TESTIMONY OF JONATHAN BENDER, ANC 3E03, IN ZC CASE #24-09

November 18, 2024

Good afternoon Mr. Chair and fellow Commissioners. I am Jonathan Bender, ANC 3E03 and Chair, ANC 3E. I am here to present the testimony of ANC 3E. Thank you for the opportunity to speak this afternoon.

In putting together this testimony, Mr. Chair, I began by looking at testimony I gave for our ANC in the PUD proceeding. That was in September of 2023. This matter, in one guise or another, has been going on for a long time. It has required a lot of time from the Zoning Commission and probably even more from our ANC and this Commissioner in particular.

From the start, ANC 3E's primary concern has been affordable housing, both how much would be required from this project and how it would be provided.

To be sure, we were also concerned in the PUD proceeding that Landmark and Wesley sought to stretch DC law farther than it could go. Ultimately, the Zoning Commission telegraphed that it agreed this was the case.

ANC 3E does not dispute that the Zoning Commission can, through a text amendment, permit Landmark to build a student apartment building on Wesley's campus. It would be better, we believe, to use rulemaking for broad, citywide policy changes than as a way to create an exception for a single land owner. Still, we don't oppose a text amendment for Landmark and Wesley simply because it is an individually-targeted amendment.

What we are left with is what concerned us most in the PUD, affordable housing, how much the project will provide and how will it be provided. At the outset, I want to reiterate what we've been saying since the PUD and what was said in our resolution for this matter. *If* Landmark and Wesley provide the kind of affordable housing that would be expected in a PUD for this project on a commercial lot nearby, we can support it. But after all this time we are still not there.

This is a project that could not be done via a PUD, much less as a matter of right, because DC law does not permit it. If it did, Landmark wouldn't be here. Landmark now asks you to amend the DC Zoning Code just for them and Wesley, but their text amendment petition proposed to exempt them entirely from the IZ requirement that would attach to their project were it a matter of right.

Does this project somehow offer so much value to the community that IZ isn't needed or can be an afterthought? The answer is "No." Per Wesley, the project is their preferred avenue to what they call "thriving in place." We want to see this happen in principle. But we need to look at the whole picture, and the whole picture, *absent* provision of significant IZ, is rather dim.

Per OP's supplemental report, "the *clearest* impact of the proposed text amendment when viewed through a racial equity lens is the *relative lack of **any** impact*." (page 12) OP says further, on page 11 of its report, that "when viewed through a racial equity lens, it is *not* envisioned or expected that the additional housing on campus for students would have *any* impact on the cost of housing in the Rock Creek West area." OP allows that it is "*possible* that

the increased number of students that could be housed on Wesley's campus may *potentially* free-up a *few* rental housings for non-student populations in the neighborhood." (emphasis added to all quotations above)

We agree with OP's analysis. The primary relevant market for Landmark is likely composed of its proposed building and dormitories on AU's campus. It doesn't make sense that many students living off campus would move instead to Landmark's building near AU's campus unless Landmark offered something dramatically different than AU offered on campus. And that does appear to be Landmark's value proposition, dorm-like apartments that are more upscale than the average real dorm.

But AU has told us, in their letter submitted for this matter, and in personal conversations, that they intend to compete by investing many millions of dollars in upgrading their residence halls and improving their on-campus experience. Thus, competition from Landmark may not even drive down the price of on- or adjacent-campus housing. Instead, it may just provoke a kind of luxury arms-race with AU to provide the fanciest housing for well-heeled students.

AU representatives have made clear that AU has *no* need for a private external housing provider to meet AU's housing goals. They have no wait list for on-campus housing. They are moving to a two-year on-campus housing requirement for undergraduates and, they told me, they can accommodate all these students in existing on-campus housing. Moreover, their campus plan permits them to add about 500 new beds if the need arises.

So AU doesn't *need* anything Landmark's project would offer. Beyond getting AU to up its luxury student housing game, the project seems to offer little to AU. Again, to quote OP, it's "*possible* that the increased number of students that could be housed on Wesley's campus may *potentially* free-up a *few* rental housings for non-student populations in the neighborhood." And OP's overall conclusion is that the project is not likely to have any effect on housing prices in the area.

Furthermore, as we noted in our resolution, Landmark's *own* briefing shows that the number of DC residents housed in its project is likely to be in the vicinity of *10% or less*.

Meanwhile, and even Landmark and Wesley advert to this in their petition, Ward 3 desperately *needs* more affordable housing for DC residents. This area has the least amount of dedicated affordable housing in the city. The Mayor has set a goal of creating 1,990 new affordable units in the Rock Creek West planning area, but so far we've only achieved about 10% of that goal.

If there's anything that would justify changing the zoning code to allow Landmark to build its apartment building, it is provision of a *substantial* amount of dedicated affordable housing. Unfortunately, Landmark has consistently tried to spend less money on affordable housing than would be required if this were a smaller project built as a matter of right on land in the vicinity that permitted commercial use.

As I mentioned, Landmark's petition seeks a *complete exemption* from the requirement to provide any affordable housing. Instead, they talk vaguely of spending $8 million on some kind of housing and say that this can be dealt with during the campus planning process. Alas,

the campus planning process contains *no authority* for the Zoning Commission to order a school to provide affordable housing – and it would come as quite a shock to other schools in town were it otherwise. So Landmark is asking the Commission to exempt it entirely from IZ requirements and to simply trust that it will make a contribution of about $8 million.

No text amendment has ever exempted a petitioner from IZ requirements. Indeed, no text amendment for an individual lot has ever granted anything like the scale of relief Landmark seeks. Exempting Landmark from IZ would set a *terrible* precedent, and the Zoning Commission should refuse to do it. Landmark's musing about spending $8 million dollars doesn't change this analysis. When it came time to spend the money, the REIT could claim the market had changed, or it had a project go bad, etc., and then spend much less or nothing at all.

We spent months working with Landmark and Wesley to try to get them to amend their proposed amendment. Finally, after a call between Landmark, Wesley and OP, Landmark submitted an alternative text amendment to the offsite IZ provisions to allow Landmark to provide IZ offsite *or its equivalent*. We agree with OP that permitting Landmark to satisfy its minimum IZ requirement with an alleged "equivalent" is unsatisfactory.

The Landmark proposal doesn't tell us who in the government would determine equivalency and 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's not clear it would have the institutional competence to evaluate such information fully. Other non-developer parties such as the ANC would be even more disadvantaged. In short, the developer would hold all the

cards, and the public likely would be denied the opportunity to meaningfully challenge the developer's claims.

At bottom, the issue here is that Landmark seems to be after a return on investment a lot higher than it or its competitors get on the projects they normally do. If, as they ordinarily do, they built the same project on a commercial lot *near* AU, they'd need to do a PUD and likely wouldn't get approval with less than 15% IZ. As we've mentioned in our filings, a representative of a REIT like 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. In other words, 15% is table stakes. 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.

Yet here Landmark wants DC to accept a contribution of $8 million that it insists, without evidence, is at least the equivalent value of the IZ required of a matter of right project. As it happened, however, Landmark eliminated about 95 spaces of likely-superfluous parking at our request. When somebody asked Landmark's counsel months ago at a meeting of a Wesley community liaison group where the $8M figure came from, she stated that it represented the savings from eliminating the parking.

Landmark's counsel later tried to walk that back, claiming that number didn't include offsetting fees for the spaces, but that doesn't seem right. The withdrawn spaces appear to have been added in the first place only to placate neighbors. They would be unlikely to have been used, at least without substantial discounts.

It is hard to determine exactly how an $8 million contribution compares to the cost of providing legitimate offsite IZ. Nonetheless, we 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 Landmark's 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.

Experts in the development field tend not to want to challenge numbers from a fellow developer in public. Accordingly, we have to date not even been able to find an expert willing to testify publicly if it comes to that. But it shouldn't come to that. The Zoning Commission set up the IZ program to require deliverables, not supposedly equivalent sums of money. The public, including their unpaid, generalist representatives in the ANC, shouldn't be expected to locate, hire, and pay expert witnesses to try to determine the "equivalent" of an IZ proffer.

Landmark and Wesley are asking to do a project that can only be done by actually changing the Zoning Code for them. It is entirely reasonable to ask them to figure out how to get offsite IZ done.

We've introduced Landmark to Urban Investment Partners (UIP) and Donahoe, both of which are developers active in 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're not aware of any Landmark efforts to independently find and engage with such other developers, however.

Landmark suggests that it would be too hard to sync development timelines to make offsite IZ happen. But Landmark's counsel has mentioned more than once that when she has gone to developers we introduced her to, it was to spend that $8 million dollar number Landmark keeps returning to. An evident possibility is that the $8 million dollars it seeks to spend is just not enough to buy even the minimum amount of IZ required of a matter of right building.

In a classic movie about a baseball field, the protagonist is told, "if you build it, they will come." Here, Mr. Chair, we believe that "if you require it, it will be built." Landmark will find a way to make offsite IZ happen. Again, ANC 3E isn't alone in believing this, but instead joins OP, the only other agency besides the ANC deserving of great weight in your deliberations.

Now, we're still left with the question of how much affordable housing this project should be required to produce. As we and others have outlined, beyond helping out Wesley, this project is not compelling, and it requires extraordinary relief to happen. Accordingly, as already mentioned, Landmark should provide at least the amount of affordable housing that it would need to provide if it were building on a typical commercial lot nearby. To do that, they'd need a PUD, and to get a PUD they'd need to provide a lot more than the minimum required IZ.

Consider that, to the extent Landmark is not required to do so, Landmark would essentially be transferring wealth from the lower or lower-middle income DC residents who

would otherwise live in the affordable units foregone, to Landmark shareholders. We shouldn't permit that.

It should be additionally kept in mind that Landmark and Wesley's original student affordable housing proffer in the PUD proceeding was for 10.8% affordable housing, with about 16% at 30% AMI, 29% at 50% AMI, and the rest at 60% AMI. And *that* proffer came before Landmark removed the 95 parking spaces, saving $8 million or something close to it.

I do want to note that we believe that if Landmark pays for legitimate offsite IZ for at least the minimum amount otherwise required onsite, it is worth *considering* a cash contribution for *additional* affordable housing.

Finally, although we support OP's proposed text change as a start, it likely would *not* be sufficient to allow you to *require* more than the amount IZ required if this was a matter of right project. To get that authority, you could add language at the end of OP's proposed 1006.10. Such language should allow you to condition campus plan approval of the proposed building on provision of affordable housing *beyond* the IZ required for a matter of right building. That *additionally-required* affordable housing could come in some combination of additional IZ, IZ at lower MFI levels, or a cash contribution to a specific project or projects. Alternatively, the ZC could simply specify the amount of additional IZ in the text amendment itself.

There also has to be a mechanism to ensure that any offsite-IZ through third-parties is, in fact, a substitute for whatever amount of on-site IZ would otherwise be required or proffered.

We also recommend adding language at the beginning of OP's proposed 1006.10 removing any doubt of a conflict with Landmark and Wesley's proposed 1001.6. This could be done by adding "Notwithstanding anything else. . ." at the beginning of OP's proposed language.

In sum, Landmark's proposed project probably won't decrease the price of housing in Ward 3, it won't have a material effect on racial equity here, it will house few DC residents, and AU does not need it. Its sole outstanding virtue, standing on its own, is that it will help Wesley thrive in place. Landmark requires extraordinary relief to be able to build its project. Equity demands that Landmark provide at least the level of affordable housing it would need to provide if it bought a nearby commercial lot and did a PUD. The Zoning Commission should ensure that it has the authority to require that level of affordable housing, and it should require it.

If, at the end of the day, Landmark's project will be accompanied by provision of affordable housing that is no less than we saw in the last PUD we supported, 5333 Wisconsin, then we will support it. For now, for all the reasons mentioned today and in our resolution, we have to oppose it.

Thank you again, Mr. Chair and Commissioners, for the opportunity to testify this afternoon. I would be pleased to respond to any questions you may have.

ANC 3E[1]

Jonathan Bender

Digitally signed by Jonathan Bender
DN: cn=Jonathan Bender, o, ou, email=jbender@ibusinesslawyer.com, c=US
Date: 2024.11.24 22:20:39 -05'00'

by Jonathan Bender
Chairperson

[1] On November 6, 2024, ANC 3E authorized by resolution the undersigned as well as Commissioners Quinn and Ghosh to represent it in all proceedings in this matter. *See* Exhibit 25. ANC 3E approved that 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.