RESPONSE OF CITIZENS FOR RESPONSIBLE DEVELOPMENT TO VALOR DEVELOPMENT'S REVISED VOLUNTARY DESIGN REVIEW APPLICATION

Zoning Commission Case No. 16-23

This statement in opposition is filed by Citizens for Responsible Development ("CRD") in response to revised plans (the "Revised Application") for redevelopment of the SuperFresh site ("SuperFresh site") filed by Valor Development (the "Applicant") on October 16, 2018. CRD is a party in this case. The case dates from the Applicant's filing of a Design Review Application on October 26, 2016. The Zoning Commission's record for this case is extensive. Following two evenings of public hearings and submission of post-hearing briefs by the Applicant and CRD, the Applicant on three occasions asked for deferral of Zoning Commission deliberation.

The Revised Application includes a handful of changes from the Applicant's previous plans. These changes however do not alter the basic character of the main building that is at the center of the community concerns raised by CRD. The principal change is that the Applicant has sunk the main building six feet six inches into the ground while expanding its footprint. The density of the proposed project (the "Project"), and the resulting traffic issues, remain unchanged. In short, the Project is still too large and is still incompatible with the neighborhood. As shown in the renderings in the Revised Application, the height of the main building is the same or even taller than the height of the American University building next door at 4801 Massachusetts Avenue (the "AU Building")[1]. While the AU Building is generally considered too large, it does face a major arterial, Massachusetts Avenue – 160 feet in width. The Project, in contrast, faces two local, residential streets both 30 feet in width.

It should be mentioned that, twice following the January 2018 hearings, the Applicant found it necessary to revise its renderings due to CRD's demonstrations showing that the initial and revised renderings the Applicant submitted were deceptive.[2] It also should be understood that the stated reason why the Applicant asked for three deferrals of Zoning Commission deliberation was because Ms. Marilyn Simon and CRD uncovered a gross failure by the Applicant to comply with the District's Inclusionary Zoning ("IZ") requirements. By now sinking the main building a little more than six feet into the ground, without reducing the density of the project, the Applicant's attempt to evade these requirements continues. The Applicant's architect, at an ANC3E meeting on October 11, 2018, called this new approach "magic." The Applicant should not be permitted to circumvent these requirements by sleight of hand.

[1] See Revised Plans – Architectural Drawing, Part 3 (Exhibit 240A3), slide A15; and Architectural Drawing, Part 4 (Exhibit 240A4), slide A23.

[2] See Applicant's Post-Hearing Submission (Exhibit 211), p. 6, and Applicant's Response to CRD Submission of February 12, 2018 (Exhibit 219). See also Applicant's Closing Statement (Exhibit 218), p. 14.

The lengthy reasons previously offered by CRD in its original Statement in Opposition[3], Post-Hearing Submission[4] and testimony as to why the Application should be denied remain relevant, and CRD incorporates them by reference here. A summary of these issues, updated to reflect changes in the Revised Application, is set forth below. A review of these issues makes clear that the Applicant has not met its required burden of proof under 11-X DCMR §604.3 to show that the requirements for Design Review have been met.

I. The Project Fails to Meet the Requirements for Design Review Because It Calls for an Increase in Density

The Applicant proposes to use the Design Review authority as a means to increase density. However, the Design Review Regulations in three separate sections specifically preclude the use of this process to increase density (see 11-X DCMR §§600.1(c), 600.5 and 603.1). It is uncontested that the matter-of-right density allowed on the SuperFresh site (Lot 807) is 184,514 GFA. According to the Applicant, the GFA of the Project is 234,629. It is obvious and undeniable that a density increase is being proposed. This is not permissible under the Design Review Regulations.

The Applicant cites 11-X DCMR §600.1(e) as authority for increasing density. Under that section, the Design Review process provides for "flexibility in building bulk control, design and site placement without an increase in density…" (emphasis added). Thus, the very authority cited by the Applicant explicitly precludes use of the Design Review authority to increase density. Density and FAR are not among the areas of flexibility that the Commission may allow in Design Review. See 11-X DCMR §603.1. By our calculations, under the Revised Application, 94.2 percent of the proposed structures on the SuperFresh site, 96.5 percent of structures on Lot 9 (the SuperFresh site together with the AU Building), and over 75 percent of structures on the Project site will consist of buildings with four or more stories (not including the penthouse level). Simply put, the Revised Application does not control bulk, but rather results in an increase in bulk from what is permitted as a matter-of-right.

II. The Proposed Transfer of Density from the Historically Protected Spring Valley Shopping Center Is Contrary to District Law

The Applicant proposes to borrow purportedly "unused" GFA from the adjacent historically landmarked Spring Valley Shopping Center ("SVSC"), which is a designated DC historic landmark and that was added to the DC Inventory of Historic Sites in 1989.[5] The owner of that shopping center – Regency – is a named party to this Revised Application. Supposedly, agreements exist between Regency and the Applicant regarding this purported transfer, which the Applicant has refused to disclose. Regardless of whatever is contained in these secret agreements, there is no dispute that the Applicant's arguments for proceeding with the Project rest on borrowing density from the shopping center.

[3] Exhibit 137.

[4] Exhibit 220.

[5] The nomination was revised by DC Historic Preservation Office and placed on the National Register of Historic Places in 2003.

A. ***No Transfer of Density Can Be Received by the Project:*** As discussed above, the voluntary Design Review Regulations do not allow the Applicant to utilize GFA from the SVSC, as that will constitute an impermissible increase in density. Moreover, credit trade areas (formerly TDR or CLD zones under the 1958 Zoning Regulations) only exist under the 2016 Zoning Regulations in five downtown Receiving Zones: South Capitol, Downtown East, North Capitol, Southwest, and New Downtown. See Figure 1 below. Lots 806 and 807 are not located anywhere near any of these five Receiving Zones and have never been eligible for TDR or CLD credits; consequently, they cannot be utilized here.

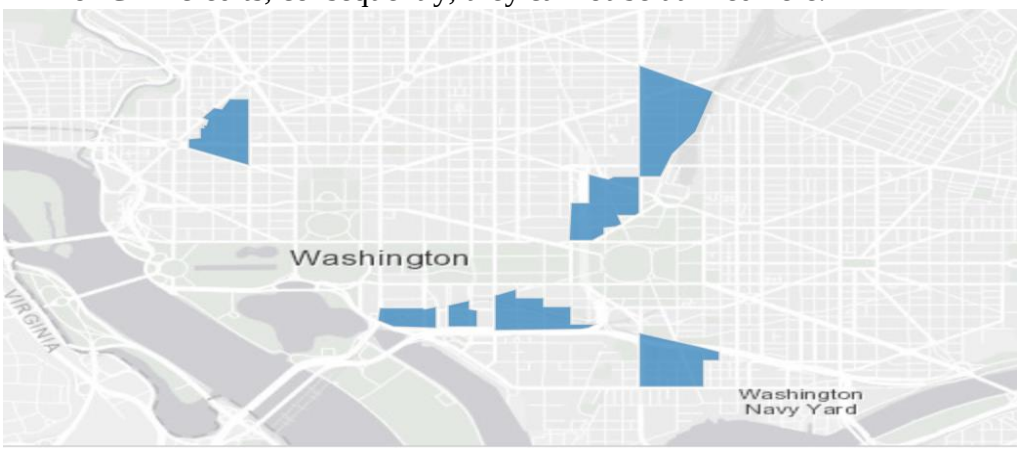

Figure 1: Designated TDR Receiving Zones. Source: DCGIS

B. ***The Proposed Project Requires Review by the Mayor's Agent and the Historic Preservation Review Board:***

1. ***Project Seeks to Consolidate Lots with Those of an Historic Landmarked Building to Create a New Project Lot and Undertake New Construction on that Lot.***

The Applicant seeks to combine assessment and taxation (A&T) lots 802, 803, 806, and 807 in Square 1499 to create a project lot that it refers to as the "Subject Property." The historically landmarked SVSC occupies lots 802 and 803 in the subject property. While the Applicant does not use the term subdivision," this lot consolidation qualifies as a subdivision. The Mayor's Agent and the D.C. Historic Preservation Review Board review any lot consolidation of an historic property that involves either the division or assembly of land into one or more lots of record, as well as undertaking any new construction on that new lot.[6]

Pursuant to D.C. Official Code § 6-1106, ("Subdivisions"), any subdivision of an historic landmark must be reviewed and approved by the Mayor's Agent. The Mayor's Agent shall first refer the application to the Historic Preservation Review Board (HPRB) for its recommendation.[7] No subdivision shall be admitted to record unless the Mayor finds that

[6] A conversion of an A&T lot to a lot of record by the Office of the D.C. Surveyor is required before permits for construction can be granted.

[7] § 6–1106. Subdivisions reads as follows: "(a) Before the Mayor may admit to record any subdivision of an historic landmark or of a property in an historic district, the Mayor shall review the application for admission to record in

admission to record is necessary in the public interest, is of special merit, or that failure to approve it will result in unreasonable economic hardship to the owner.

Since the adoption of the Historic Subdivisions Review Act of 1990,[8] the Mayor's Agent has reviewed numerous subdivision requests including the creation, subdivision, and assemblage of A&T lots and has routinely dealt with subdivisions which included A&T lots that a party wished to build on. These cases demonstrate that the Mayor's Agent has and continues to exercise authority over the creation of A&T lots, particularly where those A&T lots are synonymous with theoretical lots, which are included in the definition of subdivision in the District of Columbia Code.[9]

D.C. Official Code § 6-1107 ("New Construction") requires that the Mayor's Agent review any permit application before issuing a permit to construct a building or structure on the site of an historic landmark. Prior to making a finding on the permit application required by § 6-1107(f), the Mayor's Agent may refer the application to the Historic Preservation Review Board for recommendation.[10] The Mayor's Agent traditionally refers such cases to the HPRB for its advice on the requested subdivision, as well concept design review for any new construction on a newly consolidated lot.[11]

Including other lots as part of a consolidation with a landmarked lot to create a new project lot extends the purview of the HPRB to those lots as well, whether or not they are located in an Historic District. There are a number of cases that involved historic landmarks that fell outside an Historic District, or did so at the time of the application, that the Mayor's Agent referred to HPRB.[12] In the Rhode Island Avenue Residential Buildings case, then not located

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accordance with this section and § 6-1108.03, and, for applications that will be submitted to the Historic Preservation Review Board or the Commission of Fine Arts for a public hearing, place notice of the application in the District of Columbia Register and on the website for the Historic Preservation Office."

[8] D.C. Law 8-232. "Historic Landmark and Historic District Protection Amendment Act of 1990" amended the Historic Landmark and Historic District Protection Act of 1978 to include theoretical lot subdivisions.

[9] See O.S. No. 91-261, In Re:2501 Pennsylvania Avenue (Luzon Apartment Building); In Re: Lot 3, Square 2224, 2325 Porter Street (Greystone), H.P.A. 96-307; In Re: Germuiller Row, H.P.A. 01-144, and S.O. #3154; In Re: The Owl's Nest, 3031 Gates Road N.W., H.P.A. No. 02-635; In Re: American Pharmacists Association, 2215 Constitution Avenue, N.W., H.P.A. No. 03-286; In Re: Tregaron, 3100 Macomb Street, N.W., H.P.A. No. 04-145; In Re: Lots 1189 and 1190-Square 1320, 3905 Mansion Drive N.W. ("Hillandale"), H.P.A. No. 98-186; and In Re: Williams-Addison House, H.P.A. No. 07-267. .

[10] § 6–1107. New construction reads as follows: " (a) Before the Mayor may issue a permit to construct a building or structure in an historic district or on the site of an historic landmark, the Mayor shall review the permit application in accordance with this section and § 6-1108.03, and, for applications that will be submitted to the Historic Preservation Review Board or the Commission of Fine Arts for a public hearing, place notice of the application in the District of Columbia Register and on the website for the Historic Preservation Office."

[11] Among the many lot combination subdivisions referred to the HPRB by the Mayor's Agent are the Luzon Apartments (91-261), Brickyard Hill House/Georgetown Incinerator (98-355- 361), United Mine Workers Building (99-324), Yale Laundry (00-026 and 05-042), Rhode Island Avenue Residential Buildings (00-149), Germuiller Row (01-144), American Pharmacists (03-286), Tivoli Theater (04-092), First African New Church (04-484), and more recently Stevens School (H.PA. 15-219).

[12] Specific projects that included lot consolidations and historic landmarks that were outside Historic Districts and were referred to HPRB by the Mayor's Agent include: Luzon Apartments (H.P.A. 91-261), United Mine Workers

in an Historic District, the 2000 Mayor's Agent's Decision and Order[13] confirmed that the formation of a project lot that includes additional non-landmark lots gives HPRB review authority over all new construction on the entire newly-formed project lot, in addition to the jurisdiction that it exercises over the original landmark lot.

Because this proposed consolidation includes the historic landmarked SVSC and will result in new construction on the site of that landmark, it will trigger review by the mayor's Agent to determine if both the subdivision is necessary to undertake the project, and the project itself are consistent with the purposes of the Historic Landmark and Historic District Preservation Act of 1978 (the "1978 Act").[14] In regard to historic landmarks, Section 2(b)(2) of the 1978 Act requires that an undertaking either retains and enhances an historic landmark by encouraging its adaptation for current use or encourages its restoration. This Project does not make any such claims for the historic SVSC (see Section II. Zoning Commission Order No. 81). The Applicant cannot legally reap the benefits of combining the lots without accepting the historic preservation responsibilities that go with it.

The Applicant's position that HPRB review is not required because SVSC is separated by a public alley and therefore no lot subdivision is proposed is incorrect. The presence of an alley separating a landmark from the other lots in a combined project lot is not a disqualifying factor for review by HPRB (for example in Germuiller Row (H.P.A. 01-144)). This attempt to circumvent the intent of the 1978 Act and the regulations, which specify Mayor's Agent and HPRB review for proposals that involve a historic landmark and presents a significant impact to that landmark, denies the authority of the Mayor's Agent and HPRB in this review of the Project.

2. *HPRB Review Must Precede a Zoning Commission Hearing.*

Any permit application issued by the DC Office of Regulatory Affairs (DCRA) that involves an historic property must be reviewed and signed off on by specific agencies and bodies located in or associated with the Office of Planning. These include the HPO, the HPRB and, ultimately, the Mayor's Agent. They determine the historic compatibility and allowable scope of a project. The application is also reviewed by DCRA's sister agency, the Office of Zoning and, in this case, the Zoning Commission. Once approval is granted by the Office of Zoning, the application is returned to DCRA for the issuance of permits.

C. The SVSC Has No Available Density to Transfer:

The SVSC, Lots 802 and 803, is a historic landmark. Lots 802 and 803 are fully developed and improved with the shopping center building and parking lot, both of which are equally defining

Building (H.P.A. 99-324), Rhode Island Avenue Residential Buildings (H.P.A. 00-149), Germuiller Row (H.P.A. 01-144), Tivoli Theater (H.P.A. 04-092), and First African New Church (H.P.A. 04-484).

[13] "In the Matter of 1439 Rhode Island Avenue, N.W." Mayor's Agent Decision and Order. July 20, 2000. H.P.A. 00-149

[14] Historic Landmark and Historic District Protection Act of 1978 (D.C. Law 2-144, as amended through March 2, 2007). D.C. Official Code § 6-1101–1115.

elements of the landmark. The parking lot is as much an integral part of the landmark as is the shopping center building itself, and hence its original name "Massachusetts Avenue Parking Shops."[15] Because it is listed in the DC Inventory of Historic Sites and protected under the 1978 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. All of its GFA is accounted for. Accordingly, even if Lots 806 and 807 could receive a transfer of density, SVSC simply has none to give.

D. Zoning Commission Order No. 101 Cannot be Used as Precedent for this Project.

The Applicant continues to cite the 1976 Court of Appeals Decision re Zoning Commission Order No. 101 (Dupont Circle Citizens Association v. Zoning Commission[16]) to approve aggregation/transfer of density under its Zoning Act authority.[17] For the reasons explained below, and because that application was for a PUD (and this one is not), this decision has no applicability in the SuperFresh case.

The precursor to the Historic Preservation Review Board was the Joint Committee on Landmarks (JCL) that was created in 1964. The JCL created an inventory of historic sites in the District and nominated historic sites to the National Register of Historic Place. In 1969, the Heurich Mansion was added as a Category II Landmark to the National Register and DC Inventory of Historic Sites by the JCL. At that time, there was no local preservation law and the JCL did not have the authority to ban or forestall alterations and demolitions to historic buildings. It was not until 1978, when the Historic Landmark and Historic District Protection Act was enacted by the D.C. City Council that District of Columbia historic resources were protected by local laws, review bodies, and agents.[18]

In 1974, the Columbia Historical Society, the then owner of the Heurich Mansion, was in financial difficulty and could no longer afford to maintain the building. They began considering the sale of the property and would have profited greatly from a sale in an area under great pressure to develop. Zoning law at that time permitted the society or any purchaser of that site to

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[15] The parking lot is as much an integral part of the landmark as is the shopping center building itself, and hence its original name "Massachusetts Avenue Parking Shops." The National Register nomination for the Massachusetts Avenue Parking Shops states: "Shaped by the automobile, these shopping centers were uniquely American….. As an early example [of these shopping centers] with off-street parking provided by a forecourt, the Massachusetts Avenue Parking Shops was cited in national planning publications as a model and appears to have influenced subsequent projects elsewhere in the nation." National Register of Historic Places, Massachusetts Avenue Parking Shops, Washington, DC. National Register # 03000670.

[16] 355 A.2d 550 (1976).

[17] Applicant's Summary of Existing and Proposed Allocation of Density (Exhibit 240D).

[18] The Act established the HPRB, and the Mayor's Agent for Historic Preservation. The Mayor's Agent was given oversight to evaluate and approve demolitions and lot subdivisions. HPRB was given authority to designate historic properties and advise the Mayor's Agent on historic preservation matters in the District of Columbia and implement federal historic preservation programs in the District.

demolish the mansion and build an office building 90 feet high in its place that would also cover most of the lot.

The Heurich Mansion and Carriage House consisted of 15,695 square feet of gross floor area. A change in zoning from SP zone to C-3-B allowed a total of 121,660 square feet that could have been developed by the Society, or if the house was not razed, an unused development potential of approximately 106,000 additional developable square feet.

Zoning Commission Order No. 101 allowed for the transfer of the Heurich Mansion's unbuilt stories (and development potential offered by the lot's open areas) to be applied to a new adjacent 12-story office building to a height of 130 feet. With the development rights transferred, development pressure on the Heurich lot was relieved, as any new construction on that site would be limited to the square footage of the mansion and carriage house. No developer could build anything larger than the Heurich Mansion, even if the mansion itself were to be demolished. The mansion was then to be preserved as the agreement for the transfer was that proceeds from the sale of the unused rights were to be earmarked to help with the ongoing preservation of the mansion. This one-time transfer involving an historic building was limited to a single zoning order specific to finding a solution to save the Heurich Mansion and was not codified in further zoning regulations.

The historic SVSC does not have the same transfer potential as did the Heurich Mansion. With current local preservation protections established by the 1978 Act, it is unlikely that SVSC will ever be demolished, additional stories added to it, or the open space of the parking lot developed. As the Heurich Mansion was facing any and all these possibilities at the time, and with no historic protections, that site offered development potential that could be utilized by the CHS itself or sold and transferred.

The Applicant claims that such a transfer of development rights will help preserve SVSC and is one of the "benefits" being promoted by this project. Unlike the Heurich Mansion site in the 1970s, the historic SVSC is not under development pressure itself whatsoever. Also, unlike with the Heurich Mansion, the SVSC is protected under the 1978 Act and will not benefit from any additional historic preservation protections claimed to be provided by this project that it does not already have. Accordingly, even if Lot 807 could receive a transfer of density, the SVSC has none to give.

III. The Project Violates the Terms of the 1979 Declaration of Easement and Agreement

Another major reason to reject the proposed density 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 the structure that is now the AU Building. The Easement allocates density between Lots 806 and 807. This allocation effectively pushed

development on Lot 9 onto the Massachusetts Avenue side of the lot, benefiting the neighboring residents by reducing density on the portions of the SuperFresh site facing the neighborhood.

The Applicant 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."[19]

The Easement further 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 Lot 806 and 807]." Construction on the two lots is capped by the Easement. The parties to the Easement (the Burka family entities, who are still owners of the SuperFresh site, and their successors, 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. The Applicant is therefore prohibited from attempting to utilize additional GFA through the transfer from 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 imposed by the Easement with the other.

IV. The Project Fails to meet the Requirements for Design Review Because It Seeks More Relief Than Could Be Secured Under a PUD

The Design Review Regulation at 11-X DCMR § 600.2 states that the process cannot be used to seek more relief than would be available under a PUD. Under a PUD, a developer may add 20% in GFA.[20] Thus, under a PUD, a developer could add 36,843 in GFA (184,215 x 0.2). The additional density proposed by the Applicant using Design Review (50,115 GFA) is significantly more than that which would be allowed under a PUD, and accordingly would violate 11-X DCMR §600.2 if, contrary to the regulation, more density were permitted.

V. The Project Fails to Meet the Requirements for Design Review Because It Would Result in Action Inconsistent with the Comprehensive Plan

Section 11-X DCMR 600.4 of the Design Review Regulations states that Design Review shall not result in action that is inconsistent with the Comprehensive Plan. CRD's initial Statement in Opposition[21] describes in detail the reasons why the Project is inconsistent with the Comprehensive Plan. Each of those reasons applies to the Revised Application as well, and we shall not repeat all of them here, except to focus on the central issue that the Project is inconsistent with the Comprehensive Plan because the height, scale, and density of the Project are deeply out of character with the neighborhood. The Comprehensive Plan calls for encouraging infill development that complements the established character of the area and does

[19] *See* Applicant's Summary of Existing and Proposed Allocation of Density (Exhibit 24D), p.2.

[20] PUD Regulations, 11-X DCMR §303.3.

[21] CRD's Statement in Opposition (Exhibit 137), pp. 8-12.

not create "sharp changes in the development pattern."[22] The four to six-story main building, situated on two local, residential streets, does not in any way complement the character of the neighboring two story residential community or the nearby commercial area, most of which is comprised of the one-story SVSC and the two to three-story commercial buildings across Massachusetts Avenue in Squares 1500 and 1467. The sole exception in the area is the six-story AU Building. As noted elsewhere in this response, the construction of that building occurred in 1979 as a result of the deliberate shifting of mass from the SuperFresh portion of Lot 9 to the portion facing Massachusetts Avenue. At the time, both portions of Lot 9 had a common owner. That allocation of densities between the two lots should be preserved, not undermined.

The Project is located within the Rock Creek West Area described in the Comprehensive Plan. The Rock Creek West Element of the Plan states that "much of Rock Creek West retains a small-town character today."[23] This character is precisely what the neighbors want to protect. The infill project across Massachusetts Avenue within the other shopping center in Spring Valley (Square 1500) is the type of development that preserves the desired character. That project is a two-story commercial building that attempts to match the scale and design of the neighboring commercial buildings, and it is appropriately named "Spring Valley Village."

VI. The Project Fails to Meet the Requirements for Design Review Because It Is Inconsistent with the Future Land Use Map

The Future Land Use Map ("FLUM") is part of the adopted Comprehensive Plan and expresses the public policy on future land uses.[24] The FLUM designates the SuperFresh site as Low Density Commercial. The Comprehensive Plan's Framework Element goes on to say that a "common feature [of these zones] is that they are comprised primarily of one to three-story commercial buildings." With the sole exception of the AU Building, this designation accurately describes the SuperFresh site, Lots 802 and 803, and the commercial area across Massachusetts. CRD would support a one to three story development on the site, which would be consistent with the entire surrounding area, and submits that the Zoning Commission should look to the FLUM and the prevailing character of the area and adjacent uses in rendering a decision on the Application.

As noted, the one anomaly in the area is the six-story AU Building. The Applicant points to a statement in the Framework Element that indicates that within an area there may be individual buildings that are higher or lower than the ranges specified. Here, and contrary to the Applicant's assertion, the existence of the AU Building, which is six stories tall, argues for a lower building on the SuperFresh site. This approach of keeping taller buildings on a major thoroughfare represents good planning and, in fact, is exactly what was contemplated by the owner back in 1979. Instead, the Applicant is proposing a second building on Lot 9 which, according to their renderings, is just as tall as the AU Building. Further, and as noted above, if the Project is approved, 96.5 percent of structures on Lot 9 and over 75 percent of structures on

[22] Comprehensive Plan, Land Use Policy LU-1.4.1. See also Urban Design Policy UD-2.2, which states that overpowering contrasts in scale, height, and density should be avoided as infill development occurs."

[23] Comprehensive Plan, Rock Creek West, pp. 23-4.

[24] Comprehensive Plan, Framework Element, p. 2-33.

the Project site will consist of buildings with four or more stories (not including the penthouse level). This could not be further from the result contemplated by the exception identified by the Applicant.

VII. The Project Will Have an Adverse Impact on the Community

Contrary to the Design Review Regulations (11-X DCMR §600.1(a)), the community will be adversely affected by additional traffic congestion and neighborhood parking overload. The Gorove/Slade Supplemental Transportation Memorandum.[25] estimates that the Project will generate 155 trips during the morning peak hour and 322 trips during the afternoon peak hour. The Supplemental Transportation Memorandum does not identify the number of truck deliveries per day, but we assume that the number of truck deliveries will be at least the 21 per day mentioned in the Applicant's original Comprehensive Transportation Review ("CTR"),[26] and will probably be higher since the proposed grocery store is even larger. No estimates of the total number of weekday trips attributable to the Project, or of weekend traffic (though one can expect higher volumes for the grocery store on weekends), are provided. The critique of the Applicant's original CTR prepared by the traffic consultant retained by CRD, Joe Mehra of MCV Associates, estimates that the Project will generate an additional 3,500 trips each weekday.[27]

Most vehicles, and all the truck traffic, will enter and exit through the 20-foot wide alley behind the AU Building, using 48th Street. That alley will be used by residents of the Project and customers of the grocery store and other retail, as well as employees, students, and visitors to the AU Building. In addition, the loading docks and trash dumpsters for both the Project and the AU Building are accessed through the alleys or are situated on the alleys. In short, this alley would become a real and very dangerous bottleneck. In addition, American University shuttle buses (up to ten per hour) drop off and pick-up (and idle) at the foot of this alley, blocking one of the three lanes and, because 48th Street doglegs at that point, visibility for drivers heading in both directions will be obscured.

According to a document dated November 30, 2018 that Valor Development provided to all the parties, there will be 72 parking places exclusively for the 219 residential units (240 if the additional flexibility requested is granted). At the January 11, 2018 hearing, the DDOT representative admitted that residents of the Project will have cars. The residents of all homes in the neighborhood have vehicles, frequently two. Also, walking to the Metro is not a viable option for most, given that the site is 0.9 miles from the nearest Metrorail stop. At 1.5 autos per unit, there would need to be 328 parking spots to satisfy the needs of residents (or 360 if the requested additional flexibility is granted). Thus, the 72 parking places clearly will be inadequate, and will result in overflow parking in the neighborhood.[28] While we understand that additional shared

[25] Exhibit 244, p. 2.

[26] Comprehensive Transportation Review (Exhibit 107A), p. 13.

[27] The Mehra critique is attached as Exhibit 3 to CRD's initial Statement in Opposition (Exhibit 137).

[28] In the Technical Memorandum that is attached to the Supplemental Transportation Memorandum (Exhibit 244), Daniel Solomon and Erwin Andres of Gorove/Slade state that that there will be 228 parking spaces for residents. This memorandum, which predates the Lansing report by a full week, is inconsistent with the document submitted by Valor on November 30, 2018. A definitive statement is needed from the Applicant on the number of residential

spaces from American University may be available, there is no assurance that at any specific moment there will be spaces for residents. If the additional spaces come from spaces previously assigned as shared spaces with American University, the reallocation should be documented and made permanent without the possibility of termination by American University. The Supplemental Transportation Memorandum, but not the Revised Application, mentions that residents of the Project will be prevented from obtaining Residential Parking Permits. We understand however that there is question as to whether such a restriction will be enforceable.

The additional traffic will endanger pedestrians, including the elderly and the many young children who live and play in the neighborhood. With the elimination of Windom Walk, a path that led from 48th Street to the AU alley, pedestrians will have to walk around the Project site, using three-foot wide sidewalks with no separation from the heavily trafficked alleys. Further, pedestrians using the path along the alley behind the AU Building will have to walk by 100 feet of entrances to the loading docks and underground parking, with no refuge. The site can in no way be considered "walkable."

CRD is still reviewing the Gorove/Slade Supplemental Traffic Memorandum, having received it after the date promised, and is trying to discuss it with DDOT. Hence, CRD will be providing additional comments on transportation related issues.

VIII. The Project Fails to Meet the Requirements for Design Review Because the Project Is Not Superior to any Matter-of-Right Development Possible

Under the Design Review Regulations, the Zoning Commission must find that the design review criteria are met in a way that is superior to any matter-of-right development possible on the site. See 11-X §604.8. The Applicant has failed to meet its burden in demonstrating its design complies with this requirement. The Application has stated, essentially as a threat, that "under a matter-of-right scenario the Applicant could develop Lot 807 to a maximum height of 50 feet without setbacks at the property line, and up to 0.4 FAR at the penthouse level." [29] However, given the matter-of-right limitations of development on the SuperFresh site, it is practically impossible for the Applicant to construct such a building. A 50-foot tall building could only take up roughly half the lot, leaving plenty of room for other amenities. More importantly, we are confident that a responsible developer would not construct an unattractive building suggested by the Applicant, as this would not be in its economic interest. The threat suggested by the Applicant is an idle one. It should be clear to the Commission that the Applicant, using accomplished and creative architects, could design a matter-of-right structure that would be far superior to the Project.

IX. The Application Continues to Fall Short on Inclusionary Zoning

The reason why the Applicant asked for deferral of Commission deliberation in February 2018 was that, late in the process and based on submissions from Ms. Marilyn Simon and CRD, the

parking spaces. Even 228 spaces, however, are probably insufficient, and will cause residents to try to park in the neighborhood.

[29] Applicant's Revised Design Review Standards Analysis (Exhibit 240C), p. 15.

Applicant realized that their Project failed to meet the required inclusionary zoning set aside. Even though the Applicant uses sleight of hand in an attempt to circumvent the District's Inclusionary Zoning requirements, the Application in fact continues to fall short of the affordable housing requirement.

The IZ regulations state at 11-C DCMR §1003.1 that an "inclusionary development which does not employ Type I construction …… and which is located in a zone with a by-right height limit of fifty feet (50 ft.) or less [such as the Project] shall set aside the greater of ten percent (10%) of the gross floor area dedicated to residential use including penthouse habitable space …… 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 ….". The proposed structure does not employ Type I construction. In claiming that the "bonus density" for the IZ calculation is 0.18, the Applicant is relying on a proposed text amendment currently under consideration which would replace the term "achievable" with "utilized." This proposed change is not currently in effect and, in any case was not in effect when either the initial or the revised Application was filed. Thus, the bonus density factor should be 0.50, not 0.18.

Further, the IZ regulations also provide that an "inclusionary development's entire residential floor area including dwelling units located in cellar space or enclosed building projections that extend into public space, shall be included for purposes of calculating the minimum set-side requirements of Section Subtitle C § 1003.1 …."[30] Thus, even if the proposed text amendment is adopted, and the Applicant can use it, the Application falls short of the required amount of affordable housing because the regulations call for including residential space located in cellar space or enclosed building projections in the calculation of the bonus density set aside, which means that these amounts (26,050 SF of cellar space and 1,719 SF of building projections) should be included in the calculation of "utilized bonus density." The Revised Application however specifically states that the calculation of the set-aside based on bonus density does not include these amounts.[31] By our calculation, the IZ set-aside under the bonus density formula should be 41,333 sf plus 2,605 sf for the penthouse, or 43,938 sf in total. According to the Revised Application, the amount of IZ provided is 27,440 sf, far short of this requirement.

X. <u>The Project Has Few – or No – Benefits to the Community</u>

The Revised Application indicates in a number of places that the Project will bring a full-service grocery store to the area. While an alternative to the many grocery options currently available has some appeal, CRD members do not see a benefit if the trade-off is a massive four to six-story building that would negatively affect the neighborhood. Moreover, it is clear that the developer is having difficulty enticing a grocer to the site; the grocers whose names have been floated do not qualify as full-service groceries in the view of many in the neighborhood. A Harris Teeter, which the developer initially allowed the neighborhood to believe would be coming, is a real grocery, but a small Balducci's or Mom's (the grocers with which the Applicant claims to have non-binding letters of intent) is something much less desirable, particularly in light of the direct competition

[30] 11-C DCMR §1003.9.

[31] Summary of Inclusionary Zoning (Exhibit 240E).

that such a specialty store would pose to the long-established Wagshal's and the Wegmans coming to the Fannie Mae site nearby. Why does the Applicant feel it needs two letters of intent with grocers, and even then, say it is talking to "others?" The offer of a grocery store on this site may be illusory.

Further, the HAWK light in the middle of the 4800 block of Massachusetts Avenue is also illusory, as it is contingent on DDOT approval. Would a HAWK light even work on a wide commuter arterial, with two medians and a service road to cross? Without a safe pedestrian pathway through the Project, is there even a need for pedestrians to cross Massachusetts Avenue mid-block when there are signals at each end of the block? Finally, the tiny pocket park (Windom Park) that has replaced the sizable Windom Walk can hardly be considered an amenity. Will that space even be open to the neighborhood?

XI. **Despite the Reduction of the Height of the Building at the 48th Street Measuring Point From 50 to 43 1/2 Feet, the Zoning Regulations Prohibit the Applicant from Taking its Maximum Height Measurement at 48th Street**

The Applicant measures the height of its main building from the middle of its 48th Street side, going up 43 1/2 feet from the curb, thus taking advantage of the steeply downward sloping SuperFresh site to justify a "main parapet" that reaches an approximate total elevation of 67 1/2 feet at the lowest point of the slope along the rear alley that intersects with Yuma Street. With an additional 12 feet for the penthouse, the building continues to be a massive structure rising from 55 1/2 feet in height facing 48th Street to 79 1/2 feet in height at its back end.[32] It is not permissible, however, to use 48th Street as the measuring point to achieve this result.

The Applicant may call the 48th Street façade the building's "front," in reliance upon Subtitle B §307.5 which provides that "…any front may be used to determine the maximum height of the building…" But the applicability of that provision is limited by the clause "…[e]xcept as provided in Subtitle B §307.7…" It remains our contention that the Applicant's bid for using 48th Street as its measuring point runs afoul of Subtitle B §307.7, which specifically pertains to lots like the SuperFresh site, where the existing building and its parking garage are connected to 48th Street by a steep ramp up an artificial embankment. That provision states:

> "When the curb grade has been artificially changed by a bridge, viaduct, *embankment*, *ramp*, abutment, excavation, tunnel, or other type of artificial elevation or depression, the height of a building shall be measured using the first of the following four (4) methods that is applicable to the site:
>
> (a) An elevation or means of determination established for a specific zone elsewhere in this title;
>
> (b) An elevation for the site that was determined prior to the effective date of this section by the Zoning Administrator, or the Redevelopment Land Agency, its predecessors or successors;

[32] See Applicant's Exhibit 240a5 (drawings showing cross-sections of 48th and Yuma Streets).

(c) *A street frontage of the building not affected by the artificial elevation*; or

(d) A level determined by the Zoning Administrator to represent *the logical continuation of the surrounding street grid where height is not affected by the discontinuation of the natural elevation*." (Emphasis supplied.)

As shown in the photographs below, the principal feature of the building site is the steep **embankment and ramp** to the 48th Street curbside resulting from: (1) the original need to level the roadway for 48th Street across the natural slope of the land; and (2) the subsequent excavation of the **artificial depression** below that embankment that was needed to create the current SuperFresh parking garage; an embankment was created on the downhill side to level the road.

This photo shows 48th Street (and its embankment) looking south toward Massachusetts Avenue. The SuperFresh site is downhill to the viewer's right.

This photo shows the ramp and the retaining wall that abuts the 48th Street embankment.

From the top of the retaining wall that abuts the roadway embankment there is an approximate 15-foot drop straight down to the lower floor of the parking lot. The floor of the parking garage then slopes further downward to the level of the Yuma Street entrance to the parking lot. This amounts to a total decline in elevation from the 48th Street curb to the rear alley of approximately 24 feet. Even the Applicant admits that along Yuma Street "… there is a substantial drop in grade from east to west."[33] This substantial drop in grade is the result of the 48th Street embankment plus the "artificial depression" of the garage excavation. It would give the Applicant an illegal advantage if it were allowed to take its height measurement from the 48th Street curb.

The Applicant has previously argued that its measuring point is unchanged from the natural elevation prior to the construction of 48th Street, but this argument is based only on a conclusory, self-serving extrapolation from old USGS contour maps, fails to account for the presently level roadbed versus the steep natural slope shown on those maps, is unsupported by any actual evidence (e.g., soil samples[34]), and is clearly contrary to the visible evidence on site that 48th Street rests upon a substantial artificial embankment.

Referring once again to §307.7, paragraphs (a) and (b) obviously do not apply. That brings us to paragraph (c), which places the measuring point at "the street frontage of the building not affected by the artificial elevation". The only street frontage of the proposed building that is **not**

[33] *See* the Applicant's Prehearing Statement dated December 21, 2017 (Exhibit 114), p 11. Moreover, 24 feet is the exact difference between the building height on 48th Street (43 1/2 feet) and its rear end height (67 1/2 feet).
[34] See District of Columbia Department of Transportation Standard Specifications for Highways and Structures (2013) Division 200, at 204 (concerning "Embankment Fill").

affected by the 48th Street embankment is the Yuma Street frontage. That is where the height measurement is required to be taken under §307.7 (c). The middle of the front of the main building would be approximately where the SuperFresh garage entrance lies on Yuma Street.

The only alternative would be to refer to §307.7 (d). Under §307.7 (d), the Zoning Administrator would have to determine a level for the building that represents the "logical continuation of the surrounding street grid" that would **not** be affected by the 48th Street embankment and the steep slope of the site. This would obviously be the level occupied by the historically-preserved shopping center and the neighboring houses along Yuma Street. We see no difference in the result.

Accordingly, the application of either paragraph (c) or (d) would require the Applicant to reduce the maximum height of the main building's parapet down to no more than 50 feet at the middle of the Yuma Street frontage. **Because the Applicant's own drawings show a height of 59 feet at approximately the same point on Yuma Street, this would be a reduction of one floor from the Applicant's revised design, resulting in a less dense and tall building – the very result we seek.** This would also result in a building more nearly in the category of "moderate" rather than "medium" density, as required by the zoning regulations and the Comprehensive Plan, and much more in keeping with the residential and low-density commercial character of the existing neighborhood.

XII. The Applicant Has Failed to Submit Agreements that Are Critical to the Zoning Commission and CRD's Ability to Assess the Project

The Applicant's agreements with American University and the owner of the SVSC are needed for CRD and the general public to adequately respond to the Revised Application as well as for the Commission to evaluate the Project's legalities and impact. In fact, the Project should not be allowed to proceed until these agreements are inspected. These agreements presumably cover the transfers of density between the parcels, the nature and extent of the combination of lots and the impacts on the historically protected SVSC. Despite the fact that the Commission nearly a year ago directed the Applicant to provide these agreements, the Applicant has refused to provide them. Also, there presumably is, or will need to be, a separate agreement with American University covering the use of the alley behind the AU Building (which American University owns), as well as matters relating to the 236 parking spaces which the owner of Lot 807 must make available for use by American University under the terms of the Easement. Further, since the Applicant is offering a grocery store as an amenity, the agreements with the grocer (or grocers) should be made public. All these agreements should be provided to the Commission and made available to the parties in the case. By refusing to provide them, the Applicant is hiding behind a wall of secrecy that is preventing CRD and the Commission from fully considering the Application.

XIII. Conclusion

For the above-stated reasons, CRD believes there is more than sufficient grounds to decline to approve the Revised Application. CRD requests that Commission instruct the Applicant to continue discussions with the surrounding neighbors to reach a better design. CRD has consistently communicated to the Applicant that a reduction in height of the main building by two floors from that originally proposed would significantly increase the possibility that the Project would be supported. The benefits to the community would be two-fold. The reduction in the overall mass and scale would be more in harmony with the surrounding single-family residences it abuts. In addition, traffic generated by the Project would be reduced proportionately with the number of units eliminated.

CRD appreciates the Commission's consideration of its position.

DISTRICT OF COLUMBIA ZONING COMMISSION

CRD RESPONSE TO REVISED APPLICATION

Z.C. Case 16-23

CERTIFICATE OF SERVICE

I certify that on December 11, 2018, I emailed a true copy of the foregoing Response to Revised Application 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, Norman M. Glasgow, Jr. (norman.glasgowjr@hklaw.com).

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Dated: December 11, 2018

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