DONOHUE & STEARNS, PLC

February 20, 2018

VIA IZIS

Chairman Anthony Hood
D.C. Zoning Commission
441 4th Street, N.W., Suite 200S
Washington, D.C. 20001

Cc: Christopher Collins (via email), ANC 3E (via email) and ANC 3D (via email)

Re: ZC Case 16-23/ Valor Development, LLC/ Square 1499
Decision Date February 26, 2018

Chairman Hood:

The gaps, omissions and inaccuracies in the Applicant's most recent submission confirm Citizens for Responsible Development's (CRD) position that the Design Review Application (the Application) for the Ladybird (the Proposal) is not ready for favorable consideration by the Zoning Commission. CRD respectfully submits that the Application does not meet the Design Review Standards and, therefore, should be denied.

I. Transfer of Density

A. Transfer Results in Increased Density in Violation of Design Review Regulations

In its February 12, 2018 filing on density issues, Valor acknowledges that its Application for Design Review proposes a Project with 277,278 GFA on a lot (Lot 807) where the matter of right density allowed is 184,514 GFA. *See* Applicant's Post-Hearing Statement, Tab C, Density Transfer Summary (Applicant's Density Transfer Summary) at 2 (Exhibit 211C).

There is no dispute on these facts. Both the Applicant and CRD agree that the proposed development on Lot 807 will dramatically exceed the allowed matter-of-right density by approximately 50%. At the close of the hearing on January 25th, Valor was asked about the density on its lot alone – the FAR. In other words, the gross floor area (GFA) of the Ladybird (2 buildings) divided by the area of Lot 807. This was not provided, at least not that we have seen. By our calculations, the answer is 277,278 GFA on Lot 807 divided by 79,622 SF – 3.48 FAR.

The Applicant, however, claims the proposed Project does not amount to an increase in density because the resulting cumulative density for an amalgam of lots is just under the limit

for the lots taken together. The Applicant and the Office of Planning (OP) both argue that the resulting transfer of density between lots is authorized in a Design Review even though the resulting density in the lot on which construction is to occur far exceeds matter-of-right levels. *See id.* and OP Supplemental Report (Exhibit 215).

The Design Review regulations, however, warn in several sections that Design Review is not to be used to increase density. *See e.g.* Zoning Code at Subtitle X at Sections 600.1(e), 600.5 and 603.1. It could hardly be more obvious that in this case the Applicant is planning to use the Design Review process precisely to construct a project with 50% more density than would be allowed matter-of-right. The diagram in Applicant's Post Hearing Statement clearly describes this transaction as a transfer of density to Lot 807.

We urge the Commission to review the most recent renderings provided by Valor (*see* Applicant's Post-Hearing Statement, Tab A, Architectural Plans (Exhibit 211A)) and the more accurate ones provided by CRD (*see* CRD Visual Impact Study (Exhibit 213, 213A and 213B). The Applicant's renderings continue to be misleading and illustrate that the Project is radically out of context with both the residential neighborhood it abuts to its north and east and the commercial buildings to its south and west which sit along Massachusetts Avenue.

Contrary to the Comprehensive Plan, and sound urban planning, this Application proposes to move density *off* a major thoroughfare and *towards* a residential neighborhood. The Zoning Commission should ask itself, can this possibly be the kind of project for which the Design Review process – "intended to be shorter and less intensive than the PUD process and allow less deviation from matter-of-right zone standards" – was intended? As shown in the renderings referenced above, the end result of the Application here would result in bulk, not bulk control.

B. Design Review and PUDs Distinguished

The authority and precedent cited by the Applicant at the January 25, 2018 hearing and in its Density Transfer Summary, and by OP in its Supplemental Report, for authority to transfer/aggregate density refer to Planned Unit Developments (PUD). The Heurich Mansion case was a PUD. However, it does not follow that because density transfer may be authorized in a PUD that it is authorized in Design Review.

One purpose of the PUD process as outlined in the Zoning Ordinance is to authorize flexibility on density: "The purpose of the planned unit development (PUD) process is to provide for higher quality development through flexibility in building controls, including building height and density." *See* 11- X DCMR §300. By contrast, the Design Review process precludes its use to increase density and specifically states that an "increase in density shall not be permitted as part of a design review application." 11-X DCMR § 600.5. *See also* §§ 600.1(c), 600.1(e) and 600.2. The purpose of Design Review is to provide "flexibility in building bulk control, design, and site placement without an increase in density or a map amendment." *See* 11- X DCMR §600.1.e. Not only does the list not authorize flexibility on density as the PUD list does, it specifically prohibits

such increases under Design Review, a less intensive process. Design Review is available when issues of density are not implicated.

OP offers a strained interpretation of the legislative history of the PUD and Design Review rules in its Supplemental Report, referring to history showing that design review was originally part of PUD revisions. OP claims that "movement of the design review provisions to a separate chapter appears to have resulted in some of the process aspects of a PUD inadvertently being left out of the new chapter." This position flies in the face of all tenets of legislative construction, which state that plain meaning prevails and that a rulemaking body intends to do what its rules state. Even if Design Review was once in a list of potential forms of a PUD, it was moved out because it was different, not because it was the same. As such, it was made subject to different rules, not the same rules. Here, the deletion of design review from the PUD authority, as well as its later enactment of separate authority, clearly should be interpreted to mean that Design Reviews are not PUDs.

The Applicant and OP make much of a provision in the Design Review rules indicating that "[a]ll property included in a design review application shall be contiguous except that the property may be separated only by a public street, alley or right-of-way," 11-X DCMR § 601.4. But neither that provision nor any other provision in the Design Review rules expressly authorizes allocating FAR between sub-lots with different owners in a Design Review application, as is expressly authorized in a PUD. As noted above, the Design Review regulations clearly prohibit an increase in density as part of a design review application. The Commission should recognize and enforce the plain meaning of the regulation.

The fact that a provision is included in a PUD setting and not in Design Review is not presumptive evidence of an oversight, but presumptive evidence that it was not intended to be included in the latter. Authority for transfers of density between lots that could result in density on a single lot far exceeding matter-of-right levels cannot be gleaned from a plain reading of the Design Review rules. In fact, the legislative history reinforces the plain meaning of the Design Review rules.

In support of its claim, OP indicates that it confirmed certain procedures with the Office of Attorney General and Zoning Administrator. *See* OP Supplemental Report at 2. This is an odd formulation, and certainly not the promised legal opinion. OP does not claim it requested an opinion from either agency upon full review of the file, nor does it offer any such written opinion. The unequivocal implication of the plain terms of the regulation and its placement in a separate chapter from the PUD provisions is that the Design Review and PUD processes were intended to be very different, particularly on questions surrounding density.

The Applicant has submitted the application under Design Review, but seems to want the benefits of PUD review as well. They cannot have it both ways. They cannot claim that the market, HAWK, and alley improvements should not be considered as "amenities" (because those are only required under PUD analysis) and then simultaneously seek consideration under

PUD standards for their proposed transfer of density. Also, as CRD has noted, neighbors do not consider these offerings to be benefits.

C. The 1979 Declaration of Easement and Agreement

Another reason to reject the proposed transfer lies with the 1979 Declaration of Easement and Agreement (the "Easement") referenced in the Applicant's Post-Hearing Statement. The Easement is a recorded instrument that is memorialized in the DC land records; its purpose was to facilitate the construction of what now is the AU Building.

As the Applicant acknowledges, the Easement allocates density between Lot 806 and Lot 807. In addition, the Easement provides that "within each of the two (2) described areas [Lots 806 and 807] all remodeling, additions, or replacement construction shall not be in violation of the requirements of the Zoning Regulations for Record Lot 9 [the record lot for both Lots 806 and 807]."

The Applicant effectively concedes the ongoing binding nature of this Easement requirement when it states that "[t]he overall maximum GFA permitted on Record Lot 9 is 363,816 GFA. Subtracting the existing GFA of the AU Building, the amount of unused density is 184,514 GFA." *See* Applicant's Density Transfer Summary at 2.

Construction on the two lots is capped by the Easement at what could be allowed on the two lots under governing Zoning rules. The parties to the Easement (the Burka family entities and American University as a successor in interest) may not authorize this Project and at the same time comply with the legal covenants to which they are bound in the Easement. Valor is therefore prohibited from attempting to utilize additional GFA through the transfer from Spring Valley Shopping Center (SVSC) since doing so would surpass the maximum GFA allowed on Record Lot 9. Any such transfer from the SVSC would literally rescind with one hand the limitation promised by the Easement with the other.

II. Development Agreements as between Valor/ American University and Valor/ Spring Valley Shopping Center

Valor has refused to submit the two development agreements (each of which is with a party to the Application) that it asserts allow for transfer of density between the various parcels. The Zoning Commission directed the Applicant to provide these agreements, which presumably document transfers that are fundamental to approval of the Application. Valor has cited privacy concerns in declining to provide the agreements. One wonders if the agreements are really complete. If so, those concerns could have been easily addressed by having representatives from American University (AU) or the SVSC provide affidavits attesting to the fact that agreements were in development and expected to be finalized in the near future. Valor once again asks the Commission to rely on its word. If either AU or SVSC has concerns about specific aspects of these development agreements, why not redact the financial considerations and let the Zoning Commission decide if the redaction is appropriate? Perhaps Valor can

explain, but the explanation set forth in Will Lansing's Affidavit is simply inadequate. This omission by Valor seriously impacts the ability of the Commission to evaluate the entire application. CRD's additional statement on the Applicant's failure to provide the agreements is attached as Attachment B.

The parking agreement with American University raises similar questions. Since 1979, Lot 807 has been under an obligation to provide 236 parking spaces for the benefit of Lot 806, 4801 Massachusetts Avenue, N.W. Valor at one point told the ANCs and DDOT that it had an agreement with AU under which all but 56 of the spaces would be dedicated for use by the residents and retail customers of the Ladybird. It now says that they are 'in negotiations' with AU to modify the 1979 agreement. If this agreement is not finalized, then there is no definitive way to know whether and how the parking requirements will be satisfied.

III. Historic Preservation

In the Applicant's February 12th post-hearing submission, they mention the Heurich Mansion Case. Like the other cases cited by Valor in support of its authority to move forward with the proposal without Historic Preservation Review Board approval, the Heurich Mansion case is clearly distinguishable from the present proposal. It was considered and decided prior to the statutory protections for historic landmarks in place today. In fact, all of the cases relied upon by Valor can be easily distinguished from the present case (PUDs, rezoning cases, no existing historic landmarks on parcels proposed to be combined). Attachment A provides a detailed analysis.

IV. Inaccurate Renderings – Views from 48th Street, 49th Street and Windom Place

The Commission asked the Parties for photographs and simulations taken from the adjacent neighborhood so that they could effectively evaluate the impact on the neighbors. More specifically, the Commissioners voiced concerns about shadowing and privacy given the height differential between the surrounding residences and the proposed Ladybird. While Valor has insisted its renderings from Massachusetts Avenue and Windom Place are accurate, we urge the Commission to look at the views provided by CRD from Yuma Street, from the alley between 48th and 49th Street and especially the reverse line-of-sight view from the terrace looking down on the homes on Yuma and nearby. CRD has provided significant detail on the methodology used to develop the simulations and the adherence to best practices and industry standards. The resulting visuals accurately reflect the negative impact on the homes as well as the incompatible scale of the Ladybird with the neighborhood.

In the visual representations initially provided by Valor, there were no contextual existing structures to use to evaluate the size of the proposal or with which to compare its height (as is standard practice in visual impact studies). Surrounding homes, utility structures, cars, etc. have all been removed and the Ladybird is shown alone in a vacuum. Only in response to CRD's submissions did Valor add the requisite context needed to effectively consider the impact on the

surrounding homes – but even when they did, the mass, scale, and location of the Ladybird is not correct and is presented as significantly smaller than it will be. Valor has yet to produce accurate renderings to demonstrate the visual impact of such a massive development on neighboring streets. On rebuttal, Sarah Alexander, who was qualified as an expert witness (architecture), stated she took photographs in the exact spot (the vehicular entrance to the SVSC) as did Digital Design and Imaging Services (DDIS). Ms. Alexander stated that she took the photograph with her own iPhone 7 and was certain it was not with a wide-angle lens. In its 2/12/18 submission Valor now admits that the photographs presented on 1/25/18 were, in fact, taken with a wide-angle lens. CRD, in its 2/12/18 submission, showed how misleading the Valor images were, pointing out that Valor's representation of the Ladybird building was distorted and undersized by at least 19 percent. The Applicant has since submitted new renderings. Exhibit 211A. They say there is "very little difference" between the previous and new renderings; however, even the new renderings are inaccurate as they also were based on a wide-angle iPhone 6 camera. While the building extends further to the north than in the previous rendering, it does not line up with the correct line of sight, as shown in by DDIS in Exhibit 213A2, pp.16-17, 20.

CRD's testimony is that "best practices" for such photographs is use of a 50-mm lens, which is what was utilized by DDIS. We maintain CRD's are the only reliably accurate photo simulations.

V. No Formal Commitment to Project Amenities

A. No Concrete Plans for a Grocery Store

The Applicant's original proposal promised a 56,000-square foot, full-service grocery store. The most recent iteration of the project has reduced the size of the market space to 13,000 square feet for a specific tenant – Balducci's. This 77% reduction in what Valor offered as its primary "amenity" should not be overlooked or understated. In its analysis of the economic development element of the Comprehensive Plan, the Applicant continues to refer to this market a "full service grocery store." This is incorrect; Balducci's is a gourmet food market that differs greatly in nature from a grocery store. While it provides a variety of prepared and gourmet food, shoppers seeking staple items will still have to travel to the nearest true grocery store.

In addition, the only commitment to the now greatly reduced market is in the Memorandum of Understanding (Exhibit 138A) between Valor and ANC 3E. The MOU states that the terms (including that committing to a 13,000-square foot market) shall be enforceable even in the case that the Zoning Commission should decide not to make them conditions of approval. Other than the Applicant's word, what guarantees this? There is varying legal precedent on the enforcement of MOUs. Even assuming the elements (mirroring those of a formal contract) were found to be present, what assurance is there that the ANC would pursue its enforcement? Changes in leadership, priorities for neighborhood development or a myriad of other circumstances could mean that the promise of a market never comes to fruition.

B. LEED Certification

Similarly, the Commission has only the Applicant's word that it will meet the gold level status. There is nothing in place to insure that the Applicant does so or incorporates elements into the design that guarantee the gold level status. The specifics on how the Applicant will attain LEED gold status are vague.

C. Alley Improvements

The Applicant has promised improvements to the trash areas in the alley (consolidation and enclosure of trash dumpsters that serve the SVSC). These improvements have not yet been approved by public space, nor has the Applicant documented any agreement with SVSC.

The management plan relies on the SVSC's agreement and coordination of all vendors, retailers and their respective delivery services. The Will Lansing Affidavit says nothing about the proposed loading management plan. This plan would require the coordination of schedules for trash and deliveries, the fencing and reorientation of trash areas, etc. So far, the only mention of this plan has been by Valor with both Co-applicants remaining silent. Moreover, the alley off 49th Street is not public, but rather, is owned by AU. Much like the parking issue, neither the community nor the Commission have been provided any evidence of AU's approval of such a plan.

VI. Inclusionary Zoning

Under 11-C DCMR § 1003.1, the required inclusionary zoning set-aside is "the greater of ten percent (10%) of the gross floor area dedicated to residential use including penthouse habitable space as described in 11-C DCMR § 1001.2(d), or seventy-five percent (75%) of its achievable bonus density to inclusionary units plus an area equal to ten percent (10%) of the penthouse habitable space as described in 11-C DCMR § 1001.2(d)."

Using the Applicant's tabulations [Pre-hearing submission, Exhibit 114A1], Ms. Marilyn J. Simon in her prepared testimony at the January 25, 2018 hearing (Exhibit 166) examined this requirement based on the bonus density that the Applicant is proposing. If the achievable bonus density is the bonus density actually proposed, then the required inclusionary zoning set-aside is 56,210 SF, significantly more than the 28,320 SF set-aside offered in the Application.

In their post-hearing submission, the Applicant states that this calculation is incorrect for the several reasons. First, the Applicant states that the IZ set-aside calculation should not include the existing buildings on Lots 802, 803, and 806. While inclusionary bonus density has not been added to these buildings, the Applicant is using IZ bonus density attributable to those sites for Lot 807. The actual IZ bonus density for this Project [71,532 SF] is the difference between the total square footage of the Project [473,502 SF] and the matter-of-right square footage [401,970 SF]. If, these sites are not included in the calculation of the achievable bonus density, the floor area of the Project exceeds the amount allowed as a matter-of-right with the

IZ bonus density. The achievable bonus density cannot be less than the actual bonus density claimed. If the Applicant is using an IZ bonus of 71,542 SF plus habitable penthouse space, the required IZ set-aside is at least 56,210 SF.

Second, the Applicant states that under Ms. Simon's interpretation of the Inclusionary Zoning regulations, the set-aside for the Project would exceed the 20% IZ bonus density. This clearly is false. The Applicant is claiming IZ bonus density of 71,542 SF and habitable penthouse space of 25,611 SF. Ms. Simon's calculation of the set-aside requirement is clearly less than the bonus density claimed.

Finally, the applicant states that the basic element of the IZ program, as discussed in the IZ proceedings, is a requirement that the set-aside be between 8% and 12.5% of the residential square footage. However, the two components of the IZ requirement are separate tests and date from the first Inclusionary Zoning rulemaking [Notice of Final Rulemaking, ZC Order 04-33, May 18, 2006], and were included in every subsequent modification. For projects with a substantial commercial component, the calculation based on achievable bonus density will be significantly more than 10% of the residential square footage.

Under 11-X DCMR §601.1, no flexibility can be granted from the Inclusionary Zoning requirements through the design review process. The Applicant has not demonstrated that this Project satisfies the Inclusionary Zoning set-aside requirement.

Conclusion

Despite more than two years of design, discussion and debate, Valor's application is simply incomplete. It may never be ripe for decision, but as of February 2018, there are too many questions that directly relate to the Design Review standards and other issues CRD has raised that remain unanswered or unsatisfied. CRD respectfully requests that the Commission deny the application.

Thank you for your consideration.

Sincerely,

Edward L. Donohue

Enclosures:
Attachment A
Attachment B

REBUTTAL ON HISTORIC PRESERVATION ISSUES

I. The Cases Cited by Valor Are Inapplicable to Developments that Include Historically Landmarked Sites

During Valor's (the "Applicant") rebuttal at the January 25,2018 Zoning Commission hearing, counsel for the Applicant cited a number of cases that purportedly support Valor's "Ladybird" project and have no precedential value. None of these cases are applicable to the proposed project.

A. Three Cases Cited by Applicant Have No Bearing on the Proposed Project

Among the cases referenced by the Applicant were three zoning cases (ZC No. 15-27, ZC No. 08-07, and ZC No. 14-02). According to the Applicant, the Commission approved projects with multiple buildings on multiple lots where densities were aggregated overall in order to satisfy or come into conformance with the zoning regulations. These cases have nothing in common with the "Ladybird" project and consequently have no precedential value.

- First, none of these cases involved a Design Review application. Rather, each of these cases involved PUDs.

- Second, all three cases also included requests for rezoning. ZC No. 15-27 included a request for rezoning from C-M-1 (*i.e.*, sites for heavy commercial and light manufacturing activities employing large numbers of people and requiring some heavy machinery under controls that minimize any adverse effect on other nearby, more restrictive districts) to C-3-C (*i.e.*, sites for medium-high-density development, including office, retail, housing, and mixed-use development). The PUD site in ZC No. 08-07 involved a request to rezone multiple zone districts, including C-3-A/C-M-1, C-2-A, and C-2-A/C-3A, to a C-3-A zone district. In ZC No. 14-02, the applicant sought rezoning from the R-5-A zone to the R-5-B and C-2-A zone districts.

- Third, none of these cases involved the combination of lots that included an historically landmarked site.

Thus, these three cases are simply examples of subdivision, rezoning, and development involving non-landmarked sites. Here, the Valor project incorporates an historically landmarked, and thus protected site, and therefore poses challenges and restrictions that were not present in the three cases above. This is not only the first project undergoing the new Voluntary Design Review process, it will be the first that also attempts to incorporate an historically designated landmark in an application and will set a precedent for future such cases.

B. The McMillan Case Has Not Yet Been Decided and Lacks Precedential Value

The Applicant also cited the McMillan case (ZC No. 13-14). However, he failed to mention that the D.C. Court of Appeals (DCCA) remanded the Commission's decision, finding that the Commission had not adequately explained the reasoning behind its support of high-density development rather than medium- to moderate-density. The Court of Appeals also remanded the McMillan case to the Mayor's Agent for Historic Preservation because the Applicant failed to demonstrate that the development benefits outweighed the preservation losses. To date, the Mayor's Agent has yet to file his final decision, which

will then go back to DCCA for a final ruling. Until a final ruling by the court, the McMillan case cannot be cited as a precedent for any decisions in this case.

C. Valor's Reliance on the Heurich Mansion Case Is Similarly Misplaced

The Applicant claims that the proposed transfer of non-residential density from the Spring Valley Shopping Center (SVSC) to the Valor Lot would serve to preserve the historic SVSC from future development efforts. The Applicant has, however, failed to demonstrate how this transfer of density would provide *any* preservation benefits that would actually "retain and enhance" the landmark as required under D.C.'s Historic Landmark and Historic District Protection Act (the "Act").[1]

Valor has cited the Heurich Mansion case (Zoning Order 101[2]) as an example of the use of transfer development rights as a tool for preservation. During the Applicant's rebuttal on January 25, 2018, the Applicant's attorney stated:

> But there is a court case that's very similar to this one, it was an aggregation of density in order to relive [sic] development pressure from a historic property, not within a TDR zone, not within a CLD. … The Commission said that the sale of the development rights will ensure the preservation of the Mansion.[3]

The Heurich Mansion case is inapposite to Valor's proposed development. This case was decided well before the current statutory protections for historic landmarks had been put in place and consequently did not address the legal framework within which the Valor proposal must be considered. When the Heurich PUD application went before the Commission in 1974, there were *no* historic preservation enforcement options available to protect the Heurich Mansion or any other landmarked building. The Heurich Mansion was added to the D.C. Inventory in 1964 and to the National Register of Historic Places in 1969 by the Joint Committee on Landmarks of the National Capital. The Joint Committee was established in 1964 and was the predecessor to the Historic Preservation Review Board (HPRB), which was formed in 1983. Following passage of the National Historic Preservation Act in 1966, the Joint Committee on Landmarks became the "state" historic preservation review body. Yet, it had no enforcement power. The *Washington Post* noted that a "little bronze plaque is as easily bulldozed as granite columns or marble entablatures."[4] In 1973, after lobbying efforts by local preservationists, the City Council finally implemented only one of the protection measures suggested by the Joint Committee: a delay in any demolitions.

By 1974, the year of the Heurich Mansion PUD application, the Historical Society of Washington, DC (HSW) was facing financial hardship and had several options available for the Heurich Mansion, which was owned by, and served as the headquarters of, the HSW. These options included HSW selling the historic house to a developer who might have razed it and built a matter of right project on the site or, alternatively, subdividing the large lot and selling off the new lots.

Instead, HSW took advantage of a new zoning option: selling its development rights in order to be able to stay in the Mansion and maintain it. HSW sold 82,000 square feet of its 95,590 square feet that **could be developed** on HSW's property for $525,000. Importantly, the transfer agreement stipulated that

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[1] D.C. Law 2-144, as amended through March 2, 2007

[2] Case No. 71-30. February 1, 1974

[3] Transcript, p. 170

[4] "A Brake on the Bulldozers," *Washington Post*, Sept. 24, 1973, at A26.

the proceeds of the sale were to be used for the maintenance of the Heurich Mansion, which was rapidly falling into disrepair.

Unlike the situation with the Heurich Mansion in 1974, SVSC *already* benefits from the maximum of legally enforceable historic protections. Consequently, such a transfer as a preservation tool will not provide any additional historic protections of SVSC that it does not already have. In any event, there is absolutely no indication that the proceeds from a transfer of development rights will be put towards preservation and maintenance of SVSC. As the Applicant has refused to provide the development agreement, it is not possible for the Commission or the parties to this proceeding to ascertain whether any specific terms for the use of the sale proceeds would purport to provide any protections to the SVSC landmark.

Thus, key differences between the Heurich case and the Valor project are that HSW owned property that *could be developed* and *actually held the rights to that development*. Here, Lots 802 and 803 on which the landmarked SVSC is located are fully developed and improved with the shopping center building and parking lot, both of which are equally defining elements of the historic landmark. The parking lot is as much an integral part of the landmark as is the shopping center building itself,[5] and hence its original name "Massachusetts Avenue Parking Shops." Because it is listed in the DC Inventory of Historic Sites and protected under the Act, (1) no new floors may be added above it, (2) no additions may be placed in front, beside, or behind it; and (3) the parking lot may not be filled in with new development. Accordingly, the site has no real unused gross floor area and no further development potential. It is fully built. Consequently, the SVSC has no development rights to transfer. In other words, unlike the Heurich PUD, since further development cannot be done on SVSC's own site because it is a protected historic landmark, such development is not a right and is therefore not transferable. There is simply nothing here to transfer.

The Applicant also added that the transfer of development rights "will reduce the economic feasibility to ever selling the property, because the development on said property will be permanently reduced."[6] Under D.C. preservation laws and protections, however, selling SVSC at any time in the future, with or without the purported development rights that Valor claims that the landmark possesses, would be no more or less risky to the landmark. Thus, any permanent reduction of development of the SVSC is not an historically tangible benefit for the landmark, either.

II. The Testimony of Valor's Expert Witness Fails to Support the Proposed Development

During the Applicant's rebuttal, the Applicant's expert witness, Ms. Emily Eig, offered testimony that not only failed to support the proposed project but in fact confirmed that review by the historic preservation bodies is required. Initially, Ms. Eig was asked by the Applicant's counsel if she agreed with the fact that the ability to transfer unused density from the shopping center site to the Valor site through the flexibility provided under the voluntary design review would provide additional protections for the future of the shopping center?[7] To this, Ms. Eig answered:

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[5] The National Register nomination for SVSC states: "Shaped by the automobile, these shopping centers were uniquely American. The Massachusetts Avenue Parking Shops survives as an early example of the type, with off-street parking provided by a forecourt." Antoinette Lee and Kim Williams, 1989-2003, National Register of Historic Places Nomination: Massachusetts Avenue Parking Shops.

[6] Hearing Transcript of January 25, 2018 ("Transcript"), page 156.

[7] Ibid, page 171.

> Yes. Because if one takes away the potential for additional development on the site, then the risk to that site being altered goes down.

She continued:

> It might be altered, but it will not have new development.

Ms. Eig failed to inform the Commission, however, that this is the same level of protection from potential additional development that SVSC, as an historically landmarked building, already possesses under historic preservation laws, with or without any transfers of density.[8]

Ms. Eig then added:

> For instance, had that happened across the street on the shopping center across the street, which is an individual landmark, if there had been no ability to add any floor area or ratio space to that site, there would have been no development on that site. And that was in fact approved by the Review Board.[9]

Ms. Eig was referring to the historic landmarked shopping center at 4860 Massachusetts Ave., N.W., which has significant differences with the Valor project site. And as with the Heurich case, this is yet another misapplication by Valor of a case as precedent for this project. The landmarked shopping center at 4860 Massachusetts Ave., N.W., is comprised of multiple buildings, situated on a single record lot (Square 1500, Lot 5) that is owned by a single owner (Washington REIT), with its buildings oriented around parking in the center. The Historic Preservation Review Board determined that for this site, the parking lot was not a contributing feature of the shopping center,[10] and that the site therefore had unused and developable square footage and FAR. No transfer of floor area among unrelated parties was involved or even necessary for the construction of a two-story retail and office building on a portion of its parking lot. The example cited by Ms. Eig is therefore again inapposite.

III. Creation of Valor Project Lot Requires Historic Preservation Review

Valor is proposing to combine lots owned by three different and unrelated owners, one of which is a fully-developed historic landmark, to create a project lot. Ms. Eig was asked by counsel for the Applicant about the purview of D.C. historic preservation bodies over lot subdivisions. She responded:

> If the historic landmark of the, what's called the Massachusetts Avenue Parking Shop Center, shopping center, actually remains on its own lot, as it is today, and there is no subdivision, formal subdivision of it to a different lot, either being aggregated to it or divided from it, then there would be no Historic Preservation Review Board review. That lot remains intact, as I understand it in this proposal. If that's different, then there -- and it was in fact joined, then there would be review. But if there is no joining of those two lots, there is no review by the Historic Preservation Review Board.[11]

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[8] Ibid, page 156.
[9] Ibid, page 156.
[10] D.C. Historic Preservation Review Board, H.P.A. 15-252, April 23 and 30, 2015.
[11] Transcript, page 157.

In fact, the two SVSC lots ***will have to be joined to others***, either through a formally recorded subdivision, or by the creation of a tax lot to create a new buildable site. In the Office of Planning's Supplemental Report, the Office of Planning stated that it had confirmed with the Office of Attorney General and the Office of the Zoning Administrator that the following procedure of lot consolidation was consistent with the intent for processing a design review application: A "lot" used for the boundaries of a Planned Unit Development (PUD) or Design Review may be a tax lot or a record lot (hereinafter called the "Project-lot").[12] As Ms. Eig's testimony in fact clearly confirms, the creation of such a "Project-lot" places it squarely within the purview of the historic review bodies of the District of Columbia.

Because Valor and its co-party applicants, American University and Regency, have refused to make available to the Commission and the public their agreements with each other, precisely how Valor plans to meet the requirements to create the Project-lot remains unknowable. In order to avoid joining SVSC into the creation of a record lot (which itself would change the boundaries of a landmark lot and trigger historic preservation review), it must be assumed that Valor is therefore creating a new tax lot (Tax and Assessment or "T&A") to create the project site.

To create the Project-lot, SVSC T&A Lots 802 & 803 and Record Lot 9, which contains two separate T&A lots, Lots 806 and 807, will have to be consolidated. This subdivision to create a new project tax lot would result in appending to Lots 806 and 807 the lots of the historic landmarked SVSC. Historic landmarks and any changes to their lots are subject to historic preservation review, including the creation, as proposed here, of a T&A lot. Historic preservation review is also required for the division of any lot of record into theoretical building lots under Section 2516 of the DC Zoning Regulations.[13]

There are legal steps mandated by the Act in the creation of any subdivision. The Historic Preservation Office (HPO) must sign off on <u>all</u> applications to subdivide property in the District after reviewing the legality of the subdivision, and the creation of any theoretical lots, whether or not it is in an historic district. The HPO also reviews any subdivision of historic property for compatibility with its historic character. Generally, and as Ms. Eig pointed out during her questioning by counsel for the Applicant, review by the Historic Preservation Review Board (HPRB) would be required for any subdivision of historic property involving either the division or assembly of land into one or more lots of record. It is also required for the division of any lot of record into theoretical building lots under Section 2516 of the DC Zoning Regulations, as is proposed with the Valor project.

This question of lots of record vs T&A lots, what constitutes a "subdivision," and the purview of D.C. historic preservation bodies over lot subdivisions was decided in the case of *Re: Williams-Addison House* in 2008.[14] There, the Applicant argued against the Mayor's Agent for Historic Preservation's jurisdiction[15] over a subdivision that created T&A lots in the Georgetown Historic District, based on the theory that the plain meaning of subdivision includes only the division or assembly of land into one or more lots of record. Thus, the jurisdiction of the Mayor's Agent was dependent upon whether a T&A lot was a lot of record. The Mayor's Agent found, however, that the creation of a T&A lot, which creates a new buildable site (or allows for additions to an existing building on a separate T&A lot) is a theoretical subdivision. The Mayor's Agent determined that he does therefore have jurisdiction over the creation of T&A

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[12] OP Supplemental Report for ZC #16-23, Voluntary Design Review for Valor Development, LLC (Square 1499, Lots 802, 803, 806, and 807). Exhibit 215, filed 02/12/2018.

[13] D.C. Code 11-X §2516.

[14] In the Matter of Application of Equity Appreciation Partners Capital Fund 1 LLC for the Subdivision of the Williams-Addison House. HPA Number: 2007-267. Date of Decision: 20-Feb-08.

[15] The Mayor's Agent acts on behalf of the Mayor in reviewing permits involving historic properties. The HPRB had determined that the subdivision creating new A&T lots was inconsistent with the Act, and the case was then referred to the Mayor's Agent for Historic Preservation for a decision.

lots. As such, this type of lot must satisfy the requirements of the Act. To be consistent with the Act, the Mayor's Agent must determine that the subdivision is "necessary in the public interest," and the Applicant must sufficiently demonstrate that the subdivision will actually "retain and enhance" the landmark and allow its adaptation to current use. D.C. Code § 6-1106(b)(2).

In the *Williams-Addison* case, the Mayor's Agent also found that the creation of T&A lots at that site, without first pursuing the legal steps mandated by the Act, was an illegal circumvention of the declared intent of the City Council of the District of Columbia when it adopted the 1990 amendments to the *Historic Subdivisions Review Act of 1990* and was, therefore, a violation of the law. Consequently, the question of the creation of a Valor, Regency and American University project site must be addressed by all of the required bodies before the project can be allowed to proceed any further.

Attachment B - CRD's Statement on the Applicant's Failure to Provide the Development Agreements

Valor has refused to submit the two development agreements that it asserts allow for transfer of density between the various parcels. The Project cannot proceed without these transfers. The Zoning Commission directed the Applicant to provide these to confirm that the transfers of densities were appropriate and properly documented. The nature and extent of the combination of lots, transfers of density impact on the historically protected SVSC, among other possible impacts, are needed in order to respond to the Application. By hiding these agreements in a wall of secrecy, Valor is depriving opponents of due process of law and blocking the Commission's access to essential information that likely would be critical to its decision-making process. The agreements are essential for the Commission to consider and evaluate the entire Application.

Throughout this process and the many meetings with the community, CRD and the two ANC's, Valor has often been heard to say it is or hopes to be "transparent." In fact, it is not, nor has it been, transparent, and now its two co-applicants are hiding behind a door of privacy to add to this lack of transparency.

DISTRICT OF COLUMBIA ZONING COMMISSION

SUPPLEMENTAL FILING

Z.C. Case 16-23

CERTIFICATE OF SERVICE

I certify that on February 20, 2018, I emailed a true copy of the foregoing Rebuttal to Applicant's 2-12-18 Submission to Advisory Neighborhood Commissions 3E and 3D (3E@anc.dc.gov; 3D@anc.dc.gov), Jeff Kraskin (Jlkraskin@rcn.com) for Spring Valley Opponents, William Clarkson (wclarksonv@gmail.com) for Spring Valley Neighborhood Association, John H. Wheeler (johnwheeler.dc@gmail.com) for Ward 3 Vision and counsel for the Applicant, Christopher H. Collins (chris.collins@hklaw.com).

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Dated: February 20, 2018

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