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January 12, 2009

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

2009 JAN 12 AM 9:41

OFFICE OF ZONING

Re: Case No. 08-15: Friendship Shopping Center—Petition to Refer to BZA.
Request for Expedited Consideration and Supplemental Information

Dear Chairman Hood and Members of the Commission,

This letter is in further regard to our correspondence with you of September 24, 2008 and November 14, 2008. Those communications requested that the Commission refer the above-referenced matter to the Board of Zoning Adjustment as a special exception as required by the Macomb/Wisconsin Neighborhood Commercial Overlay Zone.

The present letter has two purposes:

1. To request that the Zoning Commission expedite its consideration of the BZA referral issue and decide the matter in advance of its hearing on the PUD, currently scheduled for February 19, 2009, rather than postponing consideration of this issue until the date of the PUD hearing; and

2. To invite the Commission's attention to two earlier opinions from the Corporation Counsel which confirm the analyses and conclusions of our September 24 and November 14 correspondences in the present matter.

1. Request That The Zoning Commission Expedite Consideration Of The BZA Referral Issue And Decide the Matter In Advance Of Its February 19, 2009 Hearing On The PUD.

This is to request that the Zoning Commission consider and decide the BZA referral issue in advance of its hearing on the PUD, currently scheduled for February 19,

ZONING COMMISSION
District of Columbia

CASE NO.

EXHIBIT NO.

08-15
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2009. If the Petitioner's position is correct, the PUD hearing cannot take place until after the BZA has had an opportunity to review the application as a special exception pursuant to the criteria of the Neighborhood Commercial Overlay. It is not reasonable to burden the parties and all interested persons with the need to prepare fully for the possibility that the PUD hearing will take place, only to learn that the PUD hearing must be postponed. Addressing the special exception issue ahead of time will avoid this situation.

2. Previous Opinions By The Office Of The Corporation Counsel Confirm That The Zoning Commission Must Refer This Case To The BZA.

Previous opinions issued by the Office of the Corporation Counsel (predecessor to the Office of the Attorney General) confirm that where applicable zoning provides that a matter is to be reviewed by the BZA as a special exception, the Zoning Commission PUD process may not by-pass the BZA special exception requirement unless and to the extent that the PUD regulations expressly grant the Commission power to substitute the PUD process for a class of BZA special exception reviews.

The issue arose in March of 1979, when the Executive Director of the Zoning Secretariat asked the Corporation Counsel whether the Commission had authority, during review of a PUD, to approve a use that would be permitted at the site as a special exception. The Deputy Corporation Counsel, Legal Counsel Division, responded that the Commission did not have authority "to approve, through the PUD process, a use which the Zoning Regulations permit at the site only pursuant to BZA review." (Memorandum of the Deputy Corporation Counsel, April 26, 1979. Attachment A.)

The opinion recognized the inconvenience of its conclusion:

It is granted that this is anomalous; however, such cannot always operate to achieve that which regulatory language fails to achieve.

It advised the Zoning Commission that the Commission could remedy the anomaly by promulgating a revised regulation.

In 1980 the Zoning Commission responded to the 1979 opinion by amending its PUD regulation to reserve to itself the option to approve any use permitted in the PUD project's zone district, including uses that would otherwise require a special exception. The Commission explained the amendment as follows:

The guidelines of the new revised Planned Unit Development regulations specify the authority of the Zoning Commission to establish height, floor area, lot occupancy, yards and courts, and other requirements for a development under the PUD, however, the guidelines are silent with respect to the establishment of use

requirements. Thus, a need for clarification with respect to use requirements is necessary. (Emphases added.)

That amendment is the predecessor to current §2405.7 of the PUD regulation, and the Zoning Commission is now expressly empowered by the PUD regulations to approve uses that formerly required BZA special exception approval.

Three things are clear from this brief review of the background of §2405.7:

1. The Commission amended the PUD regulation in 1980 in direct response to the April 1979 opinion so as to change the result of the opinion and empower the Zoning Commission to substitute the PUD process for a class of BZA special exceptions, namely certain use approvals. (See Memorandum from James O. Gibson to the Zoning Commission, February 4, 1980. Attachment B.)
2. Although the 1980 amendment changed the specific result of the April 1979 opinion as to the BZA's special exception authority on uses, it did not alter the underlying rationale of the opinion. It remains true, as the opinion concluded, that the Zoning Commission's power to act under the PUD regulation is dependant on the PUD regulation's inclusion of specific language authorizing the proposed action.
3. The 1980 amendment to the PUD regulation responded narrowly to the particular issue that prompted the 1979 opinion. The revision provided only that the Commission has power to approve a single class of BZA special exceptions. The Commission could presumably have adopted a blanket reservation of power over any and every BZA special exception duty. For whatever reason, it determined not to adopt such a broad amendment.

The 1979 opinion found it significant that the thrust of the PUD development guidelines is almost exclusively toward matters of bulk. That observation reinforced its conclusion that the language did not convey a power over uses. Today, the thrust of the PUD regulation is toward bulk and, in addition, uses. However, the BZA special exception requirement of the Neighborhood Commercial Overlay regulations is entirely distinct. Just as was the case in 1979 regarding uses, the PUD regulation today is silent as to the M/W Overlay special exception. Hence, the Zoning Commission cannot use a PUD to avoid that BZA review unless it revises its PUD regulation.¹

¹ The PUD applicant asks the Zoning Commission to rezone the area so as to eliminate the overlay that imposes the special exception requirement for the applicant's large lots. The Zoning Commission has power to revise conventional zoning as a PUD incentive. However, as discussed in our earlier correspondences, the Commission does not have power through the PUD process to eliminate an overlay zone. Even if the Commission had such power, the overlay would remain in effect until the final PUD order providing for its elimination. Accordingly, the special exception requirement is

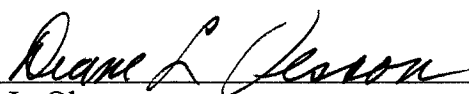
The 1979 opinion suggested that the Commission could eliminate the "anomalous" result of its finding about special exception uses by legislative action, and the Commission responded accordingly. Equally, the Commission could take legislative action to address the Macomb/Wisconsin Neighborhood Commercial Overlay special exception requirement of §§1304 and 1308.3. Here, a note of caution is warranted: A PUD application by its nature tends to seek expansion of applicable zoning limitations, whereas the Neighborhood Commercial Overlay, and the M/W Overlay in particular, is oriented toward the preservation of existing qualities, including existing scale. In this circumstance, the bi-partite review may be not so much anomaly as a wise arrangement. It shields the Commission from trying to honor two opposing goals, and it helps assure that the PUD will not be allowed to frustrate the intent of the Overlay in contravention of §2400.4.

This same issue arose in the present applicant's previous PUD proposal, Zoning Case 00-12C. A September 19, 2000 memorandum prepared by Diane Olsson on behalf of the Committee To Examine The Giant Giant, sent to Alberto Bastida, Secretary to the Zoning Commission, on September 29, 2000, provides a further discussion of the subject. (Attachment C.) The reasoning of that memorandum remains sound, and the September 19, 2000, memorandum is incorporated by reference into this letter. (The applicant withdrew its 2000 application, and the issue was not resolved at that time.)

As long as there are motives to build substantial projects, applicants are likely to employ the PUD process to obtain relaxation of zoning requirements that they view as inhibiting the full potential of their project. Whether or not the merits of a particular project warrant such relaxation, it is submitted that the Commission must be ever mindful of the limits of its powers to review and allow PUD requests. Only in this way can the Commission preserve the integrity of the overall zoning regulatory process.

For the above-stated reasons, it is respectfully submitted that the Commission should promptly address the issues raised by this letter and should not conduct a PUD hearing in Case 08-15 until after BZA review.

Respectfully submitted,



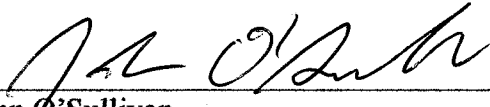
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controlling during the PUD review process, whatever the final decision on whether the Zoning Commission can remove an overlay via a PUD.

Chairman Hood and Members of the Commission

January 9, 2009

Page 5 of 5

A handwritten signature in black ink, appearing to read "John O'Sullivan", written over a horizontal line.

John O'Sullivan

3410 Newark Street NW

Washington, DC 20016

DC Bar Number 423141

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Monday, January 12, 2009, a copy of the attached letter to Chairman Hood and Members of the Commission was mailed by first class mail to the following:

Friendship-Macomb SC Inc. c/o The Stop and Shop Supermarket Co.
1385 Hancock Street
Quincy MA 02169

Phil T. Feola
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street NW
Washington DC 20037

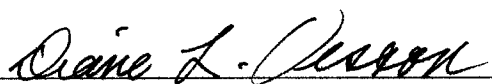
Jenifer Steingasser
DC Office of Planning
801 N. Capitol Street, NE, Suite 4000
Washington, DC 20001

Advisory Neighborhood Commission 3C
4025 Brandywine St. NW
Washington, DC 20016

Trudy Reeves, ANC 3C06
3816 Porter Street, NW
Washington, DC 20016

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3810 Macomb Street, NW
Washington, DC 20016

Nancy MacWood, ANC 3C09
3417 Woodley Road, NW
Washington, DC 20016



Diane L. Olsson

ATTACHMENT 7 A

Memorandum • Government of the District of Columbia

U.V. 1100-100-103

TO: Steven E. Sher
Executive Director
Zoning Secretariat

Department, LCD:ELC:ts
Agency, Office: Corporation Counsel

FROM: Robert E. McCally ^{JE}
Deputy Corporation Counsel, D.C.
Legal Counsel Division

Date: April 26, 1979

SUBJECT: Planned Unit Developments and BZA Review
(UDJ90738)

By memorandum dated March 1, 1979, you asked about the Zoning Commission's authority, during its review of a PUD, to approve a use which would be permitted at the site as a special exception. The particular question focuses on a site now zoned R-4, which is proposed for rezoning to SP. The proposed uses in question are a parking garage and an office building for doctors.

I am unable to conclude that amended Article 75 gives the Zoning Commission the authority to approve, through the PUD process, a use which the Zoning Regulations permit at the site only pursuant to BZA review. It is granted that this is anomalous; however, such can not always operate to achieve that which regulatory language fails to achieve.

A provision for the exercise of such authority by the Commission would certainly be reasonable, but it stands that there is no such provision now. The Commission may eliminate this anomalous result by legislative action.

Without belaboring the point by lengthy quotation, the language of current paragraphs 7501.12 and 7501.13 is not, insofar as is relevant, significantly different from the language of former sub-section 7501.1. This is particularly true as to language which the Corporation Counsel concluded, in a July 9, 1971 opinion, to preclude Commission approval within a PUD of a use which the zoning of the site would not allow. In addition, it is significant that the thrust of sub-section 7501.4, which governs development guidelines, is almost exclusively toward matters of bulk.

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U.S. OFFICE OF ZONING
D.C. 20001

There are two approaches which might, under the current Regulations, achieve the result intended. The site may be considered for rezoning to C-2-B, for example, and Article 75 used to provide more specific controls. If this alternative is unsuitable, then, in spite of the need for BZA review, the rezoning to SP remains available. The Zoning Commission's conclusions as to the appropriate uses to be allowed on the site would thereafter be entitled to the maximum deference before the BZA.

It should be explicitly noted that the Commission's lack of authority to authorize uses not provided for as a matter of right does not affect its authority to preclude, in an approved FUD, certain of the uses which might otherwise be permitted.

REM

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE

OFFICE OF THE CITY ADMINISTRATOR

February 4, 1980



ASSISTANT CITY ADMINISTRATOR FOR
PLANNING & DEVELOPMENT
1350 E STREET, N.W. - ROOM 409
WASHINGTON, D.C. 20004

M E M O R A N D U M

To: D.C. Zoning Commission
From: James O. Gibson *JOG*
Re: Zoning Commission Case No. 79-21
Text Amendment to Eliminate the Requirement
for BZA Review of Special Exceptions Within
the PUD Process

Application

This application has been initiated by the Zoning Commission to consider an amendment to the text of the Zoning Regulations to eliminate the requirement of the Board of Zoning Adjustment review for Plan Unit Development applications requesting uses that would normally require an approval from the BZA for a special exception. It is proposed that a new paragraph 7501.48 be added to the Development Guidelines subsection, to read as follows:

7501.48 The Zoning Commission reserves the option to approve any use permitted in the zone district in which the project is located, including any use which is permitted as a special exception and which would otherwise require the approval of the Board of Zoning Adjustment. Approval of the BZA shall not be required for any such use approved by the Zoning Commission.

The Zoning Commission also reserves the option to prohibit any use which would otherwise be permitted, whether as a matter-of-right or by special exception.

Summary Recommendation

It is recommended that the proposed text amendment to the Zoning Regulations be approved.

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ZONING COMMISSION
CASE No. 79-21
EXHIBIT No. 1

Background

Following the lengthy hearings and receipt of large amounts of testimony, the Zoning Commission adopted amendments to the Zoning Regulations under Order No. 251 dated February 8, 1979, to delete the previously existing PUD regulations and substitute new revised regulations. The revised PUD regulations have placed the PUD application review process entirely within the jurisdiction of the Zoning Commission eliminating the requirement of further processing by the BZA. The guidelines of the new revised Planned Unit Development regulations specify the authority of the Zoning Commission to establish height, floor area, lot occupancy, yards and courts, and other requirements for a development under the PUD, however, the guidelines are silent with respect to the establishment of use requirements. Thus, a need for clarification with respect to use requirements is necessary. Following the adoption of recent amendments to the PUD regulations, the applicants in certain PUD cases have proposed uses which are normally allowed as special exceptions within the underlying zoning districts. This has created because of the existing language of the requirements, a situation where the applications must be also reviewed and approved by the Board of Zoning Adjustment after having been approved by the Zoning Commission.

The proposed text amendment in this application is intended to remove this discrepancy from the regulations and to give the Zoning Commission clear authority to approve special exceptions and or limit the uses permitted by the underlying zoning district.

Analysis

1. As stated, the recent amendments to the Planned Unit Development regulations were adopted in 1979 after considerable staff work, public testimony and Zoning Commission deliberations. These regulations have reduced substantially the total period for the completion of the review process of a PUD application by compressing the process from three required public hearings to two or one public hearing as appropriate. The previous PUD process required 18 months to 2 1/2 years to reach completion and involved uncertainties and delays for the applicant in changing market conditions. The new amended regulations have eliminated entirely the requirement of the BZA public hearing for further processing of a PUD application. Nevertheless, the application has to be reviewed under the existing regulations by the Board for special exception if the use is not permitted as a matter of right. Consequently, the time period for completion of the PUD review process in such cases will continue to be lengthy which was not the intent of the Commission when it amended the regulations.

2. Review of PUD requires analysis of all elements integral to the proposed development. Excluding the review of a proposed use, if it is not allowed as a matter-of-right, would have the effect of making the review tentative and incomplete. All the uses proposed for any development are integral part of that development and can best be reviewed simultaneously as a procedure it would be most desirable if the Zoning Commission could make a final determination on all aspects of a PUD proposal.

3. If there occurs a conflict in the opinion of the BZA and the Zoning Commission, the remedy lies with the Zoning Commission in that the Commission can review sua sponte the BZA decision. Such a procedure would result in stretching further the time period for the complete review of a PUD application and will be burdensome to the applicant and city government.

4. The question as to whether the Zoning Commission can approve a special exception in the PUD process was referred to the Corporation Counsel. The Corporation Counsel concluded (see attached memos) that "the amended Article 75 does not give the Zoning Commission the authority to approve, through the PUD process, a use which the Zoning Regulations permit at the site only pursuant to BZA review". The Corporation Counsel goes on further to say that "It is granted that this is anomalous; however, such cannot always operate to achieve that which regulatory language fails to achieve".

In light of the Corporation Counsel's opinion, the need is clear for a text amendment that would give authority to the Zoning Commission to approve a PUD application in all respects without the need for a subsequent review by the BZA.

Recommendation

As stated, the recent amendments to the PUD regulations as adopted provide flexibility for the processings of PUD applications and reduce the total time period involved in the review process. However, the Development Guidelines, do not address the use and special exception issues. The proposed text amendment will remove this discrepancy and allow expeditious and comprehensive review of PUD applications by the Zoning Commission without further action by the Board of Zoning Adjustment. The Office of Planning and Development recommends that the proposed amendment be approved.

Attachments

Prepared by
Zoning Division, OPD
NA:rc *g*

MEMORANDUM

Subject: Zoning Commission's PUD Authority in the Macomb-Wisconsin Overlay Zone

Date: September 29, 2000

QUESTION

Does the Zoning Commission have authority to entertain an application for a planned unit development (PUD) in the Macomb-Wisconsin Overlay District, 11 D.C.M.R. §1308?

ANSWER

The Zoning Commission has authority to entertain a planned unit development application, but that authority does not supplant the Macomb-Wisconsin Overlay requirement that the applicant must seek review and approval as a special exception by the Board of Zoning Adjustment (BZA) pursuant to the standards of 11 D.C.M.R. §1304. The Zoning Commission should not entertain the PUD application unless and until after the applicant has first secured a special exception from the BZA.

FACTS

In April, 2000, GFS Realty applied for a planned unit development within the C-1/Macomb-Wisconsin ("MW") overlay zone district. The application acknowledges that (p. 8):

The MW overlay . . . requires review by and approval from the Board of Zoning Adjustment (BZA) as a special exception for development on a lot that has 10,000 square feet or more. This approval process provides for public review of large developments as to their proposed uses, vehicular access, and the scale and massing of proposed buildings, so as to ensure compatibility with and enhancement of the primary neighborhood retail function of the commercial area and to advance the other purposes of this overlay district.

However, the application goes on to state that (p. 9):

The PUD process was created to allow greater flexibility in planning and design than may be possible under conventional procedures. The PUD regulations specifically allow the Zoning Commission to approve any zoning relief that would otherwise require the approval of the Board of Zoning Adjustment ("BZA"), including lot occupancy, yards and courts.

* * *

. . . Since the development is in excess of 10,000 square feet, GFS is requesting approval of the project pursuant to Section 2400 of the Zoning Regulations, through the PUD process rather than from the Board of Zoning Adjustment pursuant to 1308.3.

By letters of July 10 (mistakenly dated June 10) and July 21, 2000, The Committee To Examine The Giant Giant requested the Zoning Commission to ensure that the applicant present its case to the BZA in accordance with the MW overlay's express requirement. In response, the applicant, by letter dated July 24, 2000, urged the Zoning Commission to reject the Committee's request. It rested its opposition on § 2405.7 of the PUD Regulations, which gives the Zoning Commission the option to approve any use otherwise permitted as a special exception by the BZA.

DISCUSSION

Background: The 1980 Revision of the PUD Rule And The Zoning Commission's Authority To Allow "Special Exception Uses,"

The Zoning Commission's authority to make direct decisions respecting special exception issues as to which the Commission had assigned primary responsibility to the BZA was carefully analysed in connection with the 1979-1980 revisions to the PUD regulation. That analysis is controlling here.

In 1979, the Zoning Commission adopted revised PUD regulations designed to place the PUD application review process entirely within the jurisdiction of the Zoning Commission, eliminating the requirement of further processing by the BZA. (ZC Order No. 251, Feb. 8, 1979.) However, while the revised guidelines authorized the Zoning Commission to establish height, floor area, lot occupancy, yards and courts and other requirements, the guidelines were silent as to whether the Commission could also use the PUD process to allow a use that would normally be allowed only as a special exception by the BZA.

Steven Sher, Executive Director of the Zoning Secretariat, asked the Corporation Counsel to advise the Zoning Commission whether its revised PUD rules authorized the Commission to approve a use which would otherwise require a special exception from the BZA. Deputy Corporation Counsel Robert E. McCally responded that the PUD rule did not give the Zoning Commission that authority. (Memorandum dated April 26, 1979.)

The McCally memorandum, finding that the 1979 PUD regulation was not significantly different from the former PUD rule, referred to a 1971 Corporation Counsel memorandum (by C. Francis Murphy) which concluded that the Zoning Commission could not use its PUD authority to approve a chancery use in a site zoned R-1-A. The 1971 memorandum pointed out that a stated purpose of the PUD regulation was to encourage certain projects "in keeping with the intent and purpose of each district" (emphasis of the author). It also noted language in the PUD regulation emphasizing that a PUD should not be used to circumvent the intent and purpose of the general provisions of the zoning regulations. The 1971 memo then quoted language of the R-1 district focusing on the low density purposes of the district, and it concluded that the chancery use was precluded. The 1979 McCally memorandum, relying in part on the 1971 reasoning, repeated that no provision in the PUD regulations authorized the Commission to approve uses that are not authorized in the site's zone district.

The Zoning Commission responded to the 1979 opinion by amending the PUD regulation to provide specifically that the Commission has the option to approve any use permitted in the zone district, including any use that would otherwise require BZA approval as a special exception. (Z.C. Order 313, May 8, 1980.) The current PUD regulation retains the essence of that provision. See §2403.16.

Analysis: The PUD Regulations Do Not Provide For The Zoning Commission To Substitute A PUD Hearing For The Special Exception Hearing Which The Macomb-Wisconsin Overlay Requires, And Therefore The Zoning Commission Does Not Have That Authority.

The essence of the corporation counsel opinions from 1967-1980, discussed above, is that once the Zoning Commission assigns a specific function to the Board of Zoning Adjustment, the Commission itself does not retain any inherent power to perform the function which it has assigned away. The Commission may, by regulation, recapture any such function, but it must do so expressly.

It is significant that the earlier opinions insisted on precise regulatory language: They made it clear that Commission's general flexibility under the PUD regulations, and its specific powers regarding height and bulk, did not extend its powers into a separate area--the special exception category of uses-- that it had assigned to the BZA.

The 1979 opinion acknowledged that its conclusion led to an anomaly in that the 1979 PUD revision was designed to create a simpler and faster process and to relieve applicants of the need for a separate trip to the BZA. A BZA hearing seemed particularly burdensome given that the BZA conclusions were subject to *sua sponte* review by the Commission and hence could bring the applicant once again before the Commission. But as the McCally opinion, 4/26/79 observed:

It is granted that this is anomalous; however, such can not always operate to achieve that which regulatory language fails to achieve.

A provision for the exercise of such authority by the Commission would certainly be reasonable, but it stands that there is no such provision now.

(Emphasis added.)

A March 6, 1980 memorandum to the Commission from Mr. Sher also recognized that the Commission's PUD authority must be considered class by class. Its power to act in areas covered by the BZA is only that which the Commission has expressly promulgated it to be:

Jurisdiction for the Board to rule upon special exceptions is thus conferred by the Zoning Commission. I therefore believe that if the Commission chooses, by regulation, to remove a class of special exceptions from the jurisdiction of the Board, the standards that the Board would have used need not and should not be used by the Zoning Commission. (Emphasis added..)

The point is that the unless specific language in the PUD regulation reserves a particular class of BZA special exception authority, the Zoning Commission does not have power to assume that function in a PUD proceeding.

The former opinions addressed whether the Commission could supplant BZA's power and duty to act on the question of the whether any of certain uses identified in the zoning regulations should be allowed in a particular zone district. The present question is whether the Commission can supplant BZA's power and duty to conduct a special exception review of any large project in the Macomb-Wisconsin Overlay Zone. The two questions are legally indistinguishable. The answer in each case is that unless language in the PUD regulation expressly grants the Commission such authority, the authority does not exist.

If the Zoning Commission wishes to include the Macomb-Wisconsin Overlay BZA special exception function among its PUD authorities, it can do so. However, to accomplish that objective, it must promulgate a specific amendment to the PUD rules.¹

This is an reasonable approach. The administrative notice and comment rulemaking process accompanying such a proposal would ensure that members of the interested public, who worked vigorously in support of the Macomb-Wisconsin overlay, would have an opportunity to inform the Commission of their views about any proposal to allow the Commission to by-pass the BZA review, with its public hearing and restrictive criteria.

It is noted that allowing a PUD to by-pass the BZA hearing in the Macomb-Wisconsin Overlay district would virtually eliminate the Overlay altogether, since that requirement is the section's sole function, other than simply identifying which streets are subject to certain Neighborhood Commercial Overlay restrictions. The Overlay applies to lots over 10,000 square feet; the opportunity to seek a PUD in C-1 zones is now available at 15,000 square feet. It truly would be an anomaly to conclude that the tighter criteria of the Overlay may only be effective for projects on lots of between 10,000 and 15,000 square feet.

GFS Realty, the PUD applicant, is seeking a zoning map amendment as a part of its application. The BZA, of course, cannot promulgate map amendments. Hence, the conclusion that the applicant must pursue the BZA hearing means that, as was the case before the 1979-1980 PUD amendments, the applicant must once again follow a two-step process (assuming that it is successful at step one). This could be viewed as an anomaly, as in the 1980 situation. Instead, however, it may well be that the Commission promulgated the preliminary BZA review requirement in the MW Overlay as an important additional safeguard for protecting this very compact C-1 shopping area from inappropriate, excessive development. In any case, it is the process that is currently dictated by the Zoning Commission's regulations and the various memoranda of the Corporation Counsel.

¹ The Macomb-Wisconsin Overlay was adopted in 1989. The PUD regulation was amended later. The Commission could have revised its PUD authorities for ocerlays at that time, had it deemed it appropriate to do so.

As to sequence of the two proceedings, it seems clear that the BZA hearing should occur first. The BZA is charged with determining the applicant's compliance with the specific neighborhood retail criteria. If the applicant fails the BZA tests there is no reason to proceed with a PUD hearing on the desired map amendment. If the BZA finds that the project satisfies all of the special exception criteria, then the Zoning Commission can consider the map amendment issue. Also, by holding the BZA hearing first, any *sua sponte* review by the Commission can be conducted in conjunction with the rest of the PUD proceeding.

The Applicant's Position

As noted above, the GFS Realty application argues that the Zoning Commission does have authority to supplant the BZA's overlay hearing. But while the application recites that the Zoning Commission can approve "any zoning relief" that would otherwise require BZA approval, the above discussion demonstrates that in fact the Zoning Commission can perform BZA activities only if and to the extent that its regulations say it can. The PUD regulations do not say "any relief;" they spell out individual categories—height, floor area ratio, lot occupancy, yards and courts and, after the 1980 amendment, uses.

Mr. Feola's July 24, 2000 letter names a more specific basis for his argument. He asserts that §2405.7 "unequivocally provides" that the Zoning Commission may "approve any use permitted as a special exception without deferring to the BZA." (Emphasis added.) The obvious answer is that §2405.7, on its face, is limited to uses. It fits comfortably with the Zoning Commission's other authorities to change specific, fairly quantifiable requirements, but it is absolutely silent as to any Commission powers vis a vis §1308.

The MW overlay hearing requirement is a whole different concept. In these hearings, the BZA is just not considering whether to allow a certain use that is listed as requiring a special exception in the project's zone district. Instead, the BZA is directed to carry out a broad public inquiry to determine whether the whole project is compatible with and enhances the primary neighborhood retail function of the commercial area and meets other criteria specifically designed for the overlay. It is not unreasonable to conduct that broad inquiry separately from the distinct PUD process.

Mr. Feola argues that if the applicant had to go first to the BZA, it would expend resources without knowing what the Zoning Commission will do in the PUD process. The cost of complying with neighborhood-protecting regulations does not seem like a strong argument for omitting a necessary step. And of course, if the BZA requires significant modification of the project, the applicant will be saved the expense of a premature appearance at the Zoning Commission.

Mr. Feola cites the Commission's use of §2405.7 in numerous cases, but none of those cases involved the unique requirement of §1308.

It is helpful to consider the criteria issue. It appears that one justification for the Zoning

Commission to assume use approvals in 1980 was that the PUD criteria were deemed at least as stringent as the BZA criteria. That rationale does not apply here, where at least some of the overlay criteria are more focused and more stringent than the PUD. As noted above, Mr. Sher's memorandum of March 3, 1980, indicates that the Zoning Commission would presumably not use the BZA's criteria if the Commission took over the BZA function. Thus, that mandated, specialized review would fail to take place.

If substituting a PUD hearing for the BZA process would result in the application of less stringent criteria, it needs to be asked whether the PUD application is intended, at least in part, to circumvent the requirements of the overlay, in violation of §2400.4.

These considerations demonstrate that the applicant's position is not persuasive.

CONCLUSION

The Zoning Commission has erred in setting down Giant's PUD application for a hearing. The action should be withdrawn.



Prepared by Diane L. Olsson, J.D.
Committee To Examine The Giant Giant