

**BEFORE THE
ZONING COMMISSION
OF THE DISTRICT OF COLUMBIA**

Athena Group, LLC, Request for
Planned Unit Development and
Zoning Map Amendment.
Square 1356, Lots 28, 929, 932, 933,
Canal Parc

Case No. 08-21

2009-03-16 PM 1:19
ZONING COMMISSION
District of Columbia

CASE NO.

08-21

EXHIBIT NO.

77

**POST-HEARING MEMORANDUM OF
CANAL VIEW HOMEOWNERS ASSOCIATION**

Canal View Homeowners Association ("Canal View"), through undersigned counsel, submits this Post-Hearing Memorandum in accordance with rulings by the Commission at the March 16, 2009, hearing on the above-captioned matter. In keeping with the intention of the Commission's directive, we limit ourselves to comment on the Applicant's March 30, 2009, response to the facts and figures presented by Canal View in its testimony on March 16th. Based upon that review, our recommendation has changed. Canal View has concluded that, absent significant reduction in the collective gross floor area of the buildings in the Project, the Commission is obliged as a matter of law to disapprove it. In all other respects, except as modified below, Canal View stands behind its earlier submissions.

I. INTRODUCTION

The Applicant is seeking both a PUD designation and a rezoning. The map amendment would increase the density of the residential zoning of approximately two-thirds of the Property from low density (R-1-B) to moderate density (R-5-A). This alone would significantly increase the development potential of the Property, and hence its value. In addition, the PUD designation would allow the Applicant flexibility in

implementing development standards for traditional R-5-A/R-1-B zoning. The Applicant is seeking considerable leeway from matter-of-right standards.

In exchange for this flexibility, the Zoning Regulations demand that the “project offer a commendable number or quality of public benefits and that it protects and advances the public health, safety, welfare and convenience.” § 2400.2.¹ As detailed in Canal View’s Hearing Statement (Feb. 2 2009) and oral testimony, the Regulations make clear that what is required goes well beyond routine, standard compliance with applicable standards, to “**superior features . . . that benefit the surrounding neighborhood or the public in general to a **significantly greater extent** than would likely result from development of the site under the matter-of-right provisions . . .**” § 2403.6 (emphasis added).

It is up to the Applicant to proffer sufficient amenities and benefits to warrant approval. What the Commission is obliged to do is “judge, balance and reconcile the relative value of the project amenities and public benefits offered” against the “degree of development incentives requested,” all in light of identified “potential adverse effects.” § 2403.8. To assist the Commission in this task, the Applicant is to submit a detailed Annotated Table showing the relief sought from the matter-of-right standards that would apply absent the PUD status and absent the rezoning. § 2403.11. This Table must also detail “how the public benefits offered are superior in quality and quantity to typical development of the type proposed . . .” § 2403.12.

Canal View has already expressed its views on the quantity and quality of the benefits and amenities proposed for the Project. This submission focuses solely on

¹ Except as noted, all statutory citations are to the Zoning Regulations, 11 DCMR.

the other side of the balance scale--the degree of flexibility requested in exchange. Canal View believes that the supplemental Annotated Table submitted by the applicant on March 30, 2009, at long last fulfills the requirement for detailed numbers in the Table. What those numbers reveal is discussed in Part III. below. We note also that the Project has once again changed, this time by eliminating one unit. Accordingly, relying on the Applicant's Annotated Table, Part III updates as appropriate numbers presented to the Commission by Canal View at the last hearing.

Before turning to that, there is a fundamental problem to be addressed, one clearly illuminated by the Applicant's latest submission. The Applicant claims that the deviation from matter-of-right standards should be analyzed on the basis of the "project as a whole . . . rather than on [an] individual theoretical lot basis." Applicant Letter to Chairperson Hood at 2 (March 30, 2009) ("Applicant Letter"). Canal View's assessment of this claim is set forth in Part II. That assessment fundamentally changes our recommendation to the Commission regarding Project approval. During the last hearing, in response to inquiry from Chairperson Hood, Canal View testified that elimination of about half a dozen dwelling units from the Project might result in a defensible approval, based on the balancing that the Commission must do when weighing amenities against zoning flexibility requested. The Chair advised that if need be the Commission would make the "hard decision" on the application if the parties could not themselves agree on a final configuration of the Project. Discussions since that time have produced a reduction of only one unit by the Applicant. It turns out, however, that our response to the Chair—that this Project should have about six fewer dwelling units—goes far beyond a balancing act judgment call by either Canal View or the Commission. Rather, as explained in Part

II, a reduction in gross floor area equivalent to that many units is required **as a matter of law**. Accordingly, our recommendation is that absent such reduction, the Project **must be disapproved**, rendering superfluous a judgmental balancing of benefits against legally allowed flexibilities.

II. WHOLE PROJECT VS. MULTIPLE LOT ANALYSIS

The Applicant claims that the Office of Planning agrees with its desire to measure deviation from matter-of-right standards based on the “whole project.” Applicant Letter 2, 4.² Further, the Applicant argues, its approach provides a “better gauge for studying the impact of the development on neighboring properties particularly with regard to density and area requirements.” *Id.* at 4. Finally, the Applicant claims that “the method of analysis chosen by Canal View discourages providing community public space in projects . . . [and] undermines the District’s efforts to promote green design.” *Id.*

None of these claims withstands scrutiny, and a close examination of the methodology employed by the Applicant reveals that its approach obscures **a defect in the Project so fundamental that the Commission is obliged to disapprove the Project as a matter of law**. First, however, we respond to the Applicant’s general assertions above. The plain text of the Zoning Regulations requires an assessment of what could be built as a matter of right, and hence, a submission of details demonstrating exactly that. Canal View did not “choose” this method of evaluation; it is statutorily required.³ Section

² Canal View’s response to this assertion is that it is not for the Applicant to speak as to what the Office of Planning does or does not agree with. Canal View suggests that instead of relying on the Applicant’s version of the views of that Office, the Commission should insist that the Office clearly and comprehensively respond to the conflicting presentations made by Canal View and the Applicant.

³ The fact that one set of data is required does not preclude the Applicant from submitting facts and figures with a different focus or orientation, for whatever persuasive effect it

2403.11 (a) explicitly requires assessment of “[t]he 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.” Applying this standard in its strictest form, there are only **four** lots on the Property (Square 1376, lots 28, 929, 932 and 933), which would mean four homes as a matter-of-right.

Canal View did not adopt this rather draconian approach to the by-right analysis. Rather, Canal View accepted the notion, implicit in the first by-right site plan submitted by the Applicant, and implicit in the latest such plan (Exhibit C to Applicant Letter), that the Applicant would be able to turn those 4 existing lots into a subdivision of far more than four full-size lots prior to matter-of-right construction.⁴ However, Canal View never acquiesced in the Applicant’s claim that such a subdivision would produce 26 full-size buildable lots, and still disputes this claim. In any event, in its February Hearing Statement and in its March testimony, Canal View nevertheless used this overly generous baseline figure to assess the percentage level of increase in the number of dwelling units being proposed, and it came to 42%, i.e., 11/26. With the recent reduction of one unit, from 37 to 36, the applicable increase percentage is 10/26, or 38%. That is

many have on the Commission in the lawful exercise of its jurisdiction in this case. But electing to do so does not absolve the Applicant of its obligation to strictly comply with the submittal requirements in the Regulations. Further, Canal View’s insistence on compliance with statutory criteria for submission and evaluation of information can hardly be viewed as “discouraging” or “undermining” any legitimate goal.

⁴ The 26 or 32 lots depicted in the Applicant’s by-right plans do not actually exist; they are therefore theoretical. The Applicant’s by-right plans reflect its understanding and awareness that it need not be limited in its by-right analysis to the four existing platted lots. The Applicant nonetheless claims that analyzing the site from the theoretical point of view of how it could be lawfully subdivided “would be contrary to the direction provided by Section 2403.” Applicant Letter 4. This is both nonsensical and inconsistent with its own decision to ignore the fact that there are only four platted lots on the site.

still a substantial increase in Project dwelling units, which, as explained in our Testimony and Hearing Statement, is how density should be viewed.

If the Applicant's prior 26-unit by-right plan overstates the number of by-right units, then 38% is an understatement of the increase in dwelling units over matter-of-right development. In addition to problems previously identified, we note that the first by-right plan did not take account of the fact that by-right construction can take place only on full-size lots, and no effort was made by the Applicant to draw full-size lots in the R-5-A portion of the Project on its by-right plan. The Applicant's current 32-unit by-right plan is even more deficient on the same grounds. Nonetheless, we will not dwell on the numerical significance of the Applicant's failure to do a by-right plan based on full-size lots, however significant that omission may be in its own right. The reason is that regardless of the exact by-right unit count, the "whole project" analysis, erroneously espoused by the Applicant as a more accurate view of the impact of the Project on the neighborhood, likewise is premised on ignoring the impact of the standards individual lots must meet and the aggregate of such standards that apply to the project as a whole. As detailed below, the Applicant's "whole project" analysis obscures the real impact of the Project on the neighborhood.

In particular and most significantly, it is quite clear on a proper analysis that the Applicant has not met the FAR requirement for the "whole project." With its "whole project" approach, the Applicant avoided calculating FAR lot-by-lot, offering instead the ratio of total gross floor area to the area of the site as the proper FAR calculation. The Applicant claims an FAR of .96 (down from .98 due to the elimination of the house on lot 10). Applicant Letter Exhibit A, Sheet 10. In fact, as detailed below, the correct FAR for

the Project as currently proposed is 1.23. The statutory maximum FAR for the Project, assuming (favorably to the Applicant) rezoning of the R-1-B portion to R-5-A, would be 1.0 under PUD standards. While the Commission's ability to allow further departure from development standards in a PUD is not specifically capped in some instances (e.g., lot occupancy, § 2405.4), **this is not true of FAR**. The PUD standards **expressly prohibit** anything more than a 5% increase in allowable FAR, and then only on a finding "that the increase is essential to the successful functioning of the project . . ." § 2405.3. While the Applicant has not sought the 5% increase, even if it did, it would mean a top-end FAR of 1.05 for the Project. An FAR of 1.23 cannot be approved as a matter of law.

To see why the current FAR is 1.23, and not .96 as claimed by the Applicant, it is necessary to compare how the Applicant computed its "whole project" FAR with the correct method for computing aggregate FAR for the Project. As shown on Applicant Letter Exhibit A, Sheet 10, what the Applicant did was divide the gross floor area of all buildings (115,637 sq. ft.) by the gross area of the site (120,994 sq. ft.). Thus, $115,997/120,994 = .96$. This calculation does not fit the definition of FAR in the Zoning Regulations. Section 199, definition of "floor area ratio" defines the term and explains how to compute the resulting ratio:

A figure that expresses the total gross floor area as a multiple of the area of the lot. This figure is determined by dividing the gross floor area of all buildings on a lot by the area of that lot.

§ 199.1. The PUD development standards expressly incorporate this definition into Chapter 24 of the Zoning Regulations. § 2499.1. In addition, in specifying a 1.0 FAR for a PUD in the R-5-A zone, the Regulations further prescribe:

The floor area ratio of all buildings shall not exceed the aggregate of the floor area ratios as permitted in the several zone districts included

within the project area;

§ 2405.2. In this case, with just the R-5-A zone involved (assuming, favorably to the Applicant, the rezoning approval), this requires calculating the ratio of the aggregate of all buildings' gross floor area to the aggregate of their lot areas. This ratio must be equal to or less than 1.0.⁵

The Applicant did not perform this calculation, even though it is a PUD application submittal requirement, § 2406.11(e)(3), because it submitted a PUD application without either existing or proposed full-size individual residential lots, having chosen to propose instead turning the four platted lots into rows of townhomes with adjacent common space in a theoretical subdivision plan. Applicant Letter Exhibit A, Sheet 8. This does not, however, absolve the Applicant of the obligation to compute an FAR for the entire site as if it had been actually subdivided into individual lots. In order to ensure an apples-to-apples comparison, however, since the FAR computation for a project with full-size individual lots must, by FAR definition, exclude (from the sum of those lot areas) portions of the project not included in the lots, the Applicant was likewise obliged to exclude from its computation the portions of its Project not normally included in such lots—in this case, **streets and sidewalks**. Indeed, since the Applicant's theoretical subdivision is merely a rearrangement of available lot area into smaller than standard lots in order to create common space for all the units,⁶ there should be no

⁵ For example, if there were ten 10,000 sq. ft. lots, totaling 100,000 square feet, and the FAR were 1.0, there could be up to 100,000 sq. ft. of gross floor area in the ten homes on the lots, and it would not matter if a few of them were slightly over 10,000 sq. ft. So long as the aggregate floor area for all ten stayed under 100,000 sq. ft., the 1.0 PUD FAR standard for the R-5-A zone would be met for that project.

⁶ The standard generic term for regulating such lot rearrangements is cluster zoning. See 4 P. Salkin, American Law of Zoning § 31.19 (5th ed. 2008).

difference in the FAR computation either way, and streets and sidewalks do not figure into the calculation in either case.⁷

As noted above, the Applicant's denominator in its computation of "project wide" FAR included the entire site, i.e., it did not exclude streets and sidewalks that would not normally be included in a conventional aggregate analysis of FAR. This failing has enormous significance. Excluding the 26,979 sq. ft. devoted to streets and sidewalks (as shown in Applicant Letter Exhibit A, Sheet 5) from the "whole project" FAR calculation shows that the real FAR for the Project is 1.23, computed as follows: $115,637 / (120,994 - 26,979) = 115,637 / 94,015 = 1.23$. Not only is this figure far above the nominal maximum FAR for an R-5-A PUD of 1.0, § 2405.2, it would also grossly exceed the absolute top-end 1.05 limit specified for the zone in § 2405.3. By hiding behind the flawed "whole project" approach, the Applicant has misapplied the FAR standard and not even bothered to try to stay within the highest PUD limit for FAR. Indeed, to achieve the nominal maximum FAR of 1.0, it will be necessary for the applicant to reduce the gross square footage of the Project by $(115,637 - 94,015) = 21,622$ sq. ft. That is roughly equivalent to a density reduction of an additional 5 units (from 36 to 31, a reduction of 6 from the plan presented at the February hearing), or a removal of the 4th floor from the 21 units that have a 4th floor.⁸

⁷ If the Commission were nevertheless to conclude that sidewalks could be counted in the FAR computations, the FAR calculations that follow in the text would reduce the FAR somewhat, but not to the point where it would be a lawful 1.0 or 1.05.

⁸ This is only an approximation. If the Applicant were to correct this deficiency in the Project with a major reduction in gross floor area, whether through floor reduction, unit reduction, or building size reduction, or some combination of these options, the redesign might entail changes in the amount of area devoted to streets and sidewalks. This change would have an impact on the revised FAR calculation.

The Applicant may claim that it is entitled to count the streets and sidewalks in the FAR calculation because they are private. There is no such allowance in the Zoning Regulations and it would produce an arbitrary and capricious result. The streets and sidewalks are intended for public use, regardless of nominal ownership. Even more to the point, under the FAR definition, such public ways may not be included in privately owned lots had the Applicant elected to proceed with a standard subdivision instead of a theoretical one, and each such lot would have its own FAR defined and limited by its own lot area. There is nothing in the Zoning Regulations that even remotely implies that with the mere expedient of a theoretical subdivision, a project is entitled to a gross floor area bonus of, in this case, over 20,000 sq. ft., by adding in streets and sidewalks.

III. DEVIATIONS FROM MATTER-OF-RIGHT STANDARDS

The Applicant has now submitted a lot-by-lot analysis that is far more detailed and comprehensive in comparison to its prior submissions. Applicant Letter Exhibit D. It appears from Exhibit D that the Applicant and Canal View are in agreement that Lots 20-34 are in the R-1-B portion of the Project and the remainder are in the R-5-A portion. Our square footage numbers for the two parts are also in very close agreement. Canal View's comments on the particulars of the Annotated Table follow.

A. Lot Occupancy. Exhibit D shows that **every one** of the 36 lots exceeds the 40% lot occupancy requirement (applicable in both the R-1-B and R-5-A zones). The crowding of the theoretical lots is especially acute in Buildings 1 and 2, where lot occupancy ranges from 71% to 88% on 14 of 19 lots, i.e., close to or exceeding double the statutory maximum.

B. Rear and Side Yards. Exhibit D reveals that **none** of the 36 houses will comply with the rear yard requirement (20' in the R-5-A zone and 25' in the R-1-B zone). The percentage deviations sought are as follows: 77.5% on lots 1-19; 46% on lots 20-28; 32.8% on lots 29-30; 28% on lots 31-34; and 10% on lots 35-37. As for side yards, Exhibit D details that of the 13 lots with side yards, 12 of them, or **92%**, are below the required minimum size for both zones (8'), with deviations ranging from 15% to 43.75%. Exhibit D also identifies 8 lots with the 8' side yard requirement where there is no side yard provided at all (lots 21-23, 26-27, & 32-34).

C. Front Yards. Lots 11-37 have a front yard requirement of 20'. Exhibit D discloses that of these 27 lots, 25, or **92.6%**, do not comply with the front yard requirement. The deviations sought range from 42.5% to 62.5%.

D. Building Height. The matter-of-right building height requirement is 3 stories and 40' in both the R-1-B and R-5-A zones. Exhibit D confirms that of the 14 lots in the R-1-B zone, the buildings proposed for 9 lots, or **64%**, fail to comply with the three story height requirement (lots 25-33). Four of these lots, or 29%, exceed the 40' height requirement by 2' (lots 26, 27, 32, & 33). As for the 22 lots in the R-5-A zone, 11 lots, or 50%, have proposed 4-story buildings, another major deviation from matter-of-right requirements.⁹ In addition, 3 of these lots (34-36), or 13.6%, also exceed the height limit by a foot or two. Matter-of-right buildings must comply with both height criteria.

E. Minimum Lot Dimensions. The R-1-B zone has a minimum lot dimension of 5000 sq. ft. § 401.3. The R-5-A zone has no minimum under this

⁹ The three story requirement in the R-1-B and R-5-A zone matter-of-right standards is used to measure the degree of deviation from matter-of-right standards for PUD evaluation. However, the PUD standards themselves eliminate the story limitation in prescribing building heights for PUD's in the R-1-B and R-5-A zones. § 2405.1.

provision, but elsewhere it is made clear that the R-5-A zone must provide 1800 sq. ft. per lot, either on the lot or in common space. § 401.5. Based on the square footage in each zone, as shown on Exhibit D, and ignoring space for streets and sidewalks, this requirement would translate to 16 single-family lots on the R-1-B property and 22 row houses on the R-5-A property, for a total of 38 dwelling units. This significantly overstates the number of matter-of-right minimum sized lots that could be achieved, since a site plan would have to be prepared showing a layout of streets and sidewalks, as well as proposed construction that avoided the wetlands on the site. The current plan nonetheless squeezes in 36 dwelling units and streets and sidewalks, or over 94.7% of a “theoretical” development devoid of internal streets. Thus, while use of a theoretical subdivision under § 2516 makes it difficult to quantify the deviation from minimum lot size with precision, it is clear that the deviation is substantial.

F. Floor Area Ratio. There is no FAR requirement in the R-1-B zone; the requirement is .9 in the R-5-A zone. § 402.4. Exhibit D discloses that **all 22 lots in the R-5-A zone** exceed the .9 FAR requirement.¹⁰ Of these, 20 have more than **double** the FAR limit of gross floor area, and of these, ten are at least **triple** the limit, with 5 lots (2, 4, 5, 7 & 8) at a remarkable **367%** of the FAR gross floor area limit. In the R-1-B zone, there is no FAR requirement. The Applicant argues that there is an “FAR Equivalent” for the R-1-B zone of 1.2. It derives this from multiplying the lot occupancy standard of 40% times the number of stories allowed (3) to produce 1.2. To combine these restrictions and equate them with an FAR requirement is wholly speculative and unsubstantiated by anything in the Zoning Regulations. Indeed, in the experience of the

¹⁰ Exhibit D erroneously does not apply the .9 FAR to lots 34-37, and erroneously does apply it to lot 20, an R-1-B lot.

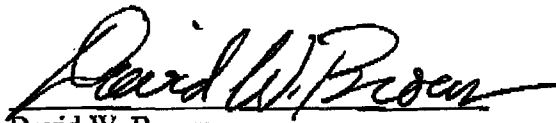
undersigned, it is highly unlikely that any jurisdiction in the country that controls residence size with an FAR requirement would tolerate an FAR in the 1.2 magnitude range for a low-density single-family zone such as R-1-B. The closest-to-home example is Alexandria, which just happens to have a single-family residential zone mirroring the R-1-B in lot size –5000 sq. ft. That zone, denominated the R-5 zone, has an FAR of .45. Alexandria Zoning Ordinance § 3-406 (B). In fact, the Commission does not even have to look across the Potomac for guidance. Roughly congruent to the Alexandria standard, the District of Columbia prescribes a .4 FAR for the R-1-B zone for approval of a PUD in that zone. § 2405.2. It is nonsense to suggest that outside a PUD, where there is less, not more, leeway, the standard would be **three times** more liberal. Even so, if one were to assume, extremely generously, and contrary to the implication of the PUD limitation, that the District would be twice as generous as Alexandria if they cured the FAR omission in the R-1-B zone, producing an FAR of .9, congruent with the R-5-A standard, **not one of the 19 R-1-B lots would come remotely close to meeting the standard, nor do any of them pass the “1.2 equivalent” standard, either.**

The explanation for the proposed development of the Property with this substantially excessive gross floor area is readily apparent. As detailed in Part II above, the Applicant has, in effect, attempted to “build” on streets and sidewalks by including them in the land from which a stated percentage of gross floor area can be extracted for development. Doing so contravenes the Zoning Regulations for the reasons detailed, and produces the sort of lot-by-lot overdevelopment that the Applicant has now been obliged, at long last, after many requests for the required Annotated Table, to disclose.

CONCLUSION

For the foregoing reasons, the Commission is obliged to disapprove the application as in violation of §§ 2405.2, 2405.3. Alternatively, upon a weighing of Project amenities and benefits against requested flexibilities, the Commission should conclude that the Project does not warrant approval.

Respectfully submitted,



David W. Brown
Knopf & Brown
401 E. Jefferson Street, Suite 206
Rockville, Maryland 20850
(301) 545-6100
brown@knopf-brown.com

April 6, 2009

Certificate of Service

I certify that the foregoing document was delivered by hand delivery, first-class mail, or email on April 6th, 2009, to the following addresses:

Chairman Anthony Hood
DC Zoning Commission
441 Fourth Street, NW, Second Floor
Washington, DC 20001

Jennifer Steingasser
Maxine Brown-Roberts
Office of Planning
2000 14th Street, NW, 4th Floor
Washington, DC 20009

Mr. Phil T. Feola, Esq.
2300 N Street, NW
Washington, DC 20037-1122

Mr. Gary Cohen
2 Wisconsin Circle, Suite 550
Chevy Chase, Maryland 20815

Cornish Hitchcock, Esq.
1200 G Street, NW, Ste 800
Washington, DC 20005

Mr. William Spencer
Palisades Citizens Association
4836 MacArthur Blvd.
Washington, DC 20007

ANC 3D
PO Box 40846 Palisades Station
Washington, DC 20016

Councilmember Mary Cheh
Ward 3 Councilmember
1350 Pennsylvania Ave, NW, Ste 108
Washington, DC 20004

Elizabeth Sandza, ANC3D01
4301 Forest Lanne, NW
Washington, DC 20016

Mr. Thomas Smith, ANC 3D02
4601 Tilden Street, NW
Washington, DC 20016

Ms. Nan Wells, ANC 3D03
5057 Overlook Road
Washington, DC 10016

Mr. Stuart Ross, ANC 3D04
5445 Potomac Avenue, NW
Washington, DC 20016

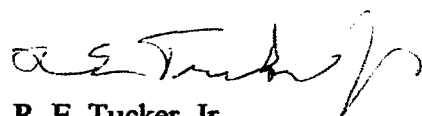
Mr. Tom DiTonto, ANC 3D05
5155 Sherrier Pace, NW
Washington, DC 20016

Ms. Ann Heuer, ANC 3D06
4705 Foxhal Crescent, NW
Washington, DC 20017

Mr. Lee Minichiello, ANC 3D08
3109 44th Street, NW
Washington, DC 20007

Ms. Ann Haas, ANC 3D09
1601 45th Street, NW
Washington, DC 20007

Mr. Bill Crews, Esq.
637 Constitution Ave, NW
Washington, DC, 20002-6035



R. E. Tucker, Jr
President
Canal View Homeowners Association