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October 31, 2019

VIA IZIS

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

Re: Applicant's Response to Post-hearing Submissions
Z.C. Case No. 19-10
Consolidated PUD @ Square 1499

Dear Members of the Commission:

On behalf of Valor Development, LLC (the "Applicant"), we hereby submit the following response to the post-hearing submissions filed on October 24, 2019, by Citizens for Responsible Development ("CRD") and Spring Valley Opponents ("SVO"). Many of the statements and comments made by CRD and SVO were also raised at the public hearing and were therefore previously addressed in the Applicant's post-hearing submission (Ex. 241 – 241D). As such, to minimize the length of this response and reduce duplication in the case record, the Applicant has included references herein to specific portions of its post-hearing submission to the greatest extent possible.

1. Response on affordable housing

CRD and SVO both suggest that the Commission should require the Applicant to provide more affordable housing than its current proffer. In addition, CRD continues to incorrectly assert that the Applicant is circumventing the Inclusionary Zoning ("IZ") regulations and claims that the Applicant's IZ calculations are based upon its own incorrect interpretation. However, CRD offers no evidence to support its statements regarding IZ.

The Applicant's IZ calculations have been prepared in accordance with the existing IZ regulations. These calculations have been in the record since the initial application filing, and have been thoroughly reviewed by the Office of Planning ("OP") and the Department of Housing and Community Development ("DHCD"), neither of which has raised any concerns with the Applicant's affordable housing calculations.

As stated in the Applicant's post-hearing submission, the Applicant will devote 12% of the Project's residential gross square footage to affordable units. As the Commission has noted, this equates to 20% more affordable housing than would otherwise be required in a matter-of-right development on the PUD site. CRD and SVO ignore the fact that the District's IZ program explicitly permits additional density to help offset the increased cost of providing affordable housing, and that the amount of affordable housing proffered as a benefit in a Planned Unit Development ("PUD") typically relates to the amount of additional density gained through the PUD. Such is not the case for this Project. Instead, and in direct response to comments made by the Commission, the Applicant has committed to a 12% IZ set aside for the Project (10% being what is required under IZ), while not requesting any additional density through the PUD.

It is noteworthy that while CRD and SVO acknowledge the extreme dearth of affordable housing within Rock Creek West, and now claim that affordable housing is one of their top concerns, neither party has ever indicated that it would be willing to accept even a small amount of additional height or density to help fulfill their objective to have more affordable housing. To the contrary, since the Project's inception, CRD and SVO have consistently called for the Project to be lower in height and less dense, all while demanding parking that far exceeds what is required under zoning. Indeed, CRD's most recent "option for the Commission" is to remove one or two floors, eliminate the proposed grocery store, and demand significantly more affordable housing. This is not an option aimed at finding a balanced and equitable solution. Rather, this is CRD's option that aims to kill the Project altogether.

In contrast, the Applicant's proposal represents a project that will considerably increase the supply of dedicated affordable housing in Rock Creek West, while also responding to the concerns of the community and balancing the collective interests of all stakeholders, including the ANCs, persons and parties in support and opposition, District agencies, the Commission, and the Applicant. For example, in response to comments from the ANCs and community regarding the Project's scale, the Applicant substantially reduced the height and density of the Project such that it is now below matter-of-right height and density. In response to comments regarding compatibility with the neighborhood, the Applicant overhauled the building design to ensure that it relates to and complements the surrounding context. In response to concerns over traffic and parking, the Applicant increased the amount of parking allocated to the residential units, agreed to restrict residents and guests from parking on public streets, and will implement a variety of transportation benefits and mitigation measures that are consistent with the District's Vision Zero goals and are fully supported by DDOT. Moreover, to aid the District's goals in sustainability and housing, the Applicant increased its sustainability commitment from LEED Silver to LEED Gold. All of these changes and commitments were made in direct response to comments from the community and/or the Office of Planning.

Finally, and to reiterate the commitments stated above, the amount of affordable housing in the Project substantially exceeds what would otherwise be required under the IZ regulations and the Applicant is not requesting any PUD height or density. <u>In fact, this single project will increase the number of dedicated affordable units in the Rock Creek West pipeline by approximately 36%.</u>

The significance of the Applicant's affordable housing proffer relative to the lack of any PUD-related flexibility being requested is highlighted in the chart below comparing the proposed PUD to several other approved PUDs. These other PUDs were selected either because they are located within Rock Creek West and/or were recently approved. As the chart clearly demonstrates, while the proposed density of the Project is 0.32 FAR below the maximum permitted matter-of-right density, the Applicant's IZ proffer is greater than all but one of the other PUDs shown. And the one PUD that has a higher IZ proffer has an approved density that is 2.04 FAR above the maximum permitted matter-of-right density. In the end, the Applicant's proposal is right-sized for the PUD site and the surrounding context and makes significant contributions across a wide range of District planning goals and objectives, including Mayor Bowser's recently established dedicated affordable housing goal for Rock Creek West.

Project	Approved	Map Amendment	Base Zoning	PUD Zoning	Approved PUD FAR	Difference from Maximum MOR FAR	IZ Benefit (% of residential)
Ladybird (Z.C. 19-10)	--	**No**	**MU-4**	**MU-4**	**2.68**	**-0.32**	**12%**
Jemal's Babe's (Z.C. 10-23)	Feb 2013	Yes	C-2-A (MU-4)	C-3-A (MU-7)	4.8	1.8	10.4%
Friendship-Macomb SC, Inc. (Z.C. 08-15)	Sept 2016	Yes	MW/C-1/R-5-A (NC-1/RA-1)	C-2-A / R-5-A (MU-4/RA-1	1.99	0.99	8%
Wisconsin Owner LLC (Z.C. 16-26)	Jan 2018	Yes	MU-4	MU-7	5.73	2.73	10%
FP Eckington Holdings, LLC (Z.C. 17-09)	Mar 2018	Yes	PDR2/PDR4	MU-5A	4.03	-1.7 (blended)	8%
Dancing Crab (Z.C. 18-03)	Dec 2018	Yes	MU-4	MU-5B	5.04	2.04	12.7
Hanover R.S. Limited P'ship (Z.C. 18-21)	June 2019	Yes	PDR-1	MU-4	3.6	1.6	12%

Source: Office of Planning Hearing Reports

2. Measurement of building height

In its post-hearing submission, CRD alleges that the Applicant is not permitted to measure the height of Building 1 from 48th Street, and that the Project violates the 1910 Height of Buildings Act. The Applicant thoroughly addressed these issues at the public hearing and in its post-hearing submission. *See, e.g.* Ex. 241D, Page 3.

CRD suggests that the Zoning Regulations require the Applicant to demonstrate that the current elevation of 48th Street is the same as the "natural elevation" (i.e. the elevation that existed prior to the construction of 48th Street and any other development). This notion was categorically discarded by the Commission during the public hearing. *See* Transcript, October 10, 2019, at p. 55-60.

As presented at the public hearing by Mr. Glatfelter, the Applicant's civil engineer, the curb grade of 48th Street has remained at the same relative elevation since its original construction, and the construction of the existing improvements on Lot 807 in the 1970s did not impact the curb

grade of 48th Street whatsoever. CRD attempts to discredit the Applicant's analysis on this topic by calling the analysis "a flagrant example of argument by 'false precision,'" yet offers no analysis of its own to substantiate its position. The Applicant's analysis was not only prepared by a licensed civil engineer using best available topographic data, it was verified through historic aerial photography and onsite empirical photographic evidence.

The Zoning Regulations and the Applicant's analysis make clear that the height of Building 1 can be measured from 48th Street. Notwithstanding, even if CRD is correct that the curb grade elevation of 48th Street was artificially elevated sometime after its construction, the Zoning Regulations clearly state that the "natural elevation" would not be the elevation predating 48th Street. Specifically, the Zoning Regulations define "grade, natural" as being "[t]he undisturbed elevation of the ground of a lot prior to human intervention; or where there are existing improvements on a lot, the established elevation of the ground, exclusive of the improvements or adjustments to the grade made in the five (5) years prior to applying for a building permit…" (emphasis added). While CRD might disagree with the Applicant's analysis, it cannot dispute that the grade along 48th Street has remained unchanged in the past five years. Thus, no matter which way the issue is resolved, the Applicant has appropriately measured the height of Building 1 from the level of the curb along 48th Street.

3. 1978 Declaration of Easement and Agreement

CRD continues to claim that the Project violates the terms of the 1978 Declaration of Easement Agreement (the "Easement") pertaining to Lots 806 and 807. The Applicant addressed this topic at the public hearing and submitted a copy of the Easement in its post-hearing submission (Ex. 241C).

CRD's post-hearing submission correctly states that the Easement, among other things, (i) allocates density between Lots 806 and 807, and (ii) 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. However, CRD incorrectly claims that the Project violates both of these terms, and incorrectly states that the Easement is intended to benefit nearby property owners as related to what can be developed on Lot 807.

CRD states that "[b]y 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 benefitting 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" (emphasis added). CRD further states that in *AU Park Citizens Assoc. v. Burka* "[t]he District of Columbia Court of Appeals…opined that the beneficiaries of the Easement were intended to be "nearby property owners."

CRD is incorrect in its assertion that the allocation of density under the Easement was intended to benefit nearby property owners. The Easement says nothing about the allocation of density being intended for the benefit of nearby property owners. Instead, the Easement simply establishes an allocation of development rights between the tax lots within Record Lot 9, and the only beneficiaries to the allocation are the tax lot owners themselves. Moreover, while it may be

CRD's opinion that the allocation of density under the Easement is "consistent with sensible land use principles," this is irrelevant as to the Easement's intended or actual purpose.

CRD also mischaracterizes the opinion of the Court of Appeals in *American University Park Citizens Assoc. v. Burka,* 400 A. 2d 737, 746 (D.C. 1979). In that case, the Petitioner was challenging the D.C. Council's approval of the closing of a public alley that existed in the area that is now at the rear of the AU Building on Lot 806.

By way of background, on April 17, 1973, the D.C. Council adopted a resolution "ordering that the requested portion of the alley be closed, subject to a deed of easement for vehicular and pedestrian access." *Id.* As clearly stated in the Court's opinion, the easement was for vehicular and pedestrian purposes, not to limit density on Lot 807. While the Court's opinion references a benefit to nearby property owners, it does so in the context of the purpose of the Easement being for vehicular and pedestrian access. Specifically, the Court stated that "[t]he Council, nevertheless, did not find reason to solicit the zoning authorities' views in this case; nor did it attempt to impose restrictions beyond the filing of an easement over the alley primarily for the benefit of nearby property owners." *Id*. Thus, contrary to CRD's assertion that the Easement is intended to benefit nearby property owners by limiting density on Lot 807, the language of the Easement and the Court opinion clearly shows otherwise.

4. Inclusion of the MAPS site in the PUD and historic preservation issues

The Applicant has already addressed all of the issues raised by CRD and SVO related to the inclusion of the MAPS site in the PUD, and the tangible historic preservation benefits provided by the proposed PUD. *See, e.g.* Ex. 241D, Pages 9 – 11. These issues include: (i) the tangible historic preservation benefit provided by the PUD, (ii) the applicability of Z.C. Order No. 101 (Heurich Mansion PUD) and related Court opinion, (iii) the legal authority held by the Commission to approve the transfer of density from the MAPS site to Lot 807 through PUD density aggregation under its broad authority established by the Zoning Act, and (iv) the ability of the Commission to approve such a transfer without having to consult or defer to the D.C. Historic Preservation Review Board. In addition, some of the historic preservation issues raised by CRD and SVO were also addressed in the report submitted by the D.C. Historic Preservation Office (Ex. 187), and in the testimony provided at the public hearing by Mr. David Maloney, D.C. State Historic Preservation Officer.

In its filing, SVO states that neither the Applicant nor the owner of the MAPS site have alleged that the aggregation of density from Lots 802 and 803 to Lot 807 is necessary due to some "economic hardship" involved in maintaining the historic MAPS, as defined in the D.C. Historic Landmark and Historic District Preservation Act (the "Historic Preservation Act"). First, the Applicant notes that the proposed PUD is being reviewed by the Commission pursuant to its authority under the Zoning Act and Title 11 of the District of Columbia Municipal Regulations ("DCMR"), and not under the Historic Preservation Act. Second, there is no requirement for the Applicant or the owner of the MAPS site to demonstrate economic hardship in order to aggregate density in the proposed PUD. Rather, the aggregation of density across the PUD site is expressly provided for under the PUD regulations contained in Subtitle X, Chapter 3 of the Zoning Regulations. Notwithstanding, as stated in the letter from Regency Centers, the owner of the

MAPS site, the Project will assist Regency Centers in maintaining the historic integrity and long-term viability of the historic MAPS (Ex. 227).

SVO also argues that the sale of density from the MAPS site may represent an alteration of the historic landmark, and that the unused density on the MAPS site is considered a defining feature of the landmark. One need only refer to how the term "alteration" is defined under District historic preservation law and regulations to see that there is simply no basis for this claim. As defined under the Historic Preservation Act and District historic preservation regulation (10-C DCMR), an "alteration" is "[a] change in the exterior appearance of a building or structure or its site, not covered by the definition of demolition, for which a permit is required; except that alter or alteration also means a change in any interior space which has been specifically designated as a historic landmark (D.C. Official Code § 6-1102(1))." Based on the foregoing definition, it is clear the sale of density from the MAPS site is not an alteration.

Further, the unused density on the MAPS site is not a defining feature of the landmark. A "character-defining feature" is defined under the District historic preservation regulations as "[t]he form and detailing of those architectural materials and features that are important in defining a building's historic character and whose retention will preserve that character." The definition goes on to describe features that may define the character of a historic resource, none of which have anything to do with unused development potential.[1]

Finally, CRD asserts that in the Heurich PUD (Z.C. Case No. 101), "the only allowable unused density transferred was from the two existing buildings on the site: the Heurich Mansion and its Carriage housing… The transfer did not include any unused land area." CRD then relies upon this assertion to claim that the MAPS site does not have enough unused density to cover what the Applicant is proposing to aggregate to Lot 807.

CRD's statements are completely inconsistent with how density is calculated generally, and is entirely contrary to the express language of the Heurich PUD order. In the Heurich PUD, the Commission found that the Heurich Mansion site has approximately 97,175 square feet of unused development potential. *See* Z.C. Order No. 101, Finding of Fact 8. As demonstrated below, this amount is based upon the entire land area of the Heurich Mansion site, which has a land area of approximately 17,380 square feet and not just the two buildings on the Heurich Mansion site as claimed by CRD.

Under the Heurich PUD order, the Heurich Mansion site was rezoned to C-3-B, which at the time permitted a maximum density of 6.5 FAR as a matter-of-right for nonresidential uses.

[1] According to the definition of "Character-Defining Feature" under the District historic preservation regulations, the character of a historic resource can be defined by: (a) The character of a historic building may be defined by exterior features such as facades, roofs, porches, and windows, and exterior materials such as masonry, wood, and metal; (b) The character of a historic building may be defined by its structural features such as bearing walls, floor framing, and roof framing, and structural materials such as brick, steel, and wood; (c) The character of a historic interior may be defined by features such as room configurations, spatial relationships, stairs, trim, and decoration, and by materials such as partitions, woodwork, plaster and finishes; (d) The site and setting of a historic property may be defined by features such as views to and from the property, landscaping, walls, and fencing, and materials such as stone and vegetation.

This equates to a total development potential of approximately 112,970 square feet.[2] The Heurich PUD order states that the Heurich Mansion site contained approximately 15,695 square feet of gross floor area. *See* Z.C. Order No. 101, Finding of Fact 8. Thus, subtracting this existing square footage from the total development potential results in approximately 97,275 square feet of unused development potential. Thus, it is clear the unused development potential was based upon the entire land area of the Heurich Mansion site.

By applying the same calculation to the MAPS site, it is clear that the MAPS site has enough unused density to cover what the Applicant is proposing to aggregate to Lot 807 for purposes of constructing the Project. The MAPS site has a land area of approximately 39,516 square feet, and the maximum density permitted under the existing MU-4 zoning (with IZ) is 3.0 FAR. This equates to a maximum development potential of approximately 118,548 square feet. The existing MAPS building contains approximately 16,922 square feet of gross floor area. As such, the overall amount of unused density on the MAPS site is approximately 101,626 square feet. As was presented at the public hearing, the Applicant is proposing to aggregate approximately 50,115 square feet of GFA to Lot 807 as part of the proposed PUD

5. Cathedral Commons PUD

The Applicant has already addressed the relationship of the Commission's decision in the Cathedral Commons PUD, and subsequent Court opinion, to the proposed PUD. *See* Ex. 241D, Pages 25 and 27.

6. Durant v. D.C. Zoning Comm'n

The Applicant has already addressed the comments made by CRD regarding the applicability of the Court's decisions in the *Durant I, II, and III* cases to the proposed PUD. *See* Ex. 241D, Page 11.

7. Evaluation of special exception relief

The Applicant has thoroughly demonstrated that it satisfies all of the required criteria necessary to obtain the requested special exception relief. *See* Ex. 241D, Page 12.

8. Evaluation of Project under PUD standards

The Applicant has already addressed compliance of the proposed Project with the PUD standards of Subtitle X § 304, including an evaluation of the Project's consistency with the Comprehensive Plan. As specifically requested by the Commission, the Applicant's Comprehensive Plan evaluation also includes information on how the Project meets the

[2] Z.C. Order No. 101 states a total of 112,870 square feet, a difference of 100 square feet. It is not clear where this minor deviation stems from; however, it is irrelevant to the Applicant's response to CRD's assertion that the unused development potential of the Heurich Mansion site was derived from only the two existing buildings on the Heurich Mansion site, the Heurich Mansion and its Carriage House. The calculation provided in this response clearly shows that the unused development potential was based upon the entire land area of the Heurich Mansion site.

Comprehensive Plan balancing test established in *Friends of McMillan Park v. District of Columbia Zoning Comm'n*, 149 A.3d 1027, 1035 (D.C. 2016). *See* Ex. 241D, Page 15 - 42

Thank you for your continued attention to this matter. We look forward to your deliberation scheduled for November 18, 2019.

Sincerely,

HOLLAND & KNIGHT LLP

By: Jessica Bloomfield

Norman M. Glasgow, Jr.
Jessica R. Bloomfield

cc: Certificate of Service
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing letter were sent via email to the following on October 31, 2019, with hard copies sent on the following business day:

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