COZEN O'CONNOR

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Anthony Hood, Chairperson
Zoning Commission
441 4th Street, NW, Suite 200S
Washington, DC 20010

Re: ZC Case No. 17-17 (the "Map Amendment")
Property Owner's Comments on Proposed Rulemaking

Chairperson Hood and Honorable Members of the Commission:

On behalf of PAL DC Storage, LLC ("PAL"), the owner of 1401 22nd Street SE, Washington, DC (the "Property") that is the subject of the above-referenced Map Amendment, which was filed by the ANC without PAL's authorization or support, please find enclosed comments on the proposed rulemaking to rezone the Property from PDR-1 to the RA-2 zone.

Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

BY: Meridith H. Moldenhauer

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BEFORE THE DISTRICT OF COLUMBIA
ZONING COMMISSION

APPLICATION OF **ZC CASE NO. 17-17**
ANC 8A

PROPERTY OWNER'S COMMENTS ON PROPOSED RULEMAKING

I. INTRODUCTION

PAL DC Storage, LLC ("PAL"), the owner of the property located at 1401 22nd Street SE, Washington, DC (the "Property"), submits the following comments on the proposed rulemaking in Zoning Commission Case No. 17-17 (the "Map Amendment"), which would downzone the Property from the PDR-1 zone to the RA-2 zone. As set forth in PAL's written statement submitted in the case record at Exhibit No. 33, as well as through the testimony of PAL and other witnesses in opposition to the Map Amendment at the public hearing on March 19, 2018, PAL reiterates its primary arguments herein:

1. The Property owner – PAL DC Storage, LLC - is opposed to the Map Amendment, which proposes to downzone a single piece of property;
2. The Map Amendment necessarily requires a fact-specific inquiry regarding consistency with the Comprehensive Plan;
3. Project-specific information was raised by multiple parties in the record and during the hearing; and
4. The Map Amendment is inconsistent with the District's Comprehensive Plan, which contains several policies that favor retention of viable, industrially-zoned land.

Accordingly, PAL requests that the Commission reconsider and vacate the proposed rulemaking to downzone the Property from PDR-1 to RA-2. In turn, PAL requests that the Map Amendment be processed as a contested case, and that PAL be afforded party status to present evidence and testimony in opposition to the Map Amendment.

II. THIS MATTER SHOULD BE PROCESSED AS A CONTESTED CASE BECAUSE OF THE FACT-SPECIFIC NATURE OF THE MAP AMENDMENT CONCERNING A SINGLE PIECE OF PROPERTY

PAL reiterates that the Map Amendment should be processed as a contested case because PAL opposes the downzoning of its Property and the Zoning Commission's decision necessitates

a fact-specific inquiry concerning a single piece of property that is owned by PAL. To that end, PAL extensively detailed in the record the basis for its request to process this matter as a contested case, but insufficient time was given in consideration of PAL's request at the outset of the March 19th hearing. The decision to proceed as a rulemaking case deprived PAL of a sufficient opportunity to become a party to the Map Amendment and present its arguments in opposition to the proposed downzoning of the Property.

Recent map amendments processed as rulemaking cases can be distinguished from the matter at hand. Zoning Commission case numbers 17-15, 17-24, 17-27 and 18-01 all concern single or contiguous pieces of property and were filed by the owner of the subject property. The Map Amendment can be distinguished from these cases because the Map Amendment was filed by ANC 8A *against* the objections of PAL, the property owner. Further, the Comprehensive Plan has language about the retention of industrially-zoned land that conflicts with other policies, including the Future Land Use Map. As such, the Map Amendment can only be approved with a more intensive, fact-specific inquiry. Unlike cases such as 17-15, 17-24, 17-27 and 18-01, this Map Amendment is not purely about consistency with the Comprehensive Plan, but requires consideration of additional information prior to a decision to downzone the Property and remove industrially-zoned land from the District's already dwindling supply.

A. Local and national legal precedent establish that this matter should be processed as a contested case

PAL previously outlined the D.C. Court of Appeals precedent that directs the Map Amendment to be processed as a contested case. *See* Exhibit No. 33. In particular, cases such as *Citizens Association of Georgetown, Inc. v. D.C. Zoning Commission*, *Chevy Chase Citizens Association v. District of Columbia Council*, and *Schneider v. D.C. Zoning Commission* clearly indicate that an administrative matter is a contested case when the matter concerns an inquiry into adjudicatory, fact-specific questions. In *Citizens Association of Georgetown*, the Court

noted the Zoning Commission performs an adjudicatory function "where a hearing resolves fact questions of specific applicability" that pertain to "the parties and their activities, businesses, and properties." *See Citizens Association of Georgetown, Inc. v. D.C. Zoning Commission*, 291 A.2d 699, 704 (1972). The Court of Appeals also noted that a rulemaking case "would not rest upon the status of any particular property, nor would the peculiar problems of any one individual in the area be of paramount concern." *See id.* at 705. The *Chevy Chase* Court adopted the holding in *Citizens Association of Georgetown* concerning a determination as to contested case status. *See generally Chevy Chase Citizens Association v. District of Columbia Council*, 327 A.2d 310, 315 (1974). In that case, which concerned an alley closing, the Court noted that the decision whether to ascertain damages or assess benefits resulting from the alley closing was "primarily adjudicatory"[1] because it concerned "immediate legal rights, duties or privileges of specific parties, rather than questions of general policy," including "the valuation of a specific piece of property." *See id.* at 316.

Appellate courts in other jurisdictions have made similar holdings to the D.C. Court of Appeals. In *Town v. Land Use Commission*, the Supreme Court of Hawaii considered a petition to amend a property's zoning designation from agricultural to rural. *See generally Town v. Land Use Commission*, 55 Haw. 538, 539 (1974). The Land Use Commission processed the matter as a rulemaking case under Hawaii's Administrative Procedure Act and ultimately granted the petition to rezone the subject property. *See id.* at 539-40. The abutting landowner filed an appeal, and the Court overturned the Land Use Commission's decision to process the matter as a rulemaking case, noting that the abutting landowner "has a property interest in the amending of a district boundary," and, therefore, "has legal rights as a specific and interested party." *See id.* at

[1] Despite these "adjudicatory" facts, the Court determined that the alley closing could be processed as a rulemaking because the street closure legislation allowed for de novo consideration of the issue in the Superior Court, which is necessarily excluded from the definition of a "contested case." *See id.* at 316.

548. The Court concluded that the abutting land owner is "entitled by law to have a determination on those rights" through a contested case. *See id*.

Similarly, in *Kaelin v. City of Louisville*, the Supreme Court of Kentucky reviewed a decision by the Jefferson County Planning Commission to change the zoning classification of a particular property. *See Kaelin v. City of Louisville*, 643 S.W.2d 590 (1983). A group of adjacent property owners opposed the zone change, but were denied the right to cross examine the applicants during the planning commission's hearing. *See id.* at 590-91. On appeal, the Court held that the adjacent owners had been denied their due process rights because they were not afforded "a trial type hearing for the purpose of determining the adjudicative facts necessary to decide the issue." *See id.* at 591. The goal of such a trial type hearing is to "permit the development of all relevant evidence that will assist the administrative body in reaching its decision." *See id.*

Unlike other cases, the Map Amendment is not limited to a simple determination as to consistency with the Comprehensive Plan. As detailed below, policies in the Comprehensive Plan restricts the rezoning of industrial land, such as the Property, to only those times "when the land can no longer viably support industrial or PDR activities or is located such that industry cannot co-exist adequately with adjacent existing uses." *See* 10A DCMR § 314.10. To resolve the conflicting language in the Comprehensive Plan requires consideration of "fact questions of specific applicability" to PAL and its intended use of the Property. *See Citizens Association of Georgetown, Inc.* at 704.

Absent an adjudicatory proceeding to consider these fact-specific inquiries, the Commission could not determine whether the proposed downzoning is, in fact, consistent or inconsistent with the Comprehensive Plan. In requesting that the Map Amendment be processed as a contested case, PAL simply seeks to present evidence that the Property is viable for an

industrial use and that an industrial use could co-exist with the neighboring properties in the area.[2] Further, an adjudicatory proceeding would afford PAL the right to cross-examine the Applicant in order to respond to certain allegations regarding the traffic, safety and other important issues relating to the consistency of the downzoning with the Comprehensive Plan.

The precedent in both the D.C. Court of Appeals and other jurisdictions reflects that the Map Amendment requires a fact-specific inquiry and should be processed as a contented case. PAL, as the owner of the Property, is uniquely and acutely impacted by the proposed downzoning. As such, PAL should be afforded the right to fully present evidence that the Map Amendment is not consistent with the Comprehensive Plan as well as to cross-examine the Applicant's witnesses.

B. <u>As demonstrated in the case record and at the hearing, the Applicant's intent in filing the Map Amendment is to bar a self-storage facility at the Property</u>

The Applicant's filings and testimony reflect that the Map Amendment was filed not to address a policy decision, but was aimed at fact-specific information relating to PAL and the proposed self-storage facility. The Applicant petitioned to downzone only the Property instead of seeking to downzone the adjacent swath of PDR-zoned land to the north and east along Fairlawn Avenue. In purposefully omitting nearby industrially-zoned land, it is clear that the Map Amendment was intended to avoid a specific self-storage use at the Property; whereas, a zoning map amendment *should* be utilized to apply broader land use policies reflected in the Comprehensive Plan and other public documents.[3]

Further, the record and the testimony in support of the Map Amendment are replete with references to PAL's proposed self-storage facility that belie any notion this rulemaking case

[2] During the March 19, 2018 hearing, the Zoning Commission improperly limited PAL from presenting critical facts or cross-examining witness, which should have been considered as part of the downzoning determination.
[3] Further, the application requests that the Map Amendment be processed as an "emergency action." It is unclear why the Applicant would seek an emergency action other than to specifically avoid the property owner's planned self-storage facility at the Property.

concerns a "policy decision directed toward the general public." *See Citizens Association of Georgetown, Inc. v. D.C. Zoning Commission*, 291 A.2d 699, 704 (1972). The Map Amendment application includes a number of exhibits that reference opposition to the proposed self-storage facility, including a resolution of Applicant ANC 8A, a letter from Ward 8 Councilmember Trayon White, and a letter from the Fairlawn Citizens Association. *See* Ex. Nos. 2, 7, 8. The letter from Councilmember White specifically cites "opposition to the proposed development of a 5 story, 1700 unit storage facility" at the Property. *See* Ex. Nos. 7, 23. Additionally, there are no fewer than six letters in support of the Map Amendment filed in the case record that cite opposition to the proposed self-storage facility at the Property. *See* Ex. Nos. 25, 29, 30, 31, 32, 43.

At the hearing on March 19, 2018, several supporters of the Map Amendment testified about the proposed self-storage facility. One supporter called the self-storage facility "a huge eyesore" that "doesn't require any serious labor, material," and is "definitely not part of my checklist when I purchased my home eight years ago." *See* 3/19/18 Hearing Transcript, pg. 24:7-12; pg. 25:9-10. Another supporter noted that the community had "said 'no' to the storage facility [and] we have not changed our minds. We still say no." *See* 3/19/18 Hearing Transcript, pg. 27:16-17. Commissioner Acker of ANC 8A testified that a self-storage facility could be used as shelter for homeless people and, as such, the self-storage facility is not wanted by the community. *See* 3/19/18 Hearing Transcript, pg. 38:18-19. There were also numerous claims that a self-storage facility would increase traffic and threaten pedestrian safety in the neighborhood. *See* 3/19/18 Hearing Transcript, pg. 14:21-23, pg. 16:15-25, pg. 27:13-15, pg. 30:14-31:2.

Yet, PAL was not afforded the right to present evidence or cross-examine the Applicant and its witnesses in order to rebut any of these claims. PAL was likewise limited in addressing

certain aspects of the Comprehensive Plan, including that the Property remains viable for an industrial use and that the industrial use could co-exist with surrounding residential uses. These fact-specific inquiries reflect that this case should be processed as a contested case, a conclusion that would be in line with case precedent concerning the distinction between a contested case and a rulemaking case in the zoning context. As such, PAL respectfully requests that the Commission reconsider its decision to process this matter as a rulemaking case and allow PAL to fully present evidence in opposition to the proposed downzoning of the Property.

III. THE PROPOSED MAP AMENDMENT IS INCONSISTENT WITH THE COMPREHENSIVE PLAN POLICIES SUPPORTING RETENTION OF VIABLE INDUSTRIAL LAND

The proposed Map Amendment is inconsistent with the policies urging retention of industrial land that are set forth in the Comprehensive Plan and industrial land studies, and the Commission did not give due consideration to these policies. The Comprehensive Plan "reflects numerous 'occasionally competing policies and goals,'" and requires balancing of "competing priorities" in determining an action's consistency as a whole. *See Friends of McMillan Park v. D.C. Zoning Commission*, 149 A.3d 1027, 1034 (2016). The Comprehensive Plan's policies "have substantial force even if they are not mandatory." *See id.* at 1035. Therefore, the Comprehensive Plan must be considered "holistically" and particular provisions of the Comprehensive Plan cannot be disregarded simply because an action is consistent with other provisions. *See id.; see also Durant v. D.C. Zoning Commission*, 65 A.3d 1161, 1168 (2013). Here, the Comprehensive Plan's Land Use Element[4] is very clear in encouraging the retention of viable, industrially-zoned land, referring to industrial uses as activities that "are an essential part

[4] It should be noted that the Comprehensive Plan's Land Use Element is given greater weight than the other elements in the Comprehensive Plan. *See* 10A DCMR § 300.3. The Future Land Use Map ("FLUM") is incorporated in the Land Use Element, but the FLUM's recommendations must be "interpreted **in conjunction** with the text of the Comprehensive Plan, including the city wide elements and the area elements, as well as approved Small Area Plans." (emphasis added) *See* 10A DCMR § 226.1.

of the District of Columbia and are vital to the city's future." *See* 10A DCMR § 313.1. The Property is currently industrially-zoned and subject to additional scrutiny based on these policies and goals of the Comprehensive Plan. The additional scrutiny to downzone the Property does not change simply because the Future Land Use Map identifies the Property as moderate-density residential.

In this regard, it must be noted that the Comprehensive Plan clearly seeks to protect industrially-*zoned* property. Land Use Element 3.1 sets forth that "approximately 2,000 acres of land in the District of Columbia are *zoned* for industrial uses." (emphasis added) *See* 10A DCMR § 314.1. The 2006 Industrial Land Use Study, which provides a framework for Land Use Element 3.1 and was outlined in PAL's written submission, also analyzes the "constrained supply of *industrially-zoned* land." (emphasis added) *See* Ex. No. 33A, pg. 45-51. The Industrial Land Use Study found that a total of 2,026 acres of District land are within industrial zones, a number that aligns with the figure cited in Land Use Element 3.1. *See* Ex. No. 33A, pg. 48. As noted in the Industrial Land Use Study, industrially-zoned lands are the only zones wherein the District's zoning regulations allow "PDR activities." *See* Ex. No. 33A, pg. 45. Thus, it is clear that the Land Use Element policies apply to industrially-zoned land.

It is in this context that the Land Use Element states "much of the city's industrial land supply is at risk" because of the lenient zoning standards in industrial zones. *See* 10A DCMR § 314.3. To combat the loss of industrially-zoned land, the Comprehensive Plan seeks to "ensure that zoning regulations and land use decisions protect active and viable PDR land uses." *See* 10A DCMR § 314.7. Most importantly, the Land Use Element explicitly states that rezoning of industrial land for non-industrial purposes should be allowed "*only when* the land can *no longer viably support* industrial or PDR activities or is located such that industry *cannot co-exist* adequately with adjacent existing uses." (emphasis added) *See* 10A DCMR §314.10. The Land

Use Element also recommends accommodating PDR uses in locations that are "well buffered from residential uses (and other sensitive uses such as schools), easily accessed from major roads and railroads, and characterized by concentrations of PDR and industrial uses." *See* 10A DCMR § 314.9.

The policies and goals of the Comprehensive Plan are clear: industrially-zoned land in the District should be retained, and should only be rezoned under limited circumstances. This determination can clearly be differentiated from other rulemaking cases because the Map Amendment necessarily requires a more intensive, fact-based inquiry into the nature of the industrially-zoned land as well as the owner's plans for the land and any existing or intended uses. PAL, the owner of the Property, purchased the Property with an intent to use the Property for a self-storage facility. In turn, the intended use of the Property is, indeed, a viable industrial use that can co-exist with adjacent existing uses.

Yet, error was committed because PAL was not permitted to present these facts and supportive evidence. The Commission simply could not adequately weigh the fact-specific Land Use Element policies that encourage retention of industrially-zoned land. The processing of this matter as a rulemaking prevents a "holistic" review that balances the competing policies and goals of the Comprehensive Plan. Therefore, PAL respectfully requests that the Commission vacate the proposed rulemaking and process the Map Amendment as a contested case.

IV. CONCLUSION

In conclusion, this matter was inappropriately processed as a rulemaking case, as it concerns a fact-specific inquiry that calls for intensive evaluation of PAL and its plans for a viable industrial use at the Property. The substantial legal precedent both locally and nationally indicate that administrative cases that require fact-specific inquiries should be processed as a contested case. The Map Amendment's consistency with the competing goals and policies of the

Comprehensive Plan cannot be sufficiently determined absent PAL presenting evidence and cross-examining the Applicant. Accordingly, PAL respectfully requests that the Commission reconsider and vacate the proposed rulemaking to downzone the Property from the PDR-1 zone to the RA-2 zone and process this matter as a contested case.

Respectfully submitted,
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