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October 5, 2001

MARY CAROLYN BROWN
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VIA HAND DELIVERY

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

Re: Zoning Commission Case No. 01-07C
1700-1730 K Street, N.W. Planned Unit Development
and Utilization of Public Air Space

Dear Members of the Commission:

On behalf of Commerce Building Associates, a joint venture, and Riddell Building Joint Venture, applicants in the above-referenced case, we are submitting herewith additional information in response to issues raised in the Office of Planning Report dated October 3, 2001, regarding the housing linkage requirements under the planned unit development ("PUD") regulations.

The applicants have offered to produce housing above the PUD requirements as one of its amenities to the PUD. Under the formulas set forth in section 2404.6(a) of the zoning regulations, the applicants are required to provided approximately 12,762 square feet of housing within in a Housing Opportunity Area. Any amount above that requirement may be considered an amenity to the PUD. The applicants have entered into an agreement with Jubilee Housing of Greater Washington to assist in the production of 16,673 square feet of housing at Trenton Park Apartment complex, which represents a thirty percent increase over the required amount.

The Office of Planning has suggested that this amenity cannot be evaluated in terms of square footage, but instead must be converted to a dollar amount to determine its adequacy. This methodology, however, departs from the express language of the Zoning Regulations and the legislative intent of the housing linkage program. In establishing the different methods for complying with the housing requirements of the Comprehensive Plan, the goal was to encourage actual housing construction rather than a cash contribution to a housing trust fund. To that end, the housing trust fund option set a very high contribution level based on the assessed value of the increased density achieved so as to discourage cash contributions. According to the rationale set forth in Zoning Commission Order No. 795 and comments received from the Downtown Cluster of Congregations, the concern was that such funds could languish before being devoted to actual housing construction. Copies of Z.C. Order No. 795 and the Office of Planning Report dated March 6, 1996, which incorporates the Downtown Cluster's comments are attached for your convenience. Accordingly, any discussion or evaluation of the production of housing in dollar amounts must be redirected to the amount of housing actually being produced. It is our position that a thirty percent increase in square footage over the required amount—which translates to housing for an additional five families at Trenton Park – is a significant amenity of the PUD and an important benefit to the city as a whole.

The purpose of the housing linkage requirements was not to make unreasonable or excessive demands of the applicant, but rather to ensure that housing production was commensurate with any additional density achieved under the PUD process. In his March 8, 1996, letter to the Zoning Commission on this matter, Chairman of the Council David Clarke emphasized that "the housing linkage concept is that if an applicant is going to get a little extra in the form of bonus office space in the District, the applicant ought to give a little extra in the form of more housing in the District." The PUD process should not be used to exact a broad range of concessions from the applicant.

We believe, in general, that there has been some confusion over how to evaluate the scope of amenities and public benefits under the PUD process. To assist the Zoning Commission and the Office of Planning in there deliberations of such issues, we are also enclosing for your consideration a memorandum prepared by Holland & Knight LLP that embraces extensive research from both the records of the Zoning Commission and applicable judicial precedents. A copy of the David Clarke letter referenced above is attached to this memorandum at Tab A.

Thank you for the opportunity to present these materials to you and we look forward to the presentation of our case at the October 11th hearing.

Very truly yours,

Whayne S. Quin

Carolyn Brown

Enclosures

cc: Office of Planning
ANC 2B
K.V. Sun Holdings

WAS1 #1019618 v1

Government of the District of Columbia

ZONING COMMISSION

ZONING COMMISSION ORDER NO. 795

Case No. 95-2
(Text Amendments – Housing Linkage Provisions Related to PUDs)
December 8, 1997

The Zoning Commission for the District of Columbia initiated this case in response to a petition from the Office of Planning (OP) requesting the Commission to amend the text of the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning. Amendments to the text of the Zoning Regulations are authorized pursuant to the Zoning Act [Act of June 20, 1938, 52 Stat. 797, as amended, D.C. Code Ann. Section 5-413 (1981)].

The OP petition, filed on March 7, 1995, requested the Zoning Commission to schedule a public hearing to consider text amendments to the planned unit development (PUD) regulations (Chapter 24, 11 DCMR) that would implement the zoning portion of the City's new housing linkage policies and program. As adopted by the D.C. Council as part of the Comprehensive Plan Amendments Act of 1994 [Section 308(a)], housing linkage requires production of or financial support for affordable housing whenever an alley closing or PUD results in an increase in office development rights.

At a regular public meeting held on April 10, 1995, the Zoning Commission authorized a public hearing on the petition. Accordingly, the hearing in this case was properly noticed for July 13, 1995 and was conducted in accordance with the provisions of 11 DCMR 3021.

At that hearing session, the Commission heard the presentations of the Office of Planning, representatives from the law firm of Wilkes, Artis, Hedrick and Lane (WAHL) , various community groups, and interested citizens. As the sponsor of the housing linkage legislation and then Chairman of the D.C. Council, David A. Clarke also testified.

By reports dated June 1 and June 28, 1995, and by testimony presented at the public hearing, the Office of Planning recommended approval of the proposed amendments with modifications. The linkage requirements apply only to PUDs where an increase in office density is requested. The proposed new text would be Section 2404 of 11 DCMR, following the new Evaluations Standards section (Section 2403) of the PUD regulations. Existing Sections 2404 through 2409 would be renumbered accordingly.

The first modification OP recommended included adding "flat" (two-family dwelling) and "rooming and boarding houses "to the qualifying housing types for linkage identified in Subsection 2404.5. The second modification involved emergency shelters. The Zoning

Commission would need to review each case for its consistency with the purposes of the housing linkage legislation whenever this type of residential use (i.e., emergency shelter) qualifies for housing linkage.

The former Chairman of the D.C. Council, David A. Clarke, submitted a letter into the record and testified at the hearing that the overall intention of the linkage legislation is to authorize a wide range of housing types that could be linked to PUDs, including single-room occupancy (SRO) housing and transitional housing for the homeless. The Zoning Commission can and should exercise its discretion in further defining the operating rules for housing linkage.

Advisory Neighborhood Commission (ANC) 2A, by resolution submitted into the record and by testimony given at the public hearing, indicated its support for several of the proposed text amendments and urged the Commission to modify others. The issues and concerns raised by ANC-2A are summarized as follows:

1. Earlier PUDs have plagued the Foggy Bottom neighborhood with intensive commercial development without significant benefits accruing to the immediate area from the amenities provided. The neighborhood should also be provided with housing.
2. Only low- and moderate-income housing would be taken into consideration under the linkage proposal.
3. A reference should be provided in the linkage regulations to Section 1200.221(10) of the Ward Two Element of the Comprehensive Plan regarding PUDs.

Testimony in support of the proposed amendments was presented by the Foggy Bottom Association, the law firm of Wilkes, Artis, Hedrick and Lane (WAHL) , the Coalition for Non-profit Housing Development, the Coalition of Economic Development Organizations, and MANNA, Inc. A number of suggestions were put forth for incorporation into the text amendments or for the Commission to consider. The issues raised at the hearing and in post-hearing submissions, and the Commission's final disposition of them, are summarized as follows:

1. Actual housing construction should be encouraged to a much greater extent than a financial contribution option. Such funds may languish before being used for actual construction. A higher percentage (e.g. – 75 rather than 50 percent) of the assessed value of the increased office density for financial contributions should be required. The Commission finds that 50 percent of the assessed value for increased office density is appropriate relative to the financial contribution option.
2. The advertised text is an accurate reflection of the housing linkage legislation. However, a substantial portion of the amenities associated with a PUD should benefit the community in which the PUD is located and has impact on. The Commission believes that the applicable provisions of proposed Subsections 2403.13 and 2404.6 adequately address this concern relative to the amount and location of housing provided.

3. The regulations need more flexibility regarding affordable housing for sale. The 20-year holding restriction would be a disincentive for home ownership. A value recapture provision can be placed in a covenant regarding the resale of a home by the original owner. The Commission concurs and believes that the proposed revised amendments address this issue adequately.

4. A minimum average residential unit size of 700 square feet would be more appropriate than the proposed 850 square feet in ensuring that some valuable projects are not excluded, especially in those areas with high land costs. The Commission believes that the 850 square-foot minimum is appropriate except for rooming houses, boarding houses or single-room occupancy housing [see proposed Subsection 2404.6 (c)].

5. Single-room occupancy (SRO) housing and transitional low- and moderate-income housing should qualify for housing linkage. The Commission concurs in part (see proposed Subsection 2404.5).

6. The Commission should consider requiring a certain minimum financial outlay per unit in order to discourage any cosmetic rehabilitation. The Commission concurs [See proposed Subsection 2404.6(d)].

7. The definitions of affordable housing, low-income household, and moderate-income household should be consistent with those of the U.S. Department of Housing and Urban Development (HUD) and the D.C. Department of Housing and Community Development (DHCD). The Commission agrees.

8. The requirement to maintain residential units as affordable housing for a 20-year period appears to contemplate that they would be rental units. This provision as written is not reasonably applicable to units, which are sold to low- or moderate-income families. Rather, it suggests that homeowners in a linkage project would not be entitled to the same appreciation in value that other homeowners would receive. The Commission makes reference to proposed Subsection 2404.6(f) of the revised amendments.

9. The law firm of Wilkes, Artis, Hedrick and Lane (WAHL) maintains that the requirement that off-site housing be located within one-quarter mile of the PUD site or within the ANC boundaries within which the PUD is located are unduly restrictive. The Comprehensive Plan clearly states that housing be assigned citywide. The Commission concurs in part. Reference to the applicable provisions of proposed Subsection 2404.6 [particularly 2404.6(a)(3)] is noted in addressing WAHL's concerns.

10. Housing linkage funds should be made available for a broad range of housing types. The Commission should not constrain itself within the text of the Zoning Regulations as to the type of housing that can be considered for approval in any given case. In this regard, the Commission finds that the proposed revised amendments adequately address this issue.

At the close of the hearing, the Commission left the record open for 50 days for additional submissions. The Commission also requested that OP address several issues that arose during the hearing and provide appropriate text indicating that when housing is provided on or adjacent to a PUD office development site, it need not be limited to affordable housing.

By memorandum, dated July 24, 1995, OP summarized the hearing testimony and recommended that certain subsections under Section 2400 be amended. OP also provided a checklist of issues for the Commission to discuss and decide upon that arose in hearing testimony. OP's recommended amendments and issue checklist are as follows:

1. On-site or Adjacent Site Housing

Subsection 2404.2 should be modified to read:

2404.2 The housing linkage requirements of this section require the applicant to produce or financially assist in the production of dwellings or multiple dwellings that are affordable to low- and moderate-income people; Provided, that:

(a) The quantity of such housing that is required **shall be** based upon the requested increase in office FAR;

(b) **If the required quantity of housing is provided on the site of the office component of the planned unit development or on an adjacent site, the housing is not restricted to low- and moderate-income housing.**

2. Special Provisions for Home Ownership

Subsection 2404.6(e) and (f) should read:

2404.6 (e) **If the required housing is provided as rental housing, it** shall be maintained as affordable dwelling units for ~~not~~ less than twenty (20) years.

(f) **If the required housing is provided for home ownership, the Zoning Commission shall have the authority to devise and adopt suitable provisions appropriate to each case, provided that such provisions shall be consistent with the intent of the housing linkage legislation; and**

Paragraph "(f)" would be changed to "(g)."

3. Citywide Scope of Off-Site Housing

The introductory clause of Subsection 2403.13 should be modified to read:

2403.13 Public benefits **other than** affordable housing **such as** public facilities or public open space, may be located off-site; Provided, that:

4. Checklist of Issues

1. Include emergency shelter as a qualifying housing type;
2. Reduce the average unit size for new construction from 850 s.f. to 700 s.f.;
3. Include reference to the Ward Two policy regarding PUDs in Ward Two;
4. Reemphasize the primacy of the affordable housing objectives in 2404.4(d)(2);
5. Amend the formulas so as to require greater housing production, or to encourage construction more strongly rather than financial contribution or to require a certain financial outlay per unit so as to discourage cosmetic rehabilitation; and,
6. Change the formulas for low- and moderate-income families to be the same as provided in HUD/DHCD rules.

At its regular monthly meeting on September 11, 1995, the Commission received and discussed various post-hearing comments submitted by public hearing participants as well as OP's issue checklist and recommendations. As a result, the Commission modified the proposed text amendments and added a number of new text provisions.

In response to the issues and concerns put forth by ANC-2A, the Commission believes that they were addressed by broadening the types of housing that could be generated through PUD housing linkages. Other issues were also addressed, including special provisions for home-ownership projects, on-site or adjacent housing, citywide off-site housing, and low- and moderate – income definitions. Having considered, discussed, and addressed the concerns of and issues raised by ANC-2A, the Commission determined that it has accorded ANC-2A the "great weight" to which it is entitled.

The Commission opined that divergent views expressed during the hearing proceedings had been reconciled by the modifications, that a reasonable balance had been struck, and that many of the issues had been resolved. Accordingly, the Commission took proposed action to approve the text amendments, as modified.

A notice of Proposed Rulemaking was published in the December 22, 1995 edition of the D.C. Register on January 19, 1994 and was referred earlier to the Zoning Administrator (ZA), OP and the National Capital Planning Commission (NCPC) for appropriate comments. As a result of both the publication and referrals, the Commission received comments from OP, NCPC, the law firm of Wilkes, Artis, Hedrick and Lane, MANNA, Inc., and D.C. Council Chairman David A. Clarke recommending that the proposed text amendments be modified further.

The proposed decision to approve the text amendments was referred to NCPC under the terms of the District of Columbia Self-Government and Governmental Reorganization Act. In a letter dated December 7, 1995, NCPC indicated that the proposed amendments would not adversely affect the Federal Establishment or other Federal interests in the National Capital, nor be inconsistent with the Comprehensive Plan for the National Capital.

The combined comments received prompted the Commission to further modify the proposed text amendments. A Notice of Revised Proposed Rulemaking was published in the D.C. Register on July 4, 1997 as a result of the modifications.

The proposed decision to approve the revised text amendments was referred to the National Capital Planning Commission (NCPC) under the terms of the District of Columbia Self-Government and Governmental Reorganization Act. By report dated August 1, 1997, NCPC found that the proposed revised amendments would not adversely affect the Federal Establishment or other Federal interests in the National Capital, nor be inconsistent with the Comprehensive Plan for the National Capital.

The Zoning Commission believes that the revised text amendments included herein will provide a workable mechanism to implement and achieve the objectives of Section 308(a) of the Comprehensive Plan Amendments Act of 1994. Furthermore, the Commission believes that its decision to approve the text amendments set forth in this order is in the best interests of the District of Columbia, is consistent with the intent and purpose of the Zoning Regulations and Zoning Act, and is not inconsistent with the Comprehensive Plan for the National Capital.

In consideration of the reasons set forth in this order, the Zoning Commission for the District of Columbia ORDERS APPROVAL of the following amendments to the Zoning Regulations:

1. Add a new Section 2404 HOUSING LINKAGE to read as follows:

2404 HOUSING LINKAGE

2404.1 A planned unit development application that proposes an increase in gross floor area devoted to office space over and above the amount of office space permitted as a matter of right under the zoning **included as part of the PUD** shall comply with the housing linkage requirements of this section, as mandated by the Comprehensive Plan of the National Capital.

2404.2 The housing linkage requirements of this section require the applicant to produce or financially assist in the production of dwellings or multiple dwellings that are affordable to low- and moderate-income people; Provided, that:

(a) The quantity of low and moderate income housing that is required shall be based upon the requested increase in office FAR; and

(b) No income limits shall apply to housing that is constructed on or adjacent to the site of the PUD.

2404.3 The applicant may either provide the required housing by means of new construction or rehabilitation as specified in Subsection 2404.6, or may elect to make a financial contribution as provided in Subsection 2404.7.

2404.4 The following exclusions and modifications shall apply:

(a) Commercial floor area other than office space shall be excluded from these computations for both the proposed planned unit development and the existing, matter of right commercial density; Provided, that the matter of right commercial density of the existing zone shall be reduced by 0.5 FAR to allow for normal retail use;

(b) If the proposed planned unit development provides an amount of housing equal to or greater than the housing that would be required under this section, no additional housing shall be required;

(c) No housing requirement pursuant to this section shall apply to a planned unit development that is proposed for property located within the boundaries of the Downtown Development District provisions of Chapter 17 of this title, nor to any PUD application filed by an agency of the federal government, the Washington Metropolitan Area Transit Authority (WMATA), or the Pennsylvania Avenue Development Corporation (PADC).

(d) An applicant may apply for a reduction or elimination of the housing required under this section as part of the planned unit development application; Provided, that:

(1) The property is located in an area classified in the Generalized Land Use Map of the Comprehensive Plan as a Development Opportunity Area, a Production and Technical Employment Area, or a New or Upgraded Commercial Center; and

(2) The Zoning Commission finds, after public hearing, that the reduced or eliminated housing requirement is necessitated or justified by the PUD's provision of other public benefits that are exceptional merit and are in the best interests of the city or the country.

2404.5 Qualifying residential uses for housing linkage shall include **dwellings**, multiple dwellings, flats, rooming houses and boarding houses, but shall exclude transient accommodations, all as defined in this title.

2404.6 If the applicant constructs or rehabilitates the required housing, the following conditions shall apply:

(a) The gross square footage of new or rehabilitated housing shall be based upon the gross square footage of increase in office space that the PUD provides in excess of that allowed as a matter of right **by the zoning included in** the

PUD application; Provided, that the amount of housing required shall be as follows:

(1) Not less than one-fourth of the gross square feet of increased office space if the required housing is part of the planned unit development or is situated on adjacent property;

(2) Not less than one-third of the gross square feet of increased office space if the location of the required housing does not comply with Paragraph (1) but is nonetheless within the same Advisory Neighborhood Commission as the planned unit development or if it is located within a Housing Opportunity Area as designated in the Comprehensive Plan;

(3) Not less than one-half of the gross square feet of increased office space if the location of the required housing is other than as provided in paragraphs(1) and (2);

(4) If any housing exists on the development site and is to be removed in order to allow construction of the planned unit development, the gross square footage of housing removed shall be added to the housing requirement as computed in paragraphs (a), (b) or (c); and, that this provision shall apply to any housing removed beginning **one year** prior to the date of the PUD application.

(b) The applicant may construct or rehabilitate the housing units, or may secure the housing production by other business arrangements, including but not limited to, joint venture, partnership, or contract construction;

(c) If the housing is provided as new construction, the average square feet of gross floor area per dwelling or per apartment unit shall be not less than 850 square feet; Provided, that no average size limit shall apply to rooming houses, boarding houses or units that are deemed single-room occupancy housing;

(d) Rehabilitation for purposes of this section shall mean the substantial renovation of housing for sale or rental that is not habitable for dwelling purposes because it is in substantial violation of the Housing Regulations of the District of Columbia, 14 DCMR;

(e) In the case of rental housing, the required housing shall be maintained as affordable dwelling units for not less than twenty (20) years;

(f) If the required housing is provided for home ownership, the Zoning Commission shall have the authority to devise and adopt suitable provisions appropriate to each case; Provided, that:

(1) Such provisions shall be consistent with the intent of the housing linkage legislation; and

(2) The Commission shall consider whether to require the applicant to legally mandate recapture of subsidy funds by the housing sponsor from the home owner if the dwelling unit is sold to a person or household who does not qualify as low or moderate income during a twenty (20) year period after the original occupancy of the dwelling unit, so that the housing sponsor may reuse the funds for other affordable housing projects.

(g) No certificate of occupancy shall be issued for the office component of a planned unit development that is subject to the provisions of this section until a certificate of occupancy has been issued for the housing required pursuant to this section.

2404.7 As an alternative to constructing or rehabilitating the required housing as provided in Subsection 2404.6, the applicant may contribute funds to a housing trust fund as defined in Section 2499; Provided, that:

(a) The contribution shall be equal to one-half (1/2) of the assessed value of the increase in permitted gross floor area for office use;

(b) The assessed value shall be the fair market value of the property as indicated in the property tax assessment records of the Department of Finance and Revenue as of the date of the PUD application; and

(c) The contribution shall be determined by dividing the assessed value per square foot of land that comprises the PUD site by the maximum permitted commercial FAR and multiplying that amount times the requested increase in gross square feet proposed for office use.

2404.8 If any housing exists on the development site and is to be removed in order to allow construction of the planned unit development, the total assessed value of the housing removed shall be added to the financial contribution as computed in Subsection 2404.7; Provided, that this provision shall apply to any housing removed beginning **one year** prior to the date of the PUD application.

2404.9 Not less than one-half of the required total financial contribution shall be made prior to the issuance of a building permit for any part of the office component of the planned unit development, and the balance of the total financial contribution shall be made prior to the issuance of a certificate of occupancy for any part of the office component of the planned unit development.

2404.10 The Zoning Commission's order granting a PUD that includes housing linkage shall specify reporting, certification and enforcement measures suitable in each case to ensure that the requirements of this section are carried out.

2404.11 A planned unit development that is subject to the housing requirement of this section shall not be relieved of the requirement to be found meritorious pursuant to the Evaluation Standards of Section 2403 of this chapter.

2404.12 The Office of Planning shall refer each application for a PUD subject to the provisions of this section to the Department of Housing and Community Development for an analysis of compliance with the housing requirements of this section and a recommendation.

2499 DEFINITIONS

2499.1 The provisions of Subsection 199 of Chapter 1 of this Title, and the definitions set forth in that Section, shall be incorporated by reference in this Section.

2499.2 When used in this chapter, the following terms shall have the meaning ascribed:

Housing trust fund - either the fund established under section 3 of the Housing Production Trust Fund Act of 1988, effective March 16, 1989, D.C. Law 7-202, or an organization that qualifies as a nonprofit organization under section 501(c)(3) of the Internal Revenue Code of 1986, approved October 22, 1986 (68A Stat 163; 26 U.S.C., Par.501(c)(3), and that also:

(a) Exists primarily for the purpose of assisting in the production of affordable housing units;

(b) Operates a trust fund that disburses money for affordable housing development;

(c) Receives applications for funds directly from developers of affordable housing;

(d) Has adopted criteria for selection of projects and allocation of funds among various types of affordable housing developments; and

(e) Has been certified by the Director, D.C. Department of Housing and Community Development, as a qualifying nonprofit organization that also complies with the requirements of paragraphs (a) through (d) of this definition.

Affordable Housing - housing where the occupant is paying **no more than 35** percent of gross income for gross housing costs, **excluding** utility costs.

Low-income households - households whose incomes do not exceed 80 percent of the median income for the area, as determined by the U.S. Department of Housing and Urban Development

(HUD) with adjustments for smaller and larger families, except that HUD may establish income ceilings higher or lower than 80 percent of the median for the area on the basis of HUD's findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low family incomes. NOTE: HUD income limits are updated annually and are available from local HUD offices.

Moderate Income households - households whose incomes are between 81 percent and 95 percent of the median income for the area, as determined by HUD, with adjustments for smaller or larger families, except that HUD may establish income ceilings higher or lower than 95 percent of the median for the area on the basis of HUD's findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low family incomes.

2. Add new Subsections 2403.13 and 2403.14 as follows:

2403.13 Public benefits other than affordable housing, such as public facilities or public open space, may be located off-site; Provided, that:

(a) There is a clear public policy relationship between the planned unit development proposal and the off-site benefit; and

(b) The off-site benefit(s) shall be located within one-quarter mile of the PUD site or within the boundaries of the Advisory Neighborhood Commission that includes the PUD site.

2403.14 If the off-site public benefit is housing, it shall be provided according to the requirements of Section 2404 of this chapter.

Vote of the Commission taken at is regular monthly meeting on September 11, 1995: 4-0 (Maybelle Taylor Bennett, John G. Parsons, William L. Ensign, and Jerrily R. Kress, to approve as amended).

Vote of the Commission taken at its regular monthly meeting on May 23, 1996: 3-0 (Maybelle Taylor Bennett, John G. Parsons, and Jerrily R. Kress, to approve as amended).

This order was adopted by the Zoning Commission at its public meeting on December 8, 1997: 3-0 (John G. Parsons and Jerrily R. Kress, to approve as amended, Maybelle Taylor Bennett, to approve as amended by absentee vote, Herbert M. Franklin, not voting, not having participated in the case).

In accordance with 11 DCMR 3028, this order is final and effective upon publication in the D.C. Register, that is on FEB 6 1998.

MAYBELLE TAYLOR BENNETT
Chairperson
Zoning Commission

MADELIENE H. DOBBINS
Director
Office of Zoning

zco795/KWK/LJP

Government of the District of Columbia

Office of the
Director

Office of Planning
415 12th Street, N.W.,
Washington, D.C. 20004

'96 MAR -6 P12:57

MEMORANDUM

MAR 5 1996

TO: D.C. Zoning Commission

FROM: Jill C. Dennis
Director

Nathan W. Gross, Chief
Comprehensive Plan Implementation

SUBJECT: Zoning Commission Case No. 95-2 (Housing Linkage), Comments on Proposed Rulemaking

The law firm of Wilkes, Artis, Hedrick and Lane (WAHL) has submitted written comments dated February 22, 1996, on the proposed housing linkage rules that are to be part of the planned unit development (PUD) regulations. The Office of Planning (OP) offers the following brief comments on the issues raised in Item 1 of WAHL's memorandum:

- The interpretation of the Council's legislation recommended at this point by WAHL was not advertised for the public hearing, and no testimony was offered advancing the interpretation now recommended by WAHL. The recommended change is significant and probably requires further notice and proceedings if the Commission wishes to adopt it.

ZONING COMMISSION
CASE No. 95-2
EXHIBIT No. 44

3/6/96

- The zoning text advertised in this case is a common sense interpretation of the Council's intent as expressed in the 1994 amendments to the Comprehensive Plan; namely that the Council was referring to three distinct classes of cases: variance, map amendment without PUD, and PUD. Historically, 75 to 80 percent of PUDs in Washington have included map amendments, and thus the PUD is normally thought of as including a map amendment. In many cases, the density increase or change of use (e.g., residential or mixed use to commercial) based on the map amendment is more significant than the relatively minor density increment allowed in the regulations for a PUD in the requested zone. Example: existing SP-2 allows 3.5 FAR limited office use; requested C-3-C allows 6.5 FAR general office use as a matter-of-right and 7.0 maximum FAR with a PUD.

- The amount of construction of or financial support for affordable housing is much less under the revised text suggested by WAHL than under the advertised text. The Council's intent, which is admittedly ambiguous to a degree in the legislation as adopted, is clearly important.

- The wide range of land uses and densities in the real world, juxtaposed with the 30+ zones in the regulations, will probably result in some ambiguous or anomalous situations when sweeping legislation such as the housing linkage bill is enacted. The WAHL memorandum seems to assume a situation in which many properties in the city are "underzoned" vis-a-vis the densities and uses generally indicated in the Comprehensive Plan. OP believes that, after 11 years of fairly continuous, government-initiated zoning map and text amendments pursuant to the Comprehensive Plan (originally adopted in 1984-85), instances of significant inconsistency between zoning and the Comprehensive Plan are more the exception than the rule.

Government of the District of Columbia

Office of the
Director

Office of Planning
415 12th Street, N.W.,
Washington, D.C. 20004

'95 JUL 27 P4:13

DIST

MEMORANDUM

JUL 24 1995

TO: D.C. Zoning Commission

FROM: Albert G. Dobbins, III
Director

Nathan W. Gross, Chief
Comprehensive Plan Implementation

SUBJECT: Hearing Summary and Final Comments, Zoning Commission Case No. 95-2 (Housing Linkage)

Zoning Commission Case No. 95-2 is a text amendment case proposing to add housing linkage provisions to the PUD regulations. The advertised text was based on the housing linkage provisions adopted by the D.C. Council in the 1994 amendments to the Comprehensive Plan. The Zoning Commission's public hearing was conducted on July 13, 1995.

This memorandum presents a brief summary of key points made by persons testifying at the public hearing. The summary is followed by the Office of Planning's (OP) final comments on three issues.

HEARING SUMMARY

D.C. Office of Planning (OP):

- The proposed text amendments were based directly upon the detailed legislation adopted by the D.C. Council.

- The linkage requirements apply only to planned unit developments (PUD) in which an increase in office density is requested.

ZONING COMMISSION
CASE No. 95-2
EXHIBIT No. 32

7/27/95

- The proposed text would be Section 2404, coming right after the new Evaluations Standards section of the PUD regulations.

- OP recommends adding "flat" (two-family dwelling) and "rooming and boarding houses" to the qualifying housing types for linkage identified in 2404.5. Although rooming house is included within "multiple dwelling," adding "boarding house" as well will ensure that single-room occupancy (SRO) housing qualifies for linkage. The boarding housing use authorizes central dining, which is excluded from rooming house use by regulation. SRO is frequently used for transitional housing in the R-4 and less restrictive zones.

- Emergency shelter is a type of transitional housing that has a separate Certificate of Occupancy (C of O) from the other residential uses indicated, and is sometimes provided simply as space within a place of worship. If it qualifies for housing linkage, the Zoning Commission would need to review each case for its consistency with the purpose of the housing linkage legislation to expand the housing supply.

Chairman, D.C. Council:

- The Council's intention in the linkage legislation was to authorize a very wide range of housing types that could be linked, including SROs and transitional housing for the homeless.

- The Zoning Commission can and should exercise its discretion in further defining the operating rules for housing linkage.

Downtown Cluster of Congregations

- The second paragraph of the waiver clause -- 2404.4(d)(2) -- should be deleted as it is too open-ended and thus too lenient in allowing waivers of the affordable housing requirement.

- Actual housing construction should be encouraged to a much greater extent than the financial contribution option. The latter funds may languish before being devoted to actual housing construction. My suggestion is to require a higher percentage, such as three-fourths rather than one-half, of the assessed value of the increased office density, for the financial contribution.

- Construction of affordable housing near the PUD site should be encouraged to a greater extent, since many of the office sites will be in the central employment area, and provision of nearby housing will shorten commutes for service workers.

Advisory Neighborhood Commission (ANC) 2A:

- Historically, numerous PUDs have hurt the Foggy Bottom neighborhood with intensive commercial development. Now affordable housing will have the priority in PUDs; we don't want only the commercial development while other neighborhoods across the city get the residential. We want the residential too.

- We want a reference in these affordable housing regulations to a policy in the Ward Two Element of the Comprehensive Plan relating to PUDs, specifically section 1200.221 (10).

Foggy Bottom Association:

- The Ward Two objectives in the Comprehensive Plan indicate that PUDs in this ward should be special: "A substantial part of the amenities provided in proposed PUDs shall accrue to the community in which the PUD would have an impact."

- Related to 2404.11 (a linkage PUD shall still be evaluated by the Evaluation Standards section), state further: "Nothing in these regulations is intended to imply that compliance with Section 2404 is sufficient public benefit to justify the granting of a PUD by the Zoning Commission."

- We support the inclusion of enforcement measures (advertised Subsection 2404.10) and the geographic limitations of advertised Subsection 2403.13.

Wilkes, Artis, Hedrick & Lane:

- The household income levels used by the federal government (HUD) for affordable housing are different from those adopted by the Council in the linkage legislation. The same standards should be used to avoid complications in the financing and delivery of affordable housing developments. (Submitted federal standards.)

- The requirement to maintain the units as affordable for twenty years assumes rental housing. A different provision needs to be adopted for ownership housing.

- Paragraph 2403.13 should be clarified to indicate that affordable housing is an off-site amenity that is not limited to nearby locations.

- The various housing types allowed by linkage, e.g., emergency shelter, will (even in linkage projects) be subject to zoning restrictions at the location where the housing is provided.

- Paragraph 2404.6(c) should specify, "Except for SROs" the average unit size shall be 850 square feet or more.

Coalition for Nonprofit Housing:

- We support the advertised text as an accurate reflection of the housing linkage legislation.

- The Commission needs an alternative approach, other than the 20-year limit, to deal with affordable housing for ownership.

- Eligible housing types should include shelters, transitional housing and SROs. There won't be too many shelters because of licensing and political constraints.

Anacostia Economic Development Organizations:

- We support the position and suggestions of MANNA, Inc.

MANNA, Inc.:

- We support the proposed zoning rules for housing linkage and have some suggestions.

- The regulation (2403.13) should be clear that affordable housing can be provided anywhere in the city.

- The rules need more flexibility regarding affordable housing for sale. The 20-year restriction would be a disincentive for homeownership in the city. The homeowners hold mortgages for the majority of the cost of their homes (over and above the linkage contribution) and are pioneers in transforming their neighborhoods. They can reasonably expect to be rewarded for this risk by resale of the home at some point. A value recapture provision can be placed in a covenant regarding resale by the first owner.

- A minimum average unit size of 700 s.f. would be better than 850 s.f. in ensuring that some valuable projects are not excluded, especially in locations with a high land cost.

- The HUD/DHCD definitions of low and moderate income housing should be used rather than the different definitions adopted by the Council.

- SROs and transitional housing should qualify for housing linkage.

- The Commission should consider requiring a certain minimum financial outlay per unit so as to discourage cosmetic rehabilitation.

FINAL COMMENTS – OFFICE OF PLANNING

1. **On-Site or Adjacent Site Housing.** At the public hearing the Zoning Commission asked OP to provide text indicating that housing provided on or adjacent to the office development (PUD) site need not be limited to affordable housing. OP suggests amending advertised Subsection 2404.2 to read as follows:

2404.2 The housing linkage requirements of this section require the applicant to produce or financially assist in the production of dwellings or multiple dwellings that are affordable to low- and moderate-income people; Provided, that:

(a) The quantity of such housing that is required **shall be** based upon the requested increase in office FAR; and

(b) If the required quantity of housing is provided on the site of the office component of the planned unit development or on an adjacent site, the housing is not restricted to low- and moderate-income housing.

2. **Citywide Scope of Off-Site Housing.** Testimony by several persons indicated confusion about the intent of proposed Subsection 2403.13. As advertised, this provision states:

2403.13 Public benefits such as affordable housing, public facilities, or public open space may be located off-site; Provided, that:

(a) There is a clear public policy relationship between the planned unit development proposal and the off-site benefit;

(b) The off-site benefit(s) shall be located within one-quarter mile of the PUD site or within the boundaries of the ANC that includes the PUD site; and

(c) If the off-site public benefit is housing, it shall be provided according to the requirements of Section 2404 of this chapter.

The concern expressed at the hearing was that off-site affordable housing, despite Paragraph (c) and the provisions of all of advertised Section 2404, might be geographically limited by Paragraph (b). To clarify the intent of the regulations, OP recommends modifying the introductory clause as follows:

2403.13 Public benefits **other than** affordable housing, **such as** public facilities or public open space, may be located off-site; Provided, that:

3. Special Provisions for Home Ownership Projects. As to the important issue of the 20-year time limit and its unsuitability for ownership housing, OP suggests that this issue is perhaps best resolved in the zoning text by enabling language rather than by attempting to devise general rules applying to value recapture on resale, etc. The modified text could read as follows:

2404.6 (e) **If the required housing is provided as rental housing, it** shall be maintained as affordable dwelling units for not less than twenty (20) years;

(f) If the required housing is provided for home ownership, the Zoning Commission shall have the authority to devise and adopt suitable provisions appropriate to each case, provided that such provisions shall be consistent with the intent of the housing linkage legislation; and

Paragraph (f) would need to be renumbered "(g)."

4. Checklist of Issues. Following is a checklist of issues from testimony that the Commission may wish to discuss and decide; whether to:

- include emergency shelter as a qualifying housing type;
- reduce the average unit size for new construction from 850 s.f. to 700 s.f.
- include reference to the Ward Two policy regarding PUDs in Ward Two;
- reemphasize the primacy of the affordable housing objective in 2404.4(d)(2);
- amend the formulas so as to require greater housing production, or to encourage construction more strongly rather than financial contribution or to require a certain financial outlay per unit so as to discourage cosmetic rehabilitation; and
- change the formulas for low- and moderate-income families to be the same as provided in HUD/DHCD rules.

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September 28, 2001

BY HAND DELIVERY

Mr. Andrew Altman, Director
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Mr. Alan H. Bergstein
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Dear Andy and Alan:

Recently, in connection with Planned Unit Development applications pursuant to Chapter 24 of the Zoning Regulations, issues have been raised about the scope of public amenities and benefits which are offered or required as part of the approval process. Various views have been expressed by a broad range of interests, with no supportive documentation or meaningful guidance on the required scope of such amenities and benefits.

Attached is a memorandum, prepared by Holland & Knight LLP, that embraces extensive research both in the files of the District of Columbia Zoning Commission and in applicable judicial precedents which we hope will assist the Zoning Commission, the Office of Planning and others in recognizing the obligations of an applicant for a PUD, as well as the limitations on the Zoning Commission in approving PUDs. We sincerely hope that this memorandum will assist the Office of Planning and the Zoning Commission in their deliberations and will facilitate better development in the District of Columbia under the Planned Unit Development process.

We are prepared to discuss this with you at your convenience. Please call us with any comments, questions or concerns you may have.

Respectfully submitted,

HOLLAND & KNIGHT LLP

Whayne S. Quin, Esq.

Norman M. Glasgow, Jr., Esq.

Paul J. Kiernan, Esq.

Steven E. Sher, Director of Zoning
and Land Use Services

WSQ:lsn
Attachment

WAS1 #1016585 v1

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MEMORANDUM

September 28, 2001

RE: Limitations on Requirements for Public Benefits and Amenities in Planned Unit Developments

A. Introduction and Summary

The purpose of this memorandum is to review the law regarding the public amenities and benefits which lawfully can be required to be provided by the applicant as part of the process for approval of a Planned Unit Development ("PUD") in the District of Columbia.

This memorandum is prompted by current discussions involving proposed PUDs now pending before the District of Columbia Zoning Commission ("Commission" or "Z.C."). Neighbors and opponents of these projects have suggested that the scope of the amenities and public benefits required for approval of a PUD properly can include a broad range of concessions and even cash contributions by the developer or landowner, including support of homeless persons' feeding programs, contributions for physical improvements not proximate to the location of the PUD, and donation to the community of funds for general use. The Office of

Planning also has indicated that a broad scope of amenities and public benefits may be required as a condition for approval of a PUD even though such amenities and benefits do not have a particular nexus with the PUD application.

Based on the language of the PUD regulations, the legislative history of those regulations, the general purposes of a PUD, and U.S. Supreme Court precedents regarding land use decisions, it is our conclusion that the public benefits and amenities required for approval must be both (1) linked to a clear public policy purpose reasonably related to the approval sought, and (2) proportionate to the scope of the zoning relief in excess of normal appropriate zoning[1] sought by the applicant for the PUD. Public benefits and amenities that do not meet this test cannot lawfully be imposed for approval of a PUD. As a result, the Zoning Commission and the Office of Planning may not require a PUD applicant to provide public benefits and amenities which are not linked by such policy and proportionality.

This memorandum first describes the current PUD regulations and the constitutional limitations on the government's ability to require exactions for approval of land use applications. The memorandum then discusses the

---

[1] Existing zoning constraints may not be appropriate in view of changes in circumstances, mistakes in original zoning, provisions of the Comprehensive Plan or pursuant to other criteria of the Zoning Enabling Act.

requirement of proportionality between the proposed benefits and amenities and the extent of the zoning relief requested.

B. PUD Regulations – Requirement for Policy Nexus

The Planned Unit Development process allows flexibility in zoning restrictions within established boundaries of the zoning provisions. See generally 5 Ziegler, Rathkopf's Law of Zoning and Planning, ("Rathkopf"), §63.01, at 63-2. As one court has described it, the PUD provisions "allow more flexibility in development than is available under the general zoning ordinance while continuing to allow the city to protect the interests it normally protects through general zoning provisions." Levitt Homes, Inc. v. Old Farm Homeowners' Ass'n, 111 Ill.App. 3d 300, 444 N.E.2d 194, 202 (1982).

In the District of Columbia, the PUD process has served two distinct but related purposes. On the one hand, the PUD process permits the development of a large area as a single unit by relaxing height, density, and use restrictions which would otherwise prevent consolidated development. As the D.C. Court of Appeals has summarized it:

> A PUD is a development in which the density and height restrictions which would otherwise be imposed by the zoning regulations are relaxed for the purposes, among others, of offering a variety of building types with more attractive and efficient overall planning. *See generally Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n*, 426 A.2d 327, 331-32 (D.C.1981). The

> PUD scheme permits the development of a large area of a single unit. *Id.* at 332. In exchange for the flexibility which the concept provides, the developer must create a "synchronized amalgam of living, institutional, and commercial facilities with diversity in buildings and structures that is in the spirit of the Zoning Regulations." *Id.*, citing 5 P. Rohan, Zoning and Land Use Controls §32.01[3] (1978).

Rafferty v. District of Columbia Zoning Comm'n, 583 A.2d 169, 171 (D.C. 1990).

The PUD also serves as the District's only form of conditional zoning. See generally 3 Rathkopf, Chapter 29A. Through PUDs, sometimes previously referenced as "Article 75 developments," applicants and the District have agreed on development programs and restrictions for specific properties, frequently agreeing to reduced density on a site.

The regulations concerning PUDs were last amended in 1998 in Z.C. Case No. 95-2. As written, the regulations specify the scope of the Zoning Commission's duties regarding public benefits and project amenities:

> In deciding a planned unit development application, the Zoning Commission shall judge, balance, and reconcile [1] the relative value of the project amenities and public benefits offered, [2] the degree of development incentives requested, and [3] any potential adverse effects according to the specific circumstances of the case.

11 DCMR § 2403.8 (emphasis added).

"Public benefits" and "project amenities" are defined terms under the Zoning Regulations

> Public benefits are superior *features of a proposed planned unit development* that benefit the surrounding neighborhood or the public in general to a significantly greater extent than would likely result from development of the site under the matter of right provisions of this title.
>
> * * *
>
> A project amenity is one type of public benefit, specifically a functional or aesthetic *feature of the proposed development*, that adds to the attractiveness, convenience or comfort of the project for occupants and immediate neighbors

11 DCMR §§ 2403.6 and 2403.7 (emphasis added).

As the italicized language demonstrates, there is a definitional linkage between the proposed benefit or amenity and the PUD project itself. Benefits and amenities must be features of the proposed project, not just generalized contributions for the "public good" unrelated to the zoning relief sought.

The most recent amendments to the PUD regulations also discussed the necessary policy linkage in the context of off-site amenities. The provision of such amenities had been approved by the Zoning Commission and by the D.C. Court of Appeals. In Blagden Alley Ass'n v D.C. Zoning Commission, 590 A.2d 139 (D.C.1991), the court upheld the Commission's authority to allow an off-site housing amenity as part of the PUD application. However, the court warned that the off-

site amenity must nevertheless be consistent with the overall goals of zoning and must be related to the relief requested:

> [W]e do not minimize the Association's concern about the potential for arbitrary action by a zoning authority. However, the Association's contentions here do not focus on the absence of adequate standards so much as on the fact that off-site amenities are unrelated to the essential purposes of P.U.D.'s as they developed in this country. Of course, when the P.U.D. concept is applied to an urban setting, it is entirely possible that the rationale underlying the relaxation of zoning requirements could incorporate amenities directed at a broader community. Still, we, like the Association, are wary of the effect of a policy that relaxes zoning restrictions while according, without some articulated standards, benefits elsewhere.
>
> * * *
>
> In view of the regulatory caveat that "the PUD process shall not be used to circumvent the intent and purposes if this title," 11 DCMR §2400.5, and the regulation's requirement that the Commission focus on whether an application provides "occupants" of the P.U.D. in a contiguous area with superior amenities, the Commission must explain how its decision to approve an application containing only off-site amenities is consistent with the regulations. It is true that the P.U.D. process must take into account an application's "[c]ompatability with city-wide and neighborhood goals, plans, and programs," 11 DCMR §2440.5, but this case poses the danger that in approving the application the Commission has allowed these larger goals to determine the P.U.D. process, at the expense of the site-focused requirements of the regulations.
>
> [G]iven the potential arbitrariness of off-site linkage, it would appear that the Commission would be well advised

> to promulgate regulations or procedures for approval of this type of off-site linkage.

590 A.2d at 145-46 (citations omitted).

The Commission thereafter adopted regulations which made explicit the need for a policy linkage between the off-site benefit and the proposed project. Section 2403.13 now reads:

> Public benefits other than affordable housing, such as public facilities or public open space, may be located off-site; Provided that:
>
> (a) There is a clear public policy relationship between the planned unit development proposal and the off-site benefit; and
>
> (b) The off-site benefit(s) shall be located within one-quarter mile of the PUD site or within the boundaries of the Advisory Neighborhood Commission that includes the PUD site.

This new provision again limited the scope of permissible "public benefits" by requiring that such benefits proposed to be located off-site still had to be within the relevant Advisory Neighborhood Commission ("ANC") boundaries (or within one-quarter mile of the site) and that there had to be a "clear public policy relationship" between the PUD proposal and the benefit. An off-site public benefit, in other words, cannot be a free-floating "extra" for the PUD applicant to furnish as the price for the PUD. Rather, under the express terms of the regulation, such public benefits must be linked to the purposes and scope of the proposed project.

Such a linkage is also constitutionally required. In a series of cases, the U.S. Supreme Court and other federal and state courts have made clear that governments cannot condition their approval of land use permits on requirements that the landowners contribute to the public good in ways unrelated to the permits. These decisions reflect the increasing risk to governments that withhold approvals in order to exact payments or fees. See generally Comment, "Exactions, Severability and Takings: When Courts Should Sever Unconstitutional Conditions from Development Permits," 27 B.C.Envtl.Aff.L.Rev. 279 (2000).

In Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), the Supreme Court held that conditioning the issuance of a building permit on whether the landowners dedicated a portion of the property to a public easement was an unconstitutional taking in the absence of a nexus between the condition and a legitimate state interest. Moreover, the government cannot require a person to give up their right to receive just compensation when property is taken for public use in exchange for a discretionary benefit conferred by the government where that benefit has little or no relationship to the property.

The Coastal Commission in Nollan argued that a lateral public easement along the beachfront to connect two public beaches separated by the Nollans' property was related to the permit requested by the Nollans to demolish an existing bungalow and replace it with a house. The Commission said that the state had a

legitimate interest in diminishing the blockage of the view of the ocean caused by the erection of the new house. The Supreme Court disposed of this argument, as the Court described it in the later Dolan opinion:

> How enhancing the public ability's to "traverse to and along the shorefront" served the same governmental purpose of "visual access to the ocean" from the roadway was beyond out ability to countenance. The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into "an out-and-out plan of extortion."

Dolan v. City of Tigard, 512 U.S. 374, 387 (1994) (citing Nollan, 483 U.S. at 837) (emphasis added).

In Dolan, the city required a landowner to dedicate a portion of her property for flood control and traffic improvements in order to secure a building permit. The Supreme Court agreed that these were legitimate state interests and that the required dedication was related to these interests. However, the Court held that the government must demonstrate a "rough proportionality" between the nature and extent of the required dedication and the impact of the proposed development. 512 U.S. at 391. The Court found that the recreational easement and bike path required by the city did not bear the reasonable relationship constitutionally required.

The Court has referred to the test as requiring a government to show an "essential nexus"[2] between the permit for which approval is sought and a legitimate state interest:

> In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an "out-and-out plan of extortion."

Nollan, 483 U.S. at 837.[3]

Other courts, applying Nollan and Dolan have struck down the imposition by the government of conditions unrelated to the purposes or scope of the applicant's requested relief. In Amoco Oil Co. v. Village of Schaumburg, 1992 WL 22591 (N.D.Ill.1992), the city conditioned approval of a special use permit to allow expansion of a service station upon the owner's agreement to dedicate land. The city argued that this condition was permissible since the state needed land to expand a highway to alleviate traffic conditions and, therefore, the city's taxpayers would save money. The court rejected this argument:

---

[2] This "essential nexus" has elsewhere been described as "a reasonable relationship between the project and the identified public problem." Isla Verde International Holdings, Inc. v. City of Camas, 990 P.2d 429, 436 (Wash. 1999).

[3] In Nollan, Justice Scalia further explained that if the government allows parties to "trade" money for relief from restrictions, the result will be a dilution of the important purposes of the restrictions. 483 U.S. at 837 & n.5.

> [S]pecial use permits are not favors to be dispensed in accord with gifts to the government. Both federal and state courts have held that it is unfair to burden one citizen with the cost of a community benefit just because he is unlucky enough to be the next in line for a zoning permit. Where states refuse to protect landowners from uncompensated takings, even those masked by legislative ordinances, the federal courts will.

Id. at *6. See also Goss v. City of Little Rock, 90 F.3d 306 (8th Cir. 1996) (landowner stated claim against city which had conditioned a rezoning on the dedication of land for future expansion of adjacent highway).

In McClure v. City of Springfield, 28 P.3d 1222 (Or. 2001), the Court held that the city had not supported its demand for several dedications of land as a condition for partition and subdivision of lots. The city had asked for a dedication of a 20-foot right of way along "M Street" for future expansion of that street, dedication of a strip for construction of a sidewalk and lighting along "8th Street" and dedication of a triangular area at the intersection of M Street and 8th Streets to ensure adequate sight visibility and turning radius. The Oregon court walked through the analysis advanced by the city in support of these exactions and found the record wanting:

> The city explained the need for the M Street dedication, utilizing a detailed calculation to demonstrate that the exaction represented a proportional response to the increase in traffic – 19 vehicle trips per day – that the proposed development was expected to generate. The city did not, however, explain how the 8th Street sidewalk and

> clipped corner dedication requirements were relevant or proportional to the expected impacts. . . . We have no difficulty accepting that sidewalks and clipped corners can advance a community's interest in safe streets, but in the absence of findings explaining how the proposed exactions further that aim – and do so proportionally to the effects of the proposed partitioning – the justification required by *Dolan* is missing.

28 P.3d at 1227.

In particularly strong language, one New Jersey court invalidated variances and site plan approvals it found tainted by the planning board's request for a contribution to the town's affordable housing fund. The planning board had originally suggested that if the developer agreed to make a contribution to the fund, it would be "taken into consideration" when the planning board reviewed the application. The court found this improper and invalidated the approvals:

> We conclude that the kind of free-wheeling bidding under review is grossly inimical to the goals of sound land use regulation. The intolerable spectacle of a planning board haggling with an applicant over money too strongly suggests that variances are up for sale. This cannot be countenanced.

Nunziato v. Planning Board, 541 A.2d 1105 (N.J.1988).

These and other cases demonstrate that the government cannot use the occasion of a development process to exact monetary and other concessions unrelated to the development. The same analysis would certainly apply where a government body conditions or defers consideration of an approval pending the

landowners' agreement with opponents of the project who insist upon exactions which the government itself could not require. In that circumstance, the government's refusal to approve the application because the neighbors have not agreed to an amenity package has the same effect as if the government itself had insisted upon the amenities.

Planned unit developments are properly tied to the goals and purposes of zoning. The PUD process allows for flexibility but not ad hoc land use decisions which would amount to "spot zoning." By the same token, the fact that a landowner has requested approval of a PUD does not open the floodgates to allow neighbors, opponents or the Office of Planning to seek benefits and amenities not connected to the approval. There must be a public policy connection between the benefits and the requested approvals or else the PUD approval process would degenerate into spot zoning or, even worse, "checkbook zoning," where proponents or opponents undermine the public interest embedded in the zoning regulations in favor of payments and other "benefits" unrelated to the PUD.

C. Weighing of Benefits – Requirement for Proportionality

Once there has been a determination of the "essential nexus" between the proposed benefit or amenity and the purpose of the requested relief, the government must show the "rough proportionality" between the benefit and the relief.

In the District of Columbia, the PUD regulations have consistently adopted the position that the "baseline" for the site is the zoning as approved with the PUD, not the zoning prior to the PUD. Therefore, for an applicant desiring further variation from the strictures of the "new" zoning category, the proposed public benefits are weighed against the new zoning, not the original zoning.

For example, in February 1979, the Zoning Commission revised the PUD regulations to itemize, for the first time, the considerations which the applicant had to demonstrate in support of the public benefit of the project. As reflected in Z.C. Order No. 251, these changes were motivated in part by the concern that the existing regulations lacked "definitive standards":

> One complaint often heard from both developers and other persons appearing in opposition to applications is the lack of clear, definitive standards upon which to judge applications. This left people without a clear guide as to what the Zoning Commission would measure a PUD against.

Z.C. Order No. 251 at 14. In response, the Commission sought to establish reasonable standards for review against which particular PUDs could be judged: "The process is designed primarily to achieve a higher quality of development than is possible under the matter-of-right zoning, while at the same time assuring adequate protection to existing or future conditions in the area which need to be enhanced." Id. at 22.

The 1979 revisions required that the applicant provide a "statement of the purpose and objectives of the project," including detailed statements about

> The benefits which would accrue which would not be available under existing zoning controls.
>
> The manner in which the proposed development standards are designed to protect the public health, safety, welfare and convenience.
>
> The impact that the proposed project will have on surrounding uses, buildings and areas.

D.C. Zoning Regulations § 7501.563 (1979) (repealed).

The height and density guidelines of the 1979 regulations showed the linkage between the scope of the relief requested and the scope of the benefits. The 1979 regulations established guidelines for development. Section 7501.4 (1979). The regulations then required the applicant to demonstrate "public benefits" if, but only if, the developer sought to exceed the specified guidelines. For example, in setting forth the height guidelines, the Zoning Commission stated:

> To exceed the guidelines indicated, the applicant shall have the burden of demonstrating and justifying the public benefits and other meritorious aspects of the proposal which will result if the additional height is approved.

D.C. Zoning Regulations § 7501.41; see also § 7501.43 (gross floor area) (1979).

In discussing the reason for this change, the Zoning Commission linked the potential for increase over the guideline heights and densities with the necessity for such increase in light of the public benefits which would accrue:

> For height and FAR, the Commission set out tables of the height and floor area which were to be normal guidelines. In many cases, these guidelines are themselves higher than the maximum permitted as a matter-of-right. In some cases, the guidelines enable property owners to achieve the height and/or floor area ratio which applied to the property prior to the changes adopted by the Commission as part of the revision to commercial, special purpose and mixed use districts. . . . To exceed the guidelines in commercial, SP or CR Districts, the Regulations require that "the applicant shall have the burden of demonstrating and justifying the public benefits and other meritorious aspects of the proposal which will result" if the additional height or floor area is approved. It is the intention of the Zoning Commission to strictly apply the guidelines, and to exceed them only in exceptional circumstances where an applicant can demonstrate that the level requested is entirely appropriate and necessary for the project and will have a positive effect.

Z.C. Order No. 251, at 27-28.

The 1979 regulations, therefore, made more explicit the linkage between the amount of zoning relief requested by the applicant and the public benefits required to be shown. The demonstration of additional public benefits was triggered when

the applicant sought relief "over and above" the guidelines set forth in the regulation.[4]

In the current regulations, the Commission has made clear that its focus is on the "features . . . that benefit the surrounding neighborhood or the public in general to a significantly greater extent than would likely result from development of the site under the matter of right provisions." 11 DCMR § 2403.6 (1995, as amended). The Zoning Commission expressly invites a comparison between what the landowner could do with the site under appropriate zoning and what the landowner proposes to do with the PUD. With a PUD application, therefore, the Commission is looking for those features of the PUD which trigger a significantly greater *extent* of benefits, not a significantly different *type* of benefit or amenity. The focus remains always on the features of the development and balancing the impacts and benefits.

The matter of right restrictions, moreover, should be those attendant on the site's appropriate zoning, even if that is not reflected in the current zoning. For

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[4] A similar formula is now found in the current regulation implementing the housing requirement. 11 DCMR § 2404.1 states that if a PUD applicant proposes "an increase in gross floor area devoted to office space over and above the amount of office space permitted as a matter of right under the zoning included as a part of the PUD," the applicant has to comply with the housing linkage requirements. See also letter attached as Attachment A and dated March 8, 1996, from David A. Clarke, Chairman of the Council of the District of Columbia.

example, assume that a medium-high density site is surrounded by properties which are developed or entitled to higher density zoning (9.0 – 10.0 FAR) development and that the PUD applicant seeks approval for the site which, once changed, would allow 10.0 FAR development, or assume that heights permitted on adjacent or nearby property are in the 130-foot range. The site was "under zoned" to begin with, a situation which might well have been corrected by a conventional zoning map amendment using the procedure which does not require an assessment of "public benefits." See D.C. Official Code §6-641.02 (2001) (formerly section 5-414); Citizens Ass'n of Georgetown, Inc. v. D.C. Zoning Comm'n, 402 A.2d 36, 39-40 (D.C. 1979) (rezoned property "not out of character with the surroundings"; Commission's action was not "spot zoning"). It would therefore be improper to order an applicant to provide "public benefits" or amenities through the PUD in order to reach the height and density which the site could enjoy as a matter of right if the site were zoned in character with its surroundings. However, the applicant should have to demonstrate public benefits to achieve height and density over and above such matter of right limits, for example, if the applicant seeks the 5% "bonus" available under 11 DCMR § 2405.3, or does not comply with lot occupancy or rear yard requirements.

The Zoning Commission requires that the applicant establish the extent to which the proposed development "would comply with the standards and

requirements that would apply to a matter of right development," "the specific relief that the applicant requests from the matter of right standards and requirements," and, if a map amendment is requested, "the extent of compliance with, and the requested relief from, the matter of right standards and requirements of development under conventional zoning." 11 DCMR § 2403.11. Again the regulations emphasize that the relevant comparison is not the proposed PUD versus no development on site; rather the relevant comparison is the proposed development and the matter of right appropriate development.

The question of whether certain benefits and amenities are sufficient to support approval of a land use decision has been addressed several times in judicial decisions in the District of Columbia. In Foggy Bottom Ass'n v. District of Columbia Zoning Comm'n, 639 A.2d 578 (D.C. 1994), the D.C. Court of Appeals addressed extensively the question of the quality and quantity of amenities for a PUD program in the context of the further development of the International Monetary Fund ("IMF") site at 19th and H Streets, N.W. The court upheld the Zoning Commission's determination that the amenities proposed (superior landscaping and access, larger visitors' center, building setbacks, architectural design) were sufficient to support the requested increased density and that the amenities for Phase III were sufficient to replace the amenities that had been approved for Phase II, principally creation of a mini-park.

The court also held that the analysis employed by the Zoning Commission was proper, notwithstanding the complaints of the Foggy Bottom Association that the wrong tests were being applied:

> The Commission declined to analyze the dollar figures attributed by opponents to the increase in FAR as compared to the value of the proposed Phase III amenities and public benefits. It also declined to adopt the view of the Office of Planning that "a true net gain" in amenities and public benefits should be required in return for the increased density. In view of the nature of petitioner's objections to elimination of the mini-park and the increased density, the Commission's order undoubtedly would have benefitted from a comparison of the amenities and public benefits in Phase II and Phase III. . . . Nevertheless, we conclude that it is implicit in the Commission's findings that Phase III's proposed building design and materials, landscaping, and expanded Visitors' center, when combined with the superior working space and the importance of the IMF's location at the present site in the District of Columbia, provided adequate amenities and public benefits.

639 A.2d at 584 (emphasis added). See also Id. at 587-88 (Commission's findings regarding amenities were supported by record evidence; Commission not required to make finding that IMF was providing net increase in amenities and public benefits in Phase III over Phase II).

The court also upheld the Zoning Commission's determination that approval of the Phase III PUD was not related to the impact triggered by the relocation of Western Presbyterian Church from the PUD site to another location in the

neighborhood. The court stated that IMF was not suggesting that the church relocation was part of the public benefits in support of its PUD application and that even the Office of Planning found the connection "tenuous" between the PUD modification approval and the impact of the church's homeless feeding program at its new location. 639 A.2d at 590. The decision therefore supports the argument that PUD approvals cannot be freighted with the diverse impacts off-site which might be related to construction of the PUD. Id. ("it is difficult to understand how the IMF or the Commission could control the activities at a different location of the former owner of Lot 826").

Proportionality remains an issue even if the "essential nexus" is established. In Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996), the California Supreme Court held that the government could impose a fee as a condition for the applicant's proposed conversion of property from recreational use to residential use. The "essential nexus" was found in the need to alleviate the demonstrated deficiency in municipal recreational resources and the city's commitment to purchase additional recreational facilities with the proceeds of the fee. However, the Ehrlich court found that the proposed fee was not supported in the record since it was based on the argument that the city "lost" the value of the applicant's facilities: "The city may not constitutionally measure the magnitude of its loss, or of the recreational exaction, by the value of facilities it had no right to appropriate without payment. . .

. The amount of such a fee. . . must be tied more closely to the actual impact of the land use change the city granted plaintiff." 911 P.2d at 449.[5]

D. Conclusion

This review of the history of PUDs in the District of Columbia demonstrates that the Zoning Commission has always viewed the benefits of a PUD application in relation to the variation requested from appropriate "matter-of-right" zoning. As a matter of regulation, as well as constitutional law, the benefits and amenities required for the PUD must be associated with the project itself. The District cannot directly or indirectly force a landowner or allow a landowner to "buy" a PUD by acceding to neighborhood demands for money or other benefits outside of existing policy or out of proportion to the requested benefit.

Both the regulations and the development of the law emphasize three points:

- Public benefits and project amenities have consistently been tied to the extent of the variation from the appropriate matter of right zoning which the applicant seeks: The greater the variation requested, the greater the extent of benefits and amenities required to be shown.

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[5] A similar analysis has been employed in cases challenging impact fees under state laws. See, e.g., Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126 (Fla. 2000)(county could not collect public school impact fees from housing subdivision whose population is limited to citizens over 55 years of age since there is no potential for an adverse impact on the public schools).

- In the 40-plus years that PUD regulations have been on the books, there has never been a provision allowing a PUD applicant to "buy" approval by simply furnishing public benefits without demonstrating compliance with the other requirements of the PUD regulation. Similarly, there has never been a regulation establishing a monetary "litmus test" for approval of a PUD.

- Even in the context of the recently-enacted amendments allowing off-site amenities, there must be a clear relationship between the approval requested and the amenity.

Public benefits or amenities which are required to be provided for approval of the PUD must demonstrate both the "essential nexus" with the project and the "rough proportionality" in terms of impact. Contributions, set-asides, programs, and other concessions which are undoubtedly sought in the name of the public good, cannot lawfully be used to block or delay approvals of projects which meet the requirements of the PUD regulations and are consistent with the goals and purposes of zoning.

At least part of the misunderstanding that now exists with regard to public benefits and amenities for PUDs results from the political process leading to approval of PUDs in the past. Nothing prohibits an applicant from seeking the support of the Advisory Neighborhood Commission, other citizen groups and individuals, with the contribution of items that are not legally required but are

provided on a voluntary basis. Over a period of time, these efforts on behalf of applicants have come to be viewed as requirements of the Zoning Commission when, in fact and in law, they are entirely separate from the regulatory standards of the PUD process. This desire of an applicant to obtain broad support for a project through discussions and negotiations is a major source of confusion that exists today among organized citizen groups and ANC's, as well as the Office of Planning and perhaps even the Zoning Commission. But to treat contributions to the neighborhood or community not required by the PUD regulations as PUD requirements would be contrary to the law described above. The Zoning Commission may not grant zoning on the basis of arrangements between the applicant and third parties anymore than it can sell higher density zoning; rather, it is limited by the provisions of the regulations and specifically the purposes of the zoning regulations as set forth in D.C. Official Code § 6-641.02.[6] It is also clear that the Zoning Commission may not make its zoning decisions on the basis of plebescite.

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[6] Nor does the requirement of "great weight" for an ANC position allow such consideration. The "great weight" requirement is one of process and not evidence. In other words, the Zoning Commission must address issues raised by the ANC, but merely because an ANC has a position does not allow the Zoning Commission to give that position special weight. See Kopff v. District of Columbia ABC Board, 381 A.2d 1372 (D.C. 1977), aff'd 413 A.2d 152 (D.C. Cir. 1980).

Respectfully, it is suggested that in determining whether to approve a PUD with or without a change in zoning, the following steps should be followed by the Zoning Commission:

1. Determine, based upon a preponderance of the evidence of record, whether the PUD as proposed meets the general standards for zoning set forth in the Zoning Enabling Act. See § 6-641.01 D.C. Code.

2. As part of the Zoning Commission's determination, assure that any deviations from, or increases over, appropriate base zoning are balanced by public benefits and amenities related and proportionate to the deviations and increases requested.

3. Where items have been provided to the community which are outside the policy and proportionality limitations described above but are part of a negotiated agreement between an applicant and the community, the Zoning Commission may recognize such contributions but may not deem them to be, nor make them, conditions to the approval of the PUD. Rather, such agreements are between the applicant and the receiving persons or parties.

Holland & Knight LLP

By: Whayne S. Quin, Esq.
Paul J. Kiernan, Esq.
Steven E. Sher, Director of
Zoning and Land Use Services

Attachment

A

COUNCIL OF THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20004

March 8, 1996

Jerrily R. Kress, Chairperson
Zoning Commission for the District of Columbia
441 4th Street, N.W.
Washington, D.C. 20001

'96 MAR 14 P12:00
OFFICE OF ZONING
DISTRICT OF COLUMBIA

RE: Case No. 95-2 (Housing Linkage)

Dear Ms. Kress:

I am writing to comment on one aspect of the proposed text amendments on housing linkage which is pending before the Zoning Commission in Case No. 95-2 and which, as currently proposed, is contrary to the Council's intent in enacting the housing linkage provisions as part of the Comprehensive Plan.

It is my understanding that the Zoning Commission has proposed that the housing linkage conditions would be required to be satisfied when an applicant obtains an increase in density as a result of a map amendment that is also part of a planned unit development ("PUD") application. However, the Council enactment specifically defined "**zoning density increase**" -- the receipt of which would trigger the housing linkage requirement -- to say that the term "**does not include increased floor area ratio that is obtained ... pursuant to an amendment of the Zoning Map**" (see section 308b (10)(O) of the Comprehensive Plan; emphasis added). An amendment of the zoning map is what it is whether or not it is combined with a PUD that may or may not provide additional bonus density on top of the increased density from the map amendment.

The rationale for excluding increased density obtained from zoning map amendments was that such rezonings by definition would be not inconsistent with the Comprehensive Plan and the increased densities from such rezonings would, by definition, become a "matter of right." It was the "little extra" in office space on top of matter-of-right density for which the Council intended an applicant to provide a "little extra" to the public in terms of an affordable housing amenity. (See page 18 of the Report of the Committee of the Whole on the Comprehensive Plan Amendments Act of 1994, dated May 17, 1994, on which the Committee stated: "**The housing linkage concept is that if an applicant is going to get a little extra in the form of bonus office space in the District, the applicant ought to give a little extra in the form of more housing in the District.**")

1 ZONING COMMISSION
CASE No. 95-2
EXHIBIT No. #45

3/14/96

I urge the Commission to revise the language of the proposed text amendments to ensure that housing linkage is required only for that part of increased commercial density obtained by an applicant as a result of the planned unit development regulations, and not for the increased commercial density obtained as a matter of right from a zoning map amendment. In urging this change, I want to reiterate my appreciation for your moving forward with this case to implement the housing linkage provisions of the Comprehensive Plan. Thank you for your consideration of these comments.

Sincerely,

David A. Clarke
Chairman

cc: Councilmember Frank Smith
Planning Director Jill Dennis