



DONOHUE & STEARNS, PLC

February 21, 2019

VIA IZIS

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

Re: ZC Case 16-23/ Valor Development, LLC/ Square 1499
Proposed Findings and Conclusions
Decision Date: March 11, 2019

Chairman Hood:

These Proposed Findings of Fact and Conclusions of Law are filed by Citizens for Responsible Development ("CRD"). CRD is a party in this case. The case dates from Valor's initial Design Review application filed on October 26, 2016. The Zoning Commission's (the "Commission's") record for this case is extensive. The Revised Project includes a handful of changes from Valor's previous plans. These changes, however, do not alter the basic character of the main apartment building that is at the center of the community concerns raised by CRD. The density of the Project, and the resulting traffic issues, remain essentially unchanged. The Project, which faces two local, residential streets is still too large and is still incompatible with the neighborhood.

A review of the record makes clear that Valor has not met its required burden of proof under Section 604.3 of Subtitle X of the DCMR¹ to show that the requirements for Design Review have been met. The Project also fails to meet the Inclusionary Zoning requirements and the requirements of the Height Act.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "E. L. Donohue", written over a horizontal line.

Edward L. Donohue

Attorney for CRD

¹ All cites to the Design Review Regulations refer to Sections in Chapter 6 of Subtitle X of the DCMR.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA

ZONING COMMISSION ORDER NO. 16-23

Z.C Case No. 16-23

Valor Development, LLC

(Voluntary Design Review @ Square 1499, Lots 802, 803, and 807)

February 21, 2019

Pursuant to notice, the Zoning Commission for the District of Columbia (“Commission”) held a public hearing on January 11, 2018, January 25, 2018 and January 7, 2019, January 24, 2019 and February 6, 2019 to consider applications for a voluntary design review filed by Valor Development, LLC (“Applicant”). The Commission considered the applications pursuant to Chapter 6, Subtitle X of the 2016 edition of the District of Columbia Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations (“DCMR”). The public hearing was conducted in accordance with the provisions of 11-Z DCMR §§ 400 *et seq.* (2016). For the reasons stated below, the Commission hereby **DENIES** the application.

FINDINGS OF FACT

A. Valor Development’s Revised Application Filed on October 16, 2018 (the “Project” or “Revised Project”) Calls for an Increase in Density

1. The current owner of the SuperFresh site, Paul S. Burka Apex Real Estate, originally owned both Lot 806 (4801 Massachusetts Avenue) and Lot 807 (the SuperFresh lot). (Exhibit 208, p.1.)
2. The lot area of Lot 806 is 41,650 sq. ft. and the lot area of Lot 807 is 79,622 sq. ft. A Declaration of Easement and Agreement, which is Dated December 20, 1978 and was recorded in 1979 (the “Declaration of Easement and Agreement”), provides that the two lots together compose Lot 9, which shall remain a single record lot for building and zoning purposes. (Exhibit 208, p. 1.)
3. At that time, the allowable FAR for the site was 2.0. Thus, on the entire Lot 9 (which covers 121,272 sq. ft.), the owner could build a building with 242,544 GFA. (Exhibit 208, p.1.)
4. In order to facilitate the construction of a large building at 4801 Massachusetts Avenue (the building now owned by American University), the owner transferred through the Declaration of Easement and Agreement some of the density allowed for

- Lot 807 to the adjoining Lot 806. Specifically, maximum available GFA was allocated as follows: 179, 302 GFA for Lot 806 and 63,242 GFA for Lot 807. (Exhibit 208, p.1.)
5. The Declaration of Easement and Agreement also provides that “all remodeling, additions, or replacement construction shall not be in violation of the requirements of the Zoning Regulations for Record Lot 9.” (Exhibit 220, p.4.)
 6. Since 1979, the zoning regulations have increased the allowable FAR for the site to 3.0, subject to satisfaction of IZ requirements. With the additional 1.0 in FAR, there was a total increase in allowable GFA of 121,272 for the entire Lot 9 (1.0 times the size of Lot 9). Assuming that Valor has an agreement with the current owner of Lot 806 to allocate the entirety of this increase to Lot 807 and satisfies IZ requirements, the current maximum GFA for Lot 807 is the original amount allocated to Lot 806 (63,242 GFA) plus the additional amount (121,272 GFA), for a total of 184,514 GFA. (Exhibit 425, p. 16.)
 7. Valor is in agreement that this is the maximum amount that can be built on Lot 807 as a matter-or-right. (Exhibit 425, p. 16.)
 8. Valor’s Proposed Project includes 234,629 GFA, 50,115 more GFA than allowed as a matter-of-right. (Exhibit 425, p. 1.)
 9. Valor’s Proposed Project also includes 26,050 sq. ft. in below grade residential, 1,719 sq. ft. in residential projection floor area and 29,572 sq. ft. in habitable penthouse space (Exhibit 425, p. 25.)
 10. The Project will include at least 219 residential units, the same number as in the previous version of the Project. Valor is asking for flexibility to increase the number of residential units by 10 percent (bringing the total to 240). (Exhibit 240, p. 7.)
 11. At the February 6, 2019 hearing, Will Lansing declined a request from the ANC3D representative to withdraw this request for a larger number of units. (Testimony of Will Lansing at the February 6, 2019 hearing, transcript, p.62.)

B. The Design Review Process Cannot Be Used to Increase Density

1. The Design Review process is in Chapter 6 of Subtitle X of the DCMR.¹
2. The Design Review Regulations state in Section 600.1(c) that Design Review can be used for projects that do not need extra density.
3. The Design Review Regulations also explicitly state that “an increase in density shall not be permitted as part of a design review application.” See Section 600.5. See also Sections 600.1(e) and 603.1.
4. Valor is proposing to use the Design Review process to transfer 50,115 in GFA from the adjacent, historically designated Spring Valley Shopping Center which occupies

¹ All cites to the Design Review Regulations refer to Sections in Chapter 6 of Subtitle X of the DCMR.

CRD'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

- Lots 802 and 803, thus increasing the density on Lot 807 above that permitted as a matter-of-right. (Exhibit 240D, p. 2; Exhibit 425, slide 17.)
5. The Office of Planning (OP) suggests that given the authority to transfer density between lots in a PUD, a similar authority must exist in the setting of Design Review. (Exhibit 215.)
 6. The PUD Regulations are in a separate chapter of Subtitle X of the DCMR, Chapter 3.
 7. In contrast to the Design Review Regulations, the PUD Regulations state that “the purpose of the planned unit development (PUD) process is to provide for higher quality development through flexibility in building controls, including height and density.” Section 300.1 of the PUD regulations.
 8. OP points out that Design Review was removed from the drafts of regulations amending the PUD rules and that some aspects of the PUD process were “inadvertently left out of the new chapter.” (Exhibit 215.)
 9. The removal or omission of a legislative provision indicates that a legislative body intended to prevent the recognition of the removed or omitted provision.
 10. OP points out that Section 303.2 of the PUD regulations allows for aggregation of FAR of all buildings included within the PUD boundary and that aggregation can be interpreted to apply to Design Review although it’s “not explicitly stated”. (Exhibit 215.)
 11. Ordinary canons of statutory construction suggest that, when a provision is in one section but not in a totally separate section, the omission was intentional.
 12. The Design Review Regulations state that the design review process provides “for flexibility in building bulk control, design, and site placement without an increase in density.” Section 600.1(e.)
 13. Webster’s Unabridged Dictionary defines the noun “control” to be “the act or power of controlling” and defines the verb “control” as “to exercise restraint” or “to hold in check; curb.”
 14. The Project is not a PUD and should not be treated like a PUD.
 15. The Project offers little in the way of amenities to the community.
 16. The principal feature offered is an organic food store which many members of the community do not consider a full-service grocery store. In his testimony on behalf of the 157-household Spring Valley West Homes Corp. Scott Parker stated that, at their annual meeting on January 8, 2019, the homeowners indicated that they were “disappointed in the presumed selection of MOM’s as the grocer.” (Exhibit 416.)
 17. Valor does not have a binding commitment from any grocery store. (Testimony of Will Lansing at the January 7, 2019 hearing, transcript, pp.43-45.)
 18. On behalf of CRD, Shelly Repp testified that a grocery store is not an acceptable trade-off for the four to six story building proposed by Valor. (January 24, 2019 hearing, transcript, p. 44.)

19. According to OP, the pocket park along 48th Street (Windom Park) will not “provide a truly public space” and “it is unlikely that the public would take advantage of the seating areas located in the proposed Windom Park.” (Exhibit 266, p. 13.)
20. The proposed HAWK light on Massachusetts Ave. between 48th and 49th Streets has not been approved by DDOT (Testimony of Erwin Andres at January 7, 2019 hearing, transcript, p. 42.)
21. The value of the HAWK light was questioned in testimony by Alma Gates speaking for Neighbors for a Livable Community (Exhibit 418). The HAWK light was also opposed in the letter of opposition filed by the 990-member Westmoreland Citizens Association (Exhibit 267).

C. The Valor Project Fails to Satisfy the Requirements of Design Review

1. Contrary to Sections 600.1(a) and 604.6 of the Design Review Regulations, the Proposed Project will have an adverse impact. See the Sections F. and G. below on traffic, parking, and pedestrian safety issues.
2. Valor is proposing to use the Design Review process to increase density on Lot 807. (Testimony of Shane Dettman at the February 6, 2019 hearing, transcript, p.13.)
3. Contrary to Sections 600.1(c), 600.1(e), 600.5 and 603.1 of the Design Review Regulations, the Proposed Project will increase density and FAR. See Sections A. and B. above.
4. Section 600.4 states that Design Review provides for greater flexibility in planning and design than may be possible under matter-of-right zoning procedures but shall not be used to circumvent the intent and purposes of the Zoning Regulations or to result in action that is inconsistent with the Comprehensive Plan.
5. The Proposed Project attempts to circumvent the matter-of-right restrictions on Lot 807 as well as the covenants of the recorded Declaration of Easement and Agreement which permitted construction of what is now the AU Building on Lot 806. See Sections A. and B. above and Exhibit 247, pp.7-8.
6. The Proposed Project is inconsistent with the Comprehensive Plan, including the Future Land Use Map which is part of the Comprehensive Plan, contrary to Sections 600.4 and 604.5 of the Design Review Regulations. See Sections D. and E. below.
7. Contrary to Section 604.7(a)(5) of the Design Review Regulations, wide sidewalks are not provided along the alleys surrounding the Project, which will carry traffic similar to that on nearby local streets. (Exhibit 332, p. 1.)
8. The Project’s design for walkways and sidewalks falls short of recommendations made by the Federal Highway Administration. (Exhibit 419, p.3.)
9. These sidewalks along these alleys are interrupted for large stretches, do not provide a pathway through to Massachusetts Avenue, and will be dangerous for a mother pushing a stroller or someone who is wheelchair bound. (Exhibit 332, p. 1; Testimony of Barbara Repp at the January 24, 2019 hearing, transcript, p. 45.)

10. The Project has few public gathering spaces, contrary to Section 604.7(b) of the Design Review Regulations. (Exhibit 266, p. 16.)
11. Contrary to Section 604.7(c)(2) of the Design Review Regulations, this infill development does not respect the neighborhood's architectural character, as it creates an overpowering contrast with the neighborhood. (Testimony of Shelly Repp at the January 24, 2019 hearing, transcript, p. 35.)
12. Contrary to Section 604.7(f)(1) of the Design Review Regulations, there are no pedestrian pathways through the development. (Exhibit 407, p. 9.)
13. Contrary to Section 604.7(f)(3) of the Design Review Regulations, the Project is not designed to be safe and pedestrian friendly. See Section G. below.
14. Contrary to Section 604.8 of the Design Review Regulations, the Project is not superior to any matter-of-right development possible on the site.
15. The matter-of-right straw man provided by Valor is unrealistic. (Testimony of Shelly Repp at the January 24, 2019 hearing, transcript, p. 37.)
16. While Will Lansing testified that Valor would not commit to include many of the features of the Project in a matter-of-right project for the site, he stated that that doesn't mean that they wouldn't examine, review, or analyze them in a matter-of-right context. (Testimony of Will Lansing at the February 6, 2019 hearing, transcript, p. 133.)
17. There are matter-of-right designs that rival the Valor Project in design and function and include attractive public spaces and wide pedestrian pathways. (Exhibit 415; Testimony of Walter Borek at the January 24, 2019 hearing, pp 129-132.)

D. The Project is Inconsistent with the Comprehensive Plan

1. The Comprehensive Plan's Urban Design Element states that one of the overarching goals for urban design is to harmoniously integrate new construction with existing building. Also, "overpowering contrasts in scale, height, and density should be avoided as infill development occurs." (Comp Plan Urban Design Element, Policy UD-2.2.)
2. The scale, height, and density of the Proposed Project clashes with the neighboring 2-story residential community. (Exhibit 407, pp.1-2).
3. The height of the Proposed Project, which rises to 82.5 feet on the North/South alley adjacent to the one-story (67.5 feet plus a 15-foot penthouse), historically designated Spring Valley Shopping Center, towers over the Shopping Center. (Exhibit 240A5, slide 4; Testimony of Sarah Alexander at the February 6, 2019 hearing, transcript, p. 132; Exhibit 427A, slide 8.)
4. The architectural renderings provided by Valor's architect clearly show that the Proposed Project is taller than the adjacent 6-story American University. Exhibit 240A4, slide 5; Exhibit 425, slide 36.)

5. Other than the AU building, the tallest surrounding buildings pointed to by Valor to demonstrate the Project's appropriate height in the context of the neighborhood were a three-story building that might include an attic and another three-story building with below grade space. Neither building is the same height as the four to six story Project that also includes below grade residential space. (Testimony of Shane Dettman and Sarah Alexander at the February 6, 2019 hearing, transcript, pp 64-65.)
6. The Comprehensive Plan's Land Use Element calls for fully capitalizing on the investments in Metrorail by requiring better use of land around transit stations and along transit corridors. (Comp Plan Land Use Element, p. LU-1.3.)
7. The "reach" of transit-oriented development around any given station varies depending on the neighborhood, but ¼ to ½ mile is generally used across the country to define a walkable radius. (Comp Plan Land Use Element, p. LU-1.3.)
8. The SuperFresh site is nine-tenths of a mile from the Tenleytown Metrorail station. (Exhibit 137, p. 9.)
9. Most people will not walk nine-tenths of a mile, both ways, to use Metrorail. (Exhibit 194.) The project site is not transit friendly. (Exhibit 137, p. 9.)
10. The Comprehensive Plan's Land Use Element states that infill development should complement the established character of the area and should not create sharp changes in the physical development pattern. (Comp Plan Land Use Element, policy LU-1.4.1.)
11. Photographs provided by both Valor and CRD show that the project site faces two residential streets with 2-story homes. (Exhibit 425, slide 15 and Exhibit 405, slide 3.)
12. The Spring Valley commercial area contains mostly one to three story commercial buildings. (Exhibit 137, p. 4.)
13. The Comprehensive Plan's Land Use Element encourages pedestrian-oriented "nodes" of commercial development along major corridors provided the "height, mass, and scale of development within nodes respects the integrity and character of surrounding residential areas and does not unreasonably impact them." (Comp Plan Land Use Element, Policy LU-2.4.5)
14. The Project site faces two local streets, not a major or minor arterial, or even a collector street, and the proposed buildings do not respect the residential neighborhood. In fact, the Project unreasonably detracts from the neighborhood. (Testimony of Shelly Repp at January 24, 2019 hearing, transcript, pp.29-30.)
15. The Project more appropriately belongs on Massachusetts Avenue, not on two local streets within a residential neighborhood. (Statement of Vice-Chair Miller at February 6, 2019 hearing.)
16. Further, as shown in the images prepared by Valor, the Project by its sheer size detracts from the historically designated Spring Valley Shopping Center. (Exhibit 427, slide 8.)
17. The project site is located in the Rock Creek West Area. (Exhibit 137, p. 10.)

18. The Comprehensive Plan's Rock Creek West Area Element states that "communities within this area share a commitment to proactively addressing land use and development issues and conserving neighborhood quality." (Comp Plan Rock Creek West Element, RCW p. 23-1.) The height, scale, and density of the Project are deeply out of character with the neighborhood and therefore violate this overarching commitment. (Exhibit 137, p. 10.)
19. The Comprehensive Plan's Rock Creek West Area Element states that "Future development in both residential and commercial areas must be carefully managed to address infrastructure constraints and protect and enhance the existing scale, function, and character of these neighborhoods." (Comp Plan Rock Creek West Element, Policy RCW 1.1.1.) The Project fails to meet the standard contemplated by this policy. Rather than managing growth, by exceeding the height and density limits of what is permitted, the Project is an example of uncontrolled growth. (Exhibit 137, p. 11.) Further, the Project will exacerbate school overcrowding at the public schools servicing the SuperFresh site - Janney Elementary, Deal Middle and Wilson High – each of which is above capacity even after each has been renovated and expanded in recent years. (Exhibit 137, p. 12.)
20. The Comprehensive Plan's Rock Creek West Area Element states that heights and densities for infill development should be appropriate to the scale and character of the adjoining communities, and that buffers should be adequate to protect existing residential areas from noise, odors, shadows, and other impacts. (Comp Plan Rock Creek West Element, Policy RCW-1.1.4.)
21. The impacts from noise, traffic and shadows on the neighboring residences will be significant; no buffers have been proposed to mitigate. The main entrance to the retail stores and to the apartment building is directly across a local street from a row of single-family homes. One can expect that those entrances will be busy. The building at that point is approximately 50 feet higher than the homes, depriving the homes of light and privacy. The 4th floor terrace on the apartment building will overlook Yuma and Alton Streets, depriving residents of those streets of privacy and creating the potential for disruptive noise. (Exhibit 240A2, slide A; Exhibit 408, slide 41.)

E. The Project is Inconsistent with the Future Land Use Map

1. The Future Land Use Map (FLUM) "express[es the] public policy on future land uses." (Comp Plan Framework Element, p. 2-33.)
2. The Future Land Use Element designates the SuperFresh site as Low Density Commercial. (Exhibit 240A2, slide 10.)
3. The Comprehensive Plan's Framework Element states that a "common feature [of Low Density Commercial areas] is that they are comprised primarily of one- to three-story commercial buildings." (Framework Element, p. 2-34.)

4. The main building is six stories, including the habitable penthouse. (Exhibit 240A1, slide 15.)
5. If the Proposed Project were approved, 96.5 percent of the structures on Lot 9 (which consists of the AU Building and the SuperFresh site) and over 75 percent of the structures on the so-called Project Lot will consist of buildings of four or more stories. (Exhibit 247, p. 9.)

F. The Project Causes Adverse Traffic and Parking Impacts

1. The traffic counts of existing traffic volume conducted by Valor's traffic consultant were performed on October 18, 2016 and October 20, 2016, more than two years ago. (Exhibit 107A, p. 27).
2. At the time the traffic counts were taken the 179,302 sq. ft. American University building next door was largely vacant, as it was undergoing renovation after AU's law school was relocated in January 2016. That building is now fully occupied and used for administrative offices, undergraduate classes and a non-credit, continuing education program enrolling more than 1000 older adults (almost all of whom drive). (Exhibit 332, p. 2.)
3. At the time the traffic counts were taken two popular restaurants and a coffee house with a total of more than 500 seats were not open. (Exhibit 332, p. 2)
4. Valor's traffic consultant estimates that the Project will generate 155 additional auto trips per hour during the AM Peak Hours and 322 additional auto trips per hour during the PM Peak Hours (Exhibit 244, p. 2.)
5. Valor's traffic consultant estimates that the Project will generate 21 truck trips per day. (Exhibit 107A, p.13.)
6. The additional traffic generated by the development will cause congestion on neighboring streets and be a particular danger to children and the elderly who live in the neighborhood. (Testimony of Laura Ivers at January 25, 2018 hearing, Exhibit 194. P.1; Testimony of Laura Ivers at January 24, 2019 hearing, transcript, pp, 116-117.)
7. Valor's traffic consultant estimates the number of new trips during the peak hours attributable to the retail and residences but does not appear to factor in the auto trips attributable to the parking spaces within the Project reserved for American University. (Exhibit 107A, p. 25.)
8. CRD's traffic consultant (Joe Mehra of MCV Associates) estimates that the project will generate a daily total of between 3393 and 3811 weekday trips, depending on the size of the grocery store. (Exhibit 406.)
9. CRD's traffic consultant estimated that the grocery store alone will generate 320 trips during a weekend hour, 60% more than during a weekday, and stated that the additional traffic attributable to the grocery store is the reason why a weekend traffic analysis is needed. (Exhibit 3 to Exhibit 137.)

10. Citing data from Valor's traffic consultant, CRD testified that it expects around half of the trips will enter/exit the site using the 48th St. entrance to the alley behind the AU Building. The number of trips per hour during the PM Peak Hours will increase from 23 to 174, a 757% increase in total trips. (Exhibit 332, p. 2.)
11. Traffic using this alley will need to navigate around the AU shuttle buses (up to 10 per hour) that park on 48th St., about 15 feet from the alley. The buses take one of the three lanes of 48th St., and sometimes block the alley (Exhibit 332, p. 2.)
12. The loading dock and trash dumpster for the AU building are also located off the East/West alley, and AU vehicles commonly park on the alley in front of the entrances. The loading bays are not shown in Valor's renderings and the impact is not addressed in Valor's CTR. (Exhibit 322, p.2; Testimony of Barbara Repp, January 24, 2019, transcript, pp. 43-44.)
13. The number of trips per hour during the PM Peak Hours using the Yuma St. entrance to the North/South alley will increase from 19 to 117, a 616% increase in total trips, and the number of trips per hour during the PM Peak Hours using the Massachusetts Ave. entrance to the North/South alley will increase from 5 to 68, a 1360% increase in total trips. (Exhibit 322, p. 2.)
14. According to diagrams from Valor's traffic consultant, Valor proposes that large (WB 50) trucks will enter the East/West alley from 48th St.; proceed around the angle in the alley to the end; then begin back-up maneuvers in order to reach the loading dock. In leaving, they will then re-enter the alley, front end first, and turn right onto 48th St. to reach Massachusetts Ave. (Exhibit 244, p. 11.)
15. According to diagrams from Valor's traffic consultant, large trucks entering the East/West alley from 48th St. will scrape parked cars on 48th St. and impinge on the sidewalk at 48th Street. (Exhibit 244, p. 11.)
16. Similarly, large trucks will impinge on the PNC Bank property when backing into the Project's loading dock. (Exhibit 332, p. 3.)
17. Large trucks will not be able to make the turn into the North/South alley from the East/West alley. (Exhibit 332, p. 3.)
18. According to diagrams from Valor's traffic consultant, large trucks coming from Maryland and turning left onto 48th to access the site from 48th need to turn left from the right-hand lane on Mass Ave. The same diagrams show that large trucks exiting from 48th St. will not be able to make a right turn to head to Maryland. (Exhibit 244, p11.)
19. It is impracticable for some trucks to use the North/South alley for deliveries to the SVSC. Even with the current low level of traffic, walkers through the alley have been hit. Trash compactors will not work in a 20-foot alley, as they need to be positioned at an angle. (Testimony of Bill Fuchs, owner of Wagshals Market, based on 30-years of observations, at the January 24, 2019 hearing, transcript, pp. 171-180.)

20. The alley behind the Spring Valley Shopping Center will be bottlenecked due to trucks servicing the shopping center. (January 25, 2018 hearing, transcript, pp. 125-127.)
21. The Project will cause increased cut-through traffic in Spring Valley, in part due to the proposed HAWK light. (January 11, 2018 hearing, transcript p. 130.)
22. The owner of the SuperFresh lot is required under the Declaration of Easement and Agreement to make 236 parking spaces available to people using the AU Building. (Exhibit 244, attached Technical Memorandum, p.2.)
23. The Project is projected to have 370 parking spaces. (Exhibit 244, attached Technical Memorandum.)
24. Valor is reserving 86 of the parking spaces for use by customers of the grocery/retail. (Exhibit 244, attached Technical Memorandum, p.1.)
25. The Project may have up to 240 residential units. (Exhibit 240, p.7.)
26. Valor's traffic consultant assumes that all but 56 of the parking spaces that it is obligated to provide for AU's use will instead be dedicated for residents and retail users of the Project. (Exhibit 244, attached Technical Memorandum.)
27. Valor does not have an agreement with AU covering the allocation of parking spaces. (Lansing testimony at January 7, 2019 hearing, transcript, p. 46.)
28. Mr. Aaron Zimmerman testified that people who live a mile from the Metro will have automobiles. (January 11, hearing, transcript p. 115.)
29. Valor proposes to restrict residents of the building from obtaining a Residential Parking Permit ("RPP"), with penalty of lease termination. (Exhibit 244, p. 10.)
30. It is unclear where the residents without parking spaces will park their vehicles.
31. There is no agreement with the Spring Valley Shopping regarding loading management, as relied upon in DDOT's report. (Exhibit 133, p. 8; Testimony of Will Lansing at the February 6, 2019 hearing, transcript, p.95.)

G. Pedestrian Safety Is Threatened Because the Alleys Are Not Equipped to Handle the New Combination of Increased Truck, Automobile, and Pedestrian Traffic

1. The significant increase in cars and trucks entering and exiting the alleyways around the perimeter of the proposed building will create dangers for pedestrians.
2. The volume of traffic in the alleys will reach the levels on the nearby streets. (Testimony of Shelly Repp, Transcript of January 24, 2019 hearing, p. 42.) This statement was unchallenged in Valor's Rebuttal.
3. Both the North/South and East/West alleys will each be 20-foot wide. (Exhibit 322, p.2.)
4. There is no safe pedestrian connectivity through the site. (Exhibit 322, p. 1.)
5. The sidewalk proposed for the North/South is only three feet wide and directly abuts the four-story high wall at the rear of the proposed building. This type of sidewalk would not meet safety or ADA standards for a low volume street. (Exhibit 322, p. 1.)

6. A mother pushing a stroller or someone who is wheelchair bound will not be able to navigate this narrow sidewalk safely. (Testimony of Barbara Repp at the January 24, 2019 hearing, transcript p. 45)
7. This sidewalk ends at the intersection of the North/South alley and the East/West alley, forcing pedestrians to walk amidst the cars and trucks in the alley leading to Massachusetts Ave. (Exhibit 322, p. 1.)
8. The sidewalk along the East/West alley ends where there are three entrances: one entrance is for the garages for the five proposed townhouses, and the other entrances are for the underground parking garage for the 214 apartment units and for the grocery store and the building's loading docks. A stretch of about 75 feet in this two-way alley, used by both cars and large trucks, will have no sidewalk. (Exhibit 322, p. 1.)
9. There is an entrance to the retail space, which could very well be the grocery store, where the East/West alley intersects with the North/South alley. Customers will need to cross two alleys at this point. (Testimony of Valor Team during Cross Examination on Rebuttal, February 6, 2019.)
10. Valor proposes to add mirrors and stop signs within the alley, and textured pavement where the alleys intersect. (Exhibit 425, p. 22.) These changes are insufficient to address the pedestrian safety issues.

H. Valor Cannot Use 48th Street as the Building Height Measurement Point

1. Valor has located the Base Height Measuring Point (BHMP) of its proposed Ladybird building at the curb grade of 48th Street. (Exhibit 3B1, p. 13; Exhibit 425, p. 30.)
2. Valor has relied upon its BHMP to propose a building which would be 43 1/2' high on the side facing 48th Street, and which would rise to 67 1/2' high at its rear along the North/South alley connecting Massachusetts Avenue and Yuma Street. The penthouse would add another 15' to the building's height. (Exhibit 425, p. 6.)
3. The change in the proposed building's height is due to the steeply sloping site, which has a 26' drop in elevation from the 48th Street curb grade down to the aforesaid alley. (Exhibit 195; January 11, 2018 hearing transcript, p. 28.)
4. Although Valor's building design includes setbacks on the upper floors of its building, these setbacks do not change the actual height of the building. (Exhibit 425, p. 6.)
5. The contour maps in the record show that, prior to the construction of 48th Street, there was a continuous natural slope descending from above 47th Street down to where the aforesaid alley exists today. (Exhibits 137, 195 and 405.)
6. The photographs of the site submitted by CRD warrant the inference that, when 48th Street was constructed circa 1940, between Yuma Street and Warren Street, the roadbed for that section of the street was leveled across the natural slope by raising an embankment on the downhill side. Hence, the curb grade from which Valor has taken its height measurement rests upon that artificially elevated curb grade. (Exhibits 137, 195 and 405.)

7. CRD's photographic evidence further establishes that the aforesaid embankment is substantial and extends from the downhill curbside of 48th Street approximately 28' to the retaining wall above the present parking lot. In addition, a ramp rises from the deck of that parking lot up to the level of the embankment, to permit vehicles to access 48th Street. (Exhibits 137 and 405.)
8. Valor has submitted evidence to support its claim that the elevation of the downhill curb grade of 48th Street has not changed since 48th Street was constructed circa 1940. (Exhibit 425, p. 33.) CRD does not contest this claim.
9. However, Valor also contends that the elevation of the curb grade of 48th Street at its BHMP has not changed since before 48th Street was constructed. To support this additional claim, Valor has compared its present-day elevation figure of 265' above sea level, to an "approximate" elevation reading extrapolated from a 1900 USGS topographic map. (Exhibit 425, p. 29.) CRD has demonstrated that the accuracy of such elevation comparisons is subject to a significant margin of error and is therefore not reliable. (Exhibit 405.)
10. Furthermore, Valor has failed to explain how the roadbed for 48th Street could have been leveled across the slope in some manner other than the raising of an embankment on the downhill side. Nor has Valor submitted any soil sample or other evidence to contest the existence of the embankment shown in CRD's photographs. Hence, all the evidence available to the Commission indicates that the curb grade of 48th Street was elevated above the natural slope by the construction of the embankment shown in CRD's photographs, at the time the 48th Street roadbed was first constructed. (Exhibits 137 and 405.)

I. The Valor Project Continues to Fail to Meet Inclusionary Zoning Requirements

1. Under the Zoning regulations, the required inclusionary zoning set-aside for a development like the Project that does not employ Type I construction is "the greater of ten percent (10%) of the gross floor area dedicated to residential use including penthouse habitable space as described in Subtitle C, Section 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 Subtitle C, Section 1001.2(d)." (Subtitle C, Section 1003.1.)
2. The latter test applies to this Project because it yields a greater amount of IZ. (Testimony of Ms. Marilyn Simon (Exhibit 374)).
3. The reason why Valor asked for deferral of Commission deliberation in February 2018 was that Valor realized, and OP confirmed, that the previous Valor proposal failed to meet the required inclusionary zoning set aside (Testimony of Will Lansing at the February 6, 2019 hearing, transcript, p.59.)
4. Valor current proposal is an attempt to circumvent the District's Inclusionary Zoning requirements by sinking the building six feet into the ground. (Exhibit 247, pp 12-13.)

5. The Project continues to fail to meet Inclusionary Zoning Requirements. (Exhibit 247, pp 12-13; Testimony of Ms. Marilyn Simon (Exhibit 374).)
6. In testimony, OP's Jennifer Steingasser stated that OP has not signed off on Valor's IZ calculations and compliance (Testimony of Jenifer Steingasser at the January 7, 2019 hearing, transcript, pp. 114-115.)
7. Even under Valor's interpretation of the IZ requirement, the Project contains only the bare minimum amount of affordable housing GFA, and in fact is less than included in the previous version of the Project. (Exhibit 240A1, pp. G05 and G09, slides 11 and 15.)
8. For the purposes of the IZ requirement, the GFA of the Voluntary Design Review site is 430, 853, the habitable penthouse space is 29,962 sq. ft, the projecting bays are 1,719 sq. ft. and habitable cellar space is 26,050. (Exhibit 240A1, p. G09, slide 15.)
9. No flexibility can be granted from the Inclusionary Zoning requirements through the design review process. (Section 601.1 of the Design Review Regulations.)

J. Historic Preservation Implications

1. Valor cites several cases involving historic properties as precedent to allow a transfer of density for this Project and relies specifically on two cases: ZC Order 101 (Heurich Mansion; Dupont Circle Citizens Association v. Zoning Commission) and Friends of McMillan Park v. D.C. Zoning Commission, 149 A.3d 1027 D.C. 2016 (Exhibit 240D). Neither of these cases authorize the Zoning Commission to allow a transfer of density under the Voluntary Design Review process.
2. All the cases cited for the Zoning Commission's authority to transfer density are PUDs. This project is not a PUD.
3. The 1976 DC Appeals Court ruling on ZC Order 101 did not authorize the Zoning Commission to transfer density outside established transfer development (TDR) or combined lot development rights (CLD) zones. In 1976, TDR and CLD zones had not yet been created. Transfers such as that under ZC Order 101 were later limited to the Downtown ("D") zones in 1989.
4. The 2016 zoning regulations replaced the old TDR program with a new credit trading program that focuses on transferring use rights and not physical density. Therefore, ZC does not have the authority to grant transfers of physical density outside the Downtown Plan ("D" zones) sending and receiving zones.
5. The McMillan order is still in front of the DC Court of Appeals and until that decision is handed down, all issues relating to the case, including the aggregation of density, remain undecided.
6. The SVSC has limited, if any, available density to transfer, and not the amount required by this project.
7. Valor cites Title 11, Subtitle I ("Downtown Zones"), Section 200 as a model for how transferable density is calculated (Exhibit 252).

8. Subtitle I has specific requirements for the treatment of a landmarked building on a project site.
9. As Valor states, under Subtitle I the Historic Preservation Review Board (HPRB) and the Zoning Commission determine the calculation and allotment of density of a landmarked building. (Exhibit 252).
10. The Historic Preservation Office (HPO) recognizes the historic plan for the SVSC, including its design and the parking lot in front as defining attributes of the landmark. Unlike with the WREIT project across Massachusetts Avenue, the SVSC affords little non-contributing spaces that can be filled in. It is highly unlikely that the Historic Preservation Review Board would approve any construction on top of the shopping center building, or any other additions that would alter the original shape and footprint of the building.
11. SVSC's density should not be determined by what is allowable with MU-4 zoning, but what HPRB may determine to be an allowable addition to this landmarked building
12. Moving density from the SVSC will not help preserve it from future development as the Valor claims (Exhibit 240B).
13. The SVSC will not benefit directly or indirectly by this project. SVSC is a landmarked site, listed in the DC Inventory of Historic Sites and the National Register of Historic Places, and its protections are established in local preservation law, with oversight by the HPRB and Mayors Agent, not by zoning.

K. Strong Neighborhood Opposition Exists to Valor Development's Revised Project Filed on October 16, 2018 (the "Revised Project")

1. On January 24, 2019, twenty-two neighbors testified as individuals in opposition to the Revised Project. Not one person testified as an individual in support of the Project. (Recording of January 24, 2019 hearing.)
2. Following the filing of the Revised Proposal on October 16, 2018, 65 letters were submitted in opposition to the Proposed project by individuals all residing close to the SuperFresh site (including ten by "200 footers"). Each of these letters was individually written and reflects heartfelt opposition. No individual living within 200 feet of the Project site submitted a letter in support of the Project. Nearly half of the individual letters submitted in support were brief form letters. Docket for Case No. 16-23.
3. One of the individuals testifying against the Revised Project was Bill Fuchs, the owner of Wagshals Market (a 94-year old DC business) and a resident of Wesley Heights. He stated that if the Project goes ahead, he will be losing his businesses located within the SuperFresh building that employ thirty people. He also stated that "I do have trepidation as how it's going to affect the other businesses that I currently have." (Transcript of January 24, 2019 hearing, p. 171.) Those other businesses

- include a delicatessen and a meat and seafood market located in the Spring Valley Shopping Center next door.
4. The 157-home Spring Valley West Homes Corporation is a party in opposition, as is Spring Valley Wesley Citizens Association and Neighbors for a Livable Community.
 5. Thirty-two residents of Spring Valley Court, just across Massachusetts Ave., have signed a petition opposing the Revised Project. (Exhibit 278.
 6. The Westmoreland Citizens Association representing 990 households just up Massachusetts Ave submitted both a letter in opposition (Exhibit 267) and testimony opposing the Revised Project (Exhibit 420.).
 7. 587 residents of ANC3D and ANC3E previously signed a petition stating that they would support a 2-3 story building on the site that would reflect the scale and character of the surrounding area but not a larger building with 200 to 250 residential units (like the one Valor now proposes). (Exhibits 27 and 27A).
 8. Given that the ANC3E Chair voted against the Project, Jonathan McHugh represented the ANC3E before the Commission. He testified that most of the ANC Commissioners said during the ANC vote that the Project is “imperfect” and that he “likes it less now.” (Transcript of January 7, 2019 Hearing, p. 146.)
 9. Despite being informed twice by CRD (once publicly during the January 7, 2019 hearing and then privately during the January 24, 2019 hearing) of the omission, the signed Memorandum of Understanding between ANC3E and Valor, which is required by the ANC3E resolution dated December 13, 2019, is missing a critical attachment (Exhibit B). (Exhibits 270 and 270A.) Consequently, the ANC action should not be given great weight.
 10. Troy Kravitz represented ANC3D before the Commission. He testified that he “tried to get them [Valor] to come down two stories.” Transcript of January 7, 2019 Hearing, p. 145.)

L. The Record Reveals Valor’s Pattern of Deception

1. For over three years, Valor has told the community that it was close to securing a full-service grocery store for the SuperFresh site. (January 25, 2018 hearing, transcript pp. 56-58.)
2. Valor now says that it has separate non-binding letters of intent with two grocers, My Organic Market (MOM’s) and one other [Balducci’s], each of which is a specialty market. (Testimony of Will Lansing, January 7, 2019 hearing, transcript p.43-45.)
3. Neighbors do not consider MOM’s a full-service grocery store. (Testimony of Scott Parker on behalf of Spring Valley West Homes Corp., Exhibit 416.)
4. With respect to the consideration of the previous version of the Project, Valor represented to DDOT that it had an agreement with American University such that all but 56 of the parking spaces that it is obligated to provide for AU’s use will instead be dedicated for residents and retail users of the Project. (January 11, 2018 hearing,

- transcript, pp. 113, 114 and 165.) However, Valor admitted at that hearing that there is no such agreement. (Lansing testimony at January 11, 2018 hearing, transcript, p. 98.)
5. Similarly, with respect to the Revised Project, Valor's traffic consultant assumes that all but 56 of the parking spaces that it is obligated to make available for AU's use will instead be dedicated for residents and retail users of the Project. (Exhibit 244, attached Technical Memorandum.) However, Valor still does not have an agreement with AU covering the allocation of parking spaces. (Testimony of Will Lansing at the January 7, 2019 hearing, transcript, p.46.)
 6. Valor's renderings of what a matter-of-right building would look like are unrealistic and misleading.
 7. The shadow studies provided by Valor cut off at 4:00 pm and are cropped, thus failing to show the full deprivation of sunlight on the immediate neighbors. (Exhibit 240A6, slide 6.)
 8. Valor has refused to provide essential agreements with the owner of the Spring Valley Shopping Center and American University, each of whom is a party to the Application, and with the presumed grocer.
 9. The Architectural Renderings previously submitted by Valor needed to be corrected on two occasions because they were misleading and grossly underrepresented the full size of the Project.
 10. Will Lansing stated during the February 6, 2019 hearing that, "We have been involved in seven successful entitlement cases over the past seven years." These cases, he said, have taken them to "Wards 1, 2, 3, 6, and 7." (Will Lansing's Testimony at the February 6, 2019 hearing.)
 11. While it appears that Valor has been involved in some successful projects, the Commission should be aware that the public record shows that:
 - A property in Ward 1 that was first acquired by Valor and partners in 2011 (Il Palazzo, LLC; ZC Case 11-08, 11-08A, 11-08B, and 11-08C) remained undeveloped until the property was sold by Valor to Mill Creek Residential Trust (MCREF Embassy, LLC) in 2015.
 - There are questions surrounding two other longstanding Valor projects, one in Ward 7 (Valor Minnesota; BZA Case 19055 and 19055A) and one in Ward 6 (Valor Benning LLC; ZC Case 16-22) where Valor has not gone forward with their proposed applications. These properties have remained undeveloped for several years.

CONCLUSIONS OF LAW

I. The Project Calls for an Impermissible Increase in Density

It is uncontested that the matter-of-right density allowed on the SuperFresh site (Lot 807) is no more than 184,514 GFA. The GFA of the Revised Project is 234,629. Valor is proposing to use the Design Review process to transfer 50,115 in GFA from the adjacent, historically designated Spring Valley Shopping Center which occupies Lots 802 and 803, thus increasing the density on Lot 807 above that permitted as a matter-of-right. However, the Design Review Regulations state in Section 600.1(c) that projects that do “not need extra density” may voluntarily submit themselves for design review. The Design Review Regulations in three additional sections specifically preclude the use of this process to increase density or FAR (see Sections 600.1(e), 600.5 and 603.1). It is obvious that Valor is proposing a density increase. This is not permissible under the Design Review Regulations.

Valor relies on Section 600.1(e) as authority for increasing density. Under this section, the Design Review process provides for “flexibility in building bulk control, design and site placement without an increase in density...” Valor’s reliance on this provision is misplaced for several reasons. First, the language specifically states that the flexibility permitted cannot result in an increase in density. Second, there is no basis for using the words “building bulk control” to authorize a transfer of density that would permit a larger than matter-of-right building on Lot 807. Webster’s Unabridged Dictionary defines the noun “control” to be “the act or power of controlling” and defines the verb “control” as “to exercise restraint” or “to hold in check; curb.” Valor is proposing to do just the opposite. Rather than restraining bulk, Valor is proposing to bulk up a building within a residential neighborhood.

Valor cites the Planned Unit Development Regulations as authority for FAR aggregation in Design Review. However, the PUD authority is contained in a separate chapter of Subtitle X of the DCMR and contains specific authority for increasing density and the type transfer/aggregation proposed here. The PUD regulations in Section 300.1 of Subtitle X state that: “The purpose of the planned unit development process is to provide for higher quality development through flexibility in building controls, including height and density.” Not only does an increase in density not appear in the flexibilities permitted under Design Review, but the regulations explicitly forbid such increases. The plain meaning of the Design Review regulations is clear – density increases are prohibited.

The Office of Planning (OP) also suggests that some aspects of a PUD were “inadvertently” left out of the Design Review Regulations. Specifically, OP refers to Section 303.2 of the PUD Regulations, which states “If a PUD includes more than one (1) zone district, the FAR of all buildings shall not exceed the aggregate of the FAR as permitted in the several zone districts included within the PUD area.” This language does not appear in the Design Review Regulations. OP suggests that this language, “although not explicitly stated,” should be interpreted to apply to design review. Ordinary canons of statutory construction say that when a provision is included in one place but not a totally separate statutory section, it should not be assumed to apply where it is not included. The PUD process has its own requirements, which are extensive and include the requirement of an “offer of a commendable number or quality of meaningful public benefits” that need to be vetted and approved by the community. The Project is not a PUD and should not be treated as a PUD. Design Review is simply the wrong vehicle for the Valor Project.

The transfer of density also violates the terms of Declaration of Easement and Agreement (the “Easement”), which was executed to facilitate the construction of what now is the AU Building. The Easement allocates density between Lot 806 and Lot 807 and 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].” Thus, 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, including their successors, may not authorize this Project and at the same time comply with the legal covenants to which they are bound in the Easement, since doing so would surpass the maximum GFA allowed on Record Lot 9.

II. The Project Fails to Meet a Number of Other Requirements of Design Review

A. Contrary to Sections 600.4, 604.5 and 604.7(c)(2) of the Design Review Regulations, the Project is Inconsistent with the Comprehensive Plan

The Comprehensive Plan’s Urban Design Element states that one of the overarching goals for urban design is to harmoniously integrate new construction with existing building. Also, “overpowering contrasts in scale, height, and density should be avoided as infill development occurs.” (Comp Plan Urban Design Element, Policy UD-2.2.) Similarly, the Comprehensive Plan’s Land Use Element states that infill development should complement the established character of the area and not create sharp changes in the physical development pattern (Policy LU-1.4.1), and the Plan’s Rock Creek West Area Element states that heights and densities for infill development should be appropriate to the scale and character of the adjoining communities (Policy RCW-1.1.4). The Proposed Project, which rises to 82.5 feet on the North/South alley, is inconsistent with these policies. The Project is incompatible with the neighboring residential

community of two-story homes and the adjacent one-story, historically designated Spring Valley Shopping Center.

For the same reasons, the Project conflicts with Section 604.7(c)(2) of the Design Review Regulations because it does not respect the neighborhood character. In short, the height and density of the Project are incompatible with the neighborhood. A project of this size belongs on a major thoroughfare, not two local streets within a residential community.

B. Contrary to Sections 600.4 and 604.5 of the Design Review Regulations, the Project is Inconsistent with the Future Land Use Map

The Future Land Use Element (the FLUM) designates the site as Low Density Commercial. The Comprehensive Plan's Framework Element states that a "common feature [of Low Density Commercial areas] is that they are comprised primarily of one- to three-story commercial buildings." At six stories tall, including the habitable penthouse, the Project's main building is inconsistent with the FLUM.

Valor 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 in the FLUM. Here, and contrary to Valor's position, 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 when density on Lot 9 was shifted to the Massachusetts Avenue side of the parcel. Instead, Valor 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 the Project lot (composed of Lots 802, 803, 806 and 807) 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 Valor.

C. Contrary to Sections 600.1(a) and 604.6 of the Design Review Regulations, the Project Will Have an Adverse Impact

Section 600.1(a) of the Design Review Regulations requires the Commission, before approving a project, to make a finding of no adverse impact. For the reasons set forth below, the Project will have an adverse impact, particularly due to the added traffic in the neighborhood and in the alley network surrounding the site. The neighborhood will also be adversely impacted due to the potential parking overload.

Any assessment of the impact of additional traffic must start with existing traffic volumes. Here, the Comprehensive Traffic Review performed by Valor's traffic consultant is based on data collected well over two years ago (on October 16 and October 20, 2016). There have been

significant changes since the time the counts were taken that require the traffic counts to be updated. The 179,302 sq. ft. American University building on Lot 806 was largely vacant in October 2016, as it was undergoing renovation after AU's law school was relocated in January 2016. That building is now fully occupied and is being used for administrative offices, undergraduate classes, and a non-credit, continuing education program enrolling more than 1000 older adults (almost all of whom drive).² At the time the traffic counts were taken two popular restaurants and a coffee house with a total of more than 500 seats were not open. In addition to the existing traffic volume and inherent growth, Valor's traffic consultant estimated that the Project itself will generate 155 additional auto trips per hour during the AM Peak Hours and 322 additional auto trips per hour during the PM Peak Hours.

Valor's traffic consultant did not estimate a daily total of additional trips, but CRD's traffic consultant (Joe Mehra of MCV Associates) estimates that the Project will generate between 3393 and 3811 weekday trips, depending on the size of the grocery store. This estimate was not challenged during Valor's rebuttal on February 6, 2019.

Valor's traffic consultant did not perform a weekend traffic analysis. CRD's traffic consultant estimated that the grocery store alone will generate 320 trips during a weekend hour, 60% more than during a weekday, and stated that the additional traffic due to grocery store is the reason why a weekend traffic analysis is needed.

The additional traffic generated by the development will cause added congestion on neighboring streets. All the additional traffic entering and exiting the building will be routed through the alley network surrounding the site. Traffic using the alley entrances on 48th Street, Yuma Street, and Massachusetts Avenue is projected to be, respectively, 757%, 616% and 1360% higher than currently. The traffic in the 20-foot wide alleys will reach the levels on the nearby streets, creating dangers for pedestrians, a danger that is heightened because there is no pedestrian connectivity through the site, contrary to Section 604.7(f)(1) of the Design Review Regulations.

These dangers will be particularly acute in the North/South alley, where trucks servicing the Spring Valley Shopping Center will need to park while unloading and loading. Contrary to Section 604.7(a)(5) of the Design Review Regulations, a wide sidewalk is not provided along this alley. The sidewalk in this alley will be 3-feet wide and will directly abut the back wall of the apartment building and will be particularly dangerous for a mother pushing a stroller or

² The Osher Lifelong Learning Institute at American University has over 1000 members.
<https://www.american.edu/alumni/benefits/education/olli.cfm>

someone who is wheelchair bound. The Project's design for walkways and sidewalks falls short of recommendations made by the Federal Highway Administration.

The sidewalks along both alleys are interrupted for large stretches and do not provide a pathway for pedestrians through to Massachusetts Avenue. Contrary to the Comprehensive Plan, the Project increases the number of pedestrian-vehicle conflict points and undermines the goal of Vision Zero. Thus, contrary to Section 604.7(f)(3) of the Design Review Regulations, the Project is not designed to be safe and pedestrian friendly. The mitigation proposed by Valor during Rebuttal - mirrors, stop signs and colored pavement – will hardly address the problems.

The additional traffic brings parking issues. While the Project will have 370 spaces, 86 spaces are being reserved for customers of the grocery store/retail and 236 spaces are currently dedicated to AU pursuant to the Declaration of Easement and Agreement. While Valor has represented to DDOT that all but 56 of 236 spaces reserved for AU will be released for use by residents and retail customers, no agreement between AU and Valor currently exists, so there's no certainty as to how many spaces will be available for residents of the complex. Given that DDOT agrees that people residing a mile from Metro can be expected to have cars, it follows that residents of the Valor building will end up needing to park in the neighborhood, which is already overwhelmed by AU students (particularly those enrolled in the life-long learning program). The shortage in parking will become particularly acute if Valor exercises its option to increase the number of units in the apartment building by ten percent (or 21 units), an option it has declined to relinquish.

D. Contrary to Section 604.7(b) of the Design Review Regulations, the Project Has Few Public Gathering Spaces

Valor's previous proposal contained Windom Walk, which OP indicates would have served as a public space. The small pocket space (Windom Park) in the Revised Project is hardly a public space. OP specifically states that "Windom Park does not function in the same way [as Windom Walk] to provide a truly public space. It is unlikely that the public would take advantage of the seating areas located in the Proposed Windom Park." While Valor also is proposing to have seating along Yuma in front of the entrance to the grocery store, it is likely that this will serve mostly grocery patrons and any large gathering would certainly be disruptive to the single-family homes directly across the street. There is another gathering area, the rooftop terrace, but that will be reserved for residents of the complex and, overlooking Yuma and Alton Streets, it will deprive Yuma and Alton Street residents of privacy and create the potential for disruptive noise.

E. The Project Fails to Meet the Requirement Found in Section 604.8 of the Design Review Regulations that the Project Be Superior to Any Matter of Right Project Possible on the Site

Under the Design Review Regulations, the 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 Section 604.8. Valor has failed to meet its burden in demonstrating that its design complies with this requirement. The matter-of-right straw man provided by Valor – a 50-foot tall building sited on the lot line – is clearly unrealistic. A matter-of-right building would need to be smaller than the Project, as it would be limited to 184,514 GFA. CRD is confident that a responsible developer would not construct an unattractive building as suggested by Valor, as this would not be in its economic interest. It should be clear to the Commission that Valor could design a matter-of-right structure that would rival or be superior to the Project. In fact, Will Lansing testified that, while Valor would not commit to include certain of the features of their Project in a matter-of-right alternative, this doesn't mean that they wouldn't examine, review and analyze them in a matter-of-right context. Importantly, Walter Borek, in individual testimony on January 24, 2019 and relying on his training as an architect, submitted details of an attractive design of a possible matter-of-right project for the site, one that had both public spaces and connectivity. (Exhibit 415). Mr. Borek's matter-of-right design featured both townhouses and apartments and included attractive public spaces and wide pedestrian pathways. Such a matter-of-right design would be consistent with the Comprehensive Plan.

III. The Zoning Regulations Prohibit Valor from Taking Its Maximum Height Measurement at 48th Street

Valor has failed to meet its burden of proof that its Building Height Measuring Point (BHMP) is lawful, because it has not refuted CRD's contention that its BHMP rests upon an artificial embankment in contravention of §307.7 of Subtitle B of the Zoning Regulations. Valor has rested its case upon an interpretation of §307.7 which would limit the applicability of that regulation to situations where the elevation of the curb grade occurs only after construction of the street. (February 6 hearing transcript.) This interpretation is erroneous because no such limitation is contained in the text of the regulation. As indicated by §307.7 (d), the regulation applies whenever there is an artificial "discontinuation of the natural elevation." Valor's interpretation is also inconsistent with its own previous contention that §307.7 does apply to railroad overpasses. (Exhibit 252, p. 15.) Moreover, Valor's proposed limitation would mean that the regulation would never be applicable, given that any street that has been reconstructed to have a higher curb grade (and consequently a higher roadbed and surface) would likely be considered a new street with a new curb grade.

Valor has previously relied upon the definition of "natural grade" in §100.2 as limiting the applicability of §307.7 to elevations of the natural grade occurring within the past two years. (Exhibit 252, p. 15.) This interpretation is erroneous because the defined term "natural grade" does not appear in §307.7, and also because §100.2 contains a specific exception for the case of

features such as a “berm,” a term that would include an embankment holding a roadway, such as the embankment shown in the present case.

Accordingly, the Zoning Regulations, at §307.7, do not permit Valor to locate its Building Height Measurement Point (BHMP) at the curb grade of 48th Street because that curb grade was elevated above the natural grade of the hillside by an artificial embankment at the time 48th Street was constructed circa 1940. In consequence, §307.7(c) applies, and requires Valor to locate its BHMP at the middle of the front of its proposed building facing Yuma Street.

IV. Valor’s Claims that It Can Transfer Density from the Spring Valley Shopping Center and that this Transfer Will Provide Preservation Benefits Are Unfounded

Valor has made numerous claims that it can transfer density from the historic Spring Valley Shopping Center (SVSC) and that such a transfer will provide preservation benefits. These claims are invalid. Additionally, in written submissions to the Zoning Commission, Valor has made direct references and comparisons to transfer development rights (TDR) programs as a justification or model in requesting a density transfer.

A. The Cited Authorities and Precedents Do Not Apply

Valor cites several cases as precedent to allow a transfer of density for this Project. None of these cases are precedent to allow a transfer of density under the Voluntary Design Review process. Valor relies heavily on two cases: ZC Order 101³ (Heurich Mansion; Dupont Circle Citizens Association v. Zoning Commission) and Friends of McMillan Park v. D.C. Zoning Commission.⁴

Both ZC Order 101 and Friends of McMillan Park were cases involving PUDs, where aggregation of FAR is permitted. Additionally, both cases involved a rezoning to allow for increased density on parts of their respective project sites, which resulted in a height/density allowance on a specific lot, also as is allowed in a PUD. The Valor Project is not a PUD, and, unlike the PUD process, the Voluntary Design Review process does not allow for an increase in density or a map amendment.⁵

³ D.C. Court of Appeals. See Zoning Commission Order No. 101; Dupont Circle Citizens Association v. Zoning Commission, 355 A.2d 550, 556-57 (DC 1976)

⁴ D.C. Court of Appeals. See *Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027 D.C. 2016

⁵ Among the other cases Valor cites were three other zoning cases (ZC No. 15-27, ZC No. 08-07, and ZC No. 14-02). According to the Valor, 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 Valor Project and consequently do not provide appropriate precedent. All

Valor argues in Exhibit 252 that ZC 101 demonstrates that the Commission has the authority to approve transfers/aggregation of density outside of a designated credit trade area (former TDR and CLD areas) pursuant to its authority under the Zoning Act of 1938. TDRs did not exist at the time of the 1976 DC Court of Appeals decision upholding ZC 101. The DC Court of Appeals upheld ZC Order 101 due to the preservation protections it offered to the Heurich Mansion, since funds from the sale of density were earmarked for the maintenance of the mansion. The ruling was specific to finding a way to save the Heurich Mansion from potential demolition, a fate it would not so easily face under today's historic preservation protections, which did not exist at that time. The record here does not show that the proceeds of the sale or transfer will be used to preserve the historic site. Instead, Valor is attempting to use historic preservation to accomplish its own zoning objectives.

The Transfer Development Rights program was established in 1989, 13 years after the ZC 101 decision, as part of the city's Downtown Plan (the "D") zones. Therefore, there were no "outside of designated credit trade areas" in 1976 as Valor claims. The 1989 TDR program limited the Commission's authority to transfer or aggregate unused physical density to specific downtown (or "D") zones. The 2016 Zoning Regulations Rewrite (ZRR) retained the limitation for transfers within D zones, and instead of covering transfers of physical density, focused on density use transfers. The transfer of density outside the D sending and receiving zones, as proposed by Valor, is contrary to the 2016 regulations.

Outside of Design Review, which is discussed earlier, all Valor really has to claim for authority is the Zoning Act of 1938's reference to its "broad authority," ZC Order 101, expired aspects of credit trading programs that was limited to D zones, a still pending McMillan decision, and three other inappropriate zoning cases. None of these support the broad authority needed to be able to transfer or aggregate density for this project. As this is 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. Valor Incorrectly Calculates Potential Transferable Density of SVSC

In its December 18, 2018 Response to CRD's Response to Revised Plans (Exhibit 252), Valor makes reference to the credit trade program under Title 11, Subtitle I, Section 200⁶ in relation to how potentially transferable density of historic buildings is to be calculated and allotted. Valor states that "while this provision relates to properties in D zones, the principle is the same as

involved requests for rezoning, and none involved a combination of lots that included a historically landmarked site or Design Review. 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.

⁶ Title 11. Zoning. Subtitle I. Downtown Zones

it relates to the SVSC.” This is not a D zone project, but if the principle were to be applied, then under the Subtitle I transfer credit program to which it referred:

- compatible new development is subject to the review process of the Historic Landmark and Historic District Protection Act of 1978 (Act);
- only the portion of the lot within the historic structure’s footprint may generate density credits, and;
- for a historic building to generate credits, the requirement that it be fully rehabilitated pursuant to the Act.

Valor claims that CRD “provides no citation for its assertion that SVSC has no unused density to transfer and argues that landmarks can in fact be developed. Valor mentions the Washington Real Estate Investment Trust project (WREIT) at the other historic shopping center across the street from SVSC as an example of how landmarks may allow for some limited development.

In contrasting the character of the two historic shopping centers, a 2015 a DC Historic Preservation Office (HPO) staff report says of SVSC:

“The coordinated quality of its design, the clarity of its plan, and the siting of the parking in front of and accessed from the avenue make it obvious why it became a national model for an automobile-oriented commercial complex...”⁷

HPO then argued that these were not the historic characteristics of the Spring Valley Shopping Village where the WREIT project was being proposed.

Yet even with its reference to how density is to be calculated under Subtitle I. Valor is still calculating available density based on MU-4 zones, or as they say “under zoning [that] already exists” and not on a calculation and determination of allotment under Subtitle I.⁸ Based on the HPO’s evaluation of SVSC’s planned site, any determination of available density by the Historic Preservation Review Board (HPRB) would undoubtedly be much less than Valor is assuming. Unlike the parking lot area in the WREIT project, the open space of the parking lot has been determined to be a contributing attribute in the site’s historic designation. It is also highly unlikely that the Historic Preservation Review Board would approve and construction on top of the shopping center building, or any other additions that would alter the original shape and footprint of the building. Either of these actions would put the landmark at certain risk of a delisting from the National Register of Historic Places.

⁷ H.P.A. #15-252 (April 23 and 30, 2015)

⁸ Title 11. Subtitle I, 200.2. 800, and 900

C. A Density Transfer Will Not Help Protect the SVSC

In its Revised Comprehensive Plan Analysis (Exhibit 240B) Valor continues to claim that the Project will allow it to shift the unused density from the SVSC (Lots 802 and 803) to the Valor Lot (Lot 807) which will protect the historic SVSC from future development pressure.

During Valor's Rebuttal on February 6, 2019, Mr. Dettman 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."

Moving density from SVSC will not help preserve it from future development as Valor claims. The SVSC will not benefit directly or indirectly by this development project. Unlike with the WREIT project across Massachusetts Avenue, SVSC affords little non-contributing spaces that can be filled in. SVSC is a landmarked site, and its protections are established in local preservation law, with oversight by the HPRB and Mayors Agent, not by zoning. Thus, the proposed density is not an historically tangible benefit for the landmark and cannot be proffered as such.

V. The Project Does Not Include the Required Inclusionary Zoning Set-Aside

Under Subtitle C, Section 1003.1 of Title X of the DCMR, 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 Subtitle C, §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 Subtitle C, §1001.2(d)."

Achievable bonus density is defined in Section 1001.1: "Achievable bonus density is the amount of the permitted bonus density that potentially may be utilized within a particular inclusionary development provided in Subtitle C §1002."

Applying this definition to the Project, the achievable bonus density is 86,394 SF, and the required IZ set-aside would be 64,795.5 SF (75% of the achievable bonus density) plus 10% of the penthouse space subject to IZ (10% of 29,570 or 2,957 SF), for a total of 67,852.5 SF. Thus, using the definition in the current regulations, the affordable housing included in the Valor Project (27,440 SF) is 40,412.5 SF less than the IZ requirement.

Valor claims (i) that the achievable bonus density for the Project needs to be reduced by site conditions, and (ii) that the achievable bonus density equals the bonus density utilized for this proposal. However, in an earlier proposal, Valor demonstrated that any site limitations are not that severe, and that the achievable bonus density is at least 71,532. This means that the required set-aside would be 56,606 SF (75% of 71,532 is 53,649 plus 2,957 for PH). With a reduction in

the achievable bonus density based on site conditions, the 27,440 SF of affordable housing in the proposal would fall short of the set-aside requirement by 29,166 SF.

Valor acknowledges that the proposed text amendment in ZC 04-33i has not been adopted but claims that the proposed text amendment is simply a clarification, not a change in the regulations. This is false. The current definition of achievable bonus density is clear: the “amount of the permitted bonus density that potentially may be utilized.” The proposed text amendment would be a change in the current regulations, changing the calculation to “the amount of the permitted bonus density that is utilized.”

Even if ZC 04-33i is adopted as proposed, the affordable housing included in this Project does not meet the inclusionary zoning requirement, since Valor did not include the residential cellar space and projections in the calculation of bonus density as required by Section 1003.9. Valor asserts that Section 1003.9 does not apply to the calculation of bonus density, but only to the calculation of residential floor area. Section 1003.9 clearly states that it applies to the minimum set aside requirements of Sections 1003.1 and 1003.2. [Emphasis on the plural “requirements” added.] No distinction is made between the two separate tests in Section 1003.1. To reach its conclusion, Valor relies on a DCRA form that includes a specific disclaimer: “This guide is not a substitute or replacement for District laws and regulations, and those legal sources should be consulted for the specific legal requirements.” The DCRA form should not be used to determine the Zoning Commission’s intention is adopting that requirement. The plain meaning of Section 1003.9 should control.

Valor also claims that Section 1003.9 does not refer to the calculation of bonus density, since Section 1002.3 provides that inclusionary developments “may construct up to twenty percent (20%) more gross floor area than as permitted as a matter of right.” Valor argues that, since the maximum bonus is based on gross floor area, residential cellar space and projections, which are not included in gross floor area, should not be included in the calculation of bonus density. However, the import of Section 1003.9 is that it sets forth the allowance available if the IZ requirement is met. It doesn’t define the term “bonus density.” Further, Section 1003.9 specifies factors that are not included in gross floor area that should be included in Section 1003.1 calculations. Specifically, and Valor agrees, that residential cellar space and projections should be included in the calculation of residential floor area in Section 1003.1 even though, according to Section 1003.1 the requirement applies to “10% of the gross floor area dedicated to residential use in the building.” There is no basis for applying Section 1003.9 to only one of the two tests set forth in Section 1003.1. Under Section 1003.9, residential cellar space and projections should be added to the gross floor area calculations included in both calculations in Section 1003.1.

If the bonus density is defined to be the bonus density “that is utilized,” rather than the bonus density “that potentially may be utilized,” and residential cellar space and projections are

included in that calculation, as specified in Section, the IZ set-aside requirement for this project would be 45,446.2 SF, and the proposal would fall short of that requirement by 18,006.2 SF.

Under Section 601.1 of the Design Review Regulations, no flexibility can be granted from the Inclusionary Zoning requirements through the design review process. Significantly, the Office of Planning has not signed off on Valor's IZ calculations and compliance. (January 7, 2019 hearing, transcript, pp. 114-115.) Since Valor has not demonstrated that this Project satisfies the Inclusionary Zoning set-aside requirement and given the extent to which the project might fall short of the affordable housing requirement, it is not appropriate to wait until the building permit stage to determine how the requirement should be calculated.

VI. Valor Has Failed to Submit Critical Agreements Needed for the Zoning Commission to Assess the Project

Valor has refused to provide CRD or the Commission with its agreements with American University, the owner of the Spring Valley Shopping Center (SVSC) and prospective grocery stores, despite the fact that the Commission over a year ago requested that Valor provide the agreements. These agreements are needed to adequately assess the legality and impact of the Project. The agreements with AU and the SVSC owner presumably cover the transfers of density between the lots and the nature and extent of the combination of lots. The agreement(s) with AU presumably will also address the parking easement AU currently retains, which will directly affect the adequacy of parking for residents of the apartment building. The duration of that agreement is critical (as it could be a short-term lease to Valor), as is any agreement on use of the private alley owned by AU, which will be used by most autos parking in the Project's garage and using the Project's loading docks. Since much has been said about Valor's commitment to clean up the alley behind the SVSC and coordinate deliveries by trucks servicing the SVSC, the SVSC agreement is also essential. Further, due to the historic designation of the shopping center, the agreement should be reviewed to determine potential impacts on the historic site, and any related covenants. Further, since Valor is offering the prospect of 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 Valor is preventing the Commission from fully considering the Project.

VII. Conclusion

Despite an extended period of design, discussion and debate, six postponements and deferral (all requested by Valor) and five hearings before the Zoning Commission, Valor's Voluntary Design Review application remains incomplete. As explained in this document, Valor has failed to meet the necessary burden of proof to demonstrate that the Proposed Project meets the requirements for Design Review and the other standards required of it and the application is therefore DENIED.

CRD'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On March 11, 2019, upon a motion by _____, as seconded by Commissioner _____, the Zoning Commission **DENIED** the application by a vote of _____ (Anthony J. Hood, Robert E. Miller, Peter Shapiro, Peter G. May, and Michael G. Turnbull to _____).

On March 11, 2019, upon the motion of _____, as seconded by _____, the Zoning Commission **ADOPTED** this Order at its public meeting by a vote of _____ (Anthony J. Hood, Robert E. Miller, Peter Shapiro, Peter G. May, and Michael G. Turnbull to adopt).

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

ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION

SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING