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VIA IZIS

Zoning Commission of the
District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: Z.C. Case No. 16-23
Valor Development, LLC – Voluntary Design Review
Applicant's Response to CRD's Response to Revised Plans

Dear Members of the Zoning Commission:

On behalf of Valor Development, LLC (the "Applicant"), we hereby submit the following reply to Citizens for Responsible Development's ("CRD") recent response to the Applicant's revised plans which was submitted to the Zoning Commission ("Commission") on December 11, 2018 (Exhibit 247). This reply also addresses CRD's expert witness request (Exhibit 248). Rather than focus on the revised plans submitted by the Applicant on October 16, 2018, CRD merely reiterates arguments it has already made during the course of this case which, as the record reflects, have already been thoroughly briefed, discussed, and addressed by the Applicant. For the sake of simplicity, the Applicant's response has been organized according to the outline of the substantive portions of CRD's response.

CRD: Request for expert witness status

Applicant Response:

CRD reiterates its prior request from February 8, 2018, to have the Commission recognize Mr. Stephen Hansen and Mr. Curt Westergard as experts in their respective fields. The reason for having to make this request now, after two hearings have already been held, is because CRD failed to proffer these individuals as experts as part of its prehearing submissions submitted in December 2017 and January 2018. On February 15, 2018, the Applicant opposed CRD's prior request to have these individuals recognized as experts witnesses, only one of whom actually testified at the hearings held on January 11 and 25, 2018 (Exhibit 216). As stated in the Applicant's prior objection, Subtitle Z § 404.1(g) requires parties to include their list of witnesses, and resumes of witnesses for consideration as experts, when filing their a request for party status. Neither of these individuals was included in the witness list in CRD's Request for Party Status (Exhibit 79). CRD also did not request expert status as a preliminary matter at the beginning of the public hearing. *See*

Subtitle Z § 408.1(b). In addition to Messrs. Hansen and Westergard, two individuals who up to this point have at least had some participation in the case, CRD now requests expert witness status for Mr. Ryan Shuler, an entirely new witness from Digital Design & Imaging Service, Inc., the same organization as Mr. Westgard.

The purpose of the order of procedures cited above is so that all other parties are given advance notice of witnesses and potential expert witnesses, and an opportunity to plan and present their testimony and cross-examination accordingly. To retroactively grant expert witness status to the testimony and reports provided by Mr. Hansen and Mr. Westergard would be prejudicial to the Applicant and contrary to established Commission procedure. For the same reasons, the Applicant opposes CRD's expert witness request for Mr. Shuler. The Commission may recall that in advance of the first public hearing the Applicant preferred two expert witnesses from Gorove/Slade & Associates, Inc., Mr. Erwin Andres and Mr. Daniel Solomon. However, as a preliminary matter at the beginning of the first hearing the Commission questioned the need to have two experts in the same field and only granted expert witness status to Mr. Andres

Based on the foregoing, should the Commission be inclined to grant CRD's request for expert witness status, the Applicant submits that such status should only be afforded to testimony provided by these individuals at the January 7, 2019, public hearing. Further, for the same reasons the Commission only granted expert witness status to Mr. Andres, the Applicant submits that if the Commission is inclined to grant expert status to one of the proffered witnesses from Digital Design & Imaging Service, Inc., such status should only be afforded to Mr. Westergard given his prior participation in the case.

CRD: Comments regarding the accuracy of the Applicant's previous renderings

Applicant Response:

Prior to addressing any substantive issue, CRD felt it necessary to begin its response by making accusatory and unsubstantiated assertions that the Applicant's initial renderings of the project were "deceptive." This statement is completely inaccurate and serves only as an attempt by CRD to paint the Applicant and the project architect in an unfavorable light so as to distract the Commission from what is truly a thoughtful and well-designed project that will restore a highly-desired full-service grocery store to the project site and significantly increase the amount of affordable housing in upper northwest. In regards to the Applicant's renderings, in no way has the Applicant made any attempt to deceive the Commission or the community. The Applicant's initial renderings were prepared by a professional rendering company that selected the camera lens to capture the view. As the Commission well knows, computer-generated massing models and renderings of a proposed development are intended to provide, as accurately as possible, a representative illustration of what a project may look like in relation to its surrounding context. There are numerous methods and programs available to prepare these illustrations with each method, including those provided by CRD, having a degree of distortion. Like a photograph, there is simply no way to generate a massing or rendering that precisely matches how the human eye will perceive a proposed project once constructed. Rather, one can only prepare these

illustrations in a manner that depicts design intent as accurately as possible given the tools available at the time. Through its own research, and CRD's filing, the project architect has discovered a great deal about the potential distortions computer-generated renderings can generate depending upon the method of preparation used. As a result, the project architect generated a completely new set of renderings that were prepared entirely within a single software package using a 50 mm camera lens. Inexplicably, rather than comment on the most recent set of renderings prepared using the specifications promoted by CRD, it seems CRD is more interested in discrediting the Applicant through unsubstantiated assertions, and refusing to acknowledge the Applicant's significant community outreach efforts and the substantial changes made to the project in response to community input.

CRD: I. The project fails to meet the requirements for design review because it calls for an increase in density

Applicant response:

On Page 2 of its response, CRD alleges that the project fails to meet the requirements for design review because it calls for an increase in density. This statement is inaccurate, demonstrates a misunderstanding of the design review process under 11-X DCMR, Chapter 6, and ignores the substantial information submitted by the Applicant and the Office of Planning ("OP") in regards to aggregation of density being permitted under the flexibility afforded by the design review process.

In an attempt to prove its point, CRD states "[i]t is uncontested that the matter-of-right density allowed on the SuperFresh site (Lot 807) is 184,514 [gross floor area ("GFA")]. According to the Applicant, the GFA of the Project is 234,629. It is obvious and undeniable that a density increase is being proposed. This is not permissible under the Design Review Regulations." The only aspect of this statement that is correct is the fact that an increase in density is not permitted under the Design Review Regulations, which the Applicant is not proposing to do. Rather, as testified to by Mr. Shane Dettman, the Applicant's expert in zoning and land use, and confirmed by OP, the Applicant is utilizing the flexibility in building bulk control afforded by the design review process to allocate unused density from the SVSC to the SuperFresh site (Lot 807) while remaining well within the MU-4 maximum matter-of-right density limitations within the design review project boundary.

On February 12, 2018, OP submitted a supplemental report which confirmed that aggregation of density is permitted as part of the design review process. In addition, the supplemental report describes how OP processes a planned unit development ("PUD") and a design review application relative to how the project boundary is defined and use for zoning computation purposes, a process that was confirmed by the Office of Attorney General ("OAG") and the Office of the Zoning Administrator ("ZA"). In relevant part, the supplemental report states that (1) a lot included in a design review boundary can be a tax lot or record lot and shall collectively make up the "Project-lot;" (2) the zoning calculations for a design review application must be determined using the Project-lot, and (3) a design review application cannot result in a non-conformity outside of the Project-lot unless relief is obtained.

CRD's comparison of the 184,514 GFA that remains on Record Lot 9 and the 234,629 new GFA proposed by the Applicant ignores the fact that the project boundary (a.k.a. the "Project-lot") includes Lot 806 (AU Building), Lot 807 (SuperFresh site), and A&T Lots 802 and 803 (Spring Valley Shopping Center ("SVSC")). Collectively, the project boundary has a land area of 160,788 square feet, not including the area of the public alley that separates the SVSC from the AU Building and SuperFresh site. The MU-4 zone permits a maximum density of 3.0 FAR (w / IZ), of which no more than 1.5 FAR can be devoted to nonresidential uses. Based on the land area of the project boundary, this equates to a maximum overall permitted GFA of 482,364 square feet, of which no more than 241,182 square feet can be devoted to nonresidential uses.

The amount of new GFA that is proposed by the Applicant within the project boundary is 234,629. The project boundary already contains 196,224 nonresidential GFA (AU Building: 179,302 GFA, SVSC: 16,922). Combined, the project, including existing and new GFA, will contain 430,853 GFA, of which 216,759 GFA will be devoted to nonresidential uses. As measured in accordance with the guidance provided by OP, the project will have an overall density of 2.68 FAR, below the maximum density of 3.0 FAR, and a nonresidential density of 1.35 FAR, below the maximum nonresidential density of 1.5 FAR. Thus, contrary to what is stated in CRD's response the project clearly does not call for an increase in density.

CRD: II. The proposed transfer of density from the historically protected Spring Valley Shopping Center is contrary to District Law

CRD: A. No transfer of density can be received by the project:

Applicant response:

CRD argues that density from the SVSC cannot be transferred to Lot 807 because it will constitute an impermissible increase in density and because the project site is not located in a credit trade area (formerly TDR and CLD zones). As discussed above, the Applicant has already demonstrated that the project does not propose an increase in density. As to CRD's comment regarding credit trade areas, CRD is correct that the project is not located within any of the ZR16 credit trade areas. However, the project does not need to be located within a credit trade area to achieve the desired development program. Rather, as discussed above and testified to by Mr. Dettman, the Applicant is transferring/aggregating unused density from the SVSC to Lot 807 through the flexibility in building bulk control that is permitted under the design review regulations contained in Subtitle X, Chapter 6 of ZR16, which also allow for the property within a design review application to be separated by a public street or alley.

CRD: B. The proposed project requires review by the Mayor's Agent and the Historic Preservation Review Board

CRD: 1. Project seeks to consolidate lots with those of an historic landmarked building to create a new project lot and undertake new construction on that lot.

Applicant Response:

CRD claims that inclusion of A&T Lots 802, 803, 806, and 807 in the project boundary constitutes a "subdivision," as that term is defined in the D.C. Historic Landmark and Historic District Protection Act of 1978, as amended by the Historic Landmark and Historic District Protection Amendment Act of 1990. This statement incorrect on the basis of the very same sections of the D.C. Code that CRD is relying upon to make its case. D.C. Code § 6-1106 ("Subdivisions") states, in relevant part, "[b]efore the Mayor may admit to record any subdivision of an historic landmark or of a property in an historic district, the Mayor shall review the application for admission to record in accordance with this section and § 6-1108.03,…" (emphasis added). Furthermore, pursuant to D.C. Code § 6-1102(13), the terms "subdivide" and "subdivision" are defined as "the division or assembly of land into 1 or more lots of record, including the division of any lot of record into 2 or more theoretical building sites as provided by the Zoning Regulations of the District of Columbia."

The express language of the D.C. Code is clear that the Mayor is required to review any subdivision "of an historic landmark or of a property in an historic district." The Applicant is not proposing to subdivide the site of the historic SVSC. No changes will be made to A&T Lots 802 and 803, the two A&T lots upon which the SVSC resides. They will not be combined or divided through a division of lots process or with theoretical building sites, nor is any new construction proposed on the SVSC site. In fact, all of the A&T lots within the project boundary will remain in the exact configuration as they currently are, with A&T Lots 802 and 803 remaining entirely separated from A&T Lots 806 (AU Building) and 807 (SuperFresh site) by the existing 20-foot public alley. The only division that will occur is on Lot 807, the only lot to contain new construction, where the Applicant will use theoretical building sites for purposes of measuring zoning compliance of the proposed apartment building and townhouses. This does not trigger review by the Mayor's Agent ("MA") or the Historic Preservation Review Board ("HPRB") since Lot 807 does not contain any historic landmarks and it is not located within a historic district.

The mere inclusion of Lots 802 and 803 (SVSC) in the project boundary also does not trigger review by the MA or the HPRB. CRD incorrectly characterizes the definition of the project boundary as a lot "consolidation," and states that "[i]ncluding other lots as part of a consolidation with a landmarked lot to create a new project lot extends the purview of the HPRB to those lots as well, whether or not they are located in an Historic District."[1] As stated above, all of the A&T lots

[1] The term "project lot" does not appear anywhere in the definition of "subdivide" or "subdivision," or anywhere else in District historic preservation law or regulations.

within the project boundary will remain in the exact configuration as they currently are, with the historic SVSC remaining entirely separated from A&T Lots 806 (AU Building) and 807 (SuperFresh site) by the existing 20-foot public alley. CRD cites to the Germuiller Row case (H.P.A. 01-144) as proof that "the presence of an alley separating a landmark from the other lots in a combined project lot is not a disqualifying factor for review by HPRB." However, a review of the MA order for Germuiller Row shows that this case involved a subdivision that consolidated several lots and "part of an alley to be closed" into a single record lot. Indeed, all of MA cases cited by CRD either involve garden variety subdivisions to combine property containing a historic landmark with other property to create a single record lot, or carve out new lots from property that contains a historic landmark. Neither circumstance is being proposed or will be required of the Applicant in this case.

CRD: 2. HPRB review must precede a Zoning Commission hearing

Applicant Response:

As thoroughly discussed above, the Applicant's proposal does not require review by the HPRB or MA. Furthermore, there is no regulatory requirement under the Zoning Regulations or District preservation law or regulations that require HPRB to review a project before the Commission conducts its review.

CRD: C. The SVSC has no available density to transfer

Applicant Response:

CRD's argument that all of SVSC's density is accounted for because both the existing building and parking lot are equally defining features is incorrect. To support its argument, CRD states that "[b]ecause [SVSC] is listed in the DC Inventory of Historic Sites and protected under the 1978 Act, (1) no new floors may be added above it, (2) no additions may be placed in front, beside, or behind it; and (3) the parking lot may not be filled in with new development." Not only is this statement entirely inaccurate as it relates whether SVSC has unused density, it also demonstrates a lack of understanding of District preservation laws, regulations, and review processes.

CRD provides no citation for its assertion that SVSC has no unused density to transfer, nor do they provide any calculations of gross floor area that show what can be constructed under zoning already exists. As shown in the tabulation of development data included in the Applicant's revised plans, the SVSC currently contains approximately 16,922 GFA. The existing SVSC parking lot does not contribute any GFA. The SVSC site (A&T Lots 802 and 803) has a land area of 39,516 square feet. Under existing MU-4 zoning, this equates to a maximum overall permitted density of 118,548 GFA (w/ IZ), of which 59,274 GFA can be devoted to nonresidential uses. As such, after accounting for the existing SVSC building there is approximately 101,626 GFA of unused density at the SVSC, of which approximately 42,352 GFA can be devoted to nonresidential uses. Thus, contrary to CRD's assertion, there is substantial unused density on the SVSC site.

Based on CRD's logic, the SVSC's historic status, including the parking lot which it refers to as a "defining element," prohibits any further development on the SVSC site; and therefore, "[a]ll of its GFA is accounted for." CRD even goes so far as to say the SVSC is "fully built." These statements grossly misinterpret District preservation law. Historic designation under District preservation law does not prohibit future development on a historic site. One need only look across Massachusetts Avenue at the recent addition to the historic Spring Valley Village shopping center which is nearly completed after having received HPRB approval (*See* H.P.A. #15-252). Rather, historic designation merely requires proposed developments and subdivisions on historic properties to be reviewed by the HPRB, and possibly the MA. Even the MA cases cited by CRD and the Zoning Regulations demonstrate the fault in CRD's argument as a good number of the MA cases involved subdivisions to facilitate additional development on historic sites. As for the Zoning Regulations, if it were as CRD asserts there would be no need for the provision concerning additions to historic resources in Subtitle I, Section 200.2 since additions to these structures would not be possible by virtue of their historic designation. Since additions can be made to historic resources, subject to review by HPRB and the MA, the Commission adopted this provision to further regulate how density on the site of a historic resource is to be allocated and computed. While this provision relates to properties in D zones, the principle is the same as it relates to the SVSC.

CRD: D. Zoning Commission Order No. 101 cannot be used as precedent for this project

Applicant Response:

Zoning Commission Order 101, which as CRD states involved a PUD and predated the formation of the HPRB under the D.C. Historic Landmark and Historic District Protection Act, continues to be good precedent for the Commission's ability to allow aggregation of density under the design review process, including the utilization of unused density to help lessen the potential for future development on a historic landmark site.

Zoning Commission Order 101 was a PUD that involved the transfer of unused density from the historic Heurich Mansion to an adjacent lot where an office building would be constructed. The Applicant cited to this case in its rebuttal testimony on January 25, 2018, to demonstrate that the Commission has the authority to approve transfers/aggregation of density outside of a designated credit trade area (former TDR and CLD areas) pursuant to its authority under the Zoning Act of 1938. As testified to by Mr. Shane Dettman on January 25, 2018, the Commission's decision was upheld by the D.C. Court of Appeals in *Dupont Circle Citizens Assoc. v. D.C. Zoning Commission* (355 A.2d 550). In that case, the Petitioner argued that the Zoning Act and Zoning Regulations did not permit the Commission to approve a transfer of development rights within a PUD. The Court rejected both of these claims. In examining the Zoning Act, the Court stated that the Zoning Act grants the Commission a broad general authority. Regarding the Zoning Regulations, the Court found the following:

> "The very nature of the Planned Unit Development concept as promulgated by the Zoning Commission in Article 75 of the Regulations suggests that a transfer of development rights from one building to another must have been contemplated as one that was both feasible and appropriate in the development of such a plan…there is no provision in PUD regulations that the floor area ratio of each building in the PUD must be within the maximum permitted in the district. The requirement to be met is that the FAR for all buildings does not exceed the 'aggregate' permitted within the project area. The Commission has found that the proposed project meets that requirement and we know of no good reason why, in making that determination, it may not take into consideration a mutually agreed upon transfer of development rights. We also hold that where the total FAR for the project is the determinative figure, rather than the FAR for each building, there is no impediment to permitting payment for the transfer of such rights from one building owner to another within the same project when agreed to by the parties."

The fact that the Heurich Mansion case was a PUD and the Applicant's case is a design review case is irrelevant since the Commission has the authority to approve aggregation of density under the Zoning Act and, as previously discussed, OP has confirmed in its supplemental report that aggregation of density across a site is a form of flexibility that is permitted under both the PUD regulations and design review regulations. Per OP's supplemental report (Exhibit 215), which was prepared in coordination with OAG and the ZA, the Applicant's computation of density and utilization of the project site have been found to be consistent with the regulations.

CRD: III. The project violates the terms of the 1979 Declaration of Easement and Agreement

Applicant Response:

The 1979 Declaration of Easement and Agreement (the "Agreement") is indeed a recorded document in the land records of the District of Columbia. It is an agreement between private property owners that, among other things, sets forth the development rights available at the time as between those private property owners, and their successors and assigns. Other than the owners listed in the Agreement, to whom the benefits and obligations of the document apply, there are no third party beneficiaries and CRD has no right or standing to assert any rights under the Agreement. Furthermore, the parties to the Agreement have the absolute and unfettered right to amend the Agreement at any time.

The project does not violate the terms of the Agreement. According to CRD, the Applicant is prohibited from attempting to utilize additional GFA through the transfer from SVSC since doing so would surpass the maximum GFA allowed on Record Lot 9 because construction on Record Lot 9, which includes A&T Lots 806 and 807, is capped by the Agreement.[2] CRD is

[2] In its response, CRD mischaracterizes the Applicant's statement regarding the overall maximum GFA permitted on Record Lot 9 and the amount of GFA that remains after subtracting the GFA of the existing AU Building. Any time the Applicant has discussed (orally or in writing) the maximum permitted and remaining GFA on Record Lot 9, it has been for purposes of establishing how much GFA is unused on Record Lot 9. The Applicant has never stated that the 1979 Declaration of Easement and Agreement caps development on the Record Lot, or prevents the

incorrect and is inconsistent with its own arguments and filings to date. In its transfer of density summary submitted on January 31, 2018[3], CRD states that the maximum density the Applicant can construct on Record Lot 9 is 184,514 GFA. This amount is arrived at by subtracting the 179,302 GFA of the existing AU Building from the overall amount of GFA that could be constructed on Record Lot 9 at 3.0 FAR, the maximum permitted density in the MU-4 zone under the Inclusionary Zoning ("IZ") regulations. However, if CRD was correct that the Agreement irrevocably capped development on Record Lot 9, then the Applicant would be prevented from accessing the additional bonus density available under IZ.

The paragraph in the Agreement cited by CRD stating that "within each of the two (2) described areas [Lot 806 and 807] all remodeling, additions, or replacement construction shall not be in violation of the requirements of the Zoning Regulations from Record Lot 9 [the record lot for both Lot 806 and 807]." Contrary to CRD's reading, this paragraph does not cap development on Record Lot 9. It merely requires all "remodeling, additions, or replacement construction" on Record Lot 9 to remain in compliance with zoning. As proposed under the design review regulations of Subtitle I, Chapter 6, the project, including existing and new construction on Record Lot 9, will comply with the Zoning Regulations.

CRD: IV. The project fails to meet the requirements for design review because it seeks more relief than could be secured under a PUD

Applicant Response:

CRD is incorrect that the project seeks more density than could be secured under a PUD. In fact, CRD's own calculations are in error as it calculates the 20% PUD-related bonus density based upon the amount of GFA that is remaining on Record Lot 9 rather than the maximum 2.5 (3.0 w/IZ) FAR permitted in the MU-4 zone.

As discussed above, the project boundary encompasses A&T Lots 802 and 803 (SVSC), A&T Lot 806 (AU Building), and A&T Lot 807 (SuperFresh site). As also permitted under the design review regulations, the property within a PUD can be separated by a public street, alley, or right-or-way. *See* Subtitle X § 301.5. As such, based upon the area of the project boundary, the maximum permitted density under a PUD would be 578,837 GFA.[4] As shown in the Applicant's revised plans, the overall project (including existing and proposed GFA within the project boundary) contains approximately 430,853 GFA. This is well below the maximum density that would be permitted under a PUD. Indeed, due to the substantial setbacks and massing reductions made by the Applicant to satisfy the design review criteria and in response to community concerns,

Applicant from being able to utilize unused density from the SVSC through the flexibility in building bulk control allowed under the design review regulations of Subtitle X, Chapter 6.

[3] Exhibit 208

[4] The project has a land area of 160,788 square feet. At the maximum permitted density of 3.0 FAR in the MU-4 zone (w/IZ), a total of 482,364 GFA would be permitted as a matter of right across the project boundary. The PUD regulations provide for an additional 20% bonus density which can be calculated using the permitted density under IZ. This results in a total permitted density of 578,837.

the overall GFA of the entire project is less than the amount of GFA that would be permitted under a PUD on Record Lot 9 *only*.[5]

CRD: V. The project fails to meet the requirements for design review because it would result in action inconsistent with the Comprehensive Plan

Applicant Response:

As required under Subtitle X §§ 600.4 and 604.5 of the design review regulations, the project is in fact overwhelmingly not inconsistent with the Comprehensive Plan. An exhaustive analysis of the Applicant's revised plans relative to the Comprehensive Plan is included in the case record at Exhibit 240B.

CRD: VI. The project fails to meet the requirements for design review because it is inconsistent with the Future Land Use Map

Applicant Response:

As thoroughly discussed in the Applicant's Comprehensive Plan analysis at Exhibit 240B, the project is not inconsistent with the Future Land Use Map ("FLUM"). The entire project site is designated as Low Density Commercial on the FLUM, and the Framework Element expressly states that the MU-4 zone (formerly C-2-A under ZR58)corresponds to this particular land use category.[6] The Applicant is not proposing to change the existing zoning, which has existed on the project site since adoption of the 1958 Zoning Regulations.

In regards to CRD's comments regarding number of stories, the Applicant has already addressed this question in its Comprehensive Plan analysis and at the hearing. The project is not inconsistent with the portion of the Low Density Commercial description that states a common feature of these areas "is that they are comprised primarily of one- to three-story commercial buildings." First, the Applicant is not proposing to construct any buildings that are solely devoted to commercial use, but rather is proposing a mixed-use project containing residential and retail uses, both of which are expressly stated as being appropriate within areas designated as commercial on the FLUM. The language of the Comprehensive Plan is unambiguous, and expressly qualifies the language regarding the number of stories in Low Density Commercial areas as relating to *commercial* buildings. Finally, the Commission has previously found mixed-use buildings with more than three stories that are similar to the Applicant's proposal to be not

[5] Record Lot 9 has a land area of 121,272 square feet. Under the PUD regulations, a total of 436,579 GFA would be permitted on Record Lot 9.

[6] The current Framework Element was adopted by the D.C. Council prior to the repeal of the 1958 Zoning Regulations ("ZR58") and replacement with the 2016 Zoning Regulations ("ZR16"). As such, the Future Land Use Map land use descriptions contained in the Framework Element refer to ZR58 zone names. The current MU-4 zone corresponds to the former C-2-A zone, which is expressly stated as corresponding to the Low Density Commercial land use designation. The switch from C-2-A under ZR58 to MU-4 under ZR16 was solely a change in name. The development parameters of the MU-4 zone are exactly the same as the former C-2-A zone.

inconsistent with the Low Density Commercial designation on the FLUM.[7] As proposed, the building on Lot 807 will be not inconsistent with the FLUM, and fully compliant with the maximum permitted height in the MU-4 zone, which permits a maximum of 50 feet with no limit on the number of stories.

CRD: VII. The project will have an adverse impact on the community

Applicant Response:

As demonstrated by the District Department of Transportation ("DDOT") report, the OP reports, and the Applicant's initial Comprehensive Transportation Review ("CTR") and supplemental transportation memoranda, the additional traffic and parking demand generated by the project will not adversely impact the community. It is not clear why CRD claims a lack of truck trip information, while in the same sentence states that the CTR indicates there will be approximately 21 truck trips per day. As was stated by the Applicant's transportation consultant at the December 13, 2018, meeting of Advisory Neighborhood Commission ("ANC") 3E, the estimated average of 21 daily truck trips is based upon surveys conducted of similarly sized projects containing grocery stores in the District, and includes all truck trips to the project site including grocery store deliveries, resident move-in/move-out, resident package deliver, mail service, etc. As was also stated at the ANC 3E meeting, contrary to CRD's stated assumption that the number of trucks will probably be higher than what is stated in the CTR, it is possible the number of truck trips will be lower given that the grocer that is likely to occupy the retail space, Mom's Organic, uses centralized distribution centers to stock its stores.

In regards to parking, despite what is stated in its response CRD well knows that the Applicant will provide more than 72 parking spaces for the 219 residential dwelling units that are proposed. In response to community comment and market demand the Applicant will provide more parking than the minimum required by zoning. Specifically, as shown in the Parking Management Plan attached to the Applicant's November 23, 2018, supplemental transportation memorandum, the Applicant will provide approximately 86 parking spaces for the retail/grocery component of the project, and will provide approximately 228 parking spaces for the residential component of the project. The Applicant will provide these spaces through a combination of spaces constructed solely for the project and a long-term leaseback arrangement with AU.

CRD's statement that " [w]ith the elimination of Windom Walk, a path that led from 48th Street to the AU alley, pedestrians will have to walk around the Project site, using three-foot wide sidewalks with no separation from the heavily trafficked alleys" is misleading. First, Windom Walk was eliminated from the project partially in response to concerns expressed by the community, including CRD, regarding the potential for legitimate pedestrian / vehicle conflicts created where Windom Walk terminated at the public alley near the loading facilities for the proposed apartment building and AU Building. Now, CRD laments the loss of Windom Walk and

[7] *See* Z.C. Order No. 08-15 (Friendship-Macomb SC, Inc.). Decision upheld by D.C. Court of Appeals (33 A.3d 382)

argues that its elimination will require pedestrians to walk through the alleys on narrow sidewalks. This is simply not the case. The elimination of Windom Walk will not lead to any more pedestrians walking through the public alleys than would have occurred if Windom Walk was retained. However, because pedestrians may occasionally choose to use the alley to access Massachusetts Avenue the Applicant is providing clearly delineated sidewalks that do not currently exist in the alley, and has committed to funding and constructing a midblock HAWK signal, subject to DDOT approval. The width of the sidewalks will be enough to improve safety in the alley while not necessarily encouraging pedestrian circulation. Rather than encourage pedestrian circulation through the alleys and near areas devoted to parking and loading access, it is a much safer to direct primary pedestrian circulation to the sidewalks along 48th and Yuma Streets where the Applicant will eliminate approximately 80 linear feet of curb cuts and construct additional pedestrian improvements at select intersections. Thus, in contrast to CRD's statements the project will improve overall pedestrian safety around the project site.

CRD: VIII. The project fails to meet the requirements for design review because the project is not superior to any matter-of-right development possible

Applicant Response:

As required under Subtitle X § 604.8 of the design review regulations, the project will satisfy the design review standards of Subtitle X § 604.7 in a way that is far superior to any matter-of-right development on the site. An exhaustive analysis of the Applicant's revised plans relative to the design review standards of Subtitle X § 604.7 is included in the case record at Exhibit 240C.

The Applicant's statements regarding the potential for matter-of-right development to be constructed to a maximum height of 50 feet without setbacks at the property line, and up to 0.4 FAR art the penthouse level is not an idle threat, as characterized by CRD, but rather is a legitimate development scenario that could be constructed under existing zoning, with a design that is much less sympathetic to the surrounding context and lacks a full-service grocery store. While, CRD states that "a 50-foot tall building could only take up roughly half the site, leaving plenty of room for other amenities," the reality is much of the remaining open area on the site could be devoted to surface parking.

As thoroughly discussed in Exhibit 240C, the design of the project is of superior quality, is complementary to the surrounding context, provides a successful transition between the lower-scale residential neighborhood and the larger-scale AU Building, and will provide a more fitting backdrop to the historic SVSC compared to what currently exists. The project is also far superior to a matter-of-right project in many other respects including, but not limited to, building program and sustainability. First and foremost, the project will restore a full-service grocery store use on Lot 807. Setting aside all of the other superior aspects of the project, the grocery store, which is highly desired by the community, is something that no matter-of-right development can provide as there is not enough nonresidential density remaining on Record Lot 9. In addition, while under District regulations the Applicant is only required to design the project to be LEED Certified, the Applicant will far exceed its sustainability requirement by achieving LEED Gold certification.

CRD: IX. The application continues to fall short on Inclusionary Zoning

Applicant Response:

Similar to its mischaracterization of the Applicant's initial renderings, CRD attempts to discredit the Applicant by making it seem as if Valor Development is trying to skirt or "evade" the District's IZ requirements. Nothing can be further from the truth, and the recent modifications made to the project do not in any way circumvent the IZ regulations. The questions raised by Ms. Simon at the public hearing regarding IZ actually uncovered an area of the IZ regulations that was not clear when applied to the unique circumstances that exist within the project boundary. Specifically, as the Applicant explained in its April 16, 2018, request for deferral, the issue had to do with how/whether the substantial amount of existing commercial gross floor area within the project boundary gets factored into the Applicant's IZ calculation when that existing gross floor area is not subject to IZ, is not being modified, and is not owned by the Applicant.[8] After conferring with the OP, the Applicant was advised that the IZ set aside calculation for the project must include the existing gross floor area of the AU Building and SVSC when determining the extent of bonus density used, which the Applicant has done in its most recent set aside calculations. As shown in the detailed IZ calculations included in the revised plans, the Applicant will fully comply with the IZ regulations.

CRD's assertions that the Applicant is not meeting IZ are in error. First, CRD states the "[i]n claiming that the 'bonus density' for the IZ calculation is 0.18, the Applicant is relying on a proposed text amendment currently under consideration which would replace the term "achievable" with "utilized" …Thus, the bonus density factor should be 0.50, not 0.18." This is the same argument that Ms. Simon raised at the recent IZ amendment hearing on September 20, 2018, where she argued that the IZ bonus density calculation has always been based upon full utilization of the bonus density regardless of how much of the IZ bonus is used. Based upon reports from OP, the Commission disagreed with Ms. Simon's argument. As discussed by OP, one of the foundations of the District's IZ program is that the set aside requirement is proportional to the density incentive. This has always been the case and, as stated by OP, the intent of the recent amendment was simply to clarify the language in the IZ regulations. As such, the Applicant's IZ calculations do not rely upon the recently adopted amendment. The calculations are correct based upon the IZ regulations currently in effect.

CRD is incorrect in its statement that the Applicant fails to include certain cellar floor area and residential projection area in the project's IZ calculation, and that these areas "should be included in the calculation of 'utilized bonus density'." As to the latter, by definition cellar floor area and bay projections are not considered gross floor area. As such, these areas do not count toward FAR; and therefore, do not get factored into the IZ bonus density calculation. Furthermore,

[8] The recent amendments to the IZ regulations adopted in Z.C. Case No. 04-33I clarify this question by including new provisions that expressly state when IZ applies to new gross floor area only, and when IZ applies to new and existing gross floor area.

as shown in the IZ calculations included on Sheet G09 of the revised plans these areas are included in the Applicant's IZ calculations exactly how they are supposed to be included per the IZ regulations and guidance published by the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"). CRD is misreading the contents of the IZ exhibit submitted by the Applicant. *See* Exhibit 240E. As the title to this exhibit states, this exhibit was prepared solely for purposes of showing the IZ calculation for the "base building" (i.e. above grade area that counts toward gross floor area). This exhibit was prepared specifically to show the Commission how the existing gross floor area within the project site was being taken into account in the Applicant's revised IZ calculations, and not to show the project's full IZ requirement, which is shown on Sheet G09 of the revised plans. This is specifically discussed by the Applicant on page 4 of its October 16, 2018, submission,
which states:

> *"Of note, the calculations contained in Exhibit E do not reflect the additional IZ required for non-communal penthouse habitable space, residential dwelling units located in a cellar, or residential GFA located in projections. As shown in the tabulations of development data included in the Revised Plans, these components would increase the IZ requirement of the Project by approximately 5,734 GFA, for a total IZ set aside requirement of approximately 27,440 GFA."*

CRD: X. The project has few – or no – benefits to the community

Applicant Response:

The standard of review for a design review application is does not require the Applicant to provide benefits and amenities. Rather, the Applicant must demonstrate that the project is not inconsistent with the Comprehensive Plan and satisfies the design review standards enumerated in 11-X DCMR § 604 in a manner that is superior to any matter or right development. Through the analyses provided in Exhibits 204B and 204C, the Applicant has demonstrated that the project overwhelmingly satisfies the applicable standard of review. Notwithstanding, as discussed above and in the Applicant's filings, the project will result in numerous benefits to the community including a new full-service grocery store; LEED Gold certification; high-quality context-sensitive design; numerous public space improvements; a new pocket park; a HAWK signal; Residential Parking Permit ("RPP") restrictions, construction of "bulb-outs" at nearby intersections, and other transportation-related improvements. These are all benefits that would not necessarily be provided or required under a matter-of-right development.

In regards to CRD's comments about the grocery store. The project will restore a full-service grocery store at the site, a use that is highly desired by the community. While CRD now criticizes the size of the proposed grocery store and the grocer that is likely to occupy the space, Mom's Organic, the current proposed size and grocer are a direct result of concerns expressed by the community, including CRD, over an earlier proposal that included a significantly larger grocery store (approximately 55,000 square feet) that was potentially going to be occupied by Harris Teeter, and a later proposal for a Balducci's that would potentially compete with Wagshal's.

As was stated at the recent ANC 3E meeting, the current proposed size of the grocery store is very similar to the vacant grocery store building on Lot 807. Further, Mom's Organic is most certainly a full-service grocery store that carries a range of basic staples and sundries, which the community has specifically requested. Of the many positive improvements the project will bring to the community, the grocery store is far and above the improvement that has been most requested by the community.

CRD: XI. Despite the reduction of the height of building at 48th Street measuring point from 50 to 43 ½ feet, the Zoning Regulations prohibit the Applicant from taking its maximum height measurement at 48th Street

Applicant Response:

CRD's comments regarding the building height measurement point ("BHMP") for the project were addressed at the January 25, 2018, public hearing during rebuttal testimony provided by Mr. Shane Dettman, the Applicant's expert in zoning and land use, and Mr. Brad Glatfelter, the Applicant's expert in civil engineering. Again, the Applicant submits that CRD's reading of the Zoning Regulations are in error. As was stated by Mr. Dettman, the measurement of height of the proposed apartment building is controlled by 11-B DCMR §§ 307.1 and 307.5. Pursuant to § 307.1, the BHMP for the project "shall be established at the level of the curb opposite the middle of the front of the building." The proposed apartment building has frontage on 48th Street and Yuma Street; and therefore, pursuant to § 307.5 the Applicant may choose either street to measure the height of the building. As such, the Applicant has chosen 48th Street as the front from which the height of the proposed apartment building will be measured from the level of the curb opposite the middle of the front of the building.

As to CRD's comments regarding the elevation of the curb along 48th Street, as testified to by Mr. Glatfelter the BHMP of elevation 265 has been consistent since at least the 1940s, without any evidence that the elevation has been artificially changed. Indeed, CRD's reliance on 11-B DCMR 307.7 is misplaced as the language in this provision to "bridge, viaduct, embankment, ramp, abutment, excavation, tunnel, or other type of artificial elevation or depression" is not applicable to the project site in any way. Rather, the language in this provision was established to address situations such as the New York Avenue, NE overpass across the railroad tracks, the H Street, NE overpass across the Union Station rail yard, and other similar situations. The existing condition along 48th Street is not reflective of any of these situations. As was stated by Mr. Glatfelter, "what's there is not a false embankment, but rather the SuperFresh is a retaining wall that retains in situ soil. So, the elevation hasn't changed on 48th Street. It always has been about [elevation] 265."

The photograph included in CRD's response clearly shows that the curb at grade is logical and consistent along 48th Street for the point of measurement. Further, the Applicant notes the definition of "natural grade" contained in Subtitle B §100.2 of ZR16 which states"

> "The undisturbed elevation of the ground of a lot prior to human intervention; or where there are existing improvements on a lot, the established elevation of the ground, exclusive of the improvements or adjustments to the grade made in the two (2) years prior to applying for a building permit; natural grade may not include manually constructed berms or other forms of artificial landscaping."

Thus, by definition, to the extent any adjustments were made to the grade in order to accommodate the construction of 48th Street, which CRD has testified could have occurred as far back as the 1920s, such adjustments would not be considered for purposes of establishing the "natural grade" surrounding the project site. Rather, since Lot 807 has existing improvements on it, the "natural grade" along 48th Street would be the established elevation of the ground not including any adjustments to the grade made within two years of applying for a building permit. Assuming the Commission approves the project, it is reasonable to assume that the elevation of the curb along 48th Street will be the same as it currently is when the Applicant applies for a building permit.

CRD: XII. The Applicant has failed to submit agreements that are critical to the Zoning Commission and CRD's ability to assess the project

Applicant Response:

CRD's request for private agreements is illogical and by extension would apply to any design review or PUD application, and potentially any BZA application that is submitted. Clearly, the Commission does not require private documents to be provided in its cases. If the Commission approved the project, the terms and provisions of the Commission's final order will control, and if there are private agreements that need to be amended in order to implement the provisions of the controlling Commission order then the parties to such agreements either amend the agreements, decide not to proceed with the project, or determine not to enforce their rights under any such agreements where there may be an inconsistency with the Commission's order.

While CRD implies that the Applicant has ignored the Commission's request for the private agreements with American University and Regency Centers, this is simply not the case. In its February 12, 2018, posthearing submission, the Applicant explained that the agreements are private, two-party contractual agreements and AU, Regency Centers, and the Applicant have determined that they are not interested in having these private agreements placed into the public record. However, the Applicant was authorized by AU and Regency Centers to submit descriptions of the general terms of the agreements relative to the allocation of density remaining on Record Lot 9, and the transfer of unused density from the SVSC to Lot 807. The Applicant submitted these descriptions in the form of a sworn affidavit from the Applicant's representative which is included in the case record as Exhibit 211D.

We look forward to the continuation of the public hearing scheduled for January 7, 2019.

Respectfully Submitted,

Norman M. Glasgow, Jr.

Shane L. Dettman
Director of Planning Services

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Elisa Vitale, Office of Planning (via hand delivery and email)
Anna Chamberlin, District Department of Transportation (via email)
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Advisory Neighborhood Commission 3E (via email)
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Edward L. Donohue, Donohue & Stearns, PLC, representing Citizens for Responsible Development (via email)
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Jeff Kraskin, Spring Valley Opponents (via email)
William Clarkson, Spring Valley Neighborhood Association (via email)
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