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VIA E-MAIL AND HAND DELIVERY

Re: Proposed Walgreens Store – 2111 Ford Parkway, St. Paul, MN  
Site Plan Review – January 14, 2019 Zoning Committee Meeting  
File No. 09-423-979

Dear Zoning Committee:

On behalf of UFCW Local 789, I offer the following comments for your consideration.

### **THE SITE PLAN FAILS FOUR CRITERIA (SUMMARY)**

The City of St. Paul Zoning Code, Section 61.402(c) contains the eleven (11) requirements to approve a site plan application. At least four (4) of the requirements, listed below, have not been satisfied:

(c) “*Site plan review and approval.* In order to approve the site plan, **the planning commission shall** consider and **find** that the site plan is **consistent** with:

- “(1) The city's adopted **comprehensive plan** and development or project plans for **sub-areas** of the city.
- “(2) **Applicable ordinances** of the city ...
- “(7) Safety and convenience of both vehicular and pedestrian **traffic** both within the site and in relation to access streets, including traffic circulation features, the locations and design of entrances and exits and parking areas within the site.
- “(8) The satisfactory availability and capacity of **storm** and sanitary **sewers**, including solutions to any drainage problems in the area of the development.” [Emphasis added.]

### **THE SITE PLAN FAILS FOUR CRITERIA (EXPLANATION)**

I. THE SITE PLAN IS INCONSISTENT WITH THE COMPREHENSIVE PLAN AND SUBAREA PLAN.

Zoning Code, Section 61.402(c) requires that a site plan be **consistent** with:

“(1) **The city's adopted comprehensive plan and development or project plans for sub-areas of the city.**” [Emphasis added.]

The proposed Walgreens store is **not** consistent with the Comprehensive Plan and the Subarea Plan for the following reasons:

A. WALGREENS IS **NOT** A MIXED USE DEVELOPMENT. The Comprehensive Plan, Chapter 2 (Land Use), states on pages 7-8:

“**Neighborhood Centers.** Growth in Neighborhood Centers provides housing for changing demographic groups; jobs that capitalize on emerging labor markets; and commercial areas with goods and services for people who live and work in them ... Neighborhood Centers conform to the following characteristics:

“\*Compact **mixed use** areas with a range of housing types at high densities, as described in this plan, and at densities identified in zoning studies recommended by this plan.” [Emphasis added.]

The Comprehensive Plan, Chapter 2 (Land Use), states on page 9:

“1.14 Promote Neighborhood Centers as compact, **mixed use communities** that provide services and employment close to residences.” [Emphasis added.]

“... Some of the benefits of mixed use are activating urban areas during more hours of the day, increasing housing options, reducing auto dependence, and creating a sense of place.”

The Area Plan Summary of the District 15 Highland Park Neighborhood Plan (adopted July 18, 2007) states on page 2:

“Through the implementation of this Plan, the community strives to:

- incorporate a **mix of uses** and a pedestrian-friendly street environment in commercial areas.”

“MIXED USE” IS DEFINED IN THE ZONING CODE. St. Paul Zoning Code, Section 66.421 states that a **mixed residential and commercial** use is a **permitted use** in the B2 zoning district. [Emphasis added.] Furthermore, “Table 66.421. Principal Uses in Business Districts,” contains a check mark (√) after “mixed residential and commercial use,” which requires conformance with development standards, including Zoning Code, Section 65. [See Zoning Code, Section 66.101(d).]

St. Paul Zoning Code, Section 65.143, contains specific standards for a mixed use development in the B2 zoning district: “**Mixed residential and commercial use.** “*Standards and conditions in B1--B3 business and IR--I2 industrial districts:* Residential uses are limited to not more than fifty (50) percent of the basement and first floor. The entire upper floors may be used for residential use. At least fifty (50) percent of the basement and first floor shall be devoted to a principal use permitted in this district, except residential use.” [Reminder: Walgreens proposal is in the B2 zoning district.]

Although Highland Village is a “neighborhood center,” the proposed Walgreens store is not a mixed use development. There is no second story for housing opportunities.

There is precedent in St. Paul for a Walgreens store, with second story for mixed use opportunities. On August 1, 2007, a Walgreens store, with a second story for office purposes, was approved in the Midway District of St. Paul. (Note: Although the two photos below are “stock photo” from unknown locations, it is clear that Walgreens can build a two story building with mixed use opportunities.)



B. THE WALGREENS STORE DOES **NOT** ENHANCE SHOPPING OPPORTUNITIES. The Comprehensive Plan, Chapter 2 (Land Use), states on page 13:

**“1.44 Maintain and enhance retail commercial areas** throughout the city by promoting standards that make them vital and attractive:

- a. access to a **broad range of goods** and services;
- b. an anchor for surrounding residential neighborhoods;
- c. safety for pedestrians; and
- d. architectural elements that add interest at the street level.”

Walgreens will **not** “maintain or enhance” a “broad range of goods and services.” To the contrary, the proposed Walgreens store will be in direct competition with following existing pharmacies:

1. Snyders, located immediately to the east across the parking lot from the proposed site;
2. Prairiestone Pharmacy, located in the Lund's store, immediately southwest of the proposed site; and
3. Fairview Highland Park Pharmacy, immediately west of the proposed site.

**In other words, even without the Walgreens store, there is still plenty of competition for pharmacy business within a very short walking distance from the proposed site.**

In summary, the proposed Walgreens store is **inconsistent** with the City Comprehensive Plan and Subarea Plan because: (1) it is not a "mixed use" development; and (2) it does not "maintain or enhance" the range of goods and services in Highland Village

Therefore, Walgreen's Site Plan must be **denied for this reason alone.**

C. MINNESOTA CASE LAW SUPPORTS ST. PAUL'S ZONING ORDINANCE, WHICH REQUIRES THAT THE SITE PLAN BE CONSISTENT WITH THE COMPREHENSIVE PLAN AND SUBAREA PLAN. On July 28, 2009, Mr. Warner, an Assistant City Attorney, rendered a legal opinion to the Zoning Committee, concluding that "... the City lacks the discretion to review the proposed use for compliance with the City's Comprehensive Plan." (See page 6.)

However, Mr. Warner's analysis is incomplete. Contrary to Mr. Warner's opinion, the Minnesota cases he cites do not support his conclusion. Instead, the St. Paul City Council must apply Zoning Code, Section 61.402(c)(1), which clearly requires that Walgreens' site plan be consistent with the Comprehensive plan and Subarea Plan.

#### 1. THE CHANHASSEN AND CHASE CASES.

Mr. Warner's legal opinion relies on the following two cases:

- a. Chanhassen Estates Residents Association v. City of Chanhassen 342 N.W.2d 335 (Minn. 1984); and
- b. Chase v. City of Minneapolis 401 N.W.2d 408 (Minn. App. 1987).

However, neither the City of Chanhassen nor City of Minneapolis zoning ordinances contained a specific requirement that the site plan must conform to the city comprehensive plan. Unlike the Chanhassen and Minneapolis ordinances, the St. Paul Zoning Code, Section 61.402(c)(1), specifically requires that a site plan application be consistent with the Comprehensive Plan and the Subarea Plan. In other words, the cases cited by the Assistant City Attorney actually support the applicability of St. Paul Zoning Code, Section 61.402(c)(1), to Walgreens' site plan application. The basis for this conclusion is explained below.

a. **Chanhassen Estate Resident's Association v. City of Chanhassen 342 N.W.2d 335 (Minn. 1984).** In this case, the plaintiff association sued the City of Chanhassen to enjoin the issuance of a building permit to construct a McDonald's restaurant. The court stated that the

principal issue is whether the proposed McDonald's is "drive-thru" facility (a permitted use) or constitutes a "drive-in," which requires a conditional use permit under the Chanhassen zoning ordinance. (Chanhassen, at page 338.)

The court, in passing, mentioned another of the plaintiff's arguments, i.e. that the proposed McDonald's restaurant was contrary to the City Comprehensive Plan. However, the opinion contains no language regarding whether or not compliance with the Comprehensive Plan was a stated criteria in the zoning ordinance for site plan review. In fact, after reviewing the "Briefs Minnesota Appellate Courts" at the Minnesota State Law Library, it is clear that the Chanhassen Zoning Code (at the time the case was decided) contained no requirement that a permitted use must be consistent with the Chanhassen Comprehensive Plan.

Furthermore, the court stated, "The zoning ordinance defines a permitted use as 'a use which may be lawfully established in a particular district or districts, provided it conforms with all requirements, regulations and performance standards of such district.' Chanhassen, Minn., Zoning Ordinance 47, Sec. 4.02 (1972). The proviso demonstrates that the council's review of an application for a permitted use need go only to the applicant's **compliance with the specific requirements, regulations and performance standards prescribed by the ordinance. Subject to such compliance, approval of a permitted use follows as a matter of right.**" [Emphasis added.] (Chanhassen, at page 340.) (Note: This language was also cited in Mr. Warner's memo, page 4.)

Finally, the Chanhassen court reiterated the rules of construction for an ordinance or statute: "When the words of a statute or ordinance in their application to an existing situation are clear and free from ambiguity, judicial construction is inappropriate." [Chanhassen, at page 339, with footnote #3: "Ordinances are construed according to the recognized principles of statutory construction. State v. Simonsen, 252 Minn. 315, 89 N.W.2d 910 (1958)."]

Unlike the zoning ordinance in the Chanhassen case, the language of the St. Paul Zoning Ordinance clearly requires that, as one of the criteria for site plan approval, Walgreens' site plan must be consistent with the Comprehensive Plan and Subarea Plan. The City of St. Paul Zoning Code, Section 61.402(c) states:

"(c) *Site plan review and approval.* In order to approve the site plan, the planning commission **shall consider and find that the site plan is consistent with:**

"(1) The city's adopted **comprehensive plan** and development or project plans for **sub-areas** of the city." [Emphasis added.]

It is noteworthy that, sometime after the Chanhassen decision, the City of Chanhassen amended its zoning ordinance to require that the site plan be consistent with the Comprehensive Plan. The present City of Chanhassen zoning code contains the following language for site plan review:

"Sec. 20-110. Standards.

"In evaluating a site and building plan, the planning commission and city council shall consider its compliance with the following:

"(1) Consistency with the elements and objectives of the city's development guides, **including the comprehensive plan**, official road mapping, **and other plans that may be adopted; ...**" [Emphasis added.]

[This ordinance contains the following history of amendments at the end of the section: “(Ord. No. 119, 2-12-90; Ord. No. 212, § 5, 7-11-94; Ord. No. 286, § 7, 12-14-98). It is clear that this site plan criteria was added in the ordinance amendments after the 1984 Chanhassen decision.]

b. **Chase v. City of Minneapolis 401 N.W.2d 408 (Minn. App. 1987)**. In this case, the plaintiffs sued the City of Minneapolis to compel issuance of a permitted use building permit for a convenience food restaurant. Similar to the Chanhassen case cited above, the court’s opinion contains no language regarding whether or not compliance with the Comprehensive Plan was a stated criteria in the zoning ordinance for site plan review. In fact, after reviewing the “Briefs Minnesota Appellate Courts” at the Minnesota State Law Library, it is clear that the Minneapolis Zoning Code (at the time the case was decided) contained no requirement that a permitted use must be consistent with the City of Minneapolis Comprehensive Plan.

Furthermore, the Chase court, citing the Chanhassen case, stated: “[R]eview of an application for a permitted use need go only to the applicant’s **compliance with the specific ‘requirements, regulations and performance standards’ prescribed by the ordinance. Subject to such compliance, approval of a permitted use follows as a matter of right.**” [Emphasis added.] (Chase, at page 412.)

Again, clearly different from the ordinances in the Chanhassen and Chase cases, the plain language of the St. Paul Zoning Ordinance requires Walgreens’ site plan to be consistent with the Comprehensive Plan and Subarea Plan, as one of the criteria for approval. The City of St. Paul Zoning Code, Section 61.402(c), states:

“(c) *Site plan review and approval.* In order to approve the site plan, the planning commission **shall consider and find that the site plan is consistent with:**

“(1) The city’s adopted **comprehensive plan** and development or project plans for **sub-areas** of the city.” [Emphasis added.]

In other words, consistency with the Comprehensive Plan and Subarea Plan are one of the “... **the specific ‘requirements, regulations and performance standards’ prescribed by the ordinance ...**” that the Chanhassen case (see page 340) and the Chase case (see page 412) contemplate.

It is noteworthy that the Comprehensive Plan had less legal importance in the Chase opinion than it does now. In the Chase case, the Court of Appeals stated, “More specifically, however, Minn. Stat. § 473.858, subd. 1 (1986) provides ‘[i]f the comprehensive municipal plan is in conflict with the zoning ordinance, the zoning ordinance supersedes the plan.’ Id. (emphasis added).” (Chase, at page 413.) However, in 1995, Minn. Stat. 473.858, Subd. 1 of the Metropolitan Land Planning Act was amended to presently read in part:

“If the comprehensive municipal plan is in conflict with the zoning ordinance, the zoning ordinance shall be brought into conformance with the plan by local government units ...”

Also, Minn. Stat. 473.865, Subd. 2 of the Metropolitan Land Planning Act provides:

A local governmental unit shall not adopt any official control or fiscal device which is in conflict with its comprehensive plan or which permits activity in conflict with metropolitan system plans.

Therefore, unlike the Chanhassen and Chase cases, decided over 20 years ago, there is a more compelling argument for including consistency with the comprehensive plan as one of the requirements for site plan review in Section 61.402(c) of the St. Paul Zoning Code.

2. SITE PLAN VS. USE. Mr. Warner's July 28, 2009 memo also mentioned, "It must be further noted under the plain language of Leg. Code §61.402(c), the matter under consideration is the site plan, not the use." (Pages 4-5.)

A two-step analysis yields an opposite conclusion. Section 61.402(c)(1) of the Zoning Code requires that the site plan be consistent with the comprehensive plan and subareas plan. The comprehensive plan contains certain requirements, including that the site plan be a "mixed use" development.

D. SUMMARY. In conclusion, the clear and unambiguous language of the City of St. Paul Zoning Code, Section 61.402(c), requires that the site plan be consistent with the comprehensive plan and subarea plan:

*"(c) Site plan review and approval.* In order to approve the site plan, the planning commission **shall consider and find that the site plan is consistent with:**

*"(1) The city's adopted **comprehensive plan** and development or project plans for **sub-areas** of the city." [Emphasis added.]*

The decisions in the Chanhassen and Chase cases are based on zoning ordinances that did not specifically require that the site plan (for a "permitted use") be consistent with the cities' comprehensive plan.

## II. WALGREENS' BUILDING FAILS TO "HOLD THE CORNER" OF FORD PARKWAY AND FINN STREET.

Zoning Code, Section 61.402(c) requires that a site plan be consistent with: **"(2) Applicable ordinances of the city."** [Emphasis added.]

The proposed Site Plan is inconsistent with the St. Paul Zoning Code, Section 63.110, which states in part:

"General design standards. The following design standards shall be used in site plan review, as applicable, unless the applicant can demonstrate that there are circumstances **unique** to the property that make compliance **impractical or unreasonable** ...

“(c) In pedestrian-oriented commercial districts (generally characterized by storefront commercial buildings built up to the sidewalk) the following standards for new construction shall apply:

- (1) Buildings shall be as **close to the sidewalk as practical**.
- (2) At intersections, buildings shall "**hold the corner**," that is, have street facades at or near the sidewalks of both streets ..." [Emphasis added.]

In brief, this ordinance requires the building to “hold the corner” of Ford Parkway and Finn Street.

The developer has the burden of proving that the “uniqueness” of the property makes compliance with the “holding the corner” “impractical or unreasonable” for Walgreens. **Walgreens** has not met this burden of proof and **has provided no written information** – that could be subject to UFCW’s review and comment - to substantiate its claim **that it cannot “hold the corner.”**

In fact, a plan by BIKO Associates (submitted during the previous Walgreens application), easily demonstrated that “holding the corner” is possible – and reasonable - by re-designing the building (with a greater length along Ford Parkway, and a shorter width along Finn Street) and placing the building on the **corner** of Ford Parkway and Finn Street. With a shorter building width, a driveway could be placed on Finn Street.

In this way, the building complies with the Zoning Code by being as “close to the sidewalk as practical” and “holds the corner” of Finn and Ford Parkway.

**Walgreens has proposed a small building for the corner of Ford Parkway and Finn. This building is only 10.5% of the total building area, which mocks the intent and plain language of the Zoning Code. Furthermore, the Zoning Ordinance states buildings (plural), not just one building!**

III. THE DEVELOPER HAS NOT MET ITS BURDEN OF PROOF THAT THE TRAFFIC PROBLEM IS RESOLVED.

Zoning Code, Section 61.402(c) requires that a site plan be consistent with:

“(7) **Safety and convenience of both vehicular and pedestrian traffic** both within the site and in relation to access streets, including traffic circulation features, the locations and design of entrances and exits and parking areas within the site.” [Emphasis added.]

There is insufficient evidence to demonstrate that the proposed site plan is consistent with the “... safety and convenience of both vehicular and pedestrian traffic ...” The latest traffic report prepared by Wenck (August 14, 2009) did not include the Synchro intersection capacity analyses computer printouts for the intersections that were analyzed. Therefore, the traffic consultant, retained by UFCW Local 789, was not able to verify the conclusions reached in the report.

Two Minnesota Government Data Practices Act requests have been delivered and UFCW Local 789 reserves the right to submit additional information in response to information received as a result of the request. [See letter from Thomas E. Casey, Attorney at Law, to Tom Beach,

City of St. Paul, dated September 23, 2009, and letter from Thomas E. Casey, Attorney at Law, to Tom Beach, City of St. Paul, dated January 6, 2010, in the city files.]

#### IV. THE STORMWATER ANALYSIS IS INCOMPLETE.

Zoning Code, Section 61.402(c) requires that a site plan be consistent with:

“(8) The satisfactory availability and capacity of storm and sanitary sewers, including solutions to any drainage problems in the area of the development.”

The Staff Report, dated January 7, 2010, states in part, “The site plan has been reviewed by Public Works and they have determined that it meets City standards subject to some minor changes.” This criterion has not been satisfied until the “minor changes” have been identified and an adequate opportunity has been provided to UFCW Local 789 to review and comment on this issue. Furthermore, this conditional approval conflicts with the plain meaning of the ordinance which **requires that the Planning Commission must** find that there is “satisfactory availability and capacity of storm and sanitary sewers including solutions to any drainage problems in the area of development.”

Similarly, Zoning Code, Section 61.402(c) requires that the site plan be consistent with: “(4) **Protection of adjacent and neighboring properties** through reasonable provision for such matters as **surface water drainage**, sound and sight buffers, preservation of views, light and air, and those aspects of **design which may have substantial effects on neighboring land uses**.” [Emphasis added.] Until drainage issues are adequately reviewed, this criteria has not been satisfied.

#### OTHER LEGAL PRINCIPLES THAT GOVERN THE CITY’S DECISION

I. THE INTENT OF THE B2 ZONING DISTRICT. St. Paul Zoning Code, Section 66.414, states: “Intent, B2 community business district. The B2 community business district is intended to **serve the needs of a consumer population ...**” [Emphasis added.] Adding a 4<sup>th</sup> pharmacy store in close proximity to three other existing pharmacies does not “... serve the needs of a consumer population.”

II. MORE RESTRICTIVE PROVISION TO GOVERN. St. Paul Zoning Code, Section 60.109, states:

“Other city, local, regional, state and federal regulations.

“(a) *Conflicting regulations.* Whenever any provision of this code conflicts with any other provision of this code or any other law or ordinance, **the more restrictive provision shall govern**, except as otherwise specifically provided.” [Emphasis added.]

“(b) Reference to other regulations. In addition to the requirements of this zoning code, all uses and development shall comply with all other applicable city, local, regional, state and federal regulations. All references in this zoning code to other city, local, regional, state or federal regulations are for informational purposes only, and do not constitute a

complete list of such regulations. These references do not imply any responsibility by the city for enforcement of other local, regional, state or federal regulations.”

[Comment: Compliance with other local, regional, state, and federal requirements must be a condition for site plan approval.]

III. WALGREENS HAS NO VESTED RIGHTS. St. Paul Zoning Code, Section 60.113, states: “Vested right. **Nothing** in this code shall be interpreted or construed to **give rise to any permanent vested rights** in the continuation of any particular use, district, zoning classification, or any permissible activities therein, and **they are hereby declared to be subject to subsequent amendment, change or modification** as may be necessary to the preservation or protection of public health, safety and welfare.” [Emphasis added.]

IV. THE ZONING REQUIREMENTS ARE THE “MINIMUM” REQUIREMENTS; THE CITY MAY IMPOSE ADDITIONAL REQUIREMENTS. St. Paul Zoning Code, Section 60.108, states: “Requirements declared minimum. In their interpretation and application, the provisions of this code shall be held to be **minimum requirements** adopted for the promotion of the public health, morals, safety, comfort, aesthetics, economic viability, convenience or general welfare. It is not intended by this code to repeal, abrogate, annul or in any way to impair or interfere with any existing provision of law, ordinance, rules or regulations. **The city may impose additional requirements where deemed reasonable and necessary to protect the public interest and to ensure compliance with the standards and purposes of this zoning code and the policies of the comprehensive plan.**” [Emphasis added.]

#### RESERVATION OF RIGHTS

As stated above, UFCW Local 789 has submitted a continuing Minnesota Government Data Practices Act request. (See letter from Thomas E. Casey to Tom Beach, City of St. Paul, dated January 6, 2010, and attached as **Exhibit 3.**)

UFCW Local 789 reserves the right to submit subsequent information to the St. Paul Zoning Committee, Planning Commission, or City Council as result of: (1) new information received through its continuing Government Data Practices Act request(s); or (2) additional factual/legal research.

#### SUMMARY

City of St. Paul Zoning Code, Section 61.402(c) states:

“(c) *Site plan review and approval.* In order to approve the site plan, the planning commission **shall** consider and find that the site plan is **consistent** with:

“(1) **The city's adopted comprehensive plan and development or project plans for sub-areas of the city.**” [Emphasis added.]

The proposed Walgreens store is **inconsistent** with the City Comprehensive Plan and Subarea Plan because: (1) it is not a “mixed use” development; and (2) it does not “maintain or enhance” the range of goods and services in Highland Village.

**“(2) Applicable ordinances of the city ...”**

The developer has failed to demonstrate that there are “... circumstances **unique** to the property that make compliance **impractical or unreasonable** ...” to “hold the corner” as required by St. Paul ordinance 63.110(c). A small building (10.5% of the total building area) on the corner **mocks the intent and plain language of the** zoning code.

“(7) Safety and convenience of both **vehicular and pedestrian traffic** both within the site and in relation to access streets, including traffic circulation features, the locations and design of entrances and exits and parking areas within the site.”

There is insufficient evidence to demonstrate that the proposed site plan is consistent with the “... safety and convenience of both vehicular and pedestrian traffic ....” The latest traffic report prepared by Wenck (August 14, 2009) did not include the Synchro intersection capacity analyses computer printouts for the intersections that were analyzed. Therefore, the traffic consultant, retained by UFCW Local 789, was not able to verify the conclusions reached in the report.

“(8) The satisfactory availability and capacity of **storm** and sanitary **sewers**, including solutions to any drainage problems in the area of the development.”

This criterion has not been satisfied until the “minor changes” have been identified and an adequate opportunity has been provided to UFCW Local 789 to review and comment on this issue. Furthermore, this conditional approval conflicts with the plain meaning of the ordinance which **requires that the Planning Commission must** find that there is “satisfactory availability and capacity of storm and sanitary sewers including solutions to any drainage problems in the area of development.”

The Site Plan Application has failed at least four criteria. Therefore, Walgreens’ Revised Site Plan Application, like its previous Site Plan Application, must be **denied**.

On behalf of UFCW Local 789, I **thank you** for your kind consideration.

**Thank you** for your kind consideration.

Very truly yours,



Thomas E. Casey

cc: Samantha Langer, Zoning Committee Secretary [via: [samantha.langer@ci.stpaul.mn.us](mailto:samantha.langer@ci.stpaul.mn.us)]  
UFCW Local 789

*St. Paul Zoning Committee*  
*January 12, 2010*

File

P.S. - Please include this letter and the letter from Biko Associates, Inc., as part of record for this site plan application. Thank you.