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August 27, 2009

Mr. Anthony Hood, Chairperson
D.C. Zoning Commission
Office of Zoning
441 4th Street NW, Suite 210-
Washington, DC 20001

Re: Answer to Applicant's Motion to Reconsider Condition 16, ZC
Case 08-15.

Dear Chairperson Hood and Members of the Commission

This letter constitutes WNNC's Answer to Applicant's Motion to Reconsider Condition 16, ZC Case 08-15 and a request to reconsider one aspect of the Commission's order.

1. WNNC's Answer to Applicant's Motion to Reconsider Condition 16.

The Applicant, through its counsel, on August 20, 2009, filed its motion to reconsider Condition 16 of the Commission's Order of July 13, 2009, effective date August 10, 2009. The Appellant's motion states that Condition 16 is vague and would be difficult to apply. The motion requests that the Commission revise Condition 16 by substituting certain more definitive requirements.

We fully agree with the intent of Condition 16, which requires the Applicant to "fulfill any other commitment or promise it made as referenced in the findings of facts above." We also agree with the Applicant that implementation of the Condition would be facilitated by identifying and defining the Applicant's commitments and promises within the Commission's Order.

However, we do not agree with the Applicant's proposed substitute language, which, unfortunately, does not encompass all of the Commission's findings but instead seeks to confine Condition 16 to its commitments and promises set forth in FF 60. Finding of Fact 60 recites commitments respecting benefits, amenities and mitigation measures but does not address the Applicant's many other commitments and promises. Hence, the principle effect of the Applicant's proposed substitute Condition 16 would be not to provide clarity to existing Condition 16 but to drastically reduce its scope, contrary to the Commission's expressed intent.

Accordingly, this Answer presents two alternatives:

ZONING COMMISSION
District of Columbia
CASE NO. 08-15
EXHIBIT NO. 285
ZONING COMMISSION
District of Columbia
CASE NO. 08-15
EXHIBIT NO. 285

Alternative 1 is that the Commission should revise Condition 16 in the manner set forth in Exhibit A, attached, to reflect additional Commission findings identified in Exhibit A or otherwise implicit in the Commission's order. This revision will provide definitive guidance to the Applicant and the Zoning Administrator as they proceed with implementation of the Commission's Order.

Alternative 2 is that the Commission must reject the Applicant's motion and retain Condition 16 as drafted.

We urge the Commission to adopt Alternative 1 and revise Condition 16 as set forth in Attachment A. If the Commission declines this alternative, we urge the Commission to deny the Applicant's Motion for Reconsideration.

2. Request for Reconsideration of Residential Parking Permit Restrictions.

The Applicant in this case advised the Commission that the issue of Residential Parking Permit (RPP) was not appropriate for discussion in the case,¹ and the Commission's Decision does not impose any RPP conditions. WNNC acknowledges that the time for filing an independent motion for reconsideration has expired, but we nonetheless request that the Commission review its decision regarding RPP, for the following reasons:

- a. Since the Commission will in any case revisit its Decision because of the Applicant's Motion for Reconsideration, it can accommodate WNNC's request in the interest of fairness and flexibility, without inconvenience.

¹ The Applicant, through both its attorney and its expert witness, mistakenly indicated to the Commission that excluding new residents from RPP is subject to a separate District Department of Transportation (DDOT) process and procedure, and that the subject was not appropriate for discussion in the PUD hearing. (TR May 20, 2009, pp. 25 and 35-36.) Following the Applicant's testimony, a concerned citizen, by inquiries dated June 8, 2009, June 17, 2009 and July 15, 2009, asked Karina Ricks, DDOT Associate Director, to clarify the DDOT "process and procedure" for RPP restrictions, Ms. Ricks responded on July 23, 2009, after the Commission's final decision in 08-15, and advised the citizen that:

Generally this is done through a BZA or Zoning Commission order . . . DDOT does not have a process to exclude anyone . . . – a voluntary exclusion or exclusion as an approved mitigation by another commission is really the only way. (Emphases added.)

It is unfortunate that the Commission received inaccurate advice from the Applicant.

b. In addition to WNNC's request, ANC 3-C, as the neighborhood's representatives, included the RPP requirement as a condition in its project approval recommendation. The ANC's opinion was entitled to great weight in Commission deliberations.

c. In prior PUD cases, the Zoning Commission has established RPP restrictions when approving Planned Unit Developments under Chapter 24 of the Zoning Regulations. See, e.g., ZC Order No. 06-31A, Nov. 19, 2007, which provides in part:

17. The Applicant shall include language in all documents related to the purchase and sale of the residential units that residents of the units in the building are prohibited from applying for residential permit parking stickers from the District of Columbia.

Of course, for the present case that language should be modified to cover leases as well as purchase and sale of North Parcel residential units.

d. The Applicant's expert witness conceded that there is an existing shortage of on-street parking. (Tr, February 19, 2009 at pp. 256-257.) The Commission should take all reasonable measures to ensure that the PUD does not unnecessarily exacerbate the existing shortage.

e. The Commission stated that it disagreed with the ANC's RPP condition because it believed that the residents will have ample off-street parking. (FF 82) Rather than serving to justify its refusal, this rationale demonstrates that RPP restrictions would not be burdensome to PUD residents, and they would be a reasonable method of providing some reassurance to PUD neighbors who remain worried about the overall adverse parking impacts of the PUD. RPP restrictions would help protect the neighborhood from an excess parking burden in case the Commission's conclusions turned out to be incorrect. The Commission's arbitrary refusal to establish RPP restrictions in this case is not justified.

Accordingly, it is appropriate for the Commission to revisit its RPP conclusion and establish conditions similar to those that it has imposed in the past, and we urge it to do so.

Thank you for your consideration.

Sincerely,



Diane L. Olsson
For the Wisconsin Newark Neighborhood Coalition

Chairperson Hood
August 27, 2009
Page 4 of 4

Encl: Attachment A--Proposed Revision to Condition 16, ZC Order 08-15

ATTACHMENT A

Proposed Revision to Condition 16, ZC Order 08-15

Condition 16

16. In addition to the other requirements of the Conditions of this Order, the Applicant shall also fulfill the following requirements:

a. Affordable housing. The affordable housing commitment as described in Condition 6 shall be a minimum of 10% of the gross floor area of the residential portion of the project, which is approximately 16,480 square feet. Half of the affordable units will be set aside as low-income affordable housing, available to households earning less than 50% of the Area Median Income ("AMI"), and the other half of the affordable units will be set aside as moderate-income affordable housing, available to households earning less than 80% of the AMI. Affordable housing shall conform to the development standards of the District of Columbia's inclusionary zoning (IZ) law.

Comment: The first sentence is the same as the Applicant's Motion for Reconsideration, Paragraph a. It stipulates the number of square feet of affordable housing and provides that the stated amount is not an approximate figure but rather is the required minimum. The second sentence clarifies Condition 6 by explaining the terms "low-income affordable housing" and "moderate-income affordable housing." See FF 60a. The third sentence is not found in the Findings of Fact but confirms the expectation that the Applicant intends to follow the guidance of the District's IZ law.

b. Total parking spaces. The Applicant shall provide a minimum of 535 parking spaces, which shall include a minimum of 395 parking spaces in the South Parcel below-grade garage. (FF 28) The South Parcel garage shall include a minimum of 388 commercial parking spaces. (FF 49)

c. Residential parking spaces, South Parcel. The Applicant shall provide two dedicated residential spaces per unit for each townhouse. (FF 28, FF 48) The Project shall permit all residents of the South Parcel units to park in the South Parcel garage. (FF 48.) Guests and visitors of the residents of the PUD shall be permitted to park in the South Parcel garage. (FF. 48)

d. Residential parking spaces, North Parcel. The Applicant shall provide one parking space per dwelling unit on the North Parcel. (FF 48), which will consist of approximately 124 residential units. (FF. 28)

The revised language of paragraph c is necessary to clarify that the number of residential parking spaces in the North Parcel parking garage will be at least equal to the number of North Parcel dwelling units and shall be revised upward or may be revised downward consistently with any change in the number of North Parcel residential units.

e. Community and overnight parking spaces. The Applicant shall set aside a minimum of 30 community parking spaces in the South Parcel garage during off-peak retail hours for use by patrons of neighborhood restaurants and other retail uses. (FF. 60f) In addition, the Applicant shall make available 30 spaces as overnight parking for community residents. (FF 60f) Off-peak retail hours shall be from 6:00 P.M. to midnight. Overnight parking shall be from 6:00 P.M. to 9:30 A.M. Use of the community and overnight parking spaces shall be without charge.

The revised language of paragraph e is necessary to clarify that the term “off peak hours” refers to off-peak retail hours and to define the terms “off-peak retail” and “overnight” for purposes of this condition. FF 50 and 57 define “peak” for grocery and retail as “daytime,” and they define “peak” for residential visitors and restaurant patrons as “evening and nighttime hours.” (FF 50.) It is obvious that if daytime, evening and nighttime hours are all deemed “peak” hours, the Applicant’s promise of 30 spaces for non-PUD users during “off-peak” hours would be meaningless, and no benefit would be conferred. It is necessary to specify the hours for “off-peak retail” and “nighttime” to provide clarity for those terms. The Applicant’s ANC Memorandum, January 16, 2009, p. 7, states that retail demand will drop off at 6:00 PM, making those spaces available for other uses starting at 6:00 P.M. The last sentence of paragraph e clarifies that the community spaces shall be free, as provided in the Applicant’s Parking Management Plan. (Pre-Hearing Submission Ex. D, 3.)

f. On-street parking. The project shall not reduce the existing supply of on-street parking (FF 49), which currently consists of a minimum of 55 spaces on those portions of Wisconsin Avenue, Newark Street and Idaho Avenue that adjoin the PUD.

g. Car-sharing and bicycle racks. The Applicant shall provide at least three dedicated parking spaces for car sharing services in the South Parcel parking garage, shall provide secure, weather-protected bicycle storage for residents, commercial tenants and their employees, customers, and visitors in both the North Parcel and South Parcel parking garages and shall provide sidewalk and garage bicycle storage racks for visitors and customers, all as set forth in the Applicant’s Transportation Management Plan, Pre-Hearing Statement Ex. D, paragraphs 1 and 5.

h. Parking Management Plan. The Applicant shall comply with the Parking Management Plan included in Exhibit 20 of the Record, including the provision that the

Applicant shall provide free parking for all customers and employees of the commercial portions of the project in the South Parcel parking garage and free parking for the community and overnight spaces, except that the free parking for the community and overnight spaces may be limited to off-peak and nighttime hours as provided in paragraph e, above. (Pre-Hearing Statement, Ex. D, Oct. 24, 2008, paragraphs 2 and 3.)

Including the Parking Management Plan in the Decision clarifies the Applicant's commitments and ensures equal implementation of the Applicant's Parking Management Plan, Transportation Management Plan and Truck Management Plan. (FF 37 and 40)

- i. Ordway Street. The Applicant shall encourage and support efforts by DDOT to prevent truck and bus traffic from using Ordway Street. (FF 54)
- j. Environmental Impact. In addition to the requirements of Condition 7 of this order, the Applicant shall construct the supermarket to LEED certification standards and shall incorporate sustainable features that are customary to new stores. These shall include at a minimum:
 - i. A state-of-the-art energy management system that controls and monitors refrigeration, lighting and HVAC systems;
 - ii. Use of skylights to provide natural light during the day and allow for the lighting system to be dimmed automatically in response to the amount of daylight harvested.
 - iii. Heat from the refrigeration systems shall be reclaimed and utilized to heat the sales floor and the water used in the restrooms and preparation areas.
 - iv. The roof of the store shall be well insulated and use a white reflective surface as a "cool roof."

The rest of the Project shall also incorporate sustainable elements including stormwater management features, water use reduction features and multiple plantings of mature 8-inch caliper trees in the streetscape and open public spaces.

This paragraph reiterates the Applicant's commitments as set forth at pages 14-15 and page 19 of its PUD application, May 18, 2008. Reiterating these commitments in the Decision will eliminate uncertainty and assist the Applicant and the Office of the Zoning Administrator in processing building permit and certificate of occupancy applications.

- k. Retail food establishments. In addition to the requirements of Condition 5, restaurants, prepared food shops and fast food establishments shall be limited to neighborhood-serving food-related retail establishments typically found in a neighborhood shopping center (FF 56), such as a Shamali's-type neighborhood deli, Starbucks-type coffee or tea house, ice cream store, wine bar or equivalent small establishments.

This condition clarifies that Condition 5b implements the Applicant's commitment as expressed by its expert witness in testimony of May 20, 2009, as follows (TR p. 18, lines 16 et seq. and p. 22, lines 2 et seq.):

(P. 18): One of the things we have discovered as we re-read the definition, it's not about restaurants. It's about food-related retail. So a Shemali's, . . .

(P. 22): . . . local neighborhood deli that we'd like to bring back, an ice cream store, all the small kinds of food-related retail that you'd want to have, . . . that you would expect to have in a neighborhood-serving place. The ice cream, the wine bar, etcetera, the Shemali's deli, the Starbucks. So to that point, we want to make sure that that's what we're looking for, is to have that component of the neighborhood center, not a collection of new restaurants.

1. Truck loading.

i. The supermarket shall be served by a maximum of six semi-tractor-trailer trucks and 30 single-unit vendor trucks per weekday.

This provision confirms the Applicant's assurances set forth on page 1 of the cover letter to its Supplemental Pre-Hearing Submission, January 30, 2009.

ii. All grocery store truck unloading activity shall comply with all noise control measures set forth in the Applicant's Supplemental Pre-Hearing Filing, January 30, 2009, p. 2) as further described in the Applicant's Environmental Noise Study with Noise Control Measures dated January 29, 2009 (See FF 60d) and as supplemented by the Applicant's proffer of additional control measures. Noise control measures shall include an angled loading entrance located a minimum of 140 feet from the property line; a proposed truck routing plan that will prohibit trucks from approaching the loading area from the residential neighborhood to the south; a 20 foot sound barrier; large native evergreen species having a minimum of 14 feet in height when planted and provision of storm windows and doors for the nearest affected residents. (FF 60d; Ex. 266, June 2, 2009, and TR July 23, 2009 p. 21.) The applicant shall guarantee and maintain the trees for a period of five years from the date of planting.

Mitigation measures for the noise generated by truck loading evolved during the course of the hearings. Highlighting the principal features of the noise mitigation program will provide clarity for the implementation of the Applicant's commitments to the Idaho Avenue neighbors. Maintenance of trees for a period of five years is a customary and necessary condition to assure survival of large trees following transplant.

iii. All grocery store unloading shall be internal to the building and with the sound proofing doors closed. (Applicant's Pre-Hearing Submission, Jan. 30, 2009, Ex. B.) The Applicant shall assure that noise generated by truck maneuvering will at all times be below ambient background levels. (FF 55)

iv. The Applicant shall employ the Macomb Street loading dock consistently with assurances given in its rebuttal testimony of May 20, 2009. Specifically, the Appellant shall establish a coordinated loading dock management system to work cooperatively with other existing or future local businesses that employ the Macomb Street loading dock. (TR, May 20, 2009, pp. 12-13.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Thursday, August 27, 2009, a copy of the attached letter to Chairman Hood and Members of the Commission was mailed by first class mail to the following:

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