answers. The PUD's consistency with the Comprehensive Plan and conformance with the Zoning Regulations has been clearly established by the Applicant and agreed with by DDOT, OP and ANC 3C. And many of WNNC's issues regarding loading, parking, potential uses, and other issues have been addressed by the Applicant through project modifications and proposed conditions. For all of the reasons set forth in the Applicant's filings and testimony, as reaffirmed by the discussion below, the Applicant respectfully requests the Commission approve the PUD and map amendment.

II. THE COMPREHENSIVE PLAN

A. Introduction

It is well-established as a matter of law that the Comprehensive Plan and its terms are intended to be a "broad framework intended to guide the future land use planning decisions for the District." See Tenley and Cleveland Park Emergency Committee v. D.C. Board of Zoning Adjustment, 550 A.2d 331, 337 (D.C. 1988). Therefore, the Commission's role, in reviewing a PUD with a related amendment to the Zoning Map, is to determine whether the proposal is "not

inconsistent” with the Comprehensive Plan as a whole. The Commission considers a PUD site’s particular designation on the land use and policy maps in concert with relevant provisions of the Land Use Element, applicable Area Element, and other provisions of the Plan, in order to determine the relative consistency of the PUD and map amendment. Consistent with this approach, the Applicant and the District of Columbia’s Office of Planning (“OP”) have provided detailed descriptions of the relevant provisions of the Comprehensive Plan that fully explain why the proposed PUD and related rezoning to the C-2-A Zone District are compatible, thus not inconsistent, with the goals and policies of the Comprehensive Plan. This material was bolstered by the testimony of former OP Director, Ellen McCarthy, who supervised and directed the 2006 revisions to the Comprehensive Plan. In short, the Applicant and OP have met the burden of demonstrating that the PUD is “not inconsistent” with the Comprehensive Plan.

When read as a whole, the 2006 Comprehensive Plan clearly and conclusively endorses the development of mixed-use, pedestrian-oriented developments along major corridors in Ward 3, such as the proposed PUD, and supports the approval of this application.

B. Wisconsin-Newark Neighborhood Coalition’s Arguments

In its April 2009 filing (“**April Brief**”), the Wisconsin-Newark Neighborhood Coalition (“WNNC”) offers a series of unpersuasive arguments that claim the PUD and map amendment applications are inconsistent with the Comprehensive Plan. WNNC’s April Brief demonstrates a lack of understanding of the role of the Comprehensive Plan in guiding land use policy and decisions.

- WNNC relies on a semantic, constrained reading of the Comprehensive Plan that cherry-picks select words or phrases and disassociates them from the overarching goals, policies, and themes of the Plan.
- WNNC also ignores specific language—language so important that it is placed directly on the Land Use Map itself—that directs the interpretation of the Future Land Use Map and clearly supports a finding that the PUD is not inconsistent with the Plan.
- WNNC fails to confront language in the Land Use Element, Rock Creek West Element, and other elements that specifically advocate the combination and intensity of uses proposed in the PUD.
- Finally, WNNC claims that “specific Plan directives” counsel against the proposed development, but fails to actually cite a provision that is inconsistent with the PUD. Instead, these provisions raise issues of fact that the Applicant and District agencies have satisfactorily addressed.

As fully described below, WNCC’s arguments are incorrect and do not provide appropriate guidance for the Zoning Commission role in interpreting the Comprehensive Plan in conjunction with this PUD application.

C. Future Land Use Map

The PUD site is designated on Low Density Commercial on the Future Land Use Map. As stated in the Applicant’s PUD application and OP’s reports, the proposed development of a mixed-use neighborhood commercial center with a grocery store, neighborhood retail and office

space, and residential uses is not inconsistent with PUD Site's underlying "Low Density Commercial" land use designation on the Future Land Use Map.

1. **Characteristics of Low Density Commercial**

The characteristics of the Low Density Commercial land use designation are summarized in the Framework Element. This description applies to the entire area (i.e. the Macomb-Wisconsin commercial center), and describes the general characteristics of the designation as follows:

- **"Corresponding zone districts are generally C-1 and C-2-A.":** The Applicant has proposed a rezoning to the C-2-A Zone District, which is clearly consistent with the land use designation.
- **"Primarily composed of one- to three-story commercial buildings."** The Macomb-Wisconsin commercial area is currently composed of multiple one- to three-story buildings. The proposed PUD would add a one-story Giant grocery store wrapped by a two-story mixed-use retail office building and a two-story mixed-use retail/residential building, and a five-story mixed-use building to the commercial area. Following completion of the PUD, the Macomb-Wisconsin Commercial Area would still be composed of primarily one- to three-story commercial buildings—only one building in the entire commercial area would be greater than three stories.
- **"Retail, office, and service businesses are the predominant uses."** The commercial area is currently composed of such uses. Again, following completion of the PUD, the commercial area would continue to be predominantly composed of such uses, with some new housing, which is explicitly permitted in commercial areas. See 10 DCMR § 225.7. Indeed, at the ground floor, all uses in the Macomb-Wisconsin commercial area would continue to be retail, office, and service businesses. The residential use introduced by the PUD serves as an additional upper-story use that supplements and supports the commercial center.

2. **Interpretation of Future Land Use Map.**

The Comprehensive Plan's Future Land Use Map is intended to be "interpreted broadly" as "a generalized guide for development and conservation decisions." Clear and concise guidelines for interpretation are laid out in the Framework Element of the Comprehensive Plan as well as on the Map itself ("**Interpretation Guidelines**").

- The Interpretation Guidelines are clear that the Future Land Use Map is "not a zoning map" and "its categories do not specify allowable uses or dimensional standards." Therefore, contrary to WNNC's assertion, the designation as "low density commercial" does not automatically preclude residential uses, nor does it preclude heights greater than three stories. In fact, the C-2-A Zone District, as noted above is one of the Zone Districts that equate to the Low Density Commercial designation, and it allows a "bonus" of 1.0 FAR for residential uses.

The Interpretation Guidelines are also clear that the typical building heights and densities included in the land use category definitions simply describe the “general character” of the category, and are not a hard cap on height or density. The Plan specifically acknowledges that “there may be individual buildings that are higher or lower than these ranges within each area”. The Interpretation Guidelines also specifically note that **“the granting of density bonuses (for example, through Planned Unit Developments) may result in heights that exceed the typical ranges cited here.”** This is consistent with the individual description of the Low Density Commercial category, which describes the area as being composed of primarily—not exclusively—one- to three-story buildings. Therefore, a single five-story building will not disrupt the general character of the commercial area and, in any event, is explicitly permitted as an exception to the general rule since the height is being granted through a PUD.

The land use designations on the Future Land Use map are intended to be “interpreted in conjunction with the text of the Plan.” As detailed by the Applicant in its filings as well as those by the Office of Planning, there are numerous provisions of the Comprehensive Plan, in both the District-wide Elements and the Rock Creek West Area Element, that support the consistency of the proposed mixed-use development with the maps and text of the Comprehensive Plan.

Finally, contrary to WNNC’s suggestion, the absence of “mixed use” striping on the Map does not preclude mixed use development on the PUD Site. The Framework Element states that housing is permitted in commercial areas even if not striped for mixed use; such striping is intended to indicate that mixing of land uses is “strongly encouraged”. See 10 DCMR § 225.7. Also, the Commission and other agencies have historically interpreted the “commercial” land use categories on the Future Land Use map to permit residential uses as well as commercial uses. As a result, many of the underlying commercial zone districts permit mixed use development, with higher permitted densities for residential uses. As previously noted, one such zone, is the C-2-A Zone which encourages residential with a FAR “bonus” and the C-2-A is specifically noted as a zone that is appropriate for the Low Density Commercial Designation on the Map.

D. Policy Map

As stated in the Applicant’s PUD application and the OP reports and testimony, the proposed development of the PUD site as a mixed-use neighborhood commercial center with a grocery store, neighborhood retail and office space, and residential uses is not inconsistent with the underlying “Neighborhood Commercial Center” land use designation.

Again, WNNC suggests that the Neighborhood Commercial Center designation precludes development of a mixed-use project because it does not specifically reference “mixed use”. This ignores the history of the Comprehensive Plan, as the “Main Street/Mixed Use” category was added in 2006 to supplement the other commercial categories, which had existed in prior versions of the Plan and always included potential for mixed-use residential and retail development. The Framework Element indicates that Main Street-Mixed Use Corridors were added to identify a category of pedestrian-oriented shopping districts, distinct from other commercial areas such as neighborhood commercial corridors that are intended to include both auto-oriented centers and pedestrian-oriented shopping areas. See 10 DCMR § 223.16. It is clear that the Neighborhood Commercial Center category permits mixed use development that

includes housing, even though they are “only” a commercial category and lack a specific mixed-use distinction.¹

E. The Land Use Element and other Districtwide Elements

The first section of the Land Use Element describes “desired pattern of growth and development” in the District. This section sets forth four areas where change is most likely to take place, including “opportunities for change along the city’s corridors and around its transit stations”. 10 DCMR § 303.1. This focus is consistent with the guiding principle for the 2006 Plan, which states: “Redevelopment and infill opportunities along corridors and near transit stations will be an important component of reinvigorating and enhancing our neighborhoods.” 10 DCMR § 217.

Section LU-1.3 of the Land Use Element is devoted to a discussion of “transit-oriented and corridor development.” The text is clear that transit-oriented development is not limited to Metro station areas, but also includes “premium transit corridors” such as the Wisconsin Avenue corridor. 10 DCMR § 306.6. The Element indicates that such development is intended primarily for commercially zoned land along these corridors, and explicitly indicates that rezoning should be considered to accommodate such development. 10 DCMR § 306.9.² When the Land Use Element is read in concert with the land use maps and the Rock Creek West Area Element, it is clear that (1) the Wisconsin Avenue Corridor is intended to include transit-oriented development on its commercial sites and (2) the PUD site is one such commercial site that should accommodate mixed-use transit-oriented development.

The Land Use Element also includes a discussion of specific policies for Neighborhood Commercial Districts and Centers that further promote redevelopment of the PUD Site. Policy LU-2.4.1 of the Land Use Element promotes the “continued growth” of commercial land uses as “inviting and attractive places” that “support social interaction and ease of access for nearby residents.” 10 DCMR § 312.5. Policy LU-2.4.2 states that “established centers should be expanded in areas where the existing range of goods and services is insufficient to meet community needs.” 10 DCMR § 312.6. Finally, Policy LU 2.4.5 of the Element encourages the development of “pedestrian-oriented ‘nodes’ of commercial development at key locations along

¹ Action LU-2.4.C: of the Land Use Element, entitled “Mixed Use District with Housing Emphasis”, further clarifies that the Plan endorses mixed use development at commercial centers: The provision recommends the development of new mixed use zoning district that “limits commercial development to the ground floor of future uses and requires residential use on any upper stories” and recommends application of the new district to “**corridor streets** that may currently have high commercial vacancies . . . including those areas designated as “Main Street Mixed Use Corridors” **and commercial centers** on the Generalized Policies Map.”

² “To avoid adverse effects on low and moderate density neighborhoods, most transit-oriented development should be accommodated on commercially zoned land. **Possible rezoning of such land in a manner that is consistent with the Future Land Use Map and related corridor plans should be considered.** Current zoning already expresses a preference for the use of such land for housing by permitting more density for mixed use projects than for projects with commercial uses alone” (emphasis added).

major corridors.” As stated by representatives of ANC 3C, AWARE, and multiple neighborhood organizations and persons in support of the PUD, the existing center is insufficient to meet neighborhood needs. These groups all passionately testified regarding the need for a better supermarket and neighborhood retail center, especially one that also provides improved access through pedestrian-oriented design and streetscape.

The policies regarding Neighborhood Commercial Centers also observe that “zoning and design standards should ensure that the height, mass, and scale of development within nodes respects the integrity and character of surrounding residential areas and does not **unreasonably** impact them.” 10 DCMR § 312.9; see also § 312.10 (requiring new uses within commercial districts be developed at a height, mass, scale and design that is appropriate and compatible with surrounding areas). As demonstrated by both OP and the Applicant, the height and scale of the proposed PUD is consistent with the character of surrounding properties:

- There is a 9-story residential building and 5-story office building immediately west of the North Parcel, across Idaho Avenue
- There is a 4-story residential building immediately east of the North Parcel, across Wisconsin Avenue
- There is a 9-story residential building immediately east of the South Parcel, across Wisconsin Avenue. Another 8-story residential building is immediately south of this building.
- There is a police station immediately west of the South Parcel, across Idaho Avenue.
- There is a five-story residential building immediately south of the South Parcel

The Applicant’s expert witnesses have demonstrated that the proposed PUD will not unreasonably impact surrounding residential properties, and OP, DDOT, and other agencies have supported these conclusions.

The Applicant and OP have both set forth the Plan’s consistency with multiple provisions of the District Elements of the Comprehensive Plan. These provisions will not be repeated here, but include provisions in the Transportation, Housing, Economic Development, and Urban Design Elements.

F. Rock Creek West Area Element

The PUD is clearly consistent with specific directives from the Area Element:

- Policy RCW-1.1.3: “Support and sustain local retail uses and small businesses in the area’s neighborhood commercial centers. These centers should be protected from encroachment by large office buildings and other non-neighborhood serving uses. **Compatible new uses such as multi-family housing or limited low-cost neighborhood serving office space (above local-serving ground-floor retail uses) should be considered within the area’s commercial centers to meeting affordable housing needs, sustain new neighborhood-serving retail and small businesses, and bring families back to the District.”**
- Policy RCW-1.1.4: “**Recognize the opportunity for infill development within the areas designated for commercial land use on the Future Land use Map. When**

such development is proposed, work with ANCs, residents, and community organizations to encourage projects that combine housing and commercial uses rather than projects that contain single uses. Heights and densities for such development should be appropriate to the scale and character of adjoining communities. Buffers should be adequate to protect existing residential areas from noise, odors, shadows, and other impacts.”

- Policy RCW-2.2.1: “**Recognize the opportunity for additional housing with some retail and limited office space . . . on underutilized commercially zoned sites on Wisconsin Avenue.** Any development in these areas should be compatible with the existing residential neighborhoods”

See 10 DCMR §§ 2308.4, 2308.5, 2312.8 (emphasis added). Nothing in the Rock Creek West Element suggests that these provisions are intended to exclude the PUD site, which is an underutilized commercial site. Indeed, the text is clear that such commercial sites offer an opportunity for multi-family housing above the ground-level retail. The provisions indicate that such development should be compatible with existing residential neighborhoods. Again, as demonstrated by OP and the Applicant, the proposed heights, scale, and density are compatible with surrounding properties; indeed, the 5-story North Parcel building is the same height or shorter than many of the buildings immediately surrounding the PUD.

G. Discussion of Specific Comprehensive Plan Provisions Cited by WNNC

In Appendix II of its April Brief, WNNC cites certain provisions of the Comprehensive Plan that it believes support a conclusion that the PUD and Map amendment are inconsistent with the Comprehensive Plan. Responses to these cited provision follow below.

1. Section 1: Comprehensive Plan Implementation Requirements

WNNC accurately cites the basic provisions of the Comprehensive Plan as they relate to the Zoning Regulations and decision-making of the Zoning Commission. However, WNNC misstates the relative weight of certain policies and elements compared to other policies. WNNC erroneously claims that the “area-specific directives take precedence over general Plan policies.” The Plan is clear, however, that the Citywide and Area Elements carry the “same legal authority,” 10 DCMR § 104.6, and nothing in the Plan suggests that policies applicable to focus areas such as the Wisconsin Avenue Corridor warrant greater weight. Furthermore, the Plan clearly states that even as some policies are “place-based,” these policies are still general in nature and “**do not prescribe specific uses or design details.**” Id.

Even assuming that the specific place-based elements applicable to the Wisconsin Avenue corridor did merit greater weight, those elements clearly favor mixed-use development with housing and low-scale office above ground-level retail uses on underutilized commercial sites along Wisconsin Avenue, as discussed above. See 10 DCMR §§ 2308.4, 2308.5, 2312.8. The PUD clearly achieves these goals.

2. Section 2: The Comprehensive Plan and the Macomb/Wisconsin Commercial Center

In Section 2-1, WNNC alleges that the Applicant and OP have relied only on “general statements” in support of the PUD. WNNC also claims that the Rock Creek West element does

not identify the PUD site as an opportunity for mixed-use development that includes housing. This is patently incorrect. The Comprehensive Plan clearly and consistently endorses mixed-use development, including housing, on commercial sites along Wisconsin Avenue.

WNNC's assertion that the Comprehensive Plan only promotes transit-oriented development at Metrorail stations is also incorrect as a matter of law and policy. As discussed above, the Land Use Element of the Comprehensive plan is clear that transit-oriented development is intended for major corridors as well as around Metrorail stations, and the PUD site's location at the junction of the Wisconsin Avenue bus corridor and multiple cross-town bus lines makes it a clear transit-oriented site. In addition to the general direction given in the Land Use Element regarding transit-oriented development along major corridors, specific provisions in the Rock Creek West Element and its Wisconsin Avenue Corridor focus area directly advocate mixed-use development featuring housing at the PUD site. See 10 DCMR §§ 2308.4, 2308.5, 2312.8. The PUD is clearly consistent with these policies from the Rock Creek West Area Element, including specific direction from the Wisconsin Avenue Corridor Policy Focus Area, for the reasons discussed above.

WNNC's reliance on the reference to Wisconsin Avenue's "eclectic" mix is misplaced, as it is a reference to the current, not anticipated, character of the corridor. WNNC's suggestion that the policy regarding the National Cathedral is the most relevant area policy is also incorrect, since it ignores multiple policies that specifically reference commercial sites along the Wisconsin Avenue corridor. And contrary to WNNC's assertion, is not "obvious" that the Cathedral would suffer negative traffic impacts due to the PUD; in fact, the Applicant's traffic study conclusively demonstrates, and the District's Department of Transportation confirms, that levels of service along the Wisconsin Avenue corridor would remain acceptable.

It is clear that WNNC's contested issues are not really with the provisions of the Plan itself, but rather a disagreement with the Applicant and OP as to whether the scale of the PUD is appropriate and the impacts have been mitigated. These are simply contested issues of fact that are expected to be addressed through the public hearing process, not legal issues of interpretation regarding the Plan. It is also worth noting, as WNNC points out, that the Plan does not require a total mitigation of impacts, but rather mitigation of impacts "to the greatest extent feasible." As demonstrated by the Applicant and Office of Planning in their written materials and oral testimony, the PUD meets these conditions.

3. Section 2.3: The Comprehensive Plan and the MW Overlay

WNNC claims that the MW Overlay helps to ensure the Macomb-Wisconsin commercial area's zoning is not inconsistent with the Plan's Low Density Commercial land use designation. While this may be true, it does not mean that use of the PUD process and removal of the Overlay will render the site inconsistent with the Plan.

First, the PUD process, like the MW Overlay, provides for the public review of large projects in the area in order to "ensure compatibility with and enhancement of the primary neighborhood retail function of the commercial area." The Zoning Commission has dedicated four nights to the public hearing in this matter, and has allowed community groups an unusually large amount of leeway in raising comments and concerns.

Second, the PUD process permits the Zoning Commission to adopt conditions that may accomplish the same purposes as an area-wide overlay. The Applicant and ANC have proposed such conditions, including limitations on the amount of financial institutions and restaurants. Further, the PUD provides additional benefits that will promote neighborhood retail and service above and beyond what would be provided in a matter-of-right MW Overlay development, such as quality street-oriented design and storefront and signage guidelines.

Third, the PUD process permits the Commission to consider the proposed development against the context of surrounding development, and for the reasons described above should reasonably find that the proposed height and density is compatible with the surrounding area and is not inconsistent with the Comprehensive Plan.

WNNC also erroneously states that the Plan expressly calls for the expansion of overlay zones. Actually, the Plan calls for “evaluation” of overlays and suggests that planning entities “**consider** creation of additional overlay zones” – hardly a mandate for larger overlay districts. 10 DCMR § 2308.17 (emphasis added). For the reasons discussed herein, removal of the MW Overlay does not render the PUD inconsistent with the Comprehensive Plan. To the contrary, the removal of the Overlay (and its related restrictions) permits the development of a project that is **more consistent** with the Comprehensive Plan.

4. Section 3: Additional Comprehensive Plan Provisions

WNNC cites a number of Comprehensive Plan provisions that allegedly support its claim that the proposed PUD is inconsistent with the Comprehensive Plan. In truth, each of these provisions raise issues of fact that require the Zoning Commission to determine whether or not the proposed PUD addresses the provision. WNNC assumes inconsistency, in many instances without providing evidence to support its finding, and despite repeated demonstrations by the Applicant, OP, DDOT, ANC 3C and others that the provision has been satisfactorily addressed. We briefly address each provision in turn to assist the Commission in its evaluation of the PUD’s consistency with the Comprehensive Plan.

- (a) **Policy LU-2.3.2: Mitigation of Commercial Development Impacts.** The Applicant has conclusively demonstrated that the proposed PUD will not impose unreasonable traffic, parking, noise, and other impacts, and these findings have been supported by OP and DDOT. The Applicant has also proposed, based on extensive conversations with OP, DDOT, and the ANC, multiple measures intended to address traffic, parking, loading, noise, design, and hours of operation. Finally, the Applicant has directly addressed the issue of “unexpected” impacts by providing an escrow fund for any traffic calming measures that may be required as a result of unanticipated traffic impacts from the PUD.
- (b) **LU-2.4: Neighborhood Commercial Districts and Centers.** As discussed above, the MW Overlay is not necessary in order to address issues regarding excessive concentrations of certain uses, parking demand, and other concerns. The PUD process permits the Zoning Commission to adopt conditions that accomplish the same purpose on a site-specific basis. Based on ANC recommendation, the Applicant is prepared to accept limitations on the percentage of financial institutions and restaurants within the proposed PUD that will accomplish this purpose.

- (c) **Policy LU-2.4.8: Addressing Commercial Parking Impacts.** Again, the Applicant has conclusively demonstrated that the proposed PUD will not impose unreasonable parking or loading impacts, and these findings have been supported by OP and DDOT.
- (d) **Rock Creek West Element: Overview.** WNNC misreads this section, which does not limit but actually advocates growth along major corridors such as Wisconsin Avenue. WNNC also erroneously assumes that building height is inversely proportional to human scale. The proposed PUD retains a “human scale” based on the proposed ground-floor retail uses and urban-oriented design. Indeed, the elimination of surface parking lots and reduction of curb cuts actually improve the pedestrian-oriented scale of the project. Also, as reiterated by the Applicant on multiple occasions, the PUD provides the Zoning Commission with the tools to control and guide growth.
- (e) **Planning and Development Priorities (a).** Issues of height, scale, character and density have all been addressed by the Applicant’s architect and the Office of Planning.
- (f) **Planning and Development Priorities (b).** The proposed PUD does not result in a net loss of buffer from the adjacent residential property. Idaho Avenue north of the existing residences is currently bounded by a commercial parking lot on the east and a police station on the west. In addition, existing loading activity at the Giant takes place in the unenclosed parking lot. The proposed development takes that loading activity and moves it into a building. It includes multiple additional provisions designed to mitigate noise, visual, and other impacts, including a 20-foot noise wall, earthen berm, and landscaping and a truck management program.
- (g) **Planning and Development Priorities (d).** As discussed in detail above, the proposed PUD can be adopted with conditions that will promote neighborhood-serving retail and limit the overconcentration of restaurants. The Applicant has proposed storefront and signage guidelines as well as use limitations that will accomplish this purpose. If the Applicant is only permitted to lease 20% of the linear frontage to restaurants, that means the other 80% of the frontage will be reserved for lease to other retail and service establishments! It is also worth noting that many of the neighbors who testified in support of the PUD demonstrated a desire for some additional restaurants.
- (h) **Policy RCW-1.1.1: Neighborhood Conservation.** The Applicant has addressed infrastructure constraints in its filings, including issues of traffic and parking in the surrounding neighborhoods. Recently-installed speed humps on Newark Street as well as the proposed escrow account for traffic calming measures will address any unanticipated traffic or parking issues.
- (i) **Policy RCW-1.1.3: Conserving Neighborhood Centers.** It is peculiar that WNNC chose to cite this provision, which directly advocates upper-story multi-family housing (and neighborhood-serving office space) as a compatible new use for existing commercial centers. WNNC’s offers no support for its claim that existing housing stock is ample to sustain local shops and services; indeed, the

state of the existing commercial center suggests that the existing housing stock may not sufficient.

- (j) **Policy RCW-1.1.5: Preference for Local-Serving Retail.** Without any evidence, WNNC alleges that the proposed PUD will attract out-of-neighborhood shoppers and diners. As OP illustrated, there are multiple grocery stores close to or just outside the one-mile perimeter of the PUD Site, which demonstrates that persons outside the immediately service radius have more convenient grocery store options available to them. Similarly, given the multiple and varied dining options available in Northwest DC, from Glover Park to Upper Wisconsin Avenue, there is no reason to believe that a few new restaurants along this portion of Wisconsin Avenue will serve as “destination” establishments. And again, the Applicant has taken multiple steps to mitigate and address traffic, parking, and other impacts, and these efforts have been endorsed by OP and DDOT.
- (k) **Policy RCW-1.1.12: Congestion Management Measures.** Yet again, WNNC makes a claim without any evidence to support it. The Applicant’s traffic studies have conclusively demonstrated that the PUD will not generate adverse traffic or parking problems with the implementation of a few mitigation measures. The traffic consultants’ conclusions, which have been endorsed by DDOT, did account for so-called “background growth”. The parking impacts of the nursing home conversion are not material to this application, since those residents have no right to park on the Giant’s property, whether on the existing surface parking lot or in the proposed parking garage.
- (l) **RCW-1.1.13: Parking.** WNNC asserts that the proposed PUD will remove on-street public parking. The PUD will actually result in no net loss of on-street parking, since the development reduces the number of curb cuts. Therefore, the PUD complies with this provision of the Plan. In addition, the PUD furthers the provision of the Plan that encourages private developments to include additional public parking in commercial districts. The Applicant has proffered 30 spaces for such use as a condition of the PUD.
- (m) **Action RCW-1.1.A: Commercial Zoning Assessment.** As discussed above, the proposal to eliminate the MW Overlay does not conflict with this policy, which calls for “consideration” of the creation of additional overlay zones, not expansion of existing zones. Furthermore, the PUD process permits the Zoning Commission to provide more finely-tuned control over the use, design, and impacts of the proposed development than would be provided through a matter-of-right development. Finally, the height limit in other overlay zones is inapplicable to this site, and there are multiple buildings immediately around the PUD Site that meet or exceed the height of the proposed PUD, as discussed in detail above.
- (n) **Policy RCW-2.2.5: Land Use Compatibility Along Wisconsin Avenue.** Again, as discussed above, the Applicant has taken many steps to ensure compatibility of the project with adjoining residential neighborhoods, which include the mid- to high-rise McLean Gardens buildings, Chesterfield Cooperative, Vaughn Place, and other larger multi-unit buildings as well as the neighborhoods populated by single-family homes. Furthermore, guided by OP and the Commission, the

Applicant has revised the architectural design of the project to ensure such appropriateness and sensitivity.

- (o) **Action RCW-2.2.C: Zoning and Design Measures.** The proposed PUD is fully consistent with this action. The Applicant worked extensively with representatives of the community and the city, including the ANC, to address multiple design and planning concerns, including height, density, and design. The proposed design specifically creates a pedestrian-oriented feel, particularly along Newark Street, that provides a true “center” for the diverse residential neighborhoods that surround the PUD Site. Finally, WNNC ignores clear evidence that many of their neighbors do walk and use bus service to commute and shop. Multiple persons testified in support of the pedestrian-oriented project, stating that they walk to the current grocery today and would continue to do so in the revised project.
- (p) **Chapter 2 Framework Element.** The importance of this Element was discussed in detail above, and even a cursory read of the element indicates that the proposed PUD is not inconsistent with the Comprehensive Plan. Again, WNNC’s claim here is a mere issue of fact to be resolved by the Zoning Commission. The Applicant believes that it has offered ample benefits and amenities to justify rezoning to C-2-A and approval of the PUD and this is supported by the Office of Planning, DDOT, ANC 3C, and multiple other entities, organizations, and persons in support.

III. THE ZONING REGULATIONS

A. Introduction

The balance of WNNC’s claims continue to raise issues of fact regarding the positive and negative impact of the PUD, and generally fall under the standards and guidelines applicable to the Commission’s evaluation of the PUD under Sections 2403 and 2405. The Applicant has consistently met its burden of proof regarding these standards and guidelines, and District agencies have supported these conclusions. While these issues have been repeatedly addressed by the Applicant, OP, and other entities throughout the proceedings, they are briefly addressed here to assist the Commission’s evaluation of these particular aspects of the PUD.

B. North Parcel Roof Structure Waivers

WNNC’s broad statement that the proposed roof structure relief “removes needed area protections” ignores the actual impact of such relief. As described by the Applicant and reiterated by OP, the proposed roof structure relief is required to reduce the size of the roof structures and improve the efficiency of the proposed building designs. Full compliance with the roof structure regulations would result in a single needlessly large roof structure on each building. The requested relief permits reasonably sized roof structures that do not impose adverse impacts.

C. North Parcel Loading Berth Waivers

The PUD Regulations allow the Commission to reduce the amount of loading facilities and account for shared use of loading facilities by different uses, depending on the uses and location within a PUD. 11 DCMR § 2405.6. The Applicant believes, and the empirical evidence in the record supports its position, that the proposed two 30-foot loading berths on the North Parcel will be adequate for the proposed mix of uses, and reiterates that the proposed Truck Management Plan will work to minimize conflicts.

- Larger berths are not necessary to accommodate typical deliveries for neighborhood retail or residential uses proposed for this building, and use of the berths shall be managed in order to minimize scheduling conflicts.³ A 55-foot berth is not needed to serve the residential units on the North Parcel. These units will be marketed primarily to one- and two-person households that will use smaller vehicles. Residential move-ins and move-outs shall be scheduled in advance for specific blocks of time in order to minimize conflicts with retail and service deliveries.
- As set forth in its Truck Management Plan, the Applicant shall require its tenants to direct all deliveries, trash disposal services, and moving vans to use the loading docks for these activities through a lease provision or similar mechanism. Similarly, the Applicant shall require tenants to direct all deliveries, trash disposal services, and moving vans to use only 30-foot trucks or smaller vehicles that are able to fit within the internal loading areas.

The Applicant believes that the proposed loading on the North Parcel is adequate, and does not believe that a dedicated on-street loading space on Idaho Avenue will be necessary. The statement was made simply to illustrate that if an unanticipated need for additional loading space arose in the future, there would be a means and a process to accommodate such space. As DDOT's representatives indicated, such an on-street loading space is established through a public process that allows for consideration of any impacts. It should be noted that on-street loading spaces are not uncommon in the local commercial area – indeed, an existing on-street loading space is located on the west side of Idaho Avenue near its intersection with Wisconsin Avenue. Based on the reasons set forth above, the Applicant has satisfied its burden of proof for this relief.

D. Relief for Multiple Buildings on a Single Lot

In its support for the Applicant's construction of rowhouses, WNNC suggests that the Applicant failed to request relief for multiple structures on a single record lot. Such relief was requested in the initial application (p. 11), reiterated in the pre-hearing submission (p. 16), and evaluated by OP in detail in its Final Report (pp.12-14).

E. Rezoning to C-2-A

³ Also, the requirement for a 55-foot retail/service berth is triggered for retail/service uses between 30,000-100,000 square feet; by contrast, retail/service uses between 20,000 and 30,000 square feet require only two 30-foot berths. Here, the proposed retail use on the North Parcel is marginally above the 30,000 (actually by only 799 square feet) square-foot trigger, and two 30-foot berths are reasonably adequate to service the retail/service uses.

WNNC opposes the rezoning of the North Parcel based on alleged inconsistency with the Comprehensive Plan, but as discussed in great detail above, rezoning to C-2-A is fully consistent with the Plan. WNNC also opposes rezoning of the South Parcel, but WNNC's opposition is baseless and ignores the clear regulatory language that governs PUDs.

First, WNNC suggests that rezoning to C-2-A would permit additional development beyond what is proposed in the PUD on the South Parcel. This ignores the limited nature of a PUD-related rezoning, which binds the Applicant to construct what is shown on the approved plans and limits the allowable height and density to what is specifically approved by the PUD. Here, the South Parcel could not be expanded beyond what is approved by the Commission without a further modification of the PUD.

Second, WNNC suggests that the PUD-related rezoning of the South Parcel could justify the rezoning of other MW/C-1 property in Square 1920. This is unlikely, since the total area of the remaining lots would fail to meet the minimum PUD area requirement. In any event, such a redevelopment would be subject to the same rigorous evaluation as the current PUD.

Finally, WNNC suggests that the aggregation of density for the PUD, which is permitted under Section 2405.2 of the Zoning Regulations, violates the Comprehensive Plan because of the relative density of the North Parcel. As described above, the Comprehensive Plan does not set forth hard caps on density or height, and allows for such increases in density (and resulting height) through the use of the PUD process.

F. South Parcel Loading Berth Waivers

Again, the PUD Regulations allow the Commission to reduce the amount of loading facilities and account for shared use of loading facilities by different uses. The proposed location and amount of loading is adequate and appropriate, and the proposed Truck Management Plan will ensure that the loading facilities are managed to minimize conflicts.

- Grocery Loading: The Applicant has satisfied its burden of proof regarding this loading area. As presented in detail by the Applicant, the proposed loading will not impose unacceptable impacts on the adjacent residential properties, given the nonresidential character of this section of Idaho Avenue, the proposed mitigation measures planned by the Applicant to mitigate noise and visual impacts, and the overall quality of the new grocery store and other benefits of the PUD.
- South Parcel Loading: The Applicant intends to load the other retail and commercial uses on the South Parcel off of Macomb Street through a 20-foot public alley. The proposed loading space can accommodate the number and type of deliveries likely for the proposed neighborhood retail and office uses, and use of the berth will be managed in order to minimize scheduling conflicts. As set forth in its Truck Management Plan, the Applicant shall require its tenants to direct all deliveries and trash disposal services to use the loading docks for these activities through a lease provision or similar mechanism. Similarly, the Applicant shall require tenants to direct all deliveries and trash disposal services to use vehicles that are able to fit within the internal loading areas.

The loading area also contains on additional truck parking space that can accommodate a second truck if the loading berth is actually occupied. The Applicant has indicated a willingness to work with the existing restaurant along the alley to develop a mutually

agreeable plan that permits shared use of this public alley. The Applicant notes that Macomb Street currently contains two on-street loading spaces which permit additional opportunities for serving this restaurant and other properties.

For all of the above reasons, the impacts of the proposed loading will not be unacceptable. The Applicant has satisfied its burden of proof.

G. Elimination of the MW Overlay

As noted by WNNC, this issue has been addressed in separate pleadings, and the authority of the Zoning Commission is clearly established by the Zoning Act and Regulations. As discussed above, the removal of the MW Overlay is not inconsistent with the Comprehensive Plan, because the PUD addresses the same issues that the Overlay addresses. Indeed, the PUD process permits the Zoning Commission to provide more finely-tuned control over the use, design and impacts of the proposed development than would be provided through a matter-of-right development. The chart below demonstrates how the proposed PUD continues to protect and enhance the successful functioning of the Macomb-Wisconsin commercial area.

<u>Provision</u>	<u>PUD</u>
1302.4: Provide designated retail and service establishments on no less than 50% of the GFA of the ground level	Likely provided (grocery store accounts for 47% of designated use at ground level).
1302.4(a): No more than 20% of ground level GFA devoted to banks/financial institutions	Provided.
1302.5: Restaurants, fast food establishments, and prepared food shops occupy no more than 25% of the linear street frontage along Wisconsin and Newark Streets	Relief requested for 20% of frontage for restaurants, fast food establishments, and prepared food shops.
1303.2: No curb cut/driveway from Wisconsin Avenue to required parking or loading	Provided.
1305.1: Matter of right height and density apply to PUDs	Relief requested for additional 11 ft. of height.
1308.2 and 1308.3: MW Overlay –public review of large developments	PUD provides for public review of large development

It should be noted, as a matter of history, that the selection of 25% as the limitation on eating and drinking establishments in the neighborhood commercial overlays was never intended to serve as a bright-line rule. As observed by Nate Gross, the OP staff member responsible for drafting the original overlay provisions in 1989, during a recent Commission reconsideration of this provision:

And it's not intended to be an extremely fine-grained standard in which you're dealing with noxious uses. I mean, these are not undesirable uses at all. It's just the feeling was that you don't want your retailer to be too dominated by higher rent paying eating and drinking establishments and price out a greater diversity of neighborhood retail and service establishments.

Z.C. Case No. 02-06 (Tr. July 18, 2002 at 11). The PUD permits the Commission to continue to impose an overall limitation on the number of eating and drinking establishments that ensures that the commercial space in the PUD will remain open for neighborhood retail and service uses. The ANC has proposed a limitation of 20% of the linear street frontage of the PUD, and the Applicant has considered and accepts this limitation. With this limitation, the PUD will continue to further the goal of the neighborhood commercial overlays, which is to ensure a diversity of retail and service options.

Finally, there is no evidence that the rezoning of the PUD site would change the rest of the commercial area for the worse. Contrary to WNNC's assertion, the remaining 11 or so properties within the MW Overlay would remain subject to its provisions and restrictions. Indeed, approval of the PUD will also actually strengthen the vibrancy of the rest of the Macomb-Wisconsin commercial area, through a revitalized anchor in the Giant and a more pedestrian-friendly urban shopping experience.

H. Public Benefits and Amenities

The Applicant reiterates its position regarding the proposed benefits and amenities, which are indeed superior to what would be provided in a matter of right project.

1. Grocery Store. The proposed PUD permits the development of a well-designed grocery store appropriate for a pedestrian-oriented urban context, including specific planning and design features such as exemplary design, siting behind ground-floor retail, internal loading, and underground parking. A matter-of-right store would not necessarily contain any of these features.
2. Neighborhood Retail. The quality of the retail space on the PUD site will be vastly improved by the PUD into a more urban-friendly pedestrian oriented experience. Surface parking lots and blank walls will be replaced by active uses on all street frontages and improved streetscape. The internal quality of retail space will also be improved to satisfy current market demands such as high ceilings and energy-efficient space. Current vacancies within the existing retail space suggest that the current retail stock is not sufficient to meet tenant demands, which provides further evidence that this is an amenity.
3. Housing and Affordable Housing. As testified by OP, the proposed affordable housing constitutes a significant amenity. WNNC also ignores the fact that the provision of any housing is considered to be a PUD amenity, and so the other market-rate units also constitute a major PUD amenity.
- 4-5. Design and Open Spaces. As testified by OP and the ANC, the proposed design and open spaces constitute a significant public amenity that goes beyond a matter of right development. Again, it is the quality of the design—the materials, the attention to detail, and the sensitivity to surrounding context—that makes the design exemplary. The size of the open spaces is sufficient to create public gathering places in this neighborhood-oriented commercial center.
6. Site Planning. As reiterated herein, mixed-use development including housing is fully consistent with the Comprehensive Plan and with generally accepted principles of good urban design. The proposed underground parking similarly constitutes a

significant amenity, since it eliminates surface parking which is considered to be an unsustainable feature. Finally, the reduction of curb cuts is most assuredly a public benefit, since it enhances the pedestrian functionality of the streetscape and minimizes points of pedestrian-vehicular parking spaces. It also restores on-street parking spaces—another benefit.

7. First Source Agreement. First Source agreements are long-accepted benefits of PUDs in order to provide employment opportunities for District residents. But for the PUD, there would be no obligation of the Applicant to enter into such an agreement.
8. Green Building Initiatives. If built as a matter-of-right, the project need not contain many of the sustainable features that are proposed. Through the PUD, the Applicant will be held to its sustainable promises. Furthermore, Giant should be permitted to receive credit for its sustainable initiatives as matter of public policy, even if they are “customary.” Failure to reward good practices, even if customary, would incentivize companies to race to the bottom, rather than rise to the top.
9. Traffic Planning and Mitigation. Some of the proposed improvements do constitute mitigation of traffic impacts. Other items, such as traffic lights, have been considered to be public benefits, because matter-of-right development could generate the trips warranting a light without resulting in the funding for the light. The proposed traffic calming escrow amount is clearly a project amenity. The Applicant conclusively demonstrated that such traffic calming measures were not required, but chose anyway to fund the escrow account to back its conclusions.
10. Parking Spaces for the Community. This represents a clear benefit, which Giant is under no obligation to provide. As noted above, this will be a permanent commitment that will run with the land for so long as the PUD is in place.
11. Revenue. It is generally well-accepted that PUDs generate both short and long term revenue benefits. In the short term, they generate revenue through the creation of construction jobs, tax revenues on construction materials, and initial transfer and recordation taxes on residential units. In the long term, they generate revenue through additional retail workers and annual increased revenue from the property, income, and sales taxes paid by new residents.
12. Comprehensive Plan. For reasons detailed in Part 1, the Project’s consistency with the Comprehensive Plan is a clear benefit and amenity.

I. Economic Justification

The Applicant is under no regulatory obligation to provide its independent financial analysis of the Project. In response to WNNC’s comment in FN 14 of its April Brief, the conditions of the PUD will run with the land to any potential subsequent owner through the PUD covenant that is required by the Regulations.

IV. CONCLUSION

As set forth herein, the consistency of the proposed PUD and map amendment with the Comprehensive Plan have been addressed by the Applicant and supported by the Office of

Planning as well as its former director, Ellen McCarthy, who supervised the formulation of the current Plan. Similarly, the Applicant has adequately established that the impacts of the proposed PUD will not be unacceptable, but are either favorable or acceptable given the quality of public benefits. This determination has been supported by the Office of Planning, District Department of Transportation, ANC 3C, AWARE, and multiple organizations and individuals in support. Based on the ample evidence in the record of this case, and for the reasons repeated herein, we respectfully request that the Commission approve the proposed PUD and map amendment to the C-2-A Zone District.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Phil Feola". The signature is fluid and cursive, with a long horizontal stroke at the end.

Phil Feola

A handwritten signature in black ink, appearing to read "David Avitabile". The signature is cursive, with the first name "David" being more prominent.

David Avitabile

May 4, 2009

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2009, a copy of the foregoing was hand delivered to the following:

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