

- 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

ZONING COMMISSION  
District of Columbia

CASE NO. 08-15  
EXHIBIT NO. 263

2008 JUN -2 PM 3:36

2009 JUN -2 PM 3:36

## **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

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 escrowing 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 Feola, 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 Sciafani, 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 Montalto, 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 Korbcl, 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 38<sup>th</sup> Street neighborhood, which she fears will become a short-cut from the 38<sup>th</sup> St. entrance and exit to the parking garage to and

from Massachusetts Avenue and the neighborhoods south and west of the PUD; Nineta 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. (§.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 §§1301, 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

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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 MW/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. (c.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, 7/9/09 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 bar 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.)

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 Idabo 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. (WNNC 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 (WNMC 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 TK 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 DZA, 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 those 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 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. (090106 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 (233 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 10 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. E, 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 2Amys 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 38<sup>th</sup> 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 mitigated 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.

196. The Office of Planning endorsed the applicant's contention that the pop-up roof structures will not be visible from adjoining streets. The report also noted that the roof structures are separated and thus, not easily contained in one structure, for aesthetic or functional reasons. The HVAC equipment in the South Block would be away from the existing residential building on Macomb Street, and the elevator for the supermarket would be adjacent to the existing residential building on Macomb Street. (Final Report, p. 6)

197. The Office of Planning also recommended that further consideration be given to the design and appearance of the South Block 14 feet high mechanical screening walls as they would be "quite visible." (Final Report, p. 7)

198. ANC Commissioner MacWood submitted to the record information that the none of the application elevations have shown the pop-up stairs so it has not been possible to evaluate their potential appearance.

199. We find that it is likely that the proposed roof structures on the South Block will have a dominating appearance given the low scale of this building. We instruct the applicant to continue to work with the Office of Planning in minimizing the appearance of roof structures and in incorporating the required enclosures into the design of the building. We further find that there is no reason to approve zoning relief for non-compliance with set back requirements for the pop-up stairs. The purpose of these stairs is to provide additional amenities to the new residents who will already benefit from outside recreation space on two levels of each apartment. Regarding the North Block building we find that the Applicant should adapt the design development for the South Block roof structures to the North Block roof structures so that there is minimal attention drawn to these structures.

**Relief from R-5-A use requirement and relief to construct separate principal buildings on a single lot.**

198. The Applicant requests relief to allow eight single-family townhouses as a residential development in an R-5-A zone under §353. (Pre-Hearing Submittal, Oct. 24, 2008.

199. We review this request pursuant to §2405.7.

200. The Applicant requests relief under §2516 to construct the proposed single-family townhouses as multiple structures on the same underlying record lot as the lot's principal building containing the supermarket and other uses.

201. Applicant's requests respecting construction of single family townhouses in an R-5-A zone and construction of separate principal buildings on a single record lot constitute use exceptions. As such, we have the authority under §2405.7 to approve these uses.

202. There has been no objection to the proposed townhouses.

203. Construction of the townhouses will add to the District's housing stock consistently with the Comprehensive Plan.

205. We find that the Applicant should be granted the requested exceptions under §353 and §2516.

**Public Benefits and Amenities**

206. The Applicant claims the following public benefits and project amenities. (Application, 5/16/08 pp. 15-21.)

- a) Housing and affordable housing.
- b) Urban design, architecture, landscaping, or creation of open space.
- c) Site planning and efficient and economical land use.
- d) Effective and safe vehicular and pedestrian access.
- e) Environmental benefits.
- f) Uses of special value.

- g) Revenue for the District.
- h) First source employment program.
- i) Comprehensive Plan.

207. The list of public benefit categories set forth in §2403.9 identifies categories where an element may be regarded as a public benefit or project amenity. Benefits and amenities in the §2403.9 categories must satisfy the evaluation standards set forth in §§2403.6-2403.8. Under §2403.2, the Applicant has the burden of proof to justify the granting of a PUD under the evaluation standards of §2403. A PUD may qualify for approval by being particularly strong in one or more of the categories in Sect. 2403.9, but the PUD must be at least acceptable in all proffered categories and superior in many. (DCMR Sect. 2403.10)

208. The Applicant refers to compliance with §2403.13. (Application, p. 19.) That section states that public benefits may be located off-site. The Applicant has not proposed any public benefits that would not be located on the PUD Site.

#### **Housing and affordable housing.**

209. The Appellant states that the project will provide new residential units and 10% affordable housing for low and moderate income tenants. (Application, p. 15.)

210. As discussed above (under FAR relief), we find that the Applicant's proposal to provide even a relatively modest level of affordable housing when no such housing is required by any regulation currently in effect is a public benefit. We will award flexibility to increase the North Block lot occupancy to 75%, provided that the Applicant submits revised plans for a North Block building of a height and density appropriate to the low density commercial zone in which it is located.

211. As further discussed above, the Applicant's reliance on the PUD's affordable housing offer as a basis for expanding permissible lot occupancy precludes reliance on the same element as a public benefit or amenity to support additional relief.

212. As discussed below, the Appellant is proposing a mixed use project including four stories of residential use in an area where that project would be inconsistent with the Comprehensive Plan's Future Land Use Map. Development that is inconsistent with the Comprehensive Plan cannot be considered a public benefit.

#### **Exemplary urban design**

213. The Applicant states that the project qualifies as a public benefit and project amenity under §2403.9(a) on the basis of exemplary urban design. It states that this benefit will include the following (Application pp. 15-17):

Significant streetscape improvements as a key benefit and amenity, which will include large street trees, special paving features and marked crosswalks at all intersections.

Inviting and active storefronts.

Well-located and carefully designed parking garages and vertical circulation core.

Clear separation of the major loading functions from pedestrian and vehicular pathways.

Enclosure of the supermarket loading facilities to provide acoustic and visual buffering for neighbors.

The creation of a number of public spaces throughout the project, consisting of a space with benches and a water feature on the north side of Newark Street, an undescribed space at the Newark Street pedestrian entrance to the Giant, a green space on Idaho Avenue south of the townhouses and a hardscape space at the corner of Idaho and Wisconsin.

214. The Office of Planning did not list the PUD architecture or proposed public space as amenities or public benefits of the project. The OP noted in the "Land Use and Urban Design" section that since the scddown meeting the North Block building had been partially redesigned to eliminate a multiple series of buildings with different styles in favor of a more unified building that still however presents a façade with multiple planes, window and door styles, etc. The OP focused predominately on describing the North Block architecture and was silent on whether it endorsed the design approach. The report recommended the addition of projecting storefront windows on the North Block building. (Final Report, p.7)

215. An opponent witness testified that the north block architecture did not relate to any architecture style in the area and was not compatible with the historic district across the street from the PUD. She also emphasized that the mass and scale of the proposed north block building was not in proportion to the south block building or to the structures directly across from it on Wisconsin Avenue. She further noted that the proposed open spaces would be significantly smaller than what is there today and that the ones on Newark Street would likely become sidewalk cafes and thus, not available for public gathering. She questioned what benefit there would be to letting the applicant take public space in order to mitigate the loading dock entrance on Idaho Avenue and placing a "vertical element" at the corner of Idaho and Wisconsin Avenues. (JayEtta Hecker, May 5, 2009)

216. A letter submitted to the record by ANC 3C Commissioner Nancy MacWood detailed concerns about the materials and ground floor design for the PUD and emphasized that typical downtown design elements were being incorporated into

a small, neighborhood shopping area that bordered an historic district. Comm. MacWood described meetings with the D.C. Historic Preservation Office where efforts to convince the applicant to break up the north block building mass were discussed. She urged that consideration be given to reducing the north block mass, and more progress be made on simplifying the north block form and details. She also questioned the need for the pop-up roof structures on the south block and noted that there were no plans or elevations demonstrating that these would not be visible from adjacent streets.

217. The Opponents disagree that the Applicant's proposed streetscape and storefront proposals satisfy the stringent evaluation standards of §§2403.6-2403.8. In particular, they state the following reasons why the proffered amenities do not justify the extent of zoning relief requested by the Applicant. (WNNC Opposition, p. 20):

A streetscape with large trees, special paving features and marked crosswalks is not significantly superior to what a matter of right project would likely provide in a new development in this attractive neighborhood, and therefore it will not benefit the surrounding neighborhood or the public in general to a significantly greater extent than would likely result from development of the site under matter of right zoning.

In its 2002 Letter of Agreement (contract) with the Cleveland Park Citizens Association and Office of Planning, Giant expressly committed itself, among other things, to build a matter of right supermarket, create an active Wisconsin Avenue Streetscape, undertake sidewalk improvement and repairs as required by the Department of Consumer and Regulatory Affairs and install and maintain reasonable landscaping of the Wisconsin Avenue and Newark Street sidewalk areas next to the South Block building, in coordination with the Historic Preservation Office. In the 2002 Agreement, Giant represented that it had no present intent to alter or redevelop the North Block but committed itself to notify OP and CPCA in advance of any significant change to the North Block and work with the parties in an attempt to resolve any issues.

The two small open spaces on the North Block do not warrant consideration as a public benefit or project amenity because North Block open space will in fact be reduced from the amount that would be required under matter of right zoning requirements because of the requested increase in lot occupancy from 60% to 75% awarded on the basis of the project's affordable housing offer, which in fact reduces the open space on that block. (WNNC Statement, p. 20.)

An increase in trucks using the Macomb Street alley will worsen the safety of the many patrons of 2Amys and other restaurants who congregate in the area. (090406 TR p. 199-202.)

The open space south of the Idaho Avenue townhouses is an attempt to mitigate the supermarket's loading proposal rather than a public amenity.

The Opponents the Applicant's attempts at visual and acoustic buffering are also mitigation, not public benefits. These measures are only made necessary by the project's intrusive design.

The neighborhoods surrounding this local shopping center already have substantial open space consisting of parks and playgrounds, two landscape conservancies and the grounds of the Cathedral. (090504 TR 178.)

218. We find that the proposed streetscape design features are on the high end of the range of, or somewhat superior to, what might be expected from a matter of right proposal at the PUD Site. Opponents also state that the application uses nearly 100% of the parcels for building or hardscape accessory uses, like driveways. The over-saturation of developed land does not leave adequate land for planning appropriate and required infrastructures that comply with Zoning Regulations; ie., number of parking spaces, location of parking spaces, loading dock capacities and locations. It also results in loss of air and space and missed opportunities for active and sustainable green space.

219. We find that the public space on the north side of Newark Street on the North Block is on the high end of, or somewhat superior to, what might be expected from a matter of right proposal at the PUD site in terms of design but that the public benefit of this and the hardscape public space on the same block are counterbalanced by the PUD's proposed reduction in the total amount of open space on the North Block.

220. We find that the proposed green space south of the Idaho Avenue townhouses constitutes attempted mitigation and does not qualify as a public benefit or project amenity.

221. We find that the Applicant has not provided sufficient information to satisfy its burden of proof as to whether the public space in front of the Newark Street entrance to the Giant should be considered a public benefit or amenity.

222. We find that the North Block massing and architectural detailing will be revised in accordance with our conclusions in the Finding of Facts Comprehensive Plan section and Conclusions of Law.

**Site planning and efficient and economical land use.**

223. The Applicant states that the project's site planning and economical land uses are public benefits and project amenities which will transform an underutilized and dated shopping center into an attractive 21<sup>st</sup> century mixed-use development. (Application, p. 17.)

224. As to the South Block of the PUD Site, Opponents state the following (WNMC Opposition, pp.

The vacant spaces on the Applicant's property are the result of its eviction of various tenants that were occupying the premises when the Applicant bought the property. The rest of the retail area is stable, with a very low rate of tenant turnover.

The Site's existing low scale is compatible with its location adjacent to the city's first historic district, Cleveland Park.

The existing low scale is also compatible with the one- to two-story buildings in the rest of the Macomb Wisconsin Overlay zone. The Applicant and the Office of Planning were both mistaken when they advised the Commission that the Overlay zone contains some three story buildings; it does not.

Higher rise apartment buildings in the vicinity of the PUD Site are consistent with the higher-density residential zones in which they are located; they do not justify the addition of a mixed use building within the Overlay area. This is also true of the PUD-based mixed use building north of the Site.

225. As to the North Block of the PUD Site, the Opponents state that, a moderate density residential mixed use building as proposed for the PUD would be inconsistent with the Comprehensive Plan and therefore cannot constitute a public benefit.

226. We do not find that it is a public benefit to develop the PUD Site to the height and density proposed by the Applicant, because any public benefits of the project that might be superior to matter of right development would be outweighed by the project's inconsistency with the Comprehensive Plan and its negative impacts on the surrounding neighborhoods. A less dense project would be a greater public benefit because it would likely result in fewer negative impacts.

**Effective and safe vehicular and pedestrian access.**

227. The applicant states that its elimination of surface parking and reduction in the number of curb cuts will enhance access and improve pedestrian access and safety. The Applicant also describes its traffic mitigation and loading dock arrangements as public benefits and project amenities. (Application, pp. 17-18.)

228. The Opponents state that reducing entry points and eliminating the light and air of surface parking will force traffic into an underground garage or into the neighborhood in search of surface parking. Forcing North Block retail patrons to park in the South Block garage or elsewhere and cross streets to reach their North Block destinations diminishes the safety of North Block retail patrons, who currently can park in a surface lot on the same block. The placement of the remaining curb cuts will encourage pedestrians and vehicles to converge at the same points in the development, creating conflicts between automobiles and pedestrians. (WNMC Opposition, p. 21.)

229. We find that the public garage is not well-located for employees and patrons of the North Block commercial tenants and therefore it is not a public benefit or project amenity. We also find that if the Applicant cannot claim a garage in a neighborhood commercial center as a public benefit at the same time that it is requesting waivers from the location and amount of commercial parking required by the Zoning Regulations

230. We find that on balance the totality of the PUD's proposed vehicular and pedestrian access does not qualify as a public benefit under §§2403.6-2403.7.

231. We find that the Applicant's traffic management and loading dock arrangements are at best mitigation, not public benefits or project amenities.

**Environmental benefits.**

232. The Applicant states that the grocery store would incorporate sustainable design features. The specific features mentioned are pinpoint rooftop skylights for daylighting the interior, stormwater management features, water use reduction features, and multiple plantings of mature 8-inch caliper trees in public space and open public spaces. Applicant asked that these items be accepted as PUD amenities and public benefits.

233. The applicant's environmental expert, Julia Craighill, testified to the efforts of Stop & Shop to promote sustainable features in their grocery stores, but she did not offer any testimony about how those initiatives might be incorporated into this PUD.

244. During rebuttal, Mr. Feola offered a change in the applicant's position on LEED certification. Prior to that point the applicant stated that they would meet some unspecified LEED standard but not seek certification. During rebuttal Mr. Feola stated that the applicant intended to satisfy LEED - *Neighborhood Development* at the silver level, but still not seek certification.

245. The Office of Planning ("OP") states that the project would include some sustainable features, such as, rain gardens, permeable pavers, green roof, and tree box filters. The OP states that project would be built to LEED certification standards, but this is incorrect. The sustainable grocery store features listed in the report were heat island reduction based on roof material, water efficient fixtures and landscaping, low-e insulated glass, refrigeration and HVAC units, heat recovery for space and domestic water heating, lighting fixtures, and skylights. The OP noted that the environmental features offered would be an improvement over existing environmental features at the site. (Final Report, p8, p10.)

246. Applicant states that stormwater management, electrical services, energy conservation features, and erosion control measures are designed to meet District regulations, including the District of Columbia Building Code. (Application, May 16, 2008, Exhibit I, Environmental Analysis)

246. Witnesses in support of the PUD testified that this project would offer substantial environmental features and benefits to the city and community. None of the statements were specific.

247. The Opponents state that applicant refuses to seek PUD LEED certification and thus, there is no way to verify that PUD will satisfy LEED certification standards at any level.

248. Douglas R. Horne, who has thirty-five years of experience in executing real estate projects that meet significant design and sustainability goals and who serves as Director of Land Advisory Services for The Conservation Fund, submitted a 4-page letter to the record. He wrote that neither the submissions nor the testimony prior to May 20, 2009 revealed any significant sustainable elements in the PUD. He acknowledged that there were some stormwater features (cisterns, raingarden) and water conservation measures but "little else in the way of sustainable design resulting in energy, waste, or greenhouse gas reductions is proposed, particularly in construction and operation of the supermarket." In reviewing the submitted LEED checklists, Mr. Horne determined that "it is evident that the majority of the LEED "points" are based on preexisting conditions the site itself - rather than any attempt to achieve sustainability through design, materials and operations." Mr. Horne also challenged the applicability of the LEED-ND and LEED for Homes programs to the environmental concerns specific to a grocery store and suggested that EPA's *GreenChill* and *Energy Star* programs should supplement LEED certification to bring the project up to the environmental standards being met by the supermarket industry overall and the District's expectations for green building standards. He presented a list of specific elements that could have been incorporated into the PUD.

249. Nancy MacWood, ANC 3C commissioner, stated in a letter to Chairman Hood that a review of the submitted LEED checklists showed that energy efficiency and renewable energy measures were not featured in this PUD. She cited national standards for reducing greenhouse gas emissions and listed grocery stores that are cooperating with these efforts. Ms. MacWood observed that this project will increase greenhouse gas emissions rather than reduce them and that is due to missed opportunities to utilize well-accepted sustainable features into the design and operation of the PUD. She listed specific sustainable features that had been suggested to the applicant at different times during its development.

251. We find that the Office of Planning was not correct that the applicant would seek LEED certification and without verification we have not accepted voluntary building to LEED standards as a public benefit.

252. We find that the remaining environmental features listed by applicant (stormwater features, raingardens, cisterns, etc.) are primarily water conservation measures and they have limited impact on greenhouse gas emissions and they would not significantly reduce the increase in greenhouse gas emissions created by this project. The record persuades us that there are reasonable but significant sustainable design and operation features that the applicant could have incorporated into the project and that these are features that other

supermarkets are employing as well as other residential projects. With the emphasis that the District of Columbia places on green building and operations and the flexibility the Zoning Commission has to interpret "superior" and "acceptable" environmental features it follows that we would impose up-to-date rather than retrograde sustainable design and building standards on evaluating the environmental proffers in this application. We find that the Applicant has not reached even an acceptable level given the amount of zoning relief requested and the energy saving opportunities that were available to them.

#### Uses of special value.

21. The Applicant states that the expanded supermarket and other proposed retail are uses of special value under §2403.9(i). It states that it is working with existing retail and service tenants to explore opportunities to include them within the redeveloped site, possibly at a lower rent. (Application, p. 19.) It states that previous Zoning Commission decisions have found that grocery stores and retail are public benefits or project amenities. (Pre-hearing Submission pp. 19-20.)

22. Opponents state that the Applicant has not met its burden of proof to show that its claims of uses of special value satisfy the standards of §§2403.6-2403.8, for the following reasons (WNNC Opposition, pp. 18-19):

The Site is already characterized by a supermarket, various street level retailers including restaurants, neighborhood-serving retail and a bank, and second floor office space.

The total amount of proposed non-supermarket retail space is slightly less than exists currently.

An upgraded supermarket and streetfront retail is the minimum expectation as to what would likely result from development of this Site in this neighborhood.

In fact, the Applicant has previously presented the neighborhood with attractive proposals under matter of right zoning: In December, 2006 Applicant proposed to develop a proposed grocery store, streetfront retail and a three-story mixed use North Block building featuring ground level retail, second floor offices and one story of residential use. The current project is less appropriate for this low density shopping district than the Applicant's previously announced plan.

Zoning Commission orders cited by the Applicant in which the Commission found that grocery stores and retail are public benefits and project amenities involved cases where no such facilities previously existed at the PUD sites.

23. We find that redevelopment of the Site with an improved grocery store and retention of street-level retail is desirable, but we find that such redevelopment could occur on the South Block by remapping the South Block to expand the commercial zone as the Applicant requests, without rezoning the Block to C-2-A or eliminating the MW Overlay.

24. We find that Applicant has not met its burden of proof to show that its proposal's uses of special value satisfy the evaluation standards of §§2403.6-3-24038.

**Revenue for the District.**

25. The Applicant made a general claim of increased District tax revenues. (Pre-Hearing Submission, 10/ 08, p. 20.)

26. The Opponents state that the Applicant offered no details on this claim and failed to address potential added burdens that the project may cause, such as infrastructure costs, increased traffic and, most significantly, the potential impact on surrounding high-tax residential areas, including the potential for reduced residential property values and taxes in the neighborhood if increased traffic and parking issues diminish the attractiveness of nearby residences. It stated that the general "tax revenue" claim is a make-weight argument that is not helpful to the hard analyses that this project requires. (WNNC Opposition, p. 23.)

27. We find that the Applicant has not satisfied its burden of proof of its claim for increased District tax revenues. We also find that this generalized claim should be balanced against the negative impacts of the project on the particular neighborhoods including the existing merchants in the area where it is located.

**First Source Employment Program.**

28. The Applicant states that it will enter into an agreement to participate in the Department of Employment Services First Source Employment Program to promote and encourage the hiring of District of Columbia residents.

29. The Opponents state that the applicant's willingness to work with the District toward the possibility of trying to employ District residents is not a reason or justification to approve a project that does not conform to the Comprehensive Plan Future Land Use Map or zoning objectives. They further state that the Applicant should not fail to make a similar effort under matter-of-right development. (WNNC Opposition, p.21.)

30. We find that the Applicant's general offer to participate in a program to promote and encourage hiring District residents does not offer sufficient assurance of actually employing District residents to counterbalance the proposed PUD's negative impacts and inconsistency with the Future Land Use Map. Plus does not meet standard. Would be provided in matter of right project.

### Comprehensive Plan.

31. The Applicant states that the PUD is consistent with and furthers many goals and policies of the Comprehensive Plan. (Application, p. 20.)

32. The Opponents state that the Applicant cannot claim compliance with some of the goals and policies of the Comprehensive Plan as a public benefit, because it is more important that the project does not comply with the clear designation of the Future Land Use Map as confirmed by the portions of the Plan's text that are most plainly applicable to the PUD Site. In any case, compliance with the law is a requirement, not a benefit or amenity. A matter-of-right project would also have to meet that test. (WNNC Opposition, p. 23.)

33. We find that the project cannot claim compliance with the Comprehensive Plan as a public benefit or project amenity.

### Public Benefits and Project Amenities—Conclusion

34. We find overall that the Applicant's proposed public benefits and amenities are surprisingly slight when viewed against the number and extent of the Applicant's requested rezoning and zoning relief requests. It appears that the claimed but undocumented need to construct a large residential component as a means of financing the grocery store has resulted in a project that is simply too large for this Site, resulting both in inconsistency with the Comprehensive Plan and in potential negative neighborhood impacts. I would put this in the language of the standards.

35. A project similar to the present proposal but with less height and density on the North Block would be a significant public benefit and could provide the same amenities as the Applicant has proposed, without the negative factors that this project presents.

### Compliance with PUD Standards

#### Office of Planning

1. By OP's report dated February 9, 2009, (the "OP Report"), and through testimony presented at the public hearing, OP recommended approval of the Application.

2. Opponents state that the OP Report and testimony are flawed in the following respects:

The OP Report, page 2, incorrectly indicates that existing buildings in the MW commercial center reach three stories in height. (See also 090406 TR p.15.) No building in the zone is more than two stories high. On cross-examination, OP admitted that it wasn't sure how many stories the building had. (090406 TR 67-68.) Evidently, OP did not consult the building's owner or tenant or examine city records making its height statement.

The OP Report, page 3, incorrectly implies that the Zoning Commission can grant the Applicant's request to remove the MW Overlay from the PUD properties. The Zoning Commission has never taken the drastic action of entirely removing a neighborhood commercial zone as PUD zoning relief. As stated in the Preliminary Matter, above, the Zoning Commission lacks power to do so. Furthermore, as At-Large Councilmember Mendleson testified, such an action would destroy the MW neighborhood commercial overlay and set a precedent that would jeopardize overlays throughout the city.

The OP Report states, page 5, that the Macomb Street loading dock would allow trucks to dock close to the uses they would serve. (P. 5; 090407.) This includes the Newark Street retail. OP testified that the Newark Street stores would be much smaller than the Giant and would have easy access. (TR 090406 pp. 166-168.) In fact, having the Newark Street retailers served by the Macomb Street dock would be a highly inconvenient arrangement.

The OP Report states, page 7, that the "centerpiece" of the project would be a state-of-the-art supermarket. In fact, unless the project is modified substantially, the principal visual and economic feature of the project would be the North Block residential building, despite the M/W Overlay's stated goal of ensuring the primary neighborhood retail function of the commercial area. (§1308.2.)

The OP Report states that the Applicant has met with the community and DDOT on many occasions to discuss traffic and parking issues, but members of the community spoke of only one meeting with each.

The OP Report, page 10, states that the PUD would be consistent with the Macomb- Wisconsin Neighborhood Commercial Overlay district. OP's statement is simply wrong. In fact, OP acknowledged on cross-examination that Overlay would restrict the project's density and the project could not be built under the Overlay. (090406 TR 71.)

The OP Report states, pages 14-19, that the PUD would be not inconsistent with the Comprehensive Plan Future Land Use Map. This statement by OP is also wrong.

The OP Report states, page 19, that employing the South Block garage as the only parking for patrons of the retail uses in the North Building "would help encourage pedestrian movement around the site." Opponents state that this is a cynical or even laughable excuse for supporting a parking arrangement that is inconvenient for shoppers and a violation of zoning regulations.

The OP Report states, page 20, that the applicant has had numerous meetings with the ANC as well as other community organizations. This statement falsely implies that the meeting with community organizations led to satisfactory results.

OP testified that its recommendation does not involve removing the Overlay because the Overlay would still exist beneath the PUD, although it also stated that the Overlay would not be applicable to the PUD. (090406 TR 44, 56-57 and 132-135.) The Opponents believe that OP's position is a sort of sophistry that is not helpful to analysis of the issues of this case.

OP testified that it did not do an economic study to determine the impact of the PUD on existing businesses and never asked Giant where it expected the customers of the new supermarket to come from. (090406 TR 77-78.)

3. We find that the flaws in the OP Report render it suspect its support for the proposed PUD. We urge OP to work with the Applicant and Opponents to arrive at a proposal that better addresses problems raised by the Opponents.

### ANC 3-C Report and Testimony

1. Advisory Neighborhood Commission 3C ("ANC") submitted a resolution conditioning its unanimous support of the PUD on 11 conditions. ANC Chair Anne Marie Bairstow testified that the ANC had heard from many residents about parking, loading, and traffic, in particular. The ANC conditions were designed to provide specific suggestions on resolving the problems cited by the ANC while supporting the goal of the construction of a new grocery store.

2. Chair Bairstow or the applicant testified that the following conditions have not been met:

Provide commercial parking spaces on the North Block;

Prevent loading or off-loading on public streets;

Provide covenants to restrict retail from using trucks that accede the capacity of proposed loading docks;

Move the South Block, Idaho Avenue loading dock away from the existing houses and ensure that noise levels will not exceed current noise levels: Applicant minimally addressed the condition by moving loading driveway 60 feet farther from houses and proposing a high retaining wall;

Prohibit residents of PUD properties from participating in RPP or similar programs, as Zoning Commission has ordered in approving other PUD applications;

Set aside 30 on-site parking spaces for non-PUD restaurants in the MW Overlay District plus an additional 30 on-site parking spaces for overnight non-PUD residential parking. The Applicant has only partly agreed to do in that applicant intends to provide 30 shared spaces to be available in "off-peak" hours, which the Applicant has not defined;

Fund a \$500,000 escrow account to finance traffic calming and mitigation measures post-construction. The Applicant has agreed to fund up to \$100,000.

3. Four ANC commissioners representing single member districts that border the proposed PUD area testified on aspects of the PUD that had been addressed in the ANC resolution conditions and were of particular concern to their constituents.

Commissioner Trudy Reeves cited the lack of open, on street parking spaces especially on weekends and evenings, the parking demand created by the existing restaurants, and the new parking demand that would be created by new destination retail. She concluded that there would be a need for at least 100 more on-site parking spaces.

Commissioner Richard Rothblum testified to the inadequacy of the noise studies related to locating the grocery store loading dock near existing houses and urged the relocation of this dock.

Commissioner Leila Afzal testified to the potential parking impacts in the neighborhood due to no on-site parking spaces for the commercial uses in the North Block. She urged that applicant be required to meet the relevant zoning parking requirements to avoid this impact.

Commissioner Nancy MacWood testified that significant parking and loading impacts resulting from this PUD would likely occur and that DDOT and OK had not been responsive in addressing them. She also testified that the Applicant has not been willing to meet with residents to negotiate resolution of these and other impacts.

3. We find that the unanimous ANC resolution citing a long series of conditions is in many instances consistent with the issues raised by the opponent parties. The testimony of the four commissioners whose SMDs border the PUD highlighted the issues of most concern to the closest neighbors to the project. Tying what we want to the ANC conditions makes me nervous. There is a vast gap between the ANC resolution and what we want.

4. We find that zoning relief from the requirement for North Block commercial parking is not warranted because the ANC has stressed that more parking will be needed to avoid spillover parking problems.

5. We find that designing a large store building project with loading docks that can only be located in a residential zone is not good site design, which is a prerequisite for PUD approval. The ANC condition that South Block loading be interconnected has been minimally addressed, but the location of the most active loading area which would include spillover loading due to the inadequacy of the Macomb alley loading configuration is unreasonable, and zoning relief will not be granted. This dock and its entrance must be relocated to a commercial zone section of the lot to avoid the enormous negative impact from the intense level of truck activity anticipated at this dock.

6. We find that it is reasonable to prohibit residents of the PUD from applying for or securing RPP decals. A prominent feature of this PUD is a doubling of the zoning requirement for on-site parking supply. Even if a redesigned North Block building reduces on-site residential parking, these residents should not be encouraged to park in the neighborhood or drive and use scarce parking in other parts Ward 3.

### **Individuals For and Against**

1. Numerous individuals testified for or against the PUD. Some of the supporters raised some of the concerns identified above. Many of the opponents expressed support for the supermarket and retail but were unable to support the PUD as a whole because of some of the concerns identified above. The party in support attempted to demonstrate that more of the community supported the PUD than opposed it. We reminded the attendees that our review of PUD applications is not based on a popularity contest.

### **CONCLUSIONS OF LAW**

#### **Preliminary Matter.**

1. The Commission finds that pursuant to §1308.3 of the Zoning Regulations, this matter, other than the use provisions, 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 §1308 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.
7. Pursuant to §1308.3, within the MW Overlay District construction of a new building on a lot that has 10,000 square feet or more in land area shall be permitted subject to review and approval as a special exception by the BZA pursuant to the standards and criteria of §1304.
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 requested remapping of a portion of the residential portion of the South Block to expand the commercial zone will is not inconsistent with the Future Land Use Map, 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 requested rezoning of 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. We withhold our conclusion on rezoning the North Block of the PUD Site pending the Applicant's revision to its proposal for that block.
12. We do 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 criteria of §1304. The Applicant has not met its burden of proof of satisfaction of those criteria.

13. Because the Applicant's proposal for the North Block at the height and scale proposed is inconsistent with the Comprehensive Plan and the MW Overlay, it is not necessary for us to make a decision on its request for relief from FAR limitations.
14. There is no authority in the Zoning Regulations 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 applicant's request to provide less than the required minimum of commercial parking spaces, in the light of existing and proposed retail in the MW Overlay District, will have an unacceptable impact on the surrounding neighborhood contrary to §2304.3.
16. The loading driveway and dock for the new supermarket will have an unacceptable impact on the immediately adjacent low density residential neighborhood.
17. We 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.
18. A 30 foot curb cut to allow an adequate turning radius for supermarket delivery trucks may be acceptable if the Applicant achieves a loading dock and access solution that does not have an unacceptable impact on the adjoining neighborhood.
19. 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.
20. 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.
21. The Applicant may receive a bonus density award as an incentive to provide a qualifying percentage of affordable housing, but the Applicant may not also claim the affordable housing as a public benefit or project amenity that to balance other flexibility requests.
22. The streetscape improvements proffered by the PUD may somewhat better than Giant would likely have provided under matter of right zoning and its 2002 agreement with the Cleveland Park Citizens Association. However, these measures would be insufficient to balance the flexibility or incentives requested, particularly in terms of the proposal for the North Block. We will review the adequacy of amenities when applicant submits a revised proposal for the North Block.
23. 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.

24. 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.

25. 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.

## 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 Square 1920 and 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 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. 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. In perpetuity.
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 not increase the burdens on the public alley on Macomb Street.
5. 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.
5. The Applicant shall redesign the South Block in order to ensure that no loading driveway or dock is within 150 feet if any exist.

## **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 §3103 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.
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 supermarker 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.

## 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.

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**FACSIMILE TO ZONING COMMISSION**

**TO** Fax Number (202) 727-6077 **2**

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

**DATE:** June 1, 2009

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