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December 7, 2020

VIA IZIS

Zoning Commission
of the District of Columbia
441 4th Street, NW - Suite 210
Washington, DC 20001

**Re: Applicant's Initial Post Hearing Submission
Z.C. Case No. 20-14 - Design Review
5 M Street, SW (Square 649, Lots 43, 44, 45, and 48)**

Dear Members of the Zoning Commission:

On behalf of VNO South Capitol LLC and Three Lots in Square 649 LLC (together, the "Applicant"), we hereby submit the following information and materials requested by the Commission at the November 12, 2020, public hearing on this case.

A. Updated Architectural Drawings

Attached hereto as Exhibit A are updated architectural drawing sheets (the "Revised Drawings") that show project updates based on comments from the Commission at the public hearing and comments from Advisory Neighborhood Commission ("ANC") 6D at the public hearing and in subsequent meetings following the hearing. The Applicant will submit a full and final set of architectural plans and elevations as part of its December 31, 2020, post-hearing submission.

1. Setbacks/Tiering and Building Simplification

The ANC requested that the Applicant create additional tiering along M Street as it moves towards the southwest neighborhood. The ANC also requested that the Applicant simplify the project's overall design so that it is less "busy" and so that the two towers and the pavilion have a more consistent and coherent overall design. Although the two comments could be considered separately, the proposed modifications, which include additional setbacks and tiering among other design revisions, collectively result in a simplified building design and are therefore described together below.

As shown on Sheets 11-12 of the Revised Drawings, the Applicant incorporated new setbacks at levels 12 and 13 of the south tower comprised of framed outdoor terraces. The new terraces are located along the M Street façade facing the pavilion, thus creating additional tiering down along M Street as the building moves west towards the southwest neighborhood. This setback also matches the top level setback facing South Capitol Street, which previously wrapped around to M Street and now also wraps onto the west façade facing the pavilion.

Similarly, as shown on Sheets 11-16 of the Revised Drawings, the Applicant incorporated a setback at levels 12 and 13 of the north tower facing Half Street that wraps around to the portion of the façade facing the pavilion, and applied the pavilion façade type across the full extent of this setback for additional consistency. At the corner of the building where the north tower meets the pavilion, the Applicant also incorporated new outdoor balconies that match the design motif and proportions of the framed terraces and windows applied to the south tower where it faces the pavilion. The overall result is a more coherent and unified building design. Moreover, the new upper level setbacks on the north and south towers together create a consistent framing of the pavilion and a constant height and cornice level at the floor slab of level 12, thus creating the same geometry as the two towers meet the pavilion in the middle.

To further enhance the symmetry of the two towers flanking the pavilion, and thus simplify and unify the building design, the Applicant also reduced the width of the setback portion of the pavilion along M Street (as it meets the south tower) and along Half Street (as it meets the north tower). *See* Sheets 8, 9, 13-15 of the Revised Drawings. These narrower reveals create a more proportional scale and simplified composition between the pavilion and the towers on either side. They also create additional amenity and green space on the level 9 terrace.

Adjacent to the narrowed reveal along M Street, the Applicant also revised the width of the south tower as it extends south towards M Street past the pavilion. As a result, both towers now meet the pavilion with the same grid and window size for their entire height to create matching proportions on either side of the pavilion. *See* Sheets 11-14 of the Revised Drawings.

Taken together, these design modifications reduce the number of unique moves and architectural characteristics previously found in the project to create a more unified and coherent building design.

2. Pavilion Design

At the public hearing the Commission requested that the Applicant reconsider the design of the pavilion at the southwest corner to be more consistent with the design and materiality of the two adjacent facades on M and Half Streets. The ANC also stated that the pavilion was “misplaced” and does not appropriately connect with the M and Half Street facades.

As described above, the Applicant incorporated setbacks on the towers on either side of the pavilion so that they are more proportional, appropriately tier down towards the pavilion, and now have a consistent height and cornice line on either side of the pavilion to create symmetry and uniformity in building design. In addition, and as shown on Sheets 11-14 of the Revised Drawings, the Applicant also incorporated framed inset terraces at the corner of the pavilion to tie the design

back to the rest of the project and provide more openness and light. The Applicant used the same wood material on the underside of the terraces and at the third floor reveal and scaled the terraces' size and design so that they match the new framed terraces on the south tower facing the pavilion. This modification also resulted in five additional balconies for residential units within the pavilion, which the ANC and the Commission have previously requested.

3. Balconies

a. Update to Hopper-Styled Balconies on M and South Capitol Facades

In response to concerns raised by ANC 6D, the Applicant eliminated the hopper-style balconies on the south tower. In their place, the Applicant extended the interlocking corner language throughout the body of the building to replace the tilted hopper-style balconies with more traditional inset balconies. The new inset balconies are a half-bay wide and two stories tall, which match the proportions of the north tower's inset and outboard terraces and the new inset terraces at the pavilion, thus furthering the uniformity across the overall project. *See* Sheets 3-5 of the Revised Drawings.

Although it removed the hopper balconies throughout the south tower, the Applicant maintained the hopper-styled windows along the top two floors before the setback to add to the perceived tiering and create a visual cornice line.

b. Update to Balconies on L and Half Street Facades

At the public hearing the Commission suggested that the Applicant remove the angled structures supporting the balconies along the L and Half Street facades in order to make them appear lighter. The ANC also expressed its concern with the balconies looking too heavy and disconnected from the overall design aesthetic. As shown on Sheets 13, 14, 16-18 of the Revised Drawings, the Applicant simplified the balcony design by replacing the previously-proposed hanging detail with a simple cantilever. The balconies also now use the same channel detail that is present throughout the project.

c. Additional Balconies on South Tower

In order to create more uniformity across the project, the Applicant also added balconies to the north tower in the following locations: (i) M Street façade in the reveal facing the pavilion; and (ii) northern-most portion of the South Capitol Street façade where it meets Lot 47.

Accordingly, taken together with all of the new balconies incorporated into the project, and based on the current demising walls, the Applicant has increased the number of balconies from 255 of units having balconies to approximately 33% of units having balconies (approximately 154 units to 202 units).

4. Brick Color and Maintenance

The Commission asked the Applicant to provide information on how the lighter brick color on the L and Half Street facades would remain clean over time. The Applicant selected this brick color in response to comments from the ANC suggesting that the Applicant lighten the brick shade that was proposed in prior façade iterations, and therefore the Applicant is not proposing to modify the selected color. However, the horizontal surfaces adjacent to the brick will be designed and sloped in a manner to encourage regular washing-away of dirt during rainfalls, so as not to encourage large amounts of dirt from accumulating on the surfaces. Sheet 19 of the Revised Drawings includes examples of projects with similar brick colors that have aged well over time. Moreover, the Applicant will implement a regular cleaning regimen such that the brick is cleaned and maintained periodically.

5. IZ Unit Location

The Commission requested that the Applicant identify a more desirable location for the one required IZ unit within the project. While the originally-selected unit was placed to have a view of the courtyard, which the Applicant viewed as a desirable location, the Applicant has relocated the IZ unit to the 5th floor facing M Street, as shown on Sheet 20 of the Revised Drawings

6. Solar

Although not specifically requested by the ANC or the Commission, the Applicant has increased the amount of solar on the project from the 750 square feet previously proposed to a minimum of 1,000 square feet.

B. Affordable Housing

1. Updated Affordable Housing Commitment

At the public hearing, the Applicant stated that it would provide 19 non-required affordable units (“Non-IZ Affordable Units”) at 80% of the Median Family Income (“MFI”). In response to comments from the Commission, the ANC and the public, the Applicant proposes to increase that commitment such that the 19 Non-IZ Affordable Units will be provided at 60% of the MFI for the life of the project and would meet the following additional development standards that are required for IZ affordable units: (i) ensuring that the proportion of studio and one-bedroom Non-IZ Affordable Units does not exceed the proportion of studio and one-bedroom market rate units; (ii) providing comparable exterior design, materials and finishes; (iii) providing comparable interior amenities such as finishes and appliances; (iv) ensuring that the Non-IZ Affordable Units are not overly concentrated on any floor of the project; and (v) ensuring that none of the Non-IZ Affordable Units are located in cellar space.

However, as set forth below, the Applicant submits that providing the Non-IZ Affordable Units beyond the minimum required by IZ (which in this case is one unit, generated by the penthouse habitable space) should not properly be considered in approving this project or included as a condition in the final zoning order.

2. Summary of the Applicant’s Commitment to Regional Affordable Housing

The Applicant testified at the public hearing regarding its substantial commitment to providing and funding affordable housing throughout the District and region. The Commission requested that the Applicant submit the relevant information for the record, including a summary of why the Applicant’s commitment has not included affordable housing that results from those initiatives in the development at the subject property. A response to this request is attached hereto as Exhibit B.

3. Compliance with Applicable Standard of Review under the Zoning Act, Zoning Regulations, and Comprehensive Plan

At the November 12, 2020, public hearing, the Applicant provided testimony regarding its compliance with the standard of review applicable to the project under the Zoning Regulations that are currently in effect. Specifically, Mr. Shane Dettman, the Applicant’s expert in zoning and land use, discussed in detail how the project satisfies the design review criteria under 11-I DCMR § 701.1, and the general special exception criteria of 11-X DCMR, Chapter 9. Mr. Dettman also articulated that, in contrast to design reviews undertaken by the Commission under 11-X DCMR, Chapter 6, the Applicant is not required to demonstrate that a project is not inconsistent with the Comprehensive Plan. Notwithstanding, Mr. Dettman described how the Applicant considered the policies of the Comprehensive Plan in its development of the project, including the policy that calls for establishing “the production of housing for low and moderate income households as a major civic priority, to be supported through public programs that stimulate affordable housing production and rehabilitation throughout the city.” *See* 10A DCMR § 504.6.

At the public hearing, the Commission commented that while the statutory language of the Home Rule Act requires that the Zoning Regulations (which are prepared and adopted by the Commission pursuant to the Zoning Act) are to be not inconsistent with the Comprehensive Plan, the Comprehensive Plan policy related to affordable housing as a civic priority should carry forward in all zoning cases even in the absence of a specific zoning requirement. The Commission also suggested that the affordable housing voluntarily being provided by the Applicant – both square footage and level of affordability – did not meet the special exception criteria applicable to the project. Such approaches to the legal relationship between the Comprehensive Plan and the Zoning Regulations, and to the special exception standard specifically, are: (i) contrary to the intent of the Home Rule Act and prior determinations made by the Commission; (ii) inconsistent with the tenants of administrative law (i.e., the Comprehensive Plan is not self-executing); and (iii) unreasonable by injecting uncertainty into the application of the Zoning Regulations.

Pursuant to the Zoning Act of 1938, the Commission is the sole entity responsible for establishing and amending the District’s Zoning Regulations. In carrying out this responsibility, the Commission is required to follow a well-defined set of procedural requirements that include holding a public hearing, advance notice of said public hearing, and providing an opportunity for individuals to be heard. *See* D.C. Code §§ 6-621.01 – 6-623.04. The passage of the Home Rule Charter did not change the Commission’s sole authority over District zoning in any way. It did, however, establish the current standard that zoning shall not be inconsistent with the Comprehensive Plan.

The Comprehensive Plan establishes a broad policy framework that is intended to guide land use decision making in the District. It is grounded in a series of goals, policies, and action statements that, except where specifically stated, are not binding. The Comprehensive Plan does not directly establish any zoning standard or review criteria that is applicable to the subject project or any other project – matter-of-right or otherwise. Rather, as stated above, it is the Commission’s responsibility to establish all zoning standards and review criteria and those standards and criteria must be not inconsistent with the Comprehensive Plan. Thus, it is the Zoning Regulations that follow the Comprehensive Plan, not the other way around.

To the extent that amendments to the Comprehensive Plan result in zoning inconsistencies, subsequent amendments should be made to the Zoning Regulations to eliminate said inconsistencies. This relationship between the Comprehensive Plan and zoning is well-established, is identified in the Implementation Element, and has been recognized by the D.C. Court of Appeals. *See* 10-A DCMR § 2504.1 and *TACPEC v. DC BZA* 550 A.2d 331 (1988) stating that “[c]onsideration of the District of Columbia Self-Government Act and the Comprehensive Plan demonstrate that the Comprehensive Plan is not self-executing and does not directly regulate the development of private property in the District of Columbia.” As such, the standards and review criteria set forth in the current, Commission-adopted Zoning Regulations constitute the legal standard of review for this project.

As required by Home Rule, the Commission’s determination for the D-5 zone to be exempt from IZ was made in accordance with this well-established relationship between zoning and the Comprehensive Plan. Specifically, the exemption of the D-5 zone, along with other high density commercial zones, is not the result of an oversight by the Commission. Rather, such zones have been expressly exempt since the initial adoption of the IZ regulations in Z.C. Case No. 04-33, which were expressly established to, among other purposes, “further the Housing Element of the Comprehensive Plan...” *See* 11-C DCMR 1000.1(a). In fact, the original IZ proposal included high density commercial zones. Upon thorough analysis, the Commission exempted these zones on the basis that there was no ability to absorb compensating bonus density to help offset the IZ set aside requirement. This exemption has been maintained over subsequent amendments to the IZ regulations. In the most recent amendments adopted in Z.C. Case No. 04-33G, the Commission reevaluated the exemption of certain Downtown (D) zones, and again, based upon analysis provided by the Office of Planning, the Commission decided to maintain the exemption. In both cases, the Commission determined that the IZ regulations, including the exemption of the D-5 zone and other high density commercial zones, were not inconsistent with the Comprehensive Plan. The Commission made these determinations based on the policies contained within the Housing Element of the Comprehensive Plan, including the policy that calls for establishing the production of affordable housing as a civic priority.

At the public hearing, the Commission also made comments on the applicable general special exception criteria of Subtitle X, Chapter 9, stating that “there not be an adverse effect on the neighborhood.” The Commission noted concerns relating to the potential impact on housing prices and availability and questioned how this impact tied into the special exception standard. To clarify, the standard of review for a special exception requires a showing of harmony with the general purpose and intent of the Zoning Regulations, no adverse effect to use of neighboring

properties in accordance with the Regulations, and satisfaction of any special conditions the Regulations may require. Consistent with the special exception standard, the project is fully compliant with the standard for the D-5 zone, does not require any zoning relief, and meets all of the applicable design review standards. As to the issue of affordable housing, the project is fully compliant with the requirements for affordable housing, which require only one IZ unit generated by the proposed penthouse habitable space. This requirement could alternatively be satisfied through a contribution to the Housing Production Trust Fund. Thus, the Applicant's commitment to providing 19 Non-IZ Affordable Units far exceeds any standards applicable to the project under the Zoning Regulations.

Furthermore, while the applicable design review criteria do not provide a standard for consideration of affordable housing (e.g., amenities and benefits) and the project is not subject to IZ given its location within the D-5 zone, the Applicant recognizes the critical need for more affordable housing in the District. This is demonstrated by the Applicant's offer to provide the 19 Non-IZ Affordable Units and by its overall commitment to affordable housing throughout the region, discussed above. However, the concerns expressed in this case by the Commission and community regarding affordable housing seek to impose standards on this project that are not applicable under current law. These overarching concerns about the applicability of affordable housing in zones which are currently exempt will be evaluated and addressed through a separate process and based on a case being brought to the Commission by the Office of Planning. Adherence to this process instills necessary confidence that the Zoning Regulations in effect can be relied upon.

The Zoning Commission has consistently determined that in a design review case its authority is limited to whether the applicant has met the design review standards specific to that property and, if requested, the standards for variance or special exception relief. *See* Z.C. Order No. 16-06. In this case, the Applicant has asked for no relief from the Zoning Regulations, and as set forth in detail in the Applicant's submissions, the Office of Planning's report, and Mr. Dettman's testimony, the Applicant has fully met the burden of the proof under the design review standards and under the general special exception criteria; and as such, the special exception must ordinarily be granted. *See Robey v. Schwab*, 307 F.2d 198, 201; *Hyman v. Coe*, 146 F. Supp. 24, 27, 32 (D.D.C.1956); *see also Stewart v. District of Columbia Board of Zoning Adjustment*, 305 A.2d 516, 518 (D.C.1973); *see also First Baptist Church v. District of Columbia Board of Zoning Adjustment*, 432 A.2d 695, 698 (D.C.1981); *see also French*, 658 A.2d at 1033 (1995).

C. Updates on ANC Engagement

Following the public hearing, the Applicant continued to meet with the ANC to address the major outstanding issues related to design of the project. The ANC's primary concerns related to (i) tiering towards the southwest from the corner of M and South Capitol Streets; (ii) better integrating the pavilion into the overall building design; (iii) reworking the Hopper-style windows; and (iv) revising the balconies to appear lighter. Descriptions of the revisions to the building design based on the ANC's comments are set forth in Section A of this Post-Hearing Statement, and the Applicant believes that they address the ANC's outstanding concerns. The Applicant is scheduled to present to the ANC on December 14, 2020.

D. Updates on Engagement with Party Opponent

The Commission granted party status in opposition to the project to 1101 South Capitol, LLC (the “Party Opponent”), the owner of Lot 47 which abuts the subject property. The Party Opponent testified at the public hearing regarding its concern with constructing the building across the previously uncovered north-south private driveway accessed from L Street. The Applicant has had open dialogue with the Party Opponent and DDOT since the public hearing, and collaboration is ongoing in pursuit of a mutually agreeable resolution. The Applicant will provide an update in its December 31, 2020 Final Post-Hearing Submission.

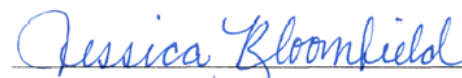
As requested by the Commission at the public hearing, the Applicant will submit a Final Post-Hearing Submission on December 31, 2020. The Applicant appreciates the Commission’s continued review of this application.

Sincerely,

HOLLAND & KNIGHT, LLP



Christine M. Shiker.



Jessica R. Bloomfield

Attachments

cc: Certificate of Service
Joel Lawson, Office of Planning (via email, with attachments)
Steve Cochran, Office of Planning (via email, with attachments)
Anna Chamberlin, District Department of Transportation (via email, with attachments)
Aaron Zimmerman, District Department of Transportation (via email, with attachments)
Gail Fast, ANC 6D Chair (via email at 6d01@anc.dc.gov, with attachments)
Andy Litsky, ANC 6D04 (via email at 6D04@anc.dc.gov, with attachments)
Fredrica Kramer, ANC 6D05 (via email at 6d05@anc.dc.gov, with attachments)
Anna Forgie, Committee on 6D02 Affairs (via email at forgie6d02@gmail.com, with attachments)

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2020, a copy of the foregoing Initial Post-Hearing Submission was served on the following by email:

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