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August 31, 2009

By Facsimile: 202-727-6072

Mr. Anthony Hood,

Chairman, DC Zoning Commission

Suite 200/210S

441 4th Street NW

Washington DC 20001

**RE: Subject: Zoning Commission Case Number 08-21 (Athena Group, LLC:
Consolidated Review of a Planned Unit Development and Related Map Amendment
@ Square 1356)**

Dear Chairman Hood:

This joint letter from Advisory Neighborhood Commission 3D (ANC3D) and the Palisades Citizens Association (PCA) is being submitted in response to the Zoning Commission's request for Floor Area Ratio (FAR) analysis from the parties, made at its July 27, 2009 public meeting on the above application. Thank you for the opportunity to address this important issue.¹

Facts

On June 25, 2009, the Applicant in Zoning Commission Case No. 08-21, Canal Parc PUD, submitted to the Commission its final amended plans for the Project. On July 27, 2009, the Zoning Commission gave Preliminary Approval to the Project, but asked the Applicant to more specifically address compliance with Zoning Regulation 2516.6(a), which specifies that

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.

Alan Bergstein of the Office of the Attorney General stated his view at the July 27, 2009 public hearing that 2516 requires a FAR calculation that excludes streets from

¹ The Zoning Commission requested that the ANC and PCA respond to Athena's August 10, 2009 FAR analysis by August 24, 2009, however, neither party could respond within that time frame due to officers' and Commissioners' schedules. Therefore, the ANC requested, by letter of July 31, 2009, a continuance to respond no later than September 4, 2009. Athena does not oppose that continuance request.

ZONING COMMISSION
District of Columbia

the area of the project tract. The Applicant had claimed in June that, given past practice, compliance with this provision did not obligate exclusion from the denominator of the overall project FAR calculation the area devoted to means of ingress and egress. Nevertheless, the Commission wanted to assess the Project on the basis of a possible finding that, regardless of how this matter was handled in prior PUD applications, Section 2516.6(a) required this exclusion.

On August 10, 2009, the Applicant presented its assessment. The Applicant relies on a "Land Area Diagram" attached to its August 10th letter. The Diagram reveals that the Applicant has computed the overall FAR at 1.04, based upon the ratio of $108,673/104,453 = 1.04$, where 108,673 sq ft is the gross floor area of all the buildings in the Project (unchanged from the June 25th submission) and 104,453 sq ft is the area of the Project tract, after deducting the area of "private streets and surface parking," i.e., 120,994 sq ft (gross tract area) less 16,541 sq ft, where the 16,541 is comprised of 14,225 sq ft in private streets and 2316 sq ft in surface parking.

The basis of the numbers for the deducted area is not explained, and is not readily inferable from data provided by the applicant on June 25th or August 10th, even though the application is unchanged between those two submission dates. In the earlier submission, the Applicant reported, in Sheet 10 (figures rounded to the nearest whole number), impermeable streets of 17,246 sq ft and permeable streets of 3,096 sq ft, for a total of 20,342 sq ft in streets. Assuming these numbers included parking spaces along the streets, the difference between the June and August street figures is 3,801 sq ft, a number nowhere to be found on Sheet 10. While the Land Area Diagram submitted in August is not to scale, it would appear that most or all of this 3,801 sq ft difference is attributable to the blue-shaded 20' private alley between Buildings 1 and 2A/B.

The Applicant, aware that the standard PUD FAR ceiling for the R-5-A zone is 1.0 under 2405.2, for the first time requests in its August 10, 2009 filing, authorization to exceed that limit pursuant to 2405.3. That section allows an FAR increase of not more than 5%, i.e., to 1.05 in this case, if the Commission finds

that the increase is essential to the successful functioning of the project and consistent with the purpose and evaluation standards of this chapter.

The Applicant claims that this standard is met with an FAR of 1.04 (less than the 2405.3 maximum of 1.05) because it has made a number of compromises in the Project as it has evolved, and further reduction in gross floor area "will undermine the economics of the project and could preclude the Applicant's ability to construct the PUD." The Applicant also claims that the increase is consistent with the purpose and evaluation standards of Chapter 24.

Analysis

1. Violation of 2405.2; Failure to Comply with 2405.3.

Assuming for purposes of discussion that the 1.04 FAR has been computed with all required deductions from the gross tract area, a point disputed in paragraph 2 below, the 1.04 FAR violates 2405.2 unless the Commission awards a 4% FAR bonus to the Project under 2405.3. If the legal standard for award of the bonus is to have any meaning, the bonus cannot be awarded as a matter of course just because a PUD application otherwise warrants approval. The grounds presented by the Applicant for the bonus do not rise above this low bar. If 1.04 is approved in this case, it would be tantamount to a "rubber stamp" of the bonus whenever a project otherwise merits standard approval. In this particular case, the difference between compliance with the 1.0 ceiling and the bonus is a reduction of 4,220 sq. ft. in overall gross floor area. This is approximately equal to one unit in Building 5 or 6A/B. The Applicant asserts, but fails to demonstrate, that keeping that additional unit is "essential to the successful functioning of the project." Indeed, the Applicant states that failure to get this extra unit "could," not "would," "preclude the Applicant's ability to construct the PUD." If the 5% bonus rule is to have any genuine effectiveness, the bonus should not be awarded on the basis of such a conclusory, poorly substantiated claim, one that any applicant could make if more substantial economic proof is not required.

2. Failure to Correctly Apply 2516.6(a) in Calculating Project FAR.

Section 2516.6(a) requires the exclusion of "land that forms a covenanted means of ingress or egress" from the area of any theoretical lot. The Applicant claims that this does not mean that this "ingress/egress" is to be deleted from the denominator of the overall FAR calculation, only from the area of theoretical lots. See the Applicant's June 25th letter at 4. This is wrong and makes no sense. The area of theoretical lots is relevant to any FAR calculation involving that lot. The operative provision is the definition of "floor area ratio," which is "determined by dividing the gross floor area of all buildings on a lot by the area of the lot." Section 199. Obviously, when doing an overall project FAR, not a one-lot FAR, one must, in parity with the definition, divide "the gross floor area of all buildings on [all] lots by the area of [all] lots." In the overall calculation, therefore, the "ingress/egress" area is excluded from the gross tract area, i.e., the total area of all lots.

The remaining question is what constitutes a "covenanted means of ingress or egress" for purposes of 2516.6(a). One plausible answer is all streets, alleys and sidewalks are within this definition, since all of them serve as means of ingress/egress to a project. Further, when the subparagraphs of 2516.6 are considered as a whole, each uses the term "means of ingress or egress," with subparagraph (b) adding the modifier "vehicular." Plainly, therefore, at the very least, any area used by vehicles to move into or out of the project must be deducted. As detailed above, the Applicant reported total street area at 20,342 sq ft on June 25th, and the Project is unchanged since then. Excluding this "covenanted means of [vehicular] ingress or egress" from the denominator of the FAR calculation, there is a net tract area of 120,994 less 20,342 = 100,652 sq ft. The FAR is therefore $108,673/100,652 = 1.08$.

As noted in the Facts, the Applicant has not explained the discrepancy between the 20,342 sq ft of permeable/impermeable streets reported in June and the 16,541 sq ft of streets and sidewalks deducted in August. If, as it appears, the Applicant is silently distinguishing between private streets and private alleys, this makes no sense in terms of the language of 2516.6(a). Both are means of vehicular ingress/egress, and there is nothing in the Zoning Regulations implying any distinction between the two.

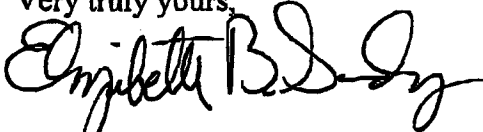
The problem would be even more severe if the Applicant also were obliged to deduct sidewalks from the gross tract area as a "covenanted means of ingress or egress." The Applicant could argue that the statute is less clear on this point, but the Commission does not need to reach that question in order to see that, regardless, there is a problem with compliance with either 2405.2 or 2405.3 in light of 2516.6(a), just considering private streets and alleys. An FAR of 1.08 is about three percentage points (or 3,000 sq ft) above the absolute maximum that the Applicant can ask the Commission to justify, i.e., 1.05, as explained above.

3. Conclusion

Because the FAR, correctly calculated for this project, is 1.08, Athena's proposed PUD can not be approved as is. The ANC and the PCA have consistently raised questions about the density of this project in the lower MacArthur Boulevard neighborhood, and this exercise has, indeed, proven that the project is too dense. The proposed PUD has too many units (34) crowded onto its 2.78 acres, and its four-story units (at least four of which require height variances to be built) would set an undesirable precedent here.

Therefore, the Zoning Commission should approve this project only with the condition that the applicant eliminate at least 7,220 square feet of gross floor area (3,000 square feet for the correct FAR calculation, and 4,220 square feet because the applicant has not met its burden of supporting a .05 bonus.). This reduction can be accomplished by the elimination of one or more units or, preferably, by the elimination of the fourth floors of enough units to bring the FAR into appropriate scale, or both.

Very truly yours,



Elizabeth B. Sandza
Chair ANC3D



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