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November 14, 2008

By Hand

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

Re: Case 08-15

Petitioners' Opposition to Applicant's
Motion to Dismiss

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Dear Chairperson Hood and Members of the Commission:

The enclosed Petitioners' Opposition to Applicant's Motion to Dismiss discusses important questions concerning the Zoning Commission's power under the Planned Unit Development regulations to alter or ignore existing Neighborhood Commercial Overlay requirements.

The Commission's careful consideration of these questions is appreciated,

Sincerely yours,



Diane L. Olsson

ZONING COMMISSION
District of Columbia
CASE NO. 08-15
EXHIBIT NO. 23

**In re: CASE 08-15 – FRIENDSHIP-MACOMB SC INC
c/o THE STOP & SHOP SUPERMARKET CO.**

PETITIONERS' OPPOSITION TO APPLICANTS' MOTION TO DISMISS

Friendship-Macomb SC Inc. ("hereinafter "PUD applicant"), through its counsel, has moved to dismiss the Petition of the Wisconsin/Newark Neighborhood Coalition to refer Case 08-15 to the Board of Zoning Adjustment. The PUD applicant has made four arguments in support of its Motion to Dismiss and has included its view that the Zoning Commission has power to remove the M/W Overlay designation from property through a PUD-related map amendment. Its arguments are not valid.

1. The PUD Application Does Not Of Itself Terminate The Overlay.

The PUD applicant acknowledges that the map amendment it is seeking would, if granted, remove the property from the Macomb/Wisconsin Neighborhood Commercial Overlay ("M/W Overlay"). However, it concedes that the requested PUD zoning map amendment would not take effect until the PUD covenant is recorded. This can only occur, if at all, after a final decision on the PUD. In spite of the reality of that timing, however, the applicant argues that the Commission should proceed as though the applicant's request to eliminate the Overlay had already been granted.

In short, the PUD applicant's position is that the Overlay is removed by the very act of an applicant asking for its removal. It is fundamental that a regulation must be followed unless and until it is no longer in effect. The M/W Overlay, now in effect, will remain so throughout the PUD review process. The PUD applicant's contrary position is patently incorrect.

**2. The Zoning Commission Does Not Have Authority To Conduct A
Section 1308.3 Special Exception Review As A Part Of The PUD Review
Process.**

The applicant contends that the Zoning Commission has authority to conduct the Special Exception review and approval required by §1308.3. Whether this is accurate can be determined by simply reading the applicable regulations.

The Zoning Regulations establish the powers of the Zoning Commission and Board of Zoning Adjustment ("BZA"). Each body has power to do that which the regulations authorize it to do; neither body may act in any way not authorized by the regulations. The BZA's power to grant special exceptions, including the Overlay Special Exception, arises from the Zoning Commission's regulations that establish the BZA's power. Similarly, the Zoning Commission's power to review and approve special exceptions through its PUD authority is limited to the power it expressly gave itself in its regulations.

The BZA's Overlay Special Exception power is established by §§1308.3 and 1304 of the Neighborhood Commercial Overlay chapter. Section 1308.3 establishes a requirement,

unique to the M/W Overlay Zone, whereby any new construction on lots of 10,000 square feet or more in the zone may be permitted, if at all, as a Special Exception under §1304. Since the PUD applicant's three lots are located in the M/W Overlay Zone and two of them are over 10,000 square feet, the two lots fall within the clear terms of §§1308.3. The applicant does not deny that fact. Nonetheless, it argues that it does not have to undergo the required BZA hearing or satisfy the conditions of §1304.

The applicant's position is that §2405.7 of the PUD regulation gives the Zoning Commission the option to override §1308.3. Turning to that section, one sees that it reserves to the Zoning Commission "the option to approve any use that is permitted as a special exception and which would otherwise require the approval of the BZA." It is important to note that, by its express terms, §2405.7 refers only to use approvals, not to the M/W Overlay's very different, more comprehensive Special Exception provision. On its face, §2405.7 does not give the Zoning Commission any authority respecting the M/W NC Overlay Special Exception.

The applicant argues that the §2405.7 authority includes both traditional use exceptions and "other exceptions," for example, roof structure relief. However, in the present case the Special Exception would consist of an entire two-block and, on one block, five-story project in an area currently zoned M/W C-1. This is a far cry from the Zoning Commission's option to supplant the BZA's role in granting an additional use or allowing a roof structure or other relatively minor physical feature. Section 2405.7's singling out of the BZA's "use" authority underscores the conclusion that in the absence of express language in the regulations, the Zoning Commission does not have an open-ended option to assume each and every BZA Special Exception duty.

A close reading of §2405.7 confirms this conclusion. The section commences, "Notwithstanding the other prerogatives of the Zoning Commission in approving uses in planned unit developments . . ." (Emphasis added.) In essence, the section says that since the Zoning Commission already has certain use approval prerogatives under the PUD regulation, it may elect to supplement those prerogatives and grant additional use approvals that would otherwise be handled by the BZA. There is no similar prerogative in the PUD regulation to review and approve Overlay special exception projects, and none can be inferred from the limited language of §2405.7. This reinforces the conclusion that the scope of §2405.7 is too limited to support the applicant's attempted stretch of the regulations.

The applicant cites §2406.2 to argue that the Commission has broad authority to eliminate the overlay district designation. Section 2406 is directed to the applicant's filing requirements, not the Commission's authority. The provision states that the applicant may file an application for a change in zoning in conjunction with its PUD application. However, either such application must be limited to a zoning change that the Commission is empowered to make through its PUD power, or it must be viewed as request for the Commission to initiate a rulemaking. The possibility that the application may request a zoning change does not expand upon the Commission's existing PUD powers to grant one. The Commission's power to change zoning in a PUD action is

limited to the power to change conventional zoning, such as the height, density, use and similar limitations imposed by traditional zone categories. See Section 4, below.

The applicant also cites and Z.C. Order No. 05-37, the Stations Holding PUD, where the Commission allowed departure from the housing subdistrict of the H Street overlay district. Review of that case demonstrates that the Commission treated the Overlay with great respect. It lifted the overlay's requirements on only about 28,000 square feet of a project that involved over 76,000 total square feet. It proceeded cautiously, finding that the additional height it was granting did not violate NC Overlay §1305.1, which requires that matter-of-right height and density limits be the guidelines for PUDs, because the site was controlled by §1326.1, a more specific H Street Overlay provision that allows added height and density in that Overlay's housing subdistrict as long as the allowance is used only for housing or preferred uses. (See Z.C. Order Number 05-37, January 14, 2008, FF. 72-74.) Most significantly, the Commission agreed with the applicant that a unique confluence of site-specific factors meant that allowing this PUD must not be taken as precedent, even within the H Street Overlay Zone.

In short, the Commission was careful to keep its Stations Holding ruling within the framework of prevailing overlay requirements, and it emphasized that the ruling could not be used as a precedent for other cases. For all these reasons, the limited, surgical relaxation of overlay requirements in Case 05-37 in no way serves as precedent for the absolute hatchet approach that this PUD applicant has requested regarding the Macomb/Wisconsin NC Overlay district.

As discussed below, the applicant also argues that the Overlay Special Exception hearing is unnecessary because the Zoning Commission will hold a hearing. At the same time, however, the applicant contends that under §2405.8 it may also be excused from meeting the criteria of the Neighborhood Commercial Overlay's Special Exception rule. These criteria are essential for protecting the community, but the PUD applicant would simply throw them all out. The applicant misreads §2405.8. Like §2405.7, the §2405.8 relief from BZA standards is expressly related to the Zoning Commission's use approval option: "... for any such use approved by the Zoning Commission under §2405.7, ..." (Emphasis added.) Nothing in the section expands that limited provision in the manner claimed by the applicant.

The applicant suggests that BZA review is pointless because the Zoning Commission may always override the BZA's conclusions pursuant to its §3128 *sua sponte* review authority. Surely, however, the Commission would exercise that power only after careful review of the BZA's work. Thus, it would have the benefit of the BZA's study of the PUD's local impact in light of the overlay criteria.

Finally, according to the PUD applicant, the Petition To Refer supposes that powers not delegated to the Zoning Commission are reserved to the BZA. This is of course not true. In fact, neither the Zoning Commission nor the BZA has any inherent, Constitution-like "reserved" powers. As stated above, each of these bodies has only the powers established for it by law and regulation, no less, no more.

It is true that the Zoning Commission promulgates regulations for both itself and the BZA. Acting in that capacity, the Commission indisputably has power to promulgate regulations establishing new limits on the BZA's Special Exception responsibilities or giving itself the missing option to take over the BZA's entire Overlay Special Exception duties. However, to do so it must give proper notice and conduct a public rulemaking. To date, it has not undertaken this necessary step.

3. **The Zoning Commission's PUD Hearing Is Not A Substitute for the Overlay's Special Exception Review Process and Standards.**

The PUD applicant argues that the BZA Special Exception hearing is unnecessary because the PUD hearing itself supplies the public review mandated by §§1308.2-1308.3. This is not correct. The PUD hearing would fail to satisfy the objectives that led the Zoning Commission to establish the BZA Special Exception process

The Zoning Commission promulgated the BZA Special Exception requirement for large lot construction in the M/W zone because it understood the singular threat to the M/W commercial zone posed by the unusually large lot sizes there. It provided for a special BZA hearing precisely to ensure careful, focused consideration of the local issues and impacts that could result from major construction on those lots.

Specifically, §1304.1 requires, among other things, a finding that the excepted building will substantially advance the Overlay's purposes, will not adversely affect neighboring property and will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity. It authorizes the imposition of various requirements as it deems necessary to protect neighboring property and to achieve the purposes of the Overlay. Similarly, §1308.2 requires the BZA hearing in order to ensure that the proposed building will be compatible with and enhance the primary neighborhood retail function of the commercial area and advance the other purposes of the M/W Overlay District.

The Commission foresaw that the objectives and standards established by the M/W NC Overlay would be critically important for the commercial center and its immediate neighborhood. Nonetheless, now that the situation that the Zoning Commission anticipated has actually arisen, the PUD applicant wants the Commission to disregard its own protective regulation and approve the proposal without the very review and standards that the Commission itself imposed.

The PUD applicant's apparent strategy to escape review under the Overlay standards is counterproductive. The applicant wants to avoid any consideration of the project's possible negative local impacts and move directly to its claims of superior public benefits. This approach impedes the affected community members' efforts to work with

the developer and the city to fine-tune the project for better compatibility with the neighborhood.¹

The PUD regulations allow the Zoning Commission to accept claimed PUD benefits based in good part on citywide considerations. Even though there may be legitimate benefits from a citywide perspective, the Overlay standards are needed to avoid unduly compromising local concerns in the exchange for more general objectives. A balanced review will enable the Commission, the applicant and the neighbors to work together for the best possible project from every viewpoint.

4. The Zoning Commission Does Not Have Power Under The PUD Regulations To Eliminate The M/W NC Overlay.

The PUD applicant's proposal, if granted, would eliminate the Neighborhood Commercial Overlay for the PUD. As a practical matter it would effectively terminate the entire M/W Overlay.² The Zoning Commission lacks the power to grant such broad relief as a PUD incentive.

The Zoning Commission does not have any inherent authority to alter or delete distinct requirements of the zoning regulations by means of a PUD proceeding. Its only has the authority that is established by the PUD regulation. Therefore, the PUD regulation must be examined to ascertain the actual extent of the Commission's authority.

¹ Certain supporters of the project insist that anyone questioning the PUD proposal "as is" is trying to "kill" the project. This is absolutely not the motive or hope of those seeking a more thorough review than the PUD process offers. There is concern that particular aspects of the proposal may have excessively negative effects on the nearby residential community and that some information supplied by the PUD applicant is not adequate. It is believed that an Overlay hearing might enhance communication leading to reasonable adjustments to the project. This in turn could result in much greater confidence and support on the part of the concerned neighbors and a project that achieves its ends with reduced local negative impacts and greater community support.

² If the Friendship-Macomb PUD application were granted, the remaining MW overlay would cover only the handful of one- and two-story buildings on either side of Macomb Street from Wisconsin Avenue west for a short half block and similar buildings on the west side of Wisconsin Avenue continuing south also for a short half-block. Unlike the buildings subject to the PUD application, many of the structures that would remain in what would be left of the severely abridged residual M-W Overlay district are currently in use as restaurants. Elimination of the major part of the overlay via the PUD would throw the remaining portion into serious violation of §1305(a), the Overlay's 25% restaurant limitation. It would also remove the restaurant restriction, among others, from the PUD development area, unless separate restrictions were adopted in connection with the PUD.

Nothing in the PUD regulation expressly empowers the Commission to grant a PUD incentive consisting of elimination of an entire chapter of Zoning Regulation requirements, such as the neighborhood commercial overlay chapter's various requirements. Careful reading of the regulation demonstrates that neither does the regulation confer that broad authority by implication.

The Commission's PUD power to modify applicable requirements in exchange for public benefits only contemplates relaxation of the traditional physical and use requirements imposed by conventional zoning. This is clear from §2400.2, which states that the Commission may act "to permit flexibility of development and other incentives, such as increased building height and density." (§2400.3; emphasis added.) Specifically, the regulation provides a list of PUD development standards (§2405); this list is limited to height, floor area ratio and other physical limitations allowable in each conventional zone district. (§§2405.1-2405.2.) Section 2405 also gives the Zoning Commission the option to allow flexibility as to other physical issues--lot occupancy, yards and courts and off-street parking: These incentives all come down to specific "bricks and mortar" issues. (§2405.3-2405.6.) Finally, §2405 allows the Zoning Commission to permit use exceptions. (§§2405.7-2405.8.) In short, nothing in §2405 authorizes the Commission to eliminate an overlay completely, with all of its distinct goals, objectives and requirements.

Additional PUD provisions confirm that the Zoning Commission's PUD incentive authority provides relief only from conventional zoning. Thus, §2400.5 refers to changing the height and bulk standards and conditions in individual cases:

... In carrying out the purposes of this chapter, the Zoning Commission may establish general standards and, in individual cases, set standards and conditions for height and bulk lesser or greater than the standards established for the affected districts in this chapter or elsewhere in this title. (Emphasis added.)

Similarly, §2403.8 refers to the "degree of development incentives," as follows:

In deciding a planned unit development application, the Zoning Commission shall judge, balance and reconcile the relative value of the project amenities and public benefits offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case. (Emphasis added.)

The term "degree," by definition, refers to the extent of permitted departure from otherwise applicable limitations. It does not contemplate a separate "kind" of incentive. It would be more than a "degree" of development incentive if the Commission tried to ignore an entire chapter of the zoning regulations containing separate statements of purpose, expressed requirements, procedural mandates, and more.

Section 2403.11 requires the PUD applicant to provide the Commission with an annotated table comparing its proposed development with existing matter of right

5. **The Zoning Commission Should Address The Merits Of This Petition.**

The PUD applicant attempts to avoid the questions raised in this Petition by asking the Zoning Commission to dismiss the Petition on grounds that the petitioners lack standing in Case 08-15.

To date, none of the Petitioners has sought party status. The hearing in Case 08-15 has not yet been scheduled, and it is petitioners' understanding that the Zoning Commission does not entertain applications for party status before a hearing is scheduled.

In addition, petitioners are aware of the Commission's strict rules regarding party status and recognize that the Commission may or may not conclude that the petitioners satisfy its tight standards. Nevertheless, the Petition presents serious issues of interpretation of the Commission's regulations which have not been discussed elsewhere. It would be regrettable for the Commission to rely on the stringency of its technical rules to avoid addressing a substantive issue of major public importance.

We note that earlier in Case 08-15, a letter petition was filed with the Commission challenging aspects of the set-down. The Commission responded substantively to that petition. It should do the same as to the present issue.

CONCLUSION.

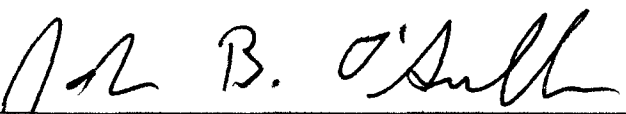
It is respectfully submitted that the Zoning Commission should not dismiss the Petition To Refer Case 08-15 to the Board of Zoning Adjustment but should consider the Petition on its merits and refer the case to the BZA for appropriate proceedings.

It is further submitted that the Zoning Commission recognize the limitations on its authority under Chapter 24 of its regulations to alter or amend the overlay requirements of Chapter 13.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Friday, November 14, 2008, a copy of the attached Opposition to Applicant's Motion to Dismiss was mailed by first class mail to the following:

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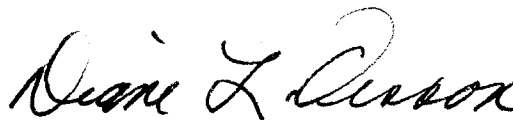
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standards and requirements. (§2403.11(a).) Section 2403.11(c) states that if the applicant requests a map amendment, the table must show “the extent of compliance with, and the requested relief from, the matter of right standards and requirements of development under conventional zoning.” (Emphasis added.) It is significant that the requirement for a comparison table contains no reference to overlays. The applicant’s table only needs to show the departure from conventional zoning, because that is the only zoning that can be amended as a PUD incentive.

Also, §2403.11(c) only imposes a duty on the applicant. It does not create any power for the Commission. It would clearly be a mistake to read §2403.11(c) as somehow independently enabling the Zoning Commission to take actions not otherwise established in the PUD regulation.

Finally, §1305.1 of the Overlay regulation is instructive. It provides strict limits on any PUD proposed for a neighborhood commercial overlay district. Section 1305.1 expressly states that in Overlay zones, the matter of right height and floor area ratio limits are to serve as the guidelines for Planned Unit Developments. If a PUD applicant could escape that requirement simply by asking to have the Overlay eliminated altogether, that provision, and in fact the entire overlay regulation, would be meaningless. It is not credible to believe that a PUD applicant could so easily circumvent the Zoning Commission’s carefully constructed Overlay regulatory package. Instead, §1305.1 shows that the overlay continues to function as the Commission considers a PUD application.³

To summarize: In contrast with the PUD provisions authorizing relaxation of conventional zoning limitations as a PUD incentive, nothing in the PUD regulation authorizes the Zoning Commission to go beyond conventional zoning and eliminate distinct objectives and requirements that have been expressly established by the Neighborhood Commercial Overlay Chapter. Without such authority, the Zoning Commission is not authorized to grant removal of the Overlay’s requirements as a PUD incentive. Instead, the Overlay remains applicable and controlling in the subject area.

This limitation accords with sound public policy. NC Overlay zone districts are uniquely designed to protect the overall neighborhood commercial area and its vicinity. As demonstrated in Footnote 2, above, removing the overlay requirements from a large part of the M/W Overlay zone district would effectively destroy the entire overlay. This is clearly more than the PUD regulations were ever intended to do.

³ The M/W situation contrasts the Commission’s decision in Case 05-37, the Stations Holding PUD, discussed at p. 3, above. There, the Commission found that allowing additional height did not violate §1305.1 because §1326.1 of the specific H Street Overlay housing subdistrict overrides §1305.1 and allows added height and density for housing in that location. There is no comparable provision in the M/W Overlay.

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Individually, as residents of the Wisconsin Avenue/Newark Street neighborhood and as residents of the District of Columbia, and on behalf of the Wisconsin/Newark Neighborhood Coalition.