



December 2, 2022

Zoning Commission of the District of Columbia  
441 4<sup>th</sup> Street, NW – Suite 210  
Washington, DC 20001

**VIA IZIS**

**Re: Z.C. Case No. 96-13A of Street Retail, LLC – Modification of Significance of a Planned Unit Development (“PUD”)**

Dear Members of the Zoning Commission (the “**Commission**”):

The Equitable Land Use Section of the Office of the Attorney General (“**OAG**”) submits the following comments in opposition to the Inclusionary Zoning (“**IZ**”) proffer proposed for the PUD Modification of Significance, which includes a map amendment, requested in Z.C. Case No. 96-13A. OAG asserts that the proposed IZ proffer is insufficient because the Modified PUD:

- Fails to set aside “at least one third (33 percent) of housing units as affordable to very-low- and extremely-low-income households”, as required by the Comprehensive Plan (Title 10A DCMR, the “**CP**”, §§ 2503.2 and 2503.3) for a property in a Future Planning Analysis Area (“**FPAA**”) where the mandatory “planning for equitable development” has not been completed (*Id.*); and
- Separately from the FPAA requirements, fails to meet or exceed the 18% IZ set-aside that would be required by the IZ+ formula for the same increase in density for a matter-of-right project pursuant to a map amendment.

OAG therefore recommends that the Commission deny the Modified PUD unless and until it:

- (1) Either provides a 33% affordable housing set-aside for very-low-income and extremely-low-income households or it fulfills the required FPAA equitable development planning analyses; and once has fulfilled this requirement, then
- (2) *At least* matches the 18% IZ set-aside that would be required for a matter-of-right project with the same square footage and uses.

**I. FPAA Requirements for Equitable Development Planning**

**a. Modified PUD Site**

The proposed Modified PUD, located at 5333 Wisconsin Avenue, N.W., in the Friendship Heights neighborhood, falls within the Rock Creek West Planning Area and the Upper Wisconsin Avenue, N.W., Corridor FPAA delineated on the CP’s Generalized Policy Map (“**GPM**”). The [2019 Housing Equity Report](#)<sup>1</sup> reported that the Rock Creek West Planning Area had the fewest dedicated affordable housing units of the District’s ten Planning Areas, comprising less than one percent of

<sup>1</sup> DHCD & OP, *Housing Equity Report: Creating Goals for Areas of Our City*, October 2019.

the District’s total dedicated affordable units, although it has 19% of the District’s land area and houses 13.6% of the District’s population.<sup>2</sup> The [2021 Rock Creek West Roadmap](#)<sup>3</sup> found that low-income residents in Rock Creek West are more severely burdened by housing costs than their counterparts across the District and that “residents with lower incomes have fewer opportunities to live in Rock Creek West than other neighborhoods in the District” (RCW Roadmap at 6, 9). The Modified PUD’s site is particularly underserved with affordable housing infrastructure - the [2021 ULI Reimagining Friendship Heights Report](#)<sup>4</sup> found that the Friendship Heights neighborhood has “no affordable or IZ units” (Friendship Heights TAP at 25). Reflecting the high housing costs and paucity of affordable units, the 2019 Equity Report imposed the highest share of the 12,000 new dedicated affordable housing units to be provided by 2025 on the Rock Creek West Planning Area – 1,990 affordable units (Equity Report at 5). The 2021 Rock Creek West Roadmap specifically linked these new dedicated affordable housing units with CP changes to create the GPM’s FPAAs and to increase the density authorized by Future Land Use Map (“FLUM”) for key sites within these FPAAs:

“a large majority of these affordable units, about 70%, could be added in Future Planning Analysis Areas along Connecticut and Wisconsin Avenues (see map on page 9 [*sic 11*]). The District is undertaking **three neighborhood plans** in these areas through 2023, **which will be critical to harnessing opportunities to add market rate and affordable housing in Rock Creek West**” (RCW Roadmap, at 5 and 11, emphasis added).

The 2021 FLUM updates granted additional available density to key properties in the Wisconsin and Connecticut Avenue FPAAs. The 2021 Rock Creek West Road Map makes clear that the new potential density in FPAAs are “an opportunity to advance the District’s housing goals in the Planning Area with the least affordable housing.” (RCW Roadmap, at 11). The Modified PUD’s site was one such property, with its FLUM designation increasing from Medium Density Commercial/Residential to High Density Commercial/Residential, authorizing significantly more density within the context of planning for equitable development, specifically affordable housing infrastructure.

**b. Future Planning Analysis Areas**

FPAAs are “large tracts or corridors where future analysis is anticipated to ensure adequate planning for **equitable development**” (CP § 2503.2, emphasis added), The CP’s Framework Element defines “equitable development” as:

“a participatory approach for **meeting the needs of underserved communities** through policies, programs and/or practices that reduce and ultimately eliminate disparities while fostering places that are healthy and vibrant. **Equitable development holistically considers land-use, transportation, housing, environmental, and cultural conditions, and creates access to education, services, health care, technology, workforce development, and employment opportunities.** As the District grows and changes, it must do so in a way that encourages choice, not displacement, and builds the capacity of vulnerable, marginalized, and low-income communities **to fully and substantively participate in decision-making**

---

<sup>2</sup> Equity Report at 4; Rock Creek West Planning Area is 13 miles out of the District’s 61 square miles (CP §§ 205.1 and 2300.1) and has a population of 93,125 of the District’s 684,498 residents ([OP, Demographic Characteristics of the District of Columbia by Area Element](#)).

<sup>3</sup> DHCD, OP, & DMPED, *Rock Creek West Roadmap*, December 2021.

<sup>4</sup> Urban Land Institute Technical Assistance Panel Report, April 2021.

**processes and share in the benefits of the growth**, while not unduly bearing its negative impacts” (CP §213.7, emphasis added).

To guarantee planning for equitable development, the CP established that for properties in a FPAA, a “two-step process must occur: planning analyses and then appropriate rezoning” (CP §2503.3).

The first step is the preparation of the planning analyses, which consider the needs of the community and the District, and which “generally establish guiding documents [for future development]. Such analyses **shall precede any zoning changes** in this area” (CP § 2503.2, emphasis added). Additionally,

“The planning process should evaluate current infrastructure and utility capacity against full build out and projected population and employment growth. Planning should also focus on issues most relevant to the community that can be effectively addressed through a planning process.... The evaluation of current infrastructure and utility capacity should specify the physical or operational capacity both inside the boundaries and any relevant District-wide infrastructure available” (CP § 2503.2).

This first step of planning for equitable development ensures that any population growth that comes with new developments in the FPAA will not unduly strain or inequitably impact city-wide infrastructure, including affordable housing, and utilities which may be located outside the FPAA (*see OP Webinar* at 1:04:53). The CP underscores the centrality of affordable housing to the infrastructure planning required for FPAAs by limiting the only exception from the requirement for the initial planning analyses to projects providing dedicated affordable housing in the same ratio as the Mayor’s 2019 goal that 12,000 of the 36,000 housing units to be created by 2025 (2019 Equity Report) be dedicated affordable units:

“To advance deeply affordable housing production, proposals that reserve **at least one third** (33 percent) of housing units as affordable to very-low- and extremely-low-income households for the life of the building in Future Planning Analysis Areas with high housing costs and few affordable housing options may proceed in advance of planning analyses” (CP § 2503.3, emphasis added).

As discussed above, the 2019 Equity Report, the 2021 RCW Roadmap, and the 2021 ULI Friendship Heights Report detailed how the Upper Wisconsin Ave FPAA that includes the Modified PUD’s site has some of the highest housing costs and fewest affordable housing options in the entire District. Planning is required to ensure the FPAA’s affordable housing goals are met. By allowing zoning changes to proceed without the necessary planning, affordable housing may not be included in the numbers anticipated by the 2019 Equity Report and the RCW Roadmap. For example, the 2021 CP increased the FLUM density category for two properties along Wisconsin near the proposed modified PUD, which are both in the process of being redeveloped. One development promised to provide 11% inclusionary units, but this was not an enforceable condition of the Board of Zoning Adjustment Order but instead a provision in a Memorandum of Understanding with the ANC.<sup>5</sup> The other development plans to provide 10% and is not seeking additional density but instead is redeveloping as a matter-of-right.<sup>6</sup> If all, or many, other properties within the FPAA are similarly developed, how will Rock Creek West be able to reach its affordable housing goal? For the District to “leverage every tool and resource available” to “harness[] the

<sup>5</sup> See BZA Case No. 20638 and Mazza Ribbon presentation to ANC 3E, July 2022, [220720\\_Mazza\\_ANC3E\\_DesignOverview.pdf](#).

<sup>6</sup> See BZA Case No. 20638, Exs. 48 and 28B. See also Mazza Ribbon presentation to ANC 3E, July 2022, video recording at 57:50 and 1:03:33, [ANC3E\\_Meeting\\_General\\_20220720.mp4 on Vimeo](#).

opportunity to add up to 2,400 affordable units in Rock Creek West,” planning for equitable development planning **must** precede zoning changes that seek to use the higher FLUM density that was predicated on planning preceding zoning changes (RCW Roadmap at 12).

The Modified PUD’s site represents one of the best locations to realize equitable development given the dearth of dedicated affordable housing in its Friendship Heights neighborhood and the increased density authorized by the increased FLUM designation that the RCW Roadmap directly tied to the FPAA with its central role in creating the new dedicated affordable housing needed for the Rock Creek West Planning Area.

The Office of Planning (“OP”) is currently working on its Wisconsin Avenue, N.W., Development Framework Study, which includes the Modified PUD’s site. OP has stated publicly that this ongoing Framework Study, which it anticipates completing sometime in spring 2023, will **not** include the FPAA’s required equitable development analyses of impacts on infrastructure and utilities. OP described the Framework Study as an initial stage in assessing the full build-out of the FPAA, which will then inform the FPAA equitable development planning analyses to be conducted separately “later” in 2023.<sup>7</sup>

**c. FPAA Equitable Development Planning Analyses Required for PUDs**

The CP permits a PUD in a FPAA to take advantage of an increased FLUM designation by seeking a zoning change without the prior completion of the equitable development planning analyses – but **only** if the PUD incorporates that equitable development planning into the PUD:

“The intent is that **both steps** of the two-step process **must** occur: planning analyses and then appropriate rezoning, although in the case of a Planned Unit Development **the planning analyses and rezoning may be combined**” (CP § 2503.3, emphasis added).

Thus, a PUD in an FPAA that is proposing a zoning change under an increased FLUM must include equitable development planning analyses that PUDs located outside of FPAAs do not need to complete. These equitable development planning analyses must include consideration of both the impacts of the PUD on the FPAA’s and District’s infrastructure, particularly affordable housing, and the needs expressed by the community as part of that planning process. For a PUD in an FPAA that has high housing costs and a dearth of affordable housing, like the Upper Wisconsin Ave FPAA, these equitable development analyses should include impacts on affordable housing infrastructure. The analyses must determine where the FPAA’s anticipated affordable housing will be built, in what quantity, and the means for creating these units.

**d. The Modified PUD Fails to Provide the Required FPAA Equitable Development Planning**

The Modified PUD seeks to take advantage of the increased density authorized by the updated FLUM. Yet neither the Application nor the OP Reports provide any equitable development planning analyses that reflect the Modified PUD’s site in an FPAA and that differ in any way from an evaluation of a PUD proposed for a site not subject to an FPAA. OP has not even completed the Development Framework Study that OP has stated will only be the initial stage for the FPAA equitable development planning analyses that will be completed later in 2023. Only this second

---

<sup>7</sup> [OP public webinar on Wisconsin Avenue, N.W., Development Framework Study, November 9, 2022, at 1:04:53.](#)

stage will meet the FPAA requirements to evaluate the current city-wide infrastructure and utility capacity against full build out of the FPAA.

**e. The Modified PUD Must Provide Required FPAA Equitable Development Planning Analyses**

OAG asserts that the Modified PUD has several options to comply with the FPAA equitable development planning requirements:

- The Modified PUD could qualify for the FPAA planning exemption by reserving 33% of the housing units for very-low- and extremely-low-income households (50% and 30% of Median Family Income (“MFI”), respectively); or
- The Commission may postpone or continue the public hearing on the Modified PUD until:
  - OP completes the required FPAA equitable development planning analyses, which OP anticipates will be completed “later in 2023”; or
  - The Applicant completes the required FPAA equitable development planning analyses as part of the PUD application, provided that these analyses evaluate the current and future infrastructure capacity, particularly affordable housing, given that the only exemption from this equitable development planning requirement requires providing 33% affordable housing.

**II. Separately from the FPAA Equitable Development Planning Analyses Requirement, the Modified PUD’s 15% IZ Set-Aside Is Insufficient**

The Modified PUD’s 15% IZ proffer is insufficient because it does not ensure that the PUD is superior to what could be built as a matter of right, which requires *at least* an 18% IZ set aside.

**a. The Modified PUD’s Revised IZ Set-Aside Is Less than What Is Required for the Same Density Increase for a Matter-of-Right Project Under IZ+**

Once the Modified PUD satisfies the required FPAA equitable development planning analyses, OAG maintains that the Modified PUD must raise its IZ set-aside to either:

- 1) At least the 18% that would be required for the same increase of density for the same project under the same MU-9A zone; or
- 2) A set aside less than 18% but that provides deeper affordability to ensure it is “superior” to an equivalent matter-of-right project as required by Subtitle X §§ 300.1, 305.2, and 305.5(f) and (g). Since the Application proposes to modify a portion of an approved PUD, OAG asserts the increase in density should be the difference between the 133,281 sf prescribed by the previously approved portion of the PUD (Z.C. Order No. 824 and Z.C. Case No. 96-13 Ex. 28 at 10) and the 385,000 sf proposed by the Modified PUD – an 189% increase.<sup>8</sup> A matter-of-right project proceeding under a map amendment that proposed a similar increase in density would be required to provide an 18% IZ set-aside under the IZ+ formula:

---

<sup>8</sup> OP’s Setdown Report ([Ex. 7 at 7](#)) calculated the increase in density as 223% (increase of 5.94 FAR over the approved PUD’s 1.84 FAR), adjusted to 209% based on the reduced increase of 5.7 FAR ([Ex. 17A1](#))



**IZ+ Formula (Subtitle C § 1003.4) Applied to the Modified PUD**

IZ+ = greater of Option 1 or 2	IZ set-aside
<b>Option 1</b> 70% of bonus density utilized (53,851 sf = 385,000 total sf proposed – 331,149 sf maximum 6.5 FAR in MU-9A zone)	37,696 sf
<b>Option 2</b> 18% of total residential GFA (376,000 sf*) (18% because 189% requested increase in density exceeds 125%)	<b>67,680 sf</b>
Additional 3% IZ set-aside required for an equivalent matter-of-right project for the same square footage in the proposed MU-9A zone (compared to the Modified PUD’s proffered 15% IZ set-aside)	<b>11,280 sf or ~11 IZ units</b>

\* OAG has subtracted the Modified PUD’s proposed minimum 9,000 sf of commercial space from the total 385,000 sf; this residential GFA may be reduced if the Modified PUD exercises the requested flexibility to provide up to 14,000 sf of commercial space. OAG also notes that this residential GFA may be larger since Application’s revised plans ([Exhibit 17](#)) appear to not include the square footage of public space of the bay projections on Wisconsin Avenue, NW, as required by Subtitle C § 1003.5.

OAG contends that the updated CP states that the only PUD public benefits that are “high priority” are affordable housing in excess of that required as a matter-of-right and anti-displacement measures (CP § 224.9). As discussed above, this prioritization of additional affordable housing over all other PUD benefits is particularly applicable to the Modified PUD’s site because:

- It is located in the Rock Creek West Planning Area, which has the least dedicated affordable housing of all ten District planning areas and is only 3.6% of the way to meeting its 2025 goal of 1,990 additional affordable housing units;
- It has a prime location on Wisconsin Avenue that OP has identified as the best location for these affordable housing units; and
- It was just “up-FLUMed” to increase the maximum density by changing its FLUM designation from Medium to High Density Commercial/Residential.<sup>9</sup>

OAG welcomes the Modified PUD’s revised IZ proffer that increases the affordability of half of the 15% IZ set-aside for households earning less than 60% MFI that reflects the FPAA’s emphasis on providing affordable units at these income levels. OAG particularly supports the inclusion of the 30% MFI units which are desperately needed. However, OAG has two concerns:

- The size (both square footage and number of bedrooms) of the 30% and 50% MFI units must be required to be proportionate to those of the 60% MFI and market-rate units, to prevent the 30% MFI units being the smallest sized units or only studios; and
- Even if these lower-income units exempt a certain proportion of the 18% MFI set-aside OAG asserts is the minimum required for the Modified PUD, the current proffer is still insufficient, as explained below.

OAG asserts that to evaluate the Modified PUD’s revised IZ proffer of reduced MFI units, the Commission should use a consistent method that is based on economic data. OAG therefore

<sup>9</sup> [“Housing Across Planning Areas,” DMPED 36.000 by 2025 Dashboard](#); Equity Report, at 5, RCW Roadmap, at 5 and 11.

**OAG Comments in Opposition – Insufficient IZ Proffer – December 2, 2022**  
**Street Retail, LLC – Modification of Significance of a PUD**  
**Z.C. Case No. 96-13A**

proposes that the Commission use DHCD’s IZ maximum rent table<sup>10</sup> as the basis for calculating the appropriate discount of the total IZ set-aside for each 30% and 50% MFI unit of the proffer. The DHCD rent table states that:

- A 30% MFI unit rents at a 50% discount (\$720 vs. \$1,440 for a 60% MFI unit); and
- A 50% MFI unit rents at a 17% discount (\$1,190 vs. \$1,440 for a 60% MFI unit).<sup>11</sup>

Since the IZ set-aside is calculated based on gross residential GFA and OP estimates that an IZ unit is approximately 1,000 gross residential sf, OAG proposes that:

- Each 30% MFI unit reduces the IZ set-aside by 500 sf (50% per DHCD table of 1,000 sf per IZ unit); and
- Each 50% MFI unit reduces the IZ set-aside by 170 sf (17% per DHCD table of 1,000 sf per IZ unit).

OAG applies this to the Modified PUD’s revised IZ proffer as follows:

- 1) Modified PUD’s revised IZ proffer:
  - 15% of 376,000 sf of gross residential GFA = 56,400 sf IZ set-aside or 56 units
  - 28 units (½ of total IZ units) at 60% MFI
  - 26 units at 50% MFI
  - 2 units at 30% MFI
- 2) Reduction of IZ set-side for deeper affordability proffer
  - 2 units at 30% MFI reduce the IZ set-aside by 500 sf each = 1,000 sf
  - 26 units at 50% MFI reduce the IZ set-aside by 170 sf each = 4,420 sf
  - Total reduction = 5,420 sf or approximately 1.45% of the gross residential GFA

Applying this reduction to OAG’s calculation of the minimum IZ set-aside:

- 18% IZ set-aside of 376,000 sf of gross residential GFA = 67,680 sf IZ set-aside
- Less 5,420 sf reduction due to 30% and 50% MFI units = 62,260 sf adjusted IZ set-aside
- This leaves the Modified PUD’s revised IZ proffer still short by approximately 5,860 sf or 1.55% of the gross residential GFA.

OAG therefore asserts that the Modified PUD is still insufficient unless it increases its IZ proffer to at least 16.55% IZ set-aside, including the 30% and 50% MFI units as proposed. Alternatively, the Modified PUD could increase the number of 30% and/or 50% MFI units according to this ratio to reach an equivalent of the minimum 18% IZ set-aside that would be required for the same density increase of a matter-of-right project under a map amendment that would trigger IZ+. Exceeding this 18% IZ set-aside would make the Modified PUD be superior to a matter-of-right project, as required by the Zoning Regulations, and would provide the only applicable “high-priority” PUD public benefit to Modified PUD.

OAG respectfully recommends that the Commission deny the Modified PUD as inconsistent with the PUD requirements of the Zoning Regulations and the CP unless it:

- Devotes 33% of affordable housing units to very low-income and extremely low-income households or completes the required FPAA equitable development planning analyses; and
- Proffers at least 18% of the residential GFA or its equivalent for IZ units.

<sup>10</sup> [IZ Program 2022-2023 Maximum Income, Rent and Purchase Price Schedule](#), at 3.

<sup>11</sup> OAG notes that [Subtitle C § 1003.9\(b\)](#) provides a similar discount for 50% MFI IZ units, although it is slightly higher (20%) because it requires that all IZ units be offered at 50% MFI, not individual ones.

**OAG Comments in Opposition – Insufficient IZ Proffer – December 2, 2022**  
**Street Retail, LLC – Modification of Significance of a PUD**  
**Z.C. Case No. 96-13A**

Respectfully submitted,

**KARL A. RACINE**

Attorney General for the District of Columbia

**/s/ Maximilian L.S. Tondro**

Chief, Equitable Land Use Section

D.C. Bar No. 1031033

**/s/ Lily Bullitt**

Assistant Attorney General

D.C. Bar No. 1736081

Attachments: Certificate of Service