



DONOHUE & STEARNS, PLC

November 12, 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 Proposed Findings of Fact and Conclusions of Law into the record for Zoning Commission Case No. 19-10.

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 **November 12, 2019**, a copy of the CRD’s Proposed Findings of Fact and Conclusions of Law 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: November 12, 2019

ZONING COMMISSION
District of Columbia
CASE NO.19-10
EXHIBIT NO.253

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA

ZONING COMMISSION ORDER NO. 19-10

Z.C Case No. 19-10

VALOR DEVELOPMENT, LLC

(CONSOLIDATED PUD @ SQUARE 1499)

[DATE]

Pursuant to notice, the Zoning Commission for the District of Columbia (“Commission”) held public hearings on October 7, 2019 and October 10, 2019 to consider the application for a consolidated planned unit development (“PUD”) and related Special Exception filed by Valor Development, LLC (“Applicant”). The Commission considered the application pursuant to Subtitle X § 601.2 of the 2016 Zoning Regulations of the District of Columbia (“ZR16”), Title 11 of the District of Columbia Municipal Regulations (“DCMR”). The public hearing was conducted in accordance with the provisions of 11-Z DCMR, Chapter 4. For the reasons stated below, the Commission hereby **DENIES** the application.

FINDINGS OF FACT

A. Background on Valor Development’s PUD Application (the “Project”; Case No. 19-10)

1. Paul S. Burka Apex Real Estate, the current owner of Lot 807 (the SuperFresh site), originally owned both Lot 807 and Lot 806 (4801 Massachusetts Avenue). (Exhibit 118, p. 36.)
2. Lot 9 is comprised of what are now A&T Lots 806 and Lot 807. The lot area of Lot 806 is 41,650 sq. ft. and the lot area of Lot 807 is 79,622 sq. ft. The 1978 Declaration of Easement and Agreement (the “Easement”) provides that Lot 9 shall remain a single record lot for building and zoning purposes. (Attachment B to Exhibit 238, p. 1.)
3. At that time, the allowable FAR for the site was 2.0. Thus, on the entire Lot 9 (which covers 121,272 sq. ft.), the owner could build a building with 242,544 GFA.
4. In order to facilitate the construction of a large building at 4801 Massachusetts Avenue (the building now owned by American University), the owner transferred through the Easement some of the density allowed for Lot 807 to the adjoining Lot 806. Specifically, maximum available GFA was allocated as follows: 179, 302 GFA for Lot 806 and 63,242 GFA for Lot 807. (Attachment B to Exhibit 238, p.3.)

5. The Easement also provides that “all remodeling, additions, or replacement construction shall not be in violation of the requirements of the Zoning Regulations for Record Lot 9.” (Attachment B to Exhibit 238, p. 3.)
6. Since 1979, the zoning regulations have increased the allowable FAR for the site to 3.0, subject to satisfaction of IZ requirements. With the additional 1.0 in FAR, there was a total increase in allowable GFA of 121,272 for the entire Lot 9 (1.0 times the size of Lot 9). Assuming that Valor has an agreement with the current owner of Lot 806 to allocate the entirety of this increase to Lot 807 and satisfies IZ requirements, the current maximum GFA for Lot 807 is the original amount allocated to Lot 806 (63,242 GFA) plus the additional amount (121,272 GFA), for a total of 184,514 GFA.
7. The Applicant agrees that 184,514 SF is the maximum amount that can be built on Lot 807 as a matter-or-right. (Exhibit 2, p.8.)
8. The Applicant’s proposed Project includes 234,629 SF GFA, 50,115 more GFA than allowed as a matter-of-right. (Exhibit 28A1, Slides G05 and G07.)
9. The Applicant’s proposed Project also includes 26,050 SF in below grade residential, 1,603 SF in residential projection floor area, and 30,323 SF in habitable penthouse space (Exhibit 241A, slide G09.)
10. The proposed Project thus will contain 292,609 SF of usable floor area, 108,091 SF more than the GFA allowed as a matter-of-right.
11. The Project will include at least 219 residential units. The Applicant is asking for flexibility to increase the number of residential units by 10 percent (bringing the total to 240). (Exhibit 2, pp. 16, 26.)
12. The Applicant has conditioned its proffer of 12 percent affordable housing on the granting of this flexibility. (October 10, 2019 Transcript, p. 176.)
13. The Project’s main building, Building 1, is a 4 to 6 story building. Since the grocery space takes up the equivalent of two levels, Building 1 is actually 7 stories in height behind the Massachusetts Avenue Parking Shops (MAPS), where it rises to 81.5 feet in height. (Exhibit 28A1, slide G07; Exhibit 28A6, slide A27.)
14. Building 1 is as tall as the 6-story American University Building at 4801 Massachusetts Avenue (AU Building). (October 7, 2019 Transcript, p. 81-82.) The Applicant’s renderings actually show that Building 1 is taller than the AU Building. (Exhibit 28A3, slide A16.)
15. This is the third time Valor Development has filed a development application for the SuperFresh site with the Commission. Valor Development originally filed an application for Voluntary Design Review on October 26, 2016 . (ZC Case No. 16-23). Following a full evidentiary hearing, on February 22, 2018 Valor Development asked that consideration be deferred due to a failure to comply with the applicable Inclusionary Zoning requirement. A revised Design Review application was filed on October 16, 2018. Following another full evidentiary hearing, the Commission on March 11, 2019 raised questions about compliance with the Design Review requirements. The Design Review application was finally withdrawn on July 18,

2019. Altogether, Valor Development asked for six deferrals and postponements of its Design Review application.

B. Neighborhood Opposition; Comments by ANC Designated Representatives

1. Nineteen individuals living within 200 feet of the Project signed letters in opposition to the proposed Project. Not one “200-footer” signed a letter or testified in support of the Project. (Exhibits for Case No. 19-10.)
2. In total, 64 neighbors filed letters in opposition to the Project. Each letter is an individually drafted, genuine letter. Many of the letters in support of the Project are short, identical form letters or one-line emails. (Exhibits for Case No. 19-10.)
3. Tenleytown Neighbors Association filed a letter in opposition to the Project (Exhibit 45) and testified in opposition. (Testimony of Dennis Williams, October 10, 2019 Transcript, pp. 146-147.)
4. The Westmoreland Citizens Association, representing 990 households living just a few blocks from the Project site, filed a letter in opposition. The letter states that there are already traffic bottlenecks on Massachusetts Avenue, and that the installation of a HAWK light will cause additional backups. (Exhibit 158.)
5. SaveWestbard Inc, which represents the majority of residents in the Westbard area of Montgomery County, also wrote a letter in opposition, 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. (Exhibit 43.)
6. Both Westmoreland Citizens Association and SaveWestbard Inc. state that the traffic and parking problems caused by the Project will discourage their members from shopping in Spring Valley.
7. Fifteen individuals testified in opposition to the Project on October 10, 2019. (October 10, 2019 Transcript, pp. 126-162.) Not one individual testified in support of the Project at the Zoning Commission hearing.
8. 587 residents of ANC3D and ANC3E previously signed a petition stating that they would support a 2-3 story building on the site that would reflect the scale and character of the surrounding area but not a larger building with 200 to 250 residential units. (Case No. 16-23, Exhibits 27 and 27A).
9. During questioning on October 7, 2019, ANC3E’s designated representative stated that at the final ANC meeting on the Project he said this is an “imperfect project” and that “there's plenty of things not to like about this project.” (October 7, 2019 transcript, p. 167.)
10. The ANC3D resolution states that the ANC asks the “Commission to encourage the applicants to increase the width of the sidewalks within the alley system from three feet to at least four feet, and ideally six feet.” (Exhibit 26, p. 4.) The Applicant has declined to do so.

11. The ANC3D resolution states that the ANC remains supportive of restricting the applicant's requested design flexibility to increase the number of units from 219 to 240." (Exhibit 26, p. 4.)
12. Mr. Repp stated that the ANC3D representative had previously stated he had asked Valor to reduce the height by two floors. (October 10, 2019 Transcript, p.71.)

C. The Applicant Has Failed to Meet the Required Burden of Proof to Show that the Project Satisfies the PUD Requirements

Based on the facts set forth in later sections:

1. Contrary to Section 304.4(a) of the PUD Regulations, the Project is Inconsistent with the Comprehensive Plan.
2. Contrary to Section 304.4(b) of the PUD Regulations, the Project Will Result in Unacceptable Adverse Impacts on the Surrounding Area.
3. Contrary to Sections 304.4(c) and 305.3 of the PUD Regulations, the Application Fails to Include Tangible and Meaningful Public Benefits and Project Amenities Sufficient to Balance the Development Incentives Requested.

D. The Project is Inconsistent with the Comprehensive Plan

1. The Comprehensive Plan's Urban Design Element states that the overarching goal for urban design is to harmoniously integrate new construction with existing buildings. (Comp. Plan Urban Design Element, p. 9-2.) Also, "overpowering contrasts in scale, height, and density should be avoided as infill development occurs." (Comp. Plan Urban Design Element, Policy UD-2.2.)
2. The scale, height, and density of the proposed Project would clash with and overpower the neighboring 2-story residential community, the one-story MAPS, and the one to three story commercial area across Massachusetts Avenue (CRD's Visual Impact Study (Exhibit 217); Testimony of Mr. Repp on October 10, 2019 (Exhibit 232A).)
3. The 81.5 ft height of the proposed Project is incompatible with the 2-story 30-foot-tall homes along Yuma Street. (Exhibit 217.)
4. The architectural renderings provided by the Applicant's architect clearly show that the proposed Project is as tall as or taller than the adjacent non-conforming 6-story AU Building. (Exhibit 28A3, slide A16.)
5. Other than the AU Building, there are no buildings in the immediate vicinity of comparable height to the Project to demonstrate compatibility with the surrounding context.

6. The infill project across Massachusetts Avenue within a second Spring Valley Shopping Center is the type of development that preserves the existing character. That project is a 2-story commercial building that attempts to match the scale and design of the neighboring commercial buildings and is appropriately named "Spring Valley Village." (Exhibit 118, p. 7.)
7. In its testimony, ANC3E included photos of several buildings that it deemed to be comparable to the proposed Project. The closest buildings shown are in the Cathedral area and, unlike the Project, are well set back from the street and the property line. Other buildings shown by ANC3E are located in zones meant for high density. (Exhibit 154A3.)
8. The Comprehensive Plan's Land Use Element calls for fully capitalizing on the investments in Metrorail by requiring better use of land around transit stations and along transit corridors. (Comp. Plan Land Use Element, p. LU-1.3.)
9. The "reach" of transit-oriented development around any given station varies depending on the neighborhood, but ¼ to ½ mile is generally used across the country to define a walkable radius. (Comp. Plan Land Use Element, p. LU-1.3.)
10. The SuperFresh site is one mile from the Tenleytown Metrorail station. (Exhibit 118, p. 4.)
11. Most people will not walk a mile, both ways, to use Metrorail. (Exhibit 194.) The project site is not transit friendly. (Exhibit 118, p. 8.)
12. The Comprehensive Plan's Land Use Element states that infill development should complement the established character of the area and should not create sharp changes in the physical development pattern. (Comp. Plan Land Use Element, policy LU-1.4.1.)
13. The project site faces two residential streets with 2-story homes. (Exhibit 118, p. 1.)
14. The Spring Valley commercial area contains mostly one to three story commercial buildings. (Exhibit 118, p. 1.)
15. The Comprehensive Plan's Land Use Element encourages pedestrian-oriented "nodes" of commercial development along major corridors provided the "height, mass, and scale of development within nodes respects the integrity and character of surrounding residential areas and does not unreasonably impact them." (Comp Plan Land Use Element, Policy LU-2.4.5)
16. The Project site faces two local streets, not a major or minor arterial, or even a collector street, and the proposed buildings do not respect the residential neighborhood. In fact, the Project unreasonably detracts from the neighborhood. (Exhibit 118, pp. 6-7.)
17. The Project more appropriately belongs on Massachusetts Avenue, and should not be located on "the back end next to a residential neighborhood." (Statement of Vice-Chair Miller on the nearly identical Design Review proposal at the February 6, 2019 hearing on Case No. 16-23; February 6, 2019 Transcript, p. 59.)

18. Further, as shown in the images prepared by the Applicant, the Project by its sheer size overwhelms the historically designated MAPS and appears to be taller than the AU Building, whose height and density are nonconforming. (Exhibit 194, Slide 22; Exhibit 249D, footnote 3.)
19. The roof of the AU Building (exclusive of the mechanical penthouse), as measured by the Applicant, is 317.33' AMSL. (Exhibit 28A6, slide A27.) The top of the main roof of Building 1 is 316' AMSL. (Exhibit 28A6, slide 27. With the 1.5 foot parapet, Building 1 is taller than the AU Building.
20. The Comprehensive Plan's Land Use Element provides that new commercial development adjacent to lower density residential areas have effective physical buffers to avoid adverse effects. (Comp. Plan Land Use Element, policy LU-2.3.3.) The mass of the Project violates this policy. Building 1 is situated along the property line, projecting over it in parts. (Exhibit 118, pp.9-10.)
21. The Comprehensive Plan's Land Use Element calls for expanding employment opportunities. (Comp. Plan Land Use Element, policy LU-2.4.1.)
22. The Comprehensive Plan's Economic Development Element calls for promoting the vitality and diversity of Washington's neighborhood commercial areas by retaining existing businesses. (Comp. Plan Economic Development Element, Policy ED – 3.1.1.)
23. The Project will eliminate jobs and existing businesses by forcing the closure of longstanding businesses (Wagshal's Catering and Kitchens, Pitmaster's BBQ, and DeCarlo's restaurant), which together employ at least 60 employees. Further, the continued existence of Wagshal's Delicatessen and Meat and Seafood markets in the Spring Valley Shopping Center has been called into question. Wagshal's has been a neighborhood institution since 1939. (Exhibit 118, p. 12.)
24. The Comprehensive Plan's Urban Design Element, as well as its Rock Creek West Element, call for the establishment of gradual transitions between large-scale and small-scale development. The relationship between taller, more visually prominent buildings and lower, smaller buildings (such as single family or row houses) can be made more pleasing when the transition is gradual rather than abrupt. (Comp. Plan Urban Design Element, policy UD-2.2.4; Rock Creek West Element, policy RCW-1-1-6.) Building 1 does not provide a gradual transition to the two story residential homes across 48th Street and Yuma Street.
25. The project site is located in the Rock Creek West Area where "communities []share a commitment to proactively addressing land use and development issues and conserving neighborhood quality." (Comp Plan Rock Creek West Element, RCW p. 23-1.) The height, scale, and density of the Project are deeply out of character with the neighborhood and therefore violate this overarching commitment. (Exhibit 137, p. 10.)
26. The Comprehensive Plan's Rock Creek West Area Element states that "Future development in both residential and commercial areas must be carefully managed to

- address infrastructure constraints and protect and enhance the existing scale, function, and character of these neighborhoods.” (Comp Plan Rock Creek West Element, Policy RCW 1.1.1.) The Project fails to meet the standard contemplated by this policy. Rather than managing growth, by exceeding the height and density limits of what is permitted, the Project is an example of uncontrolled growth.
27. The Project will exacerbate school overcrowding at the public schools servicing the SuperFresh site - Janney Elementary, Deal Middle, and Wilson High – each of which is above capacity even after each has been renovated and expanded in recent years. (Exhibit 118, pp. 8-9.)
 28. The Comprehensive Plan’s Rock Creek West Area Element states that heights and densities for infill development should be appropriate to the scale and character of the adjoining communities, and that buffers should be adequate to protect existing residential areas from noise, odors, shadows, and other impacts. (Comp Plan Rock Creek West Element, Policy RCW-1.1.4.)
 29. The impacts from noise, traffic and shadows on the neighboring residences will be significant; no buffers have been proposed to mitigate the effects.
 30. The main entrance to the retail store and the large apartment building is directly across Yuma Street from a row of single-family homes. One can expect that those entrances will be busy, and that cars and delivery vehicles will park – or double park – on Yuma Street as they drop people off or make deliveries. Noise, commotion, and pollution will become a problem, and pedestrian safety would be seriously compromised. (Exhibit 118, p.8.)
 31. The building at that point is approximately 50 feet higher than the homes, depriving the homes of light and privacy. The 4th floor terrace on the apartment building will overlook Yuma and Alton Streets, depriving residents of those streets of privacy and creating the potential for disruptive noise. (Exhibit 118, p. 8.)
 32. The added traffic will contribute to more air pollution in the neighborhood. Similarly, the noise from the added traffic, particularly truck and delivery traffic, and construction will disrupt what is currently a quiet residential neighborhood. Further, headlights from cars exiting the alleys after dark will shine directly into the homes across from the alleys. (Exhibit 118, p. 29.)
 33. 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. (Exhibit 28A7, slides A46-47.)
 34. CRD has shown, using DCOZ’s 3D map program, that the Applicant’s shadow study underestimates the shadows the Project will cause. (Exhibit 244, pp.5-6 and Attachment A.)
 35. CRD supports the construction of multi-family housing on the SuperFresh lot. Mr. Repp, testifying for CRD on October 10, 2019, clearly stated: “We support an apartment building on this site.” (Exhibit 244, p. 2; October 10, 2019 Transcript, p. 77.)

36. Mr. Repp also stated: "CRD supports the Mayor's initiative for more housing citywide, and the need for more affordable housing in Ward 3." (Exhibit 232A.)
37. CRD has suggested as a compromise a proposal in which 160 or more residential units could be included in a project on the site. During hearings on the Applicants' previous Design Review proposal, an architect who is one of CRD's members, Walter Borek, in fact offered a detailed design of a project with 166 residences that included much more open space. (Exhibit 118, p. 5.)
38. The Applicant is proposing just two percent more affordable housing than minimally required, and that is conditioned on the Commission granting the Applicant's request for flexibility to add even more density to an already dense project. (Exhibit 245A, p. 3; Statement by Mr. Lansing, October 10, 2019 Transcript, p.176.)
39. Based on input provided by OP, an earlier version of this Project was revised by sinking the apartment building six feet into the ground. One of the objectives was to circumvent a higher affordable housing requirement. The cellar space carries with it a lower IZ requirement. That is the current design. (Exhibit 244, p. 20.)

E. The Project is Inconsistent with the Future Land Use Map

1. The Future Land Use Map (FLUM) "express[es the] public policy on future land uses." (Comp Plan Framework Element, p. 2-33.)
2. The Future Land Use Element designates the SuperFresh site as Low Density Commercial. (Exhibit 2C1, slide G04.)
3. The Comprehensive Plan's Framework Element states that a "common feature [of Low-Density Commercial areas] is that they are comprised primarily of one- to three-story commercial buildings." (Framework Element, p. 2-34.)
4. Building 1 is a 4 to 6 story building. Since the grocery space takes up the equivalent of two levels, Building 1 is actually 7 stories in height behind the Massachusetts Avenue Parking Shops (MAPS), where it rises to 81.5 feet in height. (Exhibit 28A1, slide G07; Exhibit 28A6, slide A27.)
5. If the proposed Project were approved, approximately 80 percent of structures on the PUD site (by footprint) will consist of buildings that will be up to six stories tall. For this calculation, the PUD site consists of Lots 802, 803, 806 (the AU Building), and 807 (the proposed Project buildings). (Exhibit 118, p. 14.)

F. The Project Causes Adverse Traffic, Pedestrian Safety, and Parking Impacts

Background Information on the Alley System Around the SuperFresh Grocery Store

1. Two alleys, each approximately 360 feet long (Exhibit 2C11 Bowman Consulting, Civil Exhibits p. 2), border Lot 807 on two sides. The drive lane of the north-south alley is 20 feet wide, with sections along the alley used to accommodate mechanical

- equipment, refrigerators, trash bins, and parking spaces used by the existing businesses located inside the rear part of the SuperFresh building and in the adjacent MAPS shopping center. (Exhibit 186A.)
2. The north-south alley, a public alley, runs from the 4800 block of Yuma Street on the north to Massachusetts Avenue at the south end and intersects with the east-west alley near the rear property line of the PNC Bank that is located at 4835 Massachusetts Avenue. (Exhibit 28A11, slide CL01.)
 3. A driveway from the PNC Bank rear parking lot exits onto part of the north-south alley, close to where a Do Not Enter sign is posted so that vehicles are prohibited from entering this alley from Massachusetts Avenue. (Exhibit 28A11, slide CL01; Exhibit 232C.)
 4. The north-south alley is currently used for deliveries and trash pick-ups for DeCarlo's Restaurant, Spring Valley Catering, and Wagshal's kitchens that are located in the rear of the former SuperFresh building. In addition, the businesses in the MAPS shopping center (CVS, Wagshal's Deli and Market, and Wagshal's Restaurant) also use this alley for deliveries and trash pick-ups. (Exhibits 124 and 186A.)
 5. The drive lane of the north-south alley is sometimes blocked by trucks making deliveries to the businesses described above. (Exhibit 124.)
 6. When trash trucks arrive in this alley, the trucks use the entire drive lane while picking up the trash. (Exhibit 124.)
 7. Some trucks exit this alley at the south end onto Massachusetts Avenue where all traffic must turn right. (CRD video in webcast of October 10, 2019 hearing, beginning at 1:02 minute mark.)
 8. Some trucks back up in the north-south alley and exit onto Yuma Street. (CRD video in webcast of October 10, 2019 hearing, beginning at 1:02 minute mark.)
 9. The second alley, the east-west alley, runs along the western side of Lot 807 from 48th Street, bends to the west past the AU building, and then ends at the intersection with the north-south alley. (Exhibit 28A11, slide CL01.)
 10. The east-west alley, 20 feet in width, is also known as the American University (AU) alley since AU owns approximately 200 feet of this alley and has two loading bays located on this alley. (Exhibit 28A11, slide CL01.)
 11. Trash is picked up from AU's 4801 Massachusetts Avenue building in this alley, and deliveries and AU-related maintenance occur in this part of the east-west (or AU) alley. (Exhibit 124.)
 12. While the east-west alley runs along the western side of the former SuperFresh building, trucks servicing the former SuperFresh grocery store delivered their goods to the front of the SuperFresh building (facing 48th Street) where the loading bays are located. (Exhibit 124.)
 13. In its PUD Application, the Applicant proposes to use both the east-west and the north-south alleys in order to service the proposed grocery store as well as the proposed apartment building and five townhouses. (Exhibit 2, pp. 12-13.)

14. The Applicant proposes to locate loading docks for the new development along the east-west alley. (Exhibit 28A11.)
15. The Applicant proposes to locate the entrance to the underground parking garage along the east-west alley. (Exhibit 28A11.)
16. A pedestrian entrance/exit for the underground parking garage is planned for the east-west alley. (Exhibit 28A11.) This entrance/exit will be used by AU staff and students who have parked in the Project's new underground garage.
17. The Applicant proposes that trucks will access the loading docks from two alley entrances: the 48th Street entrance to the east-west alley and the Massachusetts Avenue entrance to the north-south alley (where vehicles are currently prohibited from entering). (Exhibit 28A11.)
18. The Applicant is proposing that there will be two-way simultaneous vehicle traffic in both alleys, which are 20 feet wide. (Exhibit 28A11.)
19. The Gorove/Slade (G/S) Comprehensive Transportation Review (CTR) maintains that the north-south alley will be widened. (Exhibit 25A.) This is a misleading statement because the proposed new drive lane in the north-south alley will remain at 20 feet in width, with 12 feet set aside for trash receptacles and 3 feet designated as a delineated pedestrian pathway. The width of the proposed north-south alley will actually be narrowed from its existing width. (Exhibit 186A.)

Adverse Traffic and Pedestrian Safety Impacts Caused by the Project

1. The Gorove/Slade Comprehensive Transportation Review (August 23, 2019) (G/S CTR) estimates that the Project will generate 131 additional auto trips per hour during the morning peak hours and 283 additional auto trips per hour during the afternoon peak hours (Exhibit 25A).
2. The G/S CTR estimates that the Project will generate 13 truck trips per day. The truck traffic figure does not include the truck traffic servicing the MAPS retail businesses. (Exhibit 25A.)
3. All the additional traffic generated by the Project, including vehicles of new residents and grocery shoppers, will necessarily flow through the alley network described above that borders the site. (Exhibit 25A.)
4. According to G/S, the number of vehicles per hour during the PM peak hours using the Yuma Street entrance to the north-south alley will increase from 6 to 141. (Exhibit 25A.) This represents a 2,250 percent increase in total trips. (Exhibit 186A.)
5. According to G/S, the number of vehicles per hour during the PM peak hours using the Massachusetts Avenue entrance to the north-south alley will increase from 7 to 74. (Exhibit 25A) This represents a 957 percent increase in total trips. (Exhibit 186A.)
6. According to G/S, the number of vehicles entering and exiting the 20-foot wide alley (the east-west alley) behind the American University building during the peak afternoon hours will increase from 14 per hour currently to 126 per hour. (Exhibit 25A) This represents an 800 percent increase. (Exhibit 186A.)

7. Many trucks will use the east-west alley because the Project's loading docks are located along this alley. (Exhibit 28A11.)
8. According to G/S, the Saturday peak hour volume of traffic generated by the Project will be 260 vehicles – 169 due to the grocery/retail. (Exhibit 25A.)
9. Mr. Andres, the Applicant's traffic expert, stated that the increase in traffic due to the Project will be "stark." (Transcript of October 10, 2019 hearing, p. 170.)
10. By breaking down the trips generated by specific destinations (such as the 16,000 SF SuperFresh), CRD demonstrated the inaccuracy of G/S's conclusion that the Project will generate fewer trips than existing uses. (Exhibit 238, pp.16-17.)
11. Both the east-west and north-south alleys have low volume today. Neither was designed for the high traffic volumes the Project will generate. (Exhibit 216, slide 12.)
12. According to the G/S truck turning diagrams, a 50-foot wheelbase truck on 48th Street will encroach on the sidewalk/curb-cuts because of the off-tracking of the trailer. (Exhibit 25A.)
13. Extra back/forth truck maneuvers will be needed to back in/out of the truck bay and while negotiating tight corners for the inbound as well as the outbound maneuvers. (Exhibit 124)
14. Further, parking is permitted along 48th Street and the trucks will experience difficulty making the inbound movement and may require a back and forth to complete the inbound turn. An inbound truck will encroach on the southbound 48th Street left turn lane at Massachusetts Ave. (Exhibit 124.)
15. DDOT requires that "no back-up maneuvers occur in the public realm." (Exhibit 52.)
16. If other vehicles are making left turns from 48th Street to Massachusetts Avenue, inbound trucks will stop traffic on southbound Massachusetts Avenue at 48th Street. (Exhibit 124.)
17. The loading dock and trash dumpster for the AU building are also located off the east-west alley, and AU vehicles commonly park in the alley in front of the entrances to the AU loading bays. The loading bays are not shown in Valor's renderings and the impact is not addressed in the G/S CTR. (Exhibit 28A11.)
18. American University shuttle buses (up to ten per hour) currently park and idle approximately 15 feet from the east-west alley entrance, thus blocking one of three lanes on 48th Street for extended periods. (Exhibit 124.)
19. Because 48th Street "doglegs" at this alley entrance/exit, it is difficult for drivers who are exiting this alley to see oncoming traffic and to see around the AU shuttle buses. (Exhibit 124.)
20. Although DDOT has requested "sight distance evaluations," especially for the areas near the alley entrances/exits and driveways around the Project (Exhibit 25B.), no such evaluation has been made available to date.
21. Using Gorove/Slade's figures, CRD's traffic consultant (Joe Mehra of MCV Associates) estimates that the project will generate a daily total of between 3003 and

- 3437 weekday trips, depending on the size of the grocery store and the final number of residential units. (Exhibit 124.)
22. The additional traffic generated by the development will cause congestion on neighboring streets and will be a particular danger to children and the elderly who live in the neighborhood. (Exhibit 118, p. 28.)
 23. According to diagrams from Valor's traffic consultant, Valor proposes that 50 foot wheelbase trucks will enter the east-west alley from 48th Street; proceed around the angle in the alley to the end (the intersection of both alleys); then begin back-up maneuvers in order to reach the loading dock. In exiting the loading dock, the trucks will then re-enter the alley, front end first, proceed along the alley to 48th Street, and then turn right as they exit onto 48th Street to reach Massachusetts Avenue. (Exhibit 25A.)
 24. According to diagrams from the Applicant's traffic consultant, large trucks entering the east/west alley from 48th Street may scrape legally parked cars on 48th Street. and impinge on the sidewalk at 48th Street. (Exhibit 25A.)
 25. Similarly, large trucks will impinge on the PNC Bank property when backing into the Project's loading dock. (Exhibit 25A.)
 26. As demonstrated in CRD's alley video, large trucks will not be able to make the turn from the north-south alley into the east-west alley to access the loading docks. Additionally, CRD videotaped a 30-foot wheelbase truck that became stuck at the bend in the east-west alley and could not complete the turn. (CRD video in webcast of October 10, 2019 Hearing, beginning at 1:02 minute mark.)
 27. According to diagrams in the G/S CTR, large trucks coming from Maryland and turning left onto 48th Street to access the site through the east-west alley, need to turn left from the far right lane on Massachusetts Avenue., thus blocking traffic on Massachusetts Avenue. The same diagrams also show that large trucks exiting from 48th Street will not be able to make a right turn onto Massachusetts Avenue to head to Maryland. (Exhibit 25A.)
 28. The alley behind the MAPS Shopping Center will be bottlenecked due to trucks making deliveries to the businesses in the shopping center. (Exhibit 186A.)
 29. According to the G/S CTR (p.14), "Two 40-foot pick-up and drop-off areas ("entrance zones") along Yuma Street and 48th Street are proposed to facilitate pick-up/drop-off and food delivery operations, subject to DDOT approval." Such entrance zones will create traffic congestion along these streets that are 30 feet wide since one lane of traffic would then be used by food delivery trucks and ride-hailing services that stop and idle in these zones. (Exhibit 25A.)
 30. Additional traffic congestion will occur on 48th Street between Yuma and Warren Streets where the Applicant proposes to locate an "alternative transportation block where transit options such as electric scooters, bikes, and mopeds; bike shares; and car shares can be co-located." (Exhibit 230A) Such a collection, located in a residential street (48th Street), creates hazardous conditions for both drivers,

- pedestrians, and potential users of these modes of transit. In addition, some metered parking spaces may be eliminated to create space for this corral of alternate transit modes.
31. DDOT has asked the Applicant to submit “a detailed curbside management and signage plan to DDOT.” To date, no Curbside Management Plan that would show on-street parking spaces along 48th Street and Yuma Street has been made available. (Exhibit 52.)
 32. The Project will cause increased cut-through traffic in Spring Valley, in part due to the proposed HAWK light. (Exhibit 43, p.2.)
 33. To date, there is no documentation of an agreement with Regency Centers (owner of MAPS) regarding loading management, as relied upon in DDOT’s report. (Exhibit 52.)
 34. According to DDOT, the Loading Management Plan (LMP) “should be included as a condition to help facilitate the movement of trucks and manage conflicts with other vehicles and pedestrians in the alley network.” The LMP, as described in the August 23, 2019 CTR, is inadequate to handle deliveries to the loading docks and to manage pedestrian-vehicle conflicts since there are three alley entrances/exits that will be used by trucks and two separate alleys. The current LMP also fails to include a requirement to schedule and coordinate deliveries to the AU loading bays that are located in the east-west alley. (Exhibit 52.)
 35. The volume of traffic in the alleys will reach the levels of traffic on the nearby streets. (Exhibit 186A, Statement of Shelly Repp, Exhibit 232A.)
 36. The significant increase in cars and trucks entering and exiting the alleyways around the perimeter of the proposed building will create dangers for pedestrians. (Exhibit 118, p. 28.)
 37. The existing alley system was not designed to handle the increase in pedestrian traffic created by the Project.
 38. There is no safe pedestrian connectivity through the site. Pedestrians using the alleys will walk in shared space that is designated by the Applicant to be used by cars and trucks. (Testimony of Mr. Glasgow and Mr. Andres, October 10, 2019 Transcript, p. 180.)
 39. The MAPS shopping center and the stores across Massachusetts Avenue will be desirable destinations for residents in the new building and in the surrounding neighborhood. Thus, the main pathways to these destinations will have significant interaction with vehicular traffic. (Exhibit 186A, slide 6; Exhibit 28A11, slide CL01.)
 40. Pedestrians from the main residential building and grocery store will have three main pathways to get to the shops in the MAPS shopping center and across Massachusetts Avenue. (Exhibit 186A, slide 6; Exhibit 28A11, slide CL01.)
 41. The safest but least convenient route is a long circuitous path along 48th Street to Massachusetts Avenue. (Exhibit 186A, slide 6; Exhibit 28A11, slide CL01.)

42. The other two routes are shorter than the long route but are fraught with traffic. One path turns left into the north-south alley, while the other continues on toward 49th Street and turns left at that location to enter the shopping center. (Exhibit 186A, slide 6; Exhibit 28A11, slide CL01.)
43. According to G/S, pedestrians will encounter 141 vehicles per hour entering and exiting the north-south alley from Yuma Street between the hours of 4 PM and 6 PM. (Exhibit 25A.)
44. During these peak traffic-volume hours, pedestrians will encounter 74 vehicles per hour entering and exiting the north-south alley at Massachusetts Avenue. (Exhibit 25A.)
45. The proposed HAWK light for pedestrians at the Massachusetts Avenue alleyway intersection would make walking through the north-south alley more attractive for pedestrians from the new residential building and grocery store as well as for residents and visitors in the neighborhood. (Testimony of Mr. Smith, October 10, 2019 Transcript, p. 107.)
46. With the addition of more pedestrians, the north-south alley is likely to become a conflict zone for pedestrians and vehicles. (Exhibit 118, p.28.)
47. The alleyways will become internal roadways, but will not have standard safety features such as raised sidewalks. (Exhibits 186A and 232A.)
48. As proposed by G/S, the pathway in the north-south alley is a delineated pedestrian pathway, not a raised sidewalk, and is considered "shared space" for vehicles along with pedestrians. It is three feet wide and directly abuts the four-story high wall at the rear of the proposed building. (Exhibit 25A) This type of sidewalk would not meet safety or ADA standards for a low volume street.
49. This pathway ends at the intersection of the north-south alley and the east-west alley, forcing pedestrians to walk amidst the cars and trucks in the alley leading to Massachusetts Avenue. (Exhibit 28A1, slide A02.)
50. The Applicant has proposed building a 6-foot wide sidewalk near the Massachusetts Avenue entrance to the north-south alley. This sidewalk can only extend to the point where mechanicals are located behind the MAPS shopping center. Pedestrians will be stranded in this alley amidst the cars and trucks that will use this formerly one-way alley and will be forced to walk amidst the cars and trucks in the alley leading to Massachusetts Avenue. (Exhibit 28A1, slide A02.)
51. The CTR states that pedestrian circulation around the Project site will be improved due to the elimination of two existing curb cuts along Yuma Street and 48th Street. (Exhibit 25A.)
52. The Applicant proposes three new curb cuts along the sidewalk or pathway in the east-west alley. This pedestrian pathway or sidewalk will be interrupted at three different locations for vehicle entrances: 1) one entrance is for the garages for the five proposed townhouses; 2) the next entrance is for the underground parking garage for the 214 apartment units and for the grocery store; and 3) the loading dock entrance

- for Building 1 is also located off this alley. A stretch of at least 75 feet in this two-way alley, used by cars, large trucks, and pedestrians will have no sidewalk. (Exhibit 28A8.)
53. The dramatic increase in traffic in the alleys will create dangers for pedestrians walking on the sidewalks at the alley entrances. (Exhibit 118, p.28.)
 54. The existing 5-6 feet wide sidewalks along Yuma Street and 48th Street are in good condition and contribute to making this neighborhood "very walkable." (Exhibit 25A.)
 55. In addition, in the fall of 2018, DDOT completed a project at nearby intersections that upgraded curb ramps and improved extensive lengths of these sidewalks. In its TDM, therefore, the Applicant is proposing to duplicate transportation improvements that have already been accomplished for the intersections surrounding the Project site. (Exhibit 25A.)
 56. The Applicant proposes to add mirrors and stop signs within the alley, and textured pavement where the alleys intersect. (Exhibit 25A.) These changes are insufficient to address the pedestrian safety issues and confirm that the alleys will have characteristics of city streets rather than alleys.
 57. There is an entrance to the retail space, which could very well be the grocery store, where the east-west alley intersects with the north-south alley. Customers will need to cross two alleys at this point. (Exhibit 28A1, slide A02.)

Parking Impacts

1. The owner of the SuperFresh lot is required under the Declaration of Easement and Agreement to make 236 parking spaces available to people using the AU Building. (Exhibit 25A.)
2. The Project is projected to have 375 parking spaces. (Exhibit 25A.)
3. The G/S CTR states that, "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 25B, CTR Technical Appendix, Parking Management Plan.)
4. The Applicant is reserving 86 of the parking spaces for use by customers of the grocery/retail. (Exhibit 25A.)
5. The Project may have up to 240 residential units.(Exhibit 151A.)
6. The Applicant's traffic consultant assumes that all but 56 of the parking spaces that it is obligated to provide for AU's use will instead be dedicated for residents and retail users of the Project. (Exhibit 25B.)
7. The Applicant has not provided an agreement with AU covering the allocation of parking spaces.

8. The G/S CTR (p.34) notes that the mode split for both residential and grocer/retail for this Project shows 90% for auto use; 5% transit use for residential (the Project site is one mile from Metro); and 0% for transit use for the grocer/retail. (Exhibit 25A.)
9. The Applicant proposes to restrict residents of the building from obtaining a Residential Parking Permit ("RPP"), with penalty of lease termination. (Exhibit 25A.)
10. It is unclear where the residents without on-site parking spaces will park their vehicles.

G. Other Adverse Impacts

1. The additional traffic generated by the Project will create noise and pollution, affecting the livability of the neighborhood. (Exhibit 118, p. 29.)
2. CRD has shown that the shadows created by the building will be much more extensive than the Applicant projects. (Exhibit 244, Attachment A.)
3. The street trees surrounding the building will not survive construction. The shadows cast by the building will prevent newly planted trees from growing to maturity. (Testimony of Curt Westergard; October 10, 2019 Transcript, p. 35.)
4. The Project will force the closure of long-standing D.C. businesses that employ more than 60 people. Wagshal's kitchens and catering business, and DeCarlo's Restaurant, as well as Pitmasters Barbeque are located in the SuperFresh building and will be forced to close. Further, if Wagshal's were to lose its kitchens, where 40 people work, the survival of the Wagshal's retail stores – the Delicatessen that has been located in the Spring Valley Shopping Center since 1939 and the Wagshal's Meat and Seafood Market - are in question. (Exhibit 118, p. 29.)

H. The Application Fails to Include Tangible and Meaningful Public Benefits and Project Amenities Sufficient to Balance the Development Incentives Requested

The Applicant has submitted a list of proposed public benefits and amenities . CRD has responded to the proffers. A summary of the proffers (Exhibit 245A) and CRD's responses (Exhibit 248) is set forth below:

Design and Materials

1. The Applicant claims that the building's design and materials "relate to the surrounding context," that is, the neighborhood of two-story houses. However, by placing the building on a sloping property and taking the Building Height Measuring Point from 48th Street N.W., the highest point of the lot, the Applicant has presented a building design that massively overshadows the surrounding grid of houses and shops. The building height ranges from 43 1/2 feet to 81 1/2 feet.

2. Applicant has offered no empirical evidence that would explain how such a large building, not separated by any buffers from the surrounding neighborhood, could fail to interfere with the air, light, and privacy currently enjoyed by nearby residents.
3. The Applicant claims that the design details such as courtyards, façade articulation, landscaping and “context-sensitive materials” are a public benefit or amenity, as opposed to an effort to mitigate the apparent effects of the project’s mass and scale.

Windom Park, Northwest Plaza, and private courtyards and terraces

1. Of three courtyards facing 48th Street, two are private below-ground-level areas providing light and air to below-ground apartments, and the third is designated as Windom Park. Windom Park, at approximately 1936 square feet, is not large enough to be an inviting public space and the Applicant has not developed landscape plans for this area. It has committed only to work with ANC3E regarding playable elements or to provide a reasonable justification for why they will not be provided.
2. Similarly, Northwest Plaza, the entry and exit area for the proposed grocery store, lacks firm landscaping plans. Construction of the project may well jeopardize the existing mature trees on city property at this location, and the Applicant has not offered either to maintain or replace trees on the south side of Yuma Street NW.
3. Other open spaces such as private landscaped courtyards and terraces would be located in the interior of the Project and would be accessible only by residents of the project, not open or visible to the surrounding community.

North-South and East-West Alleys (300.1(c))

1. The Applicant proposes to construct a three-foot wide pedestrian pathway on its own property in the north-south alley and a six-foot wide sidewalk in the east-west alley. Other changes to the alley system would include the conversion of the north-south alley to two-way traffic, the location of entrances to loading bays and underground parking along the east-west alley, and a loading management plan that directs retail truck deliveries to the alley system.
2. The Applicant’s proffer of public benefits includes a public easement for the above-mentioned pathway, the sidewalk, and in addition, a HAWK light at the Massachusetts Avenue entrance to the north-south alley and unspecified improvements at the intersection of the two alleys. Despite the anticipated increase in traffic, especially delivery truck traffic, the Applicant asserts that the foregoing alley proffers are public benefits and are not needed to mitigate any potential adverse impacts of the project.

Trash receptacles and alley width

1. The Applicant proposes as a public benefit to consolidate and enclose trash receptacles in the north-south alley. Since the trash would then occupy part of the current public space, the Applicant proposes to widen the alley. This would maintain the alley’s width at

twenty feet, as it is now. Trash management is necessary to maintain public health and safety.

Housing

1. The Applicant claims that the Project's location near shops and schools and its variety of building types are amenities. It further claims that it is adding a significant amount of housing and affordable housing to the Rock Creek West area. Its proffer of 12% of affordable housing is only 2% more than required under IZ rules and is conditional on being granted the flexibility to increase the number of units from 219 to 240.

Historic preservation

1. The Applicant claims that its utilization of density from the historic Massachusetts Avenue Parking Shops ("MAPS") will provide a public benefit by allowing the construction of more housing and a grocery store and by preventing future development of the MAPS site. The MAPS site is currently under no threat of demolition or in need of physical restoration. Nor is its historic designation in jeopardy. (Exhibit 187.) The Applicant is attempting to purchase 50,115 square feet of gross floor area from the MAPS owner in order to build a project larger than is allowed as a matter of right. The Historic Preservation Review Board has authority over MAPS and has not determined whether MAPS has any remaining density that could be transferred or that it would be permissible to do such a transfer.

Environmental and sustainable benefits

1. The Applicant's LEED proffer is to demonstrate that it is likely to achieve LEED Gold certification within two years.
2. The Applicant proposes to offer electric vehicle charging stations, electric outlets for electric bicycles, and interior locations for car-share vehicles, bicycle storage, and showers; however, some of these features have been eliminated in the last proffer. (Exhibit 245A.)

Transportation

1. The Applicant has offered to commit \$100,000 to provide transportation for apartment residents to the Tenleytown metro station. The means of providing said transportation are not settled but might include a contract with a ride-hailing service. The \$100,000 would likely be exhausted in about a year. The entrance on Yuma Street would be the preferred pick-up and drop-off locations for the ride-hailing services but Applicant has not specified how that might be enforced. Most of ride-hailing vehicles would use Yuma Street, since that is the direct route to and from Metro. Yuma Street consequently will see a significant increase in traffic.

2. Residents would be restricted from obtaining Residential Parking Permits (“RPP”), presumably to prevent residents from parking on nearby streets.
3. The Applicant would contribute \$15,000 toward a study of the possibility of opening the median on Massachusetts Avenue at the MAPS site and/or installation of a “pork chop” near Massachusetts Avenue. These changes would not be at the Applicant’s project site. It is not clear how they would be a public benefit or facilitate the projected increased flow of traffic through the alley system.
4. The Applicant offers to work with DDOT to establish an “alternative transportation block” on 48th Street to accommodate electric scooters, bikes, and car shares. This would be within DDOT’s purview.

Grocery store

1. The Applicant proposes to dedicate approximately 18,000 square feet to ground floor retail space. The Applicant previously proposed that 16,000 square feet would be devoted to a full-service grocery store, but in its latest filing the Applicant has reduced that amount to 13,000 square feet. To date, the Applicant has obtained a letter of intent, but has no binding commitment from a grocer to occupy that space. There are already a number of full-service grocery stores within a three-mile radius, as well as grocery delivery services.

Trees

1. The Applicant promises to plant trees in empty tree-box areas along the north side of Yuma Street between 48th and 49th Street, and along the east side of 48th Street between Yuma Street and Massachusetts Avenue. These are the opposite sides of the street from the Project. The Applicant does not acknowledge that the existing tree canopies on both sides of these streets may be damaged or destroyed during the construction, a situation that does not create a public benefit even if corrected.

I. Applicant’s Building Height Measurement Point (BHMP) Rests Upon a Substantial Road Embankment that Elevates the Curb Grade of 48th Street Above the Natural Elevation of the Building Site

1. The Applicant has located the Base Height Measuring Point (BHMP) of its proposed Ladybird building at the curb grade of 48th Street. (Exhibit 28A1.)
2. The Applicant has relied upon its BHMP to propose a building the main parapet of which would be 43 1/2’ high on the side facing 48th Street, rising to 67 1/2’ high at its rear along the North/South alley connecting Massachusetts Avenue and Yuma Street. The penthouse would add another 12’ to 15’ to the building’s height, resulting in a structure 55’ high facing 48th Street and 81 1/2’ high at its rear end. (Exhibit 28A6.)
3. The rise in the proposed building’s height toward its rear end is due to the steeply sloping site, which has a 26’ drop in elevation from the 48th Street curb grade down to the North/South alley. (Exhibit 28A6; Exhibit 118, page 33.)

CRD'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

4. Although the Applicant's building design includes setbacks on the upper floors of its building, these setbacks do not change the actual height of the building as shown in the Applicant's. (Exhibit 28A6.)
5. The contour maps in the record show that, prior to the construction of 48th Street, there was a continuous natural slope descending from above 47th Street down to where the aforesaid alley exists today. (Exhibit 229, at pages 9, 10.)
6. The photographs of the site submitted by CRD make a prima facie case that, when 48th Street was constructed prior to 1940, between Yuma Street and Warren Street, the roadbed for that section of the street was leveled across the natural slope by raising an embankment on the downhill side. Hence, the curb grade from which the Applicant has taken its height measurement rests upon an artificially elevated curb grade. (Exhibit 118, at pages 31 -32.)
7. CRD's photographic evidence further establishes that the aforesaid embankment is substantial, rising as much as half a contour level (approximately 5' to 10') and extends from the downhill curbside of 48th Street over approximately 30' of level ground to the retaining wall above the present parking lot. In addition, a ramp rises from the deck of that parking lot up to the level of the embankment, to permit vehicles to access 48th Street. (Exhibit 118, pages 31-32.)
8. The Applicant has submitted evidence to support its claim that the elevation of the downhill curb grade of 48th Street has not changed since 48th Street was constructed circa 1940. (Exhibit 229, at page 18.) CRD does not contest this claim.
9. However, the Applicant also contends that the elevation of the curb grade of 48th Street at its BHMP has not changed since before 48th Street was constructed. To support this additional claim, the Applicant has equated its present-day elevation figure of 262' above sea level to an "approximate" elevation reading extrapolated from a 1900 USGS topographic map, which the Applicant contends was also 262' above sea level. (Exhibit 229, at page 18.)
10. CRD has demonstrated that the accuracy of such elevation comparisons is subject to a significant margin of error and is therefore not reliable. As stated on the USGS official website (cited at Exhibit 118, page 33, footnote 40):

"The inherent accuracy limitations for USGS topo maps is typically about +/- half a contour interval although it can be worse than this in steep or heavily vegetated areas. This is much better than delivered by most GPS handhelds, in which elevations can err by several tens of meters."
11. In sum, the Applicant has failed to explain how the roadbed for 48th Street could have been leveled across the slope in some manner other than the raising of an embankment on the downhill side. Nor has the Applicant submitted any soil sample or other evidence that would conclusively settle the question of whether 48th Street rests upon an artificial embankment as indicated by CRD's photographic evidence. Hence, all the evidence available to the Commission shows that the curb grade of 48th Street was elevated above the natural slope by the construction of the embankment shown in CRD's photographs, at the time the 48th Street roadbed was first constructed prior to the 1940's. (Exhibit 118, pages 31 - 33.)

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

1. The Parties are in agreement that a Declaration of Easement and Agreement dated as of December 20, 1978 (the "Easement") and recorded in the District's land records governs certain matters concerning Lots 806 and 807 and remains in effect. (Exhibit 2, p.8.)
2. For zoning purposes, Lots 806 and 807 are combined to form Record Lot 9. (Attachment B to Exhibit 238, p.1.)
3. 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. (Attachment B to Exhibit 238, p.1.)
4. 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). (Attachment B to Exhibit 238, p. 3.)
5. 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. (Attachment B to Exhibit 238.)
6. 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. (Exhibit 238, p.3.)
7. This is consistent with sensible land use principles, as encouraged by the Comprehensive Plan, which calls for the establishment of gradual transitions between large-scale buildings like the AU Building and smaller buildings like single family homes. (Comp. Plan Urban Design Element, policy UD-2.2.4.)
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.**" (Attachment B to Exhibit 238, p. 3.)
9. Construction on Record Lot 9, including the SuperFresh parcel of Lot 9, is therefore capped by the Easement. (Exhibit 238, p.4.)
10. 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." (*American University Park Citizens Association v. Burka*, D.C. Court of Appeals, March 20, 1979 (400 A. 2d 737, 746)).

K. The Valor Project Continues to Fail to Meet Inclusionary Zoning Requirements

1. Valor Development previously circumvented a higher Inclusionary Zoning requirement by sinking the building 6 feet into the ground. That approach has been carried over to the PUD Application. (Exhibit 118, p. 43.)
2. At the time the PUD Application was filed, the Zoning Regulations required inclusionary zoning set-aside for a development like the Project that does not employ Type I construction is “the greater of ten percent (10%) of the gross floor area dedicated to residential use including penthouse habitable space as described in Subtitle C, Section 1001.2(d), or seventy-five percent (75%) of its achievable bonus density to inclusionary units plus an area equal to ten percent (10%) of the penthouse habitable space as described in Subtitle C, Section 1001.2(d).” (Subtitle C, Section 1003.1.)
3. Based on the Project’s “achievable bonus density,” the Project fails to comply with the District’s Inclusionary Zoning requirements. (Exhibit 247, pp. 12-13.)
4. Even under the amended regulation, the Applicant fails to meet the Inclusionary Zoning requirement because the residential cellar space and projects are not included in “bonus density.”
5. Even under the Applicant’s interpretation of the IZ rules, the Applicant is only providing 2 percent more affordable housing than minimally required. Further, only 4 of the units are at 50% MFI. (Exhibit 230A.)
6. The Department of Housing and Community Development has recommended that the Applicant devote 15 percent of the space to affordable housing, with half at 50 percent MFI. (Exhibit 53, p. 23.)

L. Historic Preservation Implications

The Inclusion of the MAPS Historic Landmark in the Project Presents Historic Preservation Issues that Must Be Addressed by the Historic Preservation Review Board

1. The Spring Valley Shopping Center, built in 1936 and formally known as the Massachusetts Avenue Parking Shops (herein “MAPS”), is designated as an historic landmark. It is listed in the DC Inventory of Historic Sites and was listed in the National Register of Historic Places in 2003.
2. The site plan for MAPS includes both the buildings and the parking area in front of them. Both are improvements on the MAPS lot and are defining characteristics of the MAPS historic landmark. (National Registry of Historic Places nominating form for MAPS.)
3. In 2016, the Historic Preservation Review Board (HPRB) had to consider whether the parking lot in the landmarked development on the other side of Massachusetts

Avenue on Lot 1500 could be developed. In concluding that the proposed development on Lot 1500 could proceed, the Historic Preservation Office (HPO) staff report distinguished Lot 1500 from MAPS based on the significance of the parking area in front of MAPS:

“While the two Spring Valley shopping complexes have similarities, they also have notable differences in their organizational qualities and historical development patterns that are relevant to evaluating the proposal. The Massachusetts Avenue Parking Shops was developed and presents itself as a single, self-evidently composed structure. The building is set back from the building line with parking provided in front that is accessed directly from Massachusetts Avenue. The coordinated quality of its design, the clarity of its plan, and the siting of the parking in front of and accessed from the avenue make it obvious why it became a national model for an automobile-oriented commercial complex. That model has become so ubiquitous and universal that it is difficult to fully appreciate that it was once novel and innovative.”

(DC Historic Preservation Office Staff Report for 4820-4874 Massachusetts Avenue and 4301 49th Street, NW; H.P.A. Number: 15-252 (April 2015).)

4. The Project proposed by the Applicant includes a transfer of 50,115 GFA from the MAPS landmark. (Exhibit 28A1, slides G05 and G07; Exhibit 229, slide 2.) The sole reason for including MAPS in this PUD is to strip it of whatever density it may possess to allow the Applicant to build an oversized project that it otherwise would not have been allowed to construct.
5. The Applicant relies on the Zoning Commission (ZC) Orders 81 and 101¹ and the District of Columbia Court of Appeals decision² in the Heurich Mansion case upholding ZC Order No. 101 as the sole precedent to support its claim that the density transfer from MAPS will aid in preserving it. (Exhibit 246, pp. 6-7.)
6. The Heurich case does not support the sale of MAPS' density because fundamental changes in the regulatory framework governing historic landmarks have occurred since the time of the decisions regarding the Heurich PUD in the 1970's. The Historic Preservation Review Board (HPRB) was not created until 1983 pursuant to D.C. Code §6-1103, and thus did not even exist at the time of the Heurich PUD.
7. At the time of the Heurich case, the Zoning Commission was only one of several bodies which, when combined, could approve a density transfer from Heurich in order to save it. ZC Order 81 shows that the decision also recognized the recommendations and approvals of other bodies tasked at that time with the oversight of zoning, planning, and landmarks. The Zoning Advisory Council, National Capitol Planning Commission, and the Joint Committee on Landmarks of the National

¹ The DC Court of Appeals ruling was on consolidated appeals from two orders of the Zoning Commission based upon a preliminary 1974 order (Order 81) and a final application for approval of a Planned Unit Development (Order 101).

² See *Dupont Circle Citizens Association v. District of Columbia Zoning*, 355 A.2d 550 (D.C. 1976).

- Capitol all had direct input on the use of Heurich's density. (Exhibit 244, Attachment B.)
8. Today, the Historic Preservation Review Board (HPRB) and the Mayor's Agent for Historic Preservation have authority to make decisions about MAPS and its density.
 9. In the Heurich case, the amount of density that could be transferred was determined by the amount *that could have been developed by the owner*. Order No. 81 states:
"The Columbia Historical Society property currently contains 15,695 square feet of gross floor area...in the Heurich Mansion and Carriage House. Under the present SP zoning a total of 95,590 square *feet could be developed by the Society*. If the requested zone change to C-3-B is granted, a total of 121,660 square feet could be developed by the Society. The property owned by the Society would thus have an unused development potential of approximately 108,874 square feet." (Exhibit 244.)
 10. The HPRB has made no determination that there is any "unused density" on the MAPS site that *could be developed by its owner*, Regency Centers.
 11. At the time of the Heurich case, the inclusion of preservation conditions in a zoning order was the only way to legally ensure that the buildings would not be razed and thus to enforce any degree of preservation. The Commission's orders in Heurich included specific conditions to ensure the preservation conditions that had to be met for approval of the density transfer from Heurich. These conditions were included in the report of the National Capital Planning Commission and entered as an exhibit into the record for public hearing and attached to Order 81 itself. (Proposed Conditions Relating to Preservation of Christian Heurich Memorial Mansion, Carriage House and Grounds. Zoning Commission Case No. 71-30. National Capital Planning Commission. NCPC File No. 0932.) (Exhibit 244, Attachment B.)
 12. Unlike the Heurich Mansion, the MAPS landmark is not facing the possibility of demolition. The Historic Preservation Office report states that it "has been successfully maintained in good condition" and "devoid of elaborate architectural detail that might require expensive upkeep or overhaul, so there is little reason to anticipate extraordinary rehabilitation costs." (Exhibit 187.)
 13. The Applicant has provided only a vague statement from Regency Centers, the Texas-based owner of MAPS and co-applicant with Valor, stating that: "the Project will greatly assist [Regency] in maintaining the historic integrity and long-term viability of the [MAPS]." (Exhibit 227.)
 14. The MAPS will not benefit directly or indirectly by this Project. Depriving MAPS of any density rights it may possess may impair its ability to preserve itself in the future should it become derelict due to fire, natural disaster, or neglect.

CONCLUSIONS OF LAW

A. Contrary to Section 304.4(a) of the PUD regulations, the Project is Inconsistent with the Comprehensive Plan

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.³ 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.⁴

The Project fails to meet these fundamental requirements because, 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. 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,⁵ 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-foot wide) rather than a major thoroughfare. The nearby commercial area consists primarily of 1 – 3 story buildings. The Applicant has failed to provide adequate buffers to shield the neighborhood from the massiveness of the Project.

While the Applicant suggests that the Project incorporates design features that relate the building to the surroundings, the alleged setbacks and façade articulation fail to mask the scale of the Project within its setting. Further, as the D.C. Court of Appeals held in *Durant*, visual impact abatements have no bearing on whether a proposed project 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.⁶

As was the case in *Durant*, the Commission cannot reconcile the scale of the Project with the surrounding single-family homes. As plainly stated in *Durant*, a six-story apartment building should be characterized as a mid-rise (4-7 story) medium density, apartment building, not moderate density. *Durant at 883*. The same analysis applies here.

In July, 2019, the D.C. Court of Appeals (referencing 10-A DCMR §300.1) stated in *Friends of McMillan Park* that the Land Use Element “is the ‘cornerstone of the Comprehensive Plan’ and ‘should be given greater weight than other elements as competing policies in different elements are balanced.’ ”⁷ The Applicant proposes to increase housing, but ignores protection of

³ See, for example, Comprehensive Plan Policy LU-1.4.1; UD-2.2; RCW p. 23.2; and RCW-1.1.1.

⁴ Comprehensive Plan, Policy RCW-1.1.4:

⁵ Valor's Rebuttal Submission, Exhibit 229, slide2.

⁶ *Durant v. Dist. Of Columbia Zoning Comm'n*, 139 A.3d 880, 884 (D.C. Court of Appeals, 2016) (“*Durant III*”). Unlike in *Durant*, at ground level substantial parts of the proposed apartment building rest on the property line. By definition, the projections extend over the property line.

⁷ *Friends of McMillan Park v. District of Columbia Zoning Commission*, slip opinion, p. 14 (DC Court of Appeals, 2019)

neighborhood character. Both goals are achievable through a meaningful compromise that would provide needed housing in a lower building that is more in harmony with the neighborhood.

B. Contrary to Section 304.4(a) of the PUD regulations, the Project is Inconsistent with the Comprehensive Plan's Future Land Use Map

The Project is 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 (Lot 807), Lots 802, and 803 (the MAPS site), and the commercial area across Massachusetts. Simply put, the Project is neither "low-density" nor commercial.

The Applicant 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 very existence of the AU 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 that is just as tall as the AU 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. The Cathedral Commons PUD is not precedent for the Valor PUD Project. The Cathedral Commons PUD consists of two parcels, a 2 and 3 story South Parcel with a land area of 137,096 SF and a 5-story North Parcel with a land area of 41,140 SF. Thus, 77 percent of the entire Cathedral Commons PUD consists of buildings three stories or less.⁸ In the case of the Valor PUD, more than three-quarters of the PUD site will be considerably higher than one to three stories, a result not contemplated by the FLUM's low-density designation.

C. Contrary to Section 304.4(b) of the PUD Regulations, the Project Will Result in Unacceptable Adverse Impacts on the Surrounding Area

1. Rising to 81.5 feet, the Project is both out of scale and out of context with the surrounding two-story residential and low-density commercial neighborhood.
2. The Project will cause congestion on neighboring streets.
3. Ride hailing cars will need to be in the area waiting for rides, creating even more traffic and air and noise pollution.
4. The Project will cause the alleys around the proposed building to become congested.
5. Trucks using the N/S alley for deliveries to the MAPS will block traffic for extended periods.
6. Trucks using the E/W alley for deliveries to the proposed building will access the alley system by way of 48th Street or Massachusetts Avenue entrances. Larger trucks will need

⁸ See *Wisconsin-Newark Neighborhood Coalition v. D.C. Zoning Commission*, 33A.3d 382 (DC Court of Appeals, 2011).

to use 48th Street, as they will not be able to make the turn onto the E/W alley. It is questionable whether large trucks will even be able to navigate the E/W alley to access the loading docks, as CRD has shown that even a 30-foot truck can get stuck at the bend in the alley.

7. A 50 foot wheel base truck operating in the confined areas will encroach on the sidewalk/curb-cuts because of the off-tracking of the trailer. The CTR shows that extra back/forth maneuvers will be needed to back in/out of the truck bays and while negotiating tight corners for inbound as well as the outbound maneuvers. Further, parking is permitted on 48th Street and the trucks will have trouble in making the inbound movement and may require a back and forth to complete the inbound movement. Inbound trucks will also encroach on the southbound 48th Street turn lane. This means that if vehicles are occupying this lane, the inbound truck will stop traffic on Massachusetts Avenue at 48th Street. Inbound trucks traveling on Massachusetts from Maryland will need to make the left turn at 48th Street from the right lane, blocking all through traffic on Massachusetts Avenue.
8. Even temporary blockages in either alley will prevent residents and customers of the grocery from entering and leaving the Project's garage levels.
9. Pedestrians and bicyclists using the alleys will face unsafe conditions. The 3-foot wide shared space pathway along the N/S alley is particularly dangerous.
10. There needs to be more clarity on the number of parking spaces to be made available to residents, particularly given the vagueness of the Parking Management Plan prepared by Gorove/Slade, which states that: "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 parking demand of each user group is met, and impact to on-street parking is minimized."⁹ Further, since a number of renters will have more than one car, standard for the neighborhood, where will the renters park their cars?
11. The Project will cast significant shadows on neighboring homes. The shadows are more extensive than shown by the Applicant's shadow study.¹⁰
12. Existing trees will not survive construction.¹¹ Large existing trees and bushes will be lost. The lack of sunlight caused by the excessive building height will alter the ability of deciduous street trees to grow.¹²
13. The Applicant proposes minimal green space to be added around the project site.
14. The unrealistic depiction of height and location and maturity of vegetation distorts the true mass and scale of the building.¹³
15. The plans call for a terrace on the main apartment building along Yuma Street, situated on the top of the fourth floor (i.e. higher than the 2-story homes the terrace overlooks),

⁹ Exhibit 50

¹⁰ Exhibit 244, Attachment A.

¹¹ Testimony of Curt Westergard (October 10, 2019 Transcript, p. 35).

¹² DDIS Visual Impact Study (Exhibit 217, slide 10).

¹³ Testimony of Curt Westergard (October 10, 2019 Transcript, p. 37).

creating privacy concerns for the residents of Yuma Street and Alton Street directly across the street.

16. Emissions coming from all the additional cars, trucks, delivery vehicles, and ride services raise air quality and pollution concerns. By offering to pay for access to Metro via a ride hailing service, car trips are encouraged. Vehicle emissions will increase.

D. Contrary to Sections 304.4(c) and 305.3 of the PUD Regulations, the Application Fails to Include Tangible and Meaningful Public Benefits and Project Amenities Sufficient to Balance the Development Incentives Requested.

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 “measurable,” and are balanced against the development incentives requested and potential adverse effects. See 11-X DCMR §304.3. The adverse effects are discussed in the previous section. Elements or items required as mitigation to potential adverse impacts of the PUD shall not also be considered as benefits. See 11-X DCMR §305.9. The development incentives requested include the 50,115 SF of GFA that the Applicant is requesting above what is available as a matter-of-right on Lot 807. Were it not for the PUD Application, the Applicant could not propose to build a building of the size and density proposed.

As CRD has explained in Exhibits 239 and 248, the claimed benefits are at best minimal. In fact, the Applicant has reduced the benefits over just the last month. The reasons are set forth below. The Project therefore fails to meet the PUD requirements.

Design and materials

It is not possible to quantify the benefits of the design, and its quality is a matter of subjective opinion. As explained above, in *Durant* the D.C. Court of Appeals found that “architectural features that would diminish the proposed building’s visual impact” would have no bearing on whether the building was of medium or moderate density. The Applicant claims to be offering façade articulations, courtyards, landscaping, high-quality “context-sensitive” building materials and upper-level setbacks to relate the building’s height and mass to the nearby residences. In doing so, it admits that the height and mass are of a scale that warrants such features, which are intended to obscure its true size and thus to mitigate its adverse impact upon the surrounding neighborhood. There is no measurable public benefit in a design that plainly reflects the Applicant’s intent to construct a building that takes unfair advantage of a sloping site and is a significantly larger building than can be built as matter-of-right. Following *Durant*, these design features should not count as a benefit.

Further, 11-X DCMR §305.10 describes an amenity as a feature that “adds to the attractiveness, convenience or comfort of the project for occupants and immediate neighbors.” The evidence and testimony reveal that the immediate neighbors are solidly opposed to the Project.

Windom Park, Northwest Plaza, and private courtyards and terraces

Windom Park and Northwest Plaza are the only two areas of the Project that are open to the general public. Windom Park is relatively small, and Northwest Plaza is the entry and exit area of the proposed grocery store. These areas may be furnished with elements conducive to use by the community but that is uncertain, and the Applicant has retained the option of not providing such elements. The Applicant has committed only to work with ANC3E to consider options for playable elements in these two spaces.

The public benefit here is minimal. The uncertainty that these benefits will be provided leads to the conclusion that they are not measurable or sufficiently meaningful to justify the flexibility that the Applicant has requested.

The alley system

By changing the alley system to accommodate two-way traffic, plus pedestrians, deliveries, and possibly parking, the Applicant would create a situation that presents considerable traffic and safety issues. The Applicant's proffers of a HAWK light, a three-foot pedestrian path, and unspecified alleged safety improvements to the alley intersection are no more than an effort to mitigate the anticipated adverse effects of this design. The alley plan fails to advance public safety, as required by Section 11-X DCMR §300.1. The Applicant asserts that its proffers are not "necessary or required," and thus are not disqualified as public benefits according to 11-X DCMR §305.9. However, that rule does not limit the definition of "measures in mitigation" to just those required by DDOT or other specific rule provisions. A measure in mitigation of any adverse effect is clearly "required" if that adverse effect is created by the Applicant's own project in the first place. The record is replete with reasons why additional safety measures are required for this project. Moreover, it is doubtful whether the safety issues are capable of being mitigated given the volume of cars, trucks, and pedestrians in the alleys.

Housing

The Applicant's offer to provide 12% of GFA as affordable housing would add a small amount to the affordable housing available in the Rock Creek West Area, but only in return for the flexibility to add even more units to a project that is already too dense. In any case, the amount of affordable housing is less than the 15% that is recommended by the D.C. Department of Housing and Community Development. Given that all housing, however designed and constructed and placed in any setting within the city, may be seen as a public good as a matter of urban planning and policy, the zoning regulations do require that each application be considered on its own merits. The record is clear that the community is not opposed to multi-family housing on the SuperFresh site. But in this case, the amount of additional housing, including affordable housing, is inadequate to qualify as a public benefit given the adverse effects of the project as a whole on the surrounding area.

Historic preservation

Under 11-X DCMR § 305.5, the Applicant is required to show that the Project provides *tangible, measurable, and quantifiable preservation benefits* to the historic landmark. However, Valor has not met this burden. The Applicant has failed to demonstrate that the density transfer is warranted and consistent with any applicable precedent, or that it somehow results in tangible, measurable, or quantifiable benefits to the historic landmark under 11-X DCMR § 305.5. Its value is primarily to the owner of the MAPS and to the Applicant. The MAPS is not threatened with demolition or with having its historic designation revoked, and so the community is not in danger of losing a convenient retail fixture. Funds from the density sale are not being set aside to restore the landmark in the future. The MAPS density is simply being used to build a structure that is larger than matter-of-right.

Transportation

The Applicant's offers to provide a time-limited mode of transport to the Tenleytown Metro, restrict parking, and designate pick-up and drop-off locations are efforts to mitigate the effects of the building's density and location a mile from the Metro. No explanation is provided on how residents will get to Metro once the \$100,000 is exhausted, which will occur in about a year. Further, a contract with a ride hailing service will contribute to increased emissions and traffic (particularly on Yuma Street, the direct route to Metro). Other items listed as benefits or amenities are within the purview of the Department of Transportation (DDOT), and do not qualify as benefits provided by the Applicant.

Grocery store

The proffer of a grocery store is still uncertain, and its size has shrunk. The Applicant has designated the grocery store as a use of special value under Section 305.5(q), rather than under Section 305.5(j) because it would be less than 15,000 square feet and there are other full-service grocery stores within a three-mile radius. The Applicant has not justified the grocery store as "special."

Trees

The replacement of trees constitutes mitigation of harm caused by the building's construction. It does not qualify as a public benefit.

Conclusion

The Applicant's proffered benefits and amenities are inadequate and do not justify approval of the PUD.

E. The Application Overall Does Not Meet the PUD Standards

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.

The Applicant has failed to meet its burden of proof to show that each of these individual requirements is met. Thus, the Application as a whole fails to meet the PUD requirements and should be denied under governing law, including 11-X DCMR §2403.8 and *Friends of McMillan Park*.¹⁴

F. The Zoning Regulations Prohibit Valor from Taking Its Maximum Height Measurement at the 48th Street Curbside.

1. 28 DCMR 11 B §307.7, prohibits the placement of a building's Base Height Measurement Point (BHMP) at a curb grade which has been changed from the natural elevation by any type of bridge, viaduct, embankment, ramp, abutment etc. "...or any other type of artificial elevation or depression."
2. 8 DCMR 11 B §307.7 is a rule of general applicability. The Zoning Commission is therefore bound to apply the rule, as it must any other rule of general applicability, in all cases to which the rule is relevant. See *Macauley v. D. C. Taxicab Commission*, 623 A. 2d 1207, 1209 (D.C. 1993) ("It is a basic tenet of administrative law that an administrative agency is bound to follow its own rules and regulations.") Accordingly, 28 DCMR §307.7 cannot be limited to the particular situation which gave rise to its adoption by the Commission, and must be applied to the case at hand in accordance with its terms.
3. CRD has established, through contour maps of the site and photographic evidence, a prima facie case that the 48th Street curbside where the Applicant has placed its BHMP rests upon a substantial artificial downhill-side embankment, which was clearly necessary to make a level roadbed for 48th Street when it was first constructed across the steep slope above the present building site.
4. As the moving party in this proceeding, the Applicant has the burden of proving its contentions concerning the compliance of its BHMP with applicable regulations. See *Kea v. Police & Firemen's Ret. & Relief Bd.*, 429 A. 2d 174 (D.C. 1981), holding that it is a fundamental principle of administrative and case law that the "...burden of proof is on the proponent of the rule or order." 429 A.2d at 175. The Applicant failed to meet its burden of proof in this respect. In particular, the Applicant has not refuted CRD's evidence that its BHMP rests upon an artificial embankment in contravention of Subtitle B §307.7 of the Zoning Regulations. The Applicant has resisted repeated invitations from CRD to submit soil samples that would settle the question of whether such an artificial embankment exists or not. This was the Applicant's case to make, not the parties in opposition.
5. Instead, the Applicant has contended that the present elevation above sea level of the 48th Street curb grade has remained exactly the same as that shown on the old contour maps of the undeveloped site before the construction of 48th Street (i.e., 262' above sea level). However, CRD has conclusively shown that such a precise degree of measurement is

¹⁴ *Friends of McMillan Park v. District of Columbia Zoning Commission*, slip opinion, p. 6 (DC Court of Appeals, 2019)

impossible, according to the U.S. Geological Survey, given the wide margins of error applicable to readings from any type of contour map as well as to readings from GPS measurement devices. Valor has submitted no refutation on this point, and the Zoning Commission must defer to the expertise of the USGS in this matter.

6. The Applicant's contentions of fact are therefore insufficient to refute CRD's prima facie showing that the 48th Street curb grade rests upon an artificial embankment.
7. The Applicant has also urged upon the Commission an interpretation of §307.7 that would limit its applicability to situations where the elevation of the curb grade occurs only after construction of the street. In accordance with this interpretation, the Applicant has submitted that the curb grade of 48th Street has not been changed since 48th Street was first constructed around 1940. This interpretation is erroneous because no such restrictive limitation is contained in the text of the regulation. The Applicant's interpretation would be inconsistent with the remedy provided in §307.7 (d), by which the Zoning Administrator must determine, in a case where the curb grade has been changed, a new BHMP where there has been no "...discontinuation of the natural elevation." If the Commission's intention had been as the Applicant contends, §307.7 (d) would necessarily have been drafted to require the Zoning Administrator to determine a new BHMP where there has been no "... discontinuation of the original curb grade level." But that is not the language of the rule as presently drafted.
8. Moreover, the Applicant's proposed limitation would mean that §307.7 would never be applicable, given that any street that has been so reconstructed as to have a higher curb grade (and consequently a higher roadbed and surface) would likely be considered a new street with a new curb grade.
9. The Applicant has also relied upon the definition of "natural grade" in §100.2 as limiting the applicability of §307.7 to elevations of the natural grade occurring within the past two years. This interpretation is erroneous because the defined term "natural grade" does not appear in §307.7, and also because §100.2 contains a specific exception for the case of features such as a "berm," a term that would include an embankment holding a roadway, such as the embankment shown in the present case. A consistent interpretation of both rules requires the conclusion that no type of artificial embankment or berm can be treated as if it constituted the "natural grade" in any situation covered by the above rules.
10. Accordingly, the Zoning Regulations, at §307.7, do not permit the Applicant to locate its Building Height Measurement Point (BHMP) at the curb grade of 48th Street because that curb grade was elevated above the natural grade of the hillside by an artificial embankment at the time 48th Street was constructed prior to 1940. In consequence, §307.7(c) applies, and requires the Applicant to locate its BHMP at the middle of the building's front facing Yuma Street, where there has been no discontinuation of the natural elevation of the building site.

G. The Project Violates the Terms of the Recorded Declaration of Easement and Agreement

The recorded Declaration of Easement and Agreement dated as of December 20, 1978 (the "Easement") governs certain matters concerning Lots 806 and 807 and remains in effect.

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. The proposed density transfer from the MAPS to the Lot 807 (the SuperFresh Lot) is inconsistent with, and in fact violates, the framework set forth in the Easement.

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).

The Declaration of Easement and Agreement 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 Lot 807, and American University as owners of Lot 806), and any 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.

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. Further, 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.

H. The Project Does Not Include the Required Inclusionary Zoning Set-Aside

Under Subtitle C, Section 1003.1 of Title X of the DCMR, in effect at the time the Application was filed, an Inclusionary Development is required to set aside "the greater of ten percent (10%) of the gross floor area dedicated to residential use including penthouse habitable space as described in Subtitle C, §1001.2(d), or seventy-five percent (75%) of its achievable bonus density to inclusionary units plus an area equal to ten percent (10%) of the penthouse habitable space as described in Subtitle C, §1001.2(d)." Achievable bonus density is defined in Section 1001.1: "Achievable bonus density is the amount of the permitted bonus density that potentially may be utilized within a particular inclusionary development provided in Subtitle C §1002." Applying this requirement to the Project, the Project fails to provide the necessary amount of affordable housing to qualify for the Inclusionary Zoning bonus.

CRD recognizes that the Commission has adopted a text amendment lessening the IZ requirement, apparently effective October 18, 2019. [ZC 04-33i.] However, the rule in effect when the Application was filed should govern.

Even if the Commission determines that ZC 04-33i applies to the Project, the affordable housing included in this Project does not meet the inclusionary zoning requirement because the Applicant does not include the residential cellar space and projections in the calculation of bonus density, as required by Section 1003.9. The Applicant has asserted that Section 1003.9 does not apply to the calculation of bonus density, but only to the calculation of residential floor area. However, Section 1003.9 clearly states that it applies to the minimum set aside requirements of Sections 1003.1 and 1003.2. [Emphasis on the plural "requirements" added.] There is no basis for applying Section 1003.9 to only one of the two tests set forth in Section 1003.1. The residential cellar space and projections should be counted in computing "bonus density." The Applicant's affordable housing set-aside falls short under this approach also.

I. The Applicant Should Be Ordered to Submit Critical Agreements Needed for the Zoning Commission to Assess the Project

Despite CRD's requests, the Applicant has failed to provide CRD or the Commission with its agreements with American University, the owner (Regency) of the MAPS, and the prospective grocery store. These agreements are needed to adequately assess the legality and impact of the Project. The agreements with AU and the MAPS owner presumably cover the transfers of density between the lots. The agreement(s) with AU presumably also address the parking easement AU currently retains, which will directly affect the adequacy of parking for residents of the apartment building. The duration of that agreement is critical, as is any agreement on use of the private alley owned by AU for access to the parking garage and loading docks. Since the Applicant says it will ensure that truck deliveries to the MAPS are made using the N/S alley rather than by parking the trucks on Yuma Street, the agreement with the MAPS owner is needed to determine the enforceability of the commitment. Further, due to the historic designation of the MAPS, the agreement should be reviewed to determine potential impacts on the historic site and any related covenants, including any commitment to maintain the historic site. Further, since the Applicant is offering the prospect of a grocery store as an amenity, the agreement(s) with the grocer should be made public. The Applicant should be ordered to submit these agreements, or at least the pertinent parts thereof, to the Commission and the other parties.

J. The Historic Preservation Review Board Has Authority Over the Historic Landmark Status and Density of MAPS

The MAPS Historic Landmark Includes Both the Buildings and the Parking Area

1. The Spring Valley Shopping Center, built in 1936 and formally known as the Massachusetts Avenue Parking Shops (herein "MAPS"), is designated as an historic landmark. It is listed in the DC Inventory of Historic Sites and was listed in the National Register of Historic Places in 2003.

2. The site plan for MAPS includes both the buildings and the parking area in front of them. Both are improvements on the MAPS lot and are defining characteristics of the MAPS historic landmark. As set forth in the National Register of Historic Places nomination form that provided the MAPS site with historic landmark status:

The Massachusetts Avenue Parking Shops qualifies for listing in the National Register under Criteria A and C for the following reasons:

The building type represented by the Massachusetts Avenue Parking Shops responded to the need to provide *planned* shopping facilities for residential areas that increasingly were dispersed beyond the central core. Shaped by the automobile, these shopping centers were uniquely American. The Massachusetts Avenue Parking Shops survives as an early example of the type, ***with off-street parking provided by a forecourt***. The Massachusetts Avenue Parking Shops was cited in national planning publications as a model and appears to have influenced subsequent projects elsewhere in the nation. In addition, the building provides an example of the Colonial Revival style adapted to a small commercial enterprise. [Emphasis added]

3. The MAPS landmark is not only the building itself, but a site with a formally recognized site plan and site boundaries. In 2016, the Historic Preservation Review Board (HPRB) had to consider whether the parking lot in the landmarked development on the other side of Massachusetts Avenue on Lot 1500 could be developed. In concluding that the proposed development on Lot 1500 could proceed, the Historic Preservation Office (HPO) staff report distinguished Lot 1500 from MAPS based on the significance of the parking area in front of MAPS:

While the two Spring Valley shopping complexes have similarities, they also have notable differences in their organizational qualities and historical development patterns that are relevant to evaluating the proposal. The Massachusetts Avenue Parking Shops was developed and presents itself as ***a single, self-evidently composed structure. The building is set back from the building line with parking provided in front*** that is accessed directly from Massachusetts Avenue. The coordinated quality of its design, the clarity of its plan, and the siting of the parking in front of and accessed from the avenue make it obvious why it became a national model for an automobile-oriented commercial complex. That model has become so ubiquitous and universal that it is difficult to fully appreciate that it was once novel and innovative.¹⁵ [Emphasis added]

4. The foregoing prior determinations show that the parking area is a recognized improvement on the lot and a contributing feature of the MAPS landmark site. Both the buildings and the parking area are part of the site plan that gave rise to its landmark status. In its October 31, 2019 submission (Exhibit 246) at page 6, the Applicant incorrectly claims that only exterior appearance of and interior spaces of buildings can qualify as the defining features of

¹⁵ DC Historic Preservation Office Staff Report for 4820-4874 Massachusetts Avenue and 4301 49th Street, NW. H.P.A. Number: 15-252. April 2015.

landmarks, and that the sale of MAPS' density cannot therefore constitute an "alteration." The Applicant ignores the prior legal determinations that the parking area is also an improvement and a defining feature of the MAPS landmark and that both the buildings and the parking area constitute the landmark site. (Exhibit 246, pp. 6-7.)

The Heurich Case Does Not Support the Sale of MAPS' Density to the Project

1. The Applicant relies on the Zoning Commission (ZC) Orders 81 and 101¹⁶ and the District of Columbia Court of Appeals decision¹⁷ in the Heurich Mansion case upholding ZC Order No. 101 as the sole precedent to support its claim that the density transfer from MAPS will aid in preserving it. (Exhibit 246, pp. 6-7.) The Applicant has misrepresented the decisions in the Heurich case by failing to address the historical context of Order No. 101.
2. ***First, regarding the Zoning Commission's authority over landmarks,*** the Applicant incorrectly cites the Heurich decisions as establishing that:
... it is clear that the Commission not only has purview over the allocation of density on properties, but that its purview is an effective means of preserving historic landmarks.
3. The Applicant's statement ignores fundamental changes in the regulatory framework governing historic landmarks since the time of the decisions regarding the Heurich PUD in the 1970's. The Historic Preservation Review Board (HPRB) was not created until 1983 pursuant to D.C. Code §6-1103 and thus did not even exist at the time of the Heurich PUD.
4. At the time of the Heurich case, the Zoning Commission was only one of several bodies which, when combined, could approve a density transfer from Heurich in order to save it. ZC Order 81 shows that the decision also recognized the recommendations and approvals of other bodies tasked with the oversight of zoning, planning, and landmarks. The Zoning Advisory Council, National Capitol Planning Commission, and the Joint Committee on Landmarks of the National Capitol all had direct input on the use of Heurich's density. (Exhibit 244, Attachment B.) Nowhere has the Applicant acknowledged the significant roles played by these other bodies in deciding the fate of the Heurich Mansion.
5. In 1971, when the Heurich PUD was initially proposed (ZC Case No. 71-30), resulting in ZC Order No. 81, the Heurich Mansion was a Category II landmark listed on the National Register of Historic Places. This status provided it with no protections beyond it being recognized as an important historic resource.
6. Also, at the time of the Heurich case, the inclusion of preservation conditions in a zoning order was the only way to legally ensure that the buildings would not be razed and thus to enforce any degree of preservation. This is no longer the case due to the existence of the Historic Preservation Review Board (HPRB) and the Mayor's Agent for Historic Preservation.

¹⁶ The DC Court of Appeals ruling was on consolidated appeals from two orders of the Zoning Commission based upon a preliminary 1974 order (Order 81) and a final application for approval of a Planned Unit Development (Order 101).

¹⁷ See *Dupont Circle Citizens Association v. District of Columbia Zoning*, 355 A.2d 550 (D.C. 1976).

7. The lack of any local preservation ordinances in the District of Columbia first began to be addressed two years *after* the Court of Appeals' 1978 decision on Order No. 101 with the ratification of the Historic Landmark and Historic District Protection Act of 1978. The HPRB was established in 1983 under the authority established in that Act pursuant to D.C. Code §6-1103.
8. The HPRB replaced and expanded the role of the Joint Committee on Landmarks and was given authority to create and protect landmarks. *The HPRB's role therefore supersedes any authority the Zoning Commission may have had to preserve landmarks in 1976 due to a lack of ordinances protecting the District's landmarks.*
9. ***Second, in Heurich, the amount of density that could be transferred was determined by the amount that could have been developed by the owner.*** Order No. 81 provides an important clarification of how the determination of available transferable density was made for the Heurich site, which the Applicant fails to acknowledge:

The Columbia Historical Society property currently contains 15,695 square feet of gross floor area...in the Heurich Mansion and Carriage House. Under the present SP zoning a total of 95,590 square feet ***could be developed by the Society.*** If the requested zone change to C-3-B is granted, a total of 121,660 square feet ***could be developed*** by the Society. The property owned by the Society would thus have an unused development potential of approximately 108,874 square feet.¹⁸ [emphasis added]
10. For Heurich, the calculation was done by subtracting the used density of the Mansion and Carriage House from what ***could be developed by the Society,*** which included the unimproved parts of its lot. Thus, what was deemed transferable was the ***development potential*** on the Heurich lot by its owner, CHS, which at that time could have been the entire lot had the Mansion and Carriage House not been carved out under the conditions of the Order.
11. By contrast, the MAPS site's historic designation includes its parking lot, and that parking lot is deemed an improvement and a contributing element to the site. The developability of the site is subject to HPRB oversight. HPRB has made no determination that there is any "unused density" on the MAPS site that ***could be developed by its owner, Regency.*** In 1971, the Heurich lot had none of these constraints, and consequently, a certain amount of its unimproved density was able to be transferred in order to save the landmark.
12. In the case of the Heurich PUD, a preservation body – at that time, the Joint Committee on the Landmarks – was involved in the decision about how much available density Heurich had, how much could be transferred, and what subsequently could be developed on its site. HPRB is now the body authorized to make decisions about whether MAPS has any density that could be developed by its owner. The HPRB has made no such determination in this case.
13. ***Third, the Commission's orders in Heurich included specific conditions to ensure the preservation conditions that had to be met for approval of the density transfer from Heurich.*** In 1971, the Heurich Mansion and Carriage House had not been maintained and were facing the possibility of demolition through a sale by the Columbia Historical Society

¹⁸ The final order approved the sale and transfer of 82,000 square feet from Heurich.

(CHS). ZC Order No. 81 included conditions to ensure that the Mansion would be preserved. These conditions were included in the report of the National Capital Planning Commission and *entered as an exhibit into the record* for public hearing and attached to Order 81 itself.¹⁹ A copy of Order No. 81 and the attachment to it are included as Attachment B to Exhibit 244.

14. Under Order No. 81, approval of the Heurich PUD application by the Joint Committee on Landmarks was contingent on the fact that the Heurich Mansion's preservation would be assured through an agreement of the parties to create a trust fund to specifically preserve the mansion. Condition 8 states:

*The Society shall place the money received from the Dupont Circle Joint Venture in consideration from the transfer of its unused floor area ratio in an income producing trust, administered by the Society, and shall use the income and may use the principal, in its sole discretion from the trust for the maintenance of the Landmark.... See Order 81, Proposed Condition #8.*²⁰

15. By contrast, the MAPS is not facing the possibility of demolition. The HPO report states that it "has been successfully maintained in good condition" and "devoid of elaborate architectural detail that might require expensive upkeep or overhaul, so there is little reason to anticipate extraordinary rehabilitation costs." (Exhibit 187). The Applicant's claim of preservation through the sale of MAPS' density is therefore a hollow proffer.
16. To support its claim that the density transfer will serve to preserve MAPS, the Applicant provides only a short quote from a letter in support from Regency, the Texas-based owner of MAPS and co-applicant with Valor stating: "the Project will greatly assist [Regency] in maintaining the historic integrity and long-term viability of the [MAPS]." (Exhibit 227).
17. The Regency letter includes no binding terms and should be accorded no weight given that the Applicant has offered this statement rather than the actual agreement governing the sale of MAPS' density – *despite the Commission's requests that this agreement be produced*. Unlike the Heurich case, the absence of any formal and public agreement between Valor and Regency negates a claim that any preservation benefit flows from use of the payment from the density transfer.

The Proposed Density Transfer Actually Impairs the MAPS Landmark

1. The sole reason for including MAPS in this PUD is to strip it of whatever density it may possess to allow the Applicant to build an oversized project that it otherwise would not have

¹⁹ *Proposed Conditions Relating to Preservation of Christian Heurich Memorial Mansion, Carriage House and Grounds*. Zoning Commission Case No. 71-30. National Capital Planning Commission. NCPC File No. 0932. (Exhibit 244.)

²⁰ Another condition relating to the preservation of the Heurich Mansion contained in the orders was that CHS, with the approval of the ZC and on the advice of the nominating committee (Joint Commission on Landmarks), could construct a library and museum building on its lot. (Exhibit 244.)

been allowed to construct. The Applicant claims that the density transfer will prevent MAPS from further developing itself.

2. The transfer of density from MAPS is not a benefit to the landmark, but in fact harms it. Nowhere does the Applicant address the point that the landmark may need its density in the future to preserve itself should it be damaged by fire or otherwise fall into disrepair.
3. The HPO report summarily dismisses as unlikely the possibility that MAPS may need whatever density it has to preserve itself in the future, a purely speculative claim. HPO's views are not those of the HPRB, the body that has authority over MAPS.
4. The Applicant also ignores the National Register of Historic Place's nomination of MAPS for historic status, which praises the low rise of MAPS as part of its historic character, thereby respecting the residential homes on the Yuma Street side of the landmark. Constructing a 6-story structure immediately adjacent to MAPS undermines this important historic feature.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia **ORDERS DENIAL** of the application for consolidated review and approval of a Planned Unit Development ("PUD") for property located at Square 1499, Lots 802, 803, 806 and 807.

On _____, 2019, upon a motion by _____, as seconded by Commissioner _____, the Zoning Commission **DENIED** the application by a vote of _____ (Anthony J. Hood, Robert E. Miller, Peter Shapiro, Peter G. May, and Michael G. Turnbull to _____).

On _____, 2019, upon the motion of _____, as seconded by _____, the Zoning Commission **ADOPTED** this Order at its public meeting by a vote of _____ (Anthony J. Hood, Robert E. Miller, Peter Shapiro, Peter G. May, and Michael G. Turnbull to adopt).

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *D.C. Register*; that is on _____.

ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION

SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING