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## Executive Summary

This statement in opposition is filed by Citizens for Responsible Development (“CRD”) in response to the Planned Unit Development application (the “PUD application” or “PUD”) filed by Valor Development (the “Applicant”) on May 6, 2019 for redevelopment of the SuperFresh site. CRD is a party to the case. The project described in the PUD (the “Project”) is essentially the same as that described in Valor’s revised voluntary design review application (Case Number 16-23). However, the Applicant must now show that the Project meets the requirements for a PUD. The Applicant fails to meet these requirements.

The fundamental flaw of the Project (as well as the previous Design Review project) is that, at four to six stories, it is simply too big. The main building rises to 81.5 feet tall and has three levels of underground garage parking. By our calculation, the Project has a Gross Floor Area of 234,292 SF, almost 50 thousand SF more than what is available on the SuperFresh Lot as a matter of right, and this doesn’t count the 57,341 SF of residential space in the cellar, in the penthouse and in the projections. A table depicting the matter-of-right calculation is set forth immediately following this Executive Summary.

As such, the Project simply overwhelms the surrounding residential and small-scale commercial neighborhood, including the historically protected Spring Valley Shopping Centers. The Project is located within a residential neighborhood consisting of two-story homes. It faces two local streets (48<sup>th</sup> Street and Yuma Street, each of which is 30-feet wide) rather than a major thoroughfare. The surrounding commercial neighborhood consists primarily of 1 – 3 story buildings. The sole exception to the low-density character of the area is the American University building next door at 4801 Massachusetts Avenue (the “AU Building”). The AU Building faces a major, 160-foot-wide arterial and could only have been built by a transfer of density from the SuperFresh site.

The Zoning Regulations state that, to approve a PUD application, the Commission must find that the proposed development:

- Is not inconsistent with the Comprehensive Plan;
- Does not result in unacceptable impacts on the surrounding area; and
- Includes specific public benefits.<sup>1</sup>

The Project fails to meet each of these requirements for the reasons set forth below:

**Part A:** The Project is inconsistent with the Comprehensive Plan. The core deficiency is that the height, scale, and density of the Project are deeply out of character with the neighborhood. This Project adds density in the wrong place.

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<sup>1</sup> 11-X DCMR §304.4.

**Part B:** At four to six stories, the Project is inconsistent with the designation of the site in the Future Land Use Map (“FLUM”) as Low Density Commercial. The Plan’s Framework Element states that a “common feature [of these zones] is that *they are comprised primarily of one- to three-story commercial buildings.*”<sup>2</sup>

**Part C:** The DC Court of Appeals’ decision in the *Durant* case establishes that PUD projects must comply with the Comprehensive Plan and the FLUM, and that architectural details do not determine whether a project is of moderate or medium density.

**Part D:** The Applicant has failed to show valid public benefits or project amenities sufficient to justify its PUD application. Most of the alleged benefits are nothing more than an ineffective attempt to mitigate the adverse impacts caused by the Project.

**Part E:** The Project will have unacceptable, negative impacts on the surrounding area, particularly as to additional traffic and congestion, pedestrian safety, and deprivation of sunlight. The livability of the neighborhood will be adversely affected.

**Part F:** By placing its Base Height Measuring Point (BHMP) at the 48<sup>th</sup> Street side of the Project in plain violation of the Zoning Regulations, Applicant would construct an outsized building egregiously out of proportion with the surrounding grid of shops and homes.

**Part G:** The Project harms the neighborhood by removing an important benefit conveyed by the terms of the existing Declaration of Easement and Agreement under which the SuperFresh lot yielded density to allow the building of what is now the American University building.

**Part H:** The project alters and degrades an historic landmark in violation of District of Columbia law.

**Part I:** The Project fails to provide the required minimum amount of affordable housing and was designed in an attempt to circumvent DC’s affordable housing requirements.

**Part J:** The Applicant has failed to submit agreements needed for the Zoning Commission review of the Project.

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<sup>2</sup> Framework Element, p. 2-34.

**Table Showing Matter-of-Right Calculation for the SuperFresh Lot**

Lot size	79,622 sq. ft.
Allowable GFA (Gross Floor Area) after 1979 reallocation of GFA to Lot 806 (assumes 2.0 FAR)	63,242 GFA
Matter-of-Right (allocates the 1.0 additional FAR for both Lot 806 and Lot 807 to the SuperFresh Lot)	184,514 GFA
GFA of Valor's Proposed Project	234,629 GFA [Does not include 57,341 SF of residential space in the cellar, in the penthouse and in the projections]
Proposed FAR on Lot 807	2.95

## **PART A: The Project Is Inconsistent with the Comprehensive Plan.**

### **1. Land Use Element**

#### **a. Transit-Oriented and Corridor Development**

The Comprehensive Plan calls for fully capitalizing on the investments in Metrorail by requiring better use of land around transit stations and along transit corridors.<sup>3</sup> The SuperFresh site, however, is 1.0 mile from the Tenleytown Metrorail stop and 1.3 miles from the Friendship Heights Metrorail stop (according to Google Maps). According to the Comprehensive Plan, “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 the walkable radius around each station.”<sup>4</sup> Further, bus service on the one line running anywhere near the site (the N4 during the workday and the N6 in the evening and on weekends) is intermittent, particularly in the evening and on weekends.<sup>5</sup>

Ward3Vison, in May 2016 pointed out that, for the SuperFresh site, “what’s missing is rapid transit.”<sup>6</sup> Moreover DDOT conceded in testimony that residents in the large apartment building will have automobiles due to the lack of public transit near the site.<sup>7</sup> The Project is not transit friendly and consequently does not satisfy the Comprehensive Plan’s objective of fully capitalizing on better use of land around Metrorail stations and along transit corridors.

#### **b. Infill Development**

The Comprehensive Plan encourages infill development of vacant land so long as the development “complement[s] the established character of the area and should not create sharp changes in the physical development pattern.”<sup>8</sup> The Project fails under this test because a 4 to 6 story, 81.5 foot tall structure does not in any way “complement” the 2-story homes on the adjoining neighborhood streets, the low density, adjacent historic Spring Valley Shopping Center (“SVSC”), or the two-story historic shopping center across Massachusetts Avenue.

Moreover, the SuperFresh building in fact is not vacant. The structure now houses locally owned catering and barbecue businesses operated by Wagshal’s that employ around 40 workers, all of whom will lose their jobs or be displaced. In addition, the Project will force DeCarlo’s, a popular, locally owned restaurant located on the site that employs more than 20 workers, to close. Finally, American University makes extensive use of the surface parking lot for its employees and contractors to park their vehicles during the day pursuant to the parking easement it holds on the site.

#### **c. Conservation of Single-Family Neighborhoods**

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<sup>3</sup> Comprehensive Plan, LU-1.3.

<sup>4</sup> Comprehensive Plan, LU-1.3.

<sup>5</sup> The Spring Valley area is not included on the list of premium transit corridors or identified as one of the City’s “Great Streets,” in the Comprehensive Plan, LU, p.3-18.

<sup>6</sup> May 26, 2016 Letter from Susan Kimmel, on behalf of Ward3Vison, to ANC3E.

<sup>7</sup> Testimony of Aaron Zimmerman at January 11, 2018 hearing on Case No. 16-23; Transcript, p. 115.

<sup>8</sup> Comprehensive Plan, Policy LU-1.4.1.

The Comprehensive Plan calls for the protection and conservation of the District’s low-density neighborhoods.<sup>9</sup> The Project will have the opposite result. AU Park currently contains approximately 2700 residences, all of which are low-rise homes, including detached homes and duplexes. There are no apartment buildings in AU Park. The addition of up to 240 new apartments, as envisioned by the Project, is inconsistent with the low density, low-rise, single-family home character of American University Park.

The Land Use Element calls for new commercial development adjacent to low-density residential areas to provide effective physical buffers.<sup>10</sup> The Project contains no buffers to mask the excessive bulk of the main building.

d. Nodal Development

The Comprehensive Plan calls for encouraging pedestrian-oriented “nodes” of commercial development at key locations along major corridors, provided that the “height, mass, and scale of development within nodes respects the integrity and character of surrounding residential areas and does not unreasonably impact them.”<sup>11</sup> The Project fails to further this goal. It does not sit along a major corridor but rather faces two 30-foot wide streets lined with two story homes. Moreover, its height, mass, and scale greatly exceed that of the surrounding residential and commercial area. If built, the Project will tower over the adjacent properties and will provide a jarring departure from the long-established family-oriented character of the neighborhood.

**2. Housing Element**

As responsible citizens of the District, CRD recognizes the need for more affordable housing in the City, and that this is a priority of Mayor Bowser. CRD would support a moderate project focused on housing. In fact, in discussions with the Applicant, CRD suggested as a compromise a proposal in which 160 or more residential units could be included in a project on the site. During hearings on the Applicants’ previous Design Review proposal, an architect who is one of CRD’s members, Walter Borek, in fact offered a detailed design of a project with 166 residences that included much more open space. Also, we feel compelled to point out that, by sinking the building in the ground by 6.5 feet, the Applicant in effect circumvented a much higher Inclusionary Zoning requirement. Further, as pointed out later in our response, the Project continues to fall short on affordable housing.

**3. Urban Design Element**

The Urban Design Element states that the overarching goal for urban design is to “enhance the beauty and livability of the city by protecting its historic design legacy, reinforcing the identity of its neighborhoods, and harmoniously integrating new construction with existing buildings.”<sup>12</sup> The Urban Design Element further states that “overpowering contrasts in scale, height, and density should be avoided as infill development occurs.”<sup>13</sup> As discussed above, the

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<sup>9</sup> Comprehensive Plan, LU-2.1.5.

<sup>10</sup> Comprehensive Plan, LU-2.3.3.

<sup>11</sup> Comprehensive Plan, Policy LU-2.4.5.

<sup>12</sup> Comprehensive Plan, Urban Design, p. 9-2.

<sup>13</sup> Comprehensive Plan, UD-2.2.

scale, height, and density of the Project clash with the neighboring 2-story residential community and with the low density, Colonial Revival style of the adjacent Spring Valley commercial center. The sheer size of the Project overwhelms and detracts from the two historically designated and protected shopping centers along Massachusetts Avenue.

#### **4. Transportation Element**

The Comprehensive Plan requires transportation demand management measures and the discouragement of auto-oriented uses.<sup>14</sup> The Project simply does not satisfy this requirement. In fact, all parties agree that residents of the Project – and there will be several hundred of them – will rely on automobiles to get to and from their apartments. Moreover, many, if not most, of those who will shop at the market that Applicants have proposed for the site will travel there by car. According to the assumptions used by Applicants’ traffic consultant, 90 percent of all trips to the Project site will be by car.

The Applicants claim that they have proposed a set of transportation improvements to mitigate the impact of the Project. However, CRD will show that the Project will generate at least 3,000 additional vehicle trips per day, and that the Transportation Demand Management (TDM) strategies proposed by the Applicant are woefully inadequate.

The principal element of the TDM is the offer of a shuttle or equivalent to the Metro. However, the funding for this service offered by the Applicant will likely run out in about a year. Clearly, this proffer will be ineffective in reducing auto-oriented uses as it is of short duration and will only be available for limited hours during the work week. This Project plainly belongs near the Metro, not a mile away.

#### **5. Rock Creek West Element**

The Project is located within the Rock Creek West Area. (RCW Element), which states in the Overview section that:

“Rock Creek West’s most outstanding characteristic is its stable, attractive neighborhoods. These include predominantly single-family neighborhoods like .... American University Park..... Although these communities retain individual and distinctive identities, they share a commitment to proactively addressing land use and development issues and conserving neighborhood quality.”<sup>15</sup>

The height, scale, and density of the Project are deeply out of character with the neighborhood and therefore violate this overarching commitment described in the Comprehensive Plan. It is important to note that the development is not on Wisconsin Avenue or Connecticut Avenue, two areas the Rock Creek West Element identifies as Policy Focus Areas, nor is it near a Metrorail station. In fact, the Project does not face a major arterial, or even a minor arterial or collector street, but instead faces two local streets (Yuma Street and 48<sup>th</sup> Street). The nearest Metrorail stations are more than a mile away. Except for the building now owned by

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<sup>14</sup> Comprehensive Plan, Action T-1.1.B, and T-1.2.3.

<sup>15</sup> Comprehensive Plan, RCW p. 23-1.

American University which fronts on Massachusetts Avenue (a major arterial), no other commercial building in the Spring Valley commercial area is more than three stories tall.

The RCW Element also states that:

“The need to appropriately control and guide growth, and to protect neighborhoods, remains a top priority throughout the community and is a major theme of this Element.”<sup>16</sup>

The Project, which is situated on two residential streets, fails under this standard. The 4 to 6 story building, situated on local, residential streets, is entirely out of character with the neighboring residential community of 2-story homes.

The RCW Element further states that:

“... much of Rock Creek West retains a small-town character today.”<sup>17</sup>

This character is precisely what the neighbors want to protect. The infill project across Massachusetts Avenue within a second Spring Valley Shopping Center is the type of development that preserves the existing character. That project is a 2-story commercial building that attempts to match the scale and design of the neighboring commercial buildings and is appropriately named “Spring Valley Village.”

The RCW Element also states that traffic congestion, pedestrian safety, and parking are major problems or issues.<sup>18</sup> The Project will exacerbate these concerns, as pointed out in CRD’s Response to Valor’s Development’s Comprehensive Transportation Review, which is being filed separately.

Under “Policies and Actions – General Policies”, the RCW Element calls for protection of low density, stable residential neighborhoods west of Rock Creek Park. The Comprehensive Plan states that the “relatively low-density commercial zoning on most of the corridors has not provided the predictability many residents seek.”<sup>19</sup> This statement would certainly be proven true were this Project approved as proposed.

The Comprehensive Plan further states as a General Policy 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.”<sup>20</sup>

The Project fails to meet the standard contemplated by this Policy. Rather than managing growth, by exceeding the density limits of what is permitted as a matter-of-right, the Project is an example of uncontrolled growth. The Project is totally out of character with the surrounding residential neighborhood of which it would be a part and with the adjacent, historically

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<sup>16</sup> Comprehensive Plan, RCW p. 23-2.

<sup>17</sup> Comprehensive Plan, RCW p. 23-4.

<sup>18</sup> Comprehensive Plan, RCW p. 23-10.

<sup>19</sup> Comprehensive Plan, RCW p. 23-9.

<sup>20</sup> Comprehensive Plan, Policy RCW-1.1.1.



designated and protected commercial corridor. CRD supports lower density development on the site that conforms to this policy.

The RCW Element, mirroring the City-wide Land Use Policy, 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. The Project fails under this policy as it is out of character with the adjoining residential and commercial neighborhoods.

In fact, the main entrance to the retail store and the large apartment building is directly across Yuma 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, and pedestrian safety would be seriously compromised.

Also, the building along the Yuma Street frontage can be as much as approximately 50 feet higher than the homes, depriving the homes of air, light, and privacy. Further, the rooftop terrace on the main buildings will overlook the Yuma and Alton Street neighborhoods, depriving them of privacy. The rooftop terraces on four of the townhouses could pose a similar issue for the 48<sup>th</sup> Street neighbors.

The RCW Element calls for recognizing the importance of the area’s five Metrorail stations to the land use pattern and transportation network of Northwest Washington and the entire District of Columbia<sup>21</sup> and that development should be centered around Metrorail stations. But even here, the Comprehensive Plan requires that “Careful transitions from development along the avenues to nearby low-scale neighborhoods must be provided.”<sup>22</sup> The Project is located a mile from Metrorail. Very few residents in the immediate neighborhood walk to the Tenleytown Metrorail stop. The site is served by one bus line (N4 during weekday days, and N6 during the evening and weekend). Bus service is intermittent during the evening (averaging once every 30 minutes) and weekend (averaging once every 45 minutes). Since the Project is not transit friendly, it fails to meet an element of “smart growth.”

The RCW Element contains a policy to

“... conserve the important resources of neighborhoods west of Rock Creek, including ... the Spring Valley Shopping Center.”<sup>23</sup>

As noted earlier, this development will detract from the Spring Valley Shopping Center.

The RCW Element states that the fact that a majority of the schools in this Comprehensive Planning Area are operating at or above capacity should be considered in DCPS facility Comprehensive Planning, and in the approval of any residential development that could further exacerbate school overcrowding.<sup>24</sup> This is truer now than when the Comprehensive Plan

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<sup>21</sup> Comprehensive Plan, Policy RCW-1.1.6.

<sup>22</sup> Comprehensive Plan, Policy RCW-1.1.6.

<sup>23</sup> Comprehensive Plan, Policy RCW-1.2.5.

<sup>24</sup> Comprehensive Plan, Policy RCW-1.2.8.

was last amended. The enrollment at each of the public schools servicing the Project site - Janney Elementary, Deal Middle, and Wilson High – is above capacity even after each has been renovated and expanded in recent years. Reducing the scale of the development as CRD has requested would reduce the stress on the public-school track serving the area.

**Detailed Response to Comprehensive Plan Sections Cited by the Office of Planning**

In its set down report for this Project, the Office of Planning referenced sections of the Comprehensive Plan that are applicable to an assessment of the Project. Set forth below is CRD’s analysis of how the proposed Project fails to meet the objectives of the Plan (the Comprehensive Plan Element and section cited by the Office of Planning are in the left column, and CRD’s position is in the right column).

<b>Chapter 3 – Land Use</b>	<b>CRD’s Position</b>
<p><b>LU-1.4.1:</b> Infill Development - Such development should complement the established character of the area and should not create sharp changes in the physical development pattern.</p>	<p>The Project is incompatible with both the two-story residential neighborhoods directly across the street and with the adjacent one-story Spring Valley Shopping Center. In both cases, there is a sharp contrast with the neighborhood. The only similar building is the six-story adjacent American University building, which is out of character with the rest of the Spring Valley commercial center and, when constructed, exceeded available FAR for the site.</p>
<p><b>LU-2.1.3:</b> Conserving, Enhancing, and Revitalizing Neighborhoods - Recognize the importance of balancing goals to increase the housing supply and expand neighborhood commerce with parallel goals to protect neighborhood character, preserve historic resources, and restore the environment.</p>	<p>The Project creates an imbalance with the neighborhood. It does nothing to protect neighborhood character. There is a way to increase housing without creating this imbalance.</p>
<p><b>LU-2.1.5:</b> Conservation of Single Family Neighborhoods - Protect and conserve the District’s stable, low density neighborhoods and ensure that their zoning reflects their established low density character. Carefully manage the development of vacant land and the alteration of existing structures in and adjacent to single family neighborhoods in order to protect low density character, preserve open space, and maintain neighborhood scale.</p>	<p>The residences in American University Park are solely single-family residences. The medium density Project will clash with the residential neighborhood. A low-density project, as envisioned by the Future Land Use Map, would accomplish much of the City’s goals without overwhelming the homes directly across the street and with the rest of American University Park.</p>
<p><b>LU-2.3.3:</b> Buffering Requirements - Ensure that new commercial development adjacent to</p>	<p>The mass of the Project essentially extends to the lot line on all sides. The street frontages</p>

<p>lower density residential areas provides effective physical buffers to avoid adverse effects. Buffers may include larger setbacks, landscaping, fencing, screening, height step downs, and other architectural and site planning measures that avoid potential conflicts.</p>	<p>on Yuma and 48<sup>th</sup> Streets that face the neighboring residences are simply not buffered or set back from the lot lines.</p>
<p><b>LU-2.4.1:</b> Promotion of Commercial Centers - Promote the vitality of the District’s commercial centers and provide for the continued growth of commercial land uses to meet the needs of District residents, expand employment opportunities for District residents, and sustain the city’s role as the center of the metropolitan area.</p>	<p>The Project will eliminate rather than expand employment opportunities. Approximately 60 people currently work in the SuperFresh site. By forcing these long-standing, locally owned and popular businesses to relinquish their premises or close, these jobs will be lost.</p>
<p><b>LU-2.4.5:</b> Encouraging Nodal Development - Discourage auto-oriented commercial “strip” development and instead encourage pedestrian-oriented “nodes” of commercial development at key locations <u>along major corridors</u>. Zoning and design standards should ensure that the height, mass, and scale of development within nodes respects the integrity and character of surrounding residential areas and does not unreasonably impact them.</p>	<p>The Project is definitely not on a major corridor, and is located 1.0 – 1.3 miles from the two closest Metro stops, according to Google Maps. The Applicants’ traffic consultant assumes 90 percent of the trips to and from the site will be by auto. The traffic will overwhelm the narrow residential streets and alleys.</p>
<p><b>LU-2.4.6:</b> Scale and Design of New Commercial Uses - Ensure that new uses within commercial districts are developed at a height, mass, scale and design that is appropriate and compatible with surrounding areas</p>	<p>As noted above, the height, mass, and scale are inappropriate and incompatible with, and in fact clash with, the surrounding areas.</p>
<p><b>Chapter 4 Transportation</b></p>	<p><b>CRD’s Position</b></p>
<p><b>Policy T-1.2.3:</b> [M]inimize the number of curb cuts in new developments. Curb cuts and multiple vehicle access points break-up the sidewalk, reduce pedestrian safety, and detract from pedestrian-oriented retail and residential areas.</p>	<p>While two curb cuts for the Project lot are being eliminated, traffic entering and exiting the site through the Yuma Street alley will increase 23 fold, through the 48<sup>th</sup> Street alley will increase nine fold, and through the Massachusetts Avenue will increase ten fold from current conditions, which will endanger pedestrians using the sidewalks crossing the alleys. Further, as explained in more detail in</p>

	other parts of CRD’s response, the sidewalks along the alleys will become extremely dangerous. Bottom line: the danger to pedestrians will be greater.
<b>Policy T-2.4.1:</b> Improve the city’s sidewalk system to form a network that links residents across the city.	No significant improvements to sidewalks are being proposed. As noted above, the risks to pedestrians will increase due to the Project.
<b>Action T-3.1.A:</b> TDM Strategies - Develop strategies and requirements that reduce rush hour traffic by ..... undertaking other measures that <u>reduce vehicular trips</u> , particularly during peak travel periods.	The shuttle service to be provided by the Applicant will be of one-year duration and only during certain times. In any case, it is unquestioned that total trips in the immediate area will increase as a result of the Project.
<b>Chapter 5 Housing</b>	<b>CRD’s Position</b>
<b>H-1.1.1:</b> Private Sector Support - Encourage the private sector to provide new housing to meet the needs of present and future District residents at locations consistent with District land use policies and objectives.	The neighbors from the outset of this Project have stated that they support development on the site. A lower-density matter-of-right building would accommodate a large amount of housing. By pushing the envelope on an oversized building, the Applicants have delayed the construction of any new housing.
<b>H-1.2.3:</b> Mixed Income Housing - Focus investment strategies and affordable housing programs to distribute mixed income housing more equitably across the entire city, taking steps to avoid further concentration of poverty within areas of the city that already have substantial affordable housing.	The building has been designed to circumvent higher inclusionary zoning requirements that would otherwise apply. As noted elsewhere in CRD’s response, there is a real question as to whether the current design meets the City’s affordable housing requirements.
<b>Chapter 7 Economic Development</b>	<b>CRD’s Position</b>
<b>ED-2.2.6:</b> Grocery Stores and Supermarkets - Promote the development of new grocery stores and supermarkets, particularly in neighborhoods where residents currently travel long distances for food and other shopping services.	There are currently 12 grocery stores within 3 miles of the site. Since the closure of the previous market almost six years ago, the neighborhood has adjusted to alternative places to shop. In addition, a new Target will open in November a mile away in Tenleytown and, in about two years a large Wegmans will open a little over a mile away. The addition of a new grocery at the SuperFresh site is not only unnecessary, but will take business away from current grocery stores and other stores offering groceries (like Wagshal’s Deli and Market).

<p><b>ED-3.1.1:</b> Neighborhood Commercial Vitality - Promote the vitality and diversity of Washington’s neighborhood commercial areas by <u>retaining existing businesses</u>, attracting new businesses, and improving the mix of goods and services available to residents.</p>	<p>The Project will force the closure of long-standing businesses (Wagshal’s Catering and Kitchens, Pitmaster’s BBQ, and DeCarlo’s restaurant), which together employ at least 60 employees. Further, the continued existence of Wagshal’s Delicatessen and Meat and Seafood markets in the Spring Valley Shopping Center has been called into question. Wagshal’s has been a neighborhood institution since 1939.</p>
<p><b>Chapter 9 Urban Design</b></p>	<p><b>CRD’s Position</b></p>
<p><b>UD-2.2.1:</b> Neighborhood Character and Identity - Strengthen the defining visual qualities of Washington’s neighborhoods. This should be achieved in part by relating the scale of infill development, alterations, renovations, and additions to existing neighborhood context.</p>	<p>As is more fully explained in CRD’s narrative at the beginning of the Comprehensive Plan analysis, the Project is out of scale to the neighborhood context, both commercial and residential.</p>
<p><b>UD-2.2.4:</b> Transitions in Building Intensity - <u>Establish gradual transitions between large-scale and small-scale development</u>. The relationship between taller, more visually prominent buildings and lower, smaller buildings (such as single family or row houses) can be made more pleasing when the transition is gradual rather than abrupt.</p>	<p>The Project lacks gradual transitions, particularly on the Yuma Street frontage. The Project is as tall as the neighboring American University building. The transition to the two-story residential homes is abrupt and lacks buffers.</p>
<p><b>UD-2.2.7:</b> Infill Development - Regardless of neighborhood identity, avoid overpowering contrasts of scale, height, and density as infill development occurs.</p>	<p>As is more fully explained in CRD’s narrative at the beginning of the Comprehensive Plan analysis, the Project will constitute an overpowering contrast with the scale, height, and density of the commercial and residential neighborhood.</p>
<p><b>Chapter 10 Historic Preservation</b></p>	<p><b>CRD’s Position</b></p>
<p>HP-2.4.3: Compatible Development - Preserve the important historic features of the District while permitting compatible new infill development. Within historic districts, preserve the established form of development as evidenced by lot coverage limitations, yard requirements open space, and other standards that contribute to the character and attractiveness of those areas. Ensure that new</p>	<p>The Project will tower over and detract from the adjacent historic Spring Valley Shopping Center. The scale of the Project conflicts with the Shopping Center. Unlike the Shopping Center, and the other historic shopping center across Massachusetts Avenue, there is limited open space in the proposed Project.</p>

<p>construction, repair, maintenance, and improvements are in scale with and respect historic context through sensitive siting and design and the appropriate use of materials and architectural detail.</p>	
<p><b>Rock Creek West Area Element</b></p>	<p><b>CRD's Position</b></p>
<p><b>RCW-1.1.1:</b> Neighborhood Conservation - Protect the low density, stable residential neighborhoods west of Rock Creek Park and recognize the contribution they make to the character, economy, and fiscal stability of the District of Columbia. 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.</p>	<p>The medium density Project will disrupt the surrounding low-density stable residential neighborhood. The Project will undermine rather than enhance the character of the neighborhood. The traffic generated by the Project will stress the neighborhood streets and public schools. The parking plan is unrealistic, given that the site is a mile from the Metro.</p>
<p><b>RCW-1.1.4,</b> Infill Development - Heights and densities for such development should be appropriate to the scale and character of adjoining communities. Buffers should be adequate to protect existing residential areas from noise, odors, shadows, and other impacts.</p>	<p>The Project is inappropriate for the scale and character of the neighborhood. The Project is lacking in buffers to protect the residential areas directly across the street.</p>

## **Part B: The Project Is Inconsistent with the Designation of the SuperFresh Site in the Future Land Use Map**

The Future Land Use Map (“FLUM”) is part of the adopted Comprehensive Plan and expresses the public policy on future land uses.<sup>25</sup> The FLUM designates the SuperFresh site as Low Density Commercial. The Comprehensive Plan’s Framework Element goes on to say that a “common feature [of these zones] is that they are comprised primarily of one to three-story commercial buildings.” With the sole exception of the AU Building, this designation accurately describes the SuperFresh site, Lots 802 and 803, and the commercial area across Massachusetts. CRD would support a one to three story development on the site, which would be consistent with the entire surrounding area, and submits that the Zoning Commission should look to the FLUM and the prevailing character of the area and adjacent uses in rendering a decision on the Project.

As noted, the one anomaly in the area is the six-story AU Building. The Applicant points to a statement in the Framework Element that indicates that within an area there may be individual buildings that are higher or lower than the ranges specified. Here, and contrary to the Applicant’s assertion, the existence of the American University Building, which is six stories tall, argues for a lower building on the SuperFresh site. The approach of keeping taller buildings on a major thoroughfare may represent good urban planning. In fact, that is exactly what was contemplated by the owner back in 1979 when the building was built. Instead, the Applicant is proposing a building which, according to their renderings, is just as tall as the American University Building. Further, if the Project is approved, approximately 80 percent of structures on the PUD site (by footprint) will consist of buildings that will be up to six stories tall. This could not be further from the result contemplated by the exception identified by the Applicant.

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<sup>25</sup> Comprehensive Plan, Framework Element, p. 2-33.

**Part C: The District of Columbia Court of Appeals’ Decision in the *Durant* Case Establishes that PUD Projects Must Comply with the Comprehensive Plan and the FLUM, and that Architectural Details Do Not Determine Whether a Project is of Moderate or Medium Density**

The Project, which rises to 81 feet at its highest point, consists of a four to six story mixed use structure. As noted, the Project site (Lot 807) is designated as Low Density Commercial on the Future Land Use Map and is zoned MU-4. The Comprehensive Plan states that a common feature of Low-Density Commercial areas is that they are comprised primarily of one- to three-story commercial buildings. Moreover, the DC Zoning Handbook states that the MU-4 Zone is “intended to be applied throughout the city consistent with the density designation of the Comprehensive Plan” and is “intended to . . . [p]ermit moderate-density mixed use development . . . .”<sup>26</sup> The Applicant references this description in its submission.<sup>27</sup> Thus, the proposed PUD Project is inconsistent with the FLUM and Comprehensive Plan because it is predominately a medium-density residential development.

The District of Columbia Court of Appeals considered a strikingly similar project in 2016 in *Durant v. District of Columbia Zoning Commission*. There, the Court of Appeals ruled that a 4-7 story apartment building is “generally consistent with medium-density residential use,” and does not meet the standard for moderate density.<sup>28</sup> The Court’s analysis in *Durant* compels the same result here.

As in *Durant*, the Applicant seeks approval of a PUD to construct a 6 story mixed-use building with over 200 dwelling units in a neighborhood of predominately single-family homes. Furthermore, as in the *Durant* case, the Applicant is attempting to justify the Project as purported “moderate density,” primarily through its flawed efforts to diminish the visual impact of the proposed structure.<sup>29</sup> However, as the Court of Appeals held in *Durant*, visual impact abatements have no bearing on whether it is properly considered a medium- or moderate-density use. The Court of Appeals expressly rejected reliance on architectural features “such as the top floor’s setback from the edge of the building and the building’s setback from the property line” as proper considerations in determining whether the project met FLUM’s definition of moderate density.<sup>30</sup> To make matters worse for the Applicant, the proposed Valor Project, unlike the PUD in *Durant*, is not set back from the property line at the ground level. Rather, the portions that are directly adjacent to the detached, single-family homes on 48<sup>th</sup> and Yuma Streets mostly sit on the property line.

Nor should the fact that the SuperFresh site is zoned mixed use change the result under the *Durant* precedent. While *Durant* concerned a parcel zoned R-2/C-1, the Court of Appeals noted that the FLUM designated “parts of the parcel for low-density and moderate-density mixed

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<sup>26</sup> DC Zoning Handbook, Mixed-Use (MU) Zones – MU-4 (available at <http://handbook.dcoz.dc.gov/zones/mixed-use/MU-4/>) (emphasis added).

<sup>27</sup> See Statement in Support (Exhibit 2), p. 7.

<sup>28</sup> *Durant v. Dist. Of Columbia Zoning Comm’n*, 139 A.3d 880, 883 (D.C. Court of Appeals, 2016) (“*Durant III*”).

<sup>29</sup> See Statement in Support (Exhibit 2), p.10.

<sup>30</sup> *Id.*, at 884.



use” and that the density of each use must be separately evaluated.<sup>31</sup> Accordingly, in an earlier ruling in *Durant* in 2014, the Court of Appeals held that, even if viewed as a mixed-use project, “the residential aspect of the project still apparently would be medium density rather than moderate density,” and therefore incompatible with moderate density zoning.<sup>32</sup>

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<sup>31</sup> *Id.*, at 882.

<sup>32</sup> *Durant v. Dist. of Columbia Zoning Comm’n*, 99 A.3d 253, 259 n.4 (D.C. 2014) (“*Durant II*”).

**Part D: The Applicant has failed to show valid public benefits or project amenities sufficient to justify its PUD application.**

The PUD process, at 11X DCMR §300.1(b), requires that each applicant must offer a “commendable number or quality of meaningful public benefits.” In addition, the Zoning Commission is required to “judge, balance, and reconcile the relative value of the public benefits and project amenities offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case.” Section 304.3. Such public benefits must be “tangible and quantifiable items.” They must be “measurable and able to be completed or arranged prior to issuance of a certificate of occupancy.” Section 305.3.

Section 305.5 provides a list of categories of possible public benefits, including the following:

[s]uperior urban design and architecture.

[s]uperior landscaping, or preservation of open spaces.

[a]ffordable housing, except that affordable housing provided in compliance with the Inclusionary Zoning requirements...shall not be considered a public benefit except to the extent it exceeds what would have been required through matter-of-right development....

a grocery store larger than fifteen thousand square feet (15,000 sq. ft.) in areas where a grocery store does not exist within a three-mile (3 mi.) radius.

LEED Gold certification

[o]utdoor children’s play area

[t]ransportation infrastructure beyond that needed to mitigate any potential adverse impacts

[m]ass transit improvements, including ...a shared bike station

Applicant contends that it has offered several amenities to the community. As the moving party in this proceeding, Applicant bears the burden of proving each of its contentions. For the reasons that follow, CRD contends that Applicant has failed to meet its burden of proof with respect to the majority of its purported amenities.

**1. Applicant’s alleged superior urban design, architecture, and superior landscaping and creation of open spaces do not qualify as “public benefits.” (11X DCMR §305.5(a)).**

**a. Applicant has failed to justify its assertion of “superior urban design.”**

Applicant claims that it has offered “superior urban design” based upon the contention that the height and mass of its Project have been carefully designed to “...relate to the surrounding context through height reductions, large courtyards, façade articulation, upper-level

setbacks, and high-quality, context-sensitive materials.” (Exhibit 2, page 25.) Applicant also claims that its design will mitigate any potential for adverse impacts from its project. Id.

First, mitigation of adverse impacts is not a public benefit or amenity. As stated in §305.9, “Elements or items required as mitigation of potential adverse impacts of the PUD shall not also be considered as benefits for the purposes of this section.”

Second, Applicant fails to explain in what sense there are “height reductions” in this PUD project. Applicant may be referring to the modest changes in building height which Applicant made to its original design in ZC #16-23 after the Office of Planning found that Applicant’s application for design review approval failed to satisfy Inclusionary Zoning requirements. The result was, and remains, an excessively large building design that is disproportionate to the surrounding community.

Moreover, as CRD has argued elsewhere, a “matter of right” building on the SuperFresh site would be significantly smaller, by almost 50,000 square feet, than the building Applicant now proposes, since a “matter of right” building would not include the aggregation of FAR from adjoining properties. Adding this square footage through aggregation of FAR is relief that Applicant is seeking in this proceeding. Because a matter-of-right building would necessarily have been a significantly smaller building than Applicant is now seeking to build, Applicant cannot claim to be offering any “height reductions” in respect to such a building.

As stated in the Comprehensive Plan, Policy RCW-1.1.4 (concerning infill development), “...heights and densities for such development should be appropriate to the scale and character of adjoining communities.” Further, there should not be any abrupt discontinuity with the surrounding neighborhood. Applicant’s proposal does not meet those goals. Given the bulk and height of the proposed four to six-story building, and the absence of any transition between that building and the surrounding neighborhood of two-story houses and the one-story historic Spring Valley Shopping Center, Applicant’s building design “relates to the surrounding context” only in a negative way. The contrasts of scale and height are clearly overpowering.

The record before the Commission (both in this case and in Applicant’s now-withdrawn Design Review case) is replete with testimony from the community pointing out the inappropriateness of such a massive building in the surrounding residential neighborhood. The building Applicant proposed for Design Review is essentially the same as that proposed in the present PUD Application. The design of Applicant’s building reflects nothing more than Applicant’s attempt to gain as much advantage from the sloping site as it can, while extending its building right up to the property lines along 48th and Yuma Streets. The two “large courtyards” are all in the interior of the building and do nothing to reduce its looming presence on all sides along those property lines.

Further, none of the Applicant’s upper-level setbacks, façade details, and other cosmetic features can disguise the building’s actual height and mass. According to Applicant’s own architectural drawings, more than 70 percent of the Ladybird building (even without the penthouse) will exceed the 50-foot limit imposed by the Height Act, measuring from ground level. This is the result of Applicant’s placement of its Base Height Measuring Point (BHMP) at

the top of the steeply sloping SuperFresh site, along 48th Street, so as to create an increasingly massive structure as it descends along Yuma Street to the base of the slope. This design feature shows that Applicant’s architects were focused on the goal of maximizing size and profit, with no concession to the goal of achieving proportionality with the “adjoining community.”

Although the Applicant will no doubt claim that the existing AU Building provides it with a suitable context for the proposed Project, that is not the case. The AU building fronts Massachusetts Avenue and is thus within an altogether different context from that of the Project, which will be surrounded by residential side streets, two-story houses, and the low-rise Spring Valley Shopping Center. Moreover, Applicant’s own proposed town houses separate the Ladybird from the AU Building and place it even further back into the residential neighborhood than it might otherwise have been.

In short, the Project design and scale might be appropriate if it were facing Massachusetts Avenue, but that is not the proposed siting. A “superior urban design” that would be appropriate on the SuperFresh site would be a residential building of up to three stories, i.e., a “moderate density” mixed use building within the meaning of that term as employed in the Comprehensive Plan (as opposed to a taller “medium density” building). Such a design would produce a building that would not overshadow the surrounding community, i.e., a building that would be similar in size to the two- and three-story commercial buildings along the south side of Massachusetts Avenue between 48th and Yuma Streets. There is no reason why Applicant could not produce such a design.

Finally, Applicant cannot seek the Commission’s approval based on Applicant’s contention that its upper-level setbacks, façade details, and rearrangements of its bay windows will “reduce the scale and massing of the project.” (See Applicant’s Prehearing Statement at Exhibit 28.) All these attempts to make the Ladybird building look smaller than it really is are both unsuccessful and irrelevant. The question of relevancy was settled in Durant v. District of Columbia Zoning Commission, supra, at 884, which makes it clear that the appearance of a building (including setbacks) has no bearing with respect to determining whether its real size makes it a medium or moderate density structure.<sup>33</sup> It is the number of stories, the number of units, and other basic physical characteristics which determine the scale and bulk of the development, and hence the effects that it will have on the surrounding neighborhood. That ruling applies in this context as well, because the question of whether the Project building is a “medium” or “moderate” density building under the Comprehensive Plan is inseparable from the question of whether it is an appropriately sized project under §305.5 (a).

Even if these façade details were a relevant consideration for the Commission, Applicant has supplied the Commission with no objective evidence that the building will actually appear to the viewer to be smaller than it is. For its part, the surrounding community clearly does not see the Project building as something smaller than it is. The proposed building is effectively the “elephant in the room,” regardless of how much Applicant’s architects have striven to disguise its true bulk and height.

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<sup>33</sup> For a fuller discussion of the *Durant* ruling, see Part C of CRD’s Response.

Accordingly, architectural features such as upper level setbacks, façade articulation, etc., which are perceived by the Applicant as making its building appear less visually enormous to nearby residents, cannot be accepted by the Commission as providing the amenity of “superior urban design” under §305.5(a).

**b. The Applicant’s assertion of superior landscaping and preservation of open spaces is also not justified.**

Applicant’s architectural drawings (at Exhibit 2C) indicate that Applicant will retain the landscaped open space in front of the proposed building’s 48th and Yuma Street sides. Along 48th Street that open space is a flat, grassy embankment with a large “heritage tree,” bushes and flowerbeds, 29 1/2 feet wide. This open space continues around the corner of 48th and Yuma Streets, where it includes a row of six very old and elegant English yew trees, down to the current entrance to the SuperFresh parking lot. Because all of this open space lies within the 90’ right-of-way of 48th and Yuma Streets, its preservation by Applicant cannot be counted as a public benefit or amenity.

Furthermore, Applicant’s architectural drawings do not show how the landscaping of that open space will be “superior” to what currently exists. Applicant only states that it will replant “any missing trees [sic] within the tree box areas.” Planting new trees in the tree box areas along 48th and Yuma Streets (*i.e.*, between the sidewalk and the curb), is not the same thing as promising to preserve the trees and plants in the open right-of-way areas. Nothing is said about that. In any event, the replacement of trees should be considered yet another example of mitigation of harm rather than an addition to neighborhood amenities.

As to the asserted “open spaces” and “large courtyards” that Applicant puts forward as providing a public benefit or amenity (Exhibit 2, at page 25), these are all interior spaces within the main building complex. The proposed “Windom Park” is small, 40 by 44 feet (approximately 1760 square feet), and it is the same size as the other two courtyards facing 48th Street, which are sunken areas designed to provide light to the subterranean apartments in the cellar of the building and, in any case, will not be accessible to the public. Windom Park will be bounded by the wall of a townhouse on one side and the south corner of the Ladybird building on the other. It will therefore appear to passers-by to be just another interior courtyard belonging to the Ladybird building. People from outside the complex would not see it as “public space.” We could not put it better than the Office of Planning did in its supplemental report dated December 28, 2018 for ZC #16-23. See Exhibit 266 at page 13:

“While OP understands the rationale for the elimination of Windom Walk, Windom Park does not function in the same way to provide a truly public space. It is unlikely that the public would take advantage of the seating areas located in the proposed Windom Park.”

A second putative “open space” is the sidewalk outside the grocery store entrance. It is difficult to see how placement of a few chairs in this area constitutes a meaningful public benefit. Although the area is somewhat larger than the surrounding sidewalks, it would more likely be in use as the main entry and exit for shoppers, rather than space for restful public enjoyment.

Finally, Applicant refers to “large ...landscaped courtyards and terraces for residential use.” Since these features would not be accessible by anyone not residing in the apartment complex itself, they cannot be seen as a public benefit or amenity that provides comfort, convenience, or pleasure to the surrounding community. All of these spaces will functionally belong to renters of the residential units. Just like the interior courtyard with a pool, those are private and not community facilities.

Hence, Applicant has failed to show: (1) how it will achieve “superior landscaping” in the open spaces along 48th and Yuma Streets which it is required to preserve; and (2) how it will provide any new public space that would qualify as a significant public benefit or “amenity” under §305.5(a).

**2. Applicant’s assertion of “site planning and efficient land utilization” also fails to qualify as a public benefit or amenity. (11-X DCMR §305.5(c))**

Applicant puts forward “site planning and efficient land utilization” as a supposed “public benefit or amenity” offered by its project. Applicant cites as examples of public benefits the following: sidewalks along the north-south and east west alleys; alley improvement; the provision of multiple residential building types; the project’s proximity to amenities such as retail, schools, and convenient bus service; and the utilization of unused commercial density from the Spring Valley Shopping Center.

These contentions are without merit.

**a. Applicant’s sidewalks are not an “amenity.”**

First, the sidewalk that is to be included in the rear (north-south) public alleyway is only three feet wide; significantly less than the federally-mandated standard width. It is not even clear whether this will be a raised sidewalk at all. Applicant has previously referred only to a “three (3) foot delineated pedestrian path” which presumably would be marked off from moving traffic only by a painted line. See Exhibit 244 in ZC #16-23, at page 7.

The sidewalk (or “delineated path”) offered by Applicant will have the site-specific problem that there will be no space or barrier between pedestrians and vehicular traffic on the alley roadway. The sidewalk or “delineated path” also will be flush against the building wall. It will not be safe for pedestrians walking in both directions, for parents with children in strollers or people needing wheelchairs, especially because the alley will simultaneously be used by heavy delivery trucks and other vehicular traffic.

According to Applicant’s own traffic study, the future number of vehicles predicted to be entering and exiting the north-south alley at Yuma Street after the construction of the Project is expected to rise from 6 vehicles per hour today to 141 vehicles per hour at the peak of the afternoon – a 2350% increase. Today, during afternoon peak hours, there are 85 vehicles per hour passing the AU alley on 48th Street and there are 150 vehicles on Yuma Street passing the intersection with the north-south Alley. Hence, in the future, the north-south alley will carry roughly the same amount of traffic as is now carried by 48th and Yuma streets. See Applicant’s Traffic Report, at pages 44-45.

In practical effect then, the alley will be put to the same use as a public street, only without proper and safe sidewalks. Hence, Applicant's so-called "alley improvement" is really an inadequate attempt to mitigate the problems that will be created by the Project. As pointed out above, such mitigation does not qualify as a public benefit or amenity.

The provision of an alley sidewalk would give the public a net benefit or amenity only if it offered optimum pedestrian safety according to nationally recognized best practices. For example, Washington D.C. is a member city of the National Association of City Transportation Officials (NACTO) which has published guidelines regarding the width of sidewalks. These are as follows:

Sidewalks have a desired minimum through zone of 6 feet and an absolute minimum of 5 feet. Where a sidewalk is directly adjacent to moving traffic, the desired minimum is 8 feet, providing a minimum 2-footbuffer for street furniture and utilities.

Sidewalk design should go beyond the bare minimums in both width and amenities. Pedestrians and businesses thrive where sidewalks have been designed at an appropriate scale, with sufficient lighting, shade, and street-level activity. These considerations are especially important for streets with higher traffic speeds and volumes, where pedestrians may otherwise feel unsafe and avoid walking.

(See <https://nacto.org/publication/urban-street-design-guide/street-design-elements/sidewalks/>)

NACTO's guidelines identify the precise problem in the case at hand, viz., a narrow sidewalk "directly adjacent to moving traffic." This is a formula for a pedestrian accidentally stepping off the edge of the sidewalk and getting hit by a passing car. Applicant must resolve this problem if its alleyway "improvements" are to qualify as offering the public any sort of benefit or amenity, or even as effective mitigation. We note that similar recommendations are made by the Federal Highway Administration, viz., that sidewalks should be at least 6 feet wide "...if at the curb face." See *FWHA Course on Bicycle and Pedestrian Transportation, Lesson 13 (Walkways, Sidewalks, and Public Spaces)* at [swless13.pdf](#). For more discussion of the pedestrian/vehicle conflicts in the alleys, see CRD's Response to Valor Development's Comprehensive Transportation Review, which is being filed separately.

As an example of what Applicant should be offering, the Commission may see in the photograph below a typical six-foot sidewalk running along an alley (at Bethesda Row in Maryland). It is difficult to imagine how pedestrians could safely negotiate a sidewalk only half that width:



**b. “Multiple residential building types” is not an amenity.**

Having “multiple residential building types” does not offer the public any sort of tangible benefit or “amenity” within the meaning of §305.5(a). It also does not meet the basic definition of an amenity, which is a feature that “provides comfort, convenience, or pleasure.” (See *Webster’s Unabridged Dictionary*, Random House 2001.) Neither the public at large nor the immediate neighborhood could possibly derive “comfort, convenience, or pleasure” from this feature. The fact of “multiple residential building types” also does not ameliorate the problem with the main Ladybird building, which is its excessive size.

**c. Proximity of the project to public facilities does not constitute an “amenity.”**

Proximity to existing public amenities such as shops, D.C. schools, and the Metrobus system does not confer a benefit upon anyone but the residents of the Ladybird building. It is not a public benefit created by the Applicant, and therefore it does not qualify as a public benefit or amenity within the meaning of §305.5(a). Applicant cannot take credit for the D.C. school system, Metrobus service, or for the stores and shops in the general vicinity.

**d. The aggregation of unused density from the shopping center is not an “amenity.”**

The Applicant’s purchase of unused density from the Spring Valley Shopping Center is not a public benefit or amenity under §305.5(a). Applicant asserts that it is doing the public a service by preventing that unused density from being put to an even worse use sometime in the future, which could only happen if its historic designation were to be withdrawn for cause, and the building razed to the ground. This is purely speculative. The historically preserved status of the property is not under threat, the building appears to be in excellent condition, and will continue to serve the community for the foreseeable future.



Moreover, the Project would be vastly out of scale with the one-story shopping center and its surroundings. The shopping center's aesthetic qualities as a defining, historic neighborhood architectural landmark would be greatly diminished by having its current backdrop of open sky and trees replaced by the back end of a monolithic structure that would obscure the shopping center's distinctive outline, and make both buildings look seriously out of place with each other. Even if Applicant's "matter of right" building would do that in any event, Applicant's plan for an even larger building has no conceivable positive aspect for the shopping center as a public benefit or amenity.

Accordingly, none of the factors cited by the Applicant under the heading of "site planning" remotely qualifies as a public benefit or amenity in a PUD proceeding.

**3. Applicant's provision of housing, including housing that provides units with three or more bedrooms (11-X DCMR §305.5 (f)(3) and affordable housing (11-X DCMR §305.5(g) is not sufficient to justify this project.**

Applicant contends that offering a significant increase in available housing in the District of Columbia constitutes a "public benefit" or "amenity" for the purposes of §305.5(a). By definition, an augmentation of available housing in the District of Columbia is necessarily included in every new residential building a developer proposes. Thus, while it is therefore an overall benefit to the District, it can hardly be considered a "public benefit or amenity" that could, by itself, justify whatever PUD project a developer puts forward.

As to affordable housing, at best the project calls for an increase of only 1% in the amount of such housing to be offered, over and above the minimum that is required in order to take advantage of the inclusionary zoning FAR bonus. This does not remotely qualify as a significant contribution to the District's stock of affordable housing. Moreover, the Office of Planning, in its Preliminary Report of May 31, 2019, has noted that the Applicant has not demonstrated how the project would provide affordable housing choices for seniors.

**4. Environmental and sustainable benefits are also not public benefits sufficient to justify Applicant's project. (11-X DCMR §305.5 (k))**

The Applicant states that it will achieve LEED Gold certification and offers a table showing how it intends to do that. This is commendable, but achieving LEED Gold certification should be considered a norm for developers looking to gain approval for a very large project, not a "public benefit" sufficient to justify such a project.

**5. Applicant's transportation infrastructure is woefully inadequate. (11-X DCMR §305.5 (o))**

Applicant plans to install a HAWK signal on Massachusetts Avenue between 48th and 49th Streets in order to improve pedestrian safety in an area where people passing through the alleyway may be expected to jaywalk. This is not a public benefit or amenity, but an attempt to mitigate a danger to the public which Applicant's own project is going to create.

Applicant repeats its intention to install sidewalks in both the north-south and east-west alleys, and to improve the alley intersections to achieve pedestrian safety. Again, these plans

must be seen for what they are: attempts to mitigate problems caused by the increase in traffic due to the project itself. As pointed out above, the sidewalks along the north-south alley will be one-half of Federal Standards and pedestrians using the alley sidewalk will have to share the space with a constant flow of delivery trucks and other traffic. The north-south alley will be open to two-way traffic, a change from its present one-way designation, and Applicant has not explained how it would even be possible to protect pedestrians from being hit by vehicles given the layout of the alley system.

Finally, there currently exist sidewalks, street trees, and landscaping along 48th Street and Yuma Street, as explained above. Applicant asserts that its plans include “wide sidewalks,” but it does not appear that Applicant’s sidewalks would be any wider than at present, or any improvement over the existing sidewalks and landscaping.

**6. Applicant’s alleged “uses of special value to the neighborhood,” or to the District of Columbia as a whole, also fall short of qualifying as public benefits or amenities. (11-XDCMR §305.5(q))**

Applicant has stated that MOM’s Organic Market has entered into a nonbinding letter of intent to open a grocery store in the new building, and that MOM’s is a full-service grocery store that will serve the needs of the surrounding community. MOM’s would ostensibly take the place of the closed SuperFresh grocery store, which was located in the building that the Project development would replace.

Although the MOM’s market would be welcomed by some as an extra convenience in the neighborhood, it does not qualify under the rules as a public amenity (11X DCMR §305.5(j)). This is because there are already 12 grocery stores within a three-mile radius of the Project site. There are: three Safeway stores, four Giant stores, three Whole Foods stores, and two independent stores (Rodman’s and Magruder’s). In addition, a Target store will open in November of this year in Tenleytown, and Wegman’s will open a store in the future (at 3900 Wisconsin Avenue NW.) Eight of these grocery stores are (or will be) within 2 miles of the Project site, including Whole Foods (1.1 miles) and Target (1 mile), both in Tenleytown. The full list is included in the footnote.<sup>34</sup> Nor does the MOM’s grocery store qualify for a “use of

**<sup>34</sup> GROCERY STORES WITHIN A THREE-MILE RADIUS OF THE SUPERFRESH SITE (ACCORDING TO THE SHORTEST ROUTE DISPLAYED ON GOOGLEMAPS):**

Whole Foods River Road	1.9 miles
Whole Foods Tenleytown	1.1 miles
Whole Foods Willard Avenue	1.7 miles
Giant Cathedral Commons	1.7 miles
Giant Connecticut Avenue	2.0 miles
Giant Westbard	2.0 miles
Magruder’s Connecticut Avenue	2.3 miles
Giant Friendship Heights	1.8 miles
Safeway Sangamore Road	2.9 miles
Safeway Georgetown	2.7 miles
Safeway Bradley Boulevard	2.9 miles
Rodmans Wisconsin Avenue	1.5 miles
Target Tenleytown (to open in 2019)	1.0 miles
Wegman’s Wisconsin Avenue (to open in 2022)	1.4 miles

special value” to the neighborhood. With such a superabundance of local grocery stores, there is no “special value” to having a MOM’s. Although a corner grocery store is a traditional convenience for persons of limited mobility, in this day and age grocery delivery is becoming the preferred alternative to individual shopping. This modern convenience obviates the advantage of having a grocery store. For a few small items that can be carried home on foot, we already have Wagshal’s Market in the adjacent shopping center. For multiple or heavy items, a trip by car to existing nearby stores (with more convenient parking than Applicant can offer) will be necessary for most grocery shoppers.

Moreover, because Applicant’s project would displace a number of locally popular businesses that now occupy the site, including Wagshal’s catering; the kitchen that serves Wagshal’s delicatessen, market and restaurant in the Spring Valley Shopping Center; Pitmasters Back Alley BBQ; as well as DeCarlo’s restaurant on Yuma Street, Applicant’s offer of a new grocery store must be seen for what it is, i.e., yet another attempt to mitigate the damage that its Project will cause rather than add to existing public amenities. Although the size of the proposed grocery store is approximately 16,000 square feet, above the minimum of 15,000 square feet specified in §305.5(q) as necessary in order to qualify as a “use of special value to the neighborhood or the District of Columbia as a whole,” Applicant’s commitment is only for a 13,000 square foot grocery for a period of ten years. So even by applicable standards, Applicant’s purported “amenity” fails to qualify under §305.5(a).

**7. Applicant’s other alleged public benefits and project amenities are invalid because Applicant cannot take credit for them in the first place. (11-X DCMR §305.5(q))**

Applicant proposes to offer a shuttle service to the Tenleytown Metro station for a period of one year following issuance of the first certificate of occupancy for Building 1. The Metro station is approximately one mile from the Ladybird site. It is about a twenty-minute uphill walk at a brisk pace for a fit walker, so some sort of regular transportation option will be needed. Private vehicles are not the solution; residents would be prohibited from obtaining residential parking permits for the surrounding neighborhood and garage parking will be limited because of the shared arrangement with American University. Yet the Applicant is only offering to provide an unspecified form of transportation for a very limited amount of time, a situation that will ultimately lead to more traffic and congestion in the area, hardly a benefit to anyone.

**Conclusion**

In sum, all of the asserted amenities in this PUD application fail to satisfy §305.5(a). Most of them amount to nothing more than mitigation of damage and problems which the Ladybird project itself would create. Applicant offers no tangible public benefit of practical use to the surrounding community.

## **Part E: The Project Will Have an Unacceptable Adverse Impact on the Surrounding Area**

### **1. Oversized Building**

As noted elsewhere, the Project is out of context with the surrounding residential and small-scale commercial neighborhood. The one exception is the oversized, six-story building on Massachusetts Avenue now owned by American University. The oversized 6-story Valor building will be a jarring intrusion into the neighborhood of much lower 2-story homes and will destroy the attractive, open vista that commuters, residents, and visitors normally see as they drive, walk, or bike on Massachusetts Avenue, a grand avenue. Plus, the building, which rises to 81.5 feet and will be built on the property line, will have a wall-like appearance along both Yuma and 48<sup>th</sup> Streets.

### **2. Traffic Congestion on Neighboring Streets**

The Comprehensive Transportation Review estimates that the Project will generate 131 additional trips per hour during the morning peak hours and 283 additional trips per hour during the afternoon peak hours, and 13 truck deliveries per day. The truck traffic is in addition to the truck traffic servicing the Spring Valley Shopping Center, which is between 16 and 34 per day.<sup>35</sup> Based on the methodology published by the Institute of Transportation Engineers, the traffic consultant retained by Citizens for Responsible Development, estimates that the Project will generate between 3003 and 3437 additional daily trips on weekdays, depending on the size of the grocery and the final number of residential units.

All the additional traffic generated by the Project will necessarily flow through the alley network surrounding the site. According to Gorove/Slade, the number of vehicles entering and exiting the 20-foot wide alley behind the American University building during the peak afternoon hours will increase from 14 per hour currently to 126 per hour in 2024. Trucks also use this alley, as the Project's loading docks are on that alley. This will cause additional congestion on 48<sup>th</sup> Street between the alley entrance and Massachusetts Avenue, which also is where the American University shuttle buses stop (up to 10 per hour during the day). The buses also idle at that location, blocking one of the three lanes for extended periods. Also, because 48<sup>th</sup> Street doglegs at that point, it is hard for vehicles to see oncoming traffic around the buses.

### **3. Traffic Congestion in the Alleys**

As noted, the additional traffic generated by the Project will flow through the alley network. The 20-foot alleys will end up carrying as much traffic as the adjoining streets. According to Gorove/Slade's projections, hourly traffic in the E/W and N/S alleys during the peak afternoon hours will increase from 27 to 341 in 2024. The infrastructure in the alleys is not adequate to handle this traffic load. The N/S alley, which Valor proposes to narrow from around

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<sup>35</sup> We acknowledge that Gorove/Slade found that the number of such trips is between 16 and 18 per day. However, the Gorove/Slade study also counted an additional 15 to 16 daily truck deliveries in the N/S alley, but found that those deliveries were for existing establishments in the SuperFresh building. Exhibit 25A, p. 15. However, a number of those deliveries were for Wagshal's kitchen in the SuperFresh building. A portion of those deliveries will necessarily be rerouted to directly supply the two Wagshal's markets in the Spring Valley Shopping Center, thus raising the number of truck deliveries in the alley.

40 feet in width to 20 feet, is currently congested with trucks servicing the Spring Valley Shopping Center. The congestion from Project generated traffic will make the situation worse, and endanger pedestrians walking through this alley from the grocery store and the entrances to the apartment building. The 3-foot wide sidewalk along the N/S alley fails to meet safety standards. The sidewalks along both alleys are not protected by separation from the drive lanes. Also, there likely will be bottlenecks in the E/W alley, which will be used by all vehicles entering and exiting the garage levels as well as trucks accessing the loading docks of American University and the Project. These conclusions are more fully explained in CRD's Response to Valor's Development's Comprehensive Transportation Review, which is being filed separately.

#### **4. The Project Presents a Danger to Pedestrians**

The Project fails to meet DC's transportation goals and, in fact, does not support the objective of **Vision Zero**. As explained in CRD's Response to Valor's Development's Comprehensive Transportation Review, the significant increase in cars and trucks using the alleys would increase the number of pedestrian-vehicle conflict points, thus endangering the lives of pedestrians using the alleys, including people walking to and from the grocery store and the apartment building. The delineated pedestrian pathways along the alleys are inadequate and do not offer protective barriers between pedestrians and the roadways. In particular, the 3-foot wide sidewalk along the N/S alley fails to meet safety standards. The pathways along both alleys are not protected by separation from the drive lanes.

Further, the increased vehicular traffic entering and exiting the site will create more conflict with pedestrians walking along Massachusetts Avenue, 48th Street, and Yuma Street, including residents of the new building and customers of the new grocery store. In addition, even if Valor implements DDOT's recommendations – curb extensions and striping missing crosswalks – the increased traffic and lack of consistent sidewalks on surrounding streets will pose a risk to pedestrians on the adjoining streets, endangering the many young children who live and play in the neighborhood, as well as the elderly.

#### **5. Parking Overload**

Valor's submission indicates that there will be 228 parking places for the 219 residential units (235 if the additional flexibility requested is granted). The residents of all homes in the neighborhood have vehicles, frequently two. Also, the Metro is not a viable option for most, given that that the site is one mile from the nearest Metrorail stop. At 1.5 auto's per unit, there would need to be 328 parking spots just to satisfy the needs of residents (or 350 if the requested additional flexibility is granted). Where will residents park these vehicles? Further, the Commission should ascertain the certainty of the availability of the 228 parking places, since the availability of these spaces depends on the reallocation of spaces that must be shared with American University. The agreement reallocating these spaces should be made public.

#### **6. Deprivation of Sunlight and Privacy**

The shadow study included in the Application shows that the Project will cast significant shadows on neighboring streets during certain parts of the day and year, depriving the neighbors of sunlight.

The plans call for a rooftop terrace on the main apartment building along Yuma Street, situated on the top of the fifth floor (more than twice the elevation of the homes on Yuma Street). Residents of Yuma Street and Alton Street will have Ladybird residents peering down on, and into, their homes and yards, depriving them of privacy.

### **7. Adverse Environmental Effects**

The added traffic described above will contribute to more air pollution in the neighborhood. Similarly, the noise from the added traffic, particularly truck and delivery traffic, and construction will disrupt what is currently a quiet residential neighborhood.

Further, headlights from cars exiting the alleys after dark will shine directly into the homes across from the alleys. As noted, the traffic through these alleys will be comparable to the current volume of traffic on the surrounding streets, namely Yuma and 48th Streets.

### **8. Loss of Local Businesses**

The Project will force the closure of long-standing D.C. businesses that employ more than 60 people. Wagshal's kitchens and catering business, and DeCarlo's Restaurant, as well as Pitmasters Barbeque are located in the SuperFresh building and will be forced to close. Further, if Wagshal's were to lose its kitchens, where 40 people work, the survival of the Wagshal's retail stores – the Delicatessen that has been located in the Spring Valley Shopping Center since 1939 and the Wagshal's Meat and Seafood Market, are in question.

### **9. Construction Damage**

Construction of the Project is expected to take over two years. The three garage levels will require a deep excavation. Valor states that there is rock beneath the site, which may require blasting. Damage to neighboring homes is likely.

**Part F: By Placing its Base Height Measurement Point (BHMP) at the 48th Street Side of the Project in Plain Violation of the Zoning Regulations, Applicant Would Construct an Outsized Building Egregiously Out of Proportion with the Surrounding Grid of Shops and Houses.**

**1. Applicant's BHMP rests upon an artificially elevated roadway embankment and therefore violates Subtitle B, §307.7.**

Applicant measures the height of the Project building from the middle of its 48th Street side, going up 43 1/2 feet from the curb grade, thus taking advantage of the steep downward slope of the site to justify a main parapet that reaches an approximate total elevation of 67 1/2 feet at the lowest point of the slope. (The lowest point of the slope, which falls from East to West, lies along the rear alley that intersects with Yuma Street.) With an additional 12 to 15 feet for the penthouse, the building continues to be a massive structure rising from 55.5 feet in height facing 48th Street to 81.5 feet in height at its back end.<sup>36</sup>

It is not permissible for Applicant to use the 48th Street curbside as its Base Height Measuring Point to achieve this result.

Applicant views the 48th Street side as the building's "front," in reliance upon Subtitle B §307.5 which provides that "...any front may be used to determine the maximum height of the building..." However, the applicability of that provision is limited by the clause "...[e]xcept as provided in Subtitle B §307.7..."

The exceptions provided in §307.7 specifically pertain to lots like the SuperFresh site, where the existing building and its parking lot are connected to 48th Street by a steep ramp and an artificial embankment which supports the 48th Street roadbed. Section 307.7 states:

"When the curb grade has been artificially changed by a bridge, viaduct, *embankment*, *ramp*, abutment, excavation, tunnel, or other type of artificial elevation or depression, the height of a building shall be measured using the first of the following four (4) methods that is applicable to the site:

- (a) An elevation or means of determination established for a specific zone elsewhere in this title;
- (b) An elevation for the site that was determined prior to the effective date of this section by the Zoning Administrator, or the Redevelopment Land Agency, its predecessors or successors;
- (c) A street frontage of the building not affected by the artificial elevation; or
- (d) A level determined by the Zoning Administrator to represent the logical continuation of the surrounding street grid where height is not affected by the discontinuation of the natural elevation."

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<sup>36</sup> See Applicant's Exhibit 2C6 (drawings showing cross-sections of 48th and Yuma Streets).

As shown in the photographs below, the salient features of the Project site are: (1) the steep ramp leading up from the parking lot to 48th Street; (2) the 30-foot wide landscaped embankment along 48th Street, and (3) the retaining wall at the border of the SuperFresh parking lot that holds up the downhill side of the embankment.

These features resulted from:

(1) the original need to level the roadbed for 48th Street across the natural slope of the land, which by necessity required an embankment to raise the level of the roadbed's downhill-side curb grade from the natural grade that predated the construction of that road; and

(2) the subsequent excavation of the artificial depression below that embankment that was excavated to create the current underground SuperFresh parking garage.

The only other way in which the roadbed of 48th Street could have been leveled would have been to make a roadcut, with a retaining wall, on the uphill side. Such a roadcut is not there.<sup>37</sup>

At present, the broad, flat embankment on the downhill side of 48th Street carries a sidewalk and fully occupies the space from the curb grade of 48th Street up to the boundary of 48th Street's 90-foot right-of-way (*i.e.*, the retaining wall). The photo below shows 48th Street and embankment looking south toward Massachusetts Avenue. The SuperFresh site is downhill to the viewer's right:



The next photo shows the ramp and the retaining wall that holds up the 48th Street embankment:

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<sup>37</sup> One can see a roadcut on a street's uphill side, with a brick retaining wall holding back the hillside, on nearby streets in AU Park, for example, along the west side of 46th Street between Davenport and Chesapeake Streets.





And this photo shows the width of the embankment, looking south along 48th Street:



From the top of the retaining wall that holds up the 48th Street embankment there is an approximate 15-foot drop straight down to the lower floor of the parking lot. The floor of the parking garage then slopes further downward to the level of the Yuma Street entrance to the parking lot. This amounts to a total decline in elevation from the 48th Street curb to the rear alley

of approximately 26 feet. Applicant has admitted that along Yuma Street "... there is a substantial drop in grade from east to west."<sup>38</sup> This substantial drop in grade is the result of the 48th Street embankment plus the "artificial depression" of the garage excavation. It would therefore give the Applicant an illegal advantage, in contravention of §307.7, if it were allowed to take its height measurement from the artificially elevated 48th Street curb grade.

Applicant has previously argued that its BHMP is unchanged from the supposed "natural elevation" above sea level that existed prior to the construction of 48th Street. But this argument fails to explain how the 48th Street roadbed could have been made level across the steep natural slope shown on the old USGS contour maps without depending upon some sort of embankment on the downhill side. If the downhill side of 48th Street rested on natural *in situ* soil, as Applicant contends, the roadbed itself would be slanted down the hillside -- but the 48th Street roadbed does not do that. It is level. By our calculation, the height of an embankment to level the roadbed would be, roughly, half the elevation difference between the contour lines on the old USGS maps, or anywhere from five to ten feet difference from the natural elevation.

Applicant has relied, for this argument, upon nothing more than a self-serving extrapolation of elevation levels from USGS contour maps dating from the 19th century, along with the use of handheld GPS elevation measuring devices, neither of which have anywhere near the degree of accuracy required to determine whether there is an embankment raising the 48th Street curb grade or not. This point was amply demonstrated by CRD in the previous Design Review case.<sup>39</sup>

It also proves nothing for Applicant to say that the elevation of the 48th Street curb grade has not changed since the 1940's. The road, and the embankment that supports it, predate the 1940's by several decades.

Finally, Valor's claim is not supported by any physical evidence, such as soil samples, which would help determine if the 48th Street curbside rests upon natural soil or the type of compacted embankment fill that is typically used by highway engineers to provide a solid footing for roadways. See Federal Highway Administration Research and Technology Report, publication no. FHWA - RD - 97-148, which states:

*"An embankment refers to a volume of earthen material that is placed and compacted for the purpose of raising the grade of a roadway (or railway) above the level of the existing surrounding ground surface...Embankments or fills are constructed of materials that usually consist of soil, but may also include aggregate, rock, or crushed paving material."*<sup>40</sup>

In sum, Applicant's position is clearly contrary to the visible evidence, plain to the most casual observer on site, that 48th Street rests upon an artificially raised embankment. We remind

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<sup>38</sup> See the Applicant's Prehearing Statement dated December 21, 2017 filed in connection with the previous Design Review application (Case No. 16-23; Exhibit 114), p 11.

<sup>39</sup> Case No. 16-23, Exhibit 405.

<sup>40</sup> See <https://www.fhwa.dot.gov/publications/research/infrastructure/structures/97148/app4.cfm> See also District of Columbia Department of Transportation Standard Specifications for Highways and Structures (2013) Division 200, at 204 (concerning "Embankment Fill").

the Commission that it is Applicant who bears the burden of proof to persuade the Commission that no such embankment exists, which Applicant has notably failed to do.

**2. The remedy for Applicant’s misplaced BHMP is set forth in the regulation.**

In the case where a curb grade has been artificially changed, §307.7 provides four different possibilities for selecting an appropriate BHMP. The Commission is required to adopt the first applicable solution set forth in the rule. In this case, the solutions set forth in paragraphs (a) and (b) obviously do not apply. That brings us to paragraph (c), which places the proper BHMP at “the street frontage of the building **not** affected by the artificial elevation” (*emphasis supplied*). The only street frontage of the proposed Project that is **not** affected by the 48th Street embankment is the Yuma Street frontage. That is where Applicant’s BHMP is required to be taken under §307.7(c).

The only alternative would be to refer to the next applicable solution, at §307.7(d). Under §307.7(d), the Zoning Administrator would determine a level for the building that represents the “logical continuation of the surrounding street grid” that would **not** be affected by the 48th Street embankment and the steep slope of the site. This would, obviously, be the level occupied by the historically-preserved shopping center and the neighboring houses on Yuma and 48th Streets, presumably an average of the various elevations along the sloping site. We see no difference in the result.

Accordingly, the application of either paragraph (c) or (d) of §307.7 would require the Applicant to reduce the maximum height of the main building’s parapet down to no more than 50 feet at the middle of the Yuma Street frontage. Because the Applicant’s own drawings show a height of 59 feet at approximately the same point on Yuma Street, this would be a reduction of at least one floor from the Applicant’s revised design. This would, in turn, result in a less dense and tall building, that is, a building of up to three floors --- the very result we seek. It would also result in a building more nearly in the category of “moderate” rather than “medium” density, as required by the zoning regulations and the Comprehensive Plan, and much more in keeping with the residential and low-density commercial character of the existing neighborhood.

**3. Applicant’s claims in rebuttal to the above argument are meritless.**

Now we address Applicant’s claims in rebuttal of the foregoing argument presented by CRD, which Applicant made in ZC #16-23.

First, Applicant asserted that §307.7 was intended only to address the situation of railroad bridges, overpasses, and the like. However, no such limitation appears in the text of §307.7, and Applicant fails to provide the Commission with any authority for its contention. On its face, the rule applies to any “embankment.” There is no ambiguity in the text of the rule that would justify the interpolation of some unwritten limitation. The definition of “embankment” in *Webster’s Unabridged Dictionary* (Random House, 2001), which controls under Chapter 11, §199.2 (g), is as follows:

**Em-bank-ment**...n. **1.** a bank, mound, dike, or the like, raised to hold back water, carry a roadway, etc.

That is precisely what we have here. CRD's photographs show that there is clearly a substantial, flat, grassy embankment on the downhill side of 48th Street, which **carries both the sidewalk and the roadway.**

Further, Applicant's reliance on the definition of "natural grade" in Subtitle B §100.2, to limit the applicability of §307.7 to changes in elevation made within the last two years, is irrelevant because the term "natural grade" is not used in §307.7. These are two different terms. In §307.7, the operative term is "curb grade." Elsewhere in §307, the term "natural grade" is used in provisions that govern the measurement of height for buildings limited to 40 feet (§307.2) and buildings removed from lot lines by a distance equal to their height (§307.6). That is all. 'Reference to the definition of "natural grade" in §100.2 therefore cannot be used to control the meaning of §307.7 with respect to such specified features as embankments, ramps, abutments, etc., affecting "curb grade."

Moreover, even the definition of the term "natural grade" in §100.2 expressly excludes "berms" from the two-year limitation which Applicant would like to see applied. The rule says that the "...natural grade may not include manually constructed berms or other forms of artificial landscaping." CRD's photographs clearly show a "berm" along 48th Street. A "berm" is defined in Webster's Unabridged Dictionary as, *inter alia*, "...any level strip of ground at the summit, or sides, or along the base, of a slope." The 48th Street embankment shown by CRD's photographs is nothing less than a level strip of ground artificially made, and landscaped with grass and trees, at the summit of the slope which extends down to the old SuperFresh store. We note that §307.7 has no limit on how old such features may be.

## **Part G: The Project Harms the Neighborhood by Removing an Important Benefit Conveyed by the Terms of the Existing Declaration of Easement and Agreement**

The Parties agree that the proposed Project cannot go forward without an increase in density on Lot 807, the SuperFresh lot. However, the proposed density transfer to the SuperFresh lot is inconsistent with, and in fact violates, the framework set forth in the Declaration of Easement and Agreement governing the subject property (the “Easement”). For zoning purposes, Lots 806 and 807 are combined to form Record Lot 9, which previously was owned in its entirety by the Burka family entities. The purpose of the Easement was to facilitate the construction of the structure that is now the AU Building – a building that exceeded the allowable density for Lot 806 and could not have been built on Lot 806 without taking some of the density from Lot 807.

The Easement therefore allocates the density between Lots 806 and 807, granting the greater share to Lot 806. The Easement is a recorded instrument, memorialized in the DC land records in 1979, that binds the owners of Lots 806 and 807 and their successors (including American University as owner of Lot 806 and any purchaser of Lot 807). The Applicants concede the ongoing binding nature of this Easement when they state: “Through a recorded Declaration of Easement and Agreement that remains in effect (the “Allocation Agreement”), 179,302 square feet of GFA was allocated to Lot 806 for the AU Building, and 63,242 square feet of GFA was allocated to Lot 807.”<sup>41</sup> The Easement further grants the owners of Lot 806 a non-exclusive easement for vehicular parking on Lot 807, the SuperFresh lot, and provides for maintenance and use of the driveways (including the alleys) and parking areas.

By allowing greater density on Lot 806 and limiting density on Lot 807, this allocation effectively pushed development to the Massachusetts Avenue side of Record Lot 9, thereby benefiting the neighboring residents by reducing density on the portions of the SuperFresh site facing the neighborhood. In fact, the District of Columbia Court of Appeals, in an opinion dated March 20, 1979, opined that the beneficiaries of the Easement were intended to be “nearby property owners.” See *American University Park Citizens Association v. Burka*, D.C. Court of Appeals, March 20, 1979 (400 A. 2d 737, 746). This is the very result encouraged by the Comprehensive Plan. See Land Use Element, Policy LU-2.4.5 (which encourages development along major corridors while respecting the surrounding residential areas) and Urban Design Element, Section UD-2.2.4 (which encourages establishment of gradual transitions between large-scale buildings like the AU Building and smaller buildings like single family homes).

The Easement further provides that “within each of the two (2) described areas [Lots 806 and 807] all remodeling, additions, or replacement construction **shall not be in violation of the requirements of the Zoning Regulations for Record Lot 9.**” Construction on the SuperFresh lot is therefore capped by the Easement. The parties to the Easement (the Burka family entities, who are still owners of the SuperFresh site, and American University as a successor in interest) and any successors such as Valor Development may not authorize this Project and at the same time comply with the terms of the Easement. The Applicant is therefore prohibited from attempting to utilize additional GFA through the transfer from SVSC since doing so would

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<sup>41</sup> See Statement in Support (Exhibit 2), p.8.

surpass the maximum GFA allowed on Record Lot 9 and would undermine the objective of the existing Easement, which was to move density to the portion of Lot 9 closest to Massachusetts Avenue and away from the residential neighborhood. Any such transfer from the SVSC would literally rescind the limitation imposed by the Easement, to the detriment of the neighbors. By eliminating this important benefit, the Applicants fail to meet their burden of showing that the Project causes no harm to the neighboring community.

As noted, the Easement also grants to AU as owner of Lot 806 an easement to use up to 236 parking spaces on Lot 807. While it appears that AU is leasing some of these spaces to Valor, the “lease agreement” has not been provided. A number of questions remain outstanding. For example, what is the term of the lease? Can AU reclaim some of the parking spaces that will initially be available to residents? Will all tenants who desire a parking space be able to rent one from Valor? A bigger question is: Where will residents without a parking space within the building for one of their vehicles park those vehicles?



## **Part H. The Proposed PUD Alters and Degrades an Historic Landmark in Violation of District of Columbia Law**

The proposed PUD includes, as part of the project lot, three parcels: the SuperFresh Lot (Lot 807), the American University building at 4801 Massachusetts Avenue (Lot 806) and the Spring Valley Shopping Center (“SVSC” or “MAPS”)(Lots 802 and 803). Massachusetts Avenue Parking Shops (“MAPS”), which is sometimes referred to as the Spring Valley Shopping Center, is owned by Regency Centers. Lot 807, the SuperFresh Lot, is the only parcel where development will actually take place. Lots 806 and 807 were originally a single lot. As previously discussed, the American University building on Lot 806 was built by taking density rights from the SuperFresh Lot by means of a recorded easement which remains in effect.

MAPS is included in the PUD for the sole purpose of transferring its purported unused density rights to the SuperFresh Lot. In fact, the proposed development could not be built by utilizing only the density on the SuperFresh Lot.

However, MAPS, built in 1936, is designated as an historic landmark. It is listed in the DC Inventory of Historic Sites and was recorded in the National Register of Historic Places in 2003. The report of the National Park Service, U.S. Department of the Interior, certifying the landmark status of MAPS is being filed separately. The current owner of the landmark, Regency Centers, a Texas-based shopping center chain, apparently proposes to sell whatever remaining available density MAPS holds to the developers of the SuperFresh Lot. As proposed, this transaction cannot proceed for the following reasons:

### **1. The Zoning Commission must consider the adverse effects on the MAPS landmark, which is included in the proposed PUD.**

The proposed PUD unquestionably includes the MAPS landmark. When a PUD incorporates a landmarked property, any adverse effects on that landmark must be evaluated by the Zoning Commission and the Historic Preservation Office. The Zoning Regulations require that the Commission examine “any potential adverse effects [of the PUD] according to the specific circumstances of the case.” Title 11-X 304.3

The Applicant’s claim that the project will not touch the landmark does not suffice for the Commission to make a determination of no impact on MAPS. The owner of MAPS – Regency Centers – is one of the Applicants in this proceeding, and the landmark will be permanently changed as a result of losing whatever density rights it still may possess. In fact, as discussed below, the transfer of density from MAPS to the SuperFresh Lot will irrevocably alter the historic landmark and compromise future preservation options.

Thus, this case differs from the Hoffman-Struever Waterfront, LLC case (ZC 11-03). In that case, the residents of the Tiber Island Condominium building across the street from the project (which was landmarked before the PUD’s stage two review), claimed that the project would have an adverse effect on the landmark. The Commission ruled that because the Tiber Island building was not part of the PUD and did not propose changes to the landmark, its status

as a landmark was immaterial.<sup>42</sup> Here, MAPS is part of the PUD, and its landmark status is permanently affected by the proposed project.

Moreover, the Zoning Regulations require the Office of Planning to obtain a report from the Historic Preservation Office (HPO) regarding this PUD. Pursuant to Title 11-X 308.4:

If a public hearing is granted, the Office of Planning shall coordinate review of the application and prepare an impact assessment of the project, which shall include reports in writing from relevant District of Columbia departments and agencies, including, but not limited to, the Departments of Transportation and Housing and Community Development, *and, if a historic district or historic landmark is involved, the Historic Preservation Office.* [Emphasis added].

Here, no such written report by the HPO assessing the impact of the proposed PUD on MAPS has been supplied. As discussed below, the proposed PUD adversely affects MAPS in numerous respects and confers no public benefits on the landmark.

## **2. The MAPS landmark receives no benefits from the proposed PUD.**

This PUD application proffers as a public benefit additional historic preservation protection for MAPS through the removal of what is claimed to be its unused density. Title 11-X 305.3 (“Planned Unit Development Public Benefits”) states that all public benefits, of which historic preservation may be one (305.5(e)), shall be *tangible* and *quantifiable* items. [emphasis added]. The public benefit proffered here certainly does not meet this PUD requirement.

The proposed PUD is a radical departure from general practice when a landmark has been included in a project lot. Since the implementation of the DC Historic Landmark and Historic District Protection Act,<sup>43</sup> the Commission has considered only a small number of cases outside the TDR zones where a landmark has been incorporated into a PUD outside TDR zones.<sup>44</sup> In all these cases, the landmark was either physically incorporated into the project’s new construction, and/or was provided with *tangible*, physical preservation benefits (i.e. restoration or

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<sup>42</sup> “Because the Tiber Island Complex is not part of the PUD, and the PUD does not propose any changes to the designated landmark, the landmark status of Tiber Island was immaterial to the Commission’s decision in the Stage 2 PUD.” Z.C. Order No. 11-03A(4A).

<sup>43</sup> D.C. Law 2-144, as amended through March 2, 2007.

<sup>44</sup> These prior cases are: George Washington University “Red Lion Row.” 2000-2040 Pennsylvania Ave, NW. ZC Case: 80-11, Church of Christ, Scientists. 900 16<sup>th</sup> St., NW. ZC Case: 13-04, Italian Embassy. 2627 Mozart Place, NW. ZC Case: 11-08, St. Matthews Cathedral. 1500 New Hampshire Ave., NW. ZC Case: 90-23, O Street Market. 7th Street, NW. ZC Case: 07-26, 07-26A-D, Hecht’s Warehouse. 1521 New York Ave., NE. ZC Case: 14-01, Randall Junior High School. 820 Half St., SW ZC Case: 07-13, Town Center East. 1001 3rd St., SW. ZC Case: 12-14A, Sumner School Project. 1615 M St., NW. ZC Case: 82-14, 2225 N St., NW. ZC Case: 89-20, and Hillandale Mansion. 4149 Parkglan Ct., NW. ZC Case: 79-14/79-6F



rehabilitation). In both types of situations, there was always a physical preservation or rebuilding of the landmark proffered as one of the major public benefits of the PUD.

The proposed Project does neither of these things. MAPS is simply a passive vehicle here, included in the PUD solely to strip it of any remaining density it may possess. Even in non-PUD projects where a landmark was included in the project lot, the tangible preservation and/or rehabilitation of the landmark was a significant aspect of the project.

Here, including the landmark in the PUD returns no benefits to MAPS. As set forth in the following section, the Applicant's claim that the density sale "preserves" the landmark by making it impossible to build anything else there is disingenuous at best. In any event, the landmark is already protected. MAPS historic preservation protections are well established in both federal and local preservation law, with oversight by the Historic Preservation Review Board (HPRB) and Mayor's Agent, not by the Zoning Commission. There is simply no reason to include MAPS in the PUD other than to try to secure enough density for the proposed oversized and inappropriate project.

**3. The proposed PUD would impair MAPS future preservation options.**

The Applicant's representation that MAPS will receive historic preservation benefits by removing the possibility of further development there is simply untrue. Stripping MAPS of density *deprives* the landmark of its future preservation options by hindering its development potential should there ever be a need to intervene to save the landmark. For example, should the building fall into a derelict state of disrepair and rehabilitation would be the only option to save it, the way to encourage this would be to allow some form of addition to the original building, as was the case with the PUD projects cited above. There would be less chance that a developer would have an interest in doing so if no additional development would be allowed as a result of this proposed density transfer.

Consequently, what the applicant has proposed is replacing existing preservation protections with an illusory one that not only fails to help the landmark but affirmatively harms it. MAPS' density rights should not be sold simply to enrich Regency Centers, its current owner. Rather, whatever density it may possess should be available to preserve or rehabilitate MAPS should that become necessary in the future. Moreover, the issues relating to the proposed transfer of density from MAPS are for the HPRB to decide and do not fall within the purview of the Zoning Commission.

**4. The Applicant has improperly calculated what it believes to be the available density of MAPS using the general MU-4 zone methodology.**

Use of the MU-4 zone methodology to calculate the development potential, and thus any remaining unused density of MAPS, disregards its status as an historic landmark. Whatever available density MAPS currently possesses can only be determined by the HPRB. Because the parking area in front of MAPS was one of the features recognized as part of its historic status, it is not at all clear whether it possesses any unused density and, if so, how much.

In fact, the District's Historic Preservation Office staff have recognized the importance of the historic designation of MAPS in considering any development affecting MAPS. When HPO was asked about the small, glassed-in patio enclosure placed by Wagshal's, a restaurant tenant of MAPS, on the back (the Yuma Street side) of MAPS, Steve Callcott, HPO Deputy Director, said he had advised the architect that for any enclosure to be found compatible and consistent with the property's designation, it would need to be lowered in height so as to not affect the roof and dormer, and retain the pediments.<sup>45</sup> Therefore, the amount of any new mass added would have to be very limited as to not affect the integrity of the designation and remain consistent with the landmark and not threaten its integrity. Thus, there is not much, if any, "stranded density" here, a term recently misapplied by OP to refer to unused density on a site.

It should be noted that the historic landmarked shopping center across Massachusetts Avenue at 4860 Massachusetts Ave., N.W. differs significantly from the Applicant's proposed PUD site in the determination and use of unused density. That landmarked shopping center is comprised of multiple buildings, situated on a single record lot (Square 1500, Lot 5) that is owned by a single owner (Washington REIT), with its buildings oriented around parking in the center. The Historic Preservation Review Board (HPRB) determined that, unlike the MAPS site, the parking lot was not a contributing feature of the shopping center. For this reason, the HPRB found that the site had unused and developable square footage and FAR. No transfer of density between different owners was involved or even necessary for the construction of a small two-story retail and office building, now known as Spring Valley Village, on a portion of its parking lot.

The determination of MAPS' available density cannot therefore be calculated solely based on what is allowable with MU-4 zoning alone. Rather, the HPRB would need to conduct a review of a specific proposal and determine what would be an allowable change to this landmarked site. The HPRB is the body authorized by District of Columbia law to make this determination. The HPRB has not been asked about the proposed Project and has consequently provided no opinion regarding the proposed sale of any density MAPS may possess.

Moreover, MAPS will be irrevocably changed if its current owner sells its remaining density rights. Selling any unused density, if such density even exists, deprives the landmark of its future preservation and development potential *as a landmark*, as discussed above.

##### **5. The PUD will have an adverse impact on the MAPS landmark.**

As stated earlier, PUD regulations require that the Commission examine "any potential adverse effects [of the PUD] according to the specific circumstances of the case." This proposed PUD will unquestionably adversely impact MAPS even beyond the loss of any of its remaining density rights. As previously discussed, the proportion, height, and mass of the proposed building and its proximity to MAPS on the same project lot will have a negative indirect impact on MAPS. The proposed project completely overwhelms the low-rise scale and character of the landmark. This argument carries even more weight now considering the Commission's finding

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<sup>45</sup> Email correspondence between Jeffrey Kraskin and Steve Callcott (HPO) dated September 24, 2015. Shared with Stephen Hansen by Mr. Kraskin.

in Z.C. Order No. 11-03A(4A) that since Tiber Island was not included in that PUD, its historic designation was immaterial. Here, MAPS is an essential part of the proposed project: without taking density from MAPS, the project could not be built.

In fact, the low-lying profile of MAPS was among the historic characteristics recognized when it was granted landmark status in the first place. The report of the National Park Service, U.S. Department of the Interior, certifying the landmark status of MAPS, noted its harmonious character with the surrounding neighborhood:

At the rear of the store, along Yuma Avenue, the building presents a more domestic feel, in keeping with the residential buildings across the street. The Colonial Revival-style replacement windows echo the shop windows on the front of the structure, while dormers and chimneys punctuate the slate-covered roof. Landscaping along this street further enhances the building's domestic quality here. ***The design for this elevation clearly followed the recommendation of city planners to accord special attention to the rear elevations of planned shopping centers, since these elevations usually abut residential streets and private homes.*** Report at p. 2 [emphasis added].

The Report further noted at page 6 that:

The design of the rear of the building is notable because it is residential in scale and appearance, thereby reflecting the recommendation of urban planner Clarence Perry who stated, "special consideration should be given to the business structure at the point where the stores stop and dwellings begin."

Consequently, for the reasons set forth above, this proposed PUD harms the MAPS historic landmark and confers no tangible public benefits on it. Whether it possesses any remaining density, and if so, how that density is to be used, are questions for the HPRB to decide, not this Commission.

## Part I: The Project Does Not Include the Required Inclusionary Zoning Set-Aside

Before addressing the Project's failure to provide the required amounts of affordable housing, it's important to remind the Commission of the history of the Valor project. The reason why the Applicant in February 2018 asked for deferral of Commission deliberation of the Design Review application was that, late in the process, Applicant was informed that their project failed to meet the required inclusionary zoning set aside. They responded by sinking the entire project six feet into the ground, but without otherwise making any other changes in size of the project or the amount of affordable housing. They did this to circumvent the inclusionary zoning requirements. Valor's architect has called this "magic."

Even though the Applicant used sleight of hand to circumvent the District's Inclusionary Zoning requirements, the Application in fact continues to fall short of the affordable housing requirement. Under Subtitle C, Section 1003.1 of Title 11 of the DCMR, 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, §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, §1001.2(d)." Achievable bonus density is defined in Section 1001.1: "Achievable bonus density is the amount of the permitted bonus density that potentially may be utilized within a particular inclusionary development provided in Subtitle C §1002."

Based on this definition, the achievable bonus density for the Project would be 80,394 SF plus amounts for the cellar space, projections and residential penthouse space. The 29,858 SF of affordable housing provided in the Project falls well short of what is required.

We recognize that the Commission has approved a text amendment which would base the calculation on "the amount of permitted bonus density that is utilized."<sup>46</sup> However, the text amendment was not effective when the Application was filed and is still not effective. We submit that the Commission should not apply the text amendment to this Application. It is not the law now, and it wasn't the law when the Application was filed.

However, even under the text amendment, the affordable housing included in this Project does not meet the inclusionary zoning requirement since Valor did not include the residential cellar space and projections in the calculation of bonus density as required by Section 1003.9. Section 1003.9 clearly states that it applies to the minimum set aside **requirements** of Sections 1003.1 and 1003.2. No distinction is made between the two separate tests in Section 1003.1, and the use of the plural "requirements" in Section 1003.9 would seem to mean that it applies to both tests.

Section 1003.9 specifies factors that are not included in gross floor area that should be included in the calculations under Sections 1003.1. Included are dwelling units located in cellar space and enclosed building projections. Valor includes residential cellar space and projections in its calculation of residential floor area in Section 1003.1 even though, according to Section 1003.1 the requirement applies to "10% of the gross floor area dedicated to residential use in the

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<sup>46</sup> ZC 04-33i.

building.” There is no basis for applying Section 1003.9 to only one of the two tests set forth in Section 1003.1. The plain meaning of Section 1003.9 should control. Any attempt to disregard cellar space and projections under the bonus density test would ignore the direction of Section 1003.9. Under Section 1003.9, residential cellar space and projections should be added to the gross floor area calculations that are required under both calculations in Section 1003.1. Further, the Applicant’s approach would result in totally ignoring factoring in the cellar space and projections for purposes of the “bonus density” calculation.

If the bonus density is defined to be the bonus density “that is utilized,” rather than the bonus density “that potentially may be utilized,” and residential cellar space and projections are included in that calculation, as specified in Section 1003.9, the IZ set-aside requirement for this project would be 44,489 SF<sup>47</sup>, and the Project would fall short of that requirement by 14,631 SF.

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<sup>47</sup> Here’s the calculation: 75% times the sum of utilized bonus density (28883 SF) plus residential cellar space (24,775 SF) plus projections (1719 SF) and adding 10% of residential penthouse space to the result.

**Part J: The Applicant Has Failed to Submit Agreements that Are Critical to the Zoning Commission's and CRD's Ability to Assess the Project**

The Applicant's agreements with American University and the owner of the SVSC are needed for CRD and the Zoning Commission to evaluate the Project's legalities and impact. In fact, the Project should not be allowed to proceed until these agreements are inspected. These agreements presumably cover the agreements about density aggregation, covenants concerning the protection of the Spring Valley Shopping Center, and agreements concerning the clean-up of the alley behind the Shopping Center and restriction on loading and unloading on Yuma Street. Even though the Commission nearly two years ago directed the Applicant to provide these agreements in the previous Design Review case, the Applicant has refused to provide them. Also, there presumably is, or will need to be, a separate agreement with American University covering the use of the private alley behind the American University Building which American University owns, as well as matters relating to the 236 parking spaces which the owner of Lot 807 must make available for use by American University under the terms of the Easement. Further, since the Applicant is offering a grocery store as an amenity, the agreements with the grocer (or grocers) should be made public. All these agreements should be provided to the Commission and made available to the parties in the case. By refusing to provide them, the Applicant is hiding behind a wall of secrecy that is preventing CRD and the Commission from fully considering the Application.

## **Conclusion**

In conclusion, the Project fails to meet the requirements for a PUD and should therefore be denied by the Zoning Commission. CRD has shown in the above pages that the Project is clearly inconsistent with the Comprehensive Plan; the Project will have many adverse impacts on the surrounding area; and finally, the Project does not include specific public benefits. In addition, the Project is inconsistent with the designation of the SuperFresh site in the Future Land Use Map. Zoning for the site calls for a moderate, not medium, density development.

If this project were lower in height and did not pack in so many units in the manner proposed, the community would respond favorably. The neighborhood favors construction of housing on the site, including more affordable housing, in a mix of a reasonable development abutting residential streets. CRD is not against development on this site. Rather, we in CRD believe that the proposal here overreaches significantly while the developer is doing as little as possible to support affordable housing and as much as possible to maximize return.

We understand that the Zoning Commission could be exhausted by this process, but the dragged-out process is entirely the responsibility of the Applicant who has repackaged an extreme proposal multiple times and tried multiple angles to squeeze it through. Had the developer come forward with a reasonable proposal - that could have secured it a reasonable return - at the outset, construction could be well underway. The clearest, most appropriate path to making something happen on this site that is fair to all is to urge the Applicant to come back with a revised proposal that is consistent with zoning and the Comprehensive Plan and as such would not elicit such strong opposition from the neighborhood.