

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA**



**ZONING COMMISSION  
NOTICE OF FINAL RULEMAKING<sup>1</sup>  
Z.C. CASE NO. 18-07  
Lean Development, LLC  
(Zoning Map Amendment @ Square 750, Lots 128 and 156-158)  
March 25, 2019**

The Zoning Commission for the District of Columbia (the “Commission”), pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797; D.C. Official Code § 6-641.01 (2018 Repl.)), and pursuant to § 6 of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206, as amended; D.C. Official Code § 2-505 (2013 Repl.)), hereby gives notice of its adoption of the following amendments to the Zoning Map:

- Rezone Lots 128 and 156-158 in Square 750 (the “Property”) from the PDR-1 zone to the MU-4 zone

**Procedures Leading to Adoption of the Amendment**

**Petition**

On May 22, 2018, Lean Development, LLC (the “Petitioner”) filed a petition requesting that the Commission under its rulemaking authority rezone:

- Portions of Lots 156-158 in Square 750 from the PDR-1 zone to the MU-4 zone; and
- All of Lot 128 and portions of Lots 156-158 in Square 750 from the PDR-1 zone to the MU-5A zone.

**The Property and Zoning**

The Property is the only portion of Square 750 zoned PDR-1.<sup>2</sup> The remaining lots in the Square – to the east and south of the Property and comprising almost 95% of the square – are zoned MU-5A. The lots to the west of the Property across 2<sup>nd</sup> Street, N.E. are zoned PDR-4, and to the north of the Property across K Street, N.E. are zoned PDR-3.

---

<sup>1</sup> For Office of Zoning tracking purposes only, this Notice of Final Rulemaking shall also be known as Z.C. Order No. 18-07.

<sup>2</sup> As discussed in the OP Supplemental Report, as defined below, at the time this case was filed, the Zoning Map incorrectly included Lot 811 and part of Lot 812 in Square 750 in the PDR-1 zone. Pursuant to Z.C. Order No. 821, in Z.C. Case No. 95-4, the Commission had rezoned “Square 750 – all lots except Lots 808 through 810, and Lot 128” (p. 6, emphasis in the original) from the C-M-1 Zone District to the C-2-B Zone District (the current PDR-1 and MU-5A zones, respectively). Lots 808 through 810 were subsequently recorded as Lots 156 through 158, including portions of the closed alley between Lots 128 and 808 through 810, as recorded in Subdivision Book 197, Page 141 in the Office of the Surveyor. The Zoning Map has since been corrected.

The Property's PDR-1 zone is intended to permit moderate-density commercial and PDR activities employing a large workforce and requiring some heavy machinery under controls that minimize any adverse impacts on adjacent, more restrictive zones. (Subtitle J § 200.1 of Title 11 of the District of Columbia Municipal Regulations (Zoning Regulations of 2016, the "Zoning Regulations," to which all references herein are made unless otherwise specified.) The PDR-1 zone has a maximum height of 50 feet and a maximum floor area ratio ("FAR") of 3.5. The PDR-1 zone does not allow residential uses, except for an apartment for an on-site watchman, janitor, or caretaker; an artist's live-work studio; or a residential dwelling existing prior to the adoption of the 1958 Zoning Regulations. (Subtitle U § 801.1(w).)

The proposed MU-4 zone is intended to permit moderate-density development and provide facilities for shopping and business needs, and housing and mixed-uses in low- and moderate-density residential areas outside the central core with access to main roadways or rapid transit stops. (Subtitle G § 400.3.) The MU-4 zone has a maximum height of 50 feet (65 feet for developments subject to Inclusionary Zoning ("IZ")), and a maximum FAR of 2.5 (3.0 for IZ developments), of which no more than 1.5 FAR can be devoted to non-residential uses.

The proposed MU-5A zone is intended to permit medium-density compact mixed-use development and provide facilities for shopping and business needs, housing, and mixed-uses on arterial streets, in uptown and regional centers outside the central core, and at rapid transit stops. (Subtitle G § 400.4.) The MU-5A zone has a maximum height of 65 feet (70 feet for IZ developments) and a maximum FAR of 3.5 (4.2 for IZ developments), of which no more than 1.5 FAR can be devoted to non-residential uses.

Both the MU-4 and MU-5A zones allow residential uses as a matter of right, as well as a broad range of other uses including service, retail, and office.

#### Comprehensive Plan ("CP") and Small Area Plan ("SAP")

Square 750, including the Property, is designated on the General Policy Map (the "GPM") of the Comprehensive Plan (Title 10A of the District of Columbia Municipal Regulations, the "CP") as a Neighborhood Conservation Area, as primarily residential in character and in which existing land uses and community character are to be maintained, although with some redevelopment in which the appropriate density is guided by the designation of the CP's Future Land Use Map (the "FLUM"). (CP §§ 223.4, 223.5.)

Although the CP's FLUM has a specific designation for PDR within the Commercial Use category, the FLUM instead designates Square 750, including the Property, for Mixed Use: Moderate-Density Residential and Low-Density Commercial. The FLUM defines Moderate-Density Residential as incorporating both row houses and low-rise garden apartment complexes and identifies the R-3, R-4, and R-5-A zones (the current R-3, RF-1, and RA-1 zones), and in certain circumstances, the R-5-B zone (the current RA-2 zone), as appropriate for this designation, although other zones may apply. (CP § 225.4.) The FLUM defines Low-Density Commercial as incorporating retail, office, and service businesses in one- to three-story commercial buildings and identifies the C-1 Zone District and C-2-A Zone District (currently the

MU-3 and MU-4 zones) as appropriate for this designation, although other zones may apply. (CP § 225.8.)

Square 750, including the Property, together with Square 749 immediately to the north across K Street, N.E., is designated in the NoMA Small Area Plan (the “SAP”) as appropriate for a mix of “residential/neighborhood-serving retail” of “Moderate to Medium Densities” – specifically the C-2-A and C-2-B Zone Districts (the current MU-4 and MU-5A zones, respectively). (SAP at 5.6 and 5.11.) The SAP designated Square 750 in the East NoMa Neighborhood that should serve as a “carefully designed transition between high and low buildings” given its location between the high-density developments to the west along the railroad tracks and the low-density residential neighborhoods of Capitol Hill to the east. The SAP, which was adopted by the Council in 2009, is not a part of the CP, but provides supplemental guidance to the CP’s FLUM and Elements (CP §§ 104.2, 104.8, and 226(d)), particularly because the CP’s Central Washington Area Element specifically calls for the implementation of the SAP. (CW-2.8A; CP §1618.14.)

#### The Petition

The Petition proposed MU-4/MU-5A split zoning as not inconsistent with the CP based on an in-depth analysis of the applicability of the CP’s GPM, FLUM, and various Elements, as well as the SAP. The Petition noted that:

- The proposed MU-4/MU-5A split zoning was not a significant change in density or height from what is allowed under the current PDR-1 zoning, but does bring the Property into conformity with the residential uses that exist in most of Square 750 and that are called for by the FLUM;
- The proposed MU-4/MU-5A split zoning would be consistent with the SAP’s call for Square 750 to be the transition between the much taller and denser buildings to the north, west, and south, and the lower residential areas to the east; and
- The CP’s Land Use, Transportation, and Housing Elements call for mixed-use near Metro stations, with PDR-zoned land near Metro stations to be rezoned for non-industrial uses.

#### Revised Petition

In response to the Commission’s request at its November 18, 2018 public hearing to consider other potential zones for the Property that would not be inconsistent with the CP, the Petitioner submitted a January 7, 2019 letter (the “Revised Petition”) that amended the Petition to request the rezoning of the entire Property to the MU-4 zone, instead of the initial request for MU-4/MU-5A split zoning. The Revised Petition analyzed eight potential zones for the Property for CP inconsistency and asserted that only two zones – the MU-4 and MU-5A – would not be inconsistent with the CP, particularly the FLUM. The Revised Petition rejected the MU-3B zone proposed by Advisory Neighborhood Commission (“ANC”) 6C, the “affected ANC” per Subtitle Z § 101.8, because the Revised Petition asserted that the low-density mixed-use of the MU-3B zone would be inconsistent with the FLUM’s designation of Square 750 for a mix of moderate-density residential and low-density commercial uses. (Exhibit [“Ex.”] 60.)

## Responses to Petition

### DDOT Report

The District Department of Transportation (“DDOT”) submitted an October 29, 2018, report (the “DDOT Report”) that: (Ex. 44.)

- Analyzed the potential impact on the District’s transportation network if the Property was developed to the maximum potential under the proposed MU-4/MU-5A split zoning compared to the current PDR-1 zoning;
- Noted that the Property was approximately 0.3 miles from both the Union Station and NoMA-Gallaudet U Metro Stations;
- Noted that the residential uses only allowed in the proposed MU-4/MU-5A split zoning generate fewer transportation trips than the office uses only allowed in the PDR-1 zoning;
- Calculated that the maximum development potential of the Property would be slightly less or the same under the proposed MU-4/MU-5A split zoning compared to the current PDR-1 zoning;
- Calculated that the maximum development potential of the Property would generate fewer or the same transportation trips under the proposed MU-4/MU-5A split zoning compared to the current PDR-1 zoning;
- Noted that the most likely increase of transportation trips would be retail or restaurant uses allowed in both the proposed MU-4/MU-5A split zoning and the current PDR-1 zoning;
- Concluded that the proposed MU-4/MU-5A zoning “would likely not lead to an increase in the number of peak hour vehicle trips on the District’s transportation network if redeveloped” under the maximum intensity of matter-of-right uses under the proposed MU-4/MU-5A split zoning when compared to that allowed under the current PDR-1 zone.

The DDOT Report noted that any future development of the Property, whether under the proposed MU-4/MU-5A split zoning or the current PDR-1 zoning, would be reviewed by DDOT based on the specific permit application, with any relevant conditions based on the specific development application.

The DDOT Report therefore concluded that DDOT had no objection to the Petition.

### OP Reports

The Office of Planning (“OP”) submitted three reports (collectively, the “OP Reports”):

- On July 20, 2018 (the “OP Setdown Report”); (Ex. 12.)
- On October 29, 2018 (the “OP Hearing Report”); and (Ex. 45.)
- On January 7, 2019 (the “OP Final Report”). (Ex. 62.)

The OP Setdown Report recommended the Commission set down the Petition for a public hearing, based on OP’s analysis that the Petition would not be inconsistent with the CP. The OP Setdown Report found that:

- The current PDR-1 zoning of the Property is inconsistent with the CP’s GPM, because the PDR-1 zone bars the residential uses currently in existence in the majority of the Neighborhood Conservation Area in which the Property is located;
- The current PDR-1 zoning of the Property is similarly inconsistent with the CP’s FLUM, which anticipated mixed residential and commercial uses;
- The Petition’s proposed MU-4/MU-5A zoning would not be inconsistent with the GPM and FLUM because it would allow the residential uses called for the Property in the GPM and FLUM that are not allowed in the current PDR-1 zone;
- The Petition’s proposed MU-4/MU-5A zoning would not be inconsistent with the FLUM because it would allow the low-density commercial uses called for the Property in the FLUM but which do not currently exist in Square 750, and so the proposed MU-4/MU-5A zoning would be similar in this aspect to the current PDR-1 zone that also allows these low-density commercial uses;
- The context of the current MU-5A zoning for the remainder of Square 750, which is all currently developed with moderate density residential uses except for one five-story apartment building, as well as the developments to the north, west, and south of the Property that are taller and denser; and
- Both the CP’s Central Washington Area Element applicable to the Property’s NoMA neighborhood and the SAP called for the Property’s neighborhood to serve as a transition from the high-density development east of the railroad tracks and the lower density residential neighborhoods to the east of the Property.

At the November 8, 2018 public hearing, OP testified that the Property’s current PDR-1 zoning is clearly inconsistent with the CP and summarized the task of the Commission as follows:

“[T]he question is, [in order] to get [the Property] to be consistent with the Comprehensive Plan, what’s the appropriate intensity for the new zoning that would permit residential on the site and commercial also?” (Public Hearing Transcript at 37.)

The OP Final Report addressed the concern the Commission raised at its July 30, 2019 public meeting, at which the Commission set down the Petition – namely, the potential incongruity between the existing moderate-density residential buildings and uses of the neighborhood and the higher density allowed under the proposed MU-4/MU-5A split zoning. OP recommended the Commission approve the Petition because its proposed MU-4/MU-5A rezoning would allow the residential uses not permitted under the current PDR-1 zoning but that are consistent with the neighborhood’s current uses. The OP Final Report concluded that:

- The Property’s current PDR-1 zoning is inconsistent with the FLUM’s mixed-residential and commercial designation for the Property because it effectively bars residential uses;
- The proposed MU-4 and MU-5A zones would not be inconsistent with the FLUM as these zones allow residential and commercial uses; and
- The density and height allowed in these zones, which are not significantly different from that allowed under the current PDR-1 zone, would be appropriate with the vision of the CP and SAP of this area as a transition between the higher and denser development to the west bordering the railroad tracks and the lower residential development to the east in Capitol Hill.

The OP Final Report responded to the Commission’s request at the public hearing to analyze alternative zones for the Property that would address the current inconsistency of the Property’s PDR-1 zoning. The OP Final Report analyzed several zones to determine which would be more consistent with the CP’s GPM and FLUM by allowing residential uses, while limiting the maximum height and density to more closely approximate the height and density of the existing buildings on Square 750. The OP Final Report:

- Recommended approval of the Revised Petition’s proposed MU-4 zoning because that zone retained the mix of residential and commercial uses called for in the GPM and FLUM, but with a lower maximum height and density than the MU-5A zone that covers the rest of Square 750 – so that the proposed MU-4 zone permitted a maximum height and density standards closer to the existing buildings on the rest of Square 750;
- Did not support the MU-3B zone proposed by the ANC because that zone is intended for low-density mixed-use development and is significantly less dense than the current MU-5A zoning of the rest of Square 750, including the new taller and denser building at Parker and 2<sup>nd</sup> Streets, N.E.; and
- Concluded that the MU-4 zone created a transition between the higher density development to the north, west, and south of Square 750 with the existing urban fabric of the rest of Square 750 to the east of the Property, which is zoned MU-5A.

### ANC Reports

ANC 6C filed three reports (collectively, the “ANC Reports”):

- A June 14, 2018, letter (the “ANC Setdown Report”); (Ex. 11.)
- A November 8, 2018, letter (the “ANC Hearing Report”); and (Ex. 54.)
- A January 7, 2019, letter (the “ANC Final Report”). (Ex. 61.)

The ANC Setdown Report took no position on the merits of the Petition but instead recommended that the Commission reject the Petitioner’s request to set down the Petition as a rulemaking case and instead set it down as a contested case. The ANC Setdown Report asserted that the Petition proposed to upzone the Property to permit additional height and density (for projects subject to Inclusionary Zoning) over the maximum allowed under the Property’s current PDR-1 zone and therefore required the Commission to consider “adjudicative” facts about a single property instead of “legislative” facts based on policy decisions. The ANC Setdown Report expressed a concern that the rulemaking process would provide less notice of the Commission’s review of the Petition than the contested case process, which require notice be mailed to the owners of all property within 200 feet of the Property in addition to the posting and *D.C. Register* publication of the notice that is all that is required for a rulemaking case.

The ANC Hearing Report agreed that the Property’s current PDR-1 zoning “made no sense,” and was inconsistent with the CP and existing residential uses of most of Square 750. Nevertheless, the ANC opposed the Petition’s proposed MU-4/MU-5A split zoning as antithetical to the CP’s GPM designation of Square 750 as a Neighborhood Conservation Area, which the ANC emphasized called for limited redevelopment with only minor changes in density. The ANC

recognized that all of the rest of Square 750 was already zoned MU-5A, but argued that the existing buildings of the square, which were lower and less dense than the maximum allowed under their MU-5A zoning, were protected by the GPM. The ANC Hearing Report also cited a concern that the proposed rezoning would create adverse impacts on the local transportation network.

The ANC Final Report, recognizing that the Property's current PDR-1 zoning was inconsistent with the CP and existing residential uses of most of Square 750, proposed that the Property be rezoned to the MU-3B zone, instead of the Petition's proposed MU-4/MU-5A split zoning. The ANC recognized that the MU-3B zone, which is defined as a "low-density" zone (Subtitle G § 400.2) is also inconsistent with the CP's FLUM that designates Square 750 for Mixed-Use Moderate-Density Residential and Low-Density Commercial. The ANC particularly opposed the MU-5A zone that covered the rest of Square 750, believing that it allowed too much height in contrast to the existing building fabric. The ANC recognized that the MU-4 zone is a "moderate-density" zone but objected to some of the permitted uses in the MU-4 zone that are prohibited in the MU-3B zone. The ANC viewed such uses as incompatible with the existing uses of Square 750. The ANC Final Report also raised a concern that the closed portion of the alley that bisected the Property was subject to a 14-foot surface easement for truck travel, although the curb cut serving this access has been removed.

#### Other Responses

The Commission received letters in support of the Petition from neighbors and from the Capitol Hill Restoration Society, which noted the current incongruity of the Property's PDR-1 zoning isolated in a square the vast majority of which is zoned MU-5A.

The Commission also received letters in opposition to the Petition as well as testimony at the public hearing. This opposition included a letter from multiple neighbors that focused on potential traffic congestion caused by potential residential development made possible under the Petition's proposed MU-4/MU-5A split zoning. Opponents also raised the concern that the Petition's proposed MU-4/MU-5A split zoning would increase the possible density to be built on the Property.

#### Decision

Subtitle X § 500.3, establishes the standards for the Commission's approval of a proposed map amendment:

*In all cases, the Zoning Commission shall find that the amendment is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site.*

Based on the record in the case, the Commission concludes that the Property's current PDR-1 zoning is inconsistent with the CP and other public policies because the PDR-1 zone is intended for production, distribution, and repair uses that are incompatible with the existing residential uses in Square 750 and because the PDR-1 zone also effectively prohibits residential uses, which is inconsistent with:

- The GPM’s Neighborhood Conservation Area designation of Square 750 (in which the Property is located) that calls for the preservation of the current residential uses that characterize Square 750;
- The FLUM’s designation of Square 750 for Mixed-Use Moderate-Density Residential and Low-Density Commercial uses (and not PDR uses);
- The SAP’s character development guidelines for Square 750 as a residential neighborhood with neighborhood-oriented retail;
- The current MU-5A zoning of almost 95% of Square 750, which allows for residential and mixed uses but not PDR uses; and
- The current residential and non-PDR uses of almost all of Square 750.

Therefore, the Commission concludes that the Property, as a matter of public policy, must be rezoned to resolve this inconsistency between the Property’s current PDR-1 zoning and the CP’s designation of the Property for primarily moderate-density residential uses with associated low-density commercial uses.

The Commission concludes that the MU-4 zoning proposed by the Revised Petition for the Property would not be inconsistent with the CP and other public policies including the SAP because the proposed MU-4 zoning would:

- Allow for moderate-density residential uses as called for in the GPM, FLUM, and SAP and that typifies the current uses of Square 750;
- Allow for low-density commercial uses associated with the primarily residential uses, up to a 1.5 FAR limit, as called for in the FLUM and SAP;
- Allow for a transition from the current higher-density mixed uses of the property to the north, west, and south of the Property to the current lower-density residential uses of the property to the east of the Property; and
- Be more consistent with the lower, less dense current residential uses that characterize the vast majority of Square 750 because the proposed MU-4 zoning would:
  - Decrease the maximum density allowed on the Property to 2.5 FAR (3.0 for IZ developments) from the maximum 3.5 FAR allowed under the current PDR-1 zoning; and
  - Retain the current 50-foot maximum height allowed under the current PDR-1 zoning, except for IZ developments that can rise to 65 feet tall.

The Commission considered the alternative potential zones for the Property as analyzed by the Applicant and OP, including the MU-3B zone proposed by ANC 6C, for consistency with the CP and other public policies and concludes that the only zones that would not be inconsistent with the CP and other public policies would be the MU-4 and MU-5A zones. Nonetheless, the Commission further concluded that the MU-4 zone is more appropriate given the current lower and less dense buildings of most of Square 750.

At its January 28, 2019 public hearing, the Commission voted to take **PROPOSED ACTION** to authorize a Notice of Proposed Rulemaking for the Revised Petition to zone all of the Property to the MU-4 zone.



**VOTE (Jan. 28, 2019):**     **4-0-1** (Michael G. Turnbull, Peter A. Shapiro, Anthony J. Hood, and Peter G. May to **APPROVE**; Robert E. Miller, not present, not voting).

**Notice of Proposed Rulemaking (“NOPR”)**

A Notice of Proposed Rulemaking was published in the *D.C. Register* on February 15, 2019 (66 DCR 2174).

**National Capital Planning Commission (“NCPC”)**

The Commission referred the proposed map amendment to NCPC for the thirty- (30) day review period required by § 492 of the District Charter on January 30, 2019. NCPC did not submit a report in this case.

**NOPR Comments**

In response to the NOPR, the Commission received only one comment – from Concerned Residents of Washington DC (“CROW”), a group of neighbors residing in the 200 block of K Street, N.E., that includes the Property. CROW’s comment opposed the Petition being considered as a rulemaking map amendment for three reasons:

- The Petition constitutes illegal spot zoning;
- The Petition should have been filed instead as a planned unit development (“PUD”); and
- The Petition should have been filed as a contested case map amendment, not a rulemaking.

The Commission rejects each of CROW’s assertions for the reasons stated below.

**Spot Zoning**

The District of Columbia Court of Appeals has established that illegal spot zoning:

“... (1) must pertain to a single parcel or a limited area – ordinarily for the benefit of a particular property owner of specially interested part – **and** (2) must be inconsistent with the city’s comprehensive plan ...” (*Daro Realty, Inc. v. D.C. Zoning Comm’n*, 581 A.2d, 295, 299 (1990) (emphasis added).)

Although the Revised Petition covers a limited area and benefits a particular owner, it is not inconsistent with the Comprehensive Plan; therefore, it does not constitute spot zoning. The Court has affirmed that simply satisfying the first prong of the spot zoning test – the limited size of the parcel(s) proposed to be rezoned – is insufficient by itself to constitute illegal spot zoning. In several cases where this first prong was satisfied, the Court nonetheless upheld the proposed rezoning based on the Commission’s having concluded that the rezoning was not inconsistent with the CP and public policies and was not “wrenched” from the rezoned property’s surroundings. (*Daro*, 581 A.2d, at 299-302.)

In evaluating the Revised Petition’s proposed rezoning of the Property, the Commission considered evidence from the Applicant and OP that:

- The Property’s current PDR-1 zoning is inconsistent with the CP and other relevant public policies;
- The Property’s current PDR-1 zoning does not match the current MU-5A zoning for the rest of Square 750;
- The Revised Petition’s proposed MU-4 zoning would not be inconsistent with the CP and other relevant public policies; and
- The Revised Petition’s proposed MU-4 zoning would be more consistent with the current lower and less dense residences in most of Square 750 by decreasing the maximum density and retaining the same maximum height (except for IZ developments) allowed under the current PDR-1 zoning.

Based on its consideration of this evidence, the Commission concluded that the proposed MU-4 zoning proposed by the Revised Petition was the appropriate public policy response to the current inconsistency between the PDR-1 zoning and CP. The Commission concluded that the proposed MU-4 zone balanced the various policies of the CP’s maps and elements and the SAP to ensure the Property no longer was inconsistent with the CP. Having concluded that the MU-4 zoning furthered many of the CP’s goals and was not inconsistent with the CP, the Commission found CROW’s assertion that approving the Revised Petition constitutes illegal spot zoning unpersuasive because it failed the second prong of the spot zoning test.

#### PUD

The Commission found this assertion by CROW unpersuasive because it concluded that the Revised Petition complied with the requirements of a map amendment per Subtitle X § 500.3. Had the Petitioner chosen to file a PUD, the Commission would have evaluated that application, but that was not before the Commission in this case. The Commission disagrees with CROW’s characterization of the Petition as “seeking flexibility” in “building controls” because the Petition addresses the policy question of the appropriate zoning district to be applied to the Property based on not being inconsistent with the CP, a policy mandate given to the Commission by the Zoning Act. A map amendment establishes the rules for property in the specific zone – it does not involve “flexibility” from the Zoning Regulations, which is instead key to an application for a PUD or Design Review, or for special exception or variance relief.

#### Contested Case Map Amendment

The Commission rejects CROW’s assertion that the Revised Petition should have been considered under the contested case procedure because the Revised Petition raised broad questions of public policy in determining the appropriate zoning for the Property to resolve the inconsistency between the current PDR-1 zoning that effectively bars the residential uses that the CP and other public policies designate for the Property. The Commission therefore concluded that the Revised Petition required the Commission to determine “legislative facts,” which the Court of Appeals has stated are “general fact which help the tribunal decide questions of law and policy and discretion.”( *Chevy Chase Citizens Ass’n v. D.C. Council*, 327 A.2d 310, 314 (D.C. 1974)(internal quotations omitted).)

In evaluating the Revised Petition, the Commission did not consider “questions of who did what, where, when, how, why, with what motive or intent [or] ... the kind of facts that go to a jury in a

jury case,” or “adjudicative facts” as identified by the Court of Appeals. (*Id.*) The Commission did not consider a specific project and notified the public at hearings that the Commission’s review of the Revised Petition did not include any potential project. Instead, the Commission evaluated the location of the Property in relation to the uses and building size and density existing in Square 750 in relationship to the surrounding neighborhood, the uses and density called for the neighborhood by the CP and SAP, and the uses and density permitted under various zones. To address these issues required the Commission to balance the goals of the CP and other public policies and to apply them to achieve the most appropriate outcome to resolve the current inconsistency between the CP’s designation for the Property and the current PDR-1 zoning. The Commission therefore concludes that its evaluation of the Revised Petition correctly fell under the rulemaking process.

### **“Great Weight” to the Recommendations of OP**

The Commission must give “great weight” to the recommendation of OP, pursuant to § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163; D.C. Official Code § 6-623.04 (2018 Repl.) and Subtitle Z § 504.6. (*Metropole Condo. Ass’n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1086-87 (D.C. 2016).)

The Commission found OP’s recommendations that the Map Amendment is not inconsistent with the Comprehensive Plan and other public policies and that the Commission approve the Map Amendment to rezone the Property to the MU-4 zone persuasive and concurred in that judgment.

### **“Great Weight” to the Written Report of the ANC**

The Commission must give great weight to the issues and concerns raised in the written report of an affected ANC that was approved by the full ANC at a properly noticed public meeting pursuant to § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976. (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2012 Repl.) and Subtitle Z § 505 .1.) To satisfy this great weight requirement, the Commission must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. (*Metropole Condo. Ass’n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016).) The District of Columbia Court of Appeals has interpreted the phrase “issues and concerns” to “encompass only legally relevant issues and concerns.” *Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978) (citation omitted).

The ANC Reports raised the following issues and concerns:

- The Petition proposed to increase the height and density allowed on the Property, and so should be evaluated as a contested case due to the expanded additional notice requirements;
- The Petition’s proposed MU-4/MU-5A split zoning failed to conserve the existing lower and less dense existing buildings of Square 750 and so was inconsistent with the CP’s GPM designation of Square 750 as a Neighborhood Conservation Area;
- The proposed MU-4/MU-5A zones allowed uses that the ANC deemed incompatible with the existing uses of Square 750;
- Traffic congestion caused by any development under the increased density allowed by the Petition;

- The appropriate resolution of the inconsistency between the Property’s CP designation and the current PDR-1 zoning is the MU-3B zone as a “moderate density” zone most appropriate for the existing uses and building; and
- The easement to Department of Public Works for truck traffic over the closed portion of the alley located on the Property.

The Commission considered each of the concerns raised in the ANC Reports and was persuaded by the ANC Report’s suggestion that the Petition should be accorded the more expansive notice requirements of a contested case to include mailed notices to all owners of property within 200 feet of the Property. However, the Commission found the remaining ANC concerns unpersuasive for the following reasons:


- The Revised Petition’s proposed MU-4 zoning would actually decrease the density allowed for the Property and maintain the current height limit except for IZ developments, and so would be more consistent with the GPM’s Neighborhood Conservation Area designation for the Property than the current PDR-1 zoning;
- The uses allowed under the MU-4 zone to which the ANC objected were already allowed as a matter of right in the rest of Square 750 under its MU-5A zoning and so allowing them on the Property would not change the character of the square;
- The DDOT Report’s conclusion that the potential traffic congestion caused by the maximum development allowed under the Revised Petition’s MU-4 zoning would generate less than or the same transportation trips as allowed under the current PDR-1 zoning;
- The MU-3B zone proposed by the ANC is defined by Subtitle G § 400.2 as intended for “low-density mixed-use development,” as the ANC itself recognized, which is less consistent with the Property’s FLUM designation for Mixed-Use Moderate-Density Residential and Low-Density Commercial than the Revised Petition’s MU-4 zoning that is intended for “moderate-density mixed-use development”; and
- The easement is an issue that is relevant in the context of a review of a specific project, not the determination of the appropriate zone for the Property given its current PDR-1 zoning’s inconsistency with the CP.

At its March 25, 2019 public meeting, in consideration of the case record and for the reasons stated above, the Commission took **FINAL ACTION** to amend the Zoning Map as follows:

Square	Lot(s)	Map Amendment
750	128, 156-158	PDR-1 to MU-4

**VOTE (March 25, 2019):** **4-0-1** (Peter A. Shapiro, Anthony J. Hood, Michael G. Turnbull, and Peter G. May to **APPROVE**; Robert E. Miller, not present, not voting).

In accordance with the provisions of Subtitle Z § 604.9, this Notice of Final Rulemaking shall become final and effective upon publication in the *D.C. Register*; that is, on March 13, 2020.

  
\_\_\_\_\_  
**ANTHONY J. HOOD**  
**CHAIRMAN**  
**ZONING COMMISSION**

  
\_\_\_\_\_  
**SARA A. BARDIN**  
**DIRECTOR**  
**OFFICE OF ZONING**