DONOHUE & STEARNS, PLC

October 24, 2019

VIA IZIS

Chairman Anthony Hood
D.C. Zoning Commission
441 4th Street, N.W., Suite 200S
Washington, D.C. 20001

Re: ZC Case 19-10/ Valor Development, LLC/ Square 1499

Chairman Hood:

On behalf of my client, Citizens for Responsible Development ("CRD"), I am submitting the attached document into the record for Zoning Commission Case No. 19-10. It includes, as directed by the Commission at the October 10, 2019 hearing:

I. One-Page Response on Affordable Housing
II. Contested Issues of Fact
III. Evaluation of the Requested Special Exception Relief
IV. Evaluation of the Proposed PUD under the Standards of Subtitle X, Chapter 3
    (a) Requested Flexibility v. Proffered Public Benefits and Amenities
    (b) Identification of Adverse Impacts and their Mitigation
    (c) Proposed PUD Is Inconsistent with the Comprehensive Plan

In addition, CRD submits its Response to the Applicant's Proffers.

We appreciate the Commission's consideration of these materials.

Thank you,

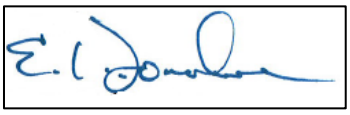
Edward L. Donohue
Attorney for CRD

Enclosures

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **October 24, 2019**, a copy of the foregoing Post-hearing submission documents and Response to Applicant's Proffers in ZC Case No. 19-10 was served via email, on Advisory Neighborhood Commissions 3E and 3D (3E@anc.dc.gov; 3D@anc.dc.gov), Jeff Kraskin (Jlkraskin@rcn.com) for Spring Valley Opponents, William Clarkson (wclarksonv@gmail.com) for Spring Valley Neighborhood Association, John H. Wheeler (johnwheeler.dc@gmail.com) for Ward 3 Vision and counsel for the Applicant, Norman M. Glasgow, Jr. (norman.glasgowjr@hklaw.com).

By:



Edward L. Donohue

Dated: October 24, 2019

I. Response on Affordable Housing

Citizens for Responsible Development (CRD) welcomes the opportunity to comment on the important issue of affordable housing, as requested by the Zoning Commission at the October 10 hearing in Z.C. 19-10.

CRD supports affordable housing on the SuperFresh site, including more than the 30 units proposed. The Commission should insist that Valor provide significantly more affordable units over and above what is minimally required. Our support for more affordable housing on the SuperFresh site dates to the predecessor voluntary design review case. Valor Development's record is more checkered. We remind the Commission that in 2018 Valor elected to circumvent compliance with a higher affordable housing requirement by sinking the building six feet into the ground. CRD has pointed out that the PUD application may still fall short of the minimum required under the regulation. Regardless, Valor is now proposing only two percent more affordable housing above its interpretation of what is minimally required. Affordable housing is a critical public benefit, and the Valor proposal does not meet the requirements for meaningful public benefits under the PUD regulations (Title 11-X 301(b)).

We find Valor's numbers somewhat perplexing. The May 6, 2019 initial PUD application (Exhibit 2C1) and the revised submission dated September 17, 2019 (Exhibit 28A1) each indicated that 29 units totaling 11% of gross square feet of residential use would be devoted to affordable units. The October 17, 2019 Proffer (Exhibit 230) increases the IZ to 12 percent but adds just one additional affordable unit, so the total is now 30. All three submissions indicate that only four of the IZ units will be the larger 3-bedroom units. We think the Valor Proffer does not go far enough. In any case, the 12 percent set aside is well below the 15 percent affordable housing recommended by the Department of Housing and Community Development. Further, DHCD recommended that half of the affordable units be reserved for tenants at 50% MFI. Valor's Proffer dated October 17 continues to indicate that only four of the 30 affordable units are at 50% MFI. We also question whether the Valor Project is consistent with the spirit of Mayor Bowser's May 10, 2019 announcement setting a goal of 36,000 new residential units in the City, with one-third being affordable.

The Office of Planning (and others) have pointed to the low amount of income-restricted affordable housing in the Rock Creek West area; however, the testimony didn't take into consideration the larger scale projects in the works in Ward 3 (the Fannie Mae Site and 4000 Wisconsin) that will add well over 100 affordable units to the area. Further, a 2011 Urban Institute report reveals that Ward 3 provides nearly 13,000 rent-controlled apartments to District residents, or 16.2 percent of all rent controlled units in the entire city. Among the Wards, Ward 3 has the second highest number of rent-controlled apartments. (Exhibits 205 and 206.) In fact, there are approximately 28 rent-controlled apartments just three blocks from the SuperFresh site in the 4000 block of 47th Street.

To reiterate, CRD supports more affordable housing on the SuperFresh site while maintaining the neighborhood as a desirable place to live, including for the many retired workers who have lived here for decades. Can this be accomplished by squeezing 219 (or 240) units into a 4 to 6-story (actually 7-story) building on a 1.9-acre site facing two residential streets. We

think not. The Commission has asked the Parties for options. One option for the Commission could be to insist that Valor provide significantly more affordable units over and above what is minimally required. As CRD and a number of individuals during testimony on October 10 said, a major concern is the height of the structure and the related traffic. A building that is one or two floors lower with more affordable housing addresses these concerns. We recognize, however, that even though Valor has never disclosed financials for what they say is a $185 million project, there could be an economic issue. One possible compromise of competing considerations would be to eliminate the grocery store as part of a project that would be one or two stories lower. The grocery space, which takes up two levels of the building (because of its much higher ceiling), could be repurposed to housing, including affordable housing. The roughly 36,000 SF of available space on the two levels is 3,000 SF more than the total affordable housing proposed in the Proffer. This redesign would eliminate (or at least reduce) the payment required by the owner of the MAPS and would reduce the need for parking, which should reduce construction costs. We want to emphasize that this is just one avenue for reaching the goal of more equitable housing distribution in the District of Columbia. As we have stated previously many times, CRD remains willing to work with all interested parties on a resolution.

II. Contested Issues of Fact

A. CRD's Response to Applicant's Height Measurement Contentions

• Subtitle B §307.7 prohibits placement of a BHMP on a curb grade that has been changed from the natural elevation by an embankment or other such feature. The rule cannot be arbitrarily limited to just those situations where an existing curb grade has been "manipulated" in the years following initial construction of the road. This is because the ultimate remedy provided by §307.7 is to require the BHMP to be placed where there is no "discontinuation of the natural elevation." See §307.7 (d).

• Hence, the leveling of the roadbed of 48th Street above the "natural elevation" by a substantial embankment on the downhill side when 48th Street was first constructed, is a situation plainly covered by §307.7.

• Moreover, §307.7 is couched in terms of general applicability to all situations involving artificial embankments, excavations, etc. The Commission is therefore not at liberty to restrict the application of its own rule to a particular historical situation.

• Applicant's effort to show that the "natural elevation" at the 48th Street curbside has not been changed since before the construction of 48th Street is a flagrant example of argument by "false precision." CRD has shown that there is a wide margin of error in any attempt to derive above-sea-level elevation figures by extrapolation from century-old topographic maps (and even by modern GPS measuring devices), so Applicant's claim that its precise figure of 265' above sea level is unchanged from before the construction of 48th Street is absurd and deliberately misleading on its face.

• Finally, CRD has repeatedly invited Applicant to support its contention of "no embankment" by providing a soil sample report to prove that the 48th Street curb grade rests on

in situ soil, and to explain how the road could have been made level without an embankment, given the steep slope over which it was laid. Applicant has still not done so and has therefore failed to carry its burden of proof on this issue.

B. The Project Harms the Neighborhood by Removing an Important Benefit Conveyed by the Terms of the Existing Declaration of Easement and Agreement

The Parties are in agreement that a Declaration of Easement and Agreement dated as of December 20, 1978 (the "Easement")[1] and recorded in the District's land records governs certain matters concerning Lots 806 and 807 and remains in effect.[2] Among other things, the Easement (i) provides Lot 806 with a non-exclusive easement for parking rights on Lot 807; (ii) requires the owners of Lot 807 to maintain the driveways and parking areas; (iii) allocates the density between Lots 806 and 807, granting the greater share to Lot 806; and (iv) requires that all remodeling, additions or replacement construction shall not be in violation of the requirements of the Zoning Regulations for the entire Record Lot 9. As matters of fact and law, the proposed density transfer from the MAPS lot to the Lot 807 (the SuperFresh Lot) is inconsistent with, and in fact violates, the framework set forth in the Easement.

By way of background, for zoning purposes Lots 806 and 807 are derived from Record Lot 9, which previously was owned in its entirety by the Burka family entities. Pursuant to its terms, the purpose of the Easement was to facilitate the financing of what is now the AU Building – a building that exceeded the allowable density for Lot 806 and could not have been built without taking some of the density from Lot 807. The Easement 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).

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 nearby property owners by reducing density on the portions of the SuperFresh site facing the neighborhood. This is consistent with sensible land use principles, as encouraged by the Comprehensive Plan. See, for example, 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 District of Columbia Court of Appeals, in an opinion dated March 20, 1979 and discussing the plans for Record Lot 9, 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).

[1] At the October 10 hearing, Mr. Glasgow stated that he would submit the Easement for the record. To be certain, CRD includes it as Attachment B to our submission.

[2] Applicant's Statement in Support dated May 6, 2019 states: "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. The Easement further grants the owners of Lot 806 a non-exclusive easement for vehicular parking on Lot 807." Exhibit 2, p.8.

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 Record Lot 9, including the SuperFresh parcel of Lot 9, 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 potential successors such as Valor Development may not authorize the transfer of density from the MAPS to Record Lot 9 to construct a building that, together with the AU Building, would exceed what is permitted on Record Lot 9 and at the same time comply with the terms of the Easement. This limitation terminates on December 20, 2077 or such time as "gross floor areas are no longer required under the Zoning Regulations of the District of Columbia."[3] Clearly, neither termination event has occurred. The Applicant is therefore prohibited from attempting to utilize additional GFA through the transfer from the MAPS since doing so would 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 MAPS 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 nearby property owners.

C. Inclusion of the MAPS in the Project Raises Important Historic Preservation Issues

Included within the PUD boundary is the Massachusetts Avenue Parking Shops (MAPS), which is designated as an historic landmark. No construction will take place on the MAPS site; the MAPS is included in the PUD solely for the purpose of transferring its purported unused density. The Applicant proposes to transfer 50,115 SF of GFA from the MAPS to the SuperFresh site to construct a building that is larger than could be built as a matter-of-right on the SuperFresh site, and without providing direct preservation benefits. See Exhibit 229, slide 2.

1. Lack of Tangible and Measurable Benefits for MAPS

The Project does not provide any tangible public benefits to the historic landmark included in the PUD Project Lot, as required under Title 11-X §305.3 ("Planned Unit Development Public Benefits"), thus failing to meet the PUD criteria for historic preservation benefits for a landmark. 11-X § 305.3 states that all public benefits of a PUD must be **tangible and quantifiable** (§ 305.3(a)), and **measurable** (§ 305.3(b)). Tangible benefits for a landmark include preservation, restoration, or rehabilitation, or the set aside of funds earmarked specifically for restoration and rehabilitation, as in the Heurich PUD cited by the Applicant (ZC Order No. 101). These are the tangible norms when a landmark is involved, but none are provided by Valor. CRD's expert witness, Stephen Hansen of Preservation Matters, LLC, stated in testimony on October 10 that the Project provides no direct historic preservation benefits to the landmark. See also Exhibit 215.

[3] Easement, paragraph 7.

2. Precedent Cited for Density Transfer from a Landmarked Building for Preservation Purposes Does Not Apply to This Project

The Applicant has consistently cited ZC Order No. 101 (the Heurich PUD) as a precedent for the transfer of density for historic preservation purposes, yet the Valor Project differs greatly from Order No. 101. As outlined below, the cases are different, and therefore Heurich has little precedential value.

- In the Heurich PUD, the only allowable unused density transferred was from the two existing buildings on the site: the Heurich Mansion and its Carriage House, totaling 90,000 square feet. The transfer did not include any unused land area.

  The maximum matter-of-right density of the MAPS buildings (assuming MU-4 Zoning and IZ credit) is 50,766 SF of GFA, not enough to cover the existing 16,922 SF MAPS building and the 50,115 SF proposed to be transferred. Valor therefore is proposing to include density rights from the parking lot, which <u>is part</u> of the landmarked site and is not developable.

- Order No. 101 established enforceable conditions relating to the preservation of the Heurich Mansion that include *inter alia*: all funds from the sale of density were to be placed in an income producing trust for the maintenance and upkeep of the Mansion, grounds, and buildings; no alterations to the Mansion or Carriage House without preservation body review; and site inspections to determine compliance.

  The Applicant has not provided an enforceable agreement covering the use of density sale proceeds to preserve the MAPS. The support letter from the owner of the MAPS, Regency Centers, (Exhibit 227) is vague, stating only that: "The Valor proposal will greatly assist us in maintaining the historic integrity and long-term viability of the Massachusetts Avenue Parking Shops." This letter is not a tangible, binding, verifiable, and enforceable commitment that proceeds received from the transfer will be dedicated for the preservation of the landmark.

  Any agreement between Regency and Valor, or at least the relevant parts thereof concerning covenants and the benefits to the MAPS, must be disclosed. This is critical to the Commission's analysis of the Application, evaluation of the proffered public benefit of MAPS's preservation, and acceptance of its terms. How can the undisclosed terms of any agreement between Valor and Regency otherwise be monitored and enforced in the future? The Applicant must be able demonstrate a tangible public preservation benefit.

- The Heurich Mansion was in such a state of neglect that the Columbia Historical Society, not having the financial means to maintain the mansion, was considering its sale that would have ultimately resulted in it being razed. The Zoning Advisory Council determined that saving the Mansion from demolition and providing for its continued maintenance through a sale of its density would therefore be a public benefit.

MAPS on the other hand is well maintained, and to date Regency has had sufficient funds for the building's upkeep. The HPO Report (Exhibit 187) admits there is no current threat to the landmark, thus making any transfer of density from it for protection and preservation purposes unnecessary.

3. The Legality of the Proposed Density Transfer Should Not Be Made by the Commission Alone

- The MAPS is included in the Valor PUD for the sole purpose of selling and transferring its purported unused density rights. Removing a landmark's density or altering its density allocation is beyond the sole purview of the Zoning Commission. Whether the MAPS has unused density and, more importantly, the removal of density, must be approved by the HPRB.

- The Applicant's use of density determinations under MU-4 zoning to calculate the available development potential of the MAPS landmark disregards its planned layout, design, and historic allocation of its density, recognized and protected by the Historic Preservation Review Board, the Mayor's Agent, and the National Park Service. Unlike the HPRB's determination of available density of the historic landmarked shopping center across Massachusetts Avenue at 4820 Massachusetts Ave., N.W (H.P.A. 15-252), the open space of MAPS's parking lot is as much a part of the allocation and historic use of density on the site as is the building itself and should therefore be considered already used. Simply put, there is no density to transfer from the MAPS parking lot.

- The amount of what is considered available density on the MAPS site– a site, due to its landmark designation, that already has very limited potential itself-- is highly questionable. The Applicant disregards its planned layout, design, and historic allocation of its density.

- Should a calculation of available density need to be made, such a determination cannot be made by the Zoning Commission alone.

4. The HPO Report Does Not Address the Requirements for Including a Landmarked Building in a PUD

- The HPO Report states that effects on the MAPS can be evaluated using the compatibility test applied by the DC Historic Preservation Review Board. The criteria applied is whether or not a project: (a) retains and enhances historic landmarks in the District of Columbia and to encourage their adaptation for current use; and (b) encourages the restoration of historic landmarks.

- Retaining a landmark would involve its restoration and preservation. Enhancing a landmark or encouraging its adaptation for current use would involve rehabilitation and/or adaptation. This Project provides neither. The HPO Report only describes

potential indirect and speculative effects of the Project due to its proximity to the new construction on another lot.

- The HPO report fails to address requirements of PUD benefits under Title 11-X § 305.3 and, at best, discusses only indirect benefits on the MAPS.

- The HPO Report does not discuss the validity of the transfer of unused density from MAPS or the lack of a preservation covenant.

III. Contested Matters of Law

A. *Wisconsin-Newark Neighborhood Coalition v. D.C. Zoning Commission* (Cathedral Commons)

The Applicant has relied on the above case to support the Project, but the mass and density of the proposed mixed-use development in that case and the context of the surrounding neighborhood from the development and surrounding neighborhood differ significantly from those here.

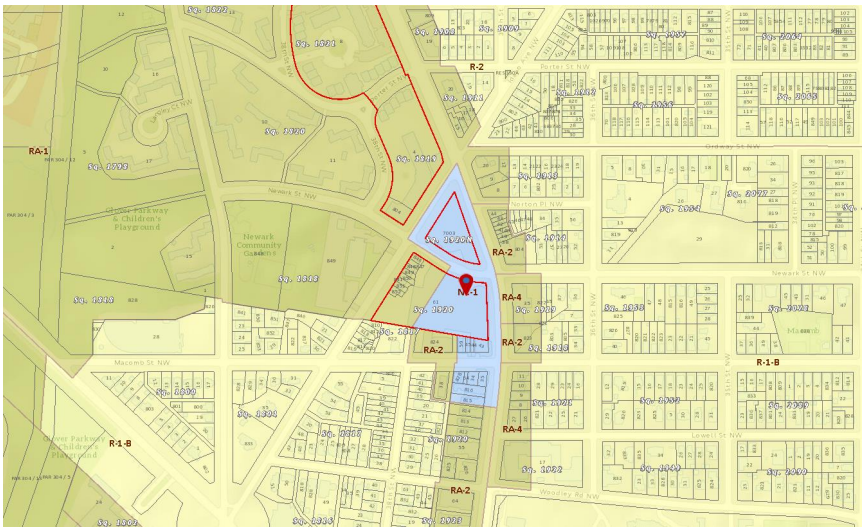
In Zoning Commission Case No. 08-15, the Commission stated in its order, "The proposed height and density will not cause an adverse effect on nearby properties, **are consistent with the height and density of surrounding properties**, and **are appropriate given the location along a major commercial corridor**." (ZC Order No. 08-15, emphasis added). In the present case, the exact opposite is true. Here, the significant adverse effect on nearby properties is a direct result of the *inconsistency* of the Project with the height and density of the surrounding properties and its failure to front on a major commercial corridor. The following chart distinguishes the two proposals.

	Cathedral Commons Mixed-Use Development	The Ladybird
Maximum height	61'	81'
FAR	1.99	2.95
Street widths for frontages	Wisconsin Avenue – 120' Idaho Avenue – 120' Macomb Street – 90'	48th Street – 90' Yuma Street – 90'
Neighboring structures/ uses	Multi-family residential (apartments) 5-story office building 9-story residential building with ground floor retail Police Department	Single family homes American University Law School Building (fronts on Massachusetts Avenue)
Closest residential zone	Across Wisconsin Avenue to the east: RA-4 (90' max height ; 3.5 max FAR; 75% max lot occupancy) To the north and south along Wisconsin Avenue" RA-2 (50' max height; 1.8 max FAR; 60% max lot occupancy)	ALL R-1-A and R-1-B: (40' max height; 40%max lot occupancy)
FLUM	Low Density Commercial & Medium Density Residential	Low Density commercial
Single Family Zoning – Existing or Planned	No	Yes

A look at the zoning map and an aerial image clearly illustrates how these two projects differ in both mass and compatibility with surrounding context. Compare the below zoning map sections. The first image (the Ladybird zoning context), shows the surrounding single-family residential context. The Valor Project, which is essentially built on the lot line along 48th Street and Yuma Street (Exhibit 28A1, slide G06), includes no buffers to soften the extreme stepped up massing. The second image shows the RA zones that separate the Cathedral Commons development from the single-family residential zones.

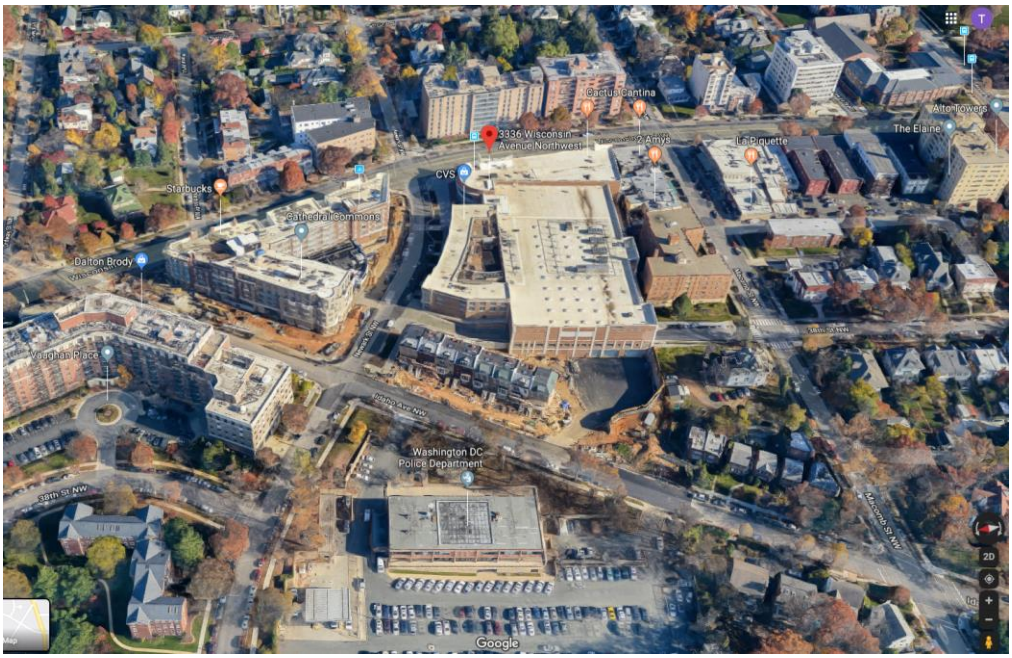
<u>The Ladybird Zoning Context</u>

<u>Cathedral Commons Zoning Context</u>

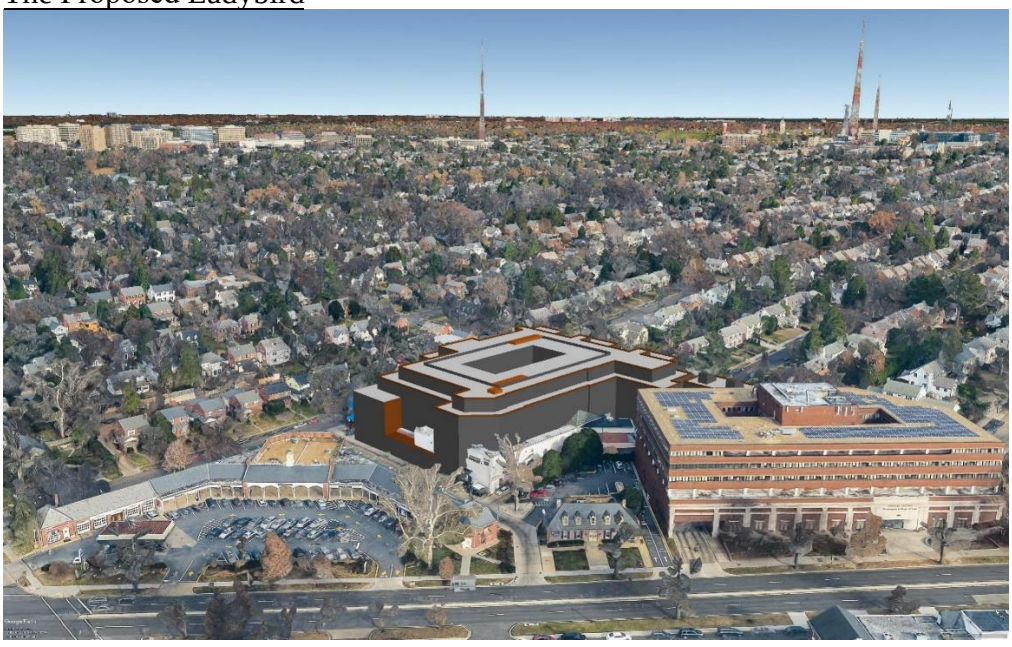


Aerial images of the two sites reveal the compatibility of the Cathedral Commons development with the neighboring properties specifically, multiple five to nine-story buildings and commercial properties. In contrast, the aerial images of the Valor Project depict only single-family homes and the American University Law School Building. Also, 77 percent of the entire Cathedral Commons PUD consists of buildings three stories or less, while only 20 percent of the Valor PUD consists of buildings that are three stories or less. In contrast, the aerial images of the Project depict only single-family homes and the American University Law School Building.

Cathedral Commons



The Proposed Ladybird



At the October 10th hearing, the Applicant accurately described the Commission's position as to the approval of the Cathedral Commons PUD. The Applicant's attempt, however, to draw a parallel between the circumstances of that case and the PUD proposed in Case No. 19-10 fails for lack of any similar context. The commercial properties that border the AU building and its location on a major corridor could support the Commission's support of a PUD at that location based on the findings in the Cathedral Commons case, but the AU building is already there.

B. *Durant v. District of Columbia Zoning Commission*

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 . . . ."[4] The Applicant references this description in its submission. [5] Thus, the proposed PUD Project is inconsistent with the FLUM and Comprehensive Plan because it is predominantly 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.[6] 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.[7] 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.[8] 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 48th and Yuma Streets mostly sit on the property line.

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[4] DC Zoning Handbook, Mixed-Use (MU) Zones – MU-4 (available at http://handbook.dcoz.dc.gov/zones/mixed-use/MU-4/) (emphasis added).
[5] See Statement in Support (Exhibit 2), p. 7.
[6] *Durant v. Dist. Of Columbia Zoning Comm'n*, 139 A.3d 880, 883 (D.C. Court of Appeals, 2016) ("*Durant III*").
[7] See Statement in Support (Exhibit 2), p.10.
[8] *Id*., at 884.

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 use" and that the density of each use must be separately evaluated.[9] 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.[10]

IV. Evaluation of the Requested Special Exception Relief

Valor has requested the following special exception relief: rear yard relief and townhome penthouse relief.

Before addressing these specific requests, we feel obligated to mention that the major relief requested by Valor in the PUD application is the request to transfer 50,115 SF of GFA from the MAPS to the SuperFresh site (Lot 807). As a result, the Project would exceed what is available as a matter-of-right on the SuperFresh lot by this amount. As CRD has stated in its Statement in Opposition,[11] and as CRD and a number of individuals stated in testimony on October 10, 2019, the fundamental flaw of the Project is that it is too big for the site and overwhelms the surrounding 2-story residential community and small-scale commercial neighborhood. CRD opposes this transfer of density. Without the transfer, the project would be more in keeping with the neighborhood. CRD opposes the density transfer.

Our opposition to the requested rear yard relief stems from the same concerns expressed above. Valor states that: "[F]or the first 20 feet of building height, which generally aligned with the Lower Level of Building 1, the required 15 foot rear yard will be provided, and in fact will be exceeded since the rear yard may be measured from the centerline of the north-south public alley. Above 20 feet, where the rear yard must be measured from the rear property line, the rear yard relief is only necessary at the northwest (Floors 1 – 3) and southwest (Floors 1 – 4) corners of Building 1, and the extent of relief in these areas is only approximately five feet since Building 1 will be setback from the rear property line by approximately 10 feet." The requested relief thus stems directly from the large size of the building, at least on the upper floors above the North/South alley. Since we have argued that the building as a whole is too large, we oppose requests which make the Project bigger. Pulling back the western side of the building along the alley back from the property line will remove the need for this special relief and make for a somewhat smaller building. It will also allow Valor to widen the alleys 3-foot pedestrian path, something CRD and ANC3D[12], and others, have recommended.

As for the townhome penthouse special exception relief, Valor stated during rebuttal that it is proposing to remove the 10-foot penthouse on the roof sand replace it with a hatch structure. While we will need to see the specifics, the revision does not appear to raise concerns.

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[9] *Id*., at 882.
[10] *Durant v. Dist. of Columbia Zoning Comm'n*, 99 A.3d 253, 259 n.4 (D.C. 2014) ("*Durant II*").
[11] Exhibit 118.
[12] Exhibit 26, p. 4.

Finally, we oppose the requested flexibility to increase the number of units by up to 10%. The Project is already too dense for the neighborhood. The requested relief is an attempt to maximize profits at the expense of the neighborhood. Significantly, ANC3D also opposes the requested design flexibility to increase the number of units from 219 to 240.[13]

V. Evaluation of the Proposed PUD under the Standards of Subtitle X, Chapter 3

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.[14]

The Applicant has failed to meet its burden of proof to show that each of these requirements is met.

A. The conclusion that the Project is not inconsistent with the Comprehensive Plan is disproved by the record.

The fundamental flaw of the Project is that, at 4 to 6 stories (actually seven stories, given that the proposed grocery store takes up two levels), it is simply too big for the neighborhood. The main building rises to 81.5 feet tall and has three levels of underground garage parking. According to Valor, the Project has a Gross Floor Area of 234,629 SF, 50,115 SF more than what is available on the SuperFresh Lot as a matter of right,[15] and this doesn't count the more than 57,000 SF of residential space in the cellar, in the penthouse, and in the projections. The Project is located within a residential neighborhood consisting of two-story homes. It faces two local streets (48th 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 Comprehensive Plan's Land Use Element, Urban Design Element, and Rock Creek West Element provide in multiple sections that infill development should complement the established character of the area and not create overpowering contrasts in scale, height, and density.[16] The Rock Creek West Element states that heights and densities for infill development should be appropriate to the scale and character of adjoining communities, and buffers should be adequate to protect existing residential areas.[17] The Project fails to meet these fundamental requirements. A lower Project, on the other hand, could be more in keeping with these requirements.

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[13] Id.

[14] 11-X DCMR §304.4.

[15] Valor's Rebuttal Submission, Exhibit 229, slide2.

[16] See, for example, Comprehensive Plan Policy LU-1.4.1; UD-2.2; RCW p. 23.2; and RCW-1.1.1.

[17] Comprehensive Plan, Policy RCW-1.1.4

A more complete analysis of the Comprehensive Plan issues is provided in CRD's Statement in Opposition (Exhibit 118). Valor and the Office of Planning have cited some sections that take a different view. CRD's point by point response to the sections of the Plan referenced by the Office of Planning is included in our Statement in Opposition. None outweigh the fundamental principles referenced in the preceding paragraph. CRD recognizes that there is considerable attention today to the need for affordable housing. Our response on affordable housing points out that the housing goals set forth in the Comprehensive Plan and other District initiatives can be met without constructing a building that is incompatible with the 2-story residential neighborhood directly across the street, the adjacent one-story MAPS, or the 2 to 3 story commercial area across Massachusetts Avenue.

B. The Project Is Inconsistent with the Comprehensive Plan's Future Land Use Map.

The Project is also inconsistent with the Future Land Use Map ("FLUM"), which expresses the public policy on future land uses. The FLUM designates the SuperFresh site as Low Density Commercial, which is defined as zones "comprised primarily of one to three-story commercial buildings." With the sole exception of the American University Building, this designation accurately describes the SuperFresh site, Lots 802 and 803 (the MAPS site), and the commercial area across Massachusetts. In fact, the very existence of the oversized AU Building argues for lower density on the adjoining lot facing the neighborhood.

The Applicant has stated that the "low density commercial" designation can include mixed-use projects. CRD does not disagree. CRD believes that the Commission should focus on a one to three-story limitation. The Applicant also states 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 represents good urban planning. In fact, that is exactly what was contemplated by the owner back in 1979 when the AU building was built. Instead, the Applicant is proposing a building which we have shown 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. In other words, three-quarters of the site will be considerably higher than one to three stories. This is not what is contemplated by the FLUM.

C. The Applicant has failed to offer meaningful and tangible public benefits and amenities.

The PUD regulations require each applicant to offer a "commendable number or quality of meaningful public benefits." See 11-X DCMR §300.1(b). Such public benefits must be "tangible and quantifiable" and balanced against the development incentives requested and potential adverse effects. The adverse effects are discussed in the next section. In reviewing the development incentives, the benefits should be reconciled with the development incentives requested. In this regard, the Commission should take into consideration that the Applicant is requesting 50,115 more GFA than would be available as a matter-of-right for Lot 807. Were it not for the PUD application, the Applicant could not propose a building of the Project's size.

CRD's assessment of each of the proposed benefits is included in our response to Applicant's proposed proffers and conditions. In summary, most of the alleged benefits are merely failed attempts at mitigation. The public benefits, which are minimal, do not support a building of the size proposed.

D. The conclusion that that the Project does not result in unacceptable impacts on the surrounding area is not supported by the record.

1. Oversized Building

Rising to 81.5 feet, the Project is out of context with the surrounding two-story residential and small-scale commercial neighborhood.

2. Traffic Congestion on Neighboring Streets

The Comprehensive Transportation Review (CTR) 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.

The CTR estimates that the Project will generate 13 truck deliveries per day. The CTR also estimates that there will be 15 to 16 truck deliveries in the N/S alley for the MAPS, in addition to the truck deliveries for the Project, based on a survey Gorove/Slade conducted earlier this year. CRD has argued that there will actually be a higher number of truck deliveries for the MAPS. Gorove/Slade's survey identified 16 to 18 N/S alley deliveries that were for tenants of the SuperFresh building, including Wagshal's kitchen. A portion of those deliveries will necessarily be rerouted to directly supply the two Wagshal's markets in the MAPS, thus raising the number of truck deliveries in the alley for the MAPS to more than the 15 to 16 estimated.

Based on the methodology published by the Institute of Transportation Engineers, the traffic consultant retained by Citizens for Responsible Development, MCV Associates, 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. Exhibit 124. A high percentage of the traffic will necessarily travel on Massachusetts Avenue as they enter and leave the site, causing additional congestion on the already congested Avenue. MCV Associates also found that the truck turning diagrams in the CTR show that a WB 50 truck operating in confined areas will encroach on the sidewalk/curb cuts and that extra maneuvers will be needed to back in/out of the loading bay and to enter the E/W alley. Exhibit 124.

The Massachusetts Avenue traffic problems have caught the attention of Maryland residents who regularly use Massachusetts Avenue. The Westmoreland Citizens Association, representing 990 households located just a few blocks away, filed a letter in opposition (Exhibit 158). The letter states that there are already bottlenecks on Massachusetts Avenue, and that the installation of a HAWK light will cause additional backups. SaveWestbard Inc, which represents the majority of residents in the Westbard area of Montgomery County, also wrote a letter in opposition (Exhibit 43) stating that traffic on the Massachusetts Avenue corridor is already congested and that the Project will make the situation worse and likely result in vehicles seeking

alternative routes by cutting through the neighborhood. Both organizations state that the traffic and parking problems caused by the Project will discourage their members from shopping in Spring Valley.

Erwin Andres stated on October 10, 2019 that the difference between current traffic and traffic upon completion of the Project will be "stark."

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. The entrance to the garage levels for residents and retail customers is on this alley. Trucks will also use this alley, as the Project's loading docks are on that alley. This will cause additional congestion on 48th 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 generally idle at that location, blocking one of the three lanes for extended periods. Also, because 48th Street doglegs at that point, the sight lines for vehicles exiting the alley are obstructed.

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, a 9-fold increase in the 48th Street alley, a 23-fold increase in the portion of the N/S alley near Yuma Street, and a 10-fold increase at the Massachusetts Avenue entrance to the N/S alley. The existing alley infrastructure is not adequate to handle this traffic load.

The N/S alley, which Valor proposes to narrow from around 40 feet in width to 20 feet, is already congested. Truck deliveries in the N/S alley can currently be made next to the drive lane. That will not be the case upon completion, as the alley will only be 20-feet wide. The trucks will necessarily block the alley while unloading, an untenable situation.

There likely also 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 loading docks of the Project. What will happen if the alley is blocked by trucks that have difficulty entering the loading dock, or worse, if they just park in the alley to unload?

4. The Project Will Not Generate Fewer Trips than Under Previous Uses

Gorove/Slade's conclusion that the Project will result in fewer trips than existing uses is not believable. Except for the grocery space, the rest of the building was fully occupied by Spring Valley Catering, Wagshal's kitchens, Jean Paul Hair Salon, and DeCarlo's restaurant in March of this year when Gorove/Slade did its traffic counts, so the trip numbers for these establishments are available. The number of trips is extremely low. According to Mr. Andres' testimony, Gorove/Slade's conclusion assumes that the SuperFresh grocery was 24,000 SF. The

SuperFresh lease, attached as Exhibit A to this submission, shows that the SuperFresh grocery consisted of roughly 16,000 square feet of grocery space, plus dry storage underneath the grocery and other space that did not generate many trips. It defies reason to believe that the 16,000 SF SuperFresh grocery and the other existing retail could generate significantly more trips than the 16-18,000 SF grocery being proposed by Valor plus 219 or more residential units.

5. The Project Presents a Danger to Pedestrians

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. The significant increase in cars and trucks using the alleys will 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 Project fails to meet DC's transportation goals and, in fact, does not support the objective of **Vision Zero.** Mr. Andres compared the pathway on the N/S alley to Cady's Alley in Georgetown. This is a false comparison. A one-hour mid-afternoon survey on Cady's Alley on October 21 counted 13 cars (and one motorcycle) traveling through the alley during the hour, far less than the 141 vehicles per hour the Gorove/Slade CTR of the Valor Project estimates will use the N/S alley during the peak PM period. Unlike the N/S alley, which is currently used for truck deliveries, there were no trucks in Cady's alley during the hour, and unlike the Ladybird, there aren't 219 residential units that generate pedestrians. In addition, in Cady's Alley there are 5-foot sidewalks for pedestrians on both sides of the drive lane, far more space than the 3-foot pathway on the N/S alley,

Bicyclists will also face unsafe conditions in the alleys as they try to access the bike storage area. 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.

6. 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 autos 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?

The Commission should ascertain the certainty of the availability of the 228 parking places, since that number depends on the reallocation of spaces that, pursuant to the Easement, must be shared with American University. The Parking Management Plan prepared by Gorove/Slade and included in ANC3E's MOU seems to provide an excessive amount of flexibility, stating: "The allocation of parking spaces to the various user groups (retail/residential/AU pass holders) within the below-grade garage will be reviewed regularly by the building owner and/or property management company to ensure that the parking demand of each user group is met, and impact to on-street parking is minimized." Exhibit 50. The agreement reallocating these spaces should be made public.

7. Deprivation of Sunlight and Privacy; Environmental Concerns

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. CRD's expert witness, Curt Westergard of Digital Design and Imaging Services, testified that the lack of sunlight caused by the excessive building height will be damaging to trees and other vegetation, preventing their growth, and any ability to mask the excessive size of the building.

The plans call for a terrace on the main apartment building along Yuma Street, situated on the top of the fifth floor (i.e. higher than the 2-story homes the terrace overlooks), creating privacy concerns for the residents of Yuma Street and Alton Street directly across the street. Mr. Westergard's video showed what those on the terrace would see.

The emissions coming from the cars, trucks, delivery vehicles, and ride services raise air pollution concerns. Large existing trees and bushes will be lost, with minimal green space added around the project site.

Attachment A – Memorandum of Lease

Key # 23 179
48th + Yuma St
Washington, D.C.

S:DC/6776
3324/720
11/10/94 deb

9500011048

MEMORANDUM OF LEASE

This Memorandum of Lease (this "Memorandum") is made this 11th day of November, 1994, by and between (a) Paul S. Burka and Robert A. Burka, Substitute Trustees under an unrecorded Trust Agreement dated as of January 2, 1976, pursuant to an Appointment of Substitute Trustees recorded among the Land Records of the District of Columbia on October 27, 1992 as instrument number 9200062134, successor in interest to Kogod and Burka Enterprises, Inc. ("Lessor"), and (b) The Great Atlantic & Pacific Tea Company, Inc. (the "Lessee").

WHEREAS, pursuant to a "Lease" dated July 26, 1963, as amended by a "First Amendment to Lease and Agreement" dated July 19, 1994 (said Lease as thus amended being hereinafter referred to as the "Lease"), Lessor let unto Lessee a building currently containing approximately fifteen thousand seven hundred fifty (15,750) square feet [plus a basement containing approximately six thousand three hundred thirty one (6,331) square feet, and two mezzanines containing a total of approximately two thousand thirty three (2,033) square feet], which building may be expanded to contain a total of seventeen thousand four hundred ninety (17,490) square feet (plus the basement and mezzanines) and which building has a principal address of 4330 48th Street, N.W., Washington, D.C. (said building, as the same may be expanded, being hereinafter referred to as "Premises"). The Premises are located in a shopping center consisting of the land described in Exhibit "A" hereto, together with the parking structure, parking lot and other structures thereon (the "Shopping Center").

WHEREAS, Lessor and Lessee decided to record this Memorandum, among the Land Records of the District of Columbia, to evidence the Lease.

NOW, therefore, this Memorandum serves as notice that the Lease has been entered into and provides, inter alia as follows (the following being only a summary, being subject to all of the terms and conditions set forth in the Lease, and not being intended to modify the Lease in any respect):

1. Term; Right of First Refusal. The Lease has an initial term of fifteen (15) years. Lessee also has eight (8) options to renew the Lease, each renewal term being for a period of five (5) years. As of the date hereof, the Lease is in its fourth renewal term. That fourth renewal term began on August 1, 1994 and shall expire on July 31, 1999. The eighth such renewal term, if exercised by Lessee, shall expire on July 31, 2019. The Lessee's right to extend the Lease for the seventh and eight renewal periods are subject to certain limitations as provided in Paragraph 45 of the Lease in the event that the Lessor has determined to demolish

the Shopping Center. In the event that the Shopping Center is redeveloped, the Lessee may have a right of first refusal to lease any space intended for use as a grocery store, supermarket or other sale of packaged goods, all as provided in Paragraph 45 of the Lease.

2. Certain Other Provisions. The Lease contains, inter alia, certain other provisions which are summarized as follows:

A. Under the provisions of Paragraph 30 of the Lease, the Lessor is required to maintain the balance of the ground in the Shopping Center which is not occupied by the stores or buildings as a parking area for the use of the Lessee and its customers in common with other tenants and their customers, except as stated in Paragraph 5 of the First Amendment to Lease and Agreement. In addition, in the event of further development of the Shopping Center, the Lessor is required to provide parking facilities which will maintain a specified minimum ratio to the area allotted to stores in the Shopping Center.

B. Under the provisions of Paragraph 31 of the Lease, should the Lessor sell or convey lands immediately adjoining the demised premises or any portion thereof, the deed of conveyance must contain a covenant that such ground shall not be used during the term of the Lease or any renewal thereof as the site of a supermarket, grocery store, meat market, produce market or dairy store.

C. Under the provisions of Paragraph 32 of the Lease, the Lessor obligates himself not to lease, rent or permit to be occupied as a supermarket, grocery store, meat market, produce market or dairy store any property owned or to be owned by Lessor within 2,000 feet of the demised premises during the term of the Lease or any extension thereof, except that such limitations shall not apply to the supermarket existing at 4801 Massachusetts Avenue, N.W., Washington, D.C. when the Lease was executed.

D. Under the provisions of Paragraph 46 of the Lease and Paragraph 5 of the First Amendment of Lease and Agreement, tenants of all spaces in the shopping center other than the demised premises, their employees, customers and invitees shall be restricted to the use of parking in the lower parking deck area and alley parking areas as existing on April 1, 1994; it being contemplated that the upper level parking areas existing on April 1, 1994 and containing approximately 105 parking spaces are to be reserved for the exclusive use of the Lessee and its customers. Lessor shall also establish and enforce reasonable parking rules, regulations and conditions, subject to approval of lessee to implement Paragraph 2 of the Declaration of Easement and Agreement dated as of December 20, 1978 and recorded among the Land Records of the District of Columbia as Instrument No. 16911.

E. Under the provisions of Paragraph 7 of the First Amendment to Lease and Agreement dated July 19, 1994, the Lessee will be permitted to utilize a designated area adjacent to the demised premises as a location for trash and refuse storage and collection.

3. Incorporation by Reference. All of the provisions of the Lease are incorporated into this Memorandum by this reference. In the event of any conflict between any provisions of this Memorandum of Lease and any provisions of the Lease, the provisions of the Lease shall be controlling.

IN TESTIMONY WHEREOF, the said The Great Atlantic & Pacific Tea Company, Inc. has, on this 1 day of December, 1994, caused these presents to be signed by Francis X. Leonard, its (vice) president, and attested to by Peter Brooker, its (assistant) secretary, and its corporate seal to be affixed and does hereby appoint Francis X. Leonard its true and lawful attorney in fact to acknowledge and deliver these presents as its act and deed; and the Lessor have also signed these presents.

[Corporate Seal]

Attest:

Peter Brooker
(Print name)
~~(Assistant)~~ Secretary

Witness:

Bernadette Smith

Lessee:

The Great Atlantic & Pacific Tea Company, Inc.

By: (SEAL)

Francis X. Leonard
(Print name)
(Vice) President

Lessor:

Paul S. Burka (SEAL)
Paul S. Burka, Substitute Trustee under an Unrecorded Trust Agreement dated January 2, 1976

Robert A. Burka (SEAL)
Robert A. Burka, Substitute Trustee under an Unrecorded Trust Agreement dated January 2, 1976

EXHIBIT "A" - (LEGAL DESCRIPTION)

Part of Lot numbered 9 in Square numbered 1499 in a subdivision made by Fred Burka and David L. Burka, Trustees, as per plat recorded in Liber 165 at folio 128 in the Office of the Surveyor for the District of Columbia, described as follows:

Beginning for the same at the point of intersection of the south line of Yuma Street with the west line of 48th Street, as shown on said plat, and running thence South with said west line of 48th Street, 376.23 feet; thence leaving said west line and running into said Lot 9, North 46 degrees 57 minutes 00 seconds West, 188.54 feet to a point in the easternmost corner of a 20-foot wide public alley as shown on said plat; thence with said alley and also with the boundary of said Lot 9, North 46 degrees 57 degrees 00 seconds West, 50.59 feet; thence West, 127.17 feet; thence North 45 degrees 00 minutes 00 seconds West, 7.07 feet; thence North, 207.99 feet to said south line of Yuma Street; and thence East along said south line of Yuma Street, 306.92 feet to the point of beginning.

Said property being now known for assessment and taxation purposes as Lot 807 in Square 1499.

Subject to Declaration of Easement and Agreement dated as of December 20, 1976 and recorded May 25, 1979 as Instrument No. 15911.

Attachment B – Declaration of Easement and Agreement

DECLARATION OF EASEMENT AND AGREEMENT

This Declaration of Easement made as of this 20th day of December, 1978, by Sheldon E. Schuman, Trustee, Successor Trustee to Fred Burka and David L. Burka in accordance with the terms of an unrecorded trust agreement dated January 2, 1976 (hereinafter referred to as Grantor),

W I T N E S S E T H :

WHEREAS, Grantor is the owner of Lot No. 9 as shown on a subdivision of Square No. 1499, as per plat recorded in the Office of the Surveyor for the District of Columbia in book 165 at Page 128, which record lot has been divided into two A & T Lots numbered 806 and 807; and

WHEREAS, Grantor has entered into two lease agreements with Burka Limited Partnership dated December 20, 1978, Lease No. 1 granting to the Lessee the property set forth on Exhibit A, being A & T Lot number 807 (Parcel No. 1) and Lease No. 2 granting to the Lessee property set forth on Exhibit B, being A & T Lot number 806 (Parcel No. 2); and

WHEREAS, Lease No. 2 provides a non-exclusive easement for a period of 99 years for vehicular parking of not less than 236 automobiles on the parking areas to be located from time to time upon the demised premises under Lease No. 1 and further provides that the building to be constructed on Parcel 2 shall rely in part on the use of gross floor area (as defined in the Zoning Regulations of the District of Columbia) allowable for Parcel No. 1 and in order to assist in its financing efforts for Parcel No. 2, Grantor desires that said easement and rights be set forth in a separate recorded declaration of easement; and

WHEREAS, Grantor believes it is in the best interest of all parties that the land described above shall remain a single record lot so long as required for building and zoning purposes and compliance (i) to assure proper connection between the existing buildings on Parcel No. 1 with the building to be constructed on Parcel No. 2 as a single building, (ii) to fix development rights (Gross Floor Area) to be allocated to each of the separately described

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areas above, or (iii) to require that within each of the two (2) described areas all remodeling, additions or replacement construction shall not be in violation of the requirements of the Zoning Regulations for Record Lot 9 in Square 1099.

NOW, THEREFORE, for good and valuable consideration, receipt of which is hereby acknowledged by the Grantor, the Grantor does hereby make the following declaration of easement:

1. Grantor hereby grants and conveys to the owners from time to time of Parcel No. 2 (including, but not limited to any noteholder secured by a deed of trust on Parcel No. 2 and any purchaser at any foreclosure sale of any deed of trust now or hereafter placed on any portion of Parcel No. 2, their successors and assigns) and any ground lessee, tenants, occupants, guests and business invitees, a non-exclusive easement for vehicular parking of not less than 236 automobiles on the parking areas located from time to time upon Parcel No. 1.

2. The owners from time to time of Parcel No. 1 (and, where applicable, any ground lessee) shall, at its expense, maintain the driveways and parking areas located on Parcel No. 1 at its sole expense. The owners of Parcel No. 1 shall have the right to relocate the driveways and parking areas on Parcel No. 1 in its sole discretion, provided that such relocation shall not unreasonably interfere with the rights granted hereunder. The owners of Parcel No. 1 shall have the right to establish uniform and reasonable rules, regulations and conditions governing the use of the driveways and parking areas as may be appropriate for the convenience and safety of the persons making use thereof.

3. The Grantor hereby covenants:

(a) That there shall be maintained proper connection between the existing building on Parcel No. 1 with the building to be constructed on Parcel No. 2 so as to constitute a single building for building and zoning purposes.

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(b) That there shall be the following maximum Gross Floor Areas, as defined in the Zoning Regulations of the District of Columbia, for the development of the properties comprising Record Lot 9 in Square 1499:

(i) A & T Lot No. 807 (Parcel No. 1) shall have a maximum GFA of 63,242.

(ii) A & T Lot No. 806 (Parcel No. 2) shall have a maximum GFA of 179,302.

(c) That within each of the two (2) described areas all remodeling, additions, or replacement construction shall not be in violation of the requirements of the Zoning Regulations for Record Lot 9 in Square 1499.

4. Nothing herein contained shall be deemed or construed by the parties hereto or by any third party as creating the relationship of principal and agent, or partnership, or a joint venture between the parties hereto, it being expressly understood and agreed that the driveways and parking areas on Parcel No. 1 shall at all times be under the exclusive control of the owners of Parcel No. 1, their heirs, personal representatives and successors and assigns.

5. The obligations of any party hereunder shall apply only with respect to the period during which such party owns or has an interest in the parcel with respect to which such obligation applies. Should such party cease to own an interest therein, the obligations thereafter accruing shall be the obligation of its successor in such ownership or interest. If the owners of Parcel No. 1 or their successor shall fail to maintain and keep in repair the driveways and parking areas thereon, then the owner of Parcel No. 2, to whom this Easement of use has been granted, shall have the right of entry and access upon Parcel No. 1 to make the necessary repairs and maintain the same. In any such case, the cost of maintenance and repair shall immediately be due and payable from the owners of Parcel No. 1.

6. This Agreement may be enforced by the owners of Parcel No. 2 and by any present and future owner thereof, their successors and assigns,

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including, but not limited to any purchaser at any foreclosure sale under any mortgage or deed of trust covering Parcel No 2; provided, however, that no suit, action or other proceedings to enforce or attempt to enforce the provisions hereof may be brought by any tenant, occupant, guest or business invitee on Parcel No. 2.

7. With regard to the easement described in paragraph 1 hereof, the same shall cease December 20, 2077 unless sooner terminated by consent of the owners of Parcels No. 1 and 2 and the noteholders secured by mortgages or deeds of trust on Parcel No. 2; and with regard to the rights granted in paragraph 3 hereof, the same shall terminate at such time as (i) the gross floor areas are no longer required under the Zoning Regulations of the District of Columbia, or (ii) December 20, 2077, unless sooner terminated by consent of the owners of Parcels No. 1 and 2 and the noteholders secured by mortgages or deeds of trust on Parcel no. 2.

IN WITNESS WHEREOF, the Grantor has hereunto set his hand and seal as of the day and year first hereinabove written.

_____ (SEAL)
Sheldon P. Schuman, Trustee

STATE OF Maryland)
) ss:
COUNTY OF Montgomery)

The undersigned, a notary public in and for the State and County aforesaid, does hereby certify that Sheldon P. Schuman, Trustee, party to the hereunto annexed Declaration of Easement and Agreement bearing date as of the 20th day of December, 1978, personally appeared before me, being personally well known to me as the person who executed the said Declaration and acknowledged the same to be his act and deed.

Given under my hand and seal this 24th day of May, 1979.

_____
Notary Public

My commission expires: 7/1/82

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In consideration of Ten Dollars ($10.00) and other good and valuable consideration, receipt of which is hereby acknowledged, the undersigned, Frederick Burka and David L. Burka, as General Partners of Burka Limited Partnership, Lessee under two Ground Leases referred to in the recitals hereof, said Leases being dated as of December 20, 1978, Lease No. 1 granting to the Lessee the property set forth in Exhibit A, being A & T Lot No. 807 (Parcel No. 1) and Lease No. 2 granting to Lessee the property set forth in Exhibit B, being A & T Lot No. 806 (Parcel No. 2), agree that the aforesaid Leases and its interest therein shall be subordinate, inferior and secondary to the terms of this Declaration of Easement and Agreement.

IN WITNESS WHEREOF, the Lessee has caused this Declaration of Easement and Agreement to be executed by its General Partners as of the day and year first above written.

BURKA LIMITED PARTNERSHIP

By Frederick Burka (SEAL)
Frederick Burka, General Partner

David L. Burka (SEAL)
David L. Burka, General Partner

All its General Partners

District of Columbia)
: ss:
County of City)

The undersigned, a notary public in and for the State and County aforesaid, does hereby certify that Frederick Burka and David L. Burka, general partners of Burka Limited Partnership, party to a certain Declaration of Easement and Agreement bearing date as of the 20th day of December, 1978 and hereto annexed, personally appeared before me, being personally well known

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to me as the persons who executed the said Declaration of Easement and Agreement and acknowledged the same to be their act and deed.

Given under my hand and seal this 23rd day of MAY, 1979.

Bruce E. Kiernan
Notary Public

My commission expires: JULY 14 1979

In consideration of Ten Dollars (10.00) and other good and valuable consideration, receipt of which is hereby acknowledged, the undersigned, American Security Bank, N.A., Substitute Trustee under a Deed of Trust dated February 2, 1965 and recorded February 11, 1965 in Liber 12361, folio 241 among the Land Records of the District of Columbia, securing a Note in the original principal amount of $500,000.00, which Note is now held by Union First National Bank of Washington, agrees that the aforesaid Deed of Trust shall be subordinate, inferior and secondary to the terms of this Declaration of Easement and Agreement.

IN WITNESS WHEREOF, the Trustee has caused this Declaration of Easement and Agreement to be executed as of the day and year first above written by Stephen C. Boyd, its Vice President, and its corporate seal to be hereunto affixed, attested by Edward J. Sigal, its Assistant Secretary, and has appointed and does hereby appoint said Stephen C. Boyd its attorney-in-fact to acknowledge and deliver these presents in its behalf, all done as of the 20th day of December, 1978.

ATTEST:

AMERICAN SECURITY BANK, N.A.

By Stephen C. Boyd

NOTEHOLDER HEREBY CONSENTS:

UNION FIRST NATIONAL BANK OF WASHINGTON

By David L. Burka
Vice President

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WASHINGTON, D.C. 20006
(202) 457-7800

DISTRICT OF COLUMBIA, ss:

I, Betty A. Whyte, a notary public in and for the District of Columbia, do hereby certify that Stephen C. Boyd who is named as attorney-in-fact for American Security Bank, N.A. the corporate party in the foregoing and attached Declaration of Easement and Agreement bearing date as of the 20th day of December, 1978, personally appeared before me in said District, the said Stephen C. Boyd being personally well known to me as the person named as attorney-in-fact in said deed for the said American Security Bank, N.A. and acknowledged said Declaration of Easement and Agreement to be the act and deed of said corporation, and that he delivered the same as such.

Given under my hand and official seal this 25th day of May, 1979.

Betty A. Whyte
Notary Public, D.C.

My commission expires: [illegible].

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EXHIBIT A

Parcel No. 1
(A & T Lot 807)

Being part of Lot 9, Square 1499, District of Columbia as shown on a plat recorded among the records of the Office of the Surveyor for the District of Columbia in Book 165 at Page 128 and being more particularly described as follows:

Beginning at the point of intersection of the southerly line of Yuma Street on the westerly line of Forty-eighth Street and running thence with said westerly line

(1) South 376.23 feet, thence leaving said line and running through and to include a portion of said Lot 9

(2) North 46° 57' 00" West 188.54 feet to a point in the northerly line of a twenty foot public alley, thence with same and also the outlines of said Lot 9

(3) North 46° 57' 00" West 50.59 feet, thence

(4) West 127.17 feet, thence

(5) North 45° 00' 00" West 7.07 feet, thence

(6) North 207.99 feet to the southerly line of Yuma Street, thence with same

(7) East 306.92 feet to the place of beginning, containing 79,622 square feet or 1.828 acres of land.

LAW OFFICES
WILKES & ARTIS
1666 K STREET, N. W.
WASHINGTON, D. C. 20006

(202) 457-7800

EXHIBIT B

Parcel No. 2
(A & T Lot 806)

Being part of Lot 9, Square 1439, District of Columbia as shown on a plat recorded among the records of the Office of the Surveyor for the District of Columbia in Book 165 at Page 128 and being more particularly described as follows:

Beginning at the point of intersection of the northerly line of Massachusetts Avenue and the westerly line of Forty-eighth Street and running with said northerly line

(1) North 46° 57' 00" West 261.98 feet to the front common corner of said Lot 9 and Lot 6, thence with the line common to said Lot 9 and 6

(2) North 43° 03' 00" East 170.00 feet to a point in the northerly line of a twenty foot public alley, thence with an extension of said line, through and to include a portion of said Lot 9

(3) South 46° 57' 00" East 188.54 feet to a point in the westerly line of Forty-eighth Street, then with same the following two courses and distances

(4) South 107.57 feet, thence

(5) South 43° 03' 00" West 91.40 feet to the place of beginning, containing 41,650 square feet or 0.956 acres of land.

LAW OFFICES
WILKES & ARTIS
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MAIL TO:

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