

January 29, 2019

**VIA FIRST CLASS MAIL**

Zoning Commission for the District of Columbia  
Attn: Anthony J. Hood, Chairman  
441 4th Street, NW  
Suite 200S  
Washington, DC 20001

RECEIVED  
D.C. OFFICE OF ZONING  
2019 FEB - 1 AM 11:43

**Re: Zoning Commission Case # 17-21; Failure to Comply with Required Protocol for Change of Institutional Land Use Designation**

Dear Chairman Hood and Commissioners:

On behalf of the United Neighbors of Southwest (“UNSW”), please accept the following letter in opposition to the application for a Planned Unit Development (“PUD”) with respect to Zoning Commission Case # 17-21 and the property at 501 I Street, SW, Washington, DC 20024 (“Property”).

The proposed PUD would require changes in both the zoning and land use designation of the Property. As set forth below, the Zoning Commission (“ZC”) is prohibited from changing a property’s land use designation absent a formal public hearing before the D.C. Council. Because no such hearing has occurred, the ZC is without authority to approve the PUD.

**I. Background**

The Property, which is owned by As You Like It, LLC (“Applicant”), is located in the R-3 zone on the District of Columbia Zoning Map. The Applicant has applied for a PUD and related amendment to the Zoning Map that would change the Property’s zone from R-3 to MU-4. The UNSW is an unincorporated organization comprised of more than sixty homeowners who oppose the PUD. The R-3 zone is a residential zone which allows for row dwellings, while including areas within which row dwellings are mingled with detached dwellings, semi-detached dwellings, and groups of three or more row dwellings.<sup>1</sup> The MU-4 zone is a mixed-use zone, which provides for mixed-use developments that permit a broad range of commercial, institutional, and multiple dwelling unit residential development at varying densities.<sup>2</sup>

In addition to requiring a change in the Property’s zoning, the PUD would require a change in the Property’s land use designation. The ZC is not authorized to change the Property’s

<sup>1</sup> 11-D DCMR § 300.6.  
<sup>2</sup> 11-G DCMR § 400.3.

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land use designation absent a formal public hearing before the D.C. Council. No such hearing has occurred, nor has one been requested. Until such time as the D.C. Council has held a formal public hearing on the matter, the ZC must reject the proposed PUD because it would improperly bring about a change in the Property's land use designation.

## **II. Use and Development Regulations – Title 10**

The ZC reviews PUD applications in light of the Comprehensive Plan (“Plan”).<sup>3</sup> The Plan establishes a “broad framework intended to guide the future land use planning decisions for the District.”<sup>4</sup> The Plan’s Land Use Element “provides direction on a range of development, conservation, and land use compatibility issues.”<sup>5</sup> The District adopted an amended version of the Plan in 2012, which included a Generalized Policy Map (“GPM”)<sup>6</sup> and a Future Land Use Map (“FLUM”).<sup>7</sup> Both the GPM and the FLUM show the Property as having an institutional use.<sup>8</sup> However, the fact that parcels designated as institutional “are not designated as Conservation, Enhancement, or Change does not mean they are exempt from the policies of the Comprehensive Plan or will remain static.”<sup>9</sup>

The FLUM, which visually depicts the policies reflected in the Land Use Element<sup>10</sup> and shows the general character and distribution of recommended and planned uses across the city,<sup>11</sup> categorizes areas as low, moderate, medium, or high density.<sup>12</sup> The GPM shows how the District is expected change from 2005 to 2025.<sup>13</sup> It does not necessarily show land use as it exists today.<sup>14</sup> “Both maps carry the same legal weight as the text of the Comprehensive Plan.”<sup>15</sup>

<sup>3</sup> *Durant v. D.C. Zoning Comm'n*, 139 A.3d 880, 882 (D.C. 2016).

<sup>4</sup> *Wisconsin–Newark Neighborhood Coal. v. D.C. Zoning Comm'n*, 33 A.3d 382, 394 (D.C.2011) (internal quotation marks omitted).

<sup>5</sup> 10-A DCMR § 300.1.

<sup>6</sup> District of Columbia Office of Planning, *Comprehensive Plan – Generalized Policy Maps*, available at <https://planning.dc.gov/page/comprehensive-plan-generalized-policy-maps>.

<sup>7</sup> District of Columbia Office of Planning, *Comprehensive Plan – Future Land Use Maps*, available at <https://planning.dc.gov/page/comprehensive-plan-future-land-use-maps>.

<sup>8</sup> District of Columbia Office of Planning, *Comprehensive Plan – Future Land Use, Map 7*, available at <https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/FutureLandUse7.pdf>.

<sup>9</sup> 10-A DCMR § 223.22.

<sup>10</sup> 10-A DCMR § 225.1.

<sup>11</sup> 10-A DCMR § 200.5.

<sup>12</sup> 10-A DCMR §§ 225.2–, 11.

<sup>13</sup> 10-A DCMR § 200.5.

<sup>14</sup> District of Columbia Office of Planning, *Comprehensive Plan – Future Land Use Maps*, available at <https://planning.dc.gov/page/comprehensive-plan-future-land-use-maps>.

<sup>15</sup> 10-A DCMR § 200.5.

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In establishing guidelines for using the GPM and the FLUM, the District of Columbia land use regulations provide:

The Future Land Use Map and the Generalized Policy Map can be amended. They are not intended to freeze future development patterns for the next 20 years. The Comprehensive Plan is intended to be a dynamic document that is periodically updated in response to the changing needs of the city. Requests to amend the maps can be made by residents, property owners, developers, and the District itself. *In all cases, such changes require formal public hearings before the DC Council*, and ample opportunities for formal public input. The process for Comprehensive Plan amendments is described in the Implementation Element.<sup>16</sup>

The same regulation also states:

The Map does not show density or intensity on institutional and local public sites. *If a change in use occurs on these sites in the future (for example, a school becomes surplus or is redeveloped), the new designations should be comparable in density or intensity to those in the vicinity, unless otherwise stated in the Comprehensive Plan Area Elements or an approved Campus Plan.*<sup>17</sup>

The regulations make clear that the Plan cannot be amended without a formal hearing before the D.C. Council. Use of the phrase “[i]n all cases” confirms that there are no exceptions to that rule.<sup>18</sup> However, the PUD does not request an amendment to the FLUM, the GPM, or any other component of the Plan. Rather, the Applicant has requested an amendment to the Zoning Map.

The Title 10 regulations specifically address zoning actions for institutional uses. The section entitled “Action LU-3.2.A: Zoning Actions for Institutional Uses” states as follows:

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<sup>16</sup> 10-A DCMR § 226.1(k) (emphasis added).

<sup>17</sup> 10-A DCMR § 226.1(h).

<sup>18</sup> It is worth noting that the process for amending the Plan requires much more than a single hearing. After the requisite hearing, the Chairman of the D.C. Council provides his or her initial recommendations to the Council Committee of the Whole (the “Committee”). See 10-A DCMR § 2517.1(b). Thereafter, the Committee holds a meeting to consider and vote on the proposed amendment(s). See 10-A DCMR § 2517.1(b). If the Committee approves the proposed amendments, they are considered by the D.C. Council, which “considers and votes on an amendment package in at least two legislative meetings (first and second readings) no less than two weeks apart.” 10-A DCMR § 2517.1(c). Once the D.C. Council has approved the proposed amendments, “[i]t is the Mayor’s responsibility to take action to approve or veto the amendments.” 10-A DCMR § 2517.2. Following Mayoral action, the proposed amendments are forwarded to the U.S. Congress for a thirty-day review period and to the National Capital Planning Commission (“NCPC”) for a sixty-day review period. See 10-A DCMR § 2517.3. If the NCPC finds that there are no potential negative impacts on the federal interest, the Plan amendments will go into effect. See 10-A DCMR § 2517.3.

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Complete a study of residential zoning requirements for institutional uses other than colleges and universities. *Determine if additional review by the Board of Zoning Adjustment or Zoning Commission should be required in the event of a change in use.* Also determine if the use should be removed as an allowable or special exception use, or made subject to additional requirements.<sup>19</sup>

While the foregoing regulation indicates that a change in use may not require approval from the ZC, it does not purport to obviate the need for a D.C. Council hearing. Indeed, the reference to “*additional review by the Board of Zoning Adjustment or Zoning Commission*” makes clear that another layer of review was also required. More importantly, however, that regulation appears to deal with land uses that are being changed from a non-institutional use to an institutional use. That is not the case here.

Yet another policy of the Plan is to:

Carefully control and monitor institutional uses that do not conform to the underlying zoning to ensure their long-term compatibility. *In the event such uses are sold or cease to operate as institutions, encourage conformance with existing zoning and continued compatibility with the neighborhood.*<sup>20</sup>

Where, as here, an institutional use ceases to operate as an institution, the Plan encourages “conformance with existing zoning [which is R-3] and continued compatibility with the neighborhood.” Contrary to Applicant’s suggestions, it does not permit the ZC to unilaterally change the Property’s land use designation without the need for a formal public hearing before the D.C. Council.

Finally, the Plan recommends that the District conduct a zoning assessment of land designated as having an institutional use. More specifically, “Action PROS-4.2.A: Zoning Assessment of Institutional Land” states:

Conduct a study of institutional land in the city to determine the appropriateness of existing zoning designations, given the extent of open space on each site. Among other things, this study should assess how current zoning policies, including large tract review, planned unit developments, and campus plans, work to protect open space. Recommend zoning changes as appropriate to conserve open space and avoid incompatible building or redevelopment on such sites. This

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<sup>19</sup> 10-A DCMR § 315.9 (emphasis added).

<sup>20</sup> 10-A DCMR § 311.9 (emphasis added).

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study should include a “best practices” assessment of how other cities around the country achieve the goal of conserving functional open space without impairing economic growth or reducing development rights.<sup>21</sup>

### **III. ZC’s Authority to Approve PUDs that Effect Changes in Land Use Designations**

To approve a PUD, the ZC must “find that the proposed PUD is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site.”<sup>22</sup> In *Barry Farm*, the D.C. Court of Appeals vacated a ZC order that did not comply with the Plan because the ZC failed to fully address the contested issues as required by the zoning and redevelopment regulatory scheme.<sup>23</sup> The court explained that the ZC:

can approve a PUD that is inconsistent with one or more such provisions if the provisions at issue are worded in mandatory terms, *only if the Commission (1) concludes that disregarding one such provision is necessary to comply with one or more other such provisions and (2) explains why it is deciding to favor one such provision over the other such provision. The Commission cannot simply disregard some provisions of the Comprehensive Plan on the ground that a PUD is consistent with or supported by other provisions of the Comprehensive Plan.*<sup>24</sup>

Accordingly, unless the ZC finds that compliance with a provision of the Plan necessitates disregarding another provision, the PUD application must be denied.

In *Durant v. District of Columbia Zoning Commission*, the D.C. Court of Appeals set aside a ZC order that concluded that a proposed PUD was a moderate-density residential development and therefore consistent with the Plan.<sup>25</sup> The Court found that the ZC had failed to articulate a rationale for why the proposed PUD was consistent with the GPM and FLUM and, as a result, found that the Plan did not pass muster under the zoning regulations.<sup>26</sup> By setting aside a ZC order that would have required a change in land use, the Court effectively held that the ZC is not authorized to approve a PUD that would effect a change in the land use designation as depicted on the GPM and FLUM. Although *Durant* did not involve any parcels designated for institutional use, the logical conclusion from its holding is that the ZC would not be permitted to

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<sup>21</sup> 10-A DCMR § 818.8.

<sup>22</sup> See *Barry Farm Tenants and Allies Assoc. v. D.C. Zoning Comm’n*, 182 A.3d 1214, 1223 (2018).

<sup>23</sup> See *id.*

<sup>24</sup> *Id.* (emphasis added).

<sup>25</sup> 139 A.3d 880, 882 (D.C. 2016).

<sup>26</sup> *Durant v. D.C. Zoning Comm’n*, 139 A.3d 880, 882 (D.C. 2016).

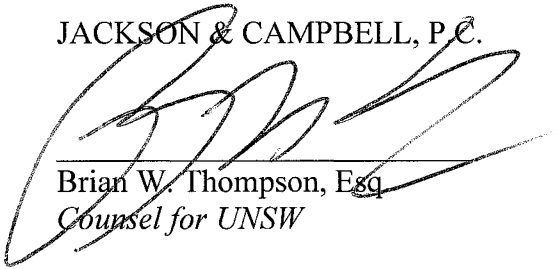
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approve the Applicant's PUD since it would require a change in the parcel's designated land use, which requires approval from the D.C. Council pursuant to 10-A DCMR § 226.1(k).

In light of the foregoing, the ZC is not authorized to approve the Applicant's PUD because the proposed PUD would effect a change in the property's institutional land use designation. Any change in the Property's land use designation requires a formal public hearing before the D.C. Council in accordance with 10-A DCMR § 226.1(k). No such hearing has occurred, nor has one been requested. Until such time as the D.C. Council has held a formal public hearing on the matter, the ZC must reject the PUD proposed by the Applicant because it improperly brings about a change in the Property's land use designation.

Sincerely,

JACKSON & CAMPBELL, P.C.



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