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Via IZIS

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

RE: Z.C. Order No. 13-14 – McMillan Sand Filtration Site
Opposition to Motion for Reconsideration from ANC 5E

Dear Commissioners:

On behalf of Vision McMillan Partners, LLC, through the Deputy Mayor’s Office for Planning and Economic Development, the applicant in the above-referenced matter (“Applicant”), we hereby oppose the motion of Advisory Neighborhood Commission (“ANC”) 5E to waive the rules to accept a request for reconsideration nearly three months after publication of the corrected order in this case. This response is timely filed pursuant to 11 DCMR § 3029.7.

1. The Commission is Divested of Jurisdiction to Entertain This Motion.

The Zoning Commission (“Commission”) is divested of jurisdiction to consider this motion for reconsideration because Z.C. Order No. 13-14, as corrected, is now before the D.C. Court of Appeals.¹ *Smith v. Pollin*, 194 F.2d 349 (D.C. Cir. 1952)(jurisdiction of a case is in the court when an appeal is pending). Nevertheless, if the Commission indicates it would grant the motion for reconsideration, the D.C. Court of Appeals could remand the case to the Commission in order to act on the motion. *Id.* at 350. For the reasons set forth below, the Commission should not consider this motion.

2. The ANC’s Motion is Untimely.

The Commission should deny the ANC’s motion as untimely. Pursuant to section 3029.6 of the Commission’s rules, a motion for reconsideration must be filed by a party within ten days of the order having become final. The corrected order in Z.C. Case 3-14 became final upon publication in the *D.C. Register* on April 24, 2015 (the “Corrected Order”). *See* 11 DCMR §

¹ See *Friends of McMillan Park, et al. v. District of Columbia Zoning Comm’n*, Case Nos. 15-AA-493, 15-AA-525, 15-AA-536, 15-AA-572, 15-AA-587, 15-AA-588, 15-AA-589, and 15-AA-590 pending before the D.C. Court of Appeals.

3028.9. The 10-day deadline to file a reconsideration motion expired on May 4, 2015, yet the ANC did not file its request until July 22, 2015, over two months – or 79 days – late. The ANC suggests that its extreme tardiness is excusable because the next ANC meeting after publication of the order was not until May 19, 2015. Yet, the ANC still failed to take action at that meeting and apparently continued the matter to its June 16 and June 24 public meetings.

Moreover, the time to comment specifically on the Applicant's proffers expired over *nine months* ago, immediately after the Commission took proposed action on the PUD. Pursuant to the Commission regulations, parties have the opportunity to comment on the Applicant's final proffers 28 days after the Zoning Commission takes proposed action. *See* 11 DCMR §2403.21. The Commission took proposed action on September 28, 2014, and the ANC had until October 27, 2014, to comment. Yet the ANC did not avail itself of that opportunity.²

Reconsideration deadlines provide important protections to the administrative process. They allow the Zoning Commission to conduct its business in an orderly fashion, and provide certainty and finality to agency actions. It is fundamentally unfair to applicants and the Commission alike to allow a party to delay the process for more than two months because they were unable to make timely decisions. It would also set bad precedent for other Commission cases. Consequently, the ANC's motion for reconsideration should be denied on timeliness grounds.

3. The ANC's Motion Does Not Provide Sufficient Grounds for Reconsideration.

Alternatively, if the Commission finds the ANC's tardiness excusable, the motion should nevertheless be denied for failure to provide sufficient grounds for reconsideration. Pursuant to section 2029.6 of the Commission's rules, a motion for reconsideration or re-argument must indicate the alleged errors in the order. Here, the ANC does not allege any error; rather, the ANC only requests that the proffers be rewritten "in a manner consistent with prior documented proffers of ANC 5E and its residents." Without any alleged error, there is no basis to reconsider the Commission's order.

The Commission should take note that the community benefit proffers contained in the Corrected Order are consistent with those adopted by the ANC in its resolution dated June 23, 2014. *See* Exhibit 833. The Commission and the Office of Attorney General then tweaked those proffers to ensure their enforceability. Subsequently, new members were elected to the ANC who wish to revisit their predecessors' resolution. That is, the newly elected ANC members want the Commission to substitute the final, approved proffers in the Corrected Order for the ones they now prefer. This is not a legitimate basis for reconsideration and must be rejected by the Commission.

² The ANC also alleges that "law and regulation provide Parties to Zoning Commission cases, the right to comment on *Final Orders*" yet does not cite any controlling authority to substantiate that claim. There is no such law or regulation.

4. Commission Adequately Considered the Applicant's Proffers and Community Comments Thereon.

The Commission received numerous comments on the Applicant's proffers throughout the proceeding. *See, for example*, Exhibit Nos. 841 and 867A (Stronghold Civic Association comments), Exhibit No. 843 (McMillan Advisory Group), and Exhibit No 845 (Bloomingdale Civic Association). Ultimately, however, it is up to the Zoning Commission to accept or reject the comments on the Applicant's proffers and issue its final order as it deems appropriate, after considering all the evidence. In fact, many of the issues raised in this latest ANC resolution were considered but rejected in the Corrected Order.³ Other ANC suggestions, such as limiting use of the Community Center to residents of the District, are best left to the District agency (in this instance, the District's Department of Parks and Recreation) with the appropriate management experience to address the changing needs of the city. Finally, with respect to the value of the public benefits package, the community is still getting the benefit of the transportation mitigation measures, which are estimated to have a value of \$1.75 million. While the Commission determined that the interim bus/shuttle service should be categorized as "mitigation" rather than a public benefit, there is no reduction in the amount of money the Applicant is devoting to the neighborhood. There is no rational basis for the Applicant to contribute an additional \$1.75 million to the project when it already provides "a full range of tangible public benefits and amenities" that the Commission has deemed to be sufficient. The suggested changes by the ANC are merely attempts to re-negotiate issues that it had already agreed to in July 2014 resolution or issues that the Commission had previously considered through comments from other persons or organizations. Thus, there is no reason for the Commission to reopen the record.

5. Conclusion

Based on the foregoing, the Commission should determine that it is divested of jurisdiction and deny ANC 5E's request to waive the rules to accept its motion for reconsideration. Alternatively, the Commission should deny the motion for reconsideration as failing to allege an error in the Commission's order or as having already addressed the issues raised by the ANC.

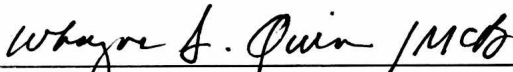
³ For example, the ANC does not believe that settlement on the first townhouse is an appropriate trigger for payments of certain benefits, yet the Commission expressly dealt with this issue in footnote 12 of the order (p. 46). The ANC also recommended that the community center and public spaces be managed by a public/private partnership comprised of at least five public members designated by the ANC and abutting civic associations. The Stronghold Civic Association and Bloomingdale Civic Associations made similar recommendations (Exhibits 867 and 845), but Commission declined to adopt this recommendation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing letter was service by email on July 29, 2015, on the following:

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