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VIA IZIS

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

Re: Z.C. Case No. 20-21
Text Amendment to Create the Barry Farm (BF) Zone

Dear Members of the Commission:

The following is submitted on behalf of Preservation of Affordable Housing (“POAH”), in response to comments submitted by Mr. Aristotle Theresa on behalf of the Barry Farm Tenants and Allies Association (“BFTAA”), in the above-referenced case. As the Commission knows, in 2013, POAH and A&R Development Companies (“A&R”) (collectively the “Developer”) were selected by the District of Columbia Housing Authority (“DCHA”) to provide master planning and master developer services for the redevelopment of the Barry Farm neighborhood. Since then, POAH has worked with DCHA and the community, including former Barry Farm residents, on a redevelopment plan that will bring a new, mixed-use/mixed-income neighborhood containing 1:1 replacement public housing units, additional market-rate and affordable housing, private and community open space, and long-sought after neighborhood-serving amenities to residents of Barry Farm and the Anacostia community.

In 2014, the Zoning Commission (“Commission”) approved a Planned Unit Development and related map amendment (the “PUD”) for the redevelopment of the Barry Farm neighborhood.¹ Unfortunately, the approved PUD was appealed to the D.C. Court of Appeals (the “Court”), which ultimately vacated and remanded the case back to the Commission for “fuller consideration” of the issues identified in the Court’s decision.² On May 30, 2018, pursuant to 11-Z DCMR § 600.3,

¹ Z.C. Case No. 14-02.

² It is worth noting, that in its decision the Court explicitly stated that “[i]n remanding this case, we are not necessarily holding that the development may not go forward on this site, but rather, are simply requiring that the Commission give fuller consideration to and explain its determinations on the issues that we have identified, in accordance with the zoning and redevelopment regulatory scheme.” Thus, while BAFTAA’s counsel may try to argue that the Court found the Commission’s decision on the prior PUD to be in error, such is not the case whatsoever. The Court merely found that the Commission’s decision was in need for further explanation on certain specific issues.

DCHA and the Developer submitted a request for the Commission’s consent to withdraw the PUD. On June 11, 2018, the Commission consented to the request and the PUD was withdrawn.

On September 9, 2020, the Office of Planning (“OP”), submitted a proposed text amendment to create the Barry Farm (BF) zone (the “Text Amendment”).³ On September 14, 2020, the Commission set down the Text Amendment for a public hearing as a rulemaking case. *See* Tr. September 14, 2020 at p. 68. At the time of set down, no comments had been submitted to the record against the Text Amendment proceeding as a rulemaking case. On December 7, 2020, the Commission held a public hearing on the Text Amendment. At the hearing, BFTAA counsel, Mr. Aristotle Theresa, testified in opposition to the petition to create the BF zone. In his testimony, and in comments submitted to the case record at Exhibit 137, Mr. Theresa made the following three arguments:

- i. The Text Amendment is inconsistent with the Comprehensive Plan and the Barry Farm, Park Chester, Wade Road Redevelopment Plan (the “Barry Farm Small Area Plan”);
- ii. Any hearings on the area subject to the Text Amendment must be held in accordance with the Commission remand regulations; and
- iii. The area included subject to the Text Amendment involves the rights of BFTAA former Barry Farm residents and concerns matters of fact that necessitate a contested case proceeding.

As discussed below, Mr. Theresa’s arguments are, in part, factually incorrect and/or based upon an incomplete statement of facts. Most importantly, even if factually correct the arguments asserted by Mr. Theresa establish no legal justification that the Commission erred in any way when it conducted the public hearing on the Text Amendment as a rulemaking proceeding.

The proposed Text Amendment is not inconsistent with the Comprehensive Plan, as supplemented by the Barry Farm Small Area Plan, and other adopted public policies and active programs.

Mr. Theresa claims that the Text Amendment is inconsistent with the Comprehensive Plan because the petition does not adequately include “a statement of the purposes and objectives of this proposal and how it is consistent with the guidance and direction of the current Comprehensive Plan.” Mr. Theresa bases this statement on an assertion that the Text Amendment “ignores important portions of the [Barry Farm] Small Area Plan such as those providing for the avoidance of hardship for Barry Farm residents,” and does not “include references to ‘other information needed to understand the implications of the proposed changes’ such as the NCI [New Communities Initiative].” Mr. Theresa claims that the Text Amendment brought forward by OP lacks any project specifics such as affordability, unit sizes, resident hardship, and resident displacement, which, according to Mr. Theresa, “are all mandates of Policy FSS-2.3.1 and the NCI.”

³ Z.C. Case No. 20-21.

Policy FSS-2.3.1 (Barry Farm New Community) of the Far Southeast and Southwest Area Elements states the following:

Encourage the revitalization of Barry Farm in a manner which:

- a. Ensures one-for-one replacement of any public housing that is removed, along with measures to assist residents and avoid dislocation or personal hardship*
- b. Creates additional opportunities for workforce and market rate housing on the site, consistent with the goals of the city's New Communities program; and*
- c. Provides new amenities such as community facilities, parks, and improved access to the Anacostia River and Anacostia Metro Station.*

While some increase in density will be required to meet the one-for-one replacement requirement, consideration should be given to including nearby vacant land in the New Community site, so that densities may remain in the moderate to medium range.

Contrary to Mr. Theresa's statement that FSS-2.3.1 sets forth a mandate that the Commission shall follow, the express language of the policy is clearly stated in non-mandatory terms that "encourage" certain considerations as part of the revitalization of the Barry Farm neighborhood. The distinction between mandatory and non-mandatory language in the Comprehensive Plan is important, and one that the Court has acknowledged. *See Friends of McMillan Park et al v. Zoning Commission*, 149 A.3d 1027 (D.C. 2016). Notwithstanding, while the language of FSS-2.3.1 is not binding on the Commission, the Text Amendment brought forward by OP nonetheless does address these issues, that is to the extent they can be addressed through zoning. In its setdown report, OP states

"[t]he BF Zone would provide additional density at a moderate range and allow for the incorporation of retail and service uses to serve the daily needs of residents. The unit types allowed would provide the opportunity for a range of household sizes and incomes. Open space/park areas would accommodate a variety of community activities." See Exhibit 2 at p. 13

Further, in its hearing report OP states

"the text amendments will allow for the future redevelopment of Barry Farm, which will include new replacement housing for former Barry Farm residents and new mixed income housing in varying unit types complemented by neighborhood retail and service uses, green and open spaces, and will also preserve and reuse designated historic landmark buildings." See Exhibit 7 at p. 2

The OP reports also provides an evaluation of the Text Amendment against the specific recommendations of the Barry Farm Small Area Plan – Physical Plan recommendations.

While Mr. Theresa states that the Text Amendment lacks specifics about affordability and unit sizes, and fails to address other guidance in FSS-2.3.1, the Barry Farm Small Area Plan and the NCI, the following table clearly shows otherwise:

Policy FSS-2.3.1	Barry Farm Small Area Plan	NCI	Proposed Text Amendment
Increase in density in the moderate- to medium-range.	Create vibrant mixed-use main street at Firth Sterling that includes 4- to 5- story buildings with retail on ground floor and residential above.		BF-1A and BF-1B zones permit moderate density mixed use development of 4.0 to 6.0 FAR, respectively. BF-2 zone permits primarily moderate density row and semi-detached buildings with residential and live-work dwelling units and flats.
One-to-one replacement of public housing.	Create mixed-income community of mid-rise apartments and low-rise family housing which includes 373 replacement units together with new affordable and market rate units for a total of 1,110 units.	One-to-one replacement of existing affordable housing, no net loss of existing deeply subsidized units.	Affordability: § 1105 – Requirement to provide no less than 380 affordable replacement units with reporting requirements at the time of each building permit. Additional affordable housing requirements for penthouse habitable space. Text Amendment will generate approximately 900 dwelling units, at least 380 of which will be affordable replacement units (approx. 42%), and approximately 40,000 square feet of retail. (OP hearing report at Exhibit 7) Unit Type: BF zones will permit a range of unit types including multi-family (BF-1) and row and semi-detached flats and single family dwellings (BF-2)
Additional opportunities for workforce and market-rate housing.		Mixed-income housing.	
New amenities such as community facilities and parks.	Creating a linear park to provide needed open space, and 20,350 square feet of neighborhood retail.	New retail activity, public spaces, and public facilities.	Ground floor preferred use requirement in BF-1 zones for buildings with frontage along Firth Sterling Avenue, SE. Use limitations in the BF-2C zone to only permit Arts, Design, and Creation; Daytime Care; Public Education;

			<p>Entertainment, Assembly, and Performing Arts; General Institutional; Parks and Recreation; and Recreational Building or Use.</p> <p>Use limitations in the BF-2D zone (historic landmark buildings) to only permit those uses listed above, as well as residential use.</p>
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As the above table demonstrates, the Text Amendment is consistent with the non-binding policy guidance provided in FSS-2.3.1, as supplemented by the Barry Farm Small Area Plan, and is also consistent with the principles of the NCI. The Text Amendment, together with the related map amendment proposed in Z.C. Case No. 20-24, will facilitate moderate- to medium-density redevelopment of the Barry Farm neighborhood area with new mixed-use, mixed-income development. Consistent with the Barry Farm Small Area Plan, the redeveloped area will contain a minimum of 900 dwelling units, with the potential for additional units depending upon the final unit mix within new multi-family buildings in the BF-1 zone, and a mix of single-family dwellings and flats in the BF-2 zone. At least 380 units will be affordable replacement units. Consistent with the goals of the NCI, in addition to the affordable replacement units the Text Amendment will facilitate additional market-rate and workforce units in the Barry Farm neighborhood area. Finally, consistent with the Comprehensive Plan and other adopted public policies and active programs, the Text Amendment will allow for the construction of private and community amenities such as open space and community facilities, as well as the construction of new neighborhood-serving retail and service uses consistent with the Barry Farm Small Area Plan.

Mr. Theresa places the entire burden of ensuring consistency with the Compressive Plan and other adopted public policies and active programs entirely on the shoulders of the Commission by stating “[t]here is no text amendment, contested case or non-contested case, that could possibly be consistent with the Comprehensive Plan given the unique provisions applicable to a discrete grouping of residents (Barry Farm residents) laid out in the Comprehensive Plan and other active policy documents still applicable to the site.” To cure this, he argues that the redevelopment of the Barry Farm neighborhood area should involve a contested case PUD. These statements exhibit a misunderstanding of the Commission’s authority relative to the Comprehensive Plan and the applicability of the Comprehensive Plan to other District agencies, and a disregard of the fact that the PUD process “is available as an optional process that may be applied for by a property owner.” *See* 11-X DCMR § 300.9.

The Comprehensive Plan is not only applicable to actions taken by the Commission. Rather, the Comprehensive Plan guides the decisions of all District executive and legislative agencies. *See* 10A DCMR § 102.6(b). The Comprehensive Plan is “the guide for all District planning,” and “establishes the priorities and key actions that other plans address in greater detail. The broad direction it provides may be implemented through agency strategic plans, operational plans, long-range plans on specific topics (such as parks or housing), and focused plans for small areas of the city.” *See* 10A DCMR § 103.3. Certainly, there is an integral link between the

Comprehensive Plan and zoning, and the Commission has a critically important role in advancing the long-sought and necessary redevelopment of the Barry Farm neighborhood area. But the Commission does not bear the responsibility, nor have the authority, to fulfill every role involved in the redevelopment effort.

Comprehensive Plan policy FSS-2.3.1 encourages the Barry Farm revitalization to include “measures to assist residents and avoid dislocation or personal hardship,” and to provide “opportunity for residents to return/stay in the community.” For its part, the Commission can help address these issues by adopting the Text Amendment, which requires no less than 380 affordable replacement units with reporting requirements at the time of each building permit. There are several other agencies, entities, and mechanisms that will play essential roles in addressing these issues through the imposition of specific requirements. These include:

- U.S. Department of Housing and Urban Development approval of demolition and disposition of the Barry Farm Dwellings, with conditions requiring the one-for-one replacement of the demolished public housing units and compliance with other HUD/Federal public housing requirements;
- Master development agreement between Barry Farm Redevelopment Associates (“BFRA”) and the D.C. Housing Authority (“DCHA”);
- Tax regulatory agreements between Preservation of Affordable Housing entity (“POAH Entity”) and the D.C. Housing Finance Agency (“DCHFA”), where applicable;
- Low Income Housing Tax Credit Indenture of Restrictive Covenants between POAH Entity and D.C. Department of Housing and Community Development; and
- Affordable housing covenants between POAH and the D.C. Deputy Mayor for Planning and Economic Development (“DMPED”).

Another example for how these issues are being address is DCHA’s Resolution 16-06, Relocation and Re-entry Policies for NCI Developments (Exhibit A). These policies address, among other things, a residents’ eligibility for right of return, prohibits the establishment of any minimum work or service requirements as a condition for a residents’ return, establishes an intention to work with District and development partners to provide relocation support and establish resident return preferences for each NCI community. Finally, POAH continues to take steps to assist former Barry Farm residents and avoid personal hardship while they wait for the Barry Farm neighborhood to be redeveloped. As described in OP’s hearing report, POAH has provided relocation services to former Barry Farm residents including: counseling and other advisory services, housing choices, and payment of moving expenses. POAH also maintains former resident engagement on a continuing basis to provide assistance with quality of life issues while off-site. Engagement efforts include, but are not limited to, providing wellness calls and connecting residents to resources, connecting residents to employment opportunities, providing monthly updates through a variety of online and non-digital means, hosting events to maintain and strengthen the Barry Farm community, and hosting virtual quarterly meetings.

Together, the collective efforts of the Commission, DCHA, DMPED, the D.C. Council and POAH address the recommendations contains in FSS-2.3.1. Thus, while Mr. Theresa may prefer to see the redevelopment of Barry Farm carried out as a contested case PUD, a PUD is by no means

required, nor is it the only way to ensure consistency with the Comprehensive Plan and other adopted public policies and active programs.

Finally, in his comments Mr. Theresa accuses the Commission of carrying out retroactive legislation by applying the proposed Comprehensive Plan that is currently pending before the D.C. Council to the proposed Text Amendment. Mr. Theresa states “[a]llowing the Office of Planning to proceed with their Text Amendment based on predictions about the Comprehensive Plan re-write is unconstitutional. Such a maneuver undermines BFTAA’s reasonable reliance on existing Comprehensive Plan and statutory regimes.” The basis of Mr. Theresa’s comments on this issue is unclear given the Commission has not taken any action whatsoever on the Text Amendment, and there is no indication in the case record that OP has based its evaluation of the Text Amendment on the proposed Comprehensive Plan. On the contrary, OP’s setdown and hearing reports clearly set forth an evaluation of the Text Amendment against the current Comprehensive Plan, as supplemented by the Barry Farm Small Area Plan. Aside from a possible mere mention that the proposed Comprehensive Plan includes a change to the Future Land Use Map (“FLUM”) designation for the Barry Farm area, nothing in OP’s analysis of the Text Amendment relies upon the proposed Comprehensive Plan, nor does it need to. The Text Amendment is clearly not inconsistent with the current Comprehensive Plan, as supplemented by the Barry Farm Small Area Plan. The adoption of the proposed Comprehensive Plan, should it include the aforementioned FLUM amendment for the Barry Farm area, will only further the Text Amendment’s consistency with the Comprehensive Plan.⁴

Hearings on the Text Amendment are not bound by the Commission’s remand procedures

In his comments, Mr. Theresa asserts that in light of the Court’s remand of the prior PUD, any hearings held on the Text Amendment should be held in accordance with the Commission’s remand procedures under 11-Z DCMR, Chapter 9. There is simply no basis for this claim as the Text Amendment is an entirely different case than the prior PUD, which was legally withdrawn in accordance with the Zoning Regulations.

Had DCHA and the Developer continued to pursue the prior PUD following the Court’s remand, then the Commission would have had to proceed with that case in accordance with its remand procedures, which provide “regulations for the Commission to follow when the District of Columbia Court of Appeals remands a Commission decision for further proceedings.” 11-Z DCMR § 900.1. Indeed, it is clear that all of the procedures set forth in 11 DCMR § 901 describe how the Commission must proceed with a case that has been remanded by the Court. However, DCHA and the Developer did not continue its pursuit of the prior PUD. Instead, the prior PUD was withdrawn pursuant to 11-Z DCMR § 600.3, which states “[a]n applicant or petitioner may

⁴ On April 20, 2021, the Committee of the Whole of the D.C. Council voted 11-0 to adopt the Committee Print of the Comprehensive Plan Amendment Act of 2020 (B24-0001). The Committee Print included the amendment to the FLUM designation for the Barry Farm neighborhood area. The Committee report indicated support for the proposed FLUM amendment, and stated the following: “The northern portion of the Barry Farm site (#9825) has proposed FLUM designations of Commercial Medium Density / Residential Medium Density. These designations will support a request for map amendments from the Zoning Commission to advance a proposal consistent with the 2006 Small Area Plan. The Committee supports this development proposal and the proposed FLUM request. Additional policy language was included in the Far Southeast and Southwest Element to direct continuing, meaningful public engagement with the residents, neighborhood and stakeholders as the Barry Farm development moves forward. Emphasis added.

withdraw, respectively, an application or petition at any time prior to the issuance of the Commission's written final decision and order," subject to conditions. As stated above, the Court vacated and remanded the prior PUD back to the Commission for further consideration of the issues raised in the Court's decision. Thus, the action of the Court nullified the Commission's order. At the Commission's public meeting on June 11, 2018, the D.C. Office of Attorney General acknowledged DCHA and the Developer's right to withdraw following the nullification of the prior PUD, stating "...the PUD process is intended to be a voluntary one and the applicant, now that they're set back by the court and the final order has been vacated, the rules provide they have a right to withdraw, if you consent to it, ...". See Tr. June 11, 2018 at p. 36. At the same meeting, the Commission consented to the withdrawal of the prior PUD.

Finally, as stated above, withdrawal of an application is subject to the Commission's consent, and to certain conditions. One such condition is that "a new application or petition shall not be accepted for filing for at least ninety (90) days after the date the written statement of withdrawal is filed." 11-Z DCMR § 600.3(d). DCHA and the Developer filed its written statement of withdrawal on May 30, 2018, and the Text Amendment was filed by OP on September 4, 2020, nearly 28 months after the withdrawal of the prior PUD.

Based on the foregoing, since the prior PUD has been withdrawn the Barry Farm neighborhood area is no longer subject to the prior PUD, nor to the Commission's remand procedures of 11-Z DCMR. The Text Amendment is an entirely new case, that was filed by OP over two years after the withdrawal of the prior PUD, and completely separated and apart from the prior PUD. As such, the Commission was correct in its handling of the Text Amendment as an entirely new case under its rulemaking procedures of 11-Z DCMR, Chapter 5

The Text Amendment public hearing was correctly carried out as a rulemaking as it was submitted by OP and concerns matters that are legislative in nature.

Mr. Theresa argues that the Text Amendment should have been processed as a contested case proceeding because the prior (vacated and withdrawn) PUD was handled as a contested case proceeding. In support of his statements, Mr. Theresa primarily relies upon a prior appeal case that has an entirely different fact pattern as the Text Amendment. Specifically, the case cited by Mr. Theresa involved the Commission's approval of a PUD as a rulemaking. That PUD involved a 2.2 acre, privately-owned site at Pennsylvania and Potomac Avenues, SE. On appeal, the Court vacated the Commission's decision on the basis that the PUD was a contested case because it was "primarily concerned with the immediate 'legal rights, duties, or privileges of specific parties,' rather than with general policy of future applicability." *Capitol Hill Restoration Soc. V. Zoning Commission*, 287 A.2d 1010 (D.C. 1972). Subsequently, the same applicant as the vacated PUD filed a map amendment, which the Commission approved following a contested case proceeding. The map amendment was appealed by the same petitioner that appealed the PUD. On appeal, despite the Commission handling the map amendment as a contested case, counsel for the Commission argued that the case should be dismissed for lack of jurisdiction because the case really was a rulemaking and not a contested case. The Court rejected this argument because: (i) the Commission had already treated the case as a contested case, and (ii) the Court had previously found the earlier PUD by the same applicant on the same parcel of land to be a contested case.

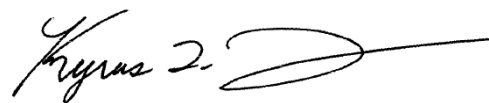
There are significant factors that distinguish the Text Amendment from the case discussed above. First, the current Zoning Regulations are clear that amendments to the text of the Zoning Regulations are rulemakings. *See* 11-Z DCMR § 201.5(a). Secondly, unlike the case discussed above, the Text Amendment was submitted by OP, while the prior (vacated and withdrawn) PUD was submitted by DCHA, POAH, and A&R. Third, the area that is subject to the Text Amendment is comprised of multiple properties and of considerable size, being over 25 acres, while the case discussed above involved a single, 2.2 acre site. Lastly, consistent with 11-Z DCMR § 201.5, the primary issues of the Text Amendment relate to broad, legislative policy judgments that potentially affect large numbers of persons, property, or the general public, rather than individual parties.

It is well known that the District continues to face a significant housing crisis. In addition to developing programs that mandate and/or incentivize the private sector development of housing and affordable housing, the District must also evaluate how best to utilize its own significant land holdings to help solve the current citywide housing crisis. Indeed, the Comprehensive Plan Land Use and Housing Elements specifically advocate for the efficient use of publicly owned sites for significant housing. Thus, the Commission's consideration of the Text Amendment relates to policy issues that go beyond a single party, or the interests of a specific group of individuals. Rather, in reviewing the Text Amendment the Commission is weighing legislative facts to make a determination of law and policy whether the creation of the new BF zone will best utilize this 25 acre, publicly-owned site to advance the District's citywide housing goals in a manner that is not inconsistent with the Comprehensive Plan, as supplemented by the Barry Farm Small Area Plan, and in line with NCI principles. Note, this will not be the first time that the Commission, through rulemaking proceeding, has adopted a text amendment to create an entirely new zone to address broader citywide, or neighborhood-wide policy issues. The Commission has taken this approach in its adoption of the Saint Elizabeths (StE), Southeast Federal Center (SEFC), Hill East (HE) zones, and Walter Reed (WR) zones. While a difference between these zones and the proposed BF zones is that the area subject to the Text Amendment already had occupied residential uses, this does not automatically make this proposal an adjudicatory proceeding. Rather, it simply means the Commission should consider the needs of those that resided in the Barry Farm neighborhood area as part of its consideration of the larger land use policy issues related to housing and equitable access to neighborhood services in relation to the redevelopment of the Barry Farm neighborhood area.

Thank you for your consideration of these comments

Respectfully Submitted,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read "Kyrus L. Freeman", with a long horizontal flourish extending to the right.

Kyrus L. Freeman