

10. Clarion concedes as it must that this Commission made a finding of fact in the PUD order that 112,070 square feet of the project would be devoted to retail uses. Clarion also concedes that the building permit required the same. This admission alone requires the application to be filed as modification of significance.

11. In fact, the PUD record is littered with representations that the project would contain not only that much retail, but that it would occupy three stories of the project around a lavish atrium. For instance, a review of the PUD applicant's "Second State Submission Pre-Hearing Statement" reveals the following:

- Exhibit 22A1 (Second Stage Submission Pre-hearing statement) on pages 115-117 features floor plans for the Metro Level, the First Floor and the second floor and all commercial space on all 3 floors is clearly labeled as retail
- Exhibit 22A1 on page 6 has this to say about retail in the project:
 - *The project includes three levels of retail uses surrounding the atrium area. The types of stores to be located on these three floors is described in the list attached hereto as Exhibit D. In addition to these small boutique type stores, there is the opportunity to locate at least one "anchor" store. . . .*
- Exhibit 22A1 on page 90 includes the following language:
 - *Retail Use*
 - *Three levels of retail space surrounding the central atrium space.*
 - *One level below-grade with Metro connection, one at street level and one level above-grade.*
 - *Small boutique shops, with the opportunity for major anchor stores.*
 - *Food court at Metro level, and other eating facilities proposed.*
 - *Specific mix described by retail consultant.*
 - *112,000 gross square feet, plus 61,000 square feet of cellar space (approximately).*
 - Exhibit 22A1 on page 95 includes the following FAR breakdown:
 - *Breakdown of FAR by use is as follows:*
 - *Retail 1.172*
 - *Office 2.277*
 - *Hotel 1.676*
 - Exhibit 22A1 on page 107 includes the following Tabulation of Development Data:
 - *Gross Floor Area and Floor-Area Ration*
 - *Retail Gross Floor Area 112,070 Square Feet*
 - *Hotel Gross Floor Area 160,337 Square Feet*
 - *Office Gross Floor Area 217,830 Square Feet*

12. To take but one more example, an excerpt from the Office of Planning report provides the following:

The applicant requests a preliminary review and approval of a Planned Unit Development (CPUD) to construct a 592,800-square foot mixed use development

consisting of 260,000 square feet of office space, an 162,148-square-foot hotel (200 rooms), and a three-level retail complex of 171,700 square feet.²

13. Clarion thus seeks a change in use, and must seek it via an application for a modification of significance. Accordingly, the instant application for a modification of consequence should be dismissed.

The Change Sought Is Not Straightforward and Requires A Hearing

14. The applicant cites two cases that state that where the issues presented are “straightforward” and no reason exists for a hearing, the Commission may deviate from the plain language of Section 703.6

15. *In neither of the cases cited did the affected ANCs seek a hearing.*

16. *Likewise, in neither of the cases did the affected ANCs oppose the substantive relief the Commission ultimately granted.* Indeed, in Case No. 04-13A, the affected ANC failed even to file a report on the merits of the application.

17. By contrast, ANC 3E strenuously opposes the relief sought and seeks a hearing.

18. The affected ANC’s opposition on the merits and request for a hearing by itself should merit a hearing.

19. Moreover, we have heard from numerous residents who strenuously oppose the application and have heard from no residents who support it.

20. As longtime Zoning Commissioners know, residents of ANC 3E have a long history of participation in zoning hearings, both in support and opposition to PUDs. This issue marks the first time any members of ANC 3E recall in which the neighborhood is (thus far) united in opposition.

21. Many of these residents want the opportunity to testify before the Zoning Commission. By contrast, *there is no indication in the two cases the applicant cites concerning flexibility in hearing requirements that the members of the public sought to be heard in those cases.*

22. Even were it not for the affected ANC’s timely-filed opposition on the merits and request for a hearing, the desire of a cross-section of affected residents to be heard by the Commission should be enough to require a hearing.

23. The issues presented here are anything but “straightforward.” ANC 3E believes that Clarion seeks this major change in use merely to enhance its rate of return for its investors, not because, for instance, the building will enter bankruptcy if the applicant does not receive the precise relief it seeks.

24. Were the Pavilion built as a matter of right, Clarion would be free to vary the mix of uses permitted at the site.

² The square footage of the “retail complex” cited here presumably includes the atrium floor space.

25. The Pavilion was not built as a matter of right, however, but instead built pursuant to a PUD where substantial zoning relief was traded for provision of specific benefits to the community – including three stories of retail around a grand atrium.

26. Whether Clarion should be permitted to abrogate this social contract is a complex matter requiring the Zoning Commission to balance harms and benefits to the community, as well as to the Pavilion’s current owners.

27. Likewise, the application requires careful evidentiary inquiry. The Zoning Commission and the affected community should not accept incomplete hearsay claims which are all Clarion as submitted, as acceptable evidence.

28. The “evidence” submitted by the applicant consists of an unsworn, self-serving letter from Clarion’s leasing agent, and a Washingtonian article with a couple of quotes from a celebrity chef who had run a restaurant in the Pavilion.

29. The leasing agent contends that he has had trouble leasing to retail uses. He does not say anything about, for instance, rents sought, how such rents compare to rents in other parts of the immediate area, or what incentives – if any – were offered to retail tenants. Neither does he say anything about the return on investment Clarion considers acceptable.

30. It is thus impossible to discern what actual hardship Clarion faces, and what responsibility it bears for any such hardship.

31. The leasing agent claims that average retail rents in the area have fallen, but again it is not clear why that would justify changing the fundamental terms of a PUD.

32. The magazine article (obviously also unsworn) contains a reference by the chef to “increased costs.” It is obviously possible that one of these “increased costs” was an attempt by the Clarion to raise the restaurant’s rent or otherwise increase payments from this tenant. Moreover, it appears the chef has closed many restaurants in many different locations.

33. The leasing agent cites a series of factors that he contends constitute “fundamental challenges” to the Pavilion, including “enclosed mall design,” “low number of retail spaces facing the street,” “lack of retail storefronts,” and “multi-level, underground parking structure.”

34. Yet, *directly across the street from the Pavilion* is Mazza Gallerie, which has *all* those features, and which appears to have much higher retail occupancy, and no claimed need to substitute medical offices for retail. Moreover, Mazza Gallerie lacks the advantages the Pavilion possesses of a large in-house hotel and office complex.

35. Likewise, the Collection at Chevy Chase, another mall a few hundred feet from the Pavilion, recently made changes to attract more retail, and appears now to be experiencing success, including obtaining two new restaurant tenants.³ Like Mazza, the Collection lacks the advantage the Pavilion possess of a large in-house hotel and office complex. Moreover, the Collection lacks the additional advantage the Pavilion possesses of an in-house Metro station.

³ See “Chevy Chase lands two new restaurants,” *Washington Business Journal*, <https://www.bizjournals.com/washington/news/2019/03/12/chevy-chase-lands-two-new-restaurants.html>

36. Again, a hearing is necessary to determine the degree to which Clarion's retail vacancy rate is self-inflicted, whether through poor management, insisting on commercially-unreasonable rents, other factors, or some combination thereof.

37. Furthermore, Clarion's application fails to address changes in traffic impacts. Yet, as noted in our previous resolution submitted to the Zoning Commission on the applicant's attempt to avoid seeking any modification of the PUD to obtain the relief sought ("ZA Resolution",⁴ according to the Institute of Traffic Engineers Trip Generation Manual, 10th Edition, during the weekday morning peak hour a medical office generates 3 times as many vehicle trips (2.78 vehicle trips per 1,000 square feet) as retail (.94 vehicle trips per 1,000 square feet) and similar levels of traffic during the afternoon peak hour (3.46 vs 3.81).

38. The failure of applicant even to address traffic increases, much less to rebut conclusively the findings in the Trip Generation Manual cited above, should lead to dismissal of the instant application and a finding that if the applicant again seeks this relief that it apply for a modification of significance.

39. Moreover, Clarion contends that medical office use would be a great benefit to the community. In fact, massive complexes of medical offices, including at least one urgent care center, already exist a few hundred feet from the Pavilion. The ANC thus strongly disagrees that addition of many thousands of square feet of medical offices would be a community benefit. The ANC and the community should have the opportunity to testify about this issue.

40. For these and other reasons, this application is anything but straightforward, and a hearing is necessary. Furthermore, based on the scant existing record, the relief applicants seek should be denied on the merits.

The Applicant Has Unclean Hands and The Commission Should Not Grant Any Relief Until All Issues Are Resolved

41. As described in the ZA Resolution, attached hereto, ANC 3E believes that the Pavilion is in violation of a number of PUD requirements. Until the Pavilion is fully compliant, no zoning relief should be granted to it.⁵

42. Furthermore, a constituent has submitted a credible complaint to the ANC that the Pavilion has made changes that render it in excess of permissible density, and that if Clarion receives the relief sought, it will likely make changes that exacerbate this violation. The Commission should investigate this complaint and, if it is valid, again, no relief should be granted to the applicant until it returns to compliance.

⁴ Attached hereto and incorporated by reference.

⁵ After the ZA Resolution was drafted, it appeared the Pavilion had come into compliance with *some* of the issues identified. Others remain, however. We note also that in Clarion's instant application, it claims that it had no way of knowing of any of the violations. This is incorrect. An ANC commissioner and residents lodged complaints with the Pavilion. If Clarion managers was unaware of the complaints, the reason, at best, would be mismanagement. If the Commission believes this is a material issue, sworn testimony on the matter can be provided.

NOW THEREFORE BE IT RESOLVED:

1. ANC 3E strenuously opposes the application for a modification of consequence on the merits and because the application is a modification of significance requiring a hearing. The ANC thus respectfully asks the Zoning Commission to deny the instant application and to hold that should the applicant seek the same or similar relief, it file a modification of significance.

2. Should the applicant file additional material before the Zoning Commission addresses this matter, we respectfully ask the Commission to treat such additional submissions as further evidence that a hearing is necessary, and to dismiss the application for a modification of consequence. If the Commission nonetheless decides to review such additional submissions on the merits, we respectfully ask the Commission to delay its final decision for at least 30 business days so that the ANC may vote on any response at its next regularly-scheduled meeting.

The resolution passed by a vote of __-__-__ at a properly noticed meeting held on April 11, 2019, at which a quorum was present, with Commissioners Bender, Ehrhardt, Hall, McHugh, Quinn, in attendance.

ANC 3E

by Jonathan Bender
Chairperson