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ZONING COMMISSION
District of Columbia

CASE NO. 08-15

EXHIBIT NO. 294

ZONING COMMISSION
District of Columbia
CASE NO.08-15
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**GOVERNMENT OF THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 08-15A**

Z.C. Case No. 08-15

**(Application by Friendship-Macomb SC, Inc. – Consolidated Planned Unit Development
and Related Zoning Map Amendment)**

October 19, 2009

**ORDER GRANTING APPLICANT'S MOTION FOR RECONSIDERATION AND
DENYING THE MOTION FOR RECONSIDERATION OF THE WISCONSIN-
NEWARK NEIGHBORHOOD COALITION**

By Zoning Commission Order No. 08-15 in Zoning Commission Case No. 08-15, the Zoning Commission for the District of Columbia (the "Commission") granted the application from Friendship-Macomb SC, Inc. (the "Applicant") for consolidated review and approval of a planned unit development ("PUD") and related amendment to the Zoning Map of the District of Columbia

The application requested consolidated review and approval of a PUD and related map amendment from MW/C-1 and R-5-A to C-2-A for property located at Square 1920, Lot 831 and Square 1920-N, Lots 1 and 2 (the "Property"). After proper notice, the Commission held a public hearing on February 19, April 6, April 23, May 4, and May 20, 2009. The parties to the case were the Applicant; Advisory Neighborhood Commission 3C ("ANC 3C"); the Advocates for Wisconsin Avenue Renewal ("AWARE"), as a party in support; and five parties in opposition, including the Cleveland Park Citizens Association ("CPCA"), the Wisconsin-Newark Neighborhood Coalition ("WNNC"), the 3300 Idaho neighbors ("3300 Idaho"), the Ordway Street Neighbors Association ("Ordway Neighbors"), and the Immediate Macomb Street Neighbors ("Macomb Neighbors").

On August 14, 2009, Zoning Commission Order No. 08-15 (the "Order") approving the application was published in the *D.C. Register*. The Order became effective on August 14, 2009.

Pursuant to 11 DCMR § 3029.5, the Applicant filed a timely motion for reconsideration of the Order by letter dated August 20, 2009. (Exhibit 283.) In its letter, the Applicant expressed concern that Condition No. 16 of the Order was vague and unenforceable. That condition read:

"16. The Applicant shall also fulfill any other commitment or promise it made as referenced in the findings of facts above, even if not specifically stated in one of the above conditions."

The Commission added this condition because of its own concern that not all of the Applicant's proffered public benefits were reflected in the Applicant's draft conditions. The Applicant's motion sought to remedy this problem by proposing additional conditions that stated the omitted proffers.

By letter dated August 27, 2009, WNNC both responded to the motion for reconsideration and included a late-filed motion for reconsideration of its own. (Exhibit 285.) The WNNC motion requested the Commission to reconsider its decision not to add a condition requested by ANC 3C that would have limited the ability of PUD residents to obtain residential parking permits. As to the Applicant's motion, WNNC proposed that the Commission either retain the existing Condition No. 16 or replace it with a more expansive set of conditions. (Exhibit 285.) Among other changes, WNNC recommended that the Commission supplement the existing Condition No. 8.b.¹ with language defining the specific hours that would constitute "off-peak" hours for purposes of the Applicant's proffer to provide free parking during that period.

By letter dated August 27, 2009, 3300 Idaho submitted an Answer to the Applicant's Motion for Reconsideration that requested the Commission retain the existing Condition No. 16. (Exhibit 286.)

By letter dated September 3, 2009, the Applicant opposed WNNC's motion for reconsideration as untimely, beyond the scope of the record, and unnecessary. (Exhibit 287.) In its letter, the Applicant also recommended that the Commission reject WNNC's additional conditions as unnecessary, beyond the scope of the record, and beyond the authority of the Commission. The Applicant reiterated its request that the Commission adopt the language it had proposed in its August 20th letter.

The Merits of the Motions for Reconsideration

Section 3029 of the Commission's Rules of Practice and Procedures authorizes parties to file motions for reconsideration. Such a motion must be filed within 10 days of the order having become final (11 DCMB § 3129.5) and must "state specifically the respects in which the final order is claimed to be erroneous, the grounds of the motion, and the relief sought." (11 DCMB § 3029.6.)

WNNC's Motion

As conceded by the movant, WNNC's motion was not timely filed, but was submitted as part of its opposition to the Applicant's timely filed motion.

The Commission "may, for good cause shown, waive any of [its rules of procedure] if, in the judgment of the Commission, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law." (11 DCMR § 3000.8.) The Commission agrees with WNNC that it would be appropriate to consider its request for reconsideration as part of its determination of

¹ Condition 8.b. of the Order read as follows:

8.b. The Project shall make at least 30 spaces in the South Parcel garage available during off-peak hours for users of existing neighborhood restaurants and overnight parking for the surrounding community

the Applicant's motion. Since the Applicant started the post-decision process by filing its request, the Commission cannot discern any harm from broadening the scope of its review. The Commission therefore accepted the late filed motion.

WNNC claims error in the Commission's decision not to include a condition proposed by ANC 3C that would effectively preclude the residential occupants of the PUD from applying for residential parking permits ("RPP"). Such permits allow parking on streets subject to RPP restrictions periods longer than the two-hour limit applicable to vehicles not displaying RPP stickers. The ANC had proposed the condition because it believed that existing curbside parking could not accommodate the additional vehicles of the new PUD's residents.

The Commission was not persuaded that such a limit was needed because the "proposed PUD will provide an ample amount of off-street residential parking given the type of units and location of the PUD." (Order 08-15, page 24.) WNNC does not contend that the Commission erred in reaching this conclusion, but asserts the condition is needed "in case the Commission's conclusions turned out to be incorrect." (Exhibit 285, page 3.)

Conditions in a PUD order serve two purposes: (1) to ensure the enforceability of the public benefits proffered by the PUD applicant; and (2) to avoid objectionable conditions that could result from the project. *See President and Directors of Georgetown College v. District of Columbia Bd. of Zoning Adjustment*, 837 A.2d 58, 69 (D.C. 2003). Having concluded that objectionable parking congestion will be avoided by virtue of the PUD's off-street parking, the Commission properly refused to impose the RPP condition as a hedge against the slim potential of error.

The WNNC motion is therefore denied.

The Applicant's Motion

The Applicant's motion expressed "concern" that Condition No. 16 was vague and might cause problems when the Applicant applies for a building permit. Had the Applicant's proposed conditions included the commitments that it now seeks to add, there would have been no need for the Commission to adopt this catch-all language.

Now that the Applicant has provided the specificity needed, the Commission is amenable to the revisions proposed. The Commission, however, agrees with WNNC that two further commitments should be added in order to reflect the Applicant's complete proffer. These appear as sub-Conditions No. 16 (f) and (g).

The remaining additional conditions requested by WNNC were not part of the Applicant's proffer and cannot be added by the Commission. The Commission has already concluded that the public benefits of the PUD warrant the flexibility requested. Had the Commission not

reached this conclusion, its only choice would have been to deny the application. As it has noted before, the Commission cannot unilaterally cure a deficient PUD proffer.

WNNC did raise a valid point with respect to the Applicant's proffer to provide free parking during "off-peak hours." The original condition did not define the term, which could lead to exactly the type of enforcement problems that the Applicant seeks to avoid. In response to this concern, the Applicant agreed to modify its proffer and to revise the related condition to specify that the off-peak period is between 9:00 p.m. and 8:00 a.m.

DECISION

For the above-stated reasons, the Commission concludes that WNNC's Motion for Reconsideration is **DENIED**.

For the above-stated reasons, the Commission concludes that Applicant's Motion for Reconsideration is **GRANTED** and that the Commission hereby modifies Condition No. 8 and Condition No. 16 of Z.C. Order No. 08-15 to read:

8. The Project shall include commercial parking facilities as shown on the plans referenced above; provided:
 - a. The Applicant shall permit use of the South Parcel garage by residents of the PUD and their guests;
 - b. The Project shall make available, at no charge, parking spaces in the South Parcel garage as follows:
 - i. At least 30 spaces shall be made available for patrons of neighborhood restaurants and other retail uses that are not part of this PUD on a first-come, first-served basis from 7:00 PM to 1:00 AM; and
 - ii. At least 30 spaces shall be made available for overnight parking for the surrounding community not part of this PUD from 9:00 p.m. to 8:00 a.m.; and
 - c. The Applicant may restrict the use of the North Parcel garage for private use by residents and guests of the Project.
16. In addition to the other requirements of the Conditions of this Order, the Applicant shall also fulfill other public benefits and amenities proffered as detailed in Finding of Fact No. 60, as follows:

- a. The affordable housing commitment as described in Condition No. 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;
- b. Implementation of the recommendations of the Applicant's noise consultant regarding the grocery store loading area, as detailed in Exhibit B of Exhibit 46 of the record;
- c. Public space improvements shall be constructed as shown on the approved plans, including special paving features along Newark Street, subject to review and approval by the District Department of Transportation;
- d. The Applicant shall provide the public spaces as shown on the approved plans including a tree-canopied space (open to the public) on the north side of Newark Street and a public plaza at the intersection of Wisconsin and Idaho Avenues;
- e. The grocery store shall be constructed with energy-efficient sustainable features equivalent to the features detailed on pages 13-14 of Exhibit 3 of the record;
- f. The Applicant shall provide a minimum of 535 parking spaces, which shall include a minimum of 395 parking spaces in the South Parcel parking garage. The South Parcel parking garage shall include a minimum of 388 commercial parking spaces; and
- g. The Applicant shall provide one parking space per dwelling unit on the North Parcel, which will consist of approximately 124 residential units.

On October 1, 2009, at a special public meeting, upon the motion of Commissioner Hood, as seconded by Commissioner Turnbull, the Zoning Commission **DENIED** WNNC's motion for reconsideration by a vote of **4-0-1** (Anthony J. Hood, Peter G. May, and Michael G. Turnbull to deny; William W. Keating, III to deny by absentee ballot; Konrad W. Schlater, not present, not voting).

On October 19, 2009, at a regular public meeting, upon the motion of Commissioner Hood, as seconded by Commissioner Turnbull, the Zoning Commission **ADOPTED** the above changes to Condition Nos. 8 and 16 of Order No. 08-15 by a vote of **4-0-1** (Anthony J. Hood, William W. Keating, III, Peter G. May, and Michael G. Turnbull to adopt; Konrad W. Schlater, not having participated, not voting).

In accordance with the provisions of 11 DCMR § 2038, this Order shall become final and effective upon publication in the D.C. Register; that is, on February 19, 2010.