

CHRISTINE MOSELEY SHIKER
202 457 7167

christine.shiker@hklaw.com

September 5, 2008

VIA HAND DELIVERY

Zoning Commission for the
District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

RECEIVED
D.C. OFFICE OF ZONING
2008 SEP -5 AM 10:19

Re: Zoning Commission Case No. 02-38A
Certified Copy of Amended and Restated PUD Covenant

Dear Members of the Commission:

On behalf of Waterfront Associates, enclosed please find a certified copy of the Amended and Restated PUD Covenant that was recorded with the Recorder of Deeds on August 21, 2008, as Document Number 2008089839. This Amended and Restated PUD Covenant includes a corrected legal description, which is the only change compared to the originally-recorded PUD Covenant recorded on March 3, 2008, and filed with the Zoning Commission on March 4, 2008.

Should you have any questions or need additional information, please do not hesitate to have Office of Zoning staff contact me.

Sincerely,

Holland & Knight LLP

By: 

Christy Moseley Shiker
ZONING COMMISSION
District of Columbia

CASE NO. 02-38A

EXHIBIT NO. 108

Enclosures

cc: Matt LeGrant, Zoning Administrator

(Via Hand Delivery; w/certified copy of
Amended and Restated PUD Covenant)



AMENDED AND RESTATED PUD COVENANT

THIS AMENDED AND RESTATED PUD COVENANT, made as of this 24 day of July, 2008, by and between the WATERFRONT ASSOCIATES, LLC ("Waterfront") and the DISTRICT OF COLUMBIA ("District") collectively referred herein as ("Declarant").

RECEIVED
D.C. OFFICE OF ZONING
2008 SEP -5 AM 10: 24

WITNESSETH:

WHEREAS, the District, as success-in-interest to RLA REVITALIZATION CORPORATION ("RLARC"), is the owner in fee simple of certain real property and improvements known as Waterfront Mall, located at 401 M Street, SW (hereinafter referred to as the "Subject Site"). The Subject Site consists of Lot 89, Square 542, as is more particularly described in Exhibit A, which, for reasons stated below, reflects a revision to the Exhibit A as attached to the original covenant; and

WHEREAS, Waterfront is the ground lessee of the Subject Site and, under a certain Land Development and Disposition Agreement entered into between Waterfront and RLARC on November 21, 2006, is the contract purchaser; and

WHEREAS, Waterfront, on behalf of and in conjunction with RLARC, originally filed an application for the first stage of a two-stage Planned Unit Development ("PUD") and a Zoning Map Amendment on September 30, 2002, under Chapter 24 of the Zoning Regulations of the District of Columbia (the "Zoning Regulations"). The Zoning Commission approved this application by Zoning Commission Order No. 02-38, dated July 31, 2003, and effective on November 28, 2003 ("Order No. 02-38"); and

WHEREAS, Waterfront, on behalf of and in conjunction with RLARC, filed a modified first-stage PUD application and related Zoning Map Amendment for the

24

Subject Site as well as a second-stage PUD application for the central portion of the Subject Site on November 15, 2006, in accordance with Chapter 24 of the Zoning Regulations. The Zoning Commission approved this full modification to Order No. 02-38 as well as the second-stage application for the central portion of the Subject Site by Zoning Commission Order No. 02-38A, dated November 19, 2007, and effective as of January 25, 2008 ("Order No. 02-38A"), which replaced in its entirety Order No. 02-38; and

WHEREAS, said Chapter 24 and Order No. 02-38A further require that the owner of the Subject Site enter into this Covenant assuring that the owner's (and its successors and assigns) development and use of the Subject Site is as approved by the Zoning Commission for the District of Columbia (hereinafter referred to as the "Zoning Commission") in Order No. 02-38A and all modifications, alterations or amendments thereto; and

WHEREAS, Waterfront and the District executed and recorded the PUD Covenant (the "Original PUD Covenant") dated as of January 25, 2008, and recorded on March 3, 2008, among the Land Records of the District of Columbia as Instrument No. 2008023182; and

WHEREAS, attached to the Original PUD Covenant as "Exhibit A" is an incorrect property description for Waterfront's leasehold interest in the Subject Site; and

WHEREAS, Declarant desires to amend and restate the Original PUD Covenant with the correct property description attached hereto as Exhibit A, which includes both the District's fee simple interest and Waterfront's leasehold interest in the Subject Site.

NOW, THEREFORE, in consideration of the foregoing recitals, which are a material part hereof, it is agreed among the parties hereto as follows:

1. Approved Plans. The terms and conditions of the Zoning Commission's approval of the Planned Unit Development and Amendment to the Zoning Map under Order No. 02-38A in Zoning Case No. 02-38A (as the same may be amended and/or modified from time to time, the "Order"), are incorporated herein by reference and made a part hereof as Exhibit B and shall be considered a part of this Covenant. The Subject Site shall be developed and used in accordance with the plans approved by Order No. 02-38A and in accordance with the conditions and restrictions contained in Order No. 02-38A, subject to such changes thereto as the Zoning Administrator of the District of Columbia and/or Zoning Commission may authorize pursuant to 11 DCMR §§ 2409.6 and 2409.9, respectively. The Declarant covenants that it shall use the Subject Site only in accordance with the terms of Order No. 02-38A, as the same may be further amended and/or modified from time to time, subject to the terms and conditions contained herein and the provisions of Chapter 24 of the Zoning Regulations.

2. Additional Time To Construct Planned Unit Development. If the Declarant should fail to file for a building permit and to commence construction of the approved Planned Unit Development within the time specified in 11 DCMR §§ 2408.8 and 2408.9 and in Order 02-38A, the Zoning Commission may duly consider an application for an extension of time for good cause in accordance with 11 DCMR § 2408.10.

3. Default. In the event that a building permit to commence construction of the approved Planned Unit Development is not filed within the time specified in 11

DCMR §§ 2408.8 and 2408.9 and in Order 02-38A or within any extension of time granted by the Zoning Commission for good cause shown pursuant to 11 DCMR § 2408.10, the benefits granted by the Order shall terminate pursuant to Section 2408.14 of the Zoning Regulations.

4. Future Conveyance. The Declarant covenants that if any conveyance of all or any part of the Subject Site takes place, such conveyance shall contain a specific covenant binding the grantee, its successors and assigns to develop and use the Subject Site in accordance with the terms and conditions of this Covenant.

5. Successors and Assigns. The covenants and restrictions contained herein shall be deemed real covenants running with the land and shall bind the parties hereto, their successors and assigns, and shall inure to the benefit of the parties hereto, their successors and assigns. Such covenants are not binding upon any party who no longer has a property interest in the Subject Site. In the event all or part of the Subject Site is sold, the purchaser and its successors and assigns shall be considered a Declarant and the District shall continue to be deemed a party to the Covenant for the purposes of enforcing all covenants, conditions and restrictions contained herein.

6. Recordation. Waterfront shall record this Covenant, as fully executed by the parties hereto, among the Land Records of the District of Columbia, and shall file a certified copy of this Covenant with the Zoning Administrator and the Zoning Commission.

7. Counterparts. This Covenant may be executed in counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

8. Rescission/Alteration of Chapter 24 Covenant. The covenants hereby created may not be extinguished without the prior approval of the Zoning Commission and the written consent of the District. In the event any amendment, modification, rescission or alteration of Order 02-38A is adopted or authorized by the Zoning Commission, or in the event of a lapse of Order 02-38A by its terms, the District shall, upon the request of the Declarant, execute an instrument, in recordable form, evidencing such action or lapse, which instrument shall amend, modify, rescind, nullify or alter this Covenant, as the case may be.

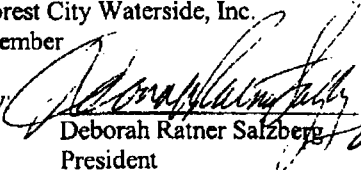
[SIGNATURES FOLLOW]

IN WITNESS WHEREOF, WATERFRONT ASSOCIATES, LLC, a Delaware limited liability company, has, as of the day and year first above written, caused this Covenant to be signed by Deborah Ratner Salzberg, President of Forest City Waterside, Inc., a member of K/FCE Management LLC, which is the managing member of Waterfront Associates, LLC.

WATERFRONT ASSOCIATES, LLC, a District of Columbia limited liability company

By: K/FCE Management LLC,
Its: Managing Member

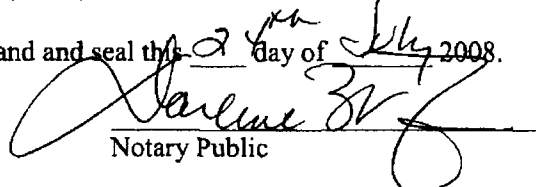
By: Forest City Waterside, Inc.
Its: Member

By: 
Deborah Ratner Salzberg
President

DISTRICT of COLUMBIA, ss:

I, Darlene W. Ford, a Notary Public in and for the District of Columbia, do hereby certify that Deborah Ratner Salzberg, President of Forest City Waterside, Inc., a member of K/FCE Management LLC, which is the managing member of Waterfront Associates, LLC, party to the foregoing Covenant, personally appeared before me and, being personally well known to me, acknowledged said Covenant to be the act and deed of the Waterfront Associates, LLC, and that she delivered the same as such.

GIVEN under my hand and seal this 27th day of July 2008.


Notary Public

My commission expires: **DARLENE W. FORD**
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires May 14, 2012

[NOTARIAL SEAL]

IN WITNESS WHEREOF, WATERFRONT ASSOCIATES, LLC, a Delaware limited liability company, has, as of the day and year first above written, caused this Covenant to be signed by Mitchell N. Schear, President of Vornado Realty Trust, the general partner of Vornado Realty L.P., the sole member of Vornado KMS Holdings LLC, the sole member of Vornado Waterfront Holdings LLC, the managing member of New Kaempfer Waterfront LLC, which is a member of K/FCE Management LLC, the managing member of Waterfront Associates, LLC.

WATERFRONT ASSOCIATES, LLC, a District of Columbia limited liability company

By: K/FCE Management LLC,
Its: Managing Member

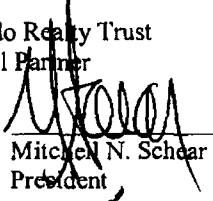
By: New Kaempfer Waterfront LLC
Its: Member

By: Vornado Waterfront Holdings LLC
Its: Managing Member

By: Vornado KMS Holdings LLC
Its: Sole Member

By: Vornado Realty L.P.
Its: Sole Member

By: Vornado Realty Trust
Its: General Partner

By: 
Mitchell N. Schear
President,

Vornado/Charles E. Smith
Washington DC
office Division

DISTRICT of COLUMBIA, ss:

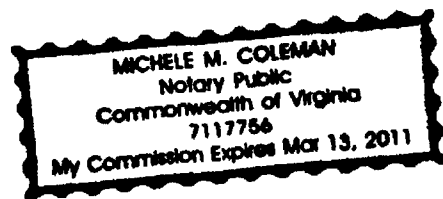
I, Michele Coleman, a Notary Public in and for the District of Columbia, do hereby certify that Mitchell N. Schear, President of Vornado Realty Trust, the general partner of Vornado Realty L.P., the sole member of Vornado KMS Holdings LLC, the sole member of Vornado Waterfront Holdings LLC, the managing member of New Kaempfer Waterfront LLC, which is a member of K/FCE Management LLC, the managing member of Waterfront Associates, party to the foregoing Covenant, personally appeared before me and, being personally well known to me, acknowledged said Covenant to be the act and deed of the Waterfront Associates, LLC, and that he delivered the same as such.

GIVEN under my hand and seal this 28th day of July 2008.

Michele M Coleman
Notary Public

My commission expires: March 13, 2011.


[NOTARIAL SEAL]




IN WITNESS WHEREOF, the Mayor of the DISTRICT OF COLUMBIA, having first considered and approved the foregoing Covenant, has directed the execution thereof in the name of said DISTRICT OF COLUMBIA, by the Secretary, D.C., who has hereunto set her hand and affixed the seal of the District of Columbia hereto under authority of the Act of Congress entitled "An Act to Relieve the Commissioners of the District of Columbia of Certain Ministerial Duties," approved February 11, 1932.

WITNESS:

DISTRICT OF COLUMBIA,
a Municipal Corporation



(Corporate Seal)

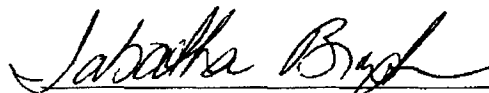
By: 

Secretary, D.C.

DISTRICT OF COLUMBIA, ss:

I, Tabatha Braxton, a Notary Public in and for the District of Columbia, do hereby certify that Dr. Stephanie Scott who is personally well known to me as the person named as Secretary of the DISTRICT OF COLUMBIA in the foregoing Covenant bearing date of the 19 day of August, 2008, and hereunto annexed, personally appeared before me in said District and, as Secretary of the DISTRICT OF COLUMBIA aforesaid, and by virtue of the authority in her vested, acknowledged the same to be the act and deed of the Mayor of the DISTRICT OF COLUMBIA.

GIVEN under my hand and seal this 19 day of August, 2008.



Notary Public, D.C.

My commission expires: _____

TABATHA BRAXTON
Notary Public District of Columbia
My Commission Expires May 14, 2012

APPROVED:

Matthew Zuck 2/17/08 (update of 2/14/08 Approval)

Zoning Division, Department of
Consumer and Regulatory Affairs

APPROVED AS TO LEGAL SUFFICIENCY

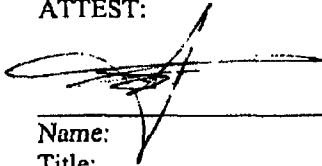
Alan Beyter

Assistant Attorney General
Office of the Attorney General
for the District of Columbia

Subordination

The Bank of New York Mellon, a New York corporation, ("Mortgagee") hereby subordinates the lien of the Leasehold Deed of Trust, Security Agreement and Assignment of Leases and Rents, and Fixture Filing dated July 19, 2007, and recorded in the Land Records of the District of Columbia on July 19, 2007 as Instrument No. 2007095171 from Waterfront Associate, LLC, a District of Columbia limited liability company, to Patrick J. Clancy ("Trustee") for the benefit of Mortgagee to this Amended and Restated PUD Covenant and hereby directs said Trustee to execute and deliver this instrument.

ATTEST:




Name:
Title:

MORTGAGEE:

THE BANK OF NEW YORK MELLON,
a New York corporation

By:



Name: Rick Laudisi
Title: Managing Director

TRUSTEE:



Patrick J. Clancy

STATE OF NEW YORK)
)
) ss:
COUNTY OF NEW YORK)

On the 27 day of July in the year 2008, before me, the undersigned, a Notary Public in and for said State, personally appeared Rich Laudisi personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within Amended and Restated PUD Covenant and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signatures on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Catherine Donovan Cordone
Notary Public

CATHERINE DONOVAN CORDONE
Notary Public, State of New York
No. 01CO8020807
Qualified in Kings County
Commission Expires March 1, 2011

My commission expires _____

~~DISTRICT OF COLUMBIA)~~

~~This Amended and Restated PUD Covenant was acknowledged before me on _____, 2008 by Patrick J. Clancy, as Trustee on behalf of The Bank of New York Mellon.~~

~~(Seal)~~

~~_____
Notary Public~~

~~My commission expires _____~~

Subordination

The Bank of New York Mellon, a New York corporation, ("Mortgagee") hereby subordinates the lien of the Leasehold Deed of Trust, Security Agreement and Assignment of Leases and Rents, and Fixture Filing dated July 19, 2007, and recorded in the Land Records of the District of Columbia on July 19, 2007 as Instrument No. 2007095171 from Waterfront Associate, LLC, a District of Columbia limited liability company, to Patrick J. Clancy ("Trustee") for the benefit of Mortgagee to this Amended and Restated PUD Covenant and hereby directs said Trustee to execute and deliver this instrument.

~~ATTEST:~~

~~_____
Name:
Title:~~

~~MORTGAGEE:~~

~~THE BANK OF NEW YORK MELLON,
a New York corporation~~

~~By:~~

~~_____
Name:
Title:~~

~~TRUSTEE:~~

~~

Patrick J. Clancy~~

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss:

On the _____ day of _____ in the year 2008, before me, the undersigned, a Notary Public in and for said State, personally appeared _____ personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within Amended and Restated PUD Covenant and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signatures on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

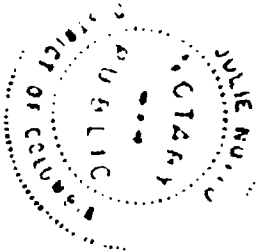
Notary Public

My commission expires _____

DISTRICT OF COLUMBIA)

This Amended and Restated PUD Covenant was acknowledged before me on July 31, 2008 by Patrick J. Clancy, as Trustee on behalf of The Bank of New York Mellon.

(Seal)



Julie Notto
Notary Public

My commission expires _____

Julie Notto
Notary Public
District of Columbia
My Commission Expires Jan. 14, 2010

EXHIBIT A

Legal Description of PUD Site

All that certain lot or parcel of land situated and lying in the District of Columbia, and more particularly described as follows:

Lot numbered 89 in Square numbered 542 in a subdivision made by RLA Revitalization Corporation, as per plat of subdivision recorded in Liber 197 at folio 91 among the Records of the Office of the Surveyor of the District of Columbia.

EXHIBIT B

ZONING COMMISSION ORDER No. 02-38A

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 02-38A

Z.C Case No. 02-38A

(Modification to a First-Stage Planned Unit Development, a Second-Stage Planned Unit Development Application and a Related Zoning Map Amendment for Waterfront Associates, LLC)
November 19, 2007

Pursuant to notice, the Zoning Commission for the District of Columbia (the "Commission") held public hearings on June 7, 2007, June 14, 2007, and September 17, 2007, to consider applications from Waterfront Associates, LLC, on behalf of and in conjunction with RLA Revitalization Corporation ("RLARC"), the owner of the property (collectively, the "Applicant"), in support of the applications to the Commission for the District of Columbia for a modification to a first-stage Planned Unit Development ("First-Stage PUD") for property located at 401 M Street, S.W. (Lot 89, Square 542) (the "Site"), second-stage review and approval of a Planned Unit Development ("PUD") for the central portion of the Site, and a change to the District of Columbia Zoning Map under Chapter 24 of the District of Columbia Zoning Regulations, 11 DCMR (February 2003), as amended ("Zoning Regulations") (collectively, the "Applications"). The Commission considered the Applications pursuant to Chapters 24 and 30 of the District of Columbia Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations ("DCMR"). The public hearings were conducted in accordance with the provisions of 11 DCMR § 3022. For the reasons stated below, the Commission hereby approves the Applications.

FINDINGS OF FACT

Applications, Parties, and Hearings

1. On November 15, 2006, the Applicant filed the Applications for a modification to the First-Stage PUD for the Site, second-stage review and approval of a PUD for the central portion of the Site, and a related zoning map amendment of the Site to rezone the Site to C-3-C (the "PUD Submission"). The PUD Submission is in the record at Exhibit 4 (PUD Submission Statement), Exhibit 5 (First Stage Plans), and Exhibit 6 (Second Stage Plans).
2. At its February 12, 2007, public meeting, the Commission set the case for hearing.
3. The Applicant filed materials in its Prehearing Submission on March 30, 2007 (the "Preheating Submission") in the record at Exhibit 15. The Applicant then filed additional

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Web Site: www.dcoz.dc.gov

materials in its Supplemental Prehearing Submission on May 18, 2007, along with fully re-issued plans and elevations (the "Supplemental Prehearing Submission"), in the record at Exhibit 24A (Supplemental Prehearing Statement), in the record at Exhibit 25 (Updated First Stage Plans), and in the record at Exhibit 26 (Updated Second Stage Plans).

4. A description of the proposed development and the Notice of Public hearing were published in the *D.C. Register* on April 20, 2007. The Notice of Public Hearing was mailed to all property owners within 200 feet of the Site as well as to Advisory Neighborhood Commission ("ANC") 6D.
5. The Commission held public hearings on the Applications on June 7, 2007, June 14, 2007, and September 17, 2007.
6. The Commission determined the parties to the case at the June 7, 2007 public hearing. Parties in this case included the following: the Applicant; ANC 6D, the ANC within which the Site is located; Tiber Island Cooperative Homes, Inc. ("Tiber Island"); and Carrollsburg Square Condominium Association ("Carrollsburg Square") (collectively, the "Parties"). Paul Greenberg and Henry Baker were not granted party status in their individual capacities, instead being named as the representatives for the Parties above respectively. Although the requests for party status from Tiber Island and Carrollsburg Square were framed as parties in opposition, the Chairman ultimately determined that the Parties were in support despite specific issues raised by each of the Parties.
7. The Applicant presented the following witnesses: Mitchell Schear and Deborah Ratner-Salzberg representing the Applicant; Shalom Baranes, architect with the firm of Shalom Baranes Associates; Chad Baird, traffic consultant with Gorove/Slade Associates; and Steven Sher, Land Planner with Holland & Knight. Mr. Schear and Ms. Ratner-Salzberg were accepted as experts in real estate and development. Messrs. Baranes, Baird, and Sher were accepted as experts in their respective fields. In addition, the following witnesses were available for questions and were accepted as experts in their respective fields: Tom Martens, Economics Research Associates, and Iris Amdur, GreenShape LLC.
8. The Office of Planning ("OP") testified in support of the project. The District Department of Transportation ("DDOT") testified generally in support of the project but raised several issues in its report, which are discussed below in Findings 121 through 136.
9. ANC 6D was represented Max Skolnick. His testimony reflected those issues set forth in the ANC 6D letter, discussed in Findings 137 through 138. Additional issues were raised, discussed in Finding 139.

10. Tiber Island presented one witness, Paul Greenberg, the president of Tiber Island. According to its submissions and testimony, Tiber Island supports the redevelopment of the Site with new high-density development. Tiber Island objected to the following aspects of the development: (1) setback of the buildings along M Street; (2) height and width of the buildings fronting on M Street; (3) projecting bay on the East 4th Street Office Building; (4) lighting for the office buildings along M Street being compatible with the residential lighting patterns for the area; and (5) compatibility of the design of the new buildings with the existing character of the neighborhood.
11. Carrollsburg Square presented one witness, Henry Baker, the President of the Carrollsburg Square Board. According to its submissions and testimony, Carrollsburg Square generally supports the redevelopment of the Site and revitalization of the project. Carrollsburg Square cited the following primary concerns: (1) setback of the buildings along M Street; (2) the M Street façade; (3) insufficient parking associated with the residential aspect of the project; and (4) curb and median cuts on M Street.
12. Many persons and organizations testified and wrote letters in support of the modified project, including Neil Albert, the Deputy Mayor for Planning and Economic Development; RLA Revitalization Corporation; WMATA; Marina View Towers, property owner immediately to the east of the Site; Town Center Apartments, the property owner immediately to the west of the Site; the Arena Stage; and Southeastern University.
13. Several persons testified in opposition to the modified project. The primary concerns included the setback of the M Street façade, the height and openness of the M Street Buildings, and the impact on the light and air of properties across M Street.
14. On June 22, 2007, Tiber Island filed an objection letter asserting that it was not given the right to cross examine the Applicant's rebuttal witness and requesting that it be given additional time to submit proposed findings of fact and conclusions of law. On July 3, 2007, Carrollsburg Square filed a similar letter. ANC 6D filed a letter supporting Tiber Island's objection.
15. On June 27, 2007, the Applicant responded to the objection letter, stating that Tiber Island waived its right to cross examine by not requesting the opportunity to cross-examine at the hearing and, in any event, was not prejudiced by the lack of an opportunity for cross examination because the issues in question will be presented as part of a second-stage application, for which Tiber Island can fully participate.
16. On July 9, 2007, the Applicant submitted a letter restating its previous response but agreeing in the spirit of cooperation to present the rebuttal witness for cross-examination.

17. At its July 9, 2007, public meeting, the Commission considered Tiber Island's objection and the Applicant's responses. The Commission scheduled a public hearing for the limited purpose of allowing the Parties to cross examine the rebuttal witness.
18. Prior to the public hearing on September 17, 2007, the Applicant submitted a Proposed Alternative Plan for the M Street Buildings (Exhibit 93). ANC 6D, Tiber Island and Carrollsburg Square each filed letters in support of the proposed alternative plan. The Commission held the public hearing on September 17, 2007, for the purpose of cross-examination and accepted the Applicant's and Parties' filings into the record.
19. At its regularly-scheduled public meeting on October 15, 2007, the Commission took proposed action by a vote of 3-0-2 to approve with conditions the Applications, including PUD plans, as presented at the public hearings or as part of the written record.
20. The proposed action of the Commission was officially referred to the National Capital Planning Commission ("NCPC") under the terms of the District of Columbia Self-Government and Governmental Reorganization Act. NCPC, by official action dated October 25, 2007, found that the Applications would not have an adverse effect on federal interests nor be inconsistent with the Comprehensive Plan for the National Capital.
21. The Commission took final action by a vote of 3-0-2 to approve the Applications at its public meeting held on November 19, 2007.

The Site and the Area

22. The Site consists of Lot 89 in Square 542, containing approximately 584,655 square feet of land area (or approximately 13.42 acres) in the "superblock" generally located within M, I, 3rd, and 6th Streets, S.W. The Site is located in the Southwest neighborhood, within the former Southwest Urban Renewal Area.
23. The Site is currently improved with an existing building complex including a three-story shopping mall structure ("Waterside Mall" or the "Mall") flanked on its east and west edges by two 130-foot high office towers. Waterside Mall was built in phases primarily beginning in the 1960's through the early 1980's, pursuant to the Southwest Urban Renewal Plan, Area "C."
24. To create the superblock for the Mall, 4th Street, S.W., between M and I Streets, S.W., was closed. Other uses in this superblock include four large, high-rise apartment buildings – two of them to the east of the Mall known as Town Center Apartments and two to the west of the Mall known as the Marina View Apartments. North of the Mall, and fronting on the south side of I Street, S.W., are two churches, Federal parkland, and a District of Columbia library (Southwest Branch). At its southern end, Waterside Mall

faces M Street and partially wraps around the entrance to the Waterfront/Southeastern University Metrorail station. A surface parking lot serving the Mall is also located at this end of the Site.

25. The central structure of the Mall is 45 feet in height and the two existing towers on each side of the central structure have heights of 130 feet. The existing improvements have a total gross floor area of approximately 1,316,871 square feet, or 2.25 FAR. In addition to the surface parking near the Metrorail Station on M Street and the above-grade parking structure, the Mall includes underground parking spaces accessed from I and M Streets, for a total of 1,252 existing parking spaces. The Mall is virtually vacant, with three remaining retail uses on the Site.
26. The Southwest neighborhoods surrounding the Site are primarily residential in character, with a mixture of building types and density. There are commercial uses lining the Southwest waterfront on the Washington Channel immediately to the west of the Site. The Amidon Elementary School and the Southeastern University are also located along the north frontage of I Street. Arena Stage is located to further to west.
27. The Site is not a designated historic landmark nor is it within a historic district.

Existing and Proposed Zoning

28. The underlying zoning of the Site is C-3-B. Based on the First-Stage PUD approval, the Site is split-zoned C-3-B/C-3-C.
29. The C-3-B District is designated as a major business and employment center and permits medium density development, including office, retail, housing, and mixed uses. C-3-B districts are compact in area and are located in or near the Central Employment Area, on arterial streets, in uptown centers, and at rapid transit stops. The uses permitted as a matter-of-right include office, retail, and residential, with a maximum permitted height of seventy feet and six stories. The C-3-B District permits as a matter-of-right a maximum floor area ratio ("FAR") of 5.0 for residential uses and a maximum density of 4.0 FAR for all other uses. The maximum permitted height as a matter-of-right is 70 feet and six stories. A PUD in the C-3-B District is permitted to have a maximum density of 5.5 FAR for residential uses and 4.5 FAR for all other uses and a maximum height of 90 feet. The density of the proposed modification to the First-Stage PUD and the accompanying second-stage PUD application is less than that allowed as a matter-of-right under the existing C-3-B zoning if the land area that will constitute a re-opened 4th Street is counted¹.

¹ Whether that occurs will depend on whether the D.C. Surveyor permits the single record lot that now includes the entire PUD site to remain once 4th Street is re-opened.

30. Under the modification to the First-Stage PUD, the zoning of the entire Site would become C-3-C. The C-3-C District is a major business and employment center that permits medium-high density development for employment and mixed uses. The uses permitted as a matter-of-right include office, residential, and retail. The C-3-C District permits matter-of-right development to a height of ninety feet, and a density of 6.5 FAR. The PUD guidelines for the C-3-C District permit a height of 130 feet and a density of 8.0 FAR. Despite the additional density that is permitted for a PUD under the C-3-C District, the Applicant proposes to develop a project with a maximum aggregate density of 4.33 FAR based on the land area of the Site, which is consistent with the First-Stage PUD and less than the permitted density in both the C-3-B and C-3-C Districts.

First-Stage PUD Approval

31. By order dated July 31, 2003, the Commission approved a First-Stage PUD for the Site. The First-Stage PUD included a medium-high density project containing a mixture of office, retail, and residential uses. The Commission approved an overall gross floor area of 2,526,500 square feet with a density of 4.33 FAR based on the total land area of the Site being 584,655 square feet ("Land Area"). Commercial uses, including office and retail uses, totaled 2,162,500 square feet of gross floor area, or 3.64 FAR based on the Land Area. This included a minimum of 75,000 square feet of gross floor area devoted to ground floor retail use. The total residential development was 400,000 square feet, or 0.69 FAR based on the Land Area.
32. The height of the buildings ranged from renovations with additions at 56 feet; new construction at 19 feet and 112 feet; and renovation of the two existing office towers at 130 feet. Both the two new residential buildings and the two proposed office buildings on M Street were proposed to be 112 feet to provide for extra height at the ground floor level to make the space optimal for retail establishments.
33. The project was to be developed in several phases, with the timing of phases dictated primarily by leasing agreements and construction of the roadway. The first phase was valid for three years. The Commission approval required that the Applicant not obtain a certificate of occupancy for more than 1,570,000 square feet of new and renovated office and retail use until it had obtained a certificate of occupancy for at least 200,000 square feet of residential use. If all milestones were met, the first stage would have been valid for a period of 17 years.
34. The urban design objectives for the project included the following:
- a. Reconnect the Site to the neighborhood by breaking it into two smaller city blocks, with the interior of the Site opened up to light and air and public access by re-establishing 4th Street through the Site;

- b. Line 4th Street and the M Street frontage with ground floor retail uses visible from the outside and accessible to the neighborhood;
- c. In place of a single, monolithic low-rise structure, create four identifiable buildings with their own recognizable entrances;
- d. Create a more urban development pattern by constructing buildings to the 4th and M Street frontages, thereby visually defining the adjacent streets and public spaces; and
- e. Create a mixed-use town center, with office workers providing a significant daytime population, the apartments bringing full-time residents and evening activity to the Site, and both of these serving as customers of the retail uses, which will also serve the surrounding neighborhood. The public plaza surrounding the entrance to the Metro Station completes the town center concept.

Proposed Modified First-Stage PUD Project

- 35. The proposed modified First-Stage PUD project ("Modified Project") includes the development of eight buildings including residential, office, and ground floor retail uses. The Modified Project includes significant open spaces as well as the re-opening of the 4th Street right-of-way.
- 36. The Modified Project includes approximately 2,526,500 square feet of gross floor area, as was approved in the First-Stage PUD. The Modified Project incorporates approximately 1,296,895 square feet of gross floor area devoted to office and retail uses and approximately 1,229,605 square feet of gross floor area devoted to residential uses, with the flexibility to convert one residential building to office use, as is discussed in Finding 42(a).
- 37. The Modified Project includes two residential towers at the north end of the Site, with maximum heights of 114 feet (referenced as the Northwest Building and Northeast Building). The existing high-rise towers (referenced as the West Residential Tower and the East Residential Tower) will be converted to residential use, maintaining a height of 130 feet. In the center of the Modified Project, two new commercial structures will be constructed, each with a height of 94 feet and flanking the newly re-opened 4th Street (referenced as the West 4th Street Office Building and the East 4th Street Office Building). On the south end of the Site, there will be two new commercial buildings fronting M Street. These buildings were initially proposed to have maximum heights of 114 feet (referenced as the West M Street Building and the East M Street Building); however, upon further study of the massing, the Applicant proposed, and the Parties agreed, that the maximum height of the West M Street and East M Street Buildings should be 127 feet, with greater setbacks incorporated upon the second floor level.

38. The Modified Project proposes a minimum of 1,087 parking spaces, and requests flexibility to increase this number based on market conditions, as was requested and granted in the approved First-Stage PUD.
39. Carrollsburg Square raised concerns regarding the number of parking spaces being insufficient to accommodate the demand of the Modified Project. Alternatively, DDOT raised concerns regarding the Applicant having the flexibility to increase the number of parking spaces without approval.
40. The Commission finds that the request for flexibility for increased parking spaces, so long as each increase is included in future second-stage applications, will address the concerns raised by community residents while at the same time will provide DDOT with sufficient opportunity to review impacts of the same.

Consistency of Proposed Modified First-Stage PUD with the Approved First-Stage PUD

41. The Modified Project is consistent with the approved First-Stage PUD as follows:
 - a. **Overall Density.** The overall density of the Modified Project is maintained at approximately 2,526,500 square feet of gross floor area, or 4.33 FAR based on the Land Area (calculated using the existing record lot, which includes the area that will comprise a re-opened 4th Street).
 - b. **Building Height of the "Four Corners".** The height of the buildings on each of the four corners has been modified – increasing from 112 feet to 114 feet for the Northwest and Northeast Buildings in order to accommodate increased retail ceiling heights on the ground level from 12 feet to 14 feet and increasing from 112 feet to 127 feet for the West M Street and East M Street Buildings to accommodate the increased retail ceiling heights on the ground level from 12 feet to 14 feet and the increased setbacks above the second floor.
 - c. **Re-Opening of 4th Street.** The Modified Project continues to include the re-opening of 4th Street through the Site, which will redefine the urban fabric of the area, create a vibrant neighborhood in numerous ways, and improve traffic circulation.
 - d. **Public Benefits and Project Amenities.** All of the public benefits and project amenities approved in the First-Stage PUD are maintained in the Modified Project; however, the Applicant has added additional amenities to the Modified Project, as set forth in Findings 90 and 91.

Modifications to First-Stage PUD Approval

42. The Modified Project modifies the approved First-Stage PUD in the following ways:
- a. ***Increase in Residential Density.*** The total residential density will increase from a minimum of 400,000 square feet of gross floor area to a minimum of 800,000 square feet of gross floor area. If the Northwest Building is maintained for residential use, the total residential density will be up to approximately 1,200,000 square feet of gross floor area. The increased residential density results from the conversion of the East and West Towers from office use in the approved First-Stage PUD to residential use as well as the conversion of the Northeast Building from office to residential use.
 - b. ***Timing for Residential Density.*** The First-Stage PUD required that no more than 1.57 million square feet of gross floor area devoted to office use be constructed until at least 200,000 square feet of residential gross floor area was constructed. In the Modified Project, a minimum of 400,000 square feet of gross floor area of residential use will be constructed in the first phase of development.
 - c. ***Retail Commitment.*** The Applicant has increased its commitment for retail space from a minimum of 75,000 square feet to a minimum of 110,000 square feet. The Applicant has also strengthened its commitment to providing a grocery store, as detailed in Finding 91(c)(2).
 - d. ***Public and Private Open Spaces.*** The proposed public and private open spaces in the Modified Project have significantly increased. The proposed lot occupancy has been reduced by approximately 40,000 square feet from that approved as a result of the increased height for the East and West 4th Street Office Buildings, with the Modified Project having a maximum lot occupancy of 63% based on the Land Area. The First-Stage PUD provided for a maximum lot occupancy of between 60% and 70%. In addition, the Modified Project includes more than double the amount of public open space adjacent to the Metro with the addition of two public plazas that traverse the Site, extending from 4th Street to the proposed entrances of the East and West Residential Towers. The total proposed public space includes more than 50,000 square feet as compared to the First-Stage PUD, which incorporated a minimum of 25,000 square feet.
 - e. ***Building Height of West and East 4th Street Office Buildings.*** The heights of the proposed West and East 4th Street Office Buildings have increased from 79 feet (6 stories with 12-foot-retail ceilings) to 94 feet (8 stories with 14-foot-retail ceilings). The two stories of additional height are necessary to increase open space and reallocate approximately 70,000 square feet of commercial use with the massing changes of the Northeast Building.

- f. ***Access to West and East Residential Towers.*** The primary entrances to the residential East and West Residential Towers are proposed to be from 4th Street via private drives through the east and west courtyards in lieu of access from east and west private drives adjacent to interior lot lines, which was approved in the First-Stage PUD. Moving the entrances to the façades that face the interior of the Site will increase pedestrian activity in the center of the Site along 4th Street and will improve the viability of retail. Eliminating the two entry courtyards of the First-Stage PUD adjacent to the East and West M Street Buildings also allows for more continuous retail frontage along M Street, thereby improving its viability as well.
 - g. ***Above-Grade Parking Structure.*** The existing above-grade parking structure will be demolished under the new plan for the Modified Project, with a residential courtyard to be provided at-grade above a parking structure below
43. The Commission finds that all of the changes reflected in the Modified Project serve to improve and enhance the overall development for the benefit of the Southwest community and the District as a whole.

M Street Set-Back, Height and Bulk

44. As part of the Modified Project, the Applicant proposes two office buildings fronting on M Street with ground floor retail. The East M Street Building includes approximately 339,000 square feet of gross floor area, and the West M Street Building includes approximately 322,700 square feet of gross floor area
45. In the First-Stage PUD, the buildings fronting on M Street included a setback from the face of the curb to the face of the building of approximately 22 feet. After working with OP and the adjacent property owner with its redevelopment of Marina View Towers, this setback has been modified to be 18 feet, 9 inches from the face of the curb to the face of the building. The Applicant testified that the continuous retail frontage along M Street will help make the retail more successful, especially in light of the fact that there is no retail on the opposite side of M Street. Furthermore, as a result of the relocation of the buildings three feet, three inches to the south, the public plazas on the north side of these buildings increased by the same dimension.
46. ANC 6D, Tiber Island and Carrollsburg Square, as well as several individuals testifying at the hearing, expressed concern that the proposed setback was not sufficient.
47. OP did not object to the proposed width of sidewalk, noting that the width was adequate for street retail and landscaping. OP also testified that the proposed width contributes to the other public places that are located in the interior of the Modified Project and are publicly accessible.

48. The Commission finds that additional setback is not necessary and that the additional setback would impair the urban fabric along M Street. The Commission further finds that the additional three feet of setback would not provide a benefit to pedestrians but would potentially have adverse impacts for the retail proposed along M Street.
49. ANC 6D, Tiber Island, and Carrollsburg Square, including others who testified in opposition to the Modified Project, also argued that the M Street façade of the Modified Project was monolithic and would adversely impact the character of that area. These groups also suggested that the M Street buildings be made taller and thinner in an effort to minimize the horizontal visual impact.
50. Mr. Baranes testified that the impact of the buildings would be negligible on the nearby properties because no shadows would be cast due to the north facing alignment of the project. Furthermore, the M Street right-of-way is exceptionally wide in this area at 120 feet in width, which is comparable to the larger boulevards throughout the District.
51. The Applicant also presented testimony in rebuttal that it would review and study the options for increasing the heights of the M Street buildings while thinning the buildings starting above the first or second level. To the extent that such revision is feasible, the Applicant would present such revised designs as part of the second-stage application(s) for those two buildings.
52. The Applicant subsequently submitted a proposed alternative plan for the M Street buildings, which incorporates a maximum height of 127 feet and setbacks of approximately 45 feet above the second level. The density of the M Street buildings does not change. Based on the record, the Applicant worked with the Parties, who each supported the proposed alternative by letters in the record. OP indicated its support for the proposed alternative at the September 17, 2007 public hearing.
53. The Commission finds that there will be no adverse impact to the amount of light, air, or open space available to neighboring properties as a result of the height, bulk and location of the East and West M Street Buildings. The Commission finds that the large right-of-way combined with the setback of the Modified Project from its property line and the setback of the Tiber Island's buildings on the southern side of M Street provide a more than appropriate visual corridor along M Street.
54. The Commission finds that the proposed alternative with maximum heights of 127 feet and setbacks of approximately 45 feet, as shown on the plan in the record at Exhibit 93, addresses the community's concern. The proposed alternative with additional height and greater setbacks is appropriate for this location, based on its proximity to the Metrorail station and location within the Central Employment Area.

Second-Stage PUD

55. The Applications include a request for second-stage approval of the four buildings through the center of the Site ("Second-Stage Site"), which involves the four buildings and their adjacent open spaces which span the middle third of the Site (the "Second-Stage Project"). The East and West 4th Street Office Buildings will flank the east and west sides of 4th Street and will include ground floor retail. Beyond these buildings, at the eastern and western boundaries of the Site, will be two existing twelve-story office buildings which will be renovated for residential use, known as the East and West Residential Towers. A continuous open space with an east/west orientation will connect the residential buildings' entrances to 4th Street. These spaces will provide pedestrian access across the center of the Site directly to the plaza surrounding the Metro station entrance. These spaces will be landscaped and activated with ground floor retail lining the base of each building along the newly re-opened 4th Street.

East and West 4th Street Office Buildings

56. The East and West 4th Street Office Buildings each have a maximum height of 94 feet, with eight stories. The East 4th Street Office Building is shaped to reflect the original 4th Street right-of-way alignment. A six-story, elongated bay which is a cantilevered extension of the aluminum and glass window system mirrors the angle right-of-way.
57. ANC 6D and Tiber Island raised concerns related to the design of this bay and its impact on the view corridors from the north and the south.
58. The Applicant responded that the construction of the Metro station in the original 4th Street right-of-way requires a curved 4th Street alignment. The proposed design allows the primary structure of the East 4th Street Office Building to respect the original 4th Street alignment while the "projecting" bay reflects the current alignment. Mr. Baranes, the Applicant's expert in architecture, testified that the impact on view corridors would be minimal.
59. The Commission finds that the design is an appropriate way of responding to an existing condition that cannot be modified (i.e., the location of the Metro station and the requirement that the 4th Street alignment). The Commission finds that the views will not be adversely impacted by the incorporation of this bay.
60. The West 4th Street Office Building establishes the west street-wall with an eight-story volume. A centrally-located indented bay, rising the entire height of the building, reduces the building's apparent length and marks the office entrance. A lower six-story bay wraps the western and southern faces of the building.

61. Two façade-types are used to define the building elevations. West and south facing façades are fully glazed ceiling-to-floor with banding frame-lines clad in metal panels. Projecting bris-soleil running in continuous horizontal bands protect the glazing from the afternoon sun and terminate in a vertical band near the center of the building, reducing the building's apparent length and marking the office entrance below. Similar shading devices are common to the neighborhood. East and north facing façades are glazed in horizontal bands offset between spandrels of modular terra cotta, with an alternate for roman brick cladding. Viewed from 4th Street, the buildings present both façade types in opposition, creating an enhanced sense of orientation and architectural complexity.

East and West Residential Towers

62. The existing towers on the Second-Stage Site will be renovated and re-fenestrated in order to convert them from office buildings into residential buildings. The massing of the existing structures will remain largely unchanged other than the addition of a mechanical penthouse, shallow glass bays, and corner balconies. The West Residential Tower will feature a two-story infill structure within the building footprint along its eastern face to replace the void formed by the removal of an adjacent above-grade parking structure that extends under the building footprint. Along the East Residential Tower's eastern face, a similar two-story infill structure is provided. Both the East and West Residential Tower are linked internally to one-story loading structures on their northern faces.
63. The façades are re-fenestrated with insulating glass and operable windows to accommodate residential use. Glazing is set in aluminum frames with metal clad horizontal and vertical bands defining floor slabs and unit partitions. Horizontal bands articulate the façade in three-story increments. Modern architectural frames wrap the mid-section of the outward facing façades. These elements reflect the proportion and character of the four adjacent I.M. Pei-designed towers. Facing inward, the façades are framed by a full-height bracket wall and roof projection that adds a formal northward orientation to the project's mid-section. The ends of the east and west plazas are marked with ten-story vertical bays added to each building's inner face.
64. The Commission questioned whether the East and West Residential Towers could accommodate roof-top terraces. The Applicant's expert testified at the hearing, and the Applicant submitted additional information in its Post-Hearing Submission (Exhibit 80) that given the dimensions of the existing building structure, the inability to stack or reconfigure the HVAC units and maintain equipment warranties, and the belief that tenants should be able to measure their own energy consumption, roof terraces are not feasible on the residential towers. The Commission is satisfied with the Applicant's response.

Retail Streetscape

65. The East and West 4th Street Office Buildings provide street-facing retail along the re-opened 4th Street. Retail extends deep into the East and West Plazas along the East and West 4th Street Office Buildings, taking full advantage of each building's corner location.
66. The retail façades have floor-to-ceiling heights of 14 feet and are expressed as one-story structures relieved from the upper levels by a shallow indented second floor. Copings, eaves, and extended canopies mark the upper horizon of the retail streetscape. Storefronts will maximize glazing heights and widths to allow for deep interior views. Canopies and solar-shading grilles enliven the Plaza-facing elevations.

4th Street Landscape, Metro, and East and West Plazas

67. The Metro Plaza is designed to direct pedestrian traffic efficiently with ample separation from vehicular traffic. Adequate sidewalk areas wrap the Metro escalator-way on all sides. The East Plaza private drive is set flush with the plaza paving to permit unimpeded pedestrian flow.
68. The Metro Plaza will be a center of activity. It incorporates two rows of shade trees, modular seating elements with internal lighting and water features. The vertical columns of water emerging from flush mounted jets in the pavement of the plaza will add visual and acoustic interest to the space. Lighting will be incorporated in the water feature to increase the effect at night. Additional lighting has been incorporated into the Metro Plaza, as indicated in Tab A of the Applicant's Post-Hearing Submission, in response to the Commission's request that this issue be further reviewed.
69. The East and West Plazas function as the development's mid-block cross-link in the best tradition of Southwest D.C. public space, including a crosswalk with additional safety measures, such as pedestrian signalization, "bulb outs," and special paving. Landscape elements further enhance the special character of these pedestrian-friendly open spaces. One-way private drives provide access to the residential towers.

Residential Courtyards

70. Amenities for the residential program are provided in the open spaces located between each pair of the residential and office buildings. The east courtyard is located above a one-story retail structure (or at-grade, pending development phasing). The landscaping in this courtyard has been designed to create two zones: a lawn and trees along the southern edge and sedum green roof panels along the northern end.

71. The west courtyard is located at-grade and consists of a series of more enclosed, intimate spaces. The spaces are more residential in nature, serving as "outdoor rooms" to serve the adjacent residential buildings.

Vehicular Access and Services

72. One-way private drives traversing the East and West Plazas provide vehicular access to the entrances of the East and West Residential Towers. When merged, vehicular traffic is separated from pedestrian flow with lines of low bollards along the East Plaza.
73. The entrances for the East and West 4th Street Office Buildings are accessed directly from 4th Street.
74. Loading access for the eastern and western halves of the Second-Stage Project is provided in covered, one-story structures adjacent to the East Residential Tower and the West Residential Tower.
75. A private drive will extend along the western edge of the Site and will function as a shared drive with the adjacent development of Marina View Towers. This shared private drive minimizes curb cuts on M Street and consolidates loading facilities for both projects.

Parking

76. The Second-Stage Project originally proposed a minimum number of parking spaces of 505 spaces, with the flexibility to increase the number of parking spaces. Community members raised concerns with the number of parking spaces being too few while DDOT requested that if the number of parking spaces was increased, such increase be permitted only after separate review and approval by the Board of Zoning Adjustment and relevant District agencies.
77. At the public hearing, the Applicant testified that the Second-Stage Project will provide a minimum of 505 parking spaces and a maximum of 745 parking spaces.

Compatibility of Design with Existing Southwest Neighborhood

78. ANC 6D and Tiber Island raised concerns about the compatibility of the design of the Second-Stage Project (and as a whole the Modified Project) with the existing character of Southwest.
79. Mr. Baranes testified that the Second-Stage Project has been designed sensitively to relate to and be compatible with the original architectural designs of the Southwest neighborhood. The Site has maintained significant open spaces in keeping with the character of Southwest, for both residents and the public alike.

80. Mr. Baranes further testified that the Second-Stage Project – and the Modified Project – have been designed in such a way to reflect the modernity that was an integral aspect of the original Southwest development. The buildings are one-of-a-kind and not found anywhere else in the District. Mr. Baranes also testified that the materials would complement the existing materials in Southwest while at the same time being unique and new.
81. The Commission finds that the Second-Stage Project has been designed to relate well with the existing character of Southwest while at the same time retaining a new and energized feeling for the town center.
82. The Commission finds that the Modified Project will create a sense of place and will achieve the goals of creating the town center.

Phasing of the Project

83. The Applicant requested that the Commission grant approval of the first-stage Modified Project for a period of five years from the effective date of the order granting the same. Within such time, the second-stage PUD application(s) for the Northwest Building, the West M Street Building, and the Northeast Building will be filed. These second-stage applications may be submitted individually, at the same time, or in any combination thereof.
84. The Applicant requested that the approval be granted for a longer period of time for the East M Street Building. In the event that the grocery store is constructed in the Second-Stage Project or that the existing grocery store surrenders its premises under the existing lease, the Applicant will file the stage-two PUD application for the East M Street Building within five years of the date that the existing grocery store vacates the Site, but no later than December 31, 2020.
85. The approval of the Second-Stage Project will be valid for a period of two years from the effective date of the order granting the same. Within this time, the Applicant shall file for a building permit. Construction shall begin with three years of the effective date of the order granting the Second-Stage Project.

Development Flexibility and Incentives

86. The Applicant requests the following areas of flexibility from the C-3-C standards:
 - a. Height in excess of matter-of-right for the Northeast Building, the Northwest Building, and the East and West M Street Buildings, but within that permitted for a PUD in the C-3-C District; and

- b. Roof structure relief to permit roof structures with walls of unequal height on the East and West 4th Street Office Buildings.
87. The Applicant initially requested flexibility from the residential recreation space requirements; however, since that time, the residential recreation space requirements have been officially repealed by Z. C. Order No. 05-02.
88. As part of the PUD, the Commission may grant such flexibility without the need for variance approval from the Board of Zoning Adjustment or compliance with the variance standards that might otherwise apply.

Public Benefits and Project Amenities

89. The Modified Project incorporates all of the public benefits and project amenities that were approved as part of the First-Stage PUD as follows:
- a. ***Reopening of 4th Street, S.W. (11 DCMR § 2403.9(i)).*** The Applicant continues to propose the re-opening of 4th Street through the center of the Site, and is currently negotiating the terms under which this area will be sold to the District. The re-opened 4th Street will consist of a 55-foot roadway within a 90-foot right-of-way for the portion of 4th Street within the confines of the Site. The re-opened 4th Street will redefine the urban fabric of the area and will create a vibrant neighborhood in many ways, including providing the opportunity for street-front retail, creating a passageway through the Site for pedestrians and vehicular traffic, opening the Site for development and benefiting the overall District transportation system. The re-establishment of 4th Street will knit the Southwest neighborhood back into the urban fabric of the District, with 4th Street ultimately running from P Street, S.W., through the Mall to Constitution Avenue, N.W.
 - b. ***Major Local Development Initiative (11 DCMR § 2403.9(i)).*** The Modified Project continues to be a major revitalization effort being undertaken with the close cooperation of the Applicant and the District to achieve important public objectives for the District and the Southwest neighborhood. The District's commitment to this revitalization effort has been confirmed by the lease agreement into which it has entered with the Applicant. Furthermore, the Modified Project will provide significant economic benefits to the District as compared to the existing situation.
 - c. ***Urban Design (11 DCMR § 2403.9(a)).*** The Modified Project will continue to accomplish major design objectives that were identified as an important part of the approved First-Stage PUD, such as superior streetscape design and pedestrian amenities, including wide sidewalks and public plaza, introduction of distinctive, vertical buildings that provide interest and variety along street frontages and are

construed to defined public spaces, and creating better connections for the neighborhood.

- d. ***Town Center (11 DCMR § 2403.9(i))***. The Modified Project will continue to create an important town center surrounding the Metrorail station. In the First-Stage PUD, the Applicant committed to a minimum of 25,000 square feet in public open space. The Applicant now commits to a minimum of 50,000 square feet of open space suitably paved and landscaped for public use and enjoyment.
 - e. ***Maintenance of Public Park North of the Site (11 DCMR § 2403.9(h))***. The Applicant has also agreed to maintain the land immediately to the north of the Site as a public park amenity after the construction by the District of the 4th Street extension through the park (the "Park Site"). The maintenance of the Park Site may include trash removal, lawn mowing, and planting, continuing for the life of the PUD, and will be governed by an agreement to be entered into between the Applicant and the appropriate District agency, after the Park Site and Park Street Extension have been transferred to the District from the Federal government.
 - f. ***Retail and Service Establishment (11 DCMR § 2403.9(h))***. The Applicant originally committed to a minimum of 75,000 square feet of gross floor area devoted to retail use. As part of the Modified Project, the Applicant has committed to a minimum of 110,000 square feet, in addition to the additional retail commitments set forth in Finding No. 91(c).
90. The Modified Project includes a number of additional public and project amenities, including the following:
- a. ***Housing (§ 2403.9(f))***. The Modified Project constitutes a new residential development adjacent to a Metrorail station and will provide at least 800,000 square feet of gross floor area devoted to residential space, with up to approximately 1,200,000 square feet of gross floor area of residential use if the Northwest Building is constructed as a residential building. A minimum of 400,000 square feet of gross floor area will be constructed as part of the first phase of development.
 - b. ***Affordable Housing (11 DCMR § 2403.9(f))***. The Applicant commits to a minimum of 160,000 square feet of on-site affordable housing, with at least eight percent of the gross floor area within the East and West Residential Towers in the Second-Stage Project (which equals approximately 32,000 square feet) being available to households earning 80% of the Metropolitan Washington, D.C. Area Median Income ("AMI") or less. The affordable housing shall be evenly distributed between the East and West Residential Towers (a total of approximately 80,000 square feet of gross floor area) and the Northeast

Residential Building (approximately 80,000 square feet of gross floor area). The affordable housing units shall be approximately the same proportion of bedroom type and size as the market rate residential units and generally evenly distributed between and within the East and West Residential Towers, with the exception of the top two floors of each building. No affordable housing is required for the Northwest Building. All affordable housing units will be maintained as affordable for a period of twenty years, regardless of whether the units are rental or for sale.

c. ***Retail and Service Establishments (11 DCMR § 2403.9(f)).*** Not only has the Applicant increased its minimum retail commitment from 75,000 square feet to 110,000 square feet, it has also committed to the following additional retail commitments:

- (1) ***Use of Local and Small Businesses for Retail Space:*** The Applicant will use best commercially reasonable efforts to provide opportunities for local and small businesses to occupy 12,500 square feet of retail space included within the minimum commitment. These local and small businesses will be certified by RLA Revitalization Corporation, as more specifically set forth in the Land Disposition and Development Agreement ("LDDA").
- (2) ***Commitment to Grocery Store Use:*** As part of the on-site retail, the Applicant has included space for a new 55,000 square foot grocery store within the Second-Stage Project. The Applicant has been working closely with the existing grocery store on the Site to renegotiate its lease, currently set to expire in December 2020, and to relocate the existing grocery store to the proposed new grocery store location on the east side of the Modified Project. The Applicant will continue to use best commercially reasonable efforts to complete such negotiations with the goal of executing a lease by August 18, 2007. If a lease is executed, the Applicant will maintain the space for the existing grocery store to operate while the new store is under construction.

In the event that the Applicant is unable to successfully negotiate a lease within the above timeframe, the Applicant agrees to:

- (a) Honor the existing grocery store lease expiring in 2020.
- (b) Reserve the proposed grocery location on the east side of the Modified Project and use best commercially reasonable efforts to lease such space to a full service grocery store (approximately 55,000 square feet) for a term commencing upon the earlier of the

termination of the existing grocery store lease or the vacation of such space for any other reason.

The Applicant further agrees to develop the Second-Stage Project in accordance with the plans set forth at Sheet 1.10 of the Second-Stage Plans (which shows the grocery store constructed) or Sheet 1.11 of the Second-Stage Plans (which shows the site plan option in the event that the existing grocery store is maintained in its current location). In the event that the Second-stage Project is constructed in accordance with Sheet 1.11 of the Second-Stage Plans, no additional construction between the East 4th Street Office Building and the East Residential Tower will be completed for any use other than the grocery store as shown on Sheet 1.10 unless the Applicant returns to the Zoning Commission for approval.

- (3) *Maintenance of Retail Uses During Construction:* In addition to the maintenance of the grocery use during the construction phase of the Second-Stage Project, the Applicant will maintain the operation of a bank and a drug store, which are the only other uses currently located at the Site
- d. *Sustainable Design Features (11 DCMR § 2403.9(h)).* The Applicant is committing to a variety of sustainable design features. For the East and West 4th Street Office Buildings, these sustainable design features include, among other items, storm water management, green roofs, and erosion and sedimentation control. A specific list of sustainable design features is set forth in Tab A to the Supplemental Prehearing Submission. The East and West Residential Towers will include sustainable design features such as erosion and sedimentation control and storm water management. A detailed list of these sustainable design features is set forth in the Applicant' Memorandum to OP (Exhibit 54). The Applicant intends to incorporate sustainable design features into each of the remaining buildings of the Modified Project in a similar quality and quantity to be determined at the second-stage proceedings for each of those projects.
- e. *Community Meeting Space (11 DCMR § 2403.9(i)).* The Applicant commits to provide approximately 1,000 square feet of office and meeting space for ANC 6D and the Southwest Neighborhood Assembly for a minimum of a 10-year term commencing upon the initial occupancy of such space. Within this committed space, the Applicant will provide approximately 350 square feet of space to each organization and a shared conference room for use by various community groups.
- f. *Security and Construction Mitigation Plan (11 DCMR § 2403.9(i)).* The Applicant commits to abiding by a Security and Construction Mitigation Plan ("Security and Construction Mitigation Plan") to be in place throughout the

development of the Modified Project. An initial draft of the Security Construction Mitigation Plan is in the record at Tab C to the Supplemental Prehearing Submission. The Applicant will continue to work with the community, RLARC, and the District government to update this plan as is necessary throughout construction.

- g. *Transportation Management Plan (11 DCMR § 2403.9(c))*. The Applicant proposes a transportation management plan, set forth in the Summary of Public Benefits and Project Amenities (Exhibit 52 – "Transportation Management Plan").
- h. *Employment and Training Opportunities (DCMR § 2403.9(e))*. In order to further the policies established in Mayor's Order No. 83-265 and D.C. Law 5-93, the Applicant will enter into an agreement to participate in the Department of Employment Services First Source Employment Program that promotes and encourages the hiring of District residents. Furthermore, in order to further policies established in D.C. Law 1-95, the Applicant will enter into a Memorandum of Understanding with the District of Columbia Department of Small and Local Business Development to utilize local, small, and disadvantaged businesses in the development of this project.

- 91. The Commission finds that the relative value of the project amenities and public benefits offered is sufficient given the degree of development incentives requested and any potential adverse effects. The Commission finds that the benefits and amenities listed in Findings 90 and 91 are acceptable to be included as part of the balancing test required in § 2403.8 of the Zoning Regulations and deserve recognition as a benefit and amenities of the PUD.

Compliance with PUD Standards

- 92. The Applications comply with the standards for a PUD set forth in Chapter 24 of the Zoning Regulations.
- 93. The Commission finds that the Modified Project offers a high level of public benefits and project amenities. When compared with the amount of development flexibility requested and project impacts, the Applications satisfy the balancing test required in § 2403.8 of the Zoning Regulations.
- 94. The Site area is approximately 584,655 square feet in land area, which exceeds the minimum area requirement of 15,000 square feet for a PUD in the C-3-C District, in accordance with § 2401.1(c) of the Zoning Regulations.

95. The Modified Project has been evaluated under the PUD guidelines for the C-3-C District. The Modified Project is well below the density permitted for a PUD within the C-3-C District, even if the re-opened 4th Street right-of-way is not included as part of the land area. The maximum height of new construction within the Modified Project is 127 feet, which is within that permitted for a PUD in the C-3-C District. The existing towers with a height of 130 feet are permitted pursuant to § 2521.1(c) of the Zoning Regulations.
96. The Modified Project has been evaluated by the relevant District agencies, including being supported by both OP and DDOT. Based on those reports, there will be no adverse impacts that cannot be mitigated by the conditions imposed herein.
97. The Commission finds that the Modified Project will provide additional economic boost to the Southwest neighborhood and the District of Columbia, as indicated in the Economic Impact Analysis attached as Tab C to the Prehearing Submission.

Consistency with Comprehensive Plan

98. In Z.C. Order No. 02-38, the Commission found that the project was consistent with, or would help implement, a number of policies in the Comprehensive Plan of 1998.
99. At the time the Applications were filed, the governing comprehensive plan was still the Comprehensive Plan of 1998. The Applicant, in its PUD Submission, set forth in detail the Modified Project's consistency with that plan.
100. On March 12, 2007, the Comprehensive Plan of 2006 came into effect and became the governing document. The Applicant set forth in its Prehearing Submission and the Applicant's expert witness testified at the June 7, 2006 public hearing, to the Modified Project's compliance with the Comprehensive Plan of 2006.
101. The Future Land Use Map of the Comprehensive Plan of 2006 designates the Site for High-Density Commercial and High-Density Residential uses. The High-Density Commercial designation defines the central employment district of the District and other major office employment centers on the downtown perimeter. This area is characterized by office and mixed office/retail buildings greater than eight stories in height, although many lower scale buildings are interspersed. The High-Density Residential designation defines neighborhoods and corridors where high-rise (eight stories or more) apartment buildings are the predominant uses. The Modified Project is consistent with these designations.
102. The Generalized Policy Map of the Comprehensive Plan of 2006 includes the Site in a Land Use Change Area and more specifically designates it for an Enhanced/New Multi-Neighborhood Center. Land Use Change Areas are defined as "areas where change to a different land use is anticipated. The guiding philosophy in the Land Use Change Areas

is to facilitate new development and to promote the adaptive re-use of existing structures. Many of these areas have the capacity to become mixed-use communities containing housing, retail shops, services, workplaces, parks, and civic facilities." (§ 2.4.1, ¶¶ 223.9, 223.11) Designation as an Enhanced/New Multi-Neighborhood Center denotes a one to three mile service area with uses that could include supermarkets, restaurants, retail shops, service-oriented businesses, and office space for small businesses. Mixed-use infill development is encouraged to provide new retail and service uses, in addition to additional housing and job opportunities. The Modified Project is consistent with these designations.

103. The Modified Project is consistent with many of the Comprehensive Plan's Framework elements including managing growth and change, creating successful neighborhoods, increasing access to education and employment, and building green and healthy neighborhoods.
104. The Land Use Element (Chapter 3) of the Comprehensive Plan of 2006 sets forth the importance of a focus on transit-oriented and corridor development, which is a central theme throughout many elements of the plan. The Comprehensive Plan of 2006 recognizes the importance of fully capitalizing on the investment made in Metrorail and states that this requires better use of the land surrounding transit stations and along transit corridors. The plan further states that much of the city's planning during the last five years has focused on making better use of transit areas. The plan sets forth certain principles for management of these lands, including the following: a preference for housing above-ground floor retail uses; a preference for diverse housing types, including both market-rate and affordable housing units; a priority on attractive, pedestrian-friendly design; and a stepping down of densities away from each station. The plan further seeks to promote the vitality of neighborhood commercial districts, which should be inviting and attractive and should support social interaction and ease of access for nearby residents.
105. The Comprehensive Plan of 2006 also stresses the critical housing issues facing the District, including, among other things, ensuring housing affordability, fostering housing production, and promoting home ownership. The new Housing Element recommends providing zoning incentives to developers proposing to build affordable housing, which should be considered as a public benefit for the purposes of granting density bonuses when new development is proposed.
106. The Transportation Element (Chapter 4) of the Comprehensive Plan of 2006 seeks to link land use and transportation and to create walkable, transit-oriented neighborhoods. The Modified Project's location at a Metrorail station and the reopening of 4th Street serve to further many aspects of this element.

107. The Lower Anacostia/Near Southwest Area Element specifically provides for the redevelopment of the Waterside Mall with residential, office, and local-serving retail uses. Policy AW-2.1.6 goes on to state that the Site should be strengthened as a retail anchor for the surrounding Southwest community and that its redesign should restore 4th Street S.W. as part of the District's street grid and improved aesthetics, circulate, and connectivity to surrounding uses.
108. The Commission finds that the Modified Project is not inconsistent with the Comprehensive Plan of 2006.

Office of Planning

109. By report dated May 25, 2007 (Exhibit 33 – "OP Report"), and through testimony presented at the public hearing, OP recommended approval of the Applications subject to the Applicant providing the following:
- a. Additional pedestrian safety measures at the intersection of the public plazas and 4th Street;
 - b. Additional information regarding the percentage of affordable units available to households earning less than 80% of the Area Median Income;
 - c. Commitment to an even distribution of affordable units between the East and West Towers and the Northeast Building; and
 - d. Commitment that any change from a grocery use in the grocery store space of the project in the Second-Stage Project would require Commission approval as a PUD modification.
110. The Applicant submitted a response to OP (Exhibit 54), providing all of the information and commitments requested by OP.
111. In its testimony at the hearing, OP noted that the Applicant had resolved each of the four conditions set forth in the OP Report.
112. OP testified and also set forth in the OP Report that the project is consistent with the land use maps of the Comprehensive Plan of 2006 and with numerous policies in the Plan, including one specifically calling for the redevelopment of the Site and the reopening of 4th Street. OP also stated that the Modified Project is consistent with basic principals of the Comprehensive Plan such as redevelopment of underutilized sites, increased density near Metro stations, provision of affordable housing, and environmental protection.
113. OP testified and set forth in the OP Report that it had no objection to the requested zoning relief and design flexibility.

114. OP set forth in the OP Report that it received comments related to the Applications from the following agencies:
- a. The Department of Parks and Recreation ("DPR") noted on that the open space areas will be a benefit to the area where public open space is lacking. Although DPR requested that consideration be given to certain proposed amenities, DPR did not response to the Office of Planning's request for additional information.
 - b. The Department of the Environment requested that certain sustainable design features be integrated into the Modified Project.
 - c. DC Water and Sewer Authority ("DC WASA") requested that certain modifications be made with respect to connections to the storm sewers. According the Office of Planning, these modifications were made and DC WASA had no additional issues.
 - d. The Metropolitan Police Department had no objection to the proposed development.
115. OP testified in support of the proposed alternative for the M Street Buildings at the September 17, 2007 public hearing.
116. The Commission finds that each of OP's issues set forth in Findings 113(a) through 113(d) have been addressed by the Applicant, as noted in Findings 114 and 115.

District Department of Transportation

117. DDOT testified at the June 7, 2007 public hearing that overall it is very supportive of the plan for the Site. DDOT further stated in the DDOT Report that there will be no adverse traffic impacts based upon the Applicant's traffic studies, with the implementation of a transportation demand management plan.
118. In the DDOT Report, and through its testimony at the June 7, 2007 public hearing, DDOT recommended approval of the Applications subject to certain conditions:
- a. The Applicant shall make a formal commitment to construct 4th Street, S.W., between Eye Street and M Street and provide an easement for a 110-foot wide right-of-way to the District. The Easement Agreement must be approved in writing by DDOT prior to the Applicant obtaining any demolition or building permits associated with this PUD. Through this Easement Agreement, the Applicant and the appropriate District agencies shall define the roles and responsibilities for 4th Street S.W. ownership, maintenance, and approval processes.

- b. The Applicant and appropriate District government agencies shall complete a written agreement regarding the terms and amount of funds transferred for the construction of 4th Street, S.W.
 - c. The Applicant shall develop a Transportation Demand Management Plan to be reviewed and approved by DDOT prior to obtaining a certificate of occupancy.
 - d. The Applicant shall undergo a public space permitting review and approval process for all private surface and subsurface uses of the 110-foot easement area provided to the District of Columbia to ensure that 4th Street S.W. and site design details comply with DDOT safety and streetscape standards.
119. In response to DDOT's request, the Applicant submitted the Transportation Management Plan. The Applicant committed to work with DDOT as necessary to refine that plan.
120. The Commission finds that the Applicant's submission of a Transportation Management Plan addresses DDOT's concern set forth in Finding 122(c).
121. The Applicant testified at the hearing, and submitted in writing through its various submissions to the Commission, that it would agree to re-open a 90-foot right-of-way as 4th Street through the center of the Site.
122. In its testimony at the public hearing on June 7, 2007, DDOT stated that it would accept a 90-foot right-of-way. In its Supplemental Report dated June 27, 2007 (Exhibit 81), DDOT agreed in writing to the 90-foot right-of-way, stating that both the planned function of 4th Street and the engineering documents that DDOT has completed can and are accommodated within a 90-foot right-of-way. DDOT further stated in its Supplemental Report that so long as the 4th Street right-of-way is controlled by DDOT through either fee simple ownership or an easement that is subject to all District public space review, permits, inspections, and approvals, DDOT supports the project as it relates to the re-opening of 4th Street, S.W.
123. In order for 4th Street to be re-opened, the District must first acquire the land pursuant to D.C. Official Code § 9-203.10. Since the Applicant has neither offered to give this area to the District, nor construct the streets at no cost, the Commission will assume that the District will pay the market value of the land and the costs for building the street. The Applicant has merely stated its willingness to enter into an agreement to convey the land. This is not an insignificant benefit, in that the District will be spared the time and cost of acquiring the land by eminent domain.
124. The terms of the conveyance of 4th Street should be determined through agreement between the Applicant and the District, so long as 4th Street is reopened through the center of the Site, as set forth in Condition No. 12.

125. In its initial report, DDOT also raised concerns regarding the pedestrian safety improvements, such as crosswalks and traffic signals as they relate to the private drives and the civic plazas.
126. The Commission finds that the pedestrian safety issues within the Site have been addressed. To the extent that additional pedestrian safety measures are warranted in existing public spaces, DDOT can move forward with implementation of such measures, including cross walks across M Street to access properties south of M Street.
127. In its report, DDOT also recommended that the Applicant be required to seek additional review and approval by the Board of Zoning Adjustment and the relevant District agencies in the event that the number of parking spaces increased above the minimum number required.
128. The Applicant testified at the hearing that it would provide a maximum of 745 parking spaces for the Second-Stage Project and that it would provide a minimum of 1,087 parking spaces for the Modified Project. The Applicant requested flexibility to increase the number of parking spaces for the Modified Project based upon market conditions. To the extent that additional parking is provided, it will be shown on future second-stage applications.
129. The Commission finds that the Applicant should be given flexibility to increase the number of parking spaces for the Modified Project. The total number of parking spaces will be submitted with each of the future second-stage projects and thus the Commission and the relevant District agencies will have sufficient opportunity to review the sufficiency of such parking and the potential for adverse impacts.
130. DDOT also raised issues related to the loading access for the East and West M Street Buildings as well as for the proposed curb cuts on M Street for access to those commercial parking garages.
131. The Applicant submitted a report from its traffic consultant summarizing the reasoning behind the location of the entrances
132. The Commission finds that this issue should be further studied and addressed as part of the second-stage application(s) for the East and West M Street Buildings.
133. The Commission finds that the Modified Project, and more specifically the Second-Stage Project, will have no adverse traffic impacts.

ANC 6D Report and Testimony

134. By letter dated June 5, 2007 (Exhibit 42), ANC 6D indicated that it voted to support the Modified Project and Second-Stage Project by a vote of 6-1. ANC 6D noted the important community benefits to which the Applicant and ANC agreed, including the grocery store and retail commitments, the housing and on-site affordable housing, the comprehensive security and construction mitigation plan, the on-site community office and meeting space, the sustainable design features, and the commitment to an ongoing dialogue with the Applicant related to parking and traffic.
135. ANC 6D also noted in its report several issues of concern, including the following:
- a. Concern that the projecting bay from the East 4th Street Office Building will impede the sight view along 4th Street;
 - b. Concern as to whether the Modified Project incorporates the architectural characteristics of the Southwest neighborhood and creates a sense of place for the Southwest neighborhood, essentially requesting that the final product be fully integrated with the surrounding neighborhood;
 - c. Concern that the Zoning Commission is not simply targeting the Southwest neighborhood for increased density;
 - d. Concern with the M Street façade, both in terms of setback and openness; and
 - e. Concern that the affordable housing component of the Modified Project is targeted so that at least eight percent of the total floor area is available to households earning less than 80% of AMI.
136. In addition, in his testimony for ANC 6D, Mr. Skolnick noted that despite the great progress, several additional issues needed to be resolved:
- a. Concern regarding pedestrian crossings on M Street near 4th Street, S.W.;
 - b. Concern regarding the impact on retail development in the event that the Northwest Building is converted to office and a request that any additional retail developed to serve office property be developed on a one-for-one square foot basis with neighborhood serving retail above what is currently provided; and
 - c. Request that additional space be provided in the East 4th Street Office Building to accommodate 100 people and that the duration of the space be longer than ten years.

137. The Commission finds that the issues and concerns raised by ANC 6D have been fully addressed throughout this Order, and the Commission finds that all of the issues and concerns have been addressed or resolved. Specifically, the Commission finds that the specific issues and concerns have been resolved as follows:
- a. The projecting bay will not adversely impact the views along 4th Street, S.W., as set forth in Findings 57 and 58;
 - b. The Modified Project has been designed to be compatible with the Southwest neighborhood and to create a sense of place for the Southwest neighborhood, as set forth in Findings 79 through 83;
 - c. The proposed setback of the M Street buildings is sufficient, as set forth in Findings 44 through 48;
 - d. The design of the M Street buildings, in terms of height and openness is appropriate as proposed, as set forth in Findings 49 through 54;
 - e. The Applicant has agreed to target its affordable housing to ensure that at least eight percent of the total floor area is available to households earning less than 80% of AMI, as set forth in Finding 91(b);
 - f. The cross-walks requested by ANC 6D are located within the public space on M Street and are within the jurisdiction of DDOT. According to DDOT plans, crosswalks are intended for M Street near 4th Street;
 - g. In the event that the Northwest Building is converted to commercial use, the minimum commitments to the amount and type of retail use, as set forth in Findings 90(d) and 91(c), will not change. In the event that modifications to the amount and type of retail are necessary, such modifications will be fully reviewed through a second-stage public hearing process; and
 - h. The Commission reviews the amenities package presented by an applicant to determine whether it is appropriate given the development flexibility and incentives requested and the impacts of the project. The Commission does not make decisions as to whether certain amenities should be increased to the reduction or detriment of others. In this case, the Commission finds that that proposed amenities package when balanced with the development incentives and flexibility requested and the impacts of the project are sufficient, as set forth in Findings 90 through 92.
138. The Commission finds that development is occurring throughout the District, with projects being developed as a matter-of-right and with requests for increased density.

The Commission finds that the Southwest neighborhood is not being targeted for development incentives any more than any other quadrant of the District.

139. The Commission afforded the views of ANC 6D the "great weight" to which it is entitled.

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. Under the PUD process of the Zoning Regulations, the Commission has the authority to modify the approved First-Stage PUD and to consider the application for approval of a Second-Stage PUD. The Commission may impose development conditions, guidelines, and standards which may exceed or be less than the matter-of-right standards identified for height, density, lot occupancy, parking, loading, yards, or courts. The Commission may also approve uses that are permitted as special exceptions and would otherwise require approval by the Board of Zoning Adjustment.
3. The development of the Modified Project carries out the purposes of Chapter 24 of the Zoning Regulations 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. The Modified Project is consistent with the purposes and goals of the Commission's approval of the First-Stage PUD, and the proposed modifications serve to enhance the overall project.
4. The Modified Project meets the minimum area requirements of § 2401.1 of the Zoning Regulations.
5. The Modified Project is within the applicable height, bulk and density standards of the Zoning Regulations for a PUD within the C-3-C District. This mixed-use project, at a Metrorail station and serving as a town center for the surrounding community, is appropriate for the Site. The impacts of the Modified Project are not unacceptable.
6. The Applications can be approved with conditions to ensure that the potential adverse effects on the surrounding area from the development will be mitigated.
7. The number and quality of the project benefits and amenities offered are a more than sufficient trade-off for the flexibility and development incentives requested.

8. Approval of the Applications is not inconsistent with the Comprehensive Plan of 2006.
9. The Commission is required under D.C. Code § 1-309.10(d) (2001) to give great weight to the affected ANC's recommendations. The Commission has carefully considered ANC 6D's support and stated issues and concerns and has responded to or addressed each of its issues and concerns.
10. The approval of the Applications will promote the orderly development of the Site in conformity with the entirety of the District of Columbia zone plan as embodied in the Zoning Regulations and Zoning Map of the District of Columbia.
11. The rezoning of the Site to C-3-C is consistent with the purposes and objectives of zoning as set forth in the Zoning Enabling Act, Section 6-641-.01 of the D.C. Code.
12. Notice was provided in accordance with the Zoning Regulations and applicable case law.
13. The Applications are subject to compliance with the provisions of the Human Rights Act of 1977, D.C. Law 2-38, as amended.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission orders **APPROVAL** of the application for a modification to the First-Stage PUD approval in Zoning Commission Case No. 02-38, second-stage PUD approval for the center portion of the Site, and for a related Zoning Map amendment to rezone the Site from C-3-B to C-3-C. This approval is subject to the following guidelines, conditions, and standards:

1. The Modified Project shall be developed substantially in accordance with the plans prepared by Shalom Baranes Associates, dated May 18, 2007, in the record at Exhibit 25, as supplemented by subsequent plan pages in the record at Exhibit 54 (Updated Cross Walk Plan), at Exhibit 68 (Revised Sheet 2.0 and Sheet 2.1), and at Exhibit 93 (Proposed Alternative Plan for M Street Buildings) (collectively the "First-Stage Plans"), as modified by the guidelines, conditions, and standards herein.
2. The Second-Stage Project shall be developed substantially in accordance with the plans prepared by Shalom Baranes Associates, dated May 18, 2007, in the record at Exhibit 26, as supplemented by subsequent plan pages in the record at Exhibit 68 (Revised Sheets 1.9 and Sheet 1.10), and Exhibit 80 (New Sheet 1.19) (collectively the "Second-Stage Plans"), as modified by the guidelines, conditions and standards herein.

3. The Modified Project shall have an approximate gross floor area of 2,526,500 square feet, or 4.33 FAR based on the Land Area within the existing record lot. As shown on the First-Stage Plans, the Modified Project shall include approximately 1,296,895 square feet of gross floor area devoted to office and retail uses and approximately 1,229,605 square feet of gross floor area devoted to residential uses. The Applicant shall have flexibility to modify this allocation of density if it chooses to develop the Northwest Building for office use in place of the proposed residential use. In that alternative, the project shall include approximately 1,688,500 square feet of gross floor area devoted to office and retail uses and approximately 838,000 square feet of gross floor area devoted to residential uses, as shown Sheet 2.1 of the First-Stage Plans.
4. The lot occupancy of the Modified Project shall be a maximum of 63% based on the Land Area.
5. The maximum height of the East and West 4th Street Office Buildings shall be 94 feet, as shown on the Second-Stage Plans.
6. The maximum height of the East and West Residential Towers shall be the height of those existing structures, with the addition of penthouse structures as shown on the Second-Stage Plans.
7. The maximum height of the Northeast and Northwest Buildings shall be 114 feet, as shown on the First-Stage Plans.
8. The East and West M Street Office Buildings shall have a maximum height of 127 feet, with setbacks of approximately 45 feet on the exterior sides generally as shown on the plan in the record at Exhibit 93.
9. The Modified Project shall include a minimum of 1,087 parking space in a below-grade parking garage or multiple parking garages.
10. The Second-Stage Project shall include a minimum of 505 parking spaces and a maximum of 745 parking spaces in the below-grade parking garage.
11. The Applicant shall construct a minimum of 50,000 square feet of public open spaces in substantial conformity with the Second-Stage Plans.
12. The Applicant shall provide a 90-foot right-of-way for 4th Street, S.W., through the Site as shown on the First-Stage Plans.
13. The Modified Project shall include a minimum of 110,000 square feet of gross floor area which the Applicant shall target for neighborhood-serving retail and service uses,

including, but not limited to, uses such as restaurants, coffee shops, flower shops, video stores, grocery stores, drug stores, banks, electronic stores, bakeries, dry cleaners, and other similar types of uses. Such floor area shall be located at the ground floor level along the M Street frontage and on both sides of the re-opened 4th Street from M Street to the northern property boundary, as generally depicted in the First-Stage Plans.

14. The Applicant shall use best commercially reasonable efforts to provide opportunities for local and small businesses, as certified by RLARC, to occupy 12,500 square feet of retail space included within the Modified Project.
15. The Applicant shall use best commercially reasonable efforts to negotiate a lease with the existing grocery store tenant until August 18, 2007. If a lease is executed, the Applicant shall maintain the space for the existing grocery store to operate while the new store is under construction. In the event that the Applicant is unable to successfully negotiate a lease within the above timeframe, the Applicant shall do the following:
 - a. Honor the existing grocery store lease expiring in 2020; and
 - b. Reserve the proposed grocery location on the east side of the Second-Stage Project and use best commercially reasonable efforts to lease such space to a full-service grocery store (approximately 55,000 square feet) for a term commencing upon the earlier of the termination of the existing grocery store lease or the vacation of such space for any other reason.
16. In the event that the Second-Stage Project is constructed in accordance with the Interim Site Plan Option shown on Sheet 1.11 of the Second-Stage Plans, no additional construction between the East 4th Street Office Building and the East Residential Tower shall be permitted for any use other than the grocery store as shown on Sheet 1.10 of the Second-Stage Plans unless the Applicant returns to the Zoning Commission for approval.
17. During construction of the Second-Stage Project, the Applicant shall maintain the operation of a bank, drug store, and grocery store on the Site.
18. The Applicant shall provide a minimum of 160,000 square feet of affordable housing, with at least eight percent of the gross floor area within the East and West Residential Towers in the Second-Stage Project (which equals approximately 32,000 square feet) being available to households earning 80% of AMI or less. The affordable housing shall be generally evenly distributed between the East and West Residential Towers (a total of approximately 80,000 square feet of gross floor area) and the Northeast Residential Building (approximately 80,000 square feet of gross floor area). The affordable housing units shall be approximately the same proportion of bedroom type and size as the market rate residential units and generally evenly distributed between and within the East and

West Residential Towers, with the exception of the top two floors of each building. No affordable housing is required for the Northwest Building. All affordable housing units shall be maintained as affordable for a period of twenty years, regardless of whether the units are rental or for sale. All other aspects of the affordable housing for the Modified Project shall be as set forth in the Applicant's Prehearing Submission.

19. The Second-Stage Project's East and West 4th Street Office Buildings shall include the sustainable design features set forth in Tab A to the Applicant's Supplemental Prehearing Submission. The Second-Stage Project's East and West Residential Tower shall include the sustainable design features set forth in record at Exhibit 54.
20. The Applicant shall provide approximately 1,000 square feet of office and meeting space for ANC 6D, the Southwest Neighborhood Assembly and other local community groups for a minimum of a 10-year term commencing upon the initial occupancy of the East 4th Street Office Building. Within this designated space, the Applicant shall provide approximately 350 square feet of office space to ANC 6D and approximately 350 square feet of office space to the Southwest Neighborhood Assembly. The remaining space shall be used as a shared conference room.
21. The Applicant shall abide by the Security and Construction Mitigation Plan to be in place throughout the development of the Second-Stage Project. The Applicant shall continue to work with the community and District government as is necessary throughout construction. The Applicant shall enter into plans similar to the Security and Construction Mitigation Plans as necessary for each subsequent second-stage application for the Modified Project.
22. The Applicant shall abide by the Transportation Management Plan. The Applicant shall continue to work with DDOT as necessary to refine the Transportation Management Plan.
23. The Applicant shall maintain the Park Site immediately to the north of the Site as a public park amenity. The Applicant's obligation to maintain the Park Site shall begin after the 4th Street right-of-way is constructed from the Site to Eye Street, S.W., and shall continue for the life of the Modified Project.
24. The Applicant shall enter into an agreement to participate in the Department of Employment Services First Source Employment Program that promotes and encourages the hiring of District residents. Furthermore, in order to further policies established in D.C. Law 1-95, the Applicant shall enter into a Memorandum of Understanding with the District of Columbia Department of Small and Local Business Development to utilize local, small and disadvantaged business in the development of this project. The fully

executed agreements shall be filed with the Office of Zoning and the Office of the Zoning Administrator prior to the issuance of the first building permit for the project.

25. The Applicant shall have flexibility with the design of the PUD in the following areas:
- a. To vary the location and design of all interior components, including but not limited to partitions, structural slabs, doors, hallways, columns, stairways, and mechanical rooms, provided that the variations do not materially change the exterior configuration of the buildings.
 - b. 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.
 - c. To make minor refinements to exterior materials, details, and dimensions, including belt courses, sills, bases, cornices, railings, and trim, or any other changes to comply with the District of Columbia Building Code or that are otherwise necessary to obtain a final building permit or any other applicable approvals.
 - d. To make refinements to the garage configuration, including layout, location, number, and design of parking spaces and/or other elements, so long as the total minimum number of parking spaces is provided.
 - e. To use the Northwest Building for either residential or commercial use, based on market conditions, with such use being specified in the second-stage approval for that building.
 - f. To vary the final alignment and design of the 4th Street right-of-way in consultation with and as approved by DDOT. This flexibility includes the right to make changes to locations of curb cuts, bulb outs, crosswalks, traffic calming measures, parking spaces, and parking meters, as well as the flexibility to make changes to the design and location of paving materials.
 - g. To vary the design and components of the proposed streetscape within the 4th Street right-of-way, including the flexibility to modify paving materials and design, street lights, street furniture, trees, landscaping, and other streetscape elements. This flexibility also includes the right to make changes to the overall design of the streetscape to comply the streetscape standards of the Anacostia Waterfront Initiative, in consultation with DDOT.
26. No building permit shall be issued for this PUD until the Applicant has recorded a covenant in the land records of the District of Columbia, between the owner of the Site

and the District of Columbia, that is satisfactory to the Office of the Attorney General and DCRA. Such covenant shall bind the Applicant and all successors in title to construct on and use this property in accordance with this Order or amendment thereof by the Zoning Commission.

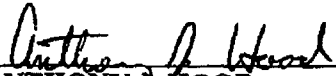
27. The Office of Zoning shall not release the record of this case to the Zoning Division of DCRA until the Applicant has filed a copy of the covenant with the records of the Zoning Commission.
28. The Second-Stage PUD approved by the Zoning Commission shall be valid for a period of two (2) years from the effective date of this Order. Within such time, an application must be filed for a building permit as specified in 11 DCMR § 2409.1. Construction shall begin within three (3) years of the effective date of this Order.
29. The First Stage Approval for the Modified Project approved by the Zoning Commission shall be valid for a period of five (5) years from the effective date of the order granting the same. Within such time, the second-stage PUD application(s) for the Northwest Building, the West M Street Building, and the Northeast Building shall be filed. These second-stage applications may be submitted individually, at the same time, or in any combination thereof. In the event that the grocery store is constructed in the Second-Stage Project or that the existing grocery store surrenders its premises under the existing lease, the Applicant shall file second-stage PUD application for the East M Street Building within five (5) years of the date that the existing grocery store vacates the Site, but no later than December 31, 2020.
30. The Applicant is required to comply fully with the provisions the D.C. Human Rights Act of 1977, D.C. Law 2-38, as amended, D.C. Official Code § 2-1401.01 *et seq.*, ("Act"). This Order is conditioned upon full compliance with those provisions. In accordance with the Act, the District of Columbia does not discriminate on the basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, or place of residence or business. Sexual harassment is a form of sex discrimination that is prohibited by the Act. In addition, harassment based on any of the above protected categories is prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action. The failure or refusal of the Applicant to comply shall furnish grounds for denial or, if issued, revocation of any building permits or certificates of occupancy issued pursuant to this Order.

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The Zoning Commission **APPROVED** the Applications at its public meeting held on October 15, 2007 by a vote of 3-0-2 (Anthony J. Hood, John G. Parsons, and Michael G. Turnbull to approve, Carol J. Mitten and Gregory N. Jeffries, having not participated, not voting).

The Order was **ADOPTED** by the Zoning Commission at its public meeting on November 19, 2007, by a vote of 3-0-2 (Anthony J. Hood, Michael G. Turnbull, and John G. Parsons to adopt; Curtis L. Etherly and Gregory N. Jeffries, having not participated, not voting).

In accordance with the provisions of 11 DCMR § 3028, this Order shall become final and effective upon publication in the D.C. Register; that is on JAN 25 2008.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



JERRILY R. KRESS, FAIA
DIRECTOR
OFFICE OF ZONING

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of Zoning



Z.C. CASE NO.: 02-38A

As Secretary to the Commission, I hereby certify that on JAN 23 2008 copies of this Z.C. Order No. 02-38A were mailed first class, postage prepaid or sent by inter-office government mail to the following:

1. *D.C. Register*
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8. *DDOT (Ken Laden)*
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ATTESTED BY:


Sharon S. Schellin
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SEP 04 2008

Sylvia Bellway
THIS IS TO CERTIFY THAT THIS IS A TRUE COPY
Frank Todd
Recorder of Deeds, D.C.