November 28, 2022

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

VIA IZIS

Re: Z.C. Case No. 22-11 of MCRT Investments, 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. 22-11. OAG reiterates its assertion that the Application's Inclusionary Zoning ("**IZ**") proffer of 15% of the proposed PUD's total residential gross floor area ("**GFA**") is insufficient to justify approval of the proposed PUD because the 15% IZ set-aside is less than the IZ set-aside required for an equivalent increase in density for a matter-of-right development, which would be 21%. As a result, the proposed 15% IZ proffer fails to qualify as a public benefit required to balance the PUD's requested development incentives - particularly the additional 61,050 square feet ("**sf**") or 2.58 Floor Area Ratio ("**FAR**") of bonus density. OAG therefore recommends that, unless the Applicant increases the IZ proffer to 21% of the PUD's residential GFA, the Commission should deny the proposed PUD as inconsistent with the PUD balancing test.

I. OAG Recommends the PUD's IZ Proffer be Increased to 21% of the Residential GFA

OAG asserts that a PUD with a map amendment, in order to claim IZ as a PUD public benefit, should provide at least the amount of affordable housing that would be required for the proposed PUD's requested additional density based on the Inclusionary Zoning Plus ("**IZ+**") formula for a matter-of-right project in the requested zone.

> "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)

OAG's recommended 21% set-aside is based on the IZ+'s calculation, in which the proposed PUD's IZ+ set-aside would be based on the bonus density utilized by the PUD:

Maximum By-Right Density in Proposed MU-10 Zone (Excluding IZ & PUD Bonus Density)	141,984 sf	6.0 FAR

Proposed PUD Residential GFA in MU-10 Zone	203,034 sf[1]	8.58 FAR[2]
Additional PUD Bonus Density (Including IZ & PUD Bonuses)	61,050 sf	2.58 FAR
70% of Bonus Density[3]	**42,735 sf**	
Percent of Residential GFA	**21%**	

As indicated in the chart above, application of the IZ+ formula to the PUD's proposed bonus density would result in an IZ set-aside of 42,735 sf—12,280 sf more than the current PUD proffer. This would translate to approximately 12 additional, permanently affordable units.

Determining a project's IZ set-aside on the basis of a set percentage of bonus density utilized is not unique to the IZ+ program and is included in the matter-of-right IZ requirements (Subtitle C §§ 1003.1-1003.2), reflecting the principle that in exchange for density above and beyond what is permitted in the zone as a matter of right, an applicant must provide a proportional amount of GFA dedicated to IZ. This same concept was extended to map amendments through IZ+, and OAG contends that it must logically follow that PUDs, which are able to obtain even greater amounts of bonus density, should also be subject to the same proportional set-aside requirements.

OAG maintains that the IZ+ program's application of this proportional set-aside requirement to map amendments had the effect of fundamentally altering 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.*"[4]

OAG asserts that it would be contrary to the Comprehensive Plan's (Title 10A DCMR, the "**CP**") housing goals, specifically its designation of the creation of affordable housing as a "high priority" public benefit (CP § 224.9) and other District housing policies, for a PUD with a map amendment to provide less affordable housing than a non-PUD 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".[5]

[1] Per Subtitle C § 1003.5, this includes non-penthouse residential GFA and public space projections (196,435 sf) as well as penthouse habitable space (6,599 sf) – Ex. 69A1 at Sheet 004.
[2] This represents the FAR equivalent of the total residential GFA, which includes square footage excluded from FAR calculations (Subtitle B §§ 303.1, 304.7-304.8), it does represent the total bonus density gained by the PUD and is the total building GFA used for the Applicant's IZ calculations.
[3] Per Subtitle C § 1003.4, the bonus density calculation is the applicable method, as it is greater than the alternative IZ+ set-aside calculation ("sliding scale" of total residential GFA) which would result in a set-aside of 36,546 sf or 18% of the proposed PUD's total residential GFA.
[4] OP Setdown Report in Z.C. Case No. 20-02, Ex. 8 at p.2.
[5] *Id.*

OAG asserts that any IZ proffer under the 21% required by the IZ+ formula fails to exceed what would be required for an equivalent matter of right increase in density and therefore does not satisfy the requirement that a PUD's proffered benefits must be "superior to a matter of right" and sufficient to "justify the degree of development incentives requested (including any requested map amendment)" and notes that the Commission "**shall deny**" a PUD that fails to provide sufficient public benefits (Subtitle X § 305.11, emphasis added).

II. OAG's Application of the IZ+ Formula Is Properly Based on the MU-10 Zone

OAG maintains that it properly based its IZ+ calculations on the MU-10 zone selected by the Applicant for the PUD-related map amendment. At the hearing, the Applicant and the Commission suggested that OAG should have used the MU-8 zone for its calculations, based on the Applicant's assertion that OP would not have supported a non-PUD map amendment to the MU-10 zone, but only to the lower density MU-8 zone and, as such, the Commission could not have approved a non-PUD map amendment to the MU-10 zone (Ex. 85). OAG rejects this argument on the basis that the Commission has the exclusive authority to decide zoning applications, including map amendments, and notes that using the MU-8 zone would not relieve the PUD from providing a higher IZ set-aside.

A. 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.[6] This is established in the Zoning Act and was recently confirmed by the D.C. Court of Appeals, which affirmed the Commission's ability to reject recommendations from OP.[7] Neither the Applicant, nor OP, have provided any persuasive evidence justifying the Commission's consideration of the MU-8 zone.[8]

Regardless of OP's position, OAG asserts that there does not appear to be a legal basis on which the Commission could have denied a non-PUD map amendment to the MU-10 zone for the PUD site. The only standard for the Commission's approval of a map amendment is a finding that it is "not inconsistent with the CP and with other adopted public policies" (Subtitle X § 500.3). Given these limited criteria, which exclude consideration of a specific project, the Commission's review is focused primarily on a map amendment's consistency with the CP maps – the Future Land Use Map ("**FLUM**") and the Generalized Policy Map. In the current case, the PUD site's Medium Density Commercial/Medium Density Residential FLUM designation *specifically* identifies the MU-10 zone as a compatible zone (CP § 227.12). Neither the Applicant, nor OP have identified any other compelling interest or CP element that would justify the Commission's denial of a map amendment to a zone specifically identified as consistent with the PUD site's FLUM designation.

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[6] *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.

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

[8] *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.)

B. Using the MU-8 Zone Would Still Require an Increased IZ Proffer

Even if OAG had based the IZ+ calculations on a project maximizing the IZ and PUD bonus density available in the MU-8 zone, it would yield an IZ set-aside of 36,443 sf. This is still 5,988 sf more than the PUD's current proffer of 30,455 sf, and still equivalent to 21% of the maximum GFA that could be constructed on the site maximizing the bonus density available for a project in the MU-8 zone:

Maximum By-Right Density in MU-8 Zone (Excluding IZ & PUD Bonus Density)	118,320 sf	5.0 FAR
Maximum PUD Density in MU-8 Zone	170,381 sf	7.2 FAR
Bonus Density (Including IZ & PUD Bonuses)	52,061	2.2 FAR
70% of Bonus Density	**36,443 sf**	
% of Maximum PUD Density	**21%**	

OAG contends that the Applicant's calculations based on the MU-8 do not accurately calculate the required set-aside for a non-PUD map amendment as the "sliding scale" method would result in a set-aside of 16% of the residential GFA, not 18%. More critically, the Applicant's calculations fail to account for the additional bonus density gained through a PUD in the MU-8 (Ex. 85 at Slide 3). As with the proposed PUD, the Applicant's hypothetical MU-8 zone analysis effectively allows the PUD bonus density to be given "for free," without any proportional IZ set-aside. As noted above, OAG asserts that doing so subverts the intent of the entire IZ program, including IZ+, as well as the housing goals of the CP.

Conclusion

Based on the foregoing, OAG stands by the arguments it presented to the Commission at the November 14, 2022, public hearing. OAG believes that, to provide a truly meaningful affordable housing benefit, the PUD's IZ proffer should be increased to at least 21% of the residential GFA based on the IZ+ baseline. Without that increased proffer, OAG asserts that the PUD does not satisfy the PUD evaluation criteria, and the Commission should deny the PUD unless the IZ set-aside proffer is increased.

Respectively submitted,

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Attachments: Certificate of Service