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June 27, 2023

VIA IZIS

Zoning Commission for the
District of Columbia
441 4th Street, NW, Suite 210
Washington, D.C. 20001

Re: ZC Case No. 22-06
Applicant's Answer in Opposition to Motion for Reconsideration filed by
Advisory Neighborhood Commission 6D

Dear Members of the Commission:

On behalf of 801 Maine Ave SW PJV LLC (the “**Applicant**”), and in accordance with Subtitle Z § 700.8, we hereby submit this answer in opposition to the “Motion of Advisory Neighborhood Commission 6D for Reconsideration of Decision” filed on June 20, 2023 (Ex. 136-136B) (the “**Motion**”). In the Motion, Advisory Neighborhood Commission (“ANC”) 6D (the “ANC”) seeks the Zoning Commission’s reconsideration of several areas of the PUD and Zoning Map amendment approval granted in Zoning Commission Order No. 22-06 (the “**Order**”) (Ex. [133](#)). For the reasons discussed below, the Motion should be denied.

1. Flexibility & Balancing

The Motion argues that the Zoning Commission erroneously accepted the Applicant’s proffers and does not provide for a reasonable balance of the project benefits and amenities against the flexibility achieved through the PUD.

The Zoning Commission’s analysis of the public benefits against the flexibility achieved through the PUD is discussed in detail in the Order. *See* Conclusions of Law Nos. 39-45, at pp. 60-61. In the Motion, the ANC challenges the validity of certain proffers, alleging that the Zoning Commission erroneously accepted the list of proffers by the Applicant as public benefits. The Applicant’s responses to the ANC’s points of reconsideration for the proffers in question is provided in the table below.

Public Benefits/Amenities Proffered	Reference in Exhibit 133	Point of Reconsideration	Applicant’s Response
LEED Platinum Certification	P. 66, B.1.; and again mentioned in P. 68, D.1	This proposed “benefit” fails the “matter-of-right” provisions (Subtitle X, 305.1) of the public benefit requirement. LEED Platinum construction standards, green roofs, and other environmental/ sustainable design features are agnostic of PUD zoning and could still take place under current zoning.	<p>Pursuant to Sub. X § 305.5(k)(5), meeting the minimum standards for LEED Gold constitutes a PUD benefit. Therefore, meeting the standards for LEED Platinum, which is above and beyond the LEED Gold rating, is properly considered a benefit of the PUD.</p> <p>A project constructed as a matter of right is not required to be constructed to LEED Platinum standards as a condition of a building permit or certificate of occupancy.</p>
Signal Warrant Study	P. 66, Item B.2.	These actions are designed to mitigate adverse effects of the new development on 9th Street and G Street which will generate <i>additional</i> traffic in the intersection, and therefore are not public benefits, per Title 11, Subtitle X, 305.9. Furthermore, a study and its findings do not include commitment from the applicant to take any action to mitigate adverse impacts.	According to the DDOT report, only one of the nine study intersections (7th and Maine) would unacceptably degrade in the level of service due to vehicular trips generated by the PUD. <i>See</i> Ex. 44 at p. 2. This traffic impact is offset by the Applicant’s TDM program, which is designed to encourage non-auto travel. The Signal Warrant Study is outside the scope of the TDM, and constitutes a public benefit given its purpose. <i>See</i> Order, Decision B.2 at pp. 66-67.
\$100K to Capitol Square for cut through traffic mitigation	P. 66, Item B.4.	This action is required to mitigate potential adverse effects of the new development’s generation of <i>additional</i> traffic and should not be weighed as a benefit. Furthermore, CSHOA noted that the amount provided is insufficient. CSHOA indicated in Ex. 130 how the logistics supposed in the Applicant’s quote were impossible, and therefore the amount not enough. CSHOA provided a new estimate based on the factual context in which the HOA can install and operate gates.	The cut-through traffic is an existing condition, and is not an adverse impact generated by the development of the PUD Site. The monetary contribution of \$100,000 to the Capitol Square Homeowners Association (“CSHOA”), which is to be expended at the CSHOA’s discretion, is greater than the cost to install the exit-controlled gates. Moreover, the Zoning Commission found “that the Applicant’s \$100,000 contribution to the [CSHOA] is sufficient to install traffic gates and to mitigate any remaining transportation impacts of the traffic.” <i>See</i> Order, Conclusion of Law No. 29 at p. 58. Thus, the proposed contribution is properly deemed a proffer because it will directly address a traffic condition that <i>currently</i> exists and is “beyond that needed to mitigate any potential adverse impacts” of the PUD. 11-X DCMR § 305.5(o).

<p>Bike and scooter corrals along perimeter of the property</p>	<p>P. 67, Item B.5.</p>	<p>These actions are required to mitigate potential adverse effects of the new development and are not public benefits, per Title 11, Subtitle X, 305.9. Furthermore, these actions would still be required under matter-of-right</p>	<p>Implementation of the TDM Plan is required to mitigate traffic impacts from the project. The installation of the bike and scooter corrals along the perimeter of the property are beyond the mitigation in the TDM Plan. The bike and scooter corrals were proffered by the Applicant in its Post-Hearing Statement, <u>at the request of the CSHOA</u>, due to concerns about bikes and scooters being abandoned in their townhome community. <i>See Ex. 119</i> at p. 10.</p> <p>Furthermore, a project constructed as a matter of right would not be required to install bike and scooter corrals along the perimeter of the property as a condition of the building permit or certificate of occupancy.</p>
<p>LEED Platinum Certification Green Roofs EV charging stations</p>	<p>P.67, Item D.1 P. 67, Item D.2 P. 67, Item D.3</p>	<p>As noted above, these proposed “benefits” fail the “matter-of-right” provisions (305.1) of the public benefit requirement. LEED Platinum construction standards, green roofs, and other environmental/ sustainable design features are agnostic of PUD zoning and can still take place under current zoning.</p>	<p>Pursuant to Sub. X § 305.5(k)(5), meeting the minimum standards for LEED Gold is a project benefit. Therefore, meeting the minimum standards for LEED Platinum is a project benefit.</p> <p>A project constructed as a matter of right is not required to be constructed at LEED Platinum certification as a condition of a building permit or certificate of occupancy.</p>
<p>9th St SW reconfiguration and redesign</p>	<p>P. 68, Item D.6</p>	<p>The community, in concurrence with the Zoning Commission, has noted on record existing traffic concerns and issues with 9th ST SW and how they would be WORSENERD by this project. These actions are <i>required</i> to mitigate adverse effects of the new development and are not public benefits, per Title 11, Subtitle X, 305.9.</p>	<p>In its report to the Zoning Commission, DDOT states that it “supports the proposal to reconfigure the curb line on 9th Street, realign the intersection of 9th and G Street, and install bike lanes on 9th Street as a Community Benefit [citing to Ex. 38C] since it will improve safety for bicyclists and pedestrians and improve the quality of the streetscape.” <i>See Ex. 44</i> at p. 2. (Emphasis added.)</p>
<p>Public Art Proffer of \$75K to a minority-owned, woman-owned, certified business entity based in Washington, DC</p>	<p>P. 68, Item D.8.a</p>	<p>Fails the “matter-of-right” provisions (Subtitle X, 305.1) of the public benefit requirement; provision of public art is not significant and could take place under current zoning.</p>	<p>A project constructed as a matter of right is not required to make a public art proffer as a condition of a building permit or certificate of occupancy. Commemorative works or public art is specifically listed as a PUD benefit category under Sub. X § 305.5(d).</p>

Workforce Housing	P. 69, Item 9	Not considered as public benefit per Ex. 133 (page 18, #54, first bullet) but at least one Commissioner made statements as if it was a benefit (see Transcript of February 9, 2023 Public Meeting – page 20, lines 11-13).	As noted in Conclusion of Law No. 21 of the Order, the workforce housing units were not proffered by the Applicant or accepted by the Zoning Commission as a public benefit. ¹
Jefferson Middle School PTO proffer of \$150K over 3 years for field experiences and curricula	P. 68,	Fails the “matter-of-right” provisions (305.1) of the public benefit requirement	If the project were constructed as a matter of right, the Applicant would not have been required to engage with the Jefferson Middle School PTO and make a contribution to the PTO as a condition of a building permit or certificate of occupancy.
3,000 sq. ft. for a grocer; market; bodega; corner store; or prepared food shop use; and space for a bank branch.	P. 68, E.2.a.	The square footage of the original proposed grocery (subsequently reduced to 3000 sq. ft for something less-than a grocery) was never large enough to qualify as a benefit given the availability of convenience vendors in the immediate vicinity and includes no documentation of commitment from any retailer. A bank, never requested by the community (most “Letter in Support” referencing such language written by the Applicant, was accepted erroneously per Subtitle Z Section 206.5(d)) and the Applicant never demonstrated how such would serve the surrounding area. The Applicant has yet to provide an MOU for <u>any</u> retail or commercial use of the space, as required by Subtitle Z Section 401.2 to be considered a proffer/public benefit.	<p>Members of the ANC previously expressed a need for full service bank and grocery store in the immediate neighborhood, which is why the uses were proffered as uses of special value to the neighborhood. Uses of special value to the neighborhood or the District of Columbia as a whole is a specific public benefit category under Subtitle X § 305.5(q).</p> <p>The format for the grocery store, or a comparable use, was reduced from 6,000 square feet (“s.f.”) to 3,000 s.f. during the zoning approval process in response to concerns expressed by the CSHOA about the traffic impacts associated with a larger grocery store.²</p> <p>The proffer relates to the types of uses, not specific users, tenants, or operators, and the condition requiring the uses is self-executing. As such, an MOU is not required to validate the proffer.</p>

¹ “The Project will also reserve 20 one-bedroom units at the 120% MFI level; however, these 20 units are not a proffered public benefit of the Project. (FF Nos. 31, 54, 71, 117.)”

² The Applicant did not proffer a grocery store use pursuant to the benefit category in Subtitle X § 305.5(j). See Applicant’s Revised List of Proffers and Conditions, Ex. 126 at p. 11. Thus, the ANC’s assertions about failing to satisfy a certain square footage threshold are without merit. Furthermore, the proffer to allocate 3,000 s.f. for a use of special value to the neighborhood also contemplates a market, bodega, corner store, or prepared food shop.

In light of the foregoing, there is no basis for the Zoning Commission to reconsider the validity of the proffers or the balancing of the project benefits against the flexibility achieved through the PUD. The ANC's request for reconsideration should be denied.

2. Affordable Housing Analysis by OAG

ANC 6D requests that OAG's analysis and suggested requirements for the affordable housing proffer be reconsidered and re-evaluated. **This request should be denied because the Zoning Commission has determined that OAG's affordable housing analysis was flawed.**

As explained in Conclusion of Law No. 45, OAG's recommendation and analysis are flawed for two reasons. First, OAG's recommendation is based on the calculation for IZ Plus, which is not the standard for a PUD. Second, OAG incorrectly applies the balancing test in Subtitle X § 304.3 by recommending a 33% affordable housing set aside for the two additional stories gained by the PUD and Zoning Map amendment process. The Zoning Commission rejects OAG assertions and concludes that the project's affordable housing proffer is sufficient when properly balanced, together with the overall benefits and amenities, against the Applicant's requested development incentives and the Project's potential adverse effects.

3. Building Height

The Motion requests that the Zoning Commission complete a detailed analysis related to those portions of the building that have a height of 130 feet or higher along Maine Avenue. As discussed in detail in the Applicant's pleadings, architectural drawings, and testimony at the public hearing, no portion of the building exceeds 130 feet in height from the established building height measuring point on G Street. *See, e.g.*, Public Hearing Transcript for Z.C. Case No. 22-06, pp. 97-98. Furthermore, as noted in the Order, the purpose of maximizing the building height along Maine Avenue is to accommodate a reduction in height and density on the north side of the PUD site, across from the townhomes on G Street. *See* Conclusion of Law No. 28.

The method and rationale for the building height along Maine Avenue is addressed clearly and thoroughly in the case record and the Order. Therefore, the ANC's requests to reconsider the approval of the height of the building should be denied.

4. Commercial Benefits

The Motion requests that the Zoning Commission reconsider whether the "bodega style" grocery and full service bank constitute benefits of the project.

As discussed in the Applicant's supplemental statement marked as Ex. [12](#) of the case record, and memorialized in the Applicant's Revised List of Proffers and Conditions marked as Ex. [126A](#) of the case record, a bank and a grocery store with a minimum 6,000 s.f. of floor area were proffered as "uses of special value to the neighborhood" in accordance with Subtitle X § 305.5(q) because members of the ANC previously expressed an interest in having these uses for the immediate neighborhood. The proposed grocery store format was modified to "bodega style" during the zoning approval process in response to the concerns expressed by the Capitol Square

Homeowners Association (“CSHOA”) about the traffic impacts associated with a larger grocery store. The immediate neighborhood still lacks a full service bank and a store where residents and local employees can purchase food, produce and other basic grocery items. As such, the proposed uses are ones that are of special value to the neighborhood. The Order requires the Applicant to devote a specific amount of ground-floor/retail space in the PUD for the life of the project, subject to the approved flexibility. The condition calls for the allocation of certain uses, not a specific user, tenant, or operator; therefore, a MOU with a specific grocer or bank is not required. *See* Order, Decision No. E.2, p. 69.

In light of the foregoing, the Zoning Commission should deny the ANC's request to reconsider the proffer to allocate 3,000 square feet of ground-floor retail space to a “bodega style” grocery and a portion of the ground floor retail/commercial space to a bank branch.

5. Traffic Impacts

The Motion argues that the Order does not reconcile or account for the full traffic impacts of the PUD requests that the Zoning Commission “complete a detailed analysis” of all the traffic-related exhibits and testimony, and reconsider “in a holistic way” the total impacts to residents.

Contrary to this argument, the Order indicates that Zoning Commission has thoroughly assessed the existing traffic conditions and anticipated impacts of the project, and cited to numerous exhibits in support of the conclusion that the transportation impacts “are capable of being mitigated or acceptable given the quality of public benefits.” *See* Conclusion of Law No. 29 (citing to FF Nos. 33, 34, 46, 52-54, 77, 89-92, 104-110, 112). Specifically, in support of its conclusion, the Zoning Commission noted the following:

- DDOT has determined, subject to proposed revisions that are incorporated in the Order's conditions, the Applicant's TDM and LMP will mitigate any potential adverse impacts on the traffic network resulting from the project.
- The project will provide a sufficient amount of bicycle and vehicle parking in line with the District's requirements, and is located in close proximity to public transit, neighborhood-serving retail, services and other amenities within walking distance of the property.
- The 9th Street Improvements will have favorable impacts on pedestrian, bicycle and vehicular safety in the area, and qualify as a significant public benefit that will help offset the project's impacts on transportation.
- The Applicant has made significant adjustments to the project's proposed driveway to discourage cut-through traffic through Capitol square, including moving the G Street curb cut approximately 36 feet west so that does not align with Capitol Square's curb cut and restricting the Project's Main Avenue access point to large trucks and one-way, northbound operations.

- The \$100,000 contribution to the CSHOA is sufficient to install traffic gates and mitigate any remaining transportation impacts of the project, after taking into account the Applicant's other efforts to design the G Street curb cut and alley to deter cut-through traffic to and from Maine Avenue.

Moreover, as DDOT noted in its report, the Applicant's CTR indicated that only one of the nine intersections studied (7th Street and Maine Avenue) would unacceptably degrade in Level of Service (LOS) due to the addition of site-generated vehicle trips." *See* Ex. 44 at p. 2. In order to offset this traffic impact, DDOT requested the implementation of the TDM plan, which is intended to encourage non-auto travel and is a stated condition of the Order. *See* Decision No. F.1 at pp. 70-72.

The Order details the traffic considerations assessed by the Zoning Commission, including the project impacts and mitigation efforts, as well as the Applicant's proffers for improvements intended to improve vehicular, pedestrian, and bicycle circulation in the area. Therefore, the ANC's request for reconsideration of this issue should be denied.

6. Letters of Support

The Motion suggests that the letters of support from www.899Maine.com be disregarded, and that the Zoning Commission reconsider its approval of the application because there are more letters in opposition to the project from residents of ANC 6D than there are letters of support from residents from ANC 6D. There were four (4) letters of support from persons that worked or lived within a mile of the project and not submitted through the website: Shawn Seaman, President, Hoffman & Associates, Inc. (Ex. 46), William Rich (Ex. 48), Ryan Quinn (Ex. 82), and the Jefferson Middle School Parent Teacher Organization (Ex. 85). For obvious reasons, zoning decisions are not based merely on the number of letters in support versus those in opposition. Also, nothing in the Order suggests the Zoning Commission "improperly evaluated" the letters in the record. **In light of the foregoing, there is no rational for the Zoning Commission to reconsider the letters of support, and the ANC's request should be denied.**

7. Shadow Studies

The Motion alleges "the Applicant presented misleading shadow studies" throughout the zoning approval process, and requests that the Zoning Commission reconsider the Applicant's initial shadow study (Ex. 20), CSHOA's additional submissions (Ex. 81 and 81A) and the CSHOA's final shadow study (Ex. 114).

The Motion fails to acknowledge the progression of the Applicant's shadow study after the initial filing (Ex. 4A3, Sheets 53-54 and Ex. 4A4, Sheet 55). An updated shadow study was included with the Applicant's Prehearing Submission filed on June 4, 2022. *See* Updated Architectural Drawings, Ex. 15A2, Sheets 51-53.³ The updated shadow study accounts for the

³ The updated shadow studies are also provided at Sheets 60-62 of the plans filed with the Applicant's Supplemental Prehearing Submission on September 16, 2022 (*see* Ex. 38A4 and 38A5) and at Sheets 60-62 of the plans filed with the Applicant's Post-Hearing Submission on November 28, 2022 (defined as the Approved Plans in the Order).

various adjustments made to the building's design and accounts for modeling discrepancies in the prior version. Also, the updated shadow study reveals that the approved project will have lesser impact on the adjacent properties than the original building design. The Applicant's Prehearing Statement includes a detailed discussion on the methodology behind the updated shadow study. *See Ex. 15*, p. 5.

The Order acknowledges that there will be some adverse impacts resulting from the height and density of the Project, including an increase in shadows and loss in privacy." *See* Conclusion of Law No. 28. The Order also confirms that "[t]he Commission has evaluated all of the shadow studies submitted to the record, both by the Applicant and the opposition, and concludes, and finds that the additional shading resulting from the proposed Project is acceptable given current conditions." **In light of these conclusions, the ANC's claim that the Zoning Commission "never fully challenged or resolved" the differing shadow studies is without merit, and the ANC's request for the reconsideration of the shadow studies should be denied.**

8. Great Weight

ANC 6D requests that the Zoning Commission strike from the Order the letters from Councilmember Allen and the other exhibits related to the workforce housing units at the 120% MFI level, arguing that great weight is given solely to the ANC and the workforce housing units were not properly proffered as a community benefit in support of the application. However, Councilmember Allen's input on the application does not diminish the great weight given to the ANC. Moreover, as noted in Conclusion of Law No. 21, the workforce housing units were not proffered as a public benefit. The Applicant proposed to record a Workforce Housing Unit Covenant prior to the issuance of a final certificate of occupancy as a condition of the approval of the PUD. **The Zoning Commission customarily proposes or accepts conditions that are not necessarily project benefits/amenities. Therefore, the request to strike the Councilmember's letters and the workforce housing proffer from the Order should be denied.**

9. Zoning Choice

The Motion requests that the Zoning Commission provide justification for rezoning the subject property to MU-9A instead of MU-11 through MU-14, which the Zoning Handbook describes as zones "intended to be applied *generally* in the vicinity of the waterfront." First, the Comprehensive Plan, not the Zoning Handbook, is the legal framework that guides development in the District. At Conclusion of Law No. 112, the Order explains in detail why the MU-9A zone is appropriate based on the property's designation of Medium Density Commercial on the Comprehensive Plan Future Land Use Map. Second, as emphasized above, the Zoning Handbook describes the MU-11 through MU-14 zones as applying "*generally*" in the vicinity of the waterfront; but it does not limit zoning in the vicinity of the waterfront to these zones. **Therefore, no further justification for the MU-9A zoning is warranted, and the ANC's request to reconsider the Order should be denied.**

Conclusion

Subtitle X § 700.6 states that a motion for reconsideration shall state specifically the respects in which the final order is claimed to be erroneous. In this case, the ANC expresses its disagreement with various areas of the approval, but fails to demonstrate how the Order was erroneous in these areas. For this reason, coupled with the counterarguments above, the Applicant respectfully requests that the Zoning Commission deny the Motion at the earliest available public meeting date.

Thank you for your careful attention to this matter.

Respectfully submitted,

HOLLAND & KNIGHT LLP



Leila M. Jackson Batties
Christopher S. Cohen

cc: Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that, on June 27, 2023, a copy of the foregoing Answer in Opposition to the Motion for Reconsideration filed by Advisory Neighborhood Commission 6D in Z.C. Case No. 22-06 was served on the following **via electronic mail** at the addresses listed below:

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