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May 5, 2009

The Honorable Anthony Hood, Chairman
District of Columbia Zoning Commission
441 4th Street, N.W.
Washington, DC 20004

2009 MAY -5 PM 1:37

Re: **Zoning Commission Case Number 08-21**
Athena Group LLC – Consolidated Review of a Planned Unit
Development and Related Map Amendment at Square 1356

Dear Chairman Hood:

This letter is submitted on behalf of the Canal View Homeowners Association ("Canal View") in response to the Athena submission of April 23, 2009 in the above-referenced matter.

Canal View, along with the ANC and the Palisades Citizens Association ("PCA"), has made several approaches to Athena in an effort to come to some agreement on the design of the planned development. Athena's responses have left us so far apart that initiating new offers has been tantamount to negotiation with oneself. Nevertheless Canal View has persisted in seeking common ground, and intends to continue the effort until it is either successful or the Commission decides the case. At this due date moment, however, there have been no substantive changes by Athena to a development plan which Canal View regards as too dense (36 units) and too great in height in comparison to the Comprehensive Plan and to the existing neighborhoods and the Palisades Community at large. Accordingly, for all the reasons previously expressed, **Canal View continues to oppose the current development plan.** Supplemental views are set forth below.

What follows first are Canal View's comments on Athena's April 23rd submission, organized according to the paragraphs of that submission:

ZONING COMMISSION
District of Columbia
CASE NO. 08-21
EXHIBIT NO. 83

Section (1). Compliance with Section 2403.8 – Balance between Amenities and degree of Incentives Requested Above Matter-of-Right

Amenities (Value)

- The values of the '2 Affordable Units (\$800,000)' and 'Environmental Benefits (\$750,000)' are questionable, at best. If there is record evidence to substantiate these claims, Canal View is unaware of it.
- The 'Construction Management Plan' is not an Amenity. It is required.
- Athena claims (in Exhibit 2, Section 2, Environmental Benefits) that it is 'Meeting standards for LEED-ND'. In fact, in the Athena submission to the Zoning Commission dated January 21, 2009, Exhibit D, Athena self-grades its LEED-ND compliance at 34 points, with the possible addition of 14 'questionable' points. **LEED-ND Certification requires 40 points** out of a possible 106 points available. Even with the 14 additional 'questionable' points, Athena garners fewer than 50 percent of the allowable LEED-ND points.

Requests

The 'Requests' section simply states 'Deviations from 2516.' Athena Exhibit 1 contains the details, which reveal that Athena is requesting substantial relief from matter-of-right standards. The deviations are presented in very summary form, but they do not materially differ quantitatively from the more complete description contained in Canal View's Post-Hearing Memorandum at 10-13, relating to lot occupancy, rear yards, side yards, front yards, building height, minimum lot dimensions (not shown by Athena) and FAR. For the convenience of the Commission, we have attached that portion of our Memorandum as Exhibit A. Even in summary form, however, it is clear that many deviations are requested. Athena acknowledges the need for deviations in 12 of 16 categories. [As detailed below, Canal View finds the number to be 13 of 16, due to an overstatement of the number of matter-of-right units.]

The following points also supplement those in our Post-Hearing Memorandum.

Section 2516.6 This section provides that in determining net density for clustered lots, '(a) The area of land that forms a covenanted means of ingress or egress **shall not be included in the area of any theoretical lot**, or in any yard that is required by this title' (Emphasis added). Without belaboring any further the point made in our Post-Hearing Memorandum (at 4-10), this requirement explicitly confirms what Canal View has been saying: it is no more proper to include in the density calculation private means of ingress and egress than it is to include public streets. If it is true, as some Commissioners believe, that it has been standard practice to include

private streets in density calculations, the appropriate response is not to continue to apply the law erroneously, but rather to correct the practice or change the law to match it.

Subsections of 2516.6 requires streets with (b) '25' road width', and (c) '60 ft turning area'. Athena notes that it is not in compliance. Section 2516.6 (d) states that: "(b) and (c) may be modified if the Board finds that a lesser width or diameter will be compatible with, and **will not be likely to have an adverse effect on, the present character and future development of the neighborhood**; provided, that the Board shall give specific consideration to the spacing of buildings and the availability of resident, guest, and service parking." (Emphasis added). The record justifies a Board finding that there is minimal room for delivery trucks to maneuver within the project, and no space available for 'service parking'.

Section 2516.9 states: "The proposed development shall comply with the substantive provisions of this title and **shall not likely have an adverse effect on the present character and future development of the neighborhood**". (Emphasis added). The development seeks substantial deviations from "the substantive provisions" of [11 DCMR], including deviations from 2516 itself. These are deviations piled upon deviations. The end result is a project that most certainly has an **adverse effect** on the present character and future development of the neighborhood, in the view of the entire neighborhood and all of its organizations.

Section 2516.10 requires Office of Planning review and a detailed OP Report on a number of critical issues. In this case, the Office of Planning **has not adequately addressed** the relationship of the proposed development to the overall purpose and intent of the Zoning Regulations, particularly as regards the following sub-paragraphs:

- (a)(2) The environment (wetlands)
- (a)(5) Parking, loading and traffic
- (b) Deliveries to be made to the site
- (d) The impact of the proposed development on neighboring properties

Section (2). Architectural Treatment of Affordable Housing Units

Canal View endorses the views expressed by the Palisades Citizens Association on this point (2), page 3 of its May 4, 2009 letter to the Commission.

Section (3) Density and Height

Athena states that 7 units exceed 40' by 2', a number that corresponds to Canal View's. We nevertheless note that **the rooftops of Building 4 exceed the height of the closest Canal View homes, directly behind them, by some 10 ft.**

Similarly, the number of project units which have a fourth story (21) is in close agreement the Canal View's number (20). But context is everything. The percentage of units over the by-right limit is over 58% of the total. **Right now the number of 4-story homes in the entire Palisades area is about 6. The neighborhood will have to brace for a 350% increase in the number of such dwellings.**

Athena claims (in its Exhibit 2, referring to Exhibit 3) that "the proposal will not have a negative effect on neighboring properties." Actually, a cursory look at Exhibit 3 would leave any reasonable person with the impression that the buildings shown in those plans would dwarf the neighboring homes. Further, it is a matter of record that the neighbors, and all the Palisades neighborhood community associations, have stated at hearings, and in writing, that the density and height of the current development plan will have a negative impact on the neighborhood

Section (4) Volumetric Study

Canal View endorses the views expressed by the Palisades Citizens Association on this point (3), page 3 of its May 4, 2009 letter to the Commission.

Athena Accommodation to Community Requests

At the bottom of page 2, Athena states that it has reduced the project by 5 units. There is far less than meets the eye in this misleading statement, as detailed below:

- 1 unit was eliminated due to DDOE mandate (see DDOE, Water Quality Division, letter dated 1/25/08: "In order to minimize impacts and protect and preserve the wetland and streams, the applicant must remove Plot Number 30.")
- At least 3 units were eliminated in order to meet the 1.0 FAR (even as measured overly generously in relation to the entire project area, including streets, alleys, and wetlands). There might be a modest economic sacrifice in reducing 39 units to 36 units, but most of it is regained when, as was done here, the floor area associated with such a reduction is plowed back into the project in the form of increased FAR in other units.

Number of Matter-of-Right Dwelling Units

Athena Exhibit 1 states that its Exhibit 4 shows a 'matter-of-right' development could achieve a total of 39 dwelling units.....'. In actual fact:

- Not one of the 'matter-of-right' plans submitted by Athena to date, including Exhibit 4 of the April 23 submission, are, in fact, valid 'matter-of-right' plans. In

addition to points made by Canal View in critique of earlier claimed 'matter-of-right' plans, we note that all of the Athena-submitted 'matter-of-right' plans, including the latest at 39 units, violate 11 DCMR Sections 353.3, and 410.12. Both sections specify that, in the R-5-A zone, anything other than **one family detached and semi-detached dwellings** require BZA approval as a special exception. Such approval is not a matter of right; it is obtainable only on an adequate showing that the plan does not "affect adversely the present character or future development of the neighborhood." It must also be clear to the BZA, as specified in 3401.1, that the project is "in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps, and will not tend to affect adversely the use of the neighboring property...". A matter-of-right plan, by definition, is one that does not require approvals beyond traditional permitting.

- In view of the foregoing, the only **genuine matter-of-right plan** in the record is the one prepared for PCA by Architect David Mitchell, whose matter-of-right plan is the only one in the record to show semi-detached dwellings in the R-5-A zone. Canal View expressly adopts the views expressed by the PCA regarding Mr. Mitchell's conclusion that the real by-right limit is 18 units, or nothing remotely like the claimed 39 units. Athena is requesting 36 units, or a **77.77% increase over matter-of-right**. Canal View fully agrees with the PCA that the actual relief from matter-of-right requirements is far greater than Athena has claimed is needed.
- Commissioner May stated at the April 13th Zoning Commission meeting that he did not think the 'matter-of-right' plan "works," and that there were some "games we need to get past." He was absolutely correct. It is also clear that the Commission has not been well served by those in the government responsible for providing a thorough, detailed and reliable framework for the weighing the Commission must make under DCMR 2403.8. Canal View recommends that the Commission not merely choose between Athena and Mr. Mitchell on this issue, but rather have a well-qualified neutral, preferably an architect on the District of Columbia payroll, review the submitted 'matter-of-right' plans to ensure that when the Commission undertakes the balancing required under DCMR 2403.8, weighing amenities against deviations from matter-of-right requirements, is done fairly and properly.

Canal View Retaining Wall

In the Canal View 'Conditions' which were presented in Testimony during the subject Hearings, Canal View requested that Athena ensure protection, and repair if required, of the existing Canal View retaining wall. Athena verbally agreed to such protection, and the subject was covered on both the Office of Planning Reports of Nov21, 2008 (Environment section, pg 7) and Feb 2, 2009 (Miscellaneous Items section) pg 2. Canal View requests that Athena be

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required to comply with the protections requested, and recommended by the Office of Planning in any approved development of the project area. Attached as Exhibit B is a more complete statement of the conditions requested.

Conclusion

For the foregoing reasons, it is apparent that the development, as proposed:

- Is premised on non-compliant 'matter-of-right' plans;
- Fails to comply with many Zoning Regulations;
- Contains excessive density by any measure (FAR or unit count);
- Contains 21 units of excessive stories and/or height;
- Is dependent on approval of an excessive number and quantity of 'Flexibilities';
- Comes with the offer of an inadequate balance between 'Amenities' and 'Flexibilities';
- Is not in harmony with the Comprehensive Plan for the Rock Creek West area, and
- Will certainly have an adverse affect on the present character and future development of the neighborhood.

As noted above, Canal View, along with the PCA and the ANC, has initiated many contacts with the developer in an attempt to come to some compromise on the existing plan. Specifically, most recently, we have offered a compromise position of 32 units, and three stories throughout, an offer which was rejected. As a result, Canal View remains opposed to the current development plan, and respectfully requests that the Zoning Commission deny the developer's application for all the reasons stated in the conclusions.

Sincerely yours,



David W. Brown

Exhibit A

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.

Exhibit B

Excerpts from Canal View 'Conditions'

11. That the developer will collaborate closely with representatives of the **Canal View Homeowners Association and the Palisades Citizens Association** to mitigate traffic impacts over the life of the project and especially during construction. (PCA, CV HOA, except that the portion in **bold** is not included in the PCA Conditions)

12. That the Canal View HOA shall have input to the Canal Parc Construction and Traffic Management Plans. (CV HOA)

13. That Athena be required to enter into a formal indemnification agreement with the Canal View Homeowners Association regarding protection of Canal View homes, retaining walls, yards, fences, roads and other Canal View properties, from any damage caused by construction efforts, or any resulting affects due to changes made in the land area or grading due to the project.

This agreement must include:

- Provisions that Athena will pay for legal assistance to the Canal View Homeowners Association for preparation and/or review of such legal agreements(s).
- Provisions for establishment of an Escrow Account by Athena to ensure funds are available to make necessary repairs for items covered under the legal agreement(s).
- Any unused amounts of the Escrow Account would be returned in full to Athena at completion of both construction and an agreed upon timeframe after completion of construction. (ANC, CV HOA)

Note: The organizations indicated in the parentheses at the end of each numbered item are the organizations whose 'Conditions' include the specific item.

Certificate of Service

I certify that the foregoing document was delivered by hand delivery, first-class mail, or email on May 5th, 2009, to the following addresses:

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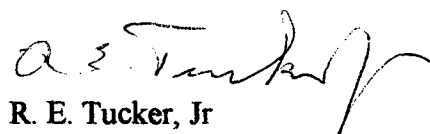
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