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April 28, 2017

Mr. Anthony Hood, Chairman
District of Columbia Zoning Commission
441 4th Street, N.W., Suite 200-S
Washington, D.C. 20001

RE: Request for clarification and correction of Order No. 15-18, Consolidated PUD and Related Map Amendment @ Square 1194, Lot 811

Dear Chairman Hood,

We are writing to seek clarification and correction of the Order mentioned above, specifically as to paragraphs 35-38 in which the Commission grants a waiver of more than 50% of the applicable PUD minimum area requirement of §2401.1 of the 1958 Zoning Regulations, notwithstanding the fact that a waiver of more than 50% is prohibited by §2401.2, and for this purpose to request that the Commission on its own motion stay the effectiveness of this Order under 11 DCMR §Z-701.1. On September 26, 2016 we submitted to the record our argument in support of the proposition that such a waiver would exceed the Commission's authority under 11 DCMR (1958)(attached).[1] On April 3, 2017 we filed a Petition for Review of this Order No. 15-18 by the District of Columbia Court of Appeals.

In this Order the Commission has now presented its justification for the waiver, which we address below.

The Commission notes that pursuant to §2401.1(c), this PUD is required to have a land area of 15,000 square feet, that a full 50% waiver as allowed by §2401.2 would leave a minimum required land area of 7,500 square feet, and that "with only 7,413 square feet of land area this Property does not meet that requirement."[2] The Commission notes further that on December 19, 2016, it took final action adopting a new provision in the 2016 Regulations, Subtitle X §301.3, pursuant to which the minimum required area in the W-2 zone, where this PUD is to be located, may be reduced by more than 50%, to a minimum of 5,000 square

[1] ZC No.15-18, Exhibit 48.
[2] Order No. 15-18, p. 5.

> feet,[3] stating that "had this PUD been filed after September 6, 2016, it would have been eligible for a land waiver to 7,413 square feet." The Commission then concludes that § 2402.2's prohibition on waiving more than 50% of the required minimum area may itself be waived without a variance
> "because it does not pertain to how property may be used, but instead establishes one prerequisite to a property being eligible to obtain PUD relief from such standards. Nevertheless, the Commission is required to set forth the basis of a decision to waive § 2402.2 with such clarity as to be understandable. (*Blagden Alley Ass'n v. D.C. Zoning Comm'n*, 590 A.2d 139, 146 (D.C. 1991).)

The Order continues:

> "[A]lthough new Subtitle X § 301.3 does not technically apply to this PUD, the underlying policy considerations that prompted the Commission to adopt it are equally relevant to the Commission's determination of this request. Since the Commission has determined that an MU-13 property of less than 15,000 square feet is eligible to request a land waiver to not less than 5,000 square feet, the Commission determined that this PUD should be similarly eligible. For that reason, and because for the reasons stated in this Order this PUD meets the existing requirements for waiver under both applicable § 2402.2 and new Subtitle X § 301.3, the Commission waives the 50% limitation.

There are two fatal flaws in the Commission's position, the first of which is that the *Blagden Alley* case is not on point here. In that PUD case, the Blagden Alley Association claimed, among other things, (1) that the Commission lacked authority under its enabling legislation to approve off-site amenities, and (2) that the Commission acted inconsistently with its regulations in approving off-site amenities for a PUD while the Zoning Regulations provided for on-site amenities but made no provision for off-site amenities.

The Court held that since it had previously upheld the Commission's authority to grant PUD applications on the basis of the Commission's general authority to promote the general welfare through zoning, and noting that the Association agreed that it could include *on-site* amenities in PUDs, the Commission could also include off-site amenities notwithstanding the absence of a specific grant of authority from the Council.

As to the Association's claim that the Commission acted inconsistently with its Regulations, the Court remanded, requiring the Commission to explain how granting the PUD with off-site amenities would be consistent with the Regulations. The Court stated that the Commission "is free to regulate through contested case proceedings", citing *Capitol Hill Restoration Society v. Zoning Comm'n,* 380 A.2d 174, 179-80 (D.C. 197O), "and thus was not bound to adhere to the letter of the contiguity and incentive regulations in this case. But when an agency does depart from the apparent plain meaning of its regulations, 'the basis for its decision must be set forth with such clarity as to be understandable,' (citing *Securities and Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 196-97 (1945)*).

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[3] Idem.

Because the developer did not proceed with the project for which the PUD had been sought, however, we understand that no such explanation was ever provided by the Commission, and consequently no opportunity presented for the Court to assess its legal adequacy. In any event, the facts in *Blagden Alley* are materially different from those of the current case. In the current case, the Commission proposes to do something that cannot be done without violating an applicable rule – the rule that sets the minimum lot size requirement for PUDs in precise arithmetical terms. By contrast, in *Blagden* the Commission was not doing something that violated the rules, but rather interpreting the rules to allow an action as to which the rules were silent, on the basis of the fact that those rules explicitly permitted something similar. Whether the Court would have sanctioned even this action in the Blagden Alley case remains undetermined,[4] but it is clear that the rules applicable in the current case are not silent as to whether a PUD may be authorized on a parcel smaller than 5,000 square feet.

Thus whether or not *Blagden Alley* might be cited to justify an expansive interpretation of existing regulations, it cannot be cited as warrant for an action that clearly contradicts a provision of the existing Regulations, as proposed by the Commission in the present case. In the present Order the Commission is not interpreting §2401, but opting to ignore it.

The second flaw in the Commission's position is that the statement that it has proffered, in apparent response to the call in the *Blagden Alley* opinion for a "clear and understandable" justification for its action, is neither clear nor understandable. It advances two separate rationales, each of which rests on arbitrary distinctions for which there is no rational basis and which generate absurd results. The first rationale is that "the waiver limit of § 2402.2 may be waived without use of the variance standard because it does not pertain to how property may be used, but instead establishes one prerequisite to a property being eligible to obtain PUD relief from such standards." But if this is true, any rule establishing prerequisites for a PUD, such as those enumerated in §X-304.4, can be ignored. Nor is there any discernible reason to suppose that rules establishing eligibility for a PUD should be any more vulnerable to being set aside by the Commission than rules establishing permissible uses or any other class of zoning rules.

The second rationale offered boils down to the proposition that since after this case was initiated, the Commission adopted different rules regarding waiver of minimum area requirements for PUDs that, were they applicable, would solve the problem of this property's ineligibility by reason of insufficient size, the new rules may be applied. If taken seriously this rationale would allow the

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[4] It is significant that neither the *Capitol Hill Restoration Society* case cited by the Court in *Blagden*, nor the *Chenery* case before the U.S. Supreme Court that *Capitol Hill Restoration* cites, involved an agency's seeking or receiving judicial approval of an action contradicting its applicable rules. *Capitol Hill Restoration,* in which it had been claimed that the PUD in question was not a "contested case", is cited by the *Blagden* court for its conclusion to the contrary in a PUD case. The *Chenery* case involved an issue raise by provisions in a corporate reorganization regarding ownership of stock by corporate management. The Court held that in the absence of a preexisting judicially established or other rule specifically applicable to the issue, the agency's decision on the basis of statutory standards in the governing legislation (the Holding Company Act) and its own experience should not be disturbed.

Commission to ignore any applicable regulation and substitute a different one that happens to have been adopted later, if it turns out to be convenient to an applicant to do so.

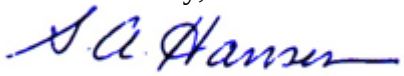
The potential corrosive effects of either of these rationales on the integrity and reliable predictability of the Regulations are obvious. As we noted in our submission of September 26, 2016,

> "[t]he PUD rules provide a flexible alternative to matter of right development but those rules are not uniformly elastic. There is no basis in law for the Commission to do what Initio LP is asking, which is essentially to grant it the 87 square foot waiver as a personal accommodation. . . . If zoning proceeds on this basis, it will sacrifice all credibility and be perceived as a deal-making marketplace more than already is the case." [5]

§2401, establishing the minimum area require for a PUD, as a regulation validly promulgated by the Commission is binding upon it;[6] it is "axiomatic that an agency is bound by its own regulations"[7] and that "once an agency commits itself in its regulations to adhering to certain principles or procedures, it cannot violate them."[8]

We therefore request that the Commission on its own motion review this Order with the aim of clarifying it in such a way as to rectify the legal deficiencies outlined above.

Sincerely,



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[5] Note 1 *supra,* p. 3
[6] *Dankman v. D.C. Board of Elections, 433 A.2d 507, 513 (D.C. 1981), and cases cited therein* including *Vitarelli v. Seaton,* 359 U.S. 535, 539-40, 79 S.Ct. 968, 972-73, 3 L.Ed.2d 1012 (1959).
[7] *Dell v. D.C. Dep't of Employment Serv's.,* 499 A.2d 102, 106, note 2 (D.C 1985)).
[8] *Zotos International, Inc. v. Kennedy*, 460 F.Supp. 268, 275 (D.D.C.1978).