



November 21, 2022

Zoning Commission of the District of Columbia
441 4th Street, NW - Suite 210
Washington, DC 20001

VIA IZIS

Re: Z.C. Case No. 22-06 of 801 Maine Ave SW PJV, LLC - Planned Unit Development (“PUD”)

Dear Members of the Zoning Commission (the “**Commission**”):

The Equitable Land Use Section of the Office of the Attorney General (“**OAG**”) respectfully submits this post-hearing filing, as authorized by the Commission, to respond to questions raised by the Commission and the Applicant at the public hearing in Z.C. Case No. 22-06. OAG reiterates its opposition to the Application’s Inclusionary Zoning (“**IZ**”) proffer of 15% of the total residential gross floor area (“**GFA**”). This proffer is insufficient to justify approval of the proposed PUD with the map amendment to the MU-9A zone because:

- The 15% IZ proffer fails to qualify as a public benefit required to balance the PUD’s requested development incentives - particularly the 286,555 square feet of added density, an increase of 167% over the maximum permitted under the existing MU-12 zone - because this 15% IZ proffer is not superior to the IZ set-aside required for an equivalent increase in density for a matter-of-right development, which would be 18%; and
- The 15% IZ proffer does not balance the PUD’s inconsistencies with the Comprehensive Plan’s (Title 10A DCMR, the “**CP**”) Future Land Use Map (“**FLUM**”) - specifically that the proposed MU-9A zone, explicitly identified as consistent with the FLUM’s High-Density Commercial designation, is inconsistent with the PUD site’s FLUM designation of Medium-Density Commercial. OAG contends that the only CP element that can balance out this FLUM inconsistency is CP § 224.9, which identifies additional affordable housing as a “high-priority” PUD benefit. OAG posits that the square footage utilizing the FLUM inconsistency should be subject to a 33% IZ set-aside, which constitutes 4% of the total gross residential square footage.

OAG therefore recommends that the PUD should be denied as inconsistent with the PUD balancing test unless the IZ proffer is increased to 22% of the PUD’s residential GFA.

I. OAG Recommends the PUD’s IZ Proffer be Increased to 22%

A. The IZ Baseline Set-Aside Should Be 18% of the Residential GFA Based on IZ+

OAG asserts that a PUD with a map amendment should, at the minimum, provide the amount of affordable housing that would be required by the Inclusionary Zoning Plus (“**IZ+**”) formula for a

matter-of-right project in the requested zone that proposes an equivalent increase in density. In this case:

Proposed PUD	458,644 square feet ¹	8.0 Floor Area Ratio (“FAR”)
Maximum in Existing MU-12 Zone (Including IZ Bonus)	172,089 square feet	3.0 FAR
Additional PUD Density (sf)	286,555 square feet	5.0 FAR
Additional PUD Density (%)	167%	

A map amendment proposing this same percentage increase in density would be required to provide an IZ set-aside of 18% based on the IZ+ Formula’s “sliding scale” option which is calculated based on the percentage change between the maximum matter-of-right FAR in the existing zone and the total FAR of the IZ+ development (Subtitle C §§ 1003.4-1003.5).

Given that a PUD’s proffered benefits must be sufficient to “justify the degree of development incentives requested (including any requested map amendment)” and the Commission “shall deny” a PUD that fails to provide sufficient public benefits, OAG asserts that any IZ proffer under the 18% required by the IZ+ formula fails to satisfy this requirement (Subtitle X § 305.11). OAG notes that the PUD public benefit regulations state:

“Affordable housing provided in compliance with the Inclusionary Zoning requirements of Subtitle C, Chapter 22, **shall not be considered a public benefit except to the extent it exceeds what would have been required through matter-of-right development under existing zoning.**” (Subtitle X § 305.5(g)(1), emphasis added)

A development on the PUD site, under the existing MU-12 zoning, would be limited to 172,089² square feet, for which the required IZ set-aside would be **12.5%** or 21,500 square feet, based on the 75% of bonus density calculations (Ex. 7 at 13, 15). Due to the proposed 24,169 square feet of retail space, the effective IZ set-aside would be **15%** of the maximum residential GFA permitted on the site (147,470 square feet). This is same percentage that the Application is currently proffering and asserting is superior to a matter of right, without accounting for the 167% increase in density. Capturing this exponential increase in density is exactly what the IZ+ program was intended to do by applying an exponential sliding scale for the IZ set-aside.

OAG maintain that although IZ+ exempted PUD-related map amendments from the IZ+ program, it nevertheless fundamentally changed the IZ baseline for PUDs with map amendments. As stated in the Office of Planning (“OP”)’s Setdown Report for the text amendment creating IZ+, “*This proposal would require an increased IZ set-aside (aka “Enhanced IZ” also referred to as “IZ Plus”) in association with a map amendment and will sit between matter-of-right and PUDs.*”³ OAG asserts that it would be contrary to the CP’s housing goals, specifically its designation of creation of affordable housing as a high priority public benefit (CP § 224.9) and other District policies for a PUD with a map amendment to provide less affordable housing than a stand-alone

¹ Ex. 38A2 at 32. Note – includes 24,169 square feet of retail space, which is not included in the total residential GFA of 439,809 square feet.

² Based on the maximum FAR of 3.0 (including IZ bonus density) and the lot area of 57,363 square feet.

³ OP Setdown Report in Z.C. Case No. 20-02, Ex. 8 at p.2.

map amendment to the same zone, despite gaining significantly more height and density, especially since PUDs are still the “District’s preferred tool to both increase new housing and affordable housing above the Regular IZ requirement”.⁴

OAG believes therefore that the PUD’s proffer fails to exceed what would be required for an equivalent matter of right increase in density and does not qualify as a public benefit. OAG’s recommended 18% would result in a set-aside of 79,166 square feet, resulting in 13,195 square feet more than the current PUD proffer. This would translate to approximately 13 additional, permanently affordable units.⁵

B. An Additional IZ Set-Aside is Needed to Balance the PUD’s Inconsistency with the Comprehensive Plan

OAG also asserts that the PUD’s requested map amendment to the high-density MU-9A zone is inconsistent with the PUD site’s FLUM Medium-Density Commercial/Residential designation (Ex. 93A, Slides 7-9). Therefore, OAG recommends that an additional IZ set-aside of 18,023 square feet be provided to outweigh this inconsistency.

OAG reached this additional set-aside on the basis that the requested MU-9A zone allows the PUD to build up to 130 feet in height, two stories more than would be permitted in the highest zone specifically identified as compatible with the FLUM, the MU-10 zone. To balance this inconsistency with the CP, OAG recommends that those two, inconsistent floors have an additional higher affordable housing set-aside of 33% of the total GFA of the two stories, resulting in an 18,023 square foot set-aside. OAG recommends 33% on the basis of the Mayor’s 2019 Housing Order stating that one-third of all new housing units in the District should be affordable.⁶

This additional set-aside would result in the PUD dedicating a total of 22% of the residential GFA to IZ as shown below:

18% of the PUD’s total residential GFA, including penthouse (439,809 square feet)	79,166 square feet
33% of the total GFA of the two inconsistent stories (54,614 square feet)	18,023 square feet
TOTAL IZ SET-ASIDE	97,189 square feet or 22% of the total residential GFA

⁴ *Id.*

⁵ This slightly adjusts square footage numbers originally presented in OAG’s presentation (Ex. 93A) to account for the penthouse GFA of 5,334 square feet which increases the total residential GFA from 434,475 square feet to 439,809 square feet (See Ex. 38A2 at p. 32). OAG notes that while penthouse space is typically broken out in IZ set-aside calculations to reflect that set-asides resulting from the penthouse are to be provided at a lower income level, it is included in the definition of residential GFA per Subtitle B § 304.7 (through not FAR per Subtitle C § 1505.1) and does not represent a significant amount of additional square footage.

⁶ Mayor’s Order 2019-36 (May 10, 2019) (*See also*, a 33% affordable set-aside also has a basis in the CP which imposes a 33% affordable set-aside as a requirement for an exception from the planning analysis requirements in Future Planning Analysis Areas. (CP § 2503.3))

II. OAG Response to Arguments Raised at the Public Hearing

A. OAG’s Application of the IZ+ Formula Is Properly Based on the MU-9A Zone

OAG properly based its IZ+ calculations on the MU-9A zone selected for the PUD-related map amendment. At the hearing, the Applicant and the Commission suggested that OAG should have used a different zone, based on the Applicant’s assertion that OP would not have supported a non-PUD map amendment to the MU-9A zone and that, in turn, the Commission could not have approved one.⁷ More specifically, the Commission suggested that OAG should have used the MU-8 zone, based on the assertion that OP would only have supported a standalone map amendment to the lower density MU-8 zone.⁸ OAG maintains that it correctly based its calculations on the MU-9A zone because the IZ+ formula considers the percentage change in density between the existing zone and the density proposed by the inclusionary development, which in this case, utilizes the additional density available in the MU-9A zone for a total of a 167% increase. (Subtitle C §§ 1003.4-1003.5)

1. The Commission is the Sole Arbiter of Any Zoning Decision

The Commission has the exclusive authority to approve or deny a zoning application, including an amendment to the zoning maps.⁹ This is established in the Zoning Act and was recently upheld by Court of Appeals which upheld the Commission’s ability to reject recommendations from OP.¹⁰ Neither the Applicant, nor OP have provided, any persuasive evidence justifying the Commission’s consideration of the MU-8 zone.¹¹

2. Using the MU-8 Zone Would Not Have Changed OAG’s IZ+ Calculations

Even if OAG had based the IZ+ calculations for the PUD on the MU-8 zone, the result would not change its recommendation of an 18% baseline IZ set-aside. As noted above, the IZ+ formula in this case considers the percentage increase in density of the *proposed development* over the maximum density permitted in the existing zone and so the map amendment zone is not relevant to the calculation. (Subtitle C §§ 1003.4-1003.5) However, using the IZ+ formula, even a hypothetical PUD built to the maximum in the MU-8 zone would still require a higher IZ set-aside (both as a percentage and in square feet) than the Application’s current proffer, despite gaining less density.

B. Additional Benefits are Needed to Balance the Proposed MU-9A Zone’s Inconsistency with the Site’s FLUM Designation

The PUD’s inconsistency with the site’s FLUM designation as Mixed-Use: Medium Density Commercial/Medium Density Residential is not fatal to the PUD but requires the Commission to find that the inconsistency is outweighed by the PUD’s furtherance of other CP policies and

⁷ October 6, 2022, Public Hearing Transcript (“Tr.”) at 229.

⁸ Tr. at 16-17, 69

⁹ See *Durant v. District of Columbia Zoning Commission (Durant I)*, 65 A.3d 1161, 1166 (D.C. 2013); see also *Wisconsin-Newark Neighborhood Coalition v. District of Columbia Zoning Commission*, 33 A.3d 382, 389-90 (D.C. 2011); D.C. Code §§ 6.621.01(e) and 6.641.01.

¹⁰ See, *Beloved Community Alliance v. District of Columbia Zoning Commission (BCA)*, 2022 WL 166641562 at 5-6 (November 3, 2022)

¹¹ *Id.* (Upholding the Commission’s rejection of OP’s recommendation in part due to OP’s failure to provide any reasonable justification for its position.)

elements.¹² In this instance, OAG asserts that the PUD should provide an affordable housing proffer that goes beyond IZ+ to offset the inconsistency by using the inconsistent height and density to further the CP’s focus on creating affordable housing and its designation of affordable housing as a “high priority” PUD public benefit. (CP § 224.9).

1. The MU-9A Zone is Inconsistent with the Site’s FLUM Designation

The Commission may not approve a PUD, including one with a map amendment, that is inconsistent with the CP:

“In addition to its authority to enact and amend zoning regulations, the Commission presides over the PUD process...Key to this process is the Commission’s authority to consider zoning amendments which may be necessary to accommodate a particular PUD proposal. *See* 11 DCMR § 2406.2 (2000). The Commission may not, however, use this process to approve a PUD or rezone an area in a manner inconsistent with the Comprehensive Plan, or with any “other adopted public policies and active programs related to the subject site” (*Durant I*, 65 A.3d 1161 at 1167; *See also McMillan*, 149 A.3d 1027 at 1033).

The CP defines, and distinguishes, the Medium and High Density Commercial FLUM designations as follows:

“Medium Density Commercial: This designation is used to define shopping and service areas that are somewhat greater in scale and intensity than the Moderate Density Commercial areas. Retail, office, and service businesses are the predominant uses, although residential uses are common. Areas with this designation generally draw from a citywide market area. Buildings are larger and/or taller than those in Moderate Density Commercial areas. **Density typically ranges between a FAR of 4.0 and 6.0**, with greater density possible when complying with Inclusionary Zoning or when approved through a Planned Unit Development. **The MU-8 and MU-10 Zone Districts are consistent with the Medium-Density category**, and other zones may also apply.

High Density Commercial: This designation is used to define the central employment district, other major office centers, and other commercial areas with the greatest scale and intensity of use in the District. Office and mixed office/retail buildings with densities greater than a FAR of 6.0 are the predominant use, although high-rise residential and many lower scale buildings (including historic buildings) are interspersed. **The MU-9, D-3, and D-6 Zone Districts are consistent with the High-Density Commercial category**, and other zones may also apply” (CP §§ 227.12-227.13, emphasis added).

The MU-9A zone requested by the Application is not a zone specifically identified as consistent with the site’s FLUM designation as Medium-Density Commercial. The MU-9A zone also permits a considerably higher maximum density (9.36 FAR) than what is contemplated by the site’s FLUM designation. While the CP does acknowledge that zones not specifically listed may also apply, the Zoning Regulations (Subtitle G § 400.8(a)) define the MU-9A as a high-density zone. More

¹² Tr. at 232. Note - OAG’s analysis is focused on the Medium Density Commercial designation as the higher density of the two categories. This is the same focus employed by the Application; *See, Friends of McMillan Park v. District of Columbia Zoning Commission (McMillan)*, 149 A.3d 1027, 1035 (D.C. 2016).

importantly, it is specifically identified as consistent with the FLUM’s High-Density Commercial designation (CP § 227.13). In fact, the Wharf PUD immediately south of the site is designated for High-Density Commercial/Residential on the FLUM and is zoned the equivalent of the MU-9A¹³. (Z.C. Case No. 11-03 Ex. 125 at p. 17) In arguing that the MU-9A is not inconsistent with the FLUM, the Application disregards the plain definition of the MU-9A as a high-density zone and the CP’s identification of the zone as consistent with the FLUM’s High-Density Commercial designation.

The intent of the FLUM in the Southwest waterfront area was to “ensure an attractive transition between the Wharf and Southwest” by focusing high density development along the waterfront south of Maine Avenue SW, which should delineate a separation from the neighborhoods to the north in order (Tr. at 244). This creates a clear distinction between the two areas by stepping down the height and density north of Maine Avenue moving into the low-density and height areas to the north and east, an intent that is further supported by the GPM, which designates the PUD site as a Neighborhood Conservation Area.¹⁴ Instead, at 130 feet tall, the PUD matches the Wharf buildings, and in fact will tower over them based on the increase in grade moving north away from the water. Thus, OAG disagrees with the Application’s assertion that the PUD merely “relates” to the Wharf and maintains that the PUD will in fact appear as a continuation of the Wharf’s high-density (Tr. at 245; *See also*, Architectural Plans at Ex. 38A2 at 15-17).¹⁵

2. An Increased Affordable Housing Proffer Can Appropriately Balance the Inconsistencies with the FLUM and Satisfy the PUD Balancing Test

a. Additional Affordable Housing Would Balance CP Inconsistencies

OAG asserts that an increased IZ proffer for the two inconsistent stories would specifically balance the FLUM inconsistencies by using the inconsistency to provide a greater quantity of “high priority” PUD benefits. As the Court of Appeals has held, inconsistency with the CP is not inherently fatal but rather requires the Commission to make a finding that the inconsistency furthers other specific CP policies and elements.¹⁶

In considering the issue of CP inconsistencies in *McMillan* (149 A.3d 1027 at 1035), the Court of Appeals held that the Commission had failed to adequately explain why it had disregarded the CP

¹³ The C-3-C Zone under the Zoning Regulations of 1958.

¹⁴ “Neighborhood Conservation areas have little vacant or underutilized land. They are generally residential in character. Maintenance of existing land uses and community character is anticipated over the next 20 years. Where change occurs, it will typically be modest in scale and will consist primarily of infill housing, public facilities, and institutional uses. Major changes in density over current (2017) conditions are not expected but some new development and reuse opportunities are anticipated, and these can support conservation of neighborhood character where guided by Comprehensive Plan policies and the Future Land Use Map.” (CP § 225.4)

¹⁵ The Commission stated that the 130 feet permitted for the Wharf development had been intended to allow for the better allocation of density on the site, permitting more open space and sightlines to the river (Tr. At 231, *See also*, Z.C. Case No. 11-03 Ex. 125 at p.5). However, no similar justification exists in the current case as the PUD would form a solid 130-foot-tall wall along the north side of Maine Avenue, providing no sightlines from the properties to the North, and providing only minimal open space in the form of an internal building court. (Ex. 38A2 at 15-17)

¹⁶ *See, McMillan*, 149 A.3d 1027 at 1034 (“even if a proposal conflicts with one or more individual policies associated with the Comprehensive Plan, this does not, in and of itself, preclude the Commission from concluding that the action would be consistent with the Comprehensive Plan as a whole”) (citing *Durant I*, 65 A.3d 1161 at 1168).

policies favoring medium- and moderate-density on a portion of the site in favor of permitting high density development. While the Commission made broad statements that the high-density development would help achieve other CP elements, it did not provide any evidence that these elements could *only* be achieved through the inconsistent high-density development, or for its “giving greater weight to some policies than to others.” (*Id.*) The Court concluded:

“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. Rather, if the Commission approves a PUD that is inconsistent with one or more policies reflected in the Comprehensive Plan, the Commission “must recognize these policies and explain [why] they are outweighed by other, competing considerations ...” *Id.* citing *Durant I*, 65 A.3d at 1170;¹⁷

The Court’s holding in *McMillan* further articulated a similar determination in *Durant I*:

“...we hold only that it is insufficient to recite that a particular action is consistent with the Plan as a whole: ‘bare conclusion[s]’ will not do. Our precedents require the Commission, when presented with a material contested issue, to address that issue and to explain its conclusion” (*Durant I*, 65 A.3d at 1171 (citations omitted)).

As such, it is not sufficient for the Application to assert broadly that despite conflicting with the FLUM, the PUD is consistent with the CP when taken as a whole because it is *generally* supportive of numerous other elements. Further, OAG asserts that this FLUM inconsistency cannot be balanced out even by the CP’s general housing goals because the FLUM inconsistency is not necessary to create the additional residential square footage as this same square footage could be accommodated on the PUD site under the MU-10 zone that the FLUM explicitly identifies as consistent with the Medium-Density Commercial designation. Instead, OAG contends that the only CP element that could balance out this FLUM inconsistency is CP § 224.9, which identifies affordable housing “above and beyond existing legal requirements” as one of only two “high priority” PUD benefits. OAG posits that the square footage utilizing the FLUM inconsistency should be subject to a 33% IZ set-aside, which constitutes 4% of the total gross residential square footage, thereby allowing the inconsistency to be outweighed through its direct furtherance of the CP’s prioritized affordable housing goals.

b. The Applicant’s Reliance on Z.C. Case No. 20-06 is Not Dispositive

OAG rejects the Applicant’s and Commission’s assertion that the Commission found the MU-9A zone consistent with the Medium Density Commercial FLUM designation in a prior PUD with map amendment, Z.C. Case No. 20-06. The Commission stated in its final order (Ex. 86 in Z.C. Case No. 20-06, the “**Final Order**”), that the PUD’s map amendment’s height and density, although in excess of that contemplated by the FLUM, would allow the PUD to directly further other CP goals, that would render the overall PUD consistent with the CP as a whole. The Final Order noted:

¹⁷ See also, *Barry Farm Tenants and Allies Association v. District of Columbia Zoning Commission*, 182, A.3d 1214, 1225-26 (D.C. 2018)(Holding that the Commission had not sufficiently justified its conclusion that “clustering” the density on the PUD site was necessary for effectuating other policy goals of the CP.)

- The PUD site was designated as a Land Use Change Area on the GPM which anticipates greater changes in the scale of development, whereas in the current PUD site is designated as a Neighborhood Conservation Area that anticipates less change in the scale of development (Final Order at p. 2-3); and
- The additional height available in the MU-9 zone would allow for the density of the buildings to be concentrated on the site, opening more of the property for use as a publicly accessible, riverside open space and allowing for “visual connections” from the nearby neighborhoods in Capitol Hill to the waterfront as the Commission concluded in the following conclusions of law:
 - “The Map Amendment to the MU-9 zone will allow the redevelopment of the PUD Site consistent with many of the development priorities of the [CP’s Lower Anacostia Waterfront/Near Southwest] Area Element, with the MU-9 zone’s additional height and density allowing the concentration of density to protect sight lines to the Anacostia River and provide for more publicly accessible open space.” (*Id.* at 26);
 - “...even though the Map Amendment will allow the PUD to be constructed to a much greater height and density than currently permitted because: The PUD’s design with multiple buildings, two of which at the maximum 130 foot height allows for the retention of viewsheds through the site and provision of substantial open space, which the Commission finds to be particularly important given the PUD Site’s location on the Anacostia waterfront...” (*Id.* at 27);
 - The Commission concurred with OP’s findings that “[t]he PUD’s density permitted by the Map Amendment, while slightly higher than that contemplated by the FLUM for matter-of-right PUDs, would allow the PUD to provide more housing and affordable housing in a concentrated location which would allow for large portions of the PUD Site to be dedicated to waterfront public space” (*Id.* at 30).

The Commission’s order acknowledged the FLUM inconsistency and identified how it was specifically outweighed through the furtherance of other CP policies.¹⁸ The Commission concluded that the MU-9’s inconsistency with the FLUM was outweighed because the additional height provided by the MU-9 *directly contributed* to the site being developed in a manner specifically supporting other CP Policies, such as providing sight lines and public access to the Anacostia waterfront, which otherwise could not have been achieved (Final Order at p. 14, 19, 26, 28; *See also*, CP §§ 813.3, 905.6, 1906.3).

OAG asserts that the current PUD, in contrast to Z.C. Case No. 20-06, is not using the additional height gained through the MU-9A zone to directly further other CP goals. Unlike Z.C. Case No. 20-06 that provided view corridors to the river and significant public open space, the PUD will create a solid wall along Maine Avenue, blocking views to the river, and without providing meaningful public space. Although the greater height is used for housing, it does not further the CP’s general housing goals because the same density could be accommodated on the site under a consistent zone. Therefore, the only way in which this additional height can be balanced in the CP is through its use to provide more “high-priority” affordable housing.

¹⁸ *McMillan*, 149 A.3d 1027 at 1035.

c. An Additional Affordable Housing Proffer Would Balance the PUD’s Requested Development Incentives and Adverse Impacts.

OAG maintains that the increased affordable housing proffer is also needed to balance the PUD’s requested development incentives. The Commission must “judge, balance, and reconcile the relative value of the public benefits and PUD amenities offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case” (Subtitle X § 304.3). While the Commission “may not compel an applicant to add to proffered public benefits,” it “**shall deny** a PUD application if the proffered benefits do not justify the degree of development incentives requested (including a requested map amendment)” (Subtitle X § 305.11, emphasis added).

The Application is seeking a considerable increase in the allowable height and density on the site through the combination of a map amendment and PUD bonus density. As noted in the record, this additional height and density will have negative impacts on the surrounding community that must be either mitigated or outweighed. As with the CP inconsistencies, the use of the additional GFA to provide affordable housing would allow the PUD to directly balance its requested development incentives and their related impacts with a critically needed public benefit — again, one of the only two PUD public benefits that the CP identifies as “high priority” (CP § 224.9).

Conclusion

Based on the foregoing, OAG stands by the arguments it presented to the Commission at the October 6, 2022, public hearing. OAG believes that to address the inconsistencies with the CP and provide a truly meaningful affordable housing benefit, the PUD’s IZ proffer should be increased to 22% of the residential GFA based on the 18% IZ+ baseline and the additional set-aside to address the FLUM inconsistency. Without that increased proffer, OAG believes that the PUD does not satisfy the PUD evaluation criteria and the Commission should not approve the PUD.

Respectively submitted,

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Attachments: Certificate of Service