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ANC 3E's RESOLUTION OPPOSING WESLEY THEOLOGICAL SEMINARY'S PETITION FOR TEXT AMENDMENT, CASE NO. 24-09

Landmark, a publicly traded REIT, and Wesley want to build a nine-story apartment building on Wesley's land primarily to serve AU students (Apartment Building). The building's primary purpose is commercial, to generate income for the REIT and Wesley.

AU has disclaimed any interest in the project. This will not be a "dormitory" for AU.

Landmark ordinarily builds student apartment buildings on non-institutional land adjacent to or near the educational institution it serves. Were Landmark to do that here for a building of the same size as the Apartment Building, it would likely need to do so via a PUD with an affordable housing proffer of 15% or more and other amenities and mitigation.

Landmark and Wesley first sought permission to build the Apartment Building via the Campus Plan process. The Zoning Commission rejected this attempt, though at least one Commissioner suggested that Landmark and Wesley might achieve their goal through the PUD process.

Landmark and Wesley then filed and fully litigated a PUD application, during which they proposed to meet their Inclusionary Zoning (IZ) requirements by creating an unprecedented self-administered affordable housing program for students. After the close of evidence and briefing, the ZC signaled that at least half, and perhaps more, of the Commissioners believed the Apartment Building was a commercial use prohibited in an institutional zone, and that the application would fail if voted upon.

Likewise, ZC members signaled that they did not support the proposed student affordable housing program and that a PUD was not the place to create an unprecedented alternative to IZ requirements.

Because the ZC was nevertheless sympathetic to Wesley's desire to use income from the Apartment Building to "thrive in place," as Wesley has put it, the ZC gave Landmark and Wesley a lengthy period to develop an alternative proposal, if one could be developed, to seek the relief necessary to build the Apartment Building.

Landmark and Wesly proposed a text amendment. The ZC signaled that it was at least open to considering same. The instant petition for a text amendment (Petition) followed.

The Petition sought to exempt the Apartment Building entirely from applicable Inclusionary Zoning requirement. Such a change would be unprecedented. Nothing about this situation would justify it as the first DC project to be so exempted, much less justify the creation of a terrible precedent that other institutions would surely seek for themselves. Landmark and Wesley spoke vaguely about making some kind of alternative contribution toward affordable housing, which they suggested could be addressed subsequently during Campus Plan proceedings. But absent a text amendment giving the ZC authority to require affordable housing during Campus Plan proceedings, the ZC *lacks authority to do so*. Thus, Landmark and Wesley's proposal was that the Apartment Building be exempted from IZ but that the ZC and the public should simply *trust* that Landmark and Wesley would provide a suitable alternative.

ANC 3E has worked with Landmark and Wesley's counsel over many months to try to improve their proposal in regard to IZ. After consultation with both ANC 3E and the Office of Planning (OP), Landmark and Wesley proposed to eliminate the request for blanket exemption from IZ and substitute it with an exemption from certain requirements of Subtitle C, Sec. 1006, the Zoning Code provision

permitting provision of offsite IZ, such that the Apartment Building would be eligible to substitute offsite IZ or its equivalent for its IZ requirement.

This would have been a significant improvement over Landmark and Wesley's original proposal. *Two days before the final ANC meeting before the ZC hearing*, however, Landmark and Wesley moved the goalposts and announced they would seek the original total exemption from IZ, and merely submit the proposed amendment as an "alternative."

Moreover, Landmark and Wesley similarly did not file a pre-trial submission until the evening of 11/4/2024, two days before the final ANC meeting before the ZC hearing and two weeks before the hearing.

This last-minute switch and late filing have impaired the ANC's ability fully to address Landmark and Wesley's proposal.

Section 501.1 of Subtitle Z of the Zoning Code requires a petitioner for a text amendment to submit and extensive supplemental filing *prior to the scheduling of a public hearing*. (emphasis added) The filing must include, among other things, a list of all witnesses and a summary of their testimony, and "any additional information, reports, or other materials the petitioner may wish to introduce[.]" (emphasis added) In short, the petitioner must lay out their case in full and disclose any evidence or materials they wish to introduce.

Section 501.2 makes clear that this filing is mandatory, stating that the "Director *shall not issue* any notice of public hearing *until* the petitioner certifies in writing that *all* of the requirements of this section have been complied with." Section 502.1 states that notices of rulemaking hearings must give at least 40 days' notice. Thus, ANC 3E should have had the detailed information at least 40 days before the hearing. Although the ANC – which naturally cannot speak in this regard for other parties – was prepared to waive the provisions of Sec. 501 in light of what it thought was very late but real progress, Landmark's

last-minute switch makes that impossible. Accordingly, in light of the plain violation of mandatory requirements and real prejudice, the ZC should, at a minimum, prohibit Landmark and Wesley from introducing any witnesses, evidence, or other information or materials that Sec. 501 required them to disclose long ago, and limit them to arguments of counsel.

ANC 3E presents substantive information and argument below.

The ZC Should Not Excise Affordable Housing Requirements From The Zoning Code For These Or Any Applicants

Landmark wrongly contends that the "Commission has communicated a preference for the dormitory to be exempt from the IZ requirements."[1] Only one Zoning Commissioner out of the then-four sitting Commissioners opined that, in light of the other Commissioners' probable vote against the PUD, he would be inclined as an alternative to support a text amendment exempting the Apartment Building from IZ regulations.[2] Moreover, this Commissioner has a long history of supporting affordable housing, and he likely was searching for some means of flexibility to allow Wesley to build the Apartment Building, and not necessarily a blanket exception from IZ obligations.

A text amendment exempting any applicant from all IZ requirements would set a terrible and dangerous precedent, and it is not necessary for Wesley to achieve its goals. Instead, text amendments could provide that the Apartment Building must provide a certain level of IZ, and that the IZ requirement may be satisfied with offsite IZ. This ensures that the precedent set is for an *alternative* means to satisfy the IZ requirement (and a provision of the Zoning Code already permits offsite IZ under certain conditions) rather than for an elimination of the IZ requirement.

[1] Petition for Text Amendments, Tab 2 of Exhibit No 2C, Case No. 24-09 (hereinafter "Petition"), at 2.
[2] Two of the three transcript citations Landmark provides at page 2 of its Petition, to pages 28 and 30 of the December transcript, are to Commissioner Imamura saying that the zoning regulations do not appear to permit student affordable housing. *He says nothing about a desire or preference to exempt Wesley from IZ requirements*.

Landmark and Wesley suggest they could provide offsite IZ and/or other affordable housing benefits during campus plan proceedings, but we are aware of *no legal authority in the Campus Plan regulations permitting the Zoning Commission to order provision of IZ or affordable housing* (such authority if it existed would come as a great shock to the other institutions subject to campus plan requirements).

Thus, Landmark is asking the ZC to exempt it from IZ requirements on the basis of a toothless suggestion that the public and the ZC should simply trust that it will follow through on whatever it deems a suitable proffer of IZ or some alternative. The ZC should reject this request outright.

Landmark and Wesley Have Discussed A Revised Request For A Text Amendment That Might Constitute An Improvement

As noted above, Landmark and Wesley had represented last week that they would withdraw their request for exemption from IZ and substitute it with an exemption from certain requirements of Subtitle C, Sec. 1006, the Zoning Code provision permitting provision of offsite IZ, such that the Apartment Building would be eligible to substitute offsite IZ or its equivalent for its IZ requirement. Petitioner switched course, however, and informed us that Landmark instead is only submitting this language as a possible alternative.

The alternative language is considerably better than the originally proposed language. Offsite IZ is appropriate in this circumstance, rather than a wholesale exemption from an IZ requirement.

Nonetheless, the alternative language is deficient in at least two respects. First, despite the expansive relief Landmark and Wesley seek, the language they propose would enshrine an IZ requirement of the bare minimum that would be required if this extraordinary matter was an ordinary matter of right project. Second, Landmark and Wesley's language would allow them to deliver affordable housing *or* a contribution that is deemed "equivalent" to provision of offsite IZ. The language does not designate who would determine equivalency or how they would make such a determination. Whatever body would make the determination would almost certainly not have access to Landmark's internal

documents showing its costs and expected revenue flows, and even if it did, it likely would not have the institutional competence to evaluate such information fully. Other non-developer parties would be even more disadvantaged.

Landmark and Wesley Seek Extraordinary Relief

Landmark and Wesley seek to build a commercial apartment building on Wesley's campus primarily to serve AU students. AU has stated that the Apartment Building has nothing to do with them and has consistently refused even to discuss how the building might interface with AU.

Yet, Landmark and Wesley seek to take advantage of permissive institutional zoning not available for commercial / non-educational uses. The majority of then-sitting Zoning Commissioner made clear after the close of evidence and briefing in the PUD hearing that they believe the proposed Apartment Building is a commercial / non-educational use. Thus, had the ZC voted in the ordinary course on Landmark and Wesley's PUD application, it would have been denied without more.

There was more, however. After reading the Office of Planning's (OP) thorough racial equity analysis, at least half of the then-sitting Zoning Commissioners opined that the Apartment Building did not meet the Comprehensive Plan's racial equity goals.[3] In particular, these Commissioners pointed to the low number of DC residents who attend Wesley and AU, leading in turn to a low number of DC residents likely to live in the Apartment Building. Landmark and Wesley's April 25th, 2024 submission ("April Submission") in the PUD proceeding, ZC #23-08, demonstrates just how few students of both institutions are DC residents. Per page 2 of the April Submission, only 13 of 113 Wesley graduates this year are DC residents, or 11.5%. Similarly, Landmark's business analysis states that a "notable trend in enrollment at [AU] is the significant share of students, roughly *9 in 10,* that are *not from Washington*

[3] Nov. 9, 2023 Hearing Tr. in ZC #23-08 at 31-2.

DC."[4] DC residents can be expected to live off campus in higher numbers than non-campus students. Thus, DC residents can be expected to make up less than 10% of tenants in the Apartment Building, and perhaps much less.

Furthermore, per Landmark and Wesley's own research, their proposed commercial Apartment Building, if permitted to be built using educational zoning, would be without precedent in DC, its sister jurisdictions Maryland and Virginia, and, in fact in any state near DC. Indeed, out of nearly 6000 post-secondary schools in the United States, Landmark and Wesley apparently could locate *only two schools* with dormitories that served students other than their own.[5] Those examples differ materially from what Landmark and Wesley propose, not least in that both involved a close partnership with the non-host institutions.[6]

Landmark and Wesley cite no authority in their Petition in support of the text amendment they seek. Landmark and Wesley did cite ZC authority in a filing in the PUD proceeding in support of a text amendment, however.[7] The leading case they cite there, *First Church of Christ Scientist*, reflects materially different circumstances than are present here. There, a text amendment was used to vary the Reed-Cooke *Overlay* to permit a historic church to be preserved, per an agreement the developer negotiated with the local neighborhood association. Accordingly, that case did *not* provide for a special deal for the developers that would otherwise be inconsistent with the zoning regulations generally, but merely amended a zoning overlay. The other cases cited by Landmark and Wesley involve even less relief, such as modification of a setback requirement. One other case they cite as an example of a single-lot

[4] April Submission, Exhibit E, (submitted as Ex. 79E), at 12 (emphasis added).
[5] *See* "Applicant's Post-Hearing Submission," in ZC #23-08 at Exhibit 6, (submitted as Ex 58).
[6] That the ZC previously permitted Wesley to fill a few vacant beds in its current dorm with AU students does not help Wesley and Landmark's case, because that use is ancillary, and ancillary commercial uses are permitted by educational institutions.
[7] April Submission at 2 and Ex. D.

text amendment, ZC # 04-27, is *not* about a single-lot text amendment; it is about implementing a zoning *overlay*.

No text amendment cited involved a change to IZ requirements, much less the wholesale elimination of an IZ requirement. Likewise, no text amendment cited involves the redefinition of a commercial use to an educational use.

For all the reasons above, the relief Landmark and Wesley seek is extraordinary.

Because Landmark And Wesley Seek Extraordinary Relief They Should Be Required To Provide Exemplary IZ

If the Zoning Commission supports a text amendment allowing Landmark and Wesley to build the Apartment Building, it should ensure that such extraordinary relief requires an exemplary amount of IZ.

Landmark and Wesley say in their Petition that ANC 3E has asked them to contribute "funds to provide the required quantity and affordability of [offsite] IZ units." This is misleading. ANC 3E has consistently asked Landmark and Wesley to make an *exemplary* affordable housing proffer, one that exceeds the proffers other developers have made in PUDs in our ANC boundaries that involve less dramatic relief than Landmark and Wesley seek.

As we have noted in a filing in the PUD proceedings, a representative of a REIT similar to Landmark told ANC 3E at a public meeting that developers believe that 15% IZ is the bare minimum they now expect to need to provide to obtain PUD approval. The case that developer filed, ZC # 96-13A, *5333 Wisconsin Avenue*, ultimately involved almost 16% IZ, including a generous mix of units at 30% AMI and 50% AMI, plus an extensive suite of other amenities. The ZC granted the application. To date, however, Landmark and Wesley have discussed providing only the minimum (offsite) IZ required, when instead they should proffer benefits exceeding those proffered for *5333 Wisconsin Avenue*.

Note that Landmark and Wesley's original student affordable housing proffer was for 10.8% affordable housing, with about 16% at 30% AMI, 29% at 50% AMI, and the rest at 60% AMI.[8] Since then, at ANC 3E's request, Landmark and Wesley have removed 95 underground parking spaces from their proposal, spaces that we believe were unnecessary and would largely have gone unused unless Landmark and Wesley rented them at very low prices (which would incentivize car usage).[9] One would think the savings from eliminating this many unnecessary parking spaces would yield considerable savings, and easily allow Landmark and Wesley to expand their offsite IZ proffer from what it offered originally to at least 15% with a significant number of units offered at 30 and 50% AMI. Yet, again, Landmark and Wesley have to date only talked about offering the minimum required IZ.

Landmark And Wesley's Offer To Spend $8 Million On Affordable Housing Likely Represents A Smaller Proffer Than It Made In The PUD Proceeding And Appears To Consist Largely Of Savings From Eliminating Unneeded Parking

Landmark and Wesley have alternatively offered to contribute 8 million dollars to some kind of alternative affordable housing. When asked at a meeting of a Wesley community liaison group where that figure came from, Landmark's counsel said that it represented the savings from eliminating the parking. At a later meeting, when asked about her prior statement, Landmark's counsel said she misspoke, and that she had quoted the raw savings which would, she said, be a net wash after offsetting fees paid for use of the eliminated spaces. Again, evidence suggests that the spaces, if used at all, would have had to be offered at very low rents. In short, it is reasonable to suspect that the $8 million Landmark now offers consists largely of cost savings from eliminating excess parking, and Landmark may hope to spend *less* of its profits on affordable housing via a text amendment than it would have had to spend if the existing zoning code permitted its project.

[8] *See* "Applicant's Proffers and Conditions for Order," in ZC #23-08, submitted as Exhibit 56, at 5.
[9] It is our understanding that Wesley originally offered these extraneous spaces largely to satisfy what it believed were community concerns.

It is hard to determine exactly how an $8 million contribution compares to the cost of providing legitimate offsite IZ. Nonetheless, ANC 3E has reviewed an estimate of the cash value of providing offsite IZ equivalent to the IZ that would be required of Landmark if the Apartment Building were matter of right. That estimate, provided without access to Landmarks cost and revenue expectations, but based on ordinary market assumptions, showed that *the cash value was approximately double the $8 million dollars Landmark proposes*. The estimate was developed by an expert in the field. Even accounting for substantial imprecision, Landmark's $8 million would apparently buy considerably less IZ than Landmark would be required to provide were this a matter of right building.

It is highly unlikely that Landmark would share its internal estimates and, even if it did, the ZC and public likely would be unable to assess their reliability.

Thus, while it might make sense to permit Landmark to make a cash payment as a *supplement* to actual offsite IZ, it makes little sense to permit it as a substitute for offsite IZ.

Landmark And Wesley Should Make An Offsite IZ Proffer That Allows Apples To Apples Comparison To Other Projects

For the reasons above, the ZC and the ANC should avoid trying to compare the cash value of Landmark and Wesley's proffer to the value of affordable housing provided for other projects. The coin of the affordable housing realm in PUD proceedings is the percentage of IZ offered at given levels of income eligibility. In light of this, ANC 3E has encouraged Landmark and Wesley to seek to buy down rents in a market rent building in our ANC boundaries to create IZ units that otherwise would not exist. This would allow for an apples-to-apples comparison to IZ proffers in other projects that have provided onsite IZ.[10] We understand that OP similarly favors this approach.

[10] Of course, the market rent of the offsite units would need to be comparable to the market rent of units in the Apartment Building, or adjustments would need to be made to maintain parity.

ANC 3E introduced Landmark's counsel to principals of both Urban Investment Partners (UIP) and Donahoe, both of which are developers active within the boundaries of our ANC. Both UIP and Donahoe expressed interest in discussing the possibility of Landmark buying down market rate units in their projects to IZ.

There are no doubt other residential developers in Ward 3 that Landmark could negotiate with to buy down market rate units to IZ. We are not aware of any Landmark efforts to find and engage with such other developers.

If Landmark cannot conclude such a deal, an evident possibility is that the $8 million dollars it seeks to spend is simply insufficient to purchase even the minimum amount of IZ required of a matter of right building.

For this reason and the reasons discussed above, the ZC should insist that any cash contributions are in addition to, rather than instead of, actual offsite IZ.

BE IT RESOLVED

ANC 3E opposes the application as filed but continues to seek a way to permit Landmark and Wesley's proposed project to come to fruition while simultaneously ensuring that the public receives the affordable housing that such extraordinary relief requires.

Be it further resolved, ANC 3E respectfully calls on the ZC:

1. To find that Landmark and Wesley seek extraordinary relief, and such relief requires an exemplary affordable housing proffer;

2. To ensure that any text amendments permitting this project to proceed to a Campus Plan proceeding include a mechanism to require provision of offsite IZ commensurate to the extraordinary relief granted; and,

3. To refuse to create the dangerous precedent of a blanket exception from IZ for these or any parties.

ANC 3E authorizes Commissioners Rohin Ghosh, Jonathan Bender and Tom Quinn to testify for the ANC at any proceedings connected to the above-referenced application and to submit or reply to any filings on behalf of the ANC at any proceedings connected to this case.

ANC 3E approved this resolution at its meeting on November 6, 2024 which was properly noticed and at which a quorum was present. The resolution was approved by a vote of 8-0-0. Commissioners Jonathan Bender, Diego Carney, Matthew Cohen, Jeffrey Denny, Rohin Ghosh, Ali Gianinno, Amy Hall and Tom Quinn were present.

ANC 3E

Jonathan Bender

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by Jonathan Bender
Chairperson