

PROPOSED FINDINGS OF FACT

Submitted by Cleveland Park Citizens Association, Ordway Street Neighbors Association, 3300 Block of Idaho Party, and Wisconsin-Newark Neighborhood Coalition

Executive Summary

As reflected in the Findings of Fact and Conclusions of Law that follow, and as well-supported by the extensive record of these proceedings, we find the Planned Unit Development, as proposed and presented, to be flawed in the following respects:

- The proposed PUD's requests for zoning relief are excessive and would negatively impact residents and businesses in the surrounding neighborhoods in many respects, in such areas as delivery and loading, parking, and traffic mitigation.
- The proposed PUD's claimed public benefits and project amenities do not satisfy the PUD regulation's evaluation standards and do not justify the extent of zoning relief being requested.
- The proposed PUD is inconsistent with area-specific provisions of the Comprehensive Plan Future Land Use Map and related Plan map and text as shown by the area-specific policies of the Plan.
- The proposed PUD seeks the unlawful act of eliminating applicability of the Macomb/Wisconsin Neighborhood Commercial Overlay to the PUD properties.
- Despite years of meetings, the Applicant has not addressed sufficiently community concerns nor responded meaningfully to the community's efforts to work with the Applicant.
- Analyses by the Applicant's traffic consultant and Office of Planning and District Department of Transportation are flawed.
- The Applicant, OP and DDOT failed to contact or take into consideration existing businesses adjacent to the PUD site or their interests.
- Important conditions of the ANC's resolution have not been met.

As further described in detail below, these flaws are addressed through the following points of our decision:

1. Pursuant to §1308.3 of the Zoning Regulations, this matter must be referred to the BZA for consideration as a Special Exception pursuant §1304 and §1308.3 of the

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ZONING COMMISSION
District of Columbia

CASE NO. 08-15

EXHIBIT NO. 261
ZONING COMMISSION
District of Columbia

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EXHIBIT NO. 261

Zoning Regulations. Nonetheless, we shall provide the Applicant with guidance on a number of issues.

2. With respect to the proposed supermarket on the South Block, Applicant shall make the appropriate modifications of its plans to: (i) move the Idaho Avenue loading facilities north, towards or onto Newark Street -- away from the Idaho Avenue homes; and (ii) Expand this relocated delivery area to accommodate all new??? South Block loading.
3. Applicant shall minimize spillover onto residential streets and adverse traffic impacts through additional parking, better loading, effective Transportation Management Plans, traffic mitigation, and less residential density by (i) removing two floors of North Block apartments to free up parking in the North Block garage for commercial customers and employees; (ii) providing adequate loading and delivery spaces on the North Block to prevent use of public space by delivery trucks; (iii) working with DDOT to exclude new apartment residents from Residential Parking Permit eligibility; (iii) providing for substantial "community parking" -- especially for patrons of existing businesses whose customers and employees have depended for years on Giant's parking lots; preparing detailed Traffic Management Plans to control traffic flow, truck deliveries, and parking management; preparing an effective plan for traffic mitigation before any new project is approved and crowding at least \$500,000 for mitigation of unanticipated impacts, as stated by the ANC as one of its conditions;
4. The Macomb-Wisconsin Overlay shall remain in place, but as proposed by the WNNC opposition parties, two additional restaurants in the new development, having a combined total of approximately 100 feet of linear frontage shall be permitted.
5. The Applicant shall develop and implement a plan to attract neighborhood-serving businesses, including long-term affordable rents and appropriately configured spaces to assure that existing and other local businesses will be able to locate in the commercial space when the development is completed.

Applications, Parties, and Hearings

1. On May 16, 2008, the Applicant filed the Application for consolidated review and approval of a planned unit development ("PUD") and related zoning map amendment of the subject property (the "Original PUD Submission"). The subject property consists of Lot 813 in Square 1920 and Lots 1 and 2 in Square 1920-N and is located along Wisconsin Avenue from slightly north of Macomb Street to Idaho Avenue (the "PUD Site").
2. The Applicant filed a Follow-up Submission on July 21, 2008 a Prehearing

Submission on October 24, 2008 (the "Prehearing Submission") a Response to Questions prepared for ANC-3C Commissioners on January 18, 2009, a Supplemental Pre-Hearing Submission on January 30, 2009 and "Appellant's Response to Wisconsin-Newark Neighborhood Coalition's April 14, 2009 Brief" ("Appellant's Response").

3. The Commission held a setdown meeting on July 29, 2008, at which the Office of Planning recommended that the application be setdown for public hearing but noted that there were at least seven issues outstanding, including details of environmental/green building initiatives; elevations of roof structures, further refinement of architecture, building facades, and materials; location of and levels of affordability of for proposed affordable units; and traffic and truck management plans, all of which it was working to resolve with the applicant. The Commission set down the application for public hearing and the first hearing was scheduled on February 19, 2009. The Commission held additional hearings on April 6, 2009, April 23, 2009, May 4, 2009, and May 20, 2009.

4. The Commission determined the parties to the case at the February 19, 2009 public hearing. Parties in this case are the following: the Applicant; Advisory Neighborhood Commission ("ANC") 3C, the ANC within which the Site is located; in support, Advocates of Wisconsin Avenue Renewal ("AWARE"); and in opposition, Immediate Macomb Street Neighbors, 3300 Block of Idaho Avenue, Cleveland Park Citizens Association ("CPCA"), Ordway Street Neighbors Association, and Wisconsin-Newark Neighborhood Coalition ("WNNC") (together, the "Opponents").

5. On September 24, 2008 WNNC filed a Petition To Refer Case 08-15 To The Board of Zoning Adjustment. On October 16, 2008 Applicant filed a Motion to Dismiss Petition to Refer Case No. 08-15 to BZA. On November 14, 2008, WNNC filed Petitioners' Opposition to Applicant's Motion to Dismiss. On January 12, 2009, WNNC filed a Request for Expedited Consideration and Supplement Information. On January 26, 2009, Applicant filed a Supplemental Response of Applicant to Petition to Refer Case No. 08-15 to BZA. (Exhibits 13, 16, 17, 23, 37 and 45, respectively.) At the hearing on February 19, 2009, the Commission determined to hold the Petition in abeyance until its deliberation of the case in chief.

6. The Applicant presented the following witnesses: Phil Peola, of Pillsbury Winthrop Shaw Pittman L.L.P., representing the Applicant; Richard Heapes, of Street-Works, LLC; Martin Wells, of Martin J. Wells and Associates; and Julia Craighill, of Steven Winter Associates; and, on rebuttal, Gerald Henning of Henning Associates.

7. Ward 3 Councilmember Mary Cheh testified in support of the Application on the basis that the PUD is consistent with sound growth principles in that it is located on Wisconsin Avenue, a major thoroughfare. She also stated that her election was a mandate for this type of development.

8. The City's Office of Planning ("OP") and District Department of Transportation ("DDOT") each testified in support of the project.

9. ANC 3-C was represented by its new chair, Anne-Marie Bairstow. Her testimony at the hearing on April 23, 2009, described the ANC's report and resolution (Ex. __), which expressed support for the project with eleven conditions including loading dock issues and the lack of retail parking in the new building that would occupy the block bounded by Idaho Avenue, Wisconsin Avenue, and Newark Street (the "North Block") (090423 TR pp. 11-24.) She also testified that the ANC had adopted a clarifying resolution three days before the date of the hearing, with no advance notice to the public or to most of the Commissioners, stating that it was not the intent of the ANC that the existing Neighborhood Commercial Overlay should interfere with the approval of the PUD.

10. AWARE was represented by Jeffrey Davis and Anne Large. Their testimony reflected unconditional support of the project, supported by their view that the project had wide community support and would be what the community and the city need.

11. Various individuals testified in support of the project with particular emphasis on their desire for an upgraded supermarket and a more vibrant neighborhood shopping area. Former OP Director Ellen McCarthy testified that in her view the project was not inconsistent with the Comprehensive Plan for the National Capital ("Comprehensive Plan"). Other supporters voiced more substantial reservations. These included ANC Commissioner Trudy Reeves, who cited serious parking concerns and requested the Commission to set aside 100 spaces for overnight parking for area residents; Commissioner Richard Rothblum, who cited the inadequacy of the noise studies related to the grocery store loading dock near existing houses in his single-member district; Commissioner Leila Afzal, who cited the lack of on-site commercial parking spaces on the North Block; and Commissioner Nancy MacWood, who stated that this PUD was likely to cause serious impacts and that DDOT and OP had not been responsive in addressing the likely significant parking and loading impacts of the PUD. She also testified that the Applicant has not been willing to meet with residents to negotiate resolution of these and other impacts.

12. At-large Councilmember Phil Mendelson testified in opposition to the Application on the basis that although he favored redevelopment of Squares 1920 and 1920N, he opposed the PUD because the North Block proposal was for a mixed use project with moderate density residential, which would be inconsistent with the Comprehensive Plan's low density commercial designation for that block. Mr. Mendelson also testified that PUDs should remain within the constraints of the underlying overlay. He stated that approval of the PUD would destroy the neighborhood commercial overlay for the area and set a precedent that would jeopardize overlays elsewhere in the city. Mr. Mendelson's testimony indicated that he had long familiarity with the Macomb/Wisconsin zoning situation and previous Giant proposals for the site, including a number of years as Chair of ANC-3C. (090406 TR pp. 248-250 and 256-257)

13. The Immediate Macomb Street Neighbors, represented by Frances Sclafani, testified in opposition to the project with a primary concern about the project's impact on the apartment building on Macomb Street immediately south of the proposed South Block building. She cited light and air issues for the lower floor tenants and noise

disturbances resulting from locating a truck loading entrance and back-up area directly next to and behind the apartment building.

14. CPCA, represented by George Idelson, Peter Espenschied and their unpaid expert witness, Dorn McGrath, testified in opposition to the project. CPCA stated that it ardently supports an improved grocery store. Its primary concerns include the project's inconsistency with the Comprehensive Plan ("Comprehensive Plan") caused by numerous factors, failure to comply with the Macomb Wisconsin Neighborhood Commercial Overlay ("MW Overlay"), and the failure of both the Applicant and OP to comply with their substantive and procedural commitments under a 2002 contractual Letter Agreement among the Applicant, OP and CPCA regarding development of the subject property.

15. The 3300 Block of Idaho Avenue, represented by Tom Haines and Philip Montalvo, testified in opposition to the project. The 3300 Block of Idaho Avenue's primary concerns include the traffic, noise, and other negative impacts of the project's proposed loading arrangements, particularly on the South Block adjacent to their residences.

16. The Ordway Street Neighbors Association, represented by David Isaacs and Dan Hecker, testified in opposition to the project. The Ordway Street Neighbors Association stated its support for a modernized supermarket but stated that its primary concerns include the project's impacts on traffic and parking in their residential neighborhood, as well as concerns regarding inadequate parking, increased traffic, elimination of the overlay, the overall size and density of the project and loading issues.

17. WNNC, represented by John O'Sullivan, John Korb, and Jim Pickman, testified in opposition to the project. WNNC stated its support for an improved supermarket and a vibrant Wisconsin Avenue streetscape but stated that its primary concerns include excessive traffic impacts; inadequate provision for parking, including the absence of commercial parking in the North Block building; excess density in the North Block; unworkable and intrusive loading dock provisions; inconsistency with the Comprehensive Plan; the Applicant's request for relief from the provisions of the MW Overlay, and lack of public benefits and amenities adequate to balance the extent of rezoning and additional zoning relief requested by the Applicant. WNNC's testimony included possible solutions for its areas of concern, including fixing the South Block loading and delivery problems; reducing traffic impacts by additional on-site parking and removing two floors of North Block residential units; excluding new apartment residents from residential parking permit eligibility; providing substantial community parking at the Site, particularly for customers and employees of existing businesses, and requiring an effective traffic mitigation plan. In furtherance of a comprehensive compromise, WNNC agreed to support an exception to the MW Overlay to permit two additional restaurants in the PUD approximately the size of Café Deluxe.

18. Various individuals testified in opposition to the project. These included: Alice Powers, on the project's adverse impact on the 38th Street neighborhood, which she fears will become a short-cut from the 38th St. entrance and exit to the parking garage to and

from Massachusetts Avenue and the neighborhoods south and west of the PUD; Ninetta Feldman on the need to relocate the entrance to Giant's loading dock away from her home on the other side of Idaho, to avoid having over sixty tractor-trailers and smaller trucks pass her house every day; Peter Pastan, owner of 2Amys Restaurant, on the importance to his restaurant of the Giant parking lot and the MW Overlay, and the unrealistic assessment of truck activity on Macomb Street; Jay Etta Hecker on, among other things, incompatibility of the North Block design with the neighborhood, the elimination of planning and zoning protections and Giant's intentional degradation of its property; DC Superior Court Chief Judge emeritus Rufus King on maintaining the existing scale of the shopping area; Ann Hamilton on the Applicant's lack of responsiveness to community concerns and the possible impacts on PUD construction of the economic recession, including the possibility of demolition followed by delayed or abandoned construction, suggesting that demolition of the South Block not begin until financing of South Block construction is in place, and that North Block demolition not begin until South Block construction is complete and North Block financing is in place; Diane Olsson, disagreeing with Ms. McCarthy's conclusions as to consistency with the Comprehensive Plan; several more individuals on the Applicant's lack of responsiveness over a long series of community meetings; Philip Olsson on the need to ensure accommodation of small businesses; Tom Graham presenting visuals showing the difference between the proposed heights portrayed by the Applicant's graphics and the actual heights of the proposed project (Ex. __); Ross Ain on, among other things, the missed opportunities for environmentally-beneficial project facilities, the fallacy of the claim that most of the neighbors wanted approval without conditions or modifications, the false assumption that most patrons won't come in cars, and the claim that the oversized Giant and residential development is necessary for an economically successful redevelopment, which he said is unsupported by any financial evidence or economic analysis; Dr. Wilfred Kohl stating that parking provisions are not sufficient to prevent spillover onto residential streets, that the new grocery store is too big, and that the Commission should require efforts to attract neighborhood-serving businesses with affordable rents; Rick Nash on the early efforts by himself and others to express concerns over the scale of the project and the impacts on the neighborhood, and the lack of responsiveness of both the Applicant and OP and DDOT to these concerns; Kate Woodard, who lives at the corner of Macomb St and Idaho Ave., on the enormous economic harm that the project's loading dock will do to their and their neighbors' house values and quality of life and various individuals concerned, among other things, that the proposed project would negatively impact the existing neighborhood shopping center tenants.

The Proposed PUD Site and Area

19. The Site consists of Lot 813 in Square 1920 and Lots 1 and 2 in Square 1920-N and consists of approximately 178,236 square feet of land area. The Site is currently improved with a one-story plus basement building including a Giant supermarket, retail space and a rear surface parking lot (Lot 813, Square 1920) (the "South Block") and, on the North Block, a two-story building with street level retail, second-story commercial

space, a separate building containing a bank, and a rear surface parking lot. (Lots 1 and 2, Square 1920-N). (The Applicant and others described the existing buildings as one- to three-stories, but that is not correct. See, e.g., Applicant's Response, p. 3.)

20. The Site is situated in Ward 3 and covers much of the two-block area bounded by Wisconsin Avenue, Idaho Avenue and a line north of the retail and apartment buildings on Macomb Street, NW. The entire Site is characterized by retail and office uses; there is no existing residential use on Applicant's property.

21. The area surrounding the PUD Site includes the approximately 20% portion of the MW Overlay district not included in the Site; single-family residential zones including the Cleveland Park Historic District; the McLean Gardens residential complex; townhouses, a two-story, four-story and eight-story multi-family residential buildings, and a detached single family home on the east side of Wisconsin Avenue in areas designated by the Future Land Use Map for residential use, and one 9-story mixed use building across Idaho Avenue from the Site built as a Planned Unit Development in an area designated by the Future Land Use Map for mixed use medium density residential/low density commercial use. The PUD Site is not a designated historic landmark nor is it within a historic district; but it is directly across the Wisconsin Avenue from the western boundary of the Cleveland Park Historic District.

Matter-of-Right Development Under Existing and Proposed Zoning

24. The Site's North Block is zoned MW/C-1. The Site's South Block is zoned MW/C-1 fronting Wisconsin Avenue and R-5-A on the western, rear portion of the lot.

25. The C-1 (Neighborhood Shopping) District is designed to provide convenient retail and personal service establishments for the day-to-day needs of a small tributary area, with a minimum impact upon surrounding residential development. (§700.1) I assume "tributary" is in the statute???

26. The C-1 District permits matter-of-right development to a maximum height of three stories/40 feet, a maximum FAR of 1.0 and a maximum lot occupancy of 60%. (§§771.1, 771.2 and 772.1.)

27. The Applicant requests expansion of the commercial portion of the South Block, reducing the R-5-A zone by over half to 25,388 square feet. It requests that all of the North Block and the expanded commercial portion of the South Block, a total of approximately 152,848 square feet, be rezoned from MW/C-1 to C-2-A.

28. The C-2-A Zone District is located in low and medium density residential areas with access to main highways or rapid transit stops, and includes office employment centers, shopping centers, and medium-bulk mixed use centers. (§720.3) It permits development to medium proportions. (§720.4.) The C-2-A District accommodates a major portion of existing commercial strip developments. (§720.5.)

29. The C-2-A District permits matter-of-right development to a maximum height of 50 feet, a maximum FAR of 2.5 for residential use and 1.5 FAR for other permitted uses and a maximum lot occupancy of 60% for residential use. %. (§§771.1, 771.2 and 772.1.)

30. For retail uses in C-1 and C-2-A Zone Districts, one parking space is required for each 300 square feet of gross floor area and cellar floor area in excess of 3,000 square feet. For residential uses in the C-2-A Zone District, parking is required at a minimum of one space per two dwelling units.

31. Thus without regard to the PUD regulations or the MW Overlay, there are differences in height (40 feet versus 50 feet), FAR (1.0 versus 2.5 for residential and 1.5 for other permitted uses, and uses (medium bulk mixed use centers are permitted in C-2-A).

32. Again without regard to the MW Overlay or restrictions contained in the Comprehensive Plan, including the Future Land Use Map, a PUD in the C-2-A Zone District may have a maximum height of 65 feet and a maximum density of 3.0 FAR, of which up to 2.0 FAR may be devoted to non-residential uses.

33. The MW Overlay is applicable to all of the Applicant's lots. The Neighborhood Commercial ("NC") Overlay establishes limitations on uses in the overlay district including limitations on the ground floor linear street frontage that may be occupied by restaurants, fast food establishments, prepared food establishments, and similar eating or drinking establishments. In addition, the NC Overlay limits the percentage of the ground level of the building that may be devoted to banks, loan offices or other financial institutions, travel agencies or other ticket offices.

34. In addition to the requirements of Neighborhood Commercial Overlays, the MW Overlay sets requirements for Special Exception proceedings to ensure compatibility with and enhancement of the primary neighborhood retail function of the commercial area and to advance the other purposes of the overlay district. Further, the NC Overlay establishes matter of right height and floor area ratio (FAR) limits as the guidelines for PUDs. (S.1303.1)

35. The PUD site accounts for approximately 80% of the MW Overlay.

The Proposed PUD Project

36. The Applicant proposes to demolish the existing structures and redevelop the properties on both blocks as described in FF 37-40.

The South Block

37. On the expanded commercially-zoned portion of the South Block, the Applicant proposes to construct a two-story building containing a new Giant supermarket, street-level retail and second-story commercial flex space or additional retail along Wisconsin Avenue and, along Newark Street, second-story residential units. The building height would be 37 feet/two stories; it would have a total FAR of 1.56, of which 1.43 would be commercial. Lot occupancy would be 75.5%. Thus for FAR, the building would be in excess of what is permitted as matter of right under C-1 zoning but less than would be permitted under C-2-A. The South Block garage would provide parking for 395 vehicles, seven of which would be for the 14 resident lofts, and seven to be share by the tenants and their visitors.

38. The Applicant proposes that loading dock access for the supermarket will be via a driveway through the remaining residentially-zoned portion of the lot off Idaho Avenue. The driveway would be located directly across the street from existing single family residences and adjacent to the abutting single family residence to the south. By the Applicant's measurements, the supermarket's truck turnaround would be located 70 feet from that family's house and the loading docks themselves would be 140 feet from the house. (Ex. A of Applicant's loading Access Alternative Sheet, May 15, 2009. The Applicant proposes that loading for the remainder of the South Block commercial development fronting on Wisconsin Avenue will be accessed from a public alley located off Macomb Street. Provision for South Block residential loading is not described. Provision for the Newark Street frontage, including the residential units, will be accessed from this dock and series of passageways leading to elevators that will connect to this side of the building.

39. On the residentially-zoned portion of the South Block, along Idaho Avenue, the Applicant proposes to construct eight three-story townhouses, with two below-grade parking spaces for each townhouse.

The North Block

40. On the North Block, the Applicant proposes to construct a five story mixed-use building containing street-level retail space and four stories of residential units above, consisting of approximately 124 units. The project would have a maximum height of 61 feet and a 3.81 FAR, of which 3.06 would be residential and 0.75 would be commercial. The building would have 75% lot occupancy. By all these measures, the building would exceed what is permissible under C-2-A as a matter of right. The proposal includes 124 parking spaces, all of which would be reserved for the residential units, twice the level established by the zoning regulations. These spaces will not be available at any time to the customers or employees of the North Block commercial space.

41. The original application proposed to include eight percent of the gross floor area, or approximately 13,184 square feet, for affordable housing. In its rebuttal testimony on May 4, 2009, Applicant offered to raise that figure to ten percent affordable housing.

PRELIMINARY MATTER: PETITION TO REFER TO BZA

42. On September 24, 2008, WNNC filed a Petition To Refer Case 08-15 To The Board of Zoning Adjustment. Thereafter the Applicant and WNNC filed various pleadings in opposition and support of the Petition, as set forth in FF 5. At the time that WNNC filed its pleadings it was not a party, since party status is not determined prior to the hearing on the application. The Commission did not respond to any of the pleadings. At the hearing on February 19, 2009, the Commission determined to hold the Petition in abeyance until its deliberation of the case at large.

43. Section 1308.3 of the Zoning Regulations states that within the MW Overlay District, on a lot that has 10,000 square feet or more in land area, construction of a new building or enlargement of the gross floor area of an existing building by 50% or more shall be permitted, subject to review and approval as a Special Exception by the Board of Zoning Adjustment ("BZA") pursuant to the standards and criteria set forth in §1304 of the Zoning Regulations. The Applicant's proposal is within the terms of §1308.3. WNNC states that §1308.3 requires this case to be referred to the BZA.

44. Section 2406.2 of the Zoning Regulations states that an application for a PUD may be filed in conjunction with a change in zoning for the property involved. Section 2403.11(c) states that to assist the Commission in applying the PUD evaluation standards, the application must include a table showing the requested relief from the standards and requirements of development under conventional zoning. Section 2406.2 addresses the contents of a PUD application, not the authority of the Zoning Commission. Section 2403.11(c) demonstrates that rezoning under a PUD is limited to conventional zoning and does not extend to requesting removal of an overlay zone, since overlay zones are not conventional zoning.

45 The Applicant refers to Z.C. Order No. 05-37 to demonstrate that the Commission has approved removal of a portion of the H Street Overlay through a PUD in the past. (Pre-Hearing Submission, 10/24/08, pp. 8-9.)

46 The Opponents stated that Order 05-37 treated the H Street Overlay with great respect and removed the Overlay from about one-third of the PUD Site after careful analysis pursuant to the criteria of §1304.1, §1305.1 and §1326.1. (Z.C. Order No. 05-37, January 14, 2008, FF 72-74.) In that case, the Commission agreed with the Applicant that a unique confluence of site-specific factors meant that allowing the PUD would not be taken as a precedent, even within the H Street Overlay zone, much less as applied to other Neighborhood Commercial Overlays. (See Case 08-15 Petitioners' Opposition to Applicants' Motion to Dismiss, November 14, 2008, p. 3.)

47. Section 2405.7 of the Zoning Regulations states that in approving PUDs, the Zoning Commission reserves the option to approve any use that is permitted as a Special Exception and which would otherwise require review by the Board of Zoning

Adjustment. The Applicant states that §2405.7 gives the Zoning Commission authority to assume the BZA's Special Exception review function under §1308.3 not only as to uses, but also as to other overlay provisions.

48. The language of §2405.7 addresses the BZA's authority to approve uses as a Special Exception, but it does not address the BZA's broader Special Exception function under the Neighborhood Commercial Overlay chapter of the Zoning Regulations.

49. By letter dated April 26, 1979, the Deputy Corporation Counsel of the District of Columbia advised the Executive Director of the Zoning Secretariat that the Zoning Commission could not assume the BZA Special Exception use function under a PUD when the regulatory language fails to achieve that result.

50. The April 26, 1979 legal opinion precluded the Commission from approving a use proposed by a PUD applicant because the Zoning Regulations required a BZA Special Exception and the PUD regulations were silent on the issue.

51. In response to the April 26, 1979 legal opinion, the Zoning Commission amended its PUD Regulations by adopting §§2405.7-2405.8. (ZC Case No. 79-21.) As explained by the Assistant Administrator for Planning and Development in a memorandum to the Zoning Commission, the purpose of the amendment was to eliminate the requirement of BZA review for PUD applications requesting *uses* that would normally require BZA Special Exception approval. The Commission's amendment to the PUD regulations could have included all aspects of such an application, but it did not. The Commission recognizes that the objectives the PUD Chapter differ from the those of the NC Overlay. A rulemaking procedure proposing a relevant amendment to the Zoning Regulations would provide an opportunity for broad public consideration of the interplay of these Chapters, free from the context of a particular development proposal. And in any event, the Commission cannot amend its regulations through an individual contested case.

52. §§2405.7 and 2405.8 fulfill the narrow use approval function for which they were designed and promulgated. However, §1308.3 is not addressed to uses but instead requires the BZA to review the entire redevelopment proposal as a Special Exception pursuant to the criteria enumerated in §1304. The Commission finds that §§2405.7-2405.8 do not authorize the Commission to reserve the option to undertake the BZA Special Exception review of the redevelopment required by §§1308.3 and 1304.

53. The Commission finds that the Applicant's other arguments for dismissing WNNC's petition are without merit.

54. In Z.C. Order No. 08-08, we approved limited Special Exceptions from certain requirements of the Georgia Avenue Overlay, but we found that the special exceptions required compliance with §§1304, 1330 and 3104 of the Zoning Regulations. What is the significance of this?

55. The Commission finds that pursuant to §1308.3 of the Zoning Regulations, this matter must be referred to the BZA for consideration as a Special Exception pursuant §1304 and §1308.3 of the Zoning Regulations.

56. Although the Commission has determined that it cannot complete action on this case prior to BZA review, the following issues are addressed to provide guidance to the BZA, the Applicant, other parties and individuals who have participated in this case.

INTERPRETING THE COMPREHENSIVE PLAN FUTURE LAND USE MAP, GENERALIZED POLICY MAP AND DISTRICT ELEMENTS

The Comprehensive Plan—General.

57. Applicant stated in the original submission that the proposed PUD is consistent with the Comprehensive Plan. They argue that a map amendment rezoning the PUD to C-2-A is consistent with the property's Low Density Commercial designation on the Future Land Use Map. The applicant incorrectly states that the PUD is also designated Low Density Residential on the Future Land Use Map. Only a portion of the South Block that adjoins the existing residential district is designated as Low Density Residential on the Future Land Use Map. In addition, the applicant lists a number of policies from the Land Use, Housing, and Economic Development Elements as support for including housing and/or area bonus densities.

58. The Office of Planning in its report to the Zoning Commission concludes that the PUD is not inconsistent with the Comprehensive Plan and specifically notes that the North Block is Low Density Commercial and the South Block is split-zoned Low Density Commercial and Low Density Residential. The OP report cites several Comprehensive Plan Element policies, as well as the Rock Creek West Element. The predominant emphasis of the report is that the PUD would provide unmet neighborhood services, provide setbacks and buffering, reduce parking supply to encourage walking, provide sufficient loading facilities, and provide mixed use development, architecture reflective of the neighborhood, and a parking facility that would encourage walking.

59. Opponent parties testified that the Office of Planning was basing its support on a series of Comprehensive Plan element policies that did not specifically apply to the PUD property. They further testified that the Future Land Use Map which was recently updated did not designate the PUD property for mixed use development or medium density commercial development, although other nodes on Wisconsin Avenue were so designated. Since the Future Land Use Map applied the relevant Land Use Element policies in a fine-grained pattern to each square and lot, it was unmistakable how the Comprehensive Plan designated future development at this site. The opponents also testified that listing various Comprehensive Plan policies out of context could not supplant the directives contained in the Future Land Use Map.

60. The Parties obviously disagree as to the appropriate interpretation of the Comprehensive Plan. (See, e.g., WNNC Statement, 4/14/09, pp. 3-8 and Appendices 1 and 2; Applicant's Response, 4/20/09, pp. 1-12.)

61. ANNC submitted an analysis stating that the following basic principles must guide the Commission in interpreting the Plan:

- a) The Home Rule Charter calls for "the preparation and implementation of the District's elements of the comprehensive plan for the national Capital." (D.C. Code §§1-2002 and 1-244.)
- b) Consistent with the implementation mandate of the Home Rule Charter, the Plan provides that the Zone Map must not be inconsistent with the Comprehensive Plan Future Land Use Map. (Plan Policy IM-1.3.2, 10 D.C.M.R. 2504.4.)
- c) In implementing the Plan, the Plan states that decisions on requests for rezoning are guided by the Future Land Use Plan read in conjunction with the text of the Plan. (Framework Guideline d, 10 D.C.M.R. 226; Policy IM-1.3.3; 10 D.C.M.R. 2504.5.)
- d) The Plan also states that since the Land Use Element integrates the policies of all other District elements, it is given greater weight than the other elements. (Plan Policy IM-1.3.4; 10 D.C.M.R. 2504.6.)
- e) The Plan further states that the Future land Use Map carries the same legal weight as the Plan document itself and its purpose is to "represent the land use policies set forth in the proposed Land Use Element," using "standardized colors for planning maps." (see 1-246, D.C. Code; Plan Framework Element, 225.1)

62. Pursuant to the principles set forth in FF 61, above, our decision on Applicant's rezoning requests must be guided by the Future Land Use Map, read in conjunction with the text of the Plan.

Wisconsin Avenue Policy Focus Area

63. The Opponents argued that although the Future Land Use Map represents the entire Plan text, the Rock Creek West Element creates two "Policy Focus Areas" and states that these areas require a level of direction and guidance above the rest of the Rock Creek West and citywide elements. (RCW-2, 10 D.C.M.R. §2310.) The Rock Creek West element names the Wisconsin Avenue Corridor as a Policy Focus Area. (RCW-2.2; 10 D.C.M.R. 2312.) Specific provisions of the Wisconsin Avenue Policy Focus Area include the following:

a) The Policy Focus Area text describes the current mix of uses along Wisconsin Avenue as eclectic, having varying ranges of density. (RCW-2.2; 10 D.C.M.R §2312.2.) It endorses the existing character by stating that the Plan does not propose any significant change in that policy. (RCW-2.2; 10 D.C.M.R §2312.4.)

b) The Wisconsin Avenue Policy Focus Area text states that Wisconsin Avenue's multi-neighborhood center at Tenleytown and the Friendship Heights regional center (both served by Metrorail) continue to be opportunity areas for new housing and new retail. (10 D.C.M.R §231.4.)

c) Consistent with the Plan's citywide policies for expanding the District's housing supply and encouraging in-fill development on vacant or underutilized sites, the Wisconsin Avenue Policy Focus Area text discusses the presence of vacant commercial buildings between Jennifer and Brandywine Streets and encourages a mix of moderate density housing and low density retail uses there. (10 D.C.M.R §2312.5.)

d) Consistent with the Plan's citywide policies for expanding the housing supply and allowing mixed use in commercial areas, the Wisconsin Avenue Policy Focus Area text recognizes the opportunity for additional housing with some retail and limited office space on the east side of Wisconsin Avenue between Albemarle and Brandywine Streets as well as at the low density commercial area north of there. (Policy RCW-2.2.1, 10 D.C.M.R. §2312.8.)

64. We find that the Future Land Use Map accurately reflects the Policy Focus Area's textual guidance for future land use along Wisconsin Avenue. As directed by the Plan text, the Map designates Wisconsin Avenue from Tenleytown to the Maryland line, including the multi-neighborhood center at Tenleytown, for mixed use. The Map designations fully reflect the Policy Focus Area text's call for housing in those locations. These designations in turn reflect and give context to the general housing goals expressed in ward-wide or citywide policies of the text.

65. We find it significant that the Policy Focus Area does not call for mixed use in the Macomb Wisconsin low density neighborhood commercial center.

APPROPRIATENESS OF MIXED USE AT THE PUD SITE.

64. The Applicant and the Office of Planning state that the proposed PUD is a mixed use development. (Application pp. vi, 5; Office of Planning Report p. 1.)

65. The Future Land Use Map does not designate the Macomb Wisconsin commercial center for mixed use.

66. The Applicant states that the absence of mixed use striping on the Map does not preclude mixed use development because such striping is intended to indicate that mixing

of land uses is "strongly encouraged," citing 10 D.C.M.R. §225.7. (Appellant's Response, p. 4.)

67. Opponents argue that the Applicant misreads §225.7. That section states that although housing is permitted in all commercial categories, the predominant use in commercial districts is commercial. The Plan separately describes the types of areas where mixed use is encouraged. See 10 D.C.M.R. §225.18. As discussed above, Wisconsin Avenue from Tenleytown to Friendship Heights fits the descriptions of §225.18; Macomb/Wisconsin does not.

68. We credit the Opponents' arguments on this matter. The Applicant's reading of §225.7 would render every commercial district in the entire city a *de facto* mixed use zone. This interpretation would tend to nullify carefully drawn plan distinctions and would be inconsistent with the Comprehensive Plan.

69. The Applicant refers us to a newly-created Main Street Mixed Use Corridor category. (Applicant's Response, 5/20/09, pp. 4-5.) We note that the Land Use Policy Map designates much of Wisconsin Avenue from Upton Street to the District Line in the Main Street Mixed Use Corridor category. (See Map and Legend, WNNC Opposition Appx. I-D and I-E.) We find that the absence of a Main Street Mixed Use Corridor designation at Macomb/Wisconsin reaffirms that the Plan does not intend a substantial residential component in this low density commercial zone.

70. The Commission finds that the points set forth in FF 57-69, above, show that an area designated only for low density commercial may include incidental housing but must respect the primary neighborhood retail function of the commercial area. (See §1308.2 of the Zoning Regulations.)

71. The Applicant also refers to the Plan's call for the development of a new mixed use zoning district. (Action LU-2.4.C, Applicant's Response p. 5, n. 1.) No such zoning districts exists at this time; the PUD application doesn't include a map amendment to rezone the subject property to mixed use; and it is speculative whether such a designation would be not inconsistent with the Plan at the Macomb Wisconsin site.

72. For all these reasons, The Commission finds that the PUD's proposed North Block building would be inconsistent with the Comprehensive Plan.

APPLICANT'S REQUESTED REZONING.

73. The Applicant makes the following requests for rezoning and relief from zoning requirements, which will be discussed in FF 74-104___:

a) Remap the South Block to enlarge the commercial portion of the lot by reducing the residential portion.

b) Rezone the commercial portion of the both blocks by changing the conventional zoning from C-1 to C-2-A.

c) Remove the Macomb-Wisconsin Neighborhood Commercial Overlay Zone from the PUD Site.

Remapping the South Block to enlarge the commercial portion of the lot by reducing the residential portion.

76. The Applicant requests that we remap a portion of the South Block of the Site by rezoning 28,105 square feet from the R-5-A portion to C-2-A. This constitutes a reduction of more than 50% of the residential zone. (090406 TR, p. 46.)

77. There was no opposition to remapping a portion of the residential portion of South Block for commercial use, although there were significant objections to the consequences resulting from the remapping and the location of the market and its parking and loading too close to the adjacent houses on Idaho and the apartment building on Macomb, the loss of light and air to those same residences, and the loss of greenspace as a buffer.

Rezoning to C-2-A.

78. The Applicant requests that the commercial portions of both blocks of the Site be rezoned from MW/C-1 to C-2-A.

The South Block

79. The Applicant states that rezoning the (expanded) South Block commercial area as well as the North Block to C-2-A is necessary to accommodate its proposal of two mixed-used buildings with ground floor retail uses and upper-story residential uses. (Application pp. 12-13.)

80. Opponents state that the proposed development of the South Block can be accommodated if the expanded commercial portion is zoned MW/C-1 with a reasonable variance on FAR. They state that Applicant has requested C-2-A zoning for the South Block in order to generate "surplus" FAR capacity for the PUD to be used on the North Block.

81. Because of our conclusion below that the Applicant's proposal for the North Block is inconsistent with the Comprehensive Plan and the MW Overlay, rezoning any portion of the South Block to C-2-A to generate an unused surplus to accommodate the North Block proposal would circumvent the intent and purposes of the Zoning Regulations and result in action that is inconsistent with the Comprehensive Plan.

82. We find that it is not necessary to rezone the South Block portion of the PUD to C-2-A in order to accommodate the PUD proposal for the South Block.

83. Because we find that the South Block building is generally consistent with existing M/W/C-1 zoning, we find that it is not necessary to defer approval of the South Block portion of the PUD pending review of the North Block proposal, if the South Block proposal is otherwise justified.

The North Block

84. The Applicant states the low density commercial North Block may be rezoned to C-2-A because the C-2-A zone may describe Low Density Commercial or Moderate Density Commercial Use. (Application, 5/15/08, p. 22.)

83. In support of this proposition, former OP Director Ellen McCarthy testified that because either C-1 or C-2-A zoning is appropriate for low density commercial development, *any* development that is permitted in a C-2-A zone is compatible with a Future Land Use Map designation would qualify as low-density commercial. She also said that she did not know if the proposed North Block building was within C-2-A matter-of-right parameters.

84. The Opponents agree that the C-2-A zone may be applied to Low Density Commercial or Moderate Density Commercial areas, but argue that the double role of the zone district does not mean that the Comprehensive Plan's low density and moderate density designations describe identical levels of development. Specifically, they argue that remapping to C-2-A is not permitted if it would conflict with the guidance of the Comprehensive Plan for a particular area. They point out that zoning on Wisconsin Avenue is not monolithic, but is block-by-block, depending on proximity to Metrorail, surrounding development, and other factors. They state that a five-story building such as the Applicant proposes for the North Block would conform to the Comprehensive Plan's Moderate Density residential or mixed use category but not the low density commercial applicable to the North Block, and is therefore inconsistent with the Comprehensive Plan Land Use Map for the PUD area. (See discussion of Wisconsin Ave. Policy Focus area, above.)

85. In other words, the Opponents attack the Applicant's and Ms. McCarthy's arguments as false logic, saying in effect that although some (matter-of-right) C-2-A buildings might be consistent with the low-density commercial designation, some are not; and in particular this one, which is moderate-density mixed use and which exceeds the matter-of-right allowances for C-2-A, cannot be reconciled with the low-density commercial designation and thus is inconsistent with the Comprehensive Plan. See the testimony of CPCA expert witness Dorn McGrath and Diane Olsson.

86. CPCA witness Peter Espenscheid argued that the North Block proposal was inconsistent with the Comprehensive Plan for another reason: a single building that is five stories high (the proposed North Block structure) cannot be viewed as consistent

with a description in the Comprehensive Plan that low-density commercial consists primarily of one- to three-storey buildings. The Commission agrees.

87. We find that the Applicant's statement that the rezoning is necessary to accommodate the PUD proposal is not of itself a sufficient justification for a PUD rezoning. First, the proposal must not be inconsistent with the Comprehensive Plan. Second, it requires careful review of the nature and extent of the corresponding public benefits and project amenities offered by the PUD, which we discuss below.

88. We find that the Applicant's statement that the rezoning is necessary to accommodate the project's proposed residential uses (Application, p. 13) is not tenable for this area since the size and scale of the residential component are inconsistent with the Comprehensive Plan Future Land Use map designation of the Site for low density commercial use.

89. In view of our findings respecting the size and scale of the PUD's proposed North Block building we find that decision on rezoning the North Block portion of the PUD should be postponed pending revision of the PUD proposal for the North Block.

Removal of the Macomb-Wisconsin Neighborhood Commercial Overlay from the PUD Properties.

90. The Applicant requests that we completely remove the MW Overlay from all of the PUD properties. (e.g., Pre-Hearing Statement, p. 9.)

91. As discussed in the Preliminary Matter, above, and stated at Conclusion of Law below, the Commission does not have power within a PUD to grant the Applicant's request to remove the MW Overlay from the PUD.

93. The Applicant states that removing the MW Overlay is consistent with the intent and purpose of the Overlay because the PUD process provides the public review of large developments otherwise called for by the Overlay; the project will advance the goal of preserving and enhancing neighborhood shopping centers and will conform to key provisions including ground-floor retail and service uses and elimination of curb cuts and driveways along Wisconsin Avenue. (Pre-Hearing Submission, 10/24/08, pp. 9-10.)

94. Specifically, the Applicant states that the proposed PUD would continue to protect and enhance the Macomb-Wisconsin commercial area because it will likely provide at least 50% of the gross floor area as ground floor retail and service establishments; will not allow more than 20% of the ground floor area to be banks, financial institutions, etc.; will limit restaurants, etc., to 20% of the PUD commercial frontage; it will not have Wisconsin Avenue curb cuts; and it provides for public review of this large scale project through the PUD instead of §1308.2. The Applicant concedes that the proposed project requests relief for an additional 11 feet of North Block building height and substantially greater FAR for the North Block than would be allowed as a matter of right even if its property is upzoned, whereas §1305.1 of the Overlay chapter requires matter-of-right

height and FAR limits to serve as guidelines for the PUD and §13042 requires that Special Exceptions under the Overlay must not exceed the Overlay District's height and FAR limits.

95. The Office of Planning Report states that the PUD would be consistent with the aim of the Overlay. (Report, 2/9/09 p. 10. However, OP acknowledges that the PUD could not be built under the Overlay.

96. The Opponents state that the Applicant's offer to limit restaurants, etc., in the PUD to 20% of the PUD's street frontage to would result in up to 300 linear feet of restaurant frontage, or up to six more restaurants assuming an average street frontage of 50 feet per restaurant; these new establishments, in combination with restaurants already operating in the MW Overlay District outside of the PUD, would provide for a total restaurant frontage substantially in excess of the Overlay limits. (WNNC Opposition Statement 4/14/09 ("WNNC Statement"), pp. 13-17.)

97. Opponents also state that removing the Overlay would remove the MW district's current ban on fast food establishments, which, they state, often result in increased litter and other undesirable impacts. (WNNC Statement, p. 16.)

98. Opponents state that adding up to six more restaurants to the zone district could change the local retail-oriented commercial center into a major dining and entertainment destination district, contrary to the Comprehensive Plan Future Land Use Map and Policy Map designations. (WNNC Statement, p.15.) They propose instead a limit of two new restaurants in the Overlay.

99. Opponents also state that removal of the Overlay from the PUD area would effectively destroy the entire MW Neighborhood Commercial overlay zone because (a) the PUD Site accounts for 80% of the entire MW Overlay area; (b) the remaining portion of the overlay is dominated by restaurants, and as a result that remaining portion would be thrust vastly out of compliance with the Overlay's 25% limitation and (c) with so little area remaining in the MW/C-1 Zone District and in light of the extent of Overlay noncompliance that would result from removing the PUD's portion of the Overlay, owners of the remaining properties would have a strong case for asking the Zoning Commission to change their zoning to C-2-A and eliminating the MW Overlay altogether. (WNNC Statement pp. 16-17.)

100. Opponents state that eliminating the MW Overlay from the PUD would be inconsistent with the Rock Creek Element of the Comprehensive Plan, which recognizes the value of neighborhood commercial overlays in protecting Ward 3 neighborhoods and calls for consideration of additional overlays to ensure that new development "is responsive to community concerns about building heights, buffers, and transitions between uses." (WNNC Statement, p. 14; Action RCW-1.1.A, 10 D.C.M.R §2308.17.)

101. Opponents concur with Councilmember Mendelson's statement that removing the Overlay by the PUD process would destroy the neighborhood commercial overlay for the

Macomb Wisconsin area and would set a precedent that would jeopardize overlays elsewhere in the city; and that even where there is a change in zoning, the PUD must stay within the matter-of-right parameters of the underlying zoning.

102. We have never awarded to a PUD a complete waiver of the provisions of an applicable Overlay District. In cases where we have provided any relief from specific Overlay requirements, we have applied the criteria of §1304.1, including the criteria of §1304.1(b) as to the exceptional circumstances relating to the property itself or to economic or physical conditions in the immediate area which justify the exception or waiver, and we have been mindful of the requirement of §1305.1. (See, ZC Order No. 05-37, 1/14/08, FF 44, 48, 49 and 72-74, and ZC Order No. 08-08, 7/14/08, FF 27 and 48-54, especially FF 51.) In ZC Order No. 05-37, we stated that the order was not to serve as a precedent in other decisions.

103. The Applicant has not provided information pursuant to the Overlay criteria.

104. We find that removal of the MW Overlay from the PUD Site would not be consistent with the intent and purpose of the Overlay. We find that it fails to comply with the Overlay in the following respects:

- a) The proposed PUD does not use the matter of right height and FAR limits of either the existing C-1 or the requested C-2-A zoning as guidelines for the PUD, contrary to §1305.1.
- b) The proposal to limit restaurants, bars, etc. to 20% of the linear street frontage would allow a total linear footage in the MW Overlay District substantially in excess of the MW Overlay's limitations, contrary to §1302.5.
- c) The proposed PUD does not include the MW Overlay's exclusion of fast food establishments, contrary to §1302.3.
- d) The proposed PUD does not respect other C-1 use limitations in MW Overlay, contrary to §1302.3.
- e) The proposal does not satisfy the criteria of §§1304.1.
- f) Removal of the Overlay from the PUD properties would have a grave impact on the remaining Overlay and would likely lead to its elimination, contrary to §§2400.4, 2403.3 and 2403.4.
- g) Removal of the Overlay would violate the intent and purposes of the Zoning Regulations and result in action that is inconsistent with the Comprehensive Plan, in violation of §§2400.4, 2403.3 and 2403.4.

APPLICANT'S REQUESTED RELIEF FROM ZONING REQUIREMENTS.

105. The Applicant requests the following relief from zoning requirements:

- a) Relief from C-2-A matter of right height and FAR requirements.
- b) Relief from lot occupancy requirements.
- c) Relief from requirements regarding the location and amount of North Block commercial parking.
- d) Relief from requirements regarding the number of commercial parking spaces at the PUD Site.
- e) Relief from loading requirements for the North Block.
- f) Relief from loading requirements for the South Block.
- g) Relief from requirements prohibiting a commercial loading driveway through a residential zone.
- h) Relief from requirements regarding the size of curb cut.
- i) Relief from requirements regarding roof structures.
- j) Relief from the prohibition of separate principal buildings on a single lot.
- k) Relief from the ban to single-family townhouses as a permitted new residential development in this zoning category (application, p. 11).

Requested relief from C-2-A matter of right height and FAR requirements.

106. In addition to requesting that all of the Site's commercial zone be expanded and that all of the commercially-zoned portion of the Site be rezoned from C 1 to C-2-A, the Applicant requests PUD relief from C-2-A matter of right zoning.

107. As stated above, the maximum development flexibility that we may authorize in the C-2-A zone district provides a height of 65 feet and FAR of 3.0 including up to 2.0 FAR commercial. (§2405.2.) We may increase these limits by up to 5% under appropriate circumstances. (§2405.3.)

108. In support of its request, the Applicant states that the FAR of the overall PUD including the North and South Blocks is 1.99. However, the proposed building for the North Block would have a total FAR of 3.81% with a residential FAR of 3.06. (Pre-Hearing Submittal, 10/24/08, Appendix B.)

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109. In support of its request, the Applicant states that construction of the grocery store would not be feasible without the full proposed multi-family residential component. Applicant states that Project expenses beyond those of a typical grocery store include ten-inch caliper trees, green roofs, Smartcars and 30 parking spaces. (2/19/09 TR p. 201.) The Applicant also cited the costs of structured parking and urban architecture. (5/20/09 TR pp. 82-83.)

110. The Applicant acknowledged that a large tree size is needed in mitigation of the Idaho Avenue loading dock. (090520 TR pp. 40-42.)

111. The Applicant declined the Opponents' request for the Applicant's pro forma data that would support its economic feasibility claim. (090520 TR p. 83.) The Applicant states that it is under no independent regulatory obligation to provide its financial analysis of the project. (Applicant's Response p. 17.) We concur with the Applicant in this regard, but note that since the Applicant bears the burden of proof in this proceeding (see Conclusions of Law __), it takes this position at its own risk.

112. The Applicant states that the project would be compatible with the height, mass and scale of surrounding buildings.

113. The Applicant also states that existing housing stock in the area may not be sufficient to sustain the local commercial center. (Applicant's Response, p. 10.)

114. The Opponents state that the height and scale of the proposed North Block building are excessive and are inconsistent with the Comprehensive Plan, as discussed extensively above.

115. The Opponents state that the presence of taller residential buildings in the residentially-zoned areas in the vicinity of the PUD Site are not a justification for permitting a PUD project that is taller than permitted by the Comprehensive Plan and the Neighborhood Commercial Overlay.

116. The Opponents state that the Plan's Future Land Use Map designates the MW Overlay area as low density commercial and the Land Use Policy Map designates the MW Overlay area as a neighborhood commercial center. (WNMC Statement pp. 4-6 and Appendix I, Comprehensive Plan maps and legends.)

117. Opponents note that the Future Land Use Map states that the common feature of low density commercial areas is that they are comprised primarily of one- to three-story buildings. (Legend, Future Land Use Map.) The description states that the predominant uses are retail, office and businesses. It does not indicate that residential use is appropriate.

118. Opponents further state that the Comprehensive Plan Implementation Element states that decisions on requests for rezoning shall be guided by the Future Land Use Map

read in conjunction with the text of the Plan. (Implementation Element, p 25-6; WNNC Statement Appendix II, p. 2.)

119. In examining the Applicant's proposal for the North Block building in the context of the Comprehensive Plan, Opponents state the following (WNNC Statement pp. 4-6; and Appendix II):

- a) The Future Land Use Map contains a specific street grid and functions to prescribe designated land uses on a block-by-block basis.
- b) The Plan states that densities within any given area on the Future Land Use Map reflect all contiguous properties on a block. (Framework Element Guidelines for Using the Generalized Policy Map and the Future Land Use Map, ¶ c.; 10 D.C.M.R. 226.)
- c) Since the Applicant's proposed five-story building would be the only building on the North Block, that block could not satisfy the description of "primarily one to three story" buildings and would therefore be inconsistent with the guidance of the Future Land Use Map.
- d) The North Block building's proposed 3.81 FAR and 61 foot high building are inconsistent with the Future Land Use Map.
- e) Treating the two-block area as a consolidated PUD under the zoning regulations does not excuse compliance by each block with the Comprehensive Plan Future Land Use map.
- f) Acceptance of the theory that a five-story building is acceptable in a low density area because C-2-A may correspond to the Plan's low density designation would reverse the Plan/zone hierarchy and unlawfully allow zoning limits to define the Plan's density categories.
- g) The Office of Planning recognized that in this case the Future Land Use Map contemplates only a small retail, office and service district with one to three story buildings, not large business districts that the same low-density commercial designation might indicate for other areas. (090406 TR pp. 10-11.)

120. The Opponents also state that the requested height and density of the proposed North Block building would result in unacceptable negative traffic and parking impacts on the surrounding neighborhood, contrary to §2403.3, for the following reasons:

- a) Unacceptable negative impacts are likely to occur because the large number of residential units will generate traffic from the residents and from their visitors, workmen, etc.

b) In addition, unacceptable negative impacts are likely to occur because the Applicant proposes to exclude all commercial tenant and patron parking from the building, despite the building's 30,799 square feet of ground floor retail space.

121. The Opponents state that the PUD Site is not Metrorail oriented, since it is approximately one mile from the closest two Metrorail stations. (090504 TR, p. 122.)

122. The Opponents state that the negative impacts from the North Building are not capable of being mitigated unless the height and density of the residential component of the building are substantially reduced.

123. The Opponents state that reducing the height of the North Building by two floors would decrease the height and density of the proposed building, would bring the project more into line with the Comprehensive Plan Future Land Use Map definition of low density commercial, would reduce the demand for residential parking spaces in the building's garage and would substantially alleviate the proposed building's negative impacts on the neighborhood.

124. As noted above, Tom Graham, an individual testifying in opposition to the project, introduced graphic materials demonstrating that the actual height of the PUD buildings including the North Block building would substantially exceed the heights portrayed by the Applicant's graphic depictions. Since Applicant did not attempt to rebut or contest Mr. Graham's testimony and exhibit, and Applicant bears the burden of proof, we must conclude that Mr. Graham's depictions were the more accurate.

125. We find that the Applicant failed to supply pro forma data or any other sufficient credible information in support of its claim that the PUD would not be feasible without the full residential component and has therefore failed to satisfy its burden of proof under §2403.2.

126. We find that the absence of an independent regulatory obligation to provide financial analysis does not relieve the Applicant from the § 2403.2 regulatory burden of proof requirement to present facts in support of its claimed economic justification for the scale of the PUD.

127. We find that the proposed North Building's 61 foot height and 3.81 FAR exceed the guidance of the Comprehensive Plan Future Land Use Map read in conjunction with the text of the Comprehensive Plan and the C-1 and C-2-A Development Standards of §2405.2 of the Zoning Regulations.

128. We find that the proposed five story, primarily residential North Block building is inconsistent with the low density commercial land use designation of the 2006 Comprehensive Plan Future Land Use Map.

129. The Applicant acknowledged that there are already a number of thousands of residential units in the neighborhood. (090219 TR 174.) According to the party in

support, census figures show that the population within a one-mile radius of the Site is slightly over 40,000. (090504 TR 39.) We find that reducing the number of proposed North Block residential units from the proposed 142 units to some lesser quantity will not of itself jeopardize the success of the commercial portion of the project from a customer standpoint.

130. We suggest that the Applicant engage in serious discussions with the Office of Planning and Opponents in an effort to modify its North Block proposals in a manner consistent with these findings.

Requested relief from lot occupancy requirements.

131. The lot occupancy of the portion of the PUD's commercial zone buildings devoted to residential use is approximately 75%. For the commercial portion of the Site, the Applicant requests relief from the C-2-A zoning requirement that the maximum lot occupancy in the portions of the building devoted to residential use is limited to 60%.

132. The PUD application filed May 16, 2008 offered to set aside 8% of the gross floor area devoted to residential use, or approximately 13,184 square feet, as affordable housing. At the May 6, 2009 hearing, the Applicant raised this offer to 10%.

133. On May 15, 2009, the District of Columbia proposed inclusionary zoning ("IZ") regulations that require high-rise developments to provide 8% affordable housing and low-rise developments to provide 10% affordable housing.

134. The proposed IZ regulations include provisions controlling administration of the affordable housing.

135. The Applicant's initial offer of 8% affordable housing is the minimum amount that would be required by IZ for a high-rise project. Its revised offer of 10% is the minimum amount allowed for low-rise developments and only 2% more than the minimum that would be required for a high rise development. The application does not address issues of administration of its affordable housing units.

136. The Applicant testified that the location of affordable housing would be uniformly distributed in the North Block building to the extent possible. (090219 TR at 144.) The Applicant was not able to address the size of the units. (090219 TR at 158.) The Applicant did not address the duration of the affordable housing.

137. The Opponents state that the Applicant is seeking a permanent increase in the project's FAR but has only offered to maintain affordability for 15 years. (090504 TR 168.)

138. The proposed IZ regulations are not yet in effect. Therefore, if the Applicant presents us with a North Block proposal consistent with our findings in this case and requests and obtains a waiver pursuant to §2405.4 to allow 75% lot occupancy on the

North Block, such waiver will constitute a zoning flexibility award under the PUD regulations rather than an automatic entitlement under the IZ regulation. As such, we may impose conditions pursuant to §2408.6.

139. We find that if the proposed IZ regulations become effective as they were proposed on May 15, 2009, the PUD's proposal to offer 10% of the gross floor area of the residential portion of its building for affordable housing is the minimum level that the regulations will require for low-rise developments and exceeds the minimum required levels for high-rise developments by only 2 percentage points..

140. We find that provision of affordable housing despite the absence of any regulatory requirement warrants granting the Applicant's request for a waiver so as to allow 75% lot occupancy by an appropriate North Block building. As conditions of this award:

- a) The Applicant shall submit a detailed description of the location within the project of the affordable housing units, which shall be uniformly distributed on all floors and all areas of the North Block building;
- b) The affordable housing units must be of a size and quality comparable to the project's other residential units;
- c) The project's affordable housing units shall be managed in accordance with the rules set forth in the Inclusionary Zoning regulations published in the D.C. Register on May 15, 2009, and
- d) The project shall maintain 10% affordable housing for the duration of the PUD.

141. We find that relying on the PUD's affordable housing offer as a basis for expanding lot occupancy in excess of matter-of-right zoning requirements precludes reliance on the same element as a public benefit or amenity to support additional relief. (See ZC Commission Order 943, Downtown Development Overlay District Final Rulemaking, July 26, 2001, p. 4, where we declined to provide that a 0.5 density bonus could be eligible for transferable development rights since the density bonus already constituted a development incentive.)

Relief from Requirements Regarding the Location and Amount of Commercial Parking.

Relief from requirements regarding the location and amount of commercial parking for the North Block.

142. Applicant requests relief from requirement of §2100.1 that all buildings erected on or after May 12, 1958 must be provided with parking spaces to the extent specified in §2101 except as provided by §§ 2102-2108.

143. Applicant requests approval to locate in the South Block garage the commercial parking spaces required to be in the North Block building. The Applicant states that such approval is ordinarily granted as a special exception under §2116.5. The Applicant denies that this proposal would adversely impact residents of Ordway Street east of Wisconsin Avenue or street parking elsewhere in the immediate area of the PUD.

144. The Ordway Street Neighbors opponents of the project stated that locating North Block commercial parking at a point remote from the North Block will lead patrons of the North Block commercial tenants to tend to park in front of their homes on Ordway Street, particularly if a stoplight is installed at Wisconsin Avenue and Ordway, making it easier and safer to access the east side of Wisconsin Avenue. They also contend that traffic on Ordway Street will increase as drivers proceed down the street looking for parking.

145. By letter to the Commission dated May 19, 2009, two opponents of the project disagreed with the Applicant's statement that approval to locate required parking in a separate building's parking garage is ordinarily granted under §2116.5. They stated that the section is limited to allowing accessory open (surface) parking, and provides that open parking may be located anywhere on the lot or elsewhere by special exception if it meets the criteria of §2116.6. In addition, §2116.7 establishes that in granting a §2116.6 special exception for the location of open parking spaces, parking on adjacent lots or lots separated only by an alley is preferred.

146. By letter hand-delivered to the Commission on May 20, 2009, the Applicant does not contest the opponents' May 19, 2009 conclusions that §2116.6 does not authorize accommodating required North Block commercial parking spaces in the South Block garage.

147. We find that §2116.5 does not provide a legal basis for allowing the Applicant to locate required North Block commercial spaces in the South Block building underground garage.

148. The opponents' May 19, 2009 letter also stated that §708 and §730 of the Zoning Regulations prevent the Applicant from locating its North Block commercial parking in the South Block garage. Those sections permit the RZA, by special exception, to allow accessory parking spaces on a separate lot in C-1 and C-2 zones, respectively. However, they require that the separate lots must be within the same square.

149. By its letter of May 20, 2009, the Applicant does not contest the opponents' May 19, 2009 conclusions that §703 and §730 do not provide a legal basis for allowing accessory parking spaces to be located in a separate square.

150. We find that since the PUD North Block building is located in Square 1920-N and the South Block building is located in Square 1920, the requirements of those sections are not met. We therefore find that §708 and 730 do not allow required North Block commercial parking to be located in the South Block garage.

151. By its letter of May 20, 2009, the Applicant shifted its reliance to §2405.6 to justify its effort to locate North Block commercial parking spaces in the South Block garage. The Applicant's letter admits that §2405.6 states that off-street parking spaces and loading berth facilities must be provided as otherwise prescribed in the Zoning Regulations. However, the Applicant points out that the Section goes on to say that "The Commission may reduce the amount of such facilities depending on the uses and the location of the project."

152. Applicant's substitute argument raises two questions. First, is the authority to approve a request for a reduction in the amount of "such facilities" limited to loading berth facilities, or does it also cover off-street parking spaces? We find that §2405.6, by its express terms, allows a reduction in loading berth facilities, depending on where the project is located and the uses of the project, but not parking spaces, which we do not believe are "facilities." We further find that §2405.6 refers to the location and uses of the project. It does not refer to the location and uses of the required parking spaces, and it does not authorize us to allow required parking that does not comply with applicable Zoning Requirements relating to the location of the spaces. We note in this connection that the Applicant's PUD application referred to §2405.6 in connection with its request to reduce the number of off-street parking spaces but not in connection with changing their location, as to which the Applicant relied solely on §2116.5. (Application, May 16, 2008, p. 10.)

153. Further, even if §2405.6 did empower us to grant a reduction in the number of parking spaces below the amount otherwise prescribed in the Zoning Regulations, it would be reasonable for us to grant a reduction to zero (as proposed by the Applicant) only if (1) we actually believed there will be no need for any spaces for the employees and customers of the North Block retail because there is enough on-street parking to accommodate these uses without an adverse impact on local residents; or (2) we in fact recognized the availability of the South Block parking. We cannot in good faith adopt the former proposition; and the latter would mean permitting the Applicant to do indirectly what it cannot do directly, *viz.*, rely on substitute parking in a different square. (And even if this were permissible, we would be left with the practical question of what will happen if and when the North and South Blocks are under different ownership.) We therefore find that there is no authority in the Zoning Regulations for us to allow the PUD to locate required North Block commercial spaces in an underground garage on a separate square from the building where the spaces are required to be located, and no lawful and reasonable basis for allowing North Block commercial parking to be reduced to zero.

154. We find that §2405.6 allows us to reduce the amount of commercial parking in the North Block, so long as the calculation does not impermissibly rely on South Block garage parking. The Applicant may advise the Commission as to the amount of commercial parking spaces that it believes will adequately serve the commercial patrons and employees of the North Block commercial tenants. Its conclusion should consider the anticipated uses of the North Block retail space and the importance of protecting the

Ordway Street Neighbors and other surrounding neighborhoods from spillover parking attributable to the North Block commercial tenants. In this regard, we note that the Applicant stated that a new traffic signal to be located at the corner of Idaho, Wisconsin, and Ordway would provide greatly enhanced safety for pedestrians crossing Wisconsin at that intersection, yet also attempted to address the concerns of the Ordway residents about parking in front of their houses by saying that shoppers are unlikely to do so in light of the need to cross at the dangerous intersection.

Relief from the required number of commercial parking spaces at the PUD Site:

155. The Applicant requests relief from the Regulations' commercial parking requirements of §2101.1 and §2116.1. Under the Regulations, the Project should provide commercial parking at the rate of one space for each additional 300 square feet of gross floor area and cellar floor area in excess of 3,000 square feet. This should result in a total of 93 commercial parking spaces in the North Block building and an overall total of 435 commercial parking spaces. Instead, the Applicant proposes to supply no commercial parking spaces in the North Parcel garage and 388 commercial parking spaces in the South Block garage, for an overall deficit of 47 commercial parking spaces for the project.

156. The Applicant states that its proposed commercial parking is adequate given the Project's location and proposed mix of uses. It cites the availability of public bus transportation, its position within walking distance for many of its future customers and patrons and its belief that many of the ground-floor retail uses will not generate "stand-alone" trips but will be visited by individuals who have already come to the site for the supermarket. The Applicant bases its assessment of parking adequacy on a survey of grocery stores in the Washington Metropolitan Area and on retail parking data from the Institute of Traffic Engineers ("ITE") study for shopping centers, which the Applicant calls "general retail."

157. The Applicant also cites its transportation management plan, under which the Applicant will (1) provide at least 3 dedicated parking spaces for a car-sharing service; (2) provide information on Metrorail and Metrobus service to customers and tenants, such as maps and schedules; (3) provide initial residential tenants with a \$20 SmarTrip card; (4) participate in a D.C. RideShare program, to the extent that it exists; (5) provide bike storage, and (6) set aside seven spaces in the South Block garage parking for the fourteen South block apartments and their visitors, as required by the zoning regulations (which would appear to increase the shortfall to 54). Presumably any cars associated with the other seven apartments and the visitors to any of the 14 apartments will be accommodated in the remaining 388 spaces for commercial parking in the South Block. Finally, the Applicant states that these will be "shared" spaces: the same spaces that will be available for shoppers during the day may be used by restaurant-goers (primarily within the PUD) in the evening.

158. The Applicant states that transit oriented development is not limited to Metrorail station areas but also includes premium transit corridors and the city's "Great Streets," citing 10 D.C.M.R. 306.6.

159. The Applicant states that it has no obligation to continue to provide parking for businesses and residents outside the PUD.

160. The Opponents state that the Applicant's proposal that all of the 124 parking spaces in the North Block garage be reserved for the residents of the Project's 124 units provides twice the residential parking that the Regulations require for the North Block building's apartments. Some of those spaces could instead be reserved to supply a portion of the commercial parking required for that building or shared with commercial customers during the day, resulting in a more efficient use of limited parking spaces. DDOT testified that North Block residential parking should be "unbundled," so that residential units would not necessarily include a parking space. (090406 TR pp. 24-25.) To the best of our knowledge, the Applicant has not accepted this proposal.

161. Opponents also point out that the Site is not Metrorail accessible, since it is approximately one mile from the closest Metrorail stations. The Comprehensive Plan recognizes that $\frac{1}{4}$ to $\frac{1}{2}$ mile is generally used across the country to define the walkable radius around each station. 10 D.C.M.R. §306.8. DDOT considers Metrorail accessible to mean that there is a Metrorail station within one-half mile.

162. Opponents also state that existing bus service has not been efficient, and that some of the bus routes relied on by the Applicant and DDOT run only during certain, limited hours of the day.

163. The Applicant's proposals regarding provision of bus schedules, maps and SmarTrip cards, participation in a potential RideShare program and supplying bike storage are welcomed, but these minor relief measures do not adequately balance or counteract the PUD's substantial parking deficit. In order for the Commission to approve such a substantial shortfall in parking, we need to be satisfied that there will be a meaningful parking control plan with teeth in place. Instead, we know almost nothing about how the spaces will be administered. Questions about parking management include but are not limited to the following: Will the "free parking" be time limited? Will shoppers be able to stay longer in the PUD lot for a fee? Will there be valet parking in the site to improve efficiency? Will there be a separate area for employee parking? Will the parking on the second level be for the grocery store only? Will parking occupants need to get their parking ticket validated by a PUD retail store? How will visitors to PUD residents be validated? Will the PUD attempt to control those who go to a non-PUD business first, before stopping at a PUD business to get their parking ticket validated? How will they make the community spaces available and control the 30-space limit on spaces set aside for non-PUD activity, and for overnight? How will the Applicant control commuter parking?

164. Opponents also state that currently there are 114,628 SF of retail/commercial space on the North and South Blocks, 68,222 of which is "active." The existing site contains 278 parking spaces (733 on the South Block and 45 on the North Block) serving the current commercial and office tenants. Although many consider the Applicant's grocery store to be substandard and the Applicant has kept a substantial amount of its existing South Block retail space empty, by the Applicant's own traffic study (May 14, 2008 PUD Submission), the Giant parking lots are already filled beyond their practical capacity during peak evening hours, and neighborhood parking is already congested. The Applicant proposes to add only 110 commercial spaces beyond the existing amount (only 80 if the 30 spaces set aside for non-PUD shoppers and residents parking early for the night are available for these uses during the peak evening period), in the face of a more than doubling of the amount of active retail/commercial in the PUD area. Moreover, the grocery store will be tripled in sized, and attract volume shoppers who will inevitably use their cars. The Applicant views the size as an approximately doubling, since the current grocery store (18,500 square feet) and pharmacy (approximately 8,500 square feet) will be combined in the new South Block supermarket. However, the substantial duplication of products in the two stores today will be eliminated, so that probably the impact in terms of products available and trips generated will be somewhere in between two and three times. This increase in activity will add to neighborhood parking congestion, particularly because the Applicant's current open parking lots will no longer be broadly available for patrons of the non-PUD commercial establishments.

165. The Applicant is offering to provide 30 non-PUD parking spaces for community parking" and for overnight parking. The Applicant states that these 30 spaces will be available during non-peak times, such as evenings, but the Applicant currently provides 40 community parking spaces for up to 3 hours during all hours. Thus, the new parking plan would reduce the community parking spaces by 25 percent. Also, the Applicant was not able to state precisely what times of day the 30 spaces would be available for community parking, and when the 30 spaces would be available for overnight parking. (090420 TR, p 77.) The Opponents state that these spaces must be available during the restaurant peak, in order to relieve the demand for on street parking. Moreover, given current usage and demand, the 30 spaces, even if available during the restaurant peak, would be far from adequate to prevent negative impact on the community and local businesses. This situation will be aggravated if the PUD contains a substantial number of new restaurant seats.

166. The current five restaurants outside the PUD generate upwards of 300 cars during peak evening hours (based on Opponent testimony, survey of five non-PUD restaurants, and estimates using data from the ITE on cars per seat in the restaurant. Many of these cars park in the nearby Giant parking lots. Without off-street parking, patrons of these restaurants will look for parking on already crowded neighborhood streets, or if discouraged, will stop coming and these restaurants will lose business, employees will lose their jobs, and the city will lose tax revenues. See testimony of Peter Pastan, owner of 2Amys. The opponents showed a video at the May 4, 2009 hearing which demonstrated how patrons of these businesses have come to rely on the Giant lots, the liveliness of non-PUD restaurants, and the congestion on neighborhood streets.

Opponents are concerned that adding 300 more cars to already crowded streets will create an impossible situation in the immediate community.

167. The Opponents also state that the Applicant's commercial parking is not adequate to cover its own grocery and other retail business. Under the Regulations, the Applicant's parking for the entire PUD is barely enough to cover that which would be necessary if the entire site were a grocery store. However, the PUD has the characteristics of a neighborhood shopping center, which generates much more demand for parking per square foot than a grocery store. Had the Applicant appropriately used data for a shopping center, they would have found that their parking plan is 56 spaces fewer than is necessary to satisfy their own parking demand. Moreover, the PUD could have up to six restaurants the size of the nearby Café Deluxe, and this restaurant demand for spaces could make the parking space deficit even worse.

168. The Opponents state that the addition of these restaurants to the five already there outside the PUD will surely turn the area into a restaurant entertainment center, and will be far from neighborhood serving. Today, almost two thirds of the cars in the Giant lots during the evening are not from Washington, DC. (090506 TR, p. 148.) More restaurants will only increase the attractiveness of this destination to out of District visitors. These visitors come by automobile. A suburban size supermarket will also attract shoppers from beyond the immediate neighborhood that the Comprehensive Plan indicates as the appropriate service area for a lowdensity commercial center.

169. Opponents point out that a large building facing the PUD Site is being converted to at least 100 luxury apartments. Consistent with the existing R-5-D zoning it will have only 37 parking spaces. Opponents state that this will add further to neighborhood parking congestion. The applicant states that the parking impacts of the conversion are not material to the PUD application because those residents have no right to park on the PUD property. The Opponents respond that Policy RCW-1.1.12 (10 D.C.M.R. §238.13) seeks to ensure that land use decisions do not exacerbate congestion and parking problems in already-congested areas. They state that Policy RCW-1.1.12 also states that mitigation plans consider not only the project under consideration but the cumulative impact of other projects that may also impact the community. The Zoning Commission and the Office of Planning must consider these impacts as the Applicant is asking for substantial zoning relief as part of the PUD. OP stated at the hearing that it was still treating the building, under heavy renovation as part of the conversion, as empty.

170. Opponents testified that neighborhood parking has become difficult, particularly because of the substantial number of restaurants now operating in the MW Overlay zone. There are also thousands of existing residential units in the neighborhood. (090219 TR, p. 174); many of these are in apartment buildings located in residentially-zoned areas or near Wisconsin Avenue and lack adequate on-site parking. Residents of these buildings also try to find space in the Giant lots.

171. Opponents are also concerned about the loss of parking on neighborhood streets due to new curb cuts on Idaho, the adequacy of Idaho to accommodate two way bus and

truck traffic if the Commission accepts the PUD's proposal to change it from one way to two way, the wide new curb cut that the Applicant requests to accommodate large delivery trucks to the Giant's loading dock and the loss of two or three street parking spaces if additional street truck loading is required on the North Block due to loading dock inadequacy, as the PUD Applicant has suggested. (See Applicant's Truck Management Plan, Pre-Hearing Submittal Ex. F, p. 2, ¶5 and TR 090406 pp. 91, 94-95 and 112-113.) This will add to the parking deficit in the Applicant's plan.

172. The Opponents also state that the Applicant's parking plan does not adequately account for the parking needs of PUD employees and visitors to PUD residents. This additional demand further exacerbates the PUD parking deficit.

173. The Opponents state that the Applicant's parking plan has shortchanged the commercial parking to benefit the Applicant's housing project. This could be remedied by eliminating two floors of housing on the North Block (62 units) and by providing only one residential parking space for every 2 remaining units, as required by the Zoning Regulations. These revisions would enable the PUD to free up 93 spaces on the North Block for commercial parking. This would supply the number of North Block commercial parking spaces required by the Zoning Regulations.

174. We find that existing parking in the PUD neighborhood is congested and is likely to become worse with the addition both of more occupied retail space and restaurants in the PUD and also a new non-PUD condominium building with limited parking directly across Wisconsin Avenue from the PUD Site. As in many other respects in this application, there is a tension that sometimes rises to the level of an internal conflict or inconsistency between the proposed size and density of the PUD and the request for relief from various restrictions, in particular the number of restaurants to be permitted in addition to those that would be permitted with the Overlay, on the one hand, and the facilities to be provided to the neighborhood, including parking.

175. This is likely to be aggravated by loss of on-street parking on Idaho Avenue. Applicant has proposed that Idaho between Wisconsin and Newark, which is currently one way towards Newark, become two way and serve as the primary access and egress route for trucks heading for both North Block and South Block loading facilities. DDOT endorsed this proposal, noting that Idaho was suitable for this use because it is 50 feet wide. When several opponents testified that in fact Idaho is only 36 feet wide on both blocks abutting the PUD, DDOT said it would make its own measurement and revert to the Commission. It has not done so. We therefore must assume that Idaho is 36 feet wide on these blocks. It is apparent that two trucks or a bus and a truck passing each other on Idaho will not leave room for parking on both sides, as it is now. This is true even if the contingent plan by DDOT and the Applicant to have a curbside loading area on the North Block is not put into effect. If it is, there may not be car parking on either side.

176. We find that the PUD has no obligation to provide parking spaces for non-PUD residential or retail drivers. At the same time, we do not ignore the substantial positive

impact that use of the existing lots has had in preventing even greater neighborhood parking congestion, and in promoting small businesses in the community outside the PUD. We are concerned about the adequacy of parking to continue to support these businesses and about the immediate community that will be negatively impacted. This is related to our consideration of whether the Applicant has proposed sufficient amenities and benefits to the community to justify the substantial waivers and zoning changes it is seeking. (See our discussion below.) It is apparent from the comments of many in the community that both parking and the effect on existing businesses in and outside the PUD are major concerns, and that additional parking above and beyond that required for the PUD is perhaps the most important amenity the Applicant could offer the community. Instead, it has asked to be allowed to provide less than is required under the Regulations.

177. We find that the Applicant's proposals for commercial parking are not adequate in the context of this proposed PUD in this location, and its request for relief from the parking requirements should not be granted. We believe that the Applicant can remedy the inadequacy either by providing the amount of commercial parking required by the Zoning Regulations or by providing up to two hours of free commercial parking for non-PUD users without limits as to the number of spaces or the time of day.

Relief from loading requirements for the North Block.

178. Based on the square footage of retail and residential, zoning regulations call for one 55 foot berth and one 30 foot berth to serve the North Block building. The Applicant asks for relief to provide two 30-foot docks. Initially, the Applicant proposed that when a 55 foot truck delivered to the North Block, it would simply stick out onto the sidewalk by 25 feet. In support of this proposal, the Applicant noted that the sidewalk would be wide enough to permit this and still allow pedestrians to pass by without being forced into the street. The ANC, however, established as one of the conditions for its approval that no loading for the PUD take place on public space. It is not clear what Applicant's current position is on this matter. There is a suggestion that it would simply ban 55-foot trucks as part of its truck management plan. Since Applicant also asks to expand the allowed retail uses from those permitted under C-1 to include those permitted under C-2-A, and since we have never gotten an answer from OP to the question posed by Mr. Espenscheid of CPCA as to whether the use limitation of the MW Overlay other than those having to do with food and financial establishments would continue to apply to the PUD, we could have no confidence in this commitment except for our decision, above, to continue to apply the restrictions in the MW Overlay. Even so, there is no assurance that the permitted uses will not occasionally need or want deliveries from a 55-foot truck. Our analysis is made more difficult by the fact that DDOT didn't estimate the kinds of retail that might occupy the North Block or the number and kinds of truck deliveries they might generate; (4/6/2009 hearing, TR. 227) and we are additionally concerned by the fact the Applicant and DDOT are going to monitor North Block loading for the first 90 days of full operation and consider at that time whether to start the process to add a dedicated curbside loading zone on Idaho. (Pre-Hearing submittal, 10/24/08, Ex. E, p. 2, paragraph 5.

179. We find that the Applicant has not ensured that impact of its North Block loading provision will not be found to be unacceptable. We recommend that in revising its plans for the North Block, the Applicant give careful attention to loading dock requirements.

Relief from loading requirements for the South Block – Giant loading.
Relief from requirements prohibiting commercial loading driveway through a residential zone.

180. There are two major issues with South Block loading: the location, design, and impacts of the Giant loading facilities, including the access driveway; and the adequacy of the planned smaller loading facility off the Macomb Street alley between 24th and the apartment building.

181. The Applicant says that the grocery loading area cannot be relocated; for the following reasons:

- a) Topography and slope of the site: the trucks must unload underneath the level of the 38th street entrance, roughly at elevation of 346' above sea level.
- b) The Giant superstore model requires the store be supplied from the rear, not from the side.
- c) Redesign of the site is constrained by presence of housing (8 town houses and 14 apartments), all of which are necessary for the commercial viability of the development.
- d) redesign of the loading operation is unnecessary because all adverse impacts on nearby residents have been mitigated. These mitigations take two forms, acoustical and visual. Loading dock noise, the only kind of noise caused by truck activity that is regulated by DC code, will be controlled by having loading dock doors closed during all unloading. Trucks will not be allowed to idle anywhere on the applicant's property.
- e) Further affects on residential quality of 3300 block should not be taken into account because the portion of 3300 Idaho block across from the police station is "not residential in character", even though it is zoned residential.

The Opposition says:

- a) The size and configuration can be changed since this is a demolition project. The topography seems to impose constraints, but these can be overcome by creative design: separate the loading dock from main structure and locate it closer to Newark, using elevators and corridors (as elsewhere in the proposed PUD) to bring wares to the rear of the store. Opponents state that they provided detailed plans of such loading alternatives to the Applicant.
- b) The applicant has not provided evidence that all housing is necessary for the viability of the project. The applicant is unwilling to reduce the amount of housing in the project because this will reduce its profits, even though such reduction would make it easier to redesign the project and avoid adverse impacts.

on neighbors. In this way the Applicant seeks to transfer equity from those neighbors to the Applicant.

c) Adverse impacts on Idaho avenue residents have not been and cannot be mitigated with the current design. Applicant has addressed visual mitigation narrowly, from a single location (the front porch of 3321 Idaho) and it proposes to do nothing to mitigate the sight of trucks on Idaho avenue nor the sight of the grocery store itself from other neighbors, who will be more impacted (such as those across the street from 3321 Idaho). Further, the acoustical noise study shows that the loading activity will violate DC noise regulations if unloading activities are not ceased while doors are open. The ANC's conditional resolution in support requires that noise to the adjoining residences be no greater than it is today. The applicant's initial estimate of truck volume for the grocery store is five or six tractor-trailers and 2 to 30 single unit trucks per day, for a total of 60 to 72 truck trips per day. But the effort to squeeze too big a project into too small a space is illustrated by the fact that whenever the Applicant tries to address one problem, it aggravates another. In this case, by acknowledging that the loading facility off the Macomb alley will be inadequate, and permitting the overflow to enter the Giant loading facilities, the Applicant will add to the number of trips involving the Giant loading facilities, in an amount which the applicant refused to attempt to quantify (its expert witness, Martin Wells, said during cross-examination of his rebuttal testimony that he "didn't want to hazard a guess"). Moreover, the long trips that will have to be made by delivery people from the Giant loading area up a ramp and along interior corridors and up an elevator to Wisconsin tenants or through the parking garage to a garage and then along an interior corridor to Newark tenants will undoubtedly slow turnover of trucks. All this additional traffic will in all likelihood make it impracticable for the Applicant to always have the dock doors shut while all these trucks unload. Further, loading dock activities are not the only source of noise impacts. The applicant does not mitigate truck noise in general (on the street or using the turnaround). The truck study shows maximum levels of truck noise at 3321 Idaho at unacceptable levels, even with barriers in place (Idaho testimony, Table 4 of acoustical study). Finally, the above measures do nothing to mitigate the physical incongruity of sudden transition of uses from residential to commercial and back. The measures do not protect the property values of residents from substantial denigration.

182. Opponents state that ANC3C and the OP have recognized the adverse impacts of the loading dock on Idaho residents (as evidenced by the conditions to ANC approval, and OP efforts to move the loading dock entrance). This is evidence that the residential character is denigrated by the location of the loading area. The 3300 block is zoned residential.

183. We find that the applicant has not met the burden of proof in showing that relocation of the loading area is impossible. The alternatives presented by 3300 Idaho party were dismissed as "infeasible," but the reason given was that "grocery store must be loaded from the rear, not the side." We do not find this reason persuasive in view of

the variety of loading methods (with elevators and long corridors) used elsewhere in the proposed PUD to bring wares from docks to stores; and do not believe that the possibility of altering the footprint of the store to permit loading from the rear has been adequately explored. Since topographical issues would be rendered moot by the alternatives, we also do not find topographical barriers to redesign persuasive.

184. There may be economic barriers to significant redesign, but no evidence has been presented to us. We find the applicant's insistence that all housing is necessary and that none of it can be reduced in order to mitigate adverse impacts, unpersuasive.

185. Further, we find that the applicant has not met the burden of proof in showing that the grocery store loading dock will not violate DC noise regulations: the 30-36 expected trucks along with the overflow from Macomb alley will likely result in so many truck trips that loading dock doors will frequently be left open while unloading operations are ongoing.

186. We find that the claim of the applicant to have mitigated noise levels to current levels is not valid. It is flawed in two ways. It is based on measurements which average over time (15 minute intervals) and over frequency (pitch), so that, as ANC Commissioner Richard Rothblum pointed out, short bursts of pure pitched noises do not show up in the measurements, and are thereby ignored. Further, it is based partly on average values of noise generated by the 30-36 trucks mentioned above; this ignores the overflow from Macomb, meaning that the average levels of noise predicted by the Applicant are too low.

187. We find that the 3300 Idaho avenue is correctly zoned as a residential street and find unpersuasive the applicant's claim that the part of it across from the police station is not currently residential in character, yet will become residential in character once the townhouses and the loading dock are added.

188. In conclusion, we find that the applicant's design causes such brutal impacts in terms of truck volume, noise and pollution, and loss of quality of life and property values on nearby residents that it cannot be approved. We deny the requested relief to locate the commercial driveway and truck turnaround in the residentially zoned portion of the South Block. The applicant must redesign its grocery store loading operation and relocate it closer to the commercial center (Newark street). The redesign should involve better balance of the loading capacities of the grocery store and non-grocery store uses, so that overflow from a location such as Macomb alley is avoided.

Relief from loading requirements for South Block (non-Giant loading)

189. The applicant has estimated truck demand on the alley to be 8 to 16 trucks per day. In the applicant's rebuttal it acknowledged the necessity to create additional capacity by suggesting that the Macomb Alley be internally connected to Idaho grocery dock, though only by a ramp usable by delivery people using hand trucks.

190. The Opponents state that Applicant should not be granted any relief to South Block loading requirements unless it can present a workable plan to avoid truck overflows and consequent impacts on neighboring residential streets. They state that Applicant's estimates of truck volumes (8-16 trucks per day) are grossly underestimated. It is based on faulty assumptions and calculation errors made by the Applicant's transportation expert. (When asked if he would recommend to his client that it accept as a condition of its certificates of occupancy for the non-Giant retail space in the South Block truck traffic at the level he forecast, Mr. Wells said no; and said the same thing if the allowance were double his forecast. So the risk of unduly favorable forecasts falls on the neighborhood; and, under Giant's new plan to allow non-Giant truck use of the Giant loading facilities, on the 3300 block of Idaho neighbors in particular.) Initially, Giant's rebuttal stated that PSI, the traffic expert hired by the 3300 block of Idaho party, had double counted when estimating non-Giant deliveries, because it counted trips (one each way) instead of deliveries. Mr. Wells acknowledged that the error was the other way, and that ITE was issuing an errata on its website that supported PSI. When these errors are corrected, using the Applicant's own methodology, the estimate of eight truck deliveries should be increased by at least four times to at least 32. The use of City Vista data referenced by the Applicant is not relevant, because of the type of retail at that site. The Applicant should have surveyed local businesses in the immediate community outside the PUD. For example, 2Amys has 10-12 deliveries per day for 6,000 SF. Similar type of retail added to the Applicant's estimates when correct for errors would make the estimate closer to estimates provide by the opponent's transportation expert, PSI.

191. We find that the applicant has not met the burden of proof to demonstrate it has a workable plan for the Macomb alley loading dock that avoids adverse impacts on nearby residents and businesses. We find that re-routing the overflow to the Idaho dock does not avoid these impacts. By adding to truck volume on Idaho Avenue, the overflow will exacerbate the adverse impacts on Idaho avenue residents due to the extra use of the loading docks there.

192. We find that the applicant has not met the burden of proof in showing that its truck management plan will function as desired and avoid impacts on neighboring residents and businesses. It does not appear that the shortcomings of the loading configurations can be managed away. Because of this a fundamental redesign is required. As stated above the applicant must relocate the Idaho Avenue loading area closer to the commercial center on Newark. Then the applicant must redesign the Macomb loading area to work harmoniously with the Giant grocery store docks so that overflow is avoided.

Relief from requirements regarding the size of curb cut.

193. Because of our determination on the location of the Giant loading facilities and the access way, we do not need to reach this question pending the redesign of the loading facilities and access there to. With regard to any revised proposal, the Applicant Should provide sufficient information on the amount of street parking that will be lost by its

proposed commercial curb to provide access to the loading facilities.

Relief from requirements regarding roof structures.

194. The Applicant requests relief from the roof structure provisions of the zoning regulations, including (1) requirements that roof structures be contained under a single enclosure of an equal height and (2) the requirement that roof structures be set back at a ratio of one-to-one from all exterior walls. (Pre-Hearing Submittal, 10/24/08, pp. 11-12.)

195. The Applicant states that the grocery store elevator core is located along the south wall of the building, and not set back at a one-to-one ratio, but that the impact will not be significant because the south façade of the building is set back approximately 21 feet from the property line and the roof structure is the same height as the parapet wall.

196. Some of the Newark Street flats on the second floor of the South Block building will contain pop-up roof structures with stairways for the occupants to reach private roof terraces. These will not be set back from the exterior walls. In addition there will be multiple structures. The Applicant states that the building is well under the maximum height permitted in the C 2-A Zone District and the roof structures have been sensitively designed so that they do not have an adverse visual impact.

195. The North Block building also has multiple structures that are of unequal heights and that are not set back from the exterior walls. In addition, we must consider Mr. Graham's portrayal of the roof lines and roof structures.

CONCLUSIONS OF LAW

Preliminary Matter.

1. The Commission finds that pursuant to §1308.3 of the Zoning Regulations, this matter, if not withdrawn by the Applicant, must be referred to the BZA for consideration as a Special Exception pursuant §1304 and §1308.3 of the Zoning Regulations.
2. Although the Commission has determined that it cannot complete action on this case prior to BZA review, the following issues are addressed to provide guidance to the BZA, the Applicant, other parties and individuals who have participated in this case.

Conclusions of Law.

1. The PUD process is available as a means of controlling development on the PUD Site.
2. Pursuant to §2400.5 of the Zoning Regulations, the PUD process shall not be used to circumvent the intent and purposes of the Zoning Regulations, nor to result in action that is inconsistent with the Comprehensive Plan.
3. Pursuant to §1301.3, where there is a conflict between the Neighborhood Commercial Overlay District chapter and the underlying zoning, the more restrictive provisions of the Zoning Regulations shall govern.
4. Pursuant to §1304.1, Special Exceptions may be granted in NC Overlay Districts if they meet the conditions of §3108 and the requirements of §1304.1.
5. Pursuant to §1304.2, §1304 shall not operate to allow any exception to the height or floor area ratio limits of any NC Overlay District.
5. Pursuant to §1305, in the Neighborhood Commercial Overlay District, the matter of right height and floor area ratio limits shall serve as the guidelines for PUDs.
6. Pursuant to §1308.2, the purpose of the MW Overlay is to provide for public review of large scale developments as to their proposed uses, vehicular access and the scale and massing of proposed buildings to as to ensure compatibility with and enhancement of the primary neighborhood retail function of the MW commercial area and to advance the other purposes of the MW Overlay District.
8. Pursuant to §2403.2, the Applicant has the burden of proof to justify the granting the PUD application pursuant to the evaluation standards of §2403.
9. The Commission concludes that the requested remapping of a portion of the residential portion of the South Block to expand the commercial zone is not inconsistent with the Future Land Use Map and other policies of the Comprehensive Plan. By adding

this portion to the MW Overlay zone, this conversion from residential to commercial will enhance the primary neighborhood retail function of the MW commercial area.

10. The Commission concludes that rezoning the South Block of the PUD Site from MW/C-1 to C-2-A would circumvent the intent and purposes of the MW/C-1 Overlay and be inconsistent with the Comprehensive Plan.

11. The Commission withholds decision on rezoning the North Block of the PUD Site pending the Applicant's revision to its proposal for that block.

12. The Commission concludes that it does not have the authority to remove the applicability of a neighborhood commercial zone from a PUD Site. Any modification of an Overlay must be conducted pursuant to the requirements of §1304. The Applicant has not met its burden of proof of satisfaction of those criteria.

13. The Commission will postpone its decision on the Applicant's request for relief from North Block FAR limitations pending the Applicant's revision of its North Block proposal.

13.1 The Commission concludes that the height, density and uses of the proposed North Block building are inconsistent with the Comprehensive Plan and as currently proposed would result in an unacceptable impact on the surrounding neighborhood.

14. The Commission concludes that any revised North Block proposal must include adequate commercial parking spaces. The Commission has no authority to allow required commercial parking spaces to be located in a garage in a separate square from the building for which spaces are required.

15. The Commission concludes that the Applicant's request to provide less than the required minimum of commercial parking spaces for the PUD would violate §2304.3 because of the impact on the surrounding neighborhood including existing retail in the Macomb Wisconsin shopping district.

16. The Commission concludes that the loading driveway and dock for the new supermarket in its present location will have an unacceptable impact on the immediately adjacent low density residential neighborhood. The Commission concludes that the Applicant has not met its burden of proof that it cannot relocate the supermarket loading docks and access driveway to a location farther removed from the existing single family residences on Idaho Avenue.

17. The Commission concludes that the Applicant has failed to meet its burden of proof that its provisions for the use of the Macomb Street alley and possible spill-over use of the Idaho Avenue docks for the commercial tenants on the South Block will not have an unacceptable impact on the immediate neighborhood, including neighbors on Macomb Street and Idaho Avenue.

18. The Commission concludes that the Applicant has not met its burden of proof that its truck management plan will sufficiently reduce the loading operation's unacceptable impacts on neighboring residents and businesses. The Commission believes that the shortcomings of the loading configurations cannot be adequately mitigated through truck management and that fundamental redesign of loading dock facilities is required.

19. The Commission will review the loading provisions for the North Block when the Applicant submits a revised plan for that Block. Such provisions should not be premised on the possibility that curbside loading may become necessary.

20. The Commission concludes that a 30-foot curb cut to allow an adequate turning radius for supermarket delivery trucks may be acceptable if the Applicant develops a loading dock and access driveway solution that does not have an unacceptable impact on the adjoining neighborhood.

21. In developing a revised proposal for the North Block, the Applicant should reconsider the size and placement of the North Block building's roof structures.

22. The Commission concludes that the proposed roof structures for the residential "lofts" on the south side of Newark Street would be visually obtrusive particularly because of the relatively low height of the building and would constitute an unacceptable impact.

23. The Applicant may receive a bonus density award as an incentive to provide a qualifying percentage of affordable housing for the duration of the PUD, but the Applicant may not also claim the affordable housing as a public benefit or project amenity that to balance other flexibility requests.

24. The Commission concludes that the streetscape improvement amenity proffered by the PUD may be somewhat better than Giant would likely have provided under matter of right zoning and its 2002 agreement with the Cleveland Park Citizens Association. However, the Commission concludes that this amenity is insufficient to balance the flexibility or incentives requested, particularly in terms of the proposal for the North Block. The Commission will review the adequacy of amenities when applicant submits a revised proposal for the North Block.

25. The Commission concludes that many of the Applicant's proffered benefits or amenities are instead mitigation measures put forth in an attempt to ameliorate the potential negative impacts that the proposal would have on the surrounding neighborhoods.

26. The Commission concludes that replacing an existing grocery store and retail with an expanded grocery store and slightly less retail space than previously existed does not qualify as a public benefit or project amenity under the standards of §§2403.33336-2403.8.

27. The Commission concludes that compliance with the Comprehensive Plan is required by law and therefore does not qualify as a public benefit or project amenity. Although the project is consistent with some Plan policies, it is inconsistent with the Future Land Use Map and various other Plan policies including Plan Map and text provisions that give clear guidance as to the land use plan for the MW Overlay District.

FACSIMILE TO ZONING COMMISSION

TO Fax Number (202) 727-6073 2

**FROM: CPCA, WNNC,
3300 block of Idaho Party, Ordway Street Neighbors Association.**

DATE: June 1, 2009

John B. O'Sullivan
1200 New Hampshire Ave. NW,
Suite 300
phone: 202 974-5610
fax: 202 974-6710

2009 JUN -1 PM 3:51

To: Sharon Shellin

From: Nancy MacWood

Date: June 1, 2009

Re. ZC Case No. 08-15

Sharon,

One of the parties in above referenced case asked me to fax the Decision portion of the Findings of Fact/Conclusions of Law because they don't have fax capabilities.

Nancy

PS I think they are faxing the remaining portions through another fax system.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia **RESERVES DECISION** on the application for consolidated review of a planned unit development for Lot 183 in Square 1920 and Lots 1 and 2 in Square 1920-N. Decision on this PUD is reserved pending the following actions by the Applicant:

1. The Applicant shall redesign the North Block building by removing not less than two floors of the height of the proposed building.
2. Not less than 10% of the residential units of the North Block building shall be reserved as affordable housing during the existence of the PUD. The percentage of affordable housing in each C-2-A building on the Applicant's C-2-A property shall be in a ratio reflecting the percentage of total housing in each building on the PUD'S C-2-A property.
3. Adequate parking shall be provided on the North Block for the North Block building's commercial and residential uses.
4. The Applicant shall redesign the South Block in order to ensure that all loading will be performed on the Applicant's property and will not increase the burdens on the public alley on Macomb Street.
5. The Applicant shall redesign the South Block in order to ensure that the location of any loading access driveway or loading facility will not result in an unacceptable impact on the neighborhood including the existing single family residences in the vicinity of the PUD Site.
6. Any Certificate of Occupancy for any commercial user of the PUD shall contain a condition that the users will conduct loading and unloading only from their loading docks and only in accordance with the provisions set out in the findings of facts and conclusions of law.
7. The Applicant shall conduct meaningful meetings with DDOT, OP and the Opponents to resolve the issues addressed by this order.

RECEIVED ZONING
2009 JUN-1 PM 3:55

FACSIMILE TO ZONING COMMISSION**TO Fax Number (202) 727-6071 2****FROM: CPCA, WNNC,
3300 block of Idaho Party, Ordway Street Neighbors Association.****DATE: June 1, 2009**

John B. O'Sullivan
1200 New Hampshire Ave. NW,
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FACSIMILE TO ZONING COMMISSION

TO Fax Number (202) 727-6071 2

**FROM: CPCA, WNNC,
3300 block of Idaho Party, Ordway Street Neighbors Association.**

DATE: June 1, 2009

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2009 JUN -1 17:14:15
CHADBOURNE & PARKE