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November 12, 2019

VIA IZIS

Zoning Commission for the
District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

**Re: Z.C. Case No. 19-10
Consolidated PUD @ Square 1499
Applicant's Proposed Findings of Fact and Conclusions of Law**

Dear Members of the Commission:

On behalf of Valor Development, LLC (the "Applicant"), we hereby submit the Applicant's proposed Findings of Fact and Conclusions of Law, as requested by the Commission at its October 10, 2019 public hearing.

Respectfully Submitted,

HOLLAND & KNIGHT LLP

By: 
Norman M. Glasgow, Jr.
Jessica R. Bloomfield

Attachment

cc: Certificate of Service
Joel Lawson, D.C. Office of Planning (via email w/ attachment)
Elisa Vitale, D.C. Office of Planning (via email w/ attachment)
Aaron Zimmerman, District Department of Transportation (via email w/ attachment)
Maximilian Tondro, Office of the Attorney General (via email w/ attachment)
Alexandra Cain, Office of the Attorney General (via email w/ attachment)

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2019, copies of this letter and the Applicant's draft Findings of Fact and Conclusions of Law were sent via email to the following:

Ms. Jennifer Steingasser
D.C. Office of Planning
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Suite 650 East
Washington, DC 20024

VIA EMAIL

Advisory Neighborhood Commission 3E
c/o Lisner Home
5425 Western Avenue NW, Suite 219
Washington, DC 20015

VIA EMAIL

** Email sent to each Commissioner*

Advisory Neighborhood Commission 3D
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** Email sent to each Commissioner*

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VIA EMAIL

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Spring Valley Opponents
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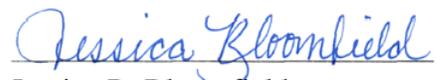
VIA EMAIL

Spring Valley Neighborhood Association
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VIA EMAIL

Ward 3 Vision
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VIA EMAIL



Jessica R. Bloomfield
Holland & Knight LLP

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 19-10
Case No. 19-10

Valor Development, LLC
Consolidated PUD @ Square 1499, Lots 802, 803, 806, and 807

November 18, 2019

FINDINGS OF FACT

Notice

1. Pursuant to notice, the Zoning Commission for the District of Columbia (“Commission”) held a public hearing on October 7 and 10, 2019, to consider a request for a consolidated planned unit development (“PUD”) filed by Valor Development, LLC (“Applicant”) for property located at Square 1499, Lots 802, 803, 806 and 807 (“Site”). The Commission considered the application pursuant to Subtitle X, Chapter 3 and Subtitle Z of the District of Columbia Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations (“DCMR”).
2. The application requested approval to construct a new mixed-use development on a portion of the Site, and to make aesthetic and circulation improvements along the existing public and private alleys within Square 1499 (“Application” or “Project”). The Project includes a new mixed-use building containing residential and retail uses (“Building 1”) and five townhomes (“Townhomes”) located on Lot 807.
3. On May 14, 2019, the Office of Zoning (“OZ”) sent a Notice of Filing of the Application to the Office of Planning (“OP”); the District Department of Transportation (“DDOT”); Ward 3 Councilmember Cheh and the at-large Councilmembers; and the affected Advisory Neighborhood Commissions (“ANCs”) 3D and 3E; and also submitted the Notice of Filing to the *D.C. Register*. (Exhibits [“Ex.”] 5-9.)
4. On June 20, 2019, OZ submitted a Notice of Public Hearing on the case to the *D.C. Register*. On June 25, 2019, OZ sent the Notice of Public Hearing to OP, DDOT, Ward 3 Councilmember Cheh and the at-large Councilmembers, ANCs 3D and 3E, and the owners of property located within 200 feet of the Site. (Ex. 14-16.)
5. On July 25, 2019, OZ submitted a Notice of Rescheduled Public Hearing to the *D.C. Register*, and on July 30, 2019, OZ sent a Notice of Rescheduled Public Hearing to OP, DDOT, the Department of Energy and the Environment (“DOEE”), the District of Columbia Housing Authority (“DCHA”) relocation committee; Ward 3 Councilmember Cheh and the at-large Councilmembers, ANCs 3D and 3E, and the owners of property located within 200 feet of the Site. (Ex. 20-21, 23.)

6. On August 19, 2019, the Applicant filed an affidavit of posting the Site with the Notice of Rescheduled Public Hearing (Ex. 24) and on October 1, 2019, the Applicant filed an affidavit of maintenance of the posted notice. (Ex. 150.)
7. The public hearing was conducted in accordance with the provisions of 11-Z DCMR Chapter 400. For the reasons stated below, the Commission hereby **APPROVES** the Application.

Parties

8. The parties to the case were the Applicant; ANCs 3D and 3E; Citizens for Responsible Development (“CRD”) and Spring Valley-Wesley Heights Citizens Association - Neighbors for a Livable Community (“SVWHCA-NLC”) in opposition; and Ward 3 Vision (“W3V”) and Spring Valley Neighborhood Association (“SVNA”) in support.
9. Pursuant to 11-Z DCMR § 403.5, ANCs 3D and 3E were automatically parties to the case. Both ANCs provided written and oral testimony in unanimous support of the Application. (Ex. 26, 48-50, 154, 200, 201, 218, 229 and 231.)
10. On July 1, 2019, CRD filed a request for advanced party status in opposition to the Application. (Ex. 17.) At its public meeting on July 29, 2019, the Commission voted 5-0-0 to grant party status to CRD.
11. On September 19, 2019, W3V filed a request for party status in support of the Application. (Ex. 31.)
12. On September 20, 2019, SVNA filed a request for party status in support of the Application. (Ex. 34.)
13. On September 20, 2019, SVWHCA-NLC filed a request for party status in opposition to the Application. (Ex. 33.)
14. At the October 7, 2019 public hearing, the Commission granted party status to W3V, SVNA, and SVWHCA-NLC, such that together with CRD there were two parties in support of the Application (the “Party Supporters”) and two parties in opposition to the Application (the “Party Opponents”).

Public Hearing

15. The Commission convened a public hearing on the Application on October 7, 2019. At that hearing, the Applicant proffered the following expert witnesses: Sarah Alexander of Torti Gallas Urban, expert in architecture; Erwin Andres of Gorove/Slade Associates, expert in transportation planning and engineering; and Shane Dettman of Holland & Knight LLP, expert in zoning and land use planning. The Commission accepted these witnesses as experts in their respective fields. At this initial hearing the Commission heard presentations from the Applicant, OP, DDOT, and the ANCs, each of which were subject to cross-examination by other parties.

16. The Commission continued the public hearing on the Application on October 10, 2019. At that time, CRD proffered the following expert witnesses: Stephen Hansen of Preservation Matters, expert in historic preservation; and Curt Westergard of Digital Design + Imaging Service, expert in visual impact studies. The Commission accepted these witnesses as experts in their respective fields. At this second hearing the Commission received presentations from Party Supporters and Party Opponents, each of which were subject to cross-examination by other parties. The Applicant also provided rebuttal testimony which was subject to cross-examination by other parties.
17. At the hearing on October 10, 2019, the Coalition for Smarter Growth testified as an organization in support of the Application. Several individuals testified in opposition to the Application, and one individual provided testimony that was undeclared. In addition to the individuals and organizations that testified at the public hearing, numerous letters in support and opposition to the Application were submitted to the record.
18. At the conclusion of the public hearing on October 10, 2019, the Commission closed the record except for specific information that was requested from the parties. The Commission requested each party to submit the following information:
 - a. A response on the affordable housing issues/options that were raised during the public hearing;
 - b. Contested issues of fact;
 - c. Contested conclusions of law;
 - d. An evaluation of the requested special exception relief; and
 - e. An evaluation of the proposed PUD against the PUD standards of Subtitle X, Chapter 3, including:
 - i. Balancing any requested flexibility against the proffered public benefits and amenities;
 - ii. Reviewing any adverse impacts and determining whether they have been outweighed or mitigated; and
 - iii. Determining whether the proposed PUD is not inconsistent with the Comprehensive Plan when taken as a whole.
19. In addition to the above, the Applicant submitted supplemental information that was specifically requested by the Commission during the public hearing.

Post-Hearing Submissions

20. On October 17, 2019, ANC 3D submitted its post-hearing submission (Ex. 231).
21. On October 17, 2019, the Applicant submitted its initial list of proposed proffers and conditions (Ex. 230 and 230A), to which SVWHCA-NLC and CRD responded on October 24, 2019 (Ex. 236 and 239).
22. On October 22, 2019, W3V submitted its post-hearing submission (Ex. 235).
23. On October 24, 2019, SVWHCA-NLC, CRD, and SVNA submitted their post-hearing submissions (Ex. 237, 238 and 240, respectively).
24. On October 24, 2019, the Applicant submitted its post-hearing submission (Ex. 241).
25. On October 29, 2019, SVWHCA-NLC submitted a letter requesting additional time to respond to the Applicant's post-hearing submission because it received the Applicant's submission by U.S. Mail and not email or hand delivery (Ex. 242), which request was granted by the Commission.
26. On October 31, 2019, W3V submitted a response to the Party Opponents' post-hearing submissions (Ex. 243).
27. On October 31, 2019, CRD submitted a response to the Applicant's post-hearing submission (Ex. 244).
28. On October 31, 2019, the Applicant filed its revised list of proposed proffers and conditions (Ex. 245 and 245A), to which CRD responded on November 4, 2019 (Ex. 248).
29. On October 31, 2019, the Applicant also filed a response to the Party Opponents' post-hearing submissions (Ex. 246).
30. On November 4, 2019, SVWHCA-NLC submitted a response to the Applicant's post-hearing submission (Ex. 247).
31. On November 5, 2019, the Applicant submitted a motion to strike a portion of CRD's post-hearing submission that included a newly prepared shadow study (Ex. 249). On November 7, 2019, CRD submitted a letter opposing the Applicant's motion to strike (Ex. 250), and on November 11, 2019, SVNA and W3V each submitted a letter in support of the Applicant's motion to strike (Ex. 251 and 252, respectively).

Site

32. The Site is located in the AU Park/Spring Valley neighborhood of Upper Northwest, Washington, DC, and consists of approximately 160,788 square feet of land area, not including the area of a public alley. The Site is generally bounded by Yuma Street on the north;

Massachusetts Avenue on the south; 48th Street on the east; and the Spring Valley Exxon station on the west.

33. The Site is presently improved with the following existing structures: (i) on Lots 802 and 803, the historic Massachusetts Avenue Parking Shops (“MAPS”), which consists of approximately 16,922 square feet of gross floor area (“GFA”) of retail and service uses (ii) on Lot 806, the former American University Law School building (the “AU Building”), which has a building height of approximately 60 feet and contains approximately 179,302 square feet of GFA of commercial and education: college/university uses; and (iii) on Lot 807, a vacant grocery store building, retail uses, and surface and below-grade parking (the “Valor Lot”). Together, Lots 806 and 807 make up Record Lot 9.
34. The MAPS site is separated from Record Lot 9 by a 20-foot public alley that runs north-south through Square 1499 connecting Yuma Street to Massachusetts Avenue, NW. The existing alley is in poor condition and is scattered with several trash dumpsters and receptacles, most of which are located within the public alley right-of-way, unscreened HVAC equipment, and other utilities/equipment associated with the MAPS.
35. The Site is bordered by two-story single-family residential dwellings to the north and east, and one- to five-story commercial, institutional, and retail buildings located to the south and west along Massachusetts Avenue, including the AU Building and MAPS, that collectively form a neighborhood-serving commercial center. The surrounding context, with the exception of the AU Building, is generally characterized by Colonial Revival style architecture.

Application

Zone Designation and History

36. On May 6, 2019, the Applicant filed the Application for a consolidated PUD to construct Building 1 and the Townhomes on the Lot 807 portion of the Site, and to make a variety of other improvements to the open spaces within and surrounding the Site. The Application did not include a request for a Zoning Map amendment.
37. The Site is located within the MU-4 zone district, which permits residential and retail uses as a matter-of-right. The MU-4 zone is intended to permit moderate-density mixed-use development; provide facilities for shopping and business needs, housing, and mixed uses; and be located in low- and moderate-density residential areas with access to main roadways or rapid transit stops and include office employment centers, shopping centers, and moderate bulk mixed-use centers. 11-G DCMR § 400.3.
38. As a matter-of-right, the MU-4 zone permits a maximum overall density of 2.5 floor area ratio (“FAR”), of which no more than 1.5 FAR can be devoted to non-residential uses. Utilizing the Inclusionary Zoning (“IZ”) density bonus (20%), a maximum overall density of 3.0 FAR is permitted in the MU-4 District. Under a PUD, a maximum overall density of 3.6 FAR is permitted in the MU-4 zone, of which no more than 2.01 FAR may be devoted to non-residential uses. 11-G DCMR § 402.1 and 11-X DCMR §§ 303.3 and 303.4.

39. The MU-4 zone permits as a matter-of-right a maximum building height of 50 feet with no limit on the number of stories, and 65 feet under a PUD. Above the maximum building height, a penthouse of 12 feet is permitted for penthouse habitable space, with 15 feet permitted for penthouse mechanical space. Under a PUD, the maximum height for penthouse mechanical space is permitted to be 18.5 feet. 11-G DCMR §§ 403.1 and 403.3; 11-X DCMR §§ 303.7 and 303.18
40. Lots 806 and 807 were created in the 1970s to, among other things, allocate the allowable nonresidential density within Record Lot 9 between the owners of the tax lots. The zoning in effect at the time allowed a maximum density of 2.0 FAR, all of which could be devoted to nonresidential use. Based upon the land area of Record Lot 9 (121,272 square feet), this amounted to approximately 242,544 square feet of GFA that was available to allocate between Lots 806 and 807. Through a recorded Declaration of Easement and Agreement that remains in effect (the "Allocation Agreement"), 179,302 square feet of GFA was allocated to Lot 806 for the AU Building, and 63,242 square feet of GFA was allocated to Lot 807. The Allocation Agreement also granted an easement to the owner of Lot 806 (currently American University) for non-exclusive access to not less than 236 parking spaces located on Lot 807.
41. Since recordation of the Allocation Agreement, the Zoning Regulations have been amended such that the maximum permitted overall density in the zone increased from 2.0 FAR to 2.5 FAR (242,544 square feet to 303,180 square feet on Record Lot 9), while the maximum permitted nonresidential density decreased from 2.0 FAR to 1.5 FAR (242,544 square feet to 181,908 square feet on Record Lot 9). For an IZ development in the MU-4 zone, the maximum overall permitted density is increased to 3.0 FAR, an increase of 0.5 FAR (bonus density), with the limitation on non-residential density remaining at 1.5 FAR. Thus, after accounting for the existing AU Building and the zoning amendments that have occurred over time, the total matter-of-right density remaining on Record Lot 9 is approximately 184,514 square feet of GFA, of which approximately 2,606 square feet of GFA may be devoted to non-residential uses. As for the Site, after accounting for the existing AU Building and MAPS, the total matter-of-right density remaining on the Site is approximately 286,140 square feet of GFA, of which approximately 44,958 square feet of GFA may be devoted to nonresidential uses.

Project Description

42. Building 1. The Applicant proposed to develop Building 1 as a mixed-use building containing approximately 219 residential units and approximately 18,000 square feet of GFA of retail uses (not including loading), of which a minimum of 13,000 square feet of GFA would be devoted to a full-service grocery store. The maximum building height will be approximately 43.5 feet, not including the penthouse, as measured from the level of the curb opposite the middle of the front of the building on 48th Street to the top of the parapet.
43. Building 1 will have a penthouse containing one-story of enclosed habitable and mechanical space, with unenclosed mechanical equipment above. The portion of the penthouse containing habitable space will have a maximum height of 12 feet above the roof upon which it is located, and the overall height of the penthouse, including the unenclosed mechanical equipment, will

have a maximum height of 15 feet. The penthouse will meet all setbacks required by the Zoning Regulations.

44. The main pedestrian entrance to the grocery store will be located at the northwest corner of the building along Yuma Street, set back approximately 17 feet from the property line. Due to the grade along Yuma Street the grocery store entrance is approximately two feet lower than the adjacent sidewalk. The main residential lobby will also be located along Yuma Street closer to 48th Street. Another retail entrance will be located at the southwest corner of Building 1 in close proximity to Massachusetts Avenue and the adjacent MAPS retail and service uses. This entrance will either be a second entrance to the grocery store or an entrance to a separate retail use.
45. Building 1 is designed in two different Colonial Revival architectural styles, and in response to the lower-density residential uses to the north and east, the massing of Building 1 includes lower building height step-downs; substantial ground- and upper-level setbacks; large courtyards, terraces, and public plazas; and context-sensitive articulation.
46. Along the 48th Street property line, the massing of Building 1 is minimized through the use of pavilions that are separated by 40-foot deep, 43-foot wide landscaped courtyards. The height of the pavilions is further reduced through the use of bay projections that are similar in scale to the height of the residential dwellings across 48th Street, which has a right-of-way width of 90 feet. The distance between Building 1 and the residential dwellings to the east along 48th Street ranges between approximately 96 to 136 feet, with the penthouse further separated by meeting or exceeding the required 1:1 setback.
47. The massing of Building 1 is also minimized along Yuma Street, where there is a drop in grade from east to west. The eastern portion of the Yuma Street façade has a three-part composition, with two lower-height pavilions separated by the main residential entry courtyard. This portion of the facade shares the same architectural style as the 48th Street elevation. The western portion of the Yuma Street façade has a similar three-part composition but expresses a distinct architectural style through the use of a different material palette and window pattern. The western portion of the façade is also set back from the property line approximately 17 feet to create an open public plaza outside the entry to the grocery store, and the upper-most level is set back an additional 14 feet.
48. The west and south facades of Building 1 are designed in the same architectural style as the street-facing facades, and will be treated with the same high-quality materials. Along the west, adjacent to the north-south public alley between Lot 807 and the MAPS site, Building 1 will be set back from the property line approximately 10 feet to provide adequate and safe circulation in the alley for vehicles and pedestrians. Above the lower level, the setback will increase another 20 feet, for a total of approximately 30 feet from the property line, along the majority of the west façade.
49. Townhomes. The Townhomes are located along 48th Street at the southern end of Lot 807. Townhomes 1 through 4 are set back approximately 20 feet from the property line. Due to the

angled southern boundary of Lot 807, Townhome 5 is located at the property line along 48th Street in order to meet the minimum rear yard requirement.

50. The Townhomes will each have three stories and range in height from 36 feet, 8 inches to 37 feet. Each Townhome will have a hatch no greater than five feet in height to access to a private roof deck. Parking for the Townhomes will be provided in a lower-level “tuck-in” garage that is accessed from the existing alley system that services the Site.
51. The architectural style of the Townhomes relates to the prevailing Colonial Revival style of the surrounding neighborhood, and utilizes similarly compatible materials.
52. Landscaping and Alley Improvements. The Project includes a variety of landscape improvements, including publicly accessible open spaces and plazas and private courtyards and terraces for Project residents. A publicly-accessible open space framed by Building 1 and Townhouse 1 will be located along 48th Street (“Windom Park”). Windom Park will contain plantings, seating, and other decorative features. Another public plaza will be located at the northwest corner of Building 1, providing a forecourt to the grocery store and creating opportunities for outdoor seating and small gatherings (“Northwest Plaza”). The Northwest Plaza will be approximately 1,700 square feet in area and located approximately two feet lower than the adjacent sidewalk due to the grade change along Yuma Street. The Northwest Plaza will provide a variety of social settings for people to interact through the use of both fixed and movable seating. To accommodate the grade difference between the sidewalk and the Northwest Plaza, a series of steps and planted slopes will be located along the sidewalk.
53. Private landscaped courtyards and terraces are also proposed as residential amenities for Building 1 and the Townhomes. Building 1 will have a large central courtyard with landscaping, a paved plaza, and a swimming pool, along with several private outdoor terraces reserved for individual residential units. Around the exterior of Building 1, two large landscaped courtyards with residential terraces will face 48th Street, and a residential entry courtyard contain landscaping and seating will face Yuma Street. Building 1 will also have a modest-sized fourth floor outdoor terrace at its northwest corner that will contain flexible seating areas and other amenities. Finally, each Townhome will have a private landscaped front yard area, rear main floor balcony, and a small roof deck.
54. Along the existing north-south public alley between Lot 807 and the MAPS site, the Applicant will reduce the number of trash containers and place them in new enclosures. To accommodate the trash enclosures and maintain safe and adequate vehicular and pedestrian circulation along the alley, Building 1 will be set back approximately 10 feet from the west property line of Lot 807. This will allow for a full 20 feet of drive aisle width for vehicles and a new three foot delineated pedestrian pathway along the west side of Building 1.
55. , Along the south side of Building 1 and Townhouse 5, the Applicant will provide a new six foot pedestrian sidewalk on private property between 48th Street and the north-south public alley.

56. The Applicant also proposes to upgrade the intersection of the east-west and north-south public alleys, and the intersection of the north-south public alley and Massachusetts Avenue. These upgrades include visibility mirrors, textured/differentiated pavement, crosswalk striping, and stop signs and/or other signage.
57. Parking and Loading. Building 1 will contain a three-level below-grade parking garage with approximately 370 vehicle parking spaces, inclusive of the 236 spaces mandated by the Allocation Agreement. In compliance with the loading requirements of 11-C DCMR, Chapter 9, Building 1 will contain a 55-foot loading berth, a 30-foot loading berth, and a 20-foot service/delivery space.
58. Access to the parking and loading facilities will be located on the south side of Building 1, adjacent to the east-west public alley. This location will minimize views and the potential for noise-related impacts on residential uses to the north and east of the Site. It also improves circulation by locating these facilities closer to Massachusetts Avenue and away from the trash enclosures and other MAPS-related mechanical equipment located along the north-south alley.
59. Sustainable Design. The Project has been designed to integrate a host of sustainable features and will be designed to achieve LEED Gold v.4 certification.
60. The Project will include a variety of strategies to satisfy Green Area Ratio (“GAR”) and stormwater management requirements, such as intensive and extensive green roof areas and bioretention areas in the various courtyards. The Project will have sustainable design features such as low-flow plumbing fixtures; energy efficient light fixtures, mechanical systems, and appliances; and low VOC materials and finishes. Convenient opportunities for recycling will be provided within a trash/recycling room on each residential floor. Conduits to provide PV panels on the roof in the future will be provided.
61. The parking garage will include eight Level 2 charging stations for electric vehicles and infrastructure to permit the installation of additional electric vehicle charging stations in the future. At least five electrical outlets will be provided within each long-term bicycle storage room for the charging of electric bikes. Locations for car-share vehicles, interior retail employee bike storage and showers, and interior residential bike storage that exceeds the required number of spaces will also be provided.

Development Incentives Requested

62. Zoning Flexibility. The Applicant did not request any zoning flexibility as part of the application. The proposed heights of Building 1 and the Townhomes are below the maximum height permitted as a matter-of-right in the MU-4 zone, and the density of the buildings within the Site, as calculated pursuant to 11-X DCMR § 303.2, does not exceed the maximum overall and nonresidential density permitted as a matter-of-right in the MU-4 zone. The Applicant did not request any PUD-related flexibility from any of the other MU-4 development standards or general zoning requirements contained in Subtitle C of the Zoning Regulations.

63. Design Flexibility. The Applicant requested the following areas of design flexibility for the Project:

- a. Interior Components: To vary the location and design of all interior components, including partitions, structural slabs, doors, hallways, columns, stairways, atria, mechanical rooms, and elevators, provided that the variations do not change the exterior configuration of the buildings as shown on the plans approved by the order;
- b. Exterior Materials – Color: To vary the final selection of the colors of the exterior building materials based on availability at the time of construction, provided such colors are within the color ranges shown on the plans approved by the order;
- c. Exterior Details – Location and Dimension: To make minor refinements to the locations and dimensions of exterior details that do not substantially alter the exterior configuration of the buildings or design shown on the plans approved by the order. Examples of exterior details would include, but are not limited to, doorways, canopies, railings, and skylights;
- d. Number of Units: To provide a range in the approved number of residential dwelling units of plus or minus ten percent (10%), except that (i) the total square footage of residential dwelling units shall not be reduced, and (ii) the total square footage reserved for affordable dwelling units shall not be reduced;
- e. Affordable Units: To vary the number and location of affordable dwelling units, except that (i) the number of three bedroom affordable dwelling units shall not be reduced; (ii) no affordable dwelling unit shall be located within a cellar, and (iii) no more than two affordable units shall be located directly above and below each other on any immediately successive floors;
- f. Retail Uses: To vary the types of uses designated as “retail” use in plans approved by the order to include the following use categories: (i) Retail (11-B DCMR § 200.2(cc)); (ii) Services, General (11- B DCMR § 200.2(dd)); (iii) Services, Financial (11-B DCMR § 200.2(ee)); and (iv) Eating and Drinking Establishments (11-B DCMR § 200.2(j));
- g. Parking Layout: To make refinements to the approved parking configuration, including layout and number of parking spaces, provided the minimum number of spaces provided is not less than the number of spaces shown on the plans approved by the order;
- h. Streetscape Design: To vary the location, attributes, and general design of the approved streetscape to comply with the requirements of, and the approval by, the DDOT Public Space Division;
- i. Signage: To vary the font, message, logo, and color of the approved signage, provided that the maximum overall dimensions and signage materials are consistent with the signage shown on the plans approved by the order and are compliant with the DC signage regulations, except that (i) the content of the blade sign at the northwest corner of

Building 1 shall be limited to directional signage only, and (ii) no more than two retail tenant signs are permitted along Yuma Street at the northwest corner of Building 1; and

- j. Sustainable Features: To vary the approved sustainable features of the project, provided the total number of LEED points achieved by the project does not decrease below the minimum required for the LEED standard required under the order.

Special Exception Relief

- 64. Pursuant to 11-X DCMR § 303.13, as part of the PUD process, an applicant may request approval of any relief for which special exception approval is required. The Zoning Commission shall apply the special exception standards applicable to that relief, unless the applicant requests flexibility from those standards. Any such flexibility shall be considered the type of development flexibility against which the Zoning Commission shall weigh the benefits of the PUD. In this case, the Applicant requested relief from the rear yard requirement for Building 1 and the penthouse requirements for the Townhomes, both of which are permitted by special exception. The Applicant but did not request any flexibility from the rear yard or penthouse standards. Thus, the special exception relief requested by the Applicant is not considered development flexibility against which the Commission shall weigh the benefits of the PUD.

- 65. Rear Yard Special Exception Relief for Building 1 (11-G DCMR § 405.2). Pursuant to 11-G DCMR § 405.2, a minimum rear yard of 15 feet is required in the MU-4 zone. The Applicant proposed a minimum rear yard depth of 10 feet along portions of Floors 1-3 of Building 1.

- 66. Pursuant to 11-G DCMR § 1200.4, relief from the development standards of the MU-4 zone may be granted as a special exception if it is found that the special exception:
 - a. Will be in harmony with the general purpose and intent of the MU zone, the Zoning Regulations, and Zoning Maps;
 - b. Will not tend to affect adversely the use of neighboring property, in accordance with the Zoning Regulations and Zoning Maps; and
 - c. Is subject in each case to any applicable conditions.

As set forth below, the Commission finds that the Applicant has met the special exception standard of review set forth in 11-G DCMR § 1200.4, for the requested rear yard relief.

- 67. The Commission finds that the rear yard relief meets the special exception standards of 11-G DCMR § 1200.4 because the rear yard will be in harmony with the general purpose and intent of the Zoning Regulations, Zoning Map, and specifically the MU-4 zone. The overall purpose of the Zoning Regulations is to establish minimum standards for the promotion of public health, safety, morals, convenience, order, prosperity, and general welfare, by (i) providing adequate light and air; (ii) preventing undue concentration of population and overcrowding of land; and (iii) distributing population, business, and industry, and the use of land in a manner

that creates favorable conditions. *See* 11-A DCMR § 101.1. The purpose of the MU-4 zone is to permit moderate-density mixed use development that includes facilities for shopping and housing needs and is located in a low- and moderate-density residential neighborhood.

68. The extent of the rear yard relief is limited to two upper-portions of the west façade of Building 1. For the first 20 feet of height measured from the alley, which generally aligns with the Lower Level of Building 1, the required 15-foot rear yard will be provided, and in fact will be exceeded since the rear yard may be measured from the centerline of the north-south public alley. Above 20 feet, where the rear yard must be measured from the rear property line, the rear yard relief is only necessary at the northwest (Floors 1 – 3) and southwest (Floors 1 – 4) corners of Building 1, and the extent of relief in these areas is only 5 feet since Building 1 will be set back from the rear property line by 10 feet.
69. Given the much lower height of the MAPS, the 20-foot public alley, and the 10-foot rear yard that will be provided, the rear yard relief will be in harmony with the purposes of the Zoning Regulations stated above. Notwithstanding the requested relief, adequate light and air will be available to the dwelling units located along the rear of Building 1, the MAPS, and into the public alley. Considering the location of the requested rear yard relief toward the interior of the Site, the rear yard relief will not adversely affect the use of neighboring properties. The portion of the MAPS that is closest to the area where the rear yard relief is requested contains back-of-house functions and does not contain any windows. In addition, the rear yard relief will not adversely affect circulation in the public alley because the required rear yard will be provided at the ground level. Finally, based upon the report submitted by the D.C. Historic Preservation Office (“HPO”) (Ex. 187), the rear yard relief will not adversely impact the setting of the historic MAPS when viewed from Massachusetts Avenue.
70. In addition to the general special exception standard, the Commission finds that the rear yard relief meets the following specific criteria listed in 11-G DCMR § 1201.1, as follows:
 - a. 11-G DCMR § 1201.1(a) – Consistent with this section, there are no residential dwelling unit windows along the rear of Building 1 that are located within 40 feet directly in front of another building. The only building directly opposite the rear of Building 1 is the MAPS, which does not have any windows along the façade that faces Building 1. Moreover, the height of the MAPS is below the height of the first level of dwelling units that face the alley in Building 1.
 - b. 11-G DCMR § 1201.1(b) - This section is not applicable because office use is not proposed.
 - c. 11-G DCMR § 1201.1(c) – Consistent with this section, the rear yard relief will not result in Building 1 being not parallel to the MAPS. In addition, there are no windows along the eastern façade of the MAPS that faces Building 1. Thus, the distance of penetration of sightlines into habitable rooms did not need to be evaluated.

- d. 11-G DCMR § 1201.1(d) - The Project will satisfy all minimum parking and loading requirements and the rear yard relief will not impact access to these facilities because the Project will provide the required rear yard at the lower level and the parking and loading facilities are not located along the north-south alley where the rear yard relief is requested. The Applicant will reduce the number of trash containers in the north-south alley, place trash containers in a new enclosure(s), and ensure that safe and adequate vehicular and pedestrian circulation is provided along the alley by setting Building 1 back from the west property line of Lot 807.

In addition, the Project includes a three-level below-grade parking garage that contains parking spaces in excess of the number of spaces required by the Zoning Regulations. Loading is also provided in an amount that meets the requirements of the Zoning Regulations. Access to the parking and loading facilities is provided on the south side of Building 1, adjacent to the east-west alley, which minimizes views and the potential for noise-related impacts on residential uses to the north and east. Providing parking and loading access in this location also improves circulation by positioning these facilities closer to Massachusetts Avenue and away from the trash enclosures and other MAPS-related mechanical equipment located along the north-south alley.

- e. 11-G DCMR § 1201.1(e) – Consistent with this section, all applicable District agencies had full authority to review and comment on the rear yard relief identified in the application

71. Based on the foregoing, the Commission finds that the Applicant has satisfied all applicable criteria for special exception relief from the rear yard requirement for Building 1 under 11-G DCMR § 405.2. Therefore, the Commission grants the requested rear yard relief.

72. Penthouse Special Exception for the Townhomes (11-C DCMR § 1500.4). Pursuant to 11-C DCMR § 1500.4, a penthouse, other than screening for mechanical equipment or a guard-rail required by the D.C. Construction Code for a roof deck, is not permitted on the roof of a detached dwelling, semi-detached dwelling, rowhouse, or flat in any zone. However, the BZA may approve a penthouse as a special exception under 11-X DCMR, Chapter 9, subject to conditions.

73. The Applicant requested relief from 11-C DCMR § 1500.4, to permit a penthouse on the Townhomes, each of which would contain a limited amount of ancillary storage space and a stairway to provide access to a roof deck. The Applicant also requested special exception relief from 11-C DCMR § 1500.9, to permit the penthouse enclosing walls to be of unequal heights, which was requested in order to minimize massing and views of the penthouses from surrounding streets.

74. In response to comments from the Zoning Commission at the public hearing, the Applicant agreed to remove the penthouses proposed for the Townhomes and replace them with hatches to provide access to the Townhome roof decks. However, the Applicant maintained its

requested relief to provide “penthouses” on the Townhomes in case the final design of the hatch is over four feet in height, given that the text of 11-C DCMR § 1500.2 suggests that even a hatch that is less than four feet in height is still considered a penthouse. Further, the Applicant maintained its requested relief to allow a penthouse with walls of unequal height in case the final design of the hatches involves a sloped roof similar to some of the precedents shown by the Applicant at the public hearing.

75. The Commission finds that the proposed hatches will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps. Given their modest size and compliant setbacks, the proposed hatches will not negatively impact the general welfare of the surrounding community. The hatches will also not have an undue impact on light and air; result in undue concentration of population and overcrowding of land; or create conditions that are unfavorable to transportation. The properties and buildings that are immediately adjacent to the proposed hatches on the Townhomes include Building 1 and the AU Building, both of which will not be adversely affected by the hatches, even if they are five feet in height. The closest existing residential uses are located over 110 feet away from the proposed hatches. Given this substantial distance, the Commission concludes that the proposed hatches will not adversely affect the use of neighboring properties in accordance with the Zoning Regulations and Zoning Maps.
76. For the reasons stated above, the Commission finds that the Applicant has satisfied all applicable criteria for special exception relief under 11-C DCMR § 1500.4; and therefore, grants the request special exception to allow penthouses (hatches) on the Townhomes provided the penthouses (hatches) do not exceed 5 feet above the roof upon which they are located.

Public Benefits and Amenities

77. In deciding a PUD application the Commission shall judge, balance, and reconcile the relative value of the public benefits and project amenities offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case. 11-X DCMR § 304.3. A project may qualify for approval by being particularly strong in only one or a few categories of public benefits, but must be acceptable in all proffered categories and superior in many. 11-X DCMR § 305.12.
78. In this case, the Commission finds that the Project offers a high level of public benefits and project amenities, and that when compared with the amount of development flexibility requested (none) and the potential project impacts, the Application satisfies the balancing test required in 11-X DCMR § 304.3. The Commission also finds that the benefits and amenities of the Project are acceptable in all proffered categories and are superior in the categories of housing, affordable housing, environmental, transportation infrastructure, and uses of special value to the surrounding neighborhood.
79. The Applicant’s proffered public benefits and amenities are set forth below:
- a. Superior Urban Design, Architecture, and Landscaping (11-X DCMR § 305.5(a) and (b)) and Site Planning and Efficient Economical Land Utilization (11-X DCMR § 305.5(c)). The proposed height and mass of the Project has been carefully designed to relate to the

surrounding context through height reductions, courtyards, landscaping, façade articulation, upper-level setbacks, and high-quality, context-sensitive materials. The Project includes development of Windom Park, a new publicly accessible open space along 48th Street; the Northwest Plaza, a new landscaped plaza adjacent to the grocery store entrance along Yuma Street; and a variety of private landscaped courtyards and terraces. The Project's site plan takes into consideration the potential for pedestrians to circulate through the public alley system through pedestrian improvements that do not currently exist, including a new three foot delineated pedestrian path along the north-south alley, a new six foot sidewalk along the east-west alley, and improvements at the alley intersections.

- b. In addition to the superior landscaping surrounding the Site and within Windom Park and the Northwest Plaza, the Applicant will construct improvements specifically intended to activate these spaces and the surrounding streetscape. To demonstrate this commitment, the Applicant will dedicate \$15,000 toward such improvements, the design of which will be developed based on input from ANC 3E, and will be subject to review and approval by District public space permitting authorities, as necessary. As part of this effort, the Applicant will also consider incorporating playable and interactive elements into the design of these spaces.
- c. The Project exhibits efficient and economical land utilization through (i) the provision of multiple residential building types (multi-family and townhomes) within a designated neighborhood commercial center in close walking proximity to numerous amenities, such as retail, services, parks, schools, and convenient bus service; and (ii) the utilization of unused density from the historic MAPS site, which will facilitate additional housing, restore a full-service grocery store to the neighborhood, and permanently reduce the amount of density that could potentially be constructed on the historic MAPS site in the future.
- d. Historic preservation of private or public structures, places, or parks. (11-X DCMR § 305.5(e)). The Project's allocation of approximately 50,115 square feet of unused GFA from the MAPS site (Lots 802 and 803) (approximately 0.31 FAR based upon the land area of the Site) to Lot 807 will help protect the historic MAPS by limiting the economic feasibility of selling the MAPS, and the economic incentive for future development, because development on the MAPS site will be permanently reduced to that permitted under existing zoning minus the FAR allocated to Lot 807.
- e. Housing, including housing that provides units with three or more bedrooms; and Affordable Housing in an amount that exceeds what would have been required through matter-of-right development (11-X DCMR § 305.5(f) and (g)). The Project results in the creation of new housing consistent with the objectives and policies of the Comprehensive Plan and the Mayor's Housing Initiative. Overall, the Project will replace a long vacant and underutilized site with approximately 219 new residential units in approximately 214,094 square feet of residential GFA. The Project's unit mix includes studio, one-, two-, and three-bedroom units, including three-bedroom IZ units.

- f. The Applicant will set aside a minimum of 12% of the residential GFA to IZ units devoted to households earning up to 60% of the median family income (“MFI”), and 12% of the non-communal penthouse habitable space to IZ units devoted to households earning up to 50% of the MFI. The Applicant will also set aside 12% of cellar floor area dedicated to residential dwelling units, and projection floor area dedicated to residential use, to IZ units devoted to households earning up to 60% of the MFI. The amount of affordable GFA proffered by the Applicant exceeds the amount that would have otherwise been required through matter-of-right development on the Site by 20%. Further, the Applicant will provide a minimum of four, three-bedroom IZ units in Building 1.
- g. Environmental and sustainable benefits (11-X DCMR § 305.5(k)). The Project has been designed to integrate a host of sustainable features and will be designed to achieve LEED Gold v.4 certification.
- h. The Applicant will redevelop the Site, which is presently impervious and lacks any form of sustainable storm water management, with new landscaping, trees, open space, green roof systems, and bioretention areas. The parking garage includes eight electric vehicle charging stations that will be Level 2 chargers or greater, and the Applicant will install infrastructure to permit the installation of additional electric vehicle charging stations in the future. Electrical outlets will also be provided within the long-term bicycle storage rooms for the charging of electric bikes. Locations for car-share vehicles, interior retail employee bike storage and showers, and interior residential bike storage that exceeds the required number of spaces will also be provided.
- i. Transportation infrastructure beyond that needed to mitigate any potential adverse impacts of the Application, including provision of a public easement for a pedestrian walkway that would not otherwise be required (11-X DCMR § 305.5(o)). The Applicant will provide the following transportation-related benefits that are not needed to mitigate any potential adverse transportation impacts created by the Project:
 - i. Fund a new high-intensity activated crosswalk (“HAWK”) signal on Massachusetts Avenue, between 48th and 49th Streets, subject to DDOT public space approval;
 - ii. Allocate \$100,000 to means for connecting Project residents to the Tenleytown Metro station through shuttle or geofence with ride hailing services.
 - iii. Restrict residents of Building 1 from obtaining a Residential Parking Permit (“RPP”) with penalty of lease termination;
 - iv. Consolidate trash receptacles currently located in the north-south alley and in public space along Yuma Street to a new enclosure along the north-south alley;
 - v. Improve the existing alley system by widening the north-south public alley by seven feet onto private property to maintain a 20-foot vehicle travel way and provide a new 3-foot pedestrian path; providing a new 6-foot sidewalk on private property along the east-west alley; constructing a new 5- to 6-foot sidewalk along

the western side of the public alley entrance from Massachusetts Avenue; and constructing improvements to the alley intersection to increase pedestrian safety and visibility;

- vi. Contribute \$15,000 toward studying the potential to open the median on Massachusetts Avenue to improve porosity and turning movements at the MAPS site, and/or studying the installation of a “pork chop” near Massachusetts Avenue and 49th Street;
 - vii. Work with ride hailing services to designate the building entrance on Yuma Street as the preferred pick-up and drop-off location; and
 - viii. Work with DDOT to designate a section of 48th Street between Yuma Street and Warren Street as an “alternative transportation block” where transit options such as electric scooters, bikes, and mopeds; bike shares; and car shares can be co-located.
- j. Uses of Special Value to the Neighborhood or the District of Columbia as a Whole (11-X DCMR § 305.5(q)). The Applicant will dedicate approximately 18,000 square feet of GFA to retail space, of which no less than 13,000 square feet will be dedicated to a full-service grocery store for at least ten years from the date of the first certificate of occupancy.
- k. Other public benefits and project amenities and other ways in which the proposed PUD substantially advances the major themes and other policies and objectives of any of the elements of the Comprehensive Plan (11-X DCMR § 305.5(r)). The Applicant will plant any missing trees within the tree-box areas located along the east side of 48th Street between Yuma Street and Massachusetts Avenue, and along the north side of Yuma Street between 48th and 49th Streets.

Transportation Mitigation

80. In addition to the transportation improvements that will be implemented by the Applicant as public benefits, the Applicant will also implement the following transportation measures which are intended to mitigate the potential transportation impacts of the Project.

81. The Applicant will fund and construct pedestrian network improvements in the immediate vicinity of the Site to encourage walking and mitigate the potential impacts of being over-parked. Specifically, the Applicant will upgrade substandard curb ramps, stripe missing crosswalks, and install curb extensions, subject to DDOT public space approval, at the following intersections:

- a) 49th Street and Yuma Street NW;
- b) 48th Street and Yuma Street NW;
- c) 48th Street and Windom Place NW; and

d) 48th Street and Warren Street NW.

82. The Applicant will implement the following Transportation Demand Management (“TDM”) Plan:

- a. Exceed the minimum zoning requirements for bicycle parking/storage facilities, which includes secure long-term bicycle storage rooms located within Building 1 and short-term bicycle parking located around the perimeter of the Site;
- b. Install a bicycle repair station in each of the long-term bicycle storage rooms located within Building 1;
- c. Unbundle the cost of residential parking from the cost of lease or purchase of each residential unit in Building 1. The unbundled cost of parking will be at a minimum equal to the average market rate within a quarter mile of the Site;
- d. Not offer free parking to any resident, employee, student, or otherwise, and only offer daily, weekly and monthly rates for purchase;
- e. Identify TDM leaders (for planning, construction, and operations) who will work with residents and grocery/retail employees to distribute and market various transportation alternatives and options;
- f. Work with DDOT and goDCgo to implement TDM measures;
- g. Share the full contact information of the TDM leaders with DDOT and goDCgo;
- h. Post all TDM commitments online for easy reference;
- i. Provide TDM materials to new residents in the Resident Welcome Package materials;
- j. Provide residents and grocery/retail employees who wish to carpool with detailed carpooling information and refer them to other carpool matching services sponsored by MWCOG;
- k. Install a Transportation Information Center Display (electronic screen) within the residential lobby of Building 1 containing information related to local transportation alternatives;
- l. Offer either a one-year membership to Capital Bikeshare or a one-year membership to a car-sharing service to each residential unit for the initial lease of each unit;
- m. Dedicate four vehicle parking spaces in the parking garage for car-sharing services to use with right of first refusal. If an agreement has not been reached with a carsharing service to occupy the four spaces, then the Applicant will provide an additional year of Capital Bikeshare memberships to new residents within Building 1; and

- n. Provide one shopping cart for grocery shopping and running errands for every 30 residential units in Building 1.

83. The Applicant will implement the following Loading Management Plan (“LMP”):

- a. A loading dock manager will be designated by the building management. The dock manager will coordinate with vendors and tenants to schedule deliveries and will be on duty during delivery hours;
- b. All tenants in Building 1 will be required to schedule deliveries that utilize the loading docks – defined here as any loading operation conducted using a truck 20-feet in length or larger;
- c. Commercial deliveries will be scheduled between 7 AM – 7 PM (7 days a week), and discouraged from making deliveries after 4 PM on weekdays;
- d. Waste collection (both commercial and residential) is allowed 7 AM – 4 PM (7 days a week);
- e. Residential move-ins/outs are allowed 9 AM – 4 PM (7 days a week);
- f. The dock manager(s) will schedule deliveries such that the dock’s capacity is not exceeded. In the event that an unscheduled delivery vehicle arrives while the dock is full, that driver will be directed to return at a later time when a berth will be available so as to not impede the drive aisle that passes in front of the loading dock;
- g. The dock manager(s) will monitor inbound and outbound truck maneuvers and will ensure that trucks accessing the loading dock do not block vehicular traffic except during those times when a truck is actively entering or exiting the alley;
- h. The loading manager(s) will monitor the alley to keep the designated loading areas clear for deliveries, keep the alley from being blocked due to vehicle loading/unloading activity, and enforce the no parking restrictions;
- i. Trucks using the loading dock will not be allowed to idle and must follow all District guidelines for heavy vehicle operation including but not limited to DCMR 20 – Chapter 9, Section 900 (Engine Idling), the regulations set forth in DDOT’s Freight Management and Commercial Vehicle Operations document, and the primary access routes listed in the DDOT Truck and Bus Route System;
- j. The Applicant will continue to coordinate with DDOT and the owners of the MAPS site (Lots 802 and 803) regarding loading operations for the MAPS site; and
- k. Trucks traveling to the MAPS site will be directed not to pick-up or drop-off on Yuma Street NW and will be directed to use the alley network.

Project Impacts

84. Pursuant to 11-X DCMR § 304.4(b), the Commission shall find that the proposed development “[d]oes not result in unacceptable project impacts on the surrounding area or on the operation of city services and facilities but instead shall be found to be either favorable, capable of being mitigated, or acceptable given the quality of public benefits in the project.” During the public hearing, the Applicant addressed the potential impacts of the Project relative to the standard of review under the PUD regulations. *See* Applicant’s PowerPoint presentation at Ex. 194. For the reasons set forth in this Order, based upon the evidence in the record the Commission finds that the majority of the potential impacts of the Project will be favorable, and any potential non-favorable impacts will be capable of being mitigated, or acceptable given the quality of proffered benefits and amenities. The Commission’s evaluation and findings on potential project impacts are organized according to the topics addressed in the Citywide Elements of the Comprehensive Plan.
85. Impacts to Land Use. The potential impacts of the Project on land use will be favorable or capable of being mitigated. The land area within the Site, and in particular Lot 807, is presently underutilized. Lot 807 is improved with a vacant grocery store building, some additional retail space that is currently in use, and a large impermeable surface parking lot. The Project will redevelop Lot 807 with a new mixed-use development containing new market rate and affordable housing and a new full-service, neighborhood-serving grocery store. This type of mixed-use / mixed-income project will significantly improve the Site’s utilization, particularly in light of the Site’s location within a designated Neighborhood Commercial Area on the Comprehensive Plan Generalized Policy Map (“GPM”), and within an area of the District where there is significant need for more affordable housing yet limited opportunity for multi-family housing. Where multi-family development opportunities do exist, such as within the Site on Lot 807, they should be taken advantage of in a manner that takes into consideration and balances potential impacts on transportation and on the surrounding context.
86. Parties and individuals opposed to the Project testified that the proposal would have adverse impacts on the surrounding area that relate to land use. These include impacts to the development pattern and established character of the surrounding area due to the height, mass, scale, and density of Building 1; impacts to public on-street parking; loss of sunlight, privacy, and views; and construction damage. The Commission has thoroughly evaluated these potential impacts, and as set forth in the following Findings of Fact, the Commission concludes that the Project will not have unacceptable impacts on these issues as they relate to land use.
- a. Height, Mass, Scale and Density. The Commission finds that 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 43’-6” height of Building 1 is below the 50’-0” maximum permitted as a matter-of-right in the MU-4 zone, and is only slightly taller than the 40’-0” maximum height permitted in the adjacent R-1-B zone. Moreover, the height of Building 1 is not substantially higher than the highest point of the roofs of the houses along 48th and Yuma Streets which range between 30 – 35 feet from street grade.
 - b. In addition to being below matter-of-right height, Building 1 also contains substantial setbacks from the property line to relate to the pattern of adjacent development. Together with the width of 48th Street and Yuma Street, both 90-foot wide streets, the distance

between Building 1 and existing development to the east and north will range between 96 and 137 feet. Furthermore, the Project incorporates numerous other design features that reduce mass and scale and successfully relate to the surroundings. For example, the façade of Building 1 has a tripartite/banded composition and uses high-quality materials. Substantial landscaped areas are provided on-site, and there is an abundant amount of additional landscaping along the adjacent public spaces. Based on the foregoing, the Commission finds that the Project's height, massing, setbacks, façade articulation, and landscaping all work together to successfully relate the Project to the established character of the surrounding area and avoid the potential for overpowering contrasts in scale on all sides, including in relation to the historic MAPS. The Commission further finds that any potential impacts on the surrounding area resulting from the Project's height, massing, scale, and density are acceptable given the quality of public benefits proffered by the Applicant, particularly with respect to housing and affordable housing.

- c. Parking. To the extent that there may be impacts to public on-street parking, the Commission finds that such impacts will be mitigated by the ample parking being provided on-site within the parking garage, the extensive TDM Plan and other transportation-related benefits that will reduce vehicle trips and promote the use of alternative modes of transportation, and the Applicant's commitment to impose RPP restrictions on residents of Building 1.
- d. Sunlight, Privacy and Views. The Commission finds that the Project has only minor impacts on direct sunlight during the later hours of the day on adjacent houses. While the impacts of the Project on sunlight increase slightly during the winter when the sun is lower in the sky, the potential impacts on direct sunlight to nearby properties will be less than what would occur with a matter-of-right project. Moreover, to the extent that impacts to sunlight occur, such impacts are minimized by the separation provided by 48th and Yuma Streets, and the lower height and set backs of the Project.
- e. The Commission notes that the D.C. Court of Appeals has previously acknowledged the Commission's use of comparing a proposed development to a matter-of-right development for purposes of evaluating impacts under a PUD. Specifically, in its decision upholding the Commission's approval of the first-stage PUD for the Southwest Waterfront (Z.C. Order No. 11-03), the Court stated "...an exhibit from the record compares "by-right" development under the previous R-3 requirements with the residential building proposed as part of the PUD. It demonstrates that row houses constructed along Sixth Street without any zoning flexibility would have a substantially similar impact on petitioners' views and their light and air." *See Randolph v. District of Columbia Com'n*, 83 A.3d 756 (D.C. 2014). Therefore, the Commission finds that its comparison of the PUD to the matter-of-right MU-4 zoning standards is appropriate in the context of finding no adverse impacts.
- f. To the extent that views into nearby properties are created by the Project, such views would not be any greater than would be created by a matter-of-right development. Considering the setbacks of the Project and the widths of 48th and Yuma Streets, the distance between the Project and existing development to the east and north will range between 96 to 137 feet. In addition, the Applicant will restrict the hours of use of the

fourth floor outdoor terrace along Yuma Street, and such restrictions are included as a condition to this Order. Therefore, the Commission finds that any potential impacts to privacy will be mitigated through setbacks and separation distances, and through restrictions on the use of the outdoor terrace.

- g. Regarding impacts on views, this Commission has previously found that individuals have no right to a view across another individual's property unless such a view is expressly granted by easement. This follows from the basic legal principle that "the actual enjoyment of the air and light by the owner of the house is upon his own land only, and that the owner of the adjoining lands has submitted to nothing which actually encroached upon his rights. Thus, one may obstruct his neighbor's windows at any time and no action can be maintained for obstructing a view." See *Hefazi v. Stiglitz*, 862 A.2d 901 (D.C. 2004). There is nothing in the record before the Commission that identifies an express grant of an easement for existing views from any adjacent property or surrounding street, and therefore, the Commission finds that any existing views are not legally protected.

87. Impacts to Transportation. The Commission finds that the potential transportation impacts of the Project will be favorable or capable of being mitigated. The transportation aspects of the Project were thoroughly analyzed in the Applicant's Comprehensive Transportation Review ("CTR") that was prepared in coordination with, and reviewed by DDOT. The CTR found that the Project will not have a detrimental impact on the surrounding transportation network, and that no mitigation was required with respect to roadway capacity and operations. Moreover, DDOT stated in its hearing report that "no mitigation for traffic impacts is requested by DDOT." (Ex. 52, p. 2). While DDOT does consider the Project to be "over-parked," this will be mitigated through the Applicant's agreement to fund pedestrian improvements at four adjacent intersections and to implement the proposed TDM Plan and LMP. These mitigation measures are conditions to this Order.

88. In addition, the Project will have several favorable transportation impacts that result from the proposed improvements to the alley system, the closure of large curb cuts adjacent to Lot 807, the installation of a HAWK signal, contributions for connections to Metrorail and to conduct specified transportation studies, as well as others. Therefore, the Commission concludes that the Project will not create any unacceptable transportation-related impacts that cannot be properly mitigated.

89. Impacts to Housing. The Commission finds that any potential impacts to housing will be favorable. The Project will produce approximately 219 new dwelling units in a desirable area of the District that contains high-quality public and private schools, abundant parks and open space, and many neighborhood-serving amenities. Most importantly, the Project will contain 20% more affordable housing GFA than would otherwise be required under matter-of-right development on the Site, and will do so without requesting any additional PUD-related density. This will result in approximately 30 dedicated affordable housing units devoted to households earning up to 50% and 60% of the MFI.

90. The Commission further finds that the new market-rate and affordable housing units will greatly help achieve the Mayor's goal of creating 36,000 new housing units by 2025, of which 12,000 units would be affordable. Based upon information contained in the Mayor's recently

released Housing Equity Report, the Project will increase the number of dedicated affordable housing units in the Rock Creek West pipeline by approximately 36%, and will move the District closer to achieving its dedicated affordable unit target for the Rock Creek West Planning Area. This is a significant contribution to the District's dedicated affordable housing goal for Rock Creek West considering that the Project is below matter-of-right height and density. Therefore, the Commission finds that the proposed Project will have extremely positive impacts to housing.

91. Impacts to Environmental Protection. The Project will redevelop an underutilized, impervious property with a new mixed-use development that will be certified LEED Gold v.4. The significant reduction in impervious surface is likely to have favorable impacts on urban heat island effect, and the new landscaping and green roof elements will provide new habitat. The Project is not expected to have any impacts on water quality or hydrology. The Commission also credits the favorable comments on the Project submitted to OP by the D.C. Department of Energy and the Environment (Ex. 53, p. 23).
92. As described by the Applicant at the public hearing, the assessment of the Project's environmental impacts does not conclude with this Commission. Rather there is an entirely separate set of regulatory requirements under the D.C. Environmental Protection Act (the "Environmental Act") and implementing regulations that require the evaluation of the potential environmental impacts before the Project can be implemented through the issuance of a building permit. Specifically, the Environmental Act mandates environmental review of a project at the permitting stage, and the D.C. Court of Appeals has held that "implementation" of a zoning approval occurs when construction actually begins. *See Foggy Bottom Ass'n v. D.C. Bd. Of Zoning Adjustment*, 791 A.2d 64, 73 (D.C. 2002).
93. Thus, the Applicant will be required to complete an Environmental Impact Screening Form ("EISF") when submitting its building permit application, which involves further analysis of numerous environmental topic areas by District agencies with expertise in those areas. The topics that are analyzed within an EISF include water quality, sedimentation and storm water management, watershed protection, air quality (which will take into account the results of the Applicant's CTR), underground storage tanks, toxic substances, hazardous waste, and environmental justice. To the extent that a reviewing agency identifies impacts that exceed established thresholds, the Applicant will be required to work with that agency to avoid, minimize, and/or mitigate such impacts to the extent necessary before the Project is implemented. Further, to the extent that any mitigation measures identified by a reviewing agency require modifications to the Project, that are not covered by flexibility granted in this Order, the Applicant would be required to seek approval of a PUD modification from the Commission.
94. Therefore, based upon the information in the record, including the environmental benefits that will result from the Project, the Commission finds that Project impacts to the environment will be favorable or capable of being mitigated. The Commission further finds that the potential environmental impacts of the Project will be further reviewed by other District agencies following the zoning entitlement process.

95. Impacts to Economic Development. The Project will result in the closure of the existing businesses on Lot 807. However, new businesses and employment opportunities will be created by the proposed grocery store, and potentially new employment opportunities at existing businesses in the surrounding area will be created as a result of additional demand generated by future residents of the Project. Moreover, as part of its agreement with ANC 3E, the Applicant is required to offer, on a right of first refusal basis, any retail space within Building 1 that is not leased to the grocery store to tenants currently operating on the Site.
96. The Project will also have favorable impacts on tax revenue through increased property, income, and sales taxes. While the exact amount of additional revenue is not known, the redevelopment of Lot 807 will certainly increase the assessed value of Lot 807 given the age and condition of the existing improvements on that property. New income tax revenue will result from residents that move to the Project from other jurisdictions, and increased sales tax revenue will result from the additional business generated by residents of the Project. Overall, the Commission finds that the impacts of the Project on the District's economic development will be favorable or acceptable given the benefits proffered by the Applicant.
97. Impacts to Parks, Recreation and Open Space. The Commission finds that the impacts of the Project on parks, recreation, and open space will be favorable. The Project will provide new publicly accessible open spaces in the form of the Northwest Plaza and Windom Park, and the Project also includes significant landscaping improvements to adjacent public spaces. The Commission also credits the favorable comments on the Project submitted to OP by the D.C. Department of Parks and Recreation (Ex. 53, p. 23).
98. Impacts to Urban Design. Any potential impacts of the Project on urban design will be favorable, capable of being mitigated, or acceptable given the quality of benefits provided by the Applicant. The Project will replace a largely vacant and underutilized property that is almost entirely impervious with a new high-quality mixed-use development that is pedestrian-oriented and has been designed to appropriately relate to the surrounding context. The Project supports its designation on the GPM as a Neighborhood Commercial Center by improving the mix of uses that are available to residents and supporting existing businesses through increased residential density. The Project will also provide significant improvements to the public realm.
99. The Project will also successfully complement the established character of the surroundings and provide 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, is only slightly taller than the maximum height permitted in the adjacent R-1-B zone, and is not substantially taller than the highest point of the roofs of the houses along 48th and Yuma Streets from street grade. The Project is also separated from the houses to the east and north by approximately 96 to 137 feet. Furthermore, the Project incorporates numerous design features that reduce its massing and scale and create a successful transition to the surroundings.
100. Impacts to Historic Preservation. Based upon testimony provided by the Applicant and HPO staff, the Commission finds that potential impacts of the Project on historic preservation will be favorable. The Project will help protect the historic MAPS by limiting the economic feasibility of selling the MAPS, and the economic incentive for future development on the

MAPS site, because development on the MAPS site will be permanently reduced to that permitted under existing zoning minus the FAR allocated to Lot 807. Furthermore, as stated in the HPO report, the Project will “enhance the character of the [MAPS] by improving its architectural setting through compatible design and superior execution as ensured through the PUD process” (Ex. 187).

101. Impacts to Community Services and Facilities. The Project will not have any adverse impacts on publically-owned land, health care facilities, libraries, emergency services, or community centers. The Site is located in a part of the District that has numerous parks and open spaces and a variety of recently renovated schools, libraries, and community centers. According to information published by the D.C. Department of Health, the Site is not located in an area of the city that has health care shortages.¹ Finally, the Project was reviewed by D.C. Fire and Emergency Management Services and the D.C. Public Library, neither of which expressed objections (Ex. 53, p. 23-24).
102. Impacts to Educational Facilities. The Project will not result in unacceptable impacts to educational facilities. As stated in the report by the Deputy Mayor for Education (“DME”), “DME estimates that the additional impact that the [Project] would have on the three DCPS by-right schools is low. While there is overutilization now and estimated in the future, this development has been incorporated into the [Master Facility Plan] 2018 estimates and DCPS planning efforts. Therefore, the additional small number of students that may live in the Ladybird in the future should not negatively influence decisions about the merit of this PUD case” (Ex. 53, p.26-29). Accordingly, the Commission finds that any potential impacts to educational facilities that may result from the Project will be acceptable given the quality of public benefits provided by the Applicant. Most notably, consistent with the Mayor’s efforts to increase affordable housing in high-opportunity areas like Rock Creek West, approximately 30 affordable dwelling units will be provided in the Project, including at least four, 3-bedroom affordable units, which will be available to households earning no more than 50% and 60% of the MFI, including households with children that will have access to the area’s high-quality schools and other public facilities and amenities.
103. Impacts to Infrastructure. Any potential impacts to infrastructure will be favorable or capable of being mitigated. With respect to storm water runoff, currently Lot 807 is entirely impervious, and what storm water management infrastructure exists is of an age that likely does not provide any treatment of runoff before it enters the municipal sewer system. The Project will replace this impervious surface condition with a LEED Gold certified development that will meet or exceed the District’s current storm water management regulations, which are far more stringent than the regulations that existed in the 1960s when the existing improvements on Lot 807 were constructed. Overall, as a result of the extensive amount of green roof, landscaping, and pervious surfaces proposed in the Project, the volume of storm water runoff entering the District’s municipal sewer system will be significantly reduced. Finally, comments provided by DC Water expressed no concerns or objections to the Project. See Ex. 53, p.25.

¹ <https://dchealth.dc.gov/service/shortage-designation>.

104. In addition to the findings stated above, the Commission credits the thorough review of the Project carried out by many other District agencies and utilities, all of which found that the Project would not create any unacceptable impacts on the surrounding area or on the operation of city services and facilities that are not capable of being mitigated. For example, OP did not identify any unacceptable adverse impacts on the surrounding area, and instead found that the Project impacts would be either favorable, capable of being mitigated, or acceptable given the quality of public benefits in the Project (Ex. 52). OP found that the Project will benefit the neighborhood with the addition of new housing, including affordable housing in a greater quantity than required, and a new neighborhood-serving, full-service grocery store. OP further found that the Project has been carefully designed to relate to the surrounding context, provide appropriate public outdoor spaces and sustainable landscape design, and establish setbacks to improve circulation along adjacent alleys and relate to the adjacent development.
105. In addition to OP, the Application was reviewed by DDOT, DHCD, DOEE, UFA, DPR, HPO, FEMS, DCPL, DCPS, and DC Water. Each of these agencies issued reports or comments to OP stating their support for or “no objection” to the Application. *See* OP Report, Exhibit 53, pp. 22-25. The reports and comments provided by these entities support the Applicant’s evaluation that impacts related to land use; transportation; housing; environmental protection; economic development, parks, recreation and open space; urban design; historic preservation; community services and facilities; educational facilities; and infrastructure, will either be favorable, capable of being mitigated, or acceptable given the quality of public benefits in the Project. Therefore, the Commission concludes that the Project will not create any adverse impacts that cannot be mitigated or found to be acceptable.

Consistency with Comprehensive Plan and Other Adopted Public Policies and Active Programs

106. Pursuant to 11-X DCMR § 304.4(a), the Commission shall find that the proposed development is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site. The Applicant submitted a detailed analysis of how the Project is not inconsistent with the Comprehensive Plan’s GPM, Future Land Use Map, guiding principles, Citywide Elements, and the Rock Creek West Planning Area Element. (Ex. 2F.) OP also provided an analysis explaining how the Project is not inconsistent with the Comprehensive Plan and concluded that “on balance, the proposal is not inconsistent with the Comprehensive Plan as a whole, including the maps and the policy statements. In particular, the proposal would further policy statements contained in the Land Use, Transportation, Housing, Environmental Protection, Economic Development, Urban Design, and Historic Preservation Citywide Elements, and the Rock Creek West Area Element.” (Ex. 11, pp. 4-11 and Ex. 53, p. 5-7.) Based on the Applicant’s filings and testimony at the public hearing, as well as the OP analyses submitted to the case record, the Commission finds that the Project is not inconsistent with the Comprehensive Plan when read as a whole.
107. The D.C. Court of Appeals recently discussed the balancing test in its review of the PUD and related Zoning Map amendment for the redevelopment of the McMillan Reservoir Slow Sand Filtration Site (Z.C. Order No. 13-14(6)) (the “McMillan PUD”). In its decision affirming the Commission’s approval of the McMillan PUD, the Court stated the following:

“The Comprehensive Plan is a ‘broad framework intended to guide the future land use planning decisions for the District. *Wisconsin-Newark Neighborhood Coal. v. District of Columbia Zoning Comm’n*, 33 A.3d 382, 394 (D.C. 2011) (internal quotation marks omitted). ‘[E]ven if a proposal conflicts with one or more individual policies associated with the Comprehensive Plan, this does not, in and of itself, preclude the Commission from concluding that the action would be consistent with the Comprehensive Plan as a whole.’ *Durant v. District of Columbia Zoning Comm’n*, 65 A.3d 1161, 1168 (D.C. 2013). The Comprehensive Plan reflects numerous ‘occasionally competing policies and goals,’ and, ‘[e]xcept where specifically provided, the Plan is not binding.’ *Id.* at 1167, 1168 (internal quotation marks omitted). Thus ‘the Commission may balance competing priorities’ in determining whether a PUD is consistent with the Comprehensive Plan as a whole.’ *D.C. Library Renaissance Project/West End Library Advisory Grp. v. District of Columbia Zoning Comm’n*, 73 A.3d 107, 126 (D.C. 2013). ‘[I]f the Commission approves a PUD that is inconsistent with one or more policies reflected in the Comprehensive Plan, the Commission must recognize these policies and explain why they are outweighed by other, competing considerations.’” *Friends of McMillan Park v. District of Columbia Zoning Comm’n*, 149 A.3d 1027, 1035 (D.C. 2016) (brackets and internal quotation marks omitted).

108. During the course of proceedings in the present case, opponents asserted that the Project is inconsistent with various Comprehensive Plan policies, including policies contained in the Land Use, Urban Design, and Rock Creek West Elements that relate to infill development, preservation of single-family neighborhoods, building transitions, and neighborhood conservation. In several instances, no rationale was provided to substantiate a claimed inconsistency or, where one was provided, it consisted of a generalized grievance that was not supported by any informed qualitative assessment or measurable evidence.
109. In its filings to the case record, and through its testimony at the public hearing, the Applicant thoroughly addressed how each of the policies for which the opposition claims the Project is inconsistent are either favorably advanced by the Project, outweighed by other competing considerations, or not applicable.
110. At the public hearing, the Commission recognized the various, somewhat overlapping, Comprehensive Plan policies within the Land Use, Urban Design, and Rock Creek West Elements that aim to preserve and protect neighborhood character through maintaining consistent zoning; providing transitions between commercial and residential uses; and establishing height, mass, and scale that is compatible with surrounding uses. The Commission specifically asked the Applicant how the Project addresses these particular Comprehensive Plan policies and, noting that the MU-4 zone is a transition zone that appears in the Framework Element under the Low Density Commercial and Moderate Density Commercial FLUM description, how the Project relates to the Low Density Commercial FLUM designation of the Site. The Applicant fully described how the Project, through its lower than matter-of-right height and density, massing reductions, upper-level setbacks, large courtyards, high-quality

materials, and landscaping, is not inconsistent with those Comprehensive Plan policies relating to infill development, preservation of single-family neighborhoods, building transitions, and neighborhood conservation. The Applicant also testified that to the extent the Project was inconsistent with one or more of these specific policies, the inconsistency was far outweighed by other competing policies and considerations in the Comprehensive Plan that relate to housing, affordable housing, environmental sustainability, and uses of special value to the neighborhood. Further, the Applicant testified that the Project is consistent with the Low Density Commercial FLUM description due in part to the fact that the Project does not utilize any PUD height or density incentives, but rather it is well within the height and density permitted as a matter-of-right in the MU-4 zone. This is true even with respect to the density proposed on the Valor Lot. *See*, Oct. 7, 2019 Transcript, pp. 46-50 and 51-52. Further, the Applicant noted that while under the PUD regulations the density of a PUD is measured across the entire PUD site, at 2.95 FAR even the overall density on the Valor Lot is within matter-of-right permissions. Notably, while as a matter-of-right up to 1.5 FAR of nonresidential use is permitted in the MU-4 zone, the nonresidential density on the Valor Lot is only 0.26 FAR.

111. To further substantiate the Applicant's position that the Project is not inconsistent with the Comprehensive Plan as a whole, the Applicant submitted a chart identifying each Comprehensive Plan policy for which opponents asserted the Project is inconsistent, and provided responses thereto (Ex. 241D, pp. 27-42). Upon reviewing this submission in comparison to the Party Opponents' submissions and testimony, and upon balancing the competing policies, the Commission finds that any policies with which the Project is claimed to be inconsistent are clearly outweighed by other competing considerations and policies.

112. Therefore, as set forth in Exhibits 2F and 241D, and particularly when viewed together with OP's conclusions demonstrating that the Project is not inconsistent with the FLUM and GPM, guiding principles, and other policies within the Citywide and Rock Creek West Elements of the Comprehensive Plan, the Commission concludes that the Project is not inconsistent with the Comprehensive Plan when read as a whole. To the extent the Project may be inconsistent with one or more individual policies, this does not preclude the Commission from finding that the Application is consistent with the Comprehensive Plan as a whole. Moreover, the Commission finds that any potential inconsistencies are far outweighed by the Project's consistency with other competing policies and considerations, and in particular those policies relating to housing, affordable housing, and environmental sustainability.

Agency Responses to Application

OP Report

113. On May 31, 2019, OP filed a report recommending that the Commission setdown the Application for a public hearing (Ex. 11). The OP setdown report included comments on the application and a description of items where resolution or additional information was required prior to the public hearing.

114. On June 10, 2019, the Commission voted to setdown the Application for a public hearing. The Commission did not request any additional information from the Applicant at that time.

On June 17, 2019, the Applicant filed a Prehearing Submission responding to the comments made in the OP setdown report (Ex. 12).

115. On September 27, 2019, OP filed a hearing report recommending approval of the Application subject to conditions (Ex. 53). The conditions listed in OP's report were as follows:

- a. Provide a revised sign plan that reduces the number of grocery signs on the north building façade to no more than two signs;
- b. Determine whether the 1,109 square-foot space at the southwest corner of Building 1 will be used for retail or amenity;
- c. Incorporate solar photovoltaics (PV) and design the remaining roof space to be as solar ready as possible for potential expansion in the future;
- d. Ensure the electric vehicle supply equipment is at least a Level 2 charger and consider the installation of additional make-ready infrastructure to install future charging equipment at significantly lower expense and disruption;
- e. Provide playable elements in the common areas and public space, especially geared at younger kids and toddlers; and
- f. Address any conditions recommended by the District Department of Transportation.

116. The OP report also included the following comments:

- a. Continue to work with OP and the Office of the Attorney General to refine the requested common flexibility language;
- b. Provide a detail for the long-term bike parking, including access, racks, and rack spacing;
- c. Provide a detailed drawing, including a dimensioned section, of the walk-out and patios on the east façade;
- d. Confirm that the townhouses would be rental and consider locating one Inclusionary Zoning (IZ) unit in a townhouse; and
- e. Submit a final list of proffered project benefits and amenities.

117. On October 4, 2019, the Applicant filed a response to the OP and DDOT hearing reports. (Ex. 151.) In response to the OP report, the Applicant made the following commitments:

- a. The Applicant would provide two grocery signs on the north building façade;

- b. The corner “retail/amenity” space would be devoted to retail uses only;
- c. The Applicant would install conduit to the roof so that it is “solar ready;”
- d. The Applicant would provide Level 2 electric vehicle chargers and install infrastructure to allow additional charging stations to be readily added in the future;
- e. The Applicant would work with ANC 3E to consider providing “playable” elements in the common areas and public spaces as part of its \$15,000 contribution to improve these spaces;
- f. The Applicant agreed to all of DDOT’s conditions;
- g. The Applicant submitted updated PUD flexibility language (Ex. 151A);
- h. The Applicant provided details on the long- and short-term bicycle parking spaces including their location, rack type and rack spacing (Ex. 151C, Sheets A02, A09 and L1.1). The Applicant also agreed to provide electrical outlets within the long-term bicycle storage rooms;
- i. The Applicant provided dimensioned sections and renderings showing the walk-out unit at the corner of 48th and Yuma Streets and the outdoor patios along 48th Street (Ex. 151C, Sheet A15.1);
- j. The Applicant stated that it had not yet determined the tenure type of the Townhomes. The Applicant also reconfirmed its IZ commitment that 11% of the Project’s residential GFA, including the GFA of the Townhomes, would be dedicated to IZ units at 50% and 60% of the MFI, which is greater than the amount of IZ square footage required by the Zoning Regulations. However, the Applicant increased this commitment to 12% at the public hearing; and
- k. The Applicant submitted an updated list of public benefits and amenities (see Exhibit 151B).

118. Based on the foregoing, as well as the Commission’s review of the OP reports in the record, the Applicant’s submissions in response thereto, and testimony presented at the public hearing, the Commission finds that the Applicant has fully addressed OP’s concerns such that the Commission can move forward in approving this case with the conditions included herein.

DDOT Report

119. On September 3, 2019, the Applicant filed a copy of its CTR (Ex. 25). A copy of the CTR was also sent to DDOT.

120. On September 27, 2019, DDOT filed a hearing report stating no objection to the application subject to conditions (Ex. 52). The conditions listed in DDOT's report were as follows:

- a. Fund and construct pedestrian network improvements in the immediate vicinity of the Site to encourage walking and offset the impacts of being over-parked. Specifically, upgrade substandard curb ramps, stripe missing crosswalks, and install curb extensions, subject to DDOT approval, at the following intersections:
 - i. 49th Street and Yuma Street NW
 - ii. 48th Street and Yuma Street NW
 - iii. 48th Street and Windom Place NW
 - iv. 48th Street and Warren Street NW
- b. Implement the [TDM] Plan as proposed in the Applicant's August 23, 2019, CTR for the life of the Project, unless otherwise noted; and
- c. Implement the [LMP] proposed in the Applicant's August 23, 2019, CTR for the life of the Project, unless otherwise noted.

121. The DDOT report also commented that the Applicant should do the following:

- a. Provide a public access easement on the 7-foot private space setback along the public alley;
- b. Obtain a public space occupancy permit for the trash enclosures along the north-south alley;
- c. Move the dumpsters in public space along Yuma Street to the new trash enclosures in the public alley; and
- d. Ensure that all trucks serving [MAPS] are directed not to load or unload on Yuma Street, and instead utilize the alley or internal private drive aisles.

122. The DDOT report also noted six items for the Applicant to address during the public space permitting process.

123. On October 4, 2019, the Applicant filed a response to the OP and DDOT hearing reports. (Ex. 151.) In response to the conditions listed in the DDOT report, the Applicant made the following commitments:

- a. The Applicant agreed to construct the pedestrian improvements requested at the intersections identified in the DDOT report;
- b. The Applicant agreed to implement the TDM plan as proposed in the CTR, and as set forth in Condition No. [REDACTED] of this Order; and

- c. The Applicant agreed to implement the LMP as proposed in the CTR, and as set forth in Condition No. [REDACTED] of this Order.

124. The Applicant also agreed to all of the comments listed in the DDOT report and responded to all of the items identified by DDOT as considerations to be reviewed during public space permitting. *See* Applicant's response to the OP and DDOT reports, pp. 5-6. Therefore, the Commission finds that the Applicant has fully addressed the comments raised by DDOT, and thus, the Project will not create any adverse impacts on the surrounding transportation network that will not be adequately mitigated.

HPO Report

125. On October 7, 2019, HPO filed a report on the Application ("HPO Report") (Ex. 187). The HPO Report states that although the Site includes the MAPS, a District of Columbia historic landmark, the Project is not subject to review by the Historic Preservation Review Board ("HPRB") no construction is proposed on the site of the landmark (Lots 802 and 803), except for low trash enclosures along the north-south alley. The HPO Report further states that the HPRB's review is limited to the site of the landmark; and therefore, does not extend to the new construction on the Valor Lot.

126. The HPO Report also evaluates the potential impacts of the Project on the historic MAPS, finding that "the setting of the landmark would be positively improved by the proposed upgrading of the rear alley and reconfiguration of the street wall line along Yuma Street to the east." The report also finds that the scale and design of Project are compatible with the landmark and overall will have favorable impacts. Specifically, the HPO Report states that "the rear wall of the SuperFresh and its rooftop mechanical equipment is un-designed and unattractive, thereby detracting from the landmark, while the rear wall of the proposed structure is a well-designed primary façade in a compatible architectural style using materials, coloration, fenestration and a window-to wall ratio that harmonize with the landmark. Its horizontal massing with forward-projecting end pavilions echoes the arm-like embrace of the horizontal shopping center and its forecourt, responding in a similar way to the dignified character of Massachusetts Avenue. Although the proposed building is taller, it does not visually overwhelm the landmark... Overall, the would improve the architectural setting of the landmark through compatible design ensured through the PUD process"

Other Agencies

127. As set forth in the OP setdown report, OP referred the Application to DOEE, DHCD, DDOT, DPR, DCPS, DPW, DOA, DOES, FEMS, MPD, DC Water, and WMATA (Ex. 10 at pg. 18). None of these entities objected to the Application.

128. None of the entities listed above objected to the Application. Rather, all comments received recommended approval of the Application or expressly stated no objection. The comments and reports received by these entities are included in OP's hearing report.

ANC Reports

129. On September 6, 2019, ANC 3D filed a resolution stating that at its regularly-scheduled and publically-advertised meeting on September 4, 2019, at which a quorum of commissioners was present, ANC 3D voted 10-0-0 to support the Application (Ex. 26).
130. On September 27, 2019, ANC 3E filed a resolution stating that at its properly noticed meeting on September 25, 2019,² at which a quorum of commissioners was present, ANC 3E voted 4-0 in support the Application (Ex. 48). ANC 3E also filed a Memorandum of Understanding (“MOU”) and a draft parking management plan (Ex. 49-50).

Opposition Parties

131. On October 3, 2019, CRD submitted a statement in opposition to the Application (Ex. 118) and a response to the Applicant’s CTR, which included its own analysis of the Project’s transportation impacts. (Ex. 124.)
132. CRD’s statement in opposition raised several issues concerning the Project, including:
- a. The Project’s consistency with the Comprehensive Plan, including the FLUM;
 - b. The relationship of the Project to the D.C. Court of appeals (“Court”) decision in the *Durant* case;
 - c. The adequacy of public benefits and project amenities proffered by the Applicant;
 - d. The potential impacts of the Project on the surrounding area, particularly with as to traffic and congestion, pedestrian safety, deprivation of sunlight;
 - e. The manner in which the height of Building 1 is measured relative to the Zoning Regulations and the 1910 Height of Buildings Act;
 - f. The impacts of the Project on the historic MAPS;
 - g. The calculation of the amount of affordable housing required under IZ; and
 - h. The Applicant’s failure to submit its agreements with other property owners within the Site to the Commission.
133. On October 4, 2019, NLC filed comments in opposition to the Application. The issues raised in NLC’s comments relate primarily to:
- a. The consistency of the Project with the Comprehensive Plan, including the FLUM;
 - b. The consistency of residential use on the Site relative to the FLUM;

² The ANC’s resolution incorrectly stated that the meeting occurred on October 25, 2019, but the meeting was actually held on September 25, 2019.

- c. The adequacy of public benefits and project amenities proffered by the Applicant;
- d. The scale and massing of the Project relative to the surrounding neighborhood;
- e. The impact of the Project on existing businesses on the Valor Lot;
- f. The impacts of the Project on traffic; and
- g. Vehicular circulation and pedestrian safety in the alleys;

134. On October 7, 2019, SVWHCA submitted a letter in opposition to the Application. The issues raised by SVWHCA in its letter relate primarily to:

- a. The scale of the Project relative to the surrounding neighborhood;
- b. The adequacy of public benefits and project amenities proffered by the Applicant;
- c. The impacts of the Project on public safety, particularly pedestrian safety in the alleys; and
- d. The impacts of the Project on the historic MAPS and the adequacy of the Applicant's proffered historic preservation benefit.

135. The issues raised by CRD and SVWHC-NLC are addressed in the Contested Issues section of this Order.

Contested Issues

136. Height and Scale of Project. Party Opponents and others in opposition assert that the Project is out of context with the surrounding residential and small-scale commercial neighborhood. CRD specifically stated that “[t]he oversized, six-story Valor building will be a jarring intrusion into the neighborhood of much lower 2-story homes and will destroy the attractive, open vista...on Massachusetts Avenue...Plus, the building, which rises to 81.5 feet and will be built on the property line, will have a wall-like appearance along both Yuma and 48th Streets.” The Commission finds that CRD’s description of the Project is inaccurate, and for the reasons set forth below concludes that the proposed height, scale, and design result in a Project that complements the scale and development pattern of the adjacent residential and commercial neighborhood and uses.

137. The Commission finds that the 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. Contrary to what many in opposition have stated, Building 1 does not have a height of 81.5 feet nor does it contain six stories. Rather, the Commission finds that the height and number of stories for Building 1 were properly measured in accordance with Subtitle B of the Zoning Regulations, and as such Building 1 has a maximum height of 43’-6” and contains 4 stories. The 43’-6” height of Building 1 is below the maximum height of 50 feet permitted as a matter-of-right in the MU-

4 zone, and is only 3'-6" taller than the maximum height of 40 feet that is permitted in the adjacent R-1-B zone. Moreover, the Commission finds that the height of Building 1 will not create a jarring contrast in scale considering the highest point of the roofs of the houses along 48th and Yuma Streets range between 30 and 35 feet from street grade.

138. In addition to being below matter-of-right height, the Project also contains substantial setbacks from the property line to relate to the pattern of adjacent development. Specifically, in contrast to CRD's statement that the Project is a "wall along both Yuma and 48th Streets," the Commission agrees with the Applicant's description that 50% of the Project's façade along Yuma Street is set back from the property line, and 64% of the façade along 48th Street is set back from the property line. Combined, 58% of the total façade at ground level along Yuma and 48th Streets is set back from the property line. Together with the width of 48th and Yuma Streets, both 90-foot wide streets, the distance between the Project and existing development to the east and north will range between 96 and 137 feet. Furthermore, despite the additional density being aggregated from the historic MAPS site, not only is the proposed height of Building 1 below matter-of-right, but the density proposed on Lot 807 is also below the 3.0 FAR permitted as a matter-of-right in the MU-4 zone. Thus, from a bulk and massing perspective the Commission agrees that the density proposed on Lot 807 does not exceed what would be permitted if Lot 807 was developed on its own.
139. The Project also incorporates numerous other design features that the Commission finds effective at reducing the Project's mass and scale and successfully relating to the surroundings. These include: (i) upper level setbacks along Yuma Street, (ii) setbacks along the north-south alley, (iii) the use of a tripartite/banded façade composition, (iv) varied, high-quality materials, (v) the provision of public and private landscaped courtyards and open spaces, and (vi) the provision of abundant foundation level landscaping.
140. Overall, the Commission finds that as a result of all of the above-described design elements the Project successfully relates to the established character of the area and will not result in overpowering contrasts in scale. The height, mass, and scale of the Project, particularly Building 1, are appropriate in relation to the context on all sides, including the side of Building 1 facing the historic MAPS. *See HPO Report at Ex. 187.*
141. Calculation of Project Density. Opposition to the Application assert that the Project contains almost 50,000 square feet of GFA more than what is available on Lot 807 as a matter-of-right. Specifically, CRD included a table in their Statement in Opposition (Ex. 118) showing that while 185,514 GFA is available for development on Lot 807 as a matter-of-right, the Applicant is proposing 234,629 GFA on Lot 807. For the reasons stated below, the Commission finds that the density of the Project is far below what is permitted as a matter-of-right in the existing MU-4 zone, and that the Project does not utilize any PUD-related increases in density.
142. As required under 11-X DCMR § 303.2, "the FAR of all buildings shall not exceed the aggregate of the FARs as permitted in the zone or zones included within the PUD boundary, as that may be increased by X § 303.3." The Commission agrees with CRD that 185,514 GFA is available for development on Lot 807, and that the GFA proposed on Lot 807 exceeds that

amount. However, the Commission notes that density for a multi-lot PUD is not measured on a per lot basis, but rather is measured as an aggregate across the entire Site, not including the area of public streets or alleys, and this is exactly how the Applicant has calculated the Project's density.

143. At the public hearing, the Applicant's expert in zoning and land use presented a diagram to the Commission showing how approximately 50,115 square feet of unused GFA from the historic MAPS site will be allocated to Lot 807 for purposes of providing a new full-service grocery store and additional housing that would not otherwise be possible under matter of right development. This aggregation of density from the MAPS site to Lot 807 is expressly permitted under § 303.2 of the PUD regulations. Moreover, the Commission's ability to aggregate density in a PUD has been confirmed by the Court. In *Dupont Circle Citizens Ass'n v. District of Columbia Zoning Commission*, 335 A.2d 550 (D.C. 1976), the Court stated that

“[t]he very nature of the Planned Unit Development concept as promulgated by the Zoning Commission...suggests that a transfer of development rights from one building to another must have been contemplated as one that was both feasible and appropriate in the development of such a plan...It is not surprising then that the Commission provided...that ‘[t]he floor area of all buildings shall not exceed the aggregate of the floor area ratios as permitted in the several districts included within the project area...’ On the other hand, there is no provision in the PUD regulations that the floor area ratio of each building in the PUD must be within the maximum permitted in the district. The requirement to be met is that the FAR of all buildings does not exceed the ‘aggregate’ permitted within the project area.”

144. The Commission has approved other multi-lot PUDs that employ aggregation of density where the FAR of one of more individual lots within the PUD exceed the permitted FAR but the overall density across the PUD site is with the permitted FAR. One such example is the McMillan Sand Filtration Site PUD, which has been upheld by the Court, in which the Commission stated “[t]he aggregation of FAR permits some buildings in a PUD to exceed the applicable FAR limits if the aggregate falls within the limit permitted for a PUD” (Z.C. Order No. 13-14(6), Conclusions of Law at p. 69).

145. As shown in the plans submitted by the Applicant, the overall density of the Project is 2.68 FAR, which is below the 3.0 FAR that is permitted as a matter-of-right under existing zoning, and even further below the 3.6 FAR that is permitted under a PUD in the MU-4 zone. Thus, the Commission concludes that the aggregation of unused density from the MAPS site to Lot 807 is permissible under the PUD regulations, and that the overall Project density complies with the Zoning Regulations.

146. Violation of the Allocation Agreement. Opponents to the Project have claimed that the Project violates the terms of the Allocation Agreement. The Applicant initially addressed this claim at the public hearing, and further addressed the issue in its response to CRD's post-hearing submission (Ex. 246).

147. In its post-hearing submission, CRD asserts that “[b]y allowing greater density on Lot 806 and limiting density on Lot 807, [the Allocation Agreement] effectively pushed development to the Massachusetts Avenue side of Record Lot 9, thereby benefitting the nearby property owners by reducing density on the portions of the SuperFresh site facing the neighborhood. This is consistent with sensible land use principles, as encouraged by the Comprehensive Plan.” CRD further states that in *AU Park Citizens Assoc. v. Burka* “[t]he District of Columbia Court of Appeals...opined that the beneficiaries of the Easement were intended to be “nearby property owners.”
148. In its response to CRD’s post-hearing submission. The Applicant states that CRD’s assertion that the Allocation Agreement was intended to benefit nearby property owners is incorrect because the Allocation Agreement says nothing about the allocation of density being intended for the benefit of nearby property owners (Ex. 246). Rather, the Applicant states that the Allocation Agreement simply establishes an allocation of development rights between the tax lots within Record Lot 9, and the only beneficiaries to the allocation are the tax lot owners themselves.
149. In further responding to the issue, the Applicant states that CRD mischaracterizes the opinion of the Court in *AU Park Citizens Assoc. v. Burka*, a case in which the Petitioner was challenging the D.C. Council’s approval of the closing of a public alley that existed in the area that is now at the rear of the AU Building on Lot 806.
150. Upon review, the Commission sees no basis for CRD’s assertion that the Project violates the Allocation Agreement, and does not agree that the Allocation Agreement is intended to benefit nearby property owners. As stated by the Applicant, the April 17, 1973, D.C. Council alley closing resolution ordered closure of the alley “subject to a deed of easement for vehicular and pedestrian access.” Further, the Court’s opinion in *AU Park Citizens Assoc. v. Burka* clearly states that the easement was for vehicular and pedestrian purposes, not to limit density on Lot 807. While the Court’s opinion references a benefit to nearby property owners, it does so in the context of the purpose of the easement being for vehicular and pedestrian access. Specifically, the Court stated that “[t]he Council, nevertheless, did not find reason to solicit the zoning authorities’ views in this case; nor did it attempt to impose restrictions beyond the filing of an easement over the alley primarily for the benefit of nearby property owners.”
151. Measurement of Building Height. In its Statement of Opposition, CRD asserted that the Applicant’s building height measuring point (“BHMP”) for Building 1 violates 11-B DCMR § 307.7, which dictates how a BHMP must be established when the curb grade adjacent to a site has been artificially changed by, among other things, an embankment. CRD asserted that the Applicant is not permitted to measure the height of Building 1 from the elevation of the curb along 48th Street, NW because the grade of the curb along 48th Street rests upon an artificially elevated roadway embankment. CRD supports its claim through a series of existing conditions photographs taken along 48th Street. However, based on the testimony of Mr. Dettman and Mr. Glatfelter, the Commission finds that 48th Street does not rest upon an artificial embankment and the height of the Project, and specifically the height of Building 1, is being properly measured as required under the Zoning Regulations.

152. Pursuant to 11-B DCMR § 307.5, where a building fronts on more than one street, any front may be used to measure the height of the building. In this case, Building 1 fronts on both 48th and Yuma Streets and, as permitted under the Zoning Regulations, the Applicant measured the height of Building 1 from the elevation of the curb opposite the middle of the front of Building 1 along 48th Street. According to CRD, the Applicant is prevented under the Zoning Regulations from measuring the height of Building 1 because 48th Street rests upon an artificial embankment. However, the Commission finds that the analysis of this issue conducted by Mr. Glatfelter thoroughly demonstrates that the curb grade elevation of 48th Street has remained at generally the same elevation since the street was originally constructed, and that the subsequent construction of the grocery store building and parking structure on Lot 807 had no known impact on the curb grade elevation of 48th Street. *See Applicant's PowerPoint presentation at Ex. 229.* Thus, because the "curb grade" of 48th Street has not been artificially changed, the Commission concludes that the Applicant may measure the height of Building 1 from 48th Street.
153. The Commission also concludes that measuring the height of Building 1 from 48th Street also complies with the 1910 Height of Building Act (the "Height Act"). Per Section 7 of the Height Act, "[i]f the building has more than one front, the height shall be measured from the elevation of the sidewalk opposite the middle of the front that will permit the greater height." (D.C. Code § 6-601.07). As shown on the plans submitted by the Applicant, the height of Building 1 is measured from the elevation of the curb along 48th Street, which compared to the elevation of the curb along Yuma Street is the elevation that will permit the greater height.
154. Traffic and Pedestrian Safety. While some opponents have asserted that the Project will have unacceptable traffic impacts, the Applicant's CTR finds otherwise. In its Statement of Opposition, CRD states that the number of vehicle and truck trips that may be generated by the Project is unacceptable, It also states that the Project will increase danger to pedestrians due to increased traffic volume and that trucks will not be able to fit in the alleys.
155. The analysis provided in the Applicant's CTR provides an estimate of the number of vehicle and truck trips that may be generated by the Project, and applies these trips to the surrounding transportation network (together with background trips and pipeline projects) to determine whether the Project will have unacceptable traffic impacts. The CTR also analyzes pedestrian circulation and truck maneuverability along streets and in the alleys. Overall, the results of the CTR show that the Project will not have unacceptable impacts on the transportation network. To mitigate the potential impacts caused by the Project being "over-parked," the CTR recommends certain pedestrian improvements to specified intersections around the Site and the implementation of several TDM strategies. Finally, the CTR recommends implementation of an LMP to offset any potential impacts that loading activities might have on surrounding intersections and the neighborhood. The Applicant has committed to implement the mitigation measures identified in the CTR, and any others requested in the report submitted by DDOT.
156. With respect to traffic volume, while the Project is projected to generate more trips than what are currently generated by the existing uses on Lot 807, the CTR finds that all of the

intersections analyzed around the Site will continue to operate at acceptable levels of service. Regarding truck circulation along streets and within the alleys, the CTR demonstrates through a series of truck maneuver diagrams that vehicles and trucks will be able to successfully access and navigate the alley and loading facilities. CRD submitted charts showing the potential increase in vehicles and trucks entering and exiting the alleys during peak PM period. However, the Commission does not find these charts persuasive given that they could merely be showing how underutilized the existing alleys are given the very limited retail uses currently in operation on Lot 807. For example, according to CRD's charts approximately 13 vehicles currently enter the north-south alley leading from Yuma Street to Massachusetts Avenue during the peak PM period, and approximately 14 vehicles enter the east-west alley off of 48th Street. The Commission considers these extremely low numbers for a neighborhood commercial center and that they do not provide a baseline from which to measure the impacts of the Project on the alley system, especially considering the large majority of the existing retail space on Lot 807 has sat vacant for several years. Based on a scope that was accepted by DDOT, the Commission credits the results of the Applicant's CTR which shows the alley systems will function at an acceptable level. Furthermore, the Commission finds that the Applicant's TDM Plan and LMP to be sufficiently robust in order to mitigate any potential impacts that may occur as a result of increased traffic in the alleys.

157. Regarding pedestrian safety, CRD stated that the increased traffic entering and existing the Site will create more conflict with pedestrians walking along Massachusetts Avenue, 48th Street, and Yuma Street. Despite CRD comments regarding the potential dangers to pedestrian circulation, the record clearly shows there will be substantial improvements to pedestrian safety and circulation through and around the Site. As part of the Project, two large curb cuts will be eliminated from 48th and Yuma Streets resulting in approximately 80 linear feet of new, unbroken sidewalk for pedestrians to use without the risk of conflict with a vehicle crossing the sidewalk. In addition, the Applicant will fund the installation of a new HAWK signal along Massachusetts Avenue between 48th and 49th Streets to address a known safety issue caused by mid-block pedestrian crossings between the Spring Valley Shopping Center and the MAPS/AU Building. The Applicant is also making significant upgrades to public and private spaces along the alleys within the Site and along surrounding sidewalks that will create a safer and more welcoming pedestrian experience.

158. Opponents of the Project have commented that the Project will jeopardize pedestrian safety in the alley system. Generally, those that have commented on this issue have stated that the significant increase in cars and trucks using the alleys would increase the number of pedestrian-vehicle conflict points, thus endangering the lives of pedestrian using the alleys. Opponents also stated that the improvements proposed along the alleys to accommodate pedestrians are not adequate and fail to meet safety standards. SVWHC-NLC has stated that "the site does not meet industry practices recommended by the American Association of State Highway and Transportation Officials (AASHTO), the Federal Highway Administration (FHWA), the National Association of City Transportation Officials (NACTO), and the Institute of Transportation Engineers" (Ex. 185). SVWHC-NLC provides very little specificity as to what any of these recommended industry practices are, and/or how the Project fails to meet such recommended practices. For example, while SVWHC-NLC states that "based on FHWA-recommended practices, the 3-foot sidewalk design proposed by Valor for the North-South

alley...will invite pedestrian hazards and create dangerous conditions,” they do not state the specific FHWA recommended practice. Notwithstanding, based on the evidence in the record it appears to the Commission that these “industry practices” are merely recommended practices as opposed to outright requirements. As such, the Commission need not seek further input from the Applicant or DDOT as to whether these recommended practices are being met.

159. The Commission credits DDOT’s testimony that the District’s design standards do not require sidewalks or pedestrian paths to be provided along alleys. According to DDOT, alleys are intended to be used by vehicles and trucks while public sidewalks are intended to be used by pedestrians. It is this hierarchy and separation of travel ways that provides the greatest degree of safety to pedestrians.

160. Notwithstanding the fact that pedestrian improvements are not required in alleys, the Applicant will provide several improvements along the alley system that will improve pedestrian safety. These improvements are not required by the District, but rather are being voluntarily provided in order to respond to the community and accommodate any pedestrian circulation that may occur in the alley. The improvements include: (i) widening the north-south alley to accommodate the new trash enclosure while maintaining a 20-foot drive aisle and a 3-foot delineated pedestrian path; (ii) providing a 6-foot wide sidewalk and delineated pavement along the east-west alley; (iii) installing protective bollards and special paving at the alley intersection; (iv) providing a sidewalk at the southern end of the north-south alley (along the west side near MAPS) from Massachusetts Avenue to the intersection of the east-west alley; and (v) installing striping and signage, as necessary, at the alley intersection and entrance to the north-south alley at Massachusetts Avenue. Compared to existing conditions, where there are no pedestrian facilities in the alleys, the Commission finds that these will improve the safety of pedestrian circulation in the alley to the extent that it occurs.

161. Overall, the Commission finds that the potential traffic generated by the Project will not have a detrimental effect on the surrounding transportation network. Further, the Commission finds that the Applicant has adequately addressed the concerns expressed regarding pedestrian safety in and around the Site, and that pedestrian safety will likely increase as a result of the several pedestrian improvements that will be made as part of the Project.

162. Parking. Opponents stated that the Project will cause adverse impacts to parking. As set forth in the CTR, the Project will provide more than enough parking to accommodate parking demand, and the Project will exceed the minimum parking required under the Zoning Regulations. In direct response to requests from the community and ANCs, the Applicant will provide one parking space per dwelling unit in Building 1 by allocating a greater percentage of the 236 parking spaces required under the Allocation Agreement to Building 1, based upon the final number of dwelling units. Furthermore, the Applicant will impose RPP restrictions on Building 1 residents with the penalty of lease termination.

163. In its Statement of Opposition, CRD states that the Commission should ascertain the availability of the parking spaces being provided by the Applicant since the availability of these spaces depends upon the reallocation of spaces that must be shared with AU. CRD also stated that the agreement reallocating these spaces should be made public. The Commission

finds that it does not need the parking agreement, or any other agreement that the Applicant might have with any of the other owners within the Site to be submitted to the record in order for the Commission to review and render a zoning decision on the Project. To the extent it is necessary to address parking-related issues, the Commission is well within its authority to impose specific requirements or restrictions in the form of conditions to this Order irrespective of the terms and conditions of any separate agreement the Applicant may have, or will enter into.

164. Deprivation of Sunlight. Opponents allege that the Project, specifically Building 1, will deprive adjacent neighbors of sunlight. Overall, the Commission finds that the Project will have minor impact on direct sunlight to the most immediate properties, and that due to the separation provided by adjacent streets, lower than matter-of-right height, and substantial ground- and upper-level setbacks the impacts to sunlight are likely to be less than the impacts that would be caused by a matter-of-right project. As shown on the Applicant's shadow study, between spring and fall the Project has only minor to moderate impacts on sunlight that occur during the later hours of the day on homes immediately east across 48th Street. As expected, the impacts of the Project increase slightly during the winter when the sun is lower in the sky throughout the day.
165. Under a matter-of-right scenario, the building facades along 48th and Yuma Street could be built entirely on the property line to a height of 50 feet, approximately 6'-6" higher than Building 1. Furthermore, with a matter-of-right building constructed up to the property line, the building penthouse could be constructed much closer to the property line than currently proposed. The Commission finds that the absence of setbacks, greater height, and larger penthouse footprint would most certainly have greater impacts to sunlight than what is proposed by the Applicant.
166. Loss of Privacy and Views. While opponents to the Project claim that the Project will cause impacts to privacy, there has been no information submitted regarding what this means other than generalized comments about the proposed outdoor terraces on Building 1. Similar to the discussion on impacts to sunlight, the Commission agrees with the Applicant that to the extent views into adjacent properties are afforded by the Project such views would not be any greater than would be afforded by a matter-of-right project, and quite possibly could be less.
167. As testified by the Applicant at the public hearing, a matter-of-right project could be constructed entirely along the property lines on Yuma and 48th Streets to a maximum height of 50 feet, plus a 12-foot habitable penthouse. Instead, the proposed Project contains substantial setbacks along Yuma and 48th Streets such that, together with the width of 48th Street and Yuma Street, the distance between the Project and existing development to the east and north will range between 96 to 137 feet.
168. In addition, the upper levels of Building 1 above the grocery store are set back farther in response to the decrease in grade that occurs along Yuma Street. Compared to a matter-of-right development, these substantial setbacks from the property line and additional upper level setbacks increase the distance between any proposed outdoor terrace and adjacent residential properties, thus reducing any potential impacts to privacy. In addition, per the agreement with

ANC 3E, the Applicant will restrict the hours of use of the communal outdoor terrace proposed above the grocery store along Yuma Street, and these restrictions have been included as a condition to this Order. Thus, the Commission finds that any potential for impacts to privacy will be mitigated through the setbacks proposed for Building 1, and the aforementioned restrictions on the use of the outdoor terrace.

169. With respect to views, opponents state that the Project will adversely impact existing views. However, the Commission finds that there are no historically designated viewsheds associated with the MAPS, and the Project does not intrude upon views along defined rights-of-way. There have been comments regarding the loss of views across the Site toward the west from Windom Place, but as has previously been acknowledged by this Commission, unless expressly granted by easement, a property owner has no right to a view across another individual's property. This finding has been upheld by the Court. Specifically, in *Hefazi v. Stiglitz*, 862 A.2d 901, 911 (D.C. 2004), the Court stated:

“[h]ere, the appellants cannot demonstrate that they have acquired an easement by prescription. In essence, they assert that they have acquired a negative easement - the right to prevent appellee from using his property in such a manner as to affect their use and enjoyment of their own property. However, it is well settled that a negative easement cannot be created by prescription. To the contrary, a negative easement can only be created by an express grant...This rule flows from the basic principle that the actual enjoyment of the air and light by the owner of the house is upon his own land only, and that the owner of the adjoining lands has submitted to nothing which actually encroached upon his rights . Thus, one may obstruct his neighbor's windows at any time and no action can be maintained for obstructing a view...”

170. Further, in Z.C. Case No. 11-03 (first-stage PUD for the redevelopment of the Southwest Waterfront), this Commission found that “[t]he viewsheds and property values of the Tiber Island homeowners are not protected by any restrictive covenants or by the Zoning Regulations.” (Z.C. Order No. 11-03, Finding of Fact 91.) This case was subsequently appealed by the party that raised the objection regarding impacts to views, but the Court did not disturb the findings regarding impacts to views and upheld the Commission’s decision (*Randolph v. District of Columbia Com’n*, 83 A.3d 756 (D.C. 2014)). Based on the foregoing, the Commission finds that opponents to the Project asserting adverse impacts on views are not entitled to any of the existing views that may currently exist across the Site, and that may be obstructed by the Project.

171. Calculation of Affordable Housing. Opponents to the Project state that the Applicant is circumventing the IZ regulations. However, no evidence grounded in the IZ regulations has been provided that demonstrates a deficiency in the Applicant’s IZ calculations. Pursuant to 11-C DCMR § 1003.1(a), the Applicant 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, and (b) an area equal to 10% of the penthouse habitable space devoted to residential dwelling units. The Applicant is also required to set aside an area equal to 10% of

cellar floor area devoted to residential dwelling units and 10% of building projection area devoted to residential use.

172. Based upon the proposed density of the PUD (2.68 FAR) the greater set aside amount is equal to 75% of the bonus density utilized. As required, penthouse habitable space, cellar floor area, and building projection areas are all included in the Applicant's IZ requirement calculations. Thus, the Commission finds the Applicant's IZ calculations to be fully consistent with the IZ regulations. In total, under the IZ regulations the Applicant would be required to set aside approximately 27,504 GSF to affordable housing. The Applicant is exceeding this amount through its PUD proffer to devote 12% of the residential GSF in the Project to affordable housing, which amounts to approximately 5,200 GSF (or 20%) more affordable housing than would otherwise be required under IZ. These calculations have been reviewed by OP and DHCD, and neither has raised any questions or issues. Furthermore, these calculations will be reviewed again by the Zoning Administrator's Office during the building permit application stage.
173. Urban Design, Architecture, and Landscaping as a Public Benefit. The Commission finds that the Project's superior urban design, architecture, and landscaping are, indeed, public benefits. In its Statement of Opposition, CRD asserts that the Project's massing and height reductions, large courtyards, façade articulation, upper-level setbacks, and high-quality, context-sensitive materials cannot be proffered as benefits because per 11-X DCMR § 305.9 "[e]lements or items required as mitigation of potential adverse impacts of the PUD shall not also be considered as benefits." However, these elements of the Project's design are not required mitigation measures.
174. For example, as testified by Mr. Dettman at the public hearing, a matter-of-right development on Lot 807 could be constructed to a maximum height of 50 feet entirely at the property line (no setbacks) along 48th and Yuma Streets. Instead, 50% of the façade along Yuma Street is set back from the property line from the ground level, and 64% of the façade along 48th Street is set back from the property line from the ground level. This is in addition to numerous other superior design features provided by the Applicant, including: additional upper level setbacks along Yuma Street as the elevation of the street decreases from east to west; additional setbacks along the north-south alley, the use of a tripartite/banded façade composition and varied, high-quality materials, the provision of public and private landscaped courtyards/open spaces; and the provision of abundant foundation level landscaping around Building 1. The Commission finds that all of these design features have been voluntarily provided by the Applicant as part of the PUD process, and that all of them will benefit the surrounding neighborhood to a significantly greater extent than would likely result from matter-of-right development. As such, the Commission finds that the above-described urban design, architectural, and landscape features are correctly considered benefits of the Project.
175. Historic Preservation as a Public Benefit and Other Historic Preservation Issues. In its response to the HPO report, CRD makes several inaccurate statements regarding the historic preservation benefits of the Project and the applicability of D.C. preservation law. Specifically, CRD states that the Project does not provide tangible or quantifiable preservation benefits under 11-X DCMR § 305.5(e), and that density determination and allotment on the MAPS site

have not been addressed. For the following reasons the Commission does not agree with these statements.

176. 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. To support its statement, CRD provides the following quote from the HPO report – “[t]he Project would enhance the character of the Parking Shops by improving its architectural setting through compatible design and superior execution.” However, the Commission finds that the Applicant has never proffered the proposed design of the Project as a historic preservation benefit under 11-X DCMR § 305.5(e), nor does the Commission read the HPO report as making such a claim. In fact, the HPO report does not opine on the Applicant’s proffered set of PUD benefits and amenities. Thus, the Commission considers the favorable comments in the HPO report regarding the Project design relative to its compatibility with the MAPS as being more appropriately read within the context of the Project’s consistency with the Historic Preservation Element of the Comprehensive Plan, and the benefits provided by the Project in the category of superior urban design and architecture under 11-X DCMR § 305.5(a).
177. The Commission agrees with the Applicant’s conclusion that the tangible historic preservation benefit provided by the Project is the permanent reduction of future development that could take place on the MAPS site. CRD claims the Applicant has never made clear the amount of GFA it will purchase from Regency, the present owner of the MAPS site. However, the Commission credits the diagram presented by the Applicant at the public hearing that clearly shows that approximately 50,115 GFA will be purchased and permanently aggregated to Lot 807 to construct the Project. *See Applicant’s PowerPoint presentation at Exs. 194 and 229.* CRD stated that “[t]angible benefits for a landmark included in a PUD would be...monies specifically earmarked for preservation and maintenance.” The Commission finds that while this may be one example of a tangible benefit, it is not the only tangible benefit that could help protect a historic landmark under a PUD. Notwithstanding, as stated in the letter to the Commission from Regency, the Project “will greatly assist [Regency] in maintaining the historic integrity and long-term viability of the [MAPS].” (Ex. 227).
178. In addition, this Commission has previously found that the permanent reduction of development potential on the site of a historic landmark can be considered a PUD benefit. Specifically, in the PUD involving the Heurich Mansion site, the Commission found that “[t]he most significant feature of this [PUD] is the proposal to transfer unused density from [the Heurich Mansion]...to the proposed 12 story office building to be built in the center of the site.” (Z.C. Order No. 101, Finding of Fact 7). The Commission further found that:

“The transfer of development rights concept is a recognized means of preserving urban landmarks...The sale of development rights will assure preservation of the Heurich Mansion for two reasons: (1) it will provide the necessary funds to operate and repair the property and (2) it will reduce the economic feasibility of ever selling the property because the development on said property will be permanently reduced to that permitted under the existing zoning minus the development rights sold...Historic preservation ordinances

are limited in their ability to preserve historic landmarks because of constitutional restrictions on the taking of property. The transfer of development rights is an effective means of preserving the Heurich Mansion as an historic landmark” (*Id.* Finding of Fact 22).

179. CRD has also made several other assertions regarding the use of aggregation of density from the MAPS site and the resulting protection afforded to the historic landmark. First, CRD stated that “[d]ensity belongs to and is an attribute of the MAPS landmark. Removing such an attribute from a landmark is beyond the purview of the Zoning Commission.” CRD also stated that “[t]he open space of the [MAPS] parking lot is as much part of the allocation and use of density as it (sic) the building itself. Therefore, one must consider the parking lot space as already used density.” Finally, CRD stated that “MAPS’s density cannot be done simply by subtracting the amount of density (FAR) already used by the landmark building’s footprint on Lots 802 and 803 from what would generally be available under MU-4 zone for those lots.” Based on the following, the Commission does not agree with these assertions.
180. First, 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. Indeed, in upholding the Commission’s decision in the Heurich Mansion PUD, the Court specifically addressed the issue of the Commission’s use of zoning to accomplish historic preservation and found that the Commission is not without jurisdiction to do so under the broad general authority granted to the Commission under the Zoning Act to, in relevant part, “promote the general welfare of the District of Columbia and its planning and orderly development as the national capital.”
181. Secondly, the MAPS parking lot does not constitute “used density” regardless of whether it is considered part of the designated landmark. The parking lot does not constitute “gross floor area,” as that term is defined in the Zoning Regulations. In addition, historic designation of a building or structure does not automatically zero out the development potential of a property. If that was the case, then the Heurich Mansion site would have had no density to transfer. Rather, historic designation merely makes future development on the site of the historic landmark subject to review by the HPRB, which may or may not reduce the amount of development that can be constructed on the historic property. Third, the exact way that CRD describes how MAPS’s density cannot be computed is exactly the way it was done in the Heurich Mansion PUD. In that case, this 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.
182. In its response to the Applicant’s post-hearing submission, SVWHC-NLC asserts that the sale of density from the MAPS site may represent an alteration of the historic landmark, and that the unused density on the MAPS site is considered a defining feature of the landmark. The Commission is not persuaded by this statement. In addressing this assertion, the Applicant refers to the definition of the term “alteration” under District historic preservation law and regulation which clearly shows the sale of unused density from the MAPS site is not an alteration.

183. SVWHC-NLC also asserts that the unused density on the MAPS site is considered a defining feature of the landmark. The Commission is also not persuaded by this comment. As stated by the Applicant, a “character-defining feature” is defined under the District historic preservation regulations as “[t]he form and detailing of those architectural materials and features that are important in defining a building’s historic character and whose retention will preserve that character.” Thus, based on this definition the Commission agrees with the Applicant that the unused density on the MAPS site is not a defining feature of the landmark.
184. Applicability of *Durant v. District of Columbia Zoning Commission I, II, and III*. CRD suggests that the *Durant* case is “strikingly similar” to the proposed Project. However, the Commission finds that CRD misinterprets *Durant*, as this case certainly works in the Applicant’s favor. First, the *Durant* case involved a PUD-related Zoning Map amendment to establish C-2-B zoning (ZR58), which appears under the Moderate and Medium Density Commercial FLUM descriptions, on a site that was largely designated as Low Density Residential on the FLUM. In the subject case, the Applicant is not requesting a Zoning Map amendment, and the existing MU-4 zoning of the Site is expressly stated in the Framework Element as being compatible with the Site’s Low Density Commercial FLUM designation.
185. Further, CRD states that under *Durant* the Applicant cannot seek approval of a PUD to construct a 6-story mixed-use building by employing “flawed efforts to diminish the visual impact of the proposed structure” because the Court in *Durant* rejected reliance on architectural features to determine whether a project met a FLUM description. CRD further stated that the Project, “unlike the PUD in *Durant*, is not set back from the property line at ground level. Rather, the portions that are directly adjacent to the detached, single family homes on 48th and Yuma Streets mostly sit on the property line.” The Commission is not persuaded by these statements for the following findings:
- a. The Applicant is not proposing to construct a 6-story building. Rather, as measured in accordance with Subtitle B of the Zoning Regulations, the Applicant is proposing to construct a 4-story mixed-use building containing residential use and a partial level of commercial (retail) use;
 - b. Unlike *Durant*, no portion of the Project is directly adjacent to detached, single family houses. Rather, the Project is separated from the houses along 48th and Yuma Streets by a minimum of 90 feet. Contrary to CRD’s statement regarding setbacks, approximately 50% of the façade along Yuma Street and 64% of the façade along 48th Street is set back from the property line. As testified by Mr. Dettman at the public hearing, as a result of these setbacks, the distance between the Project and the homes along 48th and Yuma Streets ranges between 96 feet – 137 feet. Thus, the Project has substantial setbacks from the property line, with additional upper level setbacks along Yuma Street.
 - c. The setbacks along 48th and Yuma Streets, along with several other urban design, architecture, and landscape features of the Project, are not necessary for the Applicant to make its case under the current FLUM. Rather, the Project is not inconsistent with the FLUM given the existing MU-4 zoning is expressly stated as being compatible with the Site’s FLUM designation, and the Project is below matter-of-right height and density.

The substantial setbacks, courtyards, façade articulation, and high-quality materials are all voluntarily provided by the Applicant as superior design features of the Project and to ensure that the Project relates to the scale, character, and development pattern of the surrounding context.

186. Accuracy of Landscaping in Project Renderings. In its visual impact study (Ex. 217), CRD asserted that the Applicant’s “unrealistic depiction of the height, location and maturity of the vegetation surrounding the proposed site distorts the true mass and scale of the proposed building.” CRD’s expert in visual impact studies, Mr. Curt Westergard, testified to the same at the public hearing. The Commission concludes that CRD appeared to be relying upon the wrong set of renderings to evaluate the Project in relation to the existing surrounding context.
187. The plans submitted by the Applicant contained two versions of each rendering prepared for the Project taken from multiple vantage points around the Site. The first was an “all virtual” version that digitally renders the existing and proposed buildings and surrounding streetscape and landscape. These “all-virtual” renderings were clearly marked as being intended to “best illustrate design intent.” Thus, the Commission views these renderings as being intended for analyzing the design of the proposed buildings and nothing more. When asked by the Commission, Mr. Westergard confirmed that the proposed buildings in the “all-virtual” renderings appeared to be accurately depicted, including their relation to the surrounding buildings.
188. In the past, the Commission has requested applicant’s to submit images that depict a proposed project with an existing conditions photograph. The Commission has made this request specifically for purposes of being able to evaluate a proposed project relative to the existing surroundings. Accordingly, the Applicant also submitted a second set of renderings that inserted the proposed buildings into a photograph showing the existing surrounding context. This second set of renderings was clearly marked as being “intended to best illustrate design intent in the current context,” and thus are the renderings that are intended to be used to evaluate the Project relative to the surroundings. These particular renderings were not challenged in any way by CRD. There, the Commission finds that even if the Applicant’s first set of “all-virtual” renderings did include inaccuracies in the height, location and maturity of vegetation surrounding the Site, this did not in any way impact the Commission ability to evaluate the Project relative to the surrounding context.
189. Construction Damage. In its Statement of Opposition, CRD stated that “[d]amage to neighboring homes is likely” during construction of the Project. No additional information was provided to substantiate that this will actually occur, and to the extent damage does occur, what will be the nature of the damage. The Commission finds that any development project has the potential to cause damage to neighboring properties, which is why the Applicant, and the contractor it selects to construct the Project, are required under District law to have specific types and amounts of liability insurance. Proof of this insurance is required to be provided at the time of building permit, and the Applicant will be required to comply with this and all other applicable laws and regulations regarding building construction to ensure that any impacts will be properly mitigated.

190. Furthermore, as part of its agreement with ANC 3E, the Applicant is required to abide by several construction mitigation efforts that include vibration monitoring and corrective action should damage occur to surrounding buildings. Therefore, the Commission finds that the Applicant will properly mitigate any potential constructed-related impacts to the extent required by law and through its agreement with ANC 3E.

CONCLUSIONS OF LAW

1. Pursuant to the Zoning Regulations, the purpose of the PUD process is to provide for higher quality development through flexibility in building controls, including building height and density, provided that a PUD: (a) results in a project superior to what would result from the matter-of-right standards; (b) offers a commendable number or quality of meaningful public benefits; and (c) protects and advances the public health, safety, welfare, and convenience, and is not inconsistent with the Comprehensive Plan. (11-X DCMR § 300.1.)
2. Under the PUD process of the Zoning Regulations, the Commission has the authority to consider this application as a consolidated PUD. The Commission may impose development conditions, guidelines, and standards which may exceed or be less than the matter-of-right standards identified for height, density, lot occupancy, parking and loading, yards, and courts. The Commission may also approve uses that are permitted as special exceptions that would otherwise require approval by the Board of Zoning Adjustment.
3. Development of the property included in this Application carries out the purposes of 11-X DCMR, Chapter 3 of the Zoning Regulations to encourage the development of well planned developments that will offer a variety of building types with more attractive and efficient overall planning and design, not achievable under matter-of-right development.
4. The Project, as approved by the Commission, complies with the applicable matter-of-right height, bulk, and density standards of the Zoning Regulations, as measured in accordance with the PUD regulations. The proposed mix of uses is appropriate for the Site, and the potential impacts of the Project on the surrounding area will not be unacceptable. Accordingly, the Application should be approved.
5. The Application can be approved with conditions to ensure that any potential adverse impacts on the surrounding area will be mitigated.
6. The Applicant has not requested any flexibility from the Zoning Regulations or development incentives as part of this Application, and has proffered significant benefits and amenities that outweigh any potential adverse impacts.
7. The Applicant has met all applicable criteria for the two areas of special exception relief requested as part of the Application. Specifically, the Applicant has satisfied the criteria under 11-G DCMR § 1200.4 for a special exception from the rear yard requirement for Building 1, and the criteria under 11-X DCMR, Chapter 9 and 11-C DCMR § 1500.4 for a special exception to allow a penthouse on the Townhomes.

8. Approval of the Application is appropriate because the Project is compatible with the character and development pattern of the surrounding area, and is not inconsistent with the Comprehensive Plan. In addition, the Project will promote the orderly development of the Site in conformity with the entirety of the District of Columbia Zone Plan, as embodied in the Zoning Regulations and Zoning Map.
9. The Commission is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163; D.C. Official Code § 6-623.04 (2001)), to give great weight to OP's recommendations. The Commission carefully considered the OP reports in this case and, as explained herein, finds OP's recommendation to grant the Application persuasive.
10. The Commission is required under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)) to give great weight to the issues and concerns raised in the written report of the affected ANC. ANC 3D and 3E both filed letters in support of the Application into the case record (Exhibits 26 and 48, respectively) and testified in support at the public hearing. ANC 3E also filed a signed Memorandum of Understanding (Exhibit 49), the terms of which have been included as conditions in this Order, to the extent appropriate. The Commission agrees with the ANCs' recommendations to approve the Application.
11. The Application for a PUD is subject to compliance with D.C. Law 2-38, the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2- 1401 et seq. (2007 Repl.))

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission **ORDERS APPROVAL** of the application for a consolidated PUD for property located at Square 1499, Lots 802, 803, 806 and 807. This approval is subject to the following guidelines, conditions, and standards. Whenever compliance is required prior to, on or during a certain time, the timing of the obligation is noted in bold and underlined text.

A. PROJECT DEVELOPMENT

1. The Project shall be developed substantially in accordance with the architectural and landscape plans prepared by Torti Gallas Urban, dated September 17, 2019 (Ex. 28A), as modified by the revised drawings dated October 3, 2019 (Ex. 151C) and October 24,

2019 (Ex. 241A) (collectively, the “Approved Plans”), and as modified by the guidelines, conditions, and standards herein.

2. The Applicant shall be granted a special exception pursuant to 11-G DCMR § 1200.4 from the rear yard requirement of 11-G DCMR § 405.2 to allow a 10 foot rear yard for Building 1 as shown on the Approved Plan
3. The Applicant shall be granted a special exception pursuant to 11-C DCMR § 1500.4 to allow a penthouse (roof hatch) on Townhomes 1 – 5, provided the penthouse (roof hatch) does not exceed a height of five feet above the roof.
4. The Applicant shall have flexibility with the design of the Project in the following areas:
 - a. Interior Components: To vary the location and design of all interior components, including partitions, structural slabs, doors, hallways, columns, stairways, atria, mechanical rooms, and elevators, provided that the variations do not change the exterior configuration of the buildings as shown on the plans approved by the order;
 - b. Exterior Materials – Color: To vary the final selection of the colors of the exterior building materials based on availability at the time of construction, provided such colors are within the color ranges shown on the plans approved by the order;
 - c. Exterior Details – Location and Dimension: To make minor refinements to the locations and dimensions of exterior details that do not substantially alter the exterior configuration of the buildings or design shown on the plans approved by the order. Examples of exterior details would include, but are not limited to, doorways, canopies, railings, and skylights;
 - d. Number of Units: To provide a range in the approved number of residential dwelling units of plus or minus ten percent (10%), except that (i) the total square footage of residential dwelling units shall not be reduced, and (ii) the total square footage reserved for affordable dwelling units shall not be reduced;
 - e. Affordable Units: To vary the number and location of affordable dwelling units, except that (i) the number of three bedroom affordable dwelling units shall not be reduced; (ii) no affordable dwelling unit shall be located within a cellar, and (iii) no more than two affordable units shall be located directly above and below each other on any immediately successive floors;
 - f. Retail Uses: To vary the types of uses designated as “retail” use in plans approved by the order to include the following use categories: (i) Retail (11-B DCMR § 200.2(cc)); (ii) Services, General (11- B DCMR § 200.2(dd)); (iii) Services, Financial (11-B DCMR § 200.2(ee)); and (iv) Eating and Drinking Establishments (11-B DCMR § 200.2(j));

- g. Parking Layout: To make refinements to the approved parking configuration, including layout and number of parking spaces, provided the minimum number of spaces provided is not less than the number of spaces shown on the plans approved by the order;
- h. Streetscape Design: To vary the location, attributes, and general design of the approved streetscape to comply with the requirements of, and the approval by, the DDOT Public Space Division;
- i. Signage: To vary the font, message, logo, and color of the approved signage, provided that the maximum overall dimensions and signage materials are consistent with the signage shown on the plans approved by the order and are compliant with the DC signage regulations, except that (i) the content of the blade sign at the northwest corner of Building 1 shall be limited to directional signage only, and (ii) no more than two retail tenant signs are permitted along Yuma Street at the northwest corner of Building 1; and
- j. Sustainable Features: To vary the approved sustainable features of the project, provided the total number of LEED points achieved by the project does not decrease below the minimum required for the LEED standard required under the order.

B. PUBLIC BENEFITS

1. **Prior to the issuance of the first certificate of occupancy for the Project**, the Applicant shall demonstrate to the Zoning Administrator that it has (i) worked with ANC 3E to identify specific improvements to be installed within Windom Park, the Northwest Plaza, and/or other open spaces surrounding the PUD Site that are intended to activate these spaces; (ii) considered options for installing playable and interactive elements into the design of Windom Park, the Northwest Plaza, and/or other open spaces surrounding the PUD Site, and either committed to providing such playable elements or provided a reasonable justification for why they will not be provided; and (iii) dedicated \$15,000 for the purchase, installation, or permitting of the improvements identified under items (i) and (ii) above. Evidence of the Applicant's incurred costs of \$15,000 shall be demonstrated through the direct purchase of improvements (e.g. landscape materials, equipment, benches) or through contracts with third party(s) to purchase the improvements and/or undertake landscaping, installation, design, or permitting work.
2. **Prior to the issuance of the first certificate of occupancy for the Project**, the Applicant shall demonstrate to the Zoning Administrator that it has executed and recorded a covenant in the Land Records of the District of Columbia demonstrating the amount of density that has been permanently transferred from the MAPS site (Lots 802 and 803) to the Valor Lot (Lot 807), and the amount of density that remains on the MAPS site following said transfer.
3. **For the life of the Project**, the Applicant shall provide the housing and affordable housing set forth in Sheet G09 of Ex 241A, dated October 24, 2019, and the following chart, subject to flexibility granted by the Commission; provided that the affordable housing provided shall be no less than 12% of the residential GFA, cellar floor area dedicated to dwelling

units, projections dedicated to residential use, and non-communal penthouse space in the Project, as determined by the Zoning Administrator at permit issuance.

Residential Unit Type	Residential GSF ³ / Percentage of Total	Units	Reserved for Household Earning Equal to or Less Than	Affordable Control Period	Tenure Type
Total	272,057 / 100%	219			
Market Rate	239,410 / 88.0%	189	Market Rate		
IZ⁴	29,008 / 10.7%	26	60%	Life of the Project	Rental
IZ⁵	3,639 / 1.3%	4	50%	Life of the Project	Rental
Affordable/ Non-IZ	0 / 0%	0	N/A	N/A	N/A

4. **Prior to the issuance of the first building permit for the Project**, the Applicant shall demonstrate that the roof of Building 1 has been designed to include conduit that will permit the installation of roof-mounted PV panels in the future.
5. **Prior to the issuance of the first building permit for the Project**, the Applicant shall demonstrate that it has registered the Project with the United States Green Building Council (“USGBC”) to commence the LEED certification process by furnishing a copy of its LEED certification application to the Zoning Administrator. The application shall indicate that the Project has been designed to include at least the minimum number of points necessary to achieve Gold certification under the USGBC’s LEED v.4 standards.
6. **Prior to the issuance of the first certificate of occupancy for the Project**, the Applicant shall provide the Zoning Administrator with the updated status of its LEED Certification,

³ Square footages shown represent gross square feet (“GSF”) of residential use within the project. GSF is inclusive of building area devoted to residential use that meets the definition of “gross floor area” under the 2016 Zoning Regulations (“ZR16”), including building area devoted to residential dwelling units within a penthouse, and also includes building area devoted to dwelling units located within a cellar and building area devoted to residential use within building projections into public space.

⁴ The number of IZ units is approximate based on the current dwelling unit count and layout. The number, location, and mix of IZ units may change if the total number of dwelling units changes in accordance with flexibility granted by the Commission. However, a minimum of four, 3-bedroom IZ units shall be provided.

including all credits obtained, and demonstrating that it is reasonably likely to achieve certification within two years.

7. **Prior to the issuance of the first certificate of occupancy and for the life of the Project,** the Applicant shall demonstrate to the Zoning Administrator that it has provided the following:
 - a. At least 4 electric vehicle charging stations (each capable of simultaneously charging two vehicles) in the parking garage that are Level 2 chargers or greater;
 - b. The capacity to increase the number of Level 2 electric vehicle charging stations in the garage in the future; and
 - c. At least 5 electrical outlets in each long-term bicycle storage room.

8. **Prior to the issuance of the first certificate of occupancy for the Project,** the Applicant shall demonstrate to the Zoning Administrator that it has provided the following transportation-related benefits that are not needed to mitigate any potential adverse transportation impacts created by the Project:
 - a. Funded a new “HAWK” signal on Massachusetts Avenue, between 48th and 49th Streets, subject to DDOT public space approval. If approved by DDOT, evidence of funding may be in the form of a check to DDOT and/or to a third party responsible for installing the HAWK signal;
 - b. Committed \$100,000 to provide a means for connecting residents of the Project to the Tenleytown Metro station. The Applicant may satisfy this condition through either of the following options:
 - i. Provide the Zoning Administrator with a copy of an executed contract with a private shuttle service in the amount of at least \$100,000; or
 - ii. Provide the Zoning Administrator the following documentation:
 - Documentation that the Applicant or legal entity has established an account and/or contracted with a ride hailing company(s) that will allow Project residents to travel to/from the Tenleytown Metro station at no cost, up until the \$100,000 fund is depleted. Such documentation shall include a description of the steps required for residents to access the ride hailing account.
 - An executed agreement between the Applicant and the above-mentioned legal entity requiring that the \$100,000 commitment made pursuant to this condition shall be used solely for the purpose of paying a ride hailing company(s) to connect residents of the Project to the Tenleytown Metro station; and
 - A copy of a check in the amount of \$100,000 made payable to the proper legal entity responsible for managing the residential component of the Project.

- c. Restricted residents of Building 1 from obtaining an RPP by placing a clause in emphasized type in all residential leases that prohibits residents from applying for or obtaining RPPs, upon penalty of mandatory lease termination to the full extent permitted by law;
 - d. Consolidated the trash receptacles associated with the MAPS site located in the north-south alley and in public space along Yuma Street to a new enclosure along the north-south alley, consistent with DDOT public space approval; and
 - e. Improved the existing alley system by (i) widening the north-south public alley by seven feet onto private property along the west side of Building 1, between Yuma Street and the intersection with the east-west public alley to maintain a 20-foot vehicle travel way and provide a new 3-foot pedestrian path; (ii) providing a new 6-foot sidewalk on private property along the east-west alley on the south side of Building 1, between 48th Street and the intersection with the north-south public alley; (iii) constructing a 5- to 6-foot sidewalk along the western side of the north-south public alley at the entrance from Massachusetts Avenue; and (iv) constructing improvements to the alley intersection to increase pedestrian safety and visibility. The improvements shall be consistent with those shown on the Approved Plans, as modified to obtain DDOT's approval during public space permitting;
 - f. Donated \$15,000 to DDOT and/or a third party transportation consultant toward studying the potential to open the median on Massachusetts Avenue to improve porosity and turning movements at the MAPS site and/or studying the installation of a "pork chop" near Massachusetts Avenue and 49th Street;
 - g. Established the building entrance on Yuma Street as the preferred pick-up and drop-off location for ride-hailing services; and
 - h. Submitted an application to DDOT for a public space permit to dedicate an area along the west side of 48th Street between Yuma Street and Warren Street as an "alternative transportation block" where alternative transportation options such as electric scooters, bikes, and mopeds, bike shares, and/or car shares can be co-located approved by DDOT, this "alternative transportation block" shall be demarcated with striping and/or signage.
9. **Prior to the issuance of the first certificate of occupancy for the Project**, the Applicant shall demonstrate to the Zoning Administrator that it has dedicated a minimum of 13,000 square feet of retail space to a full-service grocery store. The full-service grocery store shall meet the definition of a "Full-service grocery store" under D.C. Code § 25-101.
10. **For the first ten years of the Project**, the Applicant shall dedicate a minimum of 13,000 square feet of retail space to a full-service grocery store that meets the definition of a "Full-service grocery store" under D.C. Code §25-101. The ten year time period required under this condition shall commence upon the date of issuance of the first certificate of occupancy for the full-service grocery store.

11. **Prior to the issuance of the first certificate of occupancy for the Project**, the Applicant shall demonstrate to the Zoning Administrator that it has planted a tree in any vacant tree box located along the east side of 48th Street between Yuma Street and Massachusetts Avenue, and along the north side of Yuma Street between 48th and 49th Streets.

C. TRANSPORTATION DEMAND MANAGEMENT MEASURES

1. **Prior to the issuance of the first certificate of occupancy for the Project**, the Applicant shall demonstrate to the Zoning Administrator that it has upgraded substandard curb ramps, striped missing crosswalks, and installed curb extensions at the following intersections, as modified and approved by DDOT during public space permitting:
 - a. 49th Street and Yuma Street NW;
 - b. 48th Street and Yuma Street NW;
 - c. 48th Street and Windom Place NW; and
 - d. 48th Street and Warren Street NW.
2. **Prior to the issuance of the first certificate of occupancy and for the life of the Project**, the Applicant shall demonstrate to the Zoning Administrator that it has implemented the following TDM measures:
 - a. Installed more than the minimum number of bicycle parking/storage facilities required by the Zoning Regulations, which include secure long-term bicycle storage rooms located within Building 1 and short-term bicycle parking located around the perimeter of the Site;
 - b. Installed a bicycle repair station in each of the long-term bicycle storage rooms located within Building 1;
 - c. Unbundled the cost of residential parking from the cost of lease or purchase of each residential unit in Building 1. The Applicant shall demonstrate that the unbundled cost of parking is at a minimum equal to the average market rate for a parking space within a quarter mile of the Site;
 - d. Offered parking rates only for daily, weekly and/or monthly subscriptions for purchase only, with no free parking offered to residents, employees, students, or otherwise;
 - e. Identified TDM leaders (for planning, construction, and operations) who will work with residents and grocery/retail employees to distribute and market various transportation alternatives and options;
 - f. Worked with DDOT and goDCgo to implement TDM measures;
 - g. Shared the full contact information of the TDM leaders with DDOT and goDCgo;

- h. Posted all TDM commitments online for easy reference;
- i. Created a Resident Welcome Package that includes TDM materials;
- j. Provided residents and grocery/retail employees who wish to carpool with detailed carpooling information, including a reference to other carpool matching services sponsored by MWCOG;
- k. Installed a Transportation Information Center Display (electronic screen) within the residential lobby of Building 1 containing information related to local transportation alternatives;
- l. Purchased or secured either a one-year membership to Capital Bikeshare and/or to a car-sharing service to be provided to each residential unit during the initial lease of each unit;
- m. Dedicated four vehicle parking spaces in the parking garage for car-sharing services to use with right of first refusal. If an agreement has not been reached with a carsharing service to occupy all of the four spaces prior to issuance of the first certificate of occupancy, then the Applicant shall demonstrate that it has purchased a one-year membership to Capital Bikeshare for each residential unit; and
- n. Purchased and provided one shopping cart for grocery shopping and running errands for every 30 residential units in Building 1.

D. LOADING MANAGEMENT PLAN

- 1. **For the life of the Project**, the Applicant shall implement the LMP, as set forth in Finding of Fact No. [REDACTED] of this Order.

E. ADDITIONAL COMMITMENTS TO ANC 3E

- 1. **Prior to the issuance of the first certificate of occupancy for the Project**, the Applicant shall demonstrate to the Zoning Administrator that it has:
 - a. Offered, on a right of first refusal basis, any retail space not leased to the full-service grocery store to tenants in operation on the Site as of September 25, 2019 (date of Applicant's MOU with ANC 3E);
 - b. Retained the Heritage Tree along the west side of 48th Street;
 - c. Worked with DDOT to install a Capital Bikeshare station in the vicinity of the Project;
 - d. Worked with DDOT and JUMP, or another provider of electric bicycles and/or scooters, to include electric bicycles and/or scooters either in the pursued Capital Bikeshare station or in close proximity to the Site;

- e. Developed a written RPP-exclusion enforcement plan in concert with residents of SMD 3E01, 3E02, 3E05, and DDOT, and presented the plan to ANC 3E at least two months prior to the first certificate of occupancy for the Project;
 - f. Run any kitchen exhaust venting from the grocery store and any eating and drinking establishments in the Project to the highest roof of the Project.
 - g. Restricted events on the outdoor rooftop terrace of Building 1 to between the hours of 8 a.m. and 10 p.m. Sunday through Thursday, and 8 a.m. to 12 a.m. Friday and Saturday. Amplified music shall not be permitted on the outdoor rooftop terrace **for the life of the Project;**
2. **For the life of the Project,** the Applicant shall not negotiate a master lease with American University for student housing within the Project. This condition is not intended to limit students from independently renting units at the Project, but instead to preclude negotiations with AU; and
 3. **During and prior to construction of the Project, as applicable,** the Applicant shall abide by the terms of the “Mitigation Efforts: Construction Agreement” section of its MOU with ANC 3E (Ex. 49, pp. 6-7).

F. MISCELLANEOUS

1. No building permit shall be issued for the Project until the Applicant has recorded a covenant in the land records of the District of Columbia, between the Applicant and the District of Columbia that is satisfactory to the Office of the Attorney General and the Zoning Division, Department of Consumer and Regulatory Affairs. Such covenant shall bind the Applicant and all successors in title to construct and use the Site in accordance with this Order, or amendment thereof by the Commission. The Applicant shall file a certified copy of the covenant with the records of the Office of Zoning.
2. The PUD shall be valid for a period of two (2) years from the effective date of this Order. Within such time an application shall be filed for a building permit, with construction to commence within three (3) years of the effective date of this Order.
3. The Applicant is required to comply fully with the provisions of the Human Rights Act of 1977, D.C. Law 2-38, as amended, and this Order is conditioned upon full compliance with those provisions. In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code § 2-1401.01 et seq., (“Act”) the District of Columbia does not discriminate on the basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, or place of residence or business. Sexual harassment is a form of sex discrimination that is also prohibited by the Act. In addition, harassment based on any of the above protected categories is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

4. The Applicant shall file with the Zoning Administrator a letter identifying how it is in compliance with the conditions of this Order at such time as the Zoning Administrator requests and shall simultaneously file that letter with the Office of Zoning.

On November 19, 2019, upon the motion of _____, as seconded by _____, the Zoning Commission took **FINAL ACTION** to **APPROVE** the Application at its public meeting by a vote of 5-0-0 (Anthony J. Hood, Robert E. Miller, Peter G. May, Michael G. Turnbull, and Peter Shapiro to approve).

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

ANTHONY HOOD
Chairman,
Zoning Commission

SARA B. BARDIN
Director.
Office of Zoning