GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 10-28(3)
Z.C. Case No. 10-28
901 Monroe Street, LLC
(Consolidated Approval for a Planned Unit Development and Zoning Map Amendment)
Order on Second Remand
June 29, 2015

This proceeding concerns an application submitted by 901 Monroe Street, LLC ("Applicant") for review and consolidated approval of a planned unit development ("PUD") and related amendments to the Zoning Map of the District of Columbia Parties to this proceeding, in addition to the Applicant, are Advisory Neighborhood Commission ("ANC") 5A, a group of residents residing within 200 feet of the subject property ("200-Footers"), and the Brookland Neighborhood Civic Association ("BNCA").

By order effective June 15, 2012, the Zoning Commission for the District of Columbia ("Commission") approved the applications subject to conditions (Z.C Order No 10-28). The 200-Footers appealed the Commission's decision to the District of Columbia Court of Appeals ("Court of Appeals" or "Court"). By decision dated May 16, 2013, the Court of Appeals remanded the case back to the Commission "for appropriate supplemental findings and related conclusions of law" on four specific issues (*Guy Durant v D C Zoning Commission*, 65 A.3d 1161 (D C. 2013) ("*Durant I*")) On November 8, 2013, the Commission issued an order responding to the Court's remand charge (*See* Z C Order No 10-28(1).) The 200-Footers appealed that decision to the Court of Appeals. By decision dated September 11, 2014, the Court of Appeals vacated Z C Order No 10-28(1)[1] and again remanded the case back to the Commission

> (1) to address whether the project should properly be characterized as a moderate-density use or a medium-density use; (2) to address more fully the Upper Northeast Area Element policy that special care should be taken to protect the houses along 10th Street; (3) to determine whether, in light of the Commission's conclusions on these issues, the Commission should grant or deny approval of the project, and (4) to explain the Commission's reasoning in granting or denying approval

(*Durant v D C Zoning Comm'n*, 99 A 3d 253, 262 (D.C 2014) ("*Durant II*"))

[1] The Court of Appeals did not vacate Z C Order No 10-28 and, therefore, the approval made by that order remained in place

On December 23, 2014, the Applicant submitted a letter requesting an additional public hearing in order to submit additional testimony and evidence addressing the Court's decision in *Durant II* On December 26, 2014, the 200-Footers submitted a letter in response stating that the group believed that an additional hearing to submit evidence was unnecessary, and instead suggested that the Commission allow the parties to present oral arguments on the points stated in the Court of Appeals' Opinion ("Opinion")

At its January 12, 2015 public meeting, the Commission considered these letters and decided to hold an oral argument, as suggested by the 200-Footers.

The oral argument was held on February 26, 2015. The participants were counsel for the Applicant and the 200-Footers. No additional evidence was permitted to be introduced into the record, although the Commission accepted hard copies of the PowerPoint presentations made by each attorney

The Commission deliberated upon the remand issues at its March 9, 2015 public meeting and voted 4-0-1 to once again grant the application. The Office of the Attorney General for the District of Columbia thereafter prepared a draft order for the Commission's consideration, which the Commission adopted at its regularly scheduled public meeting of June 29, 2015 [2]

FINDINGS OF FACT[3]

1 The project site consists of Lots 3, 4, 11, 22, and 820 in Square 3829

2. The project will be a mixed-use project with ground-floor retail, residential apartments in the floors above, and underground parking

3. The total gross floor area will be approximately 198,480 square feet, for a total density of 3.31 floor area ratio ("FAR")

4. The height of the building at its tallest point is 60 feet, eight inches However, the top floor of the building is set back from the edge of the building by five to seven feet, reducing its visual impact. The height of the building at this edge is 50 feet

5 The residential component of the project will include 205-220 residential units located on the second through fifth levels of the structure along Monroe and 10th Streets and on the

[2] The Commission, in a lawfully called and noticed closed meeting held immediately prior to the public meeting, provided the Office of the Attorney General with editorial comments The Office of the Attorney General then provided a final version of the order to the Office of Zoning with the changes from its submitted draft order shown The Commission's Chair reviewed the final version of the order for consistency with the Commission's comments

[3] These Findings of Fact are not intended to displace the findings made in Z C. Order No 10-28, but to highlight the principal facts upon which the Commission decided this remand

garden through sixth levels along 9th and Lawrence Streets. The main entrance to the residential units is on 9th Street.

6 The entire structure will be set back approximately 15 feet from the property line.

7. The façade materials of the building will include brick, stone, pre-cast elements, and pressed metal accents. All elevations of the building will include the same architectural materials

8 The project includes several features intended to reduce its impact to the one-family homes adjacent to or opposite the project as follows

a Along Lawrence Street, the project will include bays of approximately 14 feet in width, and the upper levels will be pulled further back from the street edge along Lawrence Street and the alley in the square in a series of setbacks,

b The areaways along Lawrence Street will range from a depth of six feet at the intersection of 9th and Lawrence Street to 13 feet at the alley on the eastern edge of the property;

c. At the eastern edge of the property along Lawrence Street, adjacent to the north south public alley in the square, the project will include a series of setbacks from the property line These setbacks will allow for the planting of trees on the property that will help soften the visual impact of the project on the other properties located along 10th Street in this square;

d The project's design will include a series of setbacks from both the street and side lot to mediate the height differential between the adjacent townhouses on 10th Street and the project At their lowest points, these setbacks will be nearly the same height as the nearest townhouses, and

e The project will incorporate architectural features that recall elements found in the adjoining townhouses, such as chimney masses and small mansard roofs The overall effect is one that will result in a compatible scale relationship between the existing and proposed buildings.

9. Three one-family dwellings on 10th Street, N E were demolished to make way for the project None of these dwellings were designated as Historic Landmarks nor included within an Historic District pursuant to the Historic Landmark and Historic District Protection Act of 1978, D.C Law 2-144, D C. Official Code §§ 6-1101 *et seq* (2012 Repl.) ("The Historic Preservation Act.")

CONCLUSIONS OF LAW

The PUD Project is Properly Characterized as Moderate-Density

The PUD regulations provide that the Commission must find "that the proposed PUD is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site" (11 DCMR § 2403 4)

The Future Land Use Map ("FLUM" or "Map") "is part of the adopted Comprehensive Plan and carries the same legal weight as the Plan document itself The Map uses colorcoded categories to express public policy on future land uses across the city" (10 DCMR A § 225 1, as codified at www dcregs dc gov [4])

The Comprehensive Plan offers guidance about the use and interpretation of the FLUM in 10 DCMR A § 226 In relevant part, the Comprehensive Plan states that the FLUM is not a zoning map and therefore is neither parcel specific nor does it establish detailed requirements for setbacks, height, use, parking, and other attributes (10 DCMR A § 226.1(a)) The Comprehensive Plan further provides that "by definition, the Map is to be interpreted broadly." (10 DCMR A § 226.1(a)) The Comprehensive Plan further states that a PUD, such as this, "may result in heights that exceed the typical ranges" cited in the FLUM. (10 DCMR A § 226 1(c))

More than half of the project's square footage is classified under the FLUM as Low-Density Residential The balance of the project is classified as Moderate-Density Mixed-Use and Low-Density Mixed-Use The Commission, in Z C Order No 10-28(1), considered the project to be moderate-density As noted in *Durant II*, this characterization was relied upon by the Commission with respect to its determinations that the project would not be inconsistent with the FLUM, the Upper Northeast Area Element, and the General Policy Map (99 A 3d at 260)

On appeal, the 200-Footers challenged the Commission's characterization, believing instead that the project was a medium-density residential development based upon the FLUM's definition of that term as applying to "neighborhoods or areas where mid-rise (four to seven stories) apartment buildings are the predominant use" (10 DCMR A § 225 5) Although the Court did not resolve the issue, it suggested that "the project would appear to be a medium-density residential use, because it would stand six stories high and offer over two hundred apartment units" (99 A 3d at 259.) The Court of Appeals disagreed with the 200-Footers that the Commission should be reversed, because it was "not in a position at this juncture to rule as a matter of law that the project is invalid on its face as irreconcilable with the Comprehensive Plan" (99 A 3d at 259

[4] As noted by www dcregs.dc gov, the version of the District Elements of the Comprehensive Plan codified on that website is not the official version of the plan The official version, as enacted by the Council of the District of Columbia, is published in an entirely different format as a hard copy version of Title 10-A All references to 10 DCMR, Subtitle A, made herein are to the web codification

(internal quotation marks omitted)) Rather, the Opinion remanded the matter for the Commission to address the arguments raised by the 200-Footers.

The FLUM's definition of moderate-density and medium-density residential are as follows:

> 225 4 **Moderate Density Residential** This designation is used to define the District's row house neighborhoods, as well as its low-rise garden apartment complexes The designation also applies to areas characterized by a mix of single family homes, 2-4 unit buildings, row houses, and low-rise apartment buildings. In some of the older inner city neighborhoods with this designation, there may also be existing multi-story apartments, many built decades ago when the areas were zoned for more dense uses (or were not zoned at all) The R-3, R-4, R-5-A Zone districts are generally consistent with the Moderate Density Residential category, *the R-5-B district and other zones may also apply in some locations*
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> 225.5 **Medium Density Residential.** This designation is used to define neighborhoods or areas where mid-rise (4-7 stories) apartment buildings are the predominant use. Pockets of low and moderate density housing may exist within these areas The Medium Density Residential designation also may apply to taller residential buildings surrounded by large areas of permanent open space. *The R-5-B and R-5-C Zone districts are generally consistent with the Medium Density designation, although other zones may apply*

(Emphasis added)

The definition of Moderate-Density Residential thus presumptively includes the R-4 through R-5-A zones and includes the R-5-B zone "in some locations" A planned unit development in an R-4 through R-5-B zone is permitted a height of 60 feet, and an R-5-B PUD is permitted a density of 3.0 FAR Both this maximum height and FAR may be increased by five percent to 63 feet and 3 15 FAR, respectively, "provided, that the increase is essential to the successful functioning of the project and consistent with the purpose and evaluation standards of" the PUD regulations (11 DCMR § 2405 3.)[5] This PUD has an approved height of 60 feet, eight inches and a density of 3.31 FAR, which the Commission concludes to be within the range of moderate-density developments contemplated by the FLUM definition of Moderate-Density Residential

The Commission therefore rejects the position of the 200-Footers that moderate-density precludes more than four stories in height (Transcript of Oral Argument of February 26, 2015 ["OA Tr."] at 42) Under such a restriction, a 60-foot building permitted in an R-5-A PUD would be limited to four stories, which is an absurd result Reading the FLUM as placing an

[5] Because the Applicant requested C-2-B zoning, it did not need to make this showing because both its proposed height and density are within the matter of right permitted in that zone district

absolute limit on stories would turn that map into precisely the type of "straitjacket" that the 200-Footers claim they wish to avoid (OA Tr at 27)

The Commission also notes that the FLUM definitions describe neighborhoods, not buildings. Further, as noted, the FLUM is not parcel specific, but recognizes that the grant of a PUD might result in the construction of a building that might not fit squarely within a particular label. The Commission does not believe therefore that a FLUM definition absolutely prohibits a PUD of any particular height or massing, provided that the approved building is compatible with the neighborhood as described in the applicable FLUM definition. This diversity of building type is important. As noted by Vice Chairperson Marcie Cohen during the deliberations, there are "many streets in Washington, D C that have buildings that are comprised of size, height, and mass, that live harmoniously side by side These blocks contain some of the most desirable properties in the city " (Transcript of Commission Meeting of March 9, 2015 ["Meeting Tr "] at 10-11)

The Commission concludes, as it has concluded before, that this particular building presents itself as a structure with much less height and density than it actually uses Though technically a building with a height of 60 feet, eight inches, the top floor of the building is set back from the edge of the building by five to seven feet, reducing its visual impact The height of the building at this edge is 50 feet In addition, the entire building is set back 15 feet from the property line Further design features and the provision of open spaces allow the building to seamlessly integrate into the neighborhood. As stated by Commissioner Michael Turnbull during the deliberations, "I think that when you look at this project as a totality, your feeling is that it is not a dense complex " (Meeting at Tr at 14) Mr Turnbull and the other Commissioners did not come to this conclusion based upon technical drawings alone, but insisted that the project's architect presented renderings of how this building would actually be viewed by its neighbors.

The 200-Hundred Footers' analysis fails because it focusses solely upon the building's measurement (height, number of stories, and FAR) rather than how the building will actually present itself to its neighbors. And by doing so, the 200-Footers would have the Commission treat the FLUM as the zoning map it was never intended to be The Commission agrees with the observation made by the Applicant's counsel during oral argument that "it's not just the massing, but is the treatment of that massing" (OA Tr at 17) and further agrees with his observation that this PUD exemplifies what the PUD regulations intend by "superior architecture " (OA Tr. at 14) It is the sum total of that superior and thoughtful architecture that results in a project that squarely fits within the meaning of a moderate-density residential development

Special Care was Taken to Protect the Existing Low-Scale Residential Uses along 10th Street, N.E.

Subsection 2 6 1 of the Upper Northeast Area Element (UNE) of the Comprehensive Plan, provides in part that "special care should be taken to protect the existing low-scale residential uses along and east of 10th Street NE " (10 DCMR § A 2416.3.) The Court of Appeals in

Durant II indicated that "at first blush it is difficult to see how approval of a project that requires the tearing down of five residences along 10th Street and the erection of a six-story building next to six other residences is consistent with taking special care to protect those residences." (99 A 3d at 261.) The decision suggested that the Commission could not balance the loss of these residences against the furtherance of other Comprehensive Plan policies unless the Commission also concluded that "the only feasible way to advance other important policies would be to tear down five residences along 10th Street and build a six-story building next to six of the remaining residences." (*Id.*)

As noted, the actual number of residence demolished along 10th Street was three But numbers aside, the Commission does not interpret UNE § 2 6 1 as a mandate to preserve any of these one-family dwellings. The policy refers to existing residential uses without identifying any particular address Nor does the policy use the word "preserve." Further, the Council of the District of Columbia could not, through adoption of the Comprehensive Plan, impose a historic preservation mandate The affirmative adoption of a law would be required. And such a law would be far more stringent than the Historic Preservation Act, which permit the demolition of recognized historic resources to make for projects of special merit (*See* D.C. Official Code § 6-1104 (e)) As noted, none of the demolished dwellings were landmarked or included within a historic district

The Commission thus does not read UNE § 2.6 1 as precluding the owner of any dwelling along 10th Street, N.E., such as the Applicant, from demolishing their property The fact that the Applicant demolished the structures to make way for this project, as opposed to rebuilding the structures, does not alter the analysis Rather, the Commission reads the provision as requiring that the project, as designed, protect those residential uses as will remain after its construction.[6] Thus, to answer the question posed by the Court of Appeals, since UNE § 2 6 1 does not in any way prevent the demolition of any dwelling on 10th Street, N E there is no "conflict" between the destruction of such dwellings and the furtherance of the many Comprehensive Plan policies accomplished by the project "so as to require a trade-off among them " (*Durant II*, 99 A 3d at 262)

Under this interpretation, the guidance of UNE § 2 6 1 that "special care should be taken to protect the existing low-scale residential uses along 10th Street NE" has been adhered to. As noted in the above Findings of Fact, the project's design will include a series of setbacks from both the street and side lot to mediate the height differential between the adjacent townhouses on the 10th Street and the project. At their lowest points, these setbacks will be nearly the same height as the nearest townhouses Further, the project will incorporate architectural features that recall elements found in the adjoining townhouses, such as chimney masses and small mansard

[6] During the oral argument, counsel for the 200-Footers appears to have conceded this point by indicating that his client would support the project as a C-2-A project "assuming that appropriate adjustments were made to ameliorate immediate impacts right next to the particular homes that *are still standing on the block*" (OA Tr at 38) (Emphasis added) Thus, the 200-Footers apparently consider the three dwelling expendable under one zoning category, but not another

roofs. The overall effect is one that will result in a compatible scale relationship between the existing and proposed buildings As stated by Commissioner Peter May during the deliberations, the "project evolved to a place where it steps down appropriately and meets those smaller homes in an appropriate manner, and it works well " (Meeting Tr. at 19)

The Application Should Again be Granted

In its final two remand instructions, the Court of Appeals in *Durant II* instructed the Commission

> (3) to determine whether, in light of the Commission's conclusions on these issues, the Commission should grant or deny approval of the project, and (4) to explain the Commission's reasoning in granting or denying approval

(99 A.3d at 262)

The Commission, in this order, has re-affirmed its earlier determination that the project is properly characterized as moderate-density residential and that special care has been taken to protect the existing low-scale residential uses along of 10th Street, N E. Since there has been no change in the Commission's position, it again approves the application.

As noted in *Durant II, t*he Commission previously concluded that the project would not be inconsistent with the FLUM because it would "extend a Moderate–Density Mixed–Use into areas that are designated Low-Density Residential and Low-Density Mixed-Use on the FLUM." The Commission also previously concluded that the project would not be inconsistent with the Upper Northeast Area Element because the project would be "a Moderate-Density Mixed-Use development of the type encouraged by the policies applicable to the neighborhood." Finally, the Commission previously concluded that the project would not be inconsistent with the General Policy Map, it "is compatible with the existing scale . of the area," and because "applicable written policies . encourage moderate-density mixed-use transit-oriented development... (99 A 3d at 259-60, *quoting,* Z.C. Order No 10-28 (1) (internal quotation marks omitted).) These conclusions, and all other related findings made in Z. C. Order Nos 10-28 and 10-28(1)[7] remain those of the Commission.

The *Durant II* remand did not extend to the other issues addressed in Z C Order No 10-28 and, therefore, the findings and legal conclusions relevant to those issues will not be repeated here.

DECISION

Based upon the above Findings of Fact and Conclusions of Law, as well as those Findings of Fact and Conclusions of Law stated in Z C Order No 10-28, the Zoning Commission for the District of Columbia hereby again **APPROVES** Zoning Commission Case No. 10-28.

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[7] Although vacated, Z C Order No 10-28(1) remains part of the record of this case and, to the extent relevant, its findings and conclusions are incorporated herein

On March 9, 2015, upon the motion of Chairman Hood, as seconded by Vice Chairperson Cohen the Zoning Commission **REAPPROVED** the application at its public meeting by a vote of **4-0-1** (Anthony J Hood, Marcie I Cohen, Peter G. May, and Michael G. Turnbull to approve, Robert E. Miller, not having participated, not voting)

On June 29, 2015, upon the motion of Chairman Hood, as seconded by Vice Chairperson Cohen, the Zoning Commission **ADOPTED** this Order by a vote of **4-0-1** (Anthony J Hood, Marcie I Cohen, Peter G May, and Michael G Turnbull to adopt, Robert E Miller, not having participated, not voting)

In accordance with the provisions of 11 DCMR § 2038, this Order shall become final and effective upon publication in the *D C Register*; that is, on August 7, 2015

ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION

SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING