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December 2, 2022

VIA IZIS

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

**Re: Applicant's Response to OAG's Post-Hearing Submission
Z.C. Case No. 22-11
Consolidated PUD and Related Zoning Map Amendment from the MU-12 Zone to the
MU-10 Zone at 807 Maine Avenue, SW (Square 439-S, Lot 15)**

Dear Members of the Zoning Commission:

On behalf of MCRT Investments LLC (the "Applicant"), we herein submit the following responses to the Office of the Attorney General's ("OAG") Post-Hearing Statement dated November 28, 2022 (Exhibit 87).

1. OAG Assertion: In order to claim IZ as a PUD public benefit, a PUD with a map amendment should provide at least the amount of affordable housing that would be required for the PUD's requested additional density based on the IZ Plus formula for a matter-of-right project in the requested zone.

Applicant's Response: The IZ Plus regulations specifically state that IZ Plus "shall not apply to a map amendment that is related to a PUD application." *See* Subtitle X § 502.2(a). Accordingly, OAG again incorrectly applies the IZ Plus standard in determining whether the proffered affordable housing should be considered a public benefit under the PUD.

During the Zoning Commission's public hearings on IZ Plus (Z.C. Case No. 20-02), OP testified on this exact issue, stating that "OP does not propose that Expanded IZ¹ would apply any PUDs. Existing, proposed, or future PUDs would continue to be subject to the regular IZ requirements and any PUD-related negotiations to provide additional IZ units and other benefits and amenities to the community." *See* Z.C. Case No. 20-02, Public Hearing Transcript, November 16, 2020. OP also stated that "PUDs

¹ At the time of the IZ Plus hearing, OP referred to the proposed text amendments as "Expanded IZ."

would continue to be the District’s preferred tool to both increase new housing and affordable housing above the regular IZ requirements and to analyze broader public benefits and amenities.” *Id.*

In addition, in the Notice of Final Rulemaking adopting the IZ Plus regulations, the Zoning Commission specifically rejected the Committee of 100’s recommendation that the Commission apply the IZ Plus standards to PUD-related map amendments, which the final text specifically excludes. *See* Z.C. Notice of Final Rulemaking in Z.C. Case No. 20-02 at page 6.

Finally, OP specifically stated during the public hearing in this case that the intent of IZ plus was to bring zoning map amendments into the IZ program to ensure that a map amendment to a higher density without a PUD would provide IZ units beyond the minimum of IZ required under existing regulations, as there would be no PUD benefits to be derived from a more than likely matter-of-right development, and that would mean no benefits and amenities package. So, IZ Plus was never intended to be the beginning minimum point for a PUD.” *See* Public Hearing Video, November 14, 2022 at approximately 2:44.

Accordingly, in applying IZ Plus standards to the PUD-related zoning map amendment, OAG completely disregards the existing Zoning Regulations, OP’s explicit guidance, and the Zoning Commission’s ultimate determination that IZ Plus would not apply to PUD-related zoning map amendments. The Zoning Commission should follow the existing Zoning Regulations unless and until they are changed. If OAG wants to establish a new baseline for what should be considered an affordable housing benefit under a PUD, then OAG should submit a text amendment to change the Zoning Regulations to do so, instead of masking their policy views under the guise of legal analysis.

2. OAG Assertion: OAG’s recommended 21% set-aside is based on the IZ Plus calculation in which the proposed PUD’s IZ Plus set-aside would be based on the bonus density utilized by the PUD.

Applicant’s Response: As stated above, OAG incorrectly applies the IZ Plus standard to evaluate the PUD’s affordable housing proffer. In doing so, OAG also presents incorrect IZ Plus calculations and erroneously treats building projections and penthouse habitable space as PUD bonus density, which is not density gained through a PUD as it is always available even under matter-of-right standards under existing zoning. Indeed, OAG has not, and cannot, cite any provision in the Zoning Regulations that support its position that projections and penthouse habitable space are considered bonus density in any IZ calculation, whether under matter-of-right, IZ Plus, or a PUD.

The correct analysis for determining whether affordable housing can be considered a public benefit under a PUD is whether the affordable housing exceeds the amount that would be required under existing zoning. *See* Subtitle X § 305.5(g), which states that “[a]ffordable housing provided in compliance with [IZ] shall not be considered a public

benefit except to the extent it exceeds what would have been required through matter-of-right development under existing zoning.” In this case, the proffered affordable housing is well above what would have been required through matter-of-right development under the existing MU-12 zone, and is therefore properly classified as a public benefit as follows:

The existing MU-12 zone permits 3.0 FAR as an IZ development. Assuming an entirely residential project and full utilization of bonus density, the IZ set-aside requirement for a matter-of-right development would be approximately 5,916 to 8,874 square feet of gross floor area (“GFA”) generated by the base building (excluding penthouse and projections)², depending on construction type.

In contrast, the IZ proffered for the PUD is approximately 29,226 square feet of GFA generated by the base building (excluding penthouse and projections). Thus, consistent with the actual text of the Zoning Regulations, the affordable housing proffer qualifies as a public benefit because it exceeds the amount of affordable housing that “would have been required through matter-of-right development under existing zoning.”

The Zoning Regulations have well-established standards for evaluating a PUD and clearly define the extent of affordable housing that qualifies as a PUD public benefit. The existing regulations do not include the use of IZ Plus to determine baseline affordable housing for a PUD. If that were the Commission’s intent when preparing and adopting the PUD or IZ Plus regulations, then the Zoning Regulations would reflect such language. Quite the opposite, PUD-related map amendments are not subject to IZ Plus because a PUD’s affordable housing proffer is part of a larger package of public benefits and project amenities that are negotiated during the PUD process, and are collectively balanced against the PUD’s requested development incentives and potential adverse impacts. The Zoning Regulations clearly articulate the standards by which a PUD shall be evaluated, and those standards should be followed without further distraction by OAG.

3. OAG’s Assertion: The Applicant and the Commission suggested that OAG should have used the MU-8 zone for its calculations based on the Applicant’s assertion that OP would not have supported a non-PUD map amendment to the MU-10 zone, but only to the lower density MU-8 zone, and as such the Commission could not have approved a non-PUD map amendment to the MU-10 zone. OAG rejects this argument on the basis that the Commission has the exclusive authority to decide zoning applications, including map amendments, and notes that using the MU-8 zone would not relieve the PUD from providing a higher IZ set-aside.

Applicant’s Response: OAG misunderstood or intentionally mischaracterized the Applicant’s assertion at the public hearing. The Applicant did not state that the

² For purposes of this analysis, the set aside requirement for penthouse and projections is excluded to isolate the difference between IZ set asides under existing zoning, IZ+, and the proposed PUD for comparison purposes. The IZ set aside for penthouse and projections is design specific and could vary considerably between all three scenarios.

Commission could not approve a stand-alone map amendment to the MU-10 zone at the PUD Site. Rather, the Applicant's counsel stated that OP had advised the Applicant that it was unlikely to support a stand-alone map amendment to the MU-10 zone at the PUD Site, and that based on this advice, the Applicant would not have filed a stand-alone map amendment to the MU-10 zone. In response to questions from the Zoning Commission at the public hearing, OP confirmed the Applicant's statement. Accordingly, OAG's statement that the Zoning Commission has the exclusive authority to decide zoning applications is irrelevant since the Applicant would not have filed a stand-alone zoning map amendment in the first place.

Further, OAG seemingly takes the position that just because the MU-10 zone is identified in the Framework Element as being consistent with the Medium Density Commercial FLUM designation, that "there does not appear to be a legal basis on which the Commission could have denied a non-PUD map amendment to the MU-10 zone." See OAG Post-Hearing Submission at p. 3.³ However, Section 228.1(e) of the Framework Element states that "[t]he designation of an area with a particular [FLUM] category does not necessarily mean that the most intense zoning district described in that category is automatically permitted." The Commission has applied this logic in multiple cases, stating that it may approve a zone as part of a PUD that it may not otherwise approve as a stand-alone map amendment because a PUD "allows the Commission to review the design, site planning, and provision of public spaces and amenities against the requested zoning relief." See Z.C. Order No. 05-42, Finding of Fact No. 31. Thus, OAG's assertion that the Zoning Commission would approve a map amendment to the MU-10 zone, even if OP opposed such application, is without merit.

As stated above, in its submission OAG asserted that "the Applicant and the Commission suggested that OAG should have used the MU-8 zone for its calculations." To be clear, the Applicant does not agree with OAG's assertion that IZ Plus should be the baseline for a PUD. In referring to the MU-8 zone, the Applicant was pointing out that if OAG's goal was to compare the amount of affordable housing proposed for the PUD to what might be achievable under a stand-alone IZ Plus map amendment, the comparison should be based on a realistically achievable zone category. Nonetheless, in doing the IZ Plus calculation using the MU-8 zone OAG once again applied the wrong IZ Plus calculations, and incorrectly treated the building projections and penthouse habitable space as PUD bonus density. Furthermore, when the Applicant provided IZ Plus calculations for the MU-8 zone in its rebuttal at the public hearing, it demonstrated that the affordable housing proposed under the PUD exceeds what would be required under an MU-8 IZ Plus development. See Exhibit 85, p. 3, which shows: (i) an 18% IZ Plus requirement for Type I construction (25,557 square feet GFA); and (ii) a 20% IZ Plus requirement for Non-Type I construction (28,397 square feet GFA), both of which are less than the 29,226 square feet of GFA proposed for affordable housing in the PUD (excluding penthouse and projections). OAG has not pointed to any provisions in the Zoning Regulations indicating that the Applicant's calculations are incorrect.

³ The Applicant notes the inconsistency in OAG comments, which also state that the "Commission has the exclusive authority to approve or deny a zoning application" (emphasis added). See OAG Post-Hearing Submission at p. 3.

4. OAG's Assertion: OAG believes that, to provide a truly meaningful affordable housing benefit, the PUD's IZ proffer should be increased to at least 21% of the residential GFA based on the IZ Plus baseline. Without that increased proffer, OAG asserts that the PUD does not satisfy the PUD evaluation criteria and the Commission should deny the PUD unless the IZ set-aside proffer is increased.

Applicant's Response: In order to advance its policy perspective, OAG completely ignores the actual text of the Zoning Regulations. The Zoning Regulations state that "[i]n deciding a PUD application, the Zoning Commission shall judge, balance, and reconcile the relative value of the public benefits and project amenities offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case." Subtitle X § 304.3. However, OAG completely ignores Subtitle X § 305.5, which states that public benefits of a proposed PUD may be exhibited and documented in any of 18 different categories, of which affordable housing is only one of the many types of PUD public benefits. Indeed, in this case the PUD's overall benefits and amenities package far outweighs the degree of development incentives and technical zoning flexibility requested. The PUD requests a zoning map amendment to the MU-10 zone, which provides a gain of 5.21 FAR above existing zoning. The only other flexibility requested was for lot occupancy, side yard, and rear yard. In contrast, the public benefits are extensive, and include the following:

- Superior urban design, architecture, and site planning;
- Approximately \$1,000,000 in site and landscape improvements;
- Over 170% more housing than permitted under existing zoning;
- Over 200% more affordable housing than permitted under existing zoning;
- Three bedroom units (six market-rate and three IZ);
- Sustainable design, including LEED Gold, green roof and bioretention areas, rooftop solar, EV-charging stations and EV-ready infrastructure, 100% electric appliances, electric bike charging, and a variety of resilient design strategies;
- A \$75,000 contribution for public art on Maine Avenue;
- A \$150,000 contribution to Jefferson Middle School; and
- A \$100,000 contribution to Habitat for Humanity.

Accordingly, OAG ignores the fact that the affordable housing proffer is only one of many public benefits in this project, and that the standard of review requires balancing all of the benefits and amenities with the degree of incentives and adverse impacts. If OAG believes that as a policy matter the only public benefit that this PUD (or others) should be required to provide is 21% IZ, then OAG should submit a text amendment to revise Subtitle X § 305.5 of the Zoning Regulations to eliminate the 17 other types of public benefits listed.

The amount of affordable housing that should be provided in a PUD is up to the Zoning Commission to determine, and is not mandated by OAG. Indeed, in *Beloved Cmty. All. v. D.C. Zoning Comm'n*, No. 21-AA-52, 2022 WL 16641562 (D.C. Nov. 3, 2022), p.

19, a case cited in OAG’s submission, the D.C. Court of Appeals stated that “[a]lthough ‘petitioner (and others) may believe that the [inclusionary zoning] set-aside is not sufficient, **we [i.e., the Court of Appeals] have no authority to second-guess the Commission’s judgment on such policy matters.**” Emphasis added (citing *Cole v. D.C. Zoning Comm’n*, 210 A.3d 753, 762-763, n.12 (D.C. 2019), which upheld the Commission’s approval of a PUD application that set aside 8% of the residential GFA for IZ units and refrained from “second-guess[ing] the Commission’s judgement on such policy matters.” The Court’s findings in *Beloved* and *Cole* on affordable housing are directly relevant in this case, and the Applicant believes the record supports the Zoning Commission finding that the Applicant’s proposed IZ proffer, combined with the other proffered public benefits and amenities, justify approval of this application.

The Applicant appreciates the ability to provide responses to OAG’s post-hearing statement and the Zoning Commission’s continued review of this application.

Sincerely,

HOLLAND & KNIGHT LLP

By: 
Kyrus L. Freeman
Jessica R. Bloomfield

Attachments

- cc: Certificate of Service
- Joel Lawson, Office of Planning (via Email)
- Karen Thomas, Office of Planning (via Email)
- Aaron Zimmerman, DDOT (via Email)
- Emma Blondin, DDOT (via Email)
- Alexandra Cain, OAG (via Email)

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2022, a copy of the Applicant's Response to OAG's Post-Hearing Submission was served on the following via email:

1. Ms. Jennifer Steingasser
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2. Advisory Neighborhood Commission 6D
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