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ZONING COMMISSION  
District of Columbia

CASE NO. 08-21

EXHIBIT NO. 106

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA-  
ZONING COMMISSION ORDER NO. 08-21**

**Z.C. Case No. 08-21**

**Consolidated Approval for a Planned Unit Development and  
Related Zoning Map Amendment**

**(The Athena Group, LLC - Square 1356, Lots 28, 929, 932, and 933)**

**September 14, 2009**

Pursuant to notice, the Zoning Commission for the District of Columbia (the "Commission") held a public hearing on December 1, 2008, February 12, 2009, and March 16, 2009, to consider an application from Saimac Development LLC, an affiliate of The Athena Group, LLC, and associate developer, Willco Residential, (collectively, the "Applicant"), for consolidated review and approval of a planned unit development ("PUD") and related zoning map amendment for a portion of the Property from the R-1-B Zone District to the R-5-A Zone District in Square 1356, Lots 28, 929, 932, and 933. The Commission considered the application pursuant to Chapters 24 and 30 of the District of Columbia Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations. The public hearings were conducted in accordance with the provisions of 11 DCMR § 3022. For the reasons stated below, the Zoning Commission hereby approves the application.

**FINDINGS OF FACT**

**The Application, Parties, and Hearing**

1. The project site consists of Square 1356, Lots 28, 929, 932, and 933 ("Property"). The Property is bounded by MacArthur Boulevard to the north and is bordered by single-family houses, apartment buildings, and townhouses. The majority of the site is occupied by the Riverside Hospital, a 200-bed, psychiatric hospital. The Property consists of approximately 120,994 square feet of land. (Exhibit 3.)
2. Lot 28, the site of the Riverside Hospital, was constructed in accordance with an approval for a planned unit development approved in Zoning Commission Case No. 70-15 through Order No. 21 in 1971. As part of that approval, the Commission approved a map amendment from the R-1-B Zone District to the R-5-A Zone District for the entirety of the hospital site and approved the Property for use as a hospital with up to 200 beds, 200 parking spaces, a floor area ratio ("FAR") of .89, a maximum height of 42 feet, and a lot occupancy of 23%. (Exhibit 3.)
3. The Applicant initially filed its application on November 8, 2007, as a modification to the PUD approved by Zoning Commission Order No. 70-15. The Applicant's application was designated as Zoning Commission Case No. 70-15A. The modification proposed replacing the existing hospital with 41 three and four-story townhouses. At its public meeting on June 9, 2008, the Commission dismissed the modification application, and with the consent of the Applicant, treated the modification application as a request to set down the request as a new case. The Commission set the application down for a public hearing as Case No. 08-21 (June 9, 2008 Transcript ("Tr."), pp. 15, 27-28, 30; Case No. 70-15A, Exhibit 4), and directed the Applicant to supplement the materials it submitted

with its modification application with a formal application for a new PUD and map amendment.

4. On July 28, 2008, the Applicant simultaneously filed with the Commission its application for review and approval of a PUD and related map amendment from the R-1-B Zone District to the R-5-A Zone District for Square 1356, Lots 28, 929, 932, and 933 and its Pre-Hearing Submission. In this submission, the Applicant reduced its previous proposal from 41 townhomes to 37 townhomes. Over the course of the case, the Applicant ultimately reduced the number of townhomes to 34. Its final proposal, submitted on June 25, 2009, included 34 townhomes with a gross floor area of 108,673 square feet and a density of 1.04 FAR. Thirty of the townhomes are 40 feet in height or less and the PUD has a lot occupancy of 26.6%, with 48% of the site being pervious. (Exhibits 3, 13, 40, 62, 90.)
5. Three hearing sessions were held on the application. At the first hearing on December 1, 2008, the Commission granted party status to two organizations: the Palisades Citizens' Association and the Canal View Homeowners' Association; and four individuals: Dr. Ben Shaffer and his wife and Dr. Maro Sarafian and her husband. The Commission denied party status to a neighboring property owner, Mimi Castaldi (December 1, 2008 Tr., pp. 10-33). Advisory Neighborhood Commission ("ANC") 3D is automatically a party to the case.
6. The public hearing continued on February 12, 2009 and concluded on March 16, 2009. During the public hearing, the Commission heard testimony and received evidence from the Applicant, the Office of Planning ("OP"), the District Department of Transportation ("DDOT"), ANC 3D, the Palisades Citizens' Association ("PCA"), the Canal View Homeowners' Association ("Canal View"), Drs. Shaffer and Sarafian, Mimi Castaldi, and Sarah Campbell.
7. The Applicant presented its case at the hearing session on December 1, 2008, and was questioned by the Commission and cross-examined by each of the parties. The Applicant presented Jack McLaurin as an expert in architecture and site planning, Dan Dove as an expert in landscape architecture, and Marty Wells as an expert in traffic engineering. Expert status was granted to each individual. (December 1, 2008 Tr., p. 10.)
8. At the December 1, 2008 hearing session, the Commission asked the Applicant to reconsider aspects of its proposal; specifically, it asked the Applicant to review the design of its buildings and their relation to the community and the wetlands. It noted that the ornamentation of the buildings contributed to the perceived density of the development and asked the Applicant to simplify the design, pay greater attention to architectural details, provide a more thoughtful treatment of the garages across from the central park and to provide more details of the proposed roof terraces. The Commission also asked the Applicant to reconsider its treatment of the wetlands, to undertake a volumetric study

of the development and to meet with the National Park Service. (December 1, 2008 Tr., pp. 53, 249-272; Exhibit 40.)

9. The Applicant responded timely to the Commission's requests in a submission dated January 21, 2009. (Exhibit 40.)
10. The public hearing continued on February 12, 2009, at which the Applicant presented, among other things, new designs for the buildings and the wetlands and volumetric studies of the development. Cross-examination was permitted on the new information before the Commission. OP, DDOT, ANC 3D, and persons in support and opposition also testified at the February 12, 2009 hearing. ANC 3D offered, and the Commission accepted, Julie Moore as an expert in wetlands. The hearing was continued to March 16, 2009, to allow the remaining parties to present their cases. (February 12, 2009 Tr., pp. 155, 241.)
11. On March 16, 2009, the remaining parties presented their respective cases. The Applicant was permitted an opportunity to provide its rebuttal testimony, during which it presented, and the Commission accepted, Paul Oldt as an expert in wetlands analysis and Jason Mann as an arborist. The Commission asked the community and the Applicant to continue working together to try to reach a resolution suitable to all parties.
12. At the close of the hearing on March 16, 2009, the Commission requested additional information from the Applicant, which the Applicant timely provided on March 30, 2009. (Exhibit 76.)
13. At its meeting held April 13, 2009, the Commission considered the additional submissions received after the hearing, and decided to defer taking proposed action and asked the parties to take specified actions and to submit additional information. In particular, the Commission requested that the Applicant more specifically describe the value of the amenities offered by the PUD and the zoning relief requested, address whether the affordable units will be distinguishable from the market rate units, address whether the PUD is too dense and tall for the site, and provide a volumetric study showing what could be built as a matter of right on the site. The Commission set an April 23, 2009 deadline for the Applicant to submit these materials, and a May 6, 2009 deadline for the other parties to respond.
14. The Applicant responded with a timely filing on April 23, 2009. (Exhibit 82.) Canal View, PCA, and ANC 3D submitted timely responses. (Exhibits 77, 78, 80.)
15. At its meeting held May 11, 2009, the Commission considered the new submissions and again deferred taking action. The Commission expressed concerns about the Applicant's request for relief from § 2516 of the Zoning Regulations in light of the provision of § 2516.6(a) that prohibits including streets in lot area and the FAR calculation for the PUD, the density of the project, the height of some of the buildings, and the appearance of the

- affordable units. The Commission requested that the Applicant address these concerns, and set a June 1, 2009 deadline for the Applicant to respond.
16. On May 28, 2009, the Applicant requested a thirty day time extension to respond to the Commission's requests; the Commission granted that request at its meeting held on June 8, 2009.
  17. On June 25, 2009, the Applicant submitted a revised PUD proposal, and responded to the concerns expressed by the Commission at its May 11, 2009 meeting. (Exhibit 90.)
  18. At a properly noticed special public meeting held July 27, 2009, the Commission voted to take proposed action to approve the application. The Commission expressed continued concern about the Applicant's FAR calculations, and requested that the Applicant submit revised FAR calculations that exclude the lot area occupied by the private streets from the definition of the total lot area, requested further input from OP on the issue, and requested the ANC, PCA, and Canal View to respond to the Applicant's submission.
  19. The proposed action of the Commission was referred to the National Capital Planning Commission ("NCPC") pursuant to the District of Columbia Home Rule Act. NCPC, by action dated September 3, 2009, found the proposed PUD would not affect the federal interests in the National Capital, and would not be inconsistent with the Comprehensive Plan for the National Capital.
  20. On August 10, 2009 the Applicant submitted a letter containing revised FAR calculations for the PUD that excluded the private streets from the definition of lot area, and requested that if the Commission adopted this alternative FAR calculation method, that it approve an additional four percent of FAR pursuant to § 2405.3 of the Zoning Regulations. The Applicant stated that the additional FAR was justified by the record, that the Applicant had made several modifications to the project's design since the Application was originally filed in November 2007, that the project's design is well suited to a site with significant constraints of size and topography, and that a reduction in the FAR will undermine the economics of the project and could preclude the Applicant's ability to construct the PUD.
  21. OP submitted a supplemental report on August 10, 2009.
  22. Canal View submitted a letter dated August 24, 2009 stating that it had changed its position to one of support for the project.
  23. ANC 3D and PCA submitted a joint letter stating their further objections to the project, which are described more fully below.
  24. The Commission took final action to approve the application on September 14, 2009.

**The PUD Project**

25. The Property consists of approximately 120,994 square feet of land area and has frontage along MacArthur Boulevard to its north. To its west are single family detached homes in the Canal View Homeowners' Association, to the east are townhouses and two single family detached homes along Lingan Road. On the northern side of MacArthur Boulevard are a series of apartment buildings and townhomes. (Exhibits 3, 36.)
26. The Property is affected by a significant topographical condition in that there is an approximately 32 foot grade change from the northern edge of the Property to the southern edge of the Property and a federally delineated wetland parallel to its southeastern boundary. (Exhibits 36, 62.)
27. The PUD consists of 34 townhomes ("Project"). The 34 townhomes are arranged in six buildings. Thirty of the townhomes are 40 feet in height or less and the remaining four townhomes are 42 feet in height or less. Eighteen of the homes are three stories, while 16 are four stories in height. Each townhome will be located on a theoretical lot. (Post-hearing submission, Exhibit 90.)
28. The Project will have a density of 1.04 FAR and consist of 108,673 gross square feet of development, which is consistent with a PUD in the R-5-A Zone District. A total of 46 parking spaces will be provided in the townhouses and 13 visitor parking spaces will be provided on the internal streets. The development will occupy 26.6% of the Property. (Exhibits 13, 90.)
29. There are two internal private streets and one private alley included in the Project that will provide access to the development from MacArthur Boulevard. The streets and alley will be 20 feet wide. The second street, Lingan Way, will not connect with Lingan Road for direct access to MacArthur Boulevard. Lingan Way and Lingan Road will be separated by landscaping and breakable bollards. (Exhibits 3, 13, 40, 62; February 12, 2009 Tr., pp. 133, 136.)
30. The area adjacent to the southeastern property line contains a delineated wetland. The United States Army Corps of Engineers ("USACE") confirmed the boundaries of the wetlands. In a letter dated October 10, 2007, the USCACE reviewed and concurred with the Confirmation of Wetland Boundaries prepared by the Applicant's expert, Williamsburg Environmental Group, Inc. The USACE assumed jurisdiction of those areas indicated as "waters of the United States." (Exhibit 13.)
31. The wetlands will be protected by a retaining wall that is set back from the wetlands area. Due to the meandering of the wetlands, the distance the retaining wall is set back will vary, but it is generally set back approximately 10 feet from the wetlands. The height of the retaining wall also varies, but is approximately three to four feet depending on location. The minimal height of the retaining wall in conjunction with its generous set

back will protect the wetlands in that there will be less grading and disturbance during construction and a greater protective area around the wetlands. No townhouse is closer than 25 feet of the delineated wetlands. (Exhibit 40; March 16, 2009 Tr., pp. 177.)

32. The Applicant has committed to meeting the standards for LEED Neighborhood Development and the green buildings standards set by the National Association of Home Builders ("NAHB") Model Green Home Building Guidelines. In all, 48% of the Property has pervious surface and 51.5% of the Property is considered open space. There is a large central park in the center of the development that will be open to the public and provide benches, walkways and plantings for individuals to enjoy. The development includes a rain garden and a "wetlands overlook" with a butterfly garden. It also incorporates a Chicago-style "Green Alley" which utilizes permeable pavers. Finally, the Applicant is providing trees with a combined diameter, at breast height, of 407 inches in connection with the Project. (Exhibits 3, 52, [Post-hearing submission].)
33. As presented by the Applicant's architectural expert and set forth in the Applicant's July 2008 and January 2009 submissions, the Project will integrate with the greater MacArthur Boulevard community. Its building heights and proposed density are consistent with residential developments immediately adjacent to the Project. The Project has reserved more open space and pervious area in its site plan than most developments in the area. (Exhibits 40, 52, February 12, 2009 Tr., pp. 11-14, 86-89.)
34. The townhome design is in keeping with the existing architecture in the neighborhood and creates a distinct urban characteristic. Building 1, along MacArthur Boulevard, includes flat roofs to correspond to other neighboring structures along MacArthur Boulevard. Buildings 3 and 4 break-up the roofline with V-Bays, which are prominent in the Tudor-styled homes in the Foxhall neighborhood and directly across MacArthur Boulevard from the Project. The Applicant also adjusted building heights depending on the Building's context in the development. Buildings 1 and 3 are three-story buildings, as well as the townhome on Lot 34 in Building 6. The Applicant reduced the number of stories of Building 1 and Lot 34 because of their proximity to MacArthur Boulevard. The Applicant maintains a lower height along the main boulevard in response to comments it heard from the ANC. The Applicant limits Building 3 to three stories because of its proximity to the homes in the Canal View development in order to avoid any negative effect on the light, air, privacy, or views of those homes. (Exhibit 40, 62; February 12, 2009 Tr., pp. 11-14, 86-89, 90.)
35. The Applicant heeded the advice of the Commission and minimized the amount of "accessories" on the building facades. Shutters are used sparingly, building materials were simplified, and metal railings were removed. Front stoops are also provided, where appropriate, and windows are provided for the English basement units. The Project also includes formal facades for end units facing MacArthur Boulevard and the wetlands. (Exhibit 40.)

36. The Project requires approval of a theoretical subdivision and flexibility from the standards for theoretical subdivisions, specifically from the requirement to provide a 20 - 25 foot front yard, 25-foot wide streets and a 60-foot vehicular turning area. The Applicant also seeks flexibility from the side-yard and rear-yard requirements for the Project as a whole. (Exhibits 3, 25, 62, 90.)
37. The Project also requires approval of density above the limit established for PUDs in the R-5-A Zone District pursuant to § 2405.3 of the Zoning Regulations.
38. The Project will not cause adverse traffic impacts, as demonstrated by the Applicant's Traffic Study, as well as the testimony presented by the Applicant's traffic consultant during the public hearing. The study, which was based on the project of 41 townhomes, concluded that the PUD would generate fewer trips than the existing hospital when it operated at its peak capacity. Specifically, it will generate at least 33 fewer trips during the AM peak hour and seven fewer trips during the PM peak hour. Off-site intersections along MacArthur Boulevard will continue to operate at levels of service consistent with background conditions. (Exhibit 13.)

#### Zoning Map Amendment

39. The majority of the Property is located in the Institutional land use category, as shown on the District of Columbia Generalized Land Use Map. The remainder, largely the area of the wetlands, is located in the Parks, Recreation and Open Space categories. The institutional land use designation "includes land and facilities occupied and used by colleges and universities, large private schools, hospitals, religious organizations, and similar institutions." The Parks, Recreation and Open Space category includes the federal and District park systems. (Exhibit 3.)
40. The Property is currently located in the R-1-B and R-5-A Zone Districts. A large portion of the site was located in the R-5-A Zone District as a result of a PUD-related map amendment during Case No. 70-15. Prior to Case No. 70-15, however, approximately two-thirds of the southern portion of the site was located in the R-1-B Zone District, and one-third of the site, the portion along MacArthur Boulevard, was located in the R-5-A Zone District. (Exhibit 3.)
41. The R-5-A Zone District, as a matter-of-right, permits a maximum height of 40 feet (3 stories), a maximum density of .9 FAR, and a maximum lot occupancy of 40%. The R-1-B Zone District, as a matter-of-right, permits a maximum height of 40 feet (3 stories), a FAR equivalent of 1.2 and a maximum lot occupancy of 40%.
42. The Applicant has requested a PUD-related Zoning Map Amendment for the Property to the R-5-A Zone District to allow the Project to obtain the requested height and density. The PUD guidelines for the R-5-A Zone District allow a maximum height of 60 feet, a density of 1.0 FAR and a maximum lot occupancy of 40%.

43. The requested rezoning to the R-5-A Zone District is part of a PUD application, which allows the Commission to review the design, site planning, and provision of public spaces and amenities against the requested zoning relief. In Zoning Commission Order No. 921, *Consolidated Planned Unit Development and Zoning Map Amendment for Tenley Park LLC*, 48 DCR 10509 (2001), a PUD and Zoning Map amendment case, the Commission clearly articulated the legal standard for reviewing PUD-related Zoning Map amendments:

A PUD Map amendment is thus a temporary change to existing zoning, that does not begin until a PUD Covenant is recorded, ceases if the PUD is not built and ends once the PUD use terminates. This being the case, the Commission may grant PUD related map amendments in circumstances where it might reject permanent rezoning.

Z.C. Order No. 921 at 15 (COL 5). The Commission added:

A map amendment granted as part of a PUD establishes no precedent for zoning cases involving permanent zoning map amendments. A PUD map amendment is tied to the PUD use. The PUD use is constrained by covenant. Therefore, the merits of such amendments are usually analyzed in the narrow context of the PUD use requested.

Id. at 17 (COL 13). Finally, the Commission observed:

A PUD applicant seeking a related map amendment must still demonstrate that public health, safety, and general welfare goals of the zoning regulations would be served by the amendment.

Id. at 16 (COL 6).

44. In this case, the Commission finds that the proposed PUD-related map amendment of the Property to the R-5-A Zone District is appropriate given the superior features of the Project, particularly when compared to the existing hospital-related PUD, the ability to develop the Property with 32 dwelling units as a matter-of-right and the limited amount of flexibility the Applicant seeks beyond the matter-of-right parameters of the Property's zoning designation. The Commission's conclusion is consistent with the OP's recommendation to approve the Project and the PUD-related map amendment.
45. The Commission believes replacing the 200-bed psychiatric hospital with 34 for-sale townhomes is consistent with the residential uses adjacent to the Property and is a higher and better use for the underutilized property. The Commission also finds that the development will designate over 5% of the townhomes as affordable units for individuals with an income no greater than 80% of the area median income.

46. Although the Comprehensive Plan calls for institutional and park and recreational uses, rezoning to the R-5-A Zone District is consistent with the surrounding properties. The Property is surrounded by residential uses on its north, south, east, and west. In light of the fact that the hospital is no longer in operation, the institutional land use designation is no longer appropriate for the Property. The Applicant's treatment of the wetlands is consistent with the park and recreational land use designation. The rezoning is consistent with the themes, elements, and policies of the Comprehensive Plan as well as the purposes of the Zoning Regulations. (Exhibits 3, 25, 40.)

**Development Incentives and Flexibility**

47. The Applicant requested the following areas of flexibility from the Zoning Regulations. (Exhibits 3, 13, 35, 90.)
- a. Sections 2516.4, 2516.5, and 2516.6 outline requirements, including area requirements, for allowing multiple principal structures on a single lot. The Applicant cannot satisfy the area requirements for the theoretical lots due to the amount of green space the Applicant designates for public use and for superior environmental and green design features. Further, providing a 60-foot turn around and 25-foot-wide roads is unnecessary as DDOT and the Fire and Emergency Medical Services ("FEMS") has confirmed it consents to these elements of the site plan. Providing these features would increase the impervious surface on the Property.
  - b. Sections 774 and 775 delineate rear-yard and side-yard requirements for the development. The landscaping and topographical features of the Property render strict application of these regulations unnecessary.
  - c. Section 2405.2 establishes that the maximum density that can be approved through a PUD in the R-5-A Zone District is 1.0 FAR. However, § 2405.3 authorizes an increase of up to five percent of the total density above that amount if the increase is essential to the successful functioning of the project and consistent with the purpose and evaluation standards of this chapter. The additional 0.04 FAR is necessary for the successful functioning of the Project and consistent with the purpose and evaluation standards of Chapter 24 of the Zoning Regulations.

**Public Benefits and Amenities**

48. The Applicant, in its written submissions and testimony before the Commission, noted the following benefits and amenities will be created as a result of the Project, in satisfaction of the enumerated PUD standards in 11 DCMR § 2403.

- a. Efficient and Safe Vehicular and Pedestrian Access. The PUD provides one point of access from MacArthur Boulevard, thus limiting the number of curbcuts and preserving the safety of pedestrian circulation. The Applicant will not connect the private right-of-way, Lingan Way, with the public street, Lingan Road, because Lingan Road is too narrow to effectively serve the development. Moreover, the angle at which Lingan Road meets MacArthur Boulevard creates a subpar turning angle for cars turning onto and off of Lingan Road. Precluding connectivity of Lingan Road and Lingan Way also provides safety for the residents of the two existing houses on Lingan Way, as it will reduce the amount of traffic immediately in front of their homes. Finally, the Applicant is establishing a safe pedestrian network by incorporating brick sidewalks and crosswalks with pavers. The varied material will make it clear to drivers that they must use caution while driving through the development. The narrow streets will also promote pedestrian safety by signaling drivers to drive slowly. (Exhibits 3, 62; February 12, 2009 Transcript, p. 123.)
- b. Urban Design, Architecture, and Open Spaces. The Project will replace an outdated institutional building that does not utilize good urban design principles. In place of the deep setback that currently exists, the Project will situate a row of townhomes along the property line fronting MacArthur Boulevard. The Project will infill an underutilized site along a major District corridor and entry into the city. The Applicant will use detailed landscaping to screen the Project from neighboring uses in a less harsh manner than the imposing existing fence that surrounds the hospital. (Exhibit 3.)
- c. Site Planning, and Efficient and Economical Land Uses. The Project makes efficient use of the site by lining the houses along internal streets, which enables the Project to provide deeper private spaces for the townhomes, particularly along the southern property line. The PUD includes numerous open spaces for residents and members of the general public, such as a central plaza, a wetlands overlook, and a rain garden. The Applicant incorporates a number of green design features, such as extensive use of pervious pavers and an effective stormwater management and filtration system that will create an efficient residential product. (Exhibit 3.)
- d. Housing and Affordable Housing. The PUD will add 34 new, for-sale residential units to Ward 3. More than five percent of the Project is dedicated to affordable housing and will be available to families with an annual income that is no greater than 80% of the area median income. (Exhibit 3.)
- e. First Source Employment Program. Section 2403.9(e) of the Zoning Regulations states that “employment and training opportunities” are representative public benefits and project amenities. The Applicant will enter into an agreement to participate in the Department of Employment Services First Source Employment

Program to promote and encourage the hiring of District of Columbia residents during the development and construction process. (Exhibit 3.)

f. Uses of Special Value.

- Green Design: The Applicant has committed to the following improvements on the Property, which will have significant positive impacts on the land and water and the overall sustainability of the Property: meeting standards for LEED Neighborhood Development; meeting new standards set by the NAHB Model Green Home Building Guidelines for green residential buildings; re-planting a majority of native plant and tree species throughout the Property; creating a rain garden; including additional green or open space in the form of a traditional community park; creating a park-like “wetlands overlook” and butterfly garden; cleaning and enhancing the existing wetlands through native plantings; using the Chicago-style “Green Alley” permeable pavers as suggested by the District Department of the Environment (“DDOE”); creating a storm water management system to provide both water quality and quantity control; and installing bike racks in all garages to promote alternate modes of transportation. (Exhibits 3, 13, 40.)
- Universal Design: The Applicant is committed to building an inclusive development that will offer Universal Design options to pre-construction homebuyers. Universal Design provides accessibility to homeowners of all ages and physical abilities. Citizens of the District with physical challenges and those who are interested in the option of aging-in-place will benefit greatly from houses built with Universal Design features. Wider doorways, entrances, stairways, and hallways; easy entrance tubs and showers; accessible appliances; and lever door handles are all elements of Universal Design that make a home livable for everyone. (Exhibit 13.)
- Beautification of MacArthur Boulevard: The Applicant will contribute to the beautification of a stretch of MacArthur Boulevard that goes beyond their property line. The Applicant has allocated \$50,000 to beautification efforts. (Exhibit 13.)
- Palisades Community Fund: The Applicant will contribute \$15,000 to assist the community in funding a project of its choice. The money will be contributed to the Palisades Community Fund, a non-profit fund used to improve the conditions in the Palisades area of the District. (Exhibit 13.)
- Construction Management Plan: The Applicant will abide by the terms of the Construction Management Plan submitted into the record as Exhibit C of Exhibit 13. (Exhibit 13.)

- g. Environmental Benefits. As outlined above, the Applicant will meet the standards for LEED Neighborhood Development and the NAHB Model Green Home Building Guidelines. It will re-plant a majority of native plant and tree species throughout the site, which will clean and enhance the existing wetlands. It will incorporate a rain garden, a wetlands overlook, a butterfly garden, a “green alley” and an effective stormwater management program. (Exhibit 13.)
- h. Consistency with the Comprehensive Plan. The PUD advances the major themes as well as policies and objectives of the elements of the Comprehensive Plan. The Project furthers social and economic development of the District through the creation of 34 new residential units on underutilized land, with a significant affordable housing component and a highly-developed green design program (Exhibits 3, 13.)

#### **Compliance with PUD Standards**

- 49. In evaluating a PUD application, the Commission must “judge, balance, and reconcile the relative value of project amenities and public benefits offered, the degree of development incentives requested and any potential adverse effects.” (11 DCMR § 2403.8.) Given the level of project amenities and public benefits, the Commission finds that the development incentives for the development of 34 townhomes and the related rezoning to the R-5-A Zone District are appropriate. The Commission also finds that the requested areas of flexibility from the requirements of §§ 770, 2516, and 2405.2 are consistent with the purpose and evaluation standards of Chapter 24 of the Zoning Regulations and are fully justified by the superior benefits and amenities offered by this Project. The Commission finds that the Project is acceptable in all proffered categories of public benefits and project amenities and is superior in public benefits and project amenities relating to urban design, landscaping and open space, site planning, job training and employment opportunities, transportation measures, environmental benefits, and uses of special value to the neighborhood and District as a whole.
- 50. Section 2405.3 authorizes an increase of up to five percent of the total density above the limit established by § 2405.2 if the increase is essential to the successful functioning of the project and consistent with the purpose and evaluation standards of this chapter. The Commission finds the additional 0.04 FAR is necessary for the successful functioning of the project and consistent with the purpose and evaluation standards of Chapter 24 of the Zoning Regulations.

#### **Government Agency Reports and District Government**

- 51. By reports dated November 21, 2008, and February 2, 2009, and by testimony at the public hearing, OP recommended approval of the application. OP in its report and in oral testimony indicated that redeveloping the site with 37 townhomes (which was the proposal at the time OP wrote its report) would be “compatible with the various

residential unit types in the neighborhood.” OP also indicated that the development would not be inconsistent with the Comprehensive Plan, including the designated Area Element, for redevelopment of a site formerly developed with an institutional use. OP noted that the institutional designation under the future land use map was reflective of the existing use of the Property. It stated that with the demise of the institutional use, it does not seem unreasonable that the property be developed with a use and a density that is compatible to the adjacent properties. OP noted that the development was consistent with the planning and development priorities of the Rock Creek West Area Element, as well as the policies to manage institutional land uses and protect common open space. (Exhibit 25.)

52. OP testified that the development would conform to the land use, density, and height allowed under the PUD/R-5-A regulations. OP agreed with the Applicant that the proposed height of the townhomes was appropriate for the site and noted that “since the property slopes down towards the rear, visibility from MacArthur Boulevard would be reduced and therefore would not seem to tower over the two and three story buildings along MacArthur Boulevard.” (Exhibits 25, 43; February 12, 2009 Tr., pp. 87-89.)
53. At the request of the Commission, OP submitted a supplemental report dated April 6, 2009 that: (1) provided an annotated table showing the requirements of the existing zoning on the site, the zoning requirements for a PUD in an R-5-A Zone District, and the key statistics of the proposed PUD; (2) addressed OP’s previous descriptions of the level of amenities provided by the PUD; (3) identified that the PUD is located within the Rock Creek West Area for Comprehensive Plan purposes; and (4) provided a response from DDOT and FEMS regarding the use of bollards between Lingan Way and Lingan Road.
54. OP submitted a third supplemental report dated July 8, 2009 at the request of the Commission that analyzed the PUD’s compliance with § 2516 of the Zoning Regulations.
55. OP submitted a fourth supplemental report on August 10, 2009 that analyzed whether the area of private streets was included in the overall lot occupancy in the FAR calculations in four recent PUDs approved by the Commission that were cited by the Applicant in its June 25, 2009 filing.
56. By its report dated November 20, 2008, DDOT noted that the Applicant had outstanding issues to resolve with FEMS, which the Applicant did resolve, as noted below. DDOT asked that if the development were approved that the Applicant be asked to subsidize resident memberships to ZipCar and SmartBike, as well as provide access to a SmartBike station. It also suggested conditioning approval on subsidizing residents’ use of public transportation and excluding residents of the development from the residential permit parking system. In its report dated February 2, 2009, DDOT noted its objections to the collapsible bollards proposed between Lingan Road and Lingan Way. At the hearing, DDOT confirmed that it supported severing Lingan Way and Lingan Road and that such a severing would not have a negative impact on traffic and transportation, but DDOT did

not support the use of collapsible bollards. It acknowledged that FEMS approved use of this type of bollard. (Exhibit 26; February 12, 2009 Tr., pp. 123-126.)

57. DDOT testified that it did not believe the PUD would have a negative traffic impact on the community. It further noted that it supported the narrow streets as a tool to slow down traffic and was comfortable with the turn-around area provided. (Exhibits 26, 49; February 12, 2009 Tr., pp. 120-149.)
58. By its reports dated November 20, 2008 and April 3, 2009, FEMS indicated its acceptance of the PUD site plan, including the street widths, the dimensions of the turn-around area and the separation of Lingan Way and Lingan Road. (Exhibits 33, 81.) However, FEMS specifically required that such separation be accomplished with breakable bollards as shown on the Fire Truck Accessibility Plan, prepared by VIKa and dated April 2, 2009. (Exhibit 81.)
59. By its report dated September 4, 2008, the DDOE confirmed that it had determined that “the proposed project design (as described and illustrated in the revised PUD application) will have minimal or no impact on the wetland and stream at the site.” (Exhibit 34.)
60. By reports dated December 1, 2008, and February 12, 2009, the National Park Service noted concerns with the delineation and treatment of the wetlands. (Exhibits 28, 49.) The Commission notes, however, that the USACE confirmed the delineation of the wetlands and has jurisdiction along with DDOE over their treatment.
61. By a letter dated February 6, 2009, DDOT’s Urban Forestry Administration noted that the development would require the removal of three mature Willow Oak trees in public space. The Commission notes that there is a process, separate and apart from the PUD process, for securing approval to remove trees in public space and a requirement for subsequent replacement. (Exhibit 47.)
62. Councilmember Cheh submitted a letter in support of the non-connectivity of Lingan Road and Lingan Way. (Exhibit 32.)

### **3ANC 3D Report**

63. By letter dated November 20, 2008, and by testimony at the public hearing, representatives of ANC 3D indicated that at a duly noticed meeting on November 11, 2008, with a quorum present, ANC 3D voted to support the PUD with the following conditions: (1) any approval by the Commission of this application shall be granted only to The Athena Group, LLC and be made nontransferable; (2) Building 3 shall be 38 feet and three stories high to the top of the roof; all other buildings and units shall be limited to 40 feet and three stories in height; (3) in advance of construction and in cooperation with USACE and DDOE, the entire delineated wetland area shall be reflagged; and the delineated area, including the stream, shall be flagged and protected in perpetuity through

a conservation easement by a uniform setback of 25 feet from all structures and other human interference from the outermost wetland boundary, in the event there is disagreement on such boundary; (4) the width of interior roads shall be a minimum of 25 feet; (5) an ample turn-around shall provide access for all types of emergency vehicles; (6) the site shall contain 25 on-street parking spaces for guest vehicles and service and delivery vehicles; (7) the two affordable housing units shall be indistinguishable from other housing within the development; (8) the total amount of impervious lot coverage shall not be greater than 50% for the entire project; (9) by means of a covenant on the title to the land, the proffered green spaces shall be protected in perpetuity as open space and non-developable land open to the public; (10) the developer shall not be limited to his design that includes a fountain in the central park; (11) at a minimum, amenities shall include an additional 5,000 square feet of green space on site that shall be protected as described in condition no. 9 and open to the public; (12) the developer shall hire a landscape architect to design and oversee implementation of the beautification of lower MacArthur Boulevard; and (13) the developer shall give consideration to contributing to organizations that improve the quality of life in the Palisades and will enhance the project. (Exhibit 23.)

64. The ANC provided testimony that it would like the Applicant to reduce the height of the buildings, specifically those along MacArthur Boulevard, to a maximum of 40 feet and three stories and to reduce the number of units (which totaled 37 at the time of the hearing). It further testified that the only public amenity it was requesting was increased green space. (February 12, 2009 Tr., pp. 209-210, 220.)
65. The ANC introduced Julie Moore as an expert in wetlands analysis. Ms. Moore confirmed that the USACE had jurisdiction over the wetlands and that there were no regulations requiring structures to be set back a certain distance from wetlands. (February 12, 2009 Tr., pp. 183, 224.)
66. The ANC submitted a resolution dated April 1, 2009, stating that while it appreciated the efforts of the Applicant to move closer to its position, the revised project (36 townhouses) did not go far enough to satisfy the ANC's concerns. (Exhibit 80.)
67. The ANC submitted a letter dated May 5, 2009 stating its continued opposition to the PUD, indicating it had met with the Applicant and offered to drop its opposition if the Applicant modified its proposal to limit all buildings to no more than three stories and reduce the number of units to 32, and attached its response to the Applicant's April 23, 2009 submission.
68. The ANC submitted a letter dated July 8, 2009 stating that it opposed the Applicant's final design because of the height of the four, four-story buildings, the density of the proposed project, the removal of trees in public space, the affordable units remaining distinguishable from the market rate units, the lack of a circulation plan for interior

streets, insufficient green space, and the fact that the proffered amenities were benefits for the project rather than the greater community.

69. The ANC, in conjunction with the Palisades Citizens Association, submitted a letter dated August 31, 2009 stating their belief that: (1) the Applicant incorrectly calculated the density for the revised project it presented with its June 25, 2009 filing by including the lot area covered by the covenanted means of ingress and egress it would be required to exclude if it were applying for a special exception pursuant to § 2516 of the Zoning Regulations; (2) the Applicant did not meet its burden of proof in substantiating its request for bonus density pursuant to § 2405.3 in its August 10, 2009 filing; and (3) the Applicant had not included all of the lot area occupied by covenanted means of ingress and egress in its density calculations submitted as Exhibit A to its August 10, 2009 submission.

#### **Parties in Support**

70. Drs. Shaffer and Sarafian testified in support of the application. The Shaffer and Sarafian families reside at the houses on Ligan Way immediately adjacent to the Property. They testified in support of the treatment of Ligan Way and Ligan Road; specifically, that no connection would be provided between them. They support the landscaping and the collapsible bollards that will be provided between the two rights-of-way. They noted that by not connecting the roadways, their quality of life would be improved and the safety of their children ensured. (Exhibit 15; March 16, 2009 Tr., pp. 16-19, 21-23, 25-29.)

#### **Persons in Support**

71. Mimi Castaldi, a homeowner in the Canal View development, testified in support of the application. Ms. Castaldi owns property immediately adjacent to Building 3. She testified that the PUD provided more protections for her home than a matter-of-right development. She noted that the Applicant set Building 3 further back from the property line and reduced its height per her request. (February 12 2009 Tr., pp. 251-52.)
72. Michael D. Cohn, a resident of the Foxhall Mews development, submitted a letter of support into the record dated March 11, 2009. Michael Cohn lives in a development immediately adjacent to the Property and noted that he looked forward to the redevelopment of the hospital site. He stated that the concerns espoused by the ANC were not shared by him and he did not believe the proposed heights and density were inappropriate for the PUD site. (Exhibit 63.)

#### **Parties in Opposition**

73. Canal View submitted a letter opposing the Applicant's proposal but outlining conditions that, if met, would secure Canal View's support. (Exhibits 30, 31, 41.)

74. At the hearing on March 16, 2009, Canal View testified that the PUD did not comply with the standards outlined in the Zoning Regulations or the Comprehensive Plan. It noted, specifically, that the PUD required relief from the theoretical subdivision requirements and that it believed the proposed height and density were inappropriate for the site. (Exhibit 69.)
75. On April 6, 2009, Canal View submitted a post hearing memorandum responding to the Applicant's March 30, 2009 filing and made several points. First, the Applicant was underestimating the amount of relief it was requesting through its theoretical lot subdivision. Second, the Applicant was improperly calculating FAR by excluding the area occupied by streets and alleys, and when the FAR is calculated excluding these areas, the FAR exceeds the amount the Commission can approve through a PUD in the R-5-A Zone District. Third, Canal View commented on the annotated table of zoning relief the Applicant submitted with its March 30, 2009 filing.
76. On May 5, 2009, attorneys for Canal View submitted a letter responding to the Applicant's April 23<sup>rd</sup> submission. The letter stated Canal View's continued opposition to the PUD, noted Canal View's belief that the Applicant was understating the amount of relief it was requesting through the PUD in its April 23<sup>rd</sup> filing, endorsed the views expressed by the PCA that affordable housing units were distinguishable from the market rate units, stated that the density and height of the PUD are excessive, that the reduction of five units from the earlier PUD was due to factors other than community concern, disputed the Applicant's calculation of the number of units that could be achieved through a matter of right project, and requested that the Commission condition its approval of the PUD on certain protections designed to protect Canal View's existing retaining wall.
77. On July 8, 2009, Canal View submitted a letter stating that it continued to oppose the PUD, but that it was in negotiations with the Applicant that could change its position.
78. On August 24, 2009, Canal View submitted a letter stating that it changed its position to one of support for the Application, as modified by the Applicant through its June 25, 2009 submission.
79. The Palisades Citizens' Association submitted a letter in support of the PUD with conditions, which largely mirrored those outlined by the ANC and Canal View. (Exhibit 22.) Its position is that the project is too dense and the buildings are too tall to be compatible with the Palisades area.
80. At the hearing on March 16, 2009, the PCA also testified that the PUD did not meet the requirements of Chapter 24 and was inconsistent with the Comprehensive Plan. It submitted that the proposed building heights and project density were out of context with the greater community.

81. On April 6, 2009, PCA submitted a letter in opposition to the PUD. The letter stated that it changed its position as a result of the information regarding the Applicant's theoretical lot subdivision contained in the Applicant's March 30, 2009 filing. PCA stated that it believed the correct FAR calculation is 1.23 because the Project's streets and sidewalks should not be counted in the overall lot area for purposes of FAR calculations. The Applicant included the space occupied by the private streets and sidewalks in the lot area for purposes of calculating FAR.
82. On May 5, 2009, PCA submitted a letter responding to the Applicant's April 23, 2009 submission. The letter stated that it contained an inadequate description of the relief requested, detailed inadequate and vague amenities, and underestimated the zoning relief requested. PCA's letter further stated that it objected to the fact that the affordable units were smaller than the market rate units, and continued to object to the density and height of the PUD.
83. On July 8, 2009, PCA submitted a letter noting its continued objection to the PUD on grounds that the Applicant had not satisfied its burden of proof, and that the PUD will undermine the character of the neighborhood.

**Persons in Opposition**

84. Sarah Campbell testified in opposition to the PUD. She noted that the wetlands and green space should be protected. She further noted that the development was an opportunity to provide more affordable housing. (February 12, 2009 Tr., pp. 253-255.)
85. Nan Wells, ANC Commissioner for ANC 3D, submitted two letters in opposition to the PUD. She noted the same objections espoused by the ANC. (Exhibits 27, 48.)

**Satisfaction of the PUD and Zoning Map Amendment Approval Standards and Other Contested Issues**

86. The Commission credits the written submissions and testimony of the Applicant and OP that the proposed PUD and rezoning to R-5-A are appropriate and that the proffered amenities and benefits are acceptable. The Commission also credits the testimony of OP that the proposed Project and rezoning are not inconsistent with the Comprehensive Plan, including the District of Columbia Generalized Land Use Map.
87. The Commission agrees with DDOT's conclusion that the Applicant has fully addressed parking and traffic issues associated with the proposed development. It further agrees with DDOT and FEMS that the proposed roadway width, turn-around area, and lack of connectivity between Lingan Road and Lingan Way are appropriate and acceptable. The Commission concurs with FEMS that collapsible bollards are a suitable method for separating Lingan Way and Lingan Road while maintaining access for life/safety issues.

88. The Commission accorded ANC 3D the “great weight” to which it is entitled. In so doing, the Commission fully credited the unique vantage point that ANC 3D holds with respect to the impact of the proposed PUD on the ANC’s constituents. The Commission recognizes that the Applicant has responded to the majority of the ANC’s concerns and notes that it disagrees with the ANC’s conclusion that PUD height and density are inappropriate for this site for the reasons stated in Findings of Fact Nos. 91 and 92.

89. The Commission notes that ANC 3D, by resolution, supports this application subject to a number of conditions. The Commission believes that the conditions it has decided to impose as a condition of its approval are sufficient to safeguard the surrounding from any potential adverse impacts of the PUD, so that the additional requirements proposed by the ANC are unnecessary. In addition, several of the proposed conditions seem intended to enhance the public benefits proposed by the Applicant, which the Commission has no authority to do. The ANC’s proposed conditions and the Commission responses are as follows:

- a. Any approval by the Commission of this application shall be granted only to The Athena Group, LLC and be made nontransferable.

The Commission finds that the PUD Covenant will sufficiently address the community’s concerns and ensures that the project built will be constructed pursuant to the plans approved. Moreover, all forms of zoning relief run with the land making “personal conditions ... unlawful *per se*”. (*National Black Child Development Institute, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 483 A.2d 687, 692 (D.C .1984).)

- b. Building 3 shall be 38 feet and three stories high to the top of the roof; all other buildings and units shall be limited to 40 feet and three stories in height.

The Commission finds that Building 3 is less than 38 feet in height and is three stories, thus satisfying the first part of this proposed condition. Of the remaining buildings, only seven exceed 40 feet by, at most, two feet. Twenty-one units are four stories. The Commission finds that the proposed building heights are appropriate given the surrounding uses, the topographical conditions of the Property, and the precautions the Applicant is taking to protect adjacent properties, including set-backs and landscaping. The Commission further finds that the Applicant has made several changes to its proposal in response to community concerns.

- c. In advance of construction and in cooperation with USACE and DDOE, the entire delineated wetland area shall be reflagged; and the delineated area, including the stream, shall be flagged and protected in perpetuity through a conservation easement by a uniform setback of 25 feet from all structures and other human

interference from the outermost wetland boundary, in the event there is disagreement on such boundary.

The Commission is not persuaded by the ANC's claims that the wetlands is not sufficiently delineated or protected. The Commission finds that the USACE, the federal agency with sole authority over delineated wetlands and "waters of the United States", has confirmed that they have been accurately delineated in its letter dated October 10, 2007 and entered into the record as part of Exhibit 13. The PUD Covenant will confine this development to what has been proposed. *See also* discussion in Finding of Fact No. 93.

- d. The width of interior roads shall be a minimum of 25 feet.

The Commission disagrees with the request to widen the interior streets to a minimum width of 25 feet. FEMS and DDOT have both stated that they support the 20 foot width of the interior streets and DDOT has testified that it, in fact, prefers the narrower width. (Exhibits 33, 76; February 12, 2009 Tr., pp. 123, 148-149.) Further, the Commission finds that the increased width will only add to the impervious surface and be an environmental detriment.

- e. An ample turn-around shall provide access for all types of emergency vehicles.

The Commission disagrees with this request. FEMS and DDOT have both indicated that they support the internal vehicular circulation plan that is proposed. Providing a greater turn-around area, just as providing greater street widths, will reduce green space and increase impervious surface and be an environmental detriment. (February 12, 2009 Tr., p. 123.)

- f. The site shall contain 25 on-street parking spaces for guest vehicles and service and delivery vehicles.

The Commission finds that, as a matter of law, the 59 parking spaces being provided with this project are significantly more than the 36 that are required under the Zoning Regulations and will be sufficient. The Commission further notes that there is no evidence in the record from either OP or DDOT indicating that more parking spaces are desired or warranted.

- g. The two affordable housing units shall be indistinguishable from other housing within the development.

The Commission finds that the affordable houses are indistinguishable from the other houses. It notes that the Applicant has provided sufficient evidence to demonstrate that the roof terraces are not readily visible from ground level;

making the affordable houses indistinguishable from the surrounding units. (Exhibit 40.)

- h. The total amount of impervious lot coverage shall not be greater than 50% for the entire project. By means of a covenant on the title to the land, the proffered green spaces shall be protected in perpetuity as open space and non-developable land open to the public. At least 13,500 square feet of open space shall be provided.

The Applicant has testified that the public areas will be held in common and remain open. The Commission finds that the PUD Covenant is sufficient to safeguard this concern. The Commission also finds that the Applicant is providing 27,871 square feet of park/open space. (Exhibit 90.)

The Applicant has proffered that at least 48% of the project's surface will be pervious. Neither the Zoning Regulations nor any other applicable law mandates this. The proffer is therefore a public benefit that the Commission cannot unilaterally increase. It is the Commission's responsibility to "judge, balance, and reconcile the relative value of the project amenities and public benefits offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case." (11 DCMR § 2403.8.) If the public benefits do not justify the incentives requested, a PUD must be denied and cannot be saved by the Commission unilaterally adding value to the package. In this instance, the public benefits of this project warrant the flexibility requested and therefore the ANC's suggestion that more is required is not persuasive.

- i. The developer shall not be limited to his design that includes a fountain in the central park.

The Commission agrees to allow this requested flexibility.

- j. At a minimum, amenities shall include an additional 5,000 square feet of green space on site that shall be protected as described in condition no. 9 and open to the public; the developer shall hire a landscape architect to design and oversee implementation of the beautification of lower MacArthur Boulevard; and the developer will give consideration to contributing to organizations that improve the quality of life in the Palisades and will enhance the project.

The Commission finds that the Applicant is providing 27,871 square feet of park/open space, which is greater than 18,500 square feet that the community is requesting. The Commission further finds that the Applicant has proposed contributing up to \$50,000 of work to beautify MacArthur Boulevard and \$15,000 to the Palisades Citizens Association, which responds to the quality of life concerns. (Exhibit 52.) As just noted, the Commission cannot, and in this case need not, add value to an already acceptable proffer of public benefits.

90. The Commission also is not persuaded by DDOT's proposed conditions. It notes that given that the development will not have an adverse impact on traffic, it believes requiring the Applicant to subsidize ZipCar, SmartBike, and MetroCards is unnecessary. In addition, although such expenditures might serve a general public policy, they cannot be compelled in exchange for zoning flexibility. The ample on-site parking also makes unnecessary DDOT's proposed condition that the Applicant take steps to preclude the residents of the PUD from taking part in the residential permit parking program.
91. The Commission is not persuaded by Canal View's or PCA's position that the PUD is too dense. Evidence in the record shows that the Property could be developed with 32 dwelling units as a matter-of-right and the Commission does not find the additional two dwelling units, especially when balanced against the benefits of the PUD, creating adverse impacts on the surrounding community.
92. The Commission is not persuaded by Canal View's or PCA's position that the buildings in the PUD are too tall. Evidence in the record shows that 29 of 34 townhouses have building heights of 40 feet or less, the matter-of-right limit for the existing Zone Districts. The remaining five townhouses have a building height of 42 feet or less, only two feet more than the matter-of-right limit, and are all located internal to the Property. Moreover, the taller buildings are all located on the portion of the Property which is significantly lower than the elevation (above sea level) of MacArthur Boulevard.
93. The Commission is not persuaded by Canal View's or PCA's position that the wetlands are not sufficiently protected. The Commission notes that USACE and DDOE have jurisdiction over these wetlands and DDOE, by letter in the record, voices no objection to the project. (Exhibits 12, 34.) Further, the Commission notes that any permit issued for this development will be subject to review by USACE and DDOE.
94. The Commission was persuaded by the ANC's and PCA's argument that the computation of FAR should exclude the areas within the PUD site that are to serve as private streets. The PUD seeks relief from the prohibition against more than one building on a record lot, which can be granted by the BZA pursuant to 11 DCMR § 2516 and by the Commission by virtue of § 2405.7(a). Subsection 2516.5 instructs that in "providing for net density ... [t]he area of land that forms a covenanted means of ingress or egress shall not be included in the area of any theoretical lot."
95. The Applicant initially included the proposed private street areas in its FAR computation, which result in an overall FAR under the 1.0 maximum permitted. In response to the ANC's and PCA's argument, the Applicant cited several past Commission orders involving similar PUDs in which private streets were included when computing FAR. None of these orders explain why the requirement of § 2516.5(a) was not given effect. It is therefore unclear whether the Commission was aware that it was treating private streets differently than public rights of way. Now that the issue has been brought to this Commission's attention, it is unable to discern any substantive basis for doing so.

96. The Applicant is not prejudiced by its reliance upon the past practice because even with the private street areas excluded, the total FAR is 1.04. Although that exceeds the amount permitted under a PUD for this zone district by .04, § 2405.3 authorizes the Commission to grant up to five percent additional density if the “increase is essential to the successful functioning of the project and consistent with the purpose and evaluation standards of this chapter.” The Commission disagrees with the ANC’s and PCA’s argument that the Applicant has not satisfied its burden of proof under § 2405.3. Rather, the Commission believes the additional FAR is justified to create an economically viable project of high quality on a site with size and topography constraints.
97. The Commission is not persuaded by the ANC that this FAR computation should have excluded other easement areas. Only those common easements that provide unrestricted access to the public are properly excluded from zoning calculations. (*Appeal No. 17631 of Advisory Neighborhood Commission 3E and Todd Boley*, 55 DCR 3136, 3144 (2007) (permitting common driveway and similar easements to be included in zoning computations).)

### **CONCLUSIONS OF LAW**

1. Pursuant to the Zoning Regulations, the PUD process provides a means for creating a “well-planned development.” The objectives of the PUD process are to promote “sound project planning, efficient and economical land utilization, attractive urban design and the provision of desired public spaces and other amenities.” (11 DCMR § 2400.1.) The overall goal of the PUD process is to permit flexibility of development and other incentives, provided that the PUD project “offers a commendable number or quality of public benefits, and that it protects and advances the public health, safety, welfare, and convenience.” (11 DCMR § 2400.2.)
2. Under the PUD process, the Commission has the authority to consider this application as a consolidated PUD. (11 DCMR § 2402.5.) The Commission may impose development conditions, guidelines, and standards that may exceed or be less than the matter-of-right standards identified for height, density, lot occupancy, parking, loading, yards, or courts. The Commission may also approve uses that are permitted as special exceptions and would otherwise require approval by the Board of Zoning Adjustment. (11 DCMR § 2405.)
3. The development of the Project will implement the purposes of Chapter 24 of the Zoning Regulations to encourage well-planned developments that will offer a variety of building types with more attractive and efficient overall planning and design and that would not be available under matter-of-right development.
4. The application meets the minimum area requirements of § 2401.1 of the Zoning Regulations.

5. The application meets the contiguity requirements of § 2401.3.
6. The proposed height and density will not cause a significant adverse effect on any nearby properties and will, in fact, include less of an impact than the hospital while it was in operation. The impact of the Project on the surrounding area is not unacceptable. As demonstrated in the Traffic Study submitted by the Applicant and supported by DDOT, the Project will not cause adverse traffic impacts.
7. The application can be approved with conditions to ensure that any potential adverse effects on the surrounding area from the Project will be mitigated.
8. The benefits and amenities provided by the Project, particularly its contributions to the community, its green design features, and affordable housing, are reasonable for the development proposed in this application.
9. The application seeks a PUD-related zoning map amendment to the R-5-A Zone District, and an increase in height and density as permitted under the PUD guidelines. The application also seeks flexibility from the building control requirements of Chapter 25 and area requirements of Chapter 7. The benefits and amenities provided by the Project are all reasonable trade-offs for the requested development flexibility.
10. Approval of the PUD and change in zoning is not inconsistent with the Comprehensive Plan. The future land use map is a helpful tool, but is not determinative of a property's zoning designation. The Commission finds that rezoning the site to allow residential use is consistent with the Comprehensive Plan, specifically the Rock Creek West Area Element, and with the surrounding uses.
11. The PUD is fully consistent with and fosters the goals and policies stated in the elements of the Comprehensive Plan. The Project is consistent with the major themes and city-wide elements of the Comprehensive Plan, as well as the goals and policies of the Rock Creek West Area Element.
12. The Commission notes that the wetlands are subject to the jurisdiction of both USACE and DDOE and that it will defer to those agencies to determine proper treatment of the wetlands. The Commission notes agreement from all parties that there is no established requirement to set a structure back a certain distance from the delineated wetlands.
13. The Commission further notes that the removal of certain trees from the Property during the course of development is subject to the jurisdiction of DDOT pursuant to the Urban Forest Preservation Act and it will defer to that agency to determine the proper treatment of the trees on the Property.
14. The Commission is required under D.C. Official Code § 1-309.10(d) to give "great weight" to the issues and concerns of the affected ANCs. As is reflected in the Findings

of Fact, ANC 3D voted to support the application, with conditions. The Commission agrees with the ANC that this Project should be approved and that the residential townhouse use is appropriate. The Commission disagrees with the ANC's proposed conditions for the reasons stated in Finding of Fact No. 89 and the ANC's conclusion that PUD height and density are inappropriate for this site for the reasons stated in Findings of Fact Nos. 91 and 92.

15. In its post-hearing submissions, the ANC raised additional issues, namely, that the Applicant was incorrectly calculating the FAR by including the private streets and alleys in the Project's lot area, that if the Applicant excluded these private streets and alleys the FAR would exceed the amount that could be approved through a PUD in the R-5-A Zone District, and that the Applicant's request for the approval of additional density pursuant to § 2405.3 was not adequately supported.
16. The Commission's discussion as to why it was persuaded by the ANC's first contention and not persuaded by the others appears in Findings of Fact Nos. 94 through 97.
17. The Commission is also required to give great weight to the recommendations of OP. D.C. Official Code § 6-623.04. The Commission gives OP's recommendation to approve the PUD great weight and concurs with its conclusions.
18. The PUD and rezoning for the Property will promote orderly development of the Property in conformance with the District of Columbia zone plan as embodied in the Zoning Regulations and Map of the District of Columbia.
19. Granting the PUD-related map amendment is not inconsistent with the Comprehensive Plan, is appropriate for the area, and is consistent with the purposes of the Zoning Act. Findings of Fact Nos. 39 through 46.

### **DECISION**

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia **ORDERS APPROVAL** of this application for Consolidated Review of a Planned Unit Development and related Zoning Map amendment for the property located at 4460 MacArthur Boulevard (Square 1356, Lots 28, 929, 932, and 933). For the purposes of the following conditions, the term "Applicant" shall be the person owning a fee simple title to the property or its agent. The approval of this PUD is subject to the following conditions:

1. The PUD shall be developed with 34 townhomes accordance with the plans prepared by the Lessard Group, Studio 39, and VIKa and marked as Exhibits 3, 13, 20, 36, 40, 50, 51, 52, 62, and 90, as modified by the guidelines, conditions and standards herein.

2. The PUD Site shall be rezoned to the R-5-A Zone District. The PUD shall have flexibility from the theoretical lot requirements of § 2516 as well as the area requirements of Chapter 7, as necessary per the approved plans.
3. The Project shall be developed in accordance with the sustainability standards for LEED Neighborhood Development and the residential standards of the NAHB Model Green Home Building Guidelines as shown on Exhibits D and E of Exhibit 40 of the record.
4. The Project shall provide Universal Design options to potential purchasers of the townhouses in accordance with Exhibits 13 and 90 of the record.
5. There shall be a contribution of \$15,000 to the Palisades Community Fund prior to the issuance of a Certificate of Occupancy for the first building.
6. The building permits for the Project shall include a beautification plan for portions of MacArthur Boulevard with a value of \$50,000.00.
7. Townhomes located on Lots 3 and 6 shall be designated as affordable units and sold only to individuals with an annual income no greater than 80% of the Area Median Income for the Washington, DC Metropolitan Statistical Area (adjusted for family size). The Applicant will work with the Department of Housing and Community Development ("DHCD") to effectuate this condition. (Exhibit 3.)
8. The Applicant shall comply with the Construction Management Plan marked as Exhibit C in Exhibit 13 of the record.
9. The Applicant shall have flexibility with the design of the PUD in the following areas:
  - a. To vary the location and design of all interior components including, but not limited to, partitions, structural slabs, doors, hallways, columns, stairways, mechanical rooms, elevators, and toilet rooms, provided that the variations do not change the exterior configuration or appearance of the structures.
  - b. To vary final selection of the exterior materials within the color ranges and materials types as proposed, without a reduction in quality, based on the availability at the time of construction.
  - c. To vary the treatment of the separation of Lingan Way and Lingan Road in response to comments provided by FEMS, so long as the separation of Lingan Way and Lingan Road is maintained and landscaping provided.
  - d. To refine the treatment of the focal piece in the central park. A fountain shall not be required in the central park so long as the Applicant provides a suitable replacement. An ornamental tree shall be considered a suitable replacement.

- e. To make minor refinements to exterior details and dimensions, including belts, courses, sills, bases, cornices, railings, and trim or any other changes to comply with the D.C. Building Code or that are otherwise necessary to obtain a final building permit.
  - f. To refine and make adjustments to the treatment of, and buffers to, the wetlands as required by USACE and DDOE.
10. The Applicant shall enter into a First Source Employment Agreement with the Department of Employment Services prior to the issuance of a building permit for the Project.
11. No building permit shall be issued for this PUD until the Applicant has recorded a covenant among the land records of the District of Columbia between the owners and the District of Columbia that is satisfactory to the Office of the Attorney General and the Zoning Division of the Department of Consumer and Regulatory Affairs ("DCRA"). Such covenant shall bind the Applicant and all successors in title to construct on or use the property in accordance with this order and any amendment thereof by the Commission. Any previous covenant filed against any portion of the Property pursuant to Zoning Commission Case No. 70-15 and Order No. 21, shall be extinguished upon the filing of a PUD Covenant pursuant to Case No. 08-21.
12. The PUD approved by the Commission shall be valid for a period of two years from the effective date of this Order. Within such time, an application must be filed by the Applicant for a building permit for the first phase of development as specified in 11 DCMR § 2409.1. Construction shall begin on the Project within three years of the effective date of this Order.
13. The Applicant is required to comply fully with the provisions the D.C. Human Rights Act of 1977, D.C. Law 2-38, as amended, D.C. Official Code § 2-1401.01 et seq., ("Act"). This Order is conditioned upon full compliance with those provisions. In accordance with the Act, the District of Columbia does not discriminate on the basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, or place of residence or business. Sexual harassment is a form of sex discrimination that is prohibited by the Act. In addition, harassment based on any of the above protected categories is prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action. The failure or refusal of the Applicant to comply shall furnish grounds for denial or, if issued, revocation of any building permits or certificates of occupancy issued pursuant to this Order.

On July 27, 2009, upon the motion of Chairman Hood as seconded by Commissioner Schlater, the Zoning Commission **APPROVED** the application by a vote of **4-1-0** (Anthony J. Hood, William W. Keating, III, Konrad W. Schlater, and Michael G. Turnbull to approve; Peter G. May opposed).

On September 14, 2009, upon the motion of Chairman Hood as seconded by Commissioner Turnbull, the Zoning Commission **ADOPTED** this Order by a vote of **5-0-0** (Anthony J. Hood, William W. Keating, III (by absentee ballot), Konrad W. Schlater, Michael G. Turnbull, and Peter G. May to adopt).

In accordance with the provisions of 11 DCMR § 2038, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on March 5, 2010.

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DISTRICT OF COLUMBIA GOVERNMENT  
OFFICE OF THE SURVEYOR

Washington, D.C., October 5, 2007

Plan for Building Permit of SQUARE 1959 LOTS 28, 929, 932, 933

Scale: 1 inch = 40 feet Recorded in Book 159 Page 102 (LOT 28)  
Book A31 Page 3652-W (LOTS 929, 932, & 933)

Receipt No. 90440

Furnished to: PWSP

*[Signature]*  
Surveyor, D.C.  
By: L.M.A. *[Signature]*

I hereby certify that all existing improvements shown herein, are completely dimensioned and are correctly placed, that all proposed changes or construction, or both thereof, under covered parcels, are correctly dimensioned and placed, and agree with this statement the applicant, that the foundation plans as shown, shown in plan, and situated according to the same, and the property lines shown on this plan and that by means of property improvements to be erected as shown herein, the size of any adjoining lot or lots is not decreased to an area less than is required by the Zoning Regulations for and established, and it is further certified and agreed that successful zoning case is required by the Zoning Regulations will be reserved. In accordance with the Zoning Regulations, and that the same have been carefully drawn and dimensioned herein, further agrees that the situation of the adjacent parking area with respect to the High Department approved curb and alley grade will not result in a rate of grade along either of them as any point on either property is less than 20% or single-family dwellings or as is shown at 10% as any point for other buildings. (The policy of the Highway Code permits a maximum difference grade of 12% across the public street and the lot or adjacent property.)

Date:

(Signature of owner or his authorized agent)

NOTE: Data shown for Addressed and Taxed Lots or Parcels are in accordance with the records of the Department of Finance and Revenue, Assessment Administration, and do not necessarily agree with deed description.

