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October 30, 2017

VIA IZIS

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

Re: Z.C. 17-11 - Zoning Map Amendment
Square 5539 Lots 835, 838, 839, and 840 ("Subject Property")
Applicant's Request for Deferral of Decision and
Response to Comments by Julie Rones and O Street Neighbors and Friends

Dear Members of the Commission:

On behalf of the Petitioner, 3200 Penn Ave PJV, LLC, we hereby submit this request to the Zoning Commission ("Commission") to defer its decision on the above-referenced map amendment to allow the Petitioner time to work with the community, and in particular adjacent property owners, to address the issues raised at the October 2, 2017, public hearing relating to the height and setbacks of future development on the Subject Property. Further, as described below, given the unique procedural circumstances now present in the subject rulemaking, the Petitioner respectfully requests the Commission to confirm the manner in which the Petitioner would like to proceed with the case as it relates to the timing of the Commission's decision. Finally, included herein, the Petitioner submits a brief response to the comments submitted on October 16, 2017, by Ms. Julie Rones and Ms. Laura Richards regarding legal precedent for the assertion of a right to light, air, and views from a neighboring property that is held in separate ownership.

Petitioner's Request for Deferral of the Commission's Decision

At the close of the public hearing held on October 2, 2017, the Commission requested the Petitioner to submit a shadow study showing a worst-case development scenario of the proposed MU-4 zone on the Subject Property relative to its impacts on adjacent properties, and draft

findings of fact and conclusions of law.¹ However, upon consideration of the comments expressed at the public hearing by the community and the Commission, the Petitioner believes the most productive way to proceed is to ask the Commission to defer action on the case so that the Petitioner can work with adjacent neighbors to establish a set of development parameters that would apply along any lot line of the Subject Property that directly abuts the adjacent low-density residential zone (R-1-B). While still early in its coordination with the community, the Petitioner envisions the development parameters established with the community will relate primarily to height, yards, transition setbacks, and/or landscape buffer requirements. Once defined, these development parameters can be implemented through the creation of a modified version of the existing MU-4 zone, similar to what was done when the Commission created the former C-2-B-1 zone (now MU-5-B). The Petitioner looks forward to beginning its work with the community at an upcoming working session scheduled for November 1, 2017.

In regards to process, considering that the public hearing has been held on the requested map amendment, the Petitioner is now in a somewhat unique procedural circumstance since the development parameters formulated with the community will first need to be implemented through a separate text amendment rulemaking before the Commission can act further on the Petitioner's request. Given this unique circumstance, the Petitioner briefly discussed the general procedural steps to implementing the newly created development parameters with the Office of Planning ("OP"), and how that process relates to the Petitioner's current request to rezone the Subject Property. Based on an initial discussion with OP, it is the Petitioner's understanding that once a preliminary set of development parameters is created with the adjacent neighbors, the Petitioner will then forward the development parameters to OP. Upon receipt, OP will evaluate the development parameters to confirm that they not only address the concerns of the adjacent neighbors, but can also be organized into a new usable zone that can be applied in the future to other areas of the District that have similar adjacencies as the Subject Property. Once confirmed, OP would then submit the newly created development parameters to the Commission as a separate text amendment that would be processed in accordance with the requirements and procedures of 11-Z DCMR §§ 305 and 500. Relative to its current request to rezone the Subject Property (Z.C. Case No. 17-11), the Petitioner is hopeful that the Commission would consider taking proposed action to rezone the Subject Property to the new zone created as a result of the aforementioned text amendment at the same time it takes proposed action on said text amendment.²

¹ Subsequent to the public hearing, on October 16, 2017, Office of Zoning staff informed the Petitioner that it need not submit draft findings of fact and conclusions of law since the subject case is being processed by the Commission as a rulemaking proceeding, and in such cases the Office of Attorney General ("OAG") prepares the Commission order.

² At the public hearing, the OP indicated that it did not support the use of a covenant on the Subject Property as a means to enforce development requirements/restrictions intended to address concerns raised by neighboring property owners. However, since the approach now being taken by the Petitioner will require a process that is not specific to the Subject Property (i.e. creation of a new zone through a text amendment submitted to the Commission by OP), and limitations imposed by the District on a \$2.1 million grant provided to the Petitioner to assist with

Petitioner's Response to Comments Submitted Regarding Protection of Light, Air, and Views

At the conclusion of the public hearing, the Commission requested Ms. Julie Rones, representing Ms. Gwendolyn Rose, and the O Street Neighbors and Friends, represented by Ms. Laura Richards, to submit information in support of their testimony that demonstrates surrounding property owners, whether adjacent to the Subject Property or nearby, have a legal right to light and air from, and views across, the Subject Property. As discussed below, the information submitted to the Commission by Ms. Rones and Ms. Richards does not cite to any case law that would disturb the longstanding legal principle that a person has no legal right to light, air, or a view from a neighboring property that is held in separate ownership unless expressly granted through easement by the owner of the neighboring property. Rather, as has been clearly stated by the District of Columbia Court of Appeals ("DCCA"), "[A]merican courts have wisely refused to allow the acquisition by prescription of easements of light and air...This rule flows from the basic principle that the actual enjoyment of the air and light by the owner of the house is upon his own land only, and that the owner of the adjoining lands has submitted to nothing which actually encroached upon his rights...Thus, one may obstruct his neighbor's windows at any time and no action can be maintained for obstructing a view." (*Hefazi v. Stiglitz*, 862 A.2d 911, DCCA 2004)(Exhibit A).

In her submission regarding the protection of views, Ms. Rones states that "the Commission has the lawful authority to protect viewsheds given that the MAP change being sought is located at the location that the D.C. City Council determined is an extension of the L'Enfant Plan. The viewsheds within the L'Enfant Plan can be protected against obstruction." To be clear, the action of D.C. Council referred to in Ms. Rones' comments is the adoption of the Pennsylvania Avenue SE Corridor Small Area Plan, which does not describe the Subject Property as an extension of the L'Enfant Plan. Rather, the Small Area Plan states that "the corridor," referring to the section of the Pennsylvania Avenue, SE within the Small Area Plan, "began its rich history as an extension of the L'Enfant Plan." Notwithstanding, while Ms. Rones correctly states that viewsheds within the L'Enfant Plan can be protected against obstruction, and in fact are protected by way of the L'Enfant Plan's status as a registered District and Federal historic resource, and through policies of the District and Federal Elements of the Comprehensive Plan, such viewsheds are located along designated L'Enfant Plan rights-of-way and not across the Subject Property. In fact, this point is recognized in the comments submitted by the O Street Neighbors and Friends, which state "[i]n the District, primary protection is given to the L'Enfant views and views from the escarpment. These circumstances have little bearing on the case at hand."

Ms. Rones also incorrectly cites to specific sections of the 2016 Zoning Regulations ("ZR16") in support of her statement that "the Commission has the power to avoid a MAP grant

construction of a grocery store at the Subject Property, the Petitioner would like to reserve the right to discuss the use of a covenant in the event the text amendment process is unexpectedly or unreasonably prolonged.

on the basis of view analysis.” Specifically, Ms. Roness states that “[v]iewshed protection authority is pursuant to Section 701, of Title X of the Commission’s regulations.” However, this section of ZR16 is contained within the chapter pertaining to the Commission’s review of airspace development and not the review of map amendments. Specifically, Subtitle X, Section 700.1 states “[t]his chapter provides regulations for developing air rights above public streets or alleys (“airspace”) in the District of Columbia. The term “airspace development” is defined in ZR16 as “[d]evelopment above or below streets or alleys.” The Petitioner is not proposing any airspace development as part of the requested map amendment. Further, Ms. Roness states that the Commission “can refuse approval of the proposed development by not granting the MAP amendment if that would protect landowners from interference with the viewshed, and the Opposition’s line-of-sight sunlight viewing access, pursuant to 11 DCMR, Title A, Chapter 3, Section 304.3’s provisions governing ‘air’ and ‘light’ protections.” However, Ms. Roness’ reference to Subtitle A, Section 304.3 is misplaced as it pertains not to the standard of review for map amendment requests, but rather the criteria the Zoning Administrator must use when determining whether to grant a deviation from certain matter-of-right development standards within ZR16.

Regarding the comments submitted by Ms. Richards, on behalf of the O Street Neighbors and Friends, these comments begin by stipulating that “[i]t is generally accepted – and the Zoning Commission has recognized – that persons generally cannot complain of an obstructed view caused by a structure erected in accordance with the *matter of right* zoning regulations. In such a case, the governing regulations are presumed to reflect the appropriate degree of visual impact that new construction may present.” This comment supports the Petitioner’s statements above regarding the principle that a person has no legal right to light, air, or a view from a neighboring property unless expressly granted through easement by the owner of the neighboring property.

While the comments from O Street Neighbors and Friends acknowledge that property owners have no legal right to light, air, or a view from a neighboring property, they also stipulate certain circumstances in which the Commission, and the Board of Zoning Adjustment, take impacts on views into consideration while carrying out their respective authorities, including the review of map amendment requests. Specifically, the O Street Neighbors and Friends state that in reviewing a map amendment, “the Zoning Commission exercises a planning function, guided by the Comprehensive Plan and other relevant documents.” The Petitioner does not dispute this point. In fact, it is precisely why the Petitioner is requesting the Commission to defer its decision in this case. Specifically, while the requested map amendment to rezone the Subject Property to MU-4 seemingly falls squarely within the site’s mixed use (moderate density commercial / medium density residential) designation on the Comprehensive Plan Future Land Use Map (“FLUM”), as the Commission knows, the FLUM is not a zoning map. In this circumstance, despite being consistent with the FLUM, it would appear based upon comments from the Commission and the community that the requested map amendment requires a degree of “fine tuning” to respond to the immediate context through an appropriate set of development

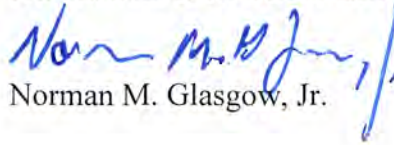
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parameters that still allows the Petitioner to carry out the long desired redevelopment of the Subject Property.

We appreciate the Commission's consideration of this request to defer decision on the subject petition.

Sincerely,

HOLLAND & KNIGHT LLP



Norman M. Glasgow, Jr.

Enclosures

cc: Jennifer Steingasser, Office of Planning (w/encl., via email)
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