

**Additional Development Workshop, Inc. Comments
to July 20, 2010 Staff Report to the City Planning Commission**

Public Comment 1: The POD regulations lack objective criteria governing the review process.

The empowering ordinance requires the Commission to adopt regulations that provide objective standards for design review as may be necessary. While the Staff Finding admits that the “base zoning is the standard of objective review,” the Staff somehow suggests that the “POD review process does not lend itself to precise quantifiable certainty.” The Staff Finding presupposes that there are other permissible standards which are not objective and for which the Commission shall use its expertise and judgment in adjudging a POD application . . . as if the objective standards do not require Commission expertise. Unless the Staff can point to the legislative record to support such a contorted interpretation, this would be a clear misreading of the ordinance.

Objective standards are the fundamental legal nexus for review, and the threshold principle from which this Commission should not stray. Reliance on subjective standards without definition that are, for the absence of certainty, amorphous and ambiguous results only in arbitrary decisions. Arbitrary decisions will not and cannot withstand scrutiny in the public forum or on review by the courts.

Criteria such as “appearance of the building,” “legibility,” “sustainability,” “efficient building performance” are undefined, unknown and subject to change over short periods of time. “As may be necessary” is not license to ignore the need for objective standards, obviate the clear direction of City Council or usurp City Council’s legislative authority.

Valid standards are subject to definition and description. City Council placed upon the Commission the direction to establish objective standards in the ordinance clearly to address the lack of standards in the ordinance itself. The ordinance does not require the “precise quantifiable certainty” that the Staff Finding suggests, but does require standards and requirements that are “objective.”

The Philadelphia Zoning Code already contains examples that are objective, and criteria in portions of the proposed subsections (b) through (g) can lend themselves to objective standards (parking impact, streetscape improvements, sustainability, and negative environmental impact). Difficult, perhaps, but that does not make the task any less important. By failing to provide objective standards behind each criteria would be to choose to follow some sections of the ordinance and not others. If the Commission cannot accept the clear direction to establish objective standards, then the Commission should seek to have the ordinance amended.

We submit that the establishment of subjective standards attempts to impose “taste” on projects. In Pennsylvania, we do not legislate “taste.”

Public Comment 7. The section 4 submission requirements are overly onerous and expensive.

The Staff comment that “many of the items required for the POD review are also required for the review of any new, large development projects” ignores that review of “as-of-right” submissions for zoning permits does not include such matters as density of the development, the scale, height, and massing of the structures, the unit count and composition, amenities included in the project, connections to adjacent sites, areas, and the development’s surroundings, parking and traffic impacts of the development, and the appearance of the building, including its form, legibility, and materials except as specifically provided in objective criteria.

Furthermore, the regulations do not establish any rationale or analysis to support the need for a traffic study for developments having either a minimum of 25 new residential dwelling units or a minimum 100,000 gross square feet of floor area along Christopher Columbus Boulevard. This presupposes, in addition, a negative impact without any explanation what are the negative impacts. Until a basis is shown to support the triggering of a traffic study and mitigation plan, we submit that this added obligation to the submission requirements results in an overly onerous and expensive process.

In particular, the traffic study and mitigation plan requirements reveal a non-growth bias that assumes that development in compliance with existing codes is harmful while negating the concept of “as-of-right” zoning.

Public Comment 8: The deadline for a final decision is too open-ended and could be continued indefinitely.

Although the 75-day time period for the Planning Commission to take action is specifically cited in the ordinance creating Section 14-1638(12)(a) of the Central Delaware Zoning Overlay, the time period should not be open-ended. 75-days should be a limit on how long the Commission has to act after which its approval is presumed. This is common practice through the Philadelphia Code and the City Charter as a method to assure timely review and action.

In reviewing plans submitted by developers under other provisions of the Zoning Code, the Planning Commission performs their review within a proscribed time limit. It should be the same for POD review and approval.

Public Comment 9: The POD process will discourage outside investment and act as a *de facto* moratorium on development.

The Staff Finding is purely speculative and does not cite any basis upon which this claim can be made. We believe that the question can and should be professionally analyzed to ascertain the added cost to a proposed development that will be incurred (in terms of time and money) because of the imposition of the new submission requirements. We do not know however, of any Staff expertise with which this claim is put forward.

This will not change because of the state of the economy but excessive time delays and submission costs before the issuance of permits can impact the ability and/or cost of obtaining financing.

Public Comment 2: Because the PCPC’s decision regarding a POD is a final decision and not merely advisory, the PCPC must act as an objective, adjudicative body. The PCPC’s decision should be based solely on the evidence and testimony presented at the hearing, any member of the PCPC should not have any communication or otherwise receive any information regarding the POD outside of the hearing.

We agree with the adoption of the MPC’s statements with regard to the unbiased record upon which a quasi-judicial body must make its decision. We strongly advise the Commission to accept the original MPC language (“any party and his representatives”) that has proven to comply with law and prohibits contact with any party or participant and not just any applicant. Commission members should have no *ex parte* communications about the subject matters of a hearing. Since a member of the Commission in these circumstances must avoid even the appearance of a conflict of interest (including a decision based on a predetermined opinion), the Commission members have an ethical obligation to base decisions solely on the record developed in the course of due process hearings.

Public Comment 3: The applicant, not the PCPC staff, should present the POD, and bear the burden of proving entitlement.

As previously stated, the obligation of presenting a POD should bear on the applicant, and we agree with this part of the Staff Recommendation. However, the Commission should play no advocacy role in the proceedings and should not request the Staff to offer advisory opinions. The applicant and other parties have the ability to call the Staff members as witnesses in their own discretion, and the Commission should have the power to issue subpoenas upon the request of parties. Of course, the City has standing to participate in the hearings and, therefore, call witnesses. The Commission should also note that, once called to testify, the Staff members will be subject to cross-examination by persons allowed to be parties in the hearings by the Commission.

In accepting this new role for the Commission, the members should understand that they are to be cast into new roles as objective deciders. You will decide what are the facts from the record. You will apply the governing law to the facts. It is up to the parties before you to present those facts and inform you of the applicable law. You are, however, not investigators.

Public Comment 4: The PCPC should have an attorney present to draft finding of fact and to rule on evidentiary matters.

We believe that the better practice is for the Commission be advised by its attorney during the course of conducting hearings. The advice that you have been accustomed to seek from the Staff, you should now seek first from your legal counsel.

While we agree with the Staff Recommendation, we must qualify the Staff Finding. While the proceedings before the Commission are not bound by technical rules of

evidence, the Commission may not ignore principals of law. Technical issues that range from whether an expert is qualified to give opinions on various issues to how to handle objections to limits of due process are difficult enough for experienced boards; the Commission will be well advised to keep legal counsel close at hand.