

Ann O. Hamilton

From: "Ann O. Hamilton" <ahamilton@erols.com>
To: <sharon.shelling@dc.gov>
Sent: Thursday, July 24, 2008 11:01 AM
Attach: Giant - PUDs and Overlays 7-23-08.doc
Subject: Wisconsin Avenue Giant Development Application

Dear Ms. Shelling:

As I mentioned in our telephone conversation yesterday, we believe that the attached is a memorandum of law raises an important legal issue that the Zoning Commission needs to consider before setting down the Friendship-Macomb PUD application.

It concludes that the Zoning Commission does not have power under its Planned Unit Development regulations to eliminate a neighborhood commercial zone designation covering the lots subject to the PUD application.

We discussed this issue with the Office of Planning yesterday. They rejected the memorandum's conclusion. We believe that they are mistaken. OP suggested that we forward the memorandum of law to the Office of the Attorney General for their opinion and analysis, which we have done.

Next Monday evening, July 28, the Zoning Commission is scheduled to determine whether to set down a PUD application in the Macomb-Wisconsin neighborhood commercial overlay district. ("MW") -- Case No. 08-15. The PUD is premised on remapping the subject area from MW/C-1 to C2-A with no overlay, which we believe the Commission has no authority to grant.

We appreciate your prompt attention to this important issue.

Thank you.

Wisconsin Avenue Neighborhood Coalition

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ZONING COMMISSION
District of Columbia

CASE NO. 08-15
EXHIBIT NO. 13

MEMORANDUM OF LAW

SUBJECT: THE RELATIONSHIP BETWEEN THE ZONING COMMISSION'S NEIGHBORHOOD COMMERCIAL OVERLAY DISTRICT REGULATIONS AND ITS PLANNED UNIT DEVELOPMENT REGULATIONS--THE FRIENDSHIP-MACOMB PLANNED UNIT DEVELOPMENT APPLICATION AND THE MACOMB-WISCONSIN NEIGHBORHOOD COMMERCIAL DISTRICT

DATE: July 23, 2008

BY: Diane L. Olsson, J.D.

SUMMARY AND RECOMMENDATION

1. The PUD regulations do not give the Zoning Commission authority to eliminate a neighborhood commercial overlay district covering the area subject to the PUD.
2. The PUD regulations do not authorize the Zoning Commission to permit a major expansion of height and density in a neighborhood commercial overlay district.
3. The Macomb-Wisconsin overlay compels large-scale projects in the MW overlay district to be reviewed by the BZA pursuant to the procedures, standards and criteria of the overlay's section on special exceptions.

Recommendation:

The Zoning Commission should direct the applicant to revise its consolidated PUD application as a two-stage application, to permit the Commission first to consider the novel and significant issues raised by an application for a PUD within a Neighborhood Commercial Overlay zone district.

I. INTRODUCTION

On May 16, 2008, Friendship-Macomb SC Inc, c/o The Stop and Shop Supermarket Co., filed a PUD application for the redevelopment of the Friendship Shopping Center, Square 1920, Lot 831 and Square 1920N, Lots 1 and 2, located within the area bounded by Wisconsin Avenue, Idaho Avenue and Macomb Street, NW, Washington, D.C. The PUD application is subtitled "Cleveland Park Giant" but in fact describes a two-block redevelopment project that would encompass a supermarket, other commercial retail and office space, a major multi-unit residential component and a row of townhouses.

The application is seeking to locate a Planned Unit Development ("PUD") in an area included within the Macomb/Wisconsin Neighborhood Commercial Overlay District.

The changes requested for the proposal include elimination of the overlay for the area of the application.

The District of Columbia Zoning Regulations establish a number of Neighborhood Commercial Overlay Districts, including the Macomb/Wisconsin ("MW") Overlay. (11 DCMR Chapter 13, final Rulemaking published 36 DCR 7616, Nov. 3 1989.) These overlays provide special protections for the designated neighborhood commercial districts.

Separately, the Zoning Regulations establish a process for Planned Unit Developments. The PUD regulations authorize the Zoning Commission to permit developments that would not otherwise conform to the requirements of the zone district where the PUD is to be located, based on identified public benefits of the PUD and in accordance with conditions and limitations specified by the PUD regulation. (11 DCMR Chapter 24.)

The Zoning Regulations now designate 24 separate overlay zones, including five Neighborhood Commercial Overlay Districts. Overlay districts are a unique form of zoning in that they are mapped in combination with the underlying conventional zoning but are distinct from it. In the almost two decades since adoption of Chapter 13, no PUD has been proposed attempting to eliminate the Neighborhood Commercial Overlay for the MW Overlay zone. It is believed that use of PUDs to eliminate existing overlay designations elsewhere in the city has not been critically examined. Because disposition of a challenge to the Friendship-Macomb application's attempt to eliminate the overlay would set the precedent for future PUD applications in any Neighborhood Overlay district citywide, the Zoning Commission should consider the application with particular attention to the extent of the Zoning Commission powers conferred by the PUD regulation and the interplay between the development incentives of the PUD regulations versus the protective features of the Neighborhood Commercial Overlay regulations.

A review of the relevant portions of the Neighborhood Commercial Overlay regulation and the Planned Unit Development regulation reveals areas of possible tension between the two. Part II, below, sets forth relevant portions of both chapters: Particularly significant provisions are highlighted. Part III discusses the relationship between the regulations and reaches the conclusions summarized above. Part IV sets forth recommendations.

II. THE REGULATIONS

A. THE NEIGHBORHOOD COMMERCIAL OVERLAY

The Neighborhood Commercial Overlay chapter includes express statements of purpose of the overlay district; specific provisions regarding Special Exceptions and PUDs, and a particular section establishing substantive and procedural requirements for the Macomb-Wisconsin Neighborhood Commercial Overlay District. The chapter includes, among other things, the following provisions. (Emphases added.)

1300

PREAMBLE

1300.1

The Neighborhood Commercial ("NC") Overlay District is established to preserve and enhance neighborhood shopping areas, by providing the scale of development and range of uses that are appropriate for neighborhood shopping and services.

* * *

1300.3

The purposes of the NC Overlay District are the following:

* * *

(c) To limit the maximum permitted height of new buildings so as to encourage a general compatibility in scale between new and older buildings.

1300.4

The provisions of this chapter that apply to the discrete NC Overlay Districts shall reflect the character, scale, and needs of the particular district.

1301

GENERAL PROVISIONS

* * *

1301.3

Where there is a conflict between this chapter and the underlying zoning, the more restrictive provisions of this title shall govern.

1304

SPECIAL EXCEPTIONS

1304.1

Exceptions from the requirements of this chapter shall be permitted only as a special exception, if approved by the Board of Zoning Adjustment after public hearing, in accordance with the conditions specified in §3108 of this title, and subject to the following requirements:

- (a) The excepted use, building, or feature at the size, intensity, and location proposed will substantially advance the stated purposes of the NC Overlay District and the particular NC Overlay District, and will not adversely affect neighboring property, nor be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity;
- (b) Exceptional circumstances exist, pertaining to the property itself or to economic or physical conditions in the immediate area, which justify the exception or waiver;

- (c) Vehicular access and egress are located and designed so as to minimize conflict with principal pedestrian ways, to function efficiently, and to create no dangerous or otherwise objectionable traffic conditions; and
- (d) The Board may impose requirements pertaining to design, appearance, signs, size, landscaping and other such requirements as it shall deem necessary to protect neighboring property and to achieve the purposes of the NC Overlay District and the particular overlay district.

1304.2 This section shall not operate to allow any exception to the height or floor area ratio limits of any NC Overlay District.

1305 PLANNED UNIT DEVELOPMENT GUIDELINES

1305.1 In the NC Overlay District, the matter of right height and floor area ratio limits shall serve as the guidelines for Planned Unit Developments.

* * *

1308 MACOMB-WISCONSIN NEIGHBORHOOD COMMERCIAL OVERLAY DISTRICT

1308.1 The Macomb-Wisconsin ("MW") Overlay District applies to the neighborhood commercial area near and extending from the intersection of Macomb Street and Wisconsin Avenue, N.W., comprising those lots zoned C-1 in Squares 1920 and 1920N.

1308.2 In addition to the purposes that are set forth in §1300 of this chapter, the purpose of the MW Overlay District is to provide for public review of large developments as to their proposed uses, vehicular access, and the scale and massing of proposed buildings, so as to ensure compatibility with and enhancement of the primary neighborhood retail function of the commercial area and to advance the other purposes of this overly district.

1308.3 Within the MW Overlay District, on a lot that has ten thousand square feet (10,000 ft. sq.) or more in land area, construction of a new building or enlargement of the gross floor area of an existing building by fifty percent (50%) or more, shall be permitted, subject to review and approval as a special exception by the Board of Zoning Adjustment, pursuant to the same standards and criteria set forth in §1304 of this chapter.

1308.4 For purposes of §1302 of this chapter [establishing designated and restricted uses], the designated use area shall include any lot that fronts

on Wisconsin Avenue or Macomb or Newark Streets within the WP [sic] Overlay District.

1308.5 For purposes of §1303.2 of this chapter [prohibiting driveways for parking spaces or loading berths], the designated roadways within the MW Overlay District shall be Wisconsin Avenue and Macomb Street.

B. THE PUD REGULATIONS

Planned Unit Development approvals are essentially development incentives that the Zoning Commission may grant to a developer in support of projects that offer public benefits. See §2400.1 and §2403.8. Public benefits are defined as "superior features . . . that benefit the surrounding neighborhood or the public in general to a significantly greater extent than would likely result from development on the site under the matter of right provisions of this title." §2403.6.

It is sometimes suggested that the PUD regulations authorize the Zoning Commission to change the pre-existing zoning of a proposed PUD area in any way that it determines, subject only to the development standard ceilings set forth in §2405 of the PUD regulation or other PUD regulation strictures. However, the regulations demonstrate that the Zoning Commission's power is not so unlimited as that suggestion.

The PUD regulation provides in part (emphases added):

2400. PLANNED UNIT DEVELOPMENT (PUD)

2400.2 The overall goal is to permit flexibility of development and other incentives, such as increased building height and density; Provided, that the project offers a commendable number or quality of public benefits, and that it protects and advances the public health, safety, welfare and convenience.

* * *

2400.4 While providing for greater flexibility in planning and design than may be possible under conventional zoning procedures, the planned unit development process shall not be used to circumvent the intent and purposes of the Zoning Regulations, nor to result in action that is inconsistent with the Comprehensive Plan.

2400.5 The Zoning Commission may approve an application for a PUD with or without modifications. In carrying out the purposes of this chapter, the Zoning Commission may establish general standards and, in individual cases, set standards and conditions for height and bulk lesser or greater than the standards established for the affected districts in this chapter or elsewhere in this title.

2402 TYPES OF APPLICATIONS

2402.1 The planned unit development process may be either a one-stage or a two-stage process.

* * *

2402.6 The Zoning Commission reserves the right to direct an applicant to revise a one-stage application into a two-stage application, if in the opinion of the Commission the circumstances and issues surrounding the proposal require a two-stage review.

2402.7 The Zoning Commission may dismiss or deny the application at the conclusion of the presentation of the applicant's case or at any point thereafter.

2403 EVALUATION STANDARDS

* * *

2403.4 The Zoning Commission shall find that the proposed planned unit development is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site.

* * *

2403.8 In deciding a planned unit development application, the Zoning Commission shall judge, balance, and reconcile the relative value of the project amenities and public benefits offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case.

* * *

2403.11 To assist the Commission in applying the evaluation standards of this section, the application shall prepare and submit to the record of the case an annotated table that shows the following:

- (a) The extent to which the proposed development would comply with the standards and requirements that would apply to a matter of right development under the zone district classification of the site at the time the application is filed;

- (b) The specific relief that the applicant requests from the matter of right standards and requirements; and
- (c) If the applicant requests a map amendment, the extent of compliance with, and the requested relief from, the matter of right standards and requirements of development under conventional zoning.

2405 **DEVELOPMENT STANDARDS**

2405.1 No building or structure shall exceed the maximum height permitted in the least restrictive zone district within the project area as indicated in the following table: . . . [TABLE specifying maximum height for PUD]

2405.2 The floor area ratio of all buildings shall not exceed the aggregate of the floor area ratio as permitted in the several Zone districts included within the project area: . . . [TABLE specifying maximum floor area ratio for PUD]

* * *

2405.7 Notwithstanding the other prerogatives of the Zoning Commission in approving uses in planned unit developments, the Zoning Commission shall reserve the option to approve any use that is permitted as a special exception and which would otherwise require the approval of the Board of Zoning Adjustment.

2405.8 Approval of the Board of Zoning Adjustment shall not be required for any such use approved by the Zoning Commission, under §2405.7, and the Zoning Commission shall not be required to apply the special exception standards normally applied by the BZA.

III. DISCUSSION

Issue 1: Does the PUD Regulation authorize the Zoning Commission, expressly or by implication, to eliminate an existing Neighborhood Commercial Overlay designation covering the area subject to the PUD?

Answer: No.

The Friendship-Macomb PUD application covers lots presently zoned MW/C-1 and R-5-A. The application asks the Zoning Commission to change the MW/C1-zoned portion to

C2-A. This proposal, if granted by the Zoning Commission, would eliminate the Neighborhood Commercial Overlay for the area included in the PUD.¹

The Zoning Commission does not have any inherent authority to use the PUD regulation to alter or delete other provisions of the zoning regulations or other requirements. Rather, its powers in permitting a PUD are only those set forth in the PUD chapter of the zoning regulations. Therefore, the PUD regulation must be examined to ascertain the actual extent of the Commission's authority.

Nothing in the PUD regulation specifically empowers the Commission to eliminate the applicability of an entire chapter of the Zoning Regulations, such as Chapter 13, the neighborhood commercial overlay chapter. Careful reading of the regulation suggests that neither does the regulation confer that broad authority by implication.

The Commission's PUD power to relax applicable requirements in exchange for public benefits contemplates relaxation of conventional physical and use requirements established by the general residential, mixed use, commercial and etc. zone districts. As set forth above, the PUD regulation allows the Commission "to permit flexibility of development and other incentives, such as increased building height and density." (§2400.3; emphasis added.) The regulation separately provides a list of PUD development standards; this list, similarly, establishes the relaxed height, floor area ratio (FAR) and other physical limitations that the Commission may grant. §2405. Section 2405 includes other physical issues: Lot occupancy, yards and courts and off-street parking. (§2405.) Under these provisions, the incentives that the regulation authorizes the Commission to offer involve "bricks and mortar" issues.

Additional PUD provisions reinforce the conclusion that the Zoning Commission's authority is directed to providing relief from conventional zoning, including physical building development, use and related incentives. Thus, §2004.5 refers to changing the height and bulk standards and conditions in individual cases:

In carrying out the purposes of this chapter, the Zoning Commission may establish general standards and, in individual cases, set standards and conditions for height and bulk lesser or greater than the standards established for the affected districts. (Emphasis added.)

¹ If the Friendship-Macomb PUD application were granted, the remaining MW overlay would cover only the one- and two-story buildings on either side of Macomb Street from Wisconsin Avenue west for a short half block and the one- and two-story buildings on the west side of Wisconsin Avenue continuing south also for a short half-block. Unlike the buildings subject to the PUD application, many of the buildings that would remain in the severely abridged residual M-W Overlay district are currently in use as restaurants. Elimination of the bulk of the overlay would throw the remaining portion into serious violation of §1305(a), the Overlay's 25% restaurant limitation. It would also remove that restriction, among others, from the PUD development area, unless separate restrictions were adopted in connection with the PUD.

Similarly, §2403.8 refers to the “degree of development incentives,” as follows:

In deciding a planned unit development application, the Zoning Commission shall judge, balance and reconcile the relative value of the project amenities and public benefits offered, the degree of development incentives requested. . . . (Emphasis added.)

The term “degree,” by definition, refers to a level of permitted departure from otherwise applicable limitations, as distinguished from any authority to grant a separate “kind” of incentive, as would be the case if the Commission attempted, in exchange for whatever public benefits or amenities the PUD was offering, to waive an entire chapter of the zoning regulations, with its separate statements of purpose, procedural requirements, and more.

The only other power that the regulation confers on the Commission is the reservation of an option to approve any use authorized as a special exception, which approval authority would otherwise be lodged in the Board of Zoning Adjustment (BZA), §2405.7, along with power to depart from the BZA special exception use standards when the Commission approves any such use. §2405.8; *cf.* §3108. This assumption of a particular function normally assigned to the BZA is limited to BZA’s approval of uses and does not extend to an assumption of any other duties assigned by regulation to the BZA. See discussion under Issue 3, below.

Sections 2405.7-2405.8 demonstrate that where the PUD regulation seeks to extend the Zoning Commission’s power to use the PUD authorization to change existing regulations in ways that go beyond the straightforward height, density and related conventional zoning limitations, *i.e.*, by authorizing the Commission also to grant use exceptions, the PUD regulation expressly and specifically provides the Commission with that additional power. This further confirms that the PUD regulation’s empowerment of the Zoning Commission to grant development incentives is limited to the power to revise conventional zoning limitations except where and to the limited extent that the PUD regulation expands the power. The Zoning Commission does not have power under the PUD regulation to repeal Zoning Regulation chapter 13 as it applies to an area subject to a PUD application.

Section 2403.11 requires the PUD application to provide an annotated table comparing the proposed development with existing matter of right standards. Section 2403.11(c) states that if the applicant requests a map amendment, the table must show “the extent of compliance with, and the requested relief from, the matter of right standards and requirements of development under conventional zoning.” This provision confirms that where the requested relaxation of height, density and similar requirements of conventional zoning would place a PUD project out of compliance with such requirements, it is appropriate for the Zoning Commission, after informed review, to amend the conventional zoning that established the requirements that are being relaxed. This conclusion is reinforced by the express language of §1305.11, which, again, calls

upon the applicant to compare its project with "conventional" zoning. The requirement for a comparison table contains no reference to overlays.

In addition, §2403.11(c) functions only to impose a duty on the applicant. It does not operate as establishing a power in the Commission: The Commission's powers in authorizing a PUD must be found elsewhere in the PUD regulation. It would clearly be a mistake to read §2403.11(c) as independently conferring a power on the Zoning Commission to take actions not otherwise authorized in the PUD regulation.

Finally, §1305.1 of the Overlay regulation is also instructive. It provides tight controls over any PUD that is proposed for a neighborhood commercial overlay district. Section 1305.1 expressly states that the matter of right height and floor area ratio limits are to serve as the guidelines for Planned Unit Developments. If a PUD could escape that requirement simply by eliminating the overlay altogether, that provision, and to some extent the entire overlay, would be meaningless. It should not be assumed that the Zoning Commission promulgated a meaningless regulation. Instead, §1305.1 shows that the overlay continues to function when a PUD is proposed.

To summarize: In contrast with the PUD provisions authorizing relaxation of conventional zoning limitations as an incentive for a qualifying PUD development, nothing in the PUD regulation authorizes the Zoning Commission to go beyond conventional zoning and repeal distinct goals and procedures that have been expressly established elsewhere in the Zoning Regulations. Without such authority, the Zoning Commission is literally powerless to throw out the entire Overlay for the PUD area. Instead, the Overlay remains applicable and controlling in the subject area.

Issue 2. Does the PUD regulation authorize the Zoning Commission to permit a significant expansion of height and density in a Neighborhood Commercial Overlay District?

Answer. No.

The Neighborhood Commercial Overlay regulation was established:

... [T]o preserve and enhance neighborhood shopping areas, by providing the scale of development and range of uses that are appropriate for neighborhood shopping and services. (§1300.1.)

The regulation expressly sets forth a purpose:

To limit the maximum permitted height of new buildings so as to encourage a general compatibility in scale between new and older buildings. §1300.3(c).²

² It should be recalled that all of the other structures in the Macomb-Wisconsin Neighborhood Commercial Overlay district are one and two story buildings. Although an eight-story mixed-use building stands just to the north of the Overlay district, that

The Overlay's purpose of limiting the size of new construction is confirmed by §1304.2. This section specifies that a special exception may not operate to allow any exception to height and FAR ratios in neighborhood commercial districts. Similarly, §1305.1 expressly stipulates that matter of right height and FAR limits must be used as the PUD guidelines in neighborhood commercial overlay districts; this provision demonstrates that the regulation contemplates that the overlay requirements continue in effect.

Further, the particular Macomb-Wisconsin Overlay district requires public review of any large-scale development in the zone district "so as to ensure compatibility with and enhancement of the primary neighborhood retail function of the commercial area and to advance the other purposes of this overlay district." (1308.2.) To ensure that result, it requires all large-scale projects in the Overlay district to be subjected to BZA's Special Exception procedures set forth at §1304. The section does not contain any exception for PUDs.

The PUD regulation requires the Zoning Commission to respect the intent and purpose of the Neighborhood Commercial Overlay. Specifically, it provides (§2400.4):

While providing for greater flexibility in planning and design than may be possible under conventional zoning procedures, the planned unit development process shall not be used to circumvent the intent and purposes of the Zoning Regulations, nor to result in action that is inconsistent with the Comprehensive Plan.

Similarly, §2403.4, under Evaluation Standards, provides:

The Zoning Commission shall find that the proposed planned unit development is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site.

Thus, the Zoning Commission cannot exercise its PUD powers in a manner contrary to the intent and purposes of the zoning regulations or the Comprehensive Plan, including the intent and purposes of the neighborhood commercial overlay regulation. Specifically, it cannot permit height and density allowances significantly in excess of pre-existing matter of right limitations.

If any conflict is seen between the Overlay's neighborhood commercial protections and the PUD's incentive-oriented provisions, such conflict is resolved in favor of the Overlay by §1301.3:

building was permitted a part of a large PUD that functioned to preserve the lower heights and open spaces of the McLean Gardens moderate-income residential area. That PUD was not located in an overlay district and cannot be used to justify a PUD within the MW Overlay District.

Where there is a conflict between this chapter and the underlying zoning, the more restrictive provisions of this title shall govern.

Section 1301.3 not only provides a clear instruction that the overlay protections will curtail an overly-ambitious PUD. In addition, it supplies insight into the Zoning Commission's intent in adopting the Overlay chapter. The section clearly signifies that the Commission viewed the Overlay as a binding regulation that must be given priority over other portions of the zoning regulations. The Zoning Commission's PUD regulation requires the Zoning Commission to respect and uphold that intent. Indeed, §

In sum, the Overlay regulation establishes a clear intent and purpose to limit the height and bulk of large projects, including PUDs, in designated Neighborhood Commercial districts: Specifically, it requires PUD evaluations to employ existing height and density limits as the guidelines for new developments. The PUD regulation, for its part, enjoins the Zoning Commission from awarding development incentives that would circumvent that intent and purpose. It must be concluded that in a Neighborhood Commercial Overlay district, the PUD regulation does not authorize the Zoning Commission to permit significant expansion of height and density beyond the preexisting zoning. Instead, it clearly prohibits that result.

Issue 3. Question: Does the Macomb-Wisconsin Overlay compel large-scale projects in the M-W overlay district to be reviewed as Special Exceptions under §1304 and pursuant to that section's standards and criteria?

Answer: Yes.

When the Macomb-Wisconsin overlay was established, the drafters were particularly cognizant that the unusually large lot sizes of Square 1920N, Lots 1 and 2, and particularly Square 1920, Lot 831, would be a magnet for large-scale development, and that such development would be inconsistent with the area's character and situation as a very low-density local neighborhood center that is not served by rapid transit (Metrorail) and that lies adjacent to the Cleveland Park Historic District. Therefore, they included a unique provision in the Macomb-Wisconsin overlay establishing special BZA review requirements for any large project proposed for that small neighborhood commercial area. See §1308.3.

Section 1308.3 states that any project on a lot of 10,000 square feet or more in area is subject to review and approval as a Special Exception by the BZA, pursuant to the standards and criteria of §1304. It will be recalled that those criteria include the requirement that a Special Exception under §1304 must not operate to allow any exception to the height or FAR limits of any Neighborhood Commercial Overlay district. (§1304.2.)

Section 1308.3 is consistent with the Overlay's overall intent to provide the particular protections that each overlay district requires to protect its unique circumstances. Section 1300.4 states:

The provisions of this chapter that apply to the discrete NC Overlay Districts shall reflect the character, scale, and needs of the particular district.

The BZA Special Exception review requirement of §1308.3 reflects the character, scale and needs of the Macomb-Wisconsin Neighborhood Commercial district, and it must be followed. An application for large-scale development within the Macomb-Wisconsin overlay district must be reviewed pursuant to the BZA procedures, standards and criteria set forth at §1304.

Careful analysis of §§ 2405.7 and 2505.8 of the PUD regulation underscores the conclusion that the Zoning Commission must defer to the BZA's Special Exception hearing authority under §§1304 and 1308.3. Recalling that the Commission can only permit departure from applicable zoning regulation requirements to the extent that the PUD or other regulation authorizes the departure, it is noted that §2405.7 specifically reserves to the Zoning Commission only the option to approve uses that would otherwise require BZA approval, and §2405.8 only operates, in the specific case of a Zoning Commission use approval under §2405.7, to excuse the Commission in that particular instance from the requirement to apply the special exception standards that are normally applied by the BZA.

Sections 2405.7 and 2405.8 are limited by their terms to empowering the Zoning Commission to assume the BZA's use approval functions, set forth at §3108. They do not contain any reference to the BZA's distinct hearing responsibilities under Overlay §1304. Since the PUD regulation expressly reserves to the Zoning Commission certain BZA powers, it follows that where the regulation makes no reservation as to a separate BZA power, no such reservation is present. The PUD regulation does not reserve to the Zoning Commission BZA's §1304 hearing powers.

Section 1304 remains in effect notwithstanding the Friendship-Macomb PUD application. The Friendship-Macomb application must undergo Special Exception review under §1304, including the criteria of §1304.2. Nothing in the PUD regulation allows the Zoning Commission to overrule a properly-decided BZA special exception review and order.

The Friendship-Macomb PUD application does not address §1308.3. Perhaps this omission was based on the theory that the Zoning Commission can simply repeal the overlay for the area of the PUD, thereby nullifying the §1308.3 procedural requirement along with the substantive constraints imposed by the Overlay. The above discussion has demonstrated that that view is in error. The applicant would have been better served to test its unsustainable assumption earlier in its planning process.

IV. RECOMMENDATIONS

The Friendship-Macomb PUD should be broken into a two-stage process.

The PUD regulations permit a PUD process to be either a one-stage or a two-stage process. §2402.1. In a two-stage process (§2402.2):

- (a) The first stage involves a general review of the site's suitability for use as a planned unit development, the appropriateness, character, scale, mixture of uses and design of the uses proposed, and the compatibility of the proposed development with city-wide, ward, and area plans of the District of Columbia, and the other goals of the planned unit development process; and
- (b) The second stage is a detailed site plan review to determine compliance with the intent and purposes of the planned unit development process, the first stage approval, and this title.

Friendship-Macomb filed its PUD application for consolidated review under §2402.3. However, the serious, precedent-setting procedural and substantive issues raised by the Friendship-Macomb PUD application in the Macomb-Wisconsin Neighborhood Commercial Overlay district must be resolved prior to proceeding with any detailed plan review. Accordingly, it is recommended that the Zoning Commission direct Friendship-Macomb to revise its one-stage application into a two-stage application as provided by §2402.6.

Filing a revised application may result in delaying or altering the development process. However, Friendship-Macomb was aware of the regulatory situation in the Macomb-Wisconsin Neighborhood Commercial Overlay District and had the responsibility to address the significant issues raised by its application.

In addition, the Zoning Commission should encourage the applicant to give serious consideration to separating the two parcels that it has included in its PUD application. In this way, it may be possible to expedite approval and construction of the project proposed for south parcel, Square 1920, Lot 831, which currently includes a large amount of vacant commercial space. That parcel would presumably require a minor map amendment to expand the C-1 zone into a portion of the present R-5-A zone, along with some relatively minor plan adjustments including relocation of the loading driveway away from the Idaho Avenue neighbors.

The applicant and the Zoning Commission could then more carefully consider the appropriateness of Friendship-Macomb's major proposal for the NC/C-1 north parcel.