



**GOVERNMENT OF THE DISTRICT OF COLUMBIA
ADVISORY NEIGHBORHOOD COMMISSION 3D
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Washington, DC 20016**

**PALISADES · KENT · SPRING VALLEY · WESLEY HEIGHTS · NEW MEXICO/CATHEDRAL · THE AMERICAN
UNIVERSITY · FOXHALL VILLAGE · BERKELEY**

July 23, 2018

Testimony of Troy Kravitz, ANC Commissioner 3D02, on behalf of ANC3D in ZC No. 18-06

Good evening members of the Commission. Thank you again for having me. I'm Troy Kravitz, ANC Commissioner for Spring Valley. ANC3D appointed me to testify on the Commission's behalf when it passed our resolution in opposition to this matter on July 11. That resolution is Exhibit 12 in the case log. It was adopted by a vote of 5-2 while I was overseas. The testimony I present here tonight was produced in consultation with a majority of ANC3D's commissioners; they have read it and helped me hone the arguments.

"Hard cases make bad law." Supreme Court Justice Oliver Wendell Holmes realized this in 1904. If you, members of the Zoning Commission, take nothing else away from what I say to you tonight, we hope you heed these words, *hard cases make bad law*, and we hope you embrace their implication.

This is a hard case. It began, in Zoning Case No. 17-11, as an issue at 3200 Pennsylvania Avenue, Southeast. The initial matter should remain the only matter as far as ANC3D is concerned: whether and how to rezone Square 5539, Lots 835, 838, 839 and 840. That parcel is currently a mix of zoning designations, including R-1-B and MU-3. I'll note here, for posterity, that no part of the parcel is zoned MU-4.

As Zoning Commissioners realized from the start, the current mish-mash of zoning at the site is not particularly conducive to revitalization of the parcel for a community that is desperate for it.

Concurrently, Commissioners emphasized the possible harm to immediately-adjacent neighbors that could result under a worst-case scenario when upzoning the parcel. Commissioner Turnbull, and others, wondered about height and light impacts. These concerns prompted Commissioner May to ask, "What about doing a custom zone in here?," a recommendation that was embraced by Chairman Hood and the Office of Planning (October 2, 2017, p. 57).

Even though there was no project to consider, the discussion talked about using shade studies to understand light impacts and using bulk control to design a still-hypothetical project sensitively. Commissioners May, Miller and Hood realized a tension in what they were being asked to consider, with Commissioner May commenting, "We're not looking at a PUD, we're not looking at a project. We're just looking at a map amendment" (October 2, 2017, p. 50). Commissioner Miller returns later to this point, and so will I.

The discussion even talked about potential covenants on the site. They'd been done in the past and the Court of Appeals had upheld their use, but the Office of Planning expressed their opposition.

Before you was a parcel with a mix of zoning designations, a desire to revitalize the site for the community, and a request to upzone the entire site. But there was no project to consider; it was all just hypothetical. Concerns were raised about the potential harm caused by a hypothetical project, and possible mitigation efforts – still in the abstract – were discussed. In short, this parcel at 3200 Pennsylvania Avenue, Southeast, Square 5539, Lots 835, 838, 839, and 840, *this is a hard case*. Someone who tells you differently hasn't been paying attention.

Faced with what to do at 3200 Pennsylvania Avenue, SE, a solution emerged. The Zoning Commission directed the petitioner to go back to the neighborhood, the neighbors immediately surrounding 3200 Pennsylvania Avenue, SE, and find something they could all live with, for 3200 Pennsylvania Avenue, SE.

And they did. This is a success story. And you all realized it. The petitioner met with the owners of single-family residences along O Street and drafted the specs for a potential project that is responsive to the potential adjacency issues. The petitioner had several meetings with these neighbors, the neighbors living around 3200 Pennsylvania Avenue, SE, and they solved the problem in their literal back yards.

As 3200 Pennsylvania Avenue, SE is quite far afield from ANC3D's jurisdiction in upper Northwest, we have no opinion about what constitutes sound policy for the affected parcel.

In addition to commending the engagement of the stakeholders involved with this parcel, we share our sympathy for their concerns. Adjacencies between zoning categories can cause challenges. By definition, uses of nearby parcels are different. This is inescapable; it's a necessary feature of any dividing line. But the inescapability of potential tension does not lessen concerns about light, traffic, noise and other impacts. ANC3D grapples with these tensions in our community and they are concerns that get treated by us with the seriousness and due respect they are owed.

The proposals before you for a text amendment affect ANC3D directly. OP proposes to create a new zoning designation with 20% less density and to have this new category be made available across the city. We oppose this, mainly for procedural and process reasons, but it is illustrative to consider the sites near us where this new zone could be applied. (See Figures 1, 2 and 3.) Figure 1 highlights in red two MU-4 zones within ANC3D. At the top is the Spring Valley commercial district, encompassing both sides of Massachusetts Avenue. At the bottom is the Palisades Safeway on Macarthur Boulevard. Figure 2 depicts the public transportation infrastructure in our area. There are two bus lines along Massachusetts Avenue, two along Macarthur, and six or so along Wisconsin Avenue. Finally, Figure 3 combines the two maps. The MU-4 zones that are adjacent to R-1-B residential zones are highlighted in red; the black stars represent the Tenleytown and Friendship Heights metroraill stations; and the blue lines are some bus routes passing through these MU-4 zones. We believe it is helpful to understand concretely, visually, what we are talking about when one speaks in the abstract about MU-4 zones bordering residential areas in the city.

Others in the case have expressed their support for a new zoning designation that is 40% less density – even 25% less density than under ZR58 – and that the text amendment be morphed into a map amendment as well so that the new zoning classification is implemented across the city. That is, they ask you to rezone entire sites across the city, tonight.

It is prudent to walk through an example of what they have in mind. Consider the vacant and deteriorating Super Fresh site by Massachusetts Avenue, NW in Spring Valley and AU Park. We've talked about this case at length – it's a voluntary design review in Zoning Case number 16-23 – so it's a handy one to use. (See Figure 4.) Record Lot 9 contains the vacant grocery store, the large surface parking lot, and the former AU Law School. Part of Record Lot 9 is highlighted in red; the AU law building is outside and beneath the red box. The lot is 121,272 square feet, with the AU law building being 179,302 square feet. The plan to limit by-right density at this site to 1.5 FAR and immediately have it rezoned, tonight, which is what you've been asked to do by some, would leave 2,606 square feet available for development. Put another way, if you were to knock down the vacant and deteriorating building and bulldoze the surface parking lot (that is, everything within the red box), you wouldn't even be able to construct two townhomes on the entire site.

While I won't comment more directly on the 40% less dense text amendment cum map amendment plan, these proposals affect parcels throughout the city. I've displayed a map of MU-4 zones in our community, but where are the maps and where is the analysis for other communities? This kind of analysis needs to happen in every neighborhood and the public needs to be brought along into the process.

Zoning is a big deal. It took 58 years to get from ZR58 to ZR16. That's two generations. We should probably assume that any decisions we make tonight have a shelf-life of about that long. Where do we, as a city, want development to be focused? Should we upzone parcels in our communities, and on what basis? The same questions apply to downzoning, say going from MU-4 to the proposed MU-4A. Do we want to downzone where transit options are relatively most abundant? If we don't want development along the major transportation arteries in our communities, is there anywhere we tolerate it? These are just some of the questions communities all across the city should be asking, and answering. Most people probably thought they answered them, conclusively, during the zoning rewrite process. ANC3D believes that, broadly speaking, they have, and so we object to reopening this discussion without their participation, let alone knowledge.

Zoning regulations govern a city's growth. It gets to the very heart of "how do we want our city to evolve," and "what do we want our city to look like, for our children and grandchildren." These are weighty considerations. They require open community discussion. They require civic engagement, and community organizing, and the other trappings of a functional civil society. The zoning rewrite that produced ZR16 involved more than 350 public meetings, thousands and thousands of participants and hundreds of written comments indicative of the dialogue so needed in a healthy democracy. It took over 8 years.

In some ways, this proceeding may appear to be the continuation of that process. But it's not. Just look at the dearth of commentary you've received. That's not because of a lack of interest; it's because of a lack of awareness. People haven't engaged with this proposed text amendment because, frankly, they haven't really known about it. This started as a case about a parcel at 3200 Pennsylvania Avenue, SE. There was an upzoning request for one particular parcel, seemingly only affecting the stakeholders surrounding 3200 Pennsylvania Avenue, SE, Square 5539, Lots 835, 838, 839, and 840. While practically nobody else engaged with this matter, this hard case ballooned into a text amendment (let alone, map amendment) potentially affecting the entire city.

Evaluating the performance of zoning regulations is important. It is what we should be doing all of the time. But that's not what's going on here. This is not about the MU-4 designation not working. This is

about the mess at 3200 Pennsylvania Avenue, SE. This is a hard case, a parcel with multiple zoning designations but none of which are MU-4. If the concern is that MU-4 is inappropriate for that site, then fine, don't upzone it to MU-4. The potential inappropriateness to make a given parcel MU-4 doesn't indicate a flaw in MU-4. That conclusion doesn't follow from the premise. There may be merit to creating a new zone to be available across the city – that's a discussion we as a city should have – but we cannot conclude that based upon the case record in this matter.

The zoning vesting rules indicate caution is needed. If this text amendment becomes available city-wide, a map amendment petition can be filed with minimal effort, knowledge and cost to foreclose all progress for 6-8 months while the petition is evaluated. Consider, for example, a matter-of-right proposal in a current MU-4 zone. If, while preparing building plans, a map amendment petition is filed, DCRA cannot approve the building plans until the petition is denied. Even a petition entirely devoid of merit shifts the burden onto the Office of Planning and the community. It becomes incumbent upon people on the ground, like dedicated but volunteer Advisory Neighborhood Commissioners, to study and address the petition. And the notice (even to the property owner) is little more than a sign, posted publicly only after a set-down is declared. This text amendment will become a sword used to disembowel development projects writ large.

We believe allowing the proposed text amendment to become available city-wide like this – by allowing an obscure (to most) zoning case transform into an obscure (to all) zoning case – is both poor policy and poor process. While it appears superficially to be a continuation of a process that enjoyed hearty public engagement for close to a decade, it actually directly undermines that very process and that very engagement. By now we know, convincingly, that the public cares about the zoning regulations governing their city's evolution. Now is not the time to exclude them, through no intention of anyone on the Zoning Commission or the Office of Planning.

So where do we go from here? This should have been a PUD. Vice Chair Miller said so himself during the October 2, 2017 hearing (p. 206). But there's no concrete project to consider at 3200 Pennsylvania Avenue, SE – it's all still hypothetical – and PUDs are toxic right now.

Covenants are another option, but they were already shot down by OP. Perhaps the desired development restrictions for the site could be expressly applied directly to the relevant parcel within ZC 17-11.

A custom zone for this site, initially suggested by Commissioner May and embraced by Chairman Hood, seems like a viable path forward. The Office of Planning didn't object, saying "If we want to continue down the path of a customized zone, [...] OP would absolutely entertain [...]. And we could call it out by square, or something, that makes it specific" (October 2, 2017, p. 83). But that's not what we have here. It's the omission of that last sentence, excerpted in full, that's the problem: "*And we could call it out by square, or something, that makes it specific.*"

Those were sensible words. This case, 18-06, started as 17-11, about a parcel at 3200 Pennsylvania Avenue, SE, Square 5539, Lots 835, 838, 839, and 840. The concerns, the objections, they were only about 3200 Pennsylvania Avenue, SE. The engagement, the meetings the Zoning Commission and the Office of Planning so rightly applaud, they took place only between the petitioner and the neighbors immediately adjacent to 3200 Pennsylvania Avenue, SE. The outcome of these meetings, which we rightly applaud, should only apply to the object of the concerns, the objections, and the meetings: 3200 Pennsylvania Avenue, SE, Square 5539, Lots 835, 838, 839, and 840. The evidence in the record for this

case and for 17-11 is that this zone was tailored for that particular parcel. With the specter of *Durant* just over the horizon, the rational basis for applying this zone city-wide is deficient.

We don't have to look far for a template to move forward. Here's an example from right in our backyards, literally, that's already in the zoning code. The R-21 zoning designation is the Chain Bridge Road/University Terrace Residential House Zone. Section 1300.2 states, "*The R-21 zone applies to the area bounded on the south by MacArthur Boulevard, on the east by Battery Kemble Park/Chain Bridge Road, on the north by Loughboro Road/Nebraska Avenue, and on the west by University Terrace.*" We could have instead pointed you to the R-8, R-9 and R-10 zones just the same, for they also specify geographic limitations for applicability.

And lest you be misled, we do not believe this constitutes spot zoning. Spot rezoning happens when a single parcel of land is singled out for rezoning when it is indistinguishable from other land in the immediate area which is not rezoned. For example, if we had a row of townhouses along a block zoned residential, rezoning the parcel for a single townhouse that was indistinguishable from the rest to allow, say, industrial use would be spot rezoning, and therefore invalid as arbitrary and capricious. That's not at all what we have here where the zoning is already different from the abundantly distinguishable neighboring parcels.

We recommend that the text amendment under consideration be amended to apply only to the specific site at 3200 Pennsylvania Avenue, SE. Doing so properly reflects the totality of the analysis, the totality of the concerns and objections, and the totality of the community engagement in the case record on this matter.

We've said it before and I'll say it again: *this is a hard case*. We don't have to let it make bad law.

Thank you.

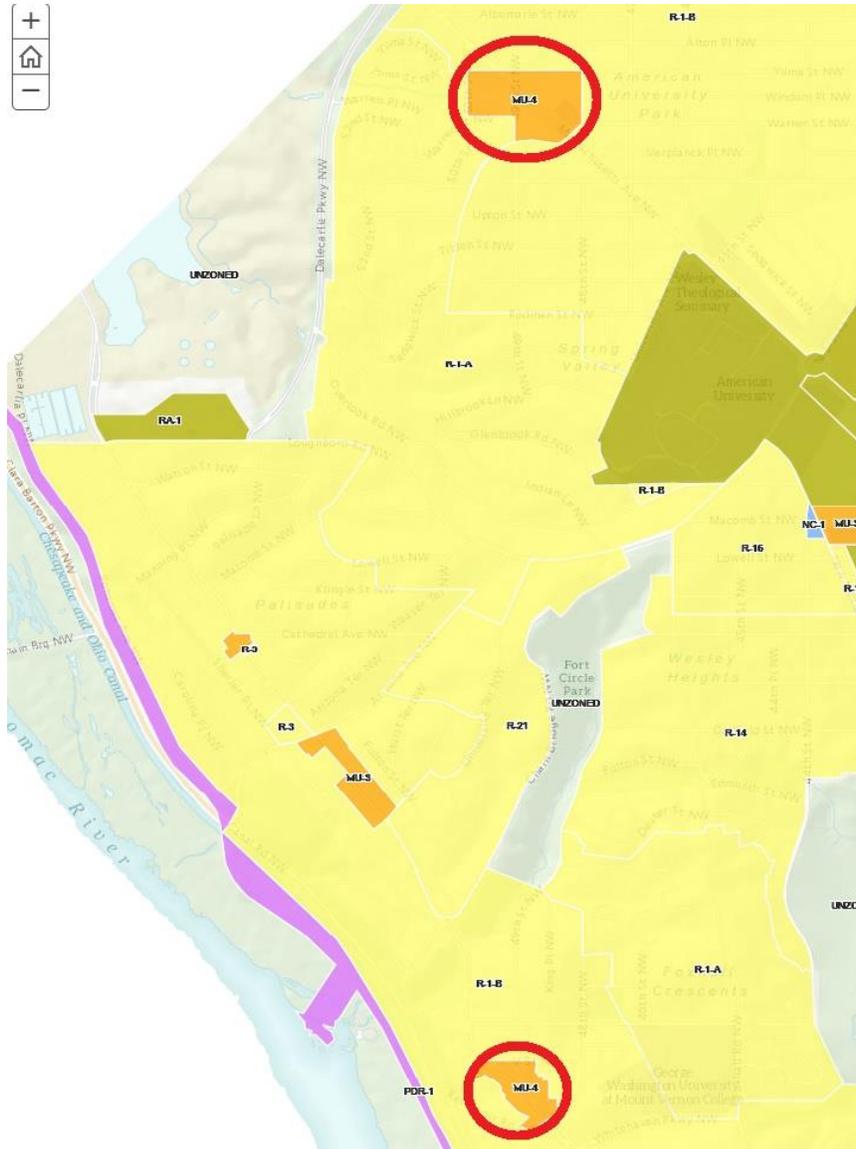


Figure 1: MU-4 Zones Adjacent to Residential Zones Within ANC3D

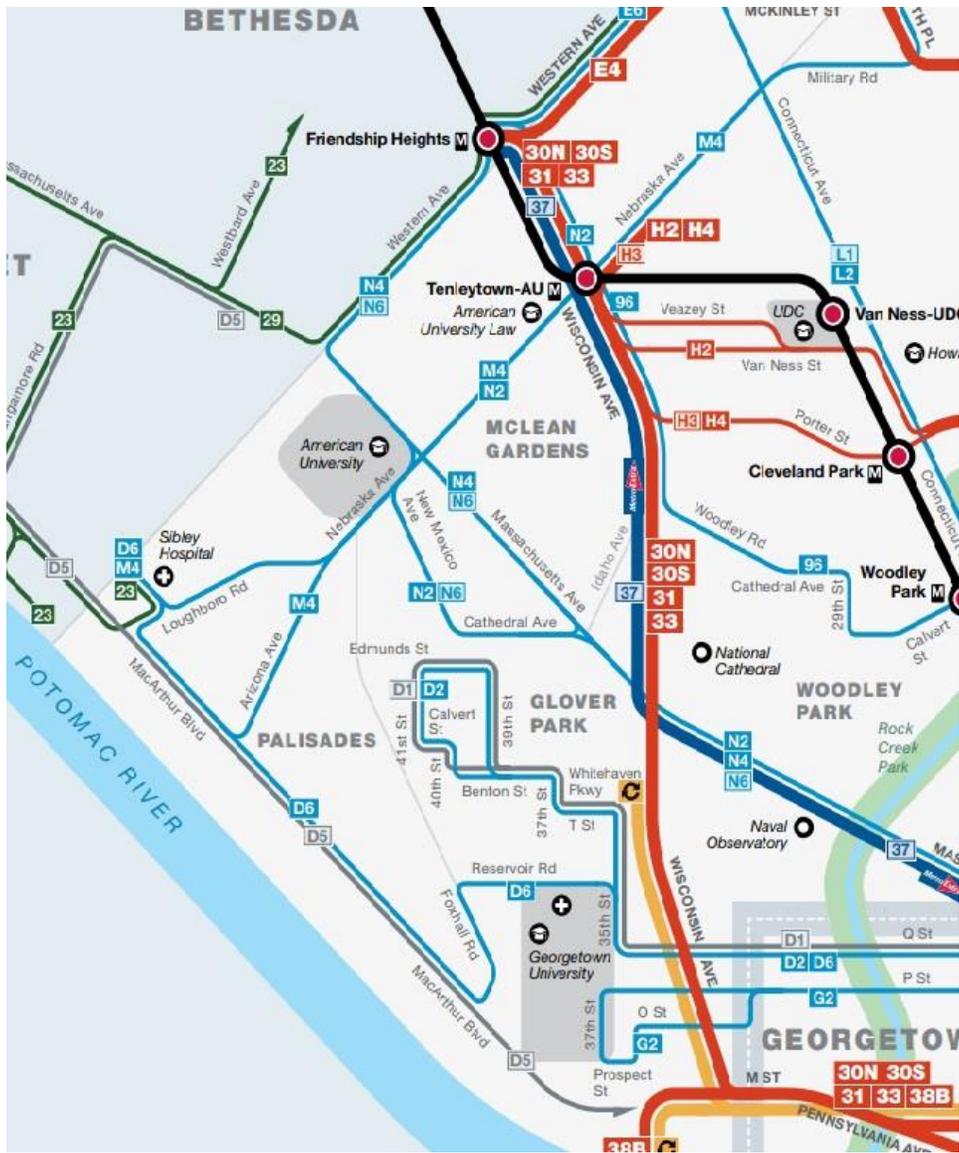


Figure 2: Public Transportation Options (Metrorail, Metrobus and DC Circulator)

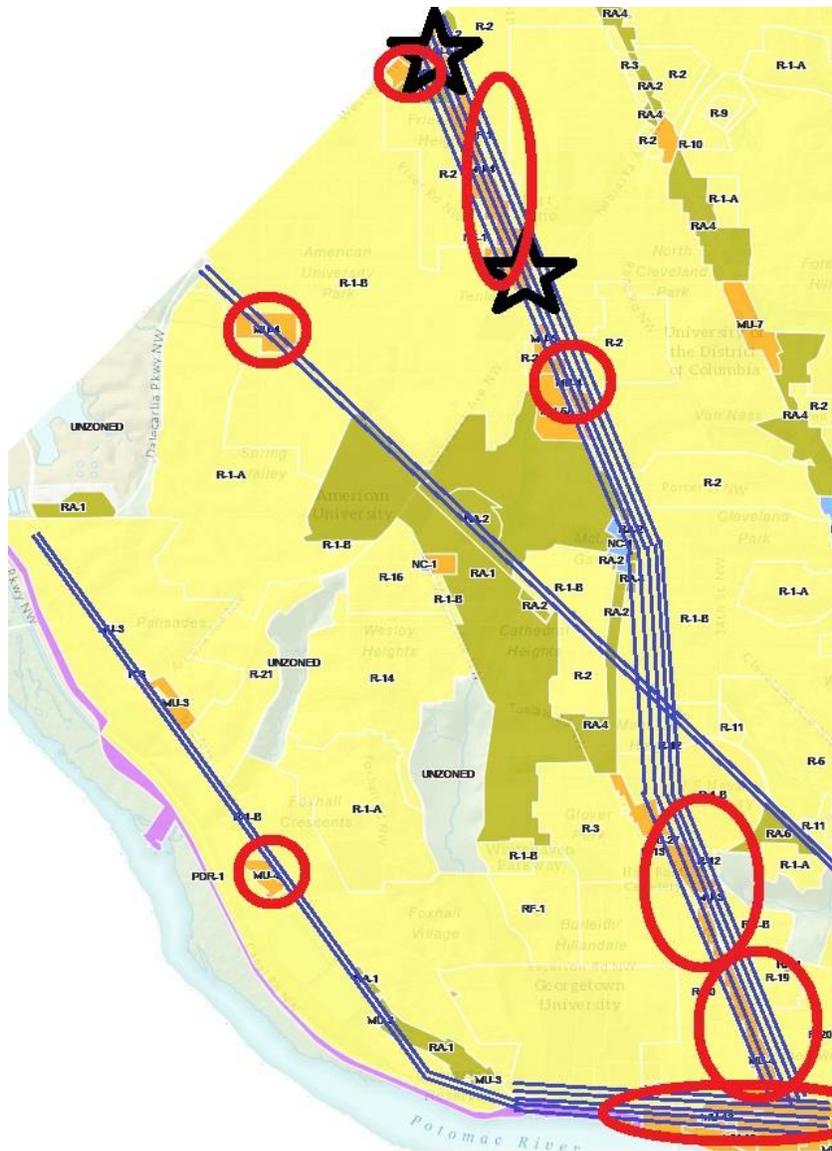


Figure 3: Overlay of MU-4 Zones, Metrorail Stations and Metrobus Routes

Legend: Residential-Adjacent MU-4 Zones in Red, Metrorail Stations in Black, Metrobus Routes in Blue

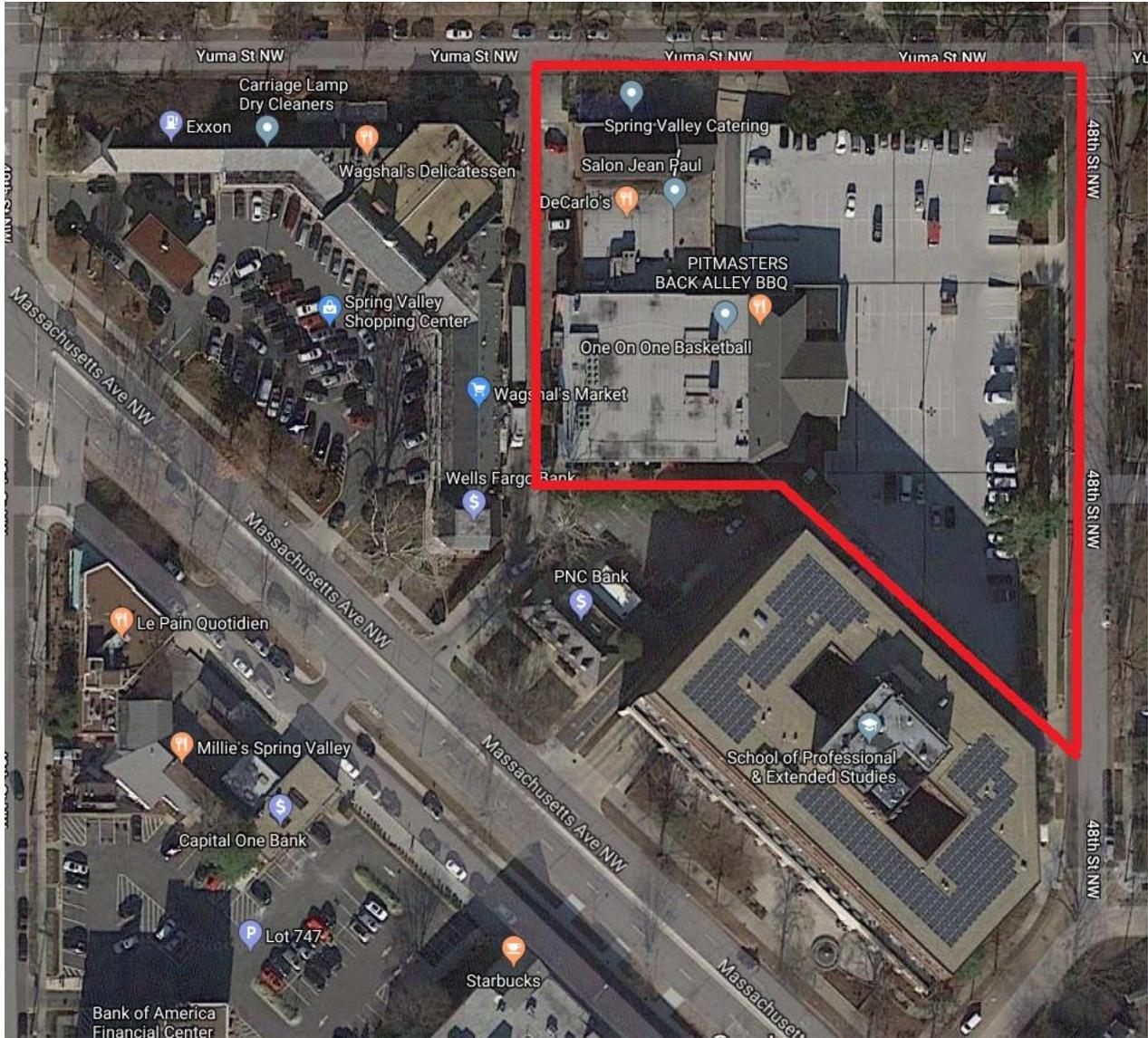


Figure 4: Portion of Record Lot 9 Being Considered in Zoning Case 16-23