BEFORE THE ZONING COMMISSION
OF THE DISTRICT OF COLUMBIA

RECEIVED
D.C. OFFICE OF ZONING
2005 JUN -3 PM 1:16

APPLICATION OF	)	
Jemal's Citadel, LLC and Faison Enterprises, Inc.	)	
For a Planned Unit Development	)	**Case No. 04-30**
At 17th Street and Kalorama Road, NW	)	**Hearing: June 6, 2005**
(Square 2572, Lot 36)	)	

MOTION OF ADVISORY NEIGHBORHOOD COMMISSION 1C FOR CONTINUANCE OR POSTPONEMENT OF HEARING OR, IN THE ALTERNATIVE, FOR A CONTINUANCE OR POSTPONEMENT OF ANC 1C'S PARTICIPATION

Pursuant to 11 DCMR §§ 3000.8 and 3005.8, Advisory Neighborhood Commission 1C (ANC 1C or ANC) respectfully moves for a continuance or postponement of the hearing in the above-captioned case for 90 days beyond the currently scheduled June 6, 2005 hearing date, or until ANC 1C advises the Zoning Commission that it has successfully completed negotiations with the Applicants and their contemplated grocer-tenant, Harris Teeter, Inc. (HT) on a comprehensive Memorandum of Understanding (MOU) to govern the project, whichever occurs sooner.

In the alternative, pursuant to the same provisions of 11 DCMR, ANC 1C moves that the Zoning Commission recess the June 6, 2005 hearing prior to presentation of ANC 1C's case under 11 DCMR § 3022.8, and further that the Zoning Commission permit ANC 1C to postpone its cross-examination of the Applicants' witnesses until a continued hearing date after the next ANC 1C business meeting on July 6, 2005.

Background

Faison Associates (for Douglas Development, Inc.) filed this application to establish a Planned Unit Development (PUD) within a building known in the Adams Morgan community as

ZONING COMMISSION
CASE No. 04-30
EXHIBIT No. 33

"The Citadel" at the intersection of Kalorama Road and 17th Street, NW (Square 2572, Lot 36). ANC 1C at its May 4, 2005 business meeting, by a roll call vote of 5-2 with one abstention (a quorum being present), adopted a resolution supporting approval of the Applicants' PUD application, but conditioned its support on the terms of an April 28, 2005 MOU proposed by the Applicants and HT, and further contingent on the Applicants and HT agreeing to 12 specific modifications of that April 28th MOU proposal.

Representatives of ANC 1C have endeavored in good faith since the ANC's May 4th meeting to negotiate a final agreement with the Applicants and HT on the ANC's 12 issues, including many hours of meetings, conference calls, drafting, and other activities aimed at eliciting from the Applicants and HT a settlement of those issues. Regrettably, the negotiations have yielded no agreement at all on three important issues (i.e., public benefit/project amenity, truck management plan, and MOU administration/enforcement). And although actual or conceptual agreement was reached on the other nine issues, the precise language used by counsel for the Applicants and HT in reducing at least three of those nine to writing is currently unacceptable (i.e., store hours of operation, hours for the sale of beer and wine and accompanying ABC voluntary agreement provisions, and training and employment of local residents through area non-profits).

Taken together, the six unresolved ANC items address the most central issues the Zoning Commission must consider when reviewing this PUD application – namely, whether the serious adverse impacts of the proposed project on the surrounding community have been or are capable of being mitigated, 11 DCMR § 2403.3, and whether the public benefits and/or project amenities required by the PUD regulations are sufficiently superior features of the application to justify the zoning relief sought, 11 DCMR §§ 2400.1, 2400.2, 2403.5, 2403.6, 2403.8. As of this moment in time, ANC 1C's answer to each of those questions is "No."

Moreover, the manner in which the Applicants and HT have approached negotiations with the ANC since the ANC's May 4th resolution has been deeply troubling. At a minimum, HT's approach to the open issues reflects very poorly on its competence. At worst, the Applicants' and HT's negotiating style has raised serious questions about their good faith among some ANC Commissioners and residents. One particularly egregious example was a call by HT's representative to the ANC's Chairperson at approximately 4:00 pm on the afternoon of June 1st – a mere three hours before the scheduled meeting at which the ANC's position at the June 6th Zoning Commission hearing was to be discussed and decided – to advise that HT was reneging on agreements reached more than 30 days earlier with regard to the management of truck deliveries to the site. These truck delivery agreements were reflected in the Applicants' and HT's own April 28th MOU proposal, and agreed to by the ANC on May 4th. HT's representative claimed that the company's distribution and grocery personnel concluded *just this week* that *their own supervisor* had erred in proposing the April 28th MOU terms! If the Zoning Commission wishes, the ANC will be pleased to detail in greater length the chronology of strange events, dropped balls, and other machinations that have led to the current state of affairs.

From this chain of events, ANC 1C regrettably concludes that HT in particular has exhibited only minimal interest in effectively mitigating the adverse impacts of the proposed project on the surrounding area; that it has delayed its responses to the ANC's concerns so as to hinder the prospects for reaching agreement before the June 1st ANC meeting; and that it has shown no fidelity even to terms of its own April 28th MOU proposal already accepted by the ANC. Similarly, it appears that until virtually the eleventh hour (i.e., the day before the ANC's June 1st meeting), the Applicants themselves did not take seriously the ANC's insistence on the need for a stronger public benefit/project amenity package than that previously put forth. Apparently the Office of Planning's agreement with ANC 1C on this point suddenly spurred the

Applicants reluctantly to make a belated proposal. Even then, however, they did not propose an adequate alternative.

Basis for Motion

Section 3005.8 of the Zoning Regulations provides that "unless the Commission orders otherwise, the Commission shall not postpone or continue a public hearing on a contested case for a period in excess of thirty (30) days from the date of the granting of such postponement or continuance." The regulations themselves do not spell out the criteria under which the Commission may "order otherwise," but it is certainly reasonable to assume that the Commission has authority to order a lengthy postponement where there is evidence of inadequate, belated, and/or bad-faith negotiation by an applicant with an ANC; or where the ANC itself, after negotiating for months in good faith, would be prejudiced in its effort to represent an entire community by being required to negotiate with a gun to its head in spite of the applicants' documented and long-standing inattention to the ANC's issues and concerns.

Section 3000.8 of the Zoning Regulations provides that the Zoning Commission "may, for good cause shown, waive any of the provisions of this chapter if, in the judgment of the Commission, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law." To the extent the Commission considers this motion to present a waiver request, such a waiver here will not cause any such prejudice. Indeed, the Applicants and HT have been on notice literally for months of what the ANC's major issues are, and at a minimum have had notice for more than a month of the ANC's 12 specific remaining concerns, as set forth in the ANC's May 4th Resolution. If anything, the prejudice to date here has flowed in the opposite direction – against ANC 1C – as a result of the Applicants' and HT's apparent tactics of delay

and constant renegotiation while the June 6th hearing date loomed ever closer. And certainly, such a waiver "is not otherwise prohibited by law" in this case.

ANC 1C's May 4th resolution expressly contemplated that if no agreement were reached on the ANC's 12 issues by May 24th, it would be in order to consider a motion or resolution at its June 1st meeting withdrawing or otherwise altering its prior conditional support. As of its meeting on June 1st, no agreement had been reached. Accordingly, by a roll call vote of 4-2 (a quorum being present), the ANC on June 1st approved the following multi-part motion:

> "that ANC 1C file a motion in Zoning Commission Case No. 04-30 requesting the ZC to continue the hearing on the PUD application beyond the currently scheduled June 6, 2005 hearing date and further requesting that another hearing date not be set for 90 days or until ANC 1C advises the ZC that the ANC has successfully completed negotiations with the applicants and Harris Teeter on a comprehensive MOU to govern the project, whichever occurs sooner. In the alternative, the ZC will be asked to suspend the June 6th hearing prior to presentation of the ANC's case and to allow the ANC to postpone cross-examination of the Applicants' witnesses until a continued hearing date. Should the ZC not grant ANC 1C's above motion for continuance on June 6th, then ANC 1C shall oppose approval of the PUD application unless the applicants and Harris Teeter are ordered as a condition of any ZC approval to enter into a comprehensive MOU with ANC 1C (and such other affected local parties as may wish to join the ANC's agreement) that includes all heretofore agreed-upon terms of the applicants' and Harris Teeter's April 28th proposal and, in addition, meets the ANC's requirements – as determined by the ANC – as to the 12 issues enumerated in its May 4th resolution."*

In effect, notwithstanding the frustration – indeed, exasperation – with the Applicants' and HT's somewhat bizarre approach to negotiation, the ANC nonetheless has decided to make one final effort at resolving the handful of highly consequential open issues that still separate the parties. However, in order to do so – and to do so without giving the Applicants and HT the tactical advantage of constantly altering previously agreed-upon language, delaying its responses to ANC proposals, and reneging completely on previously reached agreements with the pressure

* This motion was adopted after 4-2 approval of a substitute amendment proposed by the Chairperson to a more severe motion originally offered by another Commissioner. The original motion provided "that ANC 1C withdraw its support from the Citadel project and ask the Zoning Commission to move forward with the case but not make a decision on it so that ANC 1C can conclude negotiations with the Applicant."

and deadline of a Zoning Commission hearing staring the ANC in the face – it is necessary that the playing field here be leveled. The only way to do that – the only way to force the Applicants and HT to take seriously the need for bringing negotiations with the ANC to a quick and successful conclusion in the form of a written and signed MOU – is to remove completely their incentive to keep delaying, revising, rewriting, and reneging.

Thus, ANC 1C respectfully asks the Zoning Commission to postpone the hearing date in this matter for a period sufficient to remove that unfair advantage, i.e. 90 days – or until the ANC advises the Zoning Commission that an agreement has been successfully completed and signed, whichever occurs sooner. If no agreement is reached by the expiration of 90 days, then it will be evident that no agreement is going to be reached at all, and the Zoning Commission can then proceed to hear the case with all parties' positions clearly established and articulated. The ANC believes, however, that if the Zoning Commission grants this motion, an agreement will not only be reached, but reached much sooner than 90 days. Under those circumstances, the Applicants and HT – if they are serious about pursuing this application on terms fair to the Adams Morgan community – will quickly come to the conclusion that further delay works against them, not for them. Only then will serious good-faith efforts begin in earnest to close the remaining gaps with satisfactory language.

In the alternative, ANC 1C has requested the Zoning Commission to recess the June 6, 2005 hearing prior to hearing the ANC's case under 11 DCMR § 3022.8. It further requests that the Zoning Commission permit ANC 1C to postpone cross-examination of the Applicants' witnesses until a continued hearing date after the next ANC 1C business meeting on July 6, 2005. Although this is much less preferable to a complete postponement of the hearing – and one that is less likely to produce an agreement quickly – it is, at the very least, a way for the

Zoning Commission and ANC 1C to give the Applicants and HT one final opportunity at reaching a comprehensive MOU agreement.

If the Zoning Commission is inclined to suspend prior to the ANC's case but still to allow the Applicant's case to be presented, it is also imperative that the ANC be permitted – if it wishes to do so once the hearing has begun – to postpone cross-examination of the Applicant's witnesses until a future hearing date. If there is any hope at all of reaching an agreement in the current atmosphere of suspicion and frustration, that atmosphere will most certainly not be improved by an aggressive cross-examination of the Applicants' witnesses. Allowing the ANC to postpone cross-examination may also prove to be administratively efficient for the Zoning Commission itself: If an agreement is reached, the ANC may forgo most or all of its cross-examination, saving substantial time. If no agreement is reached, then the Zoning Commission, in terms of the expenditure of its time, will be no worse off than it would have been had cross-examination gone forward on June 6th. Of course, in order for this approach to be acceptable, the ANC would expect the Applicants to commit to making all of their witnesses available for cross at whatever future hearing date the Zoning Commission might select. The Commission should insist that Applicants' counsel put that commitment on the record, under penalty of a further hearing postponement or, in the case of an egregious violation, dismissal of the application entirely.

As noted above, should the Zoning Commission refuse to grant either of the ANC's motions, thus compelling the ANC to move forward on June 6th, then the ANC has voted to oppose approval of the application unless the Zoning Commission imposes an extensive MOU requirement on the Applicants and HT. In that event, the ANC respectfully calls the Commission's attention to its motion dated May 26th for a waiver of the seven-day advance filing requirement and for leave to submit a revised ANC report in the above-captioned case.

Conclusion

For the foregoing reasons, ANC 1C requests that its motion for a postponement or continuance be granted.

Respectfully submitted,



Alan J. Roth, Chairperson
Advisory Neighborhood Commission 1C
P.O. Box 21652
Washington, DC 20009

Dated: June 3, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing and attachments were served by first-class mail, postage prepaid, this 3rd day of June, 2005, to the following:

Norman M. Glasgow, Jr.
Holland & Knight
2099 Pennsylvania Ave., NW – Suite 100
Washington, DC 20006-6801

Maxine Brown Roberts
D.C. Office of Planning
801 North Capitol Street, NE
Washington, DC 20002

Ken Laden
District Department of Transportation
2000 14th Street, NW – 7th Floor
Washington, DC 20009

Stephen N. Gell, Esquire
1101 30th Street, NW – 5th Floor
Washington, DC 20007



Alan J. Roth