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March 28, 2019

VIA IZIS

Zoning Commission for the
District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

**Re: Z.C. Case No. 18-10
(Square 5799, Lot 976)
Post-Hearing Submission**

Dear Members of the Zoning Commission:

On behalf of High Street LLC (the “Petitioner”), we submit the following information requested by the Zoning Commission at its March 21, 2019, public hearing.

1. The Petition Was Properly Setdown and Processed as a Rulemaking Case

On March 21, 2019, CARE submitted comments to the Zoning Commission arguing that the above referenced case should be processed as a contested case and not as a rulemaking. *See Exhibit 35* of the record. In general, “[r]ulemaking cases are legislative in nature and present issues for resolution . . . that potentially affect large numbers of persons or property or the public in general.” 11-Z DCMR § 201.5. In contrast, “[c]ontested cases are adjudicatory in nature, present issues for resolution at a public hearing that potentially have a limited scope of impact, and involve primarily questions of fact applicable to that limited scope of impact, while broader issues of public policy are secondary concerns.” 11-Z DCMR § 201.2. Pursuant to Subtitle Z § 201.7 of the Zoning Regulations, map amendments in rulemaking cases may be initiated by:

- a. Public agencies to amend the zoning map for a neighborhood, commercial district, or other geographic area encompassing multiple properties, unless determined otherwise by the Commission pursuant to Subtitle Z § 201.9; and
- b. Private persons, organizations, or other entities to amend the zoning map in cases where:
 1. The petitioner does not own all of the property proposed to be rezoned; or

2. The petitioner owns all of the property proposed to be rezoned, but the ownership pattern is geographically scattered or otherwise of a character that raises land use policy questions to a greater degree than highly localized issues of fact and effects on neighboring properties.

Finally, when the case “is set down for a public hearing, the Commission shall . . . confirm whether the matter will be heard as a contested or rulemaking case.” 11-Z DCMR § 500.13.

In this case, the only issues being considered by the Zoning Commission are legislative in nature, such as whether the proposed map amendment is consistent with the Comprehensive Plan and any other adopted public policies and active programs related to the Property. See 11-Z DCMR §§ 304.7(d) and 405.7(a). The petition was filed by a private entity that does not own the property to be rezoned, and the Zoning Commission correctly decided to set down the petition as a rulemaking case at the Zoning Commission’s September 17, 2018 public meeting.

On June 27, 2018, the Petitioner filed the map amendment petition, which included authorization from the District of Columbia, acting by and through DHCD, which states that “the authorization is contingent upon DHCD executing an agreement with the [Petitioner]...In the event that DHCD does not execute an agreement with the Petitioner regarding the Property, then the authorization...shall be null and void.” See Exhibit 2H of the record. Thus, the petition was clearly filed by a private entity, and not a public agency. Moreover, by letter dated March 21, 2019, DHCD restated that DHCD supports “High Street LLC’s petition to rezone the Property” and that DHCD is the owner of the Property. See Exhibit 38 of the record. Thus, the present Petition was properly filed under Subtitle Z § 201.7(b)(1) since it was filed by a private entity (High Street LLC) and the Petitioner does not own all of the property included in the application. The Zoning Commission has properly applied this section in a number of rulemaking map amendment cases, and has correctly applied it in this case. See Zoning Commission Case Nos. 18-19, 19-03, 17-27, and 17-17.

Moreover, the public has been fully aware of the fact that the Petition is being treated as a rulemaking. At the Zoning Commission’s public meeting of September 17, 2018, the Zoning Commission clearly indicated that the case is being processed as a rulemaking. For example, Commissioner May specifically commented “[t]his is being set down as a rulemaking, right?” To which Vice Chair Miller responded “Yes”. See September 17, 2018 Transcript at pg. 69. In addition, the Office of Zoning Secretary Ms. Schellin confirmed “[a]nd this is being setdown as a rulemaking case.” *Id.* at pg. 70. Moreover, the initial hearing notice which was mailed to all property owners within 200 feet of the Property and to Advisory Neighborhood Commission (“ANC”) 8A on October 18, 2018, and published in the D.C. Register on October 26, 2018, states that the public hearing “will be conducted in accordance with the rulemaking case provisions of the Zoning Commission’s Rules of Practice and Procedure, 11-Z DCMR Chapter 5.” See Exhibits 12 and 17 of the record. Witnesses were advised that they could submit written testimony and that oral testimony would be limited to a maximum of five minutes for an organizational witness and three minutes for an individual. See Exhibit 13 of the record. Thus, the public has been fully aware for nearly five months that the petition is being processed as a rulemaking case, and that they could participate in the public hearing on the petition.

The District of Columbia Court of Appeals has determined that “whether a proceeding is a contested case or rulemaking depends upon whether the facts to be adduced are adjudicative or legislative.” Chevy Chase Citizens Assoc. v. D.C. Council, 327 A.2d 310, 314 (D.C. 1974). In *Chevy Case*, the Court reasoned that

Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.

Id.; *see also*, Z.C. Order No. 17-17. The only issue in the present petition is an analysis of whether the proposed rezoning is not inconsistent with the Comprehensive Plan. Moreover, the petition only involves the determination of general facts such as where the property is located; how it is zoned; and what is the Future Land Use Map designation. In a similar map amendment rulemaking proceeding, the Zoning Commission similarly determined that “[t]he only intent of which the Commission is concerned, is the intent of the Comprehensive Plan.” *See* Z.C. Order No. 17-17. Tellingly, nothing in CARE’s submission or their testimony at the public hearing suggests that the proposed map amendment is inconsistent with the Comprehensive Plan or otherwise does not meet the legal standards for approval of a zoning map amendment. In addition, as stated by DHCD, “the requested map amendment will positively impact large numbers of persons and the public in general by enabling the delivery of much needed workforce housing and affordable housing in accordance with Mayor Bowser’s goal to create 36,000 residential units in the District—at least 12,000 of which will be affordable-by 2025.” *See* DHCD Support Letter, Exhibit 28 of the record. In addition, ANC 8A stated that “the RA-2 Zoning Map Amendment will help meet the District’s goal to provide affordable housing and offer homeownership options to more residents.” *See* ANC 8A Support Letter, Exhibit 32 of the record. Thus, the facts in this petition are legislative in nature and concern questions of law and policy. Indeed, the proposed text amendment submitted by the Office of Planning (“OP”) in Z.C. Case No. 19-05, which was set down by the Zoning Commission on March 25, 2019, clarifies and codifies that map amendments (not involving planned unit developments) are rulemakings and not contested cases.

CARE argues that the case should be a contested case since setting it down as a rulemaking somehow allegedly “caused people who would have normally opposed the project” to not participate. However, the actual facts and record demonstrate that this is not the case. The Petitioner participated in 17 community meetings. *See* Exhibit 40 of the record at pg. 6. In addition, the Petitioner deferred its hearing date from December 13, 2018 to March 21, 2019 in order to participate in additional community engagement. ANC 8A also submitted a resolution unanimously supporting the requested map amendment. *See* ANC 8A Support Letter, Exhibit 32 of the record. Finally, at the March 21, 2019, public hearing, a number of people testified in support of and in opposition to the map amendment petition. There was ample opportunity for people to voice their opinions about the map amendment petition. The record demonstrates that the Commission’s handling of the case as a rulemaking instead of as a contested case in no way precluded or inhibited people from learning about the petition or otherwise participating in the public hearing on this petition.

CARE also argues that the map amendment constitutes illegal spot zoning. To constitute illegal spot zoning, the Zoning Commission's action: (1) must pertain to a single parcel or a limited area ordinarily for the benefit of a particular property owner or specially interested party; **and** (2) must be inconsistent with the city's comprehensive plan, or if there is none, with the character and zoning of the surrounding area, or the purposes of zoning regulation, i.e., the public health, safety, and general welfare. *See Daro Realty v. District of Columbia Zoning Commission*, 581 A.2d 295 (1990). Thus, while the present petition includes only a single property, the map amendment petition is not inconsistent with the Comprehensive Plan, as outlined in the Petitioner's Statement in Support (Exhibit 2 of the record), as well as OP's Setdown and Hearing Reports (Exhibits 10 and 19 of the record), and supported by the ANC (Exhibit 32 of the record). Thus, the petition does not constitute illegal spot zoning.

2. RA-1 vs. RA-2

At the March 21, 2019 public hearing, the Zoning Commission requested that the Petitioner provided a comparison between the RA-1 and RA-2 zoning requirements and how the differences might impact potential development of the Property. Below is a chart outlining the relevant zoning requirements.

	<u>RA-1</u>	<u>RA-2</u>	<u>Difference</u>
FAR	0.9; 1.08 with IZ 11-F DCMR § 302.1	1.8; 2.16 with IZ 11-F DCMR § 302.1	0.9 and 1.08 with IZ
Height	40 feet and 3 stories, not including a penthouse 11-F DCMR § 303.1	50 feet 11-F DCMR § 303.1	10 feet
Lot Occupancy	40% 11-F DCMR § 304.1	60% 11-F DCMR § 304.1	20%
Rear Yard	20 feet 11-F DCMR § 305.1	A distance equal to 4 inches per 1 foot of principal building height but not less than 15 feet 11-F DCMR § 305.1	5 feet
Side Yard	One side yard must be provided unless the building contains three or more dwelling units per floor, in which case two side yards must be provided, each with the minimum distance equal to three inches per foot of	No side yard is required; however, if a side yard is provided, it shall be no less than four feet. 11-F DCMR § 306.2(b)	4 feet

	building height but not less than eight feet. 11-F DCMR § 306.2(a)		
Uses	Multi-Family Residential Use requires special exception approval from the Board of Zoning Adjustment. 11-U DCMR § 421.1	Multi-family residential use is permitted as a matter of right. 11-U DCMR § 401.1(a).	

As stated by Mayor Bowser in her State of the District Address “the number one issue on the minds of Washingtonians is affordable housing.” *See* Transcript of Mayor Bowser’s 2019 State of the District address (available at <https://dc.gov/release/mayor-bowser-delivers-2019-state-district-address>) In addition, the Mayor stressed the need to “create and preserve housing for teachers, police officers, firefighters, janitors, social workers, and everyone else who has a good job but also needs to be able to find an affordable home.” *Id.* Indeed, the DHCD solicitation for the Property specifically states that the developer “shall ensure that the units are marketed to public employees such as firefighters, teachers and police officers” furthering the District’s goal of creating more workforce housing. The Mayor also challenged the region to produce 240,000 additional units by 2025, with DC contributing 36,000 units—at least 12,000 of which will be affordable housing. Through its Property Acquisition and Disposition Division (“PADD”), DHCD seeks to stabilize neighborhoods by decreasing the number of vacant and abandoned residential properties and transforming them into homeownership opportunities for District residents of all income levels. As a result, the proposed map amendment to the RA-2 zone is consistent with the Mayor’s and DHCD’s goal of creating additional affordable housing on a vacant and underutilized property that is owned by the District.

The Property is designated as Moderate Density Residential on the Future Land Use Map (“FLUM”). The Comprehensive Plan specifically references the RA-1 and RA-2 zone as being consistent with the Moderate Density Residential category. *See* 10A DCMR § 225.4. However, the proposed Zoning Map amendment to the RA-2 zone will further the District’s goal of providing more workforce and affordable housing throughout the District. As shown in the above chart, a map amendment to the RA-1 zone would result in the provision of less housing as a matter-of-right, directly in contravention to the Housing Element of the Comprehensive Plan, which has an overarching goal to “[d]evelop and maintain a safe, decent, and affordable supply of housing for all current and future residents of the District of Columbia.” 10 DCMR § 501.1. In addition, as stated by ANC 8A, the “petition will further facilitate the development of mixed-income homeownership options in [the] community. The RA-2 Zoning Map Amendment would permit *matter-of-right* development of multi-family residential housing.” *See* ANC 8A Supper Letter, Exhibit 32 of the record (emphasis added).¹

¹ The Zoning Commission has correctly and repeatedly stated that map amendment cases address policy issues, and not specific projects or the design of projects. However, the Petitioner and ANC 8A have entered into a Memorandum of Understanding (“MOU”), which outlines the development parameters for any proposed project on the Property. *See*

The proposed zoning map amendment is also consistent with the surrounding neighborhood. As shown in the photographs included in the context matrix that is attached to the OP Hearing Report, the area surrounding the Property is developed with a variety of residential building types ranging from detached, semi-detached, row dwelling, and several low-rise apartment buildings similar in scale to the RA-2 standards. *See* OP Hearing Report, Exhibit 19 of the record. As stated by OP, the proposed rezoning to RA-2:

would expand the range of moderate density housing types permitted to be constructed as infill housing as a *matter-of-right* within a neighborhood characterized by a wide variety of housing types and vacant properties, from one-family detached to mid-rise apartment buildings, while at the same time increasing the number of affordable units available to existing and future District residents, consistent with the Comprehensive Plan, the Future Land Use Map and the Generalized Policy Map.

See OP Setdown Report, Exhibit 10 of the record (emphasis added).

The Property is also located within the Far Southeast and Southwest Area Element of the Comprehensive Plan. Priorities for redevelopment in the Far Southeast and Southwest Area include the following: safer streets, better schools, more jobs, and *improved housing choices*. 10A DCMR § 1800.5 (emphasis added). The Far Southeast and Southwest Area is expected to grow from about 22,800 households in 2005 to 30,100 households in 2025, an increase of about 32 percent. By 2025, the area is expected to have a population of almost 82,000. 10A DCMR § 1806.1. These projections assume that vacant and abandoned housing units in the Planning Area will be refurbished or replaced, and that new units will be developed on vacant sites. *Id.* Rezoning the Property to the RA-2 zone instead of to the RA-1 zone will help the District meet these goals.

As a result, the proposed Zoning Map amendment is not inconsistent with the Comprehensive Plan, and is consistent with the District's and DHCD's goals for development throughout the District. As stated above, the requested Zoning Map amendment will positively impact large numbers of persons and the public in general by enabling the delivery of much needed workforce housing and affordable housing in accordance with Mayor Bowser's goals.

Exhibit 34 of the record. The Petitioner has committed to the terms of MOU. The MOU includes a number of conditions about the ultimate design and use of any building to be constructed on the Property with respect to items such as the number of units, building height, and unit mix. However, the final design of a potential building for the Property has not been resolved and the Petitioner has committed to additional input from the residents of ANC 8A06. Thus, the Petitioner is not in a position to define the specific impacts on a particular building design. However, as indicated above, the RA-1 zone does not allow the matter-of-right development of multi-family residential use and would require Board of Zoning Adjustment relief.

Sincerely,

HOLLAND & KNIGHT LLP



By: _____
Kyrus L. Freeman
Joseph O. Gaon

cc: Stephen Mordfin, Office of Planning (*See Certificate of Service*)
Anna Chamberlin, District Dept. of Transportation (via email)
Advisory Neighborhood Commission 8A (*See Certificate of Service*)
Commissioner Ty'on Jones, SMD 8A06 (via email)

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2019, a copy of the foregoing Post-Hearing Submission was served on the following:

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Via Email

Advisory Neighborhood Commission 8A
2100-D Martin Luther King Jr. Avenue SE
Washington, DC 20020

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Joseph O. Gaon