

**District of Columbia Zoning Commission – Case No. 16-23  
Proposed Findings of Fact and Conclusions of Law  
Citizens for Responsible Development - Party in Opposition**

**Findings of Fact**

**A. Strong Neighborhood Opposition to the Project**

1. 587 residents of ANC<sub>3</sub>D and ANC<sub>3</sub>E have signed a petition opposing Valor Development's proposal to construct a massive development with two 5-7 story buildings and 200 to 250 residential units on the former SuperFresh site. The signers state that they would support a lower building that would reflect the scale and character of the surrounding area. (Exhibits 27 and 27A)
2. 74 households, all located close to the SuperFresh site, have submitted letters to the Zoning Commission in opposition to the Project. (Exhibit Log)
3. 16 of the households that have submitted individual letters in opposition to the Project are "200 footers." No household located within 200 feet of the Project site has submitted a letter in support of the Project. (Exhibit Log)
4. At the January 11, 2018, two persons testified as individuals. One, Steven Band, explained that he does not believe the Project is ready for approval by the Zoning Commission. The other, Cheryl Cort, actually testified on behalf of the Coalition for Smarter Growth, an organization funded by developers. (January 11, 2018 hearing, transcript pp. 175-180; 183-186)
5. 26 individuals who live close to the Project site testified in opposition to the Project at the January 25, 2018 hearing. (Hearing record)
6. Bill Fuchs, the owner of Wagshal's which is located within the Spring Valley Shopping Center next door to the Project, testified against the Project. Mr. Fuchs stated that the inclusion of a Balducci's, a specialty gourmet market, in the Project will jeopardize the viability of Wagshals', which has served the community for 90 years. (January 25, 2018 hearing, transcript p. 119)

**B. The Applicant's Architectural Renderings Are Misleading and Grossly Underrepresent the Full Size of the Project**

1. From the day of the filing of its initial application, the Applicant has submitted a series of architectural renderings. (Exhibit Log)
2. CRD has submitted images from Digital Design & Imaging Service (DDIS) which show the true scale of the two proposed buildings, both looking at the Project from the front of the Spring Valley Shopping Center and from Windom Pl. The images show that the buildings are much larger than the Applicant's renderings. (Exhibits 137, 191, 213, 213A1 and 213 A2)
3. At the January 25, 2018 hearing, Sarah Alexander from Torti Gallas attempted to show that the DDIS images were inaccurate. (January 25, 2018 hearing, transcript pp 142-148)

4. Ms. Alexander's actual testimony at the January 25 hearing with regard to the Windom Pl. view presents a different message, as she stated: "But if you take their shot [of the Windom view] and you take ours, it's actually very, very, very similar. So the scale seems to be accurate in the depiction of the blue building." (January 25, 2018 hearing, transcript p.147)
5. Valor's Massachusetts Ave rendering titled: "View from Southwest – Proposed (From Massachusetts Avenue) Zoomed" has several serious flaws which create an entirely incorrect visual impact of the proposed Ladybird development as seen from this perspective. The Applicant now agrees that its photograph was taken with a wide-angle lens. (Exhibit 211, p.6.)
6. Use of a wide-angle lens artificially pushes back the landscape, making it appear smaller and farther away than in actuality. In addition to using a wide angle lens, the photograph may then have been manipulated. The effect of this is to dramatically increase the existing height of the roofline of the Spring Valley Shopping Center, minimizing the impact of the new proposed structure behind it. As a result, the representation of the Ladybird building is distorted, and undersized by at least 19 percent. (Exhibits 213, 213A1 and 213A2.)
7. The Applicant has attempted to correct the deception by submitting new renderings. Exhibit 211A. They say there is "very little difference" between the previous and new renderings. We beg to differ. However, even the new renderings are inaccurate as they also were based on a wide-angle iPhone 6 camera. While the building extends further to the north than in the previous rendering, it does not line up with the correct line of sight, as shown in by DDIS in Exhibit 213A2, pp.16-17, 20.
8. Further, the Applicant's new rendering clearly shows the south end of the building as being taller than the AU building, which would make it the tallest building in the area. (Exhibit 211, p. 13.)
9. The Applicant has shown renderings that purport to show what a matter-of-right building would look like. Since these renderings show a building that is bigger than the Project and the Project is 50% larger than what is available as a matter-of-right, the matter-of-right renderings are inaccurate. (Exhibit 155A, pp. A28-34.)

### **C. The Project is Inconsistent with the Comprehensive Plan**

1. The Comprehensive Plan's Land Use Element calls for fully capitalizing on the investments in Metrorail by requiring better use of land around transit stations and along transit corridors. (Comp Plan Land Use Element, p. LU-1.3.)
2. The "reach" of transit oriented development around any given station varies depending on the neighborhood, but ¼ to ½ mile is generally used across the country to define a walkable radius. (Comp Plan Land Use Element, p. LU-1.3.)
3. The SuperFresh site is nine-tenths of a mile from the Tenleytown Metrorail station. (Exhibit 137, p. 9.)
4. Most people will not walk nine-tenths of a mile, both ways, to use Metrorail. The N buses along Massachusetts Ave. are slow going. (Exhibit 194.)

5. The project site is not transit friendly. (Exhibit 137, p. 9.)
6. The Comprehensive Plan's Land Use Element states that infill development should complement the established character of the area and should not create sharp changes in the physical development pattern. (Comp Plan Land Use Element, policy LU-1.4.1.)
7. The project site faces two residential streets with 2-story homes and is part of the Spring Valley commercial area containing mostly one to three story commercial buildings. (Exhibit 137, p. 4.)
8. The images prepared by Digital Design & Imaging that were attached to CRD's January 4, 2018 pre-hearing statement (Exhibit 137), as well as those presented at the January 25, 2018 hearing (Exhibit 191) and as part of CRD submission dated January 12, 2018 (Exhibit 213A12, 213A2), demonstrate the excessive scale of the Project in relation to the neighborhood.
9. The Comprehensive Plan's Land Use Element encourages pedestrian-oriented "nodes" of commercial development along major corridors provided the "height, mass, and scale of development within nodes respects the integrity and character of surrounding residential areas and does not unreasonably impact them." (Comp Plan Land Use Element, Policy LU-2.4.5)
10. The Project site faces two local streets, not a major or minor arterial, or even a collector street, and the proposed buildings do not respect the residential neighborhood. In fact, the Project unreasonably detracts from the neighborhood. (Exhibit 137, p. 10.)
11. The Comprehensive Plan's Urban Design Element states that one of the overarching goals for urban design is to harmoniously integrate new construction with existing building. Also, "overpowering contrasts in scale, height, and density should be avoided as infill development occurs." (Comp Plan Urban Design Element, Policy UD-2.2.)
12. The scale, height, and density of the Project clashes with the neighboring 2-story residential community and with the low density, Colonial Revival style, Spring Valley commercial center. (Exhibit 137, p. 10) Further, as shown in the images prepared by Digital Design & Imaging referenced above, the Project by its sheer size detracts from the historically designated Spring Valley Shopping Center. (Exhibit 137.)
13. The project site is located in the Rock Creek West Area. (Exhibit 137, p. 10.)
14. The Comprehensive Plan's Rock Creek West Area Element states that "communities within this area share a commitment to proactively addressing land use and development issues and conserving neighborhood quality." (Comp Plan Rock Creek West Element, RCW p. 23-1.) The height, scale and density of the Project are deeply out of character with the neighborhood and therefore violate this overarching commitment. (Exhibit 137, p. 10.)
15. The Comprehensive Plan's Rock Creek West Area Element states that "Future development in both residential and commercial areas must be carefully managed to address infrastructure constraints and protect and enhance the existing scale, function, and character of these neighborhoods." (Comp Plan Rock Creek West Element, Policy RCW 1.1.1.) The Project fails to meet the standard contemplated by this policy. Rather than managing growth, by exceeding the height and density limits of what is permitted, the Project is an example of uncontrolled growth. (Exhibit 137, p. 11.) Further, the Project will exacerbate school overcrowding at the public schools servicing

the SuperFresh site - Janney Elementary, Deal Middle and Wilson High – each of which is above capacity even after each has been renovated and expanded in recent years. (Exhibit 137, p. 12.)

16. The Comprehensive Plan's Rock Creek West Area Element states that heights and densities for infill development should be appropriate to the scale and character of the adjoining communities, and that buffers should be adequate to protect existing residential areas from noise, odors, shadows, and other impacts. (Comp Plan Rock Creek West Element, Policy RCW-1.1.4.) As mentioned above, the Project is out of character with the adjoining residential and commercial neighborhoods. The main entrance to the retail stores and the large apartment building is directly across a local street from a row of single family homes. One can expect that those entrances will be busy, and that cars and delivery vehicles will park – or double park – on Yuma Street as they drop people off or make deliveries. Noise, commotion, and pollution will become a problem. Also, the building at that point is more than 50 feet higher than the homes, depriving the homes of air, light, and privacy. The shadow study included in the Applicant's prehearing statement shows homes on Yuma Street and parts of 48<sup>th</sup> Street will be in the shadow of the Project during the Fall and Winter, but does not show what happens after 4:00 pm during Eastern Daylight Time. CRD requested additional studies, which show that much of the neighborhood will be deprived of sunlight during the evening hours. The rooftop terraces on the two buildings will overlook the Yuma, Alton, and 48<sup>th</sup> Street neighborhoods, depriving them of privacy. (Exhibit 137, p. 11.)

#### **D. The Project is Inconsistent with the Future Land Use Map**

1. The Future Land Use Map (FLUM) "express [es the] public policy on future land uses." (Comp Plan Framework Element, p. 2-33.)
2. The Future Land Use Element designates the SuperFresh site as Low Density Commercial.
3. The Comprehensive Plan's Framework Element states that a "common feature [of Low Density Commercial areas] is that they are comprised primarily of one- to three-story commercial buildings." (Framework Element, p. 2-34.)
4. Building No. 1 of the Project is five to six stories, plus a habitable penthouse. (Exhibit 114A, pp. A04-A08, A11 and A12.)
5. Building No. 2 of the Project is four stories, plus a habitable penthouse. (Exhibit 114A1, p.A12.)

#### **E. The Applicant's Record of Deception**

1. For over two years, the Applicant told the community that it was close to securing a full-service grocery store for the SuperFresh site, and did not discourage the

- community from believing that it would be a real grocery store like a Harris Teeter. (January 25, 2018 hearing, transcript pp. 56-58.)
2. The Applicant now says that Balducci's, a specialty gourmet market, has signed a non-binding letter of intent to open a store in the Project, but that it is still negotiating a "work letter" with Balducci's. (January 11, 2018 hearing, transcript p. 59.)
  3. Many members of the community are unhappy with this selection, including all ANC3E Commissioners. (January 11, 2018 hearing, transcript p. 164.)
  4. The Applicant initially stated that some of the residential units would be condominiums, but now states that it is likely that all the units will be rentals. (January 25, 2018 hearing, transcript pp. 58-59.)
  5. As mentioned under the heading "The Applicant's Architectural Renderings Are Misleading and Grossly Underrepresent the Full Size of the Project," the Applicant has throughout the process misrepresented the scale of the Project.
  6. The Applicant represented to DDOT and to ANC 3E that it has an agreement with American University that all but 56 of the parking spaces that it is obligated to provide for AU's use will instead be dedicated for residents and retail users of the Ladybird. (January 11, 2018 hearing, transcript, pp. 113, 114 and 165.) However, the Applicant now admits that there is no such agreement. (Lansing testimony at January 11, 2018 hearing, transcript, p. 98.)
  7. As also mentioned under the heading "The Applicant's Architectural Renderings Are Misleading and Grossly Underrepresent the Full Size of the Project," the Applicant's renderings of what a matter-of-right building would look like are inaccurate and misleading.
  8. The shadow studies provided by the Applicant cut off at 4:00 pm and are cropped, thus failing to show the full deprivation of sunlight on the immediate neighbors. (Exhibit 114 A3, p. A46-47.) CRD's submissions document and illustrate this failure. (Exhibit 137 (Exhibit 4); Exhibit 191, pp. 22-23.)
  9. At CRD's insistence, the Applicant did provide shadow studies that extended the hours of the study. These studies show that much of the neighborhood will be deprived of sunlight during the evening hours. (Exhibit 137 (Exhibit 4))
  10. The Applicant has refused to provide essential agreements with the owner of the Spring Valley Shopping Center and American University, each of whom is a party to the Application. (Exhibit 211, p. 3)

#### **F. The Project Calls for an Impermissible Increase in Density**

1. The Design Review regulations state in Section 600.1(c) Design Review can be used for projects that do not need extra density.
2. The Design Review regulations also explicitly state that "an increase in density shall not be permitted as part of a design review application." See Section 600.5.
3. The current owner of the SuperFresh site, Paul S. Burka Apex Real Estate, originally owned both Lot 806 (4801 Massachusetts Avenue) and Lot 807 (the SuperFresh lot). (Exhibit 208.)

4. The lot area of Lot 806 is 41,650 sq. ft. and the lot area of Lot 807 is 79,622 sq. ft. A Declaration of Easement and Agreement, which was recorded in 1979, provides that the two lots together compose Lot 9, which shall remain a single record lot for zoning purposes. (Exhibit 208.)
5. At that time, the allowable FAR for the site was 2.0. Thus, on the entire Lot 9 (which covers 121,272 sq. ft., the owner could build a building with 242,544 GFA. (Exhibit 208.)
6. In the early 1970's, in order to facilitate the construction of a large building at 4801 Massachusetts Avenue (the building now owned by American University), the owner transferred some of the density allowed for Lot 807 to the adjoining Lot 806. Specifically, maximum available GFA was allocated as follows: 179,302 GFA for Lot 806 and 63,242 GFA for Lot 807. (Exhibit 208.)
7. Since 1979, the zoning regulations have increased the allowable FAR for the site to 3.0, subject to satisfaction of IZ requirements. With the additional 1.0 in FAR, there was a total increase in allowable GFA of 121,272 for the entire Lot 9 (1.0 times the size of Lot 9). Assuming the Applicant has an agreement with the current owner of Lot 806 to allocate the entirety of this increase to Lot 807, the current maximum GFA for Lot 807 is the original amount allocated to Lot 806 (63,242 GFA plus the additional amount - 121,272 - for a total of 184,514 GFA. (Exhibit 208.)
11. The Applicant is in agreement that this is the maximum amount that can be built on Lot 807 as a matter-of-right. (Exhibit 211C.)
12. The Applicant's proposed buildings include 272,278 GFA, 92,764 more GFA than allowed as a matter-of-right. (Exhibit 211C.)
13. Further, the Declaration of Easement and Agreement provides that "all remodeling, additions, or replacement construction shall not be in violation of the requirements of the Zoning Regulations for Record Lot 9."

#### **G. The Project Is Not a PUD**

1. The Applicant and the Office of Planning (OP) suggest that given the authority to transfer density between lots in a PUD, a similar authority must exist in the setting of Design Review. (Exhibits 211C and 215.)
2. OP points out that Design Review was removed from the drafts of regulations amending the PUD rules. (Exhibit 215.)
3. The Design Review regulation expressly forbids its use to increase density and specifically indicates that "an increase in density shall not be permitted as part of a design review application." (Subtitle X, Section 600.5. See also Sections 600.1(c), 600.1(e) and 600.3.1.)
4. The intentional removal of a legislative provision indicates that a legislative body intended to prevent the recognition of the removed provision.
5. Under accepted rules of legislative construction, it is not appropriate to review legislative history when the plain meaning of legislation is clear on its face.
6. In fact, the Project would utilize more GFA than would be available under a PUD. (Exhibit 137, p.5.)

7. The Applicant offers little in the way of amenities.
8. The principal amenity offered is a gourmet food store which most members of the community – and all ANC3E Commissioners – do not want and which will jeopardize the continued viability of Wagshal's, which has served the community for 90 years. (January 11, 2018 hearing, p. 164; January 25, 2018 hearing, transcript pp. 56-58.)
9. The Windom Walk open area is not an amenity. The area needs to be open as the Project fully utilizes available lot occupancy on Lot 9. (Exhibit 144A1, p. G05.)
10. The idea of a HAWK light on Massachusetts Ave. between 48<sup>th</sup> and 49<sup>th</sup> Streets has not been approved by DDOT (January 11, 2018 hearing, transcript p. 128).

#### **H. The Project Does Not Control Bulk**

1. The maximum permissible lot occupancy for Lot 9 is 75%. (Exhibit 144A1, p. G05.)
2. Lot 806, which is 41,650 sq. ft., is currently at 90% lot occupancy. (Exhibit 144A1, p. G05.) The footprint of the American University building is thus approximately 37,485 sq. ft. With construction of the Project, Lot 807 will include two buildings with a total footprint of 54,034 sq. ft. (Exhibit 114A1.) Thus, the two Project buildings and the American University building will have a combined footprint of 91,519 sq. ft., which is 75 percent of the total land area of Lot 9.
3. The American University building and the two Project buildings are each 5 stories or more in height (including the penthouse level). Thus, the entire buildable footprint of Lot 9 will be utilized and the entire amount will be 5 stories or higher. (Exhibit 114A1, pp. A 04-A08, A11 and A12; Exhibit 114A1, p. A12)
4. The transfer of density from the Spring Valley Shopping Center to the SuperFresh site would defeat the purpose of the Declaration of Easement and Agreement reference above, which was to transfer the density of Lot 9 to the portion of the lot closest to Massachusetts Avenue and away from the neighboring residential streets. (Exhibit 208.)

#### **I. Adverse Traffic, Pedestrian Safety, and Parking Impacts**

1. The Applicant's traffic consultant estimates that the Project will generate 148 additional vehicle trips during the AM Peak Hour and 305 additional vehicular trips during the PM Peak Hour (Exhibit 107A, p. 25.)
2. The Applicant's traffic consultant estimates that the Project will generate 21 truck trips per day. (Exhibit 107A, p.13)
3. The Applicant's traffic consultant did not estimate a daily total of additional trips, but CRD's traffic consultant estimated that the Project will generate 3500 weekday trips [Exhibit 137 (Exhibit 3)], an estimate that has not been challenged.
4. CRD's traffic consultant also estimated that the grocery store alone will generate 320 trips during a weekend hour, 60% more than during a weekday. (Exhibit 137 (Exhibit 3).)
5. CRD and CRD's traffic consultant have pointed out other flaws in the Applicant's traffic study, including that the counts of existing traffic volume does not take into account

- the full utilization of the AU Building as it was repopulated or the very successful Millie's Restaurant in the 4800 block of Massachusetts Ave. (Exhibit 137)
6. CRD has testified that it expects most of the traffic for the site will enter and exit the site using the alley behind the AU Building and 48<sup>th</sup> Street, and that the alley as well as 48<sup>th</sup> Street and the nearby intersections (including especially Warren Street and 48 St and Massachusetts Ave. and 48<sup>th</sup> Street) will be bottlenecked. (January 11, 2018 hearing, transcript p. 194.)
  7. CRD also testified that pedestrians using the alley behind the AU Building will have to negotiate 100 feet of garage entrances (with no refuge). (Exhibit 137, p.13.)
  8. CRD has pointed out that the AU buses (up to 10 per hour) wait near the alley entrance to unload and load, sometimes blocking the alley. (Exhibit 137, p.13.)
  9. CRD also testified that it was informed that AU objected to the two sides of street parking on Yuma Street and 48<sup>th</sup> Street because AU does not believe there is sufficient room for its buses. (January 11, 2018 hearing, transcript p. 119.)
  10. CRD has testified that all the additional traffic, both in the neighboring streets and the alley, will endanger pedestrians, including the many young children and elderly in the neighborhood, and cause pollution. (Exhibit 194.)
  11. Suzanne Koffsky testified that the alley behind the Spring Valley Shopping Center will also be a bottleneck due to trucks servicing the shopping center. (January 25, 2018 hearing, transcript, pp. 125-127.)
  12. Mr. Aaron Zimmerman of DDOT stated that DDOT did not take into consideration information provided by CRD, including the report of CRD's traffic consultant, in preparing DDOT's report. (January 11, 2018 hearing, transcript p. 109)
  13. Tom Smith of Spring Valley Wesley Heights Citizens Association stated that the Project will cause increased cut-through traffic in Spring Valley, in part due to the proposed HAWK light. (January 11, 2018 hearing, transcript p. 130.)
  14. The owner of the SuperFresh lot is required under the Declaration of Easement and Agreement to make 236 parking spaces available to people using the AU Building.
  15. The Ladybird is projected to have 370 parking spaces. (OP Report, Exhibit 133, p.3)
  16. The Applicant represented to represented to DDOT and to ANC 3E that it has an agreement with American University that all but 56 of the parking spaces that it is obligated to provide for AU's use will instead be dedicated for residents and retail users of the Ladybird. (January 11, 2018 hearing, transcript, pp. 113, 114 and 165.) However, it now turns out that there is no such agreement. (Lansing testimony at January 11, 2018 hearing, transcript, p. 98.)
  17. Mr. Aaron Zimmerman testified that people who live a mile from the Metro will have automobiles. (January 11, hearing, transcript p. 115.)
  18. CRD's Statement in Opposition states that at 1.5 vehicles per unit, there would need to be 328 parking spaces just to meet the needs of residents. (Exhibit 137, p. 14.)
  19. The report of Applicant's traffic consultant states that the Applicant will restrict residents of the building from obtaining a Residential Parking Permit ("RPP"), with penalty of lease termination. (Exhibit 107A, p. 16.)
  20. As a result, it is unclear where the residents will park their vehicles.



## J. Building Height Measurement

1. Valor has calculated the height of its proposed Ladybird main building from the mid-point of the side of its building facing 48th Street between Yuma and Warren Streets. (Exhibit 3B1.)
2. Valor's height calculation would result in a building 50' high on the side facing 48th Street, while rising to 73' high at its rear along the alley connecting Massachusetts Avenue and Yuma Street. This measurement does not include the 15-foot penthouse level. (Exhibit 137)
3. This change in the building's height is due to the fact that the building site, Square 1499, is a steeply sloping site that drops 26 feet in elevation from the high point of the 48th Street curbside to the aforesaid alley. (Exhibit 195; January 11, 2018 hearing, transcript p. 28).
4. Although Valor has proposed a design that features setbacks on the upper floors of its building, these setbacks would not change the actual height of the building. (Exhibit 195.)
5. All contour maps in the record show a natural sloping terrain that continues to rise above the building site to approximately the level of 47th Street and beyond. (Exhibits 137 and 195.)
6. In the light of the aforesaid contour maps, the photographs of the site submitted by CRD establishes a high probability that, when 48th Street was constructed, the roadbed for that street was leveled across that natural slope by raising an embankment on the downhill side. Hence, the curbside from which Valor has taken its height measurement rests upon that embankment. (Exhibits 137 and 195.)
7. CRD's evidence further establishes that aforesaid embankment is substantial, and extends over 24' of level ground from the downhill curbside of 48th Street to the retaining wall above the present parking lot. In addition, a ramp rises from the deck of the aforesaid parking lot up to that embankment, in order to permit cars to access 48th Street. (Exhibit 137.)
8. Valor has submitted evidence in the form of contour maps to support its claim that the elevation of the downhill curbside of 48th Street is presently 265' above sea level. Valor claims that this elevation has not changed since the publication of a 1945 USGS map which shows 48th Street above Valor's building site. CRD does not contest this claim. However, Valor also appears to contend that this elevation is not a change from the natural elevation at the same point, prior to the construction of 48th Street, as shown on a 1900 USGS map submitted by Valor. This is the claim that Valor contests. (Exhibits 195 and 206A; January 25, 2018 hearing, transcript p. 186)
9. Valor's method of determining the natural elevation of its measurement point, by extrapolating its location on the natural terrain from an estimate of the distances between the contour lines shown on its 1900 USGS map, lacks the necessary precision to contradict CRD's evidence that an artificial embankment presently exists at that measurement point. Valor has failed to establish how 48th Street could have been

provided with a level roadbed in some manner other than by raising an embankment above the natural level of the sloping terrain on its downhill side. (Exhibit 206A; January 25, 2018 hearing, transcript p. 186)

10. CRD contends that Valor has failed to submit any dispositive evidence, such as soil samples, that would permit a determination as to whether or not the downhill side of 48th Street rests upon an artificial embankment containing compacted fill. Valor admits that a soil sample has not been taken. (January 25, 2018 hearing, transcript p. 186).
11. CRD contends that Valor has failed to meet its burden of proof on this point and that the Commission should find that Valor's height measurement has been taken from the top of an artificial embankment that changed the natural elevation of the landscape when 48th Street was constructed. (Exhibit 137).
12. Taking its height measurement from the midpoint of the building facing Yuma Street would, according to CRD, reduce the height of the Ladybird building by approximately two stories, a calculation which Valor has not contested. (Exhibit 195).

#### **K. The Developer Fails to Meet Inclusionary Zoning Requirements**

1. Under the Zoning regulations, the required inclusionary zoning set-aside is "the greater of ten percent (10%) of the gross floor area dedicated to residential use including penthouse habitable space as described in Subtitle C, Section 1001.2(d), or seventy-five percent (75%) of its achievable bonus density to inclusionary units plus an area equal to ten percent (10%) of the penthouse habitable space as described in Subtitle C, Section 1001.2(d)." (Subtitle C, Section 1003.1)
2. Using the Applicant's tabulations in its Pre-hearing submission (Exhibit 114A1), Ms. Marilyn J. Simon in her testimony examined this requirement based on the bonus density that the Applicant is proposing. She stated that if the achievable bonus density is the bonus density actually proposed, then the required inclusionary zoning set-aside is 56,210 SF, significantly more than the 28,320 SF set-aside offered in the Application. (Exhibit 16).
3. The Applicant incorrectly states that the IZ set-aside calculation should not include the existing buildings on lots 802, 803, and 806 because the Applicant in fact is proposing to use IZ bonus density attributable to those lots for lot 807. (Exhibit 211C).
4. Contrary to the Applicant's assertion, the required IZ set-aside calculated by Ms. Simon (56,210 SF) does not exceed the 20% IZ bonus density because is claiming IZ bonus density of 71,542 SF and habitable penthouse space of 25,611 SF.
5. Under Subtitle C, Section 1003.1, the required inclusionary zoning set-aside is "the greater of ten percent (10%) of the gross floor area dedicated to residential use including penthouse habitable space as described in Subtitle C, Section 1001.2(d), or seventy-five percent (75%) of its achievable bonus density to inclusionary units plus an area equal to ten percent (10%) of the penthouse habitable space as described in Subtitle C, Section 1001.2(d)." As Ms. Simon argues, the latter test applies to this Application because it yields the greater amount of IZ. (Exhibit 166)

6. No flexibility can be granted from the Inclusionary Zoning requirements through the design review process. (Subtitle X, Section 601.1)

**L. The Project Will Adversely Impact the Historically Landmarked Spring Valley Shopping Center and Cannot Be Approved by the Zoning Commission Without First Being Reviewed and Approved by the Historical Preservation Review Board**

1. Lots 802 and 803 are fully occupied by the Spring Valley Shopping Center, formerly known as the Massachusetts Avenue Parking Shops (herein "SVSC"). (Exhibit 149, Hansen Report)
2. What is today commonly referred to as the Spring Valley Shopping Center is in fact composed of two adjacent but separate landmarks: the Massachusetts Avenue Parking Shops (4841-59 Massachusetts Avenue) on the east side of the avenue, and Square 1500 (4820-74 Massachusetts Avenue and 4301 49th Street) on the west. Both collections of buildings were individually determined noteworthy as planned clusters of neighborhood commercial buildings designed to complement the character of the planned neighborhoods nearby. (Exhibit 149, Hansen Report)
3. According to the Affidavit of Will Lansing dated February 7, 2017, submitted by Valor, the "Voluntary Design Review application encompasses Lots 807 (the SuperFresh lot) with Lot 806 (the American University lot) and Lots 802 and 803 (the SVSC/Regency Lots). (Exhibit 211D, Lansing Affidavit at ¶1)
4. Valor and its co-applicants, American University and Regency, have withheld from the Zoning Commission and the public at large their agreements with one another governing the proposed development. (Exhibit 211D, Lansing Affidavit at ¶4)
5. Valor and its co-applicants have submitted the Lansing Affidavit in lieu of providing their full agreements with one another.
6. Regarding Valor's agreement with Regency, the Lansing Affidavit states only that the "Agreement with FW DC [the Regency entity] allows for the allocation of 92,764 Sq. Ft. of gross floor area of unused density from Lots 802 and 803 to proposed development on Lot 807," and that, "Our agreement with FW DC [Regency] includes the purchase and allocation of unused development density from Lots 802 and 803 to Lot 807...." (Exhibit 211D)
7. Regarding Valor's agreement with American University, the Lansing Affidavit states only that, "Our agreement with AU includes a recognition that the existing AU building cannot be physically expanded on Lot 806, and thus the unused development density on Lot 9 may be used in our proposed mixed-use development on Lot 807." (Exhibit 211D)
8. Valor's proposed project cannot proceed without borrowing purported unused density from the SVSC.
9. The opponents of the proposed Project have been denied due process of law by being deprived of knowledge of the nature and extent of the combination of lots, transfers of density, and/or potentially other relevant terms of these agreements among the co-applicants.

10. Having been deprived of complete information about the nature and extent of the agreements between Valor and its co-applicants, Citizens for Responsible Development can only assess the purported "allocation" of purported "unused density" from Lots 802 and 803 to Lot 807 based on the methods available to the co-applicants under District of Columbia law to achieve this "allocation" of "unused density."
11. The methods necessary to undertake the projects are (a) a transfer of density from Lots 802 and 803 to Lot 807; and (b) the creation of a new record lot by combining Lots 802, 803, 807, and possibly Lot 806; or (c) the creation of a new Tax & Assessment (T&A) lot by combining Lots 802, 803, 807, and possibly Lot 806.
12. Assuming that the agreements between Valor, Regency, and American University provide for a transfer of density from Lots 802 and 803 to Lot 807, such a density transfer is not permissible in the area of Washington, D.C. where these lots are located. A transfer of density is only permitted in 5 specified receiving zones. Lots 802, 803, 806, and 807 are not within one of the specified receiving zones.
13. A transfer of density to Lot 807 is also not available under the Design Review process because it would result in an impermissible increase in density to Lot 807.
14. Assuming that the agreements between Valor, Regency, and American University provide for a combination of Lots 802 and 803 with Lot 807 and possibly 806, such a combination constitutes the creation of a new record or T&A (tax) lot.
15. The combination of lots constitutes a lot subdivision.
16. All lot subdivisions in the Washington, D.C. must be reviewed and signed off on by the Historic Preservation Office.
17. If the subdivision affects the character of an historic property, then it must be submitted to the Historic Preservation Review Board (HPRB) for review and approval.
18. Assuming that the agreements between Valor, Regency, and American University provide for the creation of a new T&A lot, the creation of such a T&A lot requires approval by the Historic Preservation Review Board.
19. To create the T&A lot, SVSC T&A Lots 802 & 803 and Record Lot 9, which contains two separate T&A lots, Lots 806 and 807, would have to be consolidated. This subdivision to create a new project tax lot would result in appending to Lots 806 and 807 the lots of the historic landmarked SVSC.
20. Historic landmarks and any changes to their lots are subject to historic preservation review, including the proposed creation of a T&A lot.
21. Historic preservation review is also required for the division of any lot of record into theoretical building lots under Section 2516 of the DC Zoning Regulations. D.C. Code 11-X §2516.
22. Valor has not sought or provided any review by the Historic Preservation Office or the Historic Preservation Review Board.
23. The Commission must consider the effects of the proposed development on the landmarked SVSC.
24. Valor's proposed Project will adversely impact the landmarked SVSC shopping center located on Lots 802 and 803 as well as the portion of the SVSC located across Massachusetts Avenue.

25. Valor's proposed project does not respect the scale or architecture of the landmarked shopping centers. It will loom over the landmarks and the surrounding neighborhood \*they were designed to serve.
26. The proposed Project will detract from the historic character of the shopping centers that was recognized by the Historic Preservation Review Board, when it granted landmark status to both shopping centers.
27. Consequently, the proposed Project does not satisfy the requirements of Section 604.7(c) of the Design Review regulations because it will adversely affect historic landmarks.

### **Conclusions of Law**

1. The Project Involves an Impermissible Transfer of Density
2. The Project Fails to Meet the Requirements for Design Review Because, Contrary to §§ 600.1 (c) and (e) and §600.5 of the Design Review Regulations, It Calls for an Increase in Density
3. The Project Fails to Meet the Requirements for Design Review Because, Contrary to §600.2 of the Design Review Regulations, It Seeks More Relief Than Could be Secured under a PUD
4. The Project Fails to Meet the Requirements for Design Review Because, Contrary to §604.7(c) of the Design Review Regulations, It Undermines the Historic Character of the Spring Valley Shopping Centers and Surrounding Neighborhood
5. The Project Fails to Meet the Requirements for Design Review Because, Contrary to §600.4 of the Design Review Regulations, It Circumvents the Zoning Regulations By Proposing a Medium Density Building
6. The Project Fails to Meet the Requirements for Design Review Because, Contrary to §600.4 of the Design Review Regulations, It Would Result in Action Inconsistent with the Comprehensive Plan and the Future Land Use Map
7. The Project Fails to Meet the Requirements for Design Review Because, Contrary to §600.1(a) of the Design Review Regulations, It Will Have an Adverse Impact on the Community
8. The Project Fails to Meet the Requirements for Design Review Because, Contrary to §604.8 of the Design Review Regulations, Valor Has Failed to Demonstrate that the Project Is Superior to any Matter-of-Right Development Possible
9. The Zoning Regulations Do Not Permit Valor to Take Its Maximum Height Measurement from 48th Street, so as to Erect a Much Higher Building along the Length of Yuma Street and the Rear Alley
10. Based on Actual Bonus Density Proposed, the Project Fails to Meet the Minimum Inclusionary Zoning Requirement Set Forth in 11-C DCMR §1003.1
11. Because the Project Includes the Historically Protected Spring Valley Shopping Center, the Project Must be Approved by the Historic Preservation Review Board

12. Because the Project Affects the Character of the Historically Protected Spring Valley Shopping Center, the Project Must be Approved by the Historic Preservation Review Board
13. The Project Violates the Terms of the 1979 Declaration of Easement and Agreement to Which the Owner of the SuperFresh Lot Is Bound
14. Valor's Agreements with the Owner of the Spring Valley Shopping Center and American University Should Be Made Public

For the reasons set forth above, the Party in Opposition respectfully requests that the Applicant's Design Review Application be denied.

DISTRICT OF COLUMBIA ZONING COMMISSION

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*SUPPLEMENTAL FILING*

Z.C. Case 16-23  
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**CERTIFICATE OF SERVICE**

I certify that on February 20, 2018, I emailed a true copy of the foregoing Proposed Findings of Fact and Conclusions of Law to Advisory Neighborhood Commissions 3E and 3D ([3E@anc.dc.gov](mailto:3E@anc.dc.gov); [3D@anc.dc.gov](mailto:3D@anc.dc.gov)), Jeff Kraskin ([Jlkraskin@rcn.com](mailto:Jlkraskin@rcn.com)) for Spring Valley Opponents, William Clarkson ([wclarksonv@gmail.com](mailto:wclarksonv@gmail.com)) for Spring Valley Neighborhood Association, John H. Wheeler ([johnwheeler.dc@gmail.com](mailto:johnwheeler.dc@gmail.com)) for Ward 3 Vision and counsel for the Applicant, Christopher H. Collins ([chris.collins@hklaw.com](mailto:chris.collins@hklaw.com)).



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Dated: February 20, 2018

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