

Government of the District of Columbia  
Zoning Commission



**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA  
ZONING COMMISSION ORDER NO. 22-35**

**Z.C. Case No. 22-35**

**UM 500 Penn Street NE, LLC**

**(Consolidated Planned Unit Development and Related Zoning Map Amendment  
and Airspace Development @ Square 3592, Lots 19-23 and 802, Parcel 129/45 and Airspace  
Beneath the Right of Way of the Public Alley Between Such Lots and Parcel)**

**January 11, 2024**

Pursuant to notice, the Zoning Commission for the District of Columbia (“Commission”) held a public hearing (“Public Hearing”) on December 4, 2023<sup>1</sup> to consider an application (“Application”) from UM 500 Penn Street NE, LLC (“Applicant”) concerning Lots 19-23 and 802, Parcel 129/45 and airspace beneath the right of way of the public alley between such lots and parcel in Square 3592 (“Property”). The Application requested review and approval of the following:

- A consolidated Planned Unit Development (“PUD”) pursuant to Subtitle X § 300 and Subtitle Z § 300 of Title 11 of the District of Columbia Municipal Regulations, Zoning Regulations of 2016 (the “Zoning Regulations” and to which all subsequent section references herein refer unless otherwise specified), to permit construction of two mixed-use buildings containing commercial and residential uses along with a combined below-grade parking garage and related street level improvements (collectively, the “Project”);
- A PUD-related amendment to the Zoning Map pursuant to Subtitle X §§ 300.4 and 303.12 for the Property from PDR-1 to MU-9A;
- An airspace development pursuant to Subtitle X §§ 700 and 701 and Subtitle Z § 303 to permit construction of a portion of the Project’s garage beneath the public alley that bisects the Property;
- Zoning flexibility from the rear yard, court, and penthouse setback dimensional requirements pursuant to Subtitle X § 303.1 as set forth more particularly in the Conditions hereof; and
- Such other design flexibility as is set forth in the Conditions hereof.

The Commission considered the Application pursuant to the Commission’s Rules of Practice and Procedures, which are codified in Subtitle Z of the Zoning Regulations. For the reasons stated below, the Commission hereby **APPROVES** the Application.

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<sup>1</sup> At the conclusion of the December 4, 2023 public hearing, the Commission took proposed action on the Application.

## **FINDINGS OF FACT**

### **I. BACKGROUND**

#### **PARTIES**

1. Pursuant to Subtitle Z § 403.5(a), the Applicant is automatically a party to the Application.
2. Pursuant to Subtitle Z §§ 101.8 and 403.5(b), Advisory Neighborhood Commission (“ANC”) 5D, in which the Property is located, is automatically a party to the Application as the “affected” ANC.
3. The Commission received no requests for party status.

#### **NOTICE AND SETDOWN**

4. Pursuant to Subtitle Z §§ 300.7, 300.8, 303.4, and 303.5, on July 22, 2022 the Applicant mailed to ANC 5D and the owners of all lots within 200 feet of the Property a Notice of Intent to file the Application. (Exhibit [“Ex.”] 2D2.)
5. Pursuant to Subtitle Z §§ 300.9 and 303.6 subsequent to the mailing of such Notice of Intent but prior to filing the Application with the Commission, the Applicant presented the Application to ANC 5D at its September 13, 2022 public meeting. (Ex. 2D2.)
6. Pursuant to Subtitle Z §§ 400.9-400.12, on July 27, 2023, at its duly noticed public meeting, the Commission considered the Application and voted to set the case down for a public hearing. (July 27, 2023 Regular Public Meeting Transcript (“Tr.”) at 80-97.)
7. Pursuant to Subtitle Z § 402.1(a), the Office of Zoning (“OZ”) published notice of the December 4, 2023 public hearing, concerning the Application in the October 6, 2023 issue of the *District of Columbia Register* (70 DCR 013174, *et seq.*) as well as on the calendar on OZ’s website. (Ex. 15.)
8. Pursuant to Subtitle Z §§ 402.1-402.2 and 402.6, on September 28, 2023, OZ sent notice of the December 4, 2023, public hearing concerning the Application to:
  - (a) The Applicant;
  - (b) ANC 5D;
  - (c) The ANC Single Member District 5D01<sup>2</sup> Commissioner, whose district includes the Property;
  - (d) Councilmember Zachary Parker, the Ward 5 Councilmember, in whose Ward the Property is located;
  - (e) The Office of ANC;
  - (f) The Office of Planning (“OP”);

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<sup>2</sup> Subsequent to the filing of the Application, ANC 5D was redistricted as part of the District’s decadal redistricting. As part of that redistricting, the Property remained in SMD 5D01, but the boundaries of the SMD held by Commissioner Sebrena Rhodes for SMD 5D01 were revised such that as of January 2023 (i.e., subsequent to the filing the Application), Commissioner Rhodes became the SMD for SMD 5D02, and Commissioner Arbuckle took the seat for SMD 5D01.

- (g) The District Department of Transportation (“DDOT”);
- (h) The Department of Buildings (“DOB”);
- (i) OZ Legal Division (“OZLD”)
- (j) The District Department of Energy & Environment (“DOEE”);
- (k) The Chair and At-Large Members of the DC Council; and
- (l) The owner of all lots within 200 feet of the Property.

(Ex. 16, 17.)

9. Pursuant to Subtitle Z §§ 402.3-402.4 and 402.8-402.10, on October 24, 2023, the Applicant submitted evidence that it had posted notices of the public hearing on the Property and on November 29, 2023, submitted evidence that it had thereafter maintained such notices. (Ex. 19, 26.)

10. Pursuant to Subtitle Z § 603.1 and Subtitle X § 700.2, following the December 4, 2023 public hearing, on December 6, 2023 the Office of Zoning referred the Application to the National Capital Planning Commission (“NCPC”). (Ex. 37.)

#### **THE PROPERTY AND SURROUNDING AREA**

11. The Property is located within Ward 5 and ANC/SMD 5D01 in the Northeast quadrant of the District. The Property consists of two rectangular parcels, which are bounded to the north by Penn Street, N.E., to the west by 4<sup>th</sup> Street, N.E., to the east by 5<sup>th</sup> Street, N.E. and to the south by existing commercial buildings owned by affiliates of the Applicant. The Property consists of approximately 44,585 square feet total (not including the area below the public alley that bisects the Property), a portion of which is to the east of the public alley and a portion to the west, but which area is otherwise contiguous. (Ex. 2A2.)

12. The Property is currently improved west of the alley, at 1329-1341 4<sup>th</sup> Street, N.E. are a series of single-story retail/commercial buildings and at 1345 4<sup>th</sup> Street, N.E. is the existing Motel 6 building which also contains surface parking. The existing buildings will be demolished in order to construct the Project. East of the alley the Property includes only an existing surface parking lot. The Property sits outside of the Union Market Historic District. The eastern portion of the Property is separated from the Historic District by a building at 1323 4<sup>th</sup> Street, N.E. and the western portion of the Property abuts the Historic District immediately to the south (at 1338 5<sup>th</sup> Street, N.E.). (*Id.*)

13. The Property is less than a half mile from the NoMA-Gallaudet University Metrorail station, which is served by WMATA’s Red Line. The D.C. Council has approved enhanced pedestrian access between the Union Market District and the Metrorail station. (*Id.*)

14. The Property is in the Union Market District, which is also known as the “Florida Avenue Market,” an area that has historically been a hub for food services, wholesalers, and retailers. The Union Market District is surrounded by a mix of land uses. Immediately east of the Union Market District is Gallaudet University. To the north and west are New York Avenue, N.E. and the wide rail corridor that leads to Union Station, which is just a few blocks to the southwest of the Union Market District. Florida Avenue, N.E. serves as the southern boundary of the neighborhood, beyond which is the largely residential Atlas District. To the north, bisected by New York Avenue, N.E. is the mixed-use Ivy City, and

beyond Gallaudet University to the east is the primarily residential Trinidad neighborhood. Eckington is located to the west across the regional rail corridor. (*Id.*)

15. The Union Market District has convenient vehicular access to the District's traditional downtown core and the Baltimore/Washington corridor via New York Avenue, N.E., a six-lane arterial that provides immediate access to Route 50 and points east, to the Baltimore-Washington Parkway to Howard County and Baltimore, and to the Capital Beltway. (*Id.*)
16. The NoMA-Gallaudet University Metrorail Station is located at the southern edge of Union Market across Florida Avenue, N.E. from the Union Market District and within easy walking distance, which will become even easier with the related recently funded capital improvements. The NoMA-Gallaudet Station is one stop (2-3 minutes) from Union Station with connections to MARC, VRE, Amtrak, and intercity bus service on the Red Line and is three stops from Metro Center. In the opposite direction, the Red Line runs to Silver Spring, another major employment center in the region. Multiple local Metrobus lines directly serve Florida Avenue, N.E. and the nearby Brentwood Parkway, N.E., which bus lines also provide intracity vehicular access. The Metropolitan Branch Trail ("MBT") runs along the eastern side of the rail corridor bounding Union Market. The MBT provides a bicycle connection to other District neighborhoods. The Union Market District itself is increasingly bicycle friendly, and substantial bicycle-related improvements are planned for surrounding neighborhood, including along Florida Avenue, N.E. to the south of the Union Market District, West Virginia Avenue, N.E. east of the Union Market District, and 6<sup>th</sup> Street, N.E. within the District itself. (*Id.*)
17. The Property is within walking distance of the MBT, which serves recreational cycling as well as commuters, and Mt. Olivet Cemetery. The Brentwood Hamilton Park is on the east side of the Union Market District, and the Joseph Cole Community Recreation Center is approximately one-half mile away. (*Id.*)
18. The 45-acre Union Market area is generally in the PDR-1 zone. The Union Market District, and The Market itself, have become hubs of economic activity for entrepreneurial and local DC-based start-up businesses including food-based industries, technology, media, mixed-media, and "maker" uses, all of which have found niches in near Northeast, with the Union Market District a hub for such economic activity. (*Id.*)

#### **CURRENT ZONING**

19. The underlying zoning for the Property is PDR-1. A matter-of-right development in the PDR-1 zone allows a maximum FAR of 3.5 (2.0 for certain non-PDR uses) and a maximum height of 50 feet. (Subtitle J §§ 201.1, 203.1.) The PDR-1 zone does not restrict lot occupancy but does require a rear yard and compliance with Green Area Ratio ("GAR") requirements. (*Id.* §§ 207.1, 211.1.) The PDR-1 zone does not permit residential use except in limited special circumstances. (Subtitle U § 801.1(w).) A PUD in the PDR-1 zone permits a maximum building height of 60 feet and a maximum penthouse height of 12 feet except 18 feet 6 inches for penthouse mechanical space. (Subtitle X §§ 303.7, 303.18.)

## **COMPREHENSIVE PLAN (TITLE 10-A DCMR)**

20. The Comprehensive Plan’s (“Plan”) Future Land Use Map (“FLUM”) designates the Property as Mixed Use -Medium-Density Residential, High-Density Commercial, and Production Distribution and Repair (“PDR”).

Mixed Use: The Future Land Use Map indicates areas where the mixing of two or more land uses is especially encouraged. The particular combination of uses desired in a given area is depicted in striped patterns, with stripe colors corresponding to the categories. The general density and intensity of development within a given Mixed-Use area is determined by the specific mix of uses shown. If the desired outcome is to emphasize one use over the other (for example, ground-floor retail with three stories of housing above), the Future Land Use Map may note the dominant use by showing it at a slightly higher density than the other use in the mix (in this case, Moderate Density Residential/Low Density Commercial). The Comprehensive Plan Area Elements may also provide detail on the specific mix of uses envisioned. (10-A DCMR §§ 227.20, 227.21.)

Medium-Density Residential: This designation is used to define neighborhoods or areas generally, but not exclusively, suited for mid-rise apartment buildings. The Medium Density Residential designation also may apply to taller residential buildings surrounded by large areas of permanent open space. Pockets of low and moderate density housing may exist within these areas. Density typically ranges from 1.8 to 4.0 FAR, although greater density may be possible when complying with Inclusionary Zoning or when approved through a Planned Unit Development. The RA-3 Zone District is consistent with the Medium Density Residential category, and other zones may also apply. (10-A DCMR § 227.7.)

High-Density Commercial: This designation is used to define the central employment district, other major office centers, and other commercial areas with the greatest scale and intensity of use in the District. Office and mixed office/retail buildings with densities greater than a FAR of 6.0 are the predominant use, although high-rise residential and many lower scale buildings (including historic buildings) are interspersed. (10-A DCMR § 227.13.)

Production Distribution and Repair: The PDR category is used to define areas characterized by manufacturing, warehousing, wholesale and distribution centers, transportation services, food services, printers and publishers, tourism support services, and commercial, municipal, and utility activities which may require substantial buffering from housing and other noise-, air pollution- and light-sensitive uses. This category is also used to denote railroad rights-of-way, switching and maintenance yards, bus garages, and uses related to the movement of freight, such as truck terminals. It is important to ensure that adequate, appropriate land is provided for these PDR uses that are critical to supporting the retail, transportation and service needs of the city. A variety of zone districts apply within PDR areas, recognizing the different intensities of use and impacts generated by various PDR activities. The corresponding zone category is PDR, and the present density and height limits set in these districts are expected to remain for the foreseeable future. Other districts may also apply where the PDR map designation is stripped with other land uses. In an area

striped to include PDR, development must include PDR space, and on sites containing existing PDR space the amount of PDR space on-site should be substantially preserved. (10-A DCMR § 227.14.)

21. The Plan's Generalized Policy Map ("GPM") designates the Property as a Multi-Neighborhood Center and identifies part of the site as within the New York Avenue, N.E. Corridor Future Planning Analysis Area.

Multi-Neighborhood Center: Multi-Neighborhood Centers contain many of the same activities as Neighborhood Commercial Centers, but in greater depth and variety. The area served by a Multi-Neighborhood Center is typically one to three miles. These centers are generally found at major intersections and along key transit routes. These centers might include supermarkets, general merchandise stores, drug stores, restaurants, specialty shops, apparel stores, and a variety of service-oriented businesses. These centers also may include residential and office space for small businesses, although their primary function remains retail trade. (*Id.* § 225.17.)

Future Planning Analysis Area: Future Planning Analysis Areas are described as areas of large tracts or corridors where future analysis is anticipated to ensure adequate planning for equitable development. Boundaries shown are for illustrative purposes. Final boundaries will be determined as part of the future planning analyses process for each area. Planning analyses generally establish guiding documents. Such analyses shall precede any zoning changes in this area. The planning process should evaluate current infrastructure and utility capacity against full build out and projected population and employment growth. Planning should also focus on issues most relevant to the community that can be effectively addressed through a planning process. Individual planning analyses may study smaller areas than the Analysis Area. For the purposes of determining whether a planning analysis is needed before a zoning change, the boundaries of the Future Planning Analysis Areas shall be considered as drawn. The evaluation of current infrastructure and utility capacity should specify the physical or operational capacity both inside the boundaries and any relevant District-wide infrastructure available. (*Id.* § 2503.2.)

22. Finally, the Plan includes the Property within the Upper Northeast Area Element, which recommends the following development priorities:

- (a) Redevelop the Florida Avenue Market into a regional destination that may include residential, dining, entertainment, office, hotel, maker, and wholesale food uses. The wholesale market and the adjacent DC Farmers Market are historic amenities that should be preserved, upgraded, and more effectively marketed; (*Id.* § 2411.7.)
- (b) Encourage growth while enhancing the neighborhoods of Upper Northeast . . . . The residential character of these areas should be preserved while allowing new housing opportunities for all incomes. Places of historic significance, gateways, parks, and important cultural and social places should likewise be preserved and enhanced; (*Id.* § 2408.2.)
- (c) Recognize the significant potential of the area's commercially and industrially zoned lands, particularly along the New York Avenue corridor . . . and around the

Florida Avenue Market, to generate jobs, provide new shopping opportunities, enhance existing businesses, create new business ownership opportunities, and promote the vitality and economic well-being of the Upper Northeast community. The uses, height, and bulk permitted under the existing PDR zones are expected to remain for the foreseeable future; (*Id.* § 2408.9.)

- (d) Improve linkages between residents and jobs within Upper Northeast so that more of the area's working-age adults fill the jobs located within the Planning Area. Achieve this linkage by developing additional vocational and trade schools within Upper Northeast, such as the streetcar maintenance facility, encouraging apprenticeships and internships, and creating new partnerships between the area's major employers, the District, the public and charter schools, local churches, and major institutions; (*Id.* § 2409.4.)
- (e) Create new opportunities for small, local, and minority businesses within the Planning Area, and additional community equity investment opportunities as development takes place along New York Avenue . . .; (*Id.* § 2409.5.)
- (f) Retain the concentration of PDR land uses in the New York Avenue corridor. While some industrial land was converted to other uses on select sites, such as the Bladensburg/Montana/New York triangle, these changes should not diminish the area's ability to function as an industrial district meeting the needs of government and District businesses and residents. Mixed-use redevelopment should complement PDR uses within the building envelope as a primary use when PDR zoned; and (*Id.* § 2413.6.)
- (g) Improve the appearance of New York Avenue as a gateway to Washington, DC. Support road design changes and streetscape improvements, that improve traffic flow and enhance the road's operation as a multimodal corridor that meets both regional and local needs. (*Id.* § 2413.5.)

#### **FLORIDA AVENUE MARKET SMALL AREA PLAN AND WARD 5 WORKS INDUSTRIAL LAND STUDY**

- 23. The Property is within the area subject to the Small Area Plan. (Ex. 11C.) The Small Area Plan's "Zoning and Intensity Plan" designation for the Property is for "medium-high density" development (i.e., 70-130 feet). (*Id.*) The Small Area Plan's "Illustrative" (i.e., land use) map identifies the Property as appropriate for mixed-use development including potentially wholesale/retail market space. (*Id.*) The Small Area Plan strongly encourages a food-based economy ("There is a unique opportunity to cluster food retail and related uses in the [Union Market District] to highlight its unique character and history. . . . Other enterprises such as catering companies, cooking supply stores, culinary schools and retail stores can also realize this opportunity." (Small Area Plan at 56-57.)
- 24. The Property is also subject to the Ward 5 Works Industrial Land Study ("W5W Study"). (Ex. 11C.) The W5W Study seeks "a cutting-edge and sustainable production, distribution, and repair industry that diversifies the District's economy, serves as a hub for low barrier employment, complements and enhances the integrity of neighborhoods, and provides opportunities for arts, recreation and other community amenities." It identifies eight goals and several actions regarding PDR uses, placemaking, and economic development. (*Id.*)

## II. THE APPLICATION

### **Proposed Zoning**

25. As part of the Application, the Applicant seeks a PUD-related zoning map amendment to the MU-9A zone, which is considered PUD flexibility. (Subtitle Z § 303.12.) The MU-9 zones are intended to permit high-density mixed-use development. A matter-of-right development in the MU-9A zone allows a maximum FAR of 6.5 (7.8 with IZ) and maximum non-residential FAR of 1.0; a maximum height of 90 feet (100 with IZ); a maximum penthouse height of 20 feet; and a maximum green area ratio of 0.20. (Subtitle G §§ 201.1, 203.2, 205.1, and 211.1.) The MU-9A zone requires a minimum rear and side yard in certain circumstances and does not limit lot occupancy. (Subtitle G §§ 207, 208, 210.1.) A PUD in the MU-9 zones permits a maximum building height of 130 feet. (Subtitle X § 303.7.)

### **THE PROJECT**

26. The Project contains two mixed-use buildings separated by the public alley at grade but with a shared below-grade parking garage that crosses beneath the public alley. The Project contemplates a total floor area of up to approximately 415,242 square feet of gross floor area (“GFA”), resulting in an FAR of up to approximately 9.31 with an overall lot coverage of approximately 87.4% for the building on the west half of the site (“West Building”) and 79% for the building on the east half of the site (“East Building”) (each below the 100% permitted in the MU-9 zone). The maximum height of the Project is 130 feet for the West Building fronting 4<sup>th</sup> Street, N.E., and 90 feet for the East Building fronting 5<sup>th</sup> Street, N.E.

27. The Project ultimately includes the following mix: (a) up to approximately 357,602 square feet of residential GFA consisting of approximately 350 units; (b) approximately 25 lodging units (25,740 square feet) convertible to residential GFA; (c) up to approximately 31,900 square feet of retail, commercial, PDR/Maker use, and service/back-of-house GFA on the ground, mezzanine, and partially below-grade levels; and (d) up to approximately 12,917 square feet of penthouse habitable space to be allocated among a mix of amenity space for the building (including a pool, lounge, grilling areas, work areas, and game rooms), and/or residential units. Below grade, the Project includes up to two and a half levels of parking for up to 162 parking spaces vehicle spaces and approximately 141 long-term bicycle spaces. Loading for each of the Project’s two buildings is integrated at ground level from the alley. (Ex. 2A2 and 40A.)

28. Site Plan: The Project’s site plan organizes the two buildings with frontages on 4<sup>th</sup> Street, N.E. for the West Building, 5<sup>th</sup> Street, N.E. for the East Building and common frontage on Penn Street, N.E. The two buildings each back against the public alley. The public alley is proposed to serve the dual purposes of providing the access point for parking and loading and providing a pedestrian environment, including a pedestrian connection between the two buildings. Below the alley and the adjacent privately-owned portions of the Property is a shared parking garage. At grade, the Project’s site plan intent is to activate the public realm and create a special place for pedestrian activity through the Property. Above the ground plane, the East building steps down to a maximum height of 90 feet in response to its proximity to the Union Market Historic District. The ground floor articulation and

orientation of the Project prioritizes pedestrian activity along its three street frontages. The Project places multiple retail entrances as well as the lobby entrances to the residential units along the streets. These entrances animate such portion of the street system and continue the rhythm of retail entrances and generous, transparent storefronts. From 4<sup>th</sup> Street, N.E., the Project creates two corridors into and through the Property, which are intended to contain seating, art, lighting, and other pedestrianized amenities. All of the Project's parking and loading access is only from the northernmost portion of the alley. Alley operations will be actively managed through on-site personnel and passively managed through design measures, all of which will work together to avoid conflicts between vehicles and pedestrians. The Project does not include any new curb cuts and proposes to close all of the existing curb cuts serving the Property. (Ex. 2A2, 40A.)

29. Program: The Project is vertically segmented, with a commercial ground floor and multifamily residential and lodging uses above. Due to the change in grade from south to north along 4<sup>th</sup> Street, N.E. and 5<sup>th</sup> Street, N.E., portions of the ground floor of the Project have the appearance of a double-height elevation. That double-height volume creates the potential for a mezzanine depending upon the ultimate tenant(s). The retail/commercial areas include large spaces accessible from 4<sup>th</sup> Street, N.E. and will be able to be further divided as necessary to accommodate individual tenants. The residential and lodging lobbies are located along the Project's frontages on 4<sup>th</sup> Street, N.E. and 5<sup>th</sup> Street, N.E. although may be accessed primarily (or exclusively) from the pedestrian paseo. The upper levels of the Project (i.e., levels 2-13) include residential, lodging, and amenity uses. The roof is also designed to accommodate mechanical equipment, solar panels, green roofs, and vegetation. (Ex. 2A2, 40A.)
30. Residential Unit Mix: The Project's residential program contains a mix of studio, 1-bedroom, 2-bedroom, and 3-bedroom units. Significantly, a minimum of approximately 20 units total, will have 3-bedrooms. The Project has dedicated amenity space for resident recreation and events. The Project exceeds the Inclusionary Zoning ("IZ") requirements by dedicating 15% of the residential GFA to affordable units. Of such affordable GFA, 13% is to be set aside for households earning no more than 60% of the Washington DC Median Family Income ("MFI") while two percent are to be set aside for households earning no more than 50% MFI for the life of the Project. These proffered 50% MFI units are in addition to any units that would be required as a result of residential units being located in the penthouse. (Ex. 2A2, 40A.)
31. PDR/Maker Uses: Fifty percent of the non-residential area on the ground floor of the Project will be constructed to "PDR/Maker" use specifications. Moreover, the Applicant will reserve 10% of such space for PDR/Maker uses for a period of five years.
32. Landscape/Streetscape: The Project features landscape improvements at street level, through the middle of the Property, at the second-story canopy level, and on both the "main" rooftop and the upper roof. The street level landscape elements of the Project are meant to expand upon and complement the urban park concepts approved for The Market and the plaza between The Market and the North Building. The setbacks of the building allow for open areas within the private space to be integrated with the public space, creating

a unique pedestrian experience through a sequence of dynamic plazas and features. The streetscape elements allow for flexibility to accommodate both sidewalk events and daily use for residents, visitors, and patrons of the Project's retail spaces. The sidewalks surrounding the Property are wide and allow for seating (where permissible by the Union Market Streetscape Guidelines and grade), bicycle parking, circulation, trees, stormwater controls, and other elements. Additionally, the steep grade changes on 4<sup>th</sup> Street, N.E. and 5<sup>th</sup> Street, N.E. are accommodated through strategic aperture into the public and private landscape areas, using both accessible walkways and stairs. The new architecture on 4<sup>th</sup> Street, N.E. and 5<sup>th</sup> Street, N.E. creates a consistent street-wall for pedestrians walking from Penn Street, N.E. to Neal Place, N.E. Two new pedestrian "paseos" along 4<sup>th</sup> Street, N.E. break down the scale of the Project on that block and allow pedestrian circulation in and through the Property at grade. The public alley provides space for both pedestrian and retail activation as well as access to underground parking and back-of-house service. These elements create new intersections within the Project, allowing retail frontage to occupy multiple new corners, and become their own destinations of activity with outdoor seating, art, lighting, and building entrances. The design of 4<sup>th</sup> Street, N.E., Penn Street, N.E., and 5<sup>th</sup> Street, N.E. adjacent to the Project are in accordance with Union Market Streetscape Guidelines, which the Applicant's affiliates have previously finalized with DDOT. One design feature that emerges from the Streetscape Guidelines is the inclusion of the Project's large canopies.

33. Canopies: The Project's canopies feature green roofs as a sustainability measure. Canopies, rather than street trees, are emphasized as the streetscape level "greening" and shading element, particularly on the exposed south-facing side of the Project. Canopies reflect the mercantile character of the Union Market District, which historically has had few, if any, street trees. However, some street trees are included in order to contribute to the District's wider tree canopy goals. (Ex. 2A2, 40A.)
34. Transportation, Parking, and Loading: Non-automotive modes of transportation are a priority for the Project and the Project includes a focus on bicycle parking spaces. The Project contains approximately 162 vehicle parking spaces on two and a half levels of below-grade parking to serve the residential, lodging, and retail/commercial uses. The residential spaces will be access-controlled, but the retail/commercial spaces will be available to the public generally. The below-grade garage also includes secure bicycle storage rooms with capacity for approximately 141 total long-term bicycle spaces. An additional approximately 36 short-term bicycle parking spaces are provided in public areas around the Property. The Project contains a total of two loading berths and two delivery spaces, along with additional ancillary loading areas. The loading areas are accessible via the alley only. All of the Project's parking and loading access require access only from the existing alley, so all existing curb cuts to the Property will be closed. (Ex. 2A2, 40A.)
35. Sustainable Design: The Project is designed to be certified at the level of LEED for New Construction Gold v4. The Project's level of sustainability is further evidence of its superior design and reflective of the Applicant's commitment to advance the District's sustainable development goals. (Ex. 2A2, 40A.)

## **APPLICANT'S SUBMISSIONS, REVISIONS, AND TESTIMONY**

36. Initial Application: On November 11, 2022, the Applicant filed its initial application materials that included:

- (a) A summary of the Application and appropriate application forms;
- (b) A written statement that provided an overview of the Project and justifications relating to the PUD, the PUD related Zoning Map amendment, and airspace development evaluation criteria of Subtitle X §§ 304 and 701;
- (c) An initial set of architectural drawings and elevations;
- (d) A discussion of the Project's consistency with the Comprehensive Plan, including the Comprehensive Plan Maps and Citywide and Upper Northeast Area Elements, and the Small Area Plan, and W5W Study;
- (e) A summary of the Project's potential impacts and public benefits; and
- (f) Other procedural materials required by the Zoning Regulations.

(Ex. 1, 1A, 2A1-2D4.)

37. Supplemental Submission: On June 7, 2023, the Applicant filed a supplemental submission and supporting materials responding to issues and comments raised by OP prior to the issuance of its setdown report as follows:

- (a) An updated one-page summary and updated plans and drawings for the Project;
- (b) Balconies. In response to comments from OP, the Applicant increased the number of units with dedicated outdoor space, including balconies and terraces, by adding balconies to the north façade of the East Building;
- (c) Parking Space Count. In response to comments from OP and DDOT, the Applicant reduced the number of parking spaces in the Project's garage from approximately 190 to 162 spaces;
- (d) Updated Comprehensive Plan Analysis. In response to the Zoning Commission's issuance of the Racial Equity Tool<sup>3</sup> in February 2023 subsequent to the initial filing of the application, the Applicant submitted an updated discussion of the Project's consistency with the Comprehensive Plan including an analysis viewed through the lens of racial equity; and
- (e) Community Outreach and Engagement. With respect to community outreach and engagement, the Applicant's Racial Equity Analysis detailed its many meetings with ANC 5D, and the changes made as a result of the interactions, namely:
  - Prior to submitting the PUD application, the Applicant proposed to ANC 5D that the Project would reserve 13% of its residential GFA as affordable. In response to comments from the ANC and OP, the Applicant increased the amount of affordable housing to 15% in the initial application materials to the Commission;

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<sup>3</sup> The Commission released a revised Racial Equity Tool on February 3, 2023, requiring submissions from applicants and the Office of Planning analyzing the zoning action's consistency with the Citywide and Area Elements of the Comprehensive Plan, and Small Area Plans, if applicable (Part 1); a submission from applicants including information about their community outreach and engagement efforts regarding the zoning action (Part 2); and a submission from the Office of Planning. That includes disaggregated race and ethnicity data for the Planning Area affected by the zoning action (Part 3).

- The Applicant also increased the number of three-bedroom units in the Project in response to concerns from the ANC;
- In response to comments from DDOT, the Applicant has revised the garage configuration to limit impacts to the alley near the Property; and
- In response to OP, the Applicant has added balconies to the Project, incorporated PDR/Maker space to construct 50% of commercial GFA to PDR/Maker specifications and reserve 10% of commercial GFA for PDR/Maker uses for 5 years and enhanced the project's affordable housing component.

(Ex. 11, 11A-11C.)

38. First Prehearing Submission. On September 14, 2023, the Applicant filed its first pre-hearing submission and supporting materials responding to issues and comments raised by the Commission at setdown and by OP in its setdown report. Such issues, comments, and responses are summarized as follows:

- (a) An updated one-page summary and updated plans and drawings for the Project;
- (b) Setback Relief. In response to comments from the Commission at setdown, the Applicant revised the design of both buildings to remove the need for penthouse setback relief for the guardrails and trellis elements that had been on the roof of the buildings;
- (c) Proposed Uses. In response to comments from OP, the Applicant provided additional drawings regarding the Project's proposed uses and requested use flexibility;
- (d) Zoning Relief: In response to comments from OP, the Applicant provided additional explanation regarding justification for the Project's requested flexibility from the court, rear yard, and penthouse requirements of the Zoning Regulations;
- (e) Solar Panels. In response to comments from OP, the Applicant clarified the amount of solar panels proposed for the Project;
- (f) LEED v4. In response to comments from OP, the Applicant's sustainability consultant, Lorax, clarified that the Project would pursue LEED v4 Gold as projects in the United States are not yet eligible to certify under LEED Residential v.4.1 (Ex. 13C.);
- (g) PDR Uses. In response to comments from OP, the Applicant explained the rationale for its proffer with respect to PDR/Maker uses and PDR/Maker construction specifications; and
- (h) Business Owners. In response to comments from OP, the Applicant provided information about the businesses operating on the Property and the Applicant's efforts to mitigate displacement impacts by allowing business tenants to remain on the Property in their existing locations after their originally scheduled end of lease term for approximately two years more to provide them with additional time to relocate to locations central to their customers and suppliers. The Applicant noted that it anticipates that existing business tenants will file letters in support of the Application.

(Ex. 13, 13A-13D.)

39. Comprehensive Transportation Report. On November 3, 2023, the Applicant filed a Comprehensive Transportation Report (“CTR”), including a Transportation Demand Management (“TDM”) Plan prepared by Gorove Slade. The CTR concluded that the Project will have manageable impacts on the surrounding transportation network, assuming the proposed site design elements and TDM measures are implemented as part of the Project. (Ex. 20A.)

40. Applicant’s Supplemental Pre-Hearing Submission. On November 14, 2023, the Applicant filed a supplemental submission containing updated plans for the Project and other supporting information (Ex. 21, 21A-21D.), including:

- (a) An updated one-page summary and updated plans and drawings for the Project;
- (b) Procedural materials required by the Zoning Regulations;
- (c) Balconies. In response to comments from OP, the Applicant confirmed that approximately 50% of the Project’s units have access to a private terrace or balcony (including Juliette balconies);
- (d) Canopies: In response to comments from OP, the Applicant provided additional information about the Project’s canopies, noting they range in height from 13 feet at the north of the Project near 4<sup>th</sup> Street, N.E. to 29 feet at the south of the Project near the southern paseo;
- (e) Affordable Unit Locations. In response to comments from OP, the Applicant provided proposed locations for the Project’s affordable units, consisting of 4 three-bedrooms, 11 two-bedrooms, and 34 one-bedroom and studio units;
- (f) PDR/Maker Space Specifications. The Applicant provided a visual description of the PDR/Maker space specification and an explanation about such space;
- (g) Signage. The Applicant provided plans and drawings showing proposed signage specifications for the Project;
- (h) LEED Program. The Applicant provided information from its LEED consultant clarifying that LEED Multifamily Midrise, which was suggested by DOEE, was not applicable to the Project given the Project’s number of stories (Ex. 21C1.);
- (i) Trellis and Guardrails. The Applicant confirmed that all of the Project’s guardrails comply with the requirements of the Zoning Regulations;
- (j) PUD Standards. The Applicant restated the Application’s satisfaction of the PUD evaluation standards; and
- (k) Proposed Flexibility. The Applicant provided draft design flexibility language. (Ex. 21C2.)

(Ex. 21, 21A-21D.)

41. Applicant’s Direct Presentation. In advance of the December 4, 2023 public hearing, the Applicant filed a presentation and appendix materials. (Ex. 35A1-35A11.) At the public hearing, the Applicant presented the Application and proposed Project and addressed questions raised by the Commission:

- (a) The Applicant provided testimony from eight witnesses:
  - i. Emalia Tamanikwa, as a representative of the Applicant;

- ii. Michael Marshall of Michael Marshall Design, as the Project's architect, admitted as an expert in architecture and urban design;
- iii. Navid Tehrani of HKS Architects, as the Project's architect, admitted as an expert in architecture and urban design;
- iv. David Rubin of Landscape Collective, as the Project's landscape architect, admitted as an expert in landscape architecture;
- v. Daniel Solomon of Gorove Slade, as the Project's transportation planner, admitted as an expert in transportation planning;
- vi. Shane Dettman of Goulston & Storrs, as the Project's planner, admitted as an expert in urban planning;
- vii. Sara Link of Bohler Engineering, who was neither proffered nor accepted as an expert; and
- viii. Hailee Griesmar of Lorax, the Project's sustainability consultant, who was neither proffered nor accepted as an expert;

(b) The Applicant's presentation included responses to comments from OP, DDOT, DOEE, and the Office of Attorney General ("OAG"); a summary of the Project; the Applicant's outreach and community engagement and communication with ANC 5D; and responses to questions from the Zoning Commission; (Ex. 39; December 4, 2023 Public Hearing Tr. at 7-69.)

(c) At the hearing the Applicant noted that it had revised the design of the Project to respond to comments from OP's Design Division regarding the Project's balconies; (*Id.* at 14.)

(d) The Applicant also provided testimony that it was continuing to have robust conversations with the businesses at the Property and the Applicant was working with them to accommodate their businesses, including permitting some to remain in their location past their current lease expirations and assisting with lease negotiations; and (*Id.* at 45 and 65-67.)

(e) There was no cross examination of the Applicant at the hearing. (*Id.*)

42. Applicant's Rebuttal. At the public hearing, the Applicant also provided rebuttal testimony in response to the presentation and filings from OAG, which rebuttal is summarized below in the Materially Contested Issue discussion below. (Tr. 2 at 105-117.)

43. Post-Hearing Submission. On December 11, 2023, the Applicant filed a post-hearing submission containing a consolidated set of plans for the Project reflecting the plans previously submitted as updated ahead of the public hearing. (Ex. 40, 40A.) The Applicant also provided a written response to OAG's comments, which response is also summarized below in the discussion of Materially Contested Issues. (Ex. 40.)

44. Draft Findings of Fact and Conclusions of Law. On December 11, 2023, the Applicant filed draft proffers and conditions. (Ex. 38.) On December 26, 2023, the Applicant filed final proffers and conditions reflecting comments from OZLD and DDOT. (Ex. 41.) On December 29, 2023, the Applicant filed a cover letter and draft findings of fact and conclusions of law. (Ex. 43, 43A.)

## **RELIEF REQUESTED**

45. The Application requests that the Commission approve a consolidated PUD, pursuant to Subtitle X § 300, a PUD- related amendment to the Zoning Map from the PDR-1 to the MU-9A, pursuant to Subtitle X § 300.4, which is considered PUD flexibility under Subtitle X § 303.12, and an airspace development, pursuant to Subtitle X §§ 700 and 701.
46. The Application further requests PUD-related zoning flexibility pursuant to Subtitle X § 303.1 with respect to the West Building’s rear yard, courts, and penthouse setback dimensional requirements along with other design flexibility set forth in the Conditions hereof. Specifically, the Applicant requests PUD flexibility from the requirements of Subtitle G § 207 to provide a rear yard of approximately 12.5 feet where a 28.75 foot rear yard is required; from the requirements of Subtitle G § 209 to provide open courts at the southern end of the West Building and facing 4<sup>th</sup> Street of approximately 11 feet and 11.5 feet, respectively, where 38.5 foot open courts are required; and from the penthouse setback requirements of Subtitle C § 1504.1 to provide a penthouse that is not setback 1:1 along a portion of the rear of the West Building. (Ex. 13.)
47. For the reasons set forth in the record and summarized in this Order, the Applicant asserted that the development incentives and impacts of the PUD are appropriate and fully justified given the Project’s public benefits, project amenities, and positive impacts.

## **III. APPLICANT’S JUSTIFICATION FOR RELIEF**

### **CONSISTENCY WITH THE COMPREHENSIVE PLAN AND OTHER ADOPTED PUBLIC POLICIES (SUBTITLE X § 304.4(a).)**

48. Comprehensive Plan. The Applicant provided evidence that the Project is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the Property for the reasons stated below:
  - (a) FLUM. The Application is not inconsistent with the FLUM’s Mixed Use PDR/Medium Density Residential/High Density Commercial designation for the Property, as the High-Density Commercial portion of the Property’s designation contemplates FAR in excess of 6.0. The mixed-use Project with a FAR of approximately 9.31 is not inconsistent with the Property’s high-density designation. The PDR FLUM category does not contemplate a FAR range; and though the Project exceeds the 1.8 to 4.0 FAR range contemplated by the Medium Density Residential FLUM category, greater density is possible when complying with IZ or in a PUD, which both apply to the Project as it exceeds IZ requirements and is a PUD. Notably, the Project accommodates and includes PDR/Maker uses consistent with the PDR designation for the Property;
  - (b) GPM. The Application is not inconsistent with the GPM’s Multi-Neighborhood Center designation given the proposed upper-story residential and retail, restaurant, and service uses within the Project. Notably, the definition of the Multi-Neighborhood Center does not contemplate any sort of PDR use but does note that the “primary function” of such area is “retail trade”. The Project allocates 10% of

the ground floor to PDR uses for five years and provides the capability to expand PDR uses if sufficient demand for such PDR space exists;

(c) Racial Equity (Community Outreach and Engagement and Outcomes). The Applicant's Racial Equity Analysis asserted that the Project advances the Plan's racial equity goals, including by (i) reserving 15% of its residential gross floor area as affordable: 13% for households earning 60% MFI and 2% units for households earning 50% MFI, (ii) increasing housing opportunities generally in an amenity-rich neighborhood without causing any direct displacement of residents as there is no existing residential use on the Property, (iii) providing numerous opportunities for new jobs for a variety of skill sets, ranging from construction jobs to full time hourly and salaried employment, and (iv) pivoting the Property's uses away from PDR-related harms disproportionately experienced by Black and other minority residents of Ward 5. The Applicant evaluated the Project's potential racial equity outcome against more than two dozen indicators and found that it had a potential positive or neutral impact as to all but one indicator. As to the one potentially negative outcome, the Project does displace existing businesses on the Property, but five business owners provided letters in support of the Project, and the Applicant testified that it has made efforts to work with those businesses to mitigate displacement impacts of the Project and to assist in relocation and/or right of return. The Applicant noted that as a result of the community outreach and engagement it performed pursuant to the racial equity tool, it made the following changes to the Project: (a) in response to comments from the ANC and OP, the Applicant increased the amount of affordable housing in the initial application materials to the Commission and (b) the Applicant also increased the number of three-bedroom units in the Project in response to concerns from the ANC; (Ex. 11C.)

(d) Racial Equity (Past/Present Discrimination and Affected Community). The Applicant's Racial Equity Analysis identified how historical industrial zoning practices along rail corridors in Northeast DC combined with the segregation of the District to create high concentrations of Black residents in the Northeast quadrant with a result of such zoning and segregation being a large number of Black District residents living near and adjacent to industrially-zoned (now PDR-zoned) areas which has had direct and adverse health, wealth, and quality of life impacts on Black and other minority residents primarily. The Applicant also collected feedback from community members regarding potential positive and negative impacts from the Application and used that feedback to shape the Application; (*Id.*)

(e) Land Use Element. The Application stated that the Project is not inconsistent with the Land Use Element as it is pedestrian-oriented and includes high-quality architecture and public spaces, affordable and family-sized housing to allow District residents to remain in the neighborhood and share in the benefit of the development of the Union Market District and (i) is a high-density development constructed to its Height Act limit in a manner compatible with the surrounding Union Market District and appropriate for the growing, densifying District, particularly the expanded Central Employment Area; (ii) adds density, housing diversity and affordability, and publicly accessible plazas and parklets on currently underutilized land in a manner compatible with the surrounding Multi-Neighborhood Center and the high-density scale of the emerging neighborhood;

(iii) achieves and balances multiple objectives; (iv) focuses District resources; (v) mixes uses and mitigates land use conflicts by enhancing activity at an existing node that keeps potential evening and crowd activity away from quieter residential areas; (vi) helps establish the Union Market District multi-neighborhood center; and (vii) avoids items the Land Use Element cautions against including negative impacts to any row house neighborhoods, loss of family-sized units, or intrusion of commercial/PDR uses into other residential areas (instead adding density and commercial/PDR uses away from such neighborhoods to relieve pressure in those areas). Community engagement was a priority in the Project's development, and no residents are displaced as a result of the Project; (Plan at LU-1.2.2, 2.4.4, 2.4.6, 2.1.5, 2.1.1, 1.2.3, 1.3.2, 1.4.3, 1.4.5, 1.4.6, 2.1.2, 2.1.3, 2.3.2, 2.4.7, 2.4.1, 2.4.2, 1.3.6, 2.1.11, 2.3.2, 2.4.5, 2.4.8, 1.1.2, 1.2.8, 1.2.9, 1.3.4, 2.2.5, 2.2.6, 2.1.4, 2.1.6, 2.1.7, 2.1.9, 2.1.19, 2.2.7, 2.3.1, 2.3.3, 3.5.1, 3.5.2, 3.2.13.).

(f) Land Use Element: PDR Objectives. The Applicant provided evidence that the Application is not inconsistent with any of the applicable PDR-retention related objectives of the Land Use Element or Economic Development Element because the Property is (i) designated for a mix of uses on the FLUM and Small Area Plan and does not include existing PDR uses, (ii) subject to the Small Area Plan, which controls over the policy objective that promotes retention of PDR designated areas on the FLUM based on explicit language relating to the Small Area Plan in the Comprehensive Plan, (iii) obsolete from an industrial use perspective as a two-story hotel building with large expanses of surface parking, (iv) not well-buffered from the existing and approved residential uses immediately opposite the Project along 4<sup>th</sup> Street, N.E. and 5<sup>th</sup> Street, N.E. and therefore is inappropriate for new, intense PDR uses, (v) not viable for future industrial land uses. In addition, the Project adds dedicated space for low impact "PDR/Maker uses" in a way that avoids impacts on adjacent sites and that anticipates future growth of that industry and provides support for PDR uses in buildings with best in class environmentally sustainable design; (Plan at LU-3.2.1-3.2.6, 3.2.10.)

(g) Transportation Element. The Application stated that the Project furthers the goals and policies of the Transportation Element because it (i) builds and improves pedestrian and cycling infrastructure in a safe manner, (ii) balances off-street parking supply with demand and the multitude of transit and other mobility options serving Union Market today and innovative and future-thinking parking measures (e.g., EV parking) in the Project's garage, (iii) improves the urban design and streetscape and overall visual quality at the New York Avenue, N.E. gateway entrance to the Union Market District, with buildings of substantial design quality and mass in light of the significance of that entrance, (iv) avoids auto-oriented uses, removes surface parking, and closes all existing curb cuts to rely on the existing alley system serving the west side of 4<sup>th</sup> Street, N.E., (v) constructs significant enhancements to public space to support an active and naturally-landscaped pedestrian environment that includes areas and gathering spaces for a mix of ages and abilities (with an emphasis on innovative accessibility measures) without introducing walking or cycling obstructions and revises 4<sup>th</sup> Street, N.E. and adjacent private space to include parklets and plaza that animate the street, (vi) adds residents and workers who will contribute to the use of CaBi stations and the overall

cycling system and expands EV charging capacity, (vii) includes a transportation impact assessment with required mitigation measures, (viii) delivers a robust TDM package, and (ix) adds density and uses in Union Market District that will ultimately help justify adding transit investments and a connection to the NoMA Metrorail station stop in support of the objectives of the Plan's Transportation Element, especially when viewed through a racial equity lens (e.g., Ward 5 historically not receiving as much focus on transit expansion); (Plan at T-1.1.4, 1.2.4, 2.2.2, 2.3.1-2.3.3, 2.4.1, 2.4.3-2.5.1, 4.1.3, 1.1.8, 3.2.1, 3.2.2, 3.2.3, 1.2.1, 1.2.3, 1.4.1, 1.4.2, 2.4.4, 2.3.5., 5.2.1., 5.2.2, 1.1.2, 3.1.1, 3.3.4, 4.2.1, 4.4.2, 1.1.7, 2.1.1, 2.1.2, 2.1.6., 2.6.1, 2.6.2.)

(h) Housing Element. The Application stated that the Project is not inconsistent with the Housing Element because, among other things, it helps satisfy the District's goal of 6,900 new units in the Upper Northeast planning area. The Project (i) addresses two major housing production civic priorities: includes affordable housing (where none is currently allowed or required) and imposes perpetual affordability restrictions to preserve such housing and includes 3-bedroom ("family-sized") units, including affordable 3-bedroom units and avoids any direct displacement, and (ii) does not displace any existing residents or convert any existing housing and provides a mix of affordable and market-rate units to help mitigate displacement elsewhere in Upper Northeast/Ward 5; (Plan at H-1.2.2, 1.2.3, 1.2.9, 1.1.5, 1.1.9, 2.1.3, 1.1.1-1.1.4, 1.1.8, 1.3.1, 1.2.1, 1.2.7, 1.2.11, 2.1.6, 1.1.5, 2.2.4, 1.6.5, 1.4.6, 1.6.1, 2.1.4, 2.2.1, 3.2.1-3.2.3, 4.1.3, 4.3.3, 4.3.4, 1.3.2, 1.4.2, 3.1.1.)

(i) Environmental Protection Element. The Project (i) incorporates sustainable features, including a commitment to achieve LEED Gold status, solar panels, as well as the green roof and terrace areas; (ii) advances District climate resilience objectives (located outside of any flood plain, capturing stormwater runoff, providing on-site energy generating capabilities); (iii) adds street trees where none currently exist; (iv) employs water conservation methods to achieve LEED targets; and (v) reduces the likelihood that the Property will be used for the sort of PDR use(s) that have historically had disproportionately negative and environmentally unjust effects on Ward 5 residents; (Plan at E-1.1.1, 1.1.6, 2.1.3, 1.1.2, 2.1.5, 2.1.6, 4.1.1-4.1.3, 4.2.1, 4.2.2, 4.4.1, 6.1.5, 2.1.2, 3.1.1, 3.2.1-3.2.3, 3.2.5-3.2.8, 3.2.13-3.2.15, 5.1.1, 5.1.7, 4.4.2, 4.4.3, 5.1.3, 5.1.5, 6.2.1, 6.2.5, 3.3.2, 6.3.2, 2.3.1-2.3.3, 2.4.1, 6.1.3, 6.5.1, 5.1.3, 6.7.1-6.7.2.)

(j) Economic Development Element. The Application noted that the Project advances goals and policies of the Economic Development Element by (i) adding approximately 31,900 square feet of floor area to diversify and expand the retail, service, and PDR/Maker use job sectors to capture more regional and District resident discretionary spending and to help anchor the future development of neighborhood shopping options in a neighborhood commercial center outside from the District's commercial core that is developing its own unique identity, (ii) providing dedicated space and construction to specifications suitable for a range of PDR/Maker uses, (iii) continuing the pipeline of development in the Union Market District which has resulted in the creation and success of numerous small businesses, many of which have been and are women- minority- and/or deaf-owned

businesses, (iv) adding opportunities for entry-level jobs and jobs that result in upward mobility for District residents and very small start-up and incubator businesses through innovative public space, and (v) adding residents to support the success of a local grocery story, one of a relatively small number of stores in Ward 5 (only Wards 7 and 8 have fewer); (Plan at ED-1.1.3, 2.2.1, 2.2.3, 2.2.5, 2.2.7, 2.3.2, 2.3.3, 3.1.1, 3.1.8, 1.3.1, 1.3.2, 1.3.4, 1.1.4, 2.2.4, 3.2.1, 3.2.2, 2.2.8, 4.2.6, 4.2.9, 2.2.6, 3.2.6, 3.2.7, 3.1.7, 3.2.2, 3.2.8, 4.2.12.)

(k) Parks Recreation and Open Space Element. The Project adds to the diversity of open spaces in the Union Market District by adding a linear interconnected series of parklets and public plaza areas in front of the Project, an alley system that will be more accessible to the public for recreation and cultural events than many others, and improved cycling connections to the nearby Metropolitan Branch Trail. The Project's parklets also represent opportunities for temporary and seasonal public art displays and performances; (Plan at PROS-1.1.3, 3.3.2, 3.4.4, 4.3.3.)

(l) Urban Design Element. The Application stated that the Project is not inconsistent with the Urban Design Element because it (i) is consistent with the block-scale massing, design, Height Act-limited/vertical urbanism principles in Washington DC and improves upon the delivery of such principles in the image of the District generally relative to the existing suburban and auto-oriented conditions, (ii) does not propose to close an alley and instead builds underneath a public alley in a way that preserves the alley function and creates a multipurpose space that meets utilitarian needs while also providing recreational and possibly gathering/arts space, (iii) creates a gateway to the Union Market District in a location that does not disturb the "topographic bowl" of the city and that currently expresses with very little Plan-based urban design consideration in the vicinity of the Project, (iv) employs superior and innovative architectural design that advances the Small Area Plan's design goals, improves nearby public spaces, avoids monotony, emphasizes the Property's corners, and will endure for decades, (v) advances the streetscape objectives of the Plan, (vi) provides high-quality, street-activating publicly accessible plazas, parklets, and an activated alley system, (vii) creates strong streetwalls where none currently exists, employs projections (canopies, porches, balconies, and steps), provides high-quality storefronts, and improves the adjacent streetscape with social and pedestrian-oriented features that also add visual interest, (viii) includes canopies that provide protection against sun and rain, and (ix) provides a classic tripartite design with a strong top level that respects the urban design intent of the Height Act and penthouse setback requirements as well as the character of the neighborhood while also leveraging the views available at the Property and creating opportunities for outdoor gathering and resident interactions; (Plan at UD-1.1.1, 2.2.1, 1.1.5, 1.4.4, 1.4.2, 1.4.1, 1.2.2, 4.1.2, 4.1.7, 4.1.8, 4.2.1, 2.1.1, 2.1.2, 2.1.3, 2.1.4, 2.1.5, 2.1.6, 2.1.7, 2.1.8, 2.2.3, 2.3.1 to 2.3.5, 2.4.1 to 2.4.4, 3.1.1, 3.1.3, 3.1.4, 3.1.5, 3.2.2, 3.3.1 to 3.3.4, 3.2.5, 3.3.5, 2.2.7, 4.2.2, 4.2.3, 4.2.6, 4.3.2, 4.3.5, 3.2.1, 4.2.5, 4.3.1, 4.3.3, 4.3.4, 2.3.5, 1.2.4, 2.2.4, 2.2.5, 2.2.2, 4.2.4.)

(m) Historic Preservation Element. Regarding historic preservation, the Project: (i) respects the Height Act's limits, generally does not adversely affect the nearby historic district (which recognizes a unique history of industrial uses in the District), and does not adversely affect views of the District's skyline; (ii) steps down

adjacent to the Historic District along 5<sup>th</sup> Street, N.E. and is buffered from the Historic District by an existing building along 4<sup>th</sup> Street, N.E.; and (iii) reinforces the “tilted grid” endogenous to the Union Market District and in which the historic district’s fabric is situated; (Plan at HP-1.6.2, 2.1.1, 2.1.3, 2.1.4, 1.4.2, 2.5.3-2.5.4, 1.6.3.)

(n) Infrastructure Element. The Applicant stated that the Project is not inconsistent with the Infrastructure Element because it (i) is served by adequate infrastructure (all of it currently underground), and the Applicant’s team has worked with PEPCO, DC Water, and other service providers on the location, scale, and scheduling/timing of facilities to meet future development and neighborhood demand, fees for which are paid at the time of obtaining a building permit, and (ii) includes solid waste collection from a fully-indoor trash collection facility which reduces adverse effects (noise, odors, truck movements) on neighbors; (Plan at IN-5.1.1, 5.12, 6.1.1, 6.1.3, 6.2.2, 3.1.1, 3.1.2.)

(o) Upper Northeast Area Element. The Application stated that it furthered the goals of the Area Element by: (i) providing for new affordable and mixed-income housing and growth in Ward 5 away from the predominantly residential Upper Northeast neighborhoods; (ii) improving economic development, business, and linkages to job opportunities and pedestrian-oriented retail near Florida Avenue, N.E. and Metrorail; (iii) providing uses that are environmentally improving relative to more intense PDR uses allowed as a matter-of-right on the Property and street trees where none exist; (iv) improving the appearance from New York Avenue, N.E. which is a gateway to Washington, D.C. with iconic and visually striking new buildings to serve as a gateway into the District and the neighborhood; (v) avoiding adverse effects on Upper Northeast historic resources; (vi) improving pedestrian and bicycle access and safety within the Union Market District as part of a larger Northeast DC connection effort, and (vii) implementing the redevelopment of the Union Market District consistent with the Small Area Plan; and (Plan at UNE-1.1.1, 1.1.6, 1.1.8, 1.2.4, 1.2.5, 2.3.2, 1.2.9, 1.1.11, 2.3.1, 1.2.1, 1.2.2, 1.2.6, 2.6.2, 2.1.2.)

(p) Implementation Element. The Application underwent a thorough review and evaluation as part of the PUD modification process and the PUD’s consistency with the Comprehensive Plan was refreshed. The PUD includes a mix of affordable, market rate, and three-bedroom units as a true mix of residential housing as an amenity. (Plan at IM-1.1.5, 1.3.3, 1.3.4, 1.5.1-1.5.3, 1.5.5, 1.2.1, 1.1.4, 1.1.6-1.1.8, 1.2.3, 1.3.3, 1.1.9; Ex. 11C.)

49. MoveDC (2021 Update). In addition to the Transportation Element, in December 2021 DDOT adopted an update to its District-wide long-range transportation plan called MoveDC. MoveDC identifies seven broad goals of safety, equity, mobility, project delivery, management and operations, sustainability, and enjoyable spaces along with nearly twenty policies and three-dozen “strategies.” The Project is not inconsistent with the MoveDC Plan. In particular, the Project, and its proposed improvements to and below the public alley: (a) provide people-focused, accessible placemaking opportunities, (b) permit social, cultural, commercial, and flexible uses of public space without closing a public alley, (c) expand the pedestrian and bicycle network, and (d) “Improve walkability and

pedestrian amenities with more car free zones and plazas" and "increase the people-focused use of the right-of-way and public space". (Ex. 11C.)

50. Small Area Plan. The Applicant provided evidence that the Application is not inconsistent with the Small Area Plan, as a whole, by (a) matching the Small Area Plan's "Function" (i.e., use) recommendation for new residential and retail uses; (b) being consistent with the Plan's "Character" (i.e., density and height) recommendation of Medium-High Density; (c) addressing the complexity of the urban design environment around the Property; and (d) advancing other recommendations of the Plan regarding housing, public safety, 18-hour-a-day dynamism, environmental sustainability, and pedestrian-friendly streetscapes. (Ex. 11C.)
51. W5W Study. The Applicant also provided evidence that the Application is not inconsistent with the W5W Study because it (a) adds a mix of uses, including PDR/maker uses that diversify the overall District economy, bolster the mix of food-based PDR uses in the Union Market District, and create opportunities for new and emerging businesses; (b) promotes inclusive economic growth with a range of job opportunities; (c) avoids the type of "nuisance" uses experienced in other PDR-zoned areas; (d) improves environmental performance and stewardship (especially compared with existing conditions); (e) serves other (non-PDR) municipal functions through the production of on-site affordable housing to house future employees of on-site and other nearby PDR uses; (f) includes other community amenities (e.g., public space improvements and the paseo and breezeway to the improved public alley); and (g) improves the physical appearance of the Property, helps create a "great place" in the Union Market District, enhances pedestrian and cyclist connectivity, and creates a buffer between the highly-trafficked New York Avenue, N.E. (and the railyards to the north) and the Union Market District. (Ex. 11C.)
52. Mayor's Housing Order. The Project advances the Mayor's Order for new housing in the District, particularly new affordable housing in the Upper Northeast Planning Area. (Ex. 11C.)
53. Potential Inconsistencies. The Applicant's analysis of the Project's consistency with the Plan identified potential areas of inconsistency with individual Plan policy objectives: (Ex. 11C.)
  - (a) The GPM designates the Property as a "Multi-Neighborhood Center" which "contain[s] many of the same activities as Neighborhood Commercial Centers [Typical uses include convenience stores, sundries, small food markets, supermarkets, branch banks, restaurants, and basic services such as dry cleaners, hair cutting, and childcare.... Many buildings have upper-story residential uses], but in greater depth and variety.... These centers might include supermarkets, general merchandise stores, drug stores, restaurants, specialty shops, apparel stores, and a variety of service-oriented businesses. These centers also may include residential and office space for small businesses, although their primary function remains retail trade") (emphasis added). (Plan at 10-A DCMR §§ 225.15, 225.17.)

The Applicant responded that the Project is not inconsistent with the Generalized Policy Map's Multi-Neighborhood Center designation given the proposed amount of upper-story residential and retail, restaurant, and service uses within the Project. Notably, the definition of the Multi-Neighborhood Center does not contemplate any sort of PDR use but does note that the "primary function" of such area is "retail trade";

(b) The Project achieves LEED Gold, a high level of sustainability and water efficiency, but it is short of the net-zero energy target encouraged (but not mandated) by the Plan. (Plan at H-1.6.5.)  
The Applicant noted, however, that net-zero (i.e., "net-zero" means that the housing should generate or offset as much energy as it uses) is a lofty goal that is not achievable in light of the other objectives that the Project advances, including through other sustainability measures that address issues like stormwater management and PDR and placemaking objectives;

(c) The Project does not include any housing specifically for seniors, persons with disabilities, or vulnerable populations. (Plan at H-4.1.3, H-4.3.3, H-4.3.4.)  
The Applicant responded that the Project does not preclude housing anyone in such groups and includes 15 percent of units reserved as accessible and includes broad accessibility measures for all units (e.g., elevators, in-unit washer/dryer, etc.) not possible or available in older buildings;

(d) The Applicant does not anticipate any owner-occupied housing (or any future homeowner assistance program) in the Project. (Plan at H-1.3.2, H-1.4.2, H-3.1.1.)  
The Applicant further explained however, it is unusual for a single building to have rental and owner-occupied units together; instead, the Project contributes to a mix of rental and owner-occupied units in the Union Market District overall. In addition, the market for owner-occupied housing in a condominium format is not available in the current circumstances;  
The Application includes an evaluation of climate and resiliency measures and consideration of other environmental measures; however, the Project did not undergo a full environmental review at the zoning entitlement stage even though the Plan encourages impact assessments that consider environmental and other impacts before any decision is made. (Plan at E-4.4.2, E-4.4.3, E-5.1.3, IM-1.1.1.)  
The Applicant explained that such reviews are not mandatory requirements in the Plan and are not typically included as part of PUDs or at this early stage of project planning and design;

(e) The Project retains and avoids displacement of the PNC Bank branch on the Property; however, also does not provide any opportunities for direct community equity investment, hiring incentives, CBE requirements, or small business incubator space, or mitigation efforts for potentially rising commercial rents. (Plan at ED-3.2.6, ED-3.2.7, ED-3.1.7, ED-3.2.2, ED-3.2.8, ED-4.2.12.)  
The Applicant explained that, as with many policy objectives of the Plan, these items are only ambiguously applicable to private developers (as opposed to District policymaking more generally). On balance, the Project's other positive attributes—affordable housing, family-sized housing, PDR commitments, and job creation

opportunities, chief among them—make the Project overwhelmingly consistent with the Plan and Small Area Plan;

(f) The Project arguably creates sharp transitions in mass, scale, and character relative to the single-story buildings and existing rooflines in the immediate vicinity of the Property (without any of the more customary stepping or transitioning that might be expected). (Plan at UD-2.2.4, UD-2.2.5, UD-2.2.2, UD-4.2.4.)  
The Applicant explained that such transitions are a characteristic of the Union Market District, a unique mix of new and old buildings in Washington, DC, and the Project complements and contributes to rather than detracts from the emerging architectural eclecticism of the Union Market District (in a manner not possible elsewhere); and

(g) The Project is potentially inconsistent with policy objective Plan policy UNE-1.1.8, which notes that “[t]he uses, height, and bulk permitted under the existing PDR zones are expected to remain for the foreseeable future”.  
The Applicant noted that such language (a) does not preclude changes to PDR zones consistent with the Future Land Use Map and Policy Map, which have greater weight than this section, (b) should be understood as subject to and superseded by the effective Small Area Plan recommendations with which it is in conflict, and (c) in any event is couched merely as an “understanding” and not a requirement (e.g., it does not say that uses, height, and bulk under the existing PDR zones shall not change). (Plan at UNE-1.1.6, UNE-1.1.8, UNE-1.2.4, UNE-1.2.5, UNE-2.3.2.)

**NO UNACCEPTABLE PROJECT IMPACTS ON THE SURROUNDING AREA OR THE OPERATION OF CITY SERVICES (SUBTITLE X § 304.4(b).)**

54. The Applicant provided evidence that the Application complies with Subtitle X § 304.4(b) because the impacts of the Application, are favorable, capable of being mitigated, or acceptable given the quality of the public benefits of the Project:

(a) Zoning and Land Use Impacts. The Project has no unacceptable zoning or land use impacts on the surrounding area and any impacts are instead either favorable, capable of being mitigated, or acceptable given the quality of public benefits in the Project. The Project’s mix of uses is appropriate given the Property’s proximity to transit and highway access, the ongoing development in the neighborhood, and the extensive planning and community support for the Small Area Plan. The Project’s height, and mass are appropriate given the planning objectives for Union Market. The Project’s contribution of a critical mass of commercial and multifamily uses to the neighborhood is a favorable land use impact. These proposed uses create economic opportunities and contribute to the emergence of job opportunities in the neighborhood and provide new, high-quality multifamily housing units to Ward 5. Moreover, the Project’s creation of a thoughtfully designed public space also has favorable land use impacts;

(b) Housing Impacts. The Project’s addition of new housing, affordable housing, and three-bedroom units produces favorable impacts for the District’s housing market. The Project does not displace any existing residents and is unlikely to create any adverse impacts on the surrounding housing market. Instead, the addition of the

Project's new housing units helps buffer increasing housing costs, as increases in supply are widely understood to damper rent increases;

(c) Economic Impacts. The Project has favorable economic impacts on the neighborhood by generating revenue for the District from property tax, sales tax, and income tax from its new residents. The proposed intensification of land use on the Property has positive tax revenue effects for the District. The Project will continue to attract patrons and outside investment to the Union Market District, add transit-accessible job opportunities as well as construction period jobs, and have a stabilizing and positive effect on the economy of Ward 5 and the District as a whole. The contribution of new residences in the Union Market District contributes patrons for the existing businesses and benefits the District's economic situation generally. The additional retail and PDR/Maker space addresses concerns about adverse economic impacts or changes to the neighborhood's retail and service mix in a way that serves long-time businesses and residents. To the extent there are any adverse effects from the Project, such effects are more than offset by the aforementioned mitigating factors and the Project's public benefits;

(d) Open Space, Urban Design, and Massing Impacts. The Project's urban design impacts are favorable. Those elements of the Project are a grand gesture framing the entrance to the Union Market District and heralding its arrival as a significantly emerging economic hub in the District and the greater region. In addition, the Project creates a strong presence, avoiding blank walls, curb cuts, and surface parking, providing high quality landscaping and streetscaping, and creating pedestrian-first porosity in the street network. Finally, the Project has favorable impacts on the surrounding area as a keystone linking the emerging projects elsewhere in the neighborhood and establishing the context for additional higher-density phases and design in the future. Any massing impacts are capable of being mitigated or acceptable in light of the public benefits, primarily the amount and depth of the proposed affordable housing;

(e) Transportation and Mobility Impacts. The Project does not have any unacceptable impacts on the public transportation facilities or roadways. The Project reduces the amount of proposed parking and incorporates the TDM Plan. The Project includes EV charging stations and bike storage space. The Project's CTR thoroughly evaluated the Project's potential transportation impacts and crafted a customized mitigation package. In addition, the Applicant enhanced its mitigation commitment through improvements to pedestrian spaces in the private portion of Neal Place, N.E.;

(f) Historic Resource Impacts. The Project has no unacceptable impacts on the surrounding historic resources and any impacts are instead either favorable, capable of being mitigated, or acceptable given the quality of public benefits in the Project. The Project's overall height and density are of a different scale than the lower density, existing historic structures. In terms of height and density, the Project is much more akin to the other new buildings in the Union Market District and not imitative of the scale of the contributing structures. On 4<sup>th</sup> Street, N.E. the Project is separated from the Historic District by a large non-contributing structure. On 5<sup>th</sup>

Street, N.E. the Project is adjacent to the Historic District and appropriately is stepped down to 90 feet in height on that portion of the Property;

(g) Cultural and Public Safety Impacts. The Project has favorable impacts on the culture of the surrounding area. The Project provides uses and placemaking features that contribute to the emergence of the Union Market District as an important Ward 5 space beyond a place merely to live or work. The Project's important contributions to the public realm provide neighborhood gathering and event spaces, celebrations, performance opportunities, and opportunities for social interactions and engagement. The addition of residents to the neighborhood and the Project's balconies and other design elements improves street activity, quality lighting, and other improvements all of which have positive effects on crime deterrence. In addition, the Project replaces underutilized commercial lots with well-designed, more intense uses that support the broader cultural build-out and significance of the Union Market District generally;

(h) Environmental Impacts. The Project has favorable impacts on the environment. The Project meets stormwater management and GAR requirements and is designed to achieve a LEED Gold level of design. The Project includes green roof and solar panels as well as tree plantings on the nearby streetscape. The Project's construction will include required erosion control measures;

(i) Public Facilities. The Project is unlikely to have unacceptable impacts on public facilities, such as utility infrastructure, schools, recreation centers, libraries, or parks, given the size of the Project and its mix and type of units as well as the capacity of the nearby facilities;

(j) Public Health and Safety Impacts. The Project advances public health by incorporating open space for retreat and well-being and high-quality design. The Project's bicycle facilities and proximity to Metro options encourages healthier modes of transportation. The increased activity and visibility improve public safety; and

(k) Construction Impacts. During the development period for the Project, impacts on the surrounding area are capable of being mitigated. The Applicant has significant experience successfully completing construction projects in infill locations without imposing material and adverse impacts on neighbors. There are no existing residential units on the Property or on any adjacent blocks.

(Ex. 2C2, 35A.)

**THE PROJECT INCLUDES PUBLIC BENEFITS AND PROJECT AMENITIES THAT ARE NOT INCONSISTENT WITH THE COMPREHENSIVE PLAN, SMALL AREA PLAN, OR OTHER ADOPTED PUBLIC POLICIES (SUBTITLE X, § 304.4(c).)**

55. The Applicant provided evidence that the Application complies with the public benefit requirements of Subtitle X § 304.4(c). As amended by the Application, the Project includes the following public benefits and project amenities, which the Applicant stated are not inconsistent with the Comprehensive Plan and other adopted public policies and active programs related to the Property. The Application enumerated the following benefits and amenities, superior to a matter-of-right project, organized under the categories defined by Subtitle X § 305.5:

- (a) Superior Urban Design (Subtitle X § 305.5(a).): The Project's architecture and urban design are superior. Specifically, the Project's urban design emphasizes the pedestrian nature of the Project, provides a large-scale gesture at the entry to Union Market from New York Avenue, N.E., and steps down adjacent to the Historic District. The Project similarly includes elements of superior architectural design. For example, the Project presents a thoughtful ground floor design that integrates into the surrounding context. The Project's differentiated massing, balconies, articulation, and design responds to its context on all sides;
- (b) Superior Landscaping or Creation of Open Spaces (Subtitle X § 305.5(b).): The Project's landscape, public alley, and streetscape improvements create a range of vegetation and outdoor spaces that improve the Property while also providing functional services to building residents and visitors and patrons of the area;
- (c) Site Planning and Efficient Land Utilization (Subtitle X § 305.5(c).): The benefits of the Project's site plan and efficient land utilization are reflected in the Project's overall density, introduction of residential uses on underutilized lots located near transit, the absolute number of new residential units provided, and introduction of affordable housing. The Project's greater heights and density near a transit node represent economical land utilization. Further, the Applicant proposes an efficient, economical land utilization strategy with respect to parking;
- (d) Housing and Affordable Housing (Subtitle X §§305.5(f), 305.5(g).): The provision of a greater number of residential units than could be developed on the site as a matter-of-right, three-bedroom units, and affordable housing in excess of the IZ requirements are all public benefits. The Project includes a greater number of housing units than could be developed on the site as a matter-of-right, includes a minimum of 20 three-bedroom units, and reserves 15% of its residential GFA for affordable housing units, of which two percent will be set aside for households earning no more than 50% MFI and the remainder for households earning no more than 60% MFI;
- (e) Environmental and Sustainable Benefits (Subtitle X § 305.5(k).): The Project commits to LEED Gold v4 design under the New Construction rating system, as well as a minimum of 2,300 square feet of rooftop solar panels and EV charging stations;
- (f) Streetscaping (Subtitle X §305.5(l).): The Applicant commits to performing streetscaping and innovative placemaking improvements along the adjacent portion of 4<sup>th</sup> Street, N.E., 5<sup>th</sup> Street, N.E., and Penn Street, N.E., along with the adjacent portion of "Pascal Way" (i.e., the public alley), subject to DDOT approval, and constructing two "paseos"; and
- (g) Uses of Special Value (Subtitle X § 305.5(q.).): The Applicant commits (i) to building out 50% of the ground floor non-residential space to specifications that accommodate PDR/Maker uses, and (ii) to reserving an area equal to 10% of the non-residential GFA of the ground floor to PDR/Maker uses for five years.

(Ex. 2C3, 35A, and 41.)

#### **THE PROJECT SATISFIES THE AIRSPACE DEVELOPMENT CRITERIA (SUBTITLE X, § 701.)**

56. The Applicant provided evidence that the Application complies with the requirements for an airspace development: (a) the Application seeks Zoning Commission approval per

Subtitle X § 701.1; (b) the Application seeks to use the airspace for garage purposes pursuant to the requirements of the MU-9A zone, which would be the abutting zone pursuant to the Applicant's PUD-related Map amendment per Subtitle X § 701.2; (c) the airspace does not include any vertical structures above grade so limitations and requirements of Subtitle X § 701.2 respecting the height, off-street parking, other development standards, and easements regarding light and air are inapplicable; (d) per Subtitle X § 701.3, the airspace development is being process as part of the PUD so it is otherwise subject to the relevant evaluation criteria of Subtitle X, Chapter 3; and (e) per Subtitle X § 701.4, the conditions applicable to the Project generally will also be applicable to the airspace development portion of the Application, so the Project's airspace components are not incompatible with the surrounding private property, remain accessible to the public for traversing the public alley, result in a high quality design, do not affect any viewsheds, and do not otherwise impose adverse impacts on the surrounding area. (Ex. 2A2, 35A.)

57. The Project's below alley connection is designed to provide space below grade but above the garage connection for utilities and other improvements below grade in the alley (i.e., "future proofing" the alley). This provision satisfies the requirements of Subtitle X §§ 701.3 and 701.4.

#### IV. RESPONSES TO THE APPLICATION

##### OFFICE OF PLANNING

58. On July 17, 2023, OP filed a report recommending that the Commission set down the Application for a public hearing (the "OP Setdown Report"). (Ex. 12.). The OP Setdown Report stated the following:

- (a) The Application would be not inconsistent with the maps and policies of the Comprehensive Plan, including when reviewed through a racial equity lens;
- (b) OP made the following comments regarding the Project:
  - i. Clarify and define the Project's uses, including bedroom count for residential units; use of the penthouse; the location of the lodging use proposed; and amounts and locations of retail space and PDR space on the ground floor;
  - ii. Clarify the exact locations where penthouse relief is requested and provide justification for all of the requested relief;
  - iii. Clarify on the drawings the amount and locations of solar panels and commit to a minimum level or area for solar power generation;
  - iv. Consult with DOEE to ascertain whether LEED v4.1 should be used to evaluate the project rather than v4;
  - v. Consider expansion of the commitment to PDR uses; and
  - vi. Provide additional information regarding how existing business owners are being accommodated in the redevelopment;
- (c) The OP Setdown Report analyzed the Project's consistency with the Comprehensive Plan and other adopted public policies, including evaluating it through a racial equity lens, and concluded that the Application is not inconsistent

with the Comprehensive Plan's maps or Citywide Elements and that it would further the Area Element's policy objectives;

With respect to the Property's location within a Future Planning Analysis Area on the GPM, OP noted that the Comprehensive Plan's Implementation Element states "re-zoning proposals received prior to planning studies in these Future Planning Analysis Areas may be considered if the following occur or have occurred: a Small Area Plan, development framework, technical study, design guidelines, Planned Unit Development, master plan already approved by the National Capital Planning Commission, or the re-zoning proposal would have been consistent with the 2012 Future Land Use Map" (10-A DCMR § 2503.3), as is the case with the Property. OP further stated that it is currently undertaking studies in the New York Avenue corridor, but those efforts are not yet complete;

OP cited policy objectives and goals of the Citywide Elements and Area Element that would be furthered by the Project. (Land Use Element Policies LU-1.41, 1.4.3, 1.4.C, 1.5.1, 2.1.1, 2.2.4, 2.4.1, 2.4.2, 2.4.6, 3.2.3, 3.2.10, 3.2.E, and §§ 315.1, 315.6; Transportation Element Policies T-1.4.1, 2.3.B, 2.4.1; Housing Element Policies H-1.1.1, 1.1.2, 1.1.3, 1.1.4, 1.2.1, 1.2.2, 1.2.7, 1.3.1; Environmental Protection Element Policies E-1.1.2, 3.2.3, 3.2.7, 4.1.2; Economic Development Element Policies ED-2.2.3, 2.2.4, 2.2.5, 2.5.2, 3.1.1, and § 711; Historic Preservation Element Policy HP-2.5.3; Urban Design Element Policies UD-2.1.1, 2.1.6, 3.2.5, 4.2.1, 4.2.2, 4.2.6, 4.3.4; and Upper Northeast Area Element Policies UNE-1.1.6, 1.1.8, 1.1.9, 1.1.B, 1.2.5, 2.1.2, and § 2411.3.) OP noted that among those policies, in addition to providing new market rate and affordable housing opportunities, the Project would further goals aimed at reinforcing Florida Avenue Market as a regional destination and complementing the unique retail environment in the neighborhood. The Project would further Land Use and Transportation goals of maximizing land use efficiency near transportation infrastructure and could further Economic Development goals of supporting small and local businesses;

Disaggregated Race and Ethnicity Data. OP's Racial Equity Analysis included demographic, housing, and other economic census data disaggregated by race for the Upper Northeast Planning Area, in which the Property is located. OP concluded that, "[t]he available data shows that a number of factors can be distinguished by race. For example, home ownership and home rental rates show a disparity between White and Black populations in the planning area. Similarly, the poverty level for Blacks in the planning area, 18.8%, is significantly higher than for Whites, at 10.9%. Average income shows a high level of disparity between White and Black, although that data might be skewed by the much higher percentage of Blacks that are of retirement age compared to Whites in the planning area. Disability status and educational attainment also show significant differences. The proposed housing development could help to alleviate some degree of inequity, especially regarding housing costs and the number of families that are housing-cost-burdened. Data on the number of households burdened by housing costs is not disaggregated by race but given unemployment and income levels it can be inferred that additional affordable housing provided by the project would help to further equitable outcomes for Black families. Another benefit of the project would be the provision

of residential units in close proximity to several transportation modes, which can help populations of any skill or educational level reach employment opportunities.”; and

Displacement. OP noted that the Property site currently contains a small motel, and a number of small retail/wholesale businesses and these existing businesses will be displaced as a result of the Project. However, the Applicant has indicated that it is working with the existing business owners to mitigate impacts of the new development and that the current business owners are supportive of the Project.

- (d) The OP Setdown Report also analyzed the Application against the Small Area Plan, W5W Study, and Mayor’s Housing Order; and
- (e) In its prehearing submission, the Applicant responded to the comments and requests for information in the OP Setdown Report. (Ex. 13-13D.)

59. On November 22, 2023, OP submitted a hearing report recommending that the Commission approve the Application, including the associated zoning flexibility and airspace development and generally supports the requested design flexibility with minor refinements (the “OP Hearing Report”): (Ex. 23.)

- (a) The OP Hearing Report reaffirmed that the Application remained not inconsistent with the Comprehensive Plan including when viewed through a racial equity lens;
- (b) The OP Hearing Report reviewed earlier OP and Zoning Commission comments and noted that all open issues had been clarified except:
  - i. The Applicant proposes to use a LEED system other than that which DOEE recommended (i.e., New Construction rather than Multifamily Midrise, discussed below in the context of the DOEE Report);
  - ii. The Applicant maintains that its level of PDR/Maker use commitment of 50% designed to PDR/Maker specifications and 10% reserved for PDR/Maker uses for five years is appropriate; and
  - iii. The Applicant should provide additional information in the case record about business tenant relocation assistance or ability to return to the site;
- (c) At the hearing, the Applicant responded to the open items from the OP Hearing Report; (Ex. 35A; Tr. 2 at 12-13.)
- (d) The OP Hearing Report updated its Racial Equity Analysis, including disaggregated race and ethnicity data for both the Upper Northeast Planning Area and District wide over a longer period (i.e., 10-year period) than in the OP Setdown Report and additional demographic data. OP found that “Research shows that there is a positive relationship between the provision of more housing and the ability of Black residents to remain in a neighborhood. The proposed zoning action would have a positive impact on the quantity of housing and affordable housing and would help to meet housing goals of the Comprehensive Plan as well as housing goals set by the Mayor. The PUD’s affordable housing proffer, which exceeds regular IZ and would include some units at a deeper MFI, has the potential to narrow the income disparity between White and Black populations in the planning area.”;
- (e) OP recommended approval of the PUD-related map amendment from the PDR-1 zone to the MU-9A zone. OP noted that the map amendment would allow additional height and density. Specifically, the Project’s proposed maximum height

of 90 feet (East Building) to 130 feet (West Building) is greater than the maximum 50-foot height permitted for a matter-of-right development under the existing PDR-1 zoning and is a gain of 40 feet (East Building) to 80 feet (West Building). Additionally, the Project's proposed density of approximately 9.31 FAR is a gain of 5.81 FAR when compared to the maximum 3.5 FAR permitted under the existing PDR-1 zoning, and a gain of 7.87<sup>4</sup> FAR in residential FAR as no residential use is permitted under the existing PDR-1 zoning;

(f) OP found that “[a]ny potential negative impacts of added density would be outweighed by the benefits of the project, including housing and affordable housing on a site that currently contains none, an enhanced public realm, improved environmental performance, and greater utilization of underutilized land. In addition, the project would not result in unacceptable impacts on the surrounding area in terms of its built form.”;

(g) OP recommended approval of the requested PUD zoning flexibility from court, rear yard, and penthouse setback requirements, finding that the flexibility would not result in significant impacts to light and air;

(h) OP also found that “In total, the benefits and amenities could be commensurate with the amount of flexibility sought through the PUD process.”;

(i) OP also recommended changes to some of the Applicant's requested design flexibility regarding the Project's balconies, residential units in the Project's penthouse, and permitted ground floor uses; and

(j) OP evaluated the Application's airspace development request and expressed support for that item. (Ex. 23.)

## **DDOT**

60. DDOT submitted a report dated November 22, 2023, expressing no objection to the Application provided that the Applicant implement its revised TDM Plan as proposed in the October 20, 2023 CTR, with the following additions: (Ex. 20A1, 20A2.)

- The Applicant will fund and construct two ADA curb ramps on each of the northeast and southeast corners of the intersection of private Neal Place and the north-south private alley west of 4<sup>th</sup> Street, N.E., and
- Clarify that the DC Transportation Benefits Equity Amendment Act of 2020 (i.e., the parking cash-out law) is now in effect, and that retail tenants with 20 or more covered employees are in compliance. (Ex. 22.)

61. DDOT found that the Project: (a) will improve pedestrian facilities adjacent to the Property and add pedestrian porosity to the street network; (b) consistent with DDOT standards, the Project's vehicular access is proposed via a two-way parking garage entrance from the existing rear public alley network with all four (4) existing curb cuts to the site to be closed. These are consistent with DDOT standards; (c) meets the requirements of the Zoning Regulations for vehicle parking, and the parking supply is in line with DDOT's preferred parking maximums for sites within walking distance to Metrorail stations; (d) is expected to create unacceptable delay and queueing at one study intersection resulting from the

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<sup>4</sup> OP stated that the total square footage allowed under the existing PDR-1 zone is 159,548 square feet; the Project would have a total square footage of 415,242 of which 358,618 square feet would be residential use.

addition of site-generated vehicle trips but this traffic impact is offset by the TDM Plan; and (e) implements a robust TDM Plan to encourage walking and discourage driving and supports non-automobile ownership lifestyles and use of non-auto modes. (*Id.*)

62. DDOT evaluated the CTR's analysis with respect to site access, vehicle parking, bicycle parking, loading, trees, streetscape, mode split/trip generation, pedestrian network, bicycle network, transit service, curbside management, traffic impacts, and TDM. (*Id.*)
63. DDOT reiterated its findings at the public hearing. (Tr. 2 at 94-95.)

## **DOEE**

64. DOEE submitted the following comments on the Application which were included in the OP Hearing Report: (Ex. 23.)
  - (a) LEED Rating System: DOEE commented that the Applicant should design the building to be in conformance with "LEED v4 Multifamily Midrise (MMR)" instead of "LEED v4 New Construction (NC)";
  - (b) Electrification: DOEE encouraged the Applicant to design the Project to be fully electric (i.e., eliminate the on-site combustion of fossil fuels), avoid installing any new gas infrastructure, and install EV charging stations for a portion of the residences. At the public hearing, the Applicant confirmed that it was installing capacity for EV charging stations and designing the residential units to be gas free with gas only located within the Project for commercial kitchens, building back-up systems, and possibly amenity areas; (Tr. 2 at 15.)
  - (c) Net-Zero Energy: DOEE encouraged the Applicant to explore net-zero energy construction/certification for the Project. At the public hearing, the Applicant described that it was taking net-zero energy steps such as including on-site energy generation and gas-free residential units; (*Id.*)
  - (d) Solar Energy: DOEE encouraged the Applicant to maximize rooftop solar energy generation and to consider integrating additional solar panels into the green roof. At the public hearing, the Applicant confirmed that it had increased its solar installation commitment by 15% to 2,300 square feet; (Tr. 2 at 15-16.)
  - (e) Climate Resilience: DOEE encouraged the Applicant to assess how climate change will affect the project and to incorporate resilient design strategies. The Applicant included an assessment of the Project against the "Resilient Design Strategies Matrix" published by DOEE in its *Climate Ready DC Resilient Design Guidelines*; and (Ex. 35A.)
  - (f) Deconstruction, Reuse, and Embodied Carbon: Finally, DOEE encouraged the Applicant to explore options for deconstruction and reuse or salvage of materials from the existing structures and to conduct a life-cycle analysis. The Applicant confirmed that it would have a waste-diversion program during demolition of the existing structures on the Property and would evaluate a life-cycle analysis as a possible LEED credit. (Tr. 2 at 15-16.)

(Ex. 23.)

## **ANC 5D**

65. On December 29, 2022, ANC 5D submitted a resolution, stating that at its December 13, 2022, properly called and duly-noticed meeting, with a quorum present, it voted 5-0-1 to support the Application (the “ANC Report”). (Ex. 10.) The ANC Report commended the Project’s affordable housing commitment and meaningful number of three-bedroom units. The ANC also noted its understanding that adding one- and two-bedroom units in multifamily buildings, such as the Project, can create opportunities for families to live in the rowhouses elsewhere within the ANC. ANC 5D also specifically called out its support for the Project’s garage beneath the public alley to minimize potential impacts on the sidewalks and pedestrian environment.
66. The ANC Report noted that the ANC’s interests are ensuring that the development of the Property moves forward in an orderly manner with public benefits that primarily benefit the neighborhood and the area of the ANC and concluded that the Project and its benefits are significant and satisfy the foregoing objectives. (Ex. 10.)
67. Commissioner Hector Arbuckle of ANC 5D testified at the public hearing, expressing his personal support for the Project and the Applicant’s engagement with the community. (Tr. 2 at 101-103.)

## **OAG**

68. On November 28, 2023, OAG filed written comments along with calculations and citations to the Plan, and on December 3, 2023, OAG submitted updated comments along with presentation materials (collectively, the “OAG Report”). (Ex. 24-25B, 33-34.)
69. The OAG Report argues that the Plan requires the density increases resulting from the PUD process to create affordable housing, that affordable housing is the “only” high priority in the District, and that the Project’s 15% affordable housing set aside is deficient and should instead be increased to 24.2%. (*Id.*) Further consideration of the OAG Report is set forth in the Materially Contested Issue section below.
70. On December 29, 2023, OAG submitted a request to re-open the record to respond to the Applicant’s post-hearing submission. (Ex. 42.) The Commission Chairman denied OAG’s request to re-open the record for several reasons. The request was submitted after the Commission closed the record except for specified items, which did not include a further response from OAG. OAG was participating in the case in an advisory role as a government agency, not as a party, thus was not entitled to respond to the Applicant’s post-hearing submission. The Commission asked for the Applicant to address the issues raised by OAG at the hearing in a post-hearing submission to allow the Applicant a reasonable and fair chance to respond to the issues raised by OAG. The Commission therefore believes there was no need for further rebuttal or discussion of those issues, and therefore no good cause to re-open the record. Further, the Commission believes that allowing further submissions would prejudice the Applicant by unnecessarily prolonging a case in which the Applicant had met its burden of proof.

## **ORGANIZATIONS AND INDIVIDUALS IN SUPPORT OR OPPOSITION**

71. Five business owners with businesses currently on the Property filed letters in support of the Application. (Ex. 27-31.) The letter writers noted that the accommodations made by the Applicant avoid any impacts from disruption to the business owners' businesses.
72. Sebrena Rhodes, Commissioner of SMD 5D02 (and prior to the effectiveness of redistricting in January 2023, the SMD Commissioner for 5D01, the SMD where the Property is located) wrote a letter in support of the Application, noting its 15% affordable housing set aside and 20 three-bedroom units as more than any other development in the area. (Ex. 36.)
73. No individuals in opposition presented testimony at the public hearing on December 4, 2023 (Tr. 2 at 105.), and no other persons, agencies, or organization filed written comments in opposition to the Application in the record.

## **NCPC**

74. The Commission referred the Application to NCPC on December 6, 2023, for review and comment pursuant to the District of Columbia Home Rule Act of 1973, as amended, 87 Stat. 790, Pub. L. No. 93-198, D.C. Code Section 1-201 et seq. (Ex. 37.) NCPC staff filed a letter dated December 15, 2023<sup>5</sup>, stating that NCPC staff determined that the Project falls under an exception listed in Chapter 8 of NCPC's guidelines and is exempt from NCPC review. (Ex. 44.)

## **V. MATERIALLY CONTESTED ISSUES**

75. The OAG Report raises three arguments against the Application's affordable housing proffer, which OAG asserts is deficient in light of the development incentives proffered and the requirements of the Comprehensive Plan:
  - (a) OAG references the Plan at §§ 224.9, 229.3, and 504.15 to assert that the Plan requires that when the District permits a project to obtain additional density via a PUD and/or Zoning Map amendment, the District must leverage that additional density to create affordable housing;
  - (b) OAG cites to census and other data to assert that there is a critical need for affordable housing in the District, especially in light of the Plan's emphasis on racial equity as a component of the Commission's analysis as to whether the Application is not inconsistent with the Plan and especially in light of conditions and trends in the Upper Northeast Planning Area. OAG argued that the Project's other benefits should not be considered as contributing to the justification for the density-related development incentives requested as part of the Application. In part, OAG asserts that the PDR-related benefits in the Project should be discounted because such PDR uses are required under the Plan; and
  - (c) Finally, OAG argues that the IZ-Plus formula in the Zoning Regulations is the appropriate baseline for evaluating affordable housing proffers as part of a PUD. OAG argues that a PUD and a PUD-related Map Amendment should provide no

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<sup>5</sup> The letter was submitted into the record on January 11, 2024.

less affordable housing than a Zoning Map amendment that proceeds via the IZ-Plus standards. OAG therefore provides calculations to demonstrate what it argues is the appropriate level of affordable housing for this Application in light of the density received via the Zoning Map amendment to the MU-9 zone and the PUD-related density bonus.

76. In its rebuttal testimony at the public hearing and in its post-hearing submission, the Applicant disputed OAG's analysis:

- (a) The Applicant provided evidence that the Plan sections referenced by OAG do not state that affordable housing is the "only" high priority PUD benefit. Instead, the relevant section of the Plan provides that the provision of affordable housing should be considered as "*a* high-priority public benefit." (10-A DCMR § 224.9.) The Applicant also noted that the Framework Element language cited by OAG is non-mandatory and, per the Plan at Section 200.6, is not intended to be interpreted as policy setting. Instead, § 224.9 is intended to set out a development framework where each PUD's public benefits should be unique to the PUD and should respond to critical issues facing the District, including affordable housing as a high priority. The Applicant also pointed to similar language in the Housing Element at § 504.15 which provides that, "The affordable housing proffered [i.e., by an applicant as part of a PUD] shall be considered a high priority public benefit for the purposes of granting density bonuses, especially when the proposal expands the inclusiveness of high-cost areas by adding affordable housing." Read in context, the intent of the foregoing language is to instruct the Commission to provide zoning incentives (particularly density bonuses) when a PUD provides affordable housing substantially in excess of what would otherwise be required on a site (which in addition to amount of affordable housing provided can also mean exceeding the depth of affordability). The Applicant also provided evidence that the Application is not inconsistent with § 229.3 regarding leveraging density gained via a PUD and Zoning Map amendment. The Application does leverage for affordable housing the Project's PUD- and PUD-related Map amendment density;
- (b) In response to OAG's assertion that the Project's PDR-related proffers should be discounted because PDR uses are required, the Applicant cited language from the Plan's Land Use Element demonstrating that PDR uses are non-mandatory as to the Project given its location within the area subject to the Small Area Plan; (*See, e.g.*, 10-A DCMR §§ 316.2, 3016.4.)
- (c) The Applicant did not dispute that affordable housing is a pressing issue in the District, and there is no dispute that the Project leverages an increase in density to provide affordable housing;
- (d) The Applicant asserted the only material dispute is whether the Project is obligated to provide additional affordable housing beyond the 15% proffered by the Applicant, which OAG asserts is required under the IZ-Plus standard in the Zoning Regulations. The Applicant provided conclusive evidence that the IZ-Plus standard is inapplicable to a PUD and related Zoning Map amendment. The text of the Zoning Regulations unambiguously provides that the requirements of the IZ-Plus map amendment subsection of Subtitle X do "not apply to a map amendment that

[(a)] is related to a PUD application.” (Subtitle X § 502.2.) The Applicant also provided explanation that OAG’s quantitative analysis is also inapposite, improperly ignores the Project’s proffer of three-bedroom units and ignores whether a 24.2% set aside would render the Project inviable; and (Ex. 40.)

(e) The Applicant asserted OAG’s interpretation of the IZ-Plus provisions is inconsistent with the Zoning Regulations on its face and is not supported by the legislative history behind the creation of the IZ-Plus regulations. As OP testified to the Commission at the time the Commission voted to adopt the IZ-Plus regulations, “OP does not propose that Expanded IZ apply to any PUDs. Existing, proposed, or future PUDs would continue to be subject to the Regular IZ requirements and any PUD-related negotiations to provide additional IZ units and other benefits and amenities to the community.” (Public Hearing Transcript of the District of Columbia [Zoning Commission] at 7, Z.C. Case No. 20-02 (November 16, 2020).)

77. At the public hearing, OP provided testimony in response to questions from the Commission about the OAG Report. OP testified that the IZ-Plus “program was created to capture some benefit for the city at a time when we were seeing an increase in the number of map amendments and we wanted to get a benefit out of those zoning actions, and the IZ+ program is a great way to realize a high level of affordable housing when the Zoning Commission changes the zoning on a particular site. The PUD, however, is different in that it’s a specific project. The Commission has the ability to evaluate the design, other benefits that may be present with that particular project. Just to take the current project as an example, you know, the applicant is committing to provide three-bedroom units. That’s not something that we would necessarily be guaranteed through a map amendment. Similarly, we know what the environmental performance of this building is going to be, also something that we would not know when it comes to a map amendment. So, I think there’s a variety of benefits that through the PUD process the Commission can evaluate and weigh in addition to the critical benefit of affordable housing.” (Tr. 2 at 99-100.)

78. The Commission inferred the Project would have the following potential adverse effects/impacts:

(a) Displacement of the commercial retail tenants currently located on the Property. The Commission notes however that the tenants submitted letters in support of the Project that noted that they had reached an agreement with the Applicant to mitigate the effects of the displacement; and

(b) Increased vehicular traffic and parking demand. The Commission notes that the Applicant submitted a thorough analysis of traffic, loading and parking issues, and agreed to a traffic demand management plan and other mitigations to improve the pedestrian experience near the site and mitigate the effects of these potential impacts.

## **CONCLUSIONS OF LAW**

### **AUTHORITY**

1. Pursuant to the authority granted by the Zoning Act of 1938 (June 20, 1938, 52 Stat. 797, as amended; D.C. Official Code § 6-641.01 (2018 Rep1.)), the Commission may approve (a) a consolidated PUD, (b) a PUD related Zoning Map amendment, (c) airspace development, and (d) zoning flexibility and design flexibility, pursuant to Subtitle X §§ 300, 303, and 701.

### **STANDARD OF REVIEW FOR A CONSOLIDATED PUD AND PUD RELATED ZONING MAP AMENDMENT AND AIRSPACE DEVELOPMENT**

2. Pursuant to Subtitle X § 300.1, the purpose of the PUD process is to provide for higher quality development through flexibility in building controls, including building height and density, provided that a PUD:
  - (a) *Results in a project superior to what would result from the matter-of-right standards;*
  - (b) *Offers a commendable number or quality of meaningful public benefits; and*
  - (c) *Protects and advances the public health, safety, welfare, and convenience, and is not inconsistent with the Comprehensive Plan.*
3. Pursuant to Subtitle X § 303.1:  
*As part of the PUD process, the Commission may grant relief from any building development standard or other standard referenced in the zone reference table with the exception of use regulations.*
4. Pursuant to Subtitle X § 303.12:  
*A PUD-related zoning map amendment shall be considered flexibility against which the Zoning Commission shall weigh the benefits of the PUD.*
5. Pursuant to Subtitle X § 304.3, in evaluating a proposed PUD, the Commission shall:  
*Judge, balance, and reconcile the relative value of the public benefits and project amenities offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case.*
6. Pursuant to Subtitle X § 304.4, to approve a proposed PUD, the Commission must determine that the proposed development:
  - (a) *Is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site;*
  - (b) *Does not result in unacceptable project impacts on the surrounding area or on the operation of city services and facilities but instead shall be found to be either favorable, capable of being mitigated, or acceptable given the quality of public benefits in the project; and*
  - (c) *Includes specific public benefits and project amenities of the proposed development that are not inconsistent with the Comprehensive Plan or with other adopted public policies and active programs related to the subject site.*

7. A PUD's proposed public benefits must comply with Subtitle X §§ 305.2-305.5, and 305.12, which provide that a PUD's public benefits:

*[A]re superior features of a proposed PUD that benefit the surrounding neighborhood or the public in general to a significantly greater extent than would likely result from development of the site under the matter-of-right provisions of this title;*

*[Shall] meet the following criteria: (a) Benefits shall be tangible and quantifiable items; (b) Benefits shall be measurable and able to be completed or arranged prior to issuance of a certificate of occupancy; [and] (c) Benefits may primarily benefit a particular neighborhood or area of the city or service a critical city-wide need. A project may qualify for approval by being particularly strong in only one or a few categories of public benefits but must be acceptable in all proffered categories and superior in many;*

*[S]hould relate to the geographic area of the [ANC] in which the application is proposed; and*

*[M]ay be exhibited and documented in any of the following or additional categories: (a) Superior urban design and architecture; (b) Superior landscaping, or creation or preservation of open spaces; (c) Site planning and efficient and economical land utilization; . . . (f) Housing that: (1) Exceeds the amount that would have been required through matter-of-right development under existing zoning; . . . or (3) Provides units with three (3) or more bedrooms; (g) Affordable housing except that: (1) Affordable housing provided in compliance with [IZ] shall not be considered a public benefit except to the extent it exceeds what would have been required through matter-of-right development under existing zoning. . . and (2) A PUD application proposing Inclusionary Units with deeper affordability than what would be required by IZ for the existing zone, or for the proposed zone if a map amendment is sought, shall propose only a household income level published in the Rent and Price Schedule established by the IZ Act that is in effect as of the date the PUD application was filed . . . (j) Building space for special uses including. . . (k) Environmental and sustainable benefits to the extent they exceed the standards required by zoning or other regulations . . . (q) Uses of special value to the neighborhood or the District of Columbia as a whole; and (r) Other public benefits and project amenities and other ways in which the proposed PUD substantially advances the major themes and other policies and objectives of any of the elements of the Comprehensive Plan. A project may qualify for approval by being particularly strong in only one (1) or a few of the categories in this section, but must be acceptable in all proffered categories and superior in many.*

8. An airspace development application must comply with Subtitle X § 701:

701.1 *No development of airspace may occur without approval of the Zoning Commission.*

701.2 *The Zoning Commission shall determine the use to be permitted in the proposed airspace consistent with regulations applicable to the abutting privately owned property, including limitations and requirements respecting the height of any structure to be erected in such airspace, off-street parking and development standards applicable to such structure, and easements of light, air, and access.*

701.3 *Airspace cases may be processed as a part of a design review, PUD, or project-specific rezoning application and shall be subject to the evaluation criteria and follow the procedures of the relevant chapter, except as provided in this section.*

701.4 *The Zoning Commission may impose any conditions or restrictions on airspace development that it deems necessary to ensure: (a) Compatibility with surrounding private property; (b) The accessibility of the public to traverse as appropriate the public space; (c) A high quality design of any building, landscape or public realm; (d) Appropriate treatment and protection of viewsheds; and (e) No undue adverse impacts on the surrounding area.*

9. The Comprehensive Plan Act of 1984 (D.C. Law 5-75; D.C. Official Code § 1-306.01(b)) established the Plan's purposes as:

*(1) to define the requirements and aspirations of District residents, and accordingly influence social, economic and physical development; (2) to guide executive and legislative decisions on matters affecting the District and its citizens; (3) to promote economic growth and jobs for District residents; (4) to guide private and public development in order to achieve District and community goals; (5) to maintain and enhance the natural and architectural assets of the District; and (6) to assist in conservation, stabilization, and improvement of each neighborhood and community in the District.*

10. In determining whether a PUD and PUD related Zoning Map amendment are not inconsistent with the Comprehensive Plan, the Commission shall balance the various elements of the Plan. The District of Columbia Court of Appeals discussed this balancing test:

“The Comprehensive Plan is a broad framework intended to guide the future land use planning decisions for the District.’ *Wisconsin-Newark Neighborhood Coal. v. District of Columbia Zoning Comm'n*, 33 A.3d 382, 394 (D.C. 2011) (internal quotation marks omitted). ‘[E]ven if a proposal conflicts with one or more individual policies associated with the Comprehensive Plan, this does not, in and of itself, preclude the Commission from concluding that the action would be consistent with the Comprehensive Plan as a whole.’ (*Durant v. District of Columbia Zoning Comm'n*, 65 A.3d 1161, 1168 (D.C. 2013).) The Comprehensive Plan reflects numerous ‘occasionally competing policies and goals,’ and, ‘[e]xcept where specifically provided, the Plan is not binding.’ (*Id.* at 1167, 1168 (internal quotation marks omitted).) Thus ‘the Commission may balance competing priorities’ in determining whether a PUD is consistent with the Comprehensive Plan as a whole.’ (*D.C. Library Renaissance Building/West End Library Advisory Grp. v. District of Columbia Zoning Comm'n*, 73 A.3d 107, 126 (D.C. 2013).) ‘[I]f the Commission approves a PUD that is inconsistent with one or more policies reflected in the Comprehensive Plan, the Commission must recognize these policies and explain why they are outweighed by other, competing considerations.’”

*Friends of McMillan Park v. District of Columbia Zoning Comm'n*, 149 A.3d 1027, 1035 (D.C. 2016) (internal quotation marks and references omitted).

11. The Comprehensive Plan also requires the Commission to evaluate all zoning actions through a racial equity lens. 10-A DCMR § 2501.8. Consideration of equity is intended to

be based on the policies of the Plan, and part of the Commission's consideration of whether the PUD and modifications to an approved PUD in this case are "not inconsistent" with the Plan, rather than a separate determination about a zoning action's equitable impact.

12. The Plan's Framework Element states that equity is achieved by targeted actions and investments to meet residents where they are, to create equitable opportunities, but is not the same as equality. (10-A DCMR § 213.6.) Further, "[e]very development is a participatory approach for meeting the needs of underserved communities through policies, programs and/or practices [and] holistically considers land use, transportation, housing, environmental, and cultural conditions, and creates access to education, services, healthcare, technology, workforce development, and employment opportunities." (10-A DCMR § 213.7.) The District applies a racial equity lens by targeting support to communities of color through policies and programs focusing on their needs and eliminating barriers to participate and make informed decisions. (10-A DCMR § 213.9.)
13. The Plan's Implementation Element provides guidance to help the Commission in applying a racial equity lens to its decision making. Specifically, the Implementation Element states that "[a]long with consideration of the defining language on equity and racial equity in the Framework Element, guidance in the Citywide Elements on District- wide equity objectives, and the Area Elements should be used as a tool to help guide equity interests and needs of different areas in the District." (10-A DCMR § 2501.6.) The Commission released a revised Racial Equity Analysis Tool on February 3, 2023, with new components requiring applicants to include information about their community outreach and engagement efforts and OP to include disaggregated race and ethnicity data for the affected Planning Area in their respective Comprehensive Plan consistency submissions regarding racial equity.

#### **COMPLIANCE WITH THE PUD ELIGIBILITY STANDARDS**

14. Pursuant to Subtitle X § 301.1 and 301.5, a PUD in the MU-9 zone must include a minimum land area of not less than 15,000 square feet, and all such area must be contiguous except that it may be separated, among other things, public alleys. The Property includes approximately 44,585 square feet total (not including the area below the public alley that bisects the Property. (FF ¶ 11.) Therefore, the Application satisfies the PUD eligibility requirements.

#### **COMPLIANCE WITH THE PUD REQUIREMENTS**

15. Pursuant to Subtitle X § 300.1, the Application results in a project superior to what would result from matter-of-right standards because it includes a significant amount of affordable housing, superior design, and sustainable design, none of which are required as a matter-of-right in the PDR-1 zone. (FF ¶ 19.) The Project's public benefits are commendable in number and quality (FF ¶ 55.), and the Project advances public health, safety, and welfare. (Tr. 2 at 87.) As set forth below, the Project is also not inconsistent with the Plan.

#### **CONSISTENCY WITH THE COMPREHENSIVE PLAN (SUBTITLE X §§ 304.3(a).)**

16. The Commission considered whether the Project and its proffered public benefits, are not inconsistent with the Comprehensive Plan and other adopted public policies applicable to

the Property, and concludes the Project, as revised, is not inconsistent for the following reasons:

- (a) The FLUM provides that the Property is appropriate Mixed-Use PDR/Medium Density Residential/High Density Commercial designation. The High Density Commercial designated portion of the Property allows FAR in excess of 6.0. (FF ¶ 48(a).) The PDR FLUM category does not contemplate a FAR range. The Medium Density Residential FLUM category contemplates a range of 1.8-4.0 FAR, which the approximately 9.31 FAR Project exceeds, but greater density is allowed when complying with IZ or in a PUD and the Project is both. The Commission finds the Project is appropriate for these FLUM designations and not inconsistent with the FLUM. The Commission notes that the Project allocates 10% of the ground floor to PDR/Maker uses for five years consistent with the PDR designation for the Property; (FF ¶ 20, 58.)
- (b) The GPM designates the Property as a Multi-Neighborhood Center and within a Future Planning Analysis Area, The Multi-Neighborhood Center designation ` new housing with ground floor commercial uses consistent with this designation. Though the Comprehensive Plan Implementation Element requires planning studies in Future Planning Analysis Areas prior to rezonings, there is an exception if the rezoning proposal would have been consistent with the 2012 FLUM, which is the case with the Property. (FF ¶ 21, 58.) The Commission finds the Project is not inconsistent with the GPM;
- (c) The Commission agrees with OP's conclusions that the Application advances the goals and policies in the Citywide and Area Element of the Plan, including:
  - i. Land Use Element policies promoting high-density development among other objectives; (FF ¶ 48(e), 58.)
  - ii. Transportation and Parks Recreation and Open Space Element policies promoting transit-oriented development and high-quality streetscaping as well as the inclusion of EV charging stations in the below-grade garage; (FF ¶¶ 48(g), 48(k), 58.)
  - iii. Housing Element policies promoting new housing in mixed-use developments, including affordable housing (FF ¶ 48(h) and 58);
  - iv. Environmental Protection Element and Infrastructure Element policies promoting green roof and solar panels as well as landscaping and compliance with GAR requirements, waste collection, and utilities objectives; (FF ¶ 48(i), 48(n), 58.)
  - v. Economic Development Element policies to increase retail uses and provide new employment opportunities; (FF ¶ 48(j), 58.)
  - vi. Urban Design and Historic Preservation Element policies regarding massing and streetscape; and (FF ¶ 48(l), 48(m), 58.)
  - vii. Upper Northeast Area Element policies. (FF ¶ 48 (o), 58.)
- (d) Racial Equity. The Commission concludes that the Project is not inconsistent with the CP when evaluated through a racial equity lens. The Commission reaches this conclusion based on the case record and the racial equity analyses provided by the Applicant, inclusive of community outreach and engagement information, and the

OP Reports, inclusive of disaggregated race and ethnicity data for the Upper Northeast Planning Area. (FF ¶ 48(c), 58, 59.) The Commission finds that the racial equity analyses provided address the components of the Commission's Racial Equity Tool and that the Project will further CP racial equity goals for the following reasons:

- Community Outreach and Engagement. The Applicant's racial equity analysis included evidence that it conducted community outreach and engagement, including outreach to the ANC which resulted in an increased affordable housing proffer, and an increase in the number of three-bedroom units in the Project; (FF ¶¶ 37(d), 48(c).)
- Displacement. The Applicant noted that the action would not result in any direct displacement of residents as there is no existing residential use on the Property. (*Id.*) The Application will/would likely result in the displacement of business/commercial tenants. The Applicant provided evidence that it has made efforts to work with the business/commercial tenants to assist in relocation and/or right to return, and as result, the tenants submitted letters in support of the Application; (FF ¶¶ 38(h), 48, 71.)
- The Application responds to the District's racial equity goals as the Applicant/Petitioner utilized community outreach and engagement guidance, and the Project will advance many desired Comprehensive Plan policies/themes identified in the Commission's revised Racial Equity Analysis Tool; and (*Id.*)
- Disaggregated Race and Ethnicity Data. The disaggregated race and ethnicity data for the Upper Northeast Planning Area provided by OP showed several racial disparities, particularly between White and Black populations. (FF ¶ 58, 59.) The Commission is hopeful that the Project's provision of approximately 350 new housing units, including affordable housing and three-bedroom units, will alleviate some inequity in the Planning Area by decreasing housing cost burden and allowing more Black and other minority residents to remain in the neighborhood. (*Id.*)

(e) The Project is also not inconsistent with the MoveDC update, the Small Area Plan, the W5W Study, and the Mayor's Housing Order; and (FF ¶¶ 49-52.)

(f) The Applicant identified potential inconsistencies with individual policies and objectives of the Plan, and OAG implied potential Plan inconsistencies related to what it alleged was an insufficient affordable housing proffer: (FF ¶¶ 53, 68-69, 75.)

i. The Applicant identified several ways in which the Project is potentially inconsistent with Comprehensive Plan policies. (FF ¶ 53.) The Commission agrees with the Applicant that the Project is not actually inconsistent with most of the identified policies, and the potential inconsistencies that do exist are relatively minor and are outweighed by other policies, for the reasons identified by the Applicant. (*Id.*) The Commission further concludes the ways in which the Project advances the policies identified in subsections(a)-(e) immediately above outweigh the identified inconsistent policies;

ii. The Commission concludes that the Project is not inconsistent with the Comprehensive Plan affordable housing policies identified by OAG in Sections 224.9, 229.3, and 504.15 because of what OAG characterized as an insufficient proffer of affordable housing in the PUD. (FF ¶¶ 68-69, 75.) The Commission acknowledges that OAG is correct that the Comprehensive Plan policies encourage leveraging discretionary density increases to create affordable housing, and that there is a need for increased affordable housing in the District. (FF ¶ 76.) However, the Commission concludes that the Comprehensive Plan does not require the Applicant to set aside a minimum of 24.2 percent of the Project's residential square footage as IZ, as OAG claims. OAG's assertion is based on an assumption that the IZ-Plus formula is the appropriate baseline for evaluating the affordable housing proffer. The Commission concludes that this is simply wrong. (*Id.*) Instead, the Commission concludes that the relevant point of comparison for PUDs is set forth in Subtitle X, § 305.5(g)(1), which provides that to qualify as a public benefit, the Project must provide a greater amount of affordable housing than is required under the existing matter of right zoning. The Zoning Regulations further provide under Subtitle X, § 502.2(a) that the IZ+ map amendment standards shall not apply to a map amendment that is related to a PUD application. (*Id.*) The Commission concludes that the Project is consistent with the policies cited by OAG because it does leverage the PUD process to produce new affordable housing units well beyond the requirements under the existing matter of right zoning, in accordance with the Zoning Regulations. (FF ¶ 59(e), 76, 77.) The Commission finds the Applicant's affordable housing proffer of 15% adequate. In addition, the Project includes additional affordable units at a deeper level of affordability, which is also a public benefit, as is the proffer of three-bedroom IZ units. *See* Subtitle X § 305.5(f) and (g). (FF ¶ 55, 77.) The Commission therefore concludes that the Application is not inconsistent with the policies cited by OAG that relate to affordable housing; and

iii. The Commission rejects OAG's argument that the Project's PDR-related proffers should be discounted because PDR uses are required by the Comprehensive Plan, and instead concludes that the Project's PDR/Maker use and specification proffers are properly categorized as public benefits to be included in the PUD balancing test.

The Commission concludes the PDR uses are uses of special value to the neighborhood, and the Zoning Regulations explicitly provide that uses of special value to the neighborhood qualify as PUD benefits. Subtitle X§ 305.5(q). Furthermore, as the Applicant pointed out, the Comprehensive Plan and the small area plan provide conflicting guidance on the issue of whether the PDR uses are required on the Property, so it is not as clear as OAG presents that the PDR uses are required by the Comprehensive Plan and related planning documents. (FF ¶ 76.)

**POTENTIAL ADVERSE IMPACTS – HOW MITIGATED OR OUTWEIGHED (SUBTITLE X § 304.4(b).)**

17. The Commission concludes that any moderate adverse impacts created by the Project are acceptable given the quality of the public benefits of the Project or sufficiently mitigated. (FF ¶ 54, 59-64, 71, 78.) The Project may create potential adverse impacts such as displacing existing businesses. (FF ¶¶ 38, 48(c), 58(c), 78.) However, the Commission concludes that these impacts are capable of being mitigated. (FF ¶ 58(c), 71, 78.) The Project also may create transportation-related impacts, which the Commission also finds are capable of being mitigated by the Project’s TDM Plan, and other mitigations. (FF ¶¶ 37, 60-62, 78.)

**PUD FLEXIBILITY BALANCED AGAINST PUBLIC BENEFITS AND POTENTIAL ADVERSE EFFECTS (SUBTITLE X §§ 304.4(c), 304.3, 303.12, 305.2-305.5, AND 305.12.)**

18. As discussed in greater detail below, the Commission concludes that the Project’s public benefits outweigh any potential adverse effects and are commensurate with the development incentives made possible by the PUD and related Zoning Map amendment. (FF ¶¶ 46, 54, 55, 59, 78.)

19. Pursuant to Subtitle X § 304.4(c), the Project includes specific public benefits including (a) superior architecture and design, (b) superior landscaping and creation of public open spaces, (c) efficient site planning and utilization, (d) housing and affordable housing where none is required, including a minimum of 20 three-bedroom units, a reservation of 15% of the residential GFA as affordable housing (13% at 60% MFI and 2% at 50% MFI), (e) environmental benefits such as solar panels and LEED v4 Gold design, (f) streetscape improvements, and (g) PDR/Maker use commitments and build out requirements. The Commission concludes these public benefits are not inconsistent with the Comprehensive Plan or with other adopted public policies and active programs related to the Property. In addition, the public benefits are superior features of the Project that benefit the Union Market District and ANC 5D to a significantly greater extent than a matter-of-right development of the Property; and each benefit is tangible, quantifiable, measurable, and able to be completed prior to issuance of a certificate of occupancy. The Project’s affordable housing and other housing commitments and its design and streetscape design are particularly superior, and all of the Project’s benefits are acceptable to the Commission. (FF ¶ 55; *See* Subtitle X § 305.2-3.) The Commission notes DOEE and OP’s recommendation for another LEED system for the Project other than LEED v4 Gold; however, the Commission finds the Applicant’s justification for the appropriateness of LEED v4 Gold for the Project adequate. (FF ¶¶ 38, 40, 58, 59, 64.) The Commission also notes OP’s recommendation that the Applicant increase its commitment of PDR/Maker uses; however, the Commission finds the Applicant’s commitment of 50% ground floor non-residential GFA designed to PDR/Maker specifications and 10% reserved for PDR/Maker uses for five years adequate. (FF ¶¶ 38, 40, 58, 59.)

20. Pursuant to Subtitle X § 304.3, the Commission is obligated to “judge, balance, and reconcile” the relative value of the Project’s public benefits against the development incentives and potential adverse effects. Under this criterion the Commission is not obliged to perform a rigid quantitative analysis and declines to adopt the formula that OAG

proposes. (FF ¶¶ 68-69, 75.) Rather, the Commission must consider “the specific circumstances of the case,” including elements of racial equity and give great weight to OP’s recommendations and the interests and concerns of ANC 5D. (FF ¶¶ 59, 65-67.) Both OP and ANC 5D advocate for approval of the Project, which includes a public benefits package that was crafted in consultation with ANC 5D in this case. On the one hand, the Project’s affordable housing and commitment to three-bedroom units are unsurpassed by any other primarily market-rate PUD that the Commission has seen in recent years, and the Project includes a superior design and superior streetscape and landscape improvements, a superior PDR/Maker use and design commitment, among other public benefits. On the other hand, the Applicant seeks a meaningful increase in density and modest zoning and design flexibility as development incentives for the Project which and is likely to have only relatively modest impacts, none of which are incapable of being mitigated.

21. The Commission concludes that the Applicant’s proposed PUD-related map amendment from the existing PDR-1 zone to the MU-9A zone is appropriate because:
  - The Property’s current PDR-1 zoning is inconsistent with the portions of the Property designated Medium Density Residential and High Density Commercial on the FLUM and does not allow residential use on the Property;
  - The Map Amendment is not inconsistent with the Comprehensive Plan when taken as a whole, as discussed above;
  - The Property is currently underutilized given it is currently improved with a small motel and small retail/wholesale businesses and surface parking, and can be better utilized given its location in the Union Market District in proximity to numerous transit options and economic activity; and
  - The Map Amendment will allow the property to be developed as a mixed-use Project, including residential use, at a density and height that can produce substantial new housing, including affordable housing, and PDR/Maker uses that are more compatible with the surrounding area and appropriate for this location. (FF ¶ 25-35, 48, 58, 59.)
22. The Commission concludes that the Applicant’s requested flexibility relief from the strict application of the Zoning Regulations in the MU-9A zone as to the Project’s courts, rear yard, and penthouse setback requirements is appropriate. (FF ¶ 46, 59.)
23. OAG urges the Commission to require additional affordable housing. While OAG’s advocacy is understandable in light of the District’s need for affordable housing, the Commission finds approval of the PUD with a related Map amendment and airspace development appropriate. The IZ-Plus requirements and the PUD process are intentionally separate entitlement pathways. The IZ-Plus requirements by rule do not bear on a Map Amendment related to a PUD and do not apply in this case. (Subtitle § 502.2(a).) Moreover, the Zoning Regulations provide that affordable housing that exceeds what would have been required through matter-of-right development under existing zoning is considered a valid PUD proffer. (Subtitle X § 305.5(g)(1).) The Commission also disagrees with OAG’s assertion that affordable housing is the only high priority benefit and that the Project’s other benefits should not be considered as contributing to the justification for the density-related development incentives requested as part of the Application. Instead, the Commission finds affordable housing to be a high priority benefit. (See 10-A DCMR

§ 224.9.) The Commission evaluated the Project’s entire public benefits and amenities package against the Project’s requested development incentives and adverse impacts and found the Project’s entire public benefits and amenities package adequate to justify approval of the Application for the reasons explained above. (See Subtitle X § 304.3) Further, the Commission finds the additional height and density gained through the proposed MU-9A zone to adequately leverage the production of new affordable housing. The Commission therefore rejects OAG’s reasoning and expressly disagrees with OAG that the Project’s proffers are insufficient.

As explained in detail above, the Commission also rejects OAG’s argument that the Project’s PDR-related proffers should be discounted because PDR uses are required by the Comprehensive Plan, and instead concludes that the Project’s PDR/Maker use and specification proffers are properly categorized as public benefits to be included in the PUD balancing test.

#### **AIRSPACE DEVELOPMENT SCOPE OF REVIEW (SUBTITLE X § 701.)**

24. Pursuant to Subtitle X § 701, the Commission concludes that the Project satisfies the requirements for an airspace development. The Applicant has proposed that the airspace development portion of the Project be located beneath the public alley that bisects the Property. The below-grade airspace development would include only spaces for pedestrian and vehicular movement and building mechanical systems. There are no structures above grade in the public alley to which to apply height limits, parking requirements, other development standards, or easements for light and air. The Project’s plans show a below-grade area above the below-grade garage for conduits and public utilities within the alley. The Conditions of this Order will ensure (a) compatibility of the airspace development with the surrounding private property (all owned by the Applicant), (b) continued accessibility through the public alley, (c) high quality design of the building and public realm, (d) no impact to viewsheds, and (e) no other adverse impacts on the surrounding area. (FF ¶¶ 56-57.)

#### **GREAT WEIGHT TO RECOMMENDATIONS OF OP**

25. The Commission is required to give “great weight” to the recommendation of OP pursuant to § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163; D.C. Official Code § 6-623.04 (2018 Repl.)) and Subtitle Z § 405.8. (*Metropole Condo. Ass’n. v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087. (D.C. 2016.).)

26. The Commission finds OP’s analysis of the Application, its conclusion that the Application satisfies the PUD evaluation requirements and is not inconsistent with the Comprehensive Plan maps and the Citywide Elements and the Area Element, including when viewed through a racial equity lens, and its recommendation to approve the Application persuasive, and concurs with this judgment. (FF ¶¶ 58-59.) The Commission gives OP’s recommendation great weight.

## **GREAT WEIGHT TO WRITTEN REPORTS OF THE AFFECTED ANC**

27. The Commission must give “great weight” to the issues and concerns raised in the written report of the affected ANC pursuant to § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2012 Repl.) and Subtitle Z § 406.2. To satisfy the great weight requirement, the Commission must acknowledge the ANC’s issues and/or concerns, then articulate with particularity and precision the reasons why the affected ANC does or does not offer persuasive advice under the circumstances. (*Metropole Condo.* at 1087.) If there are no issues or concerns expressed, then there is nothing to which to give “great weight.” (*Id.*)
28. The Commission finds persuasive ANC 5D’s support for the Application. The ANC articulated that its interests are ensuring the orderly development of the Project, which includes an affordable housing set aside of 15% and 20 three-bedroom units. The Commission concurs with ANC 5D’s support and accordingly gives great weight to such interests in the ANC Report. (FF ¶¶ 65-66.)

## **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 APPROVAL** of the Application for a consolidated PUD, PUD related Zoning Map amendment from the PDR-1 to the MU-9A, and airspace development subject to the following conditions and provisions (“Conditions”):

### **A. PROJECT DEVELOPMENT**

1. The Project shall be constructed in accordance with the plans submitted December 18, 2023, as Ex. 40A1-40A6 and the guidelines, conditions, and standards herein (collectively, the “Approved Plans”).
2. In accordance with the Approved Plans, as modified by the guidelines, conditions, standards, and flexibility herein, the Approved PUD shall have:
  - A maximum building height of approximately 130 feet as to the West Building and 90 feet as to the East Building;
  - Approximately 415,242 square feet of GFA cumulatively;
  - Approximately 350 residential units cumulatively (with lodging use) or approximately 375 residential units cumulatively (without lodging use); and
  - Approximately 162 parking spaces cumulatively.
3. The Project shall have the following flexibility from the Approved Plans in the following areas:
  - (a) Interior Components. To vary the location and design of all Project interior components, including partitions, structural slabs, doors, hallways, columns, stairways, atria, and mechanical rooms, provided that the variations do not change the exterior configuration of the Project as shown on the Approved Plans;

- (b) Exterior Materials – Color. To vary the final selection of the colors of the Project’s exterior materials based on availability at the time of construction, provided such colors are within the color ranges shown on the Approved Plans;
- (c) Exterior Details – Location and Dimension. To make minor refinements to the locations and dimensions of the Project’s exterior details that do not substantially alter the exterior configuration of the building or design shown on the Approved Plans. Examples of exterior details include, but are not limited to, doorways, canopies, railings, skylights, rooftop swimming pools and amenity area layouts and features (including resulting changes to the location and design of the related penthouse and rooftop structures provided such resulting changes are compliant with the Zoning Regulations as affected by the zoning relief granted herein), and changes to the placement, size, and/or number of columns outside of the East Building along 5<sup>th</sup> Street, N.E. and within the paseo areas of the West Building;
- (d) Number of Units. To vary the approved number of residential dwelling units in the Project by plus or minus ten percent (10%), except that (1) the total gross floor area of the Project’s residential dwelling units shall not be reduced, and (2) the total number of units reserved for affordable housing shall not be reduced below the numbers set forth in Condition B.1;
- (e) Parking Layout: To make refinements to the approved configuration of the Project’s parking garage, including layout of the garage and number of parking spaces plus or minus 10%, so long as the number of vehicle and bicycle parking spaces in the garage is at least the minimum number of spaces required by the Zoning Regulations, all of the foregoing being subject to the approval of the District’s Public Space Committee and DDOT’s Public Space Division with respect to the portion of such garage in public space;
- (f) Streetscape Design. To vary the location, attributes, dimensions, and general design of the approved streetscape, public alley, and projections into public space to comply with the requirements of, and the approval by, the DDOT Public Space Division;
- (g) Signage. To vary the font, message, logo, and color of the approved signage for the Project, provided that the maximum overall dimensions and signage materials are consistent with the signage on the Approved Plans and are compliant with the DC signage regulations;
- (h) Sustainable Features. To vary the approved sustainable features of the Project, provided (1) the total number of LEED points achievable for the Project does not decrease below the minimum required for the LEED standard specified in the Approved Plans and (2) solar panels may be installed vertically and/or horizontally on the Project as long as the aggregate area of the solar panel installation equals or exceeds 2,300 square feet;
- (i) Commercial Uses and Lodging Use. To vary the uses of the spaces the ground floor and second floor of the Project to be used for any use allowed in the MU-9 zone and to convert any lodging use to multiple dwelling

residential use, provided (1) any residential units resulting from any such conversion of use shall be subject to the requirements of Condition B.1 hereof; (2) such any affordable units resulting from such conversion shall be located on the floor(s) of the Project currently designated on the Approved Plans for such converted lodging use; and (3) residential units shall not be installed on the ground floor of the Project;

(j) Balconies. To install balconies that project over the southern lot line of the Property over Lot 0024 of Square 3592 provided such balconies are not enclosed gross floor area and to provide balconies and/or outdoor terraces (1) for not less than the percentage of units shown in the Approved Plans (i.e., approximately 50% of units), and (2) totaling not less than the total square footage of balcony area shown in the Approved Plans;

(k) Roof structure. To install residential units within the penthouse level of the Project, provided that any such units would be subject to the requirements of Subtitle C § 1507 and any affordable units required thereunder shall be in addition to any affordable units required under Condition B.1;

(l) Building Connection. To construct one or more knock out panels to connect the Project to the existing or future improvements on Lot 0024 of Square 3592; and

(m) Phasing. To construct the West Building and East Building under separate building permits and on separate schedules, and to seek one or more certificate of occupancy for each such building which shall be issued notwithstanding the status of the other Building's compliance with or completion under this Order, such that, without limitation, either Building may obtain a building permit and/or certificate of occupancy upon completion thereof and compliance of such Building with the requirements of the Zoning Regulations and this Order applicable to such Building alone and notwithstanding that the other Building has not begun or completed construction hereunder (by way of example, the West Building may obtain a building permit and/or certificate of occupancy by complying with the GAR and affordable housing requirements applicable only as to the portion of the Project that is the subject of such permit or certificate even if such requirements are not then fully satisfied as to the East Building). The application for a building permit for either Building and the commencement of construction thereunder within the time periods set forth herein shall act to vest this Order for the respective Building that is the subject of such building permit or commencement of construction, as applicable.

**B. PUBLIC BENEFITS**

1. For the life of the Project, the Applicant shall:

(a) Dedicate approximately 358,618 square feet of GFA to residential use cumulatively, subject to the flexibility contained herein;

(b) Reserve the equivalent of no less than 13% of the Project's residential gross floor area for households with incomes not exceeding 60% of MFI;

- (c) Reserve the equivalent of no less than two percent of the Project's residential gross floor area for households with incomes not exceeding 50% of MFI;
- (d) Provide no fewer than 20 three-bedroom units, including four three-bedroom units reserved as affordable units for households up to 60% MFI; and
- (e) Provide affordable units in the Project shall be in accordance with the following chart, subject to the flexibility noted herein (including without limitation Condition A.3(d)):

Residential Unit Type	Residential Units	MFI	Affordability Control Period	Tenure
Total	Approx. 358,618 square feet of GFA	Varies	N/A	N/A
Market Rate	85% of residential GFA	Market Rate	N/A	N/A
IZ – 13% at 60% MFI	13% of residential GFA (= approx. 46,620 sf)	60% MFI	Life of Project	Rental
IZ – 2% at 50% MFI	2% of residential GFA (= approx. 7,120 sf)	50% MFI	Life of Project	Rental
IZ – 8% of GFA of penthouse units <sup>6</sup> at 50% MFI	None planned, but see Condition A.3(k)	50% MFI	Life of Project	Rental

The Applicant shall at the time of building permit and/or certificate of occupancy for each of the East Building and West Building satisfy Condition B.1 only as to the Building that is the subject of such permit or certificate of occupancy. The covenant required by D.C. Official Code §§ 6-1041.05(a)(2)(2012 Repl.) shall include a provision or provisions requiring compliance with this condition.

2. **Prior to the issuance of a final certificate of occupancy for each Building in the Project**, the Applicant shall provide the Zoning Administrator with evidence that such Building has or will achieve the requisite number of prerequisites and points necessary to secure LEED Gold v4 certification or higher from the U.S. Green Building Council (USGBC) Green Building Certification Institute under the New Construction program. Within two (2) years after the date of issuance of the first Certificate of Occupancy for such Building, the Applicant shall provide the Zoning Administrator with documentation showing such certification for such Building.
3. **Prior to the issuance of the final certificate of occupancy for the Project**, the Applicant shall provide the Zoning Administrator with information showing that the Project as a whole includes a minimum of 2,300 square feet of roof area (which may be vertical area) containing solar panels and related equipment and adjacent space.
4. **Prior to the issuance of the final certificate of occupancy for the Project**, the Applicant shall provide the Zoning Administrator with evidence that it has installed

<sup>6</sup> Only to the extent the penthouse contains habitable space used as residential units. Remainder of penthouse GFA would be market rate, and IZ units need not be located in the penthouse.

within the Project as a whole a minimum of three (3) electric vehicle charging stations and infrastructure for 20 percent of the Project's parking spaces to accommodate electric vehicle charging stations.

5. **Prior to the issuance of building permit for the final Building in the Project**, the Applicant shall demonstrate that the plans contained in the building permit application(s) for the Project as a whole satisfy the PDR/Maker construction specifications as follows for a total area equal to a minimum of 50% of the combined ground-floor non-residential space: (a) A structural slab load (ground floor) live load of 125 pounds per square inch; (b) Clear height of approximately 16 feet from ground-floor slab to bottom of structure above; (c) An electrical supply of 50 watts per square foot; (d) A loading dock that includes a 48-inch raised loading dock and/or levelers; (e) An open floor plan layout; (f) A sound attenuation for mixed-use that satisfies NC-25 minimum noise criteria and includes seven-inch-thick minimum concrete podium slab; (g) HVAC designed for one ton per 300 square feet; and (h) Ventilation (Fresh Air/Make-Up Air) louvers at façade.
6. **For a minimum of five years after the date of issuance of the first certificate of occupancy for the first Building delivered in the Project**, the Applicant shall reserve a total area equal to a minimum of 10% of the combined ground floor non-residential space of the Project for one or more of the following PDR/Maker uses: (a) Production, sale, and/or distribution of food and beverages (provided that the onsite consumption of food and beverages shall only be permitted when associated with such production, sale, and/or distribution user); (b) Food incubators and food hubs; (c) Robotics and 3-D manufacturing; (d) Small-scale production, distribution, or repair of goods and related accessory sales; (e) Curation and sale of small-scale production goods; (f) New and locally-owned small businesses as certified with the Department of Small and Local Business Development; (g) "Creative economy" uses, including incubators, graphic design, product or industrial design, engineering and design, technology design and production, design and product curation, fashion design, horticultural design, green businesses and sustainable design, specialty sports and recreation uses, media/communications production and distribution; and/or (h) "Arts" uses including arts, design and creation uses, as defined in Subtitle B, Section 200.2(e), and entertainment, assembly and performing arts uses, as defined in Subtitle B § 200.2(n).
7. **Prior to the issuance of the final certificate of occupancy for the Project**, the Applicant shall provide the Zoning Administrator with evidence that it has constructed the paseos on the Property and the streetscape improvements on the adjacent portions of 4<sup>th</sup> Street, N.E., 5<sup>th</sup> Street, N.E., and Penn Street, N.E. and "Pascal Way" (i.e., the alley) as shown on the Approved Plans and in accordance with the Union Market Streetscape Design Guidelines (subject to approval during the public space permitting process).

**C. Transportation Mitigation**

1. **Prior to the issuance of the final certificate of occupancy for the Project**, the Applicant shall provide the Zoning Administrator with evidence that the Applicant has constructed, at the Applicant's cost:

- (a) Two ADA curb ramps on each of the northeast and southeast corners of the intersection of private Neal Place, N.E. and the north-south private alley west of, and parallel to, 4<sup>th</sup> Street, N.E. as shown in Figure 1 attached to Exhibit 41; and
- (b) The removal of that certain vertical obstacle caused by the concrete bicycle barrier on Lot 819 in Square 3587 within the minimum six-foot-wide pedestrian access route in the southern leg of the intersection as shown in Figure 1 attached to Ex. 41;

Provided, however, such work shall be required only if prior to the application for such certificate of occupancy the Applicant obtains from the owners of Square 3587 Lots 819 and 829 written consent for such work on reasonable terms, which consent the Applicant shall seek in good faith, it being understood that "reasonable terms" shall not include, without limitation, the requirement for a payment of cash or any other in kind contribution by the Applicant to any such owner in exchange for the performance of such work.

2. **Following the issuance of the final certificate of occupancy for the Project**, the Project's Transportation Coordinator(s) (as hereinafter defined) shall submit to OZ for inclusion in the IZIS case record of the case documentation summarizing compliance with the transportation and TDM conditions of this Order.

3. **Five years after the issuance of the final certificate of occupancy for the Project (and every five years thereafter)**, the Transportation Coordinator(s) will submit a letter to the Zoning Administrator, DDOT, and goDCgo summarizing continued substantial compliance with the transportation and following TDM conditions in the Order, unless no longer applicable as confirmed by DDOT; provided, that if such letter is not submitted on a timely basis, the Applicant shall have 60 days from date of notice from the Zoning Administrator, DDOT, or goDCgo to prepare and submit such letter.

4. **For the life of the Project**, the Applicant shall comply with the following TDM measures with respect to the Project:

- (a) Identify one or more "Transportation Coordinator(s)" to act as a point of contact with DDOT, goDCgo, and the Department of Buildings;
- (b) Provide each Transportation Coordinator's contact information to goDCgo, conduct an annual commuter survey of employees and residents of the Project, and report TDM activities and data collection efforts to goDCgo once per year;

- (c) Require the Transportation Coordinator(s) to develop, distribute, and market various transportation alternatives and options to residents, employees, and patrons, including promoting transportation events (i.e., Bike to Work Day, National Walking Day, Car Free Day) on the Project's website and in any internal building newsletters or communications;
- (d) Require the Transportation Coordinator(s) to receive TDM training (either in-person or webinar) from goDCgo to the extent available to learn about the TDM conditions for this Project and available options for implementing the TDM Plan;
- (e) Require the Transportation Coordinator(s) to subscribe to applicable and available goDCgo newsletters;
- (f) Require the Transportation Coordinator for the residential use in the Project to provide to all new residents welcome packets which include, at a minimum, the Metrorail pocket guide, brochures of local bus lines (Circulator and Metrobus), carpool and vanpool information, CaBi coupon or rack card, Guaranteed Ride Home brochure (brochures can be ordered from DDOT's goDCgo program by emailing [info@godcgo.com](mailto:info@godcgo.com)), and the most recent DC Bike Map;
- (g) Provide residents and employees who wish to carpool with detailed carpooling information and will be referred to other carpool matching services sponsored by the Metropolitan Washington Council of Governments ("MWCOG") or another comparable service to the extent MWCOG does not offer carpooling matching services in the future;
- (h) Post all TDM commitments on the Project's website to publicize availability and allow the public to see what commitments have been promised;
- (i) Offer a free SmarTrip card and a complimentary Capital Bikeshare coupon good for one ride to every new resident and employee of each non-residential tenant;
- (j) Unbundle the cost of vehicle parking from the lease or purchase agreement for each residential unit and charge a minimum rate based on the average market rate within a quarter mile of the Property;
- (k) Install a minimum of three electric vehicle (EV) charging stations and 20% of the proposed parking supply with EV-ready infrastructure (in total for all uses in the Project);
- (l) Satisfy the Zoning Regulations requirements' short- and long-term bicycle parking requirements by providing at least 30 short-term spaces (in total for all uses in the Project) and at least 141 long-term bicycle spaces (in total for all uses in the Project) and provide all such bicycle spaces free of charge to residents and employees of businesses operating in the Project;
- (m) Accommodate in the long-term bicycle storage room non-traditional sized bikes including cargo, tandem, and kids' bikes, with a minimum of seven spaces designed for longer cargo/tandem bikes (10 feet by 3 feet), a minimum of 14 spaces designed with electrical outlets for the charging of electric bikes and scooters, and a minimum of the greater of 71 total or 50% of such spaces horizontally on the floor of the storage room, all of which

shall be free of charge to residents and employees of businesses operating in the Project; and

(n) Permit strollers to be stored in the bicycle storage room free of charge to residents and employees of businesses operating in the Project.

5. **For the life of the Project**, for the commercial and lodging uses in the Project, the Applicant shall provide the following TDM measures:

- (a) Require the Transportation Coordinator to post “getting here” information in a visible and prominent location on the Project’s website with a focus on non-automotive travel modes including links to goDCgo.com, CommuterConnections.com, transit agencies around the metropolitan area, and instructions for patrons discouraging parking on-street in Residential Permit Parking (RPP) zones (if any) near the Project;
- (b) Provide comprehensive transportation information and directions on any hotel website, including promoting the use of non-automotive modes of transportation and links to website for goDCgo, Capital Bikeshare, DC Circulator, and the Washington Metropolitan Area Transit Authority WMATA;
- (c) Require any hotel operator to provide guests with goDCgo’s “Get Around Guide” by making it available on the property website and in printed format for front office or customer-facing staff;
- (d) Require any hotel operator’s front office or customer-facing staff to receive TDM training (either in-person or webinar) from goDCgo to the extent available to learn about the non-automotive options for traveling to the Project;
- (e) Require any hotel operator to participate in the Capital Bikeshare Corporate Membership program and offer discounted annual memberships to hotel employees;
- (f) Unbundle the cost of vehicle parking from the cost to lease any non-residential unit, charge only hourly, daily, or weekly rates, and refrain from offering free parking, validation, or discounted rates;
- (g) Require the Transportation Coordinator(s) to demonstrate to goDCgo that each non-residential tenant (including any hotel) with 20 or more employees working on-site (1) complies with the DC Commuter Benefits Law, (2) participates in one of the three transportation benefits outlined in such law (employee-paid pre-tax benefit, employer-paid direct benefit, or shuttle service), and (3) complies with DC Transportation Benefits Equity Amendment Act of 2020 (i.e., the Parking Cash-Out Law) now in effect; and
- (h) Provide at least two showers and two lockers for use by employees of any hotel and/or commercial uses in the Project (which may be shared among all uses in the Project), meeting zoning minimum requirements for at least two showers and two lockers for any hotel and/or other commercial uses requiring such showers and lockers under the Zoning Regulations.

6. The Applicant shall at the time of building permit and/or certificate of occupancy for each of the East Building and West Building satisfy Conditions C.4-C.5 only as to the Building that is the subject of such permit or certificate of occupancy.

**D. MISCELLANEOUS**

1. No building permit shall be issued for the Project until the Applicant has recorded a covenant in the land records of the District of Columbia, between the Applicant and the District of Columbia that is satisfactory to the Office of Zoning Legal Division and the Zoning Division, DCRA (the “PUD Covenant”). The PUD Covenant shall bind the Applicant and all successors in title to construct and use the Site in accordance with this Order, or amendment thereof by the Commission. The Applicant shall file a certified copy of the covenant with the records of OZ.
2. The PUD shall be valid for a period of two years from the effective date of this Order. Within such time an application shall be filed for a building permit, with construction to commence within three years of the effective date of this Order.
3. In accordance with the Act, the District of Columbia does not discriminate on the basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, or place of residence or business. Sexual harassment is a form of sex discrimination, which is also prohibited by the Act. In addition, harassment based on any of the above protected categories is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

**Final Action**

**VOTE (January 11, 2024): 4-0-1** (Joseph Imamura, Anthony J. Hood, Robert E. Miller, and Tammy Stidham to approve; 3<sup>rd</sup> Mayoral Appointee seat vacant.)

In accordance with the provisions of Subtitle Z § 604.9, this Order No. 22-35 shall become final and effective upon publication in the *District of Columbia Register*; that is, on September 27, 2024.

**BY THE ORDER OF THE D.C. ZONING COMMISSION**

A majority of the Commission members approved the issuance of this Order.

  
\_\_\_\_\_  
**ANTHONY J. HOOD**  
**CHAIRMAN**  
**ZONING COMMISSION**

  
\_\_\_\_\_  
**SARA A. BARDIN**  
**DIRECTOR**  
**OFFICE OF ZONING**

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR,

RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.