Tab A A Variance Application from Section 1402.2 to Address the Requested Increase in FAR.

Introduction:

The following addresses the question of whether a variance is needed for the Planned Unit Development to include the overall gross square footage sought. As noted earlier, Applicant concludes as a matter of law that no variance is needed.

However, the materials herein also include a formal application for a variance, with supporting materials, should the Commission reach the conclusion that a variance is, in fact, needed. Applicant submits this, as suggested by the Secretary to the Commission at its December 13, 2004 meeting, "without prejudice."

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Analysis:

Bulk v. FAR

The C-2-B District permits a maximum floor area ratio ("FAR") of 3.5, of which 1.5 is allowed for permitted uses other than an apartment house or other residential use. 11 DCMR § 771.2. Further, section 2405.3 of the Zoning Regulations provides that the FAR of a planned unit development ("PUD") in the C-2-B District cannot exceed a total of 6.0, of which no more than 2.0 can be for commercial uses. Moreover, section 2405.3 provides that the Commission may authorize an increase of not more than five percent in the maximum FAR, provided the increase is essential to the successful functioning of the project and consistent with the purpose and evaluation standards of the PUD regulations. Thus, the Commission has the authority to authorize a gross floor area of up to 2.10 for non-residential projects in the C-2-B District.

The PUD Site will be developed to a total aggregate density of 1.76 FAR, or 74,913 square feet of gross floor area. However, excluding proposed parking and existing/retained loading areas yields an FAR of 1.57, or 66,858 square feet of gross floor area that will actually be utilized by the project's principal uses.

This relief can be granted without violating section 1402.2 of the Zoning Regulations, which provides that "no Planned Unit Development shall exceed the matter-of-right height, bulk, and area requirements of the underlying district." 11 DCMR § 1402.2.

- The text of the Zoning Regulations demonstrates that there is a clear difference between "floor area ratio," which is a measurement of density, and "bulk," which is a measurement of volume.
- Moreover, well-established principles of statutory interpretation and the provisions of the Zoning Regulations lead to the conclusion that "floor area ratio" and "bulk" cannot be used interchangeably.
- Finally, a comparison of the pre-1958 Zoning Regulations reveals that neither FAR nor density were concepts employed prior to 1958. The prior regulations focused exclusively on height, stories, percentage of lot occupancy, and yard and court requirements consistent with the stated purpose of those regulations: "to establish height, area, and use districts."

Accordingly, section 1402.2 of the Zoning Regulations cannot be read to include FAR since FAR is not a measurement of bulk.

1. The Definitions of "Floor Area Ratio" and "Bulk" Demonstrates The Terms Have Different Meanings

Section 199.1 of the Zoning Regulations provides that "when used in this title [the entirety of the Zoning Regulations], the terms and phrases defined in section 199.1 **shall** have the meanings ascribed to them when used in the Zoning Regulations" (emphasis added). 11 DCMR § 199.1. Moreover, pursuant to section 199.2(g), words not defined in section 199.1 "**shall have** the meanings given in *Webster's Unabridged Dictionary* ("Webster's", emphasis added). 11 DCMR § 199.2(g). The Zoning Regulations specifically provide that **"the word 'shall' is mandatory and not discretionary"** (emphasis added). 11 DCMR § 199.2(d). See also, Leonard v. District of Columbia, 801 A.2d 82, 84-85 (D.C. 2002) ("the normal rule is that verbs such as 'must' or 'shall' denote mandatory requirements").

Accordingly, one must first look to the ***Zoning Regulation's*** definitions of "floor area ratio" and "gross floor area," and ***Webster's*** definition of "bulk" to ascertain the difference in their meanings.

The ***Zoning Regulations*** define the terms **"floor area ratio"** and **"gross floor area"** as follows:

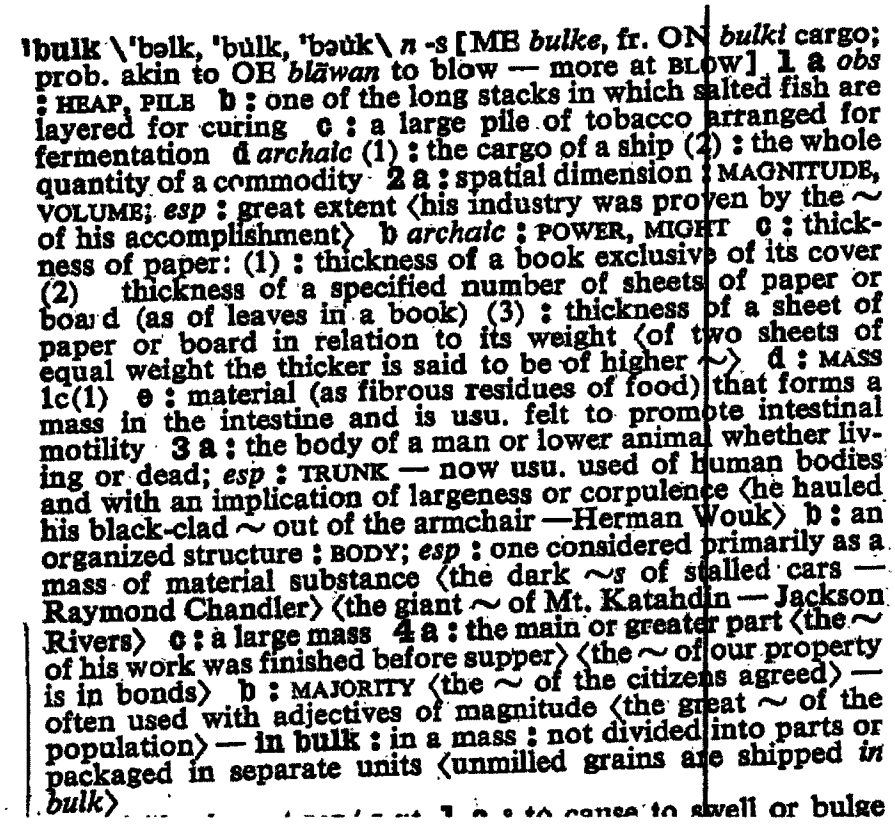
Floor area ratio	a figure that expresses the total **gross floor area** as a multiple of the area of the lot. This figure is determined by dividing the gross floor area of all buildings on a lot by the area of that lot.
Gross floor area	the sum of the gross horizontal areas of the several floors of all buildings on the lot, measured from the exterior faces of exterior walls and from the center line of walls separating two (2) buildings. The term "gross floor area" shall include basements, elevator shafts, and stairwells at each story; floor space used for mechanical equipment (with structural headroom of six feet, six inches (6 ft., 6in.), or more); penthouses; attic space (whether or not a floor has actually been laid, providing structural headroom of six feet, six inches (6 ft., 6in.), or more); interior balconies; and mezzanines. The term "gross floor area" shall not include cellars and outside balconies that do not exceed a projection of six feet (6 ft.) beyond the exterior walls of the building.

11 DCMR § 199.1.

When read in light of the definition of "gross floor area," it is clear that "floor area ratio" as used in the Zoning Regulations is a calculation that measures **density** within a specific volume of space. See also, Cathedral Park Condominium Committee v. District of Columbia Zoning Commission, 743 A.2d 1231, 1236 ftnt.2 (D.C. 2000) ("[f]loor area ratio is a density restriction").

The term "bulk" is not defined in the Zoning Regulations. The Zoning Regulations provide that terms that are not defined within its provisions "**shall** have" the meanings given in ***Webster's Unabridged Dictionary*** (§199.2(g)) and provides no leeway in this in that the same regulations also declare that "The word '**shall**' is mandatory and not discretionary" (§199.2(d)). Thus, one must look to ***Webster's*** to determine the meaning of "bulk."

The relevant section of ***Webster's*** defines "bulk" as a "spatial dimension : MAGNITUDE, VOLUME." See Excerpts from *Webster's Unabridged Dictionary*, reproduced below.



bulk \'bəlk, 'bůlk, 'bəůk\ *n* -s [ME *bulke*, fr. ON *bulki* cargo; prob. akin to OE *blāwan* to blow — more at BLOW] **1 a** *obs* : HEAP, PILE **b** : one of the long stacks in which salted fish are layered for curing **c** : a large pile of tobacco arranged for fermentation **d** *archaic* (1) : the cargo of a ship (2) : the whole quantity of a commodity **2 a** : spatial dimension : MAGNITUDE, VOLUME; *esp* : great extent ⟨his industry was proven by the ~ of his accomplishment⟩ **b** *archaic* : POWER, MIGHT **c** : thickness of paper: (1) : thickness of a book exclusive of its cover (2) thickness of a specified number of sheets of paper or board (as of leaves in a book) (3) : thickness of a sheet of paper or board in relation to its weight ⟨of two sheets of equal weight the thicker is said to be of higher ~⟩ **d** : MASS 1c(1) **e** : material (as fibrous residues of food) that forms a mass in the intestine and is usu. felt to promote intestinal motility **3 a** : the body of a man or lower animal whether living or dead; *esp* : TRUNK — now usu. used of human bodies and with an implication of largeness or corpulence ⟨he hauled his black-clad ~ out of the armchair —Herman Wouk⟩ **b** : an organized structure : BODY; *esp* : one considered primarily as a mass of material substance ⟨the dark ~s of stalled cars — Raymond Chandler⟩ ⟨the giant ~ of Mt. Katahdin — Jackson Rivers⟩ **c** : a large mass **4 a** : the main or greater part ⟨the ~ of his work was finished before supper⟩ ⟨the ~ of our property is in bonds⟩ **b** : MAJORITY ⟨the ~ of the citizens agreed⟩ — often used with adjectives of magnitude ⟨the great ~ of the population⟩ — **in bulk** : in a mass : not divided into parts or packaged in separate units ⟨unmilled grains are shipped *in bulk*⟩ ... : to cause to swell or bulge

Thus, "bulk" relates to the overall volume of a structure and is a cubic attribute. The Zoning Regulations govern bulk by a combination of vertical limits on height/stories, and horizontal requirements involving lot size and frontage, lot occupancy, and a number of restrictions on side and rear yards along with minimum widths and areas of "open" and "closed" courts (courtyards) in the various zone districts.

Since FAR is defined as a measurement of density, and bulk is defined as a measurement of volume, combined with the fact that FAR and bulk are regulated by separate provisions of the Zoning Regulations, it is clear that section 1402.2 cannot be read to include FAR.

2. Statutory Interpretation Principles Establish That "Floor Area Ratio" and "Bulk" Cannot Be Used Interchangeably

Basic principles of statutory interpretation lead to the conclusion that the term "floor area ratio" is not synonymous with the term "bulk." It is well-established that where a word has a fixed or defined meaning, a statute must be interpreted in accordance with such definition. See Bates v. District of Columbia Bd. Of Elections & Ethics, 625 A.2d 891, 893-95 (D.C. 1997) (look to definitions of words to determine their limits); Berkley v. United States, 370 A.2d 1331, 1333 (D.C. 1977) (terms defined in a statute should be construed in accordance with those definitions). As discussed above, the terms "floor area ratio" and "bulk" are defined separately in the Zoning Regulations and have different meanings. Thus, one cannot interpret section 1402.2, which specifically states "bulk," to be read as including "floor area ratio" since such terms have separate, defined meanings.

Moreover, the Zoning Regulations recognize that FAR/density and bulk have separate meanings and are different types of measurements. For example, the term "District" is defined in section 199.1 of the Zoning Regulations as follows: "sections of the District of Columbia delineated on the Zoning Map governing the use of land and the use, ***density***, ***bulk***, and height of buildings or other structures are the same." 11 DCMR § 199.1 (emphasis added). This separate use of the terms "density," which is derived from FAR, and "bulk" further demonstrates that they are not interchangeable and have distinct meanings.

Moreover, if the Commission intended the term "bulk" to be included in the definition of "floor area ratio," or vice versa, the natural and obvious way to do so would have been to simply include the word "bulk" in the definition set-forth for "floor area ratio" in section 199.1. See District of Columbia v. 313 M Street, 633 A.2d 820, 821-23 (D.C. 1993). It is equally well-established that when a statute or regulation makes express mention of one thing, exclusion of others is implied, and that when it is intended for certain terms to be included in a section, the natural and obvious way to do so would have been to include such terms. See School St. Assoc. Ltd. Partnership v. District of Columbia, 764 A.2d 798, 800, 807-8 (D.C. 2001) (if section of statute does not include certain terms, even though such terms are included in other sections of the same statute, the logical conclusion is that such exclusion was deliberate and meaningful (*expressio unius est exclusio alterius*)); McCray v. McGee, 504 A.2d 1128, 1130 (D.C. 1986) (basic rule of statutory construction that when a legislature makes express mention of one thing, the exclusion of others is implied, because there is an inference that all omissions should be understood as exclusions). Further, if a term is not included in a section, it is beyond the proper scope of statutory interpretation to read such term into a section. See Carter v. State Farm Mut. Auto. Ins. Co., 808 A.2d 466, 471-72 (D.C. 2002) (courts should not read into statute language that is not there); Bates v. District of Columbia Bd. Of Elections & Ethics, 625 A.2d 891, 893-95 (D.C. 1997) (courts cannot read terms into a statute).

The fact that the Commission defined the term "floor area ratio," yet excludes the term "bulk" form such definition is further evidence that the Commission did not intend for the term "bulk" to be included within the definition of "floor area ratio" or used as interchangeable terms. Moreover, section 1402.2 lists "bulk," but does not include FAR or density. Had the Commission intended to include FAR or density in section 1402.2, it would of done so, or must initiate a text amendment proceeding to revise the section. However, the Commission cannot now read the terms "floor area ratio," "FAR," or density into section 1402.2.

3. Conclusion

Based on the above analysis, Applicant concludes that the limitations that apply to "matter-of-right height, bulk, and area" requirements as set forth in §1402.2 do not extend into the realm of density in general or floor area ratio in particular whatsoever.

Nevertheless, as suggested by the Secretary to the Zoning Commission to the Commission at its regular monthly meeting of December 13, 2004, Applicant is submitting an Application for a Variance "without prejudice."

Those materials appear at Tab V ("Variance"), below.