



DONOHUE & STEARNS, PLC

October 31, 2019

VIA IZIS

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

Re: ZC Case 19-10/ Valor Development, LLC/ Square 1499

Chairman Hood:

On behalf of my client, Citizens for Responsible Development (“CRD”), I am submitting the attached Response to Applicant’s Post-Hearing Submission into the record for Zoning Commission Case No. 19-10.

We appreciate the Commission’s consideration of these materials.

Thank you,

Edward L. Donohue
Attorney for CRD

Enclosures

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **October 31, 2019**, a copy of the CRD’s Response to Applicant’s Post-Hearing Submission was served via email, on 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).

By:

Edward L. Donohue

Dated: October 31, 2019

ZONING COMMISSION
District of Columbia
CASE NO.19-10
EXHIBIT NO.244

CRD's Response to Applicant's Contested Issues

1. Height and Scale of Project

- The Applicant states that the Project “provides an appropriate transition between the lower-scale residential neighborhood to the north and east and the larger-scale AU Building.” To the contrary, the Applicant’s architect stated that at its highest point the Project is just a foot lower than the height of the AU building, exclusive of the elevator housing. [October 7, 2019 Transcript, pp. 81-82.] The Applicant agrees that the highest points of the roofs of the homes along 48th and Yuma Streets range between 30 and 35 feet and has previously stated that the Project is 81½feet in height at its highest point. Bottom line, the Project continues the massiveness of the AU Building (which H&K says is nonconforming) and does not serve as a transition between the AU Building and the neighboring homes.
- The Applicant states that the Project does not consist of a six-story building. On the contrary, the Applicant’s architectural drawings clearly show six stories. [Exhibit 28A2, slide A11]. In fact, as Mr. Repp testified for CRD, the Project actually is the equivalent of seven stories, as the grocery space takes up what would otherwise be two stories. [Id.]
- Contrary to Applicant’s statement, the Project exceeds the density of what would be permitted if Lot 807 were developed. Applicant admitted this in its Statement in Support [Exhibit 2, p. 8.]
- It has been alleged that CRD would only support single-family homes on the site. The record shows the inaccuracy of this statement. Mr. Repp, testifying for CRD on October 10, 2019, clearly stated: “We support an apartment building on this site.”¹

2. Calculation of Project Density

- Applicant’s assertion that the proposed Project will have less density than what they could build as a matter-of-right fails to account for the density transferred to AU in 1979 to allow for the construction of 4801 Massachusetts Avenue.
- Pursuant to the 1979 Declaration of Easement and Agreement, the maximum available GFA was allocated as follows: 179,302 sq. ft. for Lot 806, and 63,242 sq. ft. for Lot 807.²
- With the additional 1.0 in FAR now, the by-right density is 184,514 sq. ft.
- The assertion that Lot 807 could be developed to its full pretransfer density is not true and plainly contradicted by the existing and nonconforming AU building.

¹ October 10, 2019 Transcript, p. 77.

² See *American University Park Citizens Assoc. v. David Burka, et al.*, 400 A.2d 737, 739 (D.C. App. 1979) and *Paul S. Burka, et al. v. Aetna Life Insurance Co., et al.*, 945 F.Supp 313, 315 (D. D.C. 1996)

3. Measurement of Building Height

- Applicant persists in arguing: (1) that 48th Street does not rest upon an artificial embankment; and (2) that the curb grade elevation of 48th Street has remained at “...generally the same elevation since the street was originally constructed.”
- For the proposition that there is no artificial embankment, Applicant claims that the testimonies of Mr. Dettman and civil engineer Glatfelter are dispositive. But this “expert opinion” rests upon the unsupported claim that the 48th Street curb grade elevation above sea level is exactly the same as shown on topographic maps prior to the construction of 48th Street. This is a classic “argument by false precision.” CRD has already shown that such an exact comparison of elevation readings is simply not possible, given USGS warnings of the wide margin of error that applies. When “expert testimony” fails to adhere to “accepted standards” and lacks “factual elaboration,” it cannot be relied upon. See *Etheridge v. District of Columbia*, 635 A. 2d 908, 917-918 (D.C. 1993). Applicant has repeatedly failed to submit any objective evidence, such as soil samples, to settle the question of whether there is an artificial embankment or no
- Moreover, it is irrelevant for Applicant to claim that the curb grade of 48th Street has not been raised “since the street was originally constructed.” The regulation contains no such limitation. It even specifies that the ultimate remedy for cases where a BHMP has been placed atop an “artificial embankment” is for the Zoning Administrator to determine an alternative BHMP placement “...where height is not affected by the discontinuation of the natural elevation.” See §307.7 (d). The curb grade of 48th Street clearly rests upon a substantial downhill-side embankment that discontinues the “natural elevation” by as much as half a contour level, given that there is no other way the roadbed could have been made level across the slope over which it was constructed.

4. - 5. Traffic and Pedestrian Safety

- CRD, relying on Gorove/Slade’s (G/S’) own numbers, maintains that the volume of traffic in the alleys, after the proposed Project is completed, will be comparable to the current volume of traffic on Yuma and 48th Streets. This increase in traffic generated by the Project, 283 vehicles per hour during the PM peak hours, will have adverse impacts on surrounding streets and in the alleys, and will endanger pedestrian safety.
- Erwin Andres, the Applicant’s traffic expert, stated in testimony on October 10, 2019 that the difference between current traffic and traffic upon completion of the Project will be “stark.”³
- MCV Associates (CRD’s traffic consultant), using G/S numbers, has estimated that there will be over 3,000 additional daily vehicle trips. If the alleys, which are 20 feet wide, will carry a volume of traffic that is comparable to the current volume of traffic on 48th and Yuma Streets, which are 30 feet wide, it is reasonable to conclude that the narrower

³ Testimony of Erwin Andres, October 10, 2019 Transcript, p. 170.

alleys will become congested with many more cars, trucks, and pedestrians using the alleys compared to today.

- Contrary to the Applicant's October 24, 2019 Post-Hearing Submission, G/S has done no pedestrian survey for this project.
- G/S maintains that charts produced by CRD show that the "existing alleys are significantly underused." Currently, N/S alley is hardly underused by pedestrians, with about one pedestrian per minute. This number will increase after construction of the Project.⁴
- Future vehicle traffic figures produced by G/S indicate that these pedestrians will be walking amidst traffic volumes comparable to that of adjacent streets. G/S has not contested these future figures.
- Since the alleys will become internal roadways or minor streets, standard DDOT sidewalk regulations must be applied to protect pedestrians as well as drivers in the alleys.
- G/S has testified that these alleys will have "shared space" between vehicles and pedestrians.
- During the time when SuperFresh was in business, customers, both in cars and on foot, used the entrance of the store off 48th Street for both entering and exiting. The alleys were not used by cars to access the grocery store.
- CRD has shown that the current alley infrastructure is inadequate for handling the increase in traffic volume along with the increase in the number of pedestrians. A 30-foot wheelbase truck was not able to maneuver successfully in the E/W alley, which is the alley where the proposed loading docks will be located. The Applicant proposes to use 35 and 50 foot wheelbase trucks also.
- The Applicant's October 24, 2019 Post-Hearing Submission mentions the proposed placement of bollards at the intersection of the two alleys. Detailed plans for the design and placement of these bollards have not been made available, so it is impossible to evaluate the merit of these bollards.
- Some type of protective barrier is needed along the entire stretch of "sidewalks" or pathways as well as at the intersection of the two alleys, but is not included in the Applicant's plans.
- Bollards placed at the intersection of the N/S alley and the E/W alley, where cars and trucks, along with pedestrians, need to turn to access the loading docks and underground garage entrance, will surely interfere with the physical space that trucks require to turn at this busy intersection. .

⁴ Testimony by Doug Barnes, October 10, 2019, Transcript, p. 149. Mr. Barnes' testimony is based on a survey, conducted in 2018, which is filed as Exhibit 384A in Case No. 16-23.

- Mitigation measures proposed by the Applicant that include improvements to specified intersections (49th and Yuma; 48th and Yuma; 48th and Warren) around the PUD site have already been accomplished by DDOT in the fall of 2018. In any case, such mitigations are required of any developer.
- While two curb cuts will be eliminated along Yuma and 48th Streets, there will be three new curb cuts, totaling 125 feet, to allow vehicles to cross in front of pedestrians along the E/W alley off 48th Street. These cuts or entry ways include: the entrance to the townhouse garages; the entrance to the underground parking garage; and the entrance to the loading docks.
- American University also has loading bays along the E/W alley. No safety measures are yet in place that will protect pedestrians walking near the AU loading entrances.
- The Applicant indicates that the N/S alley will be widened to “accommodate a new trash enclosure while maintaining a 20-foot drive aisle and a 3-foot pedestrian path.” This is a misstatement of the changes being proposed: The N/S alley is going to be moved 7 feet towards the new building to allow for trash receptacles to be lined up along the back wall of the MAPS. The physical space in this alley will actually be narrowed from 50 and 40 feet to only 35 feet. The drive aisle will be the same width as today at 20 feet, but it will be moved. There is a question as to whether the alley can be moved without DC Council approval.
- Another mitigation proposed is construction of a new sidewalk near the southern end of the N/S alley near the PNC Bank. This is only a partial sidewalk since it will not connect with any other pedestrian path. It will strand pedestrians in the “shared space” at the intersection of the two alleys, where cars and trucks will be turning to access the new building.

Additional information from the Applicant and further study by DDOT is necessary before this Application can be properly evaluated:

- DDOT should be required to conduct an engineering study of the feasibility of a HAWK signal. The installation of a HAWK signal near the N/S alley entrance/exit will draw even more pedestrians into this alley. Since, according to G/S, this alley entrance off Massachusetts Avenue will be used heavily by cars and trucks accessing the loading docks and the underground garage, a HAWK signal at this location adds to the congestion and confusion of the traffic flow for both vehicles and pedestrians.
- A Curbside Management Plan is not yet available, although DDOT has requested this information from the Applicant. A Curbside Management Plan is necessary to evaluate the loss or addition of metered parking spaces around the Project site.
- Currently, a wide sidewalk already exists along 48th and Yuma Streets around the Project site. The Applicant’s plans do not show the future width of sidewalks along 48th and Yuma Streets.

- Likewise, sight distance evaluations requested by DDOT have not yet been provided. These line of sight evaluations are especially important both within the alleyways and around all the driveways and the alley entrances and exits surrounding the site.
- The current Loading Management Plan is inadequate for managing deliveries to the loading docks in the E/W alley since there are three alley entrances and exits that trucks will use. The current Loading Management Plan mentions the need for scheduling all deliveries to the loading docks but fails to include information on how such coordination will occur given the three alley entrances mentioned above and the deliveries that currently occur in the N/S alley for the MAPS businesses. Requiring all delivery trucks for MAPS to use the N/S alley will put more trucks into this alley. The current Loading Management Plan also fails to provide information on the loading schedule and requirements of the American University loading bays on the E/W alley.

6. Parking

- The Applicant acknowledges that the availability of parking spaces for residents is dependent on the reallocation of parking spaces to which AU is entitled. CRD continues to believe that the agreement with AU on reallocation of parking spaces needs to be made public so that a determination can be made that the reallocation is unconditional. What would happen if AU needs more parking spaces to satisfy a commitment under a new Campus Plan?
- A final parking management plan is not included in the CTR. The draft plan included in the Technical attachment and the ANC3E MOU [Exhibit 50] states that “The allocation of parking spaces to the various user groups (retail/residential/AU pass holders) within the below-grade garage will be reviewed regularly by the building owner and/or property management company to ensure that the parking demand of each user group is met, and impact to on-street parking is minimized.” This language is vague, as to both the number of parking spaces that will be made available to residents and to the duration of the commitment.
- The Applicant’s response states: “As related to parking, to the extent the Commission deems it necessary to require the Applicant to devote a specific number of parking spaces to Building 1, it can direct this to happen through a condition in its final order. CRD asks that the final order specify that 228 parking spaces will be reserved for residents, and that if the request for flexibility is granted, that 240 parking spaces will be reserved. We also request that this allocation be permanent.

7. – 8. Deprivation of Sunlight; Loss of Privacy

- DDIS has prepared a shadow study using the DCOZ 3D Map Program Solar Study Tool. See Attachment A. The shadow study shows that the Project will have more than a minimal impact on the neighborhood, as the Applicant claims.
- The Applicant’s response also states that “the Applicant believes the potential impacts on direct sunlight to nearby properties will be less than what would occur with a matter-of-

right project.” CRD does not see how the Applicant can make this statement, as a matter-of-right project would need to be smaller.

- DDIS’s presentation on October 10, 2019 also shows how persons using the apartment building’s terrace level will be able to look down and into the homes and yards on Yuma Street and Alton Street.

9. Calculation of Affordable Housing

- As stated in CRD’s post-hearing submission, CRD agrees with the Department of Housing and Community Development that the Applicant should provide more (15%) affordable housing.
- The Applicant states that it “is required to set aside: (a) the greater of 10% of the GFA dedicated to residential use excluding penthouse habitable space or 75% of the bonus density utilized . . .,” plus other amounts. The regulation that was in effect when the Application was filed provided that “achievable bonus density” should be used in this formula, not bonus density “utilized.” As stated in CRD’s post-hearing submission, CRD submits that the regulation in effect at the time the Application was filed should govern.

11. Historic Preservation as a Public Benefit

In its discussion captioned “Historic Preservation as a Public Benefit,” the Applicant relies almost exclusively on the Commission’s decision in the Heurich Mansion case and the opinion of the Court of Appeals upholding the Commission’s decision. As set forth below, the Applicant fails to disclose critical aspects of the Heurich case and mischaracterizes the decisions in that case. In fact, Heurich does not support the Applicant’s claims about the Zoning Commission’s authority over historic landmarks, about the purported and illusory benefits to MAPS from the density transfer, and about the method for computing any transferrable density from MAPS. **The Project offers no benefits to the historically protected MAPS and in fact harms it.**

1. The Applicant Mischaracterizes the Zoning Commission Orders in the Heurich Mansion Case

The Applicant cites the Zoning Commission (ZC) Orders 81 (attached as Attachment B) and 101⁵ and the District of Columbia Court of Appeals decision⁶ upholding Order 101 as the sole precedent for the transfer of density from a landmark that provides preservation benefits. Valor has failed to put Order 101 in its historical context, to note significant differences with its own proposed project, or to provide any actual text from the orders themselves. As such, The Applicant’s claim of any similarities between this case and ZC 101 are inaccurate and misleading.

⁵ The DC Court of Appeals ruling was on consolidated appeals are from two orders of the Zoning Commission based upon a preliminary 1974 order (Order 81) and a final application for approval of a Planned Unit Development (Order 101).

⁶ See *Dupont Circle Citizens Association v. District of Columbia Zoning*, 355 A.2d 550 (D.C. 1976).

First, with respect to the Commission’s authority over landmarks, the Applicant cites the Heurich decisions as establishing that:

...it is clear that the Commission not only has purview over the allocation of density on properties, but that its purview is an effective means of preserving historic landmarks.

This statement ignores fundamental changes in the regulatory framework governing historic landmarks since the time of the decisions regarding the Heurich PUD in the 1970’s. The Historic Preservation Review Board (HPRB) was not created until 1983 and thus did not even exist at the time of the Heurich PUD. Consequently, the Heurich decision does not establish a lasting precedent giving the Commission purview over all density allocations, including landmarks, if even if for preservation purposes. Rather, the Heurich case must be considered in light of its historical context. An examination of that context and a reading of the Commission’s orders reveal stark differences between Heurich and the PUD proposed by the Applicant:

- In 1971, when the Heurich PUD was initially proposed (ZC Case No. 71-30), resulting in ZC Order 81, the Heurich Mansion was a Category II landmark listed on the National Register of Historic Places. This status provided it with no protections beyond it being recognized as an important historic resource. As the DC Court of Appeals decision on Order 101 noted at the time of its decision: “Historic preservation ordinances are limited in their ability to preserve historic landmarks because of constitutional restrictions on the taking of property.”
- The Zoning Commission was only one of several bodies at that time, which when combined, could approve a density transfer from Heurich in order to save it. ZC Order 81 shows that the decision also recognized the recommendations and approvals of other bodies tasked with the oversight of zoning, planning, and landmarks. The Zoning Advisory Council, National Capitol Planning Commission, and the Joint Committee on Landmarks of the National Capitol all had direct input on the use of Heurich’s density. Thus, the Zoning Commission was but one of many agencies involved in this transfer. Nowhere has the Applicant acknowledged the roles of these other bodies in deciding the fate of the Heurich Mansion.
- At the time of the Heurich case, including preservation conditions in a zoning order was the only way to legally ensure that the buildings would not be razed and thus to enforce any degree of preservation. This is no longer the case due to the existence of the Historic Preservation Review Board (HPRB) and the Mayor’s Agent for Historic Preservation.
- The lack of any local preservation ordinances began to be addressed two years *after* the Court of Appeals’ 1978 decision on Order 101 with the ratification of the Historic Landmark and Historic District Protection Act of 1978. The HPRB was established in 1983 under the authority established in that Act. It replaced and expanded the role of the Joint Committee on Landmarks and was given authority to create and protect landmarks,

superseding any authority the Zoning Commission may have had to preserve landmarks in 1971 due to a lack of ordinances protecting DC's landmarks.

Second, the Commission's orders in Heurich included specific conditions to ensure the preservation conditions that had to be met for approval of the density transfer from Heurich. These conditions were included in the report of the National Capital Planning Commission and entered as an exhibit into the record for public hearing and attached to Order 81 itself.⁷

Moreover, the approval of the Heurich PUD application by the Joint Committee on Landmarks was contingent on the fact that the Heurich Mansion's preservation would be assured through an agreement of the parties to create a trust fund to specifically preserve the mansion. Condition 8 states:

*The Society shall place the money received from the Dupont Circle Joint Venture in consideration from the transfer of its unused floor area ratio in an income producing trust, administered by the Society, and shall use the income and may use the principal, in its sole discretion from the trust for the maintenance of the Landmark.... See Order 81, Proposed Condition #8.*⁸

- In contrast, the Applicant provides only a short quote from a letter in support from Regency, the Texas-based owner of MAPS and co-applicant with Valor stating: “the Project will greatly assist [Regency] in maintaining the historic integrity and long-term viability of the [MAPS].” (Exhibit 227).
- The Regency letter includes no binding terms and should be accorded no weight given that the Applicant has offered this vague, self-serving statement rather than the actual agreement governing the sale of MAPS' density – ***despite the Commission's requests that this agreement be produced.*** Unlike the Heurich case, the absence of any formal and public agreement between Valor and Regency negates a claim that any preservation benefit flows from use of the payment from the density transfer.
- In 1971, the Heurich Mansion and Carriage House had not been maintained and were facing the possibility of demolition through a sale by the Columbia Historical Society (CHS). By contrast, the Massachusetts Avenue Parking Shops (MAPS) is not facing the possibility of demolition. Additionally, the HPO report states that it “has been successfully maintained in good condition” and “devoid of elaborate architectural detail that might require expensive upkeep or overhaul, so there is little reason to anticipate extraordinary rehabilitation costs.” (Exhibit 187).

⁷ *Proposed Conditions Relating to Preservation of Christian Heurich Memorial Mansion, Carriage House and Grounds.* Zoning Commission Case No. 71-30. National Capital Planning Commission. NCPC File No. 0932.

⁸ Another condition relating to the preservation of the Heurich Mansion contained in the orders was that CHS, with the approval of the ZC and on the advice of the nominating committee (Joint Commission on Landmarks), could construct a library and museum building on its lot.

- The Applicant’s claim of preservation through the sale of MAPS’s density is therefore a hollow proffer. As discussed below, the sale actually impairs MAPS’ ability to preserve itself.

Third, in terms of how the approved density was calculated for the Heurich density transfer, the Applicant maintains that:

[t]he Commission computed the amount of unused development potential on the Heurich Mansion site by subtracting the density of the Heurich Mansion and Carriage House from the total amount of density that would be allowed under the PUD-related map amendment requested in that case.

Despite the Applicant’s assertion, there is in fact a major difference in density calculations between what occurred with the Heurich PUD and what the Applicant is proposing. A review of the language in Order 81 provides an important clarification of how the calculation was done for the Heurich transfer that yet again is not disclosed by the Applicant:

The Columbia Historical Society property currently contains 15,695 square feet of gross floor area...in the Heurich Mansion and Carriage House. Under the present SP zoning a total of 95,590 square feet **could be developed by the Society**. If the requested zone change to C-3-B is granted, a total of 121,660 square feet **could be developed** by the Society. The property owned by the Society would thus have an unused development potential of approximately 108,874 square feet.⁹ [emphasis added]

For Heurich, the calculation was done by subtracting the used density of the Mansion and Carriage House from what *could be developed by the Society*. Thus, what was deemed transferable was the **development potential** on the Heurich lot by its owner, CHS, which at that time could have been the entire lot had the Mansion and Carriage House not been carved out under the conditions of the Order. In the present case, MAPS’s historic designation includes its parking lot, and that parking lot is deemed a contributing element to the site. The developability of the site is subject to HPRB oversight, and as such it unclear how much of the MAPS site *could be developed by its owner, Regency*.¹⁰ In 1971, the Heurich lot had none of these constraints, and consequently, a certain amount of its density was able to be transferred in order to save the landmark.

To summarize, in the case of the Heurich PUD, there was always a preservation body – at that time, the Joint Committee on the Landmarks - involved in the decision about how much available density Heurich had, how much could be transferred, and what subsequently could be developed on its site. Here, the Applicant is asking the Commission to make a decision on the

⁹ The final order approved the sale and transfer of 82,000 square feet from Heurich.

¹⁰ The Applicant incorrectly contends that CRD has claimed the Applicant never said how much GFA Valor would purchase from Regency. In fact, CRD has repeatedly stated that the amount of density the Applicant proposes to transfer from MAPS is 50,115 GFA.

amount of MAPS's available density and its use without any input from HPRB, which is now the body authorized to make such decisions. The role of the HPRB here simply cannot be ignored.

2. The Historic Preservation Office Report Does Not Support the Applicant's Preservation Claims

In its response to CRD's Post-Hearing Submission (Exhibit 238), the Applicant states:

Regarding preservation benefits, CRD states that the HPO report fails to address whether the Project provides tangible and quantifiable preservation benefits, as required under the PUD regulations, but instead only discusses indirect effects that cannot be considered PUD benefits.

The Applicant then dismisses CRD's point about the HPO report's failure to address tangible and quantifiable benefits under the PUD regulations and claims that:

[t]he favorable comments in the HPO report regarding the Project design relative to its compatibility with the MAPS are more appropriately read within the context of the Project's consistency with the policies of the Historic Preservation Element of the Comprehensive Plan...

This argument is beside the point. The Project should be consistent with the Comprehensive Plan regardless of whether or not it is a PUD application. Consistency with the Comprehensive Plan cannot be considered a PUD benefit, even if favorably described in the HPO report.

Rather, the HPO report should have addressed whether the Project provides *tangible, measurable, and quantifiable preservation benefits*, as required under 11-X DCMR § 305.5. The HPO report did not do so, leaving the burden of proof to the Applicant. However, Valor has not met this burden: the Applicant has simply failed to demonstrate that the density transfer is warranted and consistent with any applicable precedent, or that it somehow results in tangible, measurable, or quantifiable benefits under 11-X DCMR § 305.5.

3. The Density Transfer Actually Impairs the MAPS Landmark

Finally, it must be remembered that the sole reason for including MAPS in this PUD is to strip it of whatever density it may possess. The Applicant claims that the density transfer will prevent MAPS from further developing itself. Again, this is NOT a benefit, but actually harms the landmark. Nowhere does the Applicant address the point that the landmark may actually need its density in the future to preserve itself should it be damaged by fire or otherwise fall into disrepair. In its report, HPO summarily dismisses as unlikely the possibility that MAPS may need whatever density it has to preserve itself in the future. However, HPO's views are not those of the HPRB, the body that has authority over MAPS. As such, the HPO report is unpersuasive.

At the same time, the Applicant ignores the National Register of Historic Places nomination's praise of the low rise of MAPS as part of its historic character, which respects the

residential homes on the Yuma Street side of the landmark. Constructing a 6-story structure immediately adjacent to MAPS undermines this important historic feature.

12. Applicability of *Durant v. District of Columbia Zoning Commission, I, II, and III*

- The Applicant states in its post-hearing submission that it “is not proposing to construct a 6-story building.” As stated in paragraph 1, it is clear that the Applicant is proposing to construct a 6-story building, or a 7-story building given the two stories the grocery space takes up.
- FLUM designation of low-density commercial – primarily one to three story commercial buildings
- MU-4 zone calls for moderate density, mixed-use development.
- Valor Project is medium density residential and six stories
- Visual impact abatements (i.e. upper-level setbacks) do not transform medium-density developments into compliant moderate-density
- The Applicant provides only limited setbacks from property line at ground level across from single-family homes.

Evaluation of Special Exception Relief

- As stated in CRD’s Post-Hearing Submission, the real relief sought by the Applicant is the ability to transfer 50,115 SF of GFA to the SuperFresh site. They can do this only through the PUD process. This constitutes a development advantage against which the Commission should weigh the alleged benefits of the PUD.
- CRD’s position is that the proposed Project is too large.

Compliance with PUD Standards

As CRD stated in its post-hearing statement, the Applicant has failed to meet its burden of proof to demonstrate that the Project meets each of the required PUD standards because: the Project is inconsistent with the Comprehensive Plan; the Project causes unacceptable impacts on the surrounding area; and the Project includes minimal public benefits.

A. Benefit and Amenities

CRD’s comments on the Applicant’s final list of proffered benefits are included in our October 24, 2019 filing. The proffered benefits have not changed since then. In short, the minimal benefits offered do not justify approval of the Valor Application, particularly after taking into consideration that the Applicant is requesting 50,115 SF of additional density.

1. Housing. CRD has continually supported housing on the SuperFresh lot. A matter-of-right development could include a substantial amount of housing, at least 170 apartment units.¹¹ Further, while CRD has argued for a building that is one or two floor lower, we have pointed out that repurposing the two-level grocery space for housing would free up 36,000 SF of space that could be used for multi-family housing. This revision would also save the developer money because it would eliminate (or reduce) the payment required by the owner of the MAPS. It also should reduce the cost of constructing the garage levels.

2. Affordable Housing. CRD's statement on affordable housing on the SuperFresh site is included in our post hearing submission. [Exhibit 238.] In summary, we support more affordable multi-family housing than is proposed in the Application and recommend that the Applicant include at least the amount of affordable housing contained in the DHCD request (15%). We also want to put this issue in perspective. A smaller building with a significant number of affordable units would constitute a significant share of affordable units delivered in the District.¹²

3. Environmental. The Applicant states that it will make the roof "solar ready." It is outlandish to claim any credit for this if they only mean running some wires to the roof. There's no detail on the number, output, weight, dimension, layout, angle, and position of the panels. Because it is difficult to see how the Project can have both a green roof and solar, this seems like an empty gesture. In any case, panels would have to be canted to operate efficiently, which will increase the height of the building. Among other negatives, this would lengthen the already troublesome shadows caused by the building.

The DDIS Shadow study analysis clearly indicated the project's surrounding neighborhood will experience a substantial increase of shade and shadows caused by the 6-story (81') building. Most of the major shade trees on Yuma and 48th streets will need to adapt to this loss of light. These trees, primarily elms and oaks are already stressed due to power lines bisecting their crowns and little space for tree roots.

The Torti Galas landscape design¹³ proposes multiple plantings zones around the site and along the street. The specific caliper or height of the 33 trees however are not specified. Even if the proposed street trees nearest the tallest part of the building are put in as 6ft trees it would do little to mitigate the sudden change of scale between the small 2 story houses and the Ladybird's. The existing 55 ft elm trees will likely die out because of the construction excavation or the shade the building casts on the north side of the Ladybird.

In Exhibit 231A.pdf Mr. Wheeler notes that Mr. Westergard's status as an expert on visual impacts only relates to structures. Visual impacts by scope and definition addresses the relationship between landscape and structure. The entire field of Landscape Architecture, in

¹¹ A CRD member provided a rendering showing how 166 apartment units can be constructed on the site, while still reducing scale and providing for more open space. Testimony of Walter Borek, Case No. 16-23, Exhibit 415.

¹² According to the Department of Housing and Community Development¹², there were only 154 rental Inclusionary Zoning units in total delivered in the entire city in FY 2018.

¹³ Included in Applicant's Post-Hearing submission – Exhibit 241A.

academia, private practice and government, focuses on the relationship between the landscapes and proposed structures.

Curt Westergard's master's degree in landscape architecture, in Cornell's Schools of Agriculture and Architecture, includes a formal course emphasis of woody plants (trees).

Curt Westergard passed his Maryland Tree Experts License exam in 1974 and subsequently worked as a tree surgeon in Western Europe and the mid Atlantic. for 8 years. Mr. Westergard actively participated in the Maryland Tall Trees Champion program---analyzing and measuring candidates for state tree champions for 3 years. Mr. Westergard was a researcher and contributor to the book "Landscape Design that Saves Energy" by Moffatt and Schiller.

In discussing the misleading renderings showing 120 ft trees (assumed to be the nearby (*Acer rubrum* and *Acer saccharinum*) trees in the renderings, Mr. Westergard stands by his statement that "You can't have a 120-foot tree (in this neighborhood) It's botanically impossible". More importantly it is this type of artistic exaggeration of vegetation in the scene which makes the proposed Ladybird look misleadingly smaller.

Because of microclimates commonly found on NW facing slopes streets, Mr. Westergard stands by his implication that the parts of the Ladybirds affected neighborhoods can be classified as USDA Zone 6B. More importantly, urban areas increasingly face extremes of weather and limited compacted soils that further reduce the capability of trees to reach their full height and life span.

4. Transportation Infrastructure. As noted in CRD's response to the Applicant's proffers, the transportation related components of the Application consist almost entirely of attempts to mitigate the impact and dangers imposed by the additional vehicular and pedestrian traffic around the site.

5. Grocery Store. As CRD has pointed out, there are a dozen grocery stores within a three-mile radius of the project site and many of them offer delivery services. [Exhibit 239]. The Target which opens in November 2019 just a mile away in Tenleytown is expected to offer substantially all of the items a full-service grocery provides, including fresh meats and vegetables. Further, the size of the Project's grocery space is unclear, and there currently is no binding commitment from a grocer to occupy the space. For these reasons, the provision of yet another grocery store cannot be counted as an amenity under the PUD rules.

B. Development Incentives.

The Applicant fails to mention the major PUD-related development incentive, its request to be granted 50,115 SF in additional GFA. It can only achieve this additional density through its PUD application. The Project's density is thus above what is permitted as a matter-of-right on the SuperFresh site. The additional density is the cause of the adverse impacts identified by CRD and others. Further, the Applicant argues that the proposed PUD is well below the height permitted in an MU-4 zone. CRD contests this conclusion because it is based on an erroneous Base Height Measuring Point that unfairly takes advantage of the slope of the site. These adverse impacts outweigh the minimal benefits offered by the Applicant

C. Potential Impacts.

1. Land Use. The Applicant's Post-Hearing Submission state that the "the proposed design of the Project complements the established character of the surroundings and provides an appropriate transition between the lower-scale residential neighborhood to the north and east and the larger-scale AU Building. The height of Building 1 is below the maximum permitted as a matter-of-right in the MU-4 zone Moreover, the height of Building 1 is not substantially higher than the highest point of the roofs of the homes along 48th and Yuma Streets from street grade." These conclusory statements are entirely untrue. There is considerable evidence in the record that the four to six (actually seven) story Project is incompatible with the two-story residential neighborhood directly across the streets it faces, and with the one-story MAPS and one to three story commercial area across Massachusetts Ave. The evidence also clearly shows the inaccuracy of the statement that the building is not substantially higher than the roofs of the homes along Yuma Street.

2. Transportation. The Applicant's discussion of transportation impacts does not discuss even one of the many serious, dangerous, and negative impacts raised by CRD in our testimony and written submissions.¹⁴ Erwin Andres, the Applicant's traffic expert, stated in testimony on October 10, 2019 that the difference between current traffic and traffic upon completion of the Project will be "stark."¹⁵

3. Housing. CRD's comments on the important issue of housing are set forth above, and in our post-hearing submission. [Exhibit 238.]

4. Environmental Protection. CRD has identified several environmental issues, including air quality, vehicular emissions, and noise pollution. Applicant's post-hearing submission suggests that these issues should be addressed at the permit stage. The D.C. Court of Appeals in *District of Columbia in Friend of McMillan Park v. District of Columbia Zoning Commission* (FOMP I) held that the Commission is obligated to assess environmental impacts before approving a proposed PUD.¹⁶

5. Economic Development. The Applicant's post-hearing statement admits that the Project will impact the existing businesses on the SuperFresh Lot. CRD has provided more detail, pointing out that existing businesses employing more than 60 people will be displaced.

6. Parks, Recreation and Open Space. The Applicant states that it will provide new publicly open spaces in the form of the Northwest Plaza and Windom Park. The Northwest Plaza serves as the entrance to the proposed grocery store and will likely be utilized by its customers. With respect to Windom Park, the Office of Planning has previously stated: "While OP understands the rationale for the elimination of Windom Walk, Windom Park does not function

¹⁴ Testimony of Barbara Repp, October 10, 2019 Transcript, pp. 41-45 and related video; Exhibits 124, 216 and 232C.

¹⁵ Testimony of Erwin Andres, October 10, 2019 Transcript, p. 170

¹⁶ 149 A.3d 1027. At 1036-37 (D.C. 2016).

in the same way 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.”¹⁷

7. Urban Design. The potential impacts of the Project are adverse, not favorable. As stated before, it is manifestly untrue that the project complements the established character of the surroundings and provides an appropriate transition between the lower scale residential neighborhood to the north and east and the larger scale AU Building. As CRD has stated, a structure that is more compatible with the surroundings can still make a significant contribution to the District’s housing supply.

D. The Project is Inconsistent with the Comprehensive Plan.

The Commission has requested information on how the Project meets the Comprehensive Plan test established for PUDs by the District of Columbia Court of Appeals in *Friends of McMillan Park*. CRD maintains that the Project fails this test, using detailed, fact-based arguments.

- Valor attempts to avoid consistency with the FLUM by arguing that the low-density commercial does not apply since no buildings are dedicated wholly to commercial uses. This begs the question, is there anything low-density about the Valor project?
- The assertion that the Valor Project “complements the established character of the surroundings” is wholly inaccurate. The Project dwarfs the surrounding single-family homes.
- The Applicant’s assertion that the Project “relates comfortably” to the adjoining properties is only accurate if viewed from the terraces and upper floors of the Project. Undoubtedly, the owners of the single-family dwellings along 48th and Yuma Streets would characterize the intrusion into the privacy of their residences and yards as something altogether less than comfortable.
- Where the Applicant admits that there may be inconsistencies between the FLUM and policies, it lists transportation-related considerations and pedestrian safety measures amongst the benefits that outweigh said inconsistencies. Who exactly benefits from a more congested and dangerous alley?
- The Applicant alleges that the Project successfully balances an increase in the housing supply with protection of the neighborhood character. While this balance is achievable with a lower structure and more affordable housing, the current design’s six-story height cannot be interpreted to protect the single-family dwellings in its shadow.
- There is a pattern in the Applicant’s FLUM/ Policy Compliance Chart – specifically, the conclusion that either the policy does not apply or that the project is not inconsistent therewith. This argument in the alternative omits a third and obvious choice – that the Project is inconsistent with the policies of the Comprehensive Plan.

¹⁷ Exhibit 118, p.20.

- The fact that the project is allegedly less than the matter-of-right maximum height is a catch-all for the Applicant. Try as the Applicant might to use the 43.5 foot height at the BHMP, this does not solve the real problems presented by the proposal.
- The Applicant consistently points out that the Project is not commercial, yet claims compliance with the policies that encourage the enhancement of neighborhood commercial centers and nodal development. Valor cannot have it both ways – is it commercial or not?
- An important point was made during rebuttal at the October 10th hearing. While G/S alleged there would be no increase in traffic in the alleys from when SuperFresh was in use, testimony revealed that hardly any of the SuperFresh patrons used the alleys to access the grocery store. The Project’s impacts to the alleys and pedestrian safety are great.

Comments on selected parts of Applicant’s criticism of CRD’s arguments are set forth in the chart below:

Future Land Use Map	<p>CRD’s explanation for why the Project is inconsistent with the Future Land Use Map is set forth in CRD’s Post-Hearing Submission and is not repeated here.¹⁸ However, we want to explain in more detail why the Cathedral Commons PUD is not precedent for the Project. The Cathedral Commons PUD consists of two parcels, a 2 and 3 story South Parcel with a land area of 137,096 SF and a 5-story North Parcel with a land area of 41,140 SF. Thus, 77 percent of the entire Cathedral Commons PUD consists of buildings three stories or less.¹⁹ In the case of the Valor Project, only 20 percent of the PUD consists of buildings that are three stories or less. Thus, the Valor Project is inconsistent with the FLUM.</p> <p>The chart submitted in CRD’s Post-Hearing Submission distinguishes the two PUD proposals:</p>	
	Cathedral Commons Mixed-Use Development	The Ladybird
Maximum height	61’	81’
FAR	1.99	2.95
Street widths for frontages	Wisconsin Avenue – 120’ Idaho Avenue – 120’ Macomb Street – 90’	48th Street – 90’ Yuma Street – 90’

¹⁸ See Exhibit 238, p. 14.

¹⁹ See Wisconsin-Newark Neighborhood Coalition v. D.C. Zoning Commission, 33A.3d 382 (DC Court of Appeals, 2011).

	Neighboring structures/ uses	Multi-family residential (apartments) 5-story office building 9-story residential building with ground floor retail Police Department	Single family homes American University Law School Building (fronts on Massachusetts Avenue)
	Closest residential zone	Across Wisconsin Avenue to the east: RA-4 (90' max height ; 3.5 max FAR; 75% max lot occupancy) To the north and south along Wisconsin Avenue" RA-2 (50' max height; 1.8 max FAR; 60% max lot occupancy)	ALL R-1-A and R-1-B: (40' max height; 40% max lot occupancy)
	FLUM	Low Density Commercial & Medium Density Residential	Low Density Commercial
	Single Family Zoning – Existing or Planned	No	Yes
Land Use Element	In our Post-Hearing Submission and Statement in Opposition, CRD has referenced multiple sections of the Comprehensive Plan's Land Use Element (and Urban Design Element, and Rock Creek West Element) that provide that infill development should complement the established character of the area and not create overpowering contrasts in scale, height, and density. ²⁰ The evidence is clear that a 4-6 (or 7) story building facing residential streets with 2-story homes and overlooking the 1-story MAPS does not complement the established character of the surroundings. Further, as stated elsewhere in this response, the Project does not provide a		

²⁰ See Exhibits 238 and 118.

	<p>transition between the AU Building of similar size and the neighborhood to the north and east. While the Applicant continually mentions that Building 1 has a height of 43.5 feet, it fails to state and ignores the fact that the building rises to 81.5 feet.</p> <p>It should be mentioned that just this summer the D.C. Court of Appeals (referencing 10-A DCMR §300.1) stated that the Land Use Element “is the ‘cornerstone of the Comprehensive Plan’ and ‘should be given greater weight than other elements as competing polices in different elements are balanced.’”²¹ [Emphasis added]</p> <p>The Applicant proposes to increase housing, but ignores protection of neighborhood character. As CRD has advocated, both goals are achievable through a meaningful compromise that would provide needed housing in a lower building that is more in harmony with the neighborhood.</p> <p>The Applicant continues to mention that the Project incorporates numerous design features that relate the building to the surroundings. However, the alleged setbacks and façade articulation fail to mask the scale of the Project within its setting. Further, as the D.C. Court of Appeals held in <i>Durant</i>, visual impact abatements have no bearing on whether a proposed project is properly considered a medium- or moderate-density use. The Court of Appeals expressly rejected reliance on architectural features “such as the top floor’s setback from the edge of the building and the building’s setback from the property line” as proper considerations in determining whether the project met FLUM’s definition of moderate density.²² To make matters worse for the Applicant, the proposed Valor Project, unlike the PUD in <i>Durant</i>, is not set back from the property line at the ground level. Rather, substantial portions that are directly adjacent to the detached, single-family homes on 48th and Yuma Streets sit on the property line.</p> <p>Concerning setbacks, the examples of comparable buildings in the Cathedral area included in ANC3E’s presentation show buildings that, unlike the Project, are well setback from both the street and property line.²³</p>
Residential Parking	<p>CRD’s position regarding on-site parking, including parking for residents of the apartment building, is set forth earlier.</p> <p>Also, Applicant states that the Project will not result in the removal of any public parking. This statement is untrue and reflects the cursory work done by the Applicant and its advisors. There currently are over 100 parking</p>

²¹ *District of Columbia in Friend of McMillan Park v. District of Columbia Zoning Commission*, slip opinion, p. 14 (DC Court of Appeals, 2019)

²² *Durant v. Dist. Of Columbia Zoning Comm’n*, 139 A.3d 880, 884 (D.C. Court of Appeals, 2016) (“*Durant III*”)

²³ Exhibit 154A4.

	spaces in the lower level of the SuperFresh parking structure that are currently available to the public. These spaces are being used on a daily basis by employees of the MAPS, the Spring Valley Shopping Center on the other side of Massachusetts Avenue, and the office and medical buildings in Square 1467.
Buffering	The Applicant has failed to demonstrate that its proposed “buffering requirements” will relate the Project to the surrounding scale and development pattern. Landscaping is proposed as a buffer. As Curt Westergard, CRD’s expert witness has testified, the shadows will change the vegetation that can survive. Further, he stated that “the same mismatch or misrepresentation of vegetation height is disturbing. Here on the right that’s the actual situation. There on the left is what they’re depicting, again exaggerating the height of the trees. You can’t have 120-foot tree. It’s botanically impossible. So that small exaggeration has big effects on judging the scale.” ²⁴ In short, Building 1 is not buffered and will be an affront to the neighborhood.
Transportation and TDM Strategies	CRD’s comments on the traffic and pedestrian safety issues are set forth earlier. We do, however, strenuously disagree with the statement that the number of trips generated by the Project will be less than if all the existing retail space were re-occupied. As CRD stated in our Post-Hearing Submission: “[e]xcept for the grocery space, the rest of the building was fully occupied by Spring Valley Catering, Wagshal’s kitchens, Jean Paul Hair Salon, and DeCarlo’s restaurant in March of this year when Gorove/Slade did its traffic counts, so the trip numbers for these establishments are available. The number of trips is extremely low. According to Mr. Andres’ testimony, Gorove/Slade’s conclusion assumes that the SuperFresh grocery was 24,000 SF. The SuperFresh lease shows that the SuperFresh grocery consisted of roughly 16,000 square feet of grocery space, plus dry storage underneath the grocery and other space that did not generate many trips. It defies reason to believe that the 16,000 SF SuperFresh grocery and the other existing retail could generate significantly more trips than the 16-18,000 SF grocery being proposed by Valor plus 219 or more residential units.” ²⁵
Pedestrian Network	CRD’s comments on traffic and pedestrian safety are set forth earlier. However, we’d like to comment on the Applicant’s comments about the removal of two curb cuts. What the Applicant seems to be ignoring is the

²⁴ October 10, 2019 Transcript, p.37; Exhibit 217.

²⁵ Exhibit 238, pp. 16-17.

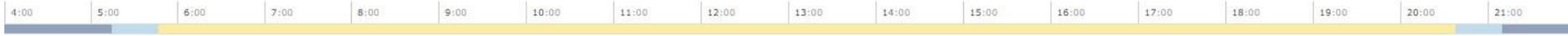
	<p>fact that pedestrians walking on the Yuma Street and 48th Street sidewalk will now be encountering more than ten times more traffic (during the PM peak hour) when they cross the Yuma Street, 48th Street and Massachusetts Ave. alleys. CRD is not arguing for preserving the existing curb cuts, but rather is pointing out the pedestrian safety issues inherent in the traffic generated by the Project.</p>
<p>Private Sector Support</p>	<p>The Applicant asks, “How CRD can describe a proposal that is within matter-of-right height and density as ‘pushing the envelope’ is unclear.” First, as CRD has stated and the Applicant agrees, the Project clearly exceeds the allowed matter-of-right density for Lot 807. Any project that exceeds matter-of-right exceeds the applicable zoning envelope. Further, CRD claims that the Project exceeds the allowable height.</p>
<p>Mixed Income Housing</p>	<p>CRD’s comments regarding affordable housing are set forth earlier. However, we are compelled to respond to the Applicant’s statement that CRD has not provided any substantive evidence to support its claim that the Applicant is circumventing the IZ requirements. This PUD Application stems from an earlier case (Case No. 16-23), for which there is an extensive record. Following evidentiary hearings in January 2018, Valor asked for a deferral of deliberations, stating “the Applicant has met with OP to discuss various aspects of the project, including the manner in which the Inclusionary Zoning (“IZ”) set aside requirement shall be calculated Based on input provided by OP, the IZ set aside calculation for the project must include the existing commercial density of the American University (“AU”) building and the Spring Valley Shopping Center (“SVSC”) when determining the extent of bonus density utilization[As a result] the Applicant has spent considerable time reevaluating the overall height and mass of the project.... Based on this analysis, the Applicant has made several substantive changes to the project.”²⁶ The change was to sink the building 6 feet into the ground, an action which circumvented an otherwise applicable and higher IZ requirement. The new cellar units resulted in a lower IZ requirement. The new design, with minor modifications is the same as provided in the PUD Application.</p>

²⁶ Case No, 16-23, Exhibit 234.

Attachment A – DDIS Shadow Study

Shadow Study Analysis

Solar Study Critique: Showing Sunrise to Sunset:



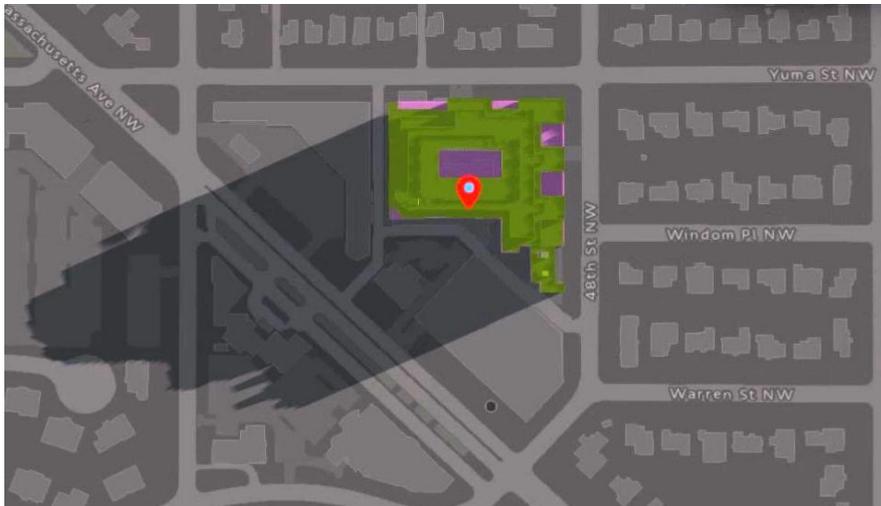
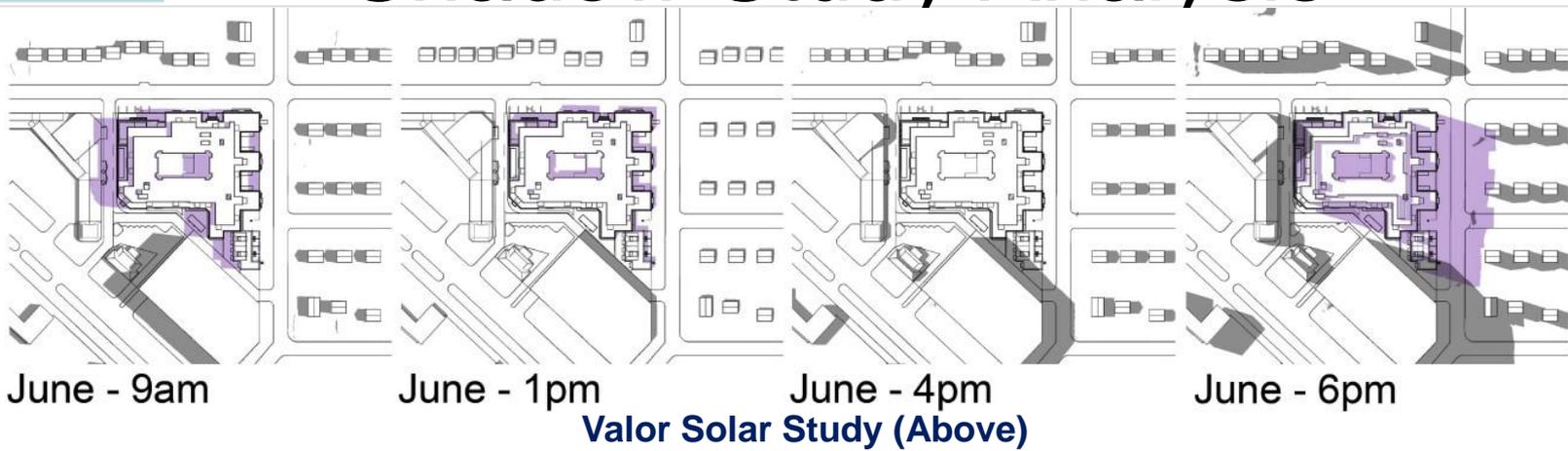
June 21st, 2019 – Yellow indicates Sunrise to Sunset. Red indicates Valor's Shadow Study. Note how there is 2.5 to 3.25 hours of daylight before and after Valor's Shadow Study starts and ends.



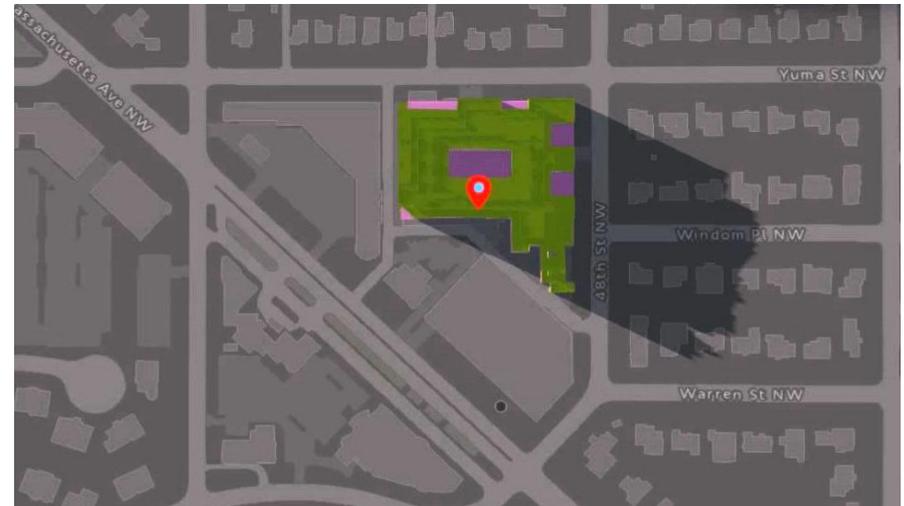
December 21st, 2019 – Yellow indicates Sunrise to Sunset. Red indicates Valor's Shadow Study.

Per industry standards, including those of the National Park Service, the Bureau of Land Management, and the Department of Energy, accurate solar studies should clearly depict the shadow cast by a proposed building at typical times of day. In residential areas, this implies the shadow pattern from sunrise to sunset. In the Valor documents of 09/17/2019 the earliest time presented is 9am, and the latest time is 6pm. 9 hours does not represent the 14.7 hrs of daylight the Yuma community currently enjoys during Summer months. Omitted are the long shadows the proposed building casts on neighbors to the WSW in the morning. The Valor study omits sun blockage for the neighbors to the East and ESE every late afternoon.

Shadow Study Analysis



June 21st, 2019 – 6:30AM



June 21st, 2019 – 8:00PM

These 2 shadow studies, produced using the DCOZ 3D map program's solar study tool, shows the full extent of the solar impact of the proposed building on the surrounding neighborhood. Note the dramatic difference in impact between the two studies. This is not an inaccuracy of the program, but an omission of data, due to the times-of-day chosen.

Shadow Study Analysis



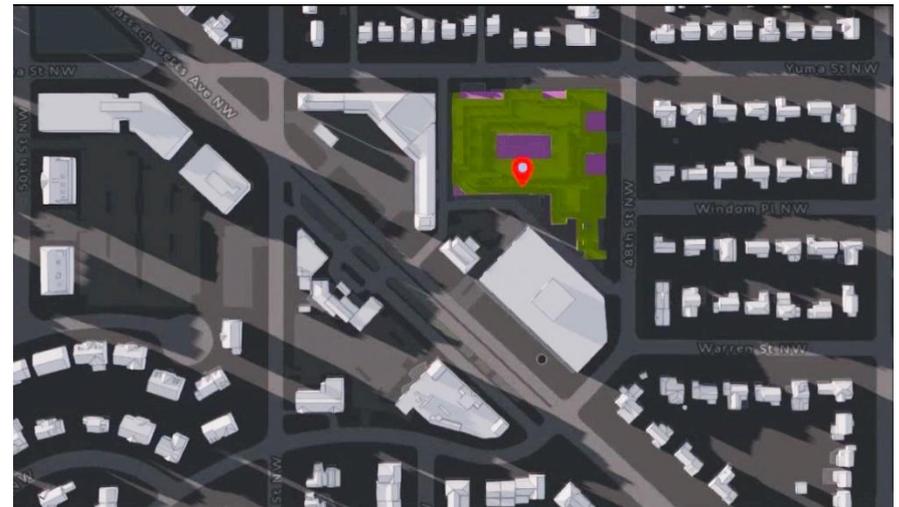
June 21st, 2019 – 6:30AM – Existing Conditions



June 21st, 2019 – 6:30AM – Proposed Conditions



June 21st, 2019 – 8:00PM – Existing Conditions



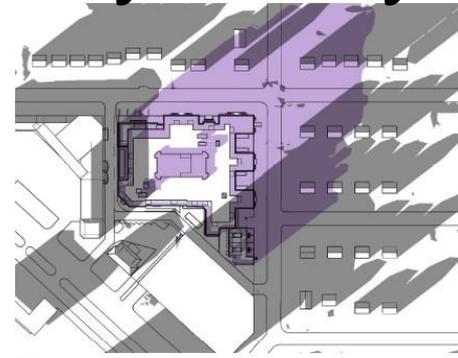
June 21st, 2019 – 8:00PM – Proposed Conditions

- At 6:30am the shadow of the ladybird will reach 600ft and cover the shopping centers on both sides of Massachusetts Ave.
- At 8pm the shadow will impact more than a dozen homes East and SE of the development. Note these homes currently enjoy full sun at this time.

Shadow Study Analysis

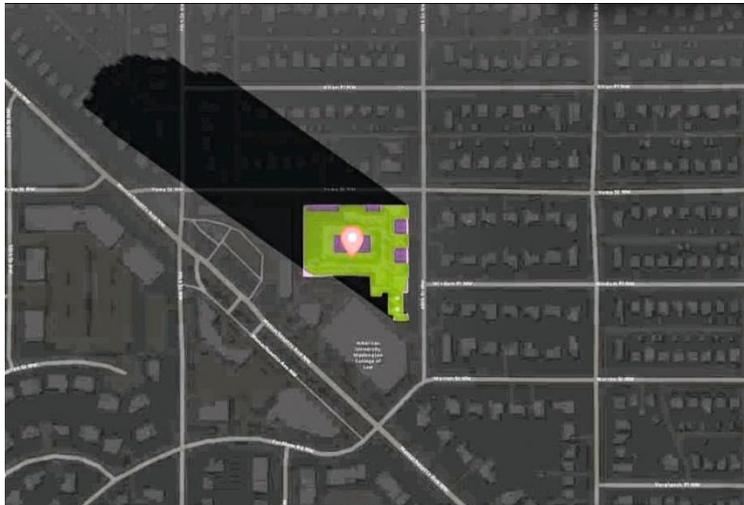


December - 9am

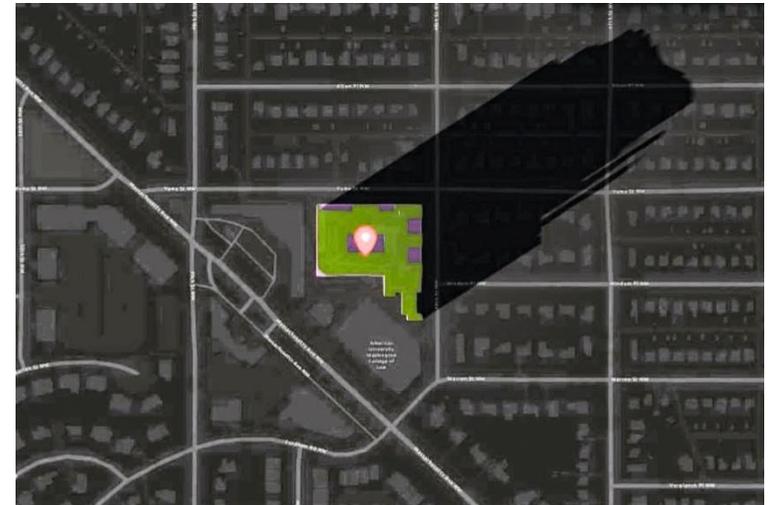


December - 4pm

Limits Valor Solar Study (Above)



Dec 21st, 2019 – 8:00AM



Dec 21st, 2019 – 4:30PM

- These 2 shadow studies, produced using the DCOZ 3D map program's solar study tool, shows the full extent of the solar impact of the proposed building on the surrounding neighborhood. Note the dramatic difference in impact between the two studies. This is not an inaccuracy of the program, but an omission of data, due to the times-of-day chosen.
- At 8am the shadow of the ladybird will reach 700ft and cover over 2 dozen homes to the NW.
- At 4:30pm the shadow will impact nearly 3 dozen homes across 6 city blocks to the NE.

Shadow Study Analysis

References:

Landscape Design That Saves Energy, by Marc Schiller, Anne Moffatt, tree shadow data contributed by Curt Westergard—Research Assistant Cornell University . *Landscape Architect in MD and VA*

Site Planning for Solar Access, US Department of Housing and Urban Development, with the US Department of Energy. *A guidebook for Residential Developers and Site Planners.*



Home

Guide to Evaluating Visual Impact Assessments for Renewable Energy

Argonne and the National Park Service (NPS) have prepared a guide to help NPS staff evaluate the quality of visual impact assessments for utility-scale renewable energy and electric transmission facilities.

Large-scale wind and solar facilities are being built across the United States, and soon will be built off our shores. When these facilities and the associated transmission projects are built on lands near areas administered by the U.S. Department of the Interior National Park Service (NPS), scenic views from NPS-administered areas may be affected. NPS is charged by law with preserving the scenic values of NPS lands for the enjoyment of future generations. Views of the lands and waters outside NPS-administered areas form an integral part of visitors' scenic experiences; these lands and waters form the backdrop for both iconic and everyday views of important scenic, historic and cultural landscapes.

As new renewable energy and transmission facilities are built, scenic impacts to NPS units are increasing. NPS staff must be able to understand the impacts of these projects, and to participate in project planning and siting activities in order to minimize the impacts to NPS scenic, historic, and cultural resources.

Visual Impact Assessments

The NPS seeks to develop strategies to avoid or mitigate visual impacts from renewable energy facilities sited on nearby lands and waters in order to preserve and protect scenic vistas – including lands outside of park units and other special status areas. Resource managers with NPS units are often required to evaluate the visual impact assessments contained in proposals for utility-scale renewable energy developments outside park boundaries. Visual impact assessments for large-scale energy projects are complex technical documents, and because of the relative newness of utility-scale wind and solar facilities, NPS resource managers at the unit level may be unfamiliar with the technical details and particular challenges these facilities present in terms of potential visual impacts.

Guidance for Evaluating Renewable Energy Facility Visual Impact Assessments

To help NPS staff to become more effective participants in the visual impact assessment process, Argonne National Laboratory's Environmental Science Division and NPS have developed the [Guide To Evaluating Visual Impact Assessments for Renewable Energy Projects](#), a comprehensive guide to evaluating the quality and completeness of visual impact assessments prepared for solar, onshore and offshore wind energy facilities, and electric transmission facilities.

The Guide covers the following topics:

- The renewable energy project siting and approval process for federal agencies;
- Correct interpretation and critical assessment of the completeness and accuracy of a visual impact assessment document;
- Assessment of impacts associated with power generation and transmission components and directly associated infrastructure; and
- Evaluation of the quality and accuracy of visual simulations of proposed utility-scale renewable energy projects.

The Guide is an important tool for NPS staff to learn about the scenic impacts of renewable energy facilities and electric transmission. The Guide helps NPS staff become more effective participants in the visual impact assessment and project planning and siting process by explaining how visual impacts are assessed, how to judge the accuracy and completeness of a visual impact assessment, and how to critically evaluate visual simulations, a key component of visual impact assessments.

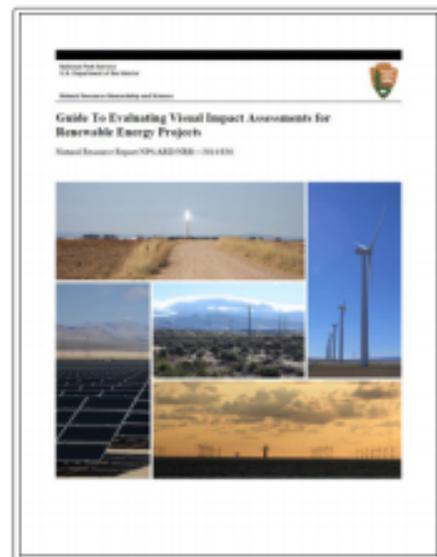
While the Guide was developed primarily for use by NPS staff, it will be useful to staff of other government agencies, tribal organizations, visual resource professionals, and other project stakeholders concerned with visual impacts to scenic, historic, and cultural resources. The Guide is publicly available at the NPS Natural Resource Publications Management Web site (<https://irma.nps.gov/Repo/Reference/Profile/2214258>).

For More Information

To learn more about EVS visual resource analysis projects, contact:



Robert Sullivan
(630) 252-6182
sullivan@anl.gov



Visual Impact Assessment Evaluation Guide

Attachment B – Order 81

Government of the District of Columbia

ZONING COMMISSION



ZONING COMMISSION ORDER NO. 81

CASE NO. 71-30

February 1, 1974

Pursuant to notice, a public hearing of the Zoning Commission was held on April 25 and June 21, 1973, to consider the preliminary application for a planned unit development and related zone change, filed by the Dupont Circle Joint Venture.

FINDINGS OF FAC'I

1. The site of the proposed planned unit development is located on the south side of Dupont Circle in the block bounded by Dupont Circle, 19th Street, Sunderland Place and New Hampshire Avenue, N.W., in Square 115, Lots 31-47, 50-56, 79, 81-82 and 822.

2. The area of the subject site is approximately 66,715 square feet (Baist Atlas Vol. 1, Page 6) .

3. A portion of the subject site is presently zoned C-3-B (High bulk major business and employment center - floor area ratio of 6.5 and 90 feet height limit,, residential use limited to floor area ratio of 4.5 and percentage of lot occupancy of 75) at the northern tip of the site occupied by the Euram Building, which faces directly onto Dupont Circle, the remainder of the site is presently zoned SP (Office-floor area ratio of 5.5, height and limit of 90 feet).

4. The related zone change filed with this preliminary application for a planned unit development requests that the portion of the subject site presently zoned SP be changed to C-3-B.

5. This preliminary application proposes the construction of a 12-story office building to a height of 130 feet with roof structures extending above that level, with retail space on the first floor and part of the first cellar, and parking for 428 at four below-grade levels.

6. The most significant feature of this preliminary application is the proposal to transfer unused density from 2 existing buildings on the site to the proposed 12-story office building at the center of the site. The applicant has contracted to purchase 90,000 square feet (approximately 5.18 FAR) from the Columbia Historical Society and 4,218 square feet (0.5 FAR) from the owners of the Euram Building. These unused development rights totalling approximately 94,218 square feet would be utilized in the construction of the proposed building,

7. The Columbia Historical Society property currently contains 15,695 square feet of gross floor area (approximately a floor area ratio of 0.9) in the Heurich Mansion and Carriage House. Under the present SP zoning a total of 95,590 square feet could be developed on the Society's property. If the requested zone change to C-3-B is granted, a total of 121,660 square feet could be developed by the Society. The property owned by the Society would thus have an unused development potential of approximately 108,874 square feet.

8. The Euram Building, located at the northern corner of the triangular site, was built to the maximum floor area ratio permitted as a matter of right in the C-3-B zone district. However, the inclusion of the Euram site within the area of the proposed planned unit development makes it eligible for a possible additional 0.5 FAR, and it is proposed that this

additional unused development potential of 4,218 square feet created through the planned unit development process be sold to the Joint Venture,

9. The subject site is located in the Dupont Circle section of the District. Within the site two new structures, the Eoram and Sunderland Buildings, have been constructed within the recent past. Other buildings adjacent to Dupont Circle and the site have been recently completed. This construction has included office buildings and apartment houses. The general area is of a mixed character, including large amounts of residential space as well as retail and employment facilities. One of the most important visual aspects of the area adjacent to the site is Dupont Circle itself. Five streets lead into the Circle from ten different directions, these streets break into the facade of the Circle. There are presently eleven building facades facing on the Circle. Of these, seven are approximately 40 feet or less in height, while the remaining four are approximately 90 feet or greater in height.

10. Immediately across 19th Street from the subject site is the Dupont Circle Building, an office building constructed prior to 1958, which rises to 130 feet and exceeds the maximum allowable FAR in the C-3-B zone district. The site is and will be accessible by mass transit. Presently numerous metro bus routes use Connecticut Avenue, Massachusetts Avenue, and P Street, 19th Street and 20th Street. The Dupont Circle station of the Rockville Metro route will be constructed to serve the area containing the site. The entrance to the south end of the station will be located on the east side of 19th Street immediately across the street from the site.

11. Existing zoning in the area is a combination of high density districts, including C-3-B, SP and C-2-B. As aforesaid, the east side of 19th Street immediately around from the site is zoned C-3-B, but developed with a building conforming to specifications of the C-4 zone district. The north side of New Hampshire Avenue is zoned C-3-B. The third side of the site is bordered by SP zoning. The C-3-B zone district currently extends approximately three-quarters of the way around Dupont Circle.

12. There have been numerous applications in the general vicinity of the subject site made to this Commission. Applications before this Commission for the square within which the subject property is located and immediately abutting squares are as follows::

- a. Square 114 (immediately across New Hampshire Avenue from the subject property): application for change of zone from SP to C-3-B: Case No. 64-90, denied without a hearing, December 15, 1964.
- b. Square 114 (immediately across New Hampshire Avenue from the subject property): application for change of zone from SP to C-3-B: Case No. 65-10, denied without a hearing, February 2, 1965.
- c. Square 114 (immediately across New Hampshire Avenue from the subject property): application for change of zone from SP to C-3-B: Case No. 66-19, approved October 4, 1966 .
- a. Square 115 (part of the subject property): application for change of zone from SP to C-3-B: Case No. 67-64, denied January 15, 1968.
- e. Square 116 (south of the subject property): application for change of zone from SP to C-3-B: Case No. 68-59, denied, December 16, 1968.

13. There have also been numerous applications before the Board of Zoning Adjustment in the squares in this general area. These applications fall generally into three classes: requests for permission to establish or continue a parking lot; requests for approval of roof structures to construct new buildings; requests for permission to include certain uses within the SP zone district. Some of the more recent significant cases involving the site include:

- a. Square 115 (part of the subject property): request for permission to occupy part of an SP office building with a nonprofit family foundation: Case No, 10287, withdrawn after public hearing, January 20, 1970,
- b. Square 115 (part of the subject property): request for permission to occupy part of an SP building with an art gallery: Case No. 10171, withdrawn after public hearing, December 16, 1969,
- c. Square 115 (part of the subject property): request for a variance of the use provisions to allow a restaurant in the SP District, Case No. 10981, denied September 21, 1971.

14. The Zoning Advisory Council found that the preservation and upkeep of a Category II Landmark, the Heurich Mansion, owned by the Columbia Historical Society, listed in the National Register of Historical Places, was in the best interest of the District of Columbia, and that the transfer sale of density from the Columbia Historic Society property to the Dupont Circle Joint Venture property was an appropriate method for accomplishing said preservation (TR. 37).

15. The Zoning Advisory Council recommended approval of the preliminary application for a planned unit development but recommended against allowing the transfer of density, created by the planned unit development procedure from the site occupied by the Eoram Building to the proposed building, since no public benefit would be gained from said transfer. The Council concluded, however, that if the applicant were to provide a direct pedestrian connection between the site and the Dupont Circle Metro Station substantial public benefit would be established thus upholding the proposed transfer of density from the Eoram Building (TR. 37, 38).

16. The Zoning Advisory Council recommended approval of the said application for a planned unit development subject to eleven conditions; relating to applying for zone change from SP to C-3-B, the number of buildings to be developed

on this property, a specific overall floor area ratio for the entire property, specific limits on gross floor area to be transferred to the new building, an established height limit for the new building, specific uses allowable in the new building, a maximum number of parking spaces to be allowed in the new building, convenient and secure parking to be provided for a specific number of bicycles in the building, a pedestrian connection across 19th Street to the Dupont Circle Metro Station, vehicular access to the new building from New Hampshire Avenue at one point, and a landscaping plan accompanying the final application for a planned unit development (TR. 38-40).

17. ~~The~~ National Capital Planning Commission recommended approval of the preliminary application provided that certain conditions relating to the preservation of the Christian Heurich Memorial Mansion, Carriage House and grounds to be made a part of the approval of the preliminary application, pursuant to paragraph 7501.38 of the Zoning Regulations and part of the Order approving the final application, pursuant to paragraph 7501.393 of the Regulations, said conditions to run with the land pursuant to paragraph 7501.53 of the Regulations (TR. 70). The said conditions were attached to the report of the Planning Commission (TR. 70) and entered as an exhibit in the exclusive record of the public hearing (TR. 80).

18. The conditions relating to the preservation of the Heurich Mansion were approved by Counsel for the applicants, the General Counsel of the Planning Commission and the office of the Corporation Counsel for the District of Columbia (TR. 73).

19. The Joint Committee on Landmarks of the National Capital recommended approval of the preliminary application (TR. 76). Stating that the cost of maintaining the Heurich Mansion is immense and that the Columbia Historical Society has been "hard pressed" to maintain the Mansion, and that its preservation would be assured through agreement of the parties to create a trust fund to specifically preserve the mansion (TR. 77).

20. Counsel for the Columbia Historical Society, George Scheitwzer, testified that the Society has been operating under a financial strain due in part to cost of maintaining the property, and that there is a substantial amount of maintenance needed, with some repairs having been deferred because of the inability of the Society to pay for them (TR. 201). The Society requested that this Commission condition the requirements of the proposed conditions relating to the preservation of the Mansion upon exemption of future real estate taxation, because it could not adhere to the conditions and pay the real estate taxes (TR. 205).

21. The proposed conditions relating to the preservation of the Heurich Mansion as referred to above, contain provisions relating to the following areas:

- a. The Society shall use its best efforts to maintain the Heurich Mansion, Carriage House and grounds in good condition and repair, to prevent exterior and interior deterioration.
- b. The Society shall place all money received from the Dupont Circle Joint Venture in consideration for the transfer of its unused floor area ratio in an income producing trust, and the Society can use the trust income and principal, in its discretion, for the maintenance and upkeep of the Mansion, grounds and buildings, If such income from the trust exceeds the cost of maintenance and upkeep the Society may use the excess for any other purposes deemed proper.
- c. No construction, reconstruction or renovation of the exterior or interior of the Mansion or Carriage House shall take place unless approved by the District of Columbia's review committee for nominations to the National Register of Historic Places.

- d. Agents of the nominating committee are permitted to inspect the premises for violations of the conditions.
- e. The Society with approval of the Zoning Commission and on the advice of the nominating committee, may erect a library and museum building on the lot.
- f. The Society may apply to the Zoning Commission for amendment or termination of the conditions if circumstances make it impossible to comply with the conditions,

22. Considerable and vigorous opposition to this preliminary application, from residents of the neighborhood, was evinced at the public hearing.

CONCLUSIONS OF LAW

1. The planned unit development process is an appropriate means of controlling the development of the subject site.

2. The additional floor area ratio, created pursuant to the Zoning Regulations when property is included in a planned unit development, can legally be allocated to any property in the planned unit development.

3. This preliminary application is appropriate, taking the present character of the area into consideration, because it would encourage stability of the area and the land values therein.

4. The approval of this preliminary application is in harmony with the intent, purpose and integrity of the comprehensive zone plan of the District of Columbia as embodied in the Zoning Regulations and Map.

5. The approval of this preliminary application for a planned unit development is in accordance with the Zoning Regulations of the District of Columbia, as amended, and the Zoning Act (Act of June 20, 1938, 52 Stat. 797), as amended.

DECISION

While the proposed FAR of the new building to be built in the middle of the site was 7.0, the effective FAR of the proposed building due to a concentration of density would have been 9.79. By reducing the overall FAR of the site to 6.5, the effective FAR of the proposed building is reduced to 8.9. The lessening of height and bulk of the proposed building will decrease its visual impact on the immediately adjacent historic landmark, the Weurich Mansion, and will provide a less abrupt height and bulk differential between the new building and buildings in the immediate area including the Euram and Sunderland Buildings.

Upon consideration of the findings of fact and conclusions of law herein, the Zoning Commission hereby Orders APPROVAL of said preliminary application for a Planned Unit Development subject to the elements, conditions and guidelines hereinafter set forth:

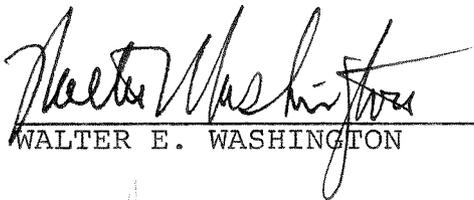
1. An application for a change of zone from SP to C-3-B for that portion of the site currently zoned SF shall accompany the application for final approval.
2. The property shall be developed with no more than five separate buildings, The existing Euram and Sunderland Buildings shall not be increased or decreased in terms of gross floor area, provided that certain minor modifications may be made to the Sunderland Building, as shown on Exhibit 16 of the public hearing.
3. The existing Heurich Mansion, Carriage House and garden shall be preserved. Additional construction on that site for a library and/or auditorium, not to exceed

a total of 15,275 square feet of gross floor area, may be approved, but only if the property owner applies to the Zoning Commission for an amendment to the approved Planned Unit Development,

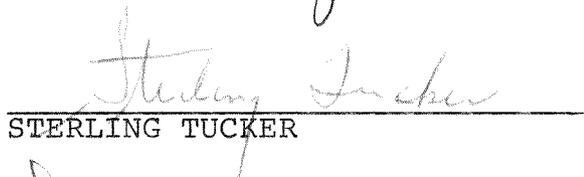
4. The overall FAR for the entire Planned Unit Development shall not exceed 6.5.
5. The new building shall include 82,000 square feet of gross floor area transferred from the Columbia Historical Society property.
6. The new building shall not exceed 130 feet in height. Any roof structures in the excess of that limit, as normally permitted by the Regulations, shall not exceed 17 feet in height.
7. The new building shall be devoted to any uses permitted in the C-3-B District, provided that the ground floor and one half of the first cellar shall be devoted to retail commercial uses, provided further that such retail uses shall not include banks.
8. Parking shall be provided at the rate of one space per 2,000 square feet of gross floor area,
9. A convenient and secure parking area for 25 bicycles shall be provided on the ground level or first cellar level.
10. Vehicular access to the new building shall be from New Hampshire Avenue and shall be restricted to one point,
 - 1b. The final design shall contain a pedestrian passage through or around the new building from New Hampshire Avenue to

19th Street. The area of such pedestrian passage will not be included in the calculation of FAR permitted on the site. Such passage shall be fronted and contain entrances to the retail establishments referred to in Item No, 7 above.

12. A plan showing all existing and proposed landscaping shall accompany the final application.
13. All provisions contained in the Proposed Conditions Relating to Preservation of Christian Heurich Memorial Mansion, Carriage House and Grounds, annexed hereto as Attachment Number I, are by this reference made part of this preliminary approval of the Planned Unit Development.
14. Said conditions for preservation shall run with the land.

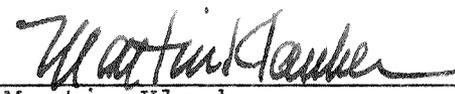

WALTER E. WASHINGTON


JOHN A. NEVIUS


STERLING TUCKER


GEORGE M. WHITE


RICHARD L. STANTON

ATTEST: 
Martin Klauber
Executive Secretary

NATIONAL CAPITAL PLANNING COMMISSION

WASHINGTON, D.C. 20576

NCPC File No. 0932

PROPOSED CONDITIONS RELATING TO PRESERVATION
OF CHRISTIAN HEURICH MEMORIAL MANSION,
CARRIAGE HOUSE AND GROUNDS
(Zoning Commission Case No. 71-30)

October 31, 1972

1. The Columbia Historical Society and any successor in interest (hereinafter called "Society") shall use its best efforts to maintain the Christian Heurich Memorial Mansion, its carriage house and grounds, known as Lot 79 in Square 115 in the District of Columbia (hereinafter called "Landmark"), in good condition and repair to prevent substantial deterioration to the interior and exterior appearance of the Mansion, the exterior appearance of its carriage house and the appearance of the grounds.

2. No construction, reconstruction, renovation or demolition shall be undertaken which would materially alter the exterior appearance and materials of construction of the Landmark, as depicted in the photographs which are annexed hereto and made a part hereof, unless approved by the District of Columbia's review committee for nominations to the National Register of Historic Places or, if the review committee ceases to exist or is no longer composed of, or required to be composed of, at least one historian, architect, and archaeologist, by a similar professional body mutually agreeable to the Society and the National Capital Planning Commission (hereinafter called "Committee") which approval shall not be unreasonably or unduly withheld.

8. The Society shall place the money received from the Dupont Circle Joint Venture in consideration for the transfer of its unused Floor Area Ratio in an income producing trust, administered by the Society, and shall use the income and may use the principal, in its sole discretion, from the trust for the maintenance of the Landmark, any necessary reconstruction, renovation, refinishing, replanting or installation, as authorized under Conditions #2 and #3, and all operating costs, including the salaries of the personnel required for the maintenance, security, and day-to-day operation of the Landmark.

If the income from the trust fund exceeds the amount of money necessary for maintenance and any reconstruction, renovation, refinishing, replanting or installation, and operating costs, then such excess may be used by the Society for any other purposes it deems necessary or proper.

9. The Society agrees that these conditions (or those in effect after any changes made under Condition 10 or otherwise) will be inserted by it in any subsequent deed, or other legal instrument, by which the Society divests itself of either the fee simple title to, or its possessory interest in the Landmark.

10. The Society may apply to the Zoning Commission for amendment of termination of these conditions in the event circumstances arise which, in the opinion of the Society, make it impossible or infeasible for the Society to comply with these conditions.