

1 GOVERNMENT OF THE DISTRICT OF COLUMBIA
2 Zoning Commission
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9 Zoning Commission Order No. 10-28(2)
10 Z.C. Case No. 10-28
11 901 Monroe Street, LLC
12 (Consolidated PUD & Related Map Amendment @ Square
13 3829)
14
15
16

17 6:30 p.m. to 7:24 p.m.
18 Thursday, February 26, 2015
19

20 Jerrily R.Kress Memorial Hearing Room
21 441 4th Street, N.W., Suite 220 South
22 Washington, D.C. 20001
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24
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1 Board Members:

2 ANTHONY HOOD, Chairperson

3 MARCIE COHEN, Vice-Chairperson

4 PETER MAY, Commissioner

5 MR. TURNBULL, Commissioner

6

7 Office of Zoning:

8 SHARON SCHELLIN, Secretary

9

10 Office of Attorney General:

11 ALAN BERGSTEIN

12

13 Other:

14 PAUL TUMMONDS, ESQ.

15 DAVID W. BROWN, ESQ.

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1 P R O C E E D I N G S

2 CHAIRPERSON HOOD: Good evening. This is
3 the Zoning Commission's public hearing to hear
4 oral arguments on Zoning Commission Case No. 10-
5 28, in accordance with the procedural order dated
6 January 12th, 2015.

7 I am joined this evening -- my name is
8 Anthony Hood. I am joined this evening by Vice
9 Chair Marcie Cohen, Commissioners Peter May and
10 Michael Turnbull, Commissioner Rob Miller is not
11 joining us this evening because he did not
12 participate in the original case.

13 We're also joined by the Office of Zoning
14 staff, Sharon Schellin, the Office of Attorney
15 General Staff, Mr. Alan Bergstein. Mr. Bergstein.
16 Okay.

17 Ms. Schellin, are there any preliminary
18 matters?

19 MS. SCHELLIN: No, sir.

20 CHAIRPERSON HOOD: Okay. All counsel are
21 sitting at the table. I would ask that you
22 introduce yourselves.

23 MR. TUMMONDS: Good evening. My name is
24 Paul Tummonds with the law firm of Goulston &
25 Storrs on behalf of the applicant.

1 MR. BROWN: Good evening, Chairman Hood.
2 David Brown of Knopf and Brown on behalf of the
3 200 Footers.

4 CHAIRPERSON HOOD: Okay. Could you
5 introduce yourself also?

6 MR. KADLECEK: Cary Kadlecek on behalf of
7 the applicant, also from law firm of Goulston and
8 Storrs.

9 CHAIRPERSON HOOD: Okay. Okay, Mr.
10 Tummonds, would you like to preserve some time at
11 the end of the argument?

12 MR. TUMMONDS: Yes, we'd like to reserve
13 four minutes for rebuttal.

14 CHAIRPERSON HOOD: No noted. Okay. I
15 think the oral scheduling argument has been
16 noticed and we all know how we're going to proceed
17 this evening. Mr. Tummonds, you may proceed.

18 MR. TUMMONDS: Great. Thank you very
19 much. Good evening, Mr. Chairman, Members of the
20 Commission.

21 On behalf of the applicant we are pleased
22 to be able to make our oral argument this evening
23 to address the remand issues.

24 As we start this discussion we think it's
25 important to look at the nature and role of the

1 comprehensive plan in relation to the Zoning
2 Commission's consideration of a PUD. You may
3 remember that at the request of the Zoning
4 Commission, at the conclusion of the final public
5 hearing, or I'd say at the first public hearing in
6 this case, the Office of Planning noted --
7 provided additional information on three bullet
8 points. Those are shown on the slide and on the
9 materials we provided.

10 Importantly the Office of Planning noted
11 that the framework element makes it clear that the
12 generalized policy map and the future land use map
13 are not zoning maps and are to be interpreted
14 broadly. The maps do not in and of themselves
15 determine whether an application or a particular
16 zoning designation is not inconsistent with the
17 comprehensive plan. They're to be interpreted in
18 conjunction with other written elements and an
19 adopted small area plan.

20 Moreover, as this Commission earlier
21 observed, the future land use map is not a zoning
22 map and is not parcel specific. The PUD process
23 specifically allows the Commission to approve
24 heights and densities that exceed what is
25 reflected on the future land-use map. It is based

1 on this understanding of how the comprehensive is
2 applied to specific PUD and zoning map amendment
3 applications which the Court of Appeals deemed to
4 be appropriate that this Zoning Commission
5 reviewed and approved this case on two previous
6 occasions.

7 With regards to this project and it's
8 appropriately being deemed to be of moderate
9 density and not medium density. The Court of
10 Appeals requested that the Commission,
11 quote/unquote, address whether the project should
12 properly be characterized as a moderate density
13 use or a medium density use. In addition the
14 Commission was required to address the arguments
15 of the parties concerning whether the project
16 should probably be under suit as a moderate
17 density use.

18 The applicant submits that the moderate
19 density category as defined and guided by
20 appropriate elements and policies of the
21 comprehensive plan accurately describes the
22 approved project. Approval of this application as
23 a moderate density project is supported by ample
24 evidence in the record of this case.

25 The definition of the moderate density

1 land use designation in the comprehensive plan is
2 not on its face inconsistent with a project of the
3 height and massing approved by the Zoning
4 Commission in this case, as noted up on the slide
5 before you, the definitely of moderate density
6 residential includes the R5B District and other
7 zones may also apply in some locations. A PUD
8 project in the R5B zone is allowed a maximum
9 height of 60 feet, and a maximum FAR of 3.0. This
10 project includes a building height of 60 feet, 8
11 inches, and a maximum FAR of 3.31.

12 By definition, in other words, a multi-
13 story building is not inconsistent with a moderate
14 density designation. A multi-story apartment
15 building is not a prohibited use, or a building
16 type which cannot be found to be a moderate
17 density category.

18 As shown in a series of slides that were
19 presented to the Zoning Commission an applicant's
20 prehearing statement in its initial presentation,
21 and in its rebuttal testimony, this building has
22 the appearance, impact, and feel of a moderate
23 density project.

24 As the Zoning Commission noted during its
25 deliberations on this case, the applicant made

1 several material changes to the project, including
2 proposing a project that is less dense and shorter
3 than a C2B matter of right project, as noted where
4 this is a 3.31 FAR, which is .09 FAR. Less than an
5 IZ matter of right C2B project. And it's 60 feet,
6 8 inches tall, which is 9 feet, 4 inches less than
7 what is permitted as a matter of right IZ C2B
8 project.

9 In particular the applicant presented the
10 attached slide, which showed how this project,
11 with its setbacks from the property line, an
12 additional floor on top, results in equal or less
13 development area compared to a project built to
14 the property line at a uniform height of 50 feet.

15 The medium density residential label
16 proposed by the 200 Footers for this project, does
17 not accurately capture what this project
18 represents. As noted it is a mixed use project.
19 It has been designed so that its impact on the
20 surrounding properties does not equate to what a
21 medium density project would represent. With all
22 due respect to the Court of Appeals, the
23 Commission should not share the observation that
24 the Court made in its response to what the
25 definition of the future land use map said when

1 they said, quote, "This project would appear to be
2 a medium density residential use, because it would
3 stand six stories high and offer over 200
4 apartment uses."

5 The project does not stand six stories
6 high in most places, and was designed not to
7 present as a massive six story apartment block.

8 There are substantial setbacks, open
9 areas, and design features to reduce how this
10 project appears and how it integrates into the
11 surrounding neighborhood. The applicant made
12 design changes throughout the PD process to
13 further limit the appearance of the project as it
14 relates to its neighboring blocks and residences.
15 The resulting impact on the neighborhood is modest
16 in scale, particularly where the project is
17 visible to or bordering on existing uses.

18 With the meaning of the comprehensive
19 plan, this project has a moderate density feel.

20 The second issue that the Court of
21 Appeals requested that we address dealt with the
22 relationship of this project with the lower-scale
23 residential uses along 10th Street. The Court of
24 Appeals asked the Commission to further consider
25 and better explain the conclusion regarding the

1 consistency of this project with upper Northeast
2 element 2.6.1, which required that special care
3 should be taken to protect the existing low-scale
4 residential uses along and east of 10th Street.

5 The Court stated that the Commission,
6 quote/unquote, "Did not give consideration to the
7 policy favoring special care for the residences
8 along 10th Street."

9 It's important to note that the upper
10 Northeast element 2.6.1, does not refer to the
11 actual residences along 10th Street, as the Court
12 of Appeals says. Rather, the upper Northeast
13 element 2.6.1 refers specifically to existing low-
14 scale residential uses along and east of 10th
15 Street. The comprehensive plan guidelines should
16 not be read as if there were a historical
17 preservation type directive for specific
18 structures. These guidelines talk about the low-
19 scale and the residential uses. The 200 Footers
20 erroneously suggest that these guidelines require
21 preservation of the then existing 10th Street
22 single-family homes, when it does not.

23 The 200 Footers' primary objection to the
24 Commission's conclusion regarding the consistency
25 of the project with the upper Northeast element

1 rests on their view that the project should be
2 considered medium density. This seems to be based
3 on the establishment of the C2B zone district
4 approved for the site, rather than the realities
5 of the PUD project that the Zoning Commission
6 approved.

7 The fact that the C2B Zone District can
8 be deemed to be a medium density zone does not
9 make this project a medium density project on this
10 site.

11 Along an adjoining 10th Street, this
12 project preserves and protects the low-scale
13 residential use that existed prior to this project
14 and still exists today. The use of building
15 setbacks, differentiation in height, incorporation
16 of design details from the 10th Street row houses,
17 such as mansard roofs, chimney details, and
18 detailed brick panels protect and preserve the
19 low-scale residential feel of 10th Street. The
20 overall feel and impact of the project along 10th
21 street is entirely commensurate with the lower
22 density residential use to the south and east.

23 The applicant in the Zoning Commission
24 paid significant attention to the design and
25 impact of the project's 10th Street façade and

1 massing. There is no retail use along 10th
2 Street, and there is no six story building next to
3 any residence. The applicant worked with the
4 neighbors and other stakeholders to arrive at a
5 development that is consistent with all of upper
6 Northeast element 2.6.1.

7 I think it's important to show this last
8 slide, which shows the relationship along 10th
9 Street to the nearest portion of the project, and
10 the nearest 10th Street neighbor. As you can see,
11 there are no six story residences directly
12 adjacent to that 10th Street row house.

13 The third component of the remand was
14 that the Commission should look at the totality of
15 the project and its consistency with the
16 comprehensive plan and the appropriateness of the
17 approval of this project. The Commission has
18 approved this project twice and should approve it
19 again. The information that we have provided to
20 you this evening thoroughly address the
21 clarifications requested by the Court of Appeals
22 regarding the moderate density character of this
23 project, and the protection of the lower scale
24 10th Street residences, and only makes the case
25 for your third approval of this application that

1 much stronger.

2 In this case, the Office of Planning
3 concluded that, quote, "The proposed project would
4 strike an appropriate balance among several
5 policies, including those addressing transient
6 oriented development, commercial revitalization,
7 and neighborhood conservation. Given the location
8 and proposed design, height, and FAR restrictions
9 and uses of the PUD, the project and the
10 associated zoning request would not be
11 inconsistent with the comprehensive plan." That
12 was the Office of Planning's conclusion. That's
13 Exhibit 320 of the record.

14 In this case the applicant made numerous
15 changes to the project in response to issues and
16 concerns raised by the Office of Planning, the
17 Zoning Commission, the 200 Footers, and members of
18 the community. The Commission appropriately
19 balanced all elements of the comprehensive plan,
20 including the Brookland CUA, Metro Station Small
21 Area Plan, numerous upper Northeast elements, the
22 future land use map, the generalized policy map,
23 and various written elements of the comprehensive
24 plan.

25 The Commission found that the project

1 would foster economic and civic development around
2 the Metro station, would provide new and
3 affordable housing units, would include high
4 quality architecture and context sensitive design,
5 would use land efficiently and provide community
6 serving retail and serve as an important
7 connection between the 12th Street retail in
8 Brookland, and the new Monroe Street Market
9 Project.

10 More importantly, the Commission
11 determined that this project is both compatible
12 with and complimentary to adjacent properties, and
13 that the amount of the C2B density utilized was
14 only that amount needed for this project to
15 succeed.

16 For these reasons, the Commission's
17 decision to approve this PUD and zoning map
18 amendment application should be affirmed once
19 again. Thank you.

20 CHAIRPERSON HOOD: Thank you, Mr.
21 Tummonds. Commissioners, do we have any follow-up
22 questions?

23 MR. MAY: Yeah.

24 CHAIRPERSON HOOD: Any? Okay.

25 MR. MAY: I have one question. I have to

1 find it.

2 So the diagrams that you have submitted,
3 I'm looking at page 7, matter of right massing to
4 property line versus proposed massing with
5 setback. So matter of right, I mean, clearly
6 that's not matter of right of all the existing
7 zones, right?

8 MR. TUMMONDS: That's correct.

9 MR. MAY: So that's matter of right under
10 --

11 MR. TUMMONDS: That was to the R5 -- that
12 was to the 50 foot height that was talked about in
13 the Metro -- it's the Brookland C.R. Metro
14 Station, 50 foot height fall to the property line.

15 MR. MAY: So it's not specific to any
16 given zone, it's just it has to do with the height
17 and massing.

18 MR. TUMMONDS: Correct.

19 MR. MAY: And the height and massing per
20 the small area plan.

21 MR. TUMMONDS: Correct.

22 MR. MAY: The small area plan actually
23 take into consideration the entirety of this site,
24 because the future land use map does not?

25 MR. TUMMONDS: Right. The small area

1 plan referred to all of the frontage along Monroe
2 Street.

3 MR. MAY: Right.

4 MR. TUMMONDS: Remember, it called for a
5 mixed use with the ground floor retail and
6 residential above. The existing apportion of the
7 property not on the future land use map that
8 includes frontage on Monroe Street is in the low-
9 density residential. For lack of a term, it's
10 yellow.

11 MR. MAY: Right.

12 MR. TUMMONDS: And so that there is a
13 conflict between what the Brookland Small Area
14 Plan said and what the --

15 MR. MAY: Right.

16 MR. TUMMONDS: -- future land use map
17 said for a portion of that.

18 MR. MAY: Right. And the small area plan
19 does not -- the designation of the mixed use are
20 does not extend further down 12th Street than say,
21 mid-block or whatever is shown in the future land
22 use map?

23 MR. TUMMONDS: Correct. I mean, on 9th
24 and 10th, not 12th. Yeah.

25 MR. MAY: 9th, 10th. 9th. Got it, 9th.

1 MR. TUMMONDS: Yeah.

2 MR. MAY: Yeah. All right. All right.
3 That's it.

4 CHAIRPERSON HOOD: Okay. Vice Chair
5 Cohen, you have any questions?

6 MS. COHEN: Yes. I'd like you to
7 elaborate a little bit on the conflict about
8 preserving the character of the neighborhood and
9 protecting the character of the adjacent
10 properties.

11 MR. TUMMONDS: Sure. I think that as
12 we've showed in some -- let me carry the -- it was
13 not just the massing that we took a lot of pains
14 to make sure that the relationship of the most
15 immediate portion of this project to the
16 residents, but also the style, the details. And I
17 think that's what really made this project
18 successful. It is the mansard roofs, it is the
19 chimney details. It is the architectural
20 flourishes, some might call them, but that's what
21 makes this project special. That's what made this
22 project a -- in PUD parlance, a superior feature
23 of architectural quality.

24 So it's not just the massing, I think,
25 but is the treatment of that massing. That being

1 said, and I'm sorry, the massing changes that we
2 made were significant. And those are also
3 important to help make sure that this project
4 reacted to and appropriately dealt with the lower
5 scale residential uses along 10th Street.

6 CHAIRPERSON HOOD: Any other questions?
7 Mr. Turnbull?

8 MR. TURNBULL: Thank you, Mr. Chair. No,
9 I didn't remember all those many changes that we
10 had done on the architecture.

11 Could you just go back over your comments
12 on 10th Street?

13 MR. TUMMONDS: Sure. So, one of the
14 concerns raised by the Court of Appeals was that
15 there wasn't anything in the order that
16 specifically talked about how this project
17 appropriately addressed the upper Northeast
18 element, 2.6.1, which said special care should be
19 given to those lower scale residential uses. I
20 think in fact this Zoning Commission did give
21 plenty of attention to protecting those lower
22 scale residential uses. That was by requiring
23 that this project have the setbacks that it have,
24 that it have the open space between that last row
25 house on 10th Street and this project. That it

1 have the step-down in heights. That it have those
2 architectural details. I think that you had, for
3 lack of -- you did do that.

4 What I think the Zoning -- what the Court
5 of Appeals wants to hear from the Zoning
6 Commission is you to specifically say, we
7 recognized that we were required to give special
8 care to those houses and we did. Unfortunately I
9 think there was a lot of, in the Court of Appeals
10 requesting the Zoning Commission to say
11 specifically, things that you did do.

12 MR. TURNBULL: Thank you.

13 CHAIRPERSON HOOD: Mr. Tummonds, on your
14 last point, I thought that this Commission did do
15 that. And being considerate and being respectful
16 of the houses on 10th Street and the whole
17 neighborhood as a whole. I know specifically this
18 Commissioner did and I'm just trying to -- and I'm
19 not too familiar with everything that the Court of
20 Appeals does. I don't know if they read our
21 transcripts. I know there occasions they read
22 parts of it. But I know specifically the
23 concerns, at least from my standpoint that I heard
24 from the 200 Footers and those of concern of
25 opposition, was that we needed to be more

1 respectful and with the homes in that area. And I
2 thought that was why we got to some of the design
3 elements that we got to.

4 So I'm just -- maybe we have to be a
5 little more specific because I know if the
6 transcript was read, I think that touched on that.
7 I'm not sure exactly what the courts -- what more
8 they want, but we will elaborate on that to that
9 point.

10 But anyway, any other questions up here?

11 Okay. Thank you. Mr. Brown.

12 MR. BROWN: Yes, sir.

13 CHAIRPERSON HOOD: You ready? Give you
14 time to swap out or are we using the same piece of
15 equipment? Okay.

16 MR. BROWN: Mr. Chairman, Members of the
17 Commission. I put up on the slide, the first
18 slide there, the remand issues from the Court of
19 Appeals. I will go over them right down the line
20 one through four.

21 The first issue that the Court asked you
22 to address is, is the project a moderate or medium
23 density use. And the reason this is important is
24 because in a PUD rezoning the Commission must find
25 that it's not inconsistent with the comprehensive

1 plan. This is both a statutory and regulatory
2 requirement.

3 And the comprehensive plan framework
4 element itself specifies that the future land use
5 map carries the same legal weight as the text of
6 the comprehensive plan as it shows the general
7 character and distribution of recommended and plan
8 uses.

9 Now you've heard argument this evening
10 about how this project is really a moderate
11 density project, but let's look at the basic
12 facts. It's, at its height, a 6.5 floor
13 residential apartment building at 60 feet and 8
14 inches in height, with ground floor retail along
15 Monroe Street, which is clearly the minority, just
16 six percent of the floor area of the project. The
17 remaining 94 percent is essentially a residential
18 apartment building.

19 Now the land use categories in the flum
20 were outlined in one of the staff set-down reports
21 showing that once we got this cleared up on appeal
22 that a majority, 62 and a half percent of the
23 property is on the -- is recommended for low-
24 density residential. That is yellow on the flum.
25 And a minority of the property is recommended for

1 mixed use at either a lower or moderate density
2 level. And it's kind of an orange stripe on the
3 flum, and I've just sort of reproduced here the
4 staff's description of the site.

5 The next slide shows -- this is the
6 applicant's own slide showing what the project
7 would look like when actually built. And you can
8 see from their own picture how overwhelming this
9 building is in relation to its neighbors on the
10 south, on the east, and on the west.

11 And in particular there is nothing
12 anywhere near this size east of the tracks in the
13 Brookland neighborhood. This would be one of a
14 kind --

15 CHAIRPERSON HOOD: Excuse me for
16 interrupting. Let's stop the clock.

17 I know there's concern about not cutting
18 the lights off. To be frankly honest, they're
19 more visible to us looking here on the table, what
20 we have in front of us. So I just wanted to make
21 that -- I see some people getting anxious.

22 MR. BROWN: All right.

23 CHAIRPERSON HOOD: I want to make sure
24 we're doing this fair. It's better for us to
25 actually look at what you provided us. I don't

1 know if my colleagues feel the same way. It's
2 better, because seeing some of the stuff they
3 can't see it, so I want to make sure we get the
4 full grasp. Okay?

5 MR. BROWN: Thank you.

6 CHAIRPERSON HOOD: So we can turn the
7 lights back on and everybody else just hold tight.
8 Okay? And we stopped the clock. Make sure we add
9 the time.

10 Okay. Okay. You may begin. Thank you.

11 MR. BROWN: So what did the Court have to
12 say about this? The Court's opinion says the
13 following. "The project would appear to be a
14 medium density residential use because it would
15 stand six stories high and offer over 200
16 apartment units. The Commission's explanation of
17 its decision to approve the project relies heavily
18 on the premise that the project would be moderate
19 density use. And you've heard tonight, once
20 again, they're not trying to defend this as a
21 medium density use. They're trying to package it
22 as moderate density.

23 But let's look at what the Court said
24 about what the flum itself says the definition of
25 moderate density use is. It quotes from the flum

1 and says that moderate density residential use
2 applies to low-rise apartment buildings, where as
3 in contrast medium-density residential use applies
4 to mid-rise, four to seven story apartment
5 buildings. This is the Court quoting from the
6 flum.

7 And now on the next page I've actually
8 put some of the flum into the slides. The first
9 page describes what the future land use map and
10 the categories are all about and what its purpose
11 is. It's part of a plan and it shows the policy
12 on future land uses across the city. Moving on to
13 the next page we see the definition of moderate
14 density residential where low-rise apartments are
15 integral to the definition. And you see that one
16 of the particular examples of moderate density
17 residential is row houses that look an awful lot
18 like the neighboring properties along 9th Street,
19 confronting this particular project.

20 In the next picture you see from the flum
21 what constitutes medium density residential. And
22 it describes, as the Court did, the mid-rise four
23 to seven story apartment buildings. And you look
24 at the picture here. It's worth a thousand words
25 in relation to what has been applied for here.

1 The major difference between the picture that's
2 shown in the flum and the applicants is that the
3 applicants is in many respects even taller than
4 this, despite the fact that it's stepped down a
5 little bit toward the end.

6 So what we submitted to you in the summer
7 of 2013 were proposed findings on this issue, and
8 I'm just going to read to you from paragraph 90 of
9 our proposed findings, just a little bit. The
10 project would extend what is a predominantly
11 medium density residential use into an area, the
12 majority of which is recommended on the flum for
13 continuation of low-density residential use. We
14 regard that as open disregard of the land use
15 designations on the flum.

16 But now we've heard several arguments for
17 why one should ignore the rather straight-forward
18 designations on the flum. The first is that it's
19 not parcel specific, and there's no specific
20 development standards, and it's not a zoning map.

21 Well, the flum is sufficiently detailed
22 for guidance at, at least the square level.
23 That's clear from a reading of the language of the
24 flum in section 226.C, and that is certain true
25 for Square 3829 as shown on the prior diagram.

1 You can readily figure out from that diagram that
2 this project occupies most of Square 3829, and you
3 can see what the land use categories are for that
4 square.

5 Now, in the comprehensive plan they don't
6 use zoning categories. They use land use
7 categories that have the potential to encompass a
8 number of zoning categories. You can't look at
9 the zoning categories and say they are or they are
10 not consistent with the flum. You have to look at
11 the nature of the use in relation to the narrative
12 description of the use in the category to
13 understand what the map is trying to achieve. And
14 in this particular case what they are saying is
15 that a mid-rise apartment building, like the Court
16 essentially seems to have found, is a medium
17 density residential.

18 Then the argument is that the flum must
19 be interpreted in conjunction with the text of the
20 comprehensive plan. Well, here in this case this
21 leads one right back to compliance with the flum
22 because under land use element 1.3.1 the flum is
23 the guidance for density in the vicinity of Metro
24 stations. And under upper Northeast element
25 1.1.2, if you look at this project as residential

1 in-fill, that also must be consistent with the
2 flum land use designations.

3 The third argument is that the Commission
4 has the discretion to approve PUD rezoning with
5 flexibility to depart from the flum limitations.
6 Well, there we to a very limited extent, agree
7 with the applicant. The flum is not a strait-
8 jacket.

9 Square 3829 is part low and part moderate
10 density. So if compatible I would say that a
11 moderate density PUD project, a genuinely moderate
12 density project could bleed over into the low
13 density areas of the flum if this Commission, in
14 its discretion, thought that was an appropriate
15 outcome. But leapfrogging from low to medium
16 without even pausing for moderate, we regard that
17 as a departure from the statutory command of
18 comprehensive plan consistency because to leapfrog
19 like that renders that command meaningless.

20 Finally, the argument is that the
21 Commission has discretion to rely, instead, on
22 competing policies in the comprehensive plan. Our
23 response here is that flum consistency is a
24 requirement of D.C. Law and it should be adhered
25 to in the absence of an irreconcilable conflict.

1 In this case the alleged competing policy is the
2 encouragement of transit oriented mixed use near
3 Metro stations. There is, however, no
4 irreconcilable conflict because there is no
5 recorded evidence that this policy cannot be
6 furthered with a less dense and intrusive
7 redevelopment of square 3829. Indeed, OP
8 initially recommended in its set down, PUD
9 rezoning to the C2A category.

10 And working within the C2A category an
11 appropriate moderate density project could readily
12 be imagined.

13 The second issue is addressing upper
14 Northeast element 2.6.1. Special care should be
15 taken to protect the existing low-scale
16 residential uses along 10th Street.

17 Well, what was on Square 3829 at project
18 approval? There were six single-family residences
19 that would be dwarfed by the project, and there
20 were five single-family residences to be raised.
21 Three of them on 10th Street.

22 The next picture, which is part of the
23 applicant's presentation, shows all of these
24 houses; the three -- the five dark ones showing up
25 in orange on there are the ones that were to be

1 raised under the project. The yellow ones are the
2 two blocks of three row houses each, which
3 continue to be there today.

4 What did the Court of Appeals remand
5 opinion say about this? Here's the quote. At
6 first blush it's difficult to see how approval of
7 a project that requires the tearing down of five
8 residences along 10th Street, actually two of them
9 are along Lawrence, and the erection of a six
10 story building next to six other residences
11 consistent with taking special care to protect
12 those residences. How much common sense is that?
13 Tearing down is not taking care to protect.

14 Then they say, well, we recognize that
15 taking special care to protect something does not
16 require protection at all costs, no matter how
17 great. Nevertheless we conclude the Commission
18 did not give adequate consideration to the policy
19 favoring special care. So the question is, how is
20 the Commission supposed to take special care? And
21 again, we have clear guidance from the Court.

22 We assume that if showing special care
23 would preclude the Commission from advancing other
24 policies, then the Commission could resolve the
25 conflict by deciding to advance those other

1 polices, rather than show that special care. In
2 other words, we assume that the policy favoring
3 special care does not flatly bind the Commission.
4 Even so the Commission does not say that the only
5 feasible way to advance other important policies
6 would be to tear down five residences and build a
7 six story building next to six of the remaining
8 ones. Those words, only feasible way, are really
9 telling because the Court goes on and says that
10 tearing them down would not be necessary to
11 complete the project. They do say that, but
12 that's quite different from concluding that the
13 project would be the only feasible way to advance
14 the other policies.

15 Put differently, the Commission has not
16 explained why the various policies at issue
17 conflict so as to require a tradeoff among them.

18 The various policies at issue don't
19 conflict. They don't require a tradeoff. The
20 flum controls the density in the vicinity of Metro
21 stations. That's land use element 1.3.1 and
22 controls it for residential infill here as I've
23 said, upper Northeast 1.1.2. And the special care
24 language in 2.6.1 is preceded by the following
25 language.

1 "Encourage moderate density mixed use
2 development on vacant and underutilized property
3 in the vicinity of the Brookland C.U.A Metro
4 Station."

5 And our proposed order talks about
6 encouraging moderate density mixed use
7 development. Where is the evidence that the only
8 feasible way to achieve mixed use development is
9 with medium rather than moderate density? OP
10 supported moderate density. We went on record in
11 support of a C2A outcome as moderate density. The
12 applicant recognizes only moderate density is
13 consistent with the comprehensive plan. Indeed
14 its argument tonight is to fit within that
15 umbrella. They repeatedly used the word moderate
16 instead of medium in their proposed findings. But
17 medium by any other name is still medium.

18 And I just want to emphasize here that
19 trying to ameliorate the effects of a medium
20 density project at the margin does not change it
21 into a moderate density project. So the
22 Commission should reject the magical effort to
23 convert a medium density project into a moderate
24 density project, and deny approval. And the
25 Commission should explain its reasoning in

1 deciding the case. That's the fourth issue.

2 The Commission has been given ample
3 resources to do this. It has two competing
4 proposed orders from the summer of 2013. We
5 drafted one that has many findings and conclusions
6 that mirror the applicants. The differences
7 between them are highlighted in our 14 page
8 identification of errors in the applicant's
9 proposed order. With that and the Court of
10 Appeals opinion in Durant II, which makes clear
11 what pivotal issues must be resolved, the
12 Commission should resolve these competing
13 positions, not adopt verbatim either one of the
14 proposed orders, and explain why it is agreeing
15 with the applicant and not with us. Or why it is
16 agreeing with us and not the applicant. And
17 explain its conclusion.

18 And we submit that the proper result here
19 is denial. Although the Commission should leave
20 open the door for revising the project into a
21 genuine moderate density development which would
22 be at the highest zone in the Brookland area east
23 of the tracks, C2A. Thank you.

24 CHAIRPERSON HOOD: Okay. Thank you, Mr.
25 Brown. Any questions, colleagues?

1 Okay. Vice Chair Cohen.

2 MS. COHEN: Okay. I can't specifically
3 direct you to a special page, but where you talk
4 about Court of Appeals remand opinion.

5 "Nevertheless we conclude --" this is the Court of
6 Appeals, "-- that the Commission did not give
7 adequate consideration to the policy favoring
8 special cure for the residences along 10th Street.
9 The applicant describes certain issues that were
10 raised by various commissioners, especially with
11 regard to the massing, the setbacks, the design
12 details, the design architecture specifically,
13 that were sensitive to those residences.

14 Can you respond to that specifically,
15 that we had -- no, the applicant now elaborates
16 those.

17 MR. BROWN: I certain would agree that
18 efforts were made to reduce the dramatic contrast
19 between the use proposed and the existing use.
20 But that should be done in every case. And that
21 should be done even in the case of a true moderate
22 density project. We should have started with that
23 process from the baseline of a moderate density
24 project, rather than from the baseline of a medium
25 density project. And we would have achieved a

1 much more harmonious result. Probably something
2 in the range of 40 to 50 feet high with similar
3 transitions down to reduce the contrast with the
4 existing single-family residences along 10th
5 Street.

6 CHAIRPERSON HOOD: Any other question?
7 Okay. Any other questions? Commissioner May?

8 MR. MAY: All right. So first on the
9 question of media versus moderate density, you in
10 your own argument included language from the
11 comprehensive plan that cites R5B as being
12 permissible within the moderate density category,
13 and the medium density category as well. Is that
14 correct?

15 MR. BROWN: I'm sorry, Commissioner, but
16 I simply do not regard the future land use map as
17 a listing of permissible zones. That's not what
18 it's about.

19 MR. MAY: I understand that. But I'm
20 asking you about what was in your argument. The
21 question is, essentially, we are given in the
22 comprehensive plan, guidance that talks about
23 consistency, and in many cases, things being
24 generally consistent. And the future land use map
25 does direct that certain zones are typically

1 considered to be consistent or not inconsistent
2 with the -- excuse me, with the comprehensive
3 plan.

4 So an R5B is included as one of those
5 zones that are possible. It's not one of the ones
6 that's typically considered moderate, but it is
7 possible, correct?

8 MR. BROWN: That is right.

9 MR. MAY: Right. And medium density
10 explicitly says it typically includes R5B. So you
11 admit the thought that a 60 foot building could
12 conceivably be consistent or not inconsistent with
13 a comprehensive plan because it says so in the
14 future land use map language.

15 MR. BROWN: I would say that when you
16 have a zone which appears in two different land
17 use categories in the flum, then that means
18 essentially that the zone itself has a range of
19 development potential that would, depending upon
20 the particular development, fit in one or the
21 other category. That is not a blanket endorsement
22 that the highest level of development permissible
23 in that zone is appropriate for the lower of those
24 two flum categories.

25 MR. MAY: So when would it be? When

1 would it be permissible to go to that high end of
2 moderate? Perhaps when it is --

3 MR. BROWN: When --

4 MR. MAY: -- in the process of balancing
5 the other comprehensive plan direction?

6 MR. BROWN: I would say it would be -- I
7 would say first of all, one should look at the
8 overall narrative description of land use
9 categories for that particular category and ask
10 yourself whether or not this particular project is
11 generally consistent with that narrative
12 description. That's where I would go in this
13 particular case and turn to the language of low-
14 rise or low-rise garden apartments in the one
15 category, and mid-rise apartments in the other
16 category. And since this project is plainly a
17 mid-rise type apartment building, it would fit
18 into the larger category, notwithstanding the fact
19 that the lower category technically has the R5B
20 zone in it.

21 MR. MAY: Okay. We heard from the
22 opposing counsel that their diagram of what would
23 be matter of right was consistent with the small
24 area plan. In other words, the small area plan
25 indicated that along Monroe that a C2A type zone

1 or a 50 foot high commercial mixed use kind of
2 zone is appropriate along the entire stretch of
3 Monroe between 9th and 10th.

4 Now, you argued that a C2A zone would be
5 appropriate for at least a portion of the site;
6 that that would be consistent with the comp plan.
7 So would, along 10th Street for that stretch that
8 is part of the project, would a C2A in your
9 interpretation of the entirety of direction that
10 we get from the comprehensive plan and the small
11 area plan, would C2A, along 10th Street for that
12 stretch of this project, be appropriate?

13 MR. BROWN: I think when you look at the
14 overall comprehensive plan and you look at the way
15 development is occurring in the city, you have to
16 take special note of the magnetism between
17 residential development and Metro stations, and
18 the fact that land becomes more valuable around
19 those stations and it's appropriate for higher
20 density development. I think that the residents
21 of Brookland have come to the understanding that
22 they simply cannot -- things cannot stay the way
23 they were. That new development has to be denser
24 and even if it creates some incompatibility with
25 the goal of protecting existing long-standing

1 residential neighborhoods, that goal has to give
2 way to a certain extent in the vicinity of Metro
3 stations.

4 But the comprehensive plan, again and
5 again, talks about the protection of around Metro
6 stations and the preservation of the residential
7 character, the preservation of the residential
8 character, by encouraging as appropriate, moderate
9 density development. Not medium density
10 development in this particular case.

11 So I think that moderate density
12 development takes us beyond having just look alike
13 apartments or row houses next door to the ones
14 that are already there. We're looking forward to
15 the future and it has to acknowledge that. That's
16 why my clients have basically unequivocally said,
17 if this project were reimagined, the entire
18 project, as a C2A project, they would be there in
19 support of it, assuming that appropriate
20 adjustments were made to ameliorate immediate
21 impacts right next to the particular homes that
22 are still standing on the block.

23 MR. MAY: Okay. Well, you took a while
24 but you eventually did answer my question. I
25 appreciate that.

1 MR. BROWN: I'm sorry.

2 MR. MAY: Sorry. Thank you.

3 CHAIRPERSON HOOD: Okay. Mr. Turnbull,
4 any questions?

5 MR. TURNBULL: Thank you, Mr. Chair. Mr.
6 Brown, I mean the applicants did address the fact
7 about -- I mean, you talk about a range of
8 development. This project does not reach any
9 capacity of what it could really be at. There has
10 been a lot taken into account to address
11 neighborhood concerns. How do you respond to
12 that?

13 MR. BROWN: Again, I would answer the
14 same way I answered Commissioner Cohen. You're
15 starting from too high a point when you start
16 peeling away to make it more compatible. I agree
17 that various things were done to soften the impact
18 of this project, but it should have started from a
19 lower level rather than from a 60 foot level.

20 And we could have that kind of adjustment
21 from a much lower project if we started with
22 something that was truly moderate density. But in
23 fact we would probably be at the upper end of
24 moderate density considering that we are adjacent
25 to a Metro station.

1 And I think that a perfectly workable
2 project could be achieved that is really not that
3 far from this particular project. It's just that
4 this one goes a bridge too far under the standards
5 in the comprehensive plan, all of them considered
6 as a whole.

7 MR. TURNBULL: Well, this whole area is
8 really not as low-scale as we've been lead here.
9 I mean, across 10th Street there are three story,
10 four story buildings, across from those
11 residential homes.

12 MR. BROWN: I believe they are three
13 story.

14 MR. TURNBULL: There's one at least four
15 on the corner. It looks like it's at least four
16 stories on the corner.

17 MR. BROWN: I'm not sure that's in the
18 record.

19 MR. TURNBULL: I'm just looking at your
20 map that you provided. I'm looking at the aerial
21 view. And I'm just looking at there's a lot of
22 larger scale buildings on 10th Street. Maybe not
23 as large as what the applicant is proposing, but
24 there are some very large scale buildings,
25 especially right across the corner. That's got to

1 be at least a three story, four story building.

2 And that was probably built as a matter
3 of right, I am assuming.

4 MR. BROWN: And what was on this site
5 before the project was approved were additional
6 single-family residences right next to the ones
7 that are not part of the project. The entirety of
8 the west side of 10th Street between Monroe and
9 Lawrence was single family residences.

10 MR. TURNBULL: Okay. Thank you.

11 CHAIRPERSON HOOD: Mr. Brown, you mention
12 upper moderate. And for me, looking at this whole
13 PUD application that was in front of us, it was
14 about avoiding extremes. So explain to me how we
15 get to upper moderate. I'm confused by your
16 statement.

17 You said upper moderate, and when I look
18 up the definition, when I look at the definition
19 of moderate, and the way we approach this case,
20 which is under 2.6.1, Special Care, and today in
21 your oral argument you mentioned upper moderate.

22 Which moderate means for me, is avoiding
23 extremes. So I'm confused by now you threw in the
24 word upper moderate. So where is the tipping
25 point? Or who decides that? Is it --

1 MR. BROWN: Well, I'm looking at the
2 language in the flum and it says as follows, "This
3 designation is used to define the District's row
4 house neighborhoods as well as its low-rise garden
5 apartment complexes. The designation also applies
6 to areas characterized by a mix of single-family
7 homes, two to four unit buildings, row houses, and
8 low-rise apartment buildings."

9 I think that there is some flexibility in
10 there to look beyond simply two and three story
11 apartment buildings, as long as you're not going
12 up above four, which is -- you know, there's not a
13 precise boundary between moderate and medium.
14 They say in the next page that medium is midrise,
15 four to seven stories. But I think this
16 Commission in its discretion could conclude that a
17 four story building could be characterized as
18 moderate if it's appropriately transitioned along
19 the lines that have been argued here tonight.

20 CHAIRPERSON HOOD: But, Mr. Brown, your
21 word tonight was upper moderate. I'm trying to
22 figure out what is upper moderate.

23 MR. BROWN: What I'm saying is that upper
24 moderate in the context of apartment buildings
25 would be four stories. The way I look at the --

1 the way I would parse the definitions of moderate
2 and medium in the flum, four is right there at the
3 margin between the two.

4 CHAIRPERSON HOOD: Okay. So nowhere in
5 the guidance other than your interpretation is
6 upper moderate use, right?

7 MR. BROWN: Well, I certain wouldn't want
8 you to be hung up on the word upper moderate.
9 What I'm suggesting is that this Commission could
10 conclude that if the project came back to you at a
11 four story level, you could justify it within the
12 flum as consistent with the intent of the plan in
13 light of all of the other policies.

14 CHAIRPERSON HOOD: Right. Understand.
15 But I mean, you and I may disagree what upper
16 moderate is, because I didn't use it. That's your
17 word.

18 MR. BROWN: All right.

19 CHAIRPERSON HOOD: Okay. All right?
20 Okay. Okay. Any other questions up here? Okay.
21 Thank you. Hold tight.

22 Oh, that's right, you had -- okay. What
23 is it, four minutes?

24 MR. TUMMONDS: Four minutes.

25 CHAIRPERSON HOOD: Okay. I'm sorry. You

1 may begin.

2 MR. TUMMONDS: Thank you. Mr. Hood, you
3 posed the question, who decides what is moderate?
4 And the answer is, you do, the Zoning Commission.
5 The Zoning Commission has the professional
6 expertise based on all the factors that are
7 presented to you with the guidance from the
8 comprehensive plan, from the written elements,
9 from the future land use map, from the generalized
10 policy map, from the small area plan, to determine
11 whether a specific project is moderate or medium.
12 A specific project is appropriate for its context
13 or not. There is no bright line in the
14 comprehensive plan asserting what is moderate or
15 medium. That is your job. You did that job in
16 this case.

17 There is a lot of discussion tonight
18 about the definitions. But that's not what the
19 guidance that we heard from *Durant 1* talks about
20 how to use the comprehensive plan. *Durant 1*,
21 referring to this case said, the plan is not a
22 code of prohibitions. It is an interpretive
23 guide, which the Commission must consider
24 holistically. It provides a broad statement of
25 policy to guide future public decision making.

1 You appropriately used that guide and you
2 appropriately deemed that this project, 60 feet, 8
3 inches tall, FAR of 3.31 is appropriately deemed
4 to be a moderate density project. It is
5 appropriate for this site.

6 With regards to the special care taken
7 for the 10th Street neighbors, I again go back to
8 *Durant 1's* decision by the Court of Appeals. It
9 said that even if a proposal conflicts with one or
10 more individual policies associated with the
11 comprehensive plan, this does not in and of itself
12 preclude the Commission from concluding that the
13 action would be consistent with the comprehensive
14 plan as a whole. Your decision with regards to
15 this special care that was taken in this project
16 for the protected, the lower scale residential
17 uses of those 10th Street homes, by requiring the
18 moderation, the differentiation in height,
19 massing, scale, architectural detailings. You did
20 take special care in protecting those uses.

21 Mr. Turnbull noted the house -- the
22 institutional structures on the other side of 10th
23 Street. During the course of this case we
24 presented testimony to show how building height
25 alone doesn't address the ability of a building to

1 be in accordance with feel, commensurate with the
2 town houses. We noted that the building across
3 the street which didn't have individual access
4 points, it had a large brick kind of blank wall.
5 That building is not in context, we believe, with
6 the lower scale residential feel of 10th Street.
7 This project is.

8 For those reasons and for all of the
9 other issues that we discussed earlier this
10 evening, we appreciate your time, and once again
11 we ask that you affirm this case for a third time.
12 Thank you very much.

13 CHAIRPERSON HOOD: Okay. Thank you. Let
14 me just see, Ms. Schellin, Mr. Bergstein, do we
15 have anything else before us on this tonight?

16 MR. BERGSTEIN: No.

17 CHAIRPERSON HOOD: Okay. I want to thank
18 Mr. Brown, we thank you. I want to thank you, Mr.
19 Tummonds. And also I want to thank your two
20 assistants for the PowerPoint. And colleagues,
21 anything else?

22 I want to thank you all for your oral
23 arguments. We greatly appreciate it, and with
24 that we will close this oral argument hearing.

25 (Hearing adjourned at 7:24 p.m.)