

Advisory Neighborhood Commission 3D

Government of the District of Columbia



15 October 2019

Mr. Anthony Hood
Chairman
District of Columbia Zoning Commission
441 4th Street, NW
Suite 200S
Washington, DC 20001

Dear Chairman Hood and members of the Zoning Commission,

The Zoning Commission has solicited from all parties a post-hearing submission evaluating the public benefits and amenities proffered in Zoning Case 19-10.¹ Advisory Neighborhood Commission 3D's [ANC3D] resolution of support for the application does exactly this in Exhibit 26.² Since ANC3D's resolution mistakenly includes ZR58 citations instead of ZR16 citations, the relevant section of the ANC's original resolution with updated citations is included here. Other parties have criticized ANC3D for these mistaken citations, but this is a "red herring" because there are no substantive differences in the text between ZR58 and ZR16 for the citations provided by ANC3D. This is demonstrated in the crosswalk between ZR58 and ZR16 compiled by the Office of Planning [OP].³ The full text of the ZR58 citation and the equivalent ZR16 citation is provided following our updated resolution.

ANC3D was cross-examined in the hearing concerning the responsibilities of Advisory Neighborhood Commissions [ANCs] and the granting of "Great Weight" by agencies reviewing ANC submissions. ANCs were created as part of the District of Columbia Home Rule Act of 1973.⁴ Elected commissioners take on oath of office that reads (in full):

I, [name], having been duly elected as a Commissioner of the Advisory Neighborhood Commissions OF THE DISTRICT OF COLUMBIA do solemnly swear or affirm that:

I, [name], will support and defend the Constitution of the United States; that I will perform such duties as may be assigned to me as a member of said Commissions to the best of my ability without fear or favor; that I will exercise my best judgment and will consider each matter before me from the viewpoint of the best interest of the District of Columbia, as a whole; and that I will faithfully discharge said duties.

ANCs are entitled to "Great Weight" in agency proceedings. According to the Code of the District of Columbia, this compels agencies to reference the ANC's "issues and concerns" and articulate, in writing, "why the [ANC] does or does not offer persuasive advice."⁵ ANCs are free to review policies from their

¹ Advisory Neighborhood Commission 3D's By-Laws permit the filing of this post-hearing submission on behalf of the full Commission. Nonetheless, this submission was circulated within ANC3D for two days for comment prior to filing.

² See Zoning Case 19-10, Exhibit 26, "ANC 3D Report," 6 September 2019.

³ See Zoning Case 08-06A, Exhibit 37, "Crosswalk – Chapter 24, Planned Unit Development Procedures," 11 October 2013.

⁴ See Title VII, Part D, Section 738, available at <https://dccouncil.us/wp-content/uploads/2018/11/Home-Rule-Act-2018-for-printing-9-13-182.pdf>.

⁵ See Division 1, Title 1, Chapter 3, Subchapter V, Part A, 1-309.10(d)(3)(A-B), available at <https://code.dccouncil.us/dc/council/code/>.

own perspective and agencies are free to find the ANC's argumentation unpersuasive. ANCs cannot simply assert "Great Weight" and an absence of sound argumentation does not require "Great Weight" to be conferred. For example, an ANC can report "*We are adamantly opposed*" to a proposal, but without being buttressed by logical arguments the statement does not warrant "Great Weight" in the agency's response.⁶ Case law upholds that ANC's "Great Weight" comes from the ANC's unique position and also from the content of its views.⁷ "*In summary, government agencies are charged to pay specific attention to the source, as well as the content, of ANC recommendations, given them whatever deference they merit in the context of the entire proceedings, including the evidence and views presented by others.*"

ANCs are free to view cases from whatever perspective they desire. In particular, ANC review is not meant to be an expert review akin to that provided by administrative agencies. As the courts found,⁸ *Second, ANC recommendations, whether in a legislative or administrative context, are not analogous to legal interpretations of enabling statutes by expert administrative agencies charged with regulatory or other governmental responsibilities. If the Board were to afford the degree of weight to ANC judgments urged by petitioners, it would tread perilously close to, if not cross into, the realm of improper delegation of its governmental authority to a private party. True the ANCs have governmental responsibilities in the sense that they are created by statute, elected by the general public, and funded by the taxpayers. But neither Congress nor the District Council has even hinted at granting ANCs responsibilities for governmental operations. They are advisory only. To construe their enabling statutes in a way that would grant the ANCs "expert" status, entitled to special deference as such, would be to sanction interference with the established pattern of governmental relationships.*

Further evidence in support of the ANC review being distinct from that of the Zoning Commission comes from the Office of Planning. In reviewing the applicability of Subtitle X Section 305.5(j) (the "3-mile radius" standard), OP wrote, the "[Zoning] Commission would value the input of ANC 3D with respect to Valor's proffered project benefits and amenities, including the proposed grocery store."⁹

Troy Kravitz
Authorized representative of ANC3D

⁶ Conversations with the Office of Advisory Neighborhood Commissions.

⁷ *Kopff v. District of Columbia Alcoholic Beverage* (381 A.2d 1372 (1997)), available at <https://law.justia.com/cases/district-of-columbia/court-of-appeals/1977/11374-3.html>.

⁸ *Ibid.*

⁹ Email correspondence with the Office of Planning, 28 August 2019.

4 September 2019

Mr. Anthony Hood
Chairman
District of Columbia Zoning Commission
441 4th Street, NW
Suite 200S
Washington, DC 20001

Dear Chairman Hood and members of the Zoning Commission,

At a regularly-scheduled and publicly-advertised meeting of Advisory Neighborhood Commission 3D on 4 September 2019, with a quorum (6) present at all times, ANC3D approved this resolution in support of Zoning Case 19-10. ANC3D authorizes Troy Kravitz, SMD 3D02, to represent the Commission in all proceedings pertaining to this case consistent with ANC3D's Bylaws.¹⁰

In this letter to the Zoning Commission, we have endeavored to make our analysis most useful to the Zoning Commission by briefly reviewing the application in light of the Planned Unit Development (PUD) Evaluation Standards in DCMR Section ~~11-X304 and 11-X305~~ ~~11-2403~~.¹¹ While the evaluation of the PUD proffer is not the responsibility of our Commission, we hope the exercise is helpful for others charged with different aspects of this case.¹²

Before proceeding, we mention for completeness that the application in ZC 19-10 is almost entirely identical to that in ZC 16-23. ANC3D has twice opined in support of the proposal in ZC 16-23.¹³ The arguments underlying our expressions of support remain applicable to the present case. We do not repeat them here for the sake of brevity.

Section ~~11-X304.4(b)~~ ~~11-2403.3~~ pertains to the proposed project's impact on city services and facilities.¹⁴ Interpreting these terms broadly, we considered two main city service components: education and transportation.

We do not expect the project to have an appreciable impact upon the utilization of public school facilities. As many local schools are already exceeding their building capacities, this is not a concern we take lightly. Nonetheless, the experience of the Cityline at Tenley apartments directly across the street from this project's in-boundary elementary school informs our expectation. While the residential unit sizes are larger for the Ladybird project than for Cityline at Tenley – suggesting increased attractiveness for families with school-age children – Cityline at Tenley is located directly across the street from the elementary school, roughly 0.9 miles closer than the project under consideration in ZC 19-10, and yet few students have historically resided in the Cityline at Tenley apartment complex.¹⁵ Moreover, from a public policy perspective, we reject the notion that public school seats should be implicitly reserved for existing

¹⁰ <https://www.anc3d.org/bylaws>.

¹¹ PUD Evaluation Standards, <http://dcrules.elaws.us/dcmr/11-x304> and <http://dcrules.elaws.us/dcmr/11-x305>
<http://dcrules.elaws.us/dcmr/11-2403>.

¹² The Office of Planning offers educational resources for PUD participants. See, for example, <https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/PUD%20summary%20ZR16%20handout.pdf>.

¹³ Zoning Case 16-23, Exhibits 109 and 245.

¹⁴ PUD Evaluation Standards, <http://dcrules.elaws.us/dcmr/11-x304><http://dcrules.elaws.us/dcmr/11-2403>.

¹⁵ Discussion with past PTA executive officers of Janney Elementary School based on review of student directories.

residents. The public schools in our community are of uniformly high-quality; expanding the opportunity of such education to more members of the community is a benefit not a drawback. In balancing this benefit to the broader community against the potential cost to the narrower community of increased school over-crowding, which we take seriously, we believe the impact of the project in ZC 19-10 to be at least acceptable and likely favorable in terms of impact on public school facilities.

We believe the proposal's impact on transportation to be acceptable as well, at least on a technical level. An updated Comprehensive Transportation Review was completed within the last six months.¹⁶ The findings from the updated analysis mirror those of the earlier analysis and our headline conclusion remains unchanged: traffic will be about the same as if the existing buildings were simply reoccupied. The proposed project includes a grocery store that is smaller in aggregate square footage than the existing businesses it replaces. The resulting reduction in commercially-related traffic intensity is expected to compensate for the increase in residentially-related traffic. Through inclusion in the attached Appendix, we also reiterate our previous points about the adequacy and usage of MetroBus transportation along Massachusetts Avenue, NW directly abutting the project site.

Section ~~11-X304.4(a)~~~~11-2403.4~~ pertains to the project's compatibility with the Comprehensive Plan.¹⁷ We again state that we find no obvious reasons to believe the project is inconsistent with the Comprehensive Plan. In terms of judging the proposal's relation to the surrounding community, we attach in the Appendix some of our prior research on the existing MU-4 commercial area where the project site is located.

Section ~~11-X305.2 and 11-X305.3~~~~11-2403.6~~ states that public benefits (including amenities per ~~11-X305.10~~~~11-2403.7~~) are superior features to a significantly greater extent "than would likely result from development of the site under the matter-of-right provisions."¹⁸ We list several such features here.

First, the proposed project includes a full-service grocery store that would not be possible in any by-right construction. This benefit is highly valued, all the more so now that the grocery store located closest to most of the Commission's area – the Palisades Safeway at 4865 Macarthur Blvd. – has since closed.¹⁹ (A

¹⁶ Gorove/Slade, Comprehensive Transportation Review, Table 8, page 34, available at <https://spaces.hightail.com/receive/rbdJb6bhRu>.

¹⁷ PUD Evaluation Standards, <http://dcrules.elaws.us/dcmr/11-x304><http://dcrules.elaws.us/dcmr/11-2403>.

¹⁸ *Ibid.*

¹⁹ Some neighbors opposing this application have argued that the proffered grocery store is not a public benefit according to the zoning regulations. The argument underlying this claim is an appeal to Subtitle X, Section 305.5(j). We offer four responses to this claim.

First, we are unaware of any guidance that governs how the ANC must review an application. While we have adopted the lens of the PUD Evaluation Standards to organize our commentary here, this is a choice and we are under no obligation to screen proposals as if we were the Zoning Commission.

We are free to judge the inclusion of a grocery store as an amenity, which we do and hereby relay. Many neighbors in our community have repeatedly expressed their belief that returning a grocery store to the now-vacant site is highly desired. We concur.

Second, Section 305.5(j) does not appear to prohibit a grocery store from being evaluated as a public benefit. Section 305.5 pertains to the public benefits of a PUD. Part j states, "Building space for special uses including, but not limited to, [...] 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 [...]." It is not clear to us that this language implies that a grocery store located within three miles of another store cannot be considered a public benefit by the Zoning

graphic depicting grocery store distances and walk times for our community is included in the Appendix.) While an 80,000 square foot Wegmans grocery store will open at 3900 Wisconsin Avenue, NW by 2022, the MOM's organic market proposed in ZC 19-10 is right-sized for the neighborhoods adjacent to the project site and appeals to residents preferring a smaller, local market to a regional destination grocery store, as well as those fulfilling their shopping needs on foot or by bicycle. Accordingly, we view the proposed MOM's organic market and the Wegmans located 1.3 miles and 28 minutes walking away as catering to both different service areas and segments of the overall grocery marketplace. Outside the grocery store will be landscaped public gathering space, including outdoor seating and dining tables.

Second, the proposal includes 29 units of affordable housing, with 20 of these being two-bedroom or larger units. This total is about 10% more than required under inclusionary zoning regulations. The 29 units of affordable housing provided with this project are more than half of the total number of inclusionary zoning units constructed in all of Ward 3.²⁰ The inclusionary zoning units included in the proposed project will advance the District's ongoing push to create affordable housing across the city in a manner that balances the need for increased housing with the height and scale of the surrounding community.²¹

Third, the proposed project includes support for and funding of a HAWK signal across Massachusetts Avenue, NW. This benefit has been requested by groups within our community, including attendees of the Osher Lifelong Learning Institute occupying part of the American University building on Lot 806.

Fourth, the provision of sidewalks within the alleys internal to the project site will enhance pedestrian safety by separating pedestrian circulation from vehicle movement. At present, there are business operating storefronts opening into these alleys, so this is not a case of redress (sidewalks in this instance) being unnecessary without the proposed building.

Commission. Such a reading, if embraced, effectively prevents *any* grocery store from being considered a public benefit in *any* PUD for *any* part of the District. The District of Columbia is 68.34 square miles and a three-mile radius corresponds to an area of over 28 square miles. Thus, the catchment basins of three grocery stores would be more than enough to cover the entire District, thereby preventing any further proffered grocery store from being considered a public benefit under the claimed reading. This interpretation strikes us as being beyond redemption.

Third, there are multiple PUD cases in which the Zoning Commission has previously considered a grocery store as a public benefit. For brevity, we mention ZC 08-15, ZC 12-18, and ZC 13-14. In the sixth order for ZC 13-14, dated 14 September 2017, the Zoning Commission cites retail space including a grocery store in the Findings of Fact under Community Benefits (section 91(f) on page 32). The grocery store is further cited as a Public Benefit in the Decision section of the order (section 12 on page 93). There are several dozen grocery stores located within three miles of the project site.

Fourth, the full-service grocery store in zoning case 19-10 is not proffered in the application under Section 305.5(j); it is proffered under 305.5(q), which applies to "uses of special value to the neighborhood or the District of Columbia as a whole."

²⁰ Department of Housing and Community Development, Inclusionary Zoning Database, <https://octo.quickbase.com/db/bi9iqv4v7>, accessed 5 August 2019.

²¹ See, for example, Mayor's Order 2019-036 calling for a "Housing Initiative" on 10 May 2019, available at [https://ggwash.org/files/2019-036_Housing_Initiative_\(5.10\).pdf](https://ggwash.org/files/2019-036_Housing_Initiative_(5.10).pdf).

Fifth, the building seeks LEED Gold certification in furtherance of the District's Sustainability, Clean Energy, and Green Building initiatives.²²

In terms of amenities accruing mainly to occupants and immediate neighbors, we list three such items.

First, the proposed building height of 43.5 feet along 48th Street, NW is 13% shorter than that permitted by matter-of-right construction.²³ Similarly, the penthouse is 38% smaller in terms of Floor Area Ratio (FAR) than that permitted by-right for Record Lot 9 alone.²⁴

Second, the project includes three recessed courtyards facing 48th Street, NW, another facing Yuma Street, NW and publicly-accessible green space along the internal alley system. While "Windom Park" at the intersection of Windom Place, NW and 48th Street, NW is publicly-accessible, we view these courts as an amenity for the occupants and immediate neighbors in terms of usable space and reduced massing, respectively, instead of a benefit accruing to the public more generally.

Third, the applicants propose to clean up the existing hodge-podge of dumpsters along the alley behind the Massachusetts Avenue Parking Shops on lots 802 and 803. The existing conditions are unsightly to neighbors.

Section ~~11-X304.311-2403.8~~ 11-2403.8 instructs the Zoning Commission to "judge, balance, and reconcile the relative value of the project amenities and public benefits offered, the degree of development incentives requested, and any potential adverse effects."²⁵ We have listed above some of benefits and amenities being offered in this case. In exchange for these items, the applicant is not requesting any of the available PUD development incentives. The FAR of the proposed project is 2.68, well within both the matter-of-right allowable FAR of 3.0 (IZ) and, especially, the 3.6 FAR permissible as a PUD for this site. The applicants request partial relief from the rear-yard setback requirements and townhouse penthouse regulations only. While utilization of density aggregation is not a PUD incentive to be judged against the community benefits and amenities package, considering it as such does not change our judgment of the relative value of the benefits offered and the development incentives requested.²⁶

In our evaluation of this proposal, we believe the PUD application in ZC 19-10 should be approved according to the standards of DCMR Section ~~11-X304 and 11-X30511-2403~~.

²² See, for example, the Sustainable DC 2.0 plan, the Clean Energy plan, and the Green Building Act of 2006, available at http://www.sustainabledc.org/wp-content/uploads/2019/04/sdc-2.0-Edits-V5_web.pdf, https://doee.dc.gov/sites/default/files/dc/sites/d DOE/page_content/attachments/Clean%20Energy%20DC%20-%20Summary%20Report_0.pdf, and https://doee.dc.gov/sites/default/files/dc/sites/d DOE/publication/attachments/Green_Building_Act_of_2006_B16-515.pdf, respectively.

²³ Zoning Handbook, Mixed-Use (MU) Zones – MU-4, <http://handbook.dcoz.dc.gov/zones/mixed-use/mu-4/>.

²⁴ *Ibid.*

²⁵ PUD Evaluation Standards, <http://dcrules.elaws.us/dcmr/11-x304><http://dcrules.elaws.us/dcmr/11-2403>.

²⁶ See Subtitle X, Section 303.2. Moreover, as the Order for ZC 15-27 makes clear in Finding of Fact No. 20 (page 4), combining multiple parcels within a PUD boundary is not a development incentive requested or obtained; it is simply how the project boundary is defined within a PUD application.

ZR58 Code Provision	Text ²⁷	ZR16 Code Provision	Text ²⁸
11-2403.3	“The impact of the project on the surrounding area and the operation of city services and facilities shall not be found to be unacceptable, but shall instead be found to be either favorable, capable of being mitigated, or acceptable given the quality of public benefits in the project.”	11-X304.4(b)	“The Zoning Commission shall find that the proposed development: (b) Does not result in unacceptable project impacts on the surrounding area or on the operation of city services and facilities but instead shall be found to be either favorable, capable of being mitigated, or acceptable given the quality of public benefits in the project; and”
11-2403.4	“The Commission shall find that the proposed PUD is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site.”	11-X304.4(a)	“The Zoning Commission shall find that the proposed development: (a) Is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site;”
11-2403.5	“In the context of the Comprehensive Plan, the Commission shall also evaluate the specific public benefits and project amenities of the proposed development, which features may in some instances overlap.”	11-X304.4(c)	“The Zoning Commission shall find that the proposed development: (c) Includes specific public benefits and project amenities of the proposed development that are not inconsistent with the Comprehensive Plan or with other adopted public policies and active programs related to the subject site.”
11-2403.6	“Public benefits are superior features of a proposed PUD that benefit the surrounding neighborhood or the public in general to a significantly greater extent than would likely result from development of the site under the matter-of-right provisions of this title. All public benefits shall meet the following criteria: (a) Benefits shall be tangible and quantifiable items; and (b) Benefits shall be measurable and able to be completed or arranged prior to issuance of a Certificate of Occupancy. Monetary contributions shall only be permitted if made to a District government program or if the applicant agrees that no certificate of occupancy for the PUD may be issued unless the	11-X305.2 11-X305.3	“Public benefits are superior features of a proposed PUD that benefit the surrounding neighborhood or the public in general to a significantly greater extent than would likely result from development of the site under the matter-of-right provisions of this title.” “All public benefits shall meet the following criteria: (a) Benefits shall be tangible and quantifiable items; (b) Benefits shall be measurable and able to be completed or arranged prior to issuance of a certificate of occupancy; (c) Benefits may primarily benefit a particular neighborhood or area of the city or service a critical city-wide need; and

²⁷ Available at <http://dcrules.elaws.us/dcmr/11-2403>.

²⁸ Available at <http://dcrules.elaws.us/dcmr/11-x304> and <http://dcrules.elaws.us/dcmr/11-x305>.

	applicant provides proof to the Zoning Administrator that the items or services funded have been or are being provided.”		(d) Monetary contributions shall only be permitted if made to a District of Columbia government program or if the applicant agrees that no certificate of occupancy for the PUD may be issued unless the applicant provides proof to the Zoning Administrator that the items or services funded have been or are being provided.”
11-2403.7	“A project amenity is one type of public benefit, specifically a functional or aesthetic feature of the proposed development that adds to the attractiveness, convenience, or comfort of the project for occupants and immediate neighbors.”	11-X305.10	“A project amenity is one (1) type of public benefit, specifically a functional or aesthetic feature of the proposed development that adds to the attractiveness, convenience, or comfort of the project for occupants and immediate neighbors.”
11-2403.8	“In deciding a PUD application, the Commission shall judge, balance, and reconcile the relative value of the project amenities and public benefits offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case.”	11-X304.3	“In deciding a PUD application, the Zoning Commission shall 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.”

Certificate of Service

I hereby certify that on 17 October 2019, copies of the foregoing letter were served on the following via email.

Advisory Neighborhood Commission 3E
c/o Jonathan McHugh (3e05@anc.dc.gov)
Citizens for Responsible Development
c/o Barbara and Sheldon Repp (repper3@aol.com)
c/o Edward Donohue (edonohue@donahuestearns.com)
Spring Valley Opponents
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c/o William Clarkson (wclarksonv@gmail.com)
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