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DAVID W. BROWN

February 2, 2009

The Honorable Anthony Hood, Chairman
District of Columbia Zoning Commission
441-4th Street, N.W.
Suite 210-S
Washington, DC 20004

2009 FEB -2 PM 1:57
DISTRICT OF COLUMBIA
OFFICE OF ZONING

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:

I represent Canal View Homeowners Association in the above-entitled matter, as stated in the attached Hearing Statement of Canal View Homeowners Association. We have enclosed twenty (20) copies of the Hearing Statement as required in this matter.

Please contact me with any questions.

Sincerely yours,


David W. Brown

/enclosures

DISTRICT OF COLUMBIA
OFFICE OF ZONING
08-21
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**BEFORE THE
ZONING COMMISSION
OF THE DISTRICT OF COLUMBIA**

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

Case No. 08-21

**HEARING STATEMENT OF
CANAL VIEW HOMEOWNERS ASSOCIATION**

Canal View Homeowners Association ("Canal View"), through undersigned counsel, submits this Hearing Statement in accordance with rulings by the Commission at the December 1, 2008 hearing on the above-captioned matter. At that hearing, Canal View's request of November 12, 2008 for party status was granted by the Commission. Since that time, Canal View has retained counsel to assist it in presenting its case as a party. Attached pursuant to 11 DCMR 3002 is the written authorization from Canal View for such representation. Exhibit 1.

Canal View will participate in the continued hearing on this matter on February 12, 2009. Canal View will present testimony in support of its position through its President, Robert E. Tucker, Jr. At the December hearing, Mr. Tucker presented the results of the Canal View vote regarding the project: Canal View opposes the development as currently planned. It would support the application with recommended conditions. Those conditions were reduced to writing before the December hearing and provided to the Applicant and other parties. A copy is attached as Exhibit 2. The Applicant made clear at the hearing that some of the proposed conditions were "deal breakers," in that approval of the PUD and rezoning subject to the conditions was not

acceptable. Hence, it appears that the Applicant and Canal View do not have a harmonious position on what action the Commission should take on the application. Canal View's recommended conditions are discussed in greater detail below. In doing so, Canal View does not wish to imply that the Applicant is opposed to each and every condition and, in fact, Canal View does not believe that to be the case. However, Canal View wants to have on the record its rationale for each recommended condition regardless of the Applicant's position on it.

I. CANAL VIEW PERSPECTIVE ON THE APPLICATION

Before turning to a discussion of recommended conditions, Canal View first sets forth its perspective on the application, which has a direct impact on the substance of its recommended conditions.

1. Nature of the Application

The Applicant is seeking both a PUD designation and a rezoning. All parties appear to be in agreement that the map amendment would increase the intensity of the residential zoning of approximately two-thirds of the Property from low density (R-1-B) to moderate density (R-5-A). This alone would significantly increase the development potential of the Property, and hence its value. In addition, the PUD designation would allow the Applicant some flexibility in implementing some of the development standards for traditional R-5-A/R-1-B zoning. As detailed below, the Applicant is seeking considerable leeway from matter-of-right standards. In exchange for this flexibility of implementation, the Zoning Regulations demand that the "project offer a commendable number or quality of public benefits and that it protects and advances the public health, safety, welfare and convenience." 11 DCMR 2400.2.

The Zoning Regulations do not prescribe what these public benefits must be, and, indeed, they will invariably vary substantially from one PUD application to another. But they are very prescriptive in how the amenities and benefits proffered by the Applicant are to be evaluated by the Commission. First, the Regulations make clear that what is required goes well beyond routine, standard compliance with applicable standards, to “**superior features . . . that benefit the surrounding neighborhood or the public in general to a **significantly greater extent** than would likely result from development of the site under the matter-of-right provisions . . .**” 11 DCMR 2403.6 (emphasis added). One type of project amenity that can qualify is a feature that benefits not just the occupants of the project, but also “immediate neighbors.” 11 DCMR 2403.7.

Second, it is not the responsibility of the Office of Planning, any other party or the Commission to prescribe or otherwise define exactly what project amenities and public benefits are required for approval; it is up to the Applicant to proffer sufficient amenities and benefits to warrant approval. What the Commission is obliged to do is “judge, balance and reconcile the relative value of the project amenities and public benefits offered” against the “degree of development incentives requested,” all in light of identified “potential adverse effects.” 11 DCMR 2403.8.

Third, to assist the Commission in this task, the applicant is to submit a detailed, annotated table showing the relief sought from the matter-of-right standards that would apply absent the PUD status and absent the rezoning. 11 DCMR 2403.11. This table must also detail “how the public benefits offered are superior in quality and quantity to typical development of the type proposed” 11 DCMR 2403.12.

2. Deviations From Matter-of-Right Standards

a. Annotated Table. The “degree of development incentives requested,” 11 DCMR 2403.8, is found in an appraisal of the deviations from matter-of-right standards necessary for approval, i.e., in the required annotated table. The Final Report from the Office of Planning (“OP”) of November 21, 2008, noted (at p. 4-5) the absence of the annotated table from the application and recommended that it be furnished by the Applicant. Indeed, what OP has noted as an omission is more appropriately described as a fundamental failing in the completeness of the application, given the Commission’s obligation to “judge, balance and reconcile” in this critical area. Canal View did not have the benefit of the Applicant’s table at the December hearing and still has not seen anything from the Applicant constituting the required supplement to the table: a qualitative or quantitative description of how the project amenities and public benefits are superior “to typical development” 11 DCMR 2403.12.

The Final Report (at p.4) does contain a staff-generated table that compares development standards sought by the Applicant to PUD standards for the R-5-A zone. This table cannot substitute for the table required of the Applicant, and the Final Report, noting the absence of the required table, does not suggest otherwise. The tabular comparison required from the Applicant is to deviations from the matter-of-right R-1-B standards for two-thirds of the Property and from the matter-of-right R-5-A standards for one-third of the Property. Since the hearing, Canal View has received the Applicant’s table from OP, but it still lacks the requisite features discussion, as noted above. The Applicant’s table also fails to distinguish the underlying zoning, lot-by-lot. Based upon the Overall Existing Conditions Plan (Sheet 38 of the July 2008 application), which

delineates the bifurcated zoning of the land in detail, it appears that all of the lots in Buildings 1 and 2 and the last 4 lots (34-37) in Building 6 are in the R-5-A zone, for a total of 23, and that all of Buildings 3, 4, 5, and the remainder of 6, for a total of 14, are in the R-1-B zone. They should have been evaluated on that basis in the Applicant's table.

b. **Lot Occupancy.** The Final Report includes, in Attachment 3, a table detailing for each lot the extent to which the application deviates from the standard lot occupancy, front yard, rear yard and side yard requirements. This table, used to assist in evaluating entitlement to clustered zoning of theoretical lots under 11 DCMR 2526, is not a substitute for the required annotated table, and the Final Report does not suggest that it was generated to fulfill the annotated table requirement. The OP table shows that every lot except one (30) exceeds the 40% lot occupancy requirement of 11 DCMR 403.2 (applicable in both the R-1-B and R-5-A zones), in many cases substantially so (i.e., by more than 50%). If lot occupancy is measured building-by-building instead, every building except one (5) exceeds the 40% lot occupancy requirement, and the deviations are equally substantial. The Applicant has elected to present lot occupancy from the point of view of the entire project, i.e. as a single lot. The Applicant, in its table, claims this produces a lot occupancy of 28%. This claim lacks any legal foundation, however. The table must show deviation from **matter-of-right** standards, and treating all the lots and adjacent open space as a single lot for lot occupancy assessment is not a matter-of-right under the terms of 11 DCMR 2516. That section makes clear that this treatment, denominated "Exceptions to Building Lot Control," is in the way of a special exception, not a matter of right. 11 DCMR 2516.1.

But even if the Applicant were to have the benefit of this provision as a matter of right, the Applicant has demonstrably failed to comply with the conditions mandated by the section. Specifically, internal streets are to be 25' wide, id. 2516.6(b), and there must be a 60' diameter turning area. Id. 2516.6(c). While these requirements can be modified by the Commission, they are not modifiable as a matter of right, id. 2516.6(d), and neither has been met in the plans submitted. In addition, there must be a front yard at least equal to the required rear yard in the zone. Id. 2516.5(b). Only two lots (29 and 30) or one building lot (5) comply with this requirement.

c. Rear and Side Yards. The OP table and the application (October submission, sheet 68) show that only 11 of the 37 lots will comply with the rear yard requirement. As to lots 1-18 and 34-37, zoned R-5-A, that requirement is 20'; as to lots 19-33, zoned R-1-B, that requirement is 25'. 11 DCMR 404.1(b).¹ The percentage deviations sought are 10% on lots 34-37; 27.5% on lots 1-19; and 28% on lots 31-33.² As for side yards, the OP table details that of the 9 lots with side yards, 5 of them (lots 1, 24, 25, 28 & 37) are below the required minimum size for the applicable zone, as prescribed in 11 DCMR 405.9 & 405.4, with deviations ranging from 11% to 96%.³

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. The plans submitted by the Applicant have been under continuous revision, particularly as to building height. It the

¹ The Applicant's setback table erroneously lists the matter-of-right rear yard requirement for Buildings 3, 4, 5, and 6 (right end) as 20'. Since these lots are zoned R-1-B, the deviation is measured from 25'.

² The deviations for lots 20-28 will increase when the Applicant updates its setback table to take account of the change in location of the retaining wall behind these units, as shown on Sheets 5 & 6 of its January 2009 submission.

³ The numbers for lots 1, 9, 10 & 19 will change when the Applicant updates its setback table to take account of the shift in one affordable unit from Building 2 to Building 1, a shift shown throughout its January 2009 submission.

January 2009 submission, the Applicant details the latest building heights for all 37 lots. 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). As detailed on sheet 19 of the January 2009 submission, 4 (or 29%) of the R-1-B lots (26, 27, 32, 33) exceed the 40' height requirement by 2', with height measured by the more generous standard allowed under the building height definition in the Regulations for the 40' height requirement (from finished grade to the middle of the top story). As for lots in the R-5-A zone, all 23 lots have proposed 4-story buildings, a major deviation from matter-of-right requirements.⁴ In addition, 3 of these lots (34-36), or 13% of them, also exceed that 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. 11 DCMR 401.3. The R-5-A zone has no minimum under this 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. 11 DCMR 401.5. The Application does not disclose the precise square footage of land in each of these zones, but the total area of all the parcels in the application appears to be very close to one-third zoned R-5-A and two thirds zoned R-1-B. Since the overall land area is 120,944 sq. ft., according to the application, the R-5-A zoned area is approximately 40,315 sq. ft. and the R-1-B area 80,629 sq. ft. Ignoring space for streets and sidewalks, this 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

⁴ 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. 11 DCMR 2405.1.

sized lots that could be achieved, since a site plan would have to be prepared showing a layout of dedicated streets and sidewalks, as well as proposed construction that avoided the wetlands on the site. The current plan nonetheless squeezes in 37 dwelling units and streets and sidewalks, or over 97% of a “theoretical” development devoid of internal streets. Thus, while lot clustering under 11 DCMR 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. 11 DCMR 402.4. The Applicant’s table does not attempt to calculate the matter-of-right FAR for the R-5-A zoned property, and no by-right site plan has been submitted by the Applicant from which those measurements and calculations could be derived. Such a site plan would enable determination of a collective FAR for all units, counting theoretical lots and common space, and excluding streets and alleys. The FAR tabulations in the Applicant’s October 2008 submission (Sheet 71), which have not been updated as necessary in its January 2009 submission, show a gross total floor area for the 23 units in the R-5-A zone of 62,834 sq. ft. Given that the gross area of this property is (as noted in part 2.e. above) is approximately 40,315 sq. ft., the 23 units would be tantamount to an FAR of 1.56. This is an **extraordinary 73% deviation from matter-of-right standards** for these R-5-A units. If the fourth floor were removed from all these units, the gross square footage would be three-fourths of 62,834, or 47,125 sq. ft., and the FAR would be 1.17, still a 30% deviation from matter-of-right standards.

In addition to looking at matter-of-right FAR deviations, the PUD regulations establish distinct FAR standards for PUD approval. They are .4 for R-1-B zoned property and 1.0 for R-5-A zoned property. 11 DCMR 2405.2. Absent the rezoning request, the overall square footage limit would therefore be $(.4 \times 80,629 \text{ sq. ft.}) + (1.0 \times 40,315 \text{ sq. ft.})$, or $33,252 + 40,315 = 73,567 \text{ sq. ft.}$ Since the total gross floor area of all the proposed buildings is 118,534 sq. ft. (according to the Applicant's latest FAR tabulations), the upward deviation would be approximately 61%. With the entire property rezoned to R-5-A, the 1.0 FAR limitation would just be equal to the site area, or 120,994 sq. ft., resulting in an FAR of $(118,534/120,994) = .98$, or 98% of the maximum allowed under 11 DCMR 2405.2.⁵ In short, while PUD standards provide some flexibility in the application of development standards in this case, at least as to the FAR requirement, the project proposed by the Applicant exceeds the statutorily mandated limit of that flexibility unless the rezoning is contemporaneously granted.

II. CANAL VIEW RECOMMENDED CONDITIONS OF APPROVAL

Discussed briefly below is the rationale for each of the 13 conditions proposed by, or endorsed by, Canal View, as detailed in Exhibit 2. The Applicant is aware of these conditions and Canal View believes that while some are in dispute, a number of them will be voluntarily agreed to by the Applicant. These conditions are not listed in the order of importance to Canal View, but rather in the order provided to the parties in this case.

1. Non-transferability of Commission Approval. Canal View is concerned that the Applicant not be able to escape any binding conditions of approval

⁵ 11 DCMR 2405.3 would allow a maximum 5% increase in FAR (in this case to 1.05) for a PUD in the R-5-A zone, on proof "that the increase is essential to the essential functioning of the project." The Applicant has not sought to take advantage of this provision.

through the mechanism of transfer of the project to another entity, whether through sale or otherwise. Canal View anticipates that the Commission will alleviate any such risk by making any conditions of approval binding on any proper transferee.

2. Building Height Limits. The Applicant has met Canal View's request for a maximum of 3 stories and 38' in the 5 lots in Building 3, but has not met its request for 3 stories elsewhere, or our request for a maximum of 40' on 7 of the other lots, as detailed in part 2.d. While the Applicant has therefore addressed building height in the area most critical to Canal View, it appears from the volumetric study (January 2009 submission, Appendix B) and other data in the application regarding rooftop heights above sea level that these townhomes will set a new, unwelcome precedent for residential building height in the immediate neighborhood as well as the larger MacArthur Boulevard community, wholly apart from the internal closed-in feeling that comes from narrow streets and tall residences in long rows. It is Canal View's understanding that from the larger neighborhood perspective, the ANC and the Palisades Citizens Association ("PCA") are opposed to four-story townhomes on this site. Canal View supports the ANC and PCA in this respect.

3. Wetlands and Environmental Concerns. Canal View has sought to have all structures separated from the wetlands with a 25' conservation easement. As to this recommendation, Canal View will take its guidance from existing or proposed regulatory requirements in determining both what constitutes a "structure" and the width of the protection area, both during and after construction. Canal View is not advocating more or less demanding requirements than are or will be prescribed by law. Draft revisions to the Zoning Regulations (FP.3.6(c)) states that "no construction or

development shall disturb delineated wetlands or land within 35' of delineated wetlands” The wording of this regulation suggests that the 35’ would apply to any construction, including the retaining wall, rather than be simply a setback to the rear house walls for lots 20-28 in Buildings 3 & 4. Whether that is so should be resolved for the Commission by the OP and others with expertise in this area. If the answer is that the setback is to the retaining wall, the Applicant should not be heard to complain that the regulation is only proposed at this point. Given that the PUD standard is for superior project amenities and public benefits, the Commission should rightly expect the Applicant to take into account emerging environmental standards, not simply minimum standards currently in effect. Ideally, Canal View would like to see the site evaluated by hydrological engineers from either DDOE or the Army Corps of Engineers, as to wetlands, stormwater runoff, grading and drainage of the site generally, and likely impact on existing retaining walls, with the results shared with all parties and the Commission.

4. Interior Road Width. Canal View proposes compliance with the 25’ road width requirement in 11 DCMR 2516.6(b), an explicit requirement for utilization of clustered lots under that provision. The record is far from clear in establishing a rationale or justification for 20’ width internal roads, a reduction of 20%. Narrow streets increase congestion (among both moving and parked vehicles), decrease vehicle maneuverability, and contribute to a lack of openness on the site. By contrast, as a PUD, the project is supposed to provide public benefits to immediate neighbors, who will not find much incentive to enjoy public amenities, if any, on site when they must first navigate narrow, uninviting streets.

5. Emergency Vehicle Turn-Around. As with the road width requirement, clustered lots under 11 DCMR 2516.6 (c) require a vehicular turn-around of at least 60' in diameter. It is not clear from the record that DOT has agreed that this requirement can be dispensed with. But even if the Applicant is given a pass on this in terms of emergency vehicles, that is not the end of the matter. The Commission can and should still require compliance with this requirement purely from a neighborhood impact perspective, i.e., the essence of what the Zoning Regulations are intended to protect. Canal View has three amply sized turnarounds that contribute to the internal free flow of vehicles, thereby reducing vehicular stress on nearby properties as well. Canal Parc should have a similar feature for similar reasons, wholly apart from whether DOT fails to demand it for fire and rescue trucks.

6. Adequate Parking, On Street and Off. Notwithstanding regulatory initiatives to reduce the number of vehicles in the District of Columbia by mandating less parking in new developments, the project site is not particularly well served by public transportation, nor is it particularly well located for pedestrians and bicyclists who might commute downtown. Canal View's experience is that these expensive townhomes will attract owners of two vehicles, at least.⁶ While not completely clear, it appears from the Applicant's January 2009 submission that each unit in Canal Parc will be capable of parking two vehicles off-street, even if two vehicles are not entirely garaged. Canal View understands that it is not able to urge the imposition of more off-street parking than that. As for on-street parking, Canal View doubts that 13

⁶ Given the site's proximity to Georgetown University, some units might well be sold as places where up to six unrelated students might live together, each with a car. In other words, the potential for one household to have ties to more than two cars—perhaps substantially more than two—is very real.

spaces dedicated to visitors, delivery trucks and the like is sufficient, and recommends 25 spaces.

7. **Indistinguishable Affordable Housing.** Canal View is advised that the ANC feels strongly that the project should have at least two affordable housing units and that they should be indistinguishable from the market units. Canal View concurs. It appears that in its latest incarnation, the site plan shows both such units in Building 1, clearly not indistinguishable from other units, both in terms of building width and building height. Of the two distinguishing features, height is the most noticeable and most easily corrected. Hence, there should be no material difference in the roof line along Building 1 due to the presence of affordable housing.

8. **Impervious Surface Percentage.** The Applicant's January 2009 submission includes a revised Green Area Plan (Sheet 3) claiming pervious surface of 46.6%, and, hence, impervious surface of 53.4%. A conservation biologist has evaluated the site for the ANC, concluding that the large amount of impervious surface planned for the site will result in a high volume of stormwater runoff into the stream channel leading to the wetlands. Canal View is very concerned about both protection of the wetlands and the integrity of its own retaining walls adjacent to the stream, which could be undermined by erosion caused by high runoff conditions. To alleviate this situation, Canal View joins the ANC in recommending that building footprints be reduced such that the impervious surface fraction of the land area falls below 50%.

9. **Common Green Areas.** The Applicant's Green Area Plan shows over 56,000 sq. ft. of green area. This includes many non-"green" areas, such as sidewalks, parking spaces, parts of the alley and the like. It also includes private back

yards. There is no tabulation of the size of the common green areas: the central plaza, the butterfly garden, the rain garden and the walking path. Canal View requests that the Commission ensure that these spaces collectively total at least 13,500 sq. ft. and that they be protected in perpetuity as common space in the District of Columbia land records.

10. Central Park Fountain. Currently the design of the central park in between Buildings 2 on one side and 3 and 4 on the other includes a fountain. Canal View concurs in the ANC recommendation that the Applicant should not be limited to that feature in designing and constructing the central park area.

11. Traffic Mitigation Plan. Canal View is concerned about *traffic impacts from the project, both during and after construction.* Post-construction, these concerns will be somewhat alleviated if the project is approved with more parking spaces, wider streets, and smaller or fewer dwelling units. But regardless of the ultimate configuration, Canal View needs to have in place a formal plan or agreement on traffic mitigation measures. Canal View does not agree with the Applicant's claim that *there will be less traffic impact in the neighborhood than when the hospital was in operation.* Nor does the experience of Canal View members jibe with the conclusions in the Applicant's Traffic Impact Study. The existing daily traffic overload on MacArthur Boulevard as it approaches Foxhall Road or Georgetown Day School can only be exacerbated by the large number of additional dwelling units contemplated for Canal Parc. Canal View requests that the Applicant be required to enter into a traffic mitigation plan negotiated in detail and in good faith among the Applicant, Canal View and the PCA—a plan that covers the detailed parking in or movement through the

neighborhood of construction vehicles, as well as vehicular movement and parking after construction is completed.

12. Construction Management Plan. It is Canal View's understanding that, as part of PUD approval, the Applicant will seek approval of a Construction Management Plan. It may be that the construction period Traffic Mitigation Plan would be embraced by this requirement. Either way, Canal View requests the opportunity to review any Construction Management Plan, to collaborate with the Applicant on its terms, and to establish a mechanism for resolving any issues relating to the Plan that cannot be resolved among the parties. Underlying this need is the fact that Canal View is financially responsible for all its streets, which are private property, as well as the other land areas in the community. Major adverse impacts to Canal View are possible due to such activities as hospital demolition, grading, use of heavy construction equipment, truck traffic off the project site, and installation of infrastructure. Consistent with PUD standards that the project advance public welfare and benefit immediate neighbors in particular, Canal View believes that the Applicant should be obliged to take measures to prevent such impacts or be required at its cost to repair any damage caused by the Applicant's project activities, personnel or equipment.

13. Indemnification of Canal View Losses. Canal View's exposure to physical and financial risks, both as to community and individually owned properties, is significant. Under the same rationale as set forth above for Condition 12, Canal View believes it would be appropriate to require the Applicant to indemnify Canal View and its landowners so as to completely protect them and their property from the risk of damage or loss to their homes, retaining walls, yards, fences and Canal View property in general,

from settling, disturbance, erosion or other causes of damage during construction, whether discovered during construction or later, for a period of five years from completion of construction. This indemnification obligation should also be one that the Applicant cannot subsequently assign to another, such as the HOA that will be created to own and administer the common property of Canal Parc.

III. THE “DENSITY” OF THE CANAL PARC PROJECT

The December 1st hearing began with concerns expressed by the Commission over the “density” of the project. In the course of the Applicant’s presentation, its counsel argued that the density of the project was actually 25% below matter-of-right density. This claim should be rejected. The reality is that, as “density” is commonly understood in the field of zoning, and should be understood in this instance, the matter-of-right density is proposed to be increased by over 40%. Since density seemed to emerge at the hearing as a pivotal consideration, even though there is no single, specific quantitative density standard in the Zoning Regulations, Canal View herewith explains in greater detail why the proper conclusion to be drawn is that matter-of-right density would be substantially increased with approval of the current plan.

“Density” is not a defined term in the Zoning Regulations. In many other zoning codes, residential zone density is defined and controlled in terms of number of dwelling units allowed per acre, which, in turn, is a function of minimum lot size or an explicit limit on how many homes can be clustered together per acre.⁷ In the District of Columbia R-1-B zone, allowed dwelling units per acre is capped with a 5000 sq. ft. minimum lot size (equivalent to 8 units per acre); in the R-5-A zone, the minimum 1800

⁷ For example, an R-10 zone might be defined in another jurisdiction as allowing 4000 square feet for each residential lot, or even smaller lots clustered around common space, with up to 10 houses for each acre of land in the project.

sq. ft. requirement for lots and common space combined is equivalent to a cap of 23 units per acre. Hence, in this instance, as noted in part II.2.e. above, the 40,315 sq. ft. of R-5-A land would theoretically allow for 22 units at 1800 sq. ft. per unit, and the 80,629 sq. ft. of R-1-B land would produce a theoretical cap of 16 units, for a total of 38 dwelling units on site. But since any realistic matter-of-right development plan must account for streets, sidewalks and areas where construction is prohibited, theoretical density can never actually be achieved. In this case, the Applicant prepared a sketch drawing claiming a matter-of-right ability to construct 26 units. This figure may be overstated, in that the sketch shows two R-1-B lots impermissibly extending into R-5-A zoned land. Assuming for discussion purposes that the claimed matter-of-right entitlement is **numerically** correct, the Applicant is proposing 37 dwelling units, which is a **42% increase** in the number of dwelling units from the 26-unit entitlement. Canal View believes this 42% increase is the valid and proper assessment of the “density” impact of PUD approval of the project, in comparison to matter-of-right development.

The Applicant’s argument that density is reduced is predicated on the claim that, as a matter-of-right, it may build to a lot occupancy of 40%, and it is only building to a lot occupancy of less than 30%, for a reduction of at least 25%.⁸ Similarly, the Applicant argues that the FAR of the PUD, at .98, is significantly below the FAR that could be achieved as of right separately in the R-1-B and R-5-A zoned portions of the Property. Wholly apart from the numerical correctness of the Applicant’s numbers, the relevant point is that neither lot occupancy nor FAR is the chosen quantitative measure of “density” under the Zoning Regulations, which do not attempt to define or quantify that

⁸ Canal View’s quantitative difficulties with accepting this claim are set forth in part II.2.b., above.

term. Indeed, the Applicant's argument presents density as an amalgam of different quantitative measures, using whatever indicia appears most favorable to its claim of reduced density.

In the absence of a statutory definition, the Commission should reject the Applicant's approach and stick to fundamentals, starting with the ordinary English definition of the term "density." It means, as pertinent here, "the quantity per unit area," and the definition goes on to give as an example the following: "as the average number of units per space unit . . . <a housing [density] of 10 houses per acre>." Webster's New Collegiate Dictionary 301 (1979). Further confirmation that the Zoning Regulations should apply the common English meaning of the term is found in Exhibit 3, an excerpt from the District of Columbia Comprehensive Plan. It labels and depicts both low density and moderate density development in the District of Columbia, without defining those terms quantitatively. The text and the picture associate "low density" with single family homes. But the lot coverage and FAR of the homes in the picture appear to be the approximate equal of the row houses depicted as "moderate density" in the adjacent photograph. Additional photographs of medium and high density residential units quite clearly depict a steadily increasing number of dwelling units per acre, even if the quantitative boundaries between these terms remains unspecified.

The Commission can also apply common sense and its own experience in concluding that what brings increased development value to the land in question, more than any other factor, including lot occupancy and FAR, is an increase in the number of dwelling units allowed on that fixed amount of land. The Commission, in administering the PUD provisions, is charged with the responsibility of ensuring that the project

amenities and public benefits associated with the PUD development are commensurate with bestowing this increase in value on the Property owner. Further, the Commission's common sense and experience will tell it that the external impacts of a development on the surrounding neighborhood are much more likely to be directly proportional to the number of dwelling units than they are to a numerical increase in lot occupancy or FAR. For example, if the PUD were for overall R-1-B rezoning and 24 single-family houses with lot occupancy and FAR equivalent to what the Applicant seeks in 37 row houses, 37 families in the houses proposed are likely to contribute more significantly to the worsening traffic situation on MacArthur Boulevard than 24 families in slightly larger dwellings.

In short, when the Commission undertakes to weigh the project amenities and public benefits of the project against the degree of development incentives requested, it should not be misled into thinking that the Applicant is actually proposing a decrease in density. To the contrary, very substantial public benefits ought to be required in order to justify what is in reality a proposed 42% increase in density. In that weighing, the Commission should keep in mind the OP appraisal in its Final Report (at p. 1):

OP finds the amenity package to be exceptionally light and many of the items listed as amenities are not fully detailed, the level of commitment is unclear, and does not appear to be the expected quality and practice for a development such as this.

CONCLUSION

For the foregoing reasons, the Commission should approve the application only if it is appropriately and satisfactorily modified as requested in the conditions proposed by Canal View.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David W. Brown", written over a horizontal line.

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

February 2, 2009

**CANAL VIEW HOMEOWNERS ASSOCIATION
4602 LAVEROCK PLACE, NW, WASHINGTON, DC 20007**

Robert E. Tucker, Jr.
President
Canal View Homeowners Association
4602 Laverock Place, NW
Washington, DC 20007-2544
February 1, 2009

Mr. David W. Brown
Knopf & Brown
401 East Jefferson Street, Suite 206
Rockville, Maryland, 20850

Dear Mr. Brown:

This letter is to confirm that the Canal View Homeowners Association has retained you as our legal counsel with regard to the District of Columbia Zoning Commission Case Number 08-21 (Athena Group, LLC – Consolidated Review of a Planned Unit Development and Related Map Amendment @ Square 1356).

You will be representing the Canal View Homeowners Association in the aforementioned case, and in particular at the continuation of the Zoning Commission Hearing regarding said case, to be held on February 12th, 2009.

The Homeowners Association acknowledges that any statement or comment which you make on our behalf will be binding on the Association.

Sincerely,



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

Exhibit 1

CANAL VIEW HOMEOWNERS ASSOCIATION CONDITIONS
Regarding PUD Application Case No. 08-21

CONDITIONS

1. That any approval by the Zoning Commission of the application be granted only to The Athena Group, LLC and be made nontransferable;
2. Building Number Three 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 the U. S. Army Corps of Engineers and the District of Columbia's Department of the Environment, the entire delineated wetland area shall be reflagged. 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 and each unit shall have two parking spaces;
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 percent for the entire project;
9. By means of a covenant on the title to the land, the proffered green spaces (i.e., the central plaza, butterfly garden, rain garden and walking path), identified by dimensions and GPS and having a combined total of 13,500 square feet, shall be protected in perpetuity as open space and non-developable land;
10. That the developer shall not be limited to his design that includes a fountain in the central park;
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.
12. That the Canal View HOA shall have input to the Canal Parc Construction and Traffic Management Plans.

Exhibit 2

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:

- a. Provisions that Athena will pay for legal assistance to the Canal View Homeowners Association for preparation and/or review of such legal agreements(s).
- b. 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).
- c. 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.

In addition, amenities shall include:

- a) An additional 5,000 square feet of green space on site shall be protected and open to the public;
- b) Hiring a landscape architect to design and oversee implementation of the beautification of lower MacArthur Boulevard – that is the area along MacArthur Boulevard from its intersection with Foxhall Road to its intersection with Q Street; and
- c) Contributions to organizations that improve the quality of life in the Palisades and will enhance the project.

Future Land Use Map and Categories ²²⁵

Purpose of the Land Use Map

The Future Land Use Map is part of the adopted Comprehensive Plan and carries the same legal weight as the Plan document itself. The Map uses color-coded categories to express public policy on future land uses across the city. Preparation of this map is explicitly required by DC Law; its purpose is to "represent the land use policies set forth in the proposed Land Use Element," using "standardized colors for planning maps." (1-246, D.C. Code). ^{225.1}

Definitions of Land Use Categories

Residential Categories

Four residential categories appear on the Future Land Use Map, as follows: ^{225.2}

Low Density Residential: This designation is used to define the District's single family neighborhoods. Single family detached and semi detached housing units with front, back, and side yards are the predominant uses. The R-1-A, R-1-B, and R-2 Zone Districts are generally consistent with the Low Density Residential land use category, although other zones may apply. ^{225.3}

Moderate Density Residential: This designation is used to define the District's row house neighborhoods, as well as its low-rise garden apartment complexes. The designation also applies to areas characterized by a mix of single family homes, 2-4 unit buildings, row houses, and low-rise apartment buildings. In some of the older inner city neighborhoods with this designation, there may also be existing multi-story apartments, many built decades ago when the areas were zoned for more dense uses (or were not zoned at all). The R-3, R-4, R-5-A Zone districts are generally consistent with the Moderate Density Residential category; the R-5-B district and other zones may also apply in some locations. ^{225.4}

Medium Density Residential: This designation is used to define neighborhoods or areas where mid-rise (4-7 stories) apartment buildings are the predominant use. Pockets of low and moderate density housing may exist within these areas. The Medium Density Residential designation also may apply to taller residential buildings surrounded by large areas of permanent open space. The R-5-B and R-5-C Zone districts are generally consistent with the Medium Density designation, although other zones may apply. ^{225.5}

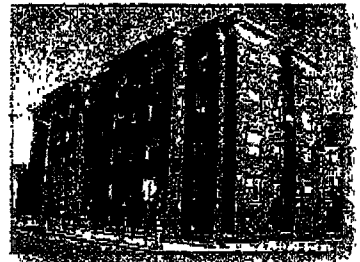
High Density Residential: This designation is used to define neighborhoods and corridors where high-rise (8 stories or more) apartment buildings are the predominant use. Pockets of less dense housing may exist within these areas. The corresponding Zone districts are generally R-5-D and R-5-E, although other zones may apply. ^{225.6}



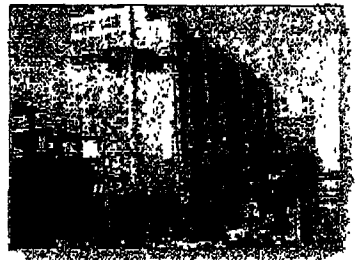
Low Density Residential



Moderate Density Residential



Medium Density Residential



High Density Residential

Certificate of Service

I certify that the foregoing document was delivered by hand delivery, first-class mail, or email on February 2, 2009, to the following addresses:

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R. E. Tucker, Jr