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May 23, 2022

VIA IZIS

Zoning Commission for the
District of Columbia
441 4th Street, NW, Suite 210S
Washington, DC 20001

Re: Z.C. Case No. 16-11 -- Applicant's Response to "The Council @Park Morton (Park Morton resident council) Motion to Reconsider ZC Remand Zoning Order 16-11 & Limited Rehearing of ZC Oder 16-12 w/ regards to Racial Equity Lens Review" (Exhibit 371) and "Park Neighbors Motion for Reconsideration and Stay of Remanded Commission Order No. 16-11" (Exhibit 370)

Dear Members of the Commission:

On behalf of Park View Community Partners and the District of Columbia (together, the "Applicant"), we hereby oppose the Park Morton Resident Council's ("Resident Council") "Motion to Reconsider Motion to Reconsider ZC Remand Zoning Order 16-11 & Limited Rehearing of ZC Oder 16-12 w/ regards to Racial Equity Lens" (the "Resident Council's Motion") included as Exhibit 371, and we hereby oppose the Park Neighbors' "Motion for Reconsideration and Stay of Remanded Commission Order No. 16-11" (the "Park Neighbors' Motion") included as Exhibit 370.

Both the Resident Council's Motion and the Park Neighbors' Motion should be denied because they do not meet the requirements of Subtitle Z, Sections 700.6 and 700.7 of the Zoning Regulations, which provide:

700.6 A motion for reconsideration, rehearing, or re-argument shall state specifically the respects in which the final order is claimed to be erroneous, the grounds of the motion, and the relief sought.

700.7 No request for rehearing shall be considered by the Commission unless new evidence is submitted that could not reasonably have been presented at the original hearing. If a rehearing is granted, notice shall be given as in the case of an original hearing.

11-Z DCMR §§ 700.6 and 700.7.

Neither the Resident Council's Motion nor the Park Neighbors' Motion includes any relevant evidence which demonstrates that Zoning Commission Order No. 16-11(1) ("Order No.

16-11(1)") is erroneous, nor does either motion present any relevant evidence that could not have been presented at the public hearing in this case.

1. The Zoning Commission Conducted a Thorough Racial Equity Analysis of Case

The Resident Council asserts that the Zoning Commission failed to properly evaluate the case through a racial equity lens, and that the Zoning Commission failed to utilize the Commission's racial equity tool, which was published on April 28, 2022. However, the record of this case and Order No. 16-11(1) include detailed racial equity analyses that, in accordance with Section 2501.8 of the Comprehensive Plan's Implementation Element, are an integral part of the Commission's Comprehensive Plan evaluation. *See* Order No. 16-11(1), Finding of Fact 297 – 310.

The information included in Order No. 16-11(1) is consistent with the information included in the Zoning Commission's published racial equity tool. Moreover, as indicated in the following chart, Order No. 16-11(1) includes multiple Findings of Fact and Conclusions of Law that fit within the Zoning Commission's racial equity tool:

Zoning Commission Racial Equity Tool	
Part 1 – Guidance Regarding Racial Equity Submissions	
Part 1 of the Commission’s racial equity tool encourages applicants to submit a discussion of applicable Comprehensive Plan Citywide and Area Elements that analyze a requested zoning action through a racial equity lens. The following information demonstrates how Order No. 16-11(1) includes detailed Findings of Fact that set forth the Commission’s evaluation of applicable Citywide and Area Elements using a racial equity lens, and provide the basis for the Conclusions of Law upon which the Commission approved the Project.	
Applicable Comprehensive Plan Elements	Order No. 16-11(1) Discussion / Evaluation
Land Use	Findings of Fact 221, 238 - 240
Transportation	Findings of Fact 241 - 243
Housing	Findings of Fact 222, 244 - 246
Economic Development	Findings of Fact 250 – 252
Urban Design	Findings of Fact 253 – 255
Environmental Protection	Findings of Fact 247 - 249
Mid-City	Findings of Fact 223 – 225, 256 - 258
Part 2 – Zoning Commission Evaluation of the Zoning Action through a Racial Equity Lens	
Part 2 of the Commission’s racial equity lens requests applicants to address specific questions related to a requested zoning action. These questions relate to the goals of the zoning action and the anticipated positive and negative impacts. As demonstrated below, Order No. 16-11(1) thoroughly evaluates each of the topics / issues addressed in the Commission’s racial equity tool.	

<u>Impacts</u> - What are the anticipated positive and negative impacts and/or outcomes of the zoning action?	
· <u>Direct Displacement</u> – Will the zoning action result in displacement of tenants or residents?	Findings of Fact 109, 125 – 126, 225, 246, 288, 306, 335 – 337.
· <u>Housing</u> – Will the action result in changes to: (i) market rate housing, (ii) affordable housing, (iii) replacement housing?	Findings of Fact 109, 111, 118, 136, 147 – 149, 170, 195, 220 – 227, 237, 240, 244 – 246, 258, 264, 268 – 271, 272 – 274, 276 – 281, 282 – 285, 287 – 288, 302, 303, Conclusions of Law 6, 17.
· <u>Physical</u> – Will the action result in changes to the physical environment such as: (i) public space improvements, (ii) infrastructure improvements, (iii) arts and culture, (iv) environmental changes, (v) streetscape improvements?	Findings of Fact 52, 55, 63, 67, 99 - 107, 111, 170, 243, 249, 258, 266, Conclusions of Law 9 - 11.
· <u>Access to Opportunity</u> – Is there a change in access to opportunity: (i) job training / creation, (ii) healthcare, (iii) addition of retail/access to new services?	Findings of Fact 35, 64, 111, 136, 170, 252, 275.

Thus, the Resident Council has not submitted any evidence demonstrating that the Zoning Commission's decision was erroneous.

The Resident Council attached an email, dated May 4, 2022, from the D.C. Council's Office of Racial Equity ("CORE"), presumably as "new evidence" to demonstrate that the Zoning Commission's racial equity analysis was flawed. However, the personal opinion of a person at CORE has no probative bearing in this case.

First, CORE is responsible for evaluating legislation pending before the D.C. Council, not for evaluating actions by other independent DC agencies or bodies. Specifically, pursuant Article III, Section 311 of the Rules of Organization And Procedure For The Council Of The District Of Columbia, CORE is only required to prepare a Racial Equity Impact Assessment “at the time of consideration of a resolution or bill being marked up by a committee” for certain legislation before the D.C. Council, or at the request of a Councilmember prior to the markup of pending legislation. As such, CORE has no legislative authority to evaluate Order No. 16-11(1).

Second, the drafter of the email clearly states: "We don't fully understand the moving pieces here, but from a cursory review...." As such, it is not clear whether the email and the opinions expressed therein were properly analyzed or vetted.

Third, the email (i) does not indicate whether the drafter had any communications with the Applicant, the Office of Planning, or the Office of Zoning to ensure they had and reviewed all of the relevant filings in this case that address racial equity; (ii) does not indicate whether the drafter reviewed the hearing testimony in this case, which included hours of discussion, including cross-examination addressing racial equity in this case; and (iii) does not indicate that the Zoning Commission's conclusions regarding racial equity are erroneous in this case.

Moreover, as indicated in the email dated May 23, 2022, and attached hereto as Exhibit A, the CORE representative indicated that the email was "sent with caveats that we do not understand all of the moving parts. We responded to an inquiry from William about this specific topic because achieving racial equity in the District will take the concerted, thorough, and genuine approach of all District entities. **My response was merely thoughts, it was not a REIA or even anything formal on behalf of our office**" (emphasis added). In short, the email has no probative value, is not evidence, and the opinions contained in the email are not a basis to discredit the Zoning Commission's and Office of Planning's evaluation in this case.

2. The Zoning Commission's Review of Case No. 16-11(1) was properly limited to the facts of Case No. 16-11 and Does Not Require a Re-evaluation of Case No. 16-12 and the New Communities Initiative

The Resident Council continues to argue that in reviewing Case No. 16-11, particularly as it relates to racial equity, the Zoning Commission must also reevaluate Case No. 16-12, the New Communities Initiative, D.C. Housing Authority actions, and that the Zoning Commission's review of Case No. 16-11 should focus on the alleged impacts of this case on Park Morton residents.

However, the purpose of this proceeding is to respond to the issues identified by the D.C. Court of Appeals opinion regarding the appeal of Case No. 16-11. Given that Case No. 16-12 was not appealed, there is nothing in the D.C. Court of Appeals opinion that addresses the substance of a completely separate case, Case No. 16-12.

Moreover, Case No. 16-12 is a completely separate case that applies to completely separate land and has different applicants from those in Case No. 16-11. The Zoning Commission order approving Case No. 16-12 remains valid. There are no pending applications that authorize the Zoning Commission to reopen and/or reevaluate the merits of Case No. 16-12.

Accordingly, the Zoning Commission properly rejected the Resident Council's attempts to use Case No. 16-11 as a vehicle to reopen and reevaluate Case No. 16-12, and the Resident Council has not presented any evidence demonstrating that the Zoning Commission's Findings of Fact are erroneous.

3. The Park Neighbors' Motion Fails to State any Basis for Reconsidering Order No. 16-11 (1)

The Park Neighbors argue that: (1) the "Zoning Commission's response to the Remanded Order 16-11 should be held in reconsideration due to Case 2021 CA 001651 B, currently active before the Superior Court of the District of Columbia", since that case involves an individual's challenge to the Comprehensive Plan; (2) the Zoning Commission "arbitrarily" relied upon the new

Comprehensive Plan in Order No. 16-11(1); and (3) without citing any particular agency, that "the impacts of this PUD application remain either under evaluated or completely un-evaluated by the relevant District agencies."

The Park Neighbors argue that the Zoning Commission should not decide this case until a challenge to the new Comprehensive Plan is resolved, and yet they also argue that the Zoning Commission's decision in the case should not be based in the new Comprehensive Plan. Notwithstanding this obvious inconsistency, there is nothing in the Zoning Regulations nor the DC Zoning Act that limits or bars the Zoning Commission from deciding zoning cases during the pendency of a challenge to the Comprehensive Plan by an individual in the DC Superior Court. Indeed, the Park Neighbors did not cite any statute, regulation, or applicable case law to support its legal position. Indeed, if the Park Neighbors' argument was valid, then the Zoning Commission would not be able to decide any zoning map amendment or PUD application during the pendency of the individual's lawsuit since all zoning map amendments and PUDs require an evaluation of consistency with the Comprehensive Plan.

Moreover, a detailed analysis of Order No. 16-11(1) clearly demonstrates that the Zoning Commission did not "arbitrarily" rely upon the new Comprehensive Plan. Specifically, Order No. 16-11(1) states:

At a properly noticed meeting held on July 26, 2021, the Commission considered the responses from the parties.

The Commission discussed whether the Project was consistent with the Comprehensive Plan that was in effect at the time it made its original decision and issued the Remanded Order, and concluded generally that it was. The Commission noted that in the interim between the Court's Opinion and its original decision, the District had amended the Comprehensive Plan in ways that could impact the Commission's deliberations on the Remanded Order. The Commission decided to hold a limited scope hearing to develop the record on how the issues regarding the proposed PUD that were raised in the Court's Opinion should be evaluated under the updated Comprehensive Plan. The Commission therefore requested that the parties and the Office of Planning ("OP") submit written statements analyzing the proposed PUD under the updated Comprehensive Plan, particularly with regard to the issues raised in the Court's Opinion.

See Order No. 16-11(1) pages 5-6.

The Park Neighbors never objected to this instruction. In fact, the Park Neighbors submitted a pleading arguing, in their view, that "[w]ithin the limited scope of this hearing, we will show how the Zoning Map Amendments and related PUD continue to violate the Comprehensive Plan, **even as amended.**" (emphasis added) See Exhibit 299. In short, the Park Neighbors have not submitted any evidence demonstrating that the Zoning Commission decision to evaluate the case under the updated Comprehensive Plan was erroneous.

Finally, without raising this argument in any prior pleading during the remand process, and without citing any particular agency, the Park Neighbors make a blanket statement that "the impacts of this PUD application remain either under evaluated or completely un-evaluated by the relevant

District agencies." However, this issue was already addressed by the DC Court of Appeals and deemed moot. Specifically, the Court stated:

As previously explained, although OP sought input from many District agencies, no agency provided input to OP before OP submitted its report, and only the Department of Transportation submitted written comments before the hearing. After an objection was raised at the hearing to the lack of written reports, the Department of Energy and Environment, DC Water, FEMS, and DHCD submitted brief statements or emails expressing views about the application. Once the additional materials were submitted, petitioners and other parties had ample opportunity to raise a post-hearing objection that the materials were belated or otherwise inadequate. As far as we have been able to determine, however, no such objection was presented to the Commission. Understandably, the Commission did not address the issue. **Under the circumstances, we hold that the issue was forfeited and is not a proper basis for relief.** *Cf., e.g., Cole*, 210 A.3d at 763-64 (declining to consider challenge to adequacy of written reports, because issue was not properly presented to Commission); *see generally, e.g., DC Applesseed Ctr. for Law & Justice v. District of Columbia Dep't of Ins., Sec. & Banking*, 214 A.3d 978, 986 (D.C. 2019) ("In the absence of exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative agency at the appropriate time.") (internal quotation marks omitted).

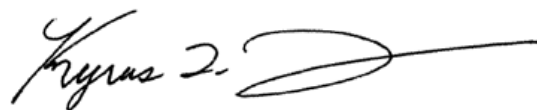
See *Cummins v. D.C. Zoning Comm'n*, 229 A.3d at pg. 31-32 (D.C. 2020).

Given that the scope of the remand process was to address the issues identified by the Court of Appeals, there was no basis to reassess or seek additional agency reports since the project has not changed and since the Court has already determined that the issue of "agency reports" is moot in this case.

Based on the foregoing, the Applicant respectfully requests that the Zoning Commission deny both "The Council @Park Morton (Park Morton resident council) Motion to Reconsider ZC Remand Zoning Order 16-11 & Limited Rehearing of ZC Oder 16-12 w/ regards to Racial Equity Lens Review" (Exhibit 371) and "Park Neighbors Motion for Reconsideration and Stay of Remanded Commission Order No. 16-11" (Exhibit 370).

Respectfully submitted,

Holland & Knight, LLP



Kyrus L. Freeman

cc: Certificate of Service
Joel Lawson, D.C. Office of Planning (via email)
Stephen Mordfin, D.C. Office of Planning (via email)
Jonathan D. Rogers, DDOT (via email)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 23, 2022 a copy of the foregoing letter was served on the following via email:

Jennifer Steingasser
D.C. Office of Planning
jennifer.steingasser@dc.gov

Advisory Neighborhood Commission 1A
1A@anc.dc.gov

Advisory Neighborhood Commission 1B
1b@anc.dc.gov

Park Neighbors c/o Marc Poe
mtnik00@gmail.com

Park Morton Resident Council
parkmortonresidentcouncil@gmail.com

Holland & Knight, LLP

A handwritten signature in black ink, appearing to read "Kyrus L. Freeman", is written over a white rectangular background.

Kyrus L. Freeman

EXHIBIT A

From: "Meni, David (Council)" <dmeni@dccouncil.us>
Date: May 23, 2022 at 3:35:46 PM EDT
Subject: Council Clarification on ZC 16-11 Motion for Reconsideration

[External email]

Good afternoon,

As Councilmember Nadeau has emphasized on numerous occasions, there is a very clear separation of powers established in the Home Rule Act between the Council, the Mayor, and the Zoning Commission on matters of zoning and land use, a distinction the Councilmember takes very seriously. The Council's sole jurisdiction over land use, planning, and zoning remains the amendment and adoption of the Comprehensive Plan (D.C. Official Code §1-204.23).

Seeing as communication from the Council Office on Racial Equity – which serves under the Council Secretary (COUNCIL RULES, PERIOD XXIV, Rule 262(b)) – was included as an attachment to a Motion for Reconsideration that is now part of the official case record, we saw it appropriate to seek clarification to ensure that nothing was misconstrued.

David Meni, Acting Chief of Staff
Councilmember Brianne K. Nadeau
(202) 368-7342
Pronouns: he/him/his

From: "Mody, Namita (Council)" <nmody@DCCOUNCIL.US>
Date: Monday, May 23, 2022 at 1:38 PM
To: "Meni, David (Council)" <dmeni@DCCOUNCIL.US>
Cc: "Nadeau, Brianne K. (Council)" <BNadeau@DCCOUNCIL.US>, "Smith, Nyasha (Council)" <NSmith@DCCOUNCIL.US>
Subject: Following up on Conversation Last Week

Hi David,

I wanted to follow up with you about our conversation last Wednesday, as it's important that I add some more context and avoid any further confusion about my intent.

My email, as I mentioned on the phone and stated in the message itself, was solely about the racial equity analysis discussion included in the Remand Order. My email does not have anything to do with the Park Morton case. It was also sent with caveats that we do not understand all of the moving parts.

We responded to an inquiry from William about this specific topic because achieving racial equity in the District will take the concerted, thorough, and genuine approach of all District

entities. My response was merely thoughts, it was not a REIA or even anything formal on behalf of our office.

I hope this helps allay any misunderstanding.

Best,
Nami

Namita (Nami) Mody (she/her)
Director
Council Office of Racial Equity

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