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March 1, 2012

Ms. Sara Bardin
Director, Office of Zoning
441-4th Street, N.W. - Suite 210-S
Washington, DC 20001

Re: Response to Post-Hearing Submissions & Findings of Fact & Conclusions of Law
Zoning Commission Case No. 10-28 (901 Monroe Street, LLC, Square 3829)

Dear Ms. Bardin:

This letter includes the documents due by 3 PM on March 1, 2012 from the "200-Footers Group" Party in Opposition in Zoning Commission Case No. 10-28 (901 Monroe Street, LLC – Consolidated PUD & Related Map Amendment, Lots 3, 4, 11, 22, & 820, Square 3829). The enclosed documents include:

- 8-page Response to Post-Hearing Submissions
- 1-page Attachment (referenced on p. 6 of the Response to Post-Hearing Submissions)
- 6-page Findings of Fact and Conclusions of Law

If any additional information is needed, Barbara Kahlow can be reached during the day on (202) 965-1083.

Sincerely,

Barbara F. Kahlow Carolyn C. Steptoe

Enclosures

cc Paul Tummonds for the Applicant
Steve Cochran, OP
Janae Grant, ANC-5A Chair
Caroline Petti, BNCA President

ZONING COMMISSION
District of Columbia
CASE NO. 10-28
EXHIBIT NO. 324

ZONING COMMISSION
District of Columbia
CASE NO.10-28
EXHIBIT NO.324

200-Footers Group's Response to Post-Hearing Submissions
in ZC No. 10-28, 901 Monroe Street PUD & Upzoning in Square 3829

This document constitutes the 200-Footers Group's response to the post-hearing submissions from: (1) the Applicant, (2) the Office of Planning (OP), and (3) the Brookland Neighborhood Civic Association (BNCA).

Applicant's Post-Hearing Submission

The Commission asked the Applicant to meet with: (a) the Brookland Neighborhood Civic Association (BNCA) Party in Support and any 200-Footers who are Supporters, including those under contingent agreements with the Applicant; and (b) the 200-Footers Group Party of 15 addresses in Opposition. The meeting with (a) took place on 2/13/12 and was only attended by one person. The one attendee was not the BNCA President or a BNCA Officer and he also was not a 200-Footer. Barbara Kahlow had wanted to attend this meeting as an observer but was unable to do so since the Applicant scheduled it for a time when she had a pre-disclosed scheduling conflict.

The meeting with (b) took place on 2/20/12 and was attended by 12 individuals in the 200-Footers Group, including ten 200-Footers and their two designated representatives (Mrs. Kahlow and Commissioner Carolyn Steptoe), two representatives from the Applicant (David Roodberg and Paul Tummonds), and one representative from the Office of Planning (OP) (Steve Cochran). As requested by the Commission, the meeting with (b) addressed both the weak Amenities proffer and the weak Construction Management Agreement (CMA) proffer, i.e., it did not also address: (i) upzoning to C-2-A versus C-2-B <u>or</u> (ii) 60% lot occupancy under C-1 and C-2-A versus the Application's proposed 75% lot occupancy. The 200-Footers Group continues to believe that a Map Amendment to C-2-A instead and 60% lot occupancy instead would mitigate some of the adverse effects, especially on the 9th Street and 10th Street rowhouses. In any case, the 2/20 meeting was productive, as the 200-Footers Group had recommended to the Commission.

After these meetings, the Applicant was asked to submit: (I) a revised Amenities package and with more detail; (II) a revised CMA; (III) a side-by-side comparison of the aerial perspective displayed during the 200-Footers Group's 2/2/12 testimony and an updated version and additional neighborhood photos; and (IV) "a massing with envelope" C-2-A visual. Unfortunately, the Applicant chose not to submit (IV). Below is discussion of (I), (II), and (III).

Before turning to this discussion, the 200-Footers Group wants to again emphasize its objection to allowing moving van trucks using and parking on the surrounding residential streets (9th, 10th, Lawrence, and Kearney). The Applicant's post-hearing submission states, "In response to DDOT comments, the Applicant agreed to restrict larger **retail** trucks from coming to the site" (2/23/12, p. 4, emphasis added). The 200-Footers Group strongly recommends that, **if the Commission approves the project, it include a condition in its Order** restricting both retail trucks and moving van trucks from using and parking on the surrounding residential streets (9th, 10th, Lawrence, and Kearney).

I. Amenities

Tab C in the Applicant's 2/23/12 post-hearing submission is its revised Amenities Package. The revision only includes a few small changes and is still **completely unacceptable** to the 200 Footers Group both in terms of the total magnitude of dollars for non-project-specific public benefits/amenities **and** the specific components in the proffer. In fact, $205,000 in non-project-specific public benefits/amenities as a *quid pro quo* would **not** be acceptable for any PUD project in Wards 2 and 3 relative to the proposed huge increase in building rights (**see 200-Footers Group's Finding of Fact #9**). Why should it be acceptable for a Ward 5 PUD project? In addition, the specific proffers are mostly inconsistent with the Commission's current policy not to accept Applicant checks to non-profit organizations instead of Applicant purchased/supplied hard amenities (e.g., trees, benches, equipment). This chart provides comparison information:

Public Benefit/Amenity	Old Amount	New Amount	Comment
replace sidewalk, curbs & gutters in rest of Square + repave North-South alley	estimated at $25,000 (part of $95,000 for replacing sidewalks, curbs & gutters around the project)	estimated at $25,000	no change
Academy of Hope for career assessment	$50,000	0	**eliminated**
Byte Back for computer literacy+	$25,000	$25,000	see discussion (a) below about possible organizational move
Community Foundation for National Capital Region for no-interest loans for small businesses	$50,000	$50,000	see discussion (b) below about corrections needed to geographic area
Dance Place	$25,000	$25,000	see discussion (c) below about serious conflict-of-interest & of no benefit to adversely impacted
Turkey Thicket Recreation Center playground equipment	$25,000	$25,000	see discussion (d) below about problems with DC's acceptance of $ & of no benefit to adversely impacted
Washington Area Community Investment Fund for 12th St. facades	0	$25,000	**new**
Security cameras around the rest of Square 3829	0	?	**expansion** but no change from $40,000 estimate in 12/29/11 proffer
$5,000/each to six 10th Street rowhouses for hardscape/landscape improvements	0	$30,000	**new** but $5,000 per owner is not sufficient for meaningful improvements
TOTAL non-Project Specific	$200,000	$205,000	

In terms of elaboration:

(a) Our understanding is that Byte Back will be moving from its nearby Monroe Street location and may no longer be in the new ANC-5B boundaries (which will include the Square 3829 site), effective 1/1/13; and, the dollars would be an undesirable direct check from the Applicant to a non-profit organization instead of preferred Applicant purchased/supplied hard and more permanent amenities (e.g., trees, benches, equipment);

(b) Tab C, p. 2 in the Applicant's 2/23/12 post-hearing submission indicates that the boundaries for the loans will be small businesses in the following area: "Michigan Avenue, NE to the north; South Dakota Avenue, NE to the east; Rhode Island Avenue NE to the south; and 9th street NE to the west" – this area is not the exact boundaries of the new ANC-5B in which the Square 3829 project will be as of 1/1/13, i.e., the boundaries need to be changed to be identical with the new ANC-5B boundaries;

(c) In the 2/20 meeting, the 200-Footers Group objected to any amenity dollars to Dance Place for multiple reasons, including: (1) as Don Padou, the only community attendee at the Applicant's Commission-directed 2/13/12 post-hearing meeting and as a 1/19/12 witness in Support, stated,

> "The gift to Dance Place is particularly troubling. One of the key members of the Developer's team, Bo Menkiti, is on the board of directors for Dance Place. The son of another key member, Cyril Crocker, was just appointed to a new position at Dance Place. An amenities package is not an opportunity for a developer to provide a tax-free gift to his own charity and call it an amenity. The gift to Dance Place is the worst sort of self dealing and the Commission should not condone such action" (p. 2, Exhibit #286, emphasis added) –

in addition, BNCA President Caroline Petti is Secretary for the Board of Dance Place: http://www.danceplace.org/about/board-of-directors/, posing another troubling self-dealing situation; (2) the dollars would not benefit the directly impacted community which is located on the other side of the railroad tracks; and (3) the dollars would be an undesirable direct check from the Applicant to a non-profit organization instead of preferred Applicant purchased/supplied hard and more permanent amenities (e.g., trees, benches, equipment).

(d) In the 2/20 meeting, the 200-Footers Group objected to any amenity dollars to Turkey Thicket for multiple reasons, including: (1) the undated letter from the DC Department of Parks and Recreation, which the Applicant submitted during the 2/2/12 hearing, stated,

> "Our process would include the Developer working with our Capital Projects team and the community to develop a plan for specific uses of the funds" (i.e., this is proof positive that this component is not yet ripe for funding) and "If the donation is deemed to be legally sufficient by OPGS" (i.e., this component is not yet ripe for funding and may never be deemed legally sufficient) (Exhibit 313);

(2) the dollars would not benefit the directly impacted community; (3) the dollars would be an undesirable check from the Applicant to a DC agency instead of Applicant purchased/ supplied hard amenities; and (4) Turkey Thicket is not located near the Square 3829 project site.

II. Construction Management Agreement (CMA)

Tab B in the Applicant's 2/23/12 post-hearing submission is its revised CMA. The revised version is definitely an improvement but it is still unacceptably missing the two most critical provisions to the 200 Footers Group: (a) any enforcement provision with penalties, and (b) critical protections for irreparable damage.

Enforcement

In the 200-Footers Group's testimony (Attachment D, p. 7, #21 in Kahlow testimony, Exhibit 296B), the 200-Footers Group included an essential enforcement provision with penalties to deter objectionable violations, such as early or late construction work noise, early construction truck queuing or idling, and moving truck use of and parking on the residential streets. As the 200-Footers Group testified on 2/2/12, recently approved PUDs on the other side of the railroad tracks regularly violate similar protective conditions in their CMAs. This omission justifies inclusion of an enforcement provision with penalties in ZC No. 10-28.

During the 2/20/12 meeting, the 200-Footers Group proposed a possibly-more-acceptable Applicant enforcement provision which would include penalty dollars to The ARC of DC. Specifically, in the 200-Footers Group's 2/22/12 post-meeting e-mail to the Applicant, the recommended enforcement provisions stated, "repeat violations being penalized by penalty $ for each offense made out to the non-profit The ARC of DC (http://www.arcdc.net/)." Nonetheless, the Applicant's revised CMA includes no enforcement provision.

Please note that the Applicant's post-hearing submission states, "While the 200 Footers have requested that a system of fines be established to assure compliance with the Construction Management Agreement, the Applicant believes that including these provisions as conditions of the Zoning Commission's Order in this case **is an appropriate mechanism** to assure compliance" (2/23/12, p. 2, emphasis added). The 200-Footers Group strongly recommends that, **if the Commission approves the project, it include a condition in its Order** of an enforcement provision with penalties for violations of the CMA.

Irreparable Damage

In addition, the 200-Footers Group included essential protective provisions for irreparable damage (Attachment D, pp. 5-6, #12 in Kahlow testimony, Exhibit 296B), such as

> "If damage occurs from the construction, the Applicant agrees to pay in full the current market replacement value of any home. The Applicant will take out an Insurance Bond and establish a third party escrow account to ensure timely and full restitution of any damage claims" (p. 5).

However, the Applicant's revised CMA does not include either an Insurance Bond or a third party escrow account. During the 2/20/12 meeting, there was a discussion to instead add the

names of the six Square 3829 rowhouse owners on the Applicant's insurance policy but this change was not included in the revised CMA.

Other CMA Problems

Lastly, there are other problems with the Applicant's **Tab B** revised CMA, such as:

- p. 1, #2, Traffic and Construction Control Plan – remove "subject to DDOT approval" in the sentence beginning "All ingress and egress for the site will be from Monroe Street or up to the proposed East-West alley between 9th and 10th Streets at the northern end of the site" since the 200-Footers Group opposes any truck use of residential streets South of the East-West alley on 9th and on 10th Streets and any use of Lawrence Street; remove "waiting for more than 15 minutes" since any queuing on residential streets is unacceptable.

- p. 3, #5, Site Management, No Disruption of Services to Property Owners in Square 3829 – add a provision to ensure no cost to the 10th Street rowhouse owners.

- p. 4, #9, Work Hours and Workers – the Applicant is silent about construction work on holidays, which should not be allowed; therefore, add "or holiday" after "Sunday" in the sentence to read "No Sunday or holiday work hours will be utilized."

- p. 5, #10, Communication – change "a single [Neighborhood] contact person" to "2 [Neighborhood] contact persons," including one for the 9th Street owners and one for the 10th Street owners.

- #12, Pre-Construction Survey of Adjacent Structures and Responsibility for Damage to Adjacent Properties – see discussion above for additional critical protective language.

- pp. 6-7, #15, Noise – the 200-Footers Group wants the same protection as in CMA for the Square 37 West End Library PUD (ZC No. 11-12) in which existing townhouses in the Square would be dwarfed and adversely affected, i.e., change 80 db. on p. 7 to 60 db., as on p. 6.

- p. 7, missing #21, Enforcement – see discussion above for critical protective language.

III. Aerial Comparisons

Tab D in the Applicant's 2/23/12 post-hearing submission aerial as of 2/23/12 – like its aerial for 11/16/10 which the 200-Footers Group used as display during its 4-person testimony panel because an updated version was not previously provided – clearly shows the vast disparity between the 2-story rowhouses and the 6.5-story proposed building. First, please note no change to the building height at 61'. Second, please note no change or setbacks on the 9th Street side, thereby having the rowhouse residents on the West side of 9th face a wall which would block their air and light during critical periods of daylight. Third, the added setbacks on 10th and Lawrence Streets do not significantly lessen the blocked air and light in bedrooms, living rooms, etc. during critical periods of daylight for the rowhouses on the West side of 10th Street and the single family homes on the South side of Lawrence Street.

OP's Post-Hearing Submission
The Commission asked OP to clarify its position that the Application is "not inconsistent" with the DC Comprehensive Plan.

Mrs. Kahlow (resume attached) is a recognized expert in the regulatory process, having retired as Staff Director for the House Government Reform Committee's Subcommittee on Regulatory Affairs, the only Congressional Committee devoted to Regulatory Policy. Mrs. Kahlow authored House Report #106-1009, "Non-Binding Legal Effect of Agency Guidance Documents" (http://www.gpo.gov/fdsys/pkg/CRPT-106hrpt1009/pdf/CRPT-106hrpt1009.pdf). It was the first comprehensive exploration of the difference in legal effect between codified laws, codified regulations, and non-codified guidance documents. This information is provided as a preface to the 200-Footers Group's explanation of the differences between: (a) codified DC law (e.g., the DC Comprehensive Plan's Policy UNE-1.1.2 stating that Upper Northeast Area development "should be consistent with the designations on the Future Land Use Map"); (b) codified DC regulations (e.g., DC's zoning rules); and (c) non-codified guidance (e.g., the Small Area Plans, which are authorized by law and approved by the DC City Council but not codified).

A specific provision in a codified DC law or a codified DC regulation is not discretionary and, thus, cannot be waived unless that DC law or regulation includes a specific waiver provision. In addition, unless there is a specific codified provision allowing a deciding official or body (e.g., such as the DC Zoning Commission) to consider the law as a whole without regard to specific provisions, no specific provision of law can be ignored. Therefore, OP's assertion that the Zoning Commission can determine that a project (i.e., an Application) is "not inconsistent" with the Comprehensive Plan as a whole is not legally supportable. OP claimed, "A project, including benefit proffers for a PUD, must be evaluated within the context of the full document to determine whether it would not be inconsistent with the Comprehensive Plan" (OP 1/9/12, p. 5). Imagine if the US Supreme Court could ignore a specific enacted legislative provision by reviewing a statute as a whole. Additionally, a provision in guidance is advisory only and cannot be cited as a basis to ignore a specific legislative provision.

As stated in Mrs. Kahlow's testimony on behalf of the 200-Footers Group (see pp. 2-3, Exhibits 296, 296A & 296B, the 2/2/12 transcript, and indented text below), the site is largely zoned R-2 (4 of the 5 lots completely and much of the 5th lot) with a bit of C-1 (the rest of the 5th lot). The Future Land Use Map shows that more than three-fourths of the site should, in the future, be no more than "Low Density Residential." Also, on 2/2/12, Mrs. Kahlow pointed to OP's corrected page 6 in Exhibit 13. This correction, made at the request of the Office of Zoning Director, revealed that OP had presented inaccurate information to the Commission on lot occupancy under C-2-A Matter-of-Right and C-2-A PUD.

> "DC's Comprehensive Plan Future Land Use Map ... indicates that the majority of the site is "Low Density Residential" and only a small part is a mixture of "**Low** Density Residential" and "**Moderate** Density Commercial" (i.e., not Medium or High Density). With respect to "Moderate Density Commercial," the Future Land Use Map states, "not exceed five stories in height." Even OP's 7/15/11 Revised Setdown Report acknowledges that only **part** of the site is "not inconsistent." OP states, "The proposed density and height are not inconsistent with what the Generalized Future Land Use Map

shows for over ½ of the applicant's site" (p. 4). In fact, as clear in **Attachment A**, well over ½[1] of the Applicant's site would be "inconsistent" with a C-2-B PUD upzoning and, thus, a C-2-B PUD for the entire site cannot legally be approved.

... **Attachment B** (from OZ's and OP's online mapping tools) reveals that the majority of the site (Lots 3, 4, 11, 820 and a large part of Lot 22, all of which are zoned R-2) cannot exceed Low Density Residential and the rest (the remainder of Lot 22) is a mixture of two categories, one of which has a maximum height of 40' and a maximum lot occupancy of 40%. Looking at **Attachments A and B**, you will see that OP's guestimate that the mixed area is "just over one-half of the site" (p. 3, 7/15/11 Revised Setdown Report) appears to be inaccurate and it is inconsistent with OP's three-quarters low density residential testimony at the Commission's 3/14/11 business meeting" (Kahlow testimony, pp. 2-3, Exhibits 296, 296A, & 296B).

In sum, OP concluded that only part of the site was "not inconsistent," i.e., the rest of the site was "inconsistent" and, thus, as a matter of law cannot be upzoned to a C-2-B PUD. Also, OP cited the following provision in the Comprehensive Plan, "The zoning of any given area should be guided by the Future Land Use Map" (OP 2/23/12, p. 2; §226(d)). In fact, DC law states, "The Future Land Use Map is part of the adopted Comprehensive Plan and carries the same legal weight as the Plan document itself" (1-246 DC Code, §225.1). And, as cited on p. 6 of this Response by the 200-Footers Group, DC law further provides that Upper Northeast Area development "should be consistent with the designations on the Future Land Use Map" (UNE-1.1.2, Compatible Infill, §2408.3). Lastly, OP pointed out, in its discussion of the Comprehensive Plan Maps, that the Generalized Policy Map "does not, however, make it clear that such [intensifying] development is preferred on the south side of Monroe Street" (OP's 2/23/12, p. 4).

OP's additional 2/23/12 arguments, including the following seven OP-cited provisions from the DC Comprehensive Plan, actually make the case for the 200-Footers Group's opposition:

- Policy IM-1.3.3, Consultation of Comprehensive Plan in Zoning Decisions, "Decisions on requests for rezoning shall be guided by the Future Land Use Map ... as well as Small Area Plans pertaining to the area proposed for rezoning" (p. 3).

- Policy LU-1.3.5, Edge Conditions Around Transit Stations, "Ensure that development adjacent to Metrorail stations is planned and designed to respect the character, scale, and integrity of adjacent neighborhoods ... building heights should 'step down' as needed to avoid dramatic contrasts in height and scale between the station area and nearby residential streets" (p. 6).

[1] During the Commission's 3/14/11 business meeting, Commissioner May asked OP, "So three quarters of the square is low density, residential on the land use map?" OP replied "yes" (p. 47). Later, Mr. May added, "the response that three quarters ... is designated for low density residential and, in fact, what's being proposed here is three quarters of the square being developed at moderate or more and mixed use. I mean, I'm not sure how I see how it fits ... I don't feel totally comfortable given that divergence from what we know of the Comprehensive Plan" (pp. 63-4).

- Policy LU-2.4.5, Encouraging Nodal Development, "Zoning and design standards should ensure that the height, mass, and scale of development ... respects the integrity and character of surrounding residential areas and does not unreasonably impact them" (p. 6).

- Policy LU-2.1.3, Conserving, Enhancing, and Revitalizing Neighborhoods, "Protect and conserve the District's stable, low density neighborhoods and ensure that their zoning reflects their established low density character ... protect low density character" (p. 7).

- Policy LU-2.1.8, Zoning of Low and Moderate Density Neighborhoods, "Discourage the zoning of areas currently developed with single family homes, duplexes, and rowhouses ... where such action would result in the demolition of housing in good condition and its replacement with structures that are potentially out of character" (p. 7).

- Policy LU-2.3.3, Buffering Requirements, "Ensure that new commercial development adjacent to lower density residential areas provides effective physical buffers to avoid adverse effects" (p. 7).

- Policy T-3.3.4, Truck Management, "Manage truck circulation in the city to avoid negative impacts on residential streets" (p. 10).

BNCA's Post-Hearing Submission

The Commission asked BNCA to submit its resolutions voted on by attendees: (a) 9/13/11 votes of 20 BNCA members, and (b) an enlarged vote of 100 attendees (due to last minute "new" BNCA members, including non-resident developer employees) on 12/13/11. BNCA's post-hearing submission did not include the requested text of the 12/13 unclear resolution for which attendees could not ask for full clarification. The only question posed on 12/13 pre-voting was by Mrs. Kahlow: "Why doesn't the resolution mention C-2-B?" The reply from Phil Blair, the BNCA Member who offered the resolution (and who testified 2/2/12 as an Opponent), was "the previous vote stands." No other clarifying questions were allowed and, thus, many voters were confused by the resolution.

Attachment

BARBARA F. KAHLOW
The Plaza #704, 800-25th Street, N.W.
Washington, DC 20037
(202) 965-1083; Barbara.Kahlow@verizon.net

Professional Experience

U.S. House of Representatives
Government Reform Committee
Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
Staff Director
January 1998 – January 2005

Author of Regulatory Right-to-Know Act, Truth in Regulating Act, Small Business Paperwork Relief Act, and other legislation. Author of two House Reports: Non-Binding Legal Effect of Agency Guidance Documents, and Problems with the Presidential Gifts System. Oversight of OMB's paperwork reduction and regulatory reform activities. Investigations of Clinton Administration policy initiatives, including federalism, two Department of Labor major rules (ergonomics and "Baby UI"), and global climate change.

Executive Office of the President
Office of Management and Budget
Office of Federal Financial Management
February 1982 - January 1998

Coordinated and authored government-wide policy development initiatives. Oversight of certain State and local regulatory relief initiatives, block grants, and crosscutting requirements (Federal "mandates"). Created the government-wide "common rule" mechanism for regulatory relief. Initiated government-wide development of program performance measures under the CFOs Act. Served as Executive Secretary of Domestic Policy Council Working Group on Federalism, Chief of Grants Management, and Chief of Policy Development Branch.

Office of Information and Regulatory Affairs
November 1972 - February 1982

Designed the specifications for and managed state-of-the-art computer systems for paperwork and regulations. Analyzed agency paperwork and regulatory proposals in crosscutting social areas.

Awards

Excellence in Programmatic Oversight Award (for my Federalism work) (1998); OMB Special Performance Awards (1982, 1989, 1996, and 1997), Quality Service Awards (1971 and 1994), OMB Division Award (1995), OMB Cash Award (1994); listed in Who's Who in America and The Almanac of the Unelected.

Volunteer Experience

Past: Appointed by Mayor as Ward 2 Member, Mayor's Task Force on Homelessness; Appointed (twice) by Council Member as Chair, Foggy Bottom-West End Team, DC City Council's Ward 2 Redistricting Task Force; Elected as Vice President and Board Member, Foggy Bottom Association; Served as Board Member, Cooperative Urban Ministry Center; Appointed as Vice Chair, House and Entertainment Committees, The University Club; Appointed to 2 Plaza Condominium Committees
Current: Secretary-Treasurer, West End Citizens Association; Secretary, Dress for Success Washington DC.

Other Memberships

DC Preservation League, Friends of the Kennedy Center, The Corcoran, The Phillips Gallery, Resident Smithsonian Associates, National Museum of Women in the Arts, Friends of the National Zoo, Washington Vassar Club, St. Patrick's Episcopal Church.

Education

B.A., Vassar College - with a 4-year NY State Regents Scholarship
Certified Professional Statistician (master's equivalent), National Center for Health Statistics, U.S. Public Health Service

200-Footers Group's Proposed Findings of Fact and Conclusions of Law
(ZC Case No. 10-28)

Application No. 10-28, 901 Monroe Street PUD and Map Amendment: Square 3829

HEARING DATES: January 19, 2012 and February 2, 2012

DECISION DATE: *[insert date]*

PRELIMINARY MATTERS:

The Commission received a request for "Party" status from the Brookland Neighborhood Civic Association (BNCA) in support and a request for "Party" status from the "200-Footers Group" (including 15 addresses) in opposition. On January 19, 2012, the Commission granted both requests.

FINDINGS OF FACT

1. On November 16, 2010, the 901 Monroe Street, LLC requested both Consolidated Review and Approval of a Planned Unit Development (PUD) and a Zoning Map Amendment for Square 3829, Lots 3, 4, 11, 22, and 820 (ZC Case No. 10-28).

2. Currently, Lots 3, 4, 11, and 820 and a large part of Lot 22 are zoned R-2; the remainder of Lot 22 is zoned C-1. The C-1 area includes only part of the frontage on Monroe Street. The Zoning Map Amendment requested upzoning for all five lots to C-2-B.

3. On March 3, 1989, the Zoning Commission approved an upzoning request from R-2 to C-1 for only three of five lots in Square 3829, opining that "The rezoning of lots 5 and 12 in Square 3829 is inappropriate, would result in commercial encroachment next to lots that are primarily residential in character, and would not be beneficial to the surrounding neighborhood" (**ZC Order No. 599, p. 4**).

4. The highest zone in the Brookland area East of the railroad tracks is C-2-A and it is located solely on the 12th Street commercial corridor. The only other zones in the area East of the railroad tracks are R-1-B, R-2, C-1, and C-M-1.

5. Most of Square 3829 is zoned R-2. DC zoning rules set the following limits in R-2: 40 feet in height, 3 stories, and 40% lot occupancy. DC zoning rules set the following limits in C-1: 40 feet in height, 1.0 Floor Area Ratio (FAR), 3 stories, and 60% lot occupancy.

6. DC zoning rules additionally provide the following maximum Floor Area Ratio (FAR): 3.0 for a C-2-A PUD and 6.0 for a C-2-B PUD. The amended Application requested 3.31 FAR.

7. DC zoning rules additionally provide the following maximum lot occupancy: 60% for both Matter-of-Right and a PUD in C-2-A, and 80% for both Matter-of-Right and a PUD in C-2-B. The Application requested 75% lot occupancy. The difference between the 40% maximum lot occupancy for R-2 and the requested 75% is huge and would cause significant adverse effects (see Finding #19). (Also, see OP's corrected p. 6 in Exhibit #13 relating to maximum lot occupancy under C-2-A.)

8. The amended Application requested 6.5 floors on two of the four sides of the proposed PUD building. The difference between the 3-stories maximum in R-2 and C-1 and 6.5 stories is huge and would cause significant adverse effects (see Finding #19).

9. The C-2-B PUD request constituted a 231% increase in allowable density (from a maximum of less than 1 FAR to 3.31) and a 53% increase in allowable height (from a maximum of 40 feet to 61 feet). Thus, the requested increase in building envelope rights is huge.

10. DC's Comprehensive Plan Future Land Use Map indicates that over three-quarters of the site is "Low Density Residential" and less than one-quarter is a mixture of "Low Density Residential" and "Moderate Density Commercial." **10 DCMR §225**, Future Land Use Map and Categories, defines "Low Density Residential" as only R-1-A, R-1-B, and R-2 (**§225.3**), i.e., not C-2-B. It also states that "Moderate Density Commercial" areas "generally do not exceed five stories in height" (**§225.9**), i.e., not 6.5 stories. Thus, a C-2-B PUD would be "**inconsistent**" with the **Future Land Use Map** for all of the site, especially for over three-quarters of the site which is destined in the future for "Low Density Residential."

11. The March 3, 2009 City Council passed (**R18-0032**) Brookland/CUA Metro Station Small Area Plan established a 50-foot height limit for all development East of the railroad tracks. It states, "Development along Monroe Street east of the WMATA/CSX tracks may be allowed up [to] a maximum 50 feet through a Planned Unit Development, as discretionary approval by the Zoning Commission" (p. 46, Monroe Street Sub-Area in the Brookland/CUA Metro Station Small Area Plan). Thus, the Application's requested 61 feet would be "**inconsistent**" with the Monroe Street Sub-Area in the Brookland/CUA Metro Station **Small Area Plan**.

12. The Monroe Street Sub-Area in the Small Area Plan identified three specific areas – <u>not</u> including Square 3829 – for relatively dense mixed use developments East of the railroad tracks.

13. Various text provisions in the DC Comprehensive Plan reveal that the Application would be "**inconsistent**" with specific protective provisions in the **DC Comprehensive Plan**. 200-Footer Group examples included: Chapter 24, Upper Northeast Area Element, Policy UNE-1.1.2 Compatible Infill ("Encourage compatible residential infill ... Such development should be consistent with the designations on the Future Land Use Map"); Chapter 3, Land Use Element, Policy

LU-1.3 Transit-Oriented and Corridor Development ("protecting lower density uses in the vicinity"); Chapter 3, Policy LU-2.1.8 Zoning of Low and Moderate Density Neighborhoods; Chapter 3, Policy LU-2.3.1 Managing Non-Residential Uses in Residential Areas; and, Chapter 9, Urban Design Element, Policy UD-2.2.7 Infill Development ("avoid overpowering contrasts of scale, height and density as infill development occurs").

Additional OP examples included: Land Use Element, Policies LU-1.3.5, LU-2.4.5, LU-2.1.3, and LU 2-3.3, and Implementation Element, Policy IM-1.3.3 ("Decisions on requests for rezoning shall be guided by the Future Land Use Map ... as well as Small Area Plans pertaining to the area proposed for rezoning").

14. On October 30, 2011 and January 3, 2012, the "200-Footers Group" submitted a letter, followed by an amendment, requesting "Party" status in opposition to the Application (Exhibits #29 & #44). The 200-Footers Group includes owners on each of the surrounding streets, including 9th Street, Monroe Street, 10th Street, Lawrence Street, and Kearney Street. The Group includes both residential and commercial property owners, the majority of which have owned these properties for decades.

15. On December 29, 2011, BNCA submitted a letter requesting "Party" status in support of the Application (Exhibit #43). In cross examination on January 19, 2012, BNCA revealed that it only represented two 200-Footer addresses which were not in the "200-Footers Group" opposition "Party." BNCA did not identify the two addresses; however, the 200-Footers Group understands that both are commercial properties.

16. On January 11, 2012, Advisory Neighborhood Commission 5A (ANC-5A), which serves the communities of Brookland, Fort Lincoln, Fort Totten, Lamond-Riggs, Michigan Park, North Michigan Park, Queens Chapel, and Woodbridge, submitted a 6-5-1 resolution in support of the Application and requested that "great weight" be afforded to its resolution (Exhibit #156). As a result of redistricting, effective January 1, 2013, Square 3829 will be in ANC-5B with a different set of Ward 5 communities.

17. On January 19, 2012, the Zoning Commission granted "Party" status to BNCA and the "200-Footers Group." ANC-5A was an automatic "Party."

18. On January 19, 2012 and February 2, 2012, the Zoning Commission held a hearing on Case No. 10-28. Even, BNCA, a Party in support, objected to the proposed Zoning Map Amendment from R-2 and C-1 to C-2-B. The 200-Footers Group, the only Party in opposition, testified to various issues, including but not limited to: (a) zoning, (b) the fact that the proposed upzoning is legally "inconsistent," (c) various adverse effects, (d) the *de facto* campus plan expansion, (e) the objectionable precedent of a Zoning Map Amendment to C-2-B, (f) serious deficiencies in the amenities proffer, (g) serious deficiencies in the proffered Construction Management Agreement, and (h) issues with some of the architect's representations, including context and setbacks (see Findings #2-13, #19-22, & #24). In addition, the 200-Footers Group testified to

the inadequate provision of PUD amenities, especially pertaining to the immediately impacted 200-Footers, as required by law (see Finding #23).

19. The 200-Footers Group discussed various adverse effects, including but not limited to: (a) blocked air and light, especially for the six 10th Street rowhouses remaining in Square 3829 and the seven 9th Street rowhouses (five of which include residential uses); (b) increased traffic; (c) objectionable traffic by large trucks on the surrounding residential streets, especially if the Commission grants a waiver from the required 55-feet deep loading berth for apartments with 50 or more dwelling units and for C-2-B retail; (d) reduced on-street parking; (e) increased crime; and (f) damage to historic homes.

20. Catholic University of America's campus plan is entirely located West of the railroad tracks. The proposed small-sized rental units in the Square 3829 project, which is just East of the railroad tracks, will likely attract Catholic University students, many of whom currently live in rooming houses close to Square 3829. This would be a *de facto* campus plan expansion without review and approval of a campus plan amendment by the Commission.

21. Upzoning from R-2 and C-1 to a C-2-B PUD would set an undesirable map precedent which future Applicants could point to for future development proposals East of the railroad tracks in Brookland.

22. The final (in the Applicant's 2/23/12 Post-Hearing Submission) proffered non-project-specific amenities (i.e., public amenities) total is approximately $205,000. The total is up from $200,000 in the Applicant's 12/29/11 20-day Supplemental Statement. The new amount includes:

    (a) $150,000 in dollar contributions to four non-profit organizations and one DC governmental agency ($25,000 Byte Back, $50,000 Community Foundation for National Capital Region, $25,000 Washington Area Community Investment Fund, $25,000 Dance Place, and $25,000 Turkey Thicket Recreation Center);
    (b) $30,000 for hardscape/landscape improvements for the six rowhouse owners in Square 3829; and
    (c) an undetermined total (estimated at $25,000 of the $95,000 for replacement of sidewalks, curbs and gutters around the project site) for replacement sidewalks, curbs, and gutters elsewhere in Square 3829 and repaving the abutting North-South alley.

    In addition, the Applicant agreed to provide security cameras around the rest of Square 3829. There was no dollar impact indicated for this addition to the earlier proffered on-site project-specific amenity for security cameras around the Square 3829 building site.

    The $205,000 total is: (a) woefully insufficient for a PUD with this magnitude of additional building envelope rights (see Finding #9); and (b) unresponsive to the

rank-ordered recommendations proposed by the 200-Footers Group, such as Senior or Workforce Housing, a police sub-station (which, more accurately after conversations with MPD, should be characterized as "dedicated office space for use by PSA 504"), and evening security patrols around the perimeter of Square 3829.

23. In addition, the amenities proffer is "**inconsistent**" with the DC Law governing all PUDs. The **Comprehensive Plan Amendment Act** of 2006 provided, "Location of PUD Amenities. Require that a substantial part of the amenities proposed in Planned Unit Developments (PUDs) shall accrue to the community in which the PUD would have an impact" (**DC Law 16-300, Policy IM-1.18, §2502.12**). In fact, only a small amount of the proffered public amenities would directly benefit the adversely impacted 200-Footers.

24. The 200-Footers Group testified in detail that the proffered Construction Management Agreement (CMA) was insufficient and unfair. The Group compared its detailed CMA with the proffer, explaining the many critical and missing protections, such as (a) an enforcement provision for violations of CMA provisions (e.g., early truck idling) (see 200-Footers Group CMA #21, which is entirely missing in the Applicant's 2/23/12 Post-Hearing Submission), and (b) a thorough pre-construction survey of adjacent structures and provisions (e.g., an Insurance Bond and third party escrow account) to reimburse Square 3829 rowhouse owners for irreparable damage (see 200-Footers Group CMA #12).

25. On ___, the National Capital Planning Commission voted ___ to [approve/deny] ZC Case No. 10-28.

CONCLUSIONS OF LAW AND OPINION

The 901 Monroe Street, LLC filed an application requesting consolidated review and approval of a PUD and an amendment to the Zoning Map of the District of Columbia pursuant to 11 DCMR Chapter 24.

The proffered PUD amenities are inadequate and inconsistent with DC law (**DC Law 16-300**, Policy IM-1.18, §2502.12) since only a small amount (vs. "a substantial part") of the amenities accrue to the immediately adversely impacted community.

The Application is "**inconsistent**" with: (a) the DC Comprehensive Plan's Future Land Use Map (**DC ST §6-641.02 & 10 DCMR §225**) (see Finding #10), (b) the DC Comprehensive Plan (**DC ST §6-641.02 & 11 DCMR §2403.4**) (see Finding #13), (c) the PUD amenities requirement in the Comprehensive Plan Amendment Act of 2006 (**DC Law 16-300, Policy IM-1.18, §2502.12 & 10 DCMR §2502.12**) (see Finding #23), and (d) the Monroe Street Sub-Area in the Brookland/CUA Metro Station Small Area Plan (**DC ST §1-306.03(c)(2) & Council R18-0032**) (see Finding #11).

DECISION

The Commission has afforded "great weight" to the issues and concerns raised in ANC-5A's recommendations, as required by law (Section 3 of the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, effective 6/27/00; D.C. Law 13-135, now codified at D.C. Code § 1-309.10(d)).

At a public meeting on __, the Commission voted preliminarily__ to **DENY** the application.

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia orders **DENIAL** of the proposed PUD and **DENIAL** of the proposed Zoning Map Amendment.

VOTE: __-__-__ (__).

BY ORDER OF THE D.C. ZONING COMMISSION
Each concurring member approved the issuance of this order.