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September 5, 2017

Anthony J. Hood, Chairman
Zoning Commission
441 4th Street, N.W., Suite 220
Washington, D.C. 20001

Re: CASE NO. 13-14 (Vision McMillan Partners, LLC and Office of the Deputy Mayor for Planning and Economic Development - Remand from the Court of Appeals)

Dear Chairman Hood and Members of the Zoning Commission:

Friends of McMillan Park (“FOMP”), a party in opposition to the above-referenced application, hereby files this response to the post-hearing submission of Applicants Deputy Mayor of Planning and Economic Development (“DMPED”) and Vision McMillan Partners (“VMP.”)

Discussion

At its meeting on June 29, 2017, this Commission determined that additional information was needed in order to fully evaluate the proposed redevelopment of the McMillan Reservoir site, and specifically the Medical Office Building proposed on Parcel 1, relative to remand issue # 1, i.e., whether other policies cited in the Order could not be advanced if development on the site were limited to medium- and moderate-density use.” The Commission therefore requested VMP to examine alternative designs or other scenarios for reducing the height of the Medical Office Building on Parcel 1 by eliminating one floor or changing the building’s footprint. FOMP hereby responds to the Applicants’ post-hearing submission, which proposes a one-foot reduction in the height of the Medical Office Building, and purports to justify why further reductions in height cannot be undertaken.

1. The Applicants Have Failed to Satisfy their Burden of Proving that Their Proposed Development is Consistent with Comprehensive Plan Policy MC 2.6.5, providing that, “Where development takes place, it should consist of moderate- to medium-density housing, retail, and other compatible uses.”

As a preliminary matter, the Applicants continue to insist that “the project is not high density,” despite the finding to the contrary by the D.C. Court of Appeals. The Applicants appear to acknowledge that Parcel 6 cannot be included in their calculation of aggregate density, in light of the plain language of MC 2.6.5, which does not permit them to aggregate density across the PUD site but instead, requires that density be based solely on the land area “[w]here development takes place.” Nonetheless, the Applicants continue to rely on the aggregate density

of Parcels 1 through 5 in support of their view that the project's density is consistent with the density permitted as a matter of right in a moderate-density commercial zone district, such as the C-2-A zone district.

However, MC 2.6.5 explicitly rejects any approach that looks beyond the parcel "[w]here development takes place" in determining the density of the development. Moreover, the Applicants cannot, consistent with Comprehensive Plan Policy MC 2.6.5, consider the open space areas on Parcel 1 – the healing garden and the open area above Cell 14 – as satisfying its obligation under MC 2.6.1 to provide a "substantial contiguous portion of the site for recreation and open space," and yet at the same time count this open space as a justification for increasing the density of the Medical Office Building. The record does not provide any FAR calculation for the Medical Office Building when the healing garden and Cell 14 are excluded from the calculation.

The Applicants also suggest that the proposed 115-foot height of the Medical Office Building is consistent with the height permitted in the CR Zone, since a PUD in the CR zone permits a height of 115.5 feet, suggesting that the CR zone is a "moderate" or "medium" density zone district. FOMP disagrees. The CR zone district is plainly also a high-density zone district. *See* ZC Exh. 937, at 1 (testimony of zoning expert Laura Richards).¹ In any event, the CR zone district permits a maximum density for commercial use of 4.0 FAR in the context of a PUD. 11 DCMR § 2405.2. As the Applicants' own zoning tabulation shows, even without eliminating the 36,879 square feet allocated to Cell #14, as Comprehensive Plan Policy MC 2.6.5 requires, the effective FAR on Parcel 1, which includes only commercial uses, is 5.5, which greatly exceeds the maximum FAR of 4.0 permitted in the CR zone. ZC Exhibit 17D.

The Applicants' post-hearing submission identifies a plethora of city-wide Comprehensive Plan policies that their plan is arguably not inconsistent with. Notably absent, however, is any mention of the Mid-City elements related to the McMillan Sand Filtration Plant "special policy focus area." Area elements that are "policy focus areas" such as the McMillan Sand Filtration Site "require a level of direction and guidance above that provided by the prior section of this Area Element and in the citywide elements." 10A DCMR § 2010.1 (MC 2010-Policy Focus Areas). ZC Exh. 937, at 2.²

Moreover, the Comprehensive Plan does not in any way support medical office buildings

¹ Under the 2016 Zoning Regulations (ZR16), the maximum heights and densities in the CR zone district with the PUD bonuses appear to correspond to the new MU-6 zone district, which clearly is intended for "medium to *high-density* mixed use development with a focus on residential use." 11 DCMR Subtitle G, § 400.5(a) (emphasis added). In any event, there are no residential uses on Parcel 1, so a CR zone district is not appropriate under either ZR16 or ZR58.

² The Applicants also fail to address the inconsistency of locating the Medical Office Building in the center of one of DC's internal flood plains, with City-wide policies relating to climate change. ZC Exh. 945, at 6, 36 (Expert testimony of Claudia Barragan).

at the McMillan Site or a linkage to the Washington Hospital Center complex. To the contrary, as FOMP's expert testified, the Comprehensive Plan calls for the *dispersion* of medical facilities throughout the District, and particularly in areas east of the Anacostia River. 10-A DCMR § 1105.1. ZC Exh.937, at p.15.

As will be discussed next, the Applicants have simply failed to satisfy their burden of proving that the community benefits and amenities offered by the PUD would not otherwise be provided by a development project that satisfies the over-riding directive of Comprehensive Plan Policy MC 2.6.5 that “[w]here development takes place, it should consist of moderate- to medium-density housing, retail, and other compatible uses.”

2. Applicants Have Failed to Satisfy Their Burden of Proving That a 115-foot-high Medical Office Building Is Essential to the Overall Success of the Project.

VMP also rejects the possibility of reducing the height of the Medical Office Building by even a single story, taking the position that altering the Medical Office Building in any manner will jeopardize the entirety of the project. The Applicants rely entirely on the self-serving statement of Trammell Crow's representative that it would withdraw from the project if there were any further reduction in gross floor area beyond the proffered two feet. No information whatsoever is presented substantiating the Applicants' overinflated assessment of the importance of retaining the full 860,000 gross square feet of space in the Medical Office Building to the economic viability of the project as a whole.

The Medical Office Building was added to the project in 2009, “given the current economic climate,” in which the housing market was at an all-time low. ZC Exhibits 79, 87. However, since that time, the housing market in the District of Columbia has soared. As the Applicants' own expert has testified, rents in the Bloomingdale area increased 64 % between 2009 and 2015, and home prices in the neighborhood are increasing at a pace that outstrips Dupont Circle, with condos selling for nearly \$500,000 in 2016. Transcript, 4/19/17, at 40, 41; ZC Exh. 896G, at 6. Yet, as Applicants have conceded, the Applicants “haven't run profitability” analyses or conducted any rent comparability studies comparing the current economics of building housing versus medical offices. Transcript, 4/19/17, at 145, 147.

Indeed, the only evidence in the record regarding the economic viability of alternative design concepts is the letter submitted by Douglas Development, a well-respected local developer, asserting the developer's opinion that “the vision for the development of McMillan Park, and the benefits that it will bring to the District of Columbia, can be achieved through less intensive means than what has been proposed.” ZC Exh. 923D. The Applicants have not even attempted to rebut this evidence.

The Applicants' claim that removal of even a single floor of the Medical Office Building would displace “benefits” requested by the community is entirely predicated on their wholly unsupported assertion that the entirety of the project is so “interconnected and interdependent”

that any modification would disrupt its delicate economic ecosystem, and their equally unsupported claim that the project includes the maximum amount of community benefits that can be supported by “the value created by the private development.” VMP Post-hearing submission, Exhibit C, at 1. Under this circular reasoning, removal of any density from the Medical Office Building on Parcel 1 would be unacceptable because it could only be shifted elsewhere on Parcel 1, displacing open space.

At the same time, the Applicants have failed to demonstrate that there is any present demand for the amount of commercial office space they intend to construct on Parcel 1. As the Applicants acknowledge, there is no anchor tenant for the Medical Office Building. *See* Transcript of 4/19/17 hearing, at 115, 144. The 2014 Land Development and Disposition Agreement (“LDDA”) approved by the D.C. Council makes clear that the Medical Office Building is a “**speculative** health care facility.” ZC Ex. 942C (Schedule 3.2), at 63 (emphasis added)

Given the absolute failure of the Applicants to provide any data or studies supporting their claim that the project would not be economically viable if 95,000 or even 195,000 gross square feet of office space were eliminated from the speculative Medical Office Building, there is absolutely no support whatsoever for the Applicants’ claim that high-density development is necessary to provide the public benefits contemplated by their development plan. *Id.* Accordingly, they have completely failed to satisfy their burden of proving that moderate density commercial/medium density residential development, such as one that increases housing density on Parcels 4 and 5 rather than concentrating high density commercial development on Parcel 1, would not be able to provide the same or even greater level of public benefits.

Even within this improperly limited framework, the Applicants’ rationale for why they cannot reduce the height of the Medical Office Building does not stand up. For example, the Applicants misleadingly claim that “loss of health care density would result in the loss of the grocery anchor.” *See* VMP Post-hearing submission, Exhibit C. In fact, there is no support in the record that Harris Teeter will break its lease with the developer if 95,000 gross square feet were eliminated from the Medical Office Building, particularly if the density of the housing were increased under an alternative design. It is self-evident that families and residents will better support the grocery store than patients or office workers.

Rather, the purported loss of the grocery store is again predicated on the unsupported assumption that Trammell Crow is the only commercial developer in the entire Washington Metropolitan Area willing to be part of the project whose insistence on the full 860,000 square feet of developable office space must be accommodated at all costs. The Applicants have not even attempted to demonstrate that if Trammell Crow leaves the team, no other developer would then step forward (as Trammell Crow themselves belatedly joined the project team). Instead, as Douglas Development asserted, it is likely that if the development on Parcel 1 were competitively bid as a moderate density development, another developer would eagerly step forward. ZC Exh. 923D.

There is absolutely no justification for Applicants' refusal to examine alternative design concepts for achieving the project's benefits, as required by Comprehensive Plan Policy MC 2.6.5. This policy directs that historic preservation and parkland are the predominant use preferences at the McMillan Park site, and limits future development to "moderate" and "medium" density, and only if necessary to facilitate the provision of open space and other amenities, which gives prominence to historic preservation and parkland as the predominant preferred uses.

In other words, the Plan views development at McMillan as appropriate to the extent it respects the focused planning policy and guidance for this historic site and for the surrounding neighborhood. The Applicants attempt to turn this policy on its head by their insistence on looking solely at the effect of reducing the density of the Medical Office Building on the proffered benefits of *their* plan, and their refusal to consider whether greater public benefits could be afforded by an alternative development plan providing for moderate/medium density development. VMP Post-Hearing Submission, Exhibit C. Indeed, the main thrust of VMP's post-hearing submission is in effect their view that they have gone too far down the "10 year period of predevelopment" to make any further adjustments to *their* plan. *Id.* at 5.

This was certainly the view of DMPED, who testified that the District of Columbia had done nothing to evaluate alternative design scenarios since receiving legislative approval in 2014. Transcript, 4/19/17, at 91, 92. However, contrary to DMPED's suggestion, nothing in the 2014 LDDA approved by the D.C. Council relieves the Applicants of their obligation to evaluate alternative design scenarios that would comport with the site's moderate-density Comprehensive Plan designation. Indeed, the legal sufficiency analysis supporting the LDDA makes clear that "the development program would be defined by a Planned Unit Development" and that "potential uses for the McMillan site *may* include . . . *light* commercial uses, such as retail, hospitality and office uses. *Most importantly, those uses will respect and incorporate the historic nature of the site.*" ZC Exh. at 951D, at 10 (emphasis added). Nothing in the LDDA suggests, implies, or directs the Zoning Commission to approve high-density commercial uses on the site if alternative proposals would provide a similar level of public benefits without destroying so much of the site's historic features and open space.

In any event, the "healing gardens" on Parcel 1 were not provided in response to "community request" for a "network of public open spaces throughout the site." *Id.* Exh. A - Slides 1, 2, 5; Ex. C, at 11. The healing garden is located adjacent to the bus turn-around, and would be visible only to the riders who get on and off the bus there. Rather, the community asked for "significant contiguous surface park space," and preservation of the site's historic elements, including adaptive re-use of the stable below-grade cells. ZC Exh. 72; ZC Exh. 951D, at 10-11. These community requests would have been better accommodated by providing more open space abutting the north and south service courts toward the center of the site, which would have allowed for the preservation of more of the historic cells.

The Applicants also falsely claim that Cell 14 was “chosen” for retention by the Applicants in response to a “community request” to protect the historic viewshed. VMP Post-hearing Submission, Exhibit A, Slide 2. In fact, the preservation of Cell 14 and its open space is due to the fact that the DC Water and Sewer Authority still controls that cell, and is using it to capture storm water flowing through a storm water main that runs directly under North Capitol Street. As the Applicants own structural report demonstrates, the “stable” cells that are in the best shape and most suitable for preservation and adaptive reuse are all in clustered in the center of the site, rather than in the locations that the Applicants have chosen for open space.

3. The Applicants Have Failed To Demonstrate Any Need for the “Specialized Floor-to-Ceiling Heights” that Necessitate the 115-foot Height of the Medical Office Building.

The Applicants have also failed to demonstrate that they could not reduce the height of the Medical Office Building by simply eliminating the “specialized floor-to-ceiling heights” of the first two floors. While Applicants contend that the “specialized floor-to-ceiling heights” are needed to accommodate specialized medical equipment, they have failed to demonstrate why an office building adjacent to the Washington Hospital Center would require any such specialized medical equipment.³ Indeed, Trammell Crow elsewhere asserts only that the Medical Office Building will relieve office space constraints on the Washington Hospital Center Campus, which will then enable the Washington Hospital Center in “modernizing their main campus.” ZC Exh. 933, at 4. (And yet, the Applicants’ own testimony is that there is no current demand for office building projects in the District of Columbia. ZC Exh. 933, at 4; ZC Exh. 951B, at 1)

Specifically, the Applicants’ asserted need for this specialized equipment is not supported by any testimony in the record, either before or after the remand from the D.C. Court of Appeals, from the Washington Hospital Center or other health care expert, indicating that the specialized equipment available at the adjacent Washington Hospital Center would be insufficient to accommodate the needs of the patients of the medical professionals who would occupy the new Medical Office Building. The Applicants’ reference to “data from a 2015 Advisory Board study” misleadingly suggests that Manufacturing Extension Partnership (“MEP”) Advisory Board did a study of the needs for the McMillan Site. VMP Post-hearing submission, at 6. In fact, it appears from the online information that the MEP Advisory Board merely establishes the building specifications for medical facilities seeking to accommodate specialized medical

³ It is worth noting that the term “Health Care Facility,” under the definition in the Comprehensive Plan, broadly includes “[a]ny facility used for the delivery of health services, including hospitals [and] . . . medical offices”. Comprehensive Plan, Vol. 3, at 6-19. However, the Applicants’ pre-remand material makes clear that the intended use of this building is for “medical offices.” *See, e.g.*, ZC Exh. 849A1, at 21, 25. The Applicants’ post-remand emphasis on providing “specialized equipment” more common in medical facilities rendering comprehensive diagnostic and out-patient surgical services is a belated and unsupported rationale offered by the Applicants in an attempt to justify the building’s excessive height.

equipment. This data does not demonstrate that there is any specified need for this equipment at the proposed Medical Office Building.⁴

To the contrary, the only testimony in the record from the Washington Hospital Center is a letter of support from Children's National Medical Center ("CNMC") written in 2014, which speaks very generally (and irrelevantly) about the desirability of including green and open space as part of the design of the Medical Office Building. ZC Exhibit 832I. Despite CNMC's apparent appreciation of having green space abutting its campus, CNMC is addressing the needs of its patients in a manner more consistent with the Comprehensive Plan by dispersing its facilities in other areas of the City. For example, CNMC's new satellite facility at 2101 Martin Luther King, SE, which opened in November 2016 to serve 9,000 children, teenagers and adolescents in Ward 8.⁵ And in November 2016, CNMC announced that it was acquiring 12 acres of the 110-acre former Walter Reed Army Medical Center campus, in order to create a research center, conference center and potential primary care center.⁶ ZC Exh. 937, at 15, 17 (testimony of Laura Richards).

There is no testimony or other information in the record that in any way speaks to the need for the Medical Office Building to provide medical or diagnostic services that require specialized medical equipment to address the unmet needs of patients at the Washington Hospital Center. To the contrary, recent news that United Medical Center, which serves poor D.C. neighborhoods east of the Anacostia River, has shut down services in Ward 8 has shown why the Comprehensive Plan concerns itself with the siting of hospital related projects citywide in a much more equitable way.⁷ DMPED has not squared the citywide medical-service inequity faced by largely black and working-family neighborhoods east of McMillan Park and the Anacostia River with the Applicants' desire to concentrate high-density medical buildings at the northern end of McMillan Park and within a neighborhood currently being served with substantial access to robust medical services.

⁴ <https://www.nist.gov/mep/who-we-are/advisory-board>.

⁵ <<https://childrensnational.org/news-and-events/childrens-newsroom/2016/childrens-national-health-system-opens-new-primary-care-center-in-anacostia>>. The new primary care combines, relocates and expands two smaller CNMC satellite sites in Southeast. The new site provides well-child care and urgent care services for infants, children, and adolescents, as well as hearing and speech, mental health, social work, and breastfeeding support. Another CNMC satellite is planned to open at The Arc in Southeast later this year and. *Id.* Other CNMC sites are scattered elsewhere around the city. ZC Exh. 937, at 15.

⁶ <<http://www.bizjournals.com/washington/news/2016/11/17/its-officialchildrens-national-health-system-to.html>>.

⁷ https://www.washingtonpost.com/local/dc-politics/dc-shuts-down-obstetrics-ward-at-united-medical-center-for-90-days/2017/08/08/31c359ae-7c52-11e7-9d08-b79f191668ed_story.html

Further, as the Applicants conceded, building a medical facility designed to accommodate the “specialized equipment” needed to provide in-patient surgical care and diagnostic services requires licensure from the D.C. Department of Health *before* the facility is developed. *See* Transcript of 4/19/17 hearing, at p. 117. *See also* D.C. Code § 44-406(a). No testimony was submitted by any expert in assessing health care needs or any governmental agency showing that construction of this speculative health care facility would satisfy the legal standard for securing such licensure. Indeed, one might readily question the need to construct a facility designed to accommodate costly medical equipment that is readily available across Michigan Avenue at the Washington Hospital Center. *See e.g. Medstar v. D.C. Dep't of Health*, 146 A.3d 360, 366 (DC, 2016) (upholding decision by the D.C. Statewide Health Planning and Development Agency (SHPDA) denying MedStar’s application for a certificate of need based on finding that Medstar “had not demonstrated that the already-available facilities in the District were inadequate to meet the demand for . . . services”). Trammell Crow’s self-serving opinion that such licensure would be readily secured is unsupported, unsubstantiated, belied by the case law, and entitled to no deference whatsoever.

Conclusion

Given the Applicants’ refusal to look at alternative development plans beyond their own, the Applicants have failed to satisfy their burden of proving that other policies cited in the Comprehensive Plan could not be advanced if development on the site were limited to medium- and moderate-density use.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Ferster', with a large, stylized flourish at the end.

Andrea C. Ferster

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response to Applicants' Post-Hearing Submission was served on September 5, 2017, by **email** to:

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