Case Nos. 13-AA-366 through 13-AA-378

In the

District of Columbia Court of Appeals

CHRISTOPHER HOWELL, ET AL.,

Petitioners,

v.

DISTRICT OF COLUMBIA ZONING COMMISSION,

Respondent,

and

STANTON-EASTBANC LLC,

Intervenor.

Petition for Review of Zoning Commission Order No. 11-24

BRIEF OF INTERVENOR STANTON-EASTBANC LLC

July 29, 2013

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INTERVENOR' S CERTIFICATE AS TO PARTIES, AMICI AND COUNSEL

Pursuant to D.C. App. R. 28(a)(2), Intervenor Respondent Stanton-EastBanc LLC hereby submits the following Certificate as to Parties, Amici and Counsel, and the Partnership status of Intervenor Respondent Stanton-EastBanc LLC, a District of Columbia limited liability company.

Parties and Amici Before the Zoning Commission. Stanton-EastBanc LLC was the Applicant, represented by Greenstein DeLorme & Luchs, P.C. Additional parties included: Advisory Neighborhood Commission ("ANC") 6B, pro se; the Capitol Hill Chamber of Commerce, pro se; Eyes on Hine, pro se; Diverse Markets Management, LLC, represented by Andrea Ferster; Hine School North Neighbors, represented by Cornish Hitchcock; and Eastern Market Metro Community Association, pro se. There were no amici curiae in the proceedings before the Zoning Commission.

Parties and Amici Before this Court. The Petitioners are Wendy Blair, Mary A. Cole, Christin L. Engelhardt, Derek Farwagi, Jane Fisher, Mary Fraker, Marcella M. Hilt, Christopher Howell, Carol Press, Michele M. Rivard, Inez Sletta, Nancy Sturm and Marcella M. Wahba, represented by Oliver B. Hall. Eastern Market Metro Community Association intervened on behalf of Petitioners, and is represented by Oliver B. Hall. The Respondent is the District of Columbia Zoning Commission, represented by the District of Columbia Solicitor General by Donna Murasky. Stanton-EastBanc LLC intervened on behalf of Respondent, and is represented by Greenstein DeLorme & Luchs, P.C.

Partnership Status of Intervenor Respondent Stanton-EastBanc LLC. Stanton-EastBanc LLC does not have a parent corporation or subsidiaries and no publicly-held corporation holds more than 10% of its member interests.

Partners. The members of Stanton-EastBanc LLC are: Eastbanc, Inc. and Stanton Development Corporation, Dantes Partners and L.S. Caldwell & Associates, Inc.

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BRIEF OF INTERVENOR RESPONDENT STANTON-EASTBANC LLC

I. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Stripped of hyperbole, the issue presented raised by the Petitioners before this Court is:

Whether the Zoning Commission's decision to approve the PUD and related map amendment is arbitrary, capricious or otherwise contrary to law?

(Petitioner's Brief ("Pet. Brief" or "Brief"), at 1)

II. STATEMENT OF THE CASE

On November 23, 2011, Stanton-EastBanc LLC filed an Application with the District of Columbia Zoning Commission for approval of a Planned Unit Development and a Zoning Map Amendment with respect to a 3.16 acre property ("Property") on Capitol Hill. The Property is now occupied by the former Hine Junior High School, which has long been out of service. Stanton-EastBanc LLC had contracted to purchase part of this Property (the North Parcel) from the District of Columbia and to enter into a long-term ground lease with the District of Columbia with respect to the South Parcel. In addition to seeking approval of its planned development project for the Property (pursuant to the Planned Unit Development), Stanton-EastBanc LLC sought a Zoning Map Amendment to rezone the Property from R-4 to the C-2-B zoning classification, in order to bring the project within the parameters of that zoning classification.

The hearing extended over three evening sessions, beginning on June 14, 2012 and concluding on July 11, 2012. After receipt of voluminous testimony and receipt of 493 Exhibits, the Zoning Commission approved both the Planned Unit Development and the Map Amendment. The Zoning Commission's 69-page Order meticulously analyzed the evidence, and the applicable law, and concluded beyond question that the Planned Unit Development and Map Amendment were well-supported, and indeed would create a meritorious project that complied with all applicable legal standards and requirements.

Although the Petitioners before this Court did not seek and were not granted party status before the Zoning Commission, the Petitioners petitioned this Court for review of the Zoning Commission's Order on April 8, 2013. On May 8, 2013, the Eastern Market Metro Community Association, which had been granted party status before the Commission, intervened in this Court on behalf of the Petitioners.

III. STATEMENT OF FACTS

A. THE PROJECT

In its Application for a Planned Unit Development ("PUD") and Zoning Map Amendment to the District of Columbia Zoning Commission ("Commission"), Intervenor Respondent Stanton-Eastbanc LLC ("SEB") proposed to raze the former Hine Junior High School building and rezone the Property from R-4 to the C-2-B Zone District,[1] in order to develop a mixed-use residential, office and retail project on the Property along the 160 foot wide Pennsylvania Avenue, directly across from the Eastern Market Metro Station ("Project").[2] (Joint Appendix ("JA") 82, 93) The record contains extensive visual images which will assist in understanding the Project. (JA 956-1040).

Petitioners allege that they "do not oppose redevelopment of the Hine School site, where the PUD is to be located." (Pet. Brief, at 2) But they want the redevelopment done their way. In this desire, Petitioners fail to understand the applicable legal standards that govern actions by the Zoning

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[1] The C-2-B Zone District under a PUD allows an overall FAR of 6.0, a commercial FAR of 2.0 and a maximum height of 90 feet. The Project complies with these requirements. (See Tabulation of Development Data, JA 601-605)

[2] The Property is owned by the District of Columbia (the "District"). In 2009 the District, through the Office of the Deputy Mayor for Planning and Economic Development ("DMPED" or "Deputy Mayor"), issued a Solicitation for Offers and, after a competitive process, SEB was chosen to redevelop the Property. The District, through DMPED, entered into a Land Disposition and Development Agreement ("LDDA") for the disposition, ground lease and development of the Property with SEB. In July 2010, after a public hearing, the D.C. Council approved the LDDA. (JA 282).

Commission. Specifically, Petitioners fail to understand that the Zoning Commission is charged with making its decisions pursuant to clearly delineated legal standards and criteria. In the instant case, having considered the evidence of record and after applying applicable legal requirements, the Commission determined in its judgment that the Project (i) makes effective and productive use of D.C. surplus property that currently consists of a large abandoned school building and an unattractive surface parking lot, and (ii) will provide a vibrant mixture of office, residential, and retail uses on the Property, thereby generating new daytime and evening populations to enliven the streets, support existing businesses, make greater use of existing neighborhood services and facilities, and will enhance the use of public transportation infrastructure serving the immediate area. (JA 29) In addition, the Project will reconnect the 600 and 800 blocks of C Street which were closed to traffic in the early 1960's, thereby improving pedestrian, vehicular, and bicycle access through the community,[3] and will create a new plaza that will remove the existing surface parking lot in order to accommodate weekend vendors, outdoor café space, and other community activities to contribute to this location becoming a central focal point to the Capitol Hill community. (JA 29)

The Property is located within the Capitol Hill Historic District neighborhood of Ward 6, within ANC 6B02 and contains approximately 3.16 acres (137,614 square feet of land). The Property is bounded by Pennsylvania Avenue, S.E. (160 feet wide), and a small portion of D Street, S.E. on the south, an east-west public alley located at the southern end of Square 900 on the north, 7th Street, S.E. (90 feet wide) on the west, and 8th Street, S.E. (100 feet wide) on the east. The Project is directly across Pennsylvania Avenue from both the Metro Station and the seven acre

[3] The Applicant will reintroduce the currently closed portion of C Street between 7th and 8th Streets. The new street will be privately constructed, repaired and maintained, but will be subject to an easement that ensures public use. C Street will be available for vehicular and pedestrian traffic and parking, except when it is being used for weekend flea markets or pre-scheduled uses, community or special events. Commissioner May noted, "I think what is gained by having [C Street] be a private street is a substantial benefit to the community in the long run." (JA 1548)

L'Enfant Plan open space generally referred to as the Eastern Market Metro Plaza and Park. (JA 284, 370-372, for annotated aerial view See JA 957-963) The Eastern Market is located to the northwest of the Property, immediately across 7th Street. (JA 284)

Abutting and nearby property is commercially zoned by the C-2-A Zone District and the Capitol Hill Commercial Overlay District ("CHC").[4] (JA 284; See extract of zoning map, JA 123) A commercial area of shops and restaurants is located on 7th Street north of Pennsylvania Avenue and south of the Eastern Market, immediately across from the Property. Barracks Row Main Street, a commercial corridor along 8th Street south of Pennsylvania Avenue, is located across the Eastern Market Metro Station plaza from the Property. (JA 284)

The Property is designated on the Comprehensive Plan's Generalized Future Land Use Map as "Mixed Use: Moderate Density Residential and Moderate Density Commercial."[5] As concluded by the Office of Planning and the Commission, a PUD related C-2-B zoning for the Site would not be inconsistent with the Future Land Use Map or the Policy Map of the Comprehensive Plan.[6]

The Project has been designed to incorporate the best principles of New Urbanism and Transit-Oriented Development in order to enliven and make Pennsylvania Avenue and 7th Street pedestrian friendly, and to concentrate the mass and the greatest height of the Project across from the Eastern Market Metro Station, Plaza and Park on the very wide 160 foot Pennsylvania Avenue. (JA 590) The Project is a mixed-use residential, office, and retail project of approximately 461,946 square feet of gross floor area. (JA 589) It will provide 150-180 residential units comprising

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[4] The Property is not located within the CHC, per the Office of Planning's testimony (JA 1439-1440) and as acknowledged by the Commission (JA 1490-1491). Since the Overlay does not apply, it was not discussed in the Order.

[5] The Site is also located within an area designated under the Comprehensive Plan's Generalized Policy Map as a "Neighborhood Conservation Area." Densities in Neighborhood Conservation Areas are guided by the Future Land Use Map and OP and the Commission found the Project not to be inconsistent with the Future Land Use Map. (JA 879)

[6] See Office of Planning's Report (JA 879); Commission Order at JA 43-44, 58.

approximately 254,000 square feet of residential gross floor area ("GFA"), which equates to more than 50% of the density of the Project as a whole. (JA 60, 589) Twenty-nine percent (29%) of the residential units of the Project (46 units) will be affordable units.[7] (JA 597)

The Project will also provide 197,051 square feet of commercial GFA uses such as office, retail, service, child development center or other permitted uses in the C-2-B Zone District. (JA 590) The Project will have a total floor area ratio ("FAR") of 3.90 (JA 1255) and building heights will range from 47 feet to the tallest portion of the Office Component (described below) at 94 feet six inches on the corner of 7th Street and Pennsylvania Avenue. This maximum height of 94 feet six inches includes the flexibility granted by the Commission under § 2405.3 of the Zoning Regulations for a five percent (5%) increase in the height of the Office Building to accommodate the elevator overrun pursuant to the Plans. (JA 1294)

The Project contains two buildings, the North Building and the South Building as described in more detail below:

North Building

The North Building will be four stories and will step down to three stories on 7th and 8th Streets to reduce its visual bulk relative to the Eastern Market and existing row houses along 8th Street. (JA 591) Retail uses will also be located in the basement of this building. (JA 591-592) The North Building Amenities include a social room, fitness room, bicycle and individual unit storage areas. In addition, the windows of the social room will look out onto the front garden and a terrace with a pergola where residents will be able to sit and enjoy the landscape. (JA 1177, 1184)

The North Building will contain 34 workforce/affordable housing units. (JA 591) They will be in the Federal Low Income Housing Tax Credit Program. Five units will be reserved for

[7] A determination letter by the District of Columbia's Zoning Administrator ("ZA") exempting the Project from the Inclusionary Zoning requirements of the Zoning Regulations was submitted to the Commission on May 25, 2012. (JA 829)

households with incomes less than 30% of the AMI, and the remaining units will be reserved for households with incomes less than 60% of the AMI. (JA 333) Fifty percent (50%) of the units will be dedicated as residences for seniors 55 years old and older. These senior units will include design elements desirable to seniors such as grab bars in every bathtub and higher toilet seats. (JA 1184)

South Building

The South Building has three primary components:

a) The 8th Street Residential Component ("8th Street Residential Component"), facing 8th Street, will be predominantly four stories along 8th Street with a partial fifth floor that will be set back from the Building's facade. This Component will contain 82 residential units, including eight affordable units. (JA 591)

b) The Office Component is located at the corner of 7th Street and Pennsylvania Avenue. This office and retail building ("Office Component") is architecturally composed of three elements: an entrance element on Pennsylvania Avenue and D Street between 7th and 8th Streets; a six-story section with a setback seventh floor at the corner; and a 7th Street element that steps down to a variety of heights as it extends northward. (JA 592).

In response to community concerns, and at the request of the ANC, the Applicant agreed to remove the top floor from the Office Component along Pennsylvania Avenue and 7th Street. (See "Recent Reduction in Height & Mass", JA 1006-1021)[8] As a result of this design revision, the height of the Project along Pennsylvania Avenue and 7th Street was reduced by eleven feet eight inches (11' 8"). The Office Component contains a building height of 94 feet six inches at its highest point (the elevator over-run). However, notwithstanding Petitioners' fixation with height, only 3,500 square feet (or

[8] This hearing presentation compares SEB's earlier submission, the "prehearing statement", to the more recent "20 day submission" to show the final reduction in height and mass of the Office Component.

.0075%) of the total 461,946 square feet of GFA of the Project, is at the 94 feet six inches height. (JA 1006). The height of the building along the Pennsylvania Avenue façade is only 79 feet. Furthermore, the small portion of the Project at the greatest height is set back from this Pennsylvania Avenue façade by 47 feet and set back from the 7th Street façade by 37 feet. (JA 1021) Any impact from the maximum height is further ameliorated since the height then steps down as this Component goes north up 7th Street to a height of only four stories and fifty-two feet.[9]

c) The Plaza Component ("Plaza Component") is located on 7th Street and turns the corner and angles in a northeasterly direction to form the northern edge of the landscaped courtyard and the southern edge of a new urban plaza. This Component consists of four stories of residential apartments located over ground-floor retail and a partial fifth floor containing amenities and mechanical equipment. The Plaza Component will provide 42 apartment units, including four affordable units. (JA 592)

B. PREHEARING INTERACTION WITH THE COMMUNITY AND CONSEQUENT CHANGES TO THE PROJECT

SEB engaged in a very extensive and wide-ranging community participation process. This community outreach process involved ANC 6B, the Capitol Hill Restoration Society, Eastern Market Metro Community Association, Eastern Market Merchants Association and many other community organizations, stakeholders and individual neighbors. (JA 605-606, 835-845) Before the first zoning hearing SEB had attended 114 community meetings, 41 of which were with the

[9] The tallest portion of the Office Component, at 94 feet six inches of building height, is appropriate in view of the fact that it faces onto the very wide 160 foot right-of-way of Pennsylvania Avenue and the even wider Eastern Market Metro plaza (between 7th, 9th, C and D Streets) (JA 595). In addition, the distance between building faces of the Office Component on Pennsylvania Avenue and the building faces of the closest buildings to the south is greater than 350 feet. (JA 595-596)

ANC. (June 14, 2012 Hearing Tr. at 75) As a result of these processes and efforts, significant revisions to the Project were agreed to by SEB.[10] (JA 588)

C. PROJECT BENEFITS AND AMENITIES

The Zoning Commission's analysis of the Project's benefits and amenities ("Project Benefits and Amenities") spans 11 pages of its Order (JA 28-39), ranging from Design and Architecture (which the Commission described as "World Class" (JA 52)), to Historic Preservation, to Housing and Affordable Housing, all of which were made conditions to the Order. Benefits to the Capitol Hill neighbors were also numerous, ranging from a landscaped public plaza to be used for a variety of community, social, recreational and other uses during the week and made available for Flea Market use on weekends, financial contributions in the amount of $50,000.00 to support high-quality public landscaping of the District-controlled portions of the Eastern Market Metro Plaza and $75,000.00 for a playground at the park located immediately east of the Project, to ANC/Community Meeting Space and a Child Development Center. (JA 62-65, 68) In addition, the lengthy and detailed Memorandum of Agreement between SEB and the ANC (discussed in greater detail below) was determined by the Commission to constitute a Benefit and Amenity. (JA 62)

D. AGENCY PROCEEDINGS

On November 23, 2011 SEB filed an Application with the Commission for a consolidated review and approval of a PUD and related zoning map amendment for Lot 801 in Square 901 in the District of Columbia, Zoning Case No. 11-24. On June 14, 2012, the Commission commenced public hearings on the Application. The hearings continued on June 21, 2012 and concluded on July 11, 2012.

Concurrently, SEB and ANC 6B reached an agreement and signed a Memorandum of Agreement ("MOA") that set forth, in great detail, the agreements of the parties with respect to a

[10] These revisions included mitigating visual impacts previously described.

wide range of topics, including loading, deliveries, construction management, parking, traffic mitigation, the use of the Plaza, a retail plan, an open space management plan and many other matters. (For MOA See JA 1205-1251) In an unprecedented move, SEB agreed to incorporate the entire MOA as one of the conditions of the Zoning Commission Order. (JA 62).[11]

In addition, SEB entered into a Letter of Intent ("LOI") with Diverse Markets Management ("DMM") – the operator of the Sunday Flea Market at Eastern Market – and Washington Arts, Antiques, Crafts & Collectible Associates Inc. ("SFM") – the operator of the Saturday Flea Market at Eastern Market – to operate a weekend flea market in the Project's new C Street and Plaza area after completion of construction of the Project. As a result of this LOI, DMM (a party in the Zoning Case) withdrew its opposition.[12]

The Commission took final action to approve the Application at the November 19, 2012 public meeting. Zoning Order 11-24 ("Order"), at issue in this case, was published in the D.C. Register on March 8, 2013. (JA 1-69)

E. PARTIES TO THE ZONING CASE

In addition to SEB, ANC 6B was automatically a party to the PUD proceeding before the Commission. The Commission granted a request for party status in support of the Application from the Capitol Hill Chamber of Commerce ("CHAMPS"). The Commission granted requests for party status in opposition to the Application to the following groups: Eyes on Hine ("EOH"), Diverse Markets Management ("DMM") (which later withdrew its opposition), Hine School North

[11] Alan Bergstein, Esq., Section Chief of the Land Use and Public Works Section for the Office of Attorney General, stated at the November 19, 2012 Public Meeting that, "each condition in that MOA is considered a condition of the order and can't be changed unless there is a modification. So this is actually a very unusual case. I think it's the first I can ever remember where it has ever happened." (JA 1640)

[12] DMM submitted a letter into the record stating the group no longer opposed the Project. (Ex. 457)

Neighbors ("HSNN"), and Eastern Market Metro Community Association ("EMMCA"). EMMCA is the only party to further pursue its opposition by intervening in the present appeal.[13] (JA 3)

F. SUPPORT FOR THE PUD

The Application received support from many District offices and agencies, including DMPED, Department of Housing and Community Development ("DHCD"), National Capital Planning Commission ("NCPC"), the Office of Planning ("OP"), Department of Transportation ("DDOT"), Eastern Market Community Advisory Committee ("EMCAC") and ANC 6B. In addition, the Historic Preservation Review Board ("HPRB"), which considered the Project prior to consideration of the Application by the Zoning Commission, approved the Project. Furthermore, the Office of Zoning - which serves as the staff to the Zoning Commission - received letters, and the Zoning Commission heard testimony from CHAMPS (a party in support), community groups (including DC Preservation League (JA 1463-1466) and Coalition for Smarter Growth (JA 1466-1470) and numerous other persons, in support of the Project, such as the former chairman of the Urban Land Institute who is an architect, land planner and urban designer. (JA 1471-1474)

By letter dated June 18, 2012, Victor L. Hoskins, Deputy Mayor for Planning and Economic Development, emphatically stated his support for the Project and noted that the District has been involved in the Project throughout the planning process and reviewed and approved both the HPRB application and the PUD application. (JA 1053-1055) Deputy Mayor Hoskins praised the development for the creation of high-quality affordable housing as well as the significant additional tax revenue that the Project will generate for the District. (JA 1053-1055)

The Department of Housing and Community Development ("DHCD") concluded, among other things, that the proposed size and density were appropriate, and it supported the seven-floor

[13] The Petitioners in the present case, Christopher Howell, Wendy Blair, Mary Cole, Jane Fisher, Mary Fraker, Marcella Hilt, Christin Engelhardt, Derek Farwagi, Carol Press, Michele Rivard, Inez Sletta, Nancy Sturm and Marcella Wahba, were not parties before the Commission.

height for the office building at 7th and Pennsylvania Avenue, the re-opening of C Street between 7th and 8th Streets and how the bulk of the South Building is successfully broken up with varying heights. (JA 891-892) While DCHD strongly supported the affordable housing, and noted the amount of affordable units is laudable, it recommended that the Applicant take steps to assure that the design and materials used on the North Building have the same level of quality and finishes that the South Building will have, in order to mitigate the increased percentage of affordable units in the North Building as compared to the remainder of the development. (JA 892) As discussed infra, those steps were in fact taken by SEB, as the Commission found. (JA 55)

NCPC, by delegated action dated October 10, 2012, found that the PUD is not inconsistent with the Comprehensive Plan. (JA 1286-1288)

OP, whose recommendation is entitled to "great weight" under D.C. Code § 6-623.04, submitted a report, dated June 4, 2012, finding among other things that the scale of development proposed is consistent with the Comprehensive Plan's land designation for Mixed Use: Moderate Density Residential and Moderate Density Commercial Development on the site[14] and that the architectural façade of the development is compatible with the adjacent neighborhood as it highlights and emulates many of the historic, architectural elements of the historic buildings in the Capital Hill Historic District. (JA 867-890) The OP report recommended approval of the Project and requested that SEB comply with several conditions, all of which were satisfied by SEB. (JA 46)

OP provided testimony at the June 14, 2012 hearing recommending approval of the proposed PUD and Map Amendment with conditions referenced in the OP report.[15] OP testified that the proposed C-2-B Map Amendment was not inconsistent with the Comprehensive Plan, and

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[14] The Comprehensive Plan designates Moderate Density Residential and Moderate Density Commercial uses to correspond to the C-2-B zone, among others (See OP Report, JA 879)

[15] OP acknowledged that there had been significant changes to the Project since the case was set down due to the Applicant's work with the HPRB, OP, ANC and other members of the community.

did not object to the requested five percent flexibility in height, but asked the Applicant to provide additional information, which SEB provided to OP. (JA 1423-1426)

DDOT supported the Application and entered into a Post-Completion Traffic Impact Monitoring Agreement, dated August 7, 2012 with the Applicant. (JA 1199-1200)

As of the date of the Application, SEB had already appeared before the HPRB on three separate occasions. In total, the Applicant had four HPRB hearings. HPRB approved SEB' s site plan and overall architectural direction on April 28, 2011; HPRB approved the height, scale, and massing of the conceptual plans on June 30, 2011; and on August 4, 2011, HPRB approved the conceptual height and massing of the Project and approved the conceptual landscaping plan. (See Historic Preservation Office ("HPO") Staff Reports and HPRB Hearing Actions; JA 450-470) Subsequent to filing the PUD Application, SEB continued to work with the HPO and again appeared before HPRB on April 26, 2012 (JA 716-721), when HPRB found that the revisions made by SEB improved the compatibility of the conceptual plan and were consistent with the purposes of the Historic Preservation Act, and concluded that any substantial changes should return to the HPRB for further review. (See HPO Staff Report and HPRB Action; JA 722-730)

ANC Commissioner Ivan Frishberg, Vice Chair of ANC 6B, Chair of the ANC 6B Hine School PUD Subcommittee and single member district representative for ANC 6B02 (the single member district in which the Project is located) testified that ANC 6B voted to support the Application subject to the terms of a Memorandum of Agreement between the Applicant and the ANC. (June 21, 2012 Hearing Tr. at 88, See ANC letter, JA 1378)

Eastern Market Community Advisory Committee ("EMCAC"), supported the Project and focused its testimony on the need for parking and the continuation of the flea market. EMCAC is an organization created by D.C. Code § 37-111 which has statutory responsibility for advising city agencies on all matters related to the preservation and operations of Eastern Market. (Ex. 127)

G. OPPOSITION TO THE PUD

Although all of the District agencies commenting on the Project were in support of the Application, there were several community groups which were opposed and were granted party status. (JA 3) These groups were HSNN, EOH, EMMCA and DMM (DMM later withdrew its opposition).[16] In addition, the Office of Zoning received letters, and the Zoning Commission heard testimony, from other community groups and persons in opposition to the Project.

H. ZONING COMMISSION ORDER

On November 19, 2012, the Commission approved the PUD and related map amendment.[17] The Commission's 69-page, single-spaced Order includes 158 detailed findings of facts and draws 16 conclusions of law. (JA 1-69) Specific parts of that Order are discussed in the Argument Section of this Brief.

To summarize, the Commission agreed with the testimony of the Project architect, transportation expert, and the representatives of SEB, and stated that this Project does in fact provide superior features that benefit the surrounding neighborhood to a significantly greater extent than a matter-of-right development on the Property would provide. (JA 58)

The Commission found that the density and height of the PUD is appropriately dispersed on the PUD site and it appropriately relates to existing townhomes and other nearby commercial or residential buildings. The scaling down of the height of the Property was found by the Commission to be appropriate given its relationship to adjacent buildings and uses. (JA 58)

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[16] DMM withdrew its opposition to the Project as a result of entering into the LOI with SEB to operate a weekend flea market. (JA 1423)

[17] Christopher Howell and Wendy Blair, both non-parties to the zoning case, filed motions for reconsideration of the Order on March 25, 2013 and March 29, 2013, respectively. On April 8, 2013 the Commission denied the motions for reconsideration (April 8, 2013 Tr. 8-9; Zoning Commission Order had not yet been published in the D.C. Register).

With respect to the Comprehensive Plan, the Commission found that the approval of the PUD-related Zoning Map Amendment was not inconsistent with the Comprehensive Plan. The Commission agreed with the determination of OP in this case and found that the proposed Project was consistent with and fosters numerous policies and elements of the Comprehensive Plan. Specifically, the Commission found that the Project furthers the following Elements: Land Use, Transportation, Environmental Protection, Urban Design, and the Area Element. (JA 58)

The Commission found that the proposed PUD-related rezoning of the Property from the R-4 to the C-2-B Zone District, needed in order to construct the mixed-use development on the Property, is appropriate given the Comprehensive Plan designation for the Property, its location, the superior features of the PUD project, the goals and policies of the Comprehensive Plan, and other District of Columbia policies and objectives. The Commission concluded that the rezoning is consistent with the Property's designation on the Future Land Use Map and the Generalized Policy Map. (JA 58)

The Commission concluded that the Project amenities and public benefits of the Application are a reasonable tradeoff for the zoning flexibility requested by SEB. In evaluating the benefits proffered pursuant to 11 DCMR § 2403.10, the Commission concluded that the Project is acceptable in all proffered categories and superior in many. (JA 58)

IV. STANDARD OF REVIEW

This Court has consistently acknowledged that the Zoning Commission has the principal responsibility for assuring that zoning regulations are not inconsistent with the District's Comprehensive Plan (the "Comprehensive Plan"). Durant v. District of Columbia Zoning Comm'n, 65 A.3d 1161, 1166 (D.C. 2013); Foggy Bottom Ass'n v. District of Columbia Zoning Comm'n, 979 A.2d 1160, 1167 (D.C. 2009). As a result of the Commission's statutory role and subject matter expertise, this Court generally defers to the Commission's interpretation of the Zoning

Regulations and their relationship to the Comprehensive Plan. Durant, supra, 65 A.3d at 1167; 1330 Conn. Ave., Inc. v. District of Columbia Zoning Comm'n, 669 A.2d 708, 714 (D.C. 1995); Wis.-Newark Neighborhood Coal. v. District of Columbia Zoning Comm'n, 33 A.3d 382, 388 (D.C. 2011).

In the context of a PUD, the decision of the Zoning Commission must be affirmed by this Court so long as: (1) the agency has made findings of fact on each material contested issue; (2) there is substantial evidence in the record to support each finding; and (3) its conclusions of law follow rationally from those findings. Durant, supra, 65 A.3d at 1167; Watergate E. Comm. Against Hotel Conversion to Co-Op Apartments v. District of Columbia Zoning Comm'n, 953 A.2d 1036, 1042 (D.C. 2008). "Substantial evidence" is evidence which is sufficient to convince reasonable minds of its adequacy. Citizens Ass'n of Georgetown v. District of Columbia Zoning Comm'n, 402 A.2d 36, 42 (D.C. 1979).

This Court's function is not to determine whether a particular zoning action by the Commission is, or is not, desirable. Dupont Circle Citizens Association v. District of Columbia Zoning Comm'n, 355 A.2d 550, 560 (D.C. 1976); accord, Washington Canoe Club v. District of Columbia Zoning Comm'n, 889 A.2d 995, 998 (D.C. 2005) ("We do not reassess the merits of the decision. ..."); Watergate, supra, 953 A.2d at 1042. "If there is substantial evidence to support the [Commission's] finding, then the mere existence of substantial evidence contrary to that finding does not allow this court to substitute its judgment for that of the [Commission]." Brown v. District of Columbia Bd. of Zoning Adjustment, 486 A.2d 37, 52 (D.C. 1984) (en banc) (quotation omitted).

When these standards are applied to the instant case, it is clear that the decision of the Zoning Commission must be affirmed.[18]

[18] Despite Petitioners' contention that "stricter review of the record" is warranted in this case (Pet. Brief, at 13, fn. 3), Petitioners fail to show that the Commission in this case "adopt[ed], verbatim, the proposals of one party." Watergate, supra, 953 A.2d at 1045. Nonetheless, SEB welcomes an

(fn. cont'd)

V. ARGUMENT

Petitioners assert three arguments:

I. The Commission Improperly Decided this Case on An Incomplete Record, Based on Evidence Stanton-EastBanc failed to Submit. (Pet. Brief, at 10)

II. The Commission's Finding That a Map Amendment from R-4 to C-2-B PUD Is Appropriate Is Conclusory and Unsupported by Substantial Evidence. (Pet. Brief, at 15)

III. The Commission Erred by Approving the "Affordable Housing" Provisions of the PUD. (Pet. Brief, at 17)

None of these arguments has any merit, and Petitioners and Intervenor EMMCA do not have standing to assert them.

A. THE PETITIONERS AND INTERVENOR EMMCA LACK STANDING BEFORE THIS COURT

Of necessity, SEB first addresses the Petitioners' and Intervenor EMMCA's lack of standing before this Court. SEB includes EMMCA in the term "Petitioners" for the purposes of this discussion. In their Brief, Petitioners assert that they are "13 residents of the Eastern Market neighborhood of Capitol Hill, who live next to or nearby the proposed PUD." (Pet. Brief, at 1) Who among the Petitioners lives "next to" the PUD and what "nearby" means is not explained. How the Petitioners are legally injured is likewise unexplained. Similarly, apart from a general interest in enhancing the quality of life of residents of the District as a whole, Intervenor EMMCA alleges only that its purpose includes preserving the historical, architectural and aesthetic value of property and objects within the Eastern Market Metro Neighborhood. EMMCA thus also fails to allege any injury to EMMCA or its members. (Pet. Brief, at 2) As this Court held in York Apartments Tenants Ass'n v. District of Columbia Zoning Comm'n, 856 A.2d 1079, (D.C. 2004), a person's or organization's close proximity to a project alone does not make every use, or change in

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intensive review of the record in this case, because that will demonstrate both the extraordinary completeness of the evidence supporting the Commission's Order as well as the Petitioners' twisting of the facts in their Brief.

use, of the subject property injurious to that person or the organization's members. 856 A.2d at 1085.

The Petitioners lack standing under this Court's established requirements, as enunciated in York, supra, 856 A.2d at 1084:

> "'The sine qua non of constitutional standing to sue is an actual or imminently threatened injury that is attributable to the defendant and capable of redress by the court. The plaintiff, or those whom the plaintiff properly represents, must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. A mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization adversely affected or aggrieved for standing purposes.'
>
> '[U]nder the so-called prudential principles of standing, a plaintiff may assert only its own legal rights, may not attempt to litigate generalized grievances, and may assert only interests that fall within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question.'" [citations omitted]

The petitioner in York, as alleged in the present case, consisted of "neighbors" of the project in question. This Court in York concluded:

> "[York Apartments Tenants Association or "YATA"] lacks standing because it has failed to allege any actual injuries suffered by its members that are not generalized grievances. *** [Their arguments] amount to nothing more than an allegation of the right to have the Zoning Commission act in accordance with its rules and regulations. Such claims are insufficient to establish standing because they are generalized grievances, not personal to the petitioner. Lujan v. Defenders of Wildlife, 504 U.S. 555, 575-76, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992) (citations and internal quotation marks omitted) ('[W]e have ... held that an injury amounting only to the alleged violation of a right to have the Government act in accordance with law was not judicially cognizable because assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.'); Allen v. Wright, 468 U.S. 737, 753-55, 104 S. Ct. 3315, 82 L.Ed.2d 556 (1983)." York, supra, 856 A.2d at 1084.[19]

[19] Tiber Island Cooperative Homes, Inc. v. District of Columbia Zoning Comm'n, 975 A.2d 186 (D.C. 2009) is not to the contrary, because it concerned the procedural question of whether the neighbors (who had been denied party status) "had standing to appear before the Commission". 975 A.2d at 192. (emphasis added) The Court in Tiber Island expressly distinguished York, stating that the petitioners in York "challenged the substance of the Commission's order, not the denial of party status." 975 A.2d at 190. Nothing in Tiber Island purported to abandon the fundamental

(fn. cont'd)

More recently, in Hollingsworth v. Perry, 186 L.Ed 2d 768 (2013), the Supreme Court explained that:

> "... the party before [the court] must seek a remedy for a personal and tangible harm. 'The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements.'
>
> ****
>
> It is, however, a 'fundamental restriction on our authority' that '[i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.' Powers v. Ohio, 499 U.S. 400, 410 (1991). There are 'certain, limited exceptions' to that rule. Ibid. But even when we have allowed litigants to assert the interests of others, the litigants themselves still 'must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute.' Id., at 411 ***."

Under the foregoing standards, Petitioners have no standing to bring this appeal. How they themselves are injured is never explained. The thirteen individuals who filed this appeal as Petitioners do not explain how the action of the Zoning Commission injures them. Similarly, Intervenor EMMCA, as an organization, asserts nothing more than a purely abstract interest in the Eastern Market Metro Neighborhood and alleges no injury to its activities, or even impaired enjoyment of the area, flowing from the Commission's Order. Thus, the thirteen individuals and Intervenor EMMCA lack standing. Friends of Tilden Park, Inc. v. District of Columbia, 806 A.2d 1201 (D.C. 2002). The thirteen individual Petitioners and EMMCA simply do not like SEB's Project, and its preferences or dislikes are insufficient to confer standing upon them.

Petitioners' arguments are nothing more than generalized grievances. Petitioners' first argument, while disguised in a "weighing of benefits" cloak, is that the Commission was required to review the LDDA and determine whether it conveyed public property to SEB "at a price drastically reduced from its fair market value" and whether there has been a failure to disclose public subsidies to SEB. (Pet. Brief, at 8-9) Petitioners contend that the LDDA terms are relevant "because they

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requirement that a petitioner must allege an injury in fact that is more than a generalized grievance. Grayson v. AT&T Corporation, 15 A.3d 219, 230-236 (D.C. 2011) (en banc); D.C. Appleseed Center v. D.C. Dept. of Ins., 54 A.3d 1188, 1201-1211 (D.C. 2012).

demonstrate that District taxpayers are subsidizing the benefits and amenities Stanton-EastBanc proffers in support of its application." (Pet. Brief, at 13) However, these assertions illustrate the Petitioners' lack of standing, because they are nothing more than a generalized grievance that, according to Petitioners, affects the public treasury as a whole. Such claims amount to nothing more than an assertion that the Zoning Commission (or some other agency) failed to follow the law.[20]

Petitioners' second argument -- that the Map Amendment was arbitrary (Pet. Brief, at 15) - - fails to even attempt to allege that these particular Petitioners are harmed any more or less than the public as a whole by an alleged failure of the Commission to follow the law.

The most blatant lack of standing is shown by Petitioners' third argument (Pet. Brief, at 17), which attempts to assert nothing more than the rights of beneficiaries of a particular governmental affordable housing program (identified as Inclusionary Zoning) or of persons who need low income or elderly housing.

The thirteen persons identified as Petitioners and EMMCA lack standing to assert any of these arguments before this Court, and the Petition for Review should be dismissed.

B. THE PETITIONERS' ARGUMENTS HAVE NO MERIT AND THE ZONING COMMISSION'S ORDER SHOULD BE AFFIRMED

It is first necessary under each of the arguments to untwist the Petitioners' erroneous statements as to what the Commission said or did, and to set the facts straight. When that is done, it is apparent that the Commission correctly decided this case. Although it is clearly apparent from their Brief that the Petitioners do not like the Project and would prefer that the Property be developed in some other fashion, Petitioners' desire in this regard is neither the prerogative of the Petitioners nor, respectfully, this Court. The test is whether the Commission's decision is arbitrary,

[20] As discussed below, Petitioners argument that the Commission relied on evidence outside of the record (the LDDA) is wholly imaginary.

capricious or contrary to law. Clearly the Commission's Order is not arbitrary, capricious or contrary to law and must therefore be affirmed by this Court.

1. THE COMMISSION DID NOT DECIDE THIS CASE ON AN INCOMPLETE RECORD

The heart of Petitioners' first argument is that: "Notwithstanding the absence of the LDDA from the record, the Commission expressly relied on that document in its analysis of the benefits and amenities Stanton-EastBanc proffers in support of the PUD." (Pet. Brief, at 11, citing JA 32-33) Petitioners continue:

> "In particular, the Commission cited the covenant that Stanton-EastBanc is required to execute pursuant to the LDDA, which specifies the terms according to which affordable housing units will be included in the North Building (the 'Covenant')." (Pet. Brief, at 11, citing JA 33)

This is simply a misstatement of what the Commission did. The Commission did not "rely on" either the LDDA or the Covenant in its analysis of the Benefits and Amenities Stanton-EastBanc proffered in support of the PUD.

The Commission's Order itself establishes SEB's affordable housing obligations, as conditions of the PUD imposed by the Commission, not by the LDDA. (JA 66) The Commission's Order refers to the LDDA affordable housing covenant only to specify when the 40-year affordability period for the North Building under the Commission's Order would begin. Thus, at page 66 of its Order, the Commission stated:

> "The North Building units shall be affordable for a period of 40 years beginning on the date the affordable housing covenant, which is required by the District of Columbia Government to be executed by the applicant pursuant to the LDDA, is recorded." (emphasis added) (JA 66)

The Commission did not in any sense rely on the substance of the LDDA's affordable housing covenant, so it is unnecessary for it to be in evidence in the record. Rather, the Commission referred to the public act of recording the affordable housing covenant. This action by the Commission bears no resemblance to the precedents on which Petitioners rely (Pet. Brief, at 12).

In Blagden Alley Ass'n. v. District of Columbia Zoning Comm'n, 590 A.2d 139, 148, fn 18 (D.C. 1991), this Court expressly recognized that producing a covenant was not required where it was reviewed or administered by a governmental agency other than the Zoning Commission. In the present case, the Federal Low Income Housing Tax Credit Program, which is administered by the Department of Housing and Community Development, prescribes the terms of the North Building's affordable housing program and carries them out.

Moreover, the issue which Petitioners raise in their Brief now, that the Commission was required to consider the LDDA and its affordable housing covenant, was not an issue raised below.

> "As a general rule,
>
> > [a]dministrative and judicial efficiency require that all claims be first raised at the agency level to allow appropriate development and administrative response before judicial review. ... Our consideration of a claim raised for the first time on appeal deprives the administrative agency of its right to consider the matter, make a ruling, and state the reasons for its action. ... Therefore, in the absence of exceptional circumstances, we will not entertain a claim that was not raised before the agency." Watergate, supra, 953 A.2d at 1044.

Before the Commission, Petitioners raised the issue of whether the Applicant (SEB) had used a "bait and switch" tactic when the Request for Proposals and SEB's Best and Final Offer are compared to its Project before the Commission. In that regard, the Commission responded to that issue, at page 54 of its Order:

> "144. Comparison of RFP/BAFO Submission (August 2009) to Current Project. In their testimony and letters to the Commission, several persons and parties in opposition expressed objections and concerns with the Applicant having used a 'bait and switch' tactic with regard to how the Plans have changed since the Best and Final Offer Submission in 2009. The Applicant has refuted this through rebuttal testimony, PowerPoint presentations and submissions detailing the comparison of the RFP/BAFO and the current designed Project.
>
> 145. Whether the plans approved for the PUD are inconsistent with the terms of the LDDA is irrelevant to the Commission's consideration. The project must be developed in accordance with the plans approved by the Commission and the conditions of approval. Whether these plans are inconsistent with any other agreements is for the parties to those agreements to determine and if necessary resolve." (JA 54)

The Commission correctly decided that the "bait and switch" argument which Petitioners had raised was not a matter for the Commission to resolve. Watergate, supra, 953 A.2d at 1043-1044 ("...the Zoning Commission does not have authority to settle a contract dispute. *** Similarly, the proper interpretation of the lease is not before us at this time.").

Given that the Commission did not rely on the LDDA or its affordable housing covenant, it follows that it did not rely on evidence outside of the record and did not in any sense deny any Due Process rights of Petitioners. In any event, Petitioners did not raise before the Commission the argument they seek to have this Court decide in the first instance.

Petitioners assert that the failure of the Commission to consider the terms of the LDDA and its affordable housing covenant was prejudicial, because "they demonstrate that District taxpayers are subsidizing the benefits and amenities Stanton-EastBanc proffers." (Pet. Brief, at 13) This assertion simply misunderstands the Commission's role in a PUD proceeding. The Commission was not required under 11 DCMR § 2403.8 to consider the LDDA or its affordable housing covenant in the Commission's analysis of "the degree of development incentives" granted to Stanton-EastBanc in return for the Benefits and Amenities proffered by SEB. Nor was the Commission required to "make a finding as to whether Stanton-EastBanc has been granted development incentives, through the LDDA or otherwise". (Pet. Brief, at 14-15, emphasis added)

The PUD regulations, specifically Section 2403.8, provide:

> "In deciding a PUD application, the Commission shall judge, balance and reconcile the relative value of the project amenities and public benefits offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case." 11 DCMR § 2403.8. (emphasis added)

Petitioners initially ignore the word "requested" in their analysis. In context, the reference is to the development incentives SEB "requested" from the Zoning Commission in this PUD. This Regulation does not require the Commission to consider anything and everything that might be construed as a government "subsidy" to any benefit arising from the PUD. In the present case, the

development incentives SEB requested from the Commission included the amendment to the Zoning Map and the enhanced FAR and maximum height allowed that the amendment entailed, as well as the 5% increase in height to accommodate the elevator overrun. They did not include the terms of the LDDA. It was therefore unnecessary for the Commission to consider the LDDA or the affordable housing covenant under 11 DCMR § 2403.8.

Additionally, the term "development incentives" does not mean that the Commission has to weigh every conceivable incentive to the developer/PUD applicant from any source. A "development incentive" refers to a balance of what the applicant is offering in the PUD against what the applicant requests from the Commission by way of more intensive development than matter-of-right zoning under the Zoning Regulations would allow. Blagden Alley Ass'n, supra, 590 A.2d at 140, fn.2 ("A PUD applicant generally requests a site be re-zoned to allow more intensive development, in exchange for which the applicant offers to provide 'amenities' or 'public benefits' which would not be provided if the site were developed under matter-of-right zoning."). Likewise, in the weighing of factors under Section 2403.8 a "potential adverse effect" of the PUD must have a nexus to the zoning concessions sought (for example, that increased FAR in the PUD may create increased parking pressures). See Cathedral Park Condo. Comm. v. District of Columbia Zoning Comm'n, 743 A.2d 1231, 1247 (D.C. 2000).[21]

Thus, the Commission correctly decided that the LDDA (and the LDDA's affordable housing covenant) was irrelevant to its analysis of the PUD.

Petitioners' statement that "not once in the entirety of its 69 page Order does the Commission address 'the degree of development incentives' granted to Stanton-EastBanc. ..." or

[21] Levy v. Board of Zoning Adjustment, 570 A.2d 739 (D.C. 1990) is not on point. That case involved a campus plan proceeding, which proceeds under a different set of Zoning Regulations. Nothing in Levy suggested that the BZA should have considered the economics underlying the street closures in that case, and that is what Petitioners demand that the Zoning Commission should have done in the present case.

any "trade off" for these incentives, is simply false. (Pet. Brief, at 14) The Commission's Order (under the heading "Flexibility Requested") specifically addressed at length the development incentives requested by SEB from the Zoning Commission (JA 26-28) and at pages 28 through 39 (11 pages) the Commission analyzes the Project's Benefits and Amenities. (JA 28-39) At page 58 of its Order, the Commission concluded as a matter of law:

> "11. The Commission concludes the project amenities and public benefits of the Application are a reasonable tradeoff for the zoning flexibility. In evaluation [of] the public benefits proffered pursuant to Section 2403.10, the Commission concludes that the Project is acceptable in all proffered categories and superior in many." (JA 58)

This was the proper and legal interpretation of the "tradeoff" which Petitioners misunderstand in their Brief.

2. THE ZONING COMMISSION'S DECISION TO GRANT THE MAP AMENDMENT AND THE PUD IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NOT INCONSISTENT WITH THE COMPREHENSIVE PLAN AS A WHOLE

Petitioners contend that the Commission's granting of the Application for the Map Amendment to C-2-B and the PUD, and the Commission's conclusion that the PUD is not inconsistent with the Comprehensive Plan, were all "conclusory and unsupported by substantial evidence." (Pet. Brief, at 15) Petitioners state that chief among the issues raised is the "obvious incompatibility of the PUD' s scale and density with the established character and prevailing development pattern of their community." (Pet. Brief, at 2) Petitioners further assert that "the Commission almost ignored the issue entirely" and that that its treatment of compatibility with the Comprehensive Plan was "perfunctory". (Pet. Brief, at 2, 3) Consumed by their zeal, Petitioners also claim that "the Commission reached a conclusion bordering on incoherent" when it stated, "[a]lthough the overall design is contemporary, the Project enhances the character of the Capitol Hill Historic District." (Pet Brief, at 3)

(a) COMPATIBILITY AS TO HEIGHT, SCALE, DENSITY, AND CHARACTER OF THE COMMUNITY

The Commission's discussion was not "incoherent", but rather Petitioners misportray that discussion in their Brief. The Commission's statement regarding contemporary design appears in the Order under the subheading, "Historic Preservation of Private or Public Structures, Places or Parks (11 DCMR § 2403.9(d))." (JA 32) The sentences immediately preceding the one quoted out of context by Petitioners show a more detailed and thorough approach to the decision-making process:

> "92. The reintroduction of C Street between 7th and 8th Streets will further an important historic preservation objective by physically and visually restoring the L'Enfant Plan street grid. In addition, the Project will create a compatible relationship of the North and South Buildings with Capitol Hill's Victorian-era residential and commercial buildings through the use of materials, proportions, building types and variety. Although the overall design is contemporary, the Project enhances the character of the Capitol Hill Historic District. The streetscape materials such as brick sidewalks, Washington Globe lights, and bollards are designed to reference details of historic Washington and to reflect the character of the neighborhood." (emphasis added) (JA 32)

More noteworthy, a few pages earlier in the Order under the subheading "Urban Design and Architecture (11 DCMR § 2403.9(a))," the Commission found that:

> "88. The Architecture is the result of a carefully planned complement of materials and scale between the existing neighborhood buildings and the Project. The Project's design breaks the development mass into distinctive parts in order to create a compatible historic district cadence and scale along the streets. The North Building presents as a stepped mass while the South Building is comprised of three distinct components, each further broken down into smaller scale units. Each of these four major components is designed with a variety of different expressions, character, and massing. The Project's character is further defined by the use of the organic materials of the historic district – including brick, stone, slate, wood and tile – rather than predominately glass or metal materials. Window proportions throughout the Project are tall and attenuated in keeping with the character of windows throughout the historic district. Individual facades have been developed to reflect the diversity of uses in the Project while being characterized by both a modern sensibility and a respect for the historic context." (emphasis added) (JA 28-29)

Likewise, the Commission's granting of the Map Amendment to C-2-B was supported by extensive evidence and analysis of the issues. This is the issue which Petitioners state in their Brief is of "paramount importance in this case." (Pet. Brief, at 15) The Commission's Order provides in the section entitled "Contested Issues", a detailed analysis of topics which were objected to by the parties in opposition before the Commission. (JA 52, et seq.) The first contested issue listed is "Project Design, Scale (including Height), and Density" (JA 52), the issues which Petitioners now bring to this Court:

> "136. Project Design, Scale (including Height), and Density. In their testimony to the Commission, several persons and parties in opposition expressed objections to the project design, scale, and density. The Commission finds that the PUD incorporates exemplary, world class architecture that is sensitive to and compatible with nearby buildings on Capitol Hill and will add to the character and attractiveness of the neighborhood. Furthermore, the Commission has no reason to disagree with the several decisions of HPRB, which were made after numerous public hearings and significant design modifications made by the Applicant's architect and landscape architect, that the Project is compatible with the Capitol Hill Historic District. Based on the architectural drawings and studies submitted by the Applicant, elements of the project design will impact the light, air, and views of the adjacent properties in a manner that is acceptable given the quality of the public benefits of the Project. Further, the Commission finds that the visual and other potential impacts from the scale and density of the Project have been mitigated and are not unreasonable given the Property's designation on the Land Use Map (which is Mixed-Use Moderate-Density Residential/Moderate-Density Commercial) and the character of the surrounding area, including the Eastern Market Metro Station (which is located directly across Pennsylvania Avenue from the Site), Eastern Market (which is located to the northwest of the Site), and the commercial area of shops and restaurants (which is located on 7th Street, north of Pennsylvania Avenue and south of the Eastern Market, immediately across from the Site) as discussed in the testimony of the Applicant's architect and OP's report and testimony.
>
> 137. Further, the Applicant has mitigated potential visual impacts of the Project's design and scale by incorporating numerous setbacks and step-downs in all elevations, significantly stepping down the mass and height of the South Building along 8th Street, placing penthouses out-of-view behind occupiable (and highly designed) spaces, varying materials and colors of all façades, and taking other significant actions described elsewhere in this Order." (JA 52)

At page 34 of its Order, the Commission found:

> "c. The new streetscapes surrounding the Project are designed to be an amenity to the users of the Project and a benefit to the Capitol Hill community. Special attention has been made for the 8th Street facades and landscaping to accentuate the

residential nature of 8th Street, while the streetscapes on Pennsylvania Avenue and 7th Street reflect the more commercial nature of these facades. There will be multiple retail spaces facing the commercial streets with a pedestrian clear zone, tree zone, and room for outdoor seating and retail spilling into the public realm. In an effort to create more open space for public benefit and at a diminution of FAR to the Applicant, a Plaza with landscaping and potential water features was created for family, dog, and children-friendly use; (Ex. 20, p. 60.)" (JA 34)

The rezoning to C-2-B, the Commission found, was not inconsistent with the Comprehensive Plan. Early in its decision, the Commission stated:

"70. The Property is currently zoned R-4. In connection with the PUD approval, the Applicant seeks a PUD-related rezoning of the Property from R-4 to C-2-B. The proposed C-2-B zone is not inconsistent with the Comprehensive Plan land use designation for mixed use: moderate density residential and moderate density commercial development on the site. The Comprehensive Plan designates moderate density residential and moderate density commercial uses to correspond to the C-2-B zone, among others (225.9)." (JA 23) (emphasis added)

In their extensive discussion in Petitioners' Brief of the Future Land Use Map and its definition of Moderate Density Commercial (Pet. Brief at 4), Petitioners completely ignore the following sentence in 10 DCMR § 225.9 (defining Moderate Density Commercial), which is the section of the Regulations they cite:

"The corresponding Zone districts are generally C-2-A, C-2-B, and C-3-A, although other districts may apply." 10 DCMR § 225.9 (emphasis added).

It is therefore clear that the Commission not only recognized the importance of compatibility with the Historic District, it went on to decide, coherently, that the Project would be compatible with the Historic District. The Commission reached a decision as to the appropriateness of scale, density, architecture and compatibility after hearing lengthy testimony over the course of three hearings. In fact, the Commission noted the extent of testimony stating, "... we've had a lot of testimony. These decisions are not often easy. You have some that like [the Project] and some that don't like [the Project]. We try to weigh everything that is testified to or given to us in the hearings to the best of our ability to make the decision." (Commissioner Hood, JA 1563) The Commission also reviewed numerous submissions pertaining to these compatibility issues from various District

offices and agencies (including DMPED, NCPC, OP, DDOT, HPRB and EMCAC), the parties (including the ANC and CHAMPS) as well as persons and organizations in support (including the D.C. Preservation League ("DCPL")[22] and Coalition for Smarter Growth[23]) and in opposition. As a result, the record in this case is replete with evidence the Commission relied on in making its decision on the Project's compatibility with the Historic District.

As stated previously, the HPRB held extensive hearings on this Project and a large portion of these hearings were dedicated to architecture, height, scale and massing. All of these HPO staff reports and HPRB hearing decisions were submitted into the record for review by the Commission (JA 49, 450-470, 722-730). OP also supported the scale and compatibility in its report (JA 867-890) and testified at the hearing regarding how rezoning to C-2-B was appropriate for this Site. (JA 1423-1430)

Evidence submitted to the Commission also includes a background of the "Historic and Neighborhood Context". (JA 284-287) The Site was initially developed with three Victorian public schools between 1864-1892. The original Victorian Hine School at the corner of 7th and C Street was later razed in order to construct the Hine School building that exists today. In SEB's hearing presentation, the architect reviewed in detail the existing site conditions, proposed land use of the Project, floor plans, elevations, reduction of mass and height, renderings, materials to be used and

[22] The Chairman of the DCPL Project Review Committee testified at the hearing and submitted written testimony endorsing the Project based on the design, material use, massing and streetscape elements relating to historic precedents. "The project's 21st Century design is compatible with adjacent new construction, nearby historic structures, and Metro-centric planning. The resulting 'vitality and plasticity' far exceed usual historic district infill or pastiche examples". (JA 1148, 1463-1466)

[23] The Policy Director for the Coalition for Smarter Growth testified at the hearing and submitted written testimony endorsing the Project. "We concur with the results of the HPRB approvals and believe that the proposed scale and overall design conforms to the Capitol Hill Historic District and enhances key historic assets such as the open space ... Given the large amount of open space adjacent to the site, we agree that a larger scale building is needed to give definition to the expansive square around Pennsylvania Avenue." (JA 1144-1145, 1466-1470)

sustainable features. (JA 956-1040) Specifically, the architect testified that the Project was designed to integrate the Property into the surrounding community both physically and programmatically; that the highest density and massing is located along Pennsylvania Avenue (160 feet wide), directly across from both the Metro Station and the seven acre L'Enfant Plan open space generally referred to as the Eastern Market Metro Plaza and Park; that not only the materials to be used in the Project but the way in which such materials will be used complements the neighborhood; and that 8th street is wide (100 feet from property line to property line) and historically has always been a transportation route. (JA 1403) The architect also explained how the street elevations illustrate that the greatest density will be directly across the street from the Metro Station and then will step down from there. (JA 1384-1418; Presentation, 956-1040). One of these presentation slides shows a photograph of the original Victorian Hine School building that was built at the corner of 7th and C Street with the new building footprint overlaid in order to show the comparison of the massing. (JA 1027) The architect stated, "I find it very interesting that the Victorians were not afraid of mass and height, and in fact built this [tall Victorian school] building catty-corner from this one-story Eastern Market building itself." (JA 1027, 1412)

The Commission engaged SEB's architect at the first hearing by requesting additional information on shadow studies, and asked very specific questions to understand the scale and compatibility of the Project with the surrounding historic neighborhood. "The existing Hine School building as [sic] fairly imposing presence as it is right now, right? So, is it possible to just sort of diagrammatically overlay a line of the existing section through the site with the existing building?" (Commissioner May; June 14 Tr., pg. 166) The Commission asked for examples of how this Project will compare to other larger buildings along Pennsylvania Avenue and cited a specific example of a "very tall building ... across the street from two and three story townhouses." (Commissioner May; June 14 Tr., pg. 166) The Commission also asked for street sections for the comparable buildings

since, "you also get to see how wide the street is and not just how tall the buildings are." (Commissioner May; June 14 Tr., pp. 166-168) In response to questions asked by the Commission at the first hearing, SEB submitted, among other things, additional shadow studies to include times later in the day, a building section and a plan showing both the outline of the existing Hine School and the proposed Project, several photographs of five and six story buildings along Pennsylvania Avenue and other major diagonal Capitol Hill Streets, the evolution of the alley façade of the North Building, and elevations showing large scale details of the materials to be used on the various facades. (JA 1056- 1121) SEB's architect reviewed the shadow studies in SEB's rebuttal testimony (JA 1496-1501) and presentation (JA 1160-1164) at the July 11th hearing ("Third Hearing"). SEB continued to submit answers to the Commission's post-hearing questions requested during the public meeting deliberations. (JA 1252-1285, 1290-1377)

OP answered questions from the Commission and from several of the parties in opposition specifically on the subject of rezoning to C-2-B and compatibility with the Comprehensive Plan. The Commission asked OP at the first hearing on June 14th what other Zone Districts are consistent with the Comprehensive Plan for this Site. OP responded that C-3-A, allowing for a 4.5 FAR and height of 90ft, would also be allowed, but provides more than what is requested of the Project, and that C-2-A would be a 3.0 FAR and a maximum of 65 feet and would not accommodate the Project. (JA 1428-1429) The land use expert for Hine School North Neighbors ("HSNN") asked OP about the Capitol Hill Overlay District and whether OP had considered whether this overlay applied to the Property. OP responded that they had considered this question and the Overlay does not apply to the Project. (JA 1439-1440)

In fact, during the testimony of HSNN's expert in the field of land use, the Commission asked, "I just wanted to understand whether you thought C-2-B in totality [is] not permitted or not appropriate under the future land use map and you're not saying that. You're just saying that the

way this has been proposed is inappropriate and it would be better to split zone" to which the expert responded, "That's right". (June 21, 2012 Transcript, pp. 214-215 (testimony of the expert of HSNN))

When questions arose as to whether there was similar zoning in the Capital Hill Neighborhood, SEB cross-examined the land use expert testifying on behalf of HSNN as to whether he was aware that there is in fact a C-2-B zoned building at Potomac and Pennsylvania at a Metrorail station. The land use expert acknowledged the existence of this C-2-B zoned building.[24] (JA 1453)

The Commission noted that "there was a fair amount of comment about the height and density but there was substantial support in testimony and in letters in support of that density." (JA 1592)

The Commission specifically referenced the argument made by some members of the community with respect to zoning C-2-A and R-4. The Commission stated, "[f]rankly, in the greater service to the city I think that it's not justified to keep this site down to C-2-A exclusively. Just going from C-2-A to C-2-B is not an extraordinary leap so I think that the density is appropriate and in the long run will be a benefit to the neighborhood and the city as a whole." (Commissioner May, JA 1551-1552) The Commission also stated that, "there is no question in my mind C-2-B is not inconsistent with the comp plan. ... However, what is proposed here is C-2-B and it seems perfectly reasonable. It's not inconsistent." (Commissioner May, JA 1599)

After three public hearings the Commission deliberated at several public meetings. The Commission noted:

> "I think there has been an earnest effort on the part of the Applicant to try to satisfy the concerns that were raised by all the different members of the community in a

[24] While this C-2-B property is not located within the Capitol Hill Historic District, it is adjacent to the District and therefore the size and scale are important.

number of different forms and forums. In many ways this is really an exceptional PUD. I know that ... a lot of people who are paying attention to this PUD don't see all of the PUDs that we see and there are a lot all the way across the city, and many deal with similarly complex issues. I think in many ways this is an exceptional case. I have absolutely no doubt that the buildings that are proposed here are going to be very, very high quality in design and construction. Again, that, in many ways, is exceptional for PUDs because we see a number of PUDs that are good but not great. I think that this has all the makings of a great building." (Commissioner May; JA 1540-1541)

The Commission also commented that "the design of the project keeps in line with the historic feel of the neighborhood ... I think it's getting used to something that is not there but does add to the community, especially because it's facing a much more highly traveled street which is Pennsylvania Avenue." (emphasis added) (Commissioner Cohen, JA 1552) The Commission applauded SEB for choosing such a distinguished Project architect. (JA 1557)

Petitioners' contention before this Court that the Commission "almost ignored the issue" of whether the Project is compatible with the scale, density and character, and prevailing development pattern, of the community is simply false. Though Petitioners assert that C-2-A Zoning "is the only designation that is strictly consistent with the 'predominate height and density' and the 'preponderance of low scale row house and other structures' found throughout the Capitol Hill historic district" (Pet. Brief, at 16), that is not their judgment to make and it is not the standard of review before this Court. Rather, the question is whether the Commission's determination was entirely arbitrary and capricious. By no stretch of the imagination is that standard violated by the Commission's Order.

(b) THE PUD IS NOT INCONSISTENT WITH THE COMPREHENSIVE PLAN

Petitioners attack the Commission's findings and conclusion that the Project and the proposed C-2-B zone are not inconsistent with the Comprehensive Plan. (Pet. Brief, at 15)

Petitioners assert that SEB's proposed development plan is particularly inconsistent with Policy HP-2.4.6 of the Historic Preservation Element Policy, which they say is "unequivocal and

dispositive." (Pet. Brief, at 16) Historic Preservation Element Policy HP-2.4.6. provides as follows:

> "Policy HP-2.4.6 Preservation Standards for Zoning Review
>
> Ensure consistency between zoning regulations and design standards for historic properties. Zoning for each historic district shall be consistent with the predominant height and density of contributing buildings in the district. Where needed, specialized standards or regulations should be developed to help preserve the characteristic building patterns of historic districts and minimize design conflicts between preservation and zoning controls." 10 DCMR § 1011.11

To begin with, Petitioners did not raise this argument before the Zoning Commission, and therefore they cannot raise it before this Court. Watergate, supra, 953 A.2d at 1044. Petitioner Howell did submit a Motion for Reconsideration, after the Zoning Commission's Order had been issued, but he had no standing to file a Motion for Reconsideration because that can only be done by a party. 11 DCMR § 3029.5. Thus, the issue was not raised below by anyone, and it is not properly before this Court.

That defect notwithstanding, as fully detailed below and in the immediately preceding section of this Brief, there is no inconsistency between the Commission's review of SEB's Application and the consistency language in Policy HP-2.4.6. The Commission correctly found that SEB's Project is consistent with the Historic District. (JA 52)

However, that is not even the issue for purposes of this Court's review. Even in the event the Hine Project were, arguendo, determined to be inconsistent with the single policy objective set forth in the Comprehensive Plan upon which Petitioners rely, such a determination would not render the Commission's Order or the Project inconsistent with the Comprehensive Plan as a whole (and that is the test), since this is only one of many policies that provide guidance to the Commission as it makes decisions relating to each goal of the Comprehensive Plan.

Petitioners fundamentally misunderstand the impact that any particular Policy articulated in the Comprehensive Plan has on the Commission's review of a PUD or Map Amendment. Earlier

this year, this Court had occasion to discuss the role that the Comprehensive Plan plays in Zoning Commission consideration of proposals, the obligations and duties of the Commission vis-à-vis the Comprehensive Plan, and this Court's standard of review regarding the Comprehensive Plan:

> "It is the Commission that is responsible for balancing the Plan's occasionally competing policies and goals, subject only to deferential review by this court. See Tenley & Cleveland Park Emergency Comm. v. District of Columbia Bd. of Zoning Adjustment, 550 A.2d 331 at 341 (D.C. 1988) ('[T]he Zoning Commission is the exclusive agency vested with responsibility for assuring that the zoning regulations are not inconsistent with the Comprehensive Plan.'). Where the Commission has fully addressed the applicable aspects, policies, and material issues regarding the Plan, this court will not substitute its own judgment for that of the Commission. See Watergate, supra, 953 A.2d at 1043 ('[T]he mere existence of substantial evidence contrary to [the Commission's findings] does not allow this court to substitute its judgment for that of the [Commission].'); Rock Creek E. Neighborhood League v. District of Columbia Zoning Comm'n, 388 A.2d 450, 451 (D.C. 1978) ('Absent arbitrary and capricious action, we will not substitute our judgment for that of the Zoning Commission.').
>
> Moreover, even if a proposal conflicts with one or more individual policies associated with the Plan, this does not, in and of itself, preclude the Commission from concluding that the action would be consistent with the Comprehensive Plan as a whole. Cf. Blagden Alley Ass'n v. District of Columbia Zoning Comm'n, 590 A.2d 139, 147 (D.C. 1991) (remanding for further consideration, rather than reversing, where the Commission did not provide 'any discussion' of an apparently conflicting policy). The Comprehensive Plan is not a code of prohibitions; it is an interpretive guide, which the Commission must consider holistically. It provides a broad 'statement of policy to guide future public decision[-]making.' Tenley & Cleveland Park, supra, 550 A.2d at 338 (quoting Report of the Committee of the Whole on Bill 5-282, District of Columbia Comprehensive Plan Act of 1984 (Jan. 17, 1984)) (emphasis in original) (internal quotation marks omitted). And '[a]lthough the Plan serves as an important policy guide, its legal mandate is more limited." Id. Except where specifically provided, the Plan is not "binding'; it is only an interpretive tool. Id. Its discrete elements 'guide[,] but do not direct' the Commission's action, and it 'do[es] not impose specific implementation techniques.' Id. at 338-39. Accordingly, that some individual policies may be facially at odds with a particular zoning action is not necessarily dispositive; the Commission must still determine whether a proposed action would be consistent with the Plan as a whole." Durant, supra, 65 A.3d at 1167-1168 (emphasis added).

Accordingly, it is clear that any inconsistency between SEB's Project and any particular Policy articulated in the Comprehensive Plan is simply not a basis to reverse or otherwise set aside the Commission's Order. Indeed, this holding is consistent with the

provisions of the Comprehensive Plan itself. In the section titled, "How to Use the Comprehensive Plan", the Comprehensive Plan states that at the heart of the Comprehensive Plan are a series of goal, policy and action statements and that "... policies provide guidance to the District as it makes decisions relating to each goal." As the Court is well aware, "this document contains hundreds of policies, each preceded by a title that indicates the subject being addressed." (emphasis added) 10 DCMR §108.4. The "Historic Preservation Citywide Elements Chapter" lists the overarching goal for historic preservation as follows: "Preserve and enhance the unique cultural heritage, beauty, and identity of the District of Columbia by respecting the historic physical form of the city and the enduring value of its historic structures and places, recognizing their importance to the citizens of the District and the nation, and sharing mutual responsibilities for their protection and stewardship." 10 DCMR §1001.1 The Policies listed after this goal, like the policies contained in the other citywide elements, are "general in nature and do not prescribe specific uses or design details." (emphasis added) 10 DCMR § 104.6. Thus, the Comprehensive Plan should be read in its entirety and without exclusive focus on a single policy contained within a document of approximately 400 pages.

Beyond the single Policy which Petitioners cite, it is specious to say that the Commission only superficially analyzed the consistency of the Project with the Comprehensive Plan. Fully six pages of its Order (JA 39-44) analyze in detail the consistency of the Project with the Comprehensive Plan, in all respects that had been raised before the Commission by the parties. Likewise, the Commission considered consistency with the Future Land Use Map and consistency with the Generalized Policy Map, and found the Project consistent with both. (JA43-44)

The Zoning Commission gave careful consideration to the consistency of the Project with the Comprehensive Plan and correctly determined that the Project is consistent with a very

significant number of Comprehensive Plan policies, including the Land Use Element, the Transportation Element, the Housing Element, the Environmental Protection Element, the Economic Development Element, the Park, Recreation and Open Space Element, the Urban Design Element, the Capitol Hill Area Element, the Future Land Use Map and the Generalized Policy Map. Accordingly, the Commission more than satisfactorily fulfilled its obligations and its decision is entitled to deference from the Court.

3. THE COMMISSION DID NOT ERR BY APPROVING THE "AFFORDABLE HOUSING" PROVISIONS OF THE PUD

(a) STANDING

Petitioners lack standing to assert that the Commission's Order as to the North Building violates the governmental affordable housing program known as Inclusionary Zoning, or that the North Building constitutes "disparate treatment", or that the 40-year affordable units should not be considered a PUD Benefit.

This Court held in Riverside Hospital v. D.C. Dept. of Health, 944 A.2d 1098, 1104-1105 (D.C. 2008):

> "As a prudential matter, the Supreme Court generally has required a litigant to 'assert his own legal rights and interests; he cannot rest his claim to relief on the legal rights or interest of third parties.' *** This general prohibition against third-party standing is intended to promote 'the fundamental purpose of the standing requirement by ensuring that courts hear only concrete disputes between interested litigants who will frame the issues properly.' *** Enforcement of the prohibition reduces the likelihood that courts will adjudicate [a third party's] rights unnecessarily, [when] it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." (Citations omitted and emphasis added.)

Accord George Washington University v. D.C. Board of Zoning Adjustment, 831 A.2d 921, 943-945, fn. 20 (D.C. 2003); Bourbeau v. The Jonathan Woodner Co., 549 F.2d 78, 85 (D.D.C. 2008); York, supra, 856 A.2d at 1084.

The situation now before this Court with respect to Petitioners is the same as in Riverside. Specifically, Petitioners have not shown any facts that they themselves would be injured by the Commission's action with respect to the North Building. Furthermore, they have no right to assert the rights of unidentified low income or elderly persons. Clifton Terrace Associates v. United Technologies Corporation, 929 F.2d 714, 721 (D.C. Cir. 1991). This third argument should be rejected on that basis alone.[25]

(b) PETITIONER'S ARGUMENT HAS NO MERIT

(i) Standard of Review by This Court.

As stated above, the purpose of review by this Court is not to second guess the Zoning Commission. As this Court recently held in Durant, supra, 65 A.3d at 1167:

> "Rather, we must affirm the Commission's decision so long as (1) it has made findings of fact on each material contested issue; (2) there is substantial evidence in the record to support each finding; and (3) its conclusions of law follow rationally from those findings."

The Zoning Commission's Order as to the North Building satisfies these standards by a very wide margin.

(ii) The Zoning Commission's Order Does Not Constitute Unfair Segregation of Affordable Units or Disparate Treatment of The Affordable Units within the North Building; and the Affordable Housing in the North Building Was Properly Considered by the Zoning Commission To Be A PUD Benefit.

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[25] There can be no claim on this appeal that the Zoning Commission's Order violates the D.C. Human Rights Act or Fair Housing Act. No such claim was asserted below so as to preserve it before this Court. Prior to the Commission's decision on the PUD, Petitioner Blair did submit an Exhibit (JA 861) to the Commission while the Application was pending; however, that Exhibit failed to raise any of the issues which Petitioner Blair subsequently attempted to raise on reconsideration, which she had no standing to file. 11 DCMR § 3029.5 As this Court held in the related case of Krengel v. Zoning Commission, No 13-AA-487 (Order dated July 17, 2013); the Zoning Commission did not grant Petitioner Blair leave to file a motion for reconsideration and "... no motions for reconsideration were filed..." On April 8, 2013 the Commission correctly denied the motions for reconsideration (April 8, 2013 Tr. 8-9; Zoning Commission Order had not yet been published in the D.C. Register).

The North Building on which Petitioners' Brief focuses (at 17) consists of affordable units financed by the Federal Low Income Housing Tax Credit Program ("LIHTC"), which appears in 26 USC § 42.[26] The Federal Low Income Housing Tax Credit Program was explained by the New Jersey court in its decision In Re Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan, 848 A.2d 1, 11-12 (N.J. Super. App. Div. 2004), writ denied, 861 A.2d 846:

> "First enacted in 1986 (Pub. L. No. 99-514, 100 Stat. 2189), 26 U.S.C.A. § 42 provides an incentive for the construction and rehabilitation of low income rental housing by lowering its overall cost through the use of tax credits to developers and owners of qualified rental projects. David Phillip Cohen, Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit, 6 J. L. & Pol'y 537, 541 (1998). The program has since become the largest federal subsidy for the development and rehabilitation of affordable housing. Megan J. Ballard, Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits, 55 Hastings L.J. 211, 212 (2003)." (brackets added)

The New Jersey Court stated the basic requirements:

> "To qualify, a project may set aside 20% or more of the building's residential units to renters whose income is 50% or less than the area's median growth income (the 20-50 test), or set aside at least 40% or more of its units to tenants whose incomes are no greater than 60% of the area's median gross income (the 40-60 test). Id. at 229-230; 26 U.S.C.A. § 42 (g)(1). To be eligible for the credit, the building must be affordable to low-income tenants for an extended period of time, generally fifteen years. 26 U.S.C.A. § 42(h)(6)(D).
>
> These tax credits are allocated to the various states according to their population. 26 U.S.C.A. § 42(h)(3)(C). *** The housing credit agency must adopt a 'qualified allocation plan.' 26 U.S.C.A. § 42(m)(1)(A). ***" (emphasis added) 848 A.2d at 12

The United States Department of Housing and Urban Development has an extensive website explaining the LIHTC Program, including the following:

> "Typical state [qualified allocation plans] encourage applicants to provide more than the minimum number of affordable units, and to provide greater than the minimum level of affordability. Moreover, credits are available only for the affordable units. As a result, many applications provide for 100 percent of the units to be affordable,

[26] It is incorrect to contend that all of the affordable units are in the North Building. The Zoning Commission's Order and the record are clear that there are 34 affordable units in the North Building and 12 more affordable units located in the South Building. Thus, all of the affordable units were not "segregated" in the North Building. (JA 66)

and many applications provide for some units to be affordable well below 50 percent of AMI." (emphasis added)

http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/training/web/lihtcs/work (under the heading "Eligibility" and within that heading "Occupancy Threshold Requirements").

The North Building will provide 34 affordable rental units of which at least 50% will be age restricted (55 years and older). Twenty-nine of these units will be reserved for households earning less than 60% of AMI and 5 units will be reserved for households earning less than 30% of AMI. The South Parcel residential condominium building will have 12 units which will be reserved for households earning less than 80% of AMI. (JA 66)

Petitioners' fundamental argument on this score is that "... this project is not in line with the statutory requirements of [inclusionary zoning] regarding comparable amenities between the market-rate units and vast majority of the proffered affordable units."[27] (Pet. Brief, a 17)

The fundamental flaw in this assertion is that the requirements of Inclusionary Zoning do not apply to the Project. To the contrary, the Zoning Administrator and the Department of Housing and Community Development specifically exempted the Project from the inclusionary zoning affordable housing program, precisely because it falls in part under the Federal Low Income Housing Tax Credit program. The Zoning Administrator's determination[28] that the Project

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[27] Although Petitioners make the broad claim in their Brief (Pet. Brief, at 17) that the affordable housing units in the North Building "contravene whole sections of Chapter One of the Comprehensive Plan. See 10 DCMR A218.310 [sic]", Petitioners do not say how that is so, and examination of that provision (10 DCMR 218.31)(which Petitioners did not raise below) shows that this claim is baseless.

[28] This April 12, 2012 determination letter by the Zoning Administrator exempting the Project from the Inclusionary Zoning requirements of the Zoning Regulations was submitted to the Commission on May 25, 2012. (JA 829) Twenty-nine percent of the residential units of the Project (46 units out of 158) will be affordable units. (JA 597). By contrast, the Inclusionary Zoning program, if it had been determined to be applicable to the Project, would have required only eight percent (8%) or ten percent (10%) of the units on a Gross Floor Area basis to be affordable. (JA 589).

qualifies for an exemption from the Inclusionary Zoning requirements of Chapter 26 of the Zoning Regulations, Title 11 DCMR [Inclusionary Zoning] was "based on the following: (a) the LIHTC financing that will be involved in the funding of the North Building means that the Hine Project is a development that will be 'financed, subsidized or funded in whole or in part by the Federal or District Government' and (b) the LIHTC financing will be administered by the Department of Housing and Community Development." This determination was entirely consistent with 11 DCMR § 2602.3(f), which provides that the Inclusionary Zoning Regulations "shall not apply to: *** any development financed, subsidized or funded in whole or in part by the federal or District Government and administered by the Department of Housing and Community Development (DHCD), the District of Columbia Housing Finance Agency, or the District of Columbia Housing Authority and that meets the requirement set forth in Section 2602.7."

The Commission did not rely in its analysis and conclusions on a "scintilla" of evidence as Petitioners contend. (Pet. Brief, at 18) This argument by Petitioners is based on erroneous and hyperbolic misstatements of fact. Thus, Petitioners say that the "Zoning Commissioners also noted concern about the disparate treatment explicitly seen in this project, but ultimately chose to ignore these concerns." (Pet. Brief, at 17) Petitioners also say that DHCD itself was concerned about the North Building. (Pet. Brief, at 17) In its April 25, 2012 Memorandum (JA 891), DHCD did note the amount of affordable units in the North Building, but then went on to suggest that, to help mitigate the increased percentage of affordable units in the North Building as compared to the remainder of the development, DHCD recommended that the Applicant "should take steps to ensure that the design and materials used on the North Building have the same level of quality and finish that the South Building will have. ..." (JA 892) That is precisely what SEB did. At the Commission hearing, Commissioner Turnbull made comments on the North Building amenities (JA 1530-1531) which prompted SEB to make a further submission. Additional information

regarding the North Building amenities and ADA accessibility was detailed. SEB also submitted information on the superior quality of the materials for the North Building and ways in which SEB further developed and refined the architecture based on comments by the Commission (JA 1177, 1184-1193). SEB submitted extensive information on how the proposed alley façade of the North Building was enhanced beyond a typical alley façade, including how the same face brick and many of the materials on the three street sides are also used on the alley façade (Ex. 355, p.4). Commissioner May, when discussing the separation of the North and South Buildings, concluded: "I believe it [the North Building] is indistinguishable in terms of the architecture." (JA 1648).

Petitioners fully avoid the fact that, as the Commission explained in its Order, the concerns of DHCD and the Zoning Commissioners were mitigated to the Commission's satisfaction, not ignored as Petitioners claim. (JA 54-55) A wealth of evidence backed up that conclusion.

SEB submitted the testimony of Mr. Buwa Binitie, the owner of Dantes Partners, a company which specializes in financing of affordable housing transactions in the District of Columbia. Mr. Binitie testified that: "The Stanton-EastBanc partnership is one that exemplifies our willingness to be sensitive to creating a mixed-income intergenerational community." (JA 1414) He explained that the PUD Application proposed 46 rent-restricted units: 34 in the North Building, 4 in the plaza, and 8 in the 8th Street building, which range from 30% to 80% of AMI. (JA 1415) The affordable units represent over 29% of the total residential units in the Applicant's proposed PUD development. (JA 1415)

Mr. Binitie further testified that there is "no doubt that our offering is above and beyond the typical income mix stipulated by the Inclusionary Zoning Regulation." (JA 1415-1416)

With respect the North Building, Mr. Binitie explained:

> "Our preference is not to concentrate affordable units in one building, however due to the nature of tax credit and bond financing, low-income housing tax credit equity investors are not crazy about taking market rate risk. This is why most typical LIHTC [financed projects] are 100 percent income restricted. However, we have

made sure that there are both a mix of incomes and income restricted units on each floor in each of the three residential buildings on the project. And more importantly, the north building is designed by the same very talented architect and more importantly, using the same high quality brick and slate materials already introduced to you earlier today." (JA 1415)

Mr. Binitie concluded:

"It is important to note that compared to the other tax credit deals in the District, including the deals that I myself have financed, LIHTC required huge amounts of District subsidy, in some cases as high as $90,000 a unit from either federal or local sources to make such deals. In our case, we've leveraged the value of the ground lease and the high density created by both the office and market rate residential to seed District taxpayers approximately $3 million. By leveraging the other uses on the site we are not only creating housing for those of modest means, but also creating a true mixed income, mixed use community that is projected to generate approximately $127 million over the next 20 years. A true net positive to the District." (JA 1416-1417) (emphasis added)

The same view was expressed in writing by Deputy Mayor Victor Hoskins in his June 18, 2012 letter to the Zoning Commission in support of SEB's PUD:

"It is important to note that the project provides for an extremely important public policy objective of the District: the creation of high quality affordable housing. Twenty-nine percent (or approximately 46) of the residential units in the Project will be reserved for households earning 30 percent, 60 percent and 80 percent of the Area Median Income ("AMI"), 17 of which will be reserved for people over the age of 55. An important vehicle for funding this number of affordable housing units is the low-income housing tax credit ("LIHTC") program. In order to qualify the Project for the use of LIHTC funding, the Applicant has created a "North Building" and "South Building"; the 34 residential units in the North Building will be reserved for households earning 30 percent and 60 percent of AMI, and funded with a combination of LIHTC, HFA bonds, and project equity. This financing mechanism enables the District to provide 34 units of housing without spending any general or housing production trust fund dollars. Approximately 10 percent of the units in the South Building will be affordable to households earning less than 80 percent of AMI. Each building will offer its own amenities to all of its residents, regardless of income." (JA 1053-1055)

It is frivolous for Petitioners to assert that the sole basis for the Commission's analysis was "the applicant's provision of two informal emails from their banking partners." (Pet. Brief, at 18) Even the most cursory analysis of the record on this score reveals an extensive record that was far more than the "scintilla" to which Petitioners refer. An extensive analysis did take place with respect to the issues Petitioners raise in their Brief regarding the North Building.

Testifying on Rebuttal, Mr. Binitie expounded on the financing points he had previously raised and on the benefits of the Project as structured:

> "I would like to address some questions that came up earlier in the hearing about the negotiations between the North and South residential buildings. I would like to point out that what the Stanton-EastBanc team is proposing as an affordable housing program is quite typical and fulfills all of the goals of the District's affordable housing policy.
>
> This project balances the wishes of the community, the District and our equity investors and lenders. We have heard from multiple capital partners of which their responses included in your package that they cannot combine the financing of low income housing tax credits and taxes and bonds with conventional debt and equity. So as a way to address the desires of the stakeholders, we have programmed a standalone separately financed residential property [the North Building] with its own superior architecture and amenities package that may be separately owned and managed in addition to a mixed income residential property [the South Building] that is conventionally financed and may also be separately owned and managed.
>
> Our plan is by no means different than the Donatelli Development/Victory Housing joint venture that is currently located at 14th and Irving Street Northwest. This development includes a separate standalone senior housing building that is directly adjacent to separately market-rate building. It is also no different than the approved PUD plan for the [City Market at O]. We have a senior housing building, the senior affordable housing building will be part of an overall million square foot development yet in the distinct building that is also separately financed.[[29]]
>
> Similar to the Hine project, the superior architecture of the aforementioned massive development are not compromised such that you can differentiate the marketed building from the affordable building. And similar to examples cited above or examples cited earlier built standalone properties have their own dedicated amenity package for their specific residents. In all of these cases the tenants get to enjoy the daily amenities and the fact that they're residing in the stellar desirable neighborhood. The community at the end of the day will see a cohesive and well planned development. The developer is able to separate the ownership and management of the building as appropriate, and finally our financiers have something they can wrap their arms around so that the project can get built." (JA 1506-1510) (brackets and footnote added)

SEB submitted for the record two emails from major low income housing tax credit investors (Wells Fargo and Centerline Capital Group), confirming that they would not be interested

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[29] In its post-hearing submission on this issue, SEB supplied additional information on the "City Market at O" project and stated that, "in 2008 the Zoning Commission approved O Street Roadside LLC's PUD application (Z.C. Case 07-26) which consists of a residential senior affordable housing building which is separate from the residential market rate residential building." (JA 1179-1180).

in buying the tax credits from this Project if low income housing tax credit units were interspersed in the market rate South Building. (JA 1194-1195). As the Senior Vice President of Wells Fargo explained in his email (JA 1194), that mix of market rate and LIHTC units in one building is not "a type of investment we would be interested in; risk profile and economic return is weighted too heavily on the market rate side for an annual return of LIHTCs." As the Senior Vice President of Centerline Capital Group explained (JA 1195), creating the North Building "...will allow the LIHTC investor ... a higher percentage of affordability on the project.... " To summarize, low income housing tax credit investors view purchasing the tax credits as a low risk proposition. In contrast, mixing the low income housing tax credit units with market rate units is viewed as taking on a higher risk — that of the market rate units which have a higher risk of failure. Low income housing tax credit investors purchase tax credits. They do not engage in market rate transactions.

On the basis of all of the testimony and exhibits on this issue, the Zoning Commission concluded:

> "146. North Building Affordable Housing — LIHTC Compliance and Building Amenities. Testimony and submission by various persons and parties raised concerns regarding the North Building entirely consisting of affordable housing units and the types of amenities offered to these residences:
>
> a. The Applicant submitted the Zoning Administrator letter confirming the Project is exempt from the IZ [Inclusionary Zoning] Requirements as a result of the LIHTC financing of the North Building and that this financing will be administered by DHCD. (Ex. 115, Tab E.) The Applicant's partner, Buwa Binitie of Dantes Partners, who specializes in financing of affordable housing deals in the District, testified that the North Building consisted solely of affordable units due to its LIHTC financing. Mr. Binitie further testified of the unwillingness of LIHTC purchasers to purchase LIHTCs from a building with a mix of affordable and market rate units. The Applicant later submitted into the record correspondence between Dantes Partners and two major LIHTC purchasers indicating that a mixed income development is not of interest to them;
>
> b. Mr. Binitie testified that the Applicant has programmed the North Building as a separately financed residential property with its own superior architecture and amenities package that may be separately owned and managed in addition to the mixed income residential

South Building which is conventionally financed and may also be separately owned and managed. Mr. Binitie noted that this Project far exceeds what is typically provided for in LIHTC properties; and

c. In addition, the Applicant further refined the amenities, noted the ADA accessibility and quality of materials used and explained the evolution of the North Building's design (as a result of both HPRB and current zoning process). (Ex. 455, Tab A.)

147. The Commission notes the importance of the Project providing 46 of the 158 residential units as affordable units. As a result, 29% of the total number of residential units will be provided as affordable units. In the North Building, five units will be reserved for households earning less than 30% of the area median income ("AMI") with the remaining 29 units reserved for households earning less than 60% of the AMI. Half of the units in the North Building will be reserved for senior citizens. In the South Building, 12 units will be reserved for households earning less than 80% of the AMI. The Applicant plans to make a special effort to market these workforce units to DC school teachers, librarians, police, and fire fighters.

148. The Applicant has taken into consideration comments made by the Commission at the hearing and has incorporated them into a revised design.

149. The Commission is satisfied with the Applicant's recent post hearing submission that the North Building will have noteworthy amenities, will be ADA accessible and that the architect has successfully worked within the limited confines of a narrow building to offer high-quality architecture and materials, superior to those typically seen in affordable housing projects." (JA 54-55)

From the foregoing, it is seen that Petitioners' contention that the Commission relied on a mere "scintilla" of evidence is simply false. Likewise, Petitioners' claims of "segregation" and "disparate" treatment have no basis. Petitioners mischaracterize the Commissioners as simply "resigning themselves" (Pet. Brief, at 19) on this issue, but that is disingenuous. To the contrary, the North Building was thoroughly aired, changes were made, and all issues were resolved by the Commission. There was nothing unique or discriminatory about the North Building, as Commissioner May noted (JA 1587-1588):

> "I mean, frankly, I'm not sure how many letters we actually need and I don't honestly think this is as big an issue as it might be in a different physical circumstance. I think that this is – we've seen a number of projects where we have an affordable component that is an independent building for senior housing.

> It's a single isolated building separated from everything else. It's not a mixed-income building on its own. I'm not surprised to see something like this and this, frankly, integrates better with the rest of the development. Even though it's across the street, it's across this plaza which I view as a connecting element, not a separating element." (JA 1587-1588)

Stated otherwise, the North Building is an integral part of a community.

As this Court noted early on (in 1976), in upholding the PUD Regulations in Dupont Circle Citizens Association v. District of Columbia Zoning Commission, 355 A.2d 550, 558-559 (D.C. 1976), the PUD Regulations permit "diversification in the use, size, type and location of buildings" in a PUD project. In Blagden Alley Ass'n, supra, 590 A.2d at 143 (D.C. 1991), this Court upheld the authority of the Zoning Commission, as part of the PUD process, to approve a PUD housing property even when it was separate from the rest of the PUD project because it was off-site. A fortiori therefore, the Zoning Commission has the authority to approve as part of the PUD process a housing element — the North Building — that is on the site of the Project, and part of the Project community.

Petitioners' final contention is that the Commission erred by disregarding the "temporary nature" of the affordable housing units in the North Building. The best that Petitioners can say is "this proffered benefit is greatly diminished." (Pet. Brief, at 20) Petitioners fail to understand that affordable housing – whether for 40 years or in perpetuity – is only one of the many Benefits and Amenities of the Project which the Commission considered. It is this overall analysis of whether the Benefits and Amenities are "acceptable in all proper categories and superior in many" as the Commission found (JA 58, Conclusion of Law 11), which Petitioners do not even attempt to overcome in this Court.

Petitioners' contention that the North Building affordable housing should not be considered a PUD Benefit is based solely on their subjective belief that 40 years is too short of a life span for the affordable units in the North Building. The Congress of the United States, in enacting the Low

Income Housing Tax Credit program, only requires an affordability period of 15 years (26 U.S.C. § 42(h)(6)(D)). The Zoning Commission rationally concluded that the much more extended 40-year life span of the low income units proffered by SEB did in fact constitute a PUD Benefit. There is nothing irrational, arbitrary or contrary to law about the Commission's determination of this period of affordability.[30]

Petitioners' assertion that after the 40-year period the North Building affordable units will become "market rate" units and the seniors will be turned out of their homes is self-serving speculation. The Commission's Order does not say that these units will become market units. Whether the North Building units will become market rate 40 years from now, or for that matter whether the governmental program identified as Inclusionary Zoning will exist 40 years from now, is unknown. It is noteworthy that in its analysis of the North Building in its June 4, 2012 Final Report, the District of Columbia Office of Planning expressed the opinion that "after the LIHTC program expires, the building will be subject to the Inclusionary Zoning requirements." (JA 870)

[30] In fact, SEB increased its initial affordability period from 30 years to 40 years. (JA 1294)

VI. CONCLUSION

For the reasons stated, the Zoning Commission's Order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Intervenor Stanton-EastBanc LLC was mailed first-class, postage prepaid on this 29th day of July, 2013, to:

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