

April 12, 2018

VIA IZIS

Anthony Hood, Chairman  
District of Columbia Zoning Commission  
441 4<sup>th</sup> Street NW, Suite 200S  
Washington, DC 20001

**Re: Z.C. Case No. 07-13G – Applicant’s Posthearing Submission**

Dear Chairman Hood and Members of the Commission:

The Applicant submits the following materials in response to the issues raised at the March 29, 2018 public hearing regarding the requested PUD modification.

**Building Design Refinements**

As requested by the Commission, the Applicant has re-examined the penthouse design. As shown on the revised drawings included in Exhibit C, the penthouse has been pulled back from the south, west, and east sides so that the screened mechanical area now matches the height and extent of the habitable penthouse and reads as a uniform structure. As a result, the solar panels have been lowered to the building roof. The solar panels will measure approximately 12 – 24 inches in height from the roof. Finally, the Applicant has eliminated the glass guardrail beyond the edge of the penthouse. Other methods will be used to address wind load on the portions of the roof that are south of the penthouse. Revised roof plans, sections, elevations, and perspectives are all included in Exhibit C.

The Applicant has also reconsidered the extent of balconies on the building. Additional balconies have now been incorporated into the lower “slots” on the west portion of the façade on the 3<sup>rd</sup> through 6<sup>th</sup> floors and on the east portion of the façade on the 2<sup>nd</sup> through 6<sup>th</sup> floors. The lower slots are a natural place to incorporate additional balconies without disturbing the overall design intent and approach for the Project. The balconies are shown in plan on page A12 and in elevation on pages A32 and A34 of the attached Exhibit C.

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**Issues Raised by the “DC For Reasonable Development: Ward 6 Study Group”**

At Exhibit 30 of the Record, Chris Otten submitted a three-page letter on behalf of the “DC For Reasonable Development: Ward 6 Study Group” alleging generalized grievances about development impacts in Ward 6 and making conclusory statements regarding the Project. The document does not raise issues regarding the changes to building design and other aspects of this PUD modification, which is the sole issue before the Commission. Rather, the document attempts to re-open issues with the PUD as a whole, which was approved a decade ago and is now final and unappealable. Moreover, the three-page document lacks any substantive allegations of error, and its conclusory allegations and grievances are unsupported by the Commission’s decade-long record of proceedings on this PUD.

Procedural Issues

This case is for approval of a PUD “Modification of Significance.” As the Commission’s own rules make clear, its review of a PUD modification is limited to the impact of the modification itself only, and it “shall not permit the Commission to revisit its original decision.” 11-Z DCMR § 704.4. PUD issues such as rezoning, height, density, and the overall evaluation of project impacts and public benefits that are reviewed and settled in the original PUD application and 2014 PUD modification are not before the Commission, and the Commission cannot reconsider those aspects of the PUD.

Here, the Applicant is merely altering and refining discrete aspects of the building design – materials, entrance locations, and so on. The issues alleged in Otten’s filing, such as the impacts of the character and scale of the PUD, its public benefits, and its consistency with the Comprehensive Plan, are settled and all remain unchanged from the Commission’s previous approvals. As the D.C. Court of Appeals recently reaffirmed, issues regarding character, scale, impact, and consistency with the Comprehensive Plan do not require reconsideration in a second-stage PUD. See Randolph v. D.C. Zoning Commission, 83 A.3d 756, 761-63 (D.C. 2014). For similar reasons and by operation of the Commission’s own regulations, a PUD modification (which is processed as a second-stage PUD pursuant to 11-Z DCMR § 704.3) does not permit reconsideration of such issues.

Otten’s document contains nothing more than collateral attacks on the fundamental elements of an approved PUD that are settled as a matter of law and beyond the scope of this proceeding. The fundamental aspects of the Project, including overall character, scale, rezoning, massing, use mix, affordable housing, project impacts, and consistency with the Comprehensive Plan were all reviewed by the Commission in the original consolidated PUD and addressed by

the Commission in Z.C. Order No. 07-13. Major modifications to the PUD in 2014 altered some of these fundamental aspects, including (1) the height and number of units in the residential component, (2) the change in the nonresidential component of the PUD from an arts school to the current proposed mix of art museum and complementary commercial uses, and (3) the current proposed public benefits package. Again, the Commission reviewed all of these changes in detail and addressed the germane issues in detail in Z.C. Order No. 07-13D. These orders were adopted pursuant to the Commission’s established rules and were not appealed. The PUD orders have been extended pursuant to the Commission’s established rules, and the extensions were not appealed. Therefore, the issues that are raised in Otten’s filing are precluded from consideration because those aspects of the PUD are final and unappealable.

Moreover, there is no evidence that this is an established or organized group that is affected or aggrieved by this PUD modification.<sup>1</sup> The document purports to be on behalf of the “Ward 6 Study Group,” but there is no indication that this group has any established presence or that Otten—who does not live in the neighborhood or even in Ward 6—is an authorized representative of this group. Other than the cursory and unsupported document, filed six minutes before the closing of the record to public comments, there was no opposition to the PUD from any individual or organization in Ward 6. Indeed, the record in this case is filled with otherwise unanimous support and enthusiasm for the PUD modification.

The document was co-signed by Coy McKinney, a neighborhood resident. Again, there is no evidence that McKinney is an authorized representative of the purported group. Moreover, although McKinney appeared at the public hearing, he did so as an “undeclared” witness and in fact expressed support for the Project as a whole, stating that he was happy to see the PUD moving forward.<sup>2</sup> McKinney did not allege that he was aggrieved by any particular aspect of the PUD modification itself.

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<sup>1</sup> Indeed, in another spurious challenge to another Southwest project a few months ago, the purported challenge was presented by Otten’s “DC for Reasonable Development: SW Planning and Safety Group” – again with no evidence of an actual group. See Z.C. Order No. 11-03J(1).

<sup>2</sup> The sole concern articulated by McKinney at the hearing was regarding affordable housing, and his position is at odds with ANC 6D, which explicitly supported the PUD’s affordable housing in its official report as well as in testimony before the Commission. If McKinney had issue with the PUD’s affordable housing, he failed to raise it during the ANC’s multiple meetings considering the PUD modification, including ANC 6D’s March 19, 2018 public meeting, where McKinney was otherwise present and actively participated on another PUD matter immediately before the Randall School PUD discussion.

Finally, Otten's filing consists of cursory and unsubstantiated generalized grievances about the alleged impact of property development in general, rather than specific allegations of harm associated with the building design and material changes associated with this PUD modification. One week later, he raised the exact same issues in the Waterfront Station PUD modification case, in a document that is virtually identical in form and in content to his filing in this case. (Compare Exhibit 30 in this case to Exhibit 86 in Z.C. Case No. 02-38I, both of which are attached as Exhibit A and Exhibit B, respectively.) Similarly, while Otten provides a list of "referenced" Comprehensive Plan policies, he does not actually argue how the PUD modification is inconsistent with any of these policies. As the Commission has previously concluded, an applicant is not obligated to respond to such assertions, because Otten failed to provide a factual or legal basis for any of his claims and he failed to draw a nexus between the alleged deficiency and the current application. See Z.C. Order No. 11-03J(1) at page 31 (FOF 150). In any event, the Commission comprehensively addressed the consistency of the PUD with the Comprehensive Plan in its 2007 and 2014 proceedings, and they are settled issues that are beyond the scope of this PUD modification proceeding.

#### Substantive Issues

Even if Otten's document did raise issues properly before the Commission in this proceeding, the concerns are unsupported by the facts in the previous PUD approvals.

Project Impacts. Otten's filing alleges (without any support) a lack of analysis of the impacts of the project's new housing units, art museum, and other uses with respect to infrastructure, environmental impacts, gentrification and displacement, and public service capacities. Otten ignores ample evidence in the records of both Z.C. Case No. 07-13 and Z.C. Case No. 07-13D that these impacts were thoroughly reviewed and addressed through multiple submissions and studies by the then-applicants as well as multiple agency reports by OP, DDOT, and ANC 6D. These submissions and reports also addressed in significant detail the consistency of the Project with the Comprehensive Plan.

Otten also ignores evidence in the record of the original PUD that directly considered the economic impact of new housing and other aspects of the PUD on the surrounding neighborhood as well as the District as a whole. The original PUD also included a detailed independent "Economic and Fiscal Impact Evaluation" (Exhibit 5F, Case No. 07-13), which spoke to not only the direct fiscal impacts of the PUD (jobs and tax revenue) but also to the many positive indirect impacts of the PUD, which as a "major reinvestment" would create new housing with "significant economic spinoff benefits to all residents of the District" and "contribute significantly to the revitalization and enhancement" of the local community. Economic and

Fiscal Impact Evaluation, Basile Baumann Prost & Associates, Inc., January 22, 2007, page 7. These conclusions were not challenged at the time of the original PUD approval, and even if Otten were not otherwise precluded from litigating these issues in this proceeding, he presents no evidence or data to rebut these conclusions now.

The modifications proposed in this application do not alter the evidence and findings that supported the earlier PUD proceedings. The PUD and its associated impacts remain substantially the same as what was previously reviewed, scrutinized, and approved.<sup>3</sup> In fact, the current PUD has fewer units, less density, and fewer parking spaces when compared to the previous approvals. At the same time, it provides the same amount of affordable housing and other public benefits, better treatment of the historic Randall School, improved sustainable design, more transportation mitigation measures, a larger courtyard, larger units for families, and a contemporary art museum that will now be free to all District residents. Given that the Commission had already concluded—twice—that the PUD’s impacts were not unacceptable given the PUD’s public benefits, the proposed modifications only tilt that balance more in the public interest and further support the same conclusion.

Finally, as indicated in testimony from OP and the Applicant, the impacts of the proposed modification were extensively reviewed by multiple city agencies and entities through the interagency review process, individual agency meetings and discussions, and separate reviews before the Historic Preservation Review Board and the Public Space Committee. Agencies engaged by the Applicant or that otherwise participated in the review of this PUD modification included:

- Office of Planning, including members of the Development Review, Long-Range Planning, Public Space Program, Historic Preservation Office, and the Senior Housing Planner
- District Department of Transportation, including members of the Planning and Sustainability Division, Infrastructure Project Management Division, and Urban Forestry Administration,

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<sup>3</sup> The filing alleges that the PUD now contains “new office space”. This is misleading. The PUD has always contained a mix of nonresidential uses within the historic school building. The proposed modification would allow for a small portion (approximately 18,000 square feet) of this nonresidential space in the historic building to be used for a range of uses, including potentially office as well as arts and institutional uses. The nominal amount of office use will make no difference in impact than the other previously-approved nonresidential uses.

- Department of Energy and the Environment, including members of the Urban Sustainability Administration and Water Resource Protection divisions
- Department of Housing and Community Development, through its Inclusionary Zoning Program Manager
- Department of Parks and Recreation
- D.C. Public Schools
- Department of General Services
- Metropolitan Police Department

The many adjustments and refinements to the PUD modification reflect the outcome of this comprehensive public review process.

Affordable Housing. Otten's filing incorrectly alleges that the PUD fails to provide affordable housing in accordance with District law and regulation. The Project consists of land that was disposed of by the District over a decade ago. Legislation adopted by the Council for the District of Columbia and signed by the Mayor in connection with this disposition and re-affirmed a few years later set the Project's affordable housing requirement at 20% of its residential units for households earning up to 80% of the Area Median Income. Therefore, the same Council that adopted the 2006 Comprehensive Plan provisions applicable to the PUD also approved the affordable housing requirement for this PUD. It is impossible to conclude that the affordable housing commitment is inconsistent with the Comprehensive Plan since both embody the Council's explicit legislative intent. To the extent that District law may now require a different affordable housing commitment for District dispositions, this is irrelevant to this property, which was disposed of previously and has been privately owned for a decade.

The Commission approved the original PUD with the same affordable housing component. At the time of original approval, the project exceeded significantly the then-applicable Inclusionary Zoning requirements and provided an amount and level of affordable housing that, again, the Council itself deemed appropriate. This affordable housing commitment was maintained in the 2014 PUD modification and continues to be maintained in this modification proceeding. Accordingly, the affordable housing component of the Project is grandfathered under the previous inclusionary zoning regulations.<sup>4</sup> The Applicant voluntarily explored changes to the Project's affordable housing program in response to requests from the Office of Planning and ANC 6D (and explained in detail its efforts to do so); however, the Applicant was under no obligation to make such changes because the scope of this proceeding

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<sup>4</sup> To the extent there is a linkage requirement for the PUD, it will be met.

was limited to the aspects of the PUD design being modified. The PUD's affordable housing program received significant community support.

It is hard to understand how the Project's market-rate and affordable housing harms existing area affordability. The Project will create nearly 500 housing units, including 100 new affordable units on currently vacant property. This housing (again, required explicitly by Council legislation) does not displace any existing housing supply; it is purely additive and is perceived as a welcome benefit by the Office of Planning, ANC 6D, and other members of the community. To this end, Otten misrepresents the ANC's position on the affordable housing. The ANC explicitly supported the proposed level and amount of affordable housing not only in previous applications but in this application as well.

Family-Sized Units. Otten alleges that the proposed townhouse units are inconsistent with Comprehensive Plan guidance regarding family housing. This is misleading. For one, there is no requirement for the Project to provide such "family-sized units". The family-sized housing units that are provided are purely an incidental and additional public benefit over and above the benefits already deemed acceptable for the PUD. For another, the distinction between a two-bedroom plus den and three-bedroom unit is largely immaterial. Either way, they units will consist of the same size and two-level configuration, with two bedrooms on the upper floor and a third room and living spaces on the lower floor. The sole distinction will be whether the third room has direct access to a window or not (and in the current design, all 19 units are designed with a window for that third room, making them three-bedroom units). What is clear is that the proffered units are larger in size and feature ground-level access, which will make them attractive to families and particularly families with young children who desire larger units with direct access to the outside.

Support for Entrepreneurs / Employing Local Residents. Otten claims that the Project fails to make any part of the nonresidential portion of the project affordable or free for the neighborhood. Much like family-sized housing, this is a false issue, since there is no such requirement. Indeed, even if it were a requirement, the PUD will provide multiple benefits that will support local artists and construction workers in ANC 6D and beyond, including:

- Annual exhibition of artwork by residents of ANC 6D;
- Resources to support an annual ANC 6D visual arts project;
- First Source Employment Agreement, with special consideration for ANC 6D residents; and
- Certified Business Enterprise Agreement, with a commitment to 35% participation by local, small, or disadvantaged businesses in the design, development, and construction for the project.

These measures are in addition to other benefits that are free to the District neighborhood, such as public access to the courtyard, public and private street network improvements, neighborhood meeting space and arts support, and of course the art museum itself.

### Conclusion

The PUD process in the District of Columbia is a detailed and comprehensive public review of catalytic development projects that provide lasting benefits to the surrounding neighborhood as well as the District as a whole. Notwithstanding Otten's unsupported and conclusory comments to the contrary, the record in this PUD reflects a decade of extensive dialogue and compromise with a broad range of interested stakeholders, including community representatives, neighbors as well as public agencies and entities. The end result of years of discussion about the Randall School PUD is a project that will advance a number of District planning goals and deliver a host of public benefits, including many policies and objectives of the Comprehensive Plan and specific features that have been directly mandated by the D.C. Council.

The PUD has a broad range of vocal public support that has consistently and enthusiastically urged the Commission to move this PUD forward. We urge the Commission to advance the extensive efforts to preserve the historic Randall School, deliver hundreds of market-rate housing and affordable housing units, and create a world-class contemporary art museum in accordance with a decade of previous decisions and the clear public mandate to do so.

Please feel free to contact the undersigned if you have any questions regarding the above.

Sincerely,

/s/

David M. Avitabile

Enclosure

cc: Mark Rivers / Joe Carrol, Lowe Enterprises  
Gail Fast, ANC 6D01  
Cara Shockley, ANC 6D02  
Ronald Collins, ANC 6D03  
Andy Litsky, ANC 6D04  
Roger Moffat, ANC 6D05  
Rhonda Hamilton, ANC 6D06  
Meredith Fascett, ANC 6D07



**CERTIFICATE OF SERVICE**

On April 12, 2018, I caused a copy of the foregoing letter and enclosure to be delivered by hand or electronic mail to the following:

Matthew Jesick  
Office of Planning  
1100 4<sup>th</sup> Street, SW, Suite E650  
Washington, DC 20024

Aaron Zimmerman  
District Department of Transportation  
55 M Street SE, 5<sup>th</sup> Floor  
Washington, DC 20003

ANC 6D  
1101 4<sup>th</sup> Street SW, Suite W130  
Washington, DC 20024

/s/ \_\_\_\_\_  
David Avitabile