GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 13-14(6)
Z.C. Case No. 13-14
Vision McMillan Partners, LLC and
Office of the Deputy Mayor for Planning and Economic Development
(First-Stage PUD, Consolidated PUD, and Related Map Amendment
@ Square 3128, Lot 800 - McMillan Reservoir Slow Sand Filtration Site)
Order on Remand - September 14, 2017

This Zoning Commission for the District of Columbia ("Commission"), through the issuance of this Order, responds to the remand instructions of the District of Columbia Court of Appeals ("Court," "Court of Appeals," or "DCCA") as set forth in *Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027 D.C. 2016) (the "Opinion"). The Opinion vacated[1] Z.C. Order No. 13-14 ("Order 13-14"), as corrected ("Remanded Order").[2]

The Remanded Order granted the application of Vision McMillan Partners, LLC and the Office of the Deputy Mayor for Planning and Economic Development ("Applicant") for first-stage and consolidated review of a planned unit development for Lot 800 in Square 3128 ("Application," "PUD," or "Project"), which is the site of the McMillan Reservoir Slow Sand Filtration Site ("PUD Site"). The Application was heard and decided pursuant to Zoning Regulations that were repealed as of September 6, 2016 and replaced with new text divided by subtitles. Existing Zoning Map designations were also renamed as of that date. Nevertheless, because this Application was filed prior to the repeal date, it remains subject to the substantive requirements applicable to it as of September 5, 2016. The remand proceeding was conducted pursuant to the Commission's current rules of procedure set forth in Subtitle Z of Title 11 of the District of Columbia Municipal Regulations ("DCMR"). Except for citations to Subtitle Z, all references to DCMR Title 11 refer to the text of that title in effect as of September 5, 2016.

[1] The Opinion also vacated two orders of the Mayor's Agent for Historic Preservation that cleared applications for subdivision and demolition for historic preservation purposes.

[2] Z.C. Order No. 13-14 was published in the April 17, 2015 edition of the *D.C. Register*. On April 24, 2015, a corrected version of that Order was published in the *D.C. Register* to (1) revise Finding of Fact ("FF") ¶ 94(a) to reflect changes to the proffers made by the Applicant through its filing dated August 25, 2014 (Exhibit 849-849-849G); (2) revise references in FF ¶ 94(c) and (d) from the "project association" to the "Partnership, as defined by Finding of Fact 75"; (3) indicate that the Partnership, as defined by FF ¶ 75, is the recipient of the Funds in FF ¶ 94(e); and (3) amend FF ¶ 94(f) to reflect changes to the proffers made by the Applicant in response to a comment from the Office of the Attorney General.

ZONING COMMISSION
District of Columbia
CASE NO.13-14
EXHIBIT NO.960

The Applicant identified seven development parcels within the PUD Site. The Commission granted first-stage PUD approval for the Master Plan and Parcels 2 and 3, consolidated PUD approval for the remaining five parcels, and a related map amendment to zone the PUD Site to the CR Zone District, except for Parcel 1, which was mapped in the C-3-C Zone District. Parcel 1 is located in the northern portion of the PUD Site and the C-3-C Zone District was requested to accommodate the 130-foot height requested for the proposed building at that location. That building was eventually approved for a maximum height of 115-feet, and will hereinafter be referred to as the "Parcel 1 Building."

The parties to the original proceeding, and therefore to this remand, were the Applicant, Advisory Neighborhood Commission ("ANC") 5E, the ANC in which the PUD Site is located, and Friends of McMillan Park ("FOMP"). FOMP is a nonprofit organization dedicated to preserving, restoring, and adaptively reusing the PUD Site. In addition, as a result in a change to the Commission's rules of procedure, ANCs 1B and 5A were also entitled to automatic party status. (11-Z DCMR § 403.5 (B).)

Throughout this remand proceeding, the Commission remained cognizant of the DCCA's admonition that its remand was "not solely for the purpose of redrafting findings and conclusions to facilitate our review and reinforce the [Commission's] decision. The [Commission] may conduct further hearings or even reach a different result." (149 A.3d 1027, 1035, *quoting*, *Ait-Ghezala v. D.C. Bd. of Zoning Adjustment*, 148 A.3d 1211, 1218 (D.C. 2016) (internal quotation marks omitted).)

Therefore, the Commission held four nights of public hearings, first hearing from members of the public, and then from the parties. In addition, the Commission received over 50 submissions from the public, the parties, and District agencies, many of which were voluminous. Finally, the Commission engaged in extensive deliberations on June 29, 2017 and on September 14, 2017. Between those two dates, the Applicant provided a submission in response to the Commission's request that it revisit the Parcel 1 Building's height. The Applicant stated that the height could be lowered an additional two feet and also suggested that the Commission consider rezoning Parcel 1 to CR. FOMP's response to the Applicant's submission will be discussed in the Conclusions of Law.

On September 14, 2017, the Commission concluded its deliberations of the remanded issues by voting to once again grant the Application with the maximum height of the Parcel 1Building being 113-feet and the entire site zoned CR.

I. Preliminary Matters.

A. The Commission's Initial Actions following its Receipt of the Opinion.

The Commission heard and decided this remand in accordance with Chapter 9, Remand Procedures, of its Rules of Practice and Procedure, set forth in Title 11-Z DCMR. In accordance with Subtitle Z § 901.1, the Office of the Attorney General ("OAG") provided the Commission with a memorandum, after which the Commission met "to determine whether it should request the parties to submit briefs, provide additional oral

or documentary evidence, present oral argument, or to augment the record by other means." (11-Z DCMR § 901.2.) At its public meeting held January 30, 2017, the Commission voted to hold a limited scope public hearing on the issues remanded and issued a procedural order in the form of a Notice of Limited Scope Public Hearing. Although not required to, the Commission agreed to hear witnesses not called by the parties. (*See* 11-Z DCMR § 901.6 ("Testimony at any further hearing shall be limited to witnesses called by the parties, unless the procedural order states otherwise.).)

The Notice of Limited Scope Public Hearing advised the public that a hearing would be held on March 23, 2017, identified five remand issues, and requested all witnesses to identify which issue or issues their testimony would address. A discussion of the Opinion and the Commission's formulation of the remand issues follows.

B. The Court of Appeals Opinion and the Remand Issues as Identified by the Commission.

The first portion of the Opinion addressed FOMP's assertion that the Commission erred in finding that the PUD and related map amendment were consistent with the District Elements of the Comprehensive Plan for the National Capital ("Comprehensive Plan"). The Comprehensive Plan includes a Future Land Use Map ("FLUM") that is separately prepared but carries the same weight as the plan document itself. (10-A DCMR § 225.1.)[3] The FLUM designation of the PUD site encourages medium-density residential, moderate-density commercial, and Parks, Recreation, and Open Space categories.

As an initial matter, the Opinion noted that the Parcel 1 Building was being zoned to C-3-C, which corresponds to the Framework Elements definition of high-density commercial and that its height and density exceeds what is permitted for the zones identified as corresponding to the Framework Elements' definitions of moderate- and medium-density commercial. Further, even with PUD flexibility, the building's density would exceed that permitted by the zones that correspond to moderate-commercial density and two of the three zones identified as corresponding to medium-commercial density. As a result, the Opinion found that "… the PUD contemplates some 'high-density' development on the site." (*Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027, 1033 (D.C. 2016).) Notwithstanding this determination, the Opinion concluded that a high-density commercial development on Parcel 1 would not make the PUD inconsistent with the FLUM designation for the site as moderate density commercial," because:

> The FLUM explicitly contemplates two ways in which more intensive development than is otherwise reflected in the FLUM may be

[3] The Comprehensive Plan is unofficially codified on the web site of the Office of Documents and Administrative Issuances as Title 10-A of the District of Columbia Municipal Regulations. The official version of the Comprehensive Plan exists in hard copy form, the PDF of which is available on the Office of Planning's website.

> permissible: (1) a larger development that as a whole is consistent with the FLUM designation may contain individual buildings with greater height or density; and (2) the PUD process may permit greater height or density. (10–A DCMR § 226.1 (c) (2016).) Here the Commission concluded that, when the entire site is taken into account, the PUD's overall density is consistent with that permitted in moderate-density commercial zones. We do not understand FOMP to dispute that conclusion. The Commission thus reasonably determined that the PUD as a whole was not inconsistent with the FLUM.

(*Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027, 1034 (D.C. 2016).)

The Opinion then turned its attention to Mid-City Element Policy ("MC") 2.6.5, which states:

> Recognize that development on portions of the McMillan Sand Filtration site may be necessary to stabilize the site and provide the desired open space and amenities. *Where development takes place, it should consist of moderate- to medium-density housing, retail, and other compatible uses.* Any development on the site should maintain viewsheds and vistas and be situated in a way that minimizes impacts on historic resources and adjacent development.

(10-A DCMR § 2016.9 (Emphasis added).)

The Opinion concluded that the "high-density use approved in the PUD" was not consistent with the italicized sentence because "unlike the FLUM designation discussed above, the Mid–City Area Element does not appear to contemplate any high-density uses on the site." (*Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027, 1034 (D.C. 2016).) The Opinion noted however that this "conflict" does not compel a finding of inconsistency with the Comprehensive Plan as a whole, but rather "the Commission may balance competing priorities" when making that determination. (*Id*.) The Opinion further found that policy was not mandatory, but noted that even non-mandatory policies carried "substantial force." (149 A.3d at 1035.) Therefore, "if 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." (*Id.* (Internal quotations marks and bracket omitted).)

Thus, the Opinion concluded, the Commission failed to do. For although the Commission's FF No. 168 concluded that "the proposed cluster development approach to the PUD Site is a critical and essential part of fulfilling the parks, recreation, and open space designation of the [FLUM], while at the same time achieving other elements of the Comprehensive Plan…", the Commission did not explain why these policies could not be advanced if development on the site were limited to medium- and moderate-density and if not, failed to state "reasons for giving greater weight to some policies than

to others." (149 A.3d. at 1027.) For this reason, the DCCA vacated Order 13-14 and remanded the case for the Commission to address these issues.

In its Notice of Limited Scope Public Hearing, the Commission designated these issues as Remand Issue 1, which as stated in the Notice read:

> **Issue 1:** A. Could the other policies cited in the Order be advanced even if development on the site were limited to medium- and moderate-density use?
>
> B. If not, which of the competing policies should be given greater weight and why?

As a related matter, the Opinion found that the Remanded Order failed to adequately address those Comprehensive Plan policies that FOMP claimed weighed against approval of the PUD.

The Notice of Limited Scope Public Hearing therefore identified the second remand issue as:

> **Issue 2:** Do these or other Comprehensive Plan policies cited by FOMP in the record of this case weigh against approval of the PUD?

The Opinion addressed several other issues that might affect the proceedings on remand.

First, the Opinion discussed MC-2.6.1, which provides that PUD reuse plans for the McMillan Reservoir Sand Filtration site should dedicate a substantial contiguous portion of the site for recreation and open space. (10-A DCMR § 2016.5.) The Court of Appeals indicated it disagreed with FOMP's argument that the need to preserve open space could never be used to justify the inclusion of high-density development on the site, instead indicating the Commission could justify some high-density development on the site, if it "were the only feasible way to retain a substantial part of the property as open space and make the site usable for recreational purposes." (*Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027, 1036 (D.C. 2016).) The Notice of Limited Scope Public Hearing therefore identified the third remand issue as follows:

> **Issue 3:** Is the high-density development proposed for on the site the only feasible way to retain a substantial part of the property as open space and make the site usable for recreational purposes?

Finally, the Opinion found the Commission "failed to adequately address a variety of asserted adverse impacts of the PUD, including environmental problems, destabilization of land values and displacement of neighboring residents, and increased demand for essential public services." (149 A.3d at 1036.)

The Commission concluded that the DCCA's concerns could be addressed through its resolution of the following final issues:

Issue 4: A. Will the PUD result in environmental problems, destabilization of land values, or displacement of neighboring residents or have the potential to cause any other adverse impacts identified by the FOMP in the record of this case?

B. If so, how should the Commission judge, balance, and reconcile the relative value of the project amenities and public benefits offered, the degree of development incentives requested, and these potential adverse effects?

Issue 5: A. Will the PUD have a favorable impact on the operation of city services and facilities?

B. If not, is the impact capable of being mitigated, or acceptable given the quality of public benefits in the project?

The Notice of Limited Scope Public Hearing then provided:

> If any party believes that the issues stated above do not accurately or fully reflect the issues remanded, that party must, no later than 3:00 p.m. on March 13, 2016, file with the Office of Zoning and serve upon the other parties a written statement identifying the asserted deficiency and offering revised language for the existing or any proposed additional issue identified. If no such submission is timely made by a party, that party is deemed to have agreed that the scope of this hearing fully encompasses the issues on remand.
>
> In addition, any party by that same date and time may file a written statement responding to the remand issues stated above. No response to another party's filing will be accepted.
>
> Other than a written statement asserting deficiencies these two submissions, and the Office of Planning and other agency reports discussed above, no submissions may be entered into the record by any party or person. During the hearing, the Commission will accept written statements offered by witnesses and exhibits offered by the parties.

No party submitted a written statement by March 13, 2017 indicating that the remand issues as stated did not accurately or fully reflect the issues remanded.

C. Pre-Hearing Filings by the Parties.

The only party to submit a written statement responding to the remand issues was the Applicant, which on March 13, 2017 filed a 22-page written submission with 16

attachments. (Exhibit ["Ex."] 895, 896A-896P.) The response also indicated no objection to the framing of the remand issues.

FOMP, through a letter dated March 15, 2017, moved the Commission to postpone the hearing for 30 days, to allow FOMP time to review the Applicant's submission and prepare for the hearing. In the alternative, FOMP moved to strike the Applicant's filing. (Ex. 900.) Among its arguments, FOMP contended only a party who objected to the remanded issues could respond to them, since neither the Applicant nor FOMP filed a written objection, neither could put in a response.

The Applicant filed an opposition to the motion on March 16, 2017, disputing this interpretation. (Ex. 901.)

At a special public meeting held March 20, 2017, the Commission voted to deny FOMP's motion. A full explanation for the basis of that decision appears in the Conclusions of Law. However, the Commission decided to postpone the presentation of the Applicant's case and FOMP's response until April 6, 2017. The March 23, 2017 hearing would begin with public testimony, followed by agency reports if time permitted. The Commission waived 11-Z DCMR § 408.9 of its Rules of Practice and Procedure to accomplish this.

On its own motion, the Commission allowed FOMP to file a late response to the remand issues by 3:00 p.m. on April 3, 2017.

D. Pre-Hearing Filings by District Agencies.

The Commission received a corrected written report from the Office of Planning ("OP"), which attached the written reports of the Office of Aging ("DCOA"), the Department of Housing and Community Development ("DHCD"), the Metropolitan Police Department ("MPD"), the District of Columbia Fire and Emergency Medical Services ("FEMS"), and the Department of Parks and Recreation ("DPR"). (Ex. 897A.) In addition, the Commission received a report from the District Department of Transportation ("DDOT"), supplementing its earlier reports in the record, and a report from the Department of Energy and Environment ("DOEE"). (Ex. 898, 894.)

As noted, the Applicant, through its response to the remand issues, provided the Commission with a letter from the Department of Consumer and Regulatory Affairs ("DCRA") advising the Applicant that it had determined that the Project was not likely to have substantial negative impacts of the environment and submission of an Environmental Impact Statement would not be required. (Ex. 896F.) Attached to the letter were the recommendations made to DCRA by DOEE, DDOT, OP, the Solid Waste Management Administration of the Department of Public Works ("DPW"), and the District of Columbia Water and Sewer Authority ("WASA").

Discussions of these reports occur in the portions of this Order that pertain to the relevant remand issue or issues.

E. Advisory Neighborhood Commissions.

ANC 5E is an affected ANC because the proposed PUD is located within its jurisdiction. Also, the Remanded Order treated ANCs 1B and 5A as affected ANC's because the PUD Site borders their areas.[4] The Remanded Order's great weight discussion was made in its ninth conclusion of law.

Neither ANC 1B nor 5A filed written reports in this remand. ANC 5E submitted a resolution, which will be separately discussed.

F. Hearings.

At the March 23, 2017 hearing, the Commission heard testimony from 25 public witnesses. Five were in support, and 19 were in opposition. Those in favor identified the positive benefits that would be brought to the area and stated their frustration at still having to look at a fence. Those against discussed the way the Project would adversely impact traffic, the environment, the historic attributes of the site, and the stability of the adjacent neighborhood. In addition, witnesses in opposition indicated that the affordable component of the Project was inadequate and explained how, in their view, the Project in general and the Parcel 1 Building in particular; were inconsistent with the Comprehensive Plan. Some stated their belief that the Court of Appeals' Opinion required that the developer re-think the Project and others urged that the development of the site go through a new solicitation through a design competition. The need for a new healthcare facility was questioned and the Commission was chastised for not permitting non-witnesses to submit written testimony. Several of those in opposition responded to points made in the Applicant's March 13, 2017 submission and expressed dismay that the District was paying the Developer's legal expenses. All public witnesses were subject to cross-examination.

The issues raised will be discussed as part of the Conclusions of Law to the extent relevant. The Commission first heard from witnesses who had previously indicated an intent to testify. It then heard from witnesses who were present in the hearing room and who added their names to the electronic witness queue. When all persons whose names were on the witness queue, and who were present, had testified, the Chair asked whether there was anyone else who wished to speak.[5] One person indicated that they wished to pose a question, and they were permitted to do so. The Chair again asked if there was

[4] The Remanded Order cited *Neighbors United for a Safer Community v. District of Columbia Bd. of Zoning Adjustment*, 647 A.2d 793 (D.C. 1994), but the principle has since been codified in the Zoning Regulations of 2016 through its definition of the term "Affected Advisory Neighborhood Commission" at 11-B DCMR § 100.2.

[5] The queue also included the names of persons who were not present. These were added by an individual in the mistaken belief that doing so would permit those absent to testify on April 6, 2017. This same individual also unsuccessfully attempted to submit approximately 230 pages of testimony from persons who were not present.

anyone else who wished to speak. When no persons responded, the Chair indicated that the public testimony had concluded and that the agency testimony would begin.

The Commission then heard from Maxine Brown-Roberts from OP. Ms. Brown-Roberts was joined by Jennifer Steingasser, OP's Deputy Director for Development Review and Historic Preservation. Additionally, the Commission heard from Anna Chamberlin of DDOT and called forward a panel consisting of representatives from FEMS, DPR, DHCD, and DOEE. At 10:06 p.m., the Chair adjourned the hearing until April 6, 2017 at 6:30 p.m., when FOMP would resume cross-examination of agency representatives.

By letter dated April 3, 2017, FOMP submitted its response[6] to the remand issues. (Ex. 925 – 925E.) As a preliminary matter, FOMP expressed its objection to the Commission reordering of the presentation of testimony and its refusal to accept written statements from persons who did not testify at the hearing.

This preliminary portion of the response ended by FOMP asserting that these "irregularities should be rectified at the April 6, 2017 hearing by, among other things, affording individuals and organizations an opportunity to testify following the parties' presentation of their respective cases and opening the record for the submission of written comments from the public."

The Commission interpreted this last statement as a motion and took up the request at the start of the April 6, 2017 hearing. Counsel for the Applicant was afforded an opportunity to respond and indicated no objection to written testimony from all members of the public being accepted after the conclusion of its case, but objected to permitting further public testimony at that time because only parties can cross-examine witness. Counsel for FOMP responded by noting that the motion was not requesting that public witnesses be permitted to perform cross-examination, but to be able to respond to the Applicant's case. FOMP's counsel stated that by depriving the public of the ability to respond in this fashion, the Commission had unlawfully shifted the burden of proof. For the reasons explained in the Conclusions of Law, the Commission voted to deny FOMP's motion.

Although it had been the Commission's intent that the parties complete their presentation on April 6, 2017, the cross-examination of agency representatives did not conclude until approximately 9:00 p.m. that night. Since it became clear that there was insufficient time for the parties to complete their cases, the Chair adjourned the hearing until April 19, 2017 at 5:00 p.m. In addition, counsel for the Applicant and FOMP agreed they could be available for a continuation of the hearing on May 1, 2017, if needed. (Transcript ["Tr."] of the April 6, 2017 Hearing at 140-141.)

[6] FOMP placed the word "response" in quotation marks, apparently to emphasize its contention that a party could not respond to the remand issues unless it objected to how they were worded.

The following chart identifies the witnesses presented by the Applicant and FOMP on April 19, 2017, and for each witness, the remand issue(s) addressed, and, as to those accepted as experts, the area of expertise in which each were qualified.

Applicant

Name	Current Position	Area of Expertise Qualified	Issue Number(s)
Brian Kenner	Deputy Mayor for Planning and Economic Development	NA	1 & 4
Matt Bell	Principal, Perkins Eastman Architects	Architecture	3
Adam Weers	Principal, Trammel Crow Company	NA	1 & 3
Leonard Bogorad	Managing Director, Robert Charles Lesser & Co. ("RCLCO")	Fiscal and economic impact analysis and real estate market and financial analysis	1 & 3
Shane Dettman	Director of Planning Services, Holland and Knight, LLP	Zoning and land use planning	All

In addition, Mr. Aakash Thakkar, Senior Vice President and Partner with the firm EYA, and Anthony Startt, an investment manager at Jair Lynch Real Estate, were requested by the Applicant to respond to certain cross-examination questions posed by FOMP. Both EYA and Jair Lynch Real Estate are members of Vision McMillan Partners. The substance of the Applicant's case did not substantially depart from the points made in its March 13, 2017 filing.

Friends of McMillan Park

Name	Title	Area of Expertise Qualified	Issue Number(s)
Laura Richards	None provided	Land Use and Zoning Matters[7]	1B
Dr. Sacoby Wilson	Assistant Professor, School of Public Health, University of Maryland	Environmental Health Science	4
Dr. Brett Williams	None provided[8]	Gentrification and displacement	4
Kirby Vining	Treasurer and a Board Member of the Friends of McMillan Park	Not offered as expert	All

In addition to these witnesses, FOMP apparently had intended to call Claudia Barragan as a witness to address remand issues 2 and 4, but she was not present. Instead, as Dr. Wilson was beginning his testimony, FOMP's counsel indicated that she had "some

[7] FOMP proffered Ms. Richards as an expert in the D.C. Comprehensive Plan and its application to zoning decisions. (Tr. April 19, 2017 Hearing at 187.)

[8] From 1976 until last year, Dr. Williams was an Assistant, Associate, and Full Professor, American Studies and Anthropology at American University.

testimony to distribute as well." (Tr. April 19, 2017 Hearing at 222.) In addition to the written testimony of Dr. Wilson, the Commission was given a written statement by Claudia Barragan. When asked who Ms. Barragan was, FOMP's counsel responded:

> Claudia Barigan [SIC] is a witness who could not be here today, so we've provided a written testimony. Dr. Wilson and Ms. Richards have both reviewed and concur with it. So, we're providing it for the record.

(Tr. April 19, 2017 at 225-226.)

However, neither Ms. Richards nor Dr. Wilson had yet mentioned Ms. Barragan's name or referenced her proposed testimony. Later, after the conclusion of Mr. Vining's testimony, Ms. Richards and Dr. Vining were asked by FOMP's counsel whether they had reviewed and agreed with the portion of Ms. Barragan's written testimony that related to their respective subject matter expertise and whether they agreed with Ms. Barragan's conclusions. Although both stated they did, neither adopted the testimony. Ms. Barragan's written testimony was not entered into the record. (Tr. April 19, 2017 Hearing at 246-247.)

At the commencement of his cross-examination of FOMP's witnesses, the Applicant's counsel asked the Chair whether he could submit written rebuttal with the understanding that FOMP could respond in writing. The request was prompted by the absence of any representative from DOEE. FOMP objected to the suggestion, stating that this would deprive it of its right to cross-examination and that it was the obligation of the Applicant to make certain that its witnesses were available for rebuttal. The Applicant responded by noting that it was 10:00 p.m., that the hearing had started at 5:00 p.m., and that it is a hardship to request that District employees be present on the chance that their rebuttal testimony would be needed.

After the completion of cross-examination, the Applicant's counsel requested permission to provide a written closing, and if that were permitted he would forgo rebuttal. The Commission expressed concern that the written closing might contain elements of rebuttal and asked why the Applicant could not immediately proceed with a closing argument. The Applicant's counsel responded that he needed time to ensure "coordination between the private sector applicants and the public-sector part."

The Chairman then ruled that the hearing would resume on May 1, 2017 with the testimony of Ms. Barragan, if she were available, followed by rebuttal, sur-rebuttal, and a closing statement by the Applicant. FOMP objected, stating that the Applicant should be required to present its rebuttal on the same day as its direct, so as to not gain an unfair advantage by having the additional time to prepare. Further, FOMP's counsel argued that the only permitted rebuttal witnesses should be from DOEE, since those were the only witnesses the Applicant confirmed it would present. The hearing was then adjourned.

On April 20, 2017, counsel for FOMP requested the Applicant's counsel to provide it with the names of all rebuttal witnesses the Applicant intended to call. (Ex. 942A.) That request was refused on April 25, 2017. (*Id.*) On the day of the May 1, 2017 hearing, FOMP filed a "*motion in limine"* requesting that the Commission bar the Applicant from presenting "any new expert witnesses or rebuttal testimony." In the alternative, the motion requested that the hearing be postponed, and that the Applicant be required to submit a list of rebuttal witnesses. FOMP also submitted three additional exhibits into the record "for purposes of completeness." Among these was a portion of the Land Distribution Agreements for the Project. The Applicant filed its written opposition to the motion that same day, but indicated that it did not object to the introduction of the three documents, but that it "reserves the right" to submit any final or complete versions of the documents, if identified. (Ex. 943.)

The Commission denied the motion because neither its rules or general evidentiary principles required an Applicant to identify its rebuttal witness. This ruling will be further explained in the Conclusions of Law. The Chair permitted the introduction of the three documents and allowed the Applicant to supplement the record as requested. The Applicant provided full versions of the three Land Disposition Agreements in its May 16, 2017 post-hearing Submission. (Ex. 951D-951F.)

The May 1, 2017 hearing began with the testimony of Claudia Barragan, who was accepted by the Commission as an expert in environmental policy and urban development. In her resume, Ms. Barragan identified her current position as being an environmental policy and urban development consultant. Ms. Barragan's testimony completed FOMP's presentation.

The Applicant's rebuttal consisted of testimony from Mr. Bogorad, Mr. Dettman, and Mr. Thakkar. The Applicant also presented the testimony of Mr. Jay Wilson, Mr. Abraham Bullo, and Mr. Steven Ours of DOEE. Following the conclusion of rebuttal, the Applicant's counsel made a closing argument, and, after some final housekeeping measures, the hearings on this remand concluded.

As noted, the Commission deliberated on the remand issues over two evenings and received a supplemental filing from the Applicant and a response from FOMP. The Findings of Facts and Conclusions of Law that support the Commission's decision to once again approve the Application follow. Those findings and conclusion are supplementary to those made in the Remanded Order, which are incorporated by reference into this Order. In the event of any conflict between the Findings of Facts and Conclusions of Law that follow and those set forth in the Remanded Order, the findings and conclusions contained herein apply.

II. The Commission's Response to the Remand.

FINDINGS OF FACT

A. The Project.

1. The existing PUD Site has approximately 1,075,356 square feet (24.69 acres) of land area and is presently unzoned. The Applicant has divided the PUD Site into seven development Parcels. Five of the Parcels are included within the consolidated portion of this Application. Parcel 1 is located at the north portion of the PUD Site, and will be improved with the Parcel 1 Building, which is to serve as a healthcare facility with ground-floor retail and a park above a preserved water filtration cell ("Cell 14"). Parcel 4, fronting on North Capitol Street at the center of the PUD Site is to be developed with a mixed-use, multi-family residential building with a ground-floor grocery store. Approximately 146 individual row dwellings are proposed for Parcel 5. The south one-third of the PUD Site, known as Parcel 6, is to be developed as an eight-acre park ("Park") including a 6.2-acre green space, a community center building, and the South Service Court comprised of historic structures to be retained and restored. Lastly, the North Service Court, also known as Parcel 7 and located immediately south of Parcel 1, is to be comprised of retained and restored historic resources. First-stage approval is sought for a mixed-use, multi-unit residential building on Parcel 2 with ground-floor retail, and a mixed-use commercial building on Parcel 3 with healthcare uses and ground-floor retail. Both buildings are proposed to have a maximum height of 110-feet. On June 27, 2014, Jair Lynch Development Partners ("Jair Lynch"), which is one of the components of McMillan, filed a second-stage application to construct the Parcel 2 development. The application was approved by Z.C. Order No. 13-14A ("Order 13-14A"), effective April 22, 2016 and appealed. When Order 13-14 was vacated, the petitioners who challenged Order 13-14A filed a motion for summary reversal. In response, Jair Lynch, which was granted intervenor status, suggested that the Court of Appeals, remand Order 13-14A to the Commission, since the fate of the first-stage application would be the fate of the second-stage. The Commission took no position. Through an order dated April 7, 2017, the Court of Appeals denied the motion for summary reversal and remanded Order 13-14A "for further proceedings, if necessary, in light of" the first-stage remand.

2. The PUD Site is part of the larger McMillan Reservoir and Filtration complex, a 92-acre facility comprised of a reservoir, the slow sand filtration facility, and a pumping station, all of which were constructed at the turn of the twentieth century by the U.S. Army Corps of Engineers. The entire complex is listed as an individual landmark in the D.C. Inventory of Historic Sites and as a Historic District in the National Register of Historic Places.

3. Historically, the PUD Site was used as a slow sand water filtration plant. It consists of 20 underground cells of sand filter beds on a level platform or

"plinth," which is inserted into the rising slope of North Capitol Street. The south end of the PUD Site is situated approximately 16 feet above the north end of the PUD Site; however, as North Capitol Street rises, the plinth remains level so that it sits approximately 10 feet below Michigan Avenue at its northern end.

4. The surface of the PUD Site is generally flat, rectangular, and is made up of a shallow dirt-bed covered with grass and weeds. This plane is punctuated by 2,100 manholes to the filter bed chambers below. Two recessed service corridors containing 20 chimney-like structures, known as the sand storage bins, traverse the PUD Site laterally with pathways that lead to the underground cells. These lateral corridors, referred to as the "North Service Court" and the "South Service Court," are lined with other elements of the water filtration process, including regulator houses, stationary sand washers, and portals and ramps to the underground chambers of sand filter beds. Overall, the PUD Site is approximately three city blocks long along North Capitol Street and First Street, and one block wide along Channing Street and Michigan Avenue.

5. The PUD Site is situated adjacent to the residential neighborhoods of Bloomingdale to the south and Stronghold to the east, which are characterized by a variety of large Victorian rowhouses and more modest rowhouses, many with front porches. The Glenwood Cemetery and Trinity College are also located to the east across North Capitol Street, adjacent to the residential communities. The Veterans Affairs Medical Center, Washington Hospital Center, and Children's National Medical Center are located across Michigan Avenue to the north and have building heights ranging from 90 to 127.5 feet. To the west across First Street is the functioning reservoir of the McMillan Reservoir and Filtration Complex operated by the U.S. Army Corps of Engineers. Further to the west is Howard University

6. The Applicant originally sought and was granted a PUD-related map amendment to rezone the PUD Site to the C-3-C and CR Zone Districts, with the C-3-C Zone District located along the northern portion of the PUD Site, which would encompass the Parcel 1 Building. The approved rezoning to the CR Zone District encompassed the remainder of the PUD Site.

7. The validity of the CR zoning was not disturbed by the Opinion.

B. <u>The Map Amendment</u>.

8. In response to the suggestion of the Applicant, the Commission decided to change its previously approved map amendment for Parcel 1 from C-3-C to CR, so the entire PUD site would be zoned CR.

9. The purpose of the Mixed-Use Commercial Residential (CR) District is to "encourage a diversity of compatible land uses that may include a mixture of

residential, office, retail, recreational, light industrial, and other miscellaneous uses." (11 DCMR § 600.1.)

10. Through the use of public review and planning, the CR provisions are intended to:

    (a) Create major new residential and mixed-use areas in planned locations at appropriate densities, heights, and mixtures of uses;

    (b) Encourage the preservation and rehabilitation of structures of historic or architectural merit;

    (c) Encourage areas devoted primarily to pedestrians;

    (d) Encourage flexibility in architectural design and building bulk; provided, that the designs and building bulk shall be compatible and harmonious with adjoining development over the CR Zone District as a whole;

    (e) Make recreation areas more accessible to the CR Zone District's residents and visitors; and

    (f) Create environments conducive to a higher quality of life and environment for residents, businesses, employees, and institutions in the District of Columbia as specified in District plans and policies.

(11 DCMR § 600.3.)

11. The zoning of Parcel 1 to the CR Zone District separately and together with the remainder of the PUD Site is consistent with the purposes and intent of the CR Zone District.

12. The CR Zone District is applied to selected geographic areas where a mixture of uses and building densities is intended to carry out elements of District of Columbia development plans, including goals in employment, population, transportation, housing, public facilities, and environmental quality. (11 DCMR § 600.4.)

13. Based upon the totality of the record, the Commission finds that the PUD Site is such an area.

14. At the September 14, 2017 public meeting, OP was asked to express its view as the appropriateness of the CR zoning for Parcel 1. In response, OP's Deputy Director, Ms. Steingasser, stated that the CR designation would be a "solution that fits the site" and noted that CR was a flexible zone that provided another means to meet the needs of the Parcel 1 Building. (Tr. September 14, 2017 Meeting at 6-7.)

15. The Parcel 1 Building will be 113 feet in height and stepping down to a maximum height of 110 feet with an overall density of 4.08 floor area ratio ("FAR"). A PUD in a CR Zone District may have a maximum height of 110 feet and a maximum FAR of 8.0, of which no more than 4.0 may be commercial. (11 DCMR § 2405.2.) The Commission is authorized to grant up to a five percent increase to this maximum height if "the increase is essential to the successful functioning of the Project and consistent with the purpose and evaluation standards of this chapter." (11 DCMR § 2405.3.) As will be explained in the Conclusions of Law, the fact that the Parcel 1 Building exceeds the permitted non-residential FAR is irrelevant because the aggregate FAR for the entire PUD Site is 1.92 (2.36 FAR excluding the private rights -of -way).

16. As will be discussed in the Findings of Facts related to Remand Issue 1A, the three additional feet of height is necessary for the viability of the Parcel 1 Building as a Healthcare Facility use, which in turn is essential to the successful overall viability of the Project.

C. <u>The Remand Issues</u>.

<u>Issue 1A</u>: Could the parks, recreation, and open space designation of the FLUM be fulfilled and the other policies cited in the Order be advanced even if development on the site were limited to medium- and moderate-density use?[9]

(1) The site already is limited to medium- and moderate-density uses

17. Now that the Commission has substituted CR zoning for the C-3-C initially approved, it believes it must determine whether that change renders the Parcel 1 Building a medium-density development. For the reasons stated below, the Commission concludes that it does.

18. Whether the Parcel 1 Building was a medium- or high-density commercial development was irrelevant to the DCCA's FLUM analysis, because neither description matched the site's moderate-density commercial striping. The Opinion found the Parcel 1 Building, although a high-density development[10], was still generally consistent with FLUM because the PUD's aggregate FAR fell within the moderate-density range. This would also be true had the Parcel 1 Building been determined to be medium-density.

[9] The Commission has revised this remand issue to add a reference to the parks, recreation, and open space designation of the FLUM to be consistent with the DCCA quotation of FF ¶ 168 at 149. (A.3d at 1035.)

[10] The Opinion twice states that the Commission "acknowledged" that the PUD included high-density "development", 149 A.3d at 1033 (both in the text and at footnote 4). In fact, the Commission only acknowledged that there would be "high-density zoning" (FF ¶¶ 171, 171), which is not necessarily the same. In any event, the approved CR zoning is medium-density.

19. The distinction between medium- and high-density was relevant to the Opinion finding that the Parcel 1 Building, as a high-density development, was inconsistent with the second sentence of MC-2.6.5. The Opinion found that "unlike the FLUM designation discussed above, [MC-2.6.5] does not appear to contemplate any high-density uses on the site." (*Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027, 1034 (D.C. 2016).) The flipside of that that finding is that MC-2.6.5 does contemplate medium-density uses.

20. The Framework Element's definitions of medium-density commercial and high-density commercial, as unofficially codified at 10-A DCMR §§ 225.9 and 225.10, are as follows:

> **Medium Density Commercial**: This designation is used to define shopping and service areas that are somewhat more intense in scale and character than the moderate-density commercial areas. Retail, office, and service businesses are the predominant uses. Areas with this designation generally draw from a citywide market area. Buildings are generally larger and/or taller than those in moderate density commercial areas generally do not exceed eight stories in height. The corresponding Zone districts are generally C-2-B, C-2-C, C-3-A, and C-3-B, although other districts may apply; and
>
> **High Density Commercial:** This designation is used to define the central employment district of the city and other major office employment centers on the downtown perimeter. It is characterized by office and mixed office/retail buildings greater than eight stories in height, although many lower scale buildings (including historic buildings) are interspersed. The corresponding Zone districts are generally C-2-C, C-3-C, C-4, and C-5, although other districts may apply.

21. In finding the Parcel 1 Building to be a high-density development, the Opinion principally focused on the approved C-3-C zoning, which is first made explicitly applicable to the high-density category and also is the first mentioned zone to allow the 115-foot height approved by the PUD.

22. The Opinion dispensed with the Applicant's claim that the C-3-C Zone District could apply to the moderate- or medium-density designation, noting that the Commission never made that assertion and that "it did not view the references to the possibility that other districts might apply as supporting a conclusion that buildings permissible only in a C-3-C district reasonably be viewed as medium- or moderate-density uses." *Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027, 1033 n4 (D.C. 2016).

23. However, the Parcel 1 Building is not "permissible only in a C-3-C district," but is allowed in the CR Zone District as well.

24. The PUD Regulations permit CR Zone District PUDs to achieve a maximum of 110 feet plus an additional five percent under the circumstances found to exist here. (11 DCMR §§ 2405.1 and 2405.3(a).) The maximum non-residential FAR for a PUD in a CR Zone District is 4.0 and is computed based upon all the land and buildings that comprise the entire PUD site. (11 DCMR § 2405.2.) The aggregate FAR for this PUD is 1.92 (2.36 FAR excluding the private rights-of-way). Even if the Parcel 1 Building's FAR was separately computed, its 4.08 nonresidential FAR could be accommodated through the additional five percent allowed by 11 DCMR § 2405.3(a). Therefore, the Parcel 1 Building could be viewed as moderate-density commercial development if the CR Zone District were applicable to that density category.

25. The Commission finds that the CR Zone District applies to the medium-density commercial designation for this site because the FLUM identifies the site as mixed-use.

26. None of the Framework Element's definitions identify the CR Zone District as applicable. This cannot mean that the CR Zone District is inconsistent with the entire FLUM. Rather, the CR Zone District is intended to apply to a site, like McMillian, for which the FLUM signifies through striping that the mixing of two or more land uses is encouraged. (10-A DCMR § 225.18.)

27. As the Framework Element indicates:

> A variety of zoning designations are used in Mixed Use areas, depending on the combination of uses, densities, and intensities. The city has developed a number of designations specifically for mixed use areas (such as SP-1, SP-2, CR, and the Waterfront districts).

(10-A DCMR § 225.21.)

28. As noted by OP's Deputy Director at the September 19, 2017 public hearing, the CR Zone District is intended to be flexible and could apply to multiple land use categories, including medium-density commercial. For that reason, OP considered the rezoning of the site to CR to not be inconsistent with the Comprehensive Plan. (Tr. September 14, 2017 at 6-7.)

29. The Commission has previously approved PUD-Related map amendments to the CR Zone District for properties designated as medium-density residential or mixed-use, and with heights comparable to that of the Parcel 1 Building as follows:

Z.C. Case No.	Land Use Category	Maximum Height (Feet)
15-15	Mixed-use Medium-Density Residential/Production, Distribution, and Repair Land Use categories	102
14-08	Medium-Density Residential	105
11-13	Medium-Density Residential	110

30. In its final report in Z.C. Case No. 11-13, OP stated:

> The proposed CR zoning, which is intended to accommodate a medium density residential Project and church use, is generally consistent with the medium density residential use designation

31. And the Commission agreed.

> Based on the evidence and testimony from the Applicant and OP, the Commission finds that the proposed PUD-related Zoning Map amendment to the CR Zone District is not inconsistent with the Property's designation on the Future Land Use Map. The CR Zone District in this case is congruent with the Medium-Density Residential Land Use category in the Comprehensive Plan.

(Z.C. Order No. 11-13, p 19.)

32. In the initial proceeding, and through the issuances of the Remanded Order, the Commission gave first-stage approval for 110-foot buildings on Parcels 2[11] and 3.

33. In the initial proceeding, FOMP specifically challenged the consistency of CR zoning with the Comprehensive Plan. FOMPs then expert, George Oberlander, noted the 110-foot height permitted for a CR PUD and concluded that requested CR zoning was "inconsistent with the medium density land use designation in the comprehensive plan." (Ex. 691.) In its proposed order, FOMP claimed that:

> [b]oth the proposed CR and C-3-C zones districts are consistent only with a high-density commercial and residential land use designation. These zone districts are inconsistent with the Comprehensive Plan's Future Land Use Map and text (MC-2.6.5),

[11] Z.C. Order 13-14A approved a second-stage PUD application for a building on Parcel 2 with a maximum height of 82'-6", not including penthouses. Order 13-14A was appealed and was remanded, but not vacated "for further proceedings, if necessary, in light of *Friends of McMillan Park*, 149 A.3D 1027/" *DC for Reasonable Dev. v. District of Columbia Zoning Comm'n*, No. 16-AA-515 (D.C. 2017).

> both of which clearly designate the site as 'mixed use: medium density residential, moderate density commercial and parks, recreation and open space.'

(Ex. 834, p. 16.)

34. The Commission does not know whether FOMP made this argument to the Court of Appeals. But whether FOMP made the argument and lost, or failed to make it at all, the Commission's finding in the initial proceeding that the CR zoning for all but Parcel 1, and the 100-foot heights approved for Parcels 2 and 3, are consistent with the Comprehensive Plan is the law of the case.

    The Parcel 1 Building's additional three feet of height does not shift it from medium- to high-density commercial because neither definition includes a height limit other than stories and the physical and location characteristic of the Parcel 1 Building are in all respects consistent with the definition of medium-density commercial and inconsistent with the same elements of high-density commercial. The medium-density commercial category applies District-wide and includes buildings, such as that proposed for Parce1 1, that do not exceed eight stories.

35. In contrast, the high-density commercial category only applies to buildings that exceed eight stories and which are "located in the central employment district of the city and other major office employment centers on the downtown perimeter." The Parcel 1 Building meets neither element.

36. The Court of Appeals has noted that the Framework Element's density definitions "focus on buildings' actual physical characteristics, such as the number of stories or units in a building." (*Durant v. D.C. Zoning Comm'n*, 139 A.3d 880, 884 (D.C. 2016).)

37. Consistent with that focus and its past precedent, the Commission concludes that the Parcel 1 Building is a medium-density development. Since no portion of the PUD site will include high-density development, the PUD is consistent with the guidance of MC-2.6.5.

38. As a result, the Comprehensive Plan issues identified in Remand Issues 1, 2, and 3 have been rendered moot.

39. Because a petition to review this Order may be filed with the Court of Appeals, and the DCCA may find that the change in the zoning for Parcel 1 from C-3-C to CR is invalid or irrelevant, the Commission will address the three issues.

(2) The PUD Fulfills the FLUM's Parks, Recreation, and Open Space Designation and Advances Comprehensive Plan Policies to a Degree that Would Be Unachievable if the Height of the Parcel 1 Building was Further Reduced.

(A) <u>The other policies cited in the Order</u>.

40. In its corrected report dated March 13, 2017, OP identified the other policies cited in the Order as:

(a) Land Use ("LU"): LU-1.2.1: Reuse of Large Publicly-Owned Sites and LU-1.2.7: Protecting Existing Assets on Large Sites;

(b) Housing ("H"): H-1.2.4: Housing Affordability on Publicly Owned Sites;

(c) Parks, Recreation, and Open Space ("PROS"): PROS-1.3.6: Compatibility with Adjacent Development and PROS-3.3.1: North Central Open Space Network;

(d) Urban Design ("UD"): UD-2.2.8: Large Site Development and UD-2.3.5: Incorporating Existing Assets in Large Site Design;

(e) Historic Preservation ("HP"): HP-2.4.3: Compatible Development; and

(f) Mid-City Area Element ("MC"): MC-2.6.1: Open Space on McMillan Reservoir Sand Filtration Site; MC-2.6.2: Historic Preservation at McMillan Reservoir; and MC-2.6.5: Scale and Mix of New Uses.

41. The Commission agrees. In addition, the Commission recognizes that Policy LU-1.2.5: Public Benefit Uses on Large Sites and LU-1.2.6: New Neighborhoods and the Urban Fabric are particularly relevant to the McMillan site.

42. LU-1.2 identifies the McMillian Site as being one of the 10 large sites for which it provides "policies that focus on broader issues" and indicates that "the Area Elements should be consulted for a profile of each site and specific policies for its future use." (10-A DCMR § 305.2.) The Applicable Area Element for the McMillan Site is the MC-2.6.

43. As demonstrated by the Applicant in Exhibit 896A, there are a myriad of other Comprehensive Plan policies advanced by the PUD. However, consistent with the remand instructions, the Commission will focus its analysis on the parks, recreation, and open space designation of the FLUM and the specific policies identified in FF ¶¶ 40 and 41, hereinafter referred to as the "Identified Policies." The Commission includes MC-2.6.5 within the Identified Policies because the PUD advances the portion of that policy that calls for viewsheds and vistas to be maintained and for development to be situated in a way that minimizes impacts on historic resources and adjacent development.

(B) <u>The PUD Fulfils the FLUM Designation and Advances the Identified Policies</u>.

(i) Parks, Open, Space, and Recreation.

44. The PUD fully implements the Parks, Recreation, and Open Space FLUM designation; and significantly advances policies LU-1.2.1: (create significant new parks); LU-1.2.5: (include new parks and open spaces in the development of District-owned properties); LU-1.2.6 (incorporation of new public open spaces); PROS-1.3.6 (design parks to be compatible with nearby uses); PROS-3.3.1 (protect and enhance the historic open space network extending from McMillan Reservoir to Fort Totten) and MC-2.6.1 (reuse plans for the McMillan Reservoir Sand Filtration site should dedicate a substantial contiguous portion of the site for recreation and open space).

45. The Project will provide approximately 7.95 acres of parks and open space (9.38 acres including the Olmsted Walk). Adding in the area of the North and South Service Courts, the total area of open space increases to approximately 12 acres. This amounts to approximately 49% of the PUD Site devoted to open space that will be accessible to persons with disabilities and will include benches along the Olmsted Walk. The parks and open space provided as part of the Project, along with Olmsted Walk, will enhance the historic open space network extending from McMillan Reservoir to Fort Totten.

46. The Park comprises the entire southern portion of the PUD Site (Parcel 6), encompassing the 6.2-acre green space, the 17,500 square foot community center, and the South Service Court. The Park's program includes pedestrian, bicycle, and vehicular access, large informal play areas, the Olmsted Walk, terraced seating, an outdoor "sprayground" and playgrounds, natural amphitheater, a stormwater pond that will reference the PUD Site's subterranean natural hydrology, and a "walking museum" that will tell the history of the PUD Site.

47. The community center will be further described in the public benefits discussion of this Order.

48. There will be covered seating areas with at least four durable high-quality picnic tables or similar tables and chairs. The Park will also accommodate informal sports and events for District residents. The western portion of the Park will include the reconstructed elevated plinth, which will be preserved with views to the reservoir and city landmarks beyond.

49. A portion of Filtration Cell 28, an underground filter bed, will also be preserved for future use. Hawthorn trees will line both sides of the Olmsted Walk, and a tree grove in a quincunx pattern will be in the center of the Park, referencing the historic pattern of manholes in the plinth. The Applicant will provide all related streetscape improvements and street furniture, including lighting, benches, trash receptacles, and bicycle racks.

50. In its report concerning this case, the DPR noted that the PUD will further its mission to promote health and wellness, conserve the natural environment, and provide universal access to parks and recreation. Also, the PUD furthers the

overarching priority of the city's most recent park planning works, the Comprehensive Plan Capital Space (2010), Sustainable DC (2013), and Parks and Recreation Master Plan (2014), by providing safe and equitable access to high-quality park spaces for all people throughout the city. (Ex. 897.)

(ii) Housing and Affordable Housing.

51. The PUD significantly advances LU-2.1 (create local housing opportunities), LU-1.2.5 (include affordable housing on District-owned sites when reused) and H-1.2.4 (a substantial percentage of the housing units built on publicly-owned sites should be reserved for "low and moderate income households.")

52. As previously noted in the Remanded Order at FF ¶ 79, the PUD will provide approximately 924,583 square feet of gross floor area ("GFA") devoted to residential uses, or approximately 677 units of new housing in principal and multiple-family dwellings with both rental and ownership opportunities.

53. As to affordable housing, on page 5-12 of the official hard-copy version of the Comprehensive Plan, between Policies H-1.2.5 and H-1.2.6, there is a yellow text box that begins with the question "What is Affordable Housing." (10-A DCMR § 504.10.) The text begins by noting that "[o]ne of the most common requests made during Comprehensive Plan public meetings was to provide a clear definition of "affordable" housing."

54. The provision then defined affordable housing as:

> [H]ousing in which occupancy is limited to households meeting special income guidelines. The price of this housing is maintained at a level below what the free market would demand using restrictive deeds, covenants, mortgage subsidies, vouchers, or other means tied to public financing or tax credits.[12]

…

> The benchmarked incomes for the Washington Metropolitan Area in 2005 [expressed in terms of Area Median Income ("AMI")]) are shown in the table below. … The terms "extremely low", "very low", "low", and "moderate" income correspond to up to 30%, 50%, 80%, and 120% of that amount, respectively.

55. Although the table referenced by the definition is not accessible through the Office of Documents unofficial codification as the result of a bad web link, the table, as shown on page 5-12, is as follows:

[12] The definition does not include Inclusionary Zoning among these tools because the program had not yet been adopted.

Target Income	HUD Income Group
30% AMI	Extremely Low
50% AMI	Very Low
60% AMI	
65% AMI	
80% AMI	Low
95% AMI	
120% AMI	Moderate

56. Twenty percent of the total square feet of GFA devoted to housing on the PUD Site will be affordable housing within the meaning of the Comprehensive Plan, as follows:

(a) On Parcel 4, a minimum of 67,018 square feet of GFA of the total new housing provided, or approximately 85 residential units, will be set aside as senior housing (55 years of age or older) for households earning between 50% and 60% of the "AMI." These units will all be in the southern wing of the building;

(b) On Parcel 5, 22 of the single-family row dwellings will be set aside as affordable housing. Nine of the affordable units will be set aside for households earning no more than 50% of AMI, with the remaining 13 affordable units set aside for households earning no more than 80% of the AMI; and

(c) On Parcel 2, approximately 25 units (approximately 21,341 square feet of total GFA) will be set aside for households earning up to 80% of the AMI.

57. Using the H.2.4 table income categories, 20% of the PUD site will be devoted to housing reserved for Very Low and Low-Income households as follows:

Household Income Level	Affordable Housing
Very Low	**Parcel 4**. 67,018 square feet of GFA, approximately 85 residential units on Parcel 4. **Parcel 5**. Nine row dwellings.
Low	**Parcel 2**. 21,341 square feet, approximately 25 units, **Parcel 5**. 13 row dwellings.

58. Using the definitions of low- and moderate-income household set forth in the Inclusionary Zoning ("IZ") regulations in place when the Application was granted, 11 DCMR § 2601.1, the same percentage of the Project will be set-aside for low- and moderate-income households.

59. The current IZ Regulations uses median family income ("MFI") percentages (80% and 60%) rather than the medium- and low-income nomenclature to identify the affordability levels of Inclusionary Units, which apply depending upon whether a unit is for purchase or for rent. (11-C DCMR § 1003.3.) Only Inclusionary Units resulting from habitable penthouse space must be reserved for households earning equal to or less than 50% of the MFI.

60. Based on the foregoing, the Commission concludes that a substantial percentage of the housing units built on the PUD Site will be reserved for low- and moderate-income households within the meaning of LU-1.2.1

(iii) Historic Preservation.

61. The PUD significantly advances Policy LU-1.2.7 by identifying and protecting site plan element and Policy MC-2.6.2 by restoring key above-ground elements of the site in a manner that is compatible with the original plan and by recognizing the cultural significance of this site, and its importance to the history of the District of Columbia as it is reused. The PUD will also advance HP-2.4.3 by retaining and restoring the character-defining features of the historic landmark McMillan Park site and by restoring others.

62. As previously found, Olmsted Walk will be re-established and lined with two rows of thornless Hawthorn trees, which are consistent with Olmsted's original design intent. The Hawthorn species is historically accurate, native to America, adapted to urban environments, and has pleasant aesthetic qualities year-around. The path itself will be made of recycled and reclaimed concrete paving to the greatest extent possible, with a steel edge and a sand or decomposed granite setting. Ramps compliant with the American's with Disabilities Act standards will access the pathway. The concrete stairs at the PUD Site's two southern corners and northeast corner that provided access to the walk will be reconstructed. The Applicant will seek permission from the U.S. Army Corps of Engineers or other responsible government agency to obtain the historic McMillan Fountain, formerly located on a portion of the McMillan Reservoir west of First Street, to install it on the PUD Site.

63. As part of the historic preservation component, the Project will retain and incorporate the North and South Service Courts and their sand filtration process structures, including all 20 sand storage bins, all four regulator houses, at least one sand washer, plus many of the filter bed portals and much of the service court walls. Retention and rehabilitation of these iconic features will retain the historic identity of the PUD Site and will create unique, place-making settings for the new community. The establishment of a 6.2-acre open space at the

southern third of the PUD Site will retain the PUD Site's visual expanse from North Capitol Street, westerly to and beyond the Reservoir, as well as offer the opportunity for residents and visitors to observe the PUD Site close in, rather than only from the perimeter as originally designed and as it presently sits. The western portion of the Park will include the reconstructed elevated plinth, which will be preserved with views to the reservoir and city landmarks beyond.

64. Cell 14, located at the northeast corner of the PUD Site, will become, on its surface, a new park permitting views to the cylindrical sand bins from the north, while its underground structure will be reserved for future adaptive reuse to compliment the public and retail activities in that area of the PUD Site. In the interim, Cell 14 will be used by WASA as a stormwater storage tank. Part of Cell 28, located off of the South Service Court, will be preserved and will be incorporated into the Park as part of the interpretive program. In total, approximately 1.5 acres of underground cells will be preserved and slated for future use. The result will be a "walking museum" that tells the history of the PUD Site and its significance to the city via a self-guided walking tour of the PUD Site's preserved and restored historic assets.

65. FOMP's assertion that the development is inconsistent with these policies will be discussed in the Commission's findings made with respect to Remand Issue 2.

(iv) Urban Design.

66. Policy UD-2.2.8 indicates that new developments on parcels that are larger than the prevailing neighborhood lot size should be are carefully integrated with adjacent sites and that structures on such parcels should be broken into smaller, more varied forms, particularly where the prevailing street frontage is characterized by small, older buildings with varying façades. (10-A DCMR § 910.16.) The clustering of the commercial density on Parcel 1 significantly advances this policy. As will be made evident in the portion of these findings that discuss the iterations of the Master Plan between 2008 and 2014, the Project evolved substantially from its initial form which spread development out over a much larger portion of the PUD Site, to its current form which distributes height and density in a manner that responds to the surrounding context in a manner that relates to the scale of the existing buildings and avoids abrupt contrasts in scale.

67. The relevant portion of UD-2.3.5 encourages the incorporation of existing assets such as historic buildings, significant natural landscapes, and panoramic vistas in the design of redeveloped large sites. (10-A DCMR § 911.8.) The extent to which the PUD advances this goal has already been described in the findings concerning the Identified Policies pertaining to parks, recreation and open space and historic preservation. The incorporation of vistas will be discussed below.

(v) Maintenance and Incorporation of Vistas.

68. In addition to the general policy of UD-2.3.5, the third sentence of MC-2.6.5 states as an objective of the McMillan Site that "development on the site should maintain viewsheds and vistas and be situated in a way that minimizes impacts on historic resources and adjacent development." (10-A DCMR § 2016.9.) As shown in Exhibit 32A1A8, Sheet 25, the Project will maintain views across the southern portion of the PUD Site through the introduction of proposed park space that will preserve the visual relationship between the southern portion of the site and the South Service Court, and between the PUD Site and the McMillan Reservoir to the west. In addition, because the elevated plinth at the southern portion of the site will be preserved, views toward the south and southwest will also be maintained. Finally, the Project will also maintain the visual relationship between Olmstead Walk and the surroundings, and between the North and South Service Courts.

(vi) Public Benefits including Healthcare and Civic Facilities.

69. The PUD significantly advances the portion of LU-1.2.5 that states:

> Given the significant leverage the District has in redeveloping properties which it owns, include appropriate public benefit uses on such sites if and when they are reused. Examples of such uses are affordable housing, new parks and open spaces, health care and civic facilities, public educational facilities, and other public facilities.

70. The affordable housing, new parks, and open spaces provided by the PUD have been described above.

71. The Healthcare Facility is located at the north end of the PUD Site, with frontage on Michigan Avenue, North Capitol Street, and First Street, N.W. The Healthcare Facility will be comprised of approximately 860,000 square feet devoted to healthcare uses, and approximately 15,000 square feet devoted to ground-floor retail. The Healthcare Facility will rise in two halves and be separated above grade by Half Street. The two halves will be connected at the main floor of the building fronting on the North Service Court.

72. The building will have a maximum height of 113 feet that will step down to an approximate height of 110 feet at the far east and northeast extensions. The building is set back from North Capitol Street by approximately 150 feet, with the preserved Cell 14 acting as a buffer between the building and the adjacent residential community. As a result, the townhouses facing North Capitol will be separated by 260 feet, roughly the size of a football field. (Ex. 927A1, p. 18.) The building will occupy approximately 55% of Parcel 1, with an overall density of 4.08 FAR. It is anticipated that the Healthcare Facility will serve the office needs of physicians and medical service providers affiliated with many of the

leading healthcare systems in the area including Children's National Medical Center and the Washington Hospital Center.

73. The Healthcare Facility's main floor will be on its south side, opening onto the historic North Service Court, and will be activated by pedestrian-oriented retail and the primary parking garage entrance for retail patrons. To the north of the building along Michigan Avenue, a terraced medicinal/Healing Garden will create a welcoming space for patients, visitors, and employees. The Olmsted Walk will connect the Healthcare Facility and its Healing Gardens with the rest of the PUD Site's public amenities to the south.

74. A future second stage will include a second healthcare facility of approximately 173,000 square feet with retail on the ground floor on Parcel 3.

75. The Healthcare Facility will be developed by Trammel Crow Company, one of the largest commercial real estate developers in the nation. In 2014, the company was ranked as the number one healthcare developer in the country by Modern Healthcare magazine. As of 2014, Nationwide Trammel Crow had $4.3 billion of healthcare development completed or in process. (Tr. of May 8, 2014 Hearing at 29.)

76. Adam Weers is a principal with Trammel Crow with substantial knowledge and experience in the development of healthcare facilities. Although not offered as an expert, his opinion testimony was accepted by the Commission, pursuant to the more relaxed evidentiary standards for administrative agencies, which permit opinions by lay witnesses. (*See Comm. for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177, 1184 and 193 (D.C. 1982).)

77. Mr. Weers testified, and the Commission found, that the healthcare use proposed for the Parcel 1 Building is a needed addition to the District's aging healthcare infrastructure. The District's healthcare facilities are on average the second oldest of any metropolitan area in the nation (Ex, 927A1, p.5.), much of which is owed to the infrequency with which new healthcare facilities are built in the District. The District's last new hospital (George Washington) was constructed in 2002. Meanwhile, the District's population is rising rapidly, with some 100,000 people moving in over this 15-year period. This places an even greater demand on the existing healthcare facilities throughout the city. These two factors – lack of new supply and a rapidly growing population – have led the District to be ranked last in terms of healthcare facilities per capita among all major metropolitan areas in the nation.

78. Further, according to information published by the DC Department of Health's Primary Care Bureau ("DCPCB"), the agency responsible for assessing and ensuring designation of areas within the District that have a shortage of health care providers, the McMillan site is located in one of nine designated Health Professional Shortage Areas ("HPSA") in the District. According to DCPCB's website, HPSAs are used by the federal government to recognize shortages of

healthcare providers for geographic areas, populations or facilities, and to prioritize the allocation of federal and local resources to address these shortages. HPSAs are designated by the Health Resources and Services Administration ("HRSA"), an agency of the U.S. Department of Health and Human Services, and once designated are rated on a scale of 0-25, with higher scores indicating greater need. According to the HPSA maps available on DCPCB, the PUD Site is located within the Low Income (LI) Columbia Heights/Ft. Totten/Takoma [primary care] HPSA which has a score of 18. (Ex. 896A *citing* Ex. 896P.)

79. Locating the Parcel 1 Building directly adjacent to the Washington Hospital Center campus will help address these systemic issues, as well as directly meet the core industries and institutional growth elements of the Comprehensive Plan.

80. A discussion of FOMP's assertion that the Healthcare Facility is inconsistent with a Comprehensive Plan policy discussing the need to distribute public healthcare facilities across the District will be discussed in the findings concerning Remand Issue 2.

81. As noted, a community center will be located in the Park and will house circulation and gallery spaces with exhibits on the history of the PUD Site, a 25-meter swimming pool, a multipurpose community meeting room with a catering kitchen, outdoor gathering spaces, fitness studio, and locker and shower facilities. The building will have a glass façade made of high-performance glazing that will welcome ample daylight into the pool and other public spaces. The building will incorporate a lightweight metal exterior trellis shading system to condition the exterior spaces and shade the building. Reinforced concrete groin vaults will recreate the experience of the historic below-grade filter beds, while wood boards, likely reclaimed wood from the PUD Site, will envelop the building's entrance vestibule.

82. The PUD will provide the following additional public benefits, as found in the Remanded Order.

Certified Business Enterprises ("CBE") Participation

83. Prior to the issuance of a building permit, the Applicant will execute a CBE Agreement with the D.C. Department of Small and Local Business Development ("DSLBD") to achieve, at a minimum, 35% participation by certified business enterprises in the contracted development costs for the design, development, construction, maintenance, and security for the Project to be created because of the PUD. Business opportunities will be posted on the DSLBD website, and the Applicant will give opportunities to CBE businesses for smaller contracts, such as catering, trash collection, and delivery service. The Applicant will continue to work cooperatively with DSLBD and its contractors and with the Business Development Councils and other local community organizations to maximize

opportunities for CBE firms throughout the process. The PUD will also include 20% sponsor equity participation by a CBE developer.

Training and Employment Opportunities

84. During construction of the Project, the Applicant will abide by the terms of the executed First Source Employment Agreement with the District Department of Employment Services ("DOES") to achieve the goal of utilizing District residents for at least 51% of the new jobs created by the PUD. To the extent permitted by law, first preference for employment opportunities will be given to Wards 1 and 5 residents. The Applicant and its contractor, once selected, will coordinate training, job fairs, and apprenticeship opportunities with construction trade organizations or with healthcare facilities and other organizations to maximize participation by District residents in the training and apprenticeship opportunities in the PUD.

Environmental Benefits

85. The Master Plan for the overall development for the PUD Site will be evaluated for LEED-Neighborhood Development and will be certified at least LEED-Gold or its equivalent. Individual buildings within the PUD Site will be certified at least LEED- Silver or its equivalent.

86. In addition, the Project will include numerous limited impact development ("LID") strategies that will result in substantial environmental benefits to areas such as stormwater management and urban tree canopy. For example, the overall design of the Master Plan and each individual building will minimize impacts on the environment through the utilization of LID and green building methods.

87. The Project will also satisfy the District's Green Area Ratio ("GAR") requirements under the Zoning Regulations. Currently the site is devoid of any meaningful tree canopy and landscaping, and what exists is in an unhealthy state and provides poor stormwater retention capacity. The Project will contain, among other notable elements, approximately 288,645 square feet ("sf") of landscaped areas, approximately 12,822 sf of bioretention facilities, approximately 690-750 new trees, approximately 11,000 sf of green roof, and approximately 58,724 sf of permeable paving.

88. Further discussion of the environmental impact of the PUD may be found in the portion of this Order addressing Remand Issue 4A.

Community Benefits

89. The Applicant will create a project association or business improvement district, referred to as the McMillan Public Space Partnership ("Partnership"). The Partnership will provide an operating framework to maintain and program the public space within the McMillan redevelopment, including the private

roadways, alleys, bicycle paths, historic walks, sidewalks, parks, open space, historic resources, streetscapes, street furniture and fixtures, and signage within the PUD boundaries. The Partnership will be a not-for-profit corporation governed by a board of directors responsible for strategic and financial planning, management, and reporting to the public. As its primary function, the Partnership will maintain and program most, if not all, of the public assets on the PUD Site via an agreement with the District. The assets include the Park and open space, historic resources, public art, and internal streets and their components (e.g., paving, light fixtures, benches). (Ex. 832M.)

90. To ensure the success of the Partnership the Applicant will contribute:

(a) $225,000 to facilitate business start-ups in the Project;

(b) $500,000 over a 10-year period to the Partnership, operating budget to hire high-school-age residents and senior residents to provide guided tours of the McMillan site highlighting the preserved historic resources; and

(c) $750,000 over a 10-year period to the Partnership operating budget to create a community market, outdoor cafe, and space for art installations between the South Service Court and South Park, and to activate the South Service Court and existing elements, such as regulator houses for small business incubators, silos as hanging gardens, water features and observation points.

91. The Applicant will also contribute:

(a) $1,000,000 as a workforce development fund to be coordinated by the Community Foundation of National Capital Region ("CFNCR"), of which $300,000 for scholarships will be for community residents to pursue higher education, training or job-related certification, encouraging "legacy" career paths such as civil engineering, landscape architecture, or on-site jobs in the medical field, with a preference for Wards 1 and 5 residents, to the extent permitted by law. The remaining $700,000 will be directed to organizations whose missions include workforce development, to create true "career paths" for District residents through readiness, training, and placement in on-site or other employment opportunities, and which have a demonstrated track record for successful job placement and retention of District residents;

(b) $125,000 to the D.C. Education Fund to be used to improve science, technology, engineering, and math teacher professional development and instruction, as well as student learning and achievement, particularly at Dunbar High School, McKinley Technical High School, and Langley Educational Campus;

(d) $500,000 for fabricating, installing, repairing and restoring tree box fence enclosures; planting trees and ground cover plants; and installing certain neighborhood signage in coordination with the Bates, Bloomingdale, Eckington, Edgewood, Hanover Area, and Stronghold Civic Associations;

(e) $150,000 to the North Capitol Main Street, Inc. for the storefront improvement program to provide grants for major corridors in ANC 5E boundaries affected by the PUD. The funds shall only be used for storefronts located on North Capitol Street, N.E., and N.W., between Channing Street and New York Avenue; and

(f) The Applicant will provide a total of approximately 97,770 square feet of GFA devoted to retail and service uses on the PUD Site. The retail space will include a Harris-Teeter grocery.

(vi) The Master Plan Evolved to Maximize the Comprehensive Plan Policies Advanced.

92. The Master Plan was formulated between 2006 and 2014 to maximize the quantity and quality of Comprehensive Plan goals achieved. As described by Matthew Bell in his direct testimony, and as illustrated in Exhibit 951C, the Master Plan progressed through several iterations, beginning with the 2006 Master Plan, and evolving through iterations in 2008, 2009, 2011, 2012, and the current plan. Throughout the process, the Applicant sought and received the input of the affected ANCs, civil associations, citizen groups, and various District of Columbia agencies. As is the case with a project of this magnitude, there was no unanimity reached, but the Applicant clearly recognized the need for preserving historic elements of the site while at the same time providing significant contiguous and usable open space, substantial affordable housing, and vibrant neighborhood-serving retail, without causing adverse traffic, visual, or environmental impacts. The Applicant came to realize it could not accomplish these things in any meaningful sense without an economic driver, which became the Parcel 1 Building.

93. The overall challenge was to satisfy the Historic Preservation Review Board ("HPRB") that the design articulated the essential characteristics of the landmark, which were a tripartite organization with two long east/west courts with above-ground features, the plinth, views across the site from First Street to North Capitol Street, and the perimeter of the Olmstead Walk.

94. The tripartite organization is the basis of the current plan. The above-grade North and South Service Courts are maintained and incorporated. The plinth that establishes the exterior character landmark to the community is maintained. The Olmstead Walk is reestablished. Views from across the landmark are maintained in the park and the service courts. Underground cells are incorporated into the public experience of the site fully at Cell 14, and partially at Cell 28.

95. The six illustrations discussed below are from Exhibit 951C and they illustrate how the Master Plan evolved into its current form.

The Original 2006 Master Pan



96. In this first plan, development covers almost the entire site, there are no healthcare facilities, and little historic preservation. There is no plinth, Olmstead Wall, or South Service Court. There is only a partial North Service Court and minimal open space.

The 2008 Master Plan



97. The 2008 Master Plan included both the North and South Service Courts, but there is still no clear tripartite organization, no plinth or Olmstead Walk, no healthcare or community facilities, and minimal underground cell preservation.

The 2009 Master Plan



98. The 2009 iteration of the Master Plan showed somewhat more tripartite organization.

The 2011 Master Plan



99. Healthcare uses are introduced by the 2011 plan, which includes a much larger park stretching across the site from North Capitol to 1st Street, with views established. Cell 14 is included and preserved and Cell 28 is included into the park along with the. Community Facility. The Olmstead Walk and the plinth are

not continuously evident but exist as partial fragments. A tripartite organization was yet to be achieved.

The 2012 Master Plan



100. With the 2012 plan, the Olmstead Walk emerges more on one side but the plan still lacked a tripartite organization, north/south view connections, or a complete plinth.

The Current Master Plan



101. The tripartite organization becomes evident under the 2014 Master Plan. There is now a complete Olmstead Walk, all of the plinth, North and South service courts, and a bigger park. The north and south views are supported by the street system. There would be approximately square feet of retail 100,000.

102. In sum, between 2008 to 2014, open space went from six to 12 acres, historic preservation went from 18 to 24 of the above-grade structures, including the plinth. Land use also changed, originally starting with office, hotel, and residential and evolving to healthcare, residential, retail, and a community center.

(C) <u>The Relationship of the Healthcare Facility to the Advancement of the Identified Policies</u>.

103. The Commission credits the testimony of Mr. Weers that the 860,000 square feet of healthcare uses on Parcel 1 is the economic driver of the Project and is critical to its viability. As is the case with most large-scale mixed-use development projects, the key to maintaining viability is to establish a critical mass of high-value uses that can support lower-return uses.

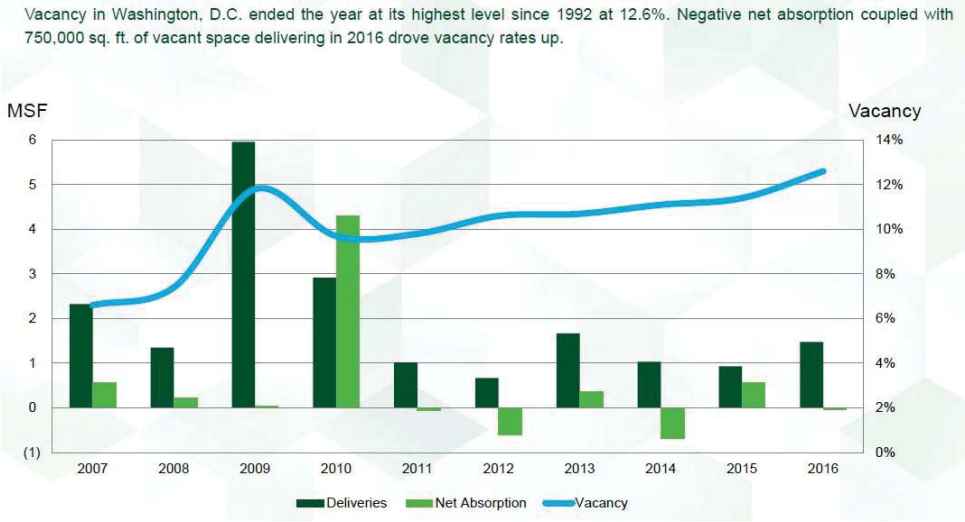
104. In addition, this Project presents a unique set of challenges. Due to the unstable condition of the below-grade infrastructure that exists on the site, significant investment is necessary to prepare the site for any kind of development, including parks and open space. Added to these development costs is the cost of subsidizing the substantial affordable housing to be provided, the historic preservation to be undertaken, and the $5,000,000 worth of community benefits offered, all in furtherance of the Comprehensive Plan policies specific to large sites in general and the McMillan site in particular. In order to overcome the substantial predevelopment costs and advance these Comprehensive Plan policies to the maximum extent possible, approximately 860,000 square feet of high-value commercial uses in needed for the Project

105. Originally, this density was spread across the site, resulting in minimal open space. In order to devote almost half of the PUD Site to parks and open space, including the large contiguous park at the south end of the site, development needed to be clustered at the north end of the site. The Applicant succeeded in clustering the critical density into less than four acres on Parcel 1.

106. In addition, devoting this amount of GFA to commercial rather than residential uses optimized the benefits generated by the Project in terms of jobs and income, while the daytime population for these uses provides the critical mass needed for the success of any significant retail component. Retail uses, particularly large grocery stores like the Harris Teeter that has committed to Project, require the daytime population drawn to the site by the healthcare uses as well as the site's residential population. (Tr. April 19, 2017 at 124-125.)

107. The Applicant also demonstrated that this development on Parcel 1 needed to be devoted to healthcare uses.

108. Outside of healthcare, there is no discernable large-scale commercial demand for the site. As illustrated in Exhibit 951B (shown below) the District's general office market is in a trough and appears poised to remain so for the foreseeable future.



109. But even in a strong office market, the McMillan site does not have the attributes a general office development site needs to be successful.

110. In contrast, healthcare real estate in the District places high value on adjacency to existing hospitals. There is approximately 3.5 million square feet of hospitals next to the McMillan site. This adjacency offers a unique opportunity for these systems to modernize significant portions of their operations by expanding across the street, and then repurposing the newly freed up space on their existing campus.

111. Further, as noted by Mr. Weers, the concentration of healthcare uses in the Parcel 1 Building is consistent with modern healthcare design, which incorporates smart growth principles like taller buildings, vertical integration, smaller footprints, underground parking, and mixed-use environments with rich amenity bases and open green public spaces.

112. Without the Parcel 1 Building, the critical mass of commercial density would disappear, the PUD would become unviable, and all the Comprehensive Plan policies it advances would be lost.

113. If the proposed eight-story buildings on Parcel 1 had typical commercial floor-to-ceiling heights, it could rise to 90 feet and still accommodate the square footage needed. (Ex. 996B.)

114. However, the vast majority of healthcare uses likely to occupy the Parcel 1 Building, including the potential and critical anchor tenants, will require minimum floor-to-floor heights that range between 13'-6" to 21'-0" to

accommodate their specialized mechanical, electrical, plumbing ("MEP"), and medical equipment requirement. (Ex. 951B, p. 3.)

115. The Framework Element's definition of the medium-density commercial category states that "[t]he corresponding Zone districts are generally C-2-B, C-2-C, C-3-A, and C-3-B, although other districts may apply." Of the three listed zones, the most height permitted with a PUD is 90 feet. Although the Commission has concluded that the 113 feet of height proposed for Parcel 1 with CR zoning is consistent with medium-density commercial, for the purposes of addressing Remand Issue 1A, the Commission will assume that 90 feet represents the outermost limit of medium-density commercial.

116. To reduce the Parcel 1 Building's height to 90 feet would require the elimination of two floors, which equates to a loss of 190,000 square feet of GFA equal to 27% of the developable space original proposed.

117. This would be in addition to previous changes made to the Parcel 1 Building's configuration and height that have already significantly constrained development. The building was moved back from North Capitol Street to create a 206-foot buffer and moved away from the North Service Court to more appropriately relate it to the historic assets preserved. The creation of the Healing Gardens to the building's north further shrunk the building footprint.

118. Further, in response to comments by the Commission and National Capital Planning Commission ("NCPC") staff, the building's height was reduced from 130 to 115 feet and the west façade was shifted by approximately 15 feet eastward to preserve the view from the Scott Statue at the Armed Forces Retirement Home These modifications resulted in a reduction of approximately 37,000 square feet of GFA.

119. Notwithstanding these changes, and the significant reductions of developable space that resulted, Trammel Crow has been able to continue its conversation with potential anchor tenants, whose early commitment is critical to the success of a project. However, the Commission credits the testimony of Mr. Weers that any further material reductions in GFA will likely put an end to these marketing efforts, thereby jeopardizing the continued existence of the healthcare component, and with it the entire Project.

120. As demonstrated by Mr. Bell in his testimony, and as depicted in Exhibit 927A at page 19, shifting 190,000 square feet of GFA to other portions of the PUD would result in adverse impacts and reduced public benefits. Moving GFA to Cell 14 would lessen the distance between the Parcel 1 Building and the existing residences to the east and would result in less preservation of Cell 14 and less open space. Adding the lost GFA to Parcels 2 and 5 would either result in less housing or the housing being moved into the Park. Adding the lost space to the Park is self-evidently unacceptable.

121. During deliberations on June 29, 2017, the Commission indicated that the height of the Parcel 1 Building deserved further examination as to whether the height could be reduced by one-story and the resulting loss of approximately 95,000 square feet density could be regained through manipulation of the building footprint. The Commission also requested the Applicant to revisit the specific floor-to-ceiling heights proposed to determine whether any further height reductions can be made without compromising the ability to meet the program needs of the anticipated healthcare tenants.

122. The Applicant responded through a submission dated August 21, 2017, and FOMP submitted its reply on September 5, 2017. (Ex. 952–952D, 953.)

123. Based upon its review of both submissions the Commission makes the findings below.

124. The elimination of a single story would result in a loss of approximately 95,000 square feet of GFA. The Commission has found that given the reductions already made to the size and height of the Parcel 1 Building, the PUD cannot sustain such a material reduction of commercial gross square footage.

125. The Commission further finds that the approximately 95,000 square feet of lost GFA cannot be regained through manipulations in the building footprint within the constraints of Parcel 1. As shown in Exhibit 952A, there are numerous development considerations/constraints that relate to important community interests, historic preservation, public benefits and amenities, and building design and leasing that impact the massing and design of the Parcel 1 Building.

126. The Applicant identified three options for reducing the building height while retaining the critical mass of GFA through manipulation of the building's footprint: (1) expanding building density to the east; (2) expanding building density to the north; and (3) expanding the building primarily to the western and southern sides. The Commission concludes that the options would result in diminished historic preservation and adverse transportation and visual impacts.

127. Expanding building density to the east would eliminate the preservation of Cell 14 and its transformation into a park, as well as the full extension the Olmstead Walk around the entirety of the site. The expansion would also erode the historic viewshed into the site from North Capitol Street (looking south) and from Michigan Avenue (looking west), both of which were specifically identified as highly impactful and important historic components by OP's Historic Preservation Office and the HPRB. Lastly, an eastward extension would significantly reduce the 260-foot buffer between the eastern tower of the healthcare facility and the adjacent Stronghold neighborhood.

128. Expanding the building to the north would eliminate significant portions of the Healing Gardens and disrupt the circulation pattern from Michigan Avenue

because it would eliminate the loop road designed into the north side of the Parcel, which was a key component to the Parcel's overall circulation plan.

129. Expanding the building primarily to the western and southern sides would reverse a change to the design made by the Applicant in response to the NCPC staff's 2014 request that the height of the western tower be reduced by 15 feet to more substantially respect the historic viewshed between the Scott Statue at the Armed Forces Retirement Home and the Capitol dome.

130. As to any further reduction of the floor-to-ceiling heights, the Applicant has been able to reduce the overall height of the Parcel 1 Building to a maximum height of 113 feet, a reduction of two feet, through reductions in the floor-to-ceiling heights on the top two floors and the retail floor at the North Service Court level. As shown in Exhibit 952D, the floor-to-floor height of Levels 7 and 8 are now proposed to be 13'-6. This is only slightly higher than the lower levels of the building which, in addition to accommodating the MEP and equipment needs of healthcare tenants, is also necessary to accommodate roof/terrace insulation and drainage requirements.

131. The Applicant has also been able to reduce the floor-to-floor height of the retail level of the building that fronts along the North Service Court from 16'-0" to 15'-0", or by one foot. While not optimal, the 15'-0" floor-to-floor height at the retail level will still allow the Applicant to achieve a clear ceiling height of 14'-0", which is widely considered a minimum acceptable ceiling height for retail space and is a minimum requirement in certain areas under the Zoning Regulations.

132. The Commission finds that no further reduction in floor-to-ceiling heights is possible. Levels 3-6 are designed with floor-to-floor heights of approximately 13'-0", already slightly less than preferred by healthcare users. These levels cannot be further reduced without severely jeopardizing the economic feasibility of the building and/or the ability to meet the program needs of the anticipated healthcare tenants on these floors. Furthermore, the Commission finds that larger floor-to-floor heights on Levels 1 and 2 must be maintained as these levels are anticipated to be the most likely to contain the types of large medical equipment and operating rooms that require the highest floor-to-floor heights. (Ex. 951B.)

133. The Commission therefore concludes that none of the Identified Policies could be advanced to the same degree, and in fact would be entirely lost, if the height of the Parcel 1 Building was reduced below 113 feet or if the density equivalent to one or two stories were shifted to other areas of the PUD Site.

Issue 1A: Given this finding, which of the competing policies should be given greater weight and why?

134. Based upon the Opinion's finding that the second sentence of MC-2.6.5 discourages any building with a height greater than 90 feet within the PUD Site, the competing policies are as follow, with each set of competing policies shown in separate columns:

MC-2.6.5: Scale and Mix of New Uses, second sentence	Land Use: LU-1.2.1: Reuse of Large Publicly-Owned Sites; LU-1.2.5: Public Benefit Uses on Large Sites and LU-1.2.6: New Neighborhoods and the Urban Fabric; LU-1.2.7: Protecting Existing Assets on Large Sites Housing: H-1.2.4: Housing Affordability on Publicly Owned Sites Parks, Recreations and Open Space: PROS-1.3.6: Compatibility with Adjacent Development and PROS-3.3.1: North Central Open Space Network Urban Design: UD-2.2.8: Large Site Development and UD-2.3.5: Incorporating Existing Assets in Large Site Design Historic Preservation: HP-2.4.3: Compatible Development Mid-City Area Element: MC-2.6.1: Open Space on McMillan Reservoir Sand Filtration Site; MC-2.6.2: Historic Preservation at McMillan Reservoir; and MC-2.6.5, third sentence; Scale and Mix of New Uses Historic Preservation: HP-2.4.3: Compatible Development

135. The Comprehensive Plan twice states that "the Land Use Element integrates the policies of all other District elements, it should be given greater weight than the other elements." (*See* Overview of Land Use Element (page 3-1), 10-A DCMR § 300.3 and Implementation Policy IM-1.3.4: Interpretation of the District Elements, 10-A DCMR § 2504.6.)

136. However, LU-1.2, which identifies the McMillian Site as being one of the 10 large sites for which it provides "policies that focus on broader issues," states that that "[t]he Area Elements should be consulted for a profile of each site and specific policies for its future use." The Applicable Area Element for the McMillan Site is the Mid-City Element and the specific policies for its future use are stated in MC-2.6 and includes the density policy included in MC-2.6.5.

137. Based upon their reading of these provisions, the Applicant's expert, Mr. Dettman, argued that the Land Use Elements should be given greater weight while FOMP's expert, Ms. Richards, argued that the MC-2.6. should control.[13]

[13] The Applicant sees the conflict as between the FLUM, with which the Opinion found the Parcel 1 Building is consistent, and MC-2.6.5, with which the Opinion concluded it is not. And since the FLUM is in the Land Use

138. The difficulty with both arguments is that the potential conflict identified in the Court's Opinion and found to exist in this proceeding, is not between the two elements, but between the one sentence in MC-2.6.5 and the Identified Policies. These Identified Policies are not just contained in the Land Use Element, but also within MC-2.6 itself, as well as in the Housing, Historic Preservation, PROS, and Urban Design Elements.

139. The question then is whether the Commission should give greater weight to those policies calling for the preservation of the site's essential historic elements and creation of affordable housing, healthcare, retaining significant open spaces, neighborhood-serving retail, significant employment opportunities, and other similar public benefits over a policy interpreted as limiting the Parcel 1 Building to a height of 90 feet.

140. First, as pointed out by Mr. Dettman, giving effect to MC-2.6.5 would thwart the broader policies' goals for large sites such a McMillan. These policies go to the heart of what the Comprehensive Plan intended for this site.

141. Second, the only impact of the Parcel 1 Building's height would be its visual impact. That impact has been mitigated to the north by the Healing Gardens and to the east by the Cell 14 park. It is not similarly possible to mitigate against the loss of housing, open space, retail, historic preservation, jobs, and the many community benefits that would result if the height of the Parcel 1 Building were reduced by any further amount.

142. Finally, as noted by Deputy Mayor Kenner, after the Commission took final action to approve the PUD, the Council for the District of Columbia adopted Mayorally-proposed Resolution 20-707, McMillan Commercial Parcel Disposition Approval Resolution of 2014. The Committee Report for that resolution appears in the record as Exhibit 896M ("Committee Report"). Identical committee reports were prepared for Resolution 20-705, the Residential Townhomes Parcel Disposition Approval Resolution of 2014, and Resolution 20-706, the McMillan Residential Multifamily Parcels Disposition Approval Resolution of 2014. All of the resolutions became effective on December 2, 2014.

143. The 19-page Committee Report in the record includes a history of the site, a "detailed" overview of the Project, and discussions of its benefits, including affordable housing and the community benefits package, the community

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Elements, its policies govern. As much as the Commission is sympathetic with the argument, it is implicit in the Opinion that the Court of Appeals found otherwise. Also, the Applicant's expert suggested that no conflict existed at all because MU-2.6.5 focused on the area "where development occurs" and therefore if the park areas are excluded, the aggregate FAR fell within the medium range. The Commission agrees with FOMP that the Court's interpretation of MC-2.6 is parcel specific. For her part, Ms. Richards seemed intent on overturning the Court's finding of FLUM consistency based upon the aggregate FAR of the PUD, which the Commission need not and will not do.

engagement undertaken, the parks and open space component, and what it referred to as "community topics." The Committee Report's description of the Project was the same as that approved by the Commission and included a specific reference to there being over a million square feet of healthcare uses.

144. The Committee Report concluded by recommending approval of the resolution because it represented "a thorough and balanced development that is the culmination of years of planning, community engagement, and execution by the District government, Vision McMillan Partners, and many affected ANCs, community groups and stakeholders." The Commission concurs with Deputy Mayor Kenner that this conclusion and the Council's subsequent adoption of the three related resolutions, and other needed legislation "demonstrates that the Council believes that the McMillan development is in the best interest of the District and that the competing policies should be weighed in favor of approving the plan with the existing height on Parcel 1."[14] (Ex. 930.)

Issue 2: Do the Comprehensive Plan policies cited in the Opinion or by FOMP in the record of this case weigh against approval of the Project?

145. The Opinion concluded that "the Commission failed to adequately address a number of provisions in the Comprehensive Plan that FOMP argues weigh against approval of the PUD." (*Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027, 1035 (D.C. 2016).) The Opinion specifically cited policies LU-1.2.6: New Neighborhoods and the Urban Fabric 10-A DCMR § 305.11; LU-2.1.5: Conservation of Single Family Neighborhoods, 10-A DCMR § 309.10; LU-2.1.10: Multi-Family Neighborhoods, 10-A DCMR § 309.15; and the introductory paragraph to Policy CSF-2 Health and Human Services Policy of the Community Service Element, 10–A DCMR § 1105.1 (2016). (*149 A.3d* at 1035.) In addition, FOMP, in its response to the remand issues, cites MC-2.6.2, MC-2.6.3, MC-2.6.4, and MC-2.6.5 as weighing against approval of the PUD. (Ex. 925, pp. 6-10.)

146. The Commission concludes that none of these policies weigh in favor of denial of the application, but instead support its approval.

LU-1.2.6: New Neighborhoods and the Urban Fabric, 10-A DCMR § 305.11.

147. In her written testimony, Ms. Richards asserted that this policy weighs against the grant of the Application because the massing of the Parcel 1 Building conflicts with the guidance to redevelop at "building intensities and massing that complement adjacent developed areas." Ms. Richards believed that the building's size, use, and orientation isolate it from the existing and new residential communities. Finally, Ms. Richards expresses concern that the

[14] The testimony was given prior to the two-foot reduction in building height that DMPED, as one of the two entities comprising the Applicant, obviously supported.

Healing Garden's orientation toward Michigan Avenue "may not be readily accessible or welcoming to the existing and planned residential communities." (Ex. 937, p. 13.)

148. The Commission agrees with OP that this policy weighs in favor of granting the Application. In its report, OP concludes that the development would integrate into the existing street grid through the introduction of two new east-west streets connecting North Capitol Street and First Street and a new north-south access from Michigan Avenue.

149. In addition, OP noted, and the Commission finds, that pedestrian and bicycle ways would provide connections internally and externally along the streets; public open space would be provided along the perimeter of the site by the restoration of the historic Olmsted Walk; and a new 6.2-acre public park and recreation center would be provided on the southern end of the site and would interface with the moderate-density rowhouse residential neighborhood across Channing Street. The Commission also agrees that the buildings, including the Parcel 1 Building, would be located to complement the adjacent community by use, height, and massing. In addition, the proposed buildings, and in particular the Parcel 1 Building, would be significantly setback from the adjacent uses.

150. As to the Healing Gardens, the Commission agrees with the Applicant that the placement of the Healing Gardens along Michigan Avenue plays a significant role in the Project's ability to re-create a significant northern section of the Olmstead Walk and fully embellish it as a feature by allowing an appropriate amount of space for it to meander along Michigan Avenue between the DDOT sidewalk and the Healing Gardens. (Ex. 952C.)

LU-2.1.5: Conservation of Single Family Neighborhoods, 10-A DCMR § 309.10.

151. This policy encourages the protection and conservation of "the District's stable, low density neighborhoods and ensure that their zoning reflects their established low-density character" and calls for the careful management of vacant land and the alteration of existing structures in and adjacent to single family neighborhoods in order to protect low density character, preserve open space, and maintain neighborhood scale."

152. As noted by OP, all the surrounding residential neighborhoods are identified as moderate-density residential on the FLUM and are developed with attached rowhouses or low-rise apartments. Also, none of these adjacent neighborhoods are being rezoned and no alterations of existing structures are proposed by this PUD, which instead reflects the careful management of vacant land. As noted above, the adjacent residences to the south will be separated from the proposed buildings by a 6.2-acre park and recreation area and the properties to the east would be separated by the 130-foot right-of-way of North Capitol Street in addition to the Olmsted Walk and Cell 14 on Parcel 1. As found by OP, the development on Parcels 4 and 5 would have heights of 78 feet and 77 feet,

respectively, and would be compatible with neighborhood scale given the separation achieved by the 130-foot right-of-way of North Capitol Street.

LU-2.1.10: Multi-Family Neighborhoods, 10-A DCMR § 305.15.

153. This policy calls for the multi-family residential character of the District's medium- and high-density residential areas to be maintained, the encroachment of large scale, incompatible commercial uses into these areas to be limited, and that these areas should be made more attractive, pedestrian-friendly, and transit accessible. It is inapplicable to this PUD because all the surrounding neighborhoods are designated on the FLUM as moderate-density residential.

The introductory paragraph to CSF-2 Health and Human Services, 10–A DCMR § 1105.1.

154. FOMP asserted that this paragraph stated a policy "encouraging geographic dispersion of health-care facilities." (149 A.3d at 1035.)

155. This introductory paragraph does not concern private healthcare facilities, such as being proposed for Parcel 1, but "community health centers as well as the provision and improvement of human service facilities such as child care and senior centers." (11 DCMR § 1105.1.)

156. The relevant portion of this paragraph states that healthcare facilities are "just as important to the quality of life as water, sewer, and transportation facilities, and have spatial needs that must be addressed over the coming years." The paragraph goes on to note that:

> Planning for social infrastructure is complicated by a number of factors, particularly the changing nature of the nation's health care delivery system *and the District's limited jurisdiction over private service providers*. Nonetheless, the Comprehensive Plan can at least state the city's commitment to provide for *an adequate distribution of public facilities across the city*, as well as measures to advance public health through the design of the city and protection of the environment.
>
> (*Id.* (emphasis added).)

157. Thus, although this encourages the District to disperse its public healthcare facilities throughout the city, it does not address private facilities, because of the limited ability of the District to compel private providers to be located in particular areas of the city.

158. That is undoubtedly why LU-1.2.5 states that the District should use its "significant leverage ... in redeveloping properties which it owns" to "include appropriate public benefit uses on such sites if and when they are reused."

Among the examples of such uses identified are "health care facilities." Although the healthcare facility proposed for Parcel 1 resulted more from economic necessity than the District's exercise of its leverage, its establishment furthers both the policies expressed in CSF-2 and LU-1.2.5 and therefore these policies weigh in favor of approval.

159. It is not relevant for the purposes of this analysis for the Commission to know what precise healthcare uses will occupy the Parcel 1 Building. Condition B.1 of Remanded Order required that "Parcel 1 shall be developed as a Healthcare Facility … devoted to medical offices, related healthcare uses, and retail." That condition is repeated here. The Commission is satisfied that this degree of specificity is sufficient to express its intent that the Parcel 1 Building be used for the type of healthcare uses that LU-1.2.5 encourages for large District-owned sites.

MC-2.6.2: Historic Preservation at McMillan Reservoir, 10-A DCMR § 2016.6.

160. As noted, MC-2.6 sets forth "several basic objectives [that] should be pursued in the re-use of the McMillan Sand Filtration site." (10-A DCMR § 2016.4.)

161. The objective stated in MC-2.6.2 is to:

> Restore key above-ground elements of the site in a manner that is compatible with the original plan, and explore the adaptive reuse of some of the underground "cells" as part of the historic record of the site. The cultural significance of this site and its importance to the history of the District of Columbia must be recognized as it is reused. Consideration should be given to monuments, memorials, and museums as part of the site design.

162. The Commission has already explained why the PUD significantly advances this policy.

163. During the original proceeding, FOMP claimed that the Applicant's proposal would destroy over 80% of the historic resources on the PUD Site, particularly the underground water filtration cells, that the new construction dwarfed the limited number of historic resources being retained in the North and South Service Courts, and that the significant open and green spaces of the landmark would be lost. FOMP also argued that alternative redevelopment options were possible that would save more of the historic site and allow adaptive reuse of the underground cells.

164. Both assertions were addressed in FF ¶¶ 135-140 of the Remanded Order. In sum, based upon the expert testimony given and reports submitted, the Commission concluded (and still does) that the cells are so structurally unstable that they cannot support development above. Even the less intensive development suggested by FOMP was unsupportable. Stabilization of the

underground cells would require such reinforcement and introduction of new structural members that the integrity of the cells would be lost. Moreover, the Secretary of Interior Standards for Rehabilitation only contemplate reconstruction of missing elements or missing structures, not demolition of an historic resource to reconstruct it.

MC-2.6.3: Mitigating Reuse Impacts, 10-A DCMR § 2016.7.

165. FOMP asserts that the PUD does not achieve the policy's objective that "any change in use on the site should increase connectivity between Northwest and Northeast neighborhoods as well as the hospital complex to the north," noting all the new streets are internal and private and that there is little integration into the existing street grid. The Commission disagrees. As stated in FF ¶ 65 of the Remanded Order, east-west connections are achieved by restoring the historic North and South Service Courts as part of the street system, as well as introducing Evarts Street, which will run laterally across the site from First Street to North Capitol Street. Further, the Project will also improve connectivity (pedestrian, bicycle, and vehicular) between the Northwest and Northeast neighborhoods and the hospital complex to the north by opening several new connections through the site.

166. The policy also states that "any development on the site is designed to reduce parking, traffic, and noise impacts on the community; be architecturally compatible with the surrounding community; and improve transportation options to the site and surrounding neighborhood."

167. As to traffic and parking, the Commission found in the Remanded Order that "the traffic and transit mitigation measures ... are sufficient to sufficiently mitigate the potential adverse effects of the project related to traffic." The Court of Appeals left this finding undisturbed and therefore FOMP's assertions to the contrary are beyond the scope of this remand. Those mitigation measures are again made conditions of the Commission's approval.

168. The Commission evaluated and concurs with OP that "development would have a mix of residential, commercial, open space and recreational uses at a scale that would be compatible to the adjacent residential and institutional uses." (Ex. 897A, p. 10.)

169. Lastly, the Commission finds that the Project is not expected to have an adverse impact on the surrounding residential use with respect to noise. Commercial development is concentrated at the north end of the site. The substantial setback of the healthcare facilities on Parcel 1 from the rowhouses along the east side of North Capitol Street will mitigate any potential for noise impacts on residential uses. In addition, the amount of new tree canopy onsite, particularly the street trees planted in the surrounding public space, and double row of canopy along the Olmsted Walk, will further reduced the external effect of noise generated by the Project.

MC-2.6.4: Community Involvement in Reuse Planning, 10-A DCMR § 2016.9.

170. This policy calls for the District and its agents to be "responsive to community needs and concerns in reuse planning for the site. Amenities which are accessible to the community and which respond to neighborhood needs should be included." FOMP asserts that the development disregarded the recommendations from community input assembled in 2002 by DHCD, which said that high-rise offices and medical facilities were undesirable for the site. In addition, FOMP contends that the comments of the McMillan Advisory Group ("MAG") were disregarded and not incorporated into the Community Benefits Agreement. (Ex. 925, p.10.)

171. The Committee Report indicates that Vision McMillan Partners held over 200 community meeting presentations, workshops, and design charrettes, in conjunction with the Deputy Mayor for Planning and Economic Development, and ANCs throughout all parts of the process. The testimony of Mr. Bell reflected how the Master Plan evolved and improved due to the community impact it received. This high level of community engagement and responsiveness is corroborated by the testimony of Mr. Thakkar. (Ex. 946.) The Commission also credits the testimony of Mr. Thakkar that the Park was made bigger to increase community support for the Project, rather than to accommodate WASA.

172. The Committee Report noted the ongoing debate within the community concerning this development and concluded that the Project represented the "culmination of years of planning, community engagement, and execution by the District government, Vision McMillan Partners, and many affected ANCs, community groups and stakeholders." And further "while no development will make every person involved happy, the proposed McMillan development provides economic development, cultural, commercial and recreational opportunity to an area that has seen this site vacant and fenced off for decades."

173. Like the Council Committee, the Commission finds a direct nexus between the excellence of this Project and DMPED and McMillan's responsiveness to community concerns and finds that the Applicant's adherence to MC-2.6.4 weighs in favor of granting the Application.

MC-2.6.5: Scale and Mix of New Uses, 10-A DCMR § 2016.8

174. This policy recognizes that "development on portions of the McMillan Sand Filtration site may be necessary" and that where "development takes place, it should consist of moderate- to medium-density housing, retail, and other compatible uses." Further any "development on the site should maintain viewsheds and vistas and be situated in a way that minimizes impacts on historic resources and adjacent development."

175. Because the Commission has now designated CR zoning for Parcel 1 and because the Parcel 1 Building meets all the narrative elements for the medium-density commercial category and none of the elements for high-density commercial, it is a medium-density building, and therefore nothing in this portion of MC-2.6.5 weighs against approval.

176. Further, even if the Parcel 1 Building was a high-density use, it is not barred by MC-2.6.5, but not for the reason suggested by the Applicant. As noted, the Commission was not persuaded by Mr. Dettman that the individual building height of Parcel 1 is irrelevant because the aggregate density "where development takes place" is consistent with moderate to medium density." FOMP is correct that the Court's interpretation is parcel specific."

177. However, as a matter of syntax, the word phrase "moderate to medium" does not qualify the phrase "other compatible uses." Excluding the word "retail" the policy is that "[w]here development takes place, it should consist of moderate- to medium-density housing, … and other compatible uses."

178. FOMP's expert witness, Ms. Richards, acknowledged that a high-density use would be consistent with the policy so long as it was compatible. (Ex. 937, pp. 10-11.) During her cross examination, she agreed that there is no *per se* restriction on high-density uses on the site:

> I am aware the court said there is no per se, [SIC] rule, [SIC] saying that you could not have a high-density building. And I did not reach that as a per se, conclusion. … [T]he Court said, that if a high-density building were to go up on that site, it might be you know, defensible or compliant if it was for a use contemplated by the plan. … For instance, the plan says medium density residential. Now, suppose that in applying the plan flexibly. Someone [SIC] said, well, let's go high-density residential, you know, and that would say, okay, sort of like it's in the ballpark. And then you see how is it [s]ited. And you have to look at all the other factors and what is it close to.

(Tr. April 19, 2017 Hearing at 256-257 (Emphasis added).)

179. Ms. Richards believes that the Parcel 1 Building would be an institutional use because it may be used by the Washington Hospital Center, and the Washington Hospital Center is designated as "Institutional" on the FLUM. Since the FLUM striped designations for the PUD site do not include "Institutional," Ms. Richards contends the Parcel 1 Building use is not "contemplated" by the Plan. Although Ms. Richards further states that an "institutional use may be another compatible use, but it's not automatically so." (Ex. 937, p. 10.)

180. The Commission has already found that the proposed healthcare use for the Parcel 1 Building is encouraged by the Comprehensive Plan Policy LU-1.2.5 for

large District-owned sites, including McMillan and is therefore presumptively compatible.

181. The last sentence of the policy, calling for the maintenance of view sheds, was fully addressed by the Commission in FF ¶¶ 143 - 145 of the Remanded Order, and was left undisturbed by the Court of Appeals. FOMP points to allegedly false statements made by NCPC staff to NCPC on November 6, 2014, when NCPC was considering the application. FOMP first made this assertion prior to the Commission taking final action on November 10, 2014, and the Commission found this information to be irrelevant to its proceedings. (Tr. November 10, 2014 Meeting at 24-26.)

182. FOMP now asks the Commission to revisit the issue because it claims that Mr. Dettman was the NCPC staffer who made the alleged false statements and that Mr. Dettman was later hired by the law firm that both then represents and now represents the Applicant. FOMP therefore suggests that Mr. Dettman was subject to a conflict in 2014, but does not identify when Mr. Dettman was first approached by the Applicant's counsel. Without that critical information, the Commission cannot determine whether the purported conflict existed during the relevant period. Further, NCPC did not submit a formal recommendation to the Commission as a result of its November 6, 2014 meeting. Therefore, whatever transpired on November 6, 2014 did not affect the Commission's determination of the viewshed issue. Rather, the last NCPC correspondence received was a letter from NCPC's Executive Director to the Project Director of Vision McMillan partners indicating that as a result of the reduction of height made to the Parcel 1 Building, NCPC staff "has no further objections to the proposed building heights." (Ex. 856B). The letter was signed for the Executive Director by Elizabeth Miller.

183. The Commission, therefore, saw no reason to re-initiate a referral to NCPC as urged by FOMP in its April 3, 2017 submission.

Issue 3: Is the 113-foot height of the Parcel 1 Building[15] the only feasible way to retain a substantial part of the PUD Site as open space and make the site usable for recreational purposes?

184. As noted, the PUD will provide approximately 12 acres of new parks and open space including the large park at the south end of the PUD Site, Cell 14, the Healing Gardens, and the Olmsted Walk. Including the area of the North and South Service Courts, this amounts to approximately 49% of the PUD Site devoted to open space. The Commission finds this is a substantial part of the PUD Site.

[15] The Commission has substituted the phrase "the 113-foot height of the Parcel 1 Building" for "the height-density development proposed for the site" to be consistent with its view that the CR zoning allows for the Parcel 1 Building to be viewed as medium-density. The change the does alter the substance of its analysis.

185. The first iteration of the Master Plan showed commercial density spread throughout the PUD Site resulting in minimal open space. By clustering the needed commercial gross area on the Parcel 1 Site, the Applicant could make 49% of the PUD Site available for Parks, Open Space, and Recreation. As previously found, the commercial density is needed, in part, to recover the significant predevelopments costs for this site, including the costs of making the site usable for recreational purposes.

186. The Commission therefore finds that there is a direct correlation between the height of the Parcel 1 Building and the retention and creation of 12 acres of new parks and open spaces on the PUD Site as open space and make the site usable for recreational purposes.

Issue 4: A. Will the PUD result in environmental problems, destabilization of land values, or displacement of neighboring residents or have the potential to cause any other adverse impacts identified by the FOMP in the record of this case?

B. If so, how should the Commission judge, balance, and reconcile the relative value of the project amenities and public benefits offered, the degree of development incentives requested, and these potential adverse effects.

A. Environmental Problems.

187. Through a memorandum dated March 9, 2017, DOEE advised the Commission that the PUD is designed to meet or exceed the minimum environmental standards of the District's regulations, and is consistent with the Comprehensive Plan. (Exhibit 894) The report noted that the Applicant's commitment to LEED ND Gold certification for the overall development and minimum certification of LEED Silver for each of the buildings, along with significant improvements to the urban fabric and tree canopy, which will provide an opportunity to move the District closer to meeting some of the sustainability goals included in the Sustainable DC Plan.

188. In terms of stormwater management, DOEE indicated that the whole of the site and all individual building sites are designed in accordance with the District's 2013 Stormwater Regulations, which retain stormwater from the 90th percentile or 1.2″ rain event. Specific strategies include the use of native plant species, intensive and extensive green roofs, an increased tree canopy, and cisterns for rainwater harvesting and reuse.

189. In 2016, the Applicant submitted an environmental impact statement form ("EISF") and related materials to the DCRA as part of the building permit application process for the PUD. An EISF is required by the DOEE regulations implementing the District of Columbia Environmental Policy Act of 1989 ("DCEPA"). The DCEPA requires that a detailed environment impact statement

must be prepared by a District agency that proposes or approves a major action that is likely to have substantial negative impact on the environment, if implemented. (D.C. Official Code § 8-109.3 (2012 Repl.).) There is no dispute that this PUD would constitute a major action. For this PUD, pursuant to the implementing regulations, DCRA was the "lead agency" responsible for determining whether an environmental impact statement was needed and for coordinating the environmental assessment with other agencies. (20 DCMR §§ 7201, 7203.)

190. The EISF is a nine-page form that is completed by all applicants for a building permit for projects that are covered by DCEPA. The EISF review process evaluates the site across a multitude of different environmental issues that includes water, sewer and stormwater implications, natural environment (including impacts to wetlands and other sensitive habitat areas), air quality, and noise. (Ex. 894.)

191. DCRA provided the EISF form as completed by the Applicant to DOEE, DDOT, the Solid Waste Management Administration of DPW, WASA, and OP. Each agency submitted written recommendations, each of which will be discussed below.

192. Through a letter dated August 29, 2016, the DCRA Director informed Vision McMillan Partners that based upon the recommendations of the reviewing agencies, DCRA had concluded that the proposed project is not likely to have a substantial negative impact on the environment; and the submission of an environmental impact statement is not required. (Ex. 896F, p. 1.)

193. The recommendations of the reviewing agencies were as discussed below, all of which are part of Exhibit 896F.

194. Through a memorandum dated May 26, 2016, DOEE made findings with respect to water quality, sedimentation and stormwater management/watershed protection, vegetation and wildlife, air quality, underground storage tanks, toxic substances, hazardous substances, and environmental justice ("DOEE Report").

195. The EISF submitted for the Project was the same submitted for any development that is subject to the EISF requirement. DOEE considered the information submitted by the Applicant to contain all the data it needed and saw no need to deviate from DOEE's standard process for reviewing the environmental impact of the Project. (Tr. of May 1, 2017 Hearing at 42.)

196. DOEE examined the Project impacts on water quality with respect to both ground- and surface water.

197. As to groundwater, the Applicant indicated that 500 gallons per day of groundwater will be pumped from the site during and after construction. Based

on this pumping rate DOEE concluded that there is no expected impact on ground water flow. (DOEE Report, p. 7.)

198. Because of soil contamination, the Applicant will remove petroleum contaminated soil off-site as required by regulation. The Applicant indicated that in the event contaminated stormwater is encountered or rainwater comes into contact with any contaminated soil, it will containerize any known or potentially contaminated groundwater or rainwater in a holding tank, obtain accurate, reproducible, and representative water samples from the tank(s) and have them analyzed in a laboratory for all contaminants of concern using United States Environmental Protection Agency ("USEPA") approved methods; and will discharge of any contaminated water in accordance with both WASA and USEPA standards. (DOEE Report, pp. 7-9.)

199. In addition, the Applicant will implement a Stormwater Pollution Prevention Plan to mitigate contaminants or hazardous substances that will affect ground and stormwater quality during construction. (DOEE Report, p. 9.) The report noted that site is not in close proximity to a hydraulically down gradient natural surface water body; therefore, the project is expected to have minimal impact to surface water flow. *(Id.*)

200. With respect to sedimentation and stormwater management/watershed protection, the report noted that currently there is no stormwater management on the site, and to bring the property into compliance, the Applicant will install multiple green roof systems, bio-retention areas, infiltration trenches, pervious pavement, and rainwater harvesting for irrigation and mechanical demands. (DOEE Report, p. 10). As a result of these actions, the report concluded that the PUD will not cause significant flooding, erosion, or sedimentation.

201. The report found no apparent significant adverse impact to habitat for fish, wildlife, or plants as a result of the proposed project. There are no endangered species on the site, and because the site is in an urban location, there is limited habitat for fish, wildlife, or plants. (DOEE Report, p. 11)

202. As to air quality, the report found that the PUD will not violate any ambient air quality standard, contribute significantly to an existing projected air quality violation, or expose sensitive receptors to significant pollutant concentrations.

203. Due to the number of planned dwelling units, the number of planned parking spaces, the amount of shopping/commercial space, the amount of entertainment and/or recreation facility space, and the reduction in level-of-service of intersections, the EISF required the Applicant to submit an air quality analysis of emissions (in pounds or tons of pollutants per day) of Carbon Dioxide ("CO") resulting from the operation of mobile sources associated with the proposed project. Applicants submitting an air quality analysis are required to use the most current version of the USEPA's mobile emissions factor model in deriving the emissions estimates. (DOEE Report, p. 13.)

204. Applicants are also required to provide an analysis of the impact from mobile sources on CO concentrations (in parts per million ["ppm"]) in the vicinity of the proposed project. At a minimum, this analysis must be conducted in accordance with the procedures identified in DOEE's "Guidance for the Analysis of Air Quality Studies Performed as a result of the EISF Process" using an approved air quality dispersion model and must include a comparison of the resulting air quality with both the one-hour average and eight-hour average the National Ambient Air Quality Standards ("NAAQS") for carbon dioxide. (*Id*.)

205. The NAAQS standards are set by the United States Environmental Protection Agency to protect the public health, including sensitive populations with an adequate margin of safety. (Tr. May 1, 2017 Hearing at 43.) Therefore, compliance with the NAAQS would signify that the project is protective of public health. (*Id*.)

206. The Applicant was not required to provide an analysis of ground-level ozone, nitrogen dioxide, lead, or fine particulate matter for the reasons stated on page 14 of the DOEE Report.

207. The DOEE Report indicates that a Transportation Impact Study ("TIS") was prepared by Grove/Slade dated March 17, 2014. The TIS focused on 19 intersections near the PUD for weekday morning and afternoon peak hour analyses and 12 intersections for Saturday afternoon peak hours. The intersections used are listed on page 15 of the DOEE Report. The traffic counts were taken on April 24, 2013, April 25, 2013, April 27, 2013, and May 4, 2013 as base data for existing traffic conditions. Additional traffic counts made in 2012 and 2013 for WASA were also used for some intersections. The study used growth rates derived from the Metropolitan Washington Council of Governments and applied to the roadways in the study, but not for the Saturday peak hours.

208. An Air Quality Analysis was completed by Applied Environmental, Inc. dated December 22, 2015. It modeled CO concentration at 63 receptors in the area of the Project. Applied Environmental also modeled CO attributable to the parking garages and the surface parking areas to be developed. On May 19, 2016, ECS, Mid-Atlantic, LLC submitted slightly revised modeling from the original modeling to address concerns raised by the DOEE's Air Quality Division about whether the most conservative assumptions regarding garage stack modeling were used. The revised numbers were slightly higher, but DOEE did not consider the change to be significant.

209. The analysis chose the worse-case scenario of traffic contributions and parking contributions and summed them with the identified CO background contributions of 4.9 ppm and 3.1 ppm, respectively, to determine an overall worse case future status for the PUD.

210. The worse-case total one-hour contribution was determined to be 13.6 ppm, which is less than the one-hour NAAQS of 35 ppm. (DOEE Report, p. 13.)

211. The worse-case total eight-hour contribution was determined to be 6.5 ppm, which is less than the eight-hour NAAQS of 9 ppm. (*Id.*)

212. Because the PUD will be compliant with NAAQS, the Commission finds that the Project will not adversely impact public health as the result of air quality, including the health of vulnerable populations.

213. Nor will there be no significant adverse impact to the environment due to underground storage tanks. The report identified eight underground tanks that were installed on the site, which were all subsequently abandoned. There is an 8,000-gallon fiberglass heating oil tank in use, but no new underground tanks will be added as part of the development. No current or historic tank leakage was reported. The report indicated that any unknown tanks and contaminated soil should be reported to DOEE if discovered for inspection prior to removal and that groundwater contaminated during dewatering should be treated in accordance with DOEE standards.

214. The report found no known toxic substance in use on the site nor would any be used, disturbed, or created in concentrations that would constitute a significant adverse impact. There are no species of plants or animals identified as threatened or endangered on the site and there are no reported effects of pesticides to public health and safety originating from the site. Also, pesticides will not be applied.

215. Similarly, DOEE found there is no known hazardous waste at the site in concentrations that would result in significant adverse impacts on the environment. There is no indication that the PUD would violate published national or local standards relating to hazardous wastes, nor would the Project create a potential public health hazard or involve the use, production or disposal of materials that pose a hazard to people, animals, or plant populations in the area.

216. Lastly, with respect to environmental justice, the DOEE Report indicated that DOEE's Office of Enforcement has found that the PUD would not be environmentally burdensome nor would it otherwise pose a disparate and unjustified health risk to the community at which it will be sited. At 32%, the concentration of low-income persons in the proposed project area is the same as for the District of Columbia as a whole. As to vulnerable populations, five percent of the project area citizens are children and eight percent are 65 or older.

217. Through a memorandum dated August 19, 2016, DDOT indicated that it had no objection to the issuance of a building permit provided that the Applicant rebuild the public space adjacent to the site to current DDOT standards. DDOT noted that the Project had already been through the PUD review process and that "DDOT did not object to the action."

218. In its August 20, 2015 memorandum, DPW's Solid Waste Management Administration indicated that the PUD will not cause a negative environmental

impact as long as the Project adheres to District law and regulations governing solid waste management.

219. On November 6, 2015, WASA submitted a memo to DCRA to report that it anticipates no long-term environmental impacts beyond the period of the construction of the proposed project. (Ex. 896F, p. 32.)

220. In its memorandum dated August 10, 2015, OP's Development Review and Historic Preservation Division found that based on its review of the cumulative adverse impacts, the proposed project will not disrupt or divide the physical arrangement of an existing community that might adversely impact the environment; or induce significant growth or concentration of population that might adversely impact the environment.

B. <u>Destabilization of Land Values, or Displacement of Neighboring Residents</u>.

221. As an initial matter, the Commission agrees with OP that the Comprehensive Plan identifies that displacement and increasing land values are taking place across the City, but does not recommend that no development is the remedy, instead, it recommends that it is important to have "sound land use policies and development review procedures that mitigate the effects of competing and conflicting uses." (Framework Element, Land Use Changes, 10-A DCMR § 205.7.) (Ex. 897A, p. 11.)

222. OP provided its analysis of the issue and both the Applicant and FOMP presented expert testimony on this topic. For this issue and all issues, the Applicant possessed the burden of proof. The Applicant offered the testimony of Leonard Bogorad, who was accepted by the Commission as an expert in fiscal and economic impact analysis and real estate market and financial analysis. FOMP presented Dr. Brett Williams, who was accepted as an expert in gentrification and displacement.

223. Mr. Bogorad has a Master of City Planning and is presently managing director of Robert Charles Lesser & Company ("RCLCO"), which has extensive experience conducting fiscal and economic impact analyses for public and private sector clients. He has 30 years of real estate consulting experience and specializes in market and financial analysis and valuation of residential, retail, office, hotel, industrial, and mixed-use developments; metropolitan development trends; fiscal and economic impact analysis; and economic development strategies.

224. Dr. Williams has a Doctorate in Anthropology and between 1976-2016 served as Assistant, Associate, and Full Professor, in American Studies and Anthropology, at American University. During this period, she served as Director of the Women's Studies Program, Director of the American Studies Program, and Chair of the Department of Anthropology.

225. After considering the testimony of both Mr. Bogorad and Dr. Williams, the Commission finds that the PUD has not and will not destabilize of land values or displace residents in the adjacent neighborhoods

226. There is no doubt that the neighborhoods surrounding the Project are experiencing an increase in land values, home prices, and rent, but that alone does not answer the question posed. The question is, what is the cause?

227. Mr. Bogorad cited to a comprehensive 76-page review of the scholarly literature regarding gentrification and displacement, which discussed numerous causes of gentrification that were identified in many different studies, none of which attributed gentrification to large projects such as McMillan.[16] A study by Jeremy Jackson cited in the literature review observed no relationship between large-scale neighborhood investment projects and changes in nearby rents.[17] (Ex. 896G, p. 8.)

228. This conclusion is corroborated by the 2015 Catholic University study of gentrification in Bloomingdale, excerpts of which were attached to FOMP's April 3, 2017 submission. The study includes an extensive discussion of the causes of Bloomingdale gentrification, but says nothing about the plans for McMillan being one of the causes. (Tr. May 1, 2017 Hearing at 41-42.) Similarly, a study of changes in Bloomingdale by the urban planner and market analyst Julie Levine, also excerpted and attached to FOMP's submission, includes an extensive discussion of the causes of market and demographic changes in Bloomingdale, but does not identify the plans for McMillan as the cause of these changes. (Ex. 925C.)

229. Further, the Bloomingdale LeDroit Park rowhouses that are relatively closer to McMillan have experienced less rapid price increases than those located farther from McMillan. This would indicate that the plans for McMillan were not a significant cause of the price increases that have been occurring for many years in the neighborhood.

230. Dr. Williams points to what she characterizes as market distress on Channing Street as an example of the destabilizing effect of this Project, but the Commission credits Mr. Bogorad assertion, not contradicted during his cross–examination, that the Zillow website she referenced shows no indication of any foreclosures or pre-foreclosures on Channing Street, and the market appears to be steadily improving. (Tr. May 1, 2017 Hearing at 30.)

[16] Zuk, M., *et al*. (2015). Gentrification, Displacement and the Role of Public Investment: A Literature Review.

[17] Zuk, p. 54; and Jackson, Jeremy (2008). Agent-Based Simulation of Urban Residential Dynamics: A Case Study of Gentrifying Areas in Boston. Thesis submitted to McGill University.

231. Nor will the development of McMillan pressure landlords of large Edgewood apartment buildings to convert to more expensive housing as asserted by Dr. Williams. Edgewood Commons, formerly Edgewood Terrace, is the largest concentration of rental apartments in Edgewood. The Commission credits Mr. Bogorad's understanding that the Community Preservation and Development Corporation is in the midst of a five-year recapitalization of the development that will assure it stays affordable for many years, using project-based Section 8 and tax credits. Other affordable apartments are in Franklin Commons, a project-based Section 8 development with rents based on the resident's income. (*Id*.) The Commission therefore accepts Mr. Bogorad's expert opinion that there will be no significant destabilization of rents in large apartment buildings in Edgewood with or without this PUD.

232. Dr. Williams points to the testimony of one public witness on March 23, 2017, that he and others moved to the area because "we saw this potential development happening, and we felt like it would be great to be near a town center." The Commission does not doubt that the potential development of this PUD may have caused one or more persons to move to the area, but such anecdotal evidence does nothing more than corroborate the Applicant's assertion that the Project is superior to matter-of-right development.

233. Instead, the Commission agrees with Mr. Bogorad that "the longstanding destabilization of land values in surrounding neighborhoods is in large part a result of an excess of housing demand relative to supply" (Tr. May 1, 2017 Hearing at 34.) This is a District-wide phenomenon that is part of a fourth waive of displacement witnessed by the District since 1920. This waive, like the previous three before it, share a common cause; namely demand from a flood of young, well-educated professionals wanting to live in the city. In all four waves individual homeowners, renters, developers, and investors, participated in renovating and as relevant, occupying the housing. (Tr. May 1, 2017 Hearing at 32.) The dramatic price and rent increases that have occurred are not attributable to individual projects, but are the result of general economic and real estate market forces. *(Id*. at 34.)

234. Mr. Bogorad asserted that these forces can be mitigated by the creation of new housing, affordable housing, and job creation, such as will result from the PUD. Dr. Williams disagrees on all counts. The issue is beyond the scope of this remand issue. The Commission has found that general real estate factors are causing the rise in housing costs and whether the PUD will mitigate any displacement that results perhaps goes to its public benefits, but not to this remand issue. However, the Commission does observe that the substantial amount of market rate housing to be constructed on this site would logically take some pressure off the trend to construct similar housing in the adjacent neighborhoods.

C. Any other adverse impacts.

235. The Commission, through its discussion of the PUD's consistency with Comprehensive Plan, has responded to all FOMP's assertions of adverse impacts, other than those that may relate to the PUDs impact on city services which will addressed in the findings pertaining to the next remand issue.

D. Balancing.

236. The Commission will address this issue in the Conclusions of Law.

Issue 5: A. Will the PUD have a favorable impact on the operation of city services and facilities?

B. If not, is the impact capable of being mitigated, or acceptable given the quality of public benefits in the project?

237. DDOT previously submitted reports dated April 21, 2014 (Ex. 38), July 7, 2014 (Ex. 837), September 10, 2014 (Ex. 851), and October 27, 2014 (Ex. 866), through which it concluded that that the mitigations identified in the Transportation Performance Plan ("TPP") (Ex. 849B), and the Transit Implementation Plan ("TIP") (Ex. 862), will adequately mitigate the anticipated impacts of the development.

238. The Commission agreed. FF ¶ 122 of the Remanded Order concluded that the "traffic mitigation measures required by this Order will adequately ameliorate traffic on the streets surrounding the PUD Site." The Opinion did not disturb that finding.

239. Through a supplemental report dated March 13, 2017, DDOT reaffirms its earlier conclusion. DDOT indicated that the TPP identified a series of physical improvements, transit service expansion plans, management plans, and performance monitoring to appropriately mitigate site impacts. The TIP supplemented the TPP by detailing the Applicant's commitment and approach to ensure adequate transit capacity will be in place prior to the occupancy of the proposed development.

240. The supplemental report also noted that DDOT, in 2016, completed the Crosstown Multimodal Transportation Study to identify improvements along east-west connections between Wards 1 and 5, address safety concerns, optimize mobility and operations, and improve efficiency for all modes along this crosstown corridor from 16th Street, N.W. to South Dakoda Avenue, N.W. DDOT indicated that the study's recommendations are consistent with the mitigations identified in the TPP and TIP, and that the Applicant's requirement to provide 1,100 peak-hour additional transit seats by full buildout can be accomplished without the recommended transit improvements on Michigan Avenue, for which further study and yet to be identified funding is needed.

241. Finally, DDOT assured the Commission that other future developments within the vicinity will include the PUD as a background development to understand their impacts.

242. The agency reports discussed below were appended to OP report. (Ex. 897.)

243. In a letter dated March 6, 2017, the Executive Director of DCOA concluded that the proposed project is fully consistent with its agency mission and furthers the goal of creating and maintaining accessible and affordable housing options for seniors.

244. In a letter dated March 13, 2017, the Director of DHCD noted that one key tool that the District of Columbia uses to produce affordable housing is using land values from District-owned land dispositions to create affordable housing. For the McMillian Project, this assisted in the creation of the substantial housing already described. Thus, the outcomes of the proposed project align with the recommendations contained in the most recent city comprehensive housing reports dated 2006 and 2013, respectively. (Ex. 897A, p. 2.)

245. MPD submitted an undated letter suggesting that the Applicant should consider such public safety measures as enhanced lighting and security features, particularly in courtyard areas, which are needed due to the proposed increase in both residential and commercial space; and that the Applicant should complete, in conjunction with DDOT, a traffic impact plan in anticipation of increased vehicular activity at the intersections of North Capitol Street and Michigan Avenue, and First Street and Michigan Avenue. The Commission finds that the lighting plans for the North and South Service Courts and the internal streets will address the security concerns identified and that recommended traffic studies have already been completed.

246. In a memorandum dated March 9, 2017, FEMS indicated that it had no objection to the approval of the proposed project if the following requirements are met: (i) fire access is not compromised and is maintained on all lots and squares to be developed, their adjacent properties' lots and squares, and any newly constructed buildings and roadways in accordance with Chapter 5 Fire Service Features, Section 503 Fire Apparatus Access Roads and Appendix "D" of the International Fire Code 2012 edition; and (ii) the surrounding roadways, North Capitol Street, N.W., First Street, N.W., Michigan Avenue, N.W., and Channing Street, N.W., are considered to be fire department access roads for the proposed project site and the surrounding property lots and squares, including the hospital complex north of Michigan Avenue; therefore, none of the stated roadways can be closed or blocked in any way that would prevent access to fire department vehicles during the proposed development or thereafter. Compliance with these requirements shall be deemed to be a condition of this Order.

247. DPR provided its comments in an undated report. DPR found that: (i) the proposed project's features, which include a 6.2-acre-park, and a multi-function recreation/community space with an attached aquatic facility, support DPR's mission to promote health and wellness, conserve the natural environment, and provide universal access to parks and recreation; (ii) the proposed project furthers the overarching priority of the city's most recent park planning works, the Comprehensive Plan Capital Space (2010), Sustainable DC (2013) and Parks and Recreation Master Plan (2014), by providing safe and equitable access to high-quality park spaces for all people throughout the city (Ex. 897A, pp. 7-8.); and (iii) the neighborhood clusters around the development site currently have limited access to parkland space and indoor aquatic space when compared to other parts of the city based on the level of service analysis completed in the Parks and Recreation Master Plan (2014); therefore, the proposed project will help bridge the gap providing area residents with access to green space and an indoor aquatic facility.

248. The report of DOEE is discussed in relation to Remand Issue 4.

Advisory Neighborhood Commissions.

249. Of the three affected ANCs, only ANC 5E submitted a resolution in response to notice of this proceeding. The resolution was adopted at its properly notice public meeting held March 21, 2017, with a quorum present. ANC 5E's resolution noted its support of the proposed project over the past several years, but also noted that it still retained some concerns. A discussion of the issues and concerns identified in that resolution, and Commission's response is provided in General Conclusions of Law 10 - 14.

CONCLUSIONS OF LAW

The Court of Appeals remanded this case back to the Commission to further analyze the consistency of the PUD with the Comprehensive Plan and the potential for the PUD to cause adverse impacts. The Commission has just made 249 findings with respect to these issues, but before applying these findings to the applicable law, it will first address several procedural issues that arose during this proceeding.

A. Procedural Issues.

(1) The motion to postpone the March 23, 2017 hearing or to strike the Applicant's response.

FOMP argues that the Applicant's response should not have been accepted because: (1) the Applicant did not object to the remand issues; (2) the Commission could only request briefs, and therefore the Applicant's submission must be viewed as a late-filed motion to modify its application; and (3) that it included exhibits.

(a) Failure to object to the remand questions.

The Notice of Limited Scope Hearing indicated, among other things, that the parties had until March 13, 2017 (10 days prior to the hearing) to file an objection to how the notice characterized the remand issues. In the next paragraph, the notice stated that "[i]n addition, any party by that same date and time may file a written statement responding to the remand issues stated above." The Applicant submitted such a response without objecting to the remand issues. FOMP submitted nothing, but two days later filed a letter requesting a 30-day postponement of the hearing, or in the alternative that the Applicant's filing be struck. (Ex. 900.)

FOMP argued that because the Notice of Limited Scope Hearing first established March 13, 2017 as the date for the submission of objections to the wording of the remand issues, and then stated that "[i]n addition, any party by that same date and time may file a written statement" responding to the remand issues, that written statement could only be submitted by a party objecting to the formulation of the remand issues. Since neither the Applicant nor FOMP objected to the remand issues, neither could file a written statement.

FOMP's reading of the Notice of Limited Scope Public Hearing as only permitting a party who objects to the remand questions to respond to them is nonsensical. The notice simply indicated that one or two things were due on March 21, 2017, either just a response to the issues or a both a response and an objection to how those issues were stated. There is no logical reason why the Commission should only allow the party that objected to the issues to respond to them.

The Commission could only request briefs.

The Commission's rules on remands provide that after the receipt of a memorandum of legal advice from OAG, "the Commission may meet to determine whether it should request the parties to submit briefs, provide additional oral or documentary evidence, present oral argument, or to augment the record by other means." (11-Z DCMR § 901.3.)

The Commission interpreted the rule as giving the Commission several options that can be used alone, together, or not at all. The rule was also intended to provide flexibility, and not place the Commission in a straightjacket. For this remand, rather than insist on the formality of briefs, the Commission decided "to augment the record" by requesting less formal written responses. This was clearly within its authority to do.

That being the case, the Commission will not respond to FOMP's claim the Applicant's timely response was an untimely modification of its application in violation of 11-Z DCMR § 401, except to note that the provision identifies the

materials that an applicant must file before notice for the first public hearing may be issued. Here, a Notice of a Limited Scope Public Hearing had already been issued, which identified exactly what could be filed and when.

The Inclusion of Exhibits.

There was nothing in the Remanded Order to preclude the Applicant from attaching exhibits and the Commission cannot understand what prejudice resulted by its doing so. FOMP does not contend that the exhibits could not be introduced at the start of the hearing, or at the time a witness testified. By submitting the exhibits when it did, the Applicant gave FOMP and the public an advance opportunity to review the documentary evidence upon which it would rely and actually allowed FOMP more time to prepare its cross–examination than would otherwise have been the case.

For these reasons, the Applicant's statement and the attached exhibits were not struck and the hearing not postponed. However, the Commission decided to alter the usual order of testimony. Instead of the parties presenting their witnesses first, and members of the public testifying afterward, the order would be reversed, with the public and agency testimony being heard on March 23, 2017, and, if needed on April 9, 2017, and the parties presenting their witnesses on April 19, 2017.

(2) The objection to the order of testimony and the limitation on written evidence.

By letter dated April 3, 2017, FOMP objected to the Commission's reordering of the presentation of testimony and its refusal to accept written statements from persons who did not testify at the hearing. Although all persons present on March 23, 2017 had been given a full opportunity to testify and present written statements, FOMP requested the Commission afford individuals and organizations an opportunity to again testify following the parties' presentation of their respective cases, *i.e.,* those witnesses in support would testify after the Applicant's case and those opposed would testify after FOMP's final witness. The letter also requested that the Commission accept the submission of written statements from persons who had not testified. FOMP claimed that the re-ordering of the testimony had shifted the burden of proof from the Applicant but did not indicate to whom it was shifted.

The Commission's decision to hold a limited scope hearing was not required by law. The Opinion noted that the Commission could have deliberated upon the record and heard from no witnesses at all. For this remand, the Commission decided that additional oral and documentary evidence would be useful. However, its remand rules provide that "testimony at any further hearing shall be limited to witnesses called by the parties, unless the procedural order states otherwise." (11-Z DCMR § 901.6.) The Commission decided to waive that rule, but in doing so, did not impose any burden on the public. Nor did its decision to change the usual order of testimony shift the Applicant's burden to the public witnesses who spoke, in favor or in

opposition. Also, because the Applicant provided advance notice of its case and its exhibits, which its presentation essentially followed, the public witnesses could and often did respond to the specific arguments being made.

On March 23, 2017, the Commission heard from 25 public witnesses and an ANC Chair. All those present who wished to testify did. The public witnesses provided valuable testimony to the Commission, which it considered in determining whether the Applicant had met its burden of proof. The Commission found that no purpose would be served by a repeat performance

As to permitting written submissions by non-witnesses, the Commission's rules do allow for the public to submit written submissions up to the date of a public hearing. However, while the Commission considered it appropriate to permit the public to testify, it saw no reason to further increase an already voluminous record (886 pre-remand exhibits) for written testimony. The District of Columbia Administrative Procedures Act provides that "[e]very "*party* shall have the right to present in person or by counsel his case or defense by oral and documentary evidence." (D.C. Official Code § 2-509(b) (emphasis added).) No similar right to submit documentary evidence is extended to the general public. The Commission offended no law nor infringed on any right by refusing to accept written submissions by non-witnesses.

(3) The motion in limine.

As noted above, the April 18, 2017 hearing ended with the conclusion of the cross-examination of FOMP's witnesses and was then continued to May 1, 2017 to allow Ms. Barragan to testify, which would be followed by rebuttal, sur-rebuttal, and a closing statement by the Applicant. FOMP objected to the rebuttal being deferred and contended that only DOEE witnesses should be permitted to testify since they were the only rebuttal witnesses identified.

On April 20, 2017, counsel for FOMP emailed the Applicant's counsel requesting the names of all rebuttal witness the Applicant intended to call. (Ex. 942A.) The request was refused in an email dated April 25, 2017. FOMP then waited until the day of the May 1, 2017 hearing to file a "*motion in limine"* to request that the Commission bar the Applicant from presenting "any new expert witnesses or rebuttal testimony, including testimony by the D.C. Department of Energy and the [SIC] Environment." In the alternative, FOMP requested that hearing be postponed, and that Applicant be required to submit a list of rebuttal witnesses.

FOMP identified no Commission rule of procedure that required the identification of rebuttal witnesses. Instead, FOMP noted that the Applicant's response to the remand issues indicated that if a new expert witness was offered on rebuttal, the Applicant would submit the witness's resume to the Commission prior to the witness's testimony. Also, FOMP argued that the Applicant could only call those witnesses it had called during its direct case, except those who are public officials. In support of this latter point, FOMP cited 11-Z DCMR § 408.9(k), which allows for "rebuttal by

Applicant." Finally, in support of its request for a postponement, FOMP stated that the Applicant's refusal to provide the names of its rebuttal representatives amount to a "surprise" within the meaning of 11-Z DCMR § 408.10, which states:

> If surprise to the applicant or to a party in a contested case is clearly shown and the inability to proceed is demonstrated, a hearing may be adjourned to allow the applicant or party sufficient time to offer rebuttal evidence. This evidence shall be filed with the Director at least fourteen (14) days before the hearing is resumed.

The Applicant responded in writing on May 1, 2017 and suggested that the motion was a delaying tactic, but did not object to the Commission's consideration of its merits. (Ex. 943.) The Applicant requested that the motion be denied because: (1) FOMP failed to cite a provision that requires an Applicant to provide a list of the rebuttal witnesses it intends to call; and (2) the Applicant only intends to call witnesses who already testified. As to the ability of DOEE representatives to testify, the Applicant pointed out that it had indicated its intent to call DOEE witnesses during the April 19, 2017 hearing, and that in any event the presiding officer has the flexibility to permit these witnesses to testify.

The Commission denied the motion. The Applicant is correct that no Commission rule requires an Applicant to provide a list of its rebuttal witnesses for the obvious reason that an Applicant would not know who they were until after a party in opposition had completed its case. The Commission's ruling is consistent with the Superior Court's Rule of Civil Procedure, which provides that "[n]o witness may be called at trial, *except for rebuttal* or impeachment purposes, unless he or she was named on the list filed by one of the parties. (D.C. Super. Ct. R. Civ. P. 16 (b)(5)(b) (emphasis added).) Although the Superior Court rules do not apply to the Commission, they do provide persuasive guidance.

As to 11-Z DCMR § 408.10, that rule identifies a circumstance when a hearing may be adjourned for the purposes of allowing time for a surprised party to prepare rebuttal evidence. In that instance, the party must provide the rebuttal evidence 15 days before the hearing resumes. That is not the circumstances here. At the time the Chair decided to adjourn the case, it was approximately 10:00 p.m., and he had ruled that Ms. Barragan could testify on FOMP's behalf when the hearing resumed. The Chair could not compel the Applicant to present rebuttal before FOMP had completed its presentation. Further, the Chair retained the discretion to adjourn and continue a hearing at any point he deemed appropriate, which given the lateness of the hour was appropriate. (11-Z DCMR § 408.1 (f).)

Lastly, FOMP's interpretation of 11-Z DCMR § 408.9, which allows "rebuttal by the Applicant" to preclude rebuttal by persons who did not comprise the Applicant, is ludicrous. The provision clearly is intended to allow rebuttal offered by the Applicant. In any event, the "Applicant" in this case includes the District of Columbia, and therefore its officials, employees, and agents.

B. <u>The Merits.</u>

Response to the Remand Issues

The Court of Appeals has remanded this case to the Commission to address issues concerning whether the Applicant has met its burden to prove:

1. The proposed PUD is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site; and (11 DCMR § 2403.4)

2. The impact of the project on the surrounding area and the operation of city services and facilities are not unacceptable, but shall instead be either favorable, capable of being mitigated, or acceptable given the quality of public benefits in the project. (§ 2403.3.)

The Commission has formulated five discrete remand issues, with the first three pertaining to the PUD's consistency with Comprehensive Plan, the fourth and fifth concerning the impact on the surrounding area and on city services and facilities.

(1) Consistency with the Comprehensive Plan

<u>Issue 1A</u>: Could the parks, recreation, and open space designation of the FLUM be fulfilled and the other policies cited in the Order be advanced even if development on the site were limited to medium- and moderate-density use?

<u>Answer</u>: In fact, development on the site is limited to moderate and medium density. However, if medium density is equated to a height limitation of 90 feet, then the parks, recreation, and open space designation of the FLUM cannot be fulfilled and the other policies cited in the Remanded Order and in this Order, cannot be advanced.

(a) <u>With Parcel 1 zoned CR, the PUD Site is limited to medium- and moderate-density uses</u>.

To be consistent with the Opinion, this issue assumes that the Parcel 1 Building is a high-density commercial use. For the reasons stated below, the Commission finds its mapping of Parcel 1 in the CR Zone District, results in the Parcel 1 Building being consistent with the Comprehensive Plan's definition of medium-density commercial and inconsistent with its definition of high-density commercial. Further, the Commission agrees with the conclusion of FOMP's expert, Ms. Richards, that a high-density building could be consistent with MC-2.6.5 if it was a compatible use, which the Commission finds the Parcel 1 Building to be.

The Commission recognizes that the Court of Appeals described the Parcel 1 Building as a "high density use". The Opinion noted that the C-3-C zoning corresponded only to the Framework Elements definition of high-density commercial and that the density and height of the Parcel 1 Building exceeded the matter-of-right limits of those zones that correspond to the medium- and moderate-commercial density definition (C-2-B, C-2-C, C-3-A, and C-3-B) and exceeded the density permitted for a PUD for the zones that generally correspond to moderate-density zones (C-2-C, C-3-A, and C-3-B).

In its August 21, 2017 submission, the Applicant suggested that the Commission consider changing the originally approved PUD related map amendment for Parcel 1 from C-3-C to CR. The Applicant pointed out that the CR zone would permit a 110-foot height through the PUD process and an additional five percent of height "upon a finding that "the increase is essential to the successful functioning of the project and consistent with the purpose and evaluation standards of this chapter." (11 DCMR § 2405.3.) The Commission voted to approve the CR zoning for the parcel and found that the § 2405.3 standard was met. As previously stated in this Order, an eight-story building with less than 113 feet in height could not accommodate the greater floor-to-ceiling heights required by potential healthcare tenants, and a further reduction of any height would render the building unmarketable and the shifting of height to other portions of the PUD Site would result in unacceptable impacts.

It is the Commission's view that this re-designation of zoning allows it to consider the question whether the Parcel 1 Building is a medium-density commercial use, as asserted by the Applicant and agreed to by OP.[18] But first, the Commission must address the appropriateness of the CR zoning for Parcel 1.

(i) The appropriateness of zoning Parcel 1 in the Mixed-Use Commercial/ Residential (CR) Zone District.

The Remanded Order approved CR for all portions of the site other than Parcel 1, and the validity of CR zoning for the PUD Site was not disturbed on appeal. Including Parcel 1 within the CR Zone District is consistent with that zone's purposes. (FF ¶¶ 9-11.) Taken together, the PUD will result in "a mixture of uses and building densities … intended to carry out elements of District of Columbia development plans, including goals in employment, population, transportation, housing, public facilities, and environmental quality." (11 DCMR § 600.4.) OP indicated no

[18] *See* FN 10.

objection to zoning Parcel 1 CR and found it to be a solution that fits the site. (FF ¶ 14.)

This amendment changes no aspect of the approved PUD. As such, it is technical in nature, and could have been accomplished as a minor modification or a modification of consequence without advertisement, hearing, or referral to NCPC. (11-Z DCMR § 703.) Although NCPC staff provided significant comments during the proceeding concerning the impact of the Project on views from the Armed Forces Retirement Home, NCPC itself did not provide official comment after the application was referred to it.

The Commission's adoption of a zone classification different from that advertised has only been found unlawful when a substantive change resulted and when:

> (1) there is evidence that those who attended the hearing were in favor of the classification announced in the notice, and (2) if they had no opportunity at the original hearing to make their views known on the classification finally adopted.

(Gerstenfeld v. Jett, 374 F.2d 333, 334 (D.C. Cir. 1967).)

Here, the C-3-C zoning was proposed by the Applicant, and it was the Applicant who suggested the change to CR. Therefore, even had this been a map amendment unrelated to a PUD, the adoption of the CR classification for Parcel 1 without re-advertisement would have been valid.

In its response to the Applicant's submission, FOMP did not indicate that it objected to the Commission's approval of the CR Zone District without further advertisement or hearing. It did, however, claim that because CR was a mixed residential and commercial zone, the Commission could not adopt CR zoning for a parcel intended only for commercial use. The argument is unpersuasive because, except in the context of a PUD, the Commission does not know whether the property it zones CR will be used for any particular use. Rather, CR zoning applies where a mixture of uses will carry out elements of District of Columbia development plans. As has been explained, those areas are shown with striped colors on the FLUM, and one of those areas is the PUD site. The application of the CR Zone District to the entire PUD site will result in a geographic area with exactly the mixture of uses contemplated for the CR Zone District.

FOMP also asserts that if Cell 14 is excluded from the computation of FAR, the Parcel 1 Building would exceed the maximum 4.0 non-residential FAR permitted for CR PUDs by 11 DCMR § 2405.2. FOMP states that Cell 14 must be excluded "as MC-2.6.5 requires," but offers no explanation why, and none is evident. The Comprehensive Plan cannot dictate how FAR is computed and the Opinion found that the Parcel 1 Building "would have a floor-area ratio of 4.08." (149 A.3d at 1033 (D.C. 2016).) Although that figure also exceeds the 4.0 non-residential maximum, the issue is a red herring. This is a multi-building PUD, all of which will be zoned CR. Subsection 2405.2 provides that the "floor area ratio of all buildings shall not exceed the aggregate of the floor area ratios as permitted in the several zone districts included within the project area."

Essentially, that regulation treats a PUD site as a combined lot for the purposes of calculating maximum FAR, which the CR Zone District also permits as a matter of right. (11 DCMR § 631.3.) Here, the aggregate FAR within the PUD Site is 1.92 (2.36 FAR excluding the private rights-of-way), and therefore well below the 6.0 matter-of-right FAR permitted in the CR Zone District for residential uses and the 3.0 FAR matter-of-right limit for non-residential uses. The aggregation of FAR permits some buildings in a PUD to exceed the applicable FAR limits if the aggregate falls within the limit permitted for a PUD. That is exactly the circumstance here.

(ii) The CR zone is among the other zone districts for which the medium-density commercial land use category applies.

The Framework Element does not identify the CR Zone District as generally corresponding to any residential or commercial land use category. That cannot mean the CR Zone District applies to none. Rather, as was pointed out by OP, CR is a flexible zone that is consistent with medium commercial density. (Tr. September 19, 2017 Meeting at 7.) The zone was created for mixed-use areas, such as the PUD Site, for which the mixing of two or more land uses is encouraged. (10-A DCMR § 225.18.)

The Commission has previously approved PUD-related map amendments to the CR Zone District for properties designated as medium-density residential or mixed-use and for comparable height. (FF ¶ 31.) OP has previously indicated that the zone "is generally consistent with the medium density residential use designation" and the Commission agreed that the zone was "congruent" with that category. (FF ¶¶ 32-33.) For this PUD, the

Commission granted first-stage approval for a mixed-use building and healthcare facility on Parcels 2 and 3, respectively, with maximum heights of 110 feet. Neither building's height nor CR zoning was questioned by the Court of Appeals.

With the CR zoning, the Parcel 1 Building meets all the elements of the definition of medium-density commercial and none of the elements of high-density commercial. The building's eight stories place it squarely in the medium-commercial density definition and outside that for high density, as does its location outside the central employment district of the city and other major office employment centers on the downtown. In terms of actual density, which is a function of floor area ratio, the Parcel 1 Building is identical to the density of a 90-foot office building, and its additional height is purely a result of greater floor-to-ceiling heights required to the unique MEP and equipment needs of its potential healthcare tenants.

As noted by the Court of Appeals, "the FLUM's definitions of 'moderate density' and 'medium density' focus on buildings' actual physical characteristics, such as the number of stories or units in a building." (*Durant v. D.C. Zoning Comm'n*, 139 A.3d 880, 884 (D.C. 2016).) The same is true for the definition of high-density commercial. Since the physical characteristics of the Parcel 1 Building fall squarely within the definition of medium-density commercial and are inconsistent with both the physical and location characteristic upon which the definition of high-density commercial focusses, the building clearly is medium-density commercial.

Like the C-3-C zoning for Parcel 1, FOMP asserted in the original proceeding that the CR zoning for the remainder of the PUD Site was also high-density and therefore inconsistent with MC-2.6.5. (FF ¶ 35.) The Commission's finding to the contrary was not disturbed by the Court of Appeals. Notwithstanding that fact, Ms. Richards continued to make the same assertion in this proceeding. The Commission believes that FOMP is barred from revisiting this, but in any event, her view is unpersuasive for the reasons stated above.

Therefore, the Commission finds that the Parcel 1 Building is a medium-density use that is consistent with MC-2.6.5.

(b) Even if the Parcel 1 Building is a high-density commercial use, it is still consistent with MC-2.6.5 because it is a compatible use

The second sentence of MC-2.6.5 states:

> Where development takes place, it should consist of moderate- to medium-density housing, retail, and other compatible uses.

It first bears noting that although MC-2.6, like all area elements, "focus on issues that are unique to particular parts of the District," it is "still general in nature" and does not "prescribe specific uses or design details." (10-A DCMR § 104.6.)

MC-2.6.5 states as an objective for the McMillian site that where development occurs it should consist of (1) moderate- to medium-density housing, (2) retail, and (3) other compatible uses. The phrase "moderate to medium" does not apply to "other compatible uses.". FOMP's expert witness, Ms. Richards, stated that there is no "per se rule" precluding a high-density use so long as the use was designated in the Comprehensive Plan for the site. (FF ¶ 178). As an example, Ms. Richards stated a high-density residential use was potentially allowed. However, Ms. Richards concluded that the healthcare use proposed was institutional, and not commercial. The basis for this statement was the potential that the Washington Hospital Center might be a tenant and because the hospital site is designated Institutional on the FLUM, Parcel 1 Building is institutional as well. However, the Commission finds that the potential lessee of a healthcare facility does not determine whether it is an institutional or commercial use. Further, the Community Services and Facilities Element groups healthcare facilities in its discussion of Primary and Emergency Care CSF-2.1.1, while hospitals are treated as "another important part of the health care delivery system." (10-A DCMR § 1106.8.)

In her written testimony, Ms. Richards stated that healthcare uses would be compatible "if the scale were appropriate." (Ex. 937, p. 10.) The Commission has found that the potential visual impacts of the building have been mitigated and that Policy LU-1.2.5 encourages facilities of this type for sites such as McMillan and is therefore presumptive compatible. (FF ¶ 180.)

Therefore, even if the Parcel 1 Building is a high-density use, it is a compatible one and one that is not inconsistent with MC-2.6.5

(c) <u>The parks, recreation, and open space designation of the FLUM cannot be fulfilled and the other policies cited in the Order cannot be advanced if development on the site were limited to a height of 90 feet</u>.

In FF ¶ 40, the Commission identified the other Comprehensive Plan issues cited in the Remanded Order as advanced by the concentration of commercial density on Parcel 1. FF ¶ 41 identified two additional policies related to large District-owned sites like McMillan and referred to both sets as the "Identified Policies." The Commission then grouped these policies

into categories consisting of (1) Parks, Open Space, and Recreation, (2) Housing and Affordable Housing, (3) Historic Preservation, (4) Urban Design, (5) Maintenance and Incorporation of Vistas, and (6) Public Benefits including Healthcare and Civic Facilities. For each category, the Commission explained how the PUD significantly advanced associated policies. In its discussion of the Parks, Open Space, and Recreation category, the Commission also explained why the PUD fully implements the related FLUM designation for the site. (FF ¶¶ 44-91.)

The Commission finds that the PUD significantly advances all the Identified Policies.

The PUD fully implements the Parks, Recreation, and Open Space FLUM designation; and significantly advances the related policies for large District-owned sites, LU-1.2.1, LU-1.2.5, LU-1.2.6, and for the McMillan Site, and MC-2.6. The PUD also significantly advances the related policies in the Parks, Recreation, and Open Space Element, PROS-1.3.6 PROS-3.3.1. As detailed in FF ¶¶ 44- 49, the Project will provide approximately 7.95 acres of parks and open space (9.38 acres, including the Olmsted Walk). Adding in the area of the North and South Service Courts, the total area of open space increases to approximately 12 acres. This amounts to approximately 49% of the PUD.

The PUD significantly advances LU-1.2.1 (create local housing opportunities), LU-1.2.5 (include affordable housing on District-owned sites when reused), and H.1.2.4. (require that a substantial percentage of the housing units built on publicly-owned sites are reserved for "low and moderate-income households"). (FF ¶¶ 51-60.) The PUD will provide approximately 924,583 square feet of GFA devoted to residential uses, or approximately 677 units of new housing in principal and multiple-family dwellings with both rental and ownership opportunities. (FF ¶ 52.) Further, a substantial percentage of the housing units (20% of the residential GFA) will be devoted to housing set-aside for low- or very-low income households. (FF ¶¶ 55-57.).

In terms of historic preservation, the PUD significantly advances LU-1.2.7 (identify and protect historic buildings, historic site plan elements) and MC-2.6.2: Historic Preservation at McMillan Reservoir. As requested by the HPRB, the Project was designed to articulate the essential characteristics of the landmark, which were a tripartite organization with two long east/west courts with above-ground features, the plinth, views across the site from First Street to North Capitol Street, and the perimeter Olmstead Walk.

The design accomplished this by making the tripartite organization as the basis of the current design. The above grade north and south service courts

are maintained and incorporated as well as their sand filtration process structures, including all 20 sand storage bins, all four regulator houses, at least one sand washer, plus many of the filter bed portals and much of the service court walls. The plinth that establishes the exterior character landmark to the community is maintained. The Olmstead Walk is reestablished and three historic stairs will be reconstructed. Potentially, a historic fountain will be returned. Views from across the landmark are maintained in the park and the service courts. Underground cells are incorporated into the public experience of the site fully at Cell 14, and partially at Cell 28. In total, approximately 1.5 acres of underground cells will be preserved and slated for future use. (FF ¶¶ 61-64.)

The PUD significantly advances the portion of LU-1.2.5 that states:

> Given the significant leverage the District has in redeveloping properties which it owns, include appropriate public benefit uses on such sites if and when they are reused. Examples of such uses are affordable housing, new parks and open spaces, health care and civic facilities, public educational facilities, and other public facilities.

In addition to providing substantial affordable housing and parks and open spaces, the PUD will provide two new healthcare facilities on Parcels 1 and 3, the latter of which will be the subject of a future second-stage application. Together, the two facilities will add over a 1,000,000 square feet of new GFA devoted to healthcare uses.

The Applicant has demonstrated that the District is in urgent need of new healthcare facilities. (FF ¶¶ 77-78.) That testimony is corroborated by CSF-1.2:

> According to the District of Columbia Primary Care Association (DCPCA), a local nonprofit health care organization, more than half of the District's residents live in neighborhoods without adequate primary health care facilities or services. Many of the existing community health centers have significant unmet capital needs and do not have access to funds to renovate or replace their facilities

(11 DCMR § 1106.6.)

The public benefits offered by the PUD have already been described in FF ¶¶ 83 - 91. These include funding of a new project association or business improvement district to which the Applicant will contribute $225,000 to facilitate business start-ups and $1,250,000 for its operating budget. The Applicant will also contribute $1,000,000 to a workforce development fund, $125,000 to the D.C. Education Fund, $500,000 for fabricating,

installing, repairing, and restoring tree box fence enclosures; planting trees and ground cover plants, and installing certain neighborhood signage; and $150,000 to the North Capitol Main Street, Inc., for its storefront improvement program.

The Commission concludes that the Applicant has met its burden to show that none of these Comprehensive Plan policies, can be advanced if the Parcel 1 Building were limited to a height of 90 feet. The Parcel 1 Building contains the minimum amount of critical commercial uses needed for the PUD to succeed economically and to allow 49% of the PUD site to be devoted to parks, recreation, and open space. (FF ¶¶ 104-106,) The building can only be marketable as a healthcare facility if it is approved at its proposed height of 113 feet, which is the minimum needed to include both the minimum GFA and the minimum floor-to-ceiling heights required by most of its likely tenants. (FF ¶¶ 108-114.) Reducing the building's height by an amount greater than the two feet as identified by the Applicant's August submission, would make the building unmarketable to its potential tenants, including the critical anchor tenants. (FF ¶¶ 117-119, 124, 130.) The Parcel 1 Building's developable area has already been severely reduced. (FF ¶¶ 117-118). The Commission credits the testimony of Mr. Weer's that Trammel Crows current negotiations with potential anchor tenants cannot survive more lost GFA. (FF ¶ 119.) Reducing building height by even one story and shifting the lost density elsewhere on the project would result in lost housing, historic preservation, and open space. (FF ¶ 120.) Accomplishing the same reduction through the manipulation of building footprint would also impact the preservation of cell 14 and the creation of a park or create adverse visual or traffic impacts. (FF ¶¶ 127-129.)

FOMP contends that the Applicant must prove "that there is no alternative moderate density development scenario that could satisfy the goals of the comprehensive plan" (Ex. 925, p. 4.) The issue is not moderate-density but moderate- and medium-density, and the Commission does not believe that the Applicant is required to engage in such a theoretical and pointless exercise. Rather, the Applicant met its burden by showing that it has designed a project that maximizes the benefits envisioned by the Comprehensive Plan for this site and that further lowering the height of the Parcel 1 Building by any appreciable amount would result in those benefits being lost and shifting the equivalent density to other portions of the site will diminish those benefits to essentially where this Project began in 2008.

Issue 1B: Since the policies cited in the Remanded Order cannot be advanced, which of the competing policies should be given greater weight and why?

Answer: The Identified Policies should be given greater weight because collectively they reflect the essence of what the Comprehensive Plan

envisioned for this site and although the loss of such benefits cannot be mitigated, the potential visual impacts resulting from the Parcel 1 Building's height has been.

The choice is stark. There is no means to give effect to the second sentence of MC-2, and Urban Design Elements collectively envision the development of McMillan Site as a unique opportunity to generate new housing (both market and affordable); create parks, recreational activities, and open space; restore key above-ground historic elements; establish magnificent vistas, and to provide substantial public benefits, including healthcare facilities, neighborhood serving retail, and the quantity and quality of benefits being offered as part of the Community Benefits Agreement. These policies should be given greater weight over a non-mandatory height limitation because they reflect the essence of what the Comprehensive Plan envisioned for this site. Further, while the loss of these benefits cannot be mitigated, the visual impact of the height of the Parcel 1 Building has been mitigated through the open-space buffers to the north and east, its movement away from the North Service Court, the shifting of its west façade by 15 feet to the east, the reduction of its height from 130 to 113 feet, and the stepping down of that height to 110 feet. As a result, the Commission believes that its giving greater weight to the Identified Policies is not tantamount to its disregard of MC-2.6.5. In *Durant v. D.C. Zoning Comm'n*, 139 A.3d 880, 884 (D.C. 2016), the Court of Appeals rejected such mitigations as being relevant to whether a building falls within a land use category. However, that opinion acknowledged that "those considerations are potentially relevant to other issues." The Commission believes that determining consistency with an area element that speaks in terms of density is one such issue.

Lastly, and as previously found, the Council of the District of Columbia adopted a Mayorally-proposed resolution approving the disposition of the land comprising the PUD Site after the Commission took final action to approve this PUD. As reflected in the Committee Report, the Council was fully aware of the Parcel 1 Building's height and proposed use. It was also aware of the benefits offered by the PUD, the extent to which historic preservation would occur, the extent of the parks and open space to be provided, and the amount of affordable housing created, and at what income levels. The report concluded that the Project was "thorough and balanced development that is the culmination of years of planning, community engagement, and execution by the District government, Vision McMillan Partners, and many affected ANCs, community groups and stakeholders." The Commission agrees with Deputy Mayor Kenner that this conclusion and the Council's subsequent adoption of the resolutions "demonstrates that the Council believes that the McMillan development is in the best interest of the District and that the competing policies should be weighed in favor of approving the plan with the existing height on Parcel 1." (Ex. 930.)

Issue 2: Do the Comprehensive Plan policies cited in the Opinion or by FOMP in the record of this case weigh against approval of the Project?

Answer: All weigh in favor of approval.

The Commission's relevant findings on this issue are stated in FF ¶¶ 145-180. Rather than repeat, these findings, the Commission offers the following cross references:

Policy	Finding(s) of Fact
LU-1.2.6: New Neighborhoods and the Urban Fabric, 10-A DCMR § 305.11	147-150
LU-2.1.5: Conservation of Single Family Neighborhoods, 10-A DCMR § 309.10	151 and 152
LU-2.1.10: Multi-Family Neighborhoods, 10-A DCMR § 305.15	153
The introductory paragraph to CSF-2 Health and Human Services", 10–A DCMR § 1105.1	154-159
MC-2.6.2: Historic Preservation at McMillan Reservoir, 10-A DCMR § 2016.6	160-164
MC-2.6.3: Mitigating Reuse Impacts, 1 0-A DCMR § 2016.7	165-169
MC-2.6.4: Community Involvement in Reuse Planning, 10-A DCMR § 2016.9	170-173
MC-2.6.5: Scale and Mix of New Uses 10-A DCMR § 2016.8	174-183

Issue 3: Is the 113-foot-high building proposed for the site the only feasible way to retain a substantial part of the property as open space and make the site usable for recreational purposes?

Answer: Yes.

In FF ¶ 184, the Commission found that the approximately 12 acres of new parks and open space is a substantial part of the PUD site. In order to devote this much area to parks and open space, and sustain the pre-development costs needed to make the site usable for recreation purposes, the commercial uses critical to the success of the PUD were concentrated at the northern portion of the site. Because office uses were not marketable, but commercial healthcare uses were, and because those uses require higher floor-to-ceiling heights, a building with a height of not less than 113 feet was needed. The six iterations of the Master Plan described in FF ¶¶ 95-101, shows that the introduction of healthcare uses and the concentration of those uses on Parcel 1 resulted in an increase in open space and parks on the site from six to 12 acres. The Commission therefore finds that the

Applicant has met its burden to prove that the height of the Parcel 1 Building, whether that be high-density or not, is the only way to retain a substantial part of the property as open space and make the site usable for recreational purposes.

2. The impact of the Project on the surrounding area and the operation of city services.

A. Impact of the Project on the Surrounding Area.

Issue 4A: Will the PUD result in environmental problems, destabilization of land values, or displacement of neighboring residents or have the potential to cause any other adverse impacts identified by the FOMP in the record of this case?

Answer: No.

Issue 4B: If so, how should the Commission judge, balance, and reconcile the relative value of the project amenities and public benefits offered, the degree of development incentives requested, and these potential adverse effects?

Answer: In the context of this remand, the balancing is not needed because no adverse impacts were found. However, the general balancing of the potential adverse impacts is part of the ultimate decision whether to grant a PUD, and therefore that balancing will be described after all the remand issues are addressed.

The PUD will not result in environmental problems.

Based upon FF ¶¶ 187-220, the Commission finds the PUD will not result in environmental problems.

The Environmental Policy Act requires the preparation of an EISF whenever a "major action is likely to have a substantial negative impact on the environment, if implemented." (D.C Official. Code § 8–109.03(a) (2012 Repl.).) The EISF process is the means for the lead District agency (for this project, DCRA) to determine whether an Environmental Impact Statement ("EIS") was needed. (20 DCMR §§ 7201, 7203.)

The EISF review process evaluates the site across a multitude of different environmental issues including water, sewer and stormwater implications, natural environment, including impacts to wetlands and other sensitive habitat areas, air quality, and noise. (FF 190.) Based upon the recommendations of DOEE, DDOT, the Solid Waste Management Administration of DPW, WASA, and OP, DCRA concluded that the Project is not likely to have a substantial negative impact on the environment; therefore, submission of an EIS was not required for the proposed project. (Ex. 896F, p. 1.) The Commission finds the

environmental analysis conducted utilized the methodology required by DCEPA, its implementing regulations, and DOEE and USEPA standards and guidelines.

FOMP's expert, Dr. Sacoby Wilson, concluded that the environmental analysis was not in compliance with the DCEPA because it did not include public health impacts. This is not correct. The impact of the PUD on air quality was determined using NAAQS, which is used to determine public health impacts, including impacts on vulnerable populations. (FF ¶ 205.) The PUD exceeded those minimum standards. (FF ¶¶ 210-211.)

Dr. Jacoby further indicated that the EISF process must assess the totality of a project's impacts, even if those impacts are regulated by another agency, such as the D.C. Department of Health ("DOH"). DCRA, as the lead agency, was responsible "for the coordination of the preparation and review of the EISF." (20 DCMR § 7203,1. *See, e.g.* D.C. Official Code §§ 8-109.02 (5).) Neither DCEPA or the implementing regulations identify which agencies should be coordinated with, thereby leaving it in the discretion of the lead agency. The EISF for this case was referred to the agencies identified above. The Commission sees no basis for second guessing DCRA's determination that these referrals sufficed.

Dr. Jacoby also expressed concerns that the environmental review did not consider the impacts on low-income households or on vulnerable populations. However, the evidence showed that the NAAQS takes into account the impact of a project's air quality on vulnerable population. Further, the evidence reflects that the environmental review included an environmental justice review, which resulted in DOEE's Office of Enforcement finding that the PUD would not be environmentally burdensome nor would it otherwise pose a disparate and unjustified health risk to the community to which it will be sited. (FF ¶¶ 205, 216.)

FOMP's other environmental expert, Claudia Barragan, faulted the environmental analysis for not discussing the potential increase in traffic, the fumes that may be coming from the parking garages, the impact of diesel vehicles, and the findings of the March 13, 2017 DDOT report. Further, Ms. Barragan criticized the evaluation for what she claimed to be the asserted absence of a thorough landscape and wildlife assessment, the inclusion of a statement that there are no water bodies in the area, and the failure of OP to send archeological teams to conduct an examination of the site.

Addressing each assertion, the Commission finds that the TIS used baseline traffic information from 2012 and 2013 and then applied growth rates derived from the Metropolitan Washington Council of Governments and applied to the roadways in study. (FF ¶ 207.) As to garages, the Air Quality Analysis provided by the Applicant in fact did model the CO attributable to the parking garages and the surface parking areas to be developed. (FF ¶ 208.) In determining that it was

not necessary to require the Applicant to perform particulate matter modeling, DOEE looked at projected increases in diesel vehicle trips from the Project and compared it to a threshold for requiring an evaluation found in EPA guidance. The number of diesel trips was far below the EPA threshold in this case. (Tr. May 1, 2017 Hearing at 45.) The Commission does not fault the 2016 environmental analysis from not the mentioning a 2017 DDOT report, which in fact stated that the Applicant's mitigation measures were consistent with those found in the study. (FF ¶ 238.).

As to the absence of a wildlife assessment, DOEE found no apparent significant adverse impact to habitat for fish, wildlife, or plants as a result of the proposed project based upon the fact that there are no endangered species on the site. Also, because the site is in an urban location, there is limited habitat for fish, wildlife, or plants. (FF ¶ 201.) The Commission finds that conclusion to be based upon a reasoned analysis. Contrary to Ms. Barragan's assertion, the report did not state that there were no water bodies in the area, but rather indicated that the site is not in close proximity to a hydraulically down gradient natural surface water body, something the Commission does not understand FOMP to dispute. (FF ¶ 199.) With respect to the need for an archeological examination, Ms. Barragan stated that DOEE understood that the sediment on the site is from the Cretaceous Age, but she does not explain how that fact is more than informational, or why an examination is needed for the purposes of determining environmental impact. In making this observation, the Commission is not shifting the burden of proof to FOMP but is stating that it cannot address an expert's conclusion when no basis is provided.

Ms. Barragan believes that the Commission should have compelled the Applicant to provide its completed EISF and the supporting documentation. The Commission cannot compel the introduction of evidence and would not have required the submission of such evidence if it could. The analysis provided by the reviewing agencies indicates the basis for their conclusions and providing the base data would not have proved helpful to the Commission given its limited expertise in the subject matter. If Ms. Barragan needed that information to complete her analysis she could have asked DCRA to provide it.

The Commission concludes the recommendations made by the reviewing agencies utilized the accepted methodology for determining the potential for the PUD to have a substantial negative impact on the environmental and the individual conclusions reached by each agency, and the ultimate reached by DCRA, followed from the analysis made. Although the recommendations did not directly address the impact of noise, the Commission agrees with the Applicant that since it must abide by the applicable maximum noise levels established in 20 DCMR, Chapter 28, there will not be environmental problems caused by noise.

Finally, DOEE, in its 2017 report to the Commission, indicated that the PUD is designed to meet or exceed the minimum regulations and is consistent with the city's Comprehensive Plan. (Ex. 894.)

Therefore, considering all the facts in the record, the Commission finds that the Applicant met its burden to show the PUD will not result in environmental problems, and in fact demonstrated that the PUD will result in significant environmental benefits.

The PUD will not cause the destabilization of land values, or the displacement of neighboring residents.

As noted in FF ¶ 226, there is no doubt that the neighborhoods surrounding the Project are experiencing an increase in land values, home prices, and rents, but that alone does not fully answer the questions posed for the remand. Instead, the Commission must determine whether: these increases can, in whole or in significant part, be attributed to an anticipation of the PUD's development or whether the PUD once constructed would alone cause or significantly contribute to an increase to housing costs that would cause displacement. For the most part, the parties focused on the impact that anticipation of the PUD has had on increased housing costs.

For the reasons stated in FF ¶¶ 227-234, the Commission agrees with the Applicant's expert, Leonard Bogorad, that of the numerous causes of gentrification identified in the scholarly literature, none are attributed to projects such as this PUD. (FF ¶ 227.) Studies of gentrification in Bloomingdale do not mention the Project. (FF ¶ 228.) Further, the Bloomingdale LeDroit Park rowhouses that are relatively closer to McMillan have experienced less rapid price increases than those located farther from McMillan, indicating that the plans for McMillan were not a significant cause of the price increases that have been occurring for many years in the neighborhood. (FF ¶ 229.) There is no market distress occurring on Channing Street as stated by the FOMP's expert Dr. Williams nor will development of McMillan pressure landlords of large Edgewood apartment buildings to convert to more expensive housing as Dr. Williams also asserts. (FF ¶¶ 230-231.) The Commission finds no basis for Dr. Williams' reliance on the testimony of one witness to demonstrate that the mere potential of the Project is drawing in new and affluent residents in such numbers as to explain the increase in land values and housing costs being experienced.

Rather, these increases reflect a District-wide phenomenon that is part of a fourth waive of displacement witnessed by the District since 1920. This waive, like the previous three before it, share a common cause; namely demand from a flood of young, well-educated professionals wanting to live in the city. In all four waves, individual homeowners, renters, developers, and investors participated in renovating and as relevant, occupying the housing. The dramatic price and rent

increases that have occurred are not attributable to individual projects, but are the result of general economic and real estate market forces. (FF ¶ 233.)

The Applicant has therefore met its burden to show that the PUD has not and will not cause destabilization of land values, or the displacement of neighboring residents.

The PUD does not have the potential to cause any other adverse impacts identified by the FOMP in the record of this case.

Through its preceding discussion of remand issues, the Commission has addressed all the adverse impacts identified by FOMP in the context of the Comprehensive Plan, increased traffic that also effect the provision of city services. The next portion of this Order will discuss all the impacts on city services identified by the many District agencies that provided reports to OP or directly to the Commission.

Balancing

The balancing called for in Remand Issue 4B only needed to occur if the PUD was likely to cause any of the adverse impacts identified in Remand Issue 4A, and the Commission found none would be. However, the Commission in its June 29, 2017 deliberations, recognized balancing required by 11 DCMR § 2403.8, cannot occur until the elements of a PUD have been resolved. Therefore, the Commission postponed the balancing required by 11 DCMR § 2403.8 until after its completed its discussion of the remand issues. This Order will do the same.

B. Impact on City Services.

Issue 5A: Will the PUD have a favorable impact on the operation of city services and facilities?

Answer: For certain agencies yes.

Issue 5B: If not, is the impact capable of being mitigated, or acceptable given the quality of public benefits in the project?

Answer: For those agencies that identified a potential non-favorable impact, in each instance the impacts were capable of being mitigated.

The Commission received written reports either directly or through OP from DCOA, DHCD, MPD, FEMS, DPR, DDOT, and DOEE. The findings of each agency are summarized in FF ¶¶ 237-248.

The reports provide sufficient detail for the Commission to determine the impact of the PUD on city services. The reports from DCOA, DHCD, and DPR indicate the impact on the services each offer will be favorable.

With respect to transportation impacts, as part of the initial proceeding, DDOT submitted reports through which it eventually concluded that the mitigations identified in the TPP and the TIP will adequately mitigate the anticipated impacts of the development. (FF ¶ 237.) The Commission concurred in that assessment, and the Opinion did not find otherwise. (FF ¶ 238.) Through a supplemental report dated March 13, 2017, DDOT reaffirms its earlier conclusion and the Commission does the same; finding that "traffic mitigation measures required by this Order will adequately ameliorate traffic on the streets surrounding the PUD Site."

The remaining agencies noted the potential for impacts on their services, which would be mitigated either by compliance with existing laws and standards or with the conditions imposed by this Order. Therefore, the Commission finds that impact of this PUD on city services will be favorable in certain instances or capable of being mitigated in others. In no respect will the impact of the PUD be unacceptable.

General Conclusions of Law

1. Pursuant to the Zoning Regulations, the PUD process is designed to encourage high quality development that provides public benefits. (11 DCMR § 2400.1.) The overall goal of the PUD process is to permit flexibility of development and other incentives, provided that the PUD project "offers a commendable number or quality of public benefits, and that it protects and advances the public health, safety, welfare, and convenience." (11 DCMR § 2400.2.)

2. Development of the property included in this application carries out the purposes of 11 DCMR, Chapter 24 to encourage the development of well-planned developments which will offer a variety of building types with more attractive and efficient overall planning and design, not achievable under matter-of-right development.

3. The PUD meets the minimum area requirements of 11 DCMR § 2401.1.

4. The PUD, as approved by the Commission, complies with the applicable height, bulk, and density standards of the Zoning Regulations under the proposed CR Zone District for the PUD Site, with the additional height flexibility permitted by 11 DCMR § 2405.3 when, as here, the additional height is essential to the successful functioning of the project and consistent with the purpose and evaluation standards of the PUD regulations. The uses for this project are appropriate for the PUD Site and compatible with the surrounding neighborhoods.

5. Pursuant to 11 DCMR § 2403.2, the Applicant has met its burden of proof to justify the granting of the application according to the standards set forth in 11 DCMR § 2405.

6. As required by 11 DCMR § 2403.3, the Applicant has demonstrated that the impact of the project on the surrounding area is capable of being mitigated and that impact on city services is favorable in some instances and capable of being mitigated in others.

7. Pursuant to 11 DCMR § 2304.4, the Applicant has proven that the Commission may find, and the Commission does find, that the proposed PUD is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site.

8. As provided by 11 DCMR § 2304.5, the Commission, evaluated the specific public benefits and Project amenities of the proposed development in the context of the Comprehensive Plan and found that these benefits and amenities, including, but not limited to, the additional market-rate and affordable housing; the provision of substantial open space, recreation, and parks in the site; the restoration of key above-ground historic elements; the retention of Cell 14 and the partial retention of Cell 28; the permanent and full-time jobs created; the provision of significant neighborhood-serving retail; the establishment of at least 860,000 square feet of healthcare uses; and the $5,000,000 worth of community benefits advance the related Comprehensive Plan policies to a degree that few if any planned unit developments have achieved.

9. Lastly, the Commission in deciding whether to again grant this application judged, balanced, and reconciled the relative value of the project amenities and public benefits offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of this case. (11 DCMR § 2403.8.) This balance weighs overwhelmingly in favor of again granting this application. The value of the public benefits is exceedingly high, the zoning flexibility comparatively modest, and the potential adverse impacts capable of being mitigated.

10. The Commission is required under § 13(d) of the Advisory Neighborhood Commission Act of 1975, effective March 26, 1976 (D.C. Law 1021; D.C. Official Code § 1-309.10(d)) to give great weight to the affected ANC's recommendation. As noted in the Remanded Order, on June 17, 2014, ANC 5E voted 4-0-3 to support the Project, with two members absent and one seat vacant. The PUD Site also borders ANC 1B and ANC 5A, and thus their views are also entitled to great weight. On May 1, 2014, ANC 1B voted 8-0-1 to defer to and participate in the process established by ANC 5E. On January 29, 2014, ANC 5A voted 7-0-0 to support the PUD application. ANC 5E also filed a motion for reconsideration, which was dismissed as untimely through Z.C. Order No. 13-14(3).

11. Only ANC 5E submitted a report in this remand proceeding, and its Chair's testimony consisted of a verbatim reading of its resolution.[19] (Ex. 913.)

12. That resolution, which was adopted at its properly notice public meeting held March 21, 2017, with a quorum present, indicated that while it has passed several resolutions of support over the past several years, it still retained some concerns about the Project, chief among them is the potential impacts of the increased motor vehicle traffic and "fears that the amenities package now being offered to ANC 5E residents may not go far enough in mitigating the adverse effects of the increased traffic." Therefore, the ANC requested that the Mayor and DDOT, in conjunction with OP, conduct a comprehensive traffic study of the likely and potential impacts of the PUD on the north/south, as well as the east/west corridors adjacent to and flowing out of the McMillan site and around the neighborhoods from which traffic from the site is likely to flow.

13. Further, ANC 5E requested that the study focus not just on identifying problems, but also on developing proposed solutions to alleviate adverse impacts identified in the study. Lastly, if the study determines that certain adverse traffic impacts of the PUD cannot be avoided, or sufficiently reduced, that Vision McMillan Partnership be required to work with ANC 5E and neighborhood civic associations to offer increased community benefits, specifically directed to benefit the residents of those neighborhoods where adverse traffic impacts cannot be mitigated.

14. It appears that the ANC's report is directed at OP and the Mayor rather than the Commission, but to the extent that the ANC is suggesting further delay of this proceeding to perform the traffic analysis it requested; the Commission does not find the advice to be persuasive. DDOT has fully examined the transportation impacts of this Project on the District's transportation network and determined that potential impacts would be mitigated. For the purposes of this Application, no further reviews are needed.

15. The Commission is required under § 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) to give great weight to OP's recommendations. For the reasons stated above, the Commission concurs with OP's recommendation for approval and has given the OP recommendation the great weight it is entitled.

16. The application for a PUD is subject to compliance with D.C. Law 2-38, the Human Rights Act of 1977, effective December l3, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1401 *et seq*.).

[19] Nevertheless, counsel for FOMP asked the ANC Chair, whether he was "aware that … allegations have been made that various Advisory Neighborhood Commissioners, not necessarily in your ANC, but possibly, have received things of value, gifts, in return for the ANC support of the Vision McMillan Project?" FOMP's counsel claimed that the question went to the witness's credibility, even though the Chair was simply reading a resolution already introduced into evidence. The clear purpose of this line of questioning was to introduce unattributed, inflammatory, and irrelevant information into the record. The objection was therefore sustained.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia again **ORDERS APPROVAL** of the Application for preliminary review and approval of a first-stage PUD, consolidated PUD, and a related map amendment to zone the PUD Site to the CR Zone District, except that should the Court of Appeals, or other court with jurisdiction, determine that the Commission could not approve CR zoning with respect to Parcel 1, then the related zoning for that parcel shall be C-3-C to a depth of 277 feet as measured from the middle of the curb at Michigan Avenue, N.W. The approval of this PUD is subject to the guidelines, conditions, and standards set forth below:

A. FIRST-STAGE PUD DEVELOPMENT PARAMETERS

1. *Architectural Plans*: The PUD shall be developed in accordance with the Master Plan (Volume 1) and the PUD and Consolidated Stage Two (Volume 2) prepared by EEK Perkins Eastman Architects, dated April 11, 2014, marked as Exhibits 32A1A1-32A1A26 and 32A2A1-32A2A72 (hereinafter Ex. 32A), and supplemented by drawings submitted on June 23, 2014, marked as Exhibits 832A1-832A3 (hereinafter "Ex. 832A") in the record, the drawings submitted on August 25, 2014, marked as Exhibit 849A1-849A2 (hereinafter "Ex. 849A"), and the drawing submitted on August 21, 2017, marked as Exhibit 952D (collectively, the "Plans"); as modified by the guidelines, conditions, and standards herein.

2. *Project Uses and Density*: The PUD shall be a mixed-use development devoted to residential, retail, service, institutional, community, and medical and related office uses, as shown on the approved Master Plan. The PUD shall have a maximum overall density of 1.92 FAR (2.36 FAR excluding the private rights-of-way), and a combined GFA of approximately 2,070,753 square feet.

3. *Building Heights*: The maximum building height of the Healthcare Facility on Parcel 1, to be located in the CR Zone District, shall not exceed 113 feet. The maximum building height on Parcel 2, to be in the CR Zone District, shall be 110 feet. The maximum building height on Parcel 3, to be located in the CR Zone District, shall be 110 feet. The maximum building height on Parcel 4, to be located in the CR Zone District, shall be 77 feet. The maximum building height on Parcel 5, located in the CR Zone District, shall be 48 feet. The maximum building height on Parcel 6, located in the CR Zone District, shall be 26 feet. Parcel 7 shall be improved with the existing historic silos (sand bins) and regulator houses.

4. *Design and Public Art Guidelines:* The Applicant shall implement and follow the Master Plan Design Guidelines prepared by EEK Perkins Eastman Architects marked as Exhibit 17C to the record; and the Cultural DC Public Art Master Plan as marked as Exhibit 17D10 to the record.

B. CONSOLIDATED PUD DEVELOPMENT PARAMETERS

1. *Parcel 1:* Parcel 1 shall be developed as a Healthcare Facility with approximately 860,000 square feet of space devoted to medical offices and related healthcare uses and 15,000 square feet to retail. The Parcel 1 Building shall have a maximum FAR of 4.08, and a maximum building height of 113 feet including the area of the proposed private Half Street. Parcel 1 shall be developed as a single building for zoning purposes, with the above-grade connection located at the main level of the building along the North Service Court. Approximately 1,900 vehicle parking spaces shall be provided in a below-grade garage. Approximately 200 bike parking or storage spaces shall be provided in the garage. Loading shall be provided as shown on the drawings.

2. *Parcel 4:* Parcel 4 shall be developed as a mixed-use residential/grocery building consisting of approximately 305,847 square feet of GFA, or a maximum density of 3.21 FAR. Approximately 55,567 square feet of GFA shall be devoted to a grocery store use (inclusive of loading) and approximately 258,235 square feet of GFA shall be devoted to multi-family residential uses (inclusive of loading), which equates to approximately 196 market-rate units and 85 affordable units for senior citizens (55 years of age or older) whose household income is between 50% and 60% of the area median income "(AMI"). The condition pertaining to this affordable housing component is set forth in Condition C.6 below. The maximum height of the building shall be 77 feet, as measured from North Capitol Street, N.W. Approximately 329 vehicle parking spaces shall be provided in a below-grade garage, with 154 spaces devoted to the retail uses and 175 spaces devoted to the residential uses. Approximately 100 bike parking or storage spaces shall be provided in the garage. Loading shall be provided as shown on the drawings submitted August 25, 2014, marked as Exhibit 849A in the record.

3. *Parcel 5*: Parcel 5 shall be developed with 146 row dwellings, consisting of approximately 350,000 square feet of GFA, or a maximum density of 1.42 FAR. The row dwellings shall have a maximum height of 48 feet, which equates to four stories. Each row dwelling shall provide a minimum of one parking space. The affordable housing conditions applicable to this parcel are set forth in the Condition C.6 below.

4. *Parcel 6:* Parcel 6, which includes the South Service Court, shall be developed as a Park including a 6.2-acre open space with a community center, as shown on the drawings prepared by EEK Perkins Eastman Architects dated April 11, 2014, marked as Exhibit 32A to the record, and as supplemented by drawings submitted on June 23, 2014, marked as Exhibit 832A in the record. The community center shall be constructed to a maximum height of 26 feet and contain approximately 17,500 square feet of GFA, or a density of approximately .07 FAR. The community center shall include gallery space with exhibits on the

history of the McMillan site, a 25-meter swimming pool, a multipurpose community meeting room with a catering kitchen, outdoor gathering space, fitness studio, and locker and shower facilities. This amenity shall be open to the public and provide a user-friendly and convenient space for public gatherings and community events. The multipurpose community meeting room shall include moveable partitions to create smaller and larger spaces for gathering. Parcel 6 shall have 21 dedicated parking spaces and a dedicated loading area located in the South Service Court.

5. *Parcel 7:* Parcel 7 shall include the North Service Court with preserved historic silos and regulator houses, two-way circulation for all modes, and pedestrian facilities, as described in Condition C.4.

6. The Applicant shall have the flexibility with the design of the PUD in the following areas:

   a. To provide a range in the number of residential units on Parcel 4 of plus or minus 10% from the number depicted on the plans dated April 11, 2014, marked as Exhibit 32A, and supplemented by drawings submitted on June 23, 2014, marked as Exhibit 832A in the record;

   b. From the roof structure set back requirements, consistent with the roof plans submitted as part of the plans dated April 11, 2014, marked as Exhibit 32A, and supplemented by drawings submitted on June 23, 2014, marked as Exhibit 832A in the record, and drawings submitted August 25, 2014, marked as Exhibit 849A of the record;

   c. From the loading requirements, consistent with the loading diagrams submitted in Exhibit 699B, and as modified by Exhibit 832A, and drawings submitted August 25, 2014, marked as Exhibit 849A of the record;

   d. From the rear yard depth requirements, consistent with the plans dated April 11, 2014, marked as Exhibit 32A, and supplemented by drawings submitted on May 13, 2014, marked as Exhibit 699A in the record;

   e. From the rear yard requirements for all of the Rowhouses except Buildings 9 and 19, consistent with the submitted plans;

   f. From the open court width requirements at Building 9 in order to provide a 9.5-foot-wide court where 10 feet is required;

   g. To vary the location and design of all interior components, including partitions, structural slabs, doors, hallways, columns, stairways, and mechanical rooms, provided that the variations do not substantially change the exterior configuration of the buildings;

h. To vary the location and configuration of the affordable units on Parcels 2 and 4. Except for the affordable senior units on Parcel 4, the proportion of studio, efficiency, and one-bedroom affordable units to all affordable units shall not exceed the proportion of market-rate studio, efficiency, and one-bedroom units to all market-rate units within a mixed-income building. The affordable units shall be of a size equal to the market-rate units, provided that the affordable units may be the smallest size of each market-rate type and have no luxury-scaled unit counterpart;

i. To vary the garage layout, the number, location, and arrangement of the parking spaces on each of the Parcels, provided that the total number of parking spaces is not reduced below the minimum level required by the Commission;

j. To vary the layout of the loading facilities on Parcel 1, provided that the dimensions and number of loading facilities are not reduced;

k. To vary the final selection of the exterior materials within the color ranges and material types as proposed, based on availability at the time of construction, without reducing the quality of the materials; and to make minor refinements to exterior details and dimensions, including curtainwall mullions and spandrels, window frames, glass types, belt courses, sills, bases, cornices, railings and trim, location, orientation, and quantity of the fins, or any other changes to comply with the District of Columbia Building Code, the recommendations of the HPRB or the Mayor's Agent for Historic Preservation, or that are otherwise necessary to obtain a final building permit;

l. To vary the final design of retail frontages, including locations of doors, design of show windows and size of retail units, to accommodate the needs of specific retail tenants;

m. To vary the location and size of signs on the buildings, as long as they conform to the sign guidelines for the PUD;

n. To vary the location, attributes, and general design of the public spaces and streetscapes incorporated in the PUD to comply with the requirements of the approval by DDOT's Public Space Division;

o. To vary the final selection of plantings and beds within the range and types as proposed, based on availability at the time of installation during the appropriate planting season for the material selected, without reducing the quality of plantings or the layout or arrangement; and

p. If any retail areas are leased by a restaurant or food service user, flexibility to vary the location and design of the ground-floor components of the building(s) in order to comply with any applicable District of Columbia laws and regulations, including DOH, that are otherwise necessary for licensing and operation of any restaurant use.

7. The Applicant shall have the option to construct the Project in phases, as shown on the plans, as follows:

a. Phase I consists of Parcels 1, 4, 5, 6, and 7, which include the Olmstead Walk and the internal roadways; and

b. Phase II consists of Parcels 2 and 3.

The deadline for filing applications for building permits and to construct the phases is set forth in Condition E.2.

C. Public Benefits

1. Urban Design, Architecture, and Site Planning: The PUD shall be developed in accordance with the Plans as modified by the guidelines, conditions, and standards herein. **Prior to the issuance of a Certificate of Occupancy for the Healthcare Facility on Parcel 1**, the Applicant shall obtain a building permit for all the necessary public infrastructure to support the development of Parcels 1, 4, 5, 6, and 7, including all project site work; all streets, alleys, sidewalks, and bike paths; historic and commemorative signage throughout the PUD site to create a walking museum of preserved buildings and views; and all related utilities.

2. Parks, Open Space, and Landscaping: **Prior to the issuance of a Certificate of Occupancy for the Healthcare Facility on Parcel 1**, the Applicant shall obtain a building permit to construct the Community Center, and approximately 500,000 square feet of public open space comprised of the South Park, the North and South Service Courts, the Healing Gardens, and preserved Cell 14. The South Park shall include covered seating areas with at least four durable high quality picnic tables and benches, an amphitheater adjacent to the Community Center, a children's playground, a "spray-ground," an outdoor adult fitness area, a pond, and open lawns for casual sports, all as shown on the drawings (pp. 33-35) and marked as Exhibit 32A210-32A2A12. The PUD shall provide all related streetscape improvements and street furniture, including lighting, benches, trash receptacles, and bicycle racks.

3. Design Guidelines; Public Art Guidelines: The Applicant shall implement and follow the Master Plan Design Guidelines prepared by EEK Perkins Eastman Architects marked as Exhibit 17C to the record; and the Cultural DC Public Art Master Plan as marked as Exhibit 17D10 to the record.

4. Historic Preservation: **The Applicant shall obtain a building permit within three years of the effective date of this Order** to retain and rehabilitate and renovate the North and South Service Courts, including all 20 sand storage bins, all four regulator houses, at least one sand washer, 11 filter bed portals and extended portions of the service court walls, and the preservation of Cells 14 and 28, all in accordance with the plans. **The Applicant shall also obtain a building permit within three years of the effective date of this Order** to re-establish the Olmsted Walk around the perimeter of the site, as shown on the plans, and this shall be accessible to persons with disabilities and include benches along the walk. **The preservation work shall be completed prior to the issuance of the Certificate of Occupancy for the community center on Parcel 6**. The Applicant shall seek permission from the U.S. Army Corps of Engineer or other responsible government agency to obtain the historic McMillan Fountain, formerly located on portion of the McMillan Reservoir west of First Street and, if permission is granted, to install it on the PUD Site.

5. Housing: The PUD shall provide approximately 924,583 square feet of GFA devoted to residential uses, or approximately 674 units of new housing in single-family and apartment houses, for both rental and ownership opportunities.

6. Affordable Housing: A portion of the total square feet of GFA devoted to housing shall be set aside for affordable housing, as follows: On Parcel 4, a minimum of 67,018 square feet of GFA of the total new housing provided, or approximately 85 units, shall be set aside as senior housing (55 years of age or older) for households earning 50% to 60% of AMI. An additional 25 units, or approximately 21,341 square feet of total GFA devoted to housing, shall be set aside on Parcel 2 for household earning 80% of the AMI. Finally, 22 of the single-family rowhouses on Parcel 5 shall be set aside as affordable housing. Nine of the affordable rowhouses will be made available to households earning no more than 50% of the AMI and the remaining affordable rowhouses will be made available to households earning no more than 80% of the AMI. The affordable housing units shall be constructed prior to or concurrently with the market-rate units on a given parcel, except that if the development is phased, the affordable units shall be constructed at a pace that is proportional with the construction of the market-rate units. All affordable units will remain subject to the applicable rental or price controls for so long as the project is in existence.[20]

7. CBE Participation: **Prior to the issuance of a building permit,** the Applicant shall execute a CBE Agreement with DSLBD to achieve, at a minimum, 35% participation by certified business enterprises in the contracted development costs for the design, development, construction, maintenance, and security for

[20] As noted, the Applicant intends to seek an exemption from the IZ regulations set forth in Chapter 26 of the Zoning Regulations of 1958. If the exemption is not granted, the Applicant shall nevertheless abide by the requirements of this condition, unless the IZ regulations impose more restrictive standards.

the project to be created as a result of the PUD. Business opportunities will be posted on the DSLBD website, and the Applicant shall give opportunities to CBE businesses for smaller contracts, such as catering, trash collection, and delivery service. The Applicant shall continue to work cooperatively with DSLBD, its contractors and with the Business Development Councils and other local community organizations to maximize opportunities for CBE firms throughout the process. The PUD shall also include 20% equity sponsor participation by a CBE.

8. Training and Employment Opportunities: During construction of the project, the Applicant shall abide by the terms of the executed First Source Employment Agreement with DOES to achieve the goal of utilizing District residents for at least 51% of the new jobs created by the PUD project. To the extent permitted by law, first preference for employment opportunities shall be given to Wards 1 and 5 residents. The Applicant and its contractor, once selected, shall coordinate training, job fairs and apprenticeship opportunities with construction trade organizations or with healthcare facility and other organizations to maximize participation by District residents in the training and apprenticeship opportunities in the PUD.

9. Project Association: **Prior to the issuance of the first Certificate of Occupancy for the PUD**, the Applicant shall establish a project association or business improvement district for the PUD that will be responsible for the maintenance and improvements of the private roadways, alleys, bicycle paths, historic walks, sidewalks, parks, historic resources, streetscapes, street furniture and fixtures, and signage within the PUD boundaries. Additionally, the project association will contribute to funding for programming and staging events within the PUD for the benefit of the public.

10. Environmental Benefits: The Master Plan for the overall development for the PUD Site shall be evaluated for LEED-Neighborhood Development and shall be certified at least LEED-Gold or its equivalent. Each project shall be LEED-Silver or Green Communities compliant, depending on its commercial or residential designation. Upon completion, the overall PUD Site shall achieve, at minimum, the applicable provisions of the Green Construction Code of the 2013 Construction Code of the District of Columbia. The Applicant shall put forth its best efforts to achieve a LEED-Silver rating or higher for the buildings on Parcels, 1, 4, 5, and 6, but the Applicant shall not be required to obtain the certification from the U.S. Green Building Council.

11. Uses of Special Benefit to the Community and City: The Applicant shall provide the following community benefits. The Certificates of Occupancy described in subparagraph (a) and subparagraphs (c) - (h) shall not be issued unless the Applicant provides proof to the Zoning Administrator that the items or services funded have been or are being provided:

a. **Prior to the issuance of the first Certificate of Occupancy for the Healthcare Facility on Parcel 1**, the Applicant shall initiate, and show evidence to the Zoning Administrator in accordance with 11 DCMR § 2403.6 of annual payments of $140,000 each over a five-year period ($700,000 total) to CFNCR to support workforce development initiatives to improve low-income workers' skills, credentials, career prospects, earnings, and job placement, particularly in key local industries and occupations. Additionally, prior to settlement on the sale of the first townhouse on Parcel 5, the Applicant shall initiate annual payments of $60,000 each over a five-year period ($300,000 total) to CFNCR to support scholarships for higher education, training, or job-related certification encouraging "legacy" career paths such as civil engineering, landscape architecture, or on-site jobs in the medical field, with a preference for Ward 1 and 5 residents to the extent permitted by law;

b. **Prior to settlement on the sale of the first townhouse on Parcel 5, the Applicant shall initiate, and show evidence to the Zoning Administrator** in accordance with 11 DCMR § 2403.6 of annual payments of $25,000 each over a five-year period ($125,000 total) to the D.C. Education Fund to be used to improve science, technology, engineering, and math teacher professional development and instruction, as well as student learning and achievement, particularly at Dunbar High School, McKinley Technical High School, and Langley Educational Campus;

c. **Prior to the issuance of the first Certificate of Occupancy for the building on Parcel 4 and prior to the first settlement on the sale of a house on Parcel 5, the Applicant shall initiate, and show evidence to the Zoning Administrator** in accordance with 11 DCMR § 2403.6 of annual payments of $50,000 over a 10-year period ($500,000 total) to the Partnership, as defined by FF ¶ 89, to hire high-school age residents and senior residents to provide guided tours of the McMillan site highlighting the preserved historic resources;

d. **Prior to the issuance of the first Certificate of Occupancy for the building on Parcel 4 and prior to the first settlement on the sale of a house on Parcel 5, the Applicant shall initiate, and show evidence to the Zoning Administrator** in accordance with 11 DCMR § 2403.6 of annual payments of $75,000 over a 10-year period ($750,000 total) to the Partnership operating budget to create a community market, outdoor cafe, and space for art installations between the South Service Court and South Park, and to activate the South Service Court and existing elements, such as regulator houses for small business incubators, silos as hanging gardens, water features and observation points;

e. **Prior to the issuance of the first Certificate of Occupancy for the building on Parcel 4**, the Applicant shall show evidence to the Zoning Administrator in accordance with 11 DCMR § 2403.6 of payment of $225,000 to the Partnership to facilitate business start-ups by awarding grants or in-kind resources to small, local retail/service businesses looking to locate and operate on site to try out their retail/service concepts. A "local" business is a retailer/service provider that is either a CBE or a business headquartered in the District of Columbia; a "small" business is a retailer/service provider owning or operating fewer than eight retail/service outlets in the aggregate at the time such retailer/service provider enters into a lease at the PUD (inclusive of such outlet at the PUD);

f. **Prior to the issuance of the first Certificate of Occupancy for the building on Parcel 4 and prior to the first settlement on the sale of a house on Parcel 5, the Applicant shall provide evidence to the Zoning Administrator** in accordance with 11 DCMR § 2403.6, that it has initiated payments to a contractor or otherwise will incur costs in the amount of $500,000 over a five-year period for fabricating, installing, repairing, and restoring tree box fence enclosures; planting trees and ground cover plants; and installing certain neighborhood signage in coordination with the Bates, Bloomingdale, Eckington, Edgewood, Hanover Area, and Stronghold Civic Associations;

g. **Prior to the issuance of the Certificate of Occupancy for the Community Center**, the Applicant shall use best efforts to provide free WiFi for public use in the community center and park; and

h. **Prior to the issuance of the first Certificate of Occupancy** for the mixed-use building on Parcel 4, the Applicant shall initiate annual payments in the amount of $30,000 each over a five-year period ($150,000 total) to North Capitol Main Street, Inc. for storefront improvements located on North Capitol Street, N.E. and N.W., between Channing Street and New York Avenue.

12. The Applicant will provide a total of approximately 97,770 square feet of GFA devoted to retail and service uses on the PUD Site. The retail space will include a full-service grocery store.

D. Transportation Mitigation Measures

1. Transportation Features: The PUD Site shall be a multi-modal transit hub that accommodates transit services, such as the Metrobus, Circulator Bus, and the future Streetcar, and provides simple connections to Capital Bikeshare stations. The Applicant shall provide 80 Bikeshare docks on the PUD Site. The Applicant shall provide short- and long-term bicycle storage and changing facilities, and

on- and off-street parking facilities, as shown on the Plans. The Applicant shall also do the following:

a. **Prior to the issuance of the building permit for the Healthcare Facility on Parcel 1**, the Applicant shall coordinate with DDOT and nearby institutions to provide a detailed final TIP. The Final TIP shall include the following:

   i. Recommended improvements to nearby bus routes to better serve the PUD Site and the neighbors, including instituting rush hour express bus service;

   ii. Recommended acceleration of planning and development of the planned Brookland-Columbia Heights Streetcar;

   iii. The provision of an interim shuttle service to the Brookland Metrorail Station prior to the District's implementation of a Circulator Bus route and streetcar line that would serve the PUD Site, without regard to cost; and

   iv. The Applicant's commitment to incentivize on-site residents and retail tenants to use public transit, such as providing space for a Transit Store, supplementing employee SmarTrip cards, and providing car-sharing and Capital Bikeshare memberships;

b. **For the life of the Project**, the Applicant shall implement the loading and curbside management plan, as set forth in Exhibits 832F2-832F3 to the record;

c. **For the life of the Project**, the Applicant shall abide by the TPP dated August 25, 2014, submitted to the record as Exhibit 849B, and updated by Exhibit 862. The Applicant shall have the flexibility to modify the TPP if approved by DDOT in writing;

d. **For the life of the Project**, the Applicant shall implement the transportation infrastructure improvements recommended by Gorove/Slade Associates and DDOT; and

e. **For the life of the Project**, the Applicant shall provide the electric car charging stations stated in Exhibit 849B. **The car charging stations on Parcel 1 shall be completed prior to the issuance of a Certificate of Occupancy for Parcel 1. The car charging station on Parcel 4 shall be completed prior to the issuance of a Certificate of Occupancy for Parcel 4. The car charging station on Parcel 6 shall be completed prior to the issuance of the Certificate of Occupancy for Parcel 6.**

E. Miscellaneous

1. The Zoning Regulations Division of DCRA shall not issue any building permits for the PUD 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 OAG and the Zoning Division, DCRA. Such covenant shall bind the Applicant and all successors in title to construct and use the property 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 the Office of Zoning.

2. The Consolidated PUD shall be valid for a period of two years from the effective date of Z.C. Order No. 13-14(6). Within such time, an application must be filed for a building permit for the construction of Phase I of the project (described in B.7 above) as specified in 11 DCMR § 2409.1. Construction of Phase I of the project must commence within three years of the effective date of this Order. The Applicant shall not be required to file an application for a building permit for the park on Parcel 6 or the improvements to Cell 14 on Parcel 1 until six months prior to the date that D.C. Water intends to vacate that particular portion of the Phase I PUD site. Construction of the park on Parcel 6 or the improvements to Cell 14 must commence within one year after the building permit is issued for that portion of the Phase I PUD site.

3. The first-stage PUD shall be valid for a period of two years after the effective date of this Order during which time the Applicant shall file a stage-two PUD application for Phase II of the PUD. The Applicant shall provide the Commission with an update of its implementation of the TIP, and its compliance with the Community Benefits Chart and Payment Schedule, with each second-stage PUD application. (Ex. 849C.)

4. The Applicant is required to comply fully with the provisions of the Human Rights Act of 1977, D.C. Law 2-38, as amended, and this Order is conditioned upon full compliance with those provisions. 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 and 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 that 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.

On September 14, 2017, upon the motion of Commissioner Hood, as seconded by Vice Chairman Miller, the Zoning Commission took **FINAL ACTION** to **APPROVE** this Application at its Special Public Meeting by a vote of **4-0-1** (Anthony J. Hood, Robert E. Miller, Michael G. Turnbull, and Peter G. May to approve; Peter A. Shapiro, not present, not voting).

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *D.C. Register*; that is on June 8, 2018.

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